MUSIC TO EVERYONE'S EARS: BINDING MEDIATION IN MUSIC RIGHTS DISPUTES

*Matthew H. Ormsbee**

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"*Ah, music. A magic far beyond all we do here!*"
– Albus Dumbledore[1]

* J.D. Candidate, Benjamin N. Cardozo School of Law, 2012; B.A., Hendrix College, 2007. I thank Maggie Baumer for her insight and feedback, and Dr. Norman Boehm and Ms. Julie Jordan for their inspiration.

[1] J. K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 127 (1999).

INTRODUCTION

Litigation has been the mainstay of copyright disputes since America's earliest copyright statute first permitted a cause of action for copyright infringement in 1790.[2] While alternative dispute resolution ("ADR") has become more prevalent in other areas of the law, many copyright attorneys and their clients do not typically consider ADR processes a viable option because these processes are still relatively new to copyright law.[3]

This Note proposes greater use of binding mediation,[4] a specialized ADR process, in music rights disputes, which are fundamentally copyright infringement disputes.[5] Section I discusses the background of copyright litigation and modern application of ADR in copyright disputes. Section II describes critical issues surrounding music rights, details the process of binding mediation, and examines other considerations relating to binding mediation. Finally, Section III considers the implementation of binding mediation in music rights disputes.

I. BACKGROUND OF COPYRIGHT LITIGATION AND ALTERNATIVE DISPUTE RESOLUTION

A. *Litigation of Copyright Disputes*

The Constitution provides the basis for federal copyright protection for creators of sufficiently original works of authorship.[6] In

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2 Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 ("an act to promote the Progress of Useful Arts").

3 Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1710 (1998) ("While ADR has become more prevalent in other areas of the law, many intellectual property attorneys do not regularly consider ADR as one of their options.").

4 Binding mediation, or "med-arb" (short for mediation-arbitration), is "a hybrid form of mediation and arbitration, and is a recognized form of ADR." Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposal Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 307 (2004). "After mediation [attempts], the parties submit unresolved issues to arbitration." *Id*.

5 Stephen P. Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. ON DISP. RESOL. 439, 440 (2003).

6 U.S. CONST. art. I, § 8, cl. 8. ("Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their respective Writings"). *See also* MICHAEL A. EINHORN, MEDIA, TECHNOLOGY, AND COPYRIGHT: INTEGRATING LAW AND ECONOMICS 9 (2004).

addition, congressional provisions, which offer generous periods of absolute protection[7] and an array of exclusive rights for lawful copyright holders[8] under the Copyright Act of 1976,[9] support the contention that creators of copyrightable subject matter should be rewarded for the fruits of their ingenuity.[10] Federal courts recognize a cause of action for infringement of a copyrighted work,[11] enabling the copyright holder to enforce his exclusive rights as against all others.[12]

Lawsuits for copyright infringement in the U.S. have always been adversarial in nature.[13] As such, it is implicit in the nature of

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7 The term of copyright protection has been consistently expanded since the first Copyright Act. *See* Eldred v. Ashcroft, 537 U.S. 186 (2003) ("The Nation's first copyright statute, enacted in 1790, provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term . . . the 1976 [Copyright] Act provided that . . . protection would last until 50 years after the author's death . . . the [Copyright Term Extension Act] enlarges the terms of all existing and future copyrights by 20 years").

8 ALFRED YEN & JOSEPH LIU, COPYRIGHT LAW: ESSENTIAL CASES AND MATERIALS 211 (2008) ("Section 106 of the Copyright Act identifies six exclusive rights that belong to a copyright owner: [a copyright owner] has the exclusive rights: (1) to reproduce the copyrighted work . . . (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work . . . (4) to perform the copyrighted work publicly; (5) . . . to display the copyrighted work publicly; and (6) . . . to perform the copyrighted work publicly . . ."). Section 102 of the 1976 Copyright Act states that "copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed." 17 U.S.C. § 102 (2000).

9 The Copyright Act of 1976 is now codified in Title 17 of the U.S. Code. Section 102 of the Act extends copyright protection to original works of authorship fixed in any tangible medium of expression. 17 U.S.C. § 102 (2000).

10 Eight identified works of authorship include material of literary, musical, dramatic, choreographic, pictorial/sculptural, audiovisual, sound recording or architectural nature. 17 U.S.C. § 102 (2000).

11 *See* Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 837 (Fed. Cir. 1992) (defining a copyright infringement claim as one in which the copyright owner must establish that the alleged infringer copied protectable expression); *see also* Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991) (providing a general overview of the issues of authorship and infringement in copyright law). 17 U.S.C. § 501(a) of the Copyright Act defines a copyright infringer as anyone who violates one of the enumerated exclusive rights.

12 O.E. Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979). *See also* EINHORN, *supra* note 6, at 1 ("The economic justification to protect with copyright is reasonable. A large fraction of production costs must be incurred upfront. While free reproduction, performance and display may benefit users, such takings can expropriate from creators due rewards. In time, the danger of expropriation reduces the incentives to create content in the first place. One general economic remedy for the economic problem then is to establish property rights through . . . copyright."). Section 501(a) of the Copyright Act of 1976 defines a copyright infringer as anyone who violates one of the six exclusive rights outlined in Section 106 of the Act. 17 U.S.C. § 501(a) (2000). The unlawful exercise of any exclusive rights permits the copyright owner to bring suit. *See* 17 U.S.C. §§ 502, 504-05 (2000).

13 *See* ROGER E. MEINERS, AL H. RINGLEB & FRANCES L. EDWARDS, THE LEGAL ENVIRONMENT OF BUSINESS 78 (1997).

adverse legal claims[14] that one party will prevail in court, while the other party must redress the grievance of the successful claimant.[15] A system of law that provides for only "winners" and "losers" affords potentially harsh results to parties that might contemplate non-litigious dispute resolution.[16]

B. *Alternative Dispute Resolution of Copyright Disputes*

The all-or-nothing approach to American litigation explains not only the elaborate system of appeals for dissatisfied litigants,[17] but also the growing popularity of ADR in the U.S.[18] Particularly, the speed,[19] confidentiality,[20] and affordability of ADR[21] render

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14 Blackman & McNeill, *supra* note 3, at 1716. ADR strives to produce creative resolutions for parties in copyright disputes. Most copyright disputes do not "require an 'either/or' result. [P]arties [will] often consider some form of shared rights to be an acceptable, or even preferred, result."

15 *Id*. at 1710 n.39.

16 ALBERT K. JIADJOE, ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE 8 (2004) ("One of the main driving forces towards ADR is public dissatisfaction with litigation. . . . [T]he usual complaints [include] spiraling costs, lengthy delays, increasing levels of litigation and court overload.").

17 Lemley, *supra* note 4, at 307 (noting that the losing party often appeals, thus further adding to the costs and duration of the dispute).

18 Alternative dispute resolution does not describe a single approach or method, but comprises many practices for settling disputes between parties. *See* CENTER FOR PUB. RESOURCES AND THE INT'L TRADEMARK ASSOC., ADR IN TRADEMARK AND UNFAIR COMPETITION DISPUTES: A PRACTITIONER'S GUIDE II-1 (William A. Finkelstein ed., 1994) (stating that the differing policies are not mutually exclusive in any particular conflict, but often are used in a customized combination). JIADJOE, *supra* note 16, at 1 ("There is no question but that conflict resolution, through the processes of negotiation, mediation and arbitration, has become an acceptable and, indeed, inevitable part of creative lawyering in the 21st century. That explains why all self-respecting law schools now provide for skills training in the field of Alternative Dispute Resolution (ADR) as part of their core offerings.").

19 Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1001-02 (2008) (noting that the backlog in federal courts and the fact that federal courts are obligated to resolve criminal matters before civil matters often results in a longer waiting period for civil trials on the merits in federal court than in state court).

20 *See* Claude R. Thomson & Annie M. K. Finn, *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!*, 62 DISP. RESOL. J. 75 (2007).

21 Dina R. Janerson, *Representing Your Clients Successfully in Mediation: Guidelines for Litigators*, N.Y. LITIGATOR, Nov. 1995, at 15 ("The notion that ordinary people want black-robed judges[,] well[-]dressed lawyers[,] and fine courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.") (quoting Chief Justice Burger, ADDRESS AT THE CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY: DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY (1985)).

ADR the preferred method of dispute resolution[22] for many disputants in the twenty-first century.[23] Increasingly, "individuals and corporations recognize that the out-of-pocket costs of litigation[24] do not begin to account for the total impact associated with lawsuits."[25] Furthermore, in recent years the music industry has flourished[26] and the financial stakes in music infringement litigation have risen significantly.[27]

The nature of a dispute is an additional factor that often attracts disputants to ADR.[28] Arguments involving complicated factual issues are good candidates for neutral fact finding in ADR,[29] since technical or complex disputes may waste limited judicial resources and vex the judiciary.[30] While courts must necessarily be at the disposal of any meriting lawsuit within their jurisdiction, the judiciary is not always competent in specialized fields, such as mathematics or music,[31] and judges have even been characterized

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22 "Parties especially should consider ADR, with the advice of counsel, when: (1) they have a sufficient understanding of the case, either through discovery or other means; (2) it seems a dispute can or should be settled; or (3) trial costs may be prohibitively high. ADR also provides advantages when parties seek a rapid outcome." Blackman & McNeill, *supra* note 3, at 1710.

23 Janerson, *supra* note 21, at 8 ("ADR seeks to address one fundamental question—what is the best way for people to deal with their differences?").

24 According to a recent study, the median cost of a copyright infringement suit is $100,000 through discovery and $200,000 through trial. Judith A. Szepesi, *Maximizing Protection for Computer Software*, 12 COMPUTER & HIGH TECH. L.J. 173, 199-200 (1996) (footnotes omitted) (citing AM. INTELL. PROP. L. ASSOC. COMMITTEE ON ECON. OF LEGAL PRAC., REP. OF ECON. SUR. 1995, at 63). Further, "the cost of copyright infringement suits is rising with the increased necessity to use expert witnesses and the increased complexity of the issues being litigated." *Id*. at 200. "Estimated median costs for alternative dispute resolution are: $50,000 for mediation; $78,000 for med/arb; $100,000 for mini-trial; $150,000 for summary jury trial; $151,000 for binding arbitration." *Id*.

25 NANCY F. ATLAS, STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK 1 (2000).

26 J. TAUBMAN, IN TUNE WITH THE MUSIC BUSINESS 51 (1980) (noting accelerated growth in the recording industry); H. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 156 (1986) (noting that technological innovation has increased the uses of music). *See also* DAVID BASKERVILLE, PH.D., THE MUSIC BUSINESS HANDBOOK 22 (2001).

27 In 1987, a jury awarded a plaintiff over $500,000 in damages. *See* Gaste v. Kaiserman, 683 F. Supp. 63 (S.D.N.Y. 1988) (finding the song "Feelings" to infringe a relatively unknown French song).

28 Having informed neutrals allows for additional cost savings and faster resolution. *See* David A. Bernstein, *A Case for Mediating Trademark Disputes in the Age of Expanding Brands*, 7 CARDOZO J. CONFLICT RESOL. 139, 155 (2005).

29 *See* ATLAS, *supra* note 25, at 4.

30 JIADJOE, *supra* note 16, at 2.

31 Yvette J. Liebesman, *Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes*, 35 AIPLA Q.J. 331, 332 (1994) ("Because all writings, including musical compositions, can be dissected to the point of becoming uncopyrightable ideas, when courts try to eliminate the uncopyrightable elements they risk over-dissecting

as hostile to copyright protection of popular music.[32] Thus, ADR is an advantageous alternative to litigation, particularly for musicians, since parties may be sophisticated in performance and composition,[33] and may spend a great amount of time and effort simply describing and clarifying their dispute to an uninitiated judge.[34]

Furthermore, an informed mediator is aware that reputations and relationships are important in the relatively small community of performers and composers.[35] There is often the possibility that even disputing parties may someday desire a business relationship with each other.[36] In this regard, ADR offers claimants the ability to keep the dispute firmly under their supervision and control.[37] ADR is not only increasingly chosen by disputants,[38] but also, overall, has yielded more satisfying results than litigation,[39] leading

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the work, after which they might never find infringement."). *See also* Apple Computer, Inc. v. Microsoft Corp., 779 F. Supp. at 135-36 (N.D. Cal. 1991).

32 Carew v. R.K.O. Radio Pictures, Inc., 43 F.Supp. 199, 200 (S.D. Cal. 1942) ("[A] phrase from Beethoven, or from any other great composer, might linger in the mind of a student of music for many years [but] the trite phrasing of an ordinary popular song, with its limitations [could not]"); Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936) (Judge Learned Hand stated that "[s]uccess in [popular music] is by no means a test of rarity or merit").

33 Paul M Grinvalsky, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 396 (1992) ("Music, however presents problems in identifying the [uncopyrightable idea], and then translating it into words a fact finder will understand.)."

34 *Id*. at 396 n.110 ("A basic understanding of music, historically and theoretically, is essential, especially where courts, perhaps having heard days of expert testimony, tend not to elaborate on the historical reasons for the experts' conclusions concerning music.").

35 Toni L. Wortherly, Note, *There's No Business Like Show Business: Alternative Dispute Resolution in the Entertainment Industry*, 2 VA. SPORTS & ENT. L.J. 162, 171 (2002).

36 Sarah Tran, *Experienced Intellectual Property Mediators: Increasingly Attractive in Times of "Patent" Unpredictability*, 13 HARV. NEGOT. L. REV. 313, 322 (2008).

37 JIADJOE, *supra* note 16, at 8 ("Also, there is the not uncommon feeling that the burning issue, which originally belonged to the disputants, becomes detached from them once it is placed in the hands of the legal system. In the process, the original, personal facts of the case are reconstructed to fit the relevant legal rules.").

38 *See, e.g.*, Bernard v. Galen Group, Inc., 901 F. Supp. 778, 779 (S.D.N.Y. 1995) (referring a copyright case, over the plaintiffs' objections, to mediation). *See* Anway, *supra* note 5, at 440 ("[C]opyright matters fall within the exclusive jurisdiction of the federal courts. Such courts, in turn, are subject to the Alternative Dispute Resolution Act of 1998, which requires federal courts 'to provide litigants in all civil cases with at least one alternative dispute resolution process, including . . . mediation.'") (internal citations omitted); *see also* Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 123 (1998). WILLIAM R. BUCKLEY & CATHY J. OKRENT, TORTS AND PERSONAL INJURY LAW 12 (2004) (noting that ADR is "becoming more and more popular as parties wish to avoid costly public court proceedings").

39 Parties to ADR are able to produce their own creative, mutual resolutions, which lead to greater client satisfaction. Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. BALT. INTELL. PROP. L.J. 47, 63 (2000). *See also* Wendy L. Dean, *Let's Make a Deal: Negotiating*

parties to feel more obligated to honor their agreements.[40] Because lawyers are obligated to provide their clients with the best legal advice possible, this advice must sometimes include an admonishment against litigation, since it may work against their client's best interests,[41] wasting resources and time.[42]

Despite its growing popularity, ADR generally remains overlooked as an alternative[43] to litigation,[44] especially for music rights disputes.[45] This phenomenon can partly be explained by certain myths that discourage litigants from choosing ADR.[46] While each of these misconceptions can ultimately be dispelled,[47] the infrequent use of ADR in music rights disputes may also be due in part to the historic use of litigation,[48] lack of training or coursework in ADR for law students, or inability to determine when ADR is ap-

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Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit, 6 J. MARSHALL. REV. INTELL. PROP. L. 365, 369 (2007) ("Parties who enjoy the freedom of creating a settlement, which meets their interests, are more likely to honor those agreements, thereby avoiding future judicial enforcement action.").

40 Dean, *supra* note 39, at 369 (quoting Nancy Neal Yeend & Cathy Rincon, *ADR and Intellectual Property: A Prudent Option*, 36 IDEA 601, 603 (1996)).

41 Ciolli, *supra* note 19, at 1014.

42 *See* ATLAS, *supra* note 25, at 2.

43 Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Throughout Evidence Rules Reform*, 64 FORDHAM L. REV. 247, 248 (1995).

44 *See* Anway, *supra* note 5, at 440. *See also* Blackman & McNeill, *supra* note 3, at 1710 ("While ADR has become more prevalent in other areas of the law, many intellectual property attorneys do not regularly consider ADR as one of their options.").

45 Wortherly, *supra* note 35, at 173 (explaining why entertainment/music companies are reluctant to pursue mediation as a form of dispute resolution).

46 Anway, *supra* note 5, at 459 ("[T]he infrequent use of mediation in copyright disputes can be explained, at least in part, by three myths: (1) the myth that parties want their 'day in court'; (2) the myth that parties must disclose confidential information during mediation; and (3) the myth that clients benefit from adversarial representation.").

47 Disputants nearly always insist on their "day in court." Joe Robertson, *Mediation Still Not Popular Among Some Lawyers*, TULSA WORLD, Aug. 30, 1998, at A1. Lawyers accordingly overlook the possibility of ADR, despite the fact that most disputants would likely choose ADR over litigation. Craig McEwen, *Note on Mediation Research*, *in* STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 3, 182 (3d ed., 1999), ("Empirical research about mediation . . . indicates that . . . [d]isputants engaged in mediation tend to be satisfied with the process and typically are more likely to be so than comparable litigants experiencing other processes."). Regarding confidentiality of information, the voluntary nature of mediation allows lawyers the ability to refuse disclosure of sensitive information. Blackman & McNeill, *supra* note 3, at 1720 ("ADR allows the parties to determine for themselves the degree to which such information will or will not be made publicly available.").

48 Before 1982, federal law did not allow for resolution of intellectual property controversies using ADR. *See* Nancy Neal Yeend & Cathy E. Rincon, *ADR and Intellectual Property: A Prudent Option*, 36 IDEA 601 (1996).

propriate.[49] In any event, perceptions of ADR are changing, and use of ADR is increasing.[50] The market for music is constantly evolving, and consumers quickly embrace new music as soon as it is available.[51] The dispute resolution method utilized in this field must be able to resolve disputes as quickly as they arise.[52]

II. Discussion of Binding Mediation and Music Rights

A. *The Dispute*

1. A Distinctive Art Form

Music has always been viewed as a distinctive art form in the eyes of the law.[53] Additionally, of all the arts, music is perhaps the least tangible.[54] As a discipline, music simply does not lend itself to layman interpretation or discernment of infringement as readily as literature or visual arts for several reasons: (1) not all music is written down, sometimes leaving only the intangible record of sound as evidence for a potential claim of infringement;[55] (2) while some themes are so easily recognizable that most people would recognize them anywhere,[56] often the distinction between two songs with similar characteristics is too subtle for an audience—perhaps even a trained musician—to detect;[57] (3) different musical genres "seg-

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49 Kaleena Scamman, *ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist-Label Relationship*, 10 Cardozo J. Conflict Resol. 269, 297 (2009).

50 *See* Anway, *supra* note 5, at 440.

51 *See* Einhorn, *supra* note 6, at 6.

52 Carmen Collar Fernandez & Jerry Spolter, *International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant?*, 53 Disp. Resol. J. 62, 63 (1998) (noting that while litigation can consume years, mediation often provides a resolution within a few hours or days).

53 Grinvalsky, *supra* note 33, at 396 (1992) ("In a sense, music has become a language for conveying, through the use of organized pitch, ideas for which words are, perhaps, inadequate.").

54 Wihtol v. Wells, 231 F.2d 550, 552 (7th Cir. 1956). *See also* Joseph Machlis, The Enjoyment of Music 6 (3d ed., 1970) (Art is, in general, "easier to experience than define.").

55 Oswald Jonas, Introduction to the Theory of Heinrich Schenker 2 (J. Rothgeb trans., 1982) ("Lacking any association to the outer spatial world, lacking purpose, the tone conjures up only the tone itself. The purely emotional reactions it evokes in the individual are of so vague a nature, and yet so varied, that cause and effect could never be unequivocally related to one another. When poetry and visual arts had already reached their highest maturity, music remained in its infancy.").

56 *See, e.g.*, the well-known three-note "NBC Chimes Theme."

57 Grinvalsky, *supra* note 33, at 395 ("Although music requires no specialized knowledge to simply appreciate, the same is not true in comparing two works for infringement. Music's natural appeal masks the complexities involved in both its creation and its analysis.").

regate" the public,[58] making the total number of listeners of each genre smaller and more homogeneous;[59] and (4) musicality is a specialized skill,[60] requiring natural talent and years of arduous study.[61] Often, too, "music's natural appeal masks the complexities involved in both its creation and its analysis."[62] Thus, while almost anyone can appreciate a musical piece, only a small portion of the

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58 *Id*. at 427 ("The recording industry keeps cranking the tunes out, and radio stations target their audiences, playing one style instead of another. There are crossover songs that make both the pop charts and country charts, but these situations are rare. A country song will certainly not make the heavy metal rock charts, unless it were altered stylistically.").

59 CHARLES HERSCH, SUBVERSIVE SOUNDS: RACE AND THE BIRTH OF JAZZ OF NEW ORLEANS 78 (2007). Historically, certain genres were relegated to audiences of a certain race, or could be heard in whites-only or blacks-only venues. "When the music expanded beyond rough, forbidden venues, it reached public locales, spaces open to a wide variety of people. In these freer spaces, sometimes as transitory as the street itself, the new music united New Orleanians of various races, sexes, and class around its infectious pulse." *Id.*

60 "Musicality" is defined as musical sensitivity or talent. *See* GERALD ABRAHAM, THE TRADITION OF WESTERN MUSIC 69 (1974).

61 For other advantages of using mediation to resolve music disputes, see Anway, *supra* note 5, at 449 ("Copyright disputes are suitable for mediation because mediation enables parties to (1) circumvent the unusually high cost of copyright litigation; (2) "share" copyrighted works; (3) avoid litigating ambiguous or adverse copyright issues; (4) preserve the business relationships and reputations of copyright disputants; and (5) select copyright experts as evaluative mediators.").

62 *See* Grinvalsky, *supra* note 33, at 396. The example shown in Figure 1 is excerpted from J.S. Bach's Organ Fugue in G minor. *Id*. at 417. Figure 2 shows the same line reduced to its basic linear movement. *Id*. Stripped of embellishment, the line in Figure 2 is indicative of the musical analysis experienced musicians would apply in detecting infringement of musical expression, free of complicated notation that might cloud a layperson's analysis.

FIGURE 1

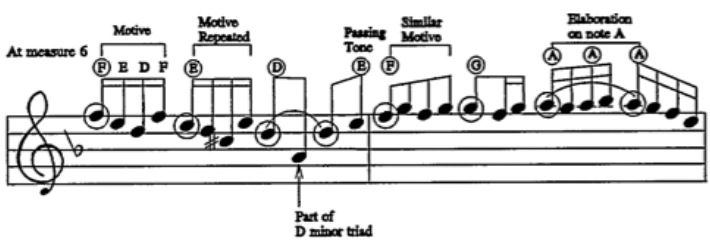
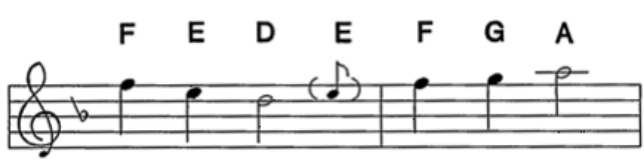


FIGURE 2



public can accurately analyze it, let alone reliably discern infringement.[63]

Accordingly, judges have historically felt uneasy resolving music rights disputes involving technical musical concepts.[64] Musical copyright protection has even been called a misnomer,[65] since a plaintiff seeking to protect his intellectual property interest traditionally finds little sympathy from the judiciary.[66] Other specialized fields may be more easily explained by expert testimony or amicus curiae, as is the practice in complicated patent suits.[67] Yet, "historically, courts [have] viewed music with a curled lip and a suspicious eye."[68] When confronted with musical plagiarism, the courts typically mistreat and disregard music's inherently unique qualities.[69]

A poorly educated judiciary is a threat to just resolution of music rights disputes, since it will likely base its conclusions on the most easily demonstrable harmonic elements.[70] Accordingly, the outcome of litigation may be either a finding of infringement where perhaps none exists, chilling the creation of new musical works,[71] or, equally as unfortunate, a finding of no infringement where unlawful copying has actually occurred.[72]

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63 *Id*.

64 Liebesman, *supra* note 31, at 334 ("With regard to music compositions, it is more difficult to apply [the Learned Hand] analysis due to its inherent limitations, namely the limited number of combinations that produce pleasing musical sounds. As a result, courts continue to struggle with discerning the level of substantial similarity between musical compositions in infringement analyses.").

65 Debra P. Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229 (1989).

66 *Id*.

67 Steven J. Elleman, *Problems in Patent Litigation: Mandatory Mediation May Provide Settlement Solutions*, 12 OHIO ST. J. ON DISP. RESOL. 759, 765, n.36 (1997) (But "[e]ven if attorneys do their best in explaining the technical differences between [intellectual property] claims, the prior art, ad the allegedly infringing device, it may be unreasonable to expect a judge or jury to understand these finder points.").

68 Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127 (1988).

69 Brent, *supra* note 65, at 229.

70 Elleman, *supra* note 67, at 123.

71 Grinvalsky, *supra* note 33, at 397 ("First Amendment freedom of expression is among those rights most precious. Courts traditionally disdain action which chills it.") (citing Ward v. Rock Against Racism, 491 U.S. 781, 790-91 (1989)).

72 *Id*.

2. Music in the Courtroom

In light of its unique characteristics, issues concerning music rights infringement can provide considerable difficulties in the courtroom.[73] Courts have conceded that, "while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear."[74] Furthermore, because the musical language is limited, it is difficult to determine what portion of the language is at the disposal of the public to use and where the permission to use it stops.[75] Thus, while the "originality threshold,"[76] the threshold for copyright protection, is not very high, the point at which a musical work becomes protected is obscure and difficult to predict.[77]

Additionally, performers and composers operate under different expectations within their trade than do professionals of other forms of artistic expression.[78] Borrowing of general themes or chord progressions from other musicians' works is a historical practice, and one that exists to this day.[79] Quotations, in the form of borrowed musical expression, are used extensively in music,[80] and the professional literature discusses the distinct aesthetic function of quotations without a hint that such borrowing may be unethical.[81]

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73 John R. Autry, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, 10 J. INTELL. PROP. L. 113 (2002) (noting that federal jurists in the U.S. have had great difficulty formulating the appropriate standard by which to adjudicate an alleged infringement of a copyrighted musical work).

74 Darrell v. Joe Morris Music Co., 133 F.2d 80 (2d Cir. 1940).

75 *See* Grinvalsky, *supra* note 33, at 396.

76 *See generally* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1991) (noting the minimum level of originality required in copyrightable creations, so as to differentiate from mere facts). *See also* EINHORN, *supra* note 6.

77 *Feist Publications*, 133 F.2d at 401.

78 Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 425 (1988) (citing that the artistic world has developed its own informal rules for borrowing).

79 *Id*. at 424 ("While copying words from another author's book without some form of acknowledgement is generally considered plagiarism, the music world functions according to different social expectations and has done so for centuries. Composers historically have drawn heavily from folk music and current popular music. In addition, composers often borrow directly from their colleagues.") (citing Bartók, *The Influence of Peasant Music on Modern Music*, in CONTEMPORARY COMPOSERS ON CONTEMPORARY MUSIC 72 (E. Schwartz & B. Childs eds., 1967) and N. CARRELL, BACH THE BORROWER 227-365 (1967)).

80 *See, e.g.,* CHARLES IVES, FOURTH SYMPHONY (1909-16) (combining various popular tunes in an extensive collage).

81 *See, e.g.*, P. GRIFFITHS, MODERN MUSIC: THE AVANT GARDE SINCE 1945 200 (1981) ("[T]he more significant reasons for such borrowings have been those of an aesthetic or even

Judges, perhaps at a loss to discern sufficient infringement in a music infringement claim, have routinely relied on reputable academics in music rights disputes.[82] The jury—composed of laypersons, presumably without specialized knowledge of music theory—may similarly be at a loss in discerning infringement.[83] For evidentiary purposes, music infringement is not as clearly perceptible as is infringement of a literary or dramatic work.[84] Furthermore, songs often contain "fingerprints," unique treatments used in a piece of music, that the average juror is unable to perceive.[85] Thus, fine musical distinctions routinely pass undetected by the untrained observer.[86]

Practice and personal experience making music and understanding others' compositions are crucial in understanding and resolving music rights disputes.[87] Also, despite allowing some degree of "borrowing" of themes[88] from earlier musicians and creat-

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moral order: the need to test the present against the past and vice versa, the wish to find musical analogues for the multiple and simultaneous sensory bombardment in the world.").

[82] *See, e.g.*, Tisi v. Patrick, 97 F. Supp. 2d 539, 543 (2000) ("The expert presented by the defendants, Dr. Lawrence Ferrara, is the Chair of the Department of Music and Performing Arts at New York University, and a recognized musicologist. Michael White, the expert proffered by Tisi, is a member of the graduate faculty at the Juilliard School and a composer of operas, concertos and songs.").

[83] *Id*. at 544 ("A lay listener may hear a basic similarity between the guitar rhythm of both songs because in both songs it is primarily based on four basic accents per measure. However, this rhythmic similarity is not significant because this guitar rhythm is extremely common in the pop rock genre, and is also featured in Eastern European folk music and is not original to either [song].").

[84] *Id*.

[85] *Id.* at 545 ("However, [one song] contains what Dr. Ferrara termed "fingerprints," unique treatments used by Filter and Patrick.").

[86] The court in *Northern Music v. King Record Distributors* was criticized for its "inaccurate, uneducated, and layman-like approach to originality." *See also* Grinvalsky, *supra* note 33, at 401 ("The *Northern* court described rhythm as simply tempo, a background for the melody, and described harmony as the mere blending of tones according to long established rules. Finding that originality must be found in the melody, the court was exhibiting the precise kind of distance to music that the *Arnstein* dissent cautioned causes sound to merge.").

[87] Liebesman, *supra* note 31, at 337 ("When ascertaining actual copying, courts have allowed expert testimony of musicologists, often highly trained musicians on the faculty at well-known universities. Musicologists form their opinions on the similarities and differences between allegedly infringing and infringed songs by analyzing and comparing their musical scores.") (citing Tisi v. Patrick, 97 F. Supp. 2d 539 (S.D.N.Y. 2000) and Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976)).

[88] A theme is "[a] musical idea, usually a melody, that forms the basis or starting point for a composition or a major section of one. Although the terms theme and subject are sometimes used interchangeably, theme often implies something slightly longer and more self-contained than subject." THE HARVARD CONCISE DICTIONARY OF MUSIC AND MUSICIANS 666 (1st ed. 1999).

ing transpositions[89] by subsequent musicians, composers will generally take another composer to task if they suspect wholesale, unashamed or willful infringement.[90] Thus, for claimants of music rights disputes, an uninformed judiciary and jury may serve as a considerable impediment to dispute resolution.

B. *The Forum*

1. Binding Mediation

ADR presents a relatively modern alternative to conventional litigation,[91] and incorporates any procedure for settling disputes by means other than litigation.[92] The array of techniques under ADR may be classified by the amount of control parties maintain over the settlement process and the dispute's ultimate outcome.[93] Binding mediation, a combination of two ADR processes, mediation[94] and arbitration,[95] offers parties the benefits of both mediation and arbitration, respectively, in settling a dispute.[96] "When parties se-

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89 A transposition is "[t]he rewriting or performance of music at a pitch other than the original one. This entails raising or lowering each pitch of the original music by precisely the same interval." *Id*. at 679.

90 A. SHAFTER, MUSICAL COPYRIGHT 209-15 (2d ed. 1939); Paul W. Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. PITT. L. REV. 232 (1955).

91 *See* ATLAS, *supra* note 25, at 1 ("Over the years, techniques for the resolution of disputes short of the courtroom have developed through the imagination and creativity of countless individuals. The need to find techniques that go beyond the traditional means of dispute resolution has become increasingly apparent.").

92 BLACK'S LAW DICTIONARY 62 (7th ed. 1999).

93 GOLDBERG, *supra* note 47, at 3 ("[C]ontrol over outcome is only one significant criterion for differentiating among third-party processes."). *See also* Anway, *supra* note 5, at 441.

94 ATLAS, *supra* note 25, at 5-7 ("Mediation is a nonbinding, facilitated negotiation process. It has been shown to produce a high rate of success in reaching voluntary, durable settlement agreements. [T]he success rate in mediation is very high because the parties come to the mediation with the express purpose of attempting to settle their dispute."). *See also* Anway, *supra* note 5, at 441 ("Mediation, in contrast to negotiation and arbitration, provides a middle-ground on which parties may resolve their disputes by ceding control of the process to a neutral third-person while retaining control over the dispute's ultimate outcome.").

95 ATLAS, *supra* note 25, at 9 ("Traditional arbitration is usually thought of as a process that involves a hearing presided over by a one- or three-arbitrator panel. The panel is presented with evidence at a formal hearing and a decision is rendered based on that evidence. The arbitrators sit much like judges and rules governing judicial conduct are generally applicable. Thus, the arbitrators are prohibited from ex parte communications, unlike a mediator."). *See also* Goldberg, *supra* note 47, at 3 ("Arbitration is a form of adjudication in which parties present evidence and make legal arguments.").

96 Lemley, *supra* note 4, at 307. Binding mediation is also known as mediation-arbitration, or "med-arb."

lect binding mediation, they agree to attempt good-faith settlement negotiations through the traditional mediation process."[97] If a settlement is not reached during the mediation phase, then a form of binding arbitration is initiated that will result in a final, non-appealable resolution of the dispute."[98] In the absence of agreement through non-binding mediation, the subsequent stage of binding arbitration guarantees that an arbitrator's eventual decision will resolve the dispute.[99]

At the outset of binding mediation, a mediator will begin to work with parties, step by step, to reach a mutual settlement.[100] A mediation session typically progresses through several stages, including the mediator's opening statement, a presentation by each party, a negotiation of the relevant issues, and an ultimate agreement.[101] At any given point in mediation, the mediator strives to gain the trust and confidence of the parties by proceeding in an impartial and deferential manner.[102] A mediator will also urge the free flow of information from the very beginning by explaining the confidential nature[103] of the mediation process,[104] the ground rules for uninterrupted dialogue, and the mediator's lack of authority to render a binding judgment.[105] A free flow of information—ideally exercised in the parties' initial presentations and continuing

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97 During mediation, a neutral third party assists the conflicting parties in crafting a settlement. *See* INSTITUTE FOR DISPUTE RESOLUTION, CENTER FOR PUBLIC RESOURCES, INC., CPR MODEL ADR PROCEDURES AND PRACTICES: MEDIATION I-1, I-4 (1995) (defining mediation as a process where a neutral third-party "actively assists" parties towards a settlement).

98 *See ADR/Mediation and Arbitration Rules and Procedures* (Sept. 19, 2010) *available at* www.resolutesystems.com/ADR/MedArbRulesProcedures.pdf.

99 NANCY H. ROGERS & RICHARD A SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 9 (1987) ("Provided parties are not able to reach agreement through mediation, arbitration is frequently the next step in resolving a dispute short of litigation.").

100 *Id.* at 13 (noting that although mediation is a sequential process, "it is also cyclical and self-reinforcing").

101 *Id.* at 14.

102 *See* In re Fla. R. Civ. Pro., 641 So. 2d 343, 349 (Fla. 1994) (per curiam) ("A mediator occupies a position of trust with respect to the parties and the courts").

103 Ciraco, *supra* note 39, at 76 (noting that in litigation, confidentiality is usually lost because judges generally do not close the courtroom to the public in jury trials).

104 Alida Camp & Louise E. Dembeck, AMERICAN BAR ASSOCIATION, COMMITTEE UPDATES, *News From the Entertainment ADR Committee* (Oct. 25, 2007), www.abanet.org/dch/committee.cfm?com=DR030500&edit ("Because of the celebrity status of individuals and the public hunger for information about disputes both personal and professional in entertainment, the confidentiality requirements of mediation and arbitration are invaluable.").

105 ROGERS & SALEM, *supra* note 99, at 20-21.

throughout the mediation—"frequently results in the parties gaining a greater understanding of their adversary's position."[106]

Mediators urge the parties toward agreement by engaging them in negotiation, carefully considering possible solutions to which the parties may be receptive.[107] Mediating "parties are in total control of the process in mediation and are limited only by the participants' needs and creativity."[108] The mediator plays a crucial role in negotiations by helping to avoid impasses: in such an event, a mediator highlights the drawbacks of conventional litigation in an effort to encourage settlement.[109] If negotiations continue unimpeded, the mediator facilitates this process until settlement is reached,[110] whereupon the agreement may be reduced to a signed, binding agreement.[111]

The synthesis of experience in ADR and musical expertise is not commonly found in a single individual, making selection of the mediator somewhat challenging.[112] However, certain sources—

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106 Anway, *supra* note 5, at 442 (citing Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1308 n.78 (1998)) (noting that mediators "may be able to take immediate steps to move the parties toward better communication and eventual mutual understanding.").

107 *See* ROGERS & SALEM, *supra* note 99, at 30.

108 Ciraco, *supra* note 40, at 63.

109 ROGERS & SALEM, *supra* note 99, at 33 (noting that the mediator may, if necessary, act as an "agent of reality").

110 If the mediation is unsuccessful, the mediator may attempt to salvage any progress by recording stipulated facts or resolved issues. ROGERS & SALEM, *supra* note 99, at 39. Moreover, the parties "may have learned to negotiate better and may, in fact, settle unresolved issues themselves later." *Id*.

111 Anway, *supra* note 5, at 443. The enforceability of mediation agreements is frequently critical to both securing party attendance at the mediation and obtaining ultimate resolution. JOHN S. MURRY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 419 (2d ed. 1996). Perhaps because "[s]ome advocates of community dispute mediation do not view legal enforceability as central to its objectives," a common misapprehension is that mediation agreements are merely aspirational and not binding on parties. *Id*.; *see also* Cathleen C. Payne, Note, *Enforceability of Mediated Agreements*, 1 OHIO ST. J. ON DISP. RESOL. 385, 385-86 (1986) (noting that parties may fail to comply with their agreements, despite a resolution tailored to their needs). "Putting [any] misapprehensions to rest, mediation agreements are enforceable to the extent they satisfy the requirements of contract law." Anway, *supra* note 5, at 443. Furthermore, "[t]he general policy favoring enforcement, and specific policies underlying certain causes of action, may enhance enforceability." *Id*.

112 Despite this challenge, there has been an increasing role of lawyers and former judges as mediators, thus enlarging the pool of total mediators available. Anway, *supra* note 5, at 444 (stating that the reason for this is largely attributable to the mediators' view that they are selected to participate in the mediation process because of their familiarity with the litigation system).

academia (for music professors or musicologists)[113] and the recording industry (for producers and business people with knowledge of music)[114]—have provided mediators in the past, and will continue to do so.[115] A mediator's expertise should match that of the disputants, helping to bridge the gap between the parties.[116] Mediators trained in both ADR and music would result in fairer resolution because they can focus on the complicated, music-related issues in the dispute,[117] not having to be educated by the parties.[118]

If mediation attempts do not lead to a mutual agreement, or if particular issues remain unresolved, parties to binding mediation will then commence arbitration, selecting one private arbiter or a panel of three private arbiters, who possess expertise in the field of music.[119] The parties may elect to have the individual who served as mediator also serve as arbiter, but this is not required.[120] While general rules of arbitration have been passed by various organizations, parties may agree to tailor the regulations to fit their individual situation.[121] Depending on the interests of the parties, the arbitration process may include limited discovery, all or some of

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113 Musicology is "[t]he historical and scientific study of music." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1191 (3d ed. 1992).

114 Note that "the three main organizations that are used to solve entertainment-related disputes are AFMA, AAA, and JAMS-Endispute." Wortherly, *supra* note 35, at 170. These organizations may be a fruitful source of ADR-trained individuals. *Id*.

115 Bernstein, *supra* note 28, at 155.

116 Even if a mediator without extensive knowledge of music theory is chosen, the time and effort "teaching" relevant concepts to the mediator would be less than in the case of a lay judge or jury. *See* Elleman, *supra* note 67, at 772 (noting that the use of an arbitrator with technical expertise avoids the problem of uneducated verdicts and the skill of these arbitrators usually guarantees that arbitration costs are 50% less than the litigation costs).

117 Ciolli, *supra* note 19, at 1014 (explaining that mediating parties in intellectual property disputes "can select neutrals that possess the expertise necessary to 'concentrate on the details and specifics of the case, as opposed to trying to learn or better understand the technical process,'" which leads to fairer resolutions).

118 Max Vilenchik, *Expanding the Brand: The Case for Greater Enforcement of Mandatory Mediation in Trademark Disputes*, 12 CARDOZO J. CONFLICT RESOL. 1101, 1109 (2010).

119 *See* ENDISPUTE INC., ADR PROCESSES 4-15 (1994) (stating that parties often select a neutral party with particular expertise or experience).

120 Familiarity with the parties and the nature of the dispute, however, would be a considerable advantage in choosing one individual to serve as both mediator and potential arbiter later in the binding mediation process. Lemley, *supra* note 4, at 307.

121 *See, e.g.,* INSTITUTE FOR DISPUTE RESOLUTION, CENTER FOR PUBLIC RESOURCES, INC., CPR MODEL ADR PROCEDURES AND PRACTICES: ARBITRATION I-5–I-18 (1995) (discussing how parties can use CPR's non-administered arbitration rules and commentary as a procedural basis to settle disputes).

the rules of evidence, the chance to examine and cross-examine witnesses, and the option to use briefs and oral argument.[122]

Binding mediation is most effective in resolving music rights disputes, in part, because the process requires considerable commitment and foresight from the parties. In non-binding mediation, the parties are free to walk away for any reason.[123] However, in binding mediation, the parties commit to two ADR processes (though only mediation may be necessary), and are guaranteed a resolution at the end of the dispute.[124] It is true that parties are free to pursue arbitration or litigation after an unsuccessful non-binding mediation session, but musicians and producers prize the certainty that their dispute will be resolved quickly, inexpensively and entirely through ADR processes. Furthermore, the highly flexible and informal nature of mediation makes it an appropriate starting point for music rights disputes.[125] Any party to ADR values the predictability and speed of resolution, but parties in the entertainment industry will especially value these traits.[126]

2. A Substitute for Conventional Litigation

Copyright protection for musical works is often lauded as a collective arrangement[127] that provides incentive and security for artists and writers.[128] The public strikes a balance with artists[129] by giving creators of new works temporary monopolies on their intellectual property.[130] "Copyright protection creates a legal right

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122 *See* CENTER FOR PUBLIC RESOURCES AND THE INTERNATIONAL TRADEMARK ASSOCIATION, ADR IN TRADEMARK AND UNFAIR COMPETITION DISPUTES: A PRACTITIONER'S GUIDE VIII-10, VIII-24–VIII-25 (William A. Finkelstein ed., 1994) (explaining that parties may adopt or reject certain rules of evidence as they wish).

123 Lemley, *supra* note 4, at 308.

124 ROGERS & SALEM, *supra* note 99, at 9.

125 Marion M. Lim, *ADR of Patent Disputes: A Customized Prescription, Not an Over-the-Counter Remedy*, 6 CARDOZO J. CONFLICT RESOL. 155, 165 (2004).

126 Wortherly, *supra* note 35, at 163.

127 MANCUR OLSEN, JR., THE LOGIC OF COLLECTIVE ACTION 42 (1972).

128 Brief for G. A. Akerlof et al. as Amici Curiae, Eric Eldred v. John D. Ashcroft, 537 U.S. 186 (2003), 2002 WL 1041846 at *2 ("The main economic rationale for copyright is to supply a sufficient incentive for creation [and] an economically mindful author will recognize this and invest in creation only if the expected returns [exceed] the upfront investment. [However], without legal protection, an author cannot prevent others from appropriating the fruits of the initial investment" at 4). *See also* EINHORN, *supra* note 6, at 1.

129 Keyt, *supra* note 78, at 428 ("The balance [of copyright] is a delicate one. To strike it properly, the legal ear needs to listen deeply, sensitive to the way small changes affect a piece of musical material").

130 Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) ("To encourage authors to create and disseminate original expression, it accords them a

against unsigned parties that is made viable by a legislative compact that no one individual could effectively negotiate and enforce."[131] Thus, it is believed that when artists' intellectual property rights are secure, incentive for still more creative works follows.[132]

If the federal copyright framework is not chosen as the forum for a music rights dispute, ADR must act as an effective substitute in order to appeal to would-be litigants. Two potential economic benefits—both to the public at large and to the disputants—result by avoiding the copyright litigation framework. First, in exercising or protecting their copyrights, rights owners may increase unit prices above the level of short-run marginal cost (i.e., zero), which is the economically efficient price in static market equilibrium.[133] Second, in pursuing payment for access, rights owners may impose additional transaction costs for search and negotiation in a manner that may discourage a number of uses that are otherwise economically efficient and beneficial.[134]

A music rights dispute is at its core a dispute over who may perform and license one or more compositions as their own.[135] The demand for resolution of such disputes is often urgent, since musical ideas can easily be adopted by new artists, and transferred to different musical media.[136] Both the nature of the dispute and the probability of another artist seizing on a profitable idea[137] favor the use of ADR over litigation.[138] "Music licensing attorney fees are

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bundle of proprietary rights in their works. But to promote public education and creative exchange, it invites audiences and subsequent authors to use existing works in every conceivable manner that falls outside the province of the copyright owner's exclusive rights. Copyright law's perennial dilemma is to determine where exclusive rights should end and unrestrained public access should begin."). *See also* Anway, *supra* note 5, at 439.

131 EINHORN, *supra* note 6, at 1.

132 *Id*.

133 Brief for G. A. Akerlof, Section I.B.

134 Brief for G. A. Akerlof, Section II ("Economists believe that when market price is set equal to short-run marginal cost, an exchange will take place if and only if consumer value exceeds producer cost. This maximizes aggregate social welfare and is viewed as economically efficient."). *See also* EINHORN, *supra* note 6, at 2.

135 *See generally* Arnstein v. Edward B. Marks Music Corp., 82 F.2d at 277 ("Success in music . . . is by no means a test of rarity or merit; . . . the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes, even though the identity extend through a sequence of twelve notes.").

136 Wortherly, *supra* note 35, at 170.

137 Scamman, *supra* note 49, at 289 ("Being a shorter process, ADR is well suited for businesses in which time is critical, like the music industry where there are deadlines and public expectations to meet.").

138 *Id*.

expensive and courts are backlogged; disputes can be unpredictable. Without money and time to defend one's legal rights in court, most people feel angry and helpless."[139] Binding mediation provides an extremely effective alternative to litigation.

3. Potential Drawbacks

One commonly cited drawback in choosing ADR over litigation is that courts often consider the tastes of the public, by means of a jury—a factor absent in ADR.[140] Particularly, in the courts' search to identify infringement of musical expression, the "lay observer test" has acquired a prominent position in music copyright infringement.[141] "Unfortunately, the test has largely been misunderstood and misapplied as an *ordinary* layperson test."[142] In contrast to this misperception, the test actually requires that a finding of infringement be made by those laypersons for whom the music was composed, the work's intended audience.[143] Courts are very hesitant to apply this standard unless they have unique knowledge of the circumstances involved in a particular case because the burden of determining a work's true intended audience is usually heavy.[144] Hence, the lack of a jury in ADR may be construed as an advantage over litigation.

Another potential drawback concerns the lack of precedent in ADR.[145] Because litigation necessarily works within the constraints of precedent, certain recurring claims can systematically be

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139 *See* MUSIC RIGHTS MEDIATION, www.http://musicrightsmediation.com (last visited Oct. 10, 2010).

140 Dawson v. Hinshaw Music, Inc., 905 F.2d 731 (4th Cir. 1990) ("[I]n any given case, a court should be hesitant to find that the lay public does not fairly represent a work's intended audience. In our opinion, departure from the lay characterization is warranted only where the intended audience possesses "specialized expertise." We thereby pay heed to the need for hesitancy when departing from the indiscriminately selected lay public in applying the test.").

141 Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

142 *See* Grinvalsky, *supra* note 33, at 396.

143 Dawson, 905 F.2d 731, *cert. denied*, 111 S. Ct. 511 (1990). A work's intended audience is generally thought of as those members of the public that would typically listen to a particular genre or have specialized knowledge of it.

144 Grinvalsky, *supra* note 33, at 396.

145 ALAN W. KOWALCHYK, AMERICAN ARBITRATION ASSOCIATION, ADR vs. LITIGATION: RESOLVING INTELLECTUAL PROPERTY DISPUTES OUTSIDE OF COURT: USING ADR TO TAKE CONTROL OF YOUR CASE 5, http://www.adr.org/si.asp?id=5003 (last visited Feb. 20, 2010) ("[C]ases that present novel legal issues, where a legal precedent is desired for future enforcement efforts and where court-supervised discovery may be necessary because of the level of detail needed to obtain critical facts" may be better candidates for litigation.").

evaluated over time.[146] Precedential history at least provides a general road map of successful claims and defenses, depending on jurisdiction and facts.[147] In ADR, however, it can be more difficult to predict an outcome. Furthermore, lawsuits are desirable and should not be supplanted by ADR, because they bolster our common law system, providing guidance for future litigants with similar claims.[148] In this way, the common law system helps claimants to order their affairs and strategize to some degree,[149] especially in matters of intellectual property.[150]

A related criticism is that there is usually no direct appellate review after ADR is completed.[151] If a party is dissatisfied after mediation, it may have to bring the case to federal court to be heard *de novo*, and thus litigation costs, which were supposed to be avoided through ADR, are reintroduced.[152] However, as Steven J. Elleman contends, "[o]nce the mediation commences, if there is absolutely no possibility of settlement, the mediator will be able to quickly recognize this fact. The parties will then be free to leave mediation quickly after investing only a minimum of resources."[153]

It is true that binding mediation operates outside of a framework of precedent, and that certain parties to binding mediation might favor litigation because certain precedent would portend a decision in their favor.[154] Furthermore, a party to litigation may attempt to change jurisdiction to gain a more favorable corpus of law; such parties would likely be resistant to submitting to binding mediation.[155] Likewise, some parties will simply insist on having

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146 *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 47 (2007).

147 Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement").

148 YARASLAU KRYVOI, INTERNATIONAL CENTRE SETTLEMENT INVESTMENT DISPUTES 67 (2010). Potential litigants could conceivably order their affairs based on precedent, potentially reducing the burden on the docket.

149 KYLE SCOTT, DISMANTLING AMERICAN COMMON LAW: LIBERTY AND JUSTICE IN OUR TRANSFORMED COURTS 1 (2007).

150 Scamman, *supra* note 49, at 284.

151 Vilenchik, *supra* note 118, at 1122.

152 *See* Bernstein, *supra* note 28, at 161.

153 Elleman, *supra* note 67, at 777.

154 *See* Wortherly, *supra* note 35, at 172.

155 Scamman, *supra* note 49, at 284 ("[The result of only clear winners and losers] makes it less likely for any further disputes concerning the same situation to arise due to grey areas.").

their day in court,[156] or may decide against ADR because it does not provide a certain remedy.[157]

While these are realistic disadvantages, the odds of a party stubbornly refusing to consider binding mediation are diminished in light of the numerous benefits of using ADR.[158] For instance, various sources of precedent may actually serve as a hindrance, offering multiple sources of uncertainty and concealing more pivotal issues.[159] Additionally, it is unrealistic that the widespread use of ADR in music rights disputes would reduce the current number of decisions issued by federal courts because of the recent increase in copyright case filings.[160] Also, even if certain remedies (injunctions or public vindication, for example) are not inherently built into the mediation process, ADR is flexible enough that such remedies can always be bargained for as part of the settlement.[161] ADR can even offer creative solutions that are not available to litigants.[162] Publicity and negative views of record labels,[163] too, may drive famous or well-known parties to choose ADR, rather than risk adverse publicity due to a high-profile lawsuit.[164] Finally, the claim of

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156 Buckley, *supra* note 38, at 13 ("Accordingly, when [ADR] is elected, it is very important to obtain the client's consent in writing, having him or her acknowledge that this choice [for ADR] has been knowingly and freely made."). *See also* Vilenchik, *supra* note 117, at 1124 ("Even if a party insists on a court ordered remedy, it should be possible for the parties to still use mediation to negotiate and agree on the terms of such orders.).

157 Jennifer Shack & Susan M. Yates, *Mediating Lanham Act Cases: The Role of Empirical Evaluation*, 22 N. ILL. U. L. REV. 287, 306 (2002) (noting that in ADR it is difficult to provide certain remedies, such as an injunction).

158 Ciraco, *supra* note 39, at 65 ("The flexibility of mediation makes it a resolution process that the parties can use to effectively achieve creative and tailored solutions . . . Mediating parties are in total control of the process in mediation and are limited only by the participants' needs and creativity.").

159 JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 273 (1964) ("Insofar as the *ratio decidendi* is determined by each 'material fact,' then what the precedent case yields must be a number of potentially binding *rationes* competing *inter se* to govern future cases of which the facts may fail [sic] within one level of generality, but not within another." (citing Oscar Chess v. Williams (1957) 1 W.L.R. 370 (C.A.).).

160 2002 Law Topics, *available at* http://www.2002law.com/topic_52.htm (last visited Dec. 30, 2010) ("[C]opyright disputes are increasingly finding their way into the courtroom."). *See* Anway, *supra* note 5, at 462.

161 Vilenchik, *supra* note 118, at 1124.

162 Ciraco, *supra* note 39, at 63 (noting the availability of public or private apology by one or more parties, an agreement for cooperation in future ventures, amendment to on-going contracts, payment of funds over time or linked to the stock market, and agreement to refrain from, or do a specific act (akin to an injunction)).

163 Scamman, *supra* note 49, at 287 ("Using ADR could also held alter the negative image of the music industry by improving and preserving the relationship between artists and record labels, and thereby reduce the number of disputes brought into the public eye.").

164 *Id*.

a disadvantageous outcome due to operation outside the common law system might be viewed as a drawback to some claimants, but ultimately it should not be viewed apart from the ultimate goal of ADR: the resolution of the immediate dispute, with only the present parties' objectives in mind.[165]

C. *Additional Considerations*

1. Disparity of Bargaining Power

In litigation, there is always a possibility that parties will be unequally impacted by the potential of incurring substantial costs associated with copyright claims.[166] Thus, large production companies generally have significantly greater bargaining power than fledgling artists.[167] While litigation ideally provides a level playing field for litigants of different means, in reality, a wealthy defendant may hire exclusive, established counsel, while a young, unknown artist may not be able to hire counsel at all.[168] For small companies, too, the long process of litigation may have adverse effects on a company's business.[169] Thus, the outcome of litigation may "lead to unjust outcomes that are at odds with the goals of copyright legislation."[170]

ADR provides a more level playing field between the small-time claimant, with perhaps few resources and experience,[171] and

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165 Ciraco, *supra* note 39, at 86. Proponents of ADR often cite that mediation is designed to address the parties' interests, rather than the parties' rights.

166 *See, e.g.* STEPHEN ELIAS, TRADEMARK: LEGAL CARE FOR YOUR BUSINESS AND PRODUCT NAME 106 (Richard Stim & Lisa Sedano eds., Nolo Press 5th ed., 2000) (explaining that many trademark disputes are resolved by the economically weaker party agreeing to back down, regardless of which party has a stronger legal claim to the intellectual property rights).

167 Regarding litigation of copyright infringement claims, not all parties are equally impacted by the potential of incurring greater costs associated with their copyright claims. Ciolli, *supra* note 19, at 1002. These higher expenses and long delays often force lower income, smaller, and noncommercial parties into unfavorable settlement agreements or discourage them from initiating a lawsuit in the first place, especially against a wealthy party. *See id*.

168 Ciraco, *supra* note 39, at 68. In this vein, it should be noted that litigation costs are "so high because litigation is a highly competitive and adversarial process that encourages parties to exaggerate their claims." *Id.*

169 Bernstein, *supra* note 29, at 157.

170 Ciolli, *supra* note 19, at 1002. Note, too, that when the litigation process finally comes to an end and a judgment is entered, "the losing party often appeals, which further adds to the costs and duration of the dispute." *See also* Lemley, *supra* note 4, at 311.

171 Scamman, *supra* note 49, at 284 ("Also, many artists may either not have the financial support needed to carry through with a lengthy lawsuit, or may win their lawsuit, but be completely out of money by the time it comes to a close.").

the established producer, with greater revenue and access to legal advice.[172] In cases of this type, if the plaintiff chose to pursue his claim by means of litigation rather than ADR, the pre-trial discovery and litigation strategies utilized by the plaintiff and defendant may be substantially imbalanced;[173] the possibility for unjust court judgments due to unequal wealth of the parties is hard-felt in litigation.[174]

Additionally, if a production company, lacking legitimate rights to a musical work, were to bring a claim against an artist before he could seek legal advice, the artist could be intimidated by the threat of litigation, choosing to forfeit his claim rather than embark on a lengthy, expensive legal dispute.[175] "Infringement suits have enormous nuisance value: a defense can cost upwards of $100,000 in attorneys fees, in addition to the time lost by musicians in attending depositions and trial instead of in composing, performing, or recording."[176] As a result, the threatened lawsuit can have an undeniable chilling effect on independent musicians who have produced original musical works.[177] A threatened artist may choose not to assert their rights due to intimidation and badgering on the part of established musicians or recording companies.[178]

In contrast, binding mediation would provide a more ideal outcome in a dispute over music rights. In the example involving the fledgling artist and the established producer, an ideal outcome through binding mediation would: (1) allow the original artist to

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172 Vilenchik, *supra* note 118, at 1109 (citing Ciraco, *supra* note 39, at 70) ("As one commentator explains, the cost-effectiveness of the mediation process allows an "open system" that takes into account that not everyone can afford to litigate.").

173 Ciraco, *supra* note 39, at 70. In contrast to litigation, "which gives power to those who can afford the financial burdens, mediation gives many who may not have had an opportunity to submerge themselves in legal waters a chance to be heard." *Id.*

174 Szepesi, *supra* note 24, at 12. According to a recent study, the median cost of a copyright infringement suit is $100,000 through discovery and $200,000 through trial. This cost is enough to discourage some individuals from even considering litigation.

175 RICHARD H. WEISE, REPRESENTING THE CORPORATION: STRATEGIES FOR LEGAL COUNSEL 11 (1996) ("Most, perhaps 90%, of all corporate litigation is settled before trial.").

176 Keyt, *supra* note 78, at 424 (citing Harrington, *Singing All the Way to Court: Charges of Plagiarism Rock the Music World*, WASHINGTON POST, Sept. 28, 1980, at K1).

177 Ciolli, *supra* note 19, at 1006 ("Poor, start-up, or non-commercial individuals and entities also face significant obstacles when attempting to enforce their intellectual property rights against wealthy defendants.").

178 Note that this chilling effect may not only discourage desirable compositional techniques by small-time musicians, but also recording companies and popular musicians, who have made it a policy never to listen to or look at unsolicited musical material. *See* Harrington, *Singing All the Way to Court: Charges of Plagiarism Rock the Music World*, WASHINGTON POST, Sept. 28, 1980, at K1. *See also* Keyt, *supra* note 78, at 424.

retain future, exclusive recording and distributing rights;[179] (2) allow the producer to retain the rights to the single appropriation or performance in dispute by means of a nonexclusive license,[180] by word or deed;[181] (3) allow the artist and producer to utilize their respective abilities in collaboration, since the artist possesses the original artistic idea and the producer has greater resources and experience in production and distribution of music; and (4) allow for an agreed upon distribution of song proceeds in proportion to the parties' contributions. Binding mediation is available to all parties because the cost-effectiveness of the mediation process allows an "open system" that takes into account the fact that not everyone can afford to litigate.[182]

2. From Baroque to Contemporary: Changing Norms

Concerns about musical plagiarism are not unique to the twenty-first century. Historically, a musician could pay homage to a predecessor by taking his popular theme and adapting it to new, personally composed music.[183] In this way, a composer would take as his subject a theme that most listeners would recognize, and would solidify its status as a classic one through the subsequent composer's re-working and variations.[184]

The *Variations on a Theme of Paganini*,[185] by Johannes Brahms, is a classic example of this practice. For this composition,

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179 Anway, *supra* note 5, at 449.

180 In most situations, resolution of intellectual property disputes does not require an "either/or" result in which one party walks away with all the rights at issue. Blackman & McNeill, *supra* note 3, at 1716.

181 LEE WILSON, FAIR USE, FREE USE, AND USE BY PERMISSION: HOW TO HANDLE COPYRIGHTS IN ALL MEDIA 233 (2005). A nonexclusive license is not a transfer of exclusive rights to copyrightable material under the 1976 Copyright Act. Under a nonexclusive license, "the Author may also grant the right to other parties to exercise these [exclusive] rights (but not indefinitely); further, the Author retains the right to exercise these rights simultaneously with any licensee."

182 Ciraco, *supra* note 39, at 70.

183 Keyt, *supra* note 78, at 424 ("Composers historically have drawn heavily from folk music and current popular music. In addition, composers often borrow directly from their colleagues.").

184 See examples of theme and variations from Johann Sebastian Bach, Franz Joseph Haydn or Ludwig van Beethoven. Musical Variation is defined as "[a] technique of modifying a given musical idea, usually after its first appearance; a form based on a series of such modifications. Variation is one of the most basic and essential of musical techniques and is widely distributed." THE HARVARD CONCISE DICTIONARY OF MUSIC AND MUSICIANS 701 (1st ed. 1999).

185 JOHANNES BRAHMS, OP. 35 (1866) (borrowing the theme from Caprice No. 24 in A minor by Niccolò Paganini). "The Paganini Variations are two sets of variations for piano by Brahms, op. 35 (1862-63), on a theme from Paganini's *Capricci* for solo violin op. 1, the same theme

Brahms took a theme composed by Niccolò Paganini, and transformed it repeatedly in a series of variations, each standing independently of the others.[186] In each variation, Paganini's theme can be heard, yet Brahms has layered his own creative composition on top of the original theme. This historical practice is based on the notion that all creative musical expression sprang from a common, universal source.[187] Classical writers saw the work of their predecessors as a common fund.[188] If every composer could tap the ethereal root of creativity, then there could be no legitimate claims of theft.[189]

In modern times, however, the viability of this practice is questioned. 2 Live Crew, a 1980's rap group, took the liberty in 1989 of adapting Roy Orbison's 1964 hit song "Oh, Pretty Woman," as a parody, with considerable commercial success.[190] The rights owners of the original song filed suit,[191] immediately recognizing the song's distinctive bass line.[192] The U.S. Supreme Court ruled for 2 Live Crew, citing the free use doctrine,[193] and distinguishing the two songs by noting that they were produced in different eras, for different audiences, and with different musical objectives.[194] In

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employed by Liszt in no. 6 of his Paganini Etudes." THE HARVARD CONCISE DICTIONARY OF MUSIC AND MUSICIANS 489 (1st ed. 1999).

186 JULIAN LITTLEWOOD, THE VARIATIONS OF JOHANNES BRAHMS 98 (2004) ("[E]ach of the two studies is a self-sufficient set of 14 variations with its own extended finale . . . Brahms chose the most widely used variation tune of the nineteenth century.").

187 "True, it is the themes which catch the popular fancy, but their invention is not where musical genius lies, as is apparent in the work of all the great masters." Arnstein v. Edward B. Marks Music Corp., 82 F.2d at 277.

188 Keyt, *supra* note 78, at 425.

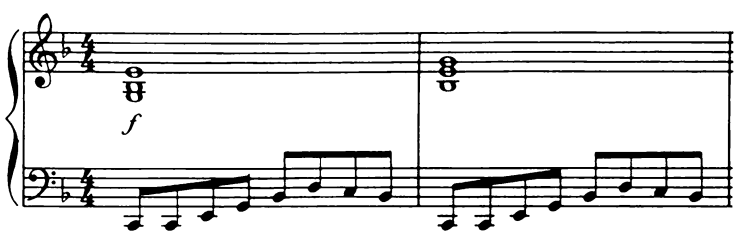
189 *Id*.

190 MARIANNE M. JENNINGS, FOUNDATIONS OF THE LEGAL ENVIRONMENT OF BUSINESS 349 (2008).

191 Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

192 Liebesman, *supra* note 31, at 334.

193 UNIVERSITY OF CALIFORNIA AT LOS ANGELES LAW SCHOOL AND COLUMBIA LAW SCHOOL, COPYRIGHT INFRINGEMENT PROJECT (Jan. 12, 2011), http://cip.law.ucla.edu/media/score_017p.html.



194 MARIANNE M. JENNINGS, BUSINESS: ITS LEGAL, ETHICAL, AND GLOBAL ENVIRONMENT 628 (2005) ("This is not, of course, to say that anyone who calls himself a parodist can skim the

less clear-cut situations, however, trial courts may not be able to make such fine distinctions.[195]

A classic example of when ADR would have more satisfactorily resolved a music rights dispute is the infringement lawsuit brought against George Harrison in 1976.[196] In this case, Harrison, formerly of The Beatles, allegedly arrived at the same chord progression that a preexisting song had used; he used this chord progression in what he deemed an original song, and a suit was brought against him.[197] While the federal district court genuinely believed that Harrison arrived at the idea for the song independently, it nevertheless held that Harrison had infringed on the original songwriter's copyright.[198] Ultimately, the court, apart from any compromise the parties might have struck, deprived Harrison of all rights in the song.[199]

Binding mediation in this situation could have avoided the harsh result of completely divesting Harrison of all music rights in the song. During the process of binding mediation, for instance, representatives of Bright Tunes might have been convinced that Harrison actually did arrive at the disputed chord progression independently, and at the same point in time when individuals at Bright Tunes arrived at the musical idea.[200] Assuming the parties had considered the possibility of compromise and equal rights to the common chord progression, the copyright protection for their dis-

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cream and get away scot free. In parody, as in news reporting, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends.").

195 David O. Stewart, *Rock Around the Docket: Justices Display their Musical Knowledge in Recent Copyright Decisions*, 80 A.B.A. J. 50 (1994).

196 Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).

197 *Id.* at 178.

198 *Id*. ("It is apparent from the extensive colloquy between the Court and Harrison covering forty pages in the transcript that neither Harrison nor Preston was conscious of the fact that they were utilizing the *He's So Fine* theme. However, they in fact were, for it is perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase.").

199 *Id.* at 180 ("What happened? I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Did Harrison deliberately use the music of *He's So Fine*? [But] I do not believe he did so deliberately.").

200 Bright Tunes Music, 420 F.Supp. at 179 ("According to Harrison, the circumstances of the composition of My Sweet Lord were as follows. Harrison . . . began 'vamping' some guitar chords, fitting on to the chords he was playing the words, 'Hallelujah' and 'Hare Krishna' in various ways . . . At some point, germinating started and . . . everyone began to join in . . . there began to emerge the My Sweet Lord text idea").

tinctive song might have been shared between the parties, as against all others.[201]

3. Parallels to Copyright Law

Certain principles of copyright law offer insight into the nature of music rights claims and undoubtedly help ADR practitioners in the resolution of music rights disputes.[202] In *Nichols v. Universal*,[203] Judge Learned Hand explained the rationale for protecting certain ideas that have been marked by unique characteristics[204] as distinguished from those that are commonplace or universal.[205] Thus, in *Nichols,* certain characters,[206] emotions[207] and sequences of incident in a play,[208] due to their unremarkable nature, were considered too common to be protectable.[209]

Like authors of literary or dramatic works, musicians invest creativity in providing their compositions with sufficient distinctive qualities to achieve copyright protection.[210] In *Nichols*, Judge Hand stated that "[u]pon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out."[211] A mediator, likely better than a judge,

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201 Blackman & McNeill, *supra* note 3, at 1716 ("Shared rights usually take the form of a license arrangement, where one party grants the other party a license for a discrete portion of the rights at issue, in return for cash payment, a reasonable royalty, an exchange of technology, or some combination thereof."). *See* Francis Flaherty, *ADR: Low Cost for High Tech*., CPR's ALTERNATIVES TO THE HIGH COST OF LITIGATION, Jan. 1993, at III-2–III-3 (defining traditional license regulations as informal meetings that involve lawyers, executives, and technical personnel from both sides of a . . . dispute, although typically without a neutral party present).

202 *See* Anway, *supra* note 5, at 440.

203 Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d. Cir. 1930).

204 Grinvalsky, *supra* note 33, at 414 ("[T]he more elaborate the expression the less likely an identical work was independently created.").

205 *Nichols*, 45 F.2d at 121 ("It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly.").

206 *Id.* at 122 ("Nor does [the author] fare better as to her characters. It is indeed scarcely credible that she should not have been aware of those stock figures, the low comedy Jew and Irishman. The defendant has not taken from her more than their prototypes have contained for many decades.").

207 *Id*.

208 *Id.* ("Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction . . . A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*.").

209 *Id*. ("If the defendant took so much from the plaintiff, it may well have been because her amazing success seemed to prove that this was a subject of enduring popularity. Even so, granting that the plaintiff's play was wholly original, there is no monopoly in such a background.").

210 Grinvalsky, *supra* note 33, at 396.

211 Nichols, 45 F.2d at 121 ("[T]he last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in

is able to appreciate the varying levels of generality in determining if a song (or parts of a song) is protectable.[212] For example, a mediator can inquire as to whether a subsequent song has taken so much of the distinct characteristics of the first song as to be an infringing work.[213] While a judge could also make this inquiry, a mediator is the better intermediary to discuss subtle nuances of musical composition with the parties.[214] Such considerations are often not clear-cut, providing no foreseeable result at the outset.[215]

4. Technology: Reaching Listeners was Never Easier

As is often the case, technology is a considerable factor in creating and complicating copyright disputes.[216] The music industry is comprised of many different relationships, as well as ever-changing and developing technology,[217] creating new problems not yet encountered.[218] YouTube, for instance, is the modern musician's springboard to near instant recognition and popularity.[219] No longer must an aspiring musician reach out to producers for the one-in-a-million opportunity to be discovered.[220] Accordingly,

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this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas.'").

212 *Id.* at 123 (noting that the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naïve, ground of its considered impressions upon its own perusal).

213 Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 565 (1985) (holding that at least one considerable factor against finding for defendant's fair use affirmative defense was that the "Nation took what was essentially the heart of the book).

214 Tran, *supra* note 36, at 321 ("The learning curve for an IP mediator is simply much flatter than for jurors and district court judges.").

215 McRae v. Smith, 968 F. Supp. 559, 561 (D. Colo. 1997) (holding that "[s]ubstantial similarity is usually an extremely close issue of fact and summary judgment has been disfavored in cases involving intellectual property).

216 EINHORN, *supra* note 6, at 2 ("First, the capabilities of the Internet have greatly reduced the costs of monitoring use and transacting for permissions. Second, licensing agents have designed a wide range of contracts and institutional arrangements to accommodate ease of use at a zero unit price.").

217 Ciolli, *supra* note 19, at 1000 (citing the digital revolution, the popularization of the Internet, and the proliferation of file sharing applications as causing some to question the effectiveness of American copyright law).

218 Scamman, *supra* note 49, at 269.

219 *See, e.g.,* Jenna Wortham, *From Viral Video to Billboard 100*, N.Y. TIMES (Sept. 5, 2010), *available at* http://www.nytimes.com/2010/09/06/business/media/06tune.html (reporting the overnight success and notoriety of the Gregory Brother's "Bed Intruder Song" recording once posted on YouTube).

220 EINHORN, *supra* note 6, at 6 ("Copyright issues moved to center stage in the policy arena with the advent of digital technology and the capacity of the Internet to move audio, video, text and numeric data from point to point in a short amount of time. As digital technology develops further, cinema fans will access movies at any hour, music fans may sample or download tunes

reaching potential listeners and fans is no longer considered a great obstacle for musicians.[221] The inundation of songs, all immediately capable of being uploaded to the Internet, provides instant exposure for each song and musician.[222] The availability and ever-expanding base of instantly attainable songs[223] make the need for ADR all the more pressing, since greater access to music increases the odds of conflict between two artists,[224] as well as the ease of copying protected material from the Internet.[225]

For example, The Gregory Brothers, a popular Brooklyn-based band, add its own flavor of "auto-tuned" music[226] and lyrics to clips of televised news reports. At the conclusion of their songs, the band, well known for its humor and commentary on politics, typically encourages listeners to create their own versions of the band's songs.[227] Independent musicians have done so, and count-

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from an historic catalog, art lovers may cybertour any great museum in the world, and e-book purchasers may replace visits to libraries and bookstores with convenient downloads.").

221 C.C. Mann, *The Heavenly Jukebox*, THE ATLANTIC MONTHLY (Sept. 2000), *available at* http://www.theatlantic.com/past/docs/issues/2000/09/mann.htm.

222 E. W. Kitch, *Can the Internet Shrink Fair Use?*, 78 NEB. L. REV. 880, 881-83 (1999); T. W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

223 Scamman, *supra* note 49, at 301 ("In the age of digital music distribution and rising accessibility of home audio production equipment, it is becoming easier and easier for artists to produce and distribute their own music without the need to be signed to a record label that could easily take advantage of them.").

224 EINHORN, *supra* note 6, at 2 ("First, the capabilities of the Internet have greatly reduced the costs of monitoring [copyright] use and transacting for permissions. Second, licensing agents have designed a wide range of contracts and institutional arrangements to accommodate ease of use at a zero unit price . . . Finally, the control over secondary products may enhance original incentives.") (citing R. P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1326 (1996).

225 *Id.* at 6 ("As the many users of Napster first demonstrated, copying material to a computer hard drive can be the first step in making content available for unauthorized distribution to any computer on the planet. Illegally distributed copies then may reasonably be expected to substitute for legal purchases, and to harm producer incentives in the process."). *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d (N.D. Cal. 2000); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

226 LORNE BREGITZER, SECRETS OF RECORDING: PROFESSIONAL TIPS, TOOLS & TECHNIQUES 106 (2008) ("One of the most commonly used pitch-correction methods of the past ten years has been the use of the Auto-Tune plug-in . . . Auto-Tune analyzes the pitch [of a sound] of the waveform in order to determine what pitch it is currently hearing, and then it will correct the pitch by stretching or compressing the periodic waveform and regenerating it to the desired correct pitch.").

227 *Brother of Sex Assault Victim Launches Bizarre Rant at Attacker—and Becomes Huge YouTube Hit,* Matt Fortune, DAILY MAIL (Aug., 17, 2010), *available at* http://www.dailymail.co.uk/news/worldnews/article-1303522/Antoine-Dodsons-YouTube-rant-Brother-sex-assault-victim-internet-hit.html ("The [Gregory Brothers] encouraged other [YouTube] users to produce their own versions of the [Bed Intruder Song], and several thousand have already obliged.").

less versions of the band's songs can be found posted on the Internet.[228] As a result, musical artists of all capabilities participate in a "conversation" on new musical works, and nearly every participant's version is instantly posted online for others.[229]

Many of the Gregory Brothers' musical works are acclaimed and widely recognized.[230] For instance, the "Bed Intruder Song,"[231] composed and released in July 2010, has since peaked at number 89 in the Billboard Hot 100 and sold over 100,000 copies on iTunes.[232] The character upon which the song is based has also realized fame and fortune due to the song's popularity.[233]

It is no longer the rare situation that an online fan, at the urging of their favorite band, creates a new version of one of the band's songs, making it available to millions of viewers on the Internet. In the event that one of the Gregory Brothers' songs subsequently becomes a hit and earns the band considerable revenue, and an independent musician also creates a version, the independent musician could earn fame and income through an online following.[234] Where the band might otherwise sue to enjoin the independent musician from publicly performing their song once it achieves popularity, the artist may claim a fair use defense,[235] since

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228 *Id.* ("The Gregory Brothers posted the chords to the [Bed Intruder] song in the description of the YouTube video so people could do their own versions. According to *The Observer*, 'More than 2,500 videos inspired by the meme had been uploaded by August 14, 2010.' Internet trends website, Urlesque, listed the '11 Best Antoine Dodson 'Bed Intruder' Remix Covers.") (citing Matt Fortune, *Brother of Sex Assault Victim Launches Bizarre Rant at Attacker – and Becomes Huge YouTube Hit*, DAILY MAIL (Aug. 18, 2010).).

229 *Id*.

230 Cole Stryker, *11 Best Antoine Dodson 'Bed Intruder' Remix Covers*, URLESQUE, Aug. 17, 2010.

231 '*Bed Intruder' Meme: A Perfect Storm of Race, Music, Comedy and Celebrity*, Andy Carvin, NATIONAL PUBLIC RADIO (Aug. 5, 2010), http://www.npr.org/blogs/alltechconsidered/2010/08/05/129005122/youtube-bed-intruder-meme ("It all began last week, when reporter Elizabeth Gentle aired a story about a woman named Kelly Dodson who was almost raped in her bedroom by a home invader. The video included an interview with her, but it was her brother, Antoine Dodson, who interrupted the assault, who stood out. Dodson addresses the camera directly with a mixture of anger, defiance and flamboyance . . . The video quickly became a runaway online hit.").

232 *See Meet the Team Behind the Meme*, BARRY.COM (Sept. 21, 2010), http://www.barry.com.au/2010/09/17/gregory-brothers-interview.

233 *See The Internet IRL: Antoine Dodson Performs 'Bed Intruder' Song Live,* THE HUFFINGTON POST (Oct. 13, 2010) http://www.huffingtonpost.com/2010/10/13/live-antoine-dodson-bed-intruder_n_761432.html.

234 *Meet the Team Behind the Meme*, *supra* note 232.

235 EINHORN, *supra* note 6, at 12 ("[T]he judicial principle of fair use . . . is now often applied in matters involving unauthorized takings of copyrighted works. The four activating principles of fair use, as instituted in 17 U.S.C. § 107, are found to be ambiguous and subjective, and there-

the band urged new versions to be produced. In this situation, it is unclear who owns musical rights to derivative musical works, created independently and subsequent to a preexisting musical idea.[236]

Where two artists claim rights to the same song, neither party knowing what the future profitability of the song may be, binding mediation would be the optimal means for resolving the dispute.[237] While non-binding mediation is an appropriate beginning for resolution, the urgency of music production (while a song is new and profitable) requires the subsequent possibility of arbitration if mediation fails.[238] It is in the parties' best interest to begin ADR with mediation, but should the parties fail to reach agreement, everyone will benefit from a speedy and enforceable resolution through arbitration, rather than proceed to litigation.

Technology has also played a role in song infringement detection. Every musical expression contains unique characteristics, which can be analyzed through physics tests[239] and compared with an alleged infringing song for similarity.[240] However, in the last two decades, the adequacy of technological tools for recognizing misappropriation in music has been unsatisfactory.[241] Technology has either failed to deliver practical solutions for practitioners in the law or has not yet been commonly accepted and used in practice.[242] While technology for detecting infringement of songs may one day become widely used, courts have yet to implement such technology.[243] This is largely because technical measures to detect

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fore creative of legal uncertainty for producers of secondary transformative works that may add new meaning to a copyrighted work.").

236 Litman, *supra* note 11, at 237.

237 Wortherly, *supra* note 35, at 164.

238 Ciolli, *supra* note 19, at 1014. Mediation awards parties the opportunity to start negotiating immediately, rather than waiting months or years to appear on a court docket, thereby reducing economic costs and enabling a speedier resolution.

239 Grinvalsky, *supra* note 33, at 410 ("A sound is merely an air vibration, the pitch of which is determined by how fast it vibrates, measured in cycles per second. The faster it vibrates, the higher the pitch.").

240 Liebesman, *supra* note 31, at 349 (noting that at its most fundamental level, music is sound, the movement of a wave by compression of molecules in the air resonating on an eardrum, that the brain subsequently interprets the sound, and that music is the expression of physics) (citing JOHN S. RIGDEN, PHYSICS AND THE SOUND OF MUSIC (2d ed. 1985).

241 *Id.* at 337.

242 *Id*. at 355 ("Because the [Mathematical Modeling Analysis] test has not yet been put to practice, there is no way to prove that mathematically modeling songs to create a correlation algorithm for copyright infringement similarity analyses would work.").

243 Liebesman, *supra* note 31, at 357.

infringement are still mechanical and not sensitive enough to the intricacies of composition and human expression.[244]

III. PROPOSAL

A. *Appropriateness of Binding Mediation*

Parties should carefully consider certain factors in deciding whether to select binding mediation for their music rights dispute.[245] Binding mediation may be considered a superior alternative to litigation when (1) the costs of litigation would be prohibitively high for either party;[246] (2) there is a chance of copyright sharing;[247] (3) the litigation outcome is particularly difficult to predict;[248] (4) legal precedent is adverse to the underlying facts of a party's case;[249] (5) litigation may harm the business relationships or reputations of the parties;[250] or (6) the dispute may require a specialized understanding of music or copyright law.[251] Each of these factors must be weighed in deciding whether binding mediation is in a party's best interest.

Music infringement litigation has suffered from habitually poor legal and musical analysis.[252] Music is a highly technical, yet often imprecise field.[253] The legal framework for resolution of music rights disputes must be adaptable to changes in the theory and

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244 *Id*. at 359.

245 "Parties especially should consider ADR, with the advice of counsel, when: (1) they have a sufficient understanding of the case, either through discovery or other means; (2) when it seems a dispute can or should be settled; or (3) when trial costs may be prohibitively high. ADR also provides advantages when parties seek a rapid outcome." Blackman & McNeill, *supra* note 3, at 1710.

246 *See supra* Part I.B. "Costs," as the term is used in relation to litigation expenses, includes everything from attorney fees to profits lost due to injunctions or threatened business relations.

247 The ability of parties to "share" copyrighted works is frequently realized through licensing agreements and joint ventures. Anway, *supra* note 5, at 465.

248 The outcome of copyright cases is frequently difficult to predict when the fair use doctrine, the inverse ratio rule, and the idea-expression dichotomy are at issue. *Id*.

249 *See supra* Part II.B.

250 This factor is especially important to intellectual property disputes, where parties frequently maintain business relationships. Anway, *supra* note 5, at 465.

251 *See supra* Part I.B. Binding mediation can be particularly appropriate for copyright disputes due to the complex, amorphous nature of intellectual property law and the ability of mediators to formulate creative business solutions. *See also* Anway, *supra* note 5, at 465.

252 Keyt, *supra* note 78, at 463.

253 *Id.* at 464.

practice of real-life compositional activity.[254] It must offer a degree of certainty and predictability in regulating and protecting music rights.[255] For all of these reasons, binding mediation is to date the most appropriate process for resolving disputes involving music rights.

B. *Logical Compromise*

Perhaps the greatest benefit of binding mediation in music rights disputes is that it offers the type of logical compromise that a court would be less willing to offer. Rather than one party receiving a judgment and the other party losing all music rights, ADR offers the possibility of mutual settlement.[256] Courts, on the other hand, when confronted with a lack of choices of remedies for the plaintiff in an infringement lawsuit, will historically deny recovery outright.[257]

Skeptics of binding mediation may claim, "Justice should not be reduced to a negotiation process."[258] However, a dispute over music rights is fundamentally different from a dispute over a breach of contract, for instance, where a one-sided award is perhaps more warranted.[259] Creative aspects of musical ideas are often creditable to numerous artists who help to make the ideas widespread. To credit the origin of a popular chord progression, for instance, to a single individual constitutes a fundamental misunderstanding of the genesis of most musical themes.[260]

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254 *Id.*

255 *Id*.

256 Michael Roberts, *Why Mediation Works* (Aug. 14, 2000), *available at* http://www.mediate.com/articles/roberts.cfm.

257 Darrell v. Joe Morris Music Co., 113 F.2d 80 (2d. Cir. 1940) (noting that while there is an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing).

258 Fiss, *supra* note 147, at 1085 (noting that parties might settle while ultimately leaving justice undone).

259 Blackman & McNeill, *supra* note 3, at 1716 ("Parties [to mediation will] often consider some form of shared rights to be an acceptance, or even preferred, result.").

260 *See, e.g.*, Bright Tunes Music, 420 F. Supp. at 180 (concluding that the subconscious incorporation of already heard music is perhaps not an uncommon practice, but that in the case at hand, constituted copyright infringement).

CONCLUSION

The benefits of choosing binding mediation over litigation reaffirm its potential as a superior alternative to litigation. Abraham Lincoln once said that part an attorney's role is to "[p]ersuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time."[261] American courts have always been available to parties to music rights disputes, but they have often disagreed over fundamental elements of musical compositions,[262] only to be criticized by knowledgeable commentators for their ineffective musical analysis.[263] Binding mediation lets parties create their own mutual settlement, free of judicial interpretation, thereby benefiting themselves and society to the greatest degree.

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261 INSTITUTE FOR DISPUTE RESOLUTION, CENTER FOR PUBLIC RESOURCES, INC., ADR IN TRADEMARK & UNFAIR COMPETITION DISPUTES DISCOURAGE LITIGATION BROCHURE 1 (quoting Abraham Lincoln in 1850).

262 Autry, *supra* note 73, at 121.

263 *Id*.