

Now is That What I Call Music?: Post-modern Classical Music and Copyright Law

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COMMENTS

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In her spare time, Jamie enjoys long distance running, reading, baking, spending time with family and friends, and music.

INTRODUCTION

Imagine a tennis court during a Grand Slam championship. The court reverberates with the cacophony of the players hitting the ball, the squeak of tennis shoes, and the patter of running footsteps. Is it music? While many would argue that it is not, in fact, LCD Soundsystem's James Murphy collaborated with IBM to create music from those very sounds during the 2014 U.S. Open.¹ From its humble beginnings in the Paleolithic flutes of the prehistoric era,² through the opera halls of Europe,³ to the avant-garde creations of the post-modern era, composers have attempted to express the purest of human emotions through musical expression. Music has the ability to cross cultural barriers and, in a way, is one of the true universal languages. While music is a universally accepted and appreciated art form, its protections under intellectual property law could hardly be considered "harmonious" and have bedeviled both composers and copyright lawyers alike.

Stemming from the first law granting protection to artistic expression, intellectual property law has struggled to grant musical works the same types of protection as other classes of protectable subject matter. As a consequence, what protection musical works do enjoy at the moment is dulled by the fact that those very protections were created while underestimating the ability of composers to challenge traditional notions of music. By basing copyright protection for musical works in traditional notions of music and musical composition, the law leaves gaps where composers of more modern works run the risk of not receiving the protection granted to their more traditional counterparts because their works do not fit the overly-narrow definition of "musical work" used by the Copyright Office.

This comment will discuss the issues with the evolution of classical music in the late-20th and early 21st centuries and traditional definitions of "musical works" as used in Section 102 of the Copyright Act. Section 102 of the Copyright Act of 1976 clearly states that "musical works" are among the class of creative works that are granted copyright protection.⁴ However, Section 101 does not define a "musical work"⁵ and as a result, the Copyright Office

1. Sonia Saraiya, *Here Are Some of the Songs James Murphy Made From U.S. Open Matches*, A.V. CLUB (Sept. 11, 2014, 9:41 A.M.), <http://www.avclub.com/article/here-are-some-songs-james-murphy-made-us-open-matc-209109>.

2. *Earliest Music Instruments Found*, BBC, <http://www.bbc.com/news/science-environment-18196349> (last visited Mar. 22, 2014).

3. See *History of Classical Music*, NAXOS, http://www.naxos.com/education/brief_history.asp (last visited Mar. 22, 2014). The late-romantic era of classical music was distinguished by attaching "story-lines" to music.

4. See Copyright Act of 1976, 17 U.S.C. § 102 (1976).

5. See *id.* § 101.

relies on the definition of “musical work” found in its internal manual to discern whether a musical work warrants copyright protection. An overly narrow definition of the term “musical work” that does not take into account changing styles of classically music could lead to a class of composers not being afforded their rightful copyright protection.

First, I will present a brief overview of copyright protections extended to music. Then, I will examine the Copyright Office’s reliance on the *Compendium*’s definition of “musical work” and highlight the issues that the definition presents to the evolution of music. Next, I will examine the evolution of classical music after the 20th Century and its shift away from traditional connotations of musical composition and how this shift contravenes with the *Compendium* definition of music, including a comparison between traditional classical music and modern era classical music, which highlights these changes. Finally, I will outline a solution to the *Compendium*’s overly narrow definition of “musical work” in order to encompass a wider spectrum of musical works that deserve copyright protection and suggest that the Copyright Office weigh the elements of music equally, as well as utilizing the *Compendium* definition of “musical work” as a guideline, so as not to overly rely on an elemental analysis of a musical work. In expanding the definition of “musical work” and weighing the elements of music equally, composers whose works may not have been copyrightable will enjoy the full protections and exclusive rights that are associated with copyright.

I. “MUSICAL WORKS” AND COPYRIGHT PROTECTION

Musical works have had a somewhat colorful history under the copyright law. While musical works are currently protected under the copyright law⁶, this protection came about after several revisions of the Copyright Act.⁷ The Act’s failure to define the term “musical work” has led to the Copyright Office adopting its own internal definition of the term. However, this definition is limiting and, with the evolution of music and composition techniques, could potentially raise issues of barring otherwise copyrightable musical works from receiving the protection that they deserve.

A. Current Copyright Protections

This section will discuss the current protections that musical works enjoy under the Copyright Act of 1976. For a work to be protected under copyright laws, the work must satisfy three elements: (1) it must be original, (2) it must

6. See *id.* § 102.

7. It was not until 1831 that musical works received copyright protection.

be fixed in a tangible medium of expression, and (3) it must be a protected subject matter under Section 102 of the Copyright Act of 1976.⁸ Although originality is not defined in the Copyright Act, the Supreme Court in *Feist Publications v. Rural Telephone Service* concluded that a work is original if it possesses independent expression of an author that expresses a modicum of creativity.⁹ The creativity requirement under copyright validity stems from a requirement that comes from the textual references in the Copyright Clause of the U.S. Constitution.¹⁰ A work is tangible for purposes of the 1976 Act if it is “fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or through the aid of a machine or device.”¹¹

Congress purposely drafted the language of the fixation requirement of Section 102(a) in a broad manner so as to encompass technologies that were not in existence at the time of the 1976 Act and to avoid largely unjustifiable distinctions between the form of fixation of a work, meaning the way in which the work was fixed.¹² In the context of musical works, a composer could likely fulfill this by using sheet music, recording it, or storing it on a computer.¹³ Under Section 101 of the Copyright Act, a work is fixed “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration.”¹⁴ Under Section 102 of the Copyright Act, “musical works” are clearly listed as one of the classes of creative works that are granted protection under copyright law.¹⁵ While an understanding of the elements of copyrightability in relation to musical works is critical to recognizing the

8. See *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340 (1991); Copyright Act of 1976 §102.

9. *Feist*, 499 U.S. at 345 (citing M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01 [A], [B] (1990)).

10. U.S. CONST. art. I, § 8, cl. 8. (empowering Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective . . . Discoveries.”)

11. Copyright Act of 1976 § 102(a).

12. See H.R. REP. NO. 94-1476, 53 (1976) reprinted in U.S.C.A.A.N. 5666-67. Congress emphasized that the 1976 Act was not to differentiate between “the form, manner, or fixation” of the work. Congress also explained the importance of the fixation requirement as a line of demarcation between common law and statutory protection. “Unfixed” works, such as improvisational works or unrecorded choreographic works, performances, or broadcasts can receive common law or statutory protection under Section 301 of the Act, but may not receive Federal statutory protection under Section 102.

13. Jon M. Garon, *Copyright Basics for Musicians*, GALLAGHER, CALLAHAN & GARTRELL, S.C. (March 2009), <http://www.gcglaw.com/resources/entertainment/music-copyright.html>.

14. Copyright Act of 1976 § 101.

15. *Id.* § 102.

dissonance between modern classical music and the notion of “musical works” in copyright law, examining the history of copyright protections for musical works demonstrates that current protections for musical works under copyright law fail to harmonize with the innovative and avant-garde nature of modern classical music.

B. History of Copyright Protections for Musical Works

While musical works currently enjoy protection under the 1976 Act, the history leading up to this arguably insufficient protection reflects the tension between musical works and copyright law. This section will discuss a history of copyright protection for musical works, beginning with the birth of copyright law in the United States and through the latest variation of the Copyright Act. The history of copyright law in the United States shows that from the beginning, Congress did not take into account the changing landscape of music when drafting copyright laws and in fact, music has been treated almost as secondary class of works as opposed to other types of protected subject matter. As a result of this treatment, musical works are protected in a way that potentially stymies artistic creativity in musical composition.

It was not until the Copyright Act of 1831,¹⁶ which expanded the Copyright Act of 1790 to include musical works, that U.S. copyright law recognized that musical works warranted protection. However, the scope of protection for musical works was limited because copyright protection extended only to the reproduction rights for printed music.¹⁷ Under the Copyright Act of 1909, the first major revision to the Copyright Act of 1790, Section 5(e) states that “musical compositions” are among the class of work that can be granted copyright registration.¹⁸ The 1909 Act expanded the world of exclusive rights for copyright holders of musical works to performance rights, arrangement rights, or setting the music or the melody to “any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.”¹⁹ Furthermore, the 1909 Act created the first compulsory mechanical license to allow people to create mechanical reproductions (phonographs) of musical works without the consent of the author of the work, provided that they adhered to the confines of the license.²⁰

16. Copyright Act of 1831, 4 Stat. 436 (1831).

17. *Id.*

18. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 § 5(e), *repealed by* Copyright Act of 1976, *supra* note 4.

19. *Id.* § 1(e).

20. *Id.*

While musical works have been contemplated as a protectable subject matter under copyright law, a troubling aspect of U.S. copyright law is that the term “musical works” has never been explicitly defined. In fact, in the House report detailing the debate surrounding the adoption of the 1976 Act, Congress merely glossed over the category of musical works, arguing that “musical works,” along with dramatic works, pantomimes and choreographic works, have a fairly settled meaning and thus, do not require a more specific definition.²¹ In the House Report, the court justified not defining musical works because with the 1976 Act, the form of the work is not significant.²² Even more problematic is in the same report, Congress reasoned that the four terms defined in Section 101 of the 1976 Act²³ purportedly required definitions, “not only because the meaning of the term itself is unsettled but also because the distinction between ‘work’ and ‘material object’ requires clarification.”²⁴ Furthermore, Congress expounded on the reasoning for defining “literary works,” stating that the term “does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data.”²⁵ It is unclear as to how a musical work has a fairly settled meaning while a literary work, one of the four terms defined in Section 101 of the 1976 Act, does not warrant such cavalier treatment. Contrary to Congress’ reasoning, a musical work does not automatically connote any artistic merit, because music is such an inherently subjective form of expression. A glimpse at the evolution of classical music, which I will discuss below, shows that the definition of a musical work is hardly “settled,” and that Congress was shortsighted in treating music in such a glib manner. Music is a quintessentially subjective form of artistic expression,²⁶ one whose definition

21. See H.R. REP. NO. 94-1476, *supra* note 12 at 53. In this Report, Congress seemed to conclude that musical works, along with dramatic works and pantomimes and choreographic works commonplace enough in society that further definitions were unnecessary. However, Congress’s failure to define these categories of protectable subject matter has led to uncertainty as to whether more modern forms of art are copyrightable. A particular example of the consequences of failing to define certain types of protectable subject matter is the area of performance art. See David Bollier, *Performance Art as Property*, COMMONS MAG. (Nov. 11, 2005), <http://onthecommons.org/performance-art-property>.

22. H.R. REP. NO. 94-1476, *supra* note 12, at 53.

23. Copyright Act of 1976 § 101. The four terms are literary works; pictorial, sculptural and graphic works (PSGs); motion pictures and other audiovisual works; sound recordings; and architectural works.

24. H.R. Rep. No. 94-1476, *supra* note 12, at 54.

25. *Id.*

26. See Paul M. Grivinsky, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395, 395 (1992); David May, Note, “So Long as Time Is Music”: *When Musical Compositions are Substantially Similar*, 60 S. CAL. L.

is far from “fairly settled,” as Congress believes, and deserves further scrutiny than the Congress’s cursory treatment. By not requiring a more specific definition of “musical work,” Congress opened up a Pandora’s Box of controversy as to what constitutes a musical work, as music styles have changed over time.

Another potential consequence of Congress’s treatment of musical works in the Copyright is that in doing so, Congress has potentially limited artistic creativity by perpetuating what Professor Arewa calls a “visual-textual bias” against musical creativity, which prevents copyright law from fully protecting musical works and musical creativity.²⁷ By visual-textual bias, Arewa posits that because the drafters of the Copyright Acts framed the protections for musical works under the influence of the notion of authorship in a literary sense, creativity in the music area tends to focus on written aspects of music, which in turn fails to include the full range of musical creativity.²⁸ The visual-textual bias prevalent in copyright reduces an inherently nonvisual art form (music) to its written representation.²⁹ Arewa notes that this “reduction” is particularly problematic in determining copyrightability of musical works, because it “causes law to place music and interpretations of infringement in cases involving music into a category analogous to legal documents,”³⁰ which almost applies a “four-corners” approach to musical compositions, not unlike contract law. By focusing on written and visual aspects of musical works, such an approach may hinder understanding of more modern approaches to musical composition that do not subscribe to traditional composition methods.³¹

C. Current Methods of Interpretation of “Musical Works” and Copyrightability

1. *The Compendium’s* definition of “music” is overly restrictive and contravenes with evolving notions of music.

The issues facing copyright law and music are further complicated by an antiquated and overly simplistic definition of music used by the Copyright

REV. 785, 806 (1987) (“[M]usical expression produces value by virtue of its relationship to nonmusical experience holds that the value musical expression produces, and the meaningful experience it imparts, is uniquely *aesthetic*.”).

27. See Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829, 1833 (2011).

28. *Id.*

29. See Olufunmilayo B. Arewa, *A Musical Work is a Set of Instructions*, 52 HOUS. L. REV. 467, 483 (2014).

30. *Id.*

31. *Id.*

Office. While it is settled the musical works are a class of copyrightable subject matter, where composers hit a “sour note” is in fulfilling the creativity element of a valid copyright. Because the 1976 Act fails to define a “musical work,” the Copyright Office relies on its internal manual, *The Compendium III: Copyright Office Practices*, to provide guidance on defining music.³² At the time I drafted this Comment, the third edition of the *Compendium* had not been promulgated. Because of this, my initial examination of the internal definition of “musical work” is based in the *Compendium II: Copyright Office Practices*. However, discussing both editions of *The Compendium* provides insight as to the developments that the Copyright Office has undertaken in determining copyrightability of musical works.

Section 402 of *the Compendium II* defines music as a “succession of pitches or rhythms, or both, usually in some definite pattern.”³³ While this definition seems fairly broad, the *Compendium* further defines music within the scope of three required elements: (1) melody, or a succession of single tones; (2) rhythm, or a grouping of pulses according to emphasis and length; and (3) harmony, or the combination of different pitches.³⁴ The *Compendium* further narrows the definition of music by singling out the element of melody as the determinative factor of whether a work is copyrightable.³⁵ Furthermore, the *Compendium* recognizes that “[s]tandard musical notation, using the five-line four-space staff is the form most frequently employed to embody musical works,”³⁶ but also states that a musical work can be sufficiently “fixed” for purposes of copyright if the work is embodied in the form of textual instructions for performance, if it is specific enough to be performed.³⁷

While the Copyright Office does not place a de minimis number of notes or measures that automatically qualify a musical work for copyright,³⁸ it is clear from the text of the *Compendium* that the Office places a greater emphasis existing notes and traditional notions of music in order to determine copyright eligibility. The Copyright Office’s shortsighted emphasis on melody as the predominant element in determining whether a musical work

32. See U.S. COPYRIGHT OFFICE, *COMPENDIUM III: COPYRIGHT OFFICE PRACTICES* (3d ed. 2014).

33. U.S. COPYRIGHT OFFICE, *COMPENDIUM II: COPYRIGHT OFFICE PRACTICES* § 402 (2d ed. 1984).

34. *Id.* §§ 403-403.01.

35. *Id.* The *Compendium* further places an overemphasis on melody by stating that lack of sufficient melody may be grounds for withholding copyright protection, if other elements, such as the rhythm and harmony of the composition, supply all or substantially all of the copyrightable content of the work.

36. *Id.* § 405.01(b).

37. *Id.*

38. *Id.* §§ 403-403.01.

may receive copyright protection fails to take in to account changing aesthetics of music.³⁹ Admittedly, attempting to distill the definition of a subjective art form, such as music, in to elements facilitates in providing an objective system for determining copyright eligibility. However, the problem with weighing certain so-called “elements,” such as melody, above other aspects of music is that it automatically places works that may not have an easily discernable melody, or may even have a complete lack of melody and rely on other musical techniques, on a lower scale than those that fit within more commonly accepted notions of music. Because of music’s inherently expressive qualities, it “may not be a relational system symbolic of elements in nonaesthetic experience, or primarily related to nonaesthetic value.”⁴⁰ Unlike other types of protectable subject matter, such as literary works, the inherently subjective qualities of music do not lend themselves to being pigeonholed in black letter “elements” that overly restrict the definition of music. Professor Arewa aptly sums up the dissonance between music and copyright law in the following:

Music is inherently relational in its construction: the harmonic meaning of a particular note or series of notes depends on the context of those notes. In addition, music is typically related in some way to performance, which distinguishes it from other types of cultural production, such as literature. Music is often less representational than literature, which also strains the relationship between copyright and music. The restricted nature of the musical scale, limitations imposed by cultural and musical conventions, the centrality of performance in music, and the nonrepresentational and relational nature of music are all factors complicating the ease of translation of literary copyright to the musical context.⁴¹

39. See Paul Théberge, *Technology, Creative Practice and Copyright*, in MUSIC AND COPYRIGHT 139, 140 (Simon Firth & Lee Marshall eds., 2d ed. 2004) (“The origins of music copyright law are rooted in a particular, restrictive notion of the musical work (defined as a combination of melody and harmony) and its fixation in a graphic form (the musical score).”) See also Jason Toynbee, *Musicians*, in MUSIC AND COPYRIGHT, *id.* at 125 (“Reducing music in copyright to basic elements, most importantly melody and . . . words, made this process even more straightforward.”).

40. May, *supra* note 26, at 807; see also *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (The court analogized music with software programs and art projects, which are “not capable of ready classification into only five or six constituent elements; music is comprised of a large array of elements, some combination of which is protectable by copyright.”).

41. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 556-7 (2006); see also V. KOFI AGAWU, *PLAYING WITH SIGNS: A SEMIOTIC INTERPRETATION OF CLASSICAL MUSIC* 15 (1991) (“Musicians are familiar with [the concept of music as a relational system rather than a substantive one] from the system of functional harmony, for example, by which a given note can take on different meanings depending on the key in which it occurs, and, within that key, the actual chord within which it functions.”).

On December 22, 2014, the Copyright Office promulgated the *Compendium III: Copyright Office Practices*, revising the definition of “musical works,” to be used by the Copyright Office.⁴² Notably, the new version of the *Compendium* eliminates the singling out of “melody” as the determinative factor to the copyrightability of a musical work.⁴³ While this most recent version of the *Compendium* signifies a greater sensitivity on the part of the Copyright Office to unconventional composition practices and forms of musical creation and is an improvement on the previous two versions of the *Compendium*, this solution is unsatisfactory. By continuing to define “musical works” using black-letter elements, the new *Compendium* runs the risk of perpetuating the overly restrictive regime of copyrightability extended to musical works as well as an over-reliance on Western notions of musical composition.⁴⁴

A more problematic issue with the Copyright Office’s usage of the *Compendium* is that because the *Compendium* is an internal manual, it is not binding and, unlike regulations, does not have the force of law.⁴⁵ Since it is an internal manual and is to be treated as guidance, the definitions in the *Compendium* should be considered more as guidelines than as a binding source. Furthermore, the fact that the *Compendium* has rarely been cited in any court documents is indicative of the notion that the *Compendium* should not be considered as heavily when determining the copyrightability of a musical work, because its relative lack of weight should not pose a bar to the granting of copyright protection.⁴⁶

2. Judicial Treatment of the Copyrightability of Music

While there is precedent stating that rhythm and harmony may be copyrightable in certain circumstances,⁴⁷ the *Compendium*’s definition of musical works fails to synchronize with this precedent by placing an over-

42. See COMPENDIUM III: COPYRIGHT OFFICE PRACTICES, *supra* note 32, § 802.1.

43. *Id.* §802.3.

44. See *id.* § 802.4(A) (In defining fixation for the purposes of musical works, the Copyright Office continues to show a preference for the traditional, five-line, four-space staff commonly used by Western composition methods).

45. See *Kugel v. United States*, 947 F.2d 1504, 1507 (D.C. Cir. 1991).

46. See *Compendium II: Copyright Office Practices*, IP MALL, http://www.ipmall.info/hosted_resources/copyrightcompendium.asp (last visited Mar. 22, 2014) (“A Westlaw search . . . shows citations by courts to the Compendium totaling less than fifty.”). This is in stark contrast to the U.S. Patent and Trademark Office (USPTO)’s Manual for Patent Examining Procedure (MPEP) (also an internal manual), which has been cited almost five hundred times.

47. See *Levine v. McDonalds Corp.*, 735 F.Supp. 92, 99 (S.D.N.Y. 1990) (rhythm and harmony can be copyrighted, even if the melody is monotonous repetition of one tone); *Tempo Music v. Famous Music*, 838 F.Supp. 162, 169 (S.D.N.Y. 1993).

emphasis on the element of melody. In *Levine v. McDonalds Corp.*, the court discussed the copyrightability of musical works and concluded that the use of a minimal number of notes in a work containing substantial other musical elements does not prevent a work from being copyrightable.⁴⁸ In a subsequent case, the court in *Tempo Music v. Famous Music* held that a per se standard banning harmonies entirely from copyright protection would “be too broad and would perhaps deprive appropriate protection to composition which contains sufficient originality and creativity to warrant such protection.”⁴⁹ However, most courts still resort to concluding that music consists of rhythm, harmony, melody, and in some works, words.⁵⁰ Furthermore, most courts are still conservative in evaluating the elements of music separately,⁵¹ rarely finding protectable expression in harmony, and continuing to place an over-emphasis on melody. While progress has been made in a judicial broadening of originality in music,⁵² courts are still mired in the traditional notions of music expressed in melody, rhythm, and harmony, “notwithstanding fundamental paradigm shifts over the last 100 years that have altered how music is composed and enjoyed.”⁵³

The *Compendium*'s treatment of musical works coupled with existing case

48. *Levine*, 735 F.Supp. at 99.

49. *Tempo Music*, 838 F.Supp. at 169; see Valeria M. Castanaro, “It’s the Same Old Song”: *The Failure of the Originality Requirement in Musical Copyright*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1271, 1281 (2008) (noting that “[t]his notion of originality fails to account for the multitude of components that make up a musical work.”).

50. See *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff’d*, 349 F.3d 591, 68 U.S.P.Q.2d 1740, 62 Fed. R. Evid. Serv. 1178 (9th Cir. 2003), *opinion amended and superseded on denial of reh’g*, 388 F.3d 1189, 73 U.S.P.Q.2d 1152 (9th Cir. 2004), *aff’d*, 388 F.3d 1189, 73 U.S.P.Q.2d 1152 (9th Cir. 2004) (“A musical composition consists of rhythm, harmony and melody, and it is from these elements that originality is to be determined”); *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393 (S.D.N.Y. 1952); *Supreme Records v. Decca Records*, 90 F. Supp. 904, 913 (S.D. Cal. 1950) (“musical creation” consists of “the grouping of notes, similarity of bars, harmony or melody”).

51. See MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 7.12 (2014).

52. See *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004) (the Ninth Circuit observed that music composed of other elements, such as pitch, tempo, phrasing, structure, and chord rhythms in addition to the traditional three elements of melody, rhythm, and harmony); see also *Ellis v. Diffie*, 177 F.3d 503 (6th Cir. 1999) (the lower court considered idea, phraseology, lyrics, chord progressions, and other musical elements in determining whether a musical work was copyrightable); *Erickson v. Blake*, 839 F. Supp.2d 1132, 1138-9 (D. Or. 2012) (stating that relevant elements that may be examined in determining copyrightability of a musical work may include melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, “hooks,” instrumental figures, and overall song structure.); *Granite Music Corp. v. United Artists Corp.*, 532 F. 2d 718 (9th Cir. 1976) (holding that the copyrightability of the musical composition in question was not a four-note sequence, but the fitting together of the sequence with other melodious phrases in a unique composition).

53. Alan Korn, *Issues Facing Legal Practitioners in Measuring Substantiality of Contemporary Musical Expression*, 6 J. MARSHALL REV. INTELL. PROP. L. 489, 491 (2007).

law reinforces the notion that copyright law in relation to musical works still retains its bias towards traditional notions of classical music by emphasizing an element-by-element analysis of copyrightability as well as a visual-textual bias by favoring standard musical notation over more nonconventional, but arguably still tangible, mediums of expression. The lack of consensus in past precedent further supports the notion that courts also subscribe to a Western-biased notion of musical composition and creativity.

D. The Evolution of Classical Music in the Post-20th Century Era

The evolution of classical music in the post-20th century era, particularly with the rise of experimental music and other techniques that reject commonly-accepted aspects of music, contravenes with the definition of a “musical work” in the *Compendium* and has led to a class of musical works that may be denied copyright protection because they do not strictly fall within the definition used by the Copyright Office. This section will discuss the evolution of classical music into the post-20th Century era and the issues that modern classical music poses in respect to copyright law.

Before the 20th Century era of classical music, composers, starting from the Classical era of Wolfgang Amadeus Mozart and Joseph Haydn, demonstrated adherence to a structural format to their works that provided clarity to the listener.⁵⁴ As the Classical era reached its heyday, early Romantic era composers, such as Hector Berlioz, Frederic Chopin, Felix Mendelssohn, Robert Schumann, Franz Liszt, and Giuseppe Verdi, began to explore a balancing of expressive qualities of music with the more structural qualities of music, using various techniques.⁵⁵ However, with the turn of the 20th Century, composers began to move in different directions. Notably, a hallmark of early 20th Century music was the beginning of breaking with traditional notions of tonality that defined previous eras of classical music.⁵⁶ This departure from traditional notions of tonality and harmony shocked many for its stark contrast to the celebration of harmony that defined the Romantic era.⁵⁷ Arnold Schoenberg was particularly known for developing a dodecaphony, or the twelve-tone system, that systematically used all twelve

54. *History of Classical Music*, NAXOS MUSIC LIBRARY, http://www.naxos.com/education/brief_history.asp (last visited Jan. 12, 2014). Classical era composers strove to move away from the highly ornamental style of the Baroque era classical music of Bach and Vivaldi.

55. *Id.*

56. See *Notes and Noise: Reassessing the Sound that was 20th-Century Classical Music*, THE ECONOMIST (Jan. 12, 2013), <http://www.economist.com/node/21569370/print>.

57. See *id.* (“Experimenting with atonality, microtonality, electronic distortion of sound and the role of chance: the developments favoured by the more innovative 20th-century composers do not make for easy listening.”).

notes of the chromatic scale, compared with the traditional seven-tone system used by most classical composers.⁵⁸ Soon after, many composers shifted further away from the use of traditional Western notions of music, those upon which copyright law is based, and began experimenting with less commonly accepted musical techniques. Most notably, Igor Stravinsky's *Rite of Spring* both shocked and transformed the way that subsequent composers perceived rhythm by frequent meter changes and unexpected accents.⁵⁹

From the 1940s to the end of the 20th century, composers further pushed the boundaries by experimenting with the lack of melody, or silence, in music. Karlheinz Stockhausen endeavored into the world of electronic music and pioneered two types of musical composition: aleatory in serial composition, otherwise known as controlled chance, which allows the musician to choose short phrases from a set list and play them in an arbitrary number of times; and spatialization, which exploits the listener's ability to locate sound.⁶⁰ Composers also experimented with using different method to produce sounds, such as using electronic music and using instruments in nontraditional matters to emit sounds. With the turn of the 21st century, composers seem poised to continue this trend of pushing the boundaries of acceptable music and to further depart from the traditional elements of music used in copyright law.⁶¹ Composers such as John Zorn, Julian Andersen, and Tansy Davies have fused classical music with other musical genres and practices in their works to create new sounds.⁶² Indeed, it seems that in the 21st century, composers are poised to blur the lines of music even further by leaving even more of the

58. See Robert Sherrane, *Arnold Schoenberg & the Second Viennese School*, MUSIC HISTORY 102, <http://www.ipl.org/div/mushist/twen/schoenberg.html> (last visited Jan. 12, 2014) ("This method involves the composer choosing a row consisting of all twelve notes, and then building the piece by using the row, or sections of it, either melodically or harmonically, forward, backward, inverted, or in retrograde inversion.").

59. Tom Vitale, *Then the Curtain Opened: The Bracing Impact of Stravinsky's 'Rite,'* NPR (May 25, 2013 5:55 AM), <http://www.npr.org/blogs/deceptivecadence/2013/05/25/186497792/then-the-curtain-opened-the-bracing-impact-of-stravinskys-rite>. ("It seems as though at first he's going to have this regular pulse. But then these accents start landing in unexpected places, and you can't quite get the pattern of it.").

60. ROBIN MACONIE, *OTHER PLANETS: THE MUSIC OF KARLHEINZ STOCKHAUSEN* 296 (2006).

61. See Nick Shave, *The Shape of Sounds to Come*, BBC MUSIC MAG., 26-32 (October 2009). The author interviewed ten composers to discuss trends in western classical music. The composers came to the conclusion that music is too diverse to categorize or limit.

62. See Tom Service, *Shuffle and Cut*, THE GUARDIAN (Mar 6, 2003), <http://www.theguardian.com/music/2003/mar/07/classicalmusicandopera.artsfeatures>; Julian Andersen, FABER MUSIC, <http://www.fabermusic.com/Composers-Details.aspx?composerid=13> (last visited Jan. 12, 2014); Tom Service, *She's Got the Funk*, THE GUARDIAN (Jun. 18, 2001), <http://www.theguardian.com/culture/2001/jun/18/artsfeatures>.

traditional rules of music behind.⁶³

A particular growing trend in 21st century classical music is polystylism, which combines elements of different music genres and compositional techniques in one unified work.⁶⁴ A particular issue that may arise with polystylism is that composers may take aspects of different musical genres, such as a melody from a rock and roll song that may not yet be in the public domain, and incorporate it in to an original polystylist work. Because the composer would be using a melody from a work that is not yet in the public domain, the work would not be registerable, even if it fulfills the other elements of a musical work. While the composer could potentially be able to copyright the work as a derivative work under Section 103 of the 1976 Act,⁶⁵ provided that the composer received permission to use a portion of the preexisting work, receiving such permission could prove to be an arduous process, particularly with an original author who is reluctant to license his or her work. This could potentially lead to a dwindling number of composers who use polystylism to incorporate preexisting melodies into new works.

Furthermore, 21st-century composers have begun to further experiment with serialism, which is a compositional technique that involves creating music according to a series of values other than melody or harmony.⁶⁶ Serialism could potentially run afoul of the Copyright Office's registration practices, because if a composer uses a series of values (tones on the scale) as the "melody" of the work, the office may consider the work to fail the idea-expression dichotomy central to copyright law, as the office could equate the series of values with facts, which would not be copyrightable under Section 102(b) of the Copyright Act.⁶⁷

Another potential area of contemporary classical music that could

63. See Welcome to the 21st Century, Classical Music?, J CONCERT ARTISTS (May 11, 2013), <http://jconcertartists.com/welcome-to-the-21st-century-classical-music/> (Discussing the current trends in 21st century classical music and concludes that because so many traditions and rules of classical music were done away with in the 20th century, it is hard to tell where classical music is headed next, but that composers seem to be in a "musical free for all, where there are no rules, and there can be very little judgment about what is good and what isn't.").

64. *Id.*

65. Copyright Act of 1976 § 103. Under this section, the copyright in the derivative work would extend only to the original material contributed by the author, and would not extend to the preexisting melody used in the work. Furthermore, the derivative work copyright would not extend to any part of the work where the second author used preexisting copyrighted material.

66. See Anne Midgette, *Contemporary Classical: A Primer*, THE WASHINGTON POST (Aug. 19, 2011), http://www.washingtonpost.com/lifestyle/style/contemporary-classical-a-primer/2011/07/13/gIQAqhDDQJ_story.html. Serialist composers commonly use the twelve-tone scale promulgated by Schoenberg and create musical phrases by combining all twelve notes of the chromatic scale in a fixed order, and then use the phrase as a basis for the work.

67. Copyright Act of 1976 § 102(b).

contravene with the Copyright Office's definition of music would be the increasing trend of aleatoric music, where the composer leaves some aspects of the work up to chance, or a primary element of the composer's work is left to chance or the determination of the performers. The issue with this type of music and the copyright office's definition of a musical work is that because some of the work is left to chance, the work may not be properly "fixed" in a tangible meaning of expression if it is not recorded or left in sheet music. Because an inherent quality of aleatoric music is that no two performances are the same, similar to improvisational jazz music, a piece that is aleatoric in nature and that uses the technique of silence could be denied copyright registration for not fitting within the definition of musical works used by the Copyright Office. Aleatoric music, along with the emergence of more modern musical techniques, such as improvisation, emphasizes the clumsy fit of copyright for musical techniques in the modern era.⁶⁸

1. Comparing Modern Classical Music with Traditional Classical Music

The disconnect between modern classical music and copyright law is highlighted by comparing a traditional classical piece with a modern classical piece. A recent example of modern classical music is particularly demonstrative of this difference is the music of Terje Isungset.⁶⁹ Isungset is known for creating "ice music," meaning music made on instruments primarily constructed out of ice. Because of the constantly changing nature of the medium on which the music is performed,⁷⁰ the music, however aesthetically pleasing it may be, could fail the elements test for copyrightability that is used by the Copyright Office because it may not have a discernable melody. Furthermore, because of the inability for the piece to be replicated, due to the fact that ice never melts at the same frequency and because Isungset's music requires an element of improvisation,⁷¹ its copyright protections as a musical work would only extend to the material submitted to the Copyright Office.⁷² Even if Isungset "fixed" his work by recording it, the

68. See Arewa, *supra* note 27, at 1843.

69. See *Norwegian Festival Shows Off the Musicality of Ice*, NPR (Jan. 21, 2014), <http://www.npr.org/2014/01/21/264399959/ice-musical-festival>.

70. *Id.* (Noting "[y]ou cannot go on stage and expect a certain sound. You have to play with the sound that instrument actually can make. And then try to create good music out of this.>").

71. See *Turning a Glacier Into a Tuba: Ice Music from Norway*, NPR (Feb. 24, 2013), <http://www.npr.org/2013/02/24/172818754/turning-a-glacier-into-a-tuba-ice-music-from-norway> ("Quite often, I don't actually know how my instrument will sound. So I just have to listen to the sound that is being created and try to create music out of this sound . . .").

72. See COMPENDIUM III: COPYRIGHT OFFICE PRACTICES, *supra* note 32, §802.4 ("Improvised works are not registrable unless they are fixed in a tangible form, such as in a transcribed copy, a phonorecord, or an audiovisual recording. A registration for an improvised

fact that the piece would never be able to be repeated again, due to the fact that the frequency at which the ice melts would be nearly impossible to replicate, would mean that Isungset would only receive protection for the sound recording of the work that he submitted, rather than the composition itself because it would not be able to be replicated.

In contrast to Isungset's work, Ludwig von Beethoven's *Symphony No. 9*,⁷³ arguably one of the most influential pieces of classical music ever composed,⁷⁴ utilizes quintessential musical techniques that are commonly accepted under copyright law. In *Symphony No. 9*, Beethoven seemed to capture the creation of the world, spiritual enlightenment, and the joy of humankind all in one piece.⁷⁵ Unlike Isungset's ice music, Beethoven's work, though far more expressive than many of his fellow composers, has a discernable melody that is "fixed" by notation onto a traditional five-line four-space music staff. Furthermore, although both Isungset and Beethoven's pieces are played on musical instruments, Beethoven's work involves no improvisation and can be easily replicated by orchestras around the world. Beethoven's work would easily withstand the *Compendium's* definition of music, because it satisfies the three-element definition of music (melody, rhythm, and harmony) and is fixated in a commonly accepted form. Unlike Beethoven, Isungset's ice music, because it relies heavily on improvisation and the nature of the instrument at the moment, may not as easily withstand scrutiny. However, an artist like Isungset, whose creations may not fall within the strict bounds of commonly accepted notions of musical works but clearly show creativity and artistic merit, should not be precluded from gaining protection for his creative expression.

E. Solution

It seems clear from the trajectory of classical music that the definition of "musical work" used in the *Compendium* is antiquated and remains in the era of music where artists conformed to traditional ideas of music. I would suggest weighing the elements of music equally, thereby removing the emphasis on melody from the definition, in order to encompass a broader class of musical works that would not have otherwise received registration. Furthermore, because of the inherently aesthetic and subjective quality of

musical work will extend only to the material that has been submitted to the Office.").

73. Tom Service, *Symphony Guide: Beethoven's Ninth ('Choral')*, THE GUARDIAN (Sep. 9, 2014), <http://www.theguardian.com/music/tomserviceblog/2014/sep/09/symphony-guide-beethoven-ninth-choral-tom-service>.

74. Christopher H. Gibbs, *Notes on Beethoven's Ninth Symphony*, NPR (Jun. 13, 2006), <http://www.npr.org/templates/story/story.php?storyId=5487727>.

75. *Id.*

music, as discussed above, I would propose using the definition of musical works in the *Compendium* as a guideline, rather than as a strict definition, in order to protect future generations of classical music composers who will continue to push the boundaries and the average listener's perception of music. By reforming the definition of musical works utilized by the Copyright Office, courts will be more receptive to broadening their understanding of originality in music. As a result, composers that may not have been able to receive copyright protection for their compositions due to failing to meet the more narrow requirement for originality in music will be able to receive protection for their works under a broader definition of originality in the scope of musical works.

CONCLUSION

Classical music has evolved and grown from the highly formalized Baroque era to the arguable lack of form that defines the 20th century era. What paths contemporary music will take remain to be seen, but it is clear that the current definition used to determine copyright eligibility for musical works is antiquated and “fails to account for unique methods of musical expression that exist beyond those narrowly drawn boundaries.”⁷⁶ By broadening the definition of “musical work” used in the *Compendium* and de-emphasizing melody's importance over the other two elements of music, composers can rest easy, knowing that they can create new and original compositions that will receive the protection they deserve.

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76. Korn, *supra* note 53, at 490.

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