

LO AND BEHOLD!: DOES TOLERATED USE GIVE AN INCENTIVE TO PLAGIARIZE? AN EXAMPLE THROUGH THE MUSIC OF BOB DYLAN[♦]

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INTRODUCTION

Bob Dylan is one of the most notable musicians in recent decades. He has influenced many great artists and has changed the path of music.¹ *Rolling Stone* magazine ranked him number two as part of the

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¹ See Eleanor Barkhorn, *How Bob Dylan Changed the '60s, and American Culture*, THE ATLANTIC (Sept. 9, 2010, 8:00 AM), <http://www.theatlantic.com/entertainment/archive/2010/09/how-bob-dylan-changed-the-60s-and-american-culture/62654/> (“He’s the most important songwriter in the last 50 years . . . [H]e’s certainly a major figure.”); Amy Blanton, *Bob Dylan:*

top 100 greatest artists, following only the Beatles.² At Bob Dylan's induction into the Rock and Roll Hall of Fame in 1988, Bruce Springsteen said, "Bob [Dylan] freed your mind the way Elvis freed your body . . . To this day, wherever great rock music is being made, there is the shadow of Bob Dylan."³ Bob Dylan has influenced generations of artists from the time he began in the 1960s through the present as he continues to create albums, like his most recent album *Tempest*, released in 2012.⁴

In 1961, Dylan rose through the New York City folk scene, recording his first album *Bob Dylan*⁵ and released it in 1962.⁶ Dylan's career continued to progress, recording more folk albums, such as *The Freewheelin' Bob Dylan*, to later changing his tone and being called a traitor to the folk movement by going electric on *Bringing it All Back Home*.⁷ Like many artists, Dylan was always changing his style with the times, transforming from folk artist, to rock star, and even through religious music.⁸

Not only has Dylan influenced many musicians, but also many musicians have borrowed his style and songs as their own. For example, Jimi Hendrix was influenced by Bob Dylan's folk sound when he arrived in New York in the 1960s.⁹ He eventually went on to cover Bob

An Impact on American Society in the 1960's, UNIV. OF N.C. AT CHAPEL HILL (Apr. 10, 2001), <http://www.unc.edu/~ablanton/BobDylan.pdf> ("Bob Dylan is considered to be the greatest influence on popular culture of all time."); *Bob Dylan Biography*, ROCK AND ROLL HALL OF FAME, <http://www.rockhall.com/inductees/bob-dylan/bio/> (last visited Oct. 6, 2013) ("Dylan re-energized the folk music genre in the early Sixties, brought about the lyrical maturation of rock and roll when he went electric at mid-decade, and bridged the worlds of rock and country by recording in Nashville . . .").

² See *100 Greatest Artists*, ROLLING STONE, <http://www.rollingstone.com/music/lists/100-greatest-artists-of-all-time-19691231/bob-dylan-20110420> (last visited Oct. 6, 2013) (the commentary on Bob Dylan was written by Robbie Robertson whom he worked with on landmark albums such as *Blonde on Blonde*).

³ See *Bob Dylan Biography*, *supra* note 1.

⁴ See *Tempest*, THE OFFICIAL BOB DYLAN SITE, <http://www.bobdylan.com/us/music/tempest> (last visited Oct. 6, 2013); see also *50 Best Albums of 2012*, ROLLING STONE, <http://www.rollingstone.com/music/lists/50-best-albums-of-2012-20121205/bob-dylan-tempest-19691231> (last visited Oct. 6, 2013) (reviewing Bob Dylan's latest album as one of the best of the year, ranking it number four out of fifty).

⁵ See Albin J. Zak III, *Bob Dylan and Jimi Hendrix: A Juxtaposition and Transformation "All Along the Watchtower"*, 57 J. AM. MUSICOLOGICAL SOC'Y 599, 612 (2004).

⁶ See *Bob Dylan*, THE OFFICIAL BOB DYLAN SITE, <http://www.bobdylan.com/us/music/bob-dylan> (last visited Oct. 6, 2013) (showing Bob Dylan's first album and song list).

⁷ See Zak, *supra* note 5, at 612–14; see also *Bob Dylan Albums*, THE OFFICIAL BOB DYLAN SITE, <http://www.bobdylan.com/us/albums> (last visited Oct. 6, 2013) (showing release dates of *The Freewheelin' Bob Dylan* and *Bringing it All Back Home* with song listings).

⁸ See EYOLF ØSTREM, THINGS TWICE 213, available at <http://dylanchords.info/tt.pdf> (last visited Oct. 6, 2013) ("When Dylan issued the album *Slow Train Coming* in 1979, it was a surprise to most of his fans: the protest singer, beatnik, former Jew even, had converted to Christianity, and to one of the more extremely evangelistic directions . . ."); BOB DYLAN, *SLOW TRAIN COMING* (Columbia Records 1979).

⁹ See Zak, *supra* note 5, at 615–16 ("Hendrix entered a Harlem dance club with a copy of *The Freewheelin' Bob Dylan* and 'asked the DJ to put on 'Blowin' in the Wind.'").

Dylan's song *All Along the Watchtower* on *Electric Ladyland* in 1968.¹⁰ In Hendrix's version of the song, there was "a dramatic shift in style and sonic texture from Dylan's original."¹¹ Hendrix made the song his own by adding his own musical style to Dylan's original work.¹²

Furthermore, Bob Dylan has also influenced the Beatles. For example, adapting to Dylan's style of music generated some of the Beatles' early success in America.¹³ John Lennon even discussed how Bob Dylan inspired him when he was writing songs.¹⁴ Additionally, in 1965, the same year that Dylan released two electric albums,¹⁵ *Bringing it All Back Home* and *Highway 61 Revisited*, Dylan's lyrics were viewed as the catalyst that pushed the Beatles into a four-year span¹⁶ during which they released albums such as *Help!*, *Revolver*, *Sgt. Pepper's Lonely Hearts Club Band*, *The White Album*, *Yellow Submarine*, and *Abbey Road*.¹⁷ For example, *Sgt. Pepper's Lonely Hearts Club Band* sounds similar to Dylan's electric albums such as *Bringing it All Back Home*, *Highway 61 Revisited*, and *Blonde on Blonde*.¹⁸

Although many musicians have borrowed from Bob Dylan, there have been recent allegations that Bob Dylan has borrowed too much from others, possibly even plagiarizing. Joni Mitchell, a peer whom he toured with, recently called Bob Dylan a phony and a plagiarist.¹⁹ Furthermore, in an interview published in *Rolling Stone*,²⁰ Mikal

¹⁰ See JIMI HENDRIX, *All Along the Watchtower*, on *ELECTRIC LADYLAND* (Reprise Records 1968); Zak, *supra* note 5, at 601 (stating that Jimi Hendrix began recording the song in London and continued to modify the song through the year later in the United States).

¹¹ See Zak, *supra* note 5, at 602.

¹² See *id.* at 630 ("Hendrix makes the song his own, unleashing the latent power of the dualisms suggested by Dylan's recording to create a sweeping musical drama of an entirely different character from the original.").

¹³ See Charles Gower Price, *Sources of American Styles in Music of the Beatles*, 15 AM. MUSIC 208, 209 (1997) ("[T]he Beatles . . . reveal a remarkable knack for absorbing a range of influences successfully—from American mainstream pop and Bob Dylan's lyric content . . .").

¹⁴ See *id.* at 226 ("Instead of projecting myself into a situation I would try to express what I felt about myself which I'd done in my books. I think it was Dylan who helped me realize that—not by any discussion . . . but just by hearing his work.").

¹⁵ See *Bob Dylan Biography*, *supra* note 1 (stating the reason Bob Dylan went from acoustic to electric was because he was inspired by the Beatles as much as the Beatles were inspired by him).

¹⁶ See Price, *supra* note 13, at 227.

¹⁷ See THE BEATLES, http://www.thebeatles.com/explore?type=story_album (last visited Oct. 7, 2013) (showing the following release dates: *Help!* was released August 6, 1965; *Revolver* was released August 1966; *Sgt. Pepper's Lonely Hearts Club Band* was released June 1, 1967; *The Beatles*, or "the White album," was released November 22, 1968; *Yellow Submarine* was released January 17, 1969; and *Abbey Road* was released September 26, 1969).

¹⁸ See *Bob Dylan Biography*, *supra* note 1 ("Dylan's gradual move from folk to rock and roll was inspired by the Beatles (whom Dylan 'secretly dug') . . ."); Zak, *supra* note 5, at 619.

¹⁹ See *Biography of Bob Dylan*, *supra* note 1; Sean Wilentz, *Is Bob Dylan a Phony?*, THE DAILY BEAST (Apr. 30, 2010, 6:15 PM), <http://www.thedailybeast.com/articles/2010/04/30/is-bob-dylan-a-phony.html>.

²⁰ Mikal Gilmore, *Bob Dylan: The Rolling Stone Interview*, ROLLING STONE, Sept. 27, 2012. Bob Dylan's interview is discussed later in Part II of this Note.

Gilmore asked Bob Dylan about recent allegations that he plagiarized lines from Civil War poet Henry Timrod as well as Dr. Junichi Saga's *Confessions of a Yakuza*²¹ based on similarities found on Dylan's albums *Modern Times* and *Love and Theft*.²² After comparing and contrasting Dylan's work to both Timrod's and Saga's, the allegations of plagiarism may have merit, considering portions of Timrod's and Saga's work were lifted and later attributed to Dylan on the albums.²³ Although Henry Timrod's poetry is within the public domain, Junichi Saga's book is not.²⁴ Thus, Dylan's failure to cite Junichi Saga's name as a source for the album technically constitutes plagiarism. Nevertheless, Junichi Saga has stated that he does not want to sue Bob Dylan, but would like Dylan to cite his name as a source in the future.²⁵ Therefore, it appears the original copyright owner would not mind the borrowing if he or she is cited as the source.²⁶

The actions of Junichi Saga demonstrate the modern idea of "tolerated use." Tolerated use occurs when the copyright owner allows another person to minimally infringe on his or her copyright without suing.²⁷ Even though tolerated use can be beneficial—as demonstrated by the rise in book sales for *Confessions of a Yakuza* after Dylan released his album and fans learned of Dylan's influence—it may also provide an incentive to artists, like Bob Dylan, to plagiarize works of other artists without fear of legal action.²⁸ This incentive demonstrates harmful possibilities that come with tolerated use: that it may not always be beneficial for the owner to allow for minimal infringement if he or she cannot share in the benefits either by not making a profit or generally not being cited as a source.

If the incentive to plagiarize does exist, people in other professions, like authors, would be penalized for the same actions and methods that a musician would use when writing a new song or creating a new melody. Thus, tolerated use in one genre may not carry over to another thereby providing an incentive to plagiarize in some areas, like music (or just within certain areas of music like folk music). However, it is also possible that, because Bob Dylan is a prominent and well-known figure, people tolerate the use of his alleged plagiarism because he has been doing it since the beginning of his career.

²¹ See *id.* at 81.

²² See *infra* Part II.D for a discussion on Dylan's use of Henry Timrod and Junichi Saga on his albums *Modern Times* and *Love and Theft*.

²³ See *infra* Part III.D.1 and 2.

²⁴ See *id.*

²⁵ See *infra*, notes 257–262.

²⁶ Here, no argument for plagiarism could be raised because the original owner of the work is cited as a source. See *infra* Part II for a further discussion on plagiarism.

²⁷ See *infra* Part I for a discussion on tolerated use and its application in various mediums.

²⁸ See *infra* Part III subsections C and D for a discussion of Bob Dylan's early accusations of plagiarism and modern examples of tolerated use.

This Note will discuss whether the concept of tolerated use encourages or gives an incentive to artists to plagiarize.²⁹ Although this Note focuses on Bob Dylan, he demonstrates the tolerated use debate and how this incentive can arise. The evidence below shows that Bob Dylan has benefited from tolerated use, but it also presents a bigger problem. Fans, critics, musicians, and courts continue to endorse tolerated use and possibly plagiarism. In order to analyze this theory, I will first discuss the concept of tolerated use, its positives and negatives, and its application in different contexts including, but not limited to, user generated content, hip-hop music, and music blogs. Second, I will compare music plagiarism to copyright infringement since both concepts are similar but often conflated as one concept. The difference is important because tolerated use primarily focuses on a person minimally infringing upon another's copyright and does not primarily focus on whether plagiarism will result. Third, I will apply the concepts of music plagiarism and tolerated use to Bob Dylan's career, focusing on both early and modern accusations of plagiarism from his albums *Love and Theft* and *Modern Times*. Here, I will look at how he plagiarized from both well-known and unknown musicians and authors to assess whether the original copyright owner was harmed by the plagiarism. Lastly, I will discuss whether the incentive to plagiarize exists and offer possible solutions to minimize the incentive.

I. TOLERATED USE AND ITS APPLICATION IN VARIOUS MEDIUMS

As technology continues to evolve, there has been a movement towards modifying how much infringement is required in order to constitute a valid copyright infringement claim.³⁰ The reasoning behind reformation is that copyrightable works are now used in different ways than they were in the past.³¹ Modern technology is creating a giant "grey zone"³² of infringements that do not fit within the traditional standard of copyright infringement. Therefore, casual infringement of a copyright can be difficult to measure because it is essentially unavoidable in day-to-day life.³³ Informal copyright practices are necessary when such grey areas exist in copyright law.³⁴

²⁹ See *infra* Part I (the basic idea of tolerated use is to allow another person to minimally "borrow" his or her copyright without fear of prosecution).

³⁰ See Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

³¹ *Id.*

³² *Id.* at 617; see *id.* at 620 ("[T]here is a large category of technically infringing uses of copyrighted works that is neither clearly within the category of fair use, nor in the category of being implicitly or explicitly licensed.").

³³ *Id.* at 618–19 (discussing a study by Professor John Tehranian which recognized that casual infringement is unavoidable because it could occur simply through email, photocopies, or quoting a line from a book without stating the author).

³⁴ Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1489 (2008).

Coining the phrase “tolerated use,”³⁵ Professor Tim Wu described the path he believed copyright should follow in the future, including a “copyright no action policy.”³⁶ Tolerated use as defined by Professor Wu is a “contemporary spread of technically infringing, but nonetheless tolerated, use of copyrighted works.”³⁷ In other words, tolerated use is a minimal infringement upon a copyright that the copyright holder has notice of, but takes no action to prosecute.³⁸ In reality, this lack of prosecution may benefit the copyright holder by encouraging users to buy a song, watch a show, or buy a product.³⁹

Professor Wu suggests that the “no action policy” will help balance what claims will be brought against copyright infringers “without deterring complementary use of the underlying work.”⁴⁰ This policy allows the copyright owner to declare what uses will be tolerated through the process of prosecuting only actions that fall outside the scope of this copyright holder’s tolerated use.⁴¹ It will also benefit users by providing certainty to an otherwise grey area of copyright law by informing the user as to what activities will be prosecuted.⁴² The result could encourage creativity for users as well as benefit the original copyright holder.⁴³

Tolerated use is a beneficial concept. It allows for growth of creativity, decreases the fear of being prosecuted and can help unknown talents be discovered. Despite these benefits, not all are convinced.⁴⁴ It has been argued that more copyright protection is needed, not less.⁴⁵ Some argue that copyright holders tolerating the use of the copyrighted material does not promote creativity because users will eventually ignore the tolerated use limitations and continue to infringe on copyright without fear of prosecution.⁴⁶ Thus, by having less copyright enforcement through minimal infringement, a chilling effect could

³⁵ See Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1233 (2011); Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1412 (2010).

³⁶ See Wu, *supra* note 30, at 617.

³⁷ *Id.*

³⁸ *Id.* at 619 (recognizing that the reason for this tolerated use could be due to laziness or costs).

³⁹ See *id.*

⁴⁰ *Id.* at 628.

⁴¹ *Id.* at 633 (stating that what falls under the “no action policy” can be simply posted on a website or somewhere else).

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See generally, Michael Grynberg, *Property is a Two-Way Street: Personal Copyright Use and Implied Authorization*, 79 FORDHAM L. REV. 435, 441–57 (2010).

⁴⁵ See Lili Levi, *Remarks for the Future of Copyright Conference* (Univ. of Miami Sch. of Law, Paper No. 2007-22, 2007).

⁴⁶ See Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 578 (1997) (describing generally how it is difficult to equate copyright law and the real world); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 16 (2010).

occur, decreasing the incentive to create innovative and new ideas.⁴⁷ This chilling effect has been recognized with service providers, like smartphones.⁴⁸

The level of tolerated use by a copyright holder depends on the generosity of the copyright holder and on the benefit the holder believes may be gained through tolerated use.⁴⁹ For example, if there has been an increase in revenue is generated from licensing a copyright, the copyright holder may choose to prosecute all but a few tolerated uses, in order to preserve the revenue stream.⁵⁰ Over time, the content owner may change his or her level of “tolerance” as technology and markets change.⁵¹ However, the changing market can make it difficult to determine whether infringement would in fact benefit the copyright holder in the future.⁵²

Tolerating infringement has the potential to harm the copyright holder, the infringing user, or the public.⁵³ Allowing infringement may distort copyright policy and assist in efforts to use copyright law to control certain technologies.⁵⁴ Nevertheless, tolerated use seems to be a growing concept accepted in different emerging technologies as well as the music industry. However, tolerated use seems to only apply in theory, and has not been applied in legal cases because it does not appear to have been adopted as a possible defense to a copyright infringement claim.⁵⁵

A recent area of conflict and uncertainty arose with user-generated

⁴⁷ See David R. Pekarek Krohn, *Media-Rich Input Application Liability*, 17 MICH. TELECOMM. & TECH. L. REV. 201, 232, 237 (2010); see also Grynberg, *supra* note 44, at 447–48 (“[W]hen the rights holder claims, ‘This is infringing, but I’ll let it go,’ the consumer lacks the incentive or ability to mount a vigorous defense.”).

⁴⁸ See Krohn, *supra* note 47, at 233.

⁴⁹ See *id.* (“Personal use is important because it actually promotes the consumption of copyrighted works. Similarly, without users [taking] advantage of them, [creators] would not invest in development of innovative new applications.”); Levi, *supra* note 45.

⁵⁰ Krohn, *supra* note 47, at 235 (demonstrating that industries, such as the music industry, are changing the way they want to enforce a copyright).

⁵¹ See Levi, *supra* note 45, at 9.

⁵² See *id.* at 7.

⁵³ See Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 295 (2011) (“Not every beneficial use of a copy, however, is also a beneficial use of the work embodied in it.”).

⁵⁴ Grynberg, *supra* note 44, at 448; see *id.* at 457 (noting that users should not govern the way a copyright is enforced, the owner of the copyright should).

⁵⁵ Tolerated use has been applied to trademarks (Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. B.E. Windows Corp., 937 F. Supp. 204, n.14 (S.D.N.Y. 1996) (stating plaintiff “has tolerated uses of the phrase ‘The Greatest ___ on Earth’ for significant periods of time”), easements (Watson v. Eaglin, 606 So. 2d 87, 88–89 (La. Ct. App. 1992) (noting that the plaintiffs *tolerated the use* of the land without seeking judicial intervention for over ten years), and trade names (O. K. Tire & Rubber Co. v. Oswald, 166 N.W.2d 749, 751 (Iowa 1969) (stating plaintiff stipulated to having knowledge of *tolerating the use* of the company name). However, the cases that came up in the search did not demonstrate “tolerated use” within a copyright context. See also Wu, *supra* note 30.

content (“UGC”).⁵⁶ UGC is a platform for users to create content, such as mashups,⁵⁷ and then release the content on websites such as Facebook, MySpace, or blogs.⁵⁸ Here, the copyright owner may tolerate such a use or “hedge” the minimal use of the copyrighted material.⁵⁹ “Hedging,” similar to tolerated use, is when “the copyright owner cannot be pinned down as having formally authorized the use,” but may have vaguely endorsed the use of the copyrighted material.⁶⁰

Although there has been open backlash concerning UGC,⁶¹ many Hollywood studios, musicians, music labels, television networks, and publications support this practice of users freely embedding videos and content on their websites⁶² because of an economic incentive to find new artists or to promote users to create videos that can lead to an increase in viewership of a television show or purchase of a song.⁶³ Consequently, the increase of UGC has allowed users to engage in informal practices of infringement that many copyright holders have accepted,⁶⁴ creating a “warming”⁶⁵ effect. This warming effect may lead users to believe this type of copyright infringement is acceptable thereby expanding emerging grey areas of copyright law.⁶⁶

To further elaborate on tolerated use within the music industry, there have been instances where music blogs allow users to download music from the blog without fear of prosecution, thus demonstrating tolerated use.⁶⁷ For example, Hype Machine, a music blog that makes music available to download or stream by users, thereby promoting

⁵⁶ See Lee, *supra* note 34, at 1460.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1488.

⁶⁰ See *id.* (noting that the copyright owner may one day endorse the use, but on another day may be against the practice of tolerated use).

⁶¹ See, e.g., *id.* at 1519–20 (stating that there have been class action lawsuits brought against YouTube and retaliation by the music industry).

⁶² Lee cites examples of musicians, music labels, television networks, and publications that support users freely embedding videos: David Byrne, David Bowie, U2, Timbaland, Carrie Underwood; Polydor and Warner Brothers music labels; NBC and Fox creating the website hulu.com; and The New York Times, The Los Angeles Times, and the Wall Street Journal, just to name a few. *Id.* at 1520–21.

⁶³ See *id.* at 1522 (“[I]t behooves the content industry to be involved [in] . . . harvesting talent, [and] building buzz.”).

⁶⁴ See *id.* at 1543.

⁶⁵ See also *id.* at 1544–47 (describing the theory of “warming”).

⁶⁶ *Id.* at 1544–45 (“[C]opyright holders have not challenged or discouraged the practice . . . given what appears to be a growing acceptance of the practice.”).

⁶⁷ John Hardy Ehlers, *Too Cool to be Sued?: Hype Machine’s Legal Issues and What Content Owners’ Tolerance of Them Means for the Music Business and Copyright Law*, 29 ENT. & SPORTS LAW. 3 (2012); but see *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200–03 (C.D. Cal. 2010) (defendant BlueBeat was a music website that posted music that could either be streamed or downloaded if the user created an anonymous account and the court found there was copyright infringement).

music and artists,⁶⁸ has surprisingly avoided legal action.⁶⁹ Record labels may not be prosecuting Hype Machine because blogs can promote new music and unknown artists, which may decrease the risk of investment in a new artist.⁷⁰ Additionally, music blogs provide an economic incentive for music labels by helping predict actual album sales simply by looking at the volume of blog posts for a particular song or album.⁷¹ Accordingly, the music industry appears to accept tolerated use as a common practice when it comes to music blogs.

Music tablature is another example of tolerated use in the music industry.⁷² Music tablature is a diagram of music notes used by artists to learn how to play a song on his or her guitar.⁷³ Up until fifteen years ago, a person who wanted to learn a song could only do so by ear, purchase sheet music, or learn from an instructor.⁷⁴ Today, instead of spending money on sheet music or hiring a private instructor,⁷⁵ musicians have created an online network where musicians can post music tablature to share with other musicians.⁷⁶ Even though copyright infringement claims against musicians who post music tablature on these websites have been brought, it has been suggested that tolerated use should be the accepted practice instead of copyright infringement actions because with each prosecuted case, the gap is further widened between the music industry and fans.⁷⁷ As a result, some musicians today “link to online tab resources or allow fans to post tabs on their official and unofficial websites.”⁷⁸

Common hip-hop industry norms demonstrate a movement towards tolerated use by balancing interests of the creator and subsequent users.⁷⁹ This industry-based system allows the community to

⁶⁸ The website also posts artists’ tour dates and links to websites such as iTunes and Amazon to play music. Ehlers, *supra* note 67, at 3; *see generally* HYPE MACHINE, <http://hypem.com/popular> (last visited Mar. 5, 2013).

⁶⁹ *See* Ehlers, *supra* note 67, at 3–5 (analyzing why Hype Machine may have violated copyright law).

⁷⁰ *Id.* at 5 (“Foster the People and Vampire Weekend both became popular on blogs and [Hype Machine] before signing with major labels . . .”).

⁷¹ *Id.*

⁷² Tara Lynn Waters, Note, *Gimme Shelter: Why the Courts Can’t Save Online Guitar Tablature, but the Music Publishing Industry Can (and Should)*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 253, 254 (2007).

⁷³ *See id.*

⁷⁴ *See, e.g., id.* at 255.

⁷⁵ Sheet music can cost approximately \$4.95 per song and a lessor can cost approximately \$25.00–\$75.00 per hour. *Id.*

⁷⁶ *See id.* at 255–56 (noting that sharing tablature online promotes feedback and music education, even though there have been claims for copyright infringement).

⁷⁷ *See id.* at 285.

⁷⁸ *Id.*

⁷⁹ *See* Horace E. Anderson, Jr., *No Bitin’ Allowed: A Hip-Hop Copying Paradigm for All of Us*, 20 *TEX. INTELL. PROP. L.J.* 115, 129–31 (2011) (analyzing various industries that have common norms, such as stand-up comedians, chefs, and magicians, that help balance the profession).

enforce hip-hop industry norms instead of relying on copyright law.⁸⁰ Therefore, like folk music, hip-hop has a history of respectful quoting; usually a later generation artist is quoting an earlier artist.⁸¹ Acceptable quoting ranges from merely quoting a line to quoting an entire song “if the song is sufficiently iconic.”⁸² With imitation, the original creator determines whether the imitation is detrimental to the copyrighted work by “examin[ing] [] the goodwill effects—whether the copying usurps or enhances the goodwill of the originator as a purveyor of creative works in the marketplace,”⁸³ thereby granting the original artist discretion on whether to bring a claim. Additionally, this norm allows an artist to copy someone else if it is clear who is being copied, either explicitly or implicitly.⁸⁴ Here,⁸⁵ the originator can claim he or she is the originator, but the originator may not later complain about how the imitator chooses to use the work at a later date.⁸⁶ Since common industry norms dictate what constitutes an actionable claim, tolerated use seems to be an accepted policy within the hip-hop industry with imitation, quoting, and copying as long as the originator is acknowledged.⁸⁷

II. MUSIC PLAGIARISM V. COPYRIGHT INFRINGEMENT: A BRIEF HISTORY OF HOW THE TWO CONCEPTS ARE DIFFERENT, YET INTERTWINE

Copyright infringement is occasionally viewed as necessary to analyze music plagiarism since both intertwine,⁸⁸ yet are completely different. The terms “plagiarism” and “infringement” are often

⁸⁰ See *id.* at 127 (suggesting that some common industry norms are imitation, quoting, and copying); see also Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 345 (2011) (noting that hip-hop has created attribution norms).

⁸¹ See Anderson, *supra* note 79, at 136; see also Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 624–25 (noting that borrowing is common practice in the hip-hop industry); Matthew H. Ormsbee, Note, *Music to Everyone's Ears: Binding Mediation in Music Rights Disputes*, 13 CARDOZO J. CONFLICT RESOL. 225, 235 (2011) (“Quotations, in the form of borrowed musical expression, are used extensively in music . . .”).

⁸² See Anderson, *supra* note 79, at 137.

⁸³ *Id.* at 141.

⁸⁴ *Id.* at 142; see also Arewa, *supra* note 81, at 637 (demonstrating that norms of borrowing within the hip-hop industry relates to a modernized copyright system).

⁸⁵ See Anderson, *supra* note 79, at 142 (“Hip-hop recognizes a quasi-paternity right for the originating artist. Paternity must be acknowledged in order to validate the imitation . . .”).

⁸⁶ *Id.* at 143.

⁸⁷ This model of tolerated use within the hip-hop industry also appears to meet the goals of the “no action policy” since it can benefit the original copyright owner and helps fosters creativity among new artists. See generally Wu, *supra* note 30.

⁸⁸ See *Allen v. Walt Disney Prods., Ltd.*, 41 F. Supp. 134, 137 (S.D.N.Y. 1941) (“[The] court pointed out the need for showing plagiarism in order to establish infringement of a copyright. Where similarities or identities are relied upon, they must do more than engender a suspicion of piracy; they must establish piracy with reasonable certainty.”); WILLIAM F. PATRY, 3 PATRY ON COPYRIGHT § 9:1 (2013) (“‘Infringement’ is occasionally confused with ‘plagiarism.’”); see also *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) (showing a similar claim to *Arnstein* where a party is claiming music plagiarism but the claim is analyzed under copyright law).

interchangeable in different contexts, and in copyright disputes, the term “music plagiarism” is commonly used.⁸⁹ The two terms, however, are different with respect to copying, attribution, and intent of the offense.⁹⁰ Plagiarism may, in fact, be a broader concept than copyright infringement, because a person can copy ideas and expressions that are not covered by a valid copyright.⁹¹ Additionally, under plagiarism, a person may be able to copy a small amount of material that may not be actionable under copyright law.⁹² Conversely, copyright infringement may be the broader concept because it covers attributed and unintentional copying of another’s work that may not be considered plagiarism.⁹³ Indeed, further confusion normally occurs when a court analyzes music plagiarism because it usually disregards unique qualities that compose the final product of a song⁹⁴ and struggles to define and apply unlawful appropriation on a case-by-case basis.⁹⁵ Furthermore, copyright infringement and plagiarism protect different interests.⁹⁶ Copyright infringement tends to protect the economic interests of the originator, requiring the borrower to obtain permission from the originator, whereas plagiarism tends to protect a moral interest requiring the borrower to give attribution to the originator.⁹⁷

An act of plagiarism does not necessarily mean there is a violation of copyright law.⁹⁸ If the creator grants unrestricted permission for use of the work and the user claims the expression as his or her own, the user commits plagiarism, but no violation of copyright law.⁹⁹ On the other hand, if a person copies another’s expression without his or her permission, the plagiarist may have violated copyright law even if the plagiarist attributed the creator as the originator.¹⁰⁰ But, the copied item

⁸⁹ Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1, 45–46 (2010).

⁹⁰ Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CALIF. L. REV. 513, 524 (1992); see PATRY, *supra* note 88.

⁹¹ Stearns, *supra* note 90, at 524.

⁹² *See id.*

⁹³ *See id.*

⁹⁴ Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 229 (1990).

⁹⁵ *See id.* at 242; see Maureen Baker, *La[w] a Note to Follow So: Have we Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1593–94 (discussing how the Ninth Circuit in *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.* expanded on the test created by the Second Circuit in *Arnstein v. Porter*).

⁹⁶ Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 202 (2002).

⁹⁷ *See id.* (explaining the differences between copyright infringement and plagiarism); Jaime S. Dursht, Note, *Judicial Plagiarism: It May Be Fair Use But Is It Ethical?*, 18 CARDOZO L. REV. 1253, 1292 (1996) (“[T]he interests that copyright law protects are economic, not moral.”).

⁹⁸ Stearns, *supra* note 90, at 514.

⁹⁹ BLACK’S LAW DICTIONARY 17c (9th ed. 2009).

¹⁰⁰ *Id.*

at issue may not have even been infringed because it may not be protected by copyright,¹⁰¹ “is in the public domain, or was written by a [] government employee.”¹⁰²

Plagiarism is generally defined as the use of another’s ideas and expressions as one’s own.¹⁰³ Some universities define plagiarism differently, either by including intent or negligence within the definition, while others state plagiarism includes using another’s ideas and expressions as one’s own, regardless of intent.¹⁰⁴ Plagiarism does not fall within a legal category; it is not a crime, a tort, or violation of an intellectual property statute.¹⁰⁵ Hence, plagiarism is not necessarily a legal wrong, but a moral wrong.¹⁰⁶ Many believe it is a fundamental principal to credit the original author when using his or her work¹⁰⁷ even though this does not always happen. Additionally, plagiarism is treated

¹⁰¹ Aaron Keyt, *An Improved Framework for Music Plagiarism*, 76 CALIF. L. REV. 421, 438 (1988).

¹⁰² Green, *supra* note 96, at 200.

¹⁰³ See BLACK’S LAW DICTIONARY, *supra* note 99, at 17c (“The deliberate and knowing presentation of another person’s original ideas or creative expressions as one’s own.”); DICTIONARY.COM, <http://dictionary.reference.com/browse/plagiarism> (last visited Oct. 14, 2013) (“[A]n act or instance of using or closely imitating the language and thoughts of another author without authorization and the representation of that author’s work as one’s own, as by not crediting the original author [A] piece of writing or other work reflecting such unauthorized use or imitation”); MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/plagiarize> (last visited Oct. 14, 2013) (“[T]o steal and pass off (the ideas or words of another) as one’s own [T]o commit literary theft: present as new and original an idea or product derived from an existing source.”); OXFORDDICTIONARIES.COM, <http://oxforddictionaries.com/definition/english/plagiarism> (last visited Oct. 14, 2013) (“[T]he practice of taking someone else’s work or ideas and passing them off as one’s own”); USLEGAL.COM, <http://definitions.uslegal.com/p/plagiarism/> (last visited Oct. 14, 2013) (“[T]aking the writings or literary ideas of another and selling and/or publishing them as one’s own writing.”).

¹⁰⁴ See *Avoiding Plagiarism*, DUKE UNIVERSITY LIBRARIES, <http://library.duke.edu/research/plagiarism/index.html> (last modified Aug. 20, 2012, 2:55 PM) (“Plagiarism occurs when a student, with intent to deceive or with reckless disregard for proper scholarly procedures, presents any information, ideas or phrasing of another as if they were his/her own and/or does not give appropriate credit to the original source.”); Latourette, *supra* note 89, at 16–18; *Plagiarism: What It is and How to Recognize and Avoid It*, INDIANA UNIVERSITY BLOOMINGTON, <http://www.indiana.edu/~wts/pamphlets/plagiarism.shtml> (last modified Apr. 27, 2004) (“Plagiarism is using others’ ideas and words without clearly acknowledging the source of that information.”); Karl Stolley et al., *Purdue OWL: Avoiding Plagiarism*, PURDUE ONLINE WRITING LAB, <http://owl.english.purdue.edu/owl/resource/589/01/> (last modified June 7, 2013, 9:15 AM) (“[P]lagiarism [] is the uncredited use (both intentional and unintentional) of somebody else’s words or ideas.”).

¹⁰⁵ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 62 (2003); see PATRY, *supra* note 88; see generally Green, *supra* note 96, at 208–27 (analyzing whether plagiarism constitutes theft).

¹⁰⁶ See PATRY, *supra* note 88; Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 102 (2010) (“Both authors and audiences generally accept that attribution is important to authors, and that false attribution, especially plagiarism, is a moral wrong.”).

¹⁰⁷ Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 791 (2007); see Garon, *supra* note 106, at 102.

differently in various industries.¹⁰⁸ For example, in the scientific community, plagiarism is treated harshly compared to journalism, or by newspaper editors.¹⁰⁹ In Europe, plagiarism is analyzed under the moral rights doctrine consisting of three parts: (1) the right of integrity, (2) the right of disclosure, and (3) the right of attribution or paternity.¹¹⁰ Although this doctrine has been used in Europe and elsewhere, it is not commonly used in the United States and is limited primarily to visual arts with virtually no application to literary works.¹¹¹ Nevertheless, the doctrine of moral rights seeks to protect the same interests as plagiarism: the moral interests of the work at hand.¹¹²

On the other hand, copyright infringement,¹¹³ although there are many grey areas,¹¹⁴ has a consistent analysis followed by the courts. First, the proponent must demonstrate proof of a valid copyright and that the work at issue that was copied is original.¹¹⁵ Courts have found that intent to infringe¹¹⁶ and damages¹¹⁷ are not elements of an infringement claim. Demonstrating he or she is the owner, author, or assignee of one of more exclusive rights and that the work at issue can

¹⁰⁸ See Green, *supra* note 96, at 196–99; see also *id.* at 196 (“There is, however, a good deal of inconsistency in both the reaction plagiarism elicits and the manner in which it is treated within and across sub-communities.”).

¹⁰⁹ Green states that the scientific community and historians have little tolerance towards plagiarism and those who do plagiarize are criticized harshly. *Id.* at 197. Conversely, journalist and newspaper editors are more lenient when it comes to plagiarism since it is a norm to quote and borrow from others. *Id.* The reason for this inconsistency may be based on the identity of the victim, whether the material plagiarized was used for inspiration, and the basic norms of the community in which the work has been plagiarized. *Id.* at 198. A discussion of tolerated use and plagiarism relating to authors is discussed later in Part III of this Note.

¹¹⁰ See *id.* at 205. Integrity prevents altering work, disclosure allows the originator to determine when the work is complete or when it should be displayed, and attribution allows the author or creator to have his or her name credited to the work. *Id.* at 205–06.

¹¹¹ *Id.* at 206. A similar version of the moral rights doctrine has been adopted in New York and California, but it is limited in the same way Congress limited the moral rights doctrine, specifically to visual arts. *Id.* at 207.

¹¹² *Id.*

¹¹³ See 17 U.S.C. § 106 (2002); BLACK’S LAW DICTIONARY, *supra* note 99, at 17c (“The act of violating any of a copyright owner’s exclusive rights granted by the federal Copyright Act . . .”). Exclusive rights in copyrighted works consist of the right (1) to reproduce, (2) to prepare derivative works based on the original work, (3) to distribute copies, (4) to perform the work publicly for certain types of work, (5) to display the work publicly for certain types of work, (6) to perform sound recordings publicly, and (7) to import copies into the United States. BLACK’S LAW DICTIONARY, *supra* note 99, at 17c.

¹¹⁴ See Wu, *supra* note 30.

¹¹⁵ *Feist Publ’ns, Inc. v. Rural Tel. Servs., Inc.*, 499 U.S. 340, 361 (1991); see 17 U.S.C. § 101 (2010); see also 17 U.S.C. § 106 (2002).

¹¹⁶ See, e.g., *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) (“It does not matter that [d]efendant [] may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright infringement. . . . [I]nnocence is significant to a trial court when it fixes statutory damages . . .”); see DAVID MIRCHIN, WHAT IS COPYRIGHT LAW? § 70 (2002).

¹¹⁷ See *On Davis v. The Gap, Inc.*, 246 F.3d 152, 158 (2d Cir. 2001) (“The existence of damages suffered is not an essential element of a claim for copyright infringement.”); see MIRCHIN, *supra* note 116.

be copyrighted proves ownership.¹¹⁸ Copying can be proven by demonstrating the defendant had an opportunity to access plaintiff's work, defendant appropriated copyrightable elements, and substantial similarity between the two works.¹¹⁹

Although copyright infringement and plagiarism are different concepts, courts have difficulty distinguishing between musical plagiarism and copyright infringement cases simply because of the nuances.¹²⁰ However, courts continue to use a similar test when approached with a copyright infringement lawsuit involving aspects of musical plagiarism.¹²¹ To further exemplify how these two concepts intertwine, and how courts struggle defining certain elements of both claims, the Second Circuit case *Arnstein v. Porter*¹²² specifies the burdens of proof needed to establish copyright infringement, but not necessarily the proof needed to demonstrate musical plagiarism. It is important to note that the original claim in the case was plagiarism;¹²³ however, the court primarily focused on analyzing whether copyright infringement had occurred, thus demonstrating how courts commonly confuse copyright infringement with music plagiarism.¹²⁴

In *Arnstein*, the court laid out a two-step test trying to provide a guideline in establishing whether or not copyright infringement has actually occurred. As to the copyright infringement claim, the court required the plaintiff to prove that: (1) the song is covered by a valid copyright, and (2) the defendant had copied the plaintiff's song through improper appropriation¹²⁵ Here, the plaintiff has the burden of proving copying as well as illicit copying.¹²⁶ To prove copying, the plaintiff can

¹¹⁸ MIRCHIN, *supra* note 116, at § 71; *see generally* *Feist*, 499 U.S. 340.

¹¹⁹ MIRCHIN, *supra* note 116, at § 72; *see* *Grubb v. KMS Patriots, L.P.*, 88 F.3d 1, 3 (1st Cir. 1996).

¹²⁰ *See* *Stearns*, *supra* note 90, at 521–22 (“The lone area in which the term has developed some legal currency is in musical-copyright infringement. There, however, plagiarism simply means unauthorized copying, a strict-liability offense that cannot be cured by crediting the original composer.”); *see generally* *infra* notes 122–131.

¹²¹ *See* *Brent*, *supra* note 94, at 232; *see also* *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) (noting that the proponent must satisfy certain aspects under a copyright infringement case, such as proof of actual copying, in order to show musical plagiarism).

¹²² *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). In this case, Plaintiff accused the Defendant of plagiarizing multiple songs and compositions that have previously been recorded, performed, and even those that have not even been published, but were sent to publishers. *Id.* at 468–69. *See* *Brent*, *supra* note 94, at 232 (“*Arnstein v. Porter* continues to be the most influential and widely-quoted musical copyright infringement test.”); *see also* *Repp*, 132 F.3d 882.

¹²³ *See generally* *Arnstein*, 154 F.2d at 467–68 (stating the plagiarism claims of the plaintiff).

¹²⁴ *See id.* at 474 (noting that there should be trials for plagiarism, yet the court continued to focus on whether copyright infringement had occurred).

¹²⁵ *Id.* at 468; *see* Maureen Baker, Note, *La[w]—A Note to Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1592 (1992) (noting that the third prong of the test, “unlawful appropriation,” is also referred to as “illicit copying”); *see also* *supra* notes 115–119 and accompanying text (demonstrating that the test laid out in *Arnstein* is similar to the modern approach in determining copyright infringement claims).

¹²⁶ *See* *Baker*, *supra* note 125, at 1593.

present expert testimony—otherwise called a musicologist¹²⁷—to determine which parts of the song are similar in order to assist the jury.¹²⁸ However, when proving illicit copying, expert testimony is not permitted to demonstrate the similarity of songs, but is only permitted to testify as to how the lay listener would react.¹²⁹ The “lay listener test” asks for the trier of fact to look at “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that the defendant wrongfully appropriated something which belongs to the plaintiff.”¹³⁰ While employing the test, the plaintiff will play for the jury parts of the song at issue to see how the jury reacts to determine whether copying does exist.¹³¹

Although this test is commonly used and has been expanded upon, it has also been criticized because some believe that the test set forth in *Arnstein* tends to confuse the jury for a lay listener.¹³² The “lay listener” is a similar standard to that of a “reasonable person”; hence, a problem arises because the jury may not consist of what a judge, an attorney, or society considers a “reasonable person.”¹³³ For example, it has been suggested that when an expert witness is used to prove copying through testimony about the similarities between the two works at issue, there is a chance the jury could be improperly influenced by the testimony of the expert to believe that the songs sound more similar than they actually are.¹³⁴ Therefore, if expert testimony is not admitted, it is likely that a juror may reach a different conclusion if he or she listened as what the court describes as a “lay listener,” instead of hearing the expert testimony.¹³⁵

Both plagiarism and copyright infringement tend to be analyzed together, since, as demonstrated in *Arnstein*, music plagiarism was the original claim and an analysis of copyright infringement led to the

¹²⁷ FRED LANE, 3 LANE GOLDSTEIN TRIAL TECHNIQUE § 16:38 (3d ed. 2012) (“A musicologist is an expert who had studied the science, history, form and methods of music. . . . Some musicologists who specialize in plagiarism cases characterize themselves as ‘musical plagiarism experts.’ The music plagiarism expert is particularly qualified to analyze two or more musical works to compare . . . their relationship.”).

¹²⁸ See Baker, *supra* note 125, at 1593.

¹²⁹ *Id.*

¹³⁰ *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946); see *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997).

¹³¹ See *Arnstein*, 154 F.2d at 473.

¹³² See Austin Padgett, Note, *The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation*, 7 PIERCE L. REV. 125, 146 (2008). Although the author of the note endorses the use of the “lay listener test,” here, the author cites examples of other scholars who have criticized the “lay listener test” such as Stephanie J. Jones, *Id.*

¹³³ *Id.* at 146.

¹³⁴ Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 295–96 (1993).

¹³⁵ See *id.* at 296.

eventual conclusion of whether actual copying existed;¹³⁶ therefore, the court confused music plagiarism with copyright infringement. The tests employed by the courts to find music plagiarism or copyright infringement may not be sufficient,¹³⁷ and do have some flaws since music is difficult to dissect¹³⁸ if experts are not used. However, the plaintiff can choose to present different facts in order to establish a claim for plagiarism or a claim for copyright infringement. Nevertheless, the concepts are separate and distinct. Proof of one does not mean that the other exists.

III. ANALYZING TOLERATED USE THROUGH THE MUSIC OF BOB DYLAN

It is important to understand the process of borrowing for musicians who quote and borrow from others before looking at past and modern examples of Bob Dylan being accused of borrowing heavily or plagiarizing from other musicians. Bob Dylan, like many other folk musicians, has borrowed from others, and others have borrowed from him. Recent accusations of plagiarism against Bob Dylan involve his more current albums *Modern Times* and *Love and Theft*. In both albums, Bob Dylan was accused of plagiarizing from Muddy Waters, a blues musician; Henry Timrod, a Civil War poet; and Dr. Januchi Saga, a Japanese author.

A. *The Rich Tradition of Quoting and Borrowing in Music*

The rich tradition of quoting and borrowing in music,¹³⁹ both in folk music as well as other genres, suggests that it has not been frowned upon. “[Q]uotation’ and ‘borrowing’ are as old as the hills in poetry, traditional songs, and visual art. . . . It’s often a part of making art.”¹⁴⁰ Information available from the past can inspire another in the present.¹⁴¹ Folk artists, for example, can be inspired by current events or events within his or her community thereby demonstrating to people, through

¹³⁶ See *supra* notes 122–131

¹³⁷ It has been suggested that a more uniform standard should be applied with regards to expert witnesses when testifying about whether copying does in fact exist during a music plagiarism/copyright infringement case. See Baker, *supra* note 125, at 1637.

¹³⁸ *Id.*

¹³⁹ Carlos Ruiz de la Torre, *Digital Music Sampling and Copyright Law: Can the Interests of Copyright Owners and Sampling Artists be Reconciled?*, 7 VAND. J. ENT. L. & PRAC. 401, n.1 (2005) (“[There has been] a long tradition of musical borrowing . . . by contemporaneous artists in American folk music . . .”).

¹⁴⁰ Dave Itzkoff, *Dylan Paintings Draw Scrutiny*, N.Y. TIMES (Sept. 26, 2011, 8:20 PM), <http://artsbeat.blogs.nytimes.com/2011/09/26/questions-raised-about-dylan-show-at-gagosian/>; see Alan Korn, *Renaming That Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321, 342 (1992) (“[Q]uotation in music existed long before contemporary forms of popular music.”).

¹⁴¹ Brad A. Greenberg, *More Than Just a Formality: Instant Authorship and Copyright’s Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028, 1070–71 (2012).

storytelling, why the musician believes that fact or event is important.¹⁴²

Indeed, music has historically borrowed others' expressions and styles while also quoting others' music.¹⁴³ Borrowing seems to be more prevalent with musicians as compared to other forms of media due to the fact that musicians work within a limited musical scale as compared to other forms of media that are free to explore elsewhere.¹⁴⁴ To demonstrate this idea, rock and roll has commonly borrowed from country music and folk music.¹⁴⁵ "[R]ock 'n' roll has [always had] a history of 'borrowing' previously existing musical ideas."¹⁴⁶ Thus, many contemporary rock musicians have borrowed from one another.¹⁴⁷

Music borrowing ranges from imitating a musician's guitar style where that musician's style was in fact borrowed from another musician before him,¹⁴⁸ or, put simply, an artist admitting that he or she did borrow or imitate another musician.¹⁴⁹ Many famous musicians like Bob Dylan have started his or her career by imitating others.¹⁵⁰ Quoting and borrowing has come up in other genres of music as well, such as rap where musicians commonly borrow from funk and soul music, jazz,¹⁵¹ and the blues.¹⁵²

Musicians and composers have traditionally borrowed ideas and concepts from folk music.¹⁵³ Louis Armstrong once said: "Man, all music is folk music. You ain't never heard no horse sing a song, have

¹⁴² Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 546–48 (2007) (discussing that judges have a tendency to quote folk music because the songs usually discuss current events).

¹⁴³ Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 586 (1992).

¹⁴⁴ Carissa L. Alden, Note, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 CARDOZO L. REV. 1729, 1744–45 (2008).

¹⁴⁵ See Korn, *supra* note 140, at 341.

¹⁴⁶ See Hampel, *supra* note 143, at 560 (quoting Elizabeth Drake, *Digital Sampling: Looming Copyright Problem*, UPI (May 4, 1987)).

¹⁴⁷ *Id.* at 586.

¹⁴⁸ The author notes that even though many artists imitated the guitar style of Chuck Berry, Chuck Berry himself borrowed his own style from country western musicians, who in turn borrowed their style from African-American musicians. *Id.*

¹⁴⁹ See *id.* at 560 (noting that the Beatles were very open about how they borrowed material from other artists).

¹⁵⁰ Jonathan Bailey, *The Fifth International Plagiarism Conference: Day Two*, PLAGIARISM TODAY (July 19, 2012), <http://www.plagiarismtoday.com/2012/07/19/the-fifth-international-plagiarism-conference-day-two/>. The post states that Richard Pryor, a comedian, obtained his start from imitating other comedians, like Bill Cosby, when he started his career. *Id.*

¹⁵¹ See David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 373, 409–14, 429 (2010) (describing the origins of jazz music).

¹⁵² See Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 581–82 (2010) (stating that blues music especially has been equated to the traditions within folk music since they usually co-existed, leading some to be confused as to whether blues was a form of folk music).

¹⁵³ See Keyt, *supra* note 101, at 424.

you?"¹⁵⁴ Folk music has been seen as a source of material¹⁵⁵ since, after all, a large percentage of folk music is in the public domain,¹⁵⁶ allowing musicians to quote and borrow without fear of being prosecuted for copyright infringement. Common folk music trends in societies have dealt mainly with the appropriation of melodies, however direct quoting and borrowing was viewed as the norm.¹⁵⁷ For example, Woody Guthrie, highly respected folk musician who himself has inspired many musicians like Bob Dylan,¹⁵⁸ has borrowed from others as his primary method of writing.¹⁵⁹ In the 1930s, songs and melodies written by the Carter Family inspired Woody Guthrie.¹⁶⁰ In turn, Woody Guthrie would use their melodies while using his own lyrics to create songs like *Will the Circle Be Unbroken*.¹⁶¹ Like Woody Guthrie, musicians or authors may acknowledge that his or her work was derived from folk traditions or other traditions when accrediting a piece of work.¹⁶²

B. Bob Dylan's Early Career

Like many folk artists, Bob Dylan admitted to borrowing and taking melodies for songs that he wrote from past folk and blues musicians, and other writers.¹⁶³ In 1962, Bob Dylan admitted that he took the tune for *The Death of Emmett Till*¹⁶⁴ from Len Chandler's song *The Bus Driver*.¹⁶⁵ Dylan admitted that since he liked the chords

¹⁵⁴ *Quotations From Jazz Musicians, Composers and Fans*, A PASSION FOR JAZZ!, <http://www.apassion4jazz.net/quotations.html> (last visited Oct. 15, 2013).

¹⁵⁵ See Keyt, *supra* note 101, at 424.

¹⁵⁶ See *id.* at n.16 ("Where folk music is in the public domain, as is usually the case, there is no legal obstacle to its use, [but] there may be disputes [involving] derivative work.")

¹⁵⁷ Mozart Olbrycht-Palmer, *Illegal Sound Musical Quotation Research Paper*, OLBRYCHTPALMER (June 9, 2012, 3:18 PM), <http://olbrychtpalmer.net/2012/06/09/illegal-sound/>.

¹⁵⁸ Bob Dylan's early inspirations will be discussed later on in this Part of the Note. Woody Guthrie influenced many musicians in the later part of the 20th century. See William Ruhlmann, *Woody Guthrie*, ALLMUSIC, <http://www.allmusic.com/artist/woody-guthrie-mn0000577531/biography> (last visited Oct. 15, 2013) (describing the overview of Woody Guthrie's career and songs during his career from the 1930s–1960s).

¹⁵⁹ See *id.* ("For the most part, Guthrie created his songs by writing new lyrics to existing folk melodies.")

¹⁶⁰ See Nick Spitzer, *The Story of Woody Guthrie's 'This Land Is Your Land,'* <http://www.npr.org/2000/07/03/1076186/this-land-is-your-land> (last visited Jan. 14, 2014) (noting that the Carter Family helped inspire the song *This Land Is Your Land*).

¹⁶¹ See Olbrycht-Palmer, *supra* note 157.

¹⁶² See Troutt, *supra* note 151, at 383.

¹⁶³ Wilentz, *supra* note 19.

¹⁶⁴ *Id.*; see generally BOB DYLAN, *THE BOOTLEG SERIES, VOL. 9: THE WITMARK DEMOS: 1962–1964* (Columbia Records 2010).

¹⁶⁵ See Wilentz, *supra* note 19; see also Michael Gray, *Len Chandler*, BOB DYLAN ENCYCLOPEDIA: A BLOG 2006–2012 (May 27, 2010, 11:49 AM), <http://bobdylanencyclopedia.blogspot.com/2010/05/len-chandler.html>. Len Chandler was a well-known guitarist and folk singer from the 1960s. He performed at the Newport Folk Festival in 1964, where Bob Dylan also performed. However, after Dylan admitted he took the tune from Chandler, Chandler retaliated and wrote songs using the same phrasing as Dylan did, such as "don't think twice, we might

Chandler used, he stole the whole tune and even Chandler's style, stating he "never sang one song in minor key" before hearing Chandler.¹⁶⁶ Additionally, the melody for *Blowin' in the Wind*¹⁶⁷ is the same as an older song *No More Auction Block*.¹⁶⁸ The song *The Ballad of Hollis Brown*'s melody comes from a 1920s ballad *Pretty Polly*.¹⁶⁹ Furthermore, the musical arrangement for *Masters of War* comes from Jean Ritchie's English folk song *Nottamun Town*.¹⁷⁰

Although a few older folk singers complained that Bob Dylan took their melodies and tunes, their complaints eventually ended when many folk singers themselves realized that they too had borrowed or had taken melodies directly from other musicians or writers, just like Bob Dylan did. For example, Pete Seeger, another acclaimed folksinger, called this method of borrowing "the folk process."¹⁷¹ "The folk process" is a method whereby musicians borrow from someone in the past in order to create something new.¹⁷² Quoting and borrowing from other musicians or writers appears to be a cultural norm not only with musicians, but also with other professions.

C. *Accusations by Others in the Music Industry Against Bob Dylan – Were These Claims Valid?*

Bob Dylan has previously been accused of plagiarism and copyright infringement claims, but no court has ever ruled that he did plagiarize.¹⁷³ Plagiarism, as discussed previously, is not necessarily a

fight." Gray, *supra* note 165.

¹⁶⁶ See Gray, *supra* note 165 (discussing what Bob Dylan said on the radio show).

¹⁶⁷ *Id.*; BOB DYLAN, *THE FREEWHEELIN' BOB DYLAN* (Columbia Records 1963) (stating that this is the album *Blowin' in the Wind* was on). However, Bob Dylan disputes this fact, as you will see in Part III(D).

¹⁶⁸ See Gray, *supra* note 165. The song was later recorded by Bob Dylan himself on *The Bootleg Series Volumes 1-3 (Rare and Unreleased) 1961-1991*. See BOB DYLAN, *No More Auction Block, on THE BOOTLEG SERIES, VOLUMES 1-3 (RARE & UNRELEASED) 1961-1991* (Columbia Records 1991). However, in a recent Bob Dylan interview with *Rolling Stone*, Bob Dylan denies that he borrowed any tune for his song *Blowin' in the Wind*. See Gilmore, *supra* note 20.

¹⁶⁹ Ben Corbett, *Bob Dylan, Plagiarist?: Was Dylan's Rise to Songwriting Fame Ethical?*, <http://folkmusic.about.com/od/bobdylan/a/Bob-Dylan-Plagiarism.htm/> (last visited Oct. 16, 2013); see Paul Slade, *Timber Wolf: Pretty Polly*, PLANETSLADE, <http://www.planetslade.com/pretty-polly.html> (last visited Oct. 16, 2013) (noting that Bob Dylan borrowed the tune from *Pretty Polly* for his song *The Ballad of Hollis Brown*, but Dylan did not record the actual song *Pretty Polly* on an album, but other artists such as Woody Guthrie and The Byrds used the tune or played the song on their albums); see also *Pretty Polly*, BOBDYLAN.COM, <http://www.bobdylan.com/us/songs/pretty-polly> (last visited Oct. 16, 2013) (list of when Bob Dylan performed the song *Pretty Polly* live in concert).

¹⁷⁰ Corbett, *supra* note 169; see Tim Dunn, *The Bob Dylan Copyright Files 1962-2007*, p. 319 (2008) (discussing how Bob Dylan was inspired by this song for *Masters of War*).

¹⁷¹ See Wilentz, *supra*, note 19; see William Ruhlmann, *Pete Seeger: Artist Biography by William Ruhlmann*, ALLMUSIC, <http://www.allmusic.com/artist/pete-seeger-mn0000266160/biography> (last visited Oct. 16, 2013) (stating that Pete Seeger was primarily responsible for "the folk music revival of the late '50s and early '60s").

¹⁷² See Wilentz, *supra* note 19.

¹⁷³ See *infra* note 190.

legal wrong, but a moral wrong.¹⁷⁴ Thus, as discussed later in this Note, Bob Dylan's reactions to recent plagiarism claims may be more hostile than they were in the past, which I believe indicates he may have consciously borrowed material from others, like James Damiano or Muddy Waters, without citing his source.¹⁷⁵ Additionally, the plagiarism claims demonstrate that Bob Dylan borrowed phrases or quotes not only from other musicians, but also from poets or authors such as Henry Timrod or Dr. Junichi Saga.¹⁷⁶ Although the examples below may demonstrate plagiarism or possible plagiarism, they are merely accusations appeared to be tolerated by critics, fans and courts.

1. Damiano v. Sony Music Entertainment, Inc.

Plagiarism, as discussed above, is the use of another's ideas and expressions as one's own.¹⁷⁷ In recent years, Bob Dylan has been accused of plagiarizing other musicians' work without giving credit to the original artist. Although the claims appear to have merit, not all claims have been proven. In the 1990s, songwriter James Damiano worked with Bob Dylan preparing a song that later appeared on Dylan's greatest hits album,¹⁷⁸ *Dignity*.¹⁷⁹ Even though additional evidence tended to show that plagiarism did in fact occur, the court in *Damiano v. Sony Music Entertainment, Inc.* did not allow additional evidence—an interview tape with the Associated Press where Bob Dylan stated he had writer's block and record sales numbers from recently recorded albums—to be compelled from defendants to help the plaintiff prove that Bob Dylan plagiarized or infringed on his song¹⁸⁰. Plaintiff Damiano accused Sony Records of falsely attributing versions of his 1982 song he submitted to the record company to Bob Dylan.¹⁸¹ The plaintiff further claimed the continued requests for music through 1988, including the song falsely attributed to Bob Dylan, consisted of infringement and misappropriation of his work.¹⁸²

James Damiano contended that his song *Steel Guitars* was the

¹⁷⁴ See *supra*, note 106

¹⁷⁵ See *infra* Part II.C.1 and 2.

¹⁷⁶ See *infra* Part II.D.1 and 2.

¹⁷⁷ See *supra* notes 103–112 and accompanying text for an explanation of plagiarism.

¹⁷⁸ See BOB DYLAN, BOB DYLAN'S GREATEST HITS VOLUME 3 (Columbia Records 1994); *Greatest Hits Volume 3 (1994)*, BOBDYLAN.COM, <http://www.bobdylan.com/us/music/greatest-hits-volume-3> (last visited Oct. 16, 2013).

¹⁷⁹ ØSTREM, *supra* note 8, at 267–71.

¹⁸⁰ *Damiano v. Sony Music Entm't, Inc.* 168 F.R.D. 485, 498 (N.J. 1996) (denying disclosure request for an interview tape that disclosed that Bob Dylan was suffering from writer's block, thereby leading him to copy Damiano's song). The case mainly focuses on motions to compel evidence from the defendant that would in turn show that Bob Dylan had a motivation to misappropriate music from Damiano and not primarily focusing on whether copyright infringement had occurred. *Id.* at 487.

¹⁸¹ *Id.* at 488.

¹⁸² *Id.*

same as Bob Dylan's song *Dignity*.¹⁸³ Although at first glance the songs do not appear similar when comparing rhythm, meter, or phrasing, a closer look at the notes demonstrates that the songs are in fact similar.¹⁸⁴ One musicologist analyzed both songs and concluded they contain similar pitches and melody to one another.¹⁸⁵ Additionally, by looking at the copyright filing date for both songs—Damiano's in 1982 and Dylan's in 1991—demonstrates that the melody and lyrical hook that Dylan allegedly took from Damiano was covered by Damiano's copyright, constituting infringement.¹⁸⁶ In response, however, the author noted that the only similarities between the songs is a "high g", the descending fifth towards the end of the selection, and the descending third . . . at the very end."¹⁸⁷ Furthermore, the method the musicologist used, the Schenker analysis,¹⁸⁸ has been criticized for focusing more on the pitch content when comparing songs rather than looking at specific details of a song to prove similarity.¹⁸⁹ Most importantly, this demonstrates that the songs are in fact similar, however, there are different ways of approaching how similar a song may be.

Nevertheless, when the court ruled on pre-trial discovery motions to compel defendants to produce documents of album sales during the period of alleged misappropriation and the tape recordings made to the press regarding Bob Dylan's writer's block and inability to create new music,¹⁹⁰ the motions were denied.¹⁹¹ Although not apparent in the case, I believe the court gave an incentive to plagiarize through tolerated use because additional evidence Damiano requested could be relevant in making it more likely than not that Bob Dylan plagiarized his song *Steel Guitars*.¹⁹² The court also found that record sales could not dictate whether Bob Dylan had an incentive to plagiarize since they are driven

¹⁸³ See ØSTREM, *supra* note 8, at 267.

¹⁸⁴ *Id.* at 267–68.

¹⁸⁵ The musicologist stated in the article is "Doctor Green who graduated Magna Cum Laude from Harvard University . . ." *Id.* at 268.

¹⁸⁶ *See id.*

¹⁸⁷ *Id.* at 269. This was Mr. Østrem's response to Dr. Green's analysis of *Dignity* compared to *Steel Guitars*. *Id.* The dispute over whether *Dignity* was a replica of *Steel Guitars* is up for debate. It is possible, if the analysis used by Dr. Green is valid, that Dylan did in fact copy the song. However, as stated later on in this section, the court did not allow for additional discovery to assist Damiano from proving his case. *See infra* note 190–191.

¹⁸⁸ Heinrich Schenker was a prominent Austrian musical theorist. *See* Tom Pankhurst, *Tom Pankhurst's Guide to Schenkerian Analysis*, SCHENKERGUIDE, <http://www.schenkerguide.com/whatischenkeriananalysis.php> (last visited Oct. 16, 2013). The method looks at "[t]he surface of the music [which] is called the foreground, the deepest layer [which is] the background and those layers of elaborations in between are referred to as the middleground." *Id.* The method looks at the harmonies that the music creates. *See id.*

¹⁸⁹ *See* ØSTREM, *supra* note 8, at 270.

¹⁹⁰ *Damiano v. Sony Music Entm't, Inc.* 168 F.R.D. 485, 493–94 (N.J. 1996).

¹⁹¹ *Id.* at 500.

¹⁹² *Id.* at 493. Note that the *plaintiff* is not tolerating the use, but the *court* appears to tolerate the use of the plagiarism and infringement. *See* notes 67–71 and accompanying text.

by public opinion and do not necessarily lead to the copying of another's work.¹⁹³ However, record sales could be relevant because if Dylan realized that fans were not purchasing his albums based on material he was personally creating, it could be more beneficial for him to borrow ideas from someone else who he has worked with, like Damiano, whose song may be successful.

Additionally, ruling that a qualified reporter's privilege existed regarding an interview Dylan gave where he claimed he had writer's block demonstrates the willingness of courts to protect the big name musician instead of the original composer, thereby endorsing a minor form of plagiarism.¹⁹⁴ However, protecting Bob Dylan in this one instance may differ in a case where the musician is not well known or does not have a reputation of borrowing from other musicians since the beginning of his career.¹⁹⁵ Indeed, Bob Dylan disclaiming he has writer's block can give rise to an inference for a reasonable jury to believe that it is more likely that he copied Damiano's song if the jury heard that he had writer's block, as compared to the jury not hearing that he had writer's block.

Therefore, by deeming the requested evidence in the motion to compel irrelevant, it is not clear whether or not Bob Dylan did in fact plagiarize James Damiano's song or was merely influenced by his music. Hence, if Damiano's musicologist's theory had been presented to the court and was believed as true, it is very possible that Bob Dylan plagiarized James Damiano's song. On the other hand, if a contrary theory was presented, one that does not involve the Schenker analysis, it is possible that Bob Dylan was only influenced by Damiano's song and used that influence to write *Dignity*, not to copy *Steel Guitars* as his own.¹⁹⁶ Nevertheless, it is still unclear whether the court endorsed Bob Dylan's potential plagiarism because of whom he was or if the court was willing to turn a blind eye to the alleged plagiarism. This court's behavior further demonstrates how a court tolerating the use of another's song may give an incentive to plagiarize. If a court is willing to dismiss a motion to compel discovery that could prove plagiarism, a court may very well do the same for another musician, even if he or she is not as well known as Bob Dylan.

¹⁹³ *Id.* ("However, sales figures do not necessarily reflect one's artistic proliferation. . . . It is possible for Bob Dylan to go through the most prolific period of his career, and coincidentally suffer from the lowest sales in his career due to the public's dislike of his material.").

¹⁹⁴ *Id.* at 498 ("Unless the plaintiff produces evidence that clearly indicates that information on Mr. Dylan's writer's block exists on the tapes, this court finds no lawful reason to compel production of the tapes.").

¹⁹⁵ Critics as well as other musicians claim that this is just what Bob Dylan does; he borrows from others and makes a song his own. See *infra* note 242–248.

¹⁹⁶ See also Green, *supra* note 96, at 179 (noting there are "difficulties of distinguishing between permissible influence and impermissible copying").

2. Muddy Waters and *Rollin' and Tumblin'*

Muddy Waters is a well-known blues musician who began his career in the 1940s, becoming extremely influential in the 1950s to 1970s, and even today.¹⁹⁷ His song *Rollin' and Tumblin'* is a soulful blues song that is commonly associated as his.¹⁹⁸ Even though Muddy Waters is viewed as the creator of the song, Hambone Willie Newbern could have originally written it in the late 1920s.¹⁹⁹ The song was recorded by Muddy Waters in the early 1950s and has been transformed by other artists.²⁰⁰ For example, Sleepy John Estes used Newbern's original tune and created the song *The Girl I Love, She Got Long Curly Hair* and Robert Johnson also used the tune and created *If I Had Possession Over Judgment Day*.²⁰¹ However, when Bob Dylan released *Modern Times*, the song *Rollin' and Tumblin'* appeared on the album in the same manner that Muddy Waters played the song and did not cite him as a source²⁰² even though other artists would generally do the same.²⁰³

When others compared the music tablature from Bob Dylan's *Rollin' and Tumblin'* to Muddy Water's, both versions of the songs are almost note for note identical.²⁰⁴ Dylan takes the riff, song title, the

¹⁹⁷ *Muddy Waters: Artist Biography by Mark Deming*, ALLMUSIC, <http://www.allmusic.com/artist/muddy-waters-mn0000608701/biography> (last visited Oct. 1, 2013) (“The depth of Waters’ influence on rock as well as blues is almost incalculable.”).

¹⁹⁸ See *infra* note 200.

¹⁹⁹ *Id.*; see MUDDY WATERS, *Rollin' and Tumblin'—Part 1, on ROLLIN' AND TUMBLIN'—PART 1* (Aristocrat 1950).

²⁰⁰ See Ali Sleeq, *The Case for Muddy Waters: Bob Dylan's "Modern Times," SPEAKIN' THE BLUES* (June 12, 2011, 11:21 AM), <http://speaktheblues.blogspot.com/2011/06/case-for-muddy-waters-bob-dylans-modern.html> (noting that Bob Dylan did not credit Muddy Waters on his album *Modern Times*).

²⁰¹ See *Rollin' and Tumblin'*, THE GRATEFUL DEAD FAMILY DISCOGRAPHY, http://www.deaddisc.com/songs/Rollin_And_Tumblin.htm (last visited Oct. 2, 2013) (showing who recorded versions of the song *Rollin' and Tumblin'* as well as artists who have adapted the original song into his or her own); Tony Scherman, *Pop/Jazz: Chipping Away at the Myths that Encrust a Blues Legend*, N.Y. TIMES (Sept. 20, 1998), <http://www.nytimes.com/1998/09/20/arts/pop-jazz-chipping-away-at-the-myths-that-encrust-a-blues-legend.html?pagewanted=all&src=pm> (“‘If I Had Possession Over Judgment Day’ is nothing but a ‘rendition’ of the old dance tune ‘Rollin’ and Tumblin’ . . . [I]ndeed [it] takes its skeletal form, and even some of its lyrics . . .”). For information on Sleepy John Estes, including discography, see Barry Lee Pearson, *Sleepy John Estes Artist Biography by Barry Lee Pearson*, ALLMUSIC, <http://www.allmusic.com/artist/sleepy-john-estes-mn0000022845> (last visited Oct. 17, 2013). For information on Robert Johnson, see Cub Koda, *Robert Johnson Artist Biography by Cub Koda*, ALLMUSIC, <http://www.allmusic.com/artist/robert-johnson-mn0000832288/biography> (last visited Oct. 17, 2013) (noting Robert Johnson as one of the most influential blues musicians) and Ben Sisario, *Revisionists Sing New Blues History*, N.Y. TIMES (Feb. 28, 2004), <http://www.nytimes.com/2004/02/28/arts/revisionists-sing-new-blues-history.html> (“Johnson may not have been a star . . . but he had many important followers like Muddy Waters . . .”).

²⁰² *Rollin' and Tumblin'*, http://dylanchords.info/45_modern/rollin-and-tumblin.html (last visited Oct. 17, 2013).

²⁰³ See Sleeq, *supra* note 200 (“[Other artists] usually [give] credit . . . where [credit is] due. Dylan in the past always cited his influences . . . but not this time.”).

²⁰⁴ See *Rollin' and Tumblin'*, *supra* note 202 (comparing music tablature from both musicians).

actual tune, and some of the same words, even though he uses his own words as well.²⁰⁵ However, if the comparison of both songs is taken as correct, plagiarism may have occurred, because Bob Dylan did not credit Muddy Waters as the originator of the music.²⁰⁶ On the other hand, if Bob Dylan did credit Muddy Waters as the originator of the song, but still used the same riff, song title, tune, and words as the original, it is possible that a claim for copyright infringement could be brought against Bob Dylan.

By looking at the elements of what constitutes copyright infringement, showing a valid copyright and that the misappropriated material was original, the claim may be valid, and the claim could stand.²⁰⁷ First, a valid copy can be demonstrated because a copyright was registered for *Rollin' and Tumblin'* in 1960.²⁰⁸ Second, although not dispositive, it can be argued that the work is original because Bob Dylan borrowed only the non-copyrightable essence of the song by using the same song title, tune, riffs, and more. However, it can also be argued that it is not "original" because the song originated in the late 1920s and various artists have registered other versions of the song.²⁰⁹ Therefore, a claim of plagiarism may be stronger in this example because failure to credit Muddy Waters is an act of plagiarism and is not necessarily copyright infringement unless originality is proven. Nevertheless, the fact that a renowned blues musician like Muddy Waters is tolerating Bob Dylan's use of his song *Rollin' and Tumblin'* demonstrates that an incentive to plagiarize may be present within music, or possibly just for Bob Dylan.

3. The Validity of the Claims

The *Damiano* case demonstrates that a successful plagiarism claim

²⁰⁵ Thom Jurek, *Bob Dylan Modern Times*, ALLMUSIC, <http://www.allmusic.com/album/modern-times-mw0000583804/> (last visited Oct. 17, 2013).

²⁰⁶ Lucille M. Ponte, *Preserving Creativity From Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 B.U. J. SCI. & TECH. L. 34, 55 (noting Bob Dylan's liner notes on the album *Modern Times* says "[a]ll songs written by Bob Dylan, and do not credit the creators[]"); see Motoko Rich, *Who's This Guy Dylan Who's Borrowing Lines From Henry Timrod?*, N.Y. TIMES (Sep. 14, 2006), http://www.nytimes.com/2006/09/14/arts/music/14dyla.html?pagewanted=print&_r=0/ ("The liner notes simply say 'All songs written by Bob Dylan' Nor does he credit the traditional blues songs from which he took the titles, tunes and some lyrics for 'Rollin' and Tumblin' . . .").

²⁰⁷ See *supra*, notes 113–119 (stating the elements of copyright infringement).

²⁰⁸ Copyright registration information available at http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=16&ti=1,16&Search_Arg=Rollin%20and%20Tumblin&Search_Code=TALL&CNT=25&PID=fplxVIT-DjaBgKc5jbdU_qkBBAKY&SEQ=20130123212014&SID=2 (last visited Oct. 17, 2013).

²⁰⁹ For other artists who have registered *Rollin' and Tumblin'*, see http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?ti=1,0&Search_Arg=Rollin%20and%20Tumblin&Search_Code=TALL&CNT=25&PID=MYxs6OZQXGzQSwEU9X4bdTTcdLjv&SEQ=20130123213319&SID=2 (last visited Oct. 17, 2013).

against Bob Dylan was difficult to prove.²¹⁰ In contrast, other artists such as Madonna,²¹¹ George Harrison,²¹² and Johnny Cash²¹³ have been successfully sued for plagiarism, whether in court or through an out-of-court settlement. Thus, whether or not Bob Dylan is a plagiarist is hard to determine. Although he did take a song from Muddy Waters and claimed it as his own, and allegedly took Damiano's song and created the song *Dignity*, it has never actually been proven that Bob Dylan plagiarized another person's work.²¹⁴ Thus, the next subsection of this Note discusses whether more recent accusations against Bob Dylan will result in a successful plagiarism claim. However, it is unclear whether an action will be commenced because more recent allegations involve instances of possible plagiarism involving material in the public domain or situations where the author is currently tolerating the use of his material within Bob Dylan's work.

D. Examples of Tolerated Use Through Bob Dylan's Music

A recent plagiarism accusation made against Bob Dylan was made by another folk artist, Joni Mitchell.²¹⁵ Even though both artists emerged during the late 1960s, Mitchell's complaints demonstrate that not all folk artists tolerate plagiarism, or what Mitchell believes is plagiarism. Joni Mitchell accused Bob Dylan of being a fake, a plagiarist, and not authentic.²¹⁶ One could assume that Dylan's career was that of a phony since after all, his real name is Robert Zimmerman,

²¹⁰ See *supra* Part II.C.1.

²¹¹ *No Ray of Light for Madonna in Song Plagiarism Case*, SYDNEY MORNING HERALD (Nov. 20, 2005), <http://www.smh.com.au/news/people/no-ray-of-light/2005/11/19/1132017024510.html> (Belgian songwriter Salvatore Acquaviva won a successful plagiarism case against Madonna and her record label, which prevented Madonna's song *Frozen* from being played on the radio and on television.).

²¹² See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (finding that George Harrison's song *My Sweet Lord* was plagiarized from *He's So Fine* by Ronald Mack).

²¹³ Johnny Cash had an out-of-court settlement with songwriter Gordon Jenkins for plagiarizing Jenkins' song *Crescent City Blues*, which was used for Cash's *Folsom Prison Blues*. See BRUCE JENKINS, *GOODBYE: IN SEARCH OF GORDON JENKINS*, 280–81 (2005).

²¹⁴ See William Henry Prince, *Why I Don't Believe Bob Dylan is a Plagiarist*, WILLIAM HENRY PRINCE, <http://williamhenryprince.com/why-i-dont-believe-bob-dylan-is-a-plagiarist/> (last visited Oct. 17, 2013); *compare Rollin' and Tumblin'—Lyrics—Muddy Waters*, DIGITALDREAMDOOR.COM, http://www.digitaldreamdoor.com/pages/lyrics_blues/mw_rolltumb.html (last visited Oct. 17, 2013) (lyrics of *Rollin' and Tumblin'* by Muddy Waters), *with Rollin' and Tumblin'*, BOBDYLAN.COM, <http://www.bobdylan.com/us/songs/rollin-and-tumblin> (last visited Oct. 17, 2013) (lyrics of *Rollin' and Tumblin'* by Bob Dylan).

²¹⁵ See Jason Ankeny, *Joni Mitchell Artist Biography* by Jason Ankeny, ALLMUSIC, <http://www.allmusic.com/artist/joni-mitchell-mn0000270491/biography> (last visited Oct. 17, 2013) (giving a biography of Joni Mitchell's career and demonstrating that she was a folk musician, but she also changed her style of music throughout her career); *Bob Dylan Biography*, *supra* note 1 (discussing how Joni Mitchell and Bob Dylan performed together as part of Bob Dylan's Rolling Thunder Revue).

²¹⁶ See Wilentz, *supra* note 19.

not Bob Dylan; but that alone does not prove that he is a plagiarist or a phony.²¹⁷ These modern accusations began when Bob Dylan released music on his albums *Modern Times* and *Love and Theft*.²¹⁸ After the albums were released, other musicians and critics claimed that Bob Dylan plagiarized parts of his lyrics from Henry Timrod, a Civil War poet, and from Dr. Junichi Saga, author of a Japanese novel *Confessions of a Yakuza*.²¹⁹ Although Henry Timrod's poetry is in the public domain and Dr. Saga has publicly stated that he is tolerating the use of Dylan's plagiarism,²²⁰ both examples demonstrate how the inaction of the copyright holder could provide an incentive to plagiarize.

1. Henry Timrod on *Modern Times*—Tolerated Use in the Public Domain

When Bob Dylan released *Modern Times* in August 2006,²²¹ people began recognizing that the lyrics of his songs on that album were similar, if not the same, as lines of poetry written by Henry Timrod.²²² Henry Timrod was born in 1828 and began writing poetry during the Civil War.²²³ Several lines of Timrod's poems were found on *Modern Times*,²²⁴ even though lines from Timrod's more famous poems²²⁵ were not referenced on the album. Walter Brian Cisco, author of a biography on Timrod, recognized borrowing of his lyrics on *Modern Times*.²²⁶ For example, on Dylan's song *When the Deal Goes Down*, Cisco recognized a line from one of Timrod's poems, "More frailer than the flowers, these precious hours," which comes from *Rhapsody of a Southern Winter Night*.²²⁷ Not only were phrases borrowed from *Rhapsody of a Southern Winter Night*, but ten other phrases from seven different Timrod poems were identified.²²⁸ Timrod's influence was also found

²¹⁷ *Id.* (noting how musicians, like Bob Dylan, do not always use their real names when performing).

²¹⁸ See *infra* Part II.D.1.

²¹⁹ See *infra* Part II.D.2.

²²⁰ See *infra* note 261.

²²¹ See Jurek, *supra* note 205.

²²² See Ponte, *supra* note 206, at 54–55 (discussing how Bob Dylan did not credit Henry Timrod in the liner notes of his album *Modern Times*); Rich, *supra* note 206.

²²³ See Rich, *supra* note 206. For a list of Henry Timrod's poems and text see *Henry Timrod*, POEMHUNTER.COM, <http://www.poemhunter.com/henry-timrod/poems/> (last visited Oct. 17, 2013).

²²⁴ See Ponte, *supra* note 206, at 54.

²²⁵ See *supra* note 223 and accompanying text. Among his most famous poems were "Ode Sung on the Occasion of Decorating the Graves of the Confederate Dead at Magnolia Cemetery" and "Ethnogenesis." Robert Polito, *Bob Dylan: Henry Timrod Revisited*, POETRY FOUNDATION (Oct. 6, 2006), <http://www.poetryfoundation.org/article/178703>. Both poems discuss how the South was coping with the Civil War. *Id.*

²²⁶ See WALTER BRIAN CISCO, HENRY TIMROD: A BIOGRAPHY (2004).

²²⁷ See Rich, *supra* note 206.

²²⁸ See Polito, *supra* note 225; Rich, *supra* note 206 (explaining that a disc jockey from a public radio station, Scott Warmuth, found ten phrases of Timrod's within Dylan's songs on *Modern*

within other Dylan works, such as the title song written for the film *Gods and Generals*.²²⁹ Additionally, Timrod's phrases from *A Vision of Poesy* were found on Dylan's song *Tweedle Dee & Tweedle Dum*, which was recorded for Dylan's album *Love and Theft*.²³⁰

Even though phrases from Timrod's poems were found on Dylan's songs on *Modern Times* as well as additional works he produced, Timrod's poetry is within the public domain and no longer protected by copyright laws, thus no legal action could actually be taken.²³¹ Nevertheless, fans and critics view the use of Timrod's phrases differently. Some of Dylan's fans still do not approve of Dylan's use of Timrod's poetry without crediting him as a source.²³² On the other hand, fans of Dylan recognize that the borrowing of Timrod's phrases would allow others to learn about Timrod when he or she would otherwise not know about the poet.²³³ James Kibler, a professor at the University of Georgia, believed that the use of Timrod's poetry within Dylan's songs would be beneficial to his students since "his students 'probably know more about Bob Dylan than Timrod.'"²³⁴

However, if Timrod's work was not in the public domain, the reaction from others may be different. Quite possibly more critics or even fans might have a similar reaction to Joni Mitchell when she claimed that Bob Dylan was a plagiarist, and thus would be more hostile to the borrowing. Nevertheless, fans and even professors seem to endorse the plagiarism believing it will be beneficial in promoting Timrod's work, demonstrating that the tolerated use of Dylan's plagiarism could provide an incentive for others to do the same.

On the other hand, for example, if Bob Dylan was an author and not a musician, he may have been accused of plagiarism when people recognized that he lifted phrases from Timrod's poetry and used them for his songs. One author, Kaavya Viswanathan wrote *How Opal Mehta Got Kissed, Got Wild, and Got a Life* in 2006.²³⁵ When readers recognized passages that were taken directly from novels by Megan McCafferty, author of *Sloppy Firsts* and *Second Helpings*,²³⁶ the book

Times).

²²⁹ See Rich, *supra* note 206. A passage from Timrod's poem *Cross the Green Mountain* was found within the title track of the film. *Id.*

²³⁰ See Polito, *supra* note 225. The album *Love and Theft* will be discussed *infra* Part D.2 focusing on Dylan's copying of Dr. Junichi Saga.

²³¹ See Rich, *supra* note 206.

²³² *Id.* (noting that a fan who was interviewed would have preferred if Dylan credited Timrod's work rather than not mention him at all).

²³³ See *id.* ("James Kibler, a professor of English at the University of Georgia who teaches the poetry of Timrod in his Southern literature classes, was delighted to hear of Mr. Dylan's use of the verse. 'If I were Timrod, I would love it.'").

²³⁴ See *id.*

²³⁵ See generally KAAVYA VISWANATHAN, *HOW OPAL MEHTA GOT KISSED, GOT WILD, AND GOT A LIFE* (2006). See Rich, *supra* note 206.

²³⁶ See generally MEGAN MCCAFFERTY, *SECOND HELPINGS* (2003); MEGAN MCCAFFERTY,

was pulled from bookstores and the press heavily criticized Viswanathan.²³⁷ Another recent example of an author being heavily criticized for plagiarism is Helene Hegemann, who authored the book *Axolotl Roadkill*.²³⁸ Not only did Hegemann have a best selling book, but a movie and a play were also being produced that stated she was the author.²³⁹ Like Viswanathan, it was discovered that some of the material from the book was from another novel, *Strobo*.²⁴⁰ Nevertheless, unlike Viswanathan, the book continued to sell in Germany and was not pulled off the shelf despite the realization that portions of the author's book were plagiarized.²⁴¹

Therefore, authors and musicians seem to be treated differently when it comes to tolerated use and plagiarism.²⁴² Is it fair that Dylan, a musician, can get away with plagiarism by having fans and critics tolerate this use when others, like novelists, are penalized for doing the same? Critics have allowed Dylan to get away with potential plagiarism when reviewing the album *Modern Times* and noting this form of borrowing is Dylan's style;²⁴³ it is part of the "folk process."²⁴⁴ Dylan has always borrowed ideas from other songs, films, and authors.²⁴⁵ One critic even wrote, "[Dylan]'s been around long enough to do anything he damn well pleases and has been doing so since the beginning."²⁴⁶ Another critic stated that Dylan's use of Timrod on his album was

SLOPPY FIRSTS (2001); see David Zhou, *Student's Novel Faces Plagiarism Controversy*, THE HARVARD CRIMSON (Apr. 23, 2006), <http://www.thecrimson.com/article/2006/4/23/students-novel-faces-plagiarism-controversy-beditors/> ("At one point, 'Opal Mehta' contains a 14-word passage that appears verbatim in McCafferty's book 'Sloppy Firsts.'" . . . The parallels between Viswanathan's novel and McCafferty's second work are equally striking."); see also Jonathon Bailey, *Famous Plagiarists: Could it Happen Today?*, PLAGIARISM TODAY (Mar. 31, 2009), <http://www.plagiarismtoday.com/2009/03/31/famous-plagiarists-could-it-happen-today/> (listing other alleged famous plagiarists like T.S. Eliot as well as Viswanathan).

²³⁷ See Rich, *supra* note 206.

²³⁸ See Nicholas Kulish, *Author, 17, Says It's 'Mixing,' Not Plagiarism*, N.Y. TIMES (Feb. 11, 2010), http://www.nytimes.com/2010/02/12/world/europe/12germany.html?_r=0 (stating the book is about a young girl "exploring Berlin's drug and club scene").

²³⁹ *Id.*

²⁴⁰ See *id.* ("In one case, an entire page was lifted with few changes.").

²⁴¹ See *id.* (the book remained ninth overall on Amazon.com's German website after the accusations of plagiarism arose, but there were comments made about the book).

²⁴² Although the two examples of authors just provided is a more extreme form of plagiarism being that portions of the books that both authors published had large portions of their books taken from others, it demonstrates an example of the differences between authors and musicians with tolerated use.

²⁴³ See Rich, *supra* note 206 ("[C]ritics and fans have long described the songwriter's magpie tendencies, looking upon that as a manifestation of his genius . . . who [] reference[s] past works.").

²⁴⁴ *Id.* In a review of Dylan's album *Modern Times*, Thom Jurek stated, "Those who think Dylan merely plagiarizes miss the point. Dylan is a folk musician; he uses American folk forms such as blues, rock . . . This tradition of borrowing and retelling goes back to the beginning of song and story. . . . It doesn't make Dylan less; it makes him more." See Jurek, *supra* note 205.

²⁴⁵ See Polito, *supra* note 225.

²⁴⁶ See Jurek, *supra* note 205.

meant to be noticed by taking something old and placing it in a new context.²⁴⁷ Lastly, one critic said, “[h]e’s not practicing the art of deception. Instead, he’s handing us his heavily marked, dog-eared maps [of the past].”²⁴⁸

This type of criticism appears to be a form of tolerated use since Dylan was not penalized for taking phrases from others, unlike Viswanathan the novelist. Additionally, this difference in treatment could lead to an incentive to plagiarize within music since a critic could simply be saying that this form of “borrowing” is similar to the “folk process”;²⁴⁹ therefore, there is nothing wrong with taking a line here or there without crediting the original author. However, the difference in the amount of plagiarism that will be tolerated may be limited to different genres of music like folk music or hip-hop. Here, plagiarism may be tolerated because, as discussed earlier, hip-hop musicians can borrow lyrics from other hip-hop artists and folk musicians tend to quote and borrow from other musicians as well.²⁵⁰ If artists like Dylan were otherwise penalized for borrowing lines without giving credit, this incentive could disappear. Although Bob Dylan’s use is just an illustration, tolerated use may have a negative impact on the music industry if it results in artists plagiarizing others’ works without being penalized by fans, critics, or the originator of the work.

2. Dr. Junichi Saga and *Confessions of a Yakuza* on *Love and Theft*—A True Example of Tolerated Use

People began to recognize that Bob Dylan borrowed phrases on his album *Love and Theft*, particularly on the song *Floater*, from Dr. Junichi Saga’s *Confessions of a Yakuza*²⁵¹ through the Internet.²⁵² By not crediting Saga for several dozen lines, including multiple versions of songs, Dylan again raised the question of how a musician can properly use another author’s work.²⁵³ *Confessions of a Yakuza* was first

²⁴⁷ See *If I Was a Master Thief, Perhaps I’d Rob Them: Bob Dylan, Plagiarism, Freshman Composition, and the “Cult of Originality,”* IMAGINARY BOUNDARIES (May 21, 2009), <http://imaginaryboundaries.wordpress.com/2009/05/21/if-i-was-a-master-thief-perhaps-i%E2%80%99d-rob-them-bob-dylan-plagiarism-freshman-composition-and-the-%E2%80%9Ccult-of-originality%E2%80%9D/#more-176>.

²⁴⁸ See *If I Was a Master Thief, Perhaps I’d Rob Them (Part II)*, IMAGINARY BOUNDARIES (May 23, 2009), <http://imaginaryboundaries.wordpress.com/2009/05/23/if-i-was-a-master-thief-ii/>.

²⁴⁹ See *supra* notes 171–172.

²⁵⁰ See *supra* Part III.A.

²⁵¹ See JUNICHI SAGA, *CONFESSIONS OF A YAKUZA* (1991).

²⁵² See Jon Pareles, *Critic’s Notebook; Plagiarism in Dylan, or a Cultural Collage?*, N.Y. TIMES (July 12, 2003), <http://www.nytimes.com/2003/07/12/books/critic-s-notebook-plagiarism-in-dylan-or-a-cultural-collage.html>; Steven Winn, *The Lines, They Were A-Changin’ But Not Enough to Save Dylan From Plagiarism Accusations. Blame It on the Internet, Where Nothing is Secret*, S.F. CHRON. (July 17, 2003, 4:00 AM), <http://www.sfgate.com/entertainment/article/The-lines-they-were-a-changin-but-not-enough-to-2564987.php/>.

²⁵³ See Pareles, *supra* note 252.

published in the United States in 1991.²⁵⁴ The book is about a retired gangster named Eiji Ijichi,²⁵⁵ who eventually became the leader of a gang that organized illegal dice games throughout Tokyo.²⁵⁶

Originally, Dr. Saga did not profit when he first released the book; he made approximately \$8,500.²⁵⁷ But after Bob Dylan's album was released and phrases from Saga's book were recognized, Saga's book moved to number 117 on Amazon.com's bestselling books list and number eight for biographies and memoirs.²⁵⁸ Interestingly, when Saga was questioned about whether he was upset that Bob Dylan was using phrases from his book, he not only was not upset, but he was happy.²⁵⁹ Saga stated "'I am very flattered and very happy to hear this news' [I am] hoping that Mr. Dylan's fans might go out and buy the book."²⁶⁰ Despite Saga's happiness that Dylan borrowed his phrasing in his songs, he and his publishers did mention²⁶¹ that they would like Dylan to cite Saga as a source of music in future liner notes concerning later additions of the album to be published.²⁶² Based on these recent statements, it appears unlikely, in my opinion, that Saga will sue Dylan over this issue.

It is important to demonstrate the similarities between Saga's book and Dylan's album. Looking strictly at the definition of plagiarism, one can see that Dylan should have credited Saga. For example, in the song *Floater*, Dylan wrote, "[m]y old man, he's like some feudal lord. . ."²⁶³ whereas in *Confessions of a Yakuza*, Saga wrote, "[m]y old man would sit there like a feudal lord . . ."²⁶⁴ Later in the same song Dylan wrote, "Juliet said back to Romeo, '[w]hy don't you just shove off if it bothers you so much'"²⁶⁵ whereas Saga wrote, "[i]f it bothers you so much,"

²⁵⁴ *See id.*

²⁵⁵ Jonathon Eig & Sebastian Moffett, *Did Bob Dylan Lift Lines From Dr. Saga? Don't Think Twice, It's All Right is the View of His Japanese Writer*, WALL ST. J. (Jan. 8, 2003, 12:58 AM), <http://online.wsj.com/news/articles/SB10576176194220600>.

²⁵⁶ *Confessions of a Yakuza*, GOODREADS, http://www.goodreads.com/book/show/171126.Confessions_of_a_Yakuza/ (providing a summary of the book).

²⁵⁷ *See* Eig & Moffett, *supra* note 255.

²⁵⁸ *See* Pareles, *supra* note 252.

²⁵⁹ *See* Eig & Moffett, *supra* note 255.

²⁶⁰ *Id.*

²⁶¹ The article further states that Saga's publisher may not be as happy; although this is just an inference, since after all, the publisher was quoted as still being excited about the use of Saga's phrases. *Id.* "[The publishing company was] surprised that Mr. Dylan made so little effort to change lines appearing in the book. . . . But [the publishing company] doesn't want to make too much of a fuss. 'We're flattered as hell, lets face it . . .'" *Id.*

²⁶² *See id.*

²⁶³ Chris Johnson, *Textual Sources to the "Love and Theft" Songs*, http://dylanchords.info/41_Jat/textual_sources.htm (last visited Oct. 17, 2013) (showing a direct comparison of lyrics from Bob Dylan's songs on *Love and Theft* to Saga's book *Confessions of a Yakuza*).

²⁶⁴ *Compare* Johnson, *supra* note 263, with Saga, *supra* note 251, at 6.

²⁶⁵ *See* Johnson, *supra* note 263.

she'd say, 'why don't you just shove off?'"²⁶⁶ Although the lines quoted are similar and one can assume that anyone can come up with those lines, Dylan uses the lines from Saga's book almost verbatim, only changing the order of the words slightly. Finally, in the last verse of the song, Dylan wrote "[s]ometimes somebody wants you to give something up/*And, tears or not, it's too much to ask*"²⁶⁷ whereas Saga wrote, "[t]ears or not, though, that was too much to ask."²⁶⁸ Additional lines throughout the song demonstrate how closely Bob Dylan used the lines from Saga's book.²⁶⁹ Here, his methodology of adaption is similar, keeping the lines the same while changing the actual word placement.

When questioned about being a plagiarist in a recent interview with *Rolling Stone*,²⁷⁰ Dylan apparently reacted hostility about his newest album *Tempest* released in September 2012.²⁷¹ Mikal Gilmore, the interviewer, asked Bob Dylan about the recent plagiarism allegations and the reason for not citing his sources both from *Confessions of a Yakuza* as well as Henry Timrod.²⁷² Dylan stated that quoting is part of the music tradition and "[he] works within the rules and limitations of it . . . [he's] not going to limit what [he] say[s]. It's a particular art form that has its own rules . . . All [of his] stuff comes out of the folk tradition."²⁷³ When further questioned about the plagiarism controversy, Dylan noted that this type of "controversy" has happened from the beginning of his career:

People have tried to stop me every inch of the way . . . *Newsweek* printed that [someone] from New Jersey wrote *Blowin' in the Wind* . . . and when that didn't fly, people accused me of stealing the melody from a 16th century Protestant hymn . . . So what's the difference? It's gone on for so long now I might not be able to live without it now.²⁷⁴

After the interview, it is clear why Bob Dylan reacted with hostility—he knew that he was borrowing, although he claims it was not done consciously. However, his reaction could lead others to investigate

²⁶⁶ Compare Johnson, *supra* note 263, with Saga, *supra* note 251, at 9.

²⁶⁷ See Johnson, *supra* note 263 (emphasis added).

²⁶⁸ Compare Johnson, *supra* note 263, with Saga, *supra* note 251, at 182.

²⁶⁹ See Johnson, *supra* note 263 and Eig & Moffett, *supra* note 255 for additional lyric comparisons from Bob Dylan's album *Love and Theft* and Saga's book *Confessions of a Yakuza*. Both sources point out additional lyric comparisons from Dylan's song *Floater* as well as comparisons from additional songs on the album such as *Po' Boy*, *Summer Days*, *Honest With Me*, and *Lonesome Day Blues*. Johnson, *supra* note 263; Eig & Moffett, *supra* note 255. For full song lyrics of Bob Dylan's songs from *Love and Theft*, see <http://www.bobdylan.com/us/music/love-and-theft>.

²⁷⁰ See Gilmore, *supra* note 20, at 42–51, 80–81 (showing the full interview with Bob Dylan).

²⁷¹ See *Tempest*, BOBDYLAN.COM, <http://www.bobdylan.com/us/music/tempest> (last visited Oct. 17, 2013).

²⁷² See Gilmore, *supra* note 20, at 81.

²⁷³ *Id.*

²⁷⁴ See *id.* for Dylan's full reaction to this questioning and his specific use of graphic language.

where his lyrics come from and what they mean because it can be inferred that it was done consciously, not unconsciously.²⁷⁵

The recent accusations of plagiarism against Bob Dylan demonstrate how tolerated use can give an incentive to plagiarize. Not only did Bob Dylan borrow from Saga's material, he was using words that were extremely similar, if not the same, in several songs on *Love and Theft*. Saga's failure to indicate that he will sue Dylan for use of his phrases without permission shows that a person can get away with plagiarism. Saga even hinted that he hoped Bob Dylan fans would purchase his book. This line of thinking directly relates to tolerated use: allowing someone to minimally infringe on his or her copyright in order to profit in the end; except here, it is plagiarism. However, by Saga not prosecuting Dylan for any alleged copyright infringement, or specifically for plagiarism, Dylan's borrowing from Saga demonstrates that some sort of incentive does exist. This incentive shows how tolerated use may not be as beneficial as some may think. By improperly citing someone as a source and claiming originality in the material, it harms rather than benefits the original copyright owner if he or she could not bring a valid claim against the user for either plagiarism or copyright infringement.

3. The Claims of Plagiarism Have Been Tolerated

When a person takes no action in response to noticeable copying of his or her original material, such tolerate use gives an incentive to plagiarize. Bob Dylan's use of Henry Timrod on *Modern Times* and his use of Saga's *Confessions of a Yakuza* demonstrate how this incentive arises. Despite the fact that Timrod's material is in the public domain, he plagiarized others' work without citing the source; thus, tolerated use is working to his benefit. Although this concept of tolerated use and plagiarism within folk music can be demonstrated through Bob Dylan, tolerated use may not be present in other types of music or works such as books, photographs, or art.

E. *Is There an Incentive to Plagiarize?*

It is hard to definitively conclude whether or not tolerated use creates an incentive to plagiarize. On the one hand, tolerated use, promotes creativity and provides benefits to the copyright holder. As stated earlier, musicians can be discovered by allowing a blog to post an album without being sued,²⁷⁶ products can be sold, and new imaginative ways of listening to a song can be discovered.²⁷⁷ However, some critics

²⁷⁵ When asked "When those lines make their way into a song, you're conscience of this happening?" Dylan responded, "Well, not really. But even if you are, you let it go in." *Id.*

²⁷⁶ See *supra* notes 67–71 and accompanying text.

²⁷⁷ See Lee, *supra* note 34 and accompanying text.

believe that tolerated use does not lead to creativity, but rather causes a chilling effect that hampers innovation and will lead to liberal use of copyright law and limit the amount of protection a copyright has.²⁷⁸ Furthermore, users will continually infringe on the owner's copyright because the user does not fear prosecution since the copyright owner has already tolerated the minimal use.

Bob Dylan is just an example that there could be an incentive to plagiarize, but overall, it seems that tolerated use may allow musicians to borrow more from others, claiming that it is part of the process. This incentive to plagiarize appears common with folk, rock, jazz, blues, and hip-hop music. However, sources of material should be noted on the album. Conversely, authors are heavily criticized for doing the same thing: simply borrowing phrases and placing them in their book.²⁷⁹ Thus, it seems that the process of writing a book is an example of where an author would not be able to borrow without citing to his or her source, unlike musicians. If we look at the modern examples of Bob Dylan borrowing phrases from Henry Timrod, lyrics and tunes from Muddy Waters, and phrases from Saga, it demonstrates the incentive at work.

This possible incentive to plagiarize represents the negative side effects of tolerated use. If the user believes he or she can minimally plagiarize another person's work without the risk of being prosecuted, he or she will continue to do so until the plagiarism becomes noticeable. However, even when it becomes noticeable, the amount of criticism can depend on who you are—either a “Bob Dylan figure,” an author, or just an ordinary citizen who did not think it was wrong to take another's work and claim it as your own. But by not punishing those who plagiarize, the original owner of the work can be harmed instead of benefiting from the minimal use. Thus, if the person who plagiarized the work is receiving a large amount of revenue for the new work, but did not credit the source of the material, the originator would not be able to share in the profits. Additionally, the user may later be more inclined to purchase work of the plagiarist over the originator. However, if the originator's work was cited, then tolerated use could be beneficial to the originator since, even if it was plagiarized per se, the originator will be credited and could then enjoy the benefits of another person's minimal plagiarism of his or her work. Nevertheless, there appears to be an incentive to plagiarize through tolerated use when critics, fans, musicians, authors, and the courts accept minimal plagiarism, which could eventually harm the originator of the work instead of benefiting him or her, since the originator will not have all the benefits that the

²⁷⁸ See *supra* notes 67–71 and accompanying text for a discussion of music blogs and tolerated use.

²⁷⁹ See *supra* notes 221–243 for examples of authors being criticized for plagiarism.

plagiarist is receiving.

CONCLUSION

After analyzing Bob Dylan's music, an incentive to plagiarize can arise through the tolerated use of fans, musicians, critics, and even the courts. When Bob Dylan failed to cite his sources on his albums, particularly *Love and Theft* and *Modern Times*, many people accepted this practice as part of Bob Dylan's process of making music.²⁸⁰ Although Bob Dylan has benefited through tolerated use because people accept his plagiarism, the unknown musician²⁸¹ or author is the person who is getting harmed; therefore, action could be taken to minimize the incentive. Here, the moral wrong of plagiarism should be brought to the public's attention before a musician believes the plagiarism will be tolerated.

First, if a well-known artist plagiarizes from an up-and-coming musician or an unknown author, that party should inform the well-known artist about a possible lawsuit or send a cease and desist letter. Second, critics should be aware of plagiarism and should not endorse the behavior. Thus, if a critic realizes a lyric could have been taken from another musician that was not recognized as a source, it should be brought to the public's attention. Additionally, a "no action policy" suggested by Professor Wu could work just as well in order to inform people what type of borrowing will lead to punishment.²⁸² However, these are just suggestions; however, this may in turn lower record sales or diminish the reputation of the well-known musician, thereby signaling to the well-known musician to change his or her style of writing songs. Essentially, if plagiarism continues, the infringing artist could be financially harmed. If critics, fans, musicians, and courts stop accepting the plagiarism, the incentive could disappear.²⁸³

*Julie Levine**

²⁸⁰ See *supra* note 231–234.

²⁸¹ See *supra* Part III.C.1 above discussing how James Damiano was harmed by not receiving credit for the alleged plagiarism of his song, *Steel Guitars*, when Bob Dylan used his musical composition for his song, *Dignity*.

²⁸² See Wu, *supra* notes 36–40.

²⁸³ See *supra* Part I discussing the negative implications of tolerated use, including decreases in innovation or inflicting harm on the original owner of the copyright by not giving him or her credit.

* Notes Editor, CARDOZO ARTS & ENT. L.J. Vol. 32, J.D. Candidate, Benjamin N. Cardozo School of Law (May, 2014); B.A. Major in Political Science, Indiana University at Bloomington (May, 2010). I would like to thank my faculty advisor, Professor Brett Frischmann, for his guidance and expertise, my notes editor, Matthew Winkel, for his dedication and patience, and Dan Levin for his encouragement throughout the entire process. Most importantly, I would like to thank my amazing mother Cindy Levine, my brother Ross Levine, and the entire Bukzin/Plump clan for continual love, support, and laughs. © 2014 Julie Levine.