AIMP After the Panel

Infringement

April 16, 2009

Panelists Barry Mallen, Esq., Gerald Eskelin, and Charles Cronin Answer Questions

RICHARD FELDMAN (AIMP Vice President):

Many of our members wanted to know your opinion regarding Joe Satriani ("Fly") vs. Coldplay ("Vida"). What issues are likely to be brought up by the respective attorneys? Which party will most likely prevail? (http://www.youtube.com/watch?v=UvB9Pj9Znsw).

BARRY MALLEN (attorney):

The issues will be **substantial similarity, originality and independent creation**. Satriani is no doubt initially relying on what he will contend is the "subjective" similarity of the melodies based on the reaction of the lay person listener. By this time each side has no doubt retained a musicologist to analyze the two works. It's hard to predict the outcome without at least knowing the results of each side's experts' analysis.

I'm sure that by now the two works have been transcribed by musicologists and that they are now focusing on the "objective" similarities of the two works, which has more to do with comparing the two compositions than the subjective reaction to just listening to the recordings of the compositions.

Coldplay's expert is no doubt also likely looking for "prior art" to show that to the extent there is similarity it is either common place and not original to Satriani or existed in works that predate the Satriani work as evidence that any similarity is not the result of copying. Coldplay's lawyers will also look to uncover work tapes of the creative process to show that its song was the result of independent creation and not copying.

GERALD ESKELIN (musicologist):

The portion that appears to be at issue contains a combination of melody and harmony that is clearly similar. Neither the melody nor the harmony considered separately is original in either song. The plaintiffs will contend that when melody and harmony are considered in combination, the resulting expression is original and protectable. The defendants will contend that even in combination, the expression is commonplace and therefore not protectable, and will conduct a search to find prior musical examples to support that view.

Musicologists on both sides will have to consider:

The melody is extremely simple, consisting of a three-note pattern (scale steps 3-4-2) repeated a step lower (2-3-1) with various embellishments. This configuration is called a "melodic sequence," a compositional device developed in the seventeenth century and

extensively used since then to provide meaningful organization (continuity and contrast) in melodic composition.

The chord progressions in the songs are based on the most basic sequence in Western music (IV-V-I), practiced endlessly on the keyboard by every freshman music student. In “Vida,” the progression is IV-V-I-vi (the vi chord is often used as a substitute for the I chord). In “Fly,” the progression is ii-V-I-vi (the ii chord is often substituted for the IV chord).

The notes in a melody are to a large extent determined by the chord progression that accompanies it, or vice versa. In both songs the chord progression is repeated over and over, providing the overriding continuity of the songs. Interestingly, the melody notes here are sometimes dissonant to the chord, but in both cases, resolve to “fit” the chords in a traditional manner. In both halves of the melody, the first note is an appoggiatura (how’s that word for a brain cruncher?) followed by an echapee (sorry ‘bout that) that resolves to a consonance. In short, there is nothing original in the shape of either melody considered in relation to the underlying harmony.

Who wins? I don’t know. The courts have that responsibility. Will the defendants identify sufficient prior art to demonstrate commonality? We, as well as the plaintiffs, will all find out soon enough.

CHARLES CRONIN:

In determining melodic similarity one needs also to consider the respective genres of the two works. The Satriani work is an instrumental rock number in an improvisatory style, with a melody that is meant to be heard as spontaneously created during performance. The Coldplay pop song is meant to be heard as a carefully rehearsed number, with all performing participants well aware of musically what comes next. This is relevant in determining which portions (notes) of the two melodies are musically essential and which are musically subordinate. Both melodies can be distilled down to a handful of notes arranged in a commonplace manner. It’s possible, however, that the parties will dispute what pitches comprise the essence of the songs, given their different genres.

From my understanding of the facts, and my musical analysis of the works, I do not believe this is a meritorious case. In my opinion the plaintiff’s lawyer should have educated Satriani on the law in this area, and recommended he not pursue the matter. I imagine the defendant’s deep pockets influenced Satriani’s (and his lawyer’s) decision to move forward with the litigation (and in a very public way) and that Coldplay may simply hand the plaintiff a bone in the form of a settlement to make this annoyance go away, and chalk the matter up as a typical business risk.

RICHARD FELDMAN:

Under copyright law, there is a statute of limitations which affects infringement *cases. What is the length of the statute? How is the beginning or start date determined? Have there been cases where the outcome was determined or affected by a statute of limitations?*

Barry Mallen .

Three years from publication. But it's a rolling three years. Thus, if a work is released in 2001 and you sue in 2008, the claim is not barred in its entirety, but the Plaintiff, to the extent it elects profits over statutory damages, can only recover the infringers' profits dating back three years from the filing of the suit.

RICHARD FELDMAN:

Can you separate myth from fact in such commonly held beliefs about infringement; such as at least three consecutive notes exactly similar to another song, or that similar words conveying the same thought constitute infringement? Also there is a commonly held belief that chord progressions and titles are immune from copyright infringement litigation. Please comment.

GERALD ESKELIN:

In my understanding of copyright law, the "number of similar notes in a row" has little to do with substantial similarity in the legal sense. The basic issue is whether the pitch sequences constitute an original expression. Additionally, it is important to consider whether the sequence is set to a similar rhythmic pattern. For example, the melodies of "Rudolph the Red-Nosed Reindeer" and the church hymn "Rock of Ages" begin with exactly the same seven-pitch sequence, but the rhythm, tempo and style are vastly different.

Regarding lyrics conveying similar meanings, the law seems to me very clear. Since ideas are not protectable by copyright, the lyrics in the songs at issue must constitute a similar "expression" of the idea, i.e., a significant number of the same words, in order to constitute infringement. Again, originality is a factor.

In regard to chord progressions, I have not ruled out the possibility that some imaginative composer might configure combinations of simultaneous pitches that are so "far out" (perhaps "in the cracks") that the expression is both original and recognizably unique, and that he/she should have the right to "own" it. For the present, since most chord progressions seem to follow established principles of harmony, that seems unlikely to happen in my lifetime.

CHARLES CRONIN:

Melodic similarity is the lynchpin in determining infringement in music copyright infringement disputes. This is because there are an infinite number of pleasing "horizontal" arrangements (i.e. melody) of the 13 pitches used in Western popular music, but relatively few "vertical" (i.e. chords – harmony) arrangements of the same 13 pitches that are similarly pleasing and useful to the creators and listeners of this music. In other words, the locus of musical (and economic) value in most popular works, is melody. That said, courts have at least hinted that other musical elements might be protectable on their own as well. *In Tempo Music v. Famous Music* in 1993, for instance, the court suggested the possibility of protection for harmonic progression in Duke Ellington's "Satin Doll".

Short titles of songs are not copyrightable, and short melodic motifs are similarly not protectable as they are de minimus expression. Neither the copyright statute nor case law interpreting it has ever set forth a specific number of common pitches or other musical elements that will support a case of infringement. It is a question of whether musical components have been used to create original expression, and whether that *expression was wrongfully copied.*

RICHARD FELDMAN:

In today's musical expressions, many Urban/Hip hop songs are referred to as "beats". Is a distinctive rhythm something *that one can defend/litigate?*

GERALD ESKELIN:

Most "beats" today are well within the parameters of common practice, and therefore not likely protectable. Only once have I been asked to search for prior art to demonstrate the commonality of a drum-set "beat." My results apparently facilitated a settlement, but since the details of settlements are rarely shared with me, I don't know whether that was a good thing or a not so good thing for my client.

CHARLES CRONIN:

It is worth noting that given the means by which much popular music is now created (assembling sounds rather than notes) the traditional nearly exclusive focus on melodic similarity in infringement determinations may give way to consideration of a broader range of musical commonalities. The growing number of sampling cases point to this development.

RICHARD FELDMAN:

Can you think of a case in which you disagreed with the outcome, and had you been involved, what would you have done differently to affect the outcome?

GERALD ESKELIN:

In the Newton vs. Diamond case, I believe the final verdict got it wrong. I did offer an opinion during the early stages of the claim, but apparently my client didn't care for my conclusion, so I was not involved in the eventual proceedings. Had I been engaged by the other side, I would have provided evidence of prior art and described musical principles of composition and natural acoustics that might have led to a different outcome.

As I mentioned on the AIMP panel, sliding pitches have been incorporated in musical composition as early as the invention of the Moog synthesizer in the middle twentieth century. Also, I mentioned that I have used sliding pitches for decades in the classroom to demonstrate principles of acoustics, specifically dissonance and consonance. Exploitation of timbre (overtone patterns) as a compositional element goes back to the earliest use of musical instruments and continues today in the form of guitar pedal boards and the turning of a synthesizer knob. The fact that in this case the overtones were created by over-blowing a flute is not relevant, in my opinion. While humming and simultaneously blowing a flute is a clever skill, the musical composition (actually, musical fragment) here did not constitute protectable expression, in my opinion.

CHARLES CRONIN:

I am generally predisposed towards the defendants in music copyright infringement disputes and am typically sorry to learn of cases decided against them. I disagreed with the decision against George Harrison, for instance, despite the fact that the court handled the matter in a thoughtful and considerate manner in finding Harrison unconsciously infringed upon the plaintiff's work. I think the world of popular music would be best served if copyright infringement were found only in cases of flagrant and deliberate misappropriation of another's musical expression that results in direct financial and professional harm to another musician.