Music as written, music as heard in music-infringement litigation

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Structural problems in musical IP

• Domain confusion
  • Lack of differentiation between notation as primary/sound as primary

• Inherent conflict
  • Sound vs. bases for judgment

Music exists only in sound BUT
Sound is its least stable element

Domains of musical substance
## Domain conflict in copyright evaluation

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<th>Notation-based evaluation</th>
<th>Sound-based evaluation</th>
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Properties of **composition**  Properties of **performance**
Domain conflict in copyright evaluation

**Notation-based evaluation**
- Melody
- Harmony
- Rhythm
- Instrumentation

**Sound-based evaluation**
- Tempo
- Dynamics
- **Timbre/sonority/genre**
- **Beat/genre**

Properties of **composition**
Judgment of **readers**

Properties of **performance**
Judgment of **listeners**
Revenue by delivery medium (RIAA 2016)
Changing bases for registration

Sound vs notation in registrations

Drift in registration media (US, 1940-2017)
>Satin Doll (reg. 1953; lit. 1993)

• Estate of Duke Ellington vs. Estate of Billy Strayhorn
• Concrete vs universal
• Ostensible Issue: scope of copyrights in derivative works
• The nature of jazz/swing/blues/bebop
  • Harmony, melody, rhythm integral
  • Tempo, timbres, dynamics collaborative/spontaneous
• Registration trail: lead sheet vs full sheet version
Satin Doll:
Ellington estate vs Strayhorn estate

Non-synchronous evidence

Work 1
Recording
Lead sheet

Work 2
Films, videos
Sheet music

https://www.kapwing.com/5e6973da1a00da0015b9360e/studio/editor
Satin Doll (Tempo Music vs. Famous Music, 1993): Ellington estate vs Strayhorn estate

Ellington lead sheet (1953)

Strayhorn realization, 1958, Tempo Music

Claim of interest in added harmony and revised melody.

Lyrics by Johnny Mercer
Satin Doll (Tempo Music vs. Famous Music, 1993): Ellington estate vs Strayhorn estate

Ellington lead sheet (1953)

Claim of interest in **added harmony** and **revised melody**.

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Strayhorn realization, 1958, Tempo Music

Revised melody

Lyrics by Johnny Mercer

3/2/2020 Eleanor Selfridge-Field (GWU "I hear America Sing")
Satin Doll: Ellington estate vs Strayhorn estate

Ellington introduction (all 7ths, 6ths)

Strayhorn written introduction (downward chromatic line)

Crowd-sourced judgment: Most performers of this piece use the Ellington intro, even though it is not in his lead sheet. No one uses Strayhorn’s introduction.

Performances*
- DE 1953*, 1959*, 1962*
- Th Monk 1969
- O Peterson 1963*, 1989
- C Terry 1989*
- Jerry Mulligan
- Count Basie

“Added harmony”

• Judgment in LZ’s favor on 3/9/20 by Ninth Circuit meeting en banc:
• Finding: only commonality a descending chromatic bass line (a minor)

Subject of dispute: First 2.5 bars of music

10 Matches in RISM, notably Gibbons and Weelkes
New action on the inverse ratio rule

• Allowed earlier obscure works to claim infringement by currently famous groups
• **Threshold** for finding of infringement lowered if alleged infringer can be shown to have had access to the earlier work.
• Changed examination technique: required new rendition of music as filed in copyright registration

**News flash: both provisions overturned on March 9, 2020**
Read the case at the MCIR blog

• https://blogs.law.gwu.edu/mcir/case/inplay-michael-skidmore-v-led-zeppelin/
Similar issues in Griffin vs Sheeran (2016—): “Let’s get it on” (1973) vs. “Thinking out loud”

Asymmetrical filings

- Recording
- Video
- Elusive lead sheet

Work 1

Work 2

Broader claims of melodic, harmonic, and rhythmic appropriation
Critical issue: Which features are interdependent, which independent...and when

- **Interdependency** of harmony, melody, and rhythm

- These relationships vary with
  - Repertory
  - Medium
  - Era
  - **Sound-based vs notation-based judgments**

- Possible **independence** of sound and notation instantiations