***Did Copyright Kill Classical Music?***
*Copyright's Implications for the Tradition of Borrowing in Classical Music*
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"Music may be a universal language, but a language is only intelligible if it talks of things we are able to understand. Those who write about music are too fond of treating the art as an end in itself instead of a means to interpret the indefinable something that hides behind all art. Thus, to have its maximum effect, the music of a nation must talk to a nation about itself, because a nation rarely understands anything else." – *Francis Toye*[1]

Classical music over the last two or three centuries has gone from the popular afternoon entertainment shared with friends, family, and community to a "museum piece" genre making up only 3 percent of music sales and dismissed by 'pop culture' as being old, outdated, and only for the 'elite.' This view of classical music ignores the practice of many classical composers throughout history to "create music which had current value: music for a specific function, whether that be ceremony, worship, public entertainment, dancing, or amateur music-making."[2] My question was, "Has copyright been a co-conspirator in that classical recession?" I particularly wanted to look at the tradition of borrowing in classical music.

The modern emphasis on individual originality and authorship largely ignores the fact that borrowing from existing music by other composers has always been a pervasive practice. Borrowing methods have ranged from verbatim quotation of musical phrases to allusion or paraphrase of existing works to a more general influence or "inspiration" from those works. Many composers borrowed extensively from the popular and folk songs and styles of their time. Other composers modeled new works

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[1] Francis Toye, *A Case for Music Nationalism*, 4 MUSIC Q. 12, 20-21 (1918).

[2] J. Peter Burkholder , *Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years*, 2 J. MUSICOLOGY, 115, 119 (1983).

on existing works either as an act of homage to another composer or as a source of compositional study and innovation. Composers wrote their music with the express purpose of connecting with their colleagues and their culture in a way that their audience could personally recognize and relate to. As one commentator observed, "Such borrowing… did not make these works any less creative. The works simply incorporate motives with which the audience is already familiar. This helps to evoke a certain emotion, place, or era. Borrowing is a way for classical composers to absorb the culture around them and to mark their place in time."[3]

Several composers of the 'classical canon' borrowed extensively from each other. George Frederic Handel (1685-1759), who has become the musicological 'poster boy' of historic borrowing, used other composers' works extensively in his musical compositions as a source of innovation. There is significant debate as to whether Handel should be considered an egregious plagiarist.[4] For example, his oratorio "Israel in Egypt" used musical material from several movements of a "Magnificat" by Dionigi Erba (1692-1729). Johann Sebastian Bach (1685-1750) transcribed and adapted several of Antonio Vivaldi's (1678-1741) concertos for his own keyboard concertos. Wolfgang Amadeus Mozart (1756-1791) borrowed material from Josef Haydn's (1732-1809) Symphony No.13 in D, Hob.I:13, for the Finale of his "Jupiter" Symphony No. 41 in C, K. 551. Ludwig van Beethoven (1770-1827)

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[3] Amanda Scales, *Sola, Perduta, Abbandonata: Are The Copyright Act And Performing Rights Organizations Killing Classical Music?*, 7 VAND. J. ENT. L. & PRAC. 281, 285 (2005).

[4] *See generally* Ellen T. Harris, *Integrity and Improvisation in the Music of Handel*, 8 J. MUSICOLOGY 301 (1990) (discussing the controversy over Handel's extensive use of borrowing); *See also* John T. Winemiller, *Recontextualizing Handel's Borrowing*, 15 J. MUSICOLOGY 444, 450 (1997) (discussing Handel's borrowing practices within the context of the culture of the time).

reworked existing music in at least a third of his own works, and Franz Schubert (1797-1828) and Felix Mendelssohn (1809-1847) borrowed from Beethoven. Gustav Mahler's (1860-1911) Symphony No. 3 in D minor borrowed from Johannes Brahms's (1833-1897) Symphony No. 1 in C, Op. 68, in which Brahms had borrowed from Beethoven's "Choral" Symphony No. 9 in D, Op. 125. For these composers and many others, borrowing was a source of creativity, expression, and genius.

The idea of borrowing seems to be at odds with modern notions of proprietary copyright. Modern copyright and definitions of authorship assume that composition is an act of autonomy and that musical ideas or expressions are not original or creative unless they come out of individual, internal genius. By this view, borrowing from another's work is automatically illegitimate, unlawful, and lacking creativity. Composers who borrow from existing works are assumed to be infringing unless they obtain a license. Some have even characterized such borrowing as an act of theft.[5] Such views ignore the inherently social nature of music as an art to be shared. Composers necessarily listen to other music and are influenced by other music.[6] They use the same limited musical 'tools' and 'language' as other composers. Furthermore, music is largely abstract and only has real 'meaning' when the composer, performer, or listener is able to relate the sounds to something extra-musical from their

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[5] *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F.Supp. 182, 183 (S.D.N.Y. 1991) (sampling case in which the court's opinion begins with "Thou shalt not steal"); Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 399 (6th Cir. 2004) (sampling of sound recording analogized to a physical taking); *See also* KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW 89 (2001) (discussing how sampling and borrowing practices have been called "stealing," "theft," "pickpocketing," and "devoid of creativity").

[6] Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 427 (1988).

own personal or shared experiences. Therefore, to relate to an audience, music must necessarily use sounds, melodies, and motifs that an audience would be familiar with.

Modern doctrines of copyright seem to heavily restrict or even preclude many borrowing practices that were historically ubiquitous. The limited judicial definitions of creativity or "originality," the ambiguity of modern copyright doctrines, and the fear of infringement suits could create a chilling effect on composers who would otherwise wish to creatively use existing materials. Copyright doctrines of substantial similarity and fair use have various tests of infringement (e.g., "idea-expression dichotomy,"[7] the "abstractions test,"[8] or the "total concept and feel"[9] test) and supposedly delineated categories of works (e.g., "derivative work" and "parody"), yet these categories have not always helped to clarify the definition of "originality" or infringing use. It has been hotly debated whether these judicially-created categories realistically reflect the actual practices of composers, musicians, and even the 'average listener.'

If a modern composer wanted to create a work that purposely reflected or borrowed from current popular musical works or styles in order to connect with the 'hearts' of his or her audience or with other contemporary composers, would they be able to do so without the fear of being slapped with an infringement suit?

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[7] *See generally* Baker v. Selden, 101 U.S. 99 (1879) (plaintiff had copyright protection in his expressions but not his ideas in a book keeping system); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) (examining the "idea-expression dichotomy" through an "intrinsic-extrinsic" test).

[8] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("[T]here is a point in [a] series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.").

[9] *See generally* Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970) (finding that the "total concept and feel" of two greeting cards were the same).

## I. The Traditions and Functions of Borrowing in Classical Music

Today, the practice of borrowing from existing music is seen as an unusual, anomalous technique. When we think of the great master composers of Western classical music, we have an image of a classical 'canon' of unalterable, untouchable works resulting from the purely individual efforts of autonomous composers. However, in reality, composers and musicians have been borrowing from each other for centuries dating back at least to the Renaissance, well before copyright laws existed.[10] Borrowing techniques such as quotation, paraphrase, allusion, transformative imitation, embellishments, and sets of variations on a theme were very popular well into the 19th and even 20th centuries. Borrowing was "not a sterile or servile act, but in fact a vibrant, creative one."[11]

### A. "Peer-to-Peer" Borrowing in Classical Music

Composers used a variety of borrowing methods for many different purposes throughout history. During the Renaissance (1400-1600), several borrowing techniques used existing music to capture listeners' attention by using melodies they would presumably recognize. Borrowing during that time was often also an act of emulation or homage to another musician or composer. For example, under the cantus-firmus principles, a composer elaborated on an existing original to create a new arrangement of an old favorite.[12] Composers added one or more lines of

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[10] *See generally* Hugh Arthur Scott, *Indebtedness in Music*, 13 MUSIC Q. 497 (1927) (discussing various ways that composers are "indebted" to each other by influence or borrowing).

[11] Winemiller, *supra* note 4, at 450.

[12] *See generally* Howard Mayer Brown, *Emulation, Competition, and Homage: Imitation and Theories of Imitation in the Renaissance*, 35 J. AM.

harmony or a secondary melody to a well-known song, or they would use the well-known song as a secondary melody in a larger work. Some composers would take a composition that they saw as thematically or musically related to their own and allude to it by beginning like the existing work but then continuing completely differently. "Parody" or "Imitation" masses, which had nothing to do with humor in the modern sense of 'parody,' used melodic portions from an existing piece of music (e.g., a fragment of a popular song) as part of the musical material for a new work. "Quodlibets"[13] combined several different melodies (often popular tunes) in counterpoint with each other in light-hearted, humorous way. Sometimes, a composer or musician would revise existing music to improve it or adapt it for different circumstances. For example, the composer might change the music from a four-line piece to a five-line piece to fit a poem, make a longer passage more condensed or a shorter passage more spacious, add another section, change an ending, or make any number of changes to fit a new situation or need. Several of these practices continued well into the Baroque era (1600-1750).

Through "transformative imitation," composers used existing works as a compositional starting point or model. They would rework the existing piece, adopt certain elements, or emulate the work's structural arrangement. For example, J.S. Bach's Harpsichord Concerto in F minor, BWV 1056, borrowed heavily from the first movement of Georg Philipp Telemann's (1681-1767) Concerto for solo oboe or flute and strings in G, TWV 51:G2, for solo oboe or flute and strings. Bach made minor changes to the beginning of Telemann's theme and adopted aspects of Telemann's scoring, harmony, phrasing,

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MUSICOLOGICAL SOC'Y 1 (1982) (discussing various Renaissance borrowing methods).

[13] "Quodlibet" is Latin for "whatever" or "what pleases."

cadential structure, and overall dimensions.[14] Handel also borrowed from Telemann's music on occasion. Telemann was well aware of this, and he even encouraged other composers to borrow from his works. In *Ueber die musikalische Composition* (1773), Johann Adolph Scheibe spoke of a conversation with Telemann, and he noted that Telemann understood "the art of making these inventions their own, so that they were transformed in their hands into new and original ideas."[15]

Other composers borrowed a mix of elements from several existing works to create something new. JohannesBrahms borrowed melodic style, embellishments, and chromaticism[16] from W.A. Mozart and Frederic Chopin (1810-1849), orchestration from Robert Schumann (1810-1856), and musical forms from Francois Couperin (1668-1733), Beethoven, and Schubert. Through this mix of existing elements, he developed new ideas on both previous and current musical trends. Musicologist J. Peter Burkholder observed that, as a result, Brahms' music was extremely popular with amateur musicians or "naïve" listeners as well as professional trained musicians. His music is filled with skilled techniques that "excite[ ] the learned connoisseur," yet at the same time, his music was "strikingly beautiful and emotionally appealing" with "enough familiar features to orient the untutored listener."[17]

Several composers often used quotes or smaller popular motifs to evoke a particular theme or subject, pay

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[14] Steven Zohn & Ian Payne, *Bach, Telemann, and the Process of Transformative Imitation in BWV 1056/2 (156/1)*, 17 J. MUSICOLOGY 546 (1999).

[15] *Id.* at 580 (Sheibe further said, "Telemann assured me of this more than once, and in light of other reliable reports I cannot doubt it").

[16] Chromaticism (from Greek *chroma*, "color") is the use of notes that are not in the central diatonic scale upon which a composition is based.

[17] J. Peter Burkholder, *Brahms and Twentieth Century Classical Music*, 8 19TH-CENTURY MUSIC 75, 81 (1984).

homage to another composer, or refer to a popular song or idea. Bach, Mozart, Mendelssohn, and several other composers quoted directly from popular songs and hymns, such as when Mendelssohn quoted from hymns in his "Reformation" Symphony No. 5 in D, Op. 107. Others quoted for humorous or playful purposes. Mozart wrote a set of playful variations on the then popular French song, "Ah! Vous dirai-je, Maman" ("Ah, I would tell you, Mother"), [18] which we know as the melody of "Twinkle, Twinkle, Little Star." The motif "B flat – A –C – B natural" (the musical 'spelling' of "BACH") was often used in homage to J.S. Bach,[19] and the eight-note sequence of the Gregorian "Dies Irae"[20] chant was used to evoke a theme of death or judgment in the works of several composers.[21]

### B. Musical Nationalism and Folk Music Borrowing

Folk music borrowing and the Nationalist movement are especially exemplary of classical music borrowing techniques. Composers used popular music and folk tunes as melodic or stylistic source material. For these composers, this was a way of showcasing, celebrating, connecting with, or saying something about the cultures and traditions that surrounded them. It was also a way for

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[18] Twelve Variations on "Ah! Vous dirai-je, Maman" in C Major, K. 265.

[19] This musical spelling of Bach's name refers to the fact that B-flat was historically called "B" and B was historically called "H" before modern standardization. Bach first used the motif himself in his "Art of the Fugue," BWV 1080. Schumann, Brahms, Liszt, Rimsky-Korsakov, Schoenberg, and Poulenc subsequently used the motif as homage.

[20] "Dies Irae" is Latin for "Day of Wrath." A Dies Irae movement was a standard part of a Requiem Mass.

[21] The "Dies Irae" Gregorian chant melody is comprised of a descending sequence of F-E-F-D-E-C-D-D (or some transposed form thereof). Berlioz famously used it in the "Dream of a Witches' Sabbath" movement of his "Symphony Fantastique." Other composers who used the Dies Irae motif included Haydn, Liszt, Mahler, Tchaikovsky, Rachmaninoff, Shostakovich, and Sondheim.

them to connect with their audience by using recognizable popular melodies, motifs, and styles. Musicologist Henry F. Gilbert identified three primary methods of using folk melodies in classical music:

> 1. verbatim, as a musical germ from which to develop a composition;
> 2. verbatim, but having no particular relation to the musical structure;
> 3. as suggestion of folk-like themes expressive of the folk spirit.[22]

For example, Johannes Brahms and Franz Liszt (1811-1886) made liberal use of real folk songs for their thematic material. Edward Grieg (1843-1907) used melodies of his native Norway verbatim as themes in several of his compositions, and Jean Sibelius (1865-1957) did the same for songs of his native Finland. The first fourteen notes of the "Austrian Hymn" attributed to Haydn are actually taken verbatim from a Croatian folk song. Haydn elaborated and extended the fundamental folk style of the melody, and his composition became so beloved that it is now the German national anthem. Peter Illyich Tchaikovsky (1840-1893) used Russian folk melodies either verbatim or as a heavy influence in his melodic, harmonic, or rhythmic styles and patterns. Tchaikovsky's Second Symphony No. 2 in C minor, Op. 17, is called the "Little Russian" Symphony because its main themes are Russian folk songs, and the principal subject of the first movement in Tchaikovsky's Piano Concerto in B-flat minor, Op. 23, is based on a phrase sung by the 'blind beggars' that Tchaikovsky heard in Kamenka, Russia.

Frederic Chopin made both literal and stylistic use of the folk music of his native Poland. Some scholars say

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[22] Henry F. Gilbert, *Folk-Music in Art-Music -- A Discussion and a Theory*, 3 Music Q. 577, 582-83 (1917).

that Chopin picked up Poland's folk music style from the countryside villages where he grew up; [23] others say he was exposed to folk idioms from the mazurkas and other dances in middle and upper class Warsaw salons and ballrooms where nationalist folk music was the vogue style of the time.[24] Chopin employed many of the melodic, harmonic, and rhythmic elements of this music in his own mazurkas, polonaises, and other Polish-style dance forms as well as in his larger-scale works, including his piano concertos and sonatas. This was Chopin's way of connecting with the culture of his beloved homeland.

Antonin Dvorak's (1841-1904) "Slavonic Dances," symphonies, and other works were largely developed from folk dances, rhythms, melodic phrases, and other characteristics of the Slavonic and Bohemian folk spirit. Additionally, when Dvorak traveled to America and heard ragtime and African-American spirituals, he said he was inspired to capture the spirit of American music in his "New World" Symphony No. 9 in E minor, Op. 95. Several musicologists say that some themes in the "New World" Symphony resemble "Swing Low, Sweet Chariot" (one of Dvorak's favorite spirituals) and "Turkey in the Straw."[25]

Beethoven frequently composed stylized dances and other works with a folk-like character. In his "Pastoral" Symphony No. 6 in F, Op. 68, he borrowed folk music elements from Austrian cultures. Bach, Schumann, and Schubert also were known to borrow folk materials for their compositions. In Italy, the lyrical character of the people's music was reflected in the operas of Rossini and Puccini, and many operatic melodies became the popular

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[23] *Id.* at 585.

[24] *See generally* Barbara Milewski, *Chopin's Mazurkas and the Myth of the Folk*, 23 19TH-CENTURY MUSIC 113 (1999) (discussing theories of how Chopin was influenced by folk music and the nationalist movement).

[25] Dvorak also borrowed from Beethoven in the Symphony's third movement "Scherzo."

songs of the people. Béla Bartok (1881-1945), Zoltán Kodály (1882-1967), Ralph Vaughan Williams (1872-1958), Heitor Villa-Lobos (1887-1959), and Manuel de Falla (1876-1946) were enormously influenced by the folk music of their native countries. These were all efforts by composers to connect with the popular cultures, communities, and people that surrounded them.

### C. America: The Great Musical Melting Pot

In the late 19th and early 20th centuries, American music truly started to come into full form, largely *because* of cultural exchanges and borrowing across musical traditions. The influx of immigrants coming to the "Great Melting Pot" nation brought with them the music of their home countries. English minstrel tunes, Jewish folk music, complex European classical music, and African-American spirituals came together to form the American music genres of ragtime, blues, and jazz. Two very notable borrowers in American classical music who were greatly inspired and influenced by the 'people's music' of the time were Charles Ives (1874-1954) and George Gershwin (1898-1937). Both used their borrowing techniques to consciously connect their music with a variety of cultures and a wider audience.

Charles Ives borrowed extensively from hymns, popular songs, ragtime, and marches. He would quote, paraphrase, or borrow harmonic, stylistic, and structural elements from existing works. He was known for a unique "cumulative setting" of music that developed fragmented motives from a melody or presented various countermelodies before the main theme was presented whole at the end. [26] Ives used Renaissance-style quodlibet

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[26] *See generally* J. Peter Burkholder, *"Quotation" and Emulation: Charles Ives's Uses of His Models*, 71 MUSIC Q. 1 (1985) (discussing the various ways Ives borrowed from various sources).

layering techniques, using the vertical or horizontal combination of two or more recognizable melodies as the basis of a piece. The melodies he layered were often of a similar theme or character, and he would put them together or paraphrase them as a joke or technical "tour de force." Ives would also quote familiar music to illustrate a text or fulfill an extra-musical purpose, similar to the way someone might quote Shakespeare in a speech to make a point or develop a character or theme. Commenting on Ives' conscious extra-musical purposes, musicologist J. Peter Burkholder said:

> Ives cites his models overtly. He wants us to know what they are, and that they are being quoted… Ives seems to be fulfilling an inner need to explain where his music comes from, why he wrote it, what it meant to him, and what it might evoke in us as we listen, so that we may participate in it as well. The programs he offers… provide a way in, offering an analogy to the music which helps us to experience the music as an analogy to life, an analogy with many possible meanings. They are… a way out of the music, a hook which connects us to his musical traditions and our prior experiences of the music he cites, or music like it… Because he consistently shows us his starting point – whether that be another piece of music, a philosophical idea, a personal experience, a text, an innovative musical procedure, or a combination of these – his music also goes beyond that of his predecessors to become music *about* something.[27]

George Gershwin borrowed from ragtime, blues, and other African-American musical forms, as well as from the musical language of Tin Pan Alley and European art music. He actively sought out opportunities to hear African-American performers in Harlem during the Harlem

[27] *Id.* at 26.

Renaissance. He made a point of observing the Gullah communities in South Carolina's South Sea Islands to get inspiration for his folk opera, *Porgy and Bess*. Several portions of the opera were noticeably similar to specific African-American spirituals. For example, the now very popular aria, "Summertime" used the same harmonic scheme as the spiritual "Sometimes I Feel Like a Motherless Child." Gershwin's other classical works, such as his famous *Rhapsody in Blue,* integrated the classical piano training he had as a youth with the "blue notes" and harmonic relationships associated with jazz.[28] Gershwin's music also often reflects the Jewish music, scales, and motifs he heard as a young boy growing up in the Jewish community of New York City's Lower East Side.

Both Ives and Gershwin wrote their music during a time when the social divisions between 'art' music and 'popular' music were already well entrenched, and many of their techniques of literal or stylistic borrowing were at least initially received with mixed reactions from both sides. Ives' borrowing techniques are still considered curiosities today, even though many of them, such as the quodlibet technique, find their roots as far back as the Renaissance. Gershwin's music had the elements of popular styles yet the technical attributes of European classical traditions. His audiences, both on the street and in the concert hall, found it difficult to classify his style within the existing hierarchies. Yet ultimately, Ives and especially Gershwin remain not only respected but extremely popular with audiences across genres and generations precisely because of their borrowing techniques.

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[28] *See* JOAN PEYSER, THE MEMORY OF ALL THAT: THE LIFE OF GEORGE GERSHWIN 84 (1998) ("[T]he inventive rhythms, the swinging touch that came directly from jazz, brought a quality to the classical-music world that was perceived as genuine freshness.").

## II. Conceptions of Authorship and Historic Copyright

Musicians do not usually question the genius of Bach, Beethoven, Brahms, Chopin, and other classical music maestros who borrowed extensively from existing music. Yet these composers and practices do not neatly fit into the "traditional" image of the self-reliant composer or author as the originator and exclusive owner of the work. In today's copyright framework we tend to think that "to borrow and reuse a portion of another composer's music not only violates the intellectual property rights of the 'loaning' composer, but also sullies the hands of the borrower, who fails to produce something wholly individual or original, and thus valuable."[29] We are uncomfortable with the idea of borrowing because we assume that it lacks any real originality and may even constitute plagiarism.

### A. The Author as "Craftsman"

Before modern copyright, composers had a fundamentally different concept of "authorship" or "ownership" of an artistic work. Renaissance and early 18th century ideas reflected a view of the author as a "craftsman" who manipulated traditional materials and rules in ways that satisfied their audiences.[30] "[O]riginality was not seen as creation on a blank slate, but rather as a process of selection, re-interpretation, and improvement."[31] Musical borrowing during this time was a legitimate, encouraged, and even commendable method of composition. Composers saw the work of their predecessors and contemporaries as a "common fund,"[32]

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[29] Winemiller, *supra* note 4, at 446.
[30] *See* Martha Woodmansee*, The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH CENTURY STUDIES 425, 426 (1984).
[31] Keyt, *supra* note 6, at 425-26.
[32] *Id.*

and they treated the original loan material as "capital."[33] "The act of borrowing was then amply justified by returning a substantial 'interest' of [the borrowing composer's] own original ideas derived from it and offered as a creative response to a received stimulus."[34] "It was only when a writer's use of the fund was uninventive or superficial that he would be taken to task."[35] The focus was on the quality of the creative work as a whole, not on the source of the individual components.[36]

Classical music during this pre-copyright era was a vibrant, relevant, and extremely popular style of musical entertainment. Instead of today's conception of the 'stuffy' atmosphere of concert halls where classical music is treated like old museum pieces being fed to a passive audience, the world of classical music was a much more participatory culture where the average person – performer or listener – was just as involved in the music-making and exchange of musical ideas as the composer. Friends would get together and play duets, chamber music, or on-the-spot improvisations based on music by Mozart, Haydn, Schubert and other famous classical composers.[37] Composers purposely left sections in concertos called "cadenzas" where the individual performer could show off their own compositional or improvisational skills. Sheet music of Beethoven sonatas and Rossini opera arrangements were

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[33] Ian Payne, *Another Händel Borrowing from Telemann?. Capital Gains*, 142 MUSICAL TIMES, 33, 40 (2001).
[34] *Id.*
[35] Keyt, *supra* note 6, at 426.
[36] *Id.* at 425 (noting that musical practice of the time, "emphasizing productivity and professional skill over originality of material, permitted borrowing *so long as* the composer used the material to good effect.") (citing PAUL HENRY LANG, GEORGE FRIDERIC HANDEL 564-65 (1966)).
[37] Composer and pianist Franz Schubert was famous for his regular musical gatherings with friends, known as "Schubertiades." Some of his compositions were probably inspired by the music and ideas that he and his friends came up with together at these gatherings.

just as popular as sheet music of folk songs and popular songs from 'non-classical' composers. Some of the music that we now consider classical or 'art' music was actually the 'music of the street' or of the people when it was first written. This music was played at parties, dances, festivals, or even literally at street corners and coffee shops.[38] Concerts of classical music were 'the place to be' for social circles from all walks of life. This social, collaborative, and participatory attitude toward music helps explain why borrowing practices were so historically pervasive in classical music and why so many composers felt so free to borrow from each other's works.

### B. Privileges and Early Copyright

Besides the inherent philosophical differences that were prevalent during the time of Handel and other borrowing composers, the role and structures of legal protection and copyright were also vastly different from today. Before modern copyright law, legal protection of a musical work came in the form of a printing privilege granted by a royal authority.[39] Unlike today, the focus of the protection was not on the author's right to the individual elements within the works but rather on the publisher's exclusive right to print or publish a work or a set of works.[40] The publisher with a privilege received the

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[38] In 18th century Leipzig, Germany, Gottfried Zimmerman owned a coffee shop where he would host weekly music concerts. J.S. Bach and George Philipp Telemann were regular attendees and participants. Musicians from all walks of life would come, from experienced virtuosos to amateur itinerant musicians. J.S. Bach also wrote an entire musical work dedicated to coffee, known as the "Coffee Cantata" (BWV 211).

[39] *See* Michael W. Carroll, *Whose Music is it Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1409 (2004) (discussing the history of pre-copyright structures).

[40] *See generally* F.M. SCHERER, QUARTER NOTES AND BANK NOTES 166-80 (2004) (discussing how pre-copyright and early copyright regimes affected the economic structures in which classical composers earned their living).

exclusive right to publish the work within the geographic domain of the granting government. Privileges were granted on an ad hoc basis and could vary widely in subject matter, scope, duration, and enforcement.

Composers were initially less interested in taking advantage of the legal protection of privileges. This may have been partly because most composers still received most of their income from working as performers or church musicians or in servant-like roles under the patronage system. Patrons and employers often had exclusive rights to the works of composers under them, and such works could not be published or disseminated without the patron's permission.[41] Additionally, composers often created their works for use in a particular (sometimes one-time-only) royal concert, recital, dance, religious service, or other specific event or purpose. As one scholar observed, "Bach, Mozart, Haydn, Beethoven, and their counterparts never had to contemplate such contemporary conditions as going to the marketplace to recoup their investments in their compositions."[42]

The first copyright law – England's Statute of Anne – came in 1709 as a result of negotiations between Parliament and a group of London book publishing guilds called the Stationers' Company. The Statute of Anne applied to "books," gave fourteen years of protection over publication rights in England, and required the author to deposit nine copies of the book in Stationers' Hall. The Statute was first applied to music in 1777 in *Bach v.*

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[41] *See id*.; *See also* William F. Patry, Patry on Copyright § 1:14 (2012) (discussing copyright's early history, including the patronage system and privileges).

[42] Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 758 (2007).

*Longman*.[43] In that case, Johann Christian Bach (son of the more famous Johann Sebastian Bach) sought injunctive relief for unauthorized editions of two of his compositions and argued that music composers had the same right to copyright protection as literary authors. Over the following decades, other countries and regions began enacting similar laws, but even as copyright law regimes started appearing, a composer's advantages and incentives for using these copyright protections were still relatively low. Composers usually received a flat fee for both the music manuscript and the right to print and distribute it.[44]

One of the biggest issues with both privileges and early copyright was that the control over publication of one's work often ended at the border of one's country or even one's local region. Publishers often pirated manuscripts from publishers outside their local territories. It was almost an encouraged practice.[45] In 1810, Gottfried Hartel (of the publisher Breitkopf & Hartel) told Beethoven that "under present conditions, avoiding piracy of revised editions in France, England, and Germany is impossible."[46] This limited, questionable protection and return may explain why privileges were still granted until at least 1828.[47] Wider internationalization of copyright did not come until at least the late 19th century through treaties and agreements such as the Berne Convention of 1887.

These open pre-copyright and limited copyright frameworks created an atmosphere where borrowing

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[43] (1777) 98 Eng. Rep. 1274 (K.B.); *See generally* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005) (discussing pre-copyright and early copyright structures and surveying various early music publication cases involving composers).

[44] Patry, supra, § 1:14.

[45] *Id.*; *Id.* at § 1:4 (noting the encouragement of "piracy" as an important local industry in various German states before German unification in 1871).

[46] SCHERER, *supra* note 40, at 176.

[47] Patry, supra, § 1:14 (privilege was granted in 1828 to composer Johann Hummel).

practices could flourish. Even as copyright laws spread and grew in scope, much of the music that composers borrowed – folk music, African American music, hymns, and jazz – was considered 'public domain' material that was free for the borrower to explore. This freedom to borrow and build on these existing trends and traditions gave composers a direct connection with the people's popular culture and with each other in an open exchange of ideas. However, around the time that copyright laws spread, the concept of authorship or author's rights gradually changed, and the popularity of classical music began to wane. As composers gained more rights under copyright laws, their works were increasingly viewed as a unique commodity in an increasingly capitalist economy. The composer's individual ideas came to be viewed as untouchable and unalterable, and classical music turned into something separate from the collaborative, participatory music that it once was.

### C. Changing Perceptions of Authorship: The "Romantic Author"

Over time, copyright focused more and more on the protection of author's rights rather than the publisher's rights. As a publisher's right, copyright was literally a right to copy and distribute written texts. As an author's right, the focus of copyright gradually shifted onto the individual ideas of the autonomous author.

Today's concept of "originality" is largely based on the image of the "Romantic author," which started appearing in the mid to late 18th century and came from the Enlightenment thinkers who stressed natural rights and

possessive individualism.[48] Unlike the concept of the author as a "craftsman" creatively building on the ideas of predecessors and contemporaries, "Romantic authorship" assumes that that creativity comes from autonomous acts of an individual genius creating completely new ideas. Under this view, the act of creation was embedded with ownership, and the internally "inspired" work became the property of the writer alone. This belief that an author is solely responsible for the production of a unique work is now so taken for granted that it has become central to modern copyright doctrine.[49]

In the 19th century, around the same time that the ideas of "Romantic authorship" gained greater prominence, the gap between popular music and 'art' music began to grow.[50] The work of the 'art' music composer was seen as a sacred text that should not be tampered with. The practices of borrowing from such composers started to be viewed as a 'sin,' and the traditions of borrowing from popular or folk music began to be seen as unoriginal and anomalous.[51]

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[48] *See generally* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (discussing philosophies of authorship); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991) (discussing historic philosophies of authorship).

[49] *See generally* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) (discussing the implications of copyright's focus on autonomous authorship).

[50] *See generally* Burkholder, *supra* note 2 (discussing some of the causes and effects of the gap between "popular" and "art" music).

[51] Arewa, *supra* note 49, at 598-591 (citing LAWRENCE LEVINE, HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA 30-32 (1988)) (referring to this "deification" of the classical masters and masterworks as "sacralization"); *See also*, Burkholder, *supra* note 26, at 1-2 (noting that 20th-century composer Charles Ives' borrowing practice is often considered "exceptional," "unlike the procedures of any previous composers", and "an extraordinary and deliberate violation of the customary integrity of compositions in the cultivated tradition, which are

Such autonomous, idealized views of authorship often fail to account for the inherently collaborative and social nature of knowledge, material, creation, and composition, particularly in the context of music. As one commentator observed:

> "Composers necessarily listen to other people's music. Composition does not occur in a vacuum. It occurs instead within an artistic culture that includes well-defined techniques and styles, as well as recurrent technical problems. Thus, it is natural that composers take ideas and inspiration from their colleagues. In addition, any new piece of music, if it is to be comprehensible to most listeners, must bear at least *some* similarity to works that have gone before."[52]

Another scholar said:

> "Only those who do not understand the process of musical composition, who cannot see and feel the subtlety of transfiguration that can be created by a changed melody, even a single note, rhythm, or accent, have made a moral issue of something that is a purely esthetic matter."[53]

"Romantic authorship" assumptions have led to a restrictive view of an intellectual property right that allows a copyright owner to prevent others from borrowing even a small portion from the owner's creation.[54] "By focusing

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normally individual, self-contained, and derived from unique, newly invented musical ideas").

[52] Keyt, *supra* note 6, at 427-428.

[53] PAUL HENRY LANG, GEORGE FRIDERIC HANDEL 560 (1966).

[54] *See also,* MCLEOD, *supra* note 5, at 42 (observing that this emphasis on individualistic, proprietary ownership "essentially 'freezes' the

upon a dichotomy between originality and borrowing, such views of musical authorship fail to recognize that the use of existing works for new creations can be an important source of innovation."[55]

The pervasive belief or assumption that borrowing indicates a lack of originality ignores the reality of musical practices throughout history and even today. Ironically, several heirs of famous historic musicians have been among those lobbying for stronger copyright. For example, even though Gershwin borrowed extensively from popular and folk styles of his time, his heirs have been among those fighting most aggressively for more extensive copyright duration and protection. Marc Gershwin, George Gershwin's nephew, lamented, "Someone could turn *Porgy and Bess* into rap music!"[56] He ignored the irony that an important part of his uncle's legacy is based on the fact that he turned jazz and spirituals into classical music (or vice versa, depending on your perspective). Such a view of copyright and creation could prevent current and future composers from emulating Gershwin's way of bridging the gap between classical music and contemporary genres, audiences, and cultures.

Today, classical music is heavily associated with old music that has been in the public domain for a decades or centuries. This view certainly has not helped improve the stereotypical image of classical music as the 'old' or 'irrelevant' museum-piece genre that has no relation to contemporary popular culture. Very little recent music is currently available in the public domain except obscure folk music from mostly non-Western civilizations, and using this music would not necessarily help a composer

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development of particular [music or musical elements], placing them in the hands of a single 'original' copyright owner").

[55] Arewa, *supra* note 49, at 585.

[56] Steve Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. TIMES, April 25, 1998, at $A_{15}$.

relate to a contemporary audience. The diminishing popularity of classical music has also reduced the financial resources of classical composers and musicians so as to often make it impractical for them to pay for licensing of current music.[57]

Because of modern ideas of authorship and copyright's extensive hold on current or recent music, composers today may have lost much of their freedom to use current musical language and material that wider contemporary audiences would relate to. There is no longer the open atmosphere or framework for the free exchange of creative musical ideas that had been historically the norm. Composers today also fear being labeled as uncreative or lazy if they try to use existing music, and there is little (if any) incentive for composers to creatively 'play around' with existing music in new, inventive ways that would connect them with their surrounding communities.

Leading up to today, there has been a great deal of litigation and legislation that has increased copyright's hold on existing music, ranging from the increased term of copyright duration to the Sixth Circuit's 2004 decision in *Bridgeport Music v. Dimension Films,* holding a two-second sound recording sample infringing.[58] The scope of modern copyright might limit the creativity of composers who want to explore, borrow, and expand on existing or popular music as Bach, Brahms, Chopin, or Gershwin did in their day.

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[57] *See also,* MCLEOD, *supra* note 5, at 91-92 (quoting several music executives and artists who complain about the costs and impracticalities of paying for music licensing, including Chris Lighty, a hip-hop management company executive who said, "It's very hard to find these [copyright owners] and very expensive legally. You can spend between $5,000 and $10,000 just trying to obtain a license and still come up dry").

[58] 383 F.3d at 398-402 (holding that a two-second sample of a sound recording without a license is a copyright infringement).

## III. Modern Copyright and Borrowing Practices

Modern American copyright frameworks along with the now widely accepted ideas of autonomous authorship seem to heavily restrict borrowing practices. Some modern copyright principles could preclude the basic ideas of traditional borrowing. For example, the substantial similarity[59] and derivative work[60] doctrines may prevent a composer from quoting or basing their work on an existing popular work. There is also a good deal of ambiguity and confusion because copyright has few bright line rules, and applications of copyright law often vary from one circuit to another. No single clear standard of substantial similarity or fair use has prevailed. It is difficult for a composer with no legal experience or counsel to know if or how they are allowed to experiment with existing musical ideas. The restrictive and ambiguous aspects of copyright doctrines along with the fear of infringement suits could at least

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[59] *See generally*, Arnstein v. Porter, 154 F.2d 464 (S.D.N.Y. 1946) (to recover damages for copyright infringement, a plaintiff must prove that defendant copied from plaintiff's copyrighted work and that copying constituted improper appropriation); Country Kids 'n City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996) (two works at issue must be "sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value").

[60] 17 U.S.C. §101 (West, Westlaw through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13) ("A 'derivative work' is a work based upon one or more preexisting works."); 17 U.S.C. §103 (West, Westlaw through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13) ("[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."); 17 U.S.C. §106 (West, Westlaw through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13) ("[T]he owner of copyright… has the exclusive rights to do and to authorize… derivative works based upon the copyrighted work.").

create a chilling effect among composers who would otherwise wish to creatively use existing materials.[61] One 'wrong step' could cost more than the borrowing effort was worth.

If a composer today wanted to create a work that purposely borrowed from popular music or other existing music in order to connect with his or her audience, would they be able to do so without the fear of being liable for copyright infringement? How would the methods of borrowing that classical composers traditionally used fit into modern copyright doctrines? How closely can a composer reflect a particular work or style without risking infringement?

### A. Copyright Infringement: Substantial Similarity

If a plaintiff wants to prove infringement of his or her pre-existing work, he or she would start by presenting either direct or circumstantial evidence that the defendant had access to the pre-existing copyrighted work.[62] Then the plaintiff must prove that his work and the defendant's work are substantially similar and that those similarities resulted from illicit copying of the original, copyright-protectable elements of the plaintiff's work.[63]

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[61] *See*, Keyt, *supra* note 6, at 424 ("Because of the danger of infringement suits, many record companies and popular musicians have made it a policy never to listen to or look at unsolicited musical material").

[62] *See, Arnstein,* 154 F.2d at 468 ("[T]he evidence [of access and copying] may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence – usually evidence of access – from which the trier of the facts may reasonably infer copying.").

[63] *See, Country Kids 'n City Slicks, Inc.*, 77 F.3d 1280, 1288 (10th Cir. 1996) (court said the test is "whether the accused work is sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value"); *Arnstein*, 154 F.2d at 468 (to recover damages for copyright infringement, a plaintiff must prove that defendant

For most composers using historic borrowing techniques, access would often be relatively easy to prove. As mentioned earlier, several historic composers even sought out opportunities to access the works and styles they hoped to emulate. Additionally, many composers borrowed from styles and works that were popular at the time, some of which were intimately familiar to them (e.g., Chopin and Polish folk dances).

Substantial similarity can be found in either "fragmented literal similarity" or "comprehensive non-literal similarity."[64] Fragmented literal similarity involves verbatim reproduction of protected portions of the pre-existing copyrighted work but does not necessarily involve copying the work's overall essence or scheme. "Comprehensive nonliteral similarity" is where the "fundamental essence or structure of one work is duplicated in another," even if the infringer did not quote verbatim from the particular work.[65] Both approaches ask for a quantitative and qualitative analysis of what was allegedly 'taken' from the plaintiff's work, and both hold potential problems for borrowing composers.

Under "fragmented literal similarity," if a composer wanted to directly quote from part of a popular song in the same way as Ives or Tchaikovsky, they would probably be liable for infringement unless they could pay for licensing. Ives' work exemplifies the idea that quoting or paraphrasing from popular recognizable songs is an

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copied from plaintiff's copyrighted work and that copying constituted improper appropriation; in cases where access to the existing work is proven, a more general substantial similarity analysis is employed; where access is not proven, courts will use a more detailed analysis of "striking" similarity to infer access and determine whether the similarities are "so striking as to preclude the possibility that the plaintiff and defendant independently arrived at the same result").

[64] 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03 [A] (2012).

[65] *Id.*

especially effective way of getting your audience to react and relate on a deeper level. However, for a composer who wanted to quote an existing song today, the potential cost or risk of liability might not be worth the effort.

A composer using a compositional method similar to Bach or Handel's style of transformative imitation – using an existing work as a model for a new work – may run into some problems under a "comprehensive non-literal similarity" analysis. The same might be true for a nationalist-style composer who wanted to use a melody, harmony, or rhythm similar to a popular style to evoke the "spirit" of the style or a particular work. If a composer today borrowed from a recent existing work the way Bach borrowed several structural and harmonic elements from Telemann's work, he or she would potentially be pulled into litigation. Similarly, if Gershwin were sued for copying the overall harmonic scheme and structure of African-American spirituals and works of the Gullah community to write his opera "Porgy and Bess," a good deal of his work would be challenged.

**i. How Much Similarity is Too Much?**

The question then becomes "how much borrowing or similarity is too much?" This has been a difficult question for legal scholars to answer, and a composer with little or no legal experience would be even more confused. Most of the confusion over substantial similarity doctrines comes from the fact that there is no bright line rule as to how much similarity constitutes "substantial similarity" or how much "copying" constitutes illicit copying or unlawful appropriation. In their efforts to come up with some guidelines, most courts have focused on the artistic and commercial "value" of the borrowed material. They have also used some form of the "idea-expression dichotomy," which focuses on which aspects of the plaintiff's work are copyrightable expressions and which are non-copyrightable ideas. However, courts have been inconsistent and often

vague in their applications of these principles, and such principles do not always help a borrowing composer to know what they are or are not legally allowed to do in their efforts to creatively borrow musical elements from existing works.

**a. The "Value" of the Borrowed Material**

The more 'valuable' the material was to the plaintiff's work, the more likely that the borrowing will be found to be 'too much.' The court will ask whether the defendant borrowed "that portion of [the plaintiff's work] upon which its popular appeal, and, hence, its commercial success, depends."[66] Was it the "catchy part,"[67] the "heart of the composition,"[68] or the "essential musical kernel"[69]? The court in *Arnstein v. Porter*, a seminal substantial similarity case, said the question is "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners… that defendant wrongfully appropriated something which belongs to the plaintiff."[70] Additionally, the *Arnstein* court said, "The plaintiff's legally protected interest is not… his reputation as a musician but his interest in the potential financial returns from his compositions."[71] The concern is that if the borrower takes the more valuable part of the plaintiff's work, then the subsequent work will be seen as a market substitute for the original.[72]

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[66] Robertson v. Batten, Barton, Durstine, & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956).

[67] Keyt, *supra* note 6, at 439-40 (discussing the implications of the judicial focus on the "value" of musical material).

[68] Elsmere Music, Inc. v. Nat'l Broad. Co., Inc., 482 F.Supp. 741, 744 (S.D.N.Y. 1980).

[69] *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177, 178 n.6 (S.D.N.Y. 1976).

[70] *Arnstein*, 154 F.2d at 473.

[71] *Id.*

[72] *See,* Keyt, *supra* note 6, at 440 (noting that the Arnstein case presumes that "appropriation of the catchy part is likely to result in appropriation of the plaintiff's customers as well… [and such use] will often be sufficient,

The judicial assumption that borrowing the "valuable" part of a work is an illicit or unlawful act of misappropriation is in direct conflict with many traditional methods of composition. A composer would often quote or paraphrase part of a known song precisely *because* it was presumably recognizable or "catchy." This was a way of making cultural or extra-musical references and getting the listeners involved in the music-making. By precluding this kind of quotation or allusion, this judicial view of borrowing could prevent composers from making valuable, direct connections with their audiences.

Additionally, this view of illicit copying focuses almost exclusively on the damage to the plaintiff's work. Courts have little to say about the value of the borrowed material to the defendant's work or the potential damage to the defendant's work if the borrowed portion were prohibited. One commentator speculated that this "prevents a defendant from appropriating a [plaintiff's] five-minute song for use in a four-hour opera, but would seem, conversely, to allow the defendant to market as his own a five-minute aria out of a plaintiff's four-hour opera."[73] Musical material can sound and 'feel' drastically different, depending on its treatment and larger context. This view of copying might not consider the effect of the context, changes, or additions that a defendant may have made to a plaintiff's material or the ways that a defendant's use of the borrowed material may be artistically and creatively beneficial to society.[74]

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for the audience of consumers to treat the defendant's work as a market substitute for the plaintiff's").

[73] Keyt, *supra* note 6, at 439 (examining the implications of the focus on the "value" of musical material as expressed in Arnstein v. Porter).

[74] *See,* Keyt, *supra* note 6, at 439-41 (discussing the focus on the value of the plaintiff's work and noting that there may be liability even where the defendant transformed the borrowed material so "it no longer sounded so catchy").

### b. The "Idea-Expression" Dichotomy

The main idea behind the "idea-expression dichotomy" doctrine is that mere copying does not automatically equal illicit copying.[75] Rather copyright infringement only occurs when a defendant has copied the copyright-protected expression of a plaintiff's ideas, not just the ideas themselves.[76] The ideas are the commonplace elements or public domain 'facts' in the work. For example, the basic idea of a "boy meets girl" story is not copyrightable because it is so commonly used that it is essentially public domain. Facts are not copyrightable because they are discovered, not original to the author.[77] Merely copying such facts and trite concepts would not be infringing. The expression of the ideas is the particular way that the ideas are used in the work to make the work "original" and thus copyrightable.[78] For example, the film "When Harry Met Sally"[79] has a different expression of a "boy meets girl" story than "You've Got Mail."[80] Judge Learned Hand discussed a similar idea in

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[75] *See,* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991) ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected. … [C]opyright protection may extend only to those components of a work that are original to the author.").

[76] 4 Nimmer, *supra* note 64, at §13.03.

[77] *Feist*, 499 U.S. at 344-45 ("[F]acts are not copyrightable."); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 ("No author may copyright his ideas or the facts he narrates.").

[78] 4 Nimmer, *supra* note 64, at §13.03.

[79] *When Harry Met Sally* (Castle Rock Entertainment 1989) (two characters are friends for over ten years; they are afraid of taking the relationship any further because it might ruin their friendship; at the end, they both acknowledge that they love each other).

[80] *You've Got Mail* (Warner Bros. Pictures 1998) (two characters meet under pseudonyms in an online chat room; in their internet lives, they secretly think they are the perfect match for each other; in their outside

his so-called "abstractions test" in *Nichols v. Universal Pictures Co.*,[81] which involved two allegedly similar plays:

> Upon any work, …a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about…; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.[82]

The Ninth Circuit in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* used a two-prong test to determine substantial similarity under the idea-expression dichotomy doctrine.[83] First, an "extrinsic test" uses expert witnesses and analytic, somewhat objective dissection to determine whether the "ideas" are "substantially similar."[84] In cases involving music, the extrinsic test often involves musically experienced experts. Second, an "intrinsic test" relies on the subjective responses of "lay listeners"[85] (i.e., the jury) to evaluate whether the "expressions" and "total concept and feel" [86] of the two works are "substantially similar."[87] Both prongs

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"real lives," they are business rivals and cannot stand each other; the guy finds out the truth about their double lives and falls in love with the girl in real life but still keeps his internet identity a secret; the girl starts secretly falling in love with the guy in real life; in the end, the guy reveals his internet identity; they acknowledge that they love each other).

[81] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[82] *Id.*

[83] 562 F.2d at 1164-67.

[84] *Id.*

[85] *Arnstein*, 154 F.2d at 473.

[86] *Roth*, 429 F.2d at 1110 (finding that the "total concept and feel" of two greeting cards were the same).

[87] *Krofft,* 562 F.2d at 1164-67.

of the Krofft test must be satisfied in order to prove infringement.[88] While some courts view the two prongs as separate, one prong can affect the perceptions and conclusions of the other. As one commentator acknowledged, "it is doubtful that jurors can selectively ignore the expert testimony upon which they likely will have based their determination of the issue of copying."[89]

If the musical "idea" is common or in the public domain, an infringement charge can be rebutted. For example, if two works at issue share a motif of several notes or a chord progression, a defendant can show how that same sequence of notes or chords appears in literal or similar form in other music.[90] This may bode well for a borrowing composer who wants to develop a work based on the "spirit" of a popular style like a nationalist composer creating a folk-style work. Some common elements, such as certain chord progressions, can be very evocative of certain styles. A classical composer might be able to find the "common" elements of popular musical styles that still made those styles distinct and show that the similarities at issue are "common devices frequently used and dictated by

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[88] *Id.*

[89] Christine Lepera and Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15-SUM ENT. & SPORTS LAW. 3, 22 (1997); *See also,* Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1232-33 (3d Cir. 1986) (noting that the distinction between expert testimony and lay opinion "may be of doubtful value when the finder of fact is the same person for each step: that person has been exposed to expert evidence in the first step, yet she or he is supposed to ignore or 'forget' that evidence in analyzing the problem under the second step").

[90] *See* Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 720-21 (9th Cir. 1976) (the plaintiff's song was not a completely unique composition because it contained a four-note sequence common in the music field).

the music's form or style."[91] For example, a defendant could show that their use of a chord progression or rhythm from the Motown songs of the 1960's resulted from incorporating a well-established musical style, not from copying a plaintiff's particular song. This type of borrowing could allow a composer some flexibility to participate in a cultural exchange of ideas in a way that theoretically does not have as much risk of liability.

However, one major point of confusion in applying the idea-expression dichotomy principles to music is that they were created for more factual subject matter, such as literature, where the line between the basic "ideas" and the unique "expression" is much easier to see. In music, that distinction is much more difficult, if not near impossible, to make.[92] Notes, harmonies, and rhythms by themselves are in the public domain and cannot be copyrighted. The musical ideas underlying any two compositions are essentially the same.[93] Many courts have noted the "limited number of notes and chords available to composers and the resulting fact that common themes

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**91** Lepera, *supra* note 89, at 5; *See e.g.,* Intersong-USA v. CBS, Inc., 757 F.Supp. 274, 280 (S.D.N.Y. 1991) (noting that a descending scale step motive is a commonly used compositional device.); Repp v. Webber, 947 F.Supp. 105, 113-16 (S.D.N.Y 1996) (noting that certain devices such as the use of rising arpeggios and tetrachords are among the most common devices in music, particularly religious music); Landry v. Atlantic Recording Corp., No. 04-2794, 2007 WL 4302074, at *6 (E.D. La Dec. 4, 2007) (noting that three songs at issue contained motives, phrases, chords, a pentatonic (5 note) blues scale, and other techniques common to all rock music).

**92** *See* Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004) ("The extrinsic test provides an awkward framework to apply to copyrighted works like music or art objects, which lack distinct elements of idea and expression.").

93 In Western music, there are twelve basic tones repeated over several octaves. Within that, a typical Western diatonic scale (pattern of sequential notes around which a piece of music is centered) is made of only seven basic tones.

frequently reappear in various compositions."[94] Cultural and musical convention allows for only so many combinations that are "pleasing to the ear."[95] Additionally, music is largely an abstract art form that only has meaning through the extra-musical experiences, associations, and reference points that the listeners themselves attach to the abstract sounds. It is difficult to ascertain how much one can or should reduce music to its basic "abstractions" to find the "ideas" or where the arrangement of musical "ideas" becomes a protectable "expression."

Courts sometimes vary in their judgment of where the public domain idea ends and the original expression begins. Some courts make it seem as if the originality threshold was not very high. In *Wihtol v. Wells*, the plaintiff's composition was very similar to an old Latvian, Italian or Russian folksong that had been in the public domain for years prior to the plaintiff's use of it.[96] Even so, the Seventh Circuit found that the additions the plaintiff made to the old folk tune were sufficient to meet the originality requirements of copyright law. The court noted that when an author adds something recognizable as a "distinguishable variation" to public domain music, it is enough for it to be "his own."[97] However, the court in *Norden v. Oliver Ditson, Co.* seemed to potentially set the bar quite a bit higher when it said that a copyrightable composition "must have sufficient originality to make it a new work rather than a copy of the old, with minor changes

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[94] Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988).
[95] *See* Darrell v. Joe Morris Music Co., 113 F.2d 80 (2d Cir. 1940) ("[W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear.").
[96] Wihtol v. Wells, 231 F.2d 550, 551-52 (7th Cir. 1956) (plaintiff admitted that he got his idea from a tune he had heard an organ-grinder play that was similar to the tune of his composition).
[97] *Id.* at 553-54.

which any skilled musician might make."[98] The lack of a consistent bright line standard of "originality" makes it difficult for a borrowing composer to know when he or she can copy an existing "idea" or how much he or she would need to change the borrowed material in order to be considered "original" and not "illicitly copied."

Furthermore, the tests are largely based on the subjective view of the lay listener.[99] Substantial similarity between two works is based on the question of whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[100] Moreover, "a jury may find a combination of unprotectable elements to be protectable… because the over-all impact and effect indicate substantial appropriation."[101] Thus, if a composer stylistically modeled their work off of an existing work (or style), a jury could still potentially find infringement even if the composer only borrowed the "common" elements found elsewhere. The composer might not intend to infringe a particular song, yet the limitations of possible musical ideas may cause the two works to sound more similar than they actually are or were intended to be.[102] For example, a composer who wanted to stylistically model a work (or part of a work) off of Michael Jackson's music could be labeled as an infringer if the jury thought the work sounded a little too much like "Thriller."

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[98] 13 F.Supp. 415, 418 (D. Mass. 1936).

[99] *See Arnstein*, 154 F.2d at 473 (noting that "lay listeners" are those "who comprise the audience for whom such... music is composed"); Hogan v. DC Comics, 48 F.Supp.2d 298, 310 (S.D.N.Y. 1999) ("Substantial similarity is generally a question of fact for a jury.").

[100] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

[101] *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (internal quotations omitted).

[102] Stylistic imitations have been mistaken for the real thing, even during the height of the nationalist movement.

Because there are only so many notes available to a composer, a borrowing composer in a sympathetic or musically knowledgeable court may have more flexibility in their use of musical "ideas." However, it is difficult for a composer to predict with any real confidence what a court or a jury will consider a "common musical idea" and what would be considered a copyrightable "expression," and it is problematic for composers to try to borrow only the "ideas" or common elements in order to 'tip toe' around a potential lawsuit. In any case, depending on how closely the composer reflected the borrowed style, how much he changed from the borrowed works, or what specific musical elements he borrowed, his work could still be found substantially similar by a jury of "lay listeners."

**ii. Elements of Music in the Eyes of a Court**

For a composer who wants to borrow from or reflect an existing work in an non-infringing way, he or she may try to rework or alter the music by changing some of the notes or harmonies, varying the rhythm, setting it in a different key or mode (Major or minor), putting it at an unexpected place in the musical structure, or layering the borrowed portions with other melodies and musical elements. A composer might only borrow one particular aspect of the existing work that he or she found attractive or useful in creating his or her own work, or a composer might borrow a mix of elements from various sources. The question then becomes: what aspects of the music does a composer have more freedom to directly borrow? How (or how much) would he or she have to alter the existing music in order for it to be non-infringing?

Courts have looked at a variety of elements to influence their decision of substantial similarity in music including melody, harmony, rhythm, pitch, tempo, phrasing, timbre, tone, spatial organization, consonance, dissonance, accents, bass lines, new technological sounds,

and overall structure.[103] Even with this long list of possible considerations, most judicial discussions of music copyright tend to focus most of their discussion on three basic elements - melody, harmony, and rhythm.[104] It is generally thought, or at least implied, that the originality of a piece of music is to be found in one of these elements. This simplistic analysis of originality and musical textures probably results from the fact that most copyright litigation has been centered around popular music, which usually has a relatively simple melodic, harmonic, and rhythmic texture.[105]

Some courts have implied that there may be a difference between analyzing popular music and analyzing more complex music.[106] Compared with popular music, classical music is often much more complex with multiple melodies, intricate rhythms and harmonies, embellishments, special performance techniques, and other more complicated, layered elements. From a musical perspective, much of a composer's originality can come from the way these complexities are layered and combined or varied, even where some of the material is borrowed. Judicially, this complexity could work for or against a borrowing classical composer. A more favorable court could see the additions and other more complex elements

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[103] *See Swirsky*, 376 F.3d at 849 (noting the various musical elements courts have considered).

[104] *See* Keyt, *supra* note 6, at 429-33 (surveying the judicially recognized elements of music and noting the tendency to focus on melody, harmony, and rhythm); John R. Autry, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, 10 J. INTELL. PROP. L. 113, 122-24 (2002) (surveying the judicially recognized elements of music, focusing on melody, harmony, rhythm, and structure).

[105] *See* Keyt, *supra* note 6, at 429-33, (criticizing various courts' simplistic or misinformed analysis of the elements of music).

**[106]** *See* Selle v. Gibb, 741 F.2d 896, 899 (7th Cir. 1984) (noting that the expert was highly experienced as a classical musicologist but had never analytically compared two popular musical works).

and layers as original expressions that make the piece substantially different from the pre-existing work. On the other hand, a less favorable court might stick with the "fundamentals" and dismiss the borrower's additions to the existing work. Copyright can seem quite restrictive if a court only allows for a limited definition of "originality" with the elements of music.

**a. Melody**

Some have argued that the melody is the part of the music most probative for an inquiry of "originality."[107] As a result, it is likely that, out of the choices of musical elements, a composer has the least amount of freedom to borrow from an existing melody. A court may look more generally at the similarity of thematic material, the melodic contour, or the overall shape of the musical phrase. Other courts employ a more detailed, exacting analysis of the individual notes and intervallic[108] relationships, looking note by note or interval by interval. The more notes or intervals the two works have in common, the more similar they are seen to be.[109] A borrowing composer could try to change or add enough notes to an existing melody to not be found infringing, but there is no bright line rule as to how many similar notes are too many. It is a question of both qualitative and quantitative value.

Many melodies will sound the same to some extent because of the limited amount of notes available. This is compounded by the fact that the two works at issue in a

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[107] *See* Northern Music Corp. v. King Record Distrib. Co., 105 F.Supp. 393, 400 (S.D.N.Y. 1952) ("It is in the melody of the composition- or the arrangement of notes or tones that originality must be found. It is the arrangement or succession of musical notes, which are the finger prints of the composition, and establish its identity.").

[108] Intervals are measures of relational distance from one note to another (e.g., the distance from A up to F is relationally the same as the distance from B up to G).

[109] *See* Autry, *supra* note 104, at 122-24 (analyzing how different courts have analyzed the elements of music).

case are often treated as if they were alone in their own little universe with less consideration of the larger musical world.[110] The court in *Repp v. Webber* noted that both melodies at issue began with an "identical interval of a sixth." [111] That similarity was not ultimately dispositive in *Repp*, but if one were to consider this a more probative fact, one would find many musical works in the wider repertory to be infringing.

A composer can show musical creativity or originality by the way he treats or adds to the melody. Some composers start out like an existing melody and continue with something completely new.[112] They might use embellishments, ornaments, chromaticism, variations, and many other tools and techniques; and the resulting expression may be original. However, courts have been inconsistent in their treatment of melodic embellishments. In *Allen v. Walt Disney Productions*, the plaintiff alleged that the two songs at issue only had two minor differences,[113] but the defendant argued that the Disney song's "decorative and embellishing notes" made it sufficiently original.[114] The court concluded that there might not be any "identity" or similarity in the passages at issue because the decorative notes made the compositions

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**110** *See* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 484-85 (2007) ("The universe within which courts evaluate the similarity of works is often a circumscribed one that may even be limited to consideration of the two works.")

111 *Repp*, 947 F.Supp. at 112.

**112** *See e.g.,* Stratchborneo v. Arc Music Corp., 357 F.Supp. 1393, 1405 (S.D.N.Y. 1973) ("Aside from some similarities in the opening passages, the works sound, to the non-professional customer's ear, quite different from plaintiff's work.").

**113** Allen v. Walt Disney Prods. Ltd., 41 F.Supp. 134, 137 (S.D.N.Y. 1941) (comparing the Disney song "Some Day My Prince Will Come" to the song "Old Eli" from a collection of college music published by Yale University).

114 *Id.* at 139-140.

dissimilar.[115] By contrast, other courts, such as in *Repp v. Webber* focused more on the fundamental melodic notes because the surrounding notes were "merely ornamental and decorative, and discounting them in ascertaining the fundamental melodic pitches is consistent with common musicological analytical practice."[116] At the same time, it is possible to oversimplify the music until one is only left with "fundamental" similarities. As the dissent in *Arnstein* recognized, a less favorable court could see similarities where none really exist.[117]

If a composer wanted to allude to a popular melody in the same way as a nationalist composer like Dvorak or Tchaikovsky, using a popular melody as a "germ" from which to develop a larger piece, they might embellish the melody or make it more complex. Chopin added quite a bit of ornamentation and technical complexity to his melodies while still distinctly evoking a particular song or style. Under the *Allen* case's standard, a composer may be able use similar techniques and show a sufficient amount of "originality" in the added material. However, under an analysis that focuses more on the "fundamental" pitches in the melody, such techniques may not be viewed as favorably, depending on how much or how prominently notes were added or changed. It is not always easy to predict which view a court might take.

A composer's choice of key (e.g., A Major as opposed to D minor) might be a consideration, but most courts give it little weight and imply that the choice of key is an idea that is impossible to separate from the expression.[118] A composer could have chosen his key for a

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[115] *Id*.
[116] *Repp*, 947 F.Supp. at 112 note 2.
[117] *Arnstein*, 154 F.2d at 476-77.
**[118]** *See* Autry, *supra* note 104, at 135-36 (surveying judicially recognized musical elements, including key and mode); *Tisi v. Patrick*, 97 F.Supp.2d 539, 543 (S.D.N.Y. 2000) (noting that both songs at issue were in A Major but many other songs are also in that key).

specific aesthetic reason or simply because the instrument or instrumentalist involved is most physically comfortable or deft at playing in that key.[119] Courts have similarly not often considered the "mode" – Major or minor – of a work because there are only two choices that are commonly used in western popular music.[120] By contrast, some classical composers have used other more unusual modes, such as Ionian, Dorian, Lydian, Phrygian, and Mixolydian.[121] Other classical music is set in an ambiguous key or with no central key at all. If a modern composer re-set a popular melody in one of these unusual modes, it is theoretically possible that a court may be willing to take that originality into account. Though, if the melody was recognizably borrowed, such originality is unlikely to be given very much weight.

For a composer who wants to creatively use an existing melody in an otherwise very original work, a judicial melody-centered view and the lack of standard as to how much melodic "originality" is required can be a serious disadvantage. The melody is often viewed as the "catchy" part, and as said before, more similarity is often

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[119] Historically, each key was believed to have large emotional, aesthetic, and sometimes even philosophical implications. For example, the key of C Major was believed to be especially happy; the key of D Major was seen as evoking feelings of royalty, victory or glory; and the key of E-flat Major (because of its use of three flats) was seen as representing God in the Trinity.

[120] *Contra Repp*, 947 F.Supp. at 113 (noting the different modes between the two songs and how this affected the different mood or purpose of the two songs at issue).

[121] Modes like Ionian, Dorian, Phrygian, Lydian, Mixolydian, Aeolian, and Locrian were relatively common in Medieval and Renaissance music; they have come back into some use in classical music of the last hundred years. Stravinsky used the Phrygian mode in his "Symphony of Psalms" (1930); he used medieval and Russian modes in many of his other works as well. Debussy used several medieval modes in his works, including his "Suite pour le Piano" (1901). The Beatles used Dorian mode in their song "Eleanor Rigby."

found where the "catchy" part of an existing work has been borrowed. Such a restrictive view of music ignores the fact that music is made up of many more elements than just melody, and it denies the reality that the meaning of a melody can change drastically depending on its larger musical context. A melody-centric court or jury might not be as willing to give sufficient weight to the creative things a composer can do with harmony, rhythm, structure, layering, and other compositional elements and techniques.[122]

Classical music often has a much more complex view of the use of a melody. Many composers, dating back to the Renaissance and including more recent composers like Ives, layered popular melodies as lower secondary voices in the harmony of an otherwise completely new work.[123] Some composers would borrow a recognizable or unique melody but change or extend the melody's rhythm, start on unexpected beats, use different harmonies, and alter other surrounding musical elements. This changed the context and meaning of the melody and even added new extra-musical meaning. Such techniques would catch an audience's attention and allow composers to appeal to both untrained listeners and connoisseur musicians.

Today, if a composer made an existing melody into part of a harmony underneath a new original melody, the judicial focus might still be on the borrowed melody even if

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[122] *Contra* Swirsky v. Carey, 376 F.3d 841, 848 n.13 (9th Cir. 2004) (acknowledging that the same pitch sequence played with different key, harmony, rhythm, and tempo could sound substantially different).

[123] In Ives' *West London*, he quoted a hymn as a secondary melody in his larger work. In doing so, he extended the rhythmic values of some of the notes (e.g., he turned some of the quarter notes into half notes, some of the eighth notes into quarter notes, etc.) and changed the surrounding harmonies. If played by itself, the melody would sound similar to the source material, even if it looked different on the page. However, in the larger texture of the work, it may sound quite different, particularly if played at a slower speed in the midst of the other musical elements of the work.

the rest of the work was much more original and creative. Likewise, if a composer borrowed several melodies from different sources and layered them in a quodlibet style work, they would probably be found infringing on several songs even though the work as a whole would never be mistaken as a market substitute for the original pre-existing works. Courts that have mostly dealt with relatively simple 'pop' music have not had much chance to consider this kind of complexity. They might not recognize the musical creativity or "originality" involved in these techniques, which had historically been very prevalent. In a less favorable court, this complexity might not influence a court's decision very much, if at all, and any "substantially similar" quote or paraphrase of a melody, no matter how layered or embellished, could be considered infringing. As a result, melody is probably also the element that composers are most reticent to experiment with for borrowing purposes.

**b. Harmony**

Harmony involves the composer's choices of how different pitches vertically relate to each other, and harmonic chord progressions are the relationships from one chord (i.e., vertical set of pitches) to the next. As mentioned before, harmony is often very suggestive of certain styles. The harmonies used by a Motown band are noticeably different than those used by a punk rock band. Even so, many similar chords and harmonic progressions will be found in a great number of pieces.[124] If one were to judge Beethoven's works purely based on basic patterns

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[124] *See* Rob Paravonian, *Pachelbel Rant*, YOUTUBE (Nov. 21, 2006), http://www.youtube.com/watch?v=JdxkVQy7QLM (using Pachelbel's Canon in D, T. 337, to illustrate how multiple songs use similar chord progressions and melodic elements); *see also* The Axis of Awesome, *The Axis of Awesome: 4 Chords Official Music Video*, YOUTUBE (Jul 20, 2011), http://www.youtube.com/watch?v=oOlDewpCfZQ (showing many popular songs that sound similar because they use the same for chords).

of chord progressions, many passages in his works could be reduced to two very common chords. Much of copyright litigation has been centered around popular music, where customary harmonic progressions have been especially limited.

Because there are often limited harmonic choices available, courts generally do not give harmonic similarities as much weight as melodic similarities.[125] A plaintiff who wants to prove infringement would probably need to show that a large number of chords have been borrowed. He or she must also be able to show that those chords are not trite or common to music in general or to the particular styles or genres in question.[126] Since this analysis gives harmonic similarities less weight, a composer might have some level of freedom to borrow from an existing harmonic progression, particularly where other surrounding elements in the new composition are original.[127]

Some courts have been willing to find a lack of similarity where the harmonic differences noticeably change the complexity and character of the work. For example, in *Repp v. Webber*, the court noted that, even where the melodies were similar, the harmonic progression in Repp's song was "very simple," but the harmonies in

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[125] *See generally* Tisi v. Patrick, 97 F.Supp.2d 539, 543-44 (S.D.N.Y. 2000) (thoroughly analyzing the similarities and differences in the chord structures works and discounting the similarities in a chord progression that was particularly common).

**[126]** *See id.* (chord progressions in both works at issue were commonly "found in songs in all genres"); McRae v. Smith, 968 F.Supp. 559, 566 (D. Colo. 1997) (noting that chord progressions found in both works at issue were "the most common chord progressions in all of the music of Western civilization").

[127] *Contra* MCA, Inc. v. Wilson, 425 F.Supp. 443, 448-49 (S.D.N.Y. 1976) (defendant borrowed a particular chord progression along with other elements from a particular song that may have been common to a genre but admitted there were at least seven others available to him that were also common to the genre; the court ultimately found the defendant had infringed on the plaintiff's work).

Webber's song were "complex and extremely sophisticated."[128] This made the overall character of the pieces creatively very different from each other.[129] Thus, if a composer is creative with their harmonic choices, they may have some extra room to borrow other portions or elements of an existing work.

On the other hand, copying a more complex chord progression can lean a court toward a finding of infringement. In *Gaste v. Kaiserman*, the plaintiff's expert pointed out that the harmony copied from the plaintiff's work "evaded resolution" in a very creative way that "he had never seen… in any other compositions."[130] The court found this to be probative, and they ultimately sided with the plaintiff.[131]

**c. Rhythm**

Rhythm is the temporal relationship between the notes – i.e., the durational value of the individual notes and how those durations allow the notes to relate to one another. The range of rhythmic values or durations is thought to be fairly limited.[132] Thus, courts tend to find rhythmic similarity less persuasive unless the rhythmic similarities between the two works at issue are symmetrically layered with other similarities.[133] On the other hand, courts might be willing to consider rhythmic differences or complexities. In *Repp*, the court noted the "rhythmic character" of the second phrase of both songs

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[128] Repp v. Webber, 947 F.Supp. 105, 113 (S.D.N.Y. 1996).
[129] *Id.*
[130] Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988).
[131] *Id.*
[132] Rhythmic values include whole notes, half notes, eighth notes, sixteenth notes, and a few others.
[133] *See* McRae v. Smith, 968 F.Supp. 559, 566 (D. Colo. 1997) (striking similarity was not established where certain individual notes of each composition did not share "significant amounts of . . . rhythm."); *See* Autry, *supra* note 104, at 136-38 (surveying how courts have analyzed rhythm in copyright litigation).

were similar.[134] Yet the court also noted several other differences in the rhythm and meter of the two works, saying, "These differences in timing qualitatively alter the core personality and character of the two songs."[135]

Courts have sometimes misunderstood or 'disagreed' over what the term "rhythm" encompasses. One common point of confusion, even among lay musicians, is to mix up the definitions of rhythm and beat. The "beat" is the basic pulse underlying the music to keep it going at a steady speed. Some courts have defined rhythm as tempo when actually tempo is simply the speed at which you play a piece of music.[136] Tempo is largely irrelevant to similarity, especially considering that it can even vary from one performer to another. Other courts and scholars have considered meter[137]– the number of pulses or beats within each bar or measure of music[138] - to be part of or the same as rhythm.

As with harmony, the fact that rhythmic similarities are less persuasive to a court gives a borrowing composer

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[134] *Repp*, 947 F.Supp. at 113 (stating that the two works were rhythmically similar in that "(1) the basic pulse of both phrases is the quarter note; (2) the relationships between the time values of certain consecutive pitches is similar; and (3) the time values of the first three identical melodic pitches, B, E and G, are identical.").

[135] *Id.* at 116; *See also* Allen v. Walt Disney Prods. Ltd., 41 F.Supp. 134, 140 (S.D.N.Y. 1941) (the court did not give the rhythmic similarities much weight; the court also noted that one song was written as a waltz and the other as a march).

**[136]** Northern Music Corp. v. King Record Distrib. Co., 105 F.Supp. 393, 400 (S.D.N.Y. 1952) ("Rhythm is simply the tempo in which the composition is written . . . . [O]riginality of rhythm is a rarity, if not an impossibility.").

[137] *See Repp*, 947 F.Supp. at 113 (one of the songs was in cut time, i.e., four primary beats per measure, while the other was in 3/4 meter, i.e., three beats per measure).

[138] While most music, particularly popular music, has generally stayed with simple meters of 3 or 4 (or 6 or 8) beats per bar, recent musical trends have opened up more possibilities, particularly in more "classical" genres of music, and have chosen more complex meters such as 5 or 7 beats per bar.

some freedom to borrow existing rhythms more directly. A composer could use rhythmic elements that are common to a style to evoke sounds that an audience would recognize yet still remain sufficiently "original" in the eyes of a court. If the borrowing composer's work is rhythmically different or more complex, a court may also allow for some similarities in other musical elements. However, the lack of consensus as to the definition of rhythm could also work against a borrowing composer in a court less willing to see the importance of their original contributions. Furthermore, if the particular rhythm were especially catchy or famous, composers might be prevented from using it at all.

**d. Combination of Musical Elements**

Several courts have noted that isolated analysis of the separate musical elements is somewhat irrelevant without consideration of the overall effect of the combination of musical elements. In *Swirsky v. Carey*, the court said, "To pull these elements out of a song individually, without also looking at them in combination, is to perform an incomplete and distorted musicological analysis."[139] The Ninth Circuit in *Krofft* said that substantial similarity is not solely dependent on isolated similarities between two works; it is based on the works' "total concept and feel" as seen by reasonable laypersons.[140] The court in *Swirsky* also noted:

> [C]oncentration solely on pitch sequence may break music down beyond recognition. If a musician

[139] Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004).

[140] Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1165–67, 1169 n.12 (9th Cir. 1977) (stating that the trial court's jury instruction was correct in saying that "you must not simply focus on isolated elements of each work to the exclusion of the other elements, combination of elements, and expressions therein." Also stating that "it is the *combination* of many different elements which may command copyright protection because of its particular subjective quality").

> were provided with a group of notes identified only by numerical pitch sequences, he or she could play that music a number of different ways, none of them being substantially similar to each other. In order to perform a song exactly, the musician would need information about key, harmony, rhythm, and tempo.[141]

By this reasoning, a composer using principles of transformative imitation could theoretically borrow certain elements, such as harmony or rhythm, and alter or layer them with new elements in unusual ways. Or they could borrow a mix of elements from different sources and layer them together to create a new "total concept and feel." If the borrowed material was not the uniquely "catchy" part of the existing work and this new "total concept and feel" did not resemble the particular existing work in the ears of a jury or the eyes of a court, the borrowing composer would be less likely to be called an infringer. For example, in *Repp*, the court noted that seven notes in the melodies of the two works were fundamentally the same.[142] However, the harmonies were much more complex, the meter was different, the rhythms were changed, the mode was different, and the overall character of the two works was different. Thus, the two works were found not to be substantially similar.[143]

Similarly, the symmetrical location or positioning of certain identical or similar notes or intervals in the two

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[141] *Swirsky*, 376 F.3d at 848 n.13, 849 ("There is no one magical combination of these factors that will automatically substantiate a musical infringement suit; each allegation of infringement will be unique. So long as the plaintiff can demonstrate, through expert testimony that addresses some or all of these elements and supports its employment of them, that the similarity was 'substantial' and to 'protected elements' of the copyrighted work, the extrinsic test is satisfied.").

[142] *Repp*, 947 F.Supp. at 112-13.

[143] *Id.* at 116-17.

works may be relevant. In *Selle v. Gibb*, the plaintiff's musical expert testified that several notes in the two songs at issue shared identical pitches and rhythmic symmetry.[144] In *Repp*, the court noted that a rising arpeggio[145] in one of the songs at issue began on the weak beat, but the rising arpeggio in the other song began on the strong beat.[146]

As mentioned before, composers such as Brahms would often borrow from a number of different sources and end up with a product that was distinctly their own. Yet this method of composition still allowed Brahms to use musical language that his audiences found familiar. Some nationalistic composers such as Bartok were similarly careful not to borrow too directly from any one source. They would borrow a mix of stylistically suggestive harmonies, rhythms, and intervals to create their new works. By the judicial standards of *Repp* and *Swirsky*, such a composer today may be able to create an "original" work while still using some musical language an audience would relate to.

However, for a composer who wished to borrow a greater amount of musical elements to more directly connect with a composer, style, or culture, even though they might alter or expand on the melody or harmony or rhythm, they might not so substantially alter the "total concept and feel" of a work as the composer in *Repp*. Historically, many composers would purposefully borrow elements of folk and popular music that maintained the musical "concept and feel" of the existing work or style, yet they took it to another level by being creative in other ways.

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[144] Selle v. Gibb, 741 F.2d 896, 899 (7th Cir. 1984).
[145] Arpeggios are notes of a chord- like figure played in sequence one at a time.
[146] *Repp*, 947 F.Supp. at 114.

Modern copyright principles purport to encourage creativity and new ideas, but the limited, simplistic judicial view of what constitutes "originality" in the elements of music could actually restrict creativity by restricting the exchange of musical ideas that used to be the norm. Musically, no one would question the musical ingenuity of the 'great classical masters,' but this modern judicial view of "originality" could work against composers using some of their compositional techniques today. Furthermore, any of the above methods of borrowing could fail to pass scrutiny by a "lay listener" jury if the composer directly borrowed the more recognizable "catchy" or "valuable" parts of the melody or other musical elements. Even where the composer borrowed the "non-protectable" elements from an existing work, the subjective nature of the similarity analysis could restrict a composer even where he did not intend infringement. The ambiguity of how much similarity is too much and the restrictive judicial definitions of creativity or "originality" in the elements of music might make the costs and potential legal risks not worth the effort of creatively borrowing or experimenting with existing music.

### B. Derivative Works

Another modern copyright doctrine that is at odds with borrowing practices is the doctrine of derivative works. A derivative work is defined in the Copyright Act as "a work based upon one or more preexisting works" including any form "in which a work may be recast, transformed, or adapted."[147] The statute goes on to say, "A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative

[147] 17 U.S.C. §101 (derivative works may include a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, or condensation).

work.'"[148] The doctrine does not refer to all works that borrow anything from pre-existing works, but the broad language suggests that any work that is substantially based on pre-existing works may be considered a derivative work.[149]

A copyright owner has the exclusive right to make or authorize derivative works.[150] For any work that uses pre-existing material, copyright protection is withheld from "any part of the work in which such material has been used unlawfully."[151] Thus, if a borrowing composer's work were deemed an unauthorized derivative work, it may limit his or her ability to use the existing material or receive copyright protection. For example, in *Negron v. Rivera*, the defendant's work had the same melody, structure, and key as the plaintiff's copyrighted work.[152] The court concluded that the defendant's work was a derivative work of the pre-existing (or "underlying") composition and could not be copyright protected if he did not obtain a license to use the pre-existing work.[153] Copyright's vague standard of "sufficient originality" creates a good deal of uncertainty as to whether a borrowing composer's work is an unauthorized derivative work.

Many historic borrowing practices involved what would now be considered derivative works. For example, Bach's keyboard arrangements of Vivaldi's violin concertos or Handel's transformative imitation of Erba's

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[148] *Id.*
[149] *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §3.01 (2012).
[150] 17 U.S.C. § 106 (2012).
[151] 17 U.S.C. § 103 (2012).
[152] Negron v. Rivera, 433 F.Supp. 2d 204, 208 (D.P.R. 2006).
[153] *Id.* at 217; *See also* Palladium Music, Inc. v. Eatsleepmusic, Inc., 398 F.3d 1193, 1197-1200 (10th Cir. 2005) (holding that independently created "karaoke music" sound recordings were derivative of underlying musical compositions, and thus were not entitled to copyright protection without licenses in the underlying compositions).

music borrowed several elements of the pre-existing work, much like in the *Negron* case. Similarly, nationalist composers often used a popular folk melody as the musical "germ" from which to develop a larger composition. Far from diminishing the original work's value, these subsequent works celebrated the original material, shed new light and perspective on the existing music, and brought knowledge of the cultures and traditions to a whole new audience. Such transformative imitations and re-settings were considered in the music world to be sufficiently original. No one playing these composers' 'versions' of the pre-existing works would deny their "original" artistic contributions to them. However, a composer using these methods today with an existing work or a popular song would easily have their work labeled as a derivative work that, without a license, is grossly infringing and unlawful. The current derivative work doctrines discourage and often preclude such "vital reinterpretations" of existing material.[154]

### C. De Minimis Copying

There are circumstances where the court could still find that a work did not unlawfully infringe, even where there is substantial similarity. One type of non-infringing borrowing is "de minimis" copying, where the copying is so trivial as to "fall below the quantitative threshold of substantial similarity."[155] If the composer borrowed a small, insignificant enough portion of the existing work, then it is not actionable. There is not a bright line standard

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[154] Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1941 (2005) (noting that copyright law provides little protection for jazz improvisations, and stating that "the contributions and compositions created by jazz artists are not considered original because, technically, they occur within the parameters of an underlying work and are therefore considered 'derivative'").

[155] Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

for exactly how little borrowing is considered de minimis. Like many other aspects of copyright, it is decided case-by-case and based on quantitative and qualitative value.

Today, de minimis disputes often come up in cases involving hip-hop sampling. Sampling, like some classical borrowing practices, involves taking small portions of an existing work and incorporating them into a new work.[156] When sampling artists are pulled into court, they often try to argue that the portion they borrowed was de minimis or not sufficiently original (i.e., too common or lacking sufficient expression) to be copyrightable. For example, in *Newton v. Diamond*, the Beastie Boys had sampled a simple, common three-note sequence (C to D-flat to C) from an existing work to create a looping or repeating pattern.[157] The court said that the sample from the underlying composition was so trivial and de minimis that it did not break the quantitative threshold of substantial similarity.[158]

Courts in a de minimis case will examine the amount of use and the "value" or centrality of the copied portion to the pre-existing work.[159] If a composer borrowed a small portion of another's song that was not central or important to the original source, the court may find it ultimately non-infringing. For example, in *Williams*

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[156] *See generally* Arewa, *supra* note 49 (discussing how the practices of borrowing in hip hop music fit in copyright and generally comparing classical borrowing with sampling).

**[157]** Newton v. Diamond 388 F.3d 1189, 1191-92, 1195-97 (9th Cir. 2003).

[158] *Id.* at 1195-97; *See also* Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976) (plaintiff's song was not a completely unique composition because it contained a four-note sequence common in the music field).

[159] *See* Stratchborneo v. Arc Music Corp., 357 F.Supp. 1393, 1404 (S.D.N.Y. 1973) (noting that no "substantial similarity [will] be found if only a small, common phrase appears in both the accused and complaining songs; unless the reappearing phrase is especially unique or qualitatively important . . . .")

*v. Broadus*, the court said that a reasonable fact-finder could conclude that the two measures sampled from the song "Hard to Handle" were not "a substantial portion of the [pre-existing] work."[160] In such a case, a composer might have more freedom to use the borrowed portion.

On the other hand, if the borrowed portion was central to the existing work or if the audience would recognize the borrowed portion, a court is more likely to find more than a de minimis taking.[161] In *Elsmere v. National Broadcasting Corporation*, Saturday Night Live borrowed only four notes from the song "I Love New York," but those four notes formed the central catch phrase of the plaintiff's song.[162] Thus, they were found to have more than a de minimis taking.[163]

This may create problems for borrowing composers who wish to borrow a small portion of the "catchy" part of a popular song. Composers traditionally quoted or copied short recognizable phrases in order to pay homage to the source, to make a direct cultural reference their audience would recognize, to refer to an extra-musical idea, or simply to make a musical joke. It was the musical equivalent of quoting Shakespeare, Abraham Lincoln, or

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[160] Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *4 (S.D.N.Y Aug 27, 2001) (the two measures only appeared at the beginning of the pre-existing work); *See also* Santrayall v. Burrell, 993 F.Supp. 173 (S.D.N.Y. 1998) (M.C. Hammer sampled from a song by The Legend, which had sampled from two other artists' work without permission; Hammer alleged that The Legend's song was thus not worthy of copyright protection, but the court concluded that the portion sampled by The Legend played such a minor role in The Legend's song that unauthorized use could not lead to actionable infringement).

[161] *See* Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987) (looking at a six-note sequence, the court noted that "[e]ven if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity").

[162] Elsmere Music, Inc. v. National Broad. Co., Inc., 482 F.Supp. 741, 744 (S.D.N.Y. 1980).

[163] *Id.* at 746 (ultimately finding this particular borrowing to constitute fair use as a parody).

Bob Hope in the middle of a speech. Ives was particularly known for this method of quotation. Most classical composers who used this borrowing method had no intention of "infringing" on the original's copyright. They expected the audience to know where the borrowed phrase originally came from. De minimis doctrines seem to discount the idea that secondary use of such small familiar passages can be creative and artistically or societally beneficial. Principles such as this show how far copyright has come since the days when the focus was on the right to publish full manuscripts of a composer's work.

### D. Fair Use

Copyright attempts to give defendants some defense or flexibility in their use of existing materials through the fair use doctrine. Under 17 U.S.C. §107, four factors are used to determine whether there is fair use of existing materials:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[164]

The fair use doctrine is an "equitable rule of reason"[165] meant to "prevent authors from exercising absolute control over their creations and to leave some breathing room"[166] for the use of works without consent in

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[164] 17 U.S.C. § 107 (2012)
[165] H.R. REP. NO. 94-1476, pt.1, at 65 (1976).
[166] Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM. L. & POL'Y 1, 1-2 (2002).

a way that would be socially beneficial.[167] The doctrine allows subsequent authors to make productive uses of existing works in a way that advances the "progress of Science and useful Arts,"[168] and it "'permits [courts] to avoid rigid application of the copyright statute when… it would stifle the very creativity which that law is designed to foster."[169] Examples of fair use include criticism, comment, teaching, scholarship, and research.[170] Authors might use copyrighted materials "to engage in social, political, or cultural commentary, to illustrate an argument or prove a point, [or] to provide historical context . . . ."[171] Yet, as the House Report noted, "[a]lthough the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged."[172]

**i. Purpose and Character of Use**

Under the first factor of fair use – the purpose and character of use – courts will often ask whether the use has been "transformative." Some see this factor as the center or "soul" of the fair use doctrine.[173] The Supreme Court said that a "transformative" use adds something new to the

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[167] *See e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477-78 (1984) (Blackmun, J., dissenting) ("[If] the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work . . . produces external benefits from which everyone profits.").

[168] U.S. CONST. art. I, § 8, cl. 8.

[169] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

[170] 17 U.S.C. § 107 (2012).

[171] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2570 (2009).

[172] H.R. REP. NO. 94-1476, pt.1, at 65 (1976).

[173] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

borrowed work by altering it with new purpose, character, meaning, or message. The new use does not "merely 'supersede[ ] the objects' of the original creation."[174]

*Campbell v. Acuff-Rose Music, Inc.*, where the Supreme Court considered 2 Live Crew's parody of Roy Orbison's "Pretty Woman," is often cited as the seminal "transformative use" case. The band had borrowed the famous guitar opening, main melody, and first line from the original song, but they significantly changed the lyrics to be much more bizarre and humorous.[175] The Court found a valid fair use defense because the 2 Live Crew song was a parody that commented on and criticized the original.[176] The Court observed that parody "has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[177] Conversely, if the parody simply uses the original to "get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish) . . ."[178]

Secondary uses of pre-existing material have generally fallen into one of three groups:

> (1) works that add no original expression;
> (2) works that add original expression, but not in the form of criticism, commentary, or scholarship; and
> (3) works that add original expression that is clearly criticism, commentary, or scholarship.[179]

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[174] *Campbell*, 510 U.S. at 579 (quoting Folsom v. Marsh, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841)).
[175] *Id*. at 572-74.
[176] *Id.* at 578-94.
[177] *Id.* at 579.
[178] *Id.* at 580.
[179] Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 583 (2000).

The prevalence of "transformative use" as the dispositive fair use test has essentially precluded the fair use defense for all secondary uses in the first two groups. Only works in the third group pass the transformative use test.[180] If a composer borrowed or added to an existing work without a provable reason of criticism, commentary, or parody, his or her work would be less likely to pass fair use scrutiny.

Traditionally, borrowing was a source of creativity, whether or not it was "transformative" in the modern judicial sense. "The notion that transformative fair use is more acceptable because it involves more creativity than other types of borrowings is based on assumptions about the nature of borrowing and creativity that are not sustainable… in light of… the European classical tradition."[181] Bach or Handel's borrowings, for example, were considered creative even if their use of the existing work was not criticism, commentary or some other "productive use." In the thinking of Handel's time, a composer's use of existing works was still considered to advance the progress of the arts as long as the existing material was used to good effect and not out of laziness or superficial, uninventive re-use.[182] For a modern composer, this central piece of the fair use doctrine means that they have little incentive to experiment with existing musical material unless they have something to overtly 'say' or comment on the existing work in a "transformative" way.

**ii. Nature of the Copyrighted Work**

The second statutory factor in fair use – the nature of the copyrighted work – possibly comes from Justice Story's articulation of the "value of the materials used"

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[180] *Id.*
[181] Arewa, *supra* note 49, at 578.
[182] Keyt, *supra* note 6, at 425.

from the copyrighted work.[183] Justice Story suggested that "some protected matter is more 'valued' under copyright law than others," and this should prompt judges to "consider whether the protected [work] is of the creative or instructive type that the copyright laws value and seek to foster" (e.g., a novel versus a shopping list).[184]

### iii. Amount and Substantiality of the Portion Used

The third statutory factor in 17 U.S.C. §107 examines "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[185] "[T]he larger the volume (or the greater the importance) of what is taken, …the less likely that a taking will qualify as a fair use."[186] The Supreme Court suggested that a court's analysis should focus on how much more was borrowed than was necessary to achieve recognizability in the purpose of the work.[187] Thus, this factor also involves both quantitative and qualitative analysis, and it is again dependent on the transformative use. In *Campbell*, for example, the Court noted that 2 Live Crew directly borrowed a significant amount of quantity and quality from the pre-existing song, and, in some cases, such substantial copying "may reveal a dearth of transformative character or purpose."[188] However, the Court acknowledged that a

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[183] Folsom v. Marsh, 9 F.Cas. 342, 344, 348 (C.C. D.Mass. 1841).
[184] Leval, *supra* note 173, at 1117.
[185] 17 U.S.C. § 107 (West 1992).
[186] Leval, *supra* note 173, at 1122.
[187] Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 587-89 (1994)*; *See, e.g., Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (finding excessive use of entertainment video footage in a documentary); *Warner Bros. Entm't. Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008) (finding excessive quoting and paraphrasing in a reference work); *Byrne v. British Broadcasting Corp.*, 132 F.Supp.2d 229 (S.D.N.Y. 2001) (finding fifty-second use of a song in an unrelated news story).
[188] *Campbell*, 510 U.S. at 587-89.

parody must take quite a bit of the original pre-existing material in order to evoke the original in the mind of the listener. "Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation."[189] Thus, at least within the context of a musical parody, a composer may have more freedom to borrow a larger amount from the original work. However, if the composer borrowed more than was necessary for the particular qualifying transformative use, the borrowed use would not be considered "fair use."

**iv. The Effect of the Use Upon the Potential Market**

The fourth factor – the effect of the use upon the potential market for the copyrighted work – is sometimes considered just as important as the "transformative use" factor.[190] Copyright emphasizes promises of rewards to encourage creativity, so the commercial and market considerations are often seen as central to its doctrines. A secondary use that substantially interferes with the market or value of the earlier work is less likely to be seen as a fair use.[191] Courts sometimes consider the proximity of the borrowing author's market to the markets that the earlier author "is exploiting or is likely to exploit."[192] They may also consider "the potential for harm caused by others

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[189] *Id.*

[190] *See id.* at 574 (noting the fourth factor has been called "the most important element of fair use").

[191] *See* i*d.* at 590 (citing *Nimmer on Copyright* § 13.05[A] [4]) (noting that courts should consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market" for the original").

[192] Samuelson, *supra* note 171, at 2579; *See e.g.*, *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002) (holding that collector's guide was in different market than beanie babies); Calkins v. Playboy Enters. Int'l, Inc., 561 F.Supp. 2d 1136 (E.D. Cal 2008) (holding that school photographer did not anticipate Playboy's subsequent use of photo).

following in the alleged infringer's footsteps, as well as any harm to the market for derivative works."[193]

Several have commented on the interdependence of the first and fourth statutory factors. Transformative uses are less likely to hurt or usurp the market or value of the pre-existing work.[194] For example, in *Campbell*, the audience would not view the parody as a substitute for the original.[195] In *Blanch v. Koons*, Blanch admitted she had not suffered harm from Koons' use of her photo in his collage painting.[196] Similarly, in *Suntrust Bank v. Houghton Mifflin Co.*, the court found that the two books at issue were aimed at different audiences.[197] Thus, if a borrowing composer could prove that their work qualifies as a transformative use, they might be able to show that their work is not interfering with the existing work's market or value. A borrowing composer could argue that their classical orchestral use of a work by a pop artist (e.g., a song by Jay-Z) was aimed at a different audience, but if

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[193] *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 277 (6th Cir. 2009) (two works were found to occupy the same market, and a fair use defense was rejected; also noting that "[w]orks that purport to be an homage to the copyrighted work may nevertheless weaken the market for licensed derivative works").

[194] *See,* Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 22-3 (1994) ("[T]he more the appropriator is using the material for new transformed purposes, the less likely it is that appropriative use will be a substitute for the original.").

[195] *Campbell*, 510 U.S. at 591-92 ("[T]he parody and the original usually serve different market functions.").

**[196]** Blanch v. Koons, 467 F.3d 244, 249, 258 (2d Cir. 2006); *See also Stratchborneo*, 357 F.Supp. at 1405-1406 (finding that the defendant had not entered unfair competition by "passing off" their work as that of the plaintiff, the public had not confused the titles or concepts of the two works, the defendants had not tainted the plaintiff's public popularity or good will, and no other party had confused the ownership of the two works).

**[197]** Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001) (plaintiff had failed to show that such secondary work would significantly harm the market for authorized derivatives).

the composer was purposely trying to reach a wider audience, including those familiar with the original work, this may be problematic.

### v. Lost in Translation: "Fair" or "Transformative" Uses in Music

Unfortunately, even though courts have recognized a large number of transformative fair use functions and situations in literary and visual arts,[198] courts have yet to recognize many purely musical transformative uses outside of parody, and most of those cases turned on the content of the lyrics. For example, in *Bourne Co. v. Twentieth Century Fox Film Corp.*, the court found fair use where the offensive lyrics of the defendant's song "I Need a Jew" parodied the wholesome worldview expressed in the song "When You Wish Upon a Star." [199]

Humor, commentary, criticism and other similar functions come out in completely different ways in music (particularly instrumental music) than they do in other more literary or visual arts. Composers such as Dvorak, Gershwin, or Ives were no less commenting on the cultures and traditions they borrowed from than the artist in

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[198] *See e.g., Blanch*, 467 F.3d at 253-54 (Koons' use of Blanch's photo in a collage painting was fair because the photo was "fodder for his commentary on the social and aesthetic consequences of mass media," and "the public exhibition of art is widely and… properly considered to 'have value that benefits the broader public interest'").

**[199]** Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499 (S.D.N.Y. 2009); *See also* Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (finding parody of plaintiff's song "When Sunny gets Blue" in defendant's "When Sunny Sniffs Glue"); Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F.Supp.2d 84 (S.D.N.Y. 2003) (finding parody where the defendant's rap song "The Forest" sarcastically used the first three lines of "What a Wonderful World" to contrast the different worldviews of the two songs); Lennon v. Premise Media Corp., L.P., 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (portion of John Lennon's song "Imagine" with the lyrics "Nothing to kill or die for / And no religion too" used in a film comparing intelligent design with Darwinian evolution. Court noted that the song "had been used as fodder for social commentary in criticizing [the] views of songwriter").

*Blanch*,[200] the writer in *Suntrust*,[201] or a critic in the newspaper. However, they did so through the medium of abstract sounds and the use of extra-musical connections. Music is inherently more abstract than literary works, and it necessarily borrows direct elements in order to make the desired comments and connections. For example, Ives quoted the well-known hymn "There is a Fountain" as a secondary melody in his work "West London," which had been originally dedicated to British religious poet Matthew Arnold (1822-1888).[202] Ives used the well-known hymn to connect and comment on the religious themes in Arnold's poetry.[203] Similarly, Dvorak, in his New World Symphony, borrowed from American spirituals and folk idioms to praise and celebrate the vibrancy and diversity of American culture and to show how the American culture looked to a foreigner, such as himself, visiting for the first time. Gershwin arguably used African-American music in his "Porgy and Bess" to comment on the cultures he saw, even apart from his use of any lyrics. Composers dating back to the Renaissance borrowed existing melodies they saw as thematically linked to their work. Other composers throughout history quoted from popular tunes in unexpected or humorous-sounding ways as a sort of 'wink' to the audience. When the existing work is well-known, actual lyrics are not necessary to garner a smile or other reaction from a listener. A quote of a famous song in an

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[200] *Blanch*, 467 F.3d at 253-54.

[201] *Suntrust*, 268 F.3d at 1270 (the defendant's novel, *The Wind Done Gone* was highly transformative of *Gone with the Wind* in recasting numerous scenes and characters and retelling the story from a radically different perspective).

[202] Ives' "West London" is actually adapted from his unfinished "Matthew Arnold Overture."

[203] *See* Burkholder, *supra* note 26, at 20-5 (discussing the various ways Ives borrowed from various sources).

unusual musical or thematic context, with or without lyrics, could potentially be quite funny or thought provoking.

Today, if a composer were to compose a very dissonant sounding anti-war themed classical work and integrate the melody of a well-known anti-war themed popular song into one section, would a court be willing to see how the composer meant to use the song to comment? Or would they be too focused on the fact that the composer "stole" a well-known sequence of notes (sans lyrics) to see the composer's extra-musical purpose or "comment"? Additionally, in such a case, one might also question whether a larger-scale work that briefly quotes the melody but not the lyrics of an existing song, at least for purposes of "commenting," is truly a market replacement for the original short four-minute song with lyrics.

Courts thus far have yet to recognize this kind of more "abstract" musical humor or comment even if it would in many ways be artistically and societally beneficial to the progress of the arts and the encouragement of creativity. It is rather ironic that the art form with the most limited language that needs to borrow noticeably more in order to "comment" is the art form that has the least amount of freedom or options to borrow under judicial fair use doctrines. Until courts recognize this ability to "comment" more abstractly, fair use is a very limited protection for a borrowing classical composer and may even be non-existent outside of a parody with lyrics. This limited view of musical "fair use" takes away much of a composer's incentive or ability to interact with surrounding musical dialogues or to experiment with different ways of expressing their points of view through inventive use of existing material.

## IV. Hypothetical: "Variations on a Theme by Lady Gaga" (or alternatively, "Variations on a Theme *in the Style of* Lady Gaga")

One very popular borrowing method is the "theme and variations" form in which a composer writes a set of variations based on a popular melody and its underlying chord progression. It was a fun way to play around with a melody or motif that the audience would presumably recognize. Bach, Haydn, Mozart, Beethoven, Schubert, Chopin, Liszt, Brahms, Rachmaninoff, Stravinsky, and many others wrote variation sets on popular melodies or themes by other classical 'masters.'[204] Variation sets are still composed today, except they are now usually based on completely original themes or themes that are in the public domain.

Typically, a theme and variations set would start with an initial statement of a theme, followed by several variations on that theme. For example, Rachmaninoff's "Rhapsody on a Theme of Paganini," Op. 43, for piano and orchestra, has 24 variations on a borrowed theme from Paganini's Caprice, Op. 1, No. 24 for violin. Usually, the melody, harmony, and rhythm of a theme are relatively clear and recognizable in the first theme statement. Then each subsequent variation is noticeably different than the one before, and the melody or the harmony or the rhythm (or all three) is increasingly manipulated from one variation to the next. In the later variations, some elements may seem virtually unrecognizable. For example, the very popular Variation No.18 of Rachmaninoff's Rhapsody

[204] Mozart wrote several sets of variations on popular themes and was famous for being able to improvise brilliant variation sets on the spot. Chopin and other composers wrote variation sets on themes by Mozart; Brahms and Rachmaninoff both wrote their own variation sets on a theme by Paganini.

(famously used as a theme in the film "Somewhere in Time"[205]) does not seem at first glance to have any relationship to the original Paganini theme. The composer of a variation set also often puts quite a bit of their own 'mark' or style on the work. The "total concept and feel" of Rachmaninoff's Rhapsody is arguably very different than the original Paganini Caprice from which the theme was borrowed.

What if a composer today wanted to write a set of variations on a current popular melody? If a composer were to write "Variations on a Theme by Lady Gaga," for example, this would be a fun way of connecting with a wider audience. If even the initial direct quote in the theme was considered infringing, the entire work would be precluded because the whole point of writing a variation set would be taken away. Some initial themes could be as short as just a couple phrases long, so a composer could try not to borrow too much of the original theme. However, if the composer borrowed the more "valuable" or catchy part of Lady Gaga's song, he would very likely be considered infringing, even under the "de minimis" doctrine.[206] He could borrow a less catchy part of her work or try to prove that the particular pitch, rhythm, or harmony sequence was particularly common, and then he might be more likely to get away with it under the idea-expression dichotomy.[207] It

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[205] *Somewhere in Time* (Universal City Studios, Inc. 1980).

[206] *See Ringgold v. Black Entm't Television, Inc.,* 126 F.3d 70, 74 (2d Cir. 1997) (noting that de minimis copying is where the copying is so trivial as to "fall below the quantitative threshold of substantial similarity"); *Elsmere Music, Inc. v. Nat'l Broad. Co., Inc.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980) (finding more than a de minimis taking where the borrowed 4 notes from the plaintiff's song were the central catch phrase of the song).

[207] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991) ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected … [C]opyright protection may extend only to those components of a work that are original to the author."); 4 Nimmer, *supra* note 64, at §13.03 (noting that copyright

is also a question of whether he could try to embellish the melody enough to be considered sufficiently original even in the initial theme statement or whether the court would look primarily to the "fundamental" pitches, especially if he already admitted that he borrowed the theme from Lady Gaga.[208] Alternatively, he could take the 'less risky' route of trying to borrow more stylistically without actually quoting from a specific Lady Gaga song, assuming the "total concept and feel" of the melody and other elements did not too closely resemble any particular song.[209] What if the initial statement of the theme was actually an upside down version of the original and the fact that it was borrowed from a popular Lady Gaga melody was simply an 'inside joke' with the audience? It is unlikely that Lady Gaga could base a suit on the fact that they refer to her work in the title, and it is very unlikely that such a work would be a market replacement for her original song. However, a borrowing composer using this work to connect with a wider audience would be in an artistic conundrum because he would naturally want to borrow as catchy and recognizable a portion as he could.

Each subsequent variation might refer at least a little to the original theme in the minds or ears of the

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infringement only occurs when a defendant has copied the copyright-protected expression of a plaintiff's ideas, not just the ideas themselves).

[208] *See e.g.,* Allen v. Walt Disney Prods., 41 F. Supp. 134, 139-40 (S.D.N.Y. 1941) (finding that the decorative notes in the defendant's work made the two works dissimilar); Repp v. Webber, 947 F. Supp. 105, 112 n.2 (S.D.N.Y. 1996) (focusing analysis on the melody's fundamental pitches because the court believed that "ascertaining the fundamental melodic pitches is consistent with common musicological analytical practice").

[209] Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1165-67 n.12 (9th Cir. 1977) (noting that substantial similarity is not solely dependent on isolated similarities between two works; rather, it is based on the works' "total concept and feel" as seen by reasonable laypersons).

listener, but the actual notes, rhythms, or other elements and embellishments may be significantly departed from the original. A couple of the individual variations may have some of the original song's "total concept and feel," in which case the composer would risk infringement under the Krofft "intrinsic test."[210] Other variations can add a great deal of complexity to the melody, harmony, rhythm, instrumentation, mood, and character, to make it "feel" completely different. Rachmaninoff's famous aforementioned Variation No.18 took Paganini's basic theme, turned the melody upside-down, altered and slowed the rhythm and meter, and changed the minor mode to Major mode.

In some variations, a version of the original melody might show up briefly again as either a primary or secondary voice, but in others, only a few notes from the original melody might appear sporadically. In other variations, there could be a completely new melody over some version of the original harmony. Under the case law as mentioned before, harmonic progressions are less protectable unless the defendant borrowed a large amount from the original.[211] Thus, a composer might have more freedom to borrow Lady Gaga's harmony, especially if other elements were altered. Rhythm is also less protectable as long as the borrowed portion was not too catchy or too much.[212] Some variations might keep the

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[210] *Id.* at 1164-67 (an "extrinsic test" uses objective analysis by experts to determine whether the "ideas" are "substantially similar; then an "intrinsic test" uses subjective responses of "lay listeners" to evaluate whether the "expressions" and "total concept and feel" of the two works is substantially similar).

[211] *See e.g.,* Tisi v. Patrick, 97 F. Supp. 2d 539, 543-44 (S.D.N.Y. 2000) (thoroughly analyzing the similarities and differences in the chord structures of two works and discounting the similarities in a chord progression that was particularly common).

[212] *See* McRae v. Smith, 968 F. Supp. 559, 566 (D. Colo. 1997) (finding that similarity was not established where certain individual notes of each composition did not share "significant amounts of . . . rhythm").

original rhythm and change everything else around it, while others could change the rhythm or meter rather significantly but keep other elements the same. Remember, in *Repp v. Webber*, portions of the two melodies at issue were similar but the rhythm, harmony, and overall character of the works were different enough that the subsequent work was found not to be infringing.[213]

However, even if the "total concept and feel" of the work were actually different, Lady Gaga's expert witness could show the jury where the similarities are in the "fundamentals" of the work and convince their ears to hear Lady Gaga's original work hidden inside the new work.[214] Furthermore, the entire work as a whole is a derivative work or "recasting" of the original theme, even if most of the work is significantly departed from the original.[215] If the composer did not get a license, their work could be labeled an unauthorized derivative work, regardless of the actual amount of creativity involved in creating a variation set. The borrowing composer could try to argue fair use, saying that his elaborate variations were a fair use "parody" or "comment" on the ridiculous, over-the-top nature of celebrity culture.[216] He could try adding the sound of car horns and camera flashes and other unusual incidental

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[213] Repp v. Webber, 947 F. Supp. 105, 113 (S.D.N.Y. 1996).

[214] *See Krofft*, 562 F.2d at 1164-67 (intrinsic and extrinsic test); *See also* Whelan Associates, Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1232-33 (3d Cir. 1986) (noting that the distinction between expert testimony and lay opinion "may be of doubtful value where the finder of fact is the same person for each step: that person has been exposed to expert evidence in the first step, yet she or he is supposed to ignore or 'forget' that evidence in analyzing the problem under the second step").

[215] 17 U.S.C. § 101 (West 2010) (a derivative work is "a work based upon one or more preexisting works" including any form "in which a work may be recast, transformed, or adapted").

[216] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-94 (1994) (finding fair use where the defendant's work was a parody that commented and criticized the plaintiff's original song).

noises throughout the piece to support this argument. The success of this argument would depend on whether the court was willing to recognize abstract musical parody or comment. Again, one could question how likely it is that such a work would be considered a market replacement of the original since it arguably serves a different market function and shows the music from a radically different perspective.[217] Such a work may even have the opposite effect of making the original more popular for listeners who want to know more about the original song on which the new work was based. However, if the court chose to stay with musical infringement case law the way it stands today, it is unlikely that such a work, abstract parody or otherwise, would be found free of infringement liability.

One would hope that Lady Gaga has a sense of humor about these things. But this hypothetical shows that a borrowing composer who wants to relate to a wider audience or connect with a current artist or work can face a great deal of legal uncertainty. They would also be discouraged or prevented from using some very valuable creative outlets and methods of composition. In the world of music, the amount of creativity and "originality" you can show within a basic framework or based on a basic pattern is often celebrated, even where the "fundamentals" are kept intact. But judicially, the theme and variations method of borrowing and others like it may come into serious question or be precluded entirely.

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[217] *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001) (finding that the defendant's novel, *The Wind Done Gone*, was highly transformative of *Gone with the Wind* in recasting numerous scenes and characters and retelling the story from a radically different perspective).

## V. Summary and Conclusion

Historically, classical music was the music of the culture and of the people. Composers drew from the latest trends, used musical language that everyday listeners could recognize and relate to, and celebrated and expanded on the musical traditions of the people. This allowed classical music and classical composers to have a direct connection with a wide audience, not only with the 'elite.' Bach premiered works at the local coffee shop and churches. Beethoven's German Dances were played by the kid next door. Chopin's Polish mazurkas were the talk of the town. Dvorak's Slavonic Dances expanded and perpetuated international interest in Slavonic and Bohemian folk cultures, and his American-inspired works shined fresh perspective on the early developing American musical landscape. Gershwin's music connected audiences from 'both sides of the tracks' and will always be popular because of that fact. The music of Ives was filled with avant-garde complexity yet could make the small town homebody laugh with its quotes of recognizable tunes. All of these connections were made possible by the freedom that these composers had to borrow from existing music and surrounding cultures.

Many of the admired geniuses of music history used borrowing methods to develop their own style and to participate in a cultural and social exchange of ideas with their audiences and fellow composers. Sometimes they quoted verbatim to make direct cultural or extra-musical connections with their listeners, and at other times, they wrote to reflect the overall essence, style, or spirit of the music they hoped to celebrate or emulate. Borrowing methods such as quotation, paraphrase, allusion, transformative imitation, embellishments, and variations on a theme were very popular forms of composition dating as

far back as the Renaissance and even going into the 20th Century.

In the pre-copyright and early copyright eras when Handel, Mozart, Chopin and others were creating their masterpieces, borrowing was a legitimate, encouraged source of creativity. Composers recognized a much wider range of possibilities in the definitions of creativity and originality than courts and copyright laws do today; they found genuine creativity and innovation even where some of the elements were borrowed. They viewed the author or composer of a work as a "craftsman" who manipulated and built on the traditions and ideas of their fellow composers and musicians in ways that satisfied their audiences.[218] Their focus was on the quality of the creative work as a whole, not on the source of the individual components.[219] Their exploration of existing music produced brilliant creative work that appealed to a diverse range of people from all tastes and walks of life and that has endured for centuries as a result. If composers had always viewed originality, authorship, and ownership the way courts do today, we arguably would never have seen some of the genius works of composers such as Bach, Brahms, Dvorak, or Gershwin.

The modern copyright framework along with Romantic assumptions of autonomous authorship have entrenched today's musical community with the taken-for-granted belief that true creativity or originality can and should only come from independent acts of individual genius.[220] Under this belief, any product that comes out of this purely individual process is the property of the author alone. Thus, working with pre-existing material by other

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[218] Woodmansee, *supra* note 30.
[219] Keyt, *supra* note 6, at 425-26.
[220] *See generally,* Cohen, *supra* note 48 (discussing philosophies of authorship); Jaszi, *supra* note 48 (discussing historic philosophies of authorship); Arewa, *supra* note 49 (discussing the implications of copyright's focus on autonomous authorship).

composers is assumed to be a lazy, uncreative way of composing. Composers today (whether they realize it or not) have put on virtual blinders because they think that exploring, experimenting with, or borrowing from the work of their predecessors and contemporaries is no longer a legitimate option. Composers who would wish to experiment with existing materials or borrowing techniques fear that they might run into legal troubles because of the potentially unfavorable way a court or even a fellow composer or musician would view what they are trying to do.

Modern copyright does not completely preclude all methods of borrowing. Composers may still have some freedom to borrow "common" elements to reflect the "spirit" of an overall style or genre.[221] Some common elements, such as chord progressions, can still be very evocative of certain styles. Composers might also have some freedom to use a form of transformative imitation to borrow the less unique harmonies and other elements or to borrow from a mix of different sources as long as the resulting work's "total concept and feel"[222] did not resemble any one existing work too much.

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[221] *See e.g.,* Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976) (finding that the plaintiff's song was not a completely unique composition because it contained a four-note sequence common in the music field); Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 280 (S.D.N.Y. 1991) (noting that a descending scale step motive is a commonly used compositional device.); Landry v. Atlantic Recording Corp., No. 04-2794, 2007 WL 4302074, at *6 (E.D. La Dec. 4, 2007) (finding that three songs at issue contained elements and techniques common to all rock music).

[222] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (finding that the "total concept and feel" of two greeting cards were the same).

Even so, judicial formulations of substantial similarity[223] and other copyright doctrines impede many other methods of borrowing existing musical material. The heavy focus on the value of even a small number of notes to a plaintiff's work,[224] regardless of its context in a defendant's work, ignores the contributions and changes the defendant might have made to the material and discounts the idea that secondary use of recognizable or "catchy" material can be artistically and societally beneficial.[225] Additionally, doctrines like the idea-expression dichotomy[226] do not fit well with music because it is nearly impossible to figure out where the musical "idea" ends and the unique "expression" begins.[227] There

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[223] *See generally*, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (noting that to recover damages for copyright infringement, a plaintiff must prove that defendant copied from plaintiff's copyrighted work and that copying constituted improper appropriation); Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996) (noting that two works at issue must be "sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value").

[224] *See* Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956) (analyzing whether the defendant borrowed "that portion of [the plaintiff's work] upon which its popular appeal, and, hence, its commercial success, depends").

[225] *See,* Keyt, *supra* note 6, at 439-41 (discussing the focus on the value of the plaintiff's work and noting that there may be liability even where the defendant transformed the borrowed material so "it no longer sounded so catchy").

[226] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991) ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected. … [C]opyright protection may extend only to those components of a work that are original to the author."); *see also* 4 Nimmer, *supra* note 64, at §13.03 (noting that copyright infringement only occurs when a defendant has copied the copyright-protected expression of a plaintiff's ideas, not just the ideas themselves).

[227] *See* Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004) (noting that idea-expression dichotomy tests are "an awkward framework to apply to copyrighted works like music or art objects, which lack distinct elements of idea and expression").

are only so many notes for a composer to choose from, and musical elements and figures often reappear in literal or similar form in several works, whether or not they were intentionally copied.[228] Composers are unsure of what they can borrow or how much they need to change existing material in order to be considered "original" because there are no bright line rules about how much borrowing or similarity is too much. The ultimate determination is largely based on the subjective view of the jury,[229] and opinions often differ from one court to another. At the same time, judicial copyright doctrines often only allow for limited, simplistic definitions of "originality" and creativity in even the basic elements of music – melody, harmony, and rhythm.[230] A composer might want to add embellishments or layer or combine the elements in new or unexpected ways, but these creative methods are not necessarily given as much weight or attention if a court sees that some pre-existing element (especially a melody) has been borrowed. Many courts seem to have forgotten (or ignored) the fact that there are a myriad of ways to be genuinely creative with music even where the "fundamentals" are borrowed.

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[228] Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988) (noting the "limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions").

[229] *See* Hogan v. DC Comics, 48 F. Supp. 2d 298, 310 (S.D.N.Y. 1999) ("Substantial similarity is generally a question of fact for a jury."); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164-67 (9th Cir. 1977) (in the court's "extrinsic-intrinsic" test under the idea-expression dichotomy, the "intrinsic" test involved the subjective responses of the jury).

[230] *See* Keyt, *supra* note 6, at 429-33, (surveying the judicially recognized elements of music and noting the tendency to focus on melody, harmony, and rhythm).

Furthermore, the vague, limited concepts of derivative works[231] and "transformative" fair use[232] in music close the door on many vital traditional methods of developing on existing music and cultural ideas. Any work that is substantially based on pre-existing works may be considered a derivative work, and a copyright owner has the exclusive right to authorize such works.[233] Composers do not want their work to be restricted because it might be labeled an unauthorized derivative work. Thus, valuable reinterpretations of existing music are discouraged. Fair use doctrines and the centrality of the "transformative use" test[234] preclude many secondary uses of music where a composer does not have something to overtly "say" or comment on the existing work in a "transformative" way. Contrary to traditional practices, this view assumes that "non-transformative" secondary uses are less acceptable or less creative than "transformative" uses.[235] Also, fair use doctrines as they relate to music have thus far only allowed

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[231] 17 U.S.C. § 101 (West 2010) ("A 'derivative work' is a work based upon one or more preexisting works."); 17 U.S.C. § 103 (West 1976) ("[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

[232] 17 U.S.C. § 107 (1992) (fair use); Campbell v. Acuff-Rose Music, Inc., *510 U.S. 569, 579 (1994)* (noting that a "transformative" use adds something new to the borrowed work by altering it with new purpose, character, meaning, or message).

[233] 17 U.S.C. § 101 ("A 'derivative work' is a work based upon one or more preexisting works."); 17 U.S.C. § 106 (West 2002) ("the owner of copyright… has the exclusive rights to do and to authorize… derivative works based upon the copyrighted work"); *See also* 1 Nimmer, *supra* note 149.

**[234]** *See generally,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (noting that a "transformative" use adds something new to the borrowed work by altering it with a new purpose, meaning, or message; the new use does not "merely 'supersede[ ] the objects' of the original creation").

[235] *See* Kudon, *supra* note 179, at 583 (noting that only secondary uses that clearly show some form of criticism, commentary, or scholarship tend to pass the transformative fair use test).

parodies to pass the "transformative use" test, and most of those cases have turned on the content of the lyrics.[236] Courts have yet to clearly say whether they would allow for the abstract and sometimes extra-musical "comments" that are possible in purely instrumental music. This takes away much of a composer's ability to interact with surrounding musical dialogues, musically express their points of view, or shed new light on existing social and cultural events and ideas.

These modern copyright doctrines heavily limit and sometimes preclude many of the borrowing practices that used to be predominant and popular ways of connecting with fellow composers and contemporary audiences. They ignore the inherently abstract and social nature of music and compositional practices. Music is an art form that is meant to be shared, and composers inevitably listen to and are influenced by the music around them. Music only has real 'meaning' when the composer or listener is able to relate the abstract sounds to their personal or shared cultural or extra-musical experiences. In order to make these desired connections with their audiences, composers must necessarily use or borrow from musical language that their contemporary listeners would recognize and relate to. However, the confusions and limitations of current copyright doctrines could work to stifle the creativity of composers who would wish to make those connections. In this way, such doctrines may even restrict the very creativity they were constitutionally intended to encourage.[237] Additionally, composers who lack financial resources or legal training or counsel are unsure of what

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[236] *See e.g.*, Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499 (S.D.N.Y. 2009) (finding fair use where the offensive lyrics of the defendant's song "I Need a Jew" parodied the wholesome worldview of the song "When You Wish Upon a Star").

[237] U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts").

they are or are not allowed to do with existing music. This all could create a chilling effect and make composers ask whether the potential cost of liability would be worth the effort of trying to creatively work with existing music. Thus, classical composers have lost vital and valuable incentives and avenues for connecting with the people, music, and cultures around them.

Modern applications of copyright law and perceptions of original authorship as they stand today may not have completely "killed" classical music borrowing practices, but they have put heavy restrictions on what is legally possible. They have given classical music a strong fear and reluctance to look around and participate in a cultural exchange of creative ideas with its wider audiences and musical communities. When viewed in the context of the history of classical music and of music in general, that unwillingness in itself is a tragedy.