# Musical Style as an Institution: Rules and Human Behavior in Music Composition Practices

by Jaime L. Carini

## Abstract

Thinking about music and musical style along institutional lines is not, at first glance, a natural extension of the Institutional Analysis and Development (IAD) Framework. Engaging with the concept of musical style in federal music copyright litigation challenges us to examine the institutions that are clearly involved. Not surprisingly, there are institutions of the law and property. The IAD framework reveals that musical style is also an institution at work in such action arenas. Treating musical style as an institution reveals that there are accepted compositional practices—particularly rules, norms, strategies, and incentives—that interact with legal and property institutions. By layering the IAD framework on a general description of one action scene from federal music copyright litigation—music expert testimony—we can better understand the tension that occurs when legal and property institutions engage with music institutions, particularly, the institution of musical style.

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Thinking about music and musical style along institutional lines is not, at first glance, a natural extension of the Institutional Analysis and Development (IAD) Framework. Once we engage musical style in federal music copyright litigation, we are also challenged to see what institutions are at play. Institutions of the law and property are clearly involved. Musical style, too, is at play. First, I juxtapose definitions of musical style with definitions of institutions, which allows us to see the striking similarities between them. Second, as Daniel Cole has argued, I use the IAD framework as a way to organize our thinking about the institutions at hand.[1] In my initial use of the IAD framework, I demonstrate that musical style is an institution. I then layer the IAD framework on a general description of one action scene from federal music copyright litigation—music expert testimony—so that we can better understand what the institution of musical style reveals to us about accepted compositional practices.

## Research Questions

As I worked through some of the conceptual questions regarding the tension between musical style and the legal rules of the game, three research questions emerged:

R1: What are the various uses of the concept of "musical style" in courtroom situations?

R2: What do musicologists contribute to our understanding of the concept of "musical style"?

R3: Is there an overlap between how music experts understand "musical style" and how

[1] Daniel H. Cole, "Formal Institutions and the IAD Framework: Bringing the Law Back In," *Legal Studies Research Paper Series*, Research Paper No. 297 (Maurer School of Law, Indiana University Bloomington, 2014): 5.

institutional analysts understand institutions?

## A Very Brief History of Copyright

Every piece of music, instrumental or song, contains two copyrights: (1) the actual composition, represented by the notated notes to form the melody and harmony; and (2) the recording of that composition, as captured by phonograph, CD, mp3, etc. Under the 1909 Copyright Act, to apply for copyright protection, one needed to capture the music using written musical notation and submit this sheet music to the U.S. Copyright Office. The 1976 Copyright Act changed this requirement so that copyright begins the moment that one fixes the music in any tangible form, including recordings.

Copyright protection in the United States dates back to 1790, when it was enshrined in the Copyright Clause of the United States Constitution (Article I, Section 8, Clause 8), which states: "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] Music compositions were not initially protected by this clause, and composers had to wait until the Copyright Act of 1831 to receive copyright protection. Since then, various copyright acts, like those from 1909 and 1976, have continued to shift the boundaries for what is and is not considered copyrightable material in printed and recorded music and how to secure these copyrights. Case law, too, further clarifies or obfuscates the rights of composers and owners.

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[2] "The Constitution of the United States: A Transcription," America's Founding Documents, National Archives, accessed December 7, 2020, https://www.archives.gov/founding-docs/constitution-transcript#toc-section-8-.

## Music Copyright and Institutional Analysis

Given the ambiguities of music copyright law, music copyright thus generates rich fields for institutional analysis. First, copyright itself has an ambiguous institutional nature. Martin Kretschmer explains that this is because in the West, one institutional structure is used to manage a variety of interests, including competing interests.[3] Second, several institutions are at play, including those from the realms of music, property, and law. For example, ownership concerns are brought up within the context of a legal institution, such as the U.S. federal or state court system. These questions of ownership, based on claims of similarity between two or more pieces of music, require the contributions of expert witnesses who can speak to these similarities through musical theoretical, analytical, and stylistic comparisons. Yet, even these musical explications of similarity (or not) are subjected to legal rules and courtroom procedures. The intersection of these institutions in federal music copyright litigation thus provides us with a complicated—and fascinating—nexus of institutional knots to untangle.

The IAD framework proves useful for untangling such institutional knots.[4] Legal proceedings, broadly speaking, can be treated as an action arena, yielding many types of action situations, such as testimonies, depositions, briefs, and motions. Participants in such action arenas include judges, jury members, attorneys, plaintiffs, defendants, and expert witnesses, among others. These participants interact with each other throughout an action situation, following very detailed rules that govern how a court case proceeds. The attributes of the

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[3] Martin Kretschmer, "Intellectual Property in Music: A Historical Analysis of Rhetoric and Institutional Practices," *Studies in Cultures, Organizations and Societies* 6, no. 2 (2000): 219.

[4] Elinor Ostrom, *Understanding Institutional Diversity* (Princeton, NJ: Princeton University Press, 2005), 15.

communities represented in litigation may be very different, depending on who the plaintiffs and defendants are. If they are both composers, then they may come from similar communities as opposed to the owner of a copyright and a composer. The biophysical/material conditions of the world being acted upon by the litigants are music compositions with their stylistic components. As the litigants and their attorneys attempt to draw boundaries of ownership around portions of music compositions, proceeding through the litigation process, they generate outcomes in the form of jury or bench decisions or appeals. The evaluative criteria in such cases can differ, depending on legal procedures at hand or the priorities of either party. In the "Blurred Lines" lawsuit, such criteria became musical style.

## Musical Style

The importance of musical style to the "Blurred Lines" case requires us to understand how musical style is conceived of and operationalized in both legal scholarship and music copyright litigation. Legal scholarship presents musical style in a variety of ways, ranging from a personal style that is unique to an individual or a band to a more general musical style with musical markers shared by multiple pieces of music. It has also been described as either a movement or a type of creative commons.[5] In the courtroom, musical style tends to be limited to

[5] Joanna Demers, "Sound-Alikes, Law, and Style," *UMKC Law Review* 83, no. 2 (Winter 2014): 303–312; Lawrence Lessig, *Free Culture* (New York: Penguin Press, 2004); Beau Steenken, "Outlaws, Pirates, Judges: Judicial Activism as an Expression of Antiauthoritarianism in Anglo-American Culture," *Quinnipiac Law Review (QLR)* 38, no. 2 (2020): 259–324; Elke Van Hellemont, "Gangland Online: Performing the Real Imaginary World of Gangstas and Ghettos in Brussels," *European Journal of Crime, Criminal Law and Criminal Justice* 20, no. 2 (2012): 165–180.

discussions of delineations between personal and general styles, as in *We Shall Overcome Foundation v. The Richmond Organization* or *MCA, Inc. v. Wilson*. In all of these situations, style is described in terms of its musical components, such as melody, harmony, rhythm, etc. Given the technical, musical nature of such descriptions, it might not seem intuitive to examine musical style through the lens of institutional analysis IAD framework. Doing so, however, allows us to see that musical style may indeed be more than a type of creative commons that contains the building blocks of a composition. Musical style may itself be an institution.

Though the concept of musical style is often referred to throughout case law and law journal articles about music copyright, its definition is assumed rather than defined. Musicologists, however, have offered various definitions of musical style. Leonard Meyer describes it this way: "Style is a replication of patterning, whether in human behavior or in the artifacts produced by human behavior, that results from a series of choices made within some set of constraints."[6] In Meyer's view, human behavior is the primary facilitator of musical style and is activated by choice and intention, generating reproducible patterns.[7] We can also notice that Meyer's phrase "some set of constraints" might also be deemed a set of rules that governs the choices a person makes when they interact with a certain style. And finally, the way that a person interacts with a style can yield products, or "artifacts," that bear markers of patterning.

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[6] Leonard B. Meyer, *Style and Music: Theory, History, and Ideology* (Philadelphia: University of Pennsylvania Press, 1989), 3.

[7] See also Mariateresa Storino, Rossana Dalmonte, and Mario Baroni, "An Investigation on the Perception of Musical Style," *Music Perception: An Interdisciplinary Journal* 24, no. 5 (June 2007): 417.

Meyer's definition of musical style, with its emphasis on human behavior and replication, seems a different conception of musical style from that portrayed in music copyright litigation, which often prioritizes the artifactual nature of music. The accounting of style offered in lawsuits describe musical style as being comprised of musical materials that composers, improvisers, and musicians can borrow from each other. While correct, this emphasis is also limiting. It fails to account for (1) the human action involved in the process of using and creating musical style, (2) the networks that are created as an artifactual result of this process, and (3) the institutional structures that facilitate human behavior and networking through music.

First, musical style is the output of artisanship, a process that Vincent Ostrom explains in great detail.[8] Simply put, people who engage in artisanship operationalize human action and human knowledge to combine natural facts and institutional facts, creating "artifacts" as a natural output of this process. Artisanship thus involves the activities of human cognition: imagination, choice, and intention. As products of artisanship, artifacts bear the markings of human behavior or what Elinor Ostrom calls the "valuation patterns held by the participants."[9] When composers work as artisans with musical materials to create compositions, they often create patterns by borrowing and reworking each other's music.[10] As we have seen, musicologists categorize these

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[8] Vincent Ostrom, "David Hume as a Political Analyst," in *The Quest to Understand Human Affairs*, ed. Barbara Allen, vol. 2, *Essays on Collective, Constitutional, and Epistemic Choice* (Lanham, MD: Lexington Books, 2012), 14; see also Jaime L. Carini, "Artisanship, Artifact, and Aesthetic Fact," (working paper, Mercatus Center, George Mason University, Arlington, VA, 2020).

[9] Elinor Ostrom, *Understanding*, 33.

[10] There is a robust literature on the compositional practices of musical borrowing and reworking. For more information, see J. Peter Burkholder, ed., "Musical Borrowing & Reworking: An Annotated Bibliography," Center

patterns of human intention as various general musical styles.

Second, human intentionality is a component of artisanship, as Vincent Ostrom notes.[11] As people interact with each other, they establish connections with one another. In addition to defining style in terms of human behavior and patterns of regularities, style can also be described in terms of relationships. This is what Homer Ulrich and Paul Pisk observe in their definition: "Musical style may be thought of as the set of elements which on the one hand gives a piece of music its identity and on the other allows it to be related to something outside itself: to a particular period of time, to a particular country of origin, to a type, to a function, to a composer, or to another piece of music."[12] Both Meyer's definition and Ulrich and Pisk's point towards the fact that style connects multiple pieces of music, one to another. Relating these compositions to each other thus requires one to make comparisons and draw conclusions about the relative similarities and dissimilarities between each piece.

Finally, because musical style is both the result of artisanship and the structure that facilitates human behavior and networking through the process of music composition, we can also consider style to be an institution that houses its own artisans.[13] A couple of thought experiments supports this assertion. We can first juxtapose the various components of musical

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for the History of Music Theory and Literature (CHMTL), Jacobs School of Music, Indiana University Bloomington, accessed December 4, 2020, https://www.chmtl.indiana.edu/borrowing/.

[11] Vincent Ostrom, "David Hume," 14.

[12] Homer Ulrich and Paul A. Pisk, *A History of Music and Musical Style* (New York, NY: Harcourt, Brace & World, 1963), 4.

[13] Vincent Ostrom, "Artisanship and Artifact," *Public Administration Review* 40, no. 4 (Jul.–Aug. 1980): 310–11.

style that we have acknowledged thus far with a couple definitions of institutions to see that there are elements held in common between musical style and institutions. We can also layer the IAD framework over our supposition of musical-style-as-institution to evaluate how many components of the framework our supposition contains in actuality.

Thus far, we have gleaned these components of musical style from the definitions offered by Meyer as well as Ulrich and Pisk: replication, patterning, human behavior, artifacts, choices, constraints, identity, and relationship. Douglass North defines institutions this way:

> Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change. . . . They therefore are the framework within which human interaction takes place.[14]

North's description of institutions provides us with these components (presented in order): rules of the game, society, human devise, constraints, human interaction, incentives, human exchange, historical change, framework. The two most important concepts that summarize North's various components are (1) the role of rules and (2) the role of human interaction. Restating North's thesis—humans can shape their behavior by constraining it through rules—allows us to easily perceives how composers adopt through the act of composition. When composers choose to write in the Baroque style versus the hip-hop style, they choose a different set of rules with which to create compositions, shaping their creative output by constraining the musical materials which they use.

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[14] Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge, UK: Cambridge University Press, 1990), 3–4.

To verify that musical style can indeed be an institution that facilitates human interaction and exchange, at least in the Ostromian sense, we can operationalize the IAD framework by seeing if it aligns with the conceptual map of musical style. Indeed, it does. The Biophysical/Material Conditions that a composer engages with are the actual physical sounds, whether the sounds of an instrument, sounds in nature, or constructed sounds like digital samples, and the various combinations of these sounds with each other to form a musical grammar constructed of melody, harmony, and rhythm. The Attributes of the Community could, at a basic level, be thought of as the values that composers hold in common, such as the extent to which they (1) exchange trade secrets or ideas with each other or (2) engage in practices of musical borrowing and reworking. The Rules of the style can be dictated by the genre itself (like hip-hop versus jazz), or they can be inherited from previous eras such as today's tendency to privilege the avoidance of parallel octaves over the use of such parallels, a practice that has existed since the late Middle Ages and early Renaissance. The Action Situation would be the process of composing, whether sketching at a piano with pencil and staff paper at hand, inputting ideas into a music notation software like Finale or Sibelius, or layering tracks in a digital audio workstation. The Participants, at a basic level, are the composers themselves, who engage each other through their music compositions. As composers interact with each other, creating a musical conversation that their fans listen in on, they generate outcomes in the form of songs or other compositions that are "physical" products to the extent that they produce sound waves generated in real time in performance or are captured in a physical or digital medium. Finally, the evaluative criteria by which the output of this conversation is measured could be how well the new song follows and innovates upon or even subverts the same stylistic rules of the genre to which it belongs.

Understanding musical style as an institution provides us with many more possibilities for examining human behavior, including the exchange of musical materials during the process of crafting a music composition. Neither North's definition of an institution nor Elinor Ostrom's IAD framework overtly account for the hierarchical nature of musical style. John Searle's concept of an institution—a collectively intended "system of rules (procedures, practices) that enable us to create institutional facts"—takes hierarchy into consideration through the assignment of status functions and "deontic powers."[15] A status function and deontic powers work together, in that a status function is simply the symbol for having the power to execute certain obligatory actions within a defined set of rules. Searle uses the example of chess as an institution, with its queen as symbolic of the deontic power it represents, meaning the types of moves that one might initiate with a queen on a chess board. Searle also uses chess to demonstrate how the game contains constitutive rules, without which chess by its nature does not exist.

A musical style is much like chess. It contains constitutive rules that assign certain deontic powers to particular musical elements, giving them a communicative power in one style that they might not possess in another style. The example of a musician who chooses to compose in one of any number of Baroque genres can be highly instructive. General rules of Baroque composition prioritize certain musical materials over others, such as independent lines (counterpoint), the development of continuo figures, or the use of such ornaments as the *trillo*. For a person to acquire the status of a composer who writes Baroque music, one would thus be obligated to write counterpoint that follows certain rules constraining his melodic and harmonic

[15] John R. Searle, "What is an Institution?" *Journal of Institutional Economics* 1, no. 1 (June 2005): 21–22.

choices within that institutionalized style. The same can be said for someone who writes in the hip-hop genre. Sampling, DJ-ing, MC-ing, and beatboxing are all obligatory stylistic features of this genre.

As we have seen, hip-hop music can be thought of as its own genre with a defining musical style. Baroque music also has a defining musical style, but it can be constitutive of many genres (i.e., fugues, concerti, sonatas, etc.). What I would like to propose in conclusion is that the general concept of musical style, which we examined with the IAD framework, can be thought of as being comprised of many institutionalized "styles," such as Baroque and hip-hop. Each style thus requires us to zoom in on a lower focal level for us to understand its various holons in particular. Likewise, one can zoom out from musical style to look at the entire music industry ecosystem, of which style comprises just one holon. Instead of placing musical style into the Biophysical/Material Conditions holon, were we to prioritize its physical sounds, we could instead focus on its institutional nature and consider it as part of the Attributes of Community. Thinking of musical style as an institution thus gives us a greater variety of mental maps with which to analyze the music ecosystem.

## The "Blurred Lines" Lawsuit

So far, we have determined that North's definition of institutions bears many similarities to attributes of musical style, concluding that musical style can be considered an institution that contains its own artisans. We have also seen how the various attributes of musical style fit neatly into the holons of Elinor Ostrom's IAD framework. And finally, we have seen that Searle's approach to institutions accounts for the kinds of hierarchical power-structures that institutions construct. These institutional approaches, when combined, show us the weaknesses of music copyright litigation. Such lawsuits typically account for musical style in purely physical, object-

oriented terms, causing us to misunderstand the gray areas that are created when we start to draw institutions of property around such process-oriented phenomena that contain their own internal, self-governing institutions.

Before we consider some documents from the "Blurred Lines" lawsuit (as it is commonly known), we must first consider the role of musical style in music copyright litigation in general. The IAD framework can be helpful here. One type of action arena centered around musical style is the courtroom attempt to distinguish between personal and general musical style. This typically involves demonstrations of similarities between two or more pieces of music. Here, the music compositions and their constitutive musical styles are the biophysical/material conditions, and the attributes of the community are the differing values between the composers and the owners of the copyright to the supposedly original song, though they may both hold one thing in common: money. The participants are most often music experts—theorists, analysts, historians, or performers—who interact in the courtroom, demonstrating these similarities by (1) performing on an instrument in the courtroom, as in the case of John Fogarty demonstrating his own music on the guitar, (2) playing a "mash-up" of the two seemingly identical pieces, or (3) showing in written music notation (sometimes with different colors for various notes) where the pieces converge and diverge. Participants also include the other types of personnel one typically sees in a courtroom, such as judges, jury members, and attorneys. The expert witnesses must follow certain rules such as eliminating unoriginal and nonprotectible musical material from their analyses. The evaluative criteria are contained within the jury instructions, which the jury uses when making their final deliberations to yield a final outcome.

The "Blurred Lines" case, involving the Marvin Gaye estate, Robin Thicke, and Pharrell Williams, generated intense concern among supporters on both sides of the lawsuit. Katherine

Leo writes that expert witness testimony influenced some of this concern with its "comparative analyses . . . that revealed noticeable stylistic similarity in the rhythmic grooves and instrumentation of both songs, but few congruences in their melodies or harmonies."[16] In other words, the points of similarity did not occur in the melody or the harmony, but at the level of musical style.

Ingrid Monson, a Harvard musicologist who was one of the two expert witnesses for the Marvin Gaye heirs, noted in her expert report how critical musical style was to the "Blurred Lines" case:

> Understanding how generic ideas or styles are realized, adapted, arranged, and varied is consequently crucial to comparing the Marvin Gaye pieces and the Thicke pieces. . . . When composers choose exactly the same variations of arguably generic elements, especially when the variations differ from the most basic expression of the style it indicates that one composer is likely copying the other.[17]

Historically, such copying has been deemed permissible, even admirable. In some circumstances, musical borrowing or copying was considered a form of homage to the composer from whom one borrowed. The most important criteria that a borrowing composer had to follow was to transform the borrowed material enough so that it could be considered a different piece of work

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[16] Katherine M. Leo, *Forensic Musicology and the Blurred Lines of Federal Copyright History* (Lanham, MD: Lexington Books, 2020), 1.

[17] Ingrid Monson expert report, 4. Cindy Dabney of the Jerome Hall Law Library, Maurer School of Law, Indiana University Bloomington, explained to me that expert reports are not typically included in case documents, are they are not considered evidence, so we were fortunate to obtain this document. The expert reports of Judith Finell, the Gaye parties' other expert witness, and Sandy Wilbur, expert witness for the Thicke parties, are unfortunately unavailable.

from a creative standpoint. It was the intentionality and human artisanship that made such borrowings acceptable.

In a pre-digital world, where a composer had to exert much effort to borrow and then transform the borrowing, his compositional skill had to be sufficient enough to overcome the level of being a mere copycat and climb to the level of being a truly original work. In her expert report, Monson explains that once one sifts below the superficial changes to the melody and harmony, which are often the targets in music copyright litigation, enough similarities remain between "Blurred Lines" and "Got To Give It Up" to demonstrate that the Thicke parties did not just listen to and recreate Gaye's style. Instead, they utilized compositional techniques that included inputting the original Gaye recording into a digital audio workstation, layering tracks over it, and deleting the original song at the end of the compositional process. At its heart, then, Monson's assertions that the Thicke parties infringed upon the Gaye parties rests upon the notion of the musical work as property and upon an institutional conception of musical style, in which style is an institution that facilitates the compositional process. And the institution of musical style, we might extrapolate from Monson's remarks, involved two very different processes: one for Marvin Gaye and a totally different one for Pharrell Williams and Robin Thicke.

## Conclusion

The 2018 appeal of the "Blurred Lines" case to the Ninth Circuit Court of the various verdicts (beginning with the first jury verdict in 2015) yielded controversial outcomes. The majority opinion emphasized the procedural limitations of the appeal while the dissenting opinion claimed that musical style was now being copyrighted. In both cases, the judges referred to musical style. The majority wrote, "Our decision does not grant license to copyright a musical style or 'groove.' Nor does it upset the balance Congress struck between the freedom of artistic

expression, on the one hand, and copyright protection of the fruits of that expression, on the other hand." The dissent strongly disagreed:

> The majority allows the Gayes to accomplish what no one has before: copyright a musical style. 'Blurred Lines' and 'Got to Give It Up' are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere. (Ninth Circuit Court, Nguyen 2018, 57)

On the one hand, the majority opinion is correct. Clearly the Gayes did not fully copyright the musical style to which "Got to Give It Up" belongs. If they had, they would also have garnered copyright privileges to other derivative works such as Michael Jackson's "Don't Stop 'Til You Get Enough" (1979), which also uses falsetto and cowbell-sounding percussion. And it is clear that the Thicke parties referred to Gaye's composition when writing "Blurred Lines," an admission that they themselves made when promoting their piece prior to the litigation that they initiated over their piece. On the other hand, the dissenting opinion is also correct. The questions that copyright litigation typically deals with involve the relative similarities of the melody, harmony, and rhythm of the pieces in question. Musical style has only ever served as a supporting partner to, rather than the key piece of, music copyright litigation.

Music copyright litigation can, in some circumstances, function as a social dilemma situation.[18] It results when there is a disagreement over ownership of musical materials between (1) two composers or (2) a composer and an owner of another composition who cannot work out their disagreements between themselves and instead look to legal institutions. Elinor Ostrom cautions us about the limited impact of resolutions to social dilemmas: "If the structure of a one-shot social dilemma game is not changed, and individuals pursue their own immediate, objective

[18] E. Ostrom, *Understanding*, 37.

outcomes as the only values taken into account, individuals will not achieve outcomes that could leave everyone better off."[19] By the time a music copyright lawsuit is initiated, it has oftentimes reached the point of a one-shot dilemma, created by the failure of prior negotiation attempts. The results of some cases do not necessarily affect all musicians, since not all cases enter the case law. But the results of appeals at certain courts like the Ninth Circuit Court do matter, because they become institutionalized as case law and change the rules of the game. When the dissenting judge in the "Blurred Lines" case expressed her opinion, her concern was real because she knew that the majority opinion would not merely impact the parties at hand—Gaye and Thicke—but could, as institutionalized case law, potentially impact how people create music. She was concerned that the outcome of the case might improve the outcome for one individual party while leaving everyone else worse off. Sometimes changes to institutional rules constrain or alter human behavior in negative ways.

By looking at these opinions through the lens of institutions, we can see that our institutional notions of intellectual property may be rooted to changes in processes of musical composition while our actual practices of musical borrowing have not changed at all. We can certainly change the rules of these institutions; this is the opportunity afforded an open society, as Elinor Ostrom recognized.[20] What institutional analysis now presents to us is the option to further investigate musical borrowing practices to determine the deep patterns of human intention that manifest themselves in the artifacts—the scores, performances, and recordings—that composers create.

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19 E. Ostrom, *Understanding*, 37.

20 E. Ostrom, *Understanding*, 33.

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