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Sound decisions: have the courts found harmony on music copyright?

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Finneas O’Connell, known professionally by just his first name, is among the world’s most popular music producers at the moment. In February, he won Producer of the Year at the Grammy Awards, largely in part due to his work on his sister Billie Eilish’s album, which also won Album of the Year.

In a recent interview with Anthony Fantano, one of the most influential music critics of the digital era, Finneas expressed his frustration at how distorted, in his eyes, the threshold for music copyright infringement has become in recent years.

“I feel like the saddest thing to me about music lawsuits is that they’re too vague,” he says, before going on to talk about the recent Katy Perry case

specifically: “It’s one thing if it’s...a whole melody line and it has the same shape, but that ‘Dark Horse’ lawsuit was a huge bummer because it was
just some notes.” Fantano suggests that, often, juries aren’t all that well equipped to make a judgment call on whether one artist has deliberately ripped off the other, or even heard the allegedly infringed work before.

“You can just say, ‘well, this was Grammy-nominated, so it must have been heard by everybody,’ and often that’s enough,” the critic argues.

The conversation, between two of the most influential voices in pop music and music criticism, reflects the disconnect that has opened up between music copyright law and creators.

Blurred lines

Finneas himself pinpoints where he thinks it started—the now infamous “Blurred Lines” case, where Robin Thicke and Pharrell Williams were found to have copied Marvin Gaye’s 1977 song “Got To Give It Up”.

That case was controversial because it appeared to take music copyright infringement into uncharted territory; the ‘groove’ of a song. In its judgment, the US Court of Appeals for the Ninth Circuit said that “musical compositions are not confined to a narrow range of expression”.

The judgment was not universally well-received: “This is not the same song to me,” Finneas said.

The decision came as a warning shot to musicians and songwriters. They were now on notice that the bar for music copyright infringement was arguably lower than it ever had been before.

It didn’t stop there. The Ninth Circuit earlier this year revived a copyright lawsuit against Taylor Swift over the lyrics “Playas gonna play” and “Haters gonna hate” from her 2013 song “Shake It Off”.

Perhaps most contentious of all was a California jury’s August 2019 decision to award $2.7 million against Perry for infringing Christian rapper Flame’s “Joyful Noise” on her 2013 hit “Dark Horse”.

The musical elements in question consisted of an eight-note phrase in an instrumental beat. The decision was met with shock, with Perry claiming she had suffered a “miscarriage of justice”, while one lawyer told *WIPR* at the time that the “test for music copyright infringement is fundamentally broken”.

‘Lowering of the bar’ According to Wesley Lewis, attorney at Haynes and Boone, high-profile decisions like the one involving Perry represent a “real lowering of the bar with respect to the amount of expression necessary to constitute copyrightable subject matter”.

That means, Lewis says, that musicians are “exposed to significant risk that they will be sued for infringement based on a portion of a work previously thought to be too small to be protectable”.

If the original Perry decision was, from the perspective of people like Finneas and Fantano, the nadir of this recent trend in music copyright, then there were two major indications last month that courts are beginning to correct course.

In March, Perry’s judgment was overturned on appeal, while the Ninth Circuit also rejected Michael Skidmore’s (acting on behalf of 1970s band Spirit) infringement claims against Led Zeppelin for their iconic ‘Stairway To Heaven’.

The *Skidmore* case, in particular, threatened to profoundly alter standards in music copyright—he argued that a lower district court, which had also ruled for Led Zeppelin, should have considered live performances of Spirit’s song “Taurus”, rather than the sheet music supplied to the US Copyright Office when comparing it to “Stairway To Heaven”.

Melinda LeMoine, partner at Munger, Tolles & Olson, says the *Skidmore* ruling is “really the first time in years that the Ninth Circuit has offered extensive guidance in a music copyright case about what musical elements are protectable”.

It should, LeMoine says, help define the legal standard in future cases about whether “substantial similarity has been met”.

Inverse ratio rule

Skidmore also dispensed with the “inverse ratio rule”, bringing the Ninth Circuit in line with other courts. “Under that rule, a plaintiff could argue that less of a showing of similarity was necessary if they could prove that the alleged infringer had a high degree of access to the work,” LeMoine explains.

“Many circuits had already disavowed that rule, and *Skidmore* finally confirmed that it is no more,” she adds.

On balance, it’s likely artists and songwriters will see these decisions as positive developments after a few years where it seemed like standards in music copyright had become almost unrecognisable.

The key problem seemed to be that the law was becoming increasingly divorced from the reality of how music is created.

“Music is never created in a vacuum, and to some extent, all musicians draw from artists and musical traditions that came before them,” says Lewis.

The legacy of the “Blurred Lines” decision still lives on, and musicians still need to be careful about paying homage to a particular artist or song. But for now, many artists will at least take some encouragement from *Skidmore* and Perry’s victory on appeal.

The message, it seems, is starting to get through to courts that the distortion of music copyright had gone too far.