

11-1-2016

Exclusive Groove: How Modern Substantial Similarity Law Invites Attenuated Infringement Claims at the Expense of Innovation and Sustainability in the Music Industry

Mark Kuivila

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Mark Kuivila, *Exclusive Groove: How Modern Substantial Similarity Law Invites Attenuated Infringement Claims at the Expense of Innovation and Sustainability in the Music Industry*, 71 U. Miami L. Rev. 238 (2016)

Available at: <https://repository.law.miami.edu/umlr/vol71/iss1/7>

This Notes and Comments is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

NOTES & COMMENTS

Exclusive Groove: How Modern Substantial Similarity Law Invites Attenuated Infringement Claims at the Expense of Innovation and Sustainability in the Music Industry

MARK KUIVILA*

As of 2015, the American entertainment market was worth about \$600 billion, and it is projected to substantially exceed that figure in coming years.¹ The global entertainment industry is worth about \$2 trillion, meaning the U.S. is responsible for over a quarter of total global entertainment revenue.² These statistics illustrate the staggering impact of the American entertainment industry on the global markets

* J.D. Candidate 2017, University of Miami School of Law. I would like to thank Professor Andres Sawicki for his valuable guidance during the writing process and Professor Lily Levi, whose Copyright class inspired this paper. I would also like to thank my loving and supportive parents, without whom I would be nothing; Brittany Sherwood, my girlfriend and partner, for her love, encouragement, and—most importantly—patience; and my other friends and family for their constant encouragement.

¹ The International Trade Administration projects that U.S. entertainment and media markets will exceed \$700 billion in total value by 2018. ANDREA DASILVA, INT'L TRADE ADMIN., 2015 TOP MARKETS REPORT: MEDIA AND ENTERTAINMENT 3 (2015), available at http://trade.gov/topmarkets/pdf/Media_and_Entertainment_Top_Markets_Report.pdf. See also Paul Bond, *Study: Global Entertainment Industry Poised to Top \$2 Trillion in 2016*, BILLBOARD (June 5, 2013), <http://www.billboard.com/biz/articles/news/global/1565728/study-global-entertainment-industry-poised-to-top-2-trillion-in>.

² Bond, *supra* note 1. See DASILVA, *supra* note 1, at 6 (predicting that the global entertainment and media industry will be worth \$2.3 trillion by 2018).

for film, television, and music. The American music industry is particularly dominant in its global market, earning half of world-wide sync revenues and accounting for nearly a third of all global music revenue.³ Entertainment is clearly the United States' chief cultural export and has a profound effect on the country's international image.

The figures above show the integral position of American media in the global market and the importance of studying and understanding the entertainment industries. Because of the country's influential role in media, U.S. copyright law, as it pertains to these industries, has a significant impact on the fundamental structures of both domestic and international entertainment business.⁴ However, a large portion of the common dialogue surrounding issues in U.S. copyright law can be dominated by vague policy arguments rather than more objective economic analysis. This article seeks to blend the policy-based and empirical perspectives, exploring the implications of U.S. copyright law on artistic culture and creative industry itself as an economic system. It will focus on the particularly fickle and confusing area of "music law" and how the current framework is inapplicable to modern music culture and destructive to the music industry as a whole.

³ Sync revenues are derived from "sync licenses" which allow the creator of a visual work to use a piece of music as accompaniment for a fee. These licenses cover compositions used in visual mediums including movies, TV shows, advertisements, and video games. See Christopher Shank, *Music Synchs Galore*, MUSIC BUS. J. (Oct. 2013), <http://www.thembj.org/2013/10/music-synchs-galore/>. According to SelectUSA, "the U.S. has the world's largest performance rights market and earns half of global sync revenues." *Media and Entertainment Spotlight: The Media and Entertainment Industry in the United States*, SELECTUSA, <https://www.selectusa.gov/media-entertainment-industry-united-states> (last visited Sept. 24, 2016). For country by country divisions of global music revenue, see RECORDING INDUS. ASS'N OF JAPAN, RIAJ YEARBOOK 2015, STATISTICS TRENDS: THE RECORDING INDUSTRY IN JAPAN 24 (2015).

⁴ Copyright infringement disputes are governed by the law of the country in which the copying took place. U.S. Copyright Office, *International Copyright*, COPYRIGHT.GOV (Nov. 2009), <http://www.copyright.gov/fls/fl100.html>. Given the lucrative potential of the U.S. entertainment markets, international entertainment entities seeking to maximize profit realization in the U.S. would have to implement monetization strategies tailored to American copyright laws. See *id.*

INTRODUCTION	240
I. PERSPECTIVE ON THE MUSIC INDUSTRY	245
II. HISTORICAL PERSPECTIVE.....	247
A. <i>Early Music Copyright Infringement Law</i>	247
B. <i>The Development of “Pop” Music and Substantial Similarity</i>	248
C. <i>Arnstein v. Porter and the Lay Listener Test</i>	249
D. <i>Dual Regime of Music Copyright: Music v. Sound</i>	251
III. THE MODERN FRAMEWORK.....	253
A. <i>The Ninth Circuit Approach: The Extrinsic and Intrinsic Tests</i>	253
B. <i>Problems with the Ninth Circuit’s Approach</i>	257
C. <i>Music under the Ninth Circuit Tests</i>	259
D. <i>The “Blurred Lines” Case: An Illustrative Example</i>	260
IV. EFFECT ON MUSICIANS AND THE INDUSTRY.....	263
A. <i>Why Musicians are so Agitated: Impact on Artists</i>	263
B. <i>Shooting Themselves in the Foot: Impact on the Industry</i>	267
V. POSSIBLE LEGAL SOLUTIONS AND THEIR IMPLICATIONS.....	270
A. <i>Change the Standards and Tests</i>	271
B. <i>Juries and Experts</i>	273
C. <i>One Court</i>	275
D. <i>This Author’s Suggestion: A Blended Solution</i>	276
CONCLUSION.....	279

INTRODUCTION

In 2013, heirs to the Marvin Gaye estate accused popular musicians Pharrell Williams and Robin Thicke of copyright infringement, asserting that their song “Blurred Lines” was substantially similar to the Marvin Gaye hit “Got to Give It Up.”⁵ After failing to

⁵ Complaint for Declaratory Relief at 1–2, *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGR), 2014 WL 7877773 (C.D. Cal. Oct. 30, 2014), available at <http://mcir.usc.edu/inplay/Documents/williamscomplaint.pdf>. For audio clips of the two songs, see *Pharrell Williams, et al. v. Bridgeport Music*,

reach a settlement, Williams and Thicke sought declaratory judgment in federal court in the Central District of California, arguing that the Gayes' infringement claim was invalid.⁶ They asserted that the plaintiffs' interests in the underlying musical composition did not protect the elements claimed to be similar—namely *sound* and *feel*.⁷ In response, the Gayes filed a suit for copyright infringement.⁸ Despite wide support for the defense in the music community, Williams and Thicke were eventually found liable for infringement in 2015, and a unanimous jury awarded the plaintiffs \$7.4 million in damages and 50% of the song's royalties—one the largest judgments in U.S. copyright history.⁹

Probably due to “Blurred Lines” unexpected popularity in 2013,¹⁰ the litigation ignited a polarizing debate regarding the scope of copyright in musical compositions. Popular musicians, industry professionals, and legal academics alike weighed in on the issue—many supporting Williams and Thicke.¹¹ The music community was

et al., UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <http://mcir.usc.edu/inplay/Pages/williams.html> (last visited Sept. 24, 2016).

⁶ Complaint, *supra* note 5, at 1–2.

⁷ *Id.* at 2.

⁸ Alan Duke, *Marvin Gaye heirs sue ‘Blurred Lines’ artists*, CNN (Nov. 1, 2013, 11:04 AM), <http://www.cnn.com/2013/10/31/showbiz/blurred-lines-law-suit/>.

⁹ These damages were later reduced to \$5.3 million, but the royalty interests were upheld. Eriq Gardner, *‘Blurred Lines’ Lawsuit: Judge Rejects New Trial*, BILLBOARD (July 14, 2015), <http://www.billboard.com/articles/news/6633554/blurred-lines-no-new-trial-pharrell-robin-thicke>.

¹⁰ With “Blurred Lines,” Thicke achieved the rare feat of having a No. 1 Single and No. 1 Album on the Billboard Charts simultaneously. Keith Caulfield, *Robin Thicke’s Rare Double No. 1 Album, No. 1 Song*, HOLLYWOOD REPORTER (Aug. 9, 2013, 6:04 PM), <http://www.hollywoodreporter.com/news/robin-thicke-rare-double-no-603600>.

¹¹ See, e.g., Paul Schrod, *Why hundreds of musicians are supporting Pharrell and Robin Thicke in ‘Blurred Lines’ appeal*, BUSINESS INSIDER (Sept. 1, 2016, 12:09 PM), <http://www.businessinsider.com/ap-more-than-200-musicians-support-blurred-lines-appeal-2016-8?r=UK&IR=T> [hereinafter Schrod, *Hundreds of Musicians*] (Discussing that over 200 musicians signed an amicus brief on August 30, 2016 supporting Williams and Thicke’s appeal to the Ninth Circuit); Jody Rosen, *Questlove on Working With Elvis Costello, Miley’s Twerking, and His Lunchtime DJ Sets*, VULTURE (Sept. 18, 2013, 1:15 PM), <http://www.vulture.com/2013/09/questlove-on-his-new-album-with-elvis-costello.html> (Expressing artist Questlove’s support for Williams and Thicke); Jordan Pearson, *The Clear Downside to the ‘Blurred Lines’ Verdict*, MOTHERBOARD (March 11, 2015,

particularly agitated by the possibility of what it saw as a permissible or even creatively necessary musical reference being categorized as infringement.¹² Additionally, many commentators believed the suit set a dangerous precedent that might encourage a destructive and already far too common practice in the music industry: commoditizing infringement litigation potential.¹³

Students and practitioners of patent law are likely familiar with “patent trolls.” These entities own a diverse array of patents with no intention of actually using them practically.¹⁴ Instead, they monetize these holdings by licensing them to companies that need the technology and suing those parties that infringe them.¹⁵ Relatively recently, others began applying a similar strategy to music copyright holdings; its practitioners are colloquially referred to as “sample trolls.”¹⁶ These entities specialize in searching for and exploiting potential infringement claims against their rights-holdings, many times

10:23 AM), <http://motherboard.vice.com/read/the-clear-downside-to-the-blurred-lines-verdict> (discussing a copyright activist’s viewpoint on the verdict); Paul Schrodt, *The \$5 million ‘Blurred Lines’ legal fight over the song’s ‘vibe’ could permanently change the music industry*, BUSINESS INSIDER (Dec. 15, 2015, 12:05 PM), <http://www.businessinsider.com/blurred-lines-case-music-copyright-2015-12> [hereinafter Schrodt, *Legal Fight*] (discussing the possible consequences of the ruling on the music industry).

¹² Schrodt, *Hundreds of Musicians*, *supra* note 11. See, e.g., Mark Swed, *‘Blurred Lines’ verdict would rock Amadeus and other great composers*, LA TIMES (March 14, 2015, 5:00 AM), <http://www.latimes.com/entertainment/arts/la-et-cm-blurred-lines-classical-notebook-20150314-column.html>. Pearson, *supra* note 11.

¹³ Peter Kirn, *Robin Thicke Judgment: The Day Copyright Law Died, Again*, CDM, (March 11, 2015), <http://cdm.link/2015/03/robin-thicke-judgment-day-copyright-law-died/>; Sherwin Siy, *On “Blurred Lines,” Copyright Infringement, and “Sample Trolls”*, PUBLIC KNOWLEDGE (Aug. 20, 2013), <https://www.publicknowledge.org/news-blog/blogs/blurred-lines-copyright-infringement-and-samp>. See Schrodt, *Legal Fight*, *supra* note 11; Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1187–88 (2014).

¹⁴ Here, “practically” means actually using the patent for its intended purpose. J. Jason Williams, et al., *Strategies for Combating Patent Trolls*, 17 J. INTELL. PROP. L. 367, 368, 368 n.1 (2010).

¹⁵ *Id.*

¹⁶ See Tim Wu, *The shady one-man corporation that’s destroying hip-hop*, SLATE (Nov. 16, 2006, 1:50 PM), http://www.slate.com/articles/arts/culture-box/2006/11/jayz_versus_the_sample_troll.htm; Siy, *supra* note 13; Kirn, *supra* note 13. For a more detailed discussion of this practice and “copyright trolls,” see

based on unauthorized sampling.¹⁷ Broad standards for finding copyright infringement based on similarity like those applied in the “Blurred Lines” case might give sample trolls a new opportunity for exploitation.¹⁸ Even more concerning is the possibility of publishers and record labels being inspired by this practice and utilizing similar strategies as a component of their business models; some evidence seems to suggest they may already be doing so.¹⁹

Even though the statistics discussed earlier in this Note may seem to indicate that the domestic and global music markets are stable and healthy, they are in fact in the midst of a major reorganization.²⁰ With the rise of home recording and digital production, the market has been saturated with new music, leading to a rise in the importance of independent artists and labels.²¹ Most importantly, the classic model by which an entertainment entity might exploit music product is no longer reliable.²² Peer-to-peer file sharing and digital distribution have had a profound effect on the market for music, requiring traditionally structured entertainment businesses to redesign their profit schemes or risk obsolescence.²³ There are more listeners and musicians than ever before, but the industry remains unsure how to combine the two into a profitable and sustainable system.²⁴

Because the industry can no longer rely on record sales as a foundational profit tool, these new business models will have to take advantage of diverse exploitation opportunities that reflect music’s

James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 86 (2012).

¹⁷ DeBriyn, *supra* note 16, at 86; Wu *supra* note 16; Siy, *supra* note 13; Kirn, *supra* note 13.

¹⁸ See Siy, *supra* note 13; Kirn, *supra* note 13.

¹⁹ See DeBriyn, *supra* note 16, at 79, 82. Recently, there has also been a wave of increasingly attenuated substantial similarity claims being brought by publishers and record labels rather than the original artists. For examples, see *infra* Sections IV. A. & B.

²⁰ DASILVA, *supra* note 1, at 4; MICHAEL MASNICK ET AL., *THE SKY IS RISING: 2014 EDITION* 3–5 (2014).

²¹ See MASNICK, *supra* note 20, at 4.

²² DASILVA, *supra* note 1, at 4; MASNICK, *supra* note 20, at 5.

²³ See DASILVA, *supra* note 1, at 4; MASNICK, *supra* note 20, at 4–5.

²⁴ DASILVA, *supra* note 1, at 4; MASNICK, *supra* note 20, at 8–9.

shifting economic locus.²⁵ Under the current American copyright regime, broad interpretation of standards for finding actionable infringement have created a tempting new low-risk-high-reward monetization outlet in profiting from infringement disputes.²⁶ Sample trolls, record labels, publishers, and private rights-holders alike can exploit these standards and use infringement claims based on similarity as a profit tool.²⁷

With the democratization of production technology and the overall simplification of musical styles, the chances of unconscious or even coincidental copying have greatly increased.²⁸ Simply put, the more music there is, the more likely it is that one piece will sound substantially similar to another.²⁹ Additionally, broad and convoluted substantial similarity standards make for outstandingly unpredictable jury decisions.³⁰ This high potential for perceived similarity and low confidence in jury decisions has made industry participants increasingly skittish when confronted with potential infringement disputes, quickly resorting to settlement rather than defending against the claimant.³¹

This Note will argue that the current standards for finding copyright infringement of musical compositions are overly broad and all but inapplicable to modern music business and culture. Additionally, these broad standards invite the destructive trend of monetizing copyright interests through litigation potential, harming both musicians and the market for music itself.³² The first part of this Note will review the current condition of the music industry and why infringement monetization has become a tempting profit opportunity. The second part will briefly discuss the history of U.S. copyright

²⁵ DASILVA, *supra* note 1, at 4; MASNICK, *supra* note 20, at 5, 9.

²⁶ See Cronin, *supra* note 13, at 1187–88.

²⁷ See Kirn, *supra* note 13.

²⁸ *Id.*

²⁹ This observation is discussed at greater length later in this note. See *infra* Section IV. A.

³⁰ See Cronin, *supra* note 13, at 1188.

³¹ *Id.*

³² It should be noted that these issues are not exclusive to the entertainment industry, and all creative industries are potentially at risk for a similar wave of damaging litigation. For a broader discussion of copyright dispute monetization and its impact on other industries, see generally DeBriyn, *supra* note 16.

law as it pertains to musical compositions. The third part will analyze the components and application of modern infringement standards, using the Ninth Circuit's approach and the "Blurred Lines" case as illustrative examples. The fourth part addresses potential effects of these standards on artists and the music industry as a whole. And finally, the fifth part will explore proposed solutions to the perceived inequities inherent in our current infringement structure, as well as the complicated implications of each. This Note will propose a comprehensive restructuring of the current framework by blending commonly suggested proposals into one consistent system.

I. PERSPECTIVE ON THE MUSIC INDUSTRY

In the mid to late 2000s, the driving forces behind the music industry for the previous fifty years seemed paralyzed.³³ Piracy and peer-to-peer file sharing were causing substantial losses for industry participants,³⁴ and these disruptive technologies had rendered traditional monetization strategies unreliable.³⁵ The industry as a whole was forced to reorganize and develop profit models that reflected music's shifting economic value in the face of new and innovative industry participants.³⁶

As of 2016, much of the remaining "doom and gloom" surrounding entertainment investment generally is misguided, and the media industries as a whole are in the midst of a global renaissance of creative content.³⁷ Film and TV investment has been steadily rising since 2000, and both industries have reached somewhat of a "golden age."³⁸ The accessibility of inexpensive and easy-to-use creative production tools spurred staggering growth in creative output over the last decade,³⁹ and digital distribution platforms allow for

³³ See DASILVA, *supra* note 1, at 4; MASNICK, *supra* note 20, at 6–7.

³⁴ See DASILVA, *supra* note 1, at 4, 13. There was a sharp decrease in music royalty revenues during this time period, and record sales, which had steadily grown since the early 2000's, leveled off. See MASNICK, *supra* note 20, at 6–7.

³⁵ See DASILVA, *supra* note 1, at 4, 13; MASNICK, *supra* note 20, at 5, 9.

³⁶ See DASILVA, *supra* note 1, at 4, 13; MASNICK, *supra* note 20, at 3, 5.

³⁷ MASNICK, *supra* note 20, at 3.

³⁸ From 1990 to 2010, movie investment more than doubled from less than \$11 billion to just short of \$24 billion. *Id.* at 2.

³⁹ *Id.* at 4.

cheap—or even free—global marketing proliferation, making it easier for independent artists to achieve widespread popularity.⁴⁰ There is more content than ever, and profit exploitation opportunities in the new corpus are vast and diverse.⁴¹

Even though more money and content are flowing through the entertainment industries than a decade ago, the profit distributions are vastly different.⁴² Democratization in the industry has shaken the dominant position of the industry's major players and spread profit distributions across a wider array of independent studios, publishers, and labels.⁴³ This is particularly true in the music industry where a substantial amount of investment interest has been directed towards access platforms rather than content development.⁴⁴ Additionally because album sales are no longer reliable profit generators, industry players must take advantage of more diverse exploitation opportunities.⁴⁵ For example, likely due to the impersonal nature of digital distribution, there has been a spike in consumer demand for live music experiences, stimulating a wave of investor interest in music festivals and venues.⁴⁶

The music industry *is* in a better position than it was a decade ago, but its investment market is still fragile.⁴⁷ Even though the live music industry has grown substantially over the last few years, some analysts are skeptical of the model's sustainability, and there have already been tribulations in the burgeoning market.⁴⁸ If the live mu-

⁴⁰ *See id.*

⁴¹ *See id.*; DASILVA, *supra* note 1, at 4.

⁴² MASNICK, *supra* note 20, at 3–4.

⁴³ *Id.*

⁴⁴ *See id.* at 4, 8. *See, e.g.*, Douglas Macmillan, et al., *Spotify Raises \$1 Billion in Debt Financing*, WALL ST. J. (March 29, 2016, 6:15 PM), <http://www.wsj.com/articles/spotify-raises-1-billion-in-debt-financing-1459284467>.

⁴⁵ DASILVA, *supra* note 1, at 4; MASNICK, *supra* note 20, at 5, 9.

⁴⁶ MASNICK, *supra* note 20, at 7.

⁴⁷ *See id.*; DASILVA, *supra* note 1, at 4. *See, e.g.*, Ryan Mac, *The Fall Of SFX: From Billion Dollar Company To Bankruptcy Watch*, FORBES (Aug. 24, 2015, 6:13 AM), <http://www.forbes.com/sites/ryanmac/2015/08/24/the-fall-of-an-edm-empire-sfx/#2715e4857a0be9b695f8c077>.

⁴⁸ MASNICK, *supra* note 20, at 4. Publicly traded EDM festival giant SFX recently filed for bankruptcy to aide in its reorganization despite widespread confidence in the company's model and management. This decision will inject more

sic bubble were to collapse, the industry might confront issues similar to those that arose a decade ago. Uncertainty among labels and publishers as to the future of music monetization schemes will only exacerbate apprehension in music investment.⁴⁹

Evidence seems to suggest that in reaction, industry participants are more frequently using copyright infringement claims as a way of garnering profits from rights-holdings.⁵⁰ To avoid expensive and unpredictable litigation, those accused of infringement are quick to settle claims by paying out lump sums or granting royalty participations while risk to the claimant in accusing a supposed infringer remains nugatory.⁵¹ Modern copyright infringement standards for music compositions foster this practice to the detriment of artists and the music industry as a whole.

II. HISTORICAL PERSPECTIVE

A. *Early Music Copyright Infringement Law*

To appreciate the highly problematic nature of modern music law, it is important to understand its historical context. Even though it may seem surprising in retrospect, “music” has not always been considered copyrightable material.⁵² English common law did not extend protection to musical compositions until 1777 when Johann Christian Bach won an infringement suit against a London music publisher for unauthorized printing and distribution of his sonatas.⁵³ In the U.S., compositions were not protected until 1831 when

uncertainty into the music festival market which has become somewhat of a cornerstone of the modern popular music model. Mac, *supra* note 47; Ben Sisario, *SFX Entertainment Declares Bankruptcy*, NY TIMES (Feb. 1, 2016), http://www.nytimes.com/2016/02/02/business/media/sfx-entertainment-declares-bankruptcy.html?_r=0.

⁴⁹ See MASNICK, *supra* note 20, at 5.

⁵⁰ See Schrod, *Legal Fight*, *supra* note 11; Cronin, *supra* note 13, at 1187–88; Ali Sternburg, *Why Are We Seeing New Sampling Suits Over Old Songs?*, PROJECT DISCO (April 9, 2014), <http://www.project-disco.org/intellectual-property/040914-why-are-we-seeing-new-sampling-suits-over-old-songs/#.V-GSxaIrIsl>. For more examples of these suits, see *infra* Sections IV. A. & B.

⁵¹ See Cronin, *supra* note 13, at 1187–88.

⁵² *Id.* at 1194.

⁵³ *Id.* at 1194–95.

Congress first revised the Copyright Act of 1790 to specifically include musical works.⁵⁴

Early music infringement disputes in Britain and the U.S. were similar, in that claims were based on reproduction of the work in totality rather than misappropriation of compositional portions.⁵⁵ However, unlike early British disputes which generally dealt with serious works like Bach's, even early infringement claims in the U.S. "dealt with less rarified works."⁵⁶ To profit from their compositions, American musicians needed to fill gaps in the European canon that appealed to other aspects of American musical taste.⁵⁷

By the early 1900s, pianos were a popular household article and the publication and sale of sheet music had grown into formidable industries.⁵⁸ The advent of public radio in the early century created yet another profitable market for the distribution and consumption of music.⁵⁹ At the forefront of this new industry were the songwriters and music publishers of New York's Tin Pan Alley who held a dominant role in the popular music industry from the late 1800s until the advent of 'Rock & Roll' in the 1950s.⁶⁰

B. *The Development of "Pop" Music and Substantial Similarity*

The modern framework of music copyright originated in response to the rise of Tin Pan Alley and the flourishing market for popular music at the turn of the twentieth century.⁶¹ Courts struggled

⁵⁴ *Id.* at 1195.

⁵⁵ *Id.* at 1208.

⁵⁶ *Id.* at 1198. Because the Copyright Act only applied to domestically produced works until 1891, publishers in the eighteenth and nineteenth centuries could readily distribute serious European works without license. Consequently, American musicians generally focused on the production of simpler works meant for a wider audience. *See id.* at 1200–01.

⁵⁷ *Id.* at 1200–01.

⁵⁸ *Id.* at 1205–06. Because sheet music was the primary distribution medium for musical compositions at the time, these new popular compositions were simpler than more serious works so as to be easily replicated by amateur performers. *Id.* at 1204–06. During this time period, suits based on infringement of the performance right became more common. However, claims for infringement of the performance right were still based on unauthorized performance of the work in *totality*. *Id.* at 1208.

⁵⁹ *Id.* at 1207.

⁶⁰ *See generally id.* at 1204–07.

⁶¹ *See id.* at 1204.

to develop standards that would be applicable to this new kind of music while protecting its growing economic value.⁶² The resulting case law established some of the more problematic and hotly debated doctrines of American music law.⁶³ By this time, courts had recognized that limiting the scope of copyright protection to the reproduction or performance of only the work's literal expression would allow infringers to avoid prosecution through immaterial variations.⁶⁴ However, offering overbroad protection could blur the distinction between copyrightable expression and mere ideas, so the doctrine of substantial similarity developed to resolve that issue.⁶⁵

Under the substantial similarity doctrine, a plaintiff rights-holder can win on an infringement claim by showing: 1) ownership of a valid copyrighted work; 2) that the defendant in fact copied the plaintiff's protected work (commonly referred to as *access*); and 3) that the resultant work is substantially similar to the plaintiff's original (also known as *unlawful appropriation*).⁶⁶ This broader standard for infringement and the success of Tin Pan Alley songwriters invited a new wave of claims brought by songwriters seeking to capitalize on the industry's burgeoning economic opportunities.⁶⁷ The simple nature of popular music at the time lowered the amount of original copyrightable content in compositions, and plaintiffs' claims for infringement became more abstracted.⁶⁸ One of the most infamous of these plaintiffs was the litigious and mentally ill Ira Arnstein.⁶⁹

C. *Arnstein v. Porter and the Lay Listener Test*

Arnstein was notorious for bringing attenuated and ultimately unsuccessful suits for copyright infringement against some of the most popular artists of his time based on minute similarities between the

⁶² See *id.* at 1208–09.

⁶³ See *id.* at 1204, 1208–09.

⁶⁴ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

⁶⁵ See *id.*

⁶⁶ See *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946).

⁶⁷ Cronin, *supra* note 13, at 1208–10.

⁶⁸ *Boosey v. Empire Music* was the first decision regarding infringement based on “qualitatively slight musical similarities between the disputed musical works.” Cronin, *supra* note 13, at 1209. For the original case, see generally *Boosey v. Empire Music Co.*, 224 F. 646 (S.D.N.Y. 1915).

⁶⁹ Cronin, *supra* note 13, at 1211–12.

works.⁷⁰ In his most memorable escapade, Arnstein sued Cole Porter, claiming the latter had copied one of his protected compositions.⁷¹ At trial, Porter successfully motioned for summary judgment, but the decision was reversed on appeal to the Second Circuit.⁷² The framework set forth in the Second Circuit's reversal retains precedential significance to this day and influences infringement decisions across all media of expressive works.⁷³

The court determined that substantial subjective similarity was a question of fact to be determined by a jury comprised of the work's intended audience.⁷⁴ According to the court, popular music was written for the musically uneducated masses, and only a lay listener could properly determine the degree of similarity.⁷⁵ Thus, the question in music infringement cases became whether the defendant took "so much of what is pleasing to the ears of lay listeners" comprising the work's intended audience as to render the works substantially similar.⁷⁶ In his opinion, Judge Jerome Frank expressed particular distaste for allowing expert testimony on the question of substantial similarity, stating that to do so would be to treat relatively simple popular works like caviar, "and [the] plaintiff's and defendant's compositions [were] not caviar."⁷⁷

The *Arnstein* opinion illustrates an unfortunate sentiment that has permeated into the modern discourse surrounding music copyright, namely that popular music is somehow less fit for serious analysis than more "learned" forms.⁷⁸ This approach to the assessment of popular music ignores the value of quantitative and objective evaluation by those versed in the artistry, science, and language of

⁷⁰ *Id.*

⁷¹ *Arnstein*, 154 F.2d at 467; *see also* Cronin, *supra* note 13, at 1211–13.

⁷² *Arnstein*, 154 F.2d at 467.

⁷³ Almost all of the circuits have adopted some version of the Second Circuit's "Lay Listener Test." *See* Cronin, *supra* note 13, at 1212.

⁷⁴ *Arnstein*, 154 F.2d at 473.

⁷⁵ *Id.*

⁷⁶ The question of subjective substantial similarity determines whether the "defendant wrongfully appropriated something which belongs to the plaintiff." *Id.*

⁷⁷ *Id.*

⁷⁸ *See, e.g.*, Cronin, *supra* note 13, at 1193 ("[W]hat we today consider to be popular music, as that term was understood in the 1940s, is actually something else—perhaps "popular sound," or, less charitably, "popular noise.").

music.⁷⁹ Experiments on this question have shown that lay juries are fundamentally ill-equipped to decipher musical similarities but that those with previous musical training are objectively more accurate in their analysis.⁸⁰ This issue has only been exacerbated by the increasingly complicated system of modern music copyright.

D. Dual Regime of Music Copyright: Music v. Sound

It is important to note that current music copyright law is far more complex than it was in the days of *Arnstein*.⁸¹ By the mid-century, sales for phonorecords had overtaken the market for sheet music as the primary avenue for music distribution.⁸² In response, Congress revised the Copyright Act in 1976 as to specifically include protection for sound recordings.⁸³ Compositions can be submitted for registration in the form of sound recordings, but only the musical elements contained within are protected.⁸⁴ Copyrights in sound recordings were meant to be separate and distinct from the protections allotted to the recording's underlying musical composition, creating two sets of copyrights in pieces of recorded music.⁸⁵ This bifurcated system imposes a distinction between *musical* elements and *sonic* qualities dictated by performance.⁸⁶ The difference between the protections extended to musical compositions and the recorded performances that embody them are subtle and, at times, confusing.

To clarify the distinction between compositional and performance qualities, consider for example the tradition of “covering” songs in music. Musicians frequently perform each other's songs in

⁷⁹ See Jamie Lund, *Fixing Music Copyright*, 79 BROOK. L. REV. 61, 86–90 (2013).

⁸⁰ *Id.*

⁸¹ See Cronin, *supra* note 13, at 1239.

⁸² Cronin, *supra* note 13, at 1213, 1213 n.139, 1214.

⁸³ 17 U.S.C. § 102(a)(7) (2012); see also Lund, *supra* note 79, at 69.

⁸⁴ See Lund, *supra* note 79, at 66–67, 67 n. 35; see also U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2012), <https://www.copyright.gov/circs/circ56a.pdf> (“Sending a musical composition in the form of a phonorecord [for example, cassette tape, LP, or CD] does not necessarily mean that there is a claim to copyright in the sound recording.”).

⁸⁵ Lund, *supra* note 79, at 66.

⁸⁶ This approach recognizes traditionally accepted distinctions between songwriters and performers in the musical arts. *Id.*

the style of a different genre with little to no change in the original's underlying melodies, lyrics, and composition. The resulting cover might be performed at a different tempo, in a different key, or with different rhythmic emphasis, but it is still musically identical to the original.⁸⁷ From a sonic perspective, the cover and the original may not be similar at all, and the overall effect of the music may completely change. In a scenario where identical compositions are performed in different styles, lay listeners are hard-pressed to properly identify the level of musical similarity.⁸⁸

Further complicating this distinction between music and sound, the proliferation of audio recording technology has melded the processes of composition and recording.⁸⁹ Unlike works by Beethoven or the Tin Pan Alley songwriters, modern popular songs are rarely written out in formal notation before their performance and are often composed in tandem with their recording.⁹⁰ Musicians will frequently make decisions during the recording process with both sonic and compositional considerations in mind, and for genres like electronic music, sonic qualities are a primary authorial consideration.⁹¹ This change in the creative process has made it increasingly difficult to differentiate between the sonic and musical expressions in a sound recording.⁹² Problematically, that distinction is integral to analyzing music under modern copyright infringement frameworks.

⁸⁷ For an example, listen to Johnny Cash's cover of "Hurt" by Nine Inch Nails and compare with the original.

⁸⁸ See Lund, *supra* note 79, at 86–88.

⁸⁹ See Cronin, *supra* note 13, at 1215–18.

⁹⁰ *Id.*

⁹¹ The proliferation of electronic recording technologies increased authorial focus on secondary non-musical elements like dynamics and timbre. Similarly, wide use of synthesizers, drum machines, sequencers, and samplers in popular genres placed new value on creative sound design, drawing authorial importance from the primary musical considerations of traditional composers. See Cronin, *supra* note 13, at 1214, 1218; MARK J. BUTLER, UNLOCKING THE GROOVE: RHYTHM, METER, AND MUSICAL DESIGN IN ELECTRONIC DANCE MUSIC, 33 (Ind. Univ. Press 2006) (ebook).

⁹² See generally Cronin *supra* note 13, at 1213–14.

III. THE MODERN FRAMEWORK

A. *The Ninth Circuit Approach: The Extrinsic and Intrinsic Tests*

Case law in the Ninth Circuit is some of the most influential in the copyright arena⁹³ but, regrettably, illustrates common issues in copyright doctrine found across the circuits. As copyright law became more complex and attenuated infringement claims became more common, the court worked to develop consistent tests for substantial similarity that would be applicable across all mediums of protected creative works.⁹⁴ In 1977, television producers Sid and Marty Krofft brought suit against McDonald's for allegedly infringing their children's television character "H.R. Pufnstuf" by using a substantially similar character in advertisements.⁹⁵ The Kroffts won at trial, and McDonald's appealed to the Ninth Circuit.⁹⁶

Influenced by the Second Circuit's approach, the *Krofft* court sought to create a broadly applicable limiting principle that would clearly delineate which specific elements of a creative work were protected expressions and which were unprotectable ideas.⁹⁷ The court reasoned that the two-prong framework used by the Second Circuit implied this distinction and correctly noted that only elements of original expression could be considered when determining subjective similarity.⁹⁸ Based on this observation, the court outlined a two-step analysis for substantial similarity known as the "extrinsic

⁹³ This is due to the rise of Southern California as the United States entertainment epicenter.

⁹⁴ See *Sid & Marty Krofft Television Prod.'s, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977).

⁹⁵ *Id.* at 1160.

⁹⁶ *Id.* at 1160–61.

⁹⁷ *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (expounding the lay listener test); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (expounding the abstractions test); *Krofft*, 562 F.2d at 1163–65, (drawing influence from both).

⁹⁸ *Krofft*, 562 F.2d at 1164–65.

and intrinsic tests.”⁹⁹ Later cases have extensively altered the original tests to clarify their application but still maintain the same two-pronged structure.¹⁰⁰

Under current interpretations, the extrinsic component of the two-part test refers to an objective comparison of “all objective manifestations of *expression*” in the works based on “articulable similarities.”¹⁰¹ Though ultimately a question for the trier of fact, the question of extrinsic similarity can often be resolved as a matter of law.¹⁰² During the extrinsic test, the court can consider external criteria like expert testimony to aid in the necessary “analytical dissection.”¹⁰³

Analytical dissection requires the jury or presiding judge to break the works down into their specific expressive elements and then compare those elements standing alone for evidence of copying measured by substantial similarity.¹⁰⁴ Here, the fact finder determines the scope of protection in the plaintiff’s work by deciding which elements are original protected *expressions* and which are unprotectable *ideas*.¹⁰⁵ The fact finder must “filter out” the unprotected or unprotectable elements and only consider similarities between the remaining components.¹⁰⁶

⁹⁹ The extrinsic test satisfies the first requirement of copying in fact, while the intrinsic addresses unlawful appropriation measured by subjective substantial similarity. *Id.* at 1164–65.

¹⁰⁰ See *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994); *Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir. 2002).

¹⁰¹ *Cavalier*, 297 F.3d at 822.

¹⁰² *Krofft*, 562 F.2d at 1164.

¹⁰³ *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *6 (C.D. Cal. Oct. 30, 2014); *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

¹⁰⁴ *Williams*, 2014 WL 7877773, at *6; *Cavalier*, 297 F.3d at 822–23.

¹⁰⁵ See *Williams*, 2014 WL 7877773, at *6; *Cavalier*, 297 F.3d at 822–23.

¹⁰⁶ *Williams*, 2014 WL 7877773, at *6; “A court “must take care to inquire only whether ‘the *protectible elements, standing alone*, are substantially similar.’” *Cavalier*, 297 F.3d at 822–23. Courts have defined the extrinsic test quite inconsistently. Some decisions have expounded that the extrinsic test is actually a test for both similarity of ideas and expression with the objective of showing copying in fact. But, those same decisions state that the fact finder must filter out unprotectable elements and only consider those that are protected. If that were actually the case, the question of similarity in idea would be irrelevant because ideas are

It must be noted here that not all components of a work have to be original expressions for the work as a whole to receive copyright protection.¹⁰⁷ Additionally, a sufficiently original arrangement of individually unprotectable elements can itself constitute a protectable expression.¹⁰⁸ In the Ninth Circuit, this principle is commonly referred to as the *Metcalf* doctrine. The court has stated that the idea-expression distinction used for analytical dissection during the extrinsic test does not obscure the *Metcalf* doctrine's applicability.¹⁰⁹ As its limiting principles, the court primarily uses the doctrines of merger and scènes á faire to determine what elements in a work are unprotectable and should be filtered.¹¹⁰

not protectable expression. *See, e.g., Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

¹⁰⁷ *See Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002).

¹⁰⁸ "Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection." *Id.* The arrangement of these components becomes an expression itself, but the content of those components remains un-protectable. *See id.*

¹⁰⁹ *Williams*, 2014 WL 7877773, at *6; Applying the extrinsic test to protectable arrangements of individually un-protectable elements is particularly difficult. During analytical dissection, the fact finder would have to ignore the content of unprotected individual ideas but somehow consider the effect of their arrangement for comparison. *See generally Swirsky*, 376 F.3d at 848. It should be noted that music compositions are fundamentally arrangements of un-protectable components. *See id.* A chord progression or rhythm alone—unless outstandingly unique—would not qualify for copyright protection, but an arrangement of those components would. *See id.* The "Blurred Lines" case eventually turns on this observation.

¹¹⁰ "[W]hen an idea and its expression are indistinguishable," they are said to have merged, and "the expression will only be protected against near identical copying." *Apple*, 35 F.3d at 1444. When similar features are "as a practical matter indispensable, or at least standard, in the treatment of a given [idea]," those components are considered scènes á faire and are not protected under copyright. *Id.* However, these doctrines alone are not adequate guides for distinguishing expressions from ideas during analytical dissection. Taken in tandem with the *Metcalf* doctrine, original arrangements of scènes á faire or merged components would receive protection, but the court provides little guidance as to what particular qualities of these arrangements the jury should consider expressive during analytical dissection. *See generally Swirsky*, 376 F.3d at 848. These doctrines are also difficult to apply to the varied works protected by copyright. *See id.* For example, it is clear that in a narrative work the concept of star crossed lovers is scènes á faire, but application of that doctrine to choreography, sculpture, or software would be more difficult.

The intrinsic portion of the framework involves a subjective determination of similarity in the “total concept and feel” of the works’ protected expressions from the perspective of an “ordinary reasonable audience.”¹¹¹ Here, the fact finder must decide whether those similarities are substantial enough to constitute unlawful appropriation by the defendant.¹¹² Because the test is meant to be purely subjective, the Ninth Circuit does not allow expert testimony or analytical dissection during the intrinsic portion, and the question is exclusively left to the jury.¹¹³ Instead of dissecting the works into their individual expressive elements and comparing them in isolation, the jury must subjectively consider the similarities between the “total concept and feel” of both works’ protectable expressions as a whole.¹¹⁴

As noted above, to fix the scope of protection extended to a particular work the fact finder must determine which elements of the work are protected original expressions and filter the unprotectable elements during the extrinsic test.¹¹⁵ According to the court, the fact finder should apply dissection in the extrinsic test and compare those elements in isolation.¹¹⁶ Then, the jury must subjectively compare the “total concept and feel” of the remaining protectable components as a whole without regard to evidence presented for the extrinsic analysis and observations made during analytical dissection.¹¹⁷ The lack of definitive boundaries between protectable expressions and unprotectable ideas for jurors to follow suggests a “liberal

¹¹¹ *Cavalier*, 297 F.3d at 822.

¹¹² *See id.*

¹¹³ “Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate.” *Sid & Marty Krofft Television Prod.’s, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). “For the purposes of summary judgment, only the extrinsic test is important because the subjective question whether works are intrinsically similar must be left to the jury.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

¹¹⁴ *See Krofft*, 562 F.2d at 1164 (disallowing analytical dissection); *Cavalier*, 297 F.3d at 822 (requiring analysis of “total concept and feel”).

¹¹⁵ *Williams*, 2014 WL 7877773, at *6.

¹¹⁶ *Id.*

¹¹⁷ *See Cavalier*, 297 F.3d at 822.; *Krofft*, 562 F.2d at 1164 (disallowing analytical dissection and consideration of expert testimony during intrinsic test).

amount of subjectivity” in the determination.¹¹⁸ This subjectivity mires an already complicated standard, further confusing jurors and producing inconsistent precedent with less predictable outcomes.¹¹⁹

B. *Problems with the Ninth Circuit’s Approach*

If you find this system cumbersome and esoteric that is because, in fact, it *is*. Commentators frequently critique the Ninth Circuit’s approach as convoluted and confusing to judges, jurors, and practitioners.¹²⁰ This breakdown in communication between the bench and jury leads to erratic decisions, inviting more attenuated claims and encouraging infringement itself.¹²¹ Furthermore, disallowing expert testimony to clarify appropriate application of the intrinsic test to the medium in question only exacerbates this disconnect.¹²² Both infringers and plaintiffs are more likely to abuse the system when outcomes are more erratic, believing that it is worth it to “roll the dice” as the potential benefits outweigh the risk.¹²³

The Ninth Circuit’s two-pronged test highlights a major issue in judicial precedent for copyright law generally—the limited applicability of legal vocabulary to the analysis of creative works. The pontifications of experts, however exclusive in their accessibility, are at least consistent in that they draw from a commonly accepted understanding of the medium.¹²⁴ Unlike the legalisms of copyright law, the vocabulary of creative critique is tailored to the specific medium

¹¹⁸ Nicholas R. Monlux, *An Invitation for Infringement: How the Ninth Circuit’s Extrinsic and Intrinsic Similarity Tests Encourage Infringement: An Analysis Using Reece v. Island Treasures Art Gallery*, 56 J., COPYRIGHT SOC’Y U.S.A. 543, 553 (2008).

¹¹⁹ *See id.*

¹²⁰ *See, e.g.,* Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL’Y 1375, 1377 (2007); Miah Rosenberg, *Do You Hear What I Hear?: Expert Testimony in Music Infringement Cases in the Ninth Circuit*, 39 U.C. DAVIS L. REV. 1669, 1688–89 (2006); Montgomery Frankel, *From Krofft to Shaw, and Beyond*, 40 COPYRIGHT L. SYMP. 429, 453 (1990); Monlux, *supra* note 118, at 544.

¹²¹ *See* Monlux, *supra* note 118, at 545.

¹²² Rosenberg, *supra* note 120, at 1676–77.

¹²³ *See* Monlux, *supra* note 118, at 545.

¹²⁴ But even though expert evaluations are consistent in their methods, these accepted approaches may not fall within the boundaries of judicial doctrine. *See* Rosenberg, *supra* note 120, at 1689.

it seeks to analyze. As courts have recognized, judges are poor judges of art,¹²⁵ and judicial doctrines can prove more confusing than enlightening. This convolution is particularly problematic when applying standards meant to encompass all creative works rather than ones tailored to the medium in question.

However carefully constructed, the tests provide no guidance on their application to varying creative mediums or the weight provided to each test.¹²⁶ The system may be appropriate in its application to narrative works where merged and scènes à faire elements are more easily identified, but it seems far less effective when applied to art forms where the lines between idea and expression are vague.¹²⁷ Filtration seems particularly difficult when a work consists of copyrightable arrangements of uncopyrightable components protectable under the *Metcalfe* doctrine. In these cases, application of the “total concept” doctrine becomes dangerously close to extending protection to uncopyrightable and ill-defined ideas like genre, style, or vibe.¹²⁸

¹²⁵ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value -- it would be bold to say that they have not an aesthetic and educational value -- and the taste of any public is not to be treated with contempt.”).

¹²⁶ Frankel, *supra* note 120, at 453.

¹²⁷ See Frankel, *supra* note 120, at 433; see also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

¹²⁸ The outcome of *Williams v. Bridgeport Music Inc.* illustrates the implications of this imprecise framework. See generally *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773 (C.D. Cal. Oct. 30, 2014).

C. Music under the Ninth Circuit Tests

The Ninth Circuit's extrinsic and intrinsic system is quite difficult to apply in cases regarding recorded musical compositions.¹²⁹ As explained earlier, a piece of recorded music embodies two distinct copyrights—one in the recording itself and another in its underlying musical composition.¹³⁰ However firm the distinction between music and sound was originally designed to be, application of the analytical dissection and “total concept” approach essentially requires distortion of that delineation.

This would be particularly true in cases regarding works that were written and recorded contemporaneously. Composition and performance overlap when musical decisions are made as to produce particular sonic effects normally dictated by the composition's performance. In these cases, the rights extended to the recording and its underlying composition are easily confused but remain integral to proper application of the extrinsic-intrinsic tests. For an example of this distinction in practice under Ninth Circuit standards, consider the surprisingly well-decided case of *Newton v. Diamond*.¹³¹

In *Newton*, flautist James W. Newton brought an infringement suit against the Beastie Boys claiming the latter had unlawfully appropriated a portion of his composition “Choir” by sampling the song's opening riff without license.¹³² The Beastie Boys had obtained a license from Newton's record label to sample the recorded material but had not acquired a license to use the underlying composition.¹³³ The registered score for “Choir” contained minimal original musical content and only a few vague performance instructions.¹³⁴ The recording, on the other hand, elaborated on the basic melodies and contained sonic performance qualities not dictated by

¹²⁹ “The application of the extrinsic test, which assesses substantial similarity of ideas and expression, to music compositions is a somewhat unnatural task guided by relatively little precedent.” *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004).

¹³⁰ Lund, *supra* note 79, at 66.

¹³¹ See generally *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004).

¹³² *Id.* at 1191.

¹³³ *Id.*

¹³⁴ Cronin, *supra* note 13, at 1228.

the notation.¹³⁵ On appeal, the Ninth Circuit determined that Newton's copyright in the composition did not extend to embellishments or performance qualities omitted from the registered score and that those elements should be filtered out during the extrinsic test.¹³⁶ Furthermore, because the defendants had only sampled a three note phrase from the score, their use was *de minimis* and did not infringe on Newton's composition.¹³⁷ *Newton* was rightly decided, but more recent decisions fail to follow its guidelines.

D. *The "Blurred Lines" Case: An Illustrative Example*

The outcome of *Williams v. Bridgeport* shows how jurors can easily—even understandably—confuse musical and performance qualities when applying the Ninth Circuit's test to compositions.¹³⁸ In light of the *Newton* decision, the outcome of the "Blurred Lines" case "appears indefensibly regressive," being fundamentally at odds with traditional Ninth Circuit interpretations of compositional copyright disputes.¹³⁹ As noted, experiments on the subject have shown that lay listeners are ill-equipped to distinguish which qualities of a musical work are dictated by its composition and which are products of its performance.¹⁴⁰ The intersection of the "Lay Listener Test," *Metcalf* doctrine, and "total concept and feel" approach create a ripe opportunity for overly broad interpretation by jurors and erratic subjective decisions.¹⁴¹

The procedural history of the "Blurred Lines" dispute began when—after failing to reach a settlement regarding the potential infringement claim by the Gaye family against them—Pharrell Williams and Robin Thicke filed an action for declaratory judgment in their favor on the question.¹⁴² According to Williams and Thicke, the Gaye family's accusation hinged on a perceived similarity between the *sound* and *feel* of "Blurred Lines" and Marvin Gaye's

¹³⁵ *Id.*

¹³⁶ *Newton*, 388 F.3d at 1193–94.

¹³⁷ *Id.* at 1196–97; Cronin, *supra* note 13, at 1229.

¹³⁸ See Cronin, *supra* note 13, at 1230–31.

¹³⁹ *Id.*

¹⁴⁰ Lund, *supra* note 79, at 78–86.

¹⁴¹ See generally *id.*

¹⁴² See generally Complaint, *supra* note 5, at 2.

“Got to Give It Up.”¹⁴³ In their ultimately unsuccessful complaint for declaratory judgment, the artists argued that feel and sound were not protected elements of a compositional copyright and that extending protection to these qualities would give rights-holders ownership over entire genres of music.¹⁴⁴ Williams and Thicke stated that “Blurred Lines” was written to “evoke an era” of music rather than to specifically imitate “Got to Give It Up” and that any similar musical devices between the two were commonly used by other songwriters of the time or were derived from unprotected elements of the underlying composition to Gaye’s work.¹⁴⁵ In response, the Gaye family filed a suit for infringement, arguing that these similarities surpassed mere influence in sound and feel and that the artists had unlawfully appropriated protected material from “Got to Give It Up.”¹⁴⁶

It must be noted that “Got to Give It Up” was recorded and registered in 1977 when the 1909 Copyright Act was still in effect.¹⁴⁷ Under the 1909 Act, only written musical notation—and not sound recordings—could be submitted for registration of compositional works, but Gaye, who could not read or write musical notation, composed and recorded the song in the same process.¹⁴⁸ After recording the song, Gaye and his publisher submitted a lead sheet prepared by a third party for registration that only contained a limited outline of the music actually performed on the recording.¹⁴⁹ The Gaye family argued that the court should consider the recorded version of the

¹⁴³ *Id.* It should be noted that in the official records the court, claimants, and expert witnesses refrained from using these words specifically, but the terms were used by Williams and Thicke in their complaint.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* However, Thicke said in an interview that he and Williams wrote “Blurred Lines” to have the same groove as “Got to Give It Up.” *See* Stelios Phili, *Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film*, GQ (May 6, 2013 9:20 PM), <http://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy>.

¹⁴⁶ Defendants’ Counterclaim at 14, *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 787773 (C.D. Cal. Oct. 30, 2014), available at <http://mcir.usc.edu/inplay/Documents/gayecounterclaim.pdf>.

¹⁴⁷ *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 787773, at *7 (C.D. Cal. Oct. 30, 2014).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

work when applying the extrinsic test, even though only the lead sheet was registered.¹⁵⁰ The presiding judge disagreed, finding that the plaintiffs' copyright only protected music contained in the score and only the content of the lead sheet could be considered.¹⁵¹ Anything outside of the registered lead sheet had to be filtered from the analysis.¹⁵²

From an objective standpoint, "Blurred Lines" does not copy any literal compositional elements from the registered score for "Got to Give It Up."¹⁵³ However, with support from expert testimony, the family argued that even though Williams and Thicke had not literally copied the composition, the artists had borrowed enough elements from the song to produce a substantially similar structure and overall effect.¹⁵⁴ The family's experts opined that "Blurred Lines" and "Got to Give It Up" were substantially similar in "constellation" of those elements and that these similarities in arrangement were significant enough to satisfy the extrinsic-intrinsic test even absent literal copying of the composition's content.¹⁵⁵

The litigation became a whirlwind of motions and countersuits that ultimately culminated in a unanimous jury decision for the Gayes.¹⁵⁶ Whatever the specific reasoning behind the decision may have been, it does seem clear that the jurors were either confused by or ignored the distinction between performance and compositional elements.¹⁵⁷ Because the scores as written were objectively dissimilar, the jury's decision appeared to be based on external criteria from the sound recording or unprotectable sonic and performance qualities that should have been filtered from the analysis.¹⁵⁸

¹⁵⁰ A lead sheet is a limited outline of the basic musical themes in a song, and it generally contains very few performance notes. *Id.*

¹⁵¹ *Id.* at *10.

¹⁵² *Id.*

¹⁵³ *Id.* at *13.

¹⁵⁴ See Defendants' Counterclaim, *supra* note 146, at 14–15.

¹⁵⁵ See *id.*

¹⁵⁶ See *Williams*, 2014 WL 7877773, at *1; Cronin, *supra* note 13, at 1230–31.

¹⁵⁷ See Cronin, *supra* note 13, at 1231.

¹⁵⁸ The jury may also have been influenced by Williams' and Thicke's inconsistent testimony and perceived dishonesty. Cronin, *supra* note 13, at 1231, 1231 n.231.

“Blurred Lines” was clearly influenced by “Got to Give It Up,” and it is quite reasonable to say that the songs sound similar. However, when only comparing the protected compositional expressions and excluding the unprotected performance qualities, this similarity does not rise to the level of copyright infringement on the composition. The “constellation” of creative decisions that the plaintiffs’ experts referred to included male falsetto vocals, alternating cowbell patterns, and omission of guitar riffs, but all of these qualities are unprotectable under past case law.¹⁵⁹ This over-application of the *Metcalfe* doctrine essentially extends copyright protection in compositions to instrumentation decisions that are generally the realm of recording and performance. But under “total concept and feel,” these arrangement qualities are provided more probative weight than the individual compositional elements. The music community criticized the decision as being inconsistent with modern music culture by making commonly accepted levels of artistic influence actionable offenses.¹⁶⁰

IV. EFFECT ON MUSICIANS AND THE INDUSTRY

A. *Why Musicians are so Agitated: Impact on Artists*

As applied in *Williams*, the Ninth Circuit’s system for finding infringement has become almost inapplicable to modern music composition, and under it, artists can be punished for using culturally accepted creative strategies.¹⁶¹ “Total concept and feel” as it pertains to music compositions can easily be construed to include performance qualities that are not dictated by the underlying music. Expanding the scope of protection in compositions to this degree essentially gives rights-holders the sole privilege to perform songs in a particular style and exclusive control over a sound or groove. This expansion shifts probative value away from the actual content of the music and improperly distorts the boundary between idea and expression by protecting style rather than composition.

Under this expanded scope, the protection afforded to seminal works of a genre would be inequitably exaggerated and limit artistic

¹⁵⁹ Defendants’ Counterclaim, *supra* note 146, at 14–15.

¹⁶⁰ Over 200 artists filed a brief with the Ninth Circuit, supporting *Williams*’ and *Thicke*’s appeal. Schrod, *Hundreds of Musicians*, *supra* note 11.

¹⁶¹ *Id.*; Swed, *supra* note 12 (stating that these practices have been accepted by musicians for centuries).

influence from a substantial portion of culturally important works. Certain music has become so influential and pervasive in the collective cultural and artistic lexicons that the likelihood of substantial similarity arising in new works is all but inevitable.¹⁶² For example, the distinctive performance styles of artists like Michael Jackson and James Brown are such definitive examples of their respective genres that reference to their works is all but necessary to write songs in those styles.¹⁶³

With the growing popularity of retro-style songwriting, evoking the sound of a culturally relevant artist has become a common practice welcomed by the listening public, but it might expose artists to potential liability.¹⁶⁴ Recently, Mark Ronson and his co-authors were accused of infringement by a UK music publisher.¹⁶⁵ The publisher claimed that Ronson's wildly popular "Uptown Funk" infringed on the song "Oops Upside Your Head" by pioneering funk group The Gap Band.¹⁶⁶ The musical similarities between the two songs are minimal and highly common to the funk genre generally, but Ronson and his publishers quickly settled with their accusers.¹⁶⁷ Commentators drew parallels between the "Uptown Funk" dispute and the "Blurred Lines" litigation, believing Ronson and his team settled in order to avoid unpredictable and potentially unfavorable litigation.¹⁶⁸

¹⁶² See generally Cronin, *supra* note 13, at 1230.

¹⁶³ The merger and *scènes à faire* doctrines might be valid defenses against this interpretation, but those doctrines are difficult to apply in cases regarding compositional infringement. Genres like Rock & Roll and R&B draw heavily on musical foundations developed by past artists of genres like Blues and Doo-Wop. See Cronin, *supra* note 13, at 1216. Had these appropriations been considered infringement, Rock & Roll would have essentially never existed. Because these appropriations were used to develop new genres rather than mimic the original, merger and *scènes-a-faire* might not have protected these artists.

¹⁶⁴ See Joanna Demers, *Sound-Alikes, Law, and Style*, 83 UMKC L. REV. 303, 303 (2014) (discussing "retromania" and the popularity of new "sound-alikes").

¹⁶⁵ Instead of initiating a legal claim, the publisher sent a request to YouTube to flag the song and keep any generated revenue in escrow until the matter was resolved. Ed Christman, *Inside the New Royalty Split for 'Uptown Funk': Who Gets Paid What*, BILLBOARD (May 4, 2015), <http://www.billboard.com/articles/business/6553861/uptown-funk-royalties-who-gets-paid>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Along with exponential growth in the sheer volume of music being created through accessible and inexpensive digital recording, “sound alike”¹⁶⁹ are essentially guaranteed.¹⁷⁰ Some might disagree with this assessment, believing that composers draw inspiration from an unlimited ethereal corpus, but this position would ignore two fundamentally limiting qualities of music creation. Firstly, all creative works, and especially music, are a product of their author’s environment and exposure to other works.¹⁷¹ Secondly, music is a limited art that draws from a finite domain of accepted quantitatively definable sonic devices.¹⁷² The simplification of pop music for mass consumption further limits these musical vocabularies and again increases the probability of similarity.¹⁷³ Other creative mediums do not have the same authoritative limits on expression and, consequently, perceived overlap is less likely.¹⁷⁴

¹⁶⁹ See Demers, *supra* note 164, at 309 (“A sound-alike is a recording intended to resemble other recorded works, usually popular hits.”).

¹⁷⁰ Cronin, *supra* note 13, at 1230.

¹⁷¹ From a psychological and philosophical perspective, the concept of artistic *originality* in general is a thin one. It inaccurately frames creative works as spontaneous generations independent of the cultural context of their creation. Musicians have always been comfortable with this fact and foster a culture of appropriation. The study of music itself is rooted in reference to past works: jazz musicians learn their craft through improvising alterations to canonic standard progressions; and musicians of the classical era were known for re-orchestrating the works of their contemporaries, adding to the free flowing creative dialogue of the time. See Swed, *supra* note 12.

¹⁷² The human ear finds a finite number of tones, intervals, and rhythmic devices pleasing to the ear. More than many other kinds of art, the vocabulary of music can be defined in measurable, quantitative values. The relationships between melodies, rhythms, and harmonies can all be expressed in terms of frequency, measureable time, and ratio-based intervals. The overwhelming majority of composed music subscribes to this fundamentally limited set of accepted sonic devices and standard structures. This is particularly true in the arena of popular music where the authorial objective is listen-ability as opposed to high-art music, such as John Cage for example where the objective in many instances is artistic exploration. See Tony Phillips, *The mathematics of piano tuning: Natural harmony*, AM. MATHEMATICAL SOC’Y, <http://www.ams.org/samplings/feature-column/fcarc-piano1>. For other articles on the subject, see *Mathematics of Music*, AM. MATHEMATICAL SOC’Y, <http://www.ams.org/samplings/math-and-music#articles>.

¹⁷³ See Cronin, *supra* note 13, at 1230.

¹⁷⁴ For example, compared to the color pallet of visual art, the accepted tonal pallet for musical expression is limited. The color “red” is a spectral condition

As an example of recent incidental copying, rights-holders to Tom Petty's classic "I Won't Back Down" accused Sam Smith of plagiarizing the song in his Number 1 hit "Stay With Me."¹⁷⁵ As in the Ronson dispute, similarity between the two songs is minimal and centers around a slight melodic and rhythmic similarity.¹⁷⁶ Tom Petty himself admitted that the similarity was a "musical accident," but like Ronson, rather than risk an expensive and unpredictable dispute, Smith and his team settled with the publisher.¹⁷⁷

This high probability of similarity is clearly problematic in genres where similarity between works is actually a valued compositional device. Modern electronic dance music like techno, electro, and house is made intending for the individual recordings to be seamlessly strung together into long format DJ sets.¹⁷⁸ As a result, these works are generally arrangements of common sonic devices used in the genre¹⁷⁹ but receive protection under the *Metcalf* doc-

encompassing a diverse range of electromagnetic wavelengths all of which constitute "red" but in different shades. *ElectroMagnetic Color*, COLOR MATTERS <https://www.colormatters.com/color-and-science/electromagnetic-color> (last visited Sept. 24, 2016). Musical compositions, on the other hand, are generally constructed from a set of twelve notes, each of which has a precise quantitative definition known as "equal temperament." For example, a perfectly tuned Middle C has an accepted frequency of 262 Hz (when rounding up), and deviations from these standards are rare, particularly in popular music. J. BACKUS, *THE ACOUSTICAL FOUNDATIONS OF MUSIC* 153 (1977), available at <http://www.audiology.org/sites/default/files/ChasinConversionChart.pdf>; Tony Phillips, *The Mathematics of Piano Tuning: Frequencies and Notes*, AM. MATHEMATICAL SOC'Y, <http://www.ams.org/samplings/feature-column/fcarc-piano2>.

¹⁷⁵ Daniel Kreps, *Sam Smith on Tom Petty Settlement: 'Similarities' but 'Complete Coincidence'*, ROLLING STONE (Jan. 26, 2015), <http://www.rollingstone.com/music/news/sam-smith--tom-petty-settlement-20150126>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* According to Petty, the parties resolved the issue amicably, and his publishers never threatened litigation during the negotiation. However, the quick jump to settlement clearly indicates a greater skittishness in the shadow of potential litigation. Daniel Kreps, *Tom Petty on Sam Smith Settlement: 'No Hard Feelings. These Things Happen'*, ROLLING STONE (Jan. 29, 2015), <http://www.rollingstone.com/music/news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-20150129>.

¹⁷⁸ For a discussion on the history of DJ'ing, see BUTLER, *supra* note 91, at 37.

¹⁷⁹ See *id.* at 206–09.

trine. While works of Beethoven and Bach were detailed and complex, these dance songs may only contain a standard four-to-the-floor rhythm, a simple melody, and textural or atmospheric sonic components.¹⁸⁰ Under the current copyright standards, these songs are almost certainly infringing on works by pioneers of the genre like Frankie Knuckles and Giorgio Moroder, but it is unlikely an electronic musician would actually assert this to be the case.

For all of these reasons, broad infringement standards restrict creativity in music and improperly punish artists for using traditional composition techniques. The lines between influence and infringement are far too distorted as to be effectively applicable to a modern music culture that heavily values referential and appropriative works. The threat of litigation prevents artists from expressing the context of their creative influence and limits an already confined medium of expression. These issues reflect the problems in applying modern copyright infringement doctrine to music and the inequitable policy implications of current standards to which the judiciary should react.

B. *Shooting Themselves in the Foot: Impact on the Industry*

Like musicians, industry commentators have lamented the overly broad application of substantial similarity standards to music compositions and criticized it for encouraging an already too common practice of using infringement disputes as a profit opportunity.¹⁸¹ Erratic jury decisions invite weaker infringement claims brought by plaintiffs with little to lose, particularly when compensating counsel through contingency fees.¹⁸² As noted, this lack of predictability also encourages defendants to settle earlier in the process for fear that they might lose much more at trial; those who do not settle could face a capricious and ill-informed jury.¹⁸³

Because of the industry's uncertain position as a whole, the opportunity to profit from infringement disputes is a tempting venture when seeking to diversify revenue streams. While historically many music infringement plaintiffs were amateur songwriters seeking to

¹⁸⁰ See *id.*

¹⁸¹ See Cronin, *supra* note 13, at 1192–93; Siy, *supra* note 13; Wu, *supra* note 16.

¹⁸² See Cronin, *supra* note 13, at 1192–93, 1243–44.

¹⁸³ See *id.* at 1188, 1243–44.

capitalize on the success of another artist, publishing houses and record labels are more frequently parties to these disputes than in the past.¹⁸⁴ Despite infringement profiteering's apparent adoption by some as a component of their profit schemes, the practice corrodes industry sustainability overall.

In an industry plagued by uncertainty, increased liability potential is an unwelcomed addition to the already high risks associated with investing in new works. In the shadow of infringement potential, music publishers and record labels, like movie studios, might concertedly reject unsolicited submissions to avoid accidental exposure to infringement claims.¹⁸⁵ Any new potential rights acquisitions will have to be vetted through a comprehensive research process to identify any potential liability associated with the work.¹⁸⁶ These necessary expenses will add more entry barriers to the already exclusive industry and thin the margins on new acquisitions.¹⁸⁷ The fear of liability and increased costs associated with its avoidance will almost certainly chill investment in new music, potentially depriving innovative artists of funding and capital.

Furthermore, rights-holders might choose to monetize culturally relevant works through litigation once the primary market for the work has cooled. These rights-holders, whether they be publishers, labels, sample trolls, or individuals, have less incentive to create, distribute, or invest in new works of music than to generate profit from current holdings. Evidence suggests that some entities already take advantage of this approach by suing for unauthorized sampling of classic works just before the statute of limitations has expired on

¹⁸⁴ For example, *see* Sections IV. A. & B., generally discussing infringement suits brought by a UK music publisher, rights-holders to a Tom Petty song, and hip-hop producer DJ Mustard.

¹⁸⁵ *See* Cronin, *supra* note 13, at 1244. Access to a work alone can be damning in cases where the works in question are substantially but only incidentally similar.

¹⁸⁶ *Id.* There is already technology that searches through music catalogues to identify unauthorized samples even when they have been extensively obscured in the recording. Duncan Geere, *iPhone App Scans Your Music Collection, Identifies All The Samples*, WIRED (June 19, 2012, 6:15 PM) <https://www.wired.com/2012/06/whosampled-app/>. A similar approach could be taken to finding sound-alikes.

¹⁸⁷ *See* Cronin, *supra* note 13, at 1188.

the claim.¹⁸⁸ In light of the “Blurred Lines” decision, these opportunistic litigants might be tempted to exploit profits from substantial similarity claims as well.

The new—and quite valuable—market¹⁸⁹ for electronic music is particularly vulnerable to the implications of this trend. Artists like Skrillex and Diplo are globally relevant due to their characteristic production styles that alone have spawned new distinct genres.¹⁹⁰ It seems that in light of the “Blurred Lines” decision, these distinctive stylistic qualities are protected expressive material under the Ninth Circuit’s approach,¹⁹¹ and a wave of litigation surrounding these new genres could have a potentially massive impact on these markets.

The industry is already reacting to the potential infringement liability in “ripping off” another artist’s style, and some suggest the “Blurred Lines” decision is to blame.¹⁹² In a truly bizarre situation, hip-hop producer DJ Mustard claimed that “Fancy” by Iggy Azalea and “Classic Man” by Jidenna were rip-offs of his signature production style that has dominated West Coast hip-hop for the last few years.¹⁹³ It is quite obvious that both songs are heavily influenced by Mustard, and both beats sound like his productions.¹⁹⁴ But even though Mustard was the originator, he received no credit on either song.¹⁹⁵ Instead, Jidenna’s publishers gave co-songwriting credits to

¹⁸⁸ See Sternburg, *supra* note 50; see also Wu *supra* note 16.

¹⁸⁹ Glenn Peoples, *Global EDM Market Hits \$6.9 Billion*, BILLBOARD (May 22, 2015), <http://www.billboard.com/articles/business/6575901/global-edm-market-hits-69-billion>.

¹⁹⁰ Gigen Mammoser, *We Talked to a Lawyer About How the “Blurred Lines” Verdict Will Impact Copyright Law in Dance Music*, THUMP (Oct. 15, 2015, 11:31 AM), https://thump.vice.com/en_us/article/we-talked-to-a-lawyer-about-how-the-blurred-lines-verdict-will-impact-copyright-law-in-dance-music.

¹⁹¹ *Id.*

¹⁹² See Tom Breihan, *DJ Mustard Thinks “Fancy” And “Classic Man” Ripped Him Off. Which, Duh*, STEREOGUM (Aug. 19, 2015, 10:34 AM), <http://www.stereogum.com/1825100/dj-mustard-thinks-fancy-and-classic-man-ripped-him-off-which-duh/wheres-the-beef/>; Andrew Unterberger, *Janelle Monae on Iggy Azalea Controversy: ‘She Steal From Us, We Steal Back’*, SPIN (Aug. 15 2015), <http://www.spin.com/2015/08/janelle-monae-jidenna-iggy-azalea-classic-man-steal-fancy/>; Christman, *supra* note 165.

¹⁹³ Breihan, *supra* note 192.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Iggy Azalea and her collaborators to avoid an infringement dispute when both had clearly copied Mustard.¹⁹⁶ Jidenna said in an interview that his team's decision to give Azalea and her collaborators writing credit on "Classic Man" was to avoid a "Blurred Lines" type litigation.¹⁹⁷

Unless there is a major change to the current substantial similarity framework, these increasingly ridiculous disputes will only become more common. By using infringement claims as a new low-risk-high-reward revenue stream, the industry is thinning its already narrow margins and fueling apprehension in new music investment. In an industry built on creativity and innovation, the potential chilling effects of this practice on new music investment could have far reaching implications on the industry's sustainability. Broad standards and unpredictable decisions only make infringement monetization a more alluring revenue opportunity for industry participants, and the need for short-term profits may outweigh the desire to avoid the strategy's long term effects.

Not only is modern substantial similarity doctrine inconsistent with historical precedent, but it also runs contrary to the constitutional goals of copyright.¹⁹⁸ By not addressing these issues, courts are doing more to stifle innovation than promote it. The scope of copyright protection has expanded immensely since its inception, and the creative industries are worse off for it. In light of these policy and economic implications, the Court should overhaul judicial approaches to substantial similarity claims.

V. POSSIBLE LEGAL SOLUTIONS AND THEIR IMPLICATIONS

The destructive implications of current substantial similarity tests are by no means exclusive concerns of the music industry, and all creative industries are potentially at risk for damaging waves of attenuated infringement litigation.¹⁹⁹ By stretching already imprecise tests to cover all copyrightable media, the current framework fails to address the particular creative and industrial needs of each

¹⁹⁶ *Id.*

¹⁹⁷ Unterberger, *supra* note 192.

¹⁹⁸ "To promote the Progress of Science and useful Arts," Congress may grant authors "the exclusive Right to their respective" works. U.S. CONST. art. I, § 8, cl. 8.

¹⁹⁹ *See generally* Williams, *supra* note 14.

sector.²⁰⁰ While some music law critics suggest solutions primarily focused on the system's application to music, this Note offers a comprehensive solution that would hopefully help address the needs of all creative industries. To truly fix music copyright, copyright in general should change.

Commentators have suggested a plethora of potential legal solutions to the problems in the modern substantial similarity framework.²⁰¹ Even though the Ninth Circuit's extrinsic–intrinsic test is an influential—and regrettably problematic—approach, similar issues are common in doctrines across all the circuits.²⁰² Three common categories of proposals have persisted over time, each addressing different perceived issues in the system.²⁰³ The following section evaluates these proposed solutions and their effects on music law, concluding that a blended system utilizing helpful elements from each is the most promising approach. Many of the suggestions discussed below were proposed as alternatives to the extrinsic–intrinsic tests, while others address the broader issues in substantial similarity schemes across all circuits.

A. *Change the Standards and Tests*

Critics of modern substantial similarity standards often suggest a major change to the fundamental judicial tests.²⁰⁴ It is undeniable that current tests are confusing to jurors and produce unpredictable

200

(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

17 U.S.C. § 102 (2012). Software is also protected, but through analogy as a literary work.

²⁰¹ See Eric Rogers, *Substantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis Among the Federal Circuits*, 2013 MICH. ST. L. REV. 893, 915 (2013); Roodhuyzen, *supra* note 120, at 1412–18.

²⁰² See Rogers, *supra* note 201, at 895.

²⁰³ See *id.* at 915.

²⁰⁴ See Roodhuyzen, *supra* note 120, at 1412–18.

and sometimes inequitable results.²⁰⁵ To modernize the current infringement regime, courts will almost certainly need to update their tests and standards. Opinions differ, however, on what form these changes should take; some recommend alterations to the current framework, while others suggest eliminating the tests entirely.²⁰⁶

For example, Michael Sharb has proposed a five-step modified “total concept and feel” analysis, while Lawrence Sher has suggested a four-step alternative to the system.²⁰⁷ In his review of the Ninth Circuit’s extrinsic–intrinsic system, Montgomery Frankel suggests that the court adopt a single-prong analysis that simply asks: “*Did defendant copy plaintiff’s protected expression?*”²⁰⁸ He claims that similarities in “total concept and feel” are completely irrelevant if the defendant did not copy the plaintiff’s protected expression.²⁰⁹ Additionally, he believes that juries should be instructed to objectively evaluate the works but have the autonomy to weigh all relevant factors as they see fit.²¹⁰

Those who recommend eliminating tests altogether believe courts should revert to copyright’s constitutional purpose—promotion of the useful arts and sciences.²¹¹ According to these critics, courts should, instead of applying convoluted comparison tests, simply determine whether judgment for the plaintiff would further constitutional policy goals and legislative intent.²¹² Application of these principles should, in theory, lead to more equitable decisions and limit the scope of copyright as to promote innovation. However alluring this approach, empirical data shows that without a defined test, decisions are far less predictable and more likely to be reversed

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Both proposals separate the question of idea and expression as to clearly distinguish between the protectable and un-protectable elements. Michael L. Sharb, *Getting a “Total Concept and Feel” of Copyright Infringement*, 64 U. COLO. L. REV. 903, 920 (1993); Lawrence Jeffrey Sher, *The Search for a Suitable Standard of Substantial Similarity, The Ninth Circuit’s Application of the Krofft Test*, 25 U.C. DAVIS L. REV. 229, 257–61 (1991).

²⁰⁸ Frankel, *supra* note 120, at 454–57

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Rogers, *supra* note 201, at 915–16; Roodhuyzen, *supra* note 120, at 1412.

²¹² Roodhuyzen, *supra* note 120, at 1419.

on appeal.²¹³ Eliminating tests entirely would exacerbate the inefficiencies its proponents seek to resolve.²¹⁴

While updating judicial tests is clearly a necessary step to fixing the substantial similarity system, changes to the frameworks alone would not solve other pervasive issues in the regime. In general, flexible standards meant to cover all media of copyrightable works fall short in that they fail to address the unique needs of each creative arena. Furthermore, these blanket standards fall behind the times and are quickly rendered obsolete in light of morphing creative landscapes. In the modern era, creative cultures evolve far quicker than legal frameworks, leaving them inapplicable to the industries they seek to regulate. As discussed above, application of these overarching tests to music compositions often produces decisions that are bizarrely out of touch with modern songwriting culture. The kind of creative work being evaluated in a dispute has a substantial effect on the case's outcome, and switching one broad principle for another fails to address these important issues.²¹⁵

B. *Juries and Experts*

Detractors frequently critique the pervasive adoption of the “lay listener” and “intended audience” tests by many circuits.²¹⁶ Clearly, lay juries are ill-qualified to evaluate the creative works in question—that is in fact what makes them *lay* juries. These critics believe that juries composed of those already familiar with the expressive medium would make more consistent and equitable decisions when applying the current framework.²¹⁷ Other commentators claim that admitting expert testimony on all aspects of infringement disputes would solve many problems with the lay listener tests.²¹⁸ Experts

²¹³ The Eleventh Circuit is the only court that has yet to expound a defined test for substantial similarity. In his empirical study on the matter, Eric Rogers found that Eleventh Circuit decisions were less predictable and more likely to be reversed than the other Circuits. Rogers, *supra* note 201, at 921, 925.

²¹⁴ *See id.*

²¹⁵ *Id.* at 926–27.

²¹⁶ *See, e.g.,* Lund, *supra* note 79, at 63–65.

²¹⁷ *Id.*

²¹⁸ Rogers, *supra* note 201, at 917–18.

would clarify how the operative test applies to the medium in question and do their best to educate jurors on esoteric aspects of the evaluation.²¹⁹

In her article *Fixing Music Copyright*, Jamie Lund argues that the “intended audience” for musical compositions are in fact musicians who are fluent in written music rather than the general public.²²⁰ Her studies showed that lay listeners were substantially less accurate than versed musicians in their evaluation of musical similarities and that exposure to expert testimony did little to improve their abilities.²²¹ Similarly, in his empirical study on the subject, Eric Rogers found that allowance of expert testimony had minimal effect on substantial similarity decisions across the circuits in general.²²² He concluded that expert testimony either fails to properly inform juries, or jurors effectively disregard expert evidence.²²³ Under either condition, allowance of expert testimony alone is not properly effective.²²⁴

However, it is sensible to believe that a jury composed of those versed in the particular media in question would likely return more accurate and predictable decisions. Changes to jury composition has a substantial impact on the accuracy of music infringement analysis, suggesting that the lay listener test is fundamentally flawed.²²⁵ However, it would not be practical to call juries composed only of artists in the medium. Additionally, without changing the underlying tests, experts and educated jurors are still mired in the same convoluted standards applied today.²²⁶ As evidenced by the expert testimony in

²¹⁹ *Id.*

²²⁰ In her opinion, written musical notation—i.e. compositions—are intended for the musically literate audience. Lund, *supra* note 79, at 63.

²²¹ *Id.* at 86–88.

²²² Rogers, *supra* note 201, at 928–29.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See Lund, *supra* note 79, at 86–88

²²⁶ See, e.g., *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *12–17 (C.D. Cal. Oct. 30, 2014).

Williams, imprecise underlying judicial standards can lead even experts to improper analytical conclusions.²²⁷ Outcomes might generally be more informed, but the issue of overall consistency and predictability remains.

C. *One Court*

Another common recommendation is vesting jurisdiction for copyright claims in one appellate court.²²⁸ Doing so would eliminate the patchwork of tests applied across the circuits, leading to more predictable outcomes and discouraging forum shopping.²²⁹ With exclusive jurisdiction over copyright disputes, the court would gain familiarity with the subject matter and develop clearer standards from a more experienced perspective.²³⁰ Empirical data supports this position²³¹ as choice of law has a substantial impact on the outcome of infringement disputes, and centralizing judicial jurisdiction might resolve this inconsistency.²³²

This suggestion is quite alluring to those who believe that many of copyright's ills arise from the court's inexperience with the cultures and industries of the creative media they review. By centralizing jurisdiction, the new appeals court could focus on developing more coherent tests and clarify their application to the varying mediums of copyrightable expression. As copyrights become increasingly valuable assets in the modern economy, law surrounding their infringement may require more devoted judicial attention than the varying circuits can provide.

However, this proposal is not without its pitfalls. Many criticize Congress' decision to centralize the patent appeals system, claiming that the Federal Circuit has done more to obfuscate the law than clarify it.²³³ For example, in 2014 the Supreme Court heard six appeals from the Federal Circuit—the most ever—and reversed five of

²²⁷ *See, e.g., id.*

²²⁸ Rogers, *supra* note 201, at 917.

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ Rogers found that the deciding Circuit had a profound effect on plaintiff win rates on substantial claims. *Id.* at 921–23.

²³² *Id.*

²³³ Ashby Jones, *Critics Fault Court's Grip on Appeals for Patents*, WALL ST. J. (July 6, 2014, 7:10 PM), <http://www.wsj.com/articles/critics-fault-courts-grip-on-appeals-for-patents-1404688219>.

those decisions.²³⁴ This seems to indicate that a centralized copyright court could fall victim to the same issues as circuit courts, and inconsistency might just be replaced by consistently *wrong* decisions.

D. *This Author's Suggestion: A Blended Solution*

The difficulty in developing a system for comprehensive substantial similarity reform is that any effective proposal will have to be multifaceted. Isolated changes to the framework would only address isolated issues, and as it stands, the problems in substantial similarity law vary across a number of different doctrines. Even more challenging is determining how these changes should be implemented; inconsistency across the circuits begs an overarching solution.

Heading patent's warning, the copyright community should be wary of centralizing its appellate process. It would be more appropriate for the Supreme Court to resolve these issues by granting certiorari to a group of substantial similarity claims covering a variety of media—"The Copyright Cases." The Court could take this opportunity to articulate clear and appropriate jurisprudence for substantial similarity cases while still allowing for interpretative innovation between the circuits. With input from the respective creative industries, the Court could expound doctrines that are more in line with modern creative cultures and industries. Blended from the proposals of other commentators, this Note provides four suggestions that might inform this restructuring.

First, and most importantly, the Court should no longer utilize the *substantial* similarity doctrine and instead apply a *gross* similarity standard. In this context "gross similarity" would mean: *inexcusable similarity on almost all factors and criteria*. This may seem like a drastic proposal, but it would be quite consistent with modern creative culture. Because substantial similarity between works will inevitably arise given the staggering rate of current creative output, a gross similarity standard properly reflects the narrow scope of protection that should be extended to these less rarified works. This is not to say that plaintiffs would be limited to actions against reproduction of their work in total. Rights-holders could still bring suit

²³⁴ *Id.*

for unlicensed appropriation of major, significant portions of their work but could no longer base claims on such attenuated differences as are allowable today.

Second, there should be no *subjective* considerations in determining infringement, and all observations should be made from an *objective* standpoint. This would bring copyright decisions in line with other areas of the law which generally require objective fact finding. Objective tests would hopefully lead to more predictable outcomes and assuage some of the mounting anxiety surrounding these disputes that leads to preemptive settlements. Allowing jurors to consider their own subjective opinions leaves too much opportunity for misapplication of the law and capricious decisions. On appeal, defendants have almost no grounds to challenge subjective findings, and judges almost always uphold the jury decision.

Third, expert testimony and extrinsic evidence should be allowed on all factual matters at issue. Even though expert input seems to have little impact on jury decisions in these cases so far, their testimonies may carry more weight when applied during purely objective analysis. By allowing experts to clarify the application of tests to the media under review, jury decisions might better conform to the cultural understandings and creative needs of that industry. Calling juries composed entirely of artists is not a practical suggestion, but lay juries should be able to consider their opinions. A viable approach might be to allow for survey results from a statistically sampled group of those familiar with the relevant medium of expression. Juries could consider these surveys as a factor in their determination, but they would not have to be outcome determinative.

Fourth, courts should apply different tests for different categories of media. A fundamental issue with current substantial similarity tests is that they are not easily applied across all mediums of copyrightable expression. But, it would be impractical for the court to expound eight different tests and clarify the application of each to their respective mediums. Instead, the court should identify categories of copyrightable expression that are similar enough in their creative features that one test could suffice. Each category would center around the most important authorial features of each medium and be paired with the most appropriate test for analyzing those features. Consider for example these categories and their respective tests:

1. Literary, Dramatic, and Narrative Works: *Abstractions Test*²³⁵
2. Software and Technology Literature: *Extrinsic Filtration Analysis*²³⁶
3. Visual Arts, Sculpture, and Architecture: *Total Concept and Feel*²³⁷
4. Music, Choreography, and Performance Art: *Analytical Dissection*²³⁸

It is true that at times these categories would overlap when applied to certain works as the case would be for video games. Under these circumstances, the court would consider the narrative features of the work under an abstractions test, the visual components under total concept and feel, and the software component under a filtration test. Facially this may come across as cumbersome, but it is actually a clearer system for jurors to follow.

Separating analysis on these factors would give jurors a more nuanced understanding of the works at issue, hopefully leading to more accurate decisions. This would also depend on what expressive components are actually at issue in the dispute. For example, if a plaintiff were to accuse a defendant of infringing on the plaintiff's protected original melody, the jury would only consider evidence of similarity as to that specific feature rather than the works as a whole. Total concept and feel when applied to protected arrangements over-expands the probative value of that expressive feature and may even trivialize similarities that alone could rise to level of infringement.

²³⁵ For literary and narrative works, the question would become: *how far must we abstract these two works before they become grossly similar, and is that level of abstraction objectively reasonable?*

²³⁶ When analyzing software literature, the jury would use the merger and *scènes à faire* doctrines to filter out un-protectable elements and consider the remaining portions for gross similarity, weighing isolated analysis and comparison in total equally.

²³⁷ For visual works, the jury would consider the total concept and feel of the protectable expressions using merger and *scènes à faire* to limit its application.

²³⁸ Music would only be analyzed in dissection and not in totality. The jury would have the autonomy to weigh each dissected observation equally. The expressive components in arrangement would be only one factor in the consideration and would be weighed against all other available evidence.

This system would limit the scope of copyright allotted to protected works based on the type of authorship they exercise, recognizing the distinct creative needs of each media. When drafting these tests, the court should consider input from those versed in each category and tailor instructions as to fit the cultural and industrial understandings of each. Hopefully when combined with an objective gross similarity standard and extrinsic evidence, these categorizations would properly guide juries through their analysis, producing more equitable and predictable decisions.

CONCLUSION

It has become abundantly clear that the U.S. copyright regime is in dire need of fundamental restructuring, and Congress seems poised to comprehensively reevaluate the Copyright Act for the first time since 1976 in the near future.²³⁹ Even though creatives will warmly welcome this long awaited reform, legislators are unlikely to address issues in the substantial similarity system. Even though the music industry is profoundly injured by the current framework, it is not remotely an industry exclusive issue. All creative industries have evolved in recent years, and the law has failed to catch up. In light of this reality, courts, creatives, and industry-people alike must take responsibility for the distressing condition of modern copyright and work towards sustainable solutions attainable without Congressional action.

First, all circuits should reexamine their current approach to infringement claims in great detail and—hopefully with the guidance of experts—work to develop clearer tests that reflect the modern creative climate. Because of their influential position in the copyright arena, the Second and Ninth Circuits should lead this reformation and outline clear precedents that address the fundamental issues of substantial similarity doctrine. Furthermore, courts should seriously consider eliminating the *substantial* similarity doctrine in favor of a *gross* similarity standard to bring the scope of copyright in line with decreasing creative rarity.

Additionally, creatives and industry entities need to take responsibility for the self-destructive trend of monetizing infringement litigation potential. The music industry is particularly guilty of this

²³⁹ MASNICK, *supra* note 20, at 4.

practice and exacerbates its own woes by doing so. Musicians, record labels, publishers, and rights-holders need to commit themselves to a fundamental cultural change or risk destroying themselves from the inside. By continuously exploiting one another through attenuated infringement claims, industry players are only raising barriers to entry and adding more uncertainty to their already precarious investment market. To that same end, artists and industry entities do themselves more harm than good by grabbing at songwriter credits and forcing inequitable settlements. These disputes limit the scope of permissive creative influence and turn traditionally acceptable composition techniques into theft. In an industry centered on creative innovation, business practices that chill that innovation may have long-term negative implications that greatly outweigh the opportunity for short-term profit.