CAUSE WE DON'T GIVE A DERN: THE FUNDAMENTAL TENSION BETWEEN MODERN COPYRIGHT LAW AND AMERICAN FOLK MUSIC

Asher Mitchell*

ABSTRACT

Section 106(2) of the Copyright Act of 1976 provides the exclusive right to prepare derivative works based upon copyrighted work. This right is often invoked in the case of highly commercialized music to protect an artist's interest in compensation for their work. While the derivative works right is essential in the music industry, it creates a divide between a copyright owner's interest in compensation and the public's interest in access. This Note delves into this divide and argues that the derivative works right is flawed in its attempt to cast a wide net over a host of creative mediums that are functionally different while paying little to no attention to how these mediums operate. Mitchell illustrates this dilemma through the lens of American folk music, a genre littered with musicians reinvigorating previous works. Mitchell argues that there exists an inherent tension between modern copyright law and American folk music traditions. To resolve this tension, Mitchell proposes a more discerning and intentionally under-inclusive ordinary observer standard and the establishment of a variety of license types so that copyright owners can opt out of strict protections. Mitchell argues that the combination of the two can solve the problems created by a rigidly applied statutory law and a musical tradition that relies heavily upon influences from others.

---

* J.D. (2021), Washington University School of Law.

INTRODUCTION

The derivative works right included in the 1976 Copyright Act provides exclusive rights to the owners of copyrighted works and gives rise to a fundamental shift in legal and cultural understandings of ownership over an original work.[1] Since January 1, 1978, the date on which these rights came into effect, owners of copyright have enjoyed the broadest degree of federal protections in our nation's history.[2] Among other exclusive rights, the copyright owner:

> [H]as the exclusive rights to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . .[3]

Additionally, § 302 establishes the duration of these rights as "endur[ing] for a term consisting of life of the author and 70 years after the author's death."[4] These rights provide long-lasting, meaningful protection to "original works of authorship fixed in a tangible medium of expression . . . ."[5] This created a multitude of issues with which modern copyright law is still wrestling today.

One such issue involves § 106(2), the exclusive right to prepare derivative works based upon the copyrighted work. The principle behind this right as an exclusive right extends back to the early twentieth century (and significantly further in its evolution as a principle of copyright protection) and eases a number of complications.[6] In highly commercialized

1. Copyright Act of 1976, 17 U.S.C. §§ 101–810.
2. 17 U.S.C. § 301(a).
3. 17 U.S.C. § 106.
4. 17 U.S.C. § 302(a).
5. 17 U.S.C. § 102(a).
6. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075. The Beach Boys' "Surfin' U.S.A.," which was derived musically and lyrically from Chuck Berry's "Sweet Little Sixteen," is a classic example of one of the many complications that the derivative works right intended to resolve. Realizing the infringement on Berry's exclusive right to derivative works, the Beach Boys settled out of court, paying a portion of the royalties of "Surfin' U.S.A." to Berry. Elizabeth Flock, *Without Chuck Berry, These 10 Famous Rock Songs Would Not Exist*, PBS NEWS HOUR (Mar. 20, 2017), https://www.pbs.org/newshour/arts/without-chuck-berry-10-famous-rock-songs-not-exist [https://perma.cc/2H43-P54S].

music, this right is clearly essential to protect the original artist's interest in compensation for the work. However, Congress has not effectively resolved issues regarding interests of parties beyond the owner(s) of the copyrighted work. "Congress and the courts have struggled to define the right way to balance the author's interest in compensation and the public's interest in access."[7] The derivative works right casts a wide net over a host of creative mediums that are functionally different while paying little to no attention to how these mediums operate. The dilemma in the balance of interests magnifies with American folk music, a genre built upon oral tradition, borrowing, community experience, and customs that heavily rely on accessibility to the public. The American folk tradition is littered with musicians reworking previous works, often as an homage to the original artist or for a multitude of other reasons, such as revitalizing an old theme for the current times.[8] There exists an inherent tension between modern copyright law and American folk music traditions.[9] This Note proposes that this dilemma could be resolved by fine-tuning copyright protection to allow greater flexibility in use of copyrighted works while maintaining protections that copyright law has historically provided.

This Note first supplies the necessary background information on the principles behind § 106(2) of the Copyright Act of 1976. Next, this Note explores the function of borrowing in American folk music followed by substantive examples of American folk songs which would not likely be permissible under modern copyright law. Next, this Note analyzes various copyright tests currently applied by courts. Finally, this Note proposes the establishment of a partial opt-out mechanism that would allow copyright owners to voluntarily reduce the rights available to them via the granting of various copyright licenses that inform the public as to which copyright owner is operating under a particular copyright license. This publicly available information could be compiled in a database similar to the Trademark Electronic Search System. As this would be an opt-out system, all copyrighted works would default to receiving full federal protections.

---

7. Bryan Bachner, *Facing the Music: Traditional Knowledge and Copyright*, 12 HUM. RTS. BRIEF 3, 9–12 (2005).

8. Nick Spitzer, *The Story of Woody Guthrie's 'This Land is Your Land'*, NPR (Feb. 15, 2012, 12:00 PM), https://www.npr.org/2000/07/03/1076186/this-land-is-your-land [https://perma.cc/492U-VZVG].

9. Among other genres like jazz, but American folk music will be the primary focus of this Note.

The second course-correcting mechanism to the proposal addresses a prevailing issue with the courts' interpretation and application of the substantial similarity test(s). A more discerning and intentionally under-inclusive ordinary observer standard should be applied in cases of highly subjective determinations made by juries unskilled in the particulars of the determination they are making. These changes could ease the tension between rigidly applied statutory law and a musical tradition that relies heavily upon influences from others.

I. HISTORY

A. Background on the Exclusive Right to Derivative Works

William Patry wrote in his treatise *Patry on Copyright* that "[t]hose who trumpet copyright as a natural right have an unnatural view of history."[10] Exclusive ownership over derivative works of a copyrighted work is a relatively recent development in human history. History contains many examples of monumental figures of creativity claiming ownership to decidedly unoriginal works. Judge Richard Posner wrote of Shakespeare:

> His characteristic mode of dramatic composition was to borrow the plot and most of the characters – and sometimes some of the actual language – from an existing work of history, biography, or drama and to embroider the plot, add some minor characters, alter the major ones, and write most, often all, of the dialogue.[11]

To understand how the right to create derivative works came to be exclusively owned by the owner of the copyright, it is essential to understand what a derivative work is and its application through time. A derivative work is a "work based upon one or more preexisting works, such as . . . a musical arrangement . . . or any other form in which a work may be recast, transformed, or adapted."[12] If the "revisions . . . as a whole, represent an original work of authorship," the work is considered to be a derivative

10. WILLIAM F. PATRY, PATRY ON COPYRIGHT § 12:1 (2007).
11. RICHARD A. POSNER, LAW AND LITERATURE 525 (3d ed. 2009).
12. Copyright Act of 1976, 17 U.S.C. § 101.

work.[13] The United States Copyright Office elaborated further on the concept of derivative work: "To be copyrightable, a derivative work must incorporate some or all of a preexisting 'work' and add new original copyrightable authorship to that work."[14] Under the 1909 Copyright Act, copyright owners were given the exclusive right to "translate the copyrighted work into other languages or dialects, or make any other version thereof . . ." including "to arrange or adapt it if it be a musical work . . ."[15] Those who create derivative works, assuming they are not the creator of the original works, can hold copyrights of those derivative works only with some agreement or permission from the owner of the original copyright or if the original work has entered the public domain. Generally, a work enters the public domain seventy years after the creator's death.[16]

Although a primitive version of the derivative works right was codified in the United States just over one hundred years ago, the origins of the right extend much further to the 1710 Statute of Anne in Great Britain.[17] In *Rethinking Copyright: History, Theory, Language*, Ronan Deazley explains the significance of the Statute of Anne in the relatively short history of copyright law.[18] The Copyright Act of 1710 served as the first copyright statute in the world, providing legal protections to a growing British publishing industry that had very little security prior to the Act.[19] A compromise between competing interests of the time, the protections were limited to printing reproductions of books.[20] Books published prior to the passage of the Act were given protection for twenty-one years, while books published after the passage of the Act were given protection for fourteen years with the possibility of re-vesting for another fourteen years if the

---

13. *Id.*
14. U.S. COPYRIGHT OFF., COPYRIGHT REGISTRATION OF DERIVATIVE WORKS CIRCULAR 14, https://www.copyright.gov/circs/circ14.pdf [https://perma.cc/5SJW-HTDL].
15. Copyright Act of 1909, Pub. L. No. 60-349, § 1(b), 35 Stat. 1075.
16. 17 U.S.C. § 302(a). For example, Stephen Foster's *Camptown Races*, published in 1850, has long since entered the public domain, while Leonard Cohen's *Hallelujah*, published in 1984, will remain under copyright for decades.
17. Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19 (1710) (Gr. Brit.) https://avalon.law.yale.edu/18th_century/anne_1710.asp [https://perma.cc/H8NN-9PRV]; RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 13 (2006).
18. DEAZLEY, *supra* note 17, at 13.
19. *Id.* The Copyright Act of 1710 is more commonly known as the Statute of Anne and is formally titled *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned. Id.*
20. *Id.* at 14.

author of the work was still alive at the time of the original fourteen-year term's expiration.[21] With an eye toward the wellbeing of "the reading public, the continued production of useful literature, and the advancement and spread of education," the Statute of Anne established movable goalposts for copyright protection that reached the United States via the Copyright Act of 1790.[22] The American Act was a largely similar law designed "for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."[23]

A peculiar inconsistency emerged in American caselaw by the mid-nineteenth century. U.S. courts found foreign translations of prior literature to contain a sufficient degree of unique quality and decision-making to avoid copyright infringement of the work being translated.[24] "The theory was that certain types of unauthorized works reflected independent judgment and therefore presented to the public 'new' works."[25] A much broader interpretation of copyright infringement, however, was levied upon musical arrangements.[26] In assessing whether a German polka composition rearranged for piano and sold as a new work constituted copyright infringement, the Southern District of New York declared that:

> The musical composition contemplated by the statute must, doubtless, be substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make.[27]

While this discrepancy between literary and musical works ultimately folded by the latter half of the nineteenth century in favor of a broader

21. *See generally id.*
22. *Id.*
23. Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790).
24. Stowe v. Thomas, 1 Pitts. 82, 23 F. Cas. 201 (1853) (ruling that an unauthorized translation of *Uncle Tom's Cabin* into German did not amount to a copy of the original work).
25. PATRY, *supra* note 10, at § 12:3.
26. *Id.*
27. Jollie v. Jaques, 13 F. Cas. 910, 913–14 (C.C.S.D.N.Y. 1850) (denying copyright protection to a musical rearrangement's contents and title, both of which derive from a previously existing work). The "statute" referenced is the Statute of Anne. A United States District Court citing the Statute of Anne in 1850, rather than the 1790 Copyright Act, appears bizarre, but perhaps the Court took this liberty due to the fact that the latter was modeled off the former.

interpretation of derivative works, one has to wonder how the courts distinguished between the experiences and skills of a composer and the experiences and skills of a translator-author to justify their vastly different protections at the time.

In 1802, Congress amended the 1790 Copyright Act by requiring notice of copyright registration to be affixed upon the work and extending a primitive version of the derivative works right, among other amendments. The latter prohibited any unauthorized person from "varying, adding to, or diminishing from the main design" any part of a copyrighted work or the copyrighted work as a whole.[28] Limited but substantial extensions to the derivative works right were granted by the courts between 1856 and 1870, one of which resolved the discrepancy between literary and musical adaptations that persisted until that point.[29] However, it was not until the 1909 Copyright Act that a derivative works right resembling those under the 1976 Act was granted. Under the early twentieth-century statute, a copyright holder retained the exclusive right to "print, reprint, publish, copy and vend . . . [t]o translate the copyrighted work into other languages . . . [t]o perform the copyrighted work publicly for profit if it be a musical composition . . . ." among other exclusive rights.[30] Notably, penalties for infringing musicians (except for dramatic, choral or orchestral compositions) were particularly lenient: "[T]en dollars for every infringing performance" and a court-imposed injunction from further reproduction of the copyrighted music.[31]

While the 1976 Copyright Act most notably refocused the scope of copyright protection under federal law and extended the term of copyright protection to seventy-five years,[32] the Act's derivative works right is

28. PATRY, *supra* note 10, at § 12:4.

29. Congress codified *Daly v. Palmer*, an 1868 case holding that appropriating events from a previously existing work into a new dramatic work constitutes copyright infringement. Daly v. Palmer, 6 Blatchf. 256 (S.D.N.Y. 1868).

30. Copyright Act of 1909, Pub. L. No. 60-349, § 1(a)–(e), 35 Stat. 1075.

31. § 25(b), (e).

32. Through the emergence of radio, television, sound recording, and other technologies, it became increasingly apparent that copyright law necessitated a rewrite. "[The 1909 act] is based on the printing press as the prime disseminator of information. Significant changes in technology have resulted in a wide range of new communications techniques that were unknown in 1909 . . ." U.S. COPYRIGHT OFF., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 (1977), https://www.copyright.gov/reports/guide-to-copyright.pdf [https://perma.cc/NAS7-6SGB]. § 25(b); Copyright Act of 1976, 17 U.S.C. § 304(b).

essentially a reorganization of the "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law" issued in 1961.[33] The report addressed a "[m]isunderstanding as to what is copyrightable material" regarding "'new versions' of preexisting works. A new version may be an adaptation of an earlier work . . . or an original compilation of preexisting materials, or it may consist of preexisting material with the addition of new material." The report further recommended that the statute "make it clear that these requirements apply to new versions of preexisting works."[34] This 1961 report, while short of a revamp of the 1909 Act, became the predicate for Congress's 1976 Copyright Act. The 1976 Copyright Act re-characterized 1961's "new versions" language as "derivative works."[35] Section 106 provides the owner of copyright with the exclusive right "to prepare derivative works based upon the copyrighted work . . ."[36] According to William Patry, the 1961 report may have considered the derivative works right to be unnecessary given the extent of overlap between the reproduction right and the derivative works right.[37] Despite this observation, the report encouraged inclusion of the derivative works right in order to maintain a clear distinction between the two rights' provisions.

The concept of a derivative works right—with all of its various expansions and refinements that have taken place over the last two hundred years—is obvious: the right to permit reproductions of fundamentally similar ideas remains with the one who produced the original idea. A legal scholar and expert in the area of tax law may release the second edition of her tax law casebook to reflect the changes in the law brought about by the Tax Cuts and Jobs Act of 2017. The second edition is obviously an extension of the first in much of its concepts and substance. On the other

---

33. U.S. COPYRIGHT OFF., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961), https://www.copyright.gov/history/1961_registers_report.pdf [https://perma.cc/9GAX-T9TW].

34. *Id.*

35. GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, *supra* note 32, at 3:2. The term "derivative works" includes "every copyrightable work that employs preexisting material or data of any kind." *Id.*

36. 17 U.S.C. § 106(2).

37. PATRY, *supra* note 10, at § 12:8. Furthermore, other scholars have noted the use of the substantial similarity test as the basis of determining infringement for both the reproduction right and the derivative works right, adding to the observation that the derivative works right may be unnecessary. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.09[A] (rev. ed. 2012).

hand, a marching band may commission an arranger to score selections of The Beatles for a halftime program, but credit for the songwriting will still rightfully belong to Lennon-McCartney. There are numerous understandings of derivative works and the rights that accompany them. These examples operate within modern concepts of creative ownership. Using that framework for more traditional concepts of ownership, however, may not always be appropriate. In many historical contexts, particularly outside the United States, traditional music has been considered collectively owned by the larger society that produced the music.[38]

Finally, it would be incomplete to conclude a history of the derivative works right without acknowledging the clear benefits that the derivative works right gives copyright owners, despite the issues in its application. The hefty compatibility issues between the modern law and historical reality do not negate the pressing need for copyright protection that the 1976 Copyright Act provides. Copyright security—in some fashion—is what gives Article I, Section 8, Clause 8 its teeth, as the Constitution granted Congress the power "[t]o promote the progress of science and useful arts," the former of which sparked the search for appropriate copyright protection.[39] The derivative works right is an attempt at creating that protection, but it may go too far.

B. Borrowing as a Component of American Folk Music

Folk music at its essence is a musical and oral vehicle for delivering culturally relevant or significant experiences, a phenomenon that reaches many genres of music but does not rest their bedrocks upon it to the same degree.[40] Folk music historically has used the oral tradition to relay songs

---

38. Dick Kawooya, Traditional Musician-Centered Perspectives on Ownership of Creative Expression (2010) 1 (Ph.D. dissertation, University of Tennessee, Knoxville) (noting that "[t]he collective ethos of traditional communities in Africa means that a traditional musician claiming individual *ownership* of a traditional piece of music goes against the collective customs and cultural values of the community." (emphasis in original))

39. U.S. CONST. art. I, § 8, cl. 8. *See, e.g.*, EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 125–26 (2002). Walterscheid interprets the historical meaning of the word "science" in this context as being functionally equivalent to the word "knowledge." Likewise, the term "useful arts" is more aptly synonymous with patents and utilitarian designs. *Id.*

40. Kim Ruehl, *The History of American Folk Music*, LIVEABOUT (Apr. 25, 2008), https://www.liveabout.com/the-history-of-american-folk-music-1322572 [https://perma.cc/ZFX7-

from one generation to the next or from one community to the next, creating a sense of a shared culture. Long after the invention of the printing press, the oral tradition has maintained a strong foothold in folk music with a remarkable consistency spanning across generations.[41] If the oral tradition is how folk music permeates within a culture, the borrowing technique is how folk music talks to itself. It is difficult to provide a definition for musical borrowing. Even Merriam-Webster merely defines borrowing as "something borrowed," specifically highlighting "a word or phrase adopted from one language into another."[42] Borrowing plays a crucial role in music similar to its role in linguistics. "Familiarity with tools that have been developed for music of other eras or kinds can facilitate our work and keep us from reinventing the wheel."[43] Although tricky to define, we can build a context for music in which borrowing makes sense. Borrowing in the context of music can be understood by considering how words on a page combine into attributable sentences—notes and rhythms on a page combine into attributable melodies in the same way. Although less easily identifiable than sentences, harmonic patterns in music can also point to a recognized source.[44] Borrowing extends beyond the benefit of the borrowing composer. It has been customarily viewed as a form of homage to the musicians and

5X6Q] (explaining that "[f]rom its origins, folk music has been the music of the working class. It is community-focused and has rarely enjoyed commercial success . . . [E]veryone is welcome to participate.").

41. "The Frog cam to the Myl dur," written in the mid-sixteenth century and otherwise known as "Frog Went a-Courtin'," is a classic example of English folk music being passed down generationally. The song has been recorded an untold number of times, many providing a range of slight to fairly significant variations on the versions preceding them. A common lyrical theme of each version depicts Frog attempting to persuade Uncle Rat for his niece's, Miss Mouse, hand in marriage. This work has such a strong tie to the oral tradition of folk music that the line between the original elements and the derivative elements added over the last several hundred years has been blurred beyond any possible distinction. *See* Bertrand H. Bronson, *Melodic Stability in Oral Transmission*, 3 J. OF THE INT'L FOLK MUSIC COUNCIL 50 (1951).

42. *Borrowing*, THE MERRIAM-WEBSTER DICTIONARY (New Ed. 2016) [https://perma.cc/2X3H-RKQR].

43. J. Peter Burkholder, *The Uses of Existing Music: Musical Borrowing as a Field*, 50 NOTES 851 (1994).

44. The Picardy cadence in music is a harmonic pattern in which the musical passage is predominantly in a minor key and concludes on a major chord resolution. Minor chords sound notably solemn, and lyrics added to minor chords typically reflect solemn themes. However, the raising of the minor third in the final chord to a major third (the "Picardy third") provides a "happier" final resolution, giving a sense of blissful finality to the listener. Although originating in the churches of the Picardy region of France, many notable composers—from Beethoven and Dvořák to Lennon-McCartney and Joni Mitchell—have utilized the Picardy cadence in their music.

composers who have come before them. Myung-Ji Lee explains this in her recent dissertation for the renowned University of North Texas School of Music:

> [M]usical quotation transcends time and space. Through their compositions, composers frequently express how much they admire their favorite composers and how they are inspired by masterpieces written by others. They pay respect to the master of the past by using and quoting pre-existing materials in the new works. The borrowed sources . . . connect the present and past.[45]

Using music as a nod to influences is apparent in every genre of music, whether it is in relatively discrete ways or blatantly obvious ones.[46] The genre and subculture of jazz is a prime beneficiary from use of this tradition. Miles Davis's seminal track "So What" from the 1959 album *Kind of Blue*, the best-selling jazz album since the invention of the trumpet, showcases a simple melody dressed up with modal harmony borrowed from African ballet and Debussey.[47] More overtly, Duke Ellington reworked Tchaikovsky

---

45. Myung-Ji Lee, *The Art of Borrowing: Quotations and Allusions in Western Music* (May 2016) (Ph.D. dissertation, University of North Texas) (on file with the University of North Texas Library).

46. For an example of the former, consider Paul Bonneau's *Caprice en Forme de Valse* (1950), a piece for classical saxophone in 3/8 time anchored by a recurring theme consisting of a pronounced downbeat followed by ascending chromatic sixteenth notes which peak and descend with eighth notes tasked with stabilizing the meter and which give the piece a light, whimsical quality. And Victor Morosco's *Blue Caprice* (1981) fuses classical and blues to create a unique piece that defies longstanding convention as to what the saxophone repertoire could showcase. Seven measures from the end and just after the climax of the piece, Morosco slips in two measures that are rhythmically inconsistent with any material previously introduced in the piece: the theme from the exposition of *Caprice en Forme de Valse*, configured to fit the key of *Blue Caprice*. While perhaps slightly jarring in its context, it is an unmistakable homage to Paul Bonneau's work. I would like to credit Dr. Adam Estes, associate professor of music at the University of Mississippi, for exposing me to these two works. *But cf.* Daniel Tarade, *An Analysis of "Song to Woody"*, THE MEANING OF LIFE TYPE STUFF (Feb. 23, 2018), https://www.lifetypestuff.com/blog/2018/2/17/jwngfyohpqb2yhr88nonvylx8zq37m [https://perma.cc/6WKF-HD2A] (noting that "Song to Woody," Bob Dylan's first original composition, borrows its melody heavily from Woody Guthrie's "1913 Massacre").

47. IAN MCCANN, THE LIFE OF A SONG: 'SO WHAT' (May 20, 2016), https://www.ft.com/content/b8266cf4-fd94-11e5-b5f5-070dca6d0a0d [https://perma.cc/6YJA-EEQ6]. Not only was *Kind of Blue* a revolutionary experiment that transitioned jazz from the bebop sphere of Charlie Parker and Dizzy Gillespie to a post-bop era, the album also brought international attention to the session musicians who played on it—John Coltrane, Cannonball Adderley, and Bill Evans. Davis influenced Coltrane's work just as Coltrane influenced Davis in the studio. *Id.*

melodies for his big band,[48] and Louis Armstrong borrowed considerably from opera.[49] The technique provides a social context for how music is both created and received by others. Jazz and folk music provide a particularly interesting comparison in the topic of borrowing, as they are excellent examples of circles that speak different languages but operate fundamentally the same in their relationship with the audience and other musicians.

While the borrowing tradition within folk music may appear to stem from a day of yonder, no longer compatible with a modern understanding of derivative works, only recently has it taken a backseat to modern copyright law. Despite the derivative works right's security in the passage of the 1909 Copyright Act, many folk artists in the early twentieth century continued the borrowing tradition, in apparent violation of copyright owners' rights, often with little to no repercussion. Woody Guthrie, a strong proponent of the borrowing tradition, undoubtedly extracted the melody of the Carter Family's "When the World's on Fire."[50] Guthrie himself found copyright restrictions on music so abhorrent that he regularly provided an "anti-copyright" notice with his songs, reading in part: "anybody caught singin [this song] without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. . . . We wrote it, that's all we wanted to do."[51]

C. Examples in American Folk Music

The practice of borrowing is a staple tradition of popular music used by every generation of folk musicians. Much of the wellspring of creativity from which folk musicians draw comes from material already existing in the public domain. Lifting a line of poetry from the Civil War era for a lyric would not venture into the realm of infringement today.[52] However, folk

48. *See* J. Peter Burkholder, *The Uses of Existing Music: Musical Borrowing As a Field*, 50 MUSIC LIBR. ASS'N 851 (1994).

49. *See* Joshua Berrett, *Louis Armstrong and Opera*, 76.2 THE MUSICAL Q. 216 (1992). Louis Armstrong embedded part the Quartet of Verdi's *Rigoletto* into his 1927 recording "New Orleans Stomp." *Id.*

50. Spitzer, *supra* note 8.

51. JOE KLEIN, WOODY GUTHRIE: A LIFE (1980).

52. Bob Dylan's 2006 album *Modern Times* loosely borrowed lines from nineteenth-century poet Henry Timrod. Timrod's line "There is a wisdom that grows up in strife" became Dylan's "Where wisdom grows up in strife."

artists do not exclusively resurrect past works; more recent works will also be incorporated.

Bob Dylan is an excellent example of an artist who frequently steps into both the past and the present for source material. His *The Freewheelin' Bob Dylan* record, "Don't Think Twice, It's All Right" contains two instances in which Dylan draws upon his contemporaries: the melody and lyrics largely derive from a Paul Clayton folk tune called "Who's Gonna Buy You Ribbons (When I'm Gone)" (who in turn borrowed his melody from a tune called "Call Me Old Black Dog" and his lyrics from a song called "Who's Gonna Buy You Chickens When I'm Gone").[53] However, a more obscure reference to Woody Guthrie also lies within Dylan's lyrics. The second verse begins: "And it ain't no use in a-turnin' on your light, babe, the light I never knowed./ And it ain't no use in turnin' on your light, babe, I'm on the dark side of the road." Dr. Steven Rings, a musicologist at the University of Chicago, observed that there exists to his knowledge only two examples in twentieth century popular music rhyming the grammatically incorrect past tense "knowed" with "road": Dylan's "Don't Think Twice It's Alright" and Woody Guthrie's "Hard Travelin'."[54]

There are few better examples of American folk music borrowing than those exhibited by the Carter Family. A.P., Maybelle, and Sara Carter from Southwest Virginia formed a folk music trio and established themselves as some of the earliest twentieth century popular music icons. The so-called "First Family of Folk" made its career in part on the work of predecessors of the musical tradition. Most notably, their 1935 hit "Can the Circle Be Unbroken" is a close reworking of Charles H. Gabriel's and Ada R. Habershon's 1907 Christian hymn "Will the Circle Be Unbroken?," and the

---

53. *Bob Dylan & Paul Clayton*, BRING YOU CHICKENS (Feb. 21, 2014), https://bringyouchickens.wordpress.com/2014/02/21/bob-dylan-and-paul-clayton/ [https://perma.cc/TYN4-AC7G].

54. Steven Rings, *"Don't Think Twice, It's All Right:" A Genealogy*, Franke Institute for the Humanities, The University of Chicago (Feb. 4, 2015), http://franke.uchicago.edu/CHF/rings/Franke_020415v2.mp4?utm_content=buffer369c8&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer [https://perma.cc/CRZ4-AGCW]. Dr. Rings's half-hour presentation demonstrates the many influences from which Dylan draws in writing "Don't Think Twice, It's All Right," ranging from the obscure "Mexican Rag" (1928) to the exceedingly well-known doowop sounds of the 1950s and early 1960s. *Id.* I consider a Dylan lyric from his 1965 song "It's Alright, Ma (I'm Only Bleeding)" to adequately capture his relationship with source material: "It's easy to see without looking too far that not much is really sacred."

extent of the overlap in melody, harmonic structure, and the chorus's lyrics indeed necessitated sharing songwriting credit with Gabriel and Habershon.

Much of the Carter Family catalog, however, is based on less extensive borrowing of older tunes. Their 1928 song "Wildwood Flower" derives from the melody of the 1860 Maud Irving and J.P. Webster parlor song "I'll Twine Mid the Ringlets."[55] Interestingly, the Carter Family's 1930 song "When the World's on Fire" is an example of both ends of the borrowing tradition, as the melody loosely stems from Mississippi gospel blues singer Blind Willie Davis's "Rock of Ages" and substantially contributes to the melody of Woody Guthrie's "This Land is Your Land."[56] "This Land is Your Land" is perhaps the quintessential example of the intercommunicative elements of folk music that so deeply resonate with listeners. The lyrics originated as Guthrie's response to Irving Berlin's "God Bless America." Uneasy over Berlin's "gloss[ing] over the lop-sided distribution of land and wealth that [Guthrie] was observing . . .," Guthrie recorded a song that reaffirmed what he believed America should aspire to become.[57]

---

55. ORIGINS AND SOURCES OF THE ORIGINAL CARTER FAMILY SONGS IN ALPHABETICAL ORDER (Oct. 15, 2019), http://www.bluegrassmessengers.com/original-carter-family-songs--alphabetical-order.aspx [https://perma.cc/3S3V-2ZCP].

56. *Id.*

57. WOODY GUTHRIE, THIS LAND IS YOUR LAND (2002), https://www.loc.gov/item/ihas.200000022/ [https://perma.cc/VP4B-CBLD].

II. MODERN INTERPRETATION OF COPYRIGHT LAW

While it could be viewed as simply reserving another stick for the creator in the copyright bundle, exclusive control over derivative works has presented a pestering issue in American folk music traditions regarding the material upon which folk musicians can draw today. In their scholarly comic book *Theft! A History of Music*, James Boyle and Jennifer Jenkins argue that while "LARGE SCALE BORROWING GOES OVER THE LINE!," forcing artists to pay for every small sample or derived melody of another work would not encourage more original music: "ACTUALLY IT WOULD BE A GREAT MUSICAL DISAPPEARING ACT!"[58] Moreover, it would be a stretch of the imagination to presume that Congress intended to bar musicians from creating works that exhibit any amount of overlap whatsoever with prior works. There are only so many chord progressions and lyric topics to go around. Perhaps section 106(2) as it is currently interpreted affords a copyright owner overprotection of the artistic and financial value of their work.

To date, Congress has yet to provide a template musicians can use to determine if their works are secure from copyright infringement. "Although the Copyright Act is comprehensive in scope, it is silent on the basic elements of copyright infringement. The basic question of 'how much copying is too much' is no exception . . . ."[59] Instead, Congress has left this determination for the courts to decide, a legislative punt that led to the Supreme Court providing that a degree of "substantial" copying is required to find evidence of infringement.[60] Without further elaboration on how to demonstrate substantial similarity, a circuit split on the issue was born.[61] The circuit courts collectively have devised three different avenues by which substantial similarity can be determined: the ordinary observer test,

58. JAMES BOYLE AND JENNIFER JENKINS, THEFT! A HISTORY OF MUSIC 223, 220 (2017).

59. Gabriel Godoy-Dalmau, *Substantial Similarity: Kohus Got It Right*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 231, 233 (2017).

60. Blunt v. Patten, 3 F. Cas. 762 (C.C.S.D.N.Y. 1828).

61. In *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, Laura Lape addressed the "lack of any substance to the concept of substantial similarity . . ." and the "absence of a meaningful standard," leading courts to "[apply] the test as they understand it." Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 185, 191 (1994).

the extrinsic/intrinsic test, and the abstraction-filtration-comparison test.[62]

A. Ordinary Observer Test

In 2001, the Second Circuit Court of Appeals wrote that works are considered to be substantially similar as to constitute copyright infringement if an "ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same."[63] The ordinary observer test, adopted by the First, Second, Third, Fifth, and Seventh Circuits, aims to look at the work as a whole and ask whether a non-expert eye would consider the work to be substantially similar to another work. The standard stems from *Arnstein v. Porter*, a 1946 case in which the Second Circuit posited:

> [t]he proper criterion on [the issue of whether Cole Porter copied from Ira Arnstein] is not an analytical or other comparison of the respective musical compositions as they appear on paper or in the judgement of trained musicians. The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.[64]

The Second Circuit found it most fitting for audiences with potentially no understanding of music theory or composition to be the arbiters of music copyright infringement. This appears to imply that the court expected the laypeople of the jury to contemplate the work as a whole and base their decision on the alleged infringement on the totality of what has been presented to them with no guidance on how to process the information.

---

62. Godoy-Dalmau, *supra* note 59, at 243.
63. Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001).
64. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).

It is important to note that what counts as an "ordinary" observer depends on the typical makeup of the intended audience of the work. Copyright infringement of a popular radio tune would be a question for an audience that frequently listens to popular music. In the case of an alleged copyright infringement involving an étude, a brief composition intended for the musician to practice a particular technique, the "ordinary" observers would be individuals with a skillset in this particular instrument. The Second Circuit added the "more discerning observer" test in *Folio Impressions, Inc. v. Byer California*.[65] This modified version of the ordinary observer test accounts for circumstances in which there is substantially more unprotected (or public domain) material within the allegedly infringing work. The Second Circuit preemptively deciphers between the unprotected material and the protectable material prior to presenting the jury with the issue of whether the defendant has infringed upon the plaintiff's rights.[66]

B. Extrinsic/Intrinsic Test

The Ninth Circuit Court of Appeals introduced a competing substantial similarity test in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp*.[67] The court addressed two sequential points of analysis: an extrinsic test and an intrinsic test. This bifurcated analysis allows the judiciary to act as a gatekeeper to which infringement cases are offered to the jury and which cases include works that have not sufficiently satisfied substantial similarity. Practically speaking, this allows courts to resolve many copyright infringement cases at the summary judgment stage.

The extrinsic test is an objective determination of whether protectable elements of the allegedly infringing work were substantially similar to the protectable material of the other work.[68] In determining substantial similarity via the objective extrinsic test, the court must filter out all unprotected ideas and facts—portions of the copyrighted work that, even if taken as a whole, could not in themselves provide copyright protection—and dissect the "measurable, objective elements" that remain.[69] If the only

65. Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759 (2d Cir. 1991).
66. *Id.*
67. Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp., 526 F.2d 1157 (9th Cir. 1977).
68. *Id.*
69. Shaw v. Lindheim, 919 F.2d 1353, 1359 (9th Cir. 1990).

instances of similarity exist within the unprotected material, the work has failed the extrinsic test and has not infringed upon the plaintiff's original work.[70]

If an allegedly infringing work passes the extrinsic test, the court will move on to the subjective intrinsic test.[71] The intrinsic test is essentially the Ninth Circuit's version of the ordinary observer test, as it presents the matter to the jury to subjectively measure the expressive contents of the work in question.[72] In *Unicolors, Inc. v. Urban Outfitters, Inc.*, the Ninth Circuit reaffirmed its determination of substantial similarity via the "extrinsic/intrinsic" test.[73] "[A] plaintiff may prove [copying] through circumstantial evidence that . . . there is substantial similarity of the general ideas and expressions between the copyrighted work and the defendant's work."[74]

C. Abstraction-Filtration-Comparison Test

Other circuits apply different substantial similarity tests for different types of copyrighted works. Finding the ordinary observer test unworkable for computer programs, the Second Circuit Court of Appeals created the abstraction-filtration-comparison test in *Computer Associates International, Inc. v. Altai, Inc.*[75] Although initially used to determine whether non-protected elements of a computer program had been copied, courts have extended this test to other copyrighted works, though it is utilized to a lesser extent than the ordinary observer test or the extrinsic/intrinsic test.[76] The test requires the identification of the allegedly infringed program's structural, protected elements; "filtering out" any non-protected elements; and comparing the remaining elements with the alleged infringing copyrighted work to determine if the works are substantially

---

70. *Id*.
71. *Sid & Marty Krofft Television Prod.*, 526 F.2d at 1164.
72. *Id*.
73. Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980 (9th Cir. 2017).
74. *Id.* at 984–85. The plaintiff must also show the defendant had access to the work to satisfy this element. *Id.*
75. Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).
76. Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 WASH. U.L. REV. 681, 694–95 (2016) (noting that "whatever usefulness the A/F/C test may have in the software context, it makes little sense for visual or musical works to be dissected in this manner.").

similar.[77] If there is substantial similarity between the protected elements and the alleged infringing work, copyright infringement exists.[78]

III. PROPOSAL

"Overprotecting intellectual property is as harmful as under-protecting it. Creativity is impossible without a rich public domain. . . . Overprotection stifles the very creative forces it's supposed to nurture."[79] Circuit courts have applied various tests for different areas of copyrightable works, because courts acknowledge that a computer program and a painting are fundamentally dissimilar types of creative works that require distinct treatment. Federal law, however, has yet to acknowledge that the complexities within each category of copyrightable works and the contexts in which those works are created lead to diverging ideas of ownership of those works within their respective communities.

In a Human Rights Brief article previously mentioned, Bryan Bachner concludes with the following call:

> Copyright law should embrace cultural and economic realities. In order to achieve its objective of promoting creativity, copyright law must recognize that different cultures have different views on how to assert proprietary control over music and therefore provide some form of ownership rights that recognize not only private property claims but also the collaborationist nature of the creative musical process.[80]

Bachner's argument calls for change in copyright law's handling of works in different cultures, a topic that extends beyond the boundaries of this Note. However, the underlying reasoning is particularly useful. This Note offers two proposals to reduce tension and provide flexibility that responds to the collaborative nature of some types of copyrightable works:

---

77. Non-protected elements are elements that would typically appear in similar types of copyrighted works. For example, a songwriter cannot claim that the G chord in her song is copyrightable in itself. However, a series of chords structured underneath a series of notes forming a unique melody could be protected as a whole.

78. *Comput. Assocs. Int'l, Inc.*, 982 F.2d 693.

79. White v. Samsung Elecs. America, Inc., 989 F.2d 1512, 1513 (9th Cir. 1993).

80. Bachner, *supra* note 7, at 12.

a partial opt-out mechanism and a more discerning and intentionally under-inclusive ordinary observer standard.

The opt-out mechanism would consist of an amendment to the 1976 Copyright Act that provides copyright owners with the ability to partially opt out of certain protections. Over the past one hundred years, copyright law has focused so intently on restricting ownership rights and shielding the use of an original idea from others that it neglected to reflect on the operational nature of the spaces in which those original ideas were birthed. The folk community can only stretch its creative limbs when it is afforded the opportunity to draw upon the techniques and common practices explained above.[81]

The optional nature of this provision does not mean that folk musicians have to give up creative ownership because tradition demands it. Folk musicians obviously do not think in lockstep, and musicians in all genres today have marketable interests in their works. One should not see a reduction in their copyright protections purely because their craft originates from a largely communal tradition rather than a commercial one. The modern reality is that even folk music has been largely commercialized. However, a partial opt-out mechanism of some kind could mend the bridge between copyright law's tendency to overprotect and the folk tradition's tendency to borrow and reuse material.

As a default, musicians would receive all of the protections afforded to them under current federal law. The partial opt-out mechanism would create a variety of copyright licensures representing different degrees of copyright protection that a musician could claim instead. In the same way that a commercial trucker is required to hold a different class of license than an average citizen driving a private vehicle, copyright holders could hold different classes of license that provide different degrees of protection. Every copyrighted work would default to having a general license (understood to provide the copyright owner with the full extent of rights granted under federal law) and choosing to opt out of the default scheme would result in the granting of a specific license that corresponds to a tailored lesser degree of copyright protection. This adds a degree of flexibility that may lead to the creation of certain licensures that better conform to the natural tendencies and needs of particular areas like folk

---

81. *See supra* Part I.C.

music. A registry or database—similar to that of the Trademark Electronic Search System—could be created as a publicly available resource for musicians (or painters, writers, etc.) to easily determine which license other copyright owners currently possess.

The second article of my proposal would be for the Supreme Court to adopt a more discerning and intentionally under-inclusive ordinary observer standard when considering whether works are substantially similar. Under the current tests, a finding of substantial similarity is not an objective inquiry but rather a subjective determination made by the jury. A common criticism of this approach is that juries are unskilled in determining to what degree protected materials are actually similar to each other, and these juries may be misled as to which melodies and harmonic patterns are infringing on another work and which are not. Gabriel Godoy-Dalmau commented, "[I]f fact finders are oblivious to material similarities, then the ordinary observer test will be under-inclusive."[82] On the contrary, a jury is tasked with finding substantial similarity, and the natural tendency for one assigned the task of looking for something is to believe that one has found it (or, if not found, at least to believe it exists).[83] Juries are more inclined to overestimate the degree of substantial similarity when material similarities are not clear.[84] Judicial adoption of an intentionally under-inclusive ordinary observer test would require standardized instructions informing the jury that a high degree of certainty is required that the work has unfairly repurposed protectable material before the work can be determined to have infringed copyright protection of another. The "more discerning" component of the aforementioned modified ordinary observer test would be drawn from the Second Circuit test in *Folio Impressions, Inc.*[85] This component could be invoked for folk music that uses a considerable amount of material already in the public domain. The more discerning ordinary observer test alone runs the risk of missing the forest for the trees; a work's originality may largely come from the interplay between unprotected and

82. Godoy-Dalmau, *supra* note 59, at 250.

83. Thomas Kida explores the topic of confirmation biases, such as in the example of using questions with simple yes or no answers to find a number that the questioner believes is the number three. People are more likely to ask, "Is it an odd number?" than "Is it an even number?," despite both questions feeding the exact same information to the questioner. *See* THOMAS KIDA, DON'T BELIEVE EVERYTHING YOU THINK: THE 6 BASIC MISTAKES WE MAKE IN THINKING (2006).

84. *Id*.

85. Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759 (2d Cir. 1991). *See supra* Part II.A.

protected material.[86] Coupling the modified test with intentional under-inclusivity could help mitigate these issues that arise in tasking a jury with determining copyright infringement.

CONCLUSION

Despite this evolving right over control of derivative works, modern copyright law protects individual works at the expense of the culture in which those works are created. Rather than encouraging the creation of more original music, the derivative works right has pressured American folk music to a degree to which the traditions and natural operations of the genre can no longer properly function without infringing upon another's copyright.

The tension arises from the attempt by federal copyright law to apply modern understandings of creative ownership to mediums largely operating under traditional understandings of creative ownership. American folk music is a collective tradition that took a village to raise, and modern copyright law attempts to divvy up that tradition into individual ownership interests. The concept of ownership is stubbornly hard to pin down in this area due to the fluid nature of the traded components that occupy the tradition and give context to the reason or reasons a particular work was created. Resolving these complications, which are compounded by the expanding concept of derivative works over time and modern understandings of creative ownership belonging to the individual, is perhaps even more difficult. The derivative works right itself is a well-intended and necessary safety net that has risen from the need to provide serious protection to the copyright owner's work. Without such, the other safeguards to copyrighted works have no teeth: copyright protection of a novel is ineffective without protection against another's use of one's characters or plotline. Nevertheless, there are real problems in the function of the derivative works right when the right is applied broadly and generically across the board. This is an area of copyright law that desperately needs to be dissected with a scalpel rather than a bone saw.

---

86. William Patry, *The More Discerning Observer Test*, THE PATRY COPYRIGHT BLOG (June 20, 2005), http://williampatry.blogspot.com/2005/06/more-discerning-observer-test.html [https://perma.cc/K3DD-TBY9].

Introducing a partial opt-out mechanism that allows flexible licensing of copyright protection and a more discerning and intentionally under-inclusive ordinary observer test for copyrighted works, which may have protected elements that are difficult to discern from unprotected elements, will do three things. First, it will provide clarity to other folk musicians as to how they may adopt certain characteristic styles or recycle otherwise protected material by the original artist. Second, it will give a presumption of fair use to the allegedly infringing musicians when the issue is brought before an unskilled trier of fact. Third, it will preserve the fullest extent of protection that federal law grants copyright holders to anyone who wishes to retain such.

Many articles have been written on whether substantial similarity is even the appropriate test for determining copyright infringement. This Note does not delve into the merits of those arguments. Instead, this Note proposes a revision to the approach courts should take when applying the substantial similarity test, and within that framework, locates an avenue by which our understanding of what is substantially similar could adjust. This solution gives appropriate flexibility to the copyright owners without detracting from their protections involuntarily.

When interviewed in 2012 by Rolling Stone magazine, Bob Dylan was confronted on the subject of appropriating Henry Timrod's words into his music.[87] Dylan responded, "It's an old thing – it's part of the tradition. It goes way back. . . I'm working within my art form. It's that simple. . . It's called songwriting. . . You make everything yours. We all do it."[88] While he gave an oversimplification of the songwriting process (and perhaps a dismissal of the current legal implications in acting upon that process),

---

87. Andrew Buncombe, *Dylan 'Borrowed' from Obscure Civil War Poet, Say Critics*, INDEPENDENT (Sept. 22, 2011), https://www.independent.co.uk/news/world/americas/dylan-borrowed-from-obscure-civil-war-poet-say-critics-416069.html [https://perma.cc/6GUB-UKBS] (noting that Dylan's lyrics "'More frailer than the flowers, these precious hours,' bear a striking resemblance to lines contained in Timrod's 'A Rhapsody of a Southern Winter Night,' which reads: 'A round of precious hours, Oh! Here where in that summer noon I basked, And strove, with logic frailer than the flowers.'").

88. Mikal Gilmore, *Bob Dylan Unleashed*, ROLLING STONE (Sept. 27, 2012), https://www.rollingstone.com/music/music-news/bob-dylan-unleashed-189723/ [https://perma.cc/6TJ7-QYMZ]. Dylan—notorious for steering clear of the media—used his one and only published interview, released in conjunction with promotion for his 2012 album *Tempest*, to address his grievances with those outside of the musical trade who criticize musicians for borrowing from other musicians: "[I]n folk and jazz, quotation is a rich and enriching tradition. . . . These are the same people that tried to pin the name Judas on me. Judas, the most hated name in human history!" *Id.*

Dylan was correct. Although the derivative works right does not explicitly ask folk musicians to abandon their art form, an over-inclusive application of the substantial similarity test could disfavor borrowing and potentially create a chilling effect on the use of a key component of the art form. After fifty years of applying a highly restrictive one-size-fits-all provision, the time is overdue for a law that reflects the multifaceted nature of copyrighted works, or else we risk the slow and quiet death of a great American institution.