

Copyright for New Editions of Public Domain Music in the USA

Copyright 2009 by Ronald B. Standler

No copyright claimed for works of the U.S. Government.

No copyright claimed for quotations from any source, except for selection of such quotations.

Keywords

copyright, derivative work, editing, edition, editor, expense, music, pre-existing, public domain, public-domain music, skill, unfair competition

Table of Contents

- Introduction 2
 - disclaimer 2
- Bach 3
- Essence of Copyright 4
- Reasons For No Copyright 5
 - no copyright for editorial work 5
 - correction of errors not copyrightable ? 7
 - short phrases not copyrightable 8
 - need nontrivial change from pre-existing work 9
 - patent law 12
 - modern rule for copyrightability of derivative works 13
 - labor, skill, expense are not protected by copyright 17
 - distinguish composition from editing 18
- No Protection is Undesirable 19
- Sacred Books 20
- Technology Created Problems for Publishers 21
- Proposal 22
 - need to distinguish original work from pre-existing work ? 23
- Conclusion 24

Introduction

In December 2008, when I was working on my essay on copyright of music,¹ I found three law review articles about misuse of copyrights.² Each of these articles, amongst other examples, mentioned current copyright notices on musical compositions by Johann Sebastian Bach. These three articles started me thinking about the validity of copyright for new editions of public-domain works. In October 2009, I wrote this essay, which is a provocative exploration of a tiny detail in contemporary U.S. Copyright Law. This essay describes the law *only* in the USA.

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

After I had worked on this essay for about two weeks, I realized that the collection of citations in this essay would be a windfall to an attorney who was representing an alleged copyright infringer. Attorneys who represent copyright infringers are generally *not* experts in copyright law, so they need assistance with legal research and analysis. And, as with every other type of copying, it is easier to copy — and maybe plagiarize too — than to spend more than fifty hours searching online legal databases, critically reading cases, writing and revising original text. I considered deleting from the public version of this essay my citations to cases in several critical parts of this essay, in an attempt to avoid providing free legal research to attorneys who represent copyright infringers. However, any competent attorney, law clerk, or paralegal could use the reasons in this essay for why copyright might not protect editorial revisions as a source of search queries for legal databases. Furthermore, deleting citations would impair the credibility of my essay. So I have decided to show citations to judicial opinions and other authorities in this essay.

¹ Standler, Music Copyright Law in the USA, <http://www.rbs2.com/copyrm.pdf> (Dec 2008).

² Paul J. Heald, "Payment Demands for Spurious Copyrights: Four Causes of Action," 1 JOURNAL OF INTELLECTUAL PROPERTY LAW 259, 283-284 (Spring 1994); Paul J. Heald, "Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music," 46 DUKE LAW JOURNAL 241 (Nov 1996); Jason Mazzone, "Copyfraud," 81 NEW YORK UNIVERSITY LAW REVIEW 1026 (June 2006).

Bach

In this essay, I use Johann Sebastian Bach as an example. J.S. Bach was born in the year 1685 and died in 1750. During Bach's lifetime the concept of copyright did not exist in Germany,³ and the USA was not established until about forty years after Bach's death. Ignoring this history <smile>, let us apply current U.S. law to Bach's works for the sake of argument. Under current U.S. law, Bach's copyrights would expire in the year 1820, seventy years after Bach's death.⁴ So how can any modern edition of Bach's music have a valid copyright notice? All of Bach's original works have been in the public domain since 1820.

The first published edition of all of Bach's then known works occurred during the years 1851-1899, when the publishing company of Breitkopf & Härtel in Leipzig produced a new edition. But in modern U.S. copyright law, any book or music published before the year 1923 now has an expired copyright and is now in the public domain. So *if* Bach's works were copyrighted in the late 1800s, then those copyrights have now expired.

Here is where this topic becomes really interesting. A publisher of a modern edition of Bach's works (e.g., Bärenreiter in Germany) would probably argue that copyright in a new edition was established by the work of a modern musicologist who recently *edited* Bach's original works. Such editing might include the labor, skill, and expense to examine old manuscripts in libraries and to correct typographical errors in previous published editions. Can new editing justify a new copyright in a work that is in the public domain? As explained below, I argue current copyright law in the USA might say "no". I say *might*, because there is no reported case involving this issue, so it is not clear how a judge would decide the case.

³ The first copyright law in the world was the Statute of Anne, in England in 1709. Copyright law in Germany goes back to the year 1806, when a copyright statute was enacted in Baden. This early German statute was based on the French copyright statute of 1793.

⁴ 17 U.S.C. § 302(a) (amended 1998, still current Oct 2009).

Essence of Copyright

Copyright protects “original works of authorship”⁵ — original expression by an author or composer. In the specific case of Bach, most of the notes in a modern edition are the same as the notes in the old Breitkopf & Härtel edition that was published in the late 1800s and is now in the public domain. Only those notes or expressive marks that are original⁶ in the new edition can possibly be protected by copyright. Original work must also contain some creativity before the work is copyrightable.⁷

The Copyright Act of 1976 says:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.

17 U.S.C. § 103(b).

This rule in § 103(b) is necessary, otherwise a publisher could maintain a perpetual copyright by publishing a new edition whenever the copyright on the previous edition expired.⁸ It is essential to understand that copyright in a derivative work (e.g., an arrangement or new edition) does *not* affect the copyright of the pre-existing work. The legislative history of § 103(b) says:

The most important point here is one that is commonly misunderstood today: copyright in a “new version” covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

U.S. House of Representatives Report Nr. 94-1476, reprinted in 1976 U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS 5659, 5670. Quoted in *Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1103, n.17 (2dCir. 1982).

⁵ 17 U.S.C. § 102(a).

⁶ *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (U.S. 1991) (“The sine qua non of copyright is originality. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”).

⁷ *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 363 (1991) (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.”).

⁸ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275 (11thCir. 2001) (“It should also be remembered that with a work as old as [Gone With The Wind] on which the original copyright may soon expire, creation of a derivative work only serves to protect that which is original to the latter work and does not somehow extend the copyright in the copyrightable elements of the original work. See § 103(b)”).

The Copyright Act of 1909 — which is no longer in effect but is relevant to derivative works created *before* 1 Jan 1978 — said:

Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

17 U.S.C. § 7 (1976 ed.).

The provision consists of one sentence with two clauses divided by a semicolon. The first clause lists the types of works that may be derivative works, explains that one may incorporate either copyrighted or public domain works into a derivative work, and further explains that the derivative work itself is copyrightable. The clause also expressly limits incorporation of copyrighted works to instances where the owner of the pre-existing work “consents.”

Stewart v. Abend, 495 U.S. 207, 230-231 (1990).

See also *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 591 (2dCir. 1999).

Reasons For No Copyright

no copyright for editorial work

The prevailing dogma in copyright law is that copyright does *not* protect correction of grammatical errors, spelling errors, punctuation errors, or other editorial efforts. There is scant authority for the rule that copyright does *not* protect such editing: Nimmer’s Treatise⁹ cites only *Grove Press, Inc. v. Collectors Publication, Inc.*, 264 F.Supp. 603, 605-606 (C.D.Cal. 1967).¹⁰ I am aware of a similar holding in *Matthew Bender & Co., Inc. v. West Pub. Co.*, 42 USPQ2d 1930, 1933-34 (S.D.N.Y. 1997), *aff’d*, 158 F.3d 674, 688, nn. 4, 13 (2dCir. 1998), *cert. den. sub nom. West v. HyperLaw*, 526 U.S. 1154 (1999). The rule that editorial changes are *not* copyrightable is consistent with the well-established legal rule that “trivial” changes from a pre-existing edition will *not* justify a copyright on a new edition, as explained beginning at page 13, below.

⁹ Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, § 3.0.3[A], n 14.1 (Aug 2009).

¹⁰ *Grove*, 264 F.Supp. at 605-606 (**Finding of Fact Nr. 4:** “Plaintiff made approximately forty thousand changes from the [source in the public domain] in producing its edition. These changes consisted almost entirely of elimination and addition of punctuation, changes of spelling of certain words, elimination and addition of quotation marks, and correction of typographical errors. These changes required no skill beyond that of a high school English student and displayed no originality. These changes are found to be trivial.” **Conclusion of Law Nr. 3:** “Since the new matter in the Grove edition was trivial, the Grove edition is uncopyrightable as a derivative work or otherwise.”).

If you look at the title page of a book, usually only the author's name will be listed. The copy editor, who corrected spelling and grammar errors in the author's manuscript will *not* have her name mentioned on the title page. The only time one sees an "editor's" name on the title page is when either (1) an editor plans a work and invites distinguished authors each to contribute one chapter or (2) an editor selects and compiles a collection (e.g., an anthology) of short works — those are a different kind of editor than a copy editor.

With the previous paragraph in mind, one reason that one sees an editor's name on the title page of a new edition of Bach's works is that the copyright on the new edition is registered with the editor as the "author" of the new edition. The publisher can *not* register the copyright in Bach's name, because Bach's work is clearly in the public domain, as explained above at page 3.

It is possible that a court could find that a musicologist exercised creativity in preparing a new edition.¹¹ For example, the musicologist could use his/her creative judgment in deciding which one of two (or more) conflicting early versions was more likely to represent Bach's intent.

Correction of spelling or grammar errors rarely changes the content or meaning of text. However, changing the pitch or duration of notes in music may¹² affect what listeners hear. So editorial changes in music *may* be more significant than editorial changes in text

One commentator urged that copyright should protect "fingerings, dynamics, phrasing" added by modern editors.¹³ In one of the few reported copyright cases on modern editions of public-domain works, a federal trial court found a valid copyright on editorial changes. Plaintiff's work was published (and copyrighted) in 1956 and contained 142 public-domain works for pianoforte. In 1961, Defendant published a verbatim copy of 29 works in plaintiff's edition, including copying mistakes in plaintiff's edition. The court noted:

Plaintiff claims to have included a considerable amount of editorial matter such as marks of fingering, phrasing and expression designed for a quicker and easier understanding of the structure and mood of the compositions and easier performance thereof. The publication was designed for beginning and intermediate students of piano.

Consolidated Music Publishers, Inc. v. Ashley Publications, 197 F.Supp. 17, 17 (S.D.N.Y. 1961).

¹¹ *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674, 688 (2dCir. 1998) (in dictum: "Our decision in this case does not mean that an editor seeking to create the most accurate edition of another work never exercises creativity.").

¹² I say *may* because changing a note for one instrument in an orchestral tutti might not be discernable to a typical listener, while changing a note in a solo would be discernable.

¹³ Ronald P. Smith, Note, "Arrangements and Editions of Public Domain Music: Originality in a Finite System," 34 CASE WESTERN RESERVE LAW REVIEW 104, 136-137 (1983).

The court held that plaintiff's work had a valid copyright:

The criterion here is originality which amounts to a little more than a mere trivial variation. *Alfred Bell & Co. v. Catalda Fine Arts*, 2 Cir., 1951, 191 F.2d 99, 102-103. We think that there is present in plaintiff's work 'at least a modicum of creative work.' *Andrews v.*

Guenther Pub. Co., D.C.S.D.N.Y. 1932, 60 F.2d 555, 557. [cites to two cases omitted] *Consolidated*, 197 F.Supp. at 18.

The court then granted plaintiff's motion for a preliminary injunction against defendant publishing copies of plaintiff's copyrighted work. The final outcome of this case is not reported. Note that the opinion in *Consolidated* was only for a preliminary injunctions and did not carefully consider the merits of the case. Further, both plaintiff and defendant in *Consolidated* were publishers, neither of whom would want to attack copyrightability, thus weakening copyright protection for their own works.

correction of errors not copyrightable ?

Furthermore, if the editor does his/her job properly, the changed notes in a new edition are not original to the editor, but simply a correction of past errors by previous editors or typesetters. The originality belongs to the composer (e.g., Bach) of the public-domain work, but the composer's copyright expired many years ago. Correction of past errors means that the modern editor has little freedom to be creative, because the principal goal is fidelity to the composer's intent. Prof. Heald has briefly discussed the lack of copyrightability of correction of past errors by editors or typesetters,¹⁴ and I agree with his analysis.

In the context of editorial changes to published judicial opinions, the U.S. Court of Appeals in New York City wrote: "... faithfulness to the public-domain original is the dominant editorial value, so that the creative is the enemy of the true." *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674, 688 (2dCir. 1998).

¹⁴ Paul J. Heald, "Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music," 46 DUKE LAW JOURNAL 241, 266 (Nov 1996).

short phrases *not* copyrightable

Even if we allow copyright for work of editors, this gives a new edition only a tiny amount of copyright protection, because most of the expression in a modern edition is the same as the expression in an earlier edition that is now in the public domain. It is well established copyright law that single words or short phrases are *not* protectable by copyright.¹⁵ By analogy, changing one wrong note in a sequence of many notes in the public domain is also not protectable by copyright. In other words, single isolated notes in a musical work are *not* copyrightable expression.

The rule in the previous paragraph has been applied to music in several cases, which appear to require a sequence of at least four notes before the notes are copyrightable:

- *Fred Fisher, Inc., v. Dillingham*, 298 F. 145, 148-149 (S.D.N.Y. 1924) (eight-note ostinato is copyrightable). Cited with approval in *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987);
- *Smith v. George E. Muehlebach Brewing Co.*, 140 F.Supp. 729, 731-732 (D.Mo. 1956) (Repeated two-note sequence, C & G, to mimic clock ticking, was *not* copyrightable.¹⁶);
- *Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, 482 F.Supp. 741, 744 (S.D.N.Y., 1980) (Four-note sequence, D C D E, theme from song ‘I Love New York’ was copied in parody ‘I Love Sodom’. Court found the theme was copyrightable, but the parody was fair use.), *aff’d*, 623 F.2d 252 (2d Cir. 1980) (per curiam). Cited with approval in *Swirsky v. Carey*, 376 F.3d 841, 851 (9th Cir. 2004) (“Although it is true that a single musical note would be too small a unit to attract copyright protection (one would not want to give the first author a monopoly over the note of B-flat for example), an arrangement of a limited number of notes can garner copyright protection. See *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F.Supp. 741, 744 (S.D.N.Y. 1980) (finding that four notes were substantial enough to be protected by copyright);”);

¹⁵ 37 C.F.R. § 202.1(a). See also • *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (the phrase “most personal sort of deodorant” is not subject to copyright protection); • *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992) (“We further agree with the district court that of the approximately 250 instances of alleged copying where access was found, all but twenty or so refer to single words or short phrases which do not exhibit the minimal creativity required for copyright protection.”); • *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 285-287 (3d Cir. 2004) (Alito, J., majority opinion) (“In a 1958 circular, the Copyright Office stated: ‘To be entitled to copyright protection, a work must contain something capable of being copyrighted — that is, an appreciable amount of original text or pictorial material...’”).

¹⁶ Nowhere in his opinion does the judge mention that Franz Joseph Haydn had a similar idea in the Andante of his Symphony Nr. 101 in the year 1794.

- *Tempo Music v. Famous Music Corp.*, 838 F.Supp. 162, 167, n.7 (S.D.N.Y. 1993) (“There is a one note variation between the original and revised melody. The Ellington Estate alleges that the one note variation is the result of a typographical error. In any event, the Court finds that the originality of the revised melody is too insubstantial to warrant copyright protection. As with the addition of alto notes in *Cooper v. James*, 213 F. 871 (N.D.Ga. 1914), a one note variation from a C natural to a C flat, ‘can hardly be said to be an original composition.’ *Id.* at 871.”);
- *Jean v. Bug Music, Inc.*, Not Reported in F.Supp.2d, 2002 WL 287786 at *6 (S.D.N.Y. 2002) (Mordent — three-note sequence C, B-flat, C — not copyrightable because it lacks originality). Cited with approval in *Lil’ Joe Wein Music, Inc. v. Jackson*, 245 Fed.Appx. 873, 879 (11thCir. 2007); *Newton v. Diamond*, 204 F.Supp.2d 1244, 1253 (C.D.Cal. 2002).
- *Swirsky v. Carey*, 376 F.3d 841, 852 (9thCir. 2004) (“The melodic line in the first measure of [plaintiff’s work] is seven notes long. It cannot be said as a matter of law that seven notes is too short a length to garner copyright protection.”);
- *Allen v. Destiny’s Child*, 2009 WL 2178676 at *12 (N.D.Ill. 2009) (“Allen does not offer any legal authority for this court to consider that the location of a single, common three-note sequence in a musical composition is sufficient to support a finding of protectability in the context of alleged copyright infringement. [¶] Consequently, this court holds that no reasonable jury could find that the three-note phrase in the Allen Song is sufficiently unique in and of itself so as to be considered an original expression, the court finds this phrase to be unprotectable as a matter of law.”).

need nontrivial change from pre-existing work

The law is clear that a derivative work must have nontrivial changes from the pre-existing work, before the derivative work can have a valid copyright.

A case in the year 1850 considered whether copyright would protect an arrangement of pre-existing music. The original music was a polka for clarinet, the arrangement was for pianoforte.

The musical composition contemplated by the statute [the U.S. Copyright Act of 1831] must, doubtless, be substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make.

Jollie v. Jaques, 13 F.Cas. 910, 913-914 (Nr. 7437) (C.C.N.Y. 1850).

Quoted with approval in *Cooper v. James*, 213 F. 871, 872 (D.Ga. 1914); *Norden v. Oliver Ditson Co.*, 13 F.Supp. 415, 417 (D.Mass. 1936); *Woods v. Bourne Co.*, 841 F.Supp. 118, 122 (S.D.N.Y. 1994), *rev’d in part*, 60 F.3d 978 (2dCir. 1995) (appellate court did not cite *Jollie*).

Ronald P. Smith traced this “mere mechanic” standard in *Jollie* back to a case in England in the year 1835.¹⁷ Ironically, Smith says the English case was overruled in England just 13 years after *Jollie* in the USA.¹⁸

In 1914, a federal trial court in Georgia held that the creation of an alto part for pre-existing works (well-known hymns) was *not* a copyrightable creation.

These altos that are prepared to the tunes in both Cooper’s book and James’ book, while probably made by musicians of experience and some skill, are not necessarily the productions of persons having the gift of originality in the composition of music. An alto may be an improvement to a song to some extent, and probably is; but it can hardly be said to be an original composition, at least in the sense of the copyright law. In patents we say that any improvement which a good mechanic could make is not the subject of a patent, so in music it may be said that anything which a fairly good musician can make, the same old tune being preserved, could not be the subject of a copyright.

Cooper v. James, 213 F. 871, 872 (D.Ga. 1914).

I cringe when I see patent law cited in a copyright case, because a patent requires *novelty* while copyright only requires originality (i.e., independent creation, not copying) and some minimal creativity.¹⁹ The *only* authority relied on by the judge in *Cooper v. James* is the *Jollie v. Jaques* case from the year 1850. *Cooper v. James* — and also *Jollie v. Jaques* — imposes too high a requirement for copyrightability of a derivative work. However, the rule in *Cooper v. James* has been accepted in subsequent federal trial court opinions, including *Tempo Music, Inc. v. Famous Music Corp.*, 838 F.Supp. 162, 167, n. 7 (S.D.N.Y. 1993).

In 1936, a federal trial court in Massachusetts wrote:

But a composition, to be the subject of a copyright, must have sufficient originality to make it a new work rather than a copy of the old, with minor changes which **any skilled musician**²⁰ might make. It must be the result of some original or creative work.

Norden v. Oliver Ditson Co., 13 F.Supp. 415, 418 (D.Mass. 1936).

In 1958, a trial court in California held that an arrangement of a song was not copyrightable:

In 1954, over a national broadcast, Bing Crosby's sons sang a song entitled, ‘They Say,’ which was a composite of several songs. Later, plaintiff’s daughters attended a summer camp, where they learned the same song. Plaintiff admits that his arrangement of ‘Tonight You Belong To Me’ was taken from his daughters’ rendition of ‘They Say.’ Plaintiff,

¹⁷ Ronald P. Smith, Note, “Arrangements and Editions of Public Domain Music: Originality in a Finite System,” 34 CASE WESTERN RESERVE LAW REVIEW 104, 106, 108 (1983) (citing *D’Almaine v. Boosey*, 160 Eng.Rep. 117, 123 (Ex. 1835).).

¹⁸ Smith at 108, citing *Wood v. Boosey*, 3 L.R.-Q.B. 223 (1868).

¹⁹ For a terse discussion of patent law, see below, beginning at page 12.

²⁰ Boldface added by Standler.

however, asserts that in his arrangement he added material not contained in either rendition of 'They Say.' His contribution consists of an introduction; a repetition of the same theme in the breaks; several bars of harmony; and an ending. All this involved was the addition of certain inconsequential melodic and harmonic embellishments such as are frequently improvised by **any competent musician**.²¹ One expert testified that the introduction added by plaintiff was as commonplace among musicians as the fairy story beginning, 'Once upon a time.' These same bars and developments thereof were repeated throughout the song as breaks and as an ending. **Such technical improvisations which are in the common vocabulary of music and which are made every day by singers and other performers, are de minimis contributions and do not qualify for copyright protection.**²² *Cooper v. James*, D.C.Ga. 1914, 213 F. 871; *Norden v. Oliver Ditson Co.*, D.C. Mass. 1936, 13 F.Supp. 415; *Supreme Records, Inc., v. Decca Records, Inc.*, D.C.Cal. 1950, 90 F.Supp. 904. *McIntyre v. Double-A Music Corp.*, 166 F.Supp. 681, 683 (S.D.Cal. 1958).

In 1993, a federal trial court in New York City summarized the statements of the rule:

This emphasis on creative process rather than novel outcomes is consistent with the standard in other jurisdictions which emphasize creative inputs beyond mere technical changes any skilled musician could make. *McIntyre v. Double-A Music Corp.*, 166 F.Supp. 681 (S.D.Cal. 1958) (describing plaintiff's "inconsequential melodic and harmonic embellishments such as are frequently improvised by any competent musician[,]"; the court finds, "Such technical improvisations which are in the common vocabulary of music and which are made every day by singers and other performers, are de minimis contributions and do not qualify for copyright protection"); *Norden v. Oliver Ditson Co.*, 13 F.Supp. 415 (D.Mass. 1936) ("a composition, to be the subject of a copyright, must have sufficient originality to make it a new work rather than a copy of the old, with minor changes which any skilled musician might make"); *Cooper v. James*, 213 F. 871 (N.D.Ga. 1914) ("anything which a fairly good musician can make, the same old tune being preserved, could not be the subject of a copyright").

Tempo Music, Inc. v. Famous Music Corp., 838 F.Supp. 162, 169, n.11 (S.D.N.Y. 1993).

In 1994, a federal trial court in New York City wrote:

In order therefore to qualify as a musically "derivative work", there must be present more than mere cocktail pianist variations of the piece that are standard fare in the music trade by **any competent musician**.²³ There must be such things as unusual vocal treatment, additional lyrics of consequence, unusual altered harmonies, novel sequential uses of themes — something of substance added making the piece to some extent a new work with the old song embedded in it but from which the new has developed. It is not merely a stylized version of the original song where a major artist may take liberties with the lyrics or the tempo, the listener hearing basically the original tune. It is, in short, the addition of such new material as would entitle the creator to a copyright on the new material. [two footnotes deleted] *Woods v. Bourne Co.*, 841 F.Supp. 118, 121 (S.D.N.Y. 1994).

²¹ Boldface added by Standler.

²² Boldface added by Standler.

²³ Boldface added by Standler.

The U.S. Court of Appeals rejected the beginning of the above quotation, but accepted the words quoted above following the dash as “a correct statement of the originality standard”. *Woods v. Bourne Co.*, 60 F.3d 978, 990-991 (2dCir. 1995). The U.S. Court of Appeals in *Woods* specifically cited the modern rule for copyrightability of a derivative work, see page 15, below.

The “any competent musician” standard is too high a threshold for copyrightability of a derivative work, such as an arrangement of public-domain music. All that is required for a valid copyright is that the work be original (i.e., not copied) and have at least a little bit of creativity.²⁴ *Jollie* and progeny were wrong to require the arranger to have a level of skill that is greater than a competent musician of ordinary skill, because novelty or nonobviousness are legal requirements for patents, as explained below, but *not* copyrights.²⁵

patent law

One of the requirements for a U.S. Patent is that the invention be non-obvious, which is defined in statute:

A patent may not be obtained ... if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

35 U.S.C. § 103(a) (enacted 1952, current Oct 2009).

The origins of this requirement for patents goes back to a case in the year 1851.²⁶ In 1889, a federal trial court denied the validity of a patent for want of novelty, using language similar to the above cases on musical arrangements:

It is not open to reasonable doubt that any competent mechanic, versed in the manufacture of hollow sheet-metal articles, having before him the patents of Stokes and Keats, could have made these improvements and modifications without exercising invention, and by applying the ordinary skill of the calling.

Kremetz v. Cottle Co., 39 F. 323, 324 (S.D.N.Y. 1889), *rev'd*, 148 U.S. 556, 559 (1893).

²⁴ *Feist*, 499 U.S. 340 (1991). See also: Ronald P. Smith, Note, “Arrangements and Editions of Public Domain Music: Originality in a Finite System,” 34 *CASE WESTERN RESERVE LAW REVIEW* 104, 112 (1983) (“... it is originality, not competence, that copyright law seeks to protect.”).

²⁵ For a list of citations that say novelty is *not* a requirement for copyright, see Standler, “Copyright Protection for Nonfiction or Compilations of Facts in the USA,” <http://www.rbs2.com/cfact.pdf>, at pages 76-78 of the 7 Sep 2009 version.

²⁶ *Hotchkiss v. Greenwood*, 52 U.S. 248 (1851) (“ordinary mechanic acquainted with the business”). See history in *Graham v. John Deere Co.*, 383 U.S. 1, 4, 11, 14-17 (1966).

It is not conceivable that a judge would void the copyright on a compilation of quotations from cases in a legal textbook, using the erroneous reason that any competent law professor could have written it. Somehow — probably the English case in 1835 and *Jollie* in the USA — the standards for copyright of music departed from the standards for literary works (i.e., text). This is an example of trial judges blindly following previous cases, and propagating an erroneous rule of law. The federal copyright statute first recognized the copyrightability of derivative works (e.g., arrangements of music) in the year 1909.²⁷ Before 1909, judges faced with a copyright case involving an arrangement of music would look for an excuse to deny copyright on the arrangement. The erroneous “any competent musician” standard from patent law may have been that excuse.

modern rule for copyrightability of derivative works

In 1927, the U.S. Court of Appeals for the Second Circuit wrote:

While a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will, even though it present the same theme. See *Gross v. Seligman*, [212 F. 930, (2dCir. 1914)].

Gerlach-Barklow Co. v. Morris & Bendien, 23 F.2d 159, 161 (2dCir. 1927).

In 1945, the U.S. Court of Appeals in New York City wrote in a case involving copyright of a rules for a traditional game:

Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. Plaintiff therefore must lose unless he has shown that his work contains some substantial, not merely trivial, originality and that the defendant sold copies embodying the original aspects of his work.

Chamberlin v. Uris Sales Corporation, 150 F.2d 512, 513 (2dCir 1945).

Chamberlin appears to be the first case to use the criterion “trivial” to reject copyright on a derivative work. In this way, *Chamberlin* appears to be the first case of the modern era.

In 1951, the U.S. Court of Appeals in New York City wrote a classic statement of originality in copyright law:

It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. Accordingly, we were not ignoring the Constitution when we stated that a ‘copy of something in the public domain’ will support a copyright if it is a ‘distinguishable variation’; [*Gerlach-Barklow Co. v. Morris & Bendien*, 2 Cir., 23 F.2d 159, 161.] or when we rejected the contention that ‘like a patent, a copyrighted work must be not only original, but new’, adding, ‘That is not * * * the law as is obvious in the case of maps or compendia, where later works will necessarily be anticipated.’ [*Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 81 F.2d 49, 53. See also *Ricker v. General Electric Co.*, 2 Cir., 162 F.2d 141, 142.] All that is needed to satisfy both the Constitution and the statute is that the

²⁷ *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484, 487, n.3 (2dCir. 1977) (“The 1909 Copyright Act was the first in this country to provide explicit protection for derivative works,”). See 17 U.S.C. §1(e) and §7 (1950 ed.).

‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’ [*Chamberlin v. Uris Sales Corp.*, 2 Cir., 150 F.2d 512; cf. *Gross v. Seligman*, 2 Cir., 212 F. 930.] Originality in this context ‘means little more than a prohibition of actual copying.’ [footnote omitted] No matter how poor artistically the ‘author’s’ addition, it is enough if it be his own. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250, 23 S.Ct. 298, 47 L.Ed. 460.

Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102-103 (2dCir. 1951).

In the context of this essay, note that an editor does *not* add original expression of “his own”, but only makes the new edition a truer reflection of the intent of the original composer (e.g., Bach).

Bell v. Catalda has been quoted or cited in the following landmark cases:

- *Wihtol v. Wells*, 231 F.2d 550, 553 (7thCir. 1956);
- *Donald v. Zack Meyer's T. V. Sales and Service*, 426 F.2d 1027, 1029-1030 (5thCir. 1970);
- *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2dCir. 1976).

In 1976, the U.S. Court of Appeals in New York City decided a case involving a plastic Uncle Sam bank, a derivative work based on cast iron banks in the public domain under the Copyright Act of 1909:

It has been the law of this circuit for at least 30 years that in order to obtain a copyright upon a reproduction of a work of art under 17 U.S.C. § 5(h) [footnote omitted] that the work “contain some substantial, not merely trivial originality” *Chamberlin v. Uris Sales Corp.*, supra, 150 F.2d at 513.

....

The test of originality is concededly one with a low threshold in that “(a)ll that is needed ... is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’ ” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d at 103.

But as this court said many years ago, “(w)hile a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will....” *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927).

L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2dCir 1976) (en banc),

cert. denied, 429 U.S. 857 (1976). Later in this case, the Court of Appeals wrote:

Absent a genuine difference between the underlying work of art and the copy of it for which protection is sought, the public interest in promoting progress in the arts indeed, the constitutional demand, *Chamberlin v. Uris Sales Corp.*, supra could hardly be served.

To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.

Batlin, 536 F.2d at 492.

In 1980, the U.S. Court of Appeals in New York City cited *Batlin*, but noted that case was decided under the Copyright Act of 1909, and wrote:

Thus the only aspects of [defendant’s] figures entitled to copyright protection are the nontrivial, original features, if any, contributed by the author or creator of these derivative works.

Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905, 909 (2dCir. 1980).

In 1991, the U.S. Supreme Court said:

There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. See generally *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251, 23 S.Ct. 298, 300, 47 L.Ed. 460 (1903) (referring to “the narrowest and most obvious limits”). Such works are incapable of sustaining a valid copyright.

Nimmer § 2.01[B].

Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 359 (1991).

Quoted in *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003). The Court’s statement in *Feist* is in the context of copyrightability of a new work, not a derivative work.

In 1994, the U.S. Court of Appeals in New York City decided a case involving a derivative work from a work in the public domain, and wrote:

The law requires more than a modicum of originality. This has been interpreted to require a distinguishable variation that is more than merely trivial. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir.) (en banc) (requiring some substantial, not just a trivial, variation), cert. denied, 429 U.S. 857, 97 S.Ct. 156, 50 L.Ed.2d 135 (1976).

Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994).

In 1995, the U.S. Court of Appeals in New York City decided *Woods*, one of the few music copyright cases to reach an appellate court:

We thoroughly discussed the standard of originality in a derivative work in our in banc decision in *Batlin*. There we held that “there must be at least some substantial variation [from the underlying work], not merely a trivial variation.” *Batlin*, 536 F.2d at 491; accord *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980) (“[T]o support a copyright the original aspects of a derivative work must be more than trivial.”). Further, “the requirement of originality [cannot] be satisfied simply by the demonstration of ‘physical skill’ or ‘special training’” *Batlin*, 536 F.2d at 491; see also *Tempo Music, Inc. v. Famous Music Corp.*, 838 F.Supp. 162, 170 (S.D.N.Y. 1993) (discussing *Batlin*). Our discussions of the originality standard in recent decisions, such as *Weissmann*, 868 F.2d at 1321, and *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988), upon which Bourne relies, do not render the *Batlin* standard inapplicable. See *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994) (relying on *Batlin* as authoritative statement of originality requirement).

In *Batlin* we warned that “[t]o extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.” 536 F.2d at 492. At least one other circuit, relying on this court’s opinion in *Batlin*, has advised special caution in analyzing originality in derivative works, since too low a threshold will “giv[e] the first [derivative work] creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work.” *Gracen v. Bradford Exchange*, 698 F.2d 300, 305 (7th Cir. 1983). As the *Gracen* court explained in discussing the originality requirement for a painting derived from a photograph, there must be “sufficiently gross difference between the underlying and the derivative work to avoid entangling subsequent artists depicting the underlying work in copyright problems.” 698 F.2d at 305. This observation may be particularly relevant in the musical context. While it is easy enough to describe the threshold of originality as being low, it is difficult to translate this standard from one medium to another. See *Tempo Music*, 838 F.Supp. at 170 (“[T]he risk of copyright confusion seems

particularly significant in music cases given that finders of fact often lack musical expertise.”); 1 NIMMER § 2.05[C] at 2-57 (noting “tendency to require a somewhat greater degree of originality in order to accord copyright in a musical arrangement”). But see 1 William F. Patry, COPYRIGHT LAW AND PRACTICE 237 (1994).

Bourne argues that the district court overstated the degree of originality required for an arrangement of a song to merit derivative work status. Bourne focuses on the court's statement that “[t]here must be such things as unusual vocal treatment, additional lyrics of consequence, unusual altered harmonies, novel sequential uses of themes...” 841 F.Supp. at 121. We agree that the sentence that Bourne quotes does overstate the standard for derivative work originality. As we have observed on several occasions, the requirement of originality is not the same as the requirement of novelty, the higher standard usually applied to patents. E.g., *Batlin*, 536 F.2d at 490 (“[T]here must be independent creation, but it need not be invention in the sense of striking uniqueness, ingeniousness, or novelty....”); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951). However, we read the district court's statement as brief dictum within a discussion that otherwise does identify the correct standard.

Woods v. Bourne Co., 60 F.3d 978, 990-991 (2d Cir. 1995).

In 2003, the U.S. Court of Appeals for the Seventh Circuit in Chicago wrote:

When as in this case a work in which copyright is claimed is based on work in the public domain, the only ‘originality’ required for the new work to be copyrightable (the very term is a misnomer) is enough expressive variation from public-domain or other existing works to enable the new work to be readily distinguished from its predecessors. *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102-03 (2d Cir. 1951). “Originality in this context means little more than a prohibition of actual copying.” *Id.* at 103 (internal quotation marks deleted); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 489 (9th Cir. 2000). That undemanding requirement is satisfied in this case; any more demanding requirement would be burdensome to enforce and would involve judges in making aesthetic judgments, which few judges are competent to make.

Bucklew v. Hawkins, Ash, Baptie & Co., LLP., 329 F.3d 923, 929 (7th Cir. 2003) (Posner, J.).

The rule preventing copyright of “trivial” changes from pre-existing material is consistent with the rule on page 5, above, that editing (e.g., correction of: misspellings, punctuation errors, typographical errors, etc.) is *not* copyrightable.

I am afraid that a jury would not be able to distinguish the sound of one group of musicians playing a public-domain edition of a composition by Bach and then playing the same composition from a new edition of Bach. If the jury can not distinguish the two editions when played, any changes in the new edition might be considered “trivial”, and therefore there would be no valid copyright on the new edition. In the context of scholarly new editions of medieval literature, a commentator said:

Because these cases often depend on an individual judgment between “trivial” or “substantial” changes, a distinction that has never been codified, it is difficult to predict what a particular court will determine in this regard — especially where courts are ill-equipped to appreciate the nature and significance of the changes, as would be likely in a case involving editions of pre-modern literature.

Brad Bedingfield, "Copyrighting Medieval Literature: Editing and Publishing the Pre-Modern Public Domain," 28 COLUMBIA JOURNAL OF LAW & ARTS 213, 219 (Winter 2005).

To avoid the problem in the previous paragraph, plaintiff might argue that the intended market for a new edition is *professional* musicians and musicologists. Plaintiff's attorney would then call expert witnesses at trial to prove that this intended audience will appreciate the changes in the new edition, therefore the changes are *not* trivial to the intended audience.

labor, skill, expense are *not* protected by copyright

Prior to the year 1991, there were a number of statements in judicial opinions that copyright protected the labor, skill, and expense of authors.²⁸ Such statements probably confused copyright law with the tort of unfair competition. In the early 1980s, a few U.S. Courts of Appeals criticized using copyright to protect "sweat of the brow".²⁹ In 1991, the U.S. Supreme Court in *Feist*, declared "sweat of the brow" was not protectable under copyright law.³⁰

Several recent cases in the U.S. Courts of Appeals have stated that effort in creating a copy is *not* relevant to whether there can be a copyright in the copy.

Feist teaches that substantial effort alone cannot confer copyright status on an otherwise uncopyrightable work.

Computer Associates Intern., Inc. v. Altai, Inc., 982 F.2d 693, 711 (2dCir. 1992).

In 2008, a U.S. Court of Appeals in Utah wrote:

... we do not for a moment seek to downplay the considerable amount of time, effort, and skill that went into making Meshwerks' digital wire-frame models. But, in assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability. See *Feist*, 499 U.S. at 359-60, 111 S.Ct. 1282; Howard B. Abrams, LAW OF COPYRIGHT § 2:8 ("Even if the *process* is both expensive and intricate, an exact or near-exact duplicate of an original should not qualify for copyright.") (emphasis added);

Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1268 (10thCir. 2008).

²⁸ See my collection of citations in "Copyright Protection for Nonfiction or Compilations of Facts in the USA," <http://www.rbs2.com/cfact.pdf>, at pages 45-50 of the 7 Sep 2009 version.

²⁹ See, e.g., *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5thCir. 1981); *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F.2d 501 (2dCir. 1984).

³⁰ *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 352-354 (1991) (at 359-360: "In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works.").

If copyright does not protect effort by authors/composers, then copyright should also not protect effort by editors, because editors display less creativity than authors/composers. The conventional view is that editors do an *uncreative*, mechanical application of rules.

Note that labor, skill, and expense of authors and publishers might be protectable under a different legal theory than copyright. Because this essay is only concerned with copyright law, I do not explore those other theories here.

distinguish composition from editing

If a modern musicologist were to take an *unfinished* work by Bach and complete the work in the style of Bach, the musicologist could obtain a copyright in his/her new work, either as an arrangement (i.e., a “derivative work” from Bach) or possibly as a new composition. In this way, composing music is distinguished from editing public-domain music.

Consider a modern editor who explicitly wrote a harmony for Bach’s melody. If the modern editor rigidly followed rules of harmony that permitted no creative choices,³¹ then the harmony would *not* be copyrightable, because the modern editor is *unoriginal* and *uncreative* — the modern editor produces the result that Bach intended, so any copyright belongs to Bach. Alternatively, if the modern editor *created* a new harmony, then that harmony could be copyrightable as a derivative work.³² The legal reasoning in this paragraph was explained by Prof. Heald,³³ and I agree with his reasoning. One needs to be careful with the phrasing, so that *novelty* is **not** asserted as a condition for copyright.³⁴

³¹ For example, translating the numbers for figured bass in Baroque composition to notes on a five-line staff.

³² See, e.g., *Tempo Music, Inc. v. Famous Music Corp.*, 838 F.Supp. 162, 167-169 (S.D.N.Y. 1993).

³³ Paul J. Heald, “Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music,” 46 DUKE LAW JOURNAL 241, 263-264 (Nov 1996).

³⁴ For a list of citations that say novelty is *not* a requirement for copyright, see Standler, “Copyright Protection for Nonfiction or Compilations of Facts in the USA,” <http://www.rbs2.com/cfact.pdf>, at pages 76-78 of the 7 Sep 2009 version.

No Protection is Undesirable

So it would appear that there can be no valid copyright in the USA on modern editions of public-domain musical works, such as those composed by Bach. This result seems wrong to me. The conclusion that there is no valid copyright on modern editions of public-domain musical works seems to me to be a *reductio ad absurdum*, which leads us to conclude that *Feist* was wrongly decided. In my earlier essay on copyright for facts,³⁵ I argued that there should be copyright protection for laborious collection of facts, and there should be copyright protection for an author who reports an original observation of fact(s).

One person — a scoundrel — could purchase one copy of a new edition of Bach's work, scan those printed pages, and upload the images (e.g., either as a JPG file or as an Adobe PDF file) to a website for free distribution. *If* there is no valid copyright on the new edition, then the publisher of the new edition can not win copyright infringement litigation against the scoundrel. So why would any publisher invest large amounts of money in the preparation of a new edition of public-domain music, if there is no legal protection against wholesale copying of the new edition? This lack of legal protection could lead to the socially undesirable result of having fewer new editions of public-domain musical works. The U.S. Constitution says the purpose of copyright is to promote Progress of knowledge,³⁶ but discouraging new scholarship is *not* promoting Progress. In the case of J.S. Bach and other major composers, scholarship to produce new editions is part of the preservation and propagation of the cultural heritage of Western Civilization. Such scholarship is *really* important, and needs to be encouraged.

Prof. Cronin lamented this lack of protection for scholarly editorial work:

... in music, performers who create new works “in the style of” a particular composer, and even use extant thematic material, enjoy stronger copyright protection for their intellectual efforts than do musicologists assiduously scraping away decades of editorial accretions to public domain works in order to reveal the wholly unprotectable original expression of the long deceased composer. Restorative work like this contributes to scholarship, but the quandary for musicologists, editors and publishers is the fact that copyright provides little incentive or protection for the product of “sweat of the brow,” regardless how elevated the brow involved.

Charles Cronin, “Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology,” 28 COLUMBIA JOURNAL OF LAW & ARTS 1, 32 (Fall 2004).

³⁵ Standler, Copyright Protection for Nonfiction or Compilations of Facts in the USA, <http://www.rbs2.com/cfact.pdf>, (Feb 2009).

³⁶ The U.S. Constitution gives Congress the power “To promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their ... Writings.” U.S. Constitution, art. 1, § 8, cl. 8.

Sacred Books

While this essay focuses on the example of Bach's music, one can easily imagine additional examples, such as sacred books. An accurate modern version of the King James Bible would only be a paraphrase of the earlier English-language edition that is now in the public domain, but one commentator believes a modern version is copyrightable.³⁷ As with the case of Bach's works, modern publishers put a copyright notice on Bibles. On the other hand, some Bibles are translations from old documents in Greek or Hebrew language, and copyright law recognizes translations are copyrightable as derivative works. There are several reported cases involving new editions of sacred books.

In *Ziegelheim v. Flohr*, 119 F.Supp. 324 (E.D.N.Y. 1954), Hebrew prayers were held to be in the public domain. But plaintiff's new edition of prayers was copyrightable because it contained more than a "merely trivial" changes from previous editions. *Ziegelheim* may no longer be valid after *Feist*, because the court allowed plaintiff's "1943 book was the product of his own labor, judgment, money and skill and as such was copyrightable as a new version of a work in the public domain."³⁸ Such protection for "sweat of the brow" was killed by the U.S. Supreme Court in *Feist*.

One post-*Feist* case allowed copyright for an English translation of a Hebrew prayerbook. *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch*, 312 F.3d 94, 97 (2dCir. 2002) (per curiam). This case is distinguishable from editorial revisions, because independent translations have long been held to be copyrightable.

But in *Torah Soft Ltd. v. Drosnin*, 136 F.Supp.2d 276 (S.D.N.Y. 2001) copyright was denied for a digital file that contained the text of the Hebrew Bible.³⁹

³⁷ Jason L. Cohn, Note, "The King James Copyright: A Look at the Originality of Derivative Translations of the King James Version of the Bible," 12 JOURNAL OF INTELLECTUAL PROPERTY LAW 513, 532-538 (Spring 2005). However, Mr. Cohn admits in his last paragraph that the copyright will be "thin and will likely protect only against verbatim copying."

³⁸ *Ziegelheim v. Flohr*, 119 F.Supp. at 328.

³⁹ *Torah Soft Ltd. v. Drosnin*, 136 F.Supp.2d 276, 288, n.11 (S.D.N.Y. 2001) ("Plaintiff has not cited a single case in which an author was granted a protectable copyright for his reproduction of an ancient public domain work such as the Bible.").

In *Douglas v. Osteen*, 560 F.Supp.2d 362, 367-368 (E.D.Pa. 2008), *aff'd*, 317 Fed.Appx. 97, 99 (3dCir. 2009) (per curiam), one preacher sued another for alleged copyright infringement in religious books. The trial court and appellate court both held that “words, [short] phrases, Bible texts, styles, and literary methods” are not protected by copyright. Both courts cited *Torah Soft* with approval.

In 1971, the U.S. Congress enacted a private law granting copyright on all editions of Mary Baker Eddy’s book *SCIENCE & HEALTH* — a book first published in 1875, and the last edition was published in 1910. The private law extended copyright protection on these books, some of which were then in the public domain, until the year 2046. The courts held this private law was unconstitutional, because the law offended fundamental principles of separation of church and state. *United Christian Scientists v. Christian Science Board of Directors, First Church of Christ, Scientist*, 616 F.Supp. 476 (D.C. 1985), *aff'd*, 829 F.2d 1152 (D.C.Cir. 1987).

Technology Created Problems for Publishers

Before the year 1965, the only way to acquire sheet music was to purchase it from a publisher. This was true regardless of whether the composition was in the public domain, was a new edition or new arrangement of a public-domain work, or was fully protected by copyright.

The widespread availability of low-cost photocopy machines after 1965 meant that people could produce inexpensive copies of sheet music, by photocopying in a library.

In the late 1990s, a user could download music from the Internet and print it on the user’s laser printer.

Photocopy machines and laser-printers have become inexpensive substitutes for printing presses. Royalty-free copying with these machines threatens profitability of music publishers, who subsidize at least part of the cost of preparing and distributing new, scholarly editions of public-domain music.⁴⁰

This history is an example of how technological change creates new legal problems, to which the law is glacially slow to respond.⁴¹ Prior to the availability of low-cost photocopy machines, no one — except competing publishers — cared about copyright of new editions of public-domain music, because musicians had no reasonable alternative to purchasing copies from publishers.

⁴⁰ Charles Cronin, “Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology,” 28 COLUMBIA JOURNAL OF LAW & ARTS 1, 3-4 (Fall 2004).

⁴¹ See, e.g., Standler, Response of Law to New Technology, <http://www.rbs2.com/lt.htm> (1997).

Proposal

this proposal is *not* law

I propose that the difficult-to-interpret 17 U.S.C. § 301 should be deleted and replaced with a simple statement of a federal tort for unfair competition.

(a) A defendant commits the tort of unfair competition when the defendant makes and/or distributes verbatim copies of all — or substantial parts — of plaintiff's work without written permission of the plaintiff, thereby exploiting the labor, skill, and expense of an author, editor, or publisher.

(b) This tort of unfair competition applies to both copyrighted and uncopied works. However, unclassified works of the U.S. Government are always available for free copying, as such works are in the public domain from the moment of creation. 17 U.S.C. § 105.

(c) For uncopied works, the tort of unfair competition expires 40 years after the date of first public display or first publication, whichever is earlier. For copyrighted works, the tort of unfair competition expires when the copyright protection expires.

Note in (a), that this tort can involve either (1) copying and selling plaintiff's work or (2) freely distributing copies of plaintiff's work — either of which deprive the author, editor, or publisher of income. In the first way, the defendant is unjustly enriched, because the defendant simply copied from plaintiff, instead of defendant making his own independent, diligent effort.

Note that, under current copyright law, there is no copyright on facts in any otherwise copyrighted work.⁴² This proposal would also protect nonfiction authors who diligently collect and verify facts.

Note in (c), the labor, skill, and expense of authors or editors in producing uncopyrightable works eventually become exploitable.

Alternatively, one could make both copyrighted and uncopied works have the same duration of protection from unfair competition. In this alternative, I suggest a term between 40 and 56 years from the date of first publication or first public display, whichever is earlier.

However, a longer duration of protection gives an author and publisher more time to be compensated for labor and expenses of preparing a scholarly new edition of a book that may have a limited market. I am less concerned about a publisher recovering the cost of producing a new edition of a popular work, because the popularity will generate significant sales regardless of legal protection. The real concern is a publisher who produces a new edition of an obscure work.

⁴² See, e.g., Standler, Copyright Protection for Nonfiction or Compilations of Facts in the USA, <http://www.rbs2.com/cfact.pdf>, (Feb 2009).

Commentators⁴³ note that the law in the United Kingdom and Australia that protects new editions of public-domain works from verbatim copying of the “whole or any substantial part” for 25 years. Such a law is equivalent to the protection that I suggest above.

need to distinguish original work from pre-existing work ?

Suppose a judge were to allow copyright on scattered corrections to previous editions of a public domain work. The copyright would apply only to the corrections that are original in the new edition, and would *not* affect the public-domain status of the work. See 17 U.S.C. § 103(b), which is quoted above, at page 4. It would be desirable for the publisher of the new edition to specify which features are original in the new edition, so that the reader has clear notice of what is copyrighted and what is public domain. I am unaware of any legal requirement for a publisher to clearly specify what was pre-existing material and what is original, although such a requirement makes sense to me.

I can envision the publisher of a new edition printing the public-domain music in black ink on white paper, and the original editorial revisions in green ink — but I am *unaware* of any publisher who does this. Although two-color printing is more expensive than black on white, switching from sheet music on paper to a computer display on a music stand would enable inexpensive multi-color displays of music.

⁴³ Brad Bedingfield, “Copyrighting Medieval Literature: Editing and Publishing the Pre-Modern Public Domain,” 28 COLUMBIA JOURNAL OF LAW & ARTS 213, 236-237, 243 (Winter 2005); Charles Cronin, “Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology,” 28 COLUMBIA JOURNAL OF LAW & ARTS 1, n.17 (Fall 2004).

Conclusion

Some changes in the copyright statute by the U.S. Congress, together with an erroneous opinion by the U.S. Supreme Court in *Feist*, have created a mess, in which the labor, skill, and expenses of authors or composers are no longer protected from exploitation by verbatim copiers. At the same time, modern photocopy machines and widespread copying on the Internet, make it easy for scoundrels to make a verbatim copy of works, with no investment of labor or skill, and with minimal expense.

There is nothing wrong with copying works that are in the public domain. The problem addressed in this essay is a modern edition that contains a few changes from pre-existing editions of a public-domain work. These changes are sometimes made after laborious scholarly work by an editor. The difficult question is whether the few changes are copyrightable. *If* the new edition is copyrightable, then 17 U.S.C. § 103(b) makes clear that the copyright *only* applies to the changes that are original to the new edition.

If you want to photocopy public-domain music, find an old edition in a library for which the copyright has expired. Alternatively, one can purchase an inexpensive, verbatim copy of a public-domain edition from publishers like Dover or Kalmus in the USA. Even if new editorial revisions to public-domain works are uncopyrightable, copying those new revisions pirates the labor, skill, and expense of the editor. And, because no reported case has decided whether editorial revisions are copyrightable, such revisions *might* be copyrightable or legally protectable under some other theory.

I should make it clear that I am *not* encouraging anyone to copy modern editions of public-domain music. The *only* purpose of this provocative essay is to expose defects in current copyright law in the USA. I believe that musicologists and publishers *should* have some kind of legal remedy against scoundrels who copy a *new* edition of public-domain material, instead of copying an old edition. I strongly urge that publishers, as well as musicologists, lobby the U.S. Congress for stronger intellectual property protection.

This document is at **www.rbs2.com/cmusic2.pdf**

My most recent search for court cases on this topic was in October 2009.

first posted 26 Oct 2009, revised 26 Oct 2009

return to my homepage at <http://www.rbs2.com/>