

Not Dead Yet:

How Copyright Protects Composers of Classical Music

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I. INTRODUCTION

The composer and musical humorist, Peter Schickele, invented a lost son of J.S. Bach. Schickele's creation, P.D.Q. Bach, was supposedly the youngest and least talented of the Bach sons. Schickele, in the guise of P.D.Q. Bach composes pieces that parody classical music conventions. In the introduction to a piece he conducted at Carnegie Hall, Schickele said:

“Working around P.D.Q. Bach's music as long I have there's one trait of his that has rubbed off on me more than any other: that is plagiarism. This *quodlibet* was a piece which had not a single original theme in it. It was all quotes from other pieces And the piece was so successful; everyone went out whistling the tunes.”¹

The piece referenced in the quote above, “The Unbegun Symphony,”² plays on the classical convention of borrowing other composers' melodies to make a reference (like a literary allusion).³ For example, Schickele

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¹ PETER SCHICKELE, *The Unbegun Symphony, on AN HYSTERIC RETURN: PDQ BACH AT CARNEGIE HALL* (Vanguard Records 1966).

² The title, “The Unbegun Symphony,” is itself a reference to an “Unfinished Symphony,” of which there are many. One of the most famous is Franz Schubert's Symphony No. 8, left incomplete at his death in 1822.

³ See Dawn Leung, *Did Copyright Kill Classical Music? Copyright's Implications for the Tradition of Borrowing in Classical Music*, ARIZ. ST. SPORTS & ENT. L.J. 1, 4. (“[T]o relate to an audience, music must

juxtaposes the famous brass theme from Pyotr Il'yich Tchaikovsky's *1812 Overture*⁴ with the upper strings and winds playing "You Are My Sunshine." Other "popular" tunes included in the piece are Stephen Foster's "Beautiful Dreamer" and "Anchors Aweigh." Clearly, part of the point was to use tunes so familiar to the audience that they seemed wildly out of place in a classical composition. Even so, Schickele avoided using contemporary popular music in what was clearly a parody;⁵ all the popular melodies were in the public domain in 1966.⁶

In Dawn Leung's article, "Did Copyright Kill Classical Music? Copyright's Implications for the Tradition of Borrowing in Classical Music," she posits that strong copyright laws and frequent lawsuits have had a chilling effect on borrowing for contemporary composers⁷ and consequently, that copyright has enforced a borrowing ban, which is a major factor in stunting classical music as a genre. However, classical music is still heard today in varied media, including commercials, Disney movies and

necessarily use sounds, melodies and motifs that an audience would be familiar with.").

⁴ Tchaikovsky's *Festival Overture in Eb major, Op. 49 (1812)* itself quotes *La Marseillaise* and *God Save the Tsar!* to reference the French army's attempt to invade Russia during the Napoleonic Wars. ROLAND JOHN WILEY, TCHAIKOVSKY 240-41 (Oxford Univ. Press 2009).

⁵ When courts consider whether a work constitutes fair use, they consider the purpose and character of the work. 17 U.S.C.A. § 107(1); Parody can be one such type of fair use. "A 'parody' which is a form of criticism, good-natured or otherwise, is not intended as a substitute for the work parodied, but it must quote enough of that work to make the parody recognizable as such, and that amount of quotation is deemed fair use." Ty, Inc. v. Publications Intern. Ltd., 292 F.3d 512, 518 (7th Cir. 2002).

⁶ Stephen Foster, *Beautiful Dreamer* (Published 1864); Oliver Hood, *You Are My Sunshine* (1933); Charles A. Zimmerman, *Anchors Aweigh*, (1906). Works published before 1923 are, by default, public domain. For a work published between 1922 and 1978, its initial copyright duration was 28 years. Patry on Copyright, sec. 7:10 In General.

⁷ Leung, *supra* note 3.

live performances. Far from being a dying breed, classical music is a survivor.

II. BACKGROUND

In order to understand the importance copyright plays in our music industry we must look to the history of music and the introduction of copyright laws. In the 9th century, European churches popularized music through use in their religious services and ceremonies;⁸ unsurprisingly, from the 9th to the 14th century, monks produced almost all of the “classical” music of the time for the church,⁹ so the musical composers were unknown.¹⁰ Following this period of primarily church music, the Renaissance period¹¹ triggered the rise of aristocratic benefactors who played a major role in transitioning classical music from religious to secular entertainment.¹² These changes fundamentally altered the production and composition of music.

As Lueng’s article says, borrowing played a primary role in classical music composition throughout history.¹³ The practice of borrowing may have helped create the greatest pieces of all time, but it only worked because of many other contributing factors, including the minimal interest composers actually had in creating their

⁸Jim Paterson, *Classical Music Periods*, MUSIC FILES LTD., <http://www.mfiles.co.uk/classical-periods.htm>, (last visited Mar. 23, 2014); See also *History of Classical Music*, NAXOS DIGITAL SERVICES LTD., http://www.naxos.com/education/brief_history.asp (last modified Apr. 8, 2014).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Michael W. Carroll, *Whose Music is it Anyway? :How We Came to View Expression as a Form of Property*, 72 U. Cin. L. Rev. 1405, 1408-09 (2004).

own work and their primary role as performers.¹⁴ Notably, the culture of musical creation was much different. Composers spent their careers working for royal patrons, giving music lessons and writing compositions for both current and prospective patrons.¹⁵ Even though artists had increased flexibility because of the demand for music outside of the church, they still had to find a sponsor to finance their efforts. Often these composers were financially dependent on noble patronage to achieve their musical goals.¹⁶ Some patrons even kept composers as servants.¹⁷ The composers of the 17th and 18th century saw the ideology of copyright being created, but instead of the composers, it benefitted patrons who generally owned all of the rights to the musical works.¹⁸ For example, Niccolo Jimmelli was denied access to copies of his own music when he left Duke Carl Eugen's service.¹⁹ Under patronage system artists were not legally entitled to their own music, therefore, they would not have any motivation to protect their works.²⁰

Although most composers were laboring under the noble patronage, George Friederick Handel was a rare exception, a freelance composer who made a profit on his

¹⁴ See Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 920 (2005).

¹⁵ 1 William F. Patry, *Patry on Copyright* § 1:14 (2012) (discussion of the history of composers and the patronage system).

¹⁶ See also Ronald B. Standler, *Music Copyright Law in the U.S.* (Jul. 21, 2013), <http://www.rbs2.com/copym.pdf>

¹⁷ Patry, *supra* note 15, at § 1:14; See also Standler, *supra* note 16 (noting that this practice of the publisher or sponsor being paid for the original extended well into the 1800's).

¹⁸ Patry, *supra* note 15; See also Standler, *supra* note 16.

¹⁹ Patry, *supra* note 15.

²⁰ See Generally Patry, *supra* note 15 (discussion of the flat fee paid to authors and composers for absolute rights to their music and copyright's protection of publishers); See Generally Carroll, *supra* note 14, at 920 (discussing pre-copyright and early copyright structures and surveying various early music publication cases involving composers).

own compositions.²¹ As the first major freelance composer of his time, Handel was an important figure in expanding the classical music market outside of the patronage system; he did this through his ability to be a performer, composer²² and businessman.²³ The 18th century also led to the introduction of concertos, creating an increased demand for performers.²⁴ This change from exclusively service to independent work and the increased demand for performers paved the way for the commercialization of the music business, giving composers the ability to control their performances and own their work.²⁵ Additionally, at the tail end of the 18th century, the practice of royalty payments instead of lump sums became more prominent in the industry, helping advance the acceptance of composers' independence.²⁶

Once the musical industry changed from a purely social mechanism to a commercial mechanism, it came under the scrutiny of the legal system. The classical period brought about the start of music as a valuable commercial commodity. Notably, composers began seeking protection for their published works through printing privileges from the English crown in the beginning of the 18th century.²⁷ This suggests that the demand for protection of musical works occurred before copyright laws covered musical compositions. The epicenter of copyright's beginnings,

²¹ Carroll, *supra* note 14, at 928 (discussing Handel as a transitional figure for the introduction of copyright protection for composers).

²² *See Generally, Id.*

²³ *See Generally, Id.*

²⁴ *Id.* at 927 (discussing pre-copyright and early copyright structures and surveying various early music publication cases involving composers).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Patry, *supra* note 15.

²⁷ Carroll, *supra* note 14, at 921.

London, England was one of the largest and wealthiest cities in Europe during the 18th century.²⁸ The monarch licensed a group of publishers called the Stationer's Company²⁹ to copy literary works and musical compositions.³⁰ The Stationer's Company helped cultivate classical music's popularity through printing compositions, which became a means for patrons and publishers to profit.³¹ These printers often abused this privilege by repeatedly selling copies of manuscripts to other unlicensed printers.³² Ultimately, this abuse led to the creation of the Statute of Anne, which protected licensed printers from copyright infringement by punishing unauthorized printing of literary works.³³ While Parliament's passage of the Statute of Anne initiated the protection in musical works, the courts did not extend the Statute of Anne to protect compositions until the end of the 18th century.³⁴

²⁸ *Id.* at 920.

²⁹ See *Generally* Carroll, *supra* note 14 at 922 (discussing the creation of the Stationer's Company).

³⁰ See Patry, *supra* note 15.

³¹ See *Generally* Michael W. Carroll, *supra* note 14 (surveying various early music publication cases involving composers); See also *The Concept and History of Copyright and Sources of Law*, NATIONAL PARALEGAL COLLEGE, http://nationalparalegal.edu/public_documents/courseware_asp_files/patent_s/Copyrights1/Concept.asp (last visited Mar. 23, 2014) (noting the events leading up to the creation of the Statute of Anne, precipitated through the creation of the Stationary Company and the inability to contain printing rights amongst the original group of printers).

³² See Patry, *supra* note 15 ("A stationer was generally unencumbered by agreements favouring authors and sold the right to print a book to another stationer without reference to the author..."); See *Generally* Carroll, *supra* note 14.

³³ See Patry, *supra* note 15. ("A stationer was generally unencumbered by agreements favouring authors and sold the right to print a book to another stationer without reference to the author...").

³⁴ Carroll, *supra* note 14, at 929-30; See also Patry *supra* note 15; See also Carroll, *supra* note 13, at 1450 (noting that claims for proprietary ownership, although not common existed as early as the late Middle Ages to the beginning of the Renaissance).

Our laws are simply a reflection of our society's history and viewpoints. To be sure, the law gradually recognizes issues that have become prominent in our culture for extended periods of time; copyright infringement of musical works is no exception. To illustrate, it took over four hundred years for music to transition from an oral tradition to a written tradition.³⁵ The invention of the printing press in the 1400's began the battle for proprietary claims of printed literary and musical works,³⁶ and long before our modern day copyright laws existed, musical compositions were seen as the property of publishers and patrons.³⁷

Classical music, like all popular things, has naturally declined in popularity with the passage of time. Even so, classical music thrived after the creation of copyright laws. For example, here in the United States classical music remained popular in some form well into the 1900's when copyright laws were passed in the 1800's.³⁸ Essentially, the ability to create a market stems from the uniqueness of the piece, and copyright laws protect a composer's right to control the use of her works. The music industry is a business; artists make money through producing pieces the public will be interested in purchasing. Furthermore, our society values originality and

³⁵ Carroll, *supra* note 13, at 1439.

³⁶ *Id.*

³⁷ See Generally Carroll, *supra* note 13, at 1452; See Generally Patry, *supra* note 15.

³⁸ See Generally *The Concept and History of Copyright and Sources of Law*, NATIONAL PARALEGAL COLLEGE, [http://nationalparalegal.edu/public_documents/courseware.asp_files/patent s/Copyrights1/Concept.asp](http://nationalparalegal.edu/public_documents/courseware.asp_files/patent%20s/Copyrights1/Concept.asp) (last visited Mar. 23, 2014); *History of Classical Music*, NAXOS DIGITAL SERVICES LTD., http://www.naxos.com/education/brief_history.asp (last modified Apr. 8, 2014).

has for many centuries.³⁹ However stringent the current copyright laws are, they still leave room for the creation of new works. Far from damaging contemporary composers by disallowing borrowing, modern copyright laws may actually *protect* them from shameless appropriation of their works by pop artists.

III. COPYRIGHT'S EFFECT ON COMPOSERS

While a composer of classical music has not been sued yet for appropriating popular music, hardly a decade has gone by in the 20th century without some pop musician standing on the shoulder of the classical giants to “create” a copyrighted work from which she or he profits.⁴⁰ Leung’s article makes it clear that she believes that modern copyright protections hamstring composers by disallowing borrowing in their music;⁴¹ however, modern copyright standards have also *protected* modern composers from having their compositions used by others in ways they did not intend to turn a profit. A composer who holds copyright over her works is able to control the use of her creation and, to some extent, her own legacy as a composer. As an example of the differing impact of composing with and without copyright protection, consider Pyotr Il’yich Tchaikovsky and Aaron Copland. Tchaikovsky composed prior to most copyright protections and Copland after.

³⁹ 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).

⁴⁰ See e.g. “Our Love,” a 1939 Big Band arrangement of Tchaikovsky’s main theme from the *Romeo and Juliet Overture*; “Once Upon a Dream,” the 1959 Disney adaptation of Tchaikovsky’s *The Sleeping Beauty* “Valse”; Eric Carmen’s “All by Myself,” (1975), an adaptation of the Adagio from Rachmaninoff’s Second Piano Concerto.

⁴¹ See Leung, *supra* note 3 at 66-67.

A. Tchaikovsky's *The Sleeping Beauty*

The famous Russian composer, Pyotr Il'yich Tchaikovsky, composed the music for the ballet, *The Sleeping Beauty*, completing the score in August 1889.⁴² The composer considered this score one of his best works,⁴³ saying that it was a topic “*not of this world*.”⁴⁴ One of Tchaikovsky's talents as a composer, according to his biographer Roland John Wiley, was “his genius for what [Tchaikovsky] called the ‘lyrical idea.’”⁴⁵ Wiley continues, “the beautiful self-contained melod[ies] gave his music a permanent appeal.”⁴⁶

Given the ballet score's lyrical nature, it is not too surprising that the 1959 Disney movie *Sleeping Beauty* uses music from Tchaikovsky's *The Sleeping Beauty*. The man credited with music for the movie is George Bruns, though.⁴⁷ Bruns did compose additional music for the score as well as adapting parts of Tchaikovsky's music to suit the animation, and the lyrics were written for the film, but the memorable melody lines were all from the Russian composer.⁴⁸ At times, the soundtrack sounds like a symphonic recording of the ballet score with a vocal track slapped on top of it. Irritatingly, Bruns⁴⁹ was nominated for

⁴² WILEY, *supra* note 4, at 342.

⁴³ David Brown, *Tchaikovsky, Pyotr Il'yich*, THE NEW GROVE DICTIONARY OF MUSIC & MUSICIANS, 606, 624 (Stanley Sadie ed., 1980).

⁴⁴ WILEY, *supra* note 4, at 311 (quoting a letter to his brother, Modest) (emphasis original).

⁴⁵ Brown, *supra* note 12, p. 607.

⁴⁶ *Id.*

⁴⁷ *Sleeping Beauty Full Cast and Crew*, IMDB.COM, http://www.imdb.com/title/tt0053285/fullcredits?ref_=tt_ov_st_sm (last visited Mar. 15, 2014).

⁴⁸ *Id.*

⁴⁹ Lest anyone conclude that George Bruns is a shameless plagiarist and nothing more, he was a composer and teacher for many years and composed many completely original pieces, including co-writing “The

an Oscar for Best Scoring of a Musical Picture in 1959.⁵⁰ One wonders what Tchaikovsky would have thought about his music being stolen to turn a profit for a giant media company.⁵¹

Imagine if we shifted Tchaikovsky's timeline and granted him copyright over *The Sleeping Beauty*. He would have exclusive rights over derivative works,⁵² and the use in 1959 in Disney's *Sleeping Beauty* would have been a clear infringement on his rights. Proving infringement requires evidence of access to the original work and proof of substantial similarity as the result of illicit copying of copyright-protected elements for the work.⁵³ As Leung says, "For most composers using historic borrowing techniques, access would often be easy to prove."⁵⁴ Given the acknowledgement in the film's original trailer that "you will literally be surrounded with [the film's] delightful

Ballad of Davy Crockett" and composing the score for *The Jungle Book*. *George Bruns Filmography*, IMDB.COM, <http://www.imdb.com/name/nm0005980/> (last visited Mar. 15, 2014).

⁵⁰ *The Official Academy Awards Database*, OSCARS.ORG, <https://www.oscars.org/awards/academyawards/legacy/ceremony/32nd-winners.html> (last visited Mar. 17, 2014).

⁵¹ The situation is especially ironic given Disney's aggressive prosecution of any use of its copyrighted or trademarked properties. *See generally* Walt Disney Productions v. Air Pirates, 581 F.3d 751 (9th Cir. 1978) (suing over "adult" parody of Mickey Mouse); Walt Disney Productions v. Filmation Association, 628 F.Supp. 871 (C.D. Cal. 1986) (suing on 11 counts of copyright infringement related to *Pinocchio*). Most recently, Disney brought a trademark infringement suit related to its animated film, *Frozen*, mere weeks after its release. Eriq Gardner, *Disney Files Trademark Lawsuit over "Frozen Land" Film*, HOLLYWOOD REPORTER (Dec. 24, 2013, 11:25 AM) <http://www.hollywoodreporter.com/thr-esq/disney-files-trademark-lawsuit-frozen-667617>.

⁵² 17 U.S.C. § 103. "A 'derivative work' is a work based upon one or more preexisting works, such as . . . musical arrangement . . . abridgement." 17 U.S.C. § 101.

⁵³ *See* Leung, *supra* note 4, at 22-26. (discussing "How Much Similarity is too Much?").

⁵⁴ Leung, *supra* note 4, at 23.

songs and glorious music of Tchaikovsky,”⁵⁵ proving access would not be an issue.

As far as whether Bruns’ adaptation used too much of Tchaikovsky’s source material, by almost any standard, the answer is “yes.” A good example of the extent of Bruns’ borrowing is the song “Once Upon a Dream” from the *Sleeping Beauty* movie. The song’s tune is from Tchaikovsky’s “Valse” in the ballet score. It is not just similar; it is identical. The melody, harmony and rhythm are completely unchanged. While Bruns did not “borrow” the entire score, he certainly borrowed one of the best-known melodies. Bruns’ adaptation undoubtedly used “that portion of [the work] upon which its popular appeal, and, hence, its commercial success, depends.”⁵⁶ It was the “catchy part”⁵⁷ and the “heart of the composition.”⁵⁸

The Disney score’s similarity to the composer’s original music could affect the potential market since a consumer would be able to purchase the best melodies of Tchaikovsky’s *The Sleeping Beauty* with the added bonus of charming lyrics. More than just Tchaikovsky’s commercial interests would be damaged, though. His reputation might suffer, either because he receives none of the credit for his compositions or because his association with a cartoon denigrates his status as a serious artist. This would not be an idle fear. Many of Tchaikovsky’s most successful themes have been appropriated so often that they

⁵⁵ *Sleeping Beauty – 1959 Theatrical Trailer*, DISNEYPLATINUMDVDSTV YOUTUBE CHANNEL, (May 10, 2010)

<http://www.youtube.com/watch?v=W0-JjakcOOQk>

⁵⁶ *Robertson v. Batten, Barton, Durstine & Osborn, Inc.*, 146 F.Supp. 795, 798 (S.D. Cal. 1956).

⁵⁷ Aaron Keyt, comment, *An Improved Framework for Music Plagiarism Litigation*, 76 Calif. L. Rev. 421, 425 (1988).

⁵⁸ *Elsmere Music, Inc. v. Nat’l Broad. Co., Inc.*, 482 F.Supp. 741, 744 (S.D.N.Y. 1980).

are now used as short-hand musical jokes. The love theme from *Romeo & Juliet*⁵⁹ is the music that swells in the background in cartoons when the long-separated lovers race across the field at one another⁶⁰ or a character sees the object of his affection for the first time.⁶¹

B. Copland's "Hoedown" From *Rodeo*

Aaron Copland, an American composer, was born about sixty years after Tchaikovsky and lived his entire life in the 20th Century.⁶² He also borrowed generously from American folk music, creating a very American style.⁶³ Copland wrote his most popular compositions in the 1940s⁶⁴ after the development of modern copyright laws. Because Copland held the copyright on his compositions, he had control over the use of them and, consequently, his reputation as a composer.

⁵⁹ Betsy Schwarm, *Romeo and Juliet*, ENCYCLOPAEDIA BRITANNICA, (Jul. 25, 2013) available at

<http://www.britannica.com/EBchecked/topic/1833143/Romeo-and-Juliet>.

⁶⁰ Amanda Angel, *Top Five Romantic Cliches in Classical Music*, WQXR (Feb. 14, 2012) <http://www.wqxr.org/#!/story/187002-top-five-romantic-cliches-classical-music/> (remarking that the piece often accompanies "two passionate parties running, arms extending, toward each other through a field of flowers"); Another good example of a good classical theme devolving into a joke is Frederic Chopin's Sonata No. 2 in B-flat Minor; the third movement, the "Marche Funèbre," is often used in film to indicate someone's death, especially in cartoons. Elizabeth Blair, *Chopin's Iconic Funeral March*, (Mar. 1, 2010, 10:19 AM) <http://www.npr.org/templates/story/story.php?storyId=124039949>.

⁶¹ See, e.g. *Animaniacs: Jockey for Position* (Warner Brothers television broadcast Oct. 25, 1993) (The love theme plays when Pinky the mouse sees Pharfignewton the horse for the first time, and they immediately fall in love.).

⁶² William Austin, *Copland, Aaron*, in NEW GROVE DICTIONARY OF AMERICAN MUSIC 496, 496 (H. Wiley Hitchcock & Stanley Sadie, eds., 1980).

⁶³ *Id.* at 510. (describing *A Lincoln Portrait* as "a hint of *Yankee Doodle*, link[ing] the lyrical *Springfield Mountain* and the boisterous *Camptown Races*.").

⁶⁴ *Id.* at 496. *A Lincoln Portrait* (1942), *Appalachian Spring* (1943-44), *Fanfare for the Common Man* (1942), and *Rodeo* (1942).

No known pop song has “borrowed” a Copland motif. The progressive rock band, Emerson, Lake & Palmer did record arrangements of “Hoedown” and “Fanfare for the Common Man,” but they credited Copland as the composer in both instances. Copland was still living at the time, and in a BBC Radio Interview, Copland said, “naturally since I have a copyright on such material, they're not able to take it without my permission; so that in each case, where I have given my permission, there was something that attracted me about the version that they perform, which made me think I'd like to allow them to release it.”⁶⁵

Even now after Copland's death, if an advertising executive or symphony conductor wants to use a Copland piece, he or she has to obtain permission for the use from Boosey & Hawkes, the publishing company.⁶⁶ Somewhat ironically, Copland's best known piece of music is from a commercial use. “Hoedown” from *Rodeo* is the music that plays in the National Cattlemen's Beef Association advertisements.⁶⁷ Had Copland been adamantly opposed to commercial use of his music during his life, he could still enforce it posthumously through a stipulation in his estate or with the publishers.⁶⁸ The strong modern copyright laws

⁶⁵ EMERSON, LAKE & PALMER, *FROM THE BEGINNING*, (Castle Music UK 2007).

⁶⁶ Hardly anyone can hear Copland's “Hoedown” without immediately also hearing the words “Beef, it's what's for dinner” in Sam Elliot or Robert Mitchum's voice. Whether Copland would appreciate that kind of musical immortality is uncertain.

⁶⁷ *Beef, it's what's for Dinner – Circa 1993*, YOUTUBE.COM, (Sept. 3, 2010) http://www.youtube.com/watch?v=tvivAIS9c_U

⁶⁸ See generally, *Beastie Boys Settle Copyright Dispute with Toy Company Goldieblox*, GUARDIAN MUSIC, <http://www.theguardian.com/music/2014/mar/18/beastie-boys-settle-copyright-dispute-goldieblox-toy-advert> (Mar. 18, 2014, 2:16 PM)

have allowed Copland to retain control over his music both during his lifetime and after his death.⁶⁹

IV. CONCLUSION

Copyright might be the disaster for classical music that Leung alleges, but it might not. She admits that courts have not examined complex Ivesian compositions that layer popular melodies; most cases have dealt with simple pop songs where the use of another's melody is straightforward⁷⁰ or sampled pop songs in hip-hop music.⁷¹ Given the lack of cases on this topic, we cannot conclude that copyright has killed the classical stars. While it is probably true enough that multi-million dollar infringement suits have a chilling effect on contemporary composers' use of borrowing, it is entirely possible that a composer would not meet the same fate as a producer using unlicensed samples.

If the key inquiry is the commercial effect of the use on the original copyrighted work, then borrowing a pop melody for a composition should be in the clear. The financial impact on a melodic quote in a symphony is likely negligible. It is unlikely that a classical composition quoting a melody from Kanye West would cause the buying public to forsake the pop singer in favor of the symphony. The overlap in the Venn diagram for people who consume classical music *and* top forty contemporary urban hits is practically nonexistent. Conversely, the

(explaining that the Beastie Boy's late frontman Adam Yauch's will had an explicit prohibition against using the group's songs in advertisements).

⁶⁹ *Aaron Copland Snapshot*, BOOSEY & HAWKES,

http://www.boosey.com/pages/cr/composer/composer_main.asp?composerid=2748 (last accessed Mar. 17, 2014, 11:41 PM) (directing purchasers how to obtain licenses to both scores and recordings of Copland's music).

⁷⁰ Leung, *supra* note 4, at 37.

⁷¹ See e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005); *Saregama India, Ltd. v. Mosley*, 687 F.Supp. 2d 1325 (S.D. Fla. 2009).

borrowing might even be helpful. Looking to Copland's example, his inclusion of the Shaker hymn "Simple Gifts" brought about a renewed popularity of the song.⁷²

We need a few brave souls to write "Variations on a Theme by Justin Timberlake" or the "1990s Pop Song Suite" featuring melodies from Britney Spears, Christina Aguilera and Mandy Moore⁷³ and see what happens. The courts might be willing to accept a fair use defense for a composition that could transform any of those artists' songs into something grander.

⁷² Austin, *supra* note 29, at 501. (noting that "*Simple Gifts*, after Copland made it famous was adopted into the repertoires of schools, churches, and the popular 'folksingers' of the 1960s").

⁷³ Titles inspired by Ralph Vaughn William's "Variations on a Theme by Thomas Tallis," borrowing from a Tudor-era composer and Vaughn William's "Folk Song Suite," borrowing English folk songs.