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# IP *Litigator*®





# Copyright Litigation

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## Uncleared Melody: Musicological Factors Considered in Copyright Infringement Cases

For copyright infringement cases involving musical compositions, courts and juries are often tasked with determining whether two songs are “substantially similar,” the legal standard required to show infringement.

Most casual music fans are aware of similarities that exist between popular songs, such as the often remarked-upon similar guitar riff intros of “Last Nite” by The Strokes and “American Girl” by Tom Petty and the Heartbreakers. In that instance, the Strokes’ Julian Casablancas did eventually remark that the relevant portion of “Last Nite” may have been inspired by “American Girl,” to which Tom Petty said “OK, good for you.” However, not all music copyright owners are as understanding as Mr. Petty (years later, he actually did initiate a dispute with Sam Smith for allegedly infringing “I Won’t Back Down”).

Since copyright protection only extends to *original* works, a party alleging infringement must show that the infringing song shares *original, protectible musical elements* with the infringed song, as opposed to commonplace musical elements which were widely used by others before the infringed song

was even written. For example, it would be an uphill battle for an infringement plaintiff to argue that a standard bass-snare drum pattern in 4/4 time should be considered an original, protectible musical element, given that such drum patterns have appeared in countless songs going back very far in time. Accordingly, parties in high-stakes copyright infringement suits often seek out renowned musicologists to serve as expert witnesses and opine on which shared elements between songs are actually *protectible*.

So, what types of musical elements are considered original and protectible for copyright purposes? And how many such elements need to be shared between two songs in order to support a finding of substantial similarity?

Below is an overview of a few musicological factors which have been considered by courts in selected high-profile cases.

### “Harmonic Rhythm” and Chord Progressions

The underlying chord progression in a song can be a defining feature, the bedrock on top of which a melody is constructed. Chord progressions are intertwined with the concept of harmonic rhythm, which refers to the timing of chords changes in a progression.

In *Griffin v. Sheeran* and in *Structured Asset Sales, LLC v. Sheeran*, both of which concerned a claim against Ed Sheeran alleging

that Sheeran’s “Thinking Out Loud” infringed on Marvin Gaye’s “Let’s Get It On,” the plaintiffs argued that the two songs shared the same chord progression (specifically, a  $I - iii - IV - V$  progression), as well as the same harmonic rhythm, and that the combination of those elements was sufficient to establish substantial similarity. In *Griffin*, the defense pointed out that the chord progression at issue appeared in at least thirteen songs and in two guitar method books prior to the release of “Let’s Get It On” (there was less evidence of prior works bearing the same harmonic rhythm), and a jury eventually found for Sheeran. In *Structured Asset Sales*, the court noted that both the chord progression and harmonic rhythm at issue were unprotectable, and while all musical works are in some way composed of the selection and arrangement of unprotectable elements, the combination of just two such elements is not enough to support a claim of substantial similarity.

### Lyrics and Theme

Musical lyrics are also subject to copyright protection, as the artistic expression of a musical work often comes from the interplay between the music and lyrics. Song lyrics are generally, but not always, arranged in some sort of rhyming structure. Especially in hip-hop, lyrics can be dense with word play and cultural references, including references to works by other artists.

In *Peters v. West*, in which a hip-hop artist named Vince P alleged that Kanye West’s song “Stronger” infringed Vince P’s song of the same name, the plaintiff claimed that the hook in West’s “Stronger” copied the lyrical theme and rhyming structure of plaintiff’s “Stronger,” as well as the song title

and a reference to Kate Moss. The court noted that Nietzsche's phrase "what does not kill me, makes me stronger" (the shared theme of the two songs) had been "repeatedly invoked in song lyrics over the past century" and there was even another hit song at the time (2012) with the same theme, "Stronger (What Doesn't Kill You)" by Kelly Clarkson. The court found that the "ubiquity of [the] common saying, together with its repeated use in other songs" suggested that West's title and lyrical theme did not infringe on plaintiff's "Stronger." As for the rhyming structures, both of which rhymed "stronger" with "wronger" and "longer" in a chorus that otherwise featured different wording, the court found that the rhyming of these particular terms was not protectable. Finally, as for the references to Kate Moss, which plaintiff argued was a unique lyrical reference, the court found that the verses in question were otherwise different and a reference to a famous and well-known model is not protectable expression.

## Melody, Scale Degrees, and "Abstract" Musical Features

The melody of a song is often its most recognizable and memorable feature. Melodies are constructed of a series of notes performed in a particular rhythm, and each note in the melody comprises a different "scale degree" (i.e., the relation of the note to the underlying key of the song). As with other musicological factors, the question of whether two melodies are close enough to support a finding of substantial similarity is dependent on the extent to which

the melodies share protectable elements.

In *Gray v. Hudson*, plaintiff Flame and his co-writers alleged that Katy Perry's "Dark Horse" infringed plaintiff's song "Joyful Noise" by using a highly similar "ostinato" (or repeating series of instrumental notes) throughout. The court found that, while the respective ostinatos consisted of the same general rhythm and scale degrees, the copyright protection was very "thin" as the ostinatos mostly consisted of commonplace musical elements (in this case, a minor scale note pattern that had been used by many songs in the past). Given the "thin" protection afforded to plaintiff's ostinato, the court found that small differences between two notes in the respective ostinatos were enough to avoid substantial similarity.

Notably, plaintiff's expert witness, musicologist in *Gray v. Hudson* relied upon a number of relatively abstract musical findings, including "texture," "quality and color of the sound," and the way the "melody moves through musical space," which the court did not find persuasive on the basis that such elements were either unprotectable or too abstract for the substantial similarity analysis. The court also rejected plaintiff's arguments relating to "timbre," or the unique sound quality of the relevant notes as performed by instruments in the respective songs, finding timbre to be unprotectable by copyright.

## When Two Songs Share a Number of Musical Elements

The above examples refer to cases in which songs were compared on

the basis of specific prominent features shared between the songs (the chord progression in the *Sheeran* cases, the lyrical themes in *Peters v. West*, and the ostinato in *Gray v. Hudson*). But what about the situation in which a plaintiff alleges infringement on the basis of a number of shared musical elements which, in combination, result in substantial similarity between the works?

In another case, *Skidmore v. Led Zeppelin* (alleging that Led Zeppelin's "Stairway to Heaven" infringed Spirit's "Taurus"), the court rejected plaintiff's arguments that the songs' melodies shared multiple elements including the same descending notes in the bass clef, same duration of pitches, same "combination of arpeggios and two-note sequences," same melodic rhythm consisting of steady eighth note beats, and same "pitch collection," finding such melodic elements *by themselves* to be unprotectable. However, as the court noted, the plaintiff did not argue infringement on the basis of the "selection and arrangement" of the unprotectable elements, which may have affected the outcome.

## Conclusion

A review of opinions on copyright infringement in the music composition context suggests that the two songs must share more than "commonplace" musical elements which have been incorporated into countless songs before. Furthermore, it generally appears that more than a few shared musical elements are required to support a finding of substantial similarity. As demonstrated by Tom Petty's decision to take legal action against Sam Smith but not the Strokes, the question of whether two musical works are

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substantially similar often depends on a totality of factors rather than any one musicological element, even if it is an iconic and recognizable guitar riff.

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