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Three Chords and the Truth Part II

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In the first installment of this article, we examined the case of *Bridgeport Music, Inc. v. Dimension Films* which surrounds digital sampling. Additionally I put forth the opinion of Peter Gutmann, an attorney who wrote an article in the October issue of *IP Law and Business* critiquing the decision and ultimately making his case for why music should not be afforded copyright protection. In this installment of the article we will look a bit more at Mr. Gutmann's reasons why he believes music should not be entitled to copyright protection, as well as an analysis of a famous copyright case involving George Harrison.

Gutmann uses the "independent fixation of the sounds captured in a recording" concept of section 114(c) as a gateway into a fractured and strained reasoning on why music should not be afforded copyright protection. He points out that there are potential pitfalls for the individual relying on 114(c) due to the fact that certain case law exists that could pose pitfalls to the unwary. In particular, he cites the 1981 case of *Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 508 F. Supp. 798 (S.D.N.Y. 1981), aff'd 722 F.2d 988 (2d Cir. 1983).

For anyone who practices copyright or is into the commercial side of music, the *Harrisongs* case should ring some bells. At heart in this case was the question of whether George Harrison's 1971 "My Sweet Lord" infringed on the Chiffons 1963 hit "He's So Fine". The songs in question both consisted of a 2 chord motif of G and C (the II and V chords of the key of F) and a 2nd motif that in the Harrison song consisted of F and Dm (the I and VI chords) and F in the Chiffons song. In particular, the trial court decision and the subsequent appellate court decision stand for the proposition that infringement may be achieved subconsciously. Therefore, no actual intent to copy needs to be shown, just a knowledge of the existing work and a substantial similarity between the two works. The court then assumes that because author had a generalized knowledge of the pre-existing work that the only logical reasoning for the similarities of the works is that the second author was influenced by the work on a subconscious level. In the *Harrisongs* case, Harrison admitted he was familiar with the Chiffons' song. Although, even if he hadn't admitted he was familiar with it, the court seemed all too eager to presume knowledge of the song due to the song's popularity and the fact that

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Harrison was a musician. In fact, the court did presume that knowledge in the case of Billy Preston, the R&B singer who collaborated with Harrison on the song and actually recorded a version of the song which was engineered by Harrison.

If you listen to the two songs (the Columbia law library music plagiarism project has a great side by side comparison of the two songs and a great analysis of the case [Click Here](#)) in their recorded format it is extremely hard to understand how the two songs are considered "identical" as the court asserts. Gutmann, no doubt fall into this category as espoused by the following statement "[i]t seems impossible to mistake the Chiffon's teen-angst doo-wop . . . for Harrison's religious meditation." In general, I agree with Gutmann's assertion that the songs do not sound alike at all. However, I think that Gutmann is a bit too quick to disregard the courts findings based on several factors that are unique to the case. Most importantly, I think Gutmann misses one key component- the fact that the court was examining the written sheet music only and not the recordings or lyrics of the two songs. Considering this fact, I think there are some factors in the Harrisongs case that can explain the court's decision other than the use of copious amounts of illegal substances.

First, you have to understand that George Harrison was a guitar player who didn't have any format music training. Guitar players for the most part do not read sheet music and correspondingly do not compose songs using musical notation. Harrison's own recount of how the song was created supports this theory, as he recounted that it essentially was created while Harrison was vamping on some chords and then improvised lyrics over it at an informal jam session prior to an interview. It was only after the song was recorded that Harrison hired another musician to transcribe the recorded song into sheet music notation. Therefore, the music notation is not always an exact replica of what is actually going on in a song. The person transcribing the music makes their best attempts to capture the essence of the recording. Secondly, when comparing the two songs, the court listened to the works played on a piano and reviewed the sheet music to the two songs and not the songs as they were originally recorded. Therefore, when doing the comparison, the court was working from basically two "summaries" of the songs. If you listed to the Chiffon's song, this becomes apparent as the song is actually quite busy and takes some effort to actually hear the chord progression (or melody). However, quite possibly the most compelling aspect as far as the court was concerned, was how the two basic chord motifs were arranged. In both songs the first motif is used four times followed by the second motif being used four times in one instance, and three times in the other. Additionally, a grace note appears in the Harrison version of My Sweet Lord (as opposed to the Billy Preston version) and in He's so fine. The occurrence of nearly the exact song structure and the presence of the same grace note was compelling enough to convince the trial and appellate courts that the songs were

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identical except for one phrase.

Upon a detailed review of the case, I don't know that I necessarily agree with Gutmann's characterization. I do agree that the court probably got the case wrong by not taking into account how the works were created and failing to address the fact that the music transcription may not be the ultimate expression of modern music. Additionally, the concept of "subconscious infringement" is quite bothersome, because it bypasses the traditional requirement to showing either through direct or indirect evidence that the author intended to copy the work. However, given the evidence presented, I can certainly see how the court reached its conclusion. I think the implications of the case are much narrower than Gutmann makes them out to be. From reading the opinion it is not just the similarity of the chord motifs that the court cared about, it was also the extreme similarity in the arrangement of both motifs. The case would most likely have been decided drastically different if Harrison's song had a more traditional call and response such as A/A/B as seen in the blues. The fact that Harrison's song not only contained the same notes, but also had the nearly identical, fairly rare arrangement allowed the court to conclude that the songs were identical.

Gutmann continues his analysis by examining the role of influences in music in general. I think most artists have influences that in part help define them as artists. Musicians are no exception. Gutmann points out several examples from classical music in which composers did pieces whose origins could be seen in another composer's work. While I am a fan of classical music (Mozart being my personal favorite), I do not share Mr. Gutmann's in-depth knowledge to be able to offer counter examples. Therefore I am going to transpose the discussion to something that is closer to my home turf the blues. The blues is also a convenient medium because it has been a huge influence on American rock and popular music. Blues is often grouped with bluegrass, country and folk music in a category known as "American Roots" music. In general "American Roots" music finds its origins in the music of the African American population in the south. The music was performed generally by self-taught musicians and was passed down through an oral tradition. The earliest blues we have record of is known as delta blues. Delta blues recordings sprung up in the 1920's and 30's and is in general characterized by a vocalist and unaccompanied guitar or a rather sparse arrangement of guitar, piano and harmonica. Delta Blues stars include Robert Johnson, Blind Lemon Jefferson, and Lead Belly. With the advent of the electric/ amplified guitar and the migration of southern blacks to northern cities such as Chicago in the 1940's, a new form of blues evolved - known as Chicago Blues. Chicago Blues is generally seen as grittier, employing over-driven guitar sounds and gritty over-driven harmonicas. The chord progressions and arrangements are similar to Delta Blues, however the music reflects the influence of the artists' new urban setting, and is characterized by a faster

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paced more driving rhythm than Delta Blues. Chicago Blues artists such as Muddy Waters, Son House, Howlin Wolf, T-bone Walker and countless others were clearly influenced by their Delta Blues predecessor, however their music was much more than mere copying of the delta blues style. They took the essence of their acoustic predecessors, and crafted their own new style. In turn, the Chicago blues artists inspired a new generation of artists ranging from the 1960's through today and include the likes of Eric Clapton, Jeff Beck, Stevie Ray Vaughn, and more recently, Keb Mo and the Los Lonely Boys.

I think someone would be hard pressed to say that just because Chicago Blues was influenced by Delta Blues, that Chicago Blues artists are not entitled to protect their works. In order to be eligible for copyright protection, there just needs to be a modicum of creativity. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). As human beings, it is unreasonable to expect people to live in a vacuum. We are always going to be influenced by others. Copyright law takes this into account. The standard for protection is originality, not novelty as in patents. Therefore, copyright law does not extend copyright just to one novel about police detectives, it extends them to all detective novels as long as they are original - i.e. it is not substantially similar to another work and there was no intent to copy. Therefore, if my novel shadows some other book's plot line and the characters seem very similar and it is shown that I 1) intentionally copied the work or that 2) I had access to the work (e.g. own a copy of the work), then there is a good possibility that I may be found to be infringing. In terms of music, this means that two songs may have very common components, but as long as they are not substantially similar and there was no intent to copy, there is no infringement. As

the *Harrisongs* case shows, this may be difficult at times and the courts may get it wrong. However, just because it may be a difficult task to assess it doesn't mean that we should throw our arms up and declare that music isn't copyrightable. Due to the vast body of music already out there, and the fact that music is governed by certain mathematical relationships that limit the potential combinations that will result in sounds that are "appealing" to the human ear, it might make sense to narrow the scope of protection so we don't get into a situation where the person who first plays the chords G D E can prevent anybody else from writing a song utilizing those chords. We should be taking a look at rhythm, tempo and the subtle accents that make each song unique.

Given the facts in *Harrisongs*, I would say that if the modified sample in Bridgeport was independently performed, there is almost no way that it would have been considered infringement. First of all, the musical phrase only appeared a few times in the song, and was not the main melody. Secondly, the pitch was lowered, which would have changed the phrase to completely different notes (unless they were lowered in octave

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increments), and the tempo was lowered stretching out the length of the phrase. This is a far cry from the facts in *Harrisongs*, in which the two songs are arguably identical. In the end, society benefits from being able to protect music and musical expression. A rule that would allow sampling without compensation to the underlying artist undermines the underlying principal of our copyright law that allows artists to protect and exploit their works for commercial gain. If sampling is truly done as a form of homage or tribute as opposed to economic gain, then I would think that artists wouldn't mind sharing some of the economic benefit with those artists that have come before, and whose shoulders modern day artists are standing upon. Additionally, a bright line test ends the confusion that often surrounds copyright cases. The test is quite simple - if you digitally sample - get a license first, or you will be in a world of hurt and a vast majority of those earning that are coming from your newest chart topper will be going to someone else. As time goes on and the body of copyrighted music builds up, the *Harrisongs* case will continue to pose a potential problem. Rational extensions of the "subconscious" infringement notion are quite troublesome. This is compounded with the court's willingness to attribute musical knowledge about certain songs merely based on the fact that an individual is a musician. The court in *Harrisongs* assumed that because a person is a professional musician, they are also a walking encyclopedia of all music that has come before - which almost guarantees a finding of subconscious infringement. This line of thought can have far reaching effects, which could extend well beyond the rational bounds of what was originally intended for copyright protection. If widely adopted such a standard could actually pose a chilling effect to new works as opposed to fostering creativity which is one of the essential backbones of our copyright law. Only time will tell.

For now, all I have is my "three chords and the truth."

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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