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Piracy, musical work, and the monosexual concept of creativity—time to do away with an obsolete metaphor and affirm the mothership connection?¹

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Piracy is an old metaphor. It appears for the first time in English language towards the end of the 17th century (JOHNS, 2007). Musical piracy is of a more recent date. Although the renaissance composer Adrian Willaert is sometimes mentioned as involved in one of the first cases of musical piracy — Willaert complained that his name was not printed alongside his composition in a Papal collection of anonymous motets — his is rather a case of neglected personal credit, than of piracy (cf. Pohlmann, 1962:38). Likewise, Friedrich Handel’s famous borrowing in 1709 of an aria from his old friend Johann Mattheson is at most a case of plagiarism (ibid.:92), not one of piracy.²

The first case of musical piracy officially acknowledged as such is probably that of Johann Christian Bach (son of Johann Sebastian Bach) who in 1777 sued a British printer for having published a collection of his piano sonatas without permission (Small, 1985). Bach won the case, as well as a place in the history of musical copyright. Since the time of Bach, copyright laws covering music have been enacted in most countries around the globe. The concept of copyright and right of authorship has been controversial at least since the Statute of Queen Anne was passed in England in 1710. The debate back then centered largely around the much criticized monopoly that copyright law assigns to the rightsholder, versus the asserted right of the author or

¹ To the memory of José Luiz Martinez, 1960–2007, friend and colleague.
² Borrowing was such a common way of composing, grounded in the ancient metaphysical principle of imitation (which would continue to be valid for yet another century after Handel), that it did not motivate any stronger protests from Mattheson than the general requirement (formulated thirty years after the event) that the asset be paid back with “interest”— an economical metaphor of Mattheson’s that should not be taken literally as involving money (Volgsten, 2012a: 71ff). Of course, “plagiarism” is also a metaphor, initially coined by 1st century Roman poet Marcus Valerius Martialis in one of his short epigrams. The metaphor was made famous a millennium and a half later by Italian poet Lorenzo Valla, who unscrupulously made the expression his own in 1441 (Fitzgerald, 2007).
composer to the “object” of his or her creative work. Supporting the claims of the authors were the printers and publishers, who argued for a perpetual “natural” right that the creative artist could divest to a publishing house for a sum of money. Today the stakes are very much the same, though fuelled by digital technology through web-based communication channels. In the media, the scene is dramatized according to a well-known antagonism between the hard working musician trying to make a living from his or her art, and the thieves that cold-heartedly rob them of their rightful earnings (Volgsten and Åkerberg, 2006). In other words, the piracy metaphor is still with us.

One may wonder why this is so? How come the metaphor is still around? What makes the pirate sailworthy on the virtual seas of the digital universe? My claim is that the pirate would not make it very far if it were not for the very special support the pirate has at its disposal. It is this indispensable back up, stemming from a rather unlikely corner, which will be my main target in this chapter. Before I tell you the name, I will add some further strokes to the pirate’s image, whereupon I will also say something about that precious object which goes by the name of the musical work.

The pirate is a chimera. Not just in the everyday sense of something unreal, but rather like that mythological creature with two heads growing out of a monstrous body. The pirate is but one of the faces of this chimera. The other face is that of — and now I reveal the name of its vital supporter — the genius. The two faces complement and mutually nurture each other; they are what enables the chimera to take on a life of its own in the collective mind of the public, a mythological being that publicly legitimizes copyright law in face of its many shortcomings and inconsistencies. The genius is the very back up without which the pirate would be nothing, an unclothed emperor. Likewise, without the pirate (or its close cousin, the plagiarist) threatening to rob the genius of its original work, there simply would be no need for the genius, no need for copyright laws. Now this might not be big news to the copyright scholar. The importance of thinkers such as Rousseau, Young or Kant for the romantic notion of genius, and the role this notion has played for copyright thinking and legislation is well known (e.g. Woodmansee, 1984). What I intend to zoom in on is a particular pre-

3 A well known inconsistency, for instance, is that between the intended purposes of copyright — such as the promotion of artistic creativity — and its practical consequences — the rights being signed away by the creative artists into the hands of the rights-industry, which can thereby withhold artistic material from creative use (for overview and discussion, see e.g. Drahos & Braithwaite, 2002; Lessig, 2004; McLeod, 2001; Vaidhyanathan, 2001; Volgsten & Åkerberg, 2006).
romantic trait that characterizes this genius, a lesser-known trait without which there would be no pirates to worry about.

First, a word about the fantastic corpus that ties the two faces — the larcenous pirate and the creative genius — together: the immaterial work, the musical composition. According to Lydia Goehr, the years around 1800 saw a change in the general understanding of music, from one of music as generally being an activity to a view according to which musical compositions are “works” existing, like Platonic entities, in their own metaphysical right (Goehr, 1992, 2). This change in view of what a musical composition is, Goehr goes on to suggest, subsequently initiated a change in “ownership rights”: “When composers began to individuate works as embodied expressions and products of their activities, they were quickly persuaded that that fact generated a right of ownership of those works to themselves” (ibid. 218).

Goehr’s chronology has since been questioned by Anne Barron, who correctly points out that an immaterial work concept was explicitly argued for already by J. C. Bach’s lawyer Lord Mansfield in 1769, albeit in a lawsuit concerning books (Barron, 2006). Although Mansfield’s claims were dismissed by the defendant lawyer Joseph Yates as being “rather quite wild” (quoted in Sherman and Bently, 1999, 19), the case shows that a rudimentary work concept existed several decades prior to that of Goehr’s romantic composer (this is not to mention the materialistic work concept of Tinctoris’ res facta, see Blackburn, 1987). However, it was a working concept endorsed by only a few, and in complete need of theoretical explication.4

Such theoretical explication of a musical work concept would not appear until much later, when the judicial need had ceased due to the influence of legal positivism in British law (Sherman and Bently, op. cit., 186). Moreover, it would appear in a rather different legal and aesthetic context, namely that of the German lands.5 Again, Goehr’s

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4 According to Barron, Locke’s labour theory of property was, by mid-18th century, widely accepted and unproblematically transferred to mental labor as the “association of ideas”, which Locke had posited in his Essay on Human Understanding. However, Yates’ objections are eligible considering that Locke’s empiricism did not reach very far into the mind of the human being. “I shall not at present meddle with the Physical Consideration of the Mind”, Locke states at the outset of his treatise, “or trouble myself to examine, wherein its Essence consists, or by what Motions of our Spirits, or Alterations of our Bodies, we come to have any Sensation by our Organs, or any Ideas in our Understandings; and whether those Ideas do in their Formation, any or all of them, depend on Matter, or no. These are Speculations, which, however curious and entertaining, I shall decline, as lying out of my Way, in the Design I am now upon” (Locke, 1690/1995, 1). Even more problematic for copyright is the fact that Locke’s essentially private “ideas” become common property once communicated publicly: communication, according to Locke, is the reverse of appropriation (Peters, 1999).

5 When an author such as Coleridge dismisses empiricism on Platonist grounds (see Cunliffe, 1994), it is already too late for it to have any deeper consequences for 19th century British copyright.
conclusions must be revised, but this time in the opposite direction. To the extent that Goehr’s historical narrative implies a reification of the musical work along Platonic lines, she is wrong about the date of its consolidation. At the beginning of the 19th century, there was yet no theoretical framework that could identify and explain the originality of a work of music. Music theory at this time was still busy explaining ideal forms; the non-conforming was, if not outright dismissed, described as “accidental” (Bonds, 1991, 126). Not until mid-century did theorists like A. B. Marx and Eduard Hanslick convincingly articulate the notion of individual form that such a work concept could be safely grounded on. And still these theories operated within an Aristotelian concept of form, according to which form was inextricably bound to matter (a troublesome relation for any doctrine on immaterial rights, which Fichte’s famous theory shows, see Kawohl and Kretschmer, 2009). Although Schopenhauer hailed Platonic form, he presented no concept of individual musical works that would stand the test, and what is more, his Die Welt aus Wille und Vorstellung had almost no impact until Wagner paid it attention half a century after its publication (likewise Christian Friedrich Michaelis’ 1806 notion of form remained but a sketch). In fact, it was not until the German law scholar Joseph Kohler needed support for his new theory of authorship right (mediating the personal and ownership rights of Roman law; see Strömholm, 1966; 1968) that Schopenhauer came to exert any substantial influence on copyright. Kohler outlined a rudimentary ontology of the musical work in his Das literarische und artistische Kunstwerk from 1892, and it was not until 1907 in his Urheberrecht an Schriftwerken that he explicitly referred to Schopenhauer (see Volgsten, 2012a; 2015a).

A musical work concept of a Platonic kind, along the lines suggested by Goehr (op. cit., 2), was not articulated in any theoretical detail until the years around 1900. A further reason for this lateness, apart from those mentioned above, is that the reification of the immaterial work relied to an important extent on the new concept of communication that evolved as a result of the new telecommunications. Whereas since antiquity, exchange of ideas had been conceived of as a merging of souls, telegraphy

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6 Ascribing to turn-of-the-century writers such as Hoffmann or Schelling this function, as Goehr does when speaking of a “formalist move” of romantic aesthetics (ibid. 153, emphasis in original), is an anachronistic exaggeration (Volgsten 2012a; similar criticism has been raised against Carl Dahlhaus’s dating of the concept of “absolute music” to more or less the same time, see Pederson 2009; Tadday, 2008). That Hoffmann did not subscribe to any Platonic concept of individual work-forms of music is clear from a court statement as late as 1822 (Hoffmann was also a trained lawyer), that “it is impossible to extract musical compositions in the same way, as it can be done with books. Reprint of a composition would only take place when an original would be ‘reengraved’ and reinterpreted identically with the original” (quoted and translated in Kawohl & Kretschmer 2003).
gave rise to the view that ideas were transported from soul to soul along a spatial transportation channel, what subsequently became known as a communication chain (Otis 2001, Peters 1999). Through this channel — the structure of which is more than coincidentally similar to that of commodity exchange — the musical work could now be communicated from a sender as a sign to be decoded by a receiver. Whereas the work equaled the immaterial signified, the material signifier had its obvious counterpart in the newly invented phonogram, the causally imprinted grooves of which attested to its status as a “natural” sign (Adorno 1928/1984; Volgsten 2012a; 2015a).

The immaterial work lost its importance as the law’s object of protection in Great Britain already during the 19th century. Scandinavian legislation, initially influenced by German copyright law as outlined by Kohler, later underwent revision as result of a critical debate concerning the metaphysical status of the work concept. Thus, by the end of the 1960s, the legal role of the work concept had become reduced from a theoretical to an everyday expression, the meaning of which varied from case to case (Strömholm, 1970). At about the same time the same work concept was actively deconstructed by compositional and performance practice, as witness the important influence of John Cage. But, despite its being punched from all sides, the chimera would not dismember, would not disintegrate. Today the pirate is still with us, alive and kicking.

There are of course trivial reasons for this, such as the metaphor being an attractive sign of identity for those who like to regard themselves as pirates. The favored connotation is that of the Robin Hood-like figure (Jack Rackham, Anne Bonny), stealing from the colonial freight ships, distributing equally among its members according to democratic principles anticipating those of the French and American revolutions by a hundred years or so (Rediker, 2004). Add to this the looks of a Jack Sparrow and one may wonder if anyone today would not want to be a pirate.

Nevertheless, as said above, the strongest contributor to the pirate metaphor is its soulmate, the genius. In and through their secret bond, the visage of genius provides the coveted booty (the private property, the original work of music), without which there would be nothing for the vain pirate-wannabe to hustle. The romantic genius guarantees that the musical work is original, that the work has its origin in the imaginative soul of the composer and nowhere else. In other words, it guarantees that the composer is not a pirate or plagiarist. To be able to pull off such a claim, proponents of the romantic genius—yesterday as well as today—rely on an age-old idea, what I call the monosexual
concept of creativity. Of course, during antiquity, it was not a matter of creating something out of nothing, but rather of forming matter (what one may call a monosexual concept of information).

In the writings of Plato and Aristotle, we find the distinction between an actively forming masculinity and a passively receiving femininity, or materiality. Form is the male, actively producing power of the universe. It resides in the (male) artist's soul and takes shape in a passive material medium (such as words or tones), which it sets in motion. This view of male forming (according to eternal principles) and female provision of transient sensuous material (mater = mother), is also the basis for the ancient perception of kinship disseminated via the paternal family tree — a concept according to which the offspring's role is to testify to the honor and glory of the father, as represented by the family, the house and the literally fruitful soil. Over this genetic chain watches genius, the guardian spirit and male fertility symbol that ensures life-giving fruitfulness of landed property and the survival of the family. Genetic inheritance is thus furthered via male informing of whatever matter may come by. Materiality means nothing to this proprietary inheritance (Battersby, 1989). It is a monosexual genetics, according to which form is active and eternal, whereas matter is passive, temporary and evanescent (and thus materiality and materialization does not warrant legal protection).

It should be noted, that before this concept of monosexual genetics could be transferred from the landowning pater familias to the proletarian composer, form had to make its way into music theory. As an activity, music was formless, a transitional stage in the forming of men’s minds (a means rather than an end in itself). The necessary adoption of form into music theory, which eventually will turn music into an object, is a process centered to the German speaking lands, beginning in the 17th century with theorists such as Nicolaus Listenius and Johannes Lippius, a process that will continue unto and beyond both Hanslick and Marx (Volgsten, 2012a; 2015a).

Notwithstanding, giving birth to the romantic genius was the result of anxious and uncertain labor. According to a widely held Herderian national-romantic view, the soul of the natural genius is subordinate to a national Volksgeist, in a way reminiscent of

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7 As Christine Battersby points out (ibid.), not until this ancient patriarchal concept of genealogy combines with the idea of a natural artistic talent, ingenium, is the stage prepared to claim romantic genius. The musical composer is entitled with ingenium in Italy already during the 16th century (Lowinsky 1964). That music history contains so few women is, one may add, not a consequence of social circumstances outside of music, but of ideas on the very “nature” of music, intrinsic to Western metaphysical tradition.
how the ancient housefather was an intermediary in a genealogical chain (with its origins shrouded in a mythological past). By contrast, true romantic genius is always the unique origin of its offspring. The source of creativity is unequivocally located to the individual soul of the composer, the original rights holder (Volgsten, 2013a).

The romantic genius, independent of collective Volksgeists as well as of any other heterogeneous influences, was not firmly established until its singlemindedly created offspring—the musical work—could be identified, which as we have seen did not occur until the turn of the 20th century.8 The same chain-model that positioned the work/sign/message, defines the composer as self-sufficient sender at the source of this communicative process. The romantic genius, thus conceived, is pervasively modern. But what is the significance of its simultaneously being anciently monosexual?

We have seen how the genetic function of creativity is based on an ingenious notion of monosexual self-semination, which — like the honor of the ancient house and family — is an exclusively patriarchal business (acknowledged in a copyright context in 1928 by the international Berne Convention’s formulation of a droit de la paternité). One must save the honor of the father’s soul, while one is free to sell the body of the offspring. The function of the notion is obvious. In order to make exclusive claims of property in musical compositions, a monosexual concept of creativity, according to which the composer is the exclusive source of creativity, is necessary. The composer cannot be reduced to a mere intermediary in a national tradition or family chain. The work must be original in every sense, its origin located to the composer’s innermost soul, his own imagination.

All this is to prevent that any second party would be able to claim "motherhood right" (a droit de la maternité as it were) to the "offspring", which for instance a musician might do as he or she materializes the immaterial work.9 Even worse, for the rights business would be a scenario in which the audience starts to make such claims to the music. This may sound far fetched at first hearing, but psychological research on so

8 During most of the 19th century, the exclusive and individualistic romantic genius was innocently entangled with the inclusive and collective genius of national romanticism (Volgsten, 2013a; 2015b). Likewise, the notion of personality, so important for 20th century culture (Susman, 1984; Fowles, 1999), and a necessary condition for the genetic paternity claims of copyright, does not seriously challenge that of universal character until the end of the 19th century (Volgsten, 2012a; 2015a).

9 Of course there are the so called “neighbouring rights” to the recordings of music, which too (in line with the inconsistencies mentioned in note 2) are usually signed away: “as far as mechanical rights to the recordings are concerned, it is the producer (or the record company) who holds all rights of reproduction” (Théberge, 2001). On the important historical relations between the concept of neighbouring rights, the International Federation of the Phonographic Industries (Ifpi) and the corporatism of Italian fascism in the 1930s, see Fleischer, 2012).
called “communicative musicality” (Malloch and Trevarthen, 2009) shows a fundamental importance of an “affective attunement” by a listener to the acoustic substrate of sounds, for these sounds to be experienced “as” music at all. Music is not firstly composed by a solipsistic genius-ego and only thereafter communicated to its audience; music is rather the crowning result of a dialogical communication between individuals in an affectively shaped social situation (Volgsten, 2012b; Csikszentmihály, 1988; Negus and Pickering, 2002; see also many of the articles in Hargreaves, Miell and MacDonald, 2012). This fact of the matter ought to have repercussions on copyright legislation. Given that we can speak of a “motherhood constellation” (cf. Stern, 1995; Volgsten, 2012b) conditioning our musical experiences, justifying its own droit de la maternité, I would like to transliterate the metaphor by way of a more popular-cultural set of imaginations, speaking instead of a mothership connection as source of creativity: the mothership as the wide-embracing, collective stock of materials that may enter into ever new configurations; the mothership as that collective culture that any private-property claim would require to identify itself as such; the mothership connection we need in order to appreciate copyright as a cultural right, rather than as some kind of chimeral right of nature.

To bring these factual remarks to a concluding closure, I want to return to the metaphorical function of the pirate. The pirate, and the piracy to which it is committed, are metaphors we tend to “live by” (cf. Lakoff and Johnson, 1980). Pirate and piracy are metaphors that structure our thoughts about musical activities. As a figure of thought, piracy implies an object — which is pirated, stolen — and thus piracy adds to a reification of the musical work. According to the same metaphorical figure of thought, since this object is created by the pirate’s dicephalic other (the genius), the object (the musical work) can be subject to exclusive ownership. In this way, speaking about pirates and piracy of music, unknowingly tends to legitimize a basically idealist copyright legislation and by extension the tendency to interpret copyright as an ownership right—with all the negative consequences this may have for composers, musicians and listeners alike.¹⁰

In sum: the chimera of genius, work and pirate does not hold up against scientific scrutiny. To the contrary, it completely downplays the role of the audience, reducing the listener to a consumer at the end of a one-way communicative chain. To

¹⁰ For references, see note 2.
prevent any "maternity claims" to be made, the work is defined as immaterial, independent of any materialization, as abstract form. The form, accordingly, must be communicated to an audience who is therefore exacted a contemplative mode of listening, which neatly corresponds to a one-way consumption process that justifies and normalizes the requirements for financial compensation.

Against this, one may counter that national laws of today hardly mention works of music as objects of copyright protection. And neither does a global pact such as the World Trade Organization’s infamous TRIPS agreement. But this only goes to show that copyright has travelled a far distance from its former justification as a utilitarian device in the service of culture. Today the “privacy” of private property pertains more readily to private corporations (against collective culture) than to individual composers or musicians (Volgsten, 2013b). Nevertheless, public legitimation is not articulated in paragraphs, but in commonly held attitudes and opinions. Therefore, in my opinion, we should do away with the piracy metaphor, and thereby also with the monstrous chimera of monosexual creation of music. In its stead I suggest as point of further discussion — keeping in mind that legislative thinking, as any other kind thereof, cannot rid itself of metaphors (Larsson, 2011) — *The Mothership Connection!*

**References**


