

COPYRIGHT LAW, MUSIC, AND CREATIVITY

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ABSTRACT

Copyright Law, Music, and Creativity

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Copyright law is struggling to properly and accurately judge modern music. While technological advances in the last 50-years have greatly contributed to the difficulty of the law's task, the real culprit behind the issue is an outdated conceptualization of the creative process and creativity as a whole. After examining the historical and cultural context surrounding the formation of copyright law, it becomes clear that the intra-psychic model of creativity was and is the model being used. The use of this model has led to an over emphasis on author-centric and formalistic approaches when dealing with infringement cases in music, and both artists and society are suffering because of this. However, experts in psychology have left behind the intra-psychic model in favor of the much more comprehensive systems model. The systems model incorporates concepts like cultural and social influences on the creative mind in order to present a more accurate view of the creative process. The systems model, or some other more accurate conception of creativity, could help the law establish methods for dealing with infringement that support copyright law's most important goal; protecting innovation in the arts.

DEDICATION

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INTRODUCTION

Legal application of copyright law is currently failing to accurately evaluate musical production in modern times. We have moved into the age of digital sound production which has given artists new tools of which Mozart and Bach never dreamed. The mal-adjustment of the law to modern day musical production only makes sense if you take into consideration that the first laws on the subject were put in place to be applied to literature not technologically advanced musical production methods like looping (Arewa, 2006, 1833). Furthermore, cultural hierarchies surrounding the art form and false narratives that romanticized authorship in the 18th and 19th centuries have stunted the growth necessary in order for the law to deal with these matters precisely. While legal scholars like Olufunmilayo B. Arewa have done a great deal to bring these issues to light, I believe that the underlying cause of copyright law's shortcomings in the modern music industry is an obvious yet very complex culprit. My belief is that outdated conceptualizations of creativity, originality, and the creative processes have become misshapen leading to the blunders recently seen in copyright law when dealing with infringement cases. My solution, and the subject of this thesis, is that by taking a deeper look into the processes of creativity from a psychological perspective, we will be able to supplement the law by introducing a more accurate depiction of creativity and the creative process. Thus, greatly enhancing the proficiency of the law when dealing with these matters.

1. CONTEXT OF COPYRIGHT IN MUSIC

1.1 Early History: The Beginning of Copyright and the Sacralization of Composers

Copyright law was originally created to protect literary author's rights to their works (Arewa, 2011, 1833). It was then adapted to include music during the era when composers of classical music began producing their works through publishers in the form of written scores. This transition of copyright law to include musical works was perhaps built upon a false foundation or rather, a mismatched one. "The difference between music and literature arises in part from the non-representational nature of musical notes and the fact that such notes do not involve everyday world phenomena. Consequently, musical compositions are often more abstract than literary works and are based on principles often" only known by musical experts (Arewa, 2006, 578). The abstract nature of music appears to be inexact in comparison to that of literary works "as a result of the limited number of tones in the Western musical scale" (Arewa, 2006, 603). It is almost impossible to exaggerate the malleability of written word, especially when compared to the limitations presented by a twelve-note scale. The use of a particular set of symbols that retain meaning of some sort is a necessary requirement of every domain. For example, the domain of literature uses written words and other grammatical symbols to express meaning, whereas the domain of music uses musical notes. The difference between these two sets of symbolic systems cannot be understated. As stated earlier by Dr. Arewa, literature is much less ambiguous in meaning than a musical composition. While I believe the inexact fit of these symbolic systems may greatly have affected the law in its infancy, this alone is obviously not enough to explain the recent shortcomings of copyright law in music. In retrospect the need for an entirely new legal framework was perhaps not the most efficient way of dealing with the

novelty of the situation due to this being the very beginning of written music. Nevertheless, this apparent conflict is still noteworthy when trying to grasp the full context surrounding the application of copyright law to music. Additionally, as you will see in this paper, this serves as yet another example of the law's inability to properly deal with cultures that place significant value on oral tradition over that of written works.

As the demand for classical music exploded upwards in Europe, the widespread desire to perform and listen to the works of Mozart, Bach, and their renown colleagues also grew. To meet the demand, musicians required access to the musical scores of these popular artists, however, the ability to mass print works was not yet accessible to the common man and so the need for producers in order to publish these much-needed printed scores also rose rapidly. This quickly resulted in an uneven power distribution between producers of musical works and composers of said works, as they had no choice but to utilize this remarkably confined service. Due to the necessity of publishers in the production of printed musical scores, many of the earliest cases of copyright law in the music industry were disputes between producers and the composers whose works they were printing and selling (Arewa, 2006, 589). While the popularity and desire for their compositions grew, these artists fought for the right to their works. Yet, as they began to age and pass away, new artists reaped the benefits of their predecessors' hard-fought battles as the law shifted into a form of author-centric protection. Soon after many of these same composers began to depart from this life, an obsession with their works began to form in society which seemed to exponentially increased the longer they were gone.

As new composers arose, they were met with a culture that was very much living in the past - refusing to accept new compositions in lieu of the classics. Thus, marking the beginning of what is now known as museum tradition: the strict adherence to the musical scores of beloved

composers' works during performances as a form of enforced reverence for their musical genius. (Arewa, 2011, 1839). This led to a markable decrease in the production and performance of new works. In fact, by the 1860s less than half of all concerts contained performances of living composers' works (Arewa, 2006, 596). This strict adherence to past works in musical culture caused composers to forget why music was created in the first place: not only to be a completely original work, but to be enjoyed by society. The result was that "young composers in the post-museum era thus came to focus on developing distinctive personal styles in order to create works that could merit a showing in the music museum... ignoring the goal of such composers to create music with current value for an audience" (Arewa, 2006, 599). Musical historians now refer to the societal praise and obsession of adored composers' works as "sacralization [in which] actual production methods [are replaced] with an idealized view of sacred works reflecting the operation of individual composers, some of whom demonstrate genius but most of whom operate autonomously and individually in the creation of musical works" (Arewa, 2006, 591). As musical interests remained focused on composers of the past, ideology about the creation of music began to become romanticized, and this romanticization has influenced conceptions of creativity in music to this day.

Romantic authorship produced a depiction of the creative process of original works (classical compositions) that heavily discouraged any form of borrowing or inexact imitation, thus, inhibiting composers from innovating works of their own (Arewa, 2006, 640). Due to this view, musicians and the broader horizon of the domain of music were severely confined to either exact imitations or works that stressed originality over quality. However, as will soon be revealed, "such views of musical authorship fail to recognize that the use of existing works for new creations can be an important source of innovation" (Arewa, 2006, 585). Not only was

inexact imitation (borrowing) of renowned works seen as theft committed by new composers, in addition the supposed greats were held in such high esteem that it was widely believed that they never borrowed in their creative methods. While the great composers like Bach, Mozart, and Beethoven were in their own right, geniuses, the idea that they didn't borrow, imitate, or improvise during the creation of their compositions is simply untrue. This can be generalized for any form of creativity, as all creators must first begin to form a concept based on the availability of the domain. The "views of musical composition as individualistic and autonomous fail to take adequate note of the centrality of borrowing in the creative processes of many composers throughout music history and as an aesthetic underpinning to the compositional practice of individual composers" (Arewa, 2006, 600). The overt adoration of classical musicians led to the belief that any form of borrowing, specifically in relation to the creation of original works, was unfair use and as such should be penalized by the law (Arewa, 2006, 608). This penalization further hindered artists' abilities to create music of which to be admired, and as this new perception of original creation came to fruition, the law was molded to fit its form.

The implementation of copyright law into the world of musical composition proved to be the beginning of a centuries long battle between what would become the two main focuses of copyright law: protecting the author's rights, and encouraging innovation in the realm of the arts and sciences (Arewa, 2011, 1830). In my opinion, the author centricity of the law- stemming from the culturally-backed and outdated conceptualization of creativity- has risen to a point that has greatly reduced access to a conducive environment for the creation of innovative musical works.

1.2 Old Conceptions of Creativity Clash with Modern Musical Production

As time went on and new genres of music like ragtime, jazz, rock, reggae, and most recently hip hop came to the forefront of musical culture, the old romanticized ideas of the creative process behind authorship caused a dichotomy. People who falsely believed that artists like Bach never borrowed during their compositions looked down on the new and very improvisational styles of music often championed by the poorer segments of society. This is in part due to the fact that the ways in which music is produced and preformed had drastically changed. In addition, the cultural heritage of classical music that had influenced copyright law in its infancy was dramatically different from the culture of music produced in the 20th century.

The prevailing ideology concerning the production of music, namely that borrowing was certainly not something that authors of original works partook in, was carried over into the 20th century. Classical museum tradition caused “many contemporary conceptions about how musical production occurs [and] are at least implicitly based on a model of individual and autonomous production that is also at the core of post-museum perceptions about how music production should occur” (Arewa, 2006, 599). The production of genres like hip hop is often in direct contrast to these very notions of creativity.

Production practices involved in making hip hop music like sampling and looping stand in direct defiance of classical ideas of authorship. Sampling is when sound is taken from an already recorded piece of music and then entered into a new piece of music. The sample is then repeated a number of times to create a portion of the new song, also known as looping. It is important to note that these practices originate from the earliest days of hip hop, when live performances were made by taking vinyl records and laying percussion beats over the existing music with the addition of rhyming vocals (Arewa, 2006, 561). In modern day hip hop, this

tradition is still common, although digital sound recordings have long since replaced vinyl records. In addition to this new digital era allowing for new ways of creating music, a need has also arisen for experts to collaborate with artists in musical production. Sound technicians, sound engineers, producers, and studio musicians only scratch the surface of those now available to be utilized in the production of one single song. Because there is a need for these experts, music is now much more collaborative. From an author-centric perspective, this collaboration alone could be seen as contradictory to classical conceptions of originality and creativity.

Court cases over the last 40 years are a direct reflection of the struggle between the romanticized views on authorship and the relatively new production methods of modern musical genres such as hip hop. This will be looked at more in depth in the coming sections of this paper. For the most part, these court cases have reinforced the notion that the best way to protect innovation in arts like music, is to protect the rights of original authors. However, the direct application of this ideology is taking away from the very thing it is trying to protect, innovation in music. The idea is not by any means outlandish. Authors' incentive to create new art must be protected. However, we are now seeing that the over protection of authors rights is stifling the production of new works. This over compensation has "serious implications for music forms such as hip hop, which borrow from existing works, and may limit the ability of creators of such forms to receive copyright protection, as their works might be deemed unauthorized derivative works" (Arewa, 2006, 573). A derivative work is a work that is at least partially comprised of other pieces of art. Copyright law has not been very accepting of hip hop music because many of the genre's works are in fact derivative to some extent. The language used in legal literature makes it very clear that modern day musical production practices like sampling are viewed in a very criminal sense. Practices like "defining sampling as theft or appropriation immediately

indicates... that something illegal, illegitimate, or at best, inappropriate has occurred” (Arewa, 2006, 581). The discrimination against these practices may find its origin in the cultural hierarchies found in society’s conceptions about music (Arewa, 2006, 584).

Hip hop did not share the same highbrow culture that classical music had, and continues to have, especially not in the earliest days of the musical genre. Hip hop was, for a while, on the fringes of society. Much like its predecessors’ jazz, blues, rock, and reggae, hip hop was largely a part of and influenced by Black culture in the United States. An argument can be made concerning the tendency of the law to overlook oral traditions like the rhyming and emphasis on lyrics full of social commentary that is popular in culturally influenced works like hip hop. This potential mismatch is only further exemplified when you consider copyright law’s literary origins. However, this is only part of the much bigger problem that started with the romanticization of authors centuries before hip hop’s introduction into the musical domain.

2. THE SOLUTION: THE SYSTEMS MODEL OF CREATIVITY

2.1 The Need to Redefine Creativity

The cultural/societal forces discussed in the previous chapter such as sacralization, romanization, and museum tradition, are all reflective of a common and outdated, yet widely accepted, model of creativity known as the intra-psychic model. Additionally, this model of creativity perhaps underlies the author-centricity of the law. For the majority of the time that copyright law has been applied to music, the standard view of creativity has been intra-psychic. The intra-psychic model is a belief that creativity is a consequence of the superiority of the creative individual's innate potential without taking other forces that effect the creative process into account. For example, the belief that Bach and Mozart were indeed geniuses is held by perhaps anyone that has had the pleasure of listening to any one of their works. As discussed earlier, the widely believed reason that these geniuses were able to produce such amazing pieces of art is the supposed fact that they were in reality superbly-gifted creatively. Whether indirectly or directly known at the time, this is synonymous with the intra-psychic model of creativity. This view is the one that seems to have influenced the conception of creativity in copyright law in its infancy as we have seen from our look into the research of the historical-context surrounding this period.

The law in its current form is still clinging to the intra-psychic model as represented through the ongoing author-centricity of the law. However, as we will explore more in depth, modern day views of psychology have moved far passed this conceptualization of creativity and I believe the law needs to catch up. As we have seen, the current model of copyright law is struggling to properly address a new age in the production of music. The epicenter of the issue

stems from this outdated view of creativity. The hard truth is that the intra-psychic model disregards historical context, cultural influences, and society's impact on the creator. Ultimately, this view makes creativity out to be something that it is not and this alone could be enough to cause the maladaptively of copyright law within the last century.

To correct this problem, let us find a view of creativity that does not just look at the tip of the creative iceberg as the intra-psychic model is guilty of doing. A more comprehensive view, that does not focus solely on the innate ability of the creator, but rather grasps the full scope of the creative process would greatly benefit the law. Surely, if this is done, we will see how much better off the law can be.

Dr. Mihaly Csikszentmihalyi is a revolutionary mind on the subject of creativity. His work in the field is world renowned and far more encompassing than previous views of creativity. He has studied psychology for well over 40 years and due to this fact as well as the vast recognition by his colleagues in the field of psychology, I believe he is a more than adequate expert for us to reference in our search for a more accurate view of creativity in the process of creating music. The intra-psychic model was, for a long time, the most widely used model to represent the creative process. Therefore, much of Dr. Csikszentmihalyi's work has centered around pointing out the issues with the intra-psychic model regarding the limited view of creativity that it supports. His solution is incorporating the very personal aspects of the intra-psychic model with the equally important role played by society and culture in order to create a more complete structure referred to as the systems model.

2.2 The Systems Model

“The systems model makes it possible to see the contributions of the person to the creative process in a theoretically coherent way. In the first place, it brings to attention the fact

that before a person can introduce a creative variation, he or she must have access to a domain, and must want to learn to perform according to its rules... it also suggests a number of additional factors that are usually ignored; for instance, that cognitive and motivational factors interact with the state of the domain and the field” (Csikszentmihalyi, 2014, 115). It is simply a fact that human beings do not create in a vacuum. This is to mean that when a creative mind is working through the creative process there are external forces that affect the process at every step. It is almost impossible to overstate the affects that society, culture, and the general context of which a creative work coincides, influences the creator and the created work. As Dr. Mihaly Csikszentmihalyi states, “the location of genius is not in any particular individual’s mind, but in a virtual space, or system, where an individual interacts with a cultural domain and with a social field. It is only in the relation of these three separate entities that creativity, or the work of genius, manifests itself” (Csikszentmihalyi, 2014, 100). To say that creative genius exists only in one’s own right, or is produced by cognitive function alone, ultimately leads us to the conclusion that nothing else outside of the artist’s creative ability is responsible for their creativity. As this theory applies to the origin and application of copyright law, the historical context is just one factor that is often overlooked and yet, is of the upmost importance when discussing creativity.

The law, and perhaps most individuals today, believe that a truly creative work can be viewed outside of a historical context. Not to suggest that the law and society are intentionally neglecting to acknowledge this fact, rather that the role of historical context tends to get overlooked when one focuses only on innate ability. It seems that humans have a tendency to romanticize the creative process and people deemed to have creative genius, as we have seen with Bach and Mozart. We want to believe that geniuses are like superheroes, born with innate superiority to the average person, and because of their genius they are able to innovate and

produce extraordinary things. The important thing to note when observing this common phenomenon is that this view ultimately rules out other influential factors. This view of creativity is fundamentally incorrect. A broader look at creativity reveals that “it is impossible to tell whether or not an object or idea is creative by simply looking at it. Without a historical context, one lacks the reference points necessary to determine if the product is in fact an adaptive innovation” (Csikszentmihalyi, 2014, 48). Without the historical context, the true value of a work cannot be assessed. Furthermore, how can the creative originality of a work be known if we are to disregard the particular form of the domain during the new work’s incorporation? For example, “two paintings may be of equal technical skill, of the same aesthetic value, but they cannot be considered to be equal in creativity... work is creative because [the artist] introduced some variations in the domain of painting at a certain point in history, when those variations were novel, and when they were instrumental in revising and enlarging the symbolic domain of the visual arts. The very same variations a few years later were no longer creative, because then they simply reproduced existing forms” (Csikszentmihalyi, 2014, 48). The same can be said for innovation in any domain, including music. Without looking at the historical context, we are left trying to determine a work’s creative significance without any foundation. Regrettably, this is the view currently presented by copyright law. As Dr. Arewa states, “works that are presumed eternal are increasingly viewed as being largely if not entirely removed from any particular historical context or performance” (Arewa, 2006, 600). This is absolutely not without consequence. As we have discovered, the impact on creativity by the historical context within and outside of copyright law greatly affected and still affects the way music is judged to be creative or original by the law. Moreover, the historical context is only the beginning of a complex apparatus that integrates social and cultural trends that have remarkable impacts on

creativity both within the individual and within any particular domain. Thankfully, Dr. Csikszentmihalyi has incorporated all of this into the systems model.

Within the systems model, Dr. Csikszentmihalyi frequently references two exterior forces that shape the environment within which a creative individual can have the opportunity, interaction, and availability of resources in order to innovate within the domain. These two exterior forces as well as the creative potential of the individual make up the trichotomy of the systems model. These can be summarized as “a set of social institutions, or field, that selects from the variations produced by individuals those that are worth preserving; a stable cultural domain that will preserve and transmit the selected new ideas or forms to the following generations; and finally, the individual, who brings about some change in the domain, a change that the field, will consider to be creative” (Csikszentmihalyi, 2014, 47). When he says ‘domain’ and ‘field’ here, Dr. Csikszentmihalyi is referring to equally important parts of any realm that involves creativity. A domain is a “culturally structured pattern of opportunities for action, requiring a distinctive set of sensorimotor and cognitive skills ... a symbolic system such as music, mathematics, or athletics” and the field is “the social organization of a domain” (Csikszentmihalyi, 2014, 41). For example, the domain of music is the symbolic system of music that a musician accesses in order to make music. The field of music is made up of the experts in the musical domain who serve as the judges of whether something is creative or not. Creative “talent cannot be observed except against the background of well-specified cultural expectations. Hence, it cannot be a personal trait or attribute but rather is a relationship between culturally defined opportunities for action and personal skills or capacities to act” (Csikszentmihalyi, 2014, 28). Notice that both domain and field are socially and culturally founded structures and in fact, “culture shapes even the most universal, the most basic, conceptual domains” (Csikszentmihalyi,

2014, 32). So how do the domain, field, and individual interact within the creative process? As I discussed earlier, the main contention held by the systems model is that it simply is not enough to judge creativity as a purely individual process. This is due to the fact that the domain and field both involve a number of other people whom any creator necessarily interacts with when they create. However, the influence of the domain and field does not begin when a person accesses the domain and begins the creative process. Rather, the influence begins when the individual enters the culture/society.

Dr. Csikszentmihalyi believes that societies are ultimately responsible for the creation and longevity of domains. This seems obvious, as a domain is only existent so long as there are people to pass along the symbolic information. However, another less-obvious implication of this theory is the extent to which society influences individuals through domains. Potentially creative individuals begin to interact with domains as soon as they develop the faculties to do so. The very first song a person hears begins a continuous cycle of encoding that will influence them throughout their lifetime. This is only compounded over time, arguably even more so for those modern-day creators who desire to entire the domain of music as a result of music's ease of access and centrality in culture/society. As these individuals mature and grow, their interaction with other people and sociocultural structures is greatly increased. In most modernized countries, children enter into schools and are taught about different domains. Society dictates which of the possible domains are focused on in the education system. Gifted students in any particular domain are often recognized early on in life. While it may seem- and has been believed for a long time- that particularly gifted individuals develop in this system and then go on to enter into a domain based on personal desire or affinity toward a particular field, even the individual's choice is in some part dictated by society.

Due to the fact that domains are a social construct, it can be observed that societal needs heavily influence how attractive a particular domain appears to a potential creator. This can be exemplified in the way demand shifts from one domain to another over time. When societal need shifts from one domain to another, prodigies who “would have been thought gifted no longer stand out, and others who would not have been noticed now appear to have talent” (Csikszentmihalyi, 2014, 31). This process is driven by societal need for innovation in specific domains. For example, the likes of DaVinci and Michelangelo would not have affected the domain of art the way they did had it not been for society’s desire for gifted individuals in the realms of arts and sciences during the renaissance, the availability of funding for these individuals, and the promise of the artists’ works being recognized. Ultimately society creates the need for creative people in any given domain. This affect is compounded by the fact that the criteria that defines creativity changes within the same domain over time. In fact, “the cultural expectations that make the expression of talent possible differ not only from one domain to another, as between poetry and physics, but also, within the same one over time” (Csikszentmihalyi, 2014, 30). Within the span of one person’s life time, a particular domain could have a large shift brought about by innovation, societal demand, or any number of influential factors. For example, a pianist prodigy at age five could be seen as a very promising creator later in their life within the domain of music. Now let us say by the time the child reaches early adulthood, society no longer desires to hear piano in music, but now has a need for prodigies in the domain of nuclear physics. This represents a shift from one domain to another as society’s needs change, and ultimately, this would greatly reduce the promise of our young piano prodigy. Furthermore, if it were the case that by the time the child reaches early adulthood - classical music was nearly extinct and there was an increase in demand for electronic dubstep -

this would also greatly affect the ability of this person to innovate within the same domain of music. This process can be seen within a creator's lifetime with or without a shift in domain. "Talent cannot be a stable trait because individual capacity for action changes over the life-span, and cultural demands for performance change both over the life-span and over time within each domain of performance" (Csikszentmihalyi, 2014, 29). Society's impact in regards to the interaction between a domain and an individual cannot be ignored as made evident by the above conjecture. An intra-psychic model would not even begin to scratch the surface of this profoundly relevant relationship within the creative realm. In addition, because the law has seemingly adopted the intra-psychic model, it can be observed that this process is also overlooked within the domain of copyright law. Fortunately, there is common ground between the intra-psychic and systems models of creativity from which to build from. Something that both intra-psychic and systems model agree on are the four stages of the creative process, although as we will see, one of the systems is much more comprehensive.

The four stages of the creative process can be effectually called the stage model and are widely accepted within the field of psychology. "Stage models...have been widely used by psychologists as frameworks for analyzing creativity. These models have focused on psychological stages of the individual's creative process, without attempting to represent social influences" (Csikszentmihalyi, 2014, 77). Luckily, within the systems model, Dr. Csikszentmihalyi has incorporated the stage model also including society's role as well as the collaborative nature of creation. The four steps of the stage model are preparation, incubation, insight, and elaboration.

The first stage in the creative process according to the stage model is the preparation stage. This stage "requires concentrating attention on a problematic issue, a need, a desire, a

challenge, or a specific problem that requires solution—long enough to master and understand its parameters. Issues of motivation, cognition, and socialization all are involved”

(Csikszentmihalyi, 2014, 80). Cognition has been considered an innate ability of a creative person. This much is already covered in the intra-psychic model that copyright law currently appears to incorporate. However, the motivation and socialization aspects require a systems model perspective. The preparation stage falls under what I have already presented in the above paragraphs in regards to society’s impact on the domain. As was stated there, individuals are developed and interact within a domain that society heavily influences. Society’s need within a particular domain is what influences individual motivation within the creative process. “The attraction of a domain depends on several variables: its centrality in the culture, the promise of new discoveries and opportunities they present, and the intrinsic rewards that working in the domain gives” (Csikszentmihalyi, 2014, 108). All of these are socially dependent factors that fluctuate over time within any particular domain. Because of music’s centrality in culture and the sheer breadth of both the field and domain, there is a substantial amount of motivation to attract new innovators to the domain. However, because of the author-centric nature of copyright law, it can be argued that the harsh punishments for borrowing negatively impact the intrinsic rewards, both monetarily and with regards to status.

The next stage in the creative process is known as incubation, “during which the subconscious repeatedly attempts new combinations of mental elements until one becomes stable and coherent enough to emerge into consciousness” (Csikszentmihalyi, 2014, 75). During this stage, we also see society and culture heavily impacts the creative individual. Due to the fact that the individual creator resides within the domain for some time during the preparation stage, society’s influence becomes a part of individual subconscious in the form of the assumptions and

rules of the domain. It is the case that, “given the importance of unconscious work in reaching creative insights, a key component of the process must be the filtering mechanism that determines which information will be passed from conscious awareness to the subconscious. The social influences of the domain and the field appear to act as the primary controlling mechanisms of the creative individual’s subconscious” (Csikszentmihalyi, 2014, 81). This has particular relevance to cases in copyright law in which the ruling of subconscious infringement is applied. In these cases, it is determined that, although unintentionally, an artist infringed upon an original work. Theoretically, society’s deep influence on a creative mind by acting as the filtering mechanism during the incubation stage could help to explain this phenomenon. I acknowledge that this is not a complete remedy for this peculiar situation, however, it is still very relevant and perhaps a starting point for copyright law reformation.

The third stage of the creative process, insight, “occurs when the subconscious combines or selects an idea which... emerges into consciousness, resulting in an “Aha!” experience” (Csikszentmihalyi, 2014, 76). While Dr. Csikszentmihalyi has already shown that the process leading up to insight is deeply social in nature, perhaps the most social aspect up to this point is insight. It has been said that insight will not occur in “the absence of interaction with other individuals who are experts in the domain or in potentially relevant other domains. At every stage of the process, the stimulation and feedback of peers is necessary to select and evaluate potential insights” (Csikszentmihalyi, 2014, 96). As it relates specifically to the creation of musical works in modern time, the ‘aha’ moments can occur in various stages of the creative process, all of which require collaboration and feedback from peers. It is clear at this point that the negative outlook on collaboration and borrowing in copyright law could strongly inhibit the number of potential insights that reach the fourth step in the creative process and, thus, net

innovation in the domain potentially suffers tremendously. This affect is only strengthened when one contemplates the highly collaborative nature of modern musical production. For the most part, the artist who will be listed as the song's author/writer will not be working autonomously on the work. Yet the assumption of the law on this matter is that musical originality only exists if the artist has indeed created the work by themselves, without influence, assistance, or inspiration from others. This false presumption is a direct consequence of the unnecessary extent of author-centricity in the law and the impact of intra-psychic model.

After the insight stage of the creative process, “there must follow a phase of elaboration during which the novel idea or product is polished and prepared for public scrutiny” (Csikszentmihalyi, 2014, 120). During the fourth and final elaboration stage- insight is transformed into the desired product. This does not occur innately, but must be collaborated upon as “the ensuing elaboration of the insight is palpably social, as individuals develop their artistic or mechanical creation or communicate verbally with colleagues in an attempt to transfer their insight into an exogenous, interpsychic social object” (Csikszentmihalyi, 2014, 84). Before the finished work is published it will be evaluated by the creator's peers in order to help determine the general reaction that can be expected in the broader public arena. After the creation of a musical work, the work is then published and enters into the public eye (ear). This work is then judged by the field, which is made up of experts within the domain of music in order to determine the worth of the innovation, the originality, and in many cases, perceived value, of the particular piece of art. The stage model dictates that “in order to be a viable creative contribution a person must not only be able to produce a novelty in the domain, but must also be able to present the novelty in such a way that the field will accept it as an improvement over the status quo, and thus worth including in the canon of the domain” (Csikszentmihalyi , 2014, 120).

Essentially, this relates to the function of the field within any domain. However, what has not to my knowledge been previously discussed, is that within the realm of copyright law, the law operates as the final mechanism in this elaboration stage. The field of experts within the domain of music function as the initial filter, representing the domain itself as they appraise works of music. However, a much more powerful filter is then applied if an artist/owner of a formally published work believes that infringement has occurred. These individuals then can seek justification through the law. If the law rules that infringement has indeed occurred, the author of the new work could potentially lose some or all rights to the new work like monetary rights and song-writing credit as well as suffering a damaged reputation. Yet, the legal process is also social in nature as often there are judges, juries, legal representatives, and even experts from the musical field that determine whether the new work is original. The fact that this process operates as the final filter of the field and also wields the substantial power of the law necessitates that we ensure the process is operating under accurate assumptions about creativity and the creative process. It is my belief that in order to accomplish a more accurate view of creativity we should incorporate the systems model into the current legal system.

3. SYSTEMS MODEL APPLIED TO COPYRIGHT CASES

3.1 Copyright Infringement Cases and the Systems Model

In order to see how exactly the systems model could benefit copyright law, I will review several infringement cases and demonstrate how the law could have affectively been supported through more accurate psychological depictions of creativity. These cases were selected to demonstrate how the systems model perspective could aid the law when dealing with the concept of creativity in infringement cases.

3.2 Fantasy Records, Inc v John Fogerty (1985)

This case was brought forward by Fantasy Records, Inc in pursuit of an infringement ruling against John Fogerty for his song “The Old Man Down the Road”. The plaintiff’s argument was that “The Old Man Down the Road” infringed upon Credence Clearwater Revival’s “Run Through the Jungle”, which was also written by Fogerty and published 15-years prior. During the trial, Fogerty was able to successfully demonstrate that the two songs were indeed technically different (which is what is required in the current state of the law). While this case was accurately decided in favor of Fogerty, the artist most responsible for the creation of each work, the case could have greatly benefited from the systems model.

As discussed earlier, the very first copyright cases involving music were between musicians and publishers. This case very much represents the same struggle, which perhaps shows the stagnation the law has suffered in this area. The systems model shows us that the domain of music is ultimately determined and sustained by society. Once published and accepted by the field, “Run Through the Jungle” became a part of the musical domain. 15-years later, “The Old Man Down the Road” was composed, published, and entered the domain. This is

significant because, as the systems model has shown, an author must internalize the domain in which they want to create in order to innovate. Once internalized, previous works in the domain should be assumed to directly impact the creation of new works. This is perhaps the single most-important concept that the law could benefit from while dealing with infringement. Fogerty obviously knew “Run Through the Jungle” prior to composing “The Old Man Down the Road”. Yet had the later been composed by another author, it is still likely that this new author would have been familiar with Fogerty’s previous work. Consciously and arguably even more so subconsciously, the previous works within any domain play an influential role in the creation of new works. This is simply a fact, which is why it should now be assumed to be the case instead of the current assumptions. The implications of this could be a massive leap forward for copyright law when dealing with musical works.

Fantasy Records, Inc v John Fogerty represents a unique situation in which an author is being sued for infringement of a work which they themselves created. However, as discussed earlier, the creative process within any domain must interact with what has come previously. Additionally, how much more is this the case for the creative process of an author who has already produced works recognized by the field as creative, and is now trying to produce more works with the same end-goal in mind; innovation. Fogerty indeed was able to show the songs were technically different. Had this not been the case, it is very likely that he would have been found guilty of infringement and lost some or all of the rights to “The Old Man Down the Road”. In this case the systems model could have been used even more impactfully.

Once an artist introduces a new work to a domain (assuming that the field has agreed that it is indeed worthy of entrance), that song is now a part of what future artists will need to internalize in order to create. This fact alone would have helped Fogerty’s argument against

infringement. The two songs, while similar in some aspects, have differences that represent 15-years of Fogerty interacting with the domain and field of music and innovating. His journey as a musician is depicted in the differences between the two pieces of music. This idea was captured by the ruling, yet it was not a part of the reasoning supporting it. The systems model could have assisted the law by establishing that innovators like Fogerty should have the right to use his own works in the creation of new ones. Once a song becomes a part of the domain, it should be easier to access for fair use by other artists. This will lead to more innovation which is essential for any domain to flourish. Once we realize that “Run Through the Jungle” is the culmination of Fogerty first internalizing previous works and then innovating within the musical domain, it becomes clear that he of course should have been allowed to perform the very same process with “The Old Man Down the Road”.

3.3 The Verve v. The Rolling Stones (1997)

“Bittersweet Symphony” is loved and enjoyed by people around the world despite being released more than 20-years ago. Sadly, this song is also well known as one of the most infamously unjust infringement rulings of all time. While composing “Bittersweet Symphony”, The Verve decided to seek out a license to use a portion of an orchestral composition of “The Last Time” by The Rolling Stones. Shortly after The Verve released “Bittersweet Symphony”, it quickly climbed to the top of the charts and would end up being the group’s biggest hit by a large margin. This was recognized by Allen Klein, The Stones’ manager throughout the 1960s-1970s, who then sought an infringement ruling against The Verve. His argument, was that The Verve violated the terms of their copyright license by using more than the agreed upon portion of the orchestral recording of “The Last Time”. The subsequent settlement resulted in The Verve signing away all royalties as well as the songwriting credits to “Bittersweet Symphony”. Shortly

after this, the composer responsible for the orchestral recording of “The Last Time”, Andrew Oldham, sued The Verve for mechanical royalties. Ultimately, The Verve lost all credit for their greatest success and contribution to the musical domain. This is reflected in the fact that at the 1999 Grammy Awards, the writer of the song, The Verve’s Richard Ashcroft, name was replaced with Keith Richards and Mick Jagger’s names as the songwriter of “Bittersweet Symphony”.

Despite the widely held belief that the outcome was unfair, it was the bitter reality for The Verve up until recently when Richards and Jagger both signed over the songwriting credits to Ashcroft in 2019. Nevertheless, the infringement found in this case should never have been entertained. It can be observed quite easily that “Bittersweet Symphony” and “The Last Time” have very few similarities. “Bittersweet Symphony” was an innovative contribution to the domain of music that garnered worldwide praise. Moreover, what we see when looking into this case is another example of the author-centricity of the law causing an irresponsible and formalistic manner in which music is judged to be original. Had the parties responsible for the outcome not been so caught up in the specifics of the already purchased licensing agreement, they could have looked at the entire scope of the matter. As Dr. Csikszentmihalyi points out in his research, creativity is multidimensional in nature. However, the legal system is still operating with an assumption of creativity that is far too shallow.

To correct the wrong suffered by The Verve, in future infringement cases the systems-model of creativity should be used to effectively correct the misunderstandings about the nature of creativity presented by the formalistic, author-centric, and intra-psychic views that are presently seen. One aspect of the systems model is the concept that musical composition, or any form of creativity, is the culmination of personal and exterior forces converging into an insight that leads to a new/innovative work. To more easily conceptualize this, a song - and the

songwriting process - should be viewed in the same manner that genetically modified plants are. When scientist alter a plants genome, by adding or removing genes, the resulting plant is considered a new organism. No one seeks infringement cases against these scientists for performing this act, even though the process often heavily involves borrowing genes from other crops. If we want to see more success and innovation within the domain of music, musical works should be judged in the same manner as these GMO organisms. I understand that this may sound far-fetched to some, but I would argue that this ideology is already being embodied within the music industry. Companies like Pandora have software that operates in very much the same way when dissecting songs. The algorithm uses user inputs (thumbs up or down) to help it decipher the user's particular taste. The individual aspects of a song are identified in this way and it has resulted in an innovative and desired way of listening to music. Ultimately, the algorithm that Pandora utilizes represents a much richer view of musical works - as complex assortments of many musical facets. Pandora uses an assortment of up to 450 musical attributes to decode any one song. I would argue that this perspective is one that is encompassed by the systems-model and even expounded upon by the model's representation of social and cultural forces constantly acting on the musical composer's mind during the creative process. Only after this is done, may we fully begin to understand the intricacy of any one song and we must begin to consider these aspects in order to more accurately judge musical works. Had the court done this in *The Verve v. The Rolling Stones*, I am sure a more just outcome could have been reached.

3.4 Bright Tunes Music Corp v. Harrisongs Music, Ltd. (1971)

In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.* the court ruled in favor of the plaintiff on the grounds that "My Sweet Lord" by George Harrison was subconsciously plagiarized from "He's So Fine" by The Chiffons. The supporting evidence was given as

follows; there exists in both songs two motifs that are repeated a number of times and also the fact that “He’s So Fine” was at the top of the charts at the same time that Harrison (The Beatles) was. While the evidence supporting the infringement ruling is shaky, due to the commonality of “very short basic musical phrase” used and the extreme overgeneralization that the “two songs are virtually identical” the real issue with the court’s ruling in this matter has to do with a misconception about creativity (Bright Tunes Music Corp. v. Harrisongs Music, 1976). As I have already covered in my research of psychological systems of creativity, in order to innovate, a creator must necessarily internalize the domain. In this case, “He’s So Fine” was indeed a part of the domain that Harrison internalized in order to create “My Sweet Lord”. The court’s ruling on this case is representative of an all-too-common misstep of the law due to a flawed understanding of the creative process. To say that someone subconsciously infringed upon a particular work in any domain, is to say that internalizing the domain is illegal and incorrect. Yet, we have shown that this very process is necessary through modern day psychology. It is the case that copyright law in dire need of restructuring or altogether ridding itself of subconscious infringement.

In this particular case, infringement was ruled in part due to the use of a common motif seen in both songs, however, I’d argue that in other domains, the use of a common motif does little to raise an eyebrow, much less bring on an infringement ruling. For example, often in literature and film, the same plot is recycled. Take into consideration the hero’s journey- the hero is called to action, met with adversity, and is able to overcome it through a number of ways. This motif has been used hundreds if not thousands of times in successful movies and books, however it continues to be reused without so much as a slap on the wrist. As we discussed in a previous case, the attributes that make up a song are in actuality far vaster than what is reflected in the

current state of the law. In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, only the motifs and harmony were discussed (Arewa, 2007, 531). This method is far too shallow and does not come close to fully grasping the hundreds of musical attributes that make up any one song.

In addition, modern day musical production has become highly collaborative in nature due to the need for expertise in a variety of facets in order to create, record, and publish a song. In the court's opinion, it is shown that the making of "My Sweet Lord" was very collaborative (*Bright Tunes Music Corp. v. Harrisongs Music*, 1976). In fact, a portion of the evidence used against Harrison could not be found to be directly tied to Harrison alone, with Harrison himself implicating that someone else could be responsible. Additionally, taking into account the numerous people required for modern day musical production, the amount of information from the domain that has been internalized by multiple subconscious minds far exceeds the amount present in any one mind. The very collaborative nature of this process was also discussed in Dr. Csikszentmihalyi's research on creativity and was found to be required in more than one stage of the creative process. In addition to the collaborative nature of the creative process, the intersections of creativity with cultural and societal forces are also left out of the court's analysis when a formalistic approach is taken. As Dr. Arewa states, "courts emphasis on melody demonstrates the limited cultural gaze of copyright with respect to musical works" (Arewa, 2007, 532). It is very irresponsible for the legal system to make use of such watered-down means of judging music. Sadly, artists like George Harrison carry the weight of this inadequate method. However, the potential loss in net innovation is something that all of society suffers.

How on earth are we to expect musicians to want to innovate within the domain of music if, due to slight similarities and mediocre evidence stating that they were aware of a previous/similar work, they could potentially lose all rights to their new work as well as suffer a

damaged reputation? Once one is aware of the need to internalize a domain in order to innovate, the ridiculousness of the subconscious infringement ruling is revealed, even more so, when the ruling involves the use of a “basic musical phrase” (Bright Tunes Music Corp. v. Harrisongs Music, 1976). I believe the systems model would be the most efficient remedy for this blunder.

3.5 Robin Thicke v. Marvin Gaye (2014)

In this case, Marvin Gaye’s inheritors were rewarded actual damages and half of all future royalties due to an infringement ruling against Robin Thicke and Pharrell William’s “Blurred Lines”. In the court’s opinion, it is stated that expert witnesses for both sides disagreed that the songs contained similar elements (Williams v. Gaye, 2018). In order to prove her point, the expert witness for the Gaye’s presented an edited version of Marvin Gaye’s “Got To Give It Up”, the song that was supposedly infringed upon. Additionally, it was taken into consideration that both Thicke and Williams were aware of and took inspiration from “Got To Give It Up” (Williams v. Gaye, 2018). The jury returned mixed verdicts that should have possibly led to more litigation.

For many reasons, the ruling of this case seems unfair. The fact that the expert witness for the Gaye’s was allowed to play edited versions of “Got To Give It Up” in an attempt to show similarity seems preposterous. Yet again, the court used a limited scope when trying to decipher the two songs and yet again the result was an infringement ruling. At this point it seems remarkably redundant to state this, but musical works are far more complex than a few musical attributes. Had the court been aware and considered the systems model of creativity, they could have seen that the similarities between the two songs could have been due to the fact that they exist within similar genres and are subject to the constraints society inadvertently places on the creative mind. Both Thicke and Williams admitted to being familiar with “Got To Give It Up”,

which only makes sense considering both of them are experts within the musical domain and even more so due to the similarity of the genres that all three men's songs typically belong within. Yet, this was not discussed by the court.

The systems-model has shown that during the creative process, the creator both consciously and subconsciously considers the domain in which they are creating. Due to the nature of musical genres, it is the case that many songs belonging to one genre will be much more similar than songs belonging to different genres. I'd argue that allowing an expert to show edited versions of any song with the intent of showing similarity between the edited song and another song belonging to a similar genre, will result in similarities being presented. This is the nature of comparing works within the same domain. If you seek out similarity between two works in the same domain, you will find it. This is yet another aspect of musical creativity in which the systems-model would greatly benefit the laws interpretation of musical works.

CONCLUSION

As I have demonstrated through the cases presented, modern-day musical production has far outpaced the laws put in place to govern it. This is in part due to forces like museum-tradition, sacralization of works, and romanization of the creative process all taking place during the law's infancy. Yet, underlying all of these forces is the intra-psychic model of creativity, that we have seen is noticeably inadequate. All of these external factors have led to the overly author-centric state of copyright law, which is causing grave misjudgments as these old-conceptions clash with new technology. If the law continues to utilize this incomplete conceptualization of creativity, there will be an enormous drop in the net innovation within the musical domain. It would be wildly irresponsible for the law to cause this, as innovation is one of the two primary objectives that copyright law is supposed to protect and encourage. In order to prevent the continuance of these blunders of the law, we must begin to search for more accurate conceptualizations of creativity. I believe Dr. Csikszentmihalyi's systems model is the most complete approach to understanding the creative process. The systems model takes into account societal and cultural influences that are grossly overlooked by the model in current use. In order to remedy the exaggerated and inaccurate views of creativity, and begin to move the law away from its current author-centric and formalistic state, the systems model, or some even more comprehensive model, should be incorporated into copyright law.

REFERENCES

Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F.Supp. 177 (1976)

Arewa, Olufunmilayo B. Creativity, Improvisation, and Risk: Copyright and Musical Innovation, 86 Notre Dame L. Rev. 1829 (2011). Available at:
<http://scholarship.law.nd.edu/ndlr/vol86/iss5/2>

Arewa, Olufunmilayo B. Freedom to Copy: Copyright, Creation and Context, 41 UC Davis L. Rev. 477 (2007) Available at SSRN: <https://ssrn.com/abstract=964054>

Arewa, Olufunmilayo B. From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C. L. Rev. 547 (2006). Available at:
<http://scholarship.law.unc.edu/nclr/vol84/iss2/5>

Csikszentmihalyi, Mihaly. (2014). Flow and the foundations of positive psychology: The collected works of Mihaly Csikszentmihalyi. 10.1007/978-94-017-9088-8.

Csikszentmihalyi, Mihaly. (2014). The Systems Model of Creativity: The collected works of Mihaly Csikszentmihalyi. 10.1007/978-94-017-9085-7.

Williams v. Gaye, 895 F.3d 1106 (2018)