



2024 ANNUAL MEETING

JUNE 9-11

Detailed Agenda – Session 4

LATEST DEVELOPMENTS IN MUSIC COPYRIGHT INFRINGEMENT CASES: PERSPECTIVES FROM EXPERT MUSICOLOGISTS, PRACTITIONERS, AND TRIAL ATTORNEYS

June 11, 2024 | 9:00 AM - 10:00 AM EDT

This panel will provide an update on how courts have been applying new standards for finding copyright infringement of musical compositions and sound recordings. It will also give attendees a chance to hear the songs at the heart of some recent infringement claims, and to participate in a discussion of whether the courts have consistently and appropriately applied prevailing legal principles.

Speakers:

- Joe Bennett (Forensic Musicologist)
- Tal Dickstein (Partner, Loeb & Loeb LLP) - Moderator
- Andrew Goldsmith (Partner, Pryor Cashman LLP)
- Katherine Leo (PhD, Associate Professor of Music, Millikin University)

Outline:

- € **Overview of copyright infringement analysis for music (10 min)**
 - Musical compositions v. sound recordings
 - Scope of protection for sound recordings; de minimis copying defense; recent protection for pre-1972 sound recordings.
 - Scope of protection for musical compositions; melody, harmony, rhythm, lyrics; tempo



- Substantial similarity tests in the Second and Ninth Circuits
- Access is irrelevant to substantial similarity; courts reject inverse ratio rule
- Role of expert musicologists

Sources: *Abs Entm't v. CBS Corp.*, 908 F.3d 405 (9th Cir. 2018); *VMG Salsoul, Ltd. Liab. Co. v. Ciccone*, 824 F.3d 871 (9th Cir. 2016); *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004); *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1258 (C.D. Cal. 2002), *aff'd*, 388 F.3d 1189 (9th Cir. 2004); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010); *Tufenkian Imp./Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 133 (2d Cir. 2003)

€ **"Blurred Lines" The Train Goes Off the Rails (5 min)**

- Protection for a "groove"?
- Bad facts make for bad law; conflicting testimony on access

Source: *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018)

€ **"Stairway to Heaven" Righting the Ship (10 min)**

- Deposit copy defines the scope of pre-1978 works
- Role of prior art
- Musical building blocks not protectable

Sources: *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)

Enrico Bonadio, Chen Wei Zhu, *Music Borrowing and Copyright Law* (2023 Bloomsbury) (Introduction and Chapter 4 "We Can Work It Out: Methods in Forensic Musicology)

Joseph P. Fishman and Kristelia Garcia, *Authoring Prior Art* 75 *Vanderbilt Law Review*. 1159 (2022)

€ **"Dark Horse" Prior Art Leds to Overturned Jury Verdict (10 min)**

- Instrumentation and timbre lead to jury bias?
- District Court and Ninth Circuit hold that simple two-note ostinatos and melodic "shape" are not protectable
- Exclusion of mashups

Source: *Gray v. Hudson*, 28 F.4th 87 (9th Cir. 2022)

€ **"Shape of You" / "Let's Get it On" Ed Sheeran Wins at Trial (Again) (10 min)**

- Deposit copy and post-1978 works



- Jury considerations; voir dire
- Verdict forms
- Avoiding a battle of the experts
- Role of celebrity
- Addressing mashups

Source: *Structured Asset Sales, LLC v. Sheeran*, 673 F. Supp. 3d 415, 419 (S.D.N.Y. 2023); *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019); *Griffin v. Sheeran*, 17 Civ. 5221 (LLS) (Special Verdict Form)

€ **Other examples (10 min)**

- “Walk It Like I Talk It” as a common rap and hip-hop phrase

Source: *Pickett v. Migos Touring, Inc.*, 420 F. Supp. 3d 197, 207 (S.D.N.Y. 2019)

- 3-bar guitar riff of the “mysterioso pizzicato”

Source: *Hines v. BMG Rights Mgmt. (US) LLC*, No. 20-CV-3535 (JPO), 2023 U.S. Dist. LEXIS 170372 (S.D.N.Y. Sep. 25, 2023)

- U2 guitar solo

Source: *Rose v. Hewson*, No. 17cv1471(DLC), 2018 U.S. Dist. LEXIS 14840 (S.D.N.Y. Jan. 30, 2018)

- Smith v. The Weeknd

Source: *Smith v. Weeknd*, No. CV 19-2507 PA (MRWx), 2020 U.S. Dist. LEXIS 130549 (C.D. Cal. July 22, 2020)

- “Dancing with a Stranger”

Source: *Sound & Color, LLC v. Smith*, No. 2:22-cv-01508-WLH-AS, 2023 U.S. Dist. LEXIS 158043, at *1 (C.D. Cal. Sep. 6, 2023)

- “Levitating”

Source: *Larball Publishing Co. v. Dua Lipa*, *Larball Publ'g Co. v. Dua Lipa*, 2023 U.S. Dist. LEXIS 138633, at *1 (S.D.N.Y. Aug. 8, 2023)

- Olivia Rodrigo’s “Good 4 U” v. Paramore’s “Misery Business”
- “Fish Market” v. Reggaeton



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€ **Q&A (5 min)**