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PERSPECTIVE

To have copied or not to have copied: That is the question for a jury

By Tre Lovell

Legal trends in the music industry have become prolific recently, specifically in the realm of copyright infringement and theft among artists. The standard for what constitutes music infringement seems to be redefined constantly, from the *Blurred Lines* case (where infringement was found) to the more recent *Led Zeppelin* action (where infringement was not found, but currently on appeal). These two high-profile cases have highlighted certain aspects of infringement litigation which have become quite controversial and incredibly significant. First, whether a judge, at the pleading stage, should be able to assert his own musical analysis and find that, as a matter of law, infringement does not exist before expert opinion and other discovery can vet out the very complicated nuances of music. Second, whether the jury should be able to listen to the actual recording or be restricted to only the sheet music for a song created prior to 1978. Both of these questions require answers that will most certainly have profound effects on future music infringement cases.

The first issue raises the age old question in music copyright cases: Does a judge, who has no music expertise, have the ability to determine whether two pieces of music are substantially similar, at the pleading stage, in a world where such comparisons have become increasingly complicated, nuanced and typically require expert opinion and extensive discovery? Whether or not two songs are substantially similar and/or one is the result of the unauthorized copying of the other is a consideration of very technical and exhaustive factors, requiring a skilled analysis of musical notes, keys, harmony, genre, chords, measures, rhythms, melody, sequence, tempo, progression, hook, cadence, composition, structure, arc, historical presence of lyrics and meanings.

New York Times News Service

Taylor Swift performs in New York, April 23, 2019.

In *Sean Hall, et.al. v. Taylor Swift*, 18-55426, in the 9th U.S. Circuit Court of Appeals, plaintiff songwriters brought suit against the famous music icon for allegedly having stolen their lyrics in her song "Shake It Off." Here, the subject of the infringement claims were lyrics used by Swift that the plaintiffs claimed were lifted from their song "Playas Gon' Play." In granting Swift's motion to dismiss, the court found as a matter of law that the subject lyrics were not sufficiently original as to be copyrightable. The 9th Circuit reversed and remanded, specifically commenting on the danger of judges being too quick to be the final arbiter on assessing art. The "district court constituted itself as the final judge of the worth of an expressive work," an improper exercise of judicial power in this case. Going a bit further, the 9th Circuit reminded that such issues are typically questions of fact.

The second issue emanates from a more logical vantage point: How can an appropriate determination of similarity and/or copying of two songs be derived by comparing the bare-bones sheet music of one song to an actual sound recording of the other, infringing work? Prior to 1972, sound recordings had no separate copyright protection under federal law, and prior to the enactment of the 1976 Copyright Act, music composers were limited to submitting sheet music as the deposit copy for a musical composition with the U.S. Copyright Office. This disparity in comparative evidence places in peril the protection of older songs. If a jury is limited to comparing a contemporary version of an older song by considering just the written sheet music against the more robust recorded version of the infringing song, can a true comparison of the works be accomplished? Will such put older songs at risk of an unfair analysis and inadequate protection?

This is one of the current issues in *Skidmore v. Led Zeppelin*, 16-56057, in the 9th Circuit, where the plaintiff was unable to admit into evidence at trial the audio version of the song "Taurus" for comparison to the sound recording of "Stairway to Heaven." Since the plaintiff owned only the copyright to the sheet music and not the audio-recorded version that the plaintiff alleged was the source of copying and identical to the iconic opening riff of "Stairway," the jury was never able to hear the actual song version of "Taurus" to compare to the song version of "Stairway." One amicus brief argued "[p]rohibiting plaintiffs from introducing evidence beyond the sheet music to demonstrate the breadth of their musical compositions, based on the historical policies of the copyright office, has the effect of robbing those plaintiffs of the full protections granted to them by the Copyright Act." *Pullman Group's Amicus Brief.*

The ultimate findings on these issues can have significant effects on future infringement litigation in the music industry, and most certainly, questions the playing field for determining a fair and accurate analysis. ■

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