Many consider Johann Sebastian Bach to be one of the greatest and most influential composers who ever lived. Musicologists call 1750, the year of Bach's death, the end of the Baroque era. Bach's music is performed all over the world by ensembles of every size and stature.

However, Bach's success as a composer came rather late. During his life, the composer worked as an unassuming church and court musician. He was first an organist, then a concertmaster who spent his last twenty-seven years as a music director in Leipzig, Germany. His compositions were utilitarian, composed primarily for use in church services. Although Bach was an exceptionally prolific composer, his music seemed destined to be lost to the ages after his death.

Since Bach had composed for so long for one parish in Leipzig, most of his works remained unpublished and were soon forgotten. Only five volumes of Bach's works were published during his lifetime. It was not until nearly eighty years after his death that Bach achieved worldwide fame. The German Romantic composer Felix Mendelssohn took an interest in Bach's music and began staging concerts, most notably a performance in Leipzig of the Saint Matthew's Passion in 1829. Suddenly a composer who had been deceased for most of a century was the toast of Europe. By 1900, a complete, forty-seven volume set of Bach's works was in print.

The story of Bach's salvation from obscurity seems unusual, but it isn't. Famous composers often fail to receive recognition in their lifetimes. One critic, describing the premiere of Ludwig von Beethoven's Third Symphony ("Eroica"), noted that many in the audience found the work lacking in artistic merit. Today, many regard Beethoven as the foremost composer of both the Classical and Romantic eras. Wolfgang Amadeus Mozart was a well-known child prodigy who enjoyed considerable fame for his compositions in his lifetime, but nevertheless lived in poverty. The creator of The Marriage of Figaro and "Eine Kleine Nachtmusik" was buried in a mass pauper's grave. More recently, the innovative American composer

“Modern copyright law and the practices associated with it can create new problems for classical composers.”

By Amanda Scales*
Charles Ives (1874-1954) became an insurance salesman because he could not make a living as a composer. He received limited praise during his lifetime, but became widely recognized twenty years after he stopped composing. Each of these composers is well known because of continued performances by those who were exposed to and recognized the greatness of their works.

In comparison to the composers of centuries past, gaining exposure should be relatively easy for modern classical composers. Geographical and territorial boundaries are no longer the obstacles that they were in Bach's day. Technology has grown by leaps and bounds in recent decades; information disseminates worldwide within a matter of seconds via the Internet. Through the use of media-sharing programs such as Napster, people can instantly access recordings of millions of pieces of music and listen to in the comfort of their home. One can even enter the notes of a score into a computer program like Finale and hear the music, thus eliminating the need for actual performers.

It would seem that, with the exposure available to modern composers of art (or 'classical'), as well as the protections available through copyright laws that ensure composers are paid for the use of their works, the composers would not be as vulnerable to obscurity and poverty. Yet this is not the case. Modern copyright law and the practices associated with it can create new problems for classical composers. The use of blanket licensing by performing rights organizations ("PROs"), combined with the long protection periods granted under the Copyright Act and the very nature of classical music, prevent many classical composers from enjoying the fruits of their labor.

This Note first explores the special concerns faced by classical composers and the distinctions that make classical composition inherently different from popular songwriting. The Note also discusses some of the more recent developments under the Copyright Act that affect composers of art music, most notably the Copyright Term Extension Act and the Fairness in Music Licensing Act. The Note then analyzes the adverse effects that the current state of the law has on classical composers. Ultimately, this Note offers suggestions for composers who wish to protect their works while retaining their artistic integrity and continuing the traditions of classical music, possibly even earning a living.

I. Background

A. Classical vs. Popular Music

There are many intrinsic differences between classical composers and popular songwriters, resulting in copyright laws and licensing agreements that affect the respective artists somewhat differently. By definition, popular music is accessible to a large portion of the population. Popular music has mass appeal; the average person can relate more readily to it than to classical music. On the other hand, classical music is generally regarded as a sophisticated art form that appeals to an educated, elite audience. Album sales for popular music are much higher than for classical music. For example, during the week of October 13, 2003, there was not a single classical album ranked within the top 100 in album sales.
Another major difference between popular and classical music is the relationship between the composer and performer. Many popular artists write their own music. Artists who do not write their music instead make arrangements through their record companies to record songs written by third-party songwriters. An artist may have a special relationship with a songwriter, such that the songwriter composes specifically for the artist. No matter who composes the music, most popular music is associated with a single artist. That artist’s popularity “sells” the song. If the song becomes a hit, it may receive time on the radio or on music-related television stations, such as MTV, VH1, CMT, or BET. For the songwriter, artist popularity and “hit” songs translate into having an easier time selling more songs to other popular artists.

Things are not so easy for classical composers. Unlike popular music, classical compositions are rarely associated with particular performers. Even when a classical piece is linked to a certain performer, multiple artists will probably perform and record it. For example, the Hermit Songs of the twentieth-century American composer Samuel Barber are often associated with the soprano Leontyne Price. Price premiered the song cycle, accompanied by the composer, at the Library of Congress on October 30, 1953. The duo recorded the songs several times during the composer’s lifetime. However, many other singers have performed and recorded the work. The work has, in fact, become part of the typical twentieth-century classical vocal repertory.

Another difference between classical and popular music lies in the methods of distribution they use. Unlike popular music, classical music is not primarily disseminated by recordings. Popular artists become famous through sales of albums and radio airplay. Classical composers, on the other hand, rely on performance and commissions to earn money.
through airplay.\textsuperscript{35} To the public, popular music really only exists in recordings.\textsuperscript{36} It is recorded in a studio, a very controlled environment where mixing boards are used to combine and balance multiple layers of sound.\textsuperscript{37} A popular song might not be played “live” until after it is successful. For classical music, this process happens in reverse. New works typically premiere in live performances. If a recording is made, it may or may not be played on radio stations. There are no real “singles” or “hits” in the classical arena. Circulation of classical music comes largely through live performances and in written form.\textsuperscript{38}

Finally, competition between composers is different in classical music. Popular songwriters primarily compete with their contemporaries to have their works recorded, which means that record companies anticipate paying for recording rights.\textsuperscript{39} By contrast, the majority of classical music that is performed and recorded is in the public domain.\textsuperscript{40} In addition to the new classical works composed today, there are thousands of works from the past four centuries that are in the public domain and still enjoy popularity with classical audiences. These older works can be used freely by anyone.\textsuperscript{41}

On the other hand, performers and ensembles have to pay to use works that are still protected by copyright.\textsuperscript{42} Because of the popularity of older works and the additional cost of performing protected ones, newer works are often overlooked. For example, Neeme Järvi, the Estonian conductor of the New Jersey Symphony, recently lamented the absence of the works of twentieth-century American composers such as Ned Rorem and Samuel Barber in the repertoires of American ensembles.\textsuperscript{43} Barber and Rorem are well known to classical performers, but not as well known to audiences.\textsuperscript{44} Since there are additional costs involved in securing the rights to music that is still under copyright, there is little incentive for many ensembles to perform music that an audience may not pay to hear. Modern classical composers therefore often have to rely on new music societies, competitions, and festivals to gain acceptance for their works.\textsuperscript{45}

\textbf{“Classical composers have always borrowed from other works. For example, in his Saint Matthew Passion, Bach composed five variations of a single chorale.”}

Since classical music is so different from popular music, copyright laws, which are primarily geared towards popular works, affect classical composers differently than popular songwriters. The restrictive effect that the Copyright Act has on the classical tradition of “borrowing” from pre-existing works has one of the biggest impacts on classical composers.

\textbf{B. An Inherent Limitation}

Due to the way composers create classical works, copyright law has a special impact on this music. Classical composers have always borrowed from other works. For example, in his \textit{Saint Matthew Passion}, Bach composed five variations of a single chorale.\textsuperscript{46} When taken in the context of the whole work, these sixteen bars become a kind of theme, as Bach uses the choristers as a sort of Greek Chorus.\textsuperscript{47} However, this was far from an original theme. The melody of the chorale was taken, note for note, from a lied, or song, by Hans Leo Hassler (1564-1612).\textsuperscript{48} It was so popular in Baroque-era Germany to use a familiar melody in a new work that there was a specific term, “contrafacta,” for this type of melodic borrowing.\textsuperscript{49} Charles Ives’ \textit{General William Booth Enters into Heaven}, written on the death of the founder of the Salvation Army,
incorporates melodies from hymns used in the early days of that organization.\textsuperscript{50} Much of the nationalistic style associated with Romantic composers such as Chopin could not have been achieved without borrowing from the music of those nations.\textsuperscript{51} Mozart borrowed liberally when composing his opera \textit{Don Giovanni}.\textsuperscript{52} Such borrowing, however, did not make these works any less creative. The works simply incorporate motives with which the audience is already familiar. This helps to evoke a certain emotion, place, or era. Borrowing is a way for classical composers to absorb the culture around them and to mark their place in time.

Under modern copyright law, however, composers are no longer at liberty to borrow from popular pieces of the day without risking infringement. Even songs such as “Happy Birthday” are protected by copyright.\textsuperscript{53} Composers still borrow from public domain works and rearrange them into new works.\textsuperscript{54} However, copyright law and the exclusive right held by copyright owners to prepare derivative works effectively ends a long tradition in classical music.\textsuperscript{55} Without the ability to make use of contemporary works, modern classical composers are somewhat limited. Due to the longstanding tradition of borrowing, current copyright laws disproportionately affect classical composers.

\section*{II. Sturm: Performer’s Rights Organizations and Blanket Licenses}

Composers and songwriters often assign non-exclusive performance rights to one of three music licensing associations: the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), or the Society of European Songwriters and Composers (SESAC).\textsuperscript{56} These organizations then sell blanket licenses, which allow the licensee to perform any and all of the licensed music for a specific period of time.\textsuperscript{57} All sorts of businesses buy blanket licenses, from restaurants to radio stations. The PRO collects money from the sales of blanket licenses and distributes it to composers as royalties according to the type of music and the frequency with which it is used.\textsuperscript{58} For their trouble, the PROs keep fifty percent of the money they collect. The Supreme Court has lauded blanket licenses as being beneficial to both licensors and licensees because they are more convenient and less expensive than individual licensing agreements.\textsuperscript{59} However, blanket licenses do not cover the rights to sheet music or to create recordings, which must instead be negotiated on an individual basis.\textsuperscript{60}

For a long time, ASCAP, BMI, and SESAC paid a small portion of every blanket license to the classical composers who belonged to those organizations.\textsuperscript{61} This was done to make up some of the difference in the amount of royalties paid for popular music as opposed to classical compositions.\textsuperscript{62} In 1994, popular musicians objected to this appropriation of what they felt was theirs, and the practice was discontinued.\textsuperscript{63} The loss of this “tribute” greatly diminished the amount of royalties which many classical composers received from their works.\textsuperscript{64} In light of the small amount of royalties they receive, many modern classical composers rely on commissions instead of royalties.\textsuperscript{65}

\subsection*{A. Broadcast Music and Buffalo Broadcasting}

Blanket licenses have been attacked in the courts on antitrust grounds. In \textit{Broadcast Music, Inc. v. CBS}, CBS and other television networks sued BMI and ASCAP, claiming that the sale of blanket licenses constituted illegal price fixing and was a \textit{per se} violation of the Sherman Antitrust Act.\textsuperscript{66} The Supreme Court held that blanket licenses did not constitute \textit{per se} price fixing because they were not specifically used to restrict trade, which would have been required for a \textit{per se} violation.\textsuperscript{67} Blanket licenses, the Court noted, lower transaction costs and make it easier for most licensees to use copyrighted works.\textsuperscript{68} The Court also stated that CBS could have negotiated individual licenses with the owners.\textsuperscript{69} However, the Court articulated that more specific attacks on blanket licensing may hold up to judicial review.\textsuperscript{70}

Independent radio and television stations in the country filed a second important class action that challenged blanket licensing for antitrust reasons.\textsuperscript{71} In \textit{Buffalo Broadcasting}, the Second Circuit primarily focused on the viability of alternatives to blanket licenses.\textsuperscript{72} Unlike \textit{Broadcast Music}, where the Court
focused largely on the pro-competition aspects of blanket licenses, the Buffalo court underscored the anti-competition aspects. While the Buffalo court found that other kinds of licenses are more expensive, have higher transaction costs, and are more burdensome to licensees, they were still viable enough to be alternatives to blanket licensing.

B. Effect of PROs on Classical Composers

Both popular songwriters and classical composers use blanket licenses and performing rights, but these arrangements fall short for classical composers. Blanket licenses have been used for a long time to great success. In fact, they have been so successful that some suggest that blanket licenses would be useful for types of art other than music. Blanket licenses are convenient, as they lower transaction costs and give composers a means to unite for greater bargaining power. However, since PROs no longer reserve a small percentage of royalties to disperse to classical composers, blanket licenses do little to aid classical composers. Composers make money on a blanket license based on the amount of airtime or play a song gets, and the airtime received by classical composers is significantly less than that received by their popular music counterparts. When a composer joins a PRO, she assigns many rights to the organization. She also agrees to give the PRO an equal share of all royalties received. This can keep the composer from some uses of her work in exchange for a negligible amount of money.

Unfortunately, PROs are so widely used that a classical composer is often compelled to join one. The majority of the members of those organizations are popular musicians who have convinced the PROs not to share proceeds with classical composers. It seems that PROs are more concerned with pleasing popular songwriting members than classical composer members. This creates a conflict of interest for a PRO that attempts to represent both classical composers and popular songwriters. Although it makes sense for PROs to try to please as many members as possible, classical composers simply get ignored.

The Supreme Court’s decision in Broadcast Music established that the sale of blanket licenses is not a per se violation of the Sherman Antitrust Act. The antitrust challenge to blanket licenses in Buffalo Broadcasting also resolved in favor of the PROs. The Second Circuit reasoned that blanket licensing was not a restriction on trade, since licensees had the alternative of direct licensing. Both of these decisions, however, occurred over twenty years ago. PROs are even more powerful now. Neither of these decisions looks at the issue from the perspective of the copyright holders, for whom the transaction costs of making direct licensing agreements could be crippling. Perhaps a suit brought on these bases would have a different outcome today, especially one brought by the composers themselves.

III. Drang: Changes to the Copyright Act

A. The Fairness in Music Licensing Act

One area of the Copyright Act that affects composers’ rights is the Fairness in Music Licensing Act (“FMLA”). The FMLA grew out of a long series of statutory law and case law in which the rights of musicians and business owners were on opposing sides. In the end, classical composers lost.

1. Pre-FMLA Copyright Law

Copyright protection has existed in America since the nation’s inception. The Constitution allows Congress to enact copyright and patent laws to promote science and the useful arts. The first Copyright Act was passed by the first Congress in 1790. Congress did not add music to the list of protected works until 1831. By the time it passed the 1909 Act, Congress had added a wide range of protections to the original law, including exclusive performance rights. The 1909 Act was meant to solidify and untangle the unwieldy state of copyright in the late 19th century. Unfortunately, the law could not anticipate the future technological changes, so courts in the following decades had to determine how the latest advances fit with the constitutional and congressional plan.
2. The Early Decisions

One of the most important decisions under the 1909 Act is *Buck v. Jewell-LaSalle Realty Co.* In the *Jewell-LaSalle* decision, a hotel owner who used an intercom system to pipe radio broadcasts into individual hotel rooms was sued for copyright infringement. The Supreme Court held that each of these retransmissions was a “performance” prohibited by the 1909 Act. From this ruling sprung the multiple performance doctrine. Under the multiple performance doctrine, each retransmission of a radio performance counted as a separate, protected performance.

The *Jewell-LaSalle* decision provided the basis of copyright law for business owners for over four decades. Then, in 1975, a case involving a restaurant owner named George Aiken dramatically changed copyright law. Aiken had a small stereo system in his restaurant that he used to play radio broadcasts of news, sporting events, and music for the enjoyment of himself, his employees, and his customers. The owners of the copyrights for two of the songs played on Aiken’s radio sued him for copyright infringement. The Supreme Court held that there was no infringement. Unlike the music in *Jewell-LaSalle*, the original broadcast was licensed. There were no speakers outside to play the music for the public at large. The radio was as much for Aiken’s own enjoyment as for anyone else’s. The Court held that because of the vast number of radio and television sets used in businesses across America, a holding that rebroadcasts such as Aiken’s amount to infringement would be unenforceable.

Further, it did not make sense to the Court to call a radio listener an infringing performer simply for turning on the radio. The Aiken decision was not only a landmark in copyright law, but it greatly limited the multiple performance doctrine.

3. The Homestyle Exemption

Congress quickly responded to the Aiken decision in the Copyright Act of 1976. The definition of “perform” was expanded to include performances created “by means of any device or process.” This effectively codified the multiple performance doctrine. Congress also created an exemption under which a transmission through a stereo of the type used in the home did not constitute a performance, unless the transmission was retransmitted to the public or a direct charge was made to hear it. This meant that small business owners like George Aiken could still play their stereos freely, despite the expanded definition of “perform.” This became known as the “homestyle exemption.”

4. The Fairness in Music Licensing Act

In 1998, Congress expanded the licensing exemption for small businesses while retaining the homestyle exemption with the FMLA. The FMLA provides that non-dramatic musical works may be transmitted to the public from a stereo of the type used in private homes, so long as there is no charge for the performance and it is not further transmitted to the public. Restaurants and bars under 3,750 square feet and other businesses smaller than 2,000 square feet may transmit copyrightable music without paying royalties and without violating copyright laws. Larger businesses may also avoid paying license fees for music so long as the system used for amplification has no more than six speakers, with no more than four in one
In either case, the music must come from a radio broadcast station licensed by the Federal Communications Commission. This is to the detriment of ASCAP, BMI, and SESAC, who can no longer sell blanket licenses to these small businesses. With the already reduced royalties paid to classical composers, this statutory regime gives them even less because they may not receive royalties even though their works are being performed. This may also injure classical composers in that businesses often play copyright-protected classical music without knowing that the music is not in the public domain. To the untrained ear, there may be no difference between this music and something written hundreds of years ago. It all appears to be fair game. At one time, composers could enforce their copyrights and recover damages in these situations. Now, if the business playing the music is small or had a small stereo system, the composer has no right to these royalties.

5. Effects of the FMLA

With or without the use of PROs, composers should be able to turn to the Copyright Act for protection. However, since the passage of the FMLA, the Copyright Act may not give adequate protection. Even before the FMLA was enacted, commentators and government officials expressed concern, not only about the adverse effects the Act would have on copyright holders, but also because the Act could be seen as violating intellectual property treaties the United States has with several other countries. Since its passage, the FMLA has been widely criticized as the harbinger of the death of copyright protection in America. However, Congress and some commentators suggest that the FMLA serves to balance the power of music licensing groups and was a necessary foil to the Copyright Term Extension Act.

a. Domestic Effects

While the FMLA provides an economic benefit to owners of small businesses, it does so to the detriment of copyright holders. For one thing, seventy percent of the small businesses which formerly had to buy blanket licenses no longer need to do so. This greatly diminishes the amount of revenue to the licensing organizations. Since the bulk of the money paid to these organizations already goes to popular songwriters, it logically follows that the amount paid to classical composers is further reduced. Not only does the FMLA cause economic harm to classical composers, it limits the rights to which copyright holders are entitled, most notably the right to control public performance of a work by digital audio transmission. The purpose of the Copyright Act is to encourage the creation of the useful arts by allowing the creators of those arts to keep exclusive rights for a period of years. It seems counterproductive to the purposes of copyright law to place the desires of small business owners ahead of the rights of the creators of musical works to exercise their ownership of those works. Copyright law gives composers the right to control the use of their works. While blanket licenses hardly offer the type of control one might expect a copyright owner to have, the FMLA leaves a composer virtually no control over where her works are played, as long as they are played in small businesses. Since the FMLA does not limit the types of businesses that may fall under its exceptions, it is easy to imagine circumstances under which
a composer’s music could be used in a way the composer would find objectionable. This is especially true when one considers that, as independent workers, songwriters are small business owners. With that approach, the FMLA favors one group of small business owners over another group of small business owners under the auspices of a larger act which was intended to protect the latter.

Perhaps the biggest failure of the FMLA is that it places no real limit on the size of the establishment where the work can be performed. The statute says that a business owner can play music in a restaurant or bar of less than 3,750 square feet (or other business of less than 2,000 square feet) so long as the original broadcast is licensed, there is no charge to hear the music, and it is not further transmitted, without restriction. In larger businesses, there is an additional restriction on the size of the amplification system used. There can be no more than six loudspeakers, and no more than four in one room. At first glance this seems reasonable. When one considers the amplification power that manufacturers have achieved with small stereo systems in the past few years, however, limiting the number of speakers hardly seems like a limitation at all. Couple this with the facts that the statute only refers to a single broadcast, the FMLA is mute as to whether a business may use multiple systems to create multiple retransmissions, and there is a possibility that any business can use the FMLA to avoid paying for a blanket license.

There is case law to support such a result. Claire’s Boutiques, a large chain of accessories retailers, won a challenge brought by BMI when BMI attempted to force the stores to buy blanket licenses. The individual stores in the chain were quite small and each was equipped with a small stereo system. The company argued that it qualified for the homestyle exemption. The court agreed, holding that even though there were many stores in the chain, the individual stores were rebroadcasting different transmissions; thus, it qualified for the exemption. It is not a far stretch from this result to say that a large store or restaurant with multiple rooms could avoid paying for a blanket license, so long as it used multiple qualifying systems and played different things on each of them.

Another technological advance that creates unfairness under the FMLA is satellite radio. Satellite radio allows subscribers to choose from thousands of highly customized radio stations. Subscribers pay a small monthly fee to have the transmissions sent commercial-free. Again, the FMLA does not prevent transmissions of this type from being broadcast in a business. Thus, a small business owner might choose to play only works by a handful of artists or composers and not have to pay more than a small subscription fee for the privilege.

b. The WTO and International Effect of the FMLA

The FMLA has been attacked internationally. European composers lodged a complaint with the World Trade Organization (WTO), stating that the FMLA violated the Berne Convention and other international agreements to which the United States is a party. The WTO agreed and ordered the United States to amend the law. So far, this has not happened.

The United States has long been a leader in the protection of Intellectual Property. In 1989, the U.S. became a member of the Berne
Convention for the Protection of Artistic and Literary Works. The United States has also entered into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which directs that the World Trade Organization shall govern international copyright issues and creates standards for copyrights for all member nations.

The Berne Convention, like the Copyright Act, provides composers and songwriters the exclusive right to authorize the public performance of their works by any means or process. This includes the rights to authorize rebroadcasting of the work and public communication by loudspeaker of the broadcast of the work. However, the Berne Convention does not include exceptions similar to those included under the FMLA, namely, that small businesses do not have to pay royalties for rebroadcasts.

Due to its more lax standards, the FMLA has come under heightened scrutiny in the international Intellectual Property arena. In 2000, the WTO dispute panel found that the FMLA violates Articles 9 and 13 of the TRIPs provisions of the WTO’s General Agreement on Tariffs and Trades. The European Union (EU) brought a claim that the FMLA unfairly harmed European composers, since their music could be played in small businesses without the payment of royalties. The dispute panel ruled in favor of the EU, stating that the FMLA created too large of an exception to the public performance rights in musical compositions guaranteed by all WTO countries under Article 9.1 of TRIPs. The panel found that the exceptions to Article 9.1 were inapplicable in instances where there was no conflict with normal exploitation of the works and no prejudice to the legitimate interests of the copyright holder. Thus, under the Berne Convention and TRIPs, the FMLA cannot apply to works of foreign composers.

The United States has agreed to amend the FMLA in order to comply with the Berne Convention and TRIPs, but this presents a challenge. Several remedies have been suggested. One proposed solution is to remove music by foreign composers and songwriters from the exceptions under the FMLA. Unfortunately, this could have an unfair, adverse effect on American classical composers. If a foreign composer discovers that his works are being played without permission, that composer could recover damages. However, if an American composer is faced with the same situation, he or she may not recover. Thus, the FMLA would protect the interests of foreign composers over those of domestic ones. This hardly seems to fit the constitutional purpose for copyright. The Constitution should govern and give rights to Americans, not exclude Americans from certain rights in favor of all others. Another problem with that solution is that it would be particularly hard to enforce in the classical milieu. Art music, particularly instrumental work, seldom has a nationality which is obvious from listening to the work. Even knowing the name of the composer may not solve this problem, since many composers may emigrate at some point in their lives.

Another proposal is to require radio stations to pay greater licensing fees to offset the amount lost from unsold blanket licenses. This money could then go to pay the foreign composers for the use of their works. This solution, however, is also problematic. Radio stations make their money from advertising, much of which is paid for by local small businesses. Typically, radio ads are a cheaper alternative to television advertising, but this may not be the case if the stations have to pick...
up the tab for broadcasts by local small businesses. Fewer businesses would be able to afford to pay for radio advertising. In this way, the same small businesses which the FMLA seeks to benefit would instead suffer harm. In addition, many stations which play classical music are members of National Public Radio (NPR), which is funded not by advertising, but by contributions from membership drives. The additional burden of paying for blanket licenses for businesses which fall under the FMLA could drive those stations out of business. Furthermore, this does not really address the problem that the composer must authorize the broadcast by the business, not just the radio station. This can only be done by licensing with the business.

Other suggestions have been based on House Report 789 and Senate Bill 1628, both from the 104th Congress. Senate Bill 1628 seeks to amend Section 110(5) of the Copyright Act by raising the square footage and number of speakers allowed within the FMLA, but bases the FMLA exceptions on the income of the business. Only a business with a gross annual income of 20 percent or less of the standard gross income for a small business under the Small Business Administration would qualify for the exception. Under this proposal, businesses that cannot afford to pay for blanket licenses are not forced to do so. House Report 789 would limit the FMLA to businesses which are smaller than 1251 square feet and have no more than four speakers. A third proposal combines the income limitation of Senate Bill 1628 and the size and system limitations of House Report 789. The first two proposals are unlikely to take effect because Congress has already rejected them. The final proposal is based on the homestyle exemption, under which a business may use a stereo system of the type sold for home use. The WTO dispute panel found Section 110(5)(A) of the Copyright Act, which is also based on the homestyle exemption, to be in compliance with the Berne Convention. However, since this amendment would mean that exemption under the FMLA would be based on income, the success of the business would determine whether the business had to pay for a blanket license. Only fairly unsuccessful businesses—those below a small business “poverty line”—would qualify. In this way, the FMLA would create a type of welfare state for small businesses. Higher charges for licenses to other businesses would probably defray the costs associated with the unsold blanket licenses, causing business owners to pay to indirectly subsidize their less successful competition.

These proposals all seem to overlook the purpose of the homestyle exemption. The homestyle exemption, formerly codified in 17 U.S.C. § 110(5), grew out of the Supreme Court’s decision in *Aiken* where the definition of “perform” under the 1909 Act was found to exclude retransmission of radio broadcasts. Congress revised the definition of performance under the 1976 Act to include the playing of music by means of any device. This added credence to the pre-*Aiken* multiple performance doctrine, by which rebroadcasts were considered separate performances from the original. Congress made a compromise in adopting the homestyle exemption, which allowed rebroadcasts on the type of stereo made for home use without constituting a performance. It indeed to keep every shopkeeper or cook who listened to the radio at work would from being guilty of copyright infringement. Without the homestyle exemption, an office worker whose personal radio was audible from the hallway could be forced to pay a licensing fee. The exemption was not, however, intended to allow small business owners to play music for the benefit of customers without paying for the right to do so. However, the new proposals treat the homestyle exemption as a benefit for small businesses.

**B. The Copyright Term Extension Act**

Another area of copyright law that may have an adverse effect on classical composers is the duration of copyrights under the Copyright Term Extension Act. Along with the FMLA, Congress passed the Sonny Bono Copyright Term Extension Act (“CTEA”) in 1997. The CTEA extended the lengths of copyrights by twenty years. For most works, the copyright term is now the author’s life plus seventy years from the death of the author. For anonymous works or works for hire, the
copyright term is now 95 years from the date of publication or 120 years from the date of creation. The CTEA applies to works that will be created in addition to those that were already in existence at the time the Act was passed.

1. Eldred v. Ashcroft
Like the FMLA, the CTEA was quickly challenged in the courts. In Eldred v. Ashcroft, a group of plaintiffs who used public domain works in their businesses challenged the constitutionality of the retroactive nature of the CTEA. The challenge was based on the language in the constitution that copyrights are to be for a “limited time.” The petitioners claimed that, if the copyrights on existing works could not be extended, the amount of time for the copyright was not really limited, but could be expanded at the will of Congress. The court, looking at previous copyright extensions, decided that the CTEA was within Congress’ power. The court dismissed the argument that the standard “life plus 70 years” copyright was excessive compared to the original fourteen year copyright passed by the first Congress. It pointed out demographic differences that developed since the passage of the first copyright statutes. In other words, since the average life span is much longer now than it was in 1796, copyright terms needed to be much longer in order to receive the same protections.

In dissent, Justice Breyer argued that long copyright terms increased transaction costs without really adding anything to the protections afforded to the composer. According to Breyer, the additional twenty year term would not provide much revenue to the composer. Breyer also pointed to facts supplied by the petitioners which suggest that many ensembles could not afford to perform copyrighted materials. The evidence presented by the petitioners also indicate that music under long copyrights could be permanently lost because publishers and databases would not bother with music that was difficult to license.

2. Is it worth it? Congress’ Balancing Act Between the FMLA and Copyright Term Extension
The FMLA was passed as a foil to the CTEA. Congress reasoned that, if copyrights were going to last longer, then copyrights should have more exceptions. This created a no-win situation. One major reason for extending copyright protection is to enable copyright holders to make more money from the works. However, the FMLA greatly reduces the amount received for the copyrights. This is a particularly bad problem for popular songwriters, whose music typically has a relatively short shelf-life. It makes little difference to a popular songwriter if her music is protected for an extra twenty years after death if the music goes out of style long before that time.

The CTEA poses a different problem, however, for the classical composer. Classical musicians have a long tradition of borrowing one another’s ideas. A composer may take a motive from one piece and extrapolate it into another or rearrange an old melody in a new style. This is not merely the stuff of amateurs; the most well known and revered composers have done this. It is a way to evoke a certain mood, time, or setting. It is a way to show respect for the work of a colleague. However, with copyright terms that last for nearly three-quarters of a century after the death of a composer, the borrowing tradition becomes
virtually impossible to perpetuate. This problem hits at the very heart of copyright law. As said by Thomas Jefferson, “[h]e who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.” The purpose of copyright is to encourage the dissemination of ideas; a copyright is not the same as a right to physical property. It does not make sense to keep copyrighted ideas virtually locked away for such a long period of time. In this way, the demographics cited by the Eldred court do not apply to classical works as perhaps they do to more commercially popular works. In Eldred, the Supreme Court found, as to copyrights for works in existence before 1978, that the CTEA did not extend copyrights beyond the constitutional boundary of a “limited time.” However, the question of whether the CTEA extends copyrights for new works for too long is still open to judicial review.

V. Proposed Solutions

Unfortunately, short of repealing the CTEA and FMLA and eliminating PROs, there is not much that Congress can do to alleviate the unequal effects of copyright law on classical composers. PROs give great benefits to some of their members; thus, outlawing them would likely do more harm than good. Congress could possibly change the CTEA to cover only certain types of copyrighted materials. Some copyright laws, such as the work-for-hire doctrine, already do this. For example, Congress could retain the extended copyrights in recordings while shortening the copyrights for the underlying works. There are, of course, a few problems with this. This change could damage copyright holders who have works that are currently in the extended portion of the term. Some authors might object to having their terms reduced. However, Congress balanced interests between authors and small business owners when it created the FMLA and CTEA. Changes could be made to the FMLA which could please many copyright holders. For example, Congress could mandate licensing fees for small businesses. This might consist of a rate schedule based on the size of the business and possibly gross income. This would generate much more money for the PROs and, if the statutory fees were small enough, would not place an undue burden on business owners. This solution would also satisfy the WTO and foreign composers.

If Congress does not make changes, it is up to the composers to protect themselves. So what can classical composers do to protect their works and retain their artistic integrity? One possible solution would involve the creation of a new PRO exclusively for classical composers. The three major PROs have been very successful in protecting the rights of popular songwriters through lobbying efforts and the sale of licenses. The cause of many of the problems for classical composers that stem from the use of PROs is the under-representation of classical composers as compared to popular songwriters who belong to those organizations. The PROs are simply more concerned with representing the majority than they are with protecting the minority of its members. However, if classical composers were to form their own PRO for the exclusive use of classical composers, it could adequately protect their interests. This is not an instant solution. It may take years for a classical-based PRO to become successful. However, once it was off the ground, this would make it easier to regulate the use of classical compositions.

There are many things that an individual composer may do to alleviate the problems caused by copyright law. Composers have quite a bit of leeway as to what they can do with their copyrights. To solve some of the ideological problems, composers could actually give some of their rights, such as the right to make derivative works, to the public domain. Since royalties are generally miniscule for classical composers, a composer may simply wish to donate his work(s) entirely to the public domain. This idea is suggested by comments of the highly successful American composer Ned Rorem, who stated that he never counts on royalties and that he makes his money from commissions. Composers could also donate early works to the public domain in order to make derivative works, to the public domain. Since royalties are generally miniscule for classical composers, a composer may simply wish to donate his work(s) entirely to the public domain. This idea is suggested by comments of the highly successful American composer Ned Rorem, who stated that he never counts on royalties and that he makes his money from commissions. Composers could also donate early works to the public domain in order to build the composer’s reputation and either later rely on commissions or reserve copyrights for subsequent works. In order to maintain the borrowing tradition and keep their works from becoming obscure, even lost, before the
copyright term expires, composers could donate their works to the public domain by will. Thus, the composer could receive royalties from the work during life, but not leave them tied up in copyright, which could limit publication, after death. The composer could even disclaim the right to make derivative works when publishing music.

VI. Conclusion

Aspects of copyright law such as the FMLA and CTEA and copyright practices such as blanket licensing affect classical composers differently than popular songwriters. This is due in part to the nature of classical music. The modern classical composer must compete with hundreds of years’ worth of music while selling their craft to a much smaller audience than that enjoyed by popular songwriters. Also, classical composers have a long tradition of borrowing from each other’s works, a tradition not found in popular music.

A combination of copyright-related factors has an adverse effect on today’s classical composers. Blanket licenses and the royalty schemes of the performer’s rights organizations do more to protect the interests of popular musicians than those in classical genres. The Fairness in Music Licensing Act contradicts the purpose of copyright and has an adverse effect on classical composers because it allows small business owners to avoid paying for music played in their stores. The Copyright Term Extension Act nearly eliminates the long-standing borrowing tradition of classical music. Despite these problems, things may be looking up for classical composers. Since the WTO has attacked the Fairness in Music Licensing Act, it may soon be repealed or modified in a way that renders it more fair to classical composers. On the other hand, changes to the FMLA could actually make things worse or create new problems.

To solve the inherent problems of copyright law and practice, composers could create a new Performer’s Rights Organization exclusively for the works of classical composers. Such a group could better protect the interests of classical composers over the current PROs, which primarily represent popular songwriters. However, the cost of starting a PRO, combined with the amount of time required to grow such an organization, may be prohibitive.

Individual classical composers could also donate all or part of their rights to the public domain in order to make their works more accessible. To retain all of their rights during life without risking the obscurity caused by an extremely long copyright term, composers could donate their works to the public domain by will.

The current state of copyright law is both over- and under-protective. If Congress continues to extend copyright protection, the accessibility of classical music may be severely limited. New classical pieces may disappear almost entirely. There will be little incentive for composers to make new works. Absent action from Congress, it is up to the composers themselves to use the Copyright Act to their advantage and maintain the integrity of their genre.

ENDNOTES

* J.D. Candidate, Vanderbilt University Law School, 2005; Bachelor of Music, Middle Tennessee State University, 2000. I would like to extend my gratitude to everyone who contributed to the editing of this note, especially Devin Gordon. My dear friend John Hegeman deserves thanks for reminding me to be grateful. Finally, and most importantly, I am forever indebted to my family – Anthony Switter and Larry, Reva, and Rachel Scales for their love and encouragement.

1 “Sola, Perduta, Abbandonata” is the title of an aria from Puccini’s Manon Lescaut. The title means “alone, lost, forgotten.”


4 Id.

5 Id.

6 Id.
Id. at 421.

8 Id.

9 Id. at 422.

10 Id. at 422, 597.


12 Grout, supra note 3, at 534–536.


15 Grout, supra note 3, at 772.

16 Willoughby, supra note 2, at 296–97.

17 http://www.napster.com (last visited Nov. 6, 2004).

18 http://www.finalemusic.com (last visited Nov. 6, 2004).

19 The term “Classical” technically relates to the Classical Era, which lasted from Bach’s death in 1750 to the beginning of Beethoven’s third period in about 1820. Musicologists collectively refer to what is popularly termed “classical music” as “art music.” However, since this note is not directed at musicologists, I will retain the popular usage and differentiate between music of the Classical era and art music in general with the use of upper- and lowercase “c’s,” respectively.

20 One of the many definitions of “popular” is “[b]eloved or approved by the people; pleasing to people in general, or to many people . . . .” WEBSTER’S REVISED UNABRIDGED DICTIONARY (1998).

21 Willoughby, supra note 2, at 296.

22 Id. at 39.

23 See http://www.billboard.com (last visited Nov. 6, 2004).


25 Id. § 9.1, at 583.


27 A search on www.amazon.com returns about 15 recordings of individual pieces from Hermit Songs or the entire cycle. Three of these recordings feature Leontyne Price.

28 For example, the Beatles song Yesterday is the most recorded song in the world, with more than 1,600 versions in existence. However, it is still undeniably a Beatles song. See www.guinnessworldrecords.com (last visited Nov. 6, 2004).

29 Biederman et al., supra note 24, §§ 8.2–8.3.4, at 552–555.

30 Id. §§ 8.3–8.3.1, at 554.

31 Id.

32 Id.

33 See Vittes, supra note 13, at 5.

34 See infra text accompanying notes 36–46.

35 Biederman et al., supra note 24, §§ 8.6–8.6.2, at 559.

36 Id. § 9.2, at 585–86.

37 See generally id. at 560.

38 Id. at 585–86.

39 See Vittes, supra note 13, at 15.

40 Biederman et al., supra note 24, § 9.2.3, at 601.

41 For example, during the 2004-2005 season of
the Metropolitan Opera, twenty-seven different operas will be performed. The most recent is *Cyrano de Bergerac*, composed by Franco Alfano in 1936. See http://www.metopera.org/season/production/ (last visited Nov. 6, 2004).

42 See 17 U.S.C. §§ 302–304 (2004). Since Bach died in 1750, Mozart in 1791, and Beethoven in 1827, the copyright terms on their works have long since expired.


45 Id.; see, Grout, supra note 3, at 799.

46 See, e.g., *Brief History*, at http://www.societyfornewmusic.org/about.cfm (last revised Oct. 31, 2004).

47 This chorale is most commonly referred to as the “Passion Chorale” or “O Haupt voll Blut und Wunden.” In English, it is the hymn “O Sacred Head Now Wounded” or “O Head, All Bloody and Wounded.” Grout, supra note 3, at 241, 420.

48 Id. at 420.

49 Id. at 241.

50 Id.


52 Grout, supra note 3, at 599.


55 McLellan, supra note 53.


59 Id.

60 Id. at 22.

61 Id. at 23.


63 Id.

64 Id.

65 Id.


68 Id. at 20.

69 Id. at 20–21.

70 Id. at 24.

71 Id.

72 Buffalo Broad. Co., v. ASCAP, 744 F.2d 917 (2nd Cir. 1984).

73 Id. at 925–32.

74 Id. at 925.

75 Id. at 925–32.

76 See Buttery, supra note 57, at 1245.

79 For example, Clear Channel, a company which owns many radio stations, has 194 country stations, 177 rock stations, and 1 classical station. As of November 6, 2004, XM satellite radio broadcasts over 120 stations: 3 classical stations, 14 rock stations, 7 country stations and various stations with other popular music formats. See www.xmradio.com/programming/full_channel_listing.jsp (last visited Nov. 6, 2004).

80 Gann, *supra* note 62, at 63.


82 *Broadcast Music, Inc.*, 441 U.S. at 24.

83 *Id.* at 928.

84 17 U.S.C. § 110(5).

85 U.S. CONST. art. I, § 8, cl. 8.


87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*


92 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 152 (1975).

93 *Id.* at 152–53.
115 Id.


117 Out of 719 stores, 628 were less than 1055 square feet. Id. at 1484–85.

118 Id. at 1485.

119 Id. at 1489–91.


121 Id.


123 17 U.S.C. § 101; see also Carter, supra note 107, at 813.


126 Id. at 1374.

127 LaFrance, supra note 121, at 420.

128 D. Ravi Kanth, WTO Rules in Favour of the EU in Music Royalties Case, BUS. TIMES (SING.), Apr. 17, 2000, at 17.

129 Id.

130 Id.

131 Id.


135 This is not always true. One of the hallmarks of the Romantic Period (1820-1900) was a nationalistic style adopted by composers such as Chopin and Tchaikovsky. This is also the reason that works by many Eastern European composers have a distinctive sound – the composers are emulating the tonalities of their national music. But this is not something your average restaurateur would be keen on.

136 For example, the composer Krzystof Penderecki lives in the United States.

137 Helfer, supra note 133.

138 For example, in the Salt Lake City area, radio airtime costs less than half the amount of television airtime before the actual production costs associated with making an ad. See Advertising Comparison, Freeway Advertising, available at http://www.freewayadvertising.com/pages/advertising_rates.html (last visited Nov. 6, 2004).


140 Hagins, supra note 77, at 420.

141 S. 1628, 104th Cong. § 1 (1996).

142 Id.

143 H.R. 789, 104th Cong. (1995); Hagins, supra note 77, at 420.

144 Hagins, supra note 77, at 421.

145 Id.

146 Id. at 420.
227. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162 (1975).


230. 17 U.S.C. § 110(5)(A); see also 17 U.S.C. § 101 (defining “performing a work publicly” to exclude performance where the audience consists only of the “normal circle of a family and its social acquaintances”).


233. Id. § 302(c).

234. Id. § 302.


236. Id.

237. Id. at 197.

238. Id. at 204.

239. Id. at 206–07.

240. Id.

241. Id. at 248 (Breyer, J., dissenting).

242. Id.

243. Id. at 249.

244. Id. at 250.

245. Goldberg & Bernstein, supra note 108.

246. McLellan, supra note 53.