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Copyright, and the Production of Music

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JOHANN GOTTLIEB FICHTE, AND THE TRAP OF *INHALT* (CONTENT)
AND *FORM*: An information perspective on music copyright

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In the digital environment, copyright law has become trapped in an assessment of what has been taken, rather than what has been done with copied materials and elements. This expands the scope of copyright into areas where it should not find infringement (such as sampling, mash-ups and other transformative uses) while encouraging activities that are problematic (such as hiding sources). This article argues that the trap was laid by the German idealist philosopher Johann Gottlieb Fichte whose influential 1793 article Proof of the Unlawfulness of Reprinting for the first time distinguishes Inhalt (i.e. content free to all) and Form (i.e. the author's inalienable expression) as copyright categories. It is shown that Fichte's structure conflates norms of communication and norms of transaction. An alternative path for copyright law in an information society is sketched from a separation of these norms: copying should be assessed from (i) the attribution of sources, and (ii) the degree to which original and derivative materials compete with each other. Throughout the article, transformative practices in music set the scene.

Keywords

copyright, idea-expression dichotomy, Johann Gottlieb Fichte, musical work,
performance, adaptation, sampling

Introduction

Modern copyright law assesses infringement predominantly from a proprietary perspective. Has anything been taken that is (within the parameters of a protected work) of value? An extreme instantiation is an aphorism from a classic British case of 1916 (*University of London Press v University Tutorial Press*): There, Peterson J suggested that ‘what is worth copying is prima facie worth protecting’ – for some even today the ultimate test of copyright infringement.¹

Aesthetic approaches to copying often ignore what has been taken. Instead, they tend to reflect on what has been done with the copied materials. Johann Mattheson’s prescription of 1739 is typical for eighteenth century music theory: ‘Taking is a permitted thing; but one must refund what has been borrowed with interest, i.e. one must furnish and elaborate the imitations so that they gain greater beauty and recognition than the pieces from which they had been taken.’²

Today, the practices flourishing in the digital environment appear to side with the latter approach, while copyright law has engaged in a rearguard action against sampling, parody, mash-ups, and countless other transformative practices.

¹ The evolution of copyright case law and statutes in the key jurisdictions is much more complex than our distinction between ‘what has been taken’, and ‘what has been done to it’ suggests. Yet, current UK law is a good illustration of a broad trend. To be sure, the *University of London* case is not uncontroversial. For example, Lord Justice Jacob suggests in *Nova v Mazooma* (2007) that findings of copying ‘are the starting point for a finding of infringement, not the end point’ (at 26). ‘Otherwise it would require the copying of insubstantial parts to be an infringement – which is so absurd as to be assuredly wrong’ (at 29). Contrast the misappropriation doctrine in the leading infringement decision from the highest UK court (House of Lords). According to *Designer Guild v Russell Williams* (2002), the infringement test for ‘altered copying’ assesses whether the defendant is using the claimant’s skill and labour. If there are sufficient similarities between original and alleged copy, a ‘substantial part’ question may not even be asked.

² The original German wording from Mattheson’s book *Der vollkommene Kapellmeister* (literally, The Complete Chapel-Master) reads (1739, p. 131): ‘Entleihen ist eine erlaubte Sache; man muss aber das Entlehnte mit Zinsen erstatten, d.i. man muss die Nachahmungen so einrichten und ausarbeiten, daß sie ein schöneres und besseres Ansehen gewinnen, als die Sätze, aus welcher sie entlehnet sind.’ All translations in this article are the authors’ own.

This article will take a closer look at the philosophical and aesthetical developments that coincided with copyright law's emerging concept of an abstract, self-contained, permanent work as the locus of protection. In the first section, the pre-copyright practices of music during the eighteenth century are sketched, and then contrasted with the aesthetic assertions of the musical work as an independent branch of the arts during the early years of the nineteenth century. The second section argues that the corresponding restrictive approach to copyright infringement (as applied, for example, to performances and arrangements) takes its lead from Johann Gottlieb Fichte's distinction of *Inhalt* (content) and *Form* in his 1793 article *Proof of the Unlawfulness of Reprinting*. The third and final section proposes an alternative model that, it is argued, resolves the tensions between digital information pastiche and copyright law in a coherent way.

The aesthetic transformation: constructing abstract works

Distinctions between original and copy, between work, adaptation and performance, are alien to musical practices pre-1800. These categories are the result of an aesthetic and legal turn we locate in the dichotomy of *Inhalt* (content) and *Form* that underpins, in contradictory ways, romantic aesthetic theory and legal philosophy.

Central to the musical practice of the seventeenth and eighteenth century was not the work of a particular composer but the event, the unique performance in a specific ritual context. This applies to religious functions, to dance music at court, and also to early opera. Of lasting artistic standing was not the music, but the play. Opera plays were printed as 'little books' (*libretti*), sold and distributed even abroad, while the musical scores remained unpublished. On the poster for the first performance of the Magic Flute (1791), the name of Emanuel Schikaneder (playwright, actor and entrepreneur) is printed much larger than Mozart's.

Recognised classical sources were regurgitated again and again, in particular in the versions of Pietro Metastasio whose libretti were set to music by dozens of composers. Each season, a different *Kapellmeister* may have been responsible for the musical

direction. He (it was always a he) would write new music, often integrating the most successful arias of the past seasons. For example, a Florentine production of Metastasio's *Didone abbandonata* of 1725, integrated arias by no less than three composers (Vivaldi, Orlandini, and Gasparini). Centre stage was not the composer whose works were to be reproduced according to his intentions but a practical musical mind, the *Kapellmeister* who adjusted the available musical material to the abilities of the singers, and to the dramaturgic constraints of the occasion.

In churches and monasteries, older music persisted for longer, and was also copied and distributed. But here too, the scores were continuously modified and adjusted for changing tastes and occasions. The contracts of court and church composers typically regulated the provision of music, but did not care where the material came from, or who wrote it (Pohlmann 1962).

Opera entrepreneurs, court administrators, church officials, even musicians and their audience paid little attention to sources or authenticity of music. J. S. Bach, according to an analysis of his manuscripts, never copied a work without making changes (Marshall 1972). G. F. Händel frequently used melodies of contemporary composers as themes for his own works (Buelow 1987). For Mozart's *Magic Flute*, 43 borrowed melodies have been identified, 33 from his own works, three each from pieces by Haydn and Gluck, and one each from Gassmann, Benda, Wranitzky and Philidor (Hyatt King 1950).

During the course of the eighteenth century, these all-pervasive practices of change, customisation and appropriation eventually became problematic, as a new conception of music took hold. Historically aware copyright scholars (Woodmansee & Jaszi 1994; Boyle 1996; Marshall 2005) have recognised a, then new, demand for 'original authorship' associated with the literary theory of the time. One of the earliest writers to plea for originality, rather than conformity to classical rules was Edward Young in his *Conjectures on Original Composition* (1759, §80): 'As far as a regard to Nature, and sound Sense, will permit a Departure from your great Predecessors; so far, ambitiously, depart from them; the farther from them in Similitude, the nearer are you to them in

Excellence; you rise by it into an Original; become a noble Collateral, not an humble Descendant from them.’ And indeed, by the end of the century, this was widely accepted. The productions of true artists would need to be characteristic, reflecting a unique persona.

However, we contend that a genius aesthetics itself is not sufficient to explain the transformation associated with the turn to the nineteenth century. For music, the aesthetic propertisation of genius relied on an emerging conception of the abstract work that may be boldly summarised in five propositions:

(1) Imitation, emulation and originality are mediated by form

While according to pre-modern aesthetic standards, artefacts were judged against their similarity (resemblance) either to nature or to earlier artefacts, post-Kantian aesthetics focusses on the creator’s person and the relation to her predecessors in gauging both – the degree of emulation and the distinction as a creative personality. Form is the flexible concept that allows both attributions: emulation and personal marking. The demand for genius is mediated by form. In Immanuel Kant’s words (*Kritik der Urteilskraft* 1790, §49): ‘The product of a genius ... is not an example of imitation (since the essence of the genius and of the spirit of work would be lost) but rather an example of emulation [Nachfolge] of another genius. It is through emulation that the consciousness is woken to its own originality.’ [‘Nach diesen Voraussetzungen ist Genie: die musterhafte Originalität der Naturgabe eines Subjekts im freien Gebrauche seiner Erkenntnisvermögen. Auf solche Weise ist das Produkt eines Genies (nach demjenigen, was in demselben dem Genie, nicht der möglichen Erlernung oder der Schule, zuzuschreiben ist) ein Beispiel nicht der Nachahmung (denn da würde das, was daran Genie ist und den Geist des Werks ausmacht, verlorengelassen), sondern der Nachfolge für ein anderes Genie, welches dadurch zum Gefühl seiner eigenen Originalität aufgeweckt wird.’] A nineteenth-century composer writing a symphony is always both emulating Beethoven in his ‘form’ (four movements, sonata form, modulations etc) as well as

marking off his personality from Beethoven's by using other techniques and varying formal elements.³

(2) Music is an autonomous branch of the arts

Eighteenth century debates about originality mostly focused on poetry and paintings, rarely on music. Music, in the hierarchy of the arts, was considered not as a work (*ergon*), but as an activity (*energeia*) – to use Humboldt's later analogy to language (1836). Thus Mattheson (1739, 82) talks of music as *Ton-Sprache* or *Klang-Rede*, literally 'a speech in sound'. The aesthetics of the nineteenth century almost reversed that hierarchy, coining the term 'absolute' for music that did not depict or speak (Dahlhaus 1978). Now, the abstract harmonic and thematic relations, in particular within non-verbal instrumental music, were seen as a superior art, constructing an autonomous text open to formal analysis. This avoided the common allegation that music merely played with sentiments, thus not addressing the higher human faculties (Kant 1790, §269), and satisfied the demand that art be evaluated according to autonomous criteria, not through the similarity to natural phenomena (*ibid.*, §49).

(3) Within abstract works of music there can be a distinction between content and form

The formal relations within a work of music may be decoded to reveal an abstract content. As the philosopher Arthur Schopenhauer writes (1988 [1819], p. 345): Music expresses the inner substance, 'the will itself' – not a particular joy or sadness but 'the joy', or 'the sadness' *in abstracto*. This slightly mysterious thought achieved considerable popularity among bourgeois music lovers, culminating in the critic Eduard Hanslick's circular dictum of 1854 that 'moving forms in sound' (*tönend bewegte Formen*) constitute the 'content of music' (*Inhalt der Musik*). The central controversy for nineteenth century music becomes the choice between the aesthetics of form

³ The tension between originality and imitation became a lasting problem of romantic theory: How could one distinguish originality from contrived folly? As Schlegel (1991 [1797], p. 52) puts it: 'The greater the already existing mass of originality, the rarer becomes new true originality.'

(*Formästhetik*, exemplified by Brahms) and the aesthetics of content (*Inhaltsästhetik*, exemplified by Wagner).

(4) Performers separate from composers into interpreters of form

Composing as a profession did not exist prior to the concept of the musical work. Earlier musicians were employed as *Kapellmeister* or instrumentalist. A few became entrepreneurs in organising operas or concerts (Händel and Bach/Abel in London). Many free-lance composers of the early nineteenth century earned their living as pianists, often playing their own works (Beethoven, Liszt, Chopin). During the nineteenth century, a new form of concert programming appears, presenting works by past composers. This can be traced in the performing life of Clara Schumann (1819-1896). During the 1840s, her programmes still include improvisations (*Fantasie*) and virtuosic arrangements of popular melodies; after about 1850, she often performs programmes consisting entirely of ‘classical’ works, for example by Bach, Beethoven, Chopin and Mendelssohn (all then dead). The musical work-concept now guarantees that the composer’s intention (*Inhalt*) can be truly revived and communicated in a performance reproducing the form (*Form*).

(5) Notation is capable of representing an authentic form (Werktreue)

Franz Liszt’s (1811-1896) aims as a performer still were ‘unmediated relationships’ [die unmittelbarsten Beziehungen] between the audience and the artist (Liszt 1838, p. 427). Thus, he made liberal use of current operatic hits, and in his early years even improvised on melodies given by the public. The intention of the composer was of secondary importance. Yet increasingly, performers began to study the scores of past works for clues of symbolic structure and the composer’s mind. Simultaneously, contemporary notation increased in complexity, prescribing speed, dynamic, rhythm and phrasing that previously would not have mattered, as performances took place in a common tradition, and music would have been short-lived. In music publishing, the first complete editions of the oeuvre of Bach (since 1851) and Händel (since 1858) sought to reconstitute the ‘authentic shape’ (*ächte Gestalt*) of the compositions (Jahn 1850).

The new aesthetic understanding of music that we have aimed to capture in these five propositions is perhaps a little overstated. The change was not universal (it was most fully articulated in Germany), and did not cover all forms of music equally. However, we claim that the five propositions delineate the aesthetics that is reflected in modern music copyright – as for example shown in Bently’s perceptive analysis of the current British legal concept of authorship (in this issue).

Musicologists have long identified the fundamental ‘regulative role’ of the ‘musical work-concept’ (Dahlhaus 1978; Goehr 1992, p. 113). Yet, the idea to set these aesthetic and philosophical developments against the emergence of copyright law is comparatively new. Martha Woodmansee in her seminal 1984 article ‘The Genius and the Copyright’ recognised that something important was going on in eighteenth century Germany but her approach, focussing on literature, perhaps overplays ‘romantic authorship’ as the driver of copyright law. As we have argued, an aesthetics of genius is not sufficient to establish property rights.

Anne Barron has a subtle and, in our view, fundamentally correct account of the process of abstraction that was necessary in law to solve ‘complex questions of attribution and identification’ (Barron 2006a, p. 42) in the early British copyright debate. In plain words, if buyers and sellers want to transact something ‘beyond the inscribed surface of a book’s pages’ (ibid., p. 43) they have to define what that is. Perhaps provocatively, Barron claims that aesthetics and law developed on parallel tracks (each according to their own logic) – with law preceding Lydia Goehr’s aesthetic ‘watershed year’ of 1800 by several decades.⁴

⁴ Barron (2006b, p. 114) cites the eminent jurists William Blackstone (argument for the plaintiff in *Tonson v Collins* –1762) and Lord Mansfield (the judge in *Millar v Taylor* – 1769). Mansfield on the object of literary property is quoted with ‘somewhat intellectual, communicated by letters’ ‘detached from the manuscript or any other physical existence whatsoever’. Deazley (2008a, commentary on *Tonson v Collins*) even ascribes to Blackstone a ‘tripartite understanding of the work’ – the physical book, the ideas conveyed

In an earlier paper of ours (Kawohl & Kretschmer 2003) we see the extension of the scope of copyright law to cover performances, transcriptions and arrangements during the early 1800s as an important indicator of this legal abstraction – as one needs to ask: performances, transcriptions and arrangement of what? – thus implying the definition of an abstract entity: the protected work.

While the legal protection of performative, derivative and transformative acts presumes the identity of the object of protection, and the aesthetic distinction of abstract, authored works presumes the identity of the authentic work; it is not clear at all how these identifications could be achieved with the conceptual apparatus assembled before 1800. Enter Johann Gottlieb Fichte.

The legal transformation: constructing inalienable expression

It is an interesting question in itself why key concepts of modern copyright law came to be developed in Germany. During the eighteenth century, Britain had the most dynamic market for the arts (books, visual arts and music), was home to a very lively aesthetic and jurisprudential debate, and already had experienced many court cases (following the passing of the first statutory copyright law for ‘books and other writings’ (Statute of Anne, 1710) and the engravers’ copyright act (so-called Hogarth’s Act, 1735). In contrast, the German speaking world was a feudal patchwork of some 300 jurisdictions that relied on a complex privilege system to regulate publishing. Reprinting of successful books was extremely common, and often encouraged by competing rulers (Kawohl 2002; Kawohl & Kretschmer 2003).

The German discussion initially took its lead from the British ‘literary property’ debate, reflecting the London booksellers’ sustained attempt to establish a common law property

in that book, and the composition (according to Blackstone: ‘those words in which an author has clothed his ideas’).

right beyond the limited statutory term of 14 years (renewable once) provided by the Statute of Anne (Deazley 2004). However, in *Donaldson v Becket* (1774) the House of Lords (the highest English court) reversed earlier court decisions – and the jurisprudential reasoning by William Blackstone in *Tonson v Collins* (1762) and Lord Mansfield in *Millar v Taylor* (1769) that had moved towards an abstract work identity.⁵

The German proponents of unregulated reprinting initially picked up the British anti-abstraction arguments. For example, Joseph Yates (later the dissenting judge in *Millar*) said as counsel for the defendant in *Tonson* (1762, p. 333): ‘I allow, that the Author has a Property in his Sentiments, till he publishes them. [...] But from the Moment of Publication, they are thrown into a State of Universal Communion. [...] It is no species of Property upon general Principles; because it is incapable of separate and exclusive Enjoyment.’ Similarly, Christian Sigmund Krause writes in a short treatise About Reprinting (*Ueber den Büchernachdruck* – 1783, p. 416): a book is a ‘secret divulged’ [ausgeplaudertes Geheimnis]. It is evident that ‘the concept of intellectual property is useless; my property must be exclusively mine; I must be able to give it away completely and retrieve it completely’ [dass der Begriff des geistiges Eigenthum unbrauchbar ist; Mein Eigenthum muss ausschliessend mein sein; ich muss es ganz weggeben, ganz zurücknehmen können].⁶

Johann Gottlieb Fichte, an idealist philosopher influenced by Kant, responds to a version of this argument by the Hamburg publisher Reimarus (1791, p. 385) who explicitly referred to the repudiation of ‘literary property’ in the British discussions. In the article *Proof of the Unlawfulness of Reprinting* (Beweis von der Unrechtmäßigkeit des Büchernachdrucks, 1793), Fichte intends to solve the difficulty on which basis ideas,

⁵ For the next 100 years, Britain’s copyright laws remained ambivalent, preserving a series of specific laws regulating specific subject matter, such as engravings, sculptures, designs, paintings, drawings and photographs (Sherman & Bently 1999) – although the 1842 Copyright Act and the Fine Art Copyright Act (1862) moved towards an abstract work identity for literary, dramatic, musical works and artistic works (Seville 1999; Kawohl & Kretschmer 2003; Deazley 2008b). The United States followed the narrow incentive approach of the Statute of Anne well into the twentieth century, but here too the concept of an abstract work found its way into court decision on derivative works (*Folsom v Marsh* 1841; cf. Bracha 2008).

⁶ A related passage of Krause’s treatise is cited in Woodmansee (1984, 443).

once communicated, may remain ‘the continuous property of the originator’ [ein fortdaurendes Eigenthum des Verfassers – Fichte 1793, p. 445].

From the premise that ‘we necessarily own as property anything that cannot be physically transferred to someone else’ [*Wir behalten nothwendig das Eigenthum eines Dinges, dessen Zueignung durch einen Andern physisch unmöglich ist* – Fichte 1793, p. 446], Fichte’s argument follows two threads: One is object-oriented and leads to the modern concept of a ‘work’, the other one is subject-orientated and provides a justification for intellectual property to be vested in the author. On the object side, the work concept is gained as a result of a two-fold abstraction from the book as commodity. On the subject side, there are different forms of property allocated to the respective results of the abstraction.

The two threads arise from quite different discourses. The latter argument, about differentiation and abstraction, is based on eighteenth century discussions about reprinting, which were led by publishers rather than authors and thus focused on physical entities rather than authors’ personalities: on original prints and on reprints, both competing commodities within the market for books. By contrast, the justification of intellectual property was rooted in concepts of personality and in a fundamental right to self-expression.⁷

Fichte first identifies two aspects of the book: he differentiates between a ‘physical aspect’ of the book, i.e. ‘the printed paper, and its intellectual aspect’ [das ‘*körperliche* desselben, das bedruckte Papier; und sein *geistiges*’] (Fichte 1793: p. 447). Within the intellectual aspect another distinction is made between the ‘material’ aspect of the intellectual, further specified as ‘the content of the book, the thoughts it presents; and the form of these thoughts, the way in which, the combination in which, the phrasing and wording in which they are presented’ [das *Materielle*, den Inhalt des Buchs, die

⁷ This echoes Immanuel Kant’s 1781 essay Of the Illegality of Reprinting (*Von der Unrechtmäßigkeit des Büchernachdrucks*) which Fichte claims not to have known when he first devised his ‘form’ argument (1793, p. 472).

Gedanken, die es vorträgt; und in die *Form* dieser Gedanken, die Art wie, die Verbindung in welcher, die Wendungen und die Worte, mit denen es sie vorträgt] (Fichte 1793: p. 446).

Then there are three types of property assigned:

- ‘The [printed paper] ceases to be the author’s property when it is sold..., and becomes an exclusive property of the buyer, because it cannot have different masters’ [‘Das (*bedruckte Papier*) ... hört durch den Verkauf unmittelbar auf, ein Eigenthum des Verfassers ... zu sein, und wird ausschließendes des Käufers, weil es nicht mehrere Herren haben kann’] (Fichte 1793: pp. 449-50).
- At the moment of publication, the ideas or content of the book ceases to be ‘exclusive property of its first master’, turning into a ‘common property of many’, i.e. of all the readers [Es hört auf ‘*ausschliessendes* Eigenthum des ersten Herrn zu sein ... bleibt aber sein mit Vielen gemeinschaftliches Eigenthum’] (Fichte 1793: p. 450).
- The third aspect is inalienable, as Fichte puts it: ‘However, what never anybody can take possession of, since it is physically impossible, is the form of these thoughts, the combinations of ideas in which, and the signs, by which they are presented’ [‘Was aber schlechterdings nie jemand sich zueignen kann, weil dies physisch unmöglich bleibt, ist die *Form* dieser Gedanken, die Ideenverbindungen, in der, und die Zeichen, mit denen sie vorgetragen werden.’] (Fichte 1793: p. 450).

This concept of ‘form’ is crucial to Fichte’s ‘proof’ since the form provides the link between the discourses. Within the two-tiered abstraction of the work, ‘form’ plays the decisive role in the second step – form and content abstracted from the intellectual aspect of the work –, whereas the first step – abstraction of the physical book and its content – was trivial and well known. ‘Form’ is likewise the justificatory basis for the claim to intellectual property.

In Fichte's words: 'Because pure ideas without sensualised images are unthinkable, and even less can be presented to others, each writer must give his own thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. The latter thus remains forever his exclusive property.' [Da nun reine Ideen ohne sinnliche Bilder sich nicht einmal denken, vielweniger Andern darstellen lassen, so muß freilich jeder Schriftsteller seinen Gedanken eine gewisse Form geben, und kann ihnen keine andere geben als die seinige, weil er keine andere hat; aber er kann durch die Bekanntmachung seiner Gedanken gar nicht Willens sein, auch diese *Form* gemein zu machen: denn Niemand kann seine Gedanken sich zueignen, ohne dadurch daß er ihre Form verändere. Die letztere also bleibt auf immer sein *ausschliessendes Eigenthum*.] (Fichte 1793: p. 451).

Fichte's form-concept is contradictory. On the one hand, it is the result of the abstraction of a physical entity: of the book as commodity. That is to say, from this angle, 'form' is an intrinsic quality of the physical book. On the other hand, it is a concept of perception and communication. From this angle, then, it is dependent on the respective person, who either – as an author – necessarily uses *his own form* as a means to communicate his thoughts, or – as a reader – necessarily changes the author's form in appropriating the enclosed thoughts. Thus, 'form' as a result of abstraction from the book had to be identical in the view of whoever read or reprinted the book. Yet 'form' as a means of communication was a fluid side-effect, flexibly changing its shape every time the book was used.

This ambiguous form-concept aims to fit with Fichte's philosophy of property and with the Romantics' ideal of free and original expression. Fichte employed a quite similar conceptual approach shortly after the *Proof* article in an essay on the legal grounds of property. It reads: 'After we have given the things a form of a mean for our ends, no other being can use them but either using the effect of our vigour, i.e. our vigour itself, which is originally our own property; or destroying this form, which means restraining our vigour

in their free effects ... and that no rational being ought to.’ [‘Haben wir Dingen diese Form eines Mittels für unsere Zwecke gegeben, so kann kein anderes Wesen sie gebrauchen, ohne entweder die Wirkung unserer Kräfte, mithin unsere Kräfte selbst, die doch ursprünglich unser Eigentum sind, für sich zu verwenden; oder ohne diese Form zu zerstören, d.i. unsere Kräfte in ihrer freien Wirkung aufzuhalten ... das aber darf kein vernünftiges Wesen.] (Fichte 1793: p. 81, quoted in Brocker 1992: p. 311). Here too ‘form’ begins as a dynamic concept of expressing and extending our vigour onto things before turning into a justification of durable property.

However, under our interpretation the emerging concept of the durable form is inconsistent with the prevailing Romantic aesthetics of the time. Walter Benjamin captures it well: ‘Unlike the enlightenment, the romantics did not conceive form as a rule of beauty, as a necessary condition for an enjoyable or sublime effect of their work. Their form was neither conceived as a rule of its own nor dependent on rules... Every form was conceived as a peculiar modification of the self-limitation of reflection, it did not require an other reflection, because it was not a medium of representation of content.’ [‘Die Romantiker faßten nicht, wie die Aufklärer, die Form als eine Schönheitsregel der Kunst, ihre Befolgung als eine notwendige Vorbedingung für die erfreuliche oder erhebende Wirkung des Werkes auf. Ihre Form galt ihnen weder selbst als Regel noch auch als abhängig von Regeln... Jede Form als solche galt als eine eigentümliche Modifikation der Selbstbegrenzung der Reflexion, einer anderen Reflexion bedarf sie nicht, weil sie nicht Mittel zur Darstellung eines Inhalts ist.’] (Benjamin 1973: p. 71).

Fichte’s slight of hand turns the subject centred reflection of Romantic aesthetics – which plausibly theorises the author’s expressions as inalienable – into something durable and unchangeable that can function as an object: property. As Fichte puts it (1793: p. 452): the property in the form gives the author the right to prevent ‘that no-one interfere with the exclusive property of that form, and appropriate that form’ [‘das Recht, zu verhindern, daß Niemand in sein ausschließendes Eigentum dieser Form Eingriffe thue, und sich des Besitzes derselben bemächtige]. One might say, *pace* Woodmansee (1984), that modern copyright was born not out of the romantic notion of genius, but despite it.

Fichte's essay proved hugely influential. His distinctions surface in preliminary papers to the Prussian Act (1837) 'for the protection of property in works of scholarship and the arts from reprint and reproduction', the seminal German copyright legislation of the nineteenth century (Wadle 1988; Kretschmer & Kawohl 2004). Over the next 200 years, the so-called idea/expression dichotomy became an integral part of US jurisprudence⁸ and found its way into the 1991 European software directive (91/250/EEC; Art. 1(2)), the 1994 WTO TRIPS Agreement and the 1996 WIPO Copyright Treaty. The wording of TRIPS (Art. 9(2)) and WIPO Copyright Treaty (Art. 2) is identical: Copyright protection shall extend 'to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.'

Before we trace the effects of Fichte's concepts on music copyright, and in particular its application to activities of a performative, derivative or transformative kind, we conclude this section with a brief review of Fichte's analysis of what we now call infringement:

- (1) Forwarding books to others, incorporating books into lending libraries, even destroying books is permitted. This only affects the 'material' aspect of the book that, as all writers concede, becomes the 'complete property' of the buyer. [Schriftsteller haben uns 'bis itzt durchgängig das völlige Eigenthum des *körperlichen* ihrer Schriften zugestanden'.] (Fichte 1793, p. 452)

- (2) Plagiarism (i.e. passing on copied words as the copier's own) is wrong not because it denies the authorship of the original writer [dem Verfasser seine Autorschaft abspreche], or violates the author's honour [dem Verfasser die rechtmäßige Ehre nicht erzeuge]; the wrong of plagiarism lies in the attempt to seize something (the 'form') that cannot be appropriated [dass der Plagiar sich

⁸ Oren Bracha (2008, commentary on *Folsom v Marsh* (1841)) argues that although the dichotomy in twentieth century American copyright law was often used to construct the 'fair use' doctrine, nineteenth century readings supported the expansion of the scope of copyright law.

eines Dinges bemächtigt, welches nicht sein ist]. (Fichte 1793, pp. 453-4)⁹

- (3) Changing the method of copying does not affect the wrong of copying. Copying by rewriting a book by hand is as wrong as reprinting, as it necessarily takes the ‘form’ of the work. ‘Those who wish to possess a copy of the book, or the copyist must negotiate with the author.’ [(D)iejenigen, welche das Buch in Abschrift zu besitzen wünschten, oder der Abschreiber, müßte darüber in Unterhandlung mit dem Verfasser treten]. (Fichte 1793, p. 463)
- (4) The printing of transcriptions of lectures is equally wrong. No lecturer would suffer that the ‘form’ of his lecture be seized by a transcriber. However, students which have made the lecturer’s thoughts their own ‘through their own reflection, and the integration of those thoughts into their own line of ideas’ [durch ihr eignes Nachdenken, und die Aufnahme derselben in ihre Ideenreihe’ – Fichte 1793, p. 456] may distribute their notes orally and in writing.
- (5) Quotations literally seize the ‘form’ of the original, but are permissible as being based on a ‘tacit mutual contract between all authors’ [scheint sich auf einen stillschweigenden Vertrag der Schriftsteller unter einander zu gründen – Fichte 1793, p. 455]. However, quoting large passages ‘without visible need’ [ohne sichtbares Bedürfniss] is wrong.
- (6) Engravings of paintings change the ‘form’, and are permitted. [Kupferstiche von Gemälden sind keine Nachdrücke: sie verändern die Form – Fichte 1793, p. 468)]. Equally re-engravings of engravings, since every engraver gives his print his own form. Only reprinting from already engraved plates is a wrong.
- (7) The publisher does not acquire property through his contract with the author, only a certain usufruct [Niessbrauch]. He only can sell on the *possibility* to acquire the

⁹ The term ‘bemächtigen’ most naturally would translate as ‘appropriate’, but ‘taking as property’ is precisely what Fichte claims cannot be done to an author’s form.

author's thoughts through the means of print, never the thoughts of the author itself, and their form. [Er darf an wen er will und kann, verkaufen – nicht die Gedanken des Verfassers, und ihre Form, sondern nur die durch den Druck derselben hervorgebrachte *Möglichkeit* sich die erstern zuzueignen (Fichte 1793: p. 457)]. At all times, the publisher acts not in his own name [nicht in seinem Namen], but on behalf of the author [sondern im Namen und auf Auftrag des Verfassers].

- (8) The potential benefits or harm of the act of copying do not matter. Eighteenth century reprinters often argued that reprinting did not cause any harm either to the author or the original publisher. Fichte cites Reimarus' claim (1791) that the more an author was being reprinted, the more his fame would spread to his advantage across all German states [dass es sogar der Vortheil des Schriftstellers sei, recht viel nachgedruckt zu werden, daß dadurch sein Ruhm über alle Staaten Deutschlands (...) verbreitet werde (Fichte 1793, p. 460)]. In contrast, Fichte insists on the 'sublime idea of right, regardless of utility' [die erhabene Idee des Rechts, ohne alle Rücksicht auf Nutzen].

At the heart of Fichte's approach to copyright infringement is a paradox. The illegitimate copyist takes something that, according to Fichte's theory, cannot be taken. On the one hand, 'form' is a fluid concept of communication and perception; on the other hand, 'form' is an intrinsic quality of the book as a commodity: the former is inalienable expression; the latter is property.

This leaves the concrete application of the content/form or, in later parlance, idea/expression dichotomy in disarray. You call it content (idea), if the taking is permitted; you call it form (expression), if it is not. In each case, an abstract entity is implied – the work – through which *everything* that is done by a secondary or derivative user is related to the author's personality.

The next section considers the implications of this approach for music.

An information perspective on copyright infringement

Fichte did not reflect on the musical practices of customisation, arrangement, performance and interpretation that so evidently draw on earlier materials. Yet, the aesthetic and legal turn associated with the period around 1800 shifted the concepts of music copyright irrevocably. In any assessment of infringement, the ‘object’ concept of the abstract work now would have to be mapped onto the ‘subject’ concept of inalienable expression. If our analysis is correct, this cannot be done coherently. For example, while Fichte thought that engraving a painting changed the ‘form’ (and thus was permissible), current copyright laws almost universally treat it as impermissible copying in as far as it involves the taking of a substantial part of the original expression. However, there is nothing in the conceptual apparatus that would explain this change. Thus the assessment of infringement can shift within the conceptual space constructed by Fichte almost randomly. A particular danger is that there is no clear barrier legitimising permissible act: all secondary or derivative uses of all artistic materials are potentially infringing, depending on how the abstraction of ‘form’ is represented on its ‘object’ and ‘subject’ dimensions.

Fichte’s copyright space can be visualised by a diagram. The vertical y-axis may be thought of as the ‘subject’ dimension, while the horizontal x-axis scales the ‘object’ dimension. The further an act of copying moves upwards (y-axis) and rightwards (x-axis), the more likely will it be found to have infringed the original work. Thus, under a Fichtean analysis, the act of plagiarism will be the clearest case of infringement (maximum harm on both subject and object dimensions) while an accurate transcription will appropriate a work (object infringement) but not harm the personality of its author (no subject infringement). A parody, vice versa, will seek to generate amusement or criticism from personality elements (subject infringement) although the work is significantly changed (no object infringement). Quotations, in the bottom left corner, will cause little harm on either dimension.

[INSERT FIGURE 1 ABOUT HERE]

Activities towards the middle of the diagram are the most problematic for the theory. Does an imitation, a reworking or an arrangement appropriate subjective and objective form in Fichte's sense? Much of the thrust of copyright developments during the nineteenth century pushed derivative uses further out into the infringing space. For example, piano transcriptions or instrumental arrangements of popular operas were initially treated as 'translations' that required no permission. In an 1822 expertise for a Berlin court, the romantic poet and lawyer ETA Hoffmann still compares an unauthorised piano score of Carl Maria von Weber's *Freischütz* to the (permitted) engraving of a painting (Kawohl 2002; Kawohl & Kretschmer 2003, p. 215).

However an agreement between music publishers (Erweiterungsakte, Leipzig 1831; Kawohl 2008) declared the melody as the property element in a composition: 'The melody is recognised as exclusive property of the publisher and every arrangement is regarded as a reprint that shows the tones of the composer and only is based on mechanical processing' [Die Melodie wird als ausschließliches Eigentum des Verlegers anerkannt und jedes Arrangement, das die Töne des Componisten wiedergibt und nur auf mechanischer Verarbeitung beruht, soll als Nachdruck angesehen werden]. The Prussian Act of 1837 followed with a protection against musical arrangements that could not be considered 'an original composition' [eine eigenthümliche Composition]. The German imperial Urheberrecht of 1901 codifies property in melodies as *starrer Melodienschutz* in §13 II LUG (as §24 II UrhG this provision is still part of current German copyright law).

Similarly, in the British case of *D'Almaine v Boosey* (1835), copyright in the score of the opera *Lestoc* by Daniel Auber was held to be infringed by the publication of arrangements of excerpts as quadrilles and waltzes. Lord Chief Baron said (1835, p. 121): "Substantially the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by ear."

Almost imperceptibly Fichte's approach to copyright infringement focusing on what had been taken from the subject and object aspects of a work's abstract form, spread from jurisdiction to jurisdiction. At the international level, the Berne Convention of 1886 (integrated into the global trade system with the WTO TRIPS Agreement of 1994) fused the subject interests of the author with abstract literary and artistic works protected for a minimum term of life of author plus fifty years, with only very narrowly conceived exceptions. The infringement language may differ in each country, emphasising for example the taking of a 'substantial part' (UK CDPA 1988 s. 16) or in American parlance, applying the test of 'substantial similarity' (often reformulated in terms of the idea/expression dichotomy – Nimmer & Nimmer 2003, §13.03[A][1]). Whether they know it or not, all members of the World Trade Organization are now disciples of Fichte.

The Fichtean perspective (potentially relating all secondary uses to the author through the work's abstract form) was able to negotiate a musical aesthetics that distinguished original and copy, adaptation and performance, authentic interpretation and improvisation – the period of notated 'classical' music between (roughly) 1800 and 1950.

During the course of the twentieth century, the notion of an abstract, self-contained, permanent work lost its persuasion. Within the constraints of this article, we cannot trace in detail the advent of jazz and blues, the commercialisation of popular music, the experimental turn in avantgard composition, the interweaving of graphics, movement, visuals and sound. To music scholars, it is now almost self-evident that the aesthetics of the abstract work has been swept away (Toynbee 2004), most notably by the wave of digital innovation since the 1980s. Yet, copyright law has persisted with an approach under which derivative uses, that leave the original recognisable, are found to be infringing almost as a rule. The aesthetic and legal tensions this generates are reflected in the treatment transformative musical uses receive under modern copyright law. For illustrative purposes, we offer a brief sketch of seven contemporary musical practices in the eyes of the law. The exposition attempts to uncover a broad trend, using non-technical language. Naturally, details will vary between jurisdictions.

Improvisation

Improvisations have no independent copyright status. If an improvisation is based on a prior copyright work, it is considered to be either a performance or an adaptation. If recorded, an improvisation can turn into an authored work itself, i.e. the equivalent of a written score ('publishing right'). However, release of the recording then needs the permission of the right holders of the prior work (which may only be achieved by assigning the publishing rights of the improvisation to the earlier right holders).

Cover version

Since the 1950s, the cover version is a staple of the popular music market. Literally, it is understood as a re-recording of a song by a different artist. Cover versions can depart quite widely from the original: in feel, in instrumentation, even in harmonisation and melody. The law may therefore treat it as an adaptation, permissible only with permission of the original right owner, and generating a new separate copyright in the adaptation as an original work. However, prior right holders have found it more advantageous to treat cover versions not as adaptations, but as recorded performances of the same song. This leaves the copyright in the cover version with the owner of the covered song.

Re-mix

The re-mix is not a re-recording of the same score but a reassembly of already recorded sounds (often with new additions). It came to prominence with the club culture of the 1980s. If not treated as a non-adapted cover version, a re-mix needs the permission of both, the right holders in the score and in the sound recording.

Typically, the publishing rights in the new track (as a new work) will have to be assigned to the owners of the earlier score. Often, even a percentage of the rights in the new sound recording will have to be contractually transferred as part of the deal (so-called 'override').

DJ-ing

Under copyright categories, a DJ is neither a composer nor performer. He or she

simply effects the public performance of tracks (incorporating both a copyright work and a sound recording). In the eyes of the law, DJ-ing is an unproductive, non-transformative use of music. However, in contemporary aesthetics, the DJ may be perceived as an artist who composes pre-produced tracks into a new form (Wicke 1997). This is reflected in DJ branded releases of albums and tracks. Copyright remuneration will only reach the DJ if his/her contributions are re-categorised as interests in a copyright work or sound recording.

Sample

Sampling is perhaps the defining feature of digitally produced music. Hip Hop may have been the first genre that used samples as equivalent to musical instruments. As samples, sounds become objects. Hank Shoklee, producer of Public Enemy/Chuck D's seminal album *It Takes a Nation of Millions* (1988) described the compositional process thus (McLeod 2002): 'The first thing we would do is the beat, the skeleton of the track. The beat would actually have bits and pieces of samples already in it, but it would be only rhythm sections. Chuck would start writing and trying different ideas to see what worked. Once he got an idea, we would look at it and see where the track was going. Then we would just start adding on whatever it needed, depending on the lyrics. It kind of architected the whole idea. The sound has a look to me, and Public Enemy was all about having a sound that had its own distinct vision. We didn't want to use anything we considered traditional R&B stuff – bass lines and melodies and chord structures and things of that nature.'

Following numerous restrictive court decisions (culminating in the US case *Bridgeport v Dimension* 2005), the aesthetics of sampling changed quite dramatically. It became common industry practice to require the clearance of all samples of sound recordings. In consequence, electronic artists now only use samples paid for by their label (with publishing rights, and often also interests in the sound recordings assigned to the owners of the samples used). Alternatively, they hide the source of their

samples, undermining the reference character of this compositional technique.¹⁰

Mash-up

Very topical is the layering of two or more existing tracks to create a new experience, sometimes with artistic intent, often for amusement. Networking sites that rely on user-generated content are littered with this kind of material which is almost always infringing copyrights in works and sound recordings. More ambitious techniques derive from the 1960s tradition of appropriation art and collage. Examples include the ‘plunderphonic’ aesthetics of Jon Oswald (1985), and bands such as Negativland, producing a critical commentary on copyright law itself (Arns 2008).

Sound-alike

The advertising industry and producers of video games have developed a marketing strategy of so-called ‘sound-alikes’ in order to avoid the clearing of rights. Music is specifically commissioned to sound like, for example, the voice of Louis Armstrong or Frank Sinatra, or the original sound track to Harry Potter (composed by John Williams), without taking elements which copyright law would deem substantial, and thus infringing. Melody fragments are avoided; instead timbre and harmonic progressions skilfully create an allusion of origin.

These seven examples illustrate how ‘borrowing repaid with interest’ (in Mattheson’s words, quoted at the outset of this article) has become problematic in a Fichtean copyright space. We argue that as musical practices during the twentieth and early twenty-first century are departing from the abstract ‘work-concept’, copyright norms have to be re-thought. In a digital environment, the framework derived from Fichte’s contradictory structure of subject and object ‘form’ should be abandoned. In its place we suggest two dimensions that take us back to pre-1800 norms. The object dimension becomes a utilitarian economic assessment: Do primary and secondary products compete

¹⁰ There is now a large literature in law, ethnomusicology and cultural studies on the phenomenon (Bently 1989; Seeger 1992; McLeod 2001; Théberge 2004; Hesmondhalgh 2006). More recent court decisions, notably the German federal court’s decision on the sampling of Kraftwerk’s *Metall auf Metall* (2008) have become more permissive, moving towards the analysis we advocate in Figure 2.

in the same market? Does derivative use affect the incentives of first production? Is the primary product no longer viable? Are the costs of derivative production significantly lower than the cost of first production?¹¹ In this diagram, the x-axis now represents the degree of competition between earlier and derivative materials. Plagiarised and transcribed materials are most likely to be found infringing on this dimension.

Our second suggestion replaces Fichte's subject evaluation with an information dimension.¹² It is a fundamental principle of an information society that the sources of derivative materials should be revealed. In a parody, this may happen by definition (as the parody will only work if the audience understands the target). Similarly, a requirement to cite with full source references will turn even extended quotations entirely innocuous (i.e. low on the y-axis). The most significant differences between the Fichtean and our proposed information framework can be seen for derivative uses that were previously hovering uncertainly in the middle of the 'abstract form' diagram: pastiche and imitation uses are no longer assessed by what has been taken, but by the kind of use made of it. For example, sampling, typically no longer competes with the original. Thus it moves as pastiche to the left. Together with an added requirement to cite the source (which currently is often hidden to avoid the clearing of rights), it is now permissible. In contrast, sound-alikes, i.e. music that seeks to generate a misleading source connection in the audience's mind, becomes more problematic. It moves up on the y-axis, and to the right on the x-axis to the extent that the secondary use competes with the primary material.

[INSERT FIGURE 2 ABOUT HERE]

¹¹ Traces of such economically minded thinking can be found in some pre-1800 jurisprudence (e.g. *Gyles v Wilcox* (1741) – tolerating abridgements), and in the development of 'fair use' defences to copyright infringement in many jurisdictions during the nineteenth century. For an economic analysis of modern 'fair use' in the US, see Gordon (1982) and Landes & Posner (1989).

¹² Reimarus, the addressee of Fichte's paper, had argued for a right to be recognised as the author that would not implicate an exclusive right. Fichte dismissed this approach (1793, pp. 451-2): ['Hieraus fließen zwei Rechte der Schriftsteller: nemlich nicht bloß, wie Herr R. will, das Recht zu verhindern, daß Niemand ihm überhaupt das Eigenthum dieser Form abspreche (zu fordern, daß jeder ihn für den Verf. des Buchs anerkenne); sondern auch das Recht, zu verhindern, daß Niemand in sein ausschließendes Eigenthum dieser Form Eingriffe thue, und sich des Besitzes derselben bemächtige.']

It is the central argument of this article that the concepts of modern copyright law derive from a peculiar abstraction that can only be understood in the philosophical and aesthetic context of the period around 1800. The legal structure, inspired by Fichte's thoughts on personal inalienable forms of expression, began to fuse norms of communication with norms of transaction. Since the object of protection – the abstract work – was being conceived as durable and permanent it became plausible to relate all performative, derivative and transformative uses back to the author.

The aesthetics of the digital age will require nothing less than a re-invention of copyright's normative space.

Acknowledgments

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FIGURE 1

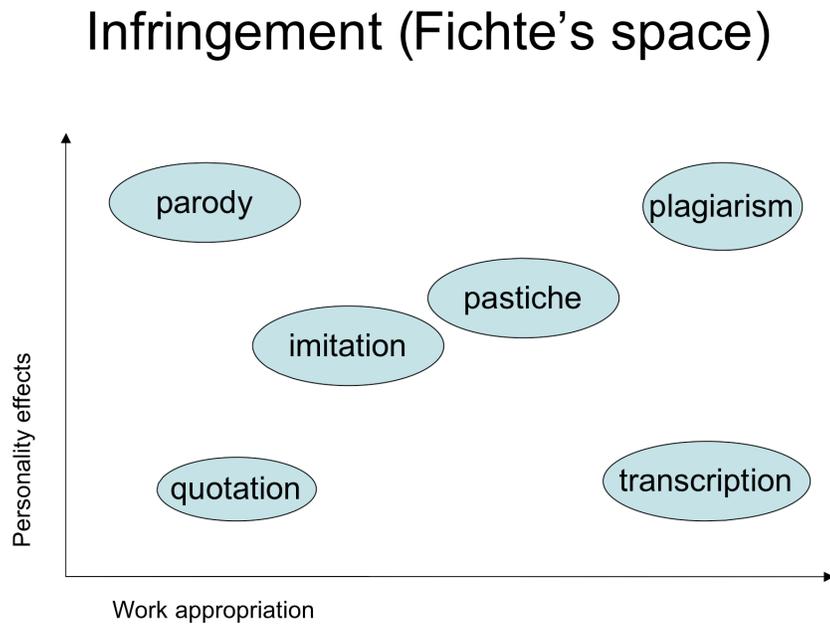


FIGURE 2

