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Copyright Trends: Substantial Similarity in the Age Of Electronic Music

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Driven by technical advances in electronic music production, an increasing amount of popular music lacks several traditional markers that courts use to determine whether one song is "substantially similar" to another: melody, harmony, rhythm, and lyrics.

Instead, the creativity inherent in electronic music centers on the "texture" of the sound being produced. But can a sound texture be protected by copyright? This article provides a road map for lawyers and judges alike to navigate substantial similarity in non-traditional forms of music, with a particular focus on electronic music.

The Traditional Framework

To establish copyright infringement, a plaintiff must demonstrate access to, and copying of, the elements of the work that are original.[1] When a court compares works with both protectible and unprotectible elements, the court's inspection will be "more discerning," and the court will ask "whether the *protectible elements, standing alone*, are substantially similar."[2]

The ground rules for evaluating substantial similarity in traditional music are familiar. From Bach through Britney Spears, Western musical compositions traditionally embodied a limited set of features. As Nimmer on Copyright put it: "It has been said that a musical work consists of rhythm, harmony and melody—and that the requisite creativity must adhere in one of these three."[3]

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Courts expanding beyond that limited ambit do so rarely and tentatively, and focus on traditional elements of musical composition: "melody, motifs, melodic contours, tonality, pitch emphasis, bass line, tempo, generic style, rhythm, ornamentation, harmony and lyrics."[4] Courts will also examine combinations of these elements: the same melody line in the same rhythm,[5] or a similar melody with similar words.[6]

Not all of those elements are necessarily copyrightable. Unprotectible aspects of a song include a common motif in the particular idiom,[7] a clichéd lyric or a simplistic melodic line,[8] or a common key signature and rhythm.[9]

The commonality of many songs follows from the structure of Western music. There are only 12 notes in a chromatic scale (i.e., each note on a piano, which repeat every 12 notes).[10] As a result, there are only 12 major and 12 minor keys, and a limited number of possible melodies or chord progressions within each key. Thus, most Western songs have used "tonal-functional harmony at their core, and have a traditional songlike melody."[11] Courts are "mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music."[12] The limited nature of traditional Western music (particularly commercially-oriented music) thus favors the party seeking to copy it.

How Electronic Music Differs

While much electronically produced music contains traditional elements of music, an increasing (and increasingly popular) amount uses those elements sparingly, or not at all. Yet only the stodgiest would deny that it is music, or that electronic music is a "work of authorship" under the Copyright Act.[13] Indeed, courts have made this same point about music in other styles. "For the uninitiated, much of rock music sounds the same, and a hasty comparison…could result in a finding of superficial similarity."[14]

The Copyright Act does not define "music." At base, music is simply a collection of sound waves arranged in a particular manner. When an object is vibrated, that vibration displaces molecules, which produces sound. The molecules travel in waves, until the energy created by the vibration dissipates.[15] The sound takes a particular waveform, depending on its volume, frequency (i.e., pitch), and timbre (i.e., the character of the sound). Differing timbres are critical to music: Such differences allow a listener to distinguish between a violin and a trumpet playing the exact same pitch.[16]

After several hundred years of music made by a limited set of instruments, any sound can now be created with little more than a laptop and software. Modern electronic synthesizers can manipulate waveforms to recreate traditional instruments, alter them, or create virtually any other kind of sound wave imaginable. The waveforms can take on other characteristics as well, depending on their amplitudes, frequency, phase, and other features, all of which combine to make the particular soundwave that a listener hears.[17] The versatility of music software is such that a modern-day musician can apply a multitude of different types of effects (chorus, reverb, delay, compression, distortion, modulation, etc.) to existing sounds, and in the process create an entirely new sound.

Not all synthesized sounds are original, but even unoriginal sounds can be adapted into original works. Music production software comes with a wide array of pre-created, license-free "sample" sounds. Electronic musicians often mix and match these samples, or combine them with other sounds, to create original musical compositions.[18] They may also alter the samples significantly so as to create entirely new sounds, also forming original musical compositions.

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A composition that results from such a creative endeavor may not have the traditional elements of melody, harmony, chord progressions, or lyrics. But it represents a creative effort, the likes of which the Copyright Act is designed to protect. A court attuned only to the traditional elements of music may miss what makes electronic music protectible.

Towards a New Framework

Successful prosecution or defense of an electronic music copyright case depends on understanding electronic music—both its method of creation and the commonly used expressions of the genre.

Plaintiffs must be aware of the characteristics comprising electronic music beyond the traditional markers: synthesizer settings and combinations; timbre; tonality; rhythmic disruptions; and other computerized effects.

Defendants should consider the

common or unoriginal elements of the music. Most producers use one of a limited number of digital audio workstations or commercially-available sound sets.[19] As a result, many sounds used in modern electronic music contain (or simply are) those "presets." Two songs may sound similar, but only because their creators used the same unoriginal license-free presets, or a similar method of creating the song.[20]

Both sides should encourage their clients to articulate the creative process behind their respective work, the legal relevance of which even the artist may not fully appreciate. The creative process in electronic music is not just knob-twiddling or pressing computer buttons. The computer is a musical instrument, and the process of composing can be used to explain why the resulting composition is protectible.

Particularly given the "newness" of electronic music, artists should exercise diligence in protecting their copyrights. After all, *someone* was the first person to chant "it's your birthday" in a hip-hop song, and someone was the second. Once the hundredth person uses it, it is an unprotectible part of the idiom,[21] but the *second* person was arguably violating a copyright that could have been protected by the first. Authors of original electronic music should protect and enforce their copyrights before their work becomes an unprotectible cliché.

Courts, for their part, must be willing to consider non-traditional elements of music beyond melody and rhythm, particularly when it comes to expert assistance. Courts analyzing substantial similarity frequently hear experts in musicology and score analysis explain similarities in the written representation of the musical work. But problems abound in analyzing sound through written means.[22] Traditional music has a traditional notation, with agreed-upon symbologies. Most electronic music cannot be written out like the score for a Beethoven sonata, as there is no agreed way to represent timbre in writing. Thus, an expert might be called on to examine not sheet music, but instead the method of producing the sounds in the piece, or even the actual waveforms.

Courts also should allow a greater tolerance for experts outside the traditionally qualified senior professor with a long list of publications, professional accomplishments, and experience with expert testimony. While there are professors who teach modern electronic music, the phenomenon is new enough that there are relatively fewer senior academics. Some courts have recognized the necessity of practical experience in a particular style. One district court considering two rap songs accepted as an expert an ethnomusicologist, rather than a more traditional professor of composition or music theory.[23] That expert, however, was also a full professor at the University of Toronto Faculty of Music, trained in musical analysis and transcription, and had previously served as an expert witness in music copyright cases—so not much of a stretch.[24]

The Daubert standard[25] and Federal Rule of Evidence 702 need not be relaxed, just reconsidered. The world's foremost expert to analyze synthesized sounds for similarity may not be a tenured professor in a prestigious music department, but instead a 28-year old DJ or producer who may not be able to read sheet music. Courts should be cautious not to disqualify experts for a lack of academic status or publications. Practical expertise in the field is key.

Conclusion

It is a cliché that parents believe the music that their teenagers enjoy to be "just noise." Certainly, music that avoids centuries of fundamental composition techniques may well be mistaken as such. But courts should not dismiss the creativity inherent in these works, particularly when, as several circuit courts have noted, substantial similarity analysis takes into account the particular audience for whom the work is intended.[26]

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Senior lawyers and judges, perhaps not the target audience for electronic music, might not immediately appreciate its original, and protectible, elements. But a particular composition should not be unprotectible just because it does not conform to the typical guideposts for assessing substantial similarity.

Courts examining only traditional elements such as melody, harmony, chord progressions, and lyrics in evaluating the substantial similarity of electronic music compositions could potentially undermine this thriving area of the musical arts. At best, courts would find no substantial similarity between two electronic compositions, because both lack any traditional elements to compare, and at worst, courts may

find no protectible elements at all. As a result, electronic music would be easier to copy, and more difficult to protect, undermining the fundamental, constitutional purpose of copyright law.

It is therefore incumbent upon courts and scholars alike, when analyzing and comparing modern-day music, to depart from traditional comparisons of melodies and lyrics largely absent in electronic music, and instead focus on elements such as timbre and texture that make this evolving musical art original and protectible.

1. *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340, 361 (1991). A plaintiff can prove musical copying without evidence of access to the original work by showing that the compositions are "strikingly similar," such that copying is the only plausible explanation of the similarities. See *Fogerty v. MGM Grp. Holdings*, 379 F.3d 348, 351 (6th Cir. 2004); *Three Boys Music v. Bolton*, 212 F. 3d 477 (9th Cir. 2000).

2. *Knitwaves v. Lollytogs*, 71 F.3d 996, 1002 (2d Cir. 1995) (citations omitted).

3. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright (hereinafter Nimmer) §2.05[D] (Matthew Bender, Rel. 83 Pub. 485 2010).

4. Sergiu Gherman, "Harmony and its Functionality: A Gloss on the Substantial Similarity Test in Music Copyrights," Fordham Intellectual Property, Media and Entertainment L.J. 19:2 (2008) (hereinafter Gherman) at 487. See also, e.g., *Three Boys*, 212 F.3d at 485 (analyzing lyrics, rhythm, pitch, cadences, instrumental figures, the verse/chorus relationship, and a "fade" ending); *Ellis v. Diffie*, 177 F.2d 503, 506 (6th Cir. 1999) (phraseology, lyrics, rhythms, chord progressions, "melodic contours," structures, and melodies); *Cottrill v. Spears*, No. 02-3646, 2003 WL 21223846, at *9 (E.D. Pa. May 22, 2003) (pitch, chord progression, meter, and lyrics); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000) (structure, melody, harmony, and rhythm); *McKinley v. Raye*, No. 3:96-CV-2231-P, 1998 WL 119540, at *5 (N.D. Tex. March 10, 1998) (lyrics, melodies, and song structure); *Intersong-USA v. CBS*, 757 F. Supp. 274, 280 (S.D.N.Y. 1991) (chord progress, structure, pitch, and harmony).

5. *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177 (S.D.N.Y. 1976).

6. *Three Boys Music*, 212 F.3d at 477.

7. See *Lil' Joe Wein Music v. Jackson*, 245 Fed. Appx. 873, 878 (11th Cir. 2007) (hip-hop phrase "Go [name], it's your birthday," not protectible because it was a "common hip-hop chant"); *Currin v. Arista Records*, 724 F. Supp. 2d 286 (D. Conn. 2010) (Pharrell and the Neptunes "I'm Frontin'" had no similarity to another song called "Frontin'" other than the name and an unprotectible "hip hop idiom").

8. *Johnson v. Gordon*, 409 F.3d 12, 21-22 (1st Cir. 2005) (the lyric "You're the One" an unprotectible cliché; the "life is but a dream" melody from "Row, Row, Row Your Boat" also would not be protectible).

9. *Cottrill*, 2003 WL 21223846 (Britney Spears' "What U See Is What U Get" did not share substantially common elements with a song called "What You See Is What You Get," outside the very common A-minor key signature and 4/4 rhythm, and the clichéd title).

10. This generalization excludes music employing microtonalities, or tones whose frequency is "between" the notes on a piano, a technique employed rarely.

11. Gherman at 509.

12. *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988); see also *Tisi*, 97 F. Supp. 2d at 548 ("The striking similarity test…is applied with particular stringency in cases…involving popular music").

13. 17 U.S.C. 102.

14. *Tisi*, 97 F. Supp. 2d at 543; see also *Lil' Joe Music*, 245 Fed. Appx. at 880 n.7 (same point regarding hip-hop music).

15. See, e.g., The Physical Principles of Sound, available at http://www.jiscdigitalmedia.ac.uk/guide/the-physical-principles-of-sound.

16. See also American National Standards Institute, "USA Standard Acoustical Terminology," S1.1-1994 (R1999) ("Timbre is that attribute of auditory sensation in terms of which a listener can judge that two sounds similarly presented and having the same loudness and pitch are dissimilar").

17. Id.

18. For example, one particular synthesizer sound (often called "Hoover" or "Dominator") appears on numerous electronic songs with minimal, if any, alteration. See, e.g., http://www.synthmania.com/Famous%20Sounds.htm (including samples of three such songs).

19. http://www.musicradar.com/us/tuition/tech/the-15-best-daw-software-apps-in-the-world-today-238905/.

20. See, e.g., *Watt v. Butler*, 744 F. Supp. 2d 1315, 1323 (N.D. Ga. 2010) (granting summary judgment for defendants; the creator of the allegedly infringing song testified that "[t]he keys on the [computer] keyboard were right beside each other. And that's how the tune came about") (alteration in original).

21. *Lil' Joe Wein Music*, 245 Fed. Appx. at 878.

22. See, e.g., *ZZ Top v. Chrysler*, 54 F. Supp. 2d 983, 986 (W.D. Wash. 1999) ("While the reduced version of the riff may…be an appropriate representation of 'how the music actually sounds' or is 'perceived,' it is not an accurate representation of the written notes that are subject to copyright protection").

23. *Watt*, 744 F. Supp. 2d at 1320.

24. Id.

25. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

26. See, e.g., *Kohus v. Mariol*, 328 F.3d 848, 858 (6th Cir. 2003); *Lyons P'ship v. Morris Costumes*, 243 F.3d 789 (4th Cir. 2001); *Whelan Assocs. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1233 (3d Cir. 1986); *Atari Games v. Nintendo of Am.*, 975 F.2d 832, 844 (Fed. Cir. 1992); *Computer Assocs. Int'l v. Altai*, 982 F.2d 693, 713 (2d Cir. 1992).