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Unconscious musical plagiarism and the mediatization of listening and memory

John Shiga

- 1 Introduced into musical copyright discourse in the early twentieth century, the notion of cryptomnesia or unconscious plagiarism highlights a key tension in copyright law. On the one hand, copyright acts as a recognizing authority for claims to authorship and originality, thus providing economic incentives to authors whose work is “original,” which in turn encourages cultural innovation. On the other hand, copyright facilitates ownership and control of cultural works by institutions rather than by authors, since its minimal notion of “originality” and extended period of protection encourage the production and exploitation of increasingly similar works. This tension reaches a breaking point in cases where two individuals claim sole authorship of what jurists and musicological experts deem to be the “same” work. These contested similarities highlight the dispersion of perceptual, signifying, mnemonic, and creative processes across an expansive and heterogeneous network that includes not only composers, musicians, and producers, but also institutions and machines, thus leading to the present difficulty of recentering the authorial subject in legal discourses and practices.
- 2 Twentieth century concerns about unconscious plagiarism anticipate contemporary anxieties about the entanglement of creative and consumer subjectivities with digital techniques in recent litigation campaigns against mash-up remixing, peer-to-peer file sharing, and other popular practices of online music reproduction; in all of these instances, copyright becomes a key site for juridical reassertions of the boundary between machine processes and “properly human” capacities to listen to, experience, remember, and create musical works. Legal debates about cryptomnesia may thus be usefully revisited as a way of investigating what Lauren Rabinovich and Abraham Geil call “the politics of the history of the relationships between machines and human subjectivity that have resulted in the present moment”.¹ While references to unconscious plagiarism or cryptomnesia are rare in the case law on musical plagiarism, the court proceedings and decisions in music plagiarism provide an opportunity to explore legal assumptions

about the appropriate relationship between media, memory, and musical composition. In this sense, copyright acts as a site for disciplining and normalising certain modes of listening to and remembering sound recordings, which in turn help smooth over tensions in the field of capitalist music (re)production.

Musical memory and the construction of the author

- 3 The construction of the author-as-owner in copyright law has been extensively explored from a wide range of disciplinary perspectives.² Many scholars have critically examined the possessiveness, rationality, creativity, individualism, and autonomy of the authorial subject, but relatively little attention has been given to the construction of the author's memory.³ Yet, legal claims to authorship and thus to originality depend on the capacities to recall past musical experiences and to recognize such experiences as memories rather than as one's own creations. Although there is no explicit articulation of memory in copyright doctrines or statutes, this article probes assumptions about musical memory underlying copyright law's discourse on unconscious plagiarism. Such cases can thus provide insight into the ways in which copyright law and the broader economy of musical rights shape and are in turn shaped by what Susannah Radstone and Katharine Hodgkin call a *regime of memory*: a regime of memory is a set of discourses, institutions, and practices which valorize and enforce models or *figurations* of memory within a given cultural space or field.⁴
- 4 Many scholars working in memory studies argue that the construction of memory in modern Western societies is inextricably linked to the development of the *bounded subject* who supposedly contains or possesses memory.⁵ Copyright law acts as a regime of memory by producing truth-claims about memory which reinforce a version of the bounded subject central to the creative industries: the author-as-owner. While courts in Canada and the United States have used the concept of cryptomnesia to account for certain instances of plagiarism, they do not recognize unconscious copying as a full or partial defence against claims of copyright infringement. The legal system's cautious use of the concept of cryptomnesia suggests that associated figurations of musical memory as at least partly non-conscious have the potential to disrupt copyright's ideals of authorship, originality, and creativity, as well as the rationales according to which copyright distributes ownership titles and settles authorial disputes.
- 5 It would be difficult to conceptualize authors as the owners of discourse without construing memory as a type of cognitive "container technology," enabling the subject to store and possess objects apprehended through experience before expressing them in "works of authorship." In this particular figuration, memory contains musical experiences along with other experiences of the social world. However, as I will demonstrate in my analysis of the case law on musical plagiarism, copyright also presumes that memory organizes these experiences and facilitates the monitoring of their sources during the creative process. In this sense, the normalisation of individual and organisational dispositions towards musical discourse as property in copyright depends on the responsabilisation of authors for monitoring and policing divisions between their practices of listening, remembering, and making. According to copyright law, "normal" musical memory maintains sharp boundaries between self/other, experience / expression, and recollection / composition, which prevent the misrecognition of musical experiences as one's own inventions.

- 6 However, figurations of memory articulated in the courtroom do not always conform to the juridical ideal of bounded subjectivity. Following Radstone and Hodgkin, the tensions and contradictions that emerge in the legal system's figurations of memory can be used to reveal "the difficulties inherent in attempts to conceptualise the bounded self's relation to the social".⁶ These tensions are particularly pronounced in cases of cryptomnesia wherein the court deems the plaintiff's work to be the *causa sine qua non* of the infringing work and yet accepts the defendant's claim to have no memory of the plaintiff's work. The composer's memory is constructed as disorganized, leaky, blurry, and unreliable in contrast to the container-like memory associated with "normal" authorship. As Radstone and Hodgkin argue, since the notion of memory as a container is so central to bounded subjectivity, figurations of memory that suggest a close connection or fluid relationship between recollection and composition can problematize that form of subjectivity. "Memory is associated with coherent, bounded and sovereign subjectivity. Yet memory emerges, at points, as that which *undermines* that very conceptualisation of the subject."⁷
- 7 To explain unintentional or unremembered plagiarism, courts often present the plagiarist's memory as indiscriminate in its accumulation of traces and autonomous in the manner in which it re-presents those traces to consciousness; memory contains *permanent* records of all experiences and operates *independently* of the subject's conscious mind. The figuration of the plagiarist's memory helps to resolve authorial disputes by attributing the production of strikingly similar works to the composers' memory, the leaky boundaries of which allow recollections of the works of others to seep into the creative process. But the introduction of unconscious recollection and unwitting plagiarism can also draw attention to a set of conceptual tensions and displacements. First, memory as a container for experiences is displaced by the unsettling notion of "being possessed" by an overly-active unconscious memory that intervenes in musical composition (and presumably other thought processes as well). Second, the demand for originality, which is an evidentiary requirement for a successful copyright infringement lawsuit, in some cases generates anxiety that all works that resembles one's own work are *strikingly* similar and are therefore illegitimate copies.
- 8 The figuration of memory as acting unpredictably and independently of consciousness is often associated with Freudian psychoanalysis, wherein the subject "balances only precariously upon its own 'primitive' and / or infantile substratum—a substratum that could rise up and 'possess' its possessor".⁸ However, when the legal system refers to cryptomnesia, it invokes a figuration of memory that emerged in another line of psychoanalytic thought stemming from the work of Carl Jung.⁹ The concept was imported into the case law on musical plagiarism in a 1924 decision in *Fred Fisher v. Dillingham*, a musical copyright infringement lawsuit filed in a US court.¹⁰ In his decision, Judge Hand wrote that he could not find any reason for Jerome Kern, a well-known Broadway composer, to risk his reputation by copying someone else's work. To explain how Kern unwittingly plagiarized someone else's work, Judge Hand construed Kern's memory as accumulating objects of memory without forgetting, and as acting independently of conscious thought. As Judge Hand explained,
- Whether he unconsciously copied the figure, he cannot say, and does not try to. Everything registers somewhere in our memories, and no one can tell what may evoke it. On the whole, my belief is that, in composing the accompaniment to the refrain of "Kalua," Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to

account for a similarity, which amounts to identity. So to hold I need not reject his testimony that he was unaware of such a borrowing.

- 9 Since the court found that Kern was exposed to the plaintiff's work, the "identical" elements in their compositions could not be coincidental, or the results of what jurists now call "independent creation." Judge Hand offered a version of the accumulative subject who possesses, but is also in some sense possessed by, a memory that contains a register of everything, including those experiences which the subject cannot recall.
- 10 References to this figuration of memory as a kind of incessant recording system that sends memories of musical experience to consciousness in the guise of original musical expressions have become increasingly common in legal commentary and in contemporary legal decisions. I will discuss the problems that this figuration of memory poses for the agency of the creative subject in my analysis of the case law on unconscious musical plagiarism. But first I will address key questions about the relationship between figurations of memory and the regulation of copying which emerge even in apparently intentional or conscious instances of musical plagiarism: how do the institutional practices of copyright law and musicological expertise affect the manner in which "private" memory is translated into "public" forms of testimony, recollection and interpretation? And if memory is potentially disruptive of copyright law, how do jurists and courts "domesticate" memory or make it less threatening to copyright's regulatory framework and to its key conceptual personage—the author-as-owner?
- 11 While this article focuses on the discourse of cryptomnesia in the Canadian context, the analysis may be useful for understanding how copyright operates as a technology for regulating musical memory in other countries as well. Although there are important differences in the copyright laws of different countries, as a signatory to the Berne Convention and other international copyright treaties, Canada's copyright legislation is based on widely recognized principles such as a minimum term of copyright protection (life of the author plus fifty years), the authorization of translations as a right of authors, and the granting of copyright the moment an expression is "fixed" in communicable form (there is no requirement to register the work to receive copyright protection).¹¹ Although Canada has been a member of the Berne Convention since 1886, Canadian policy makers, like their American counterparts, were skeptical of the Berne model of international copyright in the nineteenth century and much of the twentieth century since that model appeared to benefit copyright-exporting countries in Europe with well-developed printing and publishing industries whereas Canadian printers and publishers have historically relied on the reprinting of foreign works as their primary source of revenue.¹² In the 1980s, copyright policy in the United States made a decisive turn toward strengthening and expanding copyright protection through the integration of copyright and other forms of intellectual property into international trade agreements. Canadian copyright policy largely moved in step with that of the United States, culminating in Canada's membership in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994) and the World Intellectual Property Organization's Copyright Treaty (1996) which provide rights-holders with enhanced control over the reproduction and use of intellectual property. Many key decisions in Canadian and American copyright law dealing with cryptomnesia emerged in this period of transition when copyright protection was expanding across new media (print, electronic, digital) and in time (with the successive extensions of the term of copyright in international agreements). As Sara Bannerman notes, the international copyright regime

that emerged in the late twentieth-century through international agreements has led to growing concerns about copyright's potential to stifle free expression, intensify the commodification of creative labour and works, constrain the public domain, and hinder "democratic participation in cultural expression".¹³ The Canadian legal discourse of cryptomnesia in this pivotal period of the 1980s provides a particularly rich site for exploring the juridical struggle to reconcile mediated and nonconscious processes of hearing, remembering, and copying with notions of creative subjectivity modeled on the author-as-owner. The struggle to recognize nonconscious listening, remembering, and copying as part of the ordinary practices of composers while at the same time marking those processes as aberrations in "normal" musical creativity both reflects and facilitates the realignment of copyright with the new economic and technological conditions of musical (re)production in the late twentieth century.

Musical memory and material evidence of plagiarism

- 12 Although Canadian copyright law was initially an extension of British imperial copyright law, the trajectory of copyright policy in Canada began to parallel that of the United States by the second half of the twentieth century. Among the similarities between US and Canadian copyright law are the distinction between moral and economic rights in a creative work as well as the notion—much more central to the present discussion—of the determination of copyright infringement through analysis of three key factors: the *plaintiff's ownership of the work and the defendant's access to it* (that the plaintiff is the owner of the work by virtue of having expressed it in fixed form and that the defendant had access to this source material), *originality* (that the source material is an "original work," which usually means that the work's melody and possibly its rhythm and other characteristics have not been copied from other works), and *substantial similarity* between the allegedly infringing work and the source material. Judge Denault summarized the evidentiary requirements for copyright infringement lawsuits in his decision in *Grignon v. Roussel*, a musical copyright infringement case wherein the plaintiff successfully convinced the court that the defendant had plagiarized his work.¹⁴

To succeed in such an action a plaintiff must show the following: (1) that he has a copyright in the musical work, (2) that it is an original work, and (3) that the defendant unfairly copied it, that is, he had access to the plaintiff's work before composing his own, and that a substantial part of both works is very similar.

- 13 René Grignon successfully sued Jean-Alain Roussel for infringing upon his copyright in "Chanson numéro 7," which Grignon initially claimed he composed in August 1987 and later distributed, in Judge Denault's words, "to certain librettists and people in the artistic world in Montréal, hoping that a song would be eventually made from it" (§ 2). A song was eventually made from musical score with lyrics written by Luc Plamondon, but the composition was attributed to someone else. "Tous les Juke-Box," sung by Martine St-Clair, was released in March 1988 and the cover indicated that Jean-Alain Roussel was its composer. Given that Grignon was successful in his action against Roussel, it is worth noting that at each of the three steps—proving ownership, originality, and misappropriation—Grignon's private memory and the discourses and technologies of representation through which private memory is publicly communicated begin to drift apart.

- 14 To prove ownership of the work, authors must demonstrate that the expression was communicated in “fixed form;” these material traces then become important for proving that the defendant had or likely had access to the work. To this end, Grignon opened a sealed envelop in court, which he had mailed to himself in February 1987. The envelope contained a cassette recording of a song along with a letter bearing Grignon’s signature asserting that he had written the song, entitled “Luc,” in November 1986. In Judge Denault’s words, Grignon was “clearly surprised by the unexpected title given to his work and its date of composition” (§ 12). This gap between memory and material evidence was quickly smoothed over by Grignon’s explanation that he had originally intended the song for Céline Dion but after sending the song to Dion’s producer, who never replied, Grignon changed the song’s title to “Luc” since he had a new singer for the song in mind, Luc Plamondon, who confirmed that he had received a cassette copy from Grignon. Since Grignon had mentioned all of these copies and persons to whom he had sent them in his prior testimony, the court did not doubt the validity of his explanation.
- 15 In an attempt to undermine the originality of “Chanson Numéro 7 / Luc”, counsel for Roussel called upon expert witnesses who compared it with fourteen other songs to show that Grignon’s composition was “not new.” However, Judge Denault criticized counsel for the defendant for neglecting the question of whether or not Grignon had access to, or remembered hearing, any of these apparently similar compositions: “It is important to note that apart from ‘Born to run,’ no effort was made to have René Grignon identify any of these melodies or to determine whether he knew of them or had already heard them” (§ 19). Although the court dismissed these demonstrations of similarity, it is characteristic of such cases that the composer’s work, when subjected to this kind of scrutiny, reveals the manner in which recollection and composition are much more closely intertwined than copyright’s ideal of independent creation would suggest.
- 16 In their assessments of the degree of similarity between Grignon’s and Roussel’s songs, the expert witnesses provided just the sort of analysis that Judge Denault seemed to be seeking. Judge Denault was most impressed by Jacques Faubert, a musicologist who concluded his “painstaking analysis” with an “overall assessment of 24.5 out of 29, or 84.5%, representing the degree of similarity between the two refrains which he had analysed” (§ 36-7). Nevertheless, following Harold Fox’s rule, set out in *The Canadian Law of Copyright and Industrial Designs* in 1967, that similarities be determined “by the ear as well as by the eye,” Judge Denault asserted that “in the final analysis, it is for the judge—so much the better if he has a musical ear and knowledge—to decide whether according to his own assessment, experience and judgment an impression of similarity is created by the disputed musical works” (§ 37). Although Judge Denault claimed that “tests of hearing” are “subjective,” he was confident that he would be able to discern “objective” aural similarities through repeated auditions of the sound recordings during the court proceedings. Judge Denault’s remarks about “tests of hearing” are surprising, since they suggest that copyright law in Canada may occasionally privilege listening over looking to reconstruct the “objective” sequence of events that resulted in “striking similarities”:

Writing imposes natural limits on the reproduction of what is perceived on hearing a musical work; it is not possible to accurately reproduce by words the impression made on the ear by hearing alternately the first measures of the refrain of these two works: it is striking. In the case at bar, I have no hesitation in concluding that in melodic, harmonic and rhythmic terms, the first eight measures of “Chanson Numéro 7” and “Tous les juke-box” have such a striking resemblance that one can only be a copy of the other, with minor differences resulting from arrangements or

substitution chords. I also consider that this resemblance applies to a significant part of the work, not in quantitative but in qualitative terms, in that it concerns the first measures of the refrain which are the “hook” that the ear retains for the purpose of identifying a piece. (§ 39)

- 17 Although Roussel claimed that he wrote “Tous les juke-box” independently, Judge Denault found that the similarities were so striking that they could only be the result of either a very unusual coincidence or plagiarism. Since Grignon was able to show that Roussel had the opportunity to hear “Chanson numéro 7 / Luc,” Roussel and his witnesses’ “vague” testimonies were supplanted by material traces of striking similarity between the two songs which the court interpreted as the cause-and-effect relationship of plagiarism.
- 18 From *Dillingham* to *Grignon*, courts shift between different sets of criteria in their assessments of misappropriation or plagiarism. In the former case, the composer’s interest in maintaining his reputation cast doubt on the plaintiff’s accusation of deliberate plagiarism. In *Grignon*, the audience’s memory and the marketing and mnemonic functions of hooks were considered to be key factors in determining whether one composer had copied another. Each court uses different characteristics of the composer, the audience, or the work to reinstate the bounded subject in the context of multiple and fluid connections between the self and the social world of music production.
- 19 The concept of plagiarism, even in an apparently straightforward (or “flagrant”) case like that of *Grignon*, is based on certain normative presumptions about communication. As Ron Scollon argues,
- the more or less standard contemporary view of communication is based on the assumption that at any particular moment “one will be speaking his own thoughts on a matter and expressing his own feelings.” Definitions of plagiarism that are commonly given are also based on the idea that a person, the rightful owner, has expressed his / her own thoughts or feelings, and that another has wrongly appropriated them for some other use. Underlying both of these views is a concept of knowledge and communication which takes ideas, as well as their wordings, as capable of being originally crafted by individuals.¹⁵
- 20 Scollon suggests that the seemingly simple concept of plagiarism is shorthand for a bundle of “hefty concepts” including “the nature of the person who undertakes to communicate, the concepts of the ownership of discourse as individual or personal property”.¹⁶
- 21 Scollon insightfully points out that charges of plagiarism often reproduce a particular view of the subject of communication as the owner of his or her discourse. However, this type of possessive subjectivity is also based on a figuration of human memory as fallible. Juxtaposed with the court’s “objective” reconstructions of a person’s actions and the trajectories of recordings in the social world, memories articulated in court can be made to seem unreliable, distorted or selective. In plagiarism cases, humanly embodied memory is often characterized as vulnerable to the plagiarist’s ambition and to his or her misplaced sense of entitlement. Indeed, as I argue in the next section, the desire to be an author-owner in accordance with evidentiary requirements of copyright law may encourage composers to perceive similarities between strands of musical discourse as “striking” similarities (that is, as unlawful copies).

Between plagiarism and authorship

- 22 In the spring of 1973, a commercial for Salada tea featuring a catchy piano jingle called “The Homecoming” aired on Canadian television.¹⁷ In response to the many letters that Salada’s advertising agency received from the public about the song, the composer of “The Homecoming,” Hagood Hardy, extended the sixteen bar jingle into a 45 rpm single. The record reached the Top 10 across Canada in 1975 and sold over a million copies. In June 1981, Hardy was sued by Ivan Gondos, a piano teacher, composer and performer, who alleged that Hardy had plagiarized parts of “The Homecoming” from Gondos’ “Variations on a Theme in A Minor.”¹⁸ Over the course of three days, Gondos submitted evidence against Hardy and another composer, Rudy Toth, whose “Moment of Love” was also, according to Gondos, copied from “Variations.” Although Gondos and his supporters seemed convinced that Hardy and Toth had plagiarized Gondos’ composition, the defendants insisted they had never heard Gondos’ “Variations” and therefore could not have plagiarized it. Desperate to be recognized as the legitimate author and rightful owner of the musical works in question, counsel for Gondos deployed the concept of cryptomnesia to explain the striking similarities between the three works.
- 23 The concept of cryptomnesia can be traced at least as far back as Carl Jung’s theory of creativity as a process of unconscious recollection and recombination.¹⁹ Jung believed that unconscious copying was a normal part of the creative process. However, since the 1920s, courts have used the concept to refer to abnormalities in the creation of cultural works. Jurists usually deploy the concept of cryptomnesia in order to explain how it is possible for composers to plagiarize work which they believe to be their own. The growing legal and psychological discourse surrounding this concept elucidates institutional assumptions about the proper role of musical memory in the creative process. While the legal system uses cryptomnesia as the exception to prove the rule (that composers do not usually unintentionally copy from memory), the concept of cryptomnesia also problematizes some of copyright law’s foundational dualisms, such as self / other, experience / expression, creation / copying, and composition / recollection.
- 24 Copyright law’s demand for originality generates an excessive desire to be recognized as the point of origin of the work. The legal system manages this excess in some cases by exposing the person’s memory as contaminated or distorted by ambition, and by correcting distorted memories according to the “objective” reality disclosed by recordings and other material traces of action. Caught in an untenable position between authorship and plagiarism, the composer may attempt to make material traces conform to his or her memory. *Gondos* is perhaps the best example of this process at work in Canadian case law.
- 25 The actions filed by Gondos against Hardy and Toth began to backfire as suspicions were raised that Gondos had tampered with the evidence. Although the decision does not explicitly state this, it began to look as though Gondos had modified “Variations” in order to transform it from a superficially similar work into a *strikingly* similar work. Gondos fell into what Beverly Haviland calls “a relation between subject and object—the ‘unliveable’ other of adequately developed subjectivity.”²⁰ Having internalized the rules of copyright law, composers who hear similarities between their work and those of others may become fixated on proving infringement, since the other subject position—the place in between

author and plagiarist—is “unliveable” in the sense that copyright law makes no room for partially plagiarized works or partial plagiarists; one is either a legitimate author or not.

- 26 Many musical composers do not earn a living from what they do. Gondos, for instance, had to supplement whatever income he may have earned from his obscure musical compositions by working as pianist in a cocktail lounge and teaching piano lessons. Such composers, who are not recognized as the authors of anything valuable, also live in a society where popular music generally adheres to strict formulas and rationalized modes of production. Under such conditions, composers who have never been recognized as legitimate authors may become extremely distrustful of other musicians and composers whenever they hear similarities between their works and those of others. Gondos seems to have moved from paranoia to plagiarism, both of which, in Haviland’s words, are characterized by “an instability in the recognition of and respect for boundaries between self and other.”²¹ Gondos and his supporters were convinced that other people were copying him, that his work was original, and that other similar works were derivatives of his own. But the tragedy of the case is that it clearly demonstrates how the evidentiary requirements of originality can “thwart a writer’s attempt to negotiate her complex relationship with her origins.” The valorization of originality in copyright law seems to have provoked Gondos’ obsession with presenting similar works as plagiarized versions of his compositions, and his various attempts to make representational memory conform to his embodied memory of being the composer.
- 27 As the court tried to establish the facts of the case, Gondos’ memory seemed to be increasingly inconsistent with the sequence of events as reconstructed by expert witnesses and technologies of representation. Gondos was not able to convince the court that a photocopy of the “Variations” score represented *his* work. Whereas Gondos claimed he gave this photocopy to one of his students “years ago, 1965 or so, I don’t know,” expert witnesses pointed out that the “signs of reproduction,” including track marks on the paper as well as the size of the paper, matched Xerox machines available in 1974-5, but not in 1965 (*Gondos*, § 8 and 13). Gondos also claimed that he made his recording of “Variations” in August 1974, before he heard “The Homecoming” in a version of the Salada commercial that featured a church. This version of the commercial, however, was not aired after July of that year. Gondos’ memory of his own actions did not seem to correspond to the circulation of recordings and other media he had submitted as evidence, that is, the photocopy given to his piano student, the audio recording of “Variations” that was missing the variation from which Hardy and Toth had allegedly copied, the dates that particular Salada commercials were broadcasted on television, Gondos’ submission to BMI of an array of works in 1965 which also omitted “Variations”, and the musicological opinion that his four page folio of “Variations” contained “the work of another person” (*Gondos*, § 23).
- 28 Counsel for the two defendants asked the judge to dismiss the case due to these inconsistencies. As Judge Carruthers wrote in his decision: “In their final analyses of why all claims and contentions of the plaintiff in this action should be rejected, counsel for all the defendants submit that little, if any, credibility be attached to the evidence of the plaintiff as it bears on the issues raised in this action” (§ 28). Judge Carruthers agreed, pointing to Gondos himself as the “worst offender” among all the witnesses “who were caught up in the promotion of the plaintiff’s case to such an extent that they lost much of any objectivity they might otherwise have about the matters in issue” (§ 29). The decision portrays Gondos and his supporters as blinded by their desire to help Gondos prove that

his work had been plagiarized. At the same time, however, it is clear that *something* motivated Gondos and his supporters which, in my view, cannot be reduced to monetary gain. The similarities between Gondos', Hardy's, and Toth's works were perhaps "striking" to Gondos and his supporters, who had heard Gondos' work first, and it did not seem possible to them that this resemblance was coincidental. Counsel for Gondos later attempted to convince the court that there was a causal relationship between the works resulting from *unconscious* plagiarism on the part of Hardy and Toth. After hearing several experts on this matter, and after referring to several cases where the possibility of unconscious plagiarism had been raised, Judge Carruthers maintained that the similarities were coincidental and did not stem from the same source.

- 29 As I argue in the next section, assumptions about memory are more visible or legible in cases of cryptomnesia than in "flagrant" cases of plagiarism. Cryptomnesia highlights the problem of maintaining a sharp division between mind and matter through copyright's idea / expression dichotomy. More importantly, the figure of the author as a victim of cryptomnesia highlights the manner in which copyright confronts the notion that artistic production frequently involves "copying from memory" and that, rather than consisting of impressions or ideas arranged, recalled and narrated in a manner that is unique to the individual, memory may be rather more machine-like in its indiscriminate accumulation and transmission of "registered" experiences. Thus, the case law on cryptomnesia is a particularly useful domain in which copyright's domestication of potentially disruptive interrelationships between memory, technology, and consciousness can be explored.

Figurations of memory in the discourse of cryptomnesia

- 30 Given its role in managing innovation, creative labour, and the disruptive potential of technologies of reproduction, many scholars have correctly suggested that copyright is an ideological apparatus that primarily serves the interests of large copyright owners. Yet, cases of unconscious plagiarism or cryptomnesia are highly suggestive of the manner in which copyright law may also act as a quasi-therapeutic regime of memory by acknowledging the loss of integrity or personality that arguably follows from the misrecognition of memory as invention. The court plays the role of a recognizing authority by acknowledging that in cases of inadvertent plagiarism both the defendant and plaintiff have lost something integral to the self, or will lose something that is integral to the self (albeit, through misrecognition) as a result of the decision.
- 31 The most sympathetic statement recognizing this dual loss was put forward by Judge Owen in his decision in *ABKCO Music v. Harrisongs* after finding George Harrison's "My Sweet Lord" (including a particular grace note) was indeed "strikingly similar" to the Chiffons' "He's So Fine."²²

What happened? I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. 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.

- 32 Lawyers for musicians facing charges of plagiarism frequently refer judges to *Harrisonsongs*, and in particular to Judge Owen's admission that cryptomnesia was not only possible but that it was the most plausible explanation for striking similarity in that case. Judge Owen's decision has forced judges in Canada and the US to at least form an opinion about the notion of cryptomnesia and has spawned a substantial body of literature in legal studies and psychology about cryptomnesia and its implications for copyright.
- 33 Periodically, judges demonstrate that they have developed increasingly nuanced ways of assessing whether copying in fact occurred and, if so, whether it is unlawful.²³ This expansion of the evidentiary requirements in some cases opens up the possibility for a "copying-from-memory" defense. Legal scholar Carolyn Crowe, for example, includes "subconscious copying (copying from memory)" in a list of possible defenses which, in her view, should accompany the more nuanced approach developed in case law for assessments of access and copying: "Subconscious plagiarism results when a prior work so impresses itself on the mind of a subsequent author that, quite unwittingly and forgetting where he had seen or heard the prior work, he produces his work under the submerged influence of that work."²⁴ Pointing to Jung's notion of cryptomnesia as integral to creative subjectivity, as well as to more recent studies in experimental psychology, Barbara Green writes: "Physiological evidence explains how it is that one is able to tap into the resource of 'forgotten' memories. The brain never forgets any impression, no matter how slight. The physiology of the brain makes the reproduction of old memory possible, even after many years of total oblivion."²⁵
- 34 While there are conflicting views regarding the time that may elapse between "access" and the unconscious "reproduction of old memory," jurists seem to increasingly agree with the general principle outlined by Judge Hand in 1924, that "everything registers somewhere in our memories, and no one can tell what may evoke it." Moreover, the case law suggests that this figuration of memory as a container for everything that has been experienced leads to uncertainty about the independence of the compositional process: no one can tell *when* an object of memory will be evoked in the creative process.
- 35 While Judge Hand found that the period between "access" and "copying" was relatively short, Judge Owen's decision suggested that there had been a much longer delay between Harrison's supposed exposure to the Chiffons' song and his subsequent unconscious plagiarism of it. In an infringement lawsuit filed against Michael Bolton by the Isley Brothers over the song "Love is a Wonderful Thing," the court devoted considerable attention to Bolton's teenage exposure to a song that he was found to have subconsciously copied in his professional career as an adult.²⁶ Bolton appealed, pointing out that if in fact he and his co-author, Andrew Goldmark, had subconsciously plagiarized the Isley Brothers' song, this amounted to a "twenty-five-years-after-the-fact-subconscious copying claim."²⁷ In her decision for the appellate court, Judge Nelson responded by supporting the Isley Brothers' claim: "It is entirely plausible that two Connecticut teenagers [Bolton and Goldmark] obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later."²⁸

- 36 Canadian courts have been more reluctant to introduce this figuration of unconscious memory as actively disguising traces of “pleasing combinations of sounds” as inventions, although this concept of memory is cited, as was the case in *Gondos*, when either the plaintiff or the defendant refers the judge to cases like *Harrisongs*. When the defendant or the plaintiff in a case of musical copyright infringement admits that he or she may have plagiarized the plaintiff’s work, but has done so unconsciously, the court is confronted with the possibility that memories may be misrecognized as one’s own creations. However, American and Canadian courts stop short of admitting that the blurry relations between self / other, memory / invention, and embodied versus representational memory may be a part of the “normal” process of musical production.
- 37 Legal scholars have developed various rationales for using cryptomnesia as a partial defence against copyright infringement in the US and Canada.²⁹ Many of these assertions are based on the view that copyright law’s model of the creative process is outdated or idealistic and does not recognize the role of memory, technology, standardization, and the different contexts in which music is made meaningful. Under these conditions, the production of strange, striking or, as Adorno once called them, “haunting” similarities between the works of two or more individuals seems unsurprising.³⁰ Nevertheless, responsibility and liability for unconsciously generated similarities falls on the individual composer.
- 38 In seeking a more nuanced assessment of similarity, copying, damages, and remedies, legal scholars suggest that copyright infringement cases should be informed by an examination, in as much detail as possible, of the contexts of production. The implication is that the court should pay closer attention to changes in context in order to determine whether two works are in fact the same rather than inferring causal relations between original and the alleged copy from note-by-note comparison. As Aaron Keyt argues,
a composer creates something more than a string of acoustical events. Rather, the thing created is best viewed as a structure of relationships. Because the sounds in a composition are dependent on one another for their meaning, musical meaning is solely a function of context. *Thus, preservation of context must be a crucial element of copying.*³¹
- 39 In order to determine whether there has been a change in context and thus in the meaning of a work, Keyt suggests that courts should modify their historiographic practices and carry out an analysis of the works with an ear toward both musical and contextual considerations.
- 40 Green goes further and argues that “all artistic works subconsciously plagiarize previous artistic works.”³² As Green suggests, courts often assume that it is possible to make a sharp division between (shared and abstract) ideas and (individualized and fixed) expressions but in practice shift this line in a case-by-case way to validate the idea / expression dichotomy enshrined in copyright law. Yet, this move in jurisprudence toward normalising cryptomnesia in legal commentary also renders memory as autonomous; memory controls the process of musical production, operating independently of the psyche or the volition of the person. The creative subject is thus reconfigured with his or her unconscious memory as the driving force.

Conclusion: Copyright in a bind

- 41 While copyright is often associated with the regulation of reproduction as a means to encourage creativity, the confrontation of courts with claims of cryptomnesia in the context of infringement lawsuits highlights the manner in which copyright also imposes a disciplinary framework on listening and memory. While judges may occasionally empathize with defendants who misrecognize non-conscious recollection of musical experience as creative expression, and while courts may recognize that the technologies and practices of musical production and consumption are often entwined in the contemporary milieu of creative labour, in the end, creativity is separated from the broad spectrum of possible modes of engaging with sound and what might be called an attributional or “source monitoring” mode of perceptual, signifying, representational, and reproductive processes is normalised. Moreover, the implication of the legal discourse of cryptomnesia, which is constructed as an aberration rather than as a normal part of creativity, is that the creative subject becomes responsabilised or made responsible for managing the legal and financial risks stemming from his or her entanglement in a nexus of print, electronic and digital technologies that allow sounds to be split from their sources.
- 42 Copyright disciplines listening within the court as well as outside of it. As Michael Mopas and Amelia Curran note,³³ the quantitative and qualitative analysis of substantial similarity has gradually shifted over the past few decades in Canada and US from the analysis of whether the “lay listener” would likely hear similarities between the two works to visual and acoustic analysis carried out by forensic musicologists. Canadian case law on cryptomnesia is suggestive of broader patterns in the legal regulation of creation and memory with its attentiveness to melody (and corresponding neglect of timbre, rhythm and other musical element), its reliance on musicological expertise, its distrust of the “average listener,” and most importantly for the argument of this paper, in its insistence on listening, remembering, and creating as fundamentally distinct processes. The increasing reliance on comparative analysis of visual representations of musical expressions in the assessment of substantial similarity seems to suggest that copyright keeps both memory (of resonances and filiations between the works in question and the thousands that came before) and listening in their place, that is, as secondary and supplementary to creativity, and, in the context of court proceedings, to visual modes of producing knowledge about the ontological status of a musical work as an original or derivative work. The distrust of hearing and embodied memory, along with the corresponding urge to deploy visual techniques of musical representation and analysis, become particularly pronounced in cases of cryptomnesia.
- 43 Although unconscious plagiarism is not yet an acceptable defense for infringement, there is an underlying therapeutic role that the court assumes in recognizing the loss of one’s self or expression thereof, usually in the discourse of economic losses and damages. Notwithstanding the fact that copyright is in an important sense an economic regime, not all doctrines, principles, rules, and tests in copyright law can be reduced to the goal of efficiency and other utilitarian justifications for copyright protection. Through a modified version of Jung’s concept of cryptomnesia, Canadian and American courts uphold the values of uniqueness and originality while simultaneously reinforcing a system of music production characterized by standardization, and protect the abstract

personage of the author while simultaneously parceling out his / her / its rights to various entities. The unruliness of memory and, in particular, its disregard for propriety boundaries, can potentially undermine the sharp division between ideas and expressions. But copyright law continues to govern musical memory not only by constraining the manner in which people access the musical past, but also by requiring human memory to be as precise, fixed, and “objective” as representational technologies and expert reconstructions of musical events.

- 44 The emergence of cryptomnesia in copyright courts might also be understood as articulation of anxiety about the mediatization of music and the attendant shifts in embodied experience, habits of perception and remembering, and systems of signification and representation. In a similar way as more recent developments such as mash-up culture give rise to debates about the locus of creativity in an era of software that can “listen” and “play” for or with human users, cases of cryptomnesia foreground the problems of defining a creative role that is “properly” human in the late twentieth century music-making milieu characterized by industrial logics of managing risk in music production and increasingly automated tools for creating music. The integrity of human memory and creativity are put into question when the court’s attention is drawn to the growing intimacy of humans and machines in the production, reproduction, perception and recollection of sound and music. Cryptomnesia highlights the problem of disembedding authorial subjects from radio, photocopiers, phonographs, and other media that exploit the aural overlaps between machinic and human memory. Cryptomnesia helps “explain away” substantial similarity but also amplifies the tension between the court’s role in discursively reinforcing a model of human creativity based on notions of aesthetic originality while also underwriting the industrial production of interchangeable musical works. The tension between copyright’s role as a recognizing institution for authorial subjectivity and its facilitating role in the production of, for example, jingles for television commercials is particularly legible in cases of cryptomnesia, but that same tension can be found in the discourse around computer or algorithmic creativity, where the same tools that are used by large copyright owners (and universities) to automate the process of identifying plagiarized works can in turn be used to create new literary texts, visual works and musical compositions. The cautious and selective manner in which jurists mobilize the notion of cryptomnesia in musical copyright disputes points to the manner in which cryptomnesia has the potential to exacerbate rather than smooth over tensions in copyright law stemming from the dispersion of listening, remembering, and creating across networks of disseminated composers, musicians, institutions, and machines.

NOTES

1. RABINOVICH, Lauren and GEIL, Abraham, “Introduction,” in *Memory Bytes: History, Technology, and Digital Culture*, L. Rabinovitz and A. Geil (eds.), Durham and London, Duke University Press, 2004, p. 12.

2. The history of copyright has been mapped onto histories of subjectivity through a variety of approaches, including political economic histories of copyright (EDELMAN, Bernard, *Ownership of the Image: Elements for a Marxist Theory of Law*, London, Routledge and Kegan Paul, 1979) and histories of the Romantic author, or what David Saunders calls “subject-centered histories” (in *Authorship and Copyright*, London and New York, Routledge, 1992), which draw from the post-structuralist analyses of authorship by Barthes and Foucault: see ROSE, Mark, “The author as proprietor: *Donaldson vs. Becket* and the genealogy of modern authorship,” *Representations*, no. 23, 1988, p. 51-85; and *The Construction of Authorship: Textual Appropriation in Law and Literature*, WOODMANSEE, Martha and JASZI, Peter (eds.), Durham, Duke University Press, 1994.
3. Important exceptions are Celia Lury’s discussion of the role of memory prosthetics (especially photography) in the construction of contemporary notions of personhood (*Prosthetic Culture: Photography, Memory and Identity*, London, Routledge, 1998); and Lisa Gitelman’s study of the “material meanings” of piano rolls and the shift in musical skill and memory to perforated paper (“Media, materiality, and the measure of the digital; or, The case of sheet music and the problem of piano rolls,” in *Memory Bytes...*, p. 199-217).
4. RADSTONE, Susannah, and HODGKIN, Katharine, “Regimes of memory: An introduction,” in *Memory Cultures: Memory, Subjectivity, and Recognition*, New Brunswick, NJ, Transaction Publishers, 2006, p. 1.
5. *Ibid.*, p. 3.
6. *Ibid.*
7. *Ibid.*
8. *Ibid.*, p. 4.
9. GREEN, Barbara, “Haven’t I heard this song before?: Subconscious plagiarism in pop music and the infringement of copyright—towards a partial defense of cryptomnesia,” *Intellectual Property Journal*, no. 13, 1998, p. 53-81.
10. *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924) (hereinafter *Dillingham*).
11. BANNERMAN, Sara, “Canadian Copyright: History, Change, and Potential,” *Canadian Journal of Communication* 36, no. 1, 2011, p. 32.
12. *Ibid.*, p. 34.
13. *Ibid.*, p. 40.
14. *Grignon v. Roussel* (1991), 38 C.P.R. (3d) 4, 44 F.T.R. 121, F.C.J. No. 557 (QL) (hereinafter *Grignon*), § 9.
15. SCOLLON, Ron, “Plagiarism and ideology: Identity in intercultural discourse,” *Language in Society* 24, no. 1, 1995, p. 19-20.
16. *Ibid.*, p. 4.
17. CROWE, Carolyn, “The song you write may not be your own! Proving musical copyright infringement: A review of *Gondos v. Hardy*,” *Intellectual Property Journal* 1, no. 1, 1984, p. 33.
18. *Gondos v. Hardy* (1982), 64 C.P.R. (2d) 145, 38 O.R. (2d) 555 (hereinafter *Gondos*).
19. JUNG, C. G., “Cryptomnesia” (1909), in G. Adler and R. F. C. Hull (eds. and trans.), *The Collected Works of C. G. Jung*, vol. 1, Princeton, Princeton University Press, 1970, p. 95-106.
20. HAVILAND, Beverly, “Passing from paranoia to plagiarism: The abject authorship of Nella Larsen,” *Modern Fiction Studies* 43, no. 2, 1997, p. 297.
21. *Ibid.*, p. 296.
22. *ABKCO Music Inc. v. Harrisongs Music Ltd.*, 722 F.2d 988 (2d Cir. 1983) (hereinafter *Harrisongs*). Cited in *Gondos*, § 35.
23. THÉBERGE, Paul, “Technology, creative practice and copyright,” in *Music and Copyright*, S. Frith and L. Marshall (eds.), Edinburgh, University of Edinburgh Press, 2004, p. 150-152.
24. CROWE, Carolyn, “The song you write may not be your own!,” p. 57.
25. GREEN, Barbara, “Haven’t I heard this song before?,” p. 64.
26. *Three Boys Music Corp v. Michael Bolton*, 212 F. 3d 477 (U.S. App. 2000) (hereinafter *Bolton*).

27. *Ibid.*, p. 484.

28. *Ibid.*, p. 484.

29. See for example CROWE, Carolyn, "The song you write may not be your own!;" GREEN, Barbara, "Haven't I heard this song before?;" KEYT, Aaron, "An improved framework for music plagiarism litigation," *California Law Review*, no. 76, 1988, p. 421-464; and LITMAN, Jessica, "Copyright as myth," *University of Pittsburgh Law Review*, no. 53, 1991, p. 235-249.

30. ADORNO, Theodor Wiesengrund, "A social critique of radio music" (1945), in *Mass Communication and American Social Thought: Key Texts 1919-1968*, John Durham Peters and Peter Simonson (eds.), Oxford, Rowman and Littlefield Publishers, 2004, p. 212.

31. KEYT, Aaron, "An improved framework for music plagiarism litigation," p. 347 (emphasis in the original).

32. GREEN, Barbara, "Haven't I heard this song before?," p. 65.

33. MOPAS, Michael and CURRAN, Amelia, "Translating the Sound of Music: Forensic Musicology and Visual Evidence in Music Copyright Infringement Cases," *Canadian Journal of Law and Society* 31, no. 1, 2016, p. 25-46.

ABSTRACTS

Although there is a large body of scholarly literature on musical copyright, very little of this work explores in a sustained and direct way the role of copyright in regulating musical memory. This paper conceptualizes sound recording as a mnemonic technology and analyzes the manner in which copyright law attempts to manage the impact of this technology on legal concepts of musical memory and authorial subjectivity. The paper analyzes the case law on "cryptomnesia" or unconscious plagiarism in the United States and Canada wherein defendants claimed not to have access to the original work and therefore could not have copied it. These contested similarities highlight the dispersion of memory and creativity across a heterogeneous network that includes composers, musicians, and producers but also institutions and machines, and leads to the present difficulty of recentering the authorial subject in legal discourses and practices. In this way, late twentieth century legal disputes over unconscious plagiarism anticipate contemporary anxieties about the entanglement of creative and consumer subjectivities with digital techniques in recent litigation campaigns against mash-up remixing, peer-to-peer file sharing, and other popular practices of online music reproduction. Then as now, copyright acts as a site for disciplining and normalising certain modes of listening to and remembering sound recordings which in turn help smooth over tensions in the field of capitalist music (re)production.

INDEX

Mots-clés: Copyright, musical plagiarism, cryptomnesia, sound recording, creative subjectivity, musical memory

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