

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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YOKO ONO LENNON, SEAN ONO LENNON, 08 CV 3813 (SHS)(FM)
JULIAN LENNON, and EMI BLACKWOOD
MUSIC, INC.,

Plaintiffs,

-against-

PREMISE MEDIA CORPORATION, L.P., C&S
PRODUCTION L.P. *d/b/a* RAMPANT FILMS,
PREMISE MEDIA DISTRIBUTION L.P. AND
ROCKY MONTAIN PICTURES, INC.,

Defendants.

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DECLARATION OF DR. LAWRENCE FERRARA

I, Lawrence Ferrara, Ph.D., declare and state:

1. INTRODUCTION AND SUMMARY.

1. I am a pianist, a music theorist, Professor of Music, and the Director of Music and Performing Arts Professions in the Steinhardt School at New York University. (A copy of my curriculum vitae is attached to this Declaration as Exhibit A.) I have been asked to complete a musicological assessment of the use of “Imagine” as composed and performed by John Lennon in the film, *Expelled*. I assessed the portion of “Imagine” that appears in *Expelled* first to determine its importance in relationship to the

entirety of “Imagine” and, secondly to determine whether the portion of “Imagine” that is at issue would be easily recognizable.

2. Based on my musicological analysis, it is my opinion that the portion of “Imagine” that appears in *Expelled* represents a substantial and memorable part of the overall “Imagine” musical composition. In addition, a significant portion of the “Imagine” sound recording has been digitally sampled and played in *Expelled*. The portion of “Imagine” that is at issue (1) references recurring musical phrases that constitute nearly 50% of the “Imagine” musical composition, (2) includes a significant part of the “Imagine” sound recording, (3) is a memorable portion of “Imagine,” and (4) is easily recognizable as John Lennon’s “Imagine.”

2. ANALYSIS

(a) The Principal Components Of A Musical Composition

3. A musical composition is composed of certain distinct and identifiable components that can be isolated and described separately. Some components are more important and relevant to determining substantial similarity than others. The principal components in determining whether or not two songs are substantially similar are: (1) structure; (2) harmony; (3) rhythm; (4) melody and (5) lyrics.¹

(1) **Structure** refers to a musical composition’s organization of musical units or musical groups, often dictated by the development of the melody and lyrics. The larger portions or

¹ Less relevant similarities and differences are key, tempo, instrumentation, and style.

sections are generally referred to as Verses, Choruses, or Bridges. The material within each section begins with the smallest musical unit (e.g., a “motive”) and moves into larger groups called phrases.

(2) **Harmony** refers to the use and the organization of chords, which are specific combination of pitches built on intervals of a third. (*Pitch* is the specific high or low placement of a musical sound of a musical sound, often within a musical scale. An *interval* names the number of tones or space between two pitches.) A sequence of chords is referred to as a harmonic progression.

(3) **Rhythm** is the organization of the time values of sounds and silences, i.e., how long a sound or silence (a rest) lasts.

(4) **Melody** is a single line of music (e.g., what an individual sings or hums), which consists primarily of pitch and rhythm.

(5) **Lyrics** are the words that are sung or spoken in a song.

4. For my analysis, I have considered (1) a sound recording of “Imagine” which is track 1 on **Audio Exhibit 1** attached to this Declaration; and (2) a DVD of *Expelled*.

i. Structure

5. Analysis of the Structure of a musical composition provides a map of the overall composition and is helpful in identifying the

location of the music at issue. “Imagine” is 3:00 (i.e., 3 minutes) in duration¹. The overall Structure in “Imagine” is charted immediately below with the time into the sound recording that each section commences listed in the left column and the opening lyrical phrase listed at the right in order to facilitate identification of the each Section.

The Structure Of “Imagine”

time section

0:00 Introduction

0:13 Verse 1 (begins with the lyrics, “Imagine there’s no heaven”)

0:51 Verse 2 (begins with the lyrics, “Imagine all the people”)

1:28 Chorus (begins with the lyrics, “You, you may say I’m a dreamer”)

1:55 Verse 3 (begins with the lyrics, “Imagine no possessions”)

2:31 Chorus (begins with the lyrics, “You, you may say I’m a dreamer”)

6. The music at issue in “Imagine” is in Verse 2 from 1:02 through 1:16 into the sound recording. The *sound recording* of “Imagine” has been digitally sampled and appears without any notable manipulation in *Expelled* from 1:04:56 (i.e., 1 hour, 4 minutes, 56 seconds) through 1:05:11 in the film. The *musical composition* from “Imagine” that is at issue represents two iterations of a (1) 2-bar vocal phrase, (2) two phrases of lyrics, (3) a 2-bar piano phrase, and (4) a variant of the 2-bar piano phrase. The 2-bar vocal phrase and the 2-bar piano phrases reference music in the Introduction and all of the Verse sections as explained below.

¹ Times listed are within 1 second of the occurrence in the sound recording.

ii. *Harmony, Rhythm and Melody*

7. Each of the three Verse sections in “Imagine” consists of six 2-bar vocal phrases. The first four 2-bar vocal phrases in each of the three Verse sections use nearly the same recurring harmony, rhythm, and melody for a total 12 iterations of the 2-bar vocal phrase at issue. In order to demonstrate this recurring 2-bar vocal phrase at issue,² I have recorded and attached each 2-bar vocal phrase at issue in “Imagine” on **Audio Exhibit 1** as charted immediately below. Lyrics are provided to facilitate identification of each 2-bar vocal phrase. I have highlighted the portion of “Imagine” that was digitally sampled and appears in *Expelled* (see Tracks 8 and 9).

The 2-bar Vocal Phrases In “Imagine” Referenced In *Expelled*

Verse 1

- Track 2 2-bar vocal phrase, “Imagine there’s no heaven”
- Track 3 2-bar vocal phrase, “It’s easy if you try”
- Track 4 2-bar vocal phrase, “no hell below us”
- Track 5 2-bar vocal phrase, “above us only sky”

Verse 2

- Track 6 2-bar vocal phrase, “Imagine there’s no countries”
- Track 7 2-bar vocal phrase, “It isn’t hard to do”
- Track 8 2-bar vocal phrase, “Nothing to kill or die for”**
- Track 9 2-bar vocal phrase, “and no religion too”**

² While the music in each of the 12 iterations of the 2-bar vocal phrase is nearly identical to the other, the lyrics couple 2-bar vocal phrases. For example, the lyrics to the 2-bar phrase “No hell below us” are coupled with the lyrics, “above us only sky,” in the subsequent 2-bar phrase.

Verse 3

Track 10 2-bar vocal phrase, “Imagine no possessions”

Track 11 2-bar vocal phrase, “I wonder if you can”

Track 12 2-bar vocal phrase, “no need for greed or hunger”

Track 13 2-bar vocal phrase, “a brotherhood of man”

8. First, the portion of the “Imagine” *sound recording* that appears in *Expelled* is heard on tracks 8 and 9 as charted above. However, due to the fact that the 2-bar vocal phrase at issue is iterated 12 times throughout “Imagine,” the portion of the *musical composition* in “Imagine” that is at issue is heard on tracks 2 through 13. Thus, the harmony, rhythm and melody in the 2-bar vocal phrase in Tracks 8 and 9 are also present and referenced in the other ten iterations of that 2-bar vocal phrase on Tracks 2 – 7 and 10 – 13.

9. In addition, a 2-bar piano phrase and a variant of that phrase in “Imagine” are also at issue. The 2-bar piano phrase is marked by oscillating eighth notes playing a C chord in the first bar, an F chord in the second bar, and ending the second bar with a rising, chromatic melodic figure. This 2-bar piano phrase occurs two times in the Introduction and three times in each Verse section for a total 11 times in “Imagine.” This recurring 2-bar piano phrase is presented on Track 14 in **Audio Exhibit 1**.

10. Moreover, a variant of the 2-bar piano phrase, in which the rising, chromatic melodic figure is omitted at the end of the second bar, occurs one time in each Verse for a total three times in “Imagine.” The 2-bar piano phrase variant is presented on Track 15 in **Audio Exhibit 1**. The portion of “Imagine” that appears in *Expelled* (presented on Tracks 8 and 9 in **Audio Exhibit 1**) includes the 2-bar piano phrase and the 2-bar piano phrase variant.

11. The duration of the music that is referenced in the entirety of “Imagine” in *Expelled* is charted immediately below.

The Music At Issue In “Imagine”

<u>Time</u>	<u>Section</u>
0:00 – 0:13	Introduction
0:13 – 0:38	Verse 1
0:51 – 1:16	Verse 2
1:55 – 2:20	Verse 3

12. The portion of the musical composition in “Imagine” that is referenced in *Expelled* is heard during 87 seconds of the 3 minute (180 seconds) “Imagine.” Thus, 48.8% of “Imagine” is referenced by the musical composition that is in *Expelled*.

iii. Lyrics

13. Two lyrical phrases from “Imagine” are at issue and presented immediately below.

- (1) “Nothing to kill or die for”
- (2) “and no religion too”

(b) The Master Recording

14. As presented above, the portion of the master recording in “Imagine” that has been digitally sampled and played in *Expelled* is 1:02 through 1:16 in “Imagine.” This digital sample appears from 1:04:56 through 1:05:11 in *Expelled*.

(c) The Portion Of “Imagine” In *Expelled* is Recognizable

15. Approximately 2 seconds prior to the commencement of the portion of “Imagine” in *Expelled*, at 1:04:54, the narrator says, “...lifting a page from John Lennon’s song book...” This narration directs the viewer/listener’s attention to John Lennon and to the musical portion of “Imagine” at issue.

16. As analyzed earlier in this Declaration, the portion of “Imagine” that appears in *Expelled* consists of two, 2-bar vocal phrases and concurrent 2-bar piano phrases. The 2-bar vocal phrase at issue is the most repeated vocal phrase in the entirety of “Imagine”; it is iterated 12 times throughout “Imagine.” In addition, the lyrics, “Nothing to kill or die for, and no religion too” are meaningful within the context of the overall lyrics in “Imagine.” Moreover, the concurrent 2-bar piano phrase is iterated 11 times in “Imagine” and the 2-bar piano phrase variant is iterated 3 times in “Imagine.” Consequently, the combination of the 2-bar vocal phrase with the 2-bar piano phrases references a very memorable and substantial part of “Imagine”; the music at issue references almost 50% of “Imagine.”

17. Based on my musicological analysis, it is my opinion that the substantial and memorable portion of “Imagine” that is referenced by the

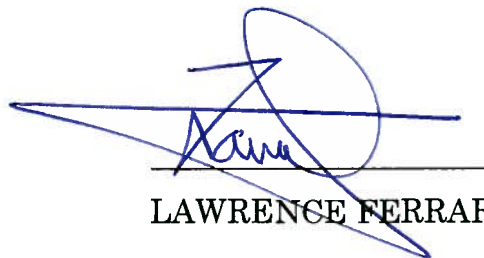
portion of “Imagine” that appears in *Expelled* is easily recognizable as being from John Lennon’s “Imagine.”

3. CONCLUSIONS

18. Based on my musicological analysis, it is my opinion that the portion of “Imagine” that appears in *Expelled* represents a substantial and memorable part of the overall “Imagine” musical composition. In addition, a significant portion of the “Imagine” sound recording has been digitally sampled and played in *Expelled*. The portion of “Imagine” that is at issue (1) references recurring musical phrases that constitute nearly 50% of the “Imagine” musical composition, (2) includes a significant part of the “Imagine” sound recording, (3) is a memorable portion of “Imagine,” and (4) is easily recognizable as John Lennon’s “Imagine.”

19. On that basis, it is my opinion that a claim of music copyright infringement of the master recording and the musical composition by the owner(s) of “Imagine” against *Expelled* is musicologically supported.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on May 14, 2008, in New York, New York.

A handwritten signature in blue ink, appearing to read "Lawrence Ferrara", is written over a horizontal line. The signature is stylized and somewhat abstract, with a large loop on the right side.

LAWRENCE FERRARA, Ph.D.