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Legal Aspects of the Music Industry

Lesson 5:
Copyright Infringement

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Writing music is difficult: it's a constant tug of war between finding a sound that is original, while also creating a sound that is familiar to the listener. When does that similarity go too far and end up in litigation? On the flip side, what happens if someone else's song sounds similar to your own? Is there any legal recourse?

In the previous lesson, we examined how to properly copyright original and recorded music. We also discovered why it was important for musicians to copyright their work and what rights are afforded to them as a result of copyrighting. Once a musical work (music and lyrics) and/or sound recording are copyrighted, the copyright holder exclusively controls how the work may be used. Copyright infringement occurs when someone violates the copyright holder's exclusive right.

In this lesson, we will look at the elements of a copyright infringement claim. The first thing to keep in mind is that only the person who owns the copyright can bring a copyright infringement suit. Once ownership is established, it must be proved that the person infringing had **access** to the song in question and that their song is **substantially similar** to the original. These terms are somewhat vague, and that is deliberate. We will discuss these terms and look at examples of various ways in which the court has interpreted them. If a person is found to be guilty of copyright infringement, there are a variety of remedies for the winning plaintiff in both the civil and criminal arenas.

Objectives

By the end of this lesson, you will be able to:

- evaluate what constitutes access, for purposes of a claim of infringement, and how music publishers and record companies strive to avoid it
- recognize the parameters of similarity, as it is considered under copyright law
- assess the range of remedies available to the prevailing party in a copyright lawsuit and the basis for choosing one over another and recognize the difference between civil and criminal penalties
- judge whether sampling a song can be constituted as plagiarism and copyright infringement

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Where'd You Nick It From?



In the last lesson we looked at the process of copyrighting your musical work and sound recording. The groundwork laid in lesson 4 is where our lesson on copyright infringement begins: in order to establish a claim of copyright infringement, the person who files the lawsuit (the plaintiff) must prove that he owns some part of the copyright to the song in question.

To review the previous lesson, a copyright is established as soon as a piece of music is notated on paper or recorded. Although registration with the copyright office is not necessary for a song to be protected, **registration is necessary to file an infringement claim in court**. As a result, it makes sense to promptly register your work with the Copyright Office, because you will have access to more remedies in the event your work is infringed.

Ownership

The person who owns the copyright is often the composer of the song. However, there may be other owners. Sometimes a company who employed the songwriter owns the copyright. Sometimes there is more than one owner, or different owners own different sorts of rights to the same music. Remember the rumor that Michael Jackson owns the publishing rights (the musical work but not the sound recording) to Paul McCartney's Beatles catalogue? Owning these publishing rights is different than owning the copyright to the sound recording. Owning the sound recording means owning the right to sell the actual recordings performed by the Beatles at Abbey Road, whereas owning the publishing rights allows you to rerecord the songs themselves and sell them for other purposes.

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Infringement

A person who is accused of copyright infringement will not usually readily admit to it. As this Noel Gallagher example shows, this isn't always completely true.



Since sometimes it is difficult to find any “direct” evidence of copyright infringement—for example, a first-hand witness to a person listening to the copyrighted song and writing a new one based on it—the courts will use what is known as *circumstantial evidence* to decide if copyright infringement has taken place. See the  [DEFINITION](#) below.

Thus, to show infringement the plaintiff (the person whose copyright may have been infringed) must show that the defendant had access to the plaintiff's song and, furthermore, that the two songs are substantially similar.

Definition

Circumstantial evidence is evidence that proves a fact by means of an inference.

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Establishing Access

Access means that there is a “reasonable possibility” that the defendant heard the song in question. For example, the plaintiff could try to prove that the defendant read the sheet music to the song. If the plaintiff can’t prove that there is a “bare possibility” that the defendant had access to the song, then the case will likely be dismissed from court.

Of course, **reasonable possibility** is a vague term that hinges on the situation or the song in question. The plaintiff can attempt to show that the defendant had access to the song as a member of the general public. This would mean that the song was popular enough that as a member of the general public you had a reasonable opportunity to have been exposed to the plaintiff’s song. So it wouldn’t take much circumstantial evidence for Outkast to prove that someone has access to “Hey Ya!” to plagiarize it. Thus, if the original song in question was a hit before the new song was written, access is usually established as a matter of law.

Access could also be established if the plaintiff auditioned or submitted a demo to the composer of the defendant’s song before it was written, or if the song was performed in an audition for the defendant’s close friend, relative, or business partner. However, proving access might be difficult if the demo was submitted to a large record label, since you would also have to prove that someone actually received the demo and listened to it.

Access cannot be proven by simply saying the artist did or didn’t have access. Nor is access the be-all, end-all of proving copyright infringement. With that said, without proof of access, copying cannot be proved, and your copyright infringement claim would fail.

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Similarity

A plaintiff needs to prove that the defendant had access to the song that the plaintiff owns the copyright to. Obviously, the songs have to sound similar. This begs the question: how similar do elements of two songs have to be for a copyright to be infringed? The definition of the phrase **substantially similar** is more vague than the definition of access. The best way to think of it would be:



“so similar that an ordinary listener to music would believe that there was a strong possibility that one song, or at least an important part of it, was copied from the other.” (*The Musician's Business and Legal Guide*, p. 77)

Don't forget that access must be proved before substantial similarity matters. If the plaintiff can't prove that the defendant had heard the song he allegedly plagiarized, the court will essentially deem the song to have been composed independently from the previous song and that the similarity is purely coincidental.

There is one rare exception to the rule where both access and substantial similarity are not necessary to prove copying by circumstantial evidence. This exception is known as the **striking similarity doctrine**. This doctrine is evoked when an expert witness testifies that the similarity is so compelling that access can be inferred. This does not relieve the plaintiff altogether, since he must still show evidence that the song was written before the defendant's.

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Take a look at the following scenarios. Based on what you know about access, decide whether or not the court found that access was proven in each case. This exercise is not trying to "test" your knowledge. Law is not about right and wrong answers, since you can never know definitively how a court will rule. Think about the facts in each scenario that you feel are important and guess how the court would rule.

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Establishing Copyright Infringement



Proving that the defendant had access to the song in question and that it's substantially similar only enables the case to be tried in a court of law. The case won't even get to a jury unless both access and similarity are present. These are what are known as **threshold** issues. 

Even if the case makes it to trial, the defendant can still prevail by proving that the defendant's song was created independently of the plaintiff's song. The law recognizes that music can be made identically without plagiarism.



The defendant might also try to prove the following:

- he is a properly trained musician and thus wouldn't need to copy another person's song.
- he already has several hit songs and would have no motivation to copy another's song.
- that elements of the song in question have turned up in the defendant's previous songs. It is permissible to infringe upon yourself (otherwise Bad Religion or Steve Reich would be suing themselves constantly).

If access and similarity are proven but the defendant has a good case for independent creation, it will be up to the jury to decide.

Definition

Threshold issues are considered the minimum requirements needed for further action; determinations upon which something else hinges.

Source: *Merriam-Webster Dictionary of Law*, 1996 Merriam-Webster, Inc.

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More Info

Is it Copying?

The law recognizes that due to the finite amount of note, chord, and rhythm combinations, aspects of songs are bound to reoccur without it being an issue of copying or plagiarizing. If this were not true, a great many punk and rock bands could be sued by the heirs of Chuck Berry, Buddy Holly, Eddie Vincent, or the Ramones for infringement of the most basic three-chord progression. Likewise, a legion of hip-hop and electronic acts could be sued for copying the very few beats capable of being produced by a rhythm synthesizer like the 808. The result is that a defendant can seek to establish that the infringed portions of the song in question are so simple (and pleasing to the masses) that anyone could have written them, and thus there is no copying.

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The final step in proving copyright infringement is proving that more than a minimal portion was copied. Many musicians believe that that an artist may borrow four bars without worrying about legal repercussions, but this is really an urban legend. This is not the case at all. For one thing, the musical passage that is allegedly “nicked” must be qualitatively important to both songs. For example, the defendant can't claim that since he used the material in one verse of his song and the original was a chorus that there was no copyright infringement.

It should also be noted that if the defendant is found liable for copyright infringement, anyone involved in the commercial exploitation of that song, from the record company who released the album, to a movie who licensed the song, can be held liable. This becomes important when the payment of remedies awarded by the court—the money awarded to the aggrieved party—is being divvied up.

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Remedies




The thing to keep in mind in terms of remedies is that once the case has been decided and the defendant loses, it is impossible to try to negotiate a fair license to use the plaintiff's song. Also, paying the plaintiff the statutory rate (*i.e.*, going rate) for a compulsory mechanical license is not an option. Rather than litigate, many artists opt to just share royalties if a similarity is detected. Therefore, before deciding to proceed with a timely and costly trial, a defendant accused of copyright infringement should weigh his options carefully.

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Practice Quiz

Once the case is litigated, the winning plaintiff has a number of remedies available to him to be used in different circumstances: injunctive relief, statutory damages, actual damages, and award of profits.



Identify the type of remedy described in this week's reading assignment.

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In this lesson, we looked at the elements of a copyright infringement claim, which a copyright owner needs to prove in order to have successful suit. This included showing that the alleged infringer had access to the copyrighted song and that the allegedly infringing song is substantially similar to the original. We also examined the kinds of damages a copyright owner would be entitled to in the event copyright infringement is found, which include statutory damages, injunctive relief, actual damages, and award of profits.

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