

**ISTANBUL TECHNICAL UNIVERSITY ★ GRADUATE SCHOOL OF ARTS AND
SOCIAL SCIENCES**

THRESHOLD OF MUSIC PLAGIARISM

M.A. THESIS

Semin TUNALI

Department of Music

Music Programme

JUNE 2019

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Thesis Advisor: Assoc. Prof. Emine Şirin ÖZGÜN TANIR

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FOREWORD

This thesis emerged out of the curiosity about how so similar, almost same songs coexist in the pop music market. Being also a lawyer, I have decided to use my legal background and search for until which point composers can borrow material from each others' musical works.

In this thesis, my aim is to discover if there is any threshold envisaged by the courts in Turkey while they are deciding on plagiarism allegations based on the expert witnesses' opinions who were appointed to plagiarism cases by the courts and court decisions about plagiarism. Here, I have tried to lay out the situation starting from taking some plagiarism cases as example and analyzed their evaluation. Besides considering several technical thresholds, I also have discovered moral thresholds until which borrowings can be tolerated. I have detected that plagiarism is not only a technical issue that you can simply disclose by analyzing musical works, it is also a multilayered issue posing questions concerning authorship and creativity.

I hereby thank my advisor Assoc. Prof. Şirin Özgün for all of her guidance, experience sharing and encouragement during the writing process of this thesis. I also thank our librarian Özlem Gürkan for making the research process easier for me and creating a welcoming and study-friendly environment. I would like to give my special thanks to my lawyer colleagues who I met during my undergraduate studies in Galatasaray University for helping and supporting me during my research process. I am also grateful for having met law professor Gül Okutan who positively approached my subject and directed me to key persons for my research, and ethnomusicologist David Fossum who was very generous with sharing me his knowledge and experience about my thesis subject. Finally, I thank to my colleague Burçin Bahadır Güner for helping me to find and shape this subject, for all his encouragement and the brainstorming we did to improve my thesis.

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ABBREVIATIONS

Art.	: Article
E.	: Case (<i>Esas</i>)
CRO	: Collective Rights Organization
HD	: Civil Chamber (<i>Hukuk Dairesi</i>)
K.	: Judgement, decision (<i>Karar</i>)
IP Law	: Intellectual Property Law
MESAM	: Professional Union for Musical Work Owners (<i>Türkiye Musiki Eserleri Sahipleri Birliği</i>)
MSG	: Musical Work Owner's Group (<i>Musiki Eserleri Sahipleri Grubu</i>)
T.	: Date (<i>Tarih</i>)
UYAP	: National Judiciary Informatics System (<i>Ulusal Yargı Ağı Bilişim Sistemi</i>)
WIPO	: World Intellectual Property Organization

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THRESHOLD OF MUSIC PLAGIARISM

SUMMARY

Plagiarism is the use of a work of art created by another person and passing it as it is one's own work. In short, plagiarism is the wrongful appropriation, the theft of work of art. Plagiarism has not emerged in our lives as a legal term, and the laws in Turkey do not define this concept. The Law No. 5846 on Intellectual and Artistic Works in Turkey aims to protect author's moral and economic rights arising out of the intellectual and artistic works, the rules and conditions in which a person can exploit these works and the sanctions in case of breach of the said rules and conditions. The Law No. 5846 grants the freedom of quotation as a possibility of exploitation of artistic works. The freedom of quotation is the right to use someone else's work without the original author's permission, under the condition to refer to the original author. In musical works, the quotation is possible by borrowing a theme, passage, motif, or idea from the original author's musical work by referring to that original author. Acting against the rules of quotation by not referring to the original author, or by giving wrong or misleading references, and appropriation of another artist's work constitutes plagiarism, and the commitment of these acts are sanctioned in the Law No. 5846.

On the other hand, inspiration from other works of art, utilization of the previous works is in the natural process of the evolution of art. This evolution process is both accepted by law principles as well as by music academia. This borrowing shall not be in the manner so as it violates the good faith and hurts our conscience. At the point where borrowing from a musical work becomes excessive, the law interferes, and the protection over the work of art begins. However, the point from which the borrowing becomes excessive, and it is deemed as stealing, is not a definite point in musical works. Especially in musical works there is not a such threshold, the threshold of plagiarism is determined according to the conditions of the case. That is why in plagiarism lawsuits, courts appoint expert witnesses to determine if there is plagiarism in the disputed works.

When expert witnesses analyze musical works involved in the lawsuits, they follow some settled paths. They compare the pieces in terms of their melody, modes or makams, harmonic structures, and instrumentations and orchestrations. If, as the result of the borrowing, the latter piece does not carry the characteristics of its own author, if it has not become a different piece but is a version of the former piece or if the borrowing from a significant section, constructive part (such as the refrain) of the piece and it sounds as if the whole piece is borrowed, they decide that plagiarism has happened. Provided that an artist constructs an entirely new work carrying his/her characteristics out of the borrowed part, that second piece is considered a new work, different than the former.

Plagiarism analysis, apart from being a technical issue, brings about the discussion of creativity, composition, and author's characteristics. None of the expert witnesses interviewed during the fieldwork and the research process of this thesis are against

borrowing. However, they believe that a creative artist shall use that borrowed part in such a way that, the taken section becomes a whole new and distinct work, which carries the characteristics of the author. They admit that plagiarism analysis is to be performed depending on the genre of the musical works. We can observe the experts' analysis in the reports prepared by them. Plagiarism lawsuits handled in this thesis are regarding Turkish pop and folk music pieces, and as to the research of this thesis, works in these genres occupy mostly the courts in plagiarism lawsuits. The expert witnesses do their analysis by acknowledging that they are analyzing pop or folk music pieces, and they do their analysis by taking into consideration the properties of these genres.

On the other hand, the experts' statements during the interviews reflect another insight. There is a high expectancy of artists in terms of creativity; even though the artist creates in the popular music market which is limited with certain demands and patterns, one expects that the composers acting in this field create their own style, put their signature in their work marking their individuality. This situation puts forward the look at the creativity and the composition, and explains the pessimism regarding the creativity.

The lawsuits and experts' opinions in this thesis exposes that the plagiarism happens due to the use of some specific chord progressions and melodic patterns which are often used in the popular music field. The borrowing of the refrains and the introductions pose the majority of the plagiarism problems. Another issue is the separation between the idea and the expression, which is reflected in the artistic area as the inspiration and the plagiarism. Therefore, the avoidance of the usage of the most common chord progressions and melodic patterns, and the avoidance of the borrowing of the way in which the ideas in music are concretised will help the prevention of the plagiarism. On the other hand, the demolition of the romantic conception of the composer and the consideration of the genre in which the musical piece is composed would moderate the perspective about creativity.

MÜZİKTE İNTİHALIN EŞİĞİ

ÖZET

İntihal başkası tarafından yaratılmış bir sanat eserinin başka bir kişi tarafından kendi eseriymişçesine kullanılması anlamına gelir. Kısaca intihal, bir eserin bir kişi tarafından haksız olarak kendine mal edinilmesidir, eser hırsızlığıdır. İntihal hayatımıza hukuki bir terim olarak girmemiştir ve Türkiye’deki yasalarda intihalin tanımı bulunmamaktadır. 5846 sayılı Fikir ve Sanat Eserleri Kanunu fikir ve sanat eserlerini meydana getiren eser sahiplerinin eserlerini ve eserlerden doğan maddi ve manevi hakları koruma amacını taşır. Kanun aynı zamanda sanat eserlerinden yararlanma koşullarını belirler ve bu koşullara uyulmadığı zaman uygulanacak yaptırımları düzenler. Kanunda öngörülen eserden yararlanma türlerinden birisi iktibas serbestidir. İktibas serbestisi, bir eserin bir kısmından eser sahibinin izni olmaksızın ancak eser sahibine atıf yapılarak alıntı yapılabilmesi hakkını ifade eder. Müzikte iktibas, kanunda belirtilen kısımların alınması ve eser sahibine atıf yapılması koşuluyla mümkündür. Bir müzik eserinden tema, motif, pasaj ve fikir nevinden parçalar alınabilip, eser sahibine atıfla kullanılabilir. Eserin gerçek sahibine atıf yapmayarak veya eksik ya da yanıltıcı atıfta bulunarak iktibas serbestisi kurallarına aykırı davranmak, bir başkasının eserini kendi eseri gibi kullanmak ve tanıtmak intihali doğurur ve bu fiillerin işlenmesi 5846 sayılı kanunda yaptırıma bağlanmıştır.

Diğer taraftan, sanat eserlerinin oluşumunda daha önce oluşturulmuş eserlerden esinlenme, mevcut sanat eserlerinden faydalanılması sanatın doğal gelişim sürecine dahildir. Sanatın bu şekilde işleyen gelişim süreci hem hukuk prensipleri, hem de müzik akademik çevresi tarafından kabul edilen bir gerçektir. Ancak, müzik eserlerinden yapılacak söz konusu kullanımların dürüstlük kuralına uygun olması ve vicdanı yaralamaması beklenir. Yapılan alıntının haddinden fazla olması durumunda hukuk devreye girer ve eser üzerinde hukuki koruma başlar. Ancak sanat eserlerinde hangi noktadan sonra başka bir eserden yapılan alıntının hırsızlık sayılacağı kesin değildir. Özellikle müzik eserlerinde böyle bir eşik bulunmamakta, her olayın içinde bulunduğu özel duruma göre intihalin eşiği belirlenmektedir. Bu yüzden söz konusu belirleme, mahkemeler tarafından intihal davalarının görülmesi sırasında atanan müzik konusunda uzman bilirkişilerce yapılmaktadır.

Bilirkişiler dava konusu eserleri artık alışlagelmiş olan bir yol izleyerek incelemektedir. Dava konusu eserler bilirkişiler tarafından karşılaştırılmakta, eserler ezgi, mod, makam, armonik yapı ve kullanılan çalgılar açısından karşılaştırılmaktadır. Şayet inceleme sonucunda, intihal sonucu oluşturulduğu iddia edilen eserde, eser sahibinin hususiyeti bulunamazsa, alıntı yapılan eserin başka bir versiyonu olduğu belirlenirse, intihalin bulunduğu sonucuna varılmaktadır. Esere yapılan alıntı sonucunda yeni ve özellikli, original bir eser oluşmamış olması, önceki eserin başka bir versiyonu haline gelmiş olması, alıntı yapılan parçanın çok önemli, temel bir kısmının (örneğin nakaratının) alınmış olması sonucunda tüm eserin alıntılanmış izlenimini uyandırması durumlarında intihalin varlığına karar verilmektedir.

İntihal incelemesi, teknik bir inceleme olmasının yanı sıra, içinde yaratıcılık, eser sahipliği ve eser sahibinin özellikleri ile ilgili tartışmaları barındırmaktadır. Alan çalışması ve tez sürecinde yapılmış olan araştırma ve röportajlarda görüşülen hiçbir bilirkişi eserlerden alıntı yapılmasına karşı değildir. Ancak, bilirkişiler ve görüşülen diğer kişiler yapılan alıntının yepyeni ve sahibinin özelliklerini taşıyan bambaşka bir eser olarak ortaya çıkması gerektiği görüşündedirler. Bilirkişiler intihal analizinin intihale konu parçaların türlerine göre yapılması gerektiği konusunda hemfikirdir. Nitekim, bilirkişi raporlarında analizlerin folk veya pop müzik türleri göz önüne alınarak yapıldığı görülmektedir. Bu tezin içerisinde geçen davalara konu olan müzik eserleri pop ve halk müziği eserleridir ve bu tez için yapılan araştırma uyarınca müzikte intihal davalarının konusunu genelde halk ve pop müziği parçaları oluşturmaktadır. Bilirkişiler de bu parçaların ait oldukları türlerin bilincinde olarak inceleme yapmakta, analizlerini bu türlerin özelliklerini göz önüne alarak yapmaktadır.

Diğer taraftan, röportaj ve görüşmeler sırasında bilirkişi ve tez için görüş bildiren diğer kişilerin sözlerinden anlaşılan başka bir boyut bulunmaktadır. Sanatçıların yaratıcılıklarıyla ilgili yüksek bir beklenti bulunmakta, sanatçının ürün verdiği alan, belli talepler ve kalıplar dolayısıyla sınırlandırılmış olan popüler müzik pazarı olsa bile bu alandaki bestecilerin kendi tarzlarını yaratmaları, parçalarına kendi özelliklerini belli eden imzalarını atmaları beklenmektedir. Bu durum yaratıcılık ve besteciliğe bakış açısını ortaya koymakta, yaratıcılıkla ilgili karamsarlığın sebeplerini açıklamaktadır.

Bu tezde yer alan davalar ve bilirkişi görüşleri intihalin, popüler müzikte sıkça kullanılan belli armonik yürüyüşlerin ve melodic kalıpların kullanılması dolayısıyla ortaya çıktığını göstermektedir. Bir parçanın giriş ve nakarat kısımlarının alınıp başka bir müzik eserinde kullanılması intihal açısından problem yaratmaktadır. Diğer bir konu ise fikir ve ifade ve bunun sanat eserlerinde yansımaları olan esinlenme ve intihal arasındaki ayrımdır. Bu sebeplerle, sıklıkla kullanılan armonik ve melodic kalıplardan kaçınılması, müzikal bir fikrin somut olarak ifade buluş şeklinin alınmasından kaçınılması intihalin ortaya çıkmasını engelleyecektir. Diğer taraftan, romantic bestecilik algısının yıkılması ve bestelenmiş bir müzik eserinin türünün göz önüne alınması yaratıcılığa bakış açısının yumuşamasını sağlayacaktır.

1. INTRODUCTION

Copyright cases in rock and pop music world occupy our daily agenda. Battles between rock and pop stars for the ownership of the songs intrigue us because of their magazinelike stories and loaded amounts of compensation paid to the rightful party.

Almost every year, there are several allegations of plagiarism that strike the audience's attention. The controversy about the song *Bitter Sweet Symphony* of the Verve is one of those stories that draw my attention. It is a song by the British alternative rock band the Verve. It was their hit song in the album *Urban Hymns* released on 27 September 1997 (Url-2). Because I liked one of its covers (the one made by the London Grammar), I did a little research about the song. Then, I found out that the song had used a sample from a Rolling Stone's song. The facts were as such: the band used a sample from an orchestral version of The Rolling Stones' song *The Last Time* recorded by The Andrew Oldham Orchestra in 1966. The Verve got the license to use a six second (Url-3) or a five note (Url-4) sample of The Andrew Oldham Orchestra version from Decca Records (which owned the Oldham orchestra recording) and put the layers with strings on it to create their song *Bitter Sweet Symphony*. However, they had neglected to have permission to use the underlying composition, which was the original version of *The Last Time* sang by The Stones. Stones' former manager Allen Klein owned the copyright of The Rolling Stones' pre-1970 songs. So, the Verve was obliged to get Klein's permission to release the song because Klein (in fact, his company ABKCO Records) had the publishing rights¹ of the song. Klein agreed for a

¹ Publishing rights is a general term used for the bundle of rights including mechanical rights, performance rights, synchronization rights, new media rights. The copyright owner (the author) is paid by the music Publisher a royalty fee in consideration for the publishing rights. Performance royalties are paid in return for the performances. Mechanical royalties are collected from the sale of recorded music, including the downloads of the songs from digital platforms. Mechanical rights are the rights to reproduce an already published piece of music in a material like CD, vinyl, cassette etc. Synchronization rights are rights to use an existing music in a film, television Show, and other types of televised media. Print rights are the rights to issue licenses for printed editions of the compositions, including the forms of sheet music, songbooks and folios; and arrangements for orchestras etc (Strasser, 2010, p. 119). New media rights include all rights not covered by the traditional modes of exploitation, such as digital performances, ringtones, interactive streamings (Url-14).

license to make use of the sample with a 50/50 split, however then, he claimed that the band broke the agreement and made use of a larger part of the Oldham recording (Url-4). He said he would sue the Verve, the band and its lead singer Richard Ashcroft thought they would spend much more money if they would enter in a lawsuit process, and they chose to settle with Allen Klein out of court. They handed over all of the publishing rights of the *Bitter Sweet Symphony* in order to be able to release that hit; henceforth they also lost control of the song. The *Bitter Sweet Symphony* was used in the commercials of the sportswear brand Nike although the band was against the use of their song in the advertisements. Still, Nike could use the song in its ads; it took authorization from ABKCO, which had the publishing rights (Url-3). Moreover, the orchestral version, which existed in the Rolling Stones Songbook was written by David Whitaker, who had no credit at all. Mick Jagger and Keith Richards got composer credits alongside Richard Ashcroft for the song *Bitter Sweet Symphony*.

When I read the story of The Rolling Stones' song *The Last Time*, of which the orchestral version was the question of the above controversy, I was surprised by the story and Keith Richards' statements. It is said the song *The Last Time* was inspired by *This May Be the Last Time* of The Staple Singers. *This May Be the Last Time* was a gospel song, a traditional one, so it was understandable that many artists recorded it. However, when The Stones took The Staples' version, changed the lyrics and recorded it, gospel fans thought that they had robbed The Staples' song. In the end, The Stones was a famous band and was making a high profit out of arranging songs by black artists. On the other hand, according to the story of the website Songfact, in the book *According to the Rolling Stones* Keith Richards makes the below statement:

At least we put our own stamp on it, as the Staple Singers had done, and as many other people have before and since: they're still singing it in churches today. It gave us something to build on the create the first song that we felt we could decently present to the band to play... The Last Time was kind of bridge into thinking about writing for the Stones. It gave us a level of confidence; a pathway of how to do it. And once we had done that we were in the game (Url-5).

A rock band can indeed use an anonymous gospel song. However, I find a bewildering part in Richards' above statement: they do not restrain themselves from using Staple Singers' arrangement of *This May Be the Last Time* to build their songs upon. They believed that borrowing from other musical pieces is inherent in the creative process

of music. They sound thankful they could benefit from such generosity. Whereas they do not seem very tolerant when they do not permit another band who wanted to use a sample from the orchestral version of their song, which is built on an anonymous song, and they had not even done the orchestration.

We do not actually know if there is really a plagiarism act in that case. When I listen to both songs, I hear the resemblance between *The Better Sweet Symphony*'s introduction and *The Last Time*'s orchestral version. I should admit that I nearly hear the introduction of the *Bitter Sweet Symphony* in the other one. But, taken as a whole, they are totally two different songs, each with a different sound according to me. It can be thought that the sample The Verve took has been used creatively and ubiquitously. There, we can only speculate and discuss with each other if it is theft or just an inspiration. We can argue if the borrowing The Verve has done is rightful or against copyright. The whole story presents an obscure situation in which we actually question if The Verve has really been creative or was just a thief... Whatever our opinions are, The Verve has given their rights away and lost control of the song.²

The above case was not brought before the authorities to decide and we, as listeners can only decide regarding our conscience. My conscience tells me that The Verve has been heavily inspired by The Stones' song, besides they had gotten the permission to use the sample. They created a whole new song with that sample, reflecting their own sound. I think The Verve's song is better known than The Stones' *This Is the Last Time*. As it is apparent in the above story, it was evident that the *Bitter Sweet Symphony* would become a hit, and the producer apparently took advantage of it.

1.1 Borrowing in Good Faith

As in this example, I notice that there are similarities between pop songs in Turkey; an ear that is not paying attention while listening might think Turkish pop songs sound like each other. This situation makes me wonder about the process of creativity and the limits of copying from other songs. Each of us can be a judge of this issue and evaluate each similarity upon our own experiences and values, but this would not serve

² On May 23, 2019, the website of Pitchfork Magazine published a news announcing that Keith Richards and Mick Jagger unconditionally gave the songwriting credits and publishing rights back to Richard Ashcroft (Url-19).

the real author and grant his rights. The courts would render a fair decision for an artist of whom the work is plagiarized. The legal systems are established upon our societies' traditions and values. Ideally, the decisions given in legal systems are to satisfy our conscience. Once we concede our conflicts and claims into the hands of justice, we confide in the decision to come from there and accept it.

In our legal system, the products created as the result of a creative process are the result of the intellect and talent of their author, and they are protected by intellectual property rights. Intellectual property rights or copyrights aim to protect the owner of the intellectual property. Let alone the discussions whether the copyrights hinder the creativity which is not the subject of this thesis, it is believed that these laws aim to encourage the creation of intellectual, artistic, scientific activities, hence the creativity while they protect the author (Savage et al., 2018, p.1). Copyrights provide for the public interest in this sense, the societies develop if they incent the artists and scientists. The encouragement of talent is possible by the protection of these with economic and moral rights (Tekinalp, 2005, p. 31).

Law No. 5846 on Intellectual and Artistic Works has regulated in Turkey moral and economic rights arising out of the products of the authors who create intellectual and artistic works, the conditions of exploitation of such products and the sanctions in case of breach of such rules and procedures.

Plagiarism is not a term defined under Law No: 5846. Stav (2014) is right in saying that plagiarism is not a legal concept. It means taking someone else's work (or a part of it), using it in a new work and taking credit for it as if the work belongs to the plagiarist. It is a "false claim of authorship" (Stav, 2014, 30). Plagiarism is, in fact, a kind of theft, and it violates the author's economic rights as well as his/her moral rights. The courts give the decision whether the theft has happened or not.

Plagiarism is not only encountered in artistic but also in academic circles. When it is concerned about literature and academic writings, detecting plagiarism is a straightforward event because the comparison between the works may be easier. Even, the software products detecting plagiarism in written works facilitates a lot the detection of such theft. On the other hand, the detection of plagiarism in music is not that easy. This fact is also indicated by Cason and Müllensiefen (2012) who give their

examples from UK case-law. Analyzing similarity in musical works displays a bigger challenge because music is a “nonverbal domain” (Cason and Müllensiefen, 2012, p. 27). That is because of the specialized nature of music the courts appoint expert witnesses who have mastered specific genres of music, in plagiarism cases. Lay listeners can, of course, hear the resemblance between two music pieces; but the court needs the experts for a more objective and scientific opinion.

Another reason to consult expert witnesses is the vagueness of the Law No. 5846. The law is clear concerning the sanctions of plagiarism. In fact, thanks to the article setting out the sanction, we know which acts would constitute plagiarism: a) giving a title to another person’s work as his work, b) citing from a work without referring to the source and c) while using someone else’s work, giving a wrong or misleading reference to his/her work are penalized. Though, making quotations from musical pieces are allowed in some instances in Law No. 5846. If an artist takes a passage, motif, theme or idea from another person’s work, provided that he/she refers to the owner of the original work, he/she can use that passage, motif, theme or idea. Here, the terms passage, motif, theme, and idea do not make sense for a judge, for a jurist and even for a musician; we do not know in which context, piece and genre should these terms be interpreted.

Many plagiarism cases appearing in the press, my interest in pop music and my legal background pushed me towards asking questions about similarities between musical works, the detection of plagiarism and the criteria for determining plagiarism. When I started to do my research, more questions have come to my mind concerning creativity and authorship. After all, there is another side to the plagiarism concept, and the other side is the evolution of art and specifically of music.

The fact that music, like other kinds of arts, is in evolution is acknowledged by law as well as it is a known fact in music academia. As you will see, when I am talking about the right of free use and the evolution of music and compositions, the use of elements from former musical works exists in the natural process of music creation. As per the right of free use, the law accepts that artistic works are created by making use of the previously created works. Borrowing from previous music pieces is in the natural process of composition. After all, it is impossible for the composers to not to be inspired by previous works. As seen in the story between The Verve and The Rolling

Stones, The Stones admits that borrowing from already existing songs is natural. On the other hand, they seem harsh about the use of a part of their composition by another band. It appears that their attitude coincides with the rising of the economic value of The Verve's song. Thus, I ask myself if the stance against plagiarism is artificial as the result of the rise of economic rights and concerns. The voice-over of the video telling the story about the *Bitter Sweet Symphony* proclaims "Since creativity became a commodity, the money is all that matters" (Url-6). Is it as simple as that? Should it be possible to borrow from former musical works as much as the borrower wants, would not it ever make the original author uncomfortable? I think it will. This discomfort is obvious in Martialis'³ words manifesting that he felt as if his poems were freed slaves, kidnapped by pirates (*plagiarus*)⁴ when he heard them recited by Fidentinus (another Roman poet). So, even when there were not any intellectual property rights, theft from works of art was not ethical; it injured the conscience. Therefore, borrowing from a work of art is tolerable to some point. As predicted by the legal principles, legal protection starts where good faith is violated (Tekinalp, 2005). In this thesis, I am looking for the threshold⁵ from which the good faith is deemed violated and plagiarism is considered to start.

1.2 Statement of Purpose and Methods

There is an urban legend in music plagiarism suggesting that it is acceptable to borrow a 4-measure or 8-measure part of a song and use it in another one. The last time I have encountered this legend was the video from magazine TV show *Söylemezsem Olmaz* in which Turkish singer Nihat Doğan, who was also one of the hosts of the TV show was suggesting about a plagiarism conflict between Tarkan and Ayşe Mine⁶ that "MESAM allows until 4 measures" (from the Youtube video in Url-1). The below Figure 1.2 depicts the moment from the TV show *Söylemezsem Olmaz* where Nihat Doğan explains within his knowledge the rules of borrowing from a musical work.

³ Roman poet known for his book of epigrams (Url-7).

⁴ The word *plagiarism* derived from *plagiarus* (Tekinalp, 2005, p. 80).

⁵ Pinter (2015) uses the word threshold to describe the limit after which a musical work is deemed plagiarized. I also wanted to use this word because I find it very convenient to define that limit.

⁶ Tarkan had allegedly sang a song which was composed by plagiarism, copying a song of Aye Mine's. According to the news, MESAM Technical Expertise Committee found an exact similarity between the main themes of two songs (Url-13).



Figure 1.1 : Screenshot from *Söylemezsem Olmaz*.

The same fact about that urban legend is pointed out in Pinter's article (2015). Pinter mentions that there is an unwritten rule saying that the minimum threshold of plagiarism is 5-9 identical notes in a row (or two measures). Even though counting the notes is more logical, since a composer may arrange a definite melody in any number of measures, depending on the beats of the notes, in my opinion, such rumors are indeed legends, and we cannot set a certain threshold for plagiarism. The individuality of an author may appear even on four notes, you can recognize from the sound and use of the notes and harmony a particular composer or work. Besides, the analysis of a work would also change according to the genre of such work. As notified by the interviewees, I talked to for my research, each plagiarism case shall be evaluated in its terms. We cannot set a standard rule for borrowing from past musical work. But of course, plagiarism is detected in some way, and there should be a certain point according to which it is decided that a song had been plagiarized. In the music world, especially in the pop music field where almost all of the songs sound similar (to me), there should be a line separating original works, carrying the characteristics of their authors and stolen works. Upon these thoughts, I aimed to discover how musical works are assessed and analyzed in the scope of plagiarism allegations in Turkish courts. This thesis explains the analysis methods of the music experts appointed by courts and the

opinions of the persons who are involved with the decision process of the plagiarism cases with respect to musical work, authorship, and creativity.

I followed two paths to analyze the situation. First, I have reached the persons who performed the duty of expert witness in legal cases of plagiarism and tried to find out if they define a concrete threshold for plagiarism. To this aim, I interviewed these experts and also read the draft reports they have written for the court. Not all of them could hand me in their reports, but I managed to read some of them. Some of the expert witnesses gave me the file numbers of some cases for which they were appointed. On the other hand, I also searched for Supreme Court decisions from a database and saw how the Supreme Court precedents were formulated when the high court decided about plagiarism. In the Supreme Court decisions, I could also find the principles regarding authorship and work of art. From the Supreme Court decisions, I attained again some file numbers which were not given by the experts I interviewed. So, with the file numbers that I had gathered, I went to the Court of Intellectual and Industrial Rights of İstanbul and examined the files that I could find.

Not all of the cases I talk about in this thesis are court cases. As it was the case in the story about The Verve and the *Bitter Sweet Symphony*, some incidents developed out of the court, and I also give information and insight regarding those cases. News appearing concerning these events and many statements by singers, music critics, magazines, and even reality shows helped me to understand better the circumstances and the angle of the society towards these issues.

As a result of the interviews I have done, reports, and news I have read and seen, I put forth several questions. These questions are not only regarding the threshold of plagiarism but also the issues that arise because of the perspective adopted by the experts (who are music scholars or musicians) and the legal system. Consequently, I tried to approach plagiarism from a musicological point of view with the help of legal knowledge. Plagiarism issue opens doors to questions concerning the evolution of music, tolerability or naturality of borrowing, the idea of creativity, composition, and cultural effects thereon.

While elaborating my questions about plagiarism, I explain legal rules in Turkey concerning plagiarism in the first hand. After my introduction, under the title of

Plagiarism in the Law in Section 2, I summarize the acts constituting the crime of plagiarism, the terms of work of art, musical work, author, the author's rights and which rights are violated as a result of plagiarism. In the same section, I cite the Supreme Court decisions that the courts use as precedent in the lawsuits concerning quotation and plagiarism. Then, in section 3, I present my fieldwork and open the titles under which I discuss the issues born out of the fieldwork. Here, I give the names of some of the expert witnesses, lawyer and judges that I interviewed. I do not openly refer to all of my interviewees due to confidentiality reasons. In this section regarding my fieldwork, I mention the cases about plagiarism that I could reach thanks to the expert witnesses and as a result of my personal research. By the intermediary of my interviews and the cases, I determine the regular analysis method applied by the courts and the experts. Besides, I present over the cases the particular problems regarding musical works, the general principles and thoughts about the concepts of authorship and creativity, inspiration and plagiarism. In this section, I explain the attitude taken by the experts and lawyers towards the plagiarism and the creativity, and I cite some instructive definitions of the experts that help us to understand a musical composition. In section 4, I try to give the scholars' opinions concerning musical evolution and composition, Turkish music, the popular music and the constraints of that genre, and the differences between inspiration and plagiarism. When you read that chapter, you will understand that the creativity, the composition process, the difference between using an idea and an expression are tightly connected to the inspiration, the evolution of art and to the authorship. In fact, these concepts cannot be separated from each other and they affect each other. Finally, I give the response to my question if there is a threshold of plagiarism and provide my assessments. For the purposes of clarity, plagiarism does merely overlap with copyright at certain points, when the plagiarized work is protected under copyright. Plagiarism is a far broader concept than copyright infringement; if not a legal infringement, plagiarism is a moral infringement, an unethical behavior (Stav, 2014, p. 6). So, even though I mention the legal rules in Turkey and sometimes in the US and Europe about plagiarism, this thesis goes beyond explaining the legal infringement of plagiarism. It approaches the problem from a sociological, musicological, ethnomusicological, and theoretical point of view.

1.3 Literature Review

When I began doing my research about this topic, I was told by most of the interviewees and critical persons who led me to my expert witnesses that this subject was not elaborated in Turkey and there was a need for sources about this topic. I had not either encountered any musicological article regarding musical plagiarism. After I have reviewed literature in Turkey about the subject, I can say there are some articles and books written on or including the topic of plagiarism. Legal papers and books constitute most of the written works concerning plagiarism. On the other hand, most scholars in the USA and Europe take this topic in hand musicologically. There are few writings treating plagiarism in music; however, written sources regarding the relationship between copyright or IP rights and music, and the works about authorship and composition might be beneficial. Here I would especially like to focus on the readings concerning musical plagiarism and some studies about copyright and music since it is my main subject of concentration.

I want to begin with an article the title of which points directly to the subject. Kitapçıoğlu (2013), in her article *Müzik Eserlerinde İntihal Suçları* (translated as the crime of plagiarism in musical works), elaborates the issue from a criminal point of view. After explaining the terms such as work, musical work, and plagiarism, she takes in hand in detail the provisions sanctioning plagiarism in the Law No. 5846; she explains crime factors, offender, the victim of crime, violated rights and the punishments. She does not give any clue about any threshold in plagiarism. Demiral Bakırman (2016), in her article *İntihal Suçları* (translated as crimes of plagiarism), discusses in general crime of plagiarism. I benefited from this source to have a general idea regarding the crime, and the rights violated as a result of the plagiarism. Öncü (2009), in her doctoral thesis *Fikir ve Sanat Eserleri Hukukunda İktibas Serbestisi ve Sınırları* (translated as the freedom of quotation and its boundaries in copyright law) discusses the situations in which a quotation can be done from a work of art. After reviewing the regulations in the Law No. 5846 and European Union legislation with respect to quotation, she touches upon the quotation of musical works as per the Law No. 5846. She mentions principles and the aim of the quotation, and conditions according to which a musical work can be quoted. She includes the discussion of whether a melody is in the scope of freedom of quotation or not. Att. M. Fatih Güçlü

(2003) has an article concerning musical works and remedies for the protection against violations (*5846 Sayılı Fikir ve Sanat Eserleri Kanunu'nda Müzik Eserleri ve Tecavüzlere Karşı Korunma Yolları*). In his article, he does not directly mention plagiarism. Güçlü first takes in hand what a work of art is and focuses on musical works among the work types cited in Law No. 5846. He discusses under a title the *derleme eser* and the ownership of *derleme* (collected) works. As per the Law No. 5846, *derleme* is, save for the rights on the original work, the work created as the result of an intellectual process and of which the content is formed by selections and arrangements, such as encyclopedias and anthologies. As per Mehmet Özbek's glossary of Turkish folk music terms, in Turkish folk music doctrine, *derleme* is the act of detecting, selecting and collecting traditional works, and also each work collected by such process is a *derleme* (as cited in Güçlü, 2003). He strikes the attention to the difference between *derleme* in terms of Turkish folk music and *derleme eser* as mentioned in the Law No. 5846 which is a work including several selected works by multiple authors. This discrepancy creates problems with respect to the rights arising out of the authorship of *derleme* works. According to Güçlü (2003, p. 17), the fact that the person who selects and collects folk music works is not entitled to any authorship is a deficiency in the Law No. 5846. In this case, the author of a *derleme* work shall be assessed under two considerations: either *derleyen* (the person who does the *derleme*) shall be accepted as the original author because he/she collects the songs and reintegrates them in the society, or he/she shall be deemed as the author of adaptation work if he/she amends the folk music work by adding his/her characteristics. If *derleyen* only detects and records the folk songs of a specific region, she/he shall not be accepted as the author of these works. If *derleyen* performs such folk song, he/she shall have performer's rights foreseen under the Law No. 5846. On the other hand, if *derleyen* presents him/herself as the author of the work, meaning that she/he signs the work with his/her name, it would be an unjust appropriation. In this case, Güçlü asks the question of who can file a lawsuit against the person who illegally shows him/herself as the author of a work. The answer to this question is the author of the work or his/her heirs. Therefore, filing a lawsuit against a person using a folk song and giving his/her name to that song is only possible by the real author of that song, however, folk songs do not have any specific author. Here, by commenting on the provision of the Law No. 5846, Güçlü (2003, p. 21) suggests that the Ministry of Culture is able to file a lawsuit against the person plagiarizing a folk song. Güçlü

finalizes this chapter by asserting that there is not any clear regulation with respect to *derleme* and authorship of *derleme* (having the meaning of detection and offering to people of the folk music works) in the Law No. 5846 which constitutes a deficiency in terms of protection of the culture. In his work, Güçlü continues explaining the author's rights, the transfer of these rights and the lawsuits that can be filed against the persons who violate these rights. Ceritoğlu (2008) is another lawyer who approaches plagiarism in her masters' thesis *Fikir ve Sanat Eserleri Hukukunda İntihal ve Esinlenme* (Plagiarism and Inspiration in the Law No. 5846 of Intellectual and Artistic Works). She elaborates the difference between plagiarism and inspiration not on the basis of each type of work of art; rather, she makes a generalization. After explaining the types of work of arts, the authorship, the authors' rights, and the concepts of plagiarism and inspiration, she cites the differences between those two concepts. The most important point in these differences is related to the concept of characteristics of the author: in a musical work created as the result of plagiarism, the characteristics of the author do not exist. She looks at the international applications concerning plagiarism and expresses that the detection of the originality is evaluated according to the circumstances of the particular case (Ceritoğlu, 2008, p. 135). She thinks that in Turkish intellectual property law and Supreme Court decisions do not appear any objective standards to determine plagiarism and inspiration and she suggests that there shall be implemented some standard, objective tests. She advances that the test used by the Supreme Court of the United States of America are based upon universal criteria that can be adopted by the Turkish courts as well (Ceritoğlu, 2008, p. 136). The courts in the U.S. use a two-stage test. In the first stage, they detect if there is any borrowed part in the work subject of the lawsuit from the original work. If there is a borrowed part, they detect in the second stage if such borrowing stays on the limit of inspiration or not. This detection is made by finding out whether the similarity between two works is relating to the essence of the original work; if the core of the original work is stolen and put in the second work. The expert witnesses step in at this stage and their analysis concerning whether the similarities between the two works are relating to distinguishing features of the work is required. In order to prove the unlawful borrowing, they take into consideration the author's possibility to reach the borrowed work or the fame gained by the second work. If there is possibility for the borrowing author to reach the original work, the experts should search if the similarities are enough to prove any plagiarism. Should the borrowing author's access to the original

work cannot be proven, the similarity shall be striking to be assessed as plagiarism. The final stage of this test is to recourse to the lay listeners (Ceritoğlu, 2008, 136). (The first two stages of this test are applied by the Turkish courts, in fact by the experts. The view of the lay listener is reflected by the experts.) One legal source that worths mentioning is Öngören's book (2010) *Müzik Eserleri* (Musical Works). Öngören takes musical works in hand from a broad agnle. He starts his book by mentioning briefly about what music is and how it was in different historical periods. Then he moves on with Turkish music and its genres such as traditional music, folk music, Ottoman music etc. He gives explanations concerning the actors of music business. After such brief explanations, he gives details about musical work, authorship, author's rights and legal remedies to be saught in case of any violation. Öngören grounds his legal knowledge and findings upon previous sources and court decisions. I have referred to him multiple times in further parts of my thesis.

Apart from the above legal sources, the topic of plagiarism is only taken in hand in newspaper articles and in general they do not go further than giving news. Only Mustafa Avcı mentions about some plagiarism cases in his three articles in *Gazete Duvar*. One of his articles is with respect to the song *Gece Gölgenin Rahatına Bak* sang by Çağatay Akman. In the article *Akman'ın, Gece Gölgenin Rahatına Bak şarkısı çalıntı mı?* (Is the song by Akman *Gece Gölgenin Rahatına Bak* stolen?) Avcı (2017a) deals with the fact that the song *Gece Gölgenin Rahatına Bak* is the same as Anna RF's song *Jump*. Akman pretends that Anna RF had borrowed their song from another Turkish song named *Her Şeyim Oldun* composed by Mehmet Ali Sezer and sang by Güllü. Before getting into the subject, he starts his article by criticizing intellectual property rights believing that they restrict music production and performance, because music is constructed upon previously made patterns, tradition and evolves with the use of the existing materials. (Although this is not the subject of this thesis, I also touch upon the relationship between the intellectual property rights and the evolution of music in due places.) He continues his article by telling the events and allegation made by Akman and gives a short explanation concerning intellectual property rights Akman has violated. Avcı makes an analysis after Akman's allegation stating that Anna RF stole the song from Mehmet Ali Sezer and he brought the song back to Turkey. From these statements and acts, Avcı reveals that Akman violated Anna RF's recording rights in any way. Avcı also compares Anna RF's and Mehmet Ali Sezer's songs with

their transcriptions to determine if Anna RF plagiarized Sezer's song. He does a thorough analysis by considering the notes, tempo, measures and find more differences between two melodies than resemblances. After Akman's allegations, Anna RF states in a Youtube video that they had not heard *Her Şeyim Oldun* before. Avcı states that, even though they had heard that melody, it is obvious that they have just been inspired by it; they transformed that melody as possible as they could, they installed the melody within the composition in such a way that they created a whole new, different song. (Here, he refers to the characteristics of the author and the possibility to use an already existing melody in a new musical work by being original.) He also points out that, the fact that Anna RF used same notes (partially) with Sezer demonstrates us that two musicians in different parts of the world can feel the same and find the same melodies, which was a remark made by one of the expert witnesses I interviewed for this thesis. Another article written by Avcı is called *Manuş Baba ve bir bestecilik kazası örneği* where he handles a case regarding which MSG (Musiki Eserleri Sahipleri Grubu)⁷ has issued a technical expertise committee report concerning the songs *Eteği Belinde* by Manuş Baba and *Senden Gayrı* by Atilla Yılmaz (2017b). The allegation was that Manuş Baba had plagiarized Atilla Yılmaz's song, MSG's technical expertise committee decides that *ara nağmes*⁸ of the two songs are the same. Avcı criticizes the report since MSG technical expertise committee did not append any analysis containing transcription. He transcribes the speculated part himself and finds out that these parts are almost exactly the same. But, rather than calling this fact as plagiarism, Avcı states that this is a "musical accident" or "compositional accident" (Avcı, 2017b), Manuş Baba was suffering from subconscious plagiarism, which is also called as cryptomnesia. Avcı believes that existing musical material may be used to produce new, creative musical works and during this creative process, sometimes the same melodies happen to be used. He explains how these kinds of accidents may happen and cites two possibilities. First possibility is cyrtomnesia; our brain may make us think that an idea or a creative thinking that we have already seen or heard is our own idea. So, Manuş Baba may have believed that the melody of *Eteği Belinde* belonged to him, he may have thought it was his idea although he had already heard of it

⁷ Musical Work Owner's Group is a CSO protecting musical author's rights.

⁸ *Ara nağme* is one of the parts of a song form in Turkish art music. This is the instrumental section existing between the other parts and linking them together. The song form arisen in Turkish art music is still used in Turkish music of today, hence we continue to use same terms.

somewhere else and did not remember it. This is the situation called as subconscious plagiarism or musical accident. The second possibility is relating the harmonic patterns used in popular music and limited melodies can be built upon these harmonies. As a result, the same melody may be found by different artists in different parts of the world, at different times. Avcı's another article (2017c) that I could find about plagiarism is relating to Cemal Reşit Rey's *Onuncu Yıl Marşı* (10th Year March) composed by him for the 10th year celebrations of the Republic of Turkey. There are allegations that this march was composed by plagiarizing a motive from Rousseau's aria *J'ai Perdu Tout Mon Bonheur*. Several journalists actually evaluated this event, I will mention further in this thesis Ayşe Hür, who claimed that Rey may had plagiarized the beginning of the march. Anyways, Avcı makes the comparison of two motives subject of the allegations by writing their transcriptions. He notices that the similarity exists in a very short section of the melody and that such melody is very generic and can be found in other classical music works. He finishes by saying that, on the other hand, it is natural for composers to borrow material from their masters out of courtesy and in order to say *hello* to those masters.

Musical plagiarism is widely handled in academic writings outside of Turkey, either those writings are legal or musicological articles or papers with respect to software serving to find similarities between two musical works. I would like to cite some of these articles, which more directly concern the subject of this thesis. Pinter (2015), in his article *Plagiarism or inspiration, on the relevance of melody as a maker for plagiarism in pop and rock music* gives a critical approach to decide about plagiarism in popular music and he also asks "where lies the threshold of musical plagiarism" (Pinter, 2015). He calls attention to the terms used by U.S. copyright law such as "substantial similarity" (Pinter, 2015) and the vagueness of these concepts. There are not any precise or algorithmic rules to determine what the substantial similarity is and in general expert witnesses precise it. They lean on prior practices and general rules settled before the courts. Pinter puts his finger on the inspiration issue in the songs and its separation from plagiarism. He bases his assumptions regarding plagiarism detection upon existing examples in the pop music world. He suggests to analyze the similarity on several levels; on the melodic and harmonic level, structure, phrasing, rhythmic level and also on lyrics, video clips, etc. Pinter suggests that harmony (chord progressions) and rhythm are not protected under copyright laws. Chord progressions

are accessible to everyone even though it seems like a chord progression is first used by a particular composer. They can be one of the factors increasing the sense of similarity, also, using the same harmonic rhythm may make think us that a song has been plagiarized. Generic rhythmical patterns and sound cannot be copyright-protected either. However, as far as I understand from Pinter, as much as the rhythm or the sound gives an idiosyncratic trait to a song, they can be less and less open to being borrowed. The deciding element of plagiarism is usually the melody, as also found out in this thesis. Especially the borrowing of lead vocals and hook melodies constitute plagiarism whereas the “backing track” (Pinter, 2015) meaning short solo fills, back vocals are more subject to inspiration. Pinter states that this is a “generally accepted rule”, and the proposed approach in his study. He also mentions the unwritten rule of borrowing 5-9 consecutively identical notes would lead to plagiarism and how they can only be an “urban legend” (Pinter, 2015). There are melodic and rhythmical patterns where a series of even 8 notes is not sufficient to deem a song as plagiarism. The reason for this is that these patterns are generic, commonly used. Pinter says that the melodies can be compared as a method to determine plagiarism but this comparative method can be misleading because of the generic melodies. Here, he suggests that music experts (hence, expert witnesses in lawsuits) can understand that these similarities arise out of the use of generic melodic patterns. Pinter stresses out that many plagiarism cases are coincidental, the resemblances are due to chance. He states that cases demonstrate there are basic melodic patterns that are advancing upon basic chord progressions and this may result in long overlaps of notations between the songs. The decision of plagiarism should be built upon the uniqueness of the borrowed part, however, some melodic patterns built on certain chord progressions are not unique enough. Though, U.S. courts still may give their verdict as the song had been plagiarized, as happened in the case *Blurred Lines* (by Robin Thicke and Pharrell Williams) vs. *Got to Give it Up* (by Marvin Gaye). He finishes his article by stating that it is much harder to find new, original melodies in pop music than it was 50-60 years ago. Back then, artists used expanded modal melodies, new types of syncopation, chord progressions, rhythmical patterns, instruments, in another saying new and original material and techniques in their songs. Also, the growth of new genres has slowed down. On the other hand, the volume of musical production and demand has multiplied. Pinter points out that this opposition triggers the probability of accidental matchings between musical works in pop music. I find Pinter’s article highly useful in

terms of seeing what the elements to be analyzed in a pop music work are, how the similarity is determined and how the originality is defined. and how the originality is defined. In addition, I have noticed that I encountered the same issues mentioned by Pinter, here in musical plagiarism cases in Turkey, either the problem would be the method of analysis or the limited situation of the pop music market is found in.

An academic study approaching my thesis subject is David Fossum's (2017) dissertation. He has accomplished his doctoral thesis regarding authorship, anonymity, and copyrights in Turkey. His thesis *A Cult of Anonymity in the Age of Copyright: Authorship, Ownership, and Cultural Policy in Turkey's Folk Music Industry* observes the relationship between IP Law and copyright law in Turkey and Turkish folk music with folklore ideology. He does not focus on plagiarism, however some facts he mentions about in his dissertation like the appropriation of Turkish folk songs, and authorship, and anonymity problems in Turkey support the discussions in my thesis. He tells the story of folk music genre shaped by the political regime in Turkey, while he mentions the handling of folk music by the state and the process of the evolution of copyright in Turkey on the other hand. Fossum made an extensive study with respect to copyright regime in Turkey, the evolution of Turkish folk music, how the state broadcast agency TRT gathered folk music works and constructed an archive, what problems arise during the construction of the archives and what the reflections were on the folk music. Through the case studies and ethnographic law approach, he explains us how actors' contribution to and attitude towards folklore can affect the rise and implementation of IP law (Fossum, 2017, p.3). Fossum tells the genre-defining discourses in Turkish folk music, one being the political or nationalist, the other being multiculturalist. The nationalist discourse builds upon the nationalist vision of the early Republic of Turkey, which induces the rejection of Ottoman traditions, including the music and inciting Turkish folk music as the only real Turkish music. On the other hand, the multiculturalist discourse arises from the image of Turkey, seen as a mosaic of different cultural groups, ethnicities and religions. Despite those controversies, Fossum explains that there is an agreement on Turkish folk music being consisted of a particular characteristic, which is anonymity. He explains subgenres and types of music existing under Turkish folk music and also the *aşık* music (music of the minstrels), *meşk* tradition and the instruments used in folk music. He moves on by questioning the relationship between music, cultural property, and IP law. He explains

the concept of authorship and how it is conceived in intellectual property law: copyright law draws an ideological picture of authorship, with authors being geniuses creating works as properties that deserve protection. The protection requires that the work shall be stable with a definite author rather than being fluid which is in controversy with the idea of the evolution of music and the creative processes (Fossum, 2017, p. 14). Discussions about the contradiction between the copyright law and creativity are dominant in the area of music and copyright and Fossum cites the assertions that copyright law hinders the creativity and threatens the traditional definitions of creativity and ownership (Fossum, 2017, p. 16). Fossum tries to reveal the understanding about authorship and the concept of work in Turkey through the understanding in the IP law system, collective rights organizations, the archives and canonical repertoire constructed by the state broadcasting agency TRT, and the folk music industry. By the intermediary of a case study, he demonstrates how copyright law is difficult to implement because of the environment in which the traditional music practices and the institutions cited in the dissertation (such as collective rights organizations, TRT, etc.) exist. He puts forth that, although the cultural policy is tried to be shaped by the state's hand with a national discourse, there is another side of this policy including the necessity for the producers, performers and even creators of folk music to be protected by copyright laws. He also mentions the problem of *derleme* and *derleyen*, and puts his finger on the gap in the law, which is normally expected to protect the *derleyen* in the creative and traditional environment of Turkey.

Iyar Stav (2014), as a jurist approaches the subject from a legal point of view in his article *Musical Plagiarism: A True Challenge for the Copyright Law*. Touching upon the opposition between the law, which aims to provide for an order and the music, which grows and operates without boundaries, he states that it is difficult to treat musical issues with laws. However, there has been a need to bring about regulations for musical issues because music has gradually become a commodity and a business. The courts in the UK and the USA tried to settle standard rules, established some doctrines in order to determine similarities between musical works. Stav cites these tests in his work and mentions about Arnstein test which has been used for more than 70 years in U.S. courts. In his introduction, Stav shows the link between the law and music. He conformably suggests that intellectual property law which deals with abstract possessions is the law branch that has the most natural interface with music.

Then he sets the ground rule for music composition from the legal side; whatever you compose, the work should be yours. When there is a musical similarity, suspicions start as to the originality of that work. Then Stav defines musical similarity: “it is the resemblance of one song to another, as a whole or only certain characteristic in it” (Stav, 2014, p.3). He defines these resemblances as very common because he thinks musical ideas are scarce sources; the musical creation is limited, especially in popular music because of the limited number of chord and notes design to compose a song. The chances are low to not to create a similar melody to another when a composer wants to create a catchy tune. Stav thinks that similarity occurs out of three reasons: coincidence, influence, and plagiarism as wrongful appropriation. Stav accepts for a composer the necessity to be influenced by former compositions of other composers. Taking fragments and ideas from other musical works should be possible as long as the one who is taking those elements creatively combines them, to convey his/her original expression. It is an ambivalent situation to distinguish the inspiration from plagiarism. Afterward, Stav gives his definition of plagiarism and says that plagiarism is not a legal concept, it basically means taking credit for someone else’s work. I appreciate Stav for this statement and for saying that it is also an unethical behavior. Because plagiarism is not a legal term, we cannot find any specific definition in the laws. Also, the statement that plagiarism becomes an infringement only if the plagiarized part is under the protection of the laws. He touches upon the unethical side of plagiarism and adds that plagiarism deprives the original author of the reputation and credit he/she should have gained from the work. Afterward, Stav mentions the blurry area between the idea and expression which is also discussed by Turkish jurists and courts. The statement that substantiality is a matter of quality rather than quantity is very fitted when we consider that characteristics of the author may reflect in any part of the musical work and this is not related to a quantity (Stav, 2015, p. 13). Subsequently, Stav explains the test used by the courts and starts with explaining the Arnstein test, from which other tests have derived. The Arnstein test is first applied in the lawsuit *Arnstein v. Porter* (1946) (as cited in Stav, 2015, p. 15) and is named after that case. In the lawsuit, to prove that the defendant copied the plaintiff’s work and the borrowing was an improper appropriation, they first look for any similarity between the two works. If so, to prove that the borrowing has taken place, it must be proven that the defendant had access to the plaintiff’s work. If the plaintiff cannot demonstrate that the defendant could reach his/her work, he/she should prove there is a substantial

similarity between two works, to the extent there can be no coincidence (Stav, 2015, p. 15). The test to prove the substantial similarity consists of an analysis of the musical elements such as harmony and melody, conducted by an expert witness. The second stage of the test is performed by lay listeners, “the judge or jury, which represents the average person with no professional or analytic grasp of music” (Stave, 2015, p. 16). Following the explanation of this test, Stav continues with explaining *extrinsic and intrinsic tests, total concept and feel, the pattern test, the abstraction test, the filtration test*. An important remark by Stav is that subconscious copying or the defendant’s intention is not a defense for the court (Stav, 2015, p. 21). Stav explains shortly how intellectual property disputes and how the laws protecting them have arisen. He mentions international statutes concerning intellectual property. Afterward, he simulates a copyright dispute and explains how that case could be finalized in courts. Throughout the simulation, he cites some principles that I also have encountered during my analysis of the expert reports. During the analysis, Stav does not ignore to check the proximity in the publishing dates of the songs, if there is a reasonable opportunity for the defendant to access the plaintiff’s song. He repeats that rhythm and structure of the musical works are only ideas that can be used by other authors and adds that the choruses are the most remembered parts of the songs. He finishes his article by making a very pertinent remark by saying that there is not necessarily any absolute truth in intellectual property law.

Another type of study focusing on musical plagiarism is the detection of plagiarism in music by the help of algorithms, devices, metrics, and visualizations that can be used as computer programs and quantitative evaluation. The main question outcoming from these articles is if these measurements can replace experts’ opinions. Müllensiefen is one of the scholars who has done multiple studies about music plagiarism and its detection by automatic measurements. In his article co-authored with Pendzich (2009) *Court decisions on music plagiarism and the predictive value of similarity algorithms*, he focuses on the detection of the similarity between the melodies. He compares standard similarity algorithms to the new ones by taking publicly available plagiarism cases as models. New similarity algorithms “make use of statistical information about the prevalence of chains of pitch intervals in a large pop music database” (Müllensiefen & Pendzich, 2009, p.207). Müllensiefen and Pendzich state that these new algorithms which are statistically informed perform better than simple

comparison algorithms. Here, the authors are interested in the accuracy rate of the algorithms compared with the findings of the courts. They found out that the algorithms could reach an accuracy rate of up to 90% in some of the measurements. Still, they abstain from saying that these methods can give 90% accurate results, instead, they prefer to state that the algorithms can be helpful in plagiarism cases to detect the common features existing between the melodies. As the result of their research, they think that “melodic plagiarism is decided about on the basis of pitch content in most of the cases” (Müllensiefen & Pendzich, 2009, p. 224), but of course there are exceptions. These exceptions arise because of the characteristic traits that cannot be measured with the algorithms and that can be evaluated according to the specific case (e.g. when call-and-response phrases in two different registers construct the melody).

In *Quantitative evaluation of music copyright infringement*, Savage et al. (2018) try to develop a test using simple quantitative methods in order to support “traditional qualitative musicological analyses and improve the efficiency and transparency of music copyright lawsuits” (Savage et al., 2018). To this end, they construct a *percent melodic identity (PMI)*⁹ method, which automatically quantifies and visualizes the percentage of identical pitch classes shared between two melodies (Savage et al., 2018). PMI method could engage with 80% of the cases they took as an example. The plagiarism decision in the cases that PMI could not predict was given according to non-melodic factors such as lyrics, access of the author etc. First, this PMI method was adapted to music in order to determine the cultural evolution of folk song melodies (Savage et al., 2018). It is striking that the authors state that this method is also convenient for the detection of plagiarism since “copying of melodies with modification is simply another form of musical evolution” (Savage et al., 2018). These authors too find that copyright infringement cases in music are too complex to be only decided about with the use of these algorithms and it cannot and should not replace trial by jury and PMI can rather be a complementary way for the courts.

Other studies concerning algorithms serving for the detection of similarity in music are performed by Prisco et al. (2017) who develop a new metric to detect similarities

⁹ This method is said to be based on the “automated sequence alignment and percent identity calculations used in molecular genetics to compare DNA and protein sequences” (Sagave et al., 2018).

in pop music pieces to assist music experts in deciding doubtful cases. Their study sets off from the idea that there is not any specific rule according to which a minimum number of identical notes or measures in two compositions constitute plagiarism. They design their work on the idea that the melody is in general taken into consideration for the recognition of a music plagiarism and they develop and compare melody visualization tools. A tool for detecting altered similarity between works is mentioned in the article by Cason and Müllensiefen (2012). Altered copying involves borrowing a section of a musical work by changing it. Cason and Müllensiefen's article provides us also with the legal perspective used in doing a comparative analysis in plagiarism cases by explaining note-for-note comparison and aural perception of similarity. Their system aims to model the reasoning and decisions of the expert witnesses, the court, but also with the lay listeners. They envisage to build a large database of western popular music songs; the allegedly plagiarizing melody will be broken into very small pieces of melodic elements which will be compared with the database. The melodic elements receiving higher weight will mean that those elements match with rarely used other elements, which indices a possible case of plagiarism. This *perceptual weighting* mechanism is considered to be combined with one of the most used similarity measurement models. Hence, they attempt to create a system that would assist the court in a more objective and transparent way than the expert witnesses. They notify that the system is being evolved although it still remains limited.

Almost all studies carried out for developing algorithms benefit from the collection of music copyright infringement cases decided in U.S. courts, which are documented in a database by the Columbia Law School & UCLA Law Copyright Infringement Project.

2. PLAGIARISM IN THE LAW

Prior to getting into the fieldwork and discussing issues concerning plagiarism, I would like to take a glance at the legal regulations with respect to work of art, borrowing from a work of art, author and its rights, and the results of the transgression of these rights.

2.1 Definition of Plagiarism

Law No. 5846 on Intellectual and Artistic Works does not give the definition of plagiarism, it sets forth several situations in which an act would constitute the crime of plagiarism regarding a work of art, and the exceptions where quotation of a piece of music would not constitute plagiarism.

Oxford Dictionaries define plagiarism as “The practice of taking someone else's work or ideas and passing them off as one's own” (Url-8). Turkish Language Association gives a similar definition for the word *aşırma* which is the Turkish translation of *plagiarism* and which suits very well to the act; it is taking somebody else's possession, putting it in your pocket and acting as if nothing happened, that possession had belonged to you forever.

We understand therefrom that plagiarism occurs when the actor of plagiarism (the *plagiarist*) takes someone else's work or a part of that work, pretends that the taken work or section belongs to her/him. In short, plagiarism is theft of work of art.

Plagiarism happens in the below cases:

- a) When the plagiarist copies the entire work and gives his/her name to it,
- b) When the plagiarist takes a section of someone else's work but does not refer to the original author,
- c) When the plagiarist refers to the original author, but the reference is wrong, incomplete or misleading.

For a better understanding of plagiarism, I would like to clarify a work, a musical work and which author's rights are infringed when a person commits plagiarism.

2.1.1 Work and characteristic

The definition of *work* is given in article 1 of Law No. 5846. This provision stipulates the core value of a work of art which is essentially protected under Law No. 5846. A work is described as “any intellectual or artistic product bearing the characteristics of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work” by the Law No. 5846¹⁰ (article 1/B). The hard-hitting point of this definition is that this product is expected to bear the characteristics of its author. In the litigations and reports I am going to explore in this thesis, we are going to find out what meant is by characteristic. We are looking for originality in a product so that it would be considered as a work in the meaning of a work of art.

Another condition for a product to be considered as work is that this product shall be mentioned among the work types envisaged by Law No. 5846. This condition is mentioned as the *objective condition* of a work, on the other hand, carrying the characteristics of the author is called as the *subjective condition*. (The courts may interpret the objective condition as being convenient for economic evaluation which means being recorded upon a physical component -as a CD, cassette etc.-. The high court probably foresees this condition for practical purposes; if the work is recorded on an item or transcribed, it is easier to detect it and to assess its value. But in principle and also, in my opinion, a work does not need to be registered anywhere to gain the legal features of a work (Tekinalp, 2003, p.12).)

In this thesis, you will see that legal and music scholars build the notion of *work* upon the *characteristics* of the author of that work. At this issue, there are a lot of points on which scholars of two different disciplines agree. In this section, I will shortly explain what does *characteristics* mean from a legal standpoint.

Law No. 5846 protects the rights arising upon the work. This characteristic of the author or the “work owner” as Law No. 5846 suggests (article 1/A) is the subject of

¹⁰ For the purposes of this thesis I am using the English translation of the Law No. 5846 as presented in the website of World Intellectual Property Organization (WIPO) (Url-9).

this protection. Ideas or subjects are not protected under Law No. 5846, whereas the Law protects the manner in which those ideas and subjects are expressed. The style in which the idea or the subject is expressed is the real object of protection. This style is reflected in the work as the characteristics of the author (Tekinalp, 2005, p. 9). This principle has repeatedly come in front of me during my research. Turkish courts, as well as U.S. courts, underline this principle because it is a benchmark in understanding if a musical concept is under copyright protection or not.

In Turkish legal doctrine, the characteristic is interpreted in many ways by different scholars. It is either the originality or the reflection of the creative power. Prof. Ernst Hirsch is one of the professors who has prepared the draft Law and it has been thought that Hirsch's personal opinions affected the idea of originality in the work. He thought that a work is original if it is unique, if someone else other than its author cannot create it. If the product is in such nature that anyone can create it, it will not possess any characteristic; therefore, the society does not have any interest in protecting such products (as cited in Beşiroğlu, 2006, p. 77). Though, we should not understand this originality as an absolute concept; we are not talking about originality, which has not ever been used or seen. Such concept shall not be conceived as the uniqueness of the work, we are not mentioning about an unseen or unheard kind of product. We would like rather express that the work should show an originality in telling the author's idea and the reflection of the author's thinking and personality on the product. The manner adopted by an artist of telling his/her story is called *üslup* in Turkish. This is the style used by the author in expressing her/his ideas. An author's expression is her/his signature, seal. This is the peculiarity of the author, of her/his artistic personality. The creativity is inherent in the author's style, so the style is individual and subjective (Tekinalp, 2005, p.100). The mentioned expression, personality, and style concepts are in the core of the characteristic of the author both for music and law scholars.

Law scholars also think that the style emerges differently, depending on the kind of the work, therefore the characteristic of the author is determined according to the type of work. The institutions who decide if the characteristics exist or not and on the level of these characteristics are the courts, hence the expert witnesses. As it will be pointed out later, this is the reason the expert witnesses express that the expert working on a

music piece subject to a plagiarism lawsuit shall be specialist on the genre of music to which the music piece in question belongs.

The condition for a product to carry the characteristics of its author to be considered as a work makes us seek the bond between the work and its author. Hence, Law No. 5846 prevents any product that could be created easily and casually by anyone shall be deemed as a work of art (Öngören, 2010, p. 19).

2.2 Musical Work

Article 3 of the Law No. 5846 sets out that “musical works are all types of composition, with or without lyrics.” The Law No. 5846 does not do any discrimination between the kinds of composition; a musical work can emerge during an improvisation process or a definite composition process. I have encountered that law books explain that electronic or computer music works are also considered as musical works as long as they carry their author’s characteristics.

Therefore, a musical product does not have to be notated to be a musical work. The element under the protection of the Law No. 5846 is the content of the work, not the shape (Tekinalp, 2008, p. 116). What we understand from shape is the structure and the rhythm of the work. Rhythm, tonescale and sound are not protected under the Law No. 5846 in principle (Tekinalp, 2008, p. 116) (and I have not encountered any exception to this rule during my research).

Here, I would like to raise an issue that has disturbed me during my research. In some law textbooks and in the Supreme Court decisions, the idea of characteristics and the conditions in which a work of art incorporates the characteristics are not clear, their narrations are far from the concepts used in the music. As per Öngören (2010), the *originality* in a musical work is sought in the rank of the voices, in the link between the scales and rhythm; the arrangement of the voices matters to determine the characteristic (p. 20, 25). He adds that the content and shape of a musical work shall be analyzed together as they are inherently connected. I do not see any consistency between two statements; the link between the voices or the rank of the voices and rhythm sound like they are mostly relating to the shape. I am not sure if we even spare a musical work’s characteristics as in relation to the content or shape.

In anyways, the idea of *the rank between the voices* conforms with the statements in the court decisions (for instance in the decision of the 11th Chamber of the Supreme Court numbered E. 2005/3742, K. 2006/3428, T. 3.4.2006) (Yargıtay 11. HD., E. 2005/3742, K. 2006/3428, T. 3.4.2006), stipulating that certain relations, the link between voices is essential in deciding if a work is characteristic. Probably Öngören took this idea from the court decisions. However, it is not possible to understand what are *the rank of the voices* and *their connections*. Moreover, in none of the reports I have seen, I have encountered the analysis of *the rank of the voices*. These kinds of expressions which also exist in court decisions, do not evoke a concrete opinion in my mind. They may try to define the melodic contour and the harmonic structure. Here, we should know that the expert witnesses primarily compare the melodies of the songs subject to the lawsuit, together with the other elements such as instrumentation, rhythm, harmony etc.

2.3 Author and Author's Rights

The concept of the author is worth explaining since when there is a plagiarism act, the person whose rights are violated is an author. Article 8 of Law No. 5846 sets out “the author of a work is the person who has created it”. Tekinalp states that the authorship emerges with the creation of the work *ipso iure* (by the law itself) (as cited in the report dated 10.04.2018 for the lawsuit in the 1st Chamber of the Court of Intellectual and Industrial Rights of Istanbul, with file number 2016/188 E.). This is the principle explaining the statement in article 8 of Law No. 5846, meaning that when a work of art is created, the one who has created it is by law the author of that work. The fact that intellectual property should be deemed a work of art or not is decided whether this work carries the characteristics of its author. This reveals the tight connection between the author and his/her work. As a result of this tight connection, the author has exclusive rights arising from his/her works.

The Law No. 5846 stipulates the presumption of authorship, which is an important concept in defining the author of a musical work. As per this presumption, the person whose name appears as the author of a work on the published copies of a work shall be deemed as the author of that work until proven otherwise (article 11). When an

author's work is plagiarized, both moral and economic rights of that author are infringed.

Moral rights of the author are the rights owned by the author by virtue of having created the work and related to his personality. Moral rights cannot be assigned to another person. The authority to disclose the work to the public (art. 14), the authority to signing the name under the work of art (art. 15), right to prohibit any modification (art. 16), and the authority to reach the original of the work (art. 17) are author's moral rights. Among these rights, plagiarism directly transgresses the authority to designate the name and the prohibition of modification.

The authority to designate the name is concerning the author's exclusive right to indicate his/her own name when disclosing the work. On the other hand, the right to prohibit any modification grants the author the authority to prohibit to make amendments to the work. Article 16 of the Law No. 5846 sets this prohibition forth as "no abbreviations, additions or other modifications may be made to a work or to the name of its author without his consent".

When a work is plagiarized in its entirety, the plagiarist giving its own name to the work clearly violates author's right to decide whether the work will be published without a name, with her/his name or under a pseudonym. The lawmaker's intent in this provision is to protect the interest of the author in being recognized as the owner of that work (Kitapçioğlu, 2013, p. 6). Equally, copying just a section of a work and not referring or a wrong reference to the author violates the right to designate the name.

When the plagiarist takes a part of a musical work without permission, he/she breaks the integrity of that work; therefore, the right to prohibit any modification is also transgressed with plagiarism. In fact, since the name and the content of the work form integrity and the author has a moral interest on the integrity of the work; any changes that affect the characteristics of the work (including the name of the work) violates article 16 of the Law No. 5846.

As to the economic rights of the author, they are; right of adaptation (art. 21), right of reproduction (art. 22), right of distribution (art. 23), right of performance (art. 24) and right to communicate a work to public by devices enabling the transmission of signs, sounds and/or images (art.25). Act of plagiarism violates article 21 of Law No. 5846

setting out the right of adaptation which is “the right to exploit a work by adapting it”. This right is related to the right to prohibit any modification and it belongs exclusively to the author except for the cases in which the author gives the permission to adapt his/her work to another person. In such a case, the person adapting, reproducing, distributing, performing, disclosing the work to the public with the author’s permission is entitled to do any changes necessary for the technique of adaptation, reproduction, performance or publication, without special permission by the author. Otherwise, if a person takes one part or the entire of a musical work without the permission of its author and uses it in his/her work, that person shall also be deemed plagiarized such work.

2.4 Crime of Plagiarism and Freedom of Quotation

Although it is not given any definition for plagiarism in the Law No. 5846, there are consequences foreseen by the Law No. 5846 for the act of plagiarism. Article 71 of Law No. 5846 stipulates that any person who infringes the moral, economic and related rights regarding intellectual and artistic works protected under the Law No. 5846 shall be sentenced with some penalties. According to the article, any person committing such infringement by a) giving a title to another person’s work as his own work; b) by citing (quoting) from a work without referring to the source and c) by giving reference regarding a work in a wrong, incomplete or misleading way shall get prison sentence or judicial fine. The legislator’s intent in foreseeing plagiarism as a crime is to protect the author’s labor and rights as well as incenting the creation of original works.

There is an exception in the Law No. 5846 concerning quotations from a musical work. This exception is referred to as freedom of quotation (*iktibas serbestisi*) and is set forth in article 35 of the Law No. 5846. If a person taking a section from a work abides by the conditions set out in article 35, he/she shall be entitled to quote from that work. Otherwise, he/she shall be deemed to have plagiarized that work.

Article 35 sets out that themes, motif, passages or ideas of a published musical work can be quoted in an independent musical work without the permission of the author only if the person who quotes refers to the author. This exception envisages public interest in the sense that it gives way for the scientific and artistic developments (Demiral Bakırman, 2015, p. 61). Hence, borrowing a section more than the

abovementioned ones or borrowing one or more of those sections from a work but not explicitly referring to the author would constitute the crime of plagiarism.

The problem arising concerning this exception is that theme, motif, passage and idea are not defined in the Law No. 5846, and there are no definite descriptions taken as reference for these units. As will be seen below, in none of the cases these terms are defined or discussed. Quotation without permission shall not be confused with inspiration. The quotation is taking a section of a work and using it exactly in another. On the other hand, inspiration expresses benefiting from the ideas used in a work and shaping the new work taking those ideas as the basis. The copyright protection covers the way in which those ideas are reflected, not the ideas themselves. As the Supreme Court (Yargıtay 11. HD., E. 2015/13399, K. 2017/1106, T. 27.2.2017) pronounces in one of its decisions, when the manner of expression of an idea is used in another work, even though it is a partial usage, means that such expression is used in the latter work.

2.5 The Issue of Melody

While mentioning the freedom of quotation, law scholars dive into the discussion regarding whether the melody is one of the elements free to be quoted in the scope of Article 35. Ideas about borrowing a melody in legal doctrine are diverse and Öngören (2010) concisely summarizes them (p. 366). Professor Ayiter believes it is possible to take a melody into another musical work provided that the one who takes it stays in the limits of the Law No. 5846; however, he thinks that in monophonic works such as works of Turkish art music, the melodies should be widely protected. Professor Erel thinks the melody is the most important component of music which gives the musical work its specialty, and since a musical work is composed of many melodies it should not be possible to adopt one or more than one melody from a musical work. However, he thinks theme, passage, motifs or ideas are possible to be borrowed in scope of the Law No. 5846 (as cited in Öngören, 2010). On the other hand, because the melody is not explicitly cited in the article as one of the concepts in scope of the freedom of quotation, Ateş thinks that melody cannot be quoted even if the quotation is in line with the Law No. 5846 (as cited in Öngören, 2010). The reason for such distinction between melody and the elements foreseen in article 35 of the Law No. 5846 is the regulation of German Copyright Law. Law scholars compare German Copyright Law and Turkish laws regarding freedom of quotation. According to Öncü (2009), German

Copyright Law allows an independent work composed by making use of another work in scope of the right of free use, to be made public without the permission of the original author. However, there is an exception to this rule: the said right of free use is not valid for the melodies. A melody cannot be taken from a work and used in another one in a recognizable way; here, the prohibition concerns an extensive use of melody (p. 254).

Here, I think the German Copyright Law and our Law are based on the same grounds and logic. In scope of the right of free use, a person can benefit from older works provided that this person creates an independent work carrying his/her own characteristics and this free use does not turn into thievery. I believe in article 35 of the Law No. 5846 foreseeing the right of quotation the lawmaker has taken the same vision as grounds. Themes, motifs and passages actually have melodies, they are composed of notes which construct a melody. Those components of a musical work are small parts that build a musical work and its melody. Hence, these small parts may be quoted in scope of freedom of quotation and these quoted parts will already have a melody. Therefore, the allegation concerning the thesis that a melody of a musical work cannot be quoted would be wrong, only the melodies within the passage, motif and theme can be quoted because those components are quoted; the melody comes within.

Nevertheless, melody is an element occupying a considerable place in legal discussions about plagiarism and this discussion is in fact not in vain, because as you will see later in this thesis, the melody is actually the focal point of the analysis performed to detect plagiarism. Besides the elements like harmony, rhythm and instrumentation, melody takes the heavy lifting part in a musical work, especially in pop songs.

2.6 Court Cases

In this section, I would like to give examples from court decisions to show how the supreme court approaches plagiarism. Supreme Court decisions, in my opinion, do not clearly stipulate what exactly are the criteria to understand what the characteristics are, how should the experts compare the works and what elements the court or the experts examine in a musical work. The Supreme Court cases can be found in search engines

that can be used by lawyers, in annotated statute books and course books. However, the decisions of the courts of the first instance being subject of the Supreme Court cases cannot always be found, you have to find them in the files at the courthouses or in the electronic system called National Judiciary Informatics System (UYAP) where you can follow your cases if you are one of the parties. Lawyers too can visit the system and check the files they work on or submit documents; they also can find information regarding other files. Even though I am a lawyer, since I am not practicing, I cannot enter this system. So, I requested some of my colleagues to look for some documents about plagiarism lawsuits and I reached as much information as I could.

The Supreme Court cases create case law, the decisions of the Supreme Court constitute a precedent; the courts of the first instance and courts of appeal decide as per the precedents of the Supreme Court. In a way, the Supreme Court establishes how legal rules shall apply to the cases. Under this subtitle, I will cite Supreme Court decisions as well as decisions rendered by the courts of first instance that I could reach, rendered respecting characteristic of the author, musical work, plagiarism and quotation.

First, the courts and the appointed expert witnesses check if the product subject to the lawsuit is a musical work. When the existence of a work is the question, the courts search if that product fulfills objective and subjective conditions. It is much easier to see if a product is among the works cited in Law No. 5846. The real question is deciding whether the product subject to the lawsuit carries the characteristics of its author. The presence of the constituent factors of a work are investigated by the court, especially by the expert witnesses appointed by the court.

2.6.1 About musical works

2nd Chamber of Court of Intellectual and Industrial Rights of Ankara confirms that the protection in a musical work is “the sound which addresses to the hearing sense and which is the intermediary of the work”. It adds that a musical product is not needed to be notated to be considered as a musical work (Ankara 2. Fikri ve Sınai Haklar Mahkemesi, E. 2011/29, K. 2012/14, T. 14.06.1012).

2.6.2 Inspiration, idea and right of free use

With respect to inspiration, the courts' approach and also the general legal principle is that we shall differentiate adaptation works created by adapting or benefiting from other works from works created out of inspiration. When an author is inspired, he/she does not have to take the permission of the author of the original work; the right of free use allows to that author to use the original author's ideas. Hence, we cannot think that any work of art may be created without being influenced from another. The right of free use arises when solely the idea but not the content of a work of art is taken into another one; in this case, the author adopting the sole idea is deemed to have inspired by the first work. This idea is well-elaborated in Supreme Court's 11th Chamber's decision E. 2015/13399, K. 2017/1106, T. 27.2.2017. I would like to refer to this case hereinafter as *Muro Case*. It is between Selda Bağcan as the claimant and Pana film as the defendant, who is claimed to have used Bağcan's song *Üşür Ölüm Bile* (*even the death has cold*) in its movie *Muro*. I will talk about this case and its expert witness report in detail further, in the next sections. I would like to content myself with saying that, the Supreme Court separates quotation from inspiration. Quotation is, as mentioned above, using a certain section of a musical work in the next work, whereas inspiration is merely the adoption of an idea in the previous work. The copyright protects not the idea but the manner in which this idea is processed. Ideas can be borrowed, can be used but the expression of those ideas cannot be used so freely.

2.6.3 Content

The fact that the content is the real subject of the protection is mentioned in the decision of the 11th Chamber of the Supreme Court numbered E. 2005/3742, K. 2006/3428, T. 3.4.2006. In the decision, it is stated that "the subject of the protection is the content of the musical work expressed by voice, and at the same time the ranks and *attachment* between the sounds, and certain mixtures of the sounds with melody, rhythm and harmony" (Yargıtay 11. HD. 2005/3742, K. 2006/3428, T. 3.4.2006). (By attachment I assume the court means links.) The same decision adds that the detection of the characteristics of the author shall be done by taking in consideration the impression of that work on a lay listener. However, the determination of such an impression shall be achieved by using scientific methods on the basis of each case. (This reminds me of a jurist expressing that impression on the ear shall be the basis of

the plagiarism determination, but such impression shall be demonstrated by expert witnesses.) It is not very clear to me in this decision if the rank and link between the sound, the mixture of the sounds with melody, rhythm, and harmony are included in the content of the work. Considering this case constitutes a precedent for other cases and mentioned in other Supreme Court decisions, I would expect a much clearer definition from the Supreme Court for the content of a work. It is not definite from the decision what is meant by these links and mixtures between the sounds, melody and rhythm. I believe all of these factors constitute the content of the work. On the other hand, Öngören (2010) expresses that the form of a work is formed by the structure and the rhythm whereas the melody is the content of the work, and that the characteristics are sometimes found the links between the sounds and sometimes in the content.

The same chamber indicated in the decision numbered E. 2015/13493, K. 2017/1474, T. 13.3.2017 same principles in terms of the subject of protection, quotation and inspiration, and the violation of the rights arising from the work, the determination of characteristics and the factors to be taken into consideration by the expert witnesses. The Supreme Court seeks clarity in the expert reports as to the opinion on the presence of plagiarism, if the work is an arrangement of the original work and if the quotation is within the limits of freedom of quotation.

2.6.4 Author's characteristics

The courts agree that anonymous melodies can be freely used. Hence, quotations from anonymous works such as folk songs, the use of their entire parts and their arrangements are acceptable. However, at first, in case a work or a part of it is subject to litigation because of their use under the reason they are anonymous, the court's priority is to determine if that work and its disputed section are really anonymous. The 11th Chamber of the Supreme Court has specified in its decision E. 1974/1100, K. 1974/1805, T. 23.5.1974 what shall be checked in a lawsuit in which the subject of the dispute is an allegedly folk song (Yargıtay 11. HD., E. 1974/1100, K. 1974/1805, T. 23.5.1974). Only the initials of the authors' names being parties to the lawsuit are given on the decision, however, it is obvious that the decision is about the song *Derule* and I guess this lawsuit was between Cemile Cevher as the claimant and the late Barış

Manço as the defender.¹¹ Cemile Cevher should have filed the lawsuit claiming that she actually had composed the song *Derule* which is known as a folk song. Here, the issue is that songs in the form of folk song (which is called *türkü*) do not have to be anonymous, they can have composers. So, in this case Cemile Cevher sought her authorship rights arising from *Derule*, whereas the defendant claimed that it was an anonymous song peculiar to the region of Trabzon.

According to this decision, the fact that the folk song is really anonymous and product of the *folk* should be verified. The history of the song should be searched; it should be questioned if that product is a work created by a person's imagination and artistic power, if an existing folklore product has become a new work of art or otherwise, if an abstract folklore work had only been notated. By way of asking these questions to competent authorities or persons one can determine the author of that work. Also, I understand hereby that the characteristics of the author is expressed by the court as the author's imagination and artistic power. As you see, the court mentions here the subjective condition of a work. This subjective condition is not an assertive independence or the presence of an unseen creation. Öngören (2010, p. 18) interprets this decision in the following way: the reshape or re-arrangement of existing material or the analysis and process of an already-existing idea is totally acceptable by the intellectual property law as the characteristics of an author. I can agree with this view except, when it is mentioned about the re-arrangement of existing material, I believe it is the arrangement of an existing work and this act is subject to the consent of the author because it does not concern a new creation. In the same decision, the court adds that the disputed works shall be compared in terms of voice, harmony, and lyrics.

I believe that the courts and expert witnesses maintain the insight adopted by the Supreme Court with respect to comparing notations and lyrics of two works and consulting official authorities and accomplished experts (namely expert witnesses). The court adds that, if the song is not notated or recorded in a tape or record, the

¹¹ Barış Manço was a Turkish rock singer and songwriter well-known with his authentic style which he created with his clothes, his compositions and lyrics. He also gave compositions in Anatolian pop genre. The artists of Anatolian pop music combined Anatolian folk music elements as well as instruments such as *yaylı tanbur* (long-necked bowed lute), *bağlama* and *kabak kemençe* (spike fiddle with gourd resonator) (Stokes, 2001), a variety of Turkish rhythm instruments with electric guitar, keyboards and drum kits (Stokes, 2001). Therefore, we can hear a lot in Manço's songs the timbre and melodies of the Turkish folk songs.

comparison shall be done by respecting the rules of music such as voice, harmony, and lyrics.

This case is sent back to the court of the first instance on the grounds that the above necessary steps had not been taken by the expert witnesses analyzing the case in the first stage. As far as I understand from an interview I have seen on Facebook taken from the book *Fadime Kimdir* by *Ayşegül Kolivar*, Cemile Cevher Çiçek could not follow the case and could not win her rights back (as cited in Url-10).

On the other hand, the Supreme Court accepts that a product shall be deemed as a work even if it makes use of an anonymous work in the event that it bears its author's characteristics (Yargıtay 11. HD., E. 2016/3508, K. 2017/5950, T. 1.11.2017). I think this decision is significant in determining the degree of originality in the presence of the author's characteristics. The court asserts that keeping the threshold of the originality high would make the creation of new works difficult. For this, the subjective condition of the work shall be interpreted broadly for the reasons of public interest. It is not necessary that a new composition is in a brand-new genre or it contains brand new melodies that have never been created. Inspirations from previous works are possible in compositions provided that the later composition does not constitute plagiarism or imitation (Yargıtay 11. HD., E. 2016/3508, K. 2017/5950, T. 1.11.2017).

3. FIELDWORK, ANALYSIS, OBSERVATIONS

Now that I have explained the legal meaning of plagiarism and the courts' perspective towards this concept alongside with the author and the work, I would like to explore how in practice the plagiarism is detected and what the persons analyzing music think regarding the concepts of work, creativity, author and borrowing. In this section, I will first tell the story about my interviews and afterward, give examples of reports under the titles, each of which direct to an important issue in plagiarism and conception of creativity.

3.1 Fieldwork

After reading the Supreme Court decisions, what I really needed was to see the background of those decisions, the implementation of the law in practice and the evaluation done by the expert witnesses. Therefore, this thesis is based on the fieldwork consisting of a) the interviews that I conducted with expert witnesses who are appointed by the court during plagiarism cases time to time, with judges and law scholars and b) of the file studies in İstanbul Courthouse (in the 1st and 2nd Chambers of Court of Intellectual and Industrial Rights of Istanbul). It has been an eye-opening process in terms of seeing the diversity of opinions among the scholars, the difference in the concerns adopted by different professionals, namely musicians/music scholars, arrangers, and jurists.

3.1.1 Expert witnesses

A court may appoint an expert witness during a lawsuit in case a situation requiring information on a special or a technical subject arises. The court may designate the expert *ipso facto* (upon its discretion) or upon the request of the parties. In plagiarism cases, the experts appointed by the courts are competent persons who can opine on a music product; either on the structure or the value of it.

The expert group I interviewed consisted of university professors, arrangers and composers, judges and lawyers. The university professors are from Istanbul Technical University State Conservatory and Mimar Sinan University State Conservatory whose areas of specialization are musicology, Turkish music, Western music, music theory and composition. There are two lawyers in my expert group, one of the lawyers is also a university professor in law at Istanbul University, the other works in MESAM¹². Also, two judges contributed my fieldwork with the interviews they gave. In the thesis, I will only mention the names of those whom have given me their consent.

In lawsuits, the expert reports are prepared by three experts: one expert of music (mostly a music academician in a university or conservatory), one jurist and one expert from the music market. For the *expert of music* side, I talked with eight university professors (among whom I can cite Songül Karahasanoğlu, Gözde Çolakoğlu Sarı and Nail Yavuzoğlu from İstanbul Technical University Turkish Music Conservatory, Hasan Uçarsu and Özkan Manav from Mimar Sinan University of Fine Arts) and one arranger/conductor (Osman İşmen) who have received or are still receiving files from the courts of intellectual property. Some of the professors could hand me in the copies of the draft reports they have written for the court. Some of them abstained from giving any written information due to privacy and confidentiality reasons; however, they could give me the numbers of some files they have been appointed to. The interviewing part of this research was enlightening as well as entertaining. It was enlightening in terms of acknowledging the actual presence of some prejudgments of music scholars towards others and to some institutions. Despite their discords, almost all of the music experts agree on the idea that there is no creativity in the music industry.

The courts try to be careful to send the files to the experts according to their expertise area and experience in a particular genre of music, but sometimes the files do not find the right person; a western music expert may be appointed for a file concerning a folk music work. Such cases are considered as *mistakes* by the expert witnesses, they think the expert who gives an opinion on a case should have real expertise on the genre of the disputed musical product. Almost all of them insisted on that point, specifically

¹² This is the abbreviation of Türkiye Musiki Eserleri Sahipleri Birliği (Professional Union for Musical Work Owners) which is a collective rights organization (a CRO) supervising mechanical and performing rights for musical composers, lyricists, arrangers, and publishers in Turkey.

Turkish music scholars indicated that if a lawsuit is concerned about a folk music piece, the expert witness who is dealing with the file shall have mastered the Turkish folk music.

Manav states that in order to determine the plagiarism, the expert should be an informed person on composition (Ö. Manav, personal communication, 11.12.2018). I understand they really take their part seriously in the legal system. Although their idea of plagiarism and their reasonings may differ from each other, they are all in favor of creative power and labor spent on the new creations. Therefore, they draw attention to the qualities of the expert witnesses. One of them expressed that an expert witness should absolutely know music theory and be able to do musical analysis. The background of the expert witness matters. One of them affirms these ideas as below:

“...there are plenty of people who make music with four measures. Thus, this is left in the hands of the person who will evaluate this situation according to his/her accumulation of knowledge...This is in the hands of the expert’s mastery, his/her fairness, and interpretation...”
(Anonymous expert, personal communication, 20.12.2018)

When I talked to the experts, we spoke on the examples they had analyzed in the cases. On the other hand, they gave other examples that were not subject to a lawsuit, thus I had an idea on their way of thinking and their look to the concept we seek in a musical work: characteristics of the author.

3.1.2 Jurists (lawyers and judges)

Prior to moving on with the issues that I noticed in experts’ analysis and other areas of my fieldwork, I will mention about my interviews with two lawyers and two judges. Both judges wanted to stay anonymous due to professional concerns. One of the judges is a retired judge who had worked in the courts of intellectual and industrial rights of Turkey. He had specialized in intellectual property and specifically copyright case and he has full knowledge of music. The other judge has been newly appointed to his office.

My interview with the younger judge was not long but effective, because the judge put his finger directly on the points I wondered about and gave me new problems to think about. The judge stroke attention to the link between Turkish society, the value of the musical works and the lawsuits about the them. One thing I find important is that when

a work of art starts to gain a reputation, then it starts to have monetary value; there begins the fight about that work of art. In the interview, I learned that there might be cases in which a musical work is plagiarized, and the real author does not object to this plagiarism; he/she thinks this will be good for that work because the plagiarist will make it famous. Then, when the plagiarist starts to make money out of his/her work, the real author raises his/her voice and asserts his/her rights. I see a coherence with these kinds of examples and the fact that a work of art becomes worth to be protected when it turns into an economically valuable commodity, which I find as a normal but sad situation. On the other hand, this points out to decay in society. The judge's hope about art and creativity was as low as the expert witnesses giving opinion for the court cases. The profound disbelief in the society by the scholars and lawyers, who are also a part thereof is significant. Here, I can only touch on this subject in terms of creativity and I believe this subject can be analyzed in a larger scope by a sociologist. That judge had mostly looked at lawsuits other than the ones about music; however, he/she had developed a sense and opinion about art and characteristic of the author. In that sense, his/her views were in concordance with the expert witnesses; he/she thought when a person sees or hears a work of art, that person should have an idea about the author of that work; this is how he/she explained the characteristics and this, the style, is what we look for in an author as the expert witnesses stress and I will explain later in this thesis.

About the test to be applied to determine plagiarism he/she believes it is the ear that can detect the difference between musical pieces. The courts look for an average perception when they talk about a lay listener's ear. As I explained in the section about expert witnesses, they are to be applied to in exceptional cases, when the court needs a technical opinion. A judge's ear may not reflect an average ear correctly; a judge's music taste cannot match the population's music taste. At this point, his/her idea is that the expert witnesses, instead of people, step in to determine the plagiarism. They can assess the population's perception of music. Also, expert witnesses' opinions will be free of any biases and subjectivities; therefore, the reliance by a judge to the expert report in a musical lawsuit would not bear any issues about objectivity.

At last, the judge finished his/her statements by saying that copyright law and music are not crystal-clear areas in which a judge can decide easily, this is a fuzzy field, the

cases are hard to determine (Anonymous judge 1, personal communication, 19.03.2019). I think this really matches with the fact that intellectual property law presupposes a difficulty since it deals with abstract possessions. Absolute truth does not exist in intellectual property law and especially in copyright law, but agreeing upon certain facts is the only possible thing in intellectual property Law (Stav, 2014, p. 49).

The retired judge clarifies in his e-mail (Anonymous judge 2, personal communication, 17.02.2019) better whether there is a test adopted by Turkish courts to determine plagiarism. The courts ask the expert witnesses to compare the musical works with their pitches and rhythms, together with their refrains and request them to state if the plaintiff's musical work is the same with the claimant's work. If there is any similarity, the experts are required to explain if it is partial or not, and if it is partial, where the similarity is. If there is a partial similarity, it is essential whether the similarity is in the part where the author's characteristics appear considering that there may be parts in a musical work that do not carry its author's characteristics. I have already mentioned the importance of the author's labor and that expert witnesses' idea that the labor spent by an author is to be respected. However, the judge adds that labor paid for a work is not enough for that work to be protected under Law No. 5846 since the core issue is the characteristic of the author. Hence, how much effort is put for a work of art is not a concern for the court (or for the Law No. 5846), the sweat of the brow¹³ doctrine is in the past now, originality and characteristic are the real concerns in judging a product as a work of art.

I had mentioned that article 35 of the Law No. 5846 sets out that themes, motifs, passages or ideas of a published musical work can be quoted in an independent musical work without the permission of the author only if the person who quotes refers to the author. The problem here was that no regulatory document or court decision had discussed what theme, motif, passage, or idea are. I could encounter these terms in expert reports, but they were never clearly defined. The judge states on this issue that (within his knowledge) the Supreme Court and other courts do not address these terms. He adds that the regulation in the article is not sufficient (in terms of clarity). He added

¹³ Sweat of the brow is an intellectual property doctrine, especially used in copyright law. The author of an intellectual product gains protection simply because he/she shows simple diligence required for the creation of a product; originality or characteristics are not required for the author to gain rights on his/her work.

there had not been any change through time in the evaluation of the plagiarism. One thing that stroke my attention was that most of the cases were about pop music and folk music works. The files I have seen were only about works in these two genres. The judge confirms this fact. He adds a point also mentioned by Turkish music scholars: the situation with folk music songs is a bit different, and the problem about them is a “long story.” Some authors adopt regional melodies, get them into their musical works and register them to MESAM, “so to speak they build slums on the Treasury’s land, then they turn it into buildings and ask for rent from others. This should not be allowed”. He actually means Turkish pop or rock music artists who use anonymous melodies or folksongs known as *türkü* in their musical work, register those before a collective rights organization (CROs) and begin to collect copyright for works not belonging to them; they can even ask copyrights from the collectors (*derleyen*) or source persons (*kaynak kişi*) of that *türkü*. Since another scholar, namely Fossum (2017) has discussed this issue in another dissertation, I will not get into its detail. However, this aspect shows, of course, the process of music creation in Turkey, the effect of intellectual property rights to this process, and the idea of rightful music creation of the authors.

I had the opportunity to interview one lawyer in one of the CROs (namely MESAM). He was not in the technical expertise committee¹⁴ of the CRO, but he had a comprehensive knowledge regarding the process of complaints of plagiarism. The information he gave is useful for us to understand the steps in a plagiarism allegation and the role of CROs in plagiarism litigations.

The technical committee of the CRO analyses the pieces merely to find out if there is a similarity between them; the analysis is performed as the expert witnesses do, the transcriptions are compared. The detection done by the technical committee is more like the determination of the real author of a musical piece. If a person can prove that he already had composed that piece, and if the similarity in two pieces concerning their entirety, the author who first composed the piece is registered as the rightholder.¹⁵ The

¹⁴ The committee reviewing complaints made to CRO regarding ownership of a work and reaching to a decision on assigning rights arising from the work in question.

¹⁵ Of course, for a musical work to be registered in the name of the author who claims ownership for that work, the decision rendered by the technical expertise committee shall be finalized. It means that there shall be no objection to the committee’s decision in one month after the decision is given.

reports prepared by the committee can also be used as evidence before the courts. It is not necessary but possible for the parties to object to the technical expertise committee's decision in case of entire similarity and claim the authorship of a musical work before the court. However, in the event of partial similarity, the committee abstains from rendering a decision and leaves the determination of similarity to the court. The reason for this is that there is not any specific measure to determine a partial similarity. In that situation, the parties may also prefer to settle and agree on the parts belonging to each other. At this point, I ask my question whether there is a certain threshold to determine plagiarism and mention about urban legends speculating that taking until 4 or 8 measures of a musical work and using them in its own is acceptable. Then I get the answer I expect: there is not any specific threshold for plagiarism and no rule of *4 measures* or *8 measures*. I now content myself with reminding the assertions made by Nihat Doğan stating that borrowing until 4 measures from a song was acceptable by MESAM. The lawyer mostly spoke about the procedure and what evidence they look after in order to decide on the ownership of a work. Eventually, the technical expertise committee does not give any decision as to the characteristics of the author; they only submit a mere technical report.

I also talked with a law professor who had signed most of the reports I have read as the legal expert. Legal experts are not supposed to give any opinion with respect to any technical concerns in a lawsuit. They complete the report as to the legal reflections of the technical aspects in the lawsuit.¹⁶ Therefore, we only talked about the legal aspects of these cases and I could not get any assessment with respect to the characteristics of a musical work and creativity of the author. The law professor stated the responsibility carried by the expert witnesses and stressed the importance of the objectivity in the reports. She added that the quality of the experts might have degraded because of the new law regarding the experts. According to this law, people who would like to be an expert for the court make an application, and after a basic training they can become an expert witness on the filed they master. These persons are written on a list, and the court cannot appoint persons other than those appearing on that list. Thus, the expert witnesses serving for years to the court with their experience will not be

¹⁶ Despite legal aspects of a lawsuit shall only be decided by the court/judge and the court shall have no expert report on legal issues according to the law, we can find legal opinions given as expert reports to the courts due to the judges' lack of experience and load of work.

able to give their opinion. Before getting into the analysis and giving case examples, I would like to notice that the legal cases mentioned below with the parties' names have already appeared in the press. The parties of the cases that are not on the press are not mentioned here due to confidentiality reasons.

3.2 The Analysis

The components to be analyzed in a plagiarism case are not foreseen in the law, but when I listened to the music experts, I understood that the analysis consists of the comparison of two or more musical pieces subject of the plagiarism lawsuit. The analysis is completely left in the hands of the experts. Some of the expert witnesses I interviewed thoroughly answered this question, and they cited one by one the elements they deal with; they work more systematically. It seems that the expert witnesses who are regularly appointed by the courts have systematized their manner of working. The music professionals and professors still giving technical opinions can give a clearer answer to the question "what do you analyze?", and they say that if one of the components among the elements of melody (and transcription of that melody), harmony, rhythm, instruments is not analyzed, the other party may object to the technical opinion.

Experts begin their analysis by listening to the musical pieces in question. Then they transcribe the pieces if it is needed because sometimes they already find the transcription in the file. One of the professors told me she used the scorebook of a rock musician sold in the bookstores because the pieces were already transcribed correctly.¹⁷

3.2.1 Comparison of musical works

Following the transcription if any, the comparison stage comes: melodic, rhythmical and harmonic structure, orchestration, arrangement, and makams of the pieces are compared. One expert told they were also comparing audio waves. Others have not

¹⁷ Uçarsu and Manav told me they decide on the plagiarism just by listening to the pieces and they do not need to transcribe them. However, although I could not look at all the files they analyzed, I could find the transcriptions in the files I reached at the court house. On the other hand, another professor stated that the opposing party immediately rejects the report because it is deficient when there are no transcriptions in the expert report.

encountered such comparison and think it cannot be trusted. As to me, I have not seen any audio-waves comparison in the files I found in the courthouses or coming from the expert witnesses; except there was one case in which I saw audio-waves were compared, but this was not a plagiarism case; it was about recordings of two pieces.

As a result of the comparison, the expert witnesses reach an opinion as to the similarity of the works. Even though they analyze the components such as rhythm, harmony, orchestration, etc., the essential element in finding the similarity between two musical pieces and determining the plagiarism is the melody. The other components out of the melody are used to understand if a musical piece gives the sense of similarity just because of its rhythm and timbre or it is the melody which creates the similarity. The transcription serves as the essential method to compare the melodies; the experts can catch the essential melody out of the grace notes and small melodic changes in the melodic contour. Besides the fact that the melody is the fundamental element of a musical work in Turkey, many points to discuss arise out of expert witnesses' statements in the interviews and reports.

At the end of my fieldwork, I have discovered that the events and my findings gather around some facts and problems. Those are a) even though elements like harmony, orchestration, etc. are analyzed in musical works, the similarity in the melody matters for determining plagiarism, melody is the carrying structure of a musical work, b) borrowing the most characteristic part of a musical work would matter, this part is refrain in popular music works, c) the problems arise around the concepts of author, work and anonymity, d) the line between inspiration and plagiarism is fuzzy, e) composer's personal qualities and background are essential in determining his/her style and e) use of limited material and harmonic patterns cause the similarity of the melodies. I will give some examples from the cases I have found, under each of these facts and problems. However, this does not mean that an example given under a title is not related to the other facts and problems. These facts and challenges are very interrelated, and in one case you can find the elaboration of more than one problem.

3.2.1.1 Melody; the heart of the musical work

I want to start this subtitle by mentioning a paragraph I read in one of the expert reports. This report was regarding a lawsuit filed by the pop singer Nil Burak against her arranger Uğur Dikmen on the grounds that the song *Sen de Başını Alıp Gitme* belonged

to her, but Uğur Dikmen had shown himself as the composer. (The news about this lawsuit was published in the newspapers (Url-20)). This is not a lawsuit about plagiarism, but it explains very well what a composition is in Turkish pop music culture, the places where stand composer and arranger. The expert witness appointed for this case who is also a music professor comments about these issues. According to him, in the pop music culture, the composition means the melody on which the song is based. There is no need for in-depth music knowledge to compose a melody shaped by the standard norms determined by the popular culture market. Any performer in this culture can easily create a song with a single melody without having any knowledge of music, including knowledge about pitches and notation, by having by having the music culture surrounding him/her and his/her instincts as reference. He/she can record that song with a sound recorder to keep it in her/his mind. In such a case, he/she is the composer and owner of that song. In pop music culture, this step is followed by the arrangement of the song. The arrangement is made by transcribing the composed melody, harmonizing it, cutting it into pieces and putting transitions between the parts if necessary, and doing the orchestration. There are many cases in which in the pop music composition process the arranger and the composer are different persons. Therefore, a performer can compose a monophonic melody and she/he is referred and credited as the composer/creator of that song.

Here, I understand that a genre and its music market are indicative in the definition of composition, composer and musical work, hence characteristics of the composer. A single, monophonic melody, how simple it is, is a composition in pop music. Since the plagiarism cases are mostly regarding pop and folk music pieces, these statements are indeed useful for me to assess the issues in musical plagiarism. Given that the melodies of the works are the main elements to be analyzed, the originality is sought within the melody, not the sound or timbre. Hence, different arrangements of the same music do not count as individual work. For instance, in one of the reports I read mentions a Kurdish song of which the composer is definite is taken and used by a TV production company for a TV show credits music. (I will not express the name of the case since it has not been public.) Only the lyrics of the song are amended and Turkish lyrics are written on the top of the melody. The expert, in his draft report prepared for the 2nd Chamber of Court of Intellectual and Industrial Rights of Istanbul, states that the music used in the TV show has the same direction and constitutive with the original song. He

calls attention to the sounds installed around the original music; there are sounds such as ululations, synthetic and semi-synthetic percussion instruments and drums which are film sounds added to reflect oriental music culture. He finalizes his thoughts by saying, “these sounds do not change the composition, they only give a more contemporary, technological and ‘TV show’ sound. Although the musics subject to the lawsuit are not the same one for one, the melody of the plaintiff’s work is used and the arrangement done by the defendant is not original nor independent” (the file number is not given due to confidentiality reasons).

3.2.1.2 Only the melody?

The interviews and file studies I have done indicate that the analysis of similarity focus on the melody. The expert witnesses indeed analyze the other elements in a musical work. Rhythm, orchestration and harmonic analysis are included in the similarity analysis. Çolakoğlu Sarı rightly states that a song is a whole with its harmony, rhythm, instruments, and melody (G. Çolakoğlu Sarı, personal communication, 13.12.2018). Karahasanoğlu states that the analysis of the mere melody would lead to wrong results, she makes this statement to draw attention to the necessity of doing genre-specific analysis and taking in consideration the principles and traits of Turkish music, the way it works, its variables (S. Karahasanoğlu, personal communication, 20.12.2018).

However, the issue comes to the fact that the melody is the vital point in musical works. Even, İşmen (O. İşmen, personal communication, 29.12.2018) clearly stated that the melody is the only base for similarity check. Actually, from other statements, I can deduct the same result, except for one I will talk about very soon. The experts assess musical works by looking at their scores. When they compare, the comparison is done over the transcriptions. They notice the grace notes or other small changes in melodic line and subtract the core melody, which is plagiarized. Most of them stated that plagiarists change the instruments or harmonic structure of a musical work so that their plagiarism is not understood.

An example given by Özkan Manav, who is a composer and professor at İstanbul State Conservatory of Mimar Sinan University constitutes an exception to the idea that only the melody matters. The event is not a court case but an allegation put forward by a journalist (Hür, 2008) and also mentioned by Avcı (2017c). Ayşe Hür comes up with

the assertion that the 10th Year March¹⁸ composed by Cemal Reşit Rey¹⁹ had been taken from the aria *J'ai Perdu Tout Mon Bonheur* of Jean Jacques Rousseau's opera *Le Devin du Village*. The first 7 notes of the two musical works are the same; in terms of melody, they have exactly the same contour, the only difference in the melody is the note values; therefore, even though the measure is the same, the rhythm differs. On the other hand, there is a difference in the harmony. *10th Year March*'s beginning is based on a C pedal (the original notation shows there is a D pedal, but during out interview Professor Manav had played it on C during his demonstration). However, *J'ai Perdu Tout Mon Bonheur*'s harmonic rhythm is faster; the harmony changes two times per bar.

Below Figure 3.1 is the comparison of the melodies of two pieces from the same tone. The melodies of the first 7 notes are almost the same, the only difference between them is the rhythm. The rhythm of *10th Year March* is slightly different due to the prosody. But, the first seven notes are followed with totally different melodies in each musical work.



Figure 3.1 : Transcription of the melodies of *J'ai Perdu Tout Mon Bonheur* and 10th Year March.

The below Figure 3.2 is the section from the original notation, including the contentious melody. This is added hereby to show the harmonic tones used under the melody. This figure is followed by a section from the notation of the *10th Year March* in the Figure 3.3.

¹⁸ This march was composed for the 10th year celebrations of the Republic of Turkey.

¹⁹ One of the first-generation Turkish composers in the Republic of Turkey.

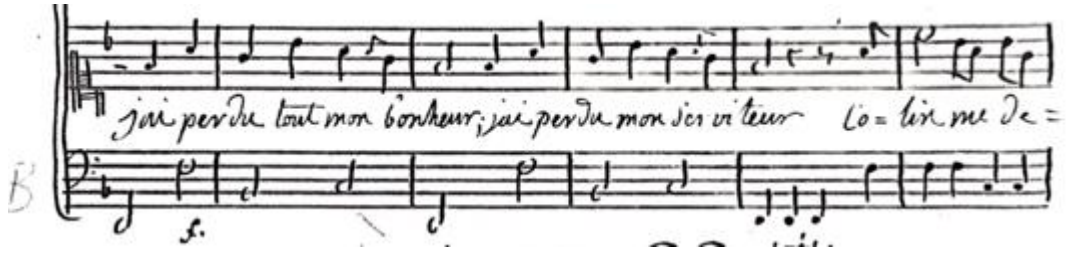


Figure 3.2 : Section from the original notation of *J'ai Perdu Tout Mon Bonheur*, the section allegedly copied by Rey.

As you will see in the below Figure 3.3, there is indeed a D pedal ongoing during the first 17 measures, under the melody.

Figure 3.3 : The original notation of the 10th Year March, the first 17 measures.

Manav argued that Rey could not have plagiarized this part (that may be named as a phrase). First of all, the difference in harmonization creates a totally different sensation. Indeed, the effect of the two musical works is totally different. Moreover, this melody is very simple and may be assessed as generic. Third, the continuation of the themes in the two works is totally different. Lastly, and I think this is a compelling argument, Cemal Reşit Rey could not have been able to copy that melody, because there was a very low possibility for Rey to hear Rousseau's work or see its score. As it will be mentioned in further sections, the composer's background, the time and

society he/she lives in are indices that are used to decide on a possible plagiarism. Still, Ayşe Hür claims that Rey had settled to France in 1913, just one year after the events organized for Rousseau's 200th birthday and received his music education there, so it was not impossible for Rey to know Rousseau's works (Hür, 2008).

Differently, İşmen's statements are in nature to disprove the above idea regarding the consideration of the harmony together with the melody. He says, "if the melody is there, this is sufficient" (O. İşmen, personal communication, 29.12.2018). Change of harmonic structure is, according to him, to hide that the plagiarist took the borrowed melody. Still, I find it difficult for Rey to possibly have listened to Rousseau since he was not the most famous composer of the 18th century. Besides, I think that composing a completely different continuation to those seven notes totally made a whole different musical work.

It is understandable why the expert witnesses and legal discussions focus on melody that much. Melody is seen as the most vital parameter of a musical work, especially in pop music. It is the element that is doing the heavy lifting, so that should be the most protected part (Müllensiefen and Pendzich, 2009). Henceforth, when the melody is copied in another musical work, the latter work would have stripped the core of the original work and its independence. In further examples, too, you will see that the similarity of melody is the most prominent part of the analysis of plagiarism.

3.2.1.3 Most plagiarized parts: refrains and introductions

Melody is the main ship of the musical work. Borrowing a section from a melody is another crucial question because its answer affects the gravity of the plagiarism. Considering that few materials are used in the construction of popular and folk music pieces when the characterizing part of the song is taken, it will sound like the whole song is borrowed. This important, characterizing part is the refrain. Uçarsu directly affirms that "the most crucial part of the piece is the refrain" (H. Uçarsu, personal communication, 11.12.2018). In his reports, he explains the importance of the refrain in popular music pieces. "It completes an important musical function. In popular song form, it is the epicenter, it is the critical part of a song that makes people remember that song, and that remains most in people's minds (together with the lyrics). In popular song forms, the process concentrates on the refrain and the song is based thereon. The

target of the music, the place where it wants to reach is the refrain part. Therefore, the refrain forms the song itself, creates the character of the song” (from the draft report dated 19.10.2010 prepared for the 1st Chamber of the Court of Intellectual and Industrial Rights). I will give some examples from cases where the experts focus on refrains. Introductions are also at stake because the borrowed refrains are in general used as introductions in borrowing pieces.

Case: Universal Müzik Taksim Edisyon (*Universal*) vs. Barlas Erinç

In a lawsuit filed by Universal Müzik Taksim Edisyon against Barlas Erinç, the cruciality of the refrain is explained by the experts. Universal sues Erinç on the grounds that the song *Beni mi Buldun?* composed by famous Turkish composer Fahir Atakoğlu and sang by Nilüfer was plagiarized by Barlas Erinç who composed the song *Ağlıyor musun?* which was sang by Candan Erçetin. The problem was that the four measures refrain of *Ağlıyor musun?* sounded very similar to the four measures refrain of *Beni mi Buldun?* In the first place, I would like to tell that the court decides that the refrains are very similar, however, they derive from an anonymous melody, henceforth there is no plagiarism (İstanbul 1. Fikri ve Sınai Haklar Hukuk Mahkemesi. Esas-Karar No: 2009/20, Esas – 2013/29). What matters, in this case, is how the experts approach the songs and how they analyze. I transcribed the songs *Ağlıyor musun?* and *Beni mi buldun?* from the same tone as seen in the below Figure 3.4.



Figure 3.4 : The transcriptions of the refrains of *Ağlıyor musun?* and *Beni mi buldun?* from same tone.

The melodic contours seen in the transcriptions in Figure 3.4 follow almost the same lines. The difference is in the accidentals of the two refrains, namely the G flat existing in *Ağlıyor musun?* If the melody was not an anonymous one, we could think that the

refrain of *Ağlıyor musun?* was borrowed from *Beni mi Buldun?* Though, when we listen to the both songs, we can understand that the songs are totally different from each other.

It seems that there is more than one expert report submitted for this case. My findings from the file are summarized as the following: The experts define what a composition is, and they divide it into three sections: introduction, development, and conclusion (as if it is a western classical music piece in sonata form, in my opinion). Yet, the development here contains the main theme “which is also the composition itself”. Here in this case, when the transcription is done the main themes of two compositions are found totally different and severally independent. Nor the refrains are thought to be similar because their makams are different; Fahir Atakoğlu composed in *kürdî makam* whereas Barlas Erinç’s composition is in *hicaz makam*. The perception of similarity is rhythmical and arises out of “the reflection of the makam divisions on the notes”. On the other hand, the same report denotes there was an inspiration from anonymous melodies and there are two measures in both songs, taken from a Balkan melody.

The common finding of the several experts appointed by the court is that there is a similarity between the refrains. However, some of the experts explain differently that although the makams of the songs are different, their melodic line is the same; so, the hearing of the two songs are not different. This kind of outcome underlines the fact that the refrain is the catchiest part of a song. Some of the experts have reflected my point of view by stating that, even though the refrains are similar, the songs are different from each other; hereby the copying becomes acceptable and the work may be considered as original. Finally, the court renders its verdict upon the last report dated 27.11.2012 which helps the court to acknowledge if the melody in question is anonymous or not. The court decision states that the records held in TRT determine the anonymity of the melody used in both refrains.

In this lawsuit, an additional report explains clearly the role of the refrain in a song. As explained in the report, the refrain is the hard-hitting part of a popular music work that serves that a musical work sticks in mind. The target of all the music in the work is to reach the refrain. Also, refrains are the most repeated parts in a musical work. Therefore, the refrain sets the character of a song and in most of the cases the copyright problem arises from the refrain part.

In this particular case, the refrains are composed of four measures. These four measures may be seen as short sections compared to the whole songs. On the other hand, the weight is more than a four measures phrase in any musical piece, because we are talking about pop songs which are comparatively shorter than other musical works in other genres and also the refrains are repeated several times towards the ends of the songs. So, when you listen to the songs, the refrains weigh more than the other parts.

From that point of view, with respect to function and characteristics of the refrain section, although the length of the refrain may only be four measures, it weighs much more in the entirety of the song. Frequent repetition of the refrain in the song creates this effect and the refrain dominates the musical work. This last report also takes the makams of the songs in consideration. According to the report, the melodies are not exactly the same because of the difference of makams. Nevertheless, there are other factors that should be taken into consideration which construct the music, such as melodic and rhythmic structure; here the melodic lines and melodic curves are almost the same. The experts' committee had decided that there was a 60% similarity between the two songs because the melodic structures of two songs do not completely overlap. This 40% difference arises from the makam difference and grace notes. In spite of those differences, the skeleton of the melody and profile of the melodies are very similar.

Plagiarism may be done entirely or partly. When the refrain of a song is plagiarized, it may seem that there is partial plagiarism when you compare the length of the refrain to the length of the musical work. Yet, in popular music works the refrain, gives the music its individuality, its effect and memorability. The copy of the refrain creates an effect as if the whole song is plagiarized.

Case: Uğur Bayar vs. Dokuz Sekiz Müzik Yapım Menajerlik Sanatsal Organizasyonlar San. ve Tic. Ltd. Şti, Fettah Can and Murat Boz – the use of introduction and bridge of a song as the refrain in another

This lawsuit is between Uğur Bayar, a singer and a composer and two singers, namely Fettah Can and Murat Boz signed under the same label. Bayar alleges that the song *Özledim* sang respectively by Murat Boz and Fettah Can was plagiarized from his song called *Dünya*. It has been determined in the case that Murat Boz's song *Özledim*, its

refrain and the melody called *ara nağme* repeated by instruments uses Dünya's instrumental introduction and *ara nağme*. I want to mention the analysis of the expert witnesses to show the working method of the experts. First, the experts divide the song into its structural sections, compare the instrumental introduction of *Dünya* and the refrain of *Özledim*. They write the similarities between the songs in bold letters as seen in the Figure 3.5 below²⁰.

DÜNYA 0:00-0:34 Instrumental introduction (<i>the refrain of “Özledim” is the same with this melody</i>) 0:35-1:54 <i>Zemin</i>²¹ and Refrain 1:55-2:26 Instrumental introduction used again as Ara Müziği 2:27-3:46 <i>Zemin</i> and Refrain 3:47-4:15 Instrumental introduction used as the closing music
ÖZLEDİM 0:00-0:22 Instrumental introduction 0:23-1:11 <i>Zemin</i> 1:12-1:59 Refrain (<i>same melody with the instrumental introduction of “Dünya”</i>) 2:00-2:23 repetition of the refrain without lyrics 2:23-3:12 Repetition of <i>Zemin</i> 3:13-3:59 repetition of the refrain 4:00-4:20 repetition of the refrain without lyrics

Figure 3.5 : Comparison of the songs *Dünya* and *Özledim*

The expert witnesses also do a note-by-note comparison of the disputed parts as seen in the below Figure 3.6. The note-to-note comparison in the Figure 3.6, shows that the only difference between the melodies is little changes done with added 8th and 16th notes before or after the notes in the main melody of *Dünya*. These little additions do

²⁰ My aim is to present the analysis of the similarities I have seen in a draft report prepared for this case. The draft report in question has not been taken from the case file.

²¹ *Zemin* is a section of the song form in Turkish art music. It is the first verse of a song. It is in the same *makam* with the song. The second verse of the song is *nakarat*, which is the refrain. The third verse is called *meyan*. The song can be altered in other *makams* during *meyan* section. The song finishes with the fourth verse which is the refrain again and which is sang with the melody of the second verse.

not make any difference in the melody of *Dünya* so, we cannot say that there is a newly created, original song made out of this borrowing.

The image displays a musical score for a comparison between two songs. It consists of three systems of staves. The first system is labeled 'Instrumental introduction and ara nağme of Dünya' and shows a melody in 4/4 time. The second system is labeled 'First refrain of Özledim' and shows a melody in 4/4 time with lyrics: 'Ben öz - le - dim ga - li - ba se - ni bu yüz -'. The third system is labeled 'Second refrain of Özledim' and shows a melody in 4/4 time with lyrics: 'Sen ü - zül - me a - cı - dan bu söz - le - rim kar - şım -'. Below this, there is a third system of staves with lyrics: 'den bu - ka - dar si - tem - le - rim' and '- da gör - sem do - lar göz - le - rim'. The score is written in treble clef with a key signature of one flat (B-flat).

Figure 3.6 : Note-to-note comparison of the songs *Dünya* and *Özledim*

Several reports other than those mentioned above point out the importance of the refrain. In popular song forms, the music is constructed upon the refrain. The quotation of the refrain of a musical work may not seem like essential plagiarism and technically it is partial plagiarism. However, the refrain dominates pop music works because it is the distinguishing part of a pop music song. Therefore, even though there is partial plagiarism as the result of the copying of the refrain, the effect of such copying is deemed as full plagiarism (draft report prepared for the lawsuit with file number 2006/78 D. İş. of the 1st Chamber of the Court of Intellectual and Industrial Rights of Istanbul).

3.2.1.4 Work and authorship

The concept of the author is another point of discussion in the expert reports. This is intelligible because in these lawsuits author's rights are at stake. While I was reading the draft reports handed in by the professors, I encountered an interesting case which

actually has appeared in the press. The case is between Erkin Koray as the plaintiff and Median Müzik Edisyon Ltd. Şti. as the defendant. The expert report submitted in this file and the court decision explain the connection between the author and his/her work, why we would deem a person the author of a work and the presumption of authorship.

***Fesuphanallah*, work, and authorship**

Erkin Koray is a very well-known and respectable rock musician in Turkey, he has been in the market since the 1960s. He is one of the pioneers of the genre known as *Anadolu rock*. In time, it has been discovered that his most famous songs were identical with the songs which have already been composed and sang in several Arab speaking countries. There have been speculations regarding these songs being plagiarized; however, I have not encountered any legal case or news concerning a lawsuit filed by the *original* authors of those songs.

One of the speculative songs is *Fesuphanallah*. Actually, there is a lawsuit about this song not against to but filed by Erkin Koray. I could not reach the case file in the courthouse, I could only find the court decision and one draft expert report. Together with these documents and news appeared on the press I can summarize the chain of events as such: a dairy product company wants to use the song *Fesuphanallah* for its advertisements and gets permission with a license agreement from Erkin Koray, who appears as the composer and lyricist of the song before MSG. This usage triggers Median Müzik Edisyon Ltd. Şti. (hereinafter referred to as *Median*); they claim that the music of *Fesuphanallah* does not belong to Erkin Koray, Romeo Lahoud and Rajji Issam, in fact, compose the song and its original name is *Weily Weily*. The publishing rights of the song *Weily Weily* belong to Median in Turkey and they pretend that the dairy products company should have got the permission to use the song from Median. Thereupon, Erkin Koray files a lawsuit against Median and requests moral damages on the grounds that Median has damaged his commercial reputation and musical career, and this led to a loss of income. The conflict is about the composition, but also the lyrics are involved in the discussion.

The melodies of *Fesuphanallah* and *Weily Weily* are the same. *Fesuphanallah* is sang first time in Turkey by Koray published in a record dated 1974. The song becomes

very famous and since then it has a considerable place in Turkish culture. The eminence of the song with its lyrics has a great magnitude and this recognition is also acknowledged by the expert reports and the court decision. It is because of this cruciality in Turkish culture that the dairy products company chose *Fesuphanallah* for their commercial. They take permission to use this song by amending the lyrics in a way to refer to the original Turkish lyrics.

Median's defense is that the song *Weily Weily* was published in 1971, before *Fesuphanallah* and that technical expertise committee (of one of the CROs) has proven that the tunes of two songs are identical. However, Median has only the publishing rights of *Weily Weily*, not *Fesuphanallah*. (These are two different songs even though they have the same melodies.) The resemblance of the tunes of the songs or the borrowing done by Koray is not a question of this lawsuit, it is not related to this event. (In my opinion, if Median thinks that the company should have taken permission from them, they should have filed the lawsuit against the dairy products company. Or, if they wanted to file a plagiarism lawsuit, they should have done it directly, out of the scope of this case.) In any way, during this discussion of authorship about music, Erkin Koray alleges that the music of *Fesuphanallah* is anonymous. According to the court decision, MSG's comments about the composer are also contradictory. In a technical expertise report submitted by MSG, they determine that two songs are substantially similar and a court decision is needed to identify the authorship and ownership of the rights on the work. In another report given by the same CSO, they state that the composer and lyricist of the song is Erkin Koray!

Upon the discussions about the authorship, the expert report and the decision of the 1st Chamber of the Court of Intellectual and Industrial Rights of Istanbul makes determinations that are worth to consider. The experts appointed by the court compare the songs and decide they resemble each other enormously, there are some very small differences arising from the difference of vocal and instrumental interpretation, and one of the works is the adaptation of the other. (However, the authorship regarding the music of the song is not directly related to this case, as previously said.)

The defendants (Median) had alleged that *Fesuphanallah* is an adaptation of *Weily Weily*. Concepts such as adaptation, cover and remake etc. are not elaborated in our Law. The experts and also the court assess the case (writing lyrics over a work

composed by another author) and opine that the work is a collective work. Erkin Koray affirms that the work is in fact anonymous and he actually had revived the work with his arrangement, performance and lyrics, and that a work called *Weily Weily* is henceforth null and void. Here, the experts' opinions concerning authorship are notable, they teach us a lesson.

The allegations of anonymity are not very much taken into consideration. Experts think that, if this hypothesis is accepted, Koray's arguments will be weakened. The experts opine that a musical product created from music pieces which have become everyone's property is not worth to be protected. Instead, they think that Koray used a composition made by other persons and wrote lyrics upon that composition and new, collaborative work has been created. The court is also aware that this song is not anonymous, the persons who first created the song have not vanished they are known and this song has not become the prevailing discourse of the society. On the allegation of Median that *Fesuphanallah* is an adaptation, the court finds the experts' opinion more credible stating that writing new lyrics upon an existing song or melody is not an arrangement. Here, we can more talk about a collective authorship about the song.

The explanations of an expert in a draft report prepared for this case are remarkable. I do not know if this report was submitted to the file, so, I do not want to give the date of the report. I want to mention the content of this report to reflect the thinking of the expert witnesses. As per the expert witness preparing the draft, the authorship is an attribute, and this attribution cannot be transferred nor can be disposed of. The link between the work and its creator is tight, and this connection grants the author exclusive rights upon his/her work. For a product to be considered as a work, it does not need to be registered before a registry, to be notified to an authority or to be known by the society. Likewise, providing a work to become famous and liked does not make the person propagating such work the owner of that work (as the author). Therefore, the registration of the song before CSOs on his name does not make him the author. The author shall be determined with the presumption in Article 11 of the Law, stating that the person whose name or pseudonym is given as the author of a work on the published copies of a work shall be deemed the author. *Fesuphanallah* is first published in 1974 in vinyl with his name appearing as the lyricist and the composer.

As the experts and the court stated, the question of whether *Fesuphanallah* is made without the permission of the composers of *Weily Weily* is not the question of the case.

The experts also point out that the dairy product company wanted to use *Fesuphanallah* in their commercials because of the lyrics of the song. Actually, when you listen to the commercial's song, you understand that they refer to *Fesuphanallah* and they wanted to use the famousness of that song. Of course, this case does not eliminate the *Weily Weily* composers' rights. The dairy products company prefers this song due to its lyrics. There is no doubt that the lyrics of *Fesuphanallah* belong to Erkin Koray.

The court accepts Koray's request for indemnities because of the moral damages he suffered. These damages have arisen because Koray's commercial reputation has been damaged due to the commercial which changed the lyrics, hence disturbed the integrity of the work (İstanbul 1. Fikri ve Sınai Haklar Hukuk Mahkemesi. E. 2016/188, K. 2016/46, T. 29/11/2018.). But, as you will remember, the dairy products company was not a party to the lawsuit; according to the decision, the court decided that Median is supposed to pay damages of TL 20,000.00 to Erkin Koray (Url-11). I think that the court has apparently made a mistake by keeping Median responsible in a case where it believes that the dairy product company used Koray's song in an unlawful way. Nevertheless, I care about the projections regarding authorship made during this lawsuit.

3.2.1.5 Anonymity and authorship

Anonymity and use of generic and anonymous melodies bring many problems in terms of the assessment of characteristic, independent works. Anonymity may be handled in many ways as it shows up in many aspects: there are cases in which just a part of the song is composed of an anonymous melody, or a song is the combination of many anonymous or generic melodies. Another often encountered problem is the use and adoption of the anonymous melodies by musicians who pretend that those melodies were their own compositions.

Case: Şivan Perwer vs. İbrahim Tatlıses

In this case, Şivan Perwer claims that his song *Peşmerge* is plagiarized by İbrahim Tatlıses, and sang with Turkish lyrics as the song called *Zurnacı İbo Dayı*. First, the experts evaluate whether the song *Peşmerge* is a musical work. As I have already mentioned, subjective condition for a product to be deemed as a work of art is that it shall carry the characteristics of its author as it is stipulated in Law No. 5846 or as it is defined by legal doctrine it shall be independent, carry creative features. Here, the song is evaluated as it is composed of anonymous melodies and refrains of a particular region and its content carries the characteristics of its author.

So, even though the elements used in the musical work are anonymous, if the anonymous melodies and refrains are together so as to reflect the individuality of its author, they accept that the subjective factor of the work of art exists. A folk music composer may create a musical work by using different melodies and motives which are anonymous and agglomerate them in his/her way. On the other hand, we should not forget that other composers may use the same melodies and motives.

The experts, in this case, find that the refrains of two songs are identical. There are small differences due to grace notes, orchestration. This refrain part is in *halay* form, and the experts indicate that it is important to check if the structure and melody of that part are in conformity with the region where *halay* form exists. The form, manner and style of the refrain and its rhythmical and melodic structure are compared with other works in *halay* form widely used in Doğu Anadolu region of Turkey and they find that this refrain is very similar to other works in *halay*. Many artists may compose similar melodies with similar rhythmic structures particular to that region, and this shows us that melodies have variants (which can be defined as variation, alternative). The expert witnesses explain that these variations are prerequisites in Turkish folk music and they have anonymous, collective character rather than personal (Draft report for the file number 2002/309 E. of the 1st Chamber of the Court of Intellectual and Industrial Rights of Istanbul). The refrain of *Peşmerge* is decided by the experts to have an anonymous character when its form, manner, regional style, melodic and rhythmic structure, and singing manners are taken into consideration. So, they opine that the refrain does not reflect any individual character. (Though, I have found out that the court ruled against Tatlıses and decided for payment of an indemnity to Şivan Perwer.

I could not reach the court decision or final decision of the Supreme Court so far, but this report is useful for us to understand the relationship between anonymity and individuality.)

I transcribed the melody of Zurnacı İbo Dayı as presented in Figure 3.7 below, it is like a simplified version of the song Peşmerge. Therefore, I believe the two songs have the same melody that can be written in two ways shown below in Figure 3.7.



Alternatively:



Figure 3.7 : Transcription of the allegedly plagiarized melody of *Peşmerge*. The melodies in the first stave may alternatively be played as they appear in the second stave.

The difference of the note values does not make any difference; when I look at the notations and listen to the two songs, I can realize that their melodies are identical.

Case: Tunay Bozyiğit vs. Mümin Sarıkaya

In this case, the composer of *Türkülere Söyleyin Sılaya Dönsün* (Tunay Bozyiğit) files a lawsuit against Mümin Sarıkaya for his composition *Hayat* which has allegedly used the refrain of *Türkülere Söyleyin Sılaya Dönsün*. Two songs are the same, and this fact can be understood just by listening. The experts, transcribing both songs conclude that the songs have the same main theme. On the other hand, when they dig deeper and do a research about the melody in question in the archives, they see that this melody had been used in many songs in Turkish music and the claimant is not even the composer of the original melody.

The Figure 3.8 below shows the transcription of the *Türkülere Söyleyin Sılaya Dönsün* as transcribed by the experts.



Figure 3.8 : Transcription of the theme *Türkülere Söyleyin Sılaya Dönsün*

I present in the Figure 3.9 below my transcription of the song *Hayat*. The only difference between the two melodies is the values of the notes, which constitute the melody.



Figure 3.9 : Transcription of the theme of the song *Hayat*

The above theme, as noted by the experts, is used in 12 measures in *ara nağme* and in *zemin* sections. It is even used in *meyan* section, which is accepted as a new section in the songs. However, even though *meyan* section gives the sensation of a new theme, this theme is used again with different notes than the original theme.

This theme is almost exactly repeated in the song *Hayat*, both in instrumental introduction and refrain. In this song too *zemin* and *meyan* sections use the same melody on different notes. Here, “the rule to use an existing melody to create a new work is overreached” (Expert report submitted to the 1st Chamber of Court of Intellectual and Industrial Rights of Istanbul for the file numbered 2008/136 E.). Moreover, this theme does not even belong to Mümin Sarıkaya. It has been discovered that this is a theme that has become anonymous and has been used in several songs. The experts cite some of the songs including this generic theme, and the court includes these titles in its verdict: *Zaman Meyhanesi* by Atilla Atasoy, *Pazarlık Edelim* by Muhlis Akarsu, *Çavreşamın* by Şahe Bedo... By the way, the experts take into consideration the tones and meter of the songs and determine that even the songs subject of the lawsuit have identical tempo.

3.2.1.6 Analysis depending on the musical work’s genre

There is a case that I find pertinent in explaining that the genre matters for the musical work analysis. I will not disclose the parties and refer to the number of the lawsuit because this case did not show up in the press. The case is about the jingles of two

television channels. The plaintiff having the rights of a jingle of a TV channel claims that the jingle is plagiarized by another composer and unlawfully used by another TV channel. The court requires several reports on the case. Some experts state that that even though the pitches of the melodies are the same, rhythm and melodic contours are by far different from each other. But, other experts appointed for the case do not assess the pieces as they are *the same*. They mention that jingles are very short pieces with short content. Because the note values and syncopations are different in both jingles, they are not evaluated as the same. The court does not content with these explanations and requests for a third opinion and renders its decision according to the last report.

The experts drafting the last report conclude that both works were in D minor. Voice graphs and compositions of both works started from lower voices of D which was the tonic, they go up until F which was the third degree of the tonic, then they descended until C which was the seventh degree of the scale, and they turned to the tonic which was D. The measures of both musics were 4/4 and the main theme were composed of 4 different note values. These note values were differently used in both pieces of music. The difference in note values provided for a difference in the hearing of the pieces.

This report states that we should not expect an exact similarity between two pieces for the existence of a quotation or borrowing. We can call the above situation as a “variant” (variation) or an interpretation: it occurs when you add some more melodies and change the rhythm of the original melody. The experts of this report mention the characteristics of a jingle. Jingles are short music pieces that signal and define the product they represent. In this case, when you hear a jingle, you should directly think of a specific TV channel. Therefore, small differences between the jingles cannot be tolerated because different products, here different channels should be represented by totally different melodies. In this case, the experts opine that the disputed jingles are the variants of one TV channel’s music. Here, they suggest one test that could be done; if you let lay listeners be standing with their back turned against the TV, if they listen to both jingles, they would think that you are on the same channel. In the end, they conclude that the defendant used the plaintiff’s music but interpreted it in a different way.

The court of the first instance rules that, on the grounds of article 35/2 of the Law No. 5846 (freedom of quotation), the pitches of two pieces do not have to be exactly the same for the existence of plagiarism. The partial adoption of the protected parts of a work would be against the Law No. 5846 and violate the author's rights. The Supreme Court rejects this opinion; the experts are expected to give their opinion if this interpretation made by the defendant is just an inspiration or whether it results in a quotation or plagiarism. So, the decision of the court of first instance standing on the third report is not accepted by the Supreme Court (Yargıtay 11. HD, E. 2015/13493, K. 2017/1474, T. 13.3.2017). (I guess the proceedings are still pending about this lawsuit.) (Here, I would like to add a legal concern of mine: the action taken by the court of first instance was right in terms of deciding according to the third report. Not only I find the third report acceptable, but also, I think that the court is able to rule on the issue which is not written in the expert report. In another saying, the experts say that the defendant varied the plaintiff's piece and at this point, the court is capable of using its discretion, rely on the last report and decide upon it.) The Figure 3.10 below shows the melodies of the disputed jingles.



Figure 3.10 : Transcriptions of the melodies of the jingles

As seen above in the Figure 3.10, the melodic contours of the jingles follow the same directions and the two melodies do not have any difference other than their note values. When the above parts are played, you can hear that the jingle of the Channel Y sounds like another version of the jingle of the Channel X.

3.2.1.7 Inspiration and the separation of idea and expression

One of the blurred lines in plagiarism discussion is, I believe, inspiration. It appears to me that, from the definitions and ideas I have heard, when a composer uses another composer's idea but not the content (the music itself), he/she is deemed to have been inspired by that composer. If the content or the expression of the idea is the composition formed by the melody, harmony, rhythm etc., I ask myself what the idea is in music. I infer from the below case that harmony, rhythm, sound, instrumentation constitute ideas to be taken, combined and used by the composers.

Muro case: Selda Bağcan vs. Pana Film

This case is about the song *Üşür Ölüm Bile* composed by Selda Bağcan which is used in the movie *Muro* by Pana Film without any license or permission. *Üşür Ölüm Bile* is considered as a folk music composition (I already mentioned that it is possible to compose pieces in the folk music field). *Muro* is a song composed only for instruments, it does not have any vocal part. *Muro*'s melodic structure is similar to the introduction and refrain of *Üşür Ölüm Bile*. The experts here conclude that this *türkü* (*Üşür Ölüm Bile*) composed by Selda Bağcan is similar to many examples in the folk genre having the same melodic and harmonic structures. The melodies of the disputed works do not entirely overlap, but their sound and character are similar, so they create similar effects on listeners. Here, the experts define this situation as inspiration. The general impressions of two works are similar because of the mode, instruments, harmonic and melodic structure.

The experts express that the work *Üşür Ölüm Bile* does not carry much independence since it is composed in Phrygian mode (*Kurdî makam*) and use common melodic and harmonic patterns already utilized by thousands of pieces in Turkish folk music. So, as far as I understand, the music of *Muro* is composed by being inspired by *Üşür Ölüm Bile*, which does not show any individual characteristics. The experts' opinion is that *Muro* is the rearrangement, re-construction or reinterpretation of *Üşür Ölüm Bile*. In this case, I think, if *Üşür Ölüm Bile* has been an original, characteristic piece, Pana Film would be obliged to take a license or permission from Bağcan to reinterpret her song. However, Bağcan's song has already an anonymous character, so Pana Film is free to use in composing the patterns she had already used.

In the justified decision rendered by the court of the first instance, the court repeats the principle about the right of free use which prescribes that ideas used by an author can be equally used by other authors (İstanbul 2. Fikri ve Sınai Haklar Mahkemesi. E. 2017/137). (On the other hand, when I look at the Supreme Court decision regarding this case, the Supreme Court rejects the decision of the court of the first instance on the grounds that the expert witnesses should have clearly stated if the music of *Muro* is plagiarized or not (Yargıtay 11. HD., E. 2015/13399, K. 2017/1106, T. 27.2.2017).). I present below, in the Figure 3.11, my transcriptions of *Üşür Ölüm Bile* and the music of *Muro* respectively.



Figure 3.11 : Transcriptions of *Üşür Ölüm Bile* and *Muro*

The above transcriptions show that the difference between the musical pieces is in their note values. When *Muro* is played on an instrument, it sounds like *Üşür Ölüm Bile* is played differently. My opinion is that this kind of similarity shows that the composer of *Muro* passed the limits of inspiration and instead of creating a new musical work with the elements of *Üşür Ölüm Bile*, he/she wrote the notes of *Üşür Ölüm Bile* in a different way.

The Supreme Court's decision rendered upon this case sets out the principles to separate inspiration from plagiarism. The high court distinguishes unlawful quotation from the right of free use. A quotation is performed by copying the exact same part of a musical work in another, in the same amount. Though, inspiration is benefiting from the ideas used in previous work and create a new work by basing upon the use of those ideas. Copyright protection is concerning the expression of those ideas, not on the ideas themselves.

3.2.1.8 Personal qualities of the composer

I had already mentioned that the composer's background and personal qualities reflected on the composition are taken into consideration by the experts in assessing if a musical work carries the style and characteristics of that composer. All of the experts insisted that a composer must have a style, a manner, and an attitude. Whatever the conditions are, either there is a limited area to compose and to create due to the genre (for example in popular music) or an abundance of musical data which can perturb composer's creativity, a real composer creates its music and we can understand that such music belongs to that composer. The exaltation of the composer may emanate from the idea that a composer is a creator and has a gift, a supernatural power in him/herself. Whatsoever, the experts consider a lot the background and qualities of the composer.

The experts relate the composer's qualities with creativity. Being creative is, of course, an important quality and attribute for a composer. The expectation from the composer being creative and original exists both in scholars and the audience. On the other hand, the fields in which certain genres such as popular music are created can restrict the composers. The possibility to glow the creativity in limited market conditions is another dilemma for the composer and it will be discussed later in this chapter. Now, the below case will enlighten us on how the experts assess the composer's style, background, and qualities.

Case: Onno Tunç (his heirs) vs. Has Gıda San. ve Tic. A.Ş. et al.

In the case seen before the 2nd Chamber of the Court of Intellectual and Industrial Property of Istanbul, the authorship of the jingle of an ice-cream commercial is discussed. The defendant companies unlawfully use the jingle composed by Tunç. They allege that the jingle belonged to Muammer Oflu and they had taken the license from him. Here, the experts would like to find a link between the jingle and Muammer Oflu and therefore they would like to know Oflu's musical past and production. When they analyze the piece, they see that the jingle is vested with the qualities found in any popular music made for commercials. On the other hand, according to the experts, it is evident that the jingle is created by a composer mastering his/her profession, using a high level of technique and having significant skills. That work contains a specific

form, setup, and contrast which indicates that the person who created that work has enough musical accumulation. The experts even compare the jingle subject of the lawsuit with Tunç's another commercial jingle work, namely *Solo Solo* and conclude that this jingle and *Solo Solo* jingle are in similar character and structure. Moreover, they pretend that the musical knowledge and experience of Muammer Oflu cannot be proven because they cannot find other works composed by Oflu. The society and times in which the composers live are also benchmarks for expert witnesses. As I have already mentioned in Cemal Reşit Rey's case where he is nearly accused of having copied of Rousseau's aria, the experts assess the probability of a composer to hear, know the work allegedly plagiarized.

Here I remember Osman İşmen's statements, one of the prominent arrangers and conductors in Turkey, also Ahmet Kaya's arranger. About four years ago, there had been a discussion regarding the probability of plagiarism between a song of Adele and a song of Ahmet Kaya. The event never turned into a lawsuit. There, İşmen talked to me about mostly used chord progressions and possible patterns which can appear within these progressions. He believed that the refrain of Adele's song *Million Years Ago* was substantially similar to the refrain of Ahmet Kaya's song *Acıların Tutunmak*. Both songs had used the same chord progression called *mars armoni* in Turkish, consisting of a progression of descending 5^{ths}. I will content to say for now, even though İşmen thinks that on the paper it looks like Adele plagiarized that song, he still questions why Adele would like to borrow Kaya's melody. She has a full team of composers and arrangers and she does not need to borrow from Kaya. İşmen adds that same feeling can emerge in two different artists in different parts of the world (O. İşmen, personal communication, 29.12.2018) (Though, it is not clear to me why he insisted that this may be plagiarism although this pattern may be used in many parts of the world and two artists can have the same feeling.) I present below, in the Figure 3.12, my transcriptions from the same tone of the songs *Acıların Tutunmak* and *Million Years Ago* respectively.



Figure 3.12 : Transcriptions of *Acılara Tutunmak* and *Million Years Ago*

There are some differences in the notes of the two songs as seen above, and also the notes values differ. However, the difference in one note or the absence of some notes in the melody that Ahmet Kaya composed does not change that melody.

3.2.1.9 Subconscious plagiarism

One of the questions in my mind in doing this field work was, isn't it difficult to not to plagiarize? The composers are exposed to so many musical sources and my assumption is, sooner or later these pieces stay in their ears, penetrates in their brain and show up someday, consciously and subconsciously in their compositions. What I have heard during my research so far is that popular music is very open to that kind of *mistake*. The general idea and also the fact are that in popular music there are fixed patterns, chord progressions used by the composers. The use of these patterns may or may not be their choice (it is to be discussed later) but they are used. Pop music is constructed on this creative process. Eventually, there is not much elbow room a pop music composer can move into, and melodies constructed upon these harmonic patterns may sound like each other from time to time. In addition, the accumulation of anonymous melodies also gets in, and there is a legacy always used by songwriters on this land, they are in our genes. Hence, as well as the folk music accumulation and abundant popular songs feed the composers, they also *poison* them and *leak* into their compositions. This kind of adoption may sometimes be in the form of inspiration, but

sometimes, it can pass the limits of inspiration and the melody of someone's song find itself in another's and this event may occur unconsciously. Uğur Bayar who was the plaintiff in the above case Uğur Bayar vs. Fettah Can and Murat Boz, states in one of TV shows to which he connected on the phone (on 20 March 2018) (Url-12) that the song should have stayed in Can's ear. Subconscious plagiarism is recognized by the composers, though not all of them seem to tolerate this act, nor the courts do.

Some other composers, like Uçarsu approach this subject moderately. Uçarsu states that he can leave the door open to subconsciously copying a melody since he is a musician. He adds that being a composer in popular music genre is more dangerous because it is a restricted area and melodies can cross with each other in a way whatsoever. Though, fields more open to exploration and novelty such as contemporary music may involve less probability for plagiarism (H. Uçarsu, personal communication, 11.12.2018).

3.2.1.10 Use of patterns and creativity

There are harmonic patterns frequently used in popular music compositions. The placement of definite melodic patterns over these harmonic progressions may result in the creation of similar musical works. This is one of the soft spots of popular music which complicates the individuality and creativity of the composers within popular music field. Yet, different movements are possible in limited areas and the experts in the below case try to demonstrate that the composers may create alternatives.

Case: Mehmet Aslan vs. Ali Tufan Kır   and TMC Film M  zik   retim ve Pazarlama A.   .

We are again face to face with a lawsuit where the refrains of two songs are found substantially similar. Since I have only seen a draft report about this case and talked with one of the experts appointed for this lawsuit, I do not have any specific, final written source. I do not have the court decision of this case, but the event was published in the newspapers. Here, I want to explain how the experts approached the subject as far as I understood from my interview.

This case relates to the fact that even though fixed harmonic patterns used in pop music may limit the composer, it is still possible to move into harmonic patterns and create

individual melodies. Ali Tufan Kır   is an acclaimed pop/rock singer-songwriter who is known by people as Kır  . His song *G  n  l* has a refrain built upon a descending harmonic pattern of Am, G, F, Em. This refrain is compared by experts with Mehmet Aslan’s song *Engel   ıktı Aramıza* sang by M  sl  m G  rses. The experts assess that the instrumentations, style and genres of the songs differ from each other but their refrains are substantially similar in terms of their melodic and harmonic construction which are both very much used in Turkish music. It is said that the melodic setting is built upon a traditional musical pattern (I believe they mean harmonic pattern), which is widely encountered in multiple genres of Turkish music. These melodic and harmonic progressions proceed within a scale of 4 or 5 notes. The experts add that however, it is possible that these harmonic patterns may be handled differently and other melodies could bear out of these patterns. The substantial similarity found between the refrains passes beyond the similarity arising out of the usage of traditional, generic patterns of Turkish music. As an example, the experts show the song *Neler Oluyor Bize?* sang by İlhan Şe  en. They state that the song *Neler Oluyor Bize* use the same harmonic and melodic pattern but in a distinct way.

When I look at the harmonic progression used in the refrain of *Neler Oluyor Bize?*, I notice that the refrain is built upon the chords Am, E, F, E. Since I have only the draft report of this case, I could not see the notation of the songs transcribed by the experts. However, also upon my observations, I can say that almost the same chords and notes are used in the refrain of *Neler Oluyor Bize?*, but they appear in a different progression. So, even though the melodic pattern is used in a descending manner over on top of Am, E and F, the song does not sound as if it is the repetition, imitation of another song.

I transcribe below in the Figure 3.13, the melodies of *Engel   ıktı Aramıza*, *G  n  l* and *Neler Oluyor Bize?*. These transcriptions show us that the refrains of *Engel   ıktı Aramıza* and *G  n  l* are identical despite the differences in the note values. Besides, it seems that *Neler Oluyor Bize?* has a distinct melody built upon the same chord progression used by the previous songs.

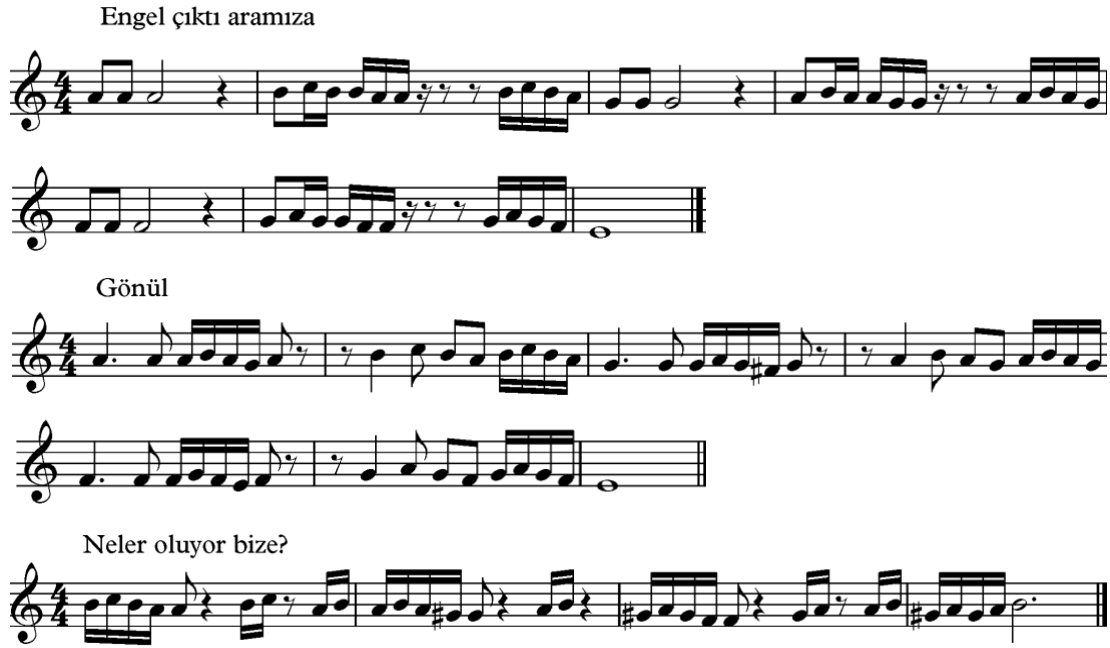


Figure 3.13 : Transcriptions of *Engel Çıktı Aramıza*, *Gönül* and *Neler Oluyor Bize?*

The use of standard patterns is another problem I infer from my fieldwork. There are standard norms determined by the popular music market and culture. These patterns and forms are accepted, their existence has gained recognition by music scholars. Some of the experts, for instance, gave the example of the sequence called *Marş Armoni*: I guess this is the translation of *harmonic progression*. Although, it is described as a harmonic progression formed by descending 5ths. For example, Amin, Dmin, G, C, Bmin, E, A. (In general, the song *Fly Me to The Moon* is given as an example to such harmonic sequence). It has been stated by the experts that in popular music exists trending harmonic patterns. Eventually, when you stay in these patterns, if you want it or not, your melody may resemble another one which is created within that pattern.

When I look at the other songs in the fieldwork part of this thesis, I see that most of them, namely cases Uğur Bayar vs. Murat Boz, Ahmey Kaya and Adele, Muro, Tunay Bozyiğit vs. Mümin Sarıkaya, suffer from the same problem: they use a descending harmonic progression, and the same melodic pattern is used over these descending scales. I know that in the last two cases the borrowed melodies were already anonymous and there was not any plagiarism as decided by the court, but these cases show that melodic patterns repeated over descending harmonic patterns are abundantly used, and their use may constitute a danger or threat for composers. If any composer

would like to be on the safe side, would not like to fall into repetition with many other composers, he/she should pay attention to which patterns he/she uses. More he/she makes use of different patterns, his/her chance to be caught up is less, and to be original is more.

The use of harmonic patterns, sequences pose a risky situation both for the composers and the expert witnesses. There are works in which a motif starts and is repeated in each sequence. If that motif is slightly similar to another one in another song, all the works begin to be similar to each other. This situation is difficult for the expert witness who is expected to differentiate if the work is plagiarized from another one or it resembles because it uses the same formula as the other works do. Even though the composer intends to create an individual composition, she/he will have at his/her hands a piece similar to others. In such cases, if the notes used are not that “special”, the works using those same patterns are “caught” (Anonymous expert, personal communication, 20.12.2018).

I believe Uçarsu’s statements (H. Uçarsu, personal communication, 11.12.2018) unfold the situation in the music market and creativity, and to look at the composer, in a proper manner. According to him, to create a new thing is a bit related to the power and personality of the composer. Today, certainly the composers are in a more disadvantageous situation than they were 100 years ago. Still, this situation should not affect their personality. According to some expert witnesses, composers of pop music are indeed in a more disadvantageous position than contemporary composers. On the other hand, composers working in new areas such as contemporary music are more authentic. Their genre allows them to explore more, many things had not been done yet in this field. Uçarsu, like his other colleagues, thinks that creativity is in a bottleneck. He asserts that the Law No. 5846 does not hinder creativity, and these quarrels arise not because of Law No. 5846, but because there is not enough creativity. A person may not need to have a big creative power in this case. Since the patterns are definite, whatever a person composes in that pattern, those compositions will sound like one another after a certain point. Whether they want it or not, anybody composing music in this market meet around average standards, they use whatever sells and this happens because they want to look after the market and to protect each other.

Çolakoğlu Sarı equally highlights the relation between the field of the composed music and originality. A composer might be luckier a hundred years ago since there were not so many compositions. However, in the West, the consumption grows, and people need novelties, new things should be constructed. In that terms, creating new works is a bit more disadvantageous for the composer. Whatsoever, new creations depend on the composer's imagination and personality. Social media indeed makes it much easier for artists to reach people, and the works are consumed rapidly. This may complicate the composers' work; still, this environment would not affect the composer's personality. She agrees with Uçarsu on that popular music composers are in a more disadvantageous position (G. Çolakoğlu Sarı, personal communication, 13.12.2018).

4. ISSUES AND DISCUSSIONS

During my fieldwork, I realized plagiarism was not only a technical issue concerning borrowing from a work of art and a comparison of two works. This act is multilayered: there are multiple factors which lie behind plagiarism; market conditions and the perception of borrowing depending on the culture and time may be cited among those factors. Furthermore, a simple analysis of plagiarism raises questions about authorship, composition and creativity. In this section I would like to elaborate and discuss the factors behind plagiarism and the issues deriving from plagiarism analysis. Though, I will have a remark; the issues I want to discuss cannot be separated from each other with clear-cut lines, they overlap and intertwine. So, once I introduce a subject under a title, I will continue to speak about it and refer to it under the other subtitles of this section.

4.1 Musical Evolution and Composition

The right of free use is a principle accepted in copyright law. When we use the word *free*, it should not be conceived as an unlimited right to use other works of art. Such use can mostly be expressed as *fair use*. Our legal system accepts that evolution in science and arts is possible by benefiting from the works previously created by others, this benefiting may either be by taking previous works as example or by emulating its own work to the previous ones. Each new expression, discourse, technical rule, or theory is based on the ones that have been formerly generated (Tekinalp, 2005, p. 31). It is impossible to prevent an artist to profit from previous works created in all branches of art. The freedom is essential, and the limitation is exceptional; it is a general law principle also foreseen in human rights and foreign legal systems. The same principle is adopted in copyright law, and this right of free use ends where the free use begins to be unfair. It is obviously said by Burkholder (2001, p.1) that the art evolves by the superposition of the new strategies and patterns to the older ones.

Yet the use of existing music as a basis for new music is pervasive in all periods and traditions, parallel to and yet different from the practices of borrowing, reworking and allusion that

contribute to the formation of traditions and the creation of meaning in literature, architecture, painting and sculpture. (Burkholder, 2001, p.1)

So, using existing works to generate new products having artistic value is the ordinary process of creation. It does not pertain to only some cultures or some lands. For instance, Burkholder shows us how borrowing was used in Western classical music (Burkholder, 1994). We learn that there were various types of borrowing, they might be several, but each of them belongs to a group of technique used for reshaping existing music in new creations. He suggests that knowing the techniques of using existing music would provide us with seeing the interrelation between traditions and periods. Here, the concept of composition is also to be scrutinized. In case we speak of the composition as an element of folk music or traditional music, it is discussed whether it is the product of individuals or the whole society (Merriam, 1964). This discussion is more the subject of folklore musics being used and appropriated by composers. Before that, it would be preferable to review the composition concept and its basic process. There are populations in which the composer is associated with a person with supernatural powers, who composes upon visions. We encounter such kind of composer and composition mostly in primitive societies; however, this idea of a composer possessing supernatural powers still shapes the look at the composer in our day. In that case, the composition is described by Nettl as unconscious, and there is no technique adopted by nonliterate societies (as cited in Merriam, 1964, p. 166) in composition as opposed to the presence of techniques in the populations “of high culture”. Here, by saying composition, I am talking of, as Nettl describes, the conscious composition which is defined by him as “deliberate and planned process of creating new music material, carried out by individuals who are aware of their specific and directed actions to the desired end” (as cited in Merriam, 1964, p. 166).

Nettl also mentions that the people in nonliterate societies should accept a composition. The songs are formally or informally accepted in nonliterate societies, either by singing or explicitly welcomed (as cited in Merriam, 1984, p. 174). Our society seems not to have that practice, but this fact evokes another kind of acceptance in us. I imagine now, acceptance and non-acceptance by the society is performed by the intermediary of laws and courts. Stealing someone else’s composition is indeed punished by the courts under the laws which reflect the society’s conscience. From another point of view, here I also think about folk songs which are taken and used and

sang by popular music artists. These kinds of actions are not at all welcomed by music scholars (and also by the legal system). If you think, it is indeed an immoral action to take a melody, to put it in your composition and put your name under it. I remember Professor Yavuzoğlu's remarks here; he objects the idea that the kaynak kişi is not even seen as the composer. He asserts that each song has a composer and that the composer shall receive his/her rights (N. Yavuzoğlu, personal communication, 03.01.2019). I think this idea is not very tenable since anonymity is a widely accepted concept and it is impossible to find the owners of some melodies. It would not be possible to track the melodies created hundreds of years ago and transmitted orally. Besides, I associate society's acceptance from another point of view. As will be explained later in the Conclusion section, there is a moral threshold in plagiarism I intend to describe, which no one can define with concrete elements such as harmonic progressions or the number of measures. The moral threshold represents the brink in our conscience where we accept that the borrowing of a musical work constitutes fair use. This conscience is the root forming the principle of good faith and fair use in law.

The above statement points me out another concern with respect to folk music. It is the appropriation of folk music by famous artists, incorporation of folk melodies into their compositions and the credit taken by those artists for the whole composition. The use of anonymous melodies is indeed acceptable and even compatible with the evolution of the music. On the other hand, folk music is a cultural creation and belongs to the society and turning oneself the owner of society's belonging, making profit out of it and prohibiting the use of this belonging by the other artists poses morality problems. One of the experts utters these concerns concisely giving a couple of examples concerning Barış Manço that I will not disclose here for confidentiality purposes. However, I myself know that Barış Manço uses melodies from folk songs in his compositions and there is even news published regarding cases involving him because of his use and allegedly wrongfully appropriation of folk songs. One of them was the case *Derule*. Another case is about the folk song *Lambaya Püf De*. The melody of this song is anonymous and is used in folkloric dances called *Anadolu Kaşık Havası*. Tamburacı Osman Pehlivan has a recording of 1928 playing this song (Url-15). (On the record Tamburacı Osman Pehlivan's name appears, we do not know if it appears because he is the performer or the composers. I could not find any proof showing that he is the composer, from the below Figure 4.1, we understand that at least, he was the

performer.) In the below Figure 4.1, we see the photograph of the vinyl including the record of the *Anadolu Kaşık Havası*, played by Tamburacı Osman Pehlivan.



Figure 4.1 : *Anadolu Kaşık Havası* Record

Barış Manço sings this song in a different manner (his version seems to be released by him in 1973). He registers the song before the CROs and then his heirs sue the artists who use in their works this traditional folk melody. In fact, singing, playing anonymous or folk music works and using them in the compositions is necessary for the cultural creations to live and subsist. If an artist takes from Tamburacı Osman Pehlivan a melody due to its anonymous character, plays it another format, and this new interpretation makes the song listened by a bigger audience, there is not any problem. However, if that artist takes these melodies, owns them and make a high revenue out of these songs, it can be considered as thievery by music scholars and in fact, also by society. (I would like to add some details about this case. As per the news published on the papers (Url-18), Manço gives the publishing rights of the song to Müzikotek, a Turkish publishing company. Then, Müzikotek files a lawsuit against MSG because the song was registered as anonymous in the registers of this CRO and because of this Müzikotek could not collect any revenue from the publishing right. Interestingly, a publishing company causes a copyright lawsuit again concerning an artist's song made out of an anonymous melody. This event reminded me of the case between The Verves and The Rolling Stones mentioned in the Introduction section of this thesis.) In the overall, earning high incomes over anonymous songs in such a way

or stealing from other artists' compositions is, in the end, not accepted by the sense of community which is also verified by the court decisions.

Musical creation and composition are in general associated with talent, inspiration, and some other thoughts and processes we cannot know unless until we get into the mind of the composer. In this sense, there are a lot of analogies done between a supernatural creator and a composer, and I will mention this issue later. But importantly, as Nettl points it out (2005, p. 29), a composition is the product generated at the end of the rearrangement and unification of the components which are already given to the composer. Composition is the result of a certain process and hard work. Mostly, we also conceive Western art music composers as geniuses. We think they make a composition overnight. However, the labor they put into their work is immense. Their talent and intelligence are undeniable, but they also expose a great intellectual work by acknowledging the theoretical limits and rules of music, even though they try to expand or break those rules. Popular music composers, even though the material and the field they deal with is limited due to the market for which they produce, they also put an intellectual work into their composition. As Nettl expresses, composers take the materials of music, organize them consciously in order to produce a work that would be possible for the listeners to conceive, or sometimes, they arrange those elements on purpose so that the product only appeals to a specific kind of listener. He adds that not only Western music compositions with written music notation but also Native American Peyote songs are equally created in such way (2005, p. 29). In the process of composition, along with the inspiration, there is always the part of "perspiration" as Nettl rightly puts it (2005, p. 31).

While talking about the composition process, Nettl actually tells us about the given elements in music. There are already elements remaining from the past, already existing in the society and the composer, within the rules of music, adds whatever he has to add so that those elements create new music. Here, the attention is drawn on the balance between the given and the added. The proportions in a work of these two factors depend on society. I imagine that in Turkish folk music (and maybe in others) the process advances mostly with the given parts since writing merely new lyrics upon an existing melody is even accepted as a new creation. In any event, it is accepted

either by the Turkish legal system and by music scholars that music advances by new additions above the old.

This is a fact that “many musical compositions incorporate material from one or more earlier works” (Burkholder, 2001, p.1). Borrowing, or broadly, taking materials from previous pieces exists in every tradition; all music is constructed upon the pieces created by the notes, scales, movements and other elements existing in that tradition. “Thus in the widest sense the history of borrowing in music is the history of improvisation, composition and performance” (Burkholder, 2001, p.1). Therefore, borrowing is practiced in all traditions and periods, but its methods depend on the time and tradition it is made in. It is because of this reason that, as we will see below, the borrowing or plagiarism analysis of the musical works shall be carried out by the experts of that specific genre and culture.

4.2 Turkish Pop Music and Outstanding Musical Elements in Musical Works

You may notice from the expert witnesses’ statements that they put a stress on the qualities of the expert who do the similarity analysis in a plagiarism case because the analysis should be genre specific. I would like to remind Karahasanoğlu’s comment that *Meşk* culture and acknowledging the evolution of traditional Turkish music is a must for a correct analysis (S. Karahasanoğlu, personal communication, 20.12.2018). Accordingly, in order to comment on the analysis made in the reports and on the statements given during the interviews, I would like to mention about the traits of Turkish pop music. I believe the idiosyncratic aspects specific to Turkish pop music and its evolution may explain the attitude towards plagiarism in music and also the music scholars’ outlooks on each other.

It would not be wrong to say that Turkish pop music is an amalgamation of many genres. I would like to expand the term *pop* as *popular* and I would like to explain the components of Turkish popular music, which encompasses many subgenres. Roughly, Turkish pop is the fusion of *alaturka* and *alafranga* music. *Alaturka*, which is a word deriving from *alla turca* (meaning in Turkish style) is in general, a pejorative connotation used by people who believe the supremacy of Western culture. In music it means, in fact, the music which includes Ottoman, Anatolian and Middle Eastern features (Tansuğ, 1999, p. 263). When I say Ottoman, I exclude the Ottoman music

affected by the Westernization in 19th century. In this *alaturka* form we can include Turkish art music (or traditional art music) and other musical styles based on Ottoman forms. On the other hand, *alafranga* music signifies European or Western music. It is important for us to understand the appearance and existence of this duality which has shaped many discussions in the Turkish music world.

Western music penetrated into Turkish music first during the Ottoman Empire with the establishment of *Muzika-i Hümayun*, the imperial orchestra, band, and chorus. This band was founded by Sultan Mahmud II in order to replace the Janissary orchestra. This band was conducted by Guiseppe Donizetti who educated the band with Western methods, and Western notation were adopted (Kaya, 2012). Western music had thus entered in Ottoman lives. With the proclamation of the republic in 1923, reformations in numerous areas from the state government to everyday life, including music have been achieved. The reformation in music envisaged the Westernization of music, because *alaturka* music was considered as though it carried Byzantine and Arabic features. Turkish intellectuals were after a kind of music purely reflecting Turkish characteristics and this music would be created by the Westernization of Turkish folk musics (which would be used as raw material), by playing them polyphonically and composing polyphonic works treating Turkish folk music motives and elements. The performance and teaching of Turkish art music which was the popular genre until then was forbidden, and this music was banned from the radio in 1934. The ban on Turkish art music from the radio did not last long, but by the time people turned their interest towards kinds of music with Arab sounds under the influence of the Egyptian movies. In 1948, Arabic-language music and films were banned, in the same period, the state promoted “folk-chorus radio” (Stokes, 2001, p.21) and these sufficed for Turkish people to shift their interest on Arabic-language music. This interest in Arab sound in music bore another genre, *Arabesk*. This genre appeared with an eclectic style combining the harmonic structures of Turkish art music with Turkish folk music, sometimes with rock and Western harmony and using a large section of strings and percussions together with some electronic instruments (Stokes, 2001, p. 21). Arabesk, which was also an uprising genre with its lyrics concerning the poverty, struggles of

life and love was degraded and has been a subject of sociological and musical discussion in the academic and intellectual circles.

As it is obvious, Turkish music is a junction point where multiple genres encounter and mix with each other. Interestingly, those mixtures are the result of conflicts between judgments and dichotomies. I have seen that this disaccord of East/West has always continued and occupied our minds and our lives. We could not escape this dilemma in our everyday lives and also in academic milieu, specifically in music. Besides some pejorative attitudes towards the institution where I am doing my masters' studies, the reactions of Turkish music scholars and Western music scholars towards each other's study area were startling and they directly reflected the aforementioned conflicts. As per my experience, it is still true that Ottoman/Turkish music (also mentioned as traditional Turkish music) is undervalued by some (and not all of them) Western music scholars or musicians. They mainly contest the *makam* systems used in traditional Turkish music. Turkish art and folk music compositions are based on modes called *makam*. In *Makam* systems intervals are comprised of microtones. *Makams* have special rules of improvisation and composition (Karahasanoğlu and Skoog, 2009, p. 65). Therefore, Turkish popular music comprising subgenres such as *Arabesk*, rock, *Anadolu rock*, pop is constituted of compositions either based on Western scales or *makams*. Many popular artists both use Turkish music instruments and *makams* in their music, or, even though they do not include any Turkish music instruments, they construct their works upon Turkish *makams*, rhythms and song forms gripped from Turkish folk and art musics (Karahasanoğlu and Skoog, 2009, p. 65). As a result, some of the musical works which are subject to the reports mentioned in this thesis too are constructed upon *makams*. Therefore, the expert witnesses analyzing the works cite *makam* as one of the elements to be compared in musical works and we encounter they mention, in their explanations, the *makams* of those works.

Another area I would like to explore shortly is the *meşk* system and anonymity. Here, I prefer first to bring up the remark given by the Turkish music professors; their general opinion is that expert witness analyzing a case in a plagiarism lawsuit should have knowledge about Turkish music. Professor Karahasanoğlu stressed also on the *meşk* culture and the importance of acknowledging that system. *Meşk* system is a traditional learning system of traditional Turkish music. It is based on the relationship of master-disciple: it signifies a system in which the student learns from his teacher by imitating

and repeating him. Karahasanoğlu describes the master-disciple system as the grounds of the *Meşk* system. The master does not only teach the music but also transfers his life experiences to the disciple (S. Karahasanoğlu, personal communication, 20.12.2018). In that system, the student learns the work by heart by repeating the work several times with its time. He/she does not only acquire the teacher's style, technique, or the way how to play the instrument but also the repertory. Thus, the repertory would be transported to the future generations by *meşk* system. This system is based on oral transmission, so there was no notation, and Turkish art music was not written. The study and learning of the traditional Turkish music were carried out with the *meşk* system until a hundred years ago. So, the repertory of Turkish art music today consists of the works notated within the last hundred years (Behar, 1998, p. 15). Now, since the beginning of the 20th century, the musical notation is used for teaching and spreading the musical works but *meşk* practices have not stopped, they are maintained as a mechanism to propagate aesthetic style socially.

Meşk system has also been applied in Turkish folk music since it is also a genre within the traditional Turkish musics and belong to the same musical culture with the Turkish art music, although it displays some small differences in its *makams*, style and form and environment of performance (Karahasanoğlu, 2012). This system has been practiced by *Aşıks*, folk poet-singers or minstrels playing *bağlama* (the long-necked lute which is mainly used in Turkish folk music). *Aşıks* have verses over which they compose in traditional Turkish syllabic form (Fossum, 2017, p. 11). Those verses are created by the *Aşıks* themselves and in addition, they sing the verses created by their masters. Since *Aşıks* also work with *meşk* method, they help the transmission of a great repertory and playing technique to the next generations. In the repertory passed over to their apprentice, there is the poetry but also the melody, because apprentices learn their master's verses with their patterns of melody. The disciple learns how to settle the verses and rhymes with the melody which is a delicate work (Karahasanoğlu, 2012, p. 167). Karahasanoğlu confirms the method used in this tradition during our interview. The disciple takes his/her master's melody and writes lyrics over it (S. Karahasanoğlu, personal communication, 20.12.2018). So, the creativity in *Aşık* music finds itself in the creation of the verses and the settlement of the verses to the existing melodies. The mere verse writing over an existing melody is the real creation in *Aşık* music. Therefore, the use of existing music and writing new lyrics thereon is a

prevalent implementation in Turkish music (S. Karahasanoğlu, personal communication, 20.12.2018).

4.3 Music Consumption and Musical Patterns in Music Creation

Although compositions are linked with talent, creativity and seen as a kind of extraordinary event, it is acknowledged now that a composition is, very often created within certain constraints which are brought with a genre. Indeed, the compositions are genre specific and genres are born due to the basic obligations of social life, as we need a kind of music to express ourselves in specific situations. So, genres fulfill some functions; the names of genres and compositions tell people how to react according to that specific music. Performers are also asked to act within the limits of that genre (Blum, 2001). Thinking of the limitations and impositions of genres, composers too will move within these constraints. This subject is highly related to the subtitle 4.6 of this thesis since the music consumption, which determines the musical patterns and codes in a specific field causes a scarcity in production.

4.4 Emulation, Inspiration, Influence vs. Plagiarism

Here I would like to touch upon the fine line between the inspiration and plagiarism and the importance and necessity of the influence in the creation of artistic accumulation. Professor Çolakoğlu Sarı whom I had an interview with had also talked about emulation (G. Çolakoğlu Sarı, personal communication, 13.12.2018). My understanding is that she was talking about being influenced by a composer and imitating him/her out of aspiration. Apparently, this issue preoccupies both the law and music and their practitioners. This subtitle is very much related to the composition and the use of existing music. Even those subjects cross with each other and they intermingle because an artist can use existing music as a point of inspiration.

Apparently, the legal principles are clear about what the inspiration is concerned. As I have already mentioned, the ideas are permissible to be taken and used as per the legal principles. The line is drawn where an author borrows the way with which the idea is concretized. However, there is not any particularity explaining the idea and its concretization. Of course, we cannot expect the law or legal systems to process upon examples, the law gives the general rule and this general rule is applied to specific

examples. That is why each plagiarism case is evaluated in its own terms and conditions and we cannot put a certain threshold for plagiarism. Article 35 regulating the freedom of quotation is more specific about the elements that can be borrowed from another musical work, and among these items is cited the *idea*. Of course, Law No. 5846 does not give any definition of the idea nor the other elements, which are passage, theme, and motive. In fact, these are named elements that can be *quoted* in another musical work and quotation and inspiration are distinguished from each other with the court decisions.

Inspiration from an idea can be more obviously understood in a theatrical or a literary work. For example, in the decision of the 3rd Chamber of the Penal Court of Intellectual and Industrial Rights for the file numbered 2005/805, we learn that a theatrical show including music and dance can handle the same subject with another show in the same genre, again by using song and dance. Here the important part is that the material used in the second show was 80-90% different than the material of the first show. Therefore, the court decided the producer of the second show had just been inspired by the first one. Nonetheless, I cannot determine such a clear-cut example of inspiration in music. In Selda Bağcan's *Muro* case, for instance, because melodic and harmonic progressions, instrumentations and modes of the two songs were similar, the experts decided that the soundtrack of the movie *Muro* had been inspired by Selda Bağcan's *türkü Üşür Ölüm Bile*. Thus, I assume elements like harmonic structures and sequences, instruments and sounds, and their tones or modes (which are related to the harmony) can be points of inspiration. In addition, it is obvious that the *idea* mentioned in the article 35 which is one of the elements that can be quoted (and in fact a formal unit of a musical work) is not the same with the *idea* which means concept or opinion appearing in the mind. To sum up, the law sees that opinions may be borrowed and elaborated by artists and this progression is in the nature of the creation of the works of art. This dichotomy of idea and expression is pointed out by several authors and it is a general opinion that the idea is uncopyrightable, it may circulate freely. The specific expression of this free-floating idea is the work itself, which is protected by copyright (Toynbee, 2003, p. 164).

I think inspiration can come out concretely as a small melody or harmonic progression as well as it can appear holistically, in a more abstract way, in the manner of a sensation or in the timbre. Whatever shape takes the inspiration, unless it does not abuse the

original author's intellectual outcome, it is one of the main constructs of the artistic integrity. In the formation of a composer, the strength of his/her relationship with his/her predecessors is accepted as a determinant factor. Blum mentions with respect to such emulation with an analogy to the mother tongue. He refers to Kurtág's remarks saying that his mother tongue is Bartók, and Bartók's mother tongue is Beethoven. He says that assimilating a predecessor's oeuvre is like gradually mastering the mother tongue and this opens a great territory for creativity that is "not constrained by a need to contend with competitors" (Blum, 2001). Ceritoğlu (2008) summarizes in her thesis the differences between inspiration and plagiarism. Differently, she adds that plagiarism is a crime as per the Law No. 5846, while inspiration is not.

Although the difference between the inspiration and plagiarism is obvious on the paper, this difference cannot be concretized and ascertained. Another problem shown by Will Straw (as cited in Negus, 2011, p. 612) is about the appropriation by artists of the concepts already created and used by a social group, and the protection of those concepts with copyright in favor of the appropriating artists. Straw namely mentions about Madonna who copied the characters of drag subcultures in her shows, music, dresses, postures and who then, owned these products legally. The manners included in the drag subcultures were not an economic or legal possession before Madonna's borrowings. Moreover, when Madonna owns these characters and manners by making works out of them, their borrowing by subsequent others will create a problem and will be judged as plagiarism. The same example is given for the authorship discussion and deciding on the real author in the new world of popular music where the artists work with creative teams. Obviously, the issue of inspiration and borrowing connects naturally to the authorship issue. Straw's discussion about inspiration and wrongful appropriation reminds me of the problems encountered in the appropriation of Turkish folk music by popular artists.

4.5 The Supernatural in the Composer

It is mentioned that in primitive societies people believed that the music creators were given with some supernatural powers. The supernatural is one of the sources where

music is drawn (Merriam, 1964). This situation should not make us think that composition and creation are not seen anymore as exceptional processes.

4.5.1 Composition and its composer

Composition is defined by Blum as “the activity or process of creating music, and the product of such activity” (Blum, 2001). The definition evokes a very simple event, the simplicity comes from the fact that the definition only reflects the mechanical aspect of the composition. In the rest of his article, he continues by repeating the same fact: a great value is put on various kinds of music in many societies. The term composition and thus the composer is loaded. He mentions that Levi Strauss, because the human being is able to compose music, calls music as “the supreme mystery among the human sciences” (as cited in Blum, 2001). Strauss builds this epithet of mysterious upon the myths about musical creativity and the attributions accorded to the composers in many societies.

I wanted to touch upon the concept of composer here again since the work done by the composer is also shaped by the traditions (including performance tradition) and the use of music in a cultural context and, in connection with this the constraints of a genre are important in the construction of a composition. Composition is an intentional act as per Scruton (2011, p. 517). It is totally agreeable when I think of any kind of music and in any condition, either when the composer intends to give a message or express him/herself as an individual, or when a work is commissioned and the composer aims to give the account predicted by the *employer* or satisfy the expectations of the audience. This intentionality plays its role and is obvious when the composer has to compose within some market practices and expectancies.

I think Nettl rightly puts the intentional nature of composition (2005, p. 31). He sees composition as a decision-making process. He calls the concrete process of composing after the inspiration as the “perspiration” (Nettl, 2005, p. 31). This process includes preparation, execution and revision stages in composition acts. This systematic point of view is important in understanding that composing is an intentional act, for which the composer prepares him/herself and applies a methodology, far from extraordinary events. This leads me to say that composition is an earthly act, performed as a job.

Some scholars connect the romantic and legendary conception of the author with the construct according to which the musical work is the product of an individual, not of the society. The legal system and copyright protection are also shaped around the individual creation concept. This model is called a “privatized intellectual property” and it presents a sociological critique (Negus, 2011, p. 614). Negus (2011) brings up Bourdieu’s comments as the author’s cultural and creative recognition should be the result of social acceptance rather than his/her talent or genius. Bourdieu believed there was an area of cultural production which could be defined as a competitive field occupied by artists. The creation and artistic reputation are supported by the “sociological struggles over position, power and prestige” (as cited in Nettl, 2011, p. 613). Ability and talent may be important in that field; however, the real acceptance in the field will realize by consorting to the conditions of acceptable artistic practice, struggles over position, and to present a recognizable work appreciated by the pioneers (such as authors, critics) of that field. These opinions coincide with the existence of the constraints in popular music market and that the products in that field are fashioned with market conditions. In this cultural production discourse, musicology is criticized over the concept of *genius* and the belief that the author/composer/musician is someone special, who does not socialize and works mystically in isolation (Negus, 2011, 614).

4.5.2 Creativity

A similar inclination to the obsession to look up the composer is to combine creativity and authorship with the high arts. This approach causes the belief that products made due to practical reasons and market needs are lack of artistic talent and creativity. However, these productions need also a special creative power and the value that we attach to these products are in fact related to our culture. We tend to discriminate the works as “genuinely creative” from the ones that are “merely competent” (Negus & Pickering in Toynbee, 2003, p. 162). We evaluate the creativity of many composers producing in various genres from popular to art music after that works have been created in accordance with our beliefs shaped by our culture. Toynbee points out that such evaluation is under the influence of a romantic discourse (Toynbee, 2003), an opinion that I strongly agree with. This romantic discourse imposes the idea that “the music comes from within and is a direct product of psyche of the creator” (Toynbee,

2003, p. 162). Within this romantic discourse lies the assumptions that the germ of creation is within the composer and his/her creativity has no connection with musics created formerly; the creation is an involuntary process (opposing to the idea that composition process is voluntary and conscious) and the composer incorporates a “creative daemon”, and the composition passes through a transformational process where it starts to appear as a new idea and then takes a definite form at the end. Toynbee adds that this perception of creativity is valid not only in art music but also in jazz and rock. The listeners of these genres may assimilate the artists with heroes and they tend to “lionize artist-creators” (Toynbee, 2003). This situation indeed poses a problem considering that the realities do not coincide with this romantic conception, because the romantic discourse does not take into consideration the social essence of the authorship in all cultures. The author is not a person who works and creates as per the needs, demands, and constraints of a market and the listeners. They are, as it is nicely put by Toynbee (2003) “a select band of individual geniuses”.

This idea was obviously in the minds of the expert witnesses that I talked to during my fieldwork. The degree of romanticism depended from one expert to the other and it was not as high as pronounced in Toynbee’s article, but their idea was, whatever the conditions are and however these conditions are difficult, a composer has to have his/her individuality and should reflect it in her/his work. The composer has got *something* that we cannot tell. It is a touch that we hear, or we sense but we cannot explain very well. So, even if we are mentioning about a pop music composer, an author creating within a genre which has its limitations defined by the market and listeners’ demands, that composer shall have a style, a touch that makes us recognize him/her when we hear, or see his/her works; he/she has a signature. The abundance of the works to which the composer is exposed to is not either an excuse for him/her to unconsciously borrow from previous material. This signature is mostly accounted in a romantic way during the interviews, though I understand from the reports that the expert witnesses recognize the characteristics of the author by looking at his/her previous works in a more analytic manner.

Although it is objectionable and burdensome for the composer to assume that the composition should be a brand-new product at the end of a mystical process, any meaningful combination of musical elements to achieve basics in a style does not make a composition original. There is indeed a signature, mark of the composer which is

recognized by the listener; Toynbee determines that this creativity is found in the “particular relation to the stylistic norm” (Toynbee, 2003, p. 165). These norms can be transcended or transgressed. So, the fact that creativity in a work is connected to being produced in scope of some stylistic norms means also that they are evaluated within these norms. (The fact that some composers are particularly creative is explained as there is a system of positions making the field of production. In that field, these positions attract particular music makers. Promising musicians aim for a particular position in that field according to “habitus”. There is a “habitus” in that field, every actor in that field carries with her the way of going on in the world. Habitus is acquired during the early years, connected to social factors such as class, education, gender. Musician habitus pushes, the field pulls and there is a convergence. When those elements line up, the space of possibilities opens up.) In this context, I wish to question the concept of the author. This is related to the compositions and attributions made to the process as mythical, supernatural, etc. apart from the personality of the qualities of the author; I want to discuss the real person.)

4.5.3 The author and her constitutive features

I question in this thesis and in general in my research the concepts and perceptions of composition, creativity and authorship. My explanations concerning these concepts are based upon the expert witnesses’ and courts’ opinions. These opinions intersect in overall, they can be classified with bullet points. The keystones of my research are roughly summarized as an author’s core feature shall be his/her characteristic, and the individuality is the road to creativity. Musical borrowing is acceptable as long as it does not amount to stealing. Accordingly, a composer may borrow existing pieces of music, may be inspired by previous works; ideas are for the free use of the authors. But, each author has to have his/her characteristic expression. This expression is apparently the melody in a musical work. We presume that whoever published a work of art first is the author of that work. A work of art is tightly connected to the person who has created it. Even if the composer received help to put the work in publishable shape, still he/she is the sole author. An exception to this fact is the collective authorship.

I wonder if these ideas are in conformity with the authorship concept and creation processes of our time. When there is a complex collaborative process involving the

input of co-writers, co-producers, studio musicians, video directors, technicians, marketing specialists in the output of a musical work, all of these elements and persons may be perceived as the author (Negus, 2011, p. 610). In that case, there is no single genius of music but a single person, namely the singer or artist in the front is in the control of her team and all the processes which a song goes through. In this respect Negus gives the example of Madonna whose works are created with the collaboration of a team of songwriters, co-producers etc. but, she says the last word about the output and achieves to put out her characteristics (Negus, 2011, p. 610).

This reminds me of the case between Nil Burak and her arranger Uğur Dikmen because it made me ask who the real author was. At first, I had a critical eye about the judgment given by the court. The legal standpoint is obvious, although I think that arrangers put a loaded amount of work to make a musical work (even just sang by voice) ready to be published and listened by a great audience and they shall be credited for this. However, in the end, it is the author who decides about the end-product. As Negus says, “author is at the center” (Negus, 2011) of the musical work. He/she is the authority, the “central figure” (Negus, 2011, p. 607). The author is seen in that position because the audience attributes a motivation to the author and his/her work. They are conscious that the work is intentionally created. This intentionality talk leads me again to the point of supernaturalism, romanticism and great expectations from the composer. Negus mentions that there is evidence in journalism, discussions etc. that in popular music, the authorship is valued vernacularly (Negus, 2011, p. 607). Indeed, this programming and methodology under the leadership of the author makes the musical creation concrete, touchable and really vernacular. Therefore, the expectations especially from popular music composers should be held according to these circumstances.

The look to the author can be decisive in defining the problems generating plagiarism disputes. As per Will Straw (as cited in Negus, 2011, p. 609), the authorship is accepted as a relationship existing between the songwriter and song. Songwriters and lyricists are routinely referred to as authors and the originating authors are protected under copyright. This single-line relationship does not allow for other authors to use the works of the originating author in order to create new works and this fact causes plagiarism allegations. It is said that now, against the romantic discourse of authorship,

the influence of popular music and jazz music studies lead to a shift in the focus from work to performance in defining the authorship (Negus, 2011, p. 609).

4.6 Scarcity in originality – genre-specific creations

Borrowing tradition, use of existing ideas and music and also the abundance of the musical works poses, according to me, a great problem for the composers. Borrowing practices and being exposed to many sources of music do not leave a lot of area to the composers in which they can move in. More works are out in the market, there is less possibility to find original music pieces and to compose original works. In addition, composing in a specific genre delimits the composer to stay within the rules and boundaries of that genre. In that terms, contemporary composers may seem themselves lucky since contemporary music is open to new explorations.

Burkholder's explanations regarding borrowing and are well-directed when he asserts that "procedure and significance of borrowing vary between repertoires and over time" (Burkholder, 2001, p.1). Therefore, it would be pertinent to assess the pieces and alleged plagiarisms according to the genre they belong to.

If we talk specific to popular music, first we have to mention about the features of this music and creativity in that genre. Toynbee, in addition to his assertions above, states that creativity in popular music and classical music are to be conceived differently. As opposed to the realm of classical music, the rules and precedents in pop music realm are easily breakable. Normally, if a composer wants to exist in the realm of a specific genre, he/she has to demonstrate s/he contains in him/herself the qualities required by that field. Since there is a scarcity of rules and precedents in pop music field, the qualities of the composers therein vary from each other. Therefore, the expectation of creativity from a pop music composer may be held according to this situation.

On the other hand, I understand from my experience, it is widely accepted that popular music pieces are like products for fast consumption. Since the rules and precedents of a music realm are also defined culturally, by the interaction of the actors, the listeners shape the creations in pop music. This demand forms the sound, and even the formal and harmonic structure of the music pieces; popular music composers use specific harmonic and melodic patterns, and sounds which incite most the listeners. Practicality and commerce are priorities in pop music compositions. There is even no expectancy

of a genius in pop music realm (Fisher, 2011). Tagg (1982) who argues that “popular music cannot be analyzed using only the traditional tools of musicology” (Tagg, 1982, p. 41) separates pop music from art music because of some properties of pop music. These properties are that pop music is to be consumed by large, heterogeneous groups of listeners which make it as a product of mass consumption; its distribution is mostly non-written; it exists as a commodity in an industrial economic system, in capitalist societies where it has to be sold as much as possible, to as many as possible. Its theory and aesthetics value are told as uncommon and it is stated that immediate aspects which are not that important in the analysis Western art music such as timbre, electromusical treatment, sound, ornamentation are surely substantial in the analysis of popular music (Tagg, 1982, p.42). Tagg (1982) adds that only the notation should not be the sole point of reference for the analyzer (p. 42). These specifics of popular music may require a different analysis of pop music pieces comparing to the Western art music works. However, I think those factors are to be considered mostly regarding the analysis of a single piece trying to revealing the meaning and role of that work. In plagiarism cases where the experts compare the songs, they use expedient methods and put an emphasis on the melody. Popular music is also distinguished by Tansuğ (1999) from art and folk music. He gives a quotation from the editors of Popular Music giving the broad term as “people’s music” (Tansuğ, 1999) associating pop music with the 20th century and mass media, music that rose under the industrialization process of the society, which is divided as producers and consumers. Popular music, mostly created by professionals, is carried out with a star system. The music industry creates star personages from artists, who are promoted as distant and glamorous persons. The music industry is institutionalized in this way so as to create commercial music and lead the listeners. The listeners seem passive though in that picture where a song prepared to be a hit is imposed on listeners without them recognizing it. Or, the industry will recognize the talents, will invest in them and promote them through mass media (Tansuğ, 1999, p. 14). In either way, it seems that the music industry imposes its own terms both on the audience and the artists. On the other hand, there is a market which is like an interface where the performer or the supply meets the audience or the demand. As a result of the two parts’ dialogue arises definite patterns of music. Tansuğ (1999) calls attention to the fact that the works of Turkish folk music are recorded, broadcast, marketed and consumed almost like any other pop music genre (p. 4). These identifications regarding popular music are important in knowing in which field and

setting and for what reasons popular music pieces are created. In fact, these conditions affect also the creativity and the work of the authors. We are talking about a field where there is a low expectancy of creativity. Still, the composers are expected to have a particular style and sound, which would distinguish them from the others.

5. CONCLUSION

When I found my thesis subject and started to do my research, I had not imagined plagiarism cases would have so many cultural aspects. I had assumed to look over the plagiarism cases in a given period of time in the courts of intellectual and industrial rights and draft a report, mostly statistical, showing how the analysis and approaches towards plagiarism had changed over time. Before I started to go to the court, I reached the expert witnesses and interviewed them. There, I realized the duels between scholars specializing in different genres, the perception towards the academic institution where I am doing my masters' studies, multifaceted side of plagiarism including creative and cultural issues. I noticed one common point though, which is the concern about creativity and music in Turkey. Further, I had not noticed that there were so many plagiarism cases occupying space in the media and in the yellow press. Once and for all, I would like to conclude my thesis by summarizing my results about these layers lying beneath this illegal copying act and tell my opinion about them.

5.1 Thresholds in the Field

I would like to give a snapshot first about the cases I searched about. The oldest case I looked into is dated from 2002, and it is about the case involving Şivan Perwer and İbrahim Tatlıses as the parties. The most recent file I have examined is the file regarding the *Muro* case, with its new file number dating from 2017, originally, the file dates from 2015. I have read draft reports, reports, and court decisions about 24 lawsuits. Not all of them were directly related to musical plagiarism but gave an idea regarding the courts' perspective about the work of art, authorship, originality, and anonymity. I also read the Supreme Court decision rendered on *Derule* case in 1974. This decision constitutes a precedent for the courts respecting the acceptance of inspiration out of anonymous work and the possibility of using an anonymous work in a new, original one (and in such case, the copyright protection would be according to the new parts of the work, not the anonymous part). The decision used as a precedent for plagiarism (and more specifically unlawful quotation) cases, is dated from 2006.

My first finding is, since the dates I have given above, the look at the creativity has not changed. I have not encountered distinct or innovative methods to compare two songs. There is a pretty settled method followed by the expert witnesses, and also the precedents about plagiarism are established. With the help of court decisions, expert witnesses, and jurists' opinions, I would like to share my findings concerning the existence of the threshold in musical plagiarism.

5.1.1 Thresholds

If I want to give a short and simple answer to the question of whether or not there is a threshold of plagiarism in music, my answer would be no, there is not. Then, I would finish my thesis here. Of course, also mentioned in several cases and parts of this thesis, there is not any specific threshold or limit after which we deem a musical work as plagiarized. The fact that each case is evaluated in its own terms is repeatedly mentioned herein. I do not find any thresholds in the conventional sense, although I think I can cite as technical thresholds some *not to dos*, some techniques to be kept away from as perceptible thresholds, while I can define a moral threshold for musical plagiarism.

5.1.1.1 Perceptible mistakes and a *not to do* list

First of all, I would like to answer the main question of this thesis: there is not any mechanical threshold looked after in plagiarism cases. Each case is evaluated in its own terms and conditions. The fact that the borrowed part is plagiarized or not depends on the genre of the music pieces, the attribute of that part (if it is the refrain or just a transition, etc.), the length of the borrowed part and also the piece from which the part is borrowed. Borrowing just one measure of a musical work would not be noticed in a piece of 10 measures, maybe. But in a piece of 4 measures which is used as a TV/radio jingle, one measure would matter in terms of reflecting the characteristic of that music.

Maybe there is not one threshold, but there are some specifics to consider to not fall in a trap and end up with a musical work resembling other works in that genre. The most problematic situations arise when there is a descending harmonic scale and the melody is constructed over that scale. If the melodic patterns are also repeated above each descending chord, the chances for that melody to be caught as substantially similar to

another are high because these patterns are eminently used. Let us remember Pinter notifying that the cases prove that there are basic melodic patterns moving upon basic chord progressions and this ends up with overlaps of notations between the songs (Pinter, 2015). This way pop up coincidences; Ahmet Kaya ad Adèle may feel the same and use the same progressions and create the same melody. Hence, I could respond to my question that why popular music songs resemble each other so much.

There are also problematic sections in the works. The conflicts mostly arise upon the refrain melodies of the songs. Refrains are copied to refrains, refrains are copied to introductions or vice versa. The borrowings of these parts create a problem because, notably in popular music, they carry the characteristics of the work. The more the refrain is repeated, the more it becomes the song itself. Therefore, the borrowing of the refrain means at a level, the borrowing of the whole song in popular music.

The plagiarism analysis is performed over all of the elements of the musical works. Not only the melody but also the harmony, instrumentation, rhythm, orchestration of the works are compared. Still, the melody is the carrying structure of the work and the experts take mostly into consideration the similarity between the melodies to determine plagiarism. Pinter (2015) too, asserts that the melody, especially lead vocals, and hook melodies are usually the keypoint in deciding about plagiarism.

When I started to write this thesis, I was more convinced that the similarities between songs stemmed from consciously or subconsciously copying acts. I would not give any chance for serendipity. However, it seems that using some composition techniques such as using popular chord progressions, simple rhythms and regular descending or ascending melodic patterns give rise to multiple coincidences. It is even hard to escape from finding similar melodies at the end of such composition processes. In addition, when these compositional patterns are used, the works that are put forward are not unique enough, in my opinion. However, these generic melodies and harmonies, when they are used in the introduction and refrain they may be attributed as the characteristic and original section of a song which constitutes a contradiction.

Here, I would like to consider the harmonic patterns of *Özledim*, *Gönül* and *Million Years Ago*. The court decided about the first two songs that they are plagiarized from other songs. About the third, there is no litigation but the arranger of the song *Acılara Tutunmak* (which is allegedly copied in *Million Years Ago*) signaled that, although

there is a possibility for that resemblance is coincidental, he could have decided that it would be plagiarism. The disputed part of *Özledim* is constituted by the chords Dm, C, Bb, Am; a descending harmonic pattern. *Gönül*'s contentious refrain is constructed upon Am, G, F, Em; again, a descending harmonic pattern with a descending melodic pattern. The chords of *Million Years Ago* proceed as Cm, Fm, Bb, Eb, Ab, Fm... and we see this time a descending 5th sequence (which is called as *marş armoni*). If you listen to the Turkish popular music every day, the songs you hear will normally resemble each other because of the frequent use of these patterns.

5.1.1.2 Grey area of thresholds

In the previous subtitle, I have tried to set some concrete points to take into consideration mostly for composers, who would not like to be trapped by patterns. Maybe one of the above could be configured as a threshold, this would be the borrowing of the refrain in a song. Here I call it refrain because in most of the examples the refrain was copied and this copying resulted in plagiarism because it was the most characteristic part of the song. Refrains may be constituted in general of a certain number of notes or measures. However, we cannot be sure that a refrain will always consist of 4 measures, for example. The cruciality of the borrowed section and whether or not such borrowing constitutes plagiarism is always evaluated on case basis.

Not all of the reports give a percentage about the matching ratio of the disputed works. In the case regarding the songs *Beni mi Buldun?* and *Ağlıyor musun?* the experts detect a 60% similarity between the refrains. Some experts state that the similarity ratio can raise up to %80-90 which leaves no doubt for deciding there is a substantial similarity between the disputed sections. On the other hand, an expert asserted that even with the similarity ratio of 50% the similarity might be considered substantial. The ratio seems low because of the embellishments and grace notes, therefore the main melody left after the embellishments are moved out is taken into consideration.

When the relativity comes in, I feel that we move from concrete features and tangible rules to a more fluid and abstract area. U.S. copyright law seeks a substantial similarity exists between the musical works in question so that the court can decide there is plagiarism (Pinter, 2015). Pinter (2015) also stresses out that there are not any algorithmic rules to determine what substantial similarity is. Experts help to identify this substantiality here, and the court decisions also rely on previous practices. Cason

and Müllensiefen (2012) mention about the detection of plagiarism and similarity in UK law. In UK law, exact similarity and substantial similarity are separated from each other. If there is not any exact similarity between two works, it should be objectively proven that there is sufficient similarity between the works so that the infringing work can be described as an adaptation or reproduction of the copied work (Cason and Müllensiefen, 2012, pp. 26, 27). This objective degree of similarity is evaluated on a case-by-case basis. If there is an identical similarity between the works, the focus shifts on the copied part and it is questioned if that section represents a substantial part of the copied work. If there is a similarity, the court tries to identify if these works are similar enough to decide on copyright infringement. There, the court attaches importance to the substance of the original work and it puts an emphasis on the aural perception as well as a note-for-note comparison (Cason and Müllensiefen, 2012, p. 27).

As understood from the above accounts, there is no absolute rule to determine plagiarism. Uncertainty prevails as to the determination of plagiarism because there is no absolute truth, a generalized rule about original work, characteristic section, the substance in a music piece. It has been already told that music experts get in the scenario at this stage. I have mentioned that lay listeners' opinions are in fact aimed to be taken but in order to provide for objectivity, expert witnesses are assigned. In a case where a generic chord progression and melody is used or an anonymous work is borrowed, a lay listener would notice the similarity and judge that it is a rip-off. Though, music experts will notice quickly that such similarity exists in multiple songs due to the generic characteristics.

In this thesis, we have confronted time to time with the importance of separating the idea from the expression in order to separate the inspiration or the emulation from the plagiarism. The idea is free-floating, it is uncopyrightable, the expression of that idea, the manner in which it is concretized is under copyright protection. Again, I would like to repeat that this distinction can be easier in literal or theatrical works but defining an idea in a musical work is still not clear to me. Maybe, the core of the idea is to be abstract: as Cason and Müllensiefen state (2012, p. 29), the greater the level of abstraction is, the less likely a section will be considered as a substantial part. How the level of abstraction can be determined or measured in a musical work is another question to me. Yet, what I infer from the above cases, the substantiality lies in the

melody and in the refrain section. When those parts are (almost) identical, they opine that there is plagiarism, except the case that the borrowed section shows generic or anonymous characters. I think all of this uncertainty is related to the fact that there are no absolute rules and values in music. Therefore, the law branch which is interested in the regulations and conflicts of art and especially of music which the IP law is affected by this fact. As Stav (2014) expresses, absolute truth does not necessarily exist in IP law. Henceforth, we can only agree on some criteria and paths to follow in cases dealing with musical works.

5.1.1.3 Moral thresholds

As previously said, the law does not provide for absolute rules in determining plagiarism and the courts leave this evaluation to expert witnesses. Though, the decisions may seem unjust if they contradict the common sense (Stav, 2014, p. 49). Stav (2014) asserts that common sense may be the ear of the audience and if the audience is willing to buy that work and pay for it, they may be responsible for deciding regarding plagiarism. The jury in the U.S. legal system constitutes that common sense, however, in general the judges rely on the technical reports submitted by the experts (Stav, 2014, p 49). Here in our legal system, it is accepted that expert witnesses represent the public's ear.

The fact that Stav brings up the common sense makes me think about conscience and how stealing a work would be against it. I believe all factors and criteria considered by the expert witnesses arise from a sense of justice and moral sense. Determining substantiality is important at that point since borrowing a substantial part of a musical work would end up with copying the heart of that work. So, I believe comparing the works, doing research for the borrowed part if it is having a generic or anonymous character and searching the composer's background and compositional features are to satisfy the sense of justice. In the end, stealing a composer's work would also be copying that composer's characteristics. From this point of view, I also see a moral threshold to be considered in dealing with plagiarism.

Additionally, in the cultural sense, I had the impression that musical plagiarism would be tolerated in some music genres, such as folk music, or borrowings would not be assessed as plagiarism. At that point, the borrowing of folk songs by famous pop/rock stars, their appropriation with new lyrics and making fortunes over those folk songs

hurt our conscience more. These matters transform the plagiarism issue from a single technical question into a moral one, and in my opinion, the public's conscience sets a moral threshold in that respect.

5.1.1.4 Accidents happen but are not tolerated

In the literature review, I mention Avcı's (2017) article about a conflict between Manuş Baba and Atilla Yılmaz over Manuş Baba's song *Eteği Belinde*. According to the technical expertise report of MSG, the *ara nağme* of *Eteği Belinde* was almost identical with the *ara nağme* of Atilla Yılmaz's song (Avcı, 2017b). Avcı asserts that this situation should not be regarded as a plagiarism case but as cryptomnesia or, in other words, as subconscious plagiarism. It is a musical accident that Manuş Baba composed an *ara nağme* with the same melody. Manuş Baba had probably heard the melody somewhere, some time ago, had forgotten it but when he was composing he came up with that melody and thought it was his original creation. A couple of cases with the similar issue have happened in the U.S. One is between Ronald Mack and George Harrison. The latter was accused to have plagiarized Mack's song *He's So Fine* to create *My Sweet Lord*. The court, following its tests, recognizes that there may be a subconscious plagiarism; it does not believe that Harrison copied Mack's song. Still, because the songs are almost identical, the court assesses the event that it is the infringement of copyright law, even though Harrison might have subconsciously plagiarized the piece (Bright Tunes Music. v. Harrisongs Music, 1976, from Url-17). Similar case has happened between Sam Smith and Tom Petty. The chorus of Sam Smith's song *Stay with Me* is basically identical with the chorus of Petty's song *I Won't Back Down*. This event was settled out of court. Sam Smith stated he had never heard of Petty's song and Tom Petty told there were no hard feelings because these things happen, it was a musical accident (Cronin, 2015). (On the other hand, let's not forget Smith paid royalties to Petty.) Both artists agree that their works were independently created. On the other hand, if this case was settled before the court, it was probable that the court would decide Petty's song was plagiarized because the lack of awareness is not a defense in U.S. courts. Subconscious plagiarism is not discussed in the case files or reports I have read for this thesis. Musical accident is accepted as a fact by Uçarsu and İşmen (H. Uçarsu, personal communication, 11.12.2018 and O. İşmen, personal communication, 29.12.2019). However, İşmen clearly states that it cannot be

accepted as an excuse and he gives an example: if a man steals your wallet and then says he was not aware of it, it cannot be acceptable (O. İşmen, personal communication, 29.12.2019). Yavuzoğlu had told that some of his students ask him sometimes if their work resembles another one (Yavuzoğlu, personal communication, 03.01.2019). Clearly this issue constitutes a discomfort also for the composers. Taylor explains the happening of subconscious plagiarism as below:

On one hand, it makes sense a defendant's intent is not relevant to the damage inflicted upon the plaintiff; however, and on the other hand, in a world of unlimited exchange of ideas and influences our subconscious can easily trick our minds into believing a given idea is genuinely ours while the idea is actually a reflection of a memory of something we were previously exposed to in the past. (as cited in Stav, 2014, p. 21)

I think that composition is a conscious process where the composer deliberately chooses the path he/she follows, the combination of the elements, but a so high level of consciousness to remember from where a certain material is taken is very hard to maintain. I believe, in any case, the material used by the composer already exists somewhere, and they are used until someone notices it. It means that unconscious borrowing attains to a degree such that the latter work challenges the original one.

5.2 Conflicts

Here, I would like to lay out dilemmas and discrepancies with respect to or arising from plagiarism and its analysis. It appears that there are discrepancies between the legal doctrine discourse and the practice in experts' reports as well as there is a contradiction in the cultural area, where the concept of author does not fit the composition practice in the popular music field.

5.2.1 Legal: law vs. practice

I perceived that the analysis done by the expert witnesses were pretty straightforward. Their methods consisted with each other. Even in case there were more than one expert report in one lawsuit, those reports were in general in concordance with each other. Therefore, even though we cannot determine any specific threshold for plagiarism, the idea of plagiarism in the expert witnesses' minds are more or less consistent with each other. It is true that each case is evaluated in its own terms and conditions, but the

existence of plagiarism specific to a case can be evaluated in the same manner by multiple expert witnesses. They do not show any big differences when it comes to determining the characteristics of the author. The analysis to be done is obviously definite and this process has been settled. An interesting dichotomy was, when I spoke to the experts, they sounded as if they believe in the supernatural in the composer. I heard their words as if a composer should have a very specific stamp and also a side that cannot be defined very well, but that we can hear and sense. Of course, this pursuit of a mystical composer does not have any reflection in their reports.

Apart from the analysis, I noticed an inconsistency between the legal sources regarding plagiarism and expert witnesses' reports. Legal sources, probably using precedents of the Supreme Court state that the characteristic of the author is to be sought in the link between voices and their rank, and rhythm and in the interrelation of these elements. Legal references including court cases and Supreme Court precedents use similar expressions for the specifications contained in a musical piece, but none of them extend these expressions. These kinds of definitions do not raise any clear idea about the elements to be analyzed during a plagiarism lawsuit or to give distinctive a character to the music piece. The only decision clear about the elements to be compared is the verdict on *Derule* case stating that disputed work shall be compared in terms of voice, harmony, and lyrics.

Equally, the discussion with respect to melody under the subject of quotation appears purposeless, knowing that the quotable elements cited in Article 35 have all melodies. From the above, I infer that law scholars are distant to the real material of their research subject and their discussions stay on the theoretical level. My guess is that they cannot imagine and picture the substance of their discussion. They take as basis the Supreme Court decisions and we have seen how they are drafted. If I compare the U.S. court decisions as far as I scanned and also originating from jurists' articles regarding musical plagiarism, I could say that they involve much more certainty on the musical elements and problematic points. In the U.S. we have the example of Arnstein test applied by the courts, this is a clear-cut example that can be both understood by lawyers and also musicians. The fact that harmony and rhythm cannot be the subject of copyright protection are mentioned in cases and legal articles (Cason and Müllensiefen, 2012, p. 27). However, the terms "theme, passage, motif and idea" in article 35 of the Law No 5846 setting out the freedom of quotation are not discussed

in anywhere. There is a settled order for the courts according to checking if the disputed product is a musical work or not, if it is an anonymous work or it carries the characteristics of its author if there is an improper borrowing and appropriation. In none of these checks, the courts discuss why a work carries the author's characteristics, why it is anonymous etc. In my opinion, we need the concretization and clear definition of the real substance disputed in the lawsuits and the connection between the legal and musical worlds.

There is another point that stroke my attention and which constitutes a discrepancy from my point of view. In the *Universal Müzik Taksim Edisyon vs. Barlas Erinc* for example, the similarity of refrains is discussed and if the melody of the refrains were not borrowed from an anonymous melody, probably the decision would be the defendant had committed plagiarism. However, as one of the reports states, the songs are different even though the refrains are almost identical; the composer wound up his characteristic, individual composition around that borrowed melody. In the case *Uğur Bayar v. Murat Boz and Fettah Can*, the court decided for the existence of plagiarism. Although, these two songs are also different from each other. I understand that refrain is the most characteristic part of a popular music composition and dominates the rest of the musical work. However, this attitude contradicts the idea that a musical work can reflect the characteristics of the author and that musical work would be accepted as an original one if the author creates a different and independent work from the borrowed section.

5.2.2 Cultural

As I already mentioned in the introduction of this section, plagiarism involves more than one discussion. The analysis of musical works because of plagiarism allegations open discussions concerning the evolution process of music and the regularity of borrowing. Even though borrowing is seen in the natural process of music creation, the point until which borrowing is fair is in fact determined by the society in which the work is created. Also, the discussion about the evolution of music gives way to the discussions about compositions, hence the composer.

5.2.2.1 Where does the composer stand?

Having done my research for this thesis, I believe now that composer stands in people's eyes somewhere between human and superhuman. It is acknowledged that composition is a conscious process in which the composer aims for a product. He/she fulfills her/his job to satisfy the demands of the music market. Still, the idea that the composer is somebody special does not leave our minds. Expectancies are high; a composer has a manner, a stance and marks his/her signature in every work he/she creates. By the way, it is natural for a composer to have a style, and indeed, you can hear this style in the timbre and melodies of the works created by him/her. However, when I did my research, those statements were rather loaded as if the composer was a superhero doted with superior qualities. These words make us think as if the music quality sought by society and the standards to blend in a genre field are high. It is true that in some fields there is rivalry and composers have to make solid assertions to show their qualities. On the other hand, we shall not forget that the lawsuits that are subject of this thesis and in general seen before the courts are regarding pop and folk music pieces. I have already mentioned that in the pop music field, there are no rigid rules and any pop music composer may survive in that field. In fact, because of the specialties of pop music I have asserted that pop music analysis shall be different than the analysis of the works in art music genres. Therefore, pop music and its composers are in general defined with degrading terms and, as there is high expectation about creativity from composers, there is a high disappointment and despair towards the creativity in music. Yet, it should not be forgotten that composers giving works in the pop music field are exposed to other constraints pushed by market conditions and it should not be easy to create new music in a field where a lot of work is emerging with the use of limited materials.

I believe too that composers have to be gifted with a degree of talent and individuality. Moreover, a composer's musical knowledge and equipment are added values to his/her character, and these reflect his/her works. The prevailing despair about creativity among the music scholars and even jurists may be the general degrading regard towards popular music; however, I have not heard any clear statement with that respect. I think musical works shall be evaluated in considering the properties of their genres and fields. Popular music is, of course, different than art music in its discourse and construction because its objectives draw apart from the intentions of art music. My

opinion is that it is possible to be creative and make an assertion in any genre; however, the works should be assessed according to the requirements and status of that field.

5.2.2.2 Western vs. eastern

A striking point during my interviews was the tension I sensed between western and eastern music scholars. This tension is the extension of the duality in which Turkey and each aspect in Turkey find itself: the conflict between East and West. When I say the conflict, I do not necessarily mean that one side pretends it is better than the other one. The issue is more complicated than that. As I mentioned in the section I accounted for the penetration of Western music in Turkey, and the westernization process has caused many ideological battles in the population. The palace and then the government directed themselves towards the West, this tendency boosted in some way more demand for Eastern-sourced music. Turkish art music or *alaturka* has been degraded, Western music belonged to an elite, the parties pushed each other back.

In my interviews, I have seen in Turkish music scholars the desire to protect and appropriation of their music. Although they insisted in the importance and necessity of acknowledging Turkish music, they have never told they did not appreciate Western music. On the other hand, unfortunately, a degrading attitude towards Turkish music and *makam* system still exist in some Western music scholars or specialists whom I talked with. I believe such an attitude cannot be accepted and these arguments do not make any contribution to the academy and music.

5.2.3 Market: power, property, standards, fast consumption and clichés

The genres of music covered in this thesis are Turkish folk and pop music. In folk music creativity conception is more different than pop music; however, folk music's evolution is similar to pop music in terms of making use of former musical works, the melodies used in there mostly have an anonymous character. Of course, as previously said, there are composers and compositions in Turkish folk music. If you can notice in *Muro* case, the lawsuit was regarding a *türkü*, a song form in Turkish folk music which had been composed by Bağcan. In those cases, the expert witnesses check again if the

composed piece carries the characteristics of its author if it is a work of art in the first place. Then they move along with the plagiarism analysis.

Both genres have a market. Folk music listeners would like to hear patterns used in Turkish folk music. On the other hand, pop music listeners' ears would be in the new sounds emerging day to day. Pop music also uses some specific patterns, either in harmony or in melody determined market conditions shaped by the music industry, pop music audience's choices and demands. In such a field where the priority is to produce for consumption, the production would be different than the production of art music. Thus, pop music composers may not be able to escape clichés and impositions of fast consumption. In this surrounding, the supernatural legend about the composer collapses also because being composer becomes just a job. However, we already know that it is a process of hard work, through which the composer organizes his/her material and thinks about his/her message. This work is put forth in order to create an intellectual product.

Another problem with music plagiarism is that the cases about it are seen as an alternative way for musicians to generate a fund. Signaled several times throughout this thesis, when music became a commodity, the ones who made it begun to exploit it from all aspects. This seems more the backing of the producers pushes the artists to file plagiarism lawsuits. In any way, the songs that we have never heard of can become famous because of being plagiarized. Actually, I did not know there were even that many plagiarism cases before digging this subject in Turkey.

Nettl had stated that a composition should have been accepted by the society in nonliterate societies (as cited in Merriam, 1984, p. 174). We do not live in a nonliterate society, but I believe this acceptance may show itself in our society in different ways. The leniency towards musical borrowings is inherent to the acceptance of a composition and shows the limit where the society accepts different uses of musical elements or copying in new musical works. Audience's purchase and consumption of allegedly plagiarized works may be interpreted as acceptance, on the other hand we know that the theft of a work of art is not welcomed.

Honestly, when I started my research my stance was more severe towards plagiarism. My lawyer side weighed more and I believed any composer should have avoided plagiarism. Now, I am moving towards the idea that plagiarism is inevitable in musical

creation. Borrowing is already in the natural flow of musical creation and accumulation. Though, I always separate conscious theft from subconscious plagiarism, inspiration or referencing other composers. I believe the author's intentions step in during the composition and borrowing processes. I accept that the composer is not a human with supernatural powers, still being a composer is different than being a non-composer. Even musicians or artists performing in other branches of art are regarded as special persons. They all indeed perform their job and mastering whatever job you have requires hard work. Artists, including composers, work for what they are commissioned. It is getting harder to find new melodies, and the growth of new genres has also slowed down. The demand is growing, and with all the abundance of musical works composers' job is getting harder. Talent and creativity factors are always among their attributes, and this will affect the regards towards the composers. However, we should not forget that musical works put forth are intellectual creations, and they are to be respected and should be protected.

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APPENDICES

APPENDIX A: CD and Tracklist (in the order of appearance in Section 3)

- 1- Sen de Başını Alıp Gitme
- 2- J'ai Perdu Tout Mon Bonheur
- 3- 10. Yıl Marşı
- 4- Ağlıyor musun?
- 5- Beni mi Buldun?
- 6- Dünya
- 7- Özledim
- 8- Fesuphanallah
- 9- Weily Weily
- 10- Peşmerge
- 11- Zurnacı İbo Dayı
- 12- Türkülere Söyle Sılaya Dönsün
- 13- Hayat
- 14- Üşür Ölüm Bile
- 15- Muro
- 16- Engel Çıktı Aramıza
- 17- Gönül
- 18- Neler Oluyor Bize
- 19- Acılara Tutunmak
- 20- Million Years Ago

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