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Berklee

## Close to the Edge: investigating the myth of the 'plagiarism threshold' in musical creativity

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## SPOILERS: Myth vs reality

- "You can sample up to x seconds..."  
Zero sampling - established in case law
- "You can copy up to x consecutive notes..."  
It always depends on context.



## Stephen Schwartz



- "What I thought was amusing (and I wondered if people would get it, and of course people did), is that it's the first seven notes of 'Over the Rainbow.'" He played from the section from "The Wizard and I" with the lyrics "Un-li-mi-ted, my fu-ture... The reason that that's a joke is because according to copyright law, when you get to the eighth note, then people can come and say, 'Oh you stole our tune.' And of course obviously it's also disguised in that it's completely different rhythmically. And it's also harmonized completely differently so that it's not [he plays the familiar opening phrase]...It's over a different chord and so on, but still it's the first seven notes of 'Somewhere Over the Rainbow'." (Schwartz, interviewed in 2004)

## 7 notes

The image shows a musical score with four staves. The top staff is labeled 'DG' and contains the melody for 'Un - ti - mi - tod'. The second staff is labeled 'SOTR' and contains the melody for 'Some - where a - ver the rain - bow'. The third and fourth staves show the same melody as the first two, but with different chordal accompaniment. The lyrics are: 'Un - ti - mi - tod' and 'to - gift - or we're' on the first line, and 'Some - where a - ver the rain - bow' on the second line.

(transcription is key-normalized for comparison)

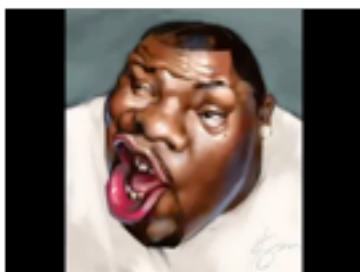
## Types of plagiarism

- Sampling the audio ('mechanical' copying)
- Copying the composition (melody, lyric, other...)
- (Fair use / de minimis defenses)



## Sampling: Gilbert O'Sullivan vs Biz Markie

(Grand Upright Music v. Warner Bros. 1991)



"Thou shalt not steal."  
(Opening words of Judge Duffy's 1991 verdict.)

## Sampling: NWA vs Funkadelic

(Bridgeport Music vs Dimension Films 2005;  
100 Miles & Runnin' / Get Off Your Ass & Jam)



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Court decision: "Get a license or do not sample. We do not see this as stifling creativity in any significant way."

## The musical work

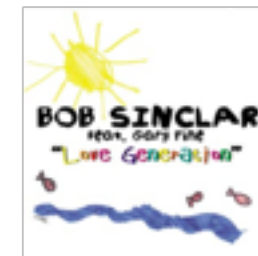
- Meta-problem:  
How do we define a musical work?
- Melody
  - **pitch, rhythm, harmonic context**  
(subtracting commonplace and extant ideas)
- Contextual factors: lyrics, lyric themes, form, instrumentation, production values?

## Melodic probability?

- Problem 1:  
How to weight harmonic context, rhythmic placement. Corpus analysis?
- Problem 2:  
What if the melodies are obviously copied but not note-for-note identical?
- Problem 3:  
A musical work is not just its topline.
- Problem 4:  
How to weight contextual variables - instrumentation, tempo, key, timbre.

## Testing the melodic threshold idea: examples

## Frankie Knuckles vs Bob Sinclar The Whistle Song (1991) vs Love Generation (2005)



## Frankie Knuckles vs Bob Sinclar The Whistle Song (1991) vs Love Generation (2005)

## Pharrell Williams vs Franz Ferdinand Can't Rely On You and Take Me Out



**Can't Rely On You**  
Pharrell Williams and Paloma Faith (2014)



**Take Me Out**  
Nick McCarthy and Alexander Kapranos (2004)

Musical notation comparing the rhythmic and melodic elements of 'The Whistle Song' (TWS) and 'Love Generation' (LG). The notation is key-normalized for comparison. Brackets above the notes indicate 'rhythmic' and 'melodic' segments for both tracks.

(transcription is key-normalized for comparison)

# How much copying?



- 5 out of 10 notes?
- 5 out of 7 notes?
- 25% of 'Take Me Out's' runtime?
- Staccato?
- Sonic context?
- Subjective decisions

# Michael Bolton vs Isley Brothers

Three Boys Music v. Michael Bolton (2000)



# Wayfair...



# Wayfair vs Billy Joel





## Inferences

- Musicians want to know: what can be copied... and how much?
- No threshold can ever be meaningful
- Musical work considered more holistically; do DAWs make producing/songwriting inseparable?

## Conclusions

- Many creators want musical thresholds...
- But no 'mathematical' threshold would be defensible
- Recognisably copying a specific work is possible without infringing copyright.
- [Sampling] compulsory licences?

Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004).  
Harvard Law Review 118 (4): 1355–62. doi:10.2307/4093384.

Cronin, Charles Patrick Desmond. 2017. 'Seeing Is Believing: The Ongoing Significance of Symbolic Representations of Musical Works in Copyright Infringement Disputes'. Social Science Research Network. <https://papers.ssrn.com/abstract=2967590>.

Demers, Joanna. 2006. Steal This Music – How Intellectual Property Law Affects Musical Creativity. Athens: University of Georgia Press,.

Grand Upright Music, Ltd v. Warner Bros. Records Inc., 780 F. Supp. 182 (S.D.N.Y. 1991)

Schwartz, Stephen. 2004. Wicked's Musical Themes Interview by Carol de Giere. <http://www.musicalschwartz.com/wicked-musical-themes.htm>.

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

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