2018

Commentary, Improving the Quality and Consistency of Copyright Infringement Analysis in Music

Kristelia A. García
University of Colorado Law School

IMPROVING THE QUALITY AND CONSISTENCY OF COPYRIGHT INFRINGEMENT ANALYSIS IN MUSIC

Kristelia A. García[†]

In a recent report (the "Report")[1] outlining scholarly concerns about the Copyright Alternatives in Small-Claims Enforcement (CASE) Act of 2017,[2] a group of law professors submitted comments on, among other things, the inquiry "What's So Special About Copyright?" That portion of the Report asks whether there are attributes unique to copyright law such that it should merit a specialized tribunal, given the myriad other areas of federal law facing similar enforcement challenges and transaction cost concerns.

Without detracting from the Report's call for empirical data supporting the potential incentives for both defendants and plaintiffs,[3] this Comment endeavors to highlight one area in particular that arguably distinguishes copyright as unique among the various areas of law calling for a specialized tribunal, and also offers a basis for narrowing the jurisdictional scope of such a specialized tribunal (in accord with another of the Report's recommendations): copyright infringement analysis in music. Infringement analysis in music is notoriously ill-suited for juries, and prone to intractable distributive justice concerns.[4] Both of these issues might be mitigated by a specialized tribunal with the authority and expertise to avoid some of the pitfalls inherent in the federal litigation process.

Music is unique among the genres protected by copyright for several reasons, the most significant being its dual-copyright structure. Under this structure, every song is protected by two distinct copyrights: one on the sound recording, and one on the underlying musical composition. While musical compositions have always enjoyed copyright protection, sound recordings were not brought under the copyright regime until 1972. Pre-1972 sound recordings are currently governed by state law.[5]

These idiosyncrasies pose unique and substantial challenges for copyright infringement analysis in music. While the terminology varies slightly from circuit to circuit, the substance of copyright infringement analysis is generally two-fold: First, there must be evidence of copying, often satisfied via demonstration of access. This is followed by a substantial similarity analysis, which considers

† Kristelia García (@kristelia) is an associate professor at the University of Colorado Law School, where she teaches copyright, trademark, and property law. She also serves as a director of the Silicon Flatirons Center for Law, Technology and Entrepreneurship, and is an affiliated fellow at the Yale Information Society Project. Prior to entering academia, Kristelia practiced in firms and in-house in the music industry, most recently at Universal Music Group. Comments, compliments, and criticism couched as such are welcome at kristelia@colorado.edu.

1. Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, BERKELEY TECH. L.J. COMMENTARIES (Nov. 28, 2017), http://btlj.org/commentaries/scholarly-concerns-about-a-proposed-small-copyright-claims-tribunal/ [https://perma.cc/A2KV-WTGZ].

2. H.R. 3945, 115th Cong. (2017).

3. *See also* Christian Helmers et al., Who *Needs a Copyright Small Claims Court? Evidence from the U.K.'s I.P. Enterprise Court*, BERKELEY TECH. L.J. COMMENTARIES (Jan. 10, 2018), http://btlj.org/2018/01/who-needs-a-copyright-small-claims-court-evidence-from-the-u-k-s-i-p-enterprise-court/ [https://perma.cc/9Q94-JGTP] (examining the United Kingdom's copyright small claims court "at least some empirical support for the [U.S.] bill's implicit assumption that . . . a small claims procedure would be . . . particularly impactful for copyright holders.").

4. *See, e.g.*, Mitchell Manger, *Blurred Lines Coming Into Focus: Are Juries Qualified to Pass Down Verdicts on Music Copyright Infringement Cases?*, CORP. COUNS. (Dec. 9, 2015, 6:00 AM), https://www.law.com/insidecounsel/2015/12/09/blurred-lines-coming-into-focus-are-juries-qualifi/ [https://perma.cc/DLZ2-3WDH].

5. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

whether the copying was improper. Both prongs of this analysis suffer deficiencies specific to the music context.

First, a showing of access is easily made by a well-known artist, and nearly impossible to show for an unknown artist. For example, in *Three Boys Music Corp. v. Bolton*, recording artist Michael Bolton was accused of infringing The Isley Brothers' track "Love is a Wonderful Thing" with his track by the same name.[6] The Isley Brothers are a well-known band, with lots of hits, and plentiful airplay. Accordingly, the Ninth Circuit found access on the basis of evidence that the Isley Brothers' track was widely disseminated.[7] In *Selle v. Gibb*, in contrast, Selle, a virtually unknown musician, sued the much more popular Bee Gees for allegedly copying his song "Let It End" with their track "How Deep Is Your Love?"[8] In that case, the district court actually overturned the jury's finding of infringement on the basis of failure to show access (i.e. widespread dissemination), and the Seventh Circuit affirmed.[9]

These examples demonstrate how smaller, less popular artists are disproportionately burdened by an access standard that effectively requires widespread dissemination. The role of a small claims copyright tribunal as a repeat player in music infringement cases affords it the unique opportunity to develop expertise in assessing access, including the opportunity to establish internal procedures for so doing that extend beyond mere dissemination. To the extent such expertise can lead to increased enforcement opportunities for less well-known artists, a specialized tribunal aligns with the incentive theory of copyright.

As a question of fact, the second step in copyright infringement analysis in music—substantial similarity analysis—considers the impropriety of the copying by application of a subjective, "lay listener" standard.[10] Herein lies the first problem with substantial similarity analysis in music: Jurors can listen to a sound recording, but they can't listen to a musical composition. Where an infringement claim alleges copying from a musical composition—or involves a pre-1972 sound recording (for which only compositions were accepted for registration)—it requires a jury to instead consider sheet music (or, in its absence, some kind of substitute, such as a lead sheet).

Because jurors cannot be assumed to read music, much less interpret similarities in musical notation, experts are typically engaged to opine on highly technical points of complicated music theory. In many cases, the matter devolves into a battle of the experts, with each side's musicologist attesting to the similarities, or lack thereof, between the compositions (or lead sheets, as the case may be). As a result, recent litigation in the area has seen astronomical verdicts,[11] irreconcilable outcomes,[12] and a propensity toward settlement,[13] which in many cases may reflect nothing more than rights accretion.

---

6. 212 F.3d 477 (9th Cir. 2000).
7. *Id.* at 483.
8. 741 F.2d 896 (7th Cir. 1984).
9. *Id.* at 902–03.
10. *See, e.g.*, Arnstein v. Porter, 154 F. 2d 464, 473 (2d Cir. 1946) ("The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners . . . that defendant wrongfully appropriated something which belongs to the plaintiff.").
11. *See, e.g.*, Williams v. Bridgeport Music, Inc., No. LACV1306004JAKAGRX, 2015 WL 4479500, at *26, *29, *45 (C.D. Cal. July 14, 2015) (remitting award of actual damages from $4 million to $3,188,527.50 and award of profits from $1,610,455.31 to $357,630.96, plus fifty percent of ongoing publishing royalties).
12. *Compare, e.g.*, *Williams*, 2015 WL 4479500, at *33 (finding of infringement resulting from a battle of the experts), *with* Skidmore v. Led Zeppelin, No. CV153462RGKAGRX, 2016 WL 1442461, at *19 (C.D. Cal. Apr. 8, 2016) (finding of no infringement).
13. *See, e.g.*, Daniel Kreps, *Tom Petty on Sam Smith Settlement: 'No Hard Feelings. These Things Happen'*, ROLLING STONE (Jan. 29, 2015), http://www.rollingstone.com/music/news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-20150129 [https://perma.cc/EJJ6-B378].

In other highly technical areas of the law, specialized tribunals mitigate this problem. The U.S. Court of Appeals for the Federal Circuit, for example, serves as the only appellate-level federal court with the authority to hear patent and trademark case appeals.[14] This specialization has afforded the Federal Circuit the opportunity to develop an expertise in these subjects, enabling it to handle highly technical disputes.[15] A small claims court for copyright might likewise develop an expertise in conducting substantial similarity analyses in music cases, thereby reducing both the cost of litigation—after all, experts are expensive—and improving the predictability of outcomes (something sorely missing at present). If the jurisdictional scope of the proposed copyright small claims court were ultimately narrowed to only music infringement claims, the potential for specialization would increase accordingly, and may even justify a call for its judges to be trained in musicology.

Assuming participation in any small claims copyright tribunal would be voluntary, there should be no Seventh Amendment concern, and no foreclosure of the federal right to an appeal. This assumes, of course, that the proposed opt-out regime passes constitutional muster, a conclusion that the Report raises serious doubts about.[16] In an ideal world, the tribunal's rulings would have declaratory effect; if not by law, perhaps by evolving industry norms and customs. This is especially likely in music infringement litigation, where claims are often brought as an impetus to settlement, and could have the desired effect of making outcomes more predictable on the whole.

A second challenge that might be ameliorated by a specialized copyright tribunal is copyright litigation's tendency to privilege musical works over musical recordings, and copyright law's failure to internalize borrowing norms and customs prevalent in certain genres.[17] Both of these practices potentially disadvantage a diverse set of musicians. Unlike classical music, genres such as jazz and rhythm-and-blues are often composed and recorded simultaneously, without formal musical notation. For pre-1972 sound recordings in these and related genres, a "lead sheet," or third-party transcription of a recorded track, was often submitted for registration in lieu of a composition. Contemporary sound recordings in these and related genres—including rock and hip hop—often adopt a similar practice in order to establish a right to publishing royalties.

The problem here is that a lead sheet rarely (if ever) encompasses the entirety of a composition. In many cases, a lead sheet will fail to include multiple creative contributions reflected in the sound recording.[18] In some cases, lead sheet deposits have been determined to be poor or flat-out inaccurate representations of the sound recording.[19] The ambiguity inherent in even the best of lead sheets affords well-paid experts wide latitude in which to interpret in their client's favor, while simultaneously denying some artists the ability to fully articulate, or defend against, an infringement claim. A

14. U.S. CONST. art. III. *See also generally* Laura G. Pedraza-Fariña, *Understanding the Federal Circuit: An Expert Community Approach*, 30 BERKELEY TECH. L.J. 89 (2015) (describing the nature, composition, and common criticisms of the structure of the Court of Appeals for the Federal Circuit).

15. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment Specialization*, 54 CAS. W. RES. L. REV. 769, 770 (2004) (describing the benefits of specialization in context of the Federal Circuit).

16. Samuelson & Hashimoto, *supra* note 1, at 2–3.

17. *See, e.g.*, Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006).

18. Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1230 & n.227 (2015) (describing how lead sheets are generally poor reflections of the full range of a musical work).

19. *Id.* at 1230 n.228 (explaining that in the context of litigation over Marvin Gaye's music, "[t]he melodic scraps sung above these elements were inserted haphazardly [on the lead sheet] following the words, as reflected in the transcriber's constant resorting to tie markings to create an intelligible visual rendering of music that was never intended to be captured in this manner.").

specialized tribunal could ameliorate this difficulty by potentially eliminating the call for experts, and by developing a proficiency in interpreting and weighing the probativity of lead sheets.

Similarly, artists in genres with a history and culture of borrowing and sharing often have a difficult time making their case under the current regime, where copyright infringement suits are spread across courts around the country. A specialized tribunal would be able to hear many, if not most, of these cases, making it easier for a consensus around sharing norms to emerge and be considered.

A final musical quirk deserves mention: Under the § 115 compulsory license[20]—commonly known as the "cover song license"—a songwriter is obligated to license her composition for recording by a statutory licensor, so long as that licensor complies with the statutory requirements and pays the statutory rate. There are limited consequences, however, for a licensor who fails to do so—either by serving a deficient notice or no notice at all, or by failure to pay. Very few individual songwriters can afford to bring a lawsuit against a deadbeat licensor. A dedicated copyright tribunal could provide just such a forum. In addition, a specialized tribunal is in an ideal position to maintain and publish a list of repeat offenders. This alone could do substantial work in the way of correcting misbehavior in an industry that often relies on reputation and repeat interaction.

The concerns described herein all highlight music's idiosyncratic position in copyright. The complex nature of copyright in music leaves it particularly susceptible to manipulative litigation tactics, and the distributive justice concerns borne thereof. A specialized tribunal focused on copyright infringement analysis in music could develop a subject matter expertise that would mitigate those issues and introduce much-needed predictability to an otherwise cumbersome and unwieldy process.

20. 17 U.S.C. § 115 (2012).