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LL.M PROGRAM IN COMMERCIAL AND INVESTMENT LAW

THESIS SUBMITTED FOR PARTIAL FULFILLMENT OF DEGREE OF LL.M

**DELINEATING THE LIMITS OF EXCLUSIVE RIGHT OF OWNER OR AUTHOR OF
MUSIC UNDER ETHIOPIAN COPYRIGHT LAW: THE CASE OF MUSIC MASHUP**

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JIMMA, OROMIA, ETHIOPIA

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ADVISOR'S APPROVAL

This is to certify that thesis entitled 'Delineating limits of exclusive right of owner or author of a music under Ethiopian Copyright law: The case of mashup music was submitted in partial fulfillment of the requirement for the degree of Master of Law (LLM)with specialization in Commercial and Investment Law to the Post Graduate Program of Jimma University School of Law, has been carried out by Asfaw Tesfaye under our guidance. Therefore, we recommend that the student fulfilled the requirements and hence hereby can submit the thesis to school.

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CERTIFICATION OF THE FINAL THESIS

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DECLARATION

I Asfaw Tesfaye hereby declare that the thesis entitled '**Delineating limits of exclusive right of owner or author of a music under Ethiopian Copyright law: The case of music mashup**' is my original work and has not been presented for degree in any other university and all sources of material used for the thesis have been duly acknowledged.

Name: Asfaw Tesfaye signature_____ Date_____

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ABBREVIATIONS

art. / arts. article / articles

para. /paras.paragraph / paragraphs

CMO: Collective Management Society

CR: Copyright

Ed. Education

EAA: Ethiopian Audiovisual Association

EMA: Ethiopian Music Association

EMCCMO: Ethiopian Music Copyright and Neighboring rights Collective Management
Organization

EIPO: Ethiopian Intellectual Property Office

IP: Intellectual Property

IPRs: Intellectual Property Rights

No. Number

OECD: Organization for Economic Co-operation and Development

TRIPS: Trade-Related Aspects of Intellectual Property Rights

UN: United Nations

UNCITRAL: United Nations Commission on International Trade Law

US: United States

WIPO: World Intellectual Property Office

WTO: World Trade Organization

Abstract

The strikes to a delicate balance between the interests of authors and other rights holders in the control and exploitation of their works on the one hand, and society's competing interest in the free flow of ideas, information, and commerce, on the other hand, is the main purpose of the copyright regime. Yet, technology is modifying the production and distribution patterns of copyrighted works, as well as consumer habits. The purpose of this study is to delineate the limit of exclusive rights of the copyright holder of music under Ethiopian copyright law. As to the methodology, the research will apply a mixed research approach. The study will follow the qualitative approach of data collection tools to get the primary source which is the copyright proclamation and interview the Ethiopian music copyright and Neighboring right collective management Organization established by the copyright amendment proclamation and Ethiopian Intellectual property Office. Books, articles, research, as well as journals, are used as secondary sources. The study found that the affirmative defense against the exclusive right of musical composers excludes the music mashup. Thus, unauthorized music mashup infringes the exclusive rights of musical work in one way and it encourages further creativity if it has done with the lawful authorization from the copyright holder by balancing the right of the musical author and encouraging new creation. However, the body established to administer the right of musicians collectively does not propose anything toward balancing the interest of copyright holders of music and encouraging new creativity through mashups. Finally, the researcher suggests that the EMCCMO should work effectively to protect the exclusive right of copyright holders without affecting the future creation of music.

Keywords: Copyright, Music, Music Mashups, Exclusive right, Ethiopia

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The Ethiopian Copyright legislation is complimentary with the International Copyright laws in providing the copyright holders in general and music copyright holder specifically to enjoy a bundle of economic and moral right.¹ The rationale for protection is compensating the copyright holders, encouraging the future creation and the right to be credited for the music work.² Copyright protects the original expression of idea in a fixed form.³

Originality in copyright is low with some degree of creativity from the author and free from copy from other works.⁴ The requirement of Originality in copyright in general is in the expression of the work rather than in the mere idea.⁵ The Ethiopian copyright law failed to define the term originality and its extent. This creates controversy on the extent of originality in copyright, especially in relation to music in order to get copyright protection. The concept of originality is also rarely defined in other national jurisdiction.⁶ According to scholars, the statutory originality requirement of copyright as relatively low.⁷ In the same fashion, the courts also decide in several cases as copyright's originality threshold as low.⁸

¹Berne Convention for the Protection of Literary and Artistic Works, (as amended) 1979, article 2(3); See Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 UNTS 299; 33 ILM 1197 (1994), article 9(2) and see also Copyright and Neighboring Rights Proclamation of 2004, Proclamation No. 410 (as amended), Federal NegaritGazeta, Year 10, No.55, article 7 and 8.

²Bollier D Brand Name Bullies: The quest to own and control culture (Hoboken, NJ: John Wiley, (2005), P.12. By granting an exclusive right to an author, the author is encouraged to create new works and this result in more creativity. Thus, Copyright can thus be said to be an incentive that is designed to drive creativity.

³Copyright and neighboring right protection proclamation No. 410/2004, article 6(1). Restated in the negative, originality requires that a person wishing to obtain rights in a work of expression did not copy the work from someone else. Fixation does not require a specific form: any physical embodiment satisfies the requirement.

⁴Gideon Parchomovsky, & Alex Stein, Originality, Faculty Scholarship at Penn Law. 258, Vol. 95.No. 1505, 1506, (2009).

⁵Desrezka Gunti Larasati, Revealing Originality of Song Works: An Analysis to the Copyright Law, Indonesian Law Review, and Vol. 4 No. 3, 280, (2014).

⁶Scholars have proposed legal changes to restrain, or better manage; copyright is now-daunting scope. Some have proposed new approaches to copyright infringement doctrines, urging that we tighten or refocus on the substantial similarity inquiry; better sensitize the fair use inquiry to key incentives and market conditions.

⁷Jessica Litman, the Public Domain, EMORY L.J., 965, (1990). See Paul Goldstein, Copyright: Principles, Law and Practice, 2.2.1, 62, (1989).

⁸Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1073 (9th Cir. 2000), See also CCC Info. Servs. v. Maclean Hunter Mkt. Reports, 44 F.3d 61, 66 (2d Cir. 1994), See WI, LLC v. WIREdata, Inc., 350 F.3d 640, 643 (7th Cir. 2003), See also, Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).

The copyright holder entitles the exclusive rights of reproduction, adaptation, publication, performance, display and the right to control the preparation of derivative works.⁹ Notwithstanding the monopoly granted to the owner by the copyright holder, exception is provided to exclusive right of music in order to avoid abuse by the copyright author/owner of music.¹⁰ The affirmative defense available against the exclusive rights copyright holder is criticism, comment, news reporting, teaching as a fair use doctrine.¹¹

The absence of threshold in the extent of originality for copyright protection and the monopoly right of copyright holder especially for music work in one way doesn't take into account the feature of music work which is based on borrowing processes the hallmark of the type of creativity and innovation.¹² Copyright fails to acknowledge the historical role, informal norms and value of borrowing, cumulative creation and citation in music.¹³ The copyright presumes borrowing is generally antithetical to creativity and innovation and that creative works worthy of protection are always created independently. Beyond being largely unsubstantiated, actually it has onerous impact on musicians who historically have used collaboration and borrowing regularly in the creative process.¹⁴

In contrast, this uncertainty in the copyright legal framework with weak enforcing institution as well as technological advancement challenged the enforcement of copyright legal framework which leads to the exploitation and infringement of the exclusive right of the copyright holder. As the main area of the study, one of such infringement of copyright holder's right is music mashup. Music mashup is a song formed by combining two or more preexisting copyrightable songs other artists without authorization.¹⁵ Some people argue in favor of the 'music mashup' have opposed the greater control of content owners, pushing for increased access to and free use

⁹Proclamation No. 4100/2004, *supra note 3*, at 4& 7.

¹⁰Aaron Power, Comment, *15 Megabytes of Fame: A Fair Use Defense for Mash- Ups as DJ Culture Reaches Its Postmodern Limit*, *Universal Law review*, 577, 591, (2007).

¹¹*Id.*

¹² Music History: Hip Hop, ICONSCIOUS, available at: <http://www.iconscious.co.uk/musichistory/hiphop.htm>, accessed in 19 June, 2022.

¹³Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law is Scratching More the surface of copyright law*, *Fordham Intellectual Property, Media & Entertainment law Journal*, V.21. No. 4, 846, (2011).

¹⁴Olufunmilayo B. Arewa, *From J.C. Bach to hip hop: Musical borrowing, Copyright and Cultural Context*, *North Carolina Law review*, V.84. No.2, 551, (2006).

¹⁵Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms-*, *University of Pennsylvania Law Review*, 3, (2000).

of copyrighted works for creating progress in the art. Other argues that, music mashup content owner is not only infringing the copyright owner to use, but also it is against the exclusive right to reproduce, public performance, and the right to own the derivative work of the art. Added to this, they by enabling them to use "what's available off the streets to them" rather than "creating out of their own souls and their own talents."¹⁶

The focus of the existing study will analyze the exclusive rights of copyright owner/author of music and affirmative defense available under Ethiopian Copyright legal framework in balancing encouragement of creativity in music with adequate compensation for the copyright holder of music particularly on music mashup. Moreover, the study will investigate status of music mashup according to copyright collective society established by copyright and neighboring right (amendment) proclamation No.872/2014.

1.2 Statement of problem

A copyright is a legal device that gives the creator of a literary, artistic, musical, or other creative work the sole right to publish and sell that work. Copyright owners have the right to control the reproduction of their work, including the right to receive payment for that reproduction.¹⁷ The protection of exclusive right of copyright author of music specifically and general copyright protection is incentive for creation of works and a *sine qua non* for encouraging indigenous talent to devote its energy to furthering national intellectual creativity.¹⁸

The rationale for protection of copyright encouraging and promoting creativity by creating a more favorable environment for art and aspiring the other to join the industry.¹⁹ The general requirements for music to be protected under copyright law are originality and fixation of the work on tangible instrument. Originality in musical work must be found from one of the following; the phrases and its grouping, melodies, harmol, and metric structure infringement of copyright in the musical works is the use of the copyrighted work without authorization of the right holder.

¹⁶*Id.*

¹⁷Prof Uvieghara E.E, Essay on Copyright Law And Administration In Nigeria, 1st Ed. Y-Book Ltd. Ibadan, 15,(1992).

¹⁸*Id.*

¹⁹ David GikikundaMiriti, Are author of music adequately protected under Kenyan copyright law? (LL.M Thesis, Nairobi University, 5, (2017).

However, the Ethiopian copyright law doesn't define originality and demarcate boundary as the requirements for protection of copyright in music. The proclamation also provides for the possible limitations of those exclusive rights as a fair use practice to balance social, educational and cultural interest of the public.²⁰ Moreover, the copyright proclamation doesn't answer the question on what extent of adaptation or derivative works of the copyrightable work especially music can infringe the right of the owner or author of music and criteria for alleging the infringement of copyright. In addition, the copyright proclamation of Ethiopia doesn't give recognition and protection of the completion of work in which the artist selected, coordinated, or arranged [the material] in such a way that the resulting work as a whole constitutes an original work of authorship even though the requisite level of creativity is low especially in relation to music mashup. The establishment of a copyright collective society for the joint management of their right is also provided for in the copyright and adjacent right amendment proclamation No. 872/2014. Anyone who makes a commercial use of a protected work is required to pay royalties. The power to submit a proposal for a work that is eligible for royalties is given for the collective society. This society is not effectively and efficiently collecting royalties concerning music mashup from mashup artists who gain economic value by compiling works of different original work.

1.3 Objectives of the study

The study has both general and specific objectives.

1.3.1 General Objectives

The general objective of this study is delineating the limitation on the exclusive rights of copyright owner or author of music under Ethiopian copyright law in the case of music mashup.

1.3.2 Specific objectives

In order to fulfill the aforementioned general objective, the study deals with the following sub-objectives:

- 1) Evaluation of the adequacy or otherwise of the limitations on the exclusive rights of copyright owner under Ethiopian copyright proclamation No. 410/2004 in protecting the author of music against music masher.

²⁰Proclamation No. 410/2004, *supra note 3*.

- 2) To analyze the challenges and controversies regarding music mashup in contemporary music copyright legislation.
- 3) To investigate the way Ethiopian music copyright and neighboring right collective management society working to protect the exclusive right of music copyright author/owner

1.4 Research Question

In delineating the limitation on the exclusive rights of copyright owner or author of music under Ethiopian copyright law in the case of music mashup as the main question, the study will ask the following interrelated sub-questions arise, which this study seeks to answer:

1. Is the limitation on the exclusive rights of the copyright owner or author of music under Ethiopian copyright proclamation is sufficient to protect the exclusive right of music copyright author/owner against music masher?
2. What are the challenges and controversies regarding music mashup in music copyright legislation?
3. What are the efforts being made Ethiopian music copyright and neighboring right collective management society are defending the exclusive ownership of music copyright from mashup artists?

1.5 Research methodology

The study focuses on delineating the limitation on the exclusive right of copyright owner or author of music under Ethiopian copyright law with specific emphasis on music mashup. In order to accomplish this, the researcher used mixed methodology that combined doctrinal and empirical study. The examination of how the Ethiopian Copyright and Neighboring Proclamation's limitation of the copyright owner's or authors exclusive rights, and a comprehensive understanding of the concept of music mashups is provided. In addition, the study employed an empirical method to determine the status of music mashups from the viewpoints of the copyright collective management and Ethiopian Intellectual Property Office.

Both primary and secondary sources served as the basis for the data used in this study. The Ethiopian copyright proclamation No. 410/2004 and questionnaires conducted with the copyright collective management society are primary sources. Moreover, some judicial rulings from other countries which is appropriate and useful in the discussion of this issue also applicable. To this

end, the researcher makes use of judicial ruling of USA and UK as music mashup first started in UK and developed USA. Moreover, International papers, conventions, charters, internet resources, journal articles, and textbooks that address the topic are some examples of secondary sources. Purposive sampling is used in the sample procedures for the Interview that are used with Ethiopian music copyright and related right management organizations, Ethiopian Intellectual property Organization copyright director, Ethiopian Music Association as well as Mashup artists, in order to obtain sufficient information from the support and follow up team leader.

1.6 Significance of the Study

This study is significant to contribute on the better understanding of the Exclusive rights of copyright holder of music in general and under Ethiopian copyright law specifically. The study also examines the notion of music mashup and the key issues raised on its status from the perspectives of mashup artists as a defense and the critics forwarded by scholars on them. The research also analysis the status of music mashup under Ethiopian copyright law. It helps in a better understanding of the exclusive right of copyright owner and outlining limitation on the exclusive right. It also examines the concept of the music mashup according to the international experience and its status under Ethiopian copyright law.

1.7 Limitations of the Study

For the copyright holder in general and its regulatory the current technological advancement is problematic especially in case of enforcement of that right. Moreover, there is no consensus in the limitation of exclusive rights of copyright holder. Added to this, most of the existing legislations of copyright are silent on the infringement the exclusive rights of the copyright holder by technological advancement and they are developing it through judicial interpretation. The scholar is also yet to agree on the status of mashup under different literatures in order to get enough resources.

1.8 Scope of the study

The substantive scope of this research mainly focuses on the delineating of the limits of exclusive rights of copyright owner under Ethiopian copyright law. The boundary of the study is Ethiopian copyright law on the limitation of the copyright owner. Specifically, the study deals with copyright owner/author of music. It also focuses on the analysis of music Mashup's legality

or otherwise under Ethiopian copyright law in exclusion of other derivative works on music such remix.

1.9. Organization of the Study

This thesis is organized into five chapters. The first chapter deals with background for the study, problems stated for the study which includes question the study aims to answer, the general and specific objective of the study, methodology and methods of the study with tools of data collection, significance of the study, limitation and organization of the study. The second chapter is the general overview of copyright legal framework in Music. It highlights copyright and musical work, exclusive right of copyright holder music, the Copyright Infringement, and affirmative defense under copyright legal framework. Chapter three focuses on Music Mashup and Copyright Musical Borrowing and Copyright legal framework. Under this chapter, background and Concept of Music Mashup, Music Mashup and Copyright Law and Experience of some national jurisdiction are discussed. Chapter four is analysis the status of the mashup under Ethiopian copyright law and other countries. The final Chapter is conclusion and recommendations.

CHAPTER TWO

THE LEGAL FRAMEWORKS GOVERNING COPY RIGHTS IN MUSICAL WORKS

2.1. Copyright law and Musical Work

Musical works lack a universally recognized legal definition. Except for stating that musical compositions are covered by copyright law, none of the major international documents governing copyright law (Berne Convention, TRIPS Agreement, and WIPO World Copyright Treaty) define the phrase "musical work."²¹ Similar to this, the pertinent national legislation of various European states (France, Germany) does not include a definition, making it difficult to define this phrase.²²

Musical work is defined as sounds that are melodic or harmonic in combination and are created by voice or instrument devoid of any words or activities meant to be sung, spoken, or performed along with the music, musical works consist only of music.²³ A musical piece that hasn't been converted to any material form cannot obtain copyright protection. As a result, a song will have two types of copyrights: one for the music and another for the song's lyrics as a literary work.²⁴ The work needs to be condensed, whether in writing or another way. For copyright protection, a relatively minimal number of notes and chords are required to assert ownership of the copyright.²⁵

Copyright serves to encourage both the production of and public access to artistic, literary, musical, theatrical, and other types of creative works. Obtaining a just reward for the copyright holder (or, more accurately, to prevent someone other than the holder from appropriating whatever benefits may be generated) is typically presented as striking a balance between

²¹Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, (1979). Art. 2. under Art. 2 (1) Berne Convention the expression 'work' defines "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as [...] musical compositions with or without words". All the convention and treaties hereinafter mentioned make provision for exclusive rights in respect of works of music.

²² Luke T. McDonough, "Is the Creative Use of Musical Works without a License Acceptable Under Copyright Law," *International Review of Intellectual Property and Competition Law (IIC)* 4, 408, (2012).

²³ Swagata Changmai, Determination of copyright infringement in musical works, *Journal of legal studies and research*, Vol.3 No. 3, 93,(2017).

²⁴*Id.*

²⁵*Id.*

promoting the public interest in encouraging the creation and dissemination of works of art and intellect.²⁶ The goal of copyright is to strike a balance between the interests of users, society, and authors.²⁷

Creators were encouraged to develop expressive works without legal protection before the adoption of copyright law. Only in the post-Classical era did the notion of creators having legal claims to their works emerge, and it wasn't until the Romantic era of the nineteenth century that it was fully accepted in the context of music.²⁸ Before that society's institutions, the nobility, or affluent people's expectations and encouragement of authors to produce such works.²⁹

The Roman Catholic Church is known to have been the oldest patron of Western musicians.³⁰ As a suitable method of intoning the Mass, glorifying the Holy Trinity of God the Father, God the Son, and God the Holy Ghost, and spiritually strengthening worshippers, the Church fostered or mandated musical creation by the clergy beginning in the Middle Ages.³¹ The solo, monophonic singing style known as chant, later known as Gregorian chant, was created by priests and monks, who infrequently got individual praise or distinct financial remuneration.³² As many churches freely distributed and shared these chants, the idea of copyright as a method of granting legal protection for expressive works did not exist.³³

This quick look at music patronage shows that even without copyright laws, composers can still be encouraged to create musical works.³⁴ A composer's attempts to create can be motivated by a variety of things, including a deep need to express oneself and the desire for divine favor, religious responsibility, the desire to win over the royal court, and the urge to curry favor with others. However, many of these historical motivators are no longer present in the modern world,

²⁶*Id.*

²⁷ Ekpa, F. Okpanachi Kure, Blessing Riche, Fair dealing as an exception to the infringement of copyright claims in Nigeria, *Idah Bar Journal of Contemporary Legal Issues*, Vol. 2, 245, (2014).

²⁸ Margit Livingston and Joseph Urbinato, Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike, *V.15 (2)*, 2013, p.233. Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol15/iss2/1>

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³² J. Peter Burkholder, et al., *A History of Western Music*, 7th ed., 24-25, (2006).

³³ Susan Boynton, Plainsong, In *'The Cambridge Companion to Medieval Music*, Mark Everist ed., 18-20, (2011).

³⁴*Id.*

and the possibility of financial gain still serves as the principal driver of artistic production, notably the writing and performance of popular music.³⁵

The ideology around the creation of music started to become idealized as musical tastes remained centered on historical composers, and this romanticization has influenced ideas about musical innovation to this day.³⁶ In order to prevent composers from creating their own works, romantic authorship established a representation of the creative process of original works (classical compositions) that strongly forbade any sort of borrowing or loose imitation³⁷

The Copyright and Patent Clause of the US Constitution is proof that the country's founders thought about the need for federal legislation to protect expressive works.³⁸ The Founders empowered Congress to award writers exclusive rights in their works for a set amount of time in accordance with that clause.³⁹ The Copyright Act of 1790, which safeguarded books, maps, and charts from unauthorized publishing, replication, and sale, was rapidly passed by Congress. The US Congress expanded the list of protected works to include musical compositions in 1831.⁴⁰

Thus, first time copyright law and music collided was in 1831 in the USA, thanks to the efforts of persons involved in the music publishing industry.⁴¹ The owner of the copyright to a musical composition was granted the same rights under this law as the owner of the copyright to a book or a map, namely, "the sole right and liberty of reprinting, publishing and retailing such... [work]... in the whole or in part." It was up to the judiciary to decide exactly how much infringement of a musical work would be actionable back then, just like it is now.⁴²

In Britain in the eighteenth century, the copyright protection of music was expanded, highlighting ongoing concerns with music copyright.⁴³ The early copyright law known as the Statute of Anne, which particularly mentions books and writings, was not initially assumed to

³⁵ Margit Livingston and Joseph Urbinato, *supra note 6*, at 238.

³⁶ Olufunmilayo B. Arewa, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C. L. Review 547, Vol.8 No. 2, 640, (2006). Available at: <http://scholarship.law.unc.edu/nclr/vol84/iss2/5>

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Margit Livingston and Joseph Urbinato, *supra note 6*, at 254.

⁴² US Copyright Act of 1790, Ch. 15, § 5, 1 Stat. 124. See also Gammons, The art of music publishing, Focal Press, United Kingdom, 21-22, (2011).

⁴³ Olufunmilayo B. Arewa, Creativity, Improvisation, and Risk: Copyright and Musical Innovation, 86 Notre Dame Law Review, 1844, (2011). Available at: <http://scholarship.law.nd.edu/ndlr/vol86/iss5/2>

apply to musical compositions.⁴⁴ Although the Statute of Anne did not at first protect musical compositions, music companies were very concerned about the matter and swapped allegations of infringement.⁴⁵

Since copyright is a commerce regulation, its original focus was only on piracy (the unauthorized copying of a published work).⁴⁶ But as copyright centralizes Romantic authorship, the emphasis of copyright ownership turns from pay to control all components of the work, not only the commodified aspects that were initially protected.⁴⁷ (Because the question of the interpretation or genesis of the concept of the musical work is interwoven with the issue of authorship, the argument of a "Romantic" shift in the understanding of the "musical work" circa 1800 is also pertinent to copyright law. The concept of the "Romantic" author, which is said to have emerged sometime in the late eighteenth century and is said to have shaped modern copyright laws and their authorship/ownership restrictions, is well-known in the discourse on the history of copyright.⁴⁸

There is a conflict over the "Romantic" author among copyright experts. Copyright infringement now includes both plagiarism and piracy. This is significant not just because accusations of plagiarism are used to suppress cultural expression and deter potential rivalry, but also because it inspires new ideas about what should be safeguarded in order to honor Romantic authors.⁴⁹ The logic that the Romantic author (or his assigns) should control every aspect of their work, including the ability to prevent others from using "their" work in creating other works, is illustrated by modern copyright expansions such as film rights or translation rights⁵⁰ Thus, a copyright that is believed to exist for the Romantic author's protection contains a logic that leads to the permanent protection of all facets of the produced work. Furthermore, when there are overt conflicts between the interests of the public and authors, interpreting copyright as based on the inherent rights of authors leads to an inbuilt bias in favor of authors.⁵¹

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶ Lee Marshall, *Romanticism and Copyright in the Music Industry*, SAGE Publications, 81, (2005).

⁴⁷*Id.*

⁴⁸ Andreas Rahmatian, *The Elements of Music relevant for Copyright Protection*, Cheltenham: Edward Elgar, 19,(2015). Available at:<http://ssrn.com/abstract=2755008>

⁴⁹ Lee Marshall, *supra note 18*, at 82.

⁵⁰*Id.*

⁵¹*Id.*

It is helpful to look at the music industry's complex development and evolution and how copyright protection has defended that industry's interests along the way to properly comprehend how music copyright coverage originated and its flaws in its current form. Due to the few tones in the Western musical scale, music's abstract character appears to be less precise than that of literary works.⁵² It is nearly impossible to overstate how malleable written language is, particularly when compared to the constraints imposed by a twelve-note scale. Every domain requires the employment of a specific set of symbols that have some form of significance. For instance, music employs musical notes to convey meaning, but literature uses written words and other grammatical symbols.⁵³

Due to the fact that this is the very beginning of written music, the scenario is fresh. When trying to understand the complete context surrounding the application of copyright law to music, this seeming disagreement is nevertheless significant.⁵⁴ This provides another illustration of how the law fails to adequately address cultures that place a high value on oral tradition rather than written works.⁵⁵ The popular desire to perform and hear the works of Mozart, Bach, and his illustrious contemporaries increased as the demand for classical music soared skyward in Europe.⁵⁶ The modern mashup genre was invented in the UK, and many mashup creators are still based there. However, the most popular mashup albums in terms of media coverage and the most popular mashup club nights in terms of attendance have both originated in the US.⁵⁷

The creation must be a musical work as defined by copyright law, it must be recorded, and it must be "original" as defined by copyright law in order for it to be protected by copyright.⁵⁸ According to the old British definition of originality, the music had to be the result of the author's own talent, labor, effort, and judgment, as well as expense and other factors.⁵⁹ The originality requirement essentially serves as a safeguard for the author against a shortcut or free

⁵²Olufunmilayo B. Arewa, *supra* note 13, at 603.

⁵³*Id.*

⁵⁴Luke V. Brock, Copyright Law, Music, and Creativity, an Undergraduate Research Scholars Thesis, 2021.P. 6.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷ By Liam McGranahan, Mashnography: Creativity, Consumption, and Copyright in the Mashup Community, A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in the Program in Music: Ethnomusicology at Brown University, 130, (2010).

⁵⁸ Andrea Rahmatian, 'The elements of music relevant for copyright protection, in A. Rahmatian (ed.), Concepts of Music and Copyright: How Music Perceives Itself and How Copyright Perceives Music (Cheltenham: Edward Elgar, 24, (2015).

⁵⁹*Id.*

ride taken by someone else who has not put in the same amount of talent and effort. In order to get the author's product at a lower price, he assumes the business risk without incurring any expenses. Copyright law defines originality as not emanating from elsewhere, not being copied it does not imply creativity or artistic qualities.⁶⁰

Before sound reproduction technology was developed, music was typically kept both physically and intangibly in human memory. Thus, the foundation of copyright, which initially protected literary and other writings, was the defense of written musical creations, which contain musical notation and, occasionally, lyrics.⁶¹ Since sound recording technologies have made it possible to preserve the oral parts of musical invention that are obvious during the performance, music is also performance art, which has implications for musical creativity. This point of view severely restricted performers and the wider scope of the field of music to either exact copies or compositions that prioritized uniqueness over excellence. The utilization of pre-existing works in new inventions can be a significant source of creativity, but such theories of musical authorship ignore this fact.⁶²

However, actual musical creative processes show how both written and oral traditions are present in all music, even European classical music. Knowing persisting perspectives of musical creation requires understanding how copyright emerged to protect music. The early history of copyright in music also reveals a trajectory in which initial worries about unauthorized copying and distribution of finished works later came to influence conceptions on the creation side, leading to copying in creation becoming increasingly disfavored during the nineteenth century and subject to increasingly sacralized views of musical creativity.⁶³

Music copyright reflected and had an effect on the sociocultural contexts of musical invention, dissemination, performance, and consumption, as was the case with the application of copyright to other artistic forms like photography. For instance, when copyright was applied to music, composers were more aware that their work was an intellectual property with monetary worth.⁶⁴ Furthermore, shifts in the power dynamics between composers and performers, notably in the

⁶⁰*Id.*

⁶¹ Olufunmilayo B. Arewa, *supra note 13*, at 585.

⁶²*Id.*

⁶³ Arewa, Olufunmilayo B. Creativity, Improvisation, and Risk: Copyright and Musical Innovation, Vol. 86 No. 5, 1834, (2011). Available at: <http://scholarship.law.nd.edu/ndlr/vol86/iss5/2>

⁶⁴ Arewa, Olufunmilayo B., *supra note 28*, at 1838.

opera world, were significantly influenced by the awareness of the worth of musical writing. Such changes in power allowed composers in the world of European art music to seize control from performers towards the end of the nineteenth century.⁶⁵

2.2 Exclusive Rights of the Copyright holder of Music

Since the Berne Convention came into effect in 1886, the copyright owner of a work of music has had a number of exclusive moral and commercial rights over the border of each and every one of these nations in 177 countries of the world.⁶⁶ When a work of music is made, these exclusive rights become immediately available to the creator, cost-free, and without the requirement to be registered with or acknowledged by any form of government.⁶⁷ The Berne Convention is specifically governed by three fundamental principles: Three principles govern the protection of works: (1) the principle of national treatment, (2) the principle of automatic protection, and (3) the principle of independence.⁶⁸

The principle of national treatment states that works of citizens of countries in the Berne union must receive the same level of protection in the country where protection is sought as those of that country's nationals.⁶⁹ For instance, the Berne Convention grants the right to sell the musical work and any associated commercial rights as well as the right to issue licenses for the use, distribution, and exploitation of the work by third parties in exchange for financial remuneration.⁷⁰ However, since the owners of copyrights have unique, exclusive rights, performing the same actions with works protected by copyrights is prohibited.⁷¹ The only things you can do with sound recording rights are making copies of the audio file and creating derivative works by reordering, remixing, or otherwise changing the order or caliber of the real sounds that were fixed in the recording.⁷² A derivative work is a piece of writing produced by a

⁶⁵*Id.*

⁶⁶Data available at WIPO official website at the time of the writing for Berne Convention contracting parties. Available at: <https://www.wipo.int/treaties/en/ShowResults.jsp?treaty>

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹Berne Convention for the Protection of Literary and Artistic Works (1979), *supra note 1*, article 2(1).

⁷⁰SILVIA A. CARRETTA, BLOCKCHAIN CHALLENGES TO COPYRIGHT Revamping the online music industry, Stockholm University, MASTER OF LAWS IN EUROPEAN INTELLECTUAL PROPERTY LAW, 32 (2019).

⁷¹M. SHAFFER VAN HOUWELING, Author autonomy and atomism in copyright law, *Virginia Law Review*, Issue 96, 549, (2010).

⁷²CREATIVE ENTREPRENEURSHIP (BERKLEE ICE), Project 'Rethink music: transparency and payment flows in the music industry, 10, (2015).

person other than the original author that modifies or alters the original work in some way. Copyright may apply to derivative works, but only if the new work is made legal use of the earlier works.⁷³

As a result, an artist is granted separate national copyright rights under the Berne Convention, which collectively form a "bundle" of national right fragments. This "fragmentation" of copyrights at the global level has been described as "right fragment".⁷⁴ In other words, each copyright in the bundle may be held and used independently in any of the 177 countries that are a signatory to the Berne Convention.⁷⁵ The music industry manages and makes use of a variety of copyrights. The multi-layering of rights included in a single recording, as well as the potential for many right holders and licensees contribute to the complexity of music copyright. Instead, the phrase "right to perform them in public" applies to both live performances in front of an audience and performances that are recorded. Even while Performing Artists have exclusive rights to copies, distribution, and performances of their recordings, their licensing and royalties' policies differ from Composers'.⁷⁶ Digital sound recordings are licensed with additional rights in addition to copying, distribution, and performance, such as paid permanent download, conditional download (such as time-limited or device-tethered), paid subscription stream, or ad-supported stream.⁷⁷

Therefore, owners of copyrights have a set of exclusive rights in their protected works and can forbid others from sharing, performing, or developing derivative works based on their protected works. These exclusive rights encourage authors to generate original works that will promote the arts and, in the end, benefit the general public through access and use. The musical composition and the sound recording are two distinct copyrights that are each separately protected when it comes to music. A musical composition is the melody and lyrics of a song, but a sound recording is the actual performance of a musical composition—in modern times, this is typically the song's digital recording. The copyright holder of musical composition has exclusive rights, including the right to produce derivative works.

⁷³*Id.*

⁷⁴ Data available at the WIPO official website at the time of the writing, *supra note 64*.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷SILVIA A. CARRETTA, *supra note 33*, at 33.

Music Copyright refers to a creator's sole ownership of a musical composition or song. Creators and/or copyright holders have the sole right to reproduce their copyrights, which allows them to generate more works that are similar to, practically identical to, or identical to their original works by utilizing the same or different materials, including modifying the original works. The author of the copyrighted work genuinely has the right to do acts like reproduction, announcement, and granting consent to third parties.⁷⁸ Copyright is violated when anything is used without the creator's consent. In addition to the economic rights covered by copyright, there is another right that is equally crucial to that of protection. It is a moral right. The transfer of creators works their ethical obligations to others as creators so long as the creator remains alive, but has the ability to withdraw this right in writing. In other words, copyright is transferrable but revocable. Because a copyrighted work is a reflection of the artist personally and cannot be changed or modified, the idea behind moral rights is to recompense the creator.⁷⁹

It is crucial to realize that every work of music has not one, but two copyrights: one for the sound recording itself and one for the underlying lyrics and music composition. Unlike the latter, which is produced by the performing artist and typically is paid for by the record label, the former is created by composers and lyricists and is funded by music producers.⁸⁰ Performance rights and technical rights are the primary rights of composers for musical compositions. The term "mechanical rights" is used in the music industry to refer to a group of rights that include the rights to distribute as well as the rights to copy or duplicate.⁸¹

The copyrights to the sound recordings are normally owned by a record label when an artist records a composition. In addition to handling the logistics of distributing them to digital service providers and producing physical products, the label manages licenses for the distribution and reproduction of the sound recordings, including remixes and the use of recordings with video (similar to sync licenses for compositions) (such as CDs and LPs).⁸² Music creation has thus become a lucrative industry for rights holders thanks to this legal framework and the various

⁷⁸ JEVA FITRI FADILLA, State responsibility for the protection of moral right in music copyright in Indonesia, Universitas Islam Indonesia, 54, (2021).

⁷⁹ Gammons, *supra note 17*, at 29.

⁸⁰ C. COOK, Dissecting the digital dollar part one: how streaming services are licensed and the challenges artists now face, Music Managers Forum Report, CMU Insights, 9,(2015).

⁸¹ P. DE FILIPPI, Blockchain-based crowd funding: what impact on artistic production and art consumption?, ObservatorioItaú Cultural, issue 19, (2015).

⁸² Shapiro in: C. SHAPIRO, H. R. VARIAN, Information rules: a strategic guide to the network economy, Harvard Business Press, (2008).

levels of copyright exploitation. The market gradually replaced public money and patronage as the primary sponsor for artistic creation in the 20th century.⁸³ Due to the introduction of new streaming technologies and the growth of online music distribution, this paradigm underwent a significant shift in the twenty-first century. The latter significantly disrupted the music industry, raising the issue of whether the current copyright system is still sufficient to encourage artistic output given the challenges associated with managing rights and enforcing copyright in the digital era. Remember that the legal foundations governing the protection of copyright and related rights for the use and exploitation of a Work are unaffected by block chain technology. Instead, it proposes a fresh method for safeguarding the aforementioned rights. A novel approach to addressing these legal issues and protecting authorship, copyrights, neighboring rights, and more broadly, the licensing and use of music in the internet era.⁸⁴

There are two ways to obtain "compulsory licenses," in the USA which allow the original author to give others a restricted license to create and distribute phonorecords.⁸⁵ The first step is to grant a compulsory license so that copies of the work may be made with the author's consent. Musicians can legally sample tracks by other artists using this method. Second, if musical arrangements are made without altering the nature of the piece, a compulsory license may be given.⁸⁶ For instance, the Chicago Symphony Orchestra would be able to get this second category of required permission if it wished to perform its own adaptation of a Philip Glass composition. Any violation of the exclusive rights of the copyright holder is copyright infringement.⁸⁷

The definition of what constitutes a derivative work exacerbates tensions with regard to works that utilize existing material under current copyright criteria that assess the similarity of two pieces of music. The issue in applying copyright to musical forms that include older works is

⁸³*Id.*

⁸⁴ M. FINCK, V. MOSCON, Copyright Law on Blockchains: Between New Forms of Rights Administration and Digital Rights Management 2.0, *International Review of Intellectual Property and Competition Law*, Volume 50, Issue 1, 78, (2019).

⁸⁵ A compulsory license allows a person to change the musical arrangement as needed to conform it to the performance involved, but the arrangement cannot "change the basic melody or fundamental character of the work" and will not be given protection as a derivative work unless the copyright owner gives consent. See United States Constitution, section 115 (a)(1),(2).

⁸⁶*Id.*, at 115(a)(1)(ii).

⁸⁷ Katie Simpson-Jones, Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to "Recast, Transform, or Adapt" Copyright, 43 *J. Marshall L. Review*, V. 43(4), 2010, p.1074.

largely due to how copyright defines a derivative work.⁸⁸ Any work that is based on an existing work may be regarded as a derivative work of that work under present copyright standards, at least in relation to the parts of the derivative work that adhere to the copyright originality criterion. Even if the independent fixations of other sounds imitate or emulate the sound recording, the scope of derivative rights does not apply to sound recordings. Future musicians will be able to create cover recordings of current sound recordings because of this restriction on the scope of derivative rights for sound recordings.⁸⁹

2.3. Copyright Infringement

Unauthorized reproduction of original musical work and performance in public while doing so violates the copyright without the owner's consent are some instances of the infringement of the musical copyright. For instance, US Copyright Law uses two key ideas to describe music copyright infringement. The first type of music copyright violation is "substantial resemblance," which states that a person commits a crime if it has a similarity in a musical work's content. The second one is there is the protectable expression of violation components which more specifically refers to a specific tempo or beat from another piece of music.⁹⁰ Basically, what is protected by copyright with regards to lyrics and melody of musical compositions builds upon one other. Tone, rhythm, and other compositional components are used in musical works.⁹¹ Because they believed that song best characterized the work, American courts actually gave song greater confidence than other melodic elements, following a norm set in nineteenth-century Europe. For some genre designations, the perspective might still be valid. However, it has long since outlived its ability to claim to be applicable to all music created and used.⁹²

Anytime a party breaches one or more of the exclusive rights granted by the copyright laws to the copyright owner, it is considered a copyright infringement. Additionally, the courts have developed rules that supplement the legislative language by placing liability, under certain conditions, on people who do not carry out the infringement-causing actions but who are

⁸⁸ Lauren J. Katunich, Time to Quit Paying The Payola Piper: Why Music Industry Abuse Demands a Complete system Overhaul, 22 Loy. L.A. ENT. L. REV. 643, 655 (2002).

⁸⁹Jennifer Norman, Staying Alive: Can The Music Industry Survive Peer-To-Peer, 26 COLUMBIA-VLA J.L. & ARTS 371, 373 (2003).

⁹⁰ P. Fishman, 'Music as a Matter of Law', Harvard Law Review, , Harvard Law University, Vol. No.131(7), 1861-1923, (2018).

⁹¹*Id.*

⁹²*Id.*

"connected" to the direct offender.⁹³ One shouldn't be surprised that the courts have used the theories of contributory and vicarious liability—theories originated in tort law—to broaden the scope of culpability for unlawful acts because copyright infringement is a specific type of tort.⁹⁴

Finding a party who can be held liable is made much easier for the owner by the principles of contributory and vicarious liability. Contributory and vicarious liability become crucial tools for the copyright owner in the online context because, as was previously mentioned, the nature of the Internet may lead to hundreds, thousands, or even millions of direct copyright infringers—many or all of whom may be anonymous, "judgment proof," or "small timers."⁹⁵ It's significant because the principles lead to the inclusion of specific, new parties in the scope of culpability who might be more effective or desirable targeted in an infringement lawsuit. Whichever approach results in the client's ability to sue the claimed infringer or their own accountability for the alleged infringement are unlikely matter to them. However, the copyright lawyer should be aware that there are significant disparities between the standards of proof needed to support legitimate copyright infringement claims under each of the three theories.⁹⁶

All original works of authorship that have been permanently affixed to a physical form of expression are protected by copyright law.⁹⁷ Despite the existence of a copyright registry, works are not needed to be identified or registered in order to be protected. It can be challenging to determine what counts as an original work of art; in recent years, protection has been sought for items as diverse as computer operating systems, tattoos, and wildflower gardens.⁹⁸

Legal ambiguity, a lack of clarity in the rights, and a number of market behaviors all work together to produce a situation where copyright rights can be violated in a variety of

⁹³ David N. Weiskop, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, Hein Online, V. 33 U.S.F. L. Rev. 1, 58, 12 (1998). Available at: <http://heinonline.org/HOL/License>

⁹⁴ 17 U.S.C. *supra note 43*, at 106.

⁹⁵ MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW*, (2d ed. 1995) V. 9(2), at 286 ("The term 'copying' is a misnomer. The reproduction, adaptation and even performance rights involve copying in one way or another. But the term 'copying' covers unlawful distribution and display as well, hardly acts of copying as one might use the term in ordinary language.").

⁹⁶ *Id.*

⁹⁷ HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT*, Vol.8 No. 25, (2010) ; see, Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. Review, 1725-1728,(2008).

⁹⁸ *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 292 (7th Cir. 2011) (holding that the garden is not protected under the 1976 Act due to the lack of authorship and fixation). See also *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom.*, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983) (finding George Harrison, a former member of the music group The Beatles, subconsciously copied another, earlier successful song). see

unintentional and possibly even imperceptible ways. In light of this, we will now describe various different types of infringement with an emphasis on the ways that rights may be violated without willfulness. We'll make the case below that these many forms of infringements can be generally divided into three categories: intentional, unintentional, and "typical" infringements.⁹⁹

2.3.1 Direct infringement

Any time one of the five exclusive rights guaranteed to the copyright owner by copyright law is violated, it is direct copyright infringement. A copyright owner must demonstrate three things in order to successfully establish direct copyright infringement:

1. Ownership of legitimate copyright in the allegedly infringed work; he has to show as he is copyright holder, created original work
2. The defendant "copied" the work, without getting any permission from the owner by violating one or more of the owner's exclusive rights;
3. This copying was improper.¹⁰⁰ Improper that is used for commercial purpose

In other words, if a copyright holder can meet these three requirements, then at the very least they can sue the person who actually carried out the copying. Direct copyright infringement is a strict liability tort, which is significant. Therefore, regardless of whether a party knew or meant to breach the owner of the copyrights to a work, anybody who engages in the illegal exercise of any of the holder's exclusive rights is liable for copyright infringement under federal law. In fact, both "innocent" copying and unconscious copying of another person's protected work may subject the offender to direct copyright infringement liability. Direct proof of copying is rarely available, despite the fact that the strict liability feature of the tort eliminates the necessity for presenting difficult-to-obtain evidence of intent or knowledge.¹⁰¹ Because of this evidentiary conundrum, a plaintiff may demonstrate direct infringement by circumstantial evidence by demonstrating that the defendant had access to the allegedly infringing work and that the

⁹⁹*Id.*

¹⁰⁰MARSHALL LEAFFER, *supra note 52*, at 14.

¹⁰¹David N. Weiskopf, *supra note 53*. The Risks of Copyright Infringement on the Internet: A Practitioner's Guide, 33 U.S.F. L. Rev. 1, 58, (1998)

defendants allegedly infringing work is "substantially similar" to the plaintiff's copyrighted work when direct evidence of copying is unavailable.¹⁰²

In conclusion, direct copyright infringement gives the copyright owner the ability to hold a specific party accountable without having to show that they did so with knowledge, will, or intent. The disadvantage of this is that only one party can be simultaneously affected by direct copyright infringement. For each alleged direct infringer and each alleged direct infringement, the plaintiff must demonstrate the necessary copying. As a result, it is impractical and frequently impossible to hold a sizable and anonymous group of suspected infringers personally accountable. Therefore, plaintiffs are also using the alternate theories of contributory and vicarious liability to impose liability on the online service providers while they are still attempting to do so directly.¹⁰³

2.3.2 Contributory Infringement

The Copyright law does not expressly make someone liable for an offense committed by another. However, the lack of such clear legislative language does not prevent a court from holding parties "connected" to the direct offender, who has not directly violated another's copyrights, accountable.¹⁰⁴ Courts have long accepted contributory copyright infringement as a workable framework for determining when it is "just" or "fair" to hold one party accountable for the activities of another, similar to other areas of the law. Contributory infringement expands the scope of responsibility beyond only the direct infringer to hold all parties equally responsible for the infringement even if they are not directly responsible.¹⁰⁵

The legal definition of contributory infringement has been outlined by the courts as follows: (1) direct copyright infringement has occurred; (2) a party induces, causes, or materially contributes to the infringing activity of another; and (3) that party also knows or has reason to know that the subject matter at issue is copyrighted and that the directly infringing party is violating it. The elements and related factual requirements necessary for a successful contributory infringement

¹⁰² MARSHALL LEAFFER, *supra note 52*. (noting that "substantial similarity" in this context refers to "similarities between the works probative of copying [by the defendant]"), Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. Review, 60,(1990).

¹⁰³ David N. Weiskopf, *supra note 59*, at 14.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

claim present the plaintiff with both benefits and disadvantages, especially in the online arena, similar to the requirements for showing direct infringement.¹⁰⁶

As was already said, the idea of contributory infringement gives the plaintiff the opportunity to hold parties accountable for the infringement of others. As a result, the plaintiff does not have to individually file a lawsuit against each of the thousands or millions of people who directly downloaded an offensive image from the Internet. Instead, the plaintiff could file a lawsuit against the Internet Service Provider ("ISP") on the basis of contributory infringement, alleging that the ISP provided the tools necessary for another to engage in the direct infringement.¹⁰⁷

Therefore, the theory of contributory liability appeals to plaintiffs when claims of direct infringement against the ISP are unsuccessful and it is unlikely that any of the other direct infringers would be successfully pursued. A plaintiff can nearly always pursue the ISP or some other third party on a theory of contributory liability because there will undoubtedly be one direct infringer on the Internet. The contributory culpability hypothesis, on the other hand, has two major disadvantages for plaintiffs. First, defendants are more likely to withstand summary judgment since the plaintiff must present highly factual evidence demonstrating intent and involvement in creating the infringing action.¹⁰⁸

In many of the decisions that have been resolved on copyright infringement matters involving Internet use, the plaintiff has moved for summary judgment in the procedural context. Due to factual disagreements that are important to establishing contributory infringement, defendants have successfully refuted these motions. Second, the precise conduct that qualifies as inciting, causing, or materially contributing to the directly infringing activity has not been established by courts in a way that is clear or consistent. The timing of when a defendant actually knew or should have known that infringement was taking place has also been disputed by the courts. The definition of online contributory infringement is quite hazy due to the lack of a clearly defined

¹⁰⁶ *Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that a party may be liable for contributory copyright infringement where "with knowledge of the infringing activity, [it] induces, causes or materially contributes to the infringing conduct of another"); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (finding that to impose liability on the defendant for contributory infringement, plaintiff must show that defendant induced, caused, or materially contributed to their infringing activity).

¹⁰⁷ *Id.*, at 933. "The standard for the knowledge requirement is objective, and is satisfied where the defendant knows or has reason to know of the infringing activity."

¹⁰⁸ David N. Weiskopf, *supra note 59*, at 16.

criterion. As a result, plaintiffs cannot predict when they will successfully allege contributory guilt.¹⁰⁹

An international basis for copyright in relation to musical works is provided by Berne Convention. The "musical composition with or without words" and "dramatically-musical works" are protected under Article 2(1) of the Berne Convention, but no additional definition of "music" or "musical composition" is provided.¹¹⁰ There are actually surprisingly few "musical work" definitions in national and international copyright law, and there is no generally agreed-upon description of the musical work. For instance, TRIPS essentially followed the Berne Convention's provisions and made no further definitions of musical works. Furthermore, the WIPO World Copyright Treaty of 1996 did not provide any definitions. The pertinent laws in Germany and the US do not offer a definition either.¹¹¹

A determination of copyright infringement is based on the copyright owner and the original essential elements of the work being copied.¹¹² The copying factors are sometimes described as involving access and substantial resemblance, despite the fact that different terms are employed. Despite the alleged need for both access and substantial resemblance, courts have found copyright liability even in situations where access has not been established.¹¹³ Music use of copyright laws illustrates a developing body of law that is neither standardized nor consistent.

A copyright owner must demonstrate actual copying of the plaintiff's original protected expression from the defendant's work to establish a substantial resemblance of the protected expression to establish copyright infringement.¹¹⁴ The fact finder then makes the "subjective" determination of whether the defendant's work is significantly similar to copyright-protected portions of the plaintiff's work. It depends on how the art is presented and the fact-background, the finder's knowledge of the art, vision, and ability to filter out unprotectable components when comparing works that they perceive to be "substantially comparable. Copyright protection covers original compilations of unprotectable components even if some of their individual parts lack

¹⁰⁹*Id.*

¹¹⁰ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857–58, Article 2(1).

¹¹¹ Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971) Art.1, 2.

¹¹² Margit Livingston and Joseph Urbinato, *supra note 6*, at 275-280.

¹¹³*Id.*

¹¹⁴ ShyamkrishnaBalganesh, The Questionable Origins of the Copyright Infringement Analysis, 68 STAN. L. REV. 791, (2016).

originality, include unprotectable ideas, or have unprotectable functioning qualities. Almost a century ago, Judge Learned Hand made this observation.¹¹⁵

Thus, it can sometimes be difficult to determine whether a later piece of work infringes. Particularly for well-known musical compositions, this is true. It is inevitable that different people will have different opinions about the uniqueness and weight of a musical work in its entirety or even just a single musical hook.¹¹⁶ It is obvious that the outcome of many music copyright infringement cases will be difficult to predict, especially when additional stochastic factors like jury trials, expert witnesses, media attention, and judges' and jurors' opinions about celebrity and non-celebrity musicians are taken into account.¹¹⁷

However, the Ninth Circuit has unnecessarily increased the inherent uncertainties of copyright law. The Ninth Circuit's judgment in *Sid & Marty Kroffit Television Productions, Inc. v. McDonald's Corp.* evaluates unlawful appropriation using the "extrinsic" and "intrinsic" test, ostensibly according to the traditional jurisprudential framework.¹¹⁸ The extrinsic test erroneously takes into account "substantial similarities in ideas," which appears to go against the statute's prohibition on intellectual property protection. By determining copyright infringement based on "whole concept and feel" without making a diligent attempt to weed out unprotectable expression, the Ninth Circuit has added to the confusion and may have violated copyright law's limiting principles. The Kroffit ruling also forbids the intrinsic stage of the analysis from taking expert testimony into account. In situations where the subject matter is technical, this categorical rule is not very useful.¹¹⁹ To determine whether musical elements are unprotectable or unoriginal, jurors may need the help of musicologists. Three Boys Music and Swirsky, which are examples of the Ninth Circuit's music copyright jurisprudence, remove crucial safeguards that should have been in place to stop juries from making copyright decisions based on unfiltered

¹¹⁵Peter S. Menell, Reflections on Music Copyright Justice, *Pepperdine Law Review*, V. 49(3), 2022, p. 566.

Available at: <https://digitalcommons.pepperdine.edu/plr/vol49/iss3/1>

¹¹⁶ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) The test for infringement of copyright is of necessity vague, 274 F.2d at 489.

¹¹⁷ Peter S. Menell, *supra note 73*, at 567.

¹¹⁸ *Peter Pan Fabrics*, p.1164. The Ninth Circuit states that its test is the "same type of bifurcated test" that was announced in *Arnstein*. While both tests are bifurcated, the Kroffit test is plainly different and deeply confusing.

¹¹⁹Shyamkrishna Balganeshe & Peter S. Menell, The Use of Technical Experts in Software Copyright Cases: Rectifying the Ninth Circuit's "Nutty" Rule, 35 *BERKELEY TECH. L.J.* 663, (2020) (focusing on the need for expert testimony to enable lay fact-finders to assess similarities between two computer software programs).

musical work comparisons, gut feelings, or forensic musicologists who are unaware of the differences between inspiration and infringement.¹²⁰

A copyright holder has the legal authority to file a lawsuit for infringement if someone infringes on their exclusive right without their consent. And the plaintiff will be entitled to a remedy unless the defendant is successful in putting out an affirmative defense.¹²¹ A work that is based on a prior copyrighted work is referred to as a "derivative work." Sound recordings and other media in which a copyrighted work is modified or adapted in some way fall under the category of derivative works.¹²²

The court began by noting that "two competing social interests"—"rewarding an individual's originality and work while at the same time allowing the nation to enjoy the benefits and advancement from use of the same subject matter"—justify the establishment of copyright law.¹²³ Based on this theory, the court came to the conclusion that copyright infringement only arises when a defendant has imitated the plaintiff's concept's expression rather than just the idea itself. In order to establish the degree of resemblance between two works, the court adopted a two-pronged approach. The "extrinsic test" in the first section assesses how comparable the concepts put forth in the two works are to one another.¹²⁴

In addition, most courts have not adequately defined the parameters of the "striking similarity" doctrine, nor the point at which "substantial" similarity becomes "striking," even though some authorities contend that, in order to be "striking," the possibility that similarities between the two works resulted from independent creation, coincidence, or a prior common source must effectively be precluded. This research aims to clarify the factual conditions that permit the comparison of two musical works to be appropriately characterized as having "striking" similarities. By contrasting judicial responses to "substantially similar" and "strikingly similar"

¹²⁰ Peter S. Menell, *supra note 73*, at 567.

¹²¹ Emily Harper, *Music Mashups: Testing the Limits of Copyright Law As Remix Culture Takes Society By Storm*, HOFSTRA L. REV., 413,(2010).

¹²² *Id.*

¹²³ John R. Autry, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, *Journal of Intellectual Property Law*, Vol. 10 No. 1, 117,(2002). Available at:

<https://digitalcommons.law.uga.edu/jipl/vol10/iss1/5>

¹²⁴ *Id.*

accusations in the unique setting of copyrighted musical works, the talks in this article try to explore the differences between substantial and striking similarities.¹²⁵

These tasks are insurmountably challenging and would necessitate hours of expert testimony to "teach" a jury what to look for and what to pay attention to in an already hotly debated field of academia, a task that would be considered a waste of time and money.¹²⁶ Jurors must decide whether copying actually took place in copyright infringement instances where the fair use defense has been offered, and if so, whether the copying was ethically wrong. The court essentially asks the jury to decide if the copying of protected parts was "too much" by using titles like "substantial similarity test" or "improper appropriation. Sadly, the majority of jurors lack musical knowledge, so they won't approach these cases with an eye toward protecting artistic freedom or spotting genuine and purposeful violations of music copyright. They are much more likely to decide if there has been an infringement based on a "gut" feeling and to be driven by a desire to wrap up the discussion and get back to their own lives as soon as possible.¹²⁷

It could be argued that the initial inquiry a jury must make in a case of infringement—whether any copying has taken place—is similarly likely to be outside the scope of a jury with no musical background. It is improbable that juries without any other musical knowledge will be able to decide fairly and accurately whether outright copying has actually occurred or whether two songs within the same genre have a passing likeness to one another based solely on the testimony of experts. "Any time you present evidence to a jury, you are gambling on what they will comprehend and take away from the testimony. Even after hours and hours of testimony from the musicologist, nobody would know which way is up. For any of the parties involved in music copyright litigation, this position is not promising.¹²⁸ Even if the transformative fair use test is a valid and reliable tool for evaluating fair use defenses, a jury that has been subjected to hours of expert musicology testimony and lacks the necessary training is insufficient to protect the rights

¹²⁵*Id.*

¹²⁶ Laura Pelligrini, Music Education In Public Schools Gets a Passing Grade, NATIONAL PUBLIC RADIO (2012). Available at: <http://www.npr.org/sections/therecord/2012/04/06/150133858/>, Judges have broad discretion to run their court rooms and have "control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time" FED. R. EVID. 611. It is unlikely that judges in music copyright cases would find extended jury music education to be a fitting use of time at trial.

¹²⁷ Megan Coane & Maximillian Verrelli, Blurring Lines? The Practical Implications of Williams v. Bridgeport Music, LANDSLIDE, Vol. 8 No. 3, (2016). Available at: <http://www.americanbar.org/publications/landslide/2015-16/>

¹²⁸ Ed Christman, Blurred Lines Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous, BILLBOARD, (2015). Available at: <http://www.billboard.com/articles/>

of musicians and creatives. The "Blurred Lines" case has drawn harsh criticism from both sides, largely because it appeared to expand the rights of music copyright owners much beyond what was previously thought to be the case.¹²⁹

There are now primarily two explanations for the development of copyright law in the modern era and its expanding scope. According to one, complicated policies are necessary for this field to ensure copyright owners have an adequate revenue stream as technologies change and business models adapt.¹³⁰ In an era when practically every piece of music can be obtained online with enough searching, music publishers and other industry titans hold this viewpoint in an effort to safeguard their revenue models. The opposing viewpoint claims that the current copyright regime, in particular the reforms made by US Congress in the previous 20 years, shields established companies from the fierce competition of the digital age.¹³¹ It is not surprising that musicians become embroiled in the conflict between the music business and new media. The ability of the musician, performer, or composer to heavily borrow as a form of creation must be preserved in a generation where music is becoming more and more deeply impacted by sources, genres, and works from around the globe.¹³²

2.4 Affirmative Defenses to Copyright Infringement

Normally, after the copyright holder establishes infringement, the onus of establishing an affirmative defense transfer to the alleged infringer. However, occasionally an unauthorized use is so slight that courts will forgive it as de minimis, releasing the defendant from responsibility for infringement and removing the requirement to establish an affirmative defense, such as fair use. Even if it seems doubtful, some mashup artists who just use a few notes from a song can claim that the use was de minimis and hence acceptable.¹³³ Therefore, an artist who steals work from another artist may not be held accountable if the use was little. The creation of and public

¹²⁹Alex Marshall, *The Man Musicians Call When Two Songs Sound Alike*, N.Y. TIMES (Oct. 11, 2016), <http://www.nytimes.com/2016/10/12/arts/music/the-man-musicians-call-when-two-tunessound-alike.html?smprod=nytcare-iphone&smid=nytcare-iphone-share>. The verdict was in fact affirmed by the Ninth Circuit in March of 2018.

¹³⁰Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 552, (2014).

¹³¹*Id.*

¹³²Peter S. Menell, *Adopting Copyright for the Mashup Generation*, U. PA. L. REV., Vol. 164.No. 441, (2016).

¹³³ Aaron Power, *Comment, 15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches Its Postmodern Limit*, Sw. U. L. Review, 585, (2007).

access to artistic, literary, musical, theatrical, and other sorts of creative works are encouraged by a set of laws known as copyright.¹³⁴

In order to obtain a just reward for the owner of the copyright (or, more precisely, to prevent someone else from taking any benefits that may be generated), a balance must be struck between serving the public interest and encouraging the production and dissemination of intellectual and artistic works. Finding a balance between the needs of consumers, society, and writers is the aim of copyright. In an effort to balance these interests, the Act among other things allows for the defense of fair dealing. If authors are unable to receive proper compensation for their work, the desire to produce will undoubtedly be diminished, creativity will suffer, and society as a whole will suffer. On the other hand, it is undeniable that some restrictions on author rights must be made if the public as a whole is to benefit as it should from the talent or labor of its members.

2.4.1. Fair Dealing

A list of potential defenses against a claim of violation of exclusive copyright is called fair dealing. It has nothing to do with the existence of approval or consent on the part of the copyright holder. Even though the act has all the necessary components to establish infringement, fair dealing is a defense to an infringement case. Therefore, in the precise situations listed under the Act, the party will benefit and be exempt from liability. The fair use doctrine is the other affirmative defense that mashup artists might be entitled to deploy. The US Congress made the decision to formalize the fair use concept as a restriction on the exclusive rights of copyright holders in the Copyright Act of 1976.¹³⁵ It became clear that giving a copyright owner unrestricted protection for all "original works of writing" would seriously jeopardize the constitutional goal of copyright, which is to advance knowledge. The exclusive right to reproduce, distribute, and make derivative works from the content, as well as the right to publicly perform the work or transmit it through audio, are all granted to the owner of a copyright as a result of copyright law.

The answer to the justification [of fair use] query largely depends on whether and how much the contested use is transformative. The usage must be beneficial and utilize the material in the quotation in a different way or with a different goal than it was intended. It is doubtful that a

¹³⁴ Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 & n.10 (6th Cir. 2005).

¹³⁵ *Id.*

copyrighted passage would pass the test if it merely repackages or republishes the original; in Justice Story's words, it would merely "supersede the objects" of the original. On the other hand, if the secondary usage enhances the original—if the material being quoted is used as a starting point and altered to provide new knowledge, new aesthetics, new insights, and new understandings.¹³⁶

To the extent that fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not a violation of copyright," this privilege is however constrained. The idea is crucial for striking a balance between the rights of present-day artists and those of aspiring artists. Therefore, mashup artists may be able to use the fair use defense to potentially escape liability in a copyright infringement lawsuit if they use samples of other artists' work in one of the aforementioned methods. According to the Copyright Act, courts must take into account the following elements when evaluating whether or not an artist's work is being used fairly: the nature of the copyrighted work, the quantity and substantiality of the portion used in relation to the copyrighted works as a whole, the purpose, and character of the use, including whether such use is for commercial or nonprofit purposes, and the impact of the use on the potential market for or value of the copyrighted work.¹³⁷

When a fair use argument has been raised in copyright infringement cases juries must decide (1) whether copying actually took place, and if so (2) whether the copying was unlawful or legally. The second step under copyright law is Criteria can become highly ambiguous. With terms that are so unhelpful—"substantial "Similarity Test" or "Irregular Appropriation"—basically, the judge asks if the copying of protected elements was "too much," a jury will decide much."¹³⁸Regrettably, the majority of jurors lack musical knowledge and are not willing to address these situations with the intention of upholding artistic freedom or discovering genuine copyright violations that are done on purpose infringement.¹³⁹

¹³⁶ Pierre N. Leval, Toward A Fair Use Standard, 103 HARV. L.REV. 1105 (1990). The notion of transformative fair use was initially advanced in the 1990 Harvard Law Review article titled "Toward a Fair Use Standard," which by Pierre N. Leval offered a helpful judicial gloss on section 107. Judge Leval advised courts to adopt the new guiding principle of "transformative usage" as a "cogent set of governing principles... solidly based in the purposes of the copyright law," as they were frequently conflicted on issues of fair use.

¹³⁷*Id.*

¹³⁸ Megan Coane&MaximillianVerrelli, *supra* note 83.

¹³⁹ Kristin Bateman, Distinctive Sounds”: A Critique of the Transformative Fair Use Test in Practice and the Need for a New Music Fair Use Exception, Seattle University Law Review, Vol. 41, 1181, (2018).

Fair use shouldn't be seen as an odd, sporadically permitted deviation from the lofty ideals of the copyright monopoly. Contrarily, it is a crucial component of the entire design. Even if there isn't a clear-cut definition of fair use and there will inevitably be disagreements over specific applications, acknowledging the role that fair use plays in achieving copyright's goals helps to create a set of guidelines that are both consistent and practical. Simply put, the character used must further the copyright purpose of promoting constructive thought and public education without unduly reducing the incentives for invention.¹⁴⁰

¹⁴⁰ Pierre N. Leval, Commentaries toward a fair use standard, Harvard University law review, Vol. 103, No.1105, 110, (1990).

CHAPTER THREE

3. Music Mashup and Copyright Law

3.1. Musical Borrowing and Copyright legal framework

The creation and distribution of cultural works, such as written works and musical compositions, are governed by the copyright doctrine.¹⁴¹ The discussion of copyright and borrowing mostly pertains to the creative side of copyright. Musical text relationships are discussed using terms like borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, composition, influence, paraphrasing, and indebtedness.¹⁴²

All genres of music creation share the common practice of borrowing. Legal discussions of postmodern forms and other contemporary forms of musical output, such as hip-hop music, frequently touch on the actuality of such borrowing in music.¹⁴³ However, these discussions frequently fail to appropriately account for how common musical appropriation is across all genres and eras.¹⁴⁴ By the time current copyright laws were adopted in the eighteenth century, ideas of copyright and originality had become increasingly prevalent. This tendency to inadequately depict musical borrowing is closely related to these ideas.¹⁴⁵

The pervasiveness of the modern conceptions of authorship and originality frequently obscures the ubiquitous existence and significance of borrowing in legal commentary.¹⁴⁶ By examining the classical heritage, it becomes clear that modern conceptions of originality, creativity, and musical authorship are historically specific and do not always correspond to actual creative practices.¹⁴⁷ Even the classical music tradition, which served as a role model for independent musical creation, does not meet the requirements set forth by modern conceptions of authorship.¹⁴⁸ It raises serious concerns about legal discussions of copyright that presume a

¹⁴¹Olufunmilayo Arewa, Copyright and Borrowing, University of California, Legal Studies Research Paper Series No. 2012-10, 33, (2006). Available at: <http://ssrn.com/abstract=2011973>

¹⁴²*Id.*, at34

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*Id.*, at 36

¹⁴⁷*Id.*

¹⁴⁸*Id.*, at37

binary between copying and originality and that copying may be incompatible with innovation that borrowing can be a source of innovation.¹⁴⁹

The general people accepted that this copying was acceptable as long as the borrower artist enhanced the original piece. (This opinion would later have an impact on the legal justification for fair use, as we'll explain later.) The 1710 Copyright Act in Britain is proof that copyright notions emerged in the 18th century, which coincided with a shift in the public's perception of musical borrowing. It's unclear whether legal changes changed popular views of borrowing or the other way around, but suddenly academics and composers were critical of borrowing artists.¹⁵⁰

In the 18th and 19th centuries, both composers and academics despised the practice of musical borrowing; however, oddly, student borrowing was still regarded as acceptable for educational purposes. The argument about originality heated up during the 20th century, and charges of it were frequently followed by legal action.¹⁵¹ Musician today is seen as culturally conscious if they use musical quotations. An artist can show that they are conversant with the canon by borrowing directly from previous work (typically in the form of a direct musical quote) and making comments about the work in question. A lot of the time, artists quote from older works in a way that sounds very lighthearted. These quotes are popular because they make sense to an expert who is "in on the joke." But a musical quotation can also be far more pointed.¹⁵²

In all musical genres, appropriation is a common practice. Legal discussions of postmodern forms and other contemporary forms of musical output, such as hip-hop music, frequently touch on the actuality of such borrowing in music. However, these discussions frequently fail to appropriately account for how common musical appropriation is across all genres.¹⁵³ By the time current copyright laws were adopted in the eighteenth century, ideas of copyright and originality had become increasingly prevalent. This tendency to inadequately depict musical borrowing is closely related to these ideas. Although the study of musical borrowing in musicology has largely concentrated on the classical genre, substantial borrowings have also taken place in the

¹⁴⁹ *Id.*

¹⁵⁰ Joseph Newman, *supra note 1*, at 13.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, North Californian Law review, Vol. 84, No. 2, 552,(2006).

genres of popular music.¹⁵⁴ Composers of popular music in the nineteenth century made a lot of borrowings, which reflected a common musical culture. In contrast to the art-music tradition, previous works were viewed as belonging to the user rather than the composer for a much longer period of time in this shared culture. The borrowings from opera in nineteenth-century American popular music reflect this shared musical lineage.¹⁵⁵

Musical borrowing, which includes a number of techniques from copying to more subtle effects, is a frequent strategy in the composition of music. Current copyright law does not fully account for the intricacy of musical borrowing.¹⁵⁶ A view of musical authorship that is both historically and culturally specific serves as the basis for contemporary copyright legislation. Due to this point of view, many musical genres, not only hip-hop, have legal representations of musical originality that do not sufficiently account for the ways in which musical borrowing is an integral part of authorship.¹⁵⁷

The blues heritage exhibits compositional practice and borrowing in a variety of ways, including through the use of popular lyrics, melody, and musical forms. Therefore, borrowing is a fundamental component in the composition and performance of blues music. Important copyright and borrowing-related difficulties are highlighted by how later musicians appropriated previously published blues works. Repetition, revision, and synthesis of many musical influences are key components of invention and innovation in the blues, as is the case with other musical forms founded on specific African American aesthetic traditions.¹⁵⁸

3.2. Background of Music Mashup

To produce an even more intense burst of musical emotion, two or more songs with copyrights are combined to make a music mashup. For many years, mashups have existed in their infancy.¹⁵⁹ When creating "The Payoff Mix" at their New York City apartment in 1983, Steve "Steinski" Stein and Doug "Double Dee" DiFranco used audio samples from a number of different musicians, including Culture Club, Little Richard, Humphrey Bogart, and Herbie

¹⁵⁴*Id.*, at 553.

¹⁵⁵*Id.*

¹⁵⁶*Id.*, at 550

¹⁵⁷*Id.*

¹⁵⁸ Olufunmilayo B. Arewa, *Blues lives: Promise and perils of musical copyright*, Cardozo arts and entertainment, Vol.27, No. 573, 598, (2010). Available at: <http://ssrn.com/abstract=1132789>

¹⁵⁹ J Roseman, *Audio Mashup Construction Kit*, Wiley Publishing, Indianapolis, 16, (2007).

Hancock. During the creation of this song, Steinski, and Double Dee "took in a wide range of pop culture, chopped it all up, and manically rebuilt it as something you could bob your head to."¹⁶⁰ John Oswald of Kitchener, Ontario, and Negativland, who "had long been generating new material from bits and pieces of pre-existing music," published the album *Plunderphonics* in 1988.¹⁶¹ It sampled and reworked songs by artists like Bing Crosby, The Beatles, Michael Jackson, and Glenn Gould. Oswald's writing quickly became known as a "cult classic" because it used sampling to challenge conventional notions of authorship, originality, and copyright. The 1993 mashup of A Public Enemy a cappella and Tijuana Brass music by The Evolution Control Committee was a significant turning point in the development of mashups as a musical genre.¹⁶²

However, it is generally agreed that the mashup first gained popularity around the turn of the millennium. At this time, peer-to-peer file sharing networks and other sources made it simple to access digital audio files, the foundation for mashups.¹⁶³ Additionally, numerous software programs that made it easier to create mashups have been developed.¹⁶⁴ The song "A Stroke of Genius" by Freelance Hellraiser, which combined the guitar work of indie rock band the Strokes with the lyrics from pop singer Christina Aguilera's "Genie in a Bottle," is one mashup that is frequently cited as the start of the modern mashup era.¹⁶⁵ It has been said that "A Stroke of Genius" is "cooler, sexier, and tenser than either of its sources." *The Village Voice*, a New York publication, claims that "[e]ach is what the other was missing all along." The mashup "Smells like Teen Booty" is another one that has "assumed a mythological status."¹⁶⁶ By fusing the strident riff of Nirvana's "Smells like Teen Spirit" with the exuberant girl harmonies and guitar swagger of Destiny's Child's "Bootylicious," the group 2 Many DJs created "Smells like Teen Booty," which they describe as "an amazing collision of pop tastes. 'Smells like Teen Booty' and 'A Stroke of Genius' were unapproved works."¹⁶⁷ The lyrics from Jay-Z's *Black Album* were combined with a "musical bed made solely using samples from the Beatles' *White Album*" by

¹⁶⁰Graham Reynolds, *A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada*, *SCRIPTed*, Vol. 6, No. 3, 642, (2009). Available at: <http://www.iposgoode.ca/2009/08/>

¹⁶¹*Id.*

¹⁶²*Id.*

¹⁶³*Id.*

¹⁶⁴*Id.*, at 642-643.

¹⁶⁵KembrewMcLeod, *supra note 21*.

¹⁶⁶Graham Reynolds, *supra note 18*, at 642-643.

¹⁶⁷*Id.*

Brian Burton, better known by his stage as Danger Mouse, to produce what he dubbed the Grey Album in 2004.¹⁶⁸

Do It Again by Billie Jean, which was simply a mashup of two songs by Steely Dan and Michel Jackson, was the first mashup to be commercially successful.¹⁶⁹ However, mashups only became popular very recently, roughly around the beginning of 2000 after the release of 'Do It Again'. Due to the low-cost method of creating mashups and the underdeveloped market for mashups, this exposure was delayed. Typically, these mashups were distributed peer to peer, which prevented them from garnering any notice. MTV's introduction of the Ultimate Mashup in 2004 marked the beginning of the mainstream success of mashups.¹⁷⁰ It had two effects: first, it inspired people by bringing this music to light and making it well-known. Second, it caught the eye of music corporations, who demanded payment for violating their copyrights. Mashups are currently a very lucrative industry.¹⁷¹

Audio mashups go above and beyond with sampling. Mashups are fully composed of preexisting works, unlike hip-hop recordings, which may sample a breakbeat from existing work and loop it while adding vocals and other fresh musical elements on top.¹⁷² They don't have any unique content. Furthermore, mashup remixers rarely have permission to use the samples they utilize, despite the fact that they use a lot of samples, in contrast to Kane, Beck, and Tricky, who probably had licenses to use the samples they incorporated into their respective tracks.¹⁷³ Audio mashups are largely a recent phenomenon that has just recently started to gain popularity. This is probably due to improvements in sampling technology and the growing acceptance of sampling in mainstream music as a result of hip-hop success.¹⁷⁴

The Grey Album by Danger Mouse, which combined vocal tracks from a cappella rendition of Jay-Z's Black Album with music from the Beatles' The White Album, marked the

¹⁶⁸ *Id.*

¹⁶⁹ ElinaLae, Mashups - A Protected Form of Appropriation Art or a Blatant Copyright Infringement?, SSRN, 1-2,(2011). Available at: <https://ssrn.com/abstract=2003854> or <http://dx.doi.org/10.2139/ssrn.2003854>

¹⁷⁰ PETER S. MENELL, *supra note 132*, at 446-447.

¹⁷¹ *Id.*

¹⁷² Michael AllynPote, *Mashed-up in Between: The Delicate Balance of Artists' Interests Lost amidst the War on Copyright*, North California law review, Vol. 88, No. 2, 653,(2010). Available at: <http://scholarship.law.unc.edu/nclr/vol88/iss2/6>

¹⁷³ *Id.*

¹⁷⁴ *Id.*

mainstream cultural introduction of audio mashups, despite the fact that they had been used by a few select underground DJs for years prior. According to rumors, Jay-Z released a cappella version of *The Black Album* to promote mashups and remixes.¹⁷⁵ Danger Mouse claimed that he "could never release the record commercially" and that "stealing music is wrong" even before receiving EMI's cease and resist letter. He also claimed that he only made a small number of the album.¹⁷⁶

The question of whether or not mashup remixers are future artists and whether or not mashups are a new kind of art that can advance the arts has generated significant debate. "Opponents of mashups question the artistic merit of audio mashups, while supporters contend that they are just as creative as any copyright-protected work and that copyright law should explicitly recognize them as original works."¹⁷⁷ By allowing young people to use "what's accessible off the streets to them" rather than "creating out of their own souls and their own skills," opponents argue that the approach "undersells the talents that young people have."¹⁷⁸

They think the procedure is "a basic failure of imagination," the result is "simply rubbishes," and the whole thing is "destroying our culture."¹⁷⁹ Since an "ordinary bedroom producer" can generate audio mashups with results resembling those of Gillis and Danger Mouse, this conclusion would appear to be supported by the ease of doing so. The finished audio mashup may sound complicated, but a lot of that intricacy comes from the original songs that the samples were pulled from. The vocal track from one song and a track made up of the instrumental track from another make up a basic mashup. For each of the two songs in a mashup, more than one song may occasionally be used.¹⁸⁰

A mashup remixer must first choose the music to sample before they can begin. Many hip-hop and R&B tracks are accessible as Cappella albums, eliminating the most challenging aspect of creating the vocal track. The mashup remixer need only choose the required sections of the Cappella album or use the full track.¹⁸¹ But with regard to the instrumental recordings, the

¹⁷⁵*Id.*, at 646.

¹⁷⁶*Id.*

¹⁷⁷*Id.*, at 647.

¹⁷⁸*Id.*

¹⁷⁹*Id.*, at 653.

¹⁸⁰*Id.*, at 654.

¹⁸¹*Id.*, at 654.

mashup remixer typically chooses sections of a song where the vocals fade out because instrumental versions of albums are not frequently, if ever, available.¹⁸² Mashups, on the other hand, are probably not collections; rather, they are more likely to be derivative compositions, making them eligible to be considered "works of authorship."¹⁸³ The additional components in derivative works must meet a slightly higher standard of inventiveness to maintain copyright protection, according to the courts. Mashups may very well pass that test since they combine samples by layering the vocal and instrument tracks, taking the selection and arranging process from making mix tapes just a little bit farther.¹⁸⁴

3.3 Copyright and Music Mashup

As was evident in the section that came before this one, copyright concerns have been a significant, if unhelpful, influence in the formation and growth of the mashup genre.¹⁸⁵ Despite the Grey Album scandal bringing mashup music to the public's attention, ongoing concerns over copyright exposure have kept the genre from growing to its full potential.¹⁸⁶ Legal ambiguity has a huge impact on the development of the music mashup genre as well as the larger creative and copyright ecosystems. The current circumstances outside of the copyright system and content market are forcing the growing community of music mashup creators and consumers.¹⁸⁷

A mashup artist infringes upon the right to reproduce by stealing a musical composition or sound recording that is copyrighted. Factual copying that substantially resembles and protected expression are the two.¹⁸⁸ The first element is only displayed when a pre-existing sound recording is sampled. If a mashup artist incorporates a copyrighted sound recording into their work, it is sufficient. It is more difficult to determine whether utilizing the sample damages "substantial" amounts of the protected language. Under the *de minimis* concept, courts would often forgive very minor amounts of copying since they create too little harm to warrant providing a remedy.¹⁸⁹

¹⁸²*Id.*, at 656.

¹⁸³*Id.*

¹⁸⁴*Id.*, at 657.

¹⁸⁵ PETER S. MENELL, *supra* note 28, at 464.

¹⁸⁶*Id.*

¹⁸⁷*Id.*

¹⁸⁸*Id.*

¹⁸⁹*Id.*

The application of this strategy to digital sampling, however, was disputed in a contentious 2005 judgment.¹⁹⁰ Courts adopt a difficult standard to determine whether the quantity of protected expression appropriated would be considered significant by a layperson, even in situations when the de minimis doctrine is irrelevant.¹⁹¹ The court must first weed out the unprotected elements of the plaintiff's copyrighted work, such as concepts or unoriginal wording.¹⁹² The next step is to determine whether the defendant's work is substantially analogous to the protected expression using a notoriously confusing criterion. A copyright owner does not have to demonstrate that the entire or almost entire copyrighted work has been appropriated in order to prove infringement.¹⁹³

The legislative history defining the infringement threshold states that reproduction in whole or in part, exact replication, imitation, or simulation would constitute a violation of a copyrighted work. As long as the author's "expression" and not only his or her "ideas" are used, even considerable departures from the original work would be considered an infringement.¹⁹⁴ The courts have stated that "even a minor portion of the original if it is qualitatively important, may be sufficient to establish an infringement" as a result.¹⁹⁵

The prevalence of contemporary ideas of originality and authorship frequently hides the prevalence and importance of borrowing in legal commentary. It is evident from a study of the classical past those contemporary ideas of originality, creativity, and musical authorship are historically specific and don't necessarily line up with actual creative activities.¹⁹⁶ The standards set forth by contemporary conceptions of authorship are not even met by the classical music tradition, which served as a model for independent musical creation.¹⁹⁷ Examining actual classical music practices demonstrates that borrowing may be a source of creativity, which raises

¹⁹⁰Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799-801 (6th Cir. 2005) (deeming any amount of sampling to be an infringement) Tim Wu, Jay-Z Versus the Sample Troll, SLATE (Nov. 16, 2006), http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html [http://perma.cc/FW8X-SK24] (asserting that the Sixth Circuit's Bridgeport decision, if adopted by other courts, threatens to make sampling prohibitively expensive).

¹⁹¹PETER S. MENELL, *supra* note 28, at 465.

¹⁹²*Id.*, p. 466

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Olufunmilayo B. Arewa, *supra* note 12, at 565.

¹⁹⁷ *Id.*, at 566.

severe problems about legal discussions of copyright that assume a binary opposition between copying and originality and that copying may be detrimental to innovation.¹⁹⁸

Not just musical works but many other forms of culture also heavily rely on borrowings. Discussions of inter-textuality in literary theory emphasize the significance of examining the relationships between literary works as well as the ways that new literary compositions draw on and relate to older ones.¹⁹⁹ Questions about the relationships between literary works have received attention thanks to the writings of Julia Kristeva and other post-structuralist authors. Regardless of whether Handel employed these borrowings in a transformative way, it was nonetheless creative.²⁰⁰ Despite the label "transformative imitation" applied by some critics to Handel's borrowings, the composer extensively and frequently drew from both his own earlier works and those of others.²⁰¹ Determining precisely which elements of a given use of precedent material are transformative and which borrowings are transformative can be difficult. A fantastic example of this is how Handel used borrowings. Furthermore, whether a musical piece is deemed transformative depends entirely on the standards used to define what constitutes transformative. With the exception of overt parody cases, the majority of court assessments of hip-hop music concentrate on the appropriation of musical notes while mostly ignoring lyrics or text.²⁰² The fact that only takes into account musical note borrowings may have a different legal impact than taking into account language, either alone or in combination with musical notes, because rapping in hip-hop often involves new text juxtaposed to snatches of previously recorded music.²⁰³ The challenges in defining a transformative underscore the necessity to reevaluate the categories used to assess various forms of borrowing in the legal context as well as the reality that borrowing and innovation are not mutually exclusive. As a result, presumptive dichotomies must be reexamined in the context of actual musical composition practice. Such a reexamination would require admitting that many musicians and composers, including Public Enemy and other hip-hop

¹⁹⁸*Id.*

¹⁹⁹*Id.*

²⁰⁰Ellen T. Harris, *Integrity and Improvisation in the Music of Handel*, *The Journal of Musicology*, Vol. 8 No. 3, 302, (1990). Available at: <http://www.jstor.org/stable/763784>

²⁰¹*Id.*

²⁰²Olufunmilayo B. Arewa, *supra* note 12, at 579.

²⁰³*Id.*

groups, George Friedrich Handel, Pete Townshend, and Johann Sebastian Bach, have derived inspiration for their works through stealing, some of it is not always transformational.²⁰⁴

The various aesthetics of creation that are evident in music and other fields demonstrate the great range of ways in which musical innovation and creativity can occur.²⁰⁵ The most prevalent ways that borrowing is interpreted in copyright discourse are closely tied to often hazy and mystical notions of creativity that assume that copying previously published works is a symptom of a lack of creativity or originality. Presumptions about the optimum methods for creating new works are closely related to the structure of copyright as a property rule and the concept of derivative works.²⁰⁶

"Mashups" are artistic works that illegally incorporate copyrighted musical samples from other songs without the performers' permission. In *Bridgeport Music, Inc. v. Dimension Films*, the court famously stated that you must get a permission or do not sample.²⁰⁷ These words made it very clear that music mashups would not find a home under copyright law. In order for mashups to be able to exist legally in an effort to find a place for them in society, several commentators have tried to protect them by employing a "quasi-parody" approach under the affirmative defense of fair use.²⁰⁸ This argument is only valid when copyrighted material is used to convey criticism, comment, news reporting, teaching, scholarship, or study of the original work.²⁰⁹ This tactic, however, has additional drawbacks. Mashups cannot be justified as parodies under the fair use principle since they make no remark on or critique of the source works.²¹⁰ Music mashups are songs that are created by digitally superimposing the lyrics of one song over the instrumentals of another, giving the average listener an instantaneous recognition of both tunes. Music mashup

²⁰⁴*Id.*

²⁰⁵*Id.*, at 627-628.

²⁰⁶*Id.*

²⁰⁷ *Bridgeport Music, Inc. v. Dimension Films*, *supra* note 47.

²⁰⁸ Andrew S. Long, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, *Oklahoma Law Review*, Vol. 60(2) 317, 361 (2007). Available at: <https://digitalcommons.law.ou.edu/olr/vol60/iss2/3> Michael Katz, *Recycling Copyright: Survival & Growth in the Remix Age*, *Intellectual property law bulletin*, 56-58, (2008).

²⁰⁹ Katie Simpson-Jones, *Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to "Recast, Transform, or Adapt" Copyright*, *The John Marshall Law Review*, Vol. 43, No. 4, 1067, (2010). Available at: <https://repository.law.uic.edu/lawreview/vol43/iss4/6>

²¹⁰*Id.*

producers, sometimes known as "mashers," do not seek permission from the owners of the copyright to use the songs that are protected.²¹¹

The fact that "genuine" music mashups are made available to the public for free is one differentiating feature of mashups that DJ Girl Talk's work does not share. In modern culture, mashups are a fresh form of expression that has grown in popularity.²¹² Mashups are a fresh form of expression that is proliferating in our culture. Over time, a variety of websites have emerged that let mashers publish their compositions and receive ratings from listeners and other mashers.²¹³ The music mashup genre is more widely known among younger music fans, but the general public is less familiar with it and its characteristics.²¹⁴ The effects of copyright regulation are a significant contributor to this generational gap. The limitations and ambiguity surrounding copyright law, particularly the vague definitions of the fair use doctrine, have significantly driven the mashup genre underground. Major record labels have largely refrained from signing and releasing mashup artists.²¹⁵

A large portion of this work is accessible through streaming sites that operate covertly or in a gray area of law and commerce. The main purpose of distributing recordings of these works through unauthorized channels is to advertise the live performances of mashup artists, many of whom are DJs who perform live in dance venues.²¹⁶ Despite the genre's ambiguous legal standing, musical mashups are one of today's most influential and cutting-edge musical styles. It has a global audience, from the dance clubs in Ibiza and Las Vegas to the most well-known music festivals in the United States to a sizable Internet fanbase, even though it is challenging to measure its influence due to its subterranean routes.²¹⁷

Each song that has been recorded is shielded by a number of legal provisions. There are separate rights for the musical work, the performer's performance captured on record, and the sound recording itself. The song's lyrics, which are regarded as literary works, may also be the subject of second copyright.²¹⁸ These rights may be owned by a variety of people or organizations.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ PETER S. MENELL, *supra* note 28, at 446.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Graham Reynolds, *supra* note 18, at 647.

Depending on which copyright they own, the owners' rights change. The person who created the sound recording is the original owner of the copyright.²¹⁹ After the end of the calendar year in which the work was initially "fixed" onto a medium (such as a computer hard drive), the maker's rights expire fifty years later. After the creators' rights expire, the audio file becomes public property. After the creators' rights expire, the audio file becomes public property.²²⁰

Among other rights, the creator of a sound recording has the exclusive right to reproduce the sound recording or any significant portion of the sound recording and to grant permission for any such reproduction. The performer is the original owner of the copyright to a performance. The rights of the performer expire fifty years after the end of the calendar year in which the performance either takes place or is captured on a sound recording.²²¹ Regarding authorized fixed performances (like those found in the majority of sound recordings), the performer has the sole authority to approve any reproduction of the fixed performance or of any significant portion of the fixed performance for a purpose other than the one for which it was authorized.²²² The making of mashups may violate both the moral rights to attribution and integrity. The right of attribution granted to artists may be breached by mashups that fail to credit the artists whose works are included in the mashup. However, the original artists are frequently acknowledged in mashups. The names of the original artists may appear in the mashup's title in "A vs. B" mashups.²²³

3.4 Is Mashup Original Work or Derivative work?

Tensions about works that use pre-existing material are exacerbated by the definition of what constitutes a derivative work under current copyright standards that compare two musical compositions.²²⁴ Because of how copyright defines a derivative work, it can be difficult to apply copyright to musical genres that incorporate prior works. Any work that is based on an existing work may be regarded as a derivative work of that work under current copyright standards, at least in relation to the parts of the derivative work that adhere to the copyright originality standard. The scope of derivative rights does not extend to sound recordings, even if independent

²¹⁹*Id.*

²²⁰*Id.*

²²¹*Id.*

²²²*Id.*

²²³*Id.*, at 665-666.

²²⁴*Id.*

fixations of other sounds mimic or emulate the sound recording. This limitation on the scope of derivative rights for sound recordings will allow future musicians to do cover recordings of present sound recordings.²²⁵ The concept of a "derivative work" and the copyright law's emphasis on originality can occasionally result in problems when applied to music because borrowing music is a common component of musical innovation across cultures and eras. As a result, with music, it's not always clear how much originality is required to make something copyrightable. Of course, before determining if mashup makers are infringing on the right to make derivative works, one must first determine whether a mashup is actually a derivative work.

A derivative work, which is based on a copyrighted work, recasts, transforms, or adapts the original work by presenting it in a unique way, such as by turning a book into a movie.²²⁶ One can create a derivative work by recasting existing material to create a new work that doesn't alter the purpose or character of the original work. Because mashup artists recast works by modifying or altering music to create mashups, the end product seems to be protected as a derivative work. However, a new work won't be recognized as a derivative work if its purpose and nature are sufficiently transformative. Thus, it is important to consider if mashups are transformative.²²⁷ To put it another way, a derivative work only counts as transformative if it changes the original work's intent or character, even though it may change how the information is presented. For instance, when a book is adapted into a movie, the movie is still considered a derivative work since, despite the junior artist's alteration of the medium of presentation; they did not modify the meaning or aim of the original work.²²⁸

The level of originality required to make a new arrangement of an existing piece copyrightable, for instance, is not always obvious in the sheet music industry. Because of this, record labels and music publishers "apply copyright symbols to public domain music" and "trivially different arrangements of public domain music" to capitalize on the confusion. Choosing to buy current music rather than photocopying it results in increased costs and major uncertainty for sheet music customers.²²⁹ In addition to the difficulties brought on by the ambiguity around what is copyrighted, copyright owners and writers are not always the same people or entities. It is typical

²²⁵*Id.*, at 414.

²²⁶*Id.*

²²⁷*Id.*, at 416.

²²⁸*Id.*

²²⁹ Olufunmilayo B. Arewa, *supra* note 12, at 572.

for ownership of the copyrights for the musical composition and sound recording to be split between several persons or entities, as was the situation in the Newton case, which may make it more difficult to get licensing for samples.²³⁰ A derivative work of a copyrighted work is protected by copyright in the same way as the copyrighted work, despite the fact that the definition of what constitutes a copyrightable derivative work is not always clear.²³¹ This may limit the ability of composers of such music forms to gain copyright protection since their works might be viewed as illegal derivative works. This has major ramifications for music genres like hip hop that borrow from preexisting works.²³²

CHAPTER FOUR

4. THE LIMITATION OF THE EXCLUSIVE RIGHT OF MUSIC COPYRIGHT UNDER THE COPYRIGHT LAW OF ETHIOPIA

4.1 Background of Ethiopian Copyright Law

The effort to modernize Ethiopia's legal system in the 1950s and 1960s prepared the way for the civil code of 1960, which has explicit laws on literary and creative ownership under title XI of the code, and the codification of law in Ethiopia.²³³ The Civil Code of 1960 is the first

²³⁰*Id.*

²³¹*Id.*

²³²*Id.*

²³³FikremarkosMerso, The Ethiopian law of intellectual property right: copyright, trademark, patent, utility models and industrial design, Addis Ababa University school of Law, 41-42, (2012).

established Ethiopia's history of largely comprehensive legal framework copyright protection, classifying musical works as artistic works.²³⁴ Music creation is included in the category of creative works of the human intellect, which is meant to protect it.²³⁵ According to Article 1648 (2) of the 1960 Civil Code, musical composition with or without text is one of the categories entitled to protection as creative output.²³⁶ After 40 years, Ethiopia passed new copyright and neighboring right proclamation in 2004, copyright and neighboring rights proclamation, to update the copyright legislation to reflect the advancements and changes that had occurred since the enactment of the 1960 Ethiopian civil code (herein after copyright proclamation).²³⁷ Compared to the civil code, the proclamation introduced new concepts, rights and strengthens the enforcement. Copyright is defined as “*an economic right subsisting in a work and where appropriate includes moral right of an author*”. The work appropriated for protection under copyright proclamation is listed under article 2(30). Musical composition is also recognized as one of the works pro-economic rights existing in a work where the producer can get express protection from the infringement of his work under Art. 2(30(d) of the copyright and neighboring rights proclamation No. 410/2004.²³⁸

Copyright proclamation entitled the economic and moral rights of the authors for his/her creative work that are granted under Articles 7 and 8.²³⁹ The works of the productions may take the form of audiovisual creations that are based on written, intellectual, or artistic works. Although creators are allowed to exercise creative freedom over their works, the copyright and neighboring proclamation is aimed at the advancement of cultural, scientific, and technical development in the country.²⁴⁰ Literary, artistic, and other forms of creative work that are derived from Musical composition have also substantially influenced the development of Ethiopia's culture, society, economy, science, and technology. It appears that the Ethiopian lawmaker is attempting to blend personal and public gains.²⁴¹ The proclamation defines musical composition as “a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed

²³⁴Civil Code of the Empire of Ethiopia, Proclamation No 165 of 1960, NegaritGazeta, 19th year, No. 2.

²³⁵FikremarkosMerso, *supra note 233*.

²³⁶Ethiopian Civil Code, *supra note 234*, at 1648 (2).

²³⁷FikremarkosMerso, *supra note 233*.

²³⁸*Id.*

²³⁹*Id.*

²⁴⁰Proclamation No. 410/2004, *supra note 3*, at preamble.

²⁴¹YemaneGesese, *Infingment and Remedies of Economikc Rights of Audiovisual Works Underr the Ethiopian Copyright Law: Law and Practices in Addis Ababa*, Addis Ababa University, 22, (2010).

with the music.” Moreover, in order to give compatible legal protection and enable right holders to administer their rights in an orderly and improved way, the proclamation is amended in 2014.²⁴²

4.2 Requirements for Copyright Protection of Musical Works

In accordance with Art. 2(30)(e) of the copyright law, musical works are protected by the copyright; nevertheless, they must first meet the two requirements for qualifying copyright protection.²⁴³

4.2.1 Originality

The producer of an audiovisual work must adhere to the requirement of originality, although the Ethiopian proclamation on copyright and neighboring rights protection, Proclamation No 410/2004, does not define originality.²⁴⁴ As a result, there is an issue with originality when cases are decided. Two legislative requirements serve as a barometer for uniqueness. While the Anglo-Saxon or common law nations employ the persistence of investment of labor, skill, and money as a standard of originality, the continental system uses the existence or practice of creative or skill on the side of the producer as a measurement.²⁴⁵

However, we can infer that originality in regard to musical works emanates from personal intellect of the creator of the work and not copied or reproduced from others work because the producer is paid for what he created. This can be inferred from the definition of Author provided as person who has intellectually created a work even though the proclamation does not directly take into consideration from the above legal standards.²⁴⁶ Thus, the originality requirement for copyright protection seems to be attached to the intellectual creativity under Ethiopian copyright and neighboring proclamation similar to the civil law legal system which requires a high degree of creativity even though the proclamation failed to answer the extent of originality is not provided.²⁴⁷

²⁴²Ethiopian Copyright and Neighboring (Amendment) Proclamation No. 872/2014, Federal NegaritGazetta, 21th Year, No. 20.

²⁴³ Proclamation No. 410/2004, *supra note 3*, at 2(30)(e).

²⁴⁴*Id.*

²⁴⁵FikremarkosMerso, *supra note 233*.

²⁴⁶ Proclamation No. 410/2004, *supra note 3*, at 2(2).

²⁴⁷FikremarkosMerso, *supra note 233*.

In Ethiopia, the Federal Supreme Court cassation bench's decision passes a binding judgment which binds all the lower courts in the country.²⁴⁸ They are four cases which is related with the concept of originality is brought before the cassation bench. However, all of these cases are on literature rather than music copyright.²⁴⁹ In those decisions, the Federal Supreme Court cassation bench equates originality and novelty. For instance, in the cases of Public Prosecutor v. Daniel Tafese and Addis Abeba University v. Birhanu G/tsadik, the courts determined whether or not the work was original based only on the existence of similar works in that industry.²⁵⁰ In the other two cases, the courts made it abundantly apparent that only original works are afforded copyright protection. These indicate that federal courts consistently link originality with innovation or newness in their rulings.

4.2.2 Fixation

Fixation is defined as “*the embodiment of works or images or sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device prepared for the purpose*” under the proclamation.²⁵¹ It is the representation of a work covered by copyright in the musical work that may be seen on a special device, broadcast over the air, or uploaded to the internet and contains both sound and image.²⁵² Fixation is the process of converting the artwork into a mechanically visible and audible sensually expressive concrete medium of expression. The proclamation makes no mention of the kind of material—such as whether it is long- or short-lasting—on which the audiovisual work is fastened. The requirement of fixation is important to serve an evidentiary purpose for the author of his creation and makes the reproduction and dissemination of the work to the public easier.

However, we can infer that as long as it was corporeal and perceptible through the senses, it could have been constructed of any substance. Fixation is crucial in musical composition because it's necessary for the existence of copyright protection. For instance, a work might be present in

²⁴⁸ Federal Courts Proclamation Amendment Proclamation, 2005, art 2-1, Proclamation no 454, Neg. Gaz, year 11 no 42.

²⁴⁹ Samuel Hailu Vs W/roSimretAyalew and others, (Federal Supreme Court Cassation Bench, Civil Case No. 68369, Tir 04/2004 E,C), Vol 13,p 576, Public prosecutor vs. Daniel Tafesse and Web planet IT Solutions, 165026 (Federal High Court, Yekatit 14/2009 E.C, FantahunEngida vs. TamiruBirhanu and Addis Abeba Culture and Tourism Office, 116946 (Federal High Court, Yekatit 10/2006 E.C), and Addis Abeba University vs. Birhanu G/tsadik, 46096(Federal High Court, Hidar 27/1999 E.C

²⁵⁰ *Id.*

²⁵¹ Proclamation No. 410/2004, *supra note 3*, at 2(11).

²⁵² YemaneGesese, *supra note at 241*, at 24- 25.

its totality in the producer's consciousness, but it still needs to go through further steps, like fixation, to be protected.

4.3 Protected Rights of Authors of Musical Works

The proclamation provides for the economic and moral rights of the author of musical works.²⁵³ The economic rights entitled financial reward for the author of musical work. While the moral right is aimed at preserving the link between the author and his work. However, it must be noted that the moral right is independent of the author's economic right.

4.3.1 Economic Right

Based on economic theory, copyright owners' and authors' economic rights are established. This argument holds that the goal of music copyright protection is to reward creative authors by giving end users access to their musical creations in exchange for a fee. The premise that musical authors need incentives to keep producing new musical works and that the allowed use of such works will thwart further expansion of the music industry is advanced by economic theory, which serves as the theoretical underpinning of economic rights. The economic right is entitled to control the reproduction of their work, the public's distribution of it via sale, rental, lease, hire, importation, or any other commercial arrangement, as well as public performances and broadcasting of the musical work, economic rights for literary, artistic, and scientific works are introduced under article 7 of the Ethiopian copyright and neighboring right No. 410/2004.²⁵⁴ Additionally, the author is granted exclusive rights to derivative works, such as those that translate, adapt, modify, or otherwise alter the original work.²⁵⁵ The author of music can either derive the economic right for him/herself or authorize others.²⁵⁶

4.3.2 Moral Right

Article 8 of the proclamation also contemplates the moral rights of a musical work's author. In our example, the moral right belongs solely to the creator of a copyright-eligible work and cannot be transferred to another person while the creator is still alive.²⁵⁷ The moral right includes the following: a) the right to claim authorship of his work, unless it is accidentally or incidentally

²⁵³Proclamation No. 410/2004, *supra note 3*, at 7&8.

²⁵⁴*Id.*, at 7(1(a-i)).

²⁵⁵*Id.*

²⁵⁶*Id.*

²⁵⁷*Id.*, at 8(2).

used in broadcasting current events reporting; b) the right to remain anonymous or use a pseudonym; and c) the right to object to any distortion, mutilation, or other alteration of his work if it is or would be detrimental to his honor or reputation; d) to release his writing.²⁵⁸ Therefore, moral right is an inalienable right to prevent others from, among other things modifying, distorting otherwise interfering with the integrity of that work.²⁵⁹

4.4 The Exclusive Rights of Musical Author vis-a-vis Music Mashups

Three reasons are identified by scholars why copyright restrictions exist.²⁶⁰ First, there are restrictions made to lessen how copyright protection affects essential freedoms and rights including press freedom, privacy, information access, and freedom of expression.²⁶¹ Second, restrictions on the use of copyright works by organizations involved in knowledge transmissions, such as libraries, archives, museums, and educational institutions, are described in the context of protecting public interests.²⁶² Thirdly, in regions where copyright holders are unable to successfully assert their rights and impose fees, there are restrictions brought on by market dysfunction.²⁶³ We can also add restrictions intended to promote knowledge dissemination and education expansion, such as restrictions on research and education and mandatory licenses enthusiastically adopted in developing nations.²⁶⁴

Achieving a balance between an author's exclusive right and other social, educational, and cultural interests of the public that may lead to a limitation of the author's exclusive rights is the ultimate goal of copyright protection, not the advantage an author receives.²⁶⁵ Between Articles 9 and 19, the Ethiopian copyright and neighboring rights proclamation allowed for the restriction and exemption of the exercise of the copyright author's exclusive rights.²⁶⁶ Quotation, reproduction for personal use, educational, library, archive, and similar institutions, broadcasting, and public communication for informational purposes are all conceivable exclusions to the

²⁵⁸*Id.*, 8(1(a-d)).

²⁵⁹*Id.*

²⁶⁰Biruk Haile, Scrutiny of the Ethiopian system of Copyright Limitations in the Light of International Legal Hybrid resulting from (the Impending) WTO Membership: Three-Step Test in Focus, *Journal of Ethiopian Law*, Vol. 25, No. 2, 160, (2012). Available at: https://hdl.handle.net/10520/AJA00220914_79

²⁶¹*Id.*

²⁶²*Id.*

²⁶³*Id.*

²⁶⁴*Id.*

²⁶⁵Proclamation No. 410/2004, at preamble.

²⁶⁶*Id.*, at 9-19.

exclusive right of the copyright authors that are applicable to musical compositions.²⁶⁷ In addition, the Ethiopian Intellectual property office may also provide a compulsory license, even if the requirements for this non-voluntary license have not yet been established.²⁶⁸ According to article 9(2(b) of the proclamation, reproduction for personal use does not include musical notation.²⁶⁹

Thus, the exclusive rights of reproduction, adaptation, public performance, public display, and public distribution belong to the author of the song.²⁷⁰ Without the original song's copyright holder's consent, a person who makes a music mashup violates at least some of these exclusive economic and moral rights, as stated in proclamation No. 410/2004 articles 7 and 8.²⁷¹

Even though the copyright and neighboring right proclamation does not define derivative work directly, it lists the act which can be seen as derivative work, such as arrangement, translation, adaptation, and other transformations and modifications. Based on the definition of music mashup discussed in the previous chapter, music mashup is created by combining two or more copyrighted songs into one. Accordingly, music mashup is covered under derivative works. As per our copyright law, music mashup infringes the following exclusive economic as well as moral rights of the copyright author of music. Before discussing the infringements made by music mashup, let's analyze whether the requirements of copyright provided by Ethiopian copyright law is fulfilled by music mashup. As mentioned above, originality and fixation are the two requirements provided in order to obtain protection for the copyright. The proclamation does not define the term "originality." However, when considering copyright under both common and civil law, originality is either the work that entirely originates from the author without plagiarizing from the existing work or the work that is tied to the author's intellectual stamp. Copyrighted content is used by mashup artists who integrate musical compositions and sound recordings into their creations. Without any unique content, music mashups is fully composed of the content of two or more previous musical work. Having said that, music mashups can be considered a derivative work because it is derived from the original work as a transformation and modification of the existing music. Mashup artists cannot claim copyright protection as an

²⁶⁷*Id.*

²⁶⁸*Id.*

²⁶⁹*Id.*, at 9(2(b).

²⁷⁰*Id.*

²⁷¹*Id.*, at 7 and 8.

original because it is drawn from copyrighted music. Derivative works, however, continue to be the exclusive property of musical authors or copyright holders, and they require the legal consent of the copyright author in order to be protected as such. Moreover, regarding the author's authorization, one must keep in mind that the authorization for other rights does not include the authorization for creating a mashup because the authorization must specifically include the mashup and be in writing.²⁷²

Firstly, it violates the author's exclusive right of reproduction since mashup artists use portions of the original song that are already protected by copyright. Making copies of one or more of the works in any way or form is referred to as reproduction in the definitional section of the proclamation.²⁷³ Because the declaration uses the term "in any manner or form," a portion of the song has been reproduced.²⁷⁴

Secondly, by rearranging, distorting, and otherwise modifying the work, mashup artists violate the musical author's exclusive right to make derivative works on the original work. The mashup artist's creations are derivative works, nonetheless, and copyright protection grants the sole authority to create such works. The fundamental justification for this is that copyright owners need to be paid for any junior works that are based on their labor. The right to prepare works based on their work, or in the alternative, to license the right to prepare derivative works and enjoy some of the profits produced by such derivative works.²⁷⁵ Given copyright holders' exclusive right to prepare derivative works, it follows that mashup artists cannot prepare mashups (which are derivative works) without authorization.

Thirdly, a lot of mashup artists also transgress the rights of copyright holders to public performance and distribution of the work. First, the exclusive right to sell their music both offline and online is granted by the right to distribute. Performances at occasions like concerts, radio broadcasts, online radio, and bar performances are all included in the exclusive right to perform works protected by copyright in public. The exclusive right of copyright holders to perform their music in public is thus violated by mashup artists who post their work online or perform live in public.

²⁷²*Id.*, at 23.

²⁷³*Id.*, at 2(25).

²⁷⁴*Id.*

²⁷⁵*Id.*, at 4 and article 7(1(b and c)).

The musical author's moral rights are also violated by the music mashup, in addition to his or her exclusive commercial rights. The moral right clause of the proclamation states that the creator of a piece of music has an unalienable right to stop others from changing, distorting, or interfering with the integrity of their musical creation.²⁷⁶

4.5 Is Music Mashup Subject to Affirmative Defenses Against the Exclusive Right?

As was plainly stated above, articles 9 through 19 of the proclamation contain restrictions on the exclusive rights of copyright holders.²⁷⁷ The alleged infringer then has the opportunity to present an affirmative defense. Copyright limits act as checks on the copyright protection system, which is always being improved.²⁷⁸ Due to the following reasons, music mashups are not eligible for the affirmative defense offered by the proclamation: Firstly, in accordance with Article 10 of the Proclamation, one of the restrictions on the musical author's copyright is the use of quotations. The exception, however, pertains to the sole right of reproduction, as music mashups are derivative works on the original song. Furthermore, quoting from the original work is only permitted when it is appropriate and serves the intended purpose.

Secondly, reproduction for personal use is permitted under article 9 exclusively for his own personal purposes.²⁷⁹ The defense for personal use against the exclusive right does not include Musical notation which seems to exclude mashup artist from the using the existing work through musical notation in addition restricting the personal use exception to reproduction rights.²⁸⁰

Thirdly, the restriction for educational purposes only applies to the reproduction right, not the other exclusive right of the musical author. Additionally, the exclusive right for educational purposes is constrained by fair use and by not exceeding the amounts for the purpose highlighted.

Fourthly, only the performance, reproduction, translation, and broadcasting rights of the musical creator in our instance are covered by articles 16 and 17 of the proclamation, respectively which are rarely related with exclusive rights infringed by mashup artist.²⁸¹ Last but not least, the revised Proclamation No. 872/2014 makes it plain that anyone using a copyrighted work for a

²⁷⁶*Id.*, at 8(1(c)).

²⁷⁷*Id.*, at 9-19.

²⁷⁸*Id.*

²⁷⁹*Id.*, at 9.

²⁸⁰*Id.*

²⁸¹*Id.*, at 16 and 17.

commercial purpose must pay royalties in accordance with the suggestion of the Copyright Management Society. Unauthorized music mashups violate the exclusive economic and moral rights of the original musical compositions, according to the legal analysis presented above. The issue is that mashup artists employ pre-existing musical compositions in their creations without the owners' consent and disseminate them on YouTube for profit.

Generally, the exception to the economic right that particularly applies to authors of musical works is limited to the right on reproduction, broadcasting, performance, importation, and other kinds of communication to the public.²⁸² In general, the copyright restrictions are not applicable to all exclusive economic rights. Therefore, neither of the proclamation's limitations or exceptions applies to music mashups since they fall under the category of the right of derivative work.

Based on the above discussion of limitation on the exclusive economic right of musical author in our case under Ethiopian copyright law, the monopoly is given for the copyright author without room for transformative work based on voluntary or compulsory license by the Author. The authorization of the copyright holder provided is for the usage of the work with stringent procedure which is burdensome in some cases like mashup artists who are using only some part of the musical from two or more pieces of music. Moreover, one may argue that compulsory license is provided under the proclamation as a limitation to exclusive rights.²⁸³ However, this provision cannot be applicable on transformative work like mashup for two reasons. The first is that, the limitation on the exclusive right musical author is only applicable on reproduction, translation, broadcasting, communication to the public, importation, and performance of the work.²⁸⁴ Thus, it is not applicable to the derivative work of musical work. Secondly, compulsory license is provided in the proclamation under article 17.²⁸⁵ However, no condition and procedure for compulsory license is provided. Moreover, it is only applicable on reproduction, translation and broadcasting of work. This gives full right for the author of music to authorize or not mashup artists to the existing music without compulsory license for such transformative work.

²⁸²*Id.*, at 9, 10, 11, 12, 13, 15, 16, 17. Article 14 limited to the reproduction of computer program.

²⁸³*Id.*, at 17.

²⁸⁴*Id.*, at 9, 10, 11, 12, 13, 15, 16, 17.

²⁸⁵*Id.*, at 17.

The researcher has observed that music mashup is common on YouTube despite their illegality and violations of the exclusive rights of copyright holders of musicians. In addition, in the interview with the researcher, the EIPO and the music copyright and the neighboring right collective management society concur that mashup is one of the major issues facing the music businesses.²⁸⁶

This is frequently brought up in connection with the monopoly power that copyright confers on its owner and the necessity to strike a balance between those rights and public access. By no means is this amalgamation of recompense and control required or inevitable. Additionally, it is feasible to design a compensation system without using control as the means of achieving compensation. Because difficulties relating to the distribution of economic gains are occasionally needlessly mixed with those relating to control over potential future uses of copyrighted works, the current copyright framework that combines control and compensation imposes superfluous transaction costs.

According to the Ethiopian copyright law, the use of copyrighted music is monopolized by the author of the music.²⁸⁷ Authors' rights to their works are protected by copyright, without disregarding the importance of encouraging or leaving the room for new creation. Since stimulating creativity is a fundamental component of growth, no civilized society can afford to disregard this. The progress of society depends on creativity, whether it is social or economic. The copyright protection offered to musicians foster an environment that is creatively stimulating, encouraging them to produce more and inspiring others to do the same. The cultural and historical peculiarity of musical production models should be taken into account to a much higher extent than is currently the case when deciding the proper balance between public and private interests and what type of access should be given for existing works. This will lead to further infringement of the rights of copyright holder of music as technology makes it easier for mashup artists to produce music mashup from the existing work and distributes it online without

²⁸⁶Interview conducted with EIPO, (23/09/2022) Interview conducted with the representative of the Ethiopian Music Copyright and Neighboring Right Management Society(EMCCMO), HailemichealRuths, at his Office, (25/09/2022). Phone Interview conducted with the President of Ethiopian Music Association(EMA), Dr. DawitYifru,(28/09/2022).

²⁸⁷The proclamation No.410/2004 under article 7 provides bundle exclusive economic rights which includes copying or reproducing the work; performing the work in public, making a sound and recording motion image of the work, broadcasting a works through the electromagnetic spectrum or through cable diffusion, and translating or adapting the work.

compensating the copyright holders. Given the fact that anyone with a computer and the requisite software can create his very own mashup, regulating the creation of mashups seems like an insurmountable challenge.

4.5. Institutional Framework of Music Copyright

An author cannot physically keep track of every instance in which his works are utilized; for instance, he cannot contact every radio or television station to inquire about licensing and payment for usage.²⁸⁸ However, it is impractical for consumers, such as broadcasting companies, to approach every author individually before utilizing any of their copyrighted works. Individuals who own copyrights and related rights typically find it challenging to manage the financial rights they have to their literary, musical, artistic, or other creative works.²⁸⁹ Due to time and resource limitations, it is nearly impossible for individual copyright holders to carry out the works or activities necessary to exploit economic rights. In order to solve such problems, effective administration of the right of copyright holders of music and effective enforcement of the copyright legislation, copyright management society is forwarded as a solution.²⁹⁰ This theory contends that the existence of copyright collecting societies makes it possible for copyright holders to distribute their works to users at a cheaper cost and aids consumers in accessing creative works at a lower cost per transaction.²⁹¹

The primary duty of collective management organizations is to facilitate trade because, frequently, transaction costs may inhibit unilateral action (especially for individuals and small firms), resulting in no trade.²⁹² The four primary duties of all copyright collecting societies are to acquire rights from right-owners, license those rights to purchasers, collect fees from users for the uses made, and distribute the fees to the right-owners.²⁹³ In the area of copyright, a working collective management structure must be established for copyright enforcement to be effective. Such an organization is absolutely vital because it allows copyright owners to regulate how their

²⁸⁸Kahsay Gebremedhn, The emerging Ethiopian copyright and related rights collecting society: assessment of challenges and prospects, 10, (2013). (Unpublished LL.M thesis submitted in Partial Fulfillment of the Requirements for the Master of Laws Degree at the School of Law, Addis Ababa University).

²⁸⁹*Id.*

²⁹⁰*Id.*

²⁹¹*Id.*, at 19.

²⁹²*Id.*

²⁹³*Id.*, at 21.

works are used in a mass market that is constantly expanding.²⁹⁴ The owners of copyrights and related rights would not be able to properly profit from their invention without an efficient collective administrative framework. However, creating a copyright collecting organization alone won't be enough to meet the objectives, namely upholding the rights of copyright holders and achieving their economic interests.²⁹⁵

The Ethiopian Music Association, founded in 1965, was the first professional organization with the aim of representing the interests of its members.²⁹⁶ This could include assisting them in negotiating fair contracts for their recordings, actively looking for methods to help them maximize the value of their contributions, and persistently advocating for the best legal framework to protect copyright and recording ownership.²⁹⁷ The association went through a period of inactivity and obscurity from 1990 to 2004, after which it gathered its 233 dispersed members and submitted an application to be recognized as a professional society.²⁹⁸

Recently, the 720 members of the EMA have used it as a crucial forum for communication and securing tighter protections. It also acts as the location for the many Ethiopian Music Awards divisions. To reintroduce performers who have been out of the public spotlight for a time, they do a lot of record collection and profiling. They also want to compile a music collection, if they can get help from their partners.²⁹⁹ TV and radio broadcasters may start asking creators of creative works for royalties in September 2021.³⁰⁰

It will be a historic development for those in the music and entertainment industries whose original works are used by the broadcast media without sharing the benefit.³⁰¹ The Ethiopian Music Copyright & Neighboring Rights Collective Management Organization (EMCCMO) was founded in December 2019 with the goal of collecting royalties on behalf of copyright holders.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Music in Africa, Ethiopian Music Association, Accessed on Sept. 24, (2022). <https://www.musicinafrica.net/directory/ethiopian-musicians-association-ema> Music in Africa is a platform for musicians and contributors to embed music and videos solely for promotional purposes.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Addis Fortune magazine, Royalty payments set to begin in September, July 3, (2021). Available at: <https://addisfortune.news/royalty-payments-set-to-begin-in-september/> Accessed on Sept. 24, (2022).

³⁰⁰ *Id.*

³⁰¹ *Id.*

Its leaders reached an agreement for a flat payment system with broadcasters. Representatives of the Ethiopian Intellectual Property Office brought the parties together (EIPO).³⁰²

The Organization has created a general and temporary permit. The first option allows broadcasters to use creative work without limitations for a year after making a one-time payment. Additionally, broadcasters must set up a piece of software that records the music played.³⁰³ On demand, temporary licenses are given out and are good for a set period of time. This category consists of public events and concerts where the programmers are expected to supply playlists. Royalty managers utilize the playlists to compute payments. The company calculated fees using regular time and primetime rates.³⁰⁴

According to the information gathered from the interviews with the various stakeholders, music mashup is one of the current issues the nation's music industry and authors are facing because it violates the authors' rights.³⁰⁵ As a derivative work, a music mashup violates the exclusive right of the music author, according to one of the informants from the Ethiopian Intellectual Property.³⁰⁶ A music mashup can help to inspire upcoming musicians to start making music, but mashup creators must first obtain legal consent from the owner of the song's copyright.³⁰⁷ As a result, mashups shouldn't be completely prohibited; instead, there needs to be a system by which mashup artists respect the right to original work. In order to foster fresh creation and prepare the path for striking a balance between an author's exclusive right and other social, educational, and cultural interests of the public, it is crucial to encourage legal mashup that is done legally with the consent of the original author.³⁰⁸ As mentioned above, no single musical author can effectively defend their exclusive rights on their own, which is why the copyright collective society is crucial.³⁰⁹ When it comes to music mashups, not only does the original work's copyright owner need permission; the mashup artist also requires it because the elements of mashup require that two or more songs be blended.

³⁰²*Id.*

³⁰³*Id.*

³⁰⁴*Id.*

³⁰⁵Interview conducted with EIPO; Interview conducted with the representative of the Ethiopian Music Copyright and Neighboring Right Management Society(EMCCMO); Phone Interview conducted with the President of Ethiopian Music Association(EMA), *supra note 283*.

³⁰⁶*Id.*, interview conducted EIPO.

³⁰⁷*Id.*

³⁰⁸*Id.*

³⁰⁹KahsayGebremedhn, *supra note 285*.

The copyright and neighboring rights proclamation (as amended) No. 872/2014 stipulated that the copyright management society had the right to submit a proposal regarding the types of works that should be subject to royalty payments to the Ethiopian intellectual property office for approval.³¹⁰ Based on this legal need, the researcher inquired in an interview with the EIPO as to whether or not the copyright management organization founded in 2019 proposed mashups as one of the categories of work requiring payment of a fee in order to be approved.³¹¹ The office answered that, the music mashup was not proposed by the Society as works subject to a royalty payment. Added to this, the society only suggested radio and TV broadcasters pay royalties for the time being and their proposal is approved by the office.³¹²

In an interview with a copyright management representative, the researcher probes about societal perceptions on mashups in general. Unauthorized music mashups violate the exclusive rights of the creator of the original musical works from which the mashup is formed because they are a derivative work based on the original music, claims an informant.³¹³ Unauthorized music mashup, according to the informant, is one of the obstacles to the application and administration of the proper musical author.³¹⁴

Why does society not propose the collection of royalties from the mashup artists as the representative of the musician who is required to propose such use of the copyrighted work to the EIPO for approval after it has been suggested that unauthorized music mashups violate the rights of the original music copyright holders? The representative of the society responded that the organization, known as the Ethiopian Music Copyright and Neighboring Rights Collective Management Organization (EMCCMO), was recently founded by Ethiopian music producers, performers, and authors.³¹⁵ Since our founding, we have been trying to determine which sorts of works should be subject to the payment of royalties.³¹⁶ We have held several talks with stakeholders about the quantity and method of royalties' payment. As part of our first proposal, we suggested TV and radio stations to the EIPO, and the office approved it, allowing us to begin

³¹⁰ Amendment proclamation No. 872/2014, *supra note 242*.

³¹¹ Interview conducted with the representative of the Ethiopian Music Copyright and Neighboring Right Management Society(EMCCMO),HailemichealRuths. (10/10/2022)

³¹²*Id.*

³¹³*Id.*

³¹⁴*Id.*

³¹⁵*Id.*

³¹⁶*Id.*

collecting royalties from TV and radio stations in September 2021.³¹⁷ We intend to approach hotels, bars, and clubs for royalties in our upcoming face proposal. As a result, in our next step proposal, we might suggest implementing the royalty payment for music mashup artists.³¹⁸

As a result, it is evident that, in the researcher's opinion, music mashups violate the rights of the author of musical work or other musical copyright holders. Both EIPO and the Ethiopian Musical Copyright and Neighboring Right Management Society (EMCCMO) concluded that an unlicensed mashup violates the original work's exclusive rights.³¹⁹ Additionally, they all agreed that music mashups are crucial for inspiring new works, and none of them thought they should be completely forbidden.³²⁰ As a result, the owners of the copyright to the original musical works must give their consent before the mashup artists can proceed. However, it is better to have the collective society manage the mashup by preparing the royalty scheme for the users because it is impossible to obtain permission due to the fact that it is time-consuming for mashup artists to obtain permission from each and every copyright holder in order for each to manage his or her exclusive right.

³¹⁷*Id.*

³¹⁸*Id.*

³¹⁹ Interview conducted with EIPO, Interview conducted with the representative of the Ethiopian Music Copyright and Neighboring Right Management Society(EMCCMO), interview with the representative Ethiopian Music Association(EMA), *supra note 302*.

³²⁰*Id.*

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATION

5.1 Conclusion and Findings

In copyright exclusive economic and moral rights belongs to the original creator in general subject matter protected and musical work specifically if it fulfills the requirements of originality and fixation. The bundle of economic rights that is protected includes, among other things, the reproduction, public communication, adaptation, translation, and modification rights for the work. Since stimulating creativity is a fundamental component of growth, no civilized society can afford to disregard this. The progress of society depends on creativity, whether it is social or economic. The copyright protection offered to musicians foster an environment that is creatively stimulating, encouraging them to produce more and inspiring others to do the same. The researcher identified the following gaps in the copyright and neighboring right proclamation associated with exclusive right of copyright holders.

According to the Ethiopian copyright law, music mashup is illegal and infringement of the exclusive rights of the author of music as the mashup artist uses the part of the existing two or more music to produce music mashup. Mashup infringes the exclusive right of reproduction, distribution, performance and the right to produce derivative work on his/her musical work. Mashup artists also cannot defend him/herself through the affirmative defense against for mashup as the limitation under Ethiopian law are against the reproduction, translation, performance, broadcasting of the work, importation, and communication of the work to the public. In contrast, music mashup is part of derivative work which is exclusively reserved for the musical author. This shows that, the creator of music have monopoly right according to Ethiopian copyright law especially in a work like music.

Firstly, according to the researcher's finding, the proclamation fails to define the term derivative work apart from listing as arrangement, translation, adaptation, and other transformations and modifications. Thus, the copyright law should be revised to include the definition for the action which is taken as derivative acts clearly in order to reduce the ambiguity of the law.

Secondly, the right to reproduce the musical work is one of the exclusive rights of reproduction for personal purpose musical author. However, the reproduction for the personal use is provided

under article 9 of the copyright and neighboring right proclamation. The proclamation fails to provide amount of reproduction for personal use to be tolerated as exception.

Thirdly, the reproduction for educational purpose is also provided as an exception to the exclusive right of copyright holder of music under article 11 of the proclamation. However, the study identified that the proclamation fails to exclude the education which is profit making and the amount of reproduction which can be used for education is also not answered by this proclamation even though it is fair use and justified for the purpose as such work is not defined. Mashup artists use the existing music for the purpose of practicing for themselves which can be included in the exception for educational purpose as per the reading of this provision.

Fourthly, the proclamation also fails to include the room for transformative work based on voluntary or compulsory license to encourage further creative in the future by using the existing works through license as the compulsory license is only applicable on reproduction or translation or broadcasting of a published work rather than musical works.

Fifthly, the works which is the subject matter of the copyright protection is provided under the definitional part of the proclamation No. 410/2004. From this lists of activities, musical composition is also provided, however the researcher identified that the definition of musical composition is not clearly provided by the proclamation.

Finally, the researcher found that the proclamation also fails to provide definition for the concept of originality with regards to copyright. Thus, the copyright law should be revised by including clear and comprehensive definition for the concept of originality in order to reduce the controversy as the mashup artist claim their mashup as original by using their own sound and style. Moreover, the collective rights of musicians which is founded for overseeing, the Ethiopian Music Copyright and Neighboring Right Management Organization the which is founded for overseeing the collective rights of musician is also failed to work effectively because of lack of infrastructure and personnel. The above problems paved the way for the infringements of the exclusive rights of copyright holders/owner of music.

5.2 Recommendation

Based on the research's findings and the inferences made above, the author suggests the following measures that, in his opinion, will help reduce the illegal activity associated with

copyright violations of audiovisual works and offer fair remedies to those whose rights are violated.

1. **The demarcation of** exclusive right of owner and mashup artist should be not only gaining reward for the copyright holder (or, more accurately, to prevent someone other than the holder from appropriating whatever benefits may be generated) and promoting the public interest in encouraging the creation and dissemination of works of art and intellect but also recognizing a low degree of creativity.³²¹
2. According to Ethiopian copyright law, in order to strike a balance between the rights of copyright holders and fostering fresh creation, it must permit the use of copyrighted works for transformative works, particularly in music, upon payment of royalties to the creator of musical works under article 17 of the copyright and neighboring right proclamation.
3. One of the criteria for the protection of copyright is originality as it is provided under article 6(1(a) of copyright and neighboring rights proclamation. However, it should be revised to include proper and clear definition for the concept of originality
4. Musical composition is one of the lists which is included under the copyright and neighboring proclamation No. 410/2004. Thus, the copyright law should be revised to include the clear definition of musical composition in order to reduce the ambiguity as music mashup can also be musical composition.
5. The Ethiopian music copyright and neighboring rights collective organization, which is authorized to manage the musician's collective rights, should put in a lot of effort to ensure that the copyright proclamation is effectively implemented. Mashup should be one of the uses of copyrighted music that the EMCCMO suggests to EIPO for payment of royalty.
6. The EMCCMO, Ethiopian Music Association, Ethiopian Audio-Visual Association, and other organizations of a similar nature should work to raise awareness among their members and other stakeholders by organizing various activities to do so as well as by presenting the problems and solutions through its quarterly bulletin on the copyright infringement caused by unauthorized music mashups and the requirement to obtain permission from copyright holders.
7. Mashup artists should avoid producing mashups without the copyright holders' permission to be lawful and to escape court action from music authors' civil remedies, such as claims for compensation and criminal liability.

³²¹*Id.*

8. In order to properly apply the right of the musical creator and to promote fresh musical creativity, the researcher also suggests effective coordination between EIPO and EMCCMO.
9. EMCCMO should openly communicate with mashup artists the process, fair royalties, and the kind of authorization that is granted to them. It is proposed that, under the moral rights framework, cultural organizations and professional associations may establish an industry code of behavior that would govern remixes and mashups and serve to distinguish between legitimate and unauthorized usage.
10. To efficiently manage the rights of copyright holders, the government, in particular EIPO should provide financial and technical support to EMCCMO in order to build up the institution's capacity in terms of both people and material resources.

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Interview

- Interview conducted with EIPO, (23/09/2022)
- Interview conducted with the representative of the Ethiopian Music Copyright and Neighboring Right Management Society(EMCCMO), Mr. HailemichealRuths (25/09/2022).
- Phone Interview conducted with the President of Ethiopian Music Association (EMA), Dr. DawitYefru (28/09/2022).

Annex A: Interview with Copyright Collective Management Society

1. What do you think about music mashups? Is Mashups copyrightable or an infringement of copyright?
2. The Ethiopian copyright and neighboring rights proclamation (Amendment) No. 872/2014 imposes an obligation on anyone who uses the work protected for commercial purposes to pay royalties to the collective management and the categories of work in which the royalties to be paid should be decided by the EIPO office upon the proposal of collective management. What are the efforts being made Ethiopian music copyright and neighboring right collective management society are defending the exclusive ownership of music copyright from mashup artists?
3. In what ways does digital technology affect the ways in which you can distribute and control your musical works? And How important is it to you to be a member of collecting societies?

Finally, That is the end of the semi-structured interview; do you have anything else you would like to add in respect of what we have discussed today?

Interview with EIPO Office

1. How do you the legality of Music Mashup?
2. Do you ever face the claims related to Music mashups?
3. As to implement and/or follow up the implementation of intellectual property

Finally, That is the end of the semi-structured interview; do you have anything else you would like to add in respect of what we have discussed today?

Interview with Music Masher

1. Tell me about yourself as Music Masher... What do you do?

2. How long have you been making music Mashup? What are your objectives as a music mashup maker?
3. Do you try to get permission from the music copyright holder?

Finally, That is the end of the semi-structured interview; do you have anything else you would like to add in respect of what we have discussed today?