

I Hate These Blurred Lines: The Intrinsic Test In Music Copyright Disputes

Prof Joe Bennett (Boston Conservatory, USA)

Prof Wendy Gordon (Professor of Law, Boston University, USA)

Abstract:

In US federal copyright cases, it is necessary for the complainants to prove both the fact of copying, and that the defendants took ‘too much’ of the prior work – ‘substantial similarity’. When comparing the works, many courts invoke a two-step comparison. The ‘extrinsic’ inquiry measures objective similarities between the works, and is normally assisted by music expert witnesses (‘forensic musicologists’). The second step – the ‘intrinsic’ inquiry – addresses whether an ordinary person (or ‘lay listener’) would view the copying as ‘too much’.

When listening to audio, it is possible that a jury may be influenced by non-copyrighted elements such as tempo, instrumentation, groove, production style or key. Courts try to minimize the influence of these elements in various ways. For example in the 2014-15 ‘Blurred Lines’ case, the judge did not allow the original recordings to be played. Such restrictions mean that juries may rely heavily on the expert opinions of musicologists for both extrinsic and intrinsic inquiries.

Not only is this practice legally questionable, but it also can be impractical. It often happens that each side’s musicologists find in favour of their clients, despite a remit to provide objective analysis, suggesting that selective use of methodology may allow each side to infer different levels of copying. In the case of *The Isley Brothers / Michael Bolton* (2000), the plaintiff’s musicologist suggested that a *combination* of hook, cadence, instrumental riff type, verse/chorus form and fade-out was copied, and the jury “found infringement based on a unique compilation of [unprotected] elements”. This raises the question of what the criteria should be for applying copyright to such combinations, and whether juries can understand instructions of the necessary complexity.

This paper discusses the challenges of methodology in forensic musicology, and the musical and psychological difficulties of applying the intrinsic test fairly and objectively (Bonadio, 2016; Gordon, 2015). It includes an analysis of three disputes, with comparative audio examples from actual cases.

Bonadio, E., 2016. Led Zeppelin, plagiarism claims, and why we should be worried about the future of music. *The Conversation*.

<http://theconversation.com/led-zeppelin-plagiarism-claims-and-why-we-should-be-worried-about-the-future-of-music-57832> (accessed 5.13.16).

Gordon, W., 2015. How the jury in the “Blurred Lines” case was misled. *The Conversation*. <http://theconversation.com/how-the-jury-in-the-blurred-lines-case-was-misled-38751> (accessed 5.13.16).

Lund, J., 2012. An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement. Available SSRN 2030509.

Three Boys Music v. Michael Bolton 212 F.3d 477 (9th Cir.2000)
