

**COPYRIGHT INFRINGEMENT:  
GET A HIT, GET A WRIT**

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**BY**

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*High profile copyright infringement litigations have become a mainstay of the music industry—from the trial that members of Led Zeppelin won defending “Stairway to Heaven,” to the Marvin Gaye estate’s win against Pharrell Williams and Robin Thicke over the latter two’s worldwide hit “Blurred Lines.” (Both cases are currently on appeal.) More recently, Pharrell and co-defendant Gwen Stefani were hit with an infringement action over their song “Spark the Fire,” and additional major artists such as Beyoncé, Ed Sheeran and Justin Bieber are favorite targets of copyright infringement plaintiffs, some of whom bring spurious claims.*

*All this raises the extent to which potential infringement defendants may be inhibited, when creating their songs and recordings, by the increased odds of facing a copyright complaint. But the concern has been in the spotlight before. The article that follows (an updated excerpt from my previous book *They Fought the Law: Rock Music Goes to Court*) details Michael Jackson’s prevailing defense of his song “Dangerous” in an infringement action. Jackson considered the case so crucial that it was the first time he testified in a courtroom in years. The case today serves as an illustrative tale about the issues and strategies that infringement defendants may face, and use, when a copyright lawsuit comes a-calling.*

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## DANGEROUS SIMILARITIES

The song gave Michael Jackson trouble from the start. Jackson, who likes to record in the dark, was in a Los Angeles studio in September 1990, working on the vocal for the title song of his *Dangerous* album. To make room so he could dance, the normally agile performer tried moving a 7-foot-tall, 60-pound sound baffle. But “it started to wobble in the dark and he didn’t know it and it fell over,” Jackson recording engineer Bill Bottrell said. “We heard a large bang.”

“I turned the lights on and saw Michael trying to get out from under this wall,” assistant engineer Brad Sundberg recalled. “I went out to help him. He said he was fine.”

Jackson continued to record, but when Sundberg drove him to the doctor the next day, Jackson found out he had suffered a mild concussion. Jackson didn’t know it then, but the accident was a doubly bad omen. Two years later, Crystal Cartier, an aspiring singer/songwriter from Denver, Colorado, would file a \$40 million copyright infringement suit alleging Jackson stole “Dangerous” from a song with the same title that she wrote. The case became so important to Jackson that when the trial was held, he would testify in court for the first time in nearly a decade.

That Cartier filed suit shouldn’t have surprised Jackson, though. Not only was Jackson the frequent target of copyright infringement allegations, but by the 1990s, such claims against major artists had become rampant in the music industry.

The infringement-suit trend had turned a business created in large part by opening its arms to new, unsolicited talent into a closed shop in which only the most persistent and clever artists—or those willing to pay industry professionals sometimes a stiff fee to circulate demo recordings—could get their material heard by influential industry decision makers. The fear of expensive copyright litigation sealed off nearly every major label, many publishing companies and numerous artist management firms to those wishing to break into the music business.

“Substantially similarity” is the primary legal test in a copyright infringement case. Generally, an infringement plaintiff must demonstrate that the defendant had access to the plaintiff’s song and that the two works are sound legally alike. There is no bright line test, however, for determining what constitutes substantial similarity between songs. A copyright plaintiff may bring in music experts, and present song charts and sound

recordings for the judge or jury to consider. Harmonies, rhythms and other elements of the songs can be used for their probative value. But any substantial similarity ultimately is to be determined by a judge or jury based on how the songs impact upon the ears of the average, lay listener.

A copyright defendant can use songs written before either of the compositions in question to show that both the plaintiff's and the defendant's works were derived from a prior common source. That and proof of independent creation are a copyright defendant's main shields against an infringement claim.

Crystal Cartier filed her copyright infringement suit in Denver federal court in June 1992. In it, she named Jackson, his MJJ Productions and his record company, Sony Music Entertainment (formerly CBS Records), as defendants. Cartier claimed to have written "Dangerous" in 1985 and recorded it at a Denver studio in January 1988 as part of her song "Player." But Cartier couldn't locate the 1988 master tape. The session engineer had not only recorded over it when working with other artists; the studio was no longer in business. Cartier contended that she distributed audiocassette copies of her recording in Los Angeles in July 1990. Then in October 1990, she recorded "Dangerous" in Denver once again, this time for her *Love Story: Act I* album.

Jackson's lawyers asked the court to dismiss Cartier's suit without holding a trial. They argued it wasn't until Cartier learned from court documents that Jackson's songs had been recorded in September 1990 that "she alleged, for the first time, that she had delivered demonstration tapes containing her song 'Dangerous' to various entities in Los Angeles, California in July 1990." But in November 1993, Denver federal Judge Edward Nottingham denied Jackson's summary judgment motion.

Nottingham scheduled the trial for February 7, 1994, but Jackson's lawyers tried to have the Cartier trial delayed. Jackson's Denver law firm, Holme Roberts & Owen, pointed to a civil suit had recently been filed against Jackson in Los Angeles on behalf of a 13-year-old boy who alleged that Jackson sexually molested him. The molestation trial was set to begin February 21. Jackson's lawyers claimed that the molestation matter would interfere with their ability to communicate with Jackson on the Cartier case and with Jackson's ability to appear at trial in Denver.

But Judge Nottingham turned down Jackson's continuance request. (Jackson settled the civil molestation suit in January, reportedly paying at least \$15 million to end the action.)

### **THE TRIAL BEGINS**

Crystal Cartier grew up in Denver, where she sang in church and school choirs. A military services veteran with a college degree in marketing, Cartier formed the Love Story band in the mid-'80s and played the Colorado club circuit.

Cartier was being represented in her case by Robert and Gretchen Eberhardt, a Denver-based father/daughter team who practiced estate, personal injury, corporate and real estate law. Cartier hired the Eberhardts because—she said about Jackson's industry clout—"anyone connected with the music business was afraid to take my case." The elder Eberhardt, a tall, slender attorney with a narrow face, had served as a legislator in the Colorado House of Representatives. Gretchen Eberhardt, new to the legal bar, had a wholesome, farm-girl look that contrasted with the mechanical tone with which she spoke.

Judge Nottingham was a former federal prosecutor with a quick temper, Nottingham ran a tightly controlled courtroom, and had a reputation for lecturing attorneys and witnesses who appeared before him. During the Cartier trial, he frequently lectured the Eberhardts on how to proceed with their case.

In his opening statement, Robert Eberhardt honed in on Michael Jackson's alleged access to Cartier's song. Eberhardt told the eight-member jury that, when Michael Jackson brought his *Bad* tour to Denver in the summer of 1988, Cartier and her sister, Antoinette Harris, got backstage and gave Jackson's road manager, Benjamin Collins, a copy of Cartier's "Dangerous" demo. Eberhardt also said that one of Cartier's stops on her July 1990 trip to Los Angeles included Warner-Chappell, the music publishing company that for many years administered Jackson's Mijac Music song catalogue. Cartier brought a promotion package of her "Dangerous" demo and "Queen Size Lover/Michael" single to Ed Pierson, in Warner-Chappell's legal department, Eberhardt claimed. Pierson had been a Denver music lawyer before joining Warner-Chappell and Cartier's package contained letters of reference from people in Denver who knew

Pierson. “I think that’s the key to the case,” Eberhardt told the jury, “because Mr. Pierson runs the business office and the legal department for Warner-Chappell.”

Jackson’s lead counsel Daniel Hoffman, a former University of Denver law school dean, told the jury in his husky voice that over 200 songs with the title “Dangerous” had been registered in the Copyright Office. Cartier registered her “Dangerous” in July 1991; Jackson his in February 1992. But Hoffman argued that the date of recording, rather than the date of registration, was more important for purposes of the infringement suit.

Crystal Cartier was the first witness to testify at trial. Ed Pierson was out of the office the day Cartier brought her demo package to Warner-Chappell, but she claimed Pierson subsequently called and said he would see if he could help her. Cartier said she gave her last copy of the “Dangerous” demo tape to Roger Christian, an A&R executive at WTG Records, another Sony Music subsidiary label. “That was the last tape I had. That was *my* personal master copy that I ran copies from,” Cartier insisted, adding that she never received the tape back.

Daniel Hoffman asked Cartier during a heated cross-examination whether any pre-October 1990 version of her “Dangerous” existed.

“I said there’s no version ... on tape,” Cartier answered. “Now, if you’re talking about the chord charts, I can’t attest to that without having those lyrics here in front of me. I’d have to see them, unless you want me to lie.” (The defendants successfully blocked Cartier from introducing lyric and chord charts of her 1988 “Dangerous” recording and a 1992 re-creation tape into evidence.)

“I don’t want you to lie. I want you to tell the jury the truth. The truth is, you don’t know,” Hoffman said.

Cartier did admit that she didn’t know whether any prior identical versions existed. She also admitted that she didn’t know whether there was any direct evidence that Michael Jackson or Jackson arranger Teddy Riley had heard her “Dangerous” demo before Jackson recorded his version.

Cartier’s sister, Antoinette Harris, didn’t help Cartier’s case. Harris testified that she couldn’t remember whether the Jackson road manager to whom Cartier claimed to have given the “Dangerous” demo at Jackson’s 1988 Denver concert had been a man or a

woman, Afro-American, Caucasian or Hispanic. (Benjamin Collins, the *Bad* tour production manager, was a strapping black man with a gravelly voice who stood well over six feet tall.)

Kris Farris, Cartier's music expert, testified that rhythmic structures and melodies in the Cartier and Jackson songs were identical. Farris said he had once been an assistant to Paul Rothchild, who produced the Doors. Now, Farris was a construction worker.

Jackson's lawyers called recording engineer Bill Bottrell, who had received co-writer's credit on Jackson's "Dangerous." Bottrell explained how he developed the song's musical bed by isolating a bass line in the composition "Streetwalker," which Jackson once planned to use on the *Bad* album. Jackson then wrote the "Dangerous" lyrics and melody, Bottrell said.

Bottrell testified that it was Jackson's policy not to listen to unsolicited tapes. To illustrate, Bottrell told how he had asked legendary Motown tunesmith Lamont Dozier—a co-writer many of Motown's biggest hits—to send songs for Jackson to consider. The Jackson Five had launched its career on the Motown label and Bottrell's idea was to re-establish those musical ties for Michael. When Bottrell brought Dozier's tape to the studio, Jackson "kept a wide berth around the tape. He wouldn't walk near it," Bottrell said. "I put the tape away and had an assistant call Mr. Dozier and say, 'Well, it probably isn't going to work out.'"

D. Anthony Ricigliano, head of music theory at the Manhattan School of Music, then testified that he believed the Cartier and Jackson songs had been created independently. During Ricigliano's testimony, co-defense counsel Richard Gabriel complained that Cartier was distracting the jury. "She's shaking her head, doing all kinds of body language, making faces and shrugging, throughout the trial," Gabriel said.

Judge Nottingham told Cartier, "[I]f you can't control yourself any better than you're doing it, I'm telling you the next time you will be watching the proceedings—or listening to them—from the marshal's office upstairs."

### **MICHAEL JACKSON'S TESTIMONY**

Michael flew into Denver on Sunday, February 13, on a Sony corporate jet. Cartier used the occasion to show up in court Monday morning dressed for the heightened media presence. Warner-Chappell's Ed Pierson was testifying at the time.

Pierson said he had been on his honeymoon when Cartier dropped her tape off at his Los Angeles office. When he returned, Pierson found Cartier's tape in his mail pile but claimed he threw it away without listening to it.

As Pierson spoke, Cartier bustled in, breasts protruding from the top of a low-cut, black-leather mini-dress. She sported fishnet stockings and spiked heels.

"That's the one day Crystal arrived in front of the courthouse in a limousine," Jackson litigation counsel Eve Wagner said. "And there we were, having to sneak Michael in through the judge's parking lot."

"When Cartier walked in, the whole jury stopped looking at me; I knew something was going on," Ed Pierson recalled.

Cartier admitted, "I didn't want to be totally upstaged by Michael or look like a frumpy old school teacher. I wore one of the costumes from my 'Dangerous' video, which had been playing on TV all week."

Judge Nottingham ordered Cartier to cover herself with a coat. Jackson then stepped into the courtroom. Some of his fans had obtained seats in the spectator section by pretending to be lawyers or court staff. Judge Nottingham's teenaged son sat among them.

Jackson wore eyeshadow, black pants and a black shirt decorated with orange epaulets. His hair was in a ponytail, a trademark tendril brushing his face.

Daniel Hoffman asked, "Did your song 'Dangerous' evolve out of any previous song that you had composed?"

"Yes. I wrote a song for the *Bad* album called 'Streetwalker' and it had a strong driving bass lick. And that bass lick was taken by my engineer because I was kind of frustrated with the song in general. So he took the bass and put new chords to the bass melody, which is what inspired the song 'Dangerous.'"

"By the way, do you read music?" Hoffman asked.

"No I don't. I don't think it's necessary."

"Did anyone in the world assist you in writing the lyrics to 'Dangerous'?"

"No."

"Mr. Jackson, who wrote the vocal melody to your song 'Dangerous'?"

"I did."

“Who named the song ‘Dangerous’?”

“I did.”

“Did you ever in your life hear of a person named Crystal Cartier before this lawsuit was filed?”

“No.”

“Did you ever hear a song written by Miss Cartier called ‘Dangerous’ before this lawsuit was filed?”

“Never in my life.”

Jackson sang a section of “Another Part of Me,” from his 1987 *Bad* album, to demonstrate how he had used the same melody for a section of “Dangerous.”

Hoffman asked about Jackson’s policy regarding unsolicited tapes.

“Well, I don’t take any unsolicited tapes because I know the danger involved. I mean, what happens when you do something like that, it’s this situation—”

“—Hold on,” Hoffman interrupted, “Just answer my question. What is the policy?”

“The policy: I do not take unsolicited tapes. No way. Everybody knows that. That’s the number one rule.”

Gretchen Eberhardt asked Jackson during cross-examination to review the transcript of the deposition he gave for the case. Eberhardt wanted to establish that Jackson had then been unable to remember the name of the song from which he said that Bill Bottrell had taken the bass line for “Dangerous.”

Eberhardt also questioned Jackson about who had access to his vault of studio tapes. When Jackson offered a detailed response, Judge Nottingham scolded, “Mr. Jackson, just answer the question.”

Jackson let out a giggle. Gretchen Eberhardt then had both the Jackson and Cartier “Dangerous” choruses played in court.

“Now Mr. Jackson, do you hear anything similar in those four bars played together?” Eberhardt asked. (Both songs’ choruses had strong similarities.)

“Well, we’re both saying ‘dangerous,’” Jackson replied, biting his lip.

“Do you hear any notes in common?”

“Not that I can think of.”

“Does it sound to you, Mr. Jackson, like you’re singing in harmony together?”

“Not to me.”

### **THE INFRINGEMENT TRIAL VERDICT**

The jury deliberated less than four hours in deciding that Michael Jackson hadn’t infringed on Crystal Cartier’s song. Cartier appealed to the 10th U.S. Circuit Court of Appeals with new lawyers, but the appeals court ruled against her.

Jackson prevailed over other infringement claims, too. In 1997, he testified in an infringement case over whether his song “Will You Be There”—also from the *Dangerous* album—infringed on singer Al Bano’s hit “I Cigni Di Balaka (The Swans of Balaka).” In 1999, an appeals court in Milan, Italy, decided that Jackson didn’t infringe on the Bano composition.

In 2006, a federal district court dismissed an infringement action that had been brought against Jackson and producer Quincy Jones in North Dakota. Plaintiff George Gleeson claimed that Jackson illegally took several songs, as well as the “moonwalk” dance, from Gleeson. But the district court ruled that the Copyright Act’s three-year statute of limitations barred Gleeson’s suit. The court noted it was undisputed that Gleeson “knew or should have known of Michael Jackson’s performance of the songs ‘Thriller,’ ‘We Are the World,’ and ‘Do You Remember,’ as well as the dance move ‘moonwalk,’ for more than twenty years. ... The songs and the popular dance move performed by the infamous Jackson have been a matter of common knowledge since the mid-1980’s.”

After her trial against Jackson, Crystal Cartier became a producer of public-access TV talk shows. And she continued to insist that Michael Jackson stole her song. “I’m not out to destroy Michael. I think he’s a fabulous performer and I forgive him,” she said, sobbing. “But until he does right by me, nothing will go right for him. That’s not me. That’s his karma.”