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Three Chords and the Truth Part I

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“All I’ve got is a red guitar . . . three chords and the truth” U2’s Bono reflects in their cover of Bob Dylan’s “All Along the Watchtower”. If you take a look a most popular music these days, you might be surprised by how many songs consist of basically three chords (for those of you who don’t know a chord is merely two or more notes played simultaneously). For example, the late Warren Zevon’s “Werewolves of London” (copyrighted 1978) and Lynard Skynard’s “Sweet Home Alabama” (copyrighted 1973) are both basically chord progressions based on the major chords of D, C & G - with differing emphasis. If you ask anybody, I don’t think that you would find a person that would say that they are the same song. Additionally, I don’t think that anybody would dare to assert that Skynard should be able to claim copyright infringement against Zevon or that either piece should not be entitled to copyright protection.

I came across an article that asked the above questions the other day. The article, written by Peter Gutmann appeared in the October issue of IP Law & Business, and asks some interesting questions. The article starts off with an analysis of the sixths circuit’s 2004 decision in *Bridgeport Music, Inc. v. Dimension Films*, and winds up questioning whether or not music should be eligible for copyright protection at all. Mr. Gutmann begins and ends the article with one central premise - “all music borrows from other music and thus warrants no protection at all.” Personally, I think Mr. Gutmann’s “throw the baby out with the bath water” analysis is a bit over simplistic and dramatic, but it is an interesting concept to consider and most of all it forces us to take a deeper look at that what copyright is actually protecting when it relates to music.

Mr. Gutmann starts the article with an overview of the 6th circuit’s 2004 decision of *Bridgeport Music, Inc. v. Dimension Films*. *Bridgeport* is a case about utilizing digital

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sampling in music. The facts of the case are fairly straight forward. The song in question is “100 miles and running”, a rap song that appeared on the sound track to the 1998 movie I Got the Hook Up. The sample in question featured a two second sample of a three note guitar riff from Funkadelic’s “Get Off Your Ass and Jam.” The riff was subsequently lowered in pitch (thereby changing the individual notes of the riff), and looped to last for 16 beats and was featured several times during the song.

The court went through a standard analysis under 17 USC 102. It examined the two works to see if there was a substantial similarity between the two. The judge ultimately ruled that no reasonable person would recognize the source of the riff without being told and therefore concluded that no infringement occurred under section 102. If the authors of “100 miles and running” had actually made the riff using a studio musician playing an actual guitar, that would have been the end of the case. Since the riff was basically sampled and subsequently altered, the court delved into a different section of the copyright statute - section 114(b).

Section 114(b) of the copyright statute protects the owner of a sound recording’s exclusive right to make copies of the recording. In particular, it grants an exclusive right to the owner of the sound recording to make copies “that directly or indirectly recapture the actual sounds fixed in the recording.” Infringement under this section occurs when an individual, other than the copyright owner, reproduces the work by mechanical means or rearranges, remixes or altering the work in some other manner by mechanical means. This section only protects the sound recording itself and not the underlying material. Therefore, if I record an arrangement of Pachabell’s “Kannon in D”, some marketing director cannot use my rendition in their new TV commercial with out paying me a royalty, even though the song itself is in the public domain. Of course the ad agency could always commission their own performance of the song (which is codified in 114(c), allowing an independent fixation of the sounds contained in the sound recording - however you still would be subject to the copyrights to a musical work contained in section 102), but they cannot steal mine just because the source material is in the public domain. This is a fairly logical provision - as the rationale behind it states that we want to www.coloradoiplaw.com



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protect people's artistic endeavors and an individual's creative interpretation, arrangement or performance of a musical piece should be protected even if the underlying material is not. The court in *Bridgeport* found that the use of the sample violated section 114(b) and set out a bright line rule - "if you sample get a license". It doesn't matter if you sample a fraction of a second or the whole work; if you do not obtain a license you will be violating copyright law.

Personally, I think this rule makes sense and allows for some clarity in the law. Additionally, we are not talking about a case where there is a chance that the infringement was unintentional - the individual intentionally sampled the other work. Likewise, the rule does not forbid sampling - you just need to get a license. When talking about music, we have a very efficient system for clearing music licenses so, there really isn't a high transaction cost for an artist wishing to use a sample. Correspondingly, requiring artists to get a license or gain permission to use a sample could result in unexpected benefits. For example, in the 1980 the rap group RUN DMC was recording a cover of Aerosmith's 1970 hit "Walk this Way". Producer Rick Rubin contacted the Aerosmith camp to get permission to use the song. Aerosmith not only gave their permission, but singer Steven Tyler and guitarist Joe Perry even stopped by the studio to lay down new vocal and guitar tracks for RUN DMC's version. That collaboration has been cited as the impetus for the wave of Rock/Rap collaborations that have been so rampant the past few years and influenced groups and rap artists such as Limp Bizkit, Linkin Park, and Jay-Z.

Guttmann also makes an attempt to defend artists that sample stating that it is not usually done to save costs, but rather as homage to honor the artists that preceded them. I don't know about you, but I really can't wrap my mind around this justification. If the motive for sampling is not economic, then why would the artist object to paying for a license? Additionally, if the purpose of the sample is to pay homage to those who have come before, why wouldn't you want the person you are honoring to receive some sort of compensation for their efforts? Lastly, the homage justification doesn't apply in the *Bridgeport* case since it is nearly impossible to pay homage to someone with a sample

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that nobody would be able to recognize in the first place. The truth of the matter is that sampling, without any obligation to obtain a license, does create a windfall for the artist. Without sampling, the artist would have to hire a studio musician who would be required to receive a performance credit on the album and residual payments on all sales or radio play of the song. By sampling and not obtaining a license an artist can keep that credit and residual for him or herself.

In the second, installment we will look at Gutmann's more controversial theory that music itself should not be afforded copyright protection.

About the Author -

Mr. Lemire is a Founding Member of the law firm of Leyendecker Lemire LLC, specializing in business and intellectual property law. Previously, Mr. Lemire served as in house counsel to various companies in the Denver Metro area in industries ranging from high tech ".com's" to strategic investment firms specializing in the purchase and sale of distressed commercial debt. Mr. Lemire has advised companies on issues such as general corporate and business law, employment law, mergers and acquisitions, contract drafting and negotiation, software licensing, strategic relationships, copyright, trademark and cyberlaw. He is a Member of the Colorado Bar Association, the American Bar Association's (ABA) Business Law section, the ABA Cyberspace Law and Internet Law Committees as well as the ABA's subcommittee on Electronic Commerce, as well as the Secretary of State's Legislative Drafting Committee on Trademarks.

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