

Copyright and Related Rights Law

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WEEK - 03

LECTURE - 14

Is Music Finite?

Welcome back to this course on copyright and related rights law. In the previous sessions, while understanding the subject matter of musical works, we have learned that music is different from the form of its fixation. We understand that music is a perception of the listener as a pleasingly harmonious melodic sound. The fact that human sounds can be composed into distinct expressions enables a distinction between the musicality of animal sounds and the compositional faculties of humans. What we will look at today in this particular session is whether music is, in fact, finite. Compositional faculties can lead to creative expression, but if the creative expressions themselves are limited, will it be possible for new musical compositions to appear? Consider this question: Is composition dependent on the instrument based on our earlier understanding? Try to answer this question.

Consider a drum, a guitar, a piano, or someone's voice. Is music dependent on instruments? You must have realized that through graphical notations, an expression of composition is possible. Therefore, composition is not dependent on any instrument, but the music that the composition captures is distinct. In this image, you can see apples of different colors, but it doesn't change the fact that these are still apples.

Similarly, instruments of various types can constitute the same music, albeit with some different properties, just like these apples. These are apples, but they are a different color and probably have a slightly different taste. In instruments too, a guitar sounds different from a piano, but the music that it generates could be substantially the same. But where different instruments can carry a substantially similar piece of music. What about different compositions and distinct expressions of music? Are these limitless? In this context, let us look at two subjects that we have already discussed.

Consider literary creativity. Can we say that literary creativity is limited in some respects? Similarly, can we say that artistic creativity is limited in some ways? You can see many different artistic expressions on canvas on your screen. They seem to be representing many flowers. But the expression of these flowers in their varied aspects is unique. Flowers that are common subjects can be represented in a limitless number of ways.

Therefore, it does not restrict artistic creativity in any way. The case is similar to books. A given idea can be expressed distinctly in a limitless number of ways. But is this the case with musical works as well? In leading up to an answer to this question, we must understand what the problems are with having limited expressions. Even if created independently, the expression would be similar to an existing creation.

How are independent creations similar? Consider this question for a moment. You must be considering the possibility that two people who do not have any access to each other and their expressions can create similar expressions. As such, this doesn't seem to be problematic, but if the number of ways in which subject matter can be expressed is limited, then the possibility of such similarities increases manifold. When you place this in the context of creativity around the world, geographic separation can ensure that a person in Peru might not have any real connection to a person in India. In the absence of any accessibility, the first question is: Is it possible for these two individuals, creative individuals, to create a similar expression? It seems possible.

Secondly, what are the chances of a similar expression? If the number of musical expressions that are possible is limited, they seem to be higher. We should also consider the effects of digital media here. Now that musical expressions that are being performed and recorded are being broadcast to all corners of the world. There is a possible limitation in such communications as well. Where communication may not be reaching certain geographic locations for any subjective reason.

Therefore, even without any accessibility, it could be possible for two people to independently arrive at a similar expression if the number of possible expressions is limited. What we will end up with is two expressions that are very similar, and in terms of whether both should be eligible for musical work protection. We have understood a general principle in copyright law that we learned in the *University of London v. University Tutorial Press* case. You would recall that when an expression satisfies an objective assessment, it can be categorized as subject matter.

The next step is to see whether it is original. The foundational understanding of the term "original" and its qualification is that the work must originate from the claimant and should not be copied from someone else. Therefore, in satisfying this principle, it is theoretically possible for many people to have copyright in substantially similar

expressions. Practically, though, this is a difficult proposition. But if the number of expressions that are possible is limited, then this practical difficulty eases.

This foundational issue, that the limitation of expression poses to the consideration of copyrightability, has been explored by Damien Riehl, a copyright attorney, who places this question in the realm of math. He states that we should understand what music is. Music, at its very basic level, is a combination of single notes, which we now know as melody. But there are only eight musical notes. Mathematically, it should be possible to generate a list of all possible combinations of these eight notes.

Meaning that if these eight notes and their combinations are created and then represented in some form of a fixation— Is it possible, then, to say that all the possible compositions have now been achieved? Let us consider these questions. Is it not possible for independent creations to be similar without access? We understand that it is. The second question is, what if the possibilities of creation were finite? We understand that the possibilities of similarity are much greater. How Riehl explains this is that he says, "Are musicians in fact creating anything if they are simply pulling combinations out of a finite list of possible compositions?" And, "if all of these combinations can be generated and stored on some medium, is he then holding the copyright to the entire melodic set?" If that is the case, then anyone who is looking to add some music would have to seek authorization from Damien Riehl. The basic consideration that there should be distinctiveness of expression evaporates.

Still further, Damien Riehl poses another complex problem: What if all of these combinations are released into the public domain for anyone to use for free? Would that mean that there is no creative musical expression possible now? We find that this argument resonates with the foundation that copyright exists in expressions and the fact that these expressions are not limited. The issue of limitations in musical work or in the creation of music leads to the understanding that: There are a number of possible higher similarities happening with respect to music than with other words. And this is where we will discuss the role of musicologists. We routinely see in copyright infringement cases involving the subject matter of musical works that the claimant and the defendant bring in music experts and musicologists to help explain the finer details of the music. Who is a musicologist? He is an expert in, or a student of, music as an academic subject, as opposed to someone who is trained in performance or composition.

Because of the possibility of higher similarities in the creation of musical works than in other works, a musicologist can assist the court in understanding finer distinctions in the music. What the musicologist can help explain, for example, is whether there is, in fact, any similarity beyond what is commonly discernible. and if, in fact, a work is so close to another that it could be presumed to be based on it, Or, in other words, the similarities are so numerous that it is all but impossible for the person to have had no access to the

original work. Let us consider the opinions of two musicologists in a case that arose in the US called Rep and K&R Music versus Andrew Lloyd. In this particular case, two pieces of music were being considered, and it was being seen whether there were similarities between the two compositions.

The two musicologists were Professor Hitchcock and Professor James Mack. They were brought in by the plaintiffs on their behalf, and they submitted reports and attested to their opinions. Professor Hitchcock was a distinguished professor of music at the City University of New York and the founding director of the Institute for Studies in American Music at Brooklyn College of the City University. He is the author of several scholarly books and articles on music. Professor Hitchcock provided a 35-page musicological analysis with attached charts to support his conclusion that one of the compositions was based on the other.

For many of us laypersons who listen to similar music, It is a question of common perception and understanding of music that leads us to think that it is substantially similar. But the expert musicologist, as can be seen in this case, is capable of generating a significant distinction between two compositions. In his analysis, Professor Hitchcock examined the overall structure, rhythm and meter, melody and harmony, and the interaction of these elements in the two pieces as a whole. Hitchcock found the basic rhythmic character and the basic metrical character of each piece identical, although the two pieces were written in different harmonic modes. Hitchcock opined that they reveal significant correspondences and an absolute identity in harmonic rhythms.

According to Professor Hitchcock, the principal and most important aspect to be considered in the comparison of the two pieces is the melodies of each piece. In analyzing the pitch and rhythm as the constituent elements of melody, Professor Hitchcock asserted that there are striking similarities between the two melodies. His conclusion was that between "Till You" and "Phantom Song," the similarities are numerous in many areas over such an extraordinary proportion of the compositions. That I cannot consider them insignificant or coincidental, and I must conclude that "Phantom Song" is based on "Till You." Let us also take a look at the second opinion, which comes in from the second musicologist, Professor Mack.

He was a professor and chairman of the Humanities Department at Harold Washington College in Chicago, Illinois. He has composed music and has been employed as an arranger, conductor, and record producer. He has also been involved in the production of radio and television commercials. Professor Mack has conducted various symphony orchestras in the performance of his own works and has performed as a flautist on several occasions. Mack approached the music in question from a contemporary commercial point of view, as well as from the traditional academic perspective utilized by Professor Hitchcock.

Although he was largely in agreement with Professor Hitchcock's analysis and conclusions, Professor Mack found even more similarities, particularly harmonic similarities, that were found by Hitchcock. Mack's analysis also took into account his opinion that aural impressions are more significant in commercial music than in symphonic music because The former is designed for the lay listener who derives their impression from what they hear. Professor Mack concluded that Till, you, and Phantom are strikingly similar and are so similar as to preclude separate creation. What we have been able to see is that the opinion of musicologists is a technically sound opinion that is different from the kind of similarity analysis - that could possibly be conducted by laypersons, not experts in the science of music. What they have been able to find is that, on account of the technical similarities, one of these compositions was based on the other.

But the theoretical issue or the foundational problem that we were looking to highlight is Was it not possible to state that two composers not connected to each other in any way can, in fact, arrive at strikingly similar compositions? If the number of compositions that are possible is, in fact, limited in nature? The finite nature of music can, therefore, create problems as time progresses and more compositions come onto the market. With this, we have hopefully understood the meaning of music. In the next session, we will be looking at the distinction between music and sound recordings, or musical works and sound recordings. We have understood that music is a type of sound, and therefore, is it then any different from a sound recording? At least terminologically, and on a basic foundational difference, it seems different. But what are the real differences? Thank you for joining me.

I will see you again in the next session. Thank you.