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Music and Law: Copyrighting a Musical Idea

Irving B. Marks

Robert M. Phillips

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WHEN COMPARED TO OTHER ASPECTS of jurisprudence, the laws of copyright in general, and of musical copyright in particular, are relatively new and still floundering in the quagmire of evolution. As early as 550 B.C., poets and musicians (the terms were for all practical purposes synonymous in those days[1]) recognized some gain for their labors in composing, writing, and performing.[2] In fact, one of the first of this breed was Simonides of Ceos (556-448 B.C.), the poet laureate of his day, who frankly avowed that his purpose in writing was to be recompensed in gold.[3] However, it was not until much later that any thought was given as to whether the songs or poems were the performer's own, or whether he had simply gathered up bits and pieces from other tunes and odes, put them together, and passed them off in performance as his original work.

Probably the first such distinction as to originality in this area came about when Ptolemy Evergetes, who ruled Egypt around 195 B.C., held competitions for original works and songs, and awarded prizes to those whose pieces were considered the best.[4] During the course of one of such competitions, Aristophanes, one of seven judges, selected an unpopular winner because he was the only one with an original composition. All the others had borrowed, at least in part, some of their compositions from other writers, and they were condemned as plagiarists by him.[5] But as to our present day concept of copyright, many consider the direct ancestor to be the Roman Law, and in particular the law of the period of Gaius (110-180 A.D.).[6]

At that time they wrestled with the problem of who owned a particular manuscript; the writer who had affixed his initials thereto, or the owner of the manuscript? They concluded that the owner was the one who was the lawful *possessor*, but the writer was to be compensated for his work.[7]

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* B.S., Ohio State Univ.; Third-year student at Cleveland-Marshall College of Law, Cleveland State Univ.; law clerk for the Legal Aid Society.

** B.S. in Music, Indiana State Univ. (Penna.); Third-year student at Cleveland-Marshall College of Law, Cleveland State Univ.

1 Shafter, Musical Copyright 3 (1939).

2 *Ibid.* at 4.

3 *Id.* at 7. For an interesting modern analogy, urging scholars to write *for money*, and showing them how to do so, see, Oleck, Research and Writing for the Professional Market: The Financial Aspects, 19 J. Legal Educ. (3) 325 (1967).

4 *Id.* at 10.

5 *Id.*

6 Lolinger, Evolution of the Roman Law 17 (1923).

7 *Ibid.*

From this point, the evolutionary process of copyright moved sporadically through the years until the advent of the Gutenberg printing press in 1440.[8] This invention, of course, revolutionized the recording of all writings, and by 1491, the Republic of Venice had issued the first copyright protection ever granted by law.[9] It is interesting to note, however, that this protection was extended to the *printers* and not to the *authors*.[10] The temptation to comment bitterly about the continuing tendencies to protect the businessman rather than the artist must be repressed.

The normal processes then carried the copyright law through Europe, England, and finally America.[11] However, it was not until the Copyright Act of 1831 that music was mentioned as a subject for copyright.[12]

Why was there this initial gap in distinguishing poems, plays, and art work as subjects of copyright, and musical compositions as *not*? The answer is simple. To be properly capable of legislating policies in order to govern, and for tribunals to adjudicate musical controversies, those persons doing the enacting and adjudicating must be well grounded in the rudiments of music.

Music always has been a highly technical profession, and as such, has been relegated to a back seat when it confronted the legislatures and jurists who had little or no formal background in the subject. This is not to advocate formal training in order to make an individual able to enjoy a Beethoven Sonata, or a waltz by Strauss. However, this *is* to advocate that some formalized schooling is required in order to determine when, in an infringement suit, a defendant performer actually has developed a melody line through improvisation that in no way resembles plaintiff composer's melody line, but which in fact is based on plaintiff composer's own chordal structure. In other words, some understanding of chord inversions, use of chromatics, and of tonic, dominant and subdominant chords, resolutions, *et al.* is necessary.

Earlier, above, we mentioned a "gap" between the development of the copyright law dealing with music and the copyright law dealing with other subjects of copyright; *i.e.*, with books, graphic art, and plays. To date, the only means available to copyright a piece of music is by submitting a notated manuscript.[13] The court invariably hangs its hat on the words "visible notation."[14] This particular thinking is derived from

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[8] *Supra* note 1, at 16.

[9] *Ibid.*

[10] *Id.*

[11] *Id.* at 26.

[12] *Id.*

[13] *Id.* at 84.

[14] 37 Code of Federal Regulations (Patents, Trademarks, and Copyrights) Sec. 202.8 (a) (1959).

the earlier strict interpretations of the Federal Constitution, which required that, in order to protect the rights of authors, their works must be in "writing." [15] However, does not the mechanical recording of an expressed musical idea possess all of the fundamental requisites of Copyright?

There is no question that a musical idea *per se* is not copyrightable.[16] This is so because the rights which arise upon the formation of an idea cannot, in fact, be protected until they take some tangible, physical form.[17] Therefore, a need exists for the musical idea to be expressed before it becomes the tangible which can be protected under the copyright law.[18] The heretofore accepted means of such expression has been written form;[19] but again the strict construction of the Constitution is emphasized. Therefore, why not a dual construction approach?

No doubt the framers of Act I had in mind the permanence attached to a written manuscript, as well as the ease of filing. But with today's modern innovations in the field of electronics, just as much permanence and ease of filing are capable with a mechanical recording as has been true of *writings* in the past.

Such a recording now could take several forms. One of the most accessible types is the magnetic tape recordings. Such a tape could have the magnetized particles that hold the sound permanently frozen in place by electronics, in order to insure the necessary longevity of the recording. A second form, and perhaps a more practical approach, would be to use either musically coded spools (similar to the metal rolls used on certain types of player pianos) or records imprinted on non-destructible discs.[20]

A further impetus for instituting the use of mechanical recordings would be its help in judging the primary criteria of whether or not an alleged author is the creator of a certain musical composition, and that those criteria show originality.[21] These factors can be found in any one of three major elements which go together to comprise a musical composition: rhythm, harmony, and melody.[22] Would not, the recording in a blatant infringement of another's musical work, provide almost *prima facie* evidence of the alleged infringement?

Probably one of the most critical needs in the area of musical copyright, to date, is a Music-Legal Board of Experts. Such a Board would

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15 U.S. Const., art. I, sec. 8.

16 *Supra* note 1, at 84.

17 *Ibid.* at 92.

18 *Id.* at 34.

19 White-Smith Publishing Co. v. Apollo Co., 209 U.S. 17 (1907).

20 *Supra* note 1, at 36.

21 Northern Music Corp. v. King Record Dist. Co., 105 F. Supp. 393 (S.D. N.Y., 1952).

22 *Ibid.*

be comprised of men with solid backgrounds of knowledge in both the law and in music. It would be the most effective and all-inclusive approach to devising the proper legislation needed, for reviewing the present law, and for arbitrating music-legal controversies as they arise.

Though, at first blush, this proposal seems a very ambitious one, it nevertheless is simply a matter of following the current trend of the law towards specialization. Just as we today have special tax courts and labor arbitration boards, so too should the arts in general, and music in particular, have available a skilled board of arbitrators.

No doubt, there would be many problems which would accompany the establishment of the proposed Music-Legal Board. Although this article will not attempt to resolve them, the problems should be brought into the light, for all to see and ponder. What qualifications or criteria should be used for selecting the board's members?: Should they be men primarily with experience that is academic or professional in nature, or a combination of the two? What rules of procedure should be used in order to effect due process? Should the board have the power of service by summons in order to subpoena witnesses? Should the board be given the power to adjudicate, and if so, how should it enforce its decrees? Finally, to what extent should appeals be allowed, and to what higher authority would the board be subservient?[23]

The law of music copyright, although now quite old, is still relatively young in its development and refinement when compared to other segments of the copyright law. The impediment in its progress is partially due to the technicalities inherent in the discipline itself, and also to the lack of musical sophistication on the part of most law making bodies. Modern day electronic developments in recording and storing sound will do much to facilitate and broaden the scope of the law. Its implementation through a Music-Legal Board of Experts could be the effective step needed in order to overcome the present shortcomings of music copyright law.

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[23] Interview with Mr. Gary Kazdin, practicing Cleveland attorney, in Cleveland, Ohio, May 28, 1969.