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
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
Properties of performance
Domain conflict in copyright evaluation

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

Sound-based evaluation
• Tempo
• Dynamics
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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

Recording
Lead sheet
Films, videos
Sheet music

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

Claim of interest in \textit{added harmony} and \textit{revised melody}.

Ellington lead sheet (1953)

Strayhorn realization, 1958, Tempo Music

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

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Ellington lead sheet (1953)

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Revised melody

Lyrics by Johnny Mercer

• 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**
Similar issues in Griffin vs Sheeran (2016—)

“Let’s get it on” (1973) vs. “Thinking out loud”

Asymmetrical filings

Work 1

Recording

Work 2

Video

Recording

Broader claims of melodic, harmonic, and rhythmic appropriation

Elusive lead sheet

3/2/2020

Eleanor Selfridge-Field (GWU "I hear America Suing")
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