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Music to a Lawyer's Ears: A New Treatise for Copyright Practitioners

BOOK EXCERPT

By Lincoln D. Bandlow

Those who are litigating their first music copyright infringement case should be keenly aware of two things: they have entered a complicated and sometimes confounding legal realm; and they should immediately get their hands on a copy of Ron Rosen's new book, "Music and Copyright." Copyright practitioners are far more likely to succeed in the former if they do the latter. Indeed, those who practice in this area must be tri-lingual: they must speak the broad language of the law, the focused language of copyright infringement jurisprudence and the unique language of music.

In "Music and Copyright," Rosen harmonizes these languages to provide an essential guide for litigators seeking to successfully navigate, as the book aptly puts it, the "sea of uncertainty in music infringement litigation."

Rosen certainly has the pedigree for writing a manual about how to captain that ship. He is a pre-eminent copyright lawyer who has spent a lifetime studying music and litigating disputes involving musical works. The landmark music copyright infringement cases he has tried are legion. Fortunately, Rosen has not chosen to keep this vast store of knowledge about copyright law and music to himself but has imparted that wisdom to the world with this new book.

The first two chapters of the book focus on the basic elements of copyright law and copyright infringement litigation. Indeed, those seeking to practice copyright litigation in general (not just those cases strictly focused on music issues) would benefit immensely from reviewing these chapters. Using clearly explained examples from seminal cases or those Rosen has litigated himself (which are often one and the same), Rosen describes the basic principles in copyright infringement law. Chapter 1 sets forth the elements of a copyright infringement claim, discussing the idea/expression dichotomy, the various tests for filtering out unprotectable elements from protected expression and the role of expert testimony to help judges and juries conduct that filtration. The book also outlines the key legal and equitable defenses in an infringement action, such as the statute of limitations, laches and estoppel and other "seldom -used tools resting in a tool chest" for the litigator such as abandonment, innocent intent, misuse of copyright and

unclean hands.

Chapter 2 addresses remedies, discussing in detail the key cases that deal with such issues as determining actual damages and profits, the unique statutory damages scheme of the Copyright Act (the book provides concise hypothetical examples to explain the workings of a statutory damages awards) and the rules for an award of attorney fees. This chapter also provides a practitioner's perspective on whether arbitration in a copyright infringement action is available, whether to choose such a remedy and the terms to include in any agreement to arbitrate. Finally, the chapter discusses injunctive relief and impoundment and the practical considerations for litigators to have in mind when pursuing those options.

The book then turns in Chapter 3 to the basic elements of musical language and ideas. Rosen meticulously describes the trinity of basic elements of music - melody, harmony and rhythm - and how analysis of these elements has been tailored and supplemented to fit within controlling copyright principles. The book helpfully explains these elements by comparing them to aspects of non-music-related infringement actions. Thus, as Rosen states, "from the copyright perspective (and in the view of many musical professionals), when the trinity is supplemented and restated, the basic elements of music are: melody, harmony, rhythm, and form/structure. They are comparable to the 'plot, theme, dialogue, mood, setting, pace and sequence' found in literary and audiovisual works." The book also explains the basic building blocks of music - such as the phrase, motive, counterpoint, tempo and meter - which are "free and available for all composers to use and develop" but which can ripen into protectable expression depending on the manner in which they are combined. This chapter includes numerous examples to illustrate these concepts. (One suggestion for future editions - a companion compact disc with musical clips and brief narration to give concrete audio examples of the concepts described in this chapter).

Turning away from the conceptual and back to the practical, Chapter 4 delves into the nitty-gritty of commencing and responding to a music copyright infringement action, with an eye toward assisting counsel in the ways to become "fully prepared to advise his client of the risks and rewards inherent in the contemplated litigation" or the "merits of his or her defenses." The book offers practical advice about the kind of information and material that a plaintiff's counsel should marshal to evaluate a potential claim (such as the work's copyright registration, a "deposit copy" of the work, recordings of defendant's work, the score of the plaintiff's work, copies (if any) of sheet music and a resume of the plaintiff's professional activities). The book also provides numerous sample forms, such as demand letters, response letters, complaints (both of the "notice" pleading variety and the more detailed "story-telling" variety, with an explanation as to why you might want to file one over the other) and answers containing the important affirmative defenses. Finally, the chapter provides an outline for creating a litigation plan that will provide counsel with a roadmap for guiding a case down the road from filing the complaint all the way to trial.

Chapters 5 and 6 deal with the importance of retaining experts in music copyright infringement cases. Chapter 5 discusses musicological experts, who analyze the works at issue, research and designate prior art examples and then render reports and/or give testimony (both at deposition and trial) regarding substantial similarity or dissimilarity of protectable expression in

the works. These experts are a key component of a music copyright infringement action: "Without the musicological expert - whether credentialed musicologists, academic, or other music professional - those involved in music infringement litigation would be deprived of the one participant who, at all stages from the filing of the complaint through trial and appeal, provides guidance in explaining the language and ideas of music for the parties, their lawyers, the court, and the jury." The chapter gives detailed information about selecting such an expert, qualifying such an expert under the *Daubert/Kumho Tire/Joiner* trilogy and how such experts can be utilized to help clients rewrite music to avoid copyright infringement claims.

Chapter 6 discusses apportionment experts, who provide information and testimony on the issue of how, in determining a profits award, the defendant's profits are to be apportioned between the materials allegedly copied by defendant from plaintiff's composition and those elements of defendant's work other than those for which plaintiff claims protection. Such an expert can be crucial because music copyright infringement cases typically involve an assertion by a plaintiff that "the material copied from his work is the sole or most important reason for defendant's success" whereas the defendant asserts that "his commercial success was due, not only to the original material he composed, but also to other elements present in the recording of his song, such as the arrangement, orchestration, stature of the composer, and the star power of the instrumental or vocal artist." The chapter discusses the key apportionment cases, the different kinds of apportionment experts (i.e., the "industry professional," the "pollster," the "disc jockey," the "consumer psychologist" and the "academic"), and gives suggested criteria for apportionment of profits.

Chapters 7 and 8 deal with the ever-changing, often uncertain but incredibly important (and constitutionally mandated) concept of fair use. Chapter 7 discusses the background of fair use, the four-factor test and the seminal cases addressing the application of the fair use defense. Chapter 8 delves into specific fair use subcategories such as parody and satire. In particular, the book discusses musical parodies and how the courts have grappled with applying fair use protection to such works (oftentimes with the analysis hinging on "whether the targeted composition combines music and words or conveys its comments solely through the language of music"). In addition, the chapter deals with "sampling" and whether such a practice has been (or should be) held to be a fair use. Finally, the chapter discusses the use of sound-alikes to mimic musical works and how the assertion of a right of publicity claim for such a use raises significant copyright pre-emption issues (and how the courts have grappled with that issue).

Chapter 9 canvasses the discovery process in a copyright infringement action. In particular, the book gives practical advice on how to wield the various discovery mechanisms to cull out information regarding the "principal areas of inquiry in copyright infringement litigation" such as: the creative process used by each party in creating his or her work; the defendant's access to the plaintiff's work; musicological questions calculated to test a party's knowledge of the basic elements of music; knowledge of pre-existing works that use common elements; the plaintiff's/defendant's collaborators in the works; people with whom the parties discussed their respective works; use of public domain materials; drafts and notes of the works; and the plaintiff's list of purported similarities between the works. The chapter provides (from the perspective of both plaintiffs and defendants) sample interrogatories, document requests, requests for admission and tips on taking depositions in copyright infringement cases.

Chapter 10 details the use of summary judgment motions, focusing on the particular areas that are ripe for summary judgment in copyright infringement cases, such as lack of ownership, lack of a defendant's access to a plaintiff's work and lack of substantial similarity of protectable expression. Rosen carefully describes the "evolving body of authorities" addressing summary judgment in the specific context of music copyright cases. He then outlines the preparation of such a motion, whether such a motion should be brought at all and the use of expert testimony in support (or opposition) to such a motion. Again, and of great interest to the practitioner, Rosen provides detailed sample pleadings of summary judgment motions and separate statements of uncontroverted facts which provide excellent examples (from both a plaintiff and defendant perspective) of how to frame the relevant issues for the court.

In Chapter 11, Rosen uses one of his cases, *Baxter v. MCA*, which involved a claim that composer John Williams had copied plaintiff's work in composing the score for the motion picture "E.T. The Extra-Terrestrial," to discuss the trial of a music copyright infringement case. In essence, Rosen has condensed the transcript from the key testimony in that case to illustrate the various points made throughout the book. This portion has an excellent "you are there" feel to it. What is missing here is some of the more practical bits of information that are so helpful in other chapters of the book. For example, there is no discussion of or sample versions of jury instructions. Moreover, copies of the opening and closing statements would have been highly valuable to the practitioner. Finally, discussion and examples of motions in limine in copyright cases would be equally helpful.

The final chapter relates to music, copyright and the impact of new technology, providing discussion of secondary liability issues, digital rights management and other related issues. Overall, in "Music and Copyright," Rosen has successfully worn both his music professor and trench-warfare litigator hats to explain the rocky seas of music copyright infringement cases and to guide practitioners through the waters. It should be a desktop placed and extensively relied-on addition to any copyright litigator's office.

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