Is creative use of musical works without a licence acceptable under Copyright?

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1 Introduction

This article argues that musical creativity requires a reasonable degree of freedom to make creative use of existing materials. At present copyright law does not properly encourage the practice of making creative use of musical works without a licence; recent case law suggests that even the use of a very small portion of an original work may result in infringement (at 6). This is particularly evident in light of the recent *Infopaq* (ECJ) and *Meltwater* (UK) cases. Evidence from other jurisdictions shows similar conflicts can arise not just with regard to works of music but also with regard to other creative works including works of literature and drama. A more flexible approach to exceptions would would encourage musical creativity. The possibility of a more flexible system of exceptions is explored (at 7).

2 (a) Creative use of Musical Works - An Historical Perspective

As discussed in detail further below, copyright infringement envisages the unauthorised or unlicensed use of a musical work. However, making creative use of existing musical materials is common in musical practice. Although the term "musical borrowing"[1] is sometimes used to denote this, the term is problematic because it is rarely the case that materials are "returned" to the place where they were originally found. In fact, the practice appears to denote the unlicensed taking and use of musical materials in contexts where such use is justified as part of creative practice. As such the idea of making "creative use" of musical works, in whole or in part, is a more accurate way of conveying this idea of "justifiable use" than the notion of "musical borrowing".

2 (b) The European Classical Tradition

Regarding authorship of music, it is widely acknowledged that making creative use of musical materials is an ancient practice that pervades many, if not all, forms of music[2]. For instance, with regard to European classical, operatic and

[1] For uses of the term see Cohen, "Copyright, Commodification and Culture: Locating the Public Domain", in: Guibault & Hugenholtz (eds.), "The Future of the Public Domain" 121, 143 (Kluwer, Alphen aan den Rijn 2006) and Arewa, "From J.C. Bach to Hip-Hop: Musical Borrowing, Copyright and Cultural Context", 84 North Carolina Law Review 547 (2006).

[2] Charles Seeger acknowledged that folk songs were created "entirely" through a process of "plagiarism". Seeger, "The Incomplete Folksinger" 450 (University of Nebraska, Lincoln 1992). See also Jones & Cameron, "Full Fat, Semi-Skimmed or No Milk Today: Creative Commons

"art" music, it is notable that up until the 19th century, many composers felt able to "copy" and re-arrange material from their own, and each other's, previous works[3]. For instance, it was not illegal, nor was it seen as "unoriginal" or "wrong" for composers to re-use melodies and to compose variations on themes which had originated with other composers. Examples of composers who partook in this kind of "creative use" include Mozart, Beethoven, Bach, Handel and Brahms.[4] Therefore, in Europe during the early 18th century this kind of creative re-use of musical works was widespread; consequently, it was seen as "benign.[5] It was not illegal at the time and therefore it was not seen as "unoriginal".

Successful examples of creative use of previous works by artists including Beethoven, Mozart, Bartok and Ives have been noted[6]. However, it has also been noted that during the 19th century, this kind of practice ceased to be tolerated by composers of "written" music[7]. In this regard, it was not until the 19th century that the concept of original, autonomous authorship became dominant in the context of European "art" music[8]. In fact, during the 18th and 19th centuries it is possible to observe the continuing ascent of the twin concepts of "the work" and the "Romantic author"[9]. The rapidly expanding market for "sheet music" was a determining factor in the rise of "the work", as composers sought to protect their rights under copyright[10]. Thus, the notion of the "composer" as the sole "author" of a piece of music naturally led to a "loss of status" for the "performer" who was now seen as a mere "executant"; in conjunction with the idea of the "composer as author", "the work" was held out as an "expression of the composer's soul".[11] However, as discussed further below, while it may have largely ceased in the context of European classical music, the creative use of existing materials continued to play an important part in a number of other musical cultures and contexts. Furthermore, as discussed further below,

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Licences and English Folk Music", 19 International Review of Law, Computers and Technology 259, 260 (2005), noting that much of what we term "pop" music today has its roots and structures in traditional music, primarily folk and blues music.

[3] Toynbee, "Copyright, The Work and Phonographic Orality in Music", 15 Social & Legal Studies 77, 80 (2006). Goehr, "The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music" 181-182 (OUP, Oxford 1993).

[4] Keyes, "Musical Musings: The Case for Rethinking Music Copyright Protection", 10 Michigan Telecommunications and Technology Law Review 407, 436 (2004), referring to Shafter, "Musical Copyright" 187 (Callaghan and Company, Chicago 1932).

[5] Rosen, "Music and Copyright" 5 (OUP, New York 2008).

[6] "Gowers Review of Intellectual Property" 67 (HMSO, London 2006); accessible at http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf – referring to Arewa, supra 3, at 630.

[7] Toynbee, supra 5, at 81. Goehr, supra 5, at 220-221.

[8] Toynbee, supra 5, at 81. See generally Goodman, "Stealing our Heritage? Women's Folksongs, Copyright Law and the Public Domain in Algeria", 49 Africa Today 84 (2002) and Manuel, "The Saga of a Song: Authorship and the Case of 'Guantanamera'" 27 Latin American Music Review 121 (2006).

[9] Barron, "Copyright Law's Musical Work" 15 Social & Legal Studies 101, 122-124 (2006).

[10] Toynbee, supra 5, at 82. See also Ehrlich, "Harmonious Alliance: A History of the Performing Right Society" 5 (Clarendon Press, Oxford 1989).

[11] Toynbee, supra 5, at 81.

"originality" must be seen as embedded within certain contexts, and the same idea of originality may not be applicable in all musical contexts.

2 (c) Blues, Jazz and Hip Hop

One context which features a high degree of creative use of existing musical materials, and which has been well documented, is the blues music tradition of the US. Notions of "originality" and "authorship" within the blues tradition are difficult to define.[12] Nonetheless, it is clear that a notion of "originality" is still vital within this tradition.[13] However, it is a different type of "originality" than the standard under copyright law. For example, it is accepted that within the blues tradition "originality" is generally expressed through arrangement and performance.[14] The structure of the music stays relatively rigid, yet within the boundaries of e.g. "twelve-bar blues", a vast array of performers are able to express themselves in an original way. This blues culture has been classed as an "oral culture". In this regard, it is said to be "strongly determined by the need to reproduce knowledge" as opposed to an overriding focus on originality of "the work".[15] As a result, these forms of traditional music have been described as "iterative-variative in structure, rather than differentiated as in the case of musical works".[16]

Cohen has observed that traditional blues and jazz music typically involve a "ceaseless process" of making creative use of existing materials.[17] For instance, the jazz performer is of paramount importance. The same composition can be arranged and performed in innumerable different ways, depending on the skill of the musician.[18] Further to this, some jazz musicians have copied and creatively used other composers" works as the basis for their own compositions. For example, Charlie Parker often created new works from pre-existing compositional structures. Thelonious Monk's "In Walked Bud" was based on a chord progression from a previous copyright work,[19] John Coltrane used Miles Davis' "So What" as the basis for his own work "Impressions"[20] and Miles Davis used

[12] Arewa, "Blues Lives: Promise and Perils of Music Copyright", 27 Cardozo Arts and Entertainment Law Journal 573, 596-597 (2009-10).
[13] Arewa, supra 14, at 587.
[14] Vaidhayanathan, "Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity" 123 (NYUP, New York 2001).
[15] Toynbee, supra 5, at 78.
[16] Toynbee, supra 5, at 78.
[17] Cohen, "Copyright, Commodification and Culture: Locating the Public Domain", in: Guibault & Hugenholtz (eds.), "The Future of the Public Domain" 121, 143 (Kluwer, Alphen aan den Rijn 2006).
[18] Ward & Burns, "Jazz – A History of America"s Music" 162 (Knopf Publishing, New York 2000).
[19] Solis, "Monk's Music: Thelonious Monk and Jazz History in the Making" 149 (University of California Press, California 2007).
[20] Crouch, "Considering Genius – Writings on Jazz" 99 (Basic Civitas, New York 2007).

the foundational structure of Bill Evan's "Peace Piece" for his own composition "Flamenco Sketches".[21]

Regarding music in the context of the US, it is not only blues and jazz that are potentially restricted by copyright law, but also "hip-hop".[22] In recent decades, the "sampling" culture of hip-hop music has been criticised for being unoriginal; it has even been described as "theft".[23] However, unlike other forms of creative use, sampling often involves direct use of a copyright sound recording. For this reason some commentators seek to differentiate this type of creative use from other examples.[24] Nonetheless, there have also been copyright disputes over the use of a small portion of the underlying "musical work" in a "Hip Hop" song, such as the dispute between the Beastie Boys and James Newton.[25] Furthermore, it has been argued that "Hip-Hop" musical practices have been negatively affected by copyright licensing requirements.[26]

Continuing with the specific example of blues music, Toynbee has noted that in the early to mid 20th century, blues melodies were frequently re-arranged and re-used by musicians working within the blues tradition.[27] As discussed further below, it is possible that these practices could lead to complications with respect to copyright law.

Vaidhayanthan has noted that it was common for Muddy Waters and other blues singers to copy an old blues song in whole or in part and then to add their own stylistic originality to the song. The resulting blues song would probably be best described as a new arrangement of the underlying work. This type of authorship resulted in songs such as "Walking Blues".[28] The song is a common blues standard. It had been previously recorded in 1937 by Robert Johnson, while Muddy Waters learned it from a recording of Son House. In each version, it is recognisably the same song, but each recording reflects the unique performance and arrangement style of each musician.

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[21] See comment and debate at http://forums.allaboutjazz.com/showthread.php?t=39671
[22] See generally Arewa, supra 3, at 547. See also Salmon "Sampling and Sound Recording Reproducton – Fair Use or Infringement?" 21 Entertainment Law Review 174, 175 (2010).
[23] *Grand Upright Music, Ltd v Warner Bros. Records Inc.*, 780 F.Supp. 182 (1991)
[24] See generally Reilly, "Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings", 31 Columbia Journal of Law and the Arts 355 (2008).
[25] *Newton v Diamond* 388 F 3d 1189 9th Cir. (2003)
[26] Arewa, "Copyright on Catfish Row: Musical Borrowing, Porgy and Bess and Unfair Use", 37 Rutgers Law Journal 227, 227-229 (2006). Toynbee, supra 5, at 87.
[27] Toynbee, supra 5, at 95. See also Madison, "Intellectual Property and Americana, or Why IP Gets the Blues", 18 Fordham Intellectual Property, Media and Entertainment Law Journal 677 (2007-2008).
[28] Vaidhayanathan, supra 16, at 122.

This type of authorship is clearly fundamental to the notions of "tradition, inspiration and improvisation"[29] within blues music. The relevant underlying work may well have been in the public domain, and if so it may well have been possible to avoid legal difficulties regarding the use of the underlying work. There would only be a possible action if it was alleged that a particular copyright arrangement of the public domain work had been infringed. In any event, no infringement was alleged. As Toynbee has noted, it was largely unheard of for blues musicians of this era to litigate regarding the taking of elements of one of their works. Due to the fact that the copyright law of the early 20th century was not strictly enforced in relation to blues music, musicians were able to continue utilizing this process.[30]

However, in the case of a blues composition which is not in the public domain, an infringement action is more likely. The discussion of blues "style and presentation"[31], as referred to above, is relevant to the dispute which occurred in the 1980s involving blues composer and musician Willie Dixon and the British pop group "Led Zeppelin". Dixon alleged that Led Zeppelin's composition "Whole Lotta Love" infringed his earlier work "You Need Love", which had been recorded in the early 1960s.[32] From a musical point of view, there is not a great difference between the situation where Robert Johnson, Son House and Muddy Waters all play different versions of the same blues song, and the case of Led Zeppelin playing a blues song that took elements from Willie Dixon's blues composition. Furthermore, there is nothing less "original", from a musical perspective, in what early blues musicians did in the early-to-mid 1900s and what Led Zeppelin did in the late 1960s. The only difference is that in one case a "public domain" composition was used, and no licence was apparently required, whereas in the other case, Willie Dixon's copyright composition was used, and therefore a licence was required.[33] In light of the Dixon case and other cases involving blues "compositions"[34], it is possible that an increased level of awareness of copyright law within the music industry has altered the acceptability of creative use of musical works, or portions thereof, even with respect to a form of music that is "traditional" in origin.

2 (d) The 1960s Folk Revival and Pop Music Boom

As with jazz and blues, making creative use of existing songs and melodies was also emblematic of the folk revival of the 1960s in the UK, Ireland and the US.[35]

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[29] Vaidhayanathan, supra 16, at 121.
[30] Toynbee, supra 5, at 87.
[31] Vaidhayanathan, supra 16, at 117.
[32] Vaidhayanathan, supra 16, at 117-118.
[33] For a discussion on the distinction between works in copyright and works in the public domain, see Geiger "Copyright and the freedom to create – a fragile balance" 38 International Review of Intellectual Property and Competition Law 707, 716-722 (2007).
[34] Arewa, supra 14, at 573-587.
[35] Jones & Cameron, supra 4, at 260.

Jones and Cameron have noted the strong necessity for continual creative re-use of musical materials within the British folk song tradition, something which was evident during the post-war folk revival.[36] A number of commentators have noted similar examples occurring in the context of Irish traditional music[37], which also experienced a post-war boom in the public houses of Britain and Ireland. In relation to the US, the same trend is visible, and one particular example stands out. Many of Bob Dylan"s early songs were adaptations of earlier British[38], Irish[39] and North American[40] folk songs.[41] In some cases entire tunes were copied, "creatively used" and put to new lyrics written by Dylan.

In addition, much of what we term "pop music" today is influenced by forms of traditional music and it is, in many ways, rich with musical materials mined from the past.[42] Furthermore, the recent UK case of *Fisher v Brooker*[43] illustrates creative use in the context of pop music. In the case of *Fisher v Brooker*, the musical work "A Whiter Shade of Pale" by Procol Harem was at issue. The demo version of the musical work was created by songwriter, and Procul Harem band member, Gary Brooker. However, the song is perhaps most famous for its organ instrumental sections. These instrumental sections were created by Matthew Fisher, during the performance and recording process, in response and counterpoint to the chord structure devised by Gary Brooker. This contribution by Matthew Fisher amounted to a significant and original contribution to the work in order for a share of authorship to be awarded. For the purpose of this article, it is interesting to note that both "the Song", as composed and presented to the band members in demo form by Gary Brooker, and the organ solo featured in "the Work" (i.e. the final recorded "arrangement" of the song), as composed by Matthew Fisher, were adapted to some extent from separate musical pieces originally composed by Bach i.e. musical works which reside in the public domain.[44] This is a clear example of creative use of existing musical materials from Bach's works by both Gary Brooker and Matthew Fisher. However, because the works reside in the public domain, no infringement could be alleged by the original copyright holder.[45]

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[36] Jones & Cameron, supra 4, at 259-262.
[37] Hall, "Irish Music in Camden 1945-1970" (Ph. D. Thesis, University of Sussex, accessible at Cecil Sharp House Library, London). See also McCann, "All That is Not Given is Lost: Irish Traditional Music, Copyright and Common Property", 45 Ethnomusicology 89 (2001).
[38] *The Freewheelin' Bob Dylan* (Columbia Records, 1963) – Bob Dylan's Dream (melody taken from Lord Franklin, a traditional folk standard in Britain and Ireland.
[39] *The Times they are a-Changin"* (Columbia Records, 1964) – Restless Farewell (melody taken from the The Parting Glass, a traditional folk standard in Britain and Ireland)
[40] *The Bootleg Series vol. 1-3* (Columbia Records, 1989) - Farewell, Angelina (melody taken from The Wagoner"s Lad, a traditional folk standard in the United States of America).
[41] http://www.irishtimes.com/newspaper/weekend/2011/0528/1224297953575.html
[42] Toynbee, supra 5, at 80. See also Jones & Cameron, supra 4, at 260.
[43] *Fisher v Brooker* [2007] E.M.L.R. 9.
[44] *Fisher v Brooker* [2007] E.M.L.R. 9 at [36].
[45] For a discussion on the distinction between works in copyright and works in the public domain, see Geiger supra 35, at 716-722.

Recently the guitarist and composer Joe Satriani settled[46] a dispute in the US against the British group "Coldplay". Satriani had alleged that the Coldplay song "Viva La Vida" infringed his earlier work.[47] The songwriter Yusuf Islam (formerly known as Cat Stevens) has also argued that "Viva La Vida" infringed his earlier work, which also pre-dates Joe Satriani's composition.[48] If it were the case that Coldplay had re-used parts from Satriani's composition, just as Brooker and Fisher had borrowed from Bach, then from a musical perspective there would be little difference between the creative acts in each case. The crucial difference from a copyright perspective is that in one case the work at the centre of the dispute was in the public domain and in the other case it was not. As with the above blues examples, acts involving public domain works appear to be much less controversial than acts of creative use involving copyright works. This may make sense from a copyright lawyer's perspective. Nevertheless, from the point of view of musical practice, it is arguable that there is little difference between the acts of creativity involved.

The examples above illustrate two important points. The first point centres on the fact that creative use of existing musical works plays an important part in musical cultures. However, the second point reveals that one person's legitimate "creative use" may be another person's copyright theft. In this view, it is clear that musical cultures can change; what was once acceptable "creative use" can eventually come to be seen as "copyright infringement". In order to examine the relationship between music and copyright law more closely, it is necessary to examine how copyright defines the "musical work".

3 (a) Examining the Musical Work in International Conventions and National Laws

The Berne Convention[49] provides an international framework for copyright in relation to the musical work. Under Article 2(1) of Berne, the "musical composition with or without words" and "dramatico-musical works" are protected, but no further definition of "music" or "musical composition" is given. In fact, there are surprisingly few definitions of the "musical work" in national and international copyright law and there is no internationally accepted definition of the musical work.[50] For instance, TRIPS[51] largely adopted the terms of the Berne Convention and it did not provide any further definition of the musical work.[52] The WIPO

[46] http://news.bbc.co.uk/1/hi/entertainment/8258217.stm
[47] http://www.guardian.co.uk/music/2009/apr/08/coldplay-deny-satriani-plagiarism-claims
[48] http://www.guardian.co.uk/music/2009/may/05/coldplay-yusuf-islam.
[49] *Berne Convention for the Protection of Literary and Artistic Works* (September 9, 1886; revised July 24, 1971 and amended 1979) hereafter known as Berne Convention; accessible at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html
[50] Sterling, "World Copyright Law" 258 (3rd Ed. Sweet and Maxwell, London 2008).
[51] *Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization* (1994) (hereafter known as TRIPS); accessible at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm
[52] Under TRIPS the Articles 1-21 of the Berne Convention are adopted with no expansion of the

World Copyright Treaty of 1996[53] also did not give any further definition. Similarly, the relevant legislation in Germany[54] and the US[55] does not provide a definition. In light of this, it can be concluded that many legislative bodies, both national and international, accept that the terms "music" and "musical work" are inherently difficult to define. Furthermore, from the point of view of legislators it is not necessary to define the terms strictly in order to provide protection to musical works under copyright.

In anticipation of the UK case study below (at 4), the decision of the Court of Appeal in *Sawkins v Hyperion*[56] is the most recent, authoritative decision on the nature of the musical work under section 3(1) of the Copyright, Designs and Patents Act, 1988. In *Sawkins*, the claimant argued that he owned the copyright in performing editions that he had prepared of works by Michel-Richard Lalande. A number of Lalande pieces, which were previously in fragments and were effectively unplayable, had been adapted into modern notation by Dr. Sawkins with minor editing additions. According to the court, this ultimately amounted to a "performing edition". The pieces were performed from the Sawkins edition by musicians in order to make a recording undertaken by Hyperion Records. However, Dr. Sawkins' copyright was not recognised by the record company. Ultimately, the court held that copyright in the performing edition vested in Dr. Sawkins.

In coming to this decision, Mummery L.J. stated that "the essence of music is combining sounds for listening to".[57] Mummery L.J. also remarked:

"Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it... There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or improvisations of sounds by a group of people with or without musical instruments should not be regarded as "music" for copyright purposes."[58]

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definition of "musical work"; accessible at http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1

[53] *WIPO Copyright Treaty* (1996), which exists in compliance with Article 20 of the *"Berne Convention" op. cit*. and complies with the Berne Convention definition of "literary and artistic works"; accessible at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806.

[54] German Act on Copyright and Neighbouring Rights, 1965 (Urheberrechtgestz) s 2(1)(2).

[55] See United States Copyright Act 1976 s 102(a)(2); accessible at http://www.law.cornell.edu/copyright/copyright.act.chapt1a.html#17usc102.

[56] *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565; [2005] 1 W.L.R. 3281. See also French case of *Sawkins v Harmonia Mundi*, 19 January 2005, Nanterre District Court, 1st chamber. See 1/2006 RIDA 391.

[57] *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281, at [53].

[58] *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281, at [53].

This is clearly a broad definition of the musical work[59].

3 (b) The Relevance of the Idea-Expression Dichotomy in this Context

In order to analyse the notion of "musical work" in the context of infringement, it is necessary to consider the "idea-expression" dichotomy. It has been stated that while the idea/expression dichotomy has little bearing on questions of subsistence, it does perform "a necessary (if difficult) role in settling what amounts to substantial taking" by a copier[60]. Nonetheless, it is arguable that the distinction between idea and expression is an "amorphous" one[61].

Regardless of whether they can be described as "ideas" or "expressions", it is the case that certain stylistic elements cannot be made subject to copyright. This can be seen in the case of literary works and dramatic works where, for example, a style or genre cannot be made subject to copyright[62]. However, it is clear that the details of a plot may be subject to copyright[63]. For this reason, Laddie has stated that since copying the details of a plot can amount to infringement, even if the details are expressed in different language, this effectively shows the weakness of the idea/expression dichotomy in this regard[64]. Regarding literary works, Stern has noted that authors themselves have often disagreed over the issue of "originality"[65]. Stern stated that some authors tend to argue in favour of their own individual "genius", while other authors freely acknowledge that writing depends upon processes of "adaptation and revision", as well as the existence of stylistic conventions, which are essential for the creation of great literature.

The idea/expression dichotomy is of dubious value in relation to music. For instance, it has been stated that that music "collapses" the idea/expression dichotomy[66]. One reason for this is that there are a limited number of musical notes in a standard major scale. Furthermore, in relation to music it is generally accepted that certain expressions cannot be made subject to copyright, in the same way that in literature certain genre conventions and basic plots cannot be made subject to copyright. Regarding musical works, some chord progressions

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[59] *Sawkins v Hyperion Records Ltd* [2005] 1 W.L.R. 3281, at [56]. See also Rahmatian, "The concepts of "musical work" and "originality" in UK copyright law - Sawkins v Hyperion as a test case", 40 International Review of Intellectual Property and Competition Law 560 (2009).

[60] Cornish, Llewellyn & Aplin, "Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights" 449-450 (7th ed. Sweet & Maxwell, London 2010).

[61] Cornish, Llewellyn & Aplin, supra 62, at 9.

[62] *Norowzian v Arks Ltd (No 2)* [2000] FSR 363.

[63] *Corelli v Gray* [1913] TLR 570. See also *Rees v Melville* [1911-16] MacG CC 168. See however *Baigent v Random House Group Ltd* [2007] FSR 579.

[64] Laddie, Prescott & Vitoria, "The Modern Law of Copyright and Designs" 98 (3rd ed Butterworths, London 2000).

[65] Stern, "Copyright, Originality and the Public Domain in Eighteenth-Century England", in: McGinnis (ed.), Originality and Intellectual Property in the French and English Enlightenment" 69, 71 (Routledge, New York 2009).

[66] Vaidhayanathan, supra 16, at 117. See also generally Rosen, supra 7.

and musical phrases are thought to be too common to be protectable. For instance, it is generally accepted that the "twelve-bar blues" structure, which generally follows the standard I-II-V chord structure, is not protectable[67]. Therefore, this particular chord structure could be described as the example of a general musical "idea" which cannot be made subject to copyright. However, at least in purely musical terms, even a generic blues progression is an "expression", not an abstract "idea". For the purposes of this article, rather than using the terms "idea" and "expression", the term "stylistic convention" is used to describe an expression of music that is too generic to be protectable under copyright. In this view, under copyright law a "stylistic convention" could not be held to be part of the author's protectable "original" input to a work. As a result, no infringement action would succeed if a mere stylistic convention was copied from one work and used in another.

4 (a) UK Case study - Assessing Copyright infringement in the context of Creative Works

Under the CDPA[68], a person will infringe copyright if, without having obtained a licence, he or she exercises one of the restricted acts e.g. adaptation, performance etc.[69] In an infringement action, it is necessary for the complainant to show a causal connection between the original copyright work and the allegedly infringing work. For instance, in *Francis Day and Hunter v Bron* Lord Diplock stated:

"...there must be a sufficient objective similarity between the infringing work and the copyright work, or a substantial part of thereof..."[70]

It is necessary, therefore, to show that the allegedly "infringing" work is derived from the copyright work in question.[71] Furthermore, an inference of derivation can be drawn in certain circumstances, for instance, where the "particular similarities relied on are sufficiently close"[72] and it can be shown positively that the defendant had "familiarity" with the copyright work at issue.[73] It appears that under UK copyright law, both conscious and unconscious copying can result in infringement.[74] However, proving a causal link between the two works "will be even more difficult in cases of unconscious copying".[75]

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[67] Vaidhayanathan, supra 16, at 118.
[68] CDPA s 16-27.
[69] CDPA s 16(2-3), s 19 & s 21(3)(b).
[70] *Francis Day & Hunter v Bron* [1963] Ch 587, at 583.
[71] *Francis Day & Hunter v Bron* [1963] Ch 587. See also *Stoddard International plc v William Lomas Carpets Ltd* [2001] FSR 848.
[72] *Designer's Guild Ltd. v Russell Williams Textiles Ltd.* [2000] 1 WLR 2413, Lord Millet at 2425. See also *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EMLR 14 (CA).
[73] *Francis Day & Hunter v Bron* [1963] Ch 587. See also Bently & Sherman, "Intellectual Property Law" 171-172 (3rd ed. OUP, Oxford 2008).
[74] *Rees v Melville* (1911-16) Macq Cop Cas 168; *Ricordi v Clayton and Wallter* (1928-1930) Macq

In the UK, the requirement of the copying of a "substantial part" is crucial.[76] Laddie has stated that although the onus is on the claimant in an infringement action, a defendant should try to argue that to the extent that his allegedly infringing work is derived from the claimant's work, the particular material taken was not originated by the claimant author and/or it is too generic to be a "substantial part"[77]. In *Ladbroke v William Hill,* Lord Reid stated that the issue of what amounts to a "substantial part" of a work depends on a qualitative test rather than a quantitative one.[78] In infringement cases involving musical works, the overall impression given by the musical work is what matters, not whether there is a note-for-note taking.[79] Furthermore, in cases of musical infringement the qualitative analysis[80] element of this test depends upon "how music is heard"[81] i.e. whether a "substantial part" of the original copyright work can be "heard" in the context of the allegedly infringing work.

In *Hawkes v Paramount*[82] a twenty second portion of a popular tune "Colonel Bogey" was used in a newsreel. This portion, the "hook" of the song, was found to amount to a "substantial part" of the work. It can therefore be said that the relative value of the particular part is taken into account[83]. In *Coffey v Warner*[84] an infringement claim by a singer-songwriter was struck out regarding "vocal inflections" in a single phrase. In *Coffey*, the vocal phrase was transferred from one of the complainant's songs "into another co-written and sung by the pop-star Madonna"[85]. Blackburne J. emphasised that the test for a "substantial part" was

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Cop Cas; *Francis Day and Hunter v Bron* [1963] Ch 587; *Industrial Furnaces v Reaves* [1970] RPC 605, at 623.

[75] Torremans, "Holyoak & Torremans Intellectual Property Law" 247 (OUP, Oxford 2010). In such cases, the courts will assess a number of factors, including the degree of objective similarity between the works and whether the similarity between the works could be coincidental. See *Francis Day & Hunter v Bron* [1963] Ch 587, Willmer L.J. at 614, noting the comments of Wilberforce J. at first instance.

[76] CDPA s 16(3).

[77] Laddie, Prescott & Vitoria, supra 66, at 84.

[78] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 276. Cornish, Llewellyn & Aplin, supra 62, at 481 at no. 24, have stated with regard to *Ludlow Music v Robbie Williams* [2001] FSR 271, that "in view of the very limited quantity actually taken, the emphasis upon quality may seem overstretched". Furthermore, it is noted that in light of the Australian "Men at Work" case (*Larrikin Music Publishing v EMI Songs Australia* [2010] FCA 29 FC Aust.), where the "quantity taken is large because the work itself is rather short then there is a greater likelihood that a qualitatively substantial part has been taken".

[79] *Francis Day & Hunter v Bron* [1963] Ch 587.

[80] See further Spence & Endicott, "Vagueness in the Scope of Copyright", 121 Law Quarterly Review 657, 663 (2005).

[81] Kelleher & Murray, "Information Technology Law in Ireland" 11 (2nd ed. Tottel Publishing, Haywards Heath 2007) referring to *Austin v Columbia* [1917-1923] MacG. CC 398.

[82] *Hawkes and Sons (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593.

[83] Bainbridge, "Intellectual Property" 146-147 (8th ed. Pearson Education Limited, Harlow 2010).

[84] *Coffey v Warner/Chappell Music* [2005] FSR (34) 747.

[85] Cornish, Llewellyn & Aplin, supra 62, at 481.

an objective one and that in this case the claim could not satisfy it[86]. Bainbridge has further stated that courts are unlikely to look favourably upon claims that engage in "cherry-picking" or that try to "tailor" parts of the work to make the claim more arguable[87]. In *Coffey*, it was simply not possible to hear a "substantial part" in the allegedly infringing work. With respect to literary works, in *Baigent v Random House*[88] it was found that no infringement occurred in relation to two books – "Holy Blood, Holy Grail" and "The Da Vinci Code" – because there was no copying of original expression. The court reiterated that mere "information, facts, ideas, theories and themes" cannot be given copyright protection.[89]

Recent rulings of the UK High Court[90] and Court of Appeal[91] in *Newspaper Licensing Agency v Meltwater* take clear influence from the ECJ ruling in *Infopaq.* For this reason, the relevant points articulated in *Infopaq* must be recalled before the important case of *Meltwater* is examined.[92] Firstly, following *Infopaq*, the originality standard for subsistence of all works is centred on the idea of the author's "intellectual creation".[93] Secondly, in *Infopaq* it was held that even an extract of 11 words could amount to an example of copyright infringement, if these 11 words are a reflection of the intellectual creation of the author.[94] Thirdly, the ECJ stressed that the "exceptions" to copyright, as contained in the Information Society Directive, must be interpreted narrowly.[95]

The primary issue of the case concerned whether Meltwater's "end users"[96] required a licence from the Newspaper Licensing Agency in order to receive media monitoring reports. In deciding that a licence was required, the High Court also reached significant conclusions regarding the issues of subsistence and infringement, conclusions that were largely upheld by the later Court of Appeal decision. In particular, regarding the issue of subsistence, it appears that in the light of *Infopaq* and *Meltwater* even very small works are protected under copyright. On this point, Proudman J. in the High Court stated that even a bare headline could amount to an original literary work in its own right provided that

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[86] *Coffey v Warner/Chappell Music* [2005] FSR (34) 747 at [10].
[87] Bainbridge, supra 85, at 150.
[88] *Baigent v Random House Group Ltd* [2007] FSR 579.
[89] *Baigent v Random House Group Ltd* [2007] FSR 579, Mummery L.J. at [156].
[90] *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch).
[91] *Newspaper Licensing Agency v Meltwater* [*Holding BV* [2011] EWCA Civ 890.
[92] Derclaye, "Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law", 32 European Intellectual Property Review 247 (2010) and Handig, "Infopaq International A/S v Danske Dagblades Forening (C-5/08): is the term "work" of the CDPA 1988 in line with the European Directives?", 32 European Intellectual Property Review 53 (2010).
[93] *Infopaq International v. Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495 at [33]-[38], [42]-[47].
[94] *Infopaq International v. Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495 at [38] and [48]-[49].
[95] *Infopaq International v. Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495 at [56].
[96] The main "end users" involved in the case were members of the Public Relations Consultants Association Limited.

the headline is the author's "intellectual creation".[97] This conclusion was upheld by the Court of Appeal.[98] Following on from this point, in relation to infringement Proudman J. stated that a headline or a short extract from the text could amount to a "substantial part" of a copyright work. Once again the court relied on *Infopaq* in making this point by stating that the "quality" of the extracted part is what is crucial i.e. if the part is a reflection of the author's intellectual creation then it will probably amount to a "substantial part". As noted above, this point is in line with the ruling in *Newspaper Licensing Agency Limited v. Marks & Spencer plc*[99] and it was further upheld by the Court of Appeal.[100]

4 (b) Exploring Infringement Cases involving Creative Works in other jurisdictions

In France a 2007 case provides useful guidance in relation to the creative use of an existing literary work. In *Hugo v Plon SA*[101], the case involved an alleged infringement of moral rights regarding an unauthorised sequel to Victor Hugo's "Les Miserables". The French Supreme Court affirmed that the right to freedom of expression, which includes the freedom to create, was protected by Article 10 of the European Convention on Human Rights. According to the court, Article 10 requires that copyright law must be balanced with the freedom to create. In particular, where monopoly protection has expired, copyright ought not be allowed to prevent acts of creativity by artists. Geiger has praised this decision as providing guidance for the "realignment" of copyright in circumstances where creativity is threatened by infringement actions.[102]

In relation to German law, Article 51 (2) of the German Copyright Act specifically allows quotations from copyright works. The extent of this principle was challenged in a German Constitutional Court case[103] involving the works of Bertolt Brecht. In the case a playwright wanted to include quotations from Brecht in a new play in order to show Brecht's words in a new artistic light. The court allowed this use stating that it was "a minor infringement of copyright" and one

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[97] *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch), comments of Proudman J. at [61] (see also [62]-[67]). In addition to *Infopaq*, Proudman J. discussed *Lamb v. Evans* [1893] 1 Ch 218, *Francis Day & Hunter Limited v. Twentieth Century Fox Corp Limited* [1940] AC 112, *Ladbroke v. William Hill* [1964] 1 W.L.R. 273, *Exxon Corporation v. Exxon Insurance Consultants International Limited* [1982] Ch 119, *Shetland Times Limited v. Wills* [1197] F.S.R. 604. Proudman J. also discussed the Australian cases of *IceTV Pty Limited v. Nine Network Australia Pty Limited* (2009) 239 C.L.R. 458 and in particular the comments of Bennett J. in the Federal Court of Australia in *Fairfax Media Publications Pty Limited v. Reed International Books Australia Pty Limited* [2010] FCA 984 at [28]-[50].

[98] *Newspaper Licensing Agency v Meltwater* [*Holding BV* [2011] EWCA Civ 890, at [22].

[99] *Newspaper Licensing Agency v Marks & Spencer* [2001] UKHL 38; [2003] 1 AC 551 at [19].

[100] *Newspaper Licensing Agency v Meltwater* [*Holding BV* [2011] EWCA Civ 890, at [23]-[29].

[101] *Hugo v Plon SA* - Decision of the French Supreme Court (Cour de Cassation), 1st Civil Division, 30 January 2007; 212 R.I.D.A. 248 (2007).

[102] Geiger supra 35, at 721, (2007).

[103] *Brecht v Heiner Müller* - Decision of German Federal Constitutional Court 1 BvR 825/98 (June 29, 2000).

which only involved a "minimal financial loss" for right-holders. The court emphasised a liberal interpretation of the "freedom to create" in Article 5(3) of the German Basic Law. On the other hand a recent German case showed much less tolerance in the area of "sampling". In a case involving the work "Metall Auf Metall"[104] a very short sample of a Kraftwerk sound recording was found to amount to an infringement.

A recent case in Australia, *Larrikin Music Publishing v EMI Songs Australia*[105], illustrates the difficulties that can arise in assessing infringement in the context of musical works.[106] As is the case under UK law, under Australian law a "substantial part" must be "copied" from one work into another. In *Larrikin*, it was necessary to consider whether a flute riff, which was taken from the work "Kookaburra" and used in the Men at Work song "Down Under" amounted to a qualitative "substantial part". "Kookaburra" can be described as a short work – it is a mere four bars long. Further to this, the copied part amounted to two bars of "Kookaburra" i.e. 50% of the work. The Federal Court of Australia was satisfied that a "substantial part" had been copied from "Kookaburra" and used in "Down Under". In other cases the court's analysis may involve a comparison of the two works in their entirety. For instance, in the Canadian case of *Drynan v Rostad*[107] an infringement was found where the central melody, key, and chord progressions of the plaintiff's work were all highly similar to the defendant's work. It was found in the case that a "substantial part" had been copied by the later artist from the antecedent work.

With regard to "tune copying", some of the world's most famous pop musicians have faced legal difficulties concerning infringement, even where the copying involved occurred "as a result of the subconscious mind"[108]. For example, in the US case of *Bright Tunes v George Harrison*[109], the melodies and chord structures of two songs were examined. It was found, under US copyright law, that there was "substantial similarity" between the song "My Sweet Lord" and the earlier work "He's So Fine".[110]

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[104] *Metall auf Metall (Kraftwerk, et al. v Moses Pelham, et al.)* - Decision of the German Federal Supreme Court no. I ZR 112/06 (November, 2008) – translation of judgment found in Conley & Braegelmann, "Metall Auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany", 56 Journal of the Copyright Society of the USA 1017, 1034 (2009).

[105] *Larrikin Music Publishing v EMI Songs Australia* [2010] FCA 29 FC Aust.

[106] Australian Copyright Act 1968. In Australia, infringement occurs when a person, without permission, reproduces a substantial part of a copyright work. In order to demonstrate this, it is necessary to show a "reproduction", which encompasses both a requirement for "objective similarity" between the two works and a requirement of a "causal connection" between the works.

[107] *Drynan v Rostad* [1994] OJ No 4253.

[108] *Bright Tunes Music Corp. v Harrisongs Music, Ltd et al.*, 420 F. Supp 177 (1976); *ABKCO Music, Inc. v. Harrisongs Music*, *et al*., 508 F. Supp. 798 (1981); on appeal, 722 F. 2d. 988 (1983); again after remand, 841 F. 2d. 494, and again 944 F. 2d 971 (1991); see also *Fogerty v Fantasy, Inc*., 510 U.S. 517 (1994).

[109] *Bright Tunes Music Corp. v Harrisongs Music, Ltd et al.*, 420 F. Supp 177 (1976).

[110] It has been noted that in the UK a case of subconscious copying of tune fragments by a musical composer could potentially lead to a claim of infringement - *Stephan Malmstedt v EMI*

4 (c) Assessing the Potential for Infringement of Arrangements of Public Domain works

With respect to the above analysis of the "idea-expression dichotomy", it was noted that certain musical stylistic conventions are in the public domain. These stylistic conventions can be used by all musicians to create new works. However, it must also be noted at this stage that it is possible to make use of whole works for which copyright protection has expired from the public domain. The creative use of a work that is in the public domain – a work which has fallen out of copyright - would not be infringement. Nonetheless, with regard to the creative use of a new copyright arrangement of a public domain work, an infringement action may be feasible. For such a case to succeed, the court would have to be of the opinion that the copyright has been infringed through the "taking" of the "originality" of the particular copyright arrangement.[111]

For instance, in the UK case of *Austin v Columbia*[112] new musical arrangements of old tunes for an opera were copied by the defendant. This was held to be an infringement, even though the relevant copied notes in the defendant's arrangement were not identical to the original copyright arrangement. On the other hand, in the Australian case of *CBS Records v Gross*[113] it was held that "the copyright in a musical arrangement was not infringed where the defendants had not used the arranger's original contribution"[114]. Furthermore, in the UK case of *Robertson v Lewis*[115] the claim centred on copyright arrangements of traditional Scottish airs. The late Sir Hugh Robertson had been renowned as the leader of the Glasgow Orpheus Choir and had copyright over an arrangement of the air "Westering Home". When the same air, but not the words or accompaniment, was recorded by Vera Lynn, the Robertson estate took an ultimately unsuccessful copyright infringement case. The Robertson estate failed to show that the recorded Vera Lynn version was derived from the Robertson arrangement. As Cornish has stated, this case shows that unless it is possible to show a clear case of copying the exact notes/accompaniment/words, in practice it may be difficult to enforce rights in an arrangement of a traditional tune.[116] In addition, many traditional melodies have uncertain origin and assessing who owns the copyright is not straightforward. In a US case involving the melody of the song "This Land Is Your Land", the estate of Woody Guthrie eventually discovered that the late Woody Guthrie had not in fact composed the relevant

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Records Ltd and Per Gessle "[2003] ECDR 162. However, no infringement was found in this case, which involved the Roxette song "Sleeping in my Car".

[111] *CBS Records Australia Ltd v Gross* (1989) 15 IPR 385 at 393.

[112] *Austin v Columbia* [1917-1923] MacG CC 398.

[113] *CBS Records Australia Ltd v Gross* (1989) 15 IPR 385 at 393.

[114] Laddie, Prescott & Vitoria, supra 66, at 108.

[115] *Robertson v Lewis* [1976] RPC 169.

[116] Cornish, "Conserving Culture and Copyright: a partial history", 13 Edinburgh Law Review 8, 18 (2009).

melody himself, but had copied it from an old song recorded by the Carter Family.[117]

5 Analysing Music in the Context of Infringement actions - Examining the Role of Musicologists

One other aspect must be considered with regard to cases of musical infringement. It is often the case that musical experts, or "musicologists", are called by both sides in the case. However, surely there is no "right" or "wrong" way to perceive music. For this reason, it can be difficult for courts to determine what amounts to a "substantial part. The role of expert testimony in these kinds of cases is of questionable value largely due to this problem of subjectivity[118].

The difficulty in showing objective similarity in musical cases was illustrated in *Larrikin*. It was not disputed that the short flute riff from "Kookaburra" had been an influence on the creation of "Down Under". A crucial question in assessing possible infringement however involved the consideration of whether the "reproduction" of two bars of "Kookaburra" in "Down Under" was "objectively similar". In order to undertake this consideration the court said that the test was that of the "ordinary reasonable listener" i.e. whether he or she would find recognition between the two works. However, the similarity between the works had gone unnoticed for many years – between 1981 and 2007, when it was noticed on a TV panel show, and even then it took some prompting for the panel to "hear" the similarity.[119] Nevertheless, the court was of the opinion that the "sensitised listener" would notice the resemblance between the two works. This is clearly a less "objective" requirement than that of the "ordinary reasonable" listener.

In the US[120], the recent case of *Swirsky v Carey*[121] also shows the difficulty of establishing "objective" criteria with regard to similarity between musical works, even when expert testimony is used. The dispute centred on a Mariah Carey song "Thank God I Found You". It was argued by Seth Swirsky that "Thank God I Found You" infringed the copyright in his song "One of Those Love Songs".

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[117] *JibJab Media, Inc v. Ludlow Music, Inc* (2005) as referred to by Jones, "Technology and the Cultural Appropriation of Music", 23 International Review of Law, Computers and Technology 59, 63-64 (2009). See also *JibJab Media Inc v. Ludlow Music Inc* (Complaint for Copyright Misuse and For Declaratory Relief of Non-Infringement of Copyright) US D. Ct. for Southern California (July 29th, 2004).

[118] Keyes, supra 6, at 435.

[119] http://www.minterellison.com/public/connect/Internet/Home/Legal%2BInsights/Alerts/NA-Two%2Bcopyright%2Bdecisions%2Bhanded%2Bdown/

[120] Crucial to US copyright infringement is the fact that copying have occurred. Copying is typically established by showing that the alleged infringer had access to the work and that the two works are substantially similar. Where there is a high degree of access, the burden of proof of establishing substantial similarity is lowered. *Three Boys Music Corp. v Bolton* 212 F.3d 477, 485 (9th Cir. 2000). See also *Metcalf v Bocho* 294 F.3d 1069, 1072 (9th Cir. 2002).

[121] *Seth Swirsky v Mariah Carey* U 376 F.3d 841 (9th Cir. 2004).

Specifically, it was alleged that the chorus of both works were "substantially similar". Mariah Carey argued that Swirsky had failed to satisfy the "extrinsic" part of the "substantial similarity" test i.e. that the evidence did not show an "objective similarity" between the two works. The district court made the decision to grant summary judgment against Swirsky, stating that the evidence of the plaintiff's musicologist was insufficient. However, the decision to dismiss the case was reversed on appeal to the Ninth Circuit and the case was eventually settled. Clearly the appeal court was much less dismissive of the potential value of the musicologist's testimony that the district court. Therefore, it is clear that acceptance of the apparent usefulness of such "expert" testimony is far from universal.

In this vein, Bently has recently criticised the deference shown by judges towards "musicological experts" in cases involving musical works[122]. Nonetheless, Crowne and Arman[123] have noted that such testimony is often influential on courts, and for this reason, it ought to be made certain that whole works have been considered by the experts, not mere portions of works. As Crowne and Arman have stated, cases of musical infringement often involve degrees of subtlety and music's value truly lies "in the ear of the beholder".[124]

6 The Musician's Dilemma - Is the Creative Use of Musical Works without a licence acceptable under Copyright?

In spite of the history of creative use in various musical cultures[125], the courts tend to display "very little sympathy for plagiarists"[126]. Furthermore, in light of the above discussion, it is clear that the concepts of "originality" and "infringement" are not static, and that while creative use does play a part in a number of musical cultures, even within some of these contexts cases of infringement may still arise. It is also clear that difficulties inevitably arise when courts attempt to assess whether a case of "creative use" is in fact a case of "infringement". In relation to this, the following question is prescient:

"At what point between general chord patterns and specific strings of notes does repetition constitute infringement of a protectable expression?"[127]

Following the recent ECJ case of *Infopaq*, which was applied in the UK case of *Meltwater*, it is now more difficult than ever to determine when a case of musical

[122] Bently, "Authorship of Popular Music under Copyright Law", 12 Information, Communication and Society 179, 192 (2009).
[123] Crown & Arman "Copy-right-brain v left-brain: the use of musicologists in Canadian copyright infringement cases", 6 Journal of Intellectual Property Law and Practice 1, 4-5 (2011); accessible online at http://jiplp.oxfordjournals.org/content/early/2011/09/05/jiplp.jpr136.short?rss=1 (pending print publication)
[124] Crown & Arman, supra 125, at 1.
[125] Rosen, supra 7, at 1-5.
[126] Bainbridge, supra 85, at 39.
[127] Vaidhayanathan, supra 16, at 118.

infringement has occurred. With the state of the law at present, musicians will surely find it difficult to evaluate which creative uses are legal and which creative uses risk infringement actions. This dilemma is likely to cause musicians to worry about making 'creative use' of any musical work without a licence.

For instance, it has always been the case that short melodies can attain copyright protection. However, post-*Infopaq* it is interesting to speculate whether a mere two or three note musical sequence could now attain copyright protection if it is said to be the intellectual creation of the author. On this point, under the current law there is no reason why a very short sequence of notes may not receive copyright protection, provided that it is sufficiently "original". Secondly, it is clear that the idea of infringement as applied in *Infopaq*, and described in the UK as the taking of a "substantial part", depends upon a qualitative test focusing upon whether the "stamp of individuality" is present in the extracted part. With respect to music, this may mean that a very small extract from a musical work may still amount to a "substantial part" for the purposes of copyright infringement.

In this context, considering that even small works can have copyright protection, and that even a taking of a small extract may be an infringing use, it is unlikely that any non-original musical elements remain in the public domain. This is problematic. As noted above, there are a limited number of notes in a musical scale. Given the additional uncertainties associated with using musicologist testimony during copyright infringement cases, musicians would be best advised to take caution when making 'creative use'.

6 (a) Chord Progressions and Creative Use

In terms of musical "structures", such as chord progressions, it was noted above that musical "style" has generally not been "monopolised" by copyright law. Some chord progressions and musical phrases are thought to be too common to be protectable[128]. As a result, no infringement action would succeed if any one of these mere stylistic conventions, such as a generic chord progression, was copied and used in another. However, although a generic chord progression, such as a twelve-bar blues progression, would not be protected, Coulthart has recently argued that a mere chord progression could be protectable under copyright provided that it is sufficiently original.[129] This would appear to be in line with recent cases. There is every reason to think, in the wake of *Infopaq*, *Meltwater* and *Larrikin,* that even a short progression of chords could be protectable if the resulting expression is deemed sufficiently original.

6 (b) Melody Extracts and Creative Use

[128] Vaidhayanathan, supra 16, at 117.
[129] Coulthart, "Copyright in chord progressions in music – Are they protected?", 23 Australian Intellectual Property Law Bulletin 202, 202-205 (2011).

With regard to the creative use of existing melodies, or tunes, Nettleton and Dawson[130] have recently queried:

"Can you use two bars of music without permission?"

Following recent cases there appears to be no reason why small, identifiable musical riffs would not be protectable.[131] Indeed, it is clear, that even a very short musical "riff" or "lick" may be protectable if it is sufficiently original i.e. if it is the "intellectual creation" of the author.[132] Furthermore, even making creative use of a small extract from a short melody could amount to a infringement". It is clear from *Larrikin*[133] that where the "quantity taken is large because the work itself is rather short then there is a greater likelihood that a qualitatively substantial part has been taken". For this reason it is possible that only generic expressions, such as the common "do-ray-me" ascending scale, are not capable of being considered as "original works", or if not as original works in themselves then as "substantial parts" of original works. In other words, it is questionable whether it is now the case that any use of "original" materials, expressions and stylistic conventions now requires a licence, even if the use is minor and not immediately discernible to the average listener.[134]

Nettleton and Dawson[135] have noted that in the context of creative use a musician "tweaks" an extract of music too much then "any emotions you hope to invoke in the audience may be lost". However, it is acknowledged that if the musician tweaks the extract too little, the musician "may inadvertently infringe third parties' copyright". For instance, Torremans has noted that under UK law if the copied "substantial part" is altered substantially, to the extent that a new, original work is created, it might be arguable that no infringement ought to occur.[136] However, under UK law this would only be guaranteed where a "substantial part" was so transformed that it is not detectible in the new original work at all.

In fact, it is possible that today's equivalent of the old blues "licks" could be protectable under copyright. Provided that the work is original, there now appears to be no limit to how short a copyright work may be. In a cautionary vein,

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[130] Nettleton & Dawson, "Sound-alikes – How close to the sun can you fly following the Kookaburra case?"" Addisons Focus Paper; http://www.addisonslawyers.com.au/documents/doc-117-sound.pdf

[131] Vaidhayanathan, supra 16, at 118, making reference to the Rolling Stones famous "Start Me Up" riff, which soundtracked the Microsoft "Windows" operating system.

[132] Berry & Borella, "Case Comment – Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd: laugh, Kookaburra, laugh", 21 Entertainment Law Review 194, 195 (2010).

[133] *Larrikin Music Publishing v EMI Songs Australia* [2010] FCA 29 FC Aust.

[134] It is of note that in *Larrikin* even an not immediately discernible example of "musical borrowing" was nonetheless found to be an infringement.

[135] Nettleton & Dawson, supra 132.

[136] Torremans, supra 77, at 250-251, referring to *Joy Music Ltd v Sunday Pictorial Newspapers* (1920) Ltd [1960] 1 All ER 703; *Glyn v Weston Feature Film Co*. [1916] 1 Ch 261.

Toynbee has suggested that the "blues" music of the USA would have been greatly inhibited had strict copyright law been enforced over certain "licks"[137]. Moreover if certain "stylistic conventions" had been made subject to copyright, this would have had a negative effect on the development of a great deal of modern music, much of which is "written in a traditional style", and is particularly influenced by "traditional" and "blues" conventions[138].

6 (c) Could Copyright Restrict Creative Use in other Artistic Fields?

In light of the above, many forms of creative use appear to be unacceptable under copyright. It may well be the case that only "unoriginal" or "generic" examples of creative use are acceptable. If it is the case that only unoriginal or generic expressions can be used creatively then there may be little value in the practice. As noted above, copyright ought not to be so strict with regard to musical works, given the limited number of notes available.[139] However, it is also clear that the underlying principles of copyright raised by this article also threaten artists in other creative fields. In particular the use of quotation in the context of dramatic works, such as occurred the German case involving the works of Brecht could be endangered. Similarly, the creation of adaptations or sequels in the fields of literature or drama, such as occurred in the French case involving "Les Miserables", could be discouraged. Overall, it is important that in cases involving creative works, courts take full account of the need to allow artists a reasonable freedom to create. Taking account of Article 10 of the ECHR, as the French Supreme Court did in the "Les Miserables" case, is important. Furthermore, as detailed below, there may also be the need for a broader "fair use"-style solution to allow creative use.

7 Licensing, "Fair Dealing" and "Fair Use" – Exploring the Possibility of a "Creative Use" Exception

Creative use of existing works is technically possible via traditional licensing mechanisms. However, this would provide an incomplete solution to the issues raised above. While the use of a work is legal where a licence is obtained, this may often be impractical, such as in a case involving an orphan work, or it may be unaffordable due to financial considerations.[140] In addition, some licences might simply be refused. Nonetheless, it is possible to accommodate such cases of creative use under the "Creative Commons"[141] brand of "open licensing", and this type of licensing may become more influential in relation to music in the

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[137] Toynbee, supra 5, at 95.
[138] Jones & Cameron, supra 4, at 260.
[139] On this point, it has been stated with regard to *Ludlow Music v Robbie Williams* [2001] FSR 271, that "in view of the very limited quantity actually taken, the emphasis upon quality may seem overstretched" - Cornish, Llewellyn & Aplin, supra 62, at 481 at no. 24.
[140] Rimmer, "The Grey Album: Copyright Law and Digital Sampling", 114 Media International Australia 40, 51 (2005).
[141] http://creativecommons.org/. See also Jones & Cameron, supra 4, at 260.

years to come. However, the traditional model of licensing, via the collecting societies, remains the most important at present, and it does not currently provide the means to properly encourage creative use.[142]

By definition, "fair dealing" and "fair use" concern situations involving "exceptions" i.e. the "permitted" acts as opposed to the "restricted acts". In light of the above UK case study, it is "notable"[143] that in contrast to the broad "fair use" provision under US copyright law[144], the current fair dealing provisions in the UK are narrowly enumerated defences to copyright infringement.[145] For this reason, it has been noted that the current UK fair dealing provisions are inflexible.[146] Unlike the position of the Canadian courts, which have recently taken an activist[147] approach to the expansion of fair dealing, the courts in the UK have not taken such an approach towards fair dealing. Therefore, in the UK allowing for the kind of "creative use" described above as part of a "transformative" or "creative" fair dealing would require an extension to the list of permitted purposes under the CDPA. In addition, once the purposes were expanded, any prospective "fair dealing" would have to be assessed by the courts in relation to the "fairness" criteria under the law in the UK as well under the relevant EU and international laws, and in particular, the "three-step test".[148]

In 2006 the UK Gowers Review[149] recommended the enactment of an exception for "creative, transformative or derivative works" within the framework of the "three-step test"[150] in order to "legitimise clearly the reworking of existing material for a new purpose or to give it a new meaning"[151]. This "transformative" recommendation was not considered by the subsequent UK IPO consultation

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[142] See generally Cardi, "Uber-Middleman: Reshaping the Broken Landscape of Music Copyright", 92 Iowa Law Review 835 (2007), Liebowitz & Watt, "How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives", 20 Journal of Economic Surveys 513 (2006), and Gyertyanfy, "Collective Management of Music Rights in Europe after the CIASC decision", 41 International Review of Intellectual Property and Competition Law 59 (2010).

[143] Bently & Sherman, supra 75, at 202.

[144] United States Copyright Act 1976 s 107.

[145] *Pro Sieben Media v Carlton UK Television* [1997] EMLR 509 (comments of Laddie J.).

[146] Garnett, Davies & Harbottle, "Copinger and Skone James on the Law of Copyright" 556 (16th ed. Sweet & Maxwell Ltd, London 2010).

[147] Canadian law now includes an idea of a "user right" as part of fair dealing – see *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339. See also D'Agostino, "Healing Fair Dealing? A Comparative Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use," 53 McGill Law Review 309, 309 (2008), noting that this decision effectively elevated the narrow exceptions to the level of a general principle, despite the fact that a "user right" is not reflected in the legislative text.

[148] Article 9(2) Berne Convention.

[149] "Gowers Review of Intellectual Property" 67 (HMSO, London 2006); accessible at http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf – referring to Arewa, supra 3, at 630.

[150] MacQueen, Waelde, Laurie & Brown, "Contemporary Intellectual Property – Law and Policy" 259 (2nd ed. Oxford University Press, Oxford 2010).

[151] MacQueen, Waelde, Laurie & Brown, supra 152, at 259.

document[152], nor was it revived under the 2011 Hargreaves Review[153] despite previous remarks by Prime Minister Cameron in favour of expanding the copyright exceptions in the UK.[154] Nonetheless, it is worth discussing what such an exception might look like.

Since there are no cases on "creative use" in the UK, the case law from the US on "fair use" and Germany on "freie Benutzung"[155], or "free use", may provide some guidance regarding the possibility of enacting a broader "fair use" style exception in the UK with the aim of facilitating creative use.

Under US law, there are four standard factors that must be taken into account in a case of apparent "fair dealing".[156] Regarding the first of the four factors, the "purpose" of a creative use would probably fall within the category termed by Samuelson as "transformative uses".[157] In the US, "fair use" cases involving music are not uncommon.[158] For instance, in *Campbell v Acuff- Rose Music*[159], the US Supreme Court made a finding of fair use in relation to a parody of the song "Pretty Woman", judging that the parody would not impact on the market for the original song. Within this category, if a use was not a parody like *Campbell*, it might fall into a line of cases regarding transformative artistic uses such as *Blanch v Koons.*[160] In this vein, Leval[161] has argued that creativity ought to be central to the idea of "transformative" use and this idea is evident in certain judgments in the US.[162] However, there is also a line of cases which stresses the idea that a "transformative" use is one which utilizes the work in order to perform a new function.[163] Furthermore, even in the cases that focus on creativity, it is often the case that the "transformative" use is creative in a different sense than

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[152] IPO, "Taking Forward the Gowers Review of Intellectual Property" 22-37 (IPO, London 2008); accessible at; http://www.ipo.gov.uk/consult-copyrightexceptions.pdf - See also MacQueen, Waelde, Laurie & Brown, supra 152, at 261.
[153] http://www.ipo.gov.uk/ipreview-finalreport.pdf
[154] http://www.bbc.co.uk/news/uk-politics-11695416; http://www.taylorwessing.com/topical-issues/details/david-cameron-faces-european-constraints-in-introducing-a-us-fair-use-copyright-exception-2010-11-10.html
[155] German Act on Copyright and Neighbouring Rights, 1965 (Urheberrechtgestz) s 24 – (1) "An independent work created by fair use of a work of another person may be disseminated or exploited without the consent of the author of the work used." (2) "Subsection 1 shall not apply to the use of a musical work by which a melody is discernibly taken from the work and used as the basis for a new work." (Translation by Klett, Sonntag & Wilske, "Intellectual Property Law in Germany" 277 (Verlag C.H. Beck, Munich 2008).
[156] United States Copyright Act 1976 s 107 - http://www.copyright.gov/title17/92chap1.html#107
[157] Samuelson, "Unbundling Fair Uses", 77 Fordham Law Review 2537, 2548-2555 (2009).
[158] See discussion of "fair use" of Phil Spector's music; accessible at http://www.nytimes.com/2010/06/27/movies/27spector.html?fta=y.
[159] *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994).
[160] *Blanch v Koons* 467 F. 3d. 244 2d. Cir. (2006)
[161] See generally Laval, ""Towards a Fair Use Standard", 103 Harvard Law Review 1105 (1990).
[162] See e.g. *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994) and *Bill Graham Archives v Dorling Kindersly Ltd*, 488 F. 3d. 605 2d. Cir. (2006).
[163] See e.g. *Kelly v Arriba Soft* 280 F. 3d. 934 9th Cir. (2002) and *Perfect 10, Inc v Amazon.com, Inc* 487 F. 3d. 701 9th Cir. (2007).

the original work e.g. parody (*Campbell*) or collage effect (*Graham*). On this point Arewa has argued:

"... even if doctrines intended to enable future uses, such as fair use, are taken into account, such property rules have thus far not facilitated a clear delineation between the scope of acceptable and unacceptable uses of existing material, particularly in contexts of living music traditions."[164]

Nonetheless, if "creativity" is truly at the root of "transformative" use, then it would seem unfair if creative uses of musical compositions were not acceptable.

Regarding the second factor, the "nature" of the work considers a number of factors including the type of work and whether the work is published or unpublished. The fact that the work is unpublished, and the particular use is "creative", as opposed to "factual", may not necessarily prevent a fair use finding.[165] Regarding the third factor, the substantiality of the taking would have to be assessed in light of each case. In line with the fourth factor, potential harm to the market, it has been noted that the "amount taken should only be judged excessive if it harmed the market for the work".[166] This is said to be in line with the decision in *Suntrust Bank v Houghton Mifflin Co*.[167] Overall, it is conceivable that the US fair use test would be useful when applied in the context of musical creativity.

In relation to Germany, the idea of "freie Benutzung"[168] is of note. Referring to Ulmer, Geller has stated that under this doctrine if materials are copied from a copyright work and used in another work, there will be no infringement if the materials taken are sufficiently subsumed within the new work.[169] This idea of "free use" does involve a certain amount of creative transformation and the court can artistic considerations into account.[170] Furthermore, the clear purpose of the

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[164] Arewa, supra 14, at 616 (2009-10).
[165] *Harper & Row, Publishers, Inc. v Nation Enterprises* 105 S.Ct. 2218. 85 L.Ed.2d. 588 (1985) at 554. The courts are generally more willing to allow fair use of factual, rather than creative, works - *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994). Nonetheless, Beebe has noted that a reasonable amount of the fair use findings involve "creative" works - Beebe, "An Empirical Study of US Copyright Fair Use Opinions 1978-2005", 156(3) *University of Pennsylvania Law Review* 549, 661 (2008).
[166] Samuelson, supra 159, 2552.
[167] *Suntrust Bank v Houghton Mifflin Co*. 268 F. 3d. Cir. 1257 11th Cir. (2001) at 1273.
[168] German Act on Copyright and Neighbouring Rights, 1965 (Urheberrechtgestz) s 24 – (1) "An independent work created by fair use of a work of another person may be disseminated or exploited without the consent of the author of the work used." (2) "Subsection 1 shall not apply to the use of a musical work by which a melody is discernibly taken from the work and used as the basis for a new work." (Translation by Klett, Sonntag and Wilske, "Intellectual Property Law in Germany" 277 (Verlag C.H. Beck, Munich 2008).
[169] Geller, "A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations", 57 Journal of the Copyright Society of the USA 553, 556 at no. 13 (2010), referring to Ulmer, "Urheber-Und Verlagsrecht" (3rd ed Springer-Verlag, Berlin 1980).
[170] Geller, supra 171, at 556-557, referring to Ulmer, supra 171, at 276.

"free use" provision is to encourage cultural progress.[171] Nonetheless, even the German idea of "free use" under s 24(2) specifically excludes cases involving music where recognisable melodies remain present in the "new" work. Despite this, the German concept provides some guidance. As stated above, exceptions must be compatible with the "three-step test". In this regard, the German exception for "free use" provides some guidance in relation to enacting broader exceptions that allow for elements of "transformative use" without falling foul of the "three-step test".[172]

Neither of the above two concepts provides a perfect fit for cases involving "creative use" of music. However, the principle at the base of both "fair use" and "free use" i.e. the encouragement of creativity and cultural progress, does fit with the creative practices of artists. For this reason, moving towards a broad "fair use" style exception in the UK, taking guidance from the US and German experiences, would improve the situation.[173] Any worries that taking a broad interpretation of "creative use" might prejudice authors' rights could be allayed via the "fairness" assessment and via application of the "three-step test". On this point, it is clear that analysis of the "three-step test" by various national courts has not been uniform.[174] In fact, there are persuasive arguments for taking a more liberal interpretation of the test.[175]

Furthermore, there are some recent precedents for change in this area; Israel recently moved from a narrow fair dealing approach to a broad fair use approach.[176] As Afori has remarked, the need for a balanced copyright law

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[171] *Kraftwerk v Moses Pelham* Decision of the German Federal Supreme Court no. I ZR 112/06 (November, 2008) – translation of judgment found in N. Conley and T. Braegelmann, "Metall Auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany", 56 Journal of the Copyright Society of the USA 1017, 1034 (2009).

[172] Griffiths, "Unsticking the Centre-Piece – the Liberation of European Copyright Law?", 1 Journal of Intellectual Property, Information Technology and E-Commerce Law 87, 89 (2010) See also IPO, supra 151, at 31-36. Nonetheless, it has been noted that the German "free use" exception is rarely upheld – Geiger, supra 35, at 713.

[173] Geiger, supra 35, at 714, has recently argued in favour of enacting an exception for "creative use", one which would "convert the exclusive right into a right to remuneration whenever the use of a work led to the creation of a new work", noting that such an innovation is not entirely without precedent in the field of intellectual property law, noting the principle is embodied in recent draft legislation on orphan works and in the area of "dependent licences" in patent law. However, this author prefers the idea of a broad "fair use" exception.

[174] Griffiths, "The "Three-Step Test" in European Copyright Law – Problems and Solutions", 4 Intellectual Property Quarterly 428 (2009).

[175] Geiger, Griffiths & Hilty, "Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law", 30 European Intellectual Property Review 489 (2008). See also Gervais "Towards a New Core International Copyright Norm: the Reverse Three-Step Test", 9 Marquette Intellectual Property Law Review 1, 32 (2005), Senftleben, "Fair Use in the Netherlands – A Renaissance?", 33 Tijdschrift voor Auteurs, Media en Informatierecht AMI 1, 7 (2009) and Geiger, "Rethinking Copyright Limitations in the Information Society: The Swiss Supreme Court Leads the Way", 39 International Review of Intellectual Property and Competition Law 943 (2008).

[176] Israeli Copyright Act 2007 s.19. See also the case of *The Football Association Premier League v Ploni* (2009) Case 1636/08 Motion 11646/08 (District Court of Tel Aviv)

motivated this change.[177] Nonetheless, with regard to the above case study, the UK courts have traditionally been conservative in applying statutory exemptions to copyright. As Burrell has remarked, merely enacting a new exception into the law may not necessarily change the traditional attitude of the courts[178].

Any possible exemption allowing "creative use" would probably have to be pursued at an EU level.[179] It has been argued that such an innovation is conceivable.[180] Nevertheless, a change in EU policy on this issue does not seem to be on the cards at present.[181] Indeed, the ECJ has recently argued in favour of interpreting the existing "Infosoc" defences narrowly.[182]

8 Conclusion

One of the purposes of copyright is surely to encourage creativity. Copyright should do more to facilitate "creative use". In order to facilitate musical creativity effectively copyright must provide a fair use-style solution to facilitate creative use. If such an innovation were to come about, it would also be important to educate musicians, and artists in other fields, about what amounts to acceptable "creative use". In line with the opinion of D'Agostino, to aid artists it might be useful for organisations such as PRS to produce "fair use guidelines" with respect to music[183].

[177] Afori, "Legislative Comment - An open standard "fair use" doctrine: A welcome Israeli initiative", 30 European Intellectual Property Review 85, 85-86 (2008).
[178] Burrell, "Reining in Copyright Law: Is Fair Use the Answer?", 4 Intellectual Property Quarterly 361, 368 (2001).
[179] Bently & Sherman, supra 75, at 240.
[180] Griffiths, supra 174, at 87.
[181] Bently & Sherman, supra 75, at 240.
[182] *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259.
[183] D'Agostino, supra 149, at 361.