

IN THE
**United States Court of Appeals
for the Ninth Circuit**

PHARRELL WILLIAMS, AN INDIVIDUAL; CLIFFORD
HARRIS, JR., AN INDIVIDUAL; ROBIN THICKE,
AN INDIVIDUAL, DBA I LIKE'EM THICKE MUSIC,

Plaintiffs-Counter-Defendants-Appellants,

AND

MORE WATER FROM NAZARETH PUBLISHING, INC.; STAR
TRAK ENTERTAINMENT; INTERSCOPE RECORDS; UMG
RECORDINGS, INC.; UNIVERSAL MUSIC DISTRIBUTION,

Counter-Defendants-Appellants,

v.

FRANKIE CHRISTIAN GAYE, AN INDIVIDUAL; MARVIN GAYE,
III, AN INDIVIDUAL; NONA MARVISA GAYE, AN INDIVIDUAL,

Defendants-Counter-Claimants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

**BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS-COUNTER-DEFENDANTS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Public Knowledge states that it has no parent corporation or publicly held corporation that holds 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Public Knowledge¹ is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

Public Knowledge has previously served as *amicus* in copyright cases. *E.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1052 n.22 (9th Cir. 2015) (quoting Public Knowledge brief); *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-375 (U.S. June 16, 2016); *Golan v. Holder*, 132 S. Ct. 873 (2012); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

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¹Pursuant to Federal Rule of Appellate Procedure 29(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 29(c)(5), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Bedřich Smetana's *Die Moldau*, a symphonic tone poem depicting the great river of the composer's homeland, opens with a grand, sweeping melody that is immediately recognizable to many. Yet that melody neither began nor ended with Smetana. It may have originated from a popular Italian song *La Mantovana* from the sixteenth century, or perhaps from a Czech nursery rhyme *Kočka Leze Dírou*, or the Swedish melody *Ack Värmeland Du Sköna*. Or perhaps it was a minor-key adaptation of the French *Ah! Vous Dirai-je, Maman*, the melody known to English-speakers as *Twinkle, Twinkle, Little Star* among others. A nearly-identical melody appears in *Hatikvah*, the Israeli national anthem.

In this case that tests what degree of similarity between musical works will give rise to copyright liability, it must be considered that similarities and recurrences among musical works like *Die Moldau* bear a unique and important function in the musical arts. Borrowing from past works occurs with frequency in musical composition for at least two reasons: Western music theory strongly favors certain structures in music, and the emotive and psychological effect of music on listeners requires composers to reuse sounds to trigger those effects.

As a result, and as documented throughout this brief, there are numerous examples of songs quoting other songs, reusing similar elements, and borrowing structures, themes, instrumentation, and other aspects of past works. The

purpose of borrowing is rarely to pass off or misappropriate others' works, and indeed, in certain genres of music, borrowing is central to the advancement of the state of the art in music.

That state of the musical arts suggests that greater flexibility in borrowing music elements ought to be permitted before copyright liability attaches. Copyright, at its core, has a public-oriented purpose: rather than merely rewarding authors for the sake of rewarding them, copyright ultimately seeks to increase the public's access to new creative works. But since new creative works build on those of the past—future Smetanas using contemporary *La Mantovanas*—limits on copyright that enable incremental innovation are just as essential to the statutory scheme as the exclusive right itself.

In a field such as music in which borrowing is especially important to future work, those limits on copyright become especially important as well. In recognition of this, the substantial similarity doctrine and underlying questions of copyrightability ought to be interpreted flexibly by this Court, to ensure that copyright law does not stifle musical progress, but rather promotes it.

ARGUMENT

I. PERHAPS MORE SO THAN FOR OTHER ARTISTIC ENDEAVORS, BORROWING AND ADAPTATION ARE IMPORTANT TO CREATIVE PROGRESS IN MUSIC

The phrase “good artists copy; great artists steal” is of indefinite origin, attributed to Picasso, Stravinsky, and others,² but the sentiment is unquestionable: in all fields of art, borrowing from past works is an essential element. In the field of music, borrowing takes on a particular importance, due to the nature of music as an art form.

A. THE MECHANICS OF TONAL MUSIC NECESSITATE A LARGE DEGREE OF SIMILARITY AMONG MUSICAL COMPOSITIONS

As an initial matter, greater similarity among musical works is to be expected simply due to the ordinary structures of Western music. Music in that tradition is composed on a scale of twelve notes. Groups of usually three notes played together form chords, and a series of chords forms a chord progression, which can serve as a harmony basis for a song or piece of music.

While as a matter of mathematical theory there is an enormous number of possible chord progressions, standard Western music theory deems certain chord progressions more conventional than others. As a result, patterns recur

²Garson O’Toole, *Good Artists Copy; Great Artists Steal*, Quote Investigator (Mar. 6, 2013), URL *supra* p. vii.

regularly in all manner of songs. The authentic cadence V-I³ shows up at the beginnings of Mozart's *Eine Kleine Nachtmusik*, the children's song *The Wheels on the Bus*, Disney's *Do You Want to Build a Snowman* from *Frozen*, and Sondheim and Bernstein's *America* from *West Side Story*, just to name a few.

More striking is the recurrence of the chord progression I-V-vi-IV or permutations thereof in popular music. That progression, featured in Elton John's *Can You Feel the Love Tonight*, John Denver's *Country Roads*, and *Let It Go* from *Frozen*, appears in at least 547 popular songs according to one listing.⁴ There has been no small amount of commentary on the progression's ubiquity. A comedy troupe asks whether "you can take those four chords, repeat them, and pump out every pop song ever," and answers the question by playing thirty-eight standards in rapid succession over those same chords.⁵

The repetition of these patterns across music is not mere copying among musicians; these patterns are repeated because they are the ones expected of music today. The four-chord pattern above, according to expert musicians, per-

³These symbols indicate the Roman numeral analysis of chord progressions, as is standard in music theory. They are included primarily for purpose of identifying and searching for relevant authority, but by way of brief explanation, each number represents the base note of the chord relative to the key signature (e.g., V indicates a chord beginning with the fifth note of the scale), and lowercase and uppercase indicate minor and major chords, respectively.

⁴See Marc Hirsh, *Song List, Six Four One Five*, URL *supra* p. vi.

⁵See Axis of Awesome, *4 Four Chord Song*, YouTube (Dec. 10, 2009), URL *supra* p. v; see also Rob Paravonian, *Pachelbel Rant*, YouTube (Nov. 21, 2006), URL *supra* p. vii.

mits songs to be cyclical and fluid, and also gives them “emotional heft.”⁶ One commenter went so far as to provide a “mathematical explanation for why these four chords seem to work well.”⁷

Reuse of basic harmonic patterns encourages creativity. The hundreds of different songs made from the same four-chord progression demonstrate how a single building block can support a multitude of creative works. The famed composer Leonard Bernstein once showed how a simple four-note melody could generate songs ranging from little French folk tunes to Smetana’s poetic *Die Moldau* to Strauss’s grand *Death and Transfiguration*—basic chords and notes open up “a whole new Milky Way of possibilities.” Leonard Bernstein, *The Infinite Variety of Music* 34–38 (Anchor Books ed. 2007).

No wonder then, that “[b]ecause composers, knowingly or unknowingly, tend to utilize the same basic patterns, such as chord progressions and cadences, music can often sound similar without actually being similar at all.” Jeffrey Cadwell, *Expert Testimony, Scènes à Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 Santa Clara L. Rev. 137, 165 (2005).

⁶Marc Hirsh, *Striking a Chord*, Boston Globe (Dec. 31, 2008), URL *supra* p. vi (terming the four-chord set the “sensitive female chord progression” for no particularly good reason).

⁷Rockin Cowboy, *Why Are Four-Chord Songs (I-V-vi-IV) So Prevalent?*, Music: Prac. & Theory Stack Exchange (Feb. 13, 2015), URL *supra* p. viii.

All of this suggests that, to ensure that composers of music have these basic tools of chord progressions and standard Western music tropes available, copyright in such basic elements of music ought to be sharply limited. Indeed, judges have recognized that musical elements “do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes.” *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936).⁸ When among possible permutations of musical notes “only a few are pleasing; and much fewer still suit the infantile demands of the popular ear,” it must be said that “[r]ecurrence is not therefore an inevitable badge of plagiarism.” *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940) (per curiam) (panel including Learned Hand, J.).⁹ Such basic elements might be properly viewed as *scènes à faire*, and no infringement of copyright ought to lie for copying them.¹⁰

⁸See also *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) (noting “the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music”).

⁹See also *Tisi v. Patrick*, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000) (noting that particular chord progression “can be found in songs in all genres” and thus “does not constitute a significant similarity”); *McRae v. Smith*, 968 F. Supp. 559, 566 (D. Colo. 1997) (allegedly similar chord progressions “are the most common chord progressions in all of the music of Western civilization”).

¹⁰See Cadwell, *supra*, at 164–65.

B. PSYCHOLOGICAL AND PHYSIOLOGICAL RELATIONSHIPS BETWEEN MUSIC AND HUMANS COUNSEL FLEXIBILITY IN PERMISSIBLE BORROWING OF MUSICAL MOTIFS

Recurrence of elements of musical composition occurs not only because the mechanics and conventions of music demands it. Recurrence is also necessary for music to serve its basic purpose of evoking emotional and psychological responses from listeners, a need that provides yet further reason for allowing composers a wide berth before copyright infringement should attach.

Perhaps uniquely among disciplines, “music speaks to us in mysterious and profound ways and invokes within us numerous physiological and emotional responses.”¹¹ Indeed, scientists have documented the physiological response of the brain’s pleasure and reward centers to music.¹²

A composer who wishes to evoke such responses must almost certainly borrow elements from prior works to do so. Reuse of instrumentation is a classic example: the presence of the Moog analog synthesizer sound cannot but recall nostalgia for the ’70s and ’80s. See Randy Lewis, *The Synth Is Back: KORG and Moog*

¹¹J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 Mich. Telecomm. & Tech. L. Rev. 407, 421 (2004); see also John A. Sloboda, *Music Structure and Emotional Response: Some Empirical Findings*, 19 Psychol. Music 110 (1991); Daniel T. Blumstein et al., *Do Film Soundtracks Contain Nonlinear Analogues to Influence Emotion?*, Biology Letters, May 26, 2010, available at URL *supra* p. vi.

¹²See, e.g., *Intensely Pleasurable Responses to Music Correlate with Activity in Brain Regions Implicated in Reward and Emotion*, 98 Proc. Nat’l Acad. Sci. 11818 (2001), available at URL *supra* p. vi.

Revive Golden-Era Analog Synthesizers, L.A. Times (Jan. 21, 2015), URL *supra* p. vii.

And reuse of musical motifs to trigger emotional responses is frequent, with two particular examples described below.

1. Few are unfamiliar with the accelerating two-note pattern that is the opening of the theme to the film *Jaws*. Made up of two low-pitched notes in rapid succession punctuating shorter and shorter periods of silence, it is a musical theme that is ingrained with a sense of fear and impending danger.

There can be little doubt of the psychological effect of that famous *leitmotif*. A recent study found that ominous music during nature documentaries led viewers to have more negative views of sharks, seeing them as more frightening. See Andrew P. Nosal et al., *The Effect of Background Music in Shark Documentaries on Viewers' Perceptions of Sharks*, PLOS One, Aug. 3, 2016, at 10–11 fig.3, URL *supra* p. vii.

But the *Jaws* theme is not original to *Jaws*. A remarkably similar two-note pattern introduces the fourth movement of Dvořák's Ninth Symphony *From the New World*, popularly known as the *New World Symphony*. There, the motif serves a similar purpose of dramatically introducing the famous melody of that symphony. Nor would the use of a low-pitched two-note throb end with *Jaws*. The more recent film *Inception* employs a similar motif (itself derived from a mechanical alteration to a 1956 French tune) to indicate a sense of urgency. See Dave

Itzkoff, *Hans Zimmer Extracts the Secrets of the “Inception” Score*, N.Y. Times (July 28, 2010), URL *supra* p. vii.

Thus, these three pieces, though vastly different, rely on the same musical device to evoke a similar sense of dramatic tension. That device is an important tool in the toolbox of composition, one that ought to be available to all musicians.

2. A more contemporary example of a recurring motif is the so-called “millennial whoop.” Identified recently by musician and online blogger Patrick Metzger, the sound comprises an upbeat alternation between the notes *sol* and *mi* (to use the *solfège* system popularized by *The Sound of Music*), generally vocalized with the syllables “wa-oh-wa-oh.” See Patrick Metzger, *The Millennial Whoop: The Simple Melodic Sequence That’s Showing Up All Over Contemporary Pop*, Slate Mag. (Aug. 29, 2016), URL *supra* p. vii. It has appeared in thirty-nine songs according to one listing, including millennial-popular hits (hence the name) such as Katy Perry and Snoop Dogg’s *California Gurls*, Carly Rae Jepsen’s *Good Time*, Demi Lovato’s *Really Don’t Care*, and Frank Ocean’s *Ivy*. See *id.*

There is no particular song known to have given rise to the millennial whoop. The sound might be described as a stylized form of Tarzan’s ululating yell—indeed, 1980s songs referencing Tarzan use the musical pattern that would become the millennial whoop.¹³ Alteration between those two same notes ap-

¹³See Baltimora, *Tarzan Boy* (1985); Morris Day & the Time, *Jungle Love* (1984).

pears in the 1939 song *Over the Rainbow* from *The Wizard of Oz* (at “someday I’ll wish upon a star”). Metzger himself reaches further back to teasing songs such as “nanny nanny boo boo” and “I know something you don’t know,” ones that in Leonard Bernstein’s words “transcend cultures across the globe.” *See id.*

Why, then, is it so common? The answer seems to be that the particular pattern is simply compelling to our ears, based both on our inherent nature and our culture. The minor-third interval that characterizes the two notes of the millennial whoop shows up in so many common speech patterns (*yoo-hoo*, *uh-oh* and *peek-a-boo*) that it might seem practically innate, and one linguistic study largely confirmed the prevalence of that minor-third interval in spoken words. *See* Jeremy Day-O’Connell, *Speech, Song, and the Minor Third: An Acoustic Study of the Stylized Interjection*, 30 *Music Perception* 441, 443, 455 (2013).¹⁴ That the millennial whoop recalls the signature sound of Tarzan strengthens its tie to a sense of carefree delight that characterizes the many songs in which it appears. One might describe it as the sound of happiness.

So it should come as no surprise that this particular musical snippet occurs so frequently across time. It is again a necessary and conventional part of the musician’s toolbox for conveying particular emotions and memories to listeners.

¹⁴*See also* Mark Yoffe Liberman, *The Intonational System of English* 30 (1979) (describing the minor third as “prominent in English chants” and “a very natural interval for people to sing”).

C. QUOTATION, HOMAGE, AND REFERENCE ARE ESSENTIAL TO ADVANCEMENT OF THE MUSICAL ARTS

Given the constraints of tonal music theory and the desire to use memory recall to elicit emotional responses, it is no surprise that the creative landscape of music relies so heavily on borrowing and adaptation of past works or generally known motifs.

Quotation abounds in classical music. Dvořák quoted heavily from other composers, the most notable example being the third movement of the *New World Symphony* using the exact opening notes of the parallel movement of Beethoven's *Ninth Symphony*, in an effort to draw connections between European tradition, Dvořák's Czech heritage, and American and other cultural influences.¹⁵ Tchaikovsky's *1812 Overture* juxtaposes Russian songs with the French national anthem *La Marseillaise* to depict a battle between Tchaikovsky's motherland and the Napoleonic army.¹⁶ These are not unique examples:

Bach borrowed material from Remken, Vivaldi, and Telemann. Brahms borrowed from Hayden and Beethoven. Beethoven borrowed from Bach, and Mozart borrowed from DuPort. Rachmaninoff borrowed from Brahms, who in turn borrowed from Liszt, who

¹⁵Leon Botstein, *Reversing the Critical Tradition: Innovation, Modernity, and Ideology in the Work and Career of Antonín Dvořák*, in *Dvořák and His World* 45–46 (Michael Beckerman ed., 1993); Michael Beckerman, *Dvořák's "New World" Largo and The Song of Hiawatha*, 19th Century Music, Summer 1992, at 35, 46.

¹⁶See Jessica Barbour, *The 1812 Overture: An Attempted Narration*, Oxford U. Press Blog (Aug. 20, 2013), URL *supra* p. vi.

in turn had borrowed from Paganini. In fact, Brahms noted that “imitation” has significant pedagogical benefits in that it “is the best way to understand how music is written and structured.”

J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 Mich. Telecomm. & Tech. L. Rev. 407, 427 (2004).

Nor is musical borrowing limited to classical composers. Film composer John Williams turned numerous themes of others into cinema score pieces. Besides *Jaws* as discussed above, the main theme of *Star Wars* is “remarkably similar” to Erich Korngold’s score for the 1942 film *Kings Row*, and the *Imperial March* drew on Chopin’s *Piano Sonata No. 2* (popularly known as the *Funeral March*).¹⁷

Indeed, whole genres of music center around the reuse of thematic elements of past works. Modern, particularly American, traditions of music including jazz, blues, and rock and roll “reflect the pervasiveness of musical borrowing.” Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. Rev. 547, 615–18 (2006); John R. Zoesch III, “Discontented Blues”: *Jazz Arrangements and the Case for Improvements in Copyright Law*, 55 Cath. U. L. Rev. 867, 870–71 (2006). Hip hop, as one commentator notes, is a field of music that relies heavily on “intensive borrowing” from other music,

¹⁷See Darryn King, *The Legacy of the Star Wars “Imperial March” Marches On*, Vanity Fair (Dec. 15, 2015), URL *supra* p. vii; Rich Drees, *Cinematic Swipe: Williams’ Star Wars And Korngold’s King’s Row Scores*, Film Buff Online (Oct. 28, 2013), URL *supra* p. vi.

often through sampling of segments of other sound recordings. Arewa, *supra*, at 622. And it is undeniable that hip hop has become an expansive, valuable, and innovative genre of music, perhaps because of that use of sampling.

After reviewing the use of repetition and borrowing in hip hop within the larger tradition of classical music borrowing (as described above) and African music traditions, the commentator concludes that “copyright standards, particularly in the music area, must have greater flexibility to accommodate varying styles and types of musical production.” *Id.* at 630. And what ought to be true for hip hop ought to be true in general. These unique circumstances of the artistic endeavor of music composition demand greater flexibility to accommodate the need for repetition in music.

II. A REQUIREMENT OF A STRONGER SHOWING OF SUBSTANTIAL SIMILARITY IN MUSIC COPYRIGHT CASES IS APPROPRIATE TO PROMOTE THE PROGRESS OF THE ARTS

The necessity of musical borrowing to musical creativity demands a permissive standard for copyright infringement that appropriately permits such non-literal borrowing. Copyright has long been understood to be premised on a utilitarian justification, that the monopoly right to exclude copying is granted in service of encouraging creation and dissemination of new works. Consequently, the scope of that monopoly right must be limited to avoid interference with downstream creators who build upon the works of the past. In the field of music where

this additive form of creativity is at its apex, special concern must be given to ensuring that the scope of copyright adequately accounts for the needs of future musicians.

1. Copyright's *raison d'être* has never been merely to reward authors; the "well settled" view is that "copyright law ultimately serves the purpose of enriching the general public through access to creative works." *Kirtsaeng*, No. 15-375, at 6 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994)). "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)). Copyright "reflects a balance of competing claims on the public interest," so "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is . . . to promote the Progress of Science and useful Arts.") (quoting U.S. Const. art. I, § 8, cl. 8) (alterations omitted).

Serving that public purpose requires limits on the scope of copyright, to ensure that future downstream authors and creators are able to draw from the wellspring of existing works. As the Supreme Court noted last Term, copyright

balances “two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build upon that work.” *Kirtsaeng*, No. 15-375, at 6. Limits on the degree of copyrightability are essential to enabling that building-upon. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994). *Feist*, applying the idea/expression dichotomy of copyright, held that factual matter must remain uncopyrightable so that copyright “encourages others to build freely upon the ideas and information conveyed by a work.” 499 U.S. at 350 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985)); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (describing copyright as “limited grant”).¹⁸

Doctrine identifies the need for copyright to have limits that facilitate future creation, but ordinary experience proves it. Creation in all endeavors, especially the artistic, depends on some degree of borrowing, adaptation, and even copying. Judicial opinions by necessity quote the works of the past to establish the law of the future. Literary writing often involves allusions to earlier works. Painters and sculptors use and improve upon the artistic techniques of past masters.

¹⁸Indeed, certain limitations on the reach of copyright may be constitutionally required under the First Amendment. See *Golan*, 132 S. Ct. at 889; *Eldred*, 537 U.S. at 219–20; Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. Rev. 1082, 1086 (2013) (following *Golan* and *Eldred*, “neither Congress nor the courts may eviscerate copyright law’s idea/expression dichotomy or fair use privilege without running afoul of the First Amendment”).

And the ability to borrow without running afoul of copyright law is most important for consumer-innovators: the garage musicians, amateur painters, and fanfiction writers of the world. While large content-creating firms have the experience and negotiating leverage to obtain licenses for their background materials, individuals do not. See Stephen Breyer, *The Uneasy Case for Copyright*, 84 Harv. L. Rev. 281, 347 (1970) (noting importance of transaction costs to copyright analysis). Nevertheless, individuals are a powerful creative and innovative force today. See Eric von Hippel, *Democratizing Innovation* 19–22 (2005) (describing prevalence of consumer-driven innovation). To leave them sidelined because of the high transaction costs of copyright licensing would undermine an important part of creative progress that copyright law is intended to promote.

2. The numerous reasons presented above for why borrowing is of special importance in musical composition *a fortiori* emphasize the need for limits on the scope of copyright infringement in that field. The structure of tonal music, use of musical techniques to evoke emotional responses, and frequency of quotation and borrowing in music all show that, more so than in other fields of art, non-literal copying is needed for artists to push the boundaries of musical innovation.

Copyright law offers several doctrines that permit for this accommodation of musical borrowing. Most pertinent to this case, the degree of substantial similarity required has been seen by courts as an appropriate avenue to contem-

plate practical and normative concerns about permissible copying. See discussion *supra* p. 7. Common musical motifs might be treated as *scènes à faire*, “stock themes commonly linked to a particular genre.” *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986); see also Cadwell, *supra*, at 164–65. Certain borrowings might properly be deemed ideas under the idea/expression dichotomy.

Yet whatever doctrinal form it may take, it is critical that copyright be properly tailored to the special circumstances that attend the natural uses and forms of expression of music. For copyright, like all intellectual property, is concerned with separating authors into independent wells of creativity: DC Comics shall be one universe and Marvel shall be another, and never the twain shall meet (absent a complex licensing deal). See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. 265, 266 (1977) (using the term “prospect theory” for this separational function of intellectual property).

Yet that “prospect theory” of intellectual property is at odds with the basic nature of music: *togetherness*. Music allows people of all sorts to share experiences, communicate with each other, build and improve upon others’ creations, and glean an understanding of our collective humanity. Copyright law has limits on its ability to force ideas apart, to ensure that ideas may collide to allow for progress in science and the arts. In an age of rapidly expanding creativity, those collisions of ideas are all the more pressingly important today.

CONCLUSION

For the foregoing reasons, this Court should reverse or vacate the judgment of the trial court.

Respectfully submitted,

Dated: August 30, 2016

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Dated: August 30, 2016

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