

# Copyright, the Work and Phonographic Orality in Music

*Social and Legal Studies*, 15/1: 77-99 (2006)

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## Abstract

Shaped by a combination of romantic aesthetics and capitalist economics in the nineteenth century, the musical work was only enshrined in copyright law at the beginning of the twentieth. However, even as the distinctiveness of the work was being legally inscribed, there emerged a new form of popular music making based on iteration. The recorded blues depended on continuity with other record-songs rather than the uniqueness of the individual work. Significantly, the phonographic orality at stake here was effectively unregulated with 'plagiarism' being tolerated. The contrast is then with the hip hop genre. This has the same iterative mode as the blues, yet with the later style rights owners have become quite litigious, and now guard their symbolic property jealously. Focusing on the U.S. this paper examines the differences between the two moments of blues and hip hop by analysing some key music copyright cases. It argues that despite stronger legal scrutiny of phonographic oral production in the contemporary period, this does not represent straightforward censorship in the way suggested by some commentators. Rather recent cases show the deep contradictions in copyright law between principles of uniqueness and tolerable continuity, and between the codification of physical sound and formal structure in music. These contradictions are inherent in the capitalist organisation of music making, and are not susceptible to any quick policy fix.

**Key words:** Copyright; Authorship; Marxism; Capitalism; the musical work; blues; hip hop

## INTRODUCTION

This paper argues that the concept of the musical work, which lies at the heart of copyright law, emerged during the nineteenth century as a result of the intersection of developments in aesthetics, technology and music markets. As the work concept became dominant in Western culture, and then in law, it not only helped to define the nature of music, it also specified the tasks of music makers. Two distinct roles were assigned, composer and performer. Significantly, such a way of conceiving music was enshrined in legislation in the USA at the start of the twentieth century. This was the moment when a new reproductive medium, the recording, was beginning to compete with printed sheet music as the dominant commodity in music markets. And intimately connected to the rise of the recording was a new kind of musical culture. We might call it phonographic orality; its most significant style was the blues. Here elements of African musical practice were combined with production methods which depended on recording and listening to recordings. The resulting music was iterative-variative in structure, rather than strongly differentiated as in the case of musical works. More, the author-performer distinction was of negligible significance. Blues records, one might say, were authored in and through performance.

The problem has then been that this way of making music (now taking new forms through the use of another iterative technology, digital sampling) does not conform to the work-concept on which copyright law was based. Why this should be so, and to what effect, are central questions for the present paper. In addressing them the focus will be on the U.S.A., home of blues and hip hop, and the techno-cultural matrix in which phonographic orality developed. To understand the formation of the work-concept, however, we need to look at a rather wider domain: Europe and America, or in more general terms, the societies of western modernity.

## THE COMING OF THE WORK: AESTHETICS/TECHNOLOGY/MARKET

What is the musical work and why is it so significant for copyright? The key issue here is the constitution of music as a genre, in other words as a particular type of symbolic artefact. The work, we might say, is the officially recognised text unit of the genre, music, and as such the *object* of copyright law. In a recent article on film Anne Barron has argued that, as well as considering copyright law in terms of the way it regulates intellectual property, we should also pay attention to how it represents its objects as text, in this case film (Barron, 2004). As she points out, the two aspects are strongly interrelated. The need to delineate film as a commodity necessarily impinges on the way its signifying functions are defined - and vice versa. More than this, the two aspects are in tension, in that each has a set of distinct imperatives (ibid 181).

Barron's discussion of the contradictory dynamics at work in film copyright is part of a larger project: the renewal of a Marxist approach to culture, and in particular the legal regulation of culture. Marxism is useful, she suggests, because it has diagnostic tools for understanding not only the economic and the ideological, but also their complex interrelationship (ibid 180). The present article adopts this sort of pragmatic Marxist

approach to copyright. But it also tries to undertake something else, namely an analysis of the social processes through which a genre is constituted *before*, or *beyond*, the law. During the late eighteenth and the nineteenth centuries, it is suggested, the musical work came to be defined in aesthetic, economic, and technological fields prior to its representation in legal discourse, while phonographic orality developed almost entirely outside the prescriptive parameters of copyright law during the twentieth century and after.

The obvious way to begin a Marxist analysis of the formation of a new cultural institution would be with a discussion of economics, or perhaps, considered as a specific ‘means of production’, with technology. Instead, the accounts of the musical work and of phonographic orality which follow will move back and forth between aesthetics, economics and technological factors. We follow Raymond Williams here (Williams, 1977, 1981). In his project to develop a ‘cultural materialist’ cultural theory, Williams criticises the classical Marxist model of base and superstructure, with its mono-causal explanation of culture as a consequence (at however many degrees removed) of the mode of production. This formulation, argues Williams, removes human agency while at the same time turning culture into a mere effect of the economic base (Williams 1977: 75-82). As an alternative to the reductionism of base and superstructure Williams proposes a “full concept of determination” where limits are set and pressures exerted “in the whole social process itself” (ibid 87).

If there is a danger of amorphousness here, of abandoning the notion of social structure or articulation altogether, Williams goes on to show in a compressed account of the development of the novel that this is far from the case.

Cultural effects need not always be indirect. It is in practice impossible to separate the development of the novel as literary form from the highly specific economics of fiction publication .... The insertion of economic determinations into cultural studies is of course the special contribution of Marxism, and there are times when its simple insertion is an evident advance. But in the end it can never be a simple insertion, since what is required, beyond the limiting formulas, is restoration of the whole social material process, and specifically of cultural production as social and material. This is where analysis of institutions has to be extended to analysis of formations. The complex and variable sociology of these cultural formations which have no direct or exclusive or manifest institutional realization – literary and intellectual ‘movements’ for example – is especially important (ibid 137-8).

The musical work is certainly a formation in Williams’s sense, in that it needs to be understood as economic, social and material, yet also the product of an intellectual movement. More, during most of the nineteenth century, it had “no direct or exclusive or manifest institutional realization” even if such a realization can now be seen as its destiny. In what follows it is only possible to sketch the process of formation of the musical work. But in the tradition of cultural materialism, the intention is to point up the full range of social forces at stake, even where historical detail is relatively thin.

We can begin with aesthetics, by which is meant not only philosophical discourses on music, but also forms of knowledge embedded in musical practice. From this perspective two related developments after 1800 were particularly important: the increasing importance of notation, and, associated with this, the rise of music as an autonomous art form. In an important sense the trend towards conceiving music as a sphere separate from everyday life reflected the larger thrust of philosophy after Kant, in the direction of the arts considered as a

separate and purely symbolic realm.<sup>1</sup> This was bourgeois ideology militant, a new sensibility which would lift its subjects and objects up, out of tangible, quotidian experience into the unalloyed realm of the aesthetic. Yet, in the case of music at least, the new emphasis also needs to be understood as a shift to a new kind of production.

Lydia Goehr's argument is important here (Goehr 1992). She goes so far as to suggest that before 1800 musical works did not exist. Plenty of music was being produced in Europe of course, but the work-concept we employ today to fix and categorise it simply did not obtain. Instead music was made and heard as a continuous *process* rather than as an object. There were several aspects to this. For one thing, music was often re-used, with composers frequently incorporating into new pieces material that they had developed earlier. Composers might also borrow from the work of others in certain circumstances (ibid 181-2). Another factor was that composition carried over into performance through the practice of extemporisation. Scores were incomplete, and so left space for players to ad-lib. Thus the ability to conceive music, as well as execute it, was a vital part of the performer's role (ibid 188-9).

This relates to a further aspect of European music before the Romantic movement: the strong continuity, rather than division of labour, between performer and composer. The latter frequently supervised and conducted performance of their own compositions, while scores were generally written with specific performers in mind (ibid 190-5). As Michael Talbot puts it, before 1800 "the accent nearly always [fell] on the executant" (Talbot 2000: 179), in the sense that performance subsumed composition. Significantly, composers often earned less than leading instrumentalists and singers, and tended to be genre specialists in opera, say, or chamber music, rather than that transcendental category, music (Goehr 1992: 181). Music making was thus much less socially stratified than today, much more a matter of craft and of ritual.

This whole system of relatively non-hierarchical music making with a flexible division of labour changed during the course of the nineteenth century. The composer-*auteur* and the 'true work' now emerged, each, by a process of reciprocation, constituting the other. Initially, this was more to do with changing conventions than the law. Take plagiarism. Previously tolerated in many contexts, it now became a serious breach of the professional code. Even re-use of one's own material was discredited (ibid 220-1). The emergence of new norms in relation to practice then led inevitably to the development of a more comprehensive system for regulating musical production based on the twin "demands of originality and untouchability" (ibid 222). The criterion of originality meant that music had to be intimately connected to the personality or soul of the composer, and heard as the projection of their powerful feelings.<sup>2</sup> As for untouchability, this was the correlative of originality. If the composer expressed himself in music (the masculine form is intentional, this remains a strongly gendered system of production) then such music ought to be inviolate, uncorrupted by the influence of another.

The unity of the work was also emphasised for practical reasons. Initially, the score had been simply a means of reproduction; it enabled the realisation of music at a temporal and spatial distance from the point of composition. But in the nineteenth century the growing scale and complexity of pieces meant that notation assumed a vital role in the process of composition itself. Whereas formerly an early piece by a composer might serve as the kernel of a new one, now a long piece could be composed without reference to any previous conception (Talbot 2000: 183). In other words, notation promoted originality. It also enabled

the 'vertical' articulation of music. Many voices might be arranged in a harmonically rich matrix. The result of these developments, evident in a Mahler symphony, was a high degree of complexity, with composition proceeding "from initial conception to final polishing" via an extended series of "sketches and drafts" (ibid). Lastly, the new system had a major impact on the whole labour process, namely a loss of status for performers. With most room for improvisation now gone they became mere executants of the composer, and with the advent of the conductor, executants once removed (Small 1987).

To sum up, the rise of the notated work in art music had several dimensions. First, it was the result of a changing ideology of the aesthetic in which music came to be conceived as immaterial, as expression not in phenomenal sound, but in the symbolic form of the score. Second, the notation through which the work was realised provided a compositional tool, a means of graphically representing, measuring and organising musical elements so that long and complex works might be produced. Both these aspects reinforced the cult of original genius. By the second half of the nineteenth century the work had become an expression of the composer's soul, and of his intellectual power to *think* in music through the heuristic device of notation.

In tandem with the elevation of the work as ideal aesthetic form, economic and technological developments were also acting to reinforce the work concept. Before 1800 instrumental music had generally been published in collections consisting of pieces by several authors, rather than the single authored edition (Goehr 1992: 199). For opera, hand copying of manuscripts was actually preferred to printing because it enabled "adjustments to suit local conditions" (Krummel and Sadie 1990 100). In other words operas were mutable, and therefore precisely not works in the modern sense. Anyway, publication was by no means the norm for the professional composer. Eighteenth century patrons would often demand exclusive use of a piece, and specify that it was not to be copied (Goehr 1992: 180).

During the nineteenth century the situation changed dramatically, in part because the expansion of the performance of new works in concert halls, opera houses and, later, popular music theatre stimulated the publishing of scores for use by performers. A more significant development, however, was the growth of a mass, domestic market in sheet music. New reproductive technologies provided the conditions for this. In 1828 Robert Wornum of London began making a 'cottage piano', or what soon came to be called an upright. By the 1860s upright pianos were being sold in large numbers across Europe and America (Howard 2003). As the middle classes bought pianos so too a large market opened up for sheet music, the 'software' needed in order to program piano 'hardware'. Producing sheet music to satisfy the new demand depended on another mid-century technological development, in printing. Chromolithography was used in the 1840s to produce popular editions with coloured cover illustrations (Krummel and Sadie 1990: 115). Then, from the 1860s, steam printing enabled a massive increase in output. By the end of the century 40,000 new titles were being published annually in Britain alone, with total sales reaching perhaps 20 million pieces a year (Ehrlich 1989: 5). As for genre, sheet music editions covered (and likely encouraged the development of) a huge range of styles. Evidence of this is provided by a U.S. archive of music from the nineteenth and early twentieth centuries which holds these types of material: 'bel canto, minstrel songs, protest songs, sentimental songs, patriotic and political songs, plantation songs, Civil War songs, spirituals, dance music, songs from vaudeville and musicals, "Tin pan alley" songs, and songs from World War I'.<sup>3</sup>

The creation of a mass market for music sheets entirely complemented the enthronement of complex and large-scale composition in the field of art music. In the latter case, as we have seen, aesthetics and compositional practice generated ‘the work’, an object of rational discourse and cognition. What then gave the work economic significance was the market in sheet music.

### COPYRIGHT LAW: THE MUSICAL WORK ENSHRINED

The earliest explicit references to music in British and U.S. statutes were made in the first half of the nineteenth century. In the U.S., s.1 of the 1831 Copyright Act defined music in these terms: ‘musical compositions in traditional notation’. In Britain, s.1 of the Dramatic Copyright Act 1833 included opera in its new category, ‘dramatic piece of entertainment’, while s. 2 of the Copyright Act 1842 located ‘sheet of music’ under the larger heading of ‘book’. Unsurprisingly, given the fact that these pieces of legislation were enacted at a very early stage in the development of both the publishing market and the work-concept, the notion of the ‘musical work’ appears nowhere in the legislation. However, by the end of the century as printed music piracy proliferated and the phonograph started to become a significant music carrier it became clear, to publishers at least, that property in music needed stronger and more comprehensive delineation (Coover, 1985: ix). The new copyright laws, enacted in the early twentieth century in both countries, certainly achieved this strengthening objective (Copyright Act 1909 (U.S.); Copyright Act 1911 (U.K.)). But the significant point for the present argument is that in doing so they absorbed developments in the aesthetic field from the previous hundred years or so. What did the measures consist in? At this point, as we set the scene for a discussion of the rise of the phonographic orality in America, it is appropriate to narrow the focus to the U.S., and the Copyright Act of 1909.

First of all, rights to control the reproduction of printed music were consolidated. Second, existing rights to control arrangement and performance were specified in detail. Third, a new music right was introduced in relation to the mechanical reproduction of works. This enabled copyright owners to charge for the use of music in recordings and piano rolls. In all these areas, though, the delineation of property rights had a double aspect. On the one hand, it involved a description of the kinds of reproduction to which the rights related: the key problem here was to catch up with the expansion in music markets over the previous hundred years or so, namely the rise of sheet music, burgeoning public performance and a fledgling market in mechanical reproduction. On the other hand, the very process of specifying types of music use in the Act also meant delineating the entity which was to be used, namely the work. Capturing in copyright law the various manifestations of music downstream, we might say, inevitably meant identifying the thing that was at the source. Thus section 1 (e) of the 1909 Act granted rights

[t]o perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.

It is in this section, one dealing with music use, that we find the key attributes of the ‘composition’. Crucially, the composition was primary in the sense that it existed before performance or publication (subsection 1(a) referred to publishing and printing). It subsisted

above and beyond its melody, although melody was clearly assumed to be a key aspect. And, arrangements or settings of it might be recorded, “in any system of notation or any form of record”. The reference to “the thought of an author” was significant for its binding together of economic and aesthetic aspects of authorship. On the one hand, the author was the owner of the rights in his work. On the other, his status as author guaranteed the status of the work: only compositions had authors.

### THE PHONOGRAPH BLUES AND THE LAW

To sum up, the U.S. Copyright Act of 1909 consolidated copyright in music, and specified its relationship to various kinds of replication, from live performance to sound recording. Almost immediately, though, an entirely new kind of aesthetic and authorial practice began to emerge in the field of popular music, premised not on composition and notation, but, precisely, on the new media technology of sound recording. As we saw above, in the nineteenth century a network of aesthetic, economic and technological forces had generated the work concept and the system of production based upon it. Now these same factors, but in a completely different configuration, created a new system of making and using music. Crucially, however, it was not recognised by copyright law nor was it, at a more general level, consecrated in the official discourse of art.

From 1921 in the U.S.A. record companies began to issue discs for a ‘colored’ market - by 1923 a new category had emerged, ‘race records’. These recordings, made by black musicians and marketed to black audiences, were mainly in the styles known as jazz, gospel music and, most importantly for the present argument, the blues (Dixon and Godrich 2001). Originally an orally transmitted style, the blues seems first to have circulated amongst freed slaves. Strong African retentions can be identified in all its regional variants (Oliver 2001). The structure of the blues, like that of oral culture more broadly, was strongly determined by the need to reproduce knowledge in conditions where there were no means of recording in notational or phenomenal form (Ong 1982). The striking contrast here is with the musical work whose rise in the nineteenth century represented the complete elimination of orality in European art music. Notation not only made it possible to execute music again and again, in other places and times from the locus of composition, it also enabled the development of long, complex works as we have seen. In particular, notation was the cornerstone of functional tonality, a rational system for organising pitch along diachronic (melody) and synchronic (harmony) dimensions. Melody and harmony then became the key parameters through which one work might be differentiated from another. Under the aesthetic regime of the work, as Lydia Goehr points out, it was crucial that a work show no sign of influence by another work (Goehr 1992: 222).

The blues had melody and harmony too of course. In these aspects it was likely influenced by the European musical tradition (Van Der Merwe 1989). But given its essentially oral function, the harmony and melody of the blues served not so much to differentiate pieces of music as in art music, but rather stitch them together. As Walter Ong puts it,

[i]n a primary oral culture, to solve effectively the problem of retaining and retrieving carefully articulated thought, you have to do your thinking in mnemonic patterns, shaped for ready oral recurrence. Your thought must come into being in heavily rhythmic, balanced patterns, in repetitions or antitheses, in alliterations and assonances, in epithetic and other formulaic expressions (Ong 1982: 34).

Such was the structure of the blues. It could be heard most succinctly in the twelve bar pattern which became the dominant blues form in the course of the nineteen twenties and thirties. Here, two repeated vocal lines of four bars each were followed by a culminating line sung over the last four bars of the stanza. On to this tripartite, lexical-metrical pattern was then superimposed a harmonic progression: I, IV, V.

Critically, the twelve bar blues which had first emerged as an oral trope, became hegemonic in and through recording. Two tendencies can be observed here: on the one hand 'deregionalisation' as recordings spread the standard of the twelve bar format; on the other hand, the emergence of new, hybrid styles of the blues on a regional, and eventually national basis. Both developments had something to do with the migration of African-Americans across the South of the United States, and from South to North (Russell 2001: 160-2). But the decisive factor was undoubtedly the way that musicians had begun to use recordings as a guide, a musical template which they might adopt and then vary in their own approaches to the blues.

Paul Oliver has highlighted the extraordinary significance of phonographic culture in black America during the inter-war period. Not only were record sales proportionately higher among blacks than whites, it is likely that records were listened to more intensely since other media were much more inaccessible. Radio stations carrying black music did not exist till after World War Two, while relatively high illiteracy rates in the twenties and thirties reduced the impact of newspapers (Oliver 1968: 2-9). We can see, then, how listening to records and playing along to them became the main way in which the twelve bar format, as well as a host of other blues tropes, were disseminated across the huge geographical expanse of the U.S. (Chanan 1995: 56-7). In effect, what had been a functional exigency in the oral blues, namely the need to repeat in order to remember, became an aesthetic imperative as African-Americans began to create music by means of phonography.

A key aspect of this phonographic oral system was the increasing salience of sound quality, of timbre and texture. In European art music the notational system depended not only on compliant execution by performers. It also involved the assumption that voices were stable givens. The sonorous character of a French horn or a contralto, for instance, were things to be taken for granted, indeed things that *had to* be taken for granted. In the case of the blues this was far from the case. Among guitarists, for example, the use of idiomatic tunings, capo, bottleneck and so on meant that the instrument sounded differently in different hands and in different territories. As LeRoi Jones points out, innovations in sonority came much more quickly as soon as race records began to be made. Before 1923, when Ida Cox cut her first recordings, the blues singer's nasal, vocal sound was limited in its influence to singers around her home town of St. Louis, Missouri. After that date the Ida Cox sound was taken up across black America and became the basis of a new vocal style (Jones 1995: 102). In effect, then, the introduction of phonography reduced geographical variation in the blues somewhat, but increased the rate of stylistic innovation over time.

How did music copyright, based as it was on the compositional and notational norms of the work, engage with the phonographic orality of the blues? The answer seems to be, in a quite arbitrary and selective fashion. As originally drafted, the U. S. Copyright Act of 1909 had not recognised sound recordings as capable of attracting copyright. It was not until 1971 that the Act was amended (Sound Recording Amendment Act 1971 (US)) by the addition of section 1(f), which recognised that 'sound recordings' were protected by a form of copyright: "Any person entitled thereto ... shall have the exclusive right .... [t]o reproduce and

distribute to the public ... reproductions of the copyrighted work if it be a sound recording...". However, this section made clear that "the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording." As if to emphasise this point, it proceeded to state that "this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording...". Here, then, the 'recording' as a matter of law was simply that which was registered by the phonographic apparatus. More, the choice of words specifically excluded rights in any symbolic pattern which might be taken to exist *behind* the particular sounds of the recording. One could freely imitate recorded sound – whereas to imitate a musical work would of course infringe copyright. Sonority could not be owned.

It seems, then, that a key marker of difference in the blues, namely sound quality, lay beyond the copyright subsisting in a blues composition considered either as a musical work or, much later, as a sound recording. Conversely some aspects of the blues which signified continuity, most of all the twelve bar structure and the melodies overlaying it, were, potentially at least, within the zone protected by the copyright in a blues composition considered as a musical work. This followed from the definition, noted above, of copyright in a musical work: this extended to the making of "any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced." Hence to re-arrange a melody could infringe the copyright in a musical work featuring that melody.<sup>4</sup> The 'rearrangement of melodies' was of course central to the blues. Paul Oliver describes one episode of melodic continuity, from 'song' to 'song', in some detail. It is worth quoting his account in full.

Charles Davenport's *Cow Cow Blues* became Louise Johnson's *On the Wall* and Cripple Clarence Lofton's *Streamline Train*; it makes the transition from piano to guitar and mandolin when it is played by Bo Carter and Charlie McCoy as *That Lonesome Train Took My Baby Away* and *Jackson Stomp* and it becomes a harmonica solo by Cow Cow Davenport's namesake, Jed Davenport. Over the space of thirty-odd years the tune became the basis of many other blues and train interpretations, retaining some of its identifiable instrumental features but becoming the setting for new blues vocals (Oliver 1968: 16).

We might describe this type of continuity as, 'same tune, new words and voicings'. Yet as a matter of copyright law, if there is substantial similarity between two tunes, the question of whether one infringes the copyright in the other by virtue of copying from it rests heavily on the question of independence of the second from the first. Given both the ubiquity and the iterative-variative structure of the blues, independent creation would on the face of it seem to be very difficult to establish. How could one possibly show that one had not listened to, and absorbed, a riff or melody, or a version thereof? This suggested that most blues tunes might have involved copyright infringement.

Popular songs in general were the focus of a considerable amount of copyright litigation from 1920 to 1950, the period when the blues was flourishing as a music industry market segment. Columbia Law School Library's *Music Plagiarism Project* shows twenty two cases during these years in which composer or publisher complained of infringement of a song.<sup>5</sup> One overriding theme emerges, namely the low level of creativity and sophistication

attributed by the judiciary to the popular song as a genre. According to the judges pop was standardised. As a consequence in order raise an inference of copying – as opposed to coincidental independent replication – a relatively high degree of similarity was required. The Court of Appeals for the Second Circuit sketched out this position in *Marks v. Leo Feist, Inc.* (1923):

[m]usical signs available for combinations are about 13 in number. They are tones produced by striking in succession the white and black keys as they are found on the keyboard of the piano. It is called the chromatic scale. In a popular song, the composer must write a composition arranging combinations of these tones limited by the range of the ordinary voice and by the skill of the ordinary player. To be successful, it must be a combination of tones that can be played as well as sung by almost any one. Necessarily, within these limits, there will be found some similarity of tone succession (ibid: 960).

The Court then found against the plaintiff on the grounds that only 6 out of 450 bars of music were copied, and therefore it had not been established that “a substantial copying of a substantial and material part” of the work in which the plaintiff owned the copyright had occurred (ibid). A similar point was made by Judge Learned Hand in *Arnstein v. Edward Marks* (1936: 277), where the same court again found against the plaintiff, and by a Californian Federal District Court in *Hirsch v. Paramount Pictures* (1937), where the repetitive structure of the standard AABA, thirty-two bar popular song was said to demonstrate that “originality in the realm of popular music lies within a very narrow scope” (ibid: 817).

What would such an approach mean for the blues whose strophic form was much more compressed, much more intensely standardised, than that of the 32 bar popular song? In fact there is only case concerning the blues in the *Music Plagiarism Project* dataset: *Shapiro, Bernstein v. Miracle Record* from 1950.<sup>6</sup> Here the boogie-woogie pianist Meade ‘Lux’ Lewis claimed that his tune ‘Yancey Special’ had been misappropriated by the authors of a rhythm and blues number called ‘Long Gone’.<sup>7</sup> At issue was a one bar bass figure (E flat – E flat octave – G – B flat – G – B flat) in the left hand of the piano which cycled through the I, IV, V chord changes of the tune. The court concluded that Lewis was not the composer of the bass figure: the evidence of Jimmy Yancey, another boogie-woogie player and “an apparently disinterested witness” (ibid: 474) that he had composed it was accepted. The judge went on to say that in any case he agreed with the defendant that the bass figure was “too simple to be copyrightable” (ibid) and so was in the public domain. On this basis, however, most blues songs would effectively be in the public domain, for most are comprised of such ‘simple’ elements. This is because one bar bass-lines and riffs had, and continue to have, an extraordinary propensity to spore-like reproduction, spreading out over time and place. Consider the long history of what, for convenience, we might call the ‘Yancey Special’ bass-line. After its widespread use in boogie-woogie during the 1930s, it became a staple of post-war rhythm and blues. ‘Long Gone’ was only one of many recorded versions. In ‘Night Train’ by Jimmy Forrest, the biggest R and B hit of 1952,<sup>8</sup> the tempo had slowed to a 78 beats per minute crawl, and passing notes were added at beats three and four to provide extra syncopation. But the left hand piano figure was otherwise the same as in Bob Crosby’s version of ‘Yancey Special’ from 1938, the notation for which had been cited in *Shapiro, Bernstein*. Meanwhile in the rhythm and blues piano style of post-war New Orleans (chief exponents: Professor Longhair, Smiley Lewis, Fats Domino, Huey Smith) the ‘Yancey Special’ bass line was ubiquitous. The most famous example, perhaps, was Domino’s

'Blueberry Hill' from 1956. Here the octave repetition of the first note at beat two was replaced by a rest. This simplified version then travelled across the Caribbean to Jamaica, where it was used on what is often reckoned to be the first reggae recording, The Folkes Brothers' 'Oh Carolina' of 1961.

Before leaving *Shapiro*, it is worth remarking upon the judge's characterisation of the bass line in question as "a mechanical application of a simple harmonious chord" which could not be protected because "the purpose of the copyright law is to protect creation, not mechanical skill" (ibid: 474-5). From the point of view of the blues, this characterisation proceeds from a misinterpretation: the application of assumptions about aesthetics and syntax taken from European classical music to a totally different idiom. As a result the key function of the 'Yancey Special' bass-line was missed. We can best understand this issue by referring to the concept of the 'participatory discrepancy' developed by ethnomusicologist, Charles Keil (Keil 1994). This is a fine, un-notable, yet utterly crucial placement of accents which helps to produce 'swing' or 'groove' – the sense of forward propulsion we experience in rhythmic music. Now suppose someone had to tried to use such a formulation to assert the originality of the 'Yancey Special' bass-line in 1950. The problem with any such argument, however, is that groove is a quality of performance, the process of sound production. Under U.S. copyright law it could not therefore be invoked as an attribute of the musical composition or as evidence of authorial creativity.

#### MUSIC COPYRIGHT AND ORIGINATION, FROM THE BLUES TO SAMPLING

All of these considerations suggest that copyright law with its model of the musical work failed to recognise the blues as a valid form of musical creation. It either dismissed the blues altogether as subsisting beneath the radar of the copyright system (because unoriginal and/or unmusical and/or comprising unprotectable elements such as sonority or performance style); or, to the extent that it accepted *some* blues creations as comprising protected original musical material, it condemned *other* blues creations as derivative in relation to these, and so infringing. Still, this certainly did not lead to suppression of the genre. Quite the reverse: it flourished under music capitalism, and new blues continued to be made after 1950 despite the fact that, potentially at least, *Shapiro* placed blues songs outside copyright's reach. Yet *Shapiro* did not really represent a landmark case: it is better described as a succinct translation into legal discourse of the common sense of the music industry. Pursuing plagiarism claims in a context where all 'writers' were plagiarists was simply bad business and likely to be an expensive waste of time. What mattered most was coming first to market with recordings whose distinctiveness consisted in uncopyrightable sonority or the unfakable persona of a performer. On the distribution side, the crucial factor was having access to an efficient system for collecting royalties for 'downstream' uses such as radio broadcasting, and this is where the real economic importance of copyright lay.

Arguably, this is as true today as it was in the 1950s – although one school of thought in media studies sees things in a rather different way. Characterising the contemporary copyright system as a repressive regime, several scholars (most notably Thomas Schumacher and Siva Vaidhyanathan) have suggested that music makers are effectively censored by litigious rights owners who prevent them from using digital samples in their recorded work (Vaidhyanathan 2001; Schumacher 1995). Now there are good reasons to understand sampling as a renewal of phonographic orality and therefore something entirely legitimate. Here we are close to the defenders of the right to sample. Recording and manipulating pieces

of existing music, particularly recorded music that has already been issued, represents the same dialogic urge that animated blues culture. In rap (still the most sample intensive popular genre) just as in blues the work-concept has low salience. Rather we encounter recordings which refer to other recordings, both inside and outside rap. This continuity between one recording and another is quite similar to that which is found in the blues. It is just that digital technology enables the breaking up of recordings into pieces, so that we hear citation and parody at a micro-level and with the high modality,<sup>9</sup> or effect of realism, that sound recording provides. In relation to the law the difference, of course, bears on the fact that to sample from a sound recording (rather than merely imitating the sounds encoded on the recording, as blues performers used to do) is, in the words of section 1(f) of the US Copyright Act 1909 'to duplicate [part of] the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording. Under the current (1976) US Copyright Act, no less than the 1909 legislation, this means that sampling may infringe the copyright in that recording, as well as in the musical work carried by the recording.<sup>10</sup> The question is, though, how far has sampling actually been prevented by copyright law.

The ruling in the first major copyright infringement case involving digital sampling, *Grand Upright Music, Ltd. v. Warner Bros. Records* (1991) – where Gilbert O'Sullivan successfully claimed against Biz Markie's record company in respect of an 8-bar appropriation from the former's 'Alone Again Naturally' – does indeed seem harsh. Duffy J.'s judgement begins with a quotation from the seventh commandment, 'Thou shalt not steal', and referred the matter for consideration of criminal charges to the U.S. Attorney's office. Yet what has followed in the period since has been the proliferation of sampling, not its suppression. Routinised sample clearing has in effect created a market for 'packets' of recorded music. This supplements the markets which the publishing industry already has in public performance, broadcasting and mechanical copyright licences. More, it gives the recording industry in America an additional secondary market, beyond the licensing of whole tracks. We might argue from a socialist perspective that this is iniquitous: small record producers who want to sample are disadvantaged in a market where the giants hold vast back catalogues; or more generally, all intellectual property is capital, 'congealed labour' in Marx's phrase, and should be abolished altogether. But whether the emergence of this system of samples-for-payment represents censorship is problematic to say the least; we ought to defer making an assessment on such a question till the end of the paper.

Significantly, in the next major copyright case to involve hip-hop after *Grand Upright*, a fair use exemption from copyright was made available on the ground that the defendant had engaged in parody. In *Campbell v. Acuff-Rose* (1994), the U.S. Supreme Court (reversing a Court of Appeals decision) ruled that 2 Live Crew's substantial appropriation of Roy Orbison's 'Oh Pretty Woman' in their composition 'Pretty Woman' was a fair use, notwithstanding 2 Live Crew's commercial purpose. Further, even though the 'heart' of the first song was incorporated into the second, this was done with parodic intent. Indeed, given that parody relies on recognisability of an original, it was through copying of the opening bass riff and the first line of the lyrics that a parodic effect was achieved (ibid: 17-20). Significantly, the appropriated elements in the 2 Live Crew version were recreated through new performances rather than direct reproduction (sampling) from Roy Orbison's original recording. So, while the Supreme Court ruling recognised a strong defence for parodies, it did so on the basis of a similarity between Orbison's musical work and 2 Live Crew's musical work. Copyright in the sound recording of Orbison's work was simply not in issue.

A recent judgement, however, deals precisely with the relationship of, and distinction between, rights in the composition and rights in the recording of that same composition. Because this case bears so strongly on a central theme of this paper, namely phonographic orality and its contradictory treatment in law, we will spend some time discussing it. In *Newton v. Diamond* (2002) the plaintiff, jazz flautist James Newton, claimed that the Beastie Boys' use of a sample from a recording he had made infringed the copyright in his composition, 'Choir', a piece for solo flute. In fact the Beastie Boys had obtained a license from ECM, the recording company which had released Newton's 1982 album *Axum* on which 'Choir' featured, to use a six second section from that recording of 'Choir'. They did not consult Newton, nor did ECM inform him about the agreement.<sup>11</sup> The sample provided an introduction to the track, 'Pass the Mic', which was released in 1992. It was also used as a continuous loop behind the beats and rapping featured on that track. All this was unknown to Newton until 2000. Because he had registered the copyright in the composition and assigned it to his own publishing company, he was able then to initiate a court action against the Beastie Boys on the grounds of breach of copyright in the composition. However in May 2002 the Central District Court of California found against Newton, dismissing his complaint on all counts. This ruling was upheld on appeal by a majority decision of the US Court of Appeals for the Ninth Circuit in November 2003 (*Newton v. Diamond* (2003)).

In the District Court, Manella J. first dealt with the distinction between copyright in the composition and copyright in the recording. Only the former was at issue in relation to the six-second sample because the ECM license covered the latter. The judge began by establishing the structure of each of these entities.

A musical composition consists of rhythm, harmony and melody, and it is from these elements that originality is to be determined ... . A musical composition protects an artist's music in written form ... . A musical composition's copyright protects the generic sound that would necessarily result from any performance of the piece" (*Newton v. Diamond* (2002): 1249).

On the other hand, "the sound recording is the sound produced by the performer's rendition of the musical work" (ibid: 1249-50).

The issue here was whether the taking of a portion of a musical work comprising a C note played on the flute, while the flautist simultaneously 'vocalized' the notes C, D-flat and C, constituted infringement of the copyright in the musical work. This portion of his composition had been scored by the plaintiff in these terms without further orchestration (i.e. the score simply instructed the performer to sing into the flute and finger simultaneously). However the plaintiff's expert witness had argued that following the special playing technique described in the score (i.e. singing and flute-playing together) would "necessarily create unique expression" (ibid: 1250). As regards this general point, the judge was persuaded that the simultaneous vocalization technique was widely used in folk, art and jazz music, and thus was hardly original. As regards the Plaintiff's further argument, that his technique went beyond generic vocalisation, and included overblowing the C note to produce 'multiphonics', or multiple pitches, the problem for the judge was that neither this, nor other musical tropes claimed as unique, were notated *in the score* (ibid: 1251).

It is worth describing these tropes in more detail because, while they were rejected by the judge as legally insignificant, they show the richness of phonographic oral expression – and in quite a different context from the blues or hip-hop. In the passage at issue Newton not

only vocalized and overblew his notes, he also produced an uncanny, guttural timbre in the flute through breath control techniques. Further, movement from one note to the next took the form of a slide, or what is known as portamento. Newton, in other words, entirely subverted the standard performative parameters of the flute to powerful effect. Yet the beginning sequence of ‘Choir’ – a mere three notes – is devastatingly beautiful not only for this reason, but also because it transfigures gospel music, the sacred oral tradition of African-America whose history runs in parallel to that of the blues.

To return to the case, a central problem for the Plaintiff was that he himself emphasised that all the special playing techniques described in court were aspects of his *performance*. Since it had been conceded that any copyright in respect of this performance had already been licensed to the defendants by way of ECM’s licence to sample from the recording all that could be at issue was the taking of the “three note sequence with one background note” (ibid: 1252). For Manella J., to focus on “the sonic effects achieved by Newton’s unique performance” distracted from the primary issue before the court: “the protectability of the elements of the composition itself, not the ‘richness and complexity’ of the ‘timbral result’ achieved through ‘Mr. Newton’s desired interpretation of the score” (ibid: 1255).

How then did the court approach the question of whether the element in question here was protected against copying? Under U.S. copyright law, the test of whether copyright in an original work (‘Choir’, in this case) has been infringed by the taking of a part of that work turns on whether the taking is ‘substantial’. Where the taking is of a part which in itself lacks originality, this test is not satisfied. Hence one focus of discussion here was whether the three-note sequence was itself original. In terms reminiscent of the judgements in cases such as *Marks* and *Hirsch*, Manella J. took the view that it was not (ibid. 1252-1255). Noting that the expert evidence showed that the three-note sequence, even with sustaining note, had been used many times before, she remarked that “[i]n assessing originality, the courts must be mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently appear in various compositions, especially in popular music” (ibid: 1253).

Even assuming that the three-note sequence was original, however, the judge took the view that it was so slight that its taking could be regarded as *de minimis* (i.e. trivial) and not actionable for this reason. The six-second sample represented a mere two per cent of ‘Choir’ and was thus certainly *de minimis* in terms of quantity (ibid: 1258). As for quality, nothing beyond his unique playing techniques had been identified by the plaintiff as capable of “[rendering] the three-note sequence qualitatively important to Plaintiff’s entire composition of *Choir*” (ibid).

On appeal, a majority of the Court of Appeals for the Ninth Circuit was prepared to assume that the sampled segment of the composition was sufficiently original to merit copyright protection but affirmed the District Court’s ruling on the ground that the taking of the three-note sequence was indeed *de minimis*.

## CONCLUSION

*Newton* takes us back to questions at the heart of this paper about the nature and significance of the musical work and how it relates to other kinds of musical practice, in

particular phonographic orality. We are now in a position to assess how far copyright law still treats music in the way it did at the beginning of the twentieth century, and if so what might be the implications for creativity in music in the contemporary period.

In separating composition from recording, and then dissecting composition, Manella J. strongly reaffirmed the work-system which emerged during the nineteenth century and had been enshrined in the U.S. Copyright Act of 1909 as well as copious case law. We can identify the following elements in that system. Musical performance (action) is separated from the work (object). It is the work that is primary because it comes first in time, but also (and partly for this same reason) because it has aesthetic primacy. The work is a product of the creativity of the composer, and therefore original. Notation is key here because it provides evidence of what is comprised in the work. This was an absolutely crucial point in *Newton*: the biggest problem for the flautist was that he had not made enough marks, not been exacting enough in his notation. Of course the recording is a form of fixation too, and therefore could be said to embody the composition as much as a manuscript does. However, the import of *Newton*, as we have just seen, was to make the distinction between work and recording much sharper. In effect, Manella J. identified expression in the work *only* with what was represented in notation. This is a strong version of the nineteenth century construction of the work, where the work tends to be coterminous with its score. It seems, then, that after *Newton* an author's performance of his work on record has little evidential authority as a representation of that work. The score, we might say, rules.

After the court case was over, Newton wrote a letter to a friend which has since been published. In it he argued that Manella J.

consistently used European paradigms to judge my music. An aria from Purcell's 'Dido and Aeneas' and Cole Porter's 'Night and Day' were examples of what is protectable. 'Choir' is about four black women singing in a church in rural Arkansas. The work is a modern approach to a spiritual (Newton 2002).

Newton had a point here. He had worked all his life in the African American musical tradition, that is in what LeRoi Jones has called the "blues continuum" (Jones 1995). And he certainly identified himself as being part of that tradition, a link in the chain of black musical orality. As a result he would always be damned by Eurocentric jurisprudence which treated music as if it consisted of singular work-objects made by autonomous authors. At the same time, though, Newton also operated in the European tradition. He produced and published scores, knew about and was influenced by (no doubt influencing too) the contemporary avant garde in art music. More, his claim was precisely a claim for authorship, for economic reward in respect of, and authorial control over, his composition. Newton's problem, then, was he could not get the rules that applied in this domain to work in that other domain of black musical orality.

Of course, Newton did have a means of protecting those aspects of his playing on 'Choir' which he had struggled so hard to establish as unique: through copyright in the recording. There are, however, considerable problems here as well. In the first place, it is customary for record companies to demand assignment of recording rights as part of the standard recording contract. This was probably so with ECM and Newton. Arguably, entering into such a contract constitutes a voluntary arrangement. Yet there is a strong case to be made that *de facto* the copyright in the recording will always be assigned. The large amount of capital required to set up a record label ensures that this function is performed by a capitalist,

while cultural labour market conditions, which are characterised by rampant over-supply combined with uncertainty of demand, give capital a large degree of hegemony over labour.<sup>12</sup>

Beyond this problem of the *de facto* transfer of copyright in the recording, however, there remains a substantial difficulty with the nature of the rights associated with the recording. Even if recording artists were able to retain their rights, the question is whether they could thereby protect their creativity as it is represented in performance, on record. To adopt Anne Barron's useful formulation, we find in the case of the sound recording a 'physicalist' definition of the object of copyright, where what is at stake are physical sensory phenomena (here, sound waves) and the devices which electronically re/produce them. This contrasts with the definition of copyright in the underlying musical work. It too has a physicalist dimension, this time in the image of the score, whether it is realised in paper and ink or other graphical interface. But the work also has what Barron terms a 'formalist' aspect.<sup>13</sup> In effect, this is what was reaffirmed by Manella J. at the beginning of her summary when she said that "[a] musical composition consists of rhythm, harmony and melody" (*Newton* (2002: 1249)). These attributes are completely to do with form, that is, a conception of music in which symbolic organisation and meaning are paramount. What then gives copyright in the work its particular power and ubiquity is that the two aspects – physicalist and formalist, score and musical properties – are interlinked. In invoking one, the other is invariably summoned up too. This is the heritage of the historical formation of the work over the course of the nineteenth century which was examined above.

Significantly, the lack of a formalist dimension in the copyright in a sound recording is not just a matter of absence. It is specifically delineated in section 114(b) of the Copyright Act 1976 (US):

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.

In the terms of the present discussion we might say the existence of a protectable form underlying the recording is categorically denied. Of course, the passage above is really no more than a reiteration of the 1909 Act's treatment of the same issue already noted in our earlier discussion of the blues.<sup>14</sup> There we saw it in terms of the accommodating openness of the law, the way that it enabled the collective development of those ownerless sonorities, grooves or 'participatory discrepancies' which have characterised the phonographic oral culture of African-America. However, in the context of *Newton* and the problem of how far copyright in the recording protects the creativity of an individual music maker, the polar opposite issue is raised. Instead of accessibility and public-ness we are confronted with appropriability and the easy rip-off of creative endeavour.

One way out of this difficulty might be to build an aesthetics of performance and sound manipulation into the sound recording copyright, in other words give it the formalist dimension which is so explicitly repudiated at the moment. The trouble is that nothing like the consensus which had been built up by the end of the nineteenth century in regard to the work exists today on these issues. Anyway, codifying the properties of the 'sound work' would simply produce a new aesthetic freeze, another hypostatisation of form. And of course it would cut completely against the grain of phonographic orality. Imagine if Meade 'Lux'

Lewis's claim had been upheld because that 'mechanical' ostinato was treated as a sublimely swinging work-attribute of his first recorded *performance* of 'Yancey Special' made in 1936. We would surely have had no 'Night Train', no 'Blueberry Hill', no 'Oh Carolina', and perhaps no reggae or hip hop. It seems, then, that phonographic orality stands by its very nature in opposition to the formalist tendency in copyright. It follows, further, that the inferiority of the copyright in the recording, its purely physicalist definition, may actually be an advantage for phonographic oral cultures, in that it reduces one part of the market in samples to a simple matter of trading recorded fragments. Whatever the economic barriers involved here, at least there is no question of the ownership of underlying sonic form preventing the appropriation of sounds by others.

Looked at in this way, the significance of *Newton* is twofold. First, Manella J. clarified the distinction between copyright in the recording and in the musical work, defining the former in what we have been calling physicalist terms. Second, in regard to the work attributes of the sample from 'Choir', the judge took the view that these did not reach the threshold of significant form, either in relation to the originality requirement or the *de minimis* principle. As a result there may now be slightly more latitude for unauthorised sampling from the musical work.

Of course the case was a rebuff to James Newton in his attempt to show that a piece of music could be both an authored work *and* a part of the African American music tradition. That is unfortunate. But the tensions between authorship, orality and the imperatives of the music industry as represented in copyright law prevent such a synthesis. By the same token, it is the exploration of these very tensions which has led in *Newton* to a qualification of the position established after *Grand Upright*. In principle, at least, certain kinds of sampling may now take place without permission of the copyright owner. We appear to be on quite a different legal planet to that ruled by Duffy, J. with his invocation of the Eighth Commandment.

In practice, though, it is difficult to see how *Newton* will produce a more open copyright regime. Pioneering hip hop samplers, Public Enemy, argue in a recent interview that the shift from free sampling to a highly regulated market in samples occurred towards the end of the 1980s, well before *Grand Upright* in other words. Injunctions and the threat of injunctions were sufficient to introduce this new regime. Hank Shocklee, the member of Public Enemy most concerned with production, describes how their first album, *It Takes a Nation of Millions to Hold Us Back*, was made in 1987 with a multitude of samples, but only a handful of clearances. By 1991 the situation had completely changed.

We were forced to start using different organic instruments, but you can't really get the right kind of compression that way. A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that's sampled off a record is going to have all the compression that they put on the recording, the equalization. It's going to hit the tape harder. It's going to slap at you. Something that's organic is almost going to have a powder effect. It hits more like a pillow than a piece of wood. So those things change your mood, the feeling you can get off of a record. If you notice that by the early 1990s, the sound has gotten a lot softer (Shocklee 2004).

What Shocklee is complaining about is an enforced retreat to an older kind of phonographic orality based on the imitation of sounds, not their direct, physical appropriation through

sampling. As a result, paradoxically enough, a key aspect of hip hop form has been undermined.

Shocklee's statement is testament to the power of the corporate cultural industries in controlling the terms and conditions of production. However, this is not really a *political* regime in the way that Schumacher, Vaidhyathan and others have suggested. For if the copyright system is conservative it is not overly prescriptive. Its ultimate function remains what it always has been: copyright law, with the work as its centre, provides optimal conditions for exchange. Of course capital always wants maximum property rights. But this is so that it can select which rights to claim according to market conditions and its strategies for accumulation. When openness is appropriate, as in the case of the blues, corporate copyright owners will be open. At other times, as with hip hop and sampling, they will close down creative options in the interests of trade. In all circumstances they will collect. To change this situation we may need to abolish capitalism, but that is probably beyond the scope of the present paper.

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## NOTES

Many thanks to Anne Barron for invaluable editing and advice on this article.

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<sup>1</sup> See Kant (1790/1951); and for a critical perspective, Eagleton (1990).

<sup>2</sup> See Davies (1994) for a discussion of expression theories of music.

<sup>3</sup> Duke University, *Historic American Sheet Music*, (Rare Book, Manuscript and Special Collections Library 1999) <<http://scriptorium.lib.duke.edu/sheetmusic/>> [accessed 05 May, 2005].

<sup>4</sup> See further on this theme, Barron (2005b), in this collection.

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<sup>5</sup> The following discussion makes use of a dataset provided by Columbia Law School Library. The *Music Plagiarism Project* (2002) is an on-line archive of key music copyright cases from the U.S. involving ‘plagiarism’, <http://www.cnmtl.columbia.edu/projects/law/library/introduction.html> [accessed 05 May, 2005]

<sup>6</sup> *Shapiro, Bernstein v. Miracle Record*, 91 F. Supp. 473 (N.D. Ill. 1950).

<sup>7</sup> In 1947 the term ‘Rhythm and Blues’, or ‘R&B’, replaced ‘Race’ as the name used by the music industry for black popular music.

<sup>8</sup> See Neil Slaven’s liner notes to CD boxed set *The R & B Hits of 1952*, (London: Indigo IGOTCD 2532, 2003).

<sup>9</sup> Modality, as used in this way to refer realism effect, is a concept from the emerging field of social semiotics. See Van Leeuwen (1998).

<sup>10</sup> s.102(a)(2) and (7) of the Copyright Act 1976 (US) protect musical works and sound recordings respectively. The same would apply under UK law, applying sections 3 and 5A of the Copyright, Designs and Patents Act 1988.

<sup>11</sup> Alan Korn and Jeffrey A. Berchenko, *First Amended Complaint* (USDC CDC, Case no. CV 00-04909-NM, 2001).

<sup>12</sup> On the particular conditions of capitalist production in the cultural industries see Miège (1989). Actually, similar terms tend to apply in respect of publishing and the work. Newton is relatively unusual in having had enough money, knowledge and entrepreneurial drive to set up his own publishing company and thus retain full control over his composition.

<sup>13</sup> For more on the ‘physicalist’ and ‘formalist’ approaches to the subject matter of copyright see Barron (2005a; 2005b).

<sup>14</sup> [Internal cross-reference needed here – in the present draft it is p. 7.]