Distributed ownership: the place of performers’ rights in musical practice

Ananay Aguilar

Music Faculty. University of Cambridge

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Literature in music and law suggests that copyright law is influenced by Romantic ideals that place musicians on a creative hierarchy in relation to the musical work fixed in the score: composers’ legal rights are wider and deeper in scope than those of performers. However, with the increasing use of the recording studio as a site where composition and performance take place at the same time and where each role contributes to the final musical work fixed in the sound recording, I ask whether it makes sense to distinguish between composers and performers in law. My findings suggest that, rather than a binary, the creative work of musicians can best be represented as moving within a continuum between composition and performance with both concepts being socially very much in use. Musicians position their work on this continuum according to four key categories: professional structures, composer-performer discourses, genre, and power relationships. I thus argue that the legal categories of authorship, adaptation and performance go a long way in protecting the majority of contributions to a musical work, reflecting social understandings of the different types of contributions to a musical work. However, I also argue that musicians using performers’ rights do so partly because they don’t have the means to negotiate rights in the musical work. For this reason, every effort needs to be made to strengthen performers’ rights.

Debates on the mutual investment of the concept of authorship in Romantic aesthetic ideals and the legal system are well-known. For instance, Lydia Goehr (1992) and JasonToynbee (2006) assume that the legal concept sprang from the aesthetic concept. In contrast, Anne Barron (2006a and 2006b) argues that the legal concept of musical work emerged out of common-law property reasoning. Yet Anne Barron also concedes that the copyright system bears some of the prejudices inherent in Romantic ideals that translate into the under-privileging of most popular musics: a celebration of the autonomy of the musical work as fixed in the score, the insistence on the separation of authorship and performance, the obsession with originality, and the undue emphasis on melody and harmony over rhythm, tone and colour. This is problematic in an era of increasingly global circulation of music and musical practices that extend beyond those embedded in Romantic ideals like those of classical music. Digital technologies have not only fostered an increased circulation but have transformed musical practices through increased connectivity and an explosion of musical possibilities offered by sound manipulation technologies which are fixed on and appreciated through sound recordings.
Richard Arnold (1999, 2007, 2008) has grappled with the difficulties (and the legal establishment’s inertia) of accepting sound recordings as a method of fixation in court cases. These difficulties stem from separating the original musical work from its adaptation or performance when all coincide in the same fixation (most notably in Fisher [2006, 2008, 2009], see McDonagh 2012), but also from conceptualising a musical contribution to fit one of these legal categories. Important considerations traversing case law are the existence or absence of a score or agreements pre-empting the production of a song (Hadley) and discourses giving weight to either an original outline (Hadley) or a finalised musical product (Beckingham and Bamgboye). Yet, whilst providing different supporting evidence for their cases, the aspiration of musicians in case law is that of joint authorship. In the face of these changes in practice and recent case law, I ask whether it makes sense to distinguish between composers and performers in law.

My main dataset stems from 35 in-depth, semi-structured interviews conducted between 2014 and 2015. I have used inductive and deductive approaches to process the interviews using qualitative analysis software MaxQDA. The dataset represents a wide spectrum of musical genres, ranging from mainstream popular musics to classical, baroque and contemporary art musics, with experimental genres in between. I found that musicianship is best described as a spectrum between composition and performance, where both can be highly creative or not creative at all. Classical composers, for instance, are people who are mostly free to create, but so are performers in many genres. In contrast, composers composing for music libraries and classical orchestral players reported low levels of creativity. In what follows I lay out four categories that determine how high musicians rank themselves in the scale of creative contribution, thereby positioning themselves vis-à-vis the musical work and the legal opportunities available to them.

The first category is that of professional structures like that of an orchestral player or of a session musician: musicians who fill a professional role accept the conditions that come with it, regardless of the level of originality of contribution.

The second category, ‘composer-performer discourses’ is a variant of the first, but in contrast to it, this category describes how musicians position themselves discursively in relation to a musical work and thereby legitimise the filling of such role. The way musicians position themselves in relation to a work can depend on ingrained discourses about the comparative value of their work: creating a point of departure in the form of an outline is considered as more deserving than fleshing it out and articulating it for an audience. Within this discourse, claiming rights in the musical work would be therefore beyond the performer’s expectation, regardless of the quality and quantity of her contribution to the final musical product. It is within this discourse that performers’ rights work best.
Genre is a third defining factor in how musicians characterise their contributions. In classical music the score is crucial to determining a musician’s role: whoever writes the score is also the author of the musical work. This is so even if the performer gives advice on the use of the instrument, makes corrections or suggestions that introduce significant changes to the final musical work. In contrast, in some genres it is common to share ownership in the musical work equally amongst everyone who was in the room when a song is written, a process referred to as ‘Nashville style’ (Vigon 2015). Yet attributing ownership is often a process of negotiation. Here, ownership is defined in the collaborative process of articulating and shaping ideas into a final musical product: the musical work. Traditional roles cease to be the defining factor in conceptualising ownership, and quality and quantity in relation to the final product is assessed. The extent to which any single contributor’s weight is believed to increase the chances of success, is also key to the negotiations. This leads me to the final category: power relationships.

A well-known example of a performer demanding half of the rights in the musical work is that of Elvis Presley (Vigon 2015). There is a logic to that, as Vigon explains referring to the composer of ‘Blue Suede Shoes’: ‘if you are a writer and not a performer, would you want 100% [of the right in the musical work] of a song performed by Carl Perkins or 50% of a song performed by Elvis?’ (2). This point underscores the importance of the contribution of a skilled and charismatic performer to a musical product and puts into perspective the relevance of its origins.

Far from being distinct categories, the categories of professional structures, composer-performer discourses, genre and power relationships overlap and flow into each other. They merge and complement the considerations traversing case law and form a complex network of possibilities that are not always straightforward to map onto the legal framework. Nevertheless, I propose that the different rights to a musical work, adaptation or performance, combined with contractual mechanisms, offer a comprehensive resource for musicians to legitimise their position in relation to a musical work. Regardless of their profession, discourse, genre or level of influence, a musician will be entitled to one type of right. I thus support Bentley and Biron’s (2014) view that the combination of legal devices offered by the 1988 CDPA and contractual mechanisms provide a stable, yet flexible, system capable of coordinating and containing the complexities arising from different musical practices.

In conclusion, does it make sense then to distinguish between composers and performers? I would suggest that it does make sense as long as there are musical practices that legitimise the separation between composition and performance. As Bentley and Biron explain, ‘it is important that different social operators feel a reasonable correspondence between the social norms that underpin their practices and legal norm embodied in copyright law’ (263), and I demonstrate that this is the case.
Considering that what is at stake is the credibility and legitimacy of copyright law, it is important to highlight the law’s failure that has become apparent throughout the trajectory of this article. Musicians using performers’ rights do so not only because their contribution is considered of less value (professional structures and composer-performer discourses), but also because they don’t have the means to negotiate rights in the musical work (genre and power relationships). These are important findings that support Arnold’s view that ‘performers remain at the bottom of the musical food chain’ (1999, 7). For this reason, every effort needs to be made to strengthen performers’ rights.

References
Bently, Lionel and Laura Biron (2014): ‘Discontinuities between legal conceptions of authorship and social practices: what if anything, is to be done?’, in Mireille van Eechoud: The work of authorship, Amsterdam, AUP.

Cases cited
Bamgboye v Reed [2004] 5 EMLR 61
Beckingham v Hodgens [2002] EMLR (45) 1005 Simon Thorley QC.
About the author

Ananay Aguilar is a Leverhulme Early Career Fellow at the Faculty of Music in the University of Cambridge. Her interests lie in the production and circulation of recordings, especially in related matters of aesthetics, economics, technology and law. She is currently working on a project on the legal circumstances surrounding performance and their effect on contemporary music-making, supported by the Centre for Intellectual Property and Information Law (CIPIL) at the Faculty of Law. Ananay studied Music at Universidad de los Andes in Colombia (BA), UNICAMP in Brazil (MA) and Royal Holloway, University of London (PhD).