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Neither plaintiffs' nor defendants' counsel will be able to rely on their standard playbooks for litigating infringement claims when it comes to electronic music, including electronic dance music.

Litigating Music Copyright Infringement: The Special Case of EDM and other Electronic Music

BY JASON GOTTLIEB AND AARON SCHUE

Music copyright litigation in America dates to the 1840s. From the 1907 battle over the player-piano rolls of ''Little Cotton Dolly'' and ''Kentucky Babe,'' to the recent litigation over Robin Thicke and Pharrell's ''Blurred Lines'' and Led Zeppelin's ''Stairway to Heaven,'' these disputes have mostly followed the same script. After the formalities of copyright ownership are established, an expert musicologist for the plaintiffs analyzes the similarities between the original song and the allegedly infringing song in the areas of melody, harmony, chord progressions, lyrics, and generic style elements, in order to establish that some copyrightable aspect of the original song was taken.

Defense lawyers also have a traditional playbook. After technical defenses (license; statute of limitations; etc.), defense lawyers can argue ''fair use,'' like transformation into some completely new piece, or satire, an exception endorsed by the U.S. Supreme Court in the case of 2 Live Crew's ''Oh, Pretty Woman.'' And, of course, defense lawyers argue that the allegedly infringing work did not copy any significant aspects of the original – at least, no aspects that were themselves protectable elements.

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Every so often, as with the emergence of player-piano rolls, new technology alters the arguments in copyright litigation cases. But electronic music, including the radical new genre of electronic dance music (or EDM) may demand the boldest re-mapping of copyright litigation in a century. Its very nature creates new arguments for plaintiffs' and defendants' lawyers alike, because of the intrinsically different aspects of electronic music, and because of a judiciary that is only starting to grapple with those differences. This article outlines the effects this emerging music genre may have on copyright litigation, and proposes new strategies for plaintiffs and defendants to handle the novel legal questions that are starting to arise.

Protectability, and How Electronica Is Different.

To establish a claim for copyright infringement under the Copyright Act of 1976, 17 U.S.C. § 101 et seq., a plaintiff must prove that it possesses a valid copyright and that the defendant copied elements of its work that are original and protectable.

To enjoy protection, music must have some element of original creativity. Traditionally, courts examine a song's melody, harmony, themes, emphasis, bass lines, tempo, style, rhythms, and lyrics – often in combination – to find that spark. However, stock elements or clichés are not protectable. For example, Rapper 50 Cent prevailed in a copyright case because the phrase ''go [name], it's your birthday'' – used in one of his biggest

hits – was deemed to be a ''common hip-hop chant'' (*Lil' Joe Wein Music v. Jackson*, 245 Fed. App'x 873, 878 (11th Cir. 2007)). The R&B song ''You're the One'' was found not to violate copyright because the elements allegedly copied were unprotectable clichés and common harmonies (*Johnson v. Gordon*, 409 F.3d 12, 21-22 (1st Cir. 2005)).

Electronic music is often created from a base of commercially-available sounds and commonly used sound-sets. As one music producer (who goes by the name Laidback Luke) said in an op-ed he penned for Billboard.com, ''I often tell my producer talents to go ahead and sample one hit drums from professional tracks. Just to be able to sound professional straight away. In EDM we use the sample packs called 'Vengeance Essential' very often. These consist of snapshots taken from professional tracks. Everyone knows it and uses it.''

The common use of commercially-available sound-sets is just one of many differences between electronic and ''traditional'' music. Unlike the last 100 years of ragtime, blues, pop, rock, and jazz, electronic music may have melody and harmony that is subtle or highly static, if present at all; repetitive bass lines and rhythms; chord progressions that are simple and repetitive (again, if at all); and few or no lyrics. A lot of what makes electronica unique is its tonality and timbre—the overall ''sound''—and the construction and layering of these sonic textures over rhythms.

These differences complicate the litigation framework. One common method of expert analysis used at trial is to write out the song in sheet music, either in traditional notation or some kind of simplified depiction. For instance, in the recent ''Stairway to Heaven'' case, the jury never even heard the original recordings of the two songs, instead hearing a musicologist's rendition of particular portions of the music as interpreted on sheet music. But an electronic composition with an incredibly creative sonic texture might appear plain and unoriginal if written in traditional music notation, or if played by any instrument other than the computer that created it.

Two new cases provide a glimpse into how electronic music is rewriting the music copyright litigation playbook.

Case Study 1: Skrillex and the Independent Method of Creation.

In May 2016, Casey Dienel, who performs as White Hinterland, sued pop star Justin Bieber and electronica producer Sonny Moore (better known as Skrillex) over their unauthorized use in their song, ''Sorry,'' of a sample of her voice from her 2014 song, ''Ring the Bell'' (*Dienel v. Warner-Tamerlane Publ.*, No. 16-0978 (M.D. Tenn. May 25, 2016)). Dienel alleged that her four-note vocal riff was the ''backbone for the composition and the song's initial hook.''

While the complaint details that the four notes of the riff are the same notes, in the same duration and timing, as used in ''Sorry,'' Dienel further emphasized that ''[t]he timbre of Plaintiff's voice is inextricably linked to her writing, especially in 'Ring the Bell.' '' In other words, it was not just four notes in the same order and rhythm; it was the particular sound quality of the notes that were significant as well.

Two days after the complaint was filed, Skrillex posted (on Twitter) a 30-second video that purports to demonstrate how he independently created the ''Sorry'' riff. His video shows a laptop computer running music production software. In the video, he takes an original a capella vocal clip from the ''Sorry'' recording sessions, uses software to change its key four semitones (or half-notes) lower, then raises the key by an octave to produce a sound apparently used in the final recording – and which is remarkably similar to Dienel's ''Ring the Bell'' riff. Skrillex's point, one supposes, is that he created the four-note riff independently, through manipulation of a different musical sound.

But Skrillex's video does not answer some key legal questions. Assuming Dienel could prove Skrillex had access to her song, does it matter if he used a different electronic method to create one sound that has a remarkable aural similarity to Dienel's? Is a different method of production important, if the end result is the same? If Skrillex ''independently'' engineered a completely different waveform to have the same notes, rhythms, and importantly, timbre, as Dienel's song, should that excuse any substantial similarity?

Case Study 2: Lady Gaga and the 'Fundamentally Out-Of-Date' Ordinary Listener Standard.

Copyright infringement can be proven either through a detailed analysis of a breakdown of the notes and rhythms, or by an ''intrinsic'' test—whether the songs ''sound alike'' to an ''ordinary listener.'' Courts have traditionally understood this ''ordinary listener'' test to be ''whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff'' (*Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946)).

However, one recently decided case suggests that this ''ordinary listener'' test may not be the best tool to examine electronic music. In a lawsuit against Stefani Germanotta (who performs under the name Lady Gaga) over her song ''Judas,'' the district court judge fretted that ''[g]iven how increasingly complex the music industry has become since the ordinary observer was first established . . . a court's 'lay ear' may not be able to adequately assess the similarities between musical works'' (*Francescatti v. Germanotta*, No. 11-5270 (N.D. Ill. June 17, 2014)). The judge noted that technological and social developments have significantly altered the musical landscape since the first music copyright cases were reported (in 1850!), when the music industry revolved around printed sheet music. In the Gaga case, ''the Gaga Song was constructed with a Digital Audio Workstation . . . which can create hundreds if not thousands of sounds, especially when you manipulate them.''

The plaintiff admitted that to an ''ordinary observer,'' her song, which was ''composed primarily by live musicians playing live instruments in the recording studio,'' might not sound alike to the Gaga song, which was ''created in large part on computers that utilize software to record and manipulate sounds.'' Thus, the ''ordinary listener'' test would not work. But, she argued, her song was still infringed because of other similarities.

The Gaga judge disagreed, finding the similarity of expression ''totally lacking'' and ''so utterly dissimilar that reasonable minds could not differ as to a lack of substantial similarity between them.'' The court did not explicitly cite the tonal, timbral, and rhythmic differ-

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ences. But it is fairly clear that the differences between the songs arising from the electronic nature of the Gaga production were distinct enough to carry the day, regardless of any underlying similarities in lyrics, chords, melody, etc.

It is not hard to imagine that the ordinary listener test might fail when applied by a judge who does not understand electronic music, or thinks it all sounds alike. It might also fail when faced with songs that are quite different in terms of style (electronic and rhythmic versus live and lyrical), even when the later work unquestionably adopts aspects of the earlier.

Accordingly, the emergence of electronic music is testing some well-worn legal concepts. Given the issues evident in these two recent cases, and other differences inherent in electronica, what new strategies can plaintiffs and defendants employ?

New Strategies for Plaintiffs.

Protectability and Substantial Similarity.

Plaintiffs will face an uphill challenge in convincing courts that a simpler set of notes or chords (typical for EDM) can be protectable. Rather than fall into the old arguments over notes and chords, plaintiffs should shift the arguments to more appropriate places for electronic music: tone qualities; sound types; and electronic tropes in specific conjunction with other tropes. Just as nobody can copyright a clichéd lyric or a common harmony, nobody can copyright EDM clichés. But different elements, even commonly used elements, in a purposeful unique conjunction with each other, may be copyrightable. Potential plaintiffs should not overlook a lack of creativity in melody and harmony if there is sufficient creativity in a tone or set of tones that is similarly employed in a potentially infringing work.

Access and discovery.

Because independent creation is a defense to infringement, Plaintiffs traditionally try to show access to the original work, either directly through a ‘‘chain of events,’’ or through wide dissemination of the original. If evidence of access is weak, then evidence of substantial similarity needs to be much stronger to prevail. But in the electronic music context, a plaintiff risks that a judge might find the traditionally-examined elements of the music lacking or unprotectable. Thus, proving access is even more important.

In a splintered media landscape, with fewer cross-genre ‘‘mega-hits,’’ it can be harder to prove access, especially when an original song is simply posted on an internet website. Fortunately, in a digital world, if actual access occurred, it can be easier to prove, through discovery into a defendant’s use of internet media sites such as YouTube, Soundcloud, and other websites where electronic music is frequently posted for consumption. Further, a skilled questioner in a deposition can demonstrate that an alleged infringer is well-aware of available music in his or her particular sub-genre, and thus more likely to have heard the original song.

New types of experts.

The best plaintiff’s expert may not be a traditional university musicologist without practical experience in this specific genre, but instead an electronic music producer who can demonstrate how the original was made (and the substantial creativity involved), and the similarities in the alleged infringing work.

New Strategies for Defendants.

Insistence on the traditional approach.

Ironically, if a plaintiff tries to change the landscape of litigation in the ways suggested above, insisting on adherence to the traditional tests can be a newly effective strategy. Defendants should insist on examining traditional elements, like melody, harmony, chord progressions, and lyrics, arguing that there is little basis in the case law for extending to mere sound types. For example, a defendant can ask the plaintiff to write out the original work in musical notation, which in many cases will leave plaintiff’s electronic work seeming plain and unoriginal.

Protectability: A Nuanced Approach.

A defendant who adopts the ‘‘traditional’’ approach against original electronic music faces a more difficult task in one respect, however: it risks stripping the defendant’s catalog of meaningful copyright protection as well. Defendants may argue that the original song contains only unprotectable and simplistic tropes that cannot be copyrighted. But electronic artists, whose fundamental creativity may lie in the creation of new sounds, cannot claim that timbre is unprotectable, because doing so might render large portions of their own music unprotectable. Thus, a more nuanced approach is necessary—defense lawyers have to walk the fine line between advocating for protectability in general, while arguing that the particular item alleged to infringe was itself not protectable: a preset sound or rhythm in commercial software, for example.

Discovery.

Defendants should explore new avenues in electronic discovery, taking full advantage of the relatively liberal access to electronic files that courts will likely allow. For example, in the Lady Gaga case, the court noted that nearly twenty gigabytes of production and session files detailing the creation of the Gaga song from its first recordings through the song’s release were produced. There is no reason why only defendants should have to produce such materials. Defendants should demand the electronic production files for the original work, to see how it developed through its various drafts. And, similar to the way plaintiffs will demand access to computing history to prove access to the original work, defendants should demand computing history during the time of the production of the original, to prove that the song was overly influenced by other pre-existing music, rendering it unprotectable.

Conclusion.

Copyright is a thorny area for musicians in the electronic music world. To again quote producer Laidback Luke, modern-day copyright litigation often ‘‘comes down to much academic pondering by judges who may or may not understand the technicalities of music productions.’’ He concluded—cynically but not necessary incorrectly—that ‘‘[w]hoever has deeper pockets to keep litigation going to its final outcome often prevails.’’ The wherewithal to litigate certainly helps, of course. But more important is a legal strategy that adopts the rubrics of traditional copyright litigation,

and adapts them for an electronic age. Music is changing; lawyering must change as well.

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