# A Tune by Any Other Name:

# Jazz, Musical Works, and Copyright

By

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We acknowledge and respect the Lək̓ʷəŋən (Songhees and Xʷsepsəm/Esquimalt) Peoples on whose territory the university stands, and the Lək̓ʷəŋən and W̱SÁNEĆ Peoples whose historical relationships with the land continue to this day.

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**Abstract**

This thesis explores musical ontology in jazz. Treating Lydia Goehr's work concept as a starting point, I examine jazz by drawing on philosophical, musicological, and legal scholarship. I analyze the features of jazz that render it a compelling ontological puzzle using George Gershwin's *I Got Rhythm* and Duke Ellington's *Cottontail* as examples. I explore the boundaries of musical identity in jazz with reference to jazz standards, contrafacts, and indeterminacy, and I address the various ways that jazz practice is at odds with Goehr's work concept. With reference to the work of James O. Young and Carl Matheson, Andrew Kania, Nicholas Cook, Stephen Davies, and Brian Kane, I explore the positions that scholars have taken on musical ontology in jazz. I build on Brian Kane's network-based ontological model by proposing melodic primacy as an important ontological feature of jazz and I trace its origins to the aesthetic and legal traditions that migrated to the United States from Europe. I apply Lydia Goehr's historical method to conclude that ontology in jazz emerged in part from the legally mandated ontology of copyright law.

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**Acknowledgements**

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Enumerating the ways in which those in my personal life have made this thesis possible is a futile enterprise, so I will simply state my thanks to Mom, Dad, Kira, Laura, and Dave. I love you all.

# Introduction: An Imaginary Museum

> *Don't listen to performances! That is not the right way, at least not for a musician, to get in touch with music. The right way is to read the text.*
>
> - Rudolf Kolisch[1]
>
> *We call it music, but that is not music: that is only paper.*
>
> - Leopold Stokowski[2]

If we hear "The Mona Lisa has been stolen," we immediately understand what has been said. The work of art commonly known as the Mona Lisa has been physically removed from its place at the Louvre without permission. If we hear "Beethoven's 5th symphony[3] has been stolen," we are likely to be confused.[4] Has a manuscript been taken? Has someone plagiarized the music from Beethoven's 5th symphony? What exactly has been stolen? What type of thing is Beethoven's 5th symphony? This deceptively simple question is a central problem in the philosophy of music. If Beethoven's 5th symphony is a work of art, what kind of work is it, and where is it located? Fundamentally this is an ontological question as it deals with the nature of being.[5]

In the introduction to this thesis I will be examining musical ontology, specifically through the lens of Lydia Goehr and the scholars who have reacted to her work. Her

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[1] Miriam Quick, "Performing Modernism: Webern on Record" (PhD diss., King's College London, 2011), 31.
[2] Glenn Gould, *The Glenn Gould Reader* (Toronto: Lester & Orpen Dennys, 1984), 264.
[3] This example is chosen to remain in line with a long tradition of using Beethoven's 5th symphony for the purpose of ontological comparison, per Lydia Goehr, "Three Blind Mice: Goodman, McLuhan, and Adorno on the Art of Music and Listening in the Age of Global Transmission," *New German Critique* 35, no. 2 (2008): 3.
[4] This analogy is paraphrased from Peter Kivy, *Introduction to a Philosophy of Music* (Oxford, UK: Clarendon Press, 2002), 202.
[5] Lacey, A. R., *A Dictionary of Philosophy*, (London: Routledge, 1996), 206-7.

approach is historical rather than strictly ontological and has produced significant controversy, but I hold that her approach is appropriate, illuminating, and can serve as a useful foundation toward an understanding of musical identity in jazz (which will be discussed in depth from chapter 1 onward).

Lydia Goehr's *Imaginary Museum of Musical Works*[6] is a landmark publication on musical identity.[7] In the first section, titled *The Analytic Approach*, Goehr addresses the ontological status of works from the perspective of analytic philosophy. She separates the views of philosophers into four categories: the Platonist view, the idealist view, the Aristotelian view, and the nominalist view.[8] The Platonist view holds that musical works are pre-existent non-created entities that require no real-world instantiation.[9] Within this view, a musical performance is an attempt to instantiate a non-physical, uncreated ideal. The idealist view holds that a musical work exists only in the mind of its creator.[10] In a similar way to the Platonic view, scores and performances are attempts to instantiate this ideal. The Aristotelian view sees musical works as discrete sound structures physically represented by scores and instantiated in performance.[11] The nominalist view holds that works do not exist as singularities. Instead, a given set of scores and attendant

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[6] Lydia Goehr, *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music* (Oxford, UK: Oxford University Press,1992).
[7] For her thoughts on the work concept pre-*Imaginary Museum*, see Lydia Goehr, "Being True to the Work," *The Journal of Aesthetics and Art Criticism* 47, no. 1 (1989): 55–67.
[8] For more detail on the analytic treatments of musical ontology see Nelson Goodman, *Languages of Art: An Approach to a Theory of Symbols*; Jerrold Levinson, "What a Musical Work Is;" Stephen Davies, *Musical Works and Performances: A Philosophical Exploration,* 37 – 44; Peter Kivy, *The Fine Art of Repetition: Essays in the Philosophy of Music,* 35 – 59; Peter Kivy, *Introduction to a Philosophy of Music*, 202 – 223.
[9] Goehr, *The Imaginary Museum of Musical Works,* 14.
[10] Goehr, *The Imaginary Museum of Musical Works,* 18-19.
[11] Goehr, *The Imaginary Museum of Musical Works*, 15-16.

performances exist and we indulge in a collective fiction that they relate to an underlying musical entity.[12]

Goehr takes particular interest in the conceptions of works found in Nelson Goodman's 1968 book *Languages of Art,*[13] and Jerrold Levinson's 1980 paper "*What a Musical Work Is."*[14] She cites Nelson Goodman as the prototypical nominalist. His conception of workhood relies on notation (as many do). According to Goodman, the "work" is not an abstract object or ideal, but is the set of performances complying with a given score. Goodman proposes a set of requirements for notationality[15] in a score, which Goehr refers to as the retrievability test:

> Given a score-copy, it is possible to identify the constitutive properties of the relevant work and thereby of its performances. It is also possible to retrieve the score on hearing a performance. The identification procedure functions in both directions.[16]

Goodman considers this notational requirement essential for understanding musical works, as music is an allographic rather than autographic art. According to Goodman, allographic art is transitory and requires instantiation, such that no distinction can be made between an original and its forgery because "no historical information concerning the production of the performance can affect the result."[17] An instantiation of an allographic art is authentic so long as it complies completely with a notation. This

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[12] Goehr, *The Imaginary Museum of Musical Works,* 16-18.
[13] Nelson Goodman, *Languages of Art: An Approach to a Theory of Symbols* (Indianapolis: Bobbs-Merrill, 1968).
[14] Jerrold Levinson, "What a Musical Work Is," *The Journal of Philosophy* 77, no. 1 (1980): 5–28.
[15] Goodman holds that a set of requirements must be met for a given system to qualify as notational. He frames this as a pass/fail test.
[16] Goehr, *The Imaginary Museum of Musical Works*, 24.
[17] Goodman, *Languages of Art*, 118.

contrasts with autographic art (such as painting), for which the mere features of the work are not sufficient for authenticity. A painting is authentic only if it has the correct provenance, making forgery possible in the autographic arts.

Goehr cites Jerrold Levinson as the representative of a modified Platonism.[18] Levinson's view of works relies on a pool of possible sounds and instrumentations that exist implicitly (or ideally) but require an act of creation in order to exist. Levinson claims that the need for a creator is paramount in our view of artworks:

> There is probably no idea more central to thought about art than that it is an activity in which participants create things-these things being artworks. The whole tradition of art assumes art is creative in the strict sense, that it is a godlike activity in which the artist brings into being what did not exist beforehand much as a demiurge forms a world out of inchoate matter.[19]

Levinson's view prescribes a connection between work and creator that places the ontology of a work in relation to a set of historical facts. A given work has a genesis at some point in time, and it persists thereafter regardless of preservation or instantiation. A work exists as a distinct object with a set of properties unique to itself.[20]

Goehr concludes that these approaches are insufficient, claiming that the attempts by philosophers to capture an ontological essence in music divorce theory from practice:

> While the analytic method has given theorists a way to account for the logic of phenomena, this has not been true for their empirical, historical, and, where relevant, their aesthetic character. Some theorists have simply ignored the complex character of the phenomena, while others have found that they could not, and furthermore that they have not wanted to. So the latter have sought reconciliation between the two. Reconciliations that have been found have been uncomfortable

[18] Goehr, *The Imaginary Museum of Musical Works*, 44.
[19] Levinson, "What a Musical Work Is," 8.
[20] Goehr, *The Imaginary Museum of Musical Works*, 45.

> and ultimately unsatisfactory. Analysis has just not produced the methodological tools to make them otherwise.[21]

With this criticism in mind, Goehr devotes the majority of *The Imaginary Museum* to a historiographical accounting of the work concept. Within this historical approach Goehr articulates that, "[t]he major methodological transition is a move away from asking what kind of object a musical work is, to asking what kind of concept the work-concept is."[22] Goehr hangs her argument on a set of interconnected claims. Around the year 1800 a confluence of aesthetic, social, and economic changes produced a new way of thinking about and relating to music in Western Europe. I will refer to this 1800 claim as the watershed thesis, a term I borrow from John Dyck.[23] This new conception held that composers create discrete, permanent musical objects with their own identities. These objects, conceived of as works, are sufficiently notated that they are repeatable in performance and appreciated for their own sake as works of art separate from the extramusical contexts of worship, dance, feasting, or royal procession. She further claims that this concept began to regulate[24] musical production and reception such that it infiltrated the fabric of musical practice. This echoes her 1989 paper *Being True to the*

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[21] Goehr, *The Imaginary Museum of Musical Works*, 86.
[22] Goehr, *The Imaginary Museum of Musical Works*, 90.
[23] John Dyck, "Did Bach Compose Musical Works? An Evaluation of Goehr's Watershed Thesis" (Master's Thesis, University of Manitoba, 2010).
[24] "…regulative concepts determine, stabilize, and order the structure of practices. Within classical music practice we compose works, produce performances of works, appreciate, analyse, and evaluate works. To do this successfully we need a particular kind of general understanding. Every time we talk about individual musical works we apply this general understanding to the specific cases." Goehr, *The Imaginary Museum of Musical Works*, 103.

*Work*,[25] where she connects this conception to E.T.A. Hoffman's *Werktreue* ideal, which held that fidelity to the work was paramount:

> Thus, a musical work is held to be a composer's unique, objectified expression, a public and permanently existing artifact made up of musical elements (typically tones, dynamics, rhythms, harmonies, and timbres). A work is fixed with respect, at least, to the properties indicated in the score and it is repeatable in performances. Performances themselves are transitory sound events intended to present a work by complying as closely as possible with the given notational specifications.[26]

The features of Goehr's post-watershed work concept are:

- **Composer-centredness**: The identity of the composer is attached to the identity of the work. Additionally, the composer is seen as independent of institutions (noble house, church, patron), and thus is free to embark on artistic exploration.[27]
- **Authorship is related to ownership**: The composer is entitled to the economic fruits of their creative labour, and they are credited and paid when their works are published.[28]
- **Originality**: The composer creates something new. Their works are reflective of their uniqueness as an artist.[29]
- **Autonomy**: The work is a complete and permanent object. It is sufficiently notated that it is reproducible in detail without the physical presence of the composer.[30]

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[25] Lydia Goehr, "Being True to the Work," *The Journal of Aesthetics and Art Criticism* 47, no. 1 (1989): 55–67.
[26] Goehr, "Being True to the Work," 55.
[27] Goehr, *The Imaginary Museum of Musical Works*, 206-7.
[28] Goehr, *The Imaginary Museum of Musical Works*, 218-9.
[29] Goehr, *The Imaginary Museum of Musical Works*, 221-2.
[30] Goehr, *The Imaginary Museum of Musical Works*, 224-5.

- **Authenticity**: The instantiation of a work must adhere to an ideology of fidelity. Musicians must be true to the work they are playing.[31]
- **Absence of extramusical function**: Works are to be appreciated for their own sake. Audiences treat performances of works as the focus of their attention.[32]
- **Canonicity**: Works can enter a canonic "imaginary museum," from which they are regularly brought to life in performance.[33]

Goehr contrasts this with the pre-watershed conception of music. She cites the social function of music composed before 1800 as a major contributor to the pre-work concept environment. As music was generally written for a given occasion, the music had to be written to serve that occasion. Issues of instrumentation, mood, and length were plastic to the extramusical considerations of a religious service or a nobleman's celebration. Additionally, Goehr claims that a weak relationship between creator and product invited musical borrowing (which allowed composers to repurpose their own material as well as that of other composers'). As there are many occasions for which a composer would be called upon to write music, individual composers could produce vast catalogues of music originally written for a single occasion.[34]

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[31] "The… duty of performers was to show allegiance to the works of the composers. To certify that their performances be of specific works, they had to comply as perfectly as possible with the scores composers provided. Thus, the effective synonymity in the musical world of *Werktreue* and *Texttreue* : to be true to a work is to be true to its score." Goehr, *The Imaginary Museum of Musical Works*, 231.
[32] Goehr, *The Imaginary Museum of Musical Works*, 236-8.
[33] Goehr, *The Imaginary Museum of Musical Works*, 205-6.
[34] Goehr, *The Imaginary Museum of Musical Works*, 181-3.

The pre-watershed musical world was, according to Goehr, a set of occasions seeking performances rather than a set of performances seeking occasions. This led to a cultural environment in which the musical products of composers were not viewed as permanent or autonomous. To the degree that a composition might be performed more than once, there was no expectation that it remain unchanged from performance to performance, or that its performances would continue after the composer's death.[35] There was, in essence, no understanding that musical works were being created.

Despite the strength of her claims, Goehr does acknowledge the permeability of the watershed boundary. She cites the music of J.S. Bach as an example of pre-watershed compositional activity that appears, in part, to align with the post-watershed work concept. However, she concludes that this resemblance is superficial and cautions us against backdating the work concept:

> …given that we have an explicit concept of a work, Bach composed works. If the concept had never acquired its explicit, regulative function within musical practice (or indeed within any other relevant or related practice), we would probably still speak of Bach's music in terms not only more familiar to Bach himself, but also still evident in other existing musical practices not regulated by the work-concept.[36]

Goehr's *Imaginary Museum* has provoked a great number of responses from scholars. As her work is interdisciplinary, she has both musicological and philosophical critics, with the musicologists tending toward a more welcoming reception.[37] The most common target of *The Imaginary Museum*'s critics is undoubtedly the watershed thesis. Goehr's decision to locate the development of the modern conception of works to the year

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[35] Goehr, *The Imaginary Museum of Musical Works*, 186.
[36] Goehr, *The Imaginary Museum of Musical Works*, 114.
[37] Nicholas Cook, *Beyond the Score: Music as Performance* (New York: Oxford University Press, 2014), 22.

1800 has proved highly controversial. Gavin Steingo has noted a tendency of scholars to expand the dating of the work concept to include the music they study.[38] James O. Young rebutted an element of the watershed thesis in his 2005 paper *The "Great Divide" in Music*.[39] He notes that Goehr's consideration of audience attentiveness and extramusical function fails to support a dating of 1800. Young cites pre-divide cases of high audience attention, post divide cases of low audience attention, and highlights the enduring popularity of incidental music across the centuries as evidence against the watershed thesis. The very notion of a dividing line has itself been challenged, with Willem Erauw claiming Goehr paid insufficient attention to the gradual process of social change[40] and Gavin Steingo regarding any such change as fundamentally non-locatable.[41]

*The Imaginary Museum* was the subject of a symposium held at the University of Liverpool's Institute of Popular Music in 1998,[42] the proceedings of which were published in 2000 under the title *The Musical Work: Reality or Invention?*[43] Editor Michael Talbot's contribution[44] claims that the key difference between pre-watershed and post-watershed

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[38] Gavin Steingo, "The Musical Work Reconsidered, In Hindsight," *Current Musicology*, no. 97 (Spring 2014): 81.
[39] James O. Young, "The 'Great Divide' in Music," *The British Journal of Aesthetics* 45, no. 2 (2005): 175–84.
[40] Willem Erauw, "Canon Formation: Some More Reflections on Lydia Goehr's Imaginary Museum of Musical Works," *Acta Musicologica* 70, no. 2 (1998): 111-12.
[41] "I would argue that locating this shift is not only theoretically impossible but also ontologically undecideble [sic]. In other words, it is not simply that 'we' as humans, because we have insufficient reasoning abilities, are unable to determine the shift. Instead, the shift itself is theoretically non–locatable because it did not ever "happen" as such. The best we can say is that the change has already taken place at some prior moment, but we cannot ever locate that moment in time." Gavin Steingo, "The Musical Work Reconsidered, In Hindsight," *Current Musicology*, no. 97 (Spring 2014): 85.
[42] Michael Talbot, "Introduction," in *The Musical Work, Reality or Invention?* (Liverpool: Liverpool University Press, 2000), 2.
[43] Michael Talbot, *The Musical Work: Reality or Invention?*, (Liverpool: Liverpool University Press, 2000).
[44] Michael Talbot, "The Work-Concept and Composer-Centredness," in *The Musical Work Reality or Invention?* (Liverpool: Liverpool University Press, 2000), 168–86.

conceptions of musical works lies in the latter's composer-centredness.[45] Talbot illustrates this with reference to the cataloguing of recordings in record stores, noting that only the Classical canon is categorized by composer (with other musics such as jazz and popular music categorized by genre and performer). Talbot's response to *The Imaginary Museum* is additive rather than subtractive, and he merely attempts to refocus Goehr's thesis rather than challenge it.

The strongest criticism of Goehr in *The Musical Work: Reality or Invention?* comes from Reinhard Strohm's contribution, *Looking Back at Ourselves: The Problem with the Musical Work-Concept.*[46] Strohm objects to the watershed thesis (as has become tradition), but goes further than Goehr's other critics. He dismisses her historical approach as non-ontological and considers her survey of analytic philosophers inadequate.[47] Perhaps most pointedly, Strohm accuses Goehr of conceptual parochialism, suggesting that she is improperly backdating modern concepts with polemical intent.[48] Goehr was given the last word in the published proceedings, which she devoted to a response to Strohm's contribution.[49] Goehr defends the watershed thesis, though arguably in a weaker

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[45] Though, perhaps learning from Goehr's misstep in citing 1800 as a watershed year, Talbot provides a window rather than a point, citing 1780-1820 as the period of change.
[46] Reinhard Strohm, "Looking Back at Ourselves: The Problem with the Musical Work-Concept," in *The Musical Work, Reality or Invention?* (Liverpool: Liverpool University Press, 2000), 128–52.
[47] "…she concludes a long analytical chapter on the work-concept with a call away from philosophical analysis and towards history: a 'change in emphasis' from ontology to musical practice. I am unclear, in any case, about the very possibility of an ontology of a historical phenomenon; but even if there are ontologies that do justice to the historical intricacies of their subject (the modern philosophers discussed in Goehr's opening chapters do not qualify), the philosopher's contingent experience and cultural-historical awareness of the subject may be parochial. A lack of professional experience may also entail a lack of critical distance from current discourses." Strohm, "Looking Back at Ourselves," 140-1.
[48] Strohm, "Looking Back at Ourselves," 145-6.
[49] Lydia Goehr, "'On the Problems of Dating' or 'Looking Backward and Forward with Strohm,'" in *The Musical Work, Reality or Invention?*, (Liverpool: Liverpool University Press, 2000), 231–46.

form than that found in the *Imaginary Museum*. Here she refocuses not on a watershed moment when everything changed, but on a watershed moment when an unusually large number of important things changed.[50] She further defends the selection of a date (whether 1800 or not) as a necessity to avoid a Sorites Paradox.[51] Finally, Goehr challenges Strohm to propose an alternative to her formulation,[52] and suggests that any competent analysis will tend toward her conclusion as described in the *Imaginary Museum*.[53]

Much of Goehr's *Imaginary Museum* rightly highlights the strangeness of a work-based mode of musical production. In the history of the world's musics, it is highly unusual for a practice to be based on a canon of retrievable musical objects, each identified with a creator and supported by an expectation of fidelity on the part of a performer:

> What we understand today to be perfect compliance has not always been an ideal and might not be in the future. Actually it is quite peculiar and rather unique. It has characterized classical music practice only for the last 200 years. It is also not universal in the world of music. In fact, it is significantly this ideal that serves to distinguish the practice of producing performances of classical musical works from the performance practices associated with other kinds of music. Whereas in classical music performances we strive towards maximal compliance with a fully specifying score, in traditional jazz improvisations, where very different notions of compliance operate, musicians seek the limits of minimal compliance to tunes or themes. In most jazz, extemporization is the norm, and it is just this feature that forecloses the possibility of our speaking comfortably of one and the same work

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[50] "I supported the Beethoven watershed because of its explanatory force. I was interested in understanding the changes I observed in how theorists and practitioners around 1800 treated and spoke about music. I did not think that everything changed around this time, but I was struck by how much did." Goehr, "'On the Problems of Dating' or 'Looking Backward and Forward with Strohm,'" 239.

[51] "If resemblance relations are sufficient to certify or guarantee the existence of the work-concept, we might have to conclude that the work-concept existed from the first day of musical practice (whenever that was) by simple virtue of the continuity relations that constitute that practice. And, worse, we might also have to conclude that the concept is, by tracing back all similarity relations, identical to all other concepts." Goehr, "'On the Problems of Dating' or 'Looking Backward and Forward with Strohm,'" 242.

[52] The language she uses is perhaps more presumptuous than a mere challenge, claiming "[t]he burden is on Strohm to produce a better description…" Goehr, "'On the Problems of Dating' or 'Looking Backward and Forward with Strohm,'" 245.

[53] Goehr, "'On the Problems of Dating' or 'Looking Backward and Forward with Strohm,'" 245.

> (rather than of a tune, theme, or song) simply being instantiated in different performances.[54]

Contra Goehr's declaration that jazz is incompatible with a post-watershed conception of musical works, many scholars have addressed the topic of musical identity in jazz with a view to locating the work.

Following in the footsteps of James O. Young, Stephen Davies, and Brian Kane, this thesis examines musical ontology as it relates to jazz music. In chapter 1 I illustrate the features that make jazz a tantalizing ontological puzzle using George Gershwin's *I Got Rhythm* and Duke Ellington's *Cottontail* as examples. I explore the boundaries of musical identity in jazz with reference to jazz standards, contrafacts, and indeterminacy, and I address the various ways that jazz practice is at odds with Goehr's imaginary museum. In chapter 2 I examine the positions that scholars have taken on musical ontology in jazz. I discuss the work of James O. Young and Carl Matheson, Andrew Kania, Nicholas Cook, and Stephen Davies. I disregard Lydia Goehr's warning against alternative conceptions of musical identity and endorse the application of her historical method to jazz.

In chapter 3 I discuss Brian Kane's ontological model as described in his book *Hearing Double: Jazz, Ontology, Auditory Culture*.[55] I explore his model's processes of replication and nomination, and his soundscape-based etiology for jazz ontology. I note that by treating ontology as historically emergent, Kane's model serves the same function for jazz that Goehr's model serves for Romantic music. In chapter 4, I highlight an

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[54] Goehr, *Imaginary Museum of Musical Works*, 99-100.
[55] Brian Kane, *Hearing Double: Jazz, Ontology, Auditory Culture,* (New York: Oxford University Press, 2024).

ontologically relevant feature of jazz underemphasized by scholars and propose an etiology for that feature. Drawing on both legal and musicological scholarship I argue that melody is of principal importance in jazz ontology and that this emerged in part from the way American copyright law privileges melody over other musical features.

# Chapter 1 - Loose Canon: Special Problems in Jazz Ontology

> *…at first there would be some excitement and so everybody just made more activity, more activity, louder, louder, louder. Then they were tired so for two minutes you had calm, calm, calm, calm, calm. And then somebody was waking up so they began again, and then they were tired, sooner this time, and so the rest was longer. You cannot call that improvisation.*
>
> - Pierre Boulez on avant-garde improvisation[56]
>
> *You can't improvise on nothin', man. You gotta improvise on somethin'.*
>
> -Charles Mingus[57]

The practices of jazz musicians present a set of compelling challenges to the ontologist. Despite some intriguing similarities between the jazz tradition and the post-watershed world of Western art music as described by Goehr, jazz operates on principles that appear *sui generis*. Indeed, jazz practice exists in an almost line-by-line contradiction of workhood per the Goehr framing of the work concept. In this chapter, I will prepare the ground for a discussion of jazz ontology by detailing the features of jazz that make such a discussion difficult.

Like the scholars I will highlight in the following chapters, I will examine "standard form jazz." Free jazz, characterized by a rejection of form and the privileging of unrestrained spontaneity, is ontologically interesting for its own reasons but is beyond the scope of this thesis.[58] Additionally, I will largely elide the form of highly-arranged big band

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[56] M. F. Oliver, *Settling the Score : A Journey through the Music of the Twentieth Century* (London: Faber, 1999), 147.
[57] Cook, *Beyond the Score*, 227.
[58] For discussions of free jazz and ontology see Lee Brown, David Goldblatt, and Theodore Gracyk, "Improvisations and Spontaneity," in *Jazz and the Philosophy of Art*, 181–207 and Richard Cochrane, "Playing

jazz most closely associated with the swing era. This type of heavily-notated jazz has the ontologically interesting features of standard form jazz but these features are fewer in number and lesser in intensity, and I believe this is why scholars focus on the latter.[59]

## Standard form jazz: contra Goehr

Standard form jazz operates on principles antithetical to those of Goehr's post-watershed work concept. According to Goehr, works are:

- composer-centred, while standard form jazz is performer-centred;
- closely-specified in notation, while standard form jazz is loosely notated or communicated orally;
- must be instantiated according to an ideology of fidelity to the work, while standard form jazz prioritizes novelty and individuality.

Despite these differences, however, standard form jazz has a feature that acts as a tantalizing invitation to think in terms of works: it has its own imaginary museum organized around jazz "standards," which are named musical objects with discrete features that are treated by the jazz cognoscenti as if they are repeatable in performance.

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by the Rules: A Pragmatic Characterization of Musical Performances," in *The Journal of Aesthetics and Art Criticism* 58, no. 2 (2000): 140-1.

[59] While big band jazz is much more closely notated than standard form jazz, improvisation remains crucial and the scores were subject to repeated revision by the composer or arrangers. For a demonstration of the impermanence of big band arrangements, see Brian Kane, *Hearing Double*, 240.

Standard form jazz is organized around a cyclical structure (the “chorus”) which is repeated over the course of a performance of a standard (or “tune”). A tune is constituted by a melody (the “head”) and a set of harmonic guidelines (the “changes”). These features can be notated in the form of a lead sheet, which can serve as a pedagogical or rehearsal tool, or a guide during performance. Figure 1.1 shows a lead sheet for the Duke Ellington tune *Cottontail*.

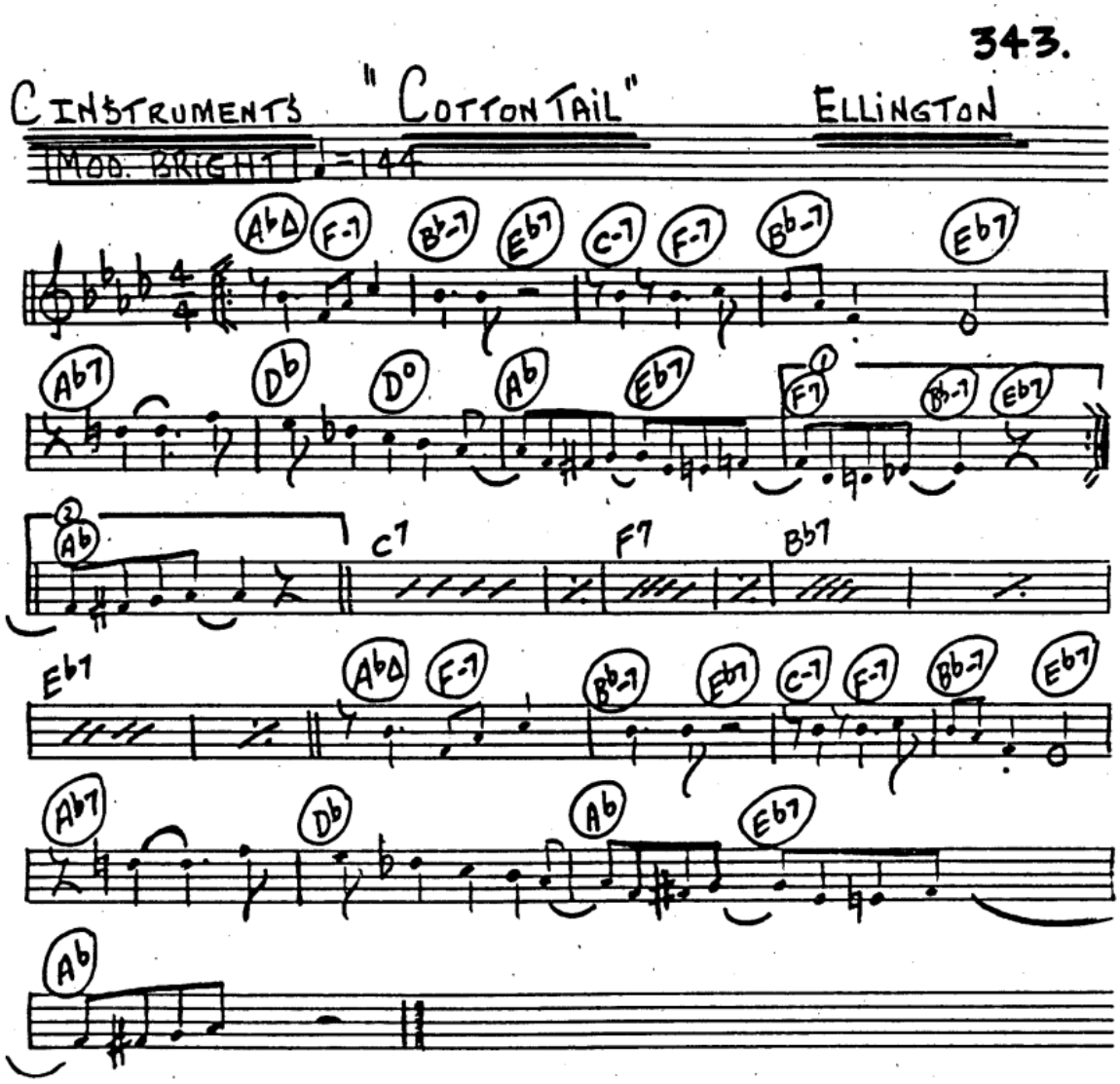


Figure 1.1. Duke Ellington, *Cottontail*, a lead sheet from the fake book *The Book*, circa 1970's, unknown compiler.

The melody is notated in a way that is recognizable to a musician enculturated in the Western art music tradition, but the harmony is not. The harmony is represented above the staff by chord symbols that provide a harmonic guideline for the tune. These symbols indicate the root of a chord and its quality. In figure 1.1, a delta symbol indicates a major

seventh chord, a minus symbol indicates a minor seventh chord, a 7 indicates a dominant seventh chord, and a circle indicates a diminished seventh chord. The first four harmonic events (occurring in measures 1 and 2) are therefore A♭ major seven (A♭ C E♭ G), F minor seven (F A♭ C E♭), B♭ minor seven (B♭ D♭ F A♭), and E♭ dominant seven (E♭ G B♭ D♭). The symbols are not used uniformly between lead sheets, and a musician must familiarize herself with a set of redundant symbols.[60] Note that no harmonic voicings are specified. It is incumbent upon the performers to realize the harmony in an idiomatic and satisfying way.

The boundaries of idiomatic voicing are broad, with a set of conventions allowing for significant leniency in actualizing a set of chord changes. Common procedures include:

- **Tritone substitution**: A dominant seventh chord can be substituted with the dominant seventh chord whose root is a tritone away. G dominant seven could become D♭ dominant seven.
- **Applied chords** (also known as **secondary dominants**): A target chord can be preceded by its dominant. D minor seven, G dominant seven can become D dominant seven, G dominant seven.
- **Unpacked chords**: A dominant seventh chord can be halved in duration and preceded by its ii. A bar of G dominant seven could become half a bar of D minor seven followed by half a bar of G dominant seven.

[60] For example, a major seventh chord may be indicated via a delta, Maj7, M7.

- **Passing diminished chords**: A diminished chord may be inserted between two chords whose roots are a major second away. C major seven, A minor seven, D minor seven, G dominant seven can become C major seven, C♯ diminished seven, D minor seven, G dominant seven.
- **Extensions**: A given harmony can have chord members that extend beyond the seventh. In the key of C, a notated C major seven could be actualized with a ninth (D) or eleventh (F).

Duke Ellington's *Cottontail* is in a 32-bar AABA form. In standard form jazz, this 32-bar structure is cycled, with each chorus either presenting the melody as written, or serving as a vehicle for improvisation. A typical performance will begin with the head, followed by multiple choruses of improvisation (with each chorus typically given to a single player), followed by a final statement of the head. Additional introductory material or a coda can be present at the beginning and end of a performance, respectively. The number of choruses, the players who solo, and their order are plastic to the occasion of performance. Wes Montgomery's 1961 recording of *Cottontail*[61] can be seen as a typical example of the treatment of form in standard form jazz. The performance begins with a head chorus followed by three choruses with guitarist Wes Montgomery as soloist, followed by two choruses with pianist Hank Jones as soloist, followed by a chorus in which

[61] Wes Montgomery, *Cottontail*, RLP 382, 1961, LP.

Montgomery and Jones alternate trading fours[62] with drummer Lex Humphries, followed by a final head chorus.

The weak relationship between composer and product is another feature of jazz that militates against workhood. The typical life cycle of a jazz standard involves a complex chain of mediations between composer and performer. Taking the George Gershwin tune *I Got Rhythm* as an example can illustrate the authorial distance. Gershwin wrote the tune in short score for his 1930 musical *Girl Crazy* and collaborated with orchestrator Robert Russell Bennet, who produced the arrangement that ended up on the music stands of Broadway orchestras. Gershwin's publisher, T.B. Harms Inc. published an *I Got Rhythm* song sheet[63] in 1930 with a piano part, vocal part, and chord diagrams for ukulele. No arranger is listed, but given the tendency for Gershwin-arranged publications to advertise on this fact (as was the case with the *George Gershwin Songbook*, first published 1932 and since 1995 published as *Gershwin at the Keyboard*) it is likely that T.B. Harms Inc. employed an anonymous arranger for its 1930 song sheet.

As jazz players adopted *I Got Rhythm* as a standard, they played from lead sheets that further mediated the content of *I Got Rhythm* (most notably regularizing the form to 32 bars from Gershwin's original 34). If a musician went to see *Girl Crazy* in 1930, enjoyed the music they heard, and then purchased the song sheets to play at home, their sense of the tune would have been mediated by two different arrangers. If that musician later heard *I*

[62] Trading fours (or eights) is a process by which musicians trade four (or eight)-bar solos in succession over the course of a chorus. This is normally employed during the drummer's solo chorus.
[63] Song sheets were widely-published arrangements of songs meant for mass market appeal to amateur players. Typical song sheets included a simple piano arrangement, sometimes with an additional vocal part.

*Got Rhythm* played in a jazz club, their sense of the tune would be further mediated by the formal, timbral, and harmonic transformations emerging from the performance. This would be an offense against Goehr's 19th -century composer-hero, but Gershwin was unphased by this arrangement, stating in 1926 "[t]he ability to orchestrate is a talent apart from the ability to create. The world is full of [the] most competent orchestrators who cannot for the life of them write four bars of original music."[64] I would summarize the expectation of reproduction implicit in Gershwin's statement as "I created the basic underlying material, and it is the responsibility of others to realize the music."

There are also cases of contested or otherwise confused authorship among jazz standards. The standard *Donna Lee* has long been attributed to Charlie Parker, but Miles Davis has claimed credit for its composition.[65] Even Gershwin's *I Got Rhythm* has a small degree of contested authorship, as its four-note basic idea bears a striking resemblance to the opening figure in the third movement of William Grant Still's 1st symphony.[66]

The weakness of the relationship between composer and product often produces scenarios in which a group of players perform a standard whose author is unknown to them in the moment:

> Often, the performers of standards may have no idea who the composer was. (Pop quiz: who composed "Stella by Starlight" or "Invitation"?) The songs have been so

[64] Howard Pollack, *George Gershwin: His Life and Work*, (Berkeley: University of California Press, 2006), 189.
[65] Miles Davis, *Miles, the Autobiography* (New York: Simon and Schuster, 1989), 103.
[66] While Gershwin wrote *I Got Rhythm* before the premiere or publication of Still's 1st symphony, Still suggests that Gershwin may have heard him workshopping the melody while playing in the pit orchestra for the 63rd Street Music Hall. Jen Hitt and Ella Harpstead, "The Dean Of African-American Composers Didn't Think He'd Be Remembered: William Grant Still At 125," Colorado Public Radio, October 22, 2020, https://www.cpr.org/2020/10/22/the-dean-of-african-american-composers-didnt-think-hed-be-remembered-william-grant-still-125/.

> often replicated, have circulated so widely, that they become like memory traces or reflexes to jazz musicians, who have honed their skills on these tunes while carrying them far from their origins. Yet, even in performances of standards by those who have forgotten the composer, the performer is always playing a dual role: on one hand, they function as the representative of the standard, on the other, they appropriate the standard to their own ends.[67]

The ontological interest of standard form jazz is further illustrated by the proliferation of contrafacts, which are tunes that develop when a new melody is written over the changes of another tune. A jazz standard may even spawn multiple contrafacts, with some of those themselves going on to become standards.[68] The motivation for this practice was both aesthetic and economic, as illustrated by drummer Max Roach:

> Of course there are about ten million tunes written on the changes of "I Got Rhythm." ... This wasn't pilfering. In cases where we needed substitute chords for these tunes, we had to create new melodies to fit them. If you're gonna think up a melody, you'd just as well copyright it as a new tune, and that's what we did. We never did get any suits from publishers.[69]

Here Max Roach refers to the "Rhythm changes," a set of chord changes based on those of *I Got Rhythm*.[70] Differing instances of Rhythm changes (whether presented in the abstract or as underlying harmonic material in contrafacts) are themselves subject to the types of harmonic modifications mentioned earlier in this chapter, with varied Rhythm

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[67] Kane, *Hearing Double*, 152.
[68] John Coltrane's *Impressions* is a contrafact of Miles Davis's *So What*, and Sonny Rollins's *Oleo*, Duke Ellington's *Cottontail*, and Charlie Parker's *Anthropology* are contrafacts of George Gershwin's *I Got Rhythm*.
[69] Richard Crawford, *The American Musical Landscape* (Berkeley: University of California Press, 1993), 227.
[70] Many Rhythm changes tunes have worked their way into the jazz canon. Charlie Parker and Dizzie Gillespie's *Anthropology*, Duke Ellington's *Cottontail*, Lester Young's *Lester Leaps In*, Sunny Rollins's *Oleo*, Thelonius Monk's *Rhythm-a-ning*, and Dizzie Gillespis' *Salt Peanuts* are contrafacts of *I Got Rhythm*.

changes found in different tunes and reference works.[71] The ontological and economic implications of contrafacts will be explored further in chapter 5.

The improvisatory basis of jazz practice presents further problems for workhood. In standard form jazz, most performing time is devoted to extemporizing. The soloists are meant to treat their chorus as an opportunity for inventiveness and novelty. While skilled jazz players cultivate a level of musicianship that allows them to reproduce recorded solos note-for-note,[72] the rote performance of previously-played material is not a part of professional jazz practice:

> For the most part, the jazz community contains public re-creations of solos through its tacit assumption that improvisations belong to the creators. Generally, a performer "couldn't play someone else's solo note-for-note; that just wasn't considered cricket"... this attitude limits the practical value of developing a large reserve of complete solos as the basis for an initial vocabulary.[73]

Still, the enculturation of jazz musicians relies on their internalization of a vast catalogue of "vocabulary, ideas, licks, tricks, pet patterns, crips, clichés, and, in the most function language, things you can do."[74] These idiomatic constituents form the basis for expression and novelty when soloing.

If loosely-notated music is actualized with a high degree of indeterminacy and conceived of as separate from its composer, this would seem to strike a terminal blow

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[71] The jazz theory textbook *Jazzology*'s rendering of the Rhythm changes makes liberal use of unpacked dominant chords in the B section, while Duke Ellington's Cottontail keeps Gershwin's original cycle of dominant chords. Robert Rawlins, *Jazzology : The Encyclopedia of Jazz Theory for All Musicians* (Milwaukee: Hal Leonard, 2005), 128.

[72] A process referred to as "transcription" which occupies a prominent place in jazz pedagogy.

[73] Paul Berliner, *Thinking in Jazz: The Infinite Art of Improvisation*, (Chicago: University of Chicago Press,1994), 101.

[74] Berliner, *Thinking in Jazz*, 102.

against workhood, but there are features in jazz practice that serve as tantalizing invitations to think of jazz in terms of works within the Goehr model.

## Standard form jazz: pro Goehr

Most strikingly, jazz has its own imaginary museum organized around standards. There exists a set of canonic, named musical objects which are instantiated in performance and are aurally recognizable to enculturated audiences. This museum is in part illustrated by the proliferation of fake books, which are collections of lead sheets meant to serve as pedagogical and performance guides for jazz musicians. Fake books were compiled, sold, and collected by jazz musicians from at least the 1940's onward.[75] They were illegally produced and sold, but served as crucial tools for working musicians. A fake book can be seen as a reflection of a jazz canon at a given time and place, and the canonicity of a standard can be roughly judged by how consistently it shows up in varied fakebooks over the decades. Early fakebooks often included *I Got Rhythm,* but it was eventually displaced in later fakebooks by its various contrafacts.[76]

Jazz also has its own composer-hero in Duke Ellington, who Harvey G. Cohen argues was the first Black jazz composer to be widely accepted as a legitimate artist.[77] This reputation was hard-won, however, as Ellington's image as a great composer was carefully

[75] Dating this development has proved difficult due to the informal nature of their production, the anonymity of their compilers, and their ephemerality of fake books as objects. For the most comprehensive source on the history of fakebooks, see Barry Kernfeld, *The Story of Fake Books: Bootlegging Songs to Musicians,* (2006).
[76] Ted Gioia, *The Jazz Standards : A Guide to the Repertoire* (New York: Oxford University Press, 2012), 167-8.
[77] Harvey G. Cohen, "The Marketing of Duke Ellington: Setting the Strategy for an African American Maestro," *The Journal of African American History* 89, no. 4 (2004): 291–93.

calculated to escape the popular impressions that jazz music was trivial entertainment, and that music produced by Black artists was primitive. According to Cohen, Ellington's manager Irving Mills portrayed "important American composer and as a genius, an artist whose work and demeanor should be associated with the values of quality and respectability."[78] This dedicated framing, coupled with Ellington's unique talents, allowed him to break into the American mainstream at a time when compositions by Black artists were largely absent from the American soundscape. Ellington was also closely associated with the music he wrote, with his catalogue of "originals" featured in advertisements for his performances. The difficulty with which Ellington achieved the status of hero-composer can be seen as an illustration of the gravitational pull away from Goehr's post-watershed work concept in jazz.

Though jazz is a tradition with named musical objects, these objects are instantiated with a high degree of variation. Despite this indeterminacy, a group of enculturated players can call a tune and begin collectively playing it without rehearsal. This appears to leave ontological room for the suggestion that jazz has, *pace* Goehr, an imaginary museum of musical works. In the following chapter, I discuss the various positions that scholars have taken on the subject of workhood in jazz.

[78] Cohen, "The Marketing of Duke Ellington," 296.

# Chapter 2 - Approaches to Jazz Ontology

> *…the view of the musical world the romantic aesthetic originally provided has continued, since 1800, to be the dominant view. This view is so entrenched in contemporary thought that its constitutive concepts are taken for granted. We have before us in fact a clear case of conceptual imperialism.*
>
> -Lydia Goehr[79]
>
> *…the charge of 'conceptual imperialism' made against the idealist tradition must be laid also at Goehr's door.*
>
> -Reinhard Strohm[80]

Many scholars have analyzed standard form jazz with a view to locating the work. Goehr's warnings against the conceptual imperialism of the work concept appear to have had an impact, as scholars with contrasting views on the issue compete at successfully placing the mantle of imperialism atop their colleagues' shoulders. Goehr takes the position that a work-based ontology is provincial to 19th-century Western Europe, and that exporting the work concept to other musics is inappropriate. Other scholars reject the European Romantic claim on the conception of the "work" as similarly provincial and inappropriate.[81] In this chapter I discuss the work of James O. Young and Carl Matheson, Andrew Kania, Nicholas Cook, and Stephen Davies.

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[79] Goehr, *Imaginary Museum of Musical Works*, 245.
[80] Strohm, "Looking Back at Ourselves," 146.
[81] The following quote from John Andrew Fisher is a representative example of this position: "To understand how the discussion of musical works in jazz could have taken such a counterintuitive turn we need to distinguish the descriptive sense of 'musical work' from various normative or evaluative concepts that do not track the ordinary concept of a musical work. 'Normative' concepts of a musical work are accounts that are value laden, presupposing ideals about what a musical work should be—in this case, influenced by a classical music model of how works are treated in classical music—and counting only those as true musical

The positions of scholars who have written on workhood in standard form jazz can be summarized as:

- The work exists in an ideal sense and performances proceed from it. Jazz standards are therefore works.
- The work emerges from performance. Jazz standards are therefore not works but points of departure for performances.
- No works exist in standard form jazz.

James O. Young and Carl Matheson's 2000 paper "The Metaphysics of Jazz"[82] explores the issue of jazz ontology extensively. Young and Matheson mount an argument that the work in jazz can be sufficiently located such that two disparate, improvised performances of the same jazz standard can be instantiations of the same work. Young and Matheson take care to separate their view of works from that of Nelson Goodman, but they use Goodman's allowance for improvisation in a work as a foothold to expand on his conception of workhood. Using indeterminacy as a bridge between Western art music and jazz, Young and Matheson address the issue of improvisation via bifurcation into improvisation *ex nihilo* and improvisation *ex materia*:

> In order to see that jazz performances can be instances of the same work, we need an understanding of improvisation. Improvisation has sometimes been defined as completely spontaneous performance. A completely spontaneous performance is executed without reference to directions, such as score, a sketch, or memories of

works." John Andrew Fisher, "Jazz and Musical Works: Hypnotized by the Wrong Model," *The Journal of Aesthetics and Art Criticism* 76, no. 2 (2018): 153.

[82] James O. Young and Carl Matheson, "The Metaphysics of Jazz," The Journal of Aesthetics and Art Criticism 58, no. 2 (2000): 125-33.

> past performances. Certainly, any completely spontaneous performance is an improvisation. However, a definition of improvisation in terms of complete spontaneity is far too restrictive. The harpsichordist who realizes a figured bass is not, on this account, improvising. Neither is the violinist who extemporaneously performs a cadenza that incorporates a theme from the concerto she or he is performing. Most importantly, for present purposes, most jazz performances are not improvisations in the sense of being completely spontaneous.[83]

The type of improvisation that normally occurs in jazz falls into the category of improvisation *ex materia*, with jazz musicians improvising within a limited field of pre-defined possibility. Using a performance of the jazz standard *Round Midnight* as played by Miles Davis as an example, Young and Matheson describe the limitations of improvisation: the performance begins with a statement of a pre-existent melody before Miles Davis begins playing variations on that melody. The rest of the band provides a harmonic foundation, with each member extemporizing their part according to a set of pre-determined chords which they can vary according to performance practice. The work, then, is described not by a highly-specified score, but in a set of loosely-defined guidelines. Jazz standards are therefore loosely-defined works that are merely instantiated with a weaker definition of replicability.

Andrew Kania responded to Young and Matheson in his 2011 paper *All Play and No Work: An Ontology of Jazz*.[84] Kania approaches the challenge of formulating a jazz ontology with an admirable governing principle:

> My goal here is to identify the work of art in jazz, if such there be… the measure of any such theory is coherence with jazz discourse and practice, that is, what people knowledgeable about jazz say and, even more importantly, do. The underlying assumption of this methodology is that art forms, such as jazz, are social practices

[83] Young and Matheson, "The Metaphysics of Jazz," 127.
[84] Andrew Kania, "All Play and No Work: An Ontology of Jazz," The Journal of Aesthetics and Art Criticism 69, no. 4 (October 1, 2011): 391–403.

> that depend on understandings that, though shared by most participants in the practice, may not be directly or immediately consciously accessible.[85]

Kania identifies four possible jazz ontologies: jazz as a tradition of works for performance, jazz performances as works, jazz recordings as works, and jazz as an art without works. Kania associates Young and Matheson with the first of these ontologies, and frames this view as one that considers jazz and classical music as ontologically continuous. Kania takes each ontology in turn, dismissing workhood in each case. His principal objection to jazz as a tradition of works for performance is the degree of indeterminacy in the performance of standard form jazz:

> Neither what is notated in the jazz tradition nor the mere fact that there is improvisation in a jazz performance proves that there are not enduring works in the jazz tradition that are instanced in performances. However, the sheer amount of improvisation in a typical jazz performance and the centrality of improvisation to the tradition seem to indicate that the proposed candidate for the enduring work in jazz, the standard, is more an aid to the performers' real-time creativity… than a work to be instanced in multiple performances…[86]

Kania rejects jazz as a tradition of performances as works in part because performances are not enduring objects but ephemeral events. He further claims that in the Western art music tradition, audiences appreciate the work rather than the performance, while in jazz, audiences appreciate the performance rather than any abstract work. This would seem to leave room for jazz recordings as works, but Kania rejects this position as well. He claims that the tradition of jazz recordings strives for maximal fidelity in representing a performance as it actually sounded (in contrast to rock recordings which are understood to be elaborated, heavily edited simulacra of performances). This would

[85] Kania, "All Play and No Work," 391-2.
[86] Kania, "All Play and No Work," 397.

then place a jazz recording in much the same ontological category as a jazz performance, which he has already rejected as a location of the work. He also notes that if jazz recordings are to be deemed works then we must also afford that status to recordings of classical music (which would still leave a gap where the abstract work should be in the case of jazz but not in the case of classical music). Via process of elimination, Kania concludes that as the work cannot be located in the abstract, in performance, or in recording, standard form jazz must not involve the performance of works.[87]

In B*eyond the Score: Music as Performance* Nicholas Cook attempts to refocus our ontological attention on performances rather than works. He emphasizes line-drawing problems and indeterminacy as factors that make idealist ontologies unwieldy and impractical. To support both objections, Cook cites Arcangelo Corelli's op. 5 violin sonatas. Corelli notated the slow movements of these sonatas in a skeletal form, with a simple violin part and figured bass accompaniment. Corelli expected the violinist to provide embellishments throughout these slow movements, and contemporaneous manuscripts indicate that these movements were actualized with significant variation.[88] Given the proliferation of these arrangements, Cook suggests that these sonatas may better be termed "genres" than "compositions".[89] Per Cook, Corelli's op. 5 represents an ill-defined "work complex" with many versions and no authentic original:

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[87] Kania's methodology and conclusions have proved controversial. For responses to *All Play and No Work*, see Julian Dodd, "Upholding Standards: A Realist Ontology of Standard Form Jazz: Upholding Standards," *The Journal of Aesthetics and Art Criticism* 72, no. 3 (2014): 277–90, John Andrew Fisher, "Jazz and Musical Works: Hypnotized by the Wrong Model: Jazz and Musical Works," *The Journal of Aesthetics and Art Criticism* 76, no. 2 (2018): 151–62.
[88] Cook, *Beyond the Score*, 228-30.
[89] Cook, *Beyond the Score*, 228.

> …op. 5 takes the form of loose assemblage of parallel versions… an assemblage that is enmeshed in an equally unstructured tradition of interpretation and connotation, and that might be said to have a centre but no clearly demarcated boundaries. Corelli's published score of 1700 clearly has a privileged role within this assemblage—it might be thought of as the centre of a gravitational eld—but the extent to which it anchors or regulates the work complex should not be over-stated. The composer's score is after all, as Martin said, just a set of instructions, and in the case of op. 5 an exceptionally incomplete set of instructions at that.[90]

Cook similarly highlights indeterminacy as a factor militating against idealist ontology. He argues that the more precise notations provided to the players of a Mozart string quartet fail to absolve them of improvisatory obligations. The symbols indicating pitch, duration, volume, tempo, and articulation are incomplete and require negotiation between players. Thus the lack of specificity in the score for a Corelli violin sonata (and the attendant indeterminacy of a performance of such) is not so different in degree of specificity from that of a Mozart string quartet. Indeed, the lack of specificity in a lead sheet for a jazz standard is not so different from that of a Corelli violin sonata:

> …regarded as specifications of sound, Mozart's string quartet scores are woefully incomplete, just like the scores of Corelli's slow movements. But that is not the right way to see them. Like lead sheets, Mozart's notations define frameworks within which musicians collectively negotiate the fine details of their performance.[91]

As a replacement for idealist ontologies, Cook suggests that musical meaning is located in performance. Given the insufficient specification of predefined musical materials and the wide variation in performances of the "same" work, Cook concludes that

[90] Cook, *Beyond the Score,* 243.
[91] Cook, *Beyond the Score,* 236.

works do not exist in the abstract but are "irreducibly social construct[s]."[92] We are left then, per Cook, with treating performances as works.

In *Musical Works and Performances: A Philosophical Exploration,*[93] Stephen Davies takes an approach not unlike that of Young and Matheson. Davies draws a distinction between ontologically "thin" and ontologically "thick" works, with thickness mapping on to the level of prescribed detail needed for a performance to instantiate the work.[94] These features are "work-determinative" and must be present for a work to be instantiated. In the case of ontologically thick works, their work-determinative properties are complex and specific, allowing for the work itself to be the focus of a listener's attention. Ontologically thin works are conversely indeterminate, leaving it up to the performer to provide the musical substance. Davies places the boundaries of these work-determinative features at the discretion of the composer.[95] Instrumentation is work-determinative if the work's composer specified instrumental forces. Harmonic voicings are work-determinative if the composer notated specific voicings. Neither are work-determinative if the composer failed to specify them. Within this model, it would appear that jazz standards must be thin works (in much the same way articulated by Young and Matheson), but Davies explicitly negates this possibility:

> I used to think… of renditions of jazz standards… as performances of works, even if the work is of interest only because it provides the occasion for the performers to exercise their skills. I now reject this view. There is no reason to assume that a

[92] Cook, *Beyond the Score,* 240.
[93] Stephen Davies, *Musical Works and Performances: A Philosophical Exploration* (New York: Oxford University Press, 2001).
[94] Davies, *Musical Works and Performances,* 21.
[95] Davies, *Musical Works and Performance*s, 23.

> playing event beginning with a particular tune is best viewed as a performance of a work thinly specified via that tune. The improvisation is inspired by the tune and is 'after' it, but the whole that is created can be regarded as new and unique.[96]

Here Davies appears to foreclose the possibility of workhood in standard form jazz, but he contradicts this mere pages later when introducing the concept of ontological thinness:

> Pieces specified only as a melody and chord sequence are thin [works]. Some tin pan alley songs are of this kind. For them, the player creates the larger structure of the performance by deciding on the number of repeats, variations, elaborations, links and the like.[97]

Perhaps this apparent contradiction results from a lack of familiarity with jazz on the part of Davies. Given that the rest of Davies's positions on this matter appear to be consistent with the second quote rather than the first, I will treat the first quote as non-representative of his model (in chapter 5 I will be exploring the work of Brian Kane, who treats Davies in much the same way).

Davies proposes a category of work based on a "model performance."[98] A sufficiently notable or influential performance of a work could be treated as a model for future performances of that work, absent any musical notation. In the case of a model performance, the work-determinative elements are transmitted via a performance rather than a score. Miles Davis's *So What?,* which became a jazz standard based on its inclusion in the 1959 Davis album *Kind of Blue*,[99] could be considered an example of a model performance within Davies's view.

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[96] Davies, *Musical Works and Performances,* 16-7.
[97] Davies, *Musical Works and Performances*, 21.
[98] Davies, *Musical Works and Performances*, 21.
[99] Miles Davis, *Kind of Blue*, CS 8163, (1959), LP.

Davies has been a highly influential scholar on jazz ontology. As the research of Davies serves as a foundation for an ontological model I explore in chapter 3, his work will be discussed further there.

The above-mentioned scholars have embarked on this ontological project at the protest of Lydia Goehr, who has warned against alternative formulations of musical identity, as illustrated by her 2007 exchange with Elaine Sisman. Sisman has advocated for the consideration of an "opus concept,"[100] noting that composers have long appended opus numbers to collections of their compositions (even absent any intent to publish). Sisman argues that this element of composers' behaviour indicates something relevant about how they conceived of their own creative products and is thus deserving of analysis on its own terms. Goehr responded to this suggestion[101] in her forward to the 2007 edition of the *Imaginary Museum*, where she expresses skepticism at the utility and practicality of competing concepts of musical identity as they "[threaten] to unfurl into infinite specification. Why not go further and add the composition-concept, the piece-concept, the oeuvre-concept, the tune-concept, the song-concept, the riff-concept, and even the improvisation-concept?"[102] Gavin Steingo's response to this is statement is instructive:

> To this, I would respond: why not, indeed? Surely, this is precisely the kind of work that musicologists should be doing? And surely serious studies of the song-

[100] "Six of One: The Opus Concept in the Eighteenth Century," in *The Century of Bach and Mozart: Perspectives on Historiography, Composition, Theory and Performance*, ed. S. Gallagher and T. F. Kelly (US: Cambridge, Harvard University Press, 2008), 79–107.
[101] Goehr was not responding directly to the previously-cited 2008 publication by Sisman, but to Sisman's discussion of an opus concept with George Lewis, per Lydia Goehr, *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music*, Rev. ed. (UK: Oxford, Oxford University Press, 2007), xxxi.
[102] Goehr, *The Imaginary Museum of Musical Works*, xxxii.

> concept, for example, would only throw more (and not less) light on the work–concept, if only by clarifying what is particular to the both?[103]

I can only mirror Steingo's inquisitiveness. Why not a song concept, indeed? Brian Kane has produced just such a study in his 2024 book *Hearing Double: Jazz, Ontology, and Auditory Culture*. Kane adopts Goehr's historical methodology in an attempt to understand musical identity in jazz. In the following chapter I describe Kane's work and endorse his method.

[103] Steingo, "The Musical Work Reconsidered, In Hindsight," 91.

# Chapter 3: Hearing Double

> *Where is the song before it is sung?*
>
> - Alexander Herzen[104]

Brian Kane's 2024 book *Hearing Double: Jazz, Ontology, and Auditory Culture* presents a comprehensive model of jazz ontology. Kane constructs his model in reaction to Stephen Davies's categories of ontologically thin and ontologically thick works cited in the previous chapter. He draws on Bruno Latour and Annemarie Mol's Actor Network Theory to construct his ontological model and R. Murray Schafer's conception of soundscapes to explain the emergence of the jazz practices relevant to his model.

Kane treats Stephen Davies as his ontological starting point. Davies claims that works, regardless of their thickness, can be reduced to a set of minimal invariant properties that are work-determinative. With respect to works, thickness is therefore a matter of degree rather than of type. Kane exemplifies this continuum with reference to the gradual march toward specificity in Western Art Music, with the increasingly detailed notations of Stravinsky and the use of recorded media by Varèse.[105] Davies cites standard form jazz as an example of ontological thinness:

> Pieces specified only as a melody and chord sequence are thin. Some tin pan alley songs are of this kind. For them, the player creates the larger structure of the performance by deciding on the number of repeats, variations, elaborations, links and the like.[106]

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[104] David Suisman, *Selling Sounds: The Commercial Revolution in American Music*, (US: Cambridge, Harvard University Press, 2009), 19.
[105] Kane, *Hearing Double, 29*.
[106] Davies, *Musical Works and Performances*, 21.

This allows for two performances of a jazz standard to be performances of the same work. The invariant underlying structure of the standard, while ontologically thin, is sufficient for workhood. Kane cites Davies's three methods by which this invariant structure can be communicated: via score, orally, and via a model performance. In all three cases, not all details communicated are work-determinative, and not all work-determinative features are communicated. The performance of the work will rely on a group of enculturated performers who are familiar with the performance practices expected in the idiom.[107] Kane's principal criticism of Davies's view is that it assumes that the work (whether thin or thick) precedes the performance.

To challenge Davies's view, Kane uses the Miles Davis tune *So What?* as a case study. Kane cites three recordings of Miles Davis performing *So What?* between 1959 and 1965. In the 1959 recording[108] there are a set of features in the head that Kane suggests could be considered work-determinative: the distinctive quartal voicings in the piano part, the melody played by the bassist, the horn doubling of the piano's rhythm, and the horn doubling of the piano's melody. Because this performance did not proceed from a score, this would constitute a model performance within Davies's view. *So What?* was again recorded by Miles Davis in 1964.[109] In this version, the piano voicings, bass melody, and rhythmic unison between piano and horns are maintained, but the horns no longer double the piano's melody. In a 1965 recording of *So What?*,[110] Miles Davis introduces yet another

[107] Davies, *Musical Works and Performances*, 31-5.
[108] Miles Davis, *Kind of Blue*, CS 8163, 1959, LP.
[109] Miles Davis, *'Four' and More*, CS 9253, 1964, LP.
[110] Miles Davis, *The Complete Live at the Plugged Nickel, 1965*, CXK 66955, 1995, CD.

change: he rhythmically displaces his horn part away from the piano part.[111] With each iteration, the potential list of work-determinative features appears to shrink. The horn part at first seemed essential to the work identity of *So What?*, but in time has turned out not to be.

While Stephen Davies might conclude that the invariant structure of *So What?* is being revealed via repeated performance, this is an unsatisfying answer for Kane:

> This surefire argument relies on a strange act of ontological misdirection. No matter what new performances of a thin work might arise, an updated invariant structure can be fashioned to account for it. Once that has been done, that newly formed invariant structure can be covertly placed back at the beginning of the chain of performances and said to have always already been present. The ontologist's own involvement in that process is occluded, for it is they who glean which properties are work-determinative and which are not— through a process of abstraction, reduction, or the like— and then project that structure back to the beginning of the chain.[112]

Kane compares this process to Sigmund Freud's conception of Nachträglichkeit, in which later events influence our memory of earlier events, effectively rewriting our perception of the past.[113] Regardless of the level of variation between performances of the same work, Davies would have us conclude that at the beginning of the process there was a pre-existent work of minimal thinness. If further performances of the work contain new variant features, the same ontological procedure could be performed anew, and an even thinner invariant structure can be placed to precede the first performance of the work. Kane's central argument in *Hearing Double* is directed at avoiding Nachträglichkeit in

[111] Kane, *Hearing Double*, 35-7.
[112] Kane, *Hearing Double*, 38.
[113] Kane, *Hearing Double*, 39.

musical ontology. Instead, Kane suggests that musical works in jazz emerge from repeated instantiation and change over time.

## Replication and nomination

Kane's model of jazz ontology is network-based and is contingent on the two parallel processes of replication (whereby jazz standards are performed) and nomination (whereby these performances are identified with each other via a common name). This connects Kane's position to Goehr's Aristotelian and nominalist perspectives.

Kane draws on Whitney Davis's definition of replication as "the sequential production of similar material morphologies . . . that are substitutable for one another in specific social contexts of use."[114] The substitutability of a replication is contingent on its purpose. A photograph of a painting could constitute a replication of that painting in the context of an art history lecture where the intent is to show a visual example of the painting for the purpose of discussion, but a photograph of a painting would not constitute a replication for the purpose of radiocarbon dating the painting.

In the case of musical replication, Kane considers substitutability to emerge from practice. If a community regards two musical performances as substitutable for each other, then they are replications of each other regardless of any morphological difference. Kane extends this view of replication beyond musical performance and into specific musical features within a performance. In particular, Kane invokes replication to address

[114] Whitney Davis, *Replications: Archaeology, Art History, Psychoanalysis,* (University Park: Pennsylvania State University Press, 1996), 1.

the indeterminacy found in jazz practice. Kane uses a selected performance history of the opening measures of *Body and Soul* to illustrate the practice of harmonic substitution covered in chapter 2 of this thesis.[115] Kane proposes a network-based ontology to explain the harmonic variety between the originally-published sheet music (1930), two Art Tatum recordings (1938, 1953), a Hank Jones recording (1956), a Teddy Wilson recording (1941), and a Thelonius Monk recording (1960).[116] Per Kane, each of these items forms a node in a network where connected nodes exist in dialogue with each other. When one performance of a standard is in imitation of a previous performance, this produces a chain of replication. Chains of replication can occur with varying degrees of fidelity, and any node in that chain can produce a new chain if that node becomes a model for another replication. This approach avoids the "need to come up with one thin pattern that accommodate[s] all instances. Instead, each artifact establishe[s] a distinct relation with a predecessor, a relation that might also be present elsewhere but is not requisite."[117]

Unlike prior ontologies, Kane's network-based approach sees the ontology of jazz standards as emergent and changeable. Kane distinguishes between permissible and impermissible replications based on the degree of morphological similarity in the replication. According to Kane:

> When replications are permissive they will produce artifacts that are morphologically quite distinct from their models. In contrast, impermissive (or strict) replications will produce artifacts with greater morphological similarities. When some replications in a new performance of a standard are permissive, the impermissive replications may

[115] Kane, *Hearing Double*, 70-80.
[116] Kane, *Hearing Double*, 76.
[117] Kane, *Hearing Double*, 78.

> become more important insofar as they function as markers of distinguishing features of previously accepted versions of the tune.[118]

This approach avoids a Nachträglichkeit ontology while preserving a gradient of specification not unlike that found in the thick/thin model presented by Davies. Kane warns us against any presumption of what may constitute work-determinative properties[119] in standard form jazz:

> We simply do not know ahead of time what features of an original will be the ones replicated. We might be surprised— a possibility that cannot arise for the ontologist and their thin, prescriptive work. The social context is the ultimate arbiter about what is or is not successful replication. As contexts change, the terms by which successful replication is assessed will also change.[120]

If these intertextual networks are mercurial and difficult to define, how could they produce discrete works? If we simply have a set of interrelated performances in dialogue with each other, how can we discern where one work of standard form jazz ends and another begins? Kane answers this question via replication's parallel process, nomination.

Nomination is the process by which performances in standard form jazz are given names. Kane notes that naming plays an essential role in the identity of jazz standards, as "… [calling] a performance *p* by the name *n* is [an assertion] that *p* should be associated with the network of performances associated with *n*."[121] For both economic and practical reasons, a tune needs a name. People need to know what record they are purchasing, and

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[118] Kane, *Hearing Double*, 92.

[119] It is worth noting here that Kane is using a weaker definition of work-determinativeness than might be expected: "[W]ork-determinative properties are not necessary properties; rather, they are properties that are sufficient for the purpose of replication." Kane, *Hearing Double*, 80.

[120] Kane, *Hearing Double*, 78.

[121] Kane, *Hearing Double*, 104.

musicians need to know which tune was just called so that they can play it. The act of nomination is one that can fail on the part of the nomenclator. Due to the degree of indeterminacy in jazz replication, an attempt to give a name to a performance is subject to a network veto:

> Although jazz performance is replicationally permissive, its space of possibilities is often constrained by its relation to the past, by the customary song-specific protocols embodied in a standard's branches. Radical replication often faces pushback because listeners, like musicians, grow accustomed to hearing standards in line with certain routines or protocols. For entrenched listeners, these protocols might be understood as work-determinative features that have crossed the line from sufficient to necessary. But that line can always be retread.[122]

Kane separates the act of authorial, top-down naming ("baptism" in his terminology) from network acceptance. From the initial, formal baptism, chains of vernacular nominations can begin as the name is accepted or rejected throughout a network. Kane cites several examples of this process in action. Saxophonist Herb Geller described Ornette Coleman's novel rendition of *Embraceable You* from his 1961 album *This is Our Music*,[123] as "… a laugh. I'm sorry, but that's not 'Embraceable You."[124] Milt Jackson referred to the same recording when he said, "He plays only his own music—except he plays *Embraceable You*, but it's not the *Embraceable You* that I know."[125] Nomination can also fail due to confusion rather than derision. Kane cites the case in 1961 at the Newport Jazz Festival in which an announcer introduced the John Coltrane Quintet, and declared that they were about to play *So What?*, only for the ensemble to begin playing

[122] Kane, *Hearing Double*, 226.
[123] Ornette Coleman, *This is Our Music*, SD-1353, 1961, LP.
[124] Kane, *Hearing Double*, 111.
[125] Kane, *Hearing Double*, 111.

what today is named *Impressions*, a contrafact of *So What?*[126] written by Coltrane that went on to become a standard. Per Kane, this confusion resulted from a failure on the part of Coltrane to decide on a name for the tune until after it had already begun a life of its own (perhaps we could call this a case of anabaptism). In 1961, Coltrane was still using the source tune's name (*So What?*) for his nascent contrafact until introducing the provisional title *Excerpts* in 1962. Coltrane's 1963 release of the album *Impressions*[127] served as its public baptism, and this nomination proved successful.

Chains of nomination can also differentiate between morphologically similar tunes. Kane cites the case of *Why Not?*, a contrafact of *Impressions* (note that we are now discussing a contrafact of a contrafact) that existed in parallel with *Impressions* during its 1961 pre-nomination stage. According to Kane, in difficult cases such as this, chains of nomination are essential for understanding work identity in jazz. With only a minor difference in the B section, both tunes could easily have been mistaken for each other, but the process of nomination has illuminated their separate identities:

> Chains of replication participate in the establishment of work identity, but in a situation like this, they are inadequate. If they were, "Impressions" and "Why Not" might be considered identical. To make a claim about work identity, we also need a baptism and historical transmission of a name… If we take the nominations "So What," "Impressions," and "Why Not" as assertions and solicitations then the replicational differences between them become crucial, even work-determinative. While all three have the same harmonic structure and form, the differences between "Impressions" and "Why Not" depend on the melody of the bridge and… the accompaniment pattern.[128]

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[126] Though *Impressions* began as a contrafact of *So What?* and was originally referred to by Coltrane simply as "*So What?*", its status as a mere contrafact is challenged by Kane, who argues it has a more complex provenance. For more, see Kane, *Hearing Double*, 115-121.
[127] John Coltrane, Impressions, A-42, 1963, LP.
[128] Kane, *Hearing Double*, 121-2.

Kane acknowledges the difficulty in applying his model. Chains of replication and nomination are complex and difficult to track over time. Kane is often left speculating about the genetic relationships between given replications as well as nominations due to a lack of historical evidence. Mere morphological analyses are insufficient within this historical model, as Kane acknowledges that "…the brute fact that two artifacts are morphologically identical or indiscernible is not sufficient for making a claim about their identity".[129]

Kane frames jazz standards as works that emerge from networks, and as such they are given to change over time. Works are "not platonically real," but are "real in a different sense: works are real when they produce results… [by constraining] and [affording] properties for future performances." Furthermore, works "are negotiated by means of everyday musical practices – in acts of reproducing and receiving them. They can be changed through performance, arrangement, and revision."[130]

## An ontological soundscape

To understand how this emergent, changeable ontology developed within jazz practice, Kane proposes a soundscape-based answer. During the period in which standard form jazz was developing and flourishing, Americans lived within a soundscape that encouraged them to think in ontologically loose terms. The way that music was produced and consumed created a culture in which the identity of a tune developed according to the

[129] Kane, *Hearing Double*, 123.
[130] Kane, *Hearing Double,* 149.

chains of replication and nomination on which Kane's ontological model depends. Kane terms his etiology the "soundscape of standards."[131]

Kane uses the nationally-broadcast weekly musical program *Your Hit Parade* as a barometer of American musical culture during the "golden age of standards," or the period roughly between 1930 and 1960. *Your Hit Parade* curated the most popular songs of the day and featured countdown-style presentations of these hits. Notably, these were not pre-recorded renditions of music but bespoke arrangements and performances produced each week. As the song itself was the focus of the countdown rather than a particular recording, arrangement, or performance of the song, each week the audience would hear the song in a new way. The same song, presented a different week, might be sung by a different singer, be presented in a different key, at a different tempo, and with a different arrangement (including reharmonization). Kane cites this as a contributing factor in a broader culture of permissive replication:

> [T]he "soundscape of standards" is a soundscape where any individual song would have been heard by listeners across various media (radio, phonography, sheet music) in quite distinct and differing performances. The specific properties of the song might be quite different from version to version. Listeners would not necessarily have associated a hit song of the day with one specific top-selling phonograph record, with one specific performer, or with one specific arrangement. Rather, there were many different possible performances by which a listener might encounter and re-encounter a song, and they might hear many different versions of that song in very close succession.[132]

[131] Kane, *Hearing Double*, 155.
[132] Kane, *Hearing Double*, 173.

In such an environment, listeners would become accustomed to conceiving of musical objects via replication and nomination. But if the soundscape of standards produced this ontological scenario, what ended the golden age of standard form jazz?

Kane maps the descending cultural trajectory of jazz standards on to the development of a cultural soundscape based on recordings. The arrival of rock and roll caused recordings to supplant songs as the locus of musical identity.[133] The primary medium in the new soundscape was the meticulously crafted, mass marketed studio recording. This soundscape encouraged the listener to conceive of musical identity as located in discrete recordings rather than ontologically loose networks. The specific sounds that could only be achieved via studio recordings became, according to Kane, work-determinative features. This allowed for people to conceive of a performance as a "cover" (a concept alien to listeners of *Your Hit Parade* in 1935). A cover can only be so conceived of if there is a prior recording closely associated with a particular performer or ensemble. Kane highlights this tension in replicational permissibility with reference to the final years of *Your Hit Parade*, which tried and failed to adapt to the changing ontological expectations of its audience:

> …its sudden demise is often attributed to the rise of rock and roll—in particular, the struggles that plagued longtime cast member Snooky Lanson when forced to sing "Hound Dog" on the show week after week. First appearing on Your Hit Parade on September 1, 1956, "Hound Dog"—which was so associated with Elvis's visual persona and the unique sound of the recording—did not translate well to Lanson's moderate, crooning, middle-of-the-road style. Here there were no swaying hips, no greasy pompadour, no sex appeal—just a toothy mouthful of all-American white bread. The old practices of mainstream permissive replication no longer seemed

[133] For more on the ontological and cultural relevance of rock and roll and recordings, see Theodore Gracyk, *Rhythm and Noise: An Aesthetics of Rock* (Durham, NC: Duke University Press, 1996).

> adequate to the new criterion of sonic duplication. Lanson didn't look like or sound like Elvis, and that fact began to matter as it had never before… In 1957, Lanson and the rest of the cast of Your Hit Parade were replaced with a new cast of younger singers, with more ability to cover "rhythm and blues" and rock and roll. And by the summer of 1958, the show would be canceled. Who needed Snooky Lanson and the Hit Paraders, when you could simply watch American Bandstand and see the genuine article lip-synching to their newest single?[134]

Though *Hearing Double* was published only recently, I believe its impact will be significant. With *Hearing Double*, Brian Kane credibly does for standard form jazz what Goehr's *Imaginary Museum* did for Romantic music: he recognizes a historically-emergent ontology in jazz based on an analysis of its modes of musical production and reception. Though it is admittedly (per Kane) difficult to apply, I hold that it represents the closest a scholar has come to describing the uniqueness of jazz ontology. In the following chapter I endorse Kane's model and attempt to add to its explanatory power by suggesting an ontological feature of jazz it overlooks and proposing an etiology for that feature.

[134] Kane, *Hearing Double*, 198.

# Chapter 4 – Melodic Primacy and Copyright: Where Ontology and Prison Sentences Meet

> *What is a musical work? Philosophers debate it, but for judges the answer has long been simple: music means melody.*
>
> -Joseph P. Fishman[135]

In this chapter I endeavor to build on Kane's model by highlighting melodic primacy as an important ontological feature of jazz and, drawing on the scholarship of Scott DeVeaux, Joseph P. Fishman, and J. Peter Burkholder, I argue that copyright law contributed to its emergence. Kane's observation that the American musical soundscape acted on the various ontological networks that produced jazz standards is well taken. It is also worthy of note that copyright acted on jazz musicians in ways that shaped their conception of musical ontology. Within a legal regime that afforded additional economic rights to composers over performers, jazz musicians were heavily incentivized to reframe themselves as the former:

> *With few exceptions (Ellington being the most obvious), jazz musicians have not primarily been composers but "mere" performers—a status several notches lower in economic and social prestige. The issue here is not intrinsic artistic worth: the accomplishments of an Armstrong or a Parker are beyond question. But in a music industry designed to funnel profits to the owners of copyrights, improvisers have found themselves in an anomalous and frustrating position. The history of jazz can be read, in part, as an attempt by determined musicians to close the gap between artistic ambition and economic reward.*[136]

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[135] Joseph P. Fishman, "Music as a Matter of Law," *Harvard Law Review* 131, no. 7 (2018): 1862.
[136] Scott Knowles DeVeaux, *The Birth of Bebop: A Social and Musical History* (Berkeley: University of California Press, 1997), 9.

It should be emphasized that ontological considerations in music are not exclusively philosophical in nature. Violators of copyright law have found themselves fined or imprisoned. In 1962, Irwin Rosenberg and Melvin Gershun were found guilty of illegally printing and distributing fake books. The following year they were sentenced to one year of probation. Both men continued their fake book bootlegging and each had their probation revoked, with Rosenberg serving 90 days in jail and Gershun serving 30.[137] It is worth noting that both men would have been on firm legal ground had they only published chord changes.

While developing his argument on nomination, Kane obliquely acknowledges the special ontological position of melody in jazz via his focus on contrafacts.

> A musician might play any number of possible "Rhythm Changes"—that is, songs that employ "I Got Rhythm" as a harmonic framework—without playing the "head" or melody at the beginning, and thus a listener would lack information that could function as a work-determinative property. There would be a bevy of songs to which that particular chord progression might be related. Thus, there would be no determinative feature specific enough to pick out the correct network to which the performance should be associated.[138]

Indeed, the presence of nomination in Kane's model is necessitated by the existence of contrafacts.[139] This would appear to acknowledge the primacy of melody in work identity in jazz, but Kane takes care to avoid endorsing this view, claiming that "the presence of the melody should not be taken as a determinate feature."[140] Kane also rightly

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[137] Kernfeld, *The Story of Fake Books,* 75-82.
[138] Kane, *Hearing Double*, 106.
[139] Kane's chapter on nomination is largely devoted to exegeses of various contrafactory relationships, and he begins the body of his argument by stating "[t]he best way to understand the contribution of naming to the ontology of standards is to consider the widespread use of contrafacts by jazz musicians." Kane, *Hearing Double*, 95.
[140] Kane, *Hearing Double*, 87.

notes the permissiveness with which melodies are replicated in jazz. Kane cites Coleman Hawkins's influential 1939 recording of *Body and Soul*,[141] which initially services the melody but departs from it early in the first chorus. As Hawkins takes a slow tempo, it takes a minute-and-a-half to complete a full chorus of the 32-bar AABA. Arguably, a rigid adherence to the prescribed melody for half of the durational capacity of a 78 record would have been a waste of wax. The melodic permissiveness of Hawkins's replication could be seen then as a result of a technologically-imposed economy of material rather than an eschewing of melody.

To refocus Kane's model, we must consider the ontological inequality that emerges from different categories of permissive replication. If a new harmony is placed under the pre-existing melody of a standard, this could be seen as a reharmonization, an arrangement, or simply the playing of the standard. As outlined in chapter 2 of this thesis, harmonic transformations are a fundamental element of jazz practice. If a new melody is placed over a pre-existing harmony, this (normally, *pace* Kane) produces a contrafact with a new name and a new work identity. This suggests that identity in jazz attaches more strongly to melody than harmony.

The aesthetic foundations of melodic primacy are of considerable antiquity. Jean-Jacques Rousseau mounts a polemical defense of melodic primacy in his 1753 essay *Lettre sur la musique française*. Rousseau argues that complex harmony is a refuge for an incompetent melodist:

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[141] Coleman Hawkins and His Orchestra, *Body and Soul*, Bluebird B-10523, 1939, 78 RPM record.

> The impossibility of inventing agreeable melodies has obliged the composers to turn all their energies in the direction of harmony, and lacking real beauties, they have introduced beauties of convention … instead of good music, they have created a learned music; to supplement melody, they have multiplied the accompaniments… To avoid being insipid, they have augmented confusion; they think they are making music, but they only make noise.[142]

Rousseau frames this in the context of a broader attack on French music and highlights the many ways in which contemporary French musical styles obscured melody (ornamentation, counterpoint, thick harmonies). Jean-Philippe Rameau responded to Rousseau only four months later with his essay *Observations sur notre instinct pour la musique*. Rameau mounts the naturalistic arguments that melody is dependent on harmony via the harmonic series and that humans have an inborn appreciation of harmony:

> We have received a gift [from nature] which is called instinct. Let us consult it in our judgements… A person whose mind is preoccupied while listening to music is never free enough to judge it. For example, if in his opinion he finds that the essential beauty of this art lies in the changes from low to high, from soft to loud, from fast to slow… he will judge everything by these criteria without reflecting on their weakness or how little merit they have, and he will fail to notice that they are distinguished from harmony, which is the unique basis of music and the principle of its greatest effects… Melody alone derives its force from this source, from which it emanates directly… Melody has no other principle than harmony as produced by the resonating body.[143]

Unfortunately for Rameau, generations of judges would disagree, as the legal primacy of melody over other musical features is quite old:

> Music has been copyrightable subject matter in the United States since 1831. For much of the time since then… music plagiarism cases have revolved around a single dimension. The coin of the realm was melody, whose imitation has tended to be both necessary and sufficient to sustain an infringement claim. If one copied a

[142] Cited by Cynthia Verba in *Music and the French Enlightenment: Rameau and the Philosophes in Dialogue* (New York: Oxford University Press, 2016), 21.
[143] Cited by Cynthia Verba in *Music and the French Enlightenment*, 26.

> protected work's melody, one was liable even if other elements were not copied. And if one didn't copy melody, liability was unlikely.[144]

This American interpretation of musical ownership migrated from the United Kingdom, where the 1835 judicial decision in the case of D'Almaine v. Boosey set a precedent on the issue.[145] The case resulted from the unauthorized publication of instrumental arrangements of arias from Daniel Auber's opera *Lestocq* (1834). The court ruled that an arrangement infringed on copyright if it reproduced the melody, as:

> It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy... the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same... The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment.[146]

The distinction between the "genius" of creation and the mechanistic simplicity of adaptation remains a part of American music copyright law today. In the case of recorded jazz standards, the composer alone is recognized as the owner of the composition.[147] This prevents jazz musicians from protecting their compositions if they are derivative of prior, protected compositions, making the otherwise copyrightable contributions of the musician ineligible for protection.[148] Regardless of the level of innovation in an artist's interpretation, if it is an arrangement of a protected composition then the rights remain with the original composer. This definition of ownership coupled with legally-mandated

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[144] Fishman, "Music as a Matter of Law," 1870-1.
[145] Fishman, "Music as a Matter of Law," 1877.
[146] Fishman, "Music as a Matter of Law," 1877-8.
[147] "Jazz Has Got Copyright Law and That Ain't Good," *Harvard Law Review* 118, no. 6 (2005): 1941.
[148] "Jazz Has Got Copyright Law and That Ain't Good," *Harvard Law Review* 118, no. 6 (2005): 1942.

melodic primacy created a precarious situation for jazz musicians, as illustrated in the following hypothetical scenario described by record producer Leonard Feather:

> You don't read or write music yourself, and you don't want to pay any-body to write music for the session, so when the boys come into the studio they start noodling around with "I Got Rhythm" or "Honeysuckle Rose", and pretty soon they have a brand-new melody based on the same chords, and they decide to call the product "Jumpin' at Wrecker" or "Wreckerlection Stomp." The boys don't realize that in the course of their noodling they have created a new tune of their own, so you put yourself down as a composer without telling them. Next day, you copyright the number, place it with a music publisher, and land yourself a fat advance royalty. Oh yes, it's a nice game, the record business.[149]

As standards form the backbone of jazz repertoire and are widely recorded by performers, this copyright regime is highly impactful. It can make the difference between a recording artist's creative output being recognized as original and therefore protected, or derivative, and requiring the recording artist to pay royalties to the copyright holder. American music copyright law sought to protect the original expression of a single composer (and lyricist in the case of compositions with a text).[150] At the dawn of the 20th century the Romantic practice of composers fixing musical objects in notation and receiving compensation for publication had firmly worked its way into American copyright law. In essence, these laws were written for Goehr's imaginary museum, not Kane's.

Given the legal primacy afforded to melody and the fact that the head is only played for a small proportion of the duration of an average performance of a standard,[151] jazz

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[149] DeVeaux, *The Birth of Bebop*, 305-6.

[150] For more on the failure of copyright law to take into account collaborative composition, see James Griffin, "Copyright in Music: A Role for the Principles of Reverse Engineering," *Legal Studies (Society of Legal Scholars)* 30, no. 4 (2010): 653–73.

[151] In the earlier-mentioned Wes Montgomery recording, only two out of eight choruses contain the melody of *Cottontail*, and "John Coltrane's interpolation of George Gershwin's 'Summertime' uses the recognizable

musicians were heavily incentivized to avoid copyrighted melodies. Coleman Hawkins avoided recording standards until his association with Capitol Records allowed him some economic leeway. During Hawkins's 1945 sessions under Capitol, he recorded 12 tunes. According to Scott DeVeaux:

> Of the twelve tunes, seven were familiar standards, none published more recently than 1933. Such tunes had long been in Hawkins's repertory, but remained underrepresented in his recordings because of the pressure by smaller companies to record only "originals." Finally in the embrace of a major company that could afford to pay composer royalties, Hawkins allowed himself the luxury of openly stating copyrighted melodies.[152]

If jazz musicians were to operate within a commodified artistic environment while exercising economic autonomy, it "required a conscious commitment on the part of musicians to reorient the music to existing commercial channels… The repertory would have to be converted into clearly defined economic units, preferably original compositions, for which authorship could be precisely established."[153] For jazz musicians seeking to avoid paying royalties (whether under major label protection or not), contrafacts were an obvious solution. As pointed out by J. Peter Burkholder:

> Because copyright applied to the melody and not the chord progression, the new piece could be performed, recorded and published without paying fees to the earlier song 's creator, and indeed could itself be copyrighted.[154]

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theme for only sixty-four seconds out of the eleven minute, thirty-one second track." "Jazz Has Got Copyright Law and That Ain't Good," 1941.

[152] DeVeaux, *The Birth of Bebop*, 402.

[153] DeVeaux, *The Birth of Bebop*, 298.

[154] J. Peter Burkholder, "A Brief History and Typology of Musical Borrowing and Reworking," in *Music Borrowing and Copyright Law* (London: Hart Publishing, 2023), 36.

The composition of contrafacts allowed jazz musicians to play on familiar changes while remaining within the prescribed legal boundaries of authorship. Indeed, despite the canonic allure of classic standards, many jazz musicians wrote contrafacts.[155] The creation of these new musical objects could be seen then as emerging in part from an externally imposed legal ontology.[156]

This is not to detract from the agency of these artists. Indeed, they were intentionally operating within their socioeconomic milieu in much the same way that Goehr's Romantics were operating within their own. Let us revisit Goehr's earlier-cited claim that Elaine Sisman's opus concept "threatens to unfurl into infinite specification. Why not go further and add the composition-concept, the piece-concept, the oeuvre-concept, the tune-concept, the song-concept, the riff-concept, and even the improvisation-concept?"[157]

It appears that in jazz a tune concept has indeed been in operation, with its own historically emergent factors granting it regulative force. The historically emergent factors that lent regulative force to Goehr's work concept urged composers to think in terms of permanent, autonomous, closely-notated musical objects, while the factors lending

[155] The composers of jazz contrafacts are too legion to provide an exhaustive list, but (only considering major names and without leaving the letter "C") they include Charles Mingus, Charlie Parker, Coleman Hawkins, Count Basie, and Charlie Christian.
[156] For more on melodic primacy, jazz, and copyright, see Mark Osteen, "Rhythm Changes: Contrafacts, Copyright, and Jazz Modernism" in *Modernism and Copyright*, (New York: Oxford University Press, 2011), 100-13, and Katherine M. Leo, "How Jazz Persists at the Periphery of Copyright," in *Music Borrowing and Copyright Law* (Oxford UK: Hart Publishing, 2023), 155–72.
[157] Goehr, *The Imaginary Museum of Musical Works*, (2007), xxxii.

regulative force to the tune concept encouraged jazz musicians to improvise around a melody and chord changes, and to treat melody as uniquely attached to musical identity.

## Conclusion

In this thesis I have endeavored to approach jazz music in much the same spirit as Lydia Goehr approached Romantic music: with a sensitivity to the practices of the artists whose products (dare I say works?) impact us today. By drawing on a diverse range of musicological, philosophical, and legal sources I have attempted to shed light on musical identity in jazz. It is unsurprising that such a range of scholars have taken an interest in jazz ontology. With its remarkable mixture of group-based improvisation and canonicity, jazz practice presents a set of compelling challenges to the ontologist. The 19th century conception of musical works that has been so aesthetically powerful fails to capture the depth and uniqueness of musical identity in jazz, but Lydia Goehr's historical method is an appropriate starting point when attempting to understand how musicians conceive of their products.

I have contributed to the discourse on this issue by importing into it a historical analysis informed by the legal structures that impacted jazz musicians. While jazz has a rich and ever-evolving aesthetic tradition animating its musicians, the externally imposed ontology of copyright law is an important factor contributing to the historical emergence of jazz ontology. Further studies can apply this analysis to other musics by investigating the ways that legal structures and economic commodification impact musicians' conception of their music. Future scholarship could explore the ontological implications of colonial and postcolonial copyright law in Nigeria and India. Additionally, this thesis will aid closer

studies of jazz musicians which aim to uncover the ways that copyright law shaped their individual practice.

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