Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike

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ABSTRACT

The standard for copyright infringement is the same across different forms of expression. But musical expression poses special challenges for courts deciding infringement disputes because of its unique attributes. Tonality in Western music offers finite compositional choices that will be pleasing or satisfying to the ear. The vast storehouse of existing public domain music means that many of those choices have been exhausted. Although independent creation negates plagiarism, the inevitable similarity among musical pieces within the same genre leaves courts in a quandary as to whether defendant composers infringed earlier copyrighted works or simply found their own way to a similar melody, harmony, rhythm, or formal structure. This Article explores the knotty legal issues embedded in copyright infringement cases involving musical expression and suggests a methodology for cutting through the knots. By delving into the historical development of Western music and tonality, it attempts to connect music history and theory with copyright jurisprudence’s ultimate goal of balancing private protection of expressive works with public access to them.