Practice Point

Copy-right-brain *v* left-brain: the use of musicologists in Canadian copyright infringement cases

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More science than art

In the digital age of remixes and 'mash-ups',[1] the value of musicologists in copyright infringement cases now goes beyond a qualified 'ear'. The field is certainly more science than art. Consider the notable example of mega-band Coldplay, which was sued by professional rock guitarist Joe Satriani. The chord progressions in Coldplay's 'Viva La Vida' sounded strikingly similar to Satriani's 'If I Could Fly' (which was recorded first). Coldplay eventually reached a settlement with Satriani, the details of which are unknown (although one might assume that hefty sums were involved, considering the prominence of Coldplay in pop-culture and Satriani in the solo guitar world).

But how does one go about proving copyright infringement in the event of a trial? The obvious challenge is that the value of music is in the 'ear of the beholder': much like the creation of music, the interpretation of the art form is inherently subjective. Aside from blatant copying, infringement (even if unintentional) is likely to be on a more subtle plane.

Section 3 (1) of Canada's Copyright Act gives the owner the 'sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public . . .'.[2] To prove one's case in a copyright infringement action, the plaintiff must therefore adduce evidence of substantial similarity between the disputed musical works. As the Federal Court noted in *U & R Tax Services Ltd. v H & R Block Canada Inc.*:

> [w]hat constitutes a 'substantial part' is a question of fact and, in this respect, the courts have given more emphasis on the quality of what was taken from the original work rather than the quantity'. Some of the matters that have been considered by Courts in the past include:
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> (a) the quality and quantity of the material taken;
>
> (b) the extent to which the defendant's use adversely affects the plaintiff's activities and diminishes the value of the plaintiff's copyright;
>
> (c) whether the material taken is the proper subject-matter of a copyright;
>
> (d) whether the defendant intentionally appropriated the plaintiff's work to save time and effort; and
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> (e) whether the material taken is used in the same or a similar fashion as the plaintiff's.[3]

And, as Professor Vaver notes, 'expert evidence may be needed to put the court in the position of someone

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This article

- Musicologists provide crucial evidence to courts in copyright infringement actions, especially in an age of digital samples and 'mash-ups'.
- Surprisingly, there are only two reported decisions in Canada in which a musicologist or professor of music was qualified as an expert witness. In this article, we examine those cases and consider the practical application and challenges of retaining a musicologist in copyright infringement cases.

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1 The most prominent mash-up artist currently in pop-culture music is probably 'Girl Talk'. Artist Gregg Michael Gillis samples several hundred songs on his latest album *All Day* to create 12 separate tracks that constantly evolve, none having a repeating verse or chorus or other elements of traditional songwriting.

2 *Copyright Act* (RSC, 1985, c. C-42). Relevant sub-sections of that provision detail other facets of this right.

3 [1995] FCJ No 962 at para 35 (footnotes omitted).

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reasonably versed in the relevant art or technology, so it may view the product through the eyes of such a person'.[4]

However, recent amendments to the Federal Courts Rules[5] impose new requirements when adducing expert evidence.[6] As of 2010, the revised rule 52.2[7] sets out the requirements for an affidavit or statement of an expert witness: it must set out in full the proposed evidence of the expert, the expert's qualifications in the areas proposed for qualification, must be accompanied by a certificate in Form 52.2 (Code of Conduct) and, in the case of a statement, be in writing and signed by the expert. It must also be accompanied by a solicitor's certificate. Form 52.2 is the acknowledgement of the new Code of Conduct, discussed below. The affidavit or statement of an expert witness provides the first chance to lay the expert's evidence and qualifications before the court. Whether the expert is a musicologist or otherwise, this process should be given due attention.

The Code of Conduct makes it clear that an expert witness' duty is to assist the Court *impartially* on matters within his/her expertise.[8] Experts must be independent and objective and cannot act as an advocate. Counsel must provide the expert with a copy of the Code of Conduct and file a signed certificate. This certificate indicates that the expert agrees to be bound by the Code. The effect of non-compliance with the Code can result in the exclusion of some or all of the expert's affidavit or statement.

The Code of Conduct also sets out the mandatory contents of an expert's report. An expert report must include

> a statement of issues addressed, the expert's qualifications, the expert's current *curriculum vitae*, a summary of the opinions expressed, the facts and assumptions on which the report is based, where the report is in response to another expert's report, an indication of the points of agreement and disagreement, the reasons for each opinion, any literature or materials relied upon, a summary of the methodology used, any caveats or qualifications necessary to render the report complete and accurate, and importantly, details of any aspect of the expert's relationship with a party to the proceeding, or the subject matter of his/her proposed evidence that might affect his/her duty to the Court to assist in an impartial manner.[9]

The Rules, and the Code of Conduct in particular, simply ensure that experts do not overstep their bounds. As the role of zealous advocate belongs to counsel, and counsel alone.

With that said, surprisingly there are only two reported decisions in Canada in which a musicologist was qualified as an expert witness. In this article, we examine those cases and consider the practical application and challenges of retaining a musicologist in copyright infringement cases.

Neudorf v Nettwerk Productions

In *Neudorf v Nettwerk Productions Ltd,*[10] a case which involved the prominent Canadian singer and songwriter Sarah McLachlan, the plaintiff Neudorf brought an action seeking a declaration of co-ownership in the songs on her album 'Touch', as well as damages for unjust enrichment and breach of contract for the services he provided on McLachlan's second record, 'Solace'. Neudorf claimed that he contributed to the composition and arrangement of four of the songs. The defendant record company which signed McLachlan replied that he was hired only to facilitate the recording of McLachlan's ideas. This case was different from a standard copyright infringement case in that Neudorf was not proving strict copying but was alleging, rather, that he and McLachlan were joint authors of the songs.[11]

The plaintiff's expert was Dr Eskelin, a doctor of music education and a professor of music at Los Angeles Pierce College.[12] When asked to comment on the process of joint authorship Dr Eskelin explained that, despite one collaborator's view that the other musician's ideas are not useful and ought not to make it into the work, those ideas still affect the creative process and can influence the work.[13]

4 D Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 146.

5 Copyright infringement actions may be brought in the Superior Courts but, when other relief is sought, must be brought in the Federal Courts. Compliance with the Federal Courts Rules, which govern procedure in both the Federal Court and Federal Court of Appeal is therefore required. The parties often prefer the Federal Court system because of its specialized expertise in intellectual property disputes which rarely can be rivalled by a Justice of the Superior Court.

6 SOR/2010-176, 3 August 2010.

7 Federal Courts Rules, SOR 98-106, R. 52.2.

8 SOR/2010-176, 3 August 2010.

9 SOR/2010-176, 3 August 2010.

10 [1999] BCJ No 2831.

11 With the advantage of hindsight, this dispute could have been avoided if the terms and conditions were clearly set out in Neudorf's contract.

12 *Neudorf v Nettwerk Productions Ltd* [1999] BCJ No 2831, at para 61.

13 ibid:

> When two writers decide to collaborate, they in fact take some chances, some risks. It might certainly be true that some of the ideas that are offered by one or the other composer are, just call them dumb ideas that never get into the song, but that is still not to say those 'dumb ideas' don't have some influence on direction that the song might have taken had those ideas not been raised. So at the end of the process, whether the ideas are incorporated or not in the song, those ideas were part of the process and that is the essential ingredient in collaboration, the process.

In cross-examination, Dr Eskelin also explained that it did not really matter what the parties thought was going on, but only what was *actually* going on.[14] The court rejected Dr Eskelin's approach to collaboration because it meant that the putative joint author need not contribute original expression, nor that the parties intended to collaborate.[15] Instead, the court suggested that the test for joint authorship ought to ask whether the plaintiff contributed *significant original expression* to the songs and whether, if it did, both parties intended that their contributions be *merged into a unitary whole* and that the other party would be a joint author.[16]

The shortcoming in Dr Eskelin's testimony illustrates the interplay between expert evidence and the law. Counsel might be well advised to better prepare the witnesses by explaining the basic area of law to them. For instance, the requirement for original expression is a basic principle of copyright: no ethical boundary is crossed by explaining to a witness, in advance, that the law of copyright requires originality (and fixation) for something to be a work of copyright.

The defence's expert, Mr Henderson, was an experienced singer, guitarist, songwriter, performer, and producer. He submitted that a songwriter's work boils down to three elements: lyrics, melody, and chords. His report stated that 'any contribution to a particular performance of a song, whether recorded or live, that is not one of these three things, is not a song-writing contribution'.[17] However, Mr Henderson's approach completely ignored one of the most fundamental elements of music: rhythm. During his cross-examination, Mr Henderson gave even more surprising evidence, explaining that an instrumental hook is not part of a song.[18] Somewhat incredibly, he submitted that he would not expect to receive compensation from anyone who sampled his former band's guitar riffs.

Some musicians—the second author included—would likely take issue with the exclusion of rhythm as an essential element of music, and the non-expectation of compensation for a riff. A riff can make a song so distinctive so as to provide that special 'something' that gets a song stuck in a listener's head. Consider the unforgettable guitar riffs of the Rolling Stones (*(I Can't Get No) Satisfaction*), Aerosmith (*Walk This Way*), among others. These tend to be some of the most attractive elements of the song. The trial judge implicitly endorsed this view when he stated that contributions other than just lyrics, melody, or chords could give rise to a claim of co-ownership.[19]

Ultimately, the trial judge rejected the bulk of Neudorf's claims. Neudorf failed to satisfy the test for joint authorship as he did not prove a mutual intent to co-author the song ('Steaming'). With respect to the three other songs, he failed to prove that he contributed original expression. Neudorf was, however, successful on the breach of contract claim for the fees he was owed for his services on the 'Solace' album.[20]

In the end, the plaintiff's expert evidence on the issue of joint authorship was rejected as being just plain wrong, whereas the defence's evidence was rejected because, in a sense, it went too far. The basic test appears to rely on contribution and intention. As stated by the trial judge:

> In the result, I find that the test for joint authorship that should be applied to the facts in the instant case is, as follows:
>
> (i) Did the plaintiff contribute significant original expression to the songs? If yes,
>
> (ii) Did each of the plaintiff and McLachlan intend that their contributions be merged into a unitary whole? If yes,
>
> (iii) Did each of the plaintiff and McLachlan intend the other to be a joint author of the songs?[21]

Drynan v Rostad

Although a small claims case, *Drynan v Rostad*[22] provides significant precedential value on the rather barren landscape of the use of musicologists in Canadian copyright infringement actions.

In 1989, the plaintiff composed a song entitled 'Filion Family Welcome', to be performed at a family

14 ibid ('it really doesn't matter what the parties understood was going on, what really matters is what was going on').

15 ibid at para 63.

16 ibid at para 96.

17 ibid at para 48. Sarah McLachlan herself, in her examination-in-chief, also agreed with this view of songwriting:

'Q You have used the phrase core elements when you talk about writing a song. Can you tell us what the core elements of the song are in your view?

A Lyrics, melody, and chords – the chords of the song. Those to me are the three most important core elements of the song.

Q What are some of the other parts of the song?

A There are musical parts, there are drum parts, there are bass parts, depending on what kind of song it is. There are acoustic parts, electric parts, background parts. All of these are embellishments, clothing, if you will, on a body. The song, the structure, is the body, and all the other parts are like nice clothing . . .' (ibid at para 49).

18 ibid.

19 ibid at paras 50 and 59.

20 He undoubtedly took some comfort in the solace claim.

21 ibid at para 96.

22 [1994] OJ No 4253.

reunion. The defendant musician was hired to perform at the same event. In 1990, the defendant composed a song entitled 'Here We Are on the Road Again' for his television series, which the plaintiff first heard in 1993 and, finding it strikingly similar to his own, launched an action for copyright infringement.

The plaintiff retained Dr Chartier, a musicologist and professor of music. Dr Chartier was handed two unmarked audio cassettes and provided a 'neutral' scientific analysis. Dr Chartier noted that substantial similarities between the two works existed. Namely, they were both written in the same key, with the same time signature (being the per-bar structure used for the tempo or rhythm of the song), had an eight bar refrain, had identical harmonies and chord progressions, and shared a virtually identical melody.[23]

Of particular importance were Dr Chartier's remarks that

> [m]any musical compositions are written in the same key. Many musical compositions have the same time signature. Many musical compositions have an eight bar refrain. Many compositions share a similar harmony or chord progression. Some songs have a similar melody. In my experience it is very rare that two musical compositions will be virtually identical in all these aspects. In my opinion, (he says) Filion Family Welcome and Here We Are On The Road Again are virtually identical in all these respects.[24]

The only concession made by Dr Chartier was that the defendant's song lacked the B(7) chord and there was a difference in the riff (although those differences were not significant enough to affect his final conclusions).[25]

The defendant retained its own expert, Dr Posen, who held a PhD in folklore. He was asked to examine the chorus of each song and give an opinion as to whether the defendant's song was so similar to that of the plaintiff's, such that it could not have been composed without reference to the latter.[26] However, for an unexplained reason (which was neither addressed nor attacked by the court), Dr Posen only performed a one minute long analysis of each song.

While Dr Chartier's findings held up on cross-examination, some of the findings of Dr Posen were successfully challenged or were conceded. Of particular importance was the fact that Dr Posen submitted that the use of the note progression T(2)-5-6 in lines A and C of both works was a 'musical cliché' and was therefore not necessarily an indication of copying. To help prove the point, a list of other songs in which the same note progression occurs was listed. The progression was said to be a common or generic element in country music. Deputy Justice House rejected this argument, finding the theory extremely difficult to reconcile with the ear after listening to a 'mix tape' containing the other songs Dr Posen referred to as evidence of the generic nature of the progression. Each of those songs had an 'audibly clearly distinct sound'.[27] The deputy judge was particularly attracted to the automotive analogy used by the plaintiff to rebut Dr Posen's evidence:

> There are Chevrolets, Fords and Porsches out there and they're all the same. This is not just a car, it is a specific kind of car, and if he (the defendant) wants to show that a Porsche is a hackney or a cliché, he (the defendant) can't put in evidence of Chevrolets and Fords, which is what he has attempted to do here (paraphrased).[28]

Dr Posen also conceded similarities in the rhythms of the two works after having the definition of the term 'rhythm' from the *Concise Oxford Dictionary of Music* put to him.[29]

Finally, Deputy Justice House discussed the 'hook' (the catchy part of a song that 'sticks' in the memories of listeners and gives popular songs their identities). The plaintiff's evidence showed that the hooks in the two works were virtually identical. Finding that Dr Chartier's evidence was more reliable and did not buckle under the pressure of cross-examination, Deputy Justice House gave judgment for the plaintiff, and awarded $6,000 in lost royalties.

Despite being a small claims case, this judgment illustrates the importance of the credibility of musicologists when giving expert testimony. This case turned almost exclusively on the evidence of the experts. Stating the obvious, experts must be instructed to undertake a proper and thorough analysis of the

23 ibid at para 23.
24 ibid at para 24.
25 ibid at para 29.
26 ibid at para 32.
27 ibid at para 37.
28 ibid at para 38.
29 ibid at para 41:

> Rhythm (in the full sense of the word) covers everything pertaining to the time side of music as distinct from the side of pitch, i.e. it includes the effects of beats, accents, measures (or bars), grouping of notes into beats, grouping of beats into measures, grouping of measures into phrases, etcetera. When all these factors are judiciously treated by the performer (with due regularity yet with artistic purpose - an effect of forward movement - and not mere machine-like accuracy) we feel and say that the performer possesses 'a sense of rhythm'.

musical works in question and must be prepared for the very real possibility of vigorous cross-examination.

Practical matters

An expert's analysis should not be confined to one very short extract from each of the songs in dispute. Another crucial error that arises from these cases is the importance of the 'hooks'. In *Drynan*, Dr Posen was not able to give any evidence about the importance of them and, in *Neudorf*, Mr Henderson's view was that hooks did not even matter. The importance of 'hooks' or prominent melodies should not be overlooked. Counsel in need of an expert witness would be well advised to find a musicologist that can perform a technical analysis of the music *without* glossing over commonplace attributes important to every-day non-expert listeners (like judges).

A thorough analysis of the entire song is also important because today's progressive music no longer conforms (necessarily) to the traditional musical composition structure of verse-verse-chorus-bridge-chorus. Artists are becoming increasingly creative with song structure, such that a 'hook' or other portion of another work may appear only once in a song. If a musicologist only examines a one minute portion of a song, the allegedly infringing and/or unique portions can—and will—be missed.