

**Who Wrote Those “Livery Stable Blues”?: Musical Ownership in *Hart et al. v. Graham***

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In January 1917, the Original Dixieland Jazz Band (ODJB) released what has become recognized as the first jazz record, Victor 18255. It introduced general American audiences to an emerging musical style that blended blues, ragtime, and band music. Selling for the middling price of 75 cents per copy, Victor 18255 swiftly outsold The Victor Talking Machine Company’s offerings from established recording giants such as Enrico Caruso and John Philip Sousa. Popular demand for the record generated an ancillary market for sheet music based on its songs. The overall commercial success of Victor 18255, coupled with its lasting influence on later jazz musicians, makes the record and its associated sheet music significant objects in jazz history. The production and legal reception of these musical objects in their first year reveals a great deal about the place of jazz musicians in a broader American cultural context at the moment their music began to reach mass audiences. This paper focuses on the B-side of the record, a song that the ODJB referred to as “Livery Stable Blues.”

During production, Victor executives re-titled the B-side of Victor 18255 as “Barnyard Blues” in an effort to avoid offending target audiences with a seemingly vulgar title. Due to a labeling error, however, the record itself retained the band’s original title. In June 1917 jilted band member Alcide Nunez, along with his colleague Ray Lopez, published sheet music for “Livery Stable Blues” with Chicago music publisher Roger Graham. Months later, the ODJB released sheet music for “Barnyard Blues” with music publisher Leo Feist. The ensuing sheet music competition resulted in a high-profile copyright infringement suit, *Hart et al. v. Graham*, heard in October 1917. As a part of a case centered on copyright privileges, the *Hart* court sought to determine who wrote those “Livery Stable Blues.”

As plaintiffs in the lawsuit, the ODJB, their manager Max Hart and their prosecuting lawyers first established the ODJB's ownership of "Barnyard Blues" by providing the April copyright registration for the song. The plaintiffs then sought to meet the legal burden of proof by demonstrating Nunez and Lopez's access to "Livery Stable Blues" as it was performed and recorded by the ODJB. Members of the ODJB recounted the compositional process for the song as originating in the creative genius of front-man Nick LaRocca with improvisatory additions from the rest of the band. LaRocca explained that the song grew out of a New Orleans jam session, followed by a fortuitous performance in a Chicago café:

"Well a valve in my cornet got stuck and it made a funny noise...I experimented with the bray or neigh, and finally worked out my livery stable melody. One day when our band had finished playing a number at the Schiller Café, here in Chicago, there was a girl sort of skylarking around the floor and I blew a horse neigh at her on my cornet."<sup>1</sup>

The band, which included Nunez at that time, then capitalized on this evocative novelty in a new blues song. Next, the plaintiffs sought to establish substantial similarity between "Livery Stable Blues" and "Barnyard Blues." During witness examinations, the plaintiffs questioned witnesses about the first time they heard the song, whether or not they heard Nunez and Lopez claim the song as their own, and when the song first came into existence.

In order to support their sufficient similarity claim, the plaintiffs drew on expert testimony that unanimously found the songs to be similar. Expert witnesses ranged from contemporary composers and arrangers, like Victor Herbert, to jazz band leaders, such as Tom Brown. Feist company songwriter Theodore Morse found that "those two numbers could be played at the same time and no difference would be noted that they were different

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<sup>1</sup>"At Last! Court Finds Man Who First Jazzed." *Chicago American*, October 11, 1917: sports, 1. Similar stories are recounted in "Discoverer of Jazz Elucidates in Court," *Chicago Daily News, Home Edition*, October 11, 1917: 1; "All Know Jazz, But No Music," *Chicago Daily Herald*, October 12, 1917: 3.

compositions.”<sup>2</sup> In particular, Morse drew attention to the close similarity of the four-measure introductions, which were almost identical in both pieces. Composer Lee Orean Smith’s examination found that the “...theoretical structure is practically the same, both as to melody, not so much identical as to harmony, but the rhythmical feeling is practically identical.”<sup>3</sup> Ragtime piano performer, ‘Professor’ James ‘Slap’ White, provided the decisive statement for the case: the two pieces of sheet music are different, but they were both blues songs, and all “blues is blues.”<sup>4</sup>

The defense rebutted these claims first by providing a contrasting access claim. They sought to establish that the “Livery Stable Blues” sheet music was published and distributed months before the “Barnyard Blues” sheet music, thus the ODJB had access to copy the “Livery Stable Blues” sheet music. Providing their own compositional process, the defendants argued that “Livery Stable Blues” was their song and was based on “More Power Blues,” a contemporaneous blues song supposedly composed by Lopez himself. Lopez explained that “Livery Stable Blues” was a separate work because of a four-bar introduction, a descriptive interlude evoking the sounds of barnyard animals, and a metrical shift created by a syncopated

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<sup>2</sup>Theodore Morse, Interrogatory Transcript, 4:6-8, October 2, 1917, *Hart et al. v. Graham* (N.D. Ill. 1917), Case File E914; U.S. District Court for the Northern District of Illinois, Eastern Division (Chicago); Records of District Courts of the United States, Record Group 21; National Archives and Records Administration-Great Lakes Region (Chicago); See also “Examination of Theodore Morse,” Series 8, Folder 10, Item 1, 4:6-8, The Dominic ‘Nick’ LaRocca Collection, Hogan Jazz Archive, Tulane University, New Orleans, LA.

<sup>3</sup>Lee Orean Smith, Interrogatory Transcript, 1:27-29, October 2, 1917, *Hart et al. v. Graham* (N.D. Ill. 1917), Case File E914; U.S. District Court for the Northern District of Illinois, Eastern Division (Chicago); Records of District Courts of the United States, Record Group 21; National Archives and Records Administration-Great Lakes Region (Chicago); See also “Examination of Lee Orean Smith,” Series 8, Folder 11, Item 1, 1:27-29, The Dominic ‘Nick’ LaRocca Collection, Hogan Jazz Archive, Tulane University, New Orleans, LA.

<sup>4</sup>“Blues Are Blues, Court Decrees, And No One Wins,” *Chicago Daily Tribune* October 13, 1917: 13; “Blues and More Blues Go Blooey in Music Suit,” *Chicago Daily Tribune* October 12, 1917: 11; “‘Blues are Blues, They Are’ Says Expert in ‘Blues’ Case,” *Variety* October 19, 1917, reprinted in Karl Koenig, *Jazz in Print (1856-1929): An Anthology of Selected Early Recordings in Jazz History*, (Hillsdale: Pendragon Press) 2002;

“Jazz Band in Lobby and Jazz Testimony Get Nowhere,” *Chicago Daily Tribune*, October 12, 1917, 11. For a discussion of all blues being alike, see “Nobody Wrote Those Livery Stable Blues,” *Chicago Daily News, Home Edition* October 12, 1917: 3; “Jazz Band May Play in Court,” *Chicago American, Tenth Edition*. October 12, 1917: sports, 1.

rhythm. Second, the defense sought to establish that “Livery Stable Blues” was inherently formulaic, and thus a set of non-protectable ideas, except for the original elements Nunez and Lopez allegedly added. As Nunez explained,

“...nobody wrote ‘The Livery Stable Blues.’ Naw. Nobody writes any of that stuff. I invented the pony cry in the ‘Blues,’ and LaRocca, he puts in the horse neigh. We was in the Schiller Café, rehearsin’, see? And I suggests that we take the ‘More Power Blues’ and hash ‘em up a bit.”<sup>5</sup>

Given each party’s argument, the court found that the two pieces of sheet music were sufficiently similar. However, the case was dismissed by Judge Carpenter:

“I am inclined to take the view of Professor Slap White in this case, that it is an old negro melody, that it has been known for a great many years... The finding of the Court is therefore that neither Mr. LaRocca and his associates nor Mr. Nunez and his associates conceived the idea of this melody...”<sup>6</sup>

As a result, “Livery Stable Blues” was placed in the public domain because the song was deemed to be an unoriginal work. Thus, nobody could claim to have written “Livery Stable Blues” and receive copyright protection for the song. This finding, however, is incongruous with the clear moral claims to the song made by the jazz musicians. Historically, the decision reveals a point of contention between the jazz community and period copyright law concerning ownership of musical works, rooted in opposing transmission traditions.

Extant *Hart* testimonies reflect two kinds of ownership rights. The first kind is the creator’s inalienable moral right to control general access to his work because it is the fruit of his labor. In the jazz community, this moral right was not managed by any formalized system, but rather was a matter of social acceptance. As such, LaRocca claimed ownership of “Livery Stable

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<sup>5</sup>“Nobody Wrote Those ‘Livery Stable Blues.’”

<sup>6</sup>“Court Findings,” Series 8, Folder 2, Item 4, 2-3, The Dominic ‘Nick’ LaRocca Collection, Hogan Jazz Archive, Tulane University, New Orleans, LA. Judge Carpenter also made an implicit argument about what constitutes “music” that has potent ramifications for the definition of jazz, however it is a tangential topic to the present discussion.

Blues” because he believed he composed it, and the same was true for the Nunez-Lopez duo. These claims are set out in the bill of complaint and answers, and serve as the foundation of both parties’ arguments in *Hart*. The second kind of ownership rights involves a bundle of legal property rights recognized as copyright. The copyright holder has the right to use, the right to exclude others from use, and the power to transfer the work. In this way, a creator is endowed with right to control his work, such that his moral right is bolstered by legal protection.

In particular, the *Hart* court was subject to the 1909 United States copyright regime, which required that a registration meet a set of formalities in order to obtain federal protection, including publication and notice. For musical compositions like “Livery Stable Blues,” the publication formality was met by providing at least one “copy” of the work to the United States Copyright Office. In 1909, “copy” referred to rendering music as an aural work in written musical notation, either in unpublished manuscript form or published sheet music, as an expression of that work. This was intended to provide a record of the work for the United States Copyright Office, for the sake of reference and evidence. Thus, he who wrote down “Livery Stable Blues,” quite literally, could legally own and control it.

In concept, the two kinds of ownership rights go together, where moral right is guaranteed by successful copyright registration. In reality, as *Hart* demonstrates, the requirement to provide a copy becomes a problem for jazz songs like “Livery Stable Blues” that were transmitted orally, and even captured on record, before ever being transcribed onto sheet music. Although *Hart* centered on two pieces of sheet music that rendered the same song into written notation, the nature of “Livery Stable Blues” as part of the oral jazz tradition calls into question the accuracy of its representation on sheet music.

Contrasting ways in which expert witnesses and jazz musicians described “Livery Stable Blues,” highlight two different conceptions about the material existence of the work, either on paper or through performance. The features that expert witnesses selected to identify “Livery Stable Blues” as a musical work, including harmony, rhythm, melody, and formal structure, were identified entirely based on their expression on sheet music. Privileging written features in the sheet music remained consistent with copyright statute that required publication on written notation to formally represent the work. Figure 1 shows an example of Theodore Morse’s comparison of the four-measure introduction to which both he and Ray Lopez draw attention. After noting differences in the internal voice-leading, Morse discussed the rhythmic difference in the third full measure.

**Figure 1: Four measure introduction of “Livery Stable Blues” and “Barnyard Blues”<sup>7</sup>**



In comparison, “Livery Stable Blues” contains syncopation to evoke the uneven “swing” rhythm heard on record, while “Barnyard Blues” presents a straight-rhythm equivalent. Metrically, the rhythmic material in the internal voices between the two sheet music versions reflects the difference between cut and common time. While in “Livery Stable Blues” the syncopation

<sup>7</sup>Alcide Nunez and Ray Lopez, *Livery Stable Blues*, Chicago: Roger Graham, 1917; D.J. LaRocca, *Barnyard Blues*, New York: Leo Feist, 1917.

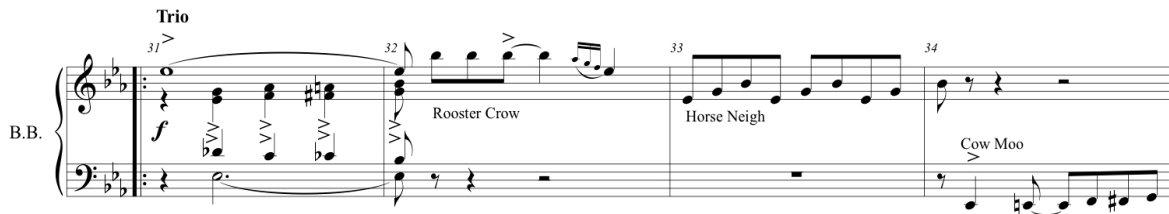
appears on the quarter note, in “Barnyard Blues” it appears on the eighth note. Although the dissimilarity appears minute on sheet music, the result in performance would create a radically different sound.

When considered as a whole, the court’s emphasis on written notation was effective only to a limited extent. On the one hand, focusing on written notation lent itself well to comparing the two pieces of sheet music. Musical elements like meter and melody revealed differences as well as similarities, as was the situation for the closely related melodic contour of both pieces of sheet music. On the other hand, certain musical elements like harmony proved to be detrimental to making a case for the originality of “Livery Stable Blues.” For example, the harmonic progression in the first section of “Livery Stable Blues” and “Barnyard Blues” is the same, based on a paradigmatic “twelve-bar blues” harmonic form. That is, twelve measures structured by harmonic motion between tonic, dominant, and subdominant or a I-IV-I-V-I progression. Both pieces sheet music include elaborations on this progression, but the archetypal structure is present. According to the jazz musicians, this harmonic structure would have been otherwise dismissed as a formulaic characteristic of the blues tradition and thus inherently unoriginal. As a result, the court found “Livery Stable Blues” unprotectable. Based on this decision, the substantial similarity found between the two pieces of sheet music became irrelevant, since the song itself was unoriginal and thus not protectable by copyright.

Conversely, jazz musicians focused on idiomatic elements such as ornaments and melodic runs to identify a song as original and thus protectable. Some of these elements, such as the animal calls, even defy written notation. Figure 2 shows an analogous section in “Barnyard Blues” where the sheet music attempts to capture the evocative animal calls heard in “Livery

Stable Blues”<sup>8</sup> within the confines of written notation. When compared to the distinctive, original sounds heard on Victor 18255, the same sounds on sheet music are reduced to melodically simplistic gestures that do not precisely express the song as it existed in live performance.

**Figure 2: Animal Calls in “Barnyard Blues”<sup>9</sup>**



Elements like ornamental runs and fills might be more easily transcribed than the animal calls, but are an improvisatory part of jazz performance practice. ODJB pianist Henry Ragas explained that after receiving instructions for how to play “Livery Stable Blues,” LaRocca trusted the band members to finish realizing their parts. As the defense counsel paraphrased, “in other words, [LaRocca] would hum the parts to you and you as musicians would put them in for the various instruments which you played[.]”<sup>10</sup> In his deposition, Ragas continued to explain that each performer’s expression of their part occurred during performance, such that “Livery Stable Blues” was never played the same way twice. Thus, transcribing these realizations would fix them in written notation, eliminating the improvisatory nature of the song as a musical work in the oral jazz tradition. Such a written transcription would provide protection only to the run as it appeared on paper, not to any other iteration that Ragas would play as part of a live performance.

<sup>8</sup>1’17”-1’23” on Original Dixieland Jazz Band, *Livery Stable Blues*, Victor 18255, 78 rpm, 1917.

<sup>9</sup>D.J. LaRocca, *Barnyard Blues*, New York: Leo Feist, 1917.

<sup>10</sup>Henry Ragas, Interrogatory Transcript, 8:23-25, October 2, 1917, *Hart et al. v. Graham* (N.D. Ill. 1917), Case File E914; U.S. District Court for the Northern District of Illinois, Eastern Division (Chicago); Records of District Courts of the United States, Record Group 21; National Archives and Records Administration–Great Lakes Region (Chicago); See also “Examination of Henry Ragas,” Series 8, Folder 5, Item 1, 8:23-25, The Dominic ‘Nick’ LaRocca Collection, Hogan Jazz Archive, Tulane University, New Orleans, LA.



It would seem that the *Hart* court needed only to turn to Victor 18255 to find the most accurate, but still tangible, representation of “Livery Stable Blues.” After all, the idiomatic features that jazz musicians use to identify the song, especially the animal calls and improvisatory runs, are captured more accurately on record. Periodicals from the case even allude to Judge Carpenter listening to Victor 18255 in the court room as evidence of the song.<sup>11</sup> However, extant court records do not include any indication that the record was heard in court.

Despite its evidentiary allure, the record has its own set of shortcomings. 78 rpm recordings such as Victor 18255 could only secure a maximum of three minutes of sound. With its flexible and improvisational form, jazz songs like “Livery Stable Blues” did not necessarily conform to this limit. It must be left to speculation whether or not the tempo on the recording is appropriate, or if instead the band played faster than usual in order to squeeze the entire song into three minutes. To play the record twice would also negate the variability of oral transmission. The listener would hear the same improvisatory gestures reproduced precisely the same way each time he heard the record. Legally, the recording remained irrelevant, since it would not be considered an expression of the work for almost another sixty years. Instead, “Livery Stable Blues,” as it was heard on record, had to be rendered on sheet music in order to receive protection, returning to the same transmission problems as the sheet music at bar in *Hart*. Even Victor 18255 itself could not provide an accurate expression of the work in order to obtain legal copyright protection for “Livery Stable Blues.”

As a result, the *Hart* court determined that “nobody wrote those ‘Livery Stable Blues’,”<sup>12</sup> and thus, nobody owned “Livery Stable Blues.” Given the underlying conceptual issues with transmission, Judge Carpenter’s decision that the two pieces of sheet music were derivative of a

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<sup>11</sup>“At Last! Court Finds Man Who First Jazzed.”

<sup>12</sup>“Nobody Wrote Those ‘Livery Stable Blues’.”

preexistent song is ironic. The existence of “Livery Stable Blues” as a musical work was predicted on performance through oral transmission, limitedly captured on record. While ‘someone’ composed the song, whether or not that meant LaRocca, Nunez, or Lopez, no person ‘wrote’ the song. Rather, the two pieces of sheet music were derivative of a preexistent, orally transmitted song that contributed to the commercial success of Victor 18255. Although Judge Carpenter’s decision approached “Livery Stable Blues” as “an old negro melody”<sup>13</sup> and thus a part of a public domain folk music tradition, the fact that the sheet music did not represent the song as an orally transmitted work would have led to the same conclusion.

Retracing the *Hart* case proceedings from a historical perspective reveals two intersecting systems of ownership rights between copyright law and jazz. While these two systems are theoretically compatible, with copyright registration protecting the moral right established in the jazz community, their opposite transmission traditions that underpin those rights clash over different conditions for expressing the musical work. Based on musician testimony, “Livery Stable Blues” existed as a discrete work in oral transmission through live performance before its transcription on sheet music. None of the three alleged authors’ claims to the song necessitated written notation to establish the boundaries of the work. Rather, they each provide aurally-based musical descriptions of the song that created a formulaic overview and specific details necessary to perform the song. Although institutional laws held precedence over community moral rights, the contrasting approaches created friction that required the song be expressed in written notation regardless of its accuracy in representing the song as a musical work. The fact that the song did not conform to limitations of written notation was only a problem for the jazz musicians seeking to bolster their moral rights in the wake of mass dissemination with federal copyright protection.

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<sup>13</sup>“Court Findings,” 2.

By considering this conceptual framework evident in *Hart*, the case brings to light representation of the musical work as a central issue in jazz history. The connection of *Hart* as pursuant to the first jazz record presents this problem as fully present at the very beginning of jazz as a commercially popular music. Despite the new tangibility afforded jazz by the advent of recording, copyright formalities limited the federal protection afforded jazz musicians for the large-scale transmission of their works to sheet music. The publication formality provided a narrower scope of copyright protection, which legally marginalized the moral ownership rights claimed by jazz musicians for their works that were originally part of oral tradition. Thus, musical works like “Livery Stable Blues” were composed and owned within the jazz community, but did not always receive the same recognition legally through federal copyright protection.

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