



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

AEJ Blog

Journal Blogs

9-27-2021

Olivia Rodrigo Retroactively Adding Songwriters: A Result of Bad Copyright Law?

Albert Aini

Cardozo Arts & Entertainment Law Journal

Follow this and additional works at: <https://larc.cardozo.yu.edu/aelj-blog>



Part of the [Law Commons](#)

Recommended Citation

Aini, Albert, "Olivia Rodrigo Retroactively Adding Songwriters: A Result of Bad Copyright Law?" (2021).
AEJ Blog. 294.

<https://larc.cardozo.yu.edu/aelj-blog/294>

This Article is brought to you for free and open access by the Journal Blogs at LARC @ Cardozo Law. It has been accepted for inclusion in AELJ Blog by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

Olivia Rodrigo Retroactively Adding Songwriters: A Result of Bad Copyright Law?

BY [ALBERT AINI](#) / ON SEPTEMBER 27, 2021



Olivia Rodrigo and her co-writer, Daniel Nigro, have retroactively given songwriting credits to artists they assert inspired parts of, or the essence of, their hit songs 'good 4 u' and 'deja vu.'¹ The process of giving retroactive songwriting credit, in addition to a portion of royalties, has gained popularity over recent years.² This may be a response to the rise of music copyright infringement lawsuits songwriters are facing, but it disincentives creativity, a main purpose of copyright law.³

To succeed on a copyright infringement case, a plaintiff must either (A) show direct evidence of copying or (B) prove copying through indirect evidence by showing that (1) the defendant

had access to plaintiff's work and (2) that the disputed works are *substantially similar*.⁴ However, courts have not clearly defined the substantial similarity test leaving it vague and inconsistent among different circuits.⁵

One main issue with the substantial similarity test is that juries probably do not understand the complexities of music. Additionally, their personal listening experiences may color their perspective of similarity. Without more substantial legal guidance, evaluating the protected similarities of two compositions can be extremely challenging to an untrained ear when judging solely from recordings.⁶ Juries often focus on the "sound-character" of a recording instead of the composition itself.⁷ A study found that lay-listeners were more likely to believe a composition was infringing on another composition when the songs were recorded in the same style even though style is an unprotected feature in when considering infringement.⁸

Composition copyright customarily protects the distinctive element of "rhythm, harmony, and melody."⁹ Juries can confuse distinctive elements with other performance factors in a recording "such as tempo, orchestration, key/pitch, or style/genre."¹⁰ One example of this can be seen in the *Blurred Lines* case, where the Gaye estate created a mash-up of 'Got to Give it Up' and 'Blurred Lines' to highlight their similarities.¹¹ However, such evidence has a high risk of manipulation with little reliability.¹²

Rodrigo retroactively added two members of Paramore as songwriters to her song 'good 4 u' (most likely because of the similarities to their song 'Misery Business' as fans have noted).¹³ Rodrigo has also given Taylor Swift, St. Vincent, and Jack Antonoff songwriting credit for her song 'deja vu.'¹⁴ While Rodrigo and her team may have collaborated with Paramore members before 'good 4 u' was released,¹⁵ Taylor Swift and her team were only an inspiration to Rodrigo.¹⁶ In an interview with Rolling Stone, Rodrigo and Nigro were talking about the songwriting and production process for 'deja vu,' and Rodrigo mentioned that she was inspired by Taylor Swift's 'Cruel Summer.'¹⁷ Specifically, Rodrigo referenced the harmonized yells in that song.¹⁸ While a part of 'deja vu' does sound similar to a segment of 'Cruel Summer,' Swift and her team should not receive royalties as a result. While the argument for 'good 4 u' infringing on 'Misery Business' is stronger because of harmonic similarities and overall sound aesthetic (and possible collaborative efforts between the artists), the retroactive addition of songwriters seems to be a response to a legal risk.

Harmony alone should not be a basis for copyright infringement.¹⁹ The substantial similarity test is undefined and unclear, which makes it difficult for scholars, lawyers, and courts to outline the necessary components of an infringement case.²⁰ Rodrigo seems to have preemptively given credit to artists because she was inspired by their style or a sound they created. This might be the result of a chilling effect cases such as the *Blurred Lines* case has on artists. In some situations, it is possible an artist won't release a song because it shares similarities with another song. All music is borrowed in some way, and juries are ill-equipped to analyze the complexities of protected and unprotected parts of a composition.

One artist, Elvis Costello, tweeted that it was fine by him that a portion of Rodrigo's song 'Brutal' was similar to a guitar riff from his song 'Pump it Up.'²¹ Costello wrote, "It's how rock and roll works. You take the broken pieces of another thrill and make a brand new toy. That's what I did."²² Artists should not have to retroactively add songwriters to their music because they were inspired by their sound. Courts should be clear about what is protected in music so that juries can properly assess music and there is no chilling effect from controversial jury decisions.

Albert Aini is a second-year law student at the Benjamin N. Cardozo School of Law and a staff editor at the Cardozo Arts & Entertainment Law Journal. Albert is interested in music and copyright law, in addition to finance and business litigation.

1. Jem Aswad, Olivia Rodrigo Adds Paramore to Songwriting Credits on 'Good 4 U', Variety (Aug. 25, 2021, 7:38 AM), <https://variety.com/2021/music/news/olivia-rodrigo-paramore-good-4-u-misery-business-1235048791/> [<https://perma.cc/M7J2-BVP2>]; Jem Aswad, Olivia Rodrigo Gives Taylor Swift Songwriting Credit on Second 'Sour' Song, 'Deja Vu', Variety (July 9, 2021, 7:54 AM), <https://variety.com/2021/music/news/olivia-rodrigo-taylor-swift-songwriting-credit-deja-vu-1235015769/> [<https://perma.cc/QT44-ZJVT>].
2. Jonathan Bailey, Retroactive Credit and the Future of Music Plagiarism, Plagiarism Today (Aug. 26, 2021), <https://www.plagiarismtoday.com/2021/08/26/retroactive-credit-and-the-future-of-music-plagiarism/> [<https://perma.cc/AD4D-RXJS>].
3. See id.; see Nicole Lieberman, Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law, 6 N.Y.U. J. Intell. Prop. & Ent. L. 91, 93 (2016).
4. Lieberman, supra note 3, at 93.
5. Id.; see Sergiu Gherman, Harmony and its Functionality: A Gloss on the Substantial Similarity Test in Music Copyrights, 19 Fordham Intell. Prop. Media & Ent. L.J. 483, 486-87 (2009) (discussing the difference between the First and Ninth Circuits' substantial similarity test); Daryl Lim, Substantial Similarity's Silent Death, 48 Pepp. L. Rev. 713, 717 (2021).
6. Daniel Abowd, FRE-Bird: An Evidentiary Tale of Two Colliding Copyrights, 30 Fordham Intell. Prop. Media & Ent. L.J. 1316, 1372 (2020).
7. Id. at 1373.
8. Jamie Lund, An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement, 11 VA. Sports & Ent. L.J. 137, 140 (2011).
9. Id. at 143 (citing 7 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.05[D] (Matthew Bender, ed., 2011)); see Mark A. Lemley, Our Bizarre System for Proving Copyright Infringement, 57 J. Copyright Soc'y 719 (2010).
10. Lund, supra note 8, at 144.
11. Abowd, supra note 6, at 1374; Williams v. Gaye, 895 F.3d 1106, 1118 (9th Cir. 2018).
12. Abowd, supra note 6, at 1374.

13. Jem Aswad, Olivia Rodrigo Adds Paramore to Songwriting Credits on 'Good 4 U', *Variety* (Aug. 25, 2021, 7:38 AM), <https://variety.com/2021/music/news/olivia-rodrigo-paramore-good-4-u-misery-business-1235048791/> [<https://perma.cc/M7J2-BVP2>].
14. Jem Aswad, Olivia Rodrigo Gives Taylor Swift Songwriting Credit on Second 'Sour' Song, 'Deja Vu', *Variety* (July 9, 2021, 7:54 AM), <https://variety.com/2021/music/news/olivia-rodrigo-taylor-swift-songwriting-credit-deja-vu-1235015769/> [<https://perma.cc/QT44-ZJVT>].
15. Aswad, *supra* note 13.
16. Aswad, *supra* note 14.
17. Rolling Stone, Olivia Rodrigo and Dan Nigro Break Down Her New Single 'Deja Vu', YouTube (Apr. 7, 2021), <https://www.youtube.com/watch?v=JxJfUoZFx8Y>.
18. *Id.*
19. Sergiu Gherman, Harmony and its Functionality: A Gloss on the Substantial Similarity Test in Music Copyrights, 19 *Fordham Intell. Prop. Media & Ent. L.J.* 483, 486-87 (2009) (discussing harmony as a functional feature of music and arguing it should be considered non-distinctive).
20. Daryl Lim, Substantial Similarity's Silent Death, 48 *Pepp. L. Rev.* 713, 744-52 (2021).
21. Aswad, *supra* note 13.
22. Elvis Costello (@ElvisCostello), Twitter (June 28, 2021, 1:42 PM), https://twitter.com/ElvisCostello/status/1409567943520931847?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1409567943520931847%7Ctwgr%5E%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fetcanada.com%2Fnews%2F796497%2Felvis-costello-says-olivia-rodrigos-brutal-riffing-off-his-classic-pump-it-up-is-fine-by-me%2F.