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Mel Stanfill

University of Central Florida, mel.stanfill@ucf.edu

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Who is an “artist” being “copied” and who’s just raw material? Race and the Uneven Application of Copyright

By Mel Stanfill

Assistant Professor of Texts and Technology and Digital Media



There’s something racialized about copyright. On one hand, intellectual property protection is treated as a measure of the achievement of Western modernity, as Martin Fredriksson (2014) shows in his study of the history of Sweden. Moreover, the person who’s eligible for copyright protection is the individual author-genius, who’s believed to deserve ownership over his (usually his) ideas because he created them from nothing but his pure talent, and this is a deeply Euro-American model of creativity (and, of course, it’s also a mythological and indeed ideological one in an age of corporate “authorship”) (Arewa 2013; Fredriksson 2014; Toula and Lisby 2014). In particular, the fact that the contemporary Western model of authorship as the *ex nihilo* production of a creative genius has a historical *origin* creates slippage between a) recognizing change and b) framing it as a historical *advance* compared to other models. Fredriksson (2014, 1024) contends that “copyright was intellectually intertwined with the idea of the progress of civilization.” That is, because the idea that creativity was a form of craftsmanship—where one skillfully combined existing elements within a tradition—was superseded historically in the European trajectory (Arewa 2013; Fredriksson 2014), non-Western models with similar values are framed as backwards through applying

these Western standards (Rose 1998; Seeger 1992; Tan 2013). By equating differing systems to superseded Western notions, the other group is constructed as stuck in the past rather than having their own development. Such “backwards” non-Western producers of culture, the story goes, use “outdated” notions of copying as homage; they therefore “steal” Western IP and must be educated or sanctioned into “proper” respect for property. Certainly, international development regimes often require an importation of Euro-American copyright frameworks as “modernization” (Fredriksson 2014; Govil 2004).

On the other hand, there is not in fact absolute protection of authorship, but rather some people’s creativity is protected and that of others is fair game. In particular, copyright is not only often tilted toward corporations (Coombe 1998; Jenkins 2006; Lessig 2004) but away from less powerful groups like African Americans (Hesmondhalgh 2006; Schumacher 1995; Vaidhyanathan 2003) or indigenous peoples (Feld 1988; Seeger 1992; Tan 2013). Non-dominant models of cultural production practiced by these populations use allegedly outdated notions of creativity as giving to and building from a tradition (discussed above). Additionally, communitarian authorship models, or indeed *stewardship* models, such as are often found with indigenous groups, are routinely treated as less binding on third parties than the Western ownership-authorship model. Without an individual author to “own” such cultural production, it is often framed as able to be exploited by anyone who cares to do so (Rose 1998; Seeger 1992; Tan 2013). As Carol Rose (1998, 160) notes, such creations “may go unrecognized as property not only because of their indefinable group character, but also because of dismissive attitudes toward their creators.” This combination of disrespecting different forms of creativity and disrespecting the people who do them structures such creative production as free for the taking, as when memes from Black Twitter become cultural signifiers without histories.

From both directions, then, “proper” copyright is aligned with whiteness, and improper forms with non-whiteness. When Black artists sample someone else’s work, it’s considered theft (Tushnet 2004; Brennan Center for Justice 2005). When white folks like the Rolling Stones or Eric Clapton copy blues sounds or Moby samples blues recordings, it’s “homage” (Hesmondhalgh 2006; Vaidhyanathan 2003; Arewa 2013). Faced with this belief system, it’s vital that we ask: Who gets to be an “artist” being “copied” and who’s just raw material? Ultimately, I argue that the meaning of an act of reuse depends on who’s doing it. Reuse of existing material in new work is *both* a valid

way to produce creative work through sampling, remix, fan work, or other practices, which should be allowed and protected, *and* a new instantiation of old practices of cultural theft from marginalized populations, and our cultural analytic frames need to join cultural common sense in making these distinctions where the law itself does not.

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Mel Stanfill is an Assistant Professor of Texts and Technology and Digital Media at the University of Central Florida. Stanfill holds a PhD in Communications and Media from the University of Illinois, Urbana-Champaign. Stanfill’s research interrogates how the relationship between media industries and their audiences in the Internet era is shaped by labor, intellectual property law, consumption, heteronormativity, and whiteness, and has appeared in venues such as New Media and Society, Critical Studies in Media Communication, and Cinema Journal.