Panel: Copyright, Justice, and Improvisation

Chair: Palmira Granados Moreno (Faculty of Law, McGill University)

Abstracts:

Charity Chan: "Alternative Copyright and Distribution Methods in Experimental Music"

My paper focuses on the innate possibilities for music distribution that Creative Commons offers to artists involved in marginal music practices, particularly when combined with other alternative distribution resources (such as CD Baby). The latitude available to artists through Creative Commons licenses lends itself well to alternative forms of distribution, particularly with methods that would otherwise, be considered illegal (i.e. P2P, CD burning, internet sources). In the case of experimental music (and arguably for all marginal art practices), these advantages are significant because Creative Commons allows artists to choose the degree of control they maintain over the use of their work, the possibilities for the proliferation and dissemination of their work are much greater than with conventional copyright licenses. While the benefits of Creative Commons for the larger creative good of has been well documented, the advantages these licenses have the potential to offer for distribution is not as widely known. This paper discusses the benefits as well as the drawbacks encountered by artists who have released music under Creative Commons licenses or who have used online distribution resources such as CD Baby or IODA. For the purposes of this study, experimental music is limited to improvised and avant-garde noise musics.

Andrew Eckart and Martin Eckart: "Collective Improvised Authorship through Open Licensing"

While it is relatively easy to identify improvisational activities in extramusical domains, it is more difficult to identify the structures which foster and promote those activities. We argue that opensource licensing is one such structure whose rules promote collaborative improvisations in the creation of software and documentation. We look at Wikipedia as an example of collective improvised writing which enacts social change by providing open information and education. The free and open nature of Wikipedia's licensing under the Gnu Free Documentation License as well as the open, discursive nature of Wikipedia editing has helped to foster an ever-changing educational resource. Rules within Wikipedia's law and structure foster, promote and in some instances enforce collaborative improvisation. Not only does licensing such as the Gnu Public License or Creative Commons foster creativity through the variation and manipulation of the work of others, it also contains elements which promote improvisational practices for immediate collaboration and creation. By thinking about law as the musical composition which guides and directs an improvising

ensemble, we may identify how improvisational law can foster the collective improvisation of meaningful intellectual creations throughout the world.

Daniel Albahary: "The Constructive Trust as Remedy for the Appropriation of Jazz Music"

Suggesting that the relationship between intellectual property law and legal protection for cultural authorship is a disjointed one, this paper examines how modern intellectual property law in common law systems could be adapted to remedy the cultural appropriation of early twentieth century African-American jazz music in the same way that intellectual property law remedies individual rights holders for infringements of copyrights, trademarks, and patents. The cultural appropriation of early twentieth century African-American jazz music by white American musicians is an important area of history which aligns well with modern debates about the adequacy or inadequacy of copyright law because, historically, inadequate copyright protection has increased the economic inequality in American society and shown that the African-American community has not fully reaped the benefits of its phenomenal creativity. This paper argues that some form of restitution is in order based on this inadequacy, because millions of dollars were made by white Americans from the marginalization of black Americans and then further from the music that arose from such marginalization. The paper operates from the context that it is socially and legally insufficient to simply recognize that African-Americans had their culture "stolen" from them and "culturally re-packaged" by white Americans, and that there is potentially no available legal remedy for such appropriation other than as an individual rights holder. Justice demands a remedy. Thus, the paper explores the possibility that the same ideas that govern the protection of individual invention, creation and expression could be portable to black jazz musicians who had their collective expression—including the unfixed and intangible parts of it—appropriated for profit. The paper argues that there should be a focus on judicial remedies for the appropriation or infringement of collective cultural expression because it is arguably as legitimate a form of copyrightable expression as anything else. More often than not, however, the issue of addressing remedies for cultural appropriation and theft" is approached in determining how to protect cultures before the appropriation occurs. What makes this paper different is that the analysis is focused on legal remedies once or after the appropriation has already occurred. When all of the individual musicians' expressions are combined, there is a body of music called jazz, which has its own uniqueness and distinctiveness. In other words, the whole body of jazz is greater than the sum of its parts. Jazz was a particular expression of ideas that was imbued with African-American experience and identity. If an individual-cum-culture's expression is appropriated by another—an outsider, such as white America—simply because there is a desire to do so, it is easy to do so, or the individual author and his or her community is easily marginalized, the very act of appropriation is not diminished or lost. If that outside appropriator adopts that cultural expression and profits

financially from it, such as with jazz, such appropriation may amount to unjust enrichment. However, drawing a straight line to this conclusion is more easily said than done and this paper delineates the journey to it. To this end, a leap in intellectual property law jurisprudence is proposed that goes from merely protecting individual authorship to viewing cultural expression as intellectual property. The paper examines modes of cultural appropriation, authenticity, and ownership as well as the common law intellectual property regime, and the appropriation of African-American music and culture through the examples of jazz, Solomon Linda (original author of the prolific “Lion King” song), Willie Dixon and Led Zeppelin. By analogizing mass restitution litigation for slavery and other class-based claims, the paper concludes by suggesting that a plausible or viable judicial remedy for the appropriation of jazz music (and other culture) may be found in the constructive trust.