

Infringement v. Fair Use in Musical Work Cases: An Experiment

Edward Lee and Andrew Moshirnia

A recent empirical study (Lee 2018) found a surprising avoidance of fair use defenses in cases involving a musical work alleged to infringe the copyright of another musical work. Outside of parody fair use, no decision under the 1976 Copyright Act has considered, much less recognized, a fair use based on musical elements (excluding lyrics) from a prior musical work that were incorporated into a new musical work in an arguably transformative way. Part of the reason for this surprising finding is that defendants in music cases rarely, if ever, raise a nonparody fair use defense to resolution. Instead, the majority of defenses rest simply on the defendant disputing the elements of the test of infringement are satisfied. Building on these findings, this Article conducts an experiment to test whether there's any difference in these alternative approaches: (1) contesting the elements of the test of infringement or (2) asserting fair use in musical work cases. The experiment simulates music infringement cases with a set of jury instructions for (1) infringement and/or (2) fair use given to respondents on MTurk, who are asked to decide one or both issues. By hypothesis, the fair use defense should provide a different outcome at least in some cases in which the defendant has a colorable claim of transformative use. If this hypothesis is validated, then it will make even more confounding the fact that defendants in music infringement cases have rarely invoked fair use as a defense.