

# IF IT IS BAROQUE, FIX IT: THE NEED FOR MORE CERTAINTY OF COPYRIGHT STATUS FOR CLASSICAL MUSIC WORKS PUBLISHED BETWEEN 1925 AND 1978<sup>\*1</sup>

## I. INTRODUCTION

Classical music is all around us. Although dismal concert attendance numbers suggest otherwise, classical music still has an important place in modern culture—from elevating emotions in film soundtracks to wooing consumers through television commercials.<sup>2</sup> Edvard Grieg’s *Peer Gynt* appeared in a Coca-Cola commercial aired during the Pyeongchang 2018 Olympics.<sup>3</sup> Advertising agencies have used Pyotr Ilyich Tchaikovsky’s famous *1812 Overture* to sell products ranging from breakfast cereal to a drug that treats overactive bladder.<sup>4</sup> Independence Day celebrations around the nation also frequently feature the piece.<sup>5</sup>

Nonclassical artists surreptitiously submerge classical works into popular music. The verse of Eric Carmen’s song “All by Myself,” also covered by Celine Dion,<sup>6</sup> originates in Sergei Rachmaninoff’s Piano Concerto no. 2 in C Minor.<sup>7</sup> Rapper Nas used Ludwig van Beethoven’s “Für Elise” throughout his song “I Can.”<sup>8</sup> Nas also used Frédéric Chopin’s Étude in C Minor, op. 10, no. 12 in his song “A Queens Story.”<sup>9</sup> Lady Gaga’s hit song “Alejandro” begins with Vittorio Monti’s *Czardas*,<sup>10</sup> which itself comes from a traditional Hungarian folk dance.<sup>11</sup> Ludacris’s song “Coming 2 America” cleverly and appropriately contains Antonín Dvořák’s Symphony no. 9 in E Minor, op.

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1. See *Baroque Music: A Beginner’s Guide*, CLASSIC FM, <http://www.classicfm.com/discover-music/periods-genres/baroque/baroque-music-beginners-guide/> [https://perma.cc/V268-MEGP] (last visited Feb. 1, 2020).

2. See, e.g., Joanne Kaufman, *Selling Products with a Swelling Score*, N.Y. TIMES (Mar. 25, 2018), <http://www.nytimes.com/2018/03/25/business/media/classical-music-advertising.html> [https://perma.cc/B3XK-39FR].

3. *Id.*

4. *Id.*

5. See, e.g., James Bennett, II, *Here’s Why the ‘1812 Overture’ Has Held onto Independence Day*, WQXR (July 3, 2017), <http://www.wqxr.org/story/heres-why-1812-overture-has-held-independence-day/> [https://perma.cc/4C2E-YLC4].

6. Leo Hickman, *Five Pop Songs with Classical Roots*, GUARDIAN (July 23, 2009, 7:05 PM EST), <http://www.theguardian.com/music/2009/jul/24/pop-classical-music> [https://perma.cc/K9R2-G7PX].

7. ERIC CARMEN, *All by Myself*, on ERIC CARMEN (Rhino Entm’t/Arista Records 1975).

8. NAS, *I Can*, on GOD’S SON (Columbia Records 2002) at 0:06; see also Hickman, *supra* note 6.

9. NAS, *A Queens Story*, on LIFE IS GOOD (Def Jam Recordings 2012) at 3:29–4:28.

10. LADY GAGA, *Alejandro*, on THE FAME MONSTER (Interscope Records 2009) at 0:00–0:33.

11. See Andrea Kapell Loewy, *Czardas/Italian Arias*, 41 FLUTIST Q. 59, 59 (2015).

95 (“From the New World”),<sup>12</sup> which was originally inspired by the Native American themes that Dvořák heard when he was the director of the National Conservatory of Music in New York.<sup>13</sup> “Coming 2 America” also plays with the famous *Dies irae* theme from Wolfgang Amadeus Mozart’s Requiem throughout.<sup>14</sup>

These examples illustrate that musical compositions seldom develop in a vacuum—composers often borrow and modify other musical works to shape their own. This issue most recently surfaced in 2018 in the Ninth Circuit case *Williams v. Gaye*.<sup>15</sup> The Ninth Circuit held that Robin Thicke and Pharrell Williams’s song “Blurred Lines” infringed Marvin Gaye’s copyright for “Got To Give It Up.”<sup>16</sup> However, the court reached its holding through procedural issues instead of substantively analyzing the music.<sup>17</sup>

The most frequently performed classical works come from the public domain.<sup>18</sup> Public domain works have no exclusive intellectual property ownership<sup>19</sup> and in general tend to be older.<sup>20</sup> Not surprisingly, all of the examples above—commercials and popular music—feature classical music in the public domain.<sup>21</sup>

The use of more recent works is an exception rather than the norm. A 2017 Lincoln Motor Company commercial played Dmitri Shostakovich’s Waltz no. 2 in the

12. LUDACRIS, *Coming 2 America*, on WORD OF MOUF (Def Jam Recordings 2001) at 1:47; David K. Israel, *6 Pop Songs That Rip Off Classical Music*, MENTAL FLOSS (Jan. 26, 2019), <http://www.mentalfloss.com/article/20706/6-pop-songs-rip-classical-music> [https://perma.cc/X6WV-SECV].

13. See John Clapham, *The Evolution of Dvorak’s Symphony “From the New World,”* 44 MUSICAL Q. 167, 167–69 (1958).

14. See, e.g., LUDACRIS, *supra* note 12, at 0:04–0:26.

15. 895 F.3d 1106 (9th Cir. 2018).

16. *Williams*, 895 F.3d at 1115–16.

17. *Id.* at 1138; Krista L. Cox, *If Mozart and Beethoven Were Alive Today, Would They Be Guilty of Copyright Infringement?*, ABOVE THE LAW (Nov. 15, 2018, 11:28 AM), <http://abovethelaw.com/2018/11/if-mozart-and-beethoven-were-alive-today-would-they-be-guilty-of-copyright-infringement/> [https://perma.cc/4QEH-DH4M].

18. See *infra* notes 216–217 for a discussion of the most widely performed orchestral and operatic works.

19. Richard Stim, *Welcome to the Public Domain*, STAN. U. LIBR., <http://fairuse.stanford.edu/overview/public-domain/welcome/> [https://perma.cc/JBQ8-2VGW] (last visited Feb. 1, 2020).

20. See *infra* note 125 and accompanying text.

21. All works published prior to 1925 are in the public domain as of January 1, 2020. E.g., PETER B. HIRTLE, CORNELL U. LIBR., COPYRIGHT TERM AND THE PUBLIC DOMAIN IN THE UNITED STATES 1–2 (2020), <http://copyright.cornell.edu/sites/default/files/2020-01/Copyright%20Term%20and%20the%20Public%20Domain%20in%20the%20United%20States%20January%202020.pdf> [https://perma.cc/FYY7-AVF7]. The composers discussed above—Grieg, Tchaikovsky, Beethoven, Chopin, Monti, Dvořák, and Mozart—all published their works before 1925. See, e.g., *Timeline of Composers*, CLASSICAL NET, <http://www.classical.net/music/composer/dates/comp9.php> [https://perma.cc/G559-38GY] (last visited Feb. 1, 2020); *Vittorio Monti*, BBC, <http://www.bbc.co.uk/music/artists/730b87ad-1774-43a0-9a65-5ec9314c0cf1> [https://perma.cc/PP9Y-UGH6] (last visited Feb. 1, 2020). Therefore, all of those works are in the public domain in the United States. See HIRTLE, *supra*, at 1–2. Sergei Rachmaninoff composed some of his works prior to 1925. See *Sergey Rachmaninoff*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/biography/Sergey-Rachmaninoff> [https://perma.cc/YBV8-TXV6] (last visited Feb. 1, 2020). He composed the Piano Concerto no. 2 in 1901. *Id.* It is currently in the public domain, but it was not in the public domain when Eric Carmen wrote the song in 1976. See Hickman, *supra* note 6.

background of a holiday ad.<sup>22</sup> Shostakovich composed his works more recently, so his works are still under copyright protection.<sup>23</sup> This rare use is just one example illustrating a broader pattern that older classical pieces are more prevalent than more modern ones.

There are many reasons why more modern classical works are not performed as frequently as older works. People may have an aural preference for older classics and eschew twentieth century composers like Arnold Schoenberg and Alban Berg because of inherent music tastes.<sup>24</sup> The cost of performing copyrighted works also exceeds the cost of performing public domain works,<sup>25</sup> so some orchestras tend to avoid modern works for financial reasons.<sup>26</sup> Another possible explanation is that people avoid some modern pieces because they cannot ascertain their copyright status, preferring to err on the side of caution to avoid copyright infringement. This Comment argues that the uncertainty of the copyright status of classical works and editions created between 1925 and 1978 not only discourages the dissemination of those works but also dissuades nonclassical artists from incorporating classical pieces into their own works.<sup>27</sup>

The copyright statuses of many works published between 1925 and 1978 are not easily accessible because the complete, comprehensive records can be found only at the physical location of the U.S. Copyright Office.<sup>28</sup> Access poses a problem not only because of the uncertainty in copyright status but also because different editions of one work can have different copyright dates.<sup>29</sup> For example, Gustav Mahler originally published his Symphony no. 1 in 1899.<sup>30</sup> The second edition, published in 1906, is in

22. See Kaufman, *supra* note 2.

23. See Georg Predota, *Minors of the Majors Dimitri Shostakovich: Suite for Variety Orchestra*, INTERLUDE (Sept. 12, 2016), <http://www.interlude.hk/front/minors-majors-dimitri-shostakovich-suite-variety-orchestra/> [https://perma.cc/8H64-GLZ8] (noting that Shostakovich composed his works, including the Suite for Variety Orchestra that contains Waltz No. 2, primarily between 1934 and 1938).

24. See, e.g., Alex Ross, *Why Do We Hate Modern Classical Music?*, GUARDIAN (Nov. 28, 2010, 4:30 PM), <http://www.theguardian.com/music/2010/nov/28/alex-ross-modern-classical-music> [https://perma.cc/YP2Y-W3KX].

25. Marc Parry, *Supreme Court Takes Up Scholars' Rights*, CHRON. HIGHER EDUC. (May 29, 2011), <http://www.chronicle.com/article/A-Professors-Fight-Over/127700> [https://perma.cc/6RSD-U9UM].

26. See Appellants' Opening Brief at 17, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259) (noting that the orchestra conductor chose public domain works because of cost reasons) [hereinafter Appellants' Opening Brief in *Golan v. Gonzales*].

27. As of January 1, 2020, works from 1924 have entered the public domain in the United States, but works from 1925 are not. Works published prior to 1978 do not follow the current Copyright Act's copyright terms. Therefore, works between 1925 and 1978 have more uncertain status. *Class of 2020: New in the Public Domain Today!*, PUB. DOMAIN REV. (Jan. 1, 2020), <http://publicdomainreview.org/blog/2020/01/public-domain-in-2020> [https://perma.cc/FXU9-APW3].

28. *Historical Public Records Program*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/historic-records/> [https://perma.cc/HKM8-5ZWM] (last visited Feb. 1, 2020) (stating that because copyright records were handwritten or typed and stored at the Copyright Office prior to 1978, those records have only traditionally been available to view in person at the Copyright Office Reading Room in Washington, D.C.).

29. See, e.g., *Symphony No. 5, Op. 67 (Beethoven, Ludwig van)*, INT'L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/Symphony\\_No.5%2C\\_Op.67\\_\(Beethoven%2C\\_Ludwig\\_van\)](http://imslp.org/wiki/Symphony_No.5%2C_Op.67_(Beethoven%2C_Ludwig_van)) [https://perma.cc/Z5CP-UY95] (last visited Feb. 1, 2020) (providing five different editions of the piece, each with a different publication date, with the earliest published in 1862 and the most recent published in 2008).

30. *Mahler Symphony 1*, GUSTAVMAHLER.COM, <http://gustavmahler.com/symphonies/mahler-symphony-1.html> [https://perma.cc/9J6U-Q8ZQ] (last visited Feb. 1, 2020).

the public domain and accessible to all users around the globe.<sup>31</sup> But the later version International Mahler Gesellschaft edited and published in 1967 is not in the public domain in the United States.<sup>32</sup> While users in the United States can freely access the 1906 edition of Mahler's Symphony no. 1,<sup>33</sup> they do not have commensurate access to the 1967 edition of the same work.<sup>34</sup> Therefore, knowing the original publication date of a classical work is insufficient in determining whether it resides in the public domain; users would have to investigate further to ascertain the copyright status of the particular edition they want to use.

This Comment argues that the current administration of copyright laws in the United States creates disincentives for the performance of music from 1925 to 1978. Section II begins with an overview of copyright law in the United States as it relates to sheet music. Section III describes the current state of classical music in the United States, and the impact of the digital age on sheet music. Section IV concludes by arguing a central repository of copyright records would better promote classical music from that time period.

## II. OVERVIEW OF COPYRIGHTS AND SHEET MUSIC

Classical music seldom receives attention in the United States. However, the plight of some twentieth century classical works, like Russian composer Sergei Prokofiev's *Peter and the Wolf*, entered the limelight in 2012 when the Supreme Court decided *Golan v. Holder*.<sup>35</sup>

This Section explores classical sheet music and the legal issues involved in the music publishing industry. Part II.A describes the history of copyright law in the United States as it relates to sheet music. Part II.B explains how classical music is copyrighted in the United States. Part II.C expands on this by explaining what is required to copyright sheet music and the relationship between sheet music and the public domain.

### A. *Looking Back*<sup>36</sup>: History and Overview of U.S. Copyright Law

In the United States, copyright protection originates in the U.S. Constitution and other statutory provisions.<sup>37</sup> This protection extends to both published and unpublished

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31. See *Symphony No. 1 (Mahler, Gustav)*, INT'L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/Symphony\\_No.1\\_\(Mahler,\\_Gustav\)](http://imslp.org/wiki/Symphony_No.1_(Mahler,_Gustav)) [https://perma.cc/A7NU-TYY8] (last visited Feb. 1, 2020).

32. *Id.*

33. See *id.* (noting the 1906 edition is in the public domain).

34. See *id.* (noting the 1967 International Mahler Gesellschaft edition is "Non-PD" in the United States).

35. 565 U.S. 302 (2012); see, e.g., Nick Baumann, *Hey Kids, Wanna Listen to "Peter and the Wolf"? Then Pay Up.*, MOTHER JONES (Oct. 6, 2011), <http://www.motherjones.com/politics/2011/10/peter-wolf-copyright-supreme-court/> [https://perma.cc/V6CG-SF62].

36. See *Johann Sebastian Bach (1685–1750)*, CLASSIC FM, <http://www.classicfm.com/composers/bach/> [https://perma.cc/ZP8N-7HDQ] (last visited Feb. 1, 2020).

37. See U.S. CONST. art. I, § 8, cl. 8; see also 17 U.S.C. § 102(a) (2018). A copyright is a form of intellectual property law that protects authors' original works that are fixed in a tangible medium of

works.<sup>38</sup> Because a copyright has a limited period of exclusivity, copyright protection effectively grants the public access to creativity when the copyright expires.<sup>39</sup> Accordingly, at different points in time, copyright protection benefits private individuals or authors as well as the public.<sup>40</sup>

A central debate among scholars is the purpose of the American copyright system and who should benefit from copyrights.<sup>41</sup> While some scholars have argued that copyright law exists to benefit the public, others claim that copyright law should benefit the individual author.<sup>42</sup> The public-private tradeoff in copyright protection highlights the tension between the copyright owner's exclusive right—or the ability to prevent others from copying the owner's work—and the public's ability to access this work.<sup>43</sup> The debate about the purpose of copyrights has persisted from the inception of copyright law in the eighteenth century to the present day. This Part will first explore the roots of copyright law in the United States, followed by a discussion of how copyright law has evolved over time to its current form.

### 1. Prelude: Forming Copyright Law in the United States

U.S. copyright law dates back to the nation's birth.<sup>44</sup> The lead-up to the Continental Congress involved discussions on whether there should be laws to protect books.<sup>45</sup> However, the Articles of Confederation did not explicitly mention

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expression. *Copyright in General*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/help/faq/faq-general.html> [<https://perma.cc/4YC8-8GGN>] (last visited Feb. 1, 2020).

38. 17 U.S.C. § 104(a)–(b); see also *Copyright in General*, *supra* note 37.

39. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

40. See *id.* (noting the limited grant of a copyright “is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”).

41. See, e.g., Hannah Dubina, Comment, *Decomposing the Precarious Future of American Orchestras in the Face of Golan v. Holder*, 60 UCLA L. REV. 950, 955 (2013) (noting the Copyright Clause “has spawned much debate about the purpose of the American copyright system”).

42. Compare 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A], Lexis (Matthew Bender & Co., rev. ed., database updated Dec. 2019) (“[T]he primary purpose of copyright [is] not to reward authors but rather to secure ‘the general benefits derived by the public from the labors of authors.’” (emphasis added) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932))), with Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 56–57 (1988) (“The first and most important step which national and international lawmakers must take is to focus copyright on authors and resist the politically attractive temptation of trampling authors’ rights in favor of easy access to authors’ works. The individual rights of authors, including authors’ personal relationship to their works, must become the central focus of contemporary efforts.” (footnote omitted)), and Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 73 (2014) (“The dominant American theory of copyright law is utilitarian, in offering the incentive of limited copyright protection to creators to generate material that is valuable to society.”).

43. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (“Copyright protection—the right of the copyright’s owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.”).

44. See Note, *Constitutional Limits on Copyright Protection*, 68 HARV. L. REV. 517, 518 (1955).

45. See, e.g., Terry Hart, *Letter from Joel Barlow to the Continental Congress (1783)*, COPYHYPE (Jan. 28, 2013) <http://www.copyhype.com/2013/01/letter-from-joel-barlow-to-the-continental-congress-1783/> (“There is certainly no kind of property, in the nature of things, so much his own, as the works which a person

copyrights.<sup>46</sup> This lack of a nationwide copyright provision changed during the Constitutional Convention of 1787.<sup>47</sup> While drafting the U.S. Constitution, James Madison and Charles Pinckney separately advocated for copyright protection.<sup>48</sup> Madison proposed giving Congress the power “[t]o secure to literary authors their copyrights for a limited time” and “[t]o encourage by premiums [and] provisions, the advancement of useful knowledge and discoveries.”<sup>49</sup> Pinckney suggested “secur[ing] to [a]uthors exclusive rights for a certain time.”<sup>50</sup>

These proposals eventually evolved into Article I, Section 8, Clause 8 of the U.S. Constitution.<sup>51</sup> This clause gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>52</sup> The Copyright Clause established the foundation for U.S. copyright law by providing exclusive rights for a certain period of time to promote “Science,” a word which modern courts and commentators have interpreted as general knowledge or learning.<sup>53</sup>

## 2. Fugue: Expanding the Duration and Scope of Copyright Protection

Both the duration and scope of copyright protection have evolved throughout U.S. history. The length of copyright protection has continuously increased over time.<sup>54</sup> Congress enacted the first copyright law in 1790.<sup>55</sup> The Copyright Act of 1790 (1790 Act) granted authors “of any map, chart, [or] book” the right to print, reprint, publish, or sell for a term of fourteen years.<sup>56</sup> The 1790 Act also permitted authors to extend or renew the original copyright term another fourteen years.<sup>57</sup> A few decades later, Congress extended the initial copyright term from fourteen to twenty-eight years by passing the Copyright Act of 1831 (1831 Act).<sup>58</sup> Like the 1790 Act, the 1831 Act also

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originates from his own creative imagination . . . . [I]t is a principle of natural justice that he should be entitled to the profits arising from the sale of his works as a compensation for his labor in producing them . . . .” (quoting Letter from Joel Barlow to the Continental Congress (1783))).

46. Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 361 (1992); Note, *supra* note 44, at 518.

47. Note, *supra* note 44, at 519.

48. *Id.*

49. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 325 (Max Farrand ed. 1911).

50. *Id.*

51. U.S. CONST. art. I, § 8, cl. 8.

52. *Id.*

53. E.g., Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259, 265.

54. See *The 18th Century*, U.S. COPYRIGHT OFF., [http://www.copyright.gov/timeline/timeline\\_18th\\_century.html](http://www.copyright.gov/timeline/timeline_18th_century.html) [<https://perma.cc/P3CG-AWGH>] (last visited Feb. 1, 2020) (“These amendments [since the first copyright law] greatly changed what works were covered under copyright, for how long, and how to register a work.”).

55. *A Brief Introduction and History*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/circs/circ1a.html> [<https://perma.cc/DS57-RLZ3>] (last visited Feb. 1, 2020).

56. Copyright Act of 1790, ch. 16, §1, 1 Stat. 124, 124, <http://www.copyright.gov/history/1790act.pdf> [<https://perma.cc/B4PC-D3L2>].

57. *Id.*

58. Copyright Act of 1831, ch. 16, §1, 4 Stat. 436, 436 (repealed 1870).

provided a fourteen-year renewal provision.<sup>59</sup> Nearly a century later, the Copyright Act of 1909 (1909 Act) again changed the renewal term.<sup>60</sup> While the 1909 Act kept the initial copyright term of twenty-eight years unchanged from the 1831 Act, it extended the renewal term to twenty-eight years.<sup>61</sup>

The Copyright Act of 1976 (1976 Act) was the last major statutory revision to copyright law and is the current law.<sup>62</sup> Under the 1976 Act, the copyright term increased to the author's life plus fifty years.<sup>63</sup> For anonymous works, pseudonymous works, and works made for hire, the term became seventy-five years from the first publication date or 100 years from the year of its creation, whichever expires first, or the life of the author plus fifty years.<sup>64</sup> The renewal lengths were again increased through the Sonny Bono Copyright Term Extension Act of 1998 (CTEA).<sup>65</sup> The CTEA dictates the current terms—the author's life plus seventy years, or if the work is by a corporate, anonymous, pseudonymous author or made for hire, the copyright length is 120 years after creation or ninety-five years after publication, whichever occurs earlier.<sup>66</sup> In other words, any work created this year is protected for the author's lifetime plus seventy years.<sup>67</sup> For anonymous works, pseudonymous works, or works made for hire, the term is ninety-five years from the first publication date or 120 years from the year of its creation, whichever occurs first.<sup>68</sup>

Like the copyright term, the substance and subject matter of copyright protection has expanded.<sup>69</sup> The 1790 Act only included maps, charts, and books as copyrightable material.<sup>70</sup> Musical compositions did not fit within these categories and therefore did not have explicit protection under the first copyright act.<sup>71</sup> The first musical composition and sheet music was registered in 1794 as a book.<sup>72</sup> Through the 1831 Act, musical compositions became statutorily protected under copyright law.<sup>73</sup> This protection originally applied only to printed sheet music.<sup>74</sup>

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59. *Id.* § 2.

60. See Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (repealed 1976).

61. *Id.*

62. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2598 (codified as amended in scattered sections of the U.S. Code).

63. See *id.* sec. 101, § 302(a), 90 Stat. at 2572.

64. See *id.* sec. 101, § 302(c), 90 Stat. at 2572–73.

65. See Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b)–(d), 112 Stat. 2827, 2827 (codified at 17 U.S.C. §§ 302–04 (2018)).

66. 17 U.S.C. § 302(a)–(c).

67. See *id.* § 302(a).

68. See *id.* § 302(c).

69. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* LAW 2–3 (2004) (showing the increase in the number of words in copyright statutes over time as a measure of expansion of rights).

70. Copyright Act of 1790, ch. 16, § 1, 1 Stat. 124, 124.

71. See William F. Patry, *COPYRIGHT LAW & PRACTICE* n.91 (1994) (ebook), <http://digital-law-online.info/patry/patry5.html> [https://perma.cc/T4C6-GESM].

72. See *FEDERAL COPYRIGHT RECORDS 1790–1800*, at 15 (James Gilreath ed., 1987) (listing “The Kentucky Volunteer a new Song” as the fifty-second entry).

73. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870).

74. See *id.*

Nonprinted music gradually earned copyright protection. Venues that played music did not have to compensate composers for the performance of their musical works until 1917 after *Herbert v. Shanley Co.*<sup>75</sup> Justice Holmes, writing for the Court, noted that “[i]f the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected.”<sup>76</sup> The Court further noted that, while the patrons of the businesses are not there solely for the music, music is a part of the whole experience and that the presence of music contributes to the overall profit.<sup>77</sup> *Herbert* thus held that places of business that also host musical performances, such as hotels and restaurants, must compensate composers, even if the venue is not separately charging guests to listen to the music.<sup>78</sup>

Section 101 of the 1976 Act enacted Section 102(a) of Title 17 of the United States Code, the current law that applies to sheet music.<sup>79</sup> Section 102(a) provides a list of subject matter that can receive copyright protection.<sup>80</sup> It includes “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”<sup>81</sup>

#### B. Copyrighting Sheet Music

Sheet music refers to handwritten or printed music that expresses music notation.<sup>82</sup> A fundamental feature of Western classical music, sheet music functions by recording expression through a standard form of symbolic notation of pitches and sound.<sup>83</sup> Its inherent adaptability has allowed it to transcend different musical styles and instruments over time.<sup>84</sup> Although this is a gross simplification, a notation instructing a musician to play an F # (F-sharp) would mean the same thing to an oboist as it would to a violinist. That remains true for an oboist and violinist in 1719 and in 2019. As a result of this consistency, Western music notation provides a standardized and established vehicle of creative expression that has withstood time.<sup>85</sup> For example, Monteverdi, a prominent Renaissance and Baroque composer of the sixteenth and seventeenth centuries,<sup>86</sup> would be able to read and interpret a piece of music written by

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75. 242 U.S. 591 (1917).

76. *Herbert*, 242 U.S. at 594.

77. *Id.* at 594–95.

78. *See id.*

79. *See* 17 U.S.C. § 102(a)(2) (2018).

80. *Id.* § 102(a).

81. *Id.*

82. Nicholas Tawa, *Sheet Music*, OXFORD MUSIC ONLINE: GROVE MUSIC ONLINE (Jan. 31, 2014), <http://doi.org/10.1093/gmo/9781561592630.article.A2257275> [<https://perma.cc/WK53-BH7U>].

83. Charles Cronin, *Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology*, 28 COLUM. J.L. & ARTS 1, 13 (2004).

84. *Id.*

85. *See id.*

86. *Claudio Monteverdi*, NPR ONLINE, <http://www.npr.org/programs/specials/milestones/990519.motm.monteverdi.html> [<https://perma.cc/76Q9-A49F>] (last visited Feb. 1, 2020).



Stravinsky,<sup>87</sup> a twentieth century composer known for his controversial work, *The Rite of Spring*.<sup>88</sup>

Access to sheet music is critical to musicians of all levels—professionals, amateurs, or students.<sup>89</sup> Despite the importance of sheet music, musicians have a difficult time in determining sheet music’s copyright statuses; this complexity has led scholars to comment that the music industry is a copyright industry rather than a creative industry.<sup>90</sup> Hal Leonard LLC, Music Sales Group, and Alfred Publishing Company dominate the sheet music publishing market for music of all genres.<sup>91</sup> These publishers license composers’ music.<sup>92</sup> Composers may assign nonexclusive performance rights to one of three performance rights organizations (also known as music licensing associations): the American Society of Composers, Authors, and Publishers; Broadcast Music, Inc.; or the Society of European Songwriters and Composers.<sup>93</sup> Through this type of agreement, the licensee pays a royalty fee to the publisher for the printed music, and the publisher pays for the printing and any unsold inventory.<sup>94</sup> For performances, licensees pay the performance rights organizations to perform the licensed music for a specific period of time, and the performance rights organizations then give fifty percent of the royalties to the composers.<sup>95</sup> Often, licensing agreements also include the copyright owner’s name, copyright date, and the words “[u]sed by permission” to protect the artist.<sup>96</sup> Including this information ascertains the true creative owner of the work, although a copyright notice on printed music is not required for the copyright to be valid.<sup>97</sup> Because copyright owners have performance and printing rights,<sup>98</sup> renting or buying sheet music gives the purchaser limited rights.<sup>99</sup>

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87. Monteverdi would probably find Stravinsky’s work an abomination to music. He would nonetheless be nonetheless able to objectively understand the written musical notes. Donal Henahan, *What, You Never Learned to Read Music?*, N.Y. TIMES (Nov. 30, 1969), <http://www.nytimes.com/1969/11/30/archives/what-you-never-learned-to-read-music-yes-its-music.html> [https://perma.cc/49V8-RF9L].

88. See ERIC WALTER WHITE, STRAVINSKY: THE COMPOSER AND HIS WORKS 37 (2d ed. 1979).

89. M. WILLIAM KRASILOVSKY & SIDNEY SHEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 297 (10th ed. 2007).

90. See PATRIK WIKSTRÖM, THE MUSIC INDUSTRY: MUSIC IN THE CLOUD 17 (2009).

91. See KRASILOVSKY & SHEL, *supra* note 89, at 298.

92. *Id.*

93. Amanda Scales, Comment, Sola, Perduta, Abbandonata: *Are the Copyright Act and Performing Rights Organizations Killing Classical Music?*, 7 VAND. J. ENT. L. & PRAC. 281, 285 (2005).

94. KRASILOVSKY & SHEL, *supra* note 89, at 298.

95. See Scales, *supra* note 93, at 285.

96. KRASILOVSKY & SHEL, *supra* note 89, at 300.

97. *Id.*

98. See 17 U.S.C. § 106 (2018).

99. See ASCAP Licensing: *Frequently Asked Questions*, AM. SOC’Y COMPOSERS, AUTHORS, AND PUBLISHERS, <http://www.ascap.com/help/ascap-licensing> [https://perma.cc/4CXN-94SA] (last visited Feb. 1, 2020) (“Rental or purchase of sheet music or the purchase of a record does not authorize its public performance.”).

C. *The Landscape of Sheet Music Under Copyright and in the Public Domain*

Traditionally, under American copyright law, music could only be protected if it was fixed in music notation; it was not until the second half of the twentieth century that music recordings received copyright protection.<sup>100</sup> Under the 1909 Act, an original musical work could not be registered unless it was filed in standard music notation, which meant that the statute did not protect sound recordings.<sup>101</sup> In practice, certain types of music, like jazz, which depended heavily on improvisation and individualized performances, effectively could not be copyrighted.<sup>102</sup> It was not until 1976 that Congress amended the copyright statute to give copyright protection to music that was exclusively captured by recording rather than sheet music.<sup>103</sup>

The 1976 Act gives scant guidance on what constitutes an original piece of sheet music, and a dearth of case law exists to indicate what deserves copyright protection.<sup>104</sup> In *Woods v. Bourne Co.*,<sup>105</sup> the Second Circuit held that for music to be copyrighted, there must be “deliberate aesthetic choices” beyond “cocktail pianist variations of the piece that are standard fare in the music trade by any competent musician.”<sup>106</sup> In contrast, other courts have held that adding fingerings, dynamics, and other musical markings on a public domain work *are* original enough for copyright protection.<sup>107</sup> Thus, it is possible for music publishers to add embellishments to public domain works and still claim copyright protection for those derivative works.<sup>108</sup> Music is comprised of many elements, and copyrights protect only some combinations of those elements.<sup>109</sup> Therefore, determining what suffices to sustain a music infringement lawsuit is difficult.<sup>110</sup> Moreover, even prior to the Supreme Court’s decision in *Golan*,<sup>111</sup> the law did not clearly identify which works by the author were considered public domain. Music publishers preyed upon this uncertainty to create “trivially different arrangements of public domain music.”<sup>112</sup>

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100. See Cronin, *supra* note 83, at 14.

101. *Id.*

102. *Id.* at 10–11, 14.

103. See 17 U.S.C. § 102(a)(7) (“Works of authorship include . . . sound recordings.”); see also Cronin, *supra* note 83, at 14–15.

104. See Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 252–54 (1996).

105. 60 F.3d 978 (2d Cir. 1995).

106. *Woods*, 60 F.3d at 991–92 (quoting *Woods v. Bourne Co.*, 841 F. Supp. 118, 121 (S.D.N.Y. 1994)).

107. See, e.g., *Consol. Music Publishers, Inc. v. Ashley Publ’ns, Inc.*, 197 F. Supp. 17, 17–18 (S.D.N.Y. 1961).

108. See Heald, *supra* note 104, at 243–44.

109. *Williams v. Gaye*, 895 F.3d 1106, 1120 (9th Cir. 2018) (“[A]s we have observed previously, ‘[m]usic . . . is not capable of ready classification into only five or six constituent elements,’ but is instead ‘comprised of a large array of elements, some combination of which is protectable by copyright.’” (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004))).

110. See, e.g., *id.*

111. See *infra* Part IV.A for a more detailed discussion of *Golan*.

112. Heald, *supra* note 104, at 245.

### 1. Sheet Music and Copyrights for Different Editions

Analyzing various editions of Beethoven's Sonata no. 31, op. 110 illustrates how copyright protection works for different editions of music.<sup>113</sup> Beethoven straddled the Classical and Romantic musical eras and became more experimental towards the end of his life.<sup>114</sup> These markings and notations are particularly interesting when looking at different publishers' edits.

Figure 1, provided below, is one of the earliest editions of the sonata.<sup>115</sup> In the second measure after *Adagio ma non troppo* (slowly, but not too much), there is no marking to indicate how loudly or softly the performer should play. The words *Arioso dolente* (lyrical, sorrowful) are also not accompanied by any other instructions.

FIGURE 1



In Figure 2, a later version of the Sonata edited by Johannes Brahms in 1862,<sup>116</sup> the second measure includes the dynamic mark *crescendo* (a gradual increase in the loudness of the music).<sup>117</sup> Further, the third measure has the German phrase *Klagender Gesang* (plaintive song) on top, which is absent from the previous version.

113. See *Piano Sonata No.31, Op.110 (Beethoven, Ludwig van)*, INT'L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/Piano\\_Sonata\\_No.31,\\_Op.110\\_\(Beethoven,\\_Ludwig\\_van\)](http://imslp.org/wiki/Piano_Sonata_No.31,_Op.110_(Beethoven,_Ludwig_van)) [https://perma.cc/QVX7-4F56] (last visited Feb. 1, 2020).

114. See LEWIS LOCKWOOD, *BEETHOVEN: THE MUSIC AND THE LIFE* 385–88 (2003).

115. Johann Cappi, *Sonate für das Piano-Forte*, Vienna, at 10 (1822). Sheet music accessed at *Piano Sonata No.31, Op.110 (Beethoven, Ludwig van)*, *supra* note 113. Beethoven finished composing Piano Sonata no. 31 in December 1821. LOCKWOOD, *supra* note 114, at 385. Because he completed the sonata in 1821, the 1822 Cappi version is one of the earliest editions of the sonata. See Cappi, *supra*.

116. Johannes Brahms, *Ludwig van Beethovens Werke, Serie 16: Sonaten für das Pianoforte, Nr.154*, Leipzig: Breitkopf und Härtel, at 122 (1862). Sheet music accessed at *Piano Sonata No.31, Op.110 (Beethoven, Ludwig van)*, *supra* note 113.

117. *Crescendo*, OXFORD DICTIONARY OF MUSIC (Joyce Kennedy et al. eds., 6th ed. 2013) (ebook), <http://www.oxfordreference.com/abstract/10.1093/acref/9780199578108.001.0001/acref-9780199578108-e-2271?rskey=ozoMcZ&result=2181> [https://perma.cc/6YC8-W9JK].

FIGURE 2



In the 1875 Hans von Bülow edition provided in Figure 3,<sup>118</sup> there are markings for fingerings. Hans von Bülow also adds notes to present further instructions to the musician.

FIGURE 3

a) Die Pedalverwendung wird die schwierige Bindung in der rechten Hand unterstützen.

b) Es ist geradezu unbegreiflich, wie die corrupte Textdarstellung, welche sämtliche bisherige Ausgaben enthalten, sich so lange Zeit hindurch unangefochten zu conserviren vermocht hat. Das nervöse Ausdrucksmittel der „Bebung“—vgl. hierüber unsere Anmerkung zu der analogen Stelle in der Coda des Adagio von Op.101. hat nur dann einen praktischen Sinn, wenn die neu anzuschlagende Note auf leichtem Takttheil, als Synkope, eintritt. Dies ist dermaßen ersichtlich, dass wir nicht erst auf das eben erwähnte Beispiel oder auf das Scherzo in der Sonate mit Violoncello Op.69 zu verweisen brauchen. Woher die Verwirrung im Manuscripte entstanden, ist sehr einfach zu erklären: Aus dem räumlich weitläufigen Wechsel der Vorzeichnung. Beiläufig: Andante d.h. molto meno Adagio.

c) Ueber die doppelte Bindung vgl. Ann. b) zu Seite I Op.101.

d) Adagio: Der Bewegung nach, nicht eigentlich im Charakter, dasselbe gilt vom folgenden Allegro. Jenes athmet Leidenschaft, letzteres Beschwingung. Man beherzige hierbei aber die Erläuterung, welche Richard Wagner (Bericht über Gründung einer Musikschule in München) von jenem durch ihn so treffend charakterisirten Beethovenischen Momente „Das tief und zart Leidenschaftliche“ gibt. Für unsere Ansicht spricht ausserdem, dass der Todtclir für das Adagio *tutte le corde* vorschreibt bei der Wiederholung des Gegensatzes (Gdur) *una corda*. Demgemäss hätte man sich vor excentrischen *pianissimo's* und gebe allen angezeigten Tonanschwellungen ungeschwächte Bedeutung.

a) The use of the pedal will aid the difficult legato in the right hand.

b) It is absolutely inconceivable how the corrupt presentation of the text found in all previous editions has been able to hold its own undisputed for so long a time. The direction to bring about here a “nervous vibration”, on upon this point our Remark to the analogous place in the coda of the Adagio of Op.101, has a practical meaning only, when the note just to be struck enters as syncope, on an unaccented part of the measure. This is so evident that we do not need to point to the example just mentioned, or to the Scherzo in the Sonata with violoncello, Op.69. Whence arose the confusion in the manuscript is easily explained, viz.: From the change of the signature occupying a large space therein. By the way: *andante*, i.e. *molto meno adagio*.

c) Concerning the double legato, compare Remark (b) to page 1 of Op.101.

d) Adagio: rather in movement, not exactly in character, the same holds good with regard to the following allegro. The former breathes passion; the latter, assuagement. Let us, however, take to heart in this connection the explanation given by RICHARD WAGNER (Report concerning the founding of a School of Music in Munich) of that Beethovenian moment so strikingly characterized by him: “The deeply and tenderly passionate.” Moreover, it favors our view, that the late poet prescribes *tutte le corde* for the adagio, but at the repetition of the counter-movement (G-major) *una corda*. Accordingly, we should beware of excentric *pianissimos*, and give to all indicated crescendos full significance.

This example illustrates the relatively minor variations between different published editions. Although all of these works are now in the public domain,<sup>119</sup> they reflect the small changes required for copyright protection, as alluded by Woods.<sup>120</sup> Although not guaranteed, relatively minor changes can be copyrighted.<sup>121</sup>

118. Hans von Bülow, *Sonate für das Pianoforte von L.van Beethoven. Op.110*, Stuttgart: J. G. Cotta, at 108 (1875). Sheet music accessed at *Piano Sonata No.31, Op.110 (Beethoven, Ludwig van)*, *supra* note 113.

119. Any work created prior to 1925 is in the public domain. See, e.g., HIRTLE, *supra* note 21, at 1–2; *supra* note 27.

120. See Woods v. Bourne Co., 60 F.3d 978, 991–92 (2d Cir. 1995); see also *supra* note 106 and accompanying text.

121. See *id.*

## 2. Sheet Music and the Public Domain

The U.S. public domain has been described as a “vast national park with no guards to stop wanton looting, with no guides for lost travelers, with no clearly defined fences or borders to stop the innocent wayfarer from being sued for trespass,” and the public domain’s material is “tainted by vague and indefinite claims of copyright in minimal or obscure ‘new versions.’”<sup>122</sup> In other words, instead of the work belonging to its creator, the work belongs to the public, and anyone can use, distribute, or copy it with no penalties. For example, in the United States, most versions of Beethoven’s Piano Sonata in D Minor, op. 31, no. 2 are in the public domain,<sup>123</sup> while nearly all versions of Prokofiev’s Piano Sonata in D Minor, op. 14 are copyright protected.<sup>124</sup> Because of the intellectual property restrictions imposed on copyrighted works, pieces in the public domain are generally older.<sup>125</sup>

Incomplete public archives also contribute to the uncertain copyright status of some music.<sup>126</sup> For example, sheet music published in the United States before 1925 is in the public domain<sup>127</sup> and that the copyright status of all records after 1978 can be found online.<sup>128</sup> Works published prior to 1925 had a seventy-five-year copyright protection term, followed by a twenty-year renewal term, so pre-1925 works entered the public domain in 2020.<sup>129</sup> However, the period from 1925 to 1978 is problematic.<sup>130</sup> This is because the U.S. Copyright Office does not track what works fall within the public domain for this particular time period.<sup>131</sup> A potential explanation is that the works between 1925 and 1978 are still governed by the 1909 Act, and the status of those works are determined through their individual publication dates and respective

122. KRASILOVSKY & SHEMEL, *supra* note 89, at 126.

123. See *supra* Section I for a discussion on different versions of sheet music and the different copyright restrictions, illustrated by Gustav Mahler’s Symphony no. 1.

124. See *Piano Sonata No. 2, Op. 14 (Prokofiev, Sergey)*, INT’L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/Piano\\_Sonata\\_No.2%2C\\_Op.14\\_\(Prokofiev%2C\\_Sergey\)](http://imslp.org/wiki/Piano_Sonata_No.2%2C_Op.14_(Prokofiev%2C_Sergey)) [https://perma.cc/8X7U-JLQK] (last visited Feb. 1, 2020).

125. See, e.g., Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 830 (2014) (“Shortly after works are created and propertized, they tend to disappear from public view only to reappear in significantly increased numbers when they fall into the public domain and lose their owners. For example, more than twice as many new books originally published in the 1890s are for sale by Amazon than books from the 1950s, despite the fact that many fewer books were published in the 1890s.” (footnote omitted)).

126. KRASILOVSKY & SHEMEL, *supra* note 89, at 126.

127. HIRTLE, *supra* note 21, at 1–2.

128. *Copyright Catalog (1978 to Present)*, U.S. COPYRIGHT OFF., <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First> [https://perma.cc/C96G-54MM] (last visited Feb. 1, 2020).

129. See Samantha Cole, *Public Domain Day 2020: These 95-Year-Old Works Are Now Free To Use*, VICE (Jan. 2, 2020, 11:04 AM), [http://www.vice.com/en\\_us/article/akwd7b/best-of-public-domain-day-2020](http://www.vice.com/en_us/article/akwd7b/best-of-public-domain-day-2020) [https://perma.cc/9BPX-CCK8].

130. See U.S. COPYRIGHT OFFICE, CIRCULAR 15A, DURATION OF COPYRIGHT 1 (2011) [hereinafter U.S. COPYRIGHT OFF., CIRCULAR 15A], <http://www.copyright.gov/circs/circ15a.pdf> [https://perma.cc/EPT8-7YE2] (“The provisions of copyright law dealing with duration are complex. Different standards apply depending on whether federal statutory copyright protection was secured before or on or after January 1, 1978, the date the current law—the Copyright Act of 1976—took effect.”); see also *supra* note 27.

131. KRASILOVSKY & SHEMEL, *supra* note 89, at 126.

renewal dates, if applicable.<sup>132</sup> Depending on the status of renewals, some of the works may be in the public domain, while others may not.<sup>133</sup> By request, the staff of the Copyright Office will search the records,<sup>134</sup> but the cost for such a search is \$200 per hour.<sup>135</sup> Further, the search will not explicitly indicate whether something is in the public domain but instead will provide information for the inquirer to subsequently determine that for herself.<sup>136</sup> Moreover, even if a printed copy of music does not have a copyright notice, it does not necessarily mean that the copyright is invalid.<sup>137</sup>

The Copyright Renewal Act of 1992 now allows the Copyright Office to renew copyrights without the author's request, so failing to renew does not mean the work enters the public domain.<sup>138</sup> But the status of renewals also poses additional problems for musicians who want to ascertain the status of a work that fell out of copyright but may have since been renewed.<sup>139</sup> The Copyright Office itself acknowledges that "[a]ccess by composer is limited" for music records from 1898 to 1937.<sup>140</sup> In other words, it would be difficult to search a copyright status solely through a composer's name.

This general lack of guidance promotes a chilling effect<sup>141</sup>: people are afraid to use works with an uncertain copyright status.<sup>142</sup> This defensiveness is exacerbated by an assumption that any source after 1925 is under copyright, even though that is not always true.<sup>143</sup> This general uncertainty leads to disclaimers like the one by the International Music Score Library Project (IMSLP): "Please obey the copyright laws of your country. IMSLP does not assume any sort of legal responsibility or liability for the consequences of downloading files that are not in the public domain in your country."<sup>144</sup> IMSLP is virtual library that hosts public domain music scores.<sup>145</sup> For

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132. U.S. COPYRIGHT OFFICE, CIRCULAR 15A, *supra* note 130, at 2.

133. *See id.*

134. KRASILOVSKY & SHEMEL, *supra* note 89, at 126.

135. U.S. COPYRIGHT OFFICE, CIRCULAR 4, COPYRIGHT OFFICE FEES 3 (2018), <http://www.copyright.gov/circs/circ04.pdf> [<https://perma.cc/B7G8-T693>].

136. *See* KRASILOVSKY & SHEMEL, *supra* note 89, at 127.

137. *Id.* at 300.

138. *Id.* at 123.

139. *See* U.S. COPYRIGHT OFFICE, CIRCULAR 22, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK 1–2 (2013), <http://www.copyright.gov/circs/circ22.pdf> [<https://perma.cc/XS7B-2FW9>] (noting that a search of the Copyright Office's *Catalog of Copyright Entries* will sometimes "not be sufficient to provide the needed information").

140. U.S. COPYRIGHT OFFICE, CIRCULAR 23, THE COPYRIGHT CARD CATALOG AND THE ONLINE FILES OF THE COPYRIGHT OFFICE 3–4 (2015) [hereinafter U.S. COPYRIGHT OFFICE, CIRCULAR 23], <http://www.copyright.gov/circs/circ23.pdf> [<https://perma.cc/2QA5-M3V9>].

141. *See* Amicus Brief on Behalf of Project Petrucci, LLC in Support of Petitioners at 11, *Golan v. Holder*, 565 U.S. 302 (2012) (No. 10-545), 2011 WL 2578554 [hereinafter Project Petrucci Amicus Brief in *Golan v. Holder*].

142. *See id.* at 9–12.

143. *See id.* at 11; *see also supra* note 27.

144. *See, e.g., 5 Poems, Op.23 (Prokofiev, Sergey)*, INT'L MUSICAL SCORE LIBR. PROJECT, [http://imslp.org/wiki/5\\_Poems,\\_Op.23\\_\(Prokofiev,\\_Sergey\)](http://imslp.org/wiki/5_Poems,_Op.23_(Prokofiev,_Sergey)) [<https://perma.cc/4XSH-8BKS>] (last visited Feb. 1, 2020).

145. *IMSLP: Goals*, INT'L MUSICAL SCORE LIBR. PROJECT, <http://imslp.org/wiki/IMSLP:Goals> [<https://perma.cc/XHS3-FAP4>] (last visited Feb. 1, 2020).

some works, such as those by Prokofiev, IMSLP also posts a warning that “[i]t is *very unlikely* that this work is public domain in the EU, or in any country where the copyright term is life-plus-70 years. However, it *is* in the public domain in Canada (where IMSLP is hosted) and other countries where the term is life-plus-50 years.”<sup>146</sup> However, there is currently no explicit guidance on the use of these works in different jurisdictions.<sup>147</sup>

### III. THE PLIGHT OF CLASSICAL MUSIC IN THE TWENTY-FIRST CENTURY

The evolution of copyright law in the United States and subsequent developments in the digital age present unique challenges to classical music and access to sheet music. This Section begins in Part III.A with a discussion of how the digital age both promotes and restricts access to sheet music. Part III.B presents a problem about current copyright records. It concludes in Part III.C with the dismal state of classical music in the United States and how a Supreme Court case in 2012 compounded the problem by holding an international copyright scheme constitutional in allowing some classical music works to be taken out of the public domain.

#### A. *Sheet Music and the Digital Age*

The digital age further complicates the challenges that public domain classical music already faces.<sup>148</sup> Technological advancements have made the public domain more accessible, but it has not resolved its problems of uncertainty.<sup>149</sup> Consequently, users of IMSLP may not submit works because of their uncertainty about the works’ copyright statuses.<sup>150</sup> Moreover, if users want to confidently check the status of the copyrights of a work produced prior to 1978, they must physically visit the Copyright Office in Washington, D.C.<sup>151</sup> The comprehensive status of works that were registered

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146. See, e.g., *5 Poems, Op.23 (Prokofiev, Sergey)*, supra note 144. For example, China has a copyright term of life-plus-fifty years. Zhonghua Renmin Gongheguo Zhuzuoquan Fa, 中华人民共和国著作权法 [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991, amended Oct. 27, 2001 & Feb. 26, 2010), art. 21 (“In respect of a work of a citizen, the term of protection for the right of publication . . . shall be the lifetime of the author and fifty years after his death, expiring on December 31 of the fiftieth year after his death.”).

147. See lincoln1222, *ATTENTION: Everything by Prokofiev Has Been Taken Off of IMSLP*, REDDIT (Mar. 9, 2018), [http://www.reddit.com/r/classicalmusic/comments/83catu/attention\\_everything\\_by\\_prokofiev\\_has\\_been\\_taken/](http://www.reddit.com/r/classicalmusic/comments/83catu/attention_everything_by_prokofiev_has_been_taken/) [https://perma.cc/5JPD-56MU] (highlighting the confusion over various copyright terms and jurisdictions through a forum discussion when Sergei Prokofiev’s music was removed from IMSLP after receiving threats of legal action).

148. See, e.g., Daniel J. Wakin, *Free Trove of Music Scores on Web Hits Sensitive Copyright Note*, N.Y. TIMES (Feb. 22, 2011), <http://www.nytimes.com/2011/02/22/arts/music/22music-imslp.html> [https://perma.cc/AG4P-68VF] [hereinafter Wakin, *Free Trove*].

149. See Project Petrucci Amicus Brief in *Golan v. Holder*, supra note 141, at 12, 27.

150. *Id.* at 11.

151. See U.S. COPYRIGHT OFFICE, CIRCULAR 23, supra note 140, at 1 (“Together, the copyright card catalog and the online files of the Copyright Office provide an index to copyright registrations and records in the United States from 1870 to the present. The copyright card catalog contains approximately 45 million cards covering the period 1870 through 1977. Registrations and records for all works dating from January 1, 1978, to the present are searchable in the online catalog, available at [www.copyright.gov/records](http://www.copyright.gov/records).”); see also Jon Orwant, *U.S. Copyright Renewal Records Available for Download*, GOOGLE BOOKS SEARCH (June 23, 2008,

before 1978 can be found only in the Copyright Public Records Reading Room.<sup>152</sup> This added barrier may mean that people are not tapping into the full potential of the public domain to disseminate classical music.<sup>153</sup>

Public domain hosting sites like IMSLP also face a constant barrage of legal battles with the music publishing industry.<sup>154</sup> Music publishers have threatened IMSLP with requests to remove the public domain sheet music from its site because they pose a threat to sales.<sup>155</sup> Given the high costs of litigation, public domain ventures face the difficult calculus that renders compliance with the requests more favorable than facing the cost burdens of litigation.<sup>156</sup> For instance, in March 2018, IMSLP removed all of its works by Sergei Prokofiev in response to a legal threat from the Music Sales Group, one of the main music publishing industry players.<sup>157</sup>

In addition, sheet music also faces a unique set of jurisdictional challenges in the digital age, with works being available online and accessible in some countries (because they are in the public domain) but not in others.<sup>158</sup> As discussed, it is especially difficult to determine whether a piece of sheet music is in the public domain in the United States.<sup>159</sup> Because of the different copyright laws, one piece of music enters different countries' public domains at different times.<sup>160</sup>

The digital age has transformed the business model for sheet music by allowing sales to occur over the computer instead of through physical retailers.<sup>161</sup> While large publishing houses previously dominated the sheet music industry, the internet also allows individual artists to create and distribute their own sheet music.<sup>162</sup> Still, the print publishing houses have adapted to the changing landscape through their large online presence.<sup>163</sup> The same major publishing houses also dominate the online sphere for sheet music sales.<sup>164</sup> The two biggest websites by volume are Sheet Music Direct and

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9:45 AM), <http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html> [https://perma.cc/9NPN-34G8] (noting that Carnegie Mellon University scanned records as part of the Universal Library Project, but "[t]here are undoubtedly errors in these records," so the most reliable source is the physical Copyright Office in Washington, D.C.).

152. *Copyright Catalog (1978 to Present)*, *supra* note 128.

153. See Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141, at 27–28.

154. Wakin, *Free Trove*, *supra* note 148.

155. *Id.*

156. Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141, at 17.

157. *lincoln1222*, *supra* note 147; see also KRASILOVSKY & SHEMEL, *supra* note 89, at 298 (discussing the major publishers in licensing classical music).

158. For example, Canadian copyrights last for the author's life-plus-fifty years, while the European Union and the United States adhere to the author's life-plus-seventy years. See *Public Domain*, INT'L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/Public\\_domain](http://imslp.org/wiki/Public_domain) [https://perma.cc/TN3A-WYYM] (last visited Feb. 1, 2020). IMSLP's main servers are in Canada, which provide a further complication for users around the world who have different copyright laws. *Id.* However, those jurisdictional questions are beyond the scope of this Comment.

159. See KRASILOVSKY & SHEMEL, *supra* note 89, at 124.

160. *Id.*; see also *supra* note 158.

161. KRASILOVSKY & SHEMEL, *supra* note 89, at 302.

162. *Id.*

163. See *id.*

164. *Id.*



Music Notes.<sup>165</sup> Sheet Music Direct is a joint venture between Hal Leonard and Music Sales Group.<sup>166</sup> Its business model allows musicians to print sheet music from their computers but also allows mail-orders.<sup>167</sup> These online retailers can offer a collection of sheet music that exponentially exceeds what can be offered at brick-and-mortar wholesalers or retailers because of the space constraints of physical locations.<sup>168</sup>

While Sheet Music Direct and Music Notes sell printable music for profit, platforms that promote the free distribution of music also exist.<sup>169</sup> As previously mentioned, IMSLP is an online platform that hosts public domain music scores.<sup>170</sup> IMSLP's collection relies on user submissions and public contributions.<sup>171</sup> As of February 10, 2020, the website hosts 154,542 works by 18,450 composers and 500,719 scores.<sup>172</sup> IMSLP's main servers physically reside in Canada.<sup>173</sup> Because of its main physical server location, IMSLP follows Canadian copyright laws.<sup>174</sup>

*B. Where's the Record? It's Haydn<sup>175</sup>: The U.S. Copyrights Records Database*

Step into the shoes of a high school wind ensemble conductor who wants to perform a Shostakovich piece that is a staple of the wind ensemble repertoire. The conductor herself performed the piece decades ago. The score is not on IMSLP, nor is the arrangement available through any online retailers, like Sheet Music Direct. The conductor's friend coincidentally owns a copy of the score and the parts from his college days. Although the friend does not remember exactly where or how the copy came into his possession, he knows it occurred prior to 2012—relevant because of *Golan*. Is this an opportunity to show students this wonderful piece of music that they may not see elsewhere, or is this a cautionary tale for avoiding copyright infringement?<sup>176</sup>

The scenario above illustrates the difficult choices that musicians face when selecting repertoire, whether for performance or for other uses. The Copyright Office has a records repository, but it only applies to works published after 1978.<sup>177</sup> Works

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165. *See id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See, e.g.,* INT'L MUSIC SCORE LIBR. PROJECT, <http://imslp.org> [<https://perma.cc/WR2T-3MQ6>] (last visited Feb. 1, 2020).

170. *See IMSLP: Goals*, *supra* note 145.

171. *See id.*

172. INT'L MUSIC SCORE LIBR. PROJECT, *supra* note 169.

173. *Public Domain*, *supra* note 158.

174. *Id.*; *see also* *IMSLP: FAQ*, INT'L MUSIC SCORE LIBR. PROJECT, <http://imslp.org/wiki/IMSLP:FAQ> [<https://perma.cc/X4U7-PTGU>] (last visited Feb. 1, 2020) (noting that IMSLP “also [has] a legally unaffiliated US-located server that can only be contributed to by admins and offers out-of-copyright files in the US only”).

175. Pronounced “high-den.” *See Franz Joseph Haydn (1732–1809)*, CLASSIC FM, <http://www.classicfm.com/composers/haydn/> [<https://perma.cc/CBL4-CGZ5>] (last visited Feb. 1, 2020).

176. Telephone Interview with A.D., Music Director at a suburban Philadelphia high school (Oct. 29, 2018). The director's friend faced this dilemma when choosing repertoire for her ensemble and ultimately chose alternative pieces to perform. *Id.*

177. *Copyright Catalog (1978 to Present)*, *supra* note 128.

composed prior to 1925 are in the public domain.<sup>178</sup> Because works composed between 1925 to 1978 are governed by the 1909 Act, the exact copyright status of the work cannot be ascertained through merely knowing when the author died.<sup>179</sup> There are current efforts to digitize the collection, but those efforts are currently being piloted,<sup>180</sup> and there are no guarantees the pilot will succeed.

The process of ascertaining the copyright status for pieces created between 1925 and 1978 is difficult and must be completed on an individual basis. The status is determined by when the composer published the work and adding twenty-eight years to that date.<sup>181</sup> If the composer created the work before January 1, 1964, then the prospective user must then find whether the Copyright Office renewed that copyright for another twenty-eight years.<sup>182</sup> If it was not renewed, then the copyright protection runs out on the date of publication plus twenty-eight years, but if it was renewed, then the copyright protection runs from the date of publication to the renewal year plus another twenty-eight years, for a total of fifty-six years from the initial publication.<sup>183</sup> If the composer created the work after January 1, 1964, but before December 31, 1977, the copyright has an automatic renewal for a ninety-five year period.<sup>184</sup>

For example, if a musician wants to perform an all-Stravinsky concert, the musician must determine the publication date of each of the works to be performed as well as their copyright renewal dates, if applicable. Stravinsky published some of his most renowned works—*The Firebird*, for example—prior to 1925,<sup>185</sup> so they are within the public domain.<sup>186</sup> Other works by Stravinsky, such as *The Rake's Progress*, are not in the public domain.<sup>187</sup> There is no uniform or easy way to determine which of Stravinsky's works are within the public domain and which are not because this requires knowing the original publication date in addition to any potential renewals.<sup>188</sup>

In contrast, the U.S. Patent and Trademark Office (USPTO), provides an online database with records dating back to 1790.<sup>189</sup> Although the search process itself can be

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178. E.g., HIRTLE, *supra* note 21, at 1–2.

179. See U.S. COPYRIGHT OFFICE, CIRCULAR 15A, *supra* note 130, at 2; see also *supra* note 27.

180. See, e.g., *Project Goals*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/digitization/goals.html> (last visited Feb. 1, 2020).

181. See U.S. COPYRIGHT OFFICE, CIRCULAR 23, *supra* note 140, at 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. *The Firebird* (Stravinsky, Igor), INT'L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/The\\_Firebird\\_\(Stravinsky,\\_Igor\)](http://imslp.org/wiki/The_Firebird_(Stravinsky,_Igor)) [<https://perma.cc/A45T-7W6C>] (last visited Feb. 1, 2020).

186. See, e.g., HIRTLE, *supra* note 21, at 1–2.

187. See, e.g., *Stravinsky, Igor: The Rake's Progress (1948–51)*, BOOSEY & HAWKES, <http://www.boosey.com/pages/opera/moredetails?musicid=4670> [<https://perma.cc/6REC-5FF5>] (last visited Feb. 1, 2020) (detailing the 1951 world premiere date and because *The Rake's Progress* was first performed in 1951 it will not enter the public domain until 2046 at the earliest—the date it enters the public domain is determined by its first performance date).

188. See U.S. COPYRIGHT OFFICE, CIRCULAR 15A, *supra* note 130, at 2.

189. *Search for Patents*, U.S. PATENT AND TRADEMARK OFF., <http://www.uspto.gov/patents-application-process/search-patents> [<https://perma.cc/FN8X-3VVA>] (last visited Feb. 1, 2020).

arduous, the records are much more comprehensive.<sup>190</sup> All of the records of every historical patent are digitized,<sup>191</sup> so there is no need to visit a physical location to ascertain the status of a patent.

Further in contrast, other countries have less ambiguous guidance on copyright protection. Returning to the Stravinsky's *The Firebird* example from above, the Canada, Japan, and the European Union are examples of other places that determine the length of copyright protection based on the death date of the author. Canadian and Japanese copyrights expire fifty years after the composer dies.<sup>192</sup> In other countries, the time period is seventy years.<sup>193</sup> For all of these countries, knowing the author's date of death is enough to ascertain whether something is copyrighted. If someone died in 1949 or earlier, then the work is in the public domain in those countries because it has been more than seventy years. However, that is not necessarily the case in the United States because the copyright status is not calculated simply by using one date: works created before 1978 still follow the 1909 Act while works created in 1978 or later follow the 1976 Act.

### C. *Funeral March: The State of Classical Music in the United States*

Classical music is dying.<sup>194</sup> Public engagement in classical music has steadily declined in the last few decades, and this dismal trend has continued in recent years.<sup>195</sup> According to the most recent annual National Endowment for the Arts's Survey for Public Participation in the Arts, only 8.6% of U.S. adults attended a classical music performance in 2017.<sup>196</sup> This figure has steadily decreased from eighteen years ago

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190. *See id.*

191. *Id.*

192. *Public Domain*, *supra* note 158.

193. *E.g., id.* There are many countries that follow the life-plus-seventy years approach, such as the Czech Republic and Denmark. *See, e.g.,* EUROPEAN PARLIAMENTARY RESEARCH SERV., COPYRIGHT LAW IN THE EU: SALIENT FEATURES OF COPYRIGHT LAW ACROSS THE EU MEMBER STATES 37, 55 (2018), [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS\\_STU\(2018\)625126\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf) [<https://perma.cc/8RQK-XNMN>]; *see also* PABLO CARDOSO, WORLD INTELLECTUAL PROP. ORG., THE ECONOMIC CONTRIBUTION OF COPYRIGHT INDUSTRIES IN THE REPUBLIC OF ECUADOR 13, [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_ec.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_ec.pdf) (last visited Feb. 1, 2020); WORLD INTELLECTUAL PROP. ORG., THE ECONOMIC CONTRIBUTION OF COPYRIGHT-BASED INDUSTRIES IN ARGENTINA 18 (2013), [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_ar.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_ar.pdf) [<https://perma.cc/ZZ78-R43E>].

194. *See, e.g.,* Mark Vanhoenacker, *Requiem: Classical Music in America Is Dead*, SLATE (Jan. 21, 2014, 11:52 PM), <http://slate.com/culture/2014/01/classical-music-sales-decline-is-classical-on-deaths-door.html> [<https://perma.cc/4YQM-72SK>].

195. *See* NAT'L ENDOWMENT FOR ARTS, OFFICE OF RESEARCH AND ANALYSIS, U.S. TRENDS IN ARTS ATTENDANCE AND LITERARY READING: 2002–2017, at 8 (2018) [hereinafter NAT'L ENDOWMENT FOR ARTS, U.S. TRENDS], <http://www.arts.gov/sites/default/files/2017-sppapreviewREV-sept2018.pdf> [<https://perma.cc/Z4ER-D5K9>].

196. *Id.* The use of the term “classical music” in this survey refers to symphony, chamber, or choral music. NAT'L ENDOWMENT FOR ARTS, A DECADE OF ARTS ENGAGEMENT: FINDINGS FROM THE SURVEY OF PUBLIC PARTICIPATION IN THE ARTS, 2002–2012, at 8 (2015) [NAT'L ENDOWMENT FOR ARTS, A DECADE OF ARTS ENGAGEMENT], <http://www.arts.gov/sites/default/files/2012-sppa-feb2015.pdf> [<https://perma.cc/PP4D-3WVL>].

when it was 11.6%.<sup>197</sup> In other words, in the past eighteen years, there was a 25.9% decrease in the rate of classical music performance attendance. In contrast, during this same time period, U.S. adult movie theater attendance has remained mostly unchanged.<sup>198</sup> In 2017, 58.6% of U.S. adults were moviegoers, which was only a 2.3% rate decrease from 2002.<sup>199</sup>

Predictably, this steady decline in classical music performance attendance has correlated with poor sales figures in the classical music business.<sup>200</sup> According to market research firm Nielsen Music's 2013 music survey, the classical genre constituted only 2.8% of all albums sold in the United States.<sup>201</sup> By 2017, that number decreased to 1.9%.<sup>202</sup> In comparison, the R&B/Hip-Hop category made up 14.6% of total album sales and the Rock category made up 34.6%.<sup>203</sup> These figures demonstrate classical music's relative lack of popularity amongst Americans.

Live classical music has also endured difficult times in this same time period.<sup>204</sup> During the past decade, the overall volume of ticket sales for orchestras has declined at an annual rate of 2.8%.<sup>205</sup> This coincided with many orchestra bankruptcies, most notably that of one of America's "Big Five" Orchestras<sup>206</sup>—the Philadelphia Orchestra.<sup>207</sup> Other orchestra bankruptcies from 2010 to 2011 included the Honolulu Symphony,<sup>208</sup> New Mexico Symphony,<sup>209</sup> and Syracuse Symphony.<sup>210</sup> These orchestra bankruptcies did not only occur as a result of the recession; the trend has continued to

197. NAT'L ENDOWMENT FOR ARTS, U.S. TRENDS, *supra* note 195, at 8.

198. *Id.* at 6.

199. *Compare id.*, with NAT'L ENDOWMENT FOR ARTS, A DECADE OF ARTS ENGAGEMENT, *supra* note 196, at 76 (noting that sixty percent of adults saw a movie in 2002).

200. *See, e.g.*, NIELSEN MUSIC, 2017 U.S. MUSIC YEAR-END REPORT 31 (2018) [hereinafter NIELSEN, 2017], <http://www.nielsen.com/us/en/insights/reports/2018/2017-music-us-year-end-report.html> [https://perma.cc/88NM-DH7S].

201. NIELSEN MUSIC, U.S. MUSIC INDUSTRY YEAR-END REVIEW: 2013, at 10 (2014), <http://www.nielsen.com/wp-content/uploads/sites/3/2019/04/nielsen-us-music-year-end-report-2013.pdf> [https://perma.cc/UN3L-K5A7].

202. NIELSEN, 2017, *supra* note 200, at 31.

203. *Id.*

204. *See* NAMITA DESAI ET AL., OLIVER WYMAN, REIMAGINING THE ORCHESTRA SUBSCRIPTION MODEL 7, 11 (2015), <http://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2015/nov/Reimagining-the-Orchestra-Subscription-Model-Fall-2015.pdf> [https://perma.cc/4TWR-H3PN].

205. *Id.* at 11.

206. James R. Oestreich, *The Big Five Orchestras No Longer Add Up*, N.Y. TIMES (June 14, 2013), <http://www.nytimes.com/2013/06/16/arts/music/the-big-five-orchestras-no-longer-add-up.html> [https://perma.cc/X26R-PXFN].

207. *See* Daniel J. Wakin, *Details Emerge of an Orchestra's Bankruptcy Plea*, N.Y. TIMES (Apr. 20, 2011), <http://www.nytimes.com/2011/04/21/arts/music/philadelphia-orchestra-papers-give-bankruptcy-details.html> [https://perma.cc/VY4N-797H].

208. Catherine E. Toth, *Honolulu Symphony Shutting Down After 110 Years of Music*, HAW. MAG. (Dec. 26, 2010), [http://www.hawaiimagazine.com/blogs/hawaii\\_today/2010/12/16/Honolulu\\_Symphony\\_shutting\\_down](http://www.hawaiimagazine.com/blogs/hawaii_today/2010/12/16/Honolulu_Symphony_shutting_down) [https://perma.cc/WN8T-ZQ97].

209. Winthrop Quigley, *Creative Drive Lets Orchestra Play On*, ALBUQUERQUE J. (Aug. 6, 2013, 12:01 AM), <http://www.abqjournal.com/242895> [https://perma.cc/NW8W-XWXX].

210. Melinda Johnson, *Syracuse Symphony Orchestra Will File for Bankruptcy, Board Announces*, SYRACUSE.COM (Apr. 6, 2011), [http://www.syracuse.com/news/index.ssf/2011/04/post\\_411.html](http://www.syracuse.com/news/index.ssf/2011/04/post_411.html) [https://perma.cc/Q5KJ-ETRN].

more recent years.<sup>211</sup> In 2016, the Boston Classical Orchestra filed for bankruptcy and cancelled the remainder of its season.<sup>212</sup>

These orchestras are creatures of tradition. They mainly perform public domain classical works.<sup>213</sup> But this limited repertoire selection also correlates with the significant cost difference between performing a public domain work and a copyrighted work.<sup>214</sup> In 2011, U.S. orchestras paid an estimated \$150 to buy the score and *perpetual performance* rights for a symphony in the public domain, compared with \$600 *per performance* for a copyrighted work.<sup>215</sup>

The preference for public domain works consequently translates to fewer performances of more recent works (those that are not in the public domain). In the latest edition of the League of American Orchestras's Orchestra Repertoire Report, which aggregates data from 3,721 individual performances among fifty-two orchestras, only one of the top ten most frequently performed works is not from the public domain.<sup>216</sup> Of the top ten most-performed operas in the United States from 2010 to 2019, which account for a total of 4,603 performances, all were operas from the public domain.<sup>217</sup>

211. See Andrea Shea, *34-Year-Old Boston Classical Orchestra Files for Bankruptcy and Folds*, WBUR: ARTERY (Feb. 11, 2016), <http://www.wbur.org/artery/2016/02/11/boston-classical-orchestra-bankrupt> [<https://perma.cc/7GKG-5PM2>].

212. *Id.*

213. See Cronin, *supra* note 83, at 30. See *infra* notes 216–217 for the top ten most performed orchestral and operatic works.

214. When Shostakovich's Symphony no. 1 was in the public domain, it cost \$130 to purchase the sheet music. See Appellants' Opening Brief in *Golan v. Gonzales*, *supra* note 26, at 17. This one-time purchase would allow unlimited performances. *Id.* After the work was removed from the public domain, the cost skyrocketed to \$495 to *rent* the music for a *single* performance. *Id.*

215. Parry, *supra* note 25.

216. The top ten most performed pieces are: (1) Beethoven, Symphony no. 3 in E-flat Major, op. 55, "Eroica"; (2) Mahler, Symphony no. 1 in D Major; (3) Rachmaninoff, Piano Concerto no. 3 in D Minor, op. 30; (4) Tchaikovsky, Symphony no. 4 in F Minor, op. 36; (5) Mozart, Symphony No. 41 in C Major, K. 551, "Jupiter"; (6) Prokofiev, Symphony no. 5, op. 100; (7) Rachmaninoff, Piano Concerto no. 2 in C Minor, op. 18; (8) Beethoven, Symphony no. 8 in F Major, op. 93; (9) Beethoven, Symphony no. 5 in C Minor, op. 67; and (10) Brahms, Violin Concerto in D Major, op. 77. LEAGUE OF AM. ORCHESTRAS, 2011–12 CLASSICAL SEASON REPERTOIRE 3 (2012), [http://americanorchestras.org/images/stories/ORR\\_1112/ORR12%20summary%20report\\_final.pdf](http://americanorchestras.org/images/stories/ORR_1112/ORR12%20summary%20report_final.pdf) [<https://perma.cc/ZB65-QYC8>]. Of these ten works, only Prokofiev's Symphony no. 5 is protected by copyright because it was published in 1944. See *Symphony No. 5, Op. 100 (Prokofiev, Sergey)*, INT'L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/Symphony\\_No.5,\\_Op.100\\_\(Prokofiev,\\_Sergey\)](http://imslp.org/wiki/Symphony_No.5,_Op.100_(Prokofiev,_Sergey)) [<https://perma.cc/GUV3-SUQ9>] (last visited Feb. 1, 2020) ("This work is *likely not* in the public domain in the US (due to first publication with the required notice after 1923, plus renewal or 'restoration' under the GATT/TRIPS amendments) . . .").

217. The top ten most performed operas are Puccini's *La Bohème*, Bizet's *Carmen*, Puccini's *Madama Butterfly*, Verdi's *La Traviata*, Rossini's *Il Barbiere di Siviglia*, Puccini's *Tosca*, Mozart's *Die Zauberflöte*, Mozart's *Le Nozze di Figaro*, Mozart's *Don Giovanni*, and Verdi's *Rigoletto*. *Statistics*, OPERABASE, <http://www.operabase.com/statistics/en#opera> [<https://perma.cc/6WEW-NV8Q>] (last visited Feb. 1, 2020) (providing a searchable database of statistics from 2004 until 2019 by work and by composer with search options by year, type of work, and geography). This data was extracted from Operabase Statistics, an online repository of opera performances. See *Introduction*, OPERABASE, <http://www.operabase.com/intro/en> [<https://perma.cc/Z8K3-TNK2>] (last visited Feb. 1, 2020). This search looked at years 2010 to 2019 and was limited to opera in the United States.

### 1. The United States Gets with the Program

Despite the evolution of copyright law throughout the country's history, the United States eschewed participation in international copyright schemes until recently.<sup>218</sup> In 1886, the Berne Convention for the Protection of Literary and Artistic Works, the first international agreement on copyright protection, established basic and general principles for the protection of literary and artistic works across borders.<sup>219</sup> The Berne Convention stated that works in one Berne member nation must receive equal protection in another Berne member nation.<sup>220</sup> In other words, member countries' copyrighted works must receive the same level of copyright protection in all other Berne member countries.<sup>221</sup> Moreover, this reciprocal protection is automatic and not conditioned upon any additional requirements.<sup>222</sup> Although the convention provided robust guidelines for international copyright law, the United States did not join the Berne Convention until over a century later on March 1, 1989.<sup>223</sup>

The United States' initial reluctance to join international schemes did not stop it from intensifying its international copyright protection laws in recent decades.<sup>224</sup> After joining Berne in 1989, there have been additional developments that have increased copyright requirements in the United States.<sup>225</sup> The United States initially adopted a "minimalist approach."<sup>226</sup> This approach refers to the United States making minimal changes to copyright law and only when it was explicitly required to do so to avoid conflicts between U.S. and foreign copyright laws.<sup>227</sup>

However, this changed in 1994 when the United States joined the World Trade Organization and signed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>228</sup> After TRIPS, Congress passed the Uruguay Round Agreements Act (URAA).<sup>229</sup> One aspect of this copyright law restored copyrights in

218. Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 1–2 (1988).

219. See *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html) [https://perma.cc/EZP8-4CPG] (last visited Feb. 1, 2020).

220. *Id.* (referring to the principle of "national treatment").

221. See *id.*

222. *Id.*

223. U.S. COPYRIGHT OFFICE, CIRCULAR 38A, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 2 (2019), <http://copyright.gov/circs/circ38a.pdf> [https://perma.cc/7X2H-HYEH]; see also Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853, 2853–61 (1988).

224. See Ginsburg & Kernochan, *supra* note 218, at 1–2.

225. See Dubina, *supra* note 41, at 978–82 (highlighting major changes in U.S. copyright law since 1989).

226. *Id.* at 978.

227. H.R. REP. NO. 100-609, at 7 (1988).

228. Dubina, *supra* note 41, at 979–80. The TRIPS Agreement is Annex 1C of the Marrakesh Agreement establishing the World Trade Organization. See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf) [https://perma.cc/73N6-3XCC].

229. See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4814 (1994) (codified as amended in scattered sections of the U.S. Code); U.S. COPYRIGHT OFFICE, CIRCULAR 38B, COPYRIGHT

the United States on foreign works if those works were still copyrighted in the other members of the Berne Convention.<sup>230</sup> If there was a piece of music no longer under copyright protection in the United States but still copyrighted in another member country, the United States would have to adhere to the other country's copyright terms.<sup>231</sup> This effectively extended the copyright terms of some works.<sup>232</sup> The URAA also provided retroactive protections to works that entered the U.S. public domain—but were protected elsewhere—prior to the United States joining Berne.<sup>233</sup> In other words, before 1989, there were works that were in the public domain in the United States but not in other countries. Those works now have protection based on the international standards rather than the U.S. standards. For example, Prokofiev's *Peter and the Wolf*, which was previously in the public domain in the United States, returned to copyright protection because of this retroactive copyright protection.<sup>234</sup>

Section 514 of the URAA extended copyright protection to works under copyright protection in their country of origin but lacking the commensurate level of protection in the United States.<sup>235</sup> There were three reasons that these works did not have copyright protection in the United States: (1) absence of copyright relations between the country of origin and the United States when the work was published, (2) lack of subject matter protection for sound recordings made before 1972, and (3) failure to provide notice of copyright status or to register and renew a copyright.<sup>236</sup> The retroactive copyright protection through section 514 is especially pertinent to classical music because most famous classical works were composed outside of the United States.<sup>237</sup> Turning back the clock on these works particularly impacted musicians because it limited the artistic choices they could make.<sup>238</sup> Some orchestra conductors had to stop performing the works that left the public domain because they were too financially burdensome.<sup>239</sup> In particular, conductors had to give up twentieth century Russian works like Shostakovich's Symphony no. 1 and Prokofiev's *Peter and the Wolf*.

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RESTORATION UNDER THE URAA 1 (2013) [hereinafter U.S. COPYRIGHT OFFICE, CIRCULAR 38B], <http://www.copyright.gov/circs/circ38b.pdf> [<https://perma.cc/E3CU-3LCK>].

230. U.S. COPYRIGHT OFFICE, CIRCULAR 38B, *supra* note 229, at 1–2.

231. Uruguay Round Agreements Act § 514, 108 Stat. at 4976–81; *see also* 17 U.S.C. § 104A (2018).

232. *See* The Associated Press, *Prokofiev and Shostakovich: Public Domain No More*, WQXR (Jan. 19, 2012), <http://www.wqxr.org/story/182225-prokofiev-and-shostakovich-public-domain-no-more/> [<https://perma.cc/5UTQ-YPZT>].

233. *Golan v. Holder*, 565 U.S. 302, 307 (2012).

234. *E.g.*, Brian Lee Pelanda, Note, *Copyright's "Traditional Contours" and "Bedrock Principles": Golan's Potential to Secure First Amendment Protection over the Public Domain*, 31 WHITTIER L. REV. 547, 551–52 (2010).

235. Uruguay Round Agreements Act § 514, 108 Stat. at 4976–81; *Golan*, 565 U.S. at 313–14.

236. *Golan*, 565 U.S. at 314.

237. For example, none of the top ten most-performed works tracked by the American League of Orchestras are by American composers. *See supra* note 216. Unsurprisingly, none of the top ten most-performed operas from 2008 to 2019 are by American composers either. *See supra* note 217.

238. *See* Appellants' Opening Brief in *Golan v. Gonzales*, *supra* note 26, at 16–17.

239. *Id.* at 17 ("Even orchestras that had already owned the sheet music of some restored works before section 514 went into effect are stopped from performing these restored works because the performance license fees creates a burdensome expense smaller orchestras simply cannot absorb.").

## 2. The Unsuccessful Attempt To Challenge Section 514: *Golan v. Holder*

In 2012, orchestra conductors, musicians, and publishers challenged section 514 of the URAA.<sup>240</sup> The petitioners in *Golan* argued that section 514 was unconstitutional because the provisions violate the “limited time” phrase within the Copyright Clause of the U.S. Constitution.<sup>241</sup> In a six to two decision, the Supreme Court held that section 514 of the URAA was constitutional.<sup>242</sup> Justice Ginsburg, writing for the majority, reasoned that the Copyright Clause “does not exclude application of copyright protection to works in the public domain.”<sup>243</sup> Comments made during a law review symposium that Justice Ginsburg’s daughter moderated seemed to inspire Justice Ginsburg’s reasoning.<sup>244</sup> The symposium comments noted that the Copyright Clause does not textually define “limited time” as a single period of time nor does it textually dictate whether things could be taken out of the public domain.<sup>245</sup> Furthermore, the lack of this textual limitation could be consistent with promoting science and art because it could help publish more works and increase access.<sup>246</sup> The majority in *Golan* employs the same reasoning that the Copyright Clause’s aim to promote the sciences is not limited to incentivizing creation of new works but also to disseminating works and ideas.<sup>247</sup> Therefore, the international copyright system promoted by section 514 aligns with the Copyright Clause’s objective to help disseminate works.<sup>248</sup>

Justice Breyer wrote a dissenting opinion in which he noted that the URAA discourages people from producing new works.<sup>249</sup> He wrote that “[b]y definition, it bestows monetary rewards only on owners of old works—works that have already been created and already are in the American public domain.”<sup>250</sup>

*Golan* effectively removed some works from the public domain and put them under copyright protection based on a reciprocity principle.<sup>251</sup> Consequently, many works, such as those by twentieth century Russian classical composers like Sergei Prokofiev and Dmitri Shostakovich, were no longer as accessible as they had previously been, nor could their copyright status be as easily ascertained.<sup>252</sup> In one of the amicus briefs arguing that section 514 was unconstitutional, Project Petrucci, the owner of IMSLP, foreshadowed that this would limit the types of classical music

240. *Golan*, 565 U.S. at 307–08.

241. *Id.* at 318.

242. *Id.* at 308.

243. *Id.* at 318.

244. *See id.* (citing Symposium, *Congressional Power and Limitations Inherent in the Copyright Clause*, 30 COLUM. J.L. & ARTS 259, 266 (2007)).

245. Symposium, *supra* note 244, at 266.

246. *Id.*

247. *Golan*, 565 U.S. at 325–26.

248. *Id.* at 326–27.

249. *Id.* at 345 (Breyer, J., dissenting).

250. *Id.*

251. *See id.* at 308 (majority opinion) (holding section 514 and its restoration of U.S. copyright protection to certain works copyrighted in Berne member countries as constitutional).

252. Brief of the American Civil Liberties Union as Amicus Curiae in Support of Petitioners at 9–10, *Golan v. Holder*, 565 U.S. 302 (2012) (No. 10-545), 2011 WL 2578555.



people can regularly enjoy.<sup>253</sup> Other critics of the *Golan* decision have stated that “this kind of amendment to the Copyright Act brings instability and uncertainty to the whole system. If no boundaries exist, the law itself becomes meaningless.”<sup>254</sup> However, to comply with section 514 of the URAA, the United States had to retroactively grant copyright protection to works that should have been protected when the United States initially joined Berne.<sup>255</sup> In other words, through the URAA, the United States had to reciprocate copyright protection for works that were copyrighted in other Berne member countries.

#### IV. DISCUSSION

Despite the prevalence of classical music in all areas of life, from commercials to popular music, more recently composed classical works face an uncertain future. While the current state of classical music is dim in general,<sup>256</sup> the plight of many twentieth century classical composers is even worse. Artistic preferences do contribute to whether audiences enjoy more modern works.<sup>257</sup> But another causal factor is that reduced access and uncertainty of the status of some of those works breeds avoidance.<sup>258</sup> In other words, because people are unsure of whether a particular piece of music is copyrighted, they tend to be discouraged and avoid that work altogether. If those pieces are not used more regularly, their loss of exposure becomes cyclical, and they may fall into obscurity altogether.

This Section begins in Part IV.A with a discussion of how the *Golan* decision is consistent with the development of copyright law in U.S. history but leaves in its wake a problem for accessing certain classical music. It follows in Part IV.B with a discussion of how financial incentives skew the performance of some works rather than others. It concludes in Part IV.C by proposing a repository to facilitate access to copyright statuses so that musicians can more easily ascertain whether they can perform the work.

##### A. *Golan’s Consistency with the Historical Development of U.S. Copyright Law*

The 2012 *Golan* case has further changed the availability of classical music, particularly that of twentieth century Russian composers.<sup>259</sup> With some Prokofiev and

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253. See Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141, at 37 (“Section 514’s restriction on users fails not only to provide ample alternative channels, but also any guaranteed alternatives whatsoever.”).

254. Elizabeth Townsend Gard, *Copyright Law v. Trade Policy: Understanding the Golan Battle Within the Tenth Circuit*, 34 COLUM. J.L. & ARTS 131, 134 (2011).

255. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976–81 (1994) (codified as amended in scattered sections of the U.S. Code).

256. Vanhoenacker, *supra* note 194.

257. See Ross, *supra* note 24; see also Richard Gray, *Audiences Hate Modern Classical Music Because Their Brains Cannot Cope*, TELEGRAPH (Feb. 20, 2010), <http://www.telegraph.co.uk/news/science/science-news/7279626/Audiences-hate-modern-classical-music-because-their-brains-cannot-cope.html> [https://perma.cc/YNY4-MFLM].

258. See *infra* note 274.

259. See generally Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141 (explaining the impact of the URAA on works that were previously in the public domain in the United States).

Shostakovich works excluded from the public domain, such as *Peter and the Wolf*,<sup>260</sup> music educators and orchestras must respond accordingly. The evolution of copyright law in the United States has created incentives that favor music publishers and copyright plaintiffs over educators and performers.<sup>261</sup> The overall effect of the current copyright scheme—whether through the administration of copyright records or through the retroactive copyright protection provided by section 514 of the URAA—is reduced access due to uncertainty.<sup>262</sup> In the aftermath of *Golan*, this is especially alarming because many works that were previously accessible are now protected.<sup>263</sup>

Given the development of American copyright law since the late 1700s, the *Golan* decision was expected and consistent with the trajectory of U.S. copyright law.<sup>264</sup> Over the last two centuries, revisions to copyright law extended the length of copyright terms.<sup>265</sup> It is unlikely that this trend will cease. More importantly, however, *Golan* ensured that the United States could provide commensurate copyright protection for foreign authors' works in the United States.<sup>266</sup> This holding is especially relevant for classical music because much of the important repertoire comes from outside of the United States.<sup>267</sup> Therefore, musicians must accept the reality that *Peter and the Wolf* will not be available in the public domain until 2036. However, this does not mean that musicians should give up on demanding the access they deserve to works that are not under copyright protection.

Although the public domain can be used to share music,<sup>268</sup> *Golan* adds uncertainty to works' copyright statuses.<sup>269</sup> As a result, users may be less likely to use or share (via IMSLP, for example) certain musical works if doing so risks infringement litigation.<sup>270</sup> Further, for IMSLP, which is the most comprehensive sheet music database available on the internet, the need to constantly monitor the copyright status of a work occurs not just for the initial upload; the volunteers who upload the works to IMSLP must also continually ascertain that these works do not run afoul of any copyright laws or recent renewals.<sup>271</sup> The limited human capital dedicated to this work, combined with the

260. See, e.g., Baumann, *supra* note 35.

261. See Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141, at 12 (discussing music publishers who wrongfully attempt to remove works from IMSLP by alleging copyright infringement).

262. See *supra* Part II.C for a discussion of the copyright status of sheet music and the difficulty of determining if a piece is in the public domain.

263. See Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141, at 11 (writing in 2011 that IMSLP users must “simply assume that everything after 1923 is still under copyright”).

264. See *supra* Part II.A for an analysis of the history of U.S. copyright law.

265. See *supra* Part II.A.2 discussing how the length of copyright terms have continuously increased throughout history from the initial fourteen years of protection granted by the 1790 Act to life-plus-seventy years as granted by the CTEA.

266. See *Golan v. Holder*, 565 U.S. 302, 308 (2012).

267. See INT'L MUSIC SCORE LIBR. PROJECT, *supra* note 169 (providing examples of how much classical music stems from outside the United States).

268. See, e.g., *id.*

269. See Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141, at 10–11.

270. See Wakin, *Free Trove*, *supra* note 148.

271. Project Petrucci Amicus Brief in *Golan v. Holder*, *supra* note 141, at 8, 11 (“While these individuals [who volunteer to verify public domain status for IMSLP] must always navigate the already formidable and growing uncertainties of copyright law, Section 514 imposes a new, continuous burden on

arduous task of maintenance, will inevitably lead volunteers to choose works that are more easily identified as public domain rather than undertaking the onerous task of tracking down the exact copyright statuses and renewal statuses of works that fall within the uncertain 1925 to 1978 date range.<sup>272</sup>

*B. More Tchaikovsky, Less Prokofiev: How Financial Incentives Impact Music*

Current copyright laws create financial incentives that promote certain works and composers at the detriment of others; musicians and orchestra conductors respond to economic incentives by making creative choices based on cost considerations.<sup>273</sup> For example, Lawrence Golan, the orchestra conductor and petitioner in *Golan*, specifically chooses public domain repertoire for his orchestra.<sup>274</sup> He noted that he had previously been able to purchase Dmitri Shostakovich's Symphony no. 1 for \$130, a price for which he could perform the work an infinite amount of times as the owner.<sup>275</sup> Now, the cost is \$495 to rent the music for a one-time performance.<sup>276</sup> From an economic standpoint, any orchestra conductor with cost limitations would favor something in the public domain over the Shostakovich work. Especially with the slew of bankruptcies that have plagued American orchestras in the past decade, most orchestras do not have the resources to afford the performance of these works.<sup>277</sup>

The cost discrepancy of copyrighted and public domain works means that copyright law effectively dictates what works will be performed and what works will not. As a result, certain works will enter obscurity while many others are repeatedly exposed to the public; it is not a coincidence that every major metropolitan orchestra performs Tchaikovsky's *1812 Overture* every year during Independence Day.<sup>278</sup>

In addition to limiting the repertoire choices of musicians, these economic incentives produce a domino effect. Often, music tastes are acquired over time, and what was once judged as bad music can become a masterpiece in subsequent generations.<sup>279</sup> By not making certain pieces available, the public will be delayed in their appreciation of Shostakovich's Symphony no. 5 or Aram Khachaturian's *Sabre Dance*. Those works could have gained the same recognition as Beethoven's Symphony no. 5, but copyright laws reduce the opportunity to do so.

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them to re-verify the copyright status of every work *ad infinitum* in order to avoid potentially crushing liability.”).

272. See U.S. COPYRIGHT OFFICE, CIRCULAR 15A, *supra* note 130, at 2; *supra* note 27.

273. See Dubina, *supra* note 41, at 993–96.

274. See Appellants' Opening Brief in *Golan v. Gonzales*, *supra* note 26, at 13–14.

275. *Id.* at 17.

276. *Id.*

277. See *supra* notes 204–212 for a discussion of the difficulties orchestras have faced in the last decade.

278. See Bennett, *supra* note 5.

279. See, e.g., Igor Stravinsky's "The Rite of Spring," NPR ONLINE, <http://www.npr.org/programs/specials/milestones/991110.motm.riteofspring.html> [<https://perma.cc/7XVY-MEPR>] (last visited Feb. 1, 2020) ("Despite its inauspicious debut, Stravinsky's score for 'The Rite of Spring' today stands as a magnificent musical masterpiece of the twentieth century."); Amar Toor, *100 Years Ago Today, 'The Rite of Spring' Incited a Riot in a Paris Theater*, VERGE (May 29, 2013, 11:15 AM), <http://www.theverge.com/2013/5/29/4375736/igor-stravinsky-rite-of-spring-100-anniversary-paris-riot> [<https://perma.cc/PZ96-C8UY>].

The financial burden of accessing these works will also impact other areas of society, including educational institutions and major orchestras.<sup>280</sup> These incentives should focus on the present, not glorifying the past: “We may need incentives for music to be written tomorrow, but not for music written seventy-five years ago.”<sup>281</sup>

C. *Too Difficult to Handel*,<sup>282</sup> *But a Liszt Can Help*<sup>283</sup>

The public domain serves as an important vehicle to inspire new works.<sup>284</sup> Anyone can record their own version of Chopin’s Étude in C Minor, op. 10, no. 12 because it is in the public domain.<sup>285</sup> However, Chopin’s work provided the inspiration for a derivative work for the rapper Nas in “A Queens Story.”<sup>286</sup> In this example, Nas’s work is copyrighted on the basis of its originality in its derivation, and original derivative works are statutorily protected.<sup>287</sup>

The current uncertain copyright status of many works creates barriers for all musicians to innovate.<sup>288</sup> If someone wants to include a sample of a piece that was composed prior to 1978, they would have to physically visit the Copyright Office in Washington, D.C., to look at the most comprehensive and accurate records.<sup>289</sup> Even if they can access the records, the search options are limited, including the option to search by composer.<sup>290</sup> The physical barriers make it less likely that someone will make the effort to search for something and more likely that they will resort to works that they know are definitively in the public domain.<sup>291</sup> This tendency likely results in less creativity, which may decrease an overall output of music that incorporates classical composers.

Because the Supreme Court held in *Golan* that taking works out of the public domain is consistent with the Copyright Clause,<sup>292</sup> music educators and orchestras who want to use works removed from the public domain must find alternatives. One of the major problems with the current copyright laws for sheet music is lack of

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280. Dubina, *supra* note 41, at 997–98.

281. Heald, *supra* note 104, at 249.

282. See *George Frideric Handel (1685-1759)*, CLASSIC FM, <http://www.classicfm.com/composers/handel/> [https://perma.cc/HL8Z-KPC5] (last visited Feb. 1, 2020).

283. See *Franz Liszt (1811-1886)*, CLASSIC FM, <http://www.classicfm.com/composers/liszt/> [https://perma.cc/NX48-J9Y6] (last visited Feb. 1, 2020).

284. Heald, *supra* note 104, at 250.

285. KRASILOVSKY & SHEMEL, *supra* note 89, at 199.

286. See NAS, *supra* note 9, at 3:29–4:28.

287. See 17 U.S.C. § 103(a) (2018); Heald, *supra* note 104, at 250. A derivative work is defined as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101.

288. See *supra* Part II.C.2 for a discussion of the difficulties in identifying the copyright status of sheet music.

289. See *supra* notes 151–153 and accompanying text.

290. See *supra* note 140 and accompanying text.

291. See *supra* Part II.C.2.

292. See *Golan v. Holder*, 565 U.S. 302, 326 (2012).

knowledge—both in terms of notice and in terms of copyright status.<sup>293</sup> The inability to search by composer to verify copyright status accentuates this problem.<sup>294</sup> There are commercial resources available that help users determine if something is under copyright or in the public domain.<sup>295</sup> However, prospective users must pay for such types of services.<sup>296</sup> A freely-accessible platform to guide what is protected, and consequently what constitutes a copyright violation, would benefit musicians and music publishers alike.

A comprehensive central repository that allows people to search for different versions and arrangements of classical music, in addition to their respective copyright dates, would help schools and orchestras be less defensive in selecting repertoire.<sup>297</sup> The International Standard Music Number exists as a way to catalogue music works, but it is rarely used, and a cursory search for “Prokofiev Romeo and Juliet” on that database only yielded *one* arrangement of his popular piece, *Romeo and Juliet*,<sup>298</sup> which indicates that it is far from complete.<sup>299</sup>

A more robust repository, like the one that the USPTO has for patents, would not only help music educators and orchestras but would also help music publishers check if anyone is infringing their works. The USPTO repository keeps track of every patent issued in the United States from 1790, whereas the Copyright Office only has records from 1978 onwards.<sup>300</sup> For works published between the years 1925 to 1978, the status of each work has to be ascertained individually.<sup>301</sup> This process creates barriers to

293. See, e.g., *About Us*, DURATIONATOR, <http://www.durationator.com/about> [https://perma.cc/UP2R-PRGJ] (last visited Feb. 1, 2020) (“[T]he determination of a work’s copyright status is more significant than ever before. Yet oftentimes making such a determination for a given work is a very complicated matter, due in no small part to the fact that while our cultural activities regularly now are global, copyright law remains based in country-by-country analyses, sorting laws, histories, agreements, and the like in order to arrive at an accurate and definitive determination of a work’s copyright status.”).

294. See *Copyright Catalog (1978 to Present)*, *supra* note 128 (“Works registered prior to 1978 may be found only in the Copyright Public Records Reading Room.”); *supra* note 140.

295. See, e.g., DURATIONATOR, <http://www.durationator.com> [https://perma.cc/AX8F-M8F6] (last visited Feb. 1, 2020).

296. See, e.g., *Products and Pricing*, DURATIONATOR, <http://www.durationator.com/products-pricing> [https://perma.cc/RTS5-65TE] (last visited Feb. 1, 2020).

297. See Appellants’ Opening Brief in *Golan v. Gonzales*, *supra* note 26, at 13 (“Just a few examples from this case illustrate this fact. Plaintiffs Lawrence Golan, Richard Kapp, and Symphony of the Canyons all perform music. Their artistic expression is facilitated by the availability of music in the public domain. Indeed the vast majority of works they perform are public domain works. Without access to the public domain works which have been ‘restored’ through the URAA their range of performances is significantly restricted.” (citations omitted)).

298. U.S. ISMN Public Archive, *International Standard Music Number Item Records for Music Scores*, LIBR. CONGRESS, <http://memory.loc.gov/diglib/ihaz/html/ismn/ismn-home.html> [https://perma.cc/K5A9-7GRS] (last visited Feb. 1, 2020) (searching for “Prokofiev Romeo and Juliet” with the only result being “Ten Pieces from Romeo and Juliet, Op. 75 (2004)”).

299. Although these arrangements are not in the public domain in the United States, IMSLP hosts various arrangements of the piece, including a piano arrangement to a strings arrangement. *Romeo and Juliet (Ballet)*, *Op.64 (Prokofiev, Sergey)*, INT’L MUSIC SCORE LIBR. PROJECT, [http://imslp.org/wiki/Romeo\\_and\\_Juliet\\_\(ballet\),\\_Op.64\\_\(Prokofiev,\\_Sergey\)](http://imslp.org/wiki/Romeo_and_Juliet_(ballet),_Op.64_(Prokofiev,_Sergey)) [https://perma.cc/4KKU-W2FA] (last visited Feb. 1, 2020).

300. *Copyright Catalog (1978 to Present)*, *supra* note 128.

301. See *supra* notes 126–137, 181–188 and accompanying text.

access that discourages people from using those works entirely.<sup>302</sup> Analogous commercial services already exist to prey upon the market need to ascertain copyright statuses within the fragmented records.<sup>303</sup> Because many people are already using online platforms like IMSLP to find sheet music,<sup>304</sup> a free and comprehensive repository can complement the hundreds of thousands of works that are already readily accessible online for use.

While a repository can help musicians determine a work's copyright status, the repository cannot address the high cost of performing copyrighted works, such as some works by Prokofiev and Shostakovich.<sup>305</sup> Thus, the cost deterrence cannot be eliminated by this solution. However, by making it possible for musicians to determine whether a piece is in the public domain, the repository can hopefully alleviate the current chilling effect that plagues orchestras, musicians, and educators. Although it is true that works protected by the 1909 Act will completely phase out within the next century, the country cannot afford to allow those works—which include many important classical works of the twentieth century—to abscond into obscurity by not exposing them to the music world.

## V. CONCLUSION

Copyright laws that promote more confusion than clarity compound the bleak landscape of classical music in the United States. The *Golan* decision, albeit consistent with international schemes and the development of U.S. copyright laws over the last two centuries, has only added to the confusion. The administration of copyright laws poses a threat to the musical creativity of the nation. The uncertainty in copyright status of certain works and different copyright dates for different editions of classical works dissuades musicians and nonmusicians alike from using certain pieces. This uncertainty and reduced access to works, especially those of the great twentieth century Russian composers, like Prokofiev and Shostakovich, artificially suppresses the creativity of artists of all genres. For works published between 1925 to 1978, there needs to be a better way of tracking what is copyrighted and what is not. Until then, if Lady Gaga wants to sample Shostakovich's Jazz Suite no. 2 in her next hit, she should call her lawyers first.

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302. See *supra* note 176 for one example of a conductor choosing not to perform a piece because of uncertainty with respect to its copyright status.

303. See *About Us*, *supra* note 293; see also *supra* notes 295–296 and accompanying text.

304. See INT'L MUSIC SCORE LIBR. PROJECT, *supra* note 169.

305. See Appellants' Opening Brief in *Golan v. Gonzales*, *supra* note 26, at 17.