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James Gibson

University of Richmond - School of Law, jgibson@richmond.edu

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Two Copyright Lessons From a Pop Music Controversy

Prof. Jim Gibson, University of Richmond School of Law

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People who study copyright law for a living must frequently endure the disappointment of seeing an interesting case settle out of court. For example, lurking behind the current Google Books controversy is a fascinating fair use argument – but if the [proposed settlement](#) manages to survive [antitrust and other challenges](#), no court will ever have a chance to rule on the fair use issue. And scholars like me will be left wondering what might have been (and whether the settlement actually [prejudices future fair use arguments](#)).

Sometimes, however, even a settlement teaches us something about the law. The recent lawsuit in the music world provides one example. Back in December, guitarist [Joe Satriani sued pop music group Coldplay](#) for copyright infringement. The allegation was that Coldplay's 2008 hit "Viva la Vida" was copied from Satriani's lesser known 2004 song "If I Could Fly."

On first listen, Satriani seemed to have a compelling case for copying. "If I Could Fly" is an instrumental track, but its [lead guitar part seems to track the vocal melody](#) of "Viva La Vida" almost note for note. Likewise, the two songs share an [almost identical four-chord progression](#) throughout.

The argument that Coldplay had copied Satriani therefore looked pretty good. Perhaps the similarities between the songs were entirely coincidental, in which case Coldplay would prevail. But how likely is it that two musicians would independently compose the same song?

Enter the Internet. As news of the lawsuit spread, musicians and music fans began to flood YouTube with videos opining on the case. Several of the videos isolated the songs' similarities and even provided ["mash ups" in which the songs were played simultaneously](#), so as to better demonstrate their overlap.

Other videos, however, showed that the features that Coldplay had supposedly copied from Satriani were present in additional songs as well. Some of those songs postdated Satriani's, giving rise to the possibility that he had lawsuits left to file. (Curiously, one such song – a [2007 track by indie band Creaky Boards](#) – was called "The Songs I Didn't Write.") But [others were earlier](#): 2002's "Francés Limón" by Argentinean band Los Enanitos Verdes, a 1980 track from former Jefferson Airplane singer Marty Balin, Cat Stevens's 1973 "Foreigner Suite," and more.

So was Satriani a plagiaree or a plagiarist? Perhaps both he and Coldplay copied from an earlier musician. As the number of similar songs piled up, however, another possibility emerged: Perhaps no one was liable to anyone. The shared melody, the chord progression – these might simply be what copyright law calls *scenes à faire*: stock elements in the genre, so common as to resist copyright protection altogether. They are not any particular musician's copyrightable expression; rather, they are fundamental building blocks of pop music, such that allowing any one person to copyright them would impede progress in the art form as a whole.

In the end, we cannot know how big a role, if any, these earlier works played in the settlement negotiations. But the controversy does teach us two interesting lessons about copyright law.

First, it drives home a fundamental point about music, and about innovation in general: its cumulative nature. Progress in the arts, and in science, rarely arrives through brilliant

breakthroughs inspired by flashes of genius. The stereotypical Eureka moment is not actually typical at all. Instead, most innovation arrives piecemeal – small steps forward in the state of the art, each of which uses existing innovation as the raw material for new advances.

This means that if intellectual property policy protection for today’s innovators is too strong, tomorrow’s innovators will be unduly impeded, and progress will slow down. Thus the rule against copyright in *scenes à faire*.

Second, the Internet may have played an important role in the resolution of the Coldplay lawsuit. In cases of this kind, each party hires its own expert musician to “dissect” the songs and determine whether the similarities are due to copying or coincidence. Here, however, those experts had the voluntary assistance of dozens of commentators – many of them professional musicians themselves – who expressed their views on the case in audiovisual form and posted the results online.

It’s hard to know whether this input helped resolve the lawsuit; perhaps the hired guns had already found and analyzed all the evidence of similar songs. But the possibility is certainly there – and it accords with other lessons we have learned about the creative power of online social networks. For example, the open-source programming community has taught us that a large, dispersed community can contribute huge value to the copyright world with little expectation of reward. And copyright’s cousin, patent law, has recently begun to experiment with the advantages of having a widespread, voluntary group of experts provide input into the “prior art” that determines the patentability of new inventions.

In the copyright context, however, such diffuse input is possible only when copyright law is sensitive to the fair use rights of Internet users and the websites that serve them. Many media companies argue that YouTube and similar websites should employ filters that automatically prevent the posting of videos containing unauthorized copyrighted content. If those filters had been in place, however, it is likely that none of these helpful videos would ever have made it into public view, despite the fact that they appear to qualify for infringement’s fair use exception.

In fact, Coldplay’s label, EMI, insisted on the removal of some of the YouTube videos that compared the songs, leading Wired.com to [speculate that EMI was using copyright to mold public opinion in its band’s favor](#). That possibility seems far-fetched, given the number of videos that EMI did not seek to remove, but the incident does show how an overly regimented approach to online copyright infringement can endanger the values that underlie fair use.

A court may soon decide whether YouTube does indeed have an obligation to filter out copyrighted material, as [the video service has been sued](#) by a number of media companies.

But with my luck, it will probably settle.

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