

Getting it Wrong: Juror Assessments of Similarity in a Music Copyright Experiment

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In an action for copyright infringement for violation of the reproduction right, similarity between the copyrighted and challenged works is assessed to determine both: (1) whether the accused infringer actually copied elements of the copyrighted work and (2) whether the accused infringer appropriated enough of the original expression to be actionable, *i.e.*, whether an improper appropriation has occurred. These are independent determinations: the former speaks to copying as a factual matter whereas the latter speaks to copying as a legal proposition, and more precisely, whether a sufficient quantum of original, protectable expression (measured from a qualitative or quantitative standpoint) has been appropriated such that liability should attach. Proof of both types of copying is necessary for a copyright plaintiff to be successful. For example, jurors may find that idiosyncrasies shared by the works indicate a probability of copying but that what was copied was not original expression. In such a case, no copyright infringement has occurred because only factual copying has been established, not legal copying.

To examine how jurors make both of these determinations, an experiment was conducted with mock jurors in a controlled setting. The jurors were presented with music from actually-litigated cases and asked to assess similarity as evidence of factual copying and misappropriation. Preliminary analysis suggests that most jurors indicated significant to gross confusion or misunderstanding regarding the jury instruction for misappropriation. Jurors seemed better at understanding and applying the concept that similarity could be evidence of factual copying. Interestingly, a significant number of jurors found factual copying where there was no misappropriation and vice versa. This could be due to jurors being confused, apathetic, or it could be evidence that jurors are focusing on different aspects of similarity in determining copying versus misappropriation.