

9th Circuit's Acceptance of 'Melodic Reduction' May Change Music Infringement Litigation

By Michael T. Mervis and Robyn S. Crosson

In recent years, courts have frequently dismissed music copyright infringement cases at the summary judgment stage, finding that the plaintiff failed to raise a triable issue of fact concerning the claimed similarity between the allegedly infringed and infringing songs. *See, eg, Onofrio v. Reznor*, 2000 U.S. App. LEXIS 2835 (9th Cir. 2000); *Moore v. Columbia Pictures Indus. Inc.*, 972 F.2d 939 (8th Cir. 1992); *Cottrill v. Spears*, 2003 U.S. Dist. LEXIS 8823 (E.D. Pa. 2003); *Toliver v. Sony Music Entertainment Inc.*, 149 F. Supp. 2d 909 (D. Ak. 2001).

In a number of cases, the court found the opinion of similarity offered by the plaintiff's expert musicologist — usually a music professor or otherwise credentialed music scholar — to be legally deficient or otherwise irrelevant to the applicable legal standards. However, a decision earlier this year from the U.S. Court of Appeals for the Ninth Circuit in *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004), *amended by* 2004 U.S. App. LEXIS 17969 (9th Cir. 2004), appears to have expanded the net of music copyright infringement cases that may survive summary judgment. In *Swirsky*, the court found that a type of expert musicological analysis,

commonly called "melodic reduction," can raise a triable issue of fact concerning similarity. This article will explain melodic reduction and the problems that the *Swirsky* decision and melodic reduction may pose for defendants in music copyright infringement cases.

In order to survive a motion for summary judgment on a claim of copyright infringement, a plaintiff must demonstrate, among other things, that the allegedly infringing work is at least "substantially similar" to protectable expression embodied in the plaintiff's work. *See, Grubb v. KMS Patriots L.P.*, 88 F.3d 1 (1st Cir. 1996). In most jurisdictions, the plaintiff must satisfy two tests in order to raise a triable issue concerning substantial similarity. The first is the so-called "extrinsic" test, which involves an evaluation of the similarity of the two works in terms of external, objective criteria. *See, Damiano v. Sony Music Entm't Inc.*, 975 F. Supp. 623, 631 (D.N.J. 1997), *appeal dismissed without op.*, 163 F.3d 1204 (3d Cir. 1998). Proof for the extrinsic test typically involves expert opinion.

The second test is the so-called "intrinsic" test, which does not involve expert testimony and is based upon the perception of similarity by the "average lay listener." *See, Damiano* at 631. Where summary judgment has been granted in music copyright infringement cases, it has often been on the ground that the plaintiff failed to

satisfy the extrinsic test. *See, eg, Onofrio*, 2000 U.S. App. LEXIS 2835; *Moore*, 972 F.2d 939; *Toliver*, 149 F. Supp. 2d 909; *ZZ Top v. Chrysler Corp.*, 54 F. Supp.2d 983 (W.D. Wash. 1999).

In simplest terms, melodic reduction is a process by which the expert musicologist identifies what he or she believes to be the most important notes in the melody of a song (for example, notes that fall on a beat) and then offers an opinion concerning similarity based only on the supposedly important notes. The notes that the musicologist deems to be less important (for example, notes that do not fall on a beat) are discounted or eliminated completely from the similarity analysis. Thus, the musicologist's opinion that the allegedly infringed and infringing songs are similar is based not on a comparison of *all* of the notes of the two songs, but rather on a comparison of only what the musicologist finds to be the *important* notes. The determination as to what is important and unimportant is based on the musicologist's judgment as to what listeners would find to be striking or memorable about the songs in question.

Prior to the *Swirsky* decision, melodic reduction had not been well-received by the courts. For example, in *ZZ Top v. Chrysler Corp.*, 54 F. Supp.2d 983 (W.D. Wash. 1999), the defendant conceded copying but argued that the relevant portion of allegedly infringed ZZ Top song ("La Grange") was not sufficiently original to be protected.

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The defendant's expert sought to show how one guitar passage, or "riff," in the allegedly infringed song had a similar pitch and rhythm to the riffs of seven other songs, and was therefore neither original nor protectable. In doing so, the expert performed a melodic reduction analysis. Rejecting the expert's opinion, the court granted summary judgment for the plaintiffs:

While the reduced version of the riff may, as [the defendant's expert] maintains, be an appropriate representation of "how the music actually sounds" or is "perceived," it is not an accurate representation of the written notes that are subject to copyright protection. ... Defendant has not, therefore, objectively analyzed the various riffs to show that the ... objective characteristics of 'La Grange's' guitar riff are not original. Rather, defendant has used seemingly objective criteria — music notes — to represent what is fundamentally [defendant's expert's] subjective perception of ZZ Top's expression of the riff.

The *ZZ Top* decision illustrates well the basis for rejecting an expert's opinion of similarity based on melodic reduction. Fundamentally, the technique relies on the perception of the expert as to which notes are important and which are unimportant. And that determination is itself based on the expert's assumptions about what the average listener perceives. It is difficult to argue that this is not an inherently subjective process and, in consequence, is irrelevant to the extrinsic test for similarity, which is supposed to be addressed only to objective comparisons.

The Ninth Circuit came to a different conclusion in *Swirsky*. There, in an effort to satisfy the extrinsic similarity

test, the plaintiffs relied upon the opinion of an expert (the same expert whose opinion was rejected in the *ZZ Top* case) who conducted a melodic reduction analysis. The lower court granted summary judgment in favor of the defendants, finding that the plaintiffs' expert did "not adequately explain, based on objective criteria, why that subset of notes [he compared] is more important, or more appropriately analyzed, than the other notes present in the songs." *Swirsky v. Carey*, 226 F. Supp.2d 1226, 1230 (C.D. Cal. 2002), *rev'd*, 376 F.3d 841 (9th Cir. 2004).

On appeal, the Ninth Circuit found that the lower court erred in discounting the plaintiffs' expert opinion. The court recognized melodic reduction as selective, but nonetheless found the plaintiffs' expert's opinion sufficient to overcome summary judgment. The court found that although the plaintiffs' expert's opinion, to a certain extent, was based on how the choruses sounded to his expert ears, his opinion was nonetheless sufficiently "objective" because, contrary to the holding of the lower court, he did explain his basis for selecting certain notes for comparison while excluding others. (This strikes the authors of this article as being too superficial an analysis. The mere fact that the expert purported to base his reduction technique on "objective" criteria does not render the inherently subjective process of picking and choosing between notes an objective one.)

To the extent that *Swirsky* represents judicial acceptance of melodic reduction, the Ninth Circuit may well have significantly expanded the net of music copyright cases that will survive summary judgment. Because melodic reduction involves a selective comparison of only certain features of the

songs at issue, it is much easier for a musicologist to find "similarity" in "reduced" versions of songs. For example, a less-than-scrupulous expert might be able to find similarity by finding only common notes to be "important" and finding notes that are clearly dissimilar to be "unimportant." Such an opinion may lack credibility and might ultimately be rejected at trial. However, for some plaintiffs surviving a summary judgment motion may be enough, as defendants who are wary of rolling the dice at a trial will be willing to settle claims even where there are serious doubts about the merits.

This does not necessarily mean that defendants facing an expert opinion of similarity based on melodic reduction must throw in the towel when it comes to summary judgment. *Swirsky* did not relieve the plaintiffs of the burden of showing that the material claimed to have been copied is original and protectable. Thus, a skilled defense musicologist may be able to demonstrate that the melodically "reduced" version of the plaintiff's song is not original, and therefore not protectable, by offering prior art with the same similarities claimed by the plaintiff's musicologist. This may require more research by the defense musicologist than would otherwise have been necessary, and thus may result in increased defense costs. But the increased effort and expense will almost always be preferable to the prospect of a trial.



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