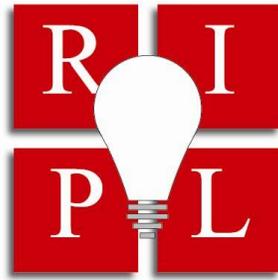


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



REDISCOVERING CUMULATIVE CREATIVITY FROM THE ORAL FORMULAIC TRADITION TO
DIGITAL REMIX: CAN I GET A WITNESS?

GIANCARLO F. FROSIO

ABSTRACT

For most of human history, the essential nature of creativity was understood to be cumulative and collective. This notion has been largely forgotten by modern policies that regulate creativity and speech. As hard as it may be to believe, the most valuable components of our immortal culture were created under a fully open regime with regard to access to pre-existing expressions and re-use. From the Platonic mimesis to Shakespeare's "borrowed feathers," the largest part of our culture has been produced under a paradigm in which imitation—even plagiarism—and social authorship formed constitutive elements of the creative moment. Pre-modern creativity spread from a continuous line of re-use and juxtaposition of pre-existing expressive content, transitioning from orality to textuality and then melding the two traditions. The cumulative and collaborative character of the oral-formulaic tradition dominated the development of epic literature. The literary pillars of Western culture, the *Iliad* and the *Odyssey*, were fully forged in the furnace of that tradition. Later, under the aegis of Macrobius' art of rewriting and the Latin principles of *imitatio*, medieval epics grew out of similar dynamics of sharing and recombination of formulas and traditional patterns. Continuations, free re-use, and the re-modeling of iconic figures and characters, such as King Arthur and Roland, made *chansons de geste* and romance literature powerful vehicles in propelling cross-country circulation of culture.

The parallelism between past and present highlights the incapacity of the present copyright system to recreate the cumulative and collaborative creative process that proved so fruitful in the past. In particular, the constant development and recursive use of iconic characters, which served as an engine for creativity in epic literature, is but a fading memory. This is because our policies for creativity are engineered in a fashion that stymies the re-use of information and knowledge, rather

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than facilitating it. Under the current regime, intellectual works are supposedly created as perfect, self-sustaining artifacts from the moment of their creation. Any modifications, derivations, and cumulative additions must secure preventive approval and must be paid off, as if they were nuisances to society.

Rereading the history of aesthetics is particularly inspiring at the dawn of the networked age. The dynamics of sharing of pre-modern creativity parallel the features of digital networked creativity. As in the oral-formulaic tradition, digital creativity reconnects its exponential generative capacity to the ubiquity of participatory contributions. Additionally, the formula—the single unit to be used and re-used, worked and re-worked—is the building block of the remix culture as well as the oral formulaic tradition. Today, in an era of networked mass collaboration, ubiquitous online fan communities, user-based creativity, digital memes, and remix culture, the enclosure of knowledge brought about by an ever-expanding copyright paradigm is felt with renewed intensity. Therefore, I suggest that the communal, cumulative, social and collaborative nature of creativity and authorship should be rediscovered and should drive our policies. In order to plead my case, I have asked for the support of the most unexpected witnesses.

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REDISCOVERING CUMULATIVE CREATIVITY FROM THE ORAL FORMULAIC TRADITION TO DIGITAL REMIX: CAN I GET A WITNESS?

GIANCARLO F. FROSIO*

I. COMPLAINT

In the short window during the 1980s between the emergence of digital sampling and the first decisions that outlawed it, Public Enemy released its album *It Takes a Nation of Millions*, which was critically acclaimed for its influence on hip-hop. Building his sonic wall, Public Enemy attempted to make use of bricks kneaded with water and clay of a communitarian musical tradition. Public Enemy linked together past and future: avant-garde music with the traditional African American and Caribbean culture of musical borrowing. In an interview given after the judicial turmoil that took down digital sampling, Carlton Douglas Ridenhour, the frontman of the rap band Public Enemy, better known by his stage name “Chuck D,” explained the impact of copyright on Public Enemy’s creativity:

Public Enemy’s music was affected more than anybody’s because we were taking thousands of sounds 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 Putting a hundred small fragments into a song meant that you had a hundred different people to answer to It’s easier to sample a groove than it is to create a whole new collage. That entire collage element is out the window.¹

A few years later, in *Caught, Can I Get a Witness?*, Chuck D bragged “[c]aught, now in court ‘cause I stole a beat / This is a sampling sport / Mail from the courts and jail / Claims I stole the beats that I rail . . . I found this mineral that I call a beat / I paid zero.”² The same witness may be of use for an entire generation of digital remixers, vidders, creators of “machinima,” developers of fangames, fanfiction writers, and users generating content.

* cc-by Giancarlo F. Frosio 2014. Residential Fellow, Stanford Law School, Center for Internet and Society; S.J.D., Duke University School of Law, Durham, North Carolina; LL.M., Duke University School of Law, Durham, North Carolina; LL.M., Strathclyde University, Glasgow, UK; J.D., Università Cattolica del Sacro Cuore, Milan, Italy. You can reach me at giancarlo.frosio@law.stanford.edu or gcfrosio@gmail.com.

¹ Kembrew McLeod, *How Copyright Law Changed Hip-Hop: An Interview with Public Enemy’s Chuck D and Hank Shocklee*, in Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law 155 (Kembrew McLeod & Rudolf Kuenzli eds., 2011) [hereinafter McLeod, *How Copyright Changed Hip-Hop*]; see also KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 62–114 (2007) [hereinafter MCLEOD, FREEDOM OF EXPRESSION].

² See McLeod, *How Copyright Changed Hip-Hop*, *supra* note 1, at 152.

II. WITNESS EVIDENCE

In the pages that follow, I will try to come up with supporting evidence to demonstrate that digging for “minerals,” appropriating and reusing them to produce follow-on creativity is exactly what creativity is all about. I will make my argument by telling you of a postmodern dream I had. In my oneiric fantasy, I have tried to answer Dangerous Chuck’s call for a witness. The most unexpected of them came to support his case.

A. Homer’s Testimony: Iliad, Odyssey, and the Oral Formulaic Tradition

It was late in the morning when the judge summoned the first witness. A blind old man walked in from the backdoor of the courtroom.

“Can you state your name, sir?” Chuck’s D’s attorney asked.

“My name is Homer. And I have never existed, in fact. I am a back-formation. I have become the archetypal poet through a process of ‘authorization.’”³ As Gregory Nagy puts it, Homer is “retrojected as the original genius of heroic songs, the proto-poet whose poetry is reproduced by a continuous succession of performers.”⁴

Homer’s works have been surrounded by many questions related to the composition, authorship, and date of the *Iliad* and *Odyssey*. This debate crossing the ancient, middle and modern era is known as the Homeric Question.⁵ In the eighteenth century, the Homeric Question became ontological. The very existence of Homer himself was put under scrutiny. François Hédelin, Gianbattista Vico, and Friedrich August Wolf argued that Homer was a symbol of poetic genius.⁶ Setting aside whether Homer had really existed or was only a symbolic figure, the process of making the Homeric verse is the central question to bear relevance in the quest for the origins of the *Iliad* and *Odyssey*. That process was dissected and unveiled in the last century by the innovative theories of an emerging school of philological studies, spearheaded by Milman Parry. As a result of these theories, the making of the Homeric verse would be the outcome of a collaborative and cumulative creative

³ See ANDREW BENNETT, *THE AUTHOR* 34 (Routledge 2005) (discussing Homer’s “authorization”).

⁴ GREGORY NAGY, *HOMERIC QUESTIONS* 92 (Univ. of Tex. Press 1996); JAN DE VRIES, *HEROIC SONG AND HEROIC LEGEND* 2–10 (Ayer Co. 1963).

⁵ See generally, e.g., NAGY, *supra* note 4, at 92; *HOMERIC QUESTIONS: ESSAYS IN PHILOLOGY, ANCIENT HISTORY AND ARCHEOLOGY, INCLUDING THE PAPERS OF A CONFERENCE ORGANIZED BY THE NETHERLANDS INSTITUTE AT ATHENS (15 MAY 1993)* (JAN PAUL CRIELAARD, J. C. GIEBEN 1995) [HEREINAFTER *HOMERIC QUESTIONS*]; JAN DE VRIES, *HEROIC SONG AND HEROIC LEGEND* 2-10 (Oxford University Press 1963).

⁶ See FRANÇOIS HÉDELIN, *CONJECTURES ACADÉMIQUES, OU, DISSERTATION SUR L’ILIADÉ* (Honoré Champion 2010) (1715); GIANBATTISTA VICO, *DISCOVERY OF THE TRUE HOMER* (Cornell Univ. Press 1984) (1725); FRIEDRICH AUGUST WOLF, *PROLEGOMENA TO HOMER* (Princeton Univ. Press 1985) (1795).

process that lasted for centuries. This insight is today known as the oral-formulaic theory.⁷

Milman Parry was a brilliant scholar who died at the age of thirty-three. Nonetheless, Parry had enough time to revolutionize the study of early epic poetry by disclosing the oral and formulaic origin of the works later textualized as the *Iliad* and the *Odyssey*.⁸ The textual evidence suggested to Parry that the written poems emerged from an evolutionary process in which composition, performance, and diffusion interacted to create the epics we know as the *Iliad* and the *Odyssey*.⁹ Parry demonstrated that the Homeric verse had a very different style and form than those of later poets, and “that it is to a very great extent a language of traditional formulas, created in the course of a long period of time by poets who composed in the mind without the aid of writing.”¹⁰ Parry singled out the Homeric epithet as the pivotal evidence inferring the oral heritage of the poems.¹¹ Parry noted that Homeric epithets, such as Achilles “swift-footed,” Hector “shining-helmet,” Hera “cow-eyed,” “divine Odysseus,” Athena “gray-eyed,” the “rosy fingered dawn,” or the sea “as dark as wine,” changed according to the needs of meter, not according to the needs of the narrative context. Again, many lines in a passage, groups of lines, or even larger narrative patterns were wholly reproduced in one or more other passages of the Homeric works. Parry concluded that the repetition of ready-made expression would have found no meaningful explanation, unless that text predated its origin in an oral tradition. The formulae were only functional devices to be used and re-used to help the *oidous* to remember and perform in the given length of the verse.

The poetic diction permeating the Homeric works was, therefore, the cumulative creation of many generations of oral poets over centuries. “From generation to generation bards had preserved words and phrases which . . . could be drawn on for the making of poetry,” Parry noted.¹² Generations of poets had created a “grammar of poetry” to be superimposed on the grammar of the language.¹³ *Aoidoi* and *rhapsodes* could draw from this grammar to perform their poetic speech. In reusing this common stock, poets would add their own contributions. In case of a particularly brilliant *oidous*, perhaps such as Homer, the original contribution to the common stock of formulas and verses could have been more substantial than in other

⁷ See generally JOHN M. FOLEY, ORAL-FORMULAIC THEORY AND RESEARCH: AN INTRODUCTION AND ANNOTATED BIBLIOGRAPHY (Garland Publ’g 1985) [hereinafter FOLEY, ORAL-FORMULAIC THEORY]; WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD (Routledge 2012) (1982).

⁸ See MILMAN PARRY, THE MAKING OF HOMERIC VERSE (Adam Parry ed., Oxford Univ. Press 1971).

⁹ See NAGY, *supra* note 4, at 30 (stating that composition, performance, and diffusion are the three interacting aspects of production and development of Homeric poetry).

¹⁰ DENYS PAGE, HISTORY AND THE HOMERIC ILIAD (Univ. of Cal. Press 1959) (commenting on Parry’s Masters of Arts dissertation, in which he first proposed the oral-formulaic theory).

¹¹ See PARRY, *supra* note 8, at 1–190.

¹² *Id.* at 195.

¹³ ALBERT BATES LORD, THE SINGER OF TALES 36 (Stephen Mitchell & Gregory Nagy eds., Harvard Univ. Press 2d ed. 2000; see also Egbert J. Bakker, *Noun-Epithet Formulas, Milman Parry, and the Grammar of Poetry*, in *Homeric Questions*, *supra* note 5, at 97-125).

instances. However, the contribution of each singer would have been always minimal, if compared to the entire stock of formulaic diction.¹⁴

The poetic formulaic of the *Iliad* and *Odyssey* resulted from a continuous process of imitation of an original pattern. The creation, use, and survival of epic formulae rested on resemblance and imitation across the generations of singers elaborating on the tradition.¹⁵ Chance was not guiding this process of imitation; rather, there was a precise model of creative production that borrowed and reused a tool to reach stylistic perfection. Under this model, the capacity of taking that process of quality improvement to the extreme was recognized as creative genius. Homer was perhaps that creative genius.¹⁶ He was the *oidos* who gave unity to a tradition. He was the individual who sewed together a story that was fashioned collectively.

[W]e should rather conceive that here is a poet who marked his works with genius not because he was able to model the words on his own thoughts, but because he was able to make use of traditional words and expressions. For us to recognize a renunciation of this sort demands a tremendous effort of imagination. . . . It is not easy to put aside the literary conventions of one's own era in favour of those of another.¹⁷

This way, the *Iliad* and the *Odyssey* would appear to be the final result of an open model of collaborative and cumulative creativity that spanned centuries. As Professor Gregory Nagy noted, "the evolution of the fixed texts that we know as the *Iliad* and *Odyssey* may be envisaged as a cumulative process, entailing countless instances of composition/performance in a tradition that is becoming streamlined into an increasingly rigid form as a result of ever-increasing proliferation."¹⁸

The investigation of one of the most influential works of Western culture leads to a very different perception of creativity than the one we are currently accustomed to accepting. This ancient model of creativity departs considerably from the modern mechanics, at least those crystalized in the legal system in force. In oral poetry, any individual work is ceaselessly reworked and modified. Creativity is the act of blending together individual contributions; it is the act of the "sewer of songs." In modern eyes, this may very much resemble an act of plagiarism. Milman Parry was aware of the contradiction when crafting his theory, and commented:

But in practice the oral poet by no means limits his borrowing to the single formula; rather he uses whole passages which he has heard. This is,

¹⁴ See PARRY, *supra* note 8, at 331.

¹⁵ *Id.* at 197.

¹⁶ See DE VRIES, *supra* note 4, at 10–11 (sustaining the view that the unity of the *Iliad* and the *Odyssey* was the work of Homer after all, and noting that "Homer is the crowning end of a long development").

¹⁷ PARRY, *supra* note 8, at 144–45.

¹⁸ GREGORY NAGY, *THE BEST OF THE ACHAEANS: CONCEPTS OF THE HERO IN ARCHAIC GREEK POETRY* (Johns Hopkins Univ. Press 1999); see also JOHN M. FOLEY, *Traditional Oral Epic: The Odyssey, Beowulf, and the Serbo-Croatian Return Song 20–31* (Univ. of Cal. Press 1990) [FOLEY, *TRADITIONAL ORAL EPIC*].

indeed, his whole art: to make a poem like the poems he has heard. I know only too well that this is sure to suggest the thought of plagiarism to those not familiar with oral poetry, but it must be understood above all that plagiarism is not possible in traditional literature. One oral poet is better than another not because he has by himself found a more striking way of expressing his own thought but because he has been better able to make use of the tradition.¹⁹

It is straightforward that oral-formulaic theory may work towards the deconstruction of the myth of original creativity, dear to modern Western society. Arnold Hauser noted the distance and the irreconcilable tension of the Homeric idea of creativity with the romantic ideal of artistry and authorship. The Homeric works would be construed as products of collective genius as opposed to the romantic idea of individual genius.

It upsets all romantic conceptions of the nature of art and the artist—conceptions which are the very foundation of nineteenth-century aesthetics—to have to think of the Homeric epics, in all their perfections, as being the product neither of individual nor of folk poetry, but, on the contrary, as an anonymous artistic product of many elegant courtiers and learned literary gentlemen, in which the boundaries between the work of different personalities, schools and generations have become obliterated.²⁰

If all his language is formulaic, Homer, the definitive poet, was no more than a “spokesman for a tradition.”²¹ Albert Lord backed up the idea by noting that in oral poetry there is no origin, but only a process of development, refinement, and elaboration. In oral poetry and Homeric poems, therefore, “the words ‘author’ and ‘original’ have either no meaning at all . . . or a meaning quite different from the one usually assigned to them.”²² Oral-formulaic theories encountered great suspicion for threatening the idea of poetic original greatness of Homer. The traditional formulaic nature of Homer’s language has seemed to cast an aspersion on Homer’s inventive power, as described by Theodore Wade-Gery:

¹⁹ PARRY, *supra* note 8, at 334.

²⁰ ARNOLD HAUSER, *THE SOCIAL HISTORY OF ART* 57 (Routledge 1999).

²¹ BARRY B. POWELL, *HOMER* 20 (Blackwell Publ’g 2004). Powell wrote:

If all Homer is formulaic, the proof of Homer’s “orality,” where is the brilliance and poetic genius of the divine Homer? The followers of Wolf had removed Homer from the equation: no more did Homer “write” the *Iliad* than Moses “wrote” Genesis. Parry restored Homer and disproved the redacted text, but in so doing seemed just as much to take away Homer’s opportunity for creativity and greatness. If all his language is traditional, consisting of formulas and formulaic expressions, then was not Homer more spokesman for a tradition than a creator in his own right?

Id.

²² LORD, *supra* note 13, at 101.

The most important assault made on Homer's creativeness in recent years is the work of Milman Parry, who may be called the Darwin of Homeric studies. As Darwin seemed to many to have removed the finger of God from the creation of the world and of man, so Milman Parry has seemed to some to remove the creative poet from the *Iliad* and *Odyssey*.²³

The comparison that Wade-Gery made with the Darwinian theories hinted to an additional feature of past approaches to creativity. The development and later textualization of the Homeric tradition belongs to an evolutionary model.²⁴ The cultural artifact did not come to life as a perfect final product. Instead, it underwent a prolonged process of evolution.

The evolutionary model is common to all epic poetry and originated from the same mechanics governing the development of the oral tradition. In this regard, the oral-formulaic theory is "a fundamental theoretical fulcrum in the study and comparison of numerous other ancient, medieval, and even contemporary literatures."²⁵ The Hittite epic poem *Gilgamesh* is one of the earliest examples.²⁶ As an additional example, an evolutionary model is applicable also to the Indian Sanskrit oral epic tradition.²⁷ The *Mahabharata*, a monumental work roughly eight times the size of the *Iliad* and *Odyssey*, and the smaller *Ramayana* were developed in their final forms across many centuries. The formative period of the *Mahabharata* is estimated from 400 B.C. to 400 A.D., and that of the *Ramayana* from 200 B.C. to 200 A.D. Again, the Bible and Biblical materials have oral roots that make them the final textualization of a collaborative and evolutionary creative model.²⁸ The Koran has arguably the same oral origin. The Arabic term *Qur'an*, and the verb from which it was taken *qu'ran*, originally meant "vocalized recitation."²⁹

B. Virgil and Macrobius' Testimony: From Platonic Mimesis to Roman Imitatio

Once Homer left the witness box, Macrobius came in to support Chuck D's case and he spoke on behalf of Virgil as well. Macrobius was the author of the *Saturnalia*, written in the fifth century A.D., and which crystallized the principles of Roman aesthetics. Macrobius' *Saturnalia* heavily influenced later medieval literature. It laid down the fundamental principles of literary description as an exercise of

²³ HENRY T. WADE-GERY, *THE POET OF THE ILIAD* 38–39 (1952).

²⁴ See NAGY, *supra* note 4, at 41–43 (positing at least five distinct consecutive periods of Homeric transmission).

²⁵ FOLEY, *ORAL-FORMULAIC THEORY*, *supra* note 7, at 12.

²⁶ See GEOFFREY S. KIRK, *THE SONGS OF HOMER* 56–57 (Cambridge Univ. Press 2005).

²⁷ See NAGY, *supra* note 4, at 44–58; STUART H. BLACKBURN, *ORAL EPICS IN INDIA* (Univ. of Cal. Press 1989); John Brockington, *The Textualization of the Sanskrit Epics*, in *TEXTUALIZATION OF ORAL EPIC* 39 (Lauri Honko ed., 2000); DE VRIES, *supra* note 4, at 99–110.

²⁸ See generally FOLEY, *ORAL-FORMULAIC THEORY*, *supra* note 7, at 51, 71; HENRI-JEAN MARTIN, *THE HISTORY AND POWER OF WRITING* 104 (Univ. of Chi. Press 1994); Robert C. Culley, *Oral Tradition and the Old Testament: Some Recent Discussion*, in *ORAL TRADITION AND OLD TESTAMENT STUDIES* 1–33 (Robert C. Culley ed., 1976); Robert C. Culley, *Oral-Formulaic Language in the Biblical Psalms*, in *4 NEAR AND MIDDLE EAST SERIES* (1967).

²⁹ See Culley, *supra* note 28, at 114–115.

imitation and emulation through invention, reordering, and different species of modification of previous models.³⁰

The Roman perception of creativity is far removed from the “modernist value system, which from the Romantic era onwards has valorized originality and artistic genius and, in consequence, denigrated copying.”³¹ Copying, imitation, and emulation in ancient creativity was an art in its own right.³² In this respect, the “anxiety of influence” of modern authorship was inconceivable to the Roman way of thinking.³³ In fact, Romans would have perceived the rejection of the influence of predecessors as “peculiar, perhaps even foolish.”³⁴ At least in the literal context, the rationale for generalized borrowing and re-use in Latin creative tradition was explained by Seneca the Elder in the following terms: “not for the sake of stealing, but of open borrowing, for the purpose of having it recognized.”³⁵ A poet might borrow a motif from another poet so as to pay that poet a compliment and have the reader discover that tribute. Henry Nettleship, renowned Virgilian scholar and Oxford professor of the nineteenth century, noted that in early imperial Rome “no sooner had a fine thought, phrase, or even rhythm been struck out by a poet, than [sic] it became, by common consent, the property of all subsequent writers. To appropriate was not to commit a plagiarism, but to do honour to its inventor.”³⁶ Again, Nettleship pointed out that “to use a friend’s verses seems to have been regarded by the Roman poets as a compliment and a mark of affection.”³⁷ This theme would later dominate medieval literature.³⁸

Leading Roman authors have openly spelled out the centrality of imitation of past works and models. In particular, originality of theme or story was far less important than it is today.³⁹ In contrast, Quintilian regarded imitation as a way to reach excellence:

³⁰ See DOUGLAS KELLY, *THE CONSPIRACY OF ALLUSION: DESCRIPTION, REWRITING, AND AUTHORSHIP FROM MACROBIUS TO MEDIEVAL ROMANCE* 36–78 (Koninklijke Brill NV 1999) (illustrating the rules of description in Macrobius’ *Saturnalia*, the stages of descriptions, and their influence on medieval writers and romances).

³¹ Elaine K. Gazda, *Beyond Copying: Artistic Originality and Tradition, in THE ANCIENT ART OF EMULATION: STUDIES IN ARTISTIC ORIGINALITY AND TRADITION FROM THE PRESENT TO CLASSICAL ANTIQUITY* 2 (Elaine K. Gazda ed., Univ. of Mich. Press 2002).

³² See generally *id.*

³³ See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (Oxford Univ. Press, Inc. 1973).

³⁴ Gazda, *supra* note 31, at 11.

³⁵ Seneca the Elder, *Suasoriae* 3.7, as cited in GIAN BIAGIO CONTE, *THE RHETORIC OF IMITATION: GENRE AND POETIC MEMORY IN VIRGIL AND OTHER LATIN POETS* 32 (Charles Segal ed., Cornell Univ. Press 1986).

³⁶ HENRY NETTLESHIP, *LECTURES AND ESSAYS ON SUBJECTS CONNECTED WITH LATIN LITERATURE AND SCHOLARSHIP* 123 (Cambridge Univ. Press 2010) (1885).

³⁷ HENRY NETTLESHIP, *ANCIENT LIVES OF VERGIL WITH AN ESSAY ON THE POEMS OF VERGIL IN CONNECTION WITH HIS LIFE AND TIMES* 62 (Nabu Press 2011) (1879).

³⁸ See Jan M. Ziolkowski, *The Highest Form of Compliment: Imitatio in the Medieval Latin Culture, in POETRY AND PHILOSOPHY IN THE MIDDLE AGES: A Festschrift for Peter Dronke* 293 (John Marenbon ed., Koninklijke Brill NV 2001).

³⁹ See Katharina de la Durantaye, *The Origins of the Protection of Literary Authorship in Ancient Rome*, 25 B.U. INT’L L.J. 37, 70 (2007) (noting that, in this respect, Shakespeare’s Elizabethan creativity also resembled this character of Roman creativity).

[F]or there can be no doubt that in art no small portion of our task lies in imitation, since, although invention came first and is all-important, it is expedient to imitate whatever has been invented with success. And it is a universal rule of life that we should wish to copy what we approve in others.⁴⁰

Imitation in Roman literature went hand in hand with the related search for excellence. At least by the first century B.C., in the *Rhetorica ad Herennium*, Cicero's *Brutus* and *De Oratore*, and Dionysius of Halicarnassus' *On Imitation*, rhetorical doctrine put forward the conviction that imitation of great authors was the surest instrument for attaining excellence in creative endeavors.⁴¹ Roman authors build upon the ideas of Plato and Aristotle that dominated the ancient construction of aesthetics. Plato, and Aristotle, in part, made imitation the general principle of art.⁴² In Plato and Aristotle's view, art was a *mimesis* of reality. The Platonic emphasis on imitation naturally made copying and borrowing necessary instruments of creativity. The Platonic concept of artistic imitation deeply influenced Hellenistic and Roman aesthetic and justified the largely imitative and cumulative nature of ancient creativity. The theory dominated most of our history of aesthetic and was discredited only under the influence of Romanticism, where the idea of Platonic imitation was regarded as anything more than "a systematic violation of art," "depriving it of all its charms."⁴³

In the *Ars Poetica*, Horace crystallized the idea that literary *mimesis* meant not only the imitation of nature, but also the imitation of literary precedents and models.⁴⁴ According to modern studies, ancient Roman literature knew three forms of literary imitation—*interpretatio*, *imitatio*, and *aemulatio*.⁴⁵ The *interpretatio* was the less original adaptation and coincided with the direct translation of one source. The *imitatio* was an adaptation that consisted in the borrowing of form, or content, or both from one or more renowned Greek sources. The *aemulatio*, finally, was a form of creative rivalry. Powerful examples are Virgil's emulation of Homer's epics and Horace's emulation of Alcaeus' lyrics. Through *interpretatio*, *imitatio*, and *aemulatio*, the Romans created an entire body of literature and visual art referring to, borrowing from and drawing on Greek models. The literary *mimesis* initially included

⁴⁰ MARCUS FABIVS QVINTILIANVS, IV, THE INSTITVTIO ORATORIA §§ 10.2.1–10.2.2 (Harold E. Butler trans., 1922) (c. 35–100 C.E.); see also Ziolkowski, *supra* note 38, at 305.

⁴¹ See Ziolkowski, *supra* note 38, at 300.

⁴² See, e.g., Plato, *Cratylus*, in XII PLATO IN TWELVE VOLUMES 423cd (Harold N. Fowler trans., 1921); Plato, *Republic*, in V–VI PLATO IN TWELVE VOLUMES 393c, 399a–c, 401a (Paul Shorey trans., 1969); Plato, *Laws*, in X–XI PLATO IN TWELVE VOLUMES 655d, 668a–c, 795e (R. G. Bury trans., 1967); Aristotle, *Poetics*, in XXIII ARISTOTLE IN 23 VOLUMES 1448b (W. H. Fyfe trans., 1932).

⁴³ Otto Apelt, *Platonische Aufsätze* 68–70 (1912), as cited in WILLEM J. VERDENIUS, MIMESIS: PLATO'S DOCTRINE OF ARTISTIC IMITATION AND ITS MEANING TO US 1–2 (1972).

⁴⁴ See Quintus Horatius Flaccus, *Ars Poetica*, l. 19–134 (c. 18 B.C.E.), as cited in THE WORKS OF HORACE: TRANSLATED LITERARY INTO ENGLISH PROSE 306 (Christopher Smart trans., 1863); Ziolkowski, *supra* note 38, at 298.

⁴⁵ See Arno Reiff, *Interpretatio, imitatio, aemulatio: Begriff und Vorstellung literarischer Abhängigkeit bei den Römern* (1959) (Ph.D. Dissertation, Universität Köln); JAMES HARDIN, TRANSLATION AND TRANSLATION THEORY IN SEVENTEENTH-CENTURY GERMANY 59–60 (1992); Ziolkowski, *supra* note 38, at 300.

exclusively Greek literature, though later was extended to a select group of Roman authors. In the early stage of Roman literature, there were great presumptions that the majority of the dramatic writings that appeared in Rome were in great part based upon Greek originals.⁴⁶ As the assumptions go, Latin poets of the fourth and third century were translating the Greeks, or at least paraphrasing them. Ennius, often referred to as the father of Latin literature, was said to have generally simplified and amplified the plays of Euripides.⁴⁷ Discussing Ennius' *Medea*, Cicero stated that it was a "word for word" translation of the *Medea* of Euripides.⁴⁸ Again, as mentioned by Cicero, *The Young Comrades* of Caecilius, or Terence's *Maid of Andros* were adaptations, or perhaps bodily translations, of two earlier comedies from Menander.⁴⁹

Virtually all ancient and medieval writing were based on the imitation of traditional paradigms and models.⁵⁰ Horace's *ausus idem*—daring to rewrite—characterized most of the ancient and medieval literary experience.⁵¹ The art of rewriting—or description—is illustrated by Macrobius' *Saturnalia* in minute detail.⁵² Macrobius gave scholastic substance to Horace's literary challenge by providing his readers with an articulated description of the literary relationship between *auctor* and *imitator*—author and rewriter. In the *Saturnalia*, Macrobius provided a full account of Virgil's borrowings.⁵³ Macrobius quoted "actual lines of Homer which Virgil has translated almost word for word,"⁵⁴ then decided "to go through the Aeneid from the beginning, book by book."⁵⁵ Later, Macrobius "tells us of the Virgil's borrowings from the old writers of Rome as well."⁵⁶ Macrobius goes on for more than ten chapters detailing instances of verbatim duplications, borrowings, translations and rewritings of the Homeric original and Roman authors, such as Ennius, Lucretius, Furius, Lucilius, Pacuvius, Naevius, Suetius, Varius, Accius and

⁴⁶ See GEORGE H. PUTNAM, *AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES* 177–78 (Kessinger Publ'g 2003) (1893).

⁴⁷ See GEORGE A. SIMCOX, I, *HISTORY OF LATIN LITERATURE FROM ENNIUS TO BOETHIUS* 34 (Kennikat Press 1971) (1883).

⁴⁸ See MARCUS TULLIUS CICERO, I, *DE FINIBUS BONORUM ET MALORUM* 4 (1914).

⁴⁹ *Id.* at 4–5.

⁵⁰ Modern aesthetics standards have departed considerably from this arrangement. Since the end of the eighteenth century the status of imitation has been questionable. In a classic article on imitation in antiquity, Richard McKeon declared that "[t]he term 'imitation' is not prominent in the vocabulary of criticism today. In such use as it still has, it serves to segregate the bad from the good in art." Richard McKeon, *Literary Criticism and the Concept of Imitation in Antiquity*, 34 *MOD. PHILOLOGY* 1 (1936), reprinted in *CRITICS AND CRITICISM: ANCIENT AND MODERN* 147 (Ronald S. Crane ed., 1952). To the sensibility of the moderns, "[i]mitation conflicts with ideals (sometimes illusory) of originality, spontaneity, innovation, unconventionality, improvisation, self-expression, and individuality that have held sway since Romanticism." Ziolkowski, *supra* note 38, at 296.

⁵¹ Flaccus, *supra* note 44, at 323 ll. 240–42 ("Ex noto fictum carmen sequere, ut sibi quivis/Speret idem, sudet multum frustra que labore/Ausus idem [I would execute a fiction taken from a well-known story, that anybody might entertain hopes of doing the same thing; but, on trial, should sweat and labor in vain]").

⁵² See MACROBIUS, *THE SATURNALIA* (1969).

⁵³ *Id.* at 290–343 (describing Virgil's adaptations of Latin writers); see also KELLY, *supra* note 30, at 58.

⁵⁴ MACROBIUS, *supra* note 52, at 290.

⁵⁵ *Id.* at 295.

⁵⁶ *Id.* at 385.

Catullus.⁵⁷ In connection with the enumeration of Virgil's borrowings, Macrobius sketched out the principles of *imitatio* and *aemulatio* that governed ancient literary creativity by noting:

[T]he reward of ones' reading is to seek to rival what meet with one's approval in the work of others and by a happy turn to convert to some use of one's own the expressions one especially admires there. For this is what our writers have often done, borrowing both from one another and from the Greeks; and this is what the greatest of the Greeks often did among themselves But if all poets and other writes are allowed to act among themselves in this way, as partners holding in common [haec societas et rerum communitio], what right has anyone to accuse Virgil of dishonesty, if he has borrowed from his predecessors to embellish his poems?⁵⁸

As Macrobius had shown, imitation and borrowing as championed by Virgil strengthened their status as instruments of literary and artistic excellence. If the poet, to be regarded as the ultimate model, had himself heavily imitated and rewritten his predecessors, then creativity could only progress through imitation. This was the lesson that the ancients, Virgil and Macrobius, left to powerfully resound for the following millennium. Large parts of the greatest and most representative works produced in Latin, French, and English in the twelfth and thirteenth centuries were rewrites, following Macrobius' principles of description.⁵⁹

C. Chaucer's Testimony: Social Textuality and Auctoritas

Now, enter Geoffrey Chaucer (1343–1400), the father of English literature. Chaucer expressed the common medieval attitude that almost everything there is to say has been said.⁶⁰ *Nullumst iam dictum quod non sit dictum prius*, Terence firstly noted.⁶¹ In the Prologue to *The Canterbury Tales* and other passages, Chaucer presented himself as a mere compiler or translator, who was not the *auctor* of the books he made and who was not responsible for the materials he used.⁶²

⁵⁷ *Id.* at 290–343, 386–409.

⁵⁸ *Id.* at 385–86.

⁵⁹ KELLY, *supra* note 30, at xiii.

⁶⁰ See JOHN A. BURROW, *MEDIEVAL WRITERS AND THEIR WORKS: MIDDLE ENGLISH LITERATURE AND ITS BACKGROUND, 1100–1500* 34 (1982).

⁶¹ Publius Terentius Afer, *Eunuchus* l. 41 (c. 161 B.C.E.), in I TERENCE: *THE LADY OF ANDROS, THE SELF-TORMENTOR, THE EUNUCH* 238 (John Sargeant trans., 1918) (“In fact nothing is said that has not been said before. So you should recognize facts and pardon new playwrights if they present what their predecessors presented before them.”).

⁶² See BENNETT, *supra* note 3, at 42; *THE IDEA OF THE VERNACULAR: AN ANTHOLOGY OF MIDDLE ENGLISH LITERARY THEORY 1280–1520* (Jocelyn Wogan-Browne et al. eds., 1999) [hereinafter *THE IDEA OF THE VERNACULAR*]; BURROW, *supra* note 60, at 36–37; SEBASTIAN COXON, *THE PRESENTATION OF AUTHORSHIP IN MEDIEVAL GERMAN NARRATIVE LITERATURE 1220–290* (2001) (mentioning that many well-known German authors of the mid-twelfth and thirteenth centuries often professed their works to be translations of French and Latin source texts).

The disclaimer may echo, perhaps, that of Lucian of Samosata. He claimed a millennium earlier his role as a mere mouthpiece of the Muses. He had Hesiod say in one imaginary dialogue with the poet of old: “I might tell you that not one of my poems is my own work; all is the Muses’, and to them I might refer you for all that has been said and left unsaid.”⁶³ In the Far East, Confucius would equally note that “I transmit rather than create; I believe in and love the Ancients.”⁶⁴ For Chaucer, therefore, the act of writing was represented by the metaphor of gleaning the harvest of poetry reaped by others:

For wel I wot that folk han here-beforn/Of Makyng ropen [reaped the harvest of poetry], and lad away the corn;/and I come after, glenynge here and there/And am ful glad if I may fynde an ere/Of any goodly word that they han left.⁶⁵

The medieval author “is configured as part of a continuum that extends from the ‘simple’ process of copying at one end to the act of ‘original’ composition at the other.”⁶⁶ In a well-known commentary on the making of books, the thirteenth-century monk Saint Bonaventure listed four types of makers of books:

There are four ways of making a book. Sometimes a man writes others’ words, adding nothing and changing nothing; he is simply called a scribe [*scriptor*]. Sometimes a man writes others’ words, putting together passages which are not his own; and he is called a compiler [*compiler*]. Sometimes a man writes both others’ words and his own, but with the others’ words in prime place and his own added only for purposes of clarification; and he is called not an author but a commentator [*commentator*]. Sometimes a man writes both his own words and others’, but with his own in prime place and others’ added only for purposes of confirmation; and he should be called an author [*auctor*].⁶⁷

In Bonaventure’s eyes, compiling, translating, commenting, or even simply transcribing the works of great authors was a worthy aim for a medieval writer.⁶⁸ Even the lower functions on Bonaventure’s scale were marked with the fabric of authorship. Bonaventure’s overlapping roles in the chain of creative literary production blurred the contours of medieval authorship, reinforcing its social matrix.

⁶³ Lucian of Samosata, *Dialogue with Hesiod* (c. 160–64 C.E.), in *THE WORKS OF LUCIAN OF SAMOSATA* 568 (Henry W. Fowler & Francis G. Fowler trans., 2007).

⁶⁴ Carla Hesse, *The Rise of Intellectual Property, 700 B.C.–A.D. 2000: An Idea in the Balance*, 131.2 *Daedalus* 26, 26 (2002) (reporting that the saying of Confucius was included in the Lun-Yii, or Analects, compiled in China in the fifth century B.C.E.).

⁶⁵ Geoffrey Chaucer, *The Legend of Good Women, Prologue, G version 61–5*, as cited in JOHN A. BURROW, *MEDIEVAL WRITERS AND THEIR WORKS: MIDDLE ENGLISH LITERATURE AND ITS BACKGROUND*, 1100–1500 31 (1982).

⁶⁶ BENNETT, *supra* note 3, at 39.

⁶⁷ Bonaventure, *In Primum Librum Sentetiarum, proem, quaest. iv*, in *OPERA* 14 (Quaracchi ed., 1882), as cited in BURROW, *supra* note 60, at 31.

⁶⁸ *See id.* at 34.

Instances of so-called “scribal interpolation” were common in the case of Chaucer’s *Canterbury Tales*, which was left in a fragmentary state by Chaucer. Those concerned with the transmission of the text spuriously added prologues, epilogues, or tales.⁶⁹

The poetic versification in the manuscript tradition is a major example of the social history of medieval and renaissance poetic texts. Derek Pearsall noted that in the context of late medieval poetic versification, the poetic text is an instrument to be used and not merely read:

Poems are borrowed and their allusions to date and circumstances changed so as to fit a new occasion. Verses are incorporated into love-letters . . . stanzas from the common stock are interlaced and reworked; simple pieces, including popular songs, are adapted for more ostentatious purposes; famous opening stanzas and striking first lines are pressed into service again and again to lunch new poems.⁷⁰

Pearsall elaborated that the poems in the medieval manuscript tradition “are no one’s property and the whole notion of authorship is in a way irrelevant.”⁷¹ The work tended to easily escape authorial control and enter into a world of easy appropriation and alteration. Arthur Marotti spoke of social textuality, malleability, and textual instability in manuscript culture.⁷² What is viewed as corruption from a modern author-centered perspective was viewed in the manuscript culture as transformative elaboration, generally accepted and often welcomed by the original author. In this regard, Marotti noted that “[i]n fact, some authors expected and even welcomed the changes that recipients of their works brought to them, acknowledging the possibility that modern textual scholarship has been reluctant to admit, that text might (accidentally or deliberately) be improved by individuals other than the original writers.”⁷³

The special connection between God and creativity further cements the communal and participatory nature of medieval authorship. In *Medieval Theory of Authorship*, Alastair Minnis explained that the medieval *auctor* ultimately took his authority from God.⁷⁴ The nature of creativity and authorship is reprocessed in medieval terms under the light of the concept of authority. The author was seen as receiving *auctoritas*—authority—to make authoritative statements directly from God.⁷⁵ The author was to be respected, believed, and finally quoted, extracted, and

⁶⁹ *Id.* at 32.

⁷⁰ DEREK PEARSALL, *OLD AND MIDDLE ENGLISH POETRY* 221 (1977); *see also* RICHARD L. GREENE, *THE EARLY ENGLISH CAROLS* cxxxii (Clarendon Press 1935) (emphasizing the similar plasticity of the text of carols).

⁷¹ PEARSALL, *supra* note 70, at 221.

⁷² ARTHUR F. MAROTTI, *MANUSCRIPT, PRINT, AND THE ENGLISH RENAISSANCE LYRIC* 135–59 (Cornell Univ. Press 1995).

⁷³ *Id.* at 136.

⁷⁴ *See* ALASTAIR J. MINNIS, *MEDIEVAL THEORY OF AUTHORSHIP: SCHOLASTIC LITERARY ATTITUDES IN THE LATER MIDDLE AGES* 10 (1988); Andrew Hope, *Plagiarizing the Word of God: Tyndale between Moore and Joye*, in *PLAGIARISM IN EARLY MODERN ENGLAND* 93–94 (Paulina Kewes ed., 2003) [hereinafter *PLAGIARISM IN EARLY MODERN ENGLAND*].

⁷⁵ *See* MINNIS, *supra* note 74, at 10.

imitated.⁷⁶ As a consequence of the special relation between creativity, authority, and God, the medieval evolution of the classical concept of “*imitatio*” rested on a premise that reached far beyond the Classics. It joined authors ultimately with God, the ultimate source of all creativity and the highest object of imitation.⁷⁷ In this sense, in the Middle Ages, plagiarism might have been interpreted as “giving to the people what God has given to the author.”⁷⁸

Not surprisingly, in connection with this creative process joining the author with God’s *auctoritas*, and therefore with the surrounding community, “writers gain authority less by their originality than by their contribution to an ongoing tradition.”⁷⁹ As a result, authorship did not entail verbal inventiveness but rather its opposite.⁸⁰ The Middle Ages coined the very word *text* out of a textile metaphor to recognize that many medieval writings “are fabrics that incorporate fibers from earlier writings and preceding traditions.”⁸¹ The task of vernacular writers—and medieval authors in general—was perceived as that of understanding, interpreting and elaborating past authorities, rather than competing with them.⁸² The common character of both the scribe and the author was to participate in an ongoing intellectual tradition connected to past authorities. In this sense, medieval authorship “was more likely to be understood as participation in an intellectually and morally authoritative tradition, within which . . . a writer might fill one of several roles, copying, modifying and translating, as well as composing.”⁸³

In the Middle Ages, creativity seemed to entail principally a process of slow augmentation of “the knowledge and wisdom of humanity.”⁸⁴ It may be loosely identified with the medieval idea of authority. Creativity was an inclusive medium. The medieval author was a cell of a breathing organism, the medieval community, and creativity was an instrument to strengthen the appurtenance of the author to the community. Thus in the medieval period, creativity was largely conceived as a participatory process, as opposed to the modern romantic individualistic perception. Creativity in the Romantic sense is an exclusive medium, empowering the individual to stand out from the community. But as to be discussed later, the idea of inclusivity in the discourse over creativity has regained momentum. There is now more emphasis on community, participation, and mass and cumulative production in the digital environment.

⁷⁶ *Id.* at 5.

⁷⁷ Ziolkowski, *supra* note 38, at 302–03.

⁷⁸ Natalie Zemon Davis, *Beyond the Market: Books as Gifts in Sixteenth-Century France*, 33 *TRANSACTIONS ROYAL HIST. SOC’Y* 69, 87 (1983).

⁷⁹ THE IDEA OF THE VERNACULAR, *supra* note 62, at 5.

⁸⁰ See Donald Pease, *Author*, in *CRITICAL TERMS OF LITERARY STUDY* 105–06 (Frank Lentricchia & Thomas McLaughlin eds., 1990); BENNETT, *supra* note 3, at 40.

⁸¹ Pease, *supra* note 80, at 292; see generally, on the textile metaphor, ERNEST ROBERT CURTIUS, *EUROPEAN LITERATURE AND THE LATIN MIDDLE AGES* (1991); Jan M. Ziolkowski, *Text and Textuality, Medieval and Modern*, in *DER UNFESTE TEXT: PERSPEKTIVEN AUF EINEN LITERATUR-UND KULTURWISSENSCHAFTLICHEN LEITBEGRIFF* 109–31 (Barbara Sabel and André Bucher eds., 2001).

⁸² See BENNETT, *supra* note 3, at 40.

⁸³ THE IDEA OF THE VERNACULAR, *supra* note 62, at 4–5.

⁸⁴ See BURROW, *supra* note 60, at 34.

D. Anon's Testimony: Anonymity and Mouvance

After Chaucer, it came the time for Anon to speak. Being the selfless medieval minstrel, he or she spoke with the words of Virginia Woolf, who evoked Anon in an unfinished literary history.⁸⁵

The voice that broke the silence of the forest was the voice of Anon. Some one heard the song and remembered it for it was later written down, beautifully, on parchment. Thus the singer had his audience, but the audience was so little interested in his name that he never thought to give it. The audience was itself the singer; "Terly, terlow" they sang; and "By, by lullaby" filling in the pauses, helping out with a chorus. Every body shared in the emotion of Anon's song, and supplied the story. [Anon] is the . . . common voice singing out of doors.⁸⁶

Anon, Virginia Woolf continued, "was a simple singer, lifting a song or a story from other peoples lips, and letting the audience join in the chorus."⁸⁷ Anon singing was a community effort. Anon sang with and for the community. The image of Anon symbolized the idea that early authorship was not an individual activity. In this sense, Woolf, and later other scholars such as Margaret Ezell, read medieval creativity in terms of social authorship.⁸⁸

In evoking Anon, Woolf expanded the perception of creativity to a nameless domain, in which individual identity cannot satisfactorily describe authorship. Anon was anonymous. Writing on the anonymous nature of medieval creativity, Woolf noted:

Anonymity was a great possession. It gave the early writing an impersonality, a generality. It gave us the ballads; it gave us the songs. It allowed us to know nothing of the writer: and so to concentrate upon his song. Anon had great privileges. He was not responsible. He was not self conscious. He can borrow. He can repeat. He can say what every one feels.⁸⁹

Anonymity became the most substantial sign of a social mode of literary production. Foucault elaborated on the same point by noting that the "'author-function' is not universal or constant in all discourse" and "the same types of texts have not always required authors; there was a time when those texts which we now call 'literary' (stories, folk tales, epics, and tragedies) were accepted, circulated and valorized without any questions about the identity of their author."⁹⁰

⁸⁵ See Brenda R. Silver, *Anon and the Reader: Virginia Woolf Last Essays*, 25 TWENTIETH CENTURY LIT. 356, 382 (1979).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See generally MARGARET EZELL, SOCIAL AUTHORSHIP AND THE ADVENT OF PRINT (1999).

⁸⁹ Silver, *supra* note 85, at 397.

⁹⁰ Michel Foucault, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 124–25 (Donald Bouchard ed., 1977). Foucault also explains

Anon and Homer shared the same nature. The same mechanics of creativity and authorship applied repeatedly across two millennia of human literary production. Bards, minstrels, jongleurs, and troubadours played the same role of the *aoidoi* of ancient Greece.⁹¹ Whether impersonating a wandering musician or a courtly poet, Anon developed and refined a stock of vernacular oral-formulaic tradition across the centuries.⁹² The final result of this cumulative and collaborative creative effort was a monumental achievement. Medieval epics—that spanned from *Beowulf* to the *Chanson de geste* and romance literature, or again from the *Nibelungenlied*⁹³ to the Finnish Kalevala, the Old Norse and Icelandic sagas⁹⁴—sprung beautifully, as the *Iliad* and the *Odyssey* before them, from the oral tradition and the endless reworking of patterns, characters, and themes by a nameless multitude of singers of songs. Like Homer, the fictional Anon was one and all of those singers. He was the singer of the vernacular tradition.

Cumulative oral production served as a matrix of the entire Western medieval epic. Referring specifically to the Nibelungen epic, Henri-Jean Martin sketched the development of this powerful continuum by noting:

As it had happen long before with the Homeric poems, more recently with the *Chanson de Roland*, and, to a certain extent, with the Arthurian romances, when the Nibelungen epic was set down in writing it resulted in a masterwork that was something like a testament that passed on a legacy of oral traditions whose days were numbered.⁹⁵

Nancy Bradbury nicely summarized the fusion of oral and written traditions in medieval epic and popular literature with the epithet “writing aloud.”⁹⁶ Performance and writing of the medieval romance developed together in tight connection, so that “the two traditions existed in a symbiotic relationship” and “clerks and minstrels . . . often borrowed each other’s plumage.”⁹⁷ The fluidity of traditional epic and popular literature derived from the symbiotic relationship between oral and written tradition. In this respect, Paul Zumthor noted that the medieval work often

that any concept of appropriation of a text cannot be used to describe the relationship between a medieval author and a medieval text: appropriation of a text, as Foucault explained, is a form of property unknown in the Middle Ages. *Id.*

⁹¹ See HAUSER, *supra* note 20, at 199–210 (discussing generally artistic figures and their social and creative role).

⁹² See, e.g., Francis P. Magoun, *The Oral-Formulaic Character of Anglo-Saxon Narrative Poetry*, 28 SPECULUM 446, 446 (1953); LORD, *supra* note 13, at 36, 198; FOLEY, TRADITIONAL ORAL EPIC, *supra* note 18, at 33.

⁹³ See Lauri Honko, *Text as Process and Practice: the Textualization of Oral Epics*, in TEXTUALIZATION OF ORAL EPIC 39 (Lauri Honko ed., 2000).

⁹⁴ See, e.g., Stephen A. Mitchell, *The Sagaman and Oral Literature: The Icelandic Traditions of Hjörleifr inn kvensami and Geirmundr heljarskinn*, in COMPARATIVE RESEARCH ON ORAL TRADITIONS: A MEMORIAL FOR MILMAN PARRY (John M. Foley ed., 1987).

⁹⁵ MARTIN, *supra* note 28, at 163.

⁹⁶ See NANCY M. BRADBURY, WRITING ALOUD: STORYTELLING IN LATE MEDIEVAL ENGLAND (1988); COXON, *supra* note 62, at 146, 173 (confirming that a “strong oral tradition continued to exert influence on written heroic literature” in Germany as well).

⁹⁷ VITZ, *supra* note 96, at 46.

“has no authentic text properly speaking,” but was “constituted by an abstract scheme, materialized in an unstable way from manuscript to manuscript, from performance to performance.”⁹⁸ The *mouvance*, as Zumthor termed it, was the defining character of the medieval text, which “was generally presumed . . . to be subject to . . . reinterpretation in the light of a new *matiere*, new understanding, new intentions, or a new audience or patron.”⁹⁹

As an effect of the merging between oral and written tradition, the *mouvance* was strongly correlated with the well-defined narrative units of the pre-modern popular culture. As Peter Burke argued, “folksongs and folktales, popular plays and popular prints all need to be seen as combinations of elementary forms, permutations of elements which are more or less ready-made.”¹⁰⁰ The episodic quality of pre-modern popular culture boosted a process of creative recombination that characterized a large chunk of the history of popular culture. The secret of the “proliferativeness” of traditional pre-modern narrative lay in the idea that “[e]very story is constituted of many smaller stories or potential stories,” because at the intersection of each unit was situated the possibility of new stories, retellings and remixing of the old.¹⁰¹

E. Chrétien de Troyes’ Testimony: Romance Literature and the Art of Rewriting

Chrétien de Troyes, the great star of the romance tradition, also came in to support Chuck D’s case and continued from where Anon had left off. Chrétien was the master of the art of rewriting. The art of rewriting, principles of which Macrobius’ *Saturnalia* illustrated to medieval authors, characterized most of the medieval romance literature. Medieval Romances rewrote their predecessors and, as Marie de France would say, they added “their own meaning to make the book better.”¹⁰² As Douglas Kelly noted in *The Conspiracy of Allusion: Description, Rewriting, and Authorship from Macrobius to Medieval Romance*, “rewriting . . . is the sphere within which medieval writers in the scholastic tradition sought and achieved originality.”¹⁰³

Tightly connected to the *mouvance* and episodic nature of medieval text, the rewritings were created by bringing together different versions or episodes of the legend to form new wholes. For example, Martin Gosman noted that all of the versions of the *Roman d’Alexandre* can be described as a phenomenon of permanent rewriting.¹⁰⁴ In the case of the Alexander’s tale, the “wonders” section was “full of

⁹⁸ PAUL ZUMTHOR, *SPEAKING OF THE MIDDLE AGES* 96 (1986) (describing this phenomenon as “mouvance”).

⁹⁹ DOUGLAS KELLY, *THE ART OF MEDIEVAL FRENCH ROMANCE* 68 (1992).

¹⁰⁰ PETER BURKE, *POPULAR CULTURE IN EARLY MODERN EUROPE* 124 (1978).

¹⁰¹ KARL KROEBER, *RETELLING/REREADING: THE FATE OF STORYTELLING IN MODERN TIMES* 78 (1992); see also BRADBURY, *supra* note 96, at 4.

¹⁰² MARIE DE FRANCE, *LAIS*, at Prologue l. 16.

¹⁰³ KELLY, *supra* note 30, at xiii.

¹⁰⁴ Martin Gosman, *Le ‘Roman d’Alexandre’ et ses versions du XII siècle: une récriture permanente*, 13 *BIEN DIRE ET BIEN APRANDRE* 7 (1996).

fossilized reminders of older stories and enticing kernels of future stories.”¹⁰⁵ The next teller would pick them up or drop them as irrelevant, according to the environment in which the new retelling was to be told. Inserting and adapting antecedent material into the new work formed the amalgamation of the different versions of the legend of Alexander. Pieces from vernacular lyric and other genres were inserted into romance narrative. A new work was created from the adaption and development of those borrowed elements through a *bele conjointure*—the blending of matters that are aesthetically pleasing and meaningful.¹⁰⁶ The phenomenon of romance *conjointure* is thus described “as a *montage* or even a *collage*.”¹⁰⁷

As earlier anticipated when discussing Saint Bonaventure’s vision of authorship, in ancient and medieval creativity, the line between author and rewriter was often blurred. The roles were often interchangeable. For Macrobius, Virgil was a consummate, and sublime, rewriter of Homer and other earlier Roman authors.¹⁰⁸ Virgil himself became an author in its full sense when he was imitated and rewritten. Again, the author of the medieval *Roman d’Eneas* was an *imitator* of Virgil, but also an intermediary *auctor* for *Erec et Enide* of Chrétien de Troyes, who was himself therefore a rewriter of the *Roman d’Eneas* and many other Latin, French and Celtic models and an *auctor* for the writers who followed him, especially the continuators of his romance of Perceval.¹⁰⁹ In a very circular way, imitation was the source of authority and made authority worth of being imitated. Hitting this very point, John of Salisbury commented in the late twelfth century on Macrobius’ influence by noting that “[h]e succeeded in making those who imitated earlier writers themselves imitable.”¹¹⁰ The recurrence of writing and rewriting generated a powerful creative force that created the millennial epic tradition.

As Chrétien explained during his testimony, accretion, retelling, and re-elaboration laid the foundations of the Arthurian Romance. Roger Sherman Loomis, one of the foremost authorities on medieval and Arthurian literature, wrote in his most notable book *Arthurian Tradition and Chrétien de Troyes*: “it appears that the *Matière de Bretagne* is a cumulative creation.”¹¹¹ According to Loomis, the oral tradition ignited a long course of development at the end of which stands the Arthurian romance and Chrétien de Troyes’ works. A similar process led to the development of the Homeric tales and Germanic legends, such as *Beowulf* and the *Nibelungenlied*. Evocatively, Loomis describes the similar origin of these three forms of traditional literature by noting:

The rhapsodes and their relation to “homer,” the scops and their relation to *Beowulf*, would offer close parallels to the Welsh *cyvarwyddon* and the

¹⁰⁵ *Id.* at 164.

¹⁰⁶ *Id.* at 214.

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., MACROBIUS, *supra* note 52, at 290–343 (Macrobius “quot[ed] actual lines of Homer which Virgil has translated almost word for word.”).

¹⁰⁹ See KELLY, *supra* note 30, at 58, 171–212.

¹¹⁰ John of Salisbury, *Metalogicon* I.24.84–85, as cited in KELLY, *supra* note 30, at 58, 171–212.

¹¹¹ ROGER S. LOOMIS, ARTHURIAN TRADITION AND CHRÉTIEN DE TROYES 38 (1961) [hereinafter LOOMIS, ARTHURIAN TRADITION].

Breton conteurs and their relation to the work of Chrétien. In all three cases the poet is the inheritor of an age old body of stories, set in far-off times and places, preserved for generations by itinerant reciters.¹¹²

Welsh or Celtic legends first developed the story, and bards sang it from place to place.¹¹³ In the ninth century, the work of Nennius further shaped the story that was later solidified by Geoffrey of Monmouth in his twelfth-century *Historia Regum Britanniae*.¹¹⁴ Putting together some scanty oral and written sources, Geoffrey de Monmouth highly fictionalized the story of Arthur to the extent that even in the twelfth century he was denounced as a forger.¹¹⁵ Several years later, from Normandy, Worcestershire, and Provence respectively, Wace, Layamon, and Chrétien de Troyes elaborated the story. In 1155, Wace simply adapted the *Historia* of Geoffrey in the first Arthurian Romance, the *Roman de Brut*.¹¹⁶ Layamon or Harley took up Wace's French version and put it into English verse.¹¹⁷ By the end of the twelfth century, Chrétien reworked the Arthurian materials and characters, perhaps adding the story of the Grail himself or deriving it from an ancient manuscript received from his patron, as he claimed.¹¹⁸ Meanwhile, the characters of the Arthurian legend spread throughout Europe.¹¹⁹ In the early twelfth century, the story of Queen Guinevere featured on the tympanum of the Cathedral of Modena.¹²⁰ It is a question whether these sculptures would have been seized and destroyed had Warner Bros. owned the rights in Geoffrey or Wace's work. After all, Warner Bros. has brought a lawsuit against an Indian group constructing a giant replica of Harry Potter's Hogwarts during a Hindu religious festival in Kolkata.¹²¹

In the thirteenth century, the Arthurian cycle came to center on Lancelot and on the story of the Grail, as sketched out in *Perceval*, the last of Chretien's Arthurian

¹¹² *Id.* at 39.

¹¹³ See DEREK ALBERT PEARSALL, ARTHURIAN ROMANCE: A SHORT INTRODUCTION 3–6 (2003); ROGER S. LOOMIS, THE DEVELOPMENT OF THE ARTHURIAN ROMANCE 16–22 (2000) [hereinafter LOOMIS, ARTHURIAN ROMANCE].

¹¹⁴ See GEOFFREY DE MONMOUTH, HISTORIA REGUM BRITANNIAE (c. 1138) [THE HISTORY OF THE KINGS OF BRITANNY]; Françoise Le Saux & Peter Damian-Grint, *The Arthur of the Chronicles*, in THE ARTHUR OF THE FRENCH: THE ARTHURIAN LEGEND IN MEDIEVAL FRENCH AND OCCITAN LITERATURE 93–96 (Glyn Sheridan Burgess & Karen Pratt eds., 2006) [hereinafter THE ARTHUR OF THE FRENCH]; PEARSALL, *supra* note 113, at 6–13; LOOMIS, ARTHURIAN ROMANCE, *supra* note 113, at 34–39.

¹¹⁵ See MARTIN, *supra* note 28, at 162; PEARSALL, *supra* note 113, at 8 (noting that the *Historia* of Geoffrey was “an amazing feat of invention”).

¹¹⁶ See Le Saux & Damian-Grint, *supra* note 114, at 96–101; PEARSALL, *supra* note 113, at 13–15.

¹¹⁷ See PEARSALL, *supra* note 113, at 16; LOOMIS, ARTHURIAN ROMANCE, *supra* note 113, at 40–43.

¹¹⁸ See MARTIN, *supra* note 28, at 162; LOOMIS, ARTHURIAN TRADITION, *supra* note 111, at 12–24, 25–38 (discussing Chrétien sources at length throughout the book).

¹¹⁹ LOOMIS, ARTHURIAN TRADITION, *supra* note 111, at 48–50.

¹²⁰ See MARTIN, *supra* note 28, at 162; PEARSALL, *supra* note 113, at 49 (noting that “subjects from Arthurian romance were also favorites throughout Europe in all forms of interior decoration, furnishings and objects d’art”).

¹²¹ See *Hindu Hogwarts Casts Bad Spell on Rowling*, METRO (Oct. 12, 2007), <http://metro.co.uk/2007/10/12/hindu-hogwarts-casts-bad-spell-on-rowling-256573/>.

romances.¹²² The romance of *Perceval* strikingly exemplifies the tradition of reuse, recurrence, and cumulative creativity in medieval *romance* literature. At least four continuations followed the original Chrétien de Troyes's *Le Conte du Graal*, typically designated as *Perceval*, written across a decade between 1181 and 1191.¹²³ From the late twelfth century to circa 1250, an anonymous writer, Wauchier de Denain, Manessier, and Gerbert de Montreuil wrote the four continuations. Each text and rewriting took over where others left off by developing a theme mentioned in the earlier version or reinventing the role of a character or place.¹²⁴ The many Grail romances that rewrote Chrétien's seminal text, which originally appropriated that which was already written, should be considered as forming a coherent whole.¹²⁵ In this sense, the *Perceval* saga should be seen as an expression of collective and collaborative authorship.¹²⁶

Indeed, the continuations were just one of the many responses generated by Chrétien's works. Robert de Boron would develop the symbolism of the Grail, first adumbrated by Chrétien, in *Joseph d'Arimathie* and his own *Perceval* now lost.¹²⁷ The same author gave a life of his own to Merlin in a romance with the same title.¹²⁸ Again, the *Elucidation* and the *Bliocadran* are short early thirteenth-century prequels to Chrétien's *Perceval*.¹²⁹ From Britain to France, the Arthurian romances soon reached Germany. The Swiss priest Ulrich von Zatzikhoven translated and adapted Chrétien's *Lancelot* into the German verse romance *Lanzelet*, including the whereabouts of the hero's childhood.¹³⁰ A few years later, rewriting Chrétien's *Perceval*, Wolfram von Eschenbach would come up with his own *Parzival*, one of the masterpieces of medieval Arthurian Romance.¹³¹

¹²² See FERDINAND LOT, *ETUDE SUR LE LANCELOT EN PROSE* (1954), as cited in MARTIN, *supra* note 28, at 162.

¹²³ See Matilda Tomaryn Bruckner, *Authorial Relays: Continuing Chrétien's Conte du Graal*, in *THE MEDIEVAL AUTHOR IN MEDIEVAL FRENCH LITERATURE* 13–28 (Virginie E. Greene ed., 2006) [hereinafter Bruckner, *Authorial Relays*]; MATILDA TOMARYN BRUCKNER, *CHRÉTIEN CONTINUED: A STUDY OF THE CONTE DU GRAAL AND ITS VERSE CONTINUATIONS* (2009) [hereinafter BRUCKNER, *CHRÉTIEN CONTINUED*]; Rupert T. Pickens, Keith Busby, & Andrea M. Williams, *Perceval and the Grail: the Continuations, Robert de Boron and Perlesvaus*, in *THE ARTHUR OF THE FRENCH*, *supra* note 114, at 93–96 (GLYN SHERIDAN BURGESS AND KAREN PRATT EDS., U. Wales Press 2006); PEARSALL, *supra* note 113, at 36–39.

¹²⁴ Bruckner, *Authorial Relays*, *supra* note 123, at 22. It mentioned the role of the Mont Dolerous, which was one of the adventures announced at Arthur's court before the knights disperse in search of the Grail in Chrétien's romance. *Id.* It was then reinvented in some of the continuations, marking the opening and closing moment of Wauchier's continuation. *Id.*

¹²⁵ *Id.* at 14, 18.

¹²⁶ *Cf. id.* at 17.

¹²⁷ See Bruckner, *Authorial Relays*, *supra* note 123, at 12; Pickens, Busby, & Williams, *supra* note 123, at 260–68; PEARSALL, *supra* note 113, at 40–41; LOOMIS, *ARTHURIAN ROMANCE*, *supra* note 113, at 114–19.

¹²⁸ See PEARSALL, *supra* note 113, at 40. In fact, Boron's Merlin was indebted to an earlier *Vita Merlini* by Geoffrey de Monmouth and his *Historia*. See GEOFFREY DE MONMOUTH, *THE LIFE OF MERLIN, VITA MERLINI* (John Jay Parry trans., 2008); Le Saux & Damian-Grint, *supra* note 114, at 95, 108 n.4; LOOMIS, *ARTHURIAN ROMANCE* *supra* note 113, at 39–40, 124–30.

¹²⁹ See Pickens, Busby, & Williams, *supra* note 123, at 215–21.

¹³⁰ See PEARSALL, *supra* note 113, at 50–51.

¹³¹ *Id.* at 51; LOOMIS, *ARTHURIAN ROMANCE*, *supra* note 113, at 67–74.

Meanwhile, Arthurian verse romances were turned into prose romances. At the beginning of the thirteenth century, clerical appropriation of the Arthurian and Grail themes with religious purposes emerged as well. They appeared in prose Grail-romances, such as *Perlesvaus* and *Didot Perceval*.¹³² Between 1215 and 1230, the expanding mass of stories was gathered together into a single chronological cycle by numerous authors and compilers. The “Vulgate” cycle of Arthurian prose romance, as this unifying work is known, includes the *Prose Lancelot*, its sequel the *Queste del Saint Grail*, and the *Mort le roi Artu* and its prequels *Estoire del Saint Graal* and *Estoire de Merlin*, partly derived from Robert de Boron’s works.¹³³ The Vulgate Cycle of Arthurian Prose romances was re-written shortly after his composition by an author who combined it with themes derived from the prose *Tristan*,¹³⁴ another hero that was now living a life on his own and whose story went through numerous adaptations, transformations, and rewritings.¹³⁵ Again, certain anonymous *remanieurs* also remodeled in part the Vulgate Cycle of Arthurian prose romances by including a so-called *Livre d’Artus*, which introduced new incidents and characters, provided references and details explaining several incidents left so far unanswered, and brought to a conclusion certain themes referred to in the Arthurian corpus as developed up to that point.¹³⁶ Starting from 1235, anonymous authors, attracting then continuators and *remanieurs*, took to the next level the derivative reuse of characters and themes by adding the tale of one or more generations.¹³⁷ For instance, *Gurion le Courtois* was a pre-Arthurian chronicle telling the stories of the fathers of the Arthurian heroes, whereas *Ysaÿe le Triste* recounted the story of the

¹³² See BRUCKNER, CHRÉTIEN CONTINUED, *supra* note 123, at 12–15; Pickens, Busby, & Williams, *supra* note 123, at 269–73; PEARSALL, *supra* note 113, at 42–43.

¹³³ See Elspeth Kennedy et al., *Lancelot with and without Grail: Lancelot do Lac and the Vulgate Cycle*, in THE ARTHUR OF THE FRENCH, *supra* note 114, at 274–324; PEARSALL, *supra* note 113, at 43–48; LOOMIS, ARTHURIAN ROMANCE, *supra* note 113, at 92–111; Jean Frappier, *The Vulgate Cycle*, in ARTHURIAN LITERATURE IN THE MIDDLE AGES: A COLLABORATIVE HISTORY, 316 (Roger S. Loomis ed., 1959) (writing of the “enigma” of the Lancelot-Grail cycle, and referring to a work that by its very size, scope, diversity, and intricacy seemed to defy any attempt to situate its creation in the hands of a single author while at the same time demonstrating a cohesion that could not be the result of mere chance).

¹³⁴ See Fanni Bogdanow & Richard Trachsel, *Rewriting Prose Romance: The Post-Vulgate Roman Du Graal and Related Texts*, in THE ARTHUR OF THE FRENCH, *supra* note 114.

¹³⁵ Starting with Tristan of Thomas and a slightly later version by Béroul, dating approximately between 1160 and 1170, the legend of Tristan was extensively expanded. Circa 1210, Gottfried von Strassburg masterfully crystalized the story of the hero in his own *Tristan*. See PEARSALL, *supra* note 113, at 52; LOOMIS, ARTHURIAN ROMANCE, *supra* note 113, at 74–79. Later, *Le Roman de Tristan de Léonois* or *Tristan en prose* [the prose Tristan] merged the story of Tristan into the Arthurian saga and adapted it into prose in the fashion of the ‘Vulgate’ Cycle. Emmanuèle Baumgartner, *The prose Tristan*, in THE ARTHUR OF THE FRENCH, *supra* note 114. Also the prose *Tristan*, composed between 1230 and 1235, appears to be a work of collaborative authorship with one Hélie the Boron continuing, or more probably revising and amplifying a text left by a writer using the pseudonym Luce de Gaut. In fact, some manuscripts still include an epilogue in which Hélie reports that he has assembled “all that was left by my lord Lucas de Gaut, who first begun the translation, by Master Gautier Map, who wrote the book centered on Lancelot [the ‘Lancelot proper’], and by my lord Robert de Boron.” *Id.* at 325–26.

¹³⁶ See Bogdanow & Trachsel, *supra* note 134, at 357–64.

¹³⁷ *Id.* at 364–67.

sons of the Knights of the Round Table after the death of Arthur.¹³⁸ The public knew some of these characters since the Chrétien's Romances, but others were introduced anew. They soon became common heritage at the free disposal of other writers, who interpolated parts of the *Gurion* romance back into the original Arthurian stories.¹³⁹

This account of the history of medieval Arthurian literature is only a preview of the amazing creative explosion that detonated all over Europe in less than a century through continuations, adaptations, translations, interpolations, and rewritings of the Arthurian saga. In the romance literature, open reuse and borrowing of iconic characters and related themes promoted relentless creative inspiration. Arthur, Lancelot, Guinevere, Perceval, Gauvain, Yvain, Merlin, and Tristan were endlessly exploited, reinvented, and transformed, while they traveled from Britain to France, Germany, and then back again to Britain. Their stories were continuously reworked or continued. Each rewriter, continuator, translator, and compiler added new details. By slow accretion, these new details grew into a new picture. They became the story as we know it now. Chrétien's or Robert de Boron's narrative, which was extensively plundered by the many that came after them,¹⁴⁰ turned into something they would have hardly expected. Chrétien himself, however, sang the powerful creative beauty of joining together, mashing up, and reworking borrowed characters, themes, and motifs. He was a rewriter before being rewritten.¹⁴¹ To Chrétien writing was to draw from a tale of adventure "une mout bele conjointure."¹⁴² The whole history of the Arthurian romance is that of recursive beautiful conjunctions. From the intersections of previous borrowed story-lines and episodes, new stories were born, old stories were reinvigorated, and the cumulative *mouvance* of old and new, original and derivative, faded away into "the story." As Roger Loomis hinted at in

¹³⁸ *Id.* at 364, 366.

¹³⁹ *Id.* at 365.

¹⁴⁰ See BEATE SCHMOLKE-HASSELNANN, THE EVOLUTION OF ARTHURIAN ROMANCE: THE VERSE TRADITION FROM CHRÉTIEN TO FROISSART 181–220 (1998) (discussing at length borrowings, plagiarism and dependence of later writers from Chrétien and providing examples of *mutatio* à la Macrobius in Arthurian romance).

¹⁴¹ That Chrétien did not create his plots is stressed more than once by Roger Loomis. See LOOMIS, ARTHURIAN ROMANCE, *supra* note 113, at 66; LOOMIS, ARTHURIAN TRADITION, *supra* note 111, at 11 (noting that "by his own account, [Chrétien] did not create his plots . . . he derived the main outlines at least of the four romances from tales familiar to his readers; the tales were commonly recited by professionals before aristocratic audiences; some versions were valued so highly as to be set down in manuscript in prose").

¹⁴² CHRÉTIEN DE TROYES, EREC ET ENIDE Prologue, l. 10–14 (William W. Comfort trans., 1919); see also Douglas Kelly, *Chrétien de Troyes*, in THE ARTHUR OF THE FRENCH, *supra* note 114, at 156–62, 156. Kelly wrote:

[T]he combination of two or more entities is a *conjunction* . . . [t]he *Erec* passage fits this meaning when Chrétien says that he *draws* his *conjunction* from a tale, thus suggesting that he is lifting parts from the tale or from a number of different versions of a tale, and recombining them in a new version.

Id.

the title of one fundamental text on the subject, the Arthurian Romance is a “collaborative history.”¹⁴³

F. Ludovico Ariosto’s Testimony: From the Chanson to the Frenzy of Roland

Ludovico Ariosto (1474–1533), the Italian author of the Renaissance masterpiece *Orlando Furioso* [The Frenzy of Roland] (1516), brought his testimony as well. Ariosto explained that his great work was the result of a cumulative tradition building upon an endless line of rewritings, borrowings, and open reuses that have characterized the *chanson de geste*, and especially the *Chanson de Roland*.

The *Chanson de Roland* is the most celebrated of Old French *chansons de geste*, which sung of the epic “deeds” of a hero. The *Chanson de Roland* recounts the story of Roland, Charlemagne’s nephew. Jongleurs carried the *Chanson de Roland* far and wide, from France to England, Italy, Germany, and Spain. The formulaic language seems to indicate an oral origin for the *Chanson de Roland*.¹⁴⁴ Even if we assume that the *Chanson the Roland* was the result of an anonymous writer of genius—a *remanieur de genie*—coming into contact with the oral tradition,¹⁴⁵ the work is the product of “elaboration over [a few] centuries by hundreds, perhaps even thousands, of poets.”¹⁴⁶ As Joseph Duggan noted, the poem should not be treated “as a monolith, but rather as a work which passed through a long process of continual creation before being written down in the Oxford manuscript.”¹⁴⁷ In fact, Duggan continued, “the normal way for narrative songs to grow from simple *chants d’actualité* to true epics, in both proportion and scope, is precisely through a process of multisecular accretion.”¹⁴⁸

One defining character of *chansons de geste* is that they went through a process of so-called “cyclization.”¹⁴⁹ This process revolved around the role of iconic characters

¹⁴³ ARTHURIAN LITERATURE IN THE MIDDLE AGES: A COLLABORATIVE HISTORY (Roger S. Loomis ed., 1959).

¹⁴⁴ See LORD, *supra* note 13, at 198 (“The *Chanson* is formulaic beyond any question . . . [s]uch analyses seem to indicate that the *Chanson* as we have it in the Oxford manuscript is an oral composition.”); JOSEPH J. DUGGAN, THE SONG OF ROLAND: FORMULAIC STYLE AND POETIC CRAFT 16–62, 34–35, 159 (1973) (noting that “indeed *Roland* is one of the more formulaic works examined”).

¹⁴⁵ DE VRIES, *supra* note 4, at 32. De Vries argued:

[I]f we are inclined to consider the Song of Roland as the end of a very long and literary development, and not at all as a masterpiece that suddenly sprung up out of nothing, this does not mean that we wish to degrade the poet to a *remanieur* of an older text.

Id. But see DUGGAN, *supra* note 144, at 101 (“We are left with but one cogent possibility supported by concrete evidence: the *Roland* which we possess must be a very nearly unadulterated product of oral tradition.”).

¹⁴⁶ DUGGAN, *supra* note 144, at 101.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 75.

¹⁴⁹ See Finn E. Sinclair, *The chanson de geste*, in THE CAMBRIDGE HISTORY OF FRENCH LITERATURE 29 (William Burgwinkle, Nicholas Hammond, & Emma Wilson eds., 2011); CATHERINE

or groups of characters promoting the formation of “cycles.” Meeting the request of the public, singers, jongleurs, and authors created poetic and legendary genealogies of the most successful heroes. By the middle of the twelfth century, new *chanson* sprang out from the original poems to sing the earlier or later adventures of the heroes, their ancestors and descendants. Three main cycles have acquired specific prominence, as famously grouped by Bertrand de Bar-sur Abe in his *Girart de Vienne*, a *chanson* written in the late twelfth century: 1) the *geste du roi*, telling the deeds of Charlemagne or a hero from his lineage, usually his nephew Roland; 2) the *geste de Garin de Monglane*, having as a central character Guillaume d’Orange, supposedly the great-grand son of Garin; and 3) the *geste de Doon de Mayence*, concerning traitors and rebels against the royal power and centering on the characters of Renaud de Montauban and Girart de Roussillon.¹⁵⁰

The figure of Roland, together with his companion Olivier and the magic horse Bayard, which is dominant in the *geste de roi* cycle, also recurred constantly in the songs of other cycles. Roland played the role of protagonist in several adventures preceding the battle of Roncevalles, such as those told in the *Chanson d’Aspremont*, *Otinel*, or *Entrée d’Espagne*.¹⁵¹ In other songs, Roland was portrayed as one of the leading knights in Charlemagne’s court. In *Girart de Vienne*, which was part of the *geste de Garin de Monglan* cycle, the first encounter between Roland and Olivier was described in connection with a duel of the two heroes near Vienne, after which Roland and Olivier swore eternal friendship.¹⁵² Meanwhile, the story of Roland was: 1) adapted into Southern Occitan speaking France, such as in *Rollan a Saragossa* and *Ronsasvals*; 2) translated and adapted into the German *Rolandslid* by Konrad der Pfaffe, the Spanish *Roncesvalles*, and the Old Norse *Karlamagnús* saga; 3) developed and re-elaborated by the Italian literature; 4) adapted into prose in many languages with enormous success; and 5) visually translated into the Sicilian *Pupi* theater. For another example of cross-country rewriting, circulation, and influence, the unfinished thirteenth-century German epic *Willehalm* by the poet Wolfram von Eschenbach was based on the French *chanson* *Aliscans*. It expanded and adapted the earlier *Chanson de Guillaume*, perhaps the oldest song of the *geste de Garin de Monglane* cycle.¹⁵³ Through the endless line of retellings, translations, variants, and rearrangements, the story was transformed and expanded with the inclusion of new characters, the modification of the old and the emergence of new scenarios, elements, and episodes, potentially open to new retellings. Roland, as well as the heroes of the

BATES, THE CAMBRIDGE COMPANION TO THE EPICS 70 (2010); LUKE SUNDERLAND, OLD FRENCH NARRATIVE CYCLES: HEROISM BETWEEN ETHICS AND MORALITY 1–22 (2010).

¹⁵⁰ See Bertrand de Bar-sur Abe, *Girart de Vienne* l. 8–67, in THE SONG OF GIRART OF VIENNE BY BERTRAND DE BAR-SUR-AUBE: A TWELFTH-CENTURY CHANSON DE GESTE (Michael A. Newth trans., 1999).

¹⁵¹ See WILLIAM W. KIBLER, MEDIEVAL FRANCE: AN ENCYCLOPEDIA 508 (1995); URBAN T. HOLMES, A HISTORY OF OLD FRENCH LITERATURE: FROM THE ORIGINS TO 1300 83 (1962).

¹⁵² Bertrand de Bar-sur Abe, *supra* note 150, at l. 5606–662.

¹⁵³ See Martin H. Jones & Timothy McFarland, *Introduction*, in WOLFRAM’S “WILLEHALM”: FIFTEEN ESSAYS xiii–xvii (Martin H. Jones & Timothy McFarland eds., 2002); Martin H. Jones, *The Depiction of Battle in Wolfram von Eschenbach’s Willehalm*, in THE IDEALS AND PRACTICE OF MEDIEVAL KNIGHTHOOD II: PAPERS FROM THE THIRD STRAWBERRY HILL CONFERENCE 46–47 (1988).

other cycles, witnessed a process of slow transformation and adaptation to the changing cultural and literary landscape. As Finn Sinclair highlighted:

The essential point to note here is that epic texts, by their very nature as texts spanning the oral/literary divide, were subject to *mouvance*—that is, to reinvention, renewal and rewriting. Even if they were composed as integral poems, their subsequent dissemination through singing and performance, and through repeated copying over the years, produced living texts, open to transformation and regeneration in response to their changing context.¹⁵⁴

Singers and jongleurs, and later literary authors, would pick the new themes and turn them into new cycles, possibly leading to new masterpieces and the emergence of new genres at some point along the line of retellings. In the fourteenth-century Franco-Venetian *Entrée d'Espagne*, for example, Roland would become an errant knight, borrowing this motif from the increasingly successful Arthurian Romances and setting the background for the Italian epic of the late fifteenth century and early sixteenth century.¹⁵⁵

The proliferation of a tradition of living texts that have been inspired by process of regeneration, continuations, and rewriting—which developed around the open reuse of characters and themes of the *Chanson de Roland* and *chanson de geste* at the intersection of oral and literary tradition—was finally crystallized and reaffirmed in one of the last literary masterpieces of the Western Renaissance. Ariosto's *Orlando Furioso* is an extraordinary example of cumulative and collaborative creativity that modern copyright policies would thwart. Ariosto's *Orlando Furioso* was a continuation of Matteo Maria Boiardo's unfinished *Orlando Innamorato* (1495)—*Roland in Love*.¹⁵⁶ Boiardo's work at once drew characters, themes, and parodistic inspiration from Luigi Pulci's *Morgante* (1478–1483).¹⁵⁷ Pulci, in fact, has supposedly reworked an anonymous fourteenth-century *Orlando* in the first part of his poem and based the last five cantos of his romance on *La Spagna in ottava rima*, a mid-fourteenth-century adaptation and rewriting of the *Entrée d'Espagne*.¹⁵⁸ Ariosto, Boiardo, and Pulci all adapted a twelfth century Old French *chanson de geste* known as *Les Quatre Fils Aymon*—The Four Sons of Aymon, frequently referred to simply as the tale of Renaud de Montauban—and mashed it up with the *Chanson de Roland* and later variations. Ariosto invited other writers to continue the story of Angelica

¹⁵⁴ Sinclair, *supra* note 149, at 28.

¹⁵⁵ See ANONIMO PADOVANO [ANONYMOUS FROM PADUA], L'ENTRÉE D'ESPAGNE: ROLANDO DA PAMPLONA ALL'ORIENTE [THE ENTRÉE D'ESPAGNE: ROLAND FROM PAMPLONA TO THE FAR EAST] (2011); NICOLÒ DA VERONA, CONTINUAZIONE DELL'ENTRÉE D'ESPAGNE (1992) (continuing the narration left unfinished in the *Entrée d'Espagne* to reach close to the happenings told in the *Chanson the Roland*).

¹⁵⁶ See MATTEO MARIA BOIARDO, *ORLANDO INNAMORATO* (Charles S. Ross trans. & ed., 2004).

¹⁵⁷ See LUIGI PULCI, *MORGANTE: THE EPIC ADVENTURES OF ORLANDO AND HIS GIANT FRIEND* (Joseph Tusiani trans., Edoardo Lebano ed., 1998).

¹⁵⁸ See JANE E. EVERSON, THE ITALIAN ROMANCE EPIC IN THE AGE OF HUMANISM: THE MATTER OF ITALY AND THE WORLD OF ROME 30 n.5 (2001); CONSTANCE JORDAN, PULCI'S *MORGANTE*: POETRY AND HISTORY IN FIFTEENTH-CENTURY FLORENCE 46 (1986).

with the verse “forse altri canterà con miglior plettro.”¹⁵⁹ The invitation was not left unheard and several sequels were produced in Italian and Spanish.¹⁶⁰

G. Shakespeare Testimony: Plagiarism, Feathers, and Crows

The Immortal Bard, Shakespeare, could not be missing from the catalogue of artists and authors willing to support Chuck D’s case. Robert Greene described his younger contemporary, Shakespeare, as “an upstart crow beautified with our feathers.”¹⁶¹ Resenting Shakespeare for dipping too far into his *Pandosto* for *The Winter’s Tale*,¹⁶² or perhaps after assisting a performance of *Henry VI*,¹⁶³ Greene warned other writers to abandon playwriting because Shakespeare “with his Tygers hart wrapt in a Players hyde, supposes he is . . . an absolute *Johannes fac totum*, is in his owne conceit the onely Shake-scene in a countrey.”¹⁶⁴ And, indeed, Shakespeare was, in modern terms, a plagiarist on a vast scale. According to Malone, out of 6,033 lines of parts I, II, and III of *Henry VI*, Shakespeare copied 1,771 verbatim and paraphrased 2,373.¹⁶⁵ Whole passages of *Antony and Cleopatra*, to take just one example, were line-by-line versifications of prose historical works.¹⁶⁶ Again, in *The Tempest*, Gonzalo’s description of the ideal state was a word-for-word transposition of Michel de Montaigne’s essays *Of the Cannibals*, as translated by John Florio in 1603.¹⁶⁷ Modern copyright laws might conceivably have stifled almost all of Shakespeare’s works at birth because they ‘stole’ from Raphael Holinshed’s and Edward Hall’s prose histories of England, Thomas North’s translation of *Plutarch*,

¹⁵⁹ LUDOVICO ARIOSTO, ORLANDO FURIOSO, XXX.16 l. 8 (William S. Rose trans., 2006) (“Perchance some voice in happier verse may sing.”).

¹⁶⁰ See DAVID QUINT, ORIGIN AND ORIGINALITY IN RENAISSANCE LITERATURE: VERSIONS OF THE SOURCE 4 (1983).

¹⁶¹ ROBERT GREENE, GROATSWORTH OF WIT: BOUGHT WITH A MILLION OF REPENTANCE: DESCRIBING THE FOLLY OF YOUTH, THE FALSEHOOD OF MAKE-SHIFT FLATTERERS, THE MISERY OF THE NEGLIGENT, AND MISCHIEFS OF DECEIVING COURTESANS, WRITTEN BEFORE HIS DEATH, AND PUBLISHED AT HIS DYING REQUEST 83 (1919); see also TERENCE SCHOONE-JONGEN, SHAKESPEARE’S COMPANIES: WILLIAM SHAKESPEARE’S EARLY CAREER AND THE ACTING COMPANIES, 1577–1594 18–21 (2008) (discussing the interpretation of Greene’s passage); ALEXANDRA HALASZ, THE MARKETPLACE OF PRINT: PAMPHLETS AND THE PUBLIC SPHERE IN EARLY MODERN ENGLAND (1997).

¹⁶² See ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 75 (1952).

¹⁶³ See ILYA GILIOV, THE SHAKESPEARE GAME: THE MYSTERY OF THE GREAT PHOENIX 120 (2003) (In fact, Greene’s passage seems to parody a quotation in the third part of *Henry VI*: “Tygers hart wrapt in a woman’s hyde.”).

¹⁶⁴ GREENE, *supra* note 161, at 83–85.

¹⁶⁵ See LINDEY, *supra* note 162, at 75.

¹⁶⁶ See William St Clair, *Metaphors of Intellectual Property*, in PRIVILEGE AND PROPERTY, ESSAYS ON THE HISTORY OF COPYRIGHT 384 (Ronan Deazley, Martin Kretschmer, & Lionel Bently eds., 2010); MARGRETA DEGRAZIA, SHAKESPEARE VERBATIM 132–76 (1991).

¹⁶⁷ See Michel de Montaigne, *On Cannibals*, in MONTAIGNE’S ESSAYS I 30 (John Florio trans., 1603), available at <http://www.luminarium.org/renascence-editions/montaigne/1xxx.htm>; William Shakespeare, *The Tempest*, in THE DRAMATIC WORKS OF SHAKESPEARE: FROM THE TEXT OF JOHNSON AND STEVENS 8 (1836); SAMUEL R. DELANY, LONGER VIEWS: EXTENDED ESSAYS 225 (1996); LINDEY, *supra* note 162, at 74–75.

Arthur Brooke's poem *Romeo and Juliet*, Chapman's *Homer*, Golding's *Ovid*, and many others.¹⁶⁸

The extensive—and unacknowledged—appropriations of Shakespeare were commonplace in early modern England. It was especially common in drama, although it was widespread in all literary fields.¹⁶⁹ The *Mock Astrologer* of Dryden is a manifesto of proud plagiarism, and self-conscious reuse of others' plots and stories. In the prologue of the play, Dryden laid down his own apologia of plagiarism:

I am tax'd with stealing all my Playes. . . . 'Tis true, that where ever I have lik'd any story in a Romance, Novel or forreign Play, I have made no difficulty, nor ever shall, to take the foundation of it, to build it up, and to make it proper for the *English* stage.¹⁷⁰

In writing his play, Dryden had drawn on Pedro Calderón de la Barca's *El Astrologo Fingido* and Thomas Corneille's *Le Feint Astrologue*, from which, by Dryden own admission, he "rejected some adventures . . . [and] heightened those which [he has] chosen; and . . . added others which were neither in the French or Spanish."¹⁷¹ In a quest for perfection among giants of the stage, Calderon, Corneille, and Dryden's plays each imitated those of the predecessor's, each separated by twenty years. This very successful pattern of re-use would be impossible under modern copyright policies.

Borrowing flourished in sixteenth-century England to such an extent that Sir Sidney Lee noted that "[t]he full story of the Elizabethan sonnet is, for the most part, a suggestive chapter in the literary records of plagiarism."¹⁷² Even the greatest of the Elizabethan sonneteers transcribed the language and the sentiments of popular French and Italian poetry.¹⁷³ Plagiarism was not at all considered a creative mischief. As Harold White noted, "[n]ot only were Englishmen from 1500 to 1625 without any feeling analogous to the modern attitude toward plagiarism; they even lacked the word until the very end of that period."¹⁷⁴

¹⁶⁸ See Nick Groom, *Forgery, Plagiarism, Imitation, Peglegger*, in *PLAGIARISM IN EARLY MODERN ENGLAND*, *supra* note 74, at 79.

¹⁶⁹ See PAULINA KEWES, *AUTHORSHIP AND APPROPRIATION: WRITING FOR THE STAGE IN ENGLAND 1660–1710* (1998) [hereinafter KEWES, *AUTHORSHIP AND APPROPRIATION*]; Paulina Kewes, "A Play, Which I Presume to Call Original": *Appropriation, Creative Genius and Eighteenth-Century Playwriting*, 34 *STUD. IN THE LITERARY IMAGINATION* 17, 17 (2001).

¹⁷⁰ John Dryden, *Preface to the Mock Astrologer* (1671), in *THE CRITICAL AND MISCELLANEOUS PROSE WORKS OF JOHN DRYDEN, NOW FIRST COLLECTED* 202 (Edmond Malone ed., 1800).

¹⁷¹ *Id.* at 203.

¹⁷² Sidney Lee, *The Elizabethan Sonnet*, in *THE CAMBRIDGE HISTORY OF ENGLISH LITERATURE* 248 (1918).

¹⁷³ *Id.*

¹⁷⁴ HAROLD O. WHITE, *PLAGIARISM AND IMITATION DURING THE EARLY RENAISSANCE* 202 (1935).

H. Coleridge's Testimony: The Divine Ventriloquist and the Obsession with Absolute Originality

Samuel Taylor Coleridge then came in and his testimony shed light on the process leading to the denial of the cumulative and collaborative nature of creativity. Trying to accommodate the tension amongst originality, appropriation, and plagiarism, Coleridge justified one notorious accusation of plagiarism from Schelling by claiming: "I regard the Truth as a divine Ventriloquist: I care not from whose mouth the sounds are supposed to proceed, if only the words are audible and intelligible."¹⁷⁵

From the seventeenth and eighteenth centuries, a new creative paradigm based on autogenous originality and invention emerged from the ashes of imitative practices and erudite borrowing. In a few years, the Statute of Anne would be enacted. Original authorship was on the rise, and plagiarism was viewed more and more as a creative mischief. As Martha Woodmansee argued, modern "copyright" and "authors' rights" laws are tightly correlated with the emergence of the modern concept of art in the eighteenth century.¹⁷⁶ The new conceptualization of art and authorship emerged from a markedly different individualistic vision of men. It was a by-product of a new idea of genius that fully expanded on the evolution earlier propelled by Dürer and Renaissance super-artists. The construction of the idea of genius, as an "instinctive and extraordinary capacity for imaginative creation, original thought, invention or discovery,"¹⁷⁷ is said to have originated in England and to have acquired special prominence in Germany.¹⁷⁸ The special focus on originality and genius rapidly became the field of research of a number of breakthrough works. Examples include *The Conjectures on Original Composition* by Edward Young, *An Essay on Genius* by Alexander Gerard, and *An Essay on Original Genius* by William Duff.¹⁷⁹ In his *Conjectures*, Young made originality the tract of a man of genius. He rejected imitation, driving it to the periphery of creative efforts: "The mind of a man of Genius is fertile and pleasant field, pleasant as Elysium, and fertile as Tempe; it enjoys a perpetual Spring. Of that Spring, Originals are the fairest Flowers:

¹⁷⁵ SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA: OR, BIOGRAPHICAL SKETCHES OF MY LITERARY LIFE AND OPINIONS* 153 (Princeton Univ. Press 1983) (1817). Together with the metaphor of the "divine ventriloquist," Coleridge also deployed the phenomenon of ocular spectra and the concept of the "genial coincidence" to describe his plagiarism. See TILAR J. MAZZEO, *PLAGIARISM AND LITERARY PROPERTY IN THE ROMANTIC PERIOD* 26–48 (2007).

¹⁷⁶ See MARTHA WOODMANSEE, *THE AUTHOR, ART AND THE MARKET: Rereading the History of Aesthetics* (1996) (reviewing the German debate over the nature of a book and discussing how the rise of art in the eighteenth century produced a new aesthetic paradigm and new ideas about artistic production that got incorporated into, and empowered by, the copyright and authors' rights laws); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author*, 17 *EIGHTEENTH-CENTURY STUD.* 425, 425–48 (1984).

¹⁷⁷ Jonathan Bate, *Shakespeare and Original Genius*, in *GENIUS: THE HISTORY OF AN IDEA* 90 (Penelope Murray ed., 1989).

¹⁷⁸ *Id.*

¹⁷⁹ See Edward Young, *Conjectures on Original Composition*, in a LETTER to the Author of Sir Charles Grandison (2d ed., 1759); ALEXANDER GERARD, *AN ESSAY ON GENIUS* (1773); WILLIAM DUFF, *ESSAY ON ORIGINAL GENIUS AND ITS VARIOUS MODES OF EXERTION IN PHILOSOPHY AND THE FINE ARTS, PARTICULARLY IN POETRY* (1767).

Imitations are of quicker growth, but fainter bloom.”¹⁸⁰ Imitation, “the sincerest form of flattery” to an Elizabethan playwright only a century earlier,¹⁸¹ was driven to the periphery of creativity. Plagiarism became a “sordid Theft” to be ruled out altogether, as Young wondered “[h]ope we, from Plagiarism, any Dominion in Literature; as that of Rome arose from a nest of Thieves?”¹⁸²

However, Young still related the creative act of a genius to some invisible divine afflatus in accordance with the Ciceronian tradition.¹⁸³ The last veil before the full individualistic empowerment of creativity still remained, but not for long. It was at this time that Alexander Gerard asserted that “genius is properly the faculty of invention . . . by means of which a man is qualified . . . for producing original works of art.”¹⁸⁴ The power of imagination was a power of the human mind, not a godly inspiration.¹⁸⁵ As Gerard argued, the source of genius was internal, not external. The exclusion of the external endowment radically changed the perception of creativity. Creativity became purely individual, a personal experience. Communitarian participation was suddenly excluded from the process of creative production.

In this respect, the presence of an external divine endowment kept in place a model of open reuse, exchange and sharing of others’ creativity. If a gift was given to the author, he was under obligation to give back to the community some of what he had received. Imitation, plagiarism, and borrowing were instrumental to return to the people what God—or the community, if we draw from a perspective where God is a construction of a community need—had given to the author.¹⁸⁶

Kant would later elaborate on Gerard’s insights by arguing that genius properly consists in the “happy relation” between the faculties of imagination and understanding.¹⁸⁷ Like Gerard, Kant stressed that the creative moment is an internal process.¹⁸⁸ Kant took a further logical step by crystallizing originality as the central property of modern aesthetic. An immediate consequence of the fact that genius “is not a mere aptitude for what can be learned by a rule,” but “a talent for producing that for which no definite rule can be given,” is Kant’s position that “*originality* must be its first property.”¹⁸⁹ The romantic author was now fully shaped. Meanwhile, the demise of imitation, plagiarism, and collaborative creativity was well on its way. By the beginning of the nineteenth century, Hegel would note, “an ingenious and trivial idea, and a change in external form, is rated so highly as

¹⁸⁰ YOUNG, *supra* note 179, at 7.

¹⁸¹ WHITE, *supra* note 174, at 120.

¹⁸² YOUNG, *supra* note 179, at 15.

¹⁸³ *Id.* at 16.

¹⁸⁴ GERARD, *supra* note 179, at 8, 29–32, 39–70 (discussing at length “[h]ow Genius arises from the Imagination”).

¹⁸⁵ *Id.* at 27–39 (discussing the problem in a section aptly titled “To What Faculty of the Mind, Genius Properly Belongs”).

¹⁸⁶ *Cf.* Davis, *supra* note 78, at 87.

¹⁸⁷ Immanuel Kant, *Kritik der Urteilskraft* § 49, in *KRITIK OF JUDGMENT* 202 (J. H. Bernard trans., 1892).

¹⁸⁸ *Id.* at 188, § 46.

¹⁸⁹ *Id.* at 189.

originality and a product of independent thinking that the thought of plagiarism becomes wholly insufferable.”¹⁹⁰

As Paulina Kewes argued, accusations of plagiarisms spared few authors, and marked a changing cultural paradigm.¹⁹¹ One of the earliest controversies over the morality of literary copying and imitation involved two French choreographers.¹⁹² In 1623, François de Lauze embarked on an aggressive campaign to name and shame one Berthélemy de Montagut, who had stolen his treaty on dancing. The three pages introducing de Lauze’s *Apologie de la danse* detailed how an early draft of that very same book was appropriated by de Montagut and published under the title *Louange de la danse*.¹⁹³ Although this first attempt to publicly stigmatize an instance of plagiarism was partially unsuccessful,¹⁹⁴ a changing sensitivity toward the issue was emerging.¹⁹⁵ Modern attitudes to literary property can also be traced in Langbaine’s *Momus Triumphans; or, The Plagiaries of the English Stage*. Langbaine’s short book was an arraignment for theft in English plays, written at the end of the seventeenth century. After listing sources and analogues of all the published English drama, Langbaine concluded:

[H]aving read most of our English Plays, as well ancient as those of latter date, I found that our modern Writers had made Incursions into the deceas’d Authors Labours, and robb’d them of their Fame. . . . I know that I cannot do a better service to their memory, than by taking notice of the Plagiaries, who have been so free to borrow, and to endeavour to vindicate the Fame of these ancient Authors from whom they took their Spoiles.¹⁹⁶

In the eighteenth century, accusations of plagiarism became commonplace. Jonson, Pope, Dryden, and Milton all faced accusations of plagiarism. At the very same time, they appeared to champion the emerging new ideal of original authorship.¹⁹⁷ The Milton affair exemplifies the transformation of the cultural

¹⁹⁰ GEORG FRIEDRICH WILHELM HEGEL, *PHILOSOPHY OF RIGHTS* § 69 (Thomas M. Knox trans., 1967).

¹⁹¹ KEWES, *AUTHORSHIP AND APPROPRIATION*, *supra* note 169, at 96–129.

¹⁹² See Barbara Ravelhofer, *The Medium of Plagiarism: Rogue Choreographers in Early Modern London*, in *PLAGIARISM IN EARLY MODERN ENGLAND*, *supra* note 74, at 134–47.

¹⁹³ See François de Lauze, *Apologie de la danse* 1–3 (1623), as cited in Ravelhofer, *supra* note 192, at 139; BERTHÉLEMY DE MONTAGUT, *LOUANGE DE LA DANSE* (Barbara Ravelhofer ed., 2000).

¹⁹⁴ See Ravelhofer, *supra* note 192, at 138.

¹⁹⁵ In this period, the emerging metaphor of paternity of the book by the authors, as employed by Philip Sidney in his *Arcadia* or by Cervantes in *Don Quixote*, is an example of a new discourse of authorship. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 38 (1993).

¹⁹⁶ Gerard Langbaine, *Momus Triumphans: or, The Plagiaries of the English Stage; Expos’d*, in *A CATALOGUE A4* (1688); see also KEWES, *AUTHORSHIP AND APPROPRIATION*, *supra* note 169, at 96–129 (discussing Langbaine’s work at length).

¹⁹⁷ See generally Ian Donaldson, *‘The Fripperie of Wit’: Jonson and Plagiarism*, in *PLAGIARISM IN EARLY MODERN ENGLAND* *supra* note 74, at 119–33 (discussing plagiarism in Jonson and Dryden); Paul Baines, *Theft and Poetry and Pope*, in *PLAGIARISM IN EARLY MODERN ENGLAND* *supra* note 74, at 123–24 (discussing plagiarism in Pope); Richard Terry, *In Pleasing Memory of All He Stole*, in *PLAGIARISM IN EARLY MODERN ENGLAND* *supra* note 74 (discussing plagiarism in Jonson, Pope and Dryden); KEWES, *AUTHORSHIP AND APPROPRIATION*, *supra* note 169, at 54–63 (discussing appropriative practices in Dryden); LINDEY, *supra* note 162, at 78–83.

landscape.¹⁹⁸ William Lauder manufactured fraudulent charges of plagiarism against Milton in a series of articles in *The Gentleman's Magazine*, later collected in 1750 as *An Essay on Milton's Use and Imitation of the Moderns, in his Paradise Lost*. The alleged plagiarism later proved to be a forgery. Lauder was soon discovered. But the case stirred up quite a controversy and “the severity of the accusation indicates an anxiety of originality becoming an obsession, with the concomitant fears that the sacred well of individual genius can be poisoned or simply drawn dry by intruders.”¹⁹⁹

This obsession grew at the beginning of the nineteenth century, so that public controversies surrounding plagiarism hit most of the British Romantic authors. In the early nineteenth century, appropriation strategies had been most famously associated with Samuel Taylor Coleridge.²⁰⁰ Coleridge had to face recursive accusations of plagiarism.²⁰¹ In his monumental work, *Coleridge: The Damaged Archangel*, Norman Fruman specifically discussed the question of Coleridge's unacknowledged sources. Fruman traced the history of the controversy that spanned for over a century from its origins in the mid-nineteenth century to the mid-twentieth century.²⁰² Thomas DeQuincey and Wordsworth largely contributed to ignite the widespread, lasting debate that surrounded Coleridge's masterpieces such as a *Hymn before Sun-Rise, France: An Ode, The Rime of the Ancient Mariner*, and the philosophical works in the *Biographia Literaria*.²⁰³ Wordsworth himself, along with Shelley or Lord Byron, were later touched by accusations of plagiarism.²⁰⁴

The Romantic obsession with plagiarism trespassed into an attempt to turn a blind eye on collaboration, assimilation, and the cumulative nature of creativity, excluding the community altogether from the discourse about creativity. The excruciating emphasis on Coleridge's plagiarism, and his alleged exceptionality, became a way to negate the failure of the Romantic aesthetic ideology that Coleridge, the father of British Romanticism, seems to represent. In fact, as Mazzeo noted, Coleridge's “borrowings contradict the logic of Romanticism: he is the brilliant and innovative poet who claimed imaginative origins for his work but who borrowed

¹⁹⁸ See generally Groom, *supra* note 168, at 80–89; Terry, *supra* note 197, at 184–91.

¹⁹⁹ Groom, *supra* note 168, at 77; see also Nuno Peixoto de Pinho, *Handel and Musical Borrowing*, available at <http://www.scribd.com/doc/58245691/Handel-and-Musical-Borrowing> (discussing the same obsession with originality in connection with George Frideric Handel's “transformative imitation” and noting that “the vast body of literature concerning Handel's compositional approach is filled with a wildly disproportionate amount of condemning accusations, the most serious of which is plagiarism”).

²⁰⁰ See THOMAS MALLON, *STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM* 26–40 (1989) (discussing Coleridge plagiarism); MAZZEO, *supra* note 175, at 17–48; LINDEY, *supra* note 162, at 84–85.

²⁰¹ See MAZZEO, *supra* note 175, at 191–92 n.12 (providing a detailed account of the most relevant sources discussing the debate surrounding Coleridge's plagiarism).

²⁰² See NORMAN FRUMAN, *COLERIDGE, THE DAMAGED ARCHANGEL* (1971).

²⁰³ See MAZZEO, *supra* note 175, at 18 (discussing Thomas DeQuincey's four articles in *Tait's Magazines* in 1834, in which Coleridge's literary debts were cataloged and dissected).

²⁰⁴ *Id.* at 49–85 (discussing the problem of coterie and oral circulation and issues of plagiarism as they emerged in the Wordsworth and Shelley household); *Id.* at 86–121 (focusing on charges of aesthetic plagiarism levied against Lord Byron), *Id.* at 144–81 (examining the charges of plagiarism brought against Wordsworth in *The Excursion*).

covertly from the texts of other writers.”²⁰⁵ So, although Coleridge was not an anomaly at all, his plagiarism was stigmatized as exceptional because Coleridge could be cast “as a damaged individual, consumed by private neuroses” and drug addiction.²⁰⁶ The failure of the Romantic ideology of absolute and self-sustaining originality was denied by presenting Coleridge’s abnormal persona as an evidence of the abnormality of Coleridge’s authorial persona. The collective, communitarian and cumulative nature of creativity was sidelined. It was seen as the effect of a blurred perception of reality from a confused individual. A quintessential example of the failure of the Romantic aesthetic model is deceitfully re-deployed to help marginalize the opposing imitative and collaborative paradigm.

Similarly, the treatment of Homer, Ossian, and Shakespeare shows that Romantic ideology transcended into a fabricated denial of the imitative and cumulative mechanics of creativity. It turned the evidence of failure of the system into corroborating assumptions. Perhaps the very notion of original genius was the result of a misperception. The notion, as originating in England, was molded on the cardinal example of Shakespeare.²⁰⁷ Shakespeare’s immense literary reputation served to propel the wide acceptance of the modern notion of genius. Homer was the other eminent example of original genius. Homer, perhaps together with the medieval bard Ossian, served as a model to develop the romantic notion.²⁰⁸ These assumptions were most likely misplaced.

There could be much debate and discussion over the nature of creativity of the three mentioned paradigmatic models. Some of that discussion was explicated in the preceding pages. While the creativities of Homer, Ossian, and Shakespeare are considered all but undoubtedly original, these supposedly quintessential models of original genius reinforce the opposite argument: primitive originality does not exist in art, but every work depends on prior works. Homer, Ossian, and Shakespeare tend to deconstruct the myth of absolute originality, rather than strengthen it. In fact, Homer is most likely a tradition, a true collective author, and the expression of a cumulative and participative model of creativity. Ossian poses very similar problems. Even if one denies the eighteenth-century construction of the legendary Gaelic bard Ossian in the “translations” of James Macpherson,²⁰⁹ Ossian is the *Anon* of Virginia Woolf, and his authorship is by definition a participative community effort.

There is much debate on whether the genius of Shakespeare lies in primitive originality or in sublime imitation, borrowing, and reuse. Again, Shakespeare most likely raises doubts over the possibility of a primitive originality. Shakespeare’s stories were the result of heavy pillaging on Middle Age and Renaissance popular tales and classical and modern history. In this sense, Shakespeare was imitative and wholly unoriginal if we look through the lens of the principles stated in Young’s *Conjectures*. As Mark Rose noted, “it would be not wholly inappropriate, I think, to

²⁰⁵ MAZZEO, *supra* note 175, at 7–8.

²⁰⁶ *Id.* at 8.

²⁰⁷ See Bate, *supra* note 177, at 77.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 93 (discussing it as a possible conclusion).

characterize Shakespeare the playwright . . . in a quasi-medieval manner as a reteller of tales.”²¹⁰

Jonathan Bate, one of the major Shakespearian scholars, argued that the claimed original, rather than imitative, nature of Shakespeare’s genius “is untrue of course,” because “we now know that Shakespeare read nature through the spectacles of many books (Ovid’s foremost among them).” Bate reinforced the same point by noting: “[M]odern scholarship has shown that Shakespeare’s art depended on the assimilation and refashioning of inherited literary and dramatic tradition.”²¹¹ Rather than individuality, Bate seems to conclude that communality was the defining character of Shakespeare’s art:

Genius became a Romantic obsession because it was a conception that seemed to guarantee individuality. . . . Hamlet may be the archetype of the individual consciousness, but Shakespeare was not Hamlet. If anything, he was the archetype of communality, not individuality. . . . By “Shakespeare” we mean not an individual, but a body of work, and that body was shaped by many individuals—by Ovid and Shakespeare’s other literary precursors, by Marlowe and his other dramatic precursors, by the actors of his company, by the audience without whom no play can be completed.²¹²

The claims that Shakespeare did not write Shakespeare²¹³ do well to unveil the misperception of the Romantic obsession with primitive originality. The claimants of that theory put forward Shakespeare’s plagiarism to prove that others have written the plays, supposedly those plagiarized. As Boyle noted, discussing these claims, “[a]fter all, the Immortal Bard would never stoop to copy the works of another. Once again, originality becomes the key.”²¹⁴ The modern overprotective copyright system has been built upon this fabricated denial of the cumulative and imitative nature of creativity and the misperceptions that it brought about.

Chuck D’s plea to get a witness to support his case for sampling and borrowing has been heard. Many have responded, but far more could have come. In his magistral lecture, *An Unhurried View of Copyright*, Benjamin Kaplan reflected:

[I]f man has any “natural” rights, not the least must be the right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and “progress,” if it is not entirely an illusion, depends on generous indulgence of copying.²¹⁵

²¹⁰ ROSE, *supra* note 195, at 26.

²¹¹ Bate, *supra* note 177, at 93.

²¹² *Id.* at 94; *see also* ROSE, *supra* note 195, at 25.

²¹³ *See, e.g.*, JAMES SHAPIRO, *CONTESTED WILL: WHO WROTE SHAKESPEARE?* (2010) (recounting that among many doubters have been writers and thinkers like Freud, Henry James, Mark Twain, and Helen Keller).

²¹⁴ JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 230 n.12 (1996).

²¹⁵ BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT, REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) 2* (2005).

Waldo Emerson shared a similar view on the ephemeral nature of originality and noted that:

The originals are not original. There is imitation, model, and suggestion, to the very archangels, if we knew their history. The first book tyrannizes over the second. Read Tasso, and you think of Virgil; read Virgil, and you think of Homer; and Milton forces you to reflect how narrow are the limits of human invention. The *Paradise Lost* had never existed but for these precursors²¹⁶

III. TRIAL BRIEF: TURNING CUMULATIVE CREATIVITY INTO A NUISANCE

At first, the witnesses that Chuck D has summoned to support his case, as well as that of any other modern digital remixer, may have surprised the court. In fact, who else may have pleaded this case more effectively than Homer and the endless line of bards and *aoidoi* he represents? Are not the bits that the court claims Chuck D stole, that “mineral” he found, the same as the formulae that were reworked over and over in the oral formulaic tradition and that produced our epic and romance literature and influenced most of our popular culture? Are not those chunks and bits of culture that digital creativity would like to re-use and remix, the same as the “harvest of poetry” that Chaucer gleaned “here and there”?

The review of the process of creating the *Iliad* and the *Odyssey* has unveiled the mechanics of writing epics. It is a powerful example of the productivity of a constant chain of open re-use of literary stock. The largest part of culture has been produced under a paradigm where imitation, even plagiarism, and social and collaborative authorship were constitutional elements of the creative moment. The literary pillars of Western culture, the *Iliad* and the *Odyssey*, were fully forged in the furnace of the oral-formulaic tradition. Later Medieval epics and *romance de geste* grew out of that tradition under the aegis of Macrobius’ art of rewriting and Latin principles of *imitatio*. Continuations, free re-use of stories and plots, and remodeling of iconic figures and characters made romance literature a powerful vehicle propelling cross-country circulation of culture and the development of modern European languages. At any step of our cultural history, we are presented with overwhelming evidences that creativity has strived through cumulative evolution, borrowing, appropriation, and imitation.

In contrast, modern policies for creativity are engineered in a fashion that thwart the re-use of information, knowledge, and creativity, rather than facilitate it. Under the current regime, works are supposedly created as perfect, self-sustaining artifacts from the moment of their creation. Any modification, derivation, cumulative addition must secure preventive approval and must be paid off, as if it is a nuisance for society. This becomes increasingly true as a consequence of extended terms of protection, expansion of authorship rights, and hurdles involved with clearing copyrights in order to perform additional reuse. In this sense, commodification of

²¹⁶ Ralph Waldo Emerson, *Quotation and Originality*, in IV WORKS OF RALPH WALDO EMERSON 145 (1876).

culture and copyright expansion, especially its emphasis on a strictly enforced control over derivative works, contradicts the very essence of human creativity.

A. Copyright Culture, Clearance Culture and “Feared Uses”

“As virtually any clown can attest, no one owns the idea of making a balloon dog, and the shape created by twisting a balloon into a dog-like form is part of the public domain.”²¹⁷ The appropriation artist Jeff Koons seems to disagree with this. In fact, the statement cited above comes from a complaint for declaratory relief that the San Francisco bookstore and art gallery Park Life had to file after Koons threatened lawsuit for selling a balloon dog-shaped book-end supposedly infringing on Koons’ well-known balloon dog sculptures.²¹⁸ Besides the risible claim—that was in fact easily demolished by the timely expert testimony of Dr. Bozo—the case is telling of an over-expanding copyright culture threatening judicial enforcement in order to prevent the use and re-use of the common stock of knowledge. Any use, to which economic or cultural value is attached, tends to trigger the reaction of alleged copyright owners. Copyright culture has become so pervasive that even silence may become a possible ground for reaction.²¹⁹ A cartoonist may no longer imitate news crawls parodying Fox News’ right-wing slant because—as Matt Groening, author of *The Simpsons*, drily noted—“[i]t might confuse the viewers into thinking it’s real news.”²²⁰ Miscellaneous stories of ordinary copyright madness have multiplied in the last decade. From rightsholders’ reactions against Girl Scout campfire sing-alongs and day care facilities distributing sheet music to children,²²¹ to Sony DMCA’s claims against the re-engineering robot dog AIBO’s jazz dance,²²² clearance culture practices have profoundly influenced our cultural landscape. Absent proof of clearance, filmmakers would be totally unable to insure, screen, or distribute movies.²²³ It may even be impossible to clear the rights of a *The Simpsons*’ clip running on a

²¹⁷ Complaint at 1, *Alexander & Song LLC v. Jeff Koons LLC*, No. 4:11-cv-00308 (N.D. Cal. Jan. 20, 2011).

²¹⁸ *Id.*

²¹⁹ See JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 6–7 (Univ. of Ga. Press 2006) (referring to legal turmoil following Mike Batt’s silent track homage to the famous silent piece, John Cage’s *4’33”*).

²²⁰ See generally MCLEOD, *FREEDOM OF EXPRESSION*, *supra* note 1.

²²¹ See *German Music Groups in Copyright Conundrum with Crèches*, M&C NEWS (Dec. 28, 2010), <http://cs.entertainmentcareers.net/blogs/music/archive/2010/12/30/german-music-groups-in-copyright-conundrum-with-creches.aspx>.

²²² See LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 95–99 (2004).

²²³ See PATRICIA AUFDERHEIDE & PETER JASZI, CENTER FOR SOCIAL MEDIA, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2004) available at http://www.centerforsocialmedia.org/sites/default/files/UNTOLDSTORIES_Report.pdf; Lawrence Lessig, *For the Love of Culture*, THE NEW REPUBLIC, Jan. 26, 2010, available at <http://www.newrepublic.com/article/the-love-culture> (discussing, among other related issues, clearing the rights in filmmaking and telling the decade-long efforts of Grace Guggenheim to clear all of the rights necessary to produce a digital edition of the movies of her own father, the late Charles Guggenheim, one of America’s greatest documentarians).

background TV set, accidentally shot in a documentary about Wagner.²²⁴ The publishing industry follows almost identical rules and clearance practices. It dictates which content may reach the marketplace, including whether an author is entitled to title a novel *Panasonic*.²²⁵

Creative behaviors that—as we have discussed at length—were commonplace and incentivized for most of human history have become increasingly harder to undertake today. In fact, the insurmountable hurdles related to the overbroad expansion of copyright—and its judicial enforcement backed up by the design of modern copyright law—highly discourage the traditional mechanics of creativity. Facing the impossibility of distributing the award-winning animated movie *Sita Sings the Blues* because of the copyright hurdles stemming from clearing the rights in 1920s jazz songs used in the movie, the film critic Roger Ebert wonders “[e]ighty years later . . . [d]on’t the copyright owners realize they are contributing to the destruction of their property by removing it from knowledge?”²²⁶ Freedom of expression, and thus our capacity to create cumulative culture, becomes often merely theoretical:

Copyright’s inconstant, unpredictable free speech safety valves, coupled with the high cost of litigation, have endangered a “clear it or delete it” culture in which these gateways intermediaries—and their errors and omissions insurance carriers—regularly insist that speakers obtain permissions for all potentially actionable uses, even those that likely do not infringe.²²⁷

As it is engineered, copyright law obliges whoever wants to use protected material to clear the copyrights by meeting the conditions set by the holder.²²⁸ Backed up by this principle of exclusivity, copyright holders expand their control over intellectual content through the interaction of concomitant factors. First, the individual is often practically incapable of clearing the complex bundle of rights involved in copyrighted content. Second, more and more often, threatening judicial enforcement becomes a practice transforming copyright protection from a defensive tool into an offensive weapon hindering, rather than promoting, culture and progress. The economic hurdles involved in facing a copyright infringement lawsuit are in themselves a bar to any unlicensed use of the content, whether it is fair or not.

²²⁴ AUFDERHEIDE & JASZI, *supra* note 223, at 154–61.

²²⁵ See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1903 (2007) (reporting that when the company Panasonic denied permission, the publisher demanded the title of the book to be changed); KEMBREW MCLEOD, *OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW* xi–xv (2001) (discussing, with a few powerful examples, how fair uses are curtailed by threats of lawsuits in academic publishing).

²²⁶ Karl Fogel, Comment to Roger Ebert, *Having a Wonderful Time, Wish You Could Hear*, ROGER EBERT’S J. (Dec. 23., 2008), <http://www.rogerebert.com/rogers-journal/having-a-wonderful-time-wish-you-could-hear> (quoting Ebert from an earlier interview).

²²⁷ NEIL W. NETANEL, *COPYRIGHT’S PARADOX* 65–66 (2008).

²²⁸ Rothman, *supra* note 225, at 1911–917.

On first account, statutory damages make it very attractive to sue for copyright infringement in the United States.²²⁹ Statutory damages can be significantly higher than the actual damages suffered by the rightsholders.²³⁰ This is because statutory damages compensate rightsholders per work as opposed to compensation for losses. Under United States copyright law, statutory damages may range from \$750 to \$150,000 per work, if willful infringement can be shown.²³¹ If the last figure is applied, statutory damages can escalate quickly and get so high that somebody at the Record Industry Association of America may even believe that copyright infringement may be worth trillions!²³² This astounding amount was demanded by a few record companies from LimeWire, a company distributing the most downloaded free peer-to-peer file-sharing client program.²³³ The recording industry tried to stretch statutory damages to their limits, by arguing that Section 504(c)(1) of the Copyright Act provided for damages for each infringement where more than one party was liable.²³⁴ Wisely enough, the Manhattan federal district court observed, “[a]s Defendants note, Plaintiffs are suggesting an award that is ‘more money than the entire music recording industry has made since Edison’s invention of the phonograph in 1877.’”²³⁵

The obscurity of copyright law adds to the problem. Fair use has been described by the Second Circuit as “the most troublesome [doctrine] in the whole law of copyright.”²³⁶ Similarly, copyright terms have increasingly become an unresolvable conundrum. The status of one of the most popular American songs, “Happy Birthday to You,” even deceived Justice Breyer in his dissenting opinion in *Eldred v. Ashcroft*²³⁷—and after a sixty-eight-page-long article from Robert Brauneis, based on hundreds of sources almost inaccessible to the layman, perhaps some doubts still remain.²³⁸ The inherent complexity and unpredictability of fair use decisions in the United States—and the intricacies of copyright terms—have facilitated the aggressive litigation posture of copyright holders. Complexity of copyright law causes a high level of uncertainty among users regarding what they can or cannot do with creative content. The complexity of copyright provisions discourages users from enforcing privileged or fair uses of copyrighted content in court. The specter of litigation operates as a disincentive for unlawful as well as privileged or fair uses—the “feared use” fallacy of fair use. Additionally, this “feared use” fallacy is promoting a further indirect expansion of private entitlements against public

²²⁹ See Rothman, *supra* note 225, at 1909–910; Jeffrey Stavroff, *Damages in Dissonance: The “Shocking” Penalty for Illegal Music File-Sharing*, 39 *CAP. U. L. REV.* 659 (2011) (discussing two recent cases of extraordinary statutory damages penalties awarded against Jammie Thomas-Rasset—a single mother—and Joel Tenenbaum—a graduate student at Boston University).

²³⁰ *Id.*

²³¹ See, e.g., 17 U.S.C. § 504(c)(2) (2012) (authorizing statutory damages of up to \$150,000 for willful infringement of copyrights).

²³² See *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 313, 317 (S.D.N.Y. 2011).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

²³⁷ See *Eldred v. Ashcroft*, 537 U.S. 186, 262 (2003).

²³⁸ See Robert Brauneis, *Copyright and the World’s Most Popular Song*, 56 *J. COPYRIGHT SOC’Y U.S.A.* 335, 425 (concluding that the copyright should most likely be expired).

privileges. Because of the obscurity of the law and the indeterminacy of the doctrine, risk-adverse users are lead into seeking a licence when none is necessary. In turn, as James Gibson pointedly noted, this practice starts a mechanism of rights accretion, by making licencing itself a proof that the use is covered by the entitlement, and “rigs the intellectual property game in favor of rights-holders.”²³⁹

B. Locking Cultural Icons into the Dungeons of Copyright

This over-reaching copyright culture translates into the ability of copyright law to suppress transformative reuses of copyrighted works. The enhanced protection of derivative works operated by modern copyright law,²⁴⁰ and a shrinking fair use doctrine,²⁴¹ turn transformative uses of previous works into a nuisance for society, rather than a creative opportunity. The parallelism between past and present highlights the incapacity of the present copyright system to recreate the cumulative and collaborative creative process that was so fruitful in the past. In particular, the constant development and recursive use of iconic characters—which was an engine for creativity in the epic literature—is but a fading memory. Nowadays, transformative use, characters, and cultural icons are locked into the dungeons of copyright, the constant enlargement of which has tightened the chains holding them. This, in turn, seems to prevent the cumulative creation of pop culture as witnessed in the pre-modern oral-formulaic creative process, and generally in the development of most human art and culture.

The speech-enhancing role of cultural icons and iconic characters is abridged in at least two different directions. On a first immediate level, modern copyright hinders the re-use of cultural icons and iconic characters as an engine of new and cumulative popular stories and creativity. It is clear that under the present copyright regime, these re-uses are prevented unless permission is given. On a more subtle level, copyright law prevents the capacity of follow-on creators to make an expressive meaning through the reference to a copyrighted item. This hindering effect of copyright has the pernicious result of impeding newcomers from using copyrighted information in order to challenge and oppose the mainstream culture that the copyrighted item represents.

²³⁹ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 951 (2007); James Gibson, *Accidental Rights*, 116 YALE L.J. POCKET PART 348, 350 (2007).

²⁴⁰ See, e.g., Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 251–52 (2011). Newman writes:

Though one would expect the category of reproductions to be much narrower than that of derivative works, in practice the two have largely merged The meaning of reproduction has thus expanded to include both works that have no literal similarity to the original, and ones that incorporate only a small amount of literal copying.

Id.

²⁴¹ See JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* 35–50 (2011).

Under the present copyright paradigm, any reuse of copyrighted characters constitutes infringement.²⁴² Some narrow exceptions—basically in case of a clear-cut parodying purpose—may apply.²⁴³ But even in those instances the limitations to copyright enforcement are uncertain at best. All modern cultural icons—such as the Disney characters, the Marvel characters, or the characters of Star Wars, Harry Potter, James Bond, or Rocky—are fiercely guarded by their rightsholders. Recently, Warner Bros. has been very active in preventing any unauthorized re-use of themes and characters from the Harry Potter saga. In *Warner Bros. v. RDR Books*, the Southern District Court of New York enjoined the publication of *The Harry Potter Lexicon*, a collection of factual information related to the Harry Potter saga.²⁴⁴ The Lexicon in fact was online for a long time as a fan-made repository that was extremely popular among fans of the Harry Potter saga.²⁴⁵ J. K. Rowling herself, the author of the Harry Potter series, refers to the Lexicon website as “such a great site that I have been known to sneak into an internet [sic] café while out writing and check a fact rather than go into a bookshop and buy a copy of Harry Potter (which is embarrassing).”²⁴⁶ Rowling and her publisher then reacted to the distribution of the Dutch translation of *Tanya Grotter and the Magical Double Bass* by the Russian author Dmitri Yemets.²⁴⁷ Yemets’ book featured the story of a female apprentice wizard that in part constituted a parody of her British colleague’s work transposed into Russian culture and folklore.²⁴⁸ The book was adjudged copyright infringement by Dutch courts.²⁴⁹ However, the publication was never enjoined in Russia and a

²⁴² *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2nd Cir. 1930). Judge Learned Hand stated:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. . . . It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.

Id.; see also *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) (“It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”).

²⁴³ *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (recognizing that parodies are obviously transformative).

²⁴⁴ *Warner Bros. v. RDR Books*, 575 F.Supp. 2d 513, 554 (S.D.N.Y. 2008).

²⁴⁵ See generally Steve Vander Ark, *THE HARRY POTTER LEXICON*, <http://www.hp-lexicon.org> (last visited Jan. 15, 2014).

²⁴⁶ *Facts about the Harry Potter Lexicon Website*, *THE TELEGRAPH* (Apr. 15, 2008, 12:01 A.M.), <http://www.telegraph.co.uk/news/uknews/1895676/Facts-about-the-Harry-Potter-Lexicon-website.html>.

²⁴⁷ See Tim Wu, *Harry Potter and the International Order of Copyright, Should Tanya Grotter and the Magic Double Bass be Banned?*, *SLATE.COM* (June 27, 2003), http://www.slate.com/articles/news_and_politics/jurisprudence/2003/06/harry_potter_and_the_international_order_of_copyright.html.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

long series of books followed from the first book, together with several other spin-offs from the *Tanya Grotter* series. In addition, an Indian writer, Uttan Ghosh, wrote an adaptation to Rowling's saga, titled *Harry Potter in Calcutta*, in which the young wizard meets several characters from Bengali literature.²⁵⁰ The publication of the story was similarly prevented by the timely intervention of the rightsholders and an out-of-court settlement.²⁵¹

The treatment of the Russian and Indian adaptations of Harry Potter witnesses a sharp contrast to the traditional creative modes of pre-modern popular culture. Most of the epic and romance literature strengthened out of the adaptation and translation of characters and themes into new social and cultural settings. In contrast, this very creative process is perceived as free-riding by modern standards. Was the endless line of Greek poets performing and mashing up the *Iliad* and the *Odyssey* free-riding over their predecessors? Were the jongleurs, bards, minstrels, and clerks free-riding on each other when they rewrote and performed the *Chanson de Roland* from court to court, from courtyard to courtyard, from France to England, from Italy to Spain? Was Chretien de Troyes free-riding over French and Celtic authors when he wrote his *Perceval*? Were Wauchier de Denain, Manessier, one Gerbert de Montreuil, and a fourth anonymous author free-riding over Chrétien when they wrote their continuations to *Perceval*? Was Matteo Maria Boiardo free-riding over Luigi Pulci's *Morgante* to write his *Orlando Innamorato*, and was Ludovico Aristo free-riding over both of them when he wrote one of the masterpieces of the Renaissance literature, the *Orlando Furioso*?

More disturbingly—if there is anything more disturbing than having denied the essential rules that governed our cultural history—the emphasis of the present copyright system on the exclusive nature of the creative process, rather than its inclusive nature, is increasingly showing unexpected and unwanted consequences. These results run counter to the values of freedom of expression that our society apparently seems to promote. Even those narrow exceptions that should provide the system with some balance seem to often fail their goals. Having lost the perception that creativity is a necessitated instrument of community appurtenance, society has hindered the capacity to engage in unrestrained social discourse, especially when commodified creativity becomes a cultural standard.

In a few instances—such as most prominently in the parodying sequel of *Gone with the Wind*, the novel *The Wind Done Gone*, in which Alice Randall rewrites the original story from the black slave's perspective—freedom of expression has been upheld to constrain the enforcement of copyright and allow the free re-use of copyrighted characters.²⁵² Unfortunately, this is not always the case. Recently, the Second Circuit confirmed that Fredrik Colting could not revive, at least in the U.S., Holden Caulfield and other characters of Salinger's *The Catcher in the Rye*.²⁵³ In *Salinger v. Colting*, the Court decided that it was not fair use for Colting to have a 76-year-old Holden Caulfield, referred to as Mr. C, brought back to life by a 90-year-

²⁵⁰ See *id.*

²⁵¹ *Id.*

²⁵² See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001).

²⁵³ See *Salinger v. Colting*, 607 F.3d 68, 70 (2d Cir. 2010), *vacating* *Salinger v. Colting*, 641 F.Supp.2d 250 (S.D.N.Y. 2009).

old author, a fictionalized Salinger, wishing to kill him.²⁵⁴ The plot of Colting's book, *60 Years Later: Coming Through the Rye*, struggles with the lifestyle of Salinger, who seemingly wanted to remove himself and the memory of his characters from society.²⁵⁵ Salinger has not published since 1965.²⁵⁶ He has never permitted adaptations of his works, other than a 1949 film adaptation of one of his early short stories.²⁵⁷ He was in the spotlight for harshly enforcing his copyrights and for an endless number of lawsuits.²⁵⁸

Colting claimed that his book is a "critical examination of the character Holden and the way he is portrayed in [*The Catcher in the Rye*], the relationship between Salinger and his iconic creation, and the life of a particular author as he grows old but remains imprisoned by the literary character he created."²⁵⁹ Colting's critique of Salinger seems to be exactly what freedom of expression in a democratic society should protect. To me, personally, then, the story is very meaningful. I read it as a metaphorical allegory of the very arguments I try to put forward here. The author Salinger is a quintessential expression of modern copyright culture and its obsession with absolute originality that has long lost sight of the cumulative, collaborative and social nature of creativity. The metaphor embedded in Colting's book challenges that culture by challenging Salinger. Colting expresses the concern that the final outcome of this copyright obsession will be to kill our own characters, together with our own culture. He wishes therefore that Salinger may recover from his obsession and set Holden free. Ironically enough, challenging the publication of the book in court proved the very argument that Colting presented in his book. A court upholding Salinger's claim would empower that argument even further. The Second Circuit did not catch the irony, most likely, and confirmed that characters are locked into the dungeons of copyright, if the author wishes so.

In cases such as *Suntrust* and *Colting*, the balance to be struck between freedom of expression and private entitlements becomes far more delicate, and often copyright law fails to achieve it. In these instances, the object of copyright protection has become a cultural standard. Therefore, similar competition problems to those in the field of technological standards arise when access is sought for participation in the social dialogue.²⁶⁰ Instead of newcomers challenging leading market positions, alternative or minority culture may be willing to challenge mainstream culture. In these instances, the owner of copyright in the standard might completely refuse to license her work, so to prevent it from being criticized or from being used to convey messages to which the author objects.

²⁵⁴ *Id.* at 70–72.

²⁵⁵ *Id.* at 72.

²⁵⁶ *Id.* at 71.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 72.

²⁶⁰ Julie Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 363 (2005) (noting that a fair use doctrine "more attentive to the ways in which context shapes creative practice might conclude, by analogy to the metaphoric functionality principle that emerges from the software copyright cases, that a broader range of uses undertaken by users for purposes of interoperating with their own culture should be permissible"). On the contrary, Cohen concludes that "most courts have steadfastly resisted developing such principles of "cultural interoperability" to apply in non-software cases." *Id.*

The scenario is the same as that reviewed in nonsensical decisions like *Walt Disney v. Air Pirates*.²⁶¹ Here, the court denied the right of a group of cartoonists to publish an adult “counter-culture” comic book featuring Disney characters “as active members of a free thinking, promiscuous, drug ingesting counterculture.”²⁶² In order to exclude fair use, the court boasts about the substantiality of the use and near-verbatim copying, as if the parodist should draw a stylized mouse or duck so that nobody will ever catch the reference, and perhaps, in order to help the readers understand, they should add a footnote saying: “we know the drawings suck and do not resemble the original, but this scribble is supposed to be Mickey Mouse, Minnie or Donald Duck.”²⁶³ In these instances, the idea-expression dichotomy is unable to prevent a conflict between copyright and free speech. As Fiona Macmillan has noted, “[i]t seems likely that representational copyright works (photographs, films, drawings, paintings) are particularly likely to attract the claim that freedom of speech cannot be properly served by simply describing the idea behind the expression.”²⁶⁴ Legal standards may slightly change and the idea-expression dichotomy may work better with different medium of expression. Here and there, courts may get it right. Later, in *Campbell v. Acuff-Rose*, the Supreme Court distinguished *Air Pirates* and held that the parodying use of Roy Orbison’s rock ballad “Oh, Pretty Woman” by the rap group 2 Live Crew in their song “Pretty Woman” was fair.²⁶⁵

Although courts may stretch copyright law to make room for cultural standards, the tension does not go away. If the rightsholders feel threatened—economically and culturally—they recursively react to the use of cultural icons and try to enforce their power of control over them by deploying legal weaponry against derivative re-users. Regardless of legal standards adopted by judicial bodies, which are inconsistent and unpredictable at best, the rightsholders’ reaction often becomes an insurmountable burden to free expression and, in any event, a strong disincentive to it. The California group Negativland, for instance, had its expressive freedom curtailed after being sued by Island Record and Warner-Chappell Music for “messing” with U2’s “I Still Haven’t Found What I’m Looking For.”²⁶⁶ Negativland’s wrongdoing consisted of recasting U2’s music with a musical collage, a commentary, interviews with Bono, and outtakes from Casey Kasem’s *American Top 40* radio show to criticize a perceived hypocrisy in U2’s message.²⁶⁷ Notwithstanding U2’s opposition to the lawsuit, Negativland and its independent distributor SST were forced to settle because of an inability to afford litigation expenses.²⁶⁸

Nadia Plesner—a Danish artist and activist—also had to face invasive enforcement of cultural icons and has seen her capacity to challenge the meaning of

²⁶¹ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, (9th Cir. 1978).

²⁶² *Id.* at 753.

²⁶³ *Id.* at 758.

²⁶⁴ Fiona Macmillan, *Commodification and Cultural Ownership*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* 57 (Jonathan Griffiths & Uma Suthersanen eds., 2003).

²⁶⁵ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994).

²⁶⁶ *See DEMERS*, *supra* note 219, at 128–30.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

those cultural icons substantially curtailed by copyright and intellectual property law. Among Nadia's featured works is the satirical depiction of a malnourished African child holding a fancy little chihuahua and a designer bag, also included in a painting that goes by the name *Darfurnica*.²⁶⁹ These works of art triggered the disgruntled reaction of Louis Vuitton.²⁷⁰ The designer bag carried by the boy, in fact, resembles the Louis Vuitton "Audra" bag.²⁷¹ Louis Vuitton sued, and the Court of The Hague rendered an ex parte decision against Nadia Plesner, ordering her to pay several hundred thousand euros, including penalties for each day the painting was still shown.²⁷² This case deserves attention as an extreme example of the troubled coexistence between freedom of expression and property entitlements over creativity. Control over intellectual property, especially over copyrighted content, seems to trespass into a form of control over our society's cultural and ethical tenets. In this respect, throughout the decades, Vuitton and others have contributed to a social syllogism where display of luxury equals success, and success through display of luxury is the trigger for global attention. In the case of Nadia Plesner, over-expansive practices of intellectual property enforcement are used to protect and keep that syllogism in place, together with the capitalist model that the syllogism is set to serve. Similarly, intellectual property rights may be enforced to prevent the emergence of a wide range of counter-cultural speech. As Madhavi Sunder recently observed, intellectual property law, and copyright law especially, substantially affects the democratic process because "semiotic democracy requires the ability to resignify the artifacts of popular culture to contest their authoritative meaning."²⁷³ There may be a subtle shift of intellectual property rights as a mechanism to protect business goodwill to an instrument of enforcement of cultural paradigms. Quite indisputably, this profound influence of intellectual property rights on our cultural landscape is far beyond their literal scope of protection. As a consequence, intellectual property may end up aiding cultural indoctrination and championing censorship of opposing cultural paradigms.

C. Sampling, Identity Politics, and Remix

Now, I will return to the very case that has prompted Chuck D to seek the expert testimony heard in the previous pages. After the expansionistic copyright protection given by decisions like *Grand Upright* and *Bridgeport Music*, the "bright line rule" has become that either one gets a license or one does not sample.²⁷⁴ As

²⁶⁹ See *The Making of Darfurnica*, NADIA PLESNER, <http://www.nadiaplesner.com/simple-living-darfurnica1> (last visited Jan. 19, 2014).

²⁷⁰ See *Louis Vuitton Malletier SA v. Nadia Plesner Joensen, et al.*, KG RK 10–214 (Court of The Hague, Jan. 27, 2011) (ex parte court order).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 108 (2012).

²⁷⁴ See *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 809–10 (6th Cir. 2005); Olufunmilayo B. Arewa, *From J. C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural*

mentioned in the beginning of this article, copyright has negatively and substantially affected the music of Public Enemy and many other samplers. By 1992, the style of the critically acclaimed *It Takes a Nation of Millions* and *Fear of a Black Planet* was no more. The copyright permission paradigm made it forbidden creativity, or at least hard enough to make to be practically forbidden. Building his sonic wall, Public Enemy attempted to make use of his own communitarian musical tradition, deeply rooted within African American and Caribbean culture of musical borrowing.²⁷⁵ But as the law is engineered, Public Enemy, and many other samplers, had to face the hurdle that their use of the common African American tradition entailed a process of re-appropriation from what was earlier appropriated by the mainstream media and entertainment system. That hurdle proved to be insurmountable. Copyright law affected Public Enemy, and the subculture that they spearheaded, far beyond market constraints. Public Enemy's work was, as hip-hop music was earlier, representative of the cultural identity of a minority reacting to mainstream hegemonic power and rapping about "white supremacy, capitalism, the music industry, black nationalism, pop culture."²⁷⁶ One of the innovative features of digital sampling was to empower creators with limited market power to produce music by collaging together what was traditionally believed to be part of a common pool of musical stock, belonging especially to the African American community. With digital sampling, creators like Public Enemy could easily bypass the filter of the music industry and most of the economic hurdles associated with preproduction and studio session costs. Reviewing the distinction between copyright in sound recording and composition, the *Bridgeport* court discusses this exact point but misses it.²⁷⁷ By concluding that *de minimis* analysis should not be applied to copyrights over sound recordings, and that samplers can simply recreate the riff themselves, the court completely overlooked the value that digital sampling has for democratic discourse and identity politics.²⁷⁸

The hindering effect of copyright over creativity, freedom of expression, and identity politics has grown exponentially with the widespread diffusion of digital technology and the emergence of remix creativity in an interconnected society. In *The Public Domain*, Professor Boyle described the story of the song "George Bush Doesn't Care about Black People" by the Legendary K.O.—a protest song against the

Context, 84 N.C. L. REV. 547, 642 (2006); David Sanjek, "Don't Have to DJ No More" Sampling and the "Autonomous" Creator, 10 CARDOZO ARTS & ENT. L.J. 607, 620–21 (1992).

²⁷⁵ See Arewa, *supra* note 274, at 619–28 (discussing African-American musical borrowing); Larisa Mann, *Decolonizing Networked Technology: Learning from the Street Dance*, in TRANSNATIONAL CULTURE IN THE INTERNET AGE (Sean Pager & Adam Candeub, eds., 2012) (discussing hip-hop's roots in Jamaican dancehall culture and the Caribbean culture of musical borrowing and social authorship); Jason Toynbee, *Reggae Open Source: How the Absence of Copyright Enabled the Emergence of Popular Music in Jamaica*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 357–73 (Lionel Bently, Jennifer Davis, & Jane C. Ginsburg eds., 2010); Johnson Okpaluba, *Free Riding on the Riddim? Open Source, Copyright Law and Reggae Music in Jamaica*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 374–86 (Lionel Bently, Jennifer Davis, & Jane C. Ginsburg eds., 2010).

²⁷⁶ MCLEOD, FREEDOM OF EXPRESSION, *supra* note 1, at 66.

²⁷⁷ See *Bridgeport*, 410 F.3d at 801–02 (overlooking the fact that the original sample has itself a historical and evocative value that cannot be replicated).

²⁷⁸ See *id.*

government in the days of Hurricane Katrina.²⁷⁹ As Boyle discusses in detail, the lineage of that song can be traced back through one hundred years of borrowings, samplings, and mash-ups. It features Ray Charles and Clara Ward, all the way to Kanye West, the hip hop musician who actually uttered the words giving the song its title and emblematic line. That lineage can be traced back from soul, blues, and gospel to rap and hip-hop. “George Bush Doesn’t Care about Black People” and the remix videos made after it became an astounding online hit. It defined the reaction to Hurricane Katrina. But it never appeared on television and never made it to the mainstream media. Under the present legal framework, that song is illegal. Or, it is at least unmanageable, as far as transaction costs are concerned, to determine whether the sampling embedded in it is legal. Although “George Bush Doesn’t Care about Black People” was widely promoted by the power of propagation of the Internet, copyright law still relegates digital remix and similar creative models to a subcultural niche. The sad irony is that the mainstream entertainment industry has privatized an originally common stock of tunes, sounds, melodies and lyrics behind unmanageable copyright transaction costs. They “have denied the ability of the original community to borrow back.”²⁸⁰ Similarly to the case of Public Enemy’s music, Legendary K.O. could cheaply create and bypass the filter of mainstream music industry. The side effect, however, would be to not have access to mainstream media channels. While technology has empowered minorities to more incisively and easily express their cultural identities, copyrighted works have the effect of restricting them and maintaining them as minor subcultural expressions. Together with the bright line rules that the law or cases like *Bridgeport* set, copyright blurs the contours of what can be and cannot be done, transforming “fair uses” into “feared uses.” Even communal, cumulative and traditional creativity gets swollen in the chasms opening up here and there, hidden in the nebula of what the law allows or does not allow.

Most creative practices in the digital domain suffer similar limitations. Fangaming—the practice of modifying video games either to create a new video game or solely to create a work of art—has experienced great popularity among the gaming communities, often in response to the inactivity of copyright owners to offer sequels of their favorite games.²⁸¹ Rightsholders have usually been resolute in shutting down those projects, as in the case of *Chrono Trigger*, a role-playing video game originally developed by Square Enix in 1995 and followed by a 1999 official sequel, *Chrono Cross*.²⁸² Fan projects to develop a sequel for PC with 3D graphics, such as *Chrono Resurrection*, *Chrono Trigger Remake Project*, and *Chrono Trigger: Crimson Echoes*, were repeatedly undertaken from 2004 to 2009 and forcibly terminated through

²⁷⁹ See James Boyle, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 124–59 (2009).

²⁸⁰ *Id.* at 129.

²⁸¹ See Burk Dan, *The Mereology Of Digital Copyright*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 711, 730–34 (2008); *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998).

²⁸² See Chrono Cross, IGN ENTERTAINMENT, http://web.archive.org/web/20070320044123/http://www.rottentomatoes.com/g/playstation/chrono_cross/ (last visited Jan. 19, 2014).

Square Enix’s cease-and-desist letters.²⁸³ The story of the sequel *Chrono Trigger* molds well to the larger picture of the tension between copyright, media conglomerate dominance, and fan-made creativity. All the elements of that tension are at play here. Fair uses are recurrently turned into “feared uses” and copyright becomes absolute. The rightsholders often issue a cease-and-desist letter to intimidate users and fan-authors, who are often clueless as to the full extent of the protection attached to copyright.²⁸⁴ As media guru Henry Jenkins noted, “[i]n such situations, the studios often assert much broader control than they could legally defend: someone who stands to lose their home or their kid’s college funds by going head-to-head with studio attorneys is apt to fold.”²⁸⁵ Although fair use defenses can be put forward on solid grounds, as many authors have argued,²⁸⁶ users are unaware or at least confused about where to draw the line. Most of the time, they retreat and give up their creative projects. For this very reason, there is no case law on non-commercial fan-made creativity.²⁸⁷

Liability concerns of platforms hosting fan-made creativity, then, add up to the chilling effects of the copyright system. In order to shield Internet Service Providers (“ISPs”) from liability, legislatures worldwide have enacted DMCA-like notice-and-takedown procedures.²⁸⁸ Recently, a DMCA notice was good enough to take down an entire world, albeit a virtual one.²⁸⁹ This is disappointing news for fans of *Second Life*’s role-playing “Sim” based around Frank Herbert’s famous *Dune* series. Following the DMCA notice of copyright infringement from Trident Media Group, the agency administering Herbert’s estate, Linden Lab, gave two days to the Sim’s administrators to comply with the rightsholders’ requests and remove all the *Dune*-themed items, characters and names.²⁹⁰ As Reichmann argued, the DMCA “shamelessly sacrificed the public interest provisions of copyright law on the altar of” private interest.²⁹¹ In fact, the DMCA notice-and-takedown process has given the copyright holders a new leverage weapon that makes the spectre of copyright shine even brighter in the nebula of “user-generated” confusion.²⁹² The recent copyright

²⁸³ See CHRONO RESURRECTION (Sept. 6, 2004), <http://www.opcoder.com/projects/chrono> (announcing the abandonment of the project as a consequence of the cease-and-desist letter from the rights holders); CHRONO TRIGGER REMAKE PROJECT, <http://www.chrono-trigger.com>.

²⁸⁴ See HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 142 (N.Y. Univ. Press 2008).

²⁸⁵ *Id.*

²⁸⁶ See SUNDER, *supra* note 273, at 105–24; Mary W.S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1127 (2009); Rebecca Tushnet, *User-generated Discontent: Transformation in Practice*, 31 COLUM. J. L. & Arts 497, 516 (2008).

²⁸⁷ See JENKINS, *supra* note 284, at 142.

²⁸⁸ See The Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

²⁸⁹ See Patrick McKay, Note, *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century*, 24 REGENT U. L. REV. 117, 137 (2010).

²⁹⁰ *Id.*

²⁹¹ Jerome H. Reichman, Graeme B. Dinwoodie, & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH L.J. 982, 1013 (2007).

²⁹² See Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893, 913 (2008).

holders' strategy has increasingly been to seek enforcement of ISPs' secondary liability with the overt goal of turning them into watchdogs. The response of Linden Lab to Herbert's estate is indicative of the considerable success of this strategy.

In many different forms, users appropriate from commercial culture to create their own culture.²⁹³ In doing so, users ignore copyright law. In order to create fanvids, fanfiction, musical mash-up, machinima, or reproduce a video clip to be discussed or perhaps decontextualized, users infringe on copyright. At the same time, users create without an interest in how copyright law would protect their works and "de-commodify" the commercial culture from which they have appropriated.²⁹⁴ By ignoring copyright, however, users, and their own emerging digital culture, are at the mercy of the commercial culture that they have appropriated. Mainstream corporate-driven culture may use copyright law or its specter to marginalize competing or alternative cultural paradigms. Even if user-generated culture is tolerated,²⁹⁵ its terms of service are set by commercial culture, and spearheaded by copyright law. At its own will, mainstream corporate-driven culture can prevent users from building their own cultures or influence the directions that such cultures will take. A couple of years after the *Dune* Sim in *Second Life* was shut down, fans are still looking for a home where they can enjoy their common passion absent the irrational, arbitrary, and inconsistent reactions of copyright holders to fan-made creativity. In responding to one user looking for people interested in role playing in the *Dune* universe and coming to know that the *Dune* Sim was no more because of the rightsholder's complaint, Vashara comments:

Wow, really I'm a Dune fan myself and a star wars roleplayer. Weird how they shut down dune and yet the whole star wars and harry potter sims never got shut down nor did the legend of the seeker roleplays. I think its [sic] stupid, infact [sic] when you roleplay you're actually advertising and promiting [sic] their product, because people will see and ask what is Dune, and we tell them its [sic] a good and then they go read it, thus making more

²⁹³ See Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 934–54 (2009) (discussing different forms of appropriation on YouTube).

²⁹⁴ *Id.* at 936–37, 940. Halbert wrote:

When fans take culture-industry products and make them into something that has social value for them . . . they are decommodifying culture by taking it out of its profit-oriented platform and transforming it not only into a derivative work under copyright law, but also into something that has cultural meaning that goes beyond monetary value.

Id.

²⁹⁵ See Tim Wu, *Tolerated Use*, 31 COLUM. J. L. & ARTS 617, 620 (2008) (noting that, in contrast with implied licencing, in the case of tolerated use "the main point is that liability likely exists, but it is simply a matter of non-enforcement").

money for the authors and publishing companies. Duh, lol, are they that thick?²⁹⁶

IV. CLOSING ARGUMENT

For most of human history, the essential nature of creativity was understood to be cumulative and collective. We have built most of our culture under a paradigm in which appropriation and the “art of rewriting” was a value for creativity, rather than a nuisance. Epic and popular culture thrived under that creative paradigm. Modern copyright and authorship law, however, turns the very propulsive engine of the creative process—appropriation, imitation, and borrowing of the tradition to build follow-on creativity—into a nuisance, rather than a foundational block. User-based creativity, empowered by digital technology and networked distribution, can help the resurgence of a flourishing popular culture. As authors have noted, “fan-made derivative works based on works of popular culture have a growing importance in twenty-first century culture, and in fact represent the rebirth of popular folk culture in America [and elsewhere] after a century of being submerged beneath commercial mass-media cultural products.”²⁹⁷

A. From Exclusivity to Inclusivity

As Debora Halbert noted, “[w]e need a cultural world where de-commodified culture prevails and people are able to build something creative on the foundation of what already exists.”²⁹⁸ The problem lies in what Lessig has referred to as the tension between a “free” and a “permission” culture: “we come from a tradition of ‘free culture.’ . . . The opposite of a free culture is a ‘permission culture’—a culture in which creators get to create only with the permission of the powerful, or of creators from the past.”²⁹⁹ It is the overexpansion of a “permission” culture that collides with the traditional mechanics of creativity and the democratic value that creativity encloses.

It particularly curtails modern forms of digital creativity. The interactive nature of the web 2.0 has propelled user-generated creativity that thrives in a “free” culture and withers in a “permission” culture.³⁰⁰ In the digital age, users and

²⁹⁶ Post from Vashara, SECOND LIFE (Mar. 20, 2012, 08:00 AM), <http://community.secondlife.com/t5/Role-Play/Role-play-DUNE/td-p/1352033> (click on “Forums,” then select “People Forum Role Play,” then “Role Play Dune”).

²⁹⁷ McKay, *supra* note 287, at 145.

²⁹⁸ See Halbert, *supra* note 293, at 960.

²⁹⁹ See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY xiv (Penguin 2004).

³⁰⁰ Several scholars have proposed a dual regime for professionals and amateurs. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 33, 254–59 (Bloomsbury 2008); Christopher May, *Bounded Openness: The Future of Political Economy of Knowledge Management*, 33 EIPR 477, 479–80 (2011) (arguing that the system of IP law will evolve into parallel hard and soft systems); Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 41 (2008).

creators have an enhanced interest in free and open re-use of intellectual content. Fanfiction community, machinima and mash-up communities, and in general online communities based upon user-generated content build their creative ethics over open re-use and remix. Mass collaboration, mass creativity, and collective and networked peer production enhance and multiply the value of re-use. After the advent of the web 2.0, the enjoyment of creativity becomes more and more an interactive process, and creativity becomes more and more a phenomenon of collective production. The capacity of easily remixing content turns users into authors with global and instantaneous capacity for distributing their own works.

In order to adjust the copyright system to the modern networked digital creativity, one necessary measure may be an inversion of the traditional copyright permission rule. The rejection of the copyright permission rule should be coupled with the implementation of additional mechanisms to provide economic incentive to creation, such as a liability rule integrated into the system or possibly an apportionment of profits. The re-definition of the traditional copyright permission paradigm would fit, in my view, within the partial de-construction of the post-romantic paradigm which over-emphasizes creative individualism and absolute originality. It would serve the goal of reconnecting creativity with its cumulative nature.

Given that the moral right of attribution will always remain the cornerstone of any revised creativity management system,³⁰¹ one should distinguish between reproductive use and creative use of intellectual works. I believe that creative use should be allowed to the public at large with no permission required in order to perform it. As it was traditionally for most of human cultural history, the right to appropriate expressions should be absolute. On the absolutistic nature of the right to borrow and reuse others' creativity, I follow in the footsteps of David Lange, Jefferson Powel, and Jed Rubenfeld.³⁰² I do not see meaningful reasons for the appropriation to not extend beyond private appropriation for personal use and include competitive or commercial uses, if the right mechanisms to compensate authors are in place. I therefore locate my proposal within the framework set by Lange and Powel in the

A dual regime has been proposed also by European legal scholarship. See Marco Ricolfi, *Consume and Share: Making Copyright Fit for the Digital Agenda*, in *THE DIGITAL PUBLIC DOMAIN*, 49–60 (M. Dulong de Rosnay & J.C. De Martin eds., Open Book Publishers 2012); Christophe Geiger, *Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 *VAND. J. ENT. TECH. L.* 515, 547–48 (2011) (proposing the dual regime in the context of creative reuses).

³⁰¹ In contrast, integrity is irrelevant if it is spelled out that the original work has been tampered with.

³⁰² See DAVID LANGE & JEFFERSON H. POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 384 n.37 (Stanford Law Books 2009); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 *YALE L.J.* 1, 5 (2002) (noting that “copyright’s prohibition of unauthorized derivative works is unconstitutional, but that it could be saved if its regime of injunctions and damages were replaced by an action for profit allocation”). In a similar fashion, the principle of exclusivity in copyright has also been challenged in civil law systems. Geiger, *supra* note 300, at 547 (proposing the implementation of a “limitation-friendly copyright protection, even if doing so would require rethinking the principle of exclusivity on which intellectual property is based [and] the scope of copyright is reduced to the prevention of the mere copy of the work, and does not cover the creative re-uses”).

following terms: “a provision for apportioning revenues resulting from competitive appropriation, one that is calculated to preserve incentives to create the original work without impairing the absolute freedom of others to bend that work to the service of their own further expression.”³⁰³ I think that each creator should enjoy (1) a statutory royalty upon any revenue stream coming from the derivative work (2) upon a claim to be made within a certain period. This way, if the incentive to create was based on the foreseeability of reaping any benefit from derivative works, the author should diligently and promptly patrol the market.³⁰⁴ The royalty scheme may be implemented so that the quality and market success of the original work is taken into consideration. A solution may be to maintain a fixed statutory royalty in accordance with different classes related to the type and diffusion of the works. Technology will definitely help to calculate quality and impact of the borrowed materials. The author will have the burden to show any supporting evidence to have the work included in a certain class.³⁰⁵

In a similar fashion to that envisioned for creative uses, no permission would be required to make commercial reproductive use of an intellectual work. In contrast to the case of creative use, the compensatory regime for reproductive uses would be closer to a liability regime.³⁰⁶ In this case, in fact, there is no contribution to the creative process to balance the appropriation of another’s creativity. Therefore, the creator has the right to internalize the full market value of the appropriated work. In any event, the compensation to the author should never be inferior to the market price set by the author, if the author chooses to directly sell the work. Far more effectively than with creative uses, digital watermarking technologies would allow almost perfect tracking of the commercial life of the work. In contrast, public non-commercial reproductive use, which includes peer-to-peer piracy, would be in the sole domain of the author. Only the author would be entitled to authorize the reproduction, circulation, and distribution of her works for non-commercial uses. Present exceptions and limitations will apply to that exclusive right. Cultural flat-

³⁰³ LANGE & POWELL, *supra* note 302, at 143, 181.

³⁰⁴ See generally Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1603–24 (2009); Loren, *supra* note 300, at 34 (arguing for the necessity of taking motivation into account when determining the scope of copyright protection).

³⁰⁵ I realize that adjustment and polishing of the arrangement that I am supporting need to be done, especially in relation to the inclusion of more than one work in the new derivative work. At the moment, I will pass on this, as a detailed definition of the system would need a treatment on its own, which is beyond the scope of my present undertaking.

³⁰⁶ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1120 (1972); Louis Kaplow & Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 766 (1996); Jerome H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743, 1781 (2000); Jerome H. Reichman & Tracy Lewis, *Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 337–66 (Keith E. Maskus & Jerome H. Reichman eds., 2005); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1376 (1996); Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 254 (2009).

rate mechanisms,³⁰⁷ alternative compensation systems,³⁰⁸ or extended collective licensing schemes³⁰⁹ will most likely be introduced to decriminalize peer-to-peer file exchange, fix the orphan work problem, and ease non-commercial digitization projects.

The implementation of a creativity management system along these guidelines may have actual substantial advantages for the authors. Each use of their works may be a potential source of revenues. Further, the absence of transaction costs for licensing the rights may boost the number of derivative and reproductive uses. Additionally, creators' revenues will be attached to the success of creativity cumulatively made on top of their own. This, in turn, may have positive social externalities, by connecting directly individual economic success with the success of other individuals and the surrounding creative community. Creativity would return to being an inclusive, rather than exclusive, medium.

B. From the Oral Formulaic Tradition to Digital Remix

Rereading the history of aesthetic is particularly inspiring at the dawn of the networked age. The Internet may be a privileged venue to reproduce the mechanics of the oral tradition.³¹⁰ It is difficult to overlook the special connection that the mechanics of pre-modern creativity share with post-modern forms of digital creativity. The dynamics of sharing of pre-modern creativity, together with the cumulative nature of the oral-formulaic creative process, parallel the features of digital networked creativity. Digital creativity reconnects its exponential generative capacity to the ubiquity of participatory contributions. As in the oral-formulaic

³⁰⁷ See Alain Modot et al., *The "Content Flat-Rate": A Solution to Illegal File-Sharing?*, in EUROPEAN PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICY, POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES, CULTURE AND EDUCATION 65–102 (2011), available at <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=44308>; INSTITUT FÜR EUROPÄISCHES MEDIENRECHT [INSTITUTE OF EUROPEAN MEDIA LAW] (EML), DIE ZULÄSSIGKEIT EINER KULTURFLATRATE NACH NATIONALEM UND EUROPÄISCHEM RECHT [THE ADMISSIBILITY OF A CULTURAL FLAT RATE UNDER NATIONAL AND EUROPEAN LAW] 63 (2009) available at http://www.gruene-bundestag.de/cms/netzpolitik/dokbin/278/278059.kurzgutachten_zur_kulturflatrate.pdf; Bernt Hugenholtz, Lucie Guibault, & Sjoerd Van Geffen, *The Future Of Levies In A Digital Environment*, in INSTITUTE FOR INFORMATION LAW (2003), available at <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>.

³⁰⁸ See WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 9 (2004); Neil W. Netanel, *Impose A Noncommercial Use Levy To Allow Free Peer-To-Peer File Sharing*, 17 HARV. J. L. & TECH. 1, 77 (2003).

³⁰⁹ See, e.g., Marco Ciurcina, Juan Carlos De martin, Thomas Margoni, Federico Morando, and Marco Ricolfi, *Creatività Remunerata, Conoscenza Liberata: File Sharing e Licenze Collettive Estese [Remunerating Creativity, Freeing Knowledge: File-Sharing and Extended Collective Licenses]*, NEXA CENTER FOR INTERNET AND SOCIETY (2009), available at <http://nexa.polito.it/licenzecollettive>; Johan Axhamn and Lucie Guibault, *Cross-border Extended Collective Licensing: a Solution to Online Dissemination of Europe's Cultural Heritage?*, IViR (2011), available at http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report092011.pdf.

³¹⁰ See THE PATHWAYS PROJECT, ORAL TRADITION AND INTERNET TECHNOLOGY, <http://www.pathwaysproject.org/pathways/show/HomePage> (last visited Jan. 19, 2014) (drawing parallels between the media dynamics of oral traditions and the Internet).

tradition, mass collaboration is a key element of production in the digital environment.

Again, emerging creative productions, including remix, mash-up, musical sampling, vidding, and the creative process developing in Youtube-like environments, implement the logic of the traditional oral-formulaic creative production. It does so by cumulatively building creativity over the reuse, expansion, and reassembling of minimal bits of creative discourse. The sample and the clip of the remix tradition correspond to the formula of the oral tradition. The formula, the single unit to be used and reused, worked and reworked, is the inspiring paradigm of the remix culture.

Moreover, digital creativity re-implements the same mechanics of pre-copyright creativity that envisioned borrowing and copying as a necessary tribute to previous works. As in the pre-modern tradition, digital creativity deploys appropriation and borrowing as imitative and emulative instruments. From fanfiction to “machinima” and fangames, from thematic Sims in virtual worlds to vidding or music mash-up, modern digital creativity is made of appropriation, borrowing, and imitation that are laid out to create new meanings and find new inferences. They are intended to pay tribute to the iconography of the commercial popular culture as well as to challenge, deconstruct, and overcome it.

Social textuality and intertextuality, which are dominating features of medieval creativity, play a pivotal role in the digital domain as well. On one hand, the intertextual nature of medieval literary culture, as a constant reference to authority and tradition to which the textile metaphor of the word “text” evokes, shows an affinity with the hyper-textuality of digital culture and creativity. Linking is a built-in feature of creativity produced in a digital environment. On the other hand, the social malleability of the text in pre-modern manuscript culture finds a parallel in mass-collaborative projects in the digital environment, such as Wikipedia.

Finally, the networked society sets the preconditions for a social and collaborative idea of authorship that resembles the pre-modern collectivistic idea of creativity. More conspicuously than ever, digital creativity is deeply intertwined with communitarian actions and reactions. Open source software developments, Wikipedia, fangames, and thematic “Sims” grow out of peer and mass-collaborative creative projects. Vidding, “machinima,” musical sampling and mash-up compose a puzzle of responses and memes as part of a hyper-reactive community environment. In the digital environment, creativity returns to be an inclusive, rather than exclusive, medium. This may suggest that, in the networked information society and economy, we are witnessing the demise of the individualistic idea of authorship that gave birth to our copyright system.

The parallel between formula, remix, and mash-up, intertextual medieval creativity and hyper-textual digital creativity, social textuality and mass-collaboration in the manuscript and digital culture, may suggest an emerging dystonia between the post-romantic paradigm of authorship and the present cultural and creative landscape. This dystonia reverberates on the obsolescence of the present policies for creativity. It suggests that the communal, collaborative, and cumulative role of creativity should be emphasized and promoted. The emergence of the digital participative culture may offer the opportunity to realign creativity with its original participative nature. As in pre-modern culture, the idea of inclusivity in the discourse about creativity has regained momentum with the emphasis on

community, participation, and mass and cumulative production in the digital environment. As in pre-modern culture, a re-emerging social consciousness indicates that creativity must serve as an instrument to empower the individual to be part of a community, rather than stand out of it.

Change in our creative environment is in progress. In the twilight of a system, it may be inspiring to look at the dawn of our knowledge governance in order to understand how to start the new day to come. Digital technology and creativity look back at the generative capacity of the traditional cumulative, collaborative, and communitarian mechanics of creativity as an evidentiary basis for reform.

Reporting a last quip from my fantastic trial, and playing the role of Chuck D's attorney one more time, as a last question, I asked Homer, "Do you think we would have had the *Iliad* and the *Odyssey* if *Bridgeport* and the like was the law in force at the time?"

Homer decidedly said, "No."

"I have no further questions."