PART II

Analysing Music Genres and their Relationship with Copyright

Section A: General

7

Pop and the Musical Unconscious

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I. Introduction

It is often claimed that pop music is a genre predicated on a distinctively fleeting musical catchiness, an unmistakable youth appeal and a certain disdain for the establishment. As an indicator of what was to come, these attributes are interesting because pop ended up becoming the musical genre that attracted more legal controversies than any other. While it might be possible to trace legal disputes affecting pop artists regarding the originality of facial make-ups, the illegitimate release of album covers or the rise of merchandising controversies over brand exploitation, copyright became the pre-eminent legal device in the historical narrative that defined pop music. The law of copyright has often been called upon to deal with contractual quarrels over royalties, piracy and plagiarism, and the great variety of legal claims raised or defended by pop artists was epitomised by the history of the band in which the genre is frequently claimed to be rooted – The Beatles.

Pop music has attracted so much copyright litigation because, as a forensic musicologist ironically observes in this volume, 'that is where the money is'.[1] The well-known US case in which former Beatle, George Harrison, was sued for copyright infringement seems to confirm this premise.[2] Money appears to have been the main trigger for the dispute. Gold discs, celebrity stardom, catchy songs and musical similarities constituted the common elements that brought this and many other controversies over musical properties into the courts. In this specific instance, the judge ruled that Harrison had subconsciously copied the plaintiff's composition. From a legal perspective, it is the resonance of this judgment that is remarkable. It is often mentioned in textbooks, conferences and scholarly articles.[3] Although some domestic courts have pointedly declined to follow the decision as it came from another jurisdiction, this has not stopped lawyers

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[1] See G Protheroe, 'Forensic Musicology in Action: A Personal Perspective', ch 5 of this volume.

[2] *Bright Tunes Music Corp v Harrisongs Music Ltd* 420 F Supp 177 (SDNY 1976). For this case and many other pop music controversies, see the Music Copyright Infringement Resource (Columbia Law School and the George Washington School of Law) at https://blogs.law.gwu.edu/mcir/.

[3] WM Landes and RA Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003) 88; J Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1992) 68 *Chicago-Kent Law Review* 841, 882; D Vaver, 'Creating a Fair Intellectual Property System for the 21st Century' (2001) 10 *Otago Law Review* 1, 8; S Corbett, 'Creative Commons Licenses, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?' (2011) 74 *MLR* 503, 508; T Aplin and J Davis, *Intellectual Property. Text, Cases and Materials* (Oxford University Press, 2021) 201.

and legal scholars from repeatedly referencing it.[4] One reason for this insistence is that the case exemplifies an infringement arising from an unintentional act of borrowing.[5] At first glance, this type of borrowing appears paradoxical, but it serves to highlight that pop music is a genre especially inhabited by the unconscious.[6] In fact, the judge himself committed a Freudian slip after his judgment, referring to the two songs as if they were distinct.[7] Although the decision remains a frequent trope in copyright scholarship, the mechanisms by which the case came to judgment have received far less attention. The legal proceedings, the evidence and the events that took place in the courtroom and afterwards have been eclipsed by a normative discussion around the nature and scope of copyright liability.[8] While the doctrinal impulse is a logical reaction to a type of borrowing that seems to blur the legal distinction traditionally made between copyright and patents, the problem is that it often conflates the descriptive with the normative, thus foreclosing other lines of enquiry.[9] This is regrettable, not only because the musician himself described the experience as a 'nightmarish' week in court,[10] but also because an excessive focus on the regulatory question obscures several recurrent features that tend to characterise pop music's encounters with the law.

This chapter traces some of these characteristics by revisiting the details of the dispute, and its associated procedural difficulties, which spanned over two decades. On the one hand, it argues that media influences on human agency tend to shape the way pop music comes to be thought of and imagined in copyright law. On the other hand, it offers an alternative reading of copyright litigation and adjudication beyond the debates of experts. Despite the heavy emphasis on forensic musicologists, primarily because they tend to narrow and stabilise an analytical framework for comparison and judgement, there is much more to be said about the associations between pop music and copyright. Looking beyond the musicological expertise offers a starting point to trace connections that made pop music significant as both a legal and a cultural phenomenon.

II. Hearing

What does popular music mean? How can it be measured? Through sales? Peer recognition? Followers? Cult status? Or does it depend on people still recalling a song despite the passing of time? It is telling that trials involving pop music often begin with attempts to measure popularity and success.[11] The concept of 'the popular' is problematic because of the ambiguity of the term and its changing connotations.[12] In that sense, and for the record, is music popularity not

[4] This can be seen in Canadian, British and Australian copyright cases, eg *Gondos v Hardy* (1982) 64 CPR (2d) 145, 38 OR (2d) 555 (Canada); *Drynan v Rostad* (1994) 59 CPR (3d) 8 (Canada); *Michael Mitchell v British Broadcasting Corporation* [2011] EWPCC 42 (UK); *Universal Music Publishing Pty Ltd v Palmer* (No 2) [2021] FCA 434 (Australia).

[5] 'George Harrison Guilty of Plagiarizing, Subconsciously, a '62 Tune for a '70 Hit' *New York Times* (8 September 1976) 42.

[6] P Szendy, *Hits: Philosophy in the Jukebox* (Fordham University Press, 2012) 32–42.

[7] D Pedler, *The Songwriting Secrets of the Beatles* (Omnibus Press, 2003) 637; J Blaney, *George Harrison: Soul Man* (Paper Jukebox, 2016) 116; B Harry, *The George Harrison Encyclopaedia* (Virgin Books, 2003) 279.

[8] CL Alden, 'A Proposal to Replace the Subconscious Copying Doctrine' (2008) 29 *Cardozo Law Review* 1729.

[9] R Metzger, 'Name that Tune: A Proposal for an Intrinsic Test of Musical Plagiarism', (1985) 5 *Loyola of Los Angeles Entertainment Law Review* 61.

[10] The legal ordeal had such an impact on him that it featured in one of his subsequent songs; see G Harrison, *I, Me, Mine* (Chronicle Book, 2002) 340; R Cromelin, 'Lawsuit Inspires Harrison's Song' *Los Angeles Times* (21 November 1976) 93; G Giuliano, *Dark Horse. The Secret Life of George Harrison* (Pan Books, 1991) 166.

[11] See, eg the British copyright case of *Fisher v Brooker & Ors* [2006] EWHC 3239 (Ch) paras 1 and 3 (Blackburne J): 'one of the most successful popular songs of the late, 1960s … [it is] no exaggeration to say that with the passage of time the song has achieved something approaching cult status'.

[12] J Derrida, *Eyes of the University. Right to Philosophy 2* (Stanford University Press, 2004) 175–84.

self-evident?[13] Antoine Hennion suggests that pop songs 'have no need to justify their existence; they exist in their own right, and their sales figures are the only claim to legitimacy they need'.[14] However, establishing what is known of and about the popularity of songs constitutes an important frame of reference in juridical practice.[15] While it might look like a mere fact-finding exercise, it is in reality particularly significant in copyright litigation narratives concerning pop music.[16] The reasons are twofold. First, measuring exposure serves as a springboard for copyright infringement tests that hinge upon access (or causal connection).[17] Second, success ratings and mass consumption indexes allow for the argument that pop songs might have become part of our collective musical unconscious, thus paving the way for the possibility of unintentional musical borrowings. In an era in which music is everywhere, from muzak to Spotify, this possibility exists, enhanced by media saturation and exploitation. However, the predicament in court lies not only in establishing the popularity of a song, but also in the need to prove that the defendant had probably heard it. Indeed, the admissibility of chart popularity indexes was one of the contentious issues in the case against George Harrison.

The hearing began at the Foley Square courthouse in downtown Manhattan in the last week of February 1976.[18] As the plaintiff introduced the first exhibits, the defence attorney, Joseph J Santora, raised an objection against one of them.[19] There was no problem with copyright registrations, depositions or even record sleeves tendered. The main complaint concerned music charts and their probative weight. Their character as out-of-court statements, and hence hearsay evidence, was the subject of some initial legal deliberation. Given the statistical significance of the charts as an index of popularity, their reliability and admissibility were problematic, as they would encourage in the mind of the judge a plausible scenario whereby, as one expert witness in the trial mentioned, 'you can't escape it'.[20] How is it possible not to be exposed to a song if it has been played extensively on air? This assumption echoes the emblematic notion of a radio pop hit, an earworm that has lodged itself in your head, whether it was wanted or not. Even if you did not particularly like it, or did not deliberately tune in to hear it, there it was, and it was impossible to avoid.[21] It would influence you even against your will. Although the objection against charts was partially overcome by the issuing of a subpoena to a staff member of *Billboard*,[22] the defence

[13] According to Umbreit, 'it would be better to treat popularity value as the primary element in copyright': see KB Umbreit, 'A Consideration of Copyright' (1938) 87 *University of Pennsylvania Law Review* 932, 953.

[14] A Hennion, 'The Production of Success. An Anti-Musicology of the Pop Song' (1983) 3 *Popular Music* 59, 162.

[15] See, eg the US copyright cases *Packson v Jobete Music* 1967 [unreported]; *Devin Copeland v Justin Bieber et al*, 789 F 3d 484 (4th Cir 2015); *Williams v Gaye*, 895 F 3d 1106, 1116 (9th Cir 2018).

[16] In the British case of *Francis Day & Hunter v Bron* [1963] Ch 587, this question of how to figure out the factor to achieve a high place in the Hit Parade was put to expert witnesses such as Geoffrey Bush and Stanley Smith-Masters. See 'English Evidence: Francis, Day, & Hunter v Bron' in RG21 – Records of the District Court for the Eastern District of PA, Civil Action, File 27800, National Archives and Records Administration (NARA) Archives.

[17] *Carew v RKO Radio Pictures* 43 F Supp 199 (1942); *Ellis v Diffie* 177 F 3d 503, 506 (6th Cir 1999); see generally MB Nimmer and D Nimmer, *Nimmer on Copyright* (Matthew Bender, 1963) 604–05 ('Copying by the defendant').

[18] George Harrison was represented by Hardee, Barovick, Konecky & Braun. The reason was that one of the partners was David Braun, a well-known music lawyer who had represented Bob Dylan and Neil Diamond. Interview with Stephen Ross, 3 March 2022.

[19] *Bright Tunes-Music v Harrisongs Music Ltd et al*, transcript of the hearing, 14–16 (docket 71-CV-602); Box 5449; RG 21; Records of the US District Court for the Southern District of New York, Civil Action, National Archives and Records Administration (NARA) (hereafter 1976 hearing transcript).

[20] David Greitzer (on cross-examination), 1976 hearing transcript (n 19) 102.

[21] Learned Hand explained this in the following manner: '[E]verything registers somewhere in our memories, and no one can tell what may evoke it … Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick'. See *Fred Fisher, Inc v Dillingham*, 298 F 145, 147–48 (SDNY, 1924).

[22] Constance Bewen (direct examination), 1976 hearing transcript (n 19) 154–60. Bewen was the supervisor of the steno pool at Billboard Publications.

attorney continued arguing against their use on the basis that 'an entry in *Billboard* is not the same as a certified Government document in this sort of thing'.[23]

It is important to highlight that music charts and record listings were invoked and displayed repeatedly throughout the proceedings.[24] As the lawyer in the parallel action brought against Harrison in England observed, one of the difficulties in the trial preparation was to obtain 'a blackboard and easel to hang the charts from, but we are continuing our efforts in this connection'.[25] While charts served to build a discourse about the currency and purported popularity of the plaintiff's song, and therefore the chance that Harrison had heard it, their centrality also set up the argument of unconscious borrowing. It is notable how many pop music copyright cases continue to be tied to framing strategies that use music charts as a springboard for an argument.[26] As Ken Barnes has explained, record companies loved the various music charts, largely because they enabled them to differentiate songs and develop advertising campaigns so they could 'create a success story for a record'.[27] As music charts served the dual purposes of data collection and product promotion, they represented marketing devices to capture audiences and incentives to buy a record using a teaser. However, the rising importance of charts to buttress legal cases had an unintended consequence, namely their influence in reducing the plausible explanation of substantial similarities to the following hypothetical dichotomy: coincidence or unconscious copying.

In this specific case, 'He's So Fine', the popular song by The Chiffons that the plaintiff, Bright Tunes, alleged had been infringed by Harrison, had been top of the charts in 1963.[28] George Harrison's song, 'My Sweet Lord', had also topped the charts in the early 1970s.[29] The similarity between the songs seemed obvious, as the experts demonstrated extensively in court.[30] However, among the expert testimonies introduced by the defendant was a witness somewhat different from the typical musicologist. Harrison's defence called on an ethnomusicologist who specialised in gospel.[31] The point was to move the analysis from forensic musicology to another musical perspective. This shift relied on the definition of ethnomusicology as 'a branch or separate field, actually, depending on who you speak to, of musicology. We prefer as ethnomusicologists to think of it as a separate field totally from musicology.'[32] This particular witness provided evidence highlighting how 'My Sweet Lord' was to be interpreted as deriving not from the plaintiff's work, but from a religious and spiritual allure based upon musical improvisations and mantras. The very title of the song suggested that characteristic, which was enhanced by a repetition of Christian and Hindu mantras ('hallelujah' and 'Hare Krishna') to praise the Lord.[33] While neither

[23] ibid 160.

[24] George Harrison (cross examination), 1976 hearing transcript (n 19) 258–59.

[25] Ray Palmer, Davenport, Lyons & Co to John Gardner, 22 June 1976; John Gardner Papers (hereafter JGP).

[26] See, eg *Three Boys Music Corp v Bolton*, 212 F 3d 477 (9th Cir 2000); *Pharrell Williams et al v Bridgeport Music et al*, No 15-56880 (9th Cir 11 July 2018).

[27] K Barnes, 'Top 40 Radio. A Fragment of the Imagination' in S Frith (ed), *Facing the Music. Essays on Pop, Rock and Culture* (Mandarin, 1990) 41. The specific relationship between music charts and pop music is explored in C Belz, *The Story of Rock* (Oxford University Press, 1969) 17–20; EA Hakanen, 'Counting Down to Number One: The Evolution of the Meaning of Popular Music Charts' (1998) 17(1) *Popular Music* 95.

[28] *Bright Tunes Music Corp v Harrisongs Music Ltd* 420 F Supp 177, 179 (SDNY 1976); see also S Soocher, *Baby, You're a Rich Man. Suing the Beatles for Fun & Profit* (University Press of New England 2015) 178.

[29] JM Greene, *Here Comes the Sun. The Spiritual and Musical Journey of George Harrison* (Bantam Books, 2006) 226.

[30] Some music journalists, like Peter Jones, had already identified similarities between the songs; see P Jones, 'Mirror Pick' *Record Mirror* (24 July 1971) 16.

[31] David Simpson Butler (direct examination), 1976 hearing transcript (n 19) 479–519; see also A Clayson, *George Harrison* (Sanctuary Publishing, 2001) 354.

[32] Butler (direct examination), 1976 hearing transcript (n 19) 480.

[33] Harrison (direct examination), 1976 hearing transcript (n 19) 203.

the plaintiff nor the judge felt that this testimony was relevant, it is nevertheless remarkable, as it was aimed at prompting the argument that musical genres and traditions could determine that songs that are substantially similar, analytically or forensically, might nevertheless be culturally, and thus musically, different.

This blind spot has not gone unnoticed. For instance, Richard Elliot has recently considered how the legal case focused almost exclusively on 'plagiarism of melodic motifs, with little reference to lyrics beyond their syllabic value'.[34] By placing such an emphasis on melodic motifs, the court was constrained by its own search for musical equivalences, missing the connections between words and melodies that transcend them.[35] It is clear that the mantras were not original and could not be subject to copyright protection, but Harrison was arguing that, at the point of recording and composing the song, they were its most important determiners.[36] Indeed, this way of fashioning the argument relied on defining Harrison's song as an invocation, whose choruses depicted a search for immediate contact with God and Krishna, introducing a Sanskrit prayer and shifting the analysis of musical similarities to a genealogical enquiry about its provenance. Although the point was not successful in avoiding copyright liability, it was significant in the assessment of damages. The consequence implied here is that there might be different gradations of musical borrowing.[37] According to the defence attorney, the infringement was partial as it did not touch upon the lyrics and some aspects of the tune; hence, 'any award to the plaintiff should be on that basis alone commensurate and be even less than a 50 per cent'.[38]

A. Sotto Voce

One of the interesting features of the case is that George Harrison himself was called to give evidence and became the central object of attention in the courtroom. Although it is possible to see the influence of forensic experts in dissecting the songs, Harrison's testimony was pivotal, not only because the judge accepted its credibility, but also because, in doing so, he implied that Harrison neither intended to copy nor was conscious of having done so. How did Harrison copy? How did he compose? What did he have to say? As the decision depended on the view that copying was not deliberate, Harrison's testimony and his demeanour seem to have won the judge's sympathy to enable the peculiar finding of inadvertent copying. What those who attended the trial still remember is that 'there was a peacefulness and humility about him and I think the Judge recognized this, especially when George was testifying and demonstrating on his guitar the notes and chords he used in composing "My Sweet Lord"'.[39]

Harrison was often labelled 'the quiet one' of the Beatles, and the transcript of the hearing confirms that personality trait.[40] Both in examination and cross-examination, Harrison's

[34] R Elliott, 'So Transported: Nina Simone, "My Sweet Lord" and the (Un)folding of Affect' in M Thompson and I Biddle (eds), *Sound, Music, Affect. Theorizing Sonic Experience* (Bloomsbury, 2013) 81.

[35] See, eg EJ Huntley, *Behind that Locked Door. George Harrison: After the Break-Up of the Beatles* (Xerostar Holdings, 2002) 67.

[36] This can also be seen in his conversation with Mukunda Goswami in AC Bhaktivedanta Swami Prabhupada, *Chant and Be Happy. The Power of Mantra Meditation* (The Bhaktivedanta Book Trust, 1997) 32–35; see also O Harrison, *George Harrison. Living in the Material World* (Editions de la Martinière, 2011) 280.

[37] One particularly enlightening essay on the gradation is P Nettl, 'Musical Kleptomaniacs' *The Etude* (February 1947) 66.

[38] *ABKCO Music, Inc v Harrisongs Music*, transcript of the hearing (docket 71-CV-602) 35; Box 5526; RG 21; Records of the US District Court for the Southern District of New York, Civil Action, National Archives and Records Administration (NARA) (hereafter 1979 hearing transcript).

[39] Correspondence with Joan Chiarini, February 2022; interview with Bob McKay, February 2022.

[40] See, eg A Clayson, *The Quiet One. A Life of George Harrison* (Black Bear, 1991).

testimony came across as rather odd and he was frequently interrupted with requests to raise his voice.[41] Instead of delivering a robust testimony, his voice was so soft as to be on occasion almost inaudible. This was nowhere better displayed than in the response he gave to the request to describe how he composed his music. This question of authorship was of considerable significance because, as many other pop musicians mentioned in the trial, he did not read music.[42] As Harrison stated,

> there is no particular way to write a song from my point of view, and also from most people that I know who compose songs. I mean it can come either with just an idea driving in a car, just by playing about on an instrument I can get an idea just by a rhythm, hearing a rhythm. You could write a song to that police siren outside if you want to …[43]

While this reference, connecting what was happening outside to the inside of the courtroom, illustrated an openness to transforming and absorbing anything into music, it also evidenced a distraction and a difficulty when it came to pinpointing exactly where inspiration might emerge.[44] It is no coincidence that a recurring problem in pop music copyright relates to disputes about joint authorship precisely because of that empirical difficulty to which George Harrison testified in court.[45] And yet, when he was trying to explain it, he was interrupted again:

> *Q:* Mr Harrison, can you raise your voice just a little bit so I can hear you? The windows are open, and the sirens you are talking about, the sound make it difficult. You mentioned something like sound, you hear sounds. You mentioned the police siren a moment ago, and you said that that at times can cause you to compose a song. Can you think offhand of an example or two where you have composed a song in that fashion?[46]
>
> *A:* I mean, for example, the police car was just going. And that is a rhythm, straight away, so all you need, I mean on one example I was on a holiday in Sardinia, and the house I was staying in had a water pump that I think was for circulation of a swimming pool. It was in a shed, and the rhythm that the water pump was making, I composed a song just starting from that rhythm.[47]

Somewhat cryptic, perhaps, but indicative of sound as the starting point for musical inspiration. For Harrison, music was 'something I hear and I feel'.[48] Curiously, this description echoes the way in which David Byrne has recently explained his view of musical creativity,[49] and seems to confirm Lionel Bently's observation that 'in popular music, it is sounds that matter'.[50] Harrison testified at length at the trial, bringing a guitar to the courtroom and performing musical demonstrations directly relating to the issue of how he composed 'My Sweet Lord'.[51] Although illustrations and musical renditions by expert witnesses had been a recurring feature of copyright litigation,[52] it was not so common to see a defendant demonstrating methods of composition in court via

[41] George Harrison (direct examination), 1976 hearing transcript (n 19) 164, 170, 176, 178 (recalled), 329.
[42] Harrison (direct examination), 1976 hearing transcript (n 19) 189.
[43] Harrison (direct examination), 1976 hearing transcript (n 19) 176.
[44] See, eg M Cable, *The Pop Industry. Inside Out* (WH Allen, 1977) 138–50.
[45] In fact, the judge also speculated that the infringing song, 'My Sweet Lord', was coauthored with another musician, Billy Preston; see *Bright Tunes Music Corp v Harrisongs Music Ltd* 420 F Supp 177, 180 (SDNY 1976).
[46] Harrison (direct examination), 1976 hearing transcript (n 19) 176.
[47] ibid 177.
[48] Harrison (cross-examination), 1976 hearing transcript (n 19) 278.
[49] D Byrne, *How Music Works* (Canongate, 2013) 210.
[50] L Bently, 'Authorship in Popular Music in UK Copyright Law' (2009) 12 *Information, Communication and Society* 179.
[51] Harrison (direct examination), 1976 hearing transcript (n 19) 184, 196.
[52] Perhaps the most famous of these expert witnesses was Sigmund Speath, known as the 'tune detective', who was reported singing, tapping his feet and playing the piano on his multiple court appearances. See *Rich v Paramount Pictures, Inc* [Civ No 20256 Second Dist, Div One, 15 February 1955]; F Waring, 'In Memory of Sigmund Speath' *Music Journal* (1 January 1967) 25; S Speath, 'Musical Plagiarism' (1936) 173 *Harper's Magazine* 329; GA Rosen, *Unfair to Genius. The Strange and Litigious Career of Ira B Arnstein* (Oxford University Press, 2012) 101–18.

a musical instrument.[53] Introducing an instrument into proceedings was significant, not only because it shifted the perception beyond the printed score, but also because it reinforced the quality of pop music as a genre primarily defined by playing.[54] Evidence scholars like Gerald Nokes had already highlighted that 'a musical instrument may be both seen and heard, though once the sound of words is in question, as with a gramophone record of a song played in court, the border between real and other evidence requires delineation'.[55] What is also interesting in the context of that border between real and other evidence is Harrison's specific selection of musical instrument. While it would later become obvious why he chose a guitar, the fact is that music copyright lawsuits until then had been characterised by the prominence of the piano as the ideal vehicle to demonstrate points in dispute.[56] The sovereignty of the piano as an evidential tool had been such that some lawyers went further, giving advice as to the type, characteristics and positioning of the instrument to be brought to the courtroom:

> [A]n upright [piano] is preferable to a spinet, for it has a superior courtroom presence and afford a convenient platform for exhibits and sheet music. Because the piano is useful in emphasizing or demonstrating elements of testimony, it should be positioned as near as possible to the witness stand and the court reporter, so as to minimize interruption to the flow and cohesiveness of the presentation'.[57]

The court performance seems to have proved exactly what Harrison had previously revealed in his testimony, namely, as recalled by his attorney, 'that neither he nor any of the other Beatles read music, and that they were all "jungle musicians" who operate[d] strictly by sound'.[58] Although such unorthodox evidence could have irritated the judge, there is no trace in the transcript of that reaction. Quite the opposite, in fact. According to Harrison's attorney, the judge 'sincerely and strongly believed that it was his original composition and not an infringement'.[59] While this reading of the decision is debatable, it is nevertheless accurate to suggest that Harrison's unusual testimony enabled the judgment that his copying was unconscious rather than deliberate and wilful.[60] The judge concluded that his

> subconscious knew it already had worked in a song his conscious mind did not remember … Did Harrison deliberately use the music of 'He's So Fine'? I do not believe he did so deliberately. Nevertheless, it is clear that 'My Sweet Lord' is the very same song as 'He's So Fine' with different words, and Harrison had access to 'He's So Fine'. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.[61]

[53] Although it was not common for defendants to demonstrate musical abilities, there was a long history of evidential practice whereby plaintiffs performed different instruments (eg violin and piano) in court to support their case; see *Arnstein v Edward B Marks Music Corp* 11 F Supp 535 (SDNY 1935); *Arnstein v Edward B Marks Music Corp* 82 F 2d 275 (2d Cir 1936); 'Song Writer Plays Piano for Court' *New York Times* (7 March 1939) 25; Rosen, *Unfair to Genius* (n 52) 119–45.

[54] It is no surprise, then, that the dichotomy between authorship and performance is often blurred in pop music; see R Arnold, 'Are Performers Authors?' (1999) 21 *European Intellectual Property Review* 464.

[55] GD Nokes, 'Real Evidence' (1949) 65 *Law Quarterly Review* 57, 64.

[56] *Wilkie v Santly Brothers, Inc* 91 F 2d 978 (2nd Cir 1937); *Allen v Walt Disney* 41 F Supp 134 (SDNY 1941); *Jones v Supreme Music Corp* 101 F Supp 989 (SDNY 1951); *Northern Music Corp v King Record Distributing Co* 105 F Supp 393, 400 (SDNY 1952); *Rich v Paramount Pictures, Inc* [Civ No 20256 Second Dist, Div One, 15 February 1955].

[57] JS Clark, 'Copyright Litigation' in MD Kraft (ed), *Using Experts in Civil Cases* (Practising Law Institute, 1977) 146.

[58] JJ Santora, *Bright Tunes v Harrison (1971–1998)* (unpublished memoirs, 1999) 2, Santora Zimmerman archive (hereafter SZ).

[59] Joseph J Santora (affidavit), 1979 hearing transcript (n 38) 214–15.

[60] 'It is apparent from the extensive colloquy between the court and Harrison covering 40 pages in the transcript that neither Harrison nor (Billy) Preston were conscious of the fact that they were utilizing the "He's So Fine" theme': *Bright Tunes Music Corp v Harrisongs Music Ltd* 420 F Supp 177, 180 (SDNY 1976); see also 'Harrison Guilty' *Variety* (8 September 1976) 82; 'George Harrison Guilty of Plagiarism' *Billboard* (11 September 1976) 21; 'Subconscious Plagiarism Infringes Copyright' (1977) III(2) *Art & the Law* 6.

[61] *Bright Tunes Music Corp v Harrisongs Music Ltd*, 420 F Supp 177, 181 (SDNY 1976).

For that finding to be arrived at, however, there was a preliminary step, a causal trajectory where the possibility of copying was established. The rhetorical strategy pushed by the plaintiff consisted of privileging music charts to document a chance or possibility of copying.

A key moment in Harrison's cross-examination reflects the legal strategy to establish a causal relation between the litigants. It came when Harrison was asked if he had heard the plaintiff's recording, described by the plaintiff's attorney as a hit radio song in England. When Harrison denied having heard the song, he was confronted with the UK charts in which the plaintiff's song appeared 'virtually at the same time as the Beatles' own recordings'.[62] Again he denied being aware of this fact, but was asked to scroll down the charts to state the ranking position in which both were listed.[63] Bringing Harrison to read aloud the coexisting time frame of popularity eventually helped to link his testimony to that plausibility sought by all copyright plaintiffs: the opportunity to copy. Music charts produced this potentiality in and of themselves, allowing their perspective, their qualitative measurement, to be produced in court. Seeing radio charts in this way gradually advanced the argument from the question of *timing* towards the issue of the *manner* in which the copying could have taken place, shifting the question of access towards that of awareness. This could be rephrased, as some copyright agencies and index-hunters had already flagged in the 1960s, as inadvertent copying.[64] The unfortunate effect of media exposure was the production of an echo of a memory that could not necessarily be intentionally recalled. The music was stored in the head, coming out accidentally years later. In that sense, the introduction of radio charts tied together to musical resemblances raised the spectre of unconscious copying.

Given that radio popularity caused a degree of subjectivation, the mass medium could equally prompt a collateral effect – the production of accidental similarities and innocent infringers. It is no surprise that several scholars have focused on these unintended effects in their attempt to develop normative solutions to fix what they conceive as copyright 'accidents'.[65] This doctrinal shift could help to solve the puzzle of liability. Ascribing agency and responsibility using moral or fault-based credentials could be taken to imply not only bureaucratic standards (instead of rules) governing the possibility of copyright infringement, but also the act of unconscious copying, defined as 'a sin of neglect rather than intention'.[66] One can add here that, in any case, Harrison did not have any sense of guilt; nor did he feel redeemed or reconciled by the decision. His concern was that he could not understand 'how the courts aren't filled with similar cases – as 99 percent of the popular music that can be heard is reminiscent of something or other'.[67] Curiously, a subtle link between unintentional hearing, ubiquity and the unconscious had already become explicit a couple of decades earlier. The Muzak company had based its success on the premise of disseminating music to be heard but 'not listened to'.[68] Recorded music had been franchised to restaurants, elevators, banks, factories, transatlantic aeroplanes and a variety of places to be easily assimilated unintentionally by workers and consumers.[69] Its omnipresence was

[62] Harrison (cross examination), 1976 hearing transcript (n 19) 258.

[63] ibid.

[64] 'Rencontres, réminiscences, plagiats' *SACEM, Bulletin d'information de la société des auteurs compositeurs et éditeurs de musique* (April 1965) 30.

[65] See, eg O Bracha and PR Goold, 'Copyright Accidents' (2016) 96 *Boston University Law Review* 1025, 1038.

[66] R Posner, *Little Book of Plagiarism* (Pantheon Books, 2007) 97.

[67] 'My Sweet Lord' in F Bronson, *The Billboard Book of Number One Hits* (Billboard, 1985) 286; see also M Brown, 'A Conversation with George Harrison in *Rolling Stone*, 19 April 1979' in A Kahn (ed), *George Harrison on George Harrison. Interviews and Encounters* (Chicago Review Press, 2020) 271.

[68] J McDermott, 'If It's To Be Heard but Not Listened To, It Must Be Muzak', box 215, folder 9, John Steiner Collection, University of Chicago Library.

[69] Another way of expressing this was to refer to Muzak as 'somnambulist' music. See William Benton to Ethel Maclean, 18 July 1949, William Benton papers, box 226, folder 5, University of Chicago Library.

such that Anthony Haden-Guest wrote that 'Muzak will attend your birth in (for instance) the Mercy Home, Carolina; and your death in (for instance) the Nelson Funeral Home, Arkansas, or a crematorium in Birmingham'.[70] Although there might be some obvious differences between the copyright decision under discussion and Muzak, there is, nevertheless, an interesting shared premise, typified in the way Muzak was described as 'music for the subconscious'.[71]

B. Money

It is remarkable how the musicological analyses avoided the subject of economic success, given that much of the emphasis in the dispute was on the connection between copyright and money – how to trace it, whether and when to settle, how to account for it. The protracted legal controversy involving 'My Sweet Lord', which had started in the early 1970s, affected Harrison's subsequent ventures, such as the recording of an album tellingly entitled *Living in a Material World* (1973) and the establishment of the Material World charitable foundation, which used copyright royalties as a way to fund humanitarian projects.[72] It took more than five years for the copyright dispute to reach the courts as the plaintiff, Bright Tunes, had financial difficulties and had gone into receivership.[73] After the liability hearing in August 1976 had found Harrison liable of a copyright infringement, the next legal hurdle was the calculation of damages.[74] How could one assess the damage caused by a subconscious copying? How to account for an unintentional liability? Interestingly, the question raised again the issue of popularity, shifting the focus from the media to the legal remedy, and from access to the plaintiff's song to the success of the defendant's infringing composition. The shift in the legal process meant turning the eye to the role of popularity in record sales, live performances and radio airtime.[75] Although this might be disregarded as a mere bean-counting exercise, the peculiarity of the infringement (unconscious or unintentional) required a certain calibration in the estimation of damages.[76] As the judge himself pointed out, 'had I earlier found that Harrison deliberately plagiarized the music, I would award the entire earnings of "My Sweet Lord"'.[77]

The assessment of damages was further complicated by the fact that the infringing song, 'My Sweet Lord', was a big hit, so there was a need to consider its worldwide reach, the different sublicensing agreements and the existence of infringement claims pending or settled in other jurisdictions.[78] While radio stations used individual songs in their programmes and playlists,

[70] A Haden-Guest, *Down the Programmed Rabbit-Hole* (Hart-Davis MacGibbon, 1972) 12.

[71] L Lader, 'Music That Nobody Hears' [September 1950] *Nation's Business* 58; Ronald H Coase papers, box 84, folder 3, University of Chicago Library.

[72] George Harrison chronology, March 1973, box 40; George Harrison visit 13 December 1974, Sheila R Weidenfeld Files, Gerald R Ford Presidential Library; Harry (n 7) 278.

[73] JC Self, 'The "My Sweet Lord"/"He's So Fine" Plagiarism Suit' [1993] *9/10 Magazine*.

[74] 'Good Lord! It's the Same Old Song' *Melody Maker* (18 September 1976) 30.

[75] *ABKCO Music, Inc v Harrisongs Music Ltd* 508 F Supp 798, 800 (SDNY 1981).

[76] Huntley (n 35) 165.

[77] *ABKCO v Harrisongs* (n 75) 804.

[78] In fact, a similar infringement action brought in England by the British copyright assignee of 'He's So Fine', The Peter Maurice Co Ltd, began in January 1974 and was settled out of court in 1977. The hearing date was distanced off due to the heavily congested state of the court lists in England, so it ended up being scheduled after the American liability case was decided, facilitating the ground for a negotiated agreement between the parties; see Palmer to Gardner, 5 April 1976; JGP (n 25). Although there is obviously no law report, the first expert approached by the claimant for advice, Geoffrey Bush, declined the possibility to participate in the case for the plaintiff, saying 'he could never believe that a former Beatle could have infringed any copyright, either consciously or unconsciously', and acted instead for the defendant (Harrisongs); see J Bellido, 'Popular Music and Copyright Law in the Sixties' (2013) 40 *Journal of Law and Society* 593. The expert

record companies had become increasingly album-orientated since the early 1950s.[79] This difference in the way the musical commodity circulated raised the problem of the calculation of its value, and apportionment of damages from a copyright perspective.[80] If radio time was easy to track, the impact factor and the value of a song in an album was significantly more difficult to ascertain.[81] For example, how much money was derived from an infringing song that was included in an album alongside other tracks? This question not only referred to *All Things Must Pass*, on which the infringing song was originally released, but also affected albums such as *The Concert of Bangladesh* (1971) and *The Best of George Harrison* (1976), on which 'My Sweet Lord' had been also included.

Here the law hesitated between a mechanistic theory of profits, whereby cuts or tracks in an album were considered equally in the treatment of royalties, and a more subjective appreciation of the significance of the infringing piece in those albums, based on the consideration that the most popular song was the crucial factor contributing to sales.[82] Either way, the accounting exercise in respect of the income from the infringing song was even more vexing in respect of the other two albums. On the one hand, a significant aspect of *Bangladesh* was that the presence of other musicians such as Bob Dylan and Ravi Shankar could explain its popularity and sales.[83] The difficulty with the second album was not only the fact of its release after the copyright judgment, but also its special character as a compilation of previous hits, therefore making it even more difficult to assess profits attributable to the infringing song.

Another way in which the law tried to deal with the lack of legal definition of the notion of popularity was by enlisting the evidential assistance of copyright collecting societies, such as the Performing Rights Society (UK) or Broadcast Music, Inc (USA), as their role was to monitor the exploitation of musical works from their repertoire. While the production of paper records relating to performances has an evidential weight in the tracing of money routes, the significance of collecting societies in these narratives is also derived from other administrative decisions. After a legal controversy is flagged up, they tend to temporarily freeze royalty accounts until a dispute is resolved.[84] As copyright litigation in pop music is costly and tends to be prolonged over years or decades, the effect of such an internal administrative decision over the financial lives of musicians and music publishers is weighty. In taking this stance, collecting societies often steer the parties towards settlement and mediation. This could also explain how some cases never reach the courts, therefore partly answering Harrison's question as to how come the courts were

musicologist approached subsequently by the plaintiff in England, John Gardner, thought that resemblance between the songs was unassailably precise, making it 'a cast-iron case'; see Gardner to Irene Bull, 29 April 1993, 'Love Hurts folder', JGP (n 25). However, after the settlement out of court, Gardner received a letter from Geoffrey Bush in which he said, 'meaningfully, that all the Court Ushers and Reporters, chairwomen and odd bods were strongly of the opinion, after listening to the records, that there was no resemblance between the songs!': Gardner to Palmer, 6 July 1977, JGP (n 25).

[79] The market for records dramatically changed the course of music publishing after the Second World War and recordings became the major way in which music was communicated. '[T]he introduction of the LP album which could include twelve songs instead of the two previously available on singles created opportunities for the use of six times as many songs although the unit price per song to the consumer remained about the same': L Feist, 'Notes for the Bicentennial. 300+ Years of American Music Publishing', Leonard Feist papers, box 4, folder 5, New York Public Library, Library for the Performing Arts, Music Division.

[80] RS Rosen, *Music and Copyright* (Oxford University Press, 2008) 238–39.

[81] *ABKCO v Harrisongs* (n 75) 804. The judge used the Broadcast Music, Inc monitoring of air play by disc jockeys to estimate the value of each song from the album *All Things Must Pass*.

[82] Huntley (n 35) 165–67.

[83] G Cannon, 'The Bangladesh Concert Records' *The Guardian* (4 January 1972) 8. On the tax and legal problems of the Bangladesh album, see Clayson, *George Harrison* (n 31) 311–19.

[84] 'Plagiats', *SACEM, Bulletin d'information de la société des auteurs compositeurs et éditeurs de musique* (February 1967) 26–27.

not filled with similar cases. The opportunity to encourage mediation did not arise in this case. Although Harrison and his publishing company, Harrisongs, were affiliated to different societies, such as the PRS, the composer of the song owned by the plaintiff, Ronnie Mack, was not a member of a collecting society.[85]

C. Trust

Often lost in the doctrinal analysis of the decision are the specific procedural details that made the case even more remarkable. The switch from liability to damage incidentally revealed operations before and after the trial in a way that characterised the pop music industry throughout the 1970s. It not only showed how royalties, past and future, could be estimated, but also how entangled relationships and arrangements between musicians and agents could cloud the issue, even to the point of influencing the very possibility of a legal dispute. These dealings, negotiations and arrangements were fundamental in commercialising pop. For example, business agents and managers mediated the transfer of music into recordings and their circulation around radio and television stations, contributing to their popularity.[86] As essential as they were in codifying copyright into business, these relationships tended to be brittle and ephemeral, somehow mirroring the genre itself, brief by its very nature and characterised by the splitting up of bands or the meteoric rise and downfall of music trajectories.[87] One of the consequences of this volatile environment was that, once these relationships started to crumble, acrimonious legal disputes ensued. These breakdowns are intriguing and yet somehow strangely ordinary at the same time, particularly because loyalties were tied to royalties as a way to reimburse agents for negotiating record contracts and promoting artists.[88]

Shortly before this case moved to the damage phase, the Beatles' notorious former business manager, Allen B Klein, acquired both the copyright interest of the plaintiff and the damage claim against Harrison.[89] In doing so, his company, ABKCO, replaced the original plaintiff in the proceedings. The move appeared to signal the typical side-switching, back-stabbing reaction of a disgruntled former manager – in this case, one well known for his litigious character.[90] It looked like a strategy developed after the judicial outcome, so the swap was accepted by the court and ABKCO continued the damage proceedings against Harrison in relation to the unconscious copyright infringement.[91] However, as Klein's lawyers had advised Harrison previously, this substitution meant not only that he was sued by his former manager, but ironically that this

[85] Ruth Beltram, PRS to Paul Adler, ASCAP, 6 October 1986, PRS archives (Harrisongs).

[86] Rogan's discussion of different types of managers in pop history is particularly interesting. According to Rogan, the function of the pop manager in the 1960s was somewhere between 'the hard businessman, the medical doctor and the dedicated schoolteacher'. J Rogan, *Starmakers and Svengalis: The History of British Pop Management* (Trans-Atlantic Publications, 1988) 266.

[87] J Fielding, 'Insight: The Toughest Wheeler-Dealer in the Pop Jungle' *Sunday Times* (13 April 1969) 1–2.

[88] In the UK, Salmon LJ provided a telling depiction of the significance of management in pop music: 'Almost anything a manager might do, however harmless or trivial, could induce hatred and distrust in a group of highly temperamental, jealous and spoilt adolescents'. See *Denmark Productions Ltd v Boscobel Productions Ltd* [1968] 3 WLR 841.

[89] 'Agreement between Bright Tunes and ABKCO Music, Inc, 13 April 1978'; *ABKCO v Harrisongs* (n 75) 803.

[90] F Goodman, *Allen Klein: The Man Who Bailed Out the Beatles, Made the Stones and Transformed Rock & Roll* (Eamon Dolan/Houghton Mifflin Harcourt, 2015) 278. This seems to be confirmed by the number of legal cases that the firm got involved in after the well-known disputes that Klein had against the Rolling Stones, the Beatles and the Kinks. See, eg *ABKCO Music, Inc v Stellar Records, Inc* 96 F 3d 60, 62 n 4 (2d Cir 1996); *ABKCO Music, Inc v LaVere* 217 F 3d 684 (9th Cir 2000); *ABKCO Music & Records Inc v Jodorowsky* [2002] All ER (D) 304 (Feb).

[91] Harry (n 7) 276.

was 'one of the few times in American litigation where one party was responsible for the pleadings on both sides of a case'.[92] Significantly, the discovery proceedings opened another line of inquiry – the way the manager might have influenced the circumstances under which the initial controversy arose. The key point here, beyond the typical legal trivialities, is that it laid bare the different rationales before and after a trial. Klein (or ABKCO) did not come on the scene after the copyright litigation but had been in contact with the plaintiff at the early stages, that is to say, when the settlement negotiations were taking place.[93] In fact, Harrison's attorney, Joseph J Santora, recalled how the very same process server involved in the Beatles' break-up case against Klein was the one who served the legal papers on Harrison.[94] In any case, the vital issue was that covert interference and the breach of fiduciary duty could have contributed to the failure of the settlement negotiation between Harrison and Bright Tunes, and hence enabled the legal dispute to ensue.

Was this the main trigger of the dispute? What might have happened had Klein not intervened? Although it was not possible to ascertain with absolute certainty whether the copyright case would or would not have taken place without Klein's breach of fiduciary duty, the notable feature here is how money and information were considered as gatekeepers to the law. The disclosure of financial information had the likely effect of having influenced the negotiation by prejudicing the very possibility of a settlement.[95] One of the problems of such conclusion is that it turns the copyright decision upside down, revisiting the controversy before the litigation. Would not settlement have been the preferred vehicle to resolve a dispute that culminated in an unconscious copying judgment? With the benefit of hindsight, yes. However, that possibility was surely off the table because of the breach of fiduciary duty. What could be the legal remedy in a lawsuit that would probably not have taken place without such illegality? This conundrum was addressed by the decision of the district court in 1981, which held that Harrison remained the owner of the copyright in the infringing song, 'My Sweet Lord', and required ABKCO and Allen B Klein to turn over the rights and profits acquired from the original plaintiff in relation to the original song. This meant that a constructive trust was imposed in favour of Harrison.[96] Two years later, the Court of Appeals for the Second Circuit affirmed the judgment of the lower court in the two main issues, namely, ownership by Harrison of the copyright in 'My Sweet Lord' and the constructive trust requiring ABKCO to transfer the rights and profits acquired by it in relation to the original composition, 'He's So Fine'.[97] Although the litigation continued for a decade, also taking into account foreign settlements and redefining the scope of the trust,[98] this twist epitomises the elasticity of the encounter between pop music and copyright, riddled with ambiguities and professional conflicts.[99] Judged in the context of its time, it exemplifies a special type of legal irony, particularly if one compares it to the emphasis on percentages and proportions whereby statistical evidence and expert musicological analysis framed the relationship in the courtroom. In the end, the songwriter who had been found liable for copyright infringement ended up becoming the owner of the song he had infringed.[100]

[92] Santora, *Bright Tunes v Harrison* SZ (n 58) 2.
[93] *ABKCO v Harrisongs* (n 75) 803.
[94] Santora, *Bright Tunes v Harrison* SZ (n 58) 1.
[95] Bertolt Brecht had already suggested this issue in relation to his copyright litigation. See J Bellido, 'Experimenting with Law. Brecht on Copyright' (2020) 31 *Law and Critique* 127.
[96] *ABKCO v Harrisongs* (n 75) 803.
[97] *ABKCO Music, Inc v Harrisongs Music Ltd*, 722 F 2d 988 (2d Cir 1983).
[98] 'Now Harrison Sued in UK' *Music Week* (2 July 1977) 4; 'Harrison Settles Out of Court' *Music Week* (9 July 1977) 4.
[99] The final iterations of the legal controversy were *ABKCO Music, Inc v Harrisongs Music Ltd* 841 F 2d 494 (1988) and *ABKCO Music, Inc v Harrisongs Music Ltd* 944 F 2d 971 (1991).
[100] B Southall, *Pop Goes to Court* (Omnibus Press, 2008) 56; Goodman (n 90) 241.

III. Conclusion

Although the case was decided almost half a century ago, it has become representative – indeed, virtually prophetic – of a certain oddity in the genre-specific dynamics between pop music and copyright law. How could someone copy while denying having heard a popular song? How could anyone deny hearing a song when we are all surrounded by music in a media-saturated world? Are forensic musicologists the final arbiters in explaining what we can hear and what we cannot remember? Has copyright law inevitably become the province of expert listeners? The case left some interesting questions up in the air while somehow anticipating what was yet to come.[101] One of the very few points on which almost all copyright scholars seem to agree today is that the law needs to be reimagined. On the one hand, contemporary legal scholarship focuses on the necessity of interpreting exceptions and defences to copyright infringement broadly – especially the treatment of quotations – extending the purely textual paradigm into popular media such as music, film and television. On the other hand, more pop music plagiarism cases have reached the courts, reiterating the problems highlighted in this chapter.

Uncannily, as the Harrison controversy dealt with musical consciousness and memory, it was only a matter of time before science fiction narratives took it as source material. Most jurisprudents and legal historians would be indifferent to this reference and might even be alarmed by it – perhaps rightly so. However, from the vantage point of science fiction, we can transcend historiographical or doctrinal interpretations and examine anxieties generated by such cases. In a short story entitled *Melancholy Elephants* (1984), Spider Robinson introduces the Harrison case in a conversation set in Washington, DC between two characters, a lobbyist and a politician, in the context of a bill that would extend the copyright term. According to the lobbyist, plagiarism lawsuits like the Harrison case had become a plague.[102] In fact, she mentions a stream of lawsuits that came in its aftermath – copyright controversies involving Yoko Ono, the John Lennon estate and many others that, more often than not, ended up being settled.[103] In a chaotic and bewildering technological age dominated by copyright clearances, musical fact-checkers and claims routinely settled, the story is interesting because it invites the reader to reflect on borrowing, creativity and the illusion of originality that copyright instils in its subjects.

What does it mean to reflect on the encounter between the popular and copyright law in an increasingly technologised and mass mediated world? What was the seminal desire elicited by pop in all its aspects? Unlike other musical genres, pop music democratised compositional procedures, creating a celestial backdrop of highs and lows around authorship, while at the same time becoming subservient to the record industry. This combination of stardom, creativity and law had particular effects on the way we link copyright to our capacity to dream, remember and forget. One of the characters in the science fiction narrative mentioned above speculates about the spell of originality fading away if copyright continued to be extended by legislation when we consider the increase in life expectancy. For what would be the function of copyright if distant memories and musical resemblances could easily be retrieved by the legal system? Seeking to

[101] Immediately after the decision, Ringo Starr commented that Harrison had been 'very unlucky. There's no doubt that the tune is very similar but how many songs have been written with other melodies in mind? … he was very unlucky that someone wanted to make it a test case in court': R Coleman, 'Starr Trek' *Melody Maker* (2 October 1976) 17.

[102] S Robinson, *Melancholy Elephants* (Penguin Books, 1984) 12–13; see also J Oswald, 'Bettered by the Borrower: The Ethics of Musical Debt' in C Cox and D Warner (eds), *Audio Culture: Readings in Modern Music* (Continuum, 2004) 131–37.

[103] Most of these controversies are also mentioned in R Palmer, 'The Pop Life. Today's Songs, Really Yesterday's?' *New York Times* (8 July 1981) 21.

avoid the hassle and the vertigo of plagiarism allegations, a well-known pop musician recently decided to start documenting his compositional forays. This would certainly produce a sort of artificial repository for the memory, a documentary of entire recording processes to avoid being caught by an appeal to the unconscious or a reference to accidental copying. Here we see record keeping imagined as a kind of witnessing in pop composition and song writing, a strategy to make a record of composing, writing a song or, indeed, making a record. Although claiming to be an innovative strategy for solving copyright problems, such self-documenting and archiving might not actually be so new. In fact, they can be traced to arrangements that tied pop music to marketing and advertising promotions. In that sense, there is nothing particularly innovative in documenting behind-the-scenes creative processes, since not only is it part of our everyday experience in social media, but rather – and perhaps more interestingly – it resembles the urban legend of copyright protection that involved sending a certified sealed letter with the material to one's future self, so that there existed a stamped and sealed envelope containing the manuscript, album or score.[104] However, once again, the record does not speak for itself. A notable passage in *Melancholy Elephants* shows that the illusion (or delusion) of originality is probably more problematic, hypnotic and mysterious than it seems at first glance:

> My husband wrote a song for me, on the occasion of our fortieth wedding anniversary. It was our love in music, unique and special and intimate, the most beautiful melody I ever heard in my life. It made him so happy to have written it. Of his last ten compositions he had burned five for being derivative, and the others had all failed copyright clearance. But this was fresh, special – he joked that my love for him had inspired him. The next day he submitted it for clearance and learned that it had been a popular air during his early childhood, and had already been unsuccessfully submitted fourteen times since its original registration. A week later he burned all his manuscripts and working tapes and killed himself.[105]

[104] Although this scheme, often called 'poor man's copyright', was recommended as early as the 1950s, it is not a coincidence that it became particularly ubiquitous in 'How to Make It in the Pop Music' business literature of the 1970s. See, eg 'So You've Written a Song!' (1955) 9(2) *Changing Times – The Kiplinger Magazine* 45; K McNeel and M Luther, *Songwriters with a Touch of Gold* (Will Martin Publishing, 1976); LP Wilbur, *How to Write Songs That Sell* (H Regnery, 1977) 52–53; JG Erickson, ER Hearn, ME Halloran and S Riklin, *Musician's Guide to Copyright* (Scribner's, 1979) 17.

[105] Robinson (n 102) 16–17.