

**CARTOGRAPHIES OF COPYRIGHT:**  
Crisis & Propertization

Turun yliopisto  
Historian, kulttuurin ja  
taiteiden tutkimuksen laitos  
Kulttuurihistoria  
Pro gradu -tutkielma  
Paul Flanders  
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*Cartographies of Copyright* is a cultural history of copyright that maps out various contradictions and tensions that give shape to the crisis of copyright and its relations to US music industries. More specifically, this work charts the radical dissension of copyright in recent history and argues for an understanding of the crisis as an internal transformative process. This formulation shifts the analytic approach from an abstract conceptual-legal perspective to a series of discrete points within a lived history, culture and materiality of copyright thought, audio technologies and neoliberal capitalism. Seen in terms of territorialization, the expansion of copyright via the music industries gives unique insight into the particular ways music and its media formats effect the evolution of copyright culture and law. When framed this way, an investigation into music and copyright leads to recognizing new forms of control, changing modes of administering access and contemporary relations of power.

To chart the effects of these transformations I draw upon the tensions and problematics that constitute the Wu-Tang Clan's 2015 one-of-a-kind release: *Once Upon A Time In Shaolin*. After accessing contentious foci within traditional copyright paradigms, I argue that classical models lack explanatory power, pose problems for understanding the transformations of copyright throughout history and fail to provide a comprehensive account of the present crisis. Taking inspiration from the reoccupation thesis presented by Hans Blumenberg and recent research in copyright I propose an alternative model rooted at the dialectic crux of property metaphors, audio technologies and formats, and neocapitalist commodity logic—all of which give shape to an internal transformation within copyright law and culture I term *propertization*.

*Cartographies of Copyright* is not a legal treatise, per se; rather, the work sees law as text set within a larger social milieu liable to change and evolution. Drawing from legal theory, cultural studies and media studies the work engages copyright from the perspectives of critical history, rhetoric, media-materiality and speculative economics. The multidisciplinary approach also stakes out new formations to the problematics faced by music historically and to draw connections between the music industries and the broader social contexts they are situated in.

*Cartographies* argues for a new lexicon to begin imagining alternative models to account for copyright's transformations—ones better suited to imagining viable alternatives. It calls attention to the urgent need of public discussion concerning the role of copyright in contemporary music and culture and provides modest suggestions for thinking about the future of the copyright regime and the musical properties within it.

Keywords: copyright, property, intellectual property, propertization, culture, rhetoric, metaphor, reoccupation, media, format, platform, technology, economics.

Introduction	1
Research Focus	2
Approaches to Crises	6
Sounds of Copyright	9
The Rise of Copyright Talk	11
I. Cartography of a Crisis	18
Combatting the Static Narrative	19
Disentangling the Crisis	23
Copyright's Existential Crisis	29
Limitations of Crisis	33
II. Background Metaphorics of Copyright	36
Legal Troubles	38
The Reoccupation of the Authorial Position	41
Mapping the Metaphors	44
Foregrounding Rhetoric	48
Once Upon a time...Property	52
III. Re-formatting Copyright: The Material Conditions of Change	58
Material Labor and Theories of Property	60
Material, Media and Music	65
Re-formatting Property	74
IV. Financing Musical Properties: Monopoly, Access and Speculation	82
Accumulation, Manifest Discography & Platform Logic	84
Allocating Acoustics	90
Conclusion: Charting the Future	98
Appendix:	103
Bibliography	104

# Introduction

“The crisis of artistic reproduction which manifests itself in this way can be seen as an integral part of a crisis in perception itself.”  
Walter Benjamin, “On Some Motifs in Baudelaire”

Scholars have long decried the expansion of copyright, and while most theoretical formulations demonstrate it to be the effects of a plurality of forces, these approaches belie a certain logical organization that forbids asking certain types of questions, namely just into what copyright is expanding? This question may at first glance seem absurd, but the logical consequences of seeking out possible answers requires engaging with a copyright far more implicated in society, industry and culture than dominant legal or conceptual frameworks prescribe. If copyright expansion is, as many scholars have argued, antithetical to its core goals and rational, new approaches to understanding the function of copyright and its expansion are needed. What follows aims to provide such an approach.

Written as a speculative history, this work surveys and charts developments within copyright to map out dimensions of the expanding copyright regime. It is ‘speculative’ on a number of levels; in the first, it proceeds along a conjectural route with the intention of asking new questions of copyright, its conceptual formation, its pragmatic function in the music industries and its growing position in American culture and history more generally.<sup>1</sup> In the second, drawing from the unique one-of-a-kind album, *Once Upon A Time In Shaolin*, this thesis plays on the etymological root, *specere* “to look at, view”, to consider what I will argue is the spectacle of copyright—that is, certain schematic metaphors that give copyright its form, determine its power within contemporary culture and vectorize its effects on the social relationships that constitute it.<sup>2</sup> To map the extent of these relations and their historical transformations is, I argue, to

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<sup>1</sup> Throughout the remainder of the thesis I will be referring to “copyright” in the United States of America and am not, say, more generally equating copyright with authors’ rights in the European Union unless otherwise noted. The culture of copyright, while not a common denominator globally, is intimately involved in a steadily growing number of trade agreements with the U.S. and thus reflections in this essay, I hope, can be seen in light of larger ramifications for a globalizing culture more broadly.

<sup>2</sup> While not being a commodity itself outright, copyright represents the framework and network for understanding and facilitating the commodification of cultural products while simultaneously affecting our perception of cultural goods more generally.

account not only for the ways copyright has transformed and the consequences of these developments but serves to see how copyright is transforming the musical landscape.

## Research Focus

Research directed at copyright has previously taken aim at accounting for how copyright has expanded with little attention spared for engaging with the question of “into what?” Given its historically factual origins and its common linguistic formation in spatial terms (extends, distends, expands, etc.), why does the spatial metaphor always run aground? This is all the more alarming when we consider it in chronological terms. All arguments for or against copyright’s expansion throughout history have involved inherited views of the past and a diverse array of models for imagining the future. Take for instance the music industries. Views of composers and their compositions transformed with the advent of the player piano and again with the LP. More recently remixing, mash-ups, P2P file-sharing networks and online streaming have all had profound impacts on imagining and reimagining the role and position of copyright for industry and individuals alike. Yet acknowledgement of a historical consciousness, both indebted and expectant, appears rarely, if at all. For many scholars it surfaces only when indicating how far astray we have come. Thus, questions of the sort “into what?”, aim to locate formulations of copyright within specific historical epochs wherein possible views of the future of copyright arise and can be conceptually circumscribed. For the purposes of this thesis it has a second function as well. “Into what?”, aims to draw attention to the spatial dimension of the copyright regime, to the set of relations that comprise the concrete social, material, and economic worlds wherein the copyright regime excesses its power. The expansion of copyright cannot be limited to conceptions of a stable or maturing copyright extending temporally—a mere question of duration—but must account for the multiple public and private dimensions of experiences copyright affects.

Accounting for multiple dimensions stands in contrast to the impression one might get from much discussion surrounding copyright. A standard history might suggest the fairly simple equation where a growing moral decay amongst an audience less and less

inclined to pay for musical works plus a declining difficulty of entry to access content equals the collapse of major cultural industries. These simplifications and abstractions famously supplant the real material and historical conditions rendering them easier to swallow, more practical for introducing change. Given this narrative structure, the response to the ‘onslaught’ of lazy thieves has been the steady attempt to secure more, longer and stronger protections for copyright right’s holders—a view the courts and congress seem to have sided with recently, and more frequently. This expansion nevertheless, comes at a cost.<sup>3</sup> To be sure, scholars writing against such expansion have recently picked up on this logic and many have sought to re-frame the question in terms of a “trade-off” by concocting notions of “cultural environmentalism” that seek an ecological-social sustainability between the creative producers and their industrial-intellectual environment. But even then, “sustainability” fails to offer a history of copyright accountable for the legal or cultural transformations up to the present, and much less a consensual logic to resolve the present crisis.

But it is best to start from consensus. While scholars can disagree on virtually every aspect of copyright, I think it is fair to say that literature on copyright unanimously agrees that copyright has expanded since its initial constitutionalization; and, secondly, most Americans became aware of being domiciled to the copyright regime in the wake of the internet and digital downloading. Within roughly a decade of time, its reaches, excesses and powers were impressed into the public consciousness, and the conquest continues. But well into the twentieth-century copyright was understood as a limited term monopoly privilege guaranteed by the government for the promotion of knowledge to the benefit of the public. Many scholars have tended to see this transformation negatively yet they nonetheless part ways when defining where and how along the way it managed to be turned on its head and has continued to transcended its previous limitations without exception. It is precisely in charting out this network of relations, the coordinates and their referents within the copyright regime, that this thesis stakes out a new approach: a cartography of copyright.

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<sup>3</sup> The price we pay is not only in terms of “giving up ground” within the public domain, but we forfeit an approach to understanding the structure of, and historical developments within, copyright.

In drawing from cartographic studies, the hypothesis of this thesis stakes out a model of copyright that draws from traditional concepts, what on a map might be likened to large continuous areas and develops an map of the copyright regime by pinpointing a constellation of coordinates and access points. These points, in turn, define the territories formed within them and when considering digital technologies, connecting these points is easier than ever. In the realm of music, this means working through concepts of author, format and work towards an understanding of the power structures framing contemporary musical properties. This thesis also is indebted to hermeneutical studies and so places the task of understanding, “as a historical and experiential act in relation to entities which themselves possess historical force, as well as a point of departure in the experience of the work of art and the constitution of an aesthetics.”<sup>4</sup> It asks how our understanding of copyright might be affected, even distorted, by previous formations of copyright held as “true” or “right” in the past? The same goes for how power might be exerted or expressed within historical and contemporaneous frameworks. Drawing from the work of Reinhart Koselleck and Hans Blumenberg I am less occupied by the philosophical questions the notion of historical consciousness brings to the fore, as by the historical question of what type of experience of understanding is made possible by it. That is, implicit in this work is the question of how can we account for our experiences of copyright in contemporaneity (informed by understandings of the age of modernity, post-modernity or even second modernity), and posit an understanding that acknowledges the breaks in history digitalization has incited without discounting the continuity of certain conditions that gave rise to them?

How then to account for the continuity of law and the discontinuity of history? How to account for changes while acknowledging some level of consistency? These are questions the historian is familiar with. In charting out the expansion of copyright law and culture this thesis argues for an understanding rooted in a process termed “propertization”. My claim to see copyright’s expansion in terms of property is not unprecedented, but while this varied and nuanced research grounds my approach, these accounts are nonetheless, incomplete. In identifying “property talk” or “property logic”

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<sup>4</sup> Keith Tribe, translators introduction to *Futures Past*, by Reinhart Koselleck, (New York: Columbia University Press, 2004), xvi.



as the main factor for copyright's expansion thinkers approach property as they approach authors, works, audiences and even rights—conceptually. Such conceptual thinking fails to account for the historical pragmatism required by language and in so doing disregards the structural accounts of a world that follow in transformations within property. When we think about property as a concept, we fail to account on the full spectrum of rhetorical and theoretical underpinnings that come with references to property. Instead, I argue for thinking of property in terms of a metaphorical propensity for structuring a world in its image. Furthermore, the constellation of concepts that comprise the discourse of property relations—its foregrounded rhetorics—such as ownership, values, inheritance, etc., grant novel insights when anchored by a background metaphors of property. Both of these prior reasons lead to a third: with contemporary mass media, globalization and digitalization new ways of thinking about the new spaces to extract rent, to control access and exercise power are needed that traditional property models are not able to reach. But perhaps most importantly, focusing on propertization makes clear that critiques of copyright must be contextualized within the bounds of material culture and the possibilities of creativity within historical societies.

Thus, while the standard narrative of copyright's response to internet exposure seems to corroborate with most peoples' experiences the copyright regime is by no means inherently digital. In fact, the allusion to an intangible origin creates an easily scalable problem for right's holders that ultimately puts the public, or those against the unnecessarily and excessive advances of copyright law, at a radical disadvantage. But there is a contradiction here. The standard narrative attempts to extort the plurality of concerns the internet and digitalization references (global scale theft, technological disruption, anonymity, flooded markets, etc.) all the while assuming some familiarity with a pre-digital process. This thesis begins by asking why did copyright reach a state of crisis now, and not at some other time? And furthermore, what could a crisis of copyright even mean for us? Phrased historically, *under what conditions could a crisis of copyright be possible and comprehensible as such?*

## Approaches to Crises

These conditions, the hypothesis of the thesis holds, allow us to chart the dimensions of the crisis and grant a more comprehensive understanding of copyright today. Scholars have written extensively on a crisis-ridden modernity and indeed, many continue to argue that the crisis of copyright can and should be understood by framing it as one amongst many.<sup>5</sup> Indeed, this position seems generally accepted on an institutional level.<sup>6</sup> The idea that copyright is somehow a latecomer to crisis, that it had progressed flawlessly until it met its digital demise, is simply untenable however. While the idea that copyright has faced multiple crises and suffered them admirably, only to come out stronger on the other side is equally untenable for right's holders of today. The remarkable tendency within copyright rhetoric to speak of an encroaching future points to the specific kind attention given to the present. A present now plagued, of course, but never contextualized as previous future. If the failure to historicize copyright is increasing, it is no doubt the weight of a future our society pushes upon us in shorter and more similar intervals complicating our capacity to assess ourselves and our environments in order to adapt accordingly. With the profusion of charts, ratings and stats the fetish for the new hit is undeniably strong in the music industry. But it is nothing particularly new. Why is it felt so strongly now?

With the rise of post-modernism, post-humanism and other such schools of thought on the left, arguments for a need to account for these seemingly radically different set of conditions arise: the present is often described as some gross set of aftereffects from inexhaustible forces begun somewhere in modernity but which have catapulted us into an uncertain present. Not only have considerations of older, longer-standing conditions

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<sup>5</sup> The terminological choice of "crisis" reflects a historical and theoretical indebtedness to hermeneutical practice and continues in the trajectory of previous scholars of copyright. Although, considering copyright in reference to a "risk-society," such as described by Ulrich Beck, would no doubt provide rich interpretations for further scholarship on copyright culture and law.

<sup>6</sup> "Although this body of legal rules certainly has a rich prehistory, the institutions and mechanisms that regulated information production before 1710 (patronage, printing press, and so forth) were rooted in understandings of social life that assumed the primacy and stability of hierarchical authors and (accordingly) did not reflect the emergence of "possessive individualism" and, with it, modernity," (Biagioli, Jaszi and Woodmansee 2011, 414).

whose pressure is no longer felt as pressing been abandoned, but they should be declaimed as myths in their own right.

These presentations are caricatures in ways, each is far more complex and both have provided lasting contributions to scholarship but the victories and pitfalls each system solicits produces real problems for developing a comprehensive investigation into copyright. On the one hand, modernist crises often fail to account for the many ways politics (identity, gender, race, etc.,) and economics have empowered an increasingly small number of investors and hedge-fund managers while the growing mass of society have become entrepreneurial individuals. Much less can it explain why the musical industries embody finance capital institutions where traditional models of exchange and incentive fail to accounts for the reality or creative producers. This tendency is mimicked within the music industries with three “majors” dominated nearly eighty percent of music revenues and then the top one percent of artists taking the lion’s share of those profits. That being said, neither can a post-modern declaration of the death of totalizing systems, subjectivity and the author account or provide insight into responding to the rise of a singular monolith in a global neoliberalism, and the radical distribution of knowledge and information to the economic vast financial benefit of a few. A concept of crisis, if it is to bear the weight of accounting for the present situation, must be bound up in the social and political actions of human-beings and their institutions and organizations.

In framing investigations, Raymond Williams and David Harvey, have observed the need to ground theory with a “militant particularism.” All interpretations drawn from discrete factors of lived limitations and expectations tirelessly transcend their unique circumstances. Harvey writes:

“The move from tangible solidarities understood as patterns of social life organized in affected and knowable communities to a more abstract set of conceptions that would have universal purchase involves a move from one level of abstraction – attached to place – to another level of abstraction capable of reaching out across space. And in that move, something [is] bound to be lost.”<sup>7</sup>

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<sup>7</sup> David Harvey, *Justice, Nature and the Geography of Difference* (Cambridge: Blackwell Publishers Inc. 1996), 33.

The dialectical process of reflecting upon discrete collections of actions, behaviors and communities tirelessly runs into the impositions of abstraction—time and space. In mapping out various dimensions of copyright and the changes they undergo through time, an aggregate form takes shape. This shape represents the lay of the land and depicts the growing sphere of influence for copyright. Grounding the expansion of copyright in spatial terms is all the more pressing when we consider that we are situated at the crux of the contemporary capitalist declaration: “the annihilation of space through time.” Here, in this contradiction, studies of copyright can dig in, measure the distances and chart the means of expansion.

In the music industries specifically, the crisis is said to be linked to the devaluation of music. The easy elision between value and worth should be noted here, but I insist we suspend cynical judgement and address this concern in full expectation that there is more to be learned from the situation, even if its description is less helpful. With the recent release and exclusive sale of the most expensive album in the world, *Once Upon a Time in Shaolin* by the Wu-Tang Clan, the singular one-of-a-kind album went for two million dollars and put the question of the value of music front and center; and did it all without a single mention of copyright.<sup>8</sup> To be sure, in the fine print the “new and unique legal structures” created to mount and realize the sale were mentioned and an alarming awareness of contemporary copyright rhetoric was implicated in publicity surrounding the album. The issue of copyright explicitly, was not, however, mentioned. It is not surprising at first glance, law tends to take a backseat in discussions of artistic genius in most conversations. That the law served to make possible the work’s effort to, among other things, “reverse the devaluation of music” within a changing cultural landscape is somehow easy enough to swallow, but the idea that this kind of model would actually be implemented seems absurd.<sup>9</sup> All in all, *Once Upon A Time in Shaolin* points to the growing presence of copyright, a condition that not only captures the real movements within copyright law and culture, but speaks to the difficulty of forming an opinion about it. It is somehow, obvious, trite, passé, unquestionable. It forms the basis for

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<sup>8</sup> *Press Release*, see *Appendix*.

<sup>9</sup> *Press Release*, see *Appendix*.

allocating views on authorship, art work, audience and capital and determines the space of conversation. Hence the need for a topological approach to copyright. Copyright has, as it were, already prepared the space. There is something alarming about the silence it produces. *Once Upon A Time In Shaolin* can be said to be the occasion to begin talking. Perhaps it is because the preposterous model it proposes reflects and distorts tendencies already in motion within the present model for music productions and distribution. It posits, as it were, a ghostly image of the future cobbled together from bits of the past and bytes of the present.

## Sounds of Copyright

These broad changes point to the moving geography of influence of music. Music has left the minstrels and parlors and has graduated into the halls of global corporate business. There is something more fundamental here also, a question that hinges on experience and the possibility of creativity that we would do well to consider.

“Innovation” aside, what are the kinds of relationships we have with art, music and our common culture? What are the kinds we want to have? What is the difference between the privatization of our word and the privatization of our ability to imagine another one?

These questions hinge on the belief that copyright, and intellectual property more broadly, is not simply about the things, works, objects, expressions that we protect or copy, but, rather, about the relationships people have via those things with each other. Given that copyright has expanded beyond its own image into an invasively large aspects of our daily lives, more often than not criminalizing all who come into contact with it, how might this affect our views of copyright’s role in creativity?

If the album points to an ambivalence surrounding copyright, it should not be taken as any kind of resignation to business as usual. From their debut record with Loud/RCA records, the Wu-Tang Clan saw hip-hop as a business. De facto leader of the Wu-Tang Clan, the RZA, boasted:

“We reinvented the way hip hop was structured, and what I mean is, you have a group signed to a label, yet the infrastructure of our deal was like anyone else's [...] We still could negotiate with any label we wanted, like Meth went with Def Jam, Rae stayed with Loud, Ghost went with Sony, GZA went with Geffen Records, feel me? [...] And

all these labels still put ‘Razor Sharp Records’ on the credits [...] Wu Tang was a financial movement. So what do you wanna diversify...? [...] Your assets?”<sup>10</sup>

This “free-agent” deal was unheard of before the RZA managed to put it into play. But that was just the beginning. The Wu-Tang Clan soon expanded into films (acting and composing), into merchandizing and ultimately into the Wu-Tang brand. While the Wu-Tang certainly have had some innovative approaches to operating in the music industry, the radical nature of their one-of-a-kind album appears to have had some precedent. In the first article announcing the existence of the album, Forbes writer Zach Greenburg noted, "After watching Jay Z debut his album in partnership with Samsung last summer--and buy 100 copies of Nipsey Hussle's \$100 mixtape--Cilvaringz and his Wu-Tang compatriots had something resembling proof of concept for *Once Upon A Time In Shaolin*."<sup>11</sup> The logic Greenburg employees sees differentiation and scarcity as the revolutionary aspects to the album and completely neglects to mention the complex backstory of history, politics, law, art and culture that anchors the very idea of creativity. The emphasis on seeing the “new” within a financial logic speaks to the tendency to skip over copyright’s historical baggage in favor of its present (much higher) stake in economics. *Once Upon A Time In Shaolin* serves embodies the forces that cut across a musical property and determine it.

Copyright has exceeded its boundaries as a mode of accounting for culture and become the dominant mode of recounting our culture.<sup>12</sup> There is perhaps nowhere more delicate and divisive than the relationship between music and copyright. It is particularly vexed—not least because of the music industries utter dependence on copyright to generate profit. But music and the media that enable its production, dissemination and reception have historically challenged the limits of copyright law; and perhaps most interestingly, music, unique among the other arts has a special position in

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<sup>10</sup> RZA–interview 17 May 2005 “Wu-Tang Clan on the Rise”, 2005. *wuforever Daily dose of Wu-Tang News*, accessed November 5, 2016, <http://wuforever.com/index.php?limitstart=485>.

<sup>11</sup> Zach Greenburg, “Why Wu-Tang Will Release Just One Copy of Its Secret Album,” *Forbes*, 26 March 2016, accessed October 23, 2016, <http://www.forbes.com/sites/zackomalleygreenburg/2014/03/26/why-wu-tang-will-release-just-one-copy-of-its-secret-album/#5ff85c8e52fe>

<sup>12</sup> Both in the sense of justifying the story of culture, art and science and in representing it numerically, symbolically and ultimately economically.

conceptualizing property relations and relations of production. Drawing from the work of French philosopher and economist, Jacques Attali, I contend that the dominant view that musical works of art “have in one way or another been taken as reflecting or corresponding to the economic, or at best as lagging behind concrete social development,” fails to account for the unique position music has in conceptualizing the creation and afterlives of creative works.<sup>13</sup> Given the historical fact of copyright’s extension, and arguably most powerfully via the channels carved out by music and its affiliate industries, it stands to reason that music has some capacity to *anticipate* historical and social changes. I argue that the means and measures by which music has brought people into contact, to some degree, helped create the dominance of copyright that is at one and the same time, the very means for social transformation. Within the network of power lies the means to “search out the future in the present itself,” as Fredric Jameson argues, “and to see the current situation not merely as a bundle of static and agonizing contradictions, but also as the place of emergence of new realities of which we are as yet only dimly aware.” Thus, theorizing through copyright takes precedent over any theory of copyright. *Once Upon a Time in Shaolin* works to ground this theory as the embodied effects of copyright’s transformation and the occasion for imagining alternatives.

## The Rise of Copyright Talk

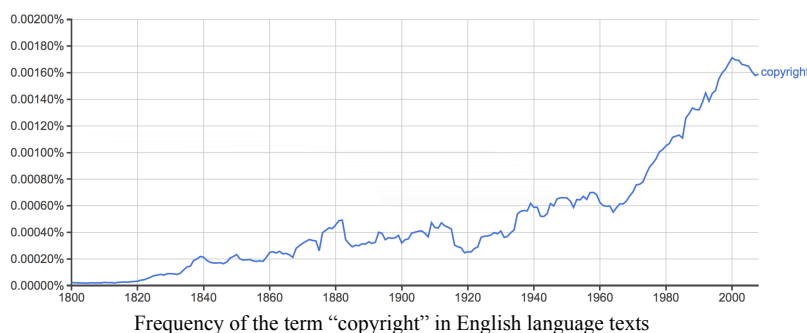
If *Once Upon A Time In Shaolin* does not ‘fix our problem’, it certainly makes it clear that alternative models are hard to come by. What’s more is that the apparent inability to talk about copyright is not because people are not taking about it. Consider for the moment this table below which diagrams the number of times the word “copyright” appears in the English language over the past century and a half. The term had steadily grown in popularity in line with the increase in protectable items until roughly the Copyright Act of 1976. By the turn of the century it had become a household term. This is telling, we can no longer excuse ourselves with the casual, “Who besides a few record

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<sup>13</sup> Jacques Attali, forward to *Noise: The Political Economy of Music* (Minneapolis: University of Minnesota Press, 1988), xi.

company lawyers, cares?”<sup>14</sup> Copyright is not just for the few, it concerns everyone. The ubiquity of copyright should not however, be mistaken for a general sense of clarity.<sup>15</sup>

Google Ngram Chart: Copyright



How is this possible? The traditional response is that copyright is, of course, a highly complex piece of legislation wrapped in a strain of legalese whose existence has, for most of our history, been relegated to courtrooms and boardrooms. And this argument has some validity to this day. But while preeminent scholars of copyright continue to be lawyers copyright has become the concern of a diverse number of fields and disciplines.<sup>16</sup> Scholars have argued that the rhetorics have something to do with this sudden increase, often pointing to a full on legal crusade against pirates.

Just take a look at the number of lawsuits flooding the courts in the wake of the RIAA’s legal campaign against their own customers. An estimated 30,000 individuals receiving

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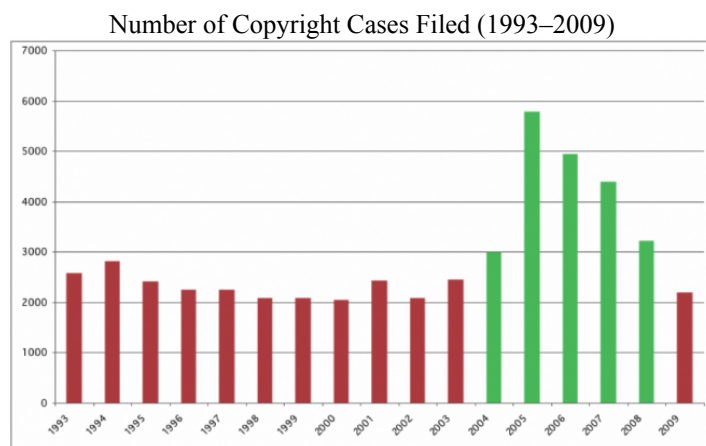
<sup>14</sup> Simon Frith and Lee Marshall, *Music and Copyright* (Edinburgh: Edinburgh University Press, 2004), 1.

<sup>15</sup> This ubiquity of the term “copyright” and “intellectual property”, along with “information society” and “knowledge economy” have indeed become household terms. Scholars have noted on the international desire, led by the World Intellectual Property Organization (WIPO) to get the ideas into the classroom, and soon: “To that end, WIPO has recently published a colorful comic book (featuring games like “Spot the Infringement”) to instill respect for copyright in children’s minds—a concept that might already be lost on their older, file-sharing siblings,” (Biagioli, Jaszi, and Woodmansee 2011, 1).

<sup>16</sup>The field is steadily growing. Biagioli, Jaszi, and Woodmansee write at the beginning of *Making and Unmaking Intellectual Property*: “One an area of the law populated only by a technical subculture of attorneys and scholars, intellectual property (IP) has become a focus of vital concern and remarkably intense inquiry across an expanding range of disciplines and consistencies,” (Biagioli, Jaszi, and Woodmansee 2011, 1).



a threat of legal action, at the peak, only recently has their number has begun to lessen.<sup>17</sup> Lawsuits in 2009, some 2,192 are down almost a third from 2008, and “represent more than a 50 percent drop from 2005.”<sup>18</sup> These lawsuits are often accompanying with “pre-litigation” settlement letters geared towards the easy profit extraction without any need to enter the courtroom. Many of the court letters are simply John Doe letters tied to an IP address procured by subpoena to an internet provider. But another response to the aforementioned excuse for copyright’s mystery might be, “yeah, it has been behind locked doors, but not without a good reason,” and while there are compelling reasons to this argument too, it frames copyright in a vein of risk management thinking, one geared towards securing the continued viability of the status quo.



Source: Administrative Office of the Courts

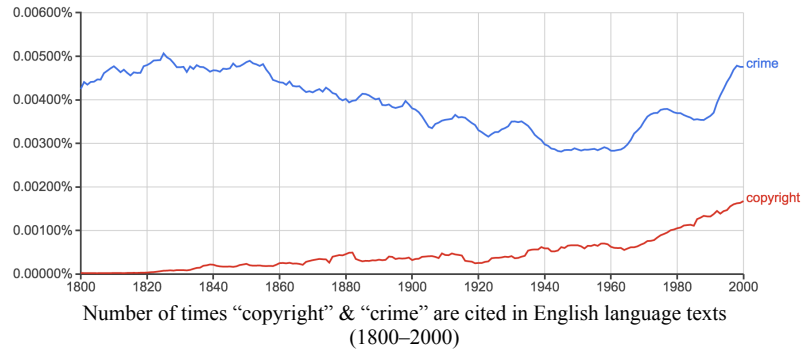
Considering copyright historically, we must first notice that copyright rarely, if ever, becomes an issue except in the event of its infringement. Put another way, copyright only comes up when its a problem. If you look at the headlines over the last decade copyright is flanked by a host of terms of derision: “violation”, “theft”, “plagiarism”, “lawsuit”, “risk”, “fight”, “battle”. The negative terminology surrounding copyright is a moral argument in action. One whose teleological grasp we’re unable or unwilling to hazard arguing against. While the following graph does not describe any actual increase

<sup>17</sup> See the Electronic Frontier Foundation’s review “RIAA v. The People: Five Years Later”. See also: David Kravets, "File Sharing Lawsuits at a Crossroads, After 5 years of RIAA Litigation," *Wired Magazine* Sept. 8, 2008.

<sup>18</sup> David Kravets , “Copyrights Lawsuits Plummet in Aftermath of RIAA Campaign,” *Wired Magazine*, August 5 2010, accessed November 5, 2016, <https://www.wired.com/2010/05/riaa-bump/>

in criminality or *copyrightness* in society but it does show corresponding growth across both amongst English-language books.

Google Ngram Chart: Crime & Copyright



There is a second point I want to make about this. The previous graph does not specify legal text books or techie texts but is simply books, across the board. A simple cross referencing with the top hits on Google reveals just about anyone and anything under suspicion. From Justin Bieber, Facebook or Monsanto, to the “Happy Birthday Song”, “Stairway to Heaven” or even major Pharmaceutical companies to Google Books are either in court, settling outside it or paying up because of it.<sup>19</sup> The range is stunning. From the banal to the iconic, from food to drugs, from oral tradition to digital corporation, all are equally at risk. The range of texts that would need to account for this increase in use is growing and so is this ‘world of copyright’. It is also much bigger, more complex and, I argue, more intimately imbricated in American culture in ways that have hitherto been under-appreciated, if not unacknowledged.

To understand these changes requires leaving the the legal nodal point of copyright out into its cultural and medial embodiments. Copyright, while rooted in the legal sphere, is not restricted to it, and nor should any investigation. In part, because there remains a particular stronghold within intellectual property. Peter Jaszi writes, “Many would accept that notions of crime are rooted in religious and ethical beliefs or that the emergence of human rights law was abetted by the ethos of post–World War II decolonialization. But among intellectual property scholars, there has been some resistance to claims of cultural influence in the copyright field—at least in the United

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<sup>19</sup> Google search was compiled on April 26, 2016.

States.”<sup>20</sup> Despite scholarship on the cultural products of the author or the artistic work, scholars refuse to acknowledge any alternative underlying premises. Jaszi’s diagnosis is a collective “disillusioned position that copyright, unlike other bodies of law, is really all about the money; that IP law is simply a machine to generate innovation through economic incentives; and that lawyers are merely engineers called on occasionally to tweak or tinker with the mechanism.”<sup>21</sup>

Jaszi is quoted at length here because where the rhetoric used to describe the problem ends is where this thesis begins. We must venture forth from the legal shade because the model of power, copyright as legal authority presupposes, has become outdated. The regime of copyright has no center.<sup>22</sup> Rather than declare the death of the author, the collapse of law, or the end of the State, I refer to the nature of the network, perhaps evidenced nowhere more profoundly than within contemporary economic theory. Such logic may be reprehensible when considering the motivation or intention of copyright, but is not irrational when analyzing its development. If the idea that copyright is limited to financial concerns is held by disillusioned lawyers, it is because we have a corrupt view of contemporary capitalism and its role in technological development. To say copyright is only about the money may in some sense appear to be contradictory in light of the growing relevance of cultural studies into law and the failing economics of many copyright dependent industries but correlations between the successes and failures of industry and capital are fiction and bare no relation to reality inasmuch as to market fluctuation. The strength of copyright does not guarantee the strength of one’s stocks. A critical approach to the changing material conditions and growing logic of finance-capital in copyright dependent industries provides compelling grounds for understanding transformations within the copyright regime. Transfigurations that have turned copyright into an empire of transactions, of access and of excess. As discussions of copyright continue to be sequestered within legal and economic quarters we must

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<sup>20</sup> Biagioli, Jaszi, and Woodmansee, *Making and Unmaking Intellectual Property* (Chicago: University of Chicago Press, 2011), 415.

<sup>21</sup> Biagioli, Jaszi, and Woodmansee, *Making and Unmaking Intellectual Property*, 416.

<sup>22</sup> “Power, a while back, occupied the center. For it to come from this center, for it to be effective to its edges, for it to be carried to the periphery, a necessary condition is that there be no obstacle and that the space be homogenous around its action,” (Serres 2007, 95).

wrestle them out into the light of public opinion. For the questions copyright instigates have established themselves as political questions of the first order and so deserve consideration as such.

The chapters that follow are divided in to these concerns. The first chapter, “Cartography of a Crisis” opens up the discussion of crisis by exploring the historical conditions underpinning a crisis in copyright. In ‘framing’ the discussion of copyright in terms of its crisis I reference previous literature and analyze the received knowledge. I then propose a model for mapping the various dimensions of the copyright regime and draw upon a logic of spatial thinking to identify relations of power. In the second chapter, “Background Metaphorics and Foreground Rhetoric,” I draw from the work of Hans Blumenberg, to provide a sustained critique of the background metaphorics of copyright. In charting the various positions copyright has occupied within American culture I propose a framework for understanding the transformations within copyright I call propertization. In the third chapter, “Re-formatting Copyright” I chart out the technological and materiality conditions of copyright within traditional formulations of copyright and argue that their are inherent contradictions, many of which are left unanswered or are resolved within a framework of contemporary capitalism. In the fourth chapter I plot the expansion of copyright along its corporate capitalist axes to draw out the underlying expectations of value and access. Each chapter aims at understanding copyright in the framework of different totalities or structures, none of which are exhaustive, but all of which reveal the dynamic development of copyright in relation to the music industries.

While there is no single master narrative to account for the variety of topics, issues, positions and participants that arise from concerns of copyright, there is a urgent need to develop a consensus to begin imagining a common future. And to begin thinking about where copyright is headed, we need some account of how we arrived here. Copyright will and must transform, but it must also bend in the direction of securing free-speech, creativity and technological development. If the chapters of this thesis can make headway towards explaining this process and reorienting our approach then it will have

made a great impact in the politics of our culture already. I do not consider this work to be limited to mere criticism but see it as a positive contribution to the study of culture and history and as the basis for future work in the fields of music and copyright and their relations to the human person. Such a comprehensive approach, general as it is, provides the grounds for more enduring research and understanding.

# I. Cartography of a Crisis

What the term “copyright” means, should, it seems, be readily discernible. Given that it is often presented as either self-evident or inherently flawed, most are familiar with the notion of describing the relationship between an author and a work such that a limited exclusive right belonging to the author for the use and distribution of a work is guaranteed by the state. What might be unfamiliar is the notion that this guarantee was implemented for the benefit of the public.<sup>23</sup> One need not reference statistics, data analyses or algorithms from any of the dominant institutions or industries (which appearing non-rivalrous when not absorbing each other under their corporate umbrella), to see that the sentiment surrounding copyright is largely absent of public opinion.<sup>24</sup> Instead, copyright logic is administered by dominant industry stakeholders out of concern for authors and the sanctity works. The language however, proves dubious upon peering under the veil of corporate grandiloquence. Indeed, what once was a turn of phrase administered to install a constitutional defense against wrongful monopoly—no matter how “morally hazardous”, “philistine” or “commercial” it appears to the European observer—now refers to the basis for the industry standard white-knuckled grip on its content, US hardball legislation in the global market and the privatization of knowledge and information in what is referred to as the ‘second enclosure movement’ of the public domain.<sup>25</sup>

The transformation of copyright I’m outlining here can, to a large extent, be situated in the twentieth and twenty-first centuries, despite being characterized as the result of a

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<sup>23</sup> See Lewis Hyde’s *Common As Air: Revolutions, Art and Ownership* for an incredibly well-written and thoroughly investigated history of the public domain and a brilliant history of the guiding values behind the US Founding Fathers in terms of self-governance, creative communities and a conception of a public political being.

<sup>24</sup> Statistics, nevertheless, dot the horizon of any discussion concerning copyright, and often present themselves with the numerical simplicity and self-evident explanatory power only numbers can. As the majority of the numbers come directly from the record industries themselves the subsequent statistics have certain limitations (see Dave Laing’s work in *Popular Music* 16/3 pp. 311-12 & *Popular Music* 17/3 328-29).

<sup>25</sup> For a more thorough exploration of the many enclaves within reach of the copyright regime see James Boyle’s “The Second Enclosure Movement and the Construction of the Public Domain” (Law and Contemporary Problems: 2003), Lewis Hyde’s *Common As Air: Revolutions, Art and Ownership*, Yochai Benkler’s *The Wealth of Networks: How Social Production Transforms Markets and Freedom*.

sudden cultural unmooring in the information storm digitalization has produced. For a frame of reference, we might look to the millennium mania, what was dubbed by John Hamre, United States Deputy Secretary of Defense, as the “electronic equivalent of El Niño.” While historical synchronicity guarantees nothing, the reference point serves to identify a wildfire-like craze that appeared to put entire industries, banking systems and all the way up to the edifice of western civilization, at risk. The “millennium bug” was a contagion of geopolitical and world banking concern now remembered mainly as popular culture mania and generic computing compression.<sup>26</sup> It is not my intention to make light of the situation or the claims made by either side; rather, I aim to raise the question about what kind of public dimension can be said to inform the conditions underlying a crisis of copyright. It was, after all, in the mist of Y2k that we saw Napster burst out of the Dot.com bubble and convert any remaining agnostics or non-believers that the issue of copyright was anything but a non-issue. Both its historical moment and the means by which it reached its newly founded relevance in the public consciousness might account for a particular coloring of the crisis. More importantly, this extensive public dimension, as the Y2K moment reminds us, is more than “mass media” hysteria but points to how both the intricate and grand aspects of technology affect what and how we think about the structures that govern and guide our daily lives. In this chapter I aim to map out several key elements comprising the crisis of copyright, with particular emphasis on their musical contexts.

## **Combatting the Static Narrative**

To a great extent any connection between copyright’s charged arrival into the market of ideas and the radical inversion copyright, from public interest to the increased security and power of right’s holders, are fertile grounds for looking at the conditions of crisis. But an inversion of such scope would undoubtedly be unpalatable, if not improbable, had it happened over night; and even more dubious if we didn’t understand ourselves to still be in the midst of the very transformation we claim to have endured. Despite a

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<sup>26</sup> Hindsight is 20-20. Now it seems reasonable to force that disk space on computers was small and while six digit dates, such as MMDDYY, were used instead of four-digit dates, like 1999, the roll-over problem of a computer not registering 00, as year 2000, instead of 1900, could have happened at the end of any century.

tendency to adhere to a narrative of crisis that positions the critical point in contemporaneity, I argue that a comprehensive understanding of the situation is only recognizable over time and with recourse to the various positions copyright has occupied in the past. We would not be able to accept this critical predicament if we were unable to comprehend what had predated it: perhaps not every backroom compromise or public argument that went into its unique phrasing, but more importantly, why we feel so strongly about the faith, good will and explicit means Article I, Section 8, Clause 8 of the United States Constitution entrusted to the United States Congress:

“To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the exclusive Right their respective Writings and Discoveries.”<sup>27</sup>

There is no question that various interpretations of the constitution have, at times, been more convincing or less persuasive throughout history, and the copyright clause is no different.<sup>28</sup> I want to emphasize that what is most startling when considering the apparent newness of the crisis of copyright is less the fact that there have been many crises before, most of which can be (are often are) quickly and compellingly framed as either issues of technological advancement or economic disaster, but our modern reluctance to reflect upon the history of copyright. This history is more than tradition, it is our mortgage. Modern thought has all too often sought out proof of its legitimacy by pointing out that the crises we moderns find ourselves in date back to some problematic origin that we have advanced from that we no longer face, to some past debts we no longer owe. It would follow that at some point in history a break, transition or mutation occurred that has tainted the well ever since. This belief in some original error in our modern concepts drove many mid-century thinkers to find the faults, both errors and breaks, in in our inheritance.

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<sup>27</sup> *U.S. Const.* art. I, § 8.

<sup>28</sup> History confirms interpretations have varied as hearts and minds have been won and lost, but it is another question all together to ask if such mutability is the nature of law: “A law does not exist in order to be understood here historically, but to be concretized in its legal validity by being interpreted... This implies that the text, whether law or gospel, if it is it to be understood properly— i.e., according to the claim it makes—must be understood at every moment, in every concrete situation, in a new a different way. Understanding here is always application,” (Gadamer 2004, 308-309).



A similar tendency prevails in copyright disputes. Critiques of the concept of the “romantic author” dominate much of copyright literature, while expositions on “symbiotic relationship between copyright law and technology” seek to ground copyright in a stable legal authority subjected to the whims of new business practices.<sup>29</sup> To be sure, more recent scholarship has dealt increasingly with the conceptual difficulties posed by fundamental legal differences (tangible and intangible property, idea/expression dichotomy, authorship, originality, etc.) and these debates have extended beyond the traditional realms of policy but the narrative of crisis remains rooted in some (recent) past failure—be it moral, economic, legal or technological. If we actually take a historical view of the law, what past would we point to when suggesting that copyright broke down? After all, going back in time to some golden era would only result in fewer exclusive rights, shorter durations of protection and cumbersome application procedures until only books, maps and charts were covered, and even those would be published by royal decree. To chart the crisis of copyright requires a historical calculus capable of explaining the historical arc copyright has travelled and the processes working within it—not the mere difference between two points.

For one, the legal armature of copyright requires that it is an aggregate of opinions about how to frame issues. Rights, after all, structure the form of government, the content of laws just as they shape and reveal the morality of lawmakers and law-abiders/breakers. Such a view of copyright discloses, not an array of questions, but an ever shifting assortment of answers understood within a future horizon. Crisis is after all, always judged in relation to something not in crisis, replete with an expectation for some future. When thinking about modern crises, German philosopher and historian, Hans Blumenberg, observes a common historical fallacy: “something was absent, which is supposed to have been present before.”<sup>30</sup> This reasoning hardly explains the loss

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<sup>29</sup> Ben Depoorter, “Technology and Uncertainty: The Shaping Effect on Copyright Law”, *University of Pennsylvania Law Review*, 157/6, Symposium: The Foundations of Intellectual Property Reform (Jun., 2009), 1832.

<sup>30</sup> Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. Robert M. Wallace Boston: The MIT Press, 1983), 4.

though; it simply elaborates a means of accounting for a newer kind of change within an older paradigm—and in music, this tactic has cheated death out of a considerable fortune before.<sup>31</sup>

Instead, I argue that any effort to understand the crisis of copyright turns not on a return to its origin, but by grasping how far we have come from it. As such, the approach pursues a historical account of the changing “positions” copyright has taken up by developing a sense of the reaches of the copyright regime and the subterranean continuity evidenced in the immanent politics it engenders.<sup>32</sup> To sketch out a cartography of copyright then amounts to charting the distances and to mapping the extensions. An effort that amounts to identifying the relations and nodes of power within the world of copyright, how they change. To reframe the question from the origin of crisis to developing an understanding of the conditions of its being considered crisis is the driving motivation for this work.

“Nothing wants to go back to the beginning,” Blumenberg writes in his major work *The Legitimacy of the Modern Age*.<sup>33</sup> “On the contrary, everything apportions itself according to its distance from that beginning.”<sup>34</sup> Blumenberg’s thought is important for remembering that the traditional narrative of crisis assumes a radical break with our emergence into the digital age. This epochal shift however, fails to account for any continuity within copyright. I propose it is a continuity predicated on problems rather than solutions. As Robert Wallace has noted, “instead of remaining forever fixated on ‘doctrines’ or ‘ideas’ as the stuff of our tradition, we need to learn to relate these to the human activity of inquiring, of questioning, which gives them their relevance and

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<sup>31</sup> To see a more detail history of the music industries well documented fear of change, and particularly technology, see Steve Knopper’s *Appetite for Self-Destruction*; Lawrence Lessig’s *Free Culture*; Alex Sayf Cummings’ *Democracy of Sound*.

<sup>32</sup> “Position” in relation to copyright refers to a dominant account of social relations that structure the relationships that both represent and underlie authors, works and audiences within historical societies.

<sup>33</sup> Blumenberg, *The Legitimacy of the Modern Age*, 4.

<sup>34</sup> Blumenberg, *The Legitimacy of the Modern Age*, 4.

concrete meaning.”<sup>35</sup> We would do well to remember copyright’s importance to the human activity of creativity and inquiry. They involve the challenge of deciding how to establish relations in society between author, work and audience that balances the need to ensure authors are adequately remunerated with the democratic pursuit of an enlightened public.<sup>36</sup> In doing so, we do so we may find other kinds of continuity besides a nebulous expansion, technological intervention or a morally degenerate generation. For the remainder of this chapter I will draw out the lines of inquiry to give shape to the network of forces that constitute the conditions of a crisis of copyright to demonstrate that to the view the crisis of copyright as a matter of scope, rather than of size, offers novel interpretations of copyright, its role in society and the changes both have undergone.<sup>37</sup>

## Disentangling the Crisis

To begin thinking critically about copyright we need to distinguish it from other forms of intellectual property. Primarily, copyright is the expression of an idea and not the idea itself. This distinction is known as the idea/expression dichotomy. It is equally well appreciated how difficult it is to draw the line and how fundamental the establishment of such a line is. A shorthand here might suggest that copyright generally handles the conceptually complex topics of creativity, authorship and culture in ways that patents (concerned more with strict standard of “innovation” in the form of inventions, things and processes), and trademarks (intended to guarantee the “good will” of a company in the marketplace) do not. These seemingly flimsy distinctions derive from a notion of culture relatively foreign to contemporary ears. The one in which copyright came about was one where many creations were intuitively understood as common.<sup>38</sup> This word

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<sup>35</sup> Blumenberg, translator’s introduction to *The Legitimacy of the Modern Age*, xviii.

<sup>36</sup> There is no doubt that in the past, in the fervor of democracy, the driving motivation of copyright was an informed and enlightened public engaged in the open and free exchange of ideas. Now such thoughts seem more to be afterthoughts.

<sup>37</sup> Raymond Shih Ray Ku, “The Creative Destruction of Copyright: Napster and New Economics of Digital Technology” *The University of Chicago Law Review* 69/1 (2002): 264.

<sup>38</sup> Lewis Hyde, *Common As Air: Revolution, Art, and Ownership*. This reading is predicated on a historical understanding of the driving motivations of 18th century political thought and thinking through the vastly different intellectual milieu, such as the kind that produced the Republic of Letters and the French and American revolutions.

“common”, in all of its various meanings, is extremely important for thinking about copyright for a number of reasons. While patents and trademarks most certainly effect the lived experience of individuals on a daily basis, often in more practical ways than copyright, they are rarely our “common concern.” In part, because they do not carry the cultural baggage copyright assumes (for better or for worse) nor have they emerged on the public scene with the same publicity and force as the new “collective problem” of copyright. There can be no denial that copyright has ceased to be an issue only for legal scholars, lawmakers or business executives. This reality has been made painfully clear in the academy, the sciences and in the public sphere with the rabid lawsuit tactics of industries and right’s holders over the past two decades. Copyright is no longer a problem of the few, it has forced itself into the public sphere and thus warrants a terminology that is less alienating, less obtrusive. It should not be surprising then, that we’ve simply never had one, as Jessica Litman points out:

“We have never had a mechanism for members of the general public to exert influence on the drafting process to ensure the the statute does not burden private, non-commercial, consumptive use of copyrighted works. The design of the drafting process (in which players with major economic stakes in the copyright sphere are typically invited dos it down and work out their differences before involving members of Congress in any new legislation) excludes ordinary citizens from the negotiating table.”<sup>39</sup>

It goes without saying that such a structure gives credence to the idea that copyright is not something that the ordinary citizen should care about or would ever need concern. Litman continues, “It should also be unsurprising that many copyright holders insists that current copyright laws applies to everyone as literally written; there are no privileges or exemptions for the public because it would be inappropriate for members of the public to have them.”<sup>40</sup> Such an understanding of copyright is not only inconsistent with legal practice, but goes against the legal logic enshrined in copyright throughout history. Furthermore, it denies that “American law has long recognized, first informally and later by statute, that a certain degree of copying, categorized as “fair

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<sup>39</sup> Jessica Litman, “Revising Copyright Law for the Information Age” *Oregon Law Review* 75/19 (1996): 2.

<sup>40</sup> Litman, “Revising Copyright Law for the Information Age,” 3.

use,” is acceptable.”<sup>41</sup> From the viewpoint of current stakeholders, people and companies in current positions of power, this makes a lot of sense though. Given the expansion of copyright it is not surprising to hear that the public has not been privy to the proceedings of copyright thus far, but this must change. The need to understand concerns for the copyright are not simply specialized thinking. Because the common and communal nature of copyright, as a temporary exclusive right (what we might call a privilege) guaranteed by the federal government, is inherently political and deeply ingrained in democracy. As sociologist and music scholar Simon Frith has noted, “because rights regimes depend on legal regulation (rather than on market forces), the economics of rights cannot be discussed separately from the politics of rights.”<sup>42</sup> This logic extends to the extensive, and growing, network of special interests and government lobbying on national and international levels just as much as it invokes the rights and interests of the public and their access to information, education and democratic discussion. Another crucial reason “common” is invoked here is drawn from the work of Lewis Hyde. Working upon a similar assumption: I understand that as American citizens we have inherited a cultural commons, which consists of art and ideas.<sup>43</sup> What Hyde describes as the vast collection of “human wit and imagination”—and it belongs to all of us. Ranging from the works of Shakespeare to knowledge of how to create aspirin, this information is extremely hard to exclude others from and it is by nature abundant, put another way, non-rival. The fact that one has knowledge and has enjoyed literary experiences of Shakespeare does not preclude another from having so whatsoever. Some of these were or are under copyright protection and this should remind us of the immensely intricate nature of copyright and its ability to effect our collective identities—in public and private. Thus, in developing an understanding of the

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<sup>41</sup> Litman, “Revising Copyright Law for the Information Age,” 4.

<sup>42</sup> Simon Frith, “Music industry research: Where now? Where next? Notes from Britain” *Popular Music* 19/3 (Oxford: Cambridge University Press, 2000), 388.

<sup>43</sup> Hyde writes: “All that we make and do is shaped by the communities and traditions that contain us, not to mention by money, power, politics, and luck. And even should the artist or scientist think she has extracted herself from the world to stand alone in the studio, a tremendous array of faculties and mind-states may well attend her creativity,” (*Common as Air* 2011, 56). For an interesting analysis of Hyde’s assumptions see Fred Brandfon’s, Review “Art Ownership: On Lewis Hyde’s “Common as Air”: Apr Books *The American Poetry Review* Vol. 40, No. 2 (American Poetry Review: 2011) 15.

extant crisis, the fact of copyright's reach cannot be overlooked,; it is one of public interest, it is a common concern.

The second step in disentangling the crisis of copyright is to unpack the complex and interconnected relationship it has with the music industry. There can be no doubt that music, unlike other media has a special relationship with copyright, because unlike any other industry it relies upon it absolutely.<sup>44</sup> As copyright scholar Lee Marshall argued back in 2005, “the music industry is currently at the heart of the new challenges facing intellectual property;” a statement that if said today would hardly be dated.<sup>45</sup> Nineteenth century composers lobbied for protection of their compositions, which at the time were understood in terms of written works. Because of music's unique relation to copyright it presents difficulties that we should be careful not to confuse crises of the music industries with those of the copyright world. That the much proclaimed “de-valuation of music” may have a connection with copyright is hardly enough to purport that copyright stands to bear the burden of guilt of explaining why. Such a narrative leads only to general result, one that might could be reached with an astonishing array of equations and computations.

How then to distinguish them? Certain broad strokes can be made here. First, and most obviously, copyright does not apply to only music. This argument was referenced by Marshall in identifying how the music industry is an “exemplar” of the new problems facing intellectual property. Secondly, the tendency to conflate music and the music industries, or even “the music industry” with “music industries,” works only to supplant any critical notions of how the music we stream, hear in films or listen to on the radio is produced in reality ruling out all other possible ways to organize its production, dissemination, and experience of the audience. An example is useful. John Williamson and Martin Cloonan have modestly argued that “the notion of the single music industry

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<sup>44</sup> Lee Marshall *Bootlegging: Romanticism and Copyright in the Music Industry*, (London: SAGE Publication ltd, 2005), 4.

<sup>45</sup> Lee Marshall, *Bootlegging: Romanticism and Copyright in the Music Industry*, 4.

is an inappropriate model for understanding and analyzing the economies and politics surrounding music.”<sup>46</sup> While Williamson and Cloonan choose to focus their critique to the economic and the political their critique does a lot of the important groundwork for understanding the implications of discourse framing, or of talking about issues a certain way. For Williamson and Cloonan, we should adopt the the term “music industries (plural)” for the purposes of developing a clearer understanding of how these industries work and perhaps more importantly, the “designing of policies for them.”

Primarily, the use of the term ‘music industry’ suggests a homogeneous industry when in fact there are a disparate set of industries, often in alliance but not too infrequently at odds. Additionally, the term ‘music industry’ is used all too often in reference to the ‘recording industry’. In both cases the term ‘music industry’ leads to “misrepresentation and confusion,” and “it suggests simplicity where there is complexity and homogeneity where there is diversity.”<sup>47</sup> This confusion, like the misrepresentation, is vectorized and targeted at the public for the simple reason that it serves certain vested interests for the industries to remain indeterminate.<sup>48</sup> The problems are enough for Williamson and Cloonan to argue that “the notion for single music industry is an inappropriate model for understanding and analyzing the economies and politics surrounding music.”<sup>49</sup>

A third matter to disentangle is copyright’s relation to the music industry’s profit schemata. We would do well to remember that copyright can be said to be “in, but not of the market.” This serves as a reminder that it a federal guarantee (statutory law) and hardly anything “natural”. This ruling has on many occasions been reaffirmed.

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<sup>46</sup> John Williamson and Martin Cloonan, “Rethinking the Music Industry,” *Popular Music* 26/2, (2007): 305.

<sup>47</sup> Williamson & Cloonan, “Rethinking the Music Industry,” 305.

<sup>48</sup> Williamson and Cloonan then layout the four most pressing places where this misrepresentation occurs: (1) “Use by Representative and Umbrella Organizations”, such as BPI or the American ASCAP or RIAA, 2) “Media Use”, including music publications such as Billboard, Music Week or even The Guardian 3) “Official Use” in governmental organizations and, 4) “Academic Use” dating at least back to the critiques of the staunch cultural industry critiques of Adorno. It was his production based thinking that may be the cause for the ‘over privileging.’

<sup>49</sup> Williamson & Cloonan, “Rethinking the Music Industry,” 305.

Originally, in the case *Donaldson v. Beckett* argued in the House of Lords in 1774 and more recently in 1834, where Judge McLean ruled in *Wheaton v. Peters*, that common law protected personal letters or diaries, "this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world."<sup>50</sup> Indeed, he continued, "Congress, then, by this act, instead of sanctioning an existing right, as contended, created it."<sup>51</sup> In this sense, it is just like the oxymoronic "natural market forces" in "free market societies". To make sure, the dispute is not that the ideas of expressions are not unadulterated thoughts, but that protection for original thoughts is not tied to whatever "natural," "original" origin they may have. The relationship between art and copyright has this conceptual collusion in large part due to a proclivity to draw rhetorical connections and identify similar elements as constitutive of similar things. Failing to do so risks the slippery slope towards adopting pro-industry language—a lesser-recognized form of capitalist apologetics.<sup>52</sup> To be sure, the language of music industries commonly effects the way we think about music *and* how we think about copyright. Indeed, the very idea of industry has changed how we talk about music and culture. Even before Adorno's critique of the production-based cultural industry, fabrication had pervaded our thinking to such a degree that "the image or model whose shape sides the fabrication process not only precedes it, but does not disappear with the finished product."<sup>53</sup> In our age, the age of *homo faber*, our processual thinking guides our experience of works before their completion. The absolute reliance upon the law, a characteristic that defines music's current relation to copyright, implicates the legal structure as a blueprint for its possible realization.<sup>54</sup> But copyright has never sold anything, that is, been the reason someone bought something; and, it is decidedly should not be a means for sustaining industrial

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<sup>50</sup> *Wheaton v. Peters*, 33 U.S. 591 at 658.

<sup>51</sup> *Wheaton v. Peters*, 33 U.S. at 660–61

<sup>52</sup> While conventional wisdom tell us that copyright is the necessary incentive for the creation of works, history tells us that authors create works contrary to conventional wisdom. Much scholarship has gone into challenging the view of copyright presented by industry spokesmen and women, not to mention the economic travails and successes they submit as evidence for such travesties. The point is not to disavow copyright but to acknowledge its very real and formal relations with capitalism.

<sup>53</sup> Hannah Arendt, *The Human Condition*, (Chicago: The University of Chicago Press, 1998), 141.

<sup>54</sup> "The actual work of fabrication is performed under the guidance of a model in accordance with which the object is constructed," (Arendt 1998, 140).



status quo. The tendency to conceptually conflate music, industry and copyright is not uncommon, only unproductive. That copyright has served many masters is not to its discredit however, rather, it points to its irreplaceable role in understanding modern creative practices. We must strive for an account of these relations that does not begin with the digitalization of everything, but acknowledges, rather, that “the current situation is a crisis long in the making.”<sup>55</sup>

## Copyright’s Existential Crisis

In 2009, law professor Ben Depoorter, declared: “Judging from the headlines, it appears that copyright law is in an existential crisis.”<sup>56</sup> The crisis has been going on for sometime, arguably much longer than Depoorter’s article suggests. What is of particular interest for the present work is the change in discourse Depoorter identifies and represents. It would seem that the crisis is of a different degree now, it is somehow more existential in nature.<sup>57</sup> The views advanced by many copyright advocates today point to a difficulty in accounting for the thoughts of prior thinkers within copyright’s current bounds. What is more is that many formerly held arguments are now acknowledged as specious and romantic. But, “if these out-of-date beliefs are to be called myths, then myths can be produced by the same sorts of methods and held for the same sorts of reasons that now lead...” to historical knowledge.<sup>58</sup> To understand the crisis is then to understand the problematics that arise within the present paradigm of copyright. To grasp the environment surrounding copyright, its conditions and possibilities, proves an invaluable tool to understanding its changes as much as its current state.

When Depoorter speaks of an existential crisis of copyright law he is explicit about the juridical aspects despite his use of them as mathematical constants. In fact, the two assumptions that ground his argument are the “formative roles of legal uncertainty and

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<sup>55</sup> W. Ron Gard and Elizabeth Townsend Gard, “Marked by Modernism: Reconfiguring the “Traditional Contours of Copyright Protection” for the Twenty-first Century” in *Modernism & Copyright* (Oxford: Oxford University Press, 2011) 157.

<sup>56</sup> Ben Depoorter “Technology and Uncertainty,” 1832.

<sup>57</sup> Jens Schovsbo, “How to get it Copy-Right” in *Art and Law: The Copyright Debate*, edited by Morten Rosenmeier & Stina Teilmann (Copenhagen: DJØF Publishing, 2005). p. 25.

<sup>58</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago, 1970), 2.

legal delay.”<sup>59</sup> The legislative nature of copyright appears to be always already unstable; either utterly inapplicable in light of technological development or predicated on an old model of things and thus unfit for grounds of enforcement. This kind of out-of-dateness hardly justifies terming it an existential crisis though. An existential crisis is typically a situation where individuals are forced to question the very foundations of their lives, to ask whether or not it has any meaning, purpose or value—not if they’ve fallen behind and need an update. To be fair, Depoorter does not seem to suggest that at the end of the day copyright law has lost its purpose. Which begs the question, what exactly is different about the present and how does it relate to the crisis? Legal theories are of little help here. For one, all laws are in effect, *post facto*. There are not speed limits prior to someone speeding and either risking, endangering or taking life or property. The conceptual confusion between what is protected, why it is protected and what deserves protection only complicates the issue.

The move to personify a piece of legislation may be a mere turn of phrase, a product of grammatical coherence or rhetorical conviction, but it also betrays a trend in recognizing a rich subterranean humanity at play in discussions of copyright. The humanity at play in copyright is tied to a sense of self-understanding, whether (identity laws in copyright) or a “natural order” (traditional contours imply every works eventual placement into the public domain) that when questioned and/or broken renders an individual and their work lost or unsure of the future. To anthropomorphize laws or interpretations of laws is indeed a rhetorical gesture, and as such, not an empty one. In fact, as I showed within the history of music copyright there is precedent for doing so.

Early music copyright likened melody to “the fingerprints of a musical work, the primary index of a piece’s singularity.”<sup>60</sup> The emphasis is not mere wordplay but the very value of argumentation. In 1909 speaking of various aspects of music in such

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<sup>59</sup> Depoorter, “Technology and Uncertainty,” 1867.

<sup>60</sup> Joanna Demers, “Melody, Theft and High Culture” in *Modernism and Copyright*, 130. Furthermore, the stipulation of the law according the Copyright Act of 1909 was that any cover not change “the basic melody or fundamental character of the work.” 17 U.S.C. §115(a)(2).

personal tones, even material fingerprints, was the standard. But in the wake of the Copyright Act of 1976 the law changed. Up until the latter part of the twentieth century the expression of music had been the penned lyrics or the written notes and the idea existed in the composer's head. "Now that copyright protects all sounds fixed in a recording, however, the category of expression includes not just notation but the full range of audio phenomena that arises from recorded performance of the score."<sup>61</sup> Similarly, changes in identify of composers and how they imagine their work has produced a difference way of listening. As composers and musicians have needed to adapt to the new parameters of the law so as not to be accused or convicted of copyright violation, they have had to become more conscious of how all sounds have become equally important to the song and not any particular tune, ditty or melody. To notice a "borrowed" bass line or a sampled track is often just the point. Hence the tendency to identify an artist with their sound. This figure of speech has been the result of a mutually constructive relation between music and copyright.

The tendency of wanting to pinpoint the problem often results in the easy claim that technology is at the root of the problem. Those most often arguing this line simultaneously call for technology to resolve the problem too, however. There can be no doubt that technological change has indeed produced unexpected situations, which, in turn, has caused copyright to address new phenomena utterly ill-equipped. But less so because copyright was weak or uninterested in protecting original creations and more along the lines of it couldn't have imagined the LP in 1879 or television in 1909 and so couldn't account for it—yet. "And so" Depoorter writes, "time after time, technological advancements have affected copyright law by demanding answers to difficult questions regarding the scope of the law."<sup>62</sup> But these technological advancements have challenged law makers for centuries and furthermore, a quick look at copyright transformation indicates that issues concerning the scope of the law have only involved their expansion over the past century. One need only think of developments in cartography, the printing press, the player piano and the gramophone, the record player,

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<sup>61</sup> Joanna Demers, "Melody, Theft and High Culture," 131.

<sup>62</sup> Ben Depoorter, "Technology and Uncertainty," 1839.

cd's, computers, all long before the internet or mp3. In short, technology, or at least technological change, seems hardly fit to provide a comprehensive account for the present crisis either.

Depoorter seems to acknowledge this technology loop, even if it is the product of convenience for right's holders:

“When copyright owners feel that the law adapts too slowly and fails to offer adequate protection, they invest in antipiracy-protection (*sic*) technologies. This investment, in turn, motivates users to invest in circumvention technologies, creating an arms race between content owners and pirates in which the very technology that is used to create a lock can be used to pick it.”<sup>63</sup>

Thus, copyright stakeholders take the law into their own hands when they “feel” so and this feeling produces an arms race. This notion of copyright sounds more like tax loopholes, publicity stunts and privatization of public services towards furthering empire. This is however, specific to rights regimes. As I mentioned early, rights regimes are reliant upon legal, which in the case of the United States is effectively state sponsored enforcement of free market forces. We see that the guiding framework rest upon a question that, again, turns upon not so much what does copyright mean but what would it have to have meant to make it capable of an existential crisis? The law as described is blatant control, discipline and order amidst a storm; and, technology as the waves bashing against the hull of property.<sup>64</sup> Again, such a description implicitly ignores those individuals for whom the law applies, from whom the law derives its power—the public. Might the existential crisis of copyright that Depoorter references be a crisis of the public? Has the American public lost all faith in copyright “to promote the progress of science and useful arts” through the federal guarantee? Copyright scholar, Siva Vaidhyanathan, writes, “Copyright is a ‘deal’ that the American people, through its congress, made with the writes and publishers of books.”<sup>65</sup> Is the deal off the table?<sup>66</sup>

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<sup>63</sup> Ben Depoorter, “Technology and Uncertainty,” 1839.

<sup>64</sup> The argument presented here is a caricature, but scholars such as Ulrich Beck have noted through concepts such as second modernity and knowledge society the inherent risks modern society has become aware of, and been forced to endure. That this reflexivity provides strong enough evidence to justify the strengthening law is hardly substantiated though.

<sup>65</sup> Vaidhyanathan, *Copyrights and Copywrongs*, (New York: NYU Press, 2003), 21.

<sup>66</sup> The situation of copyright, be it crisis, is not the mere standard process of ‘growing up’, rather, it has a specific historical function in the failure of a belief and a series of expectations: “Legitimacy becomes a subject of discussion only when it is disputed,” (Blumenberg 1983, 97).

## Limitations of Crisis

For Nietzsche it was a loss of collective faith in religion or traditional morality that constituted the grounds for an existential crisis. If the existential crisis of copyright is a collective loss of faith, then what deal have we lost faith in and can be said of the culture that produced it? The “deal” I have already alluded to, and legal scholars such as Neil Netanel, have written convincingly about the changes in approaches to the public and democratic foundations of copyright. The culture of copyright likewise, spans the distance from America’s Founding Fathers to hip-hop artists of the 21st century. Questions of historical methodology necessarily arise: how can arguments be made across such historical spans without a modicum of recognizability in the first place? What counts is this modicum of similarity? Who decides what counts? I argue that certain “identity conditions”, certain “structural continuities” must exist for historical arguments to hold water in identifying similarities between historical events.

One such way is to examine the semantic translations that occur over time. This dialogical thinking posits that these changes are not the result of new questions to old answers though. Rather, these semantic translations point to a tendency to cover-up or smuggle political agendas in the guise of new conceptual thinking. Concepts, such as author, work and audience have changed and will no doubt continue to change with various stakes for politics and economy. What is of prime importance, for Blumenberg, are certain “carry over questions;” those problems that were not adequately answered in the past or have yet to be abandoned in the present that make the *identity* of historical processes but not their content. Rather, there is a subterranean basis to such conceptual outgrowths. As Koselleck has argued in *Futures Past*, “history is only able to recognize what continually changes, and what is new, if it has access to the conventions within which lasting structures are concealed.”<sup>67</sup> The metaphorical underpinning advanced here takes concepts and re-implicates them into the logic of the lived world. For Blumenberg, this constitutes the foundational aspect of metaphors, the foundation upon

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<sup>67</sup> Koselleck, *Future Past*, 275.

which without orientation, thought and action would be inefficacious. To think about this in terms of a cartography, the expansion of the copyright regime brings in new and different territories under the banner. This does not however, lead to more of the same, but, rather, at each turn to new ways of being territorial.<sup>68</sup>

To this end, this work engages with several dominant concepts within copyright and posits a metaphorological approach rooted in the foundational understandings of property and its reoccupation. What I term propertization seeks to shed light on certain rhetorical, material and economic arguments behind the advance of copyright expansion. What is not argued is the existence of some consistent impulse to resolve the question of property, hence my terminology propertization. Rather, propertization refers to new “positions”, or set of problems, within a framework of possible orientation, thought and action in the world. It aims to reflect the internal maneuvers and contradictory motivations within contemporary copyright culture and law. In one sense this effects the confines of time, predominately understood as duration and expectation, and on another the spatial limitations, the growth of works covered by copyright as well as the ways and measures they are protected.<sup>69</sup>

The functional reoccupation of copyright has changed dramatically: from censorship and regulation by the Queen, to commercialization and legitimization of the artist as individual, to the expansion of the notions of art and professionalization of the artist, to ‘sustainability’ within a capitalist market structure. Instead, propertization allows us to see the matrix of needs, expectations and questions that unite these overlapping paradigms. We can ascertain a sense of the scope of the crisis once we have recognized a particular trajectory of it having come into being as a crisis and its unique relation to the future. As Koselleck has cogently argued, “the entire sociopolitical linguistic

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<sup>68</sup> See William Rankin’s, *After the Map: Cartography, Navigation, and the Transformation of Territory in the Twentieth Century*, (Chicago: University of Chicago Press, 2016). Perhaps, nowhere is it most powerfully exemplified by the DMCA (Digital Millennium Copyrights Act) of 1998 and the creation of new digital and technological controls.

<sup>69</sup> “A consistent discovery in the following studies is the fact that the more a particular time is experienced as a new temporality, as “modernity,” the more that demands made of the future increase. Special attention is therefore devoted to a given present and its condition as a superseded former future,” (Koselleck *Futures Past*, 3).

domain is generated by the progressively emerging tension between experience and expectation.”<sup>70</sup> To this end, the crisis in copyright might be seen as part of the crisis of creative production itself. One might ask: “what is the position of creativity in society?” While another might pursue a more pragmatic approach that draws from the merely abstract. Instead the questions might be phrased: how is it tied to *our* past and what can it do for *our* future? To stake out ground for formulating responses to these questions in relation to copyright we must take account of one major translation, one I believe can help develop our understanding the extant crisis: the abandonment of an authorial past for a propertied future.

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<sup>70</sup> Koselleck, *Futures Past*, 274.

## II. Background Metaphorics of Copyright

*All things are subject to interpretation.  
Whichever interpretation prevails at a given  
time is a function of power and not truth.  
—Friedrich Nietzsche*

Understood historically, copyright cannot be described in terms of its general contents: author, property, law, but, rather, by its function. In fact, these largely heterogenous characteristics often serve to represent copyright like some conceptual shorthand, but always at the expense of understanding its function. While much discussion surrounding copyright seems intent to focus on the external forces shaping a nebulous kernel of truth, some *essential* copyright, recent thought has frowned upon essential arguments. This tendency to seek out some essential core to copyright is the prerequisite for denying the mutable social relations that constitute its possibility: “But for all that law shapes works of culture, it is itself, quintessentially, a work shaped; indeed, one could say that nothing is more “made” than law.” Particularly, because this rational ultimately lacks explanatory power when asking about the conditions constituting the crisis of copyright or how it might have come about. An essential understanding of copyright fails to answer how the essence of copyright could have undergone such a radical transformation into its inverse, from limited right and public interest to an expansive regime of rights used to harness private profit on a global scale. In light of the collective heritage I will argue that only within copyright is such a transformation accountable on account of the historical conditions identified earlier. The modern extent crisis is the product of an immanent historical process within copyright itself.

Seen in the long *durée*, a such a model of copyright does not slide into a comfortable teleology—from a former limited right towards its more fuller, robust version. The modern status as moral bludgeon and gavel for the conviction and punishment of “pirates” betrays a conceptual “reoccupation,” one less of consensus than one of



inheritance and special interest.<sup>71</sup> These substantial elements may provide compelling evidence for a number of copyright's various "positions" but they do not account for its transformations. The specious essential element of copyright is only possible to imagine if copyright, after having been drug through history, emerged suddenly freed of any historical mortgage. If we are to resist this teleological approach to copyright we must be able to account for a continuity to copyright that acknowledges those positions it has occupied and those it has retreated from. By adopting a cartographic approach, a view of 'the topography of copyright' reveals a marked history, akin to a palimpsest. The multitude of arguments surrounding the production of creative works and their remuneration have used copyright as the occasion, not as the tool to discuss the ordering of relations. The general sentiment that copyright has some 'readiness to hand', some immediate use-value is an inverted modern crystallized conception. Somehow we have managed to turn land into an estate, transformed the occasion into the justification. This process is more than likely the product of our process-oriented thinking. A pathological thinking that aims to determine *how* copyright might do what it needs to do to recover or overcome the crisis, but one that simultaneously avoids addressing *what* copyright is. This is because the nature of one's undertaking is deeply determined by the problem one is addressing.

The tendency to speak abstractly of the conceptional armature of copyright needs to be replaced with an understanding of the function of copyright: not *how* it does, but *what* it does. The question cannot be how the modern rights regime describes or resists what came before it but what means allow for its extension and the production of new power structures. *Once Upon a Time in Shaolin* exemplifies these latent structures in copyright and supplies a vivid imagery for charting their various constellations. By exploring the background metaphors and the foregrounded rhetorics a compelling narrative for understanding copyright's historical transformations. To get there though we take a short detour through the legal cocoon of copyright.

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<sup>71</sup> "This is the story about private interests, vested interests, and the inexorable pace of technological change," begins Jessica Litman's "Copyright Legislation and Technological Change," (Litman 1989, 275).

## Legal Troubles

That the language of law strives to become streamlined logic and pure concept for the sake of eliminating misunderstanding seems self-apparent, and in many ways, as it should be. James Freund writes of the legal craftsman, “He is engaged in an endless struggle to rid the language of ambiguity and exterminate half-truths.”<sup>72</sup> He continues, “conclusions are conclusive unless clearly labeled tentative; the unexplained assumption is dangerous; the unattributed statement, anathema.”<sup>73</sup> There is however, the realistic acceptance that language has not yet arrived at this state of pure sensibility. Provided that it had, we would “have to relinquish any justifiable interest in researching the *history* of its concepts.”<sup>74</sup> As Blumenberg points out in the case of philosophy, seen from a view of completion, history would only serve to identify failed fledging attempts at understanding, those necessary but destructive moments of unrealized thought. Thinking of language as the horses pulling the chariot of progress has had dangerous consequences. This type of eternal certainty was however, deemed to belong exclusively to the creator and his creation and put to rest some time back so long as we mortals realized that all that remained, “the world of our images and artifacts, our conjectures and projections—in short, the universe of our ‘imagination,’” was our concern.<sup>75</sup> The backdrop of these conceptual transformations then, the dark infinite sky that gives cause to looking at the whirl of the celestial bodies sheds light on that something ancillary to the light of conceptual thought.

Copyright as an idea seems straight forward enough, but once historicized it fails to be the clear conception in practice. Changes within the law are numerous. What is of particular interest for this study is not in recognizing that changes are many and particular, nor that such changes fail to account for some “progress” in copyright, but that these changes correlate to changes in experience and expectation. As I hope to

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<sup>72</sup> James C. Freund, *Lawyering: A Realistic Approach to Legal Practice*, (New York: Law Journal Seminars-Press, Inc., 1979), 47.

<sup>73</sup> Hans Blumenberg, *Paradigms for a Metaphorology*, (Ithaca: Cornell University Press, 2010), 48.

<sup>74</sup> Blumenberg, *Paradigms for a Metaphorology*, 2.

<sup>75</sup> Blumenberg, *Paradigms for a Metaphorology*, 2.

show, thinking about the relations between experience and expectation in a technologically reforming world grants novel interpretations of more recent changes in copyright culture and law. Notions of legal precedent, our sense of the sanctity of law, even terminology such as the ‘traditional contours of copyright’ work to distance law from fraternizing with frivolous or sudden change. Even when radical changes within US law occur, they’re evoked as if they always fit within the legal teleology: freedom of speech, the abolition of slavery, women’s suffrage and the sale of alcohol are all labeled amendments. This title works to confer some sense of longevity to the legal regime. Things are as they have been, or they can simply be tacked on to an already functioning whole. This image is one where law moves slow, so it goes without saying that a more complex grasp of transformations within the law or interpretational schemata of the law are not common knowledge. Indeed, it goes against the moral injection the law bears within it. In light of this reality, it is easier to find structural similarities to the transformations within copyright law in other fields as reference points. Before beginning though, to chart out the changes in copyright we need to justify what counts as a change.

One way to do this is to break up copyright into its various “positions” or “paradigms.”<sup>76</sup> When talking about changes in copyright I could refer to copyright within a particular period of time, within a national border, or in connection to a new technology and much scholarship has proceed along these lines.<sup>77</sup> (The national border

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<sup>76</sup> The notion of a paradigm here is not used in contrast to position, it is used loosely and synonymously. It works to inject a certain direction and dynamic attribute into the static position. In this sense, a position is always only temporary—or at least never forever—whether it is abandoned or occupied. In respect to copyright, the authorial “position” can be said to be the conceptual framework for attracting a lasting group of individuals (scholars, industry officials, public officials, citizens, etc.,) away from alternative models of thinking about copyright (public interest, property rights, originality) while providing them with enough stability and unanswered questions to justify its endurance. While positions or paradigms attract lasting groups of adherents who work within them over differing spans of time, they are not ever necessarily consciously selected at any point. It might help to think of them more abstractly, more akin to the positions we take in an argument than an actual location although history testifies to a correlation between the two. Positions then, may engender coherent traditions or destroy them, but they have always a working agreement of fundamentals, be they rules, standards or methods.

<sup>77</sup> Copyright scholarship is full of accounts of early copyright, European vs American notions of copyright, german vs french and more recently, a plethora of accounts of the certain digital demise of culture industries. Music was not included in the list of possible works capable of receiving copyright protection until the 1800’s. It was not until the Copyright Act of 1831 that musical compositions were protected by copyright, which still did not include public performances. This is most clearly a carry over of a literature based thinking.

will remain the United States of America and any general statements about EU jurisprudence only serve to illustrate American exceptionalism.)<sup>78</sup> These positions are shaky grounds to formulate differences, however. Like sand on the shore, each of these categories lies nestled in historical epochs that constantly take on new shapes in light of our recent discoveries. Work by Benedict Anderson has argued for acknowledging the imaginary compartment and composition of the modern nation state and the notion of nationalities more broadly; and, identifying transformations in copyright in relation to new technologies risks a certain bland technological determinism or digital utopianism that does not accurately reflect the reality of copyright.<sup>79</sup> So how do we distinguish the positions of copyright?

As the law strives for a certain clarity in terms and procedure of thought it proceeds along a trajectory of resurfacing the landscape within its domain. In this sense, the law produces the facts it allegedly stumbles upon.<sup>80</sup> Scholars have noted that the productive capacity of law includes “subjects and the subject positions it affords,” including the Marxist insight into the conditions for the production, interpellation and ideological adoption of a “possessive, rights-bearing subject.”<sup>81</sup> Following the work of scholars like Rosemary J. Coombe, we would do well to shift our thought to consider how subjects

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<sup>78</sup> “Copyright laws of a country have no extraterritorial application. Nevertheless, practically every nation in the world, by adherence to either bilateral or multilateral treaties of conventions, protects the copyrights of foreign nationals,” (Cramer 1965, 531). The global agenda of right’s holders is hardly a secret however; US foreign trade agreements have largely bullied countries into reforming their stances on intellectual property rights as a condition for approval.

<sup>79</sup> Benedict Anderson, *Imagined Communities* (2011). As Rosemary J. Coombe has argued, the emergence of new holders of intellectual property under the auspices of international treaties, connections and customs: “in these transnational processes, communities are in important way imagined, “traditions” are often invented and “cultures” seem to be emerging everywhere in legal guise,” (Coombe 2011, 83). The question of technology will be addressed at more length in the following chapter but suffice it to say now that copyright has not responded to or shaped new technologies individually or uniquely, however we might define them; and, furthermore, right’s holders and users are hardly suspended apart from technological changes themselves, but are often, in fact, instigating them for their own profit and benefit. On the other hand, one need only think of the Statue of Anne in the wake of the printing press or the introduction of the CD as technological markers for accumulating power, profit and capital.

<sup>80</sup> See Rosemary J. Coombe, “Cultural Agencies” in *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective*, The University of Chicago Press (Chicago: 2011), 81.

<sup>81</sup> Coombe, “Cultural Agencies,” 80. She writes elsewhere, “The law must be understood not simply as an institutional forum of legitimating discourse to which social groups turn to have preexisting difference recognized but, more crucially, as a central locus for the control and dissemination of those signifying forms with which difference is made and remade” (Coombe 1998: 37).

and the world they make their way in, replete with its various opportunities and impossibilities, is produced by the law and not limit ourselves to concerns over how the law corresponds to, or fails to accurately reflect, lived realities. In doing so, changes in copyright might be understood in terms of the changes in the positions it occupies, and the experiences of music it makes possible. The structural turn in legal discourse to the relations and conditions that give rise to possible subjects and their personalities, away from a model of fully finished and complete subjects, has tremendous purchase for copyright.

## The Reoccupation of the Authorial Position

I think it is safe to say that the majority of discussions surrounding copyright revolve around the author—most notably of the ‘Romantic’ variety. I will call this constellation of relations centered on or anchored in authorial presence in a work the “authorial position” or “authorial paradigm” of copyright. It is no understatement to say that the “authorial position,” largely in the form of critiques of authorship, dominates much of copyright literature.<sup>82</sup> Take *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, in which James Boyle advances a theory of “romantic authorship,” which he claims is behind much of contemporary intellectual property doctrine. A central point of the work argues that authors have too much power within the modern IP regimes, and particularly so in reference to copyright—a position I hold as well. But where Boyle’s analysis sees the “romantic author” as the main driving force behind the expansion of copyright I argue that it has been superseded by another. The romantic author may remain a vital, albeit auxiliary, force in copyright expansion, the authorial position has been in large part abandoned by major right’s holders and reoccupied by the paradigm of property.

There are several reasons for this coming to pass. The first critique of the romantic author is its dearth of explanatory power when considering the legal rules in practice.

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<sup>82</sup> See the work of Roland Barthes, James Boyle, Rosemary J. Coombe, Cathy Davidson, Michel Foucault, Peter Jaszi, Martha Woodmansee, Mark Rose for valuable critiques concerning western notions of authorship and their relation to copyright.

The ease of slipping into a model of unique genius producing great works is well documented, but this paradigm tells us nothing about “limited terms” or constrained rights within the modern copyright regime. Secondly, a long-term historical development of copyright cannot be accounted for under the rubric of romantic authorship. From early copyright law in England, starting with the Statute of Anne in 1709, the claim has been used as a “straw man” for publishers until the later creation of the professional author and up until the death of the author in the 1960’s. Vaidhynathan writes, “although the author was mentioned as the beneficiary of the statute, the act was really another regulation of the practice of printing and selling books, not writing them, and a recognition of the public’s interest in the process.”<sup>83</sup> No manuscript was worth selling until an author had signed over the rights to the publisher—the only real player in legal and commercial game. What the law did do however, was give the work a timeline: after a work had outlived its term of protection (originally fourteen years) it would fall into the public domain and be under control of the public. But while early copyright might have operated within and at times occupied the authorial position (even if more as a bivouac with the intention to exploit rather than to extol), the position has largely been abandoned now.

Largely due to the fact that, “there are numerous aspects of intellectual property law that not only cannot be explained by the romantic authorship theory, but which seem affirmatively inimical to it.”<sup>84</sup> These fall into two broad categories for law Professor Mark Lemley: the rules regarding ownership of intellectual property are largely in favor of corporations, not individual authors or inventors. The work-for-hire doctrine is official testament to this notion but it is common knowledge that “for many classes of works, including books, movies, and music it is *de rigeur* for the artist to assign the copyright to the publisher, producer, or studio.”<sup>85</sup> The second category notes that virtually every modern author is a user of prior works, so the idea that copyright law

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<sup>83</sup> Vaidhynathan, *Copyrights and Copywrongs*, 40.

<sup>84</sup> Mark Lemley, “Book Review—Romantic Authorship and the Rhetoric of Property,” in *Texas Law Review* (1997): 873-906. 15. See also Stewart E. Sterk’s “Rhetoric and Reality in Copyright Law” in *Michigan Law Review* 94/5 (1996); and more generally, Jessica Litman, “Revising Copyright Law for the Information Age.” *Oregon Law Review* 75/19 (1996).

<sup>85</sup> Lemley, “Review,” 16.

privileges the unique author at the expense of what came before fails to account for the fact that a current reading of copyright rules “are susceptible to exactly the opposite interpretation—that they give initial creators far too much control over the work of transformative improvers.”<sup>86</sup> The authorial paradigm doesn’t give a firm footing to side with either author or the improver, the older or the newer author. A fourth problem with the paradigm of romantic authorship is that it doesn’t account for modern changes in copyright law. Not only does the logic of the romantic author paradigm resist any argument for change of any sort, but it also proves feeble before the task of understanding the particular changes it has undergone.<sup>87</sup> I would add to the list of criticisms that such focus on the author is a distraction from the real politics at hand. As Vaidhynathan has argued: “If we continue to skewer the ‘straw man’ of authorship with our dull scholarly bayonets, we will miss the important issues: ownership, control, access, and use.”<sup>88</sup>

While the “authorial position” has been largely abandoned, arguments nonetheless continue to be launched from within its borders and the questions it raised, limited as they were to the area provided by the theoretical structure, have hardly simply disappeared. With its collapse, the central role it had in establishing a territory to proffer answers to the questions of how to imagine and structure the delicate balance between incentivizing creative individuals to produce creative works for the benefit and in the interest of a democratic public, resulted in vacating a position and therefore leaving it open to be reoccupied. It is important to note just what the authorial paradigm provided though. It shaped the model for framing the relations between an author, an audience and the state. What later failed to provide adequate grounds for answering questions of increasing practical concern, such as what kind of protection should be guaranteed or how to assess the appropriate length of duration, fared equally poorly in responding to

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<sup>86</sup> Lemley, “Review,” 18.

<sup>87</sup> Copyright was originally available for application and at a maximum of fourteen years of protection before eligibility for another fourteen. It has grown to the life of the author plus seventy years. Romantic authorship, it seems, fails to answer why there would be any limitations at all. Furthermore, the ‘straw man’ of the Stationer’s cannot explain the development of authorial professionalization, its subsequent downgrade to “work-for-hire” status and then corporatization.

<sup>88</sup> Siva Vaidhynathan, *Copyrights and Copywrongs*, 11. See also Pamela Anderson “The Copyright Grab” *Wired*, (1996).

questions of a kind never before imagined, like those brought on by technological advancement and the growing importance of capital. In lieu of this abandonment, the modern idea of property, although virtually concurrent with the authorial paradigm, “reoccupied” the central position for conceptualizing copyright. This reoccupation created a vacuum of possible answers to discarded questions such as artist identity, the importance of originality, the justifications for various types of rights (particularly when belonging to corporate entities) and the logic behind such financial incentives. Similarly, the reoccupation helped to provide answers to questions long left unanswered while also raising new questions of its own. It was this proprietization, replete with a new set of questions and their more recent derivations that, I will argue, constitutes the background metaphors necessary for understanding the extant crisis in copyright today.<sup>89</sup> The fact that authorial arguments continue to dominate copyright scholarship, policy and popular conceptions of copyright is not evidence of the weakness of the property paradigm; but, instead, serves as testament to the “reoccupation” of the authorial position by property.

## Mapping the Metaphors

Before continuing on, I want to ground this view of metaphors in the various positions of copyright. The study of metaphors has been a valuable approach in literary jurisprudence but with the literary turn in historical analysis metaphors have taken a more central role in the understanding of understanding.<sup>90</sup> To locate the dominant metaphors within the “authorial” or “property position” amounts to a staking out the terrain within which these metaphors could be grounded and to test the criteria by which they can be comprehended and mapped. Thus, in arguing that the authorial position was dominated by the metaphor of the ‘romantic author’ I contend that certain foundational

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<sup>89</sup> The derivations I refer to can be summed up in the neoliberal investment market strategies of speculative real-estate and monopoly rent theories.

<sup>90</sup> See works such as Ian Ward’s “On Literary Jurisprudence” *Journal of Law and Interdisciplinary Studies* (2011), Guyora Binder and Robert Weinberg’s “Cultural Criticism of Law” *Stanford Law Review* (1997), William Patry’s *Moral Panics and the Copyright Wars*, Julie E. Cohen’s “Creativity and Culture in Copyright Theory” *Georgetown University Law Center* (2007), Stephan Larson’s *Metaphors and Norms: Understanding copyright law in a digital society* (Lund University: 2011) and more generally Hayden White’s *The Fiction of Narrative* Johns Hopkins University Press (2010) and *The Content of the Form: Narrative Discourse and Historical Representation*, Johns Hopkins University Press (1987).



elements to the framework for conceptualizing authorship, originality, publication, audience, even ideas and access have already been assumed. The legalistic idea of ownership by virtue of being an individual, let alone an author was an incredibly compelling metaphor, one whose relevance continues to prevail in fields and discourses outside the realm of copyright. The metaphor provided a place to stand firmly in one's burgeoning eighteenth-century individualism and the convictions of genius and intelligence that nutrients it still today. The authorial metaphor had been taken from the creator god and given unto man thereby collect a new assortment of markers by which we might give ourselves new names. As such, an individual could be recognized, remembered and celebrated in the modern world. The metaphors of authorship grounded any thesis concerning them by providing theoretical and pragmatic accounts of the world such that thought, action and orientation were possible and meaningful.<sup>91</sup>

In *Paradigms for a Metaphorology*, Blumenberg addressed the question straight on by asking: "What role do metaphors play in philosophical language?" Given the fact that language has not reached the level of clarity once sought by thinkers like Descartes, how do we account for its instability? Blumenberg proposes that metaphors might be thought of as "*leftovers elements*," byproducts of our long journey from *mythos* to *logos*; or, we posit them as "*foundational elements*" of philosophical language.<sup>92</sup> In this foundational sense, the 'translational' character they acquired in the development from myth to logic seeped into ground our modern thought is built upon. They "resist being converted back into authenticity and logicity" and remain irredeemably expressive in function.<sup>93</sup> We cannot ask questions of them but find them already asked in the foundation of existence. In this sense, metaphors such as the "light of truth" or the "naked truth" contain a history in a much more radical sense than the concept of truth would allow. Such a distinction for philosophical language would be, of course, dramatic. To suggest that such 'absolute metaphors' might ground our thought is

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<sup>91</sup> "The origin of the modern age's acute methodological reflection thus essential lies in the need not to have to accept and passively receive the truth, but to ground it *fundits demuo* [totally anew]—'ground' understood not just in the sense of coming up with the grounds for a thesis but of producing the thesis itself from its grounds," (Blumenberg, *Paradigms*, 31).

<sup>92</sup> Blumenberg, *Paradigms for a Metaphorology*, 3.

<sup>93</sup> Blumenberg, *Paradigms for a Metaphorology*, 3.

tantamount to understanding the teleology of a logicalization in language to be grounded on such “leftover elements” itself. Blumenberg’s speculative thinking amounts to a radically new relation between the imagination and logic. Indeed, such thinking buries down to systemic relations to ascertain the ‘courage’ of the mind to identify not necessary what something is, but what it ought to be for us and its possible uses. For Blumenberg, this provides metaphor with its unique value: “unlike a concept, a metaphor does not have a referential but a pragmatic function. Its content determines, like an orienting reference, a conduct; it gives structure to a world; it represents that which cannot be experienced, incomprehensible: the totality of reality.”<sup>94</sup>

Thus, while scholars such as Vaidhyanathan have argued for academics to take a more active role in encouraging public debate about copyright issues, a position I believe in as well, I argue that the need for conceptual clarity (nature of the author or “piracy”) is as much part of the problem as part of the solution. Not only is conceptual clarity itself very hard to attain due to differing interpretations, legalese and the intricacies of exceptions and arcane global treatises, it has produced little actual change in copyright policy. Instead of the hard slog to carve out some conceptual clarity, these conceptions, regardless of their varied manifestations, remains fixed within an abstract totality whose relations of power, in part, constitute the very crisis of copyright they purportedly aim to resolve.<sup>95</sup> A quick example will be of use to indicate how metaphors suggest much more than they at present appear to. Vaidhyanathan passionately writes, “What happens when all questions of authorship, originality, use and access to ideas and expressions become framed in the terms of ‘property rights’? The discussion ends. There is no powerful property argument that can persuade a people concerned about rewarding ‘starving artists’ not to grant the maximum possible protection. How can one argue for ‘theft’?”<sup>96</sup>

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<sup>94</sup> Elías José Palti, “From Ideas to Concepts To Metaphors: The German Tradition of Intellectual History and the Complex Fabric of Language,” *History and Theory*, 49/2 (2010): 205.

<sup>95</sup> Nietzsche critiques in *The Difference Between Good and Evil* the ‘Innate systemism and relationship of concepts’ which is “in fact not so much a discovering as a recognizing,” (Nietzsche, *Between Good and Evil*, 31).

<sup>96</sup> Vaidhyanathan, *Copyright and Copywrongs*, 12.

Metaphors do not merely seek to identify the relationship between the author and her creation, but the entire world of art that consumers and producers inhabit. The authorial position likewise managed to produce an entire industry around the relations it advocated. Being absolute though, these metaphors all but negate protestations or the possibility of another way to imagine the relationships. Because it is, after all, these relationships that are of central importance. The relations between individuals in society is what is at stake, not mere capital.<sup>97</sup> Property at once served the interests of authors to establish their professional status if only to overtake them as the dominant mode of structuring the relations within the world of copyright, and with an alarming efficiency and profound consequences.

Property has been at the center of copyright discussions long before the ‘intellectual’ was added. “The use of ‘property’; as a metaphor when considering copyright questions is not new. The earliest landmark case in British copyright discuss, “the great question of literary property.”<sup>98</sup> In the United States it can be traced back to Mark Twain and his infamous tirade to invoke property talk “to shift the debate away from what was good for American at large to what would benefit successful authors.”<sup>99</sup> Twain’s notoriety grew the more he collected signatures and spoke before congress, noting, “a day would come when, in the eyes of the law, literary property will be as sacred as whiskey, or any other of the necessities of life.”<sup>100</sup> While notions of property arose they did so for particular reasons, namely towards establishing the author as the benefactor of the work, even when the author was more of a straw man for the profiteering publishers. Twain’s efforts, while largely fruitless during his life, bring to light the reality of American republican ideals often clashing with property interests. They did continued to do so into the 20th century.

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<sup>98</sup> Vaidhynathan, *Copyright and Copywrongs*, 11.

<sup>99</sup> Vaidhynathan, *Copyright and Copywrongs*, 11.

<sup>100</sup> Vaidhynathan, *Copyright and Copyrights*, 56.

## Foregrounding Rhetoric

Scholar Mark Lemley has noted, “The idea of propertization begins with a fundamental shift in the rhetoric of intellectual property law.”<sup>101</sup> Dating back to early views of property Mark Rose has documented the view of authors as owners; an idea, drawn from the Lockean notion of property’s foundation in labor. But recent resort to charges of “theft” versus “infringement”—a far more morally neutral term—may incline judges to punish the former more easily. Theft invokes a property logic whereas infringement suggests a petty violation. Much scholarship has been applied towards arguing for the public benefit of thinking of information as property. Others have acknowledged the rhetorical shift and are combatting it. What is most certain is that the Supreme Court acknowledges it.<sup>102</sup> Property notions may have been traditionally drawn from common law property rights and incentive approaches, but more recent intellectual property notions are generally clustered behind the Chicago School Law-and-economics movement, generally labeled the Neoclassical approach, stressing rational expectations, price theory and private ownership.<sup>103</sup> This turn within the economics of copyright exemplifies the latest and most complete abandonment of the authorial position and the near total reoccupation of it by property. The incentive approach, usually argued on the basis of limited terms to keep free-riders out of the system is seen as “crude” and “two-dimensional” to the neoclassical approach.<sup>104</sup> For the neoclassical approach, copyright is much more, as Netanal explains, “copyright is primarily a mechanism for market facilitation, for moving existing creative works to their highest socially valued uses.”<sup>105</sup> This logic helps to explain why the expansion of copyright is not merely more territory but the very means of accounting for what territory is.

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<sup>101</sup> Mark Lemley, “Book Review—Romantic Authorship and the Rhetoric of Property,” in *Texas Law Review* (1997): 34.

<sup>102</sup> Lemley, “Book Review”, 35.

<sup>103</sup> Neil Weinstock Netanel “Copyright and a Democratic Civil Society,” *The Yale Law Journal* 106/2 (1996): 283-367.

<sup>104</sup> Netanal, “Copyright and Democracy,” 309.

<sup>105</sup> Netanal, “Copyright and Democracy,” 309.

Not only is there a huge increase in the number of things being claimed as property but also the power over that property is increasing. Wholesale attack on the public domain, to the idea that a work would ever belong to more than one person. Think of the absolute singularity of the album. The point here is similar, not to critic the idea (of which there are many) but that the idea of property bears the explanatory power far better than an eighteenth century romantic author can. This metaphor, property, is responsible for the destruction of the public domain into private property and serves to explain it better. But this metaphor is immanent within copyright in other ways as well. How can we make assessments? Lemley points out the key distinction nested in the dominant metaphors: “The import of romantic authorship theory is that the intellectual contributions of “authors” are overvalued, and the intellectual contributions of others are correspondingly undervalued. By contrast, the theory of propertization suggests that strong pressure exist to make sure that all valuable information is owned by someone, simply because it is valuable.”<sup>106</sup>

A transformation within the background metaphors amounts to a reconstruction of the relations of power and the attitude or comportment of its adherents. As Netanal writes, “the neoclassicist approach focuses less on the precarious balance between reader and writer than on perfecting markets for all potential uses of creative works for which there may be willing buyers.”<sup>107</sup> The absolute metaphor does not in this sense speak falsity, nor is it capable of speaking truth. Rather, as Blumenberg notes, “absolute metaphors ‘answer’ the supposedly naïve, in principle unanswerable questions whose relevance lies quite simply in the fact that they cannot be brushed aside, since we do not *pose* them ourselves but find them already *posed* in the ground of our existence.”<sup>108</sup> To this end, the author is dead. The more recent turn to intellectual property accounts for a radical translation of authorial influence to literary property into property management such that literary property need hardly be seen in light of its literariness. What in the early eighteenth-century was a dubious proposal, “...it is just, that an author should reap

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<sup>106</sup> Lemley, “Book Review,” 50.

<sup>107</sup> Netanal, “Copyright and Democracy,” 309.

<sup>108</sup> Blumenberg, *Paradigms for a Metaphorology*, 14.

the pecuniary profits of his own ingenuity and labor,” has been replaced by a modern market fixation dependent on neoclassical economic notions of property and property-owning subjects. The reoccupation of the authorial position by property has a predominately pragmatic value in testifying on behalf of those historical witnesses whose own testimony may lack such value. To tease out the effects of these subterranean shifts in the questions we do not ask, the ones we would never think to ask, guides the remainder of this chapter as I turn to the foregrounded rhetoric of the album *Once Upon a Time in Shaolin*.

For it is only by identifying an orientation that we can begin to ascertain what fundamental “certainties, conjectures and judgments in relation to which attitudes and expectations, actions and inactions,” of an epoch, (the historical unit of measure for a dominant position) and how they are regulated.<sup>109</sup> Only in the fine print upon sale, after they had, ‘spent months finalizing contracts and devising new legal protections for a distinctive work whose value depends on its singularity,’ do the legal contours surface. To be fair, they may not be the most eye-catching or trendy aspect of the album, release or the record. But as I’ve argued earlier, their conspicuous absence during a ‘crisis of copyright’ deserves our attention. Copyright is there as the absolute metaphor, the horizon of possibility and the framework for understanding our approach to works of art. Its absence then, is telling. But just what does it have to say?

It is worth mentioning here that the study of rhetoric aims to investigate how and what is said to inform, persuade and motivate one’s audience. Following Aristotle, rhetoric typically provides heuristics for understanding, discovering and developing arguments for particular situations. Namely, practical and public matters. Aristotle makes the distinction between dialectic and rhetoric but notes how rhetoric is a ‘counterpart’ of dialectic, indeed, even resembles it. It seeks out ‘probable knowledge’ in an effort to defend or accuse. Not simply geared to elaborate or describe one’s thoughts, rhetoric formulates judgments, judgements that convince or not based on credibility and emotion, but succeed or fail on the weight of something other than sheer theoretical

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<sup>109</sup> Blumenberg, *Paradigms for a Metaphorology*, 14.

argumentation and facts. When looking at the press release, the website and related interviews surrounding the release of *Once...* this goes equally for what is *not* said. An academic study of copyright must account for the dialectic and the rhetoric of copyright. Given the fact that dialectics, in the sense of a real question and answer between right's holders, the users of content and the government, is virtually absent, rhetoric must be accounted for. This unilateral nature of copyright discourse, as discourse in effect, is all the more reason to draw questions from given answers.

The need to understand the rhetoric of copyright is hardly a new approach.<sup>110</sup> Scholars have noted the historical arrival of new metaphors for understanding technological development and a slew of problems digital media have produced, moral arguments against 'pirates', right's holders and questions of the materiality of intellectual property and not the mention the contentious concept of the author, have all been challenged and debated. Work by Steward E. Sterk has noted a certain stagnant character to the rhetoric surrounding copyright and the unfortunate fact that "the rhetoric captures only a small slice of contemporary copyright reality."<sup>111</sup> This is, in part, why the background metaphors of copyright is valuable. As I mentioned earlier, the emphasis on property is the only the other side of the coin of piracy.<sup>112</sup> Vaidyanathan has gone so far as to suggest that "All along, the author was deployed as a straw man in the debate. The unrewarded authorial genius was used as a rhetorical distraction that appealed to American romantic individualism," one predicated on the accumulation of property.<sup>113</sup> The rhetorical ploy should be old hat, and while Vaidyanathan's consternation towards its effective end is shared by this author, the 'property right' as the general public now

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<sup>110</sup> The work by scholars such as Larson, Lessig, Vaidhanathan, Patry, Jaszi and Woodmansee, to name a few, prefigure and ground approaches to understanding the vagaries of the language composing copyright regimes.

<sup>111</sup> Stewart E. Sterk, "Rhetoric and Reality in Copyright Law," *Michigan Law Review* 94/5 (1996): 1197.

<sup>112</sup> This is to a large extent because whenever we approach the conceptual totality that we call copyright in contemporary times, the question of copyright has already been posed for us. The fact that copyright is in a state of crisis is a testament to this fact. This structures our approach and it conditions our response.

<sup>113</sup> Vaidyanathan, *Copyrights and Copywrongs*, 11.

understands copyright obfuscates any attempt to argue on behalf of any original intention at all.<sup>114</sup>

## Once Upon a time...Property

The high-res website fronting the *Once Upon a Time in Shaolin* release greets its audience with a cool minimal grey. Clicking on the Latin heading, CONCEPTUS, (drawing on the term and moment of conception, intended to trigger a reflection on our own personal absent fortuitous beginnings, or more commonly the early stages of the embryo), the website in emboldened red capitals declares: "SINCE TIME IMMEMORIAL". A minor deviation from the more common English phrase "from time immemorial". Such subtleties of phrasing are the fruits of rhetoric, the very proof of its efficacy. Time immemorial, of course, refers to a time extending beyond the realm of memory, record or tradition. A turn of phrase whose meaning has an interesting and pertinent locutionary deviation in application such that recollections of times bygone more generally can be thrown beyond the horizon of remembrance for generally innocuous, albeit exaggerated, rhetorical effect while the phrase takes on a highly specific implication in reference to a property or benefit such that a 'property or benefit has been enjoyed for so long that they no longer need to prove how they came to own it.' Time immemorial becomes time out of mind, "a time before legal history and beyond legal memory' according to the 18<sup>th</sup> century treatise by Sir William Blackstone (1765) Commentary Iviii 281. The influence of Blackstone's thought on English law is uncontested and as such, the effect of Blackstone's thought on the American legal system is similarly great. Such a defining text as Blackstone's commentaries served to provide a readable justification for what was then seen as obscure— that English law was indeed rational, just and inevitable that things should be as they are.'

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<sup>114</sup> "It was originally a narrow federal policy that granted a limited trade monopoly in exchange for universal use and access," (Vaidynathan, 2003, 11).



The turn of phrase however, has relevant ramifications to the present study when used in relation to property, the benefits it endows and relations it assumes. Authors like Shaunnagh Dorsett and Lorraine Weir have written about the development of English common law and the place of “time immemorial” in its institution. The pluralistic, fragmented and decentralized nature of English law was becoming unwieldy until legal reform sought to bring the bric-a-brac system into the 'law of the land'. Dorsett writes that English common law “is still often described as owning its validity and continuing force to its origins in 'time out of mind'...[and the] concept of 'time immemorial' remains doctrinally central to parts of the common law, notably to the validity and enforceability of local custom.”<sup>115</sup> The fact that the law remains rooted in a particular sense of 'having always done it this way' is perhaps less astonishing than some of its consequences. The flippancy of the phrase suggests that at a certain point memory, record and tradition no longer count, are no longer valid. It's not that people don't have memories or haven't heard account, it's that those memories and those accounts no longer count. So it was in 1275 in the Statue of Westminster effectively limiting the time of memory to the reign of Richard I (Richard the Lionheart) beginning legal history and legal memory on the 6<sup>th</sup> of July 1189, the date of the King's accession to the throne. That property and benefit need not be legitimated, or rather, that they are legitimated because they have been enjoyed hitherto should ring a loud siren in the head of anyone who claims such essential values from time immemorial. The mundane origins of the Wu-Tang project, *Once Upon a Time in Shaolin*, draw upon a mythical past, not of valiant heroes who overthrew their ruthless oppressors but of the inception of legal order. As if to say, for those who have managed to accrue land now, it matters not when or by what means, but from here on out it is yours by virtue of your claim. The position of property here not only attempts to ground *Once Upon a Time in Shaolin*, but to reinterpret all art under the same category.

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<sup>115</sup> Shaunnagh Dorsett “‘Since Time Immemorial’: A Story Of Common Law Jurisdiction, Native Title And The Case Of Tanistry” (Melbourne University Law Review: 2002) 38. See also Lorraine Weir’s “‘Time Immemorial’ and Indigenous Rights: A Genealogy and Three Case Studies (Calder, Van der Peet, Tsilhqot'in) from British Columbia” (Journal of Historical Sociology: 2013).

The press release for *Once Upon a Time...* notes that, “By adopting an approach to music that traces its lineage back through The Enlightenment, the Baroque and the Renaissance, we hope to reawaken age old perceptions of music as truly monumental art.”<sup>116</sup> Reference to these ‘golden eras’ of musical history elides any account the horrid conditions of artists, not to mention the terrible social conditions of people more generally, and works to identify the artist with the absolute power associated with benefactors and patrons.<sup>117</sup> A kind of historical cherry-picking ensures. By ignoring the historical fact that the nature of making and experiencing art has changed since the seventeenth century *Once...* removes the question of music from conditions of production in exchange for focusing on the conditions of consumption. It is from this point of view that art is ultimately experienced and praised, that originality is acknowledged and appreciated and the European disposition to view culture like Americans view economics, as a trickle down effect of ‘high’ culture to the ‘lower’ masses proves its value and its worth. The closing lines of the press release are the nail in the coffin: “We hope to steer those debates toward more radical solutions and provoke questions about the value and perception of music as a work of art in today’s world.”

Property exists in time and space, much like the proprietor who may call it theirs. The title *Once Upon a Time in Shaolin* refers to some golden days, the days of yore and myth. The standard introduction of a bedtime story both exploits the fantastical and reflects on their past. There are cameos and sounds from members of the Wu-Tang who have passed, references to times long gone. Secondly, the reference to Shaolin is a continuation of the Wu-Tang’s tendency to reference tv martial arts and the Shaolin temple in China. Shaolin was the slang they developed for Staten Island. Thirdly, in thinking about the album, the RZA, writes, “Only one man can hold the scepter.”<sup>118</sup> The pharaoh in this context is not an abstract reference but the absolute ruler of a kingdom, over a realm, the pharaoh is the regime. Sterk has noted, “creative people define

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<sup>116</sup> *Press Release, see Appendix.*

<sup>117</sup> The work was created, after all, absent any patron and therefore demonstrates the prestige of the author-patron, a new model of artist cable of investing in themselves.

<sup>118</sup> *Press Release, see Appendix.*

themselves by reference to their work and giving them control over their work is essential in order to protect their self-conceptions.”<sup>119</sup> That financial rewards allow authors to maintain a sense of identity has been documented throughout copyright literature, most commonly tracing back to Hegel and his theories on property as personality personified.<sup>120</sup> This line of thinking forms the basis of a mutual recognition both artists and audience independently will. If works were treated as public goods, the logic goes, recognition would be one-sided, the audience appreciating the artist but the artist unable to recognize their admirers. While the emphasis on mutual recognition, particularly on behalf of the artist towards their admirers hardly seems to be the common reference point, the reference to a unique scepter *Once...* makes overt reference to the identity of an artist and their creative domain to be wrapped up in whatever transaction consecrated the sale of the album. Just as for Hegel, property rights served as a touch stone in their actual existence between equal actors and less so any substantial content. “Because property is about relations, not about objects,” as Sterk notes, “the precise contours of legal doctrine are unimportant so long as property law enables people to engage in intersubjective relations.”<sup>121</sup> The necessity for equal grounding in contractual relations, can be traced back to this logic as well. It is worth stressing here two main points: the first is that considerations of copyright that reject the notion of equal parties (most notably the absence of diminution of the public voice) ultimately amount to right’s holders aims to legitimate their own identities as the expense of their audience, the resultant relationship being uneven and philosophically less gratifying. How might a lesser audience even truly value the work of a greater artist? Secondly, Hegel’s logic, being dialectical rather than essential, precludes the necessity of rights in any strict sense as such rights need not have any particular content

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<sup>119</sup> Stewart E. Sterk, “Rhetoric in Copyright,” 1239.

<sup>120</sup> Stewart E. Sterk, “Rhetoric in Copyright,” 1240. Hegel’s attempt to get at the reality of human life led him to believe that an abstract human remained abstract until distinguishing characteristics could be ascertained and the unique individual would be recognizable from an abstract mass. Property was one powerful way to do this. By occupying some space, through compulsion, wealth or work, one’s identity was differentiated.

<sup>121</sup> Sterk, “Rhetoric in Copyright,” 1241.

or form except that it allows for both the individuality of artist and audience to be mutually recognizable.<sup>122</sup>

In this chapter I have argued that rhetorical tools have a certain ‘readiness to hand’ about them. They provide an insight into the existing expectations, attitudes and predispositions of arguments and positions. This is generally done through metaphors, authorship and property which serve to frame the possibility of imagining, and this is no different for issues of copyright, piracy, art, technology and value. Secondly, given that rhetoric is the means by which we build our environment as humans it will never cease to be both our poison and panacea. This realization allows us to bracket or suspend certain moral arguments and hazard imagining alternatives to copyright. Like copyright, rhetoric, we do not make use of it ‘because of a transcendent ‘surplus’ that [we] possess but because of an immanent deficiency, a deficiency of pre-given, prepared structures to fit into and of regulatory processes for a connected system.’<sup>123</sup> Copyright is there to insure that certain processes are there to regulate and ensure the possibility of creativity, not to reward it, praise it, or guarantee it. Creativity is ultimately action, one that must occur inspire of not knowing what might happen. Indeed, it is such creativity that we most value. Copyright is a kind of harmony of contradictions and as such it has been mere noise for some and brilliant sounds for others. These contradicting interests are made apparent through metaphors and the assemblages of concepts that compose the world of copyright.<sup>124</sup>

I have charted the extent of copyright rhetoric and its proprietary conclusions. An analysis of *Once Upon a Time in Shaolin* suggests that the exclusive legal *a priori* of copyright grounds the projects property based language and logic. This logic is intended to redirect thoughts through the moral arguments of right’s holders and towards

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<sup>122</sup> Not the mention such logic hardly begins to explain the need for post-mortem rights.

<sup>123</sup> Hans Blumenberg “An Anthropological Approach to Rhetoric,” in *After Philosophy: End or Transformation?*, edited by Kenneth Baynes, James Bohman, and Thomas McCarthy, translated by Robert M. Wallace (Cambridge: The MIT Press, 1987), 433.

<sup>124</sup> “A new theoretical practice and meaning: establishing relations between the history of people and the dynamics of the economy on the one hand, and the history of the ordering of noise in codes on the other,” (Attali 1985, 5).

ownership which is the solution to the tragedy of the commons. This line of reasoning is radically against the public interest. Furthermore, this same move is interestingly made by reference to the historic ‘golden ages of music’ and the concerns of ‘high’ art. Both logics, although contradictory, aim to focus copyright on the distribution and consumption end of culture and away from the social conditions of creative production. This is in line with our idea of property, not in describing what it is, but in accumulating it. This was, in part, the result of technological innovations. These technological turns we now turn to in the following chapter

As I have argued above, copyright is by no means what it must be, nor as it should be. In fact, copyright has undergone many transformations, ones identifiable within the historical contingency of various situations over time, in what we might terms ‘ages’ or ‘epochs’. This kind of formulation allows us to approach the crisis as such, as some kind of break or rupture. Furthermore, this ‘rupture’ is not something for industry officials or lawyers to handle. It is not limited to a dialectic analysis but is intimately concerned with the rhetoric of the public. Not least because of the extensive litigation that has brought copyright into the homes of an astonishing amount of citizens but, as I will argue, because the extensive reach of copyright has come to effect the way we ‘hear’.

History demonstrates that great musicians such as Bach, Beethoven and Mozart were held in profoundly high esteem. They were considered sublime artists and masters of exploring emotion. Their work forged windows into the most elusive elements of the human experience. And yet in our time, music is no longer perceived in the same way.<sup>125</sup>

How then should music be perceived? In that time it was the savant composer, now it is the one with the scepter. As I mentioned earlier, discussion over music is about *what* you hear only after you’ve established *how* to hear.

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<sup>125</sup> *Press Release, see Appendix.*

# III. Re-formatting Copyright: The Material Conditions of Change

The Wu-Tang Clan’s “ambitious project to restore both economic and experiential value to music” hinges on the slippery terminology of the singular value. They write in the *Press Release*, “As this was never about personal gain but about the essence of value,” they donated a “significant portion” to charity. Only later does the “historical sale” boomerang back “through the ages to remind us every now and then that music is a great art from that should be valued as such.”<sup>126</sup> In this case, value serves to rejoin, perhaps to re-entangle, economy and experience together seamlessly, insinuating a prodigal one-of-a-kind bond between the two. A gap seemingly traversable only by copyright. This gap exists as a relation such that our common sentiment is not offended by economic influence on art nor art’s solicitous affair with economy. Such delicacies should not be taken as juvenile nor unrealistic, for the assumptions brought to art combined with the expectations heaped upon it from tradition, irregardless of whether or not art is beholden to them, confounds our judgments when tainted with the smell of money.<sup>127</sup> There can be no doubt that certain cultural products are set apart from other out more base commodities, like sneakers or sweatpants. The divide between them, increasingly semipermeable as it may be, serves for making certain analytic distinctions. For the time being, I would like to suspend the most apparent question, as laid out by David Harvey: “how to reconcile this uniqueness with its commodity status,” and draw attention to the ‘unique work of art’ concept for a couple of pressing reasons.

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<sup>126</sup> *Press Release*, see *Appendix*.

<sup>127</sup> *Pecunia non olet*: “money doesn’t stink” a clever response credited to Roman emperor Vespasian (AD 69–79) in response to his son, Titius’, claim of the disgusting nature of the Urine Tax, a tax levied on the distribution of urine from public urinals of the wealthy. Later Marx would also point to the disappearing act of commodities in relation to the impossibility of telling where the money came from or is going. The cultural imaginary is rife with references to negative pecuniary effects on creativity, whether it’s “selling out” or its opposite function, of the tendency of money to move, to shift, or displace the problem away so as to “clear the air.”

The first is that while the ‘work of art’ for the Wu-Tang, appears to be very much a material thing, crafted, touched, malleable and increasingly analog, the press release, in no uncertain terms, puts the weight of the work’s novelty on “the historic sale” of *Once Upon a Time in Shaolin* and the “album’s intended distribution.”<sup>128</sup> Ironically enough, it’s the means of letting go of the work that anchors the “challenge to the increasing disposability of music in the digital era.”<sup>129</sup> To adopt the aesthetic language for a moment, it becomes increasingly clear that the Wu-Tang are very interesting in *the* work of art, that is, what art does, or is capable of doing, at least as much as any particular work of art. In fact, I will argue *Once Upon a Time in Shaolin* was intended and, indeed, continues to do a very specific kind of work. And all this without the vast majority of people ever having to listen to it. Before venturing into what this kind of work is, a second point, built off of the former. If the album roots its “historic” capacities in how we access music, or more likely than not in this case, what our experience of *not* accessing it, what different kind of relations with music can we interpret from the one-of-a-kind release? Put in terms of copyright, what tensions are brought to light when considering the material conditions of the singular non-distributed *Once Upon a Time in Shaolin* and in what ways do these belie the album’s position in cultural and legal propertization of music in the cultural imagination? A critical examination of the history between the intercepting realms of culture, technology and law can be a helpful in mobilizing alternative approaches to copyright. I hope to show that this approach opens up rich interpretations of a presently narrow conception of ‘material’ in copyright.

What follows in this chapter lays out the framework for providing answers to the earlier questions and proceeds to investigate the material conditions of music and its relation to copyright broadly. I then articulate how these relations help to understand the peculiarity of the propertization of copyright in the digital era. This requires getting to know the ‘lay of the land’ by recourse to several of the major developments within notions of ‘property’, how it has transformed and the various ways copyright has developed in the past. An examination of the album *Once Upon a Time in Shaolin*

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<sup>128</sup> *Press Release*, see *Appendix*.

<sup>129</sup> *Press Release*, see *Appendix*.

serves as the occasion to think through the specific materiality and media of the work, to see the relations that compose the extant crisis of copyright. The history that emerges from the real material conditions of production and reception of this musical work and not a specific law, innovation, or point in time aims to be both evidentiary of propertization and causal in thinking about alternatives. In this sense, the “prevalence of a specific condition of things” guides the methodology, proscribing certain logical consequences while imagining others.<sup>130</sup>

## Material Labor and Theories of Property

The transition to a metaphoric of property positions property as the dominant trope for understanding the relations comprising copyright. I have argued that previous accounts considering transformations within copyright tend to suffer from the fact that attention gravitates towards the discrete subjects and objects involved in the production process, the author and the work. This emphasis on the subject and object suffers from an inherent failure to account for copyright laws’ internal transformations historically and more recently, is hardly reflected in copyright law. Nonetheless, arguments critical of copyright expansion are launched from the position of the subject, only they tend to plot the audience as the true subject and master of the copyright regime narrative. That “Romantic determinism”, as Anne Barron has labeled it, has largely *not* been responsible for copyright’s transformations has not stopped it from being the dominant metaphor for thinking about copyright.<sup>131</sup> This proclivity to speak on behalf of the author is now largely an effect passed down through tradition and adopted as dogma; but in the eyes of capital, and increasingly the law, it serves as a profitable and exploitable distraction. As I argued above, property was a valuable ally in founding (and funding) the fledgling professional author and allowed her to establish more control over the conditions and means of production. It is the pressing reality of the economic limitations of authors that takes center stage in *A Room of One’s Own*, in which Virginia Woolf writes, “[o]ne cannot think well, love well, sleep well, if not has not dined

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<sup>130</sup> Blumenberg, *The Legitimacy of the Modern Age*, 461.

<sup>131</sup> See Anne Barron’s “Copyright Law and the Claims of Art” I.P.Q.: No. 4 *Sweet & Maxwell Ltd and Contributors* 2002.



well.”<sup>132</sup> While the problem of authorial penury was not limited to England, (nor to women, although they were no doubt worse off than their male counterparts), the particular form it took in the English speaking world came from the English philosopher, John Locke.

Based in his *Second Treatise on Government*, Locke’s labor theory of property, based in natural law, held that the origins of property are rooted in the exertion of labor upon natural resources. Drawing from the Bible, Locke claimed that god had given the world to all of humanity:

“...since He gave it them for their benefit and the greatest conveniences of life they were capable to get from it, he can’t have meant it should always remain common and uncultivated. He gave it for the use of the reasonable and hard-working man (and labour was to be his title to it)...”<sup>133</sup>

With its publication in 1690, the *Second Treatise* quickly became the dominant reference for literary-property arguments in court. While Mark Rose has argued for that copyright is a “specifically modern institution,” the amalgamation of technology, ideologies of unique individuality, and advanced marketplace society. The contentious but popular idea that “[c]opyright is founded on the concept of the unique individual who creates something original and is entitled to reap a profit from those labors,” is the fortuitous product of centuries of contingent and, at times, competing interests.<sup>134</sup> The Lockean labor theory of property seemed to be able to unite the technological, economic, political and aesthetic interests by identifying the social order’s principal function as defender of private property and the author as prime laborer, the genius appropriator, of a property immaterial but no less real. If we stand back and acknowledge the dramatic transformation of a landed gentry prior to copyright to the contemporary corporate conglomerate proprietor of “intangible properties” or “intellectual property”, the relationship between society and property has followed a fairly steady trajectory with the introduction of Locke’s labor theory of property. This is

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<sup>132</sup> Virginia Wolf, *A Room of One’s Own*, taken from <http://gutenberg.net.au/ebooks02/0200791h.html> (8.10.2016)

<sup>133</sup> John Locke, *Second Treatise on Governments*, para 30 (1690). HTML version produced by Chuck Geif. <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm> (Seen 8.10.2016)

<sup>134</sup> Mark Rose, *Authors and Owners* (Cambridge: Harvard University Press, 1993), 2.

remarkable. The path, beginning in the ashes of feudalism and continuing for over three centuries until the radically parallel digital worlds of wireless online gaming, has largely resulted in the reproduction of conventional property relations.<sup>135</sup> The main distinction I want to make here is that while property has changed, a point I will address in more detail shortly, the reproduction of property relations has not. Is there something about Locke's labor theory of property, his theory of appropriation, that might account for this?

The implicit assumption to Locke's theory is the plenitude of the world, hence the Lockean proviso that one can take from the land of plenty as long as one leaves 1) 'enough' and 2) 'as good' resources for others: in Locke's wording, "he that leaves as much as another can make sure of does as good as take nothing at all."<sup>136</sup> While this golden age plenitude serves as the basis for understanding copyright logic it appears today as the "superficial streaming and data conception" of the internet, precisely what the Wu-Tang Clan's album stands to contest. The "convenient consumerism" such plenitude provides results in the passive denigration of music as art.<sup>137</sup> In response, the single one of a kind album aims to stand out and redirect attention to the value of the single unique work of art. Such a pivot exposes contradictions within the theory in its modern day context. Latent in Locke's theory is the general rejection of taking from others, but his theory advances along a line of appropriation, not simply allowing, but even encouraging accumulation.<sup>138</sup> In the *Human Condition*, Hannah Arendt notes, "[w]hat the modern age so heatedly defended was never property as such by the

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<sup>135</sup> X has argued in "Solomon's Bluff" in *Modernism and Copyright*, "The idea that the advent of virtual worlds is producing in contemporary society a significantly new kind of relationship between property and the cultural imagination; and, second, a sense of the degree to which the innovative potential of this new form has largely been ignored in favor of the reproduction of the most conventional forms of property relations."

<sup>136</sup> John Locke, *Second Treatise on Governments*, para 27 (1690). HTML version produced by Chuck Geif. <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm> (Seen 8.10.2016)

<sup>137</sup> *Once Upon A Time in Shaolin* Official Website, 88 tab. <http://scluzay.com/eighteight/> (10.10.2016)

<sup>138</sup> This accumulation is the reality of free-market capitalism. Sterk quotes from economist Friedrich Hayek that market prices have little bearing on merit or desert, "Their function is not so much to reward people for what they *have* done as to tell them what in their own as well as in general interest they *ought* to do," (Hayek, *Legislation and Liberty*, 71-72).

unhampered pursuit of more property or of appropriation.”<sup>139</sup> In the case of intellectual property, it could be fashioned from nothing and otherwise, taken from somewhere or purchased from someone else. “No doubt, “before 1690 no one understood that a man had a natural right to property created by his labour; after 1690 the idea came to be an axiom of social science.”<sup>140</sup> This radical transition sheds light on the relations between ideas of property and relations of property. For Arendt, the unification of labor and property amounted to a revolutionary union of opposites: labor originally being the activity corresponding to poverty and property being the condition of wealth. Labor was never understood as the means to wealth, rather, “according to Cicero—and he probably only sums up contemporary opinion—property comes about either through ancient conquest or victory or legal division.”<sup>141</sup> Indeed, Law Professor Stewart Sterk has noted the important economic function of Lockean labor/property theory when he argues that in suggesting people are entitled to their own labor “it encourages people to work in a way that they might not if labor were treated as part of a common pool of societal resources.”<sup>142</sup> Thus, effectively resolving the pressing dispute by avoiding the ‘tragedy of the commons’ and foregrounding the economic advantages of the theory itself. The question therefore arises, as Sterk points out, whether the Lockean theory would be so compelling were it not for the economic advantages such regime generates, a point digital economies has brought to the fore and I will take up in more detail in the following chapter.<sup>143</sup> It is enough here to lay out some of the tensions and similarities between the dominant labor theory of property advanced in the eighteenth-century and our twenty-first century understanding of artistic and cultural production.

That this theory “won the day” appears self-evident from the view of post-Soviet neoliberal global economy in 2016, but it was actually far more contested for thinkers knee-deep in the national democratic fury of the eighteenth-century. There were

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<sup>139</sup> Arendt, 1985, 110.

<sup>140</sup> Quoted from *The Human Condition*, 171. Arendt’s citation: Richard Schlatter, *Private Property: The History of an Idea* (1951).

<sup>141</sup> Arendt, footnote 56. *The Human Condition*, 110-111.

<sup>142</sup> Stewart Sterk, “Rhetoric in Copyright” *Michigan Law Review* 94, (1996): 1235.

<sup>143</sup> Sterk, “Rhetoric in Copyright” 1236.

alternatives to the way of thinking we currently claim to be the norm even then. Scholars like Hobbes and Hume argued that property only arises after society is established with a Sovereign, or the State. Property was understood to be the basis of individuals distinguishing themselves within a collective society, as the means for forming relations with one another as opposed to Locke's notion that persons were already, indeed naturally, individualized. Property was first and foremost, property of oneself and had no basis on conventions or politics, but came straight from god. The notion of owning yourself deserves a quick comment. For Hume, and later for Hegel, ideas of personality were tied to social equality and not to financial equity. They understood that creative people defined themselves by reference to their work—property was seen to be the means by which personality was objectified.<sup>144</sup> The need for such objectification was due to the abstract nature of personality itself. Property allowed abstract individuals to acquire external affects, much like talents and traits for the sake of becoming recognizable. It was this recognition that stood as the basis of a possibility of mutual exchange between creators of goods and their admirers. Hegel's notion of mutual exchange does fall in line with much of intellectual property law but only as sufficient grounds for focusing on the intersubjective relations, and not the objects, whereas, modern day intellectual property law goes above and beyond that in defining what kind of relationships are available. Sterk writes, "Intellectual property rights, although entirely consistent with Hegel's conception of property, are not strictly necessary. Perforce, intellectual property rights need not have any particular content of form."<sup>145</sup> Moreover, since 1909 musicians have had little say over where their music could be performed. With the implementation of compulsory licenses for mechanical reproductions of music in 1909 and the subsequent and necessary formation of ASCAP in 1914, musicians were left to try and collect their revenues themselves for five years or pay a fee to get them. Mutual exchange was rendered an economic insufficiency and done away with.<sup>146</sup> Furthermore, following the Copyright Act of 1976 an increasingly number of creative works have been done as 'works for hire', a unique exception to the

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<sup>144</sup> Sterk, "Rhetoric in Copyright" 1239. See also Hegel's *Philosophy of Right* (1976), Hume's *Treatise and the Enquiry Concerning the Principles of Morals* (1751).

<sup>145</sup> Sterk "Rhetoric in Copyright" 1241.

<sup>146</sup> Litman, "Copyright Legislation and Technological Change," 275.

general rule that the person who created the work is not legally recognized as the author of that work. In other countries, this is understood as ‘corporate authorship’ as the employer, be it corporation, organization, individual or any other legal entity is the legal author.<sup>147</sup> This is different than signing over, or “transferring” copyright, like musicians or authors do to publishers because the author, retains those copyrights not granted to the publisher where as works made for hire, in all their entirety, belong to the employer unless otherwise agreed.

The purpose of this small historical tangent into property theories and their legal correlates aims to see through the contradictions and justifications of the current maldistribution and exploitation of intellectual property to a possible, more egalitarian, future. While ownership frames relationships to property and therefore, to music, I argue those relationships have always been about the relationships between people, and not between people and things. Thus, a critique of the propertization of copyright identifies at once, copyright’s “more fundamental commitment to the logic of property” while arguing that changing conceptions of property plays a part in sustaining the status quo of property relations. That is, an examination of the transformations of property amongst stable property relations allow us to approach propertization anew. With the continuous accumulation of property by the ruling class stable, an inquiry into just what counts as property, and by what means the seemingly endless amount of ‘scarce’ property available to capture guides the next step in the present analysis before turning to how these new properties help sustain and strengthen property relations in the music industries.

## **Material, Media and Music**

According to scholar, Anne Baron, because “Romantic determinism” is responsible for the tendency to overlook the ways in which the protected work is legally defined in terms of the author. What is needed then, is a turn to a “Modernist materiality”, which

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<sup>147</sup> This is in large part a uniquely American amendment. Moral right, being those rights that guarantee actual creators the right to publicly identify themselves as such and to maintain integrity of their work are thus excluded from copyrights according to the Berne Convention. Microsoft is the credited developer of its products where as Adobe lists many of its developers behind Photoshop.

aims to show how the “object” of Modernist art is reflected in copyright law.<sup>148</sup> While an in-depth investigation into the proposed intersection between copyright, art and art theory is beyond the scope of the present argument there are several points I would like to open up and pursue in relation to Barron’s work. I will briefly comment on the tendency to ground ideas in their respective historical or aesthetic epochs before engaging the effects of the Modernist material impulse to investigate how immaterial or intangible works have posed complications for copyright law in the past and how those might differ in the digital age. Lastly, I will then turn to the materiality of sound itself and its correlation to changes in copyright law.

Planting ideas in their respective historical or aesthetic epochs works as a kind of cultural and philosophical short hand for avoiding the need to qualify all kinds of competing social, economic and political baggage involved in the discussion of ideas. It also serves to locate the origin of an idea in a ‘fruitful time’, that needn’t account for its germination. The tendency to slip into speaking of the past in terms the past itself created is a persistent problem for the historian. To speak in terms of a period of time on the one hand and a set of distinctive beliefs, norms, themes on the others means balancing the material conditions of the latter with the technological possibilities of the former. In discussing the universalizing idea of “Art” as a “trend towards imaging art, with a capital A, as a “system” of the five major arts—painting, sculpture, architecture music and poetry—unified as a distinct arena of human activity under common principles supplied by the philosophical discourse of aesthetics,” Barron, citing Kristeller, dates the emergence of this attitude in the eighteenth century.<sup>149</sup> So when the Wu-Tang Clan declare that “[b]y adopting an approach to music that traces its lineage back through The Enlightenment, the Baroque and the Renaissance, we hope to reawaken age old perceptions of music as truly monumental art,” we have to ask what history is being referring to, that is, what is fruitful about those eras?<sup>150</sup> If the

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<sup>148</sup> Baron, “Copyright Law and the Claims of Art”, 370.

<sup>149</sup> Barron, “Copyright Law and the Claims of Art,” 374. She argues, “Until the early modern period, the term “art” was applied to all kinds of human activities which we would not call crafts of sciences... The exaltation of the artist’s creative nature became evident first—from the 1760’s—in literary theory and practice, and migrated from there to embrace the visual arts” (Barron, 376-377).

<sup>150</sup> *Conceptus*, <http://scluzay.com/conceptus/> (Accessed 10.10.2016)

“monumental art” referred to is not “Art” in the sense Barron and others have argued dates back to the Romanic era, what conception of art is it and when could it be said to have been possible? Arguably, the historical references to “monumental art” are mere low hanging fruit—on the one hand a flourish, an aggrandizing gesture aimed at distancing the work from its present context of mass-production, but on the other hand, the gesture belies attempts to tie each of the era’s greatest revolutionary achievements and successes into the work’s complex and competing messages. First off, the Enlightenment is hardly cited as being a popular or convincing adjective when discussing music, particularly as it lived in the shadow of the Romanticism. The Enlightenment is nevertheless, a moving point everyone seems to agree upon. Renaissance music, in a similar fashion, is not the medium typically referenced when describing the truly revolutionary overthrow of institutional control in the arts.<sup>151</sup> Nevertheless, the album intends to garner just that effect. I mention this historical tendency briefly not because both scholars and rap stars make recourse to positioning arguments in epochs but because I want to draw attention to the ways *Once Upon a Time in Shaolin* suggests, at times obvious, and others oblique references to changing social orders. When considering music in each of these historical epochs the mutations reveal the changing ways in which people were accessing music, rather than how musical structures or sounds proved revolutionary. The limitations on how music could be experienced are only even the definitions of describing the experience. These references work towards reframing the Wu-Tang Clan’s attempt to change the perception of music—obvious or oblivious as they may be.

To return to the emphasis on materiality in the Modernist impulse, following the work of W. Ron Gard and Elizabeth Townsend Gard I would like to reposition the modernist impulse from the relegated realm of superstructure, to firmly in the base. In doing so I ask, what is modernist about the means and conditions of production of *Once Upon a Time in Shaolin* and what can it tell us about the larger crisis of copyright? Drawing upon the modernist ‘narrative of crisis’ I follow a line of thought on the material level, an approach described by Gard and Gard as being attentive to the “volatile, critical state

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<sup>151</sup> It was the ‘traditionalist’ Italian music form, Opera, that is most often cited, despite being most often positioned only at the end of the Renaissance and the beginning of the Baroque period.

of the economic core and its self presentations.”<sup>152</sup> This line of thinking sees the modernism of the law—its being-in-crisis—as the focal point, regardless of the modernity of a given work. This thought runs parallel to Barron who sees the materiality of Modernist art reflected in copyright law because “copyright assumes ‘Art’ manifests itself only in a determinate array of species,” thereby discriminating and excluding many potential works.<sup>153</sup> In other words, the law’s discriminatory practice surrounding what receives and does not receive protection allows an examination of the inherent biases of copyright and its treatment of works of art. Thus, whereas Barron argues that Modernist aesthetics are reflected in the law because of its focus on material and medium, Gard and Gard argue the modernism of the law is itself grounded on responding to a materialization of culture. To suggest copyright both effects and is effected by the works it protects or doesn’t seems intuitive enough, what is of real interest is how and why.

Barron provides a broader more theoretical argument. She sees copyright law’s deep commitment to property has the guiding logic for a view of art much older than Romanticism, where “separate arts are distinguished from each other, and the essential components of each art carefully dissected, for the purpose of identifying their *aesthetic* limits and possibilities.”<sup>154</sup> Gard and Gard, on the other hand, locate a turning point early on in the twentieth-century with the affirmation of the Copyright Act of 1909. They note that while “copyright protects the expressive dimension of a “work” rather than its material embodiment as an object’ nonetheless, the broadening of the expressive aspects considered eligible for protection conferred both a new legitimacy and new secure on industrial objects with copyrightable elements.”<sup>155</sup> Technological innovations in sound recording and mass industrialization taking place on a global scale produced a sensation that the vastly larger number of objects eligible for copyright were, in the eyes of copyright, insufficiently protected. This more generous open-door policy introduced a

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<sup>152</sup> Gard and Gard, “Marked by Modernism,” 158.

<sup>153</sup> Barron, “Copyright Law and the Claims of Art,” 375.

<sup>154</sup> Barron, “Copyright Law and the Claims of Art,” 370.

<sup>155</sup> Gard and Gard, “Marked by Modernism” 158.



‘materialization of culture’ that hardly went unnoticed, while trying to accommodate for a media revolution and the simultaneously perceived steady ‘dematerialization’ of culture into forms like radio, film and (later) TV. The difficulty of grappling with this dematerialization of culture produced grievances that ultimately produced the copyright revisions on 1976, and, I argue, persists to this day.<sup>156</sup> Indeed, concern about the dematerialization of culture at the turn of the century seems hardly foreign to our contemporary palette. What was concern over analog objects has turned to anxiety over “digital exchanges.” Drawing from *Once Upon A Time...* it is not a concern over the content so much as it was the means of access:

“The complacency of no holds barred access and the saturation wrought by technology’s erosion of challenges. Mass replication has fundamentally changed the way we view a piece of recorded music, while digital universality and vanishing physicality have broken our emotional bond with a piece of music as an artwork and a deeply personal treasure.”<sup>157</sup>

The tendency to blame technology for poisoning the cultural well in music is hardly new, however; whether it was the piano-player, the LP, the radio, the television, the cassette, the CD or the MP3, each format has taken the media beyond the prior’s limitations. It did so in ways that challenged and shaped what sounds could be produced and recorded, and how they could be enjoyed. Not all of these resulted in the dematerialization of culture though. In fact, it is important to note that intangibility and invisibility are not synonymous with immateriality. Examples from a history of sound recording technologies like the piano-player and the LP, testify to the one novelty of materialized music, while later developments like the Compact Disk (CD) and even the MP3 argue for reconsidering how digitalization produced a new kind of materiality. It is to the shape of this materiality, those various instances within the changing materiality of a given medium, what I will call format, that I turn to next.

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<sup>156</sup> The 1976 Copyright Act stated that the work received federal protection the very moment it was “fixed in an any tangible medium of expression.” This reinterpretation was in part a response to adhere to international treaties but also sought to address what Gard and Gard argue was an overconfidence in “the materiality of goods.”

<sup>157</sup> *Conceptus*. <http://scluzay.com/conceptus/>.

At the beginning of Friedrich Kittler's groundbreaking work *Gramophone Film Typewriter*, he writes "Media determine our situation, which—in spite or because of it—deserves a description."<sup>158</sup> What is beyond a doubt, as the *Translator's Introduction* notes, is their influence on how we appreciate them. Our present media determine how we think and talk about media of the past as much as they shape our thinking about media of future. Media are not innocent or neutral structures, technological systems or modes of communication. Authors as diverse as Friedrich Kittler, Marshall McLuhan, Jean Baudrillard and Paul Virilio have all written on the ideological impact of media on communication and subjectivity. It is common for these authors, Kittler included, to place media in historical epochs and to argue how each medium (clay, papyrus, paper, circuitry, fiber optics) "in turn tends to create its unique monopoly of knowledge."<sup>159</sup> Kittler's approach drawn from Foucault's, is to seek out the means of accounting for and store knowledge. It is in light of this history that computerization and digitalization tend to strike scholars are the beckoning in of less a radically new technological era than one of communication. The changing modes of creating and storing information made possible by new technologies shatter the monopoly previous mediums held over knowledge and the imagination under the previous regime of information transfer. While it is not within the bounds of the present inquiry to undertake an in-depth analysis of whether or not "media technologies define our horizons of knowledge," or challenge if we can in fact "reason only as far as the information machines of our time (our 'technological a priori') grant us, but to draw attention to the inherent complications in talking about media and their content overtime. In doing so we problematize the language for describing those processes once familiar but in contemporary technological frameworks suddenly vastly other. For it is just this difficulty that more recent discussions of the technological impact on copyright often overlook. To account for the 'new normal' we must take stock of the past as a totality, and not merely its morality. Peter Decherney, writing on early copyright problems in cinema observes, "truths about motion pictures that seem obvious and inevitable in

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<sup>158</sup> Friedrich A. Kittler, *Gramophone Film Typewriter*, trans. Geoffrey Winthrop-Young and Michael Wutz (Stanford: Stanford University Press, 1999), xxxix.

<sup>159</sup> Michael MacDonald "Empire and Simulation: Friedrich Kittler's War of Media" *The Review of Communication* 3.1: (2003), 81.

hindsight took decades to identify and fix,” and goes on to suggest how answers to questions put forward throughout history “grew out of philosophical questions about how to shape the future or art, business, and society through new media.”<sup>160</sup> In one way this is refining the argument advanced early about the back-and-forth of copyright law and the materiality of the works it aims to protect, but what media studies serves to identify and what art history is less inclined to, is shifting the emphasis of older models of communication from the content or the messages to “their very circuits, the very schematism of perceptibility.”<sup>161</sup>

At this point, it is worth recalling that while most descriptions of the extant crisis of copyright oscillate between appeals to authorial (or right holder) rewards and their ‘natural’ (in economic terms) response to changes in technology. In this model, media are introduced only to stress how technology exacerbates the otherwise, normal situation. There is a tendency to end critical investigation there because, as media theory Joseph Vogl has argued: “Media make things readable, audible, visible, perceptible, but in doing so they also have a tendency to erase themselves and their constitutive sensory function, making themselves imperceptible and “anesthetic.”<sup>162</sup> While this may help to account for the fact that “certain actions cannot be attributed to a person; and yet, they are somehow still performed,” such as the questions of “piracy” when someone downloads and thereby reproduces a digital file online—an argument advanced by media theorists that aims to clarify how “that situation is reflected by the medium”—we need to grasp the significance of particular material instances across media and how changes in media reflect larger social, aesthetic, political and economic forces.<sup>163</sup> Claims about an invaded past don’t stand up to close analysis. And a critical examination of the various changing conditions of sound technology and its relation to music should. And all the more so if the goal is to identify just what is being protected

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<sup>160</sup> Peter Decherney “Copyright dupes: piracy and new media in Edison v. Lubin (1903) *Film History* Vol. 19 (2007): 109.

<sup>161</sup> Cornelia Vismann, “Cultural Techniques and Sovereignty,” *Theory Culture & Society* 30/6 (2013): 84.

<sup>162</sup> Joseph Vogl and Brian Harrahan “Becoming-Media: Galileo's Telescope” *Grey Room*, No. 29, *New German Media Theory* (Fall, 2007), 20.

<sup>163</sup> Vismann, “Cultural Techniques,” 84.

well into the future in the eyes of the law. As Johnathon Sterne has argued “[i]f your goal in designing a technology is to achieve some combination of channel efficiency and aesthetic experience, then the sensual and technical shape of your technology’s content is every bit as important as the medium itself.”<sup>164</sup> With this mind, I turn to musical formats for an understanding of music’s materiality but inasmuch as copyright is focused on the materiality of the works it aims to protect and promote an investigation into formats aims to explore the material relations of copyright as well.<sup>165</sup>

In suggesting that the various instances in the changing materiality of music can be understood as format I am consciously engaging a history of discrete communication technologies and a genealogy of digital media culture.<sup>166</sup> Following Sterne, subjecting digital history to a history of sound resolves several puzzles in the history of sound recording. The first issue amounts to reframing digital history, and a history of sound, in terms of a “general theory of compression.” The MP3 was not the first, and will certainly not be the last, new media to be more efficient and mobile, in terms of information and economy. While these developments begin “close to economic or technical considerations,” Sterne is quick to note that, “over time they take on a cultural life separate from their original, intended use.”<sup>167</sup> The second valuable asset to understanding digital media within a history of sound is its capacity to point out the contingency and competing interests of digital technologies. Take for instance the problem of verisimilitude, a longstanding puzzle for audiophiles and sound professionals, Sterne is quick to address. He defines the problem: In an age of ever-increasing bandwidth and processing power, why is there also a proliferation of lower-definition formats? If we have possibilities for great definition than ever before, why does so much audio appear to be moving in the opposite direction?”<sup>168</sup> Notions of

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<sup>164</sup> Johnathon Sterne *MP3: The Meaning of a Format*, (Durham: Duke University Press, 2012), 6.

<sup>165</sup> According to Sterne, “*Format* denotes a whole range of decisions that affect the look, feel experience, and workings of a medium. It also names out the rules according to which a technology can operate,” (Italics in original) (Sterne 2012, 7).

<sup>166</sup> Sterne, *MP3*, 2.

<sup>167</sup> Sterne, *MP3*, 6.

<sup>168</sup> Sterne, *MP3*, 4.

progress tend to progress in only one way but it all hinges on how to measure progress. The typical account of progress in communication implies “a quest for definition, immersion, and richness of verisimilitude.”<sup>169</sup> This dream is exactly the one we see in advertisements and marketing for sound equipment and other digital technologies. Without going into the technical distinctions between definition and its supposed correlation to reality, or audience preference for light distortion and alternation, it is enough here to point out how the progress-myth of recording technologies, particularly acute versions in the digital era, not only encourages fans to purchase the new format for its ‘superior sound’ when in fact, there may not be anything ‘better’ in terms of fidelity or correspondence to reality (it might even have startlingly less total sonic information like the MP3); but to shed light on various reasons why fans engage music in the first place and, perhaps more importantly, how the plethora of ways to experience music involve a complex matrix of technologies to account for them. Those critical dimensions of a format require codification, “something though policy, sometimes through technology’s construction, and sometimes through sedimented habit.”<sup>170</sup>

This codification suggest that format theory applied to music requires working within the limited horizon of a particular musical format (and sonic media more generally) in relation to the multiple scales and time frames of media.<sup>171</sup> Sterne observes how a critical study of format reveals its “articulation with particular practices, ways of doing things, institutions, and even in some cases belief systems,” within the general paradigm of storing and moving audio information.<sup>172</sup> Alternating between the particular and larger totality acknowledges the changing conditions behind the storage and movement of audio across time and on various scales within various contexts. The dialectic involved between format and media engages those particular lived listening experiences of fans of music in a plurality of social, cultural and economic dimensions. In the case

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<sup>169</sup> Sterne, *MP3*, 4. He notes the common assumptions: “(1) that greater definition is the same thing as greater verisimilitude; (2) that increases in definition necessarily enhance end-users’ experiences; (3) that increases in bandwidth and storage capacity necessarily lead to higher definition media for end users,” (Sterne 2012, 4).

<sup>170</sup> Sterne, *MP3*, 8.

<sup>171</sup> Sterne, *MP3*, 11.

<sup>172</sup> Sterne, *MP3*, 10.

of format studies, this smaller register gives new insights to the generality; but more than simply reframing it, it has purchase on identifying the ideological inertia of sound. Looking “beneath, beyond and behind the boxes your media come in...invites us to ask after changing formations of media, the contexts of their reception, the conjectures that shaped their sensual characteristics, and the institutional politics in which they were enmeshed.”<sup>173</sup> Thus, format theory once again reminds us of the erroneous belief in the neutrality of media, an idea McLuhan planted with “the media is the message” that was to be later radicalized by Baudrillard in “Requiem for the Media,” where he writes, media are “not *coefficients* but *effectors* of ideology.”<sup>174</sup>

In contrast with media, in the case of format theory there is a certain level of specificity that one can point to when identifying the source of some ideological vector. Sterne writes, “we may talk of media as being invented and developed, but the equivalent—and much less spectacular—moment of birth for a format would have to be the moment it becomes a standard.”<sup>175</sup> With this in mind, when the Wu-Tang Clan write, “[p]erhaps it is our cultural attitudes to modern music that have cast it as something to be consumed. The complacency of no holds barred access and the saturation wrought by technology’s erosion of challenges,” there arise a number of questions about what kind of cultural baggage ‘modern music’ in this context has and more to the point, just what kinds of ‘challenges’ they are referring to. While I will address this latter point at length in the next chapter, I want to now explore the former.

## Re-formatting Property

It seems clear that the Wu-Tang Clan have a vision of the world where culture attitudes have been shaped off beat with modern music’s technological developments. They paint an image where those developments made knowingly and willingly by industry investment—manufacturing and marketing myths that intentionally pursued profit—are

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<sup>173</sup> Sterne, *MP3*, 11.

<sup>174</sup> Jean Baudrillard, “Requiem for the Media,” in *For a Critique of the Political Economy of the Sign*, trans Charles Levin (St. Louis: Telos, 1981), 169.

<sup>175</sup> Sterne, *MP3*, 22.

something bands were blindsided by, but fans were supposed to have see coming (or at least to have shown some self-control). For the purposes of this thesis, the problem ultimately hinges on the correlations and distortions the *Once...* model reflects in the actual present music practices. If music industry share holders, the primary right's holders in the music world, have advocated with investment and marketing, or legal suppression, how might we understand the role of format and technological development in terms of industrial advantage? Advantage for such industries cannot be limited to terms of the bottom line. An understanding of modern day capital much raise the complexity of inquiry to problematize just what profits,, recommendations, shopping preferences, brand loyalty and other service oriented business practices are generating. Thus, would it be ridiculous to suggest that patterns between the correlations and disjunctures of our attitudes and various changes in format are reflected in copyright law as well?

I would like to briefly take stock of the arguments up until this point. In the first part of this chapter I argued that an understanding of the material conditions of the author revealed the implicit arguments of authorship to be founded on Lockean labor theory. This theory, the basis for individualist freedoms and entitlements, was shown to be grounded in the maintenance of status quo labor relations. Because intellectual property laws do not produce sufficient incentive for much intellectual labor and intellectual property is itself abundant, there is no potential for the tragedy of the commons and Lockean logic fails to provide adequate grounds for privatizing intellectual property. The market logic glued on top of the Lockean moral arguments aims to equate market behavior with just reward, a deeply flawed logic that has nonetheless become the driving economic thought over the past centuries. Switching from the materiality of the author, in the second part, an investigation into the materiality of the 'object' protected by copyright revealed a similar trajectory. Following an approach to music from the position of format and recorded sound, the analysis cut a path across media, drawing out the cultural, social, political, economic, and technological contexts in which we, the audience, not only experience music but the means by which copyright law approaches it. Copyright law is innately dynamic. The promotion, distribution, and protection all

assume a changing and active context to justify its relevance, if not its existence. The question again arises: in what ways can an analysis of the materiality copyright, understood in terms of its object and whose materiality is understood in terms of format, reveal the tensions and contradictions of the present system and in particular, in the propertization of copyright? Turning to *Once Upon a Time in Shaolin*, I hope that by drawing upon these bold claims to draw out the obscure and stark tensions within the prevailing model.

The radically of *Once...* is, in the words of the Wu-Tang Clan, “the first high-profile album never to be commercially released to the public and the first of its kind in the history of music.”<sup>176</sup> This imposed scarcity is the product of creative destruction. There is, after all, nothing inherently limited about a digital product. The uniqueness of the work is, despite its fine arts wardrobe, not in the work itself. They write, “[t]he sole existing exemplar of *Once Upon A Time In Shaolin*, of which all backups and digital files have been destroyed,” confirming the inherent semiotic gray zone in “exemplar”. Exemplar, taken from the Latin *exemplum*, meaning ‘sample, imitation’ is one of those words whose meaning is deeply dependent on what it is being compared to and the context it is used in. It is either a typical example or an excellent model. There is a certain tongue-and-cheek involved in suggesting there is one digital replication to be prized above all others. The work itself has been destroyed, liquidated in favor of its more expensive copy. Only the ornate shell remains to invoke not only the ‘labor’ and the ‘object’ (the author and the work) but to grant it “its presence in time and space.”<sup>177</sup> Such “authenticity” is held out honestly, and in reactionary form. The one-of-a-kind album can be said to be “authentic” only in light of its history of abundance. The work is, at the end of the day, in CD format. There is something ironic about the choice. Not because the any household computer could copy the music or because it is the highest

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<sup>176</sup> *Work*, <http://scluzay.com/work>. (Accessed 14.10.2016).

<sup>177</sup> Walter Benjamin, “The Work of Art in the Age of Mechanical Reproduction,” *Illuminations*, (New York: Schocken Books, 1969), 220.



quality format available, despite being introduced in the 1980's but because the CD's emergence into the global economy marked the beginning of a revolution in music.

The conception of the CD is largely credited to a meeting of the minds of Phillips (then known as Royal Philips Electronics) and Sony in 1979. The specifications of which could not be agreed upon, but the disk of 115 millimeters in diameter and 74 minutes of storage became the norm. The standard story behind this format is that a CD needed to be long enough to play Beethoven's Ninth Symphony without interruption, hence exactly 74 minutes. This is, however, only one story of how the format came to be. Sterne demonstrates how engineers at Philips began discussing about the success of the cassette tape and how the compact disc should be about the same size because of the growing importance in transportability. Furthermore, given the technological capabilities available at the time Sterne argues that the CD format largely kept with leading interests in "isomorphism with other media" to maximize customer familiarity and communicability between existing media.<sup>178</sup> The importance of this narrative should not go unnoticed. The story about Beethoven's Ninth suggest the CD was the format for high culture, like all formats before it, arguing for a higher quality of sound that real musicians would appreciate. Additionally, it grounds the notion that "the primary referent of sound recording is live music," and not other recordings.<sup>179</sup> Nonetheless, the record companies did not take to the new technology well. They would need to develop new packing, record shops would need to build new shops, customers would need to buy new devices and the record industries were already in a slump. As CD's took off in the 1980's the record industries began to see a steady rise in profits with people re-purchasing their entire collection. And in 1988, Sony purchased the largest record company in the world for two billion dollars, CBS records. Now solidifying its stake in the global economy, Sony had both the hardware and the software, the format and the content, and the music industry has never been the same.

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<sup>178</sup> Sterne, *MP3*, 14. See also, Immink "The Compact Disk Story".

<sup>179</sup> Sterne, *MP3*, 14.

The format of *Once*... brings the tensions behind the means and mannerisms of access to music the foreground. The self-imposed scarcity of the album is entirely manipulated and the ‘exemplar’ status plays with the idea of a digital original, the framing of the whole work argues for the audience to come and experience art on art’s terms. A tradition in music that aims to link recorded sound to live performance, a dubious contention as best.<sup>180</sup> It’s worth mentioning here the particular and reoccurring tendency in the *Once* campaign to bring music back into the fold of the visual. As information has become more and more invisible, music, the original problem child has started to fill it out. The task of packaging sound has already been a tricky situation. But “sound recording set off conflicts over culture and property that profoundly shaped the course of copyright law in the twentieth century.”<sup>181</sup> Sayf Cummings has argued that ultimately, “it introduced a kind of medium that could not be seen with the naked eye,” and that “all previous copyrightable works could be see, whether words on a page, musical notes, or the lines and colors of a photograph.”<sup>182</sup> The effect was not merely to confound authors, audiences and lawmakers but it shook the basis of ownership. Different artists could all play the same track and each might play it differently, what was the original distinctive one?

The conflation of music into the realm of visual art is hardly a naive or innocent gesture. As information supersedes the cases it was carried in, grounding the information in an object has been a common move within information industries. Apple software requires you to have an Apple product. Within music, Frank Oceans pop up store and magazine, Kanye’s Sculpture *Famous* and Jay-Z’s performance piece. I believe it amounts to an attempt to change the image of music, that is, how music is supposed to be seen. The perception of art. The RZA writes in the press release for the album, “Mass replication has fundamentally changed the way we view a piece of recorded music, while digital universality and vanishing physicality have broken our emotional bond with a piece of

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<sup>180</sup> Throughout the history of recorded sound music has changed focus from live performance to record sound. Whether it was covers, re-mixes or samples, new music has made reference to the recorded works, replete with effects, distortions and mixes, of others and not their actual performances.

<sup>181</sup> Alex Sayf Cummings, *Democracy of Sound: Music Piracy and the Remaking of American Copyright in the Twentieth Century* (Oxford: Oxford University Press, 2013) 3.

<sup>182</sup> Cummings, *Democracy of Sound*, 3.

music as an artwork and a deeply personal treasure.”<sup>183</sup> Much has been written about the visual dominance of contemporary culture and while I do not currently have the time to do so, the tendency to conflate these mediums can be likened to the effects of intellectual property disputes. To ground it into a material is to make the issue of property more tangible. Recent pop-up releases by Frank Ocean, Kayne West’s sculptures, Jay-Z’s performance art pieces and Beyonce’s video-albums are all crossing boundaries. Indeed, it is an attempt to try and take difficulties and intricacies of copyright into a simpler, more concise form.

There are correlations between *Once Upon A Time in Shaolin* and this historic moment in music history that go deeper than the CD but that are made visible only in light of it. Whether it is “technology’s erosion of challenges” or the “cultural attitudes to modern music” that stand in the way of music receiving its due in the Clan’s eyes, it is patently clear that music and the industry that supports it, is anything but the victim of some larger cultural coop. In fact, as I hope to have demonstrated music industries have through their own schemes of profit helped to create and sustain the culture of music as it currently is. A culture that is in large part, predicated on accumulation and disposability. While the Wu-Tang claim “only one man can hold the scepter,” I am arguing that a view of the object of music fails to account for the relations sustaining music.

While music had previously been “owned” in the form of a score, a form springing from a particular kind of music and that lent itself to belonging to a publisher or patron than the actual person who created it, it was with the advent of recorded music that the concern of its accumulation can be said to have become a concern. This accumulation of musical objects is the sensible result of a property logic grounded on the same basis as justifying the author’s recompense.<sup>184</sup> This self-same property logic would however, have to endure history so that the reproduction and subsequent accumulation of sound

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<sup>183</sup> *Press Release. See Appendix.*

<sup>184</sup> The various capacities of formats dramatically transformed approach to the medium. Recorded sound was not used and manipulated by mere consumers; many a composer, most famously Stravinsky, would utilize the new technology to listen to their recordings and make corrections, foreshadowing a major industrial curveball with mixing and sampling.

might become the necessary condition. In this sense, Lockean property logic reoccupied the justifications for the accumulation of property only after it had secured itself as legitimate grounds for guaranteeing such property in the first place. As the economic conditions advanced what accounted for property underwent a change but the relations to property did not.

If we accept the argument that the background metaphors of copyright have undergone a transformation from romantic author to property, and that that change has had an effect on the way we think about, deal with and what we expect from music then how can we account for these changes? In the previous chapter I argued that the locating copyright in terms of a property paradigm has explanatory power for transformations within copyright law throughout history, that it provides a compelling narrative for understanding the rhetorical trappings of music industries and business practices and provides insight into ‘property’ references within pop culture itself. These examples were drawn from US legal decisions, accounts of shifting models for capitalizing on music, in considerable part due to copyright, and specific references to the album *Once Upon a Time in Shaolin*.

I hope to have demonstrated that the limited conceptions of materiality in thinking about copyright neglects to consider the relations of property at a high cost. Arguments based on the author and on the work equally serve to sustain property relations and references to technological disturbances clearly points to the inherent tension holding the structure together. A structure, I argue, predicated on propertization. By focusing on the material conditions determining the changing notions of author and object in the eyes of copyright law it becomes clear that throughout the past century copyright has transitioned from granting limited monopolies in the public interest to a model with recourse to accounting for creators and creations within the framework of accounting for capital. In accounting for the growing number of potential revenue sources (authors now working for hire) by the increasing number of objects available for copyright protection, industries have capitalized on their employees producing works in the company’s name. On the other hand, a look at the changing formats of recorded sound

reveals a tendency towards an increase in the quantity of properties without any correlation to an increase in quality. Customers purchase the same content on LP, cassette, CD and now MP3 not because the quality was radically better, but the conditions of listening to music, the situations of accessing it and the culture of engaging it have themselves undergone mutations that extend and ripple beyond the independent logic of a company but reflect the transforming logic of capital. Whether it is labeled real or landed property, literary property, or intellectual property, in each case, the property relations remain relatively stable while authors and audiences duke it out over the imposed scarcity of abundant goods. In other fields, scholars such as Eric Hayot and Edward Wesp have observed a similar contradiction: how do we account for the fact that “the advent of virtual worlds is producing in contemporary society a significantly new kind of relationship between property and the cultural imagination; and, second, a sense of the degree to which the innovative potential of this new form has largely been ignored in favor of the reproduction of the most conventional forms of property relations.”

Put another way, a critique from a materialist perspective identifies the juncture of copyright and technology as hardly inimical, but, rather, as an ever present dimension of copyright’s expansion in accordance with the logic of propertization. Elaborating upon the drastic effects for both the public and future authors a line is unnecessary, it’s worth bearing in mind that the line of thought I am advancing sees the purported problem of technicalization as an inherent blinding at the expense of an elaboration of method.<sup>185</sup> Such a blinding, I have argued is the tendency to project the problem of technology such that desperate answers to ‘new questions’ can be provided. The framework I am proposing assumes that the crisis of copyright is one that requires reconsidering the conditions of such a crisis to account for the possibility of its coming into being, before proffering answers to resolving it. It is to this ‘blinding’ that I now turn. The economic dimension gives forms to logic of copyright and aims to demarcate the new territories the copyright regime has taken and intends through and by the means and logic of propertization.

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<sup>185</sup> Bernhard Siegert, “The map is the territory”, *Radical Philosophy* 169 (September/October 2011), 3.

# IV. Financing Musical Properties: Monopoly, Access and Speculation

The crisis of artistic reproduction which manifests itself in this way can be seen as an integral part of a crisis in perception itself...Insofar as art aims at the beautiful and, on however modest a scale, 'reproduces' it, it conjures it up (as Faust does Helen) out of the womb of time. This no longer happens in the case of technical reproduction.

–Walter Benjamin

*On Some Motifs in Baudelaire*

*Once Upon A Time in Shaolin* presents a model for music that is utterly unsustainable.

Six years of private funding, twenty years of hip-hop history and some hundred years of cumulative career credit to leverage behind the project are prerequisites prohibitively difficult to enter the market for most musicians. Neither the investment nor the distribution model are something anyone who qualifies as the 'usual' or 'majority' audience member could advocate. If, as they say, "[r]ecorded music is the work of art" then what can one make from the refusal to travel the traditional contours of recorded music?<sup>186</sup> Whatever the intended goal of the album is, it presents an alternative to whatever we think the 'traditional contours' of a musical work to be, but perhaps what *Once...* is presenting is only the logical conclusion of the propertization of copyright.

Understanding copyright in terms of propertization requires examining the correlations and tensions inherent to the contentious development of property its effects on both our thinking of copyright law and the effects of our thinking, evidenced by vectored manifestations in legal transformation. As I argued in the previous chapter, distinguishing between property, literary property and intellectual property is not limited to proceeding along taxonomic lines of what qualifies as property within a given regime. Such analysis, while insightful for understanding the borders of consideration,

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<sup>186</sup> Taken from the album's website. "When recorded music loses its monetary value, it's the little guy who suffers most. Artists at the top of the tree have other potential revenue streams. They can tour, they can license, synchronize, and diversify into fashion or film. But an independent musician starting out has none of those options. He needs the thousand copies of his album to be worth something. Recorded music is the work of art." As Walter Benjamin noted, "Reflection shows us that our image of happiness is thoroughly colored by the time to which the course of our own existence has assigned us" ("Thesis on the Philosophy of History"; *Illuminations*, 254).

what might be understood as an epochal sigh-limit, (the horizon of logic and imagination based on an understanding of what technology has hitherto changed and what legal measures are best practices in relations to the predicted future) is only the grounding of an examination into excavating patterns of thought accountable for the real transformations within the law, which have hitherto led to the expanding borders to the copyright regime. If this expansion bears a striking resemblance and logic to the imperialistic growth of capitalism it is not mere coincidence.

In the previous chapter I aimed to open up new understandings of the materiality of copyright by investigating the property logic in terms of labor and property relations. Given the radical increase in the number of ‘ownable’ musical properties through the reproduction of content on multiple formats and their evolution in the digital era I want to draw those out those transformations and their correlations to modern neoliberal property relations. In so doing I do not insist on arguing that musical industries actively sought out the trajectory they, and we along with them, are on—although there is ample evidence to claim they were actively engaging in decision making practices that rendered it possible, if not probable. My intention is, on the one hand, to identify correlations within the rationale of propertization in current finance-capitalism and, on the other, to point out the ways in which ‘cultural properties’, and in particular music properties, have been more than mere victims in this process. Such a critique is not intended to seal the doom of music, but, rather, to take stock of how advanced the situation truly is—in the words of Benjamin, “to bring about the real state of emergency”—in hopes of altering the consequences of the present.<sup>187</sup> In this sense, the critique I have advanced seeks to make headway towards accounting for the contradictions that compose the field of copyright, for the seeds of the future are planted in the present. A second note, the success or failure of the record industries is entirely irrelevant to understanding the neoliberal capitalist drive as markets are erroneously justified as rewards for right decisions, but merely in directing where the next investment or expenditure *ought* to be made. Now I turn to exploring the transformations within music properties and their correlations in neoliberal market

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<sup>187</sup> Benjamin, “Thesis on the Philosophy of History” VIII, in *Illuminations*, 257.

capitalism. I want to talk about the way economics has been framed (consumption), relations of technology and capitalism in relation to the rapid accumulation of property in their multiplication and our storage capacities on devices and platforms, the way to laws are passed and lastly, the tendency to capitalize cultural products and monopoly rent.

## **Accumulation, Manifest Discography & Platform Logic**

Following the tradition of many leftist critical perspectives, placing copyright (the practice, institution, and behaviors related) within some larger totality allows a critique in which it can be seen to “play an intrinsic part in the reproduction of certain forms of inequality, alienation, or injustice.”<sup>188</sup> Copyright and the all too often technological excuse is problematic several reasons I argued above: 1) it is a limited understanding of materiality of media and format; 2) it betrays any agency/responsibility on behalf of the aggrieved parties; 3) it has and continues to be used as an excuse to exploit and extend the borders of the law; and I will argue here, it obfuscates the financial realities girding existent practices and locations of culture.

Copyright was established to promote the “useful Arts and Sciences” but is invoked in the event of their violation. It is a limited privilege guaranteed by the government for an explicitly democratic purpose and in the interest of the public. This broad statement is something US law upholds and most lawmakers and lawyers can agree upon. However, the means and measures of demarcating “limited”, of understanding the functioning intricacies of “democracy” and measuring the “interest of the public” appear in stunning variety. The unique situation of music, virtually predicated on this guarantee, puts the industrial models of music and legal framework copyright in contentious dialogue. Throughout history music has had the unfortunate position of responding to social, cultural and technological changes first. Take the CD and DVD, as law professor Randal

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<sup>188</sup> David Graeber, *Toward an Anthropological Theory of Value*, (New York: Palgrave, 2001), 227.



C. Picker notes: [u]nlike music CD's, where encryption of content has come very late, DVD's came with content controls from the get-go."<sup>189</sup>

The complications arrive when we realize that works that receive this protection, even void of authorial majesty or public celebrity, free of ideological shadows or distortions are still important to us, still something special. The various media of art and culture demand our attention because we think they can point us in a direction towards better understanding ourselves. All the while, these works, "existing on a higher plane of creativity and meaning" are steadily becoming commercialized and commodified. The desire to come to their defense tends to reduce our thought to a set of contradictory positions, a cognitive dissonance, whose untangling often seems excessively technical—a problem trapped in confines of legalese.

A common result is that a certain tendency to adopt a view of musical creations similar to those who claim to be the creators. Whether or not that is the artist, music industry officials or even the government "[t]he most robust policy ideas are informed by a cogent rhetorical framework that eases their way to general acceptance."<sup>190</sup> Copyright is no different, particularly when the argument is framed in terms of 'piracy'. The exposure effect of certain arguments tends to link the familiarity of certain arguments with their logic, rational or power to convince. A view of music aligned with that of the industry from which it, in large part, arises, raises the question of why would our treatment of music be any different? It is true that not all music follows this trajectory, but a considerable portion of it does. There are at present three major record labels, Sony BMG, Universal Music Group and Warner Music Group and together they account for anywhere between sixty-six to eighty-eight percent of the global market share.<sup>191</sup> Following Universal's buyout of EMI in 2012, all three companies are based in

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<sup>189</sup> Randal C. Picker "From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright", *The University of Chicago Law Review* (70:281) 282.

<sup>190</sup> Niel Weinstock Netanel "Copyright and Democratic Civil Society" *The Yale Law Journal* 106/2 (1996) 306.

<sup>191</sup> Nielsen SoundScan notes in 2011 that the "Big Four" controlled about 88% of the market. In 2012, after the merger between EMI and Sony Music Entertainment, Nielsen SoundScan reported a growth noting that the "Big Three" controlled 88.5% of the market.

the United States.<sup>192</sup> While the ‘indies’ are gradually taking up more and more of the market share in terms of ownership, they are themselves no so independent. In fact, many independents, like those accounting for most of the indie reporting, such as Taylor Swift’s Big Machine Records, are either owned by the majors or distributed by one.<sup>193</sup> Indies, then, have managed to maintain their ‘lead’ in publishing revenues but are unable to keep up with sales of CD or LPs. There is something to the distinction between distribution and ownership that I would like to draw attention to.

The crisis of copyright coincides with the fact that the copyright regime has expanded over the past century. But empire has never succeeded by merely maintaining what it has, rather, its ravenous appetite requires that conquest go on, if always to that place just out of view. This is equally true in the case of music, a mode of expression that has historically receded into memory and until recently consistently remained difficult to ascertain by sight. With the innovation of sound recording technologies, real sounds, not just their symbols, could be captured, stored, and experienced again. The obvious is worth stating here: the advent of sound recording technologies produced the necessary conditions for the accumulation of sound recordings. Objectification is a sufficient, but not a necessary, condition for commercialization, but what in the United States amounted to Manifest Discography, a movement that can be described as the ideological equivalent of the Western land grab only played out in musical formats and on the field of various platforms. These accumulative tendencies not only reflect a cultural and social understanding of property but in term they helped determine our understanding of property more generally.<sup>194</sup> Scholars have written about composers, music performers, collectors, bootleggers, pirates, re-mixes and mash-ups and onto music’s capacity to

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<sup>192</sup> Congressional hearings in both the EU and US seemed to acknowledge the monopolization occurring but ultimately failed to act. Regulators approved of the takeover insinuating a major re-organization in the field. See <https://www.thebalance.com/big-three-record-labels-2460743>

<sup>193</sup> Ed Christman, Big Machine is distributed by Universal Music Group. “U.S. Recording Industry 2015: Streams Double, Adele Dominates” <http://www.billboard.com/articles/business/6835216/us-recording-industry-2015-streams-double-adele-dominates-nielsen-music>. (Accessed 5.1.2016).

<sup>194</sup> The central role of music in the copyright battles cannot be exaggerated. The very word “expansion” has disappeared from our political vocabulary, which now uses the words “extension” or, critically, “overextension” to cover a very similar meaning” (Arendt, *Imperialism*, vii). “Only the very rich and very powerful countries can afford to take the huge losses involved in imperialism” (viii).

diversify into film with Cinema until it's own manifestation with MTV.<sup>195</sup> Music's ubiquity in modern society demonstrates the radical increase in consumable musical properties, but it also directs the inquiry into thinking about the means of accessing all of these new formats via platforms.

That the largest record companies in the world, collectively called the “majors”, have a level of influence on the distribution of music well beyond cargo shipping is hardly surprising in our digital culture. At each turn, copyrights for individual composers took profit, prestige and power from wealthy patrons, recording technologies at the beginning of the twentieth-century replaced the purchasing of sheet music to the dismay of music publishers, while between online file-sharing and the creation of the iPod and iTunes legal and illegal online music distribution came to be dominated by individuals swapping music for free or the profiteering computer company Apple and iTunes.<sup>196</sup> Scholars have noted that over history various musical platforms, from the stage to Spotify, have developed their own unique control points. It is copyright, however, that have developed to cover an “increasing range of creative works and their uses — although doing so took extensive wrangling among various interested parties with governing authorities.”<sup>197</sup> Indeed, online platforms like Spotify, Soundcloud and Rdio have gotten their starts, or been rescued from bankruptcy, by major label investment and subsequent ownership. Forbes magazine notes, “Left for dead by most investors and pundits, the surviving Big Three labels—Warner, Universal and Sony—have quietly muscled out stakes of the hottest digital entertainment startups, including 10% to 20%, collectively, of the established streaming services, such as Spotify and Rdio.”<sup>198</sup> All this stands to reason record industry players learned a lesson in the wake of failing to

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<sup>195</sup> Lee Marshall *Bootlegging & Romanticism*, Alex Sayf Cummings *Democracy of Sound, Appetite for Disaster, Noise: Political Economy of Music*, etc.

<sup>196</sup> David Tilson, Carsten Sørensen, Kalle Lyytinen “Platform Complexity: Lessons from the Music Industry”, *System Sciences* (HICSS), 2013 46th Hawaii International Conference on, 4630.

<sup>197</sup> Tilson, Sørensen, Lyytinen, “Platform Complexity,” 4631.

<sup>198</sup> Zack O'Malley Greenburg <http://www.forbes.com/sites/zackomalleygreenburg/2015/04/15/revenge-of-the-record-labels-how-the-majors-renewed-their-grip-on-music/> (Viewed 28.9.2016) But it's not just streaming services, the article notes how labels have shares in music video startup Interlude, the song recognition app Shazam and even capitalizing on hardware / apparel companies such as Beats by Dre before it was purchased by Apple for \$3 billion last year.

capitalize with Apple's "Rip, Mix, Burn" campaign.<sup>199</sup> There is no doubt that the algorithms utilized by streaming services are often opaque but it has become all the more clear that the contracts artists have with their labels determine the actual payout, and generally speaking, they're not in favor of the artist.<sup>200</sup>

This type of behavior is nothing remarkable, or new, when seen in light of the previous investments made by music publishers since their professionalization. Control of various platforms, like the printing press, "could be used to exert influence on the trajectory of cultural change in music and elsewhere."<sup>201</sup> The mass production of compositions and music instruments help mold the music industry into the shape we now recognize it to be. Later, with the introduction of copyright, the profitable capacity of the mass scale production of scores granted new motivations for investment and capital into the industries. Later on, with the approval of the Copyright Acts of 1909 and 1978 (the introduction of a right to mechanical reproduction, compulsory license systems in 1909 in response to the new recording technologies; works for hire and the protection of sound recordings in response to technological advances in recording, distribution) granted a new source of revenue for right's holders. The law continued to expand, when in 1992 Congress declared copyright renewal to be automatic, in 1998 it went from Life plus fifty, to Life plus Seventy and later that same year President Clinton signed into law the contentious Digital Millennium Copyright Act (DMCA).<sup>202</sup> The point of referencing these court cases to to draw attention to the particular ways in which copyright can be said to be expanding and the identify the radical change in scope. With each move, copyright law has protected a growing number of items to be owned, a logic endemic of manifest discography, but it has undergone a radical transformation in lockstep with neoliberal property logic. Once technology provided a

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<sup>199</sup> Tilson, Sørensen, Lyytinen, "Platform complexity," 6.

<sup>200</sup> An article written by CEO Daniel Ek of Spotify in response to Taylor Swift's refusal to include her music on the service arguing: "I'm not willing to contribute my life's work to an experiment that I don't feel fairly compensates the writers, producers, artists, and creators of this music." <https://news.spotify.com/se/2014/11/11/2-billion-and-counting/> (16.10.2016) See also a report by Music Business Worldwide "Major labels Keep 73% of Spotify Premium Payouts - Report (3.2.2015) <http://www.musicbusinessworldwide.com/artists-get-7-of-streaming-cash-labels-take-46/>

<sup>201</sup> Tilson, Sørensen, Lyytinen, "Platform Complexity," 4.

<sup>202</sup> Amendment to Section 304 of Title 17.

means to shrink those properties into 1's and 0's, not only could more be sold, but the format specifics required purchasing devices to *access the same music*.

Whether it was the CD or the MP3, audiences needed to invest in the machines that access music above and beyond the music itself. This transition led to right's holders investing in a range of new items from music apparel, Beats by Dre recently purchased by Apple, to creating entirely new platforms for access music, such as the new streaming service Tidal, fronted by the likes of huge names like Jay-Z, Beyonce, Kanye West and Daft Punk. The fact that artists are now the face of these services should suggest they are somehow better, however. All of these changes point to the growing allure of finance. Whether it is the algorithmic services provided by streaming services or the prohibitive pricing of *Once Upon A Time in Shaolin*, questions of copyright and music has been cast in terms of access. This propertization amounts to a slow blurring of the boundaries between tangible properties and intangible properties as Picker argues: "in some basic way, to date, intellectual property has lacked one further key characteristic of tangible property: absent taking by force, use of tangible properties requires prior consent of the owner."<sup>203</sup> Intellectual property isn't monitored in this way: singing in the shower does require any down payment. Rather, intellectual property works *post-facto*, where one might sue in the event of a violation. The apparent ubiquity of music has concealed the nature of the dominant modern relationship to music: access. Format theory has shed light on the fact that it is how, when and where we access music that demands our attention. Just as property is no longer imagined in terms of plots of land, we can no longer think in terms of returning to some collector's romance in owning music as discrete items. There is a certain irony when Cilvaringz claims: "We always treasure the things we had to work for or commit to more than the things that are a click away. I still remember the albums I had to queue up to buy with my hard earned money – the process of investing in it deepened the experience of listening to it. And that is the other critical point here - questioning whether universal accessibility has diminished the way we experience music."<sup>204</sup>

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<sup>203</sup> Picker, "From Edison to the Broadcast Flag," 283.

<sup>204</sup> *Press Release*. See *Appendix*.

The question of investment indeed determines our experience of listening to music in the streaming era, but it is foolish to think that spending money on music makes it any desirable when access to music is largely approached as access to music in reserve. The vast catalog available on streaming services was only the natural outcome of the cultural tendency to fill iPod's and other devices to their max. Under what rubric might we understand musical properties?

## Allocating Acoustics

As scholars have noted, the reasons for copyright's extension are many and they have pressed themselves upon the hearts and minds of judges, legislators and policymakers with varying successes throughout history.<sup>205</sup> The rational framework encasing the logic of access in the modern copyright regime can be said to be rooted in "a blend of neoclassical and institutional economic property theory."<sup>206</sup> Acknowledging this framework is useful because it resists the utopian tendency to claim cultural objects exist outside the dominant economic model of our time, it has explanatory power for understanding the experiential shift from ownership to access and provides a logic for understanding copyright's expansionism. Neoclassical economics in copyright can be distinguished from the traditional view that sees copyright in terms of a limited and necessary incentive for the creation of new works. Neoclassical though pushes economic analysis in the other direction stressing the expansive property regime with maximum duration, ultimately resulting in the diminution of the public domain. Under the neoclassical approach, copyright is "a mechanism for market facilitation, for moving existing create works to the highest socially valued uses," that is, by allowing copyright owners to achieve maximum profit from their works in the market.<sup>207</sup> There is at once a general sense by neoclassical advocates that law is already loaded with an implicit

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<sup>205</sup> Netanel notes, "there are many reasons for copyright's expansion, including technological development, power politics (both domestic and international), and the transformation of the United States from a net importer to a major exporter of intellectual works" (Copyright and Democracy: 306).

<sup>206</sup> Netanel, "Copyright and Democracy." See also work by Stanford law professor and economic approach advocate Paul Goldstein.

<sup>207</sup> Netanel, "Copyright and Democracy," 309.

economic logic, a rational that such economic thinking and language merely seek to bring out.<sup>208</sup> Thus, for the neoclassical thinker property's central role in promoting allocative efficiency of creative works means focusing on perfecting markets for *all potential uses creative works may have* at the expense of any balance between artist and audience.

The question for the traditionalist precariously hinges on finding the “right” amount of protection to give the “right” amount of incentive for the “right” amount of time for ultimate benefit of the public. The neoclassicist can bypass these taxing policy issues by guaranteeing maximum protection and leaving their allocation up to the market's fluctuations and mechanisms. Netanel is quick to note: “To be certain, neoclassicist copyright scholars are generally mindful that market dictates will sometimes conflict with copyright's democracy-enhancing goals.”<sup>209</sup> Nevertheless, towards the goal of settling the immense difficulty of variable pricing and piracy neoclassical models offer simplified equations to the irregularities of the market and demands of the public. Such thinking amounts to maximum rights for owners equivalent to allowing rights owners the privilege to collect monopoly rent, thereby guaranteeing authors to develop their works in the way consumers want.<sup>210</sup> The dubious logic such a model is based upon requires two comments. The first is that the logic of property inherent in this system can be said to have its roots in marginal utility theory. Marginal utility theory sees property as the ability to capture future profits, and not “the embodiment of previously committed investment and labor.”<sup>211</sup> The fact that property is no longer based on a logic of labor in the creation of new works is a late-coming nail in the coffin to the dead model of romantic determinism. Moreover, copyright logic has effectually ceased to promote the creation of anything new at all but has turned to capitalizing on the possible uses of what already exists. By engaging with the materiality of copyright we had arrived at a similar conclusion: the vast production of redundant content in various

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<sup>208</sup> Bruce A. Ackerman “Law, Economics, and the Problem of Legal Culture” *Duke Law Journal*, 1986:929 (1986) 934.

<sup>209</sup> Netanel, “Copyright and Democracy,” 310.

<sup>210</sup> *Once Upon A Time in Shaolin* embodies these contradictions to a degree bordering on parody.

<sup>211</sup> Netanel, Copyright and democracy, 311, 312

formats amounts to a condition of music as a kind of standing reserve.<sup>212</sup> The homecoming of Valéry's prophetic words, "Just as water, gas, and electricity are brought into houses from far far off to satisfy our needs in response to minimal effort, so we shall be supplied with visual or auditory images, which will appear and disappear at a time movement of the hand, hardly more than a sign."<sup>213</sup> The comparison between utilities and works of art may, at first, seem a bit harsh, but we should not be turned off. One might be inclined to suggest it is more the distribution networks, the individualism inherent to one's own electric consumption that Valéry references but there is, no doubt, an ominous notion in the massive infrastructure inferred before the possibility of such a totality can come into existence at all. What we might term as the institutional view, or anything on such a scale, is most often likened to mass production of the kind that privileges the movement of goods over and above their unique capacities to inspire and enthrall. Such a transition is no doubt corollary to the developments in economics, as Netanel has observed, "like neoclassical law and economics, new institutional property theory also tends to elevate market change over the implementation of public policy through law."<sup>214</sup> This logic should recall the previous critique of property as property relations over any particular good or set of goods. The result is a reversal of motive, an inverse ideological move where the movement of musical works across the market justifies the policies that guarantee their movement. The role of copyright in promoting the creation of new works takes an auxiliary role to ensuring the universally exclusive transfer of property goods. To make the second point I will turn to David Harvey's work "The Art of Rent: Globalization, Monopoly and the Commodification of Culture" to explain the radical consequences of monopoly rents in the fields of art and culture.

For David Harvey, scholarship is long over due for re-engaging politics at crossroads of culture, capital and social alternatives if there is to be any opportunity for rallying the old vanguards of radical discussion. The abstraction "monopoly rent" then aims to

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<sup>212</sup> Drawing from Heidegger, such an 'enframing' of music posits music to come into being at a whim. Such a coming into being is not however, unique to the music in any way, but to the means of accounting for it in forms of rent extraction, digital reproduction and algorithmic taste-makers.

<sup>213</sup> Quote taken from Benjamin's "The Work of Art in the Age of Mechanical Reproduction" in *Illuminations*.

<sup>214</sup> Netanel, "Copyright and Democracy," 313.



secure Harvey's approach to describing the larger entrenched process many blithely label the commodification of culture. The tendency to write-off the term "monopoly rent" as too technical, or simply void of any of the emotion that alienated cultural producers are actually feeling is reminiscent of the tendency to avoid discussions of copyright for its purported legal intricacies. In both cases, there is a sentiment of the gigantic, understood at one and the same time as the disorienting feeling of standing on the ledge of some great quantitative expanse of contemporary numerical logic and the realization that such an expanse is hardly something numbers have produced. The sheer expanse works in abstraction to prohibit critical thought and as such Harvey aims to show where and how various cultural practices intersect with political-economic forces. He writes, "monopoly rent arises because social actors can realize an enhanced income stream over an extended time by virtue of their exclusive control over some directly or indirectly tradable item which is in some crucial respects unique and non-replicable."<sup>215</sup> For Harvey, there are two situations in which monopoly rents tend to arise. The first is that some special resource, commodity or location that allows for social actors to extract maximum rent from those who want to use it; following Marx, Harvey proposes a vineyard producing excellent wine as the ideal example. The property component might be a prime central location within a city such that residential rents but predominately commercial rents would be extremely high due to accessibility. These are indirect cases of monopoly rent, because the commodity itself is not traded upon but rather the "commodity or service produced through their use" that garners an added value.<sup>216</sup> The direct monopoly rent is when the vineyard or prime real estate is traded upon directly. In these instances capitalists invest in these spaces for future purposes, withholding the property from use for speculative gains. This situation is more akin to purchasing a rare work of art. For the purposes of the present work, it's important to note that the two overlap with relative frequency (invest in an art work and lease it to a museum for an exhibition) but it is the distinct contradictions Harvey identifies in the system as a whole that I want to draw attention to.

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<sup>215</sup> David Harvey, "The Art of Rent: Globalization, Monopoly, and the Commodification of Culture" *Socialist Register* (2002), 94.

<sup>216</sup> David Harvey, "The Art of Rent," 94.

The first is that no matter how unique, special, rare or brilliant the work is it is never outside of the tradable realm of money. No matter what the object is, take for example, *Once Upon A Time in Shaolin*, now the most expensive album ever sold, it is not so special that it could not be bought and sold, over and over again. Thus, when Cilvaringz speaks about the uniqueness of the album he speaks about having to contractually sustain it, even if he resorts to another logic:

“Initially we wanted the buyer to do whatever he wanted with it. But when we realised how much commercial interest there was, we began to understand that allowing it to play out in that way would undermine its trajectory as an art piece, even if no amount of replication could touch the original. We felt that retail commercialization and mass replication would dilute the status of the album as a one off work of art and compromise the integrity of our statement.”

The “status of the album as a one off work of art” is tied to its status as an so-called investment. Quickly reselling the album or allowing the owner to rent it out to a series of museums and galleries (the original plan for the album) would immediately cut into the monopoly status of a single work accessible by only one person: “Only one man can hold the scepter,” after all.

The tendency towards monopoly is not a recent phenomenon in the history of capitalism, nor in the music industries. The majors were not always controlling over eighty percent of music. People used to listen to local music, but once local labels and radio stations had to compete with ones far away those ‘natural monopolies’ gave way to mega-corporations.<sup>217</sup> All along the way private property has grounded the capitalist enterprise and sought out monopolies or built alliances. The second result from the destruction of natural monopolies in the age of globalism has been “to secure ever more firmly the monopoly rights of private property through international commercial laws that regulate all global trade,”<sup>218</sup> the result of which has been to bully countries into adopting strict copyright, patent and trademark laws before they can trade with Western countries. The result is often alienation from cultural producers, resentment from

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<sup>217</sup> Harvey notes, “The music industry of the United States succeeds brilliantly in appropriating the incredible grass roots and localized creativity of musicians of all stripes (almost invariably to the benefit of the industry rather than the musicians). Even politically explicit music which speaks to the long history of oppression (as with some forms of rap and Jamaican reggae and Kingston Dave Hall music) gets commodified and circulated widely throughout the world,” (Harvey, *Art of Rent*, 107).

<sup>218</sup> David Harvey, “The Art of Rent,” 98.

foreign countries and indigenous peoples. In the case of music presently, the correlation between strengthening and enumeration more rights for holders and the increasing monopolization of the majors cannot be seen as anything other than two sides of the same coin. A coin capitalism seeks to acquire to no end; and to this end, Harvey aims to direct the progressive forces of culture. An understanding of the neoliberal capitalist framework gives credence to the development of copyright towards a speculative practice. The consequences of this turn are nothing short of an abandonment of the democratic values inherent in the creation of copyright in the United States and the all out rejection of art and culture's unique position as the grounds for creative autonomy and expression. As Netanel notes, "the 'patronage' of advertisers and bundled service providers would be no less constraining than that of contemporary corporate givers and seventeenth-century aristocrats."<sup>219</sup> And while I would be remiss to acknowledge that our view of democratic governance has changed as well, I would like to draw attention to the concern of scope. Charting the path of copyright expansion in parallel with neoliberal financial capital demonstrates the radical inverse of values market driven logic requires.

All of these factors should indicate that cultural industries, music among them, are not beyond or outside the influence of neoliberal capitalist policies. It is not that these industries were overtaken or betrayed by a series of bad deals forcing their hand. What happened with the massive restructuring of industry in the 1970's and into the 1980's happened across the board—the cultural industries included. Changes in the copyright law not merely changing at the whims of music industry officials, but with the corporate conglomerates being formed in the steady dissolution of singular companies. This can be seen with the changing economic structures of the music industries towards maximizing profit extraction in response to the expanding rights secured by the Copyright Act of 1976, even if it meant it came at the expense of their own company suffered. Years after Sony Entertainment's buyout of CBS has secured Sony Records as a major they became embroiled in protecting their properties as the rip, copy burn crazy of the 1990's and 00's hit home. Much of the music being 'ripped' off of CD's was performed by Sony devices signaling the tendency of corporations to take the money

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<sup>219</sup> Netanel, "Copyright and Democracy," 361-362.

out of one hand and putting it in the other. This larger transformation matches on with the broader history of finance capitalism. As David Graeber has noted:

“One of the great innovations of recent decades is the enormous efflorescence of finance capital: at this point, over 90% of economic transactions in what is called the global marketplace no longer have any immediate connection with manufacturing or trading commodities of any kind, but simply consist of currency trading and other forms of financial speculation.”<sup>220</sup>

This type of investment is not only mirrored, but anchored in the global administrative system copyrights have become. Seen in light of the growth of finance capital the crisis of copyright appears to mimic the tendency of bureaucratic regimes to rely on government authority to extract their profits.<sup>221</sup> The result of which has been the steady increase in class power.<sup>222</sup> A type of class power infamous in the United States at the 1% and mimicked in the music industries. In 2014, a study showing the digital and physical music sales showed an estimated seventy-seven percent of music income goes to the superstar artists.<sup>223</sup> *The Atlantic* reports, “even though the amount of digital music sold has surged, the 10 best-selling tracks command 82 percent more of the market than they did a decade ago. The advent of do-it-yourself artists in the digital age may have grown music’s long tail, but its fat head keeps getting fatter.”<sup>224</sup> This is not merely the dedication of a growing fanbase for singular stars, but the result of a big data-driven analysis that allows record labels to predict which songs will be hits and to guarantee their profitability by analyzing the ways in which people are engaging music, how they are experiencing it, and where. If we take Graeber’s history at his word then the general transition in the music industry starts to mimic that of what was happening in the

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<sup>220</sup> David Graeber. “Neoliberalism” in *The Insecure American: How We Got Here and What We Should Do About It*. Edited by Gusterson, Hugh and Besteman, Catherine. (Berkeley: University of California Press, 2009), 57 .

<sup>221</sup> David Graeber has written extensively on the bureaucratization of corporations and government in his works *Debt: The First 5000 Years*; *The Utopia of Rules: On Technology, Stupidity and the Secret Joys of Bureaucracy*.

<sup>222</sup> “When recorded music loses its monetary value, it’s the little guy who suffers most. Artists at the top of the tree have other potential revenue streams. They can tour, they can license, synchronize, and diversify into fashion or film. But an independent musician starting out has none of those options. He needs the thousand copies of his album to be worth something. Recorded music is the work of art.”

<sup>223</sup> Paul Resnikoff, March 5, 2014, “The Top 1% of Artists Earn 77% of Recorded Music Income, Study Finds...” <http://www.digitalmusicnews.com/2014/03/05/toponepercent/> (Accessed 5.3.2014).

<sup>224</sup> Derek Thompson, December, 2014, “The Shazam Effect” *The Atlantic*. [http://www.theatlantic.com/magazine/archive/2014/12/the-shazam-effect/382237/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2014/12/the-shazam-effect/382237/?single_page=true) (Accessed 17.10.2016).

country as a whole. The “strategic pivot of the upper echelons of U.S. corporate bureaucracy” towards shareholders and then towers the financial structure as a whole produced the financial equity firms and mega-corporations that we find incredibly obvious today. “Think about it from the view of investments” we’re told. The persistence of noting the failure of many albums to recoup the investments record labels have made begins starts to sound as though investment does not inherently include any risk, have the music industries gotten “too big to fail”?

Throughout this chapter I have attempted to locate and draw out the correlations between the propertization of copyright in musical properties and larger neoliberal economic processes. These connections serve the purpose of identifying the extractive and alienating tendencies within copyright practices surrounding music within the larger totality of the economy. A framing procedure that I hope to have demonstrated has great purchase on stretching the understanding of the extant crisis of copyright beyond the purely economic. Copyright has never caused anyone to purchase music and certainly not to purchase more music. Rather, just as the copyright regime has proliferated into a stunning array of content and the devices to access this content, it has developed according to a logic that believes they are guaranteed a return on investments already made, a business model radically similar to financial investment bankers. Just as what constitutes a musical property has transformed, so have the number of ways to access it and controlling those access points. The model of the gate keeper may be gone, but the gates remain. Capital will continue to seek to secure profit from that access. Interestingly enough, this model might be likened to live music, where the quality of the show is entirely independent of the cost of entry. In this experiential and expectational contradiction a conversation of copyright must arise. As neoclassical economics has little to offer to the way in which we actually communicate and experience and everything to over in what we can expect copyright must aspire to encourage communication to give voice to the causes of contemporary experience of alienation from our own culture.

# Conclusion: Charting the Future

There can be no mistake that studies of copyright are grim. The dialectics leading towards “irresolution,” the legal trajectory “futile and necessary.”<sup>225</sup> They have a negative prophetic ring like the words Benjamin issued on the eve of the fascist era: “It is only for the sake of those without hope that hope is given to us,” more than any prophetic remark about revolutionary potential. It is no confidence builder when the influence of well-heeled private interest has such powerful sway over legislature in comparison to the diverse expectations and desires of the public at large. That their interests are not necessarily the public’s is to admit the obvious only though. The situation is advanced, but, as I have argued, it is precisely because of this dissension that the crisis has emerged into public consciousness.

Copyright, it has been argued, is notorious for “industry rent-seeking,” and while recent years only point to every increasing levels of unprecedented influence by private interests and corporations in both level and kind of protection, it also has seen their involvement in the writing of law. Even such incrimination cannot succeed without a compelling rhetorical and theoretical armature to appease some and win general acceptance amongst the others. To this end, I have sought to lay the groundwork for building a new lexicon to outfit frameworks for understanding the crisis of copyright, to critically engage the history of copyright and finally, to begin imagining alternatives. In this thesis I have aimed to demonstrate the reach of a particular rhetorical and theoretical framework of copyright (property), how it is employed, and what consequences such a framework may lead to. This speculative approach aimed to lay the groundwork for identifying the logic of expansion within the copyright regime. Cartographically speaking, the work aimed to both provide an alternative image of copyright by charting its extensions along rhetorical, material and economic dimensions. Beyond just providing an alternative by which to imagine copyright, this

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<sup>225</sup> Mark Rose, *Authors and Owners*, 8.

work aimed to dig up and decipher the subterranean logic by which we can understand the present moment. To this end, future research should look to a history of the metaphors of property and their implications for understanding our experience of art and the problematics of digitalization. Furthermore, investigations in the pragmatic effects of the metaphor will direct thought towards format, media and the materiality of copyright and the works it aims to encourage and protect.

Propertization, put simply, amounts to the idea that conceptions of copyright are composed from the possibilities provided within the metaphors of property—that these metaphors change as our engagement with the world and the orientation provided by property relations transform, is a historical fact.<sup>226</sup> Given that property serves as a founding metaphor for how we orient, think and act in the world, the world of copyright has had little trouble in accommodating to these changing notions of property. Thus, propertization helps give shape to the transformations of copyright with a high level of correspondence to our experiences of these transformations throughout history. In so doing, it also posits an alternative view of the crisis of copyright. For this reason, I sought to identify those factors within the propertization of copyright that best demonstrate what I argue accounts for the unique course it has taken. A course that was by no means preordained or linear, but, rather, took the form the limitations and barriers—historical, economic, political, technological and cultural— imposed in various situations. In this sense, that copyright was ‘understood’ as property in its origins, just as it is now, would be an invalid inference; while copyright owners did not hesitate to use “property rhetoric” in earlier skirmishes property supplied a different framework for thinking and operating in the world. This was best evidenced by function reoccupation of positions by copyright throughout history. Similarity may insure identity, but it does not guarantee function.

Additionally, I argued that alternative models of thinking about copyright, the author paradigm and the constitutional paradigm have not resulted in limiting changes to the

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<sup>226</sup> Hughes writes, “The concern over the influence of the property construct takes several distinct forms, the three most prominent being concern about natural rights views of property, concern about real property views of property, and concern about law and economics theory,” (997).

expanding copyright regime, nor do they provide convincing accounts of the changes copyright has hitherto undergone. Furthermore, the process of amending copyright, or accounting for any uncertain areas has been, to a large extent, left up to the courts to decide. And for more of the twentieth and twenty-first centuries their rulings have been overwhelmingly in favor of copyright expansion.<sup>227</sup> The “reoccupation” of the author by property within the background metaphors of copyright did not occur within the hearts and minds of unsuspecting individuals though. The transformation in thinking about music that occurred with the advent of recorded sound had tremendous repercussion for our understanding and experience of music *and* the industries that consolidated around it. Not only did it supply the necessary conditions for the possibility of owning a recording of sound, effectively revolutionizing human habits in sense perception and communication, it brought with it commercialization, customization, and culturization.

Indeed, propertization has a special purchase in considerations of music. In the particular sense of music, propertization identifies an essential quality of musical properties, inalienable from its format, that structures experience. Each musical property is considered to have a horizon of experience, designed towards the ways someone might experience it. This logic is increasingly understood as imagined points of access or possible uses. It is plausible at any point that music be left abstract, unsullied by material expression and thus propertized, but as such it is equally unsullied by the ears of an audience and left to have the sound equivalent to that magical fall of a tree in a forest, experienced perhaps in theory but never in earnest. What this property entails however, is a propensity to form connections, to bring people into relation. This is what Benjamin referred to as “the idea of life and afterlife in works of art.” The reproduction of sound was a revolutionary moment, it became resoundingly clear: “there was an inkling that life was not limited to organic corporeality.”<sup>228</sup> Sampling, remixing and covers continue to breathe new relevance into the afterlives of art.

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<sup>227</sup> Jessica Litman, “Copyright Legislation and Technological Change”. The result of which is to essentially say that congress has every right to pass whatever laws they so desire.

<sup>228</sup> Walter Benjamin, “The Task of the Translator,” *Illuminations* 71.



The metaphor of property has itself helped to provide a language to explain many of these transformations. As Nentanel has observed, “the naked pursuit of self-interest only goes so far in shaping a legal regime. The most robust policy ideas are informed by a given rhetorical framework that resonates among lawmakers and eases the way to general acceptance.”<sup>229</sup> To understand the propertization of copyright we need to understand changes in property, changes in those things which can be said to be owned and their effects on copyright, its crisis, and our understanding of it. I argued that these transitions can be seen in semantic translations, informed views of the materiality of copyright and an understanding of speculative economics. I have argued that *Once Upon A Time in Shaolin* embodies this exaggerated and contradictory form of property logic. The album reflects a tendency within copyright to use property-talk to tie disparate meanings together and anchor otherwise free-floating arguments in favor of copyright expansion. The album not only exemplified the effects and consequences of the rhetorics of property, but by its musical nature and one-of-a-kind status implicated the under theorized materiality of property logic in copyright discussions. Lastly, the album foreshadows the results if the logic of neoclassical market theories were taken to its logical conclusion. In short, the album represents, complicates and implicates many of the forms of control copyright’s trajectory is set on. These examples help to identify limits and demarcations set by the paradigm of propertization. A paradigm, I have argued, we would do well to acknowledge but not buy into.

Only, someone already has. Someone did pay two million dollars for the album. There is a certain irony to the story, not even the Wu-Tang Clan could have predicted.

Immediately after they announced just who the “single American collector” was who purchased the album, the Wu-Tang Clan responded on Twitter by saying they donated a considerable portion of the check to charity. The purchase, which had been made in Spring and announced only in the Fall, proved to be a boon for news coverage but an ironic undoing to the project itself. The owner to be was none other than, Martin Shkreli, infamously known also as “Pharma Bro.” In the time between purchasing the album and the announcement Mr. Shkreli had managed to make himself, according to

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<sup>229</sup> Nentanel, “Why Has Copyright Expanded? Analysis and Critique,” *UCLA School of Law* 2008.

*The New Yorker*, the “most reviled person in America.” The young pharmaceutical executive turned villain became infamous in the wake of a purchase of a drug called Daraprim his company, Turing Pharmaceuticals, had made. The drug is used to treat a rare illness, toxoplasmosis, a disease fatal to H.I.V. patients.<sup>230</sup> After purchasing the generic drug his company raised the price from under twenty-five dollars a pill to seven hundred and fifty dollars, more than a 5,000% increase. Once the public got wind of the fact that Shkreli was going to be the single owner of the Wu-Tang Clan’s final album, the “seal on a dynasty,” there was a backlash.

The truly stunning thing about the event is that Shkreli’s business move is not at all uncommon. Even Shkreli sharply countered that the government likes to “beat up on guys that are seen to be public enemies, if you will,” and noted the price hike was due to the “distribution model.”<sup>231</sup> The relations to the music industry are uncanny. Infact, the pharmaceutical industry is the paradigmatic example of an industry wide move to establish monopoly powers by centralizing capital and securing unprecedented protection. What made him the anathema of a country for a couple weeks was not his actions, but the tendency to imagine that he represented the single thing keeping the system from working. The correlations to the concerns of copyright could not be any more clear. It seems that Shkreli, intent on proving a point about the influence of money complicates our expectations and aspirations for musicians and the music industries as well. The story behind *Once Upon A Time In Shaolin* grounds us in the contemporary situation by disclosing many problems we would do well to fix in the future while providing us with a warning from the past. The future of copyright will be decided, it’s territories changed, and it will be up to us to recognize what is continually changing by maintaining access to the common conventions of copyright which have lasted through time. Only then will we imagine alternatives whereby it is a future might be more democratic and free.

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<sup>230</sup> Kelefa Sanneh, February 5, 2016. “Everyone Hates Martin Shkreli, Everyone is Missing the Point,” *The New Yorker*. <http://www.newyorker.com/culture/cultural-comment/everyone-hates-martin-shkreli-everyone-is-missing-the-point> (Accessed November 5, 2016).

<sup>231</sup> Dan Diamond, December 3, 2015. “Martin Shkreli Admits He Messed Up: He Should’ve Raised Prices Even Higher,” *Forbes*. <http://www.forbes.com/sites/dandiamond/2015/12/03/what-martin-shkreli-says-now-i-shouldve-raised-prices-higher/#1bf30aaf1964> Accessed November 5, 2016).

# Appendix:



PRESS RELEASE

**Paddle8 presents the exclusive sale of Wu-Tang Clan's one-of-a-kind album  
*Once Upon A Time in Shaolin***

**Beginning March 2, the sole copy of the new and final album by the Wu-Tang Clan will be available for private sale through Paddle8**

**MoMA PS1 to host an intimate listening event and conversation with RZA on Monday, March 2**

Paddle8 is honored to present the exclusive sale of the sole copy of the Wu-Tang Clan's final album, *Once Upon A Time in Shaolin*. The album is a unique work of art that will be available for sale to one single collector, with no physical or digital duplicate in existence. Stored in a vault in Morocco since its completion last year, *Once Upon A Time in Shaolin* is the last album to include contributions by the entire surviving Wu-Tang Clan, and represents the apotheosis of the group's three-decade career. *Once Upon A Time in Shaolin* will be available for private sale through Paddle8 beginning March 2, when Paddle8 will launch a special site with musical outtakes from the album, a track list, and exclusive interviews with Wu-Tang Clan founding member RZA at [paddle8.com/wu-tang](http://paddle8.com/wu-tang).

With a cinematic narrative in the inimitable Wu-Tang vernacular, *Once Upon A Time In Shaolin* has been envisioned from execution through distribution as both a work of art and an audio artifact. A sonic sculpture presented in a hand-carved nickel-silver box, it is accompanied by a 174-page manuscript containing lyrics, credits, and anecdotes on the production of each song, printed on gilded Fedrigoni Marina parchment and encased in leather by a master bookbinder. The conditions of sale stipulate that the buyer will agree to not release any of the content of the artwork to the public for a period of 88 years. As *The Independent* wrote upon the announcement of the album's intended distribution, it serves as "a challenge to the increasing disposability of music in the digital era."

*Once Upon A Time In Shaolin* is a retrospective soundscape that threads 31 songs, skits, and stories into a 128-minute-long aural screenplay. Recorded in part in the Wu-Tang Clan's home enclave of Staten Island, New York, the album marks not only a geographic return to "Shaolin"—the philosophical home of the Wu-Tang Clan—but a sonic homecoming as well. In addition to the original Clan members, the work reunites the diaspora of MCs related to the Clan into a compelling narrative, featuring appearances from longtime Wu-Tang collaborators like Redman, members of an extended brethren including Killarmy and Sunz of Man, and the familiar scene-setting of long-time backing vocalists Tekitha and Blue Raspberry. *Once Upon A Time in Shaolin* is produced by RZA and Tarik "Cilvaringz" Azzougarh, who has collaborated with Wu-Tang Clan since being discovered by Ol' Dirty Bastard and Method Man in 1997.

On Monday, March 2, MoMA PS1 will present an intimate listening event as part of the institution's Sunday Sessions series of public programming, organized by associate curator Jenny Schlenzka. The evening will feature a never-before-heard, 13-minute compilation of tracks from *Once Upon A Time in Shaolin*, as well as a conversation between RZA and Sasha Frere-Jones, the executive editor of *Genius*, about the album itself and its experimental distribution model. The event will serve as the first and only time that the public will hear excerpts from this album. A tailored sound experience has been generously provided by Jim Toth of Timbre Tech.

"*Once Upon A Time in Shaolin* aims to reverse the devaluation of music, to celebrate the album as a work of art that encompasses the creative energies of an ecosystem of artists, and to help return music to a fine-art status. We are overwhelmed by the enthusiasm and curiosity for this project, and

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