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Distributed ownership in music: between authorship and performance

Abstract

Following criticisms of British copyright law that it is influenced by Romantic ideals of authorship, I ask whether it makes sense to distinguish between music composers and performers in law. Drawing on interviews with classical and popular music performers and relevant case law, I examine how performers negotiate and exploit different rights in order to determine ownership. Evidence suggests that, rather than a binary, musicians' creative work can best be represented as moving along a continuum between composition and performance with both concepts socially much in use. Musicians position their work on this continuum according to three motifs: composer-performer discourses and careers, genre, and power relationships. I argue that the legal categories of joint or individual authorship, adaptation and performance protect most contributions to a musical work and align with social understandings of the different types of contributions. Yet I also note that, viewed more normatively, a recasting of the rights could help shift those social understandings and alter the inequalities inherent in both musical practices and the law.

Keywords

Performers' rights, joint authorship, adaptation, music, sound recording, copyright, performance, ownership, Romantic ideals

Introduction

Debates on the tensions arising from the arguable influence of the Romantic authorship concept on the legal system are well-known. For instance, Lydia Goehr (Goehr, 1989, 2007) and Jason Toynbee (Toynbee, 2006) assume that the legal concept sprang from an aesthetic concept reified through the fusion of philosophical ideals and the emergence of a marketplace for musical works driven by a rising bourgeoisie. In contrast, Anne Barron (Barron, 2006a) argues that the legal concept of musical work emerged from common-law property reasoning. Yet Barron (2006b) also concedes that the copyright system bears some of the prejudices inherent in Romantic ideals that translate into the under-privileging of performance and orality and, by extension, of most popular musics. These prejudices are expressed through the celebration of the autonomy of the score-based musical work, the obsession with originality, the undue emphasis on melody and harmony over rhythm, tone and colour, and thus the sharp separation of authorship and performance. Lionel Bently (Bently, 2009) further emphasises the reinforcement of such values in the courtroom by judges and expert witnesses schooled in elite institutions favouring a musical education still much reliant on Romantic ideals.

The structural distinction between authors and performers in copyright law has evolved from a complex historical background. In both common law and civil law countries, musical works are among those protected by full copyright or author's rights, while the rights of performers, introduced in the UK as late as 1988, fall into the category of neighbouring rights, and are more limited. The question that arises then is whether this imbalance can be socially justified. Considering, as Lionel Bently and Laura Biron (2014) propose, that copyright law's legitimacy depends on its widespread acceptance, in this paper I ask whether it makes sense to distinguish between composition and performance in law.

I begin by examining the Copyright, Designs and Patents Act 1988 and relevant case law to offer an overview of the differences between the two sets of rights and the options available to performers. Crucially, I develop this discussion by drawing on a series of in-depth interviews with performers and managers regarding how they position themselves relative to relevant legal categories. I divide musicians' conceptualisation of their musical practices into three motifs that invite the exploitation of one legal category over others: composer-performer discourses and careers, genre, and power relationships. Joint authorship of the musical work remains the preferred option and a viable one for performers with the bargaining power to reach favourable agreements and/or for those passing the relevant legal standards for joint authorship in the event of a legal dispute. Performers' rights remain the central set of rights for musicians with less social and legal bargaining power. More broadly, my findings suggest that performers are mostly unconcerned about the status of their legal protection. There are two central reasons for this: firstly, many performers are not aware of their legal rights; secondly, for those performers who are aware of their legal rights, the legal framework offers sufficient flexibility to accommodate most of the complexities arising from different musical practices. Given that the latter reason has been addressed elsewhere (Bently and Biron, 2014; Firth, 2015), in the last section I shift the focus to the implications arising from performers' legal ignorance, an ignorance that acts against their own interest. As I will argue, the prejudices inherent in Romantic ideals that have been said to influence the copyright system also bear on performers' conception of their own work.

The legal framework[i]

Content and signal

Although both are formally classed under 'works', UK copyright law differentiates between two broad categories of authorial works (such as musical works) and entrepreneurial works (such as sound recordings). This matters, because some of the most relevant differences in protection between works and performances are inherent in differences between musical works and sound recordings. Perhaps one of the most interesting ways of making sense of this distinction comes from Richard Arnold (2011), who (extrajudicially) relates it to one between content and signal[iii]: as content, musical works are protected independently from the signal (or medium) that carry them. Sound recordings, in contrast, fall into the category of protected signals, where the content (or message) carried is irrelevant. For this reason, Arnold continues, sound recordings are exempt from the originality requirement (Arnold, 2011, p. 276).

This exemption gives rise to different types of copying. A musical work can be copied in two different ways: on the one hand, the signal can be copied by photocopying a musical score or by downloading a digital file containing the musical work onto a computer; on the other, the content of a musical work may be copied by performing or arranging the work. This is not the case of sound recordings, of which only the copy of the signal is protected, that is, the copy of the sound file or record. Copyright of the sound recording does not protect the content. Crucially, as Arnold points out,

> content copyrights protect the creativity of authors expressed in their works. Such creativity merits protection from unauthorised exploitation regardless of the medium in which the work happens to be embodied at any one moment. By contrast, signal copyrights protect investment in producing a signal. That investment merits protection from free-riding, but a more limited degree of protection than that required by authors' works. (Arnold, 2011, p. 277)

CBS Records Australia Ltd v Telmak Teleproducts (Australia) Pty Ltd [1987][iii] demonstrates how this has been applied: here, the judge agreed with the respondent 'that a mimicking, as distinct from reproducing the whole or a part of the sounds embodied in the sound recording constituted no breach of copyright' (at 41). 'Mimicking' is here understood as the copying of the content.[iv]

Barron (2006a) refers to the difference between content and signal in terms of 'depth' of protection of the copyright work: copyright is 'thin' where the protected object is co-extensive with its signal, and 'thick' when it assumes an object that transcends its signal to include the content (Barron, 2006a, p. 105). The protection of musical works therefore exceeds that of sound recordings and performances in depth, which (as discussed below) has also implications for the breadth of protection of both sound recordings and performances.

The performance

Performers in law have 'non-property rights' and property rights. The former requires permission by performers for their performance to be recorded or broadcast (s.182): if a producer releases a recording without the express, written consent of a performer, this will be held as an infringement of the performers' legal rights (*Jodie Henderson v All Around the World Recordings Inc* [2013]).

Once the performance is recorded with the performer's consent, the performer has property rights stemming from the sound recording's exploitation similar to the producer's: a reproduction right (s.182A), distribution right (s.182B), rental and lending rights (s.182C) and a making available right (s.182CA). Performers also have a right to equitable remuneration from public performances and communication to the public other than by making available (s.182D(1)).

Rights compared

A performer's property rights are not linked to a performance fixed on the sound recording, but to a contribution to the making of the sound recording. That is, a performer is not the owner of the performance: he does not own the timbre and elocution of the performance itself. Performers' property rights are dependent on protection accorded to sound recordings and therefore inherit their characteristics. This has practical consequences: if a composer chooses to sample the sound recording where this sound has been fixed, she needs to license the sample from both the performer and the record company. Alternatively, the composer may choose to imitate the sound: any other performer may reproduce the same sounds in studio without infringing performers' rights[v] (or the copyright in the sound recording).

It may be argued that this separation from the fixed performance gives performers a level of autonomy regarding the creation of sound that they would lack otherwise. In other words, copyrights limit other creators' creative options to the possibilities not in copyright. Therefore, if performances were constrained by copyrights, performers would be limited to the performances not already protected by copyright, which would inhibit performance unnecessarily.

There are also differences in breadth deriving from the differences in depth of protection between the musical work and both the sound recording and performance. Authors (including producers) and performers have reproduction (s.17 and s.182A) and distribution rights (s.18 and s.182B). These rights prevent, respectively, copying and distribution of the signal of the musical work or sound recording. Yet in the case of musical works, the concept of reproduction encompasses more than simply copying the signal. As outlined above, a reproduction of an object falling within the contents category

can consist of a performance or adaptation: authors' thus have performance rights (s.19; also known as performing rights) and adaptation rights (s.21). The performing right entitles authors to license their work's public performances in live situations or via sound recordings. Adaptation of a musical work is defined as 'an arrangement or transcription of the work' (s.21(3b)). Because these are content rights, producers and performers lack adaptation rights in their sound recordings and performances, respectively. Producers have performance rights when playing or showing the recording in public (s.19(3)), which does not differ in practice from their communication to the public rights (Bently and Sherman, 2014, pp. 154–8), held also by authors and performers.

Note here that, unlike performances, adaptations can be considered original and thus attract the same set of copyrights accorded to musical works. Although on a secondary level relative to the original musical works, original adaptations may become an important source of income for performers who create new versions of a work (see for example *Beckingham v Hodgens* [2002], discussed below)[vi].

In short, performers' property rights are signal rights with a focus on sound recordings as distinct from the performances contained in them. There are some other differences that I will not discuss here for brevity, that include differences in the interpretation of the communications to the public right, restrictions regarding performances' use in film, shorter term of protection and more limited moral rights. But this brief overview indicates that performers' rights lack the depth and breadth of the whole set of authors' copyrights.

Under certain circumstances, performers can claim joint authorship

Three conditions must be met when claiming joint authorship. According to Lionel Bently and Brad Sherman (2014), the conditions for joint authorship demand that

1. each author contributes to the making of the work a contribution that must be 'significant', 'original' and of the appropriate kind;

2. there be collaboration, according to a common design, cooperation or plan; and that

3. the contributions not be distinct (130-33, see also Firth (2015) and Bently and Biron (2014) for a comprehensive discussion of joint authorship).

Beckingham and *Fisher v Brooker* [2006] champion performers' eligibility for joint authorship in a musical work or in its arrangement. In *Beckingham*, violinist Robert James Beckingham, known by the stage name of Bobby Valentino, was hired as a session musician to perform in the 1984 recording of The Bluebells's version of the song 'Young at Heart'. This song had originally been composed by Robert Hodgens and Siobhan Fahey for the band Bananarama and so this case concerned the song's original adaptation. After discussing with the band members the style they had envisioned for this version, Beckingham contributed to the song the memorable opening violin part repeated twice more throughout the song. At the time, Beckingham was paid a flat £75 session fee. Floyd J considered Beckingham's contribution to the song significant and original enough to grant him joint authorship to this song's version in equal shares (following *Stuart v Barrett* [1994]). This success story was said at the time to be a game-changer for performers (e.g. Free 2002), provided, of course, they have the bargaining power to sign favourable contracts or take their opponents to court.

Fisher illustrates the administrative complexities inherent in defining a musician's contribution to a song. The case concerned the contested authorship of the famous 1960s song 'A whiter shade of pale' by the rock band Procul Harum. According to the band members, Gary Brooker had written, and subsequently recorded, an outline of a song in the form of a demo with lyrics by Keith Reid. On recording in the studio a more

substantial version, band member Matthew Fisher devised an introductory organ solo inspired by a Bach chorale prelude: the song's famous hook. Fisher also created the organ accompaniment to the vocal parts. For this, the band paid Fisher a one-off fee for his services as a performer. Four decades later, and in light of the success of the song, Fisher sued the band. The case went first to the High Court (*Fisher v Brooker* [2006]), then to the Court of Appeal (*Brooker v Fisher* [2008]) and finally to the House of Lords (*Fisher v Brooker* [2009]). In the High Court, Blackburne J held that Fisher was a joint author of the musical work. However, when the case reached the Court of Appeal, Mummery LJ held instead that Fisher was a joint author of the arrangement of the musical work. This decision, upheld at the House of Lords, assumed a distinction between an underlying compositional work (the demo) and a subsequent arrangement (the studio recording including the organist).

In writings spanning a decade, Arnold (1999, 2007, 2015) attends to the difficulty of distinguishing between a composition and an arrangement in an attempt to disentangle the issues involved in deciding a case of contested authorship. His efforts focus on demonstrating that the number of fixations of a musical work should not be confused with a musical work's versions. So, where the musician(s) in question identify successive versions of a work, the later version is an arrangement of the earlier: this is so regardless of the method of fixation in either case, that is, whether one version is in writing or recorded electronically. Indeed, according to Arnold, successive versions may coincide in one single fixation: 'in a case where what is recorded is an arrangement, the recording will simultaneously fix both the underlying musical work (if previously unfixed) and the arrangement, and copyright may subsist in both' (Arnold, 1999, p. 4). Following this reasoning, Mummery LJ's reading of *Fisher* would be correct, with Luke McDonagh (McDonagh, 2012) suggesting that Blackburne J's decision was influenced by the

complexity of licensing issues arising from Fisher's contribution to the arrangement of the work.

This discussion suggests that defining who might be eligible to claim joint authorship of the musical work or (joint) authorship of the arrangement is far from straightforward and contingent on a number of factors. Indeed, case law commends that the definition of joint authorship be independent from the 'quantity, quality or originality' of the musical elements (*Godfrey v Lees* [1995], 325) and that joint ownership can exist in unequal shares (*Bamgboye v Reed* [2002], [42]). Yet other factors seem to have influenced the judges' decisions: these may relate to the creative process, regarding the timing of the contribution or the position of the contribution within the work (Firth, 2015, pp. 153–162); they may be ideological, concerning the bearing of Romantic ideals on popular music (Arnold 2015, para.10.12; Barron 2006b, pp.28–30; Bently 2009, p.195); or they may depend on the quality of the evidence (Firth, 2015, pp. 148–50), the expert witnesses and technologies employed (Bellido, 2016) and the musical competence of the judge (Free, 2002, p. 97; Firth, 2015, p. 148).

In short, establishing authorship is a complex matter. Whilst performers' rights are less attractive, reliance upon them may be the simplest option for many musicians. As Arnold points out, 'classical musicians performing a conventional written score are unlikely to create an original work. Nor are pop musicians faithfully reproducing the recording of one of their songs' (2010, p.10). Such performers are protected by performers' rights.

What emerges, then, is that legal representations of authorship and performance depend on social discourse about music, that is, how musicians themselves conceive of their work and its exploitation. In what follows I explore these discourses about authorship and performance through three motifs.

Musical practices: three motifs

Methodology

My main dataset stems from 36 in-depth interviews lasting each around one hour, conducted between 2014 and 2016 mostly in London. 34 of the interviewees described themselves as performers. Two managers gave me insight into the practices of highly successful performers. The interviews are semi-structured: I used a structured interview schedule but also gave respondents flexibility to respond in their own time and lead me in unexpected directions. I have anonymised the interviews to allow respondents to talk freely without potentially harming their careers. I took notes during the interviews and prepared field notes describing my overall impression of the respondents and interview conditions.

Generating a consistent sample proved elusive: assumptions and clues given in related literature about the population's high heterogeneity were confirmed during the interview stage. For instance, professional categories and musical genres are navigated with ease, while age is independent from industry experience, with the latter linked to the individual's cultural and social capital, musical ambition and a high degree of luck. Accounting for the loosely connected population, characterised by musicians' portfolio careers, I used a snowball-sampling technique based on personal recommendation (Seale, 2012, p. 145). I sought multiple starting points to tap into several networks and generate a representative sample (Thomson and Cook, 2011; Arts Council England, 2015): 30 per cent of women, a wide range of ages (24-74 years, with a mean of 38 and a median of 34) and wherever possible, variety in educational background. All of the respondents had recording experience as either performers, composers, producers or a combination of the three.

Of the three interview areas, two are relevant here: Firstly, I asked about musical background, including (musical) education and genres of choice. Taken together, the dataset represents a wide spectrum of musical genres, ranging from indie rock and mainstream urban and dance musics to classical, baroque and contemporary art musics, with jazz, fusion and experimental genres in between. Secondly, I enquired about current projects and activities, including sources of income, networks, promotional activities and issues of ownership. The fact that ownership was so buried in the questions was deliberate: I wanted to understand the significance of copyright law within their overall professional strategies.

After transcription, I processed the interviews using the qualitative analysis software MaxQDA. This software allowed me to label relevant sections, name them and then collect all the sections with the same label to reflect on emerging themes that could be compiled into categories. This process has both been inductive and deductive. The inductive approach relied on the structured schedule, which created easily recognisable themes mostly in the order I envisaged them. The deductive approach arose when other, unforeseen themes emerged while I was labelling the interviews. These themes gained in significance when they repeated throughout the dataset to form a pattern (Rivas, 2011 and also Silbey, 2015, pp.287–97). Emerging themes were related to the specific activities of performers and the way they were conceptualised: for instance, despite the fact that most of the interviewees described themselves primarily as performers, there were many instances when they linked activities like writing and composing with expressions denoting ownership such as 'my music'. As will become clear, different degrees of ownership were also linked to producing, arranging, improvising and rehearsing.

I also draw on two interviews conducted in 2016 for a separate piece of research on copyright reform, involving twelve industry and government representatives

representing different stakeholder groups. Although interview areas varied significantly, interview length, related documentation, anonymisation and analysis were similar to that of performers. I reproduce some of their views on the contribution of performers to a musical work.

1. Composer-performer discourses and careers: origin stories

This represents perhaps the most pervasive motif and one which influences and, in turn, is influenced by the primacy of the author in current copyright law.

The composer-performer distinction is imparted through musical education from an early age. Western formal music tuition generally begins by learning an instrument. In countries where music tuition is highly formalised, such as in the UK, students advance through grades for which they are expected to learn some history and theory in addition to their instrumental skills. Composition comes at a later age and is often encouraged in the context of university-entry examinations. Of 34 musicians, 31 had university degrees, of which 15 had an undergraduate degree in music in the UK. A further five had music degrees elsewhere or at postgraduate level, whilst five more had relevant degrees including drama, sound engineering and media studies. This means that amongst the sample a total of 20 musicians had music or music-related degrees in the UK. The group with undergraduate music degrees in the UK was likely to have taken A levels in music or equivalent music entry exams, which distinguish between a test in performance, one in composition and another in history and theory. So, while the students may have become accomplished in these three areas, their disciplinary divisions encouraged them to think about them separately since school age.

On entering music school, these distinctions may either have blurred or become further entrenched depending on the course chosen. At the time of writing, institutions

with a focus on performance will offer either a course in performance (e.g. the Royal College of Music [RCM], which, like other music schools mentioned here, was part of the sample) or courses in performance or composition (e.g. the Royal Academy of Music [RAM]). Universities are more likely to offer a more open music course in which students can tailor their own 'pathways', which may include performance and composition, but also popular music, early music, musicology or music therapy (e.g. Goldsmiths, University of London and Guildhall School of Music and Drama). While pathways are flexible, most courses will offer only one course of one-to-one tuitions per year, meaning that a focus area is encouraged. At Masters level, the distinctions at bachelor level become further defined with courses focusing specifically on either of these areas. Five of the respondents followed a postgraduate course in performance. In short, while students may encounter many opportunities to both perform and compose (and most likely will have friends and colleagues on each of the two streams), subdivision is encouraged from an early age and sharpened in higher education. Consequently, musicians tend to affiliate themselves to either group, even if they engage in both activities.

This affiliation offered structure to my sample, as most of my respondents described themselves primarily as performers, even when they composed and/or produced. All of the respondents identified as performers (34), followed by composers or songwriters (19), teachers (17) and producers (15). Six respondents did all four and were among the most established musicians within my sample. This indicates high mobility between roles, due perhaps to the shared training.

Musicians also expressed great understanding of and generosity over their colleagues' contributions. Nevertheless, it was not uncommon that some became possessive about what they considered to be their contribution. I reproduce one of two

similar accounts: a bandleader was concerned about how to distribute proceeds in the fairest way [20-141125]. This involved establishing a contribution point system whereby performers increased their share in the band. The share included consideration of material belongings such as stage and sound equipment and the goodwill of the band. So, if at the end of the year the band made a profit, it would be shared according to the points system. In addition, if a band member were to leave the band, she would be entitled to a payment relative to the value of the share in the band at the time of leaving. This sophisticated system ensured that members, whether they performed, arranged or composed, collaborated on building the band's brand. Yet their contribution was ranked based on the traditional composer-arranger-performer hierarchy: whilst everyone earned a set amount of points per performance, composers earned additional points, followed by arrangers. Proceedings from PRS were again shared only amongst the two composers. These two respondents valued the initial structural outline of a song, disregarding the extent to which these outlines transformed over time with the sum of the other members' contributions. Origin stories appear to be the defining factor in these and other examples (see, for instance, *Stuart* and *Hadley v Kemp* [1999]).

Performers also draw a clear line between their contribution as interpreters of somebody else's work and a more creative contribution that stretches beyond their strict duties as performers. This lengthy, but eloquent, interview abstract illustrates this. On the question of how this performer felt about ownership of a gig for which he had received a one-off fee, he replied:

> [18-14112]: I always think about it like builders, I always come back to builders and if someone asked me to build them a wall, I'll build them a wall and I'll go away. So if they ask me once I've finished building it, 'I wanted it like this, can you re-do it like this'. I'm like, 'No, because there it is, that's what you asked for'.

Do you know what I mean? I like it very much to be my work and I care about it, obviously if they're saying this really is bad then I'm like, 'Oh no, is it, I'll fix it'. But like I'm not going to work more stuff than I've been asked to do, it's like if someone asked you to build a wall that's three foot high and when they finish they go, 'Actually I want it this high', it's like, 'Well that's going to cost more money because it's more bricks'.

But do you want to be credited for what you do?

[18-14112]: That depends, I think, it's nice. It's nice when you see your name on a CD, I think that's always nice, but it's not the first thing that comes into my head, particularly for anything commercial. Like I really don't care if it's commercial. If I worked with an artist on writing, you know working on a drum part for them or something like that, yes I do want that because I've written that for them, which is weird because that's the only thing that doesn't fit in with my brick wall thing, unless builders are writing their names on them now.

So it comes down to writing. Can I say that?

[18-14112]: I guess so, yes that's true.

'Writing' is key in conceptualising this performer's contributions to a musical work. Considering, as he said, that he 'always worked to fees', his contributions over a lifetime would arguably involve great variation in skill and creativity. Yet 'writing' suggests a contribution to the generation of points of departure, to a musical work's origins. To expand on the brick wall analogy, writing is associated with a building's foundations: the type of foundation sets limitations on the building, even though the building can take different shapes.

How 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 more deserving than articulating and fleshing it out for an audience. More practically, writing generates a sense of ownership worth to be credit for, where performance is seen as a service, 'work to fees'. Within these discourses, claiming rights in the musical work would be therefore beyond the performer's expectation, regardless of the quality and quantity of his contribution to the final musical product: here, performers' rights work best.

Musicians' descriptions of themselves are simultaneously determined by the careers available to them and by the professions they choose for themselves. Musical careers, a sub-category of the motif of composer-performer discourses, divide the music business into roles or positions filled by musicians according to their skill and expertise. Yet pervasive composer-performer discourses determine how musicians position themselves in relation to a musical work and thereby legitimise the filling of such roles and eventually the following of a specific career.

Classical musicians, for example, are taught about potential careers from an early age: composers write and own the score, whilst performers interpret and work in the service of the score. In the role of soloists or small ensembles, performers may find that their job involves a great deal of creativity, which may involve interpreting a score innovatively or working with a contemporary composer on shaping the final work. Nevertheless, in most cases and especially in the presence of a written score, the roles of composer and performer are not questioned. An arranger's work is also determined by the score: an arranger is the musician who adapts an existing set of instructions (the musical work fixed in the score) to a new set of limitations, which may be related to instrumentation, duration or level of difficulty. The law responds well to these clearly defined cases: a composer in this scenario would claim authorship in the musical work,

while a performer would be entitled to performers' rights. An arranger would have author's rights in the adaptation of the musical work.

Clearly defined musical professions have a similar role to that of a score. Consider, for instance, a session musician: an instrumental or vocal performer who is invited to work with others at recording sessions or live performances. Conveniently for their employers, session musicians operate as service providers: they are employed on a case-by-case basis to provide support to a soloist or band for live performances or recording sessions, be they for a record, advertising, film or TV. The term is used in all musical styles and genres; indeed, session musicians are expected to be literate in a number of them. Versatility is key, but also the ability to sight read, learn parts quickly, improvise chords or a bassline from a lead sheet, chord chart or a simple MIDI outline of the part to be performed. A good session musician may therefore be in high demand within the industry, but rarely achieve popular celebrity status.

Usually, session musicians are paid a flat fee for the session and are asked to sign standard contracts (drafted by the Musicians' Union [MU] or in-house by record companies) assigning all of their performers' rights to the producer of the sound recording. This may be seen as advantageous if compared with the alternative of participating in the commercial risk associated with recording a song: whether the song is successful or not, session musicians will take home their session fee (Author 2017). This set-up is also useful for up-and-coming musicians whose own brand is in the making but need a secure, yet flexible, income on the side. On the downside, when the work dries up, so will their income. This is even if the music to which they contributed still tops the charts. The view that this arrangement is fair and sufficient is widespread amongst record companies, whether major or independent. One industry representative naturalised this situation: 'The nature of the performance of session musicians is that it is a buy-out of

the exclusive rights. Obviously what they're paid allows for that, that's simply the nature of the work they do' [06MI-161005]. Another put this in terms of justice:

> Session musicians, and let's be clear, we have an agreement with session musicians [through the MU] that pays them for playing of tracks, and you know, we pay them for a job, in the same way you pay anyone else. [Laughter]. Now, on broadcast, they happen to get a repeat fee, but […] there's no kind of justice reason why someone who you pay to do something should then get paid again and again, and again and again. […] They're paid per session, that's how it works, in the same way that if you go to an orchestra and you play for an evening, you're paid. [07MI-161010]

This last statement ignores that a live event is transient whilst a recording can be listened to repeatedly. In this regard, both hint at the performers' unwaivable right to equitable remuneration for the communication to the public of the performance (s.182D(1)). Even if they have assigned all their rights, session musicians will continue receiving royalties for their fixed performances as long as the performances continue to be played in public. However, in order to receive these royalties, session musicians and, indeed, all performers, need to register with their collection society and regularly update the record of their performances—in the UK, this is PPL. Of the 33 performers I have relevant data, only eight were registered with PPL. Of the remaining 25 who were not registered with PPL, six were in the process of registering, five had heard about PPL but did not think it worthwhile or did not have time for it, and 14, nearly half of the respondents, had not heard about PPL. Note that those registered with PPL remarked how little royalties they received if compared with royalties received from PRS, the collection society for composers. Some of them perceive it as a bureaucratic hassle, as one observed: 'all I get from them is annoying emails' [30-150820].

This legal ignorance may be explained again through deeply entrenched composer-performer discourses imparted through musical education: performers' sense of ownership is not developed as part of their education and so legal issues become secondary. This may be changing, as younger respondents graduated from the BRIT School and Goldsmiths attested. A more senior professional performer had a different view:

> [27-150713]: Nobody told me at university, nobody told me at the colleges. And I actually put sessions in place, when I was [heading a programme at a highly prestigious music school], and told the students about all of this, and I was told to stop doing it by the management. I know, it's unbelievable, isn't it? I was really...
>
> [Over speaking] The management?
>
> [27-150713]:...yeah, got really seriously told off about it. It was, like, almost an official warning that, that's not what they're here for, that's not how the money should be spent. They're just here to play. And I said, well, 'They're gonna end up playing to a cul-de-sac, because if they don't know about the business...'
>
> [Over speaking] Unbelievable!
>
> [27-150713]:...and it's true across all the conservatoires, they don't get any instruction.

The tacit rules and practices implicit in professional structures fostered by composer-performer discourses break down from time to time. Bobby Valentino in *Beckingham* exemplifies this: having been hired as a session musician at a time when performers' rights were not in place, he later successfully claimed for joint authorship in the adaptation of the song. While agreements determining a session musician's traditional role may be explicit (through contract, as in *Beckingham*) or implied (through behaviour,

as in *Fisher*), the musician may be able to win a case for joint authorship if the three relevant conditions can be met.

2. Genre: the score versus the musical product

Genre is a second defining motif in how musicians characterise their contributions. To begin with, I wish to highlight the strong correlation of genre distinction and educational background. In my sample, I found that the musicians with the most formal training in traditional music schools were also those working in classical music. Of 34 musicians interviewed, seventeen had a bachelor's degree in music; of these, ten were in classical music. Amongst these ten, eight were the most highly educated within the traditional music conservatoires (RCM, RAM, Guildhall, Royal Northern College of Music and overseas), with some of them coming from music schools (Yehudi Menuhin School and Chetham's School of Music) and/or following postgraduate degrees. All of these eight described themselves as classical performers. This contrasted heavily with the group of twelve musicians who received formal or informal musical training and went on to do either degrees related to music or other, unrelated, degrees. Of these, only one considered herself a classical performer, although she was heavily invested in the jazz world. The remaining eleven described themselves as a combination of performer, composer or sound engineer, in a myriad of popular and experimental genres. In short, it is the more highly educated performers who are most likely to identify with the label of classical performer, which in turn may have consequences for how they view their contribution to a musical work.

As outlined above, in classical music the score determines a musician's role: whoever writes the score is therefore the composer. This is so even if the performer gives advice on the use of the instrument and/or makes corrections or suggestions that introduce

significant changes to the final musical work. A classical performer I interviewed described ownership as a spectrum. So, for example, in the case of a canonical work by a deceased composer she defined her role as one of 'interpreting material but not changing it necessarily' [24-150529]. Next to that is work with living composers that can benefit from adjustments specific to her instrument: she was happy to surrender ownership here too. Problems arose when suggestions moved into the territory of collaborations:

> [24-150529]: It's not co-authorship [meaning joint authorship] necessarily but if quite a lot of the ideas have come from the two of us talking or even if I've suggested ideas, then in an ideal world I would like some ownership.
>
> What prevents you from that?
>
> [24-150529]: I think there's the tradition of me being the performer and the composer being the composer, and the composer writing the notation and putting their name on the score. […] So, I guess how I see it, you've got the traditional composer-performer collaborations and then almost at the opposite end of the spectrum, you've got the co-authored works. I think both of those are quite obvious in terms of ownership. It's the things that are a mixture of the two that are more complicated. I think the issue of the score is quite a big one, and generally the person who's written the score takes ownership of the work.

While quality and quantity of contribution is crucial, this performer emphasises the score as marking the distinction between author and performer: the score generates a sense of ownership, whilst illustrations on the violin are seen as a service. This is unless joint authorship is decided from the outset: a pre-emptive agreement is key and can supersede the weight of the score and determine the contribution's quantity and quality, so as to conform with the relevant legal standards. The ability to negotiate any agreement

from the outset may, in turn, depend on the creators' bargaining power (on which more below).

Contribution may be assessed differently in other genres, as is evocatively explained by this manager, who started working in indie rock:

> In my past I've always worked with just, you know, very traditional setup of writer, writer and performers, and that's very simple because, you know, there's no complication there. Last year I've been working in pop music a lot more, where several people can be involved and these exact things come up. [It's] all very new to me. So I'm involved in all these negotiations for the first time over the last six months, and it's been a very, very educational process to see that you're literally carving songs up between several people, and some of them have contributed very little but because they're famous and they're successful they're able to ask for a much higher percentage than they deserve. [01M-150506]

Here he is talking about a process commonly referred to in the industry as 'Nashville style', by which ownership in the musical work is shared equally amongst everyone in the room when a song is written (Vigon, 2015). As pop and rock manager Tim Vigon commented in *The Guardian* in March 2015, 'this is great for a collaborative songwriting session where something starts from scratch, but a little tougher when someone brings in a mostly written song' (2). Vigon sympathises with this process when it is in the name of harmony:

> Look at bands and you'll see it tends to be the ones where songwriting credits are split equally from day one that tend to last the longest – U2 and REM are good examples. It might not be exact or necessarily fair to the 'main' songwriters but it certainly makes for more harmony than one person getting massively bigger cheques than the others. (2)

Or, as Jostein Gripsrud explains in relation to the Norwegian duo Kings of Convenience: 'They may maintain a special feeling in relation to some songs as being their offspring, so to speak, but handle the question of legal and economic rights in a pragmatic manner' (2014, p.230).

Yet, mostly, attributing ownership is a detailed negotiation process. A manager working in urban and dance genres, where Nashville-style production processes are the norm, explained to me that although everyone in the room may be assumed to be a potential contributor, sessions are invariably followed by detailed negotiation for royalty points in respect of the contributors' rights in the musical work. For example, he had sat at one of Kanye West's recording sessions, where the final negotiation involved 14 contributors. This can include literally anybody sitting in the room: from the main artist/s to session musicians, producers, engineers, or even managers and A&R personnel who represent artists and conduct negotiations—'seriously, even I've got royalty points on one song', he confided to me [02M-150528]. On listening to a session's short abstract he had recorded the night before, a true collaborative process emerged: lyrics materialised in tandem with the rhythm; when words failed, someone shouted the missing link across the room; this, in turn, triggered a defining riff by the guitarist. The managers' skill lies in unpacking the value of these contributions:

> You go into a collaboration session and then you get these very, very messy… afterwards where people phone up and say 'well I did this much', and then the other person says 'well, I did this much', and then the managers and the artists and everybody argues until you reach consensus. [01M-150506]

In these cases ownership is defined throughout 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 of the contribution to the final product is assessed (see also *Bamgboye*). The extent to which any single contributor's weight is believed to increase the chances of success, also influences the negotiations, as both managers quoted made clear. This leads me to the final motif: power relationships.

3. Power relationships

Elvis Presley offers a well-known example of a performer demanding half of the rights of authors in the musical works he performed (Vigon, 2015). Vigon explains this referring to the composer of the rock'n'roll hit 'Blue Suede Shoes': 'if you are a writer and not a performer, would you want 100% [of the rights in the musical work] of a song performed by Carl Perkins or 50% of a song performed by Elvis?' (Vigon, 2015, p. 2). This point weighs the contribution of a skilled and charismatic performer to a final musical product against the musical work's origins. Authors are familiar with this tension and are prepared to forgo royalty points for the potential impact of a contribution from a highly successful musician, be they a performer, a producer or engineer. In short, 'wrote a great song but want it recorded by a big producer? Be prepared to give up some of your song for the honour of working with them' (Vigon, 2015, p. 3).

On discussing Vigon's article with the manager above, he provided more detail on how Nashville-style writing sessions involving powerful contributors work in practice:

> So, sometimes somebody can get 25% for sitting there and not even adding a word. But, because they were part of the process and everybody's agreed before that everyone in the room is getting a split, then it's done. Sometimes, again, that split can be, if you're going in with a top songwriter, then the songwriter manager will inform you before that, for instance, 'if you want to work with this person who wrote this big song, just so you know, even though it's a collaboration, no

matter what you do, he has a flat fee of this, or he has a flat percentage of at least this'.

Then you get other situations where a song is recorded and it's done and everybody's like we're happy with it, but then for instance you might get a guest performer who adds an enormous amount of marketing value and they may insist that in order to be a guest performer, that they take a percentage of the sum. Then you also get the producer who may come in and change a beat, and say 'now I want a percentage of a song', and this is where things get really messy because you have so many different people. [01M-150506]

Note that in court, legal standards for joint authorship will in theory prevail over an agreement, whether this agreement is explicit or implied. As Alison Firth has put it, 'an agreement cannot as a matter of principle determine the issue of authorship. One can determine by agreement in advance to share the consequences and benefits of authorship—copyright and its rewards (s.91)—but this does not displace the objective legal, question of authorial contribution' (2015, p.164). In practice, however, any performer with enough bargaining power to negotiate a favourable agreement involving a share in the musical work, is at least as likely to be able to defend the value of his contribution in court as his counterpart.

The difficult negotiation processes to which this manager refers are not exclusive to Nashville-style writing sessions. Successful songwriters, in the sense of authors as conceived by copyright law, are in high demand by artists who may or may not write songs. Like any top star in the industry, the top songwriters have also managers and publishers who are well-connected and able to bring their songs to the attention of the managers and A&Rs (that is, artist and repertoire people in charge of finding and curating a label's roster) of top artists. Again, in the words of this manager:

> [01M-150506]: So say we're talking about Xenomania, which is one of the big song factories, if you want to call it that. […] They will be very careful to make sure they are going to the right artists because they want to maximise the income. So, then it becomes a negotiation between the record company, the publisher on both sides and the management on both sides, where everybody's discussing how much, say, Britney Spears should get for performing it. In those situations it's quite difficult because if it's a song that everyone's going 'well this is obviously a hit', what actually happens then, like any business deal, is you have several people vying to record the song. You might have Britney Spears, Christina Aguilera, Demi Lovato, you know, any number of pop stars and all of the record companies and all of the pop stars management saying 'I want that song'.
>
> So you can get the highest bidder.
>
> [01M-150506]: Absolutely. In that place you can push back and you can say 'well, if you want the song, you can only have a small percentage' or 'you can have no percentage', or 'you have to pay us for it'. However, in another position if you've got a really good song and you pitch it to everybody, and this is what publishers do, but you don't get any takers or you don't get many takers then you're kind of in trouble because the boot is then on the foot if you signed a big artist who wants to record it, and they say 'well, I'm going to do it if I get 75% of the song writing income'. You then have a decision to make. It's like 'well, I'm getting ripped off' but, like back to that thing: 25% of potentially a million radio plays, or 100% of a thousand radio plays if I give it to a smaller artist.

In the motif of power relations, the contributions to a song are measured in financial and social capital[vii], where the potential value of each contributor determines their share of royalty points. Yet, as mentioned above, performers rarely have Elvis

Presley's or Britney Spears's bargaining power. The cases of negotiated authorship described by this manager are those of a very lucky few, especially if contrasted with the large majority of performers struggling to make a living.

Legal framework meets musical practice

Far from distinct, the motifs of composer-performer discourses and careers, genre and power relationships overlap and flow into each other. Important factors traversing any motif are the score (especially in classical music, Arnold 2015, 10.17-9), discourses giving weight to either an original outline (as in *Hadley*) or a finalised musical product (as in *Beckingham* and *Bamgboye*) and agreements pre-empting a song's production (as suggested also by Mummery LJ in *Fisher* at [109]). These motifs and traversing factors, added to each legal case's specificities, form a complex network of possibilities difficult to map onto the legal framework. Nevertheless, I maintain 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 discourse, profession, genre or level of influence, a musician will be entitled to one right. This is even so when considering that the legal standards for joint authorship will always prevail over an agreement, whether this agreement is explicit or implied. I thus support Bently and Biron's (2014) view that the combination of statutory devices and contractual mechanisms provide a stable, yet flexible, system capable of coordinating and containing the complexities arising from different musical practices.

And yet…

For a musician this may not be the most satisfying statement. Copyright law has been openly criticised by many, leading to what Bently and Biron (2014) have identified as a loss of legitimacy by the public. I address two objections relating to the use musicians give to the legal framework.

1. What is the role of performers' rights considering that joint authorship can be agreed or established in so many cases?

It has become clear throughout the article that it is in the musician's interest to always seek authorship or joint authorship of a musical work first. A composer may claim authorship because her genre's discourse is in agreement with the relevant legal standards of authorship. A performer in that same genre may choose to work collaboratively with a composer because he values the composer's contributions and together they jointly decide from the outset to claim authorship in the musical work. Similarly, a guitarist may be vested with joint authorship every time he contributes to a musical work because his colleagues appreciate the commercial value of his performances. Why then distinguish between a composer and a performer in law, when given the right circumstances, both will claim joint authorship? I suggest, following Arnold (2010, p. 10), that performers' rights exist for all those situations in which performers are not entitled to authorship or joint authorship, be it because the musical discourse within which they operate does not entitle them to authorship or because they do not have the bargaining power to negotiate these rights.

2. Can the law's complexity highlighted by so many performers and managers be justified?

It may be argued that the complexity of the current copyright system is impenetrable for most musicians. The whole legal establishment, including judges, also struggles to make

sense of this complexity, if the large body of literature commenting on the few court cases disputing the degree of contribution of a performance to a musical work is anything to go by. I argue that this complexity arises from the copyright system's flexibility. As discussed, musical practices fluctuate between changing variables difficult to navigate even for the most seasoned musician. That the copyright system can accommodate this complexity is cause for celebration, though, even when admitting that it can be improved. Bently and Biron (2014, pp. 263–70) have shown that, while alternatives to the current copyright regime exist, neither is fully satisfying.

Young and inexperienced musicians are hit hardest by the system's complexity. In my interviews I found a pervading ignorance of copyright-related matters amongst musicians: while most were aware of authors' rights in musical works, performers' rights and PPL were not on their horizon. This ignorance translates into the signing of less than favourable contracts and a failure to register to their collection society to collect payments. Literature on authors' contracts confirm my observations: for instance, Dusollier et al argue that 'inattention, inexperience or simply pressure on young, and not so young, authors, make them sign transfers that go far beyond what is strictly necessary for the work's exploitation. Very often, authors give away all their rights' (2014, p.81; see also Guibault et al. 2015).

The dark side of power relationships is represented by the normalisation of the exploitation of musicians by publishers and record companies, an exploitation facilitated by the copyright system's sheer complexity. Bently and Biron object to this, arguing that, whilst attributions of ownership often reflect power relations, such attributions would be irrelevant for copyright law's assessment of ownership: '[law's autonomy] creates spaces that are free from prior social relations of power, especially economic power' (2014, p. 262). This may be true in theory, but ignores that musicians with low bargaining power

are unlikely to have the means, whether economic or otherwise, to access the law's institutions and seek a fair assessment of their contractual arrangements. The good news is that musicians' increased power and traction in the industry bring a greater awareness of copyrights and associated contracts and/or the capital to employ a good lawyer (Phillips and Street, 2015, pp. 254–55).

It is understandable that young and inexperienced musicians struggle to penetrate copyright law's complexities; it is less so when it comes to judges. Cases like *Hadley* and *Beckingham*, which had different outcomes, despite similar facts (based on the evidence), send conflicting signals that are hard to disentangle. They demonstrate that, rather than autonomous, the legal system is inextricably implicated in a variety of musical discourses. Regarding *Hadley*, Barron finds that Park J 'evokes one of the key elements of the Romantic aesthetic in the process of assessing the legal status of the claimants' efforts' (2006b, p.29). Similarly, when judges have been sympathetic towards performers, their musical expertise has been worth highlighting (see for instance Free 2002, p.97, on Floyd QC in *Beckingham*, and Firth 2015, p.148, on Blackburne J in *Fisher*). *Fisher*, exemplifies the law's complexity on an administrative level: as McDonagh has pointed out, Blackburne J appears to have 'sought to avoid dealing with the licensing complexities' (2012, p.6) when he granted Fisher authorship in the original work instead of in its arrangement, as was later ruled by Mummery LJ in the Court of Appeal and upheld in the House of Lords.

However, this is not to say that the copyright system's complexity is excessive: I propose instead that a system flexible enough to accommodate the intricacies of musical practices (and other artistic practices) is likely to have inherent complexities.

Conclusion

I conclude this article with an overview of the main points leading to my introductory question: does it make sense to distinguish between composition and performance in law?

I built on the distinction between content and signal to show that there are structural and substantive differences in the legal protection of authors and performers, where authors are privileged at the expense of performers. Yet, I demonstrated through case law that in cases where the three relevant conditions for joint authorship are met, performers can claim authorship of a musical work or of its adaptation. While these two points are well understood by relevant literature, the mechanisms by which performers position themselves in relation to the law to exploit their work are less so. Three motifs emerged from my interviews on these mechanisms. Firstly, the motif of composer-performer discourses and careers divides the roles of composer and performer in such as way that the composer is the creator or originator of a musical work, whilst the performer is its executor. In this motif, composers link their work to a strong sense of ownership, whilst performers conceive of theirs as a service external to it. This service, in turn, is exploited through established professional and contractual practices that buy performers out of their rights; the only remaining rights of long-term financial value are collectively managed unwaivable equitable remuneration rights for performers. Secondly, these conceptualisations vary between genres, where classical musicians are more inclined to follow the above discourse. Musicians in other genres, such as urban and dance, may understand their contributions to a musical work to be of equal value. Internal practices amongst genres may also translate into musicians glossing over such differences to preserve their working relationships. In these two cases, conceptualisations of their contributions may translate into the sharing of joint authorship in equal measure. Thirdly, where large financial gain is made from a particular musician's contribution, relationships of power determine the musicians' positioning in relation to a specific

work. Divisions of ownership in a musical work (through the category of joint authorship) thus reflect the value of the contribution in terms of potential economic gain.

Drawing on these conceptualisations of musicians' contributions to a musical work, I demonstrated that while the protection of performers' rights is low when compared to the rights of authors, they play a legitimate social role: to protect performers who conceive of their work as a service. Joint authorship of the musical work remains the preferred option and a viable one for performers who conceive of performance of equal value to composition and have the bargaining power to reach favourable agreements and/or for passing the relevant legal standards for joint authorship in the event of a legal dispute. I thus argued that the complexity arising from this diversity of rights was justified.

Most notably, the interviews suggest that the inequalities between composers and performers are not exclusive to the copyright system. As outlined above, literature on copyright has been critical of the British legal system because it bears some of the prejudices inherent in Romantic ideals that celebrate the autonomy of the musical work and the originality of its author at the expense of the performer. I argue that the composer-performer discourses inherent in Romantic ideals permeate not only the copyright system but also musical practices. These discourses are carried through from educational establishments to professional frameworks, becoming further entrenched in genre formations. As my data has suggested, composer-performer discourses are introduced to musical practices via formal music tuition from early home schooling through to postgraduate degrees. The genre of classical music, which draws its value precisely from Romantic ideals, appears to be most heavily invested in these discourses.

Yet where these discourses support existing capital structures, they can also be found in other mainstream, industrialised, genres, like pop, rock and urban.

Finally, to answer the introductory question, I would say that, if it is one about the legitimacy of the legal system, it does make sense to distinguish between composition and performance in law. As Bently and Biron explain, 'it is important that different social operators feel a reasonable correspondence between the social norms that underpin their practices and legal norms embodied in copyright law' (2014, p.263), and I demonstrate this to be the case. The legal system mirrors prevailing composer-performer discourses, *even if these discourses act against performers' interests*. However, if the question is a normative one, I would suggest, drawing on a large body of literature justifying creativity and ownership in performance (which is not the remit of this paper), that a simplified recasting of the copyright system could shift social understandings of the creative process in music and address the current inequalities between different contributors to a musical work. This can only be achieved with the participation of performers and the mobilisation of their educational structures.

Notes

[i] This overview forms the basis for discussion of the interviews and has been written bearing in mind readers unfamiliar with the legal structure of the music copyright system, such as music scholars. Readers familiar with copyright law may choose to go directly to the second part.

[ii] Anne Barron (2004a, 2004b, 2006b) has previously discussed this distinction as one between a 'formalist' and a 'physicalist' understanding of intellectual property and usefully employs these concepts to describe the historical developments that led in *Bach v Longman* [1777] from the protection of books to that of musical works (2006b). I use Arnold's more intuitive terminology for simplicity.

[iii] The UK 1911 Act formed the basis for copyright law throughout the then British Empire. While Commonwealth countries have introduced local specificities since then, many similarities remain. Case law from these countries may thus assist in the interpretation of UK law (and vice-versa), especially when precedents are rare or inexistent in the home jurisdiction (Firth, 2015, p. 144).

[iv] Section 114(b) of the US Copyright Act 1976 is explicit on this: 'The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 [specifying rights in reproduction and derivative works respectively] do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.'

[v] For a performer to dispute this in court, he would have to demonstrate that the sound in question was original (and therefore protected as a musical work) and, if original, that it is sufficiently long for it not to be regarded as *de minimis* (or trivial; see *Newton v Diamond* [2003]).

[vi] The mechanism for performers' claim of authorship or joint authorship is discussed in detail by Arnold (2015, para.10.01-33). The multiple licensing layers originating from different levels of rights are debated below regarding *Fisher and Brooker* [2006, 2008, 2009].

[vii] Social capital is a part of a taxonomy of social mobility devised by sociologist Pierre Bourdieu (1979). Social capital refers to an individual's network of contacts and their ability to draw on it.

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