

**An Empirical Examination of the
Effect of the Lay Listener test in Music
Composition Copyright Infringement**

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Infringement

- A successful case for infringement requires:
 - Plaintiff's ownership of a valid copyright
 - Defendant copied plaintiff's work
 - The copying was actionable, i.e. at least some of the material that Defendant copied was "protected."

Substantial similarity

- Plaintiff must prove that defendant's work is substantially similar to protected elements of plaintiff's work.
- Most popular test to prove substantial similarity include is the lay listener test

Lay Listener Test

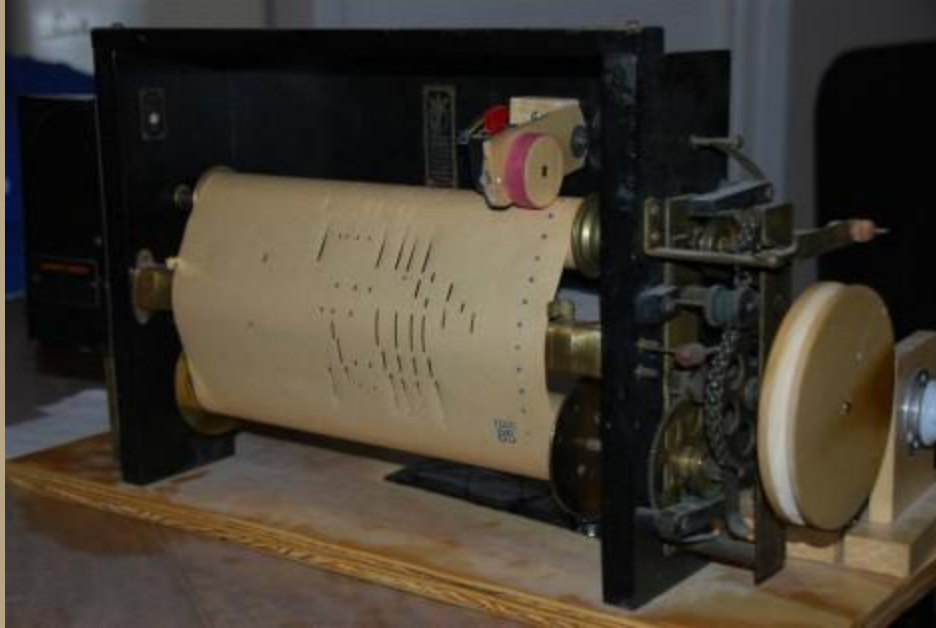
- Jury determines substantial similarity by listening to the two pieces with limited to no interference from expert testimony.

Music copyright: a history

When the doctrine made sense



Piano rolls



Sound recording



Sound recordings

- A sound recording must be distinguished from, on the one hand, the material object on which the sound is recorded, and, on the other, the underlying musical composition, or dramatic or literary work that is recorded and transposed into aural form by the sound recording. Clearly, a sound recording copyright vests no proprietary rights in the material object as such. Likewise, the sound re-cording copyright does not attach to the underlying work *per se*, but only to the aural version of such work as fixed on the material object. A sound recording is, in this sense, a derivative work.

Nimmer on Copyrights.

Lay listener test



The disconnect

MUSIC COMPOSITION

- ◉ Rhythm
- ◉ Melody
- ◉ Harmony
- ◉ Lyrics

MUSIC PERFORMANCE

- ◉ Tempo
- ◉ Key
- ◉ Orchestration
- ◉ Genre/style

What the project does

- Isolate the effect of music performance on listener perception of substantial similarity.
- Determine the extent to which the instructions given to jurors modifies the relationship observed between performance and perception.

What the project does

- Isolate the effect of jury instructions on the likelihood of a finding of infringement, irrespective of (controlling for) performance.
- Determine the extent to which individuals understand the instructions they've been given, in the aggregate.
- Determine the extent to which individuals understand the constituent elements of the aggregate instructions, i.e. probative test, similarity test.



Research Design and Execution

- An eight group, sixteen treatment condition experimental model will be executed to examine the effect of musical performance on listener perception of similarity between two music compositions.

Research Design and Execution

Treatment Conditions 1-8:

- Treatment conditions 1-8 will occur under highly controlled conditions.
- Participants will only be told that they are part of a study to assess how the way music is played affects how it is perceived.
- Each participant will individually assess a range of characteristics associated with the music they will hear.

Research Design and Execution

Treatment conditions 9-16:

- Treatment conditions 9-16 have been designed to determine whether the inclusion of a jury instruction modifies the relationship observed under the first eight treatment conditions.
- The jury instruction that will be used in these treatments is typical of those used in composition copyright infringement cases.

Research Design and Execution

Treatment conditions 9-16 Cont'd:

- After each participant has individually assessed the music they will hear, the entire group will be asked to discuss, and then make a final decision, as to whether the music pieces they heard are substantially similar.
- The final task for participants in these groups will be to assess how well they understood the jury instruction they had been given. They will assess specific elements of the instruction and the instruction as a whole.