## From the Instructor

Jung Hyun (Claire) Park wrote "Questioning the Copyright Act: Is Copyright Doing It Right?" for her second major essay in the WR 100 seminar "Boston Jazz Now!" The assignment for Paper 2 was to examine a particular instance of triumph or tribulation in jazz history. In her essay, Park addresses current copyright law as an existential challenge to jazz. She acknowledges that copyright law is designed with the laudable intention of protecting the intellectual property of composers, among others. However, she points out, the law deems improvisation (no matter how creative it is and no matter how much or little it depends on a previous work) to be derivative rather than original. This understanding, she argues, can have the horrible consequence of stifling the spirit of innovation without which jazz will cease to exist. In this thought-provoking essay, Park traces the background of the current law; exposes its flaws; and proposes strategies for ameliorating the problem.

— Thomas Oller

WR 100 ESL: Boston Jazz Now

## From the Writer

One thing that drew me to the course "Boston Jazz Now" was jazz's spontaneity. I was impressed by the performers' knack for taking an original piece as an inspiration and improvising to create a whole different sound. Upon listening to jazz performances in various concerts, I wondered: if jazz is an improvisatory art, how are both the composers' original pieces and the performers' original improvisations protected? Hence, my paper "Questioning the Copyright Act: Is Copyright Doing It Right?" challenges the efficacy of the current copyright law and its application to jazz. It seeks to assess whether the law keeps the fine balance between guaranteeing rights of composers' intellectual properties and preventing any exploitation of performers' creative improvisation.

— Jung Hyun Park

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# Questioning the Copyright Act: Is Copyright Doing It Right?

Jazz music, at its best and most progressive, can be a very abstract art. Individual musicians have free rein to improvise on a melody, or even dispense with the melody altogether and improvise on chords. An audience member might listen with pleasure as an elaborate but mysterious improvisation unfolds, suddenly realizing only in the last ten seconds of the piece: "Ah, so *that* was the song they were playing!" In fact, jazz per se heavily depends on improvisation of an existing music to ultimately showcase the ingenuity and talent of the artist. It extracts the core idea from the piece and draws a mind map that expands so far, letting the artist wander but not be lost. Because of this unique quality, jazz is often caught in controversy in terms of copyright issues. The Copyright Act of 1976 dictates that the owner of a tune recorded in a tangible form must be compensated when an artist performs it or its derivative—a work based on one or more pre-existing works—publicly (Copyright Act of 1976). The copyright law seeks to ensure the musicians' rights to their compositions and it is certainly a necessary measure to protect intellectual property. However, the act has a plethora of loopholes and limitations so that it ultimately does not protect musicians as a whole. It fails to keep the balance between guaranteeing rights to composers and allowing free expression of jazz performers. As an unfortunate corollary, the current copyright law does not protect, but rather threatens, jazz performers and the genre as a whole.

To begin with, the Copyright Act's identification of jazz improvisation as derivative is inappropriate, and this erroneous categorization negatively impacts the musicians in many ways. Firstly, adaptation of and improvisation from pre-existing works are the sine qua non of jazz; however, it is essential to note that jazz musicians borrow the idea and

not the expression (Kim). They use other pieces as an inspiration, a spark that marks the beginning of a spontaneous creative process. With much expertise, they chisel and add to the original work to an extent that it fades into subtlety. This explains the phenomenon discussed in the introduction, where listeners do not know the song being played until the very end of the performance or even until they hear the title after the performance. Even though the current copyright law and its subsequent case law contend otherwise, jazz improvisation therefore can qualify under Section 107 of the Fair Use Doctrine. Clause three of Section 107 states that if "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" (17 USCA. Sec. 107. 1976) are minimal, the reproduction is not an infringement and can stand as an independent creation. Given the doctrine, jazz improvisation is not derivative and must be prized as an original work of its musician. Unfortunately though, the Copyright Act of 1976 does not recognize jazz improvisation's originality, by dismissing it as derivative rather than fair use of the copyrighted work.

Because the current Copyright Act considers jazz improvisation as derivative, artists have trouble financing their performance. One of the major components of a jazz performance is changing a famous and familiar song completely to incorporate an element of surprise and to maximize the audience's appreciation of the musician's talents. In order to do so, however, the musician has to pay royalties to the owner of the copyright. This signifies that if the concert is mainly comprised of improvisatory performance of pre-existing works, the musician has to spend a considerable sum of money. Furthermore, unintended breach of copyright becomes a tremendous financial liability to the performer. The cases of Irving Berlin, Inc. v. Daigle and Same v. Russo et al. clearly demonstrate the financial struggle of jazz musicians. In 1926, the plaintiff alleged that the defendants had infringed the copyright of his three songs by performing them at a dance pavilion in Plaquemine, Louisiana. Berlin demanded minimum statutory damages of $250 per infringement—an absurdly enormous amount of money, especially in 1929, the advent of the Great Depression, when the court decision was made. However, the court ruled in favor of the plaintiff, despite the desperate appeal of the defendants (Berlin, Inc. v. Daigle and Same v. Russo et al.). This case was one of the first cases that exemplified how the copyright law brutally ignores the originality of jazz improvisation

by labeling it derivative—leaving a huge financial burden that is difficult for artists to carry. However, the painful truth is that the Copyright Act of 1976 is built on such cases rather than improving on them. It continues to categorize jazz improvisation as derivative and subjects artists to heavy accountability upon alleged breach of copyright. These incessant risks of infringement and resultant liability instill fear into current and aspiring jazz musicians and thereby hinder the growth of jazz in contemporary society.

Another major limitation of the Copyright Act of 1976 is that it awards compulsory license—the right to record and distribute an existing musical composition—only to the underlying work of the copyright owner and not to the contributions made by the artist. In other words, the improvisatory additions of the musician are not protected and are "vulnerable to unauthorized transcriptions and use" ("Jazz Has Got Copyright Law and That Ain't Good"). This means that the exact cover of a song done by a college student has more rights than the artistic improvisation of an expert jazz musician. For instance, a jazz musician does not receive statutory protection from bootleg recordings of his or her performance. It is the copyright holder who can sue the bootleggers and receive statutory compensations. This is because Section 106 of the Copyright Act grants the copyright holder an exclusive right to prepare derivative works and to collect revenues from performance or distribution of the copyrighted work. The application of this section is evident in the case of Miles Davis and Cole Porter. In 1958, Miles Davis recorded a different version of Cole Porter's song: "Love for Sale." Davis completely altered the expression of the song; in fact, 75% of the recording was improvisatory, while only 25% alluded to the original music. Nevertheless, organizations like American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) represented the copyright owner, Porter, and collected fees from radio stations and nightclubs for only the 25% of the song. As a result, Davis did not enjoy much commercial benefit and his 75% was left unprotected from exploitation (Wilson). In the end, this is genuine hypocrisy. Why does the copyright law place musicians' intellectual property at risk when its supposed objective is to protect it?

Skeptics may note that most jazz performers are composers as well and argue that copyright can serve as a financial incentive for artists

to compose more tunes. They may also assert that the overdependence on existing tunes and the subsequent lack of new ones are the causes of jazz's decline in the modern era. However, Maslow's hierarchy of needs counters such skepticism. In 1943, Abraham Maslow proposed his motivational theory, which explains the levels of needs that motivate certain behavior. He asserted that both internal and external needs play a role in motivation. His hierarchy is composed of, in ascending level of impact, physiological needs (food, shelter, water, etc.), safety (security, law, order, etc.), social needs (friendship, intimacy, etc.), esteem (achievement, mastery, independence, etc.), and self-actualization (self-fulfillment, personal growth, etc.) (Maslow). Even though the hierarchy suggests that lower level needs—physiological needs and security—are fundamental, it seems otherwise in the jazz realm. Several distinguished jazz artists, such as Hank Mobley, continued their creative pursuits despite their humble beginning and end. Here, it becomes apparent that creativity requires motivation that is beyond mere physical needs. Creativity, then, is driven by Maslow's higher needs—esteem and self-actualization. Nevertheless, financial incentives provided by the copyright law only address physiological and safety needs. In reality, the copyright law's labeling of jazz improvisation as derivative rather disturbs the esteem and self-actualization of the artists. By only meeting lower needs while discarding, if not usurping, the higher needs, copyright law is futile in motivating creation. Furthermore, the law's bias towards composers thwarts the genre as a whole. The constant decline in consumption of jazz recording manifests its detrimental effect (The Recording Industry Association of America); the law is diminishing the stage of the performers, who feel vulnerable and discriminated against. However, it should be remembered that jazz is largely a performing art. To resuscitate jazz's prominence, it is imperative to revise the law to protect the performers as much as the composers.

The current Copyright Act of 1976 is ineffective in serving its purpose but rather impedes the growth of jazz in the contemporary society. The major concern arises from its categorization of jazz improvisation as derivative, despite its originality. This flawed classification works against many jazz performers, by financially burdening them and denying them exclusive license to their improvisation. Even though these limitations are apparent, they do not mean that the copyright law must not exist as

a whole. The copyright law is, by its nature, a protective measure, but it must be amended and enhanced to fulfill its purpose. One possible solution could be discussing the originality of the improvisation and the extent of the underlying music's prominence after the performance. Then, the performance could either be determined as either not derivative, or, if it is derivative, the payment could be negotiated depending on the use of the copyrighted music in the performance. Furthermore, the amount of royalties paid to the copyright owner could also reflect the financial benefits gained by the performer by adopting the copyrighted piece. This amendment may allow thorough consideration of several factors that constitute the complex nature of jazz improvisation. It is true that such consideration is done by the judge's discretion, once the dispute reaches the court. Just like other laws, the copyright act has a degree of flexibility in various cases. However, the judge is a human being, prone to errors in judgment. Moreover, the higher aim of law is to prevent conflicts rather than to simply resolve them. Hence, the Copyright Act of 1976 calls for lucid and unambiguous revisions that protect both the composers and performers to help jazz reach its renaissance as the world's popular music.

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