Your Riff Or Mine?

A Sixth Circuit decision tried to sort out the real from the fake. But no music can really claim to be original.
By Peter Gutmann

For decades courts have struggled to draw a bright line between artistic inspiration and actionable plagiarism. But in trying to protect originality without stifling creativity, the law has overlooked an essential point—all music borrows from other music and thus warrants no protection at all.

In *Bridgeport Music, Inc.* v. *Dimension Films*, decided in September 2004, the U.S. Court of Appeals for the Sixth Circuit announced a simple test for infringement that takes into account contemporary digital technology. Yet its test elevates abstract analysis above common sense, ignores the nature of the artistic process, and leaves the underlying problem as unresolved as ever.

Bridgeport involved a two-second sample of the three-note guitar riff that opens Funkadelic's 1975 "Get Off Your Ass and Jam." Looped, lowered in pitch, and extended to 16 beats over seven seconds, it appeared five times in "100 Miles and Runnin'," a rap song that was included on the sound track of the 1998 movie *I Got the Hook Up*.

At trial, district court judge Thomas Higgins had found scant resemblance between the mood, tone, or purpose of the looped segment and the original—the Funkadelic song celebrated dancing, whereas the alleged infringement distended the riff (actually little more than an arpeggiated chord) to evoke the tension of a police chase. Indeed, the judge ruled that no layperson, even if familiar with Funkadelic, would recognize the source without being told.

The Sixth Circuit agreed, yet found actionable infringement. Acknowledging no precedent for its decision, the court fashioned a new and disarmingly simple bright-line rule: "Get a license or do not sample."

The court justified this as a strict reading of the copyright statute, in which section 114(b) gives the owner of a sound recording the exclusive right to make copies "that directly or indirectly recapture the actual sounds fixed in the recording." The court found no basis for drawing any distinction between copying a whole work or just a scrap—hence, all unauthorized sampling is illegal.

Copyright law often lags behind technology, but this provision, enacted in 1972, seems remarkably prescient of the then-nascent digital age. To the delight of sound buffs and engineers, but to the dismay of the recording industry, a digital copy is not merely similar to the source but an exact replica. Thus, taken literally, the statutory reference to "the actual sounds fixed in the recording" seems to support the court's absolute position.

To validate its new tenet, the court asserted many virtues. Proof and enforcement are clear, as the bytes from the original and derivative works are easy to compare. Process and intention become irrelevant, since outright copying can never be accidental. Economic value is assumed, as why else would the infringer have taken the sample? Litigation is efficient, as parties and tribunals are spared costly battles of

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experts and subjective decisions.

Yet section 114(b) contains an exception. It distinguishes "another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate [those in the original]." The Sixth Circuit seized upon this as a safety valve for its inflexible rule, suggesting that "if an artist wants to incorporate a 'riff' from another work in his or her recording, he is free to duplicate the sound of that 'riff' in the studio." That didn't work out for George Harrison, whose taste of such creative freedom proved fleeting, bitter, and expensive.

No composer who sits down to write something "new" can escape the powerful influences of the past. Prior generations often built on a mentor's music as a sincere form of flattery.

After his company Harrisongs was dragged into court, the late Beatle's 1971 "My Sweet Lord" was found to have infringed the Chiffons' 1963 "He's So Fine." Harrison conceded that he knew the Chiffons tune, a top-ten hit in England and America. Yet he denied any intentional copying, insisting he conceived the song in a hotel room, riffing with organist Billy Preston. While the court accepted Harrison's explanation, it found him to have imitated "subconsciously." Finding one motif identical and a secondary phrase superficially similar, the court concluded that "My Sweet Lord" owed 75 percent of its success to the melodic connection and awarded royalties accordingly.

The aesthetic implications of the Harrisongs cases remain troubling. A song consists of far more than an opening phrase or even a full melody. The most cursory audition of the two records reveals strikingly different structures, melodic development, choruses, tempos, instrumentation, background vocals, and overall texture. It seems impossible to mistake the Chiffons' teen-angst doo-wop ("doo lang doo lang doo lang") for Harrison's religious meditation.

More troubling is a fact that the Harrisongs courts seem to have missed altogether. The same motif at issue—a descending phrase of G-E-D in steady rhythm—had been used as a principal theme and published a century earlier, both by Ernest Chausson in his 1889 Symphony in B-flat, Op. 20 and by Johannes Brahms in his 1891 Clarinet Quintet, Op. 115.

Indeed, Brahms took a rather tolerant view of such matters, and with good reason. When a critic derided his Symphony No. 1 as "Beethoven's Tenth," based on the similarity between the principal theme of Brahms's finale and the famous "Ode to Joy" in Beethoven's Symphony No. 9, Brahms reportedly snarled words to the effect of, "So what? Any fool can hear that." Fortunately for Brahms, Beethoven's copyright attorneys weren't around to sue.

Brahms's stance wasn't just a flare of artistic temper but a shrewd grasp of history. It's been said that all rock and roll is derived from three chords. If that's true, then, according to the Harrisongs cases, whoever first put those three chords together is owed billions in royalties.

Western music is based on a handful of common qualities. Compositions coalesce around certain intervals, harmonies, rhythms, and structures not at random, but because they relate expressively to the human condition, mold our expectations, and foster artists' training and outlook. Thus, tonal relations correspond to the laws of physics (a standard chord is an overtone series), our rhythmic preferences are driven by physiology (a stirring march is an elevated heartbeat), and favorite forms involve repetition and contrast that mirror our fluctuating emotions.

Musical novelty is at best a matter of degree. A typical melodic phrase or harmonic progression owes far more to its predecessors than many artists (and their lawyers) care to admit. The opening fragment of "He's So Fine" and "My Sweet Lord" is so simple that a child with no musical training could easily tap it out while doodling around on a keyboard. Neither of the songs' respective authors could claim to have invented that phrase; rather, each sensed intuitively how to craft appealing and cohesive statements out of commonplace and even trite material.

Indeed, the components of art often are so rudimentary as to refute any meaningful notion of ownership. Consider Pablo Picasso's sculpture of a bull's head, consisting only of a bicycle seat and handlebars. Originality stems not from claiming entitlement to fundamental materials, but rather from an inspired way of transforming them to evoke a response.

No composer who sits down to write something "new" can escape the powerful influences of the past. Rather than penalize imitation, prior generations often built on a mentor's music as a sincere form of flattery. Indeed, four of Brahms's major works were variations on themes of Haydn, Handel, Schumann, and Paganini. Surely, Brahms could have invented equally appealing fresh material, but he chose to honor his subjects and perpetuate their memories. Much

of the sampling in rap isn't done to save studio costs, as the Bridgeport court assumed, but to pay tribute to the founders of that genre.

Most of the early copyrights were simply a matter of having been in the right place at the right time. For musicians, that meant being in a studio at the dawn of the radio and recording industry, when publication rights suddenly became lucrative. Musicologists have traced many of the first recorded (and hence copyrighted) songs to much earlier, often oral, sources that were themselves derived from the artists' cultural traditions. Blues and folk devotees can trace lyrics and melodies through dozens of antecedents. Many artists we revere as the "roots" of our culture claimed copyrights for their songs simply because they were first to publish, even though their work wasn't truly original. Such copyrights reflect opportunism rather than genuine invention.

Thus, of the first country stars to record, Gid Tanner and Riley Puckett made no pretense of having written their repertoire, while A.P. Carter claimed authorship of nearly all the Carter Family songs, even though he was more a compiler and stylist than a composer, having collected and arranged existing Appalachian folk tunes. Yet Tanner and Puckett were forgotten as mere performers while Carter, abetted by his huge catalog of copyrights, will forever be remembered as a prolific writer of seminal music. Copyright has changed our underlying conception of the nature of musical invention and has skewed our cultural history.

Courts are not entirely to blame for this issue. Were a copyright allowed to expire after a reasonable period, its original purpose might be restored, giving creators time to exploit their work before others got a chance to build on it. But thanks to constant congressional extensions, copyright protection has become effectively perpetual. Nothing has entered the public domain in the United States by operation of time for 80 years and seems unlikely ever to do so again. As a result, a huge and growing body of work is entitled to permanent protection.

Consequently, modern composers are in great peril. The reason is a matter of simple mathematics. Consider the three-note motifs scrutinized in the Bridgeport and Harrisongs cases. Since the first tone in a motif can be transposed into any key, use of all 12 chromatic notes in an octave, where most melodies lie, allows only 144 possible permutations. And since each note can be long or short relative to the others, there are only eight basic rhythms, yielding a total of 1,152 potential combinations. So what are the chances that our modern composer might seize on a brand-new motif or that he or she never heard a predecessor and thus is immune to a "subconscious" copyright charge?

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The Bridgeport court's distinction between sampling and performance is legally convenient, but utterly impractical. It might temporarily simplify copyright enforcement against literal replication of digital recordings, but the underlying problem remains. Every modern work of music, no matter how seemingly novel, is irretrievably indebted to legions of forebears. Its real origins are forever shrouded in the mists of time, and its rightful ownership properly belongs to the only truly original author of all: Anonymous. ■

Peter Gutmann is a partner in the Washington, D.C., office of Womble Carlyle Sandridge & Rice, specializing in broadcast regulation and transactions. He can be reached at pgutmann@wcsr.com.