From Print to Audio Technology, Sound Reproduction & Musical Copyright

Olufunmilayo B. Arewa

Copyright@300 Conference
April 9, 2010
Overview

- Newton v. Diamond
- Copyright Expansion to Music
- Copyright, Musical Genres & Musical Creation
- Impact of Technology
Newton v. Diamond

- Ninth Circuit, 2003
- Beastie Boys obtained license from ECM records to sample sound recording performed by composer Newton
- Did not obtain license to use underlying composition by Newton
- Sampled 6 second segment of *Choir*

- District court had held that no license to the underlying composition was required because, as a matter of law, the notes in question -- C - D flat - C, over a held C note -- lacked sufficient originality to merit copyright protection.

- District court also held that even if the sampled segment of the composition were original, Beastie Boys' use was de minimis and
Newton v. Diamond

- Ninth circuit affirms district court on grounds that use was de minimis
- Court’s discussion of case reflects persistent themes and issues in musical copyright
Newton v. Diamond

• This is particularly true with works like “Choir,” given the nature of jazz performance and the minimal scoring of the composition . . . And it is clear that Newton goes beyond the score in his performance . . . Once we have isolated the basis of Newton's infringement action – the “Choir” composition, devoid of the unique performance elements found only in the sound recording . . .
Copyright Expansion to Music

- Expansion of copyright to music
- 1777 -- *Bach v. Longman*
- Statute of Anne applied to music
- U.S.
- 1790 Act did not include music
- 1831 Act expanded copyright to music
Copyright Expansion to Music

- Musical variations
- Musical characteristics
- Tones, harmonic conventions
- Notes not representational
- Shifting contextual meaning of notes
- Music distributed in handwritten manuscript form into 19th century
Copyright Expansion to Music

- Technological limitations -- printing music difficult and expensive
- Often discuss expansion of copyright in list form: in 1790, copyright applied to books and maps; music added in 1831
- Christine Haight Farley article on expansion of copyright to photography -- significant issues of context arise in expansion of copyright
Copyright Expansion to Music

- Copyright inexact fit for music
- Creation side
  - Difficulties with pervasive borrowing practices in music
  - Visual emphasis cannot easily accommodate compositional aesthetics based on oral traditions in music
- Source of tensions in musical copyright
Copyright, Genre & Creation

- Newton’s performance elements reflective of strong oral tradition in jazz
- Music may include both oral and written traditions -- shifting relationships over time
  - European art music oral tradition
  - Jazz music written tradition
- Challenges composition-performance dichotomy
Copyright, Genre & Creation

- Notation -- written tradition
- Originally a tool and mnemonic device for accomplished performers
- Renaissance music
  - Strong oral tradition similar to 20th century jazz
- Jazz
  - Copyright deposits often lead sheets with basic melody
  - Less often transcription of performance
Copyright, Genre & Creation

• Improvisation -- oral tradition
• Associated with certain musical forms -- jazz, blues
• Key aspect of European art music tradition until 19th
  • Bach, Mozart, Beethoven as improvisers
  • Virtuosi -- Paganini and Liszt
• Important aspect of learning and composition
Copyright, Genre & Creation

- J.S. Bach visit to Frederick the Great ==> The Musical Offering -- last major Bach work
Copyright, Genre & Creation

• Composition
  • May include both written and oral aspects
  • Improvisation as composition
• Dominant copyright assumptions
• Visual emphasis
• Dichotomy between musical composition and performance with performance derivative of a composition
Copyright, Genre & Creation

- 2 significant events by early twentieth century
- Sacralization of European art music and displacement by African based musics
- Lawrence Levine conception of sacralization
- Widespread dissemination of technologies of audio reproduction
Copyright, Genre & Creation

- Nineteenth century European art music sacralization
- Less participatory
- Denial of borrowing
- Increased focus on musical authors
- Could no longer abridge and improvise
- Invention of canon of authoritative works
Copyright, Genre & Creation

- Nineteenth century sacralization
  - **Written composition**
  - No repetition (musicologist Burkholder -- hidden emulation)
  - Dominance of written notation
- **Musical performance**
  - Exact repetition of written composition
  - Good fit for underlying copyright assumptions but *inflexible*
Copyright, Genre & Creation

• Decline of oral tradition
• Elimination of improvisation from European art music by 1910
• Cadenzas and ornamentations retained in da capo arias (ABA)
• Inconsistent with sacralization norms that require that each performance serve as a replication from a past era
Copyright, Genre & Creation

• European art music once popular music
• Incorporated into events of daily living
• Sacralization led to decline in living tradition (Susan McClary -- inside job)
• Replacement as popular music by series of African based musics
  • Ragtime, blues, jazz, R&B, gospel, doowop, soul, disco, rap
Copyright, Genre & Creation

• Displacement challenges copyright

• Dominant oral tradition -- similar to Renaissance music

• Compositional and performance practices facilitated by sound recording technologies

• Sound recording copyright

• Henry Louis Gates -- aesthetic of repetition and revision
Impact of Technology

• Displacement occurred in same era as introduction of technologies of sound reproduction
• Popular music today
  • Composition in recording studio from sketch
  • Later reduced to notation
  • Aesthetics of composition and performance less fixed and more malleable
Impact of Technology

- Musical copyright visual emphasis
- Sees score as authoritative document
- Music a performance art
- Oral and aural important
- Visual emphasis increasingly out of sync with musical practice
- Possible to create and perform music without writing
Impact of Technology

- Musical copyright visual emphasis
- Runs counter to
  - Aesthetics of musical creation in many genres
  - Technologies of sound reproduction that enable fixation of formerly transient performances
- Performance as composition
- 20th century improvisation returned to classical tradition
Newton v. Diamond

- Questionable rationale based on composition performance dichotomy
- Continuing tensions in musical copyright
- Need for greater consideration of variations in compositional practices in music cases
- Rethinking sound recording copyright
- Cultural implications of copyright
- Customizing copyright for different fields and genres?