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Editor's Note

It is with great pleasure that *Chapman Law Review* releases the second Issue of Volume Twenty-Seven. This Issue is centered around the journal's twenty-seventh annual symposium, "Rhythm, Rhyme, and the Rule of Law, which took place on February 2, 2024. The discussion at the event centered around the nexus of music and the law—ranging from intellectual property to the admission of evidence in criminal trials. This year's event was especially timely as it kicked off GRAMMY weekend and took place on the heels of a record-breaking year for concerts. Guests had the opportunity to learn more about the legal issues affecting their favorite artists, and like many concerts, the symposium was also a sold-out event.

It was a privilege to host TEDx speaker Damien Riehl to deliver the symposium's keynote address. Mr. Riehl, an attorney, musician, and software developer, discussed his transformative *All the Music Project*, which used artificial intelligence to "brute-force" every possible melody in the common melodic ranges onto a single hard drive. The project aims to eliminate "accidental infringement" copyright lawsuits. Mr. Riehl provided a plethora of examples of such suits rooted in copyright law, which involved famous artists and songs like Sam Smith's "Stay with Me," Vanilla Ice's "Ice, Ice Baby," and Taylor Swift's "Shake it Off." Mr. Riehl concluded his address by discussing the ramifications of artificial intelligence and large language models on the legal profession, providing guests with an eye-opening look into how technology is already disrupting the industry.

The first panel, titled "A Federal Right of Publicity?" consisted of Professor Kevin J. Greene, Professor John Tehranian, and Brandon Anand, and included a vibrant discussion about the history of artists' right of publicity and how conventional intellectual property law frameworks have adversely impacted African American creators in the music space. The panel explored various state laws governing the right of publicity, and how advancements in artificial intelligence technology could persuade federal legislators to adopt uniform standards regarding artists' rights to publicity.

The second panel, titled “Rap on Trial,” included Professor Charis Kubrin, Professor Jack Lerner, and Rep. Hank Johnson, United States Congressman for the Fourth District of Georgia. The panelists discussed the legal and social issues that arise when an artist’s lyrics, specifically rap lyrics, are introduced as evidence in a criminal prosecution against them, a tactic often referred to as “Rap on Trial.” Again, this issue was incredibly timely given that the trial of well-known rapper Young Thug was simultaneously taking place. Professor Kubrin provided insights regarding the racial issues and nuances that might be at play in these cases, pointing to her research as evidence to suggest that people are more likely to interpret lyrics as violent when they are told the lyrics are from a rap song, as opposed to a country song. Rep. Johnson provided the audience with an overview of the Restoring Artistic Protection Act (RAP Act), which aims to protect artists from the wrongful use of their lyrics against them in criminal and civil proceedings.

The *Chapman Law Review* would like to extend our utmost gratitude to our panelists and keynote speaker for their intriguing insights addressing these significant legal issues affecting the music community. We are also incredibly thankful to Professor Henry Noyes and Professor Nate Camuti for moderating their respective panels. In addition, we would like to thank each of our esteemed authors for their contribution to this ongoing discussion. This Issue features various articles from our panelists opining on the same questions addressed in the physical symposium and the keynote address.

None of this would have been possible without *Chapman Law Review*’s amazing Executive Program Editor, Bennet Cinkle, and her creativity, persistence, and unwavering commitment to making this year’s symposium a resounding success. *Chapman Law Review* is thankful to the Dean of Chapman University’s Dale E. Fowler School of Law, Paul D. Paton, for his captivating opening remarks and tremendous support for our symposium. We are also thankful for the members of the administration and faculty who made our symposium, as well as the publication of this Issue, possible, including our faculty advisor, Professor Celestine McConville; Assistant Dean of Student Affairs, Camille Heenan; Law Events Coordinator, Jonathan Smith; and Digital Media and Marketing Manager, Deane Sutic. Finally, I would like to thank all our guests who took time out of their busy schedules to attend the event, and fellow third-year law student and “house DJ” Livia

Espiritu, who filled the Kennedy Hall lobby with her beats and mixes to cap off a memorable day.

Lastly, I am truly honored and humbled to have had the privilege to work with the 2023-2024 Chapman Law Review editors. It takes a village to put together this publication (and make more than a hundred friendship bracelets), and I would like to express my profound appreciation for your hard work this year. I am grateful for your dedication and passion for the journal and am incredibly proud of the Volume we pieced together as a team. In closing, I am reminded of the words of the late Kobe Bryant, “It’s not [about] the destination. It’s the journey.” And what a journey it was—I couldn’t have imagined a better team to have been on it with.

Darian Nourian
Editor-in-Chief

AI, Originality, and Creativity: Copyrighting All the Melodies to Avoid Accidental Infringement

*Damien Riehl**

If you think of the “Live Your Life” song, who thinks that “Levitating” by Dua Lipa sounds like—or is substantially similar to—“Live Your Life,” by Artikal Sound System? Who does not think they sound substantially similar?

It’s a trap. That’s the wrong question to even ask. Really, the question of substantial similarity is number three in this. Really, the order of questions we should be asking is the following: is this melody even copyrightable in the first place? That’s the first question. And that’s what we are going to be talking about today. In 2019, I said to my colleague, Noah Rubin, “Should we break music?” And he said, “Heck ya, let’s break music.” And that’s how the *All the Music Project* came about.

I’m going to tell you a true story, but instead of the name of the protagonist, think about your favorite artist. Think about your favorite musician and think about your favorite song by that musician. Think about them bringing that song from nothing to something into your ears and bringing you so much joy.

Now think about your favorite musician getting sued and that lawyer saying to your favorite musician, “I represent this group. I think you heard their song and then you wrote yours. You infringed their copyright.”

And imagine your favorite musician saying, “No, it’s not true. I don’t think I’ve ever heard that song. But even if I did, I certainly wasn’t thinking about them when I made my song.”

Imagine the case going to trial and a judge saying, “I believe you; I don’t think you consciously copied that group. But what I think did happen is you *subconsciously* copied them. You infringed their copyright, and you have to pay them a lot of money.”

* Technology Lawyer, VP at vLex, SALI leader, and Founder of *All the Music, LLC*. This is an edited version of a keynote speech given at a symposium entitled “Rhythm, Rhyme, and the Rule of Law” at Chapman University Fowler School of Law on February 2, 2024.

Think about whether that's fair or just. This actually happened to George Harrison, the lead guitarist of The Beatles, and the group was The Chiffons, who had a song that goes, "He's so fine, oh so fine." And George Harrison had a song that goes, "My sweet Lord, oh, sweet Lord." [Sings the same melody.] But what neither George Harrison nor The Chiffons nor the judge, nor anybody else had really considered, is, maybe, since the beginning of time, the number of melodies is remarkably finite. Maybe there are only so many melodies in this world. And The Chiffons, when they picked their melody, plucked it from that already existing finite melodic dataset. And George Harrison happened to have plucked the same melody from that same finite melodic dataset.

When many laypeople think about musicians, they think about them drawing from their own creative wellspring, bringing from nothing, something into the world. They have a blank page upon which they can put their creativity. That's actually not true. As George Harrison realized, you have to avoid every song that's ever been written because, if you don't, you get sued. If you're lucky, you pluck one of those already existing melodies that hasn't been taken. If you're unlucky, you pluck a melody that's already been taken—whether you've heard that song or not. Maybe you've never heard it before. If that happens, if you're lucky, you have a co-songwriter or somebody else who says, "That new song sounds a lot like that old song." And you change it before it goes out the door. Now, if you're unlucky, you don't have somebody telling you that; you release it out in the world, the group hears your song, and they sue you for a song that you've maybe never heard before in your life. You've just stepped on a *melodic landmine*.

The thing is, this is the world before my colleague, Noah Rubin, and I started our project. The world now looks like this: we filled in every melody that's ever existed and ever can exist. Every step is going to be a melodic landmine. And ironically, this is actually supposed to help songwriters. Let me tell you how.

I am a lawyer and have been since 2002. I have litigated copyright cases and also taught copyright in law school. I am also a musician. I have a bachelor's degree in music. I'm a performer and recording artist. And I also produce records. I am also a technologist. I've been coding since 1985, for the web since 1995. I've done cybersecurity and I also currently design software. So, that puts me right in the middle of a Venn diagram that gives me a few insights that, if I were in any one of those areas, I might not have had. And my colleague Noah Rubin, in addition to being one

of the smartest people I've ever known, is also a musician, and he's also one of the most brilliant programmers I've ever known.

Between our work, we came to a realization that you may have been had: "You know that new song? It sounds a lot like this other old song." And there's a reason for that. We've demonstrated that there are only so many melodies. There are only so many notes that can be arranged in so many ways.

And that's different than visual art, where there are an infinite number of brushstrokes, colors, and subjects that, to accidentally mimic them, is very difficult. Similarly, with language, the English language has 117,000 words in it, so the odds of accidentally writing the same paragraph are next to zero.

In contrast, music doesn't have 117,000 words. Music has eight notes: *Do, Re, Mi, Fa, Sol, La, Ti, Do*. One, two, three, four, five, six, seven, eight. And every popular melody that has ever existed and ever can exist is those eight notes. Now, it's remarkably small.

I worked in cybersecurity, and I know if I wanted to attack your password and hack your password, one way to do it is to use a computer to write really quickly "AAA." No? "AAB," "AAC," and to keep running until it hits your password. That's called brute-forcing a password. So, I thought, what if you could brute force melodies? What if you could say, *Do-Do-Do-Do, Do-Do-Do-Re, Do-Do-Do-Mi*. And then exhaust every melody that's ever been. And the way the computer reads music is called the Musical Instrument Digital Interface ("MIDI"). And in MIDI, it looks like this: *Do-Do-Do-Do, Do-Do-Do-Re*.

So, I asked my colleague Noah, asking "Can you write an application to be able to march through every melody that's ever existed and ever can exist?" He responded, "yeah, I could do that."

So, at a rate of 300,000 melodies per second, he wrote a program to write to disk every melody that has ever existed and ever can exist. And the thing is, to be copyrighted, you don't have to do anything formal. As soon as it's written to a fixed, tangible medium, this hard drive is copyrighted automatically.

Now, this leaves copyright law with a very interesting question, because you think about the world before and songwriters had to avoid every song that has ever been written, in

red.¹ Noah and I have exhausted the entire melodic copyright. So, if you superimpose the songs that have been written, in red,² with the songs that haven't yet been written, you have an interesting question: have we infringed every melody that has ever been? And, in the future, every songwriter that writes in the green spots,³ have they infringed us?

Now, you might think at this point: are you some sort of copyright troll that's trying to take over the world? And I would say, "No, absolutely not." In fact, the opposite is true. Noah and I are songwriters ourselves. We want to make the world better for songwriters. So, what we've done is we've taken everything and put it in the public domain. We're trying to keep space open for songwriters to be able to make music. And we're not focused on the lyrics. We're not focused on recording. We're focused on melodies. And the thing is, we're running out of melodies that we can use. The copyright system is broken, and it needs updating.

Some of the insights that we've received as part of our work are that melodies, to a computer, are just numbers because those melodies have existed since the beginning of time, and we're only just discovering them. So, the melody, *Do-Re-Mi-Re-Do*, to a computer is literally 1-2-3-2-1. So, really, the number 1-2-3-2-1 is just a number. It's just math that has existed since the beginning of time. And under the copyright laws, numbers are facts. And under copyright law, facts either have thin copyright, almost no copyright, or no copyright at all. So, maybe if these numbers have existed since the beginning of time where we're just plucking them out, maybe melodies are just math, which is just facts, which maybe are not copyrightable. Maybe if somebody's suing over a melody alone—not lyrics, not recordings, but just the melody alone—maybe those cases go away. Maybe they get dismissed.

Now you might ask, "Well, what constitutes a melody?" And we were initially going to take the entire piano keyboard and do the entire keyboard. But we thought, let's focus on the vocal range, which is actually two octaves. And then we thought, no, actually we're talking about pop music, which is the only thing that makes money that people sue over. So, we looked at musicologists, and they have debated what is a motif (a short melody) versus a longer

¹ For a visual representation, see TedxMinneapolis, *Why All Melodies Should Be Free For Musicians to Use*, TED (Aug. 2019), https://www.ted.com/talks/damien_riehl_why_all_melodies_should_be_free_for_musicians_to_use?language=en [https://perma.cc/SR6A-4D8H].

² *Id.*

³ *Id.*

melody. And we landed with twelve notes. And then we superimposed that number with songs that have either been litigated or threatened to be litigated.

The Chiffons' "He's So Fine" goes [singing], "He's so fine, oh so fine." That's eight notes. And then George Harrison's "My Sweet Lord" goes [singing], "My sweet Lord, oh sweet Lord."⁴ Also, eight notes. So, okay, cool, let's go with "Under Pressure" by Queen versus "Ice Ice Baby" by Vanilla Ice.⁵ Super close, right? Tom Petty's "I Won't Back Down" goes [singing], "Oh, I won't back down, no I won't back down." Ten notes. Sam Smith's "Stay With Me" goes [singing], "Won't you stay with me 'cause you're all I need."⁶ Ten notes. Think of Flame's "Joyful Noise" versus Katy Perry's "Dark Horse." Different melodic ending? Jury didn't care. Verdict for \$2.8 million.⁷ That melody shows up in our first dataset 8,128 times. So, Flame—who sued Katy Perry—should he get a monopoly for life of the author plus seventy years over that thing that showed up 8,000 times in my dataset? My machine cranked it out at 300,000 melodies per second. Should he get a monopoly for life of the author plus seventy years? That's the real question. That's the crux of this issue.

So, dataset number one: major scale and minor scale. Dataset number two: many said, "*Um, actually* you are not covering jazz and you are not covering classical." Cool. We'll do chromatic too now. Now we've got the western scale. "*Um, actually* you're not really covering rhythm." Cool. We'll do rhythm too. We'll add one note that's called "silence." Now we've got every rhythmic melody. Any variation on this is just math. Give me another, "*Um, actually,*" and I'll give you another dataset. This is all math.

So, Noah, who worked with me in cybersecurity—best cybersecurity coder I have ever seen—he and I are going to be speaking at the South by Southwest conference ("SXSW") in

⁴ See *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177 (S.D.N.Y. 1976).

⁵ See Stephanie Sengwe, *Musicians Who Were Accused of Copyright Infringement by Other Musicians: Can You Hear the Similarities?*, PEOPLE (May 5, 2023, 12:20 PM), <https://people.com/music/musicians-accused-of-copyright-infringement-by-other-musicians/> [https://perma.cc/JNX4-44UM].

⁶ *Id.*

⁷ The judge in that case later overturned that verdict, explaining that the melody was not "particularly unique or rare." A three-judge panel for the Ninth Circuit later affirmed the district court judge's decision. See *Katy Perry's "Dark Horse" Comes Out in Front: Ninth Circuit Affirms No Infringement in Copyright Lawsuit*, JD SUPRA (Mar. 16, 2022), <https://www.jdsupra.com/legalnews/katy-perry-s-dark-horse-comes-out-in-8093022/> [https://perma.cc/EEA4-5JKG]; Mark Savage, *Katy Perry Wins in Dark Horse Copyright Appeal*, BBC (Mar. 11, 2022), <https://www.bbc.com/news/entertainment-arts-60705977> [https://perma.cc/B2FQ-NZ23].

Austin, Texas.⁸ There, we are going to be speaking together and jamming. He's a brilliant guy who now works for Amazon Web Services. If you were to use Amazon, you have him to thank for keeping you safe. He created this dataset for All the Music. We put everything in the public domain. It is all on GitHub. You are able to do it right here. If you want to join us and if you want to help us, go ahead, and do that. You can expand our dataset beyond what we have done to the entire keyboard with every rhythmic variation, and it's all math. We're just going to exhaust all the things. So, want to help? Go ahead and join us.

Really, the other question, though, is we have talked about the red copyrighted spots:⁹ What about Bach? What about Mozart? So, if the red spots¹⁰ are copyrighted, what about the gray spots¹¹ that are already in the public domain? There's a real question: can I take a Bach melody and pull it out of the public domain? Or is what's in the public domain always in the public domain, whether you've heard Bach or not? What if you were to superimpose all the copyrighted spots on the public domain spots? And that's what I actually am going to be doing.

Spotify has a patent, saying, "If you input a melody, we will tell you every song where this melody shows up." And so I have a buddy who's the former Chief Economist of Spotify, and I said, "Hey, can you connect me with that inventor?" And he said, "Sure." So I'd like to take all 471 billion of my melodies and put it into Spotify's algorithm, to be able to say: where are the open spots and where are the closed spots? And more importantly, where is Bach? Where is Beethoven? Where are these things that maybe somebody thought that they had copyrighted the melody, but it has been in the public domain since the 1700s?

The thing is, we're running out of melodies. If you think about a song that has an intro, verse, pre-chorus . . . there may be a bunch of—maybe ten—melodies in a particular song, countermelodies, etc. Streaming services currently have an estimated 375 million songs, and they'll likely have 450 million songs by the end of the next year. At ten melodies per song, that's four and a half billion melodies that are just being cranked out.

⁸ South by Southwest celebrates the convergency of tech, film, music, education, and culture. See SXSW, <https://www.sxsw.com/about/> [<https://perma.cc/CW96-XQUD>] (last visited Apr. 14, 2024).

⁹ See TedxMinneapolis, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

There are only so many notes: *Do-Re-Mi-Fa-So-La-Ti-Do*. That's sixty-eight billion melodies, that's eight to the twelfth power. So, sixty-eight billion melodies, and with our most-recent dataset we've already hit over 470 billion melodies. And let me tell you, of those sixty-eight billion, a lot of them sound awful, like, *Duh, duh, duh, duh, duh, duh, duh*. Nobody's going to listen to a melody like that.

The number of listenable melodies is remarkably finite, and we're running out of them. Because every bedroom producer is recording songs things and uploading them to YouTube, Spotify, etc. Everyone in their bedroom is doing these things. So, the number of spots we're trying to keep open are for people to be able to make more music.

Who knows about Judge Learned Hand? Great guy. He came up with the idea of independent creation. He said that "Ode on a Grecian Urn" was a poem and he said that, hypothetically, as a thought experiment, if you're writer who came up with the exact same words from "Ode on a Grecian Urn" without having read the original Keats poem, both you and Keats would still have independent copyright in that poem—because you independently created that, since you haven't heard Keats before. That was the beautiful thing about independent creation.

But for music, independent creation is pretty much dead, or, at least, it has been dead since the George Harrison case. Independent creation really goes to "access." "Did I have access to 'Ode on a Grecian Urn' or not?" If the answer is, "Yes, I had access," then I violated the copyright. If the answer is, "No, I didn't hear it," I can independently create it and both of us can have copyright in this thing.

But the thing is that "Ode on a Grecian Urn" type of access didn't matter to George Harrison, because he said, "I didn't have access to The Chiffons—I didn't hear their song." But the court said, "No, I think you *subconsciously* infringed; therefore, whether you had access or not, you don't remember."

So, George Harrison, had to prove a negative—prove that he had *never* heard a song before. Now, where in the law have you ever had to prove a negative (which, by the way, is philosophically impossible)? You cannot prove a negative. In almost every case, the plaintiff has to prove that the defendant *did* something. The onus is usually on the plaintiff, on The Chiffons, to prove that George Harrison did the thing.

Here, the judge flipped it, saying, “George Harrison, it’s your burden to say that you’ve *never* heard it.” And how are you going to be able to say that you’ve never heard something in the grocery store? You’ve never heard something with your friend holding a phone up to you? It’s impossible to say you’ve never heard this song before.

So, this has been an injustice since when I attended Mitchell Hamline College of Law. This seems stupid. Because almost never has the onus been on the defendant to prove a negative. So, “subconscious infringement” killed Justice Learned Hand’s independent creation. Every case since that has said that you have to prove that negative, which is, again, impossible: grocery store, friend’s car. Learned Hand is sad.

But really, this goes to element two: Access. Do you have access to the thing?

When you think about access, there are cases where they’ve *definitely* had access. John Fogerty definitely had access to John Fogerty—and Creedence Clearwater Revival’s “Run Through the Jungle.”¹² This is an actual lawsuit where Fogerty was sued by his label Fantasy Records for his use of “Run Through the Jungle” in his single “The Old Man Down the Road.” Fogerty definitely had access to Fogerty.

No access is if a baby sings into a recording—and by the way, the toy’s fixed tangible medium enables copyright— [singing] “Da-da-da-da-daaa, da-da-da-da-daaa” to the same tune as Taylor Swift’s “Shake It Off,” which goes “I stay out too late. Got nothing in my brain.” No access because Taylor Swift has never heard that baby. Therefore, no access: that’s a clear independent creation, right?

But almost none of the cases are “access” or “no access”; it’s all in the middle. They’re all either: maybe you heard it, maybe you didn’t; maybe you infringed, maybe you subconsciously infringed. Almost all of these are a fact question. And the tricky part about fact questions and litigation is that most of the cases—The Chiffons’ case and Katy Perry’s case—are fact questions. And when you think about the timeline of cases, the fact question is never done at the cease-and-desist letter stage: “pay me money, or I’ll sue you.”

You go through the litigation lifespan. The fact-question lawsuit takes years. And fact questions don’t get decided until the

¹² Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

end. And how much does it cost to get to the end? In legal fees—that’s lawyer fees—the cost is about \$2 million on the high end.

So, am I as a songwriter going to roll the dice spending \$2 million on lawyers—and then maybe pay damages on top of that—for this fact question as to whether I heard the song or didn’t hear the song? Or subconsciously infringed?

Tom Petty apparently threatened to sue Sam Smith over, ‘Oh, I won’t back down’ versus ‘Won’t you stay with me.’ Sam Smith might have thought “Wait, am I going to spend \$2 million to roll the dice? And then to be found that I subconsciously infringed Tom Petty?” Even though Smith said they’d never heard Tom Petty’s song before: Co-songwriter. Radiohead got sued by The Hollies: co-songwriter. Same song (Creep) —Radiohead apparently threatened to sue Lana Del Rey. They allegedly settled. Because nobody wants to roll the dice for a subconscious infringement to have to prove a negative that can’t be proven, right?

So, this is what really stuck in my craw in 2000 when I was in law school. I thought, this is stupid. Shouldn’t we be able to dismiss these things at the front end of the case? Saying these melodies are unoriginal, therefore uncopyrightable, and maybe the case goes away on a motion to dismiss?

Or the plaintiff should have the onus like they always have had the onus in other cases: Plaintiffs have the burden of proof. Plaintiffs should be required to show that the defendant actually had access—give evidence of *actually* having access—and absent that kind of evidence, the case goes away. That’s where the onus should be.

So, access? That’s the wrong question. Substantial similarity? Wrong question. Real question: is the melody copyrightable in the first place? Because asking if it is copyrightable first is the right thing to do.

So, if any of you are litigating these types of cases, or if any of you are a judge, look to copyrightability first. Do that analysis first. If it’s not copyrightable, do not pass go. Do not collect \$200. If it’s not copyrightable, it goes away.

Before my TED Talk,¹³ litigants and courts debated whether the alleged infringer had access and whether the melodies were substantially similar. After my TED Talk, everybody moved to question whether the melody is even copyrightable.

¹³ See TedxMinneapolis, *supra* note 1.

The “Blurred Lines” case¹⁴ essentially held that you can copyright a vibe. In the Katy Perry case, the court denied judgment as a matter of law, and then a jury verdict reached a verdict of \$2.8 million. Every defendant before my talk lost. Because everyone focused on “access” and “similarity.” Most didn’t even address originality and copyrightability. It wasn’t even argued.

Then my TED Talk happened, where I said, “Hey, these things are uncopyrightable.” My talk was released on YouTube in January 2020, and it blew up. It became viral. Within three days after it was released, it had 200,000 views. Currently, in its various incarnations on the web, it has about 2.1 million views. In January 2020, I also was interviewed by Adam Neely, the YouTuber. That interview had almost 800,000 views within a few days. We were also trending on Reddit. *The Atlantic* did an article about this.¹⁵ We were the top post on Reddit.¹⁶ We were on *Motherboard* by VICE, *The Independent* out of Ireland, and *The Telegraph* out of London.¹⁷ I was on CBS Sunday Morning.¹⁸ I got invited to a group, the “Pho List,” which is a bunch of music industry lawyers, tech people, and music tech people, where we did a lot of debates about my project.

My talk got a lot of press, and it really shifted this conversation to say, “Hey, is the melody even copyrightable in the first place or not?”

And so, after that, the Ninth Circuit, in the Led Zeppelin case, said “No, that melody for ‘Stairway to Heaven’ is uncopyrightable. Unoriginal, therefore uncopyrightable.”¹⁹ The verdict against Katy Perry was also reversed. Back in 2018, the judge essentially said, “No, I’m sorry. I can’t rule in favor of Katy Perry as a matter of

¹⁴ See Sengwe, *supra* note 5.

¹⁵ See Alexis C. Madrigal, *The Hard Drive With 68 Billion Melodies*, *The Atlantic* (Feb. 26, 2020), <https://www.theatlantic.com/technology/archive/2020/02/whats-the-point-of-writing-every-possible-melody/607120/> [<https://perma.cc/HR22-ZGXD>].

¹⁶ See u/Gustheanimal, REDDIT, https://www.reddit.com/r/MadeMeSmile/comments/15y7oig/damien_riehl_copyrighted_every_music_melody_known/ [<https://perma.cc/6FNK-H8EZ>] (last visited Apr. 15, 2024).

¹⁷ See *Computer Coders Create Every Melody Possible In Bid to Help Musicians Avoid Copyright Suits*, *THE TELEGRAPH* (Feb. 26, 2020), <https://www.telegraph.co.uk/news/2020/02/26/computer-coders-create-every-melody-possible-bid-help-musicians/> [<https://perma.cc/3AZM-MV5E>].

¹⁸ See *The Blurred Lines Surrounding Music Copyrights*, CBS News (Apr. 4, 2022, 4:28 PM), <https://www.cbsnews.com/news/music-copyrights-songwriting-lawsuits/> [<https://perma.cc/5589-FSTZ>].

¹⁹ *Ninth Circuit Shows Led Zeppelin a Whole Lotta Love in ‘Stairway’ Copyright Win*, *JD SUPRA* (Apr. 3, 2020), <https://www.jdsupra.com/legalnews/ninth-circuit-shows-led-zeppelin-a-10238/> [<https://perma.cc/BK78-HNF6>].

law.”²⁰ Then after my TED Talk, the judge essentially said, “No, as a matter of law, I’m going to reverse the jury verdict,” stating that the melodies are unoriginal, therefore uncopyrightable, and reversing her earlier ruling.²¹

The Ninth Circuit, then affirming, said, “as a pitch sequence, you are not entitled to copyright protection because these are the building blocks that are in the public domain.”²² That’s what I argued in my TED Talk. These are building blocks of music.

And then my friend Jennifer Jenkins asked me to speak at Duke Law. I was speaking there and, that morning, Ed Sheeran won his case in the United Kingdom (UK).²³ Back in my talk, I said, “There are only so many melodies, and we’re running out.” After he won his UK case, Ed Sheeran put out a press release, saying, “There’s only so many notes and very few chords used in pop music.”²⁴ And I said, “Dude, you not only stole the melody, but you also stole my line.”

Anyway, correlation is not causation. That is, none of them cited me, but really, the question is, do you need to cite me? Because it’s not the thing that I did. It’s the *idea* of the thing that I did that really matters. “Copyrightable?” is the question. And the real question: is Judge Learned Hand’s idea of independent creation still dead? Or does it even matter anymore? Because if you only go to the question of copyrightability, you don’t need to pass go. You don’t need to collect \$200. You don’t need to figure out substantial similarity. All that matters is, “is it original”? And if not, the case goes away.

Now we go to the machine composers. In the 1960s, specifically 1965, the U.S. Copyright Office essentially said, “You know, there’s going to be a time where the computers are going to

²⁰ See *Katy Perry Loses Summary Judgment In “Dark Horse” Copyright Infringement Case, As Court Decides That Commercial Exploitation Not Necessary to Show “Widespread Dissemination” For Purposes of Proving “Access”*, MCPHERSON LLP (Sep. 5, 2018), <https://mcpherson-llp.com/katy-perry-loses-summary-judgment-in-dark-horse-copyright-infringement-case-as-court-decides-that-commercial-exploitation-not-necessary-to-show-widespread-dissemination/> [https://perma.cc/SFL8-XJXE].

²¹ See *Katy Perry’s “Dark Horse” Comes Out in Front: Ninth Circuit Affirms No Infringement in Copyright Lawsuit*, JD SUPRA (Mar. 16, 2022), <https://www.jdsupra.com/legalnews/katy-perry-s-dark-horse-comes-out-in-8093022/> [https://perma.cc/EEA4-5JKG].

²² *Id.*

²³ *Ed Sheeran Wins Shape of You Copyright Case and Hits Out at ‘Baseless’ Claims*, BBC (Apr. 6, 2022), <https://www.bbc.com/news/entertainment-arts-61006984> [https://perma.cc/G2S9-BGRK].

²⁴ Bill Donahue, *Ed Sheeran Heads to Trial Over Claims He Copied Marvin Gaye’s ‘Let’s Get It On’*, BILLBOARD PRO (Apr. 21, 2023), <https://www.billboard.com/pro/ed-sheeran-copyright-lawsuit-trial-lets-get-it-on/> [https://perma.cc/26LH-J9YF].

be able to make words. What are we going to do then? The number of words written by computers will increase, and you cannot categorically say that you *cannot* copyright those things. A computer could be used like a typewriter. And so, the question is—the human authorship—is that merely the machine being the instrument that the human is operating?” They were thinking about this in 1965. Pretty good, right?

We’re there now, right? The question is when Noah and I used a machine to brute force “*Do-Re-Mi-Fa-So-La-Ti-Do*,” and did eight up and twelve across, was that machine doing our bidding? Were we setting the metes and bounds of the copyright—and is that a “creative” aspect? Or was that just math that was unoriginal, therefore uncopyrightable? That’s the real question.

When you think of a flow chart: are machine-created works copyrightable or not? Applied to our project, if the answer is “Yes, machine-created works are copyrightable,” then we just copyrighted 471 billion melodies, putting them in the public domain. Have at it. So that’s option number one.

If you say “No, machine-created works are uncopyrightable,” the question is why? Why are they uncopyrightable? Is it because they are facts and ideas? Maybe. Is it because they’re unoriginal and uncreative? Maybe. If so, all of my 471 billion melodies are *still* public domain—because they are facts that are unoriginal and uncopyrightable.

Then, the next step is: what if a human makes that *identical* melody? Right? Like Flame’s melody, [singing] *Dun, dun, dun, dun, dun, dun, dun, dun, dun*. In my dataset Flame’s melody shows up about 8,125 times. Should Flame get a monopoly on that unoriginal melody? Does the melody somehow flip, switch—from machine-created unoriginal, uncopyrightable to somehow copyrightable—just because he plucked that same melody out of the finite dataset? His all of a sudden becomes “original”?

No, it’s stupid. All of these things—471 billion melodies—are ostensibly uncopyrightable. These cases should go away because there are only so many of those notes. Most of the people have said, even law professors say, “*Um actually*, Damien, people didn’t have access to your 471 billion melodies.” Focus on originality.

More interesting is this question: are these melodies unoriginal? TED Talks are limited to only eighteen minutes. I wanted to go deeper into originality, but the organizers said “Eighteen minutes, dude.” And I’m like, “Alright, eighteen

minutes, I'll limit originality." But this is the thing that now I'm able to talk about with you. Should we give a government copyright monopoly, life of the author plus seventy years, over something our computer spit out at 300,000 melodies per second?

With large language models, this is accelerated. I was asked by the Bench and Bar of Minnesota, "Can you write something about ChatGPT?" I said, "How long do you want it to be?" "Seventeen pages." I said, "No, not going to do it." I'm flying all over the world, talking about AI. I'm building AI systems. My rule of thumb is one page per hour, so that would take seventeen hours I just don't have. But then I realized, this is on ChatGPT, right? So like I do for every writing project, I created an outline. So, this is about three pages of really good multi-level bullets, covering, "What are large language models?" "How do they work?" "Why do they matter to the law?" "How did they beat the bar exam?"

I took that outline, and then I prompted ChatGPT to say, "Here's an outline for an article for a legal magazine. Expand it into an article. For each bullet point, give me one or two sentences." And ChatGPT spits out nineteen pages of really good stuff. I'm not done though. I spent the next three hours adding, editing, revising, putting it into my voice. I was jamming with this thing. This isn't a robot author; it's a co-author. I was jamming with it. Then, I sent the paper to the editor, who responded "Cool, let's get it out the door. I don't even need to edit it much." It took a seventeen-hour process and shrunk it down to three hours. That's a 5x increase by my math.

But the real question is: who wrote my article? That was my three pages of outlines. Those were my ideas. Could ChatGPT create those good ideas? No, because I've been thinking since November of 2022—when ChatGPT came out—every waking moment, all I've been thinking about is how large language models can affect the law. So, it was my every waking moment that created those ideas. I would argue that none of you could do that like I did that.

So, then the real point is—I asked it to do *one* expression of my ideas. I could have just as well said, "Give me a thousand expressions." "Give me ten thousand expressions." "Give me a hundred thousand." "Give me a billion expressions of my ideas." Expressions are commodities. All that matters is the ideas.

By the way: ideas? Uncopyrightable. Machine-created expressions of those ideas? Uncopyrightable. It's uncopyrightable all the way down.

Bill Gates said he's been through three revolutions in his career. He helped enable the computer revolution, where there was zero marginal cost to *duplicate* things; that was in the 1980s. In the 2000s, there was zero marginal cost to *distribute* things through Amazon shopping or email. And now there is zero marginal cost to be able to *ideate* and *create* things.

This is the first time that idea and expression, they've merged. Ideation? Uncopyrightable. Expression? Uncopyrightable. Where does the workforce go at this point? Ideas are the thing, not expressions.

One of the funniest and also most profound cartoons I've ever seen shows a guy saying, "Hey, look! I took this bullet point, turned it into an email I pretended I wrote." And then the recipient says, "Look, I took this email, turned it into a bullet point that I pretended I read."

Funny, but if it *started* with a bullet point (idea) and *ended* with a bullet point (idea), what's the point of this email (expression)? You can make 1,000 versions (expressions). You can make a billion versions (expressions) of this. The ideas are the thing. The facts are the thing. The ideas and the facts: uncopyrightable. Machine-created stuff in the middle? Uncopyrightable. It's uncopyrightable all the way through.

Ideas are valuable. I was spending every waking moment thinking about those three pages of ideas. Those are valuable. The expression that "version one" came up with—or the "version one billion" came up with—it's a commodity.

Ideas are uncopyrightable under the idea-expression distinction. Facts are uncopyrightable. The expressions are copyrightable if there is a modicum of creativity. I've argued in my *All the Music Project* that there is no modicum of creativity, and, again, the U.S. Patent and Trademark Office or the U.S. Copyright Office essentially said, "If machine-created, then uncopyrightable."²⁵

I have a friend named Michael Bommarito. He's one of the guys who beat the bar exam: with GPT-4, he beat ninety percent of humans on the bar exam. He took the *Federal Register*—which is good bedtime reading, if you've ever read it—and he told the large language model, "Express today's *Federal Register* like a chill

²⁵ Thaler v. Perlmutter, 2023 WL 5333236, at *6 (D.D.C. Aug. 18, 2023).

pirate lawyer.” And it took the ideas and facts and said, “*Sorry to disrupt your morning tide, but the compliance crew conducted a sunset review, and fear ye not, the Tariff Act was all above board, those pesky regulations, wishing you a calm sea and well-deserved booty. Signed, your super chill pirate lawyer.*”

Funny, right? But you could also say, “Explain it to me like I’m a six-year-old.” “Explain it to me like my client, who is a high school dropout.” “Explain it to me like someone who has a Ph.D. in physics.” Those expressions are all doable right now, and they’re commoditized. And by the way, those expressions? All uncopyrightable.

Look at the Gettysburg Address. Then, think of the Gettysburg Address as ideas in bullet points. Which is easier to read and understand? And which is poetry? The bulletpoint form is not poetry, but can you understand what he’s saying more quickly? *Hell yeah.*

Here’s one of Justice Oliver Wendell Holmes Jr.’s legal opinions. Here’s Justice Holmes’s ideas, not in an eighteenth-century expression that really takes you all a long time to think through, but in easily digestible bullet-point form. Does this look like a law school summary? *Hell yeah.* Which is easier to skim and read? Which is easier to prep for your bar exam?

This is the thing. The *ideas* are the thing. The expressions—the eighteenth-century expression of what the copyright law is, or the explaining it for a sixth grader—are commoditized.

My wife is an English professor. Since ChatGPT came out, she’s said, “I want to retire. ChatGPT does A work on every assignment. What am I even doing?” And I responded, “You thought that you were teaching writing, but really what you’re teaching is ‘idea transfer’.”

Because what am I doing right now? I’m trying to get my ideas into your brain. I’m doing it through the air and the waves that are going through it. Maybe some of my ideas are going to land in your brain to make you have ideas. But we found as a society that maybe it’s better if we put those ideas onto paper. And now I can maybe get the ideas from my brain onto the paper into your brain as you read it.

So, I said to my wife, “You thought you were teaching writing, but really what you were teaching is idea transfer.” Taking ideas and transferring them to paper, to then transfer those ideas into your brains. And maybe we’re doing that, with the large language

models, cheaper and faster than we ever have before. That process of getting ideas onto paper and into the recipient's brain is just faster than it used to be.

This presentation is me trying to get my ideas into your brain—and maybe, hopefully, they'll stay there when you leave.

Canadian philosopher Marshall McLuhan in the 1970s said, "The medium is the message."²⁶ He was talking about books that turned into radio, TV, movies. Though he wasn't around when the internet came out, it similarly applies to the web, email, the cloud, and now LLMs. Of course, the medium is the message all the way down.

In fact, when I was prepping for this Keynote Address, I was trying to remember "Which of the media was McLuhan talking about?" I asked the large language model to tell me which media he was talking about. So, in that way, literally, the medium *is* the message. The *way* that I use this information is as important as the information itself. The large language model is the thing. The medium is the message.

And how do readers read these days? They read in bullet points. They read in summaries. Uncopyrightable ideas. Snippets. Turns out lawyers are 2024 readers. Judges that we appear before are 2024 readers.

I work for a legal tech company that has a billion legal documents. I've got the essence of every judge's opinion that I'm now inputting into a tool to say, "I want my brief to be in this judge's style," because everybody likes the way that they speak, and everybody likes the way that they write. So, judges are 2024 readers, and then they say, "I like the ring of this brief." They won't know that I've essentially copied that judge's style and applied it.

Legal data is structured data. We don't think of it as structured data, but it's got a lot of structure: for example, a motion to dismiss for lack of subject matter jurisdiction. Standards Advancement for the Legal Industry ("SALI") is a legal data standard²⁷ that I'm leading that's being used by Thomson Reuters, Lexis-Nexis, NetDocuments, the biggest corporations in the world like Microsoft, Facebook, and world's largest firms. Everyone is coalescing around the SALI legal data standard.

²⁶ MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 10 (McGraw-Hill, 1964).

²⁷ See Modern Legal Industry Standards, SALI ALLIANCE, <https://www.sali.org/> [<https://perma.cc/KE3X-KV7E>] (last visited Apr. 16, 2024).

What if you were to take all of these things like lack of standing, preemption, Digital Millennium Copyright Act (DMCA), breach of contract, etc., and tag it up? Tag up the spans of the document with each one of these tags?

That's what I'm doing today. I'm tagging up everything that matters in the law with a billion legal documents, not just in the United States, but in a hundred countries worldwide. I'm doing this for the United Kingdom. I'm doing this for Latin America. I'm doing this for Asia. I'm tagging up the things that matter in every single one of them. I'm working with a group right now that is tagging up all the things in India.

SALI is a non-profit.²⁸ I'm a volunteer for the non-profit. Everything I'm showing you is free and open source. Free as in beer, free as in speech. You can make it extensible, and you can get it for free. It's on GitHub. These are the companies that are using it: Thomson Reuters, Lexis, Bloomberg, NetDocuments, Time Manager, and in-house counsel at Microsoft, Intel, and DLA Piper. They're all coalescing around the legal data standard called SALI that I'm leading worldwide.

Once you extract everything that matters from the documents and dockets, you can say, "Hey, that statement in your brief states that "to determine whether common issues predominate...." We've now built a tool that is able to say, "Here are all the cases with that proposition where the *defendant* wins—and here are all the cases with that proposition where the *plaintiff* wins." So, I can say, "Hey, you represent the defendant, but you've cited *Benton*, where your side lost. Why didn't you cite one of these case with that proposition where your side won?" These are all quantifiable things and it's just math. It's just data. Ideas are the things that matter. Increasingly, expressions don't matter.

When you think about vector space, linguistic concepts are ideas plotted out in vector space. There are two dimensions in this graph, and so you can see it takes "shower," "kit," "valve," "garden hose," etc., and the AI kind of clusters them together. This is two-dimensional vector space: X and Y axes. Now imagine adding a third dimension: a Z axis. You could see where these things cluster in three-dimensional vector space? Now imagine adding a fourth dimension. Can't do it, right? It's impossible for our human brains to figure out how to visualize a fourth dimension.

²⁸ *Id.*

But now imagine 12,000 dimensions. That's what the large language models are doing: They're plotting concepts into 12,000 dimensions. And somewhere in those 12,000 dimensions are "Bob Dylan-ness," and "Ernest Hemingway-ness," and "Picasso-ness." The idea of each of those and the style of each of those live in the 12,000-vector space. And so when you vectorize things, you're plotting them into this 12,000-vector space, which is just the ideas of Bob Dylan and the style of Ernest Hemingway.

And can Bob Dylan sue me for writing a song "in the style of Bob Dylan"? No. The style of Bob Dylan is not copyrightable. If it were, he could sue every singer-songwriter since the 1970s, right? The style of Bob Dylan is uncopyrightable because it is an idea.

So then why would a machine extracting his ideas to create a new expression—an expression that is uncopyrightable—why would that be any different than when a *human* does it? The input, if it's just ideas. If it's pulling text from the book, it's pulling those ideas, putting them into vector space, and throwing away the expressions. The expressions go away. All that's left is the idea. The expressions go into the trash. And then those ideas are facts that are unoriginal and uncopyrightable. Then you get new expressions that are also uncopyrightable.

Ideas matter. Expressions don't.

The courts also consider fair use: Are LLMs transformative? Yeah, they are. If you think about the Google Scholar case, the Second Circuit held that if you index a whole bunch of books, and you take that word index, that is a transformative purpose.²⁹ By taking words and being able to search those words, that is transformative—beyond what the books were originally intended for.

Now, if a *word index* is transformative, how about a vector model in a 12,000-dimensional vector space? If an index of words is transformative, how transformative is the ideas that are in that 12,000-dimensional vector space?

So, the fly in my ointment of this argument is: what if you were to take the first twelve paragraphs of *Harry Potter* and say, "Tell me what's statistically likely after that." And then it spits out the entirety of *Harry Potter*. Then the input and the output are identical.

Because, of course, after eight paragraphs—and this is what happened in the *New York Times*: Plaintiffs prompted eight

29 Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

paragraphs of it and said, “What’s statistically likely after that?”³⁰ And the LLM spit out the rest of the *New York Times* article. Of course it’s going to do that, right?

In cybersecurity, they call that “red teaming.” That’s either bad actors—or people *pretending* to be bad actors—trying to get the machine to do something that it’s not supposed to do. In that case, though, isn’t the *New York Times* being the bad actor, trying to get the machine to do something that it’s not supposed to be doing?

And in those cases, isn’t that kind of like a videocassette recorder (“VCR”) from the 1980s Sony “*Betamax* case,” where the plaintiffs argued “People can use VCRs to be able to infringe copyright.”³¹ In the case, the U.S. Supreme Court focused on whether there are there substantial, non-infringing uses of the VCR—and it turns out, there are. You can record HBO movies, and you can *also* record your kid’s recital. These are substantial, non-infringing uses. So, the VCR was non-infringing.

How many substantial, non-infringing uses are there for a large language model? It’s going to transform the world. You know, a billion, literally a billion substantial, non-infringing uses.

So how does that fall into the *New York Times* argument? The thing they need is guardrails. Make sure that the output doesn’t match the input, and that’s what OpenAI is doing, and that’s what every foundational model should be doing going forward.

Is this painting copyrightable? [Displays abstract art.] A machine made that. A guy named Stephen Thaler tried to get copyright registration for this. The U.S. Copyright Office said, “No. Machine-created, therefore uncopyrightable.” Can machines create patents? No, machine-created, so unpatentable.

That makes sense, right? Because really, what is intellectual property but the government saying to you, “I’ll give you a limited monopoly to incentivize you to make more things. Essentially, this is a quid pro quo: I want to incentivize you to make more things. So, I’m going to give you a monopoly.”

Machines don’t need incentives. They don’t need an incentive to do make many versions of my article. My server didn’t need an incentive to make 471 billion melodies. It literally took four days to create 471 billion melodies. There’s no need to incentivize for

³⁰ See Aatish Bhatia, *Watch an A.I. Learn to Write by Reading Nothing but ‘Harry Potter’*, THE N.Y. TIMES (Apr. 27, 2023), <https://www.nytimes.com/interactive/2023/04/26/upshot/gpt-from-scratch.html> [<https://perma.cc/7QC5-L7EY>].

³¹ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

that. So, should my melodies be copyrighted? No, because the machine needs no incentives. The incentives are off.

There is a case about *Zarya of the Dawn*, where a graphic novel author filed their work with the U.S. Copyright Office, which rubberstamped it. Then the author said, “Wow, I didn’t think they would register it, because all the images were made by AI [Midjourney].” And the U.S. Copyright Office said, “Huh?” And the U.S. Copyright Office revoked the copyright registration, saying, “Alright, you get copyright for what you wrote as a human, but the machine-created things: uncopyrightable.”³²

So, they split it: If a human created it, it’s okay and copyrightable, but the machine-created parts, uncopyrightable. So now if you file something with the U.S. Copyright Office, you have to declare how much of it was human-created and how much was machine-created.

But how about the my article I mentioned earlier, where I took my ideas (three pages’ worth), the machine spit something out, and I spent three hours jamming with it—editing, revising, and putting it into my voice?

This is back in 2020 before large language models. I used a tool called These Lyrics Don’t Exist. I said, “Give me a country song that’s a love song and happy,” and it spit out a bunch of lyrics called “Freight Train of Love.” And then I created this song that I put up on SoundCloud with the melodies from the *All the Music Project*, lyrics from “These Lyrics Do Not Exist” (an AI songwriter), drums from “Superior Drummer” (an automated drummer), and then I arranged and did other things. How can I unbake the cake as to what is copyrightable and what is uncopyrightable in this? I did lots of things. What’s copyrightable?

Really, we’ve been dealing with this dilemma for hundreds of years with joint works. If book coauthors’ contributions are 90% to 10%, do the courts decide “John gets 90% of royalties, Jane gets 10%”? No, courts aren’t going to settle fights about, “is that 10% the *more important* part? What are the splits going to be?” No. Everybody owns an *undivided interest* in the work’s entirety. We’re not going to unbake the cake, the courts say.

³² See *U.S. Copyright Office limits registration for AI-created Zarya of the Dawn graphic novel*, NIXON PEABODY (Mar. 9, 2023), <https://www.nixonpeabody.com/insights/alerts/2023/03/09/us-copyright-office-limits-registration-for-ai-created-zarya-of-the-dawn-graphic-novel> [https://perma.cc/8VKR-PG3Z].

How about co-authoring with machines? When I wrote my article by jamming with the machine, I contributed a bunch, then it contributed a bunch, and then I contributed a bunch more. Human, then machine, then human. How do you unbake that cake? And the answer is: you don't because you can't. It's impossible.

Because if you look at a redlined Track Changes sentence, are you going to say, "Okay, the black stuff that the machine created, that's uncopyrightable, but I get the two words here and there that I wrote and edited: those two words are copyrightable." If humans were doing this as a joint work: undivided interest, right? Because I'm not going to be able to unbake that cake.

If I tried to register the article, how would I tell how much was human and how much was machine? Because, honestly, I didn't write it with "track changes." I have no idea what was the human's and what was the machine's. I jammed with my machine coauthor. So what parts are machine-created? What parts are human created? I don't know. It's one whole, undivided interest.

Music is even worse. Music doesn't have "track changes." I can ask a machine "Give me a bunch of chord progressions." Machine spits out a bunch of chord progressions. Give me a bunch of melodies? Machine spits out a bunch of melodies. I'm up till 3 a.m. jamming with that, moving things around, editing here and there, then getting out the door. How do you unbake that cake? You don't. Because it's impossible. Undivided interest whether it's a human or machine. You can't unbake cakes.

So how do I comply with the U.S. Copyright Office, saying how much was human and how much was machine if I don't even know myself? Am I committing fraud on the U.S. Copyright Office if I say I don't know?

And how many of these things are filed with the Copyright Office without that person even saying anything? How many hit songs have actually been in this hybrid process where the human and the machines are jamming, and they don't disclose it? And you're never going to find out until it comes to a lawsuit. And even if it goes to a lawsuit, you're not going to find out until you're in the deposition. And even in the deposition, you're not going to find out if the person lies and says, "No, that was all me." So, the odds of catching this kind of fraud is next to zero. Where does this land? It's *uncopyrightable turtles* all the way down.

Old music is also eating new music. Songwriters are selling their catalogs: Bruce Springsteen,³³ Sting,³⁴ Bob Dylan,³⁵ Leonard Cohen.³⁶ Everyone's selling their catalogs because they can make a lot of money, hundreds of millions of dollars, on these things.

When we think about the Old World—maybe before 2000—new music was the most-important thing. Record labels invested in artist development. They spent millions to make sure that new artists get airplay. Artists and repertoire (A&R) was a thing.

Catalog music, though? You go to the gas station and get old (catalog) music for a dollar. Nobody cared about catalog music, right?

But then that flipped. Going forward, record labels dropped their A&R budget. They're not developing people that blow up on TikTok. They're like, "Cool, you blew up on TikTok. Now we know you're viable, but I'm not going to invest a dime in new artists these days." Catalog, though? Bob Dylan, Springsteen, Sting? The industry is investing billions in that. This is old music eating new music.

And I was actually at South by Southwest with the two lawyers that do a lot of these deals with Bob Dylan, Leonard Cohen, etc., and I asked them, "Is this an example of the old music eating new music?" And they responded, "Yeah, of course it is."

Because, if you're an investor, which do you bet on? (1) Bob Dylan's songs' ability make money? Or (2) Someone out of South Los Angeles, whose songs have a one-in-a-thousand chance of making money? If I'm going to invest my money, will I do it on Bob Dylan or on this unknown artist? Of course, I'm going to invest in Bob Dylan. Old music eats new music.

Also "you stole my melody" lawsuits: old music eating new music. Whether it's Tom Petty suing Sam Smith, whether it's The Hollies suing Radiohead suing Lana Del Rey, whether it's the "Blurred Lines" case. This is old music eating new music, or at least trying to.

³³ Ben Sisario, *Bruce Springsteen Sells Music Catalog in Massive Deal*, The N.Y. Times (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/arts/music/bruce-springsteen-sells-music-catalog.html> [https://perma.cc/7AX8-UBZZ].

³⁴ Ben Sisario, *Sting Sells His Songwriting Catalog for an Estimated \$300 Million*, The N.Y. Times (Feb. 10, 2022), <https://www.nytimes.com/2022/02/10/arts/music/sting-sells-catalog-universal.html> [https://perma.cc/D6JG-CAKS].

³⁵ Ben Sisario, *Bob Dylan Sells His Songwriting Catalog in Blockbuster Deal*, The N.Y. Times (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/arts/music/bob-dylan-universal-music.html> [https://perma.cc/TLU2-XRN2].

³⁶ Jem Asward, *Leonard Cohen Song Catalog Acquired by Hipgnosis*, VARIETY (Mar. 5, 2022, 6:25 PM), <https://variety.com/2022/music/news/leonard-cohen-hipgnosis-1235196842/> [https://perma.cc/2R49-DBC4].

My buddy Michael Bommarito, one of the guys who beat the bar exam, said, “I really like your copyright thing. Let’s do the same thing with patents. Let’s take every single patent that has ever been filed and take every claim in each of those patents, and then use a large language model to recombine all those claims into new inventions—new prior art.” So, we’re going to upload all those new inventions, that recombined prior art, into the Internet Archive so that if you try to recombine old claims into a new patent application, the Patent Office and the Examiner will say, “No, Damien, Mike, Noah, and All the Patents did that in 2024. You can’t get a patent monopoly because that’s already been invented. As prior art, you don’t get a patent for it.” So, really, patents should be for whatever inventors do that is novel; not just recombining old things. So, what we’ve done for copyright, we want to do for patents as well.

This is a patent application that has my name on it.³⁷ It’s by Thomson Reuters, and the application is in the public domain, so that’s why I can talk to you about it. The patent is about workflow and practice management, and it’s essentially saying: if you have a matter—whether it’s litigation or transactional—you can break that matter into 1,000 tasks.

Then for Task 357, I, as a partner, can assign it to Jane. Jane can now see the ways to complete Task 357. Here are the Westlaw queries to do for Task 357. Here are the internal documents that have done Task 357. And here are your colleagues who have done Task 357 in the past, if you want to talk with them. Do that for Task 357—and all thousand tasks.

Jane then moves Task 357 from “To Do,” to “Doing,” to “Done.” Now you firms know how long it takes to do Task 357. And because you know how long it takes, you know how much it costs to do task 357. Now that you know how much task 357 costs, when new things come in the door, you can budget more accurately because now you know how much task 357 and all the other things cost.

The last thing I’m going to talk about is human creativity. What is creativity but statistical unlikelihood? Sting said, “The essence of all music is surprise.”³⁸ He essentially said, “If I’m not surprised in the first thirty seconds, I go to the next song.”

³⁷ Systems and Methods for Workflow and Practice Management, U.S. Patent No. 11868936 (filed May 23, 2017) (issued Jan. 9, 2024).

³⁸ See *Interview: Sting Talks Tour & New Album 57th & 9th*, TICKETMASTER (Nov. 14, 2016), <https://blog.ticketmaster.com/interview-sting-new-album-57th-and-9th/> [https://perma.cc/UL8Y-4HWY].

“Surprise” means it’s “statistically unlikely.” Ray Bradbury essentially said, “Creativity is continual surprise.”³⁹ Surprise: statistically unlikely. Joseph Conrad essentially said, “It’s an education of the unseen, familiar, and surprising.”⁴⁰ Statistical unlikelihood. Thurgood Marshall’s arguments in the 1950s: statistically unlikely. Who’s going to be making those arguments? Only a few people are going to do that. Legal creativity is statistically unlikely.

I’m applying that to legal tech. I took the *New York Times* case, where they sued Microsoft and OpenAI just a few weeks ago,⁴¹ and I dragged the Complaint into my tool that I’m building right now, where we extract every single claim and every fact—everything that I, as a litigator, cared about, when I got a complaint. What are the claims? What are the facts? What are they looking for? What is the relief?

Then we go into strategy. What are the defenses to each of these claims? Give me a questionnaire I can ask my client to bolster my answer to these defenses. Find similar things in 800 million dockets and documents and motions, briefs, pleadings, motions that have happened, cases like mine.

Then, the output is legal questions specifically focused on this complaint. What are the legal standards for copyright infringement in the context of GenAI and large language models? How have the courts interpreted fair use for copyrighted material for training AI systems? You upload a document; it gets these things out of the box.

That’s why I was in New York yesterday. Tonight, right after this, I’m going to speak to the American Bar Association (ABA) about what I’m doing at vLex. For each of the claims, it extracts all the citations, governing law, and related facts for each of the claims. What are the defenses? “Hey, you might want to argue fair use, that training is transformative and doesn’t substitute for the

³⁹ See QUOTEFANCY, <https://quotefancy.com/quote/897626/Ray-Bradbury-Surprise-is-where-creativity-comes-in#:~:text=Ray%20Bradbury%20Quote%3A%20%20%20%20where%20creativity%20comes%20in.> [https://perma.cc/8AEC-NHQB] (last visited April. 16, 2024).

⁴⁰ See Maria Popova, *Creative Magic and What Makes a Great Writer: Joseph Conrad’s Beautiful Tribute to Henry James*, THE MARGINALIAN, <https://www.themarginalian.org/2015/12/03/joseph-conrad-henry-james-appreciation/> [https://perma.cc/2ZQ2-XHRQ].

⁴¹ See Halelua Hadero and David Bauder, *The New York Times Sues OpenAI and Microsoft for Using Its Stories to Train Chatbots*, ASSOCIATED PRESS (Dec. 27, 2023), <https://apnews.com/article/nyt-new-york-times-openai-microsoft-6ea53a8ad3efa06ee4643b697df0ba57> [https://perma.cc/P5DX-EZRH].

original.” This is all the machine spitting these things out. “Hey, what do I need to show? That the large language model is educational and research-oriented, and it doesn’t affect the market for the *New York Times*.” That’s a good legal observation.

It did that for every single one of them, and I asked for one defense, but I could have asked for 100 defenses or 300 defenses. And it will give me 300 defenses that I can pick and choose from the best ones. Give me a questionnaire to ask my clients. “Hey, how did you create those datasets?” “How did you select what you were going to do?” “How much of the *New York Times* stuff did you pull?” “How do you try to avoid copyright?” “How many lawyer hours were spent thinking about questions like this that my machine literally spit out in less than a minute?”

Let’s talk about the idea-expression dichotomy. Training the large language model is merely extracting the ideas that are vector embeddings, and not the expressions, which are jettisoned. The output is something you can paste into a brief: “Your Honor, here’s the idea-expression dichotomy” and “Your Honor, here’s how large language models are trained.”

What I didn’t show you is the rest of the brief that you can copy and paste and put into the output; the vector embeddings of our ideas; how we throw away expressive content; and the legal precedent. We do that, not just for a complaint to an answer, but we’re building every single motion, brief, pleading, deposition, etc. Bring your own facts. Go ahead and record your interview with your clients, transcribe that interview, upload that into my system. You got a ready-to-bake complaint, ready-to-make answer, and ready-to-make motion all the way through.

I’ve spoken to Fortune 50 companies. What they want to do is take every complaint that’s ever been received and compare that historically to what their law firm has done, seeing if the lawyers added anything on top of what the machine did. And if their lawyers didn’t do anything on top of that, that says something.

Then, going forward, before the corporations even give the complaint to their law firm, they’re going to run the Complaint through this tool. And they’re going to give the machine’s output to their lawyers, saying, “What can you do on top of what the machine spit out in a minute? Because that’s all we’re going to pay you for. We’re not paying for you to re-create the wheel.” They’re going to do that for every single one of the complaints.

So, this is kind of dire—you being law students—right? But this is the question—these are the honest things that people say, like, “ChatGPT, it’s not quite there yet.” They don’t see the train a-comin’ down the track. I’m telling you what’s coming: it’s not coming down the pike. This is out in the world now. This is not the future; this is today.

So, as law students, you should think about what you can do that’s on top of what my machine can do today in 2024 because my machine is going to do more in 2025 and more in 2026 and more in 2027, and inevitably where this lands is our humanness—our humanity. I use TurboTax every year. I still go to a human accountant to ask, “You know, tell me about this. I’m not quite satisfied. Talk me off the edge here, is this right?”

Our humanity is what we give. We are counselors. So, really, the more we can counsel, the more we’re going to make it through our large language model.

Depending on the day, I vacillate between: the legal profession will go away—that’s a scarcity mindset—or an abundance mindset, where my friend who serves as litigation counsel at Ford Motor Company says, “Do you know how much we’re regulated and how much of that regulatory work we’re not giving to you because you are all too expensive? If you use large language models and shrink your costs, I’m going to give you way more work.” So that’s an abundance mindset.

So, depending on the day, I vacillate between scarcity and abundance. Is all the legal work going to go away, or are we going to have more work than we ever have? Today, I’m focused on abundance.

Think about the access to justice problem: eighty percent of legal needs are unmet because we’re too expensive. What if we were to shrink the cost and open up that eighty percent to help not ten people—because of scarcity—but abundance: I can now serve 1,000 people. I can now work for a legal aid organization that can serve 10,000 people. That abundance is going to make society way better. And it’s *because* of the machines, not *in spite of* the machines.

Large language models produce output that’s statistically likely. They tell you the statistical likely next word, sentence, etc. That is uncreative. Humans are jagged. Less predictable. The way that ChatGPT detectors are saying “if it’s jagged, it’s more likely to be human created.” That’s what they do.

But what if you were to *force* unlikelyhood? What if you were to tell the LLM, “Give me gangster rap in the style of the *King James Bible*.” The LLM writes: “*In land of the hustle brethren gather round / Behold the tale of the streets profound / In the beginning God created Heaven and Earth / But in the alleyways, man proves his worth. . .*”

Those are two statistically unlikely things that are creative, right? If a human wrote that: “Oh, that person’s creative,” right? That’s the machine doing that.

The idea of gangster rap and the idea of *King James Bible*, those each live in different vector spaces. And what the LLM is doing is finding the connective *latent* space—that’s the term that’s used—latent space between these two vectors.

Then I said, “You’re a creative poet. Create ten poem ideas, creating disparate concepts that usually aren’t associated with one another.” The LLM combined things like “ancient ruins and modern technology”; “classical music and urban street decay”; “chess strategies and beekeeping.”

This one seemed interesting to me: “mushroom foraging and cybersecurity.” Those are two very disparate concepts. So, I said, “Prompt something conveying mushrooms and cybersecurity,” and this is its output:

*Here in the forest of code, mushrooms hide
Data encrypted in nature’s stride
A forager’s keen eye, a hacker’s mind
In each cap and byte, secrets intertwined.*

That’s creative, right? It’s statistically unlikely. That’s a machine being creative. So, really, maybe the machine could say, “Hey, figure out what is far away in latent space and then shoot right in the middle and give me connections between those two disparate things.” Do that for poems. Do that for legal arguments. Facts. Law. Give me a creative legal argument that is going to win for this judge, and statistically likely to win for that judge. So, it’s the cosine distance—people who don’t like geometry, fine, but it’s kind of the middle.

You don’t want to have the cosine similarity be too close together because that’s obvious; that’s not creative. But you also don’t want to have it too far away, like that’s super weird, right? And I don’t want to do that. But there’s a creative cosine to say, “Yeah, it’s not too super weird, and it’s not too on-the-nose.” There’s a middle

distance to be able to say, “That is creative.” Just enough to be creative. To say, “Oh, that’s so clever.” The LLMs are doing this.

I’m going to close with a love poem, comparing a human relationship to assembling an IKEA furniture set. And it’s hilarious, right? Who would have thought to put love with an IKEA furniture set? But the output is:

*Like love, this bookcase comes in pieces
A puzzle of boards and screws.
We fumble with vague instructions
Baffled, but determined
Trying to fit tab A into slot B.
It tests our patience, teamwork
Whether we can weather the frustration
And see the vision for the finished whole.
We stand back to the end with sore thumbs
And look upon our creaky creation.*

That’s creative. It’s stupid that I got emotional, but it’s—I was thinking about my wife, right? That’s beautiful. A machine created that.

We’re in a weird world—in our law and in our creativity. What is “creative” these days? So, I would ask everybody in this room: think about where you fit into our new world that I’ve been talking about with you, because it’s not tomorrow; it’s today. And anybody who tells you that we’re not going to be doing anything with large language models in law anytime soon doesn’t see the train coming down the tunnel. This is happening.

It is Time for a Precise, Narrowly Tailored Federal Right of Publicity

*Brandon J. Anand**

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INTRODUCTION

In 2022, twenty plaintiffs brought a putative class action claim against a mass media conglomerate for misappropriating their names and identities in disclosing the information to third parties.¹ They alleged different violations under their nine respective state right of publicity statutes.² Although the claims brought were all state claims with no federal equivalent, the parties ultimately stipulated to having the case consolidated and

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¹ *In re Hearst Commc'ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 617 (S.D.N.Y. 2022).

² *Id.*

decided by one court.³ In *In re Hearst Communications State Right of Publicity Statute Cases*, the court had to interpret the effect of nine different publicity statutes in the context of identical factual allegations.⁴ The plaintiffs and defendant stipulated that the “statutes are substantially similar and will include overlapping issues of law,” reasoning that one court could dispose of the nine statutes at the same time and essentially address the various state statutes as if they were one federal law.⁵ Without this agreement between the parties, and acceptance of that agreement by the court, widely different holdings may have resulted. Even with the agreement, substantial resources (both private and public) were necessitated by the lack of one uniform law.

The right of publicity (also now colloquially referred to as “N.I.L.” or “name, image, likeness” in the sports world) is rooted in privacy rights and is currently regulated by state law. Although the ends sought are essentially the same, the laws vary considerably from state to state.⁶ For example, although most jurisdictions consider the interest a property right, other states hold it as a privacy right.⁷ Without uniformity between states,

³ *Id.* at 618–19.

⁴ *Id.*

⁵ *Id.* at 619.

⁶ See, e.g., ARIZ. REV. STAT. § 12-761 (LexisNexis 2024) (applying to soldiers exclusively rather than private citizens); N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024) (protecting the “name, portrait, or picture” of all “living persons”); CAL. CIV. CODE § 3344.1(g) (Deering 2023) (providing seventy years for a post-mortem right of publicity); TENN. CODE ANN. § 47-25-1104(a) (2023) (providing ten years for a post-mortem right of publicity); VA. CODE ANN. § 8.01-40(B) (2023) (providing twenty years for a post-mortem right of publicity); FLA. STAT. ANN. § 540.08(5) (LexisNexis 2023) (providing forty years for a post-mortem right of publicity); for statutes with fifty year post-mortem right, see KY. REV. STAT. ANN. § 391.170(2) (LexisNexis 2023), NEV. REV. STAT. ANN. § 597.790(1) (LexisNexis 2024), and TEX. PROP. CODE § 26.012(d) (LexisNexis 2024); N.Y. CIV. RIGHTS LAW § 50 (Consol. 2023) (providing no post-mortem right except for unauthorized use of a deceased performer’s digital replica); WASH. REV. CODE ANN. § 63.60.040(2) (LexisNexis 2024) (providing seventy-five years for post-mortem right of publicity); see also differences in statutory damages in CAL. CIV. CODE § 3344(a) (Deering 2023) (providing for \$750 in statutory damages); IND. CODE ANN. § 32-36-1-10(1)(A) (LexisNexis 2024) (providing for \$1,000 in statutory damages); TEX. PROP. CODE § 26.013(a)(1) (West 2024) (providing for \$2,500 in statutory damages); N.Y. CIV. RIGHTS LAW § 50-f (Consol. 2024) (providing no statutory damages, other than for the limited post-mortem right related to deceased performer’s digital replica, in which case there are statutory damages of \$2,000). See also *Electra v. 59 Murray Enters., Inc.*, 987 F.3d 233, 252 (2d Cir. 2021) (quoting *Gautier v. Pro-Football, Inc.*, 106 N.Y.S.2d 553, 560 (App. Div. 1951), *aff’d*, 107 N.E.2d 485 (1952)) (explaining that New York’s right of publicity statute provides “primarily a recovery for injury to the person, not to his property or business”).

⁷ See, e.g., N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024); ARIZ. REV. STAT. § 12-761 (LexisNexis 2024); CAL. CIV. CODE § 3344 (Deering 2024); IND. CODE ANN. § 32-36-1-1 (LexisNexis 2024).

transactions are likely to incur higher costs as parties will have to grapple with laws that are similar, but still different enough to require additional due diligence to address. Similarly, with the current patchwork system, litigation costs are increased with plaintiffs encouraged to forum shop for the most beneficial jurisdiction and defendants encouraged to look for the most restrictive jurisdiction, thus creating unnecessary procedural waste.

A precise, narrowly tailored federal right of publicity will promote creativity and business rather than stifle it, and also protect First Amendment rights. In this article, Part I discusses whether the right of publicity should be considered a privacy or property right, and illustrates the importance of a publicity right. Part II provides an overview of the lack of consistency and uniformity between states' right of publicity statutes. Finally, Part III examines what a federal right of publicity should look like and how a federal right would apply in practice.

I. PRIVACY OR PROPERTY?

The origin of the right of publicity is the right of privacy. Interestingly, although the right has morphed and evolved for over a century, the concern that led to the creation of privacy rights in 1890 is the same concern that continues to prompt advocacy for a federal publicity right today. That concern was articulated by Samuel Warren and Louis Brandeis in the article, *The Right of Privacy*, in which they expressed the need for a right of privacy due to the instant nature of producing photographs and newspapers.⁸ At the time, instantaneous photography threatened to invade people's private lives, where newspapers could circulate pictures of private individuals without consent.⁹ With the potential oversteps by the press,¹⁰ courts had to find a way to address this invasion of privacy for the private individual.

Today, with the advent of smartphones and relatively inexpensive media production technology, we can produce photographs, as well as graphics, images, sounds, and videos, even more rapidly and with just a few clicks. This ability continues to expand as the capacity of artificial intelligence ("AI") increases daily. Despite these advancements, and a push to address AI

⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

⁹ *Id.*

¹⁰ *Id.* at 196.

specifically,¹¹ the jurisprudence on the right of publicity is still in disarray. Creating a uniform system for the century-old right of publicity should be addressed first (or at least simultaneously) with addressing any specific AI concerns. Creating one clear system will eliminate many of the foreseen problems created by AI, which have largely been hyped up in typical political fashion.

The rights of privacy and publicity are now two distinguishable doctrines. Whereas the right of privacy seeks to prevent the dissemination of private information in order to protect one's dignity and mental suffering, the right of publicity is focused on the commercial value of one's persona.¹² Far from a privacy right, the right of publicity is a commercial tort of unfair competition that allows people to monetize exposure of their persona.¹³

A. Value of One's Right to Publicity

The right of publicity is a distinct and necessary right, regulating an area not covered by copyright, trademark, or any other form of intellectual property. Moreover, despite the right being a lesser-known cousin of copyright, trademark, and patent rights, upon close inspection, the basis for the right of publicity is intuitive—a natural right of every person.¹⁴ If someone uses a person's name, image, likeness, voice, or any aspect of their persona, to endorse or market a product, they should have to pay for that use. Further, every individual should be able to deny the use of their right of publicity for any reason, moral or otherwise.¹⁵

Similar to trademark law, one goal of a right of publicity is to protect against unfair competition.¹⁶ Under the Third Restatement of Unfair Competition section 46, the appropriation of a person's identity for commercial value without that person's consent is barred from use in trade.¹⁷ The prevention of this trade tactic protects people, public or private, from having their likeness,

¹¹ H.B. 5594, 103d Gen. Assemb. (Il. 2023).

¹² See Warren & Brandeis, *supra* note 8; see also U.S. Dep't. of Just. v. Rep. Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

¹³ See J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:57 (2d ed. 2023).

¹⁴ See Jonathan L. Faber, *Recent Right of Publicity Revelations: Perspective from the Trenches*, 3 SAVANNAH L. REV. 37, 40 (2016).

¹⁵ See Jonathan L. Faber & Welsey A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as a Model, the State-Based Right of Publicity Is Ready to Move to the Federal Level*, 45 RES GESTAE 31, 32–33 (2001).

¹⁶ See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995).

¹⁷ See *id.* §§ 46, 47.

name, or identity used without their consent by another in commercial trade.¹⁸

Although public individuals or celebrities are often the subject of cases involving the right of publicity, the right is not limited to public figures—rather, it extends to every person, public or private.¹⁹ The lynchpin of a right of publicity claim is a commercial use. Nonetheless, generally, the value of one’s right of publicity is commensurate with their fame. For example, if a private person’s image or likeness is used to endorse a product, without notoriety, the actual damages may not be much. What would the market value be for a license to use a private person’s image? How much of the profits could be shown as directly attributable to the use of that non-celebrity’s persona? Even if the answer to both of those questions is “not a whole lot,” a claim may still be brought, and damages could still be awarded. As a fact-intensive inquiry, a jury and court would decide the value of the use. As such, every case is different, so although a person is not famous, that does not mean their image cannot be valuable.²⁰

In any event, the right of publicity serves to protect people from exploitation in an area that is otherwise unregulated. Copyright law serves to protect a right “fixed in any tangible medium.”²¹ Trademark rights protect source identifiers, i.e., anything that designates the origin of a product or service.²² As an example of the value of the right of publicity, imagine a singer who is not famous and agrees to record a song, but is not told that that song will eventually be used in a global commercial campaign. That individual would likely not have enough notoriety for a claim in trademark. Their voice would not serve as a source identifier, as the public would not generally be able to identify that person based on their voice (regardless of how amazing their voice may be). Although they may have some copyright protection, a work-for-hire clause would allow the other party to not only use, but create derivative works of that initial use, and thus the singer may be left with no additional compensation if that voice is subsequently used on a massive advertising campaign.

¹⁸ *See id.*

¹⁹ *See* MCCARTHY & SCHECHTER, *supra* note 13, § 1:3. *See generally* Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE 24 (2000).

²⁰ *See, e.g.,* Christoff v. Nestlé USA, Inc., 213 P.3d 132, 134, 141 (Cal. 2009) (reversing a jury award of over \$15 million based on the “single publication rule”).

²¹ 17 U.S.C. § 102.

²² *See* Trademark Act of 1946, 15 U.S.C. §§ 1051–1141n.

On the other hand, a right of publicity provides a clear claim where a person's voice is used without authorization. While studios and advertising agencies will likely contract specifically for the right of publicity and continue to use their bargaining position to pay what may be seen as below market value, nonetheless, more clarity is required in contracting to provide the licensor a better grasp on what is being negotiated and result in more fair compensation when the use of a person's voice (or image) expands (often, exponentially) beyond the original contracted use.

The right of publicity sits neatly in between other forms of intellectual property, namely copyright and trademark, sharing rationale with each, and filling an unaddressed gap. Under the U.S. Constitution, works by individual authors are imbued with copyright protection to "promote the Progress of Science and useful Arts."²³ With a license to use a copyrighted work, a derivative work can freely build upon an existing protected expression of an idea.²⁴ Although it is debatable whether the right of publicity promotes creativity, this right should similarly incentivize a person to protect their individuality, identity, and essence as a person (regardless of how much effort they have put in to cultivate this persona). With the ability to bring a claim under a right of publicity, a pathway is created to prevent the commercialization of an individual's identity without consent.²⁵ At the same time, similar to trademark protection, a right of publicity protects the public from confusion in the commercial marketplace.²⁶

B. Current Right of Publicity State Statutes

Although derived from privacy rights, the right of publicity evolved and is now best characterized and generally considered a property right—specifically, an intellectual property right.²⁷ In states where the right is still considered a privacy right—and even in states where the right of publicity is generally referred to as a

²³ U.S. CONST. art. I, § 8, cl. 8.

²⁴ 17 U.S.C. §§ 103, 204.

²⁵ See generally Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity*, AM. BAR ASSOC. (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/land-slide/2020-21/september-october/ [what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/] [<https://perma.cc/FWY9-VYHY>].

²⁶ See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1164 (2006).

²⁷ Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM'NS LAW. 14, 14 (2011). Notwithstanding, some states may still consider it a privacy right. *Id.*

property right—the historical origins as a privacy right create confusion and discrepancies in application of the right.²⁸

i. New York

In 1903, New York passed the first privacy law in the country, concerning the use of a living person’s “name, portrait or picture”²⁹ without prior consent.³⁰ In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit examined the New York law and distinguished the right of publicity from the right of privacy.³¹ In that case, involving a contract for baseball player photographs on chewing gum products, the court saw value in a person’s photograph and in the right to exclusively contract to use that photograph for the promotion of a product, such as chewing gum.³² Further, the court recognized an economic incentive for prominent persons to monetize their likenesses by issuing exclusive grants.³³ The New York statute primarily serves privacy interests.³⁴ The New York law provides a claim where, without written authorization, one’s “name, portrait, picture or voice is used within th[e] state for advertising purposes or for the purposes of trade.”³⁵ Although the prohibited use is in a commercial context, damages are focused on privacy concerns.³⁶ Damages from a right of publicity claim under New York Civil Rights Law sections 50 and 51 include “mental strain, humiliation, [and] distress associated with the traditional notion of privacy” and also

²⁸ See, e.g., NEB. REV. STAT. § 20-202 (2024); 9 R.I. GEN. LAWS §§ 9-1-28, 9-1-28.1 (2024); WIS. STAT. § 995.50 (2023); *Lugosi v. Universal Pictures*, 603 P.2d 425, 439 n.14 (1979) (Bird, C.J., dissenting) (“[T]he development of [the] right has been spasmodic. This is in part a consequence of courts adjudicating claims which might be categorized as invasions of plaintiff’s right of publicity as privacy claims.”).

²⁹ N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024). See Daniel J. Solove, *A Brief History of Information Privacy Law*, G.W. LAW SCHOLARLY COMMONS 1, 13 (2006), available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2076&context=faculty_publications [<https://perma.cc/V853-LND9>]; see also *New York*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/new-york/#:~:text=New%20York%20recognizes%20a%20right,the%20country's%20first%20privacy%20law. [<https://perma.cc/JM7M-EXME>].

³⁰ *Id.*; see also *Faber*, *supra* note 14, at 40.

³¹ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953).

³² *Id.* at 868.

³³ *Id.* at 868.

³⁴ See *id.* at 867; see also N.Y. CIV. RIGHTS LAW § 51 (Consol. 2024). But see *In re Hearst Comm’n’s State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 617, 620 (S.D.N.Y. 2022) (reasoning that the right of publicity in nine jurisdictions not including New York is only a property right).

³⁵ N.Y. CIV. RIGHTS LAW § 51 (Consol. 2024).

³⁶ See *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 77 (S.D.N.Y. 1982) (citing *Brinkley v. Casablanco*, 438 N.Y.S.2d 1004, 1012 (1981)).

economic injury stemming from the privacy interests of public figures (i.e., injury to a “property” interest).³⁷ While focused on privacy rights, this New York right of publicity statute nonetheless creates a property right held by the individual until contracted, licensed, or gifted.³⁸

ii. California

Although it is best described as a property right, courts also refer to California’s right of publicity as a privacy right.³⁹ Essentially, in California, the statutory right of publicity is a property right that provides redress for commercial injury, and the common law right of publicity provides redress for both commercial injury and non-commercial injury.⁴⁰ In addition, the statutory right requires a knowing use, whereas mistake and neglect are sufficient to infringe the common law right.⁴¹ Practically, the non-commercial aspect of the right of publicity in California provides a remedy for emotional distress from the negligent or inadvertent use of one’s right of publicity.⁴²

iii. Indiana

Indiana’s right of publicity statute is often considered the most expansive (i.e., plaintiff-friendly) in the nation.⁴³ This view is derived substantially from (1) the statute providing a broad definition of what is included in the right (“name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms”⁴⁴); (2) the statute allowing claims to be brought in

³⁷ *Id.*

³⁸ *Id.*; see also Assemb. 5605-C, 2019–2020 Legis. Assemb., Reg. Sess. (N.Y. 2020).

³⁹ See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (“Injury to a plaintiff’s right of publicity is not limited to present or future economic loss, but ‘may induce humiliation, embarrassment, and mental distress.’” (quoting *Waits v. Tracy-Locke, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992))).

⁴⁰ In California, “the right of publicity is both a statutory and a common law right.” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001). For California’s statutory right of publicity, see CAL. CIV. CODE § 3344 (Deering 2024). For California’s common law right of publicity, see *Comedy III Prods.*, 21 P.3d at 799, 811; *Eastwood v. Sup. Ct.*, 198 Cal. Rptr. 342, 344 (Ct. App. 1983); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992).

⁴¹ See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995); *Orthopedic Sys., Inc. v. Schlein*, 135 Cal. Rptr. 3d 200, 210–11 (Ct. App. 2011); *Eastwood*, 198 Cal. Rptr. at 351–52.

⁴² See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103-04 (9th Cir. 1992), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

⁴³ See, e.g., *Roesler & Hutchinson*, *supra* note 25.

⁴⁴ IND. CODE § 32-36-1-7(1) to (9) (2023).

Indiana regardless of the residence of the parties; and, (3) Indiana's post-mortem right of publicity extending one hundred years after the date of a person's death.⁴⁵ However, the Indiana statute does not provide the highest statutory damages in the country.⁴⁶

As one can imagine, these inconsistencies in the law create inconsistent results nationwide and add to the general criticism of the right of publicity. A federal right of publicity with consistent application will, at least, lessen the harm to plaintiffs, defendants, and commercial businesses.

II. HARM IN A LACK OF CONSISTENCY AND UNIFORMITY

Several states consider the right of publicity to be a property right.⁴⁷ However, some states still consider it a privacy right,⁴⁸ and others (such as California), view it as both.⁴⁹ Although it may seem like a distinction without a difference, delineating key aspects of each statute is important to ensure a clear application when framing a federal law.

In *Hearst*, the District Court for the Southern District of New York analyzed the history of the right of publicity statutes in eight states and one territory (Alabama, California, Hawaii, Indiana, Nevada, Ohio, South Dakota, Washington, and Puerto Rico),⁵⁰ explaining that the right of publicity is an intellectual property

⁴⁵ *Id.* § 32-36-1-8(a).

⁴⁶ Compare IND. CODE § 32-36-1-10(1)(A) (2023) (at least \$1,000 or actual damages), with TEX. PROP. CODE ANN. § 26.013(a)(1) (West 2023) (at least \$2,500 or actual damages).

⁴⁷ See, e.g., *Florida Right of Publicity Law*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2023), <https://www.dmlp.org/legal-guide/florida-right-publicity-law> [https://perma.cc/Q9K9-ESWR] (citing FLA. STAT. § 540.08 (2023)). See also *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967–68 (10th Cir. 1996) (citing OKLA. STAT. tit. 12, § 1449(A) (1985)).

⁴⁸ See e.g., NEB. REV. STAT. § 20-202 (2024) (“Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy.”)

⁴⁹ See Judicial Council of California Civil Jury Instructions No. 1084A (referring to the “right to privacy” but also requiring a direct connection to “commercial purpose,” which connotes a property interest).

⁵⁰ *In re Hearst Commc'ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616 *passim* (S.D.N.Y. 2022) (first citing ALA. CODE §§ 6-5-770, -772 (2023); then citing CAL. CIV. CODE § 3344 (Deering 2024); then citing HAW. REV. STAT. §§ 482P-1 to 482P-8 (2023); then citing IND. CODE §§ 32-36-1-1 to 32-36-1-20 (2023); then citing NEV. REV. STAT. §§ 597.770–597.810 (2023); then citing OHIO REV. CODE ANN. §§ 2741.01–2741.99 (LexisNexis 2024); then citing S.D. CODIFIED LAWS §§ 21-64-1 to 21-64-12 (2024); then citing WASH. REV. CODE §§ 63.60.010–63.60.080 (2023); and then citing P.R. LAWS ANN. tit. 32, §§ 3151–3158 (2011)).

right that is created by one's labor and effort.⁵¹ The *Hearst* court further explained that the "right of publicity is meant to protect the value of an individual's name, likeness, or other indicia of identity, by preventing it from being commercially exploited by another."⁵² The *Hearst* court found the right of publicity is solely a property right, distinguishing publicity rights from privacy rights.⁵³ By concluding that the plaintiffs had no viable right of publicity claims, the Court denied making a judgment as to whether the activity at issue (selling subscriber information without consent) is actionable conduct as any claim other than a right of publicity but alludes to the possibility of privacy claims.⁵⁴ The Court also specifically rejected the plaintiffs' arguments that the right of publicity statute could be applied to misappropriation "isolated from the overarching right of publicity."⁵⁵ In other words, appropriation of one's name, image, or likeness absent its use to promote a product or make an endorsement, is insufficient to state a right of publicity claim. The key is that the use must be in conjunction with selling a good or service, whether that is through promotion or branding.

If considered a privacy right, damages may be limited to general damages (commonly referred to as pain and suffering). However, as a property right, damages for a violation of the right of publicity should not include damages from personal feelings, embarrassment, or distress, but should include damages to compensate for the commercial loss, including lost profits attributable to the use and diminishment in value of commercial reputation. It is confusing, and moreover, unnecessary, for the right of publicity to encompass any use outside the commercial realm—redress for non-commercial uses can be found through claims for negligent infliction of emotional distress, defamation, and right of privacy.

Currently, the Indiana statute is "the most progressive Right of Publicity Statute in the nation."⁵⁶ The broad protection afforded

⁵¹ *In re Hearst Commc'ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 620 (S.D.N.Y. 2022) (citing *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013)).

⁵² *Id.* at 620–21.

⁵³ *Id.* at 620.

⁵⁴ *Id.* at 626.

⁵⁵ *Id.* at 623.

⁵⁶ Faber & Zirkle, *supra* note 15, at 31.

by Indiana's statute encourages forum shopping.⁵⁷ Although plaintiffs may enjoy the benefits of that statute, this type of a haphazard system is not beneficial for society. Without uniformity, plaintiffs are likely to file in a jurisdiction where they are most likely to reap the most benefits. For example, the California statutes explicitly includes name, voice, signature, photograph, and likeness,⁵⁸ while the New York statute does not include signatures.⁵⁹ Meanwhile, other state statutes do not include voice.⁶⁰

While some states have statutory protections and others have common law (California has both⁶¹), transaction and litigation costs can be reduced significantly with a uniform federal right. Transaction costs are increased when contracting parties must consider the laws of various jurisdictions when negotiating and papering deals. Further, forum shopping by parties, complex procedural steps to consolidate state claims, and disparate results all increase litigation costs. By reducing transaction and litigation costs under a federal right of publicity, both businesses and public and private individuals will benefit from the lack of inconsistency between jurisdictions.

III. SOLUTION: A FEDERAL RIGHT OF PUBLICITY

Although the *Hearst* court did not set out to establish a federal right of publicity, the case alludes to the idea of combining similar state statutes regarding a right of publicity. Interestingly, in *Hearst*, nine plaintiffs, alleging violations of nine different state statutes, asserted that the statutes, while “not identical . . . are substantially similar and will include overlapping issues of law.”⁶² As seen in *Hearst*, there has been significant movement by states modeling statutes after each other.⁶³ With states emulating each other's right of publicity statutes, a federal law would negate the

⁵⁷ The statute explicitly allows claims to be brought in Indiana State Court based on activity that occurs within the state's borders, regardless of the residence of any of the parties. IND. CODE ANN. §§ 32-13-1-1—32-13-1-20 (LexisNexis 2023).

⁵⁸ CAL. CIV. CODE § 3344 (Deering 2023).

⁵⁹ See N.Y. CIV. RIGHTS LAW § 50 (Consol. 2024).

⁶⁰ See, e.g., ARIZ. REV. STAT. § 12-761 (LexisNexis 2024); FLA. STAT. § 540.08 (2023); KY. REV. STAT. ANN. § 391.170 (LexisNexis 2023); MASS. GEN. LAWS ch. 214, § 3A (2024); NEB. REV. STAT. § 20-202 (2023); 9 R.I. GEN. LAWS §§ 9-1-28 to 28.1 (2024); TENN. CODE ANN. § 47-25-1104 (2024); UTAH CODE ANN. §§ 45-3-2 to -3 (LexisNexis 2023); VA. CODE ANN. § 8.01-40 (2023); WIS. STAT. § 995.50 (2023).

⁶¹ See *supra* note 40.

⁶² *In re Hearst Commc'ns State Right of Publicity Statute Cases*, 632 F. Supp. 3d 616, 618–19 (S.D.N.Y. 2022).

⁶³ See, e.g., Faber & Zirkle, *supra* note 15, at 31.

need for each state to go through the process of enacting their own statutes. Instead, a federal law would collectively address the same issue, making the consolidation of nine different lawsuits unnecessary, avoiding a need for attorneys to know multiple state statutes, and eliminating procedural waste.

A. Proposal

A federal right of publicity will provide clarity through well-defined categories of what is protected, what is not protected, and how long protections are afforded. The right of publicity should protect a person's name, image, likeness, voice, and signature from being used without authorization to endorse or promote a commercial endeavor, such as the sale of goods or services. Categories beyond name, image, likeness, voice, and signature are unnecessary. For example, expanding likeness to include "distinctive appearance, gestures or mannerisms,"⁶⁴ such as in Indiana's statute, are unnecessary as all are already included in likeness, as long as those features actually invoke the person in the public's mind.

B. Private vs. Public Parties

As seen through the discussion above, there should not be a distinction between private and public parties. Although the right is generally thought of as applying to any person, regardless of the level of fame achieved, there is still debate about the differences in the right for public and private persons.⁶⁵

There is no need to divide the right into categories based on the arbitrary determination of whether one is a celebrity or not. First, the inquiry would be entirely subjective and susceptible to disparate application of the law. The categorization of celebrity versus private citizen is not black and white, but rather, exists across a spectrum. Especially in the day of social media and through the rise in popularity of talent competitions such as *American Idol*, and reality shows on virtually every topic under the sun, there is a blurred line between private and public citizens, and there can be no good methodology to distinguish between celebrity and non-celebrity. Today, an unknown singer is one viral video or TikTok away from becoming an international superstar.

⁶⁴ IND. CODE ANN. § 32-36-1-1 (LexisNexis 2023).

⁶⁵ See, e.g., *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 77 (S.D.N.Y. 1982).

Most importantly, the distinction does not matter practically; the market will determine the value of a person's right of publicity.

C. Right of Publicity After Death

With the current state-based system, the post-mortem rights provided for by state statutes could not be any more divergent—ranging from no post-mortem right at all to an unlimited right.⁶⁶ Criticism for a post-mortem right is focused on arbitrary comparisons to other forms of intellectual property, the concern that a “remote heir” does not deserve protection, and free speech considerations.⁶⁷

Copyright protection lasts for the life of the author plus seventy years after death. Patent protection is provided for only fourteen to twenty years.⁶⁸ The primary reason for limiting the terms of those granted rights is to allow the public to make use of and expand upon creations and inventions, ultimately providing the biggest benefit to society. Providing some form of limited monopoly to the creator/inventor is also generally seen as being beneficial to society as it provides an incentive to create and invent.

That being said, the differences between copyright and right of publicity are vast. Copyright protects a specific work, whereas the right of publicity protects an individual. Copyright protection seeks to encourage the creation of new works by finding a balance between incentivizing creation and ensuring public access to and use of creative works (to, in turn, spawn more creation and disseminate knowledge). The same rationale does not apply to the right of publicity. The right of publicity exists to prevent unwanted association with a product or service. While there is a need to incentivize the work put into creating a marketable persona, the concern of ensuring public access that exists with copyright is not present in the right of publicity context. After all, the right is limited to commercial uses of one's persona. Allowing one to have a full monopoly over their persona, while they are living, should not be controversial. However, the same is not true of the existence of that right after death.

Decades of jurisprudence have considered the right of publicity a property right. As a property right, it should be freely descendible and alienable. As long as there are clear, codified

⁶⁶ See *supra* note 6.

⁶⁷ *Id.*

⁶⁸ See *How Long Does Patent, Trademark or Copyright Protection Last?*, STOPFAKES.GOV (Feb. 25, 2021), <https://perma.cc/9UKA-6MTH> [<https://perma.cc/9UKA-6MTH>].

exceptions, there are no policy justifications for limiting the post-mortem right of publicity. With exceptions for news, public affairs, and expressive works/art, First Amendment and fair use concerns are addressed. This also accounts for any argument that the right would hinder creators or minimize the free market. Artists and producers would be free to utilize the personas of deceased celebrities in works of art, but only the heirs and rightsholders would be able to exploit the personas in connection with the promotion or endorsement of products.⁶⁹

That the right of publicity should exist perpetually is not as far-fetched as it may seem at first glance. Trademarks, which may be most closely related to the right of publicity, have an unlimited duration as long as used.⁷⁰ Trademarks protect the reputation and goodwill of a business, similar to the right of publicity protecting the reputation and goodwill of a person.

However, at least when a person is living, the right of publicity cannot be lost due to lack of use (as with trademarks). The right of publicity stems from natural rights that are immutable, and thus the pre-mortem right of publicity does not require any use—a person should own their persona and have the free choice as to how to cultivate and exploit it (or not). However, any post-mortem right does not share the same universal human right quality. As such, the post-mortem right should have a use requirement to be maintained. After an exclusive period, the heirs and rightsholders should be required to make use of the right of publicity in order to keep it. As time goes on following a person's death, the likelihood that a rightsholder has any personal connection to the deceased diminishes, and the likelihood that a corporation controls their right of publicity increases. In addition, the passage of time would increase the societal benefit in ensuring free access to use that right of publicity, as an ingrained piece of culture. If the heirs of a deceased celebrity want to keep the right, they simply have to keep using it. Tennessee's law provides some guidance on this point.⁷¹ The Tennessee statute provides that the right will continue for ten

⁶⁹ See, e.g., Richard E. Fikes, *The Right of Publicity: A Descendible and Inheritable Property Right*, 14 CUMB. L. REV. 347, 367 (1984) (arguing that the public interest will be minimally impacted as the First Amendment will triumph and allow for uses that are beneficial to society).

⁷⁰ See *supra* note 68.

⁷¹ TENN. CODE ANN. § 47-25-1104 (2023).

years after a person's death and then will continue indefinitely, unless it is not used for two years.⁷²

The federal law should provide post-mortem rights in a similar manner. There should be an initial period in which the right is granted regardless of use and a subsequent period where use is required. Due to concerns that remote heirs may be the undeserving beneficiaries of post-mortem rights, there should be time limits on the absolute post-mortem right, roughly equivalent to one generation. Thereafter, if the rightsholders fail to make use of it for a period of two years, the right will be lost and available to anyone.

Twenty years after death, based on a conservative number of one generation, would be appropriate to balance the various concerns at play.⁷³ On one hand, there are no strong arguments against the right from continuing indefinitely, as any property right would. On the other hand, questions as to the seeming impropriety of providing a “privacy” right, after someone has died, do not seem likely to diminish, and thus, a compromise is necessary to get any legislation passed. In sum, the right will continue exclusively for 20 years after death, and indefinitely if being used by the heirs or their successors—but if not used for a period of two years (after the exclusivity period), it will be lost for good, and available to others.

D. First Amendment and Fair Use Exceptions

The federal statute should spell out the so-called “exceptions” to the right of publicity. There is strong precedent for these exceptions, and they serve to provide necessary and well-accepted limits on the right of publicity. Explicitly including them in legislation will help to alleviate concerns from detractors, and also provide clarity, thus reducing both transactional and litigation costs. As such, they should be codified to the greatest extent possible.

As recognized by some courts, a fair use analysis analogous to that used in copyright cases is appropriate for the right of publicity.⁷⁴ States have also codified exceptions to the unauthorized

⁷² *Id.*

⁷³ See, e.g., *The Whys and Hows of Generations Research*, PEW RSCH. CTR. (Sept. 3, 2015), <https://www.pewresearch.org/politics/2015/09/03/the-whys-and-hows-of-generations-research/> [<https://perma.cc/G8R9-Y2K6>].

⁷⁴ See, e.g., *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982); see also *Apple Corps Ltd. v. Leber*, 229 U.S.P.Q. 1015 (Cal. Super. Ct. 1986).

uses of the right of publicity.⁷⁵ In California, use of one's right of publicity in connection with any news, public affairs, or sports broadcast or account, or any political campaign, is not actionable per the statute.⁷⁶ However, the use of a person's name, image, or likeness in one of the enumerated categories may still give rise to a claim in California, as constitutional defamation standards have been held to apply to the right of publicity statute.⁷⁷

The federal statute should codify exceptions for news, public affairs, and sports broadcasts/accounts, and political campaigns, and also make clear that uses in these categories that promote or endorse another do not qualify as an exception. The federal statute should also make clear who bears the burden of proof. As in California, the plaintiff shall bear the burden of showing that the use does not occur in relation to a news, public affairs, or sports broadcast, or any political campaign.⁷⁸

General First Amendment and fair use defenses must also be available in order to account for the public interest. These defenses shall be affirmative defenses, and the defendant should have the burden of proof, similar to a copyright fair use defense.⁷⁹

CONCLUSION

Not only is there a need for a federal right of publicity, but it should really not be a controversial proposition. As discussed in this article, under the current state-law system, claims are being heard in jurisdictions where none of the parties reside, and federal courts are tasked with consolidating and interpreting claims from multiple jurisdictions. Case outcomes can vary drastically just depending on the residency of a plaintiff.⁸⁰ Although not explicitly mentioned in the Constitution like the Copyright Clause,⁸¹ the authority for Congress to pass a federal right of publicity can

⁷⁵ See, e.g., CAL. CIV. CODE § 3344 (Deering 2024).

⁷⁶ See *id.*

⁷⁷ See *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 349–52 (1983).

⁷⁸ See *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 319 (2001) (“Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d).”).

⁷⁹ See 17 U.S.C. § 107 (2024); Jury Council of California Civil Jury Instructions 1804A (2024); see also *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537, 542 (S.D.N.Y. 2019) (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 213 (2d Cir. 2015)).

⁸⁰ See *Milton H. Greene Archives v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1182 (C.D. Cal. 2008), *aff'd*, 692 F.3d 983 (9th Cir. 2012).

⁸¹ See U.S. CONST. art. I, § 8, cl. 8.

hardly be doubted. As demonstrated by the mere fact that cases are brought in states where no party resides, the Commerce Clause⁸² is sufficient support for a federal right, as products are being marketed, promoted, or sold interstate.

When the right of publicity is clearly defined to exist only in relation to commercial promotion or endorsement, rather than an open-ended right of privacy, and the exceptions and defenses outlined above are statutorily set forth, the right should not be feared but rather embraced. By eliminating ambiguity, and, in turn, reducing wasted time and money, a federal right of publicity will protect publicity rights for individuals and their families and also spur creativity and desired public discourse on matters of public interest.

⁸² *Id.* art. I, § 8, cl. 3.

Goodbye Copyright? The Rise of Trademark and Rights of Publicity in the Hip-Hop Music Industry

*Kevin J. Greene**

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INTRODUCTION

1986 was a seminal year in the “golden age” of hip-hop.¹ That year, the iconic rap group Run-DMC inked a million-dollar contract with Adidas.² Adidas’s affiliation with hip-hop built Adidas into one of largest sneaker companies in the world.³ The Run-DMC and Adidas partnership signaled both a seismic shift in marketing and the rise of the ancillary rights of trademark and publicity rights.⁴ The Run-DMC/Adidas deal is part of the lore of hip hop, and like lore, the story of how the deal occurred is sketchy.⁵ If Run is to be believed, an oral deal for the record-breaking deal was cut right on stage at a Run-DMC performance.⁶ In any event, a written contract was inked, and history was made.⁷

Hip-hop music dominates popular culture and fuels the global entertainment industry, from music to dance, film, advertising, television, social media, and the internet.⁸ Hip-hop music, also known as rap, is an art form created by African American artists, but largely controlled through distribution and intellectual property (“IP”) transfers by majority white-led corporations.⁹ From its inception, hip-hop presented a challenge to prevailing theories and doctrines of intellectual property, especially copyright law. Today, the gauntlet of rules regarding who is an IP owner, what is and is not protected, and the law’s bias toward the sophisticated continues to burden hip-hop artists.

Hip-hop arose in the 1970’s from Black artists and performers in the South Bronx:

¹ See Robin Mellery-Pratt, *Run-D.M.C.’s ‘My Adidas’ and the Birth of Hip Hop Sneaker Culture*, THE BUS. OF FASHION (July 18, 2014), <https://www.businessoffashion.com/videos/news-analysis/run-d-m-c-s-adidas-birth-hip-hop-sneaker-culture> [<https://www.perma.cc/JUN3-ZXF6>] (“Angelo Anastasio, a senior Adidas employee, was attending a 1986 Madison Square Garden performance of the Raising Hell tour when he was struck by the sight of tens of thousands of fans lifting their Adidas sneakers into the air, answering the call of those on stage. Inspired, Anastasio reportedly ran back to the Adidas New York headquarters and within days, Run-D.M.C. became the first hip hop group to receive a million-dollar endorsement deal.”).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See André Douglas Pond Cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 516, 518–19 (2010) (noting that “[h]ip-hop music and culture have ‘conquered’ the world”).

⁹ Lewis Weaver, *Corporate Exploitation of Hip Hop*, ITAZRAP (May 15, 2013), <https://itazarap.wordpress.com/2013/05/15/corporate-exploitation-of-hip-hop/> [<https://perma.cc/H8YC-L9M4>] (concluding that the hip hop genre is being “exploited” by “mostly large white owned corporations”).

In the summer of 1973 there was a back-to-school party in the basement of a south Bronx apartment building which changed the world. It was there at Highbridge's 1520 Sedgwick Avenue that an 18-year-old Jamaican immigrant by the name of Clive "DJ Kool Herc" Campbell invented a new genre of music when he looped the break of James Brown's "Give It Up or Turnit Loose" inside of the packed rec-room.¹⁰

Hip-hop is a cultural cluster of music, dance, fashion, and art.¹¹ Hip-hop rose to cultural prominence against both a racialized cultural battleground and a hostile legal environment for the Black artists and performers who create it. Early hip-hop contracts were typically exploitative and often there were no contracts at all.¹² Digital sound sampling is essential to hip-hop art forms, and the very legality of that sampling is therefore essential to rap itself.

IP and contract disputes in the hip-hop music context abound today as in the past. At the courthouse, an overwhelmingly white judiciary referees cases and hip-hop disputes.¹³ The most famous

¹⁰ Alex Mitchell, *A History of Hip Hop in the Boogie Down Bronx*, BRONX TIMES (Feb. 25, 2021), <https://www.bxtimes.com/a-history-of-hip-hop-in-the-boogie-down-bronx> [https://www.perma.cc/6HEA-A435].

¹¹ See Alvin Benjamin Carter III, *Statutorily Stifling: The Legal Burden Copyright Places on the Hip-hop Community*, NE. UNIV. L. REV. EXTRA LEGAL (Feb. 10, 2018), <https://nulawreview.org/extralegalrecent/2018/2/10/statutorily-stifling> [https://perma.cc/EH9X-KYBB] ("Hip-hop is a culture comprised of various elements. There are many schools of thought as to how many elements there are, but four are generally accepted as the main elements of the culture. Those elements are DJing, emceeing (rapping), dancing, and graffiti. (There is also the fifth element of knowledge which is also widely recognized.)").

¹² For instance, Sugar Hill Records, who produced the first commercially successful hip-hop record, "Rapper's Delight," was known as being exploitative. See Francesca D'Amico, *You Can't Stop the Truth: The Story of the Original Founding Members of the Sugarhill Gang*, ACTIVE HISTORY (Feb. 21, 2012), <https://activehistory.ca/blog/2012/02/21/you-cant-stop-the-truth-the-story-of-the-original-founding-members-of-the-sugarhill-gang/> [https://perma.cc/L76J-JLFK] (noting that Sugar Hill Gang members "Wright and O'Brien's label not only removed their writing credits from recordings and stole their profits and publishing rights, but trademarked the group's name and Wright and O'Brien's stage names, making it virtually impossible for the emcees to perform their original material when they attempted a comeback in 2005."). Members of the group have alleged they received only "token payouts, often in the form of cars and clothes, . . . [and] few royalty cheques or concert earnings." *Id.* Ice Cube, who wrote and performed on the groundbreaking NWA album "Straight Outta Compton," only "received \$32,700 in album royalties" on the multi-platinum album. See Ben Westhoff, *Did Jerry Heller Actually Cheat N.W.A.?*, FORBES (Sept. 7, 2016, 9:43 AM), <https://www.forbes.com/sites/ben-westhoff/2016/09/07/jerry-heller-nwa/?sh=610595895176> [https://perma.cc/3CNZ-JPFC].

¹³ See Rakim Brooks, *A Quarter of Federal Courts Have Only Ever Had White Judges*, DEMOCRACY DOCKET (Nov. 6, 2013), <https://www.democracymocket.com/opinion/a-quarter-of-federal-courts-have-only-ever-had-white-judges/> [https://perma.cc/DKV5-WSL5] (noting that most judges have come from legal careers at large corporate law firms or prosecutors' offices, while other legal backgrounds — like legal aid offices that serve the common good

early sampling case showed tremendous judicial hostility to hip-hop. The late Judge Kevin Duffy in the Biz Markie case denounced digital sound sampling and the rappers who engaged in it as thieves deserving criminal prosecution.¹⁴

In the intervening decades, hip-hop has become an indispensable pillar of the music industry. The legal system, however, still struggles to reconcile hip-hop production with copyright law. Copyright, a creature of white cultural dominance, is generally hostile to notions of “remix,” including sampling. Remix involves copying, and copying without permission is generally actionable as copyright infringement.¹⁵

Similarly, no legally cognizable cause of action exists for “cultural appropriation.”¹⁶ Copyright law does not protect ideas.¹⁷ This includes styles of performance, which copyright considers an unprotectable idea.¹⁸ Much of the cultural past is in the public domain, a space that treated Black artists brutally under the era of copyright formalities. And after that, the doctrine of fair use disposes of any copyright claim for cultural appropriation.

My scholarship posits that copyright doctrine, music industry standards, and practices and adjudication in the courts have acted as a fulcrum of wealth-extraction out of the creative Black community. Legal doctrines and industry practices serve to divert the bulk of the value of works by Black artists into the coffers of

and are more often populated by people of color — were not seen as viable paths to a judicial nomination. This approach privileged not only white lawyers, who had greater access to the traditional career paths, but also more men (three district courts in the country have *never* had a female trial judge.”). *See also* Clay Halton, *Racial Diversity in the U.S. Judicial System*, INVESTOPEDIA (Feb. 15, 2024) (“The judicial system in the United States has historically been dominated by a virtually all-white judiciary. Having judges who represent the diversity of the nation is important for justice, but it still has largely not been achieved Minority group members make up just 20% of all [judges].”).

¹⁴ *Id.* at 185 (granting plaintiff’s application for a preliminary injunction and recommending that the United States Attorney consider “prosecution of these defendants under 17 U.S.C. § 506(a) and 18 U.S.C. § 2319”).

¹⁵ *See, e.g.*, 17 U.S.C. § 501(b) (providing cause of action against anyone who “violates any of the exclusive rights of the copyright owner”).

¹⁶ Brigitte Vézina, *Cultural Appropriation Keeps Happening Because Clear Laws Simply Don’t Exist*, TORONTO STAR (Dec. 22, 2019), https://www.thestar.com/opinion/contributors/cultural-appropriation-keeps-happening-because-clear-laws-simply-don-t-exist/article_1da10d3f-593d-5bffb03d-f70d23deeb88.html [<https://www.perma.cc/523A-GFZL>] (noting that there is no legal definition of the term cultural appropriation, which has been so overused that “it’s hard for anyone to say for sure if something is culturally appropriated or not”).

¹⁷ 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”).

¹⁸ *See, e.g.*, *McDonald v. West*, 138 F. Supp. 3d 448, 455 (S.D.N.Y.) (2015) (noting that “copyright does not protect styles, but only particular expressions of those styles”).

non-creators and corporate conglomerates. I have written elsewhere that copyright law, in particular, routinely treated works created by African Americans as if dedicated to the public domain that is freely appropriable by anyone.¹⁹

While rap music sits at the top of music charts and generates billions in revenues through other areas of the entertainment industry such as Tik-Tok, fashion, and memes originating in the Black community, the copyright revenues available to artists in the age of digital streaming have actually declined steeply from the days of the vinyl record business.²⁰ Streaming revenues are led by hip-hop music and generate billions in song plays and ad revenues, but pay out fractions of pennies to artists, meaning that many millions or even billions of streams are necessary to generate wealth.²¹

The paucity of revenues generated from copyright sources has diminished the importance of copyright revenues for hip-hop artists and elevated ancillary revenue sources from branding (the domain of trademarks) and endorsements (the domain of publicity rights).²² Because musical artists typically own rights to their trademarks and to their name and likeness, this development constitutes progress on its face.

The U.S. entertainment industry is built on a model that requires artists to give up copyrights in exchange for distribution

¹⁹ See K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM'NS & ENT. L.J. 339, 368 (1999).

²⁰ See Suzanne Kessler, *The Non-Recording, Non-Artist "Recording Artist": Expanding the Recording Artist's Brand into Non-Music Arenas*, 20 VAND. J. ENT. & TECH. L. 515, 515 (2017) ("[A]s digital delivery, especially streaming, now supplants physical records as the primary music consumption manner, the money that labels and artists realize from music sales has significantly decreased. In particular, artists earn fractions of pennies per track streamed. Labels, too, are dissatisfied with their returns on digital sales, which are insubstantial compared to the returns on physical product.").

²¹ See DeJuan Wright, *Hip-Hop Remains a Branding Behemoth*, BUSINESS2COMMUNITY, <https://www.business2community.com/branding/hip-hop-remains-a-branding-behemoth-02430398> (last updated Sept. 12, 2021) ("According to Nielsen Music/MRC Data, six out of ten of the most streamed artists of the last decade were hip-hop artists . . . and the other four artists (Taylor Swift, Ariana Grande, Rihanna, and Ed Sheeran) have featured hip-hop artists on at least one of their singles.").

²² See Christopher R. Chase, *How the Band Protects its Brand: The Use of Trademarks to Protect and Promote the Musical Artist*, INTELL. PROP. TODAY (Apr. 2007), https://fkks.com/uploads/news/Band_Protects_Brand_Complete.pdf [<https://perma.cc/AA3D-7Z6V>] ("The landscape of the music industry has changed, however, in recent years. As artists in the music industry become more reliant upon ancillary streams of revenue rather than record sales alone, they must seek out other opportunities for income and can use their names and logos to do so.").

of music and motion pictures.²³ Some might categorize this exchange as a “devil’s bargain.”²⁴ However, this article contends that the rise of trademark and publicity rights portends three insights.

First, the primacy of branding and endorsements in hip-hop has led to abusive trademark litigation by rappers seeking to stake claims. Abusive claims, even where trivial or absurd, must be defended, and can cast a chill on free expression and the dissemination of expressive works.²⁵

Second, and perhaps even more troubling, the gold rush in branding and endorsements has exposed inequities in the trademark ownership process, where unsophisticated and unrepresented artists have lost out on trademark rights. The U.S. Trademark Office, like the U.S. Copyright Office, does not verify claims of trademark ownership, and registration occurs against a backdrop of murky legal standards regarding who is the trademark owner of a musical group.²⁶

Third, vis-à-vis copyright law and trademark law, the right of publicity emerges as a kind of safe space for artists. There is no plethora of expropriation of artist publicity rights, but rapacious contract provisions regarding name and likeness rights could pose potential problems.

As trademark and right of publicity valuations continue to soar above what artists can generate in the streaming era, these problems are likely to expand, suggesting that tighter penalties should exist for abusive trademark assertions, and that the trademark ownership process needs reform to prevent

²³ See *The Song Goes on Forever; Can the Copyright End?*, KELLY IP (Apr. 2, 2020), <https://www.kelly-ip.com/copyright/the-song-goes-on-forever-can-the-copyright-end/> [<https://perma.cc/9B22-FTVX>].

²⁴ *Id.* (noting that music artists are forced into a “devil’s bargain . . . to get their first recording contract. . . . [f]or most emerging singer/songwriters, the quid pro quo for getting a record deal was this: the record company demanded that the artist assign her copyrights to the label. And that demand came in the form of an offer the artists couldn’t refuse—either assign the copyrights or no deal—a classic case of one party to a deal holding all the cards and having all the leverage.”).

²⁵ For a discussion of the way trademark law can chill free speech, see generally Lisa P. Ramsey, *Free Speech Challenges to Trademark Law after Matal v. Tam*, 56 HOUS. L. REV. 401 (2018).

²⁶ The U.S. Copyright Office notes that “[a]s a general rule, the U.S. Copyright Office accepts the facts stated in the registration materials, unless they are contradicted by information provided in the registration or materials or in the Office’s records.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 18 (3d ed. 2021). However, the U.S. Copyright Office itself “does not conduct investigations or make findings of fact to confirm the truth of any statement made in an application, such as whether a work has been published or not.” *Id.*

expropriation against unsophisticated parties. The complexities of the trademark ownership process have facilitated lost rights for unsophisticated and unrepresented artists.

I. THE DARK HISTORY OF TRADEMARK/PUBLICITY RIGHTS AND RACIAL DOMINATION

I have spent over two decades mapping out the ways in which IP, particularly copyright and trademark law, have adversely impacted African American creators in the music space. Under copyright law, Black creators experienced a lack of protection for their works so vast and pervasive that I have labeled it “copyright scandal.”²⁷ The gap between what Black innovators in music created and what multinational corporations have been enriched by is enormous. IP rights in musical works are particularly vital, because music, out of all the subject matter of copyright, powers all sectors of the entertainment industry from film and video games to live theatre and television.

My scholarship in the copyright arena explored how the trifecta of a copyright regime structurally hostile to African American modes of creation, a minefield of copyright formalities and rapacious industry practices, customs and contractual norms divested protection for some the greatest African American artists.²⁸ The ascendancy of minstrel or “coon” music cemented notions of black inferiority as America consumed a steady diet of racist stereotypes right through the old Victrola.²⁹

Trademark law, like minstrel music, presented a similar assault on African American people. Right through the middle of the twentieth century, a plethora of racially stereotypical trademarks proliferated the American marketplace.³⁰ The commercial marketplace of trademarks communicated a pernicious message in the marketplace of ideas—that blacks and other people of color are different and inferior.³¹ I have contended that trademark law in fact served as a primary source of promoting white supremacy and Black inferiority in American society.³² Unfortunately, the problem of racist trademarks is not a thing of

²⁷ See K.J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African- American Artists*, 49 PEPP. L. REV. 615 (2022).

²⁸ *Id.*; see also K.J. Greene, Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship, 58 SYRACUSE L. REV. 431 (2008).

²⁹ See sources cited *supra* note 27 and *infra* note 32.

³⁰ See sources cited *supra* note 27 and *infra* note 32.

³¹ See sources cited *supra* note 27 and *infra* note 32.

³² See Greene, *supra* note 28.

the past, and a recent U.S. Supreme court case has opened the door to the specter of a new rash of racist trademark registrations.³³

The right of publicity and trademark law too have their own dark history vis-à-vis Black folk. The history is steeped in the appropriation of the likenesses of African Americans. Companies built brands around these images, creating brands that generated millions of dollars, but as with copyright law, there is scant evidence that the models received commiserate remuneration.³⁴ In turn, these images promoted not just brands but a consistent message of black inferiority and servility.

In the early twentieth century, America awoke in the morning with pancakes from Aunt Jemima (modeled after a real person, Nancy Green). Alternatively, Americans could have breakfast with “Rasta,” the Cream of Wheat chef, modeled from a photo of Frank White, an African American chef.³⁵ During the day, men chewed on “N*****hair” chewing tobacco, and some on the sly scanned the pages of “Black Tail” magazine.³⁶ In the evening, dinner out could be at “Sambo’s” restaurant or perhaps at home with a side of “Uncle Ben’s” rice.³⁷ All of these brands used images of African Americans, which fall under the right of publicity, but also functioned as source-indicators, the purview of trademark law. In

³³ The case is *Matal v. Tam*, 582 U.S. 218 (2017). Analysts posit that in the wake of *Tam*, “[r]acist words and images can now be registered as trademarks in the United States of America.” Vicki Huang, *Trademarks, Race and Slur-appropriation: An Interdisciplinary and Empirical Study*, 2021 UNIV. ILL. L. REV. 1605 (2021).

³⁴ See Sam Roberts, *Overlooked No More: Nancy Green, the ‘Real Aunt Jemima’*, THE N.Y. TIMES (last updated Aug. 28, 2020), <https://www.nytimes.com/2020/07/17/obituaries/nancy-green-aunt-jemima-overlooked.html> [https://perma.cc/R3A9-N6T5] (noting that the original model for the Aunt Jemima brand, Nancy Green “was said to have received a lifetime contract and made a fortune, but it’s more likely that she simply worked for the company (she described herself in the 1910 census as a ‘housekeeper’) while serving as a missionary for the historic Olivet Baptist Church in Chicago.”).

³⁵ It cannot be definitively confirmed that Frank White is the model for Cream of Wheat Cereal, however “[t]he chef was photographed about 1900 while working in a Chicago restaurant. His name was not recorded. White was a chef, traveled a lot, was about the right age and told neighbors that he was the Cream of Wheat model . . .” *Final Tribute For Cream Of Wheat Man*, CBS NEWS (June 15, 2007, 4:10 AM), <https://www.cbsnews.com/news/final-tribute-for-cream-of-wheat-man/#> [https://perma.cc/7EZT-5X3Q] (noting that Frank White, essential to the success of the Cream of Wheat Brand, “died in 1938, and until [2007], his grave in Woodlawn Cemetery bore only a tiny concrete marker with no name”).

³⁶ See David J. Dent, *In Search of Black America: Discovering the African-American Dream*, NEW YORK TIMES BOOKS, <https://archive.nytimes.com/www.nytimes.com/books/first/d/dent-search.html> [https://perma.cc/N3BQ-TVSV] (last visited Mar. 27, 2024); *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1368–69 (D.C. Cir. 1994).

³⁷ See *Denny’s and Sambo’s*, JIM CROW MUSEUM (2018), <https://jimcrowmuseum.feris.edu/question/2018/august.htm> [https://perma.cc/277U-CBAV]; *Our History*, BEN’S ORIGINAL, <https://www.bensoriginal.com/our-history> [https://perma.cc/GNJ6-S62L] (last visited Mar. 27, 2024).

the wake of the murder of George Floyd in 2020, a kind of brand reckoning occurred. General Mills, the owner of the “Aunt Jemima” mark decided to abandon it.³⁸

II. A REMARKABLE TRANSFORMATION OF ANCILLARY RIGHTS IN THE HIP-HOP AGE

Today’s right of publicity and trademark doctrines reflect a remarkable transformation from the copyright model, which facilitated widespread exploitation of Black music artists. Indeed, the ancillary rights of trademark and publicity rights stand at the forefront of wealth creation for rappers and other creative artists. In a recent law review article, Professors Robert Merges and Justin Hughes posit that copyright law has been on balance a financial boon for African Americans.³⁹ The article’s primary evidence for their assertion was a listing from *Forbes* magazine of the fifty wealthiest African Americans.⁴⁰

Black music stars, including Beyoncé, Diddy, and Jay-Z, are indeed stunningly rich. However, the bulk of their wealth is not derived from their music copyright royalties but from branding and endorsements.⁴¹ This is the zone of the right of publicity and trademark revenues, not copyright revenues. Today’s music artists create wealth by building brands in everything from fashion and fragrances to headphones.⁴² The rapper Megan Thee Stallion is a poster child for the primacy of ancillary rights. In addition to netting millions for a Super Bowl ad, “[s]he has

³⁸ See Audra L. Savage, *Aunt Jemima’s Resignation Letter*, 121 COLUM. L. REV. F. 186, 216 (2022) (“Aunt Jemima’s resignation marks the beginning of corporations issuing statements, pledging money, and retiring racist brands in the wake of George Floyd’s murder.”).

³⁹ See Justin Hughes & Robert Merges, *Distributive Copyright Justice*, 92 NOTRE DAME L. REV. 513, 549–55 (2016).

⁴⁰ *Id.*

⁴¹ See Barclay Palmer, *What Are the Brands and Businesses of Beyoncé?*, INVESTOPEDIA (Dec. 17, 2022), <https://www.investopedia.com/articles/insights/062516/brand-and-business-beyonc-knowles-pep-twx.asp#toc-beyonc-and-jay-z-net-worth> [<https://perma.cc/F7CN-E6UC>]; Combs *Global: A New Era of Excellence*, COMBS GLOBAL, <https://combsglobal.com/> [<https://perma.cc/U9LY-2QY8>] (last visited Mar. 27, 2024); Autumn Hawkins, *Jay-Z: The Businesses That Made His Billion-Dollar Empire*, JAMMIN’ 105.7, <https://jammin1057.com/listicle/jay-z-the-businesses-that-made-his-billion-dollar-empire/> [<https://perma.cc/X3KK-722U>] (last visited Mar. 27, 2024).

⁴² See Travis Lyles, *The \$3 Billion Deal for Dr. Dre’s ‘Beats’ Almost Never Happened*, BUS. INSIDER (Aug. 19, 2015, 1:02 PM), <https://www.businessinsider.com/beats-by-dre-almost-never-happened-2015-8> [<https://perma.cc/9ZBP-DU6J>] (“After selling his gold-mine headphone company Beats by Dre last year to Apple for \$3.2 billion, rap mogul Dr. Dre’s net worth spiked to an estimated \$700 million.”).

recently signed endorsement deals with Nike, Revlon, Cash App and Popeyes.”⁴³

III. THE RIGHT OF PUBLICITY AS “THE LEAST DANGEROUS BRANCH”

Copyright law has and continues to cause distributive problems for Black artists. Trademark law, on balance, has been far less negative for Black artists, but there are areas where trademark law has disadvantaged artists. In contrast, the right of publicity as it exists today is, metaphorically, the “least dangerous branch” of IP for Black artists.⁴⁴ My work in the right of publicity arena started in 2008 when Chapman Law School asked me to speak at a right of publicity conference in Orange County. I was not too interested. It seemed to me that the right of publicity was overdone, with too many scholars writing about it. What do I have to add?

Chapman said they would pay me money to speak. My interest piqued, and I mused, “All I have to do is drive up the 5 Freeway to lovely Orange County and run my mouth a little?” Or as Brando’s character, the washed-up ex-boxer in the classic movie “On the Waterfront,” said, “I get all that dough for not doing nothing?”⁴⁵

Then the organizers at Chapman said, “And by the way, Professor Greene, if you agree to write an article too for the symposium, we will pay you x dollars more.” And I said, “I’ll do it. Orange County, here we come!”

As agreed, I gave a talk at Chapman and wrote an article entitled, “Intellectual Property Expansion: The Good, the Bad and the Right of Publicity.”⁴⁶ The piece garnered honors as one of the top IP articles of the year by Thompson-Reuters. It was the first of many articles on publicity rights. Still, my distaste for publicity rights and their expansion did not abate.

The right of publicity continued to interest me, mainly for its intersection with IP and critical race and feminist theory. The

⁴³ Jabari Young, *Megan Thee Millions: Rapper Reaps Record Riches*, FORBES (Nov. 28, 2022), <https://www.forbes.com/sites/jabariyoung/2022/11/28/megan-thee-millions-rapper-reaps-record-riches/?sh=2bc0972c7696> [https://perma.cc/5WXM-N8H9].

⁴⁴ The analogy springs from the work of Professor Bickel, who in a famous book characterized the federal judiciary as the “least dangerous branch” in our separation of powers scheme. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press ed., 2d ed. 1962).

⁴⁵ *ON THE WATERFRONT* (Columbia Pictures 1954).

⁴⁶ K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521 (2008).

ancillary rights of publicity and trademark law fueled the dynamic of African American cultural appropriation. My article “Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues” was among the first to analyze publicity rights through a critical race/feminist lens.⁴⁷

Still, the right of publicity at a theoretical level continued to cause existential angst. I was all in on writing about the right of publicity’s (and trademark law’s) role in perpetuating Black stereotypes, giving us Uncle Ben, distorting Black culture, and ripping off Nancy Green, the original Aunt Jemima. I have written that Black music is irresistible in American culture, but so is the Black body in marketing and branding.⁴⁸ That is right of publicity territory. Publicity rights and trademark played a central role in the promulgation of white superiority.⁴⁹

Right of publicity theory left me torn. Early in my academic career, I faced considerable flak from academics who saw no connection between racial inequality and intellectual property. Some even left the room when I stood up to deliver a presentation on an aspect of race and IP. I considered the risks, but ultimately concluded the work of unmasking how the IP system promotes inequality was more important than my standing in the academy. Today, a bevy of scholars in IP explore issues of domination and disinvestment that undergird the seemingly race-neutral façade of copyrights, trademarks and rights of publicity.

As for the right of publicity, I was never sold that the law needs to grant economic incentives and monopolies to push people to become famous. Isn’t the money from a sports, film or record deal, the adoration of fans, the groupies, and the freebies enough? One would have to believe that Madonna or Michael Jackson would not have done what they did *unless* they could control all aspects of their likeness and be paid on endorsement deals.

The hip-hop music industry, however, offers more credible theories and validation based in real events about the usefulness of rights of publicity theories. The theory of allocative efficiency,

⁴⁷ K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. OF GENDER, SOC. POL’Y & THE L. (2008).

⁴⁸ See Eunice Kim, *The Marketing of Black Women’s Body in Hip-Hop*, THE GUARDIAN (March 7, 2021), <https://ucsdguardian.org/2021/03/07/the-marketing-of-black-womens-body-in-hip-hop/> [<https://perma.cc/RJ67-FMU9>] (noting that the stereotypical images portraying African American women that are “accepted in hip hop [are] the Diva, the Gold Digger, the Freak, the Dyke, Gangster, Sister Savior, Earth Mother, and Baby Mama”).

⁴⁹ See Greene, *supra* note 28.

or said more simply, oversaturation, is an alternative to the economic incentive theory. The analog to this theory is trademark dilution in the trademark context.

Trademark dilution posits that famous marks may lose their cache and prestige if overexposed by free-riding trademark bandits.⁵⁰ Exhibit A of the problem of overexposure in the right of publicity context is illustrated by the rapper MC Hammer. Those who were not alive when MC Hammer ruled the early 1990's cannot imagine the scene he caused. He was instrumental in taking hip-hop all the way mainstream, further maybe then even Run-DMC. The baggy parachute pants, the catchy lyrics, and oh, the exquisite funky dance moves. He really was "too legit"—except as a rapper he lacked any visible "street cred," despite his upbringing on the mean streets of Oakland.

That didn't stop Hammer from using his brand in a flurry of commercials and other projects. Hammer did TV commercials for Taco Bell, floating on the roof of Taco Bell in those puffy pants, and busting a move.⁵¹ Hammer also did TV commercials for Pepsi and Kentucky Fried Chicken (KFC). The KFC ad made a list of the worst rapper commercials.⁵² He had a kids cartoon show too.⁵³

And then came the backlash. Hammer was pilloried as anything but a "legit" rapper, despite his hit song "2 Legit to Quit." He was mocked on the hit show "In Living Color," the hippest show of the 90's.⁵⁴ The show featured dancers known as the Fly Girls, trained by Jennifer Lopez, famously known as "J Lo." And just like

⁵⁰ See *Trademark Dilution*, INT'L TRADEMARK ASS'N, <https://www.inta.org/fact-sheets/trademark-dilution-intended-for-a-non-legal-audience/> [https://perma.cc/P4NG-N6AH] (last updated Nov. 9, 2020).

⁵¹ See Chris Woodyard, *Marketing: M.C. Hammer to Rap in Praise of Taco Bell in Grammy TV Spots*, L.A. TIMES, (Feb. 16, 1991), <https://www.latimes.com/archives/la-xpm-1991-02-16-fi-1170-story.html> [https://perma.cc/4RRZ-L7VJ] ("In the [1991 commercial], M.C. Hammer is seen hanging out with buddies. One suggests buying some hamburgers. Hammer, of course, gets the idea of going to Taco Bell. In a subsequent chase scene, he inflates his baggy pants and drifts to a Taco Bell.").

⁵² See Jessica McKinney et al., *The Worst Rapper Commercials*, COMPLEX (Jan. 5, 2021), <https://www.complex.com/music/2021/01/worst-rapper-commercials/> [https://perma.cc/3XH9-9PUY].

⁵³ See MURRAY FORMAN, *THE 'HOOD COMES FIRST: RACE, SPACE, & PLACE IN RAP AND HIP-HOP* 305 (1997) (noting that the questionable status of MC Hammer and Vanilla Ice within hip-hop culture became even more pronounced as their images flooded teen magazines and, in Hammer's case, took the form of a plastic action figure and a Saturday morning cartoon).

⁵⁴ The television show "In Living Color" parodied Hammer's song "You Can't Touch This." See Trish Broome, *Top 10 in Living Color Music Parodies*, THOUGHT CATALOG (Sept. 30, 2012), <https://thoughtcatalog.com/trish-broome/2012/09/top-10-in-living-color-music-parodies/> [https://perma.cc/2RTS-R9DC].

that, it was gone. The next thing you know, old Hammer's not a millionaire. Oversaturation (and massive overspending) had done him in.

The ancillary rights of trademark and publicity have, from the outset of hip-hop, been vital to the genre. Rock artists often scorned commercial ventures, clinging to the role of true "artiste." Bette Midler and Tom Waites, for example, both refused to license music for use in commercials and sued corporations that used imitations of their voices in commercial ads.⁵⁵

In contrast, early hip-hop artists were unabashedly commercial from the beginning, reflecting the "hustling" ethos of the inner-city that spawned the music. Many analysts have noted:

[Hip-Hop] artists developed a sense of entrepreneurship because they had to. Hardly anyone wanted to do business with hip hop. The first rap records were released into the most hostile environment for black music since the 1950s. In the midst of the early 1980s backlash against disco, big music companies viewed rap as an even less palatable offshoot.⁵⁶

Run-DMC, for example, immediately capitalized on their association with Adidas sneakers, becoming the face of the brand and enriching themselves greatly in the process.⁵⁷ Today, artists such as Jay-Z, Snoop Dog, and Rihanna generate revenues from branding that swamp music industry revenues.⁵⁸ The rise of ancillary rights as the path to hip-hop riches is driven by music industry economics. The prevalence of music consumption by streaming has devastated available music royalties to artists.⁵⁹ Today's artists understand they are not in the business of music, but of branding.

⁵⁵ See *Waits v. Frito-Lay*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1047 (1993); see also *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

⁵⁶ Dan Charnas, *A History of Hustling Gives Hip Hop its Entrepreneurial Edge*, FIN. TIMES (Feb. 3, 2015), <https://www.ft.com/content/4282afc8-ab9f-11e4-b05a-00144feab7de> [<https://perma.cc/6BM4-K34F>].

⁵⁷ See Gary Warnett, *How Run-DMC Earned Their Adidas Stripes*, MR PORTER (May 27, 2016), <https://www.mrporter.com/en-us/journal/lifestyle/how-run-dmc-earned-their-adidas-stripes-826882> [<https://perma.cc/E42N-FPMD>].

⁵⁸ See Madeline Berg, *Fenty's Fortune: Rihanna is Now Officially a Billionaire*, FORBES (Aug. 4, 2021, 6:30 AM), <https://www.forbes.com/sites/maddieberg/2021/08/04/fentys-fortune-rihanna-is-now-officially-a-billionaire/?sh=4f6e6b737c96> [<https://perma.cc/B7MG-HEUC>].

⁵⁹ See Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, THE NY TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html> [<https://perma.cc/HUB3-SU3L>].

IV. TRADEMARK LAW—FROM SOURCE IDENTIFICATION TO BRAND VALUE

Trademark law's crown jewel, the Lanham Act, is designed to prevent unfair competition and to police the marketplace of misleading trademark uses.⁶⁰ The Act also protects famous trademarks against trademark dilution. Built into the Lanham Act are pro-trademark ownership benefits and enforcement tools. These benefits always depend on registration, a formality of great import. The Lanham Act's embrace of a formalistic and cultishly complex regime is a legal wonder—a great cathedral. But it harbors potential pitfalls, like IP formalities that would tend to reward the wealthy and connected, and to disadvantage marginalized communities. Under copyright law, formalities have been the bane of Black artists from the inception of the music industry. To truly harness the system, money and resources are needed. The knowledge of how to use the system is available only at a cost not available to communities at the bottom.

Trademark law protects the senior users' interests of a trademark and exists to prevent consumer confusion in the marketplace. Trademark law in its origins was less about protecting trademark owners, and more about combatting uses of trademarks that would confuse consumers as to the source identification of the product or service.⁶¹

Today, the source-identifying function of trademark law is still echoed by the courts, but it is clear from a dollars-and-cents perspective that the trademark ownership function is by far more salient. Trademark rights constitute the biggest asset of giant corporations like Coca-Cola and Google, outstripping the value of buildings, product inventory, and other holdings.⁶² Google's brand value, for example, has been valued at a staggering \$458 billion in 2021.⁶³ Of that, the value of the trademark alone is \$44.3 billion.⁶⁴ Trademarks are also a profit center for corporations, generating

⁶⁰ Lanham Act, 15 U.S.C. §§ 1015–1141n (2022).

⁶¹ See Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 555 (2006) ("The primary focus of trademark law has always been protecting the source identification and information transmission functions of marks.").

⁶² See Eric Goldman, *Google Defends Its Most Valuable Asset in Court*, FORBES (Sept. 15, 2014, 12:11 PM), <https://www.forbes.com/sites/ericgoldman/2014/09/15/google-successfully-defends-its-most-valuable-asset-in-court/?sh=7542521e21e1> [<https://perma.cc/VMC8-PKPB>].

⁶³ *Google Brand Value From 2006 to 2023*, STATISTA (July 2023), <https://www.statista.com/statistics/326046/google-brand-value/> [<https://perma.cc/D782-9DZA>].

⁶⁴ *Top Ten Trademarks: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/top-ten-trademarks> [<https://perma.cc/8K5B-QVWF>].

revenue through ancillary merchandise and licensing deals where the brand is central.⁶⁵

This is the basis of the franchise industry, which makes its profits from licensing trademarks. With such money at stake, whether a corporate distributor like Disney,⁶⁶ a toy company like Mattel,⁶⁷ or a hip-hop artist like Dr. Dre,⁶⁸ it is not to be wondered that trademark law is the situs of abusive trademark disputes.

At the center of trademark protection is trademark registration. The Lanham Trademark Act offers a modicum of protection to unregistered trademarks used in interstate commerce under section 43(a).⁶⁹ However, unregistered trademarks are treated in practice as the pauper, while registered trademarks play the role of the prince. Trademark law conveys many benefits to trademark owners, not the least of which is privileged treatment in trademark litigation.

Trademark registration “offer[s] several key advantages.... [including] the rebuttable presumption that the owner listed on the registration is the actual owner of the mark.”⁷⁰ Trademark registration also provides protection against “other individuals who subsequently attempt to use the mark.”⁷¹ Additionally, in the music industry, “for an established artist, trademark registrations protect rights in his/her brand, help guard revenue streams, and provide him/her with additional control over the brand when embarking on new business ventures, while for the record label

⁶⁵ A good example is the branding power of Harry Potter. J.K. Rowling conveyed rights to the Potter mark to Warner Brothers, but “Rowling and Warner Bros jointly own US trademark rights for ‘J.K. Rowling’s Wizarding World,’ a fictional world with movies, a website, and related goods and services.” *J.K. Rowling Trademarks*, GERBEN IP: GERBEN TRADEMARK LIBR., <https://www.gerbenlaw.com/trademarks/celebrities/j-k-rowling/> [https://perma.cc/XR52-L7CE].

⁶⁶ See *Disney Trademark Infringement: Everything You Need to Know*, UPCOUNSEL (last updated Jan. 1, 2024), <https://www.upcounsel.com/disney-trademark-infringement> [https://perma.cc/Y2UA-K6WZ].

⁶⁷ See Jenna Greene, *Don’t Mess With Barbie*, REUTERS (Updated Aug. 17, 2022, 10:56 AM), <https://www.reuters.com/legal/litigation/dont-mess-with-barbie-2022-08-17/> [https://perma.cc/W9DW-YNF3].

⁶⁸ See Mark Savage, *Dr. Dre Loses Trademark Battle With a Gynaecologist Called Dr. Drai*, BBC (May 8, 2018), <https://www.bbc.com/news/entertainment-arts-44043205> [https://perma.cc/TAD6-Y7RR].

⁶⁹ 15 U.S.C. § 1125 (2012).

⁷⁰ See April Xiaoyi Xu, *They Belong with Taylor Swift™: Applying Trademark Law and Textual Analysis to the Branding of Love Song Lyrics*, 2020 U. ILL. L. REV. ONLINE 139, 144–45 (2020).

⁷¹ *Id.* at 145.

involved, trademarking also benefits the label by offering additional security.”⁷²

V. HIP-HOP: BRANDING TO DIE FOR?

Today’s hip-hop artists have taken branding and endorsements miles ahead of rock artists like The Beatles, who early in their career signed a horrible branding deal that haunted the super group for years.⁷³ The Beatles were and are a marketing behemoth and branding rights remain sought after to this day.⁷⁴ Their name and likeness rights were litigated for unauthorized use by the “producers of the ‘Beatlemania’ stage show.”⁷⁵ However, their initial merchandising deal allocated ten percent of revenues to the group and ninety percent to the company handling the merchandising.⁷⁶ The Beatles should have been able to negotiate at least a thirty percent rate on merchandise.⁷⁷ This error by their manager, Brian Epstein, ultimately cost “[T]he Beatles more money than they ended up making from their record sales.”⁷⁸

Contemporary rappers have also gone far beyond Run-DMC’s 1986 Adidas sneaker deal. Under the auspices of trademark publicity rights law, rappers turn hit songs like “WAP” by Cardi B and “Hot Girl Summer” by Megan Thee Stallion into branding gold.⁷⁹ Perhaps “Exhibit A” for hip-hop branding is the rapper

⁷² *Id.*

⁷³ See John Greathouse, *This Rookie Mistake Cost the Beatles \$100,000,000*, FORBES (July 25, 2015, 1:16 PM), <https://www.forbes.com/sites/johngreathouse/2015/07/25/this-rookie-mistake-cost-the-beatles-100000000/?sh=86966ec8b279> [https://perma.cc/7E2Y-QVYM].

⁷⁴ See Thania Garcia, *Music Industry Moves: UMG’s Bravado Acquires the Beatles’ North American Merch Rights*, VARIETY (Sept. 1, 2022, 3:20 PM), <https://variety.com/2022/music/news/cbs-news-anthony-mason-summerstage-icon-1235354514/> [https://perma.cc/ZT9K-JC87].

⁷⁵ The Beatles prevailed, winning a \$10 million judgment in California state court for misappropriation of likeness. See Richard Harrington, *\$10 Million to Beatles*, WASH. POST (June 4, 1986, 8:00 PM), <https://www.washingtonpost.com/archive/lifestyle/1986/06/05/10-million-to-beatles/0ce022ae-1237-42db-9deb-6e7e020c2132/> [https://perma.cc/35ZU-5HE9].

⁷⁶ See John P. Gelinas, *Merchandising the Beatles*, MIND SMOKE RECORDS (Mar. 20, 2024), <https://msmokemusic.com/blogs/mind-smoke-blog/posts/6485331/merchandising-the-beatles-updated> [https://perma.cc/7FC9-N8L6] (noting that the hysteria for Beatles merchandise was so “crazy” that the group even received offers to market their bathwater).

⁷⁷ See Greathouse, *supra* note 73.

⁷⁸ *Id.*

⁷⁹ See Sajae Elder, *Megan Thee Stallion Says She Has Officially Trademarked “Hot Girl Summer”*, FADER (Sept. 21, 2019), <https://www.thefader.com/2019/09/21/megan-thee-stallion-trademark-hot-girl-summer> [https://perma.cc/GUV2-X4A]; see also Chelsea Ritschel, *Cardi B Reportedly Files Trademarks for New WAP Merchandise Including Liquor and Purses*, INDEPENDENT (Sept. 29, 2020, 7:46 PM), <https://www.independent.co.uk/life-style/cardi-b-wap-merchandise-trademark-application-megan-thee-stallion-b698576.html> [https://perma.cc/65A2-4J96].

Travis Scott. Scott has nabbed endorsements and done branding collaborations from fashion house Dior to McDonald's, with stops at Nike, Epic Games, and General Mills.⁸⁰ Widely acclaimed as a marketing genius, Scott acquired trademark rights to *Astroworld*, his hit album, which was an abandoned trademark for a Houston amusement park.⁸¹

In November 2021, ten people died at Scott's concert amid allegations that he failed to stop the show.⁸² Some have alleged that jammed lines to purchase merchandise at the show were a contributing factor.⁸³ If so, people literally died to obtain the rapper's merchandise.

In the wake of the Astroworld tragedy, brand collaborators backed off or completely dropped Scott as an endorsement partner. Beer giant Anheuser-Busch discontinued Scott's ballyhooed hard

⁸⁰ See Abram Brown, *How Hip-Hop Superstar Travis Scott Has Become Corporate America's Brand Whisperer*, FORBES (Nov. 30, 2020, 6:30 AM), <https://www.forbes.com/sites/abrambrown/2020/11/30/how-hip-hop-superstar-travis-scott-has-become-corporate-americas-brand-whisperer/?sh=6f8d8f4974e7> [https://perma.cc/6SE5-NQGX]; Mike Destefano & Lei Takanashi, *A Timeline of Travis Scott's Brand Collaborations*, COMPLEX (Sept. 8, 2020), <https://www.complex.com/style/a/mike-destefano/travis-scott-brand-collaboration-timeline> [https://perma.cc/6RAH-SZ6N].

⁸¹ See *Astroworld - Trademark Details*, JUSTIA TRADEMARKS, <https://trademarks.justia.com/879/31/astroworld-87931909.html> [https://perma.cc/PJ6A-HURK] (last visited Feb. 24, 2024); Craig Hlavaty, *This Week in 2005 Houston's Playground AstroWorld Closed Its Gates for Good*, HOUS. CHRON. (Oct. 30, 2018, 4:45 AM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/This-week-in-2005-AstroWorld-closed-its-gates-10307466.php> [https://perma.cc/QB23-HFQL].

[Scott's Astroworld mark] covers everything from the concerts and promotions themselves to fan merchandise like shirts and hoodies, household items, pet clothes, and more. He has also filed trademark applications for his name and several logos for similar purposes. He protected the phrase, "Look Mom I Can Fly" with a trademark in 2019, and the name of his Netflix documentary, for clothing such as shirts, hats and pants.

Travis Scott Trademarks, GERBEN TRADEMARK LIBR. (Feb. 2, 2024), <https://www.gerbenlaw.com/trademarks/musicians/travis-scott/> [https://perma.cc/N9GQ-XG3P].

⁸² See Gary McWilliams & Erwin Seba, *Deaths at Travis Scott Concert Due to Accidental Suffocation, Medical Examiner Says*, REUTERS (Dec. 16, 2021, 4:36 PM), <https://www.reuters.com/world/us/houston-medical-examiner-rules-deaths-travis-scott-concert-were-accidental-2021-12-16/> [https://perma.cc/5Q2W-JG66].

⁸³ See Lei Takanashi, *The Hype for Travis Scott Merch Helped Fuel the Chaos at Astroworld*, COMPLEX (Nov. 12, 2021), <https://www.complex.com/style/a/lei-takanashi/travis-scott-astroworld-festival-tragedy-merch-chaos> [https://perma.cc/QE4B-VQFS] (alteration in original) ("[Around 10:30 a.m.] the crowd was storming the merch tent that was placed right in front of the main entrance. It got really packed and people were jumping over metal gates trying to be first . . . There wasn't anyone guiding us in the line, so it just became a huge mess . . . We had no space, and all our bodies were so compressed onto one another. People were trying to get out and were screaming to give them space.").

seltzer drink, Cacti.⁸⁴ The fashion house Dior indefinitely postponed its collaboration with Scott.⁸⁵ One can only speculate whether Travis Scott branding will be viable going forward.

VI. ABUSIVE TRADEMARK LITIGATION AND HIP-HOP

In 2004, I wrote the first law review article exploring the phenomena of abusive trademark litigation.⁸⁶ My article defined abusive trademark litigation as “the overreaching assertion of trademark rights, typically by a large corporate entity against a smaller entity . . . where the claim involves neither a likelihood of [consumer] confusion . . . nor free-riding or . . . unfair competition.”⁸⁷ Trademark litigation is abusive when it aims to shield corporate image from unflattering attention and making examples of purported infringers by filing spurious claims. In such instances, the brand owner’s goal is not about any likelihood of consumer confusion. Building on my work in this area, Professor Leah Chan Grinvald defines trademark bullying “as the enforcement of an unreasonable interpretation by a large corporation of its trademark rights against a small business or individual through the use of intimidation tactics.”⁸⁸

Many corporations engage in abusive tactics. The iconic fashion brand Louis Vuitton hilariously threatened a law conference on IP and fashion with a cease-and-desist letter for using artwork consisting of the brand’s transformed logo on the conference flyer.⁸⁹

⁸⁴ See Thomas Kika, *Travis Scott Loses Cacti Beverage Brand as Astroworld Taints ‘Marketing Genius’ Reputation*, NEWSWEEK, <https://www.newsweek.com/travis-scott-loses-cacti-beverage-brand-astroworld-taints-marketing-genius-reputation-1658505> [<https://perma.cc/X4F5-TJP6>] (Dec. 12, 2021, 4:49 PM).

⁸⁵ See Jon Dec. Blistein, *Dior Axes Travis Scott Collaboration After Astroworld Tragedy*, ROLLINGSTONE AUSTRALIA (Dec. 29, 2021, 9:03 AM), <https://au.rollingstone.com/music/music-news/travis-scott-dior-collaboration-postpone-35681/> [<https://perma.cc/NB9F-DD68>].

⁸⁶ See K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine—Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL’Y 609 (2004).

⁸⁷ *Id.* at 632.

⁸⁸ Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 642 (2011).

⁸⁹ Jenevieve Maerker, *Trademark Parody Dispute Puts Fashion Law in the Spotlight*, JD SUPRA (Mar. 22, 2012), <https://www.jdsupra.com/legalnews/trademark-parody-dispute-puts-fashion-la-21523/> [<https://perma.cc/WU9K-J8HZ>] (noting that in-house counsel at Louis Vuitton “called the poster ‘a serious willful infringement,’ asserted that the law school group should have ‘known better,’ and demanded that [the group] stop using it”). The law school cited trademark fair use and the First Amendment, and the fashion company ultimately backed down. See *id.*

Mattel Corporation has also behaved aggressively in connection with its Barbie trademark.⁹⁰ Furthermore, Monster Energy sued Disney for the 2013 film “Monsters University” and an author for a book entitled “Albert and the Amazing Pillow Monsters.”⁹¹ The author, Justin Drazin, is quoted thusly: “I had to bow to [Monster Energy’s] demands . . . I had written a second and third book . . . but they were never published because of the Monster debacle.”⁹²

What drives these “disputes” is not any concern over consumer confusion, but rather “turf”-marking and sending signals, not to real infringers, but to those the mark owner simply wishes to suppress.

VII. REGULATORS, MOUNT UP: DR. DRE, JAY-Z, AND THE TRADEMARK ART OF WAR

As trademark and right of publicity revenues have soared, rappers have taken increasingly aggressive steps in the enforcement arena. The rapper RZA of Wu-Tang Clan, for example, has launched trademark infringement actions “against multiple e-commerce sites for selling bootleg products with the Wu-Tang Clan logo.”⁹³ The hip-hop space is not immune to overaggressive trademark and right of publicity legal tactics. In virtually every case where a celebrity is involved in an alleged trademark violation, misappropriation of likeness under the right of publicity will also be alleged.⁹⁴ The drama of trademark claims and disputes ticks on like clockwork in the rap music industry.

⁹⁰ See, e.g., Greene, *supra* note 67.

⁹¹ Andrew L. Yarrow, *A D.C. Root Beer Company, an Energy Drink Behemoth and an Ugly Trademark Fight*, WASH. POST (Oct. 21 2019, 9:00 AM), https://www.washingtonpost.com/lifestyle/magazine/a-dc-root-beer-company-an-energy-drink-behemoth-and-an-ugly-trademark-fight/2019/10/21/5f2b190c-e156-11e9-8dc8-498eabc129a0_story.html [<https://perma.cc/E5ZK-48GW>].

⁹² *Id.*

⁹³ Tara Mahadevan, *RZA Files \$2 Million Lawsuit Against Wu-Tang Clan Bootleggers for Trademark Infringement*, COMPLEX (Jan. 25, 2022), <https://www.complex.com/music/a/cmplx/tara-mahadevan/rza-files-2-million-lawsuit-wu-tang-bootleggers-trademark-infringement> [<https://perma.cc/9NDU-ZB8Y>].

⁹⁴ See generally Daniel A. Rozansky et al., *Protecting Image and Likeness Through Trademark Law*, NAT’L L. REV. (Oct. 19, 2021), <https://www.natlawreview.com/article/protecting-image-and-likeness-through-trademark-law> [<https://perma.cc/M6QL-6RX3>] (describing potential overlap between right of publicity and trademark claims).

There are fights over titles to cable television shows as in the fight over the mark “Empire.”⁹⁵ An independent hip-hop music label named Empire Distribution challenged Fox Television (Fox) by sending a letter alleging the title of Fox’s hit show “Empire” constituted unauthorized use of the music label’s trademark.⁹⁶ Apparently, Empire Distribution tried to negotiate a settlement wherein Fox would pay Empire \$8 million to continue using the “Empire” title.⁹⁷ Fox’s (entirely predictable) response was to bring a declaratory judgment action, and the music label counterclaimed for trademark infringement.⁹⁸

The District Court ruled in favor of Fox, and the Ninth Circuit affirmed Fox’s victory. The artistic relevance test from *Rogers v. Grimaldi* disposed of the music label’s counterclaim.⁹⁹ The main takeaway, however, is this: do not send letters to Fox Television or any Fox entity threatening legal action.¹⁰⁰ A declaratory judgment action, as here, is likely to follow.

Perhaps the poster child for abusive hip-hop trademark litigation is a recent lawsuit by the rapper Dr. Dre of NWA fame. Dr. Dre sued a real doctor, a gynecologist named Draion M. Burch from Pennsylvania.¹⁰¹ Dr. Draion Burch filed a federal trademark registration application for “Dr. Draï” for speaking services at

⁹⁵ See Steve Brachmann, *Twentieth Century Fox Television Wins Trademark Case, ‘Empire’ Does Not Infringe*, IP WATCHDOG (Nov. 22, 2017, 6:15 AM), <https://ipwatchdog.com/2017/11/22/twentieth-century-fox-wins-trademark-case-empire/id=90366/> [https://perma.cc/7G6H-VLUQ].

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192, 1195 (9th Cir. 2017).

⁹⁹ See *id.* at 1197–99. The seminal case of *Rogers v. Grimaldi* established the test for artistic uses of trademarks to further First Amendment concerns. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

Under the *Rogers* test, the use of a trademark in the title of an expressive work does not violate the Lanham Act unless such use (1) “has no artistic relevance to the underlying work whatsoever,” or (2) if it has artistic relevance, “explicitly misleads as to the source or content of the work.” The *Rogers* test traditionally applies to the use of a mark in the *title* of an expressive work, but some courts, including the Ninth Circuit, have expanded its application to use of a mark within the *body* of an expressive work as well.

See *The Ninth Circuit Affirms Significant Legal Victory for Fox*, CDAS (Jan. 3, 2018), <https://cdas.com/allowing-tv-series-empire-continue-producing-show-merchandise-record-label-empire-distributions-objections/> [https://perma.cc/SJF8-9ABG] (quoting *Rogers*, 875 F.2d at 999).

¹⁰⁰ See *Twentieth Century Fox*, 875 F.3d at 1195.

¹⁰¹ *Young v. Burch*, 2018 TTAB LEXIS 154 (T.T.A.B. 2018). See Ben Beaumont-Thomas, *Dr. Dre Loses Trademark Battle with Gynaecologist Dr. Draï*, *The Guardian* (May 10, 2018, 8:33 AM), <https://www.theguardian.com/music/2018/may/10/dr-dre-loses-copy-right-battle-with-gynaecologist-dr-drai> [https://perma.cc/4HDM-PL8E].

seminars and for audiobooks.¹⁰² Dr. Dre, in response, filed an opposition action with the United States Trademark Office.¹⁰³ The opposition was denied, meaning Dr. Dre's mark could be registered.¹⁰⁴ The rapper then challenged the denial to the Trademark Trial and Appeal Board, which soundly rejected Dr. Dre's contentions.¹⁰⁵

Here, it would seem that the rapper's lawyers—who, given Dr. Dre's immense fortune, must be fine lawyers—forgot about a basic rule every law student who has taken a basic trademark law class knows: the “Aunt Jemima doctrine.”¹⁰⁶ While the Aunt Jemima brand is defunct,¹⁰⁷ the “Aunt Jemima doctrine” remains locked in as a pillar of trademark law.¹⁰⁸ It says that a trademark infringement claim requires that the marks in question be used in the same or related line of business.¹⁰⁹ Dr. Dre, the real doctor, writes books about anatomy and does podcasts and talks.¹¹⁰ Dr. Dre raps and sells headphones.¹¹¹ Consumers are unlikely to be confused.

Perhaps more than any hip-hop artist, Jay-Z has taken branding to its greatest zenith. Recently Jay-Z was pronounced a billionaire, and branding and endorsement are a massive part of his fortune.¹¹² Jay-Z also defends his brands (and all his IP) in the legal arena as aggressively as any Fortune 500 company. In copyright litigation over his hit song of 2004, “Izzo,” Jay-Z showed

¹⁰² Young, 2018 TTAB LEXIS at 154.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* See David Williams, *Rapper Dr. Dre Loses a Trademark Dispute with Ob/gyn Dr. Dre*, CNN (May 9, 2018, 4:09 PM), <https://www.cnn.com/2018/05/09/entertainment/dr-dre-trademark-ruling-trnd/index.html> [<https://perma.cc/BN45-J8PC>].

¹⁰⁶ Aunt Jemima the brand is no more: done in, some would say, by a “woke” mob.

¹⁰⁷ Dee-Ann Durbin, *Aunt Jemima Brand Gets a New Name: Pearl Milling Company*, PBS (Feb. 9, 2021), <https://www.pbs.org/newshour/arts/aunt-jemima-brand-gets-a-new-name-pearl-milling-company> [<https://perma.cc/J2C6-FZYH>].

¹⁰⁸ See Kenneth L. Port, *Learned Hand's Trademark Jurisprudence: Legal Positivism and the Myth of the Prophet*, 27 PAC. L.J. 221, 244–45 (1996); Matt Soniak, *How Aunt Jemima Changed U.S. Trademark Law*, MENTAL FLOSS (Jun. 15, 2021), <https://www.mentalfloss.com/article/30933/how-aunt-jemima-changed-us-trademark-law> [<https://perma.cc/AW4L-EJF4>].

¹⁰⁹ *Aunt Jemima Mills Co. v. Rigney & Co.*, 257 F. 407, 409–10 (2d Cir. 1917) (“[W]e think that goods, though different, may be so related as to fall within the mischief which equity should prevent.”).

¹¹⁰ See Young v. Burch, 2018 TTAB LEXIS 154 at 2 (T.T.A.B. 2018).

¹¹¹ *People Aren't Hearing All the Music*, BEATS BY DRE, <https://www.beatsbydre.com/company/aboutus> [<https://perma.cc/GW6N-K77T>] (last visited Mar. 5, 2024).

¹¹² See Zack O'Malley Greenburg, *Artist, Icon, Billionaire: How Jay-Z Created His \$1 Billion Fortune*, FORBES (Jun. 3, 2019), <https://www.forbes.com/sites/zackomalleygreenburg/2019/06/03/jay-z-billionaire-worth/?sh=35ffc4173a5f> [<https://perma.cc/699Y-7DQ6>].

that he simply will not settle claims.¹¹³ In that copyright case, an unknown singer named Demme Ulloa sued Jay-Z for using her voice on the “Izzo” song without giving her credit.¹¹⁴ Almost for certain, this matter could have been settled for a modest sum. Instead, the case went to the district court, which denied Jay-Z’s motion for summary judgment on two of Ulloa’s claims.¹¹⁵ Jay-Z filed a motion for reconsideration, but it was denied,¹¹⁶ and was appealed to the Second Circuit. In the end, the legal fees were likely well above six figures.

In the trademark realm, Jay-Z and his affiliated companies have seen numerous trademark battles. Jay-Z’s \$200 million sale of his Rocawear fashion line to Iconix Brands led to a lawsuit by Iconix, in which it alleged trademark rights in the “Rocawear” mark were part of the transaction.¹¹⁷ Iconix filed an arbitration claim against Roc Nation and Jay-Z when Jay-Z’s companies sold Roc Nation baseball caps, which Iconix contended violated the parties’ licensing agreement.¹¹⁸ Jay-Z fought valiantly, even disputing the validity of the arbitration on the matter due to the lack of African American arbitrators on the panel.¹¹⁹ Ultimately, the parties settled, with Jay-Z reputedly paying \$15 million to Iconix.¹²⁰

Jay-Z’s signature “diamond cutter” hand gesture has also led to trademark litigation. At concerts and public forums, Jay-Z routinely does a hand gesture where he brings his hands together

¹¹³ See *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411 (S.D.N.Y. 2004).

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ *Ulloa v. Universal Music & Video Distrib. Corp.*, 2004 U.S. Dist. LEXIS 6755 at *1 (S.D.N.Y. Apr. 19, 2004).

¹¹⁷ See Cedric “Big Ced” Thornton, *Jay-Z Buys Back Intellectual Property for Rocawear for \$15 Million*, BLACK ENTER. (Nov. 23, 2019), <https://www.blackenterprise.com/jay-z-buys-back-intellectual-property-for-rocawear-for-15-million/> [<https://perma.cc/2QXS-34VL>]; see also First Amended Complaint at 2–3, *Iconix Brand Grp., Inc. v. Roc Nation Apparel Grp., LLC*, No. 17-CV-3096 (A.J.N.), 2019 WL 5203256 (S.D.N.Y. Sept. 26, 2019).

¹¹⁸ See *Rocawear, Iconix Put Years-Long Web of Trademark, Fraud Fights to Bed in New Settlement*, TFL (Nov. 14, 2019), <https://www.thefashionlaw.com/rocawear-iconix-put-years-long-web-of-trademark-fraud-fights-to-bed-in-new-settlement/> [<https://perma.cc/S5HK-EF8F>]; see also Eriq Gardner, *Jay Z’s Roc Nation Accused of Undermining \$204 Million Licensing Deal*, HOLLYWOOD REP. (May 2, 2017, 7:44 AM), <https://www.hollywoodreporter.com/business/business-news/jay-zs-roc-nation-accused-undermining-204-million-licensing-deal-999514/> [<https://perma.cc/JZF7-VDDE>].

¹¹⁹ *Id.*

¹²⁰ See Kori Hale, *Jay-Z’s Roc Nation Gets Iconix Lawsuit Dismissed for \$15 Million*, FORBES (Nov. 24, 2019, 8:00 AM), <https://www.forbes.com/sites/korihale/2019/11/24/jay-zs-roc-nation-gets-iconix-lawsuit-dismissed-for-15m/?sh=4acefa736e29> [<https://perma.cc/7RD8-4XZH>].

like a pyramid.¹²¹ Jay-Z reportedly attempted to register the hand gesture—unsuccessfully—eight times with the U.S. Trademark Office.¹²² Jay-Z was sued by a wrestler named “Diamond” Dallas Page in 2005 for trademark infringement for use of the hand gesture.¹²³ The case apparently settled favorably for Dallas Page.¹²⁴ Jay-Z renewed his attempt to register the gesture in the Trademark Office in 2018.¹²⁵

One cannot help but think that, while great for individuals, these trademark and right of publicity conflicts are not beneficial to society.

VIII. INEQUITABLE TRADEMARK DISTRIBUTIONS

Finally, the music industry has always been plagued by trademark inequities which penalize the legally unsophisticated and unrepresented. This dynamic plagued the Blues artists at the inception of the music industry and continues to afflict urban hip-hop artists of today.¹²⁶ There is a tremendous economic and informational gap between the “haves” of IP, such as multimillionaire and billionaire rappers and major record labels, and the “have-nots”: the creative African American artists. There is copyright law for the one percent, and copyright and IP law for everyone else. Black creators are the cultural shock troops that drive everything entertainment-related. Black street slang turns into corporate-owned advertising.¹²⁷ Social media and the internet “thrive[] on content from Black people.”¹²⁸ Black teenagers’

¹²¹ See *Jay-Z Goes Hands-On for Trademarks*, PROTOPOPESCU & PARTNERS: INTELL. PROP., <https://protopopescu.eu/blog/2019/10/21/jay-z-goes-hands-on-for-trademarks/> [<https://perma.cc/ZF3P-MSSS>] (last visited Mar. 19, 2024); Quibian Salazar-Moreno, *Jay-Z Loses Lawsuit over Roc-A-Fella “Diamond” Hand Sign*, HIPHOP, <https://www.ihiphop.com/jay-z-loses-lawsuit-over-roc-a-fella-%E2%80%9Cdiamond%E2%80%9Dhand-sign/> [<https://perma.cc/TN7B-XKJT>] (last visited Feb. 24, 2024).

¹²² See *Jay-Z Goes Hands-On for Trademarks*, *supra* note 121.

¹²³ See Salazar-Moreno, *supra* note 121; see also Complaint, *Diamond Dallas Page v. Shawn Carter et al.*, No. 05-08475 DSF (JWJx), 2005 WL 3775933 (C.D. Cal. Dec. 2, 2005).

¹²⁴ See Salazar-Moreno, *supra* note 121.

¹²⁵ See Timothy D. Sitzmann, *Hands off Jay-Z’s Hand Gesture Trademark*, WINTHROP & WEINSTINE (Feb. 8, 2018), <https://winthrop.com/bold-perspectives/hands-off-jay-zs-hand-gesture-trademark/> [<https://perma.cc/NQJ7-WHR4>].

¹²⁶ See Greene, *supra* note 19, at 343, 356 n.82.

¹²⁷ See Lei Danielle Escobal, *Without Black Leaders, Companies Shouldn’t Profit from AAVE*, DIAMONDBACK (Oct. 6, 2021), <https://dbknews.com/2021/10/06/corporations-aaave-profit-performative/> [<https://perma.cc/LH7L-9PUR>].

¹²⁸ DeAsia Paige, *Black Memes Matter: How Black People Drive Social Media Culture*, UNIV. DAILY KANSAN: CHALK (Feb. 27, 2020), https://www.kansan.com/chalkmagazine/black-memes-matter-how-black-people-drive-social-media-culture/article_b572c262-5995-11ea-b61d-2b1231ea3e81.html [<https://perma.cc/XS9S-PR6F>] (“[O]ut of the five . . . most-viewed GIFs of 2019, four of them were based on the reactions from Black people, according to GIPHY.”).

internet memes go viral, but these creators often lack the wherewithal to turn phrases into protectable IP.¹²⁹ Created by Black youth but trademarked by others, TikTok dances that are performed by videogame avatars online—and the music itself—often end up in the hands of non-creators.

The U.S. Trademark Office investigates whether confusingly similar trademarks exist in the trademark registration process.¹³⁰ The Trademark Office, however, does not investigate whether the mark applicant and claimant is indeed the person or entity entitled to trademark ownership. The Trademark Office's website has a section devoted to trademark registrations for musical artists and bands.¹³¹ The website has a subsection on trademark ownership in the registration process.¹³²

However, the guidance is sparse regarding the critical issue of who is entitled to claim trademark ownership, with the website providing only that “[i]f there are joint owners, [meaning] more than one person owns the trademark but [they] haven’t formed a legal partnership,” then “[i]nclude each person’s name in the application.”¹³³ The Trademark Office further notes that “all band members co-own the trademark as individuals,” and the claimant must “complete owner information for each member by identifying each member as an individual and specifying each member’s national citizenship.”¹³⁴ This is useful information, but far from setting forth standards of trademark ownership in the musical group context.

This begs the question: what if one member of a band decides to register the band name on their own, unbeknownst to the other members? This dynamic occurs frequently when there is a musical group that has not contractually defined issues of trademark ownership in a partnership agreement or otherwise.¹³⁵

¹²⁹ See Emma Grey Ellis, *Want to Profit off Your Meme? Good Luck if You Aren't White*, WIRED (Mar. 1, 2017, 11:00 AM), <https://www.wired.com/2017/03/on-fleek-meme-monetization-gap/> [<https://perma.cc/4XZR-KPJ7>].

¹³⁰ See *Likelihood of Confusion*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trade-marks/search/likelihood-confusion> [<https://perma.cc/BCA2-K7LD>] (last visited Mar. 19, 2024).

¹³¹ *Rockin' Your Trademark*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trade-marks/laws/rockin-trademark> [<https://perma.cc/E4GK-4C3Y>] (last visited Feb. 24, 2024).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Even where a written partnership agreement exists, things can go horribly awry, as seen in the band Journey's epic trademark ownership disputes. See Chad Childers,

This is precisely what happened in a case involving a band, known as Wonderbread 5.¹³⁶ The Bay Area band consisted of five members who performed together for over ten years. One member described Wonderbread 5 as “a bunch of Caucasian boys playing Jackson 5 songs.”¹³⁷ As is common among musical groups, the band did not have a formal partnership agreement setting forth trademark ownership, and never filed a trademark registration.¹³⁸ One member of the band, Gilles, was expelled from the group, and litigation over the termination ensued in a California state court.¹³⁹

Gilles subsequently filed a federal trademark registration, listing himself as the author.¹⁴⁰ The other band members, as petitioners, filed a trademark cancellation action to cancel the mark on the grounds of fraud.¹⁴¹

The Trademark Trial and Appeal Board looked at the evidence and ruled that Gilles’s registration should be cancelled since Gilles was not the trademark owner of the Wonderbread 5 mark.¹⁴² In doing so, the Board looked to a test for band ownership formulated by Professor McCarthy in the McCarthy on Trademarks and Unfair Competition treatise.¹⁴³

In his treatise, McCarthy sets forth a test for band ownership.¹⁴⁴ McCarthy posits that in cases involving a band, it must first be determined whether the group name is personal to the individual members or not.¹⁴⁵ If not, a second question then must be determined: for what quality or characteristic is the musical group known and who controls that quality?¹⁴⁶ The

Journey Reach Settlement with Ex-Rhythm Section over Alleged ‘Coup’, LOUDWIRE (Apr. 1, 2021), <https://loudwire.com/journey-reach-settlement-ross-valory-steve-smith-alleged-coup/> [https://perma.cc/T3W2-Y44P] (“[Journey] guitarist Neal Schon and keyboardist Jonathan Cain accused Valory and Smith of attempting to pull a corporate “coup d’état” trying to gain control of the band’s name and trademark without consulting them. Schon and Cain had a 1998 written agreement with former vocalist Steve Perry that granted them the rights to the group’s name and trademark.”).

¹³⁶ *Wonderbread 5 v. Patrick Gilles a/k/a Wonderbread 5 and/or Wonderbread Five*, 115 U.S.P.Q.2d (BNA) 1296 (T.T.A.B. 2015).

¹³⁷ *Id.* (quoting Rickard Dep. 8:24-9:7 (32 TTABVUE 210)).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §16.45 (Thomson West, 5th ed. 2017).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

answer should identify the person or entity that owns the group name as a mark.¹⁴⁷

Ultimately, the Board held that “the WONDERBREAD 5 mark was not ‘personal’ to Respondent Gilles or any other of the band members.”¹⁴⁸ The mark signified the ‘style and quality’ of the group: a Jackson 5 tribute band, not a ‘particular performer combination.’”¹⁴⁹

The hip-hop arena has also witnessed disputes over band trademark ownership. An example is the rap group Run-DMC. The group started in 1981 with three members—Joseph “Rev. Run” Simmons, Darryl “D.M.C.” McDaniels and Jason “Jam Master Jay” Mizell, who passed away in 2002.¹⁵⁰ In 1986, Run-DMC entered into a landmark deal with Adidas and, in essence, not only became the face of the sneaker giant, but arguably built the company into what it is today.¹⁵¹

Yet amazingly, the trademark for Run-DMC was not filed as a trademark until 2004.¹⁵² Moreover, one member of the band, McDaniels, registered the mark exclusively.¹⁵³

Similarly, the iconic hip-hop group Wu-Tang Clan formed in the early 1990’s and consisted initially of Robert Diggs, known as RZA, and Russell Jones, known as Ol’ Dirty Bastard. The band’s famous bat-wing logo was designed by band member D.J. Mathematics. According to band member U-God, “each member of the group made an investment”—he estimates \$40,000—“to get Wu-Wear off the ground in the mid-’90s.”¹⁵⁴ Later, a music producer signed the group to a recording deal. “RZA also convinced [the producer] to allow each individual in the group to become, in essence, a free agent. They could sign a solo deal with any other

¹⁴⁷ *Id.*

¹⁴⁸ *Wonderbread 5 v. Patrick Gilles a/k/a Wonderbread 5 and/or Wonderbread Five*, 115 U.S.P.Q.2d (BNA) 1296 (T.T.A.B. 2015).

¹⁴⁹ John L. Welch, *Precedential No. 21: TTAB Sides with Band in “WONDERBREAD 5” Ownership Dispute*, THE TTABLOG: KEEPING TABS ON THE TTAB (July 20, 2015), <https://thettablog.blogspot.com/2015/07/precedential-no-21-ttab-sides-with-band.html> [<https://perma.cc/BM54-LXBW>].

¹⁵⁰ See McKenzie Jean-Phillippe, *Why Run-D.M.C. are the Undisputed Kings of Hip-Hop*, OPRAH DAILY (Jan. 24, 2020, 10:15 AM), <https://www.oprahdaily.com/entertainment/a30644382/run-dmc-facts/> [<https://perma.cc/CD96-MY2L>].

¹⁵¹ See Mellery-Pratt, *supra* note 1.

¹⁵² See RUN--DMC, Registration No. 3310249.

¹⁵³ *Id.*

¹⁵⁴ Bandini, *U-God Airs Wu-Tang’s Dirty Laundry. It Was Far From Simple Back Then*, AMBROSIA FOR HEADS (Mar. 20, 2018), <https://ambrosiaforheads.com/2018/03/ugod-calls-out-rza-wu-tang-clan-management-book/> [<https://perma.cc/P2T2-2KC3>] (citation omitted).

company, and take the Wu-Tang name with them”¹⁵⁵ However, as member U-God claims:

DJ Mathematics drew that logo on the back of a napkin back in the day. RZA quickly trademarked it, and to this very day his brother beefs when any of the original members attempt to use it. That to me is crazy — I mean, I understand if someone was using it without the group’s permission, but the members of the group itself? Wow, that’s just crazy.¹⁵⁶

In this sense, trademark law has traded one set of problems for artists for another. In the 1960s and 1970s, some record labels and producers demanded ownership of a band’s trademark. Motown Records was one such label, and Motown seized the rights to the trademark of Motown’s greatest band in terms of commercial sales—the Jackson 5.¹⁵⁷

That is why when the Jackson 5 left Motown in the late 1970s, the group had to change its name to “The Jacksons.”¹⁵⁸ The great singer Tina Turner faced the same fate when she left Ike Turner and his record label.¹⁵⁹ Similarly, the 1980s group, New Edition, had to sue to wrest back their trademark in the band’s name from their producer, Maurice Starr.¹⁶⁰ Starr was the impresario behind the group, and no doubt whipped them into shape to achieve hit records in the 1980s.¹⁶¹ The “New Edition” name was first used in 1978 by Bobby Brown and four childhood friends, and was later resurrected in 1981.¹⁶²

IX. OLD-SCHOOL HIP-HOP TRADEMARK AND OWNERSHIP ISSUES

No scholarship exists on the legal history of old-school hip-hop trademarks. The issue is germane to this exploration of the rise of trademark and branding in the hip-hop arena. What emerges is the notion that early hip-hop artists, despite their affinity for marketing

¹⁵⁵ Frannie Kelly, *The Wu-Tang Clan’s 20-Year Plan*, NPR (Apr. 8, 2013, 6:00 AM), <https://www.npr.org/sections/therecord/2013/04/08/176519640/the-wu-tang-clans-20-year-plan> [<https://perma.cc/EP6R-HM7M>].

¹⁵⁶ Bandini, *supra* note 154.

¹⁵⁷ UMG Recordings, Inc. v. Sigg Music, Inc., 2018 WL 3529479, at *5 (T.T.A.B. 2018).

¹⁵⁸ As part of a 1980 settlement agreement, the members of the Jackson 5 gave up all rights to the Jackson 5 mark, which was owned by Motown. *See id.* at *6 (noting that the 1980 settlement agreement “does not provide that the Jackson brothers collectively or individually own or have the right to use the trademark J5 or any other marks”).

¹⁵⁹ Ike Turner chose and trademarked the name “Tina Turner” so he could, if the need ever arose, replace one “Tina Turner” with another. *IKE TURNER WITH NIGEL CAWTHORNE, TAKIN’ BACK MY NAME: THE CONFESSIONS OF IKE TURNER* 74–75 (1999).

¹⁶⁰ *See Bell v. Streetwise Recs., Ltd.*, 640 F. Supp. 575, 579 (D. Mass. 1986).

¹⁶¹ *See* Peter Watrous, *White Singers + Black Style = Pop Bonanza*, N.Y. TIMES, Mar. 11, 1990 (§ 2), at 1.

¹⁶² *See Bell*, 640 F. Supp. at 577 n.5.

and commercial ventures existed in a kind of Wild West. The Run-DMC trademark is illustrative of some of these problems.¹⁶³

The group's members, McDaniels, Simmons, and Mizell, were three talented young men from the streets of Hollis, Queens, New York City,¹⁶⁴ and not educated in legal matters. Records indicate that the Run-DMC trademark was first used in commerce in 1983 but was not registered until 2004.¹⁶⁵ The original registrant of the mark was McDaniels.¹⁶⁶ The mark was subsequently transferred to Run DMC Holdings, Inc., and again to Run-DMC Brand, LLC.¹⁶⁷

The fact that the Run-DMC mark remained unregistered for over twenty years is in itself rather astonishing. After all, this is the band that pioneered modern endorsement deals in hip-hop music and has sold over 230 million records worldwide.¹⁶⁸ There are few safeguards in preventing unscrupulous parties from registering band trademarks and stage names. A band member could hypothetically file an opposition to a trademark application that omits the band member. This presumes that an artist would be aware that such chicanery was afoot. The opposition period is short for trademark registrations.¹⁶⁹ The next step would be a cancellation proceeding, which are notoriously expensive proceedings and have a very low success rate.¹⁷⁰ Once a mark has

¹⁶³ See *supra* notes 150–153 and accompanying text; *Run-DMC Co-Founder Darryl McDaniels Inks Wide Ranging Licensing Deal*, THE LICENSING LETTER (Nov. 3, 2021), <https://www.thelicensingletter.com/run-dmc-co-founder-darryl-mcdaniels-inks-wide-ranging-licensing-deal/> [https://perma.cc/72HH-PRAM].

¹⁶⁴ Maurice DuBois, *Run-DMC's Darryl McDaniels Reflects on His Hollis, Queens, Roots*, CBS NEWS (Aug. 11, 2023, 7:10 PM), <https://www.cbsnews.com/newyork/news/run-dmc-darryl-mcdaniels-hollis-queens/> [https://perma.cc/K68R-APCZ].

¹⁶⁵ RUN--DMC, Registration No. 3,310,249. See also U.S. Trademark Application Serial No. 73/712,624 (filed Feb. 22, 1988).

¹⁶⁶ *Run-DMC Co-Founder Darryl McDaniels Inks Wide Ranging Licensing Deal*, *supra* note 163.

¹⁶⁷ *Id.*

¹⁶⁸ McKenzie Jean-Philippe, *Why Run-D.M.C. Are the Undisputed Kings of Hip-Hop*, OPRAH DAILY (Jan. 24, 2020, 10:15 AM), <https://www.oprahdaily.com/entertainment/a30644382/run-dmc-facts/> [https://perma.cc/WV22-UVF5].

¹⁶⁹ See 37 C.F.R. § 2.101(c) (2023) ("The opposition must be filed within thirty days after publication . . . of the application being opposed or within an extension of time . . .").

¹⁷⁰ Barton Beebe & Jeanne C. Fromer, *Fake Trademark Specimens: An Empirical Analysis*, 120 COLUM. L. REV. F. 217, 246–47 (2020) ("[T]he[] biggest limitation [of trademark cancellation proceedings] is their high cost, which can be burdensome to smaller businesses. One study . . . estimates the median cost of a U.S. opposition or cancellation proceeding to be \$95,000." (citing AM. INTELL. PROP. L. ASS'N, 2015 REPORT OF THE ECONOMIC SURVEY 39 (2015), <http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf> [https://perma.cc/S7FW-J72D])).

been in use continuously, it becomes close to impossible to obtain cancellation due to the doctrine of incontestability.¹⁷¹

X. STANDARDS FOR FRAUDULENT TRADEMARK REGISTRATIONS

False representations on trademark applications are unlawful. The Lanham Trademark Act provides that “[a]ny person who shall procure registration in the Patent and Trademark Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof.”¹⁷²

Traditionally, courts interpreted section 1120 to show that “[a] trademark applicant commits fraud in procuring a registration when it makes material representations of fact in its declaration which it knows or should know to be false or misleading.”¹⁷³ That changed with the Federal Circuit’s decision in *In re Bose Corporation*.¹⁷⁴

In *Bose Corporation*, the Federal Circuit significantly lowered the high bar of proving fraud shown in the *Medinol* line of cases.¹⁷⁵

In *In re Bose Corporation*, . . . the CAFC ruled that the TTAB’s standard for determining whether fraud existed was too low. “[B]y equating ‘should have known’ with a subjective intent,” the Board “erroneously lowered the fraud standard to a simple negligence standard.” . . . The CAFC found no substantial evidence that Bose intended to deceive the PTO in the renewal process, and it therefore reversed. The CAFC made it clear that proof of intent to deceive is required to establish fraud: “Thus, we hold that a trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO.”¹⁷⁶

¹⁷¹ See *Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1208 (11th Cir. 1999) (“Once a registration has achieved incontestable status, it is treated as conclusive evidence of the registrant’s right to use the trademark, subject to certain enumerated defenses. Thus, incontestability narrows, but does not eliminate, the grounds upon which the trademark’s validity may be called into question by a defendant.” (citation omitted)).

¹⁷² Lanham Act § 38, 15 U.S.C. § 1120 (1975).

¹⁷³ *Medinol Ltd. v. Neuro Vasx, Inc.*, 67 U.S.P.Q. 2d 1205 (T.T.A.B. 2003).

¹⁷⁴ 580 F.3d 1240 (Fed. Cir. 2009).

¹⁷⁵ Richard E. Petershack, *The Bose Decision: Proving Fraud on the USPTO Made Harder*, AXLEY ATTYS (Dec. 8, 2009), https://www.axley.com/publication_article/the-bose-decision-proving-fraud-on-the-uspto-made-harder/ [<https://perma.cc/Z3MB-L2E5>].

¹⁷⁶ *Id.*

Under the *Bose Corporation* standard, a person alleging fraud on the Trademark Office must do so by presenting clear and convincing evidence of actual fraud.¹⁷⁷

XI. GOODBYE COPYRIGHT? COPYRIGHT'S HIP-HOP PROBLEM

Trademark and publicity rights have emerged as a much more attractive alternative to the traditional music industry source of copyright revenues. The reasons for this are three-fold. First, in the era of digital streaming, payouts to artists are nowhere near the revenues of the old vinyl and later CD hard copy sales.¹⁷⁸ Top-line artists such as Taylor Swift have bemoaned the inequitable payouts from digital streaming services. “Swift has advocated for change in the music-streaming industry since 2014 when she published an essay for The Wall Street Journal arguing that ‘music should not be free.’ The same year, Swift pulled her ‘1989’ album from Spotify.”¹⁷⁹ In response, the architect of Spotify’s platform flatly stated that the platform was not built to pay artists. There is a global movement afoot to bring more equity for artists to the streaming space, but it faces long odds.¹⁸⁰

Hip-hop’s relationship with copyright law has been tenuous and combative from the outset. The first major hit record hip-hop song, “Rapper’s Delight,” was based on pilfered lyrics from an unfortunate rapper, D.J. Caz, who missed the studio session for

¹⁷⁷ See Adrienne Baker, *In Re Bose Corp.: CAFC Requires a Clear and Convincing Intent to Deceive*, JOLT DIGEST (Sept. 14, 2009), <https://jolt.law.harvard.edu/digest/in-re-bose-corp> [https://perma.cc/Z468-EM54].

¹⁷⁸ Jess Conway, *Progressive Beats: from CDs to Online Streaming*, MEDIUM (Nov. 13, 2020), <https://medium.com/digital-society/progressive-beats-from-cds-to-online-streaming-e8760b22f7ae> [https://perma.cc/V22Z-J3TW]. But in an ironic twist, vinyl record sales now exceed those of CD’s. See Sarah Whitten, *Music Fans Pushed Sales of Vinyl Albums Higher, Outpacing CDs, Even as Pandemic Sidelined Stadium Tours*, CNBC (July 13, 2021, 11:23 AM), <https://www.cnbc.com/2021/07/13/music-fans-pushed-sales-of-vinyl-albums-higher-in-first-half-of-2021.html> [https://perma.cc/TAK8-5P77].

¹⁷⁹ Hannah Towey, *Taylor Swift Doesn’t Need to Earn Streaming Royalties, According to a Former Spotify Boss Who Said the Company Is a Distribution Platform That Wasn’t Built to Pay Artists*, BUS. INSIDER (July 6, 2021, 1:09 PM), <https://www.businessinsider.com/taylor-swift-doesnt-need-streaming-royalties-former-spotify-boss-said-2021-7> [https://perma.cc/Y7CN-KYKS]; see also Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), https://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219?mod=article_inline [https://perma.cc/Z4PZ-DD4A].

¹⁸⁰ See Ben Sisario, *Musicians Say Streaming Doesn’t Pay. Can the Industry Change?*, N.Y. TIMES (May 10, 2021), <https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html> [https://perma.cc/269B-DHHD] (“Major record labels, after contracting painfully for much of the 2000s, are now posting huge profits. Yet not enough of streaming’s bounty has made its way to musicians, the activists say, and the major platforms’ model tends to over-reward stars at the expense of everybody else.”).

the song. His lyrics were used in the record without authorization, and he has yet to receive writing credit for it.¹⁸¹ The song was also used, again without authorization, in the Chic song “Good Times” and served as its backbone.¹⁸²

XII. HOSTILE JUDICIAL ATTITUDES

Judicial hostility to hip-hop in its early days was palpable. The apex of judicial hostility occurred in the *Grand Upright* case, where the late rapper Biz Markie used an unauthorized sample of the Gilbert O’Sullivan song, “Alone Again Naturally.”¹⁸³ A plethora of copyright infringement claims plagued hip-hop songs from Vanilla Ice’s hit song “Ice, Ice Baby” to the iconic group Tribe Called Quest’s “Can I Kick It,” which sampled Lou Reed’s “Take a Walk on the Wild Side.” The digital sampling which made Public Enemy great became impossible in this hostile judicial environment.¹⁸⁴

¹⁸¹ See Yahoo Travel, *Writing Cred for ‘Rapper’s Delight’ Sparks Grudge*, N.Y. POST (Jan. 26, 2014, 5:21 AM), <https://nypost.com/2014/01/26/writing-cred-for-rappers-delight-sparks-grudge/> [https://perma.cc/BAS5-BK8W] (“Pioneering rapper Grandmaster Caz (a.k.a. Curtis Brown) has long claimed that his former manager, future Sugar Hill member Big Bank Hank (nee Henry Jackson), stole the lyrics for the legendary song.”).

¹⁸² See Mosi Reeves, *Sample Snitching: How Online Fan Chatter Can Create Legal Trouble for Rap Producer*, PITCHFORK (Jan. 21, 2021), <https://pitchfork.com/features/article/sample-snitching-how-online-fan-chatter-can-create-legal-trouble-for-rap-producers/> [https://perma.cc/8Z9S-2DVC] (“The very first hip-hop hit, Sugarhill Gang’s ‘Rapper’s Delight,’ was the subject of a legal challenge (settled out of court) from the members of Chic, whose ‘Good Times’ bass line the pioneering rap song interpolated.”).

¹⁸³ See Dasha Chestukhin & Joelle Milov, “All Samples Cleared!”: Remembering Biz Markie’s Contributions to Copyright Law, COWAN, LEIBOWITZ & LATMAN (Aug. 17, 2021), <https://www.cll.com/CopyrightDevelopmentsBlog/all-samples-cleared-remembering-biz-markies-contributions> [https://perma.cc/MQQ9-QW38] (“The resulting case, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991), was decided in O’Sullivan’s favor, with Judge Kevin Duffy beginning his opinion with the biblical admonition ‘[t]hou shalt not steal’ and noting that defendants had violated ‘not only the Seventh Commandment, but also the copyright laws of this country.’”).

¹⁸⁴ Chuck D, the leader of Public Enemy, noted in an interview that:

Public Enemy’s music was affected more than anybody’s because we were taking thousands of sounds. If you separated the sounds, they wouldn’t have been anything—they were unrecognizable. The sounds were all collaged together to make a sonic wall. Public Enemy was affected because it is too expensive to defend against a claim. So we had to change our whole style, the style of *It Takes a Nation* and *Fear of a Black Planet*, by 1991.

Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy’s Chuck D and Hank Shocklee*, LITTLE VILL. (Oct. 17, 2011), <https://littlevillagemag.com/how-copyright-law-changed-hip-hop-an-interview-with-public-enemys-chuck-d-and-hank-shocklee/> [https://perma.cc/P5T3-LFDR].

XIII. FALSE COPYRIGHT REGISTRATIONS AND ROYALTY UNDERCOMPENSATION

Black artists in hip-hop and every genre created by them have been plagued by false copyright registrations, royalty underpayments and non-payments, and inequitable music industry contracts. This is an on-going saga, as illustrated by R&B legend Johnnie Taylor's heir's battle to receive royalties from a major record label.¹⁸⁵ Even when artists, such as Taylor, who scored a number one hit in 1976 with "Disco Lady," achieve commercial success, they somehow end up on the short end of royalty statements.¹⁸⁶

XIV. DOCTRINAL HOSTILITY TO HIP-HOP CULTURAL PRODUCTION

At a more organic level, copyright law's features exhibit considerable hostility to Black artists. For one, copyright law generally rewards composers but not performers who are outside the copyright loop. Only composers are entitled to copyright royalties under U.S. law.¹⁸⁷ Because Black music cultural production is based on performance, not composition, this has been a serious disadvantage to Black artists.

Copyright law is also hostile to short phrases, which are the stock and trade of the genre.¹⁸⁸ It is manifest that "short phrases—perhaps because they're so easily severable from larger works—are commonly the subject of theft. They're often plucked and recycled in other literary, musical or artistic works or on merchandise."¹⁸⁹ The hostility to short musical phrases is detrimental to Black creators. In a lawsuit filed by then little-known rappers against rap mega-star Ludacris for his hit "Stand Up," the court declined

¹⁸⁵ See Johnathan Bernstein, *He Scored the First Platinum Hit. 45 Years Later, His Family Is Fighting for Every Penny*, ROLLING STONE (Nov. 2, 2021), <https://www.rollingstone.com/music/music-features/johnnie-taylor-fonda-bryant-sony-royalties-1241773/> [<https://perma.cc/35N7-2HUV>] ("Since at least 2011 . . . Taylor's heirs weren't receiving any royalty earnings from their father.").

¹⁸⁶ *Id.*

¹⁸⁷ See Mary LaFrance, *Are We Serious About Performer's Rights?*, 5 IP THEORY 81, 81 (2015) ("Historically, the rights of performers have received far less attention than the rights of traditional authors. The law has been reluctant to recognize performers as authors and, to the extent that performers' rights are recognized, they are secondary to, and more limited than, the rights of traditional authors.").

¹⁸⁸ See *What Does Copyright Protect?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-protect.html> [<https://perma.cc/NH2X-9CZV>] (last visited Feb. 21, 2024) ("Copyright does not protect names, titles, slogans, or short phrases.").

¹⁸⁹ Mary Minow, *Copyright Protection for Short Phrases*, STANFORD LIBRS. (Sept. 9, 2003), https://fairuse.stanford.edu/2003/09/09/copyright_protection_for_short/ [<https://perma.cc/W7GS-B26X>].

to find that the infringing phrase “just like that” was insufficiently original to merit copyright protection.¹⁹⁰

XV. COPYRIGHT FORMALITIES AND LITIGATION BARRIERS

Finally, copyright law formalities like registration and copyright termination also have had deleterious impacts on hip-hop and other African American artists. In 2019, the U.S. Supreme Court declared that a completed registration certificate is required to institute copyright infringement or ownership cases.¹⁹¹ I have contended elsewhere that copyright formalities like registration and copyright termination will necessarily disadvantage marginalized communities.¹⁹² As an example, rapper 2 Milly sued the online game company Fortnite for copyright infringement, but in the wake of the *Fourth Estate* case, rescinded his copyright lawsuit for want of a registration certificate.¹⁹³

Copyright enforcement through lawsuits is a rich person’s pursuit, as copyright litigation is frightfully expensive.¹⁹⁴ Additionally, plaintiffs in music copyright infringement cases have an abysmal record of success in pursuing claims.¹⁹⁵

CONCLUSION

For all of these reasons, trademark and the ancillary right of publicity have emerged as the best IP regimes for hip-hop artists in the era of digital streaming. Artists, of course, must achieve some level of visibility in the marketplace to take advantage of trademark branding and celebrity endorsement deals. The road ahead is not

¹⁹⁰ See *BMS Entertainment/Heat Music LLC v. Bridges*, No. 04 Civ. 2584 (PKC), 2005 WL 1593013, at *8 (S.D.N.Y. July 6, 2005) (denying summary judgment to the defendants. Ludacris and producer Kayne West prevailed over the plaintiffs at trial.).

¹⁹¹ See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 890 (2019).

¹⁹² See, e.g., Kevin J. Greene, *The Future is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. COPYRIGHT SOC’Y 45 (2021) (exploring the devastating impact of the copyright termination provisions on Black artists).

¹⁹³ See Sam Desatoff, *Rapper 2 Milly Drops Lawsuit Against Epic After Supreme Court Ruling*, YAHOO! (Mar. 8, 2019), <https://www.yahoo.com/now/rapper-2-milly-drops-lawsuit-211100446.html> [<https://perma.cc/288S-KT9P>].

¹⁹⁴ Terrica Carrington, *A Small Claims Court Is on the Horizon for Creators*, COPYRIGHT ALL. (Oct. 14, 2017), <https://copyrightalliance.org/small-claims-court-on-the-horizon/> [<https://perma.cc/7WBA-TY9Q>] (noting that the average cost for a copyright infringement case as of 2017 is \$278,000 and that “[f]or far too many creators, the protections afforded by copyright are more theoretical than practical, as they lack the financial resources to bring a suit for infringement in federal court. In a practical sense, the courthouse doors are locked shut for individual creators and small businesses seeking to enforce their rights”).

¹⁹⁵ See Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1899 (2018).

totally clear, however, because trademark, like copyright law, has formal procedures and standards that can be manipulated to deprive the unwary artist of property and protection.

Rap Rhyme, Prison Time: How Prosecutors Use Rap Evidence in Gang Cases

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INTRODUCTION

The phrase “rap on trial” signifies a tactic used by prosecutors to introduce a defendant’s rap lyrics and videos as evidence of criminality at trial.¹ Rather than treat rap as a form of artistic expression, prosecutors claim the lyrics are either autobiographical confessions of illegal behavior or evidence of motive or intent with respect to an alleged crime.² Beyond First Amendment concerns, putting rap on trial raises the specter of discrimination in the courtroom, as experimental research finds that individuals hold negative stereotypes about rap music and

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¹ Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE AND JUST. 185, 185 (2014).

² *Id.* at 186.

rap artists, most of whom are young men of color.³ Notably, this practice occurs almost exclusively for defendant-authored *rap* lyrics and videos, even as other music genres contain references to violence or crime.⁴

In rap on trial cases, prosecutors frequently introduce lyrics and videos as evidence of gang association, membership, or participation to help secure convictions and gang enhancements⁵—a practice we call *gang affiliation through rap misrepresentation*. For the accused, the consequences of this practice can be severe: Gang enhancements can substantially increase the length of sentences, including the imposition of indeterminate life sentences or, in first degree murder cases, life without the possibility of parole and even the death penalty.

In this Article, we call for greater nuance and careful treatment of rap-related evidence in the courtroom, which includes recognizing rap's history, conventions, and practices generally, and acknowledging rap's complicated and complex intersection with gangs specifically. Greater nuance and more careful treatment will enable courtroom members, including judges and jurors, to make better informed evaluations regarding whether rap evidence, despite being prejudicial, is sufficiently probative and if so, what relevance it may have to the case. We preface this argument with a review of punitive policies and practices associated with gangs in the criminal justice system, and with a discussion of how prosecutors use rap evidence in actual gang-related rap on trial cases. We conclude with recommendations. While *gang affiliation through rap misrepresentation* is prevalent throughout the United States, its epicenter is California—our focus in this Article.

³ See, e.g., Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. OF EXPERIMENTAL CRIMINOLOGY 507, 521 (2018); Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280, 289 (2016); Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 803 (1999); Carrie B. Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705, 715 (1999).

⁴ Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 RACE AND JUST. 330, 333 (2018).

⁵ See Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 93–94 (2019).

I. GANGS IN THE CRIMINAL JUSTICE SYSTEM

A central component of the “tough on crime” policy movement of the 1980’s and 1990’s was the targeting of street gangs and their members. Developing from the Racketeer Influenced and Corrupt Organizations (“RICO”) Act of 1970 to combat criminal enterprises, California’s Street Terrorism Enforcement and Prevention (“STEP”) Act of 1988 was the first act to establish a broad set of gang laws and enhancements targeting “criminal street gang[s].”⁶ Other states followed suit with their own legislation. As of 2020, all fifty states, the District of Columbia, and the United States federal government have enacted some form of gang legislation.⁷ Although legal definitions of criminal street gangs vary from state to state, most are similar to the one utilized in California,⁸ which defines a criminal street gang as follows:

[A]n ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.⁹

While definitions like this seem straightforward at first glance, they are problematic in practice given challenges associated with identifying who is (and is not) a gang member, and with defining what constitutes gang activity. Scholars argue that “there is no generally accepted methodology for identifying gangs, gang members, or gang[-]related crime,”¹⁰ resulting in little to no agreement among researchers on the “true” definition of a gang.¹¹ Yet, definitional issues have not thwarted efforts by law enforcement to establish a network of databases to label and track gang activity, including in California.

⁶ Beth Bjerregaard, *Legislative Approaches to Addressing Gangs and Gang-Related Crime*, in THE HANDBOOK OF GANGS 345, 348, 353 (Scott H. Decker & David C. Pyrooz eds., 2015).

⁷ See *Highlights of Gang-Related Legislation*, NAT’L GANG CENTER, <https://nationalgangcenter.ojp.gov/legislation/highlights> [https://perma.cc/679C-95UT] (last visited Feb. 22, 2024).

⁸ Bjerregaard, *supra* note 6, at 356.

⁹ CAL. PENAL CODE § 186.22(f) (West 2024).

¹⁰ Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 106 (2000).

¹¹ See Rebecca D. Petersen, *Definitions of a Gang and Impacts on Public Policy*, 28 J. OF CRIM. JUST. 139, 142 (2000).

Entry into California's CalGANG Database includes ten criteria that require officers to label individuals as "gang members." Among them are: being observed to associate with gang members, writing about gangs, wearing clothing believed to be gang-related, being identified as a gang member by a reliable source, and being photographed with known gang members.¹² For a gang database to be effective, it must be accurate, with clear definitions, a formal documentation process, and strong administrative oversight.¹³ Yet, the process for being entered into a gang database is determined by officer discretion, and often lacks administrative review. In the worst-case scenario, an officer "decides someone is a gang member and writes it on a card[.]"¹⁴ As such, "local and state gang databases have been found to be rife with misinformation, fabricated evidence, and unjustifiable entries on mostly Black and Latino men."¹⁵ While efforts such as the Fair and Accurate Gang Database Act of 2017, which shifts oversight of CalGANG to the California Department of Justice, seek to provide critical oversight, concerns remain.¹⁶ In 2020, the Los Angeles Police Department (LAPD) suspended use of the database following an investigation of "at least 20 officers accused of framing innocent people" and of entering "incorrect data about individuals they questioned into the database to boost statistics."¹⁷ Nebulous definitions coupled with officer discretion underscore the potential for stereotypes and prejudice to impact who is ultimately named in a gang database.

Stereotypes surrounding race, place, gender, and socio-economic status influence who is likely to wind up in a gang database, or whose social group is likely to be labeled as a "gang." Not surprisingly, young men of color living in disadvantaged

¹² See Rebecca Rader Brown, *The Gang's All Here: Evaluating the Need for National Gang Database*, 42 COLUM. J.L. & SOC. PROBS. 293, 307 (2009).

¹³ See *id.* at 318–19.

¹⁴ See ANA MUÑIZ, BORDERLAND CIRCUITRY 41 (2022).

¹⁵ See *id.* at 43; see also 10News Digital Team, *Toddler Gangsters? Audit Finds Flaws in State-Run Gang Database*, ABC 10NEWS SAN DIEGO (Aug. 16, 2016, 6:13 PM), <https://www.10news.com/news/audit-baby-gangsters-show-flaws-in-database> [<https://perma.cc/6AMV-TMLK>].

¹⁶ See Lauren M. Pittman, *Constructing a Compromise: The Current State of Gang Database Legislation and How to Effectuate Nationwide Reform*, 106 IOWA L. REV. 1513, 1523–24 (2020).

¹⁷ See Kristina Bravo, *LAPD Suspends Use of CalGang Database Months After Announcing Probe of Officers Accused of Falsifying Information*, KTLA 5 NEWS (Jun. 20, 2020, 11:42 AM), <https://ktla.com/news/local-news/lapd-suspends-use-of-calgang-database-months-after-announcing-probe-of-officers-accused-of-falsifying-information/> [<https://perma.cc/2QSQ-4JLG>].

urban areas are disproportionately represented, in part because the process involved in identifying gang members emphasizes the cultural styles of Black and Hispanic individuals. Gang “uniforms,” for example, include baggy clothing, baseball caps, and other styles common among young men of color.¹⁸ These stereotypes generate troubling statistics.

In 1992, only four years after the STEP Act was initiated, “Los Angeles police classified 47% of the young African American males in the city as belonging to a gang”¹⁹—a percentage far out of alignment with the population percentage for this group. In 2000, the CalGANG database classified 112,000 individuals as gang members with approximately 66% identified as Hispanic, 33% identified as Black, and only 2% identified as white,²⁰ reflecting significant racial and ethnic disparities and leading to the conclusion that “gang enhancement statutes criminalize entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live.”²¹ Research, in contrast, finds that gang membership is a rare occurrence for all races and ethnicities; the National Longitudinal Study of Youth self-report survey finds that only “2.8% of Blacks, 2.9% of Hispanics, and 1.3% of Whites responded that they had belonged to a gang.”²² The high levels of racial and ethnic disparity found in gang databases suggest labels of gang membership act “as a proxy for low-income urban [B]lack and Latinos” and “criminalize not just a select group of alleged gang members but entire racial groups.”²³ Policies and practices that result in lengthy prison terms, including civil gang injunctions and gang enhancements, exacerbate these disparities.

¹⁸ See Linda S. Beres & Thomas D. Griffith, *Gangs, Schools and Stereotypes*, 37 LOY. L.A. L. REV. 935, 949 (2004); see also MUÑIZ, *supra* note 14, at 41–42; Nicholas Espiritu, (E)Racing Youth: The Racialized Construction of California’s Proposition 21 and the Development of Alternate Contestations, 52 CLEV. ST. L. REV. 189, 189–90 (2004).

¹⁹ Beres & Griffith, *supra* note 18, at 951.

²⁰ Anne Marie O’Connor, *Massive Gang Member List Now Clouded by Rampart*, L.A. TIMES (Mar. 25, 2020), <https://www.latimes.com/archives/la-xpm-2000-mar-25-mn-12570-story.html> [https://perma.cc/LR68-FWNP].

²¹ See Assemb. B. 333, 2021 Reg. Sess. (Cal. 2021); see also K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 2–5 (2015).

²² Beres & Griffith, *supra* note 18, at 952.

²³ See ANA MUÑIZ, POLICE, POWER, AND THE PRODUCTION OF RACIAL BOUNDARIES 38 (Rutgers Univ. Press ed., 1984).

A. Injunctions, Prosecutions, and Enhancements

In response to street gangs, California utilizes a “two-pronged attack,” including gang injunctions and criminal gang enhancements.²⁴ City attorneys seek gang injunctions to target specific neighborhoods and gangs within those neighborhoods in an attempt to reduce gang-related criminal activity.²⁵ Injunctions prohibit gang members from engaging in otherwise “legal activities, such as associating together in public, possessing a beeper, or using a cellular phone”²⁶ and even “standing, sitting, walking, driving, gathering or appearing anywhere in public view’ with any other defendant or gang member.”²⁷ In 2013, Los Angeles had forty-six active gang injunctions that targeted seventy-two neighborhoods with measures that restricted the activities of gang members, or more accurately, that restricted the activities of residents labeled as “gang members.”²⁸ Individuals in gang databases are more likely to find themselves listed on injunction lists. Yet given definitional challenges and discretion,²⁹ individuals can have their freedom restricted without notification based on vague, broad assumptions of gang association—potentially violating their constitutional rights.³⁰ Although recent reforms in California limit gang injunctions, permitting them jurisdiction only over specifically-named individuals (versus entire neighborhoods) who have had an opportunity to appeal the decision,³¹ such efforts do little to prevent individuals from being listed in gang *databases*. This makes it easier for defendants to find themselves on gang injunction lists and for gang experts to identify them as gang members in court, where they face more severe penalties if criminally convicted.

²⁴ See Raffy Astvasadoorian, *California’s Two-Prong Attack Against Gang Crime and Violence: The Street Terrorism Enforcement and Prevention Act and Anti-Gang Injunctions Note*, 19 J. JUV. L. 272, 272–73 (1998).

²⁵ *Id.* at 286.

²⁶ *Id.* at 273.

²⁷ *Id.* at 287 (quoting *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 3 (Cal. Super. Ct. filed Mar. 30, 1994)).

²⁸ See Ana Muniz, *Maintaining Racial Boundaries: Criminalization, Neighborhood Context, and the Origins of Gang Injunctions*, 61 SOC. PROBS. 216, 216 (2014).

²⁹ See Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 115 (2005).

³⁰ *Id.*

³¹ See James Queally, *Los Angeles Must Change Use of Gang Injunctions Under Court Settlement*, L.A. TIMES (Dec. 26, 2020, 6:00 AM) <https://www.latimes.com/california/story/2020-12-26/los-angeles-gang-injunctions-must-change> [<https://perma.cc/CX4B-CCTF>].

California doubled down on its tough-on-gang approach by enacting the Gang Violence and Juvenile Crime Prevention (“GVJCP”) Act of 1998. The GVJCP Act made it easier for juveniles engaged in gang activity to be prosecuted in adult court.³² At the national level, the implementation of the federal Gang Abatement and Prevention (“GAP”) Act of 2007 expanded who can be penalized for gang activity, broadened enhancement penalties, and created a national gang database run by the U.S. Department of Justice.³³ Under the GAP Act’s definition of gang activity, a “guilt by association” standard is utilized, which “can have the effect of sweeping entire neighborhoods into a gang database.”³⁴ Once in a database, individuals can face severe consequences, including being more likely to be subjected to excessive police force, loss of employment, and having their database status used to prove motive or enhancements in court.³⁵ In court, prosecutors need not “prove that the person is a member of the criminal street gang” to secure a gang enhancement,³⁶ yet the consequences of a gang-enhanced conviction are severe.

Per the California Penal Code, “a person who is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members” is subject to an additional two to four years in prison beyond the standard sentence.³⁷ If the felony is classified as serious or violent, the term increases by five and ten years, respectively. Gang enhancements for certain felony convictions, including but not

³² See Sarah Raymond, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California’s Juvenile System and Reasons to Repeal It*, 30 GOLDEN GATE U.L. REV. 233, 258-60 (2000); see generally Thomas F. Geraghty, *Justice For Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190 (1997).

³³ See Brown, *supra* note 12, at 312–13.

³⁴ *Id.* at 317; see also Gang Abatement and Prevention Act of 2007, S.456, 110th Cong. § 521 (2007) (amending U.S. Code 18 § 521 to define a gang as “a formal or informal group, organization, or association of 5 or more individuals,” making it “unlawful for any person, for the purpose of gaining entrance to or maintaining or increasing position in, or in furtherance of, or in association with, a criminal street gang, or as consideration for anything of pecuniary value to or from a criminal street gang, to knowingly commit or threaten to commit against any individual a crime of violence” and allowing the Attorney General for each state to designate “high intensity gang activity areas” for federal assistance to create “criminal street gang enforcement teams, consisting of Federal, State, tribal, and local law enforcement authorities, for the coordinated investigation, disruption, apprehension, and prosecution of criminal street gangs and offenders in each high intensity gang activity area.”).

³⁵ See Wright, *supra* note 29, at 117–18.

³⁶ CAL. PENAL CODE § 186.22.

³⁷ See *id.*

limited to carjacking or discharge of a firearm, add an indeterminate life sentence to a previously determinant sentence.³⁸ Gang membership is also considered a special circumstance for first degree murder charges, making the defendant eligible for life without parole (“LWOP”) or the death penalty.³⁹

Definitional challenges, stereotyping and bias, and prosecutorial discretion combine to create the perfect storm in gang rap on trial cases, where prosecutors routinely secure convictions and enhancements by introducing a defendant’s rap lyrics or videos as evidence to establish gang association, membership, participation, and motive—with troubling consequences.

II. RAP ON TRIAL, CONVICTIONS, AND ENHANCEMENTS IN GANG CASES

How common are cases where prosecutors allege gang affiliation using rap evidence? One content analysis of 160 state and federal rap on trial cases between 2012 and 2017 finds that in more than one in five cases (22.5%), rap lyrics were utilized to establish gang affiliation for the purpose of sentencing enhancements.⁴⁰ Research in California suggests these findings are conservative. Our analysis of 105 rap on trial cases across the state between 2010 and 2020 finds that in fully seventy-one cases (67.6%), rap was used to help prove gang affiliation.⁴¹ With either estimate, cases alleging gang affiliation comprise a significant portion of all rap on trial cases.

In what ways are prosecutors introducing rap lyrics and videos as evidence in these cases? Prosecutors use rap evidence to: (1) show a defendant is associated with a gang or involved in gang activity; (2) show a defendant is actively involved in gang activity if recent activity is in question; (3) claim the motive for a crime is gang related or committed for the benefit of a gang; and (4) establish the existence of, or provide information about, a specific gang. Below we present examples highlighting the diverse ways that prosecutors incorporate rap evidence to establish gang affiliation as they seek convictions and enhancements in criminal trials.

³⁸ See *id.*

³⁹ See CAL. PENAL CODE § 190.2.

⁴⁰ See Lutes et al., *supra* note 5.

⁴¹ Kyle Winnen, Prosecutor Narratives and Race Constructions in Rap on Trial Cases (May 22, 2023) (M.A. Thesis, University of California Irvine) (on file with author).

In the case of rapper Tiny Doo, whose real name is Brandon Duncan, prosecutors used his rap lyrics to allege he was connected to a series of shootings by the Lincoln Park Bloods in the San Diego area in 2013 to 2014.⁴² Duncan, who had no prior criminal record and no knowledge of—or involvement in—the alleged shootings, was charged with nine felonies and associated gang enhancements.⁴³ Duncan’s only official link to the Lincoln Park Bloods was a 1997 entry in a gang database.⁴⁴ Prosecutors admitted that Duncan did not purchase or fire any of the weapons, and that he was not at the scene of the shootings in question.⁴⁵ Rather, the primary piece of evidence against him was his rap mixtape, *No Safety*, which despite featuring a picture of a loaded revolver on the cover, makes no mention of the shootings.⁴⁶ Duncan found himself facing up to twenty-five years to life in prison because prosecutors argued the shooting gained status for Duncan’s alleged gang, allowing him to sell more albums.⁴⁷ Duncan’s attorney maintained that the “shootings are unsolved and so they do not actually know who did the shootings.”⁴⁸ Rather, they’re choosing to focus their resources on taking Brandon Duncan and his rap music off the streets and prosecuting the person who says the word gun rather than going after the person that actually uses the gun.”⁴⁹ After being incarcerated for seven months, Duncan’s charges were eventually dismissed by a judge.⁵⁰

⁴² See R. Stickney, Steven Luke & Andie Adams, *Judge Dismisses Gang Conspiracy Charges Against Rapper Tiny Doo*, NBC 7 SAN DIEGO (Mar. 16, 2015), <https://www.nbcsandiego.com/news/local/san-diego-tiny-doo-rapper-gang-conspiracy-case/1991951/> [<https://perma.cc/VN2X-2DK9>]; see also Kristina Davis, *Rapper “Tiny Doo” and College Student Arrested Under Controversial Gang Law Get Day in Court Against Police*, SAN DIEGO UNION-TRIBUNE (May 23, 2018), <https://www.sandiegouniontribune.com/news/courts/sd-me-tiny-doo-20180522-story.html> [<https://perma.cc/HL9U-S8D6>]; *Jailed for Rap Lyrics: Is Rapper Tiny Doo a Murderer or a Musician?* (2015), <https://www.youtube.com/watch?v=mHNgoZeQ1Sw>; Peter Holslin, *A Jailhouse Interview with Tiny Doo, the Rapper Facing a Life Sentence for Recording an Album*, VICE (Dec. 1, 2014), <https://www.vice.com/en/article/6959q7/tiny-doo-interview-jail-no-safety-faces-life-in-prison-for-recording-album> [<https://perma.cc/87UK-XJTP>]; *Brandon Duncan w/ Attorney Brian Watkins on CNN* (2015), https://www.youtube.com/watch?v=sp2CNA_88fA [<https://perma.cc/5CJ6-8X9C>].

⁴³ See sources cited *supra* note 42.

⁴⁴ See sources cited *supra* note 42.

⁴⁵ See sources cited *supra* note 42.

⁴⁶ See sources cited *supra* note 42.

⁴⁷ See sources cited *supra* note 42.

⁴⁸ See sources cited *supra* note 42.

⁴⁹ See *Brandon Duncan w/ Attorney Brian Watkins on CNN*, YOUTUBE (2015), https://www.youtube.com/watch?v=sp2CNA_88fA [<https://perma.cc/5CJ6-8X9C>].

⁵⁰ See sources cited *supra* note 42.

In 2012, Laz Tha Boy, whose real name is Deandre Mitchell, was indicted for his alleged role in two gang-related shootings.⁵¹ Despite conflicting eyewitness testimony and no physical evidence connecting him to the shooting, prosecutors introduced Mitchell's rap lyrics not only as evidence of criminal behavior but as evidence of gang association, even as they contained no specific details about the shooting.⁵² In their argument, prosecutors ignored the basic distinction between author and narrator, inviting the grand jury to conflate Deandre Mitchell with his music persona, Laz Tha Boy, and asking jurors to view his raps as literal statements or confessions.⁵³ Mitchell was indicted on all counts, although his case was dismissed after he spent nearly two years in jail.⁵⁴

Laz Tha Boy and Tiny Doo are well-established rappers, yet most artists involved in gang rap on trial cases are less well-known. In the case of *People v. Espinoza*, where the prosecutor used rap lyrics to help prove gang affiliation, Gilbert Espinoza was charged and tried for multiple counts, including three counts of attempted murder.⁵⁵ Each count included gang enhancements.⁵⁶ In his first trial, the jury was unable to reach a unanimous verdict, and a mistrial was declared.⁵⁷ Between his first and second trial, Espinoza's jail cell was searched, and authorities found rap lyrics about the "gangster lifestyle."⁵⁸ Per the appellate decision, the trial court ruled the lyrics were "'fair game' if Espinoza took the stand."⁵⁹ Espinoza claimed that "he is a 'rap artist' who writes about the 'gangster lifestyle'"—not an active gang member.⁶⁰ The prosecutor was allowed to present the lyrics to the jury under the

⁵¹ See Peter Hart, *Treating Rhymes as Crimes: The War on Hip-Hop*, NAT'L COAL. AGAINST CENSORSHIP (Apr. 23, 2015), <https://ncac.org/news/blog/treating-rhymes-as-crimes-the-war-on-hip-hop> [https://perma.cc/G57G-M94F]; see also *Killer or Artist? Why Rap is on Trial*, REASON.COM (Nov. 13, 2014), <https://reason.com/video/2014/11/13/killer-or-artist-why-rap-is-on-trial/> [https://perma.cc/EA5K-4RWG]; Charis E. Kubrin & Erik Nielson, *A New California Trend—Prosecuting Rap*, L.A. TIMES (2014), <https://www.latimes.com/opinion/la-xpm-2014-apr-07-la-oe-kubrin-and-nielson-rap-prosecution-20140408-story.html> [https://perma.cc/FLE6-FVZ8]; *Rap's Poetic License: Revoked*, E. BAY EXPRESS (Apr. 29, 2015), <https://eastbayexpress.com/raps-poetic-license-revoked-2-1/> [https://perma.cc/H3Y4-HHMR].

⁵² See sources cited *supra* note 51.

⁵³ See sources cited *supra* note 51.

⁵⁴ See sources cited *supra* note 51.

⁵⁵ See *People v. Espinoza*, No. B210956, 2010 WL 1509797, at *1, *11 (Cal. Ct. App. Apr. 16, 2010).

⁵⁶ See *id.* at *1.

⁵⁷ See *id.*

⁵⁸ *Id.* at *11.

⁵⁹ *Id.*

⁶⁰ *Id.*

ruling that it was “a question for the jury to decide whether or not what [Espinoza’s] doing is make believe [sic].”⁶¹ Espinoza was convicted on all counts in his second trial, with both gun and gang enhancements.⁶² He was sentenced to three concurrent fifty year-to-life sentences, each broken down as “life in state prison with a minimum parole eligibility date of 15 years, based on a true finding on the gang enhancement . . . plus a consecutive 25 years to life for the firearm enhancement . . . plus a consecutive 10 years for the gang enhancement.”⁶³

In some cases, a defendant’s gang associations are not in question, but whether he is still an active gang member—as opposed to a former gang member—is in question. In *People v. Corswell*, prosecutors utilized Paul Corswell’s binder containing roughly fifty pages of rap lyrics “to impeach [the] defendant’s claim that he was no longer involved in any gang-related activity.”⁶⁴ Corswell testified that he was a former gang member, having joined at the age of thirteen, but had since turned his life around, claiming he hadn’t been active in the gang since his release from prison for a robbery.⁶⁵ He further testified that at the time of his arrest he was living with his wife and three sons, was working as a film editor, and was in the process of having his gang-related tattoos removed or modified.⁶⁶ Corswell’s rap lyrics were enough to convince a jury that he was still actively participating in gang activity.⁶⁷ He was sentenced to fifty-five years to life for attempted murder, the sentence determined in large part by gang enhancements.⁶⁸

While gang enhancements incentivize prosecutors to include rap lyrics and videos at trial, rap evidence can be introduced absent enhancements. In *People v. Stone*, for example, prosecutors introduced Malachite Stone’s lyrics to show that he was a member of the Crips, even as no gang enhancements were sought.⁶⁹ The lyrics included the defendant’s rap persona, “Shady,” as well as the words “cuz” and “Crip smashing.”⁷⁰ At trial, the state called a police detective as a gang expert, who testified that the term “cuz”

⁶¹ *Id.*

⁶² *See id.* at *1.

⁶³ *Id.*

⁶⁴ *See People v. Corswell*, No. B244154, 2014 WL 3895644, at *6 (Cal. Ct. App. Aug. 11, 2014).

⁶⁵ *Id.* at *3.

⁶⁶ *See id.*

⁶⁷ *See id.* at *1 n.1.

⁶⁸ *See id.*

⁶⁹ *See People v. Stone*, No. C071315, 2014 WL 470406, at *1, *2 (Cal. Ct. App. Feb. 6, 2014).

⁷⁰ *See id.* at *2.

is “synonymous with being a Crip gang member,” as “the Bloods gang did not use that term.”⁷¹ While the defense countered that the term is a popular “part of hip[-]hop culture,” the court relied on Urban Dictionary—an online crowd-sourced site that defines slang language—to inform the matter.⁷² The court found that “[t]he first definition was: ‘cousin, friend, brotha, homie/homey, and wuddup cuz’” while the second was “a word Crips use for gang banging purposes.”⁷³ Based on this information, the court admitted the rap lyrics as gang evidence.⁷⁴ The appellate court disagreed with the trial court ruling, arguing that “potential prejudice of the gang evidence substantially outweighed its limited probative value. The trial court erred in admitting it.”⁷⁵ However, the appellate court also ruled that the error was harmless, affirming Stone’s conviction and sentence.⁷⁶ Stone was sentenced to forty-four years and eight months for two counts of robbery.⁷⁷

Appellate courts affirming convictions despite finding error with trial courts for the admission of evidence is not uncommon. In *People v. Edwards*, Michael Edwards, a juvenile at the time of his alleged crime, was charged with four counts, including murder, two counts of shooting at an inhabited dwelling, and assault with a firearm—each including a gang enhancement charge.⁷⁸ During trial, the prosecution used rap videos to help establish the existence of the Taliban gang. The gang expert, a police detective, “described the video as showing the Taliban’s territory, activities, gang signs, clothing, tattoos, and logos. Rap lyrics accompanying the video described threats of violence and shootings.”⁷⁹ While the Detective testified at length about the meaning of other Taliban-related rap songs, describing their lifestyle and criminal activities,

[o]n cross-examination, [Detective] admitted that defendant did not appear in the video, the rap songs, or any of the MySpace photos the prosecution presented. [Detective] also testified that, in all of the conversations he had with gang members over the years, none of them had ever mentioned defendant. Defendant had no gang-related tattoos, and [Detective] had never seen defendant throw a gang sign, either in person or in photos. [Detective] could not locate any gang “field identification cards” connected

⁷¹ *Id.*

⁷² *Id.* at *3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at *4.

⁷⁶ *See id.* at *6.

⁷⁷ *See id.* at *1.

⁷⁸ *See People v. Edwards*, 193 Cal.Rptr.3d 696, 712, 722 (Cal. Ct. App. 2011).

⁷⁹ *Id.* at 720.

with defendant. And he had never seen defendant making or standing near gang graffiti. [Detective] was not aware of any moniker connecting defendant to the Taliban, and he had never seen defendant, in person or in photos, wearing camouflage clothing.⁸⁰

Despite this, the jury found Mr. Edwards guilty of second degree murder and one count of shooting at an inhabited dwelling while hanging on the other two counts and “returned no findings on any of the enhancements.”⁸¹ Despite multiple errors in the trial court regarding the gang evidence testimony, the appellate court deemed the errors harmless, suggesting their “analysis would be different if the jury had returned a true finding on any of the gang enhancements.”⁸² This indicates that while the court believed the gang and rap evidence was prejudicial, it was not unduly so. Tried as an adult, Mr. Edwards was sentenced to twenty-two years to life.⁸³

One concerning pattern in the cases presented thus far is the use of a purported gang expert, typically someone in law enforcement, to testify on the meaning and significance of rap lyrics and videos absent qualification to do so. As our discussion in the following section reveals, an understanding of rap requires being educated on the genre’s complex history, conventions, and practices, especially as they relate to the rap-gang intersection. Yet almost uniformly, these “experts” treat rap lyrics as literal accounts of a defendant’s associations, feelings, intentions, or actions. In *People v. Renteria*,⁸⁴ for example, German Renteria was convicted of assault with a firearm and sentenced to sixteen years in prison, with ten of those years resulting from gang enhancements.⁸⁵ During his trial, the gang expert, a police officer, testified that Renteria’s rap lyrics “demonstrated his membership in [the gang], his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the [assault].”⁸⁶ Similarly, in *People v. Blacknell*,⁸⁷ the gang expert, a police officer, interpreted Joseph Blacknell’s lyrics in strictly literal terms, offering testimony that “[h]ead leaking’ refers to ‘an assault on somebody and their head is leaking fluids’” and that

⁸⁰ *Id.* at 721.

⁸¹ *Id.* at 712.

⁸² *Id.* at 747.

⁸³ *See id.* at 712.

⁸⁴ *See* *People v. Renteria*, No. B262367, 2016 WL 4440406, at *1 (Cal. Ct. App. Aug. 23, 2016).

⁸⁵ *Id.*

⁸⁶ *See id.* at *1–2, *6.

⁸⁷ *See* *People v. Blacknell*, No. A135721, 2018 WL 1905452, at *6 (Cal. Ct. App. Apr. 23, 2018).

“smacking shit” means committing an assault.”⁸⁸ As we discuss below, such a narrow interpretation by a non-rap expert can be problematic because non-rap experts often lack critical knowledge about rap music’s artistic conventions and complex and subversive use of language.⁸⁹

Some courts acknowledge the prejudicial effect of rap evidence in criminal trials. In *People v. Charles*, Roshawn Charles was initially convicted of criminal threats and assault, resulting in a sentence of nine years, six of which stemmed from gang enhancements.⁹⁰ At trial, the prosecution presented two rap videos from the Bloods on Point (“B.O.P.”) gang.⁹¹ The rap videos had no relation to the crimes being charged, and Mr. Charles did not appear in the videos or assist in their production.⁹² The appellate court ultimately ruled that the rap videos were unnecessarily cumulative to establishing the existence of the B.O.P. gang while being “unduly prejudicial relative to their probative value.”⁹³ The conviction was reversed—something that occurs in only a very small number of *gang affiliation through rap misrepresentation* cases.⁹⁴

The takeaway from this discussion is simple: rap lyrics and videos are too frequently and often erroneously introduced in criminal cases to prove gang affiliation. The consequences of this practice are potentially severe, including additions of indeterminate life sentences or special circumstances to justify sentences of life without parole and death penalty judgments in first degree murder charges for defendants. More broadly, this practice denies rap the status of art, raises critical First Amendment concerns, and increases the probability that aspiring rappers—most of whom are young men of color—may not receive a fair trial, contributing to racial and ethnic disparities so often documented in the criminal justice system.

How can we minimize these detrimental effects? We argue that what is needed is greater nuance and careful treatment of rap-related evidence in the courtroom, which includes recognizing

⁸⁸ *Id.* at *6, *8.

⁸⁹ See David Greenwald, *Rap Star or Gang Member?*, DAVIS VANGUARD (Oct. 21, 2010), <https://www.davisvanguard.org/2010/10/rap-star-or-gang-member/> [<https://perma.cc/7Q5M-MXP5>].

⁹⁰ See *People v. Charles*, No. B250051, 2015 WL 1951887, at *1, *6 (Cal. Ct. App. Apr. 30, 2015).

⁹¹ See *id.* at *12.

⁹² See *id.* at *4, *12–13.

⁹³ See *id.* at *13–14.

⁹⁴ See *id.* at *15.

rap's history, conventions, and practices more generally, and acknowledging rap's complicated and complex intersection with gangs more specifically. This will enable courtroom members, including judges and jurors, to make better informed evaluations regarding whether or not rap evidence, despite being prejudicial, is sufficiently probative to be included and if so, what relevance it may have to the case. The following section seeks to provide rap's necessary history and context.

III. THE RAP-GANG INTERSECTION: A CALL FOR GREATER NUANCE

A. Origins and History

At the core of our argument is a recognition of rap's history and origins. “[R]ap is part of a tradition of oral recitation that originated in Africa many centuries ago.”⁹⁵ While a music genre in its own right, rap has musical similarities with earlier American genres including blues, country, gospel, soul, rock and roll, and rock.⁹⁶ Like any music genre, rap has subgenres, including “gangsta rap”⁹⁷ and drill, which have been the focus of extensive criticism,⁹⁸ yet are misunderstood on many fronts. This misunderstanding contributes to the problematic treatment of rap evidence in criminal courts. Among the criticisms are that these subgenres are responsible for crime and violence in disadvantaged communities.⁹⁹ Yet rap's origin story, in fact, reveals it began as an alternative to violence that was, and still is, considered by many as a means to escape the dire conditions of disadvantaged communities—rather than exacerbate them.¹⁰⁰

Early on, rap redirected gang activity into positive social action, replacing gun battles with rap battles, the winner being the artist with the “dopest” verse. Rap battles brought violence off the

⁹⁵ Catherine Tabb Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. NEGRO EDUC. 245, 245–46 (1991).

⁹⁶ See Stoia et al., *supra* note 4, at 12.

⁹⁷ This term is increasingly recognized as pejorative and discriminatory, and may erroneously associate the defendant with gangs and criminality, skewing the perspective of judges and jurors. See JACK I. LERNER & CHARIS E. KUBRIN ET AL., *RAP ON TRIAL: A LEGAL GUIDE* 29 (2d ed. 2024).

⁹⁸ See Stoia et al., *supra* note 4, at 3; see also FORREST STUART, *BALLAD OF THE BULLET: GANGS, DRILL MUSIC, AND THE POWER OF ONLINE INFAMY* 2–3 (Princeton Univ. Press 2020).

⁹⁹ See Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 360–61 (2005); see also STUART, *supra* note 98, at 13.

¹⁰⁰ See EMMETT G. PRICE III, *HIP HOP CULTURE* 12–13 (ABC-CLIO, Inc., 2006).

streets, as did break dancing.¹⁰¹ Whereas gangs had long claimed territory through fighting, rap “posses” or “crews”—often comprised of former gang members—sought an alternative to violence. In this way, rap helped erode the violent gang culture that, during the 1980s, consumed places like the Bronx.¹⁰²

Another reality often overlooked by the public is that disadvantaged neighborhoods, which are home to many rappers, offer limited (legitimate) opportunities to gain status and success, making rapping an appealing enterprise. This was especially true in cities throughout the 1980s and 1990s where, for example, “[t]he limited economic opportunity in South Central, Los Angeles, left young, uneducated African American men with three choices: join a gang, sell drugs, or join the music industry.”¹⁰³ Even today, “for many [B]lack and Latino working-class youth who turned to hip-hop music, rapping, DJing, and producing are ways to avoid low-wage labor or, possibly, incarceration.”¹⁰⁴ Rappers routinely recognize this in their lyrics: “In the heart of the city you was born and bred / You grew up smart or you wound up dead / Things move fast, but you knew the scoop / And your savior was a rhyme and a beat and a rap group.”¹⁰⁵ In fact, artists devote entire songs to celebrating the fact that rap, and hip-hop more generally, “saved [their] life,” as does Lupe Fiasco:

One you never heard of, I
 Push it harder, further, the
 Grind might feel like murder, but
 Hip-Hop, you saved me
 One you never heard of, I
 Push it harder, further, the
 Grind might feel like murder, but
 Hip-Hop you saved my life¹⁰⁶

¹⁰¹ See Powell *supra* note 95, at 247.

¹⁰² See *id.* at 246–47.

¹⁰³ See David A. Canton, *The Political, Economic, Social, and Cultural Tensions in Gangsta Rap*, 34 REVS. AM. HIST. 244, 247 (2006).

¹⁰⁴ See Robin D. G. Kelley, *Kickin' Reality, Kickin' Ballistics: "Gangsta Rap" and Postindustrial Los Angeles*, in DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 117, 130 (William Eric Perkins ed., 1996).

¹⁰⁵ See 3RD BASS, *Product of the Environment*, on THE CACTUS ALBUM (Def Jam Recordings 1989).

¹⁰⁶ See LUPE FIASCO (FT. NIKKI JEAN), *Hip-Hop Saved My Life*, on LUPE FIASCO'S THE COOL (Atl. Recording Corp. 2008).

The irony, of course, is that given its roots in communities marred by pervasive crime and violence, rap has long been misconstrued as an extension of urban dysfunction rather than a response to it—an irony not lost on rappers. In an interview with rapper Marco Pave, he stated:

Growing up in a community where several people whom I knew and had been friends with were killed before my first year of high school was over, music was my saving grace. Now, it is my bread and butter. Although hip-hop gets a bad rap (no pun intended) for promoting violence, most times hip-hop artists are only aiming to shine the light on the negative situation that inner-city youth face. Through my art I speak about issues that affect people of color in a global community. The music isn't vulgar, the situations I am describing are vulgar, and I'm advocating to change them.¹⁰⁷

Rappers create music, not only to escape disadvantaged communities, but to navigate the challenges associated with neighborhood gangs, including finding ways to escape gang life. Geoff Harkness, author of *Chicago Hustle and Flow*, finds evidence of this in his ethnography of the symbiotic relationship between “gangsta rap” and street gangs in the city of Chicago, which has one of the largest underground music scenes in the nation.¹⁰⁸ Through six years of fieldwork, including in-depth interviews with 135 rappers, Harkness creates a window into the heart of an underground teeming with artists trying to launch careers in the music industry, hoping to be the next big name out of Chicago.¹⁰⁹ Among his key findings is that for some of his subjects, one “risk management strategy was to extract oneself from the gang lifestyle and use rap as a justification for doing so. This technique enabled rappers to remove themselves from gang-related violence and criminal activity without losing face.”¹¹⁰ And many did want out, for reasons not difficult to grasp. According to Gumbo, a rapper that Harkness interviewed:

It's only so long you can do illegal shit before you get caught up. I don't care how good you think you are. It's a numbers game. The more time that go by, the more dudes know about you, the more haters there are, somebody gonna say something, some shit gonna happen, you gonna get locked up. So real hustlers, real Gs, go legal at some point and get a legal hustle.¹¹¹

¹⁰⁷ Interview with Marco Pave, Rapper (on file with author).

¹⁰⁸ See GEOFF HARKNESS, *CHICAGO HUSTLE AND FLOW: GANGS, GANGSTA RAP, AND SOCIAL CLASS 4*, 179 (Univ. of Minn. Press, 2014).

¹⁰⁹ See *id.* at 16, 19.

¹¹⁰ See *id.* at 185.

¹¹¹ See *id.* at 177.

For many in Harkness's study, that legal hustle was pursuing a career as a rap artist.

Jooyoung Lee, author of *Blowin' Up: Rap Dreams in South Central*, also finds this in his ethnography of aspiring rappers in South Central, Los Angeles.¹¹² From Dr. Dre to Snoop Dogg to Ice Cube, some of rap's biggest stars made their careers in Los Angeles. According to Lee, there is a new generation of young, mostly Black, men creating rhymes and hoping to one day find themselves "blowin' up," or getting signed to a record label and becoming famous. Lee finds many of these aspiring rappers get their start in the legendary hip-hop open-mic workshop, Project Blowed. Researching the project and its participants, Lee is able to see hip-hop in the making.¹¹³ On the rap-gang intersection, similar to Harkness, Lee finds, "[Project Blowed] was where they learned how to rhyme and where they created friendships with other rappers. For many, it was a creative sanctuary away from gangs, a neutral zone where youth from different neighborhoods could get together around their shared love of hip-hop."¹¹⁴ These men worked hard to blow up as recording artists because, "[c]ompared to the unattractive options in front of them—as gang members or in the low-wage labor market—rapping and pursuing their creative talents seemed like a better way to spend their time."¹¹⁵ Lee shares the observations of aspiring rapper Choppa, who explains this in simple terms: "What hip[-]hop did for me was provide me an outlet where I could be the coolest motherfucker and didn't have nothing to do with that bullshit, being in a gang."¹¹⁶ As Lee explains, "Hip[-]hop was a world where Choppa could make a name for himself, a 'creative alternative' to gangs."¹¹⁷ In short, rap allowed aspiring artists in Lee's study to navigate gangs, and the violence associated with them, in their communities. "In this way, [rap] functions like sports and other extracurricular activities, providing young people with an alternative way to construct a 'cool' identity outside of gangs[:]"¹¹⁸

Hip[-]hop was a creative alternative for the men in this book. For some, it represented an alternative masculinity. Rappers could still be cool

¹¹² See JOOYOUNG LEE, *BLOWIN' UP: RAP DREAMS IN SOUTH CENTRAL*, at x (Univ. of Chi. Press, 2016).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 10.

¹¹⁶ *Id.* at 25.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 33.

and respected on the streets even if they weren't in gangs. Others were indirectly shielded from gangs through their participation in hip[-]hop, as family members, friends, and other mentors inspired their creative interests. Still others were directly exempted, getting a pass from gangs to develop their talents and pursue their rap dreams.¹¹⁹

Recent ethnographies, including of drill rappers in Chicago, similarly document aspiring artists' desire to blow up as they capitalize "on a burgeoning market for urban gang violence" and convert negative stereotypes "into a new form of capital that they exchanged for financial success."¹²⁰

B. Artistic Conventions and Practices

While acknowledging rap's origins and history is critical to any analysis of rap evidence in the courtroom, including in situations when such evidence is introduced to establish gang association, membership, participation, and motive, it is also necessary to understand the genre's artistic conventions and practices. Every music genre is defined by certain artistic conventions, including common themes. Rap is no exception. Charis Kubrin's content analysis of over 400 rap songs identifies the following common themes: respect, material wealth, misogyny, nihilism, and violence or the threat of violence.¹²¹ Most relevant to *gang affiliation through rap misrepresentation* cases, Kubrin finds that violent lyrics and imagery are pervasive in rap, documenting that nearly sixty-five percent of the songs sampled reference some aspect of violence, with many graphic in their violent depictions.¹²²

Why does rap favor these themes, especially violence and the threat of violence? What are rappers' motivations as they create music? In rap on trial cases, prosecutors maintain that rappers brag or confess to crimes in their lyrics. In gang rap on trial cases specifically, they claim that rappers use lyrics and videos to intimidate opposing gang members or issue threats. In fact, there are many reasons behind rap's thematic content, and they have little to do with the claims of prosecutors.

For many, rapping empowers men in powerless positions.¹²³ The rapper Murs explains, "When you're a young, black male in

¹¹⁹ *Id.* at 44.

¹²⁰ STUART, *supra* note 98, at 2, 6.

¹²¹ See Kubrin, *supra* note 99, at 360–61; see also Charis E. Kubrin, "I See Death Around the Corner": Nihilism in Rap Music, 48 SOCIO. PERSPS. 433, 434 (2005).

¹²² See sources cited *supra* note 121.

¹²³ See Ronald Weitzer & Charis E. Kubrin, *Misogyny in Rap Music: A Content Analysis of Prevalence and Meanings*, 12 MEN & MASCULINITIES 3, 5–6 (2009).

America, you feel powerless—you feel like you don't have a voice, you're disenfranchised—so when you get the microphone, you wanna just pump yourself up. I think that's where all the bravado comes from, where all the braggadocio comes from.”¹²⁴

Rapping is also a form of therapy or anger management. In NF's song “Therapy Session” he raps:

I am aware, it's aggressive
 I am not here for acceptance
 I don't know what you expected
 But what you expect when you walk in a therapy session, huh?
 . . .
 When I feel something, whether it's anger
 Um, it's a passion about something—or frustration
 Like, this is where I go
 This is—this is—that's the whole 'NF Real Music' thing, man
 This is real for me—I need this
 This is a therapy for me.¹²⁵

Rappers also view their artistic expression as a form of street journalism, “an alternative voice to mainstream journalists and social scientists.”¹²⁶ When rapper Ice Cube was with N.W.A., he explained, “We call ourselves underground street reporters. We just tell it how we see it, nothing more, nothing less.”¹²⁷ And “[w]hen hip[-]hop artist 50 Cent was asked about the violent content in his music . . . he responded by saying, ‘hip[-]hop's a reflection of the environment that we grew up in, it's the harsh realities that end up in the music.’”¹²⁸ Importantly, “[l]isteners know that these lyrics do not represent autobiographical accounts of the singers' lives. Rather, they reflect the general circumstances in the lives of their audience.”¹²⁹

Finally, violent lyrics and imagery are pervasive in rap because they help boost record sales.¹³⁰ As rap became excessively

¹²⁴ Stoia et al., *supra* note 4, at 343.

¹²⁵ NF, *Therapy Session*, on THERAPY SESSION (Capitol Christian Music Grp. 2016).

¹²⁶ KELLEY, *supra* note 104, at 121.

¹²⁷ *Id.*

¹²⁸ Desmond Upton Patton, Robert D. Eschmann & Dirk A. Butler, *Internet Banging: New Trends in Social Media, Gang Violence, Masculinity and Hip Hop*, 29 *COMPUTS. HUM. BEHAV.* A54, A58 (2013).

¹²⁹ Stoia et al., *supra* note 4, at 337.

¹³⁰ See BAKARI KITWANA, *THE RAP ON GANGSTA RAP* 23–24 (Third World Press 1994); see also Weitzer & Kubrin, *supra* note 123, at 7.

commercialized, record companies exaggerated violence as a marketing ploy.¹³¹ Nowhere is this more apparent than with “gangsta rap,” which “intentionally used sexually charged language to sell records and to create [a] unique style.”¹³² Nicholas Stoia, Kyle Adams, and Kevin Drakulich explain:

One of the early shifts was from the “righteous” to the “real” or from more politically oriented music to “cynical street tales.” The marketplace, guided by these actions of music industry executives, rewarded not only street tales of involvement in violence and crime but also authenticity . . . in which aspiring rappers represented themselves as authentic gangsters, even in the many cases where such claims were not true.¹³³

For example, Cliff Blodget, a (white) partner in Rap-A-Lot Records, encouraged the Geto Boys of Houston’s Fifth Ward to incorporate violent lyrics when he realized that “the consumer market wanted to hear bloody tales from the hood.”¹³⁴ In response, the Geto Boys referenced popular antiheroes of the period in their lyrics, including Jason Vorhees from the *Friday the 13th* movies and Chucky, the murdering child doll.¹³⁵

This dynamic raises questions about rap’s “authenticity,” a focal point in rap on trial cases, including gang cases. Prosecutors frequently make claims such as, “[w]e know the defendant believes in what the gang’s rules are because he says so in his rap lyrics”¹³⁶ and “that’s what he is. Gangster doing gangster things, doing Real N[***]a Shit. [The rap] [v]ideo tells it all.”¹³⁷ Yet the discussion above underscores why these claims are problematic, as does another rap convention: the use of stage names. Among rappers, it is critical to distinguish between person and persona, or artist and character.¹³⁸ Nearly all rappers utilize stage names that reflect larger-than-life characters, akin to actors like Al Pacino (Scarface) and Arnold

¹³¹ See Kitwana, *supra* note 130, at 24.

¹³² See Canton, *supra* note 103, at 250.

¹³³ See Stoia et al., *supra* note 4, at 342 (quoting DAN CHARNAS, *THE BIG PAYBACK: THE HISTORY OF THE BUSINESS OF HIP-HOP* 408 (New Am. Libr. 2011)).

¹³⁴ See Canton, *supra* note 103, at 250.

¹³⁵ *Id.*

¹³⁶ For a transcript of the prosecutor’s closing argument, see Transcript of Record at 2126, *People v. Espinoza*, No. YA066625 (Cal. Super. Ct. Feb. 15, 2007) (on file with author).

¹³⁷ For a transcript of the prosecutor’s closing argument, see Transcript of Record at 471, *People v. Taylor*, No. RIF1506402 (Cal. Super. Ct. filed Oct. 20, 2015) (on file with author).

¹³⁸ See Kubrin & Nielson, *supra* note 1, at 197.

Schwarzenegger (The Terminator).¹³⁹ The fictional characters portrayed in rap are often a far cry from the true personalities of the artists behind them, which is why it is dangerous to assume that a rapper's persona reflects the artist's true character. Conrad Tillard, "The Hip Hop Minister," captured this sentiment perfectly when he said, "Every [B]lack man who goes into the studio, he's always got two people in his head; him, in terms of who he really is, and the thug that he feels he has to project."¹⁴⁰ Indeed, some rappers fashion themselves as actors; when asked about a correlation between rapping and acting, Will Smith responded:

Oh absolutely. In rap music, you have to defend yourself. You know, rap music is really aggressive You'll get chewed up and spit out if you're not confident and if you're not strong and assertive And there's something in rappers' eyes, there's something that gets created in the eyes from having been able to create that defense through an offensive posture, and to be able to be in that space where you can sit in a room and feel confident and you don't care what nobody says, and you don't care how they come at you¹⁴¹

These points are relevant in gang rap on trial cases, where prosecutors suggest that lyrics and videos are to be taken literally, as autobiographical accounts of thoughts and behaviors. Yet those who understand rap's conventions recognize that "living like a gangsta did not mean that all those who followed the gangsta image were gang members"¹⁴² and "a singer's lyrics are a highly unreliable guide to his or her offstage behavior."¹⁴³ Ice Cube and Dr. Dre of N.W.A., for example,

were not gang members, nor were they ever in jail, but their first-person narratives convinced audiences that they were gang bangers. Similar to actors who portray gangsters in film, the majority of gangsta rappers were not gang members and some attended college: they were getting paid to talk about a life that they were extremely familiar with, but did not live.¹⁴⁴

Indeed, researchers routinely recognize that many of the pioneering Los Angeles gangsta rappers were not gang members,

¹³⁹ To name a few: Eminem or Slim Shady (Marshall Mathers); Jay-Z (Shawn Corey Carter); 50 Cent (Curtis James Jackson); Dr. Dre (Andre Young); Snoop Dogg (Calvin Broadus Jr.); Busta Rhymes (Trevor Smith Jr.); Childish Gambino (Donald Glover); Xzibit (Alvin Nathaniel Joiner). See Sarai Chinwag, *The Real Names of 108 Famous Rappers*, EXTRA CHILL (Dec. 3, 2023), <https://extrachill.com/rappers-real-names> [<https://perma.cc/KG83-3PCR>].

¹⁴⁰ See Stoia et al., *supra* note 4, at 331.

¹⁴¹ See *id.* at 334.

¹⁴² See Canton, *supra* note 103, at 252–53.

¹⁴³ See Stoia et al., *supra* note 4, at 339.

¹⁴⁴ See Canton, *supra* note 103, at 246–47.

or they had only peripheral associations with street gangs.¹⁴⁵ Most of these fledgling rappers, however, grew up in communities where gang activity was common, and they used this proximity to craft cinematic soundscapes steeped in gang minutiae: “the nuanced hand signs, vocabulary, and gestures, the special clothing and color-coding, and the territorial graffiti.”¹⁴⁶ Thus a “formula”¹⁴⁷ was born, whereby the genre’s pioneers appropriated, interpreted, packaged, and sold the hidden world of street gangs through what appeared to be insider knowledge. Indeed, “part of the significance of N.W.A. was that they realized that rebellious street norms could be exploited for economic gain,”¹⁴⁸ a practice that remains true today in the world of cyber banging.

C. Cyber Banging

The terms “cyber banging” and “internet banging” refer to online gang activity wherein gang-associated youth utilize social media and the internet to “broadcast their gang affiliation, brag about a recent fight or murder and communicate threats.”¹⁴⁹ While cyber banging is a concerning trend, scholars question its connection and translation to real-world violence.¹⁵⁰ Caylin Louis Moore and Forrest Stuart identify two competing theoretical frameworks on cyber banging: a parallelism thesis and a coevolution thesis.¹⁵¹ Scholars adhering to the parallelism thesis, which draws “primarily on self-report surveys, content analyses, and non-gang-involved parties to interpret the meanings”¹⁵² of online gang activity, argue that “the same gang violence mechanisms—intergroup conflict, reciprocity, and status-seeking—

¹⁴⁵ See EITHNE QUINN, NUTHIN’ BUT A “G” THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP 52–53 (2005); see generally JEFF CHANG, TOTAL CHAOS: THE ART AND AESTHETICS OF HIP-HOP (Columbia Univ. Press 2006) (undertaking an intensive exploration of hip-hop aesthetics in relation to identity and multiculturalism).

¹⁴⁶ QUINN, *supra* note 145, at 53.

¹⁴⁷ See DAN CHARNAS, THE BIG PAYBACK: THE HISTORY OF THE BUSINESS OF HIP-HOP 221 (New Am. Libr. 2011).

¹⁴⁸ Geoff Harkness, *Gangs and Gangsta Rap in Chicago: A Microscenes Perspective*, 41 POETICS 151, 155 (2013) (quoting Eric K. Watts, *An Exploration of Spectacular Consumption: Gangsta Rap as Cultural Commodity*, 48 COMM’N STUD. 42, 46 (1997)).

¹⁴⁹ Patton et al., *supra* note 128, at A55.

¹⁵⁰ See Caylin Louis Moore & Forrest Stuart, *Gang Research in the Twenty-First Century*, 5 ANN. REV. CRIMINOLOGY 299, 310–11 (2022).

¹⁵¹ *Id.*

¹⁵² *Id.* at 310.

on the urban street . . . unfold online.”¹⁵³ Gang members can utilize the internet to diss, threaten, antagonize, or call out rival gangs, creating new conflicts and reigniting old ones that then result in real-world violence.¹⁵⁴ These scholars tend to view online gang activity as a literal representation of real-life gang activity.¹⁵⁵

Coevolution scholars argue that more nuance is necessary to understand cyber banging, consistent with our position here. Research suggests that “social media do[es] not independently exacerbate offline violence and, in some cases, may even provide gang-associated individuals and surrounding communities with a historically new means for preventing, de-escalating, and avoiding violence.”¹⁵⁶ Specifically, claims that cyber banging is used for recruitment purposes¹⁵⁷ have not been supported in empirical work.¹⁵⁸ Instead, “the bulk of extant research suggests that the Internet is primarily used for self-promotion and general communication.”¹⁵⁹ Self-promotion is often done through drill music, an “emerging genre of hyperviolent, hyperlocal, DIY-style gansta rap that claims to document street life and violent criminality” through social media and other online platforms.¹⁶⁰

Stuart’s ethnography of the Corner Boys in Chicago reveals that popular understandings of drill music and the rappers that perform

¹⁵³ Desmond U. Patton et al., *Gang Violence on the Digital Street: Case Study of a South Side Chicago Gang Member’s Twitter Communication*, 19 NEW MEDIA & SOC’Y 1000, 1012 (2017) (citation omitted).

¹⁵⁴ See JEFFREY LANE, *THE DIGITAL STREET* 122–24 (2019); see also Richard K. Moule Jr., Scott H. Decker & David C. Pyrooz, *Technology and Conflict: Group Processes and Collective Violence in the Internet Era*, 68 CRIME L. & SOC. CHANGE 47, 50–51 (2017); Desmond U. Patton et al., *When Twitter Fingers Turn to Trigger Fingers: A Qualitative Study of Social Media-Related Gang Violence*, 1 INT’L J. BULLYING PREVENTION 205, 215 (2019).

¹⁵⁵ See Patton et al., *supra* note 128, at A58–59.

¹⁵⁶ Moore & Stuart, *supra* note 150, at 310 (citation omitted); see also LANE, *supra* note 154, at 3; Timothy McCuddy & Finn-Aage Esbensen, *The Role of Online Communication Among Gang and Non-Gang Youth*, in *GANGS IN THE ERA OF INTERNET AND SOCIAL MEDIA* 81 (Chris Melde & Frank Weerman eds., 2020); STUART, *supra* note 98, at 194–95; Marta-Marika Urbanik & Kevin D. Haggerty, *‘It’s Dangerous’: The Online World of Drug Dealers, Rappers and the Street Code*, 58 THE BRITISH J. OF CRIMINOLOGY, 1343, 1343–44 (2018).

¹⁵⁷ See FED. BUREAU OF INVESTIGATION, 2011 NATIONAL GANG THREAT ASSESSMENT 11 (2011), <https://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment> [<https://perma.cc/64ZF-HGGY>].

¹⁵⁸ See David Décary-Héту & Carlo Morselli, *Gang Presence in Social Network Sites*, 5 INT’L J. OF CYBER CRIMINOLOGY 876, 870–80 (2011); see also David C. Pyrooz, Scott H. Decker & Richard K. Moule Jr., *Criminal and Routine Activities in Online Settings: Gangs, Offenders, and the Internet*, 32 JUST. Q. 471, 476, 490 (2015); McCuddy & Esbensen, *supra* note 156.

¹⁵⁹ McCuddy & Esbensen, *supra* note 156, at 84.

¹⁶⁰ STUART, *supra* note 98, at 3.

it are misunderstood.¹⁶¹ Using an analogy from Bourdieu's *The Rules of Art*, Stuart compares drill rappers to nineteenth-century novelists from lower-class backgrounds who, in order to compete with their upper-class counterparts, "peddled exaggerated stereotypes and parodies that aroused the voyeuristic desires of consumers" and "effectively commodified their stigma, converting negative stereotypes . . . into a new form of capital that they exchanged for financial success."¹⁶² When it comes to drill music and online cyber banging, the internet does not necessarily mirror reality.¹⁶³ Drill rappers are often not involved in the violence or gangs that they rap about, despite their violent, gangster personas.¹⁶⁴ These rappers use their music for self-promotion to gain financial opportunities that would otherwise be unachievable.¹⁶⁵

In a world where views and "going viral" generate profit, drill artists have commodified portrayals of violence, gangs, and "the hood."¹⁶⁶ Portrayals of authenticity are required for success, even though most violent displays in drill are hyperbolic or entirely fabricated.¹⁶⁷ Drill rappers portray themselves as the biggest, the baddest, and the most violent by "demonstrating an expertise with guns, displaying unwavering support from fellow gang members, flaunting close connections to well-known homicide victims, and challenging rivals" in order to gain the clout necessary to become successful.¹⁶⁸ But Stuart's nuanced approach digs past the potential capital gains, and exposes a desire for recognition and dignity in a world where young men from the inner city are otherwise left without. His most poignant example comes from a conversation with a study participant, AJ. Stuart asks AJ why he continues to produce drill music even though he isn't actually involved in the violence or gang activity that he portrays in his music:

"Why am I doing this?" he asked, mostly rhetorically. "If I wasn't doing this, would *you* even be down here in the low-incomes? Would *you* even care that I exist?"

AJ's words hit me hard. My stomach tightened as I searched for an answer. I didn't have one. He had a point. There were hundreds of

¹⁶¹ *See id.*

¹⁶² *See* PIERRE BOURDIEU, *THE RULES OF ART: GENESIS AND STRUCTURE OF THE LITERARY FIELD* (1996).

¹⁶³ *See id.* at 6–7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 76.

¹⁶⁸ *Id.* at 6.

people living in his neighborhood, but I had sought him out *precisely* because he was creating violent online content. This was his goal, after all: to be noticed and seen by the world at large—by classmates, neighbors, out-of-town fans, and perhaps even curious professors—as a noteworthy and exceptional individual. Like the rest of the Corner Boys, AJ was looking for a way to stand out from the crowd, to distinguish himself from what Junior often referred to as “ordinary hood [n****s].”¹⁶⁹

The evolution of drill music is not dissimilar from its predecessor, “gangsta rap.” For this reason, assuming a strong nexus between rap, the internet, and offline gang behavior, is problematic. Whether it’s “gangsta rap,” drill, or trap rap, these subgenres blur the lines of reality with rappers claiming to “keep it real” as they promote their carefully crafted personas. Indeed, some artists purposefully sound “off beat” as they rap in an attempt to “keep it real” and be “authentic.” As one of Stuart’s participants responded after being asked about rerecording a beat that sounded a little off: “It’s *supposed* to sound like that. Like some real street shit. . . . This is hood shit. This is what *real* [n****a] music sound like. You ain’t know about this.”¹⁷⁰ Similar to how influencers portray a charmed but distorted picture of their lives, gaining followers and clout through exaggerated displays of wealth and leisure, rappers’ blending of reality and fiction is intentionally, creatively, and tactically done to gain more views or sell more records—commercialization at its highest.¹⁷¹

D. Commercialization

As just noted, rap involves the creation of a character who is aggressive, bold, and supremely confident. “Seizing on the often[-]violent tendencies of such characters, record companies, beginning in the mid[-]to[-]late 1990’s, helped to create and nurture the gangsta persona, a ‘highly mediated’ representation of what they perceived the listening public to want.”¹⁷² Similar dynamics occur with drill and related subgenres.¹⁷³

A core component of “the listening public” was, and still is, white audiences, who comprise a nontrivial percentage of rap’s consumer base.¹⁷⁴ According to Robin D.G. Kelley, for middle-class whites,

¹⁶⁹ *Id.* at 200.

¹⁷⁰ *Id.* at 66.

¹⁷¹ *See id.* at 2.

¹⁷² Stoia et al., *supra* note 4, at 335.

¹⁷³ *See* STUART, *supra* note 98, at 123.

¹⁷⁴ Stoia et al., *supra* note 4, at 335.

“gangsta rap unintentionally plays the same role as the blaxploitation films of the 1970s It attracts listeners for whom the ghetto is a place of adventure, unbridled violence, and erotic fantasy, or an imaginary alternative to suburban boredom.”¹⁷⁵ Raising the question of why “gangsta rap,” rather than socially conscious rap, appeals to suburban white teenagers, Quinn argues that the former advocated “youth rebellion, entrepreneurial mobility narratives, and masculinist identification. Much of gangsta’s appeal stemmed from shared, youthful, masculine pleasures rather than the ‘othering’ of racial difference,” which is less appealing to white listeners.¹⁷⁶ It is not surprising that “[w]hite male suburban teenagers are less likely to buy rap albums that discuss white male privilege, sexism, homophobia, or social inequality.”¹⁷⁷

This formula made gangsta rap incredibly profitable: “the more rappers were packaged as violent black criminals the bigger the white audience became.”¹⁷⁸ Knowing that white teenagers were the biggest consumers of rap, mega corporations limited the topics and issues rappers were allowed to sing about.¹⁷⁹ “Gangsta rap” that propagated condescending and disparaging stereotypes of African Americans and their values had a greater mass market appeal,¹⁸⁰ resulting in songs where African Americans are typically depicted as “a thug or gang member.”¹⁸¹ In this way, “gangsta rap” is often considered “a ploy by record companies to sell records to infatuated teenagers, a modern kind of minstrelsy.”¹⁸²

For their part, rappers embraced this formula for success, asserting that if most whites think the ghetto is all about drugs, violence, and gang warfare, then this is the story they will get. Jeanita Richardson and Kim Scott note that:

Rather than ignoring the social inequities that persisted in their neighborhoods, rappers became the ultimate capitalists (copying the dominant cultures strategies) by creating and owning a music form designed

¹⁷⁵ KELLEY, *supra* note 104, at 122.

¹⁷⁶ QUINN, *supra* note 145, at 85.

¹⁷⁷ Canton, *supra* note 103, at 249.

¹⁷⁸ HENRY A. RHODES, *The Evolution of Rap Music in the United States*, in 4 THE MINORITY ARTIST IN AMERICA (1993), <https://teachersinstitute.yale.edu/curriculum/units/files/93.04.04.pdf> [<https://perma.cc/43LP-VLYV>].

¹⁷⁹ See KITWANA, *supra* note 130, at 11, 69 n.7; see also TRICIA ROSE, THE HIP HOP WARS 155 (2008); Mtume ya Salaam, *The Aesthetics of Rap*, 29 AFR. AM. REV. 303, 312 (1995).

¹⁸⁰ See JEFFREY OGBONNA GREEN OGBAR, HIP-HOP REVOLUTION: THE CULTURE AND POLITICS OF RAP (2007); see also ROSE, *supra* note 179.

¹⁸¹ Jeffrey Lozon & Moshe Bensimon, *A Systematic Review on the Functions of Rap Among Gangs*, 61 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1243, 1249 (2017).

¹⁸² Stoia et al., *supra* note 4, at 334.

to expose inequities and social contradictions. In an economic sense, what rap and hip-hop artists have done, is apply the capitalistic skills and networks valued by society to catapult themselves into media moguls.¹⁸³

E. Linguistic and Communicative Practices

Rap's artistic conventions described above are rooted in the Black oral tradition of signifying and other communicative practices.¹⁸⁴ Signifying is a way of speaking that involves ritual insult (called "playing the dozens") and double entendre.¹⁸⁵ With signifying, words and phrases have meanings beyond their conventional practices, change over time, and should not be taken literally. Rap is also constructed around the exploitation and subversion of several tenets of language.¹⁸⁶ Rappers privilege figurative, not literal, language, and rely on artistic conventions such as simile, metaphor, and hyperbole in their music and imagery. For example, when Wu-Tang Clan raps, "[s]o stop, the life you save may be your motherfuckin' own / I'll hang your ass with this microphone,"¹⁸⁷ it evokes images of violence as a means to convey the evisceration—on the microphone—of rap opponents. As Stoia, Adams, and Drakulich underscore, "[a]lthough the lyrics may *describe* acts of violence, their sole function is to boast about the MC's rapping prowess versus his contemporaries."¹⁸⁸ According to Kelley:

When the imagery of crime and violence is not used metaphorically, exaggerated and invented boasts of criminal acts should be regarded as part of a larger set of signifying practices. . . . [T]hese masculinist narratives are essentially verbal duels over who is the "baddest motherfucker around." They are not meant as literal descriptions of violence and aggression, but connote the playful use of language itself.¹⁸⁹

¹⁸³ Jeanita W. Richardson & Kim A. Scott, *Rap Music and Its Violent Progeny: America's Culture of Violence in Context*, 71 J. NEGRO EDUC. 175, 184 (2002).

¹⁸⁴ See Geneva Smitherman, "The Chain Remain the Same": *Communicative Practices in the Hip Hop Nation*, 28 J. BLACK STUD. 3, 4 (1997).

¹⁸⁵ CAROL D. LEE, *Intervention Research Based on Current Views of Cognition and Learning*, in BLACK EDUC.: TRANSFORMATIVE RSCH. & ACTION AGENDA FOR NEW CENTURY 73, 83 (Joyce E. King ed., 2005); see also CHERYL L. KEYES, RAP MUSIC AND STREET CONSCIOUSNESS 131–39 (2004).

¹⁸⁶ See MARCYLIENA MORGAN, "Nuthin' but a G thang"; *Grammar and Language Ideology in Hip Hop Identity*, in SOCIOCULTURAL AND HIST. CONTEXTS OF AFR. AM. ENG. 187, 190 (Sonja L. Lanehart ed., 2001).

¹⁸⁷ WU-TANG CLAN, *Clan in da Front*, on ENTER THE WU-TANG (36 CHAMBERS) (Loud Records & RCA Records 1993).

¹⁸⁸ Stoia et al., *supra* note 4, at 346.

¹⁸⁹ Kelley, *supra* note 104, at 121.

This is certainly the case when it comes to rap lyrics that reference gangs and gang banging, as stated by Kelley:

Many of the violent lyrics are not intended literally. Rather, they are boasting raps in which the imagery of gang bangin' is used metaphorically to challenge competitors on the mic—an element common to all hard-core hip[-]hop. The mic becomes a Tech-9 or AK-47, imaginary drive-bys occur from the stage, flowing lyrics become hollow-point shells.¹⁹⁰

On the topic of creative language use, rappers like to invent new words as well as invert the meaning of others. Consider the word “sick.” “Sick” typically means ill or not well.¹⁹¹ Yet in rap culture, it has come to mean the exact opposite; if something is “sick” that means it is really great or amazing.¹⁹² Rappers often describe their lyrical talent as “sick” such as when, for example, Jay-Z raps, “For ‘96, the only MC with a flu / Yeah, I rhyme sick, I be what you’re tryin’ to do.”¹⁹³

At the same time, certain words or phrases may have multiple, even contradictory, meanings. That is, the very same word or phrase may mean different things in different songs, or may change meaning over time. Consider the word “ill.” In rap culture, if something is “ill,” it may be cool or awesome, such as when, for example, Jay-Z raps “On my back the flyest clothes, looking ill as shit.”¹⁹⁴ The related term “illin” however, can mean being uncool or unrelaxed, acting crazy or “wack,” or tripping or bugging as evidenced in Run-D.M.C.’s song, “You Be Illin’,” which describes examples of “wack” behavior such as ordering a Big Mac and french fries at a Kentucky Fried Chicken restaurant, calling out “touchdown!” at a basketball game, repelling a woman at a party with bad breath, and being oblivious to the fact a person is eating dog food for dinner.¹⁹⁵ In other words, at least part of the time while “ill” can mean “wack,” it can also mean the opposite of “wack.” The word “ill” even has other meanings, such as to hang out, relax, and have fun, as in the case of the Beastie Boys’ song “Time To Get Ill,” which they describe as “an exhortation to

¹⁹⁰ *Id.* at 121.

¹⁹¹ *Sick*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sick> [<https://perma.cc/Q2XV-2HZH>] (last visited Apr. 15, 2024).

¹⁹² *Id.*

¹⁹³ JAY-Z (FT. THE NOTORIOUS B.I.G.), *Brooklyn’s Finest*, on REASONABLE DOUBT (Roc-A-Fella Records & Priority Records 1996).

¹⁹⁴ JAY-Z (FT. ANGELA “MECCA” SCOTT), *Feelin’ It*, on REASONABLE DOUBT (Roc-A-Fella Records & Priority Records 1996).

¹⁹⁵ RUN-DMC, *You Be Illin’*, on RAISING HELL (Profile Records 1986).

abandon one's inhibitions."¹⁹⁶ In fact, confusion over the various meanings and uses of these very terms made headlines,¹⁹⁷ revealing the challenges associated with interpreting slang words and phrases in rap music culture.

The discussion in this section reveals a complex latticework of rap's motivations, formulas, and dynamics, which are essential for understanding the genre and interpreting its expressions. Problematically, these motivations, formulas, and dynamics are rarely acknowledged in the courtroom. Even worse, prosecutors can misrepresent rap evidence, maintaining the lyrics and videos reflect the "true personality"¹⁹⁸ of the defendant. The practice of *gang affiliation through rap misrepresentation* can bias juries, leading to unfair trials for defendants.

CONCLUSION

Rap evidence is routinely introduced by prosecutors in gang cases throughout the U.S. In many, the lyrics and videos constitute the central, or even sole, evidence used to show that a defendant is associated with a gang or involved in gang activity; show that a defendant is actively involved in gang activity if the recent activity is in question; claim the motive for a crime is gang-related or committed for the benefit of a gang; and, prove the existence of, or depict information about, a specific gang. A lack of understanding by courtroom actors of rap's history, normative conventions, and complexity when it comes to the rap-gang intersection, coupled with negative stereotypes about the genre, lead to incorrect assumptions and false claims about rap music and rappers, making it difficult for defendants in these cases to receive a fair trial.

Perhaps the most problematic claim is that rappers' lyrics and videos are literal statements that indicate participation in, or association with, gangs and the criminal life. Far too often, prosecutors insist that what one hears in rap lyrics or what one sees in rap videos is true, which is why they suggest that "[t]hrough photographs, letters, notes, *and even music lyrics*, prosecutors can

¹⁹⁶ Steven Hyden, *The Beastie Boys' Mike D Finally Gives an Authoritative Definition of "Illin" on Colbert*, THE A.V. CLUB (Jan. 13, 2012), <https://www.avclub.com/the-beastie-boys-mike-d-finally-gives-an-authoritative-1798229268> [<https://perma.cc/N2PX-6E7N>].

¹⁹⁷ See Deb Amlen, *The Puzzle Master 'Throws Down' on ILLIN'*, N.Y. TIMES: WORDPLAY (Jan. 10, 2012, 10:05 PM), <https://archive.nytimes.com/wordplay.blogs.nytimes.com/2012/01/10/the-puzzle-master-throws-down/> [<https://perma.cc/9ELU-UCQM>].

¹⁹⁸ ALAN JACKSON, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 16 (2004), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/prosecuting-gang-cases-what-local-prosecutors-need-know> [<https://perma.cc/C248-PVV3>].

invade and exploit the defendant's true personality.”¹⁹⁹ This advice, from the manual “Prosecuting Gang Cases: What Local Prosecutors Need to Know,” published by the Bureau of Justice Assistance, is put to practice in courtrooms across the country.

Erroneous claims about rap music, including by courtroom actors, are nothing new. Decades before “rap on trial” became part of the lexicon, scholars recognized this:

Too many critics have taken the easy way out by reading rap lyrics literally rather than researching actual social relations among young people, in all of their diversity and complexity. And there is no reason in the world to believe that any music constitutes a mirror of social relations that can be generalized for entire groups of people.²⁰⁰

Twenty years later, scholars continue to find that “[C]ourts tend to incorrectly assume that no specialized knowledge is required to interpret lyrics and that lyrics should be interpreted *literally* as reflecting accurate, truthful, and self-referential narratives.”²⁰¹ This is certainly apparent in gang cases where rap evidence occupies a central role.

Yet, as we explained in the previous section, this claim—and related others—is problematic when one considers rap's long history and complex genre conventions. To sum up our argument:

Understanding that (1) boasts about one's strength coupled with metaphorical threats against one's enemies have been a defining feature of rap lyrics since the genre's inception and (2) depictions of violence in said lyrics are metaphorical both in origins and in practice, helps both to contextualize the lyrics and to understand the misguidedness of criminal proceedings in which they are presented as evidence.²⁰²

The take-away is clear: rap evidence offers low probative value in gang enhancement cases.

At the same time, there is growing evidence that including rap lyrics and videos as evidence in criminal cases is likely to have a high prejudicial impact. Findings from experimental studies reveal rap's bias. In their study of rap music stereotypes, for example, Travis Dixon and Daniel Linz presented respondents with sexually explicit rap lyrics or sexually explicit non-rap lyrics,

¹⁹⁹ *Id.* (emphasis added).

²⁰⁰ Kelley, *supra* note 104, at 142.

²⁰¹ Stoa et al., *supra* note 4, at 331.

²⁰² *Id.* at 352.

both of which were viewed as equally explicit in a pre-test.²⁰³ They found that the sexually explicit music was considered more “patently offensive” and less artistic when it was labeled as “rap” compared to when it was labeled as “non-rap,” revealing that similar lyrics are evaluated differently depending on the music genre with which they are associated.²⁰⁴

In another experimental study, Carrie Fried examined whether stereotypes about rap music affected how violent lyrics were evaluated.²⁰⁵ Participants read a set of violent lyrics from Kingston Trio’s 1960 folk song, “Bad Man’s Blunder,” and were randomly assigned to be told that they came either from a rap or a country song. After reading the lyrics, participants evaluated them along different dimensions, including the offensiveness of the song, the threatening nature of the song, the need for regulation for the song, and whether the song would incite violence. Fried found that participants were more likely to deem the lyrics threatening and offensive when labeled as “rap” compared to when labeled as “country.” She concluded that “[t]he same lyrical passage that is acceptable as a country song is dangerous and offensive when identified as a rap song.”²⁰⁶

Twenty years later, Adam Dunbar, Charis Kubrin, and Nicholas Scurich replicated and extended this study by first testing whether violent lyrics labeled as “rap” are perceived as more threatening, dangerous, and in need of regulation compared to identical lyrics labeled as “country,” and second by testing whether violent rap lyrics are perceived as more literal or autobiographical compared to identical lyrics labeled as country, in line with claims by prosecutors.²⁰⁷ They found that participants labeled the exact same lyrics as more offensive, in greater need of regulation, and more literal/autobiographical when characterized as rap compared to country, consistent with Fried’s 1999 study.²⁰⁸ In a follow-up study, Dunbar and Kubrin shifted the focus from rap lyrics to rap artists in an attempt to answer the question: Are those who write violent lyrics evaluated more negatively when the

²⁰³ See Travis L. Dixon & Daniel G. Linz, *Obscenity Law and Sexually Explicit Rap Music: Understanding the Effects of Sex, Attitudes, and Beliefs*, 25 J. APPLIED COMMUN. RSCH. 217, 226, 229 (1997).

²⁰⁴ *Id.* at 230.

²⁰⁵ See generally Fried, *supra* note 3.

²⁰⁶ *Id.* at 715–16.

²⁰⁷ See Dunbar et al., *supra* note 3, at 281, 283.

²⁰⁸ *Id.* at 1,

music is characterized as rap compared to other music genres?²⁰⁹ Comparing rap to both country and heavy metal, they found that participants who were told a set of violent lyrics were from a rap song were more likely to assume the songwriter is a member of a gang, is involved in criminal activity, and has a criminal record.²¹⁰

In an experiment that examines rap stereotypes in the context of criminal trials, Stuart Fischhoff explored the biasing effects of “gangsta rap” lyrics on individuals’ perceptions of a defendant’s personality.²¹¹ He presented subjects with biographical information about a hypothetical eighteen-year-old African American man (Offord Rollins, an actual defendant in a murder case), but only some were shown violent, sexually explicit rap lyrics that he had written.²¹² Participants were then asked to judge the young man’s personality and character, including whether they believed he was honest, selfish, sexually aggressive, and capable of murder.²¹³ Fischhoff found that the “results were dramatic in their demonstration that participants viewing violent, misogynist rap lyric samples judged the target male far more negatively than when he was not associated with such lyrics.”²¹⁴ Results also showed that the writing of such rap lyrics was more damning in terms of adjudged personality characteristics than was the fact of being charged with murder.²¹⁵ Stated alternatively, exposure to the rap lyrics evoked a negative reaction in participants that was more intense than the reaction to being told that the young man was on trial for murder.²¹⁶

Finally, in another set of experiments, Dunbar examined how rap lyrics are evaluated when presented in a trial context, and determined whether and how individuals change their evaluations of the lyrics to support their verdict.²¹⁷ In the study, participants were tasked with evaluating rap lyric evidence, both independently and in the context of a trial.²¹⁸ They were then tasked with rendering a

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See Fischhoff, *supra* note 3, at 798.

²¹² *Id.* at 798–99.

²¹³ *Id.*

²¹⁴ *Id.* at 800.

²¹⁵ *Id.* at 800–03.

²¹⁶ See *id.* at 803.

²¹⁷ See Adam Dunbar, *Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases*, 10 RACE & JUST. 320 (2020).

²¹⁸ *Id.*

verdict in the case.²¹⁹ Dunbar found that first, participants constructed a narrative to make sense of multiple pieces of evidence and that rap lyrics were viewed as interdependent with other evidence.²²⁰ Second, he found that participants' evaluations of the lyrics shifted based on their verdict; participants who thought the defendant was guilty were more likely to view the lyrics as an "incriminating confession"²²¹ when they were presented in conjunction with other trial evidence compared to when the lyrics were the sole piece of evidence in a police investigation.²²² And third, Dunbar found that "evaluations of rap lyrics shifted more to support guilty verdicts than verdicts of not guilty."²²³

Our conclusion is that rap evidence in gang cases offers low probative value yet is highly prejudicial—a worrisome combination. Moreover, the potentially error-prone and prejudicial identification of gang members, as described at the outset of this Article, create a cumulative detrimental effect. In light of this, we offer recommendations moving forward.

First, rap evidence should be used sparingly in gang cases, if at all. Direct evidence, including physical and forensic evidence, which has higher probative value and lower prejudicial impact, is preferred. This recommendation is consistent with AB 2799, the Decriminalization of Artistic Expression Act, recently signed into California law.²²⁴ Noting "a substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence," AB 2799 requires "a court, in a criminal proceeding where a party seeks to admit as evidence a form of creative expression, to consider specified factors when balancing the probative value of that evidence against the substantial danger of undue prejudice."²²⁵ The Act establishes the presumption that creative expression such as rap (but also music more generally, dance, performance art, visual art, poetry, literature, film, and other forms of expression) is not probative for its literal truth or as truthful narrative unless that expression meets specified conditions.²²⁶

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 333.

²²² *Id.*

²²³ *Id.*

²²⁴ A.B. 2799, 2021-2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

²²⁵ *Id.*

²²⁶ *Id.*

Second, if rap evidence is introduced in gang cases, defense attorneys should be prepared to challenge its introduction in pre-trial motions, making arguments along the lines advanced in this Article.

Third, if judges allow rap evidence despite such challenges, it is critical to include rap music expert witnesses, especially those well-versed in the genre's conventions and complexities. These experts can challenge erroneous claims, including by gang experts insufficiently knowledgeable about rap music, and provide necessary context and nuance in which to evaluate the rap evidence at hand. Of course, gang experts, especially members of law enforcement, should not be testifying as to the interpretation of rap lyrics to begin with. Practical recommendations along these lines are offered in *Rap on Trial: A Legal Guide*.²²⁷

Finally, in the courts—and beyond—we must stop denying rap the status of art, which is effectively what happens when lyrics and videos are treated as autobiographical confessions of illegal behavior, or as “evidence of a defendant’s knowledge, motive, or identity with respect to an alleged crime.”²²⁸ As Mukasa Mubirumusoke reminds us, “within the critical literature no one contends that the events and crimes described in these lyrics *actually* take place or intimates that they should be used in a court of law. Rap, at the end of the day, is a form of art.”²²⁹

²²⁷ See LERNER & KUBRIN, *supra* note 97.

²²⁸ Kubrin & Nielson *supra* note 1, at 186.

²²⁹ Mukasa Mubirumusoke, *Rapping Honestly: NaS, Nietzsche, and the Moral Prejudices of Truth*, 30 J. SPECULATIVE PHIL. 175, 191 (2016).

Rap on Trial: A Brief History

Jack Lerner*

ABSTRACT

In recent years, the prosecutorial tactic, often called “Rap on Trial”—in which rap lyrics and videos associated with a defendant are used as evidence of criminal activity—has exploded into national prominence. The widely-followed prosecution of Young Thug and his labelmates, along with other high-profile rappers, has generated intense interest in the issue, but even before the Young Thug indictment, legislators in California, Washington D.C., and other states had introduced legislation to curb the practice. The Rap on Trial tactic has been around since at least 1991; hundreds of courts have issued judicial opinions permitting the use of rap evidence, despite a steady stream of peer-reviewed empirical studies demonstrating that the tactic introduces a substantial risk of unfair prejudice. In this Article, the author reflects on his work on this issue, identifies important moments in the history of the tactic, explores why it has become more well-known in recent years, and what this new prominence suggests about the state of the Rap on Trial tactic. The author concludes by offering suggestions for policymakers and courts.

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INTRODUCTION

In 2014, I came across an article in the *San Diego Union-Tribune* about a man who was being prosecuted under California's controversial street gang conspiracy law. No criminal acts were alleged against Brandon Duncan, who raps as "Tiny Doo," but prosecutors were using his rap lyrics—and only his lyrics—to tie him to a long list of alleged felonies.¹ The California Street Terrorism Enforcement and Prevention Act ("STEP Act") applies if the defendant "promotes, furthers, assists, or benefits" from criminal conduct.² The prosecution argued that, because Mr. Duncan gained a reputational benefit in the form of street credibility, he could be prosecuted for a slew of crimes that other people had committed.³

I was outraged. This prosecution was a clear violation of Mr. Duncan's right to free speech; its use rested on the dismissive assumption that rap music is not art but instead a literal confession; it threatened to introduce inflammatory language about violence and criminality that could prejudice the jury; it sought to leverage decades of negative media treatment and

¹ See Kristina Davis, *Dozens Protest Gang Conspiracy Cases*, SAN DIEGO UNION-TRIB. (Dec. 4, 2014, 3:32 PM), <https://www.sandiegouniontribune.com/sdut-protest-gang-conspiracy-case-duncan-tiny-doo-2014dec04-story.html> [<https://perma.cc/C9XK-LMMX>]; see also Memorandum of Points and Authorities of Amicus Curiae in Support of Defendant Brandon Duncan's Motion to Set Aside Information Pursuant to Penal Code § 995, *People v. Duncan* (No. SCD256609) (Cal. Sup. Ct. Feb. 27, 2015), at 1 ("The charges boil down to prosecuting Mr. Duncan because of the content of his speech. That is a clear violation of the First Amendment and the California Constitution, both of which protect speech about crime and violence, even if the speaker is recounting or lionizing criminal acts.").

² CAL. PENAL CODE § 182.5 (West 2024).

³ See Memorandum of Points and Authorities of Amicus Curiae in Support of Defendant Brandon Duncan's Motion to Set Aside Information Pursuant to Penal Code § 995, *supra* note 1, at 22. Duncan spent several months in detention and was later awarded half of a \$1.475 million settlement with the City of San Diego. *Tiny Doo, Aaron Harvey React to Their \$1.5M Settlement After Wrongful Arrest*, KPBS (Feb. 11, 2020, 10:55 AM), <https://www.kpbs.org/news/2020/feb/11/tiny-doo-another-man-wrongfully-jailed-will-split-/> [<https://www.perma.cc/E7X6-3FYG>].

preconceptions about rap music as a genre; it was an attempt to use creative expression to prop up a case that otherwise would have been dead on arrival—and, ultimately, I felt, this was an attempt to punish Mr. Duncan just for being a rapper.

I was well aware that police have been targeting rappers via surveillance, harassment, and selective prosecution since the 1980s.⁴ I vividly remembered following, as a young fan, the prosecution of 2 Live Crew for obscenity,⁵ Snoop Dogg's trial and acquittal for murder,⁶ the backlash against Ice-T's song "Cop Killer,"⁷ and of course, the legendary controversy around N.W.A.'s hit "F**K Tha Police."⁸ The targeting of rap by police is just the latest chapter of a long history in which law enforcement have harassed, intimidated, and suppressed Black musicians, a story that dates back well over a century.⁹ And because Black and Latino communities are notoriously over-policed,¹⁰ rappers are more frequently caught up in the criminal justice system. Though I knew of this history, I was not aware at the time that prosecutors were bringing rap lyrics and videos into the courtroom and using them as evidence of criminal activity.

This prosecutorial tactic, often called "Rap on Trial,"¹¹ dates back at least to 1991, is widely known throughout the criminal defense bar, and can even be found in prosecutors' training materials.¹² Rap music is sometimes the basis for true threats¹³ or even obscenity prosecutions, and is used in sentencing and parole determinations, but its most common use by far is as evidence

⁴ For a useful overview of the "long tradition of antagonism between the legal establishment and hip-hop culture," see Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185 (2014).

⁵ *Skywalker Recs., Inc. v. Navarro*, 739 F. Supp 578, 596 (S.D. Fla. 1990), *rev'd sub nom.* *Luke Recs., Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). In 1991, at a small 2 Live Crew performance in suburban New Orleans, I counted 35 policemen outside the venue—including several mounted police.

⁶ See Kim Bellware, *California Makes It Harder to Use Lyrics as Evidence Against Rappers*, WASHINGTON POST (Oct. 2, 2022, 9:00 AM), <https://www.washingtonpost.com/life-style/2022/10/02/california-rap-lyrics-law/> [<https://www.perma.cc/2K88-SWPZ>].

⁷ BODY COUNT, COP KILLER (Sire Records 1992).

⁸ N.W.A., FUCK THA POLICE (Ruthless Records 1988).

⁹ See Harmony Holiday, *A Brief History of the Policing of Black Music*, LITERARY HUB (June 19, 2020), <https://lithub.com/a-brief-history-of-the-policing-of-black-music/> [<https://www.perma.cc/G6BD-K53A>] ("For as long as Black music has been popular . . . it has also been criminalized by white police at all levels of law enforcement.").

¹⁰ See generally Aaron Chalfin et al., *Police Force Size and Civilian Race*, 4 AMERICAN ECON. REV.: INSIGHTS 139, 140 (June 2022) (reporting race-specific effects of larger police forces in the United States).

¹¹ See Kubrin & Nielson, *supra* note 4.

¹² See *infra* Part III.

¹³ See *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018).

supporting criminal charges. Prosecutors justify the use of rap lyrics by arguing that they serve as literal confessions of illegal actions, are indications of motive, intent, or knowledge related to the alleged crime, or demonstrate membership in a criminal gang. In truth, they are used primarily to circumvent rules against character or propensity evidence and to leverage racial bias and preconceived notions about rap music in order to strengthen the prosecutor's case. It is noteworthy that this practice is virtually exclusive to the rap genre, despite the fact that American culture is filled with themes of violence or criminality, from country music to mob films.

As I read more, I learned that a growing body of experimental studies show that people often hold negative stereotypes about rap music and its performers, who are predominantly young men of color. These studies strongly suggest that as soon as a lyric is identified as rap, juries will judge the lyric as more literal, autobiographical, offensive, and violent as compared to when they are labeled with other genres like "country" or "heavy metal."¹⁴ Yet as I discuss in this Article, these studies are not sufficiently considered by courts assessing whether to admit rap lyrics.

As it happened, my University of California Irvine colleague, Dr. Charis Kubrin, is one of the nation's leading researchers on this issue. When we met in 2017, she had been studying rap music from a sociological perspective for over a decade,¹⁵ had just co-authored an important experimental study on rap lyrics,¹⁶ and been an outspoken critic of Rap on Trial for several years.¹⁷ Dr. Kubrin began hearing regularly from defense attorneys seeking help fighting the introduction of rap lyrics as evidence. Often, they

¹⁴ See Adam Dunbar et al., *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280, 281, 288 (2016).

¹⁵ See Charis E. Kubrin, "I See Death Around the Corner": Nihilism in Rap Music, 48 SOCIO. PERSP. 433, 433–59 (2005); Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 360–78 (2005).

¹⁶ See Dunbar et al., *supra* note 14, at 280–92.

¹⁷ A 2014 TEDx Talk by Dr. Kubrin entitled "The Threatening Nature of...Rap Music?" has been viewed over 300,000 times on YouTube. See Charis E. Kubrin, *The Threatening Nature of...Rap Music?*, YOUTUBE (Oct. 23, 2014), <https://www.youtube.com/watch?v=cjTihRtFJbU>. See also Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, THE N.Y. TIMES (Jan. 13, 2014), <https://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html> [<https://perma.cc/U7AF-VEC2>]; Charis E. Kubrin & Erik Nielson, *Op-Ed: A New California Trend-Prosecuting Rap*, L.A. TIMES (Apr. 7, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-kubrin-and-nielson-rap-prosecution-20140408-story.html#axzz2yL6IsZgC> [<https://perma.cc/7ERT-2RN9>]; Charis E. Kubrin, *Op-Ed: A Potential Censorship or Criminalization of Rap Music*, THE N.Y. TIMES (Dec. 4, 2014), <https://www.nytimes.com/roomfordebate/2014/12/03/should-facebook-do-more-to-monitor-violent-expressions/a-potential-censorship-or-criminalization-of-rap-music> [<https://perma.cc/3XSC-WVTW>].

had been blindsided just before trial, or they simply did not know much about rap music with its localized variations, unique lingo, and artistic conventions. Nor were they always familiar with the case law, First Amendment arguments, voir dire tactics, or practical strategies that had been used before. So, we decided to team up and together with a group of dedicated law students in the UCI Intellectual Property, Arts, and Technology Clinic at the UC Irvine School of Law, we set out to create a legal guide that would help level the field in the battle over the use of rap lyrics in the courtroom.

Over the next three years, we read and catalogued hundreds of cases involving rap lyrics, pored over social science studies analyzing the impact of rap music, and educated ourselves about artistic practices within rap—such as braggadocio, hypermasculinity, and the convention of “keepin’ it real.” Most importantly, we spoke with many defense attorneys who had dealt with rap evidence in the courtroom, and learned that even in places like rural Missouri, prosecutors seek to use rap lyrics and videos whenever they can.

In June 2021, we launched *Rap on Trial: A Legal Guide* (hereinafter referred to as the “Guide”), a comprehensive resource designed to help attorneys at every stage of a criminal case—from initial discovery to pre-trial motions, jury selection, and trial.¹⁸ We knew from the outset it was necessary to do more than walk through the legal arguments for objecting to the admissibility of lyrics. Lawyers often need to educate judges and juries about rap music, and judges also need to know about the experimental research on rap and bias, so we included a substantial discussion of both the research and the themes and conventions in rap music. And based on our conversations with practitioners, we included strategic advice, including a stage-by-stage “Roadmap to Challenging Rap on Trial.”¹⁹ We also created a Brief Bank and Case Compendium as companions to the Guide.²⁰

¹⁸ See JACK I. LERNER & CHARIS KUBRIN, *RAP ON TRIAL: A LEGAL GUIDE* 1 (1st ed. 2021); see also *UC Irvine Law, Criminology Experts Release Second Edition of Rap on Trial: A Legal Guide*, UCI NEWS, (Jan 23, 2024), <https://news.uci.edu/2024/01/23/uc-irvine-law-criminology-experts-release-second-edition-of-rap-on-trial-a-legal-guide/> [https://perma.cc/GQU2-FEKZ].

¹⁹ See sources cited *supra* note 18.

²⁰ See *Rap on Trial Brief Bank*, UCI IP, Arts & Tech Clinic, <https://ipat.law.uci.edu/rap-on-trial-brief-bank/> [https://perma.cc/J2SK-ZALX] (last visited Apr. 11, 2024).

Following the publication of our Guide, Dr. Kubrin, my students, and I presented educational workshops to hundreds of attorneys across the country, talked with dozens of reporters about the issue, and provided guidance to policymakers on legislation that would place important guardrails on the practice. Given the changing landscape of this issue, we published the Guide's Second Edition not too long ago.²¹ This new edition includes discussions of the California Racial Justice Act, implicit bias, negative polling and hostile media treatment of rap, the surprisingly common practice of ghostwriting, the declining usefulness of the term "gangsta rap," and, of course, new legislation. Throughout it all, the most gratifying moments came when we were contacted by defense attorneys who found our Guide particularly useful in cases they were involved in. In fact, attorneys even used a rough pre-publication draft of the Guide to successfully limit the use of rap lyrics in a federal case involving firearms and other charges.²²

Since we began working on the Guide, the issue of Rap on Trial has become even more prominent. By the time the second edition of the Guide was published in January 2024, California and Louisiana had passed new legislation placing guardrails on the use of rap lyrics in criminal trials,²³ and three states had considered legislation as well. Between the inception of the project and the second edition, fellow scholars wrote a book and numerous academic articles about Rap on Trial; two documentaries and a podcast were produced about the practice; and a nationwide movement began to advocate for change. In April 2022, the issue exploded into national prominence like never before when prosecutors in Atlanta, Georgia, arrested two of the most famous rappers in the world, Young Thug and Gunna, using the state's Racketeer Influenced and Corrupt Organizations ("RICO") Act. The indictment, just like Brandon Duncan's in San Diego, uses Young Thug's rap lyrics to tie him to a range of crimes other people committed.

In this Article, I discuss some of the most important moments in the history of this prosecutorial tactic, beginning with the first known judicial opinion addressing the admissibility of rap

²¹ *UC Irvine Law, Criminology Experts Release Second Edition of Rap on Trial: A Legal Guide*, UCI NEWS, (Jan 23, 2024), <https://news.uci.edu/2024/01/23/uc-irvine-law-criminology-experts-release-second-edition-of-rap-on-trial-a-legal-guide/> [https://perma.cc/GQU2-FEKZ].

²² See *United States v. Stephenson*, 550 F. Supp. 3d 1246, 1255 (M.D. Fla. 2021) (relying on the Guide to exclude three YouTube music videos from evidence).

²³ See CAL. EVID. CODE § 352.2 (West 2022).

evidence and concluding with the recent movement. This account will shed light on today's debates about the role of racial bias in the criminal justice system; show the continuing impact of harmful judicial decisions from decades ago; and inform ongoing conversations about what legal reforms are needed.²⁴

I. THE EARLY CASES

A. *United States v. Foster*

The first written judicial opinion on the use of rap lyrics in criminal trials is widely understood to be *United States v. Foster*.²⁵ In that case, the United States Court of Appeals for the Seventh Circuit held that it was not an error for the prosecution to introduce lines of verse found in a notebook by the defendant. Derek Foster was questioned, searched, and arrested at Chicago's Union Station when he was observed with two heavy, unwieldy suitcases, which turned out to contain cocaine and PCP. At trial, the only disputed issue had been whether Foster knew he was transporting controlled substances.²⁶ The prosecution successfully introduced a two-line "verse" found in a notebook in Foster's possession, which Foster challenged on appeal:

Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve
all over town.

Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars
than your average bussiness [sic] man.²⁷

These lines did not relate to the actual charges in the case. Foster was accused of transporting drugs, while the verse discussed selling or dealing drugs. Foster argued that his verse was art, and fictional, written for eventual incorporation into a rap song. The court compared Foster's argument to *State v. Hanson*, a 1987 decision by the Washington Court of Appeals in which a man was accused of shooting a 7-11 clerk in the stomach. In *Hanson*,

²⁴ This account does not address the history of rap music's conflict with the legal system, which is notoriously long, fraught with injustice, and very well covered in other works. Nor do I provide a full discussion of the broader cultural context involving decades' worth of negative media coverage and public opinion polling showing broad hostility to rap. For such a discussion, see JACK I. LERNER & CHARIS KUBRIN, RAP ON TRIAL LEGAL GUIDE 14–16, 30–43 (2d ed. 2024). I also do not discuss prosecutions of rap lyrics as true threat or for obscenity; this Article concerns cases about the use of rap lyrics or videos as evidence to prove a crime or support aggravating circumstances such as gang enhancements. For a brief discussion of true threats, see *id.* at 96–99.

²⁵ See *United States v. Foster*, 939 F.2d 445, 455–56 (7th Cir. 1991); see also ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 14–15 (The New Press ed., 2019) (discussing *Foster* and its importance).

²⁶ See *Foster*, 939 F.2d at 449.

²⁷ *Id.*

the prosecutor questioned the defendant about “fiction he had written which contained some incidents of violence.”²⁸ The Washington court rejected the use of these fictional writings out of hand: “any value” of the writings “would be overwhelmed by the danger of unfair prejudice.”²⁹ Besides, held the court, “[w]ithout some further foundation, the defendant’s writings were simply not probative. A writer of crime fiction, for example, can hardly be said to have displayed criminal propensities through works he or she has authored.”³⁰

The panel in *Foster* took a different tack, holding that Federal Rule of Evidence 404(b) permitted the verse. Rule 404(b) prohibits evidence to be used “to prove a person’s bad character or his propensity to commit crimes” (similar to Washington’s Evidence Rule 404, at issue in *Hanson*³¹), but also *permits* such evidence for certain purposes, including knowledge. The court held that the verse was relevant because it showed that Foster “was familiar with drug code word and, to a certain extent, narcotics trafficking, a familiarity that made it more probable that he knew that he was carrying illegal drugs.”³² Furthermore, held the court, the verse “rebutted Foster’s protestations of naiveté.”³³ The court rejected Foster’s argument with an analogy to *The Godfather*:

[T]he rap verse was not the equivalent of admitting The Godfather as evidence that Mario Puzo was a mafia don It was, instead, the equivalent of admitting The Godfather to illustrate Puzo’s knowledge of the inner workings of an organized crime family Rap music, under Foster’s definition, “constitutes a popular musical style that describes urban life”; it describes the reality around its author. And it is Foster’s knowledge of this reality, as evidenced by the verse that he has admittedly authored, that was relevant to the crimes for which he was charged.³⁴

In a vacuum, this reasoning might make sense. But this opinion was not written in a vacuum: it was written just as the “gangsta rap” movement burst into chart-topping popularity,³⁵ and controversy over rap music had been national news for at several years.³⁶ By that point, millions of records that mention drug dealing had been sold by artists such as Ice-T, Eazy-E, Ice

²⁸ State v. Hanson, 731 P.2d 1140, 1143 (Wash. Ct. App. 1987).

²⁹ *Id.* at 1144.

³⁰ *Id.*

³¹ WASH. EVID. R. 404.

³² *Foster*, 939 F.2d at 455.

³³ *Id.* at 455–56.

³⁴ *Id.* at 456.

³⁵ JEFF CHANG, CAN’T STOP WON’T STOP 416 (St. Martin’s Press 2005).

³⁶ See LERNER & KUBRIN, *supra* note 24, at 35–43.

Cube, the Geto Boys, KRS-One, Too \$hort, and of course, N.W.A. The court noted that, “[a]t trial, the government offered testimony that the words ‘key’ and ‘rock’ were standard code words used in cocaine trafficking.”³⁷ It failed to mention, however, that anyone who listened to rap at the time would have been familiar with those words.³⁸ The court easily could have held that a rap lyric mentioning “keys” and “rocks” had no probative value on the question of whether someone actually had firsthand knowledge of drug trafficking.³⁹ By ignoring this context, the court allowed Derek Foster’s affinity for rap to be used against him. Being an aspiring rapper—or simply a fan of rap music—was enough for the court to demonstrate Foster’s “knowledge of this reality.”⁴⁰

How could the court have ignored what was obvious by this time even to white suburban kids who listened to rap? It is possible that the judges simply were not familiar with rap music. Rap is a product of Black culture. It is heavily associated with the Black community,⁴¹ much more so in 1991 than today. In contrast, all the judges on the *Foster* panel were white men, averaging sixty-three years of age, when the case was decided. The trial judge was of the same demographic, age fifty-four at the time.⁴²

The court’s discussion of *The Godfather* is also problematic, and telling. The court declared that *The Godfather* could be admitted to show Mario Puzo’s knowledge of the inner workings of the mafia. But it is well established that Puzo had no first-hand knowledge of the mafia world other than a few neighborhood characters. “I’m ashamed to admit that I wrote the *The Godfather* entirely from research,” he wrote. “I never met a real honest-to-god gangster. I knew the gambling world pretty good, but that’s

³⁷ *Id.* at 449 n.1.

³⁸ See, e.g., ICE-T, I’M YOUR PUSHER (Syndicate Studios West 1988) (“You know where I can get a key? I know where you can get a LP.”); TOO \$HORT, CITY OF DOPE (RCA Records 1988) (“It’s like midnight, slangin’ rock. Task force just hit the block.”).

³⁹ Cf. *United States v. Sneed*, No. 3:14 CR 00159, 2016 WL 4191683, at *6 (M.D. Tenn. Aug. 9, 2016) (“[R]apping about selling drugs does not make it more likely that [the] Defendant did, in fact, sell drugs.”).

⁴⁰ *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

⁴¹ See IMANI PERRY, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP 12 (2004). See also Christine Reyna et al., *Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12 GRP. PROCESSES & INTERGROUP RELS., 361 (2009).

⁴² See generally AMERICAN BAR ASS’N, PROFILE OF THE LEGAL PROFESSION (2023), <https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf> [<https://perma.cc/6MJW-LGG3>].

all.”⁴³ The book and film have also received criticism for perpetuating a one-sided, stereotypical view of Italian-Americans—in other words, the book is not accurate to real life.⁴⁴ And the book’s depiction of the mafia was a broad, mythic saga that did not capture how organized crime actually worked at the time, and certainly not by 1991;⁴⁵ in fact, *The Godfather* itself famously changed how real-life mobsters spoke and dressed.⁴⁶

It would have been wrong to use Puzo’s ability to research and tell a story as evidence of his criminal activity, just as it was wrong to use Derek Foster’s rap lyrics to do so. Neither work demonstrates any real connection to a criminal enterprise, but the use of either would be highly prejudicial. Furthermore, Puzo was a lifelong gambler who was in debt to bookies and loan sharks when he wrote *The Godfather*⁴⁷—yet, as far as we know, he was never arrested and his book was never used as evidence against him. The court’s use of this comparison is problematic both because it takes an unacceptably broad view of the admissibility of creative expression, and because it inadvertently highlights the fact that only rap evidence has ever been used in court.⁴⁸

The legacy of *Foster* is significant. The opinion has been cited by other courts dozens of times, including in the Second, Third, Fourth, Fifth, Sixth, and Tenth Circuits; the Maryland Supreme Court; the Massachusetts Supreme Judicial Court; the Nevada

⁴³ MARIO PUZO, THE MAKING OF *THE GODFATHER* AND OTHER CONFESSIONS 35 (G.P. Putnam’s Sons, 1972); see also Eric Homberger, *Obituary: Mario Puzo*, THE GUARDIAN (July 4, 1999, 9:14 PM), <https://www.theguardian.com/news/1999/jul/05/guardianobituaries> [<https://perma.cc/Q86F-HRLK>].

⁴⁴ Pop Culture Happy Hour, *‘The Godfather’ and the Limitations of Representation*, NPR (Nov. 6, 2022, 12:10 AM), <https://www.npr.org/transcripts/1133013484> [<https://perma.cc/4KUW-M6JG>].

⁴⁵ See, e.g., Sean M. McWeeney, *The Sicilian Mafia and Its Impact on the United States*, 56 FBI L. ENF’T BULL. 1, 6-7, 10 (1987) (highlighting the complexity of organized crime operation, such as an assignment of a person whose only task is to receive a phone call at nighttime).

⁴⁶ Justin Metz, *With ‘The Godfather,’ Art Imitated Mafia Life. And Vice Versa.*, THE NEW YORK TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/09/movies/godfather-mafia.html> [<https://perma.cc/4TFJ-TLCJ>].

⁴⁷ PUZO, *supra* note 43, at 34.

⁴⁸ See discussion *infra* pp. 419–21.

Supreme Court; and numerous trial courts.⁴⁹ It was still being cited approvingly as recently as 2023.⁵⁰

B. *People v. Olguin* and *People v. Zepeda*

California has seen far more Rap on Trial cases than any other state. A few years after *Foster*, a pair of appellate decisions in California set the stage for hundreds of opinions over the next three decades permitting rap evidence to show gang affiliation or related facts.⁵¹

People v. Olguin is the first written judicial opinion in California to consider rap lyrics.⁵² There, the California Court of Appeal considered the admissibility of rap lyrics to show allegiance to a gang and associated motive, knowledge, and intent.⁵³

Cesar Javier Olguin and Francisco Calderon Mora were prosecuted for a murder in Santa Ana, California, related to a territorial dispute between two gangs.⁵⁴ At trial, prosecutors introduced handwritten lyrics found in a search of Mora's home that associated him with one of the gangs in question.⁵⁵ The lyrics were read aloud by the lead investigator on the case, "who also interpreted them."⁵⁶ A substantial amount of lyrics were read to the jury: around fifteen couplets, comprising nearly 400 words, and taking up over twenty lines of small text in the *California Appellate Reports*.⁵⁷ The lyrics do make reference to gangs, but also many references to criminality and violence, with lines such as "Ima shootin in the head make him jump like a rana," "smoking Marijuana," "Well make you bleed," and "When I walk out my door I have to pack my forty four."⁵⁸ The lyrics did not mention the crime at issue in that case.

⁴⁹ See, eg., *United States v. Garcia*, 291 F.3d 127 (2d Cir. 2002); *United States v. Gibbs*, 190 F.3d 188 (3d Cir. 1999); *United States v. Gastiaburo*, 16 F.3d 582 (4th Cir. 1994); *United States v. Williams*, 957 F.2d 1238 (5th Cir. 1992); *United States v. Stuckey*, 253 Fed. Appx. 468 (6th Cir. 2007); *United States v. Long*, 774 F.3d 663 (10th Cir. 2014); *Hannah v. State*, 23 A.3d 192 (Md. 2011); *Commonwealth v. Correa*, 210 N.E.3d 407 (Mass. 2023); *Holmes v. State*, 306 P.3d 415 (Nev. 2013).

⁵⁰ *Correia*, 210 N.E.3d at 407.

⁵¹ *People v. Olguin*, 31 Cal. App. 4th 1355, 1372 (1994); *People v. Zepeda*, 167 Cal. App. 4th 25 (2008).

⁵² *Olguin*, 31 Cal. App. 4th at 1372. See NIELSON & DENNIS, *supra* note 25, at 62–65, for a further analysis of this case as well as the harmful prosecutorial practice of combining gang and rap evidence.

⁵³ *Olguin*, 31 Cal. App. 4th at 1383.

⁵⁴ *Id.* at 1366–67.

⁵⁵ *Id.* at 1372–73.

⁵⁶ *Id.* at 1372 n.3.

⁵⁷ *Id.* at 1372.

⁵⁸ *Id.* at 1372 n.3–4.

Both defendants were convicted.⁵⁹ On appeal, Mora argued that the lyrics had not been adequately authenticated, but the court held that “[b]oth the content and location of these papers identified them as the work of Mora.”⁶⁰ Mora also objected that the lyrics created a substantial risk of unfair prejudice, but the Court of Appeal refused to overrule the trial court:

Regardless of whether these lyrics were written before or after the killing . . . they demonstrated his membership in [the] Southside [gang], his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the killing. The trial court properly admitted them, carefully limiting them to those purposes.⁶¹

As discussed above, however, these lyrics also contained numerous references to violence and criminality. Given that the prosecution featured extensive expert testimony from the lead investigating detective regarding street gangs and the defendants’ membership in a gang, which the court called “highly probative on the issues of intent and motive,” and “highly relevant to the prosecution’s theory of how and why [the victim] was killed,” the court easily could have held that the rap evidence should have been excluded as both unfairly prejudicial and cumulative.

Olguin, Mora’s co-defendant, objected that the lyrics were inadmissible character evidence and had effectively been used against *him*, violating his right to confrontation.⁶² The court rejected this argument as well, casually dismissing the risk of prejudice.⁶³ “The mere fact the lyrics might be interpreted as reflective of a generally violent attitude could not be said ‘substantially’ to outweigh their considerable probative value.”⁶⁴

As to the risk that Olguin would be confused with Mora, the court held, “Nothing makes these rap lyrics inherently unreliable—at least no more unreliable than rap lyrics in general—and there is little risk the jury would find them so authoritative as to overwhelm their ability to follow the instruction to consider them only against Mora.”⁶⁵ By downplaying the lyrics’ “unreliab[ility],” the court was clearly indicating that a jury could consider the lyrics as literal fact, and use them to make

⁵⁹ *Id.* at 1366.

⁶⁰ *Id.* at 1373. At least one evidence treatise has criticized the court’s holding on authentication. 1 JEFFERSON, CAL. EVIDENCE BENCHMARK (3d ed.) § 30.25, p. 667.

⁶¹ *Olguin*, 31 Cal. App. 4th at 1373.

⁶² *Id.* at 1373–74.

⁶³ *Id.* at 1374.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1375.

conclusions about Mora's gang allegiance (and, "inferentially,"⁶⁶ his motive and intent). In light of this conclusion on literality, the second part of the passage—"at least no more unreliable than rap lyrics in general"—appears to indicate a default assumption that rap lyrics can be taken literally.

Olguin is one of the most cited cases in Rap on Trial history, if not the most cited. Courts have cited this holding over 200 times.⁶⁷ Together with *People v. Zepeda*, *Olguin* stands for a broad rule in California that rap lyrics can be admitted whenever they show gang affiliation.

The California Court of Appeal decided *People v. Zepeda*⁶⁸ fourteen years after *Olguin*, reaching the same conclusion using similar reasoning. Santos Nieto Zepeda was convicted at trial of murder, attempted murder, and two assaults with semi-automatic firearm, gang, and other enhancements added.⁶⁹ The appeal primarily concerned Zepeda's challenge to the jury instruction on what constitutes "reasonable doubt," but it also dealt with rap lyrics.⁷⁰ At trial, the prosecution played two rap songs that the court characterized as "gangster rap,"⁷¹ which it attributed to Zepeda. A large amount of lyrics were played for the jury (who were given written transcripts so they could follow along):⁷² over forty-eight lines of verse, taking up nearly two pages of the opinion.⁷³ Again, the lyrics contained more than gang references—they were also filled with expletives and violent imagery that did not mention gang allegiance or rivalries. An example:

I'm a straight-up hustlin' pimp, mother fucker can't you see,
 what you got one fine-ass bitch trick, I've got like two or three,
 so you mother fuckers want to kill (inaudible)
 guard your house and load the gate mother fucker I'm about to retaliate,
 creepin' up in your window, puttin' a slug into your face, slippin' and
 sliding outta the scene so bad I don't catch a case,
 (inaudible) from almighty Chico, oh you know we don't have a play,

⁶⁶ *Id.* at 1373.

⁶⁷ *See, eg.*, *People v. Coneal*, 254 Cal. Rptr. 3d 653 (2019); *State v. Williams*, 820 N.W.2d 156 (Wis. 2012); *People v. Mendoza*, 132 Cal. Rptr.3d 803 (2011); *People v. Medina*, 95 Cal. Rptr. 3d 202 (2009).

⁶⁸ *See People v. Zepeda*, 167 Cal. App. 4th 25 (2008).

⁶⁹ *See id.* at 28.

⁷⁰ *See id.* at 29–32.

⁷¹ *Id.* at 32.

⁷² *See Terry Vau, Prosecution Rests in Zepeda Trial*, ENTERPRISE-REC. (Oct. 4, 2006), <https://www.chicoer.com/2006/10/04/prosecution-rests-in-zepeda-trial/> [<https://perma.cc/AT7R-LA4P>].

⁷³ *Zepeda*, 167 Cal. App. 4th at 33–34.

when I realize hangin' ain't gonna happen just doing our gangster thing,
I'm a hoggin' doggin' player bitch and I been that way so long,
just take a hit of the dojo weed as you're listenin' to this song,
take a 40 (inaudible) hit that shit until it's gone . . .
(Inaudible) blunts and broken jugs (inaudible) lift it on my homie's back
and (inaudible)⁷⁴

During trial, one of the police experts admitted that the lyrics did not refer specifically to the murder in question, and that the references to violence and criminality were not much different than the content on commercially successful records of the "gangsta rap" genre.⁷⁵ As it happened, substantial gang evidence had already been admitted, including writings found at the home where Zepeda was living, a photograph of Zepeda making gang signs, and a tattoo on Zepeda's hand.⁷⁶ He was convicted.

On appeal, Zepeda's counsel argued that the rap evidence was cumulative and unduly prejudicial, but the Court of Appeal held that the lyrics were relevant and admissible.⁷⁷ As in *Olguin*, the court relied on the testimony of a police "gang expert"⁷⁸ who "testified that gangs communicate through music."⁷⁹ Therefore, the court found:

[Zepeda's] communications here were not ambiguous or equivocal. These lyrics . . . go beyond mere fiction to disclosing defendant's state of mind, his motives and intentions, and his fealty to furthering his criminal gang's activities . . . The evidence was not unduly prejudicial . . . The language and substance of the lyrics, although graphic, did not rise to the level of evoking an emotional bias against the defendant as an individual apart from what the facts proved.⁸⁰

Again, the court treated the lyrics literally. In the court's eyes, this was not art but "communications" that "go beyond mere fiction." And again, the court made no mention of the enormous controversy around this type of rap, nor of the body of empirical research that had been published by this time.

⁷⁴ See *id.*

⁷⁵ See Vau, *supra* note 72.

⁷⁶ *Zepeda*, 167 Cal. App. 4th at 32.

⁷⁷ *Id.*

⁷⁸ As we discuss in the *Rap on Trial Legal Guide*, the frequent use of "gang experts" to interpret rap music is problematic. LERNER & KUBRIN, *supra* note 24, at 112–17 ("Prosecutors often present rap lyrics through a law enforcement perspective, commonly a 'gang expert' charged with explaining the supposed relevance of the lyrics to the jury. But these individuals are not 'rap experts' and can incorrectly define rap terms.").

⁷⁹ *Zepeda*, 167 Cal. App. 4th at 35.

⁸⁰ *Id.*

Olguin and *Zepeda* set an extremely permissive standard for the admission of gang evidence in the form of rap. In the years since, many Court of Appeal panels have relied on these cases to permit gang-related rap evidence. Rap evidence and gang evidence are regularly commingled—even though countless studies have shown that gang evidence, like rap evidence, threatens the right to a fair trial.⁸¹ California Governor Gavin Newsom’s Committee on Revision of the Penal Code warned in 2020 that “[gang] evidence considered in court can be unreliable and prejudicial to a jury Empirical research corroborates this assessment. Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them.”⁸² The Committee also pointed out that gang enhancements are almost exclusively applied to people of color, “[y]et research shows that white people make up the largest group of youth gang members. It is difficult to imagine a statute, especially one that imposes criminal punishments, with a more disparate racial impact.”⁸³ The Committee recommended that direct evidence of gang involvement be bifurcated from the guilt determination at trial and suggested several other reforms be made to gang enhancement proceedings.⁸⁴ In 2021, the California Legislature did just that with the STEP Forward Act, requiring, along with other reforms, that gang enhancement be tried separately from underlying offenses.⁸⁵

Despite this important reform, it remains unclear how much the STEP Forward Act will ameliorate the compounding prejudice that occurs when gang evidence and rap evidence are commingled. In the Act, the Legislature warned against this type of commingling, declaring that “[g]ang enhancement evidence can be unreliable and prejudicial to a jury *because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people.*”⁸⁶ Despite this danger, the Act’s bifurcation requirement only explicitly applies to gang enhancements and the crime of

⁸¹ See COMM. ON REVISION OF THE PENAL CODE, 2020 ANN. REP. AND RECOMMENDATIONS 46 (2021) (first citing Mitchell L. Eisen et al., *Examining the Prejudicial Effects of Gang Evidence*, 13 J. FORENSIC PSYCH. PRAC. 1 (2013); and then Mitchell L. Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2 (2014)); see also *People v. Burgos*, 77 Cal. App. 5th 550 (2022) (gang evidence is “inherently prejudicial”).

⁸² See COMM. ON REVISION OF THE PENAL CODE, *supra* note 81.

⁸³ *Id.* at 44.

⁸⁴ *Id.*

⁸⁵ Assemb. B. 333, 2021 Leg., Reg. Sess. (Cal. 2021).

⁸⁶ *Id.* § 2(d)(6) (emphasis added).

participation in a criminal street gang.⁸⁷ The danger remains that substantial gang evidence could still be permitted, including via rap lyrics, using the justification that it is relevant to the underlying offense, such as to show motive or intent.⁸⁸ Courts should heed the California legislature's warning and work to keep gang evidence out of the courtroom whenever possible—particularly when it comes in the form of rap lyrics or videos. When prosecutors offer rap evidence to prove gang-related elements of a charge, courts should be *more* reluctant, not less, to admit such evidence.

Between *Olguin* in 1994 and *Zepeda* in 2008, the California Court of Appeal issued forty-three judicial opinions assessing rap evidence; nearly all of these, though not designated for publication, allowed the rap evidence to be admitted.⁸⁹ In total, since 1994, at least 330 opinions have been issued in California dealing with rap evidence, nearly always admitting rap lyrics or videos.⁹⁰

Olguin and *Zepeda* have left quite a legacy—one that can still be felt today. In 2023, a California Court of Appeal panel relied on those cases to affirm the extensive use of violent rap lyrics to show gang affiliation, premeditation, and intent to murder.⁹¹ In *People v. Ramos*, a police “gang expert” testified at trial that “[o]nly a gang member would make reference to such things in a rap video. He also testified that the gang rapper uses rap as a diary of gang events.”⁹² The court accepted this blanket statement at face value, and found no abuse of discretion in admitting rap lyrics.⁹³ The court also distinguished artists like Neil Young and Johnny Cash from “street gang rap artists”⁹⁴:

Of course, in many other contests, song lyrics do not reflect their author's true state of mind. Neil Young did not shoot his girlfriend, although he sang that he did in “*Down by the River*.” And Johnny Cash

⁸⁷ CAL. PENAL CODE § 1109 (West 2022).

⁸⁸ See *People v. Session*, 311 Cal. Rptr. 3d 363, 371–72 (2023) (holding that failure to bifurcate was harmless because gang evidence could have properly been admitted for motive, intent, and so on); see also *People v. Boukes*, 300 Cal. Rptr. 3d 1, 9–10 (2022) (finding “any error in the lack of bifurcation was harmless” because the evidence at issue could have been admissible to demonstrate motive).

⁸⁹ For additional large-scale analysis of rap opinions, see Erin Lutes, James Purdon & Henry F. Fradella, *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77 (2019); see also Mapping Rap on Trial, RAP ON TRIAL, <https://www.rapontrial.org/> [<https://perma.cc/T79Z-6KC6>] (last visited Apr. 8, 2024).

⁹⁰ See sources cited *supra* note 89.

⁹¹ *People v. Ramos*, No. D074429, 2022 WL 11515789, at *1–*2 (Cal. Ct. App. Oct. 20, 2022).

⁹² *Id.* at *21–*27.

⁹³ *Id.* at *21.

⁹⁴ “Street gang rap” is not a term that is known or regularly used in the rap industry, not does it refer to a musical rap sub-genre like “trap,” “drill,” “crunk,” or even “gangsta rap.”

did not kill a man in Reno just to watch him die, even though he sang that he did in “*Folsom Prison Blues*.” However, the significant distinction between lyrics such as these and [the defendant’s] rap is that the “street gang rap artist” creates rap as a “diary of themselves.”⁹⁵

The passage also makes the wrong comparison. The question is not whether Neil Young was ever accused of shooting his girlfriend. A better comparison would be whether Neil Young was ever accused of domestic violence or of assaulting a woman. Would his lyrics have been treated as literal then? Along similar lines, what if Johnny Cash were accused of murder? Would his lyrics have been used then? If history is a guide, probably not. Johnny Cash was arrested at least seven times during his career and there is no record that his lyrics were ever used against him.⁹⁶

Though *People v. Ramos* is an unpublished opinion and may not be cited in California, and has been certified for review by the California Supreme Court,⁹⁷ the prevalence of opinions like it make clear that legislative intervention is necessary.

Right around the time of *Zepeda*, the number of Rap on Trial opinions in California spiked. Prior to 2008, an average of 4.6 opinions per year were issued; from 2009-2023, an average of 19.2 opinions were issued.⁹⁸ What explains the increase? It may have to do with the digitization of judicial opinions and their inclusion in legal databases, or changes in the way the California Court of Appeal included opinions in the *California Appellate Reports*. It may also be a result of lower music production costs combined with free internet distribution, as YouTube gained massive popularity beginning around 2006.⁹⁹ This, in turn, led to more publicly accessible rap than ever before¹⁰⁰—and also made it much easier than ever before for police to find, surveil, and target rappers.¹⁰¹

⁹⁵ *People v. Ramos*, 90 Cal. App. 5th 578, 597 (2023) (quoting the law enforcement “gang expert”).

⁹⁶ See Jackie Manno, *Inside Johnny Cash’s Arrest Record*, THE LIST (June 13, 2022, 9:42 AM), <https://www.thelist.com/613328/inside-johnny-cashs-arrest-record/> [https://perma.cc/V2B2-UF8L].

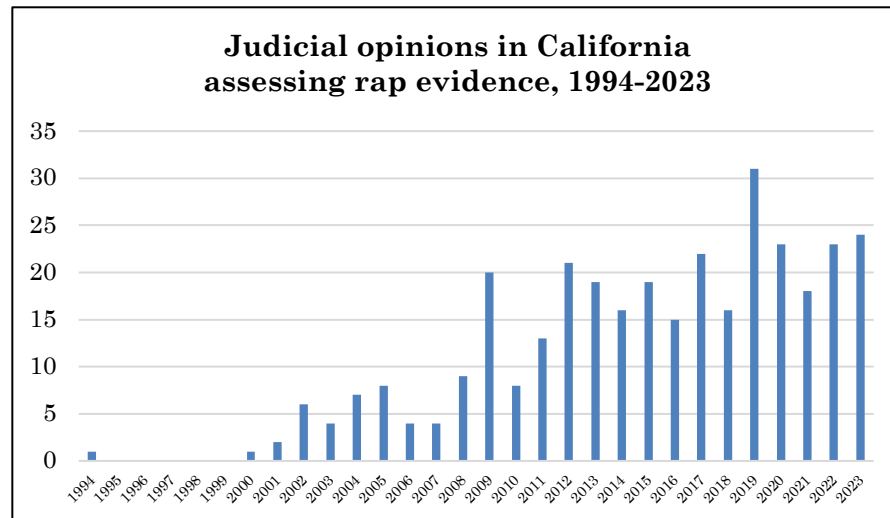
⁹⁷ *People v. Ramos*, 531 P.3d 968 (Cal. 2023).

⁹⁸ On file with author.

⁹⁹ See *Youtube Serves Up 100 Million Videos a Day*, NBC NEWS (July 16, 2006, 12:18 PM), <https://www.nbcnews.com/id/wbna13890520> [https://perma.cc/YPR3-72GS].

¹⁰⁰ See *id.*

¹⁰¹ See Joseph Goldstein & J. David Goodman, *Seeking Clues to Gangs and Crime; Detectives Monitor Internet Rap Videos*, THE N.Y. TIMES (Jan. 7, 2014), <https://www.nytimes.com/2014/01/08/nyregion/seeking-clues-to-gangs-and-crime-detectives-monitor-internet-rap-videos.html> [https://perma.cc/39QB-MZ4L] (discussing New York Police Department’s program to monitor the New York rap scene, including via YouTube).



II. EMPIRICAL RESEARCH

Just two years after *Olguin*, Dr. Carrie Fried published a landmark study on the risk of bias when it comes to rap music.¹⁰² Fried set out to test the hypothesis that “rap lyrics receive more negative criticism than other types of lyrics, perhaps because of their association with Black culture.”¹⁰³ The study asked participants to report their emotions based solely on lyrics, then again when participants were told the genre of music. To do so, she used the first verse of a folk song recorded in the 1960s by the all-white folk group, The Kingston Trio, called “Bad Man’s Blunder.” The lyrics read:

Well, early one evening I was rollin’ around
I was feelin’ kind of mean
I shot a deputy down
Strollin’ on home and I went to bed
Well, I laid me pistol up under my head

Some participants were told the song was rap, while others were told it was country music. The results were stark. Fried found that “[t]he exact same lyrical passage, which is acceptable as a country song or when associated with a White artist, becomes a dangerous, offensive song in need of government regulation

¹⁰² See Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135, 2135 (1996).

¹⁰³ *Id.*

when it is a rap song or associated with a Black artist.”¹⁰⁴ Fried observed that while participants would not report negative emotions based on learning the singer’s race, they did based on the genre of music—rap as compared to country. This study was the first to suggest that subjects are biased against rap music simply by virtue of its identification as rap music, and it informed numerous studies over the next twenty-five years.¹⁰⁵

Two decades later, Adam Dunbar, Charis Kubrin, and Nicholas Scurich replicated Dr. Fried’s findings in their own experimental study. Using the same song, and conducting two additional studies, these researchers again found that when violent lyrics were described as “rap,” subjects judged the lyrics to be more literal and autobiographical than when they were labeled as “country.”¹⁰⁶ In light of these findings, they concluded, “rap lyrics might influence jurors’ decisions independent of their actual content. That is, the mere label of rap is sufficient to induce negative evaluations, even when holding constant the actual lyrics.”¹⁰⁷ As a result, “a key concern is that any value rap lyrics may have as evidence is likely to be artificially inflated by stereotypes associated with the genre.”¹⁰⁸

In a 1999 study, Stuart Fischhoff sought to examine how jurors would perceive “gangsta rap” lyrics used as evidence in a murder trial.¹⁰⁹ Dr. Fischhoff served as an expert witness for the defense in a 1992 murder trial in which the court permitted violent and misogynistic rap lyrics to be admitted.¹¹⁰ A mistrial was declared, and three years later the case was retried.¹¹¹ Dr. Fischhoff was again retained as an expert witness.¹¹² In preparation for his testimony, he explored the effect of inflammatory rap lyrics by asking test subjects for their impression of an individual using the defendant’s real background and actual rap lyrics.¹¹³ Dr. Fischhoff

¹⁰⁴ *Id.* at 2141.

¹⁰⁵ Dr. Fried conducted two additional studies that built on her findings in *Bad Rap for Rap* and yielded similar results. *See, e.g.,* Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCH. 705 (1999); Carrie B. Fried, *Stereotypes of Music Fans: Are Rap and Heavy Metal Fans a Danger to Themselves or Others?*, 8 J. MEDIA PSYCH. ONLINE 1, 7–9 (2003).

¹⁰⁶ Dunbar et al., *supra* note 14, at 286.

¹⁰⁷ *Id.* at 289.

¹⁰⁸ *Id.*

¹⁰⁹ Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 795 (1999).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 795–96.

¹¹² *Id.* at 796.

¹¹³ *Id.*

shared the defendant's background with all the subjects.¹¹⁴ Some were shown the lyrics and some were also told the defendant was on trial for murder.¹¹⁵ The findings were again conclusive—they “clearly indicate that showing participants the rap lyrics exerted a significant prejudicial impact on the evaluation of a person and particularly so when the person is accused of murder.”¹¹⁶ These results, he concluded, were:

chilling in their implications Based on the present research results, the outcome of the first trial, and the desire by the Prosecution to get the gangsta' rap lyrics into evidence in the retrial, it seems that people may indeed be inclined to identify an artist with his/her artistic product.¹¹⁷

These studies are some of the most prominent and influential in a substantial body of empirical research on attitudes toward rap and on jurors' reaction to it.¹¹⁸ Yet, they have rarely been considered by courts. Dr. Fried's landmark 1996 study, for example, has only been cited in a judicial opinion once—a dissent.¹¹⁹ In total, empirical studies by these authors have been referenced just seven times in nearly 700 judicial opinions.¹²⁰

Courts should begin to consider the empirical research more regularly. The California Legislature recently required that, if offered, courts must consider “[c]redible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression” and “[e]xperimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.”¹²¹ In enacting the law, the Legislature cited several of the studies discussed above.¹²² Courts throughout the nation should follow California's lead and carefully consider this research whenever rap evidence is at issue.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 803.

¹¹⁷ *Id.* at 803, 804.

¹¹⁸ See LERNER & KUBRIN, *supra* note 24, at 118–23.

¹¹⁹ Hart v. State, No. 05-19-01394-CR, 2022 WL 3754537, at *16 (Tex. App. Aug. 30, 2022) (Reichek, J., dissenting).

¹²⁰ *Id.*; United States v. Donald, No. 3:21-CR-9 (VAB), 2023 WL 6958797, at *21 n.7 (D. Conn. Oct. 20, 2023); United States v. Wiley, 610 F.Supp.3d 440, 445 (D. Conn. 2022); Montague v. State, 243 A.3d 546, 551 n.2 (Md. 2020); Jordan v. State, 212 So. 3d 836, 858 (Miss. Ct. App. 2015) (Fair, J., dissenting), *aff'd*, Jordan v. State, 212 So. 3d 817 (Miss. 2016); United States v. Bey, No. CR 16-290, 2017 WL 1547006, at *6 n.2 (E.D. Pa. Apr. 28, 2017); Holmes v. State, 306 P.3d 415, 418 (Nev. 2013).

¹²¹ CAL. EVID. CODE § 352.2(b)(1)–(2) (West 2024) (effective Jan. 1, 2023).

¹²² See A.B. 2799, 2021-2022 Leg., Reg. Sess. (Cal. 2022).

III. PROSECUTORS SAY THE QUIET PART OUT LOUD: RAP EVIDENCE IS CHARACTER EVIDENCE

By 2004, the use of rap lyrics was a go-to tactic for prosecutors around the country—so much so that their training manuals openly discussed the tactic. Tellingly, these materials make clear that the primary purpose of rap evidence is not simply to prove elements like motive or intent. The real motivation is to leverage years of hostile media coverage,¹²³ negative stereotypes, and misinterpretation of lyrics to create a negative image of the defendant's character or shore up a case.

In a manual published by the American Prosecutors Research Institute, a then-Deputy District Attorney for the County of Los Angeles revealed this true purpose in so many words:

Perhaps the most crucial element of a successful prosecution is introducing the jury to the real defendant . . . Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant's true personality. Gang investigators should focus on these items of evidence during search warrants and arrests.¹²⁴

Around the same time, a United States Department of Justice bulletin gave similar guidance.¹²⁵ The bulletin claimed that with rap lyrics, gang members “put their true-life experiences into lyrical form,” and that such lyrics “reflect true-life experiences” and “the author's gang mentality.”¹²⁶ The bulletin instructed the reader to “remain mindful of . . . the opportunities to obtain inculpatory evidence” in the form of rap lyrics and recordings.”¹²⁷

The 2004 American Prosecutors' Research Institute manual shows that the real value of rap evidence is as character or propensity evidence—a shortcut to make a conviction easier, or a way to turn a weak case into a strong one.¹²⁸ The publication of these manuals represents a shameful moment in the history of this prosecutorial tactic. It is telling that prosecutors have been this explicit about the true purpose for which they use rap evidence,

¹²³ For a discussion of hostile media coverage throughout the history of rap, see LERNER & KUBRIN, *supra* note 24, at 35–43.

¹²⁴ AMERICAN PROSECUTORS RESEARCH INSTITUTE, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW 15–16 (2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf [<https://perma.cc/6YFA-ZQ7F>].

¹²⁵ See Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, 54 U.S. ATT'YS' BULL. 1, 1 (May 2006), <https://www.justice.gov/archive/olp/pdf/gangs.pdf> [<https://perma.cc/682A-LGPA>].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J. L. & ARTS 1, 1–2 (2007) (discussing the training materials); see also Kubrin & Nielson, *supra* note 4.

and courts should have these comments in mind when they consider whether to admit it.¹²⁹

IV. *STATE V. SKINNER* RAISES AWARENESS

In 2014, the New Jersey Supreme Court decided *State v. Skinner*.¹³⁰ The case raised considerable attention and garnered numerous amicus briefs.¹³¹ At trial, a witness for the prosecution read thirteen pages of rap lyrics to the jury, which had been found in Skinner's car.¹³² The lyrics did not mention the victim and were written well before the crime at issue—but they were quite violent.¹³³ In addition, even though the charges bore no relation to violence against women, the prosecution read to the jury lyrics that included depictions of rape and “violent and demeaning treatment of women.”¹³⁴ The case has been cited numerous times for its clear holding that:

Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged¹³⁵

At issue was New Jersey's Rule of Evidence 404(b), which prohibits “evidence of other crimes, wrongs, or act” except in certain circumstances including to show “motive or intent.”¹³⁶ The trial court had ruled that the lyrics were admissible under Rule 404(b)(2) to demonstrate the defendant's motive and intent “because the rap lyrics addressed a street culture of violence and retribution that fit with the State's view of defendant's role in the attempted murder.”¹³⁷

In evaluating this application of Rule 404(b), the court applied a four-part test specific to New Jersey designed “to avoid the over-use of extrinsic evidence of other crimes or wrongs.”¹³⁸ The test

¹²⁹ For a more detailed discussion of the training materials, see Dennis, *supra* note 128. See also Kubrin & Nielson, *supra* note 4.

¹³⁰ *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

¹³¹ See, e.g., Brief of Amicus Curiae American Civil Liberties Union of New Jersey In Support Of Defendant-Respondent, *State v. Skinner*, 95 A.3d 236 (N.J. 2014) (No. A-57/58-12 (071764)).

¹³² See Nielson & Kubrin, *supra* note 17.

¹³³ See *id.*

¹³⁴ *Id.* at 504.

¹³⁵ *Skinner*, 95 A.3d at 238–39.

¹³⁶ N.J.R.E. § 404(b).

¹³⁷ *Skinner*, 95 A.3d at 238.

¹³⁸ *Id.* at 247.

includes the following elements. First, “the evidence of the other crime must be admissible as relevant to a material issue [that is genuinely disputed].”¹³⁹ Second, it must be “similar in kind and reasonably close in time to the offense charged.”¹⁴⁰ Third, “the evidence of the other crime must be clear and convincing.”¹⁴¹ Fourth, “[t]he probative value of the evidence must not be outweighed by its apparent prejudice.”¹⁴² Applying these factors, the court rejected the use of rap evidence below, finding that there was but a tenuous connection between the lyrics and the charged offense.¹⁴³ The court emphasized the requirement for a “strong connection to the attempted murder offense with which defendant was charged.”¹⁴⁴ Without such a connection, the court found an overwhelming risk of undue prejudice “without much, if any, probative value.”¹⁴⁵

The court also admonished the prosecution not to make statements that “employ language designed to stoke a jury’s fear for the future of its community or make an inflammatory argument akin to a ‘call to arms.’”¹⁴⁶ At trial, the prosecutor had talked about a “subculture of violence” related to snitching and likened testimony favorable to Skinner to “a call for anarchy.”¹⁴⁷

Several courts have examined *Skinner*’s “strong nexus” test, and many more have cited the case. The Court of Appeals of Washington applied *Skinner* to hold that the admission of rap lyrics violated Washington’s Evidence Rule 403, and suggesting that the trial court should have “engaged in a weighing process similar to the one outlined in *Skinner*.”¹⁴⁸

The Maryland Supreme Court, formerly known as the Maryland Court of Appeal, purported to adopt the test but ignored New Jersey’s four-part “other crimes or wrongs” analysis, interpreted the rap lyrics in question very broadly, virtually ignored the question of character or propensity evidence, and heavily discounted the danger of undue prejudice.¹⁴⁹ Justice Shirley M. Watts, in dissent, pointed out that the lyrics actually

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 252.

¹⁴⁴ *Id.* at 253.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 254.

¹⁴⁷ *Id.* at 242.

¹⁴⁸ *Matter of Quintero*, 541 P.3d 1007, 1034 (Wash. Ct. App. 2024).

¹⁴⁹ *Montague v. State*, 243 A.3d 546, 563–70 (Md. Ct. App. 2020).

did not bear a close nexus to the facts of the case and warned that the court had departed from other courts in creating an overly permissive rule.¹⁵⁰ The *Montague* ruling has been sharply criticized; prominent music industry attorney Dina LaPolt called it “blatantly racist.”¹⁵¹

In California, the Court of Appeal flatly refused to adopt the *Skinner* test.¹⁵² The prosecution in that case had sought to use a rap video to show a shooting was gang-related and to demonstrate familiarity with “the gang’s culture of violence.”¹⁵³ Relying again on *Olguin* and *Zepeda*, the panel upheld the admission of rap lyrics with little analysis.¹⁵⁴

Skinner was decided at a moment when attention to the Rap on Trial issue appeared to be picking up. Its “strong nexus” test, combined with the factors for determining when to admit “other crimes or wrongs” evidence, bears some similarity to legislation that has been introduced in Congress and several states.¹⁵⁵ Importantly, the Court also recognized that rap is artistic expression, and it is wrong to treat rap lyrics literally:

The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song “I Shot the Sheriff,” actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story “The Tell-Tale Heart,” simply because of their respective artistic endeavors on those subjects. Defendant’s lyrics should receive no different treatment.¹⁵⁶

V. PROMINENT RAP PROSECUTIONS

The vast majority of Rap on Trial cases concern artists with only local notoriety or no following at all. Many concern handwritten writings that are poorly authenticated. Yet, over the decades, many prominent, commercially successful rappers have had their rap music used against them in criminal prosecutions. A brief, non-exhaustive examination of these notable examples will

¹⁵⁰ *Id.* at 570 (Watts, J., dissenting).

¹⁵¹ See Dina LaPolt, *Rap Lyrics Now Admissible as Court Evidence: A Dangerous Precedent* (Guest Column), VARIETY (Jan. 5, 2021, 9:30 AM), <https://variety.com/2021/music/opinion/rap-lyrics-admissible-evidence-dangerous-precedent-1234878315/> [<https://perma.cc/SR5V-KSUV>].

¹⁵² See *People v. Heartsman*, No. A135202, 2015 WL 2400735, at *6, *14 (Cal. Ct. App. May 20, 2015).

¹⁵³ *Id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *infra* Part VI.C.

¹⁵⁶ *State v. Skinner*, 95 A.3d 496, 522 (N.J. 2014).

shed light on the methods prosecutors use to make the content of rap songs or videos the focus of their cases, including in press releases or statements made to the news media. These prosecutions have raised awareness about the Rap on Trial practice—none more so than the ongoing trial of Jeffrey Williams, professionally known as “Young Thug.”¹⁵⁷ Of course, these prosecutions, and media coverage of them, have also served to send a message that successful rappers will be targeted and punished.¹⁵⁸

Mac Dre is an early example. The Vallejo, California, rapper, whose real name is Andre Hicks, released “Punk Police” in part because he felt that police were harassing him.¹⁵⁹ He was convicted in 1993 for conspiring to rob a bank and at trial, a recording was played of Hicks snapping his fingers to the rap lyrics “I’m going to get my gat (gun) and go pull a heist.”¹⁶⁰ Mac Dre and his friends and family felt strongly that the arrest and prosecution was in retaliation for “Punk Police.”¹⁶¹

Superstar rapper Snoop Dogg was tried in 1996 and acquitted in California for murder.¹⁶² At trial, Snoop’s lyric “Cause it’s 1-8-7 on a undercover cop” from the song “Deep Cover” was used, even though the song was written for the crime film *Deep Cover*, which featured an undercover policeman as a protagonist.¹⁶³

In 2001, New Orleans rapper and No Limit Records recording artist Mac Phipps was convicted of manslaughter after a shooting took place at a concert where he was scheduled to perform.¹⁶⁴ At trial, the prosecution spliced together two songs—one about “battle rapping” and another about his father, a military veteran—

¹⁵⁷ See discussion *infra* pp. 433–34.

¹⁵⁸ See Deena Zaru, *Judge Rules Rap Lyrics Can ‘Conditionally’ Be Used As Evidence in Young Thug Trial*, ABC NEWS (Nov. 9, 2023, 10:19 AM), <https://abcnews.go.com/US/judge-rules-rap-lyrics-conditionally-evidence-young-thug/story?id=104760646> [<https://perma.cc/LL3F-2Y2H>].

¹⁵⁹ Jessica Kariisa, *Did Mac Dre Really Go to Prison Because of His Lyrics?* KQED (June 29, 2023), <https://www.kqed.org/news/11954252/did-mac-dre-really-go-to-prison-because-of-his-lyrics> [<https://perma.cc/W6DA-EJ5H>].

¹⁶⁰ The Associated Press, *Sentencing Stalls Rapper’s Career*, OAKLAND TRIB. (Jan. 12, 2023), available at <https://perma.cc/W5WM-RB6F>.

¹⁶¹ See Kariisa, *supra* note 159.

¹⁶² Kim Bellware, *California Makes It Harder to Use Lyrics as Evidence Against Rappers*, WASHINGTON POST (Oct. 2, 2022, 9:00 AM), <https://www.washingtonpost.com/life-style/2022/10/02/california-rap-lyrics-law/> [<https://perma.cc/ZP3S-38AB>].

¹⁶³ *Id.*

¹⁶⁴ See Ramon A. Vargas, *Former No Limit Rapper Mac Released From Prison, Back Home After Being Granted Parole: ‘Blessed,’* NOLA (Jun. 24, 2021), https://www.nola.com/news/courts/former-no-limit-rapper-mac-released-from-prison-back-home-after-being-granted-parole-blessed/article_612244fa-d43a-11eb-83d1-1fc4e097c3f4.html [<https://perma.cc/MDT3-NGU2>].

to paint Mac as a violent person.¹⁶⁵ The district attorney continued with the prosecution, and ultimately achieved a conviction, even after a man working security that night came forward and declared that he had shot the victim in self-defense. Mac was released from prison in 2021 after serving twenty years of a thirty-year sentence.¹⁶⁶

Project Pat, an affiliated member of the platinum-selling rap group Three 6 Mafia, was prosecuted in 2002 for being a felon in possession of a firearm.¹⁶⁷ At trial, the court took judicial notice of the term “gangsta rap” and, over defense counsel’s objections, asked potential jurors about “gangsta rap.”¹⁶⁸ During trial, the court allowed the prosecutor to question a witness about a range of rap recordings, repeatedly using the loaded term “gangsta rap.”¹⁶⁹ The court allowed this line of questioning on the grounds that it tended to show the defendant “like[d] guns.”¹⁷⁰ The Sixth Circuit upheld the conviction, over a meticulous dissent that was nearly twice as long as the majority opinion.¹⁷¹

In December 2014, Ackquille Pollard, better known as the rapper “Bobby Shmurda,” and fourteen others were arrested in New York on charges including conspiracy, reckless endangerment, and gun possession.¹⁷² Police allegedly found twenty-one guns and a small amount of crack cocaine during the arrest.¹⁷³ While the charges against Shmurda were not the gravest, the prosecutor described Shmurda as the “driving force behind the GS9 gang” and the “organizing figure within this

¹⁶⁵ Medhill Justice Project, *Years After Rapper Was Convicted for Killing, Questions Raised About His Case*, THE LENS (Dec. 23, 2014), <https://the-lensnola.org/2014/12/23/years-after-rapper-was-convicted-for-killing-questions-raised-about-his-case/> [https://perma.cc/CL36-WC2K].

¹⁶⁶ Ramon Antonio Vargas, *Former No Limit Rapper Mac Released from Prison, Back Home After Being Granted Parole: 'Blessed'*, NOLA.COM (June 23, 2021), https://www.nola.com/news/courts/former-no-limit-rapper-mac-released-from-prison-back-home-after-being-granted-parole-blessed/article_612244fa-d43a-11eb-83d1-1fc4e097c3f4.html [https://perma.cc/MT7X-SQ8X]. The podcast *Louder Than A Riot* covers Mac Phipps’s story in detail. See *Louder than a Riot, 21 Years and 1 Day: Mac Phipps (Exclusive)*, NPR (Mar. 12, 2021), <https://www.npr.org/2021/03/11/976072964/21-years-and-1-day-mac-hipps-exclusive> [https://perma.cc/JY9E-KT5V].

¹⁶⁷ *United States v. Houston*, 205 F. Supp.2d 856, 859–60 (W.D. Tenn. 2002).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 864–66.

¹⁷⁰ *Id.* at 866.

¹⁷¹ *United States v. Houston*, 2004 WL 2030302, at *1 (6th Cir. Sept. 7, 2004).

¹⁷² Heran Mamo, *A Timeline of Bobby Shmurda’s Case*, BILLBOARD (Jan. 6, 2021), <https://www.billboard.com/music/rb-hip-hop/bobby-shmurda-case-timeline-9507234/> [https://perma.cc/SQ4P-LJ4K].

¹⁷³ *Id.*

conspiracy” during the arraignment.¹⁷⁴ Shmurda’s bail was set at \$2 million—about ten times what others have received for comparable charges.¹⁷⁵ James Essig, head of the Brooklyn South Violence Reduction Task Force that made the arrests, explained during a press conference that Shmurda’s songs and videos were “almost like a real-life document of what they were doing on the street.”¹⁷⁶ In September 2016, Shmurda accepted a plea deal agreeing to serve seven years in prison.¹⁷⁷

In a murder case against Los Angeles rapper Darrel Caldwell, known professionally as “Drakeo the Ruler,” prosecutors could not connect him directly to the crime.¹⁷⁸ Though Caldwell attended the party where the killing occurred, he had left before the incident.¹⁷⁹ Prosecutors attempted to build a case by portraying Caldwell’s rap group as a gang and using his lyrics to suggest his involvement.¹⁸⁰ A jury trial lasting twelve weeks resulted in an acquittal on most charges, including murder and attempted murder, but the jury hung on gang conspiracy charges.¹⁸¹ The prosecution then re-filed the gang charges.¹⁸² After over two and a half years behind bars, in November 2020, Caldwell was offered a plea deal the day after reformist George Gascón defeated Jackie Lacey for Los Angeles District Attorney.¹⁸³ He was released the same night.¹⁸⁴

In February 2019, Daniel Hernandez, known as the rapper “Tekashi 6ix9ine,” pleaded guilty to nine counts of racketeering,¹⁸⁵

¹⁷⁴ See Robert Kolker, *Hot Shmurda*, VULTURE (May 4, 2015), <https://www.vulture.com/2015/05/bobby-shmurda-court-case.html?> [<https://perma.cc/3PTP-H3ET>].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Mamo, *supra* note 172.

¹⁷⁸ See Kyle Eustice, *Drakeo the Ruler Finally Released from Prison Following ‘Sudden’ Plea Deal Offer*, HIPHOPDX (Nov. 4, 2020, 3:17 PM), <https://hiphopdx.com/news/id.58840/tittle.drakeo-the-ruler-finally-released-from-prison-following-sudden-plea-deal-offer> [<https://perma.cc/25QS-JBVW>]; see also Jeff Weiss, *Stabbing, Lies, and a Twisted Detective: Inside the Murder Trial of Drakeo the Ruler*, FADER (July 11, 2019), <https://www.thefader.com/2019/07/11/drakeo-the-ruler-murder-trial-los-angeles-report> [<https://perma.cc/VFB3-5844>].

¹⁷⁹ See Weiss, *supra* note 178.

¹⁸⁰ *Id.*

¹⁸¹ See Jeff Weiss, *The Ruler’s Back: Drakeo the Ruler Is Finally Free—and Ready to Talk*, THE RINGER (Nov. 13, 2020, 5:55 PM), <https://www.theringer.com/music/2020/11/13/21563566/drakeo-the-ruler-trial-release-prison-interview-we-know-the-truth> [<https://perma.cc/GV74-7ZQV>].

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Eric Levenson & Lauren del Valle, *Rapper Tekashi 6ix9ine Sentences to 2 Years in Prison for Racketeering After Flipping on Gang Associates*, CNN (Dec. 18, 2019, 3:37 PM), <https://www.cnn.com/2019/12/18/us/tekashi-6ix9ine-guilty-sentencing/index.html> [<https://perma.cc/EBM4-N236>].

firearms offenses, and drug trafficking, and agreed to testify and cooperate with prosecutors against alleged gang members.¹⁸⁶ Federal authorities built a case against the rapper in part by using lyrics from his songs as proof that he was a member of a gang and a criminal.¹⁸⁷ During the hearing, prosecutors played excerpts from Hernandez's "Kooda" and "Gummo" music videos, and jurors were given transcripts of Gummo's lyrics.¹⁸⁸

Kentrell Gaulden, known as the rapper "NBA Youngboy," was charged with possession of a firearm after police pulled him over in March 2021 in Tarzana, California, and found a gun in his vehicle.¹⁸⁹ During his federal trial in Los Angeles, prosecutors sought to introduce lyrics from three Youngboy songs—"Lonely Child," "Life Support," and "Gunsmoke"—to help convict him.¹⁹⁰ Among other verses, prosecutors argued that the lyric "FN, Glock, MAC-10s" from "Gunsmoke" demonstrates the rapper's "familiarity and knowledge of FN," the manufacturer of the gun found in his car.¹⁹¹ The judge ruled to exclude the use of Youngboy's lyrics as evidence and he was acquitted of the felony gun-possession charge in July 2022.¹⁹²

Jamell Demons, known to rap fans as "YNW Melly," currently faces a double murder retrial in Fort Lauderdale, Florida.¹⁹³ He is accused of shooting to death two fellow rappers and childhood friends in October 2018 after a late-night recording session, in an alleged staged drive-by.¹⁹⁴ The first trial started in June 2023, but ended with a hung jury in July 2023.¹⁹⁵ Now, under a new

¹⁸⁶ See Victoria Bekiempis, *Tekashi 6ix9ine's Ex-Bodyguard Found Guilty of Kidnapping Him*, VULTURE (Oct. 3, 2019), <https://www.vulture.com/2019/10/tekashi69-trial-update-snitching-leads-to-guilty-verdict.html> [<https://perma.cc/6K9N-C3DD>].

¹⁸⁷ See Fox 5 NY Staff, *Citing Tekashi 6ix9ine, Lawmakers Seek Limits to Using Rap Lyrics as Criminal Evidence*, FOX 5 N.Y. (Nov. 20, 2021, 8:19 AM), <https://www.fox5ny.com/news/ny-rap-lyrics-criminal-evidence-bill> [<https://perma.cc/9LJM-AZEH>].

¹⁸⁸ Bekiempis, *supra* note 186.

¹⁸⁹ See Joe Coscarelli, *YoungBoy Never Broke Again Found Not Guilty in Federal Gun Case*, THE N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2022/07/15/arts/music/nba-youngboy-gun-charges-verdict.html> [<https://perma.cc/3BMU-397D>].

¹⁹⁰ *Id.*

¹⁹¹ Kristin Robinson, *Judge Says NBA Youngboy Lyrics Can't Be Used as Evidence as L.A. Gun Possession Trial Begins*, BILLBOARD (July 12, 2022), <https://www.billboard.com/pro/nba-youngboy-lyrics-firearm-possession-trial/> [<https://perma.cc/7EKV-6LYC>].

¹⁹² Coscarelli, *supra* note 189.

¹⁹³ See Edward Helmore, *Rapper YNW Melly's Lyrics Could Be Used Against Him in Double Murder Retrial*, THE GUARDIAN (Dec. 17, 2023, 4:42 PM), <https://www.theguardian.com/music/2023/dec/17/rapper-ynw-melly-lyrics-double-murder-retrial> [<https://perma.cc/7YPL-FWF2>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

prosecutor, the State of Florida seeks to admit a staggering fifty-five songs, four album covers and eighteen audio files into evidence, including Melly's 2018 breakout hit, "Murder on My Mind"—even though the song was recorded at least two years before the crime took place.¹⁹⁶ Melly faces the death penalty if convicted.¹⁹⁷

The most sensational Rap on Trial prosecution in hip hop history is the trial of Jeffrey Williams, professionally known as "Young Thug."¹⁹⁸ In 2022, Atlanta prosecutors filed an indictment using Georgia's RICO Act. The indictment against Young Thug, labelmate Gunna (real name Sergio Kitchens), and twenty-five others included seventeen excerpts from their rap lyrics.¹⁹⁹ Notably, some lyrics cited were from songs recorded over seven years prior.²⁰⁰ Young Thug's music, particularly his "Slime Season" mixtapes, is credited with popularizing terms like "slime" and "slatt" that are now commonplace in hip hop.²⁰¹ However, the indictment labelled these very terms as identifiers of a criminal gang, specifically Young Slime Life ("YSL").

Before trial, the court held that the First Amendment did not provide free speech protections against the use of creative expression as evidence.²⁰² The prosecution immediately acted on that ruling, reading lyric after lyric to the jury—and making Young Thug's music the focus of the case.²⁰³ As this Article was going to print, the trial was ongoing and expected to last several more months.²⁰⁴

This case represents a particularly aggressive example of the Rap on Trial tactic. It has also created an observable chilling effect: since the YSL indictment, rappers have begun including disclaimers on their recordings, explicitly noting that the recordings are fiction,

¹⁹⁶ See *id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Jennifer Zhan, *Here Are the Rap Lyrics Being Used in the YSL Trial*, VULTURE (Nov. 27, 2023), <https://www.vulture.com/article/young-thug-lyrics-ysl-indictment.html> [<https://perma.cc/8WSC-3YSB>].

¹⁹⁹ *Id.*

²⁰⁰ See Jeff Weiss, *Why Young Thug Is the 21st Century's Most Influential Rapper*, BBC (Oct. 21, 2019), <https://www.bbc.com/culture/article/20191021-why-young-thug-is-the-21st-century-s-most-influential-rapper> [<https://perma.cc/W979-JVBR>].

²⁰¹ *Id.*

²⁰² See Michael Saponara, *A Timeline of Young Thug's YSL RICO Trial*, BILLBOARD (Apr. 8, 2024), <https://www.billboard.com/lists/young-thug-ysl-rico-trial-timeline/may-9-2022-young-thug-arrested-on-array-of-rico-charges/> [<https://perma.cc/G9MM-M5NK>].

²⁰³ *Id.*

²⁰⁴ See *id.*

and they know police are watching.²⁰⁵ The case has also sparked enormous media interest, outraged thousands of fans, and introduced the problems with Rap on Trial to millions who had not previously been aware of them. As I discuss below in Part VI.B., it also accelerated and intensified an activist movement against the use of rap evidence in criminal trials.

VI. SIGNS OF HOPE: ACTIVISM, LEGISLATION, AND PROMISING JUDICIAL DECISIONS

A. Recent Case Law: Signs of Progress?

Since we began drafting the Guide, well over 125 Rap on Trial opinions have been issued in California alone, the overwhelming majority of them permitting rap evidence. That is a dispiriting figure. But we also began to observe some encouraging signs in the case law.

In 2019, the California Court of Appeal decided *People v. Coneal*, another gang case involving rap evidence.²⁰⁶ In that case, the court sharply limited rap evidence on the basis of unfair prejudice and cumulativeness.²⁰⁷ The court the carefully analyzed *Olguin* and *Zepeda*,²⁰⁸ and determined that unlike in those cases, the gang evidence in *Coneal* was cumulative.²⁰⁹ It is one of the only California opinions to restrict rap evidence on the basis of cumulativeness.²¹⁰

Then, in 2021, the United States District Court for the Eastern District of Pennsylvania held that the First Amendment requires “a presumption that artistic expression is not a factual admission.”²¹¹ *Bey-Cousin v. Powell* was a Section 1983 action against police officers in which the plaintiff alleged that two officers had planted a gun on him, leading to arrest, conviction, and imprisonment on firearm possession charges.²¹² The officers

²⁰⁵ See Andre Gee, *Rappers Are Saying They're 'Cappin' in Songs. Here's Why.*, COMPLEX (Aug. 10, 2022), <https://www.complex.com/music/a/andre-gee/rap-disclaimers-lyrics-cappin-monster-corleone> [<https://perma.cc/5PF2-ZSWM>]; see, eg., Lil Durk, Ahh Ha (Sony Music 2022) (“Everything I’m saying . . . is all props . . . this shit is not real . . . in case the police is listening.”); see also Jack Lerner, *Opinion: It's Scary to Use Art as Trial Evidence*, The Atlanta J.-Const. (Dec. 6, 2023), <https://www.ajc.com/opinion/opinion-its-scary-to-use-art-as-trial-evidence/FDOZZV2PMJEYNG7IUKVPIDHFAI/> [<https://perma.cc/5ZSD-25VD>].

²⁰⁶ *People v. Coneal*, 41 Cal. App. 5th 951, 964–65 (2019).

²⁰⁷ *Id.* at 664, 668.

²⁰⁸ See *id.* at 663–64 (first citing *People v. Olguin*, 37 Cal. Rptr. 2d 596 (1994); and then citing *People v. Zepeda*, 83 Cal. Rptr. 3d 793 (2008)).

²⁰⁹ *Id.*

²¹⁰ See LERNER & KUBRIN, *supra* note 24, at 76.

²¹¹ See *Bey-Cousin v. Powell*, 570 F. Supp. 2d 251, 255 (2021).

²¹² *Id.* at 254.

sought to admit rap lyrics the plaintiff had released while the prosecution was pending, including the songs “Busted by Da Fedz,” “Gun Talk,” and “Court Apparance” [sic]; the plaintiff moved to preclude that evidence.²¹³ The court granted the motion, and began its opinion as follows:

Vincent Van Gogh summarized an artist's inspiration: “You must start by experiencing what you want to express.” But while many artists base their art on experience, they also embellish, change, or distort their experience for purposes of their craft. The question before the Court is whether a party to a lawsuit can use an artist's expressions against him as evidence of the truth. And the Court's answer is, “Not always.” In a society that treasures First Amendment expression, courts should start with a presumption that art is art, not a statement of fact. To rebut that presumption, the party offering the evidence must demonstrate that the art is the artist's attempt to tell a factual story. The mere fact that an artistic expression resembles reality is not enough because holding otherwise would risk chilling the free expression that our society holds dear.²¹⁴

This is the only case we have found that establishes a presumption, based on the First Amendment, against the use of an artist's rap lyrics against them.²¹⁵

In 2024, the United States District Court for the Eastern District of New York issued a powerful, thorough opinion in *United States v. Jordan* in which it examined rap music as a genre. The court situated rap within the context of Black history, but also explained why rap has value and why it is important.²¹⁶ “[R]ap artists have played the part of storytellers,” the court observed, “providing a lens into their lives and those in their communities.”²¹⁷

In considering whether to admit rap lyrics, the court noted that it “must remain cognizant that ‘hip hop is fundamentally an art form that traffics in hyperbole, parody, kitsch, dramatic license, double entendres, signification, and other literary and artistic conventions to get it[s] point across.’”²¹⁸ Furthermore, “rap artists have become increasingly incentivized to create music about drugs and violence to gain commercial success, and will exaggerate or fabricate the contents of their music in pursuit of that success.”²¹⁹ This is a point rarely made in the courts. The court rejected the prosecution's motion to admit rap videos and

²¹³ *Id.*

²¹⁴ *Id.* at 253–54.

²¹⁵ LERNER & KUBRIN, *supra* note 24, at 90–95 (discussing First Amendment jurisprudence).

²¹⁶ *United States v. Jordan*, 2024 WL 343970, at *1 (E.D.N.Y. Jan. 30, 2024).

²¹⁷ *Id.* at *2.

²¹⁸ *Id.* at *6–*7 (quoting MICHAEL ERIC DYSON, *THAT'S THE JOINT!: THE HIPHOP STUDIES READER* xii (Forman & Neal eds., 2004))

²¹⁹ *Id.* at *7.

lyrics because the lyrics had no specific connection to the crime at hand, and were not materially different than many other songs. Finally, the court cautioned other courts against “overly permissive rules allowing the use of rap lyrics and videos against criminal defendants.”²²⁰

At trial, a jury convicted the defendants of murder, without the rap lyrics. This was only fitting, as the murder victim was legendary DJ Jam Master Jay.²²¹

One final example: in 2022, the Decriminalizing Creative Expression Act was passed in California, the nation’s first-ever law addressing the use of creative expression as evidence. Less than two months after the law went into effect, the California Court of Appeal held in *People v. Venable* that the new law is retroactive to all non-final cases, including cases on appeal.²²² More importantly, however, it recognized the high risk of racialized bias in rap lyrics, quoting from Assembly Floor testimony:

[R]ap lyrics and other creative expressions get used as racialized character evidence: details or personal traits prosecutors use in insidious ways playing up racial stereotypes to imply guilt. The resulting message is that the defendant is that type of Black (or Brown) person . . . There's always this bias that this young Black man, if they're rapping, they must only be saying what's autobiographical and true, because they can't possibly be creative.²²³

Courts often talk about the inflammatory nature of rap lyrics and assess the risk they create of unfair prejudice, but they almost never acknowledge the racialized nature of that prejudice. In California, they are now required to do so. *People v. Venable* is the first court ever to apply the new statute, and still one of the only courts ever to acknowledge that with respect to rap evidence, the risk of unfair prejudice arises out of, and is amplified by, racial bias.²²⁴ In that sense, it is a historic holding.

²²⁰ *Id.* at *13.

²²¹ See Press Release, U.S. Attorney’s Office, Eastern District of New York, Two Queens Men Convicted of Drug-Related Murder of Run-DMC D.J. Jason Mizell, Also Known as “Jam Master Jay” (Feb. 27, 2024), <https://www.justice.gov/usao-edny/pr/two-queens-men-convicted-drug-related-murder-run-dmc-dj-jason-mizell-also-known-jam> [<https://perma.cc/NE2E-7AB5>].

²²² *People v. Venable*, 88 Cal. App. 5th 445, 454–55 (2023).

²²³ *Id.* at 454–55 (quoting AB 2799, Assem. Floor Analysis at p. 3, (internal citations omitted)).

²²⁴ *People v. Bryant*, No. 05-152003-0, at 66 (Cal. Sup. Ct. Oct. 3, 2022).

B. A Growing Movement Against Rap on Trial

In 2007, Andrea Dennis published a comprehensive examination of the Rap on Trial tactic.²²⁵ “When courts permit the prosecutor to admit rap music lyrics as criminal evidence,” she wrote, “they allow the government to obtain a stranglehold on the case,” both by using the lyrics as evidence and by constructing a narrative framework for the case. Dennis’s comprehensive article was followed by more legal and empirical research, including a 2014 sociological analysis by Charis Kubrin and Erik Nielson that further placed the Rap on Trial tactic in historical context, showing that it “resides within a long tradition of antagonism between the legal establishment and hip-hop culture, one that can be traced back to hip-hop’s earliest roots.”²²⁶

Around that time, interest in this issue began to increase at a rapid pace. Since 2018, when Dr. Kubrin, my students, and I began work on the Guide, leading scholars Dennis and Nielson wrote a book,²²⁷ NPR produced a two-season podcast,²²⁸ two documentaries were created,²²⁹ and a substantial body of legal scholarship has been published.²³⁰

The YSL prosecution has generated national interest in the Rap on Trial issue, and fueled a movement in response. Music executive Kevin Liles, founder and CEO of the company that distributes Young Thug’s YSL label, created a Change Petition entitled “Art on Trial: Protect Black Art,” which has been signed by over 90,000 people.²³¹ “With increasing and troubling frequency,” Liles wrote, “prosecutors are attempting to use rap lyrics as confessions. This practice isn’t just a violation of First Amendment protections for speech and creative expression. It punishes already marginalized communities and silences their stories of family, struggle, survival, and triumph.”²³² The petition calls for legislation to restrict the use of creative expression court.

The music industry has also begun to advocate for change.²³³ On November 1, 2022, an open letter was published by over 100

²²⁵ Dennis, *supra* note 128.

²²⁶ Kubrin & Nielson, *supra* note 4.

²²⁷ NIELSON & DENNIS, *supra* note 25.

²²⁸ *Louder Than a Riot*, *supra* note 166.

²²⁹ RAP TRAP: HIP HOP ON TRIAL (ABC News Studios 2023); AS WE SPEAK: RAP MUSIC ON TRIAL (Paramount+ 2024).

²³⁰ See LERNER & KUBRIN, *supra* note 24, at 118–23.

²³¹ See Kevin Liles, *Art on Trial: Protect Black Art*, Change.org (June 8, 2022), <https://www.change.org/p/art-on-trial-protect-black-art> [https://perma.cc/9SE3-Y8EH].

²³² *Id.*

²³³ See *Art on Trial: Protect Black Art*, ART ON TRIAL: PROTECT BLACK ART, <https://www.protectblackart.co/> [https://perma.cc/E72A-SB57] (last visited Apr. 12, 2024).

artists, music industry figures, legal experts, and organizations such as the Black Music Action Coalition, the Recording Academy, BMG, Spotify, and even TikTok.²³⁴ Like Liles's petition, the letter decried the Rap on Trial tactic and called for legislative reform.²³⁵ "Rappers are storytellers," it argued, "creating entire worlds populated with complex characters who can play both hero and villain. But more than any other art form, rap lyrics are essentially being used as confessions in an attempt to criminalize Black creativity and artistry."²³⁶ Warner Music Group published the letter as full-page advertisements in both *The New York Times* and *The Atlanta Journal-Constitution*.²³⁷ The industry has continued to support legislative efforts to protect creative expression in court.²³⁸

In the United Kingdom, human rights groups have launched a similar initiative entitled "Art Not Evidence" in response to increasing attempts by Crown prosecutors to use of drill music in criminal proceedings.²³⁹ In support of this movement, Members of Parliament Kim Johnson and Nadia Whittome have announced plans to introduce legislation entitled the Criminal Evidence (Creative and Artistic Expression) Act.²⁴⁰

C. Legislative Action

In 2020, California passed the Racial Justice Act of 2020, which sought to eliminate racial bias in the justice system by providing procedural means by which to challenge convictions and sentences where racial bias or animus is present.²⁴¹ The legislature passed the Act in response to the 1986 Supreme Court

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Artists, Industry Leaders, Legal Experts Join Together to Protect Black Art*, WARNER MUSIC GRP. (Nov. 1, 2022), <https://www.wmg.com/news/artists-industry-leaders-legal-experts-join-together-to-protect-black-art> [<https://perma.cc/6BUJ-YLDK>].

²³⁸ *Id.*

²³⁹ See *Art Not Evidence*, ART NOT EVIDENCE, <https://artnotevidence.org/> [<https://perma.cc/3KDB-KBUC>] (last visited Apr. 17, 2024).

²⁴⁰ See Aneesa Ahmed, *'It risks miscarriages of justice': MPs oppose rap lyrics being used as evidence in UK trials*, THE GUARDIAN (Nov. 22, 2023, 5:56 AM), <https://www.theguardian.com/music/2023/nov/22/mps-call-for-change-in-rap-lyrics-being-used-as-evidence-in-uk-trials-nadia-whittome-kim-johnson-shami-chakrabarti-annie-mac> [<https://perma.cc/9XHF-ZDBM>]; see also *Criminal Evidence (Creative and Artistic Expression) Bill*, ART NOT EVIDENCE, <https://drifttime.notion.site/Criminal-Evidence-Creative-and-Artistic-Expression-Bill-2554634113ef463bb8b42534d262b34d> [<https://perma.cc/G4MD-D836>] (last visited Apr. 17, 2024).

²⁴¹ California Racial Justice Act of 2020, Assemb. B. 2542 (Ca. 2020). See also California Racial Justice Act for All, Assemb. B. 256 (Ca. 2022) (amending the Racial Justice Act to make it retroactive, among other changes); *California Racial Justice Act for All Signed Into Law*, ASSEMBLYMEMBER ASH KALRA (Sept. 30, 2022), <https://a25.asmdc.org/press-releases/20220930-california-racial-justice-act-all-signed-law> [<https://perma.cc/2DGH-6VTB>].

decision *McCleskey v. Kemp*, which requires defendants to prove the existence of purposeful discrimination in order to prove a Constitutional violation.²⁴² An early application of the Racial Justice Act came in a rap evidence case when, in 2022, a trial court in Contra Costa County, California, vacated a conviction and sentence for murder and other crimes pursuant to the Act.²⁴³ In *People v. Bryant*, the court found that implicit racial bias played a role: “whether purposefully or not, the prosecution’s use of rap lyrics as evidence of [defendants’] commission of the charged offense and gang membership premised their convictions on racially discriminatory evidence.”²⁴⁴

While that case was pending, Governor Newsom signed the nation’s first legislation restricting the use of creative expression. The Decriminalizing Creative Expression Act, Assembly Bill 2799, added a new section to the Evidence Code addressing creative expression, defined as “the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.”²⁴⁵ The law passed unanimously in both chambers.²⁴⁶ The new Section 352.2 of the Evidence Code establishes a baseline presumption that the probative value of creative expression is minimal, unless one of three conditions is met: “the expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available.”²⁴⁷ The legislative findings to the Act make clear that it is meant to complement the Racial Justice Act. The findings mention key empirical studies (including those discussed above), requires that courts “consider . . . testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression,” as well as “[e]xperimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.”²⁴⁸ Finally, the new provision supplements the definition of “undue prejudice” in a critically

²⁴² *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²⁴³ *People v. Bryant*, No. 05-152003-0, at 66 (Cal. Sup. Ct. Oct. 3, 2022).

²⁴⁴ *Id.*

²⁴⁵ A.B. 2799, 2022 Leg., 2021-2022 Sess. (Cal. 2022); see also CAL. EVID. CODE § 352.2.

²⁴⁶ A.B. 2799, 2022 Leg., 2021-2022 Sess. (Cal. 2022).

²⁴⁷ *Id.* § 352.2(a)(1).

²⁴⁸ *Id.* § 352.2(b)(1).

important way. Now, whenever creative expression is at issue, the court *must* investigate “the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.”²⁴⁹

Thirty cases have been decided since AB 2799 went into effect; in each, the question of retroactivity is paramount because the trials took place before the Act was passed. That question is now before the California Supreme Court.²⁵⁰ *People v. Venable*, discussed above, held that AB 2799 is retroactive,²⁵¹ but it appears to be an outlier; most other Court of Appeal panels have held that the Act is not retroactive, and most have held that, in any event, the question of retroactivity is moot because any error in admitting rap evidence was harmless error.²⁵² In *People v. Ramos*, discussed above, the California Supreme Court ordered the panel “to vacate its decision and reconsider the cause” in light of the new law.²⁵³ One might consider this a signal to change course; instead, the panel quickly held that AB 2799 is not retroactive, and simply repeated verbatim its holding affirming the admission of rap evidence, including its broad language characterizing “street gang rap” as a “diary.”²⁵⁴

While there are signs that the judiciary is becoming more aware of the dangers inherent in using rap evidence, cases like *Ramos* show that many judges still do not appreciate the danger—or are digging in their heels. These cases make clear that legislators need to give courts more guidance, and place strict guardrails, on the use of rap evidence. And legislators are listening. Lawmakers from both parties, in several states—including Maryland,²⁵⁵ New York,²⁵⁶ Georgia,²⁵⁷ Missouri,²⁵⁸ and Illinois²⁵⁹—have introduced bills intended to curb the misuse of creative expression in court.

In Congress, Representatives Hank Johnson and Jamaal Bowman have introduced the Restoring Artistic Protection

²⁴⁹ *Id.* § 352.2(a)(2).

²⁵⁰ *People v. Venable*, 523 P.3d 871, 871 (2023) (granting defendant’s petition for review along with the related issues in *People v. Bankston* and *People v. Hin*).

²⁵¹ *Id.*

²⁵² *See, e.g.,* *People v. Sanchez*, No. H050599, 2024 WL 1007925 (Cal. Ct. App. Mar. 8, 2024); *People v. Olguin*, 31 Cal. App. 4th 1355, 1377 (1994); *see also* *People v. Frahs*, 9 Cal. 5th 618, 628-29 (2020).

²⁵³ *People v. Ramos*, 2022 WL 11615789, at *1 (Oct. 20, 2022).

²⁵⁴ *Id.* at *24.

²⁵⁵ H.B. 1429, 2023 Reg. Sess. (Md. 2023).

²⁵⁶ S.B. 1738, 2023 Leg. Sess. (N.Y. 2023).

²⁵⁷ H.B. 990, 2023 Gen. Assemb. (Ga. 2023).

²⁵⁸ H.B. 353, 102d Gen. Assemb., Reg. Sess. (Mo. 2023).

²⁵⁹ H.B. 3420, 103d Gen. Assemb. (Ill. 2023).

(“RAP”) Act.²⁶⁰ The RAP Act would create a new Federal Rule of Evidence 416 entitled “Limitation on admissibility of defendant’s creative or artistic expression.” Like AB 2799, the RAP Act sets forth several conditions, each of which must be met before evidence of a defendant’s creative expression can be admitted. The proponent must first prove by clear and convincing evidence that the defendant intended the expression to be literal.²⁶¹ The creative expression also must “refer to the specific facts of the crime alleged;” be “relevant to an issue of fact that is disputed;” and have “distinct probative value not provided by other admissible evidence.”²⁶² Also like AB 2799, the Act includes procedural protections: the court must conduct a hearing outside the jury, make its ruling and findings of fact on the record, and must limit the issue and deliver a limiting instruction to the jury if it does admit creative expression.²⁶³

VII. CONCLUSION

The Rap on Trial issue is at a critical moment. As this Article was going to press, the trial of Young Thug was ongoing, and expected to last for months more. That case represents an ambitious escalation of the use of rap evidence. Meanwhile, Rap on Trial decisions continue to issue almost weekly, and most courts *still* permit rap evidence to be admitted, or wave away serious problems as “harmless error.” And, as we show in the Guide, over thirty years’ worth of opinions are having a noticeable chilling effect.

Yet there are encouraging signs. More people than ever before are aware of, and outraged by, the use of rap lyrics in criminal proceedings. There is real momentum toward further legislative change, and courts are now more likely to see rap as an art form with its own unique conventions and history.

In California, the justice system is in flux; new laws on racial bias, gang enhancements, and rap evidence are being interpreted by the courts as matters of first impression. The California Supreme Court will soon decide whether AB 2799 is retroactive,²⁶⁴

²⁶⁰ Restoring Artistic Protection Act of 2023 (“RAP ACT”), H.R. 2592, 118th Cong. (2023).

²⁶¹ *Id.* at §2(a).

²⁶² *Id.* Unlike the RAP Act, which requires *each* of these condition to be met, AB 2799 allows the evidence if any *any* of the predicate conditions are met. CAL. EVID. CODE §352.2. AB 2799 also differs from the RAP Act in that it contains substantial legislative findings drawing a connection between rap evidence and racial bias, and explicitly requires judges to consider empirical research and genre evidence—as well as the risk of racial bias.

²⁶³ H.R. 2592, §2(a).

²⁶⁴ *People v. Venable*, 528 P.3d 871, 871 (2023).

and eventually it will interpret the new Section 352.2. When it does, it should declare *Olguin* and *Zepeda* invalid in light of the STEP Forward Act, and reaffirm what the legislature has plainly instructed: when rap evidence is introduced, courts must consider the risk of explicit and implicit racial bias, and must do so with the Racial Justice Act in mind.

The California Supreme Court, and other courts across the land, should follow the lead of recent decisions like *Bey-Cousin v. Powell*, *United States v. Jordan*, and *People v. Venable* and recognize the free speech principles at stake, as well as the historical context, social milieu, and artistic contributions of rap music. They should instruct courts not to commingle gang and rap evidence except in truly extraordinary circumstances. They should sharply restrict the use of the harmless error doctrine in rap cases. And all courts must recognize that rap evidence is a key entry point for racial bias in America's justice system.

It's safe to assume that prosecutors will continue trying to use rap evidence for the foreseeable future—and, unfortunately, many courts will support these efforts. We can expect some courts to downplay the artistic value of rap and the risk of unfair prejudice, ignore context, and turn a blind eye to the racial bias inherent in the Rap on Trial tactic. It will ultimately be up to policymakers, and the citizens who elect them, to prevent this. Legislators must continue to work on new laws that provide guidance and guardrails against this abusive practice. They must also remain vigilant. Some courts will misinterpret, minimize, or simply ignore rules that restrict their ability to admit rap evidence. Legislators must be prepared for that to happen and be ready to go back to the legislative chamber to refine and strengthen the law. And citizens must be engaged—talking with legislators, county officials, and even their local district attorney, and advocating for change in other ways.

The history of Rap on Trial contains many important lessons. It exposes the racism and unfairness that still plagues the American criminal justice system. It demonstrates the enduring importance of rap music in American culture. And, it teaches us that through organizing, legal advocacy, research, legislative action, and education, we can make progress toward a more just legal system. The next chapter in this story is still being written, but it is sure to reflect that change is afoot.

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