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

Professor Jamie Lund
St Mary’s University
School of Law
Visiting at Golden Gate Law
• What do jurors listen to/for?
• How well do jurors understand the jury instruction?
• How do jurors consider evidence of similarity for proving copying vs. substantial similarity?
• What do jurors listen to/for?
• How well do jurors understand the jury instruction?
• How do jurors consider evidence of similarity for proving copying vs. substantial similarity?
• What do jurors listen to/for?
• How well do jurors understand the jury instruction?
• How do jurors consider evidence of similarity for proving copying vs. substantial similarity?
What do jurors listen to/for?
How well do jurors understand the jury instruction?
How do jurors consider evidence of similarity for proving copying vs. substantial similarity?
The Experiment: Lay listener test

- How much can we sway jurors with superficial performance similarities?
### Performance Elements

<table>
<thead>
<tr>
<th>Music Composition</th>
<th>Music Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhythm</td>
<td>Tempo</td>
</tr>
<tr>
<td>Melody</td>
<td>Key</td>
</tr>
<tr>
<td>Harmony</td>
<td>Orchestration</td>
</tr>
<tr>
<td>Lyrics</td>
<td>Genre/style</td>
</tr>
</tbody>
</table>
SIMILAR

Yes: 86.4%
No: 13.6%

DIFFERENT

Yes: 15.2%
No: 84.8%
• What do jurors listen to/for?
  How well do jurors understand the jury instruction?
• How do jurors consider evidence of similarity for proving copying vs. substantial similarity?
Looked at responses of the 178 participants to this question: “What was it about the songs that you heard that led you to rate them as you did?”
What jurors listen to

- Tempo
- Instruments
- Melody
- Beat
- Feel
- Rhythm
- Key
- Style
- Tone
- Elements
- Song structure
- Harmony
What do jurors listen to?

- Composition elements: 29%
- Performance elements: 71%
"The reason I could tell it's different is the first song sounded like puppies and kittens and what society tells me to be and the second one -- I thought if hell exists, this is what should be played."

- Comment during jury deliberation after the songs were played similarly.
Can you educate jurors to actively listen to music?
Overview

- What do jurors listen to/for?
- How well do jurors understand the jury instruction?
- How do jurors consider evidence of similarity for proving copying vs. substantial similarity?
To find music copyright infringement between plaintiff's and defendant's songs, you must find that the songs are substantially similar. Two works are substantially similar if the original expression of ideas in the plaintiff’s copyrighted work and the expression of ideas in the defendant's work that are shared are substantially similar. Original expression are those unique aspects of plaintiff's song that are not common or ordinary to the genre or to music generally. The amount of similarity must be both quantitatively and qualitatively significant, that is the defendant's song copied either a substantial portion of the original expression of the plaintiff's song, or copied a smaller but qualitatively important portion of the plaintiff's song.
To find music copyright infringement between plaintiff's and defendant's songs, you must find that the songs are substantially similar. Two works are substantially similar if the original expression of ideas in the plaintiff’s copyrighted work and the expression of ideas in the defendant's work that are shared are substantially similar. Original expression are those unique aspects of plaintiff's song that are not common or ordinary to the genre or to music generally. The amount of similarity must be both quantitatively and qualitatively significant, that is the defendant's song copied either a substantial portion of the original expression of the plaintiff's song, or copied a smaller but qualitatively important portion of the plaintiff's song.
To find music copyright infringement between plaintiff's and defendant's songs, you must find that the songs are substantially similar. Two works are substantially similar if the original expression of ideas in the plaintiff’s copyrighted work and the expression of ideas in the defendant's work that are shared are substantially similar. Original expression are those unique aspects of plaintiff's song that are not common or ordinary to the genre or to music generally. The amount of similarity must be both quantitatively and qualitatively significant, that is the defendant's song copied either a substantial portion of the original expression of the plaintiff's song, or copied a smaller but qualitatively important portion of the plaintiff's song.
Which of these is a term of art?

- Original expression
- Quantitative or qualitative similarity
Comprehension of Original Expression

- Didn’t get it: 70%
- Neutral: 19%
- Got it: 11%

Comprehension of Qualitative and Quantitative Significance

- Didn’t get it: 41%
- Neutral: 36%
- Got it: 23%
“It means having not related to the music they are trying to produce, hence creating a different type of genre.”

“These are key chords or sections that define the song, typically found in the chorus section.”

“I would say that original expression means that the idea of the work is original to and from the composer. Also, here it sounds as though it means it is different from any genre of music”

“Original expression means, the song does not fit any of the current genres. It can create a new one.”
Quantitative/qualitative: got it?

15%  21%  32%  11%  9%
What do jurors listen to/for?
How well do jurors understand the jury instruction?
How do jurors consider evidence of similarity for proving copying vs. substantial similarity?
<table>
<thead>
<tr>
<th></th>
<th>COPYING</th>
<th></th>
<th>SUBSTANTIAL SIMILARITY</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Similar (Group C)</td>
<td>Different (Group D)</td>
<td>Similar (Group C)</td>
<td>Different (Group D)</td>
</tr>
<tr>
<td>Yes</td>
<td>72.7%</td>
<td>19.6%</td>
<td>86.4%</td>
<td>15.2%</td>
</tr>
<tr>
<td>No</td>
<td>27.3%</td>
<td>80.4%</td>
<td>13.6%</td>
<td>84.8%</td>
</tr>
</tbody>
</table>
“But the solutions of engineers are much alike. Everything we think can in principle be thought by someone else. The real ideas, as evolution shows, come about by chance.”

Theo Jansen
Does it matter which order jurors decide copying vs. substantial similarity?