

An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement

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The paper presents the results from an experiment examining the way that courts conceive of and execute the Lay Listener Test for music copyright infringement. Specifically, the experiment challenges the assumption that the lay-listener can focus on elements of a composition copyright to the exclusion of other performance factors such as tempo, orchestration, key, and style.

Music recordings consist of two distinct copyright protections: (1) a copyright in the underlying composition (the “Composition Copyright”) and (2) a copyright in the sound recording (the “Recording Copyright”). The most popular test for Composition Copyright infringement, the Lay Listener Test, conflates the two by having jurors listen to sound recordings. Playing the sound recording in a Composition Copyright case invites the jurors to make the wrong comparison, comparing the sound recordings, rather than the compositional elements underlying each recording.

To test this potential for prejudice, an experiment was conducted replicating the Lay Listener Test in a controlled setting. Experiment participants were presented two pairs of music from actually-litigated composition infringement cases. The participants were asked to assess the similarity of the allegedly infringing compositions as if they were jurors performing the Lay Listener Test. One set of participants heard the songs performed similarly, i.e. same timbre, orchestration, tempo, key, and style. The other participants heard the same pairs of compositions but performed with different timbre, orchestration, tempo, key, and style. Participants consistently rated compositions performed similarly as being more compositionally similar than identical compositions played dissimilarly, suggesting that the Lay Listener Test introduces prejudicial elements into the jury’s determination of substantial similarity.

The audio clips used in the experiment can be found at jlundlaw.com.