

# COPYRIGHT LAW and HARMONIC STRUCTURE

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## INTRODUCTION

Copyright law is an important concern for the musician in today's contemporary society. It affects all aspects of music in our culture. The products (sheet music, recording, videos, etc.) from all styles of music, whether classical, popular, country or jazz, are protected. Most musicians view the copyright law as having the greatest significance for composers and arrangers; however, educators and performers need to understand how copyright law can pertain to their work.

The Copyright Office, in *Copyright Basics* (1987), describes "copyright [as] a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of 'original works of authorship'" (p.3). The Copyright Act of 1976 (17 USC 102) defines works of authorship to include the following categories:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works; and
7. sound recordings.

The Copyright Office states:

this protection is available to both published and unpublished works. Section 106 of the Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

1. To reproduce the copyrighted works in copies of phonorecords;
2. To prepare derivative works based upon the copyrighted work;
- 1.

To distribute copies of phonorecords of the copyrighted work to be public by sale or other transfer of ownership, or by rental, lease, or lending;

4. To perform the copyrighted work publicly;
  5. To display the copyrighted work publicly.
- (Copyright Basics, 1987, p.3).

## PURPOSE

Protection of an original work is clearly defined under the Copyright Act of 1976; however, there is one area of interest to composers, arrangers, performers and educators of jazz and improvised music that remains undecided. The area of uncertainty concerns whether the harmonic structure of a work, the chord changes, can be copyrighted. The creation of new melodies on an established harmonic progression is the very nature of jazz and all improvised music. If the harmonic progression and structure of a work is copyrightable without a melody, then an improviser could be in violation of copyright law with every improvisation. The purpose of this paper is to examine how copyright law and common practice affects the jazz musician.

## ORIGINALITY

The basic question of whether a work can be copyrighted depends upon the originality of the work. In Nimmer On Copyright (1987) the requirement of originality of a musical work is examined:

It has been said that a musical work consists of rhythm, harmony and melody, and that originality if it exists must be found in one of these.

One court has suggested that “originality of rhythm is a rarity, if not an impossibility,” and at least one other court seems to have agreed that originality may not be found in rhythm alone. However, one court has recognized copyrightable originality in rhythmic annotations, and another found the necessary originality in fingering, dynamic marks, tempo indications, slurs and phrasing.

The courts have hesitated to find the necessary originality in harmony, and it has been suggested that harmony cannot in itself be the subject of copyright. However, at least one court seems to have found copyrightable originality in harmony.

Melody is, of course, the usual source of originality in musical compositions.

(P. 2-57 - 2-58)

Nimmer elaborates further on how melody is the usual source of contention when there is a question concerning copyright.

## CASE LAW

The copyright law is clear when there is any question regarding the originality of a melody; however, there is a great deal of uncertainty concerning the originality of rhythm and harmony. Nimmer (1987) cites three cases that pertain specifically to harmony. In Shapiro, Bernstein & Co. v. Miracle Record Co., (1950) there was a question concerning whether the bass line was copyrightable. The court could not find the necessary originality in the harmony:

It is agreed by the parties that the trebles (melody) of both compositions are different; it is agreed that the basses are identical. Infringement, if any, must therefore be in the bass.

[The] bass line is too simple to be copyrightable; that is a mechanical application of a simple harmonious chord; and that the purpose of the copyright law is to protect creation, not mechanical skill. (p. 474-475)

In Northern Music Corp. v. King Record Distributing Co., (1952) one of the questions before the court clearly dealt with harmony and if it is copyrightable:

In suit for infringement of copyrighted musical composition, it is in melody of copyrighted composition, or arrangement of notes or tones, that originality must be found, since it is arrangement or succession of musical notes which are fingerprints of composition and establish its identity. (p. 394)

The court's ruling on this issue says that harmony cannot be copyrighted:

Technically analyzed, a musical composition is made up of rhythm, harmony, and melody. Originality, if it exists, must be found in one of these .... Harmony is the blending of tones; this is achieved according to rules which have been known for many years. Being in the public domain for so long neither rhythm nor harmony can in itself be the subject of copyright.

The decision of the court in Wihitol v. Wells (1956) found in favor of the copyrighting of harmony. The harmonic structure of the work in question, implied by the writing of vocal parts, was protected by copyright in the opinion of this court: The writing of the three other parts, alto, tenor and bass, was further original work of the plaintiff. We hold plaintiff's copyright is valid. (p. 554) Is this question concerning harmony in Wihitol v. Wells (1956) one of harmonic structure or one pertaining to arrangement? The court does not distinguish between the two possibilities; however, it implies that harmonic structure can be copyrighted.

The Copyright Act of 1976 revised the law these decisions were based upon; yet, the decisions in these cases, while over thirty years old, are still valid law. Each case was shepardized and found to still be sound legal reasoning. In the revised copyright law, the definition of "original works" remained essentially unchanged. There is no mention of whether the harmonic structure of a musical work is considered original in and of itself and therefore copyrightable exclusive of the melody. When any one of these cases were cited in an action pertaining to music, the question concerned the protection of melodic originality, not the originality of harmonic structure or progression.

## MUSIC LICENSING AGENCIES

When inquiring to music licensing agencies, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), concerning their position on whether a harmonic progression could be copyrightable in and of itself, neither agency could or would give a definite answer. When questioned about this particular problem, Cynthia Lee, of the ASCAP legal department, would not give an answer. She said that the question was unique and inquired in the office to see if anyone had an experience in this particular area. No one had any specific knowledge concerning harmonic originality and "it was not ASCAP's policy to give legal advice over the phone." She then said that their main reference for questions dealing with copyright was Nimmer On Copyright and that would be an excellent place to begin research. (C. Lee, personal communication, April, 7 1988).

Gary Roth at BMI was considerably more helpful. Mr. Roth is a lawyer in the legal department and prefaced the conversation by stating that he was "not a musician, only a lawyer familiar with copyright." He stated that he had never had an inquiry concerning the copyrighting of harmony alone; however, he was willing to give his opinion. He said that the law was very clear in not allowing a copyright to public domain material. He believed the question to be whether the material (harmony) is "distinct enough in and out of context for a knowledgeable individual to recognize the work without the melodic line. This would establish the original right of authorship." He concluded by saying that this was a gray area and would probably need to be settled in court. (G. Roth, personal communication, March 31, 1988).

Materials sent from the Copyright Office, after an inquiry on this matter, offered no new

information concerning harmonic structure. The circulars are mainly concerned with melodic lines and lyrics. In fact, there is no mention of harmony in any of the circulars they sent on copyright.

## COMMON PRACTICE

What does all this mean to the composer, arranger, performer or educator of jazz music? For years jazz composers and performers have written or spontaneously created new melodies based upon established harmonic progressions. The progressions have come from what are called “standards,” tunes that have stood the test of time. Most knowledgeable musicians, not just jazz musicians, would be able to recognize the original melodies from hearing the chord progressions. A few examples include:

STANDARD	JAZZ MELODY
Sweet Georgia Brown	Dig - Miles Davis/Jackie McLean
Cherokee	Tea Pot - JJ Johnson
Whispering	KoKo - Charlie Parker
What Is This Thing Called Love	Groovin' High - Dizzy Gillespie
All The Things You Are	Hot House - Tadd Dameron
Get Happy	Prince Albert - Kenny Dorham/Max Roach
Out Of Nowhere	Out of the Blue - Mile Davis
You Stepped Out Of A Dream	San Soucie - Gigi Gryce
After You've Gone	Chick's Tune - Chick Corea
The Masquerade Is Over	Later - Louis Smith
Love For Sale	'56' - Johnny Griffin
Love Come Back To Me	Ezz-thetic - George Russell
	Bean and the Boys - Coleman Hawkins

These tunes have a new melody and new title but have exactly or basically the same chord progression as the standard. Some composers even allude to the standard tune through the title of the new melody:

STANDARD	JAZZ MELODY
Night And Day	Day And Night - David Liebman
Love Walked In	Ni Deklaw Evol - Thad Jones

New melodies have even been written for jazz tunes:

STANDARD	JAZZ MELODY
Lady Bird - Tadd Dameron	Half Nelson - Nelson Boyd
Confirmation - Charlie Parker	Denial - Miles Davis
	Jucy Lucy - Horace Silver
Well You Needn't - Thelonious Monk	I Didn't - Miles Davis

There are many other examples not listed here. It is interesting to note that each of these pieces, the original standard and the jazz melody, is protected under copyright. Precedent appears to have been established.

### TITLED PROGRESSIONS

When the harmonic progression is labeled with a title, is it then protected by copyright? While the copyrightability of harmonic progressions has not been seriously tested in court under the Copyright Act of 1976, common usage seem to consider harmonic progressions public domain. Titles are “not eligible for statutory copyright protection” (Copyright Basics, 1987, p. 4). However, there appears to be a judgement in favor of the progression being protected under copyright when a specific title is applied to the harmony. In Wihtol v. Wells (1956) the court stated:

Defendant urges that the title to a copyrighted song is not protected by the copyright. We agree that the title, in itself, is not subject to copyright protection. We think, however, that the title of a copyrighted work should be taken into account when the same title is applied to a work copied from it. (p. 553)

The Title associated with the progression appears to be the key as to whether the harmony can be protected under copyright. Mr. Ross’ opinion, that if the harmony was “distinct enough in and out of context for a knowledgeable individual to recognize the work without a melodic line” (G. Ross, personal communication, March 31, 1988), would be greatly strengthened by the addition of a title. A title would imply a melody, especially if the accompanying harmonic progression fit the tune. Determining the original right of authorship would therefore be less in question.

### CONCLUSION

Since the Copyright Law is vague in the area of harmony, major music associations are unsure of how the law applies to harmonic structure and can only offer an opinion. Nimmer On Copyright, the respected authority on copyright law, suggests that harmonic progressions cannot be copyrighted. Facts bearing upon the resolution of this issue would include the current practice and common usage of harmonic progressions by performers and composers. If harmony was found to be copyrightable, due to the confusion concerning the law, a violation would have to be proven to have been malicious and not one of good faith. In conclusion, harmonic progressions are not specifically mentioned in the Copyright Act of 1976 and whether they can be copyrighted remains an undetermined area. Only a court case with harmony as an issue will cast any new light on this matter.

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