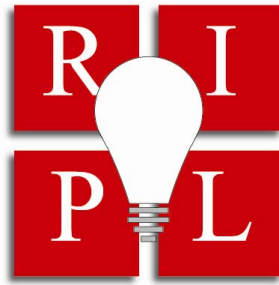


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THEY'RE PLAYING OUR SONG! THE PROMISE AND THE PERILS OF MUSIC COPYRIGHT
LITIGATION

WILLIAM R. COULSON

ABSTRACT

Music copyright cases are unique, costly, difficult, and complex. It was no different in the case where Ray Repp, a music composer for a Catholic publishing house, filed suit against Andrew Lloyd Webber, the famed British composer most famous for such Broadway hits as *Cats* and *Phantom of the Opera*. Repp alleged that Webber's "Phantom Song," the theme music for the *Phantom of the Opera* musical, infringed Repp's song "Till You," which he wrote and copyrighted almost a decade earlier. Webber in turn claimed that Repp's "Till You" was in fact a copy of an even earlier Webber song, "Close Every Door." The entire litigation spanned a decade, generated two trials, four published district court opinions, and a landmark Second Circuit decision. It involved hotly contested issues of venue, testimony of expert musicologists, courtroom waltzes, courtroom demonstrations by Webber and his ex-wife Sarah Brightman, and media attention. The author, who was lead counsel for Repp and K&R Music, Inc. in the *Repp v. Webber* litigation, uses the case as a template to illustrate the unique strategies, problems, and promise of music copyright litigation. The article discusses, on an anecdotal basis, useful lessons to be gleaned from the experience and should be studied by any practitioner who wishes to dive into the maelstrom of music copyright litigation.

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THEY'RE PLAYING OUR SONG! THE PROMISE AND THE PERILS OF MUSIC
COPYRIGHT LITIGATION

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WILLIAM R. COULSON*

I. INTRODUCTION

Andrew Lloyd Webber shifted uneasily in his chair. The first day of the famed British composer's deposition was commencing in the stately, wood-paneled conference room of the blue-blood Manhattan law firm of Chadbourne & Parke at Rockefeller Center. He was there to defend his musical integrity in a monumental plagiarism battle with a Catholic publishing house, K&R Music, Inc., and its composer, Ray Repp. Each side had accused the other of stealing its music.

He owned the home-field advantage. At the time, three of his musicals were playing to sold-out theaters in New York City: *Cats*, *Sunset Boulevard*, and *Phantom of the Opera*,¹ the main theme music of which was at issue in the lawsuit.²

The deposition did not get off to an auspicious start.

Attorney: Do you prefer to be called Mr. Lloyd Webber or Mr. Webber?

Witness: My correct title is Sir Andrew.

Attorney: Would you like me to call you "Sir Andrew"?

Witness: It might be the best

Attorney: I will call you Mr. Witness.

* © William R. Coulson 2014. William R. Coulson is a Chicago entertainment litigation attorney. He graduated from Dartmouth College (A.B. Mathematics) and the University of Illinois College of Law (J.D.). Prior to entering private practice, he clerked for two U.S. District Court judges (in East St. Louis and in Chicago) and then spent thirteen years as an Assistant United States Attorney in Chicago and in Denver, including eight years as a Supervisor. Any facts in this article that are not attributed are based on court records and the author's personal observations. Any opinions contained in this article are the author's own.

¹ See *Andrew Lloyd Webber*, INTERNET BROADWAY DATABASE, <http://ibdb.com/person.php?id=12073> (last visited May 14, 2014) (listing dates of Webber's Broadway runs).

² See *Repp v. Webber*, 858 F. Supp. 1292, 1296 (S.D.N.Y. 1994), *rev'd*, 132 F.3d 882, 885 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998); *Repp v. Webber*, 892 F. Supp. 552, 555 (S.D.N.Y. 1995); *Repp v. Webber*, 914 F. Supp. 80, 81 (S.D.N.Y. 1996); *Repp v. Webber*, 947 F. Supp. 105, 107 (S.D.N.Y. 1996), *aff'd*, 132 F.3d 882, 885 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998). Webber was represented by the Manhattan law firm of Gold, Farrell & Marks.

Fortunately, relations between counsel and the witness grew more professionally amiable as the litigation progressed. Dealing with successful, creative composers can be daunting, enthralling, and maddening all at once. It is difficult not to admire such masters of their art. Music copyright infringement claims bring out the best and the worst from them. Their creative processes, integrity, and entire musical lives are at issue. Music copyright cases are unique, costly, difficult, and complex. They are rife with both great promise and dire peril. The lessons of hard experience with such cases need to be preserved and studied by practitioners before they dive into this maelstrom.

The author was lead counsel for Ray Repp and K&R Music, Inc. in the *Repp v. Webber* music copyright litigation,³ which spanned a decade, generated two trials, four published district court opinions, and a landmark Second Circuit decision.⁴ This article will use the case as a template to illustrate the unique strategies, problems, and promise of music copyright litigation. The objective will be to discuss, on an anecdotal basis, useful lessons to be gleaned from the experience.

The article will deal with the “classic” music copyright claims—that one composer “stole” or “borrowed” or “copied” the protected music of an earlier composer. It will not deal with the equally interesting contemporary cases charging the unlicensed use of a song or tune. First, the article will briefly track the history of music infringement cases and discuss the elements that need to be proved (or refuted).

II. PRELUDE: AN OVERVIEW OF MUSIC COPYRIGHT LAW

“If music be the food of love, play on”

William Shakespeare, *Twelfth Night*, act 1, sc. 1

Just as there was little practical need for any copyright protections until Gutenberg developed his printing press, there was no real development of music plagiarism litigation until the advent of wax recordings and then public radio transmissions in the 1920s. The 1909 Copyright Act expressly protected musical compositions that have been made “in any form of record” or mechanical reproduction (such as

³ The author was ably assisted in this litigation by attorney John Leovy and his other colleagues at the Chicago law firm of Cherry & Flynn. Paralegals/secretaries Ursula Collins and Donna Chickerillo also played key roles.

⁴ *Repp*, 858 F. Supp. at 1304; *Repp*, 892 F. Supp. at 560; *Repp*, 914 F. Supp. at 85; *Repp*, 947 F. Supp. at 116; *Repp*, 132 F.3d at 892.

carousels and music boxes).⁵ Early cases utilized a crude “comparative method” of note-by-note analysis.⁶

It was not until the 1940s that a federal appellate court refined the elements of a music infringement case. In *Arnstein v. Porter*,⁷ an apparently paranoid and litigious plaintiff accused the legendary Cole Porter of stealing numerous works from him, including such Cole Porter classics as “Night and Day” and “Begin the Beguine.”⁸ Not surprisingly, Cole Porter prevailed. Arnstein’s broad, tenuous claims have forevermore saddled music copyright plaintiffs with a skeptical reception by courts and the public.⁹ But *Arnstein* did formulate the deceptively simple elements unique to music claims.

A plaintiff, said the Court, must prove a valid copyright in his work, and that the defendant copied protectable elements from plaintiff’s work.¹⁰ Copying must first be shown with similarities indicating copying (now called “probative similarities”). It must then be established that the copying was illicit, according to the ears of the “ordinary lay hearer.”¹¹ The former invites expert testimony, while the latter is entirely subjective.¹²

Subsequent case law developed additional concepts such as “access”¹³ and “independent creation”¹⁴ and “scenes a faire”¹⁵ which can serve as methods of proof or refutation. By the time of *Repp v. Webber*, music copyright elements were fairly settled,¹⁶ and they have remained

⁵ See Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 1 Stat. 1075, 1081 (1909) (repealed 1976).

⁶ See *Hein v. Harris*, 175 F. 875, 876 (S.D.N.Y. 1910) (holding that defendant’s song infringed plaintiff’s based on the fact that even though the songs were in different keys, defendant’s melody was almost an exact reproduction of plaintiff’s, as evidenced by the number of similar notes); *Haas v. Leo Feist Inc.*, 234 F. 105, 107 (S.D.N.Y. 1916) (focusing on the similarities between the bars of each song).

⁷ *Arnstein v. Porter*, 154 F.2d 464, 475 (2d Cir. 1946).

⁸ *Id.* at 467.

⁹ See Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 732 (1987).

¹⁰ *Arnstein*, 154 F.2d at 468.

¹¹ *Id.*

¹² See *id.* (noting that the plaintiff must prove “copying,” which allows expert testimony, before the court will consider subjective evidence in order to prove that the copying was illicit).

¹³ See *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) (explaining that because direct evidence of copying is rarely available, the plaintiff can rely on circumstantial evidence such as proof of access); *Smith v. Jackson*, 84 F. 3d 1213, 1218 (9th Cir. 1996) (explaining that when a high degree of access is shown, there is a lower standard of proof on substantial similarity).

¹⁴ See *Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 (11th Cir. 1986) (stating that proof of access and similarity establishes only a presumption of infringement, which may be rebutted by proof of independent creation of the allegedly infringing song).

¹⁵ See *Smith*, 84 F.3d at 1216 n.3 (explaining that “scenes a faire” refers to elements that are “so common or trite” that they are not protectable).

¹⁶ See *Selle*, 741 F.2d 896, 905–06 (holding that the Bee Gees’ hit song “How Deep is Your Love” did not infringe composer’s work); *Gaste v. Kaiserman*, 863 F.2d 1061, 1063 (2d Cir. 1988) (holding that the Morris Albert song, “Feelings,” infringed the copyright of a French composer’s song “Pour Toi”).

so since the Second Circuit spoke in *Repp*.¹⁷ While the terminology varies somewhat among the federal circuits, the concepts are the same.

First, a plaintiff must show ownership of a valid copyright in a musical composition.¹⁸ The plaintiff must be either the legal or beneficial owner of the copyright.¹⁹ If there have been ownership transfers, the chain of title to the plaintiff must be shown. Before suing, the musical composition copyright must be registered with the U.S. Copyright Office²⁰—preferably in the form of sheet music and sound recordings. Registration creates a rebuttable presumption of validity and of originality sufficient to warrant copyright protection.²¹ This is an extremely low threshold, and this presumption is easily rebutted if the allegedly infringed music consists only of common, trite themes that reappear often in music—like three-note arpeggios or quick drum riffs.²²

Second, the plaintiff must show unauthorized copying of his work by the defendant.²³ This sounds simple, but it is not. To establish unauthorized copying, a plaintiff must show actual copying and “improper or unlawful appropriation.”²⁴ Actual copying could be proved by direct evidence: an eyewitness who saw the defendant copying the plaintiff’s song, or an admission by the defendant.²⁵ But case law subsequent to *Arnstein* has recognized that copiers are “rarely caught red-handed,”²⁶ thus the difficulty of ever proving copying directly.

More often, a plaintiff will seek to prove copying by showing that defendant had access to her work *and* that the two works are

¹⁷ See, e.g., *Hobbs v. John*, 722 F.3d 1089, 1094 (7th Cir. 2013) (reiterating elements of copyright infringement).

¹⁸ *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003).

¹⁹ 17 U.S.C. § 501(b) (2012); see also *Fantasy Inc. v. Fogerty*, 654 F. Supp. 1129, 1131 (N.D. Cal. 1987) (citing *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984)) (defining a beneficial owner as “an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees”); *Righthaven v. Wolf*, 813 F.Supp. 1265, 1272–73 (D. Colo. 2011) (explaining that legal interest in a copyright is delineated in the exclusive rights granted by the Copyright Act).

²⁰ 17 U.S.C. § 411.

²¹ 17 U.S.C. § 410(c).

²² See *Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (“To rebut the presumption, an infringement defendant must simply offer some evidence or proof to dispute or deny the plaintiff’s prima facie case of infringement.”); *Darrel v. Joe Morris Music Co.* 113 F.2d 80, 80 (2d Cir. 1940) (holding that an identical eight-note musical sequence was not dispositive of plagiarism); *Smith v. Jackson*, 84 F.3d 1213, 1219 (9th Cir. 1996).

²³ *Jorgensen*, 351 F.3d at 51.

²⁴ *Id.*

²⁵ *Id.* (quoting *Boisson v. Banian, Ltd.*, 273 F.3d 262, 267 (2d Cir. 2001)); see also *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (describing “rare scenario where there is direct evidence of copying” when appellee handed several artisans a photograph of appellant’s sculpture, and subsequently directed the artisans to make a duplicate copy).

²⁶ *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988).

“substantially similar.”²⁷ Access is normally proven one of two ways. The plaintiff could show a specific route by which her song came to defendant’s attention, i.e., she sent it to him, or he purchased the plaintiff’s album, or he heard it on the radio or attended the plaintiff’s concert.²⁸ Or the plaintiff can show the public dissemination of her work and ask the jury to infer access from that dissemination alone.²⁹

“Substantial similarity” has remained true to the *Arnstein* formulation. It means that a plaintiff must show “probative similarity,” which suggests copying rather than coincidence.³⁰ Probative similarity is usually proven through expert dissection and expert testimony.³¹ If the competing songs are “strikingly similar,” then access can be inferred as well.³²

Once a plaintiff has established actual copying, either through direct evidence, or through access and substantial similarity, he or she must establish “improper or unlawful” appropriation.³³ “Unlawful appropriation” is judged solely by the ear of the “ordinary lay hearer,” as *Arnstein* put it.³⁴ This is wholly subjective. In practice, it means not only that the competing music must sound alike to the listener, but also that the similarities are of value to the work and are not merely simple, common riffs or sequences.³⁵

Defendants often make the argument that there are only a handful of notes, so that much music necessarily sounds alike.³⁶ The rebuttal is that there are infinite combinations of notes, rests, beats, and ornamentation that can be used to create infinite different compositions. There are only twenty-six letters in the English alphabet, yet an infinite variety of unique combinations of them to

²⁷ *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983) (quoting *Warner Bros. v. Am. Broad. Cos.*, 654 F.2d 204, 207 (2d Cir. 1981)) (stating that access to work was dispositive due to the song’s widespread popularity).

²⁸ *See id.* at 998.

²⁹ *Id.* (holding that access was presumed because the song sat on the top of the charts for weeks in England and the United States); *see also* *McRae v. Smith*, 968 F. Supp. 559, 565 (D. Colo. 1997) (noting that public dissemination must be substantial and refusing to presume access where distribution of plaintiff’s recordings was “brief and regional”).

³⁰ *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 56 (2d Cir. 2003).

³¹ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

³² *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998) (citing *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995)).

³³ *Jorgensen*, 351 F.3d at 51; *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991) (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986)).

³⁴ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

³⁵ *See Intersong-USA*, 757 F. Supp. at 281 (noting that appellee’s “descending scale step motive[s] . . . structural pattern[s] [and] chord progressions . . . [are] common compositional devices” and therefore failed to qualify as substantive portions of the song); *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004) (stating that “trivial copying does not constitute actionable infringement”).

³⁶ *See Darrell v. Joe Morris Music Co.* 113 F.2d 80, 80 (2d Cir. 1940) (noting that “simple, trite [musical] themes” are expected to reoccur frequently and defendants were able to find numerous musical equivalents in other songs).

form distinctive novels, short stories, and screen plays. Thus there is no minimum number of notes that can be copyrighted or infringed.³⁷

A copyright violation can be either willful or subconscious.³⁸ In *Bright Tunes Music Corp. v. Harrisongs Music*, the late, great George Harrison of Beatles fame was found to have subconsciously copied the Chiffons' 1960s ballad "He's So Fine" when he wrote his song "My Sweet Lord."³⁹ The case inspired some serious composers to hire consulting musicologists to vet their new songs to detect possible subconscious copying.

The fair use defense to infringement plays little role in these copying cases—unless the defendant's work is clearly a parody of the original work.⁴⁰

The Copyright Act also provides that the Court "in its discretion" may award costs and attorney fees "to the prevailing party."⁴¹ This provision, although discretionary and not mandatory, raises the stakes and heightens the tension for both plaintiffs and defendants.

Thus, music copyright cases are especially interesting because the proof can be complex, yet the outcome can turn on a uniquely subjective aural sense of the judge or jury, as we shall see. With this legal background in mind, we return to the lessons of *Repp v. Webber*.

III. THE *REPP V. WEBBER* COPYRIGHT LITIGATION

A. *The Dramatis Personae*

Plaintiff Ray Repp is a professional musician primarily engaged in composing, publishing, recording, and performing popular liturgical music.⁴² He is widely credited with introducing folk music and guitar into the Catholic Church. At the time of his lawsuit, he had published eleven albums of music containing over 120 musical compositions, and he had performed at over 200 live concerts around the world. Various articles had been published which mentioned him along with Webber as popularizing religious and Biblical-themed music. Repp's publishing company was plaintiff K&R Music, Inc., the president of which was Father William Kelly. Repp lived near Ithaca, New York at

³⁷ See *id.* (recognizing an "enormous number of possible permutations of . . . musical notes," but noting that "only a few are pleasing; and much fewer still suit the infantile demands of the popular ear").

³⁸ See *Three Boys Music Corp. v. Michael Bolton*, 212 F.3d 477, 483 (9th Cir. 2000).

³⁹ *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp 177, 180 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

⁴⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994).

⁴¹ 17 U.S.C. § 505 (2012).

⁴² *Ray Repp*, OREGON CATHOLIC PRESS, <http://www.ocp.org/artists/634> (last visited May 14, 2014).

the time the lawsuit was filed. He wrote and copyrighted his song “Till You” in 1978. Repp is a kind and gentle soul, who cares deeply about his music and his faith. And when Father Kelly and I strolled down the streets of Ithaca, New York, before his deposition, homeless men joyously greeted him and thanked him for past help he had given them. These were good people.

Andrew Lloyd Webber is a British citizen who had composed numerous musical compositions for musical theater productions around the world.⁴³ His first great successes were *Joseph and the Amazing Technicolor Dreamcoat* and *Jesus Christ Superstar*, in the 1970s, both with Biblical themes. He followed these productions with *Cats*, *Starlight Express*, *Song and Dance*, *Aspects of Love*, *Sunset Boulevard*, and *Phantom of the Opera*.⁴⁴ Rightly or wrongly, Webber has been dogged throughout his career with accusations in the media that his work was “derivative.” The U.K. group Kit and the Widow recorded a song about Webber entitled “Steal It from Somebody Else,”⁴⁵ and another group called the Lost Continents sold T-shirts depicting Webber rewriting classic pieces of music (none of this evidence was admitted at the trials). Webber wrote the song “Close Every Door” for the “Joseph” musical in 1968. He testified that he completed “Phantom Song” in 1984 or 1985, and it became the theme music for the *Phantom of the Opera* musical. As the case progressed, the parties moved away from initial anger and sarcasm. During the trials, Webber was affable and professional, and during breaks we shared discussions about such things as Margaret Thatcher’s tax policies and the keeping of “grace and favor” homes in the United Kingdom.

B. *The Works at Issue*

“[M]usic oft hath such a charm
To make bad good, and good provoke to harm.”

William Shakespeare, *Measure for Measure*, act IV, sc. 1

Ray Repp wrote the song “Till You” in 1978, and registered its copyright the same year. “Till You” is a liturgical guitar tune, the lyrics of which are based on passages from the Book of Luke called the Magnificat. “Till You” was released in 1978 as part of the K&R album entitled *Benedicamus* in the formats of record albums, cassettes, and

⁴³ Andrew Webber, THE KENNEDY CENTER, http://www.kennedy-center.org/explorer/artists/?entity_id=16264 (last visited May 14, 2014).

⁴⁴ *Id.*

⁴⁵ DVD: Kit & the Widow—Live at Cadogan Hall (Simon Weir Feb. 15, 2011).

sheet music. Repp's July 1990 lawsuit alleged that Webber's "Phantom Song," registered with the Copyright Office in 1987, infringed "Till You" by slavishly copying the melody, which is repeated and is central to both works. "Phantom Song," written as a show tune, added orchestral ornamentation before and after the core melody. Defendant Webber denied copying and interposed the affirmative defense of independent creation. Eighteen months into the lawsuit, Webber amended his answer and filed a counterclaim against Repp. Now Webber asserted that Repp's "Till You" in fact copied Webber's 1968 song "Close Every Door" from his biblical musical *Joseph and the Amazing Technicolor Dreamcoat*.⁴⁶

1. Probative Similarity and the Use of Expert Musicologists

As noted, expert musicologists play an important role in these cases.⁴⁷ Counsel thus needs to have at least a working knowledge of musical notation. There are different ways to notate a piece of music. Songs that sound similar to the ear may appear to have quite dissimilar sheet music. And, as happened in *Repp v. Webber*, dozens of additional musical compositions often become part of the expert analyses. Counsel needs to know concepts like the difference between a dotted eighth note and a quarter note, and terms like "pitch," "key," "meter," "harmony," and "melody."

Before proceeding on an infringement case, counsel is well advised to procure a favorable consulting expert's report on the competing music. There are law firms and college music professors who will do this. Potential issues will thereby be identified. And if the case is ultimately lost, such a show of due diligence and good faith will help avoid any adverse award of fees and costs.

Repp was able to retain for trial testimony two world-renowned musicologists. Professor H. Wiley Hitchcock was a founding director of the Institute for Studies in American Music at Brooklyn College, which is part of the City University of New York. He was editor of the leading music dictionary and authored numerous books and articles on music. Professor James Mack of Harold Washington College in Chicago was legendary in the world of popular music arranging, conducting, and producing music for symphony orchestras and the likes of Ramsey Lewis, Nancy Wilson, and Curtis Mayfield. Hitchcock rendered an academic 35-page report with supporting charts, while Mack's emphasis was more of a contemporary popular music analysis.

Webber hired as his expert Professor Lawrence Ferrara, who was Chairman of the Music Department at New York University. His

⁴⁶ *Repp v. Webber*, 858 F. Supp. 1292, 1297 (S.D.N.Y. 1994), *rev'd*, 132 F.3d. 882 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998).

⁴⁷ See 3 FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 16:38 (3d ed. 2013).

second musicologist—Professor Jonathan Kramer from Columbia University—was not timely disclosed, and the court barred his testimony.

The musicology was complex and lengthy. These experts, remember, were to testify as to “probative similarity”—that is, similarities which suggest copying as opposed to coincidence. Common lyrics or unique “signatures” are sometimes cited as evidence of copying. Ferrara also opined on Webber’s affirmative defense of independent creation. Only a brief overview will be recited here to give the reader a taste of copyright musicology.⁴⁸

Essentially, the experts broke down the melodies of “Till You” and “Phantom Song” into two musical phrases (phrases 1 and 2). In both songs the notations of these phrases were virtually identical. Disregarded was any ornamentation that preceded or followed the melodies. The key was also disregarded—that element does not affect the melody. The two distinctive phrases follow one another in both songs, and are repeated several times.

TABLE 1
MUSICOLOGY CHART USED AS DEMONSTRATIVE EVIDENCE IN COURT

The melody of “Till You” (Section A) together with the melody of “Phantom Song” (Section A)

⁴⁸ See *Repp v. Webber*, 132 F.3d 882, 886–87 (2d Cir. 1997) (describing testimony of expert musicologists during district court proceedings), *cert. denied* 525 U.S. 815 (1998).

Hitchcock concluded that “Between ‘Till You’ and ‘Phantom Song’ . . . the similarities are so many, in so many areas, over such an extraordinary proportion of the compositions, that I cannot consider them as insignificant or coincidental, and I must conclude that ‘Phantom Song’ is based on ‘Till You.’”⁴⁹ Mack agreed with Hitchcock, but found even more similarities, particularly harmonic similarities. Mack concluded that “‘Till You’ and ‘Phantom’ are strikingly similar, and are so similar as to preclude separate creation.”⁵⁰

Webber’s expert, Ferrara, essentially opined that “Phantom” was indeed a derivative work—but that Webber copied from himself when he wrote the piece and this could constitute independent creation. Ferrara found in earlier Webber compositions snippets of notes similar to phrase 1 of the melodies at issue. He also found in different prior Webber works snippets of notes similar to phrase 2. In addition, he located in public domain works snippets of notes similar to phrase 1 or phrase 2. Notably, he did not find anywhere phrase 1 followed by phrase 2 in the same piece of music. Indeed, Repp’s expert Hitchcock criticized Ferrara’s approach of “isolating three-to-six note fragments” and then finding them in numerous compositions. Ferrara did not deny that “Till You” and “Phantom” were substantially similar.

As to Webber’s counterclaim based on his song “Close Every Door,” Ferrara opined that it was substantially similar to “Till You,” even though he could only find in “Close Every Door” snippets of notes similar only to phrase 2 of the “Till You” melody. Professors Mack and Hitchcock opined that “Till You” was not similar to “Close Every Door.”

Webber’s counterclaim thus had muddied the musicological waters considerably. Webber’s position was that “Till You” and “Close Every Door” were similar, but that “Till You” and “Phantom” were not similar. Had Repp’s suit and the counterclaim been tried together, this would have been a difficult tightrope to walk, in my view. There were far more similarities between “Till You” and “Phantom,” and those songs sounded more alike to the lay listener. Repp’s claim would have looked stronger by comparison to Webber’s counterclaim. Alas, it was not meant to be. The claims were destined to be tried separately, and Webber’s inconsistent positions were never presented to the same trier of fact for decision. They could be used, however, for cross-examination at trial.

As the reader will note, the musicology in these cases can be turgid and difficult. The issues of access, the artist’s creative processes, and the lay hearer’s impression are simpler and often dispositive despite the musicology.

⁴⁹ *Id.*

⁵⁰ *Id.* at 887.

2. Access

Repp needed to prove the public dissemination of “Till You” sufficiently to enable a jury to infer that Webber had a reasonable opportunity to see or hear the song. He had to show such distribution between 1978, when he wrote “Till You,” and 1985 when Webber finished “Phantom Song.” This is called the “access period.” During this period “Till You” was sold as part of the album entitled *Benedicamus*. Repp testified, and employees corroborated, that he ordered 5,000 albums, 8,000 cassettes, and 13,000 sheet music books, and sold all of them. He had some paper documents of these sales, but most of the documents were long gone. Repp also performed “Till You” at over 200 concerts at which the products were sold. And “Till You” made the heavy playlist at a New York radio station. Webber had made frequent trips to the United States and New York City during this period. Repp estimated that K&R realized over \$250,000 in revenues from these products. Repp also argued that he and Webber shared the liturgical music genre, making access more likely. Moreover, because two experts opined that “Till You” and “Phantom Song” were “strikingly similar,” access could also be inferred from those findings.

Whether this evidence was enough to establish a “reasonable possibility” of access was a jury question. For instance, in *Gaste*, the successful plaintiff had shown only \$15,000 in receipts from his song.⁵¹ Repp also identified a mutual friend with Webber’s brother Julian during the access period. Robert Velline, aka “Bobby Vee” of 1960s rock and roll, had a copy of “Till You,” but he denied sharing it with either Julian or Andrew Webber during the access period.

On his counterclaim, Webber made a parallel access argument by establishing the public dissemination of “Close Every Door” prior to Repp’s composing “Till You” in 1978. Neither side had direct evidence of access.

Access is often a major stumbling block to a music copyright plaintiff. You must have a colorable theory as to how the defendant heard the plaintiff’s music before he wrote the offending song.⁵² Sometimes juries infer access from the public distribution of a song; sometimes not. It depends on the fabric of all the evidence in a case.

Music copyright cases also open up to scrutiny the composers’ entire musical lives and their creative processes. Few composers document or tape or transcribe fully their creations of songs—it is often an intuitive and spontaneous experience. When called upon years later to describe how they created new songs, they often cannot do so. And it is virtually impossible to recall what other music might

⁵¹ *Gaste v. Kaiserman*, 863 F.2d 1061, 1063 (2d Cir. 1988).

⁵² *See Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

have been in their heads subconsciously at the time. So such testimony, unless documented, will carry little weight. Repp and Webber both described their recollections about creating their music, and both insisted that they did not knowingly copy anyone. Neither Repp nor Webber had fully documented records of the creations of “Till You” and “Phantom.” But the inquiry must be made.

As noted, Professor Ferrara put into issue numerous earlier Webber compositions. Repp also submitted examples of other alleged copying by Webber to impeach the independent creation defense. These submissions included: (1) that Webber’s song “Memory” from *Cats* sounded strikingly similar to 1930s Big Band leader Larry Clinton’s “Bolero in Blue”; (2) that Webber’s “I Don’t Know How to Love Him” from *Jesus Christ Superstar* sounded similar to Mendelssohn’s violin concerto, slow movement; and (3) that Webber’s “On This Night of 1000 Stars” from *Evita* sounded similar to the Christian song “Tell My People.” The Court considered such other songs on summary judgment, but chose to give them no weight because they had not resulted in prior findings of copyright infringement.⁵³ They were not admitted into evidence at the trials.

The point is clear: clients need to know that claiming copyright infringement will subject their entire musical life’s works to unwanted scrutiny, with unknowable results. And successful composers would be well advised to document and record their evolution of any new songs.

C. The Judicial Proceedings

So, after years of intensive discovery and with all this evidence to sort through, what actually happened in court? Repp had originally filed his complaint in Chicago, but at Webber’s request it was transferred to New York.

After discovery, defendant Webber filed the obligatory motion for summary judgment on Repp’s claim. This motion set off a chain of legal events that consumed years. Had the case simply gone to trial right after discovery, its resolution would have been quicker and cheaper for everyone, and taxed the resources of the judiciary much less.

In the first of many published opinions to come out of the case, the Court granted Webber’s motion.⁵⁴ The Court found (1) that Repp’s access theory based on the public dissemination of “Till You” was “pure speculation”; (2) that the two songs were not similar enough to support copying; and (3) that Webber’s testimony about his independent creation of “Phantom” was uncontradicted.⁵⁵ We felt that this ruling

⁵³ See *Repp*, 858 F. Supp. at 1304.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1302–1304.

was erroneous and vulnerable to reversal on appeal, and the Second Circuit Court of Appeals was ultimately to agree.

However, there was no final, appealable order in the case while Webber's counterclaim was still pending. The Court denied our Rule 54(b) motion to immediately appeal the adverse summary judgment and to stay the counterclaim.

So Repp filed a parallel summary judgment motion on the counterclaim against him. The Court denied this motion, finding (1) that a jury could infer access from the wide dissemination of Webber's counterclaim song "Close Every Door"; (2) that the Court could not say as a matter of law that the songs "Till You" and "Close Every Door" were not substantially similar; (3) that Repp's uncontradicted testimony of his independent creation of "Till You" was not dispositive because he could have subconsciously copied Webber; and (4) that Webber had proven alleged infringements within the statute of limitations (that is, after 1988) because Webber had shown that Repp realized \$75.87 in receipts from "Till You" products after 1988. As discussed below, this \$75.87 figure would be the source for some scandalously irresponsible news reporting about the case.⁵⁶

These two rulings seemingly contradicted each other in their applications of the law to the facts. But before Repp could appeal his adverse judgment, he had to go to trial and defend his work against the counterclaim. No doubt sensing a favorable forum, Webber waived a jury trial for his counterclaim.

So, another year later, during a lovely fall week in New York, the counterclaim was tried before the same Judge who had made the hostile rulings. The parties and the musicologists testified. Spectators were deterred from attending the trial due to the virtual armed camp that surrounded the Federal Courthouse that week—the Government was prosecuting a foreign terrorism case and security had set up a perimeter three blocks around the site. During closing arguments the author, to demonstrate to a skeptical and uncomprehending Judge that waltz time ("Close Every Door") and duple time ("Till You") create dramatically different sounds, waltzed an imaginary partner around the courtroom while chanting "one-two-three" "one-two-three" "one-two-three." This anecdote again illustrates the unusual means to which lawyers must be willing to resort in presenting these music copyright cases.⁵⁷

My Broadway dance debut was successful. Two months after the trial, the Court issued an opinion entering judgment for Ray Repp and

⁵⁶ Repp v. Webber, 892 F. Supp. 552, 557–59 (S.D.N.Y. 1995) (denying plaintiff's motion for summary judgment on certain grounds, but ordering further discovery on limitations period); Repp v. Webber, 914 F. Supp. 80, 83 (S.D.N.Y. 1996) (finding defendant's counterclaims timely).

⁵⁷ My favorite press clipping from the case was titled *Webber Ruled Off Key as Coulson Waltzes Through Court*. See Mary Wisniewski Holden, *Webber Ruled Off Key as Coulson Waltzes through Court*, CHICAGO LAWYER 8 (Jan. 1997).

against Webber on the counterclaim.⁵⁸ The Court found (1) that the weight of the credible evidence did not support an inference of access—now there was no reason to doubt Repp’s veracity; and (2) that the songs were not substantially similar.⁵⁹ The Court expressly credited the testimony of Repp’s Chicago musicologist Professor Mack and his “more convincing holistic analysis.”⁶⁰ So Repp had fended off Webber’s plagiarism accusation. Now, finally, he could appeal the adverse ruling on his claim.

Webber cross-appealed his counterclaim loss. Another year passed, and the appeals were argued in the Second Circuit Court of Appeals in New York before Judges Kearse, Miner, and Cabranes. I did not have to waltz again in Court, but was prepared to do so if necessary.

Two months later the Second Circuit issued its opinion, and it was all in Repp’s favor.⁶¹ The Court of Appeals found no error in the counterclaim judgment for Repp. The Court reversed the summary judgment against Repp and remanded it for trial.⁶² The Court concluded that (1) the District Court had improperly weighed the evidence on access and independent creation; (2) that the experts’ findings of “striking similarity” could by itself support access; and (3) that unlawful appropriation was for a jury to determine.⁶³ So, finally, Repp was to get his trial, which could have been held years earlier had not the case descended into interminable motion practice.

The jury trial commenced on an unseasonably warm December day. CourtTV asked to televise the trial; the Judge declined the request. Most of the evidence outlined in this article was heard by the jury. The musicologists testified and played snippets of notes on the piano, which was placed in the courtroom. Repp testified about his creation of “Till You” and the \$250,000 in receipts from it. Webber played the piano in the courtroom as well, and he and his former wife—singer Sarah Brightman—testified about his creation of the “Phantom” song and his supposed isolation from all other music.⁶⁴ After all this sound and fury, the jury left to deliberate.

Trial lawyers know that when a jury is “out”—that is, deliberating your case—nothing much gets done. After what seemed like an interminable wait, the jury returned with its verdict. The verdict was

⁵⁸ Repp v. Webber, 947 F. Supp 105, 116 (S.D.N.Y. 1996).

⁵⁹ *Id.* at 115–16.

⁶⁰ *Id.* at 116.

⁶¹ Repp v. Webber, 132 F.3d 882, 892 (2d Cir. 1997).

⁶² *Id.*

⁶³ *Id.* at 890–91. Webber then took the case to the United States Supreme Court, but the high court denied his certiorari petition. *Lloyd Webber v. Repp*, 525 U.S. 815 (1998).

⁶⁴ See Jessie McKinley, *Andrew Lloyd Webber’s Latest Audience: A Jury in Federal District Court*, N.Y. TIMES (Dec. 15, 1998), available at <http://www.nytimes.com/1998/12/15/nyregion/andrew-lloyd-webber-s-latest-audience-a-jury-in-federal-district-court.html> (describing Webber’s in-court recital and testimony from Webber and Brightman).

in favor of defendant Webber and against Ray Repp. The jurors had no comment as they left the courthouse. That was effectively the end of the case: both the claim and the counterclaim had lost.

So both composers were vindicated. Both can say that they successfully defended a plagiarism lawsuit. Each can accuse the other of filing a spurious claim. The difficulties of prevailing on an infringement claim were again demonstrated. Both composers probably also deterred any future plagiarism claims by defeating the accusations. Because each side had won half the case, there were no attorney fees to be awarded to a prevailing party.

IV. ENDING ON A HIGH NOTE: TAKEAWAYS FOR MUSIC COPYRIGHT ATTORNEYS

“[T]ax not so bad a voice
To slander music any more than once.”

William Shakespeare, *Much Ado About Nothing*, act II, sc. 3

This decade-long litigation ran longer than did World War I, with a similar but non-lethal forensic result—neither side gained an inch after all the intense fighting. But the lessons and the appellate precedent have served to inform and warn future litigants. The Second Circuit confirmed the elements of music copyright infringement and the ability to infer access from striking similarity alone,⁶⁵ and it confirmed that the trial court cannot substitute its judgment for the jury’s on fact questions such as access and unlawful appropriation.⁶⁶

Many cautions and advice have attended this article so far. Below are additional observations that might be useful to future litigants and their counsel.

Venue. The Federal venue provision permits a civil suit to be filed in the District where any defendant resides, or in a District where a substantial part of the events giving rise to the action occurred. A defendant who is not a resident in the United States (such as Webber) may be sued in any District.⁶⁷

We filed the suit in the U.S. District Court for the Northern District of Illinois in Chicago. No doubt a substantial number of the alleged infringements occurred in Chicago, a large city where the “Phantom Song” was sold and performed. There is no question that Chicago was an entirely proper venue for the lawsuit. To our chagrin, however, on Webber’s “forum-non-conveniens” motion, the District

⁶⁵ *Repp*, 132 F.3d at 890–91.

⁶⁶ *Id.* at 889.

⁶⁷ 28 U.S.C. § 1391(c)(3) (2012).

Court in Chicago transferred the case to New York, where Webber could more conveniently litigate from his Trump Tower Penthouse!

This transfer unfairly increased the burden and inconvenience on Repp and his lawyers. Travel to and lodging in New York City is more expensive, and we had to engage local counsel there—Chadbourne & Parke.

My advice to lawyers in these kinds of cases is to avoid venues in New York or Los Angeles, if possible. Based on many years of experience in entertainment litigation, it's my opinion that juries and even judges in those cities are more star struck and deferential to the entertainment industry than judges and juries elsewhere. When Webber's ex-wife Sarah Brightman breezed into the courtroom to testify at the second trial, we heard one of the jurors sigh, "Oh, it's Sarah!" Trouble! Chicago is the best venue for entertainment cases. Chicago juries are more sensible and objective. And I believe the Chicago federal trial bench is among the best anywhere. But in *Repp* we were sited in expensive New York City, and I was soon on a first-name basis with the flight attendants on the morning American Airlines flight to LaGuardia.

Bifurcation. In *Repp*, both parties agreed to bifurcate liability and damages, under Federal Rule of Civil Procedure 42(b). In music copyright cases this is usually more efficient. It permits discovery to focus on liability, and defers any intrusive and complicated financial inquiries into the plaintiff's "actual damages" and the defendant's "profits." Sometimes a damages number which both sides can live with can later be negotiated and stipulated, without prejudice.

Wealth Disparity. Typically a would-be plaintiff in a music copyright case is less well heeled and more obscure than is the potential defendant. In law school we learn the axiom that "nobody sues a loser"—a penniless defendant is not an attractive damages target, even if liability is strong. After all, the most robust measure of copyright damages is the defendant's profits from the infringing work.

These cases are notoriously expensive to bring. So usually defendants are the successful composers and own the successful songs. Indeed, a plaintiff will typically discover the alleged infringement after it has become popular. And courts have recognized that a musical thief may be more likely to steal from an obscure composer than a prominent composer.⁶⁸

So if you represent a plaintiff in a music case, be prepared to face a well-financed defense. Of course, two lawyers can litigate successfully against twenty lawyers, and sometimes too many lawyers can spoil the broth and scatter the overall case knowledge. So don't be discouraged by the wealth disparity; but recognize that a laser-beam focus on the key factual issues and cost efficiencies will be necessary. Even if your

⁶⁸ See *Gaste v. Kaiserman*, 863 F.2d 1061, 1067 (2d Cir. 1988).

opponents may have limousines, you can still get to the courthouse in a taxi.

Media Attention. Given the usual fame and wealth disparities between the parties in these cases, counsel must also be prepared for a hostile media reaction.⁶⁹ Since *Arnstein*, plaintiffs have reflexively been portrayed by the media as gold-diggers trying to cash in by making preposterous assertions that they really wrote famous music. No doubt in some instances this is a fair characterization. Counsel must therefore seek to establish the legitimacy of the client's claim early in the minds of the media, before the potential jury pool and the Judge can be poisoned by negativity.

This starts with the complaint, which should include biographical information and the *bona fides* of the plaintiff. In *Repp*, plaintiff was an honorable, devout, established composer of some renown in his field. Plaintiff's two supporting musicologists were widely regarded as among the best in the world. When counsel gets a media call (and you will), she must, consistent with court rules and attorney ethics, educate the media about the bona fides of the claim and maintain a working, professional relationship with the callers throughout the case. At worst, try to persuade the media to delay any pejorative treatment of the claim until more facts are available. You cannot control the media, but you can serve as a resource for them.

In *Repp*, as a result, the media coverage of the case was fairly balanced and factual. At the trials, however, the *New York Times* reporter often sat with Webber's people in the courtroom. And one serious error in reporting by the *Times* persists to this day. Webber filed his counterclaims in October of 1991. Because the statute of limitations was three years from the last act of infringement, Webber had to prove that Repp had exploited "Till You" after October 1988. In fact almost all of the sales of "Till You" products had occurred before 1988, and the album had then been out of print. Webber did establish, finally, that Repp had licensed "Till You" to a Christian licensing company after 1988, and had actual receipts from sales of "Till You" products after 1988 totaling a whopping \$75.87! Our argument that this amount was trifling—and *de minimus non curat lex*—was overruled, and Webber was able to proceed with his counterclaims. But the *Times* wrongly and sarcastically reported that Repp's "Till You" was a "\$78 Song"⁷⁰ and then later that Repp's sales were \$75.87 versus Webber's sales of "more than \$1 billion."⁷¹ In fact, as noted above, the undisputed total receipts from "Till You" to K&R Music

⁶⁹ See, e.g., William Grimes, *A \$78 Song vs. a Lloyd Webber Work*, N.Y. TIMES (Sept. 26, 1996), available at <http://www.nytimes.com/1996/09/16/arts/a-78-song-vs-a-lloyd-webber-work.html>.

⁷⁰ *Id.*

⁷¹ McKinley, *supra* note 64; see also Hubert B. Herring, *December 13–19: Lord Lloyd Webber for the Defense*, N.Y. TIMES (Dec. 20, 1998), available at <http://www.nytimes.com/1998/12/20/weekinreview/december-13-19-lord-lloyd-webber-for-the-defense.html>.

were over \$250,000 from sales of 26,000 albums, cassettes, and sheet music.⁷² The \$75.87 figure was thus actually the value of Webber's legal claim, not Repp's, but the *Times* misused the numbers to state the opposite.

So while you can never control the media, be prepared for a negative spin, and do what you can to mitigate it.

Evidentiary Issues. How does a lawyer cross-examine a piano? During depositions and at trial, it is common in these cases for the composers and the musicologists to play the piano or some other musical instrument to illustrate their compositional technique or their analyses. This is fraught with difficulties for the lawyers.⁷³ It is difficult to discern live whether the notes are being accurately played, and it is impossible to go back and cite to a particular rendition to question the witness about it. It all happens too fast. And it is equally impossible for a court reporter to transcribe what is happening. There is no time to effectively utilize an audiotape of the live piano playing, even if one were available. Even having your own expert sit in the room to listen to the performance is unavailing—it happens too fast and too many snippets of notes are played for even an expert to specifically rebut misplays or biases.

The author of this article has cross-examined thousands of witnesses, and I have read dozens of treatises and textbooks on effective cross-examination. Nowhere have I discovered an effective approach to cross-examining a piano, however, and I invite my colleagues in the law to ponder this question. It is a problem unique to music copyright cases.

⁷² See *Repp v. Webber*, 132 F.3d 882, 884 (2d Cir. 1997), *cert. denied*, 525 U.S. 815 (1998).

⁷³ See *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 398 (S.D.N.Y. 1952). The court expressed its own exhaustion as to in-court demonstrations and playback:

At trial, we have had eleven specially prepared recordings introduced by the plaintiff prepared to demonstrate similarity between the two songs with respect to melody and harmony. Thus, we have had the first 16 measures of each song played consecutively on the piano without harmony and then played simultaneously. We have listened to the identical notes of the two songs being played on the piano and while whistling was used to designate the different notes. We have endured other strange combinations of drums and bells, of temple blocks and tympany [*sic*]. We have suffered through the playing of the commercial recordings. The defendants were not to be outdone in these endeavors. They brought forth a few records and crowned their activities by bringing a piano into court for use in cross-examining plaintiff's expert and illustrating the testimony of their own experts. We are certain this was not all done either for our entertainment or annoyance.

Id. (internal citations omitted).

V. THE BEAT GOES ON

The Second Circuit opinion in *Repp v. Webber* made it a little easier for plaintiffs in music cases to survive summary judgment. And, to be sure, these cases continue to be filed, and defendants still ultimately prevail more often than not. Proving access remains the most common stumbling block for plaintiffs. Subsequent cases in this field span every musical genre, and reading about them makes for an interesting afternoon for music buffs on a rainy day.⁷⁴

So, do composers ever “borrow” from each other? Of course, it happens.⁷⁵ Examples abound. Even if it amounts to larceny, is it easy to prove? Decidedly not.

Sometimes composers don't know whether or not they subconsciously copied someone else's music. Copyright, including music copyright, is designed to protect and encourage the creative process. But copyright law also works to ensure that musicians respect their colleagues' work. The law should play no favorites—neither rich nor poor, neither successful nor novice. Music copyright law should operate to make the music industry better. The unique aural and

⁷⁴ See *Hobbs v. John*, 722 F.3d 1089, 1096 (7th Cir. 2013) (holding that Elton John's “Nikita” was not substantially similar to cruise photographer's “Natasha” where both are about an impossible Cold War romance but did not “share enough unique features”); *Peters v. West*, 692 F.3d 629, 636 (7th Cir. 2012) (concluding that “Stronger” by Kanye West was not substantially similar to Vince P.'s “Stronger” because both used unprotectable elements such as references to Supermodel Kate Moss); *Lessem v. Taylor*, 766 F. Supp. 2d 504, 512 (S.D.N.Y. 2011) (denying cross-motions for summary judgment where the court found that genuine issues of material fact existed as to whether defendant's “How We Do” and plaintiff's “Elevator” were substantially similar or coincidental); *Davis v. Blige*, 505 F.3d 90, 109 (2d Cir. 2007) (holding that district court erred in granting summary judgment to Mary J. Blige and other defendants on infringement claims for the songs “L.O.V.E.” and “Don't Trade in My Love” because one co-owner could not extinguish other co-owner's infringement claims through retroactive transfer of copyright interests); *Johnson v. Gordon*, 409 F.3d 12, 20–24 (1st Cir. 2005) (explaining that the musical composition of “You're the One (For Me)” was not infringed by Sisters With Voices' “You're the One” because copyright protected for a registered short version did not extend to elements contained exclusively in unregistered long version and the allegedly infringing song was dissimilar); *Bridgeport Music Inc. v. Dimension Films*, 401 F.3d 647, 654 (6th Cir. 2005) (reversing district court's grant of summary judgment in favor of defendants on claim that defendants' movie included an infringing sample of “Get Off Your Ass and Jam” in the rap song “100 Miles and Runnin'”); *Positive Black Talk Inc. v. Cash Money Records*, 394 F.3d 357, 374–75 (5th Cir. 2004) (determining that plaintiffs could not prove factual copying where rap artists had independently created “Back That Azz Up”); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485–86 (9th Cir. 2000) (holding that Michael Bolton's “Love is a Wonderful Thing” infringed on the Isley Brothers' “Love is a Wonderful Thing” because there was a finding of access and substantial similarity); *Ellis v. Diffie*, 177 F.3d 503, 506–07 (6th Cir. 1999) (holding that infringement did not occur—even though chorus of defendant's “Prop Me Up Beside the Jukebox (If I Die)” was substantially similar to Plaintiff's “Lay Me Out by the Jukebox When I Die”—because plaintiff did not establish access).

⁷⁵ For an interesting discussion of appropriation in music and culture see Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S (Feb. 2007), 59–71, available at <http://harpers.org/archive/2007/02/the-ecstasy-of-influence/>. The key to Lethem's essay further suggests the prevalence of appropriation and borrowing throughout the arts. *Id.* at 68–71.

subjective qualities of fact-intense music copyright infringement claims also mean that the lawyers' talents are challenged.

When a client claims that someone "stole my song" or is accused of stealing a song, the long legal and factual journey is just beginning.