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## 'Fragmented literal similarity' can lead to copyright infringement

Brevity is a valuable commodity. The German philosopher Friedrich Nietzsche once wrote that "it is my ambition to say in 10 sentences what other men say in whole books — what other men do not say in whole books." "Twilight of the Idols" (1898). And while that sentence itself is perhaps not a good example of brevity, Nietzsche's point is well taken.

Copyright law sometimes recognizes the value of brevity and protects it. This is particularly true in cases claiming infringement of a musical work. This came to mind recently when I was reading a copyright case involving the funkadelic music of George Clinton. The case of *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009) shows that in a copyright infringement analysis, the amount of material copied, alone, is not outcome determinative. Copyright law looks at the qualitative significance of the copied material as well.

Clinton, sometimes referred to as the "godfather of funk," is considered one of the great masters of funk music from the '70s and '80s, along with James Brown and Sly Stone. His group was called Parliament-Funkadelic (a/k/a the P-Funk All-Stars) and they were inducted into the Rock and Roll Hall of Fame in 1997. Clinton's most famous song is "Atomic Dog" from 1982. It is the "anthem of the funk era," according to the testimony of one expert in the case.

It is not uncommon for the writer of even a legendary composition like "Atomic Dog" to not own the copyright. The copyright of Clinton's masterpiece is owned by Bridgeport Music, the plaintiff in the case.

In 1998, a hip-hop group known as Public Announcement made a record called "D.O.G. in Me," which was released by defendant UMG. Bridgeport sued based on

Public Announcement's use of the phrase "Bow wow wow, yippie yo, yippie yea," as well as the repetition of the word "dog" in a low tone at regular intervals in the allegedly infringing song. The district court denied the defendant's summary judgment motion. After a trial, the jury found willful infringement and awarded damages.

UMG argued that these elements of the song (the word "dog" and the bow-wow refrain) were not protected by copyright because they were not "original" under copyright standards. UMG claimed these elements should have been "filtered out" of the infringement analysis. We don't know whether 6th U.S. Circuit Court of Appeals Judge Martha Craig Daughtrey is a fan of Clinton and the P-Funk All-Stars, but her opinion makes clear that the court was not buying UMG's vibe.

The court broke its infringement analysis into two parts. First, it looked at the issue of originality of the copied elements to determine whether they were protectable by copyright. Drawing on the Supreme Court's exegesis of originality in *Feist v. Rural Te. Serv. Co.*, 499 U.S. 340 (1991), the court noted that the standard for originality is a low one. As *Feist* said, the "vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious." *Id.* at 345. The 6th Circuit found that Clinton's elements easily cleared this low hurdle. Even the word "dog" was protectable under this standard, as it constituted "a stand-alone melody of one word." 585 F.3d at 276. This is consistent with other cases involving song lyrics where courts have found even brief portions of the lyrics to be original and protectable. For example, in *Lessem v. Taylor*, 766 F. Supp. 2d 504 (S.D.N.Y. 2011), the lyrics "this is how we do" with a 5-note rhythm were sufficiently original to be

### INSIDE IP LAW



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protectable. In *Santrayll v. Burrell*, 1996 WL 134803 (S.D.N.Y. 1996), the word "uh-oh" repeated four times to a particular rhythm as a hook was found to be original. The '80s rap group The Fat Boys were found to have protectable rights in the lyrics "Brrrr" and "Hugga-Hugga" in a vocal hip-hop

percussive sound for which their front man Big Buff Love was well-known. *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.* 1994 WL 62360 (S.D.N.Y. 1994).

After finding that Clinton's brief lyrics were protectable, the *Bridgeport* court turned to the issue of substantial similarity. The songs as a whole differed in theme, tempo and style. Nevertheless, the jury was justified in finding substantial similarity based on close copying of important material. The court recognized that "the copying of a relatively small but qualitatively important or crucial element can be an appropriate basis upon which to find substantial similarity." *Id.* at 275. This approach to substantial similarity is based on a concept identified by the copyright guru Melville B. Nimmer, who coined the phrase "fragmented literal similarity" to describe a situation where a fragment of a work has been closely copied even though the overall theme or structure of the work has not been copied. It is in contrast to what Nimmer calls "comprehensive nonliteral similarity," which is concerned with the copying of nonliteral elements of the work where the fundamental essence or structure of the original work is copied into the infringing work. The 6th Circuit embraced the fragmented literal similarity approach and held that the jury was properly instructed that substantial similarity could be based on this theory.

So check out "Atomic Dog" on YouTube to hear Clinton's answer to the eternal question "Why must I chase the cat?" (Answer: "Nothin' but the dog in me") and check out *Bridgeport Music v. UMG* to find out whether copying a small amount can result in liability in music copyright litigation (Answer: It can where there is fragmented literal similarity of qualitatively important elements of plaintiff's work).

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