What Composers and Copyright Lawyers Can Teach Other

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Okay, so where does it start? It starts with the work. And what’s a little odd is that in the Copyright Act, the work is undefined. It’s just the thing. It’s the thing that you artists have created. But that makes it sound like it’s a mono-dimensional, one, unitary thing. And what I’m going to talk about tonight is that even a song that seems like it’s one thing, it still has all these multiple parts to it and not all the parts will be in fact be treated equally and who contributes the different parts will be quite important.

So what I’ve got here is an E chromatic scale, but it’s not on musical staff notation just because again, what we’re doing tonight is I’m going to take you through how guitarists, someone like me, would think about music, would approach, then writing. So I have here, then the dark brown line over on the left. We tried to do this so that it imitates the guitar neck here, right? So the nut is here, this is called the nut, and then the frets. So if I were doing just a simple chromatic thing...

musical example

Okay so those are all my notes right there. And it’s a little funky because it doesn’t sound like a particularly great scale, but you can do a lot of stuff in chromatic.

musical example

So you can kind of riff around and so you start to hear a lot of jazz music will use the full chromatic range. Well what do I mean though about the continuous tone shift? Right now what I was doing, although I probably bent a note here and there, but right now, if I play just the discreet notes...

musical example

...the guitar is somewhat like a piano or another instrument where you don’t get any micro-tones in between. All you get is half-steps.

musical example

So the guitar is nice that way because it’s very precise like a piano is. You don’t have to worry about intonation in the same way that you do if you’re playing say a fret-less instrument or a horn or something where you can accidentally get a lot of pitch waiver on it. But at the same time the guitar is nice because you can bend notes.

musical example

And you get cool double-stop things like that and what’s happening is I’m actually getting a full tone shift. Now a lot of time if you bend, you’ll be...
okay, so there’s the same note, now here’s a half tone up.

*musical example*

So I’ll bend, when most guitar players they’ll bend up the half-step...

*musical example*

...but not all the time. And why I’m saying this is because sometimes, people say well okay, so we know that things like guitar you know you do bend the notes on it, but you end up not getting those true micro-tones, you end up actually stretching up to the next half-step at the least. And yeah, there’s kind of a gloss where you’re kind of going up through this sort of infinite range, but you’re really just going a discreet half-step or sometimes even bending further than that. But nonetheless, there you have it. You have this kind of whole infinite range. But at the same time, you have this approach which is largely discreet to at most the twelve tones of the chromatic scale. But a lot of people when you’re writing songs, you’re in fact actually not using the full twelve notes. So I’m telling the one story and then pulling the rug out from under it. So I’m telling you there’s a way to actually get continuous tone shift and have in theory lots and lots of notes, but in fact most often called key-centered songs, you reduce it down to the eight tones of the major scale. So you then have just basically the major scale. And then a lot of rock songs will diminish that even further to just a pentatonic scale. So you’ve got the major scale...

*musical example*

...and I’m playing it in open E. Those of you who are guitar players know that it’s often nice to be in E because you have that nice low E string. Or maybe you want to be in A because you have that A that can be open. But basically then, working up the fret board, you have your first tone open, second, third, then you jump up to the next string, fourth, fifth, sixth, seventh, and eighth. In the guitar and again for people who play it, it’s obvious it’s really sort of a two-dimensional instrument meaning that piano and things you’re kind of playing a very linear fashion. Guitar you can play sort of linear up and down the string but then you can jump across strings, too. and that actually makes quite a big difference where this is all going to be leading to is because of the nature of how the fret board is set up, there’s going to be a whole bunch of riff patterns that are just so natural to play on the guitar would not be that intuitive to play on something like the piano in many case particularly in something like the key of E. But you end up with what I’m calling somewhat loosely sort of a path dependency in that players, guitar players will fall into sort of ruts. But we’ll see in a moment or so that they can actually break out of those sort of ruts, too. And some of the most original riffs from particularly the classic rock era come right out of some very standard patterns and somehow break out of that and become something that you know and recognize.

So in the pentatonic scale, you break it down even further. Pentatonic because you just have five tones...

*musical example*

...and that seems like a very limited palette, but in fact there’s a ton of songs that have...

*musical example*

...I’m just kind of doing that old Zeppelin song right? And now let me jump back for a moment. As I was saying at the outset, there are all these different ways of approaching writing songs and the way we’re going to talk about tonight is what I’m calling the riff-driven version of doing it but there’s a lot of other approaches. A classic one and people who don’t write songs may assume that the
melody always comes first. Now it begs the question of what the melody is. And that’s another thing I’m going to talk about tonight is that in a lot of rock and other kind of pop songs, other kind of forms, there is not necessarily always one traditional clear melody that leads or drives the whole song. Instead, there’s lots of other things going on. But you could write a song from melody first. You could write it from lyrics first, I’ve got some lyrics and now I’m going to put some melody around it. You could do the chords or riffs first, which is what we’re going to focus on tonight. And you can do some or all of that simultaneously.

So a lot of music theory conventions write intervals are things where you’re applying two notes at the same time.

*musical example*

And a chord is where you get three at a time.

*musical example*

And then arpeggios are where you take the chord form and you just play it in sequence.

*musical example*

And that’s what normally thought about when you’re writing songs. You think about all those devices, but there’s also the bass and the harmony lines and that’s what we’re going to shift to and focus.

Now the heart of a lot of first starting in the twentieth century and then continuing on a lot of pop music is just the twelve-bar blues pattern, right?

*musical example*

And what is the twelve-bar blues pattern? Well it’s this, I didn’t really come up with a good notation for it so I apologize for it being a little awkward. But you’ve got here meaning the one, the tonic chord, built off the root, you play that four times, two times on the fourth chord back down to the root, the fifth the dominant, the sub-dominant root and then back up to the fifth. But all you’re doing is this:

*musical example*

And that was pretty boring, it didn’t sound like the blues at all it was just strumming. Why I did that though was because I want to get to the sense of abstracting out or separating out the chord changes themselves, meaning what chord is being played when and the rhythmic patterns with which you will play the chords. Because the thing that we’re going to try and ferret out is these sort of micro-pauses or different ways of phrases something make quite a big difference in the perception of the music. We also then have some sort of odd scales, major-minor composite scale and blue notes and things we are sort of adding on from the major scale and change it then to make it a lot more interesting sounding.

So in the major-minor composite scale, you’re adding in then, here in the low part you had...

*musical example*

...first, second, third. But now you’re going to add in the minor third...
...which is an odd thing because in a lot of more traditional music before the sort of blues influence came in, you wouldn’t shift or in the same song have the minor third and then the major third in the same thing unless you clearly were changing and making a dramatic shift, but you have that in this...

...And then you also have a flatted third...

...And then you have a flatted seventh instead of the major seventh...

...Okay so it’s a very different, odd kind of scale but those of you who’ve done any kind of blues rock soloing and stuff will know that you’re doing that and what you’re playing on for the listener is that continually twinging back and forth between the very major kind of sound and the minor or bluesy sound because of the blues notes. And then because again things always get over simplified, any of you who’ve ever played guitar know the standard, classic blues box pattern they call it. It’s just this device for guitar players because again we’re looking at the guitar very visually and not trying to think about it in terms necessarily of the musical staff or those things, we have to play in a sense that makes sense for the guitar. So having these kind of devices like this...

...doesn’t sound like much, but going back to that pentatonic scale that I was talking about, you can then do a lot of solos and things. And so a lot of melodies and things you’ve heard over blues songs are simply nothing but this simple blues box pattern.

So now we’ll do something a little more interesting. So the first thing we’ll do is we’ll take from the basic E chord...

...and then we’re going to add on the sixth...

...and there it is. The sixth tone is just being added on.

So you’re starting to get something that sounds a little more interesting. And then you can add on the seventh too...

...And then you can get even more fancier...

...And what you’re doing there is you’re still working up from the fifth, sixth, seventh, but you’re
adding up these higher notes, too onto it...

musical example

...There’s a ton of standard chord changes that have been used over time. There’s a standard one, four, five, which is just sort of like...

musical example

...And then there’s changes like...

musical example

...And then there’s other things like...

musical example

...And in this I’ve written down what all these changes are. And then there’s the classic riff that launched a thousand songs, the Bo-Diddly-B...

musical example

...So you get that and then that’s pretty distinctive sounding, right? It’s the Bo Diddley Beat, so here’s my first question to you guys. Is that protectable by copyright? So let’s say that it was not done before and somebody comes up with that and says, here’s my thing. I’ve got no melody, I’ve got no lyrics, I’ve got nothing else...

musical example

...what do you think? Here’s our problem now, we’re kind of stuck yet this thing has a ton of value. Why does it have value? Because people still build songs around this riff to this day. More modern bands like U2 have done it, they had that song Desire back in the nineties it had one extra chord in it, but it was clearly just a Bo Diddley thing. So now going back to you guys as song writers off chord changes, you could take something like that tweak it a little bit, come up with something new. But maybe we just have to say, as Bob suggested to us, that we’re just out of luck right? So how would I make something protectable around this though?

Okay, now the next riff, there’s no good name for it I’m just calling it the first, flatted third and then the fourth. And that is...

musical example

...this is the...

musical example

...used a lot of different ways, but...

musical example

...you can see the case name so you know where this is going. And ZZ Top opens the song with that thing it’s a funny thing that they do that because it’s almost like they’re paying homage to the blues roots because all these bands from the seventies, you know ZZ Top and Led Zeppelin, they all were just kind of distilling what I’m going to call in a moment, the blues...
...They do that and then they open it up...

...We’re like okay, that sounds a little different. But here’s a question to you, are those two different riffs or ws that just the same thing? Well it ended up litigate, litigated right here in WA State. Who remembers this case? I have the songs for you. The argument was that’s just a generic riff and there should be no protection for ZZ Top. Let me play La Grange first, so you know what the ZZ Top was that they were comparing it to.

Even the melody, it’s not that distinct of a melody right? The sound of his voice is sort of funky. So what happens? Chrysler decides to use this in a truck commercial and particularly, they want to use that rocked up part of it and they do it and then ZZ Top sues them because they didn’t have rights to do it and then Chrysler tries to defend and say, oh okay. It’s interesting because they actually used the actual recording of the ZZ Top but it was just as the sound recording rights were coming in, so that a normal avenue that a band today would have used to say you can’t just play my actual sound recording was not quite as available to them. So it came down to copyright composition. Chrysler then said, we have a musicologist who will get up and do a presentation kind of like I’m doing but probably not with the guitar and we’ll show you how this is just the same riff as first a John Lee Hooker song...

So what do you think is it the same riff?

...so they said that on the patent side called the priorit that’s the priorit, that was like in the forties or in the fifties, so there’s no way that this thing is protectable now. But again we have to get down to why would destroy the originality of the new ZZ Top recording. So we always have to be careful of that originality thing. It’s a low threshold of originality. Here’s ’Spirit in the Sky’:

Same riff?

If you were the jury let’s say listening to those three things together, would you say they’re just the same riff? Is that even the right question to be asking, though. What Chrysler was trying to say is that somehow the existence of these two other songs destroyed the ability of ZZ Top to claim copyright in what? Not necessarily the entire song, but what was excerpted in the Chrysler, like Dodge Ram or something, in that commercial was the big power chords. So it all came down to that and so Chrysler was thinking if we just take down that part, we don’t have anything to worry about lyrics or melody which are at least nominally original. But now that’s the question then, do you think then, and we’ll take a show of hands on this, do you think ZZ Top deserves to have copyright protection reach down to that riff just by itself in their song. Okay so one of the ideas then comes up and this is where Bob’s with the short phrases is it’s also getting to what are building blocks? These are two separate ideas but they can overlap quite a bit. We’re nervous that if we capture small things that then we’re going to be capturing building blocks. So here’s the problem, if we do give somebody the rights for this...
...no one else can do that? So that’s what ends up being at stake. Now we’re going to plunge ahead some other songs now because we’re going to see where despite that idea nonetheless somebody can take some basic progressions and still make them seem, and I think most of you will agree, and I almost guarantee you, putting your hands up and saying oh, I see how that should have been generic but it’s actually not when I end up listening to it.

Okay, now we’re going to jump from the sort of playing chords and things to playing actually just some walking bass lines. The very fundamental bass line that’s a walking bass line that’s used is just the one, the third, and the fifth it’s just making up the chord.

It’s in a twelve-bar form

That’s kind of exciting, but not real exciting, but now I can add the sixth to it.

Okay. Add the seventh. See where I’m going with this.

I’m kind of proud of it, that’s pretty good. Is it original? No you’ve heard that a million times. But again, let’s not get too trapped in the idea about how original does it have to be? And that’s the thing that’s a little bit tough. It’s not about whether somebody has done something similar to it or whether it kind of sounds generic, if it’s distinguishable at all maybe we should give her protection. But again we’re nervous that if we try to give it too much protection and no one else can do anything around it, that’s going to be a problem.

Now we add one more element in which is the minor third, remember I was talking about the major-minor composite a really distinctive tone is when you run up through the minor and then the major.

So then that minor to major sounds, I think it sounds quite natural there, it doesn’t sound funky, but it’s a weird device. It’s sort of like a grace note on a piano where you hit the one note and then the next quickly.

Now I’m hoping you starting to hear already that I’m already taking some liberties with this. I’m not just playing it exactly the same way every time. And when you start getting very facile with these then you start getting bored with them of course because we get bored easily as humans and then you just start adding different stuff to it.

Now we’ve already talked about is any of this protectable? Are the chords changes themselves protectable? That’s a tough one. If it’s just the chord changes in and of themselves? Maybe not. Are the complex versions of that bass run protectable, but so far I think the vote is no. Kudos to me for being able to play that, but it’s not particularly original, you don’t get any protection for it. If I write a new blues song, then is any of it protectable?
I can start singing some melody over it you know.

Is it protectable at all? Alright no, so then here is the question, is all of the blues just kind of stuck now? You can never write an original blues song. People do it all the time, right people write original blues songs. Okay here’s the trap we get caught into is how original does it have to be? We can look to the lyrics, are the lyrics very original? Well a lot of them are going to be the same you know often kinds of stories, but if they’re at least nominally distinct, then you can get copyright on it. The challenge is going to be that even if we can show it’s nominally distinct from the other stuff that has been recorded before our concern is going to be when somebody writes a new song looking back to whether they can be sued by blues artist number 12 today who’s writing a song. So we’re looking kind of in both directions as to somebody writing songs then, somebody writing songs now, and somebody writing songs in the future. Now here’s the weird part. So you had this thing that I think I’ve made kind of clear. It always works out this way when I do this kind of demonstration, that people say okay you played kind of these blues rock kind of riffs it’s pretty standard, there’s nothing protectable there. Then it was the state of the field, I would argue by about the 1950’s and 60’s, and then low and behold you had this sort of weird thing where you had a bunch of largely white guys taking those blues patterns and doing something that suddenly sounded distinctive. And it’s a little odd because they really were just building off of some of those same riffs. And so now we’re going to try to sort of deconstruct in a way what on earth they were doing that made it sound somewhat distinctive. So what do we have, we have Roy Orbison with ’Pretty Woman’.

And I’m going to show you the charge in a moment and you’re going to see that it was just the same damn thing. But it sounds a little different this is a big hit record, right and a lot of it was off that riff.

It was so famous that then 2 Live Crew had to do a parody of it, or they claimed it was a parody right? Van Halen did a cover of that song. Rolling Stones, something similar, they took the heart of it, that fifth, sixth, seventh and they did this.

And then the song goes on from there. This is nothing original. But notice a lot of what they were doing was what I call here sort of distilling the blues out. Rather than playing the full sort of patterns, more of a sense like this with more harmonies around it.

they’re essentially saying, you know the coolest part about that is this.

That note in the middle and I’m going to focus on that and I’m going to amp up the guitar so you really hear that darn thing.
But now I ask you, what’s so original about that? Or is there something artistic and creative, though about like I’m saying just distilling and pulling something out of the middle of what was always there but now is made much more explicit. The Beatles do something similar.

**musical example**

Notice they’re doing that minor third to major third.

**musical example**

Now I’m going to ask you in a moment what seems distinctive about that all? There is something that you can hang your hat for both the Roy Orbison riff and the Beatles ‘Day Tripper’ that seems different from the standard bass rhyme. But we’ll get back to that in a second. And I’ll play you one of my own songs in a moment. I like every other person who likes blues rock had to do my own kind of token E blues rock kind of song.

**musical example**

And you’ll hear that in a second in it’s all full studio glory. So here’s what’s going on in Pretty Woman. Losing my guitar pick there. You have the root, the third, the fifth and the seventh. What looks a little bit different here though?

**Audience**

Ninth

O’Connor:

Exactly. We threw up a ninth which is really just the second tone of the scale but when you go above the octave you’re going to call it the ninth ending up there. So you’ve added that and what you have is this kind of top part to the riff. So rather than just being the low...

**musical example**

...which would be the very standard part, you also have...

**musical example**

...now also think about that pause in a moment and say why does the pause make a difference?

**musical example**

And it’s that top part that makes it different.

**musical example**

And now let’s look at ‘Day Tripper’. Same thing on the bottom, but although they have the minor third in there too, but they add the stuff on the top they’re adding the ninth up there too.

**musical example**

We already looked at ‘Satisfaction’. And I showed you mine already. So now here’s the question, Roy Orbison and the ‘Day Tripper’ riff are those original? Do they get protection? Yeah, more of you are nodding your heads. But why? This sort of vexes me. Why does it vex me? Because I’d like
to write a riff like 'Day Tripper' and make huge money too, right? If I could write something...how do they take...well it always comes back to well there’s only so many notes and you can infinitely re-do them. But no, it’s actually even that wide open. What I’m saying to you that there are patterns, particularly in things like blues rock are so constrained that it’s really quite hard to come up with something new in the conventions of that genre. That’s exactly one of the points I’m trying to point out here. When I played the first simple bass line.

Now even just playing it by itself on a guitar makes it come out front and center a little more but really I’d be playing it with a band and there’d be a singer, there’d be horns, there’d be other stuff. And this is just a kind of a motif in the background. It’s just a bass motif supporting rhythmically and harmonically supporting the melody of the song. And that’s what I was saying about distilling. The genius to the extent that it is genius, of a lot of the blues rock category was pulling out these things that were always there in the bass and then shining the spotlight and bringing them up and making them like a melody. So this becomes the curious thing. And now think about 'Day Tripper' as a song, too. Who can sing the melody to 'Day Tripper'? Singing: 'Got a good reason, takin' the easy way out. Got a good reason.' And it kind of repeats again. What’s fascinating is the melody gets more interesting because of the context of what’s going on underneath it. Right?

Now here what’s interesting there it’s really pretty much the same melody but because the chord shifted underneath it, it actually makes it sound like more is going on in the melody than actually is. So this is an example.

Now think about Led Zeppelin songs where as much we all may love Robert Plant he’s usually as I kindly call it, just sort of caterwauling over the top. I mean I love Led Zeppelin, I’m not trying to be mean but he’s just like ‘Yeah’, he’s doing his thing. It’s great, it’s impressive but you don’t go away singing a Led Zeppelin song, right? But you do know the riffs.

Everyone knows that, well if you’ve ever heard the song. But you know that riff. Think about things like Aerosmith.

That’s kind of cool, for me, that’s kind of cool, I love that stuff. And that opens the song like you’re saying the spotlight is on that thing, it’s become really the melody of the song. But now we come back to Bob’s issue. Now that was a fairly long run.

But that’s really all you got, but it’s the driving thing of the song. So we’re going to come back in a moment and talk about the heart of the work, too. So we have some issues. We’ve just seen that we have these standard patterns, we’ve locked ourselves down to a fairly narrow subset of notes. We’re not even using the full twelve chromatic notes. And we’ve heard it sounds impressive, but generic and other times it seems to be distinctive. Let me suggest is some of the parts, it actually comes down to the style and the phrasing. And what I mean by that is that a lot of these early white rock guys who were trying to take on the blues patterns were not really getting the same groove, the same feel. They were trying to imitate it but of necessity they ended up doing it a little differently and in particular there are a lot of pauses that get put in that’s not as fluid as the original blues
forms. In the original blues forms, again you really have a nice fluid, shuffle feel.

*musical example*

It just keeps kind of chugging along and that’s great. And this time listen to 'Day Tripper'.

*musical example*

Let me pause that again.

*musical example*

See what happened is that hesitation. In the normal blues pattern it’d be.

*musical example*

You’d go right up to that minor third, you don’t pause. Here you go.

*musical example*

See one thing as you play music longer at least this was my experience, you get to a point where when you first start playing, it’s like really hard to change the chords and it seems like time passes really fast. Then as you get better and more comfortable playing it feels like you have nothing but time. You’re like oh there’s all sorts of time around that note. I’m saying that because that’s critical in style phrasing. Behind the beat, ahead of the beat, you know where the beat is, but you can get very distinctive by hesitating or rushing. Willie Nelson, arguably, built an entire song writing and performance style by delivering the melody behind the beat. He could take standard songs and make them seem different by doing that behind the beat delivery. So here again 'Day Tripper'.

*musical example*

Roy Orbison takes it to another note where he just hangs on that seventh note.

*musical example*

So it’s again that idea about pulling it out front and center. Six note rule, it’s not really a rule, it’s not written anywhere. But there is this idea that if it’s too short it doesn't get protection. When I learned that, remember I was a musician and a songwriter before becoming a copyright lawyer, I was really unhappy. Because the coolest stuff in rock music are these riffs. But here’s my counter: if it’s the heart of the work, you can’t freely copy it. You can’t use any kind of analysis even like a fair use kind of analysis. Anything and say I just took a little bit a tiny little bit, if you measure it down, it’s like one measure long. But if it’s that measure that keeps repeating and it’s the heart of the work and that’s the identifiable that people think about as the song, I would build an argument. I don’t know that I would win, but I would build an argument. But we still need to be careful about overprotecting. Over protecting building blocks that everyone needs. Because remember, we’re perilously close to the standard blues runs and chord changes that everyone needs to write new songs.

But here’s are some other questions now. Is the riff actually protected? When I was learning to play, I duly went out and bought sheet music, thought I’d try to learn by reading sheet music and I was unhappy. I got some Beatles song because I love the Beatles and they were out of key. I could play by ear enough where I knew that was not the key that the song was recorded in and also the key riffs, the guitar riffs were not in there. What often happened was, as I know now in retrospect, even
artists like the Beatles, not necessarily all of them can write music, even if they can, in standard notation, even if they can do they want to be bothered? No, you write songs just kind of live off the cuff, instead of just scribing it out. So who writes down that published sheet music? Well apparently it turns out there a lot of people on staff at publishing houses who would then kind of do a piano line. So what you get is that odd thing where it’s just kind of a bass and treble clef piano version of the song and what that guy chose to put in there is all that is in there. But so here’s the interesting thing, what then trumps? So if the recorded version has that cool riff in it, does the copyright attach to that? Or is it attached to whatever was then deposited when as the official record of the copyright with the copyright office. Now some of that would have changed then when we got to the ’76 act and beyond and when you could have copyright automatically attaching as you wrote the work. But now we’re going to start worrying about, and for the songwriters in the room, start worrying about what essentially become different versions of the work as you move along. So you started with something. It morphs. It’s going to morph if you’re in a band and you bring in the song idea to the rehearsal space and then suddenly the other guys put their part on there. What is happening as that’s going along? What’s being claimed, how is it being claimed? Here is something, again not for the lawyers, you guys know this stuff, but for the non-lawyers, the thing to start watching out for is that distinction between the phono-recording right, the sound recording right and the underlying composition right. When you’re writing your songs keep track of how they are being developed. And look to as I’m pointing out here, are you conceiving it as one work that you’ve done just parts of over time, or are you really looking at it ends up being different works, different versions of the song. Look at the language here, ‘a work is created when it’s fixed in a copy or a phono-record for the first time, when a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time.’ So it’s almost like you’re kind of version tracking in a way. That’s the work then. If you substantially change the song in performance and you’re playing it out and you’re not recording it again, the only thing that may be protectable for the composition right is that recording you did in the band rehearsal space two months ago. Where the work has been prepared in different versions, each version constitutes a separate work. Now this is where we’re going to pause and then we’ll come back and start thinking about the very vexing of who owns what when you have a bunch of people in a band and they come in and maybe somebody brings in the chord changes and then words get attached to it, words get attached to it and then you have a song.

Now that we have a sense of the so-called value proposition of those short riffs, now it brings up a dilemma. Because we go into the rehearsal space. We talked at the beginning about different people write songs differently. Some come up with lyrics first, melody first. A classic thing in a kind of pop rock space is the ‘song writer’ comes in with chord changes and a melody. That means the rest of the song has to be fleshed out from there. And now what we’re going to try to do is figure out as different people add different parts, which of those parts are going to be owned by which person and what is the value to the overall work? The old Procol Harem song called ‘Whiter Shade of Pale’, everyone probably knows it, we’re going to play it in a second. It was subject to some litigation over the past few years. Finally wrapped up last year. And basically the organist in the band argued that he was the one who contributed this signature melodic line that was not the melody of the song necessarily but was an important line in it and that he should then get separately or at least get some rights to royalties because he wasn’t given song writing credit. Now I was getting it off itunes, and I couldn’t find the original on itunes. It’s like Procol Harem must have some sort with itunes and they wouldn’t allow it. But somehow this live version from 2007 is available. Listen to the organ line.

**musical example**

Who cares about the rest. When you listen to the organ line, ooh I remember that’s the ‘Whiter
Shade of Pale’ thing, right? Now listen to this.

**musical example**

The Bach piece, sound familiar now? What do you think, how close?

So now we’re going to have two issues. This is something that’s critical and I was starting to set up in the first part of the presentation that as you’re writing songs now, let’s say I’m writing a brand new song tonight, I am in some ways looking forwards and looking backwards. I would like to enforce my brand new song against any interlopers who’ll come later on and write a song that I think copies mine. But I have to be looking in the rear view mirror to see who wrote stuff before that I might be taking. But now the interesting part if it again that if I genuinely come up with by myself, as I said to you before, the original requirement is so low, that I can get copyright to it. So even though a lot of times it seems like the courts and others will fall into a patent type analysis of art, well it was done before, therefore no one can do that now, that’s not necessarily how the analysis should go. It has to come down to copying. So how do you then, get there? Well in the music context what’s going to happen a lot is well it’s a famous song before, and then you can argue or impute almost to anyone who was anywhere near a radio that they must have heard the song and copied it. This is of course the famous George Harrison case. For the lawyers in the room know that case. I should have brought the clips and I didn’t . But it’s 'My Sweet Lord’, but he wrote it, it clearly sounded like 'He’s So Fine’ an earlier song from the sixties and so he was sued. And so he got up in court with his guitar, we guitar players like to play guitar wherever we can, he demonstrates on how he came up with the song because he’s just hell-bent on saying this was truly original. And the court not wanting to offend George Harrison of the Beatles, I’m making that part up. But there was clearly a little bit of deferential stuff going on because they basically say it was sort of inadvertent copying. But essentially the argument is there’s no way you could not have heard that 'He's So Fine” song because it was such a smash hit in the sixties it was on every radio everywhere. I know you’re saying you didn’t hear it but you must have heard it and you must have unintentionally or subconsciously copied it. So that’s the only way in which earlier songs can become part of the priorit. But what if our keyboard player in Procol Harem says I never listen to classical music, I have never listened to that. Then that old thing, the Bach piece should have no impact. But what happens to the case, what’s interesting is he does then get vindicated by the court. It goes through some appeals and basically they say then that he should have shared songwriting credit because that piece that he does even as much as it sounds kind of derivative of the Bach piece, but again that’s not necessarily the right test, that was an important part of the song and it should be part of the song writing credit. So everyone’s, not everyone, but me, others are watching that case because now you have a bunch of guys in a room let’s say and again the songwriter comes in with chords and a melody and then somebody puts this cool riff over the top and let’s say it’s the lead guitar player and then he goes away and he leaves the band. And the song becomes a big hit and it’s that riff that he made up that’s really important. You bring him in for songwriting credit you go and you duly deposit something with the copyright office either a recording or a notation of the song, maybe does or does not include the riff. That’s going to lead to some potential problems. To demonstrate this a little more, I’m actually going to play, I threatened to do this and now I’m going to do it, play one of my own studio recordings because it is off of one of these basic, as I said I had to make one of these derivative blues bass kind of songs myself and so I did. And now I’m going to talk to you about separating out this idea about coming in with chords and melody and actually coming in with a guitar hook.

**musical example**

I did all this in analog days. It’s amazing new world all the digital stuff I am blown away. So what’s going on I overdubbed all the guitars, wrote the song, did all the vocals. Now the bass player, now
let me just run through this I want you to hear the bass run in a moment. He does it’s separate from
the main hook. This is actually before I was losing hair, I was in my twenties when I wrote this.

**musical example**

Whoa that’s a great bass line. I mean he was a great bass line right? Who plays bass? Anyone here
play bass? He was a monster bass player I wish he was here in Seattle and I could be in a band with
him again. But now that part, that (sings example) he does on the bass. He added that I didn’t tell
him to play that. What I came in with is just this thing. Now I did come in with the riff. So in a
moment I’m going to change the hypothetical so to speak and pretend that I didn’t come in with the
riff, but I did because I’m the riff-driven guy. I came in with the riff.

**musical example**

Okay, so that’s how I started, that was the song to me. So I did the guitar part as I said and I did the
vocals, but the bass line? Should my bass line get any protection for that should he get any respect?
No? You’re saying yes? I consider that to be my song, though. I’m not giving him songwriting
credit. Now let’s listen to another part and this is me, but now we’re going to think about the
difference between sort of planned parts and improvisational parts.

**musical example**

This is the guitar solo, I’m waiting the whole song to play this.

Musical Example: cont.

So who thinks that solo should be protectable? You were going to give my bass player some credit
do I get credit for that? It doesn’t make a difference though that I could probably not duplicate that
now on my life. Because I’m one of those guys who goes into the studio and I love doing that fresh
solo. I don’t want it to be canned because we had the tapes rolling and it came out pretty well. I
could probably kind of put it back together, but it wouldn’t be exactly right. Does that matter?
There are some cases on this. The famous case with the flutist. What is being added by whom and
what is their intent. Now let me give you an idea of a different kind of guitar solo. If you go to...

**musical example**

...just setting up the basic idea of ’Twist and Shout’ by the Beatles.

**musical example**

Then the big build up. Now I would argue to, if George actually came up with that, George Harrison
for that because it’s a planned out, I see it as a planned out solo, he plays it the same way every
time. It really is, in my mind, part of the composition now. And now take the analogy out even
further and think about bands like the Grateful Dead and other kind of jam bands. And the heart of
the song may be this long improvisational stretch where everyone’s improvising. They capture it on
tape, let’s say, or digital recording now. It’s a work, I guess, there’s certainly a sound recording right
to it but how do you put that together? So I don’t have the answer for that one, I don’t know if
anybody does. But this notion of whether it’s done improvisationally sort of off the cuff or if it’s
planned out can play a role in thinking about what it is. Now ’Whiter Shade of Pale’, the organist
was clearly doing that line every time. It’s a very distinct set line, he may vary it stylistically a bit..
Now let’s go to the core riff of my song, the...
that part. What do you think is that protectable. Here’s where I’m always dying, this is the money question. I’ve set you guys all up for this, I want to know do I make the cut. I tried to add my own little tweak, right? It’s not just the minor third.

**musical example**

And I got my little pause, remember I said in the ’Day Tripper’, that’s important.

**musical example**

And then here’s your thing.

**musical example**

I’m crushed. I’m always crushed about this. No one values that enough. But here’s the thing, you know. People are still writing songs like this. I wrote that in 1989 or something. People still write songs around those riffs and will continue to be faced with that question. Where does it tip over? But again I always want to draw you back to the idea that I can still get copyright protection to some degree or certainly I can get it in the whole song because the test of originality is low. It’s just no one’s played exactly that before and I didn’t copy of it from anyone. But here’s the interesting thing. Am I copying it because I’ve heard a million of those kind of blues riffs before and I intentionally, I admitted to you I was kind of doing my own version of one of those riffs. Is that enough to say that I copied somebody else’s song. Because now what we’re going to get into for one of our finally topics is the notion of faulty covering, that’s what I call it. When you sort of try to copy somebody else’s stuff and you don’t quite hit the mark. Does it matter if you intended to, if you fail to do it maybe it just shouldn’t matter, it’s like no harm, no foul. I’ve been trying to argue for a few years, and Bill knows this, I never quite get to the point where I’m confident enough to put this article out there but that it really is all about style. And I say this just because the lawyers in the room know that copyright in courts often try to say we don’t want copyright to really protect style, stylistic performances, that’s sort of the embellishment of the performer. At most you get your sound recording right for that great performance. The underlying composition is separate. When you do your version of it you’re still just doing a cover of the song, you’re doing a version of the song. But I want to argue in fact, that it’s all about the style, in particular because through the twentieth century and including today, you have what I call the merger of the composer and the performer. This is not a new idea but it’s something that we have to focus on. Is that before that time, you had a lot of composers who many times didn’t perform their works, not publicly, they didn’t do the big version of it. You had a virtuoso singer or player what ever who did the performance of it. But the merger that we’ve come to expect our artists, our artists to write their songs and perform their songs. And we actually want to listen to those ones who actually bring a distinct perspective or sort of view. It becomes about the context of the music. Oh it’s interesting that it’s that same old kind of riff but they’ve give this new twist to it So I’m going to start to argue that the very thing that makes something at all original is that somebody has intentionally or otherwise changed the rules, changed the parameters of what came before. Now we have a number of imitation cases which are where commercial parties, companies, in one case Frito Lay, in another Ford Motor Company like the style so much, we’re going to jump out of copyright for a moment now, but liked the style so much that they actually hired singers to imitate that singer, in one case Tom Waits in another case Bette Midler. And to also come up with in the Bette Midler case was a case she had performed and in the Tom Waits case was to write a Tom Waits like kind of song. SO that’s an interesting thing like you can say I love Neil Young, you can hear a Neil Young song coming a mile away. I mean if you like him at all, or maybe you don’t like him and then you want to run away from it. But there’s a lot of songs oh that’s got to be a song by person X. But the only way you can say that is there’s a somehow recognizable style that plays through across all these things.
Now let’s take it out to an extreme though and see what happens when we have a song and somebody purportedly covering the song but it starts getting out to the edge We’ll start with the original...

musical example

Now we talked about this before that’s actually distilling out the standard five, six, seven, blues riff, bringing it front and center And then we get to the melody and that’s good. Now we fast forward.

musical example

Not many people remember this version. Recognize it yet? No? It’s Devo does the Stones. It’s the same song, right. I have this album too.

As much as I’m amused by Devo, we will stop it there. What is going on there? The lyrics, you got us there, they’re covering those, they’re saying the exact lyrics. The phrasing is pretty different, though, and then the whole rest of the song is totally different. Now there is towards in they bring in the token (sings Rolling Stones riff) they do that kind of once or twice, but that’s not how the song was structured. So now the question is what is that that Devo did? Whether you like it or not, I thought it was kind of funny is it a copy or something else? Let me change my terminology. Is it a cover? Is it a cover version or not? That’s going to become important. Now let’s go back to the idea of context again, if you’re a student of art history and you look at sort of grander art than our pop songs we’ve talked about tonight You know it can be quite important or maybe you feel different about it as to viewing an artwork in the context of its historical setting what the artist was sort of intending to push back against or signal, you know this stuff is quite important. And I argue that a lot of rock music became kind of high end in that way, a lot of it was conceptualized stuff. Devo was leading this, a lot of the new wave artists like Talking Heads, they were very much trying to make artistic statements. They were coming at it often from an art school background and so they were trying to do almost deconstruction, if you will, of some of the classic rock sort of canon As they are doing this, though that’s great. We want our artists to be doing artist creative stuff. But then we jump and we put our law hat on and we say so what are you doing for purposes of rights and protections and things like that. Now here’s what a cover is that’s entitled to the compulsory license under section 115. For the non lawyers, why is this important? Because if it’s a cover, then you get the compulsory license which means that, and we’ll read the language in a second, so long as the original composer has authorized to be put our into the public in a version already once, then anybody basically has the right to do a new version of the composition and they have to pay a set fees to do so but they don’t need permission of the composer to do it. So if they compulsory license includes the privilege of making a musical arrangement of the work, so you get to arrange it, you get to monkey with it a little bit to the extent necessary, though, extend necessary we’re limiting that, to conform it to the style or manner of interpretation of the performance involved. But the arrangement shall not change the basic melody or fundamental character of the work and shall not be subject to protection as a derivative work under this title except with the express consent of the copyright owner. So what do you think? Is the Devo version a cover that’s going to fall under the compulsory license? Now there are a number of times when we start to see these kinds of taking a lot of liberties with it. So if it’s not a cover the, what are the implications for that? Well if it’s not a cover, then it’s some sort of unauthorized copy or even a derivative work, but for the non-lawyers, the original composer has the right to control derivative works new versions made. Now normally we think of derivative works as there’s a book and somebody’s going to make a movie version out of it, so we’re sort of jumping into different media, we’re doing something very different with it. But if it’s a derivative work now, then you’d have to go and get permission from the composer to do that. And this in some ways gets us to the famous ‘Pretty Woman’ case I alluded to earlier. And the lawyers all know this case, the non lawyers don’t It’s that 2 Live Crew did a version of it and they
ended up being sued over it by Acuff-Rose, the holder of the copyright for the Roy Orbison ’Pretty Woman’ song. And the interesting thing at the outset, you say well why was there even an issue? Couldn’t it have just been a cover covered by a compulsory license. But one of the issues that comes up is that the song was so changed from the original version that it seemed to fall outside of that and so then they did need the permission to do it. And so how did they have to defend themselves, since they ended up not being able to get the permission. So this is the problem if the composer won’t give you the permission, then you can’t do it. 2 Live Crew went ahead with it none the less and we know the famous part of the outcome, they tried to bring it under the parody fair use. We’re making fun of Roy and his song song because we’re dong that, it should be exempted there. So this means then that as you’re going through and doing your original songs and then doing cover songs and you’re doing creative things taking a lot of license, I use that in an informal sense, license with somebody else’s work because you want to make an artistic statement. You have be very careful with that depending where you end up with it.

So that’s what I want to end up on now. There’s so much more, there’s only so much time. I think that again, as we’ve seen tonight, composers understanding a little bit about the legal side you know we don’t want you to start worrying too much about the law, feel free to be creative, do what you want to do. But start thinking of these issues of who’s going to own it what exactly is being covered? Which parts of the song can be covered and what can’t be covered? And that will help you then avoid a lot of headaches down the road. You’ll know what you’re getting into as you get into it. On the lawyer side, I would argue that if you don’t know music that well, it is actually quite helpful because understanding what the composer is doing, understanding how they’re building off of prexisting forms, understanding what are truly building blocks and what are things where the building block has been morphed enough where maybe we should allow it some protection can then help us to have better outcomes for looking at litigation over music copyright. And with that I’ll end it, thank you for your attention and I’ll stay around for questions.