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Fighting the (Copy) Right: Fair Use as a Compositional Tool in the United States

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Annotated Bibliography

In 1976, the United States Congress passed the Copyright Act of 1976, drastically changing how long materials were copyrighted after initial publication and/or their creator's death. The Copyright Term Extension Act of 1998 extended it even further if the material is considered to be owned by a corporation rather than a single "author." Quotation, a notable aspect of Western music since its inception, was greatly impacted by these rulings, as suddenly more material was protected by copyright than what had previously been. These acts, especially the section regarding what is exempt from copyright under Fair Use, have been brought up regularly in litigation surrounding music, although in very inconsistent manners. This paper aims to explore these inconsistencies, and propose a route for Fair Use to be used as a way to defend extensive quotation in contemporary classical music.

Burkholder, J. Peter. "Borrowing." *Grove Music Online*, 2013, Grove Music Online. <https://doi-org.du.idm.oclc.org/10.1093/gmo/9781561592630.article.52918>.

J. Peter Burkholder, considered to be one of the foremost experts in the field of borrowing and quotation in music, defines musical borrowing, very simply, as the use of earlier music in a new piece of music. This allows for a variety of subcategories, notably quotation, and different approaches to the idea of borrowing. Within a section on quotation in popular music, Burkholder references the reduction in sampling within rap music as a result of early 1990s court cases that required artists to get permission for samples. John Oswald's *Plunderphonics* is also

brought up in relation to this legal trouble, with the further addendum of its sampling directly being a commentary on ownership.

Burkholder, J. Peter. "Quotation." *Grove Music Online*, 2013, Grove Music Online. <https://doi-org.du.idm.oclc.org/10.1093/gmo/9781561592630.article.52854>.

Burkholder defines quotation as a subset of musical borrowing, specifically the use of a brief segment of one work within another, where it is also not the focus. Burkholder takes issue with the liberal way many scholars (probably myself included) use the phrase, suggesting the original needs to be either exactly or closely recreated, but not the main focus of the work, a limitation I find somewhat subjective. When discussing post-WWII music, Burkholder references quotation's use to highlight differences between the present and past, but similarly is concerned about misuse of the term.

Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

This case provides a court opinion on the use of the term "transformative" within Fair Use, and to what extent that can be claimed. The most important part of this case was the decision that transformative derivative works did not have to expressly comment on the works they were derived from, just that they had to be transformative enough for a court to consider them different. There does not seem to be a specific metric for how much one has to change for something to become truly transformative: five of the twenty-five photograph edits Prince was being sued over were not considered to be different enough from Cariou's originals.

Copyright Act of 1976, *US Code* 17 (2018), §§ 101 et seq.

The Copyright Act of 1976 is predictably the main United States doctrine regarding copyright. Most notable is §107, the limitations on exclusive rights according to Fair Use. The doctrine behind Fair Use is quite simple and quite flexible, something of a catchall, rather than a strict series of rules. Many of the purposes and elements are applicable to music, and certain writings and rulings have elaborated on those guidelines. This document is incredibly useful to this essay, as it is the main legal document the rest of the argument and most of the other sources will hinge on.

Ehrett, John S. "Fair Use and an Attribution-Oriented Approach to Music Sampling." *Yale Journal on Regulation* 33 (2016): 655.

John Ehrett comments on the underdeveloped nature of Fair Use law, and the diverse responses sampling has received in various circuit courts around the United States. Ehrett approaches this confusion with a proposal: to make sampling a choice between attribution or licensing, with the artist either citing the source in the metadata and material related to the music or avoiding that and getting a license from the original creator. This is an approach derived from academia, which Ehrett acknowledges is somewhat different from creative exercises, but he considers it to be still quite applicable. Ehrett's proposal stands as proof of interest in the legal field in reforming how musical borrowing is treated by the law, and how Fair Use could be applied in the future.

Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 742–43 (2017).

This is a similar case to *Cariou v. Prince*, but with music as the focus. Artist Drake sampled a Jimmy Smith song after getting permission to use the recording, but without getting permission for the composition itself from Smith's estate. The court found that the song was transformed enough, used a properly small sample, and that there was not real damage, as the plaintiff had only established a market for licensing the track as a response to the Drake album. This is useful as it brings the ideas of *Cariou v. Prince* into a musical setting, and provides context for what a court may find transformative enough within a musical context, in this instance the mixing of musical materials with the intent to create a somewhat different message.

Golan v. Holder, 565 U.S. 302, 327 (2012).

In this case, which went before the Supreme Court, the petitioners, Laurence Golan and other musicians, claimed the Uruguay Round Agreements Act overstepped congressional power as stated in the U.S. Constitution, therefore infringing on First Amendment Rights. The URAA made works that were formerly under the public domain no longer free to use, affecting what scores were freely accessible to orchestras and academics. The majority opinion, penned by Justice Ruth Bader Ginsberg, found the URAA was still within the bounds set by the Constitution, and therefore still valid. This is one of the few instances of classical music emerging in response to copyright, and tells a little about the court's opinion on acts of classical music that violate copyright.

Holm-Hudson, Kevin. "Quotation and Context: Sampling and John Oswald's Plunderphonics."

Leonardo Music Journal 7 (1997): 17-25.

This essay examines John Oswald's use of musical borrowing, which the composer calls Plunderphonics due to his explicit intent to use illegal materials, within several EP's of Oswald's. The author starts by examining timbre and rhythm, but is then drawn to the inherent extramusical ideas being confronted by Oswald, that of commentary on the music it borrow from. Oswald sits on an odd border between what academics generally consider to be part of the Western classical tradition and what is instead considered to be pop music, but this article examines it from a more classical perspective, giving it credence as an interesting case in musical borrowing and how it is impacted by the law.

Lee, Edward. "Fair Use Avoidance in Music Cases." *Boston College Law Review* 59 issue 6 (2018): 1873-1931.

This article is a thorough summary and exploration of Fair Use cases regarding music and how their results contribute to a larger trend in Fair Use cases, examining trends in success and failures in cases using Fair Use as a defense. In all the cases the author, Edward Lee, examined, only one defense case that used Fair Use as an argument lost. Surprisingly, within those that one, all used the parody aspect of Fair Use, other than *Estate of Smith v. Cash Money Records, Inc.* mentioned above. Lee provides several comments on these results, including advice on how courts may approach fair use in the future, which can be a very useful resource for examining the issue from the defendant's angle.

Metzer, David Joel. *Quotation and Cultural Meaning in Twentieth-Century Music*. New Perspectives in Music History and Criticism. Cambridge: Cambridge University Press, 2003.

David Metzger examines quotation through a lens very similar to that of J. Peter Burkholder. He frames musical borrowing, mostly quotation, as a tool intricately connected to the cultural context of the original music, and how its placement in the new work comments on or uses that context for an artistic goal. Most relevant is a chapter titled “Sampling and thievery,” which explores contemporary music, mostly within a more popular idiom, and how emphasizing the act of theft within musical quotation can serve as a type of anti-establishment message, an act directly aimed at the law and mass media. Metzger predictably brings up famous cases, although leans more in a direction we might view as closer to contemporary classical music, mentioning artists behind rap music, but going more in depth with music by Negativland, Scanner, and John Oswald.

Negativland. *Fair Use: The Story of the Letter U and the Numeral 2*. San Francisco: Seeland Records, 1995.

This book is incredibly unique; it is more of a collection of primary sources, curated and commented upon in a very cheeky yet artistic manner. The entire document follows the release of Negativland’s EP titled *U2*, and the massive copyright fight with Island Records (the band U2’s label at the time), radio host (and voice of Shaggy from *Scooby Doo*) Casey Kacem, and their own former label SST. It is useful not only as a collection of sources, but also metatextually as an examination of an idea brought up by John Oswald in *Plunderphonics*: sampling and the complex issues sampling creates as a material itself to be elevated into artistic statements.

Oswald, John. “Plunderphonics, or Audio Piracy as a Compositional Perogative.” Paper presented at the Wired Society Electro-Acoustic Conference, Toronto, January 1985.

Oswald's conference paper is something of a manifesto, exploring the roots of his idea of plunderphonics, musical borrowing that is explicitly illegal, and how it is something of a musical inevitability. Oswald briefly explores the legal side, but as a Canadian, those aspects are less directly related to our discussion than the rest. Instead, Oswald's explanation of how technology, musical trends, and culture are all leading towards the necessity of musical piracy serves as a strong base that his music explores.