



Steal This Music

HOW INTELLECTUAL PROPERTY LAW
AFFECTS MUSICAL CREATIVITY

Joanna Demers

THE UNIVERSITY OF GEORGIA PRESS

ATHENS AND LONDON

CONTENTS

Making Music in the Soundscapes of the Law,

by Rosemary Coombe *vii*

Acknowledgments *xiii*

Introduction *1*

Chapter One Music as Intellectual Property *11*

Chapter Two Arrangements and Musical Allusion *31*

Chapter Three Duplication *71*

Chapter Four The Shadow of the Law *111*

Notes *147*

Bibliography *159*

Index *171*

MAKING MUSIC IN THE SOUNDSCAPES OF THE LAW

Although copyright applies to many cultural expressions, its extension into the field of musical creativity manifests most clearly the complexities of the law and the range of its cultural influence. From its origins as a right to prohibit the unauthorized copying of sheet music, musical copyright has dramatically expanded. With respect to musical compositions, the law now enables copyright holders to enjoin public performances, broadcasting, the making of sound recordings in any medium, and, in many jurisdictions, the sharing of music with the aid of digital technology. Each of these exclusive rights can be separately assigned or multiply licensed for distinct purposes, potentially creating tangled webs of prohibition that freight the use of music with dangers of litigation. More and more performances are now considered public (for example, songs sung at family meals in restaurants, at children's day care centers, and at summer camps), and the reproduction of even short samples of a song is potentially an infringement if the original work is recognizable.

The reach of copyright law has extended far beyond compositions to encompass sound recordings and performances as unique "works" of creativity deserving protection. Rights over recordings and performances, known as neighboring rights, in many jurisdictions are simply incorporated into existing copyright statutes. They exacerbate

the already complicated webs of protection woven around musical works. Terms of copyright protection have become progressively longer, ensuring that fewer and fewer works of musical creativity enter the public domain. The realm of acts exempt from infringement liability—including certain reproductions, performances, and communications of musical works—has not expanded as rapidly as the body of limitations that increasingly encroach upon the range of social activities in which music may be enjoyed. Even the physical media for fixing music have been taxed, and legislators have passed laws against circumventing technological “locks” used to prevent copying of electronic media even where some of the copying the new laws prevent might actually be permitted under traditional copyright laws. Although there is a rich body of case law elaborating the public’s right to fair dealing and fair use of works, copyright owners seek to circumvent it. In any case, however potentially generous, fair use is valuable only to those who can afford the fees necessary for aggressive litigation. Most fans and creators who share music will be sufficiently intimidated by a corporate “cease-and-desist letter” on legal letterhead to stop their offending activity—regardless of how creative, transformative, noncommercial, or noncompetitive it may be—go underground, or pay a licensing fee set by corporate fiat. Meanwhile, the recording industry that tends to control the greatest concentration of copyrights in musical works has also learned to deploy contract law, trademark law, common law unfair competition suits, and even publicity rights to limit listening practices and creative use of music without authorization and payment.

This legal situation leaves us with a musical culture structured primarily in favor of the financial interests of corporate intellectual property holders and shaped by the contractual conditions they establish. Any presumption that music serves public purposes and helps support social objectives seems to have vanished just as any notion that the state should act to protect the public interest and

to secure access to a range of public goods has become illegitimate. Even the long tradition of socializing the next generation into society's norms and values through music is rendered suspect when underfunded school systems and nonprofit social groups must pay royalties to pass down a nation's cultural heritage to its children.

The irony here is that perhaps no area of human creativity relies more heavily upon appropriation and allusion, borrowing and imitation, sampling and intertextual commentary than music, nor any area where the mythic figure of the creative genius composing in the absence of all external influence is more absurd. Contemporary technologies have greatly multiplied and democratized opportunities for musical creativity and self-expression, while also providing means for the musically enthusiastic to share music with others and to accelerate the processes of collaboration on which musical innovation relies. Have we reached a crossroads? Will the ever more aggressive legal tactics of corporate intellectual property holders put an end to sharing and collaboration, or is there a "will to music" that will continue to energetically evade attempts to restrict such practices?

In this lively and accessible primer, Joanna Demers explores this terrain and moves considerably beyond it, demonstrating that the intellectual property provisions that apply to music do not merely prohibit forms of musical expression and modes of consumption. Through interpretation and misinterpretation by creators and users, intellectual property rights in music help shape the field of musical forms available to us, the tendencies of musical allusion and appropriation, and the emergence of alternative forms of regulation and musical sociality. From a sociological and anthropological perspective, intellectual property law is generative as well as prohibitive.¹ Creative practices and new norms, values, and conventions—new moral economies—grow up in the shadows of the law.

The privileging of melody in the law's recognition of the musical

work, for example, may shape practices of arrangement. The availability of materials in the public domain may attract disproportionate creative investments in older tunes. In the mid-twentieth century, three conditions contributed to an environment conducive to forms of musical appropriation that gave birth to rock 'n' roll: first, the law's failure to recognize unfixed works from oral traditions; second, the limited protection afforded sound recordings and their performers; and third, the lack of acknowledgment of voice and performance styles as legally protectable attributes. The law's validation of melody and harmony as protectable entities has arguably provoked forms of avant-garde musical collage that highlight "the arbitrary distinctions between sound, music, and noise" as Demers reveals. Social resistance to the legal equivalent of musical composers and literary authors is expressed in forms of creative transformation that challenge the hegemony of authorial intention in determining musical significance. The novelty collages ("mash-ups") that Demers considers owe a great deal of their popularity to their illegality and to the creative ways in which authorial personas that enjoy increasing protection by intellectual property laws are drawn into new realms of unintended signification. Her reading of the evolution of allusion and sampling practices in hip-hop and "esoteric collage" is an insightful exploration of the distinctive means by which the performance of authenticity in a cultural tradition demands forms of cultural appropriation suppressed by the overreaching of copyright holders.

This volume is an important study of shifting cultural values and new musical practices generated in relation to a legal climate characterized by uncertainty and change. Compositional collage activity appears to be strongly influenced by the copyright status of musical materials, and new technologies are evolving to enable musicians to render collages whose musical origins cannot be discerned. A new

market in “pre-cleared” samples has developed to meet creative demand. New social venues for sampling, such as underground parties and scratch competitions, have emerged to evade legal constraints. The growing role of copyright in the field of music has also turned an increasing number of artists into intellectual property activists, just as it has spawned an alternative, more democratic regulatory regime—the Creative Commons, in which creators and users bypass corporate middlemen to ensure that music is available for shared use.

World music also continues to “constitute an ethical minefield,” as Demers admits, because of the weak protection afforded to non-Western musical traditions and the sense that profiting from the musical forms of others is exploitative. This situation is likely to change in the near future as new forms of intellectual property protection are devised for “traditional cultural expressions” and as digital communications technologies make it easier or more likely that communities of origin will become aware of unauthorized appropriations of their musical heritage. If these new cultural rights are exercised by governments, however, it seems likely that the controls they exercise and the fees they demand will be resented as much as those of their corporate counterparts. In this case as well, I suspect, we will discover that the practices, values, and meanings shaped in the light of the law and in its shadows will be as diverse as the forms of musical creativity we celebrate.

Rosemary Coombe

Canada Research Chair in Law, Communication,
and Culture, York University

NOTE

1. Coombe, *The Cultural Life of Intellectual Properties*.