Music Improvisation and Copyright
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1. Introduction

On January 24th, 1975, during a drive tour of Europe with ECM record producer Manfred Eicher and sound engineer Martin Wieland, Keith Jarrett had been invited to perform at the Opera House in Cologne. The concert had been scheduled at an unusually very late hour, immediately after an opera performance. That concert would never have been the one music lovers know through the ‘Köln Concert’ album if a number of important things had not gone awry.¹ The concert was organized by a teenager who had arranged the rental of a Bösendorfer grand piano that, for a number of misunderstandings with the opera house staff, was never delivered to the theatre stage. What Jarrett and his record label’s team found when they arrived at the venue was a much smaller baby grand – a backstage piano used mostly for rehearsals. Having an unexpectedly bad instrument at his disposal - thin in the upper registers and weak in the bass register – Jarrett could have easily cancelled the live recording session that ECM had been planned in Cologne since the beginning of the European tour concert. The label team decided to make a record of the performance anyway, since they had brought and set all necessary equipment on stage.

In an interview with Don Heckman, Jarrett also recalled that, before that concert, he was incredibly tired after a long drive from Zurich and for not having slept for 24 hours.² Anger and disappointment for the conditions in which the performance was taking place can be perceived especially at the very beginning of the performance,

¹ The author would like to thank Jane Ginsburg, Guido Zaccagnini, Luke McDonagh, Enrico Bonadio and Nicola Lucchi for their review of a draft of this chapter and their suggestions and criticism. Errors and/or omissions are the sole responsibility of the author.
² See Don Heckman, The Making of Keith Jarrett’s The Köln Concert, The GRAMMYs, 7 January 2014. As reported in the interview, Jarrett was also very upset (“in almost hell”) for an unpleasant experience he had at an Italian restaurant where he had his pre-concert dinner (“Everyone else was eating, I was the one who was going to play in an hour, and I still didn’t have any food. And then when they finally brought the food, I was still hungry, because I wasn’t happy with the food they served.”)
in the first track, when someone in the audience laughs after having heard Jarrett starting his improvised performance by imitating the bells the theatre used to play in the lobby to warn the public that a performance was about to start.\textsuperscript{3} In the same interview, Jarrett recalled that both the enthusiastic audience he found at the theatre and the challenge of having to use a surprisingly bad instrument strongly motivated him to play in a different way.

While performing on that night he did not know the rolling and rhythmically repetitive figures he played with the left hand, to strengthen the weak bass notes, and his virtuosic phrasing confined by the right hand in the middle part of the keyboard, to avoid the thin upper registers, would have been permanently fixed and become legendary. The record ECM produced after that adventurous musical journey is still the best selling album in the history of jazz and, over the years, became an object of cult for musicologists, music lovers and performers themselves.

This story exemplifies how improvisation practices can place a skilled performer in a position to create original and highly regarded pieces of music directly on stage without having to rely on fixed musical materials and on musical texts. This type of music work can easily be boosted by the intrinsic unpredictability and aural dimension of live performances and unexpected, adventurous conditions under which a skilled musician might be encouraged to perform in response to “spontaneous creative impulses”\textsuperscript{4}, as Jarrett did in Cologne.

As this chapter shows, composing a piece of musical work spontaneously (i.e. in an improvisatory manner) without having previously fixed the work into a musical text or another tangible medium openly challenges copyright laws that, for historical reasons, especially in common law systems, are based on primacy of notated or fixed musical compositions. The chapter intends to clarify, from a broadly comparative perspective, whether and how current copyright systems, in spite of the emphasis placed by existing laws on notated or fixed works, can accommodate the interests of music authors resorting to improvisation practices. Improvisation gives rise to an unconventional type of copyright in so far as composition and performance occur

\textsuperscript{3} The introductory motive played by Jarrett at the beginning of the first track of the album, and imitating the bells in the theatre hall, is G-D-C-G-A.

simultaneously, in a way that the improvisation itself is the composition being performed.⁵

The chapter is structured as follows. Section 2 explains briefly why, from an historical point of view, copyright systems ended up disfavoring extemporaneous authorship, in spite of an international legal framework which is strongly protective of authors’ rights. Section 3 shows how the requirement of originality and fixation apply to improvised musical compositions and how such unconventional kind of copyright works is protected in different copyright systems. Section 4 critically evaluates the impact of the exclusive rights of authors and music publishers on derivative works, taking jazz music as an example of performing art based on quotation, elaboration and transformation of pre-existing copyright works. Section 5, finally, while considering pros and cons of implementing copyright paradigms in the realm of improvisation, shows that a broader understanding of musical authorship, which encompasses also the performative aspects of composition, and higher consideration for autonomy of follow-on works would ensure a more adequate incentive and reward of creativity that relies on improvisation techniques.

2. Notion of copyright ‘music work’

Even though music is, by its very nature, a performing art, early copyright statutes in Europe started affording legal protection to composers and, even more so, to music publishers in relation to their musical texts. Legal protection of musical works developed – in both the common law and civil law traditions – as an extension of the protection originally reserved to books and ‘writings of all kinds’ to written musical compositions.⁶ In particular, in 18th century Britain, the renowned Statute of Anne (1710) did not afford protection to musical works, at least until 1777, when Johann Christian Bach, the youngest son of Johann Sebastian Bach, one the leaders of the

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London music scene at that time, brought a successful case against publisher Longman for the unauthorised publication of some of his works. As pointed out by Barron, the ruling by Lord Mansfield in *Bach v Longman* extended the protection afforded by the 1710 Act from ‘books and other writings’ to musical scores on the assumption that musical compositions were ‘writings’.

Since the only way to preserve music was through written notation, copyright in music works developed historically as a form of intellectual property being incorporated primarily into music *texts* and afforded to music ‘writers’ (i.e. composers and lyricists), who sold their rights to publishers in exchange for royalties. At that time, statutes and courts took into consideration the only aspect of musical creation that could be fixed onto a medium and be commercially exploited, namely, music scores. From a historical point of view the codification of the modern copyright system coincided, in the second half of the 18th century, with the emergence of a proper and independent concert scene and the formation of a market for theatrical music (e.g. operas) and vocal or instrumental recitals that enabled composers to present new pieces to the public and to earn from performance of their own music more than what they gained from music publishers in terms of royalties. The music publishing business was boosted by the emergence, since the 18th century, of paying audiences, especially in theatres, which attended public performances of musical works that, until then, had been confined to small and closed circles in religious ceremonies or aristocratic gatherings. Demand for music scores increased with the emergence of bourgeois audiences with surplus income, time and interest in performing, in their private homes, what they could appreciate in public performances.

It was only with the invention of the phonogram that the performing aspects of music, and in particular the ephemeral sounds of improvisation, which had played an essential function in transmission and evolution of music across history, started being

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8 See Anne Barron, ‘Copyright Law’s Musical Work’, *supra* note 6, pp. 116-118. The author quotes a excerpt (p. 118) from *Bach v Longman* [1774]: 624, where Lord Mansfield states: “Music is a science; it may be written; and the mode of conveying the ideas is by signs and marks […]”.
10 See Anne Barron, ‘Copyright Law’s Musical Work’, *supra* note 6, p. 115.
To use Walter Benjamin’s lexicon – at that time music performances lost their ‘aura’ and their eminently ephemeral character while being incorporated into reproducible and transmissible items that were distinct from original and authentic performances which took place at a given time and in a certain place before a present audience.12

The demand for musical works continued to expand with the advent of new technologies enabling large-scale dissemination of music through phonograms and the evolution and diffusion of mass media. Such technological evolution was accompanied by an expansion of the scope of music copyright, which aimed at enabling composers and music publishers to control (or at least be remunerated) for radio and TV broadcasts of their works. At the same time, sound recordings became objects of mass consumption and provided copyright owners with a source of additional revenues based on mechanical reproductions and communication to the public of musical compositions.13

Although in different ways, and with a different timing in continental-European and Anglo-American jurisdictions, the artistic work of music performers and the investments of record producers gained momentum through the introduction of an additional layer of legal protection specifically targeted at fixations of sounds by music performers and production of phonograms by record producers. The rise of these new ‘products’ led to the codification in continental Europe of so-called ‘neighbouring’ rights for performers and phonogram producers14 and, in the United Kingdom, of an entrepreneurial form of copyright in sound recordings, whose author was defined by law as the ‘maker’ of a sound recording (i.e. the record producer).15

11 Recording technology became available following Thomas Edison’s 1877 development of tinfoil phonograph technology: see Olufunmilayo Arewa, ‘Creativity, Improvisation and Risk’, supra note 7, p. 1833, who recalls that this new technology was not immediately commercialized for music.


13 From the late 19th century composers and lyricists had already started forming associations and collecting societies whose aim was essentially that of monitoring as well as licensing rights of public performance and, a later stage, radio and TV broadcasting. In addition to that, at least in continental European countries, authors’ collecting societies licensed also the rights of mechanical reproduction for the production and distribution of sound recordings.

14 For instance, Italy started conferring protection to performers and record producers in 1941, through the enactment of a new copyright act which contains a section on rights related to copyright (‘diritti connessi’: see Law n. 633/1941, Title II). France implemented the 1961 Rome Convention, with regard to performers, in 1985 (Law 2nd of July 1985).

15 The United Kingdom introduced rights in sound recordings through the Copyright Act 1956 (cf. Sect 12) whereas Ireland enacted the same right in the Copyright Act 1963; significantly, neither the UK nor the Irish acts granted any statutory rights to music performers. As pointed out by Jane Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’, Columbia Law School, Public Law & Legal
These legislative interventions preluded the conclusion of the 1961 Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations.\textsuperscript{16} Remarkably, the United States were not parties of the Rome Convention and ended up enacting a form of federal copyright protection for “fixation of series of musical, spoken or other sounds” only in 1971.\textsuperscript{17} Interestingly, in the same way as the rights in sound recordings created in UK and Ireland at an earlier stage, US law protects sound recordings that are original in the sense that they are not copied from a previous work. However, US copyright law relies on a different definition of ‘authorship’, under which music performers, recording engineers and record producers can be regarded as joint authors of the sound recording.\textsuperscript{18} Moreover the scope of the US copyright in sound recordings is narrower than its UK and Irish equivalents since it is deprived of the right of public performance, apart from digital audio transmissions.\textsuperscript{19}

As a result of the diversified legal protection of sound recordings and performances, from the second half of the 20\textsuperscript{th} century onwards the structure of music copyright has subsequently relied on distinct and autonomous layers of intellectual property. Such layers target - respectively - musical compositions, fixations of performances and sound recordings in a rigidly pre-determined manner. Following the logic and the spirit of the 1961 Rome Convention, the aim of rights of performers and record producers is not that of rewarding authorship and originality of musical creation, in the same way as the rights of authors do. Rather, their function is to protect the value of the artistic work of performers and, even more so in Anglo-


\textsuperscript{17} Sound Recording Act of 1971, Public Law 92-140 (October 15, 1971), 85 Stat. 391.

\textsuperscript{18} See Sect 101 of the US Code, Title 17, which defines a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”. Under US law recording engineers are regarded as co-authors of the sound recording insofar as they make original contributions to the recording. If, however, recording engineers are employees of the record producer, then the producer becomes the co-author. As regards copyright ownership, moreover, Sect 101 provides that “authors of a joint work are co-owners of copyright in the work”. However, it is customary in the US recording industry that at least employee performers and contributors to the sound recording (such as recording engineers) conclude ‘work made for hire’ agreements assigning all of their rights to a record producer, who subsequently acquires all rights of commercial exploitation.

\textsuperscript{19} The Digital Performance in Sound Recordings Act of 1995 amended Sect 106 of the US Code, Title 17, to introduce an exception to the rule of ‘no public performance rights’ for sound recordings by providing an exclusive right to perform sound recordings publicly by means of digital transmissions.
American copyright systems, the investments made by record producers from slavish copying. From the perspective of improvised music performances, the 1961 Rome Convention text, while restating the principle of primacy of the rights of authors over the rights of performers and record producers, establishes a clear and restrictive link between ‘performances’ and ‘literary or artistic works’, keeping them firmly distinct, as if certain improvisations could not constitute per se original works created simultaneously with the performance (i.e. without having to relate to pre-existing, fixed works). The definition of ‘performers’ was significantly broadened under the 1996 WIPO Performances and Phonograms Treaty (WPPT), where an express reference to (unfixed) ‘expressions of folklore’ suggests that protected performances, in the countries which are parties to the WPPT (which include the United States) should also be music performances as such (i.e. which do not consist of performances of pre-existing literary or artistic works).

3. Originality, authorship and fixation of improvised music

As all intellectual creations, improvised music works can be protected by copyright protection on condition that a work is ‘original’ and, in Anglo-American systems, fixed in a tangible medium.

(i) Originality

‘Originality’ is an essential requirement for copyright to subsist in a given intellectual creation. In the absence of a unitary notion under international copyright law, originality is a concept through which copyright systems define, in significantly different ways, the main characteristics a work should possess in order to trigger copyright protection. As explained by Jane Ginsburg, originality is synomous with authorship, in so far as it identifies the type of contribution which makes an

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20 See the 1961 Rome Convention, Article 3(a): “…actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works”.


22 As pointed out by Jane Ginsburg & Edouard Treppoz, International Copyright Law – U.S. and E.U. Perspectives, Edward Elgar, Cheltenham (2015), p. 278, the Berne Convention does not provide for a minimum threshold of creativity; however, Article 2(3) refers to “original works” whereas Article 2(5) refers to works which constitute “intellectual creations” “by reasons of the selection and arrangement of their contents”.
intellectual work original. In setting out higher or lower standards of intellectual labour, the various copyright systems require either a minimum of personal creative activity (or a ‘modicum of creativity’, as the US Supreme Court held in *Feist v Rural Telephone*) or, in traditional common law, ‘sweat of the brow’, i.e. a standard which allows for copyright protection in so far as works entail expenditure of time and resources. In the last two decades the standard of originality has evolved in Europe as a result of the EU harmonization of national copyright laws and the extension of the standard of the ‘author’s own intellectual creation’ to the generality of copyright works. According to this standard, originality subsists whenever an author makes free or subjective choices and stamps the work with a personal touch.

Originality, as such, does not raise specific challenges to protection of improvised music works. For instance, there is no doubt about Jarrett’s authorship of the three solo piano pieces he improvised at the Cologne opera theatre, especially if one considers that – unlike the vast majority of jazz works – his improvisation did not rely on any pre-existing materials or compositions and took advantage of the unexpected conditions which stimulated Jarrett’s talent and creativity. That type of

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24 See *Feist Publications, Inc v Rural Telephone Service Co., Inc*, 499 U.S. 340 (1991), where the US Supreme Court, holding that the requirement of originality (which consists of independent creation plus a modicum of creativity) is mandated by the US Constitution, excluded that mere aggregation of data could constitute original creations.
25 See Jane Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’, *supra* note 15 pp. 14-16, who emphasizes that the gap between civil law and common law copyright systems was even wider, at least until recently, since countries such as France and Germany formerly endorsed an assessment of originality based on higher or lower artistic or aesthetic merit of works (e.g. the fact that photographs were regarded as “machine-mediated” works made these works less worthy than other creations).
26 Initially, EU law harmonized copyright’s standard of originality in a sector-specific fashion. Directive provisions laid down the concept of ‘author’s one intellectual creation’ with regard to specific categories of works, such as computer programs, photographs, and databases: see, respectively, directives 91/250/EEC (replaced by Directive 2009/24/EC) on the legal protection of computer programs; 93/98/EEC (replaced by Directive 2006/116/EC: cf. art. 6 with regard to originality of photographs) and 96/9/EC on the legal protection of databases. From 2009 onwards, several judgments of the Court of Justice of the European Union have generalized the standard of originality: see, for instance, *C-05/08 Infopaq International A/S v Danske Dagblades Forening [2009]*, which found that 11-word sentences can be ‘[…] suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article […]’; and Joined cases *C-403/08 Football Association Premier League QC Leisure and C-429/08 Karen Murphy v Media Protection Services Ltd [2011]*, where the CJEU rejected Premier League’s claim of originality of football matches since the rules of football leave “no room for creative freedom”.
27 See *C-145/10 Painer v Standard Verlags* [2011], par. 89-92, where the CJEU found that portrait photographs of a young girl were capable of meeting the requirement of originality, in a way that use of the photographs by magazines and newspapers without the photographer’s authorization constituted copyright infringement.
performance would also qualify as original work if Jarrett, in our example, had played his fully improvised pieces not alone but with a group, such as the trio he has formed for decades with Gary Peacock (bass) and Jack DeJohnette (drums). The difference, in comparison to a piano solo performance, is that a group improvisation would entail joint authorship of the works, with a subsequent allocation of the rights in the music work in accordance with either the contribution of each group member to the whole work and/or the deal the band leader might have closed with his fellow musicians before undertaking the performance.\footnote{See Joseph D. Kim, ‘Copyright: Jazz’s Friend or Foe?’, \textit{Law Practice Today, The Intellectual Property Issue}, October 2013, who stresses how, from a practical perspective, at least in the US, a band leader might actually engage the service of the other band members in a written ‘work made for hire’ agreement, which would make the leader own both the composition and the recording as improvised by the group.}

Moreover, considering that music improvisation presupposes a condition of simultaneity of creation and performance, and given the aforementioned structure of music rights, fixation of improvised music can easily give rise to a dual legal protection subsisting in the (abstract) music work and, at the same time, in the performance fixed into a sound recording. In the example of Jarrett’s trio, in case of a live or studio recording, the improvisers would acquire also exclusive rights in the resulting work, on the grounds of the dual protection deriving from the application of both copyright and sound recording rights in the work and in the phonogram, respectively.

Determining authorship of improvised music is certainly more complex and difficult to discern when improvisation draws upon and borrows from pre-existing works, irrespectively of whether the earlier work is still under copyright or in the public domain.\footnote{The conflict between music improvisation and the copyright in pre-existing musical compositions used for purpose of elaboration and transformation is taken into consideration under Sect 4 (see infra).} If a pianist improvises her own variations on public domain works such as Domenico Scarlatti’s keyboard \textit{sonatas} at the time of performing (and recording) such works, her copyright as author of the improvised works and her rights as performer of Scarlatti’s earlier works might prove to be inseparable because of the fusion of the main elements of the old and of the new works. Since rights in fixations and sound recordings are shaped primarily as neighbouring rights (or, in the UK and US, as copyrights in sound recordings) there is an objective risk of confusion between the subject matter of the improvised work - which is by definition \textit{not} expressed through notation, at least initially - and the portions of Scarlatti’s musical work which
are just performed by the pianist, with no original contributions from her part. In the example of music improvisation drawing on public domain compositions, the risk is that the improviser’s musical variations or additions might be viewed, in a very reductive manner, not as original works themselves – because of the original contributions and elaborations made by the follow-on improviser - but as mere performances of the earlier works, i.e. Scarlatti’s sonatas.

(ii) Fixation
What would happen if a solo piano improvisation such as that of the Köln Concert had remained unrecorded? Would such improvisation have any legal value or consequences?

According to Article 2(2) of the Berne Convention, fixation is not a mandatory requirement for subsistence of copyright.  

This means that such a substantive limitation on copyrightable subject matter is a prerogative of national laws. In Anglo-American copyright systems, unfixed works of any kind are expressly excluded from copyright’s scope, irrespectively of how original an improvised music work, a lecture or a theatrical improvisation might prove to be. From a copyright perspective, in countries such as US, UK and Ireland it would be as if Jarrett’s performance had never taken place, due to the fact that fixation of musical work is a mandatory requirement. Unfixed improvised music cannot be protected under UK or Irish copyright law since improvisatory musical creations are not “recorded in writing or otherwise” or “fixed in any tangible medium of expression … from which they can be perceived, reproduced, or otherwise communicated […]”.

Continental-European copyright systems, instead, are less inclined to establish formal restrictions of copyright’s subject matter, even though creation and authorship of musical works are difficult or impossible to prove in the absence of a tangible medium. Countries like France and Italy closely follow the approach of the Berne Convention in not expressly requiring fixation in order to confer automatic protection

30 Article 2(2) of the Berne Convention provides that it shall be a matter for national legislation “ […] to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”

31 See US Code, Title 17, Sect 101 and Sect 102(a); UK 1988 Copyright Designs Patents Act, Sect 3(2); as for Ireland, the 2000 Copyright and Related Rights Act, Sect 18(1).
in response to *creation* (i.e. and not fixation) of *all* original works.\(^{32}\) As pointed out in the literature, in those specific circumstances where French copyright law exceptionally requires fixation (e.g. with regard to choreographic works, circus acts: cf. L 112-2-4) such requirement has been interpreted by French courts as a rule of proof rather than a statutory restriction of copyright’s scope.\(^{33}\)

However, one might legitimately wonder what kind of value a copyright that cannot be effectively proved might have: just a symbolic value? If, in the aforementioned example, Jarrett’s fully improvised solo piano performances in Cologne had not been recorded, the pianist would not have been in a position to claim authorship in his improvised pieces unless he had made a transcription of his own pieces immediately after the concert or had authorized someone else to do so (as it happened many years after the recording).\(^{34}\) Jarrett would not have received, in addition to his performer fees, any additional compensation related to his rights as extemporaneous author of the three pieces. Moreover, the local authors’ collecting society would not have found Jarrett’s improvised piano pieces in any of the existing musical repertoires performing rights societies administer *ex ante*, i.e. before public performances of (written) music works performances occur.\(^{35}\)

4. Copyright and its basic tension with derivative works: the example of jazz

As pointed out above, music copyright follows, mainly for historical reasons, a rigid allocation of rights and a subdivision of roles between authors and performers that clashes with the core business of music genres where the contribution of performance to musical authorship is as important (if not more important, sometimes) than musical texts (i.e., sheets). As pointed out in the literature, it is somehow inevitable that the adoption under modern copyright law of a concept of music ‘work’ entirely based on the aesthetically and economically predominant conceptions of musical creativity in Europe, as developed from the beginning of the 19\(^{th}\) century onwards, ended up

\(^{32}\) This is the same policy goal the Berne Convention pursues by explicitly providing under Article 5(2) that the existence and exercise of copyright should not be made dependent on the fulfilment of any formality such as registration, deposit or filing of copies, payment of fees, etc.


\(^{35}\) As clarified below (see Sect 5), the subsistence of copyright in improvised music works, even in the absence of a recording – at least in those countries where fixation is not an indispensable requirement - might actually encourage a more fair allocation of fees stemming from commercial exploitation of the rights in public performances whenever pre-existing copyright works are used, especially in the domain of jazz music, for improvisatory purposes in the live music business.
excluding antagonist styles and artistic movements from the benefits of copyright systems.36 In certain musical contexts – e.g. jazz, hip hop, punk, rap - improvisation plays such an essential function that the distinction between author’s and performer’s roles might prove to be blurred and very difficult to draw.

The historical development and philosophy of jazz help clarify what obstacles copyright pose to music improvisation, depending on whether improvised works incorporate or develop materials (i.e. melodies, harmony, rhythms) borrowed from earlier musical compositions. Even though improvisation practices have been relevant for performance across modern history of music – from renaissance and baroque music to rap and hip-hop - jazz is certainly the genre for which improvisation has played – structurally and aesthetically – the most relevant function. What makes jazz so relevant to understand the artistic value of improvisation is mainly the way this music historically developed from the late 19th century onwards. Jazz originated from a fusion of Afro-American popular music, which reached the United States at the time of the slave trade, with cultured and sophisticated traditions originally brought to America by European immigrants. Drawings from early nineteen-century New Orleans show that black musicians gathering in Congo Square were playing percussion and string instruments which were identical to instruments used in indigenous African music.37 Work songs that could be heard from slaves in plantations of southern states such as Texas and Louisiana were characterized by different forms of ritualized vocalising such as field hollers, prison work songs and street cries that openly disregarded the Western system of notation and scales. African music performance traditions could also be clearly identified in religious vocal pieces such as gospels and spirituals, in spite of the attempts of religious organizations to convert African Americans to more edifying examples of Western music. This way black people ended up transforming psalms and hymns into music where groups of singers performed variations on the melody and, at the same time, blended their voices through ornamentations resulting in “great unified streams of tone”.38 Afro-American and Latin-American rhythms and melodies ended up influencing also works

38 See Ted Gioia, The History of Jazz, supra note 37, quoting an expression by musicologist Alan Lomax.
by renowned composers and performers from the late 19th century and the early 20th century such as virtuosic pianist Louis Moreau Gottschalk (a New-Orleans born child of a German Jew and a creole woman from Haiti) and Scott Joplin, a native of Texas renowned for his piano ragtimes.

From a copyright-related perspective a crucial aspect triggered by the historical process of fusion and elaboration of different musical traditions is that jazz originates from an inextricable mix of folkloric and, yet, highly sophisticated instrumental and vocal practices which remained essentially *unwritten* and were transmitted only orally for decades. It was only with the advent of the first sound recordings that the eminently performance-based and improvised elements of what we call ‘jazz’ (from an expression used in brothels where legends such as that of phenomenal pianist and composer Jelly Roll Morton originated) became more available to wider audiences and easier to understand, perform and develop at a much bigger scale.

From the early 20th century jazz developed as an artistic form where performers combine music which is written down with music which is improvised. Jazz musicians interact with each other on the grounds of well-established musical structures, where a ‘chorus’ embodies a pre-existing composition which is used by an arranger or a band leader to create a “head” theme (A) and a “bridge” theme (B). The chorus is normally preceded by an introduction and follows, traditionally, a structure where the head and the bridge themes are alternated (e.g. A-A-B-A). The chorus structure allows all performers in a group (starting with the lead instruments) to take the lead and improvise their own solos on a rhythmic and harmonic base provided by instruments (e.g., bass, drums, piano) which loop the initial chord changes, with frequent alterations and substitutions of harmonies.\(^{39}\)

This structure shows that jazz has developed largely as a form of appropriation art based on borrowing, elaborating and eventually transforming existing themes, harmonies and rhythms. A simple explanation of how improvisation has been conceived and organized in the context of jazz music shows why this artistic movement inevitably clashes with the exclusive rights to control derivative works in

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\(^{39}\) As pointed out in the literature, the number of solos or choruses is not pre-determined, in a way that, if each member of a jazz group plays three choruses the underlying music work would essentially make up only fourteen percent of the total work: see Note, ‘Jazz Has Got Copyright Law and That Ain’t Good’, 118 Harvard Law Review, Issue 6, p. 1940 (2005), pp. 1943-1944.
so far as the pre-existing composition is still protected by the copyright of composers and music publishers.

The musical compositions which have traditionally been used for jazz improvisation are catalogued and inserted into famous collections of songs, such as the ‘Real Book’ and the ‘American Songbook’, which are still regarded as works in progress. These pieces are commonly referred to as ‘standards’ and were composed mostly in the 1930s, ‘40s and ‘50s for films and musicals by musicians such as George Gershwin, Cole Porter, Irving Berlin, and many others.\(^{40}\) Improvised music based on elaboration and transformation of copyright standards evidences that the exercise of copyright by owners of popular music repertoires ends up placing music improvisers in a precarious and disadvantaged position with regard to both live improvisations and improvisatory works fixed in studio recording sessions. As far as live music is concerned, improvisations are generally tolerated although not formally authorized by performing rights societies such as ASCAP and BMI, in a way that improvisers cannot acquire any rights in the derivative works they create at the time of their performance. With regard to studio recording sessions, improvisers need the express authorization of the owners of copyright in the underlying musical composition whenever they use such composition to create an improvisatory derivative work to be fixed in a phonogram.

The main obstacle to jazz music improvisation based upon pre-existing music materials comes from a copyright principle - emerged in the second half of the 19th century and enshrined in the 1886 Berne Convention - according to which the author of a work protected by copyright must be granted the right to authorise (and to object to) any adaptations, arrangements or alterations of her work.\(^{41}\)

This means that, under international copyright law, derivative works entail permission by the copyright owner in the earlier work.\(^{42}\) As pointed out above, copyright ends up protecting primarily authors and publishers (i.e., as assignees of the whole or a part of authors’ rights) of notated works (e.g. the Real Book songs) by

\(^{40}\) Standards are “pieces that a professional musician may be expected to know”: see Note, ‘Jazz Has Got Copyright Law and That Ain’t Good’, supra note 39, p. 1942.

\(^{41}\) Cf Article 12 of the Berne Convention (Right of Adaptation, Arrangement and Other Alteration).

\(^{42}\) The fact that such right to control transformations and adaptations also has a moral right connotation under Article 6-bis of the Berne Convention amplifies the chilling effects on music improvisation, especially in countries where the rights to paternity and integrity of copyright works – which are actionable in cases where at stake is the reputation or honour of the author – are more effectively and generously enforced.
granting them exclusive rights of reproduction, public performance and – most importantly – the aforementioned right of adaptation and alteration of an original work. The application of this principle to an eminently performative art such as music – where copyright, as we have seen, subsists mainly in musical texts and the roles of authors and performers are rigidly pre-determined – greatly disfavors all music which is not (or not entirely) encompassed by notation and fixations occurring before performance of the work.

In light of the above-mentioned structure of rights and prerogatives in musical compositions, it is easy to understand why musical contexts and artistic movements where borrowing, modifying and transforming earlier creations have structural functions and an undisputed artistic value can be so much penalised.

If the principle of ‘no derivative works without permission’ were enforced tightly in the jazz music sphere, copyright would inevitably stifle (instead of encouraging) improvisation practices jazz musicians have historically developed and resorted to. If, in live jazz performances, copyright were enforced consistently with its structure of rights, the vast majority of music performances would amount to large-scale infringements of copyright in compositions used by jazz musicians for their transformative purposes.

As things stand, the only way for music improvisers to escape the aforementioned bounds raised by copyright, especially in domains where creation of derivative works is pervasive, is that of relying on the transformative character of their works. Transformative uses can be successfully excluded from music copyright’s scope under the fair use doctrine, as the U.S. Supreme Court did while considering that a rap version of Roy Orbison’s ‘Oh, Pretty woman’ by group Live Crew was transformative enough to constitute a parody of the original song. In European copyright systems, instead, in the absence of a broadly construed exception to copyright such as ‘fair use’, transformative uses can be excused under exceptions such as parody and quotation or, as explicitly provided in certain countries, whenever copyright law explicitly grants musical variations the status of autonomous copyright work.


\[44\] See, for instance, Article 2 of the Italian Copyright Act (Law n. 633/1941 and subsequent amendments), which reads as follows: ‘In particular, protection includes […] 2) musical works and
Whenever copyright exceptions do not apply or the autonomy of the improvised derivative work from the earlier work cannot be successfully invoked or relied on, copyright laws – as mandated by the Berne Convention - require permission for music improvisers to be entitled to adapt, elaborate or transform earlier copyright works. The impact of such principle, however, is different depending on whether improvised works are fixed in sound recordings (also during a live performance) or remain unrecorded since performance occurs in live concerts just before a present audience (e.g. in a theatre, concert hall or a live music club):

- As far as recorded music is concerned, an improvised piece drawing upon a preexisting work acquires protection under copyright law as a derivative work in so far as it is original. If the earlier work is still protected by copyright, the improviser and/or her record producer will have to clear not only the right of mechanical reproduction but also the right of adaptation, which is normally exercised by individual composers and/or music publishers, unless a compulsory licence applies and authorizes adaptations. It should be considered that even in the United States, where a compulsory licensing scheme exists (since 1909) for mechanical rights in copyright compositions, the musician wishing to protect his or her original musical additions in a sound recording must seek permission from the copyright holder in the earlier/underlying composition in order to acquire a derivative work copyright in the additional materials.45

- As regards live performances, improvised music relying on use of pre-existing copyright songs and other protected musical materials turns out to be de facto unrestricted since authors and music publishers do not expressly authorise, through their collecting societies, adaptation or transformation of standards. What copyright owners licence is just the right of public performance. This

45 Note, ‘Jazz Has Got Copyright Law and That Ain’t Good’, supra note 39, p. 1945. See Sect 115 of the US Code, Title 17, which provides a compulsory license to make and distribute a sound recording of a copyright musical work once a recording of such work has already been distributed to the public in the United States with the copyright holder’s consent, subject to certain terms and conditions of use. Sect 115 specifies that if the follow-on sound recording relies on a new arrangement of the musical composition, such arrangement ‘[…] shall not change the basic melody or the fundamental character of the work, and shall not be subject to protection as a derivative work […] except with the express consent of the copyright owner.’ This condition explains why the compulsory licensing scheme at issue does not cover highly transformative improvised works, for whose recording the improviser shall clear the right of adaptation.
means that, when enjoying unlimited freedom on stage and using repertoires protected by copyright, jazz musicians do so at their own risk and, at the same time, do not earn a cent from what collecting societies charge concert organizers and/or music venues for public performance of their members’ compositions. Although enjoying de facto aesthetic freedom to develop pre-existing materials in their gigs, music improvisers are systematically deprived of any shares of the royalties stemming from the rights of public performance in their own original improvisations and end up being treated – at least in the live music business - as mere performers of someone else’s work. This means that, unless music jazz performers improvise on the grounds of their own tunes (which is increasingly often the case) the only beneficiaries of royalties from live concerts are the authors and publishers of jazz standards.

5. Can copyright guarantee a better treatment of music improvisation?

If copyright were expected to afford protection to all authors of original music works, irrespectively of how authorship materialises, there would be no reason to exclude authors of improvised music from the realm of music copyright owners as a result of the fixation requirement or as a consequence of the need for improvisers to acquire permission from the owner of preexisting works. If copyright systems sought to genuinely follow the broadly protective and formalities-free character of artistic property under the Berne Convention, barriers to a sufficiently broad legal recognition and financial reward of this form of musical authorship should not be raised or maintained, even though such barriers are authorized (i.e. the fixation requirement) or built (i.e., the derivative work principle) in the Berne Convention system.

In the relevant literature it was argued that extending current copyright paradigms to the realm of music improvisation would be counterproductive, if one considers that the implementation of intellectual property rights would impact negatively on dynamics of improvisation practices, at least in certain contexts. It is pointed out that implementing copyright paradigms in artistic environments where creativity is community-based and authorship is primarily a collective, collaborative process would amount to commodifying relations among musicians who are not
interested in claiming exclusive rights in their own musical work and in being credited for such work.\textsuperscript{46} 

Other commentators claimed, instead, that the current underprotection under copyright law of music genres based on improvisation practices has not allowed these genres to grow in terms of dissemination and popularity and eventually hindered their creative development by widely discouraging vital reinterpretation of pre-existing music.\textsuperscript{47} Jazz, for instance, accounts for a very low percentage of total record sales and no longer influences pop culture as it once did.\textsuperscript{48} 

As shown in the next paragraphs, in spite of persisting discrepancies at national level on significant fronts – e.g., the notion of musical ‘work’ and the allocation of different rights to composers and performers; the scope of exceptions allowing certain transformative uses - copyright systems could ensure a better understanding and a stronger support to improvised music if (i) authorship relied on a broader understanding of what kinds of original contribution are copyrightable and (ii) adaptations and elaborations of earlier music works, at least in certain musical sectors, could be regarded, on the grounds of their essentially transformative character, as exempted from the scope of the right to control the derivative works that improvisers create by transforming, altering or quoting earlier works.

\textit{i) A broader notion of ‘work’ should encompass performative aspects of creation} 
As briefly recalled above, the requirement of originality under both European and US copyright laws sets out a low threshold of ‘authorship’. The fact that the Court of Justice of the European Union, on the grounds of a EU-wide standard of originality (i.e., the ‘author’s own intellectual creation’) affirmed the copyrightability of “works” such as 11-word extracts from protected newspapers or simple portrait photographs shows that copyright protects also minimum levels of creativity.\textsuperscript{49} If, as a matter of consistency, at least in the EU, this broadly protective approach were applied also to musical authorship, one would need to replace the current narrow concept of ‘work’, based primarily on musical texts (i.e. notation), with a broader concept encompassing

\textsuperscript{46} Cf Larisa Mann, ‘If It Ain’t Broke … Copyright’s Fixation Requirement and Cultural Citizenship’, Sect II(A), 2011, available at \url{http://ssrn.com/abstract=1691266}, discussing whether the requirement of fixation should be abolished in the US. 
\textsuperscript{47} See Note, ‘Jazz Has Got Copyright Law and That Ain’t Good’, \textit{supra} note 39, pp. 1940-1941. 
\textsuperscript{48} \textit{Ibidem}, p. 1940. 
\textsuperscript{49} See, respectively, notes 26 and 27.
also the aspects of composition which are not embodied into musical texts but are added at the time of performance and fixed on a tangible medium. This means that, at least in certain music genres where performers are expected to provide original contributions, authorship should logically be evaluated on the grounds of the medium embodying the final rendering of the music work, which is normally a phonogram.

At the end of the day, excluding oral expressions of music or ‘non-visual’ musical practices from the notion of ‘work’ is no longer easy to justify. From the time when music publishing could be viewed as the most profitable copyright business, reality and technology have radically changed. The original commercial (and artistic) value of music sheets and scores has been preserved mostly in sectors where notation is still expected, as with music from the Romantic generation, from the beginning of the 19th century onwards, to encompass the act of musical creation in its entirety. In these repertoires, the idea was (and still is) that the role of the performer remains subjected to that of the composer, in a way that performers are not expected to take any freedoms to alter and modify the musical text, which is therefore “sacralized”.

In the aforementioned domains it does make sense to preserve the current notion of music work and to continue to give priority to notation and sheets. To the contrary, for jazz and other music genres whose practices are at odds with the aforementioned narrow notion - since acts of creation and performance are intertwined – to prove authorship (which could often be joint authorship) musicians should be allowed to rely on the performative aspects embodied primarily in the sound recording version of a piece, which would define a broader notion of ‘work’ that corresponds to reality of practice/performance.

The main point here is that the fact that recordings as such are protected through a neighbouring right in countries which have implemented the Rome Convention or a limited copyright in countries like the U.S. should not hinder the qualification of extemporaneous music composers as authors of their music ‘work’.

50 See Anne Barron, ‘Harmony or Dissonance?’, supra note 36, p. 48, and Jason Toynbee, ‘Copyright, the Work and Phonographic Orality in Music’, 15 Social & Legal Studies, Issue 1, 77 (2006), p. 95, discussing also, in a critical way, whether or not the notion of authorship and musical work should extend to aspects of a sound recording as performance style.

51 It should be recalled that even in the history of classical music there are avantguard repertoires in which notation leaves room for improvisation, in a way that performers are requested to make their own extemporaneous creative choices while interpreting musical compositions by composers such as John Cage, Bruno Maderna, Sylvano Bussotti and Karl-Heinz Stockhausen.

52 See Arewa, ‘Creativity, Improvisation and Risk’, supra note 7, p. 1842.
In other words, the fact that fixation of an improvised performance triggers the acquisition of rights in the ensuing sound recording should also help evidence the contents of the improvised musical composition and the acquisition of a related copyright.

In domains where performance naturally entails the addition of musical elements to the ones fixed through notation, an issue arises with regard to the version of a work which should be regarded as the definitive one, especially when such work has to be compared with other creations because of plagiarism or infringement claims.\(^{53}\) When jazz flutist James Newton claimed that rap group ‘Beastie Boys’ had infringed his copyright in a piece for solo flute (‘Choir’) by using, without his authorization, a sample from a record of the piece Newton had made for ECM, the Central District Court of California found against him on the assumption the recording sample triggered the clearance of the sole sound recording right, which was licensed by ECM.\(^{54}\) The Court (whose findings were upheld by the Court of Appeals for the Ninth Circuit)\(^{55}\) distinguished between the right in the musical composition and the right in the sound recording, arguing that “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”.\(^{56}\) As pointed out by Toynbee, the main issue arising in this case was whether the author-performer could claim authorship in his piece as rendered in the sound recording, which contained a peculiar effect, known as ‘multiphonics’, produced by singing and playing a wind instrument at the same time.\(^{57}\) This vocalisation was not indicated specifically in the music text, which merely instructed the performer to sing into the flute and play simultaneously, i.e. without indicating the notes (C–D flat–C) that Newton improvised at the time of fixing his own piece into the ECM record. The Court dismissed the infringement claim arguing that the additional elements coming from Newton’s performance and fixation of sounds could not be regarded as protected by copyright since they were not notated in the score. The only right which could

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\(^{54}\) See Toynbee, ‘Copyright, the Work and Phonographic Orality in Music, *supra* note 49, p. 91.

\(^{55}\) *Newton v Diamond* 349 F. 3d 591 (9th Circuit 2003).

\(^{56}\) *Newton v Diamond*, p. 1249.

\(^{57}\) See Toynbee, ‘Copyright, the Work and Phonographic Orality in Music’, *supra* note 49, p. 91.
apply to the rap sampling was the (narrower) right in sound recordings owned, and
duly licensed to the Beastie Boys, by ECM.\textsuperscript{58}

As this chapter advocates, in proving originality and authorship of a certain
music work, the performative aspects of musical composition should ideally be taken
into consideration and, if justified by a certain kind of musical authorship, prevail on
the mere text-based version. In other words, the performed version of a music piece,
as fixed in a phonogram, could legitimately be regarded as a more reliable form of
fixation than a musical text. As pointed out above, the recorded version of jazz, rap or
hip hop pieces can easily contain additional elements which are improvised or added
by performers only at the time of the recording production and can make the
recording of a work remarkably different from what the composers notated on a music
sheet.\textsuperscript{59}

The advantages of a flexible notion of work could be appreciated also the
other way around, in order to evaluate subsistence of musical authorship whenever a
music performance embodies additional original input incorporated into performing
editions used for the fixation of a certain composition. Here an excellent example
comes from the practice of ancient music, whose notation often leaves broad room for
improvisation at the time of performance, giving musicians a varying degree of
interpretative freedom. Notation in manuscripts from the 16\textsuperscript{th} and the 17\textsuperscript{th} century is
often poor (i.e. full of lacunae) and/or undecipherable by musicians accustomed to
modern notation. This means that performance of such repertoire often requires the
intervention of a musicologist having expertise in that repertoire and being able to fill
the existing gaps in the score. As held by a UK court in a case concerning the
production of a recording of baroque music by French composer Lalande, if the
musicologist’s work ends up filling significant gaps in the original manuscript and
making the music works playable by adding musical lines, arrangements, bass line
figures and ornamentations or variations, those original additions and materials can
qualify as copyright works.\textsuperscript{60} This entails that the record producer having fixed
performances based on musical texts and on performing editions added by a

\textsuperscript{58} \textit{Ibidem}, p. 92.

\textsuperscript{59} As pointed out in this volume by Luke McDonagh, ‘Protecting traditional music under copyright
(and choosing not to enforce it)’, p. 8, adopting a broad and flexible notion of ‘musical work’, which
encompasses not only notation but also other elements of musical practice and performance, helps
apply copyright law also in the domain of traditional music, where musical arrangements of pre-
existing tunes can qualify as original works and acquire copyright protection.

\textsuperscript{60} See Hyperion Records v Sawkins [2005] EWCA Civ 565.
musicologist would infringe the musicologist’s copyright if the record producer had not cleared the mechanical rights of the author of the performing editions. If, as it has been suggested, the notion of music ‘work’ were no longer defined too narrowly and took account of the significant impact of performance on creation of a work, it would be much easier for music improvisers to exercise their rights of ‘authors’ of original works in all sorts of exploitation of such works, i.e. from production of phonograms to the live performance business.

**ii) More room for free and autonomous transformative music**

Assessing whether a music improviser re-using someone else’s musical work should be treated as author of an autonomous creation or, more reductively, as an author of a derivative (i.e. dependent) work can be a hard task, legally speaking. Whether copyright in existing works should legitimately raise barriers and limits to musical adaptations and elaborations which characterize and define entire genres is a question that deserves, from a copyright policy perspective, a convincing answer, especially if one considers that a few of these genres have escaped the contexts and communities where they initially developed.\(^6^1\)

For a matter of contractual fairness and an adequate balancing of interests, courts or bargaining parties should be placed in a position to predict the circumstances under which an improvised music work drawing upon (or at least initially quoting) an earlier copyright work would be regarded as a proper, autonomous work, and not as an elaboration or mere performance of earlier songs or compositions. For instance, rules on copyrightability could be interpreted to help courts understand how much Coltrane and his band fellows were indebted to Rodgers and Hammerstein in the making of their well-known version of ‘My favourite things’ and whether Coltrane’s version constitutes a proper autonomous work or a derivative work.\(^6^2\)

If one wished to foster improvisation drawing on pre-existing creations, which is typical of jazz music, extemporaneous composers would need to gain more freedom from legal ties to earier works, as established by the copyright principle on derivative works. At the moment copyright law allows authors of copyright songs such as the Real Book or American Songbook standards to restrict or monetize widely

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\(^6^1\) See Anne Barron, ‘Harmony or Dissonance’, *supra* note 36, p. 33, recalling how rap emerged out of the New York hip hop scene in the late 1970s, under the influence of dub music and DJs who had moved from Jamaica to New York as of the early 1970s.

transformative re-uses of their works made by music improvisers. In this regard, music copyright can be regarded as financially rewarding past composers while raising a barrier to follow-on musical creativity, especially after the 20-year extension of copyright’s term of protection in Europe and in the United States in the mid- and late 1990s. If obstacles to the making of derivative works were removed or lowered through one of the aforementioned legal tools – depending on their concrete availability and scope in a given copyright system – improvisers and their record producers would largely benefit from having to pay no fee for the clearance of rights in the repertoires they use, with subsequent, significant savings.

As advocated in the relevant literature, at least in certain musical contexts where earlier works are used as standardized elements of creation, such as the jazz music domain, copyright songs used as a starting point for music improvisation could be treated as mere facts or ideas, whose elaboration and transformation should not entail permission and/or payment of any licence fees. At the end of the day, if underlying musical compositions used by jazz performers constitute mainly raw materials it is unfair (or widely exaggerated) to grant their copyright owners the right to control follow-on creativity.

Alternatively, as pointed out above, a solution could be that of resorting to a broader interpretation of exceptions which shield highly transformative uses from infringement actions. Obviously, US courts would be better equipped than European courts considering the potential scope and flexibility of the fair use doctrine, which seeks to valorise the transformative character of follow-on work. However, the application of European copyright exceptions such as quotation and parody should not be underestimated a priori, especially at a time when the CJEU has embarked in a process of interpretation and harmonization of copyright exceptions, including parody, with EU-wide effects.

Finally, when it comes to unrecorded music works improvised on stage, the ephemeral character of performance inevitably makes it hard or impossible, especially in the context of group improvisation, to discern and prove authorship from a legal

63 See, respectively, directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights and the 1998 Sonny Bono Copyright Term Extension Act in the US.
64 See Note, ‘Jazz Has Got Copyright Law and That Ain’t Good’, supra note 39, pp. 1947 ss.
65 See Note, ‘Jazz Has Got Copyright Law and That Ain’t Good’, supra note 39, p. 1948 (arguing that jazz standards are “not intended to be the end product that reaches the listener” but simply “… the idea from which the predominantly improvisatory expression flows”).
66 See, with regard to parody, C-201/13 Deckmyn v Helena Vandersteen and others [2014].
point of view (i.e. what has been created, by whom, and how much has been borrowed and transformed by the various performers). However, at least in countries where fixation is not a mandatory requirement for subsistence of copyright, these improvisatory works would still qualify for copyright protection, at least on paper. An objective problem persists, instead, in common law jurisdictions, where an effective solution resulting in a fair qualification of musical authorship in the domain of improvised works would require a relaxation of the fixation requirement under copyright law statutes.

In these situations, if one wished to grant music improvisers freedom to use and elaborate someone else’s work and to gain remuneration for their improvisations, it would not be unrealistic – also as a matter of local cultural policy – to encourage a change in the way authors and publishers of copyright works license, through their performing rights societies, their own works for live performances. If one wished to place authors at the centre of the copyright system, it would seem fair not only to recognise the aforementioned freedom but also a right to remuneration justified by the original work music improvisers perform on stage on the grounds of earlier copyright works. If - to foster use of their works by music improvisers - performing rights societies licensed not only the authors’ rights of public performance but also the rights of adaptation and transformation for purposes of improvisation, the concerned rights holders could contractually agree to reserve a fair share of public performance rights revenue to musicians having performed in specialized music venues where improvisation is an everyday business (jazz clubs, theatres or other music venues hosting improvised music). This is actually the model followed by French collecting society SACEM for the allocation of royalties stemming from rights of public performance in France and Luxembourg. This system of remuneration is based on the enrollment of SACEM members in a register of ‘improvisers of jazz music’, who are entitled to use, every time they perform copyright works publicly, a special form to be submitted to SACEM. To be eligible for such improvisation right, these musicians are required to specify the title of each work the perform and the name(s) of the improviser(s) in addition to the names of authors and composers of the underlying musical compositions. On the grounds of this information, SACEM regulations

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67 See, in particular, Larisa Mann, ‘If It Ain’t Broke … Copyright’s Fixation Requirement and Cultural Citizenship’, supra note 46.
provide that 2/3 of the collected fees should be allocated to the owners of copyright in the original work and 1/3 to the improvisers whose names appear in the live music program.

6. Conclusion

As this piece has advocated, there is no reason in a legislative environment which provides strong and broad protection to authorship, at both international and European level, to place authors of improvised music works music in a disadvantaged position. This chapter has shown that it is mainly for historical reasons that the notion of musical ‘work’ ended up being defined on the sole grounds of notation, with the extension of copyright protection originally conceived for books and other literary works to musical writings (i.e., texts). Music is, at the end of the day, an eminently performative art. In certain music genres composition inevitably occurs at the time of performance, in a way that authorship and performance can easily coincide and be attributed to the same musician or group of musicians. The chapter has pointed out that, for improvised works which are recorded by using one of today’s myriad digital recording technologies and devices, it is unreasonable to restrict the notion of ‘work’ to notated music. As it has been said, such a ‘sacralized’ notion might still be acceptable for those works, especially in modern and avantguard music repertoires, where texts are designed to entirely encompass the act of musical creation, in a way that performers are not asked or encouraged to create additional elements of a music piece at the time of performing it. In other music genres (the chapter has used jazz as an historically and aesthetically prominent example) where musical texts are no more than a source of guidance or raw materials for musical performance – instead – a fair definition and finding of authorship should logically (and legally) be based on the final rendering of a musical work. In those genres it has been stressed that the creative elements and choices which meet the requirement of originality and, as a result, deserve copyright protection, can be much better appreciated and weighted, at least in their entirety, in a sound recording than in a music sheet. In those genres where improvisation has a prominent role, a definition of authorship based on the final rendering of the work should not be hindered by the existence of compartmentalized categories of intellectual property rights, whose emergence was historically due to technological developments and to the need to foster and financially reward the work.
of individuals and/or entrepreneurs (i.e. record companies) who contributed to the making and distribution of sound recordings without being, legally speaking, ‘authors’ of musical compositions. It goes without saying that, as the piece has sought to clarify, music improvisers shall be legally treated as holders – in a condition of simultaneity - of a plurality of exclusive rights granted under copyright laws to authors and – separately - to performers and record producers (i.e., whenever music improvisers make records of their works by themselves, also on the basis of ‘work made for hire’ agreements with other musicians). This chapter has pointed out also that, whenever original impromptu works draw upon someone else’s work, as in the case of improvisations upon copyright jazz standards, a fair definition of musical authorship should make it possible for authors of widely transformative works or musical variations to acquire an autonomous (i.e. not a derivative work) copyright in their compositions without having to acquire permission from the composer and/or publisher of the work he or she transforms. As the chapter pointed out, such a non-derivative and autonomous character of improvised works could be found on the grounds of different legislative provisions (e.g., parody and other copyright exceptions; the autonomous protection of musical variations) and doctrines (e.g., ‘fair use’ in the US) creators, content producers and, eventually, courts can dispose of in different copyright systems. Last but not least, it has been argued that, as regards unrecorded improvised performances in a genre like jazz, a relaxation or repeal of the mandatory requirement of fixation in jurisdictions such as the United States, United Kingdom and Ireland would make it possible for collecting societies to strike a fair balance between the interests of composers and music publishers whose works (i.e., ‘standards’) are used for improvisatory purposes and the interests of music improvisers who use those works for their own impromptu creations in live music venues. As shown by the example given by SACEM in France and Luxembourg, there is nothing (apart from the above-mentioned fixation requirement in common law jurisdictions) which restricts parties from contractually agreeing on a fair split of the revenue stemming from the clearance of rights of public performance and of musical adaptation between the copyright holder in a pre-existing copyright composition and the author of an improvised work which draws upon such composition.