Episode Book

EPISODE #5537

How Do Cover Artists Legally Exist?

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SYNOPSIS

Daniel asked a deceptively simple question: how does the entire world of cover artists legally exist? The answer runs through Section 115 of the Copyright Act, a compulsory mechanical license that dates back to a 1908 anti-monopoly fight over player piano rolls. That single quirk means any American musician can record their own version of any song that's already been commercially released — no permission required, just a statutory royalty. But the refuge is narrower than it looks. We walk through the composition-versus-master distinction, the three-license stack (mechanical, sync, master), why exactly one of those is compulsory, and why the whole video-cover economy is "outlawed by default" on platforms even when it's completely legal. Plus the limits: public performance, the derivative-work line, the first-release gate, and a century of melody-infringement cases from Puccini's Tosca to the present.

TRANSCRIPT



Corn

Here's the question that's been rattling around my head all morning. How does the entire world of cover artists legally exist?



Herman

That's a good one to open cold on.



Corn

Daniel sent this in. He's been thinking about it because cover artists are everywhere, right? You've got the YouTube channels, the bar bands, the whole genre of people who are consistently, reliably bad at it and keep uploading anyway. And they all operate in broad daylight. Nobody's hiding. So Daniel wants to know the general legal position, and specifically the refuge that lets even the consistently bad ones keep going.



Herman

He's asking the right question, because on the surface it looks like it shouldn't work.



Corn

He also remembered something about melody. That copyright sometimes extends to the melody itself, and that courts have actually been asked to decide whether one melody was sufficiently similar to another to count as infringement. So he wants that piece too. What's the general position, and what's the specific legal shelter?



Herman

There's a lot there. And the answer starts with one deliberate quirk of American copyright law, and a fight over player pianos.



Corn

Player pianos.



Herman

That's not a joke. That's where this comes from.



Corn

Alright. So give me the mechanism first, before we get to the pianos.



Herman

The mechanism is the compulsory mechanical license. Section 115 of the Copyright Act. Since the Copyright Act of 1909, any American musician has had the right to record their own version of somebody else's song, as long as that song has already been recorded and commercially released. Music alone, or music with lyrics. You don't need the copyright owner's permission.



Corn

You don't need permission.



Herman

You need to pay. That's the whole trick. The composer cannot deny you a mechanical license. They can't say no. They can set nothing, because the rate is set by statute. You give notice, you pay the statutory royalty, and you record your version. That's it.



Corn

So the word compulsory is doing real work there. It's not a negotiation that usually goes your way. It's a license that exists whether the owner likes it or not.



Herman

And that inversion is the entire foundation. Everything else in this conversation sits on top of it.



Corn

Okay. Now the distinction I think we need before anything else makes sense.



Herman

Composition versus master.



Corn

Say it properly.



Herman

The musical composition is the melody, the lyrics, the harmony, the structure. That's owned by the songwriter or the publisher. The sound recording, the master, is the specific recorded performance. The actual take. That's separately copyrighted, and it's usually owned by a record label. A cover artist licenses the composition, and then makes a brand new master that they own themselves.



Corn

So the cover artist never touches the original recording.



Herman

Never. That's the clean line. A cover uses the composition and builds its own recording from scratch. A sample uses the master, and that requires permission. Interpolation is the middle case. You re-record the composition, so you still need a license for it, but you're not touching the original master.



Corn

So the refuge is real, but it's narrow. It's one specific right, for one specific kind of use.



Herman

And the narrowness is where all the interesting trouble lives. The origin story, the three licenses, the melody question, and then where the whole thing falls apart on the platforms.



Corn

Start with the pianos. I want to know why this exists at all.



Herman

Nineteen oh eight. Congress is moving toward giving music publishers control over mechanical reproduction. Mechanical meaning any machine that reproduces the music. And as that becomes clear, the Aeolian Company starts signing exclusive deals with the major publishers to be the sole manufacturer of piano rolls.



Corn

Sole manufacturer.



Herman

Exclusive. If you want a roll of a popular song, you buy it from Aeolian, because Aeolian has the deal and nobody else can get one.



Corn

And Congress looked at that and saw a monopoly forming.



Herman

They saw exactly that. And their response was to make the mechanical right compulsory. You cannot lock competitors out of the market for reproducing a song. Anyone can make a roll, or a record, as long as they pay the set royalty. The cover-song industry is a direct descendant of an anti-monopoly fight over player pianos.



Corn

So the refuge wasn't designed to protect artists.



Herman

Not remotely. It was designed to protect the knock-off manufacturers from being squeezed out by exclusive deals. The fact that it now protects a teenager with a webcam is a side effect.



Corn

That's a hell of a thing to inherit.



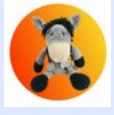
Herman

It is. And it gets better, because the original compulsory license only covered audio. It said nothing about pairing the song with pictures.



Corn

Which is the three-license stack.



Herman

This is the part I want to spend real time on, because it explains almost everything about why covers are treated the way they are online. A video cover involves three distinct rights. The mechanical license covers the composition, the notes, the rhythms, the lyrics. That one is compulsory. The sync license covers pairing the song with visual media. That one is not compulsory. And the master license covers the specific recording, which a cover artist doesn't need, because they made their own.



Corn

So of the three, exactly one is compulsory.



Herman

Exactly one. And that single fact is the whole story. It's why you can walk into a studio and legally record a cover of anything that's been released, and it's also why uploading that same recording to YouTube can get you a copyright strike.



Corn

Hold on. Say that again. You can legally record it, but you can't necessarily legally put it on video.



Herman

You can record it. That's the mechanical. Putting it on video with visuals is a sync use, and sync is not compulsory. The rightsholder decides. There's no statutory rate, no automatic license, no notice-and-pay. You ask, and they can say no, or say yes for a number you can't afford, or say nothing at all.



Corn

Which means the whole video-cover economy is running on permissions that can be withdrawn or never granted in the first place.



Herman

And in practice, mostly never granted, because the transaction cost of clearing a sync license for a random YouTube upload is higher than the license is worth. So the platforms built their own system instead.



Corn

Content ID.



Herman

And Content ID primarily cares about sync rights. So here's the trap. You record a cover. You pay the mechanical royalty properly. You are, as far as the composition goes, completely legal. You upload it. Content ID flags it, because the system doesn't distinguish a lawful cover from an infringement. The rightsholder then chooses. They can allow the video and take the monetization, or they can take it down and issue a strike. And you have no way of knowing which one you'll get until you upload.



Corn

So you're legal and you're still at their mercy.



Herman

You're legal and you're still at their mercy. There's a line I saw from a practitioner that puts it well. Cover songs are basically outlawed by default on YouTube, even though they're entirely legal.



Corn

That's the sentence of the episode, honestly.



Herman

It's close.



Corn

Okay, so now the limits. What does the compulsory license actually not cover? You've given me sync. What else?



Herman

Public performance. Live shows, streaming. That's handled separately, through the performing rights organizations. ASCAP, BMI, SESAC. And this is why bars and clubs have those stickers on the door. The venue pays a blanket license fee, and that blanket covers live performances of copyrighted songs on the premises.



Corn

So the cover band isn't the one holding the license.



Herman

The venue is. Which is why a bar can have a cover band on Friday night and be completely fine, and why that same venue streaming the set online is doing something different. The blanket license covers the live performance. It doesn't cover the stream.



Corn

That's the exact thing Daniel flagged. Venues being careful about copyright even when it's just streaming something off the internet.



Herman

And they're right to be careful, because the moment it goes out over a stream, you've left the territory the blanket license covers.



Corn

There's a third limit, isn't there. Something about changing the song.



Herman

Section 115(a)(2). You're allowed to rearrange the work, and the statute's language is that you can do it to conform it to the recording artist's interpretation. But you cannot change the basic melody or the fundamental character of the work.



Corn

So there's a legal line between a cover and a derivative work.



Herman

That's the line. Rearrange the arrangement, change the key, change the tempo, change the instrumentation. Fine. Change the melody itself, or change the fundamental character of the song, and you've left the compulsory license and you're into derivative-work territory, which needs permission.



Corn

And the fourth limit.



Herman

The composer controls who releases the first recording. You cannot force a mechanical license for a song that hasn't been released yet. Bob Dylan used this. He refused his own record company permission to release a live recording of Mister Tambourine Man.



Corn

His own record company.



Herman

His own. He held the composition, and he said no, and that was the end of it.



Corn

So the refuge has a gate, and the gate is the first release.



Herman

The first release is the gate. Once the song is out in the world, anybody can cover it. Before that, the composer decides.



Corn

What changed recently on the compliance side? Because I remember something about a collective.



Herman

The Mechanical Licensing Collective. It came out of the Music Modernization Act, and it now administers blanket compulsory mechanical licensing for digital platforms. So for streaming releases, it's dramatically easier to be compliant than it used to be. There's a blanket, the platform reports usage, the royalties get distributed. For independent artists, there are also services that administer mechanicals directly. The Harry Fox Agency, Easy Song Licensing, and some of the distributors handle it for you.



Corn

So the paying part has gotten easier.



Herman

The paying part has gotten much easier. The sync part has not gotten easier at all.



Corn

Because sync was never compulsory to begin with.



Herman

Right. No collective can fix a right that Congress never made compulsory.



Corn

Okay. That's the mechanism and its limits. Now the question Daniel actually asked about melody. Does copyright reach that far?



Herman

It does. A melody is protectable expression. And courts have spent a century adjudicating whether one melody is sufficiently similar to another to count as infringement.



Corn

What's the test?



Herman

The plaintiff has to prove two things. Access, meaning the alleged infringer heard the original. And substantial similarity, meaning the two works share protected, unique musical components. And the honest difficulty, which one source puts bluntly, is that it is difficult to come to a definition of what similarity even is.



Corn

That's a remarkable thing to admit in a legal standard.



Herman

It's the whole problem. Similarity is a judgment call, and judgment calls move.



Corn

Give me the cases. Start early.



Herman

Nineteen twenty-one. The song Avalon. The opening melody resembled an aria from Puccini's Tosca, transposed into a major key. Puccini's publishers sued the composers, Vincent Rose, Al Jolson, and Buddy DeSylva, and won. Twenty-five thousand dollars plus all subsequent royalties. One of the earliest melody-infringement wins on record.



Corn

And that's a transposition. Same melody, different key.



Herman

Same melody, dressed differently. And the court heard it.



Corn

Now the famous one.



Herman

George Harrison. My Sweet Lord against the Chiffons' He's So Fine. Harrison was successfully sued. And the detail that matters is what the judge found. He found Harrison had not intentionally copied.



Corn

So he didn't mean to.



Herman

He didn't mean to. The judge concluded he'd likely experienced cryptomnesia. Unconscious memory. He'd heard the song, absorbed it, and it came back out as his own without him recognizing it. Intent is not required for infringement.



Corn

That's the part that should scare anybody who writes music.



Herman

It should. You can infringe a song you believe you've never heard.



Corn

Men at Work.



Herman

Down Under against Kookaburra. Larrikin Music won on a pattern of notes in five bars of a ninety-three bar song.



Corn

Five bars out of ninety-three.



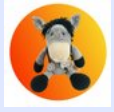
Herman

Five bars. That's how small a protected melodic element can be.



Corn

Blurred Lines.



Herman

Twenty fifteen. Thicke and Pharrell found liable for copying Marvin Gaye's Got to Give It Up. Seven point four million dollars. And this one is controversial, because the Gaye composition was only protected through a lead sheet. The sound recording wasn't at issue. Critics argued the verdict effectively protected style and groove rather than melody. A classical music critic wrote that the verdict would rock Amadeus and other great composers.



Corn

That's the case where the law started protecting a feeling.



Herman

That's the criticism, yes. That it protected a vibe.



Corn

Stairway to Heaven.



Herman

Spirit's Taurus. A jury ruled for Led Zeppelin in twenty sixteen, and the Supreme Court ruled in Led Zeppelin's favor again in October of twenty twenty. That case turned on what counts as protectable expression versus common musical building blocks. The inverse ratio rule was in play.



Corn

Explain that one.



Herman

The inverse ratio rule said that the more access you can prove, the less similarity you need to show. Strong access, weak similarity, still infringement. And the courts narrowed it, because it was being used to lower the similarity bar in ways that made verdicts unpredictable.



Corn

Katy Perry.



Herman

Dark Horse. A federal jury found the beat and the instrumental line infringed a Christian rapper's song, Joyful Noise. Then Judge Christina Snyder reversed it in March of twenty twenty. Which is the reminder that these verdicts are not stable. You can win at trial and lose at the bench.



Corn

So the case law is a mess.



Herman

The case law is a mess, and here's the reason underneath the mess. Any music that follows a scale is constrained by a small number of notes. In twenty nineteen, two people, Damien Riehl and Noah Rubin, used a computer to compose every possible twelve-beat melody in a one-octave heptatonic scale. All of them.



Corn

How many is that?



Herman

About sixty-eight point seven billion. And it fits on commercially available hard drives.



Corn

Sixty-eight billion melodies is a finite number you can hold in your hand.



Herman

That's the argument. Melodic originality is finite. And if it's finite, then unconscious plagiarism isn't a moral failing, it's arithmetic.



Corn

Which cuts against the whole cryptomnesia panic.



Herman

It does. Though I'd say it cuts against the panic, not against the doctrine. The doctrine still requires access and substantial similarity. The finite-melody argument is really about how thin the originality actually is.



Corn

Now give me the other side. What isn't protected?



Herman

Generic images, themes, chord progressions, common musical building blocks. There was an Elton John case in twenty twelve over Nikita, dismissed because the only similar elements were generic images and themes not protected under copyright law. And Tom Petty, asked about Dani California sounding like Mary Jane's Last Dance, said he seriously doubted there was any negative intent, and then, a lot of rock and roll songs sound alike. Ask Chuck Berry.



Corn

That's the sanest sentence in the entire field.



Herman

It is. And it's the exact opposite of the Blurred Lines outcome.



Corn

Okay. So we have the mechanism, the limits, and the melody case law. Now let's put it together for the actual question. The consistently bad cover artist. Why are they legal?



Herman

Because the law doesn't care whether the cover is good. Copyright protects the composition, not the quality of the performance. A terrible cover that faithfully reproduces the melody and pays the royalty is exactly as legal as a brilliant one.



Corn

The badness is protected by the same statute as the brilliance.



Herman

Word for word the same statute. There's no quality threshold anywhere in Section 115.



Corn

So run the checklist for me. What does the bad cover artist actually need to do?



Herman

Four things. Cover only released songs. Don't change the basic melody or the fundamental character. Pay the mechanical royalties, which the collective or a distributor can handle for you. And if you perform live, perform at venues that hold the PRO licenses, which most venues do.



Corn

And if they do all four?



Herman

They're on solid legal ground. The refuge is real.



Corn

But.



Herman

But platform enforcement is the wild card. Because the moment they put it on video, they're in sync territory, and sync isn't compulsory, and Content ID doesn't distinguish a lawful cover from a theft. So the same person can be fully compliant and still get demonetized or struck, depending on what a rightsholder decides that afternoon.



Corn

And there's no way to know in advance.



Herman

No way to know in advance. That's the gap. The law permits it, the platform may not.



Corn

There's one more case I want, because it's the perfect illustration of how layered this gets. Prince and Radiohead.



Herman

Two thousand eight. Prince covered Radiohead's Creep at Coachella, and a clip of it went up on YouTube, and it got taken down. And the thing that makes it perfect is that Thom Yorke made clear the song belonged to Radiohead and he was fine with it.



Corn

So the songwriter was fine.



Herman

The songwriter was fine. But the videographer held rights to the recording, the performer held rights to his rendition, and the publisher held the composition rights. Three layers, and any one of them can pull the clip.



Corn

The person with the least objection is the one everybody assumes has the power.



Herman

That's the whole rights stack in one incident.



Corn

So to Daniel's question. The general legal position is that covers rest on a compulsory license that's been there since nineteen oh nine, and the refuge is real, and it's narrow, and it's older than any of us.



Herman

And it was an accident of anti-monopoly politics.



Corn

Right. Which is the part I keep coming back to.



Hilbert

They were mostly not Aeolian.



Corn

Sorry?



Hilbert

The rolls. In the back of the shop. They were mostly not Aeolian. They were the knock-offs.



Herman

You worked in a piano shop.



Hilbert

Tuning and repair. Late two thousands. There was a stack of player rolls in the back room, and the owner was convinced they were worth a fortune, so I spent a slow winter cataloguing them. Brand, number, condition, all of it. Most of them were the unauthorized versions. The knock-offs.



Corn

The ones Congress was worried about.



Hilbert

That's the thing people get backwards. The compulsory license wasn't written to protect the little guy making art. It was written because the knock-off manufacturers were about to get locked out by exclusive deals, and Congress didn't want one company owning the rolls. So they made the license compulsory, and the knock-offs got to stay in business.



Herman

And the owner tried to sell the collection.



Hilbert

He tried to sell it to a museum. They told him it was worthless, because they were the unauthorized versions. Nobody collects the knock-offs.



Corn

So the copies nobody wants are the reason the law exists.



Hilbert

That's about the size of it. He was not pleased. Anyway, I'm late for an appointment.



Corn

So the refuge for every cover artist alive is a historical accident.



Herman

It's an accident with a very long tail. The knock-off rolls were the first cover artists, legally speaking. The unauthorized versions that Congress protected so a single company couldn't own the market. And that protection is the same one a kid with a webcam is standing on today.



Corn

Which means the whole thing is contingent. It's not a principle anybody designed. It's a monopoly fight that happened to leave a door open.



Herman

The door is narrow in exactly the places you'd expect. Audio, not video. Released songs, not unreleased ones. Same melody, not a new one.



Corn

The misconception I want to kill before we go. The one I think most people hold.



Herman

Go ahead.



Corn

Most people believe you need the original artist's permission to record a cover. You don't. If the song has been commercially released, the composer cannot deny you a mechanical license. You don't need permission. You need to pay.



Herman

The second one, which is the one that actually bites people. Most people believe that paying the mechanical royalty makes a video cover safe. It doesn't. Sync licenses aren't compulsory, and Content ID enforces sync rights. A fully legal cover can still be demonetized or struck.



Corn

The law says yes and the platform says maybe.



Herman

The law says yes and the platform says maybe.



Corn

Which leaves a question I don't have an answer for. If the compulsory license was an anti-monopoly accident rather than a design, what would a principled version of cover law actually look like? Should sync be compulsory too? Or would that break the whole visual-media licensing market?



Herman

I don't know. And there's a harder version coming, because as AI-generated music and AI covers proliferate, the three-license stack is going to get stress-tested in ways the nineteen oh nine Congress could not have imagined. Sixty-eight billion melodies is already a small number. It's going to get smaller.



Corn

The delightful world of consistently bad cover artists exists in a gap between what the law permits and what platforms enforce. That gap is the story. Thanks as always to Hilbert Flumingtop for producing. This has been My Weird Prompts. If you enjoyed it, leave us a review, it helps. We'll be back soon.



Herman

See you then.