Copyright in Jazz and Bebop

Bebop, or 'bop', is a broadly referring term in the jazz lexicon which delineates a style of jazz which many would recognize as the defining sound of the modern American jazz tradition. The style was developed starting in the mid-to-late 1950s and throughout the 1960s primarily by the artists John Coltrane, Art Tatum, Miles Davis, Charlie Parker, and Dizzy Gillespie, alongside many others, who adopted and repurposed the popular songs of their day by substituting new melodies over the compositions,[1] creating a new type of song known as a 'contrafact'.[2]

The bop sound is inexorably linked to other jazz styles and admits a diversity of approaches, but the traditional structure of the music remains well-respected to the modern day and presents a difficult question in the context of copyright analysis. The bop style can be thought of as having an A-B-A form: first, a melody is played over a chord progression, then, while the supporting members of the band continue to repeat the song's form, or harmonic and rhythmic underpinnings, a soloist improvises. Finally, the improvisation ends, and the band repeats the primary chorus together.[3] Therefore, a bop song contains precisely structured elements as well as an improvised element. While the melody may be the most easily recognizable element to an average listener, it is the improvised solo which most attracts fans of this musical style. The arranged melody in the primary chorus and the underlying harmonic and rhythmic structure can be thought of as a scaffold to support and inform the creative work of the soloist, whose role can be filled by any member of the group. There are obvious tensions from a copyright perspective between the rights of the author of the original song and the soloists, whose contribution is not only collaborative but also the primary defining feature of the genre. This art form therefore is a genesis of written and improvised performance.

Copyright in jazz solos

In her paper, "The Invisible Artists of Copyright Jurisprudence: Joint Authorship in Jazz Improvisation under Canadian Law",[4] Rebecca Noble presents two possible conceptions of the copyright accruing to the improvised contributions. First, as a derivative work: the scope of derivative rights of the author is essentially set out by section 3(1) of the *Copyright Act*[5] with regard to the substantiality of the appropriation of original work, in tandem with the *de minimis* requirement of originality of the secondary work, insofar as it is an exercise of skill and judgment as developed in *CCH Canadian Ltd v Law Society of Upper Canada*.[6] Noble notes that in the United States, derivative works are positively statutorily defined and have therefore provided a more clear avenue to assessing copyright in jazz solos, while in Canada, the classification is less rigid.[7] Differing conceptions of originality also play a role here – while

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[1] See Harvard Law Review Association, "Jazz Has Got Copyright Law and That Ain't Good" (2005) 118:6 Harvard Law Review 1940 at 3.
[2] See Rebecca Noble, "The Invisible Artists of Copyright Jurisprudence: Joint Authorship in Jazz Improvisation under Canadian Law" (2021) The Canadian Bar Association, at 3.
[3] See Harvard Law Review Association, *supra* note 1 at 1942.
[4] Noble, *supra* note 2.
[5] Copyright Act, RSC 1985, c. C-42, s 3(1).
[6] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 339.
[7] See Noble, *supra* note 2, at 4.

some commentators have construed music as rife with opportunity for originality,[8] others have pointed to the fixed possible combinations of notes as a limitation.[9]

Alternatively, the tension between copyright in the author and the soloist's contributions can be conceived of as a moral rights issue:[10] the integrity of both the original work and the new work are both protected under this formulation. In the bebop context, where improvisation is not only encouraged but essential to the art form, it would seem that the scope of the author's rights may be limited by their presumed expectation that other artists would adopt it as a vehicle to produce their own interpretations and solos, since the improvised contribution is so integral to the genre.

Noble highlights the possibility of joint authorship as a mode of copyright protection which risks deficiency when applied to jazz recordings. When a bop recording is fixed in a sound recording, the existing Canadian caselaw falls short of providing certainty in the protection of the contributing artists' copyright. While the denial of joint authorship rights to Sarah McLachlan's studio drummer in *Neudorf v Nettwerk Productions Ltd*[11] may seem intuitively correct due to the lack of intended collaboration, in a bop context there is a strong implicit intent to collaborate, particularly with respect to the soloists' contributions. This is inherent to the notion of contrafact. *Neudorf* was followed by *Neugebauer v Labieniec*[12] and *Seggie c Rooftop Games Inc*,[13] which have inconsistently applied the test for joint authorship[14] – the controlling principle however is that intent to collaborate must be present. This intent should be presumed to exist when considering copyright issues in jazz improvisation due to the nature of the art form, particularly with respect to the role of the improvised solo in the bop form.

Issues for further consideration

Other copyright issues in the jazz tradition present difficulty as well – there is a commonly accepted practice of 'quoting' famous parts of solos within the context of a performer's original improvised work. This occurs when a performer plays a melody that was previously improvised by another performer – whether the use of a 'quote' will be well received depends on whether it is directly reproduced and passed off as original, as Pat Metheny famously accused Kenny G of doing,[15] or whether it is altered sufficiently to become an original contribution, or whether it is played as an *homage* or 'tip of the hat' to the originating artist. Where this falls in the context of originality and derivative rights is unclear and difficult to assess under the current copyright paradigm. Transcriptions of solos also present a problem – transcribing the improvised works of jazz performers is a long-established tradition in jazz study,[16] and the common practice of making the written transcriptions available to others engages the reproduction right. Fair dealing likely provides a good defence here, but if the authorship in the original solo is unprotected it

[8] See Noble, *supra* note 2 at 2.
[9] See Harvard Law Review Association, *supra* note 1 at 1943.
[10] See Noble, *supra* note 2 at 2.
[11] *Neudorf v Nettwerk Productions Ltd*, [1999] BCJ No 2831, 3 CPR (4th).
[12] *Neugebauer v Labieniec*, 2009 FC 666.
[13] *Seggie c Rooftop Games Inc*, 2015 QCCS 6462.
[14] See Noble, *supra* note 2 at 12.
[15] See Noble, *supra* note 2 at 6.
[16] See Harvard Law Review Association, *supra* note 1 at 1945.

could allow a transcriber to sell their written transcription without compensating the originating artist.[17]

The question of copyright in improvised jazz performance should be assessed with a mind to the centrality of improvisation both in the composition and performance of jazz music, as well as with consideration of the genre's tradition of providing a vehicle for improvisational possibility to future performers through their interpretations of the original work. A strong presumptive intent to collaborate in this context should be recognized, and the moral rights of jazz improvisors should be afforded substantial protection against unauthorized transcription.

References:

Copyright Act, RSC 1985, c. C-42.

Noble, Rebecca, "The Invisible Artists of Copyright Jurisprudence: Joint Authorship in Jazz Improvisation under Canadian Law" (2021) The Canadian Bar Association.

Harvard Law Review Association, "Jazz Has Got Copyright Law and That Ain't Good" (2005) 118:6 *Harvard Law Review* 1940.

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[17] See Harvard Law Review Association, *supra* note 1 at 1946.