

Introduction

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What is the relationship between copyright and music? How does copyright perceive music? How do musicians see the purpose of copyright for music?

This edited collection of chapters on music and copyright, with four musicians and musicologists and four copyright lawyers as contributors, grew out of an interdisciplinary workshop on music and copyright at the University of Glasgow that I organised on the occasion of the tercentenary celebrations of Glasgow Law School in 2013. This workshop, 'Artistry and Artificiality? Music and Copyright', took place on 6 September 2013. Its aim was to bring together musicians and musicologists with copyright law specialists, and to make musicians think about copyright and lawyers reflect about music.

This collection is truly interdisciplinary, a path often welcomed but less often followed. When lawyers do interdisciplinary work in intellectual property law, this tends to be cross-disciplinary within the law (for example, copyright and human rights) or it descends into a kind of law-and-economics study in which legal institutions and (hermeneutic) interpretative methods are remodelled as economic concepts and, where that proves difficult, a call for reforming (or deforming) the law is frequently put forward so as to bring 'positive' law more in line with the supposedly immutable, universal 'natural' laws of the all-encompassing market. In this intellectual climate the arts and humanities naturally fare badly, and the potential of philosophy and the humanities for interdisciplinary legal studies is too much neglected. This is particularly true of music, because, while many disciplines have considerable awareness of the existence of conceptual frameworks in philosophy, logic, linguistics or history which may inform their own, the rich legacy of music theory and thinking in musical conceptions as a *musica theorica* has long been forgotten outside music scholarship. But having some understanding of music was part of the general education well into the nineteenth century, and this knowledge could enrich the thinking in other areas. Today one has to be an anachronistic *uomo universale* if, for example as

a lawyer, one studies the structure of a Bach fugue or a Mozart sonata to get some inspiration for solving an intricate problem of organisation and presentation of legal arguments in an article or in a pleading. Normally music is either irrelevant to lawyers or a pastime entirely unrelated to their 'proper job'. Where the nature of the subject-matter, copyright, inescapably binds law and music together, music is often only considered as some potentially valuable resource which can be sold and rented out, through assignments and licences. And this dealing with copyright, where the musical work is only an incidental object, is then within the focus of the lawyers' attention, of academics and practitioners alike.

In contrast, musicians, musicologists and sociologists of music are very much aware of the phenomenon of copyright, which plays an increasingly important role within their own disciplines. But copyright is then often viewed from the outside as a kind of undifferentiated, monolithic concept or as a tangle of uninteresting technical rules, unsympathetic to the idea of collaboration between performers/composers in favour of one single author-genius, struggling with the ideas of performance and of the process of creation, and being generally a threat to the unfolding of creativity, particularly through the commercialisation of music by the entertainment industries for which copyright provides the necessary legal vehicle. While these are all valid points of criticism, copyright nevertheless gives a more complex picture.

The principal idea of this book is to present the thoughts of music scholars who examine copyright and copyright lawyers who look at music, each from their own discipline and from their familiar conceptual framework. Copyright lawyers may be perplexed when they read how music scholars perceive copyright, as a phenomenon of intellectual history or as the subject-matter of a philosophical argument, with little reference to specific statutes or case law, and music scholars may be puzzled by the lawyers' extensive discussion of court decisions on copyright in musical works in which one may be able to discern only indirectly a notion of the art form of 'music'. The creation of such a possible bewilderment is intentional. A multidisciplinary approach starts with the appreciation as to how scholars in other disciplines think.

Specialists in music and musicology discuss the idea of the musical work and of performance, as well as the question of 'collective' authorship in collaboration processes, especially where they involve performance and improvisation. Specialists in copyright examine the formal system of copyright and the way in which musicians, singers and performers deal with the law in practice. Copyright lawyers will also look at the building blocks of 'musical works' in law, how they are translated into copyright and how they reflect (or not) the reality of music

creation and music performance. The final chapters will discuss the socio-political role and economic effects of certain aspects of copyright on the music business. The contributions concentrate on the subsistence instead of the infringement of copyright, and on the nature of its subject-matter ('music', or the 'musical work'?). Concepts and ideas, and their social effects, rather than the technical legal rules of exploitation of copyright with regard to musical works, are of principal interest.

John Butt explores in his chapter the development of the 'work concept' in Western art music, being the intellectual foundation for the copyright category 'musical work'. Is there in any given period a phenomenological entity that can be defined as a 'work'? The idea of the 'musical work' is not only more closely related to Western art music, but is also associated with specific eras in the history of music. Butt presents the current discussion in musicology and adjacent disciplines in this regard, from around the sixteenth century to the present time. The more recent weakening of the classical work concept allows consideration of other factors implicit in the music, particularly performance. New media and methods of communication have also helped to draw attention to different ways of listening to music, contrary to a generally assumed passivity of the music listener. Music is no longer listened to as an impersonal object in its own right. This also means that the idea of 'musical works' as fixed and inviolable objects is gradually relinquished.

In the next chapter Charlotte Waelde discusses the performative aspect of music and the interpretation of musical works in performance, as well as the question of arrangement, which is in reality often closely connected with the performance of music. These are all complicated problems for copyright, as Waelde shows when she deals with the relevant case law on originality and (co-)authorship. Music cannot be captured in its entirety by copyright. And what actually constitutes the musical composition, or traditionally, 'the score'? Since much of experimental music escapes any institutionalisation and definition, policy intervention can hardly be directed at a specific object and becomes difficult. Waelde demonstrates in case studies – interviews with performing musicians/composers – what composition and performance really are for musicians.

Martin Parker Dixon takes a more philosophical approach in his piece. What does authorship in relation to a work of music mean? Is it a kind of (social and legal) entitlement to a 'musical work' and what is the justification for such an entitlement? Is it some 'herculean labour'? The ability, art and craft to make 'something'? To express 'deep feelings'? Theories relating to creativity may begin with a reflection on the nature of the thing being made. Dixon puts forward two theses to examine

claims to paternity and integrity of the work, claims which are given legal effect by the two corresponding, and the two most important, moral rights: the ‘auteur thesis’ – the author as the singular, necessary and efficient origin of the work of art, and the ‘artisanal thesis’ – the author being (at best) co-responsible for the formation of a work of art. Dixon picks up a line of thought from Jean-Paul Sartre: it might be that fundamentally the artist makes artworks in order to possess them; to have not only a thing but also to have the work they ‘put into’ the object (be it constructive work, emotional work, spiritual work, etc). Can we leave aside speculation about creativity and address instead the experience of possessing, by asking what claims are being made to substantiate that possession?

In my own chapter I argue that copyright law has no genuine understanding of the nature of music as an art form; it attaches to certain aspects of music which it declares as normatively relevant and thus ascertains building blocks of the legal protection system. In this way music is considered as an object of legal transactions, especially as an object of transferable property. This is a result of the translation process of music into legal categories. The chapter looks at the elements and stages of this process, starting with sketching out a philosophical discussion of the phenomenon of music as a basis for copyright protection. It then discusses court cases of copyright on originality, co-authorship and on the ‘idea–expression dichotomy’ that demonstrate the legal categories with which the law encapsulates and re-interprets the elusive art of music.

Björn Heile approaches the question of authorship in music from a musician’s and musicologist’s perspective, with particular reference to jazz. In his chapter he analyses the contributions to Duke Ellington’s famous song ‘Mood Indigo’ by Ellington himself, by his clarinettist Albany (Barney) Bigard, by the latter’s teacher, Lorenzo Tio, and others. He reconstructs the creative contributions of various individuals in detail, evaluating their originality and significance for the final result. Although Ellington was by no means the sole creator of the song, Ellington did take most of the fundamental creative decisions. In his musical analysis Heile shows that the idea of authorship is also dependent on the kind of work or part of the work which it relates to: what is a memorable tune, what is musical material that is a ‘standard’, what are improvisations and what significance do they have for ‘authorship’.

Alison Firth’s chapter concentrates on the complicated question of copyright co-authorship and co-ownership in music. By way of an extensive analysis of the relevant case law in copyright, she shows how joint authorship is understood in UK law: joint authorship depends upon

collaboration of musical co-authors, and on original contributions from them towards the finished work. The contributions must be merged, so that they are not distinct. The contributions must also be of the correct kind, that is to say, contributions towards the expressive form that is protected by copyright. But Firth's discussion also demonstrates that these principal rules on joint authorship cannot be extracted easily from the court decisions, as these are not always consistent and grapple with the performative and improvisatory nature of music.

In the next chapter John Williamson provides an insight into the lobbying of interest groups in the music industry and their influence on law-making in copyright. Williamson offers a possible new perspective for the character of performers' rights, by interpreting them as musical labour. He discusses the evolution of performers' rights in the UK with particular focus on the previously unrecognised role of the Musicians' Union. Although the Musicians' Union saw recorded music from the beginning as a threat to the live work undertaken by its members, it has been an important participant in the negotiations surrounding such rights, by simultaneously lobbying both on national and international levels while carving out deals with the record companies and broadcasters. Williamson provides a critical evaluation of the Musicians' Union's shifting role in relation to industrial and technological changes, as well as the evolution of copyright legislation.

The final chapter, by Paul J. Heald, is directed at the practical side of music 'consumption' by listeners and users. It is an empirical study that demonstrates that notice-and-takedown regimes can create a market for music on the video- and music-sharing website YouTube. According to transaction cost theory, notice-and-takedown regimes can lower transaction costs by facilitating communication between users and copyright owners, especially where content filtering provides the automatised of much of the process. Heald's market study tests this transaction cost theory by tracking 90 songs on YouTube that reached No. 1 on the US, French, and Brazilian pop charts from 1930 to 1960. An analysis of the data demonstrates that the US Digital Millennium Copyright Act (DMCA) 'safe harbor' system as applied to YouTube helps maintain public access to many old songs by allowing those possessing copies (primarily infringers) to communicate with copyright owners at relatively low cost to satisfy the market of potential listeners.

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law, for reviewing the chapters. Furthermore, I would like to thank the Law School of the University of Glasgow for having given me the opportunity to host the workshop in autumn 2013, and the publisher Edward Elgar for making the publication of this book possible.

Finally, one may quote a passage from *Versuch über die wahre Art das Clavier zu spielen* (1753) by C.P.E. Bach (*Vorrede*, p. 4), which confirms and at the same time contradicts notions of copyright in relation to music and performance:

Die vortrefflichsten Meister in der Ausübung [des Clavierspielens], denen man etwas Gutes abhören könnte, sind noch nicht in so grosser Anzahl zu finden, als man sich vielleicht einbilden dürfte. Das Abhören, eine Art erlaubten Diebstahls, aber ist in der Musik desto nothwendiger, da, wenn auch die Abgunst unter den Menschen nicht so groß wäre, viele Sachen aufstossen, die man kaum weisen, geschweige schreiben kan, und die man also vom blossen Hören erlernen muß.

(The best masters in the exercise [of keyboard playing], from whom one could learn something good by way of listening, cannot be found in quantities as great as one may imagine. Listening, a kind of permitted theft, is, however, in music the more necessary (even if enviousness among humans were not so strong), since many matters come up which one can hardly explain, let alone write, and which one must learn from mere listening.)

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