

WRITING RIGHTS
PERFORMANCE, CREATIVITY, AND COPYRIGHT'S VISUAL BIAS

OLUFUNMILAYO B. AREWA
Professor of Law and Anthropology
University of California, Irvine

Abstract

Copyright was first applied to words and was initially visual/textual in orientation. Since the earliest copyright laws, copyright subject matter has progressively expanded from granting rights to protect written expression to other artistic arenas. Copyright law has, however, consistently undervalued the art of performance while favoring the written expression of music. This paper examines the numerous ways in which copyright law systematically disfavors performance and suggests two possible explanations. First, copyright law seems to exhibit a visual bias toward perceptible music notation such as written sheet music, which superficially resembles books, maps, and charts, the first objects of U.S. copyright protection. Second, the successful movement beginning in the nineteenth century to 'sacralize' older music forms and freeze in place canonical classical works has contributed to visual bias. Sacralization involved the identification of original written texts that could serve as 'authentic' works, a process that came at the expense of alternative performance practices. The original emphasis of copyright law on writings and trends towards sacralization since the nineteenth century, together with the fixation requirement, have disadvantaged creative practices based in performance. This has disfavored some plaintiffs who have sought greater protection for their own performance practice, while at the same time disfavored some defendants whose creative, non-notated performance practice should allow a greater scope for their borrowing. Copyright's visual/textual bias thus diminishes the important contributions of performers of music and hinders recognition of the full spectrum of activities that may be embedded in musical performance. This article suggests that courts in interpreting infringement must look beyond the visual. Contexts of creation should play a greater role in copyright infringement determinations, which should take a more holistic approach to music and other arts that incorporates both visual and nonvisual elements and greater understanding of musical perception as a basis for infringement.