Do You Hear What I Hear?: The Inequities in Substantial Similarity Tests For Musical Copyright Infringement Cases

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INTRODUCTION

The year was 2013, and Pharrell Williams and Robin Thicke had written the number one single on the Billboard Hot 100 chart.[1] The royalties were rolling

DOI: https://doi.org/10.15779/Z38N00ZV1Q

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1. *See* Williams v. Gaye, 895 F.3d 1106, 1116 (9th Cir. 2018). "Blurred Lines" was the best-

in for Williams's and Thicke's funky pop tune "Blurred Lines" when the Marvin Gaye estate accused the songwriting duo of copyright infringement.[2] After a lengthy legal battle, the court reached a decision that shocked the music industry and songwriters everywhere.[3] The Ninth Circuit Court of Appeals concluded Williams and Thicke infringed on Gaye's "Got to Give It Up," finding substantial similarities in the vocals, harmonies, keyboard, and bass parts of the two tunes.[4] While the songs admittedly share a similar upbeat party-going vibe, the court found no similar melodies, chords, or lyrics between "Got to Give It Up" and "Blurred Lines."[5]

Flash forward to 2014: Led Zeppelin's legendary "Stairway to Heaven" was under heavy scrutiny as the court determined whether the famous guitar opening to the 1968 rock tune was substantially similar to Spirit's "Taurus."[6] Unlike Williams and Thicke, Led Zeppelin walked away from this suit relatively unscathed; the Ninth Circuit Court of Appeals reached a well-supported decision that copyright infringement had not occurred and noted the allegedly copied material was not protected by copyright.[7]

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selling single worldwide in 2013. *See id.* "Blurred Lines" also reached no. 2 on the Billboard Year End Hot 100 songs for 2013. *See Year-End Charts Hot 100 Songs*, BILLBOARD (2013), https://www.billboard.com/charts/year-end/2013/hot-100-songs. The song generated $16.6 million in revenue for Thicke and Williams. *See* Mark Savage, *Blurred Lines: Robin Thicke and Pharrell Williams to Pay $5m in Final Verdict*, BBC NEWS (Dec. 13, 2018), https://www.bbc.com/news/entertainment-arts-46550714.

2. *See Williams*, 895 F.3d at 1115–16 (discussing the Marvin Gaye Estate's claims on appeal, and Thicke and Williams's request that the jury's verdict be overturned on appeal).

3. *See* Adrienne Gibbs, *Marvin Gaye's Family Wins 'Blurred Line' Appeal; Pharrell, Robin Thicke Must Pay*, FORBES (Mar. 21, 2018, 3:37 PM), https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#3715a279689b ("'In our community here at Berklee we have a concentration of 6,000 musicians, and it sent seismic shockwaves throughout,' says Berklee College of Music professor, vice president for academic affairs and musicologist Joe Bennett."); Savage, *supra* note 1 (discussing the verdict, ordering Thicke and Williams to pay the Gaye Estate a total sum of $4.98 million and 50% of all future royalties earned by "Blurred Lines").

4. *See Williams*, 895 F.3d at 1138.

5. *See id.* at 1117–18. The court failed to recognize any similarities between the key elements typically used to find infringement between musical works, such as melodies or lyrics. *See id.* However, Pharrell Williams openly admitted to deriving inspiration from "Got to Give It Up" when composing "Blurred Lines." *See Pharrell Williams Says He Was Inspired by Marvin Gaye's 'Got to Give It Up'*, DAILYMOTION (2013), https://www.dailymotion.com/video/x16neoq ("I tried to take the feeling that 'Got to Give It Up' gave me. But I also tried to do…like blend in Southern White Baptist harmonies on the chorus.").

6. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1057 (9th Cir. 2020). Skidmore filed the original action in 2014 and in 2020, the Ninth Circuit Court of Appeals upheld the lower court's findings that "Taurus" and "Stairway to Heaven" were not substantially similar. *See id.* at 1079.

7. *See id.* at 1063. The *Skidmore* jury found that Led Zeppelin's 8-bar passage was not substantially similar to "Taurus" because "the similarities claimed by Skidmore either involve unprotectable common musical elements or are random." *See id.* at 1059–60. The case was brought on behalf of the Randy Craig Wolfe Trust. *See id.* at 1056. Wolfe had composed "Taurus" for his band Spirit in 1967 or 1968. *See id.* The facts were undisputed; Led Zeppelin and Spirit had "crossed paths" in the late 1960s or early 1970s. *See id.* at 1057. Though there was evidence the bands had played at least three shows together between 1968 and 1970, the bands had never toured together. *See id.* Thus, access could be proven. *See id.* However, other factors pointed strongly against a

The vastly different decisions reached in these cases are illustrative of a larger problem with the substantial similarity test in copyright infringement cases involving the alleged copying of musical compositions and sound recordings.[8] The current tests used to determine substantial similarity in copyrighted works fail to account for the unique aspects of music.[9] The courts' failure to create and apply a fair and customized test for music copyright infringement cases has resulted in repercussions in the music industry, the effects of which run counter to the goals of copyright law by granting too much protection for authors' works and disincentivizing artists.[10] The courts can account for the unique attributes of music in copyright infringement cases by modifying the substantial similarity test to allow for a neutral expert to educate jurors about music theory and common compositional techniques.[11]

This Note focuses on the substantial similarity test and its imbalanced application in music copyright infringement cases.[12] Part I encompasses a brief history of copyrights in musical compositions and sound recordings, as well as an overview of the goals of copyright law and how these goals incentivize musicians to create and disseminate their works.[13] Part I also includes an overview of the Second Circuit Court of Appeals "ordinary observer" test and the Ninth Circuit Court of Appeals extrinsic/intrinsic test.[14]

Part II discusses the key challenges in applying these tests to infringement cases involving music.[15] Several unique aspects of music, including the limitations of Western tonality and current music consumption trends, make these tests difficult to apply.[16] Part II also notes recent music copyright

finding of substantial similarity, including the common use of descending chromatic lines in musical compositions. *See id.* at 1058.

8. *See Williams*, 895 F.3d at 1138 (holding "Got to Give It Up" and "Blurred Lines" are substantially similar); *but see Skidmore*, 925 F.3d at 1063 (holding "Taurus" and "Stairway to Heaven" are not substantially similar).

9. *See* Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 278 (1993) (arguing a new approach in determining cases of copyright infringement is needed).

10. *See* Kory Grow, *'Blurred Lines' Artists 'Sleep Well Knowing They Didn't Copy'*, ROLLING STONE (Mar. 12, 2015, 3:14 PM) https://www.rollingstone.com/music/music-news/blurred-lines-artists-sleep-well-knowing-they-didnt-copy-64756/ (citing Robin Thicke's interview after the *Blurred Lines* decision, at which time Thicke felt as though he "let songwriters down by helping establish [a] horrible precedent that somebody can make a claim based upon a song that sounds the same, yet is materially different").

11. *See infra* Part II & Part III (discussing the unique attributes of music in the context of copyright and suggesting a modification to the current substantial similarity analysis).

12. *See infra* Part II (illustrating the difficulties in applying the current tests for substantial similarity to cases involving music and discussing common musical practices).

13. *See infra* Part I (discussing the history of copyrights in music and the goals of copyright law).

14. *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (creating the Second Circuit Court of Appeals "ordinary observer" test for copyright infringement cases); Sid & Marty Krofft TV Prods. v. McDonald's Corp., 567 F.2d 1157, 1162 (9th Cir. 1977) (creating the Ninth Circuit Court of Appeals extrinsic/intrinsic test for copyright infringement cases).

15. *See infra* Part II (discussing methods of music making and music consumption).

16. *See* Jones, *supra* note 9, at 278 (discussing the unique attributes of music that require a

infringement cases and how these cases have impacted the landscape of the music industry.[17] In the wake of the courts' expanding definition of copyright protection in music, songwriters are crediting a large number of artists and erring on the side of caution when deriving inspiration from other musicians, thus facing an uphill battle in receiving a fair share of publishing royalties.[18] Due to the influx of copyright infringement cases in music after recent judicial holdings, musicians are now afraid of costly litigation and more eager to settle.[19]

Part III proposes a modest adjustment to the courts' current approach in music copyright infringement cases.[20] By using neutral expert testimony to provide education in music theory and common compositional techniques for jurors, the court might begin to remedy some of the issues plaguing current substantial similarity analysis.[21]

I. OVERVIEW OF COPYRIGHT IN MUSIC AND THE GOALS OF COPYRIGHT LAW

Since the inception of copyright law, Congress has adopted new legislation to adapt to society's ever changing technological and social landscape.[22] Although Congress has recognized the various shifts in the consumption of art and the emergence of new art forms, both Congress and the courts have historically treated music like any other form of art.[23] Due to this treatment of music, courts have adopted a one-size-fits-all approach to copyright infringement litigation.[24] A brief examination of the various tests for copyright infringement

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new test for music copyright infringement).

17. *See infra* Part II (discussing judicial decisions throughout the last several decades).

18. *See Music Publishing 101*, TUNECORE, https://www.tunecore.com/guides/music-publishing-101 (last visited Jan. 9, 2021). Publishers ensure mechanical and performance royalties are accounted for and properly paid to songwriters, whether there is one songwriter or multiple. *See id.*

19. *See* Grow, *supra* note 10 (noting Robin Thicke's fear that the *Blurred Lines* verdict set a dangerous precedent for future musicians); *infra* Section II.C (discussing the health of the music industry in the wake of recent judicial decisions).

20. *See infra* Part III (discussing a proposed adjustment to the current substantially similarity tests).

21. *See id.* (providing an argument for the use of neutral expert testimony to educate jurors).

22. *See generally* Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124; Copyright Act of 1831, 4 Stat. 436; Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075; Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; *see also* JULIE E. COHEN ET. AL, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (Erwin Chemerinsky et al. eds., 4th ed. 2014) ("[T]he Framers of the U.S. Constitution embraced [a] utilitarian rationale for copyright protection when they granted Congress the power to enact the copyright laws. Granting a limited monopoly to the authors of creative works provided a means for the fledgling country to encourage progress in knowledge and learning.").

23. *See* J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. TECH. L. REV. 407, 410 (2004) ("In looking at the development of music copyright law, it is evident that both Congress and the courts have historically treated music just like other types of works of authorship, and, consequently have approached the legal issues of protection and infringement of music like those other types.").

24. *See id.* at 425 ("[M]usic copyright law has not altered its fundamental balance in the last 150 years.").

and a review of how the overarching goals of copyright law pertain to music will assist in understanding the current precarious climate for music copyright infringement litigation.[25]

A. The Development of Copyrights in Music

The U.S. Constitution grants Congress the power to provide artists and authors copyright protection for their creative works to promote the progress of society and the useful arts.[26] In 1790, Congress first utilized this power, passing the first federal copyright act.[27] The Copyright Act of 1790 granted copyright protection to books, maps, and charts.[28] In 1831, Congress extended protection to musical compositions, beginning the long and complicated history of copyright protection in musical works. [29]

The Nineteenth Century saw both the advent of copyright protection in musical compositions and significant social changes that spurred further amendments to the Copyright Act.[30] As the Civil War came to an end in 1865, sales of pianos began increasing, in turn increasing the demand for sheet music.[31] While the popularity for sheet music grew, music publishers began flocking to New York City, establishing what would later become known as Tin Pan Alley.[32] These publishers recruited composers to write songs that vocalists across the city would later perform to promote the sale of the sheet music.[33] In response to the growing number of public performances of musical compositions by performers who did not write their music and the failure of player piano roll makers and phonograph record makers to pay royalties, Congress amended the Copyright

25. *See Arnstein* v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (creating the Second Circuit Court of Appeals "ordinary observer" test for copyright infringement cases); Sid & Marty Krofft TV Prods. v. McDonald's Corp., 567 F.2d 1157, 1162 (9th Cir. 1977) (creating the Ninth Circuit Court of Appeals extrinsic/intrinsic test for copyright infringement).

26. *See* U.S. CONST. art I, § 8, cl. 8 ("The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to authors . . . the exclusive Right to their respective Writings . . . .").

27. *See* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, *amended by* Copyright Act of 1802, 2 Stat. 171.

28. *See id.*

29. *See* Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436 (amending the 1790 Act to include musical compositions).

30. *See generally* Act of Jan. 6, 1897, ch. 4, § 29 Stat. 481–82 (granting authors of musical works the exclusive rights to perform their works).

31. *See* Keyes, *supra* note 23, at 412 ("At the end of the Civil War, piano sales began to increase every year and by 1887 there were over 500,000 youths studying piano. During this steady rise in piano purchasing, demand for sheet music began to increase as well.").

32. *See id.* at 412–13 (discussing the creation of Tin Pan Alley, located at West 28th Street between Fifth and Sixth Avenues in the Flower District of Manhattan and once a mecca for music publishing); *see also* Caleb Crain, *A Professional Victim: Ira B. Arnstein*, THE NATION (Apr. 30, 2013), https://www.thenation.com/article/archive/professional-victim-ira-b-arnstein/ ("What killed Tin Pan Alley was new technology. With the advent of the player piano, the phonograph and the radio, fewer people went to the trouble of making music themselves. People still liked to listen, but not many had a need for sheet music anymore.").

33. *See* Keyes, *supra* note 23, at 413 ("[Tin Pan] Alley publishers began hiring skilled musicians to write songs that would be sold in sheet music form to the public.").

Act in 1897 to give copyright holders the exclusive right to publicly perform music.[34] Fearing that certain companies would gain a monopoly over compositions, Congress instituted the compulsory license, which remains in effect today.[35] The compulsory license allows a licensee to create and distribute a phonorecord of a non-dramatic musical work.[36] The licensee can obtain the license from the copyright owner of the underlying musical composition without negotiating with the owner.[37]

Copyright in music saw another major shift in the early Twentieth Century with the advent of the phonograph record.[38] The phonograph record, or "phonorecord," as well as the "radio music box" brought music directly into the home.[39] Thus, the Copyright Act of 1909 (1909 Act) would again extend

34. *See* Act of Jan. 6, 1897, ch. 4, § 29 Stat. 481–82. Player pianos were a popular musical machine in the 1890s. *See* Joseph Fox, *Day of the Player Piano*, AMERICAN HERITAGE (May 1988), https://www.americanheritage.com/day-player-piano. The player piano allowed non-musicians to enjoy music by using their hands or feet to pump a perforated paper roll embedding musical compositions. *See id.* The piano rolls contained felt-tipped wooden rods that would drop down on keys and play them. *See id. See also* Jeff Spurgeon & Max Fine, *Before Spotify: The Player Piano*, WQXR (June 14, 2018), https://www.wqxr.org/story/spotify-player-piano-organ/ (illustrating how a player piano works); *Phonograph*, MARRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/phonograph (last visited Jan. 9, 2021) (defining phonograph as a "an instrument for reproducing sounds by means of the vibration of a stylus or needle following a spiral groove on a revolving disc or cylinder"). The term "phonorecord," which is a phonograph record, is still used when discussing sound recording copyrights and mechanical licenses. *See* 17. U.S.C. § 101.

35. *See id.* § 115(a) (establishing the compulsory license for musical compositions).

36. *See id.* Congress made clear that the underlying musical composition must have been previously distributed to the public to be eligible for the compulsory license. *See* COHEN, *supra* note 22, at 413. The compulsory license was amended in 1998 to include "distribution of phonorecords by means of digital downloads." *See id.* The compulsory license extends only to recorded covers, meaning a personal rendition of the original composition, but not public performances. *See id.* Additionally, the compulsory license extends only to compositions but not sound recordings. *See id.* Thus, if a songwriter seeks to sample another artist's sound recording, the songwriter could not obtain a compulsory license. *See id.* Rather, the songwriter would have to negotiate a license with the owner of the sound recording copyright. *See id.*

37. *See id.* Zac Brown Band is a band known for frequently covering other artist's original works during the band's live performances. *See* Robert Crawford, *See Zac Brown Band's Intimate John Prine Cover on 'Austin City Limits'*, ROLLING STONE (Oct. 20, 2017, 3:34 PM), https://www.rollingstone.com/music/music-country/see-zac-brown-bands-intimate-john-prine-cover-on-austin-city-limits-201714/. If Zac Brown Band covered "Devil Went Down to Georgia" by Charlie Daniels during a live music performance, Zac Brown Band would have to obtain a performance license from Charlie Daniels. *See* Prometheus13, *Uncaged. . .Kashmir. . .The Devil Went Down to Georgia - Zac Brown Band (Live)*, DAILYMOTION (Oct. 11, 2014), https://www.dailymotion.com/video/x7u283h. However, if Zac Brown Band sought to record the composition "Devil Went Down to Georgia," the band might obtain a compulsory license from Charlie Daniels. *See* ZAC BROWN BAND, PASS THE JAR: ZAC BROWN BAND AND FRIENDS LIVE FROM THE FABULOUS FOX THEATRE IN ATLANTA (Southern Ground 2010) (containing recordings of live music covers, including "Devil Went Down to Georgia").

38. *See* 17 U.S.C. § 115(a). A phonograph record or "phonorecord" includes digital files, vinyl albums, cassettes, and CDs. *See id.* § 101.

39. *See* Keyes, *supra* note 23, at 412–13, 415 (discussing the changing technologies of the early Twentieth Century, during which time "music began to seep into the American culture unlike at any other time up to that point in our history").

protection for musical compositions, granting copyright holders the exclusive right to reproduce their music.[40] By extending protection to music played on new technologies, including player pianos, phonographs, and the radio, the 1909 Act effectively provided protection for the reproduction of musical compositions beyond the mere copying of sheet music.[41]

The most dramatic shift in music consumption began in the 1950s.[42] During this era, Americans became enthralled with radio personalities and the jukebox.[43] Television further captured American audiences and became a new vehicle to listen to music and watch it being performed.[44] Television shows, such as The Ed Sullivan Show, American Bandstand, and Soul Train, featured popular musicians of the day and introduced American audiences to the top tunes of the time.[45] With these new means of music consumption, Congress granted sound recordings copyright protection through passage of the Sound Recording Act of 1971 (1971 Act).[46] The Sound Recording Act was enacted to prevent the infringement of phonorecords due to rapidly advancing piracy and duplicating technologies.[47] Although the 1971 Act did not grant sound recordings full

40. *See* Copyright Act of 1909, ch. 320, §§ 5, 11 (providing copyright protection against "any arrangement or setting of [the musical composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced").

41. *See id.*

42. *See* Keyes, *supra* note 23, at 417 ("The parlor piano eventually gave way to 22,000 phonographs, millions of radios, multitudes of disk jockeys, and 500,000 jukeboxes.").

43. *See id.* (discussing the introduction of the radio).

44. *See id.* at 418 (discussing the invention of the television and how the television impacted American audiences).

45. *See* The Beatles, *The Beatles - I Want To Hold Your Hand - Performed Live On The Ed Sullivan Show 2/9/64*, YOUTUBE (April 7, 2016), https://www.youtube.com/watch?v=jenWdylTtzs (depicting The Beatles legendary performance on the Ed Sullivan show on February 9, 1964); BTAN Oneline, *Don't Worry Baby*, YOUTUBE (Dec. 27, 2007), https://www.youtube.com/watch?v=9Y-0nWVdBH4 (depicting The Beach Boys performance of "Don't Worry Baby" on American Bandstand in 1964); NoMadU55555, *ABBA – S.O.S. 1975 (High Quality)*, YOUTUBE (Mar. 4, 2017), https://www.youtube.com/watch?v=Xs0YVJNxUgo (showing Swedish pop band ABBA performing on American Band Stand in 1975); *12 Mind-Blowing 'Soul Train' Performances*, ROLLING STONE (Feb. 5, 2014, 5:50 PM https://www.rollingstone.com/music/music-lists/12-mind-blowing-soul-train-performances-11385/joe-tex-i-gotcha-1972-231961/ (discussing the top 12 performances on Soul Train); *see also* Queen Official, *Queen - Killer Queen (Top Of The Pops, 1974)*, YOUTUBE (Aug. 1, 2018), https://www.youtube.com/watch?v=2ZBtPf7FOoM (depicting Queen's first television performance on Top of the Pops, the British equivalent of popular American television shows that featured musicians).

46. *See generally* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391; *see also* 17 U.S.C. § 101 (defining sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects . . . in which they are embodied").

47. *See* 104 S. Rpt. 128(discussing the purpose of the Sound Recording Act of 1971 "to prevent phonorecord piracy due to advances in duplicating technology"); 17 U.S.C. § 114(a) ("The exclusive rights of the owner of copyright in sound recordings are limited to the rights specified by clauses (1), (2), and (3) and (6) of section 106, and do not include any right of performance under 106(4).").

copyright protection, Congress remedied this lack of protection by granting more extensive copyright protections for sound recordings in the Copyright Act of 1976 (1976 Act).[48] While the 1976 Act was significant in its protection of sound recordings and compositions, the Act did not define what constitutes a musical work.[49] Would a drummer's pounding on upside down tubs constitute a musical work?[50] Or a percussionist hitting plastic tubes?[51] Or did Congress have a more traditional notion of a musical work, intending only to protect melodies?[52]

Regardless of Congress's lack of guidance in defining what constitutes a musical work, technological advancements continued to shape music consumption in the decades following the 1976 Act.[53] In 1987, the Moving Picture Experts Group created the MP3, allowing the transmission of digital audio files.[54] Napster, Inc. quickly took advantage of this new technology by creating a peer-to-peer file sharing system that enabled widespread copyright infringement.[55] While Napster was forced to shut down due to the high volume of infringing activity on the site, Napster ushered in a new era for music consumption.[56] Pandora hit the music market in 2000, allowing listeners to create a customized radio station using a complex music prediction algorithm.[57] Soon

48. *See* 17 U.S.C. § 102(a)(7) (extending copyright protection to sound recordings).

49. *See id.* § 101 (defining various works and categories of protected subject matter and failing to define what elements are necessary to constitute a musical work).

50. *See* William Wei, *Best Drummer Ever [HD]*, YOUTUBE (Oct. 2, 2013), https://www.youtube.com/watch?v=FqJdzYY_Fas.

51. *See* Pipe Guy, *Pipe Guy – House/Trance/Techno Live*, YOUTUBE (Aug. 10, 2014), https://www.youtube.com/watch?v=-0gED3rn2Tc.

52. *See* JIMMY BUFFET, *Margaritaville*, *on* CHANGES IN LATITUDES, CHANGES IN ATTITUDES (ABC 1977) (illustrating a well-known vocal melody sung by Jimmy Buffet).

53. *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005) (holding in favor of rights holders after a case arising out of the invention of the MP3 and new peer-to-peer file sharing technology).

54. *See* A&M Records v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001) ("In 1987, the Moving Picture Experts Group set a standard file format for the storage of audio recordings in a digital format called MPEG-3, abbreviated as 'MP3.'").

55. *See id.* ("Napster allows its users to: (1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents of other users' MP3 files from one computer to another via the Internet. These functions are made possible by Napster's MusicShare software, available free of charge from Napster's Internet site, and Napster's network servers and server-side software.").

56. *See Napster Shut Down*, ABC NEWS (July 27, 2000), https://abcnews.go.com/Technology/story?id=119627&page=1 ("The RIAA estimates that song-swapping via Napster by an estimated 20 million people worldwide has cost the music industry more than $300 million in lost sales.").

57. *See About Pandora*, PANDORA, https://www.pandora.com/about/mgp (last visited Jan. 10, 2021) ("Pandora is a leading music and podcast discovery platform, providing a highly-personalized listening experience to approximately 70 million users each month . . . ."); *see also* Amy X. Wang, *The Spectacular Existential Crisis of Pandora*, ROLLING STONE (Nov. 2, 2018, 8:41 AM), https://www.rollingstone.com/pro/features/pandora-media-radio-siriusxm-and-crisis-725663/ (discussing the difficulties Pandora has faced in royalty payments and its competition with Spotify). Pandora radio was unique because it introduced the Music Genome Project, a sophisticated technology that analyzes music to provide listeners with the most customized music listening experience possible. *See Music Genome Project*, PANDORA, https://www.pandora.com/about/mg

after, Spotify enticed listeners by creating a market for on-demand digital streaming.[58] Despite the growing ease of distributing and consuming music, problems arose as to how to properly pay artists for the use of their works.[59] In response, Congress passed the Music Modernization Act of 2018 (the MMA).[60]

The MMA introduced a massive overhaul in music copyrights as a direct response to technological advancements in music consumption and growing pressure from artists and major players in the music industry.[61] The MMA protected pre-1972 fixed sound recordings and established a statutory blanket license for digital music streaming services, amending Section 115 of the Copyright Act and thus remedying the confusing and complicated payment of mechanical royalties.[62] Mechanical royalties refer to per-unit payments for the

(last visited Jan. 10, 2021). In 2018, SiriusXM bought Pandora for $3.5 billion, creating the largest audio entertainment company in the world. *See SiriusXM Buys Music Streamer Pandora for $3.5 Billion*, NBC NEWS (Sept. 24, 2018, 8:06 AM), https://www.nbcnews.com/tech/tech-news/siriusxm-buys-music-streamer-pandora-3-5-billion-n912446.

58. *See How Spotify Came to Be Worth Billions*, BBC NEWS (Mar. 1, 2018), https://www.bbc.com/news/newsbeat-43240886 (discussing the growth of Spotify since the company's "humble beginnings"). Apple introduced its digital on-demand streaming service in June 2015, in direct competition with Spotify. *See Introducing Apple Music — All The Ways You Love Music. All in One Place.*, APPLE, https://www.apple.com/newsroom/2015/06/08Introducing-Apple-Music-All-The-Ways-You-Love-Music-All-in-One-Place-/ (last visited Jan. 10, 2021); *see also* Eli Blumenthal, *Is Apple Music Really Beating Spotify With U.S. Users? WSJ Report Says Yes*, USA TODAY (Apr. 5, 2019, 1:06 PM), https://www.usatoday.com/story/tech/talkingtech/2019/04/05/apple-music-now-reportedly-bigger-than-spotify-us/3375960002/ (discussing the Wall Street Journal's report declaring Apple Music the most popular streaming service in the U.S.). Pandora, Apple Music, and Spotify operate using a subscriber model, meaning subscribers pay a monthly fee for access to Apple's, Spotify's, and/or Pandora's music catalog. *See id.*

59. *See* Daniela Brumer, *We Survived 2020 and the Mechanical Licensing Collective is Now in Full Effect…But How Exactly Does it Work?*, CARDOZO AELJ (Feb. 1, 2021), https://cardozoaelj.com/2021/02/01/we-survived-2020-and-the-mechanical-licensing-collective-is-now-in-full-effect-but-how-exactly-does-it-work/ (discussing issues in the payment of mechanical royalties and how many streaming services did not pay artists these royalties).

60. *See generally* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, H.R. 1551, 115th Cong. (2018) (enacted).

61. *See* Variety Staff, *Senate Passes Music Modernization Act*, VARIETY (Sept. 18, 2020), https://variety.com/2018/music/news/senate-passes-music-modernization-act-1202947518/ ("[T]he industry overwhelmingly supported the bill . . . ."). Paul McCartney, Katy Perry, and Don Henley were among the major artists that supported the passage of the Act. *See id.* Additionally, the Act saw support from key music industry executives, including Greg Maffei (President and CEO of SiriusXM), Irving Azoff (founder of Azoff Music Management and Global Music Rights), Mitch Glazier (President of the Recording Industry Association of America), Michael Huppe (CEO of SoundExchange), Martin Bandier (Chairman and CEO of Sony/ATV Music Publishing), Mike O'Neill (President and CEO of BMI), and Elizabeth Matthews (CEO of ASCAP). *See id.*

62. *See* Music Modernization Act §302; *see also* COPYRIGHT ALLIANCE, SUMMARY OF H.R. 1551, THE MUSIC MODERNIZATION ACT (MMA) 2, https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf (last visited Feb. 3, 2021) ("The compulsory blanket mechanical license created by the Act covers activities related to the making of permanent downloads, limited downloads, and interactive streams of musical works embodied in sound recordings ('covered activities'). Parties may also engage in these covered activities by striking voluntary licensing deals or by obtaining authority for a permanent download of a musical work from a record company subject to an individual download license. Currently, such licenses can only be obtained on a song-by song basis. The rates for this new blanket license

reproduction of a musical composition on a compact disc (CD), a cassette tape, a digital download, or another manufactured format.[63] Each time a sound recording of a song is purchased by a consumer, the mechanical royalty is paid to a music publisher and is then passed along to the songwriter, in turn requiring the record label or digital download provider, such as iTunes, to receive permission from the songwriter to distribute his or her work for sale.[64] The MMA also created a Music Licensing Collective charged with the collection and distribution of mechanical royalties, thus encouraging greater transparency in the music industry and more efficient payment of mechanical royalties.[65] From 1830 to current times, Congress has recognized evolving music technologies and modern methods of music consumption by continued amendments to the Copyright Act, and most recently, the enactment of the MMA.[66]

B. The Goal of Copyright

Copyright law is intended to encourage artists to create art for the advancement of public welfare by guaranteeing authors exclusive rights to their respective works.[67] These exclusive rights protect authors from the unlawful copying of their works because such copying would disincentivize artists.[68] Additionally, copyright plays a pivotal role in encouraging the dissemination of works.[69] Once the limited period of exclusive protection has expired and the work has entered the public domain, the public has complete access to the author's work without having to compensate or get a license from the author, and

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will be determined through a willing buyer/willing seller standard (a market- based standard).").

63. *See* Kevin Zimmerman, *Understanding Mechanical Royalties*, BROADCAST MUSIC, INC. (Mar. 28, 2005), https://www.bmi.com/news/entry/Understanding_Mechanical_Royalties. Mechanical royalties refer to "per-unit payments made by the record company to the music publisher for the reproduction of copyrighted musical compositions appearing on CDs, cassette tapes, vinyl albums, and other such manufactured formats." *See id.*

64. *See id.*

65. *See* Music Modernization Act §§ 102, 202; COPYRIGHT ALLIANCE, *supra* note 62, at 2 ("The [Music Licensing Collective] will (i) collect, distribute, and audit the royalties generated from these licenses to and for the respective musical work owners; (ii) create and maintain a public database that identifies musical works with their owners along with ownership share information; (iii) provide information to help with and engage in matching musical works with their respective sound recordings; and (iv) hold unclaimed royalties for at least 3 years before distributing them on a market-share basis to copyright owners as reflected by royalty payments made by digital music providers for the covered activities in question.").

66. *See* Music Modernization Act § 102; Copyright Act of 1909 § 5; 17 U.S.C. § 102(7) (providing protection for sound recordings, the modern method of music consumption).

67. *See* Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 546 (1985) ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."). These exclusive rights include reproduction of a work, public distribution of a work, public performance of a work, public display of a work, public digital performance of a sound recording, and preparation of derivative works. *See* 17 U.S.C. § 106.

68. *See* COHEN, *supra* note 22, at 248 ("Policymakers have perceived copying as one of the most serious threats to creative incentives.").

69. *See id.* at 7 (discussing an author's ability to prevent others from copying works without authorization and an author's ability to monetize a copyrighted work which, in turn, encourages dissemination of the copyrighted work).

a free flow of creative ideas can ensue.[70] Thus, copyright law strives to achieve a balance between maintaining a rich public domain and granting authors exclusive rights to protect and profit from their works.[71]

While an entire work will not enter the public domain until the expiration of the period of exclusivity, there are aspects of a work that permanently reside in the public domain.[72] These unprotectable aspects are aspects that are not original, including an author's thoughts and ideas; titles and common short phrases; elements of a work common to a genre; and elements of the work that are functional rather than creative.[73] Allowing these aspects to remain in the

70. *See Harper & Row*, 471 U.S. at 546–47. For works created on or after January 1, 1978, the period of exclusivity is the lifetime of the author plus 70 years. *See* 17 U.S.C. § 302. For joint works created on or after January 1, 1978, the period of exclusivity is the life of the last surviving author plus 70 years. *See id.*

71. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 977 (1990) ("The concept that portions of works protected by copyright are owned by no one and are available for any member of the public to use is such a fundamental one . . . ."); Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) ("The copyright laws attempt to strike a balance between protecting original works and stifling further creativity."); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (discussing the "inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it").

72. *See* 17 U.S.C. § 102(b) (limiting copyright protection as to not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work").

73. *See Harper & Row*, 471 U.S. at 547 ("The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."); 17 U.S.C. § 102(b) (limiting copyright protections); *see also* Cain v. Universal Pictures, 47 F. Supp. 1013, 1016 (S.D. Cal. 1942) ("One does not infringe the secret, undisclosed thoughts of an author. One infringes the literary product in which his original thoughts have found expression."); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("[T]here is a point in [a] series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended."); A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980) (defining scenes a faire as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic"). For instance, a cape on a superhero would not receive copyright protection because it is common to the superhero genre. *See* SUPERMAN (Columbia 1978); BATMAN (Warner Bros. Pictures 1989); THOR (Paramount Pictures 2011); THE BOYS (Amazon Prime 2019). However, the specific attributes of the superhero could receive protection. In the music context, the inclusion of a guitar solo in a rock song will not receive copyright protection because the inclusion of a guitar solo in a rock song is common to the genre. *See* VAN HALEN, *Hot for Teacher*, *on* MCMLXXXIV (Warner Bros. 1984) (illustrating a guitar solo played by Edward Van Halen); GUNS N' ROSES, *Sweet Child O' Mine*, *on* APPETITE FOR DESTRUCTION (Geffen 1989) (illustrating a guitar solo played by Slash); RAGE AGAINST THE MACHINE, *Bulls On Parade*, *on* EVIL EMPIRE (Epic 1996) (illustrating a guitar solo played by Tom Morello). Functional items or elements will also not receive copyright protection. *See* 17 U.S.C. § 102. Thus, a mannequin might be considered too functional to receive copyright protection if there was no creative effort exerted when creating the mannequin and the mannequin's purpose is purely to display clothing. *See generally* Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913 (7th Cir. 2004). In music, a chord progression is an element of a work that might be considered too functional to receive copyright protection. Chords are "[t]hree or more notes heard as a single entity." *See* BARBARA RUSSANO HANNING, CONCISE HISTORY OF WESTERN MUSIC A12 (5th ed. 2014). Chord progressions are a sequence of chords played in succession and are necessary to move a song from section to section. For instance, Tom Petty's "Free Fallin'" starts with two open chords followed by a quick succession of three chords. These chords continue to move the song from section to section. *See* TOM PETTY, *Free Fallin'*, *on*

public domain permits and encourages the continued production of creative works because authors and artists can utilize them to produce new works.[74] However, there is some confusion regarding what aspects of a musical work reside in the public domain and what aspects of a musical work are the exclusive intellectual property of the author.[75] The courts have done little to define exactly what separates unprotectable ideas from protected expression in music despite having defined a sort of musical hierarchy.[76] For instance, the court considers melody and pitch the most protected.[77] The melody is the sequence of tones, typically accompanied by other parts or chords.[78] The melody is what the average individual might hum or whistle.[79] The pitch is how high or low a note is played or sung.[80] Rhythm, harmony, lyrics, meter or tempo, and structure are less important when analyzing the substantial similarity between two musical works and these elements typically receive less copyright protection.[81]

FULL MOON FEVER (MCA 1989). However, the courts nor Congress have explicitly defined what constitutes a functional element of a musical work. *See* 17 U.S.C. § 101 (defining various works and categories of protected subject matter and failing to define what elements are functional in a musical work).

74. *See* COHEN, *supra* note 22, at 257–58 (arguing copyright protection would "provide too much protection if it were construed to hold liable those who take only unprotectable elements of the copyrighted work or who take so little of what is protected that the goals of copyright law are not implicated"); Sega Enters., Ltd. v. Accolade, Inc., 977 F.2d 1510, 1527 (9th Cir. 1992) ("[T]he fundamental purpose of the Copyright Act [is] to encourage the production of original works by protecting the expressive elements of those works while leaving the ideas, facts, and functional concepts in the public domain for others to build on."); *see also* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) ("[T]he world at large is free to imitate or stimulate the creative work fixed in a recording so long as an actual copy of the sound recording itself is not made."); Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) ("[T]here are, and can be few, if any, things, which in an abstract sense, are strictly new and original throughout.").

75. *See* Alice J. Kim, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 COLUM.-VLA J. L. & ARTS 109, 118 (1994–1995) ("The primary theoretical problem with *Krofft* is that, while it predicates admissibility of expert testimony on the idea-expression dichotomy, it does not define those foundational terms.").

76. *See* Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1893 (2018) ("That courts have partaken in that hierarchizing for so long is puzzling. This is not how copyright usually works."); *but see* Jeremy Aregood, *Blurring the Line: An Examination of Technological Fact Finding in Music Copyright Law*, 16 J. MARSHALL REV. INT. PROP. L. 115, 124 (2016) ("[C]ourts have adopted no coherent model to determine substantial similarity, and appear to have stuck with the idea that music is too ethereal, or simply consists of too many elements to be effectively categorized or compartmentalized and separated into individual elements.").

77. *See* Fishman, *supra* note 76, at 1863 ("[M]elodic likeness [is] at the center of music infringement cases, alongside only the literary content of any accompanying lyrics. Rhythm, harmony, orchestration, and organizational structure are ostensibly peripheral.").

78. *See* HANNING, *supra* note 73, at A16 (defining melody as a "succession of tones perceived as a coherent line," the "tune," or the "principal part accompanied by other parts or chords").

79. *See* QUEEN, *We Will Rock You*, *on* NEWS OF THE WORLD (EMI 1977) (illustrating "We will, we will rock you" as a well-known vocal melody sung by Queen's famed singer Freddie Mercury).

80. *See* HANNING, *supra* note 73, at A19 (defining pitch as "any of the twelve notes of the chromatic scale"). Understanding pitch is most helpful when visualizing a piano. Each key of a piano, both black and white, plays a different pitch.

81. *See* Fishman, *supra* note 76, at 1863 (discussing the court's relative "hierarchy").

Copyright law specifically incentivizes songwriters to write new music in a number of ways, including allowing authors to be paid for exploitation of the "performance right" and their receipt of mechanical royalties.[82] The performance right requires third parties to receive a license for the use of a copyrighted composition or sound recording.[83] When a songwriter owns a copyrighted work, the songwriter can receive performance rights payments through others' exploitation of that work.[84] Performance rights organizations (PROs), such as American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and Society of European Stage Authors and Composers (SESAC) negotiate licensing fee agreements with a music user.[85] After reaching an agreement, the music user will have the right to perform the composition or sound recording.[86] The license fees will then be collected by the PRO and distributed to the songwriters and publishers whose work was performed.[87] For example, if Miley Cyrus were to perform a live version of "Heart of Glass" by Blondie at a public concert, Cyrus would need to procure a performance license to ensure the performance was not infringing the copyright in the composition.[88] Cyrus would then pay Blondie's PRO the agreed upon fee to license the

Rhythms describe the duration of notes while the tempo describes how fast the notes are played. Lyrics are the words that are used in the musical composition and can be sung by a single vocalist or a group of vocalists. Harmonies result when "combinations of notes, the intervals, and chords" are played simultaneously. *See* HANNING, *supra* note 73, at A15. Harmonies can be accomplished vocally or instrumentally. *See id.* For instance, in A Great Big World's song "Say Something," Christina Aguilera is featured singing the high harmonies throughout the piece while A Great Big World's vocalist simultaneously sings the melody of the piece. *See* A GREAT BIG WORLD, *Say Something*, *on* IS THERE ANYBODY OUT THERE? (Epic Records 2013). The structure or form of a song is the "shape . . . of a composition or movement" and typically refers to the relationship between the various parts or pieces of a song, such as the relationship between the verse, the bridge, and the chorus. *See* HANNING, *supra* note 73, at A14. For example, "All the Small Things" by blink-182 follows a common structural pattern, beginning with a verse into a chorus. *See* BLINK-182, *All the Small Things*, *on* ENEMA OF THE STATE (MCA 1999). The song then progresses to another verse, a chorus, an instrumental bridge, and ends with a double chorus. Thus, the structure is verse/chorus/verse/chorus/bridge/chorus/chorus. *See id.*

82. *See* JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, AND SUCCESS 31 (7th ed. 2011) (discussing the various sources of income for a music publisher and a songwriter); Keyes, *supra* note 23, at 425 ("Music copyright holders have been given broad powers over their copyrights, which has allowed holders to leverage significant financial gains from exclusivities.").

83. *See* 17 U.S.C. § 106(a) (providing authors the exclusive right to perform a sound recording and composition publicly).

84. *See* BRABEC, *supra* note 82, at 31 (discussing performance rights payments).

85. *See id.* (discussing the various performance rights organizations). Blanket licenses are issued by PROs as well. *See Blanket Licenses*, SONGTRUST, https://www.songtrust.com/music-publishing-glossary/glossary-blanket-license (last visited Jan. 9, 2021). These licenses allow a music user to "play or perform all compositions controlled by all publishers represented by that [PRO]." *See id.* The licensee will typically pay a yearly fee that allows him or her to use all licensed songs without a specified limit. *See id.*

86. *See* BRABEC, *supra* note 82, at 31 (discussing the performance license).

87. *See id.* These performing rights organizations collect roughly $2 billion per year in licensing fees. *See id.*

88. *See* Miley Cyrus, *Miley Cyrus – Heart of Glass (Live from the iHeart Festival)*, YOUTUBE (Oct. 6, 2020), https://www.youtube.com/watch?v=NbdRLyixJpc&ab_channel=MileyCyrusVEVO.

composition "Heart of Glass," and the PRO would distribute the licensing fee to the songwriters and publishers of "Heart of Glass." [89]

Songwriters and artists also receive mechanical royalties, at a rate set by the Copyright Royalty Board, for record sales, streaming, distribution, and manufacture.[90] The current statutory rate for permanent downloads, CDs, and record sales is set at $0.091 for recordings of a song five minutes or less and $0.175 per minute for songs over five minutes.[91] Streaming services, such as Apple Music, Spotify, and Pandora, pay a mechanical royalty rate between roughly 4% to 6.75% of the service's revenue.[92] In January 2018, the Copyright Royalty Board announced an increase in the mechanical royalty rate for streaming services, requiring a 44% increase in mechanical royalty rates by 2022.[93] Spotify and Pandora immediately challenged the rate increase and it is still unclear whether the rate increase will occur.[94] The Copyright Royalty

89. *See* BRABEC, *supra* note 82, at 31. If Cyrus were to create a recording of "Heart of Glass" that was later played in a public forum, such as on SiriusXM or a webcast, both Cyrus and Blondie would be compensated. Cyrus would be compensated for the public performance of her sound recording while Blondie would be compensated for the public performance of the composition. *See also* Justin Curto, *Every Miley Cyrus Cover, Ranked*, VULTURE (Dec. 4, 2020), https://www.vulture.com/article/miley-cyrus-covers-ranked-worst-best.html.

90. *See* BRABEC, *supra* note 82, at 32. The Copyright Royalty and Distribution Reform Act of 2004 established the Copyright Royalty Judges program. *See Copyright Royalty Board*, FEDERAL REGISTER, https://www.federalregister.gov/agencies/copyright-royalty-board (last visited Jan. 10, 2021). The judges are tasked with determining and adjusting royalty rates and terms "applicable to the statutory copyright licenses." *See id.* As a copyright holder, an artist has the exclusive right to license his composition and sound recording for manufacture on a CD, cassette tape, or vinyl record. *See* 17 U.S.C. § 106(1). Additionally, the artist as the copyright holder has the exclusive right to distribute his composition and sound recording to the public via a CD, vinyl record, cassette tape, digital download, or any other medium. *See id.* § 106(3).

91. *See* 37 C.F.R. § 385.11. Taylor Swift's best-selling album "1989" is illustrative of the payment of mechanical royalties. *See* Kelley Dunlap, *Here's How Taylor Swift Gets Paid*, BUZZFEED (Nov. 3, 2014), https://www.buzzfeed.com/kelleydunlap/how-does-taylor-swift-make-her-money. Taylor Swift would receive a mechanical royalty of $0.091 per song for every album sold. *See id.* Thus, for a 13-song album like "1989," Swift would receive $1.17 per album. *See id.* This sum would then be split among all of the co-writers. *See id.*

92. *See* 37 C.F.R. § 385.21. With the increase, a streaming service would have been required to pay between 48% and 50.75% of its revenue rather than the current rate of 4% to 6.75% of the services' revenue. *See id.*

93. *See id.*

94. *See* Elizabeth Aubrey, *Spotify and Amazon "Sue Songwriters" After New Row Over Royalties*, NME (Mar. 10, 2019), https://www.nme.com/news/music/spotify-and-amazon-sue-songwriters-after-row-over-royalties-2459832 (discussing Spotify and Amazon appealing the Copyright Royalty Board's ruling requiring a 44% increase in streaming royalty rates and Pandora and Google's request that the Copyright Royalty Board review the decision); *see also* Aaron Grech, *Spotify, Amazon, Google, Pandora and Others Prevail in Copyright Royalty Board Decision Regarding 44 Percent Increase in Royalties*, MXDWN MUSIC (Aug. 11, 2020, 9:33 PM), https://music.mxdwn.com/2020/08/11/news/spotify-amazon-google-pandora-and-others-prevail-in-copyright-royalty-board-decision-regarding-44-percent-increase-in-royalties/ (discussing the results of Spotify and Pandora's appeal and how "[j]udges were reportedly interested in seeing how this 44 percent uptick would affect the relationship between labels and streaming platforms"); Jem Aswad, *Spotify, Amazon to Argue Against Songwriter Rate Hike in Court of Appeals*, VARIETY (Mar. 10, 2020, 5:05 PM), https://variety.com/2020/music/news/spotify-amazon-songwriter-royalties-court-appeals-1203528044/ (discussing challenges to the Copyright Royalty Board's rate

Board's decision to increase mechanical royalty rates was likely a reaction to the uphill battle artists face in collecting money from digital on-demand streaming services.[95] An artist has to reach roughly 1,000 streams of a song to make approximately $6.00.[96] Low streaming rates coupled with difficulties in receiving timely and accurate payment have led to backlash by several well-known artists.[97] Mechanical and performance royalties remain a crucial means of encouraging the continued creation of music and wholly promote the goals of copyright law.[98] However, the current judicial climate could risk discouraging artists from creating new musical works despite the availability of mechanical and performance royalties.[99]

C. Substantial Similarity Tests Used by Different Circuit Courts of Appeal

The Copyright Act provides that an individual who violates the exclusive rights of an author is an infringer.[100] However, Congress did not provide any statutory guidance on how to determine whether copyright infringement has

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increase). Several notable musicians, including Nile Rodgers, Kenneth "Babyface" Edmonds, Greg Kurstin, Frank Dukes, Benj Pasel, and Justin Paul, wrote an open letter to Spotify criticizing the streaming service's appeal. *See* Jem Aswad, *Hit Songwriters Slam Spotify's Attempt to Lower Royalties: 'You Have Used Us'*, VARIETY (Apr. 9, 2019, 2:36 PM), https://variety.com/2019/biz/news/spotify-secret-genius-songwriters-lower-royalties-1203184870/.

95. *See* Amy X. Wang, *How Musicians Make Money – or Don't at All – in 2018*, ROLLING STONE (Aug. 8, 2018, 10:21 AM), https://www.rollingstone.com/pro/features/how-musicians-make-money-or-dont-at-all-in-2018-706745/ ("According to one Spotify company filing, average per-stream payouts from the company are between $0.006 and $0.0084.").

96. *See id.*

97. *See* Kim C., *Artists Against Spotify: Why They Don't Like The Streaming Service?*, MUSIC TIMES (Sept. 5, 2020, 9:59 AM), https://www.musictimes.com/articles/82222/20200905/artists-against-spotify-why-dont-streaming-service.htm (discussing how Spotify is disfavored among notable artists, such as Coldplay, Tool, Adele, and surviving members of The Beatles); Andrew Unterberger, *8 Artists You Still Can't Find on Any Major Streaming Service*, BILLBOARD (Jan. 19, 2018), https://www.billboard.com/articles/news/7549739/artists-streaming-services-holdout-not-available (discussing notable artists that refuse to allow streaming services to license their music, including Yoko Ono, Tool, and Bikini Kill); Andy Gensler & Ed Christman, *Taylor Swift's Songs Generated $400K After Returning to Streaming Services Last Week*, BILLBOARD (June 21, 2017), https://www.billboard.com/articles/business/7840948/taylor-swift-streaming-revenue-amount-publishing-royalties/ (discussing Taylor Swift's removal of her catalog from Spotify in November 2014 and subsequent return to Spotify in June 2017).

98. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.").

99. *See* Andy Hermann, *Beyond 'Blurred Lines': How Forensic Musicology Is Altering Pop's Future*, ROLLING STONE (Apr. 4, 2018, 5:13 PM), https://www.rollingstone.com/pro/features/beyond-blurred-lines-how-forensic-musicology-is-altering-pops-future-204986/ (discussing changes in the music industry following the *Blurred Lines* decision).

100. *See* 17 U.S.C. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . .").

occurred.[101] Rather, courts have been left to specify the elements necessary to prove copyright infringement.[102] Courts have thus dictated that to prove copyright infringement, a plaintiff must show that he has a valid copyright and the defendant copied elements of the work that are original.[103] Proving copying is often highly circumstantial as direct evidence of copying is difficult to obtain.[104] Absent evidence of direct copying, the court requires that the plaintiff prove the defendant had access to the original work and that there are substantial similarities between the original work and the allegedly infringing work.[105]

Typically, courts do not struggle in applying the first element of the test for copyright infringement in cases involving music.[106] Because the Copyright Act requires the plaintiff to have a valid registration certificate showing the plaintiff is the owner of the copyright, proving ownership of a valid copyright is relatively straightforward.[107] However, proving a defendant's access and substantial similarity between the first work and the second work can be complex.[108] Thus, several tests have emerged in an attempt to simplify the perplexing task of determining substantial similarity.[109]

1. The "Ordinary Observer" Test

The First, Second, Third, Fifth, and Tenth Circuit Courts of Appeal use an ordinary observer test, or some variation thereof, which was first articulated by

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101. *See* Christopher Sprigman & Samantha Hedrick, *The Filtration Problem in Copyright's "Substantial Similarity" Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 576 (2019) (discussing the absence of statutory guidance in copyright infringement analysis).

102. *See id.*

103. *See* Feist Publn's., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351–52 (1991) (dictating the boundaries of the originality requirement in copyright); *see also* Rentmeester v. Nike, Inc., 883 F.3d 1111, 1118–19 (9th Cir. 2018) (discussing dissection and originality in a photograph).

104. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 179–80 (S.D.N.Y. 1976) (discussing George Harrison's creation of "My Sweet Lord" and the court's inference of access in the absence of direct evidence of copying); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000) ("Proof of copyright infringement is often highly circumstantial, particularly in cases involving music.").

105. *See Rentmeester*, 883 F.3d at 1117 (discussing independent creation); *Three Boys*, 212 F.3d at 481 ("Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar.'").

106. *See* Sprigman & Hedrick, *supra* note 101, at 577 ("Proving ownership is usually straightforward; the Copyright Act requires U.S. authors to register their copyright claim prior to bringing an infringement action, and proof of ownership ordinarily requires nothing more arduous than the production of the registration certificate showing plaintiff as owner.").

107. *See* 17 U.S.C. § 401(c); *see also* COHEN, *supra* note 22, at 656 (stating the certificate of registration provides proof of "the dates of creation and publication, the identity of the copyright owner, and the validity of the copyright").

108. *See* Sprigman & Hedrick, *supra* note 101, at 577 (discussing the complexities of proving access and substantial similarity).

109. *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (dictating the Second Circuit's "ordinary observer" test); Sid & Marty Krofft Prods. v. McDonald's Corp., 567 F.2d 1157, 1162 (9th Cir. 1977) (dictating the Ninth Circuit's extrinsic/intrinsic test).

the Second Circuit Court of Appeals in *Arnstein v. Porter.*[110] In *Arnstein*, composer Ira Arnstein brought an action for copyright infringement against Cole Porter, alleging Porter's compositions "Begin the Beguine," "My Heart Belongs to Daddy," and "Night and Day" infringed several of Arnstein's compositions.[111] The case was one of many infringement suits brought by Arnstein in the 1930s and 1940s, all of which resulted in losses for Arnstein.[112] While the two-part test was established in a music copyright infringement action, it has reached beyond cases of music copyright infringement.[113]

Under the ordinary observer test, a work is not considered substantially similar to the original copyrighted work if an ordinary observer would be prone to overlook the similarities.[114] A plaintiff must first prove that the allegedly infringing defendant objectively copied the plaintiff's work and the defendant's

110. *See* Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005) (using a test similar to the "ordinary observer" test); *Arnstein*, 154 F.2d at 468; Tanksley v. Daniels, 902 F.3d 165, 174 (3d Cir. 2018) ("In its basic formulation, substantial similarity asks whether 'a "lay-observer" would believe that the copying was of protectible aspects of the copyrighted work.'"); Armour v. Knowles, 512 F.3d 147, 152 (5th Cir. 2007) (using a test similar to the "ordinary observer" test); Jacobsen v. Deseret Book Co., 287 F.3d 936, 942–43 (10th Cir. 2002) (applying a variation of the *Arnstein* test).

111. *See Arnstein*, 154 F.2d at 467.

112. *See id.* at 464; *see generally* Arnstein v. Broad Music, 137 F.2d 410 (2d Cir. 1943); Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275 (2d Cir. 1936); Arnstein v. Twentieth Century Fox Film Corp., 52 F. Supp. 114 (S.D.N.Y. 1943); Arnstein v. Am. Soc. of Composers, Authors and Publishers, 29 F. Supp. 388 (S.D.N.Y. 1939). Ira B. Arnstein remains an interesting character in both musical and legal communities. *See* Crain, *supra* note 32. Born Itzig Arenstein in Ukraine, Arnstein emigrated to New York City in 1891. *See id.* As a child he sang in multiple choirs and toured with the opera singer Nellie Melba as a pianist. *See id.* In 1899, Arnstein launched his composing career and had composed up to opus 80 by 1914. *See id.* Despite Arnstein's vast number of compositions, his musical talents were modest, and he likely contributed more to the legal field than the world of music. *See id.* Beginning in 1928, Arnstein began suffering from a sort of copyright infringement mania, suing a number of notable composers. *See id.* Cole Porter, Irvin Berlin, Edward B. Marks (a music publisher), BMI, and Twentieth Century Fox were among Arnstein's victims. *See id.* In 1941, Arnstein brought a major lawsuit against 23 composers and publishers and lost. *See id.*

113. *See* Kim, *supra* note 75, at 112 (arguing the "ordinary observer" test reaches "far beyond the music context"); Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 258–60 (2013) (discussing the advent of the "ordinary observer" test by Judge Frank).

114. *See* Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001) (quoting Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509, 514 (2d Cir. 1991)) ("[A]n allegedly infringing work is considered substantially similar to a copyrighted work if 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'"). Courts occasionally apply a "more discerning observer" test when a plaintiff's work is not "wholly original" and contains elements from the public domain. *See id.* This "more discerning observer" test requires that the court "eliminate the unprotectable elements from its consideration and to ask whether the protectible elements, standing alone are substantially similar." *See* Mannion v. Coors Brewing Co., 377 F. Supp 2d 444, 461 (S.D.N.Y. 2006). However, the Second Circuit has been hesitant to apply this test because the ordinary observer test typically requires that the court does not dissect a work into "separate components and compare only the copyrightable elements." *See Boisson*, 273 F.3d at 272. To dissect works in this manner would "result in almost nothing being copyrightable because original works broken down into their composite parts would usually be little more than basic unprotectable elements." *See id.* at 462.

work was not independently created.[115] Copying can be established through a defendant's admission to copying or direct and circumstantial evidence that proves copying.[116] During this first step, the court permits the "judgment of trained musicians" to aid the trier of fact in determining whether such copying has in fact occurred.[117] An expert may dissect a musical composition into its constituent elements and make an informed comparison about the "probative similarities" and differences between the two works.[118] If the plaintiff successfully establishes copying, the court then proceeds to the second step to determine whether "improper appropriation" has occurred.[119]

The second step of the "ordinary observer" test requires the finder of fact to determine whether the allegedly infringing work used too many of the copyrightable elements of the original work.[120] The *Arnstein* court held the lay-listener was particularly well suited to make the determination of improper appropriation.[121] Therefore, improper appropriation ultimately turns on whether the lay-listener or ordinary observer would consider the two works to be substantially similar.[122] This lay-listener is considered to be an ordinary person

115. *See Arnstein*, 154 F.2d at 468 ("If there is evidence of access and similarities exist, then the trier of facts must determine whether the similarities are sufficient to prove copying."); Livingston & Urbinato, *supra* note 113, at 258 ("The plaintiff must first prove that the defendant did not independently create his or her own work but instead copied it from the plaintiff's.").

116. *See Arnstein*, 154 F.2d at 468 ("[E]vidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying.").

117. *See id.* ("On this issue, analysis . . . is relevant, and the testimony of experts may be received to aid the trier of the facts.");

118. *See* Livingston & Urbinato, *supra* note 113, at 254 ("[E]xperts may deconstruct a musical composition into its component parts—melody, harmony, rhythm, texture, and formal structure—and use their expertise to make informed comparisons about the resemblances between the two works according to music theory.").

119. *See Arnstein*, 154 F.2d at 468. For example, in *Tisi v. Patrick*, Michael Tisi, a songwriter and composer, accused Richard Patrick and Filter, a performing group, of infringing the copyright to Tisi's tune "Sell Your Soul" in defendant's song "Take A Picture." 97 F. Supp. 2d 539, 541 (S.D.N.Y. 2000). The court allowed both Tisi and the defendants to dissect each song into its constituent elements and compare those constituent elements before turning to the issue of improper appropriation. *See id.* at 544. Tisi's expert discussed the similarities in the chord progressions of both songs. *See id.* However, the court agreed with defendant's expert, finding there were differences in the structure, chords, and rhythm of both songs. *See id.* at 544, 549. Because there were no probative similarities between the works, the court did not move on to the improper appropriation analysis. *See id.* at 546; *see also* Filter, *Filter – Take A Picture (Official Music Video)*, YOUTUBE (Apr. 7, 2010), https://www.youtube.com/watch?v=h8MAHQhKe7Q.

120. *See Arnstein*, 154 F.2d at 468 (requiring the second step of analysis show that "the copying . . . went so far as to constitute improper appropriation").

121. *See id.* at 473 ("The proper criterion [for improper appropriation] is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians.").

122. *See id.* ("The question . . . is whether defendant took from plaintiff's work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."); *see also* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) ("The test for infringement of a copyright is of necessity vague . . . no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.'

of reasonable disposition without advanced musical training.[123]

The primary distinction between the two steps is the reliance on the judgment of experts in the first step and the reliance on the lay-listener in the second step.[124] While the first step uses musical experts to assess probative similarity, expert testimony may be used only to assist in examining the reaction of lay observers in the second improper appropriation step, which establishes whether actual infringement occurred or not.[125] Thus, expert testimony—which could most accurately dissect the musical compositions and compare similarities of the constituent elements—is not applicable in the second step's improper appropriation analysis.[126]

2. The Extrinsic/Intrinsic Test

Based on the Second Circuit Court of Appeals' ordinary observer test, the Ninth Circuit Court of Appeals articulated its own two-part extrinsic/intrinsic test to determine substantial similarity in *Sid & Marty Krofft Productions v. McDonald's Corp*.[127] While the inverse ratio rule included in the *Krofft* test was overturned in the Ninth Circuit's *Skidmore v. Led Zeppelin*, the framework of the extrinsic/intrinsic analysis remains intact.[128] The Eighth and Fourth Circuits also use the Ninth Circuit's approach.[129]

Decisions must therefore inevitably be ad hoc.").

123. *See* Keyes, *supra* note 23, at 432 (discussing the reasonable person being a "vehicle for assessing social norms").

124. *See* Kim, *supra* note 75, at 113 ("The court . . . qualified the first-prong-versus-second prong, 'experts allowed/experts not allowed'. . . .").

125. *See Arnstein*, 154 F.2d at 468 (discussing the use of experts in the improper appropriation analysis to "determin[e] the reaction of lay auditors").

126. *See id.* at 473 (discussing the use of experts in the second prong of the "ordinary observer" test); Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001) ("[A] court is not to dissect the works at issue into separate components and compare only the copyrightable elements.").

127. *See* 567 F.2d 1157, 1162 (9th Cir. 1977). In *Krofft*, Sid and Marty Krofft alleged McDonald's infringed on the Krofft's television show in a McDonald's McDonaldland advertising campaign. *See id.* at 1161.

128. *See* 952 F.3d 1051, 1066 (9th Cir. 2020). The inverse ratio rule requires "a lower standard of proof of substantial similarity when a high degree of access is shown." *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000). The *Skidmore* court noted the use of the inverse ratio rule is highly problematic for several reasons and "is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties." *See Skidmore*, 952 F.3d at 1066. The use of the inverse ratio rule is especially problematic in an increasingly digital world in which digital on-demand streaming has dominated as the preferred method of music consumption because it is highly likely that one can somehow manage to prove access. *See* AUDIO MONITOR U.S., THE OVERALL MUSIC LANDSCAPE 13 (Jan. 2018), https://musicbiz.org/wp-content/uploads/2018/09/AM_US_2018_V5.pdf (discussing the popularity of digital streaming); *see also* Jones, *supra* note 9, at 286 (discussing striking similarity, in which "no amount of evidence of access can prove copying if the material in question is not similar," however, in works "which contain similarities that are so striking as to preclude the possibility that the defendant could have created his work independently of plaintiff's work . . . an inference of copying" is justified without further proof).

129. *See* Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 966 (8th Cir. 2006) (using a test similar to the Ninth Circuit's extrinsic/intrinsic test); Dawson v. Hinshaw Music Inc., 905 F.2d 731, 734 (4th Cir. 1990) (using a test similar to the Ninth Circuit's extrinsic/intrinsic test).

The extrinsic/intrinsic analysis is premised on the "idea-expression" dichotomy which divides a creative work into two categories: those elements that are not protected by copyright law (ideas) and those elements that are (expression).[130] The first part of the *Krofft* test is the extrinsic analysis.[131] The extrinsic analysis compares the two works and assesses the similarity of the ideas by identifying the similarities in the basic concepts and themes of the two works.[132] Similar to the ordinary observer test, the initial step of the two-part test uses expert testimony to assist in the court's analytical dissection of the two works.[133]

The second step of the *Krofft* test requires an intrinsic analysis, testing for similarity in the expression from the perspective of a lay-listener.[134] The intrinsic analysis is solely dependent on whether an ordinary observer would find similarity between two works.[135] Similar to the second step of the *Arnstein* test, *Krofft*'s second step does not allow for the use of expert testimony to dissect a musical composition into components that can then be compared for similarity.[136]

The primary similarities between the "ordinary observer" test and the extrinsic/intrinsic test are the initial use of experts for an objective analysis of copying followed by an ordinary observer's evaluation of substantial similarity.[137] Both tests place heavy emphasis on the findings of the lay-

130. *See Krofft*, 562 F.2d at 1165 (discussing the idea/expression dichotomy); *see also* 17 U.S.C. § 102(b) (providing copyright protection for expressions but not ideas).

131. *See Krofft*, 567 F.2d at 1164 ("It is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed."); Livingston & Urbinato, *supra* note 113, at 261 ("Under *Krofft*'s first step, the 'extrinsic test,' the trier of fact must compare the plaintiff's and defendant's works to determine the similarity of their ideas–in other words, the basic concept or theme behind the works.").

132. *See Krofft*, 567 F.2d at 1164 (discussing the extrinsic analysis and similarities between ideas); Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) ("The 'extrinsic test' is an objective comparison of specific expressive elements."); Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994) ("The [extrinsic] test focuses on 'articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events' in two works.").

133. *See Skidmore*, 952 F.3d at 1064 (pointing out the court must address "objective similarities of specific expressive elements in the two works" in the extrinsic analysis). For example, in *Three Boys Music Corp. v. Bolton*, the court examined the extrinsic similarities between "Love is a Wonderful Thing" by Michael Bolton and "Love is a Wonderful Thing" by The Isley Brothers. 212 F.3d 477, 485 (9th Cir. 2000). The court allowed Bolton and The Isley Brothers to introduce testimony of expert musicologists. *See id.* The Isley Brother's expert presented a dissection of the two tunes, comparing the objective similarities between the songs' title hook phrases, cadences, instrumental figures, verse/chorus relationships, and the fade endings. *See id.* The expert was able to present enough extrinsic similarities to move to the intrinsic analysis, during which the jury found the two songs were not substantially similar. *See id.*

134. *See* Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994) (discussing the intrinsic analysis "test[ing] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance").

135. *See Krofft*, 562 F.2d at 1164 (discussing the first step of the extrinsic/intrinsic test).

136. *See id.*

137. *See* Kim, *supra* note 75, at 113 (arguing the *Arnstein* court "qualified the first-prong-versus-second prong" as "experts allowed/experts not allowed").

listener.[138] Proving substantial similarity in music thus hinges on the observations of an everyday individual.[139] Despite the seeming clarity of the tests, the courts' failure to distinguish protected "expressions" from unprotected "ideas" has made it difficult to apply the above tests to cases involving music.[140] Likewise, the courts have not identified when a work crosses the threshold from "borrowing" to "substantial copying" or misappropriation.[141] Moreover, courts often have difficulty applying the analysis as two separate prongs and often collapse the analysis into a single prong.[142] For instance, expert testimony is meant to remain objective in the extrinsic analysis because it is relevant only to the determination of whether the ideas between the two works are similar enough to establish the possibility of improper appropriation.[143] The ordinary observer then determines whether the two works are substantially similar without the judgment of trained musicians.[144] However, during the first step of the analysis, courts often allow experts to reach their own subjective conclusions about whether the works are substantially similar and whether there was improper appropriation.[145] Thus, experts go beyond the scope of their duties and extend into the territory of the ordinary observer.[146] An ordinary observer is given no opportunity to reach his or her own subjective conclusions about whether there

138. *See id.*

139. *See* Sprigman & Hedrick, *supra* note 101, at 577 ("[S]ubstantial similarity is, at its essence, a test that relies on the impression of an ordinary observer."); Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004) ("[T]he general test for substantial similarity . . . looks to the response of the average audience, or ordinary observer, to determine whether a use is infringing.").

140. *See* Livingston & Urbinato, *supra* note 113, at 261 ("[T]he Ninth Circuit has not expressly delineated the extrinsic elements of musical works, making the test difficult for the lower courts to apply.") While the Ninth Circuit uses specific criteria for determining ideas for literary works (including theme, plot, dialogue, mood, setting, pace, sequence of events, and characters), the court has failed to specify what constitutes a musical idea for the purposes of the extrinsic test. *See* Kim, *supra* note 75, at 118 (discussing the courts' lack of guidance in distinguishing a musical idea from a musical expression); Jones, *supra* note 9, at 279 (arguing "the court should adopt a precise definition of a musical idea").

141. *See* Jones, *supra* note 9, at 283 ("[T]he federal courts did not define 'substantial' nor did they explain the point at which mere similarity is sufficient to demonstrate misappropriation.").

142. *See* MCA, Inc. v. Wilson, 425 F. Supp. 443, 449–50 (S.D.N.Y. 1976), *aff'd and modified*, 677 F.2d 180 (2d Cir. 1981) (using expert testimony in proving both probative similarity and improper appropriation); Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 282 (S.D.N.Y. 1991) (finding no infringement after expert testimony, discounting probative similarity, and not deciding on the issue of unlawful appropriation, thus failing to account for the observations of a lay-listener); Jones, *supra* note 9, at 289 (arguing "later courts utterly disregarded the *Arnstein* court's evident intentions . . . lumping the two tests together completely"); Kim, *supra* note 75, at 119 ("[C]ourts sometimes sneak the second prong under the first . . . .").

143. *See* Kim, *supra* note 75, at 113 (discussing the use of experts in each step of the court's analysis).

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

145. *See* Nicholas Booth, *Backing Down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works*, 24 J. INTELL. PROP. L. 99, 123–24 (2016) ("[T]he manner in which courts employ this expert testimony often leads to greater confusion. Chief among the typical problems is that experts will often aggregate their objective findings to arrive at a subjective conclusion . . . .").

146. *See* Aregood, *supra* note 76, at 124 ("[T]he reliance on experts to teach lay listeners how to objectively appreciate music muddles the distinction between objective and subjective.").

are substantial similarities between the two works because the experts have already done so.[147] This practice effectively conflates the objective extrinsic analysis and the intrinsic analysis by allowing experts to reach conclusions in both steps of the analysis.[148]

II. SUBSTANTIAL SIMILARITY AND MUSIC

The aforementioned substantial similarity tests are clear in theory, but courts have had difficulty in applying the tests to cases involving music.[149] This is largely due to the fact that music is an artform unlike any other; more particularly, music is the only art form that is primarily aural rather than visual.[150] One listens to "Crocodile Rock" by Elton John and is transported back to driving around with the windows down in a 1974 Pontiac Firebird.[151] Perhaps one might be flooded with the memory of dancing with her first boyfriend at her millennium themed senior prom in 2000 when "I Want it That Way" by Backstreet Boys comes on the radio.[152] In contrast, one gazes at a painting or reads a book, taking in all that the work has to offer without experiencing the same immediate and deep emotional response elicited by music.[153] Music has been known to cause an array of emotional responses in individuals of all ages, yet the tests presuppose that there is only one way to hear and interpret music.[154]

Despite obvious differences between music and other works, both the "ordinary observer" test and extrinsic/intrinsic test continue to be used for all art forms that receive copyright protection.[155] This treatment of music is particularly troubling because tonal Western music traditionally follows a given set of stylistic patterns, such as the use of a limited set of chord progressions.[156]

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147. *See* Booth, *supra* note 145, at 124 (discussing problems with the courts' use of experts in the context of music copyright infringement cases).

148. *See* Kim, *supra* note 75, at 117 (discussing how the application of the *Arnstein* test can lead courts to collapse the probative similarity and improper appropriation steps together by allowing experts in both steps).

149. *See id.* (arguing the *Krofft* extrinsic/intrinsic test is ill-suited for the analysis of music and "is not only confusing to the fact finder but can improperly influence and actually skew the outcome of music copyright actions").

150. *See* Wihtol v. Wells, 231 F.2d 550, 552 (7th Cir. 1956) (arguing "music is perhaps the least tangible" of all the arts); Livingston, *supra* note 113, at 230 ("[M]usic is the only type of creative work that humans experience primarily through the ear.").

151. *See* ELTON JOHN, *Crocodile Rock*, *on* DON'T SHOOT ME I'M ONLY THE PIANO PLAYER (MCA 1974).

152. *See* BACKSTREET BOYS, *I Want It That Way*, *on* MILLENNIUM (Jive 1999).

153. *See* Keyes, *supra* note 23, at 422–23 (discussing emotional responses to music).

154. *See id.* (discussing the impacts of music on the body).

155. *See id.* at 410 (arguing a "one-size-fits-all" approach is not viable for music because of "sociological and technological changes, as well as . . . the historical practices of the music composition process"); *see also* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1066 (9th Cir. 2020) (adjusting to technological changes by dispensing with the inverse ratio rule); *but see* Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994) (discussing the evolution of the extrinsic analysis to "objectively consider[] whether there are substantial similarities in *both* ideas and expression").

156. *See* RUSS BALLARD, *Since You Been Gone*, *on* WINNING (Polydor 1979); JOURNEY,

Additionally, many musicians and composers engage in the practice of permissible musical borrowing by using those elements of another musician's work that are in the public domain.[157] These practices cause an inherent tension between the theory of access by means of wide dissemination and a court's use of the doctrine of subconscious copying because a song may sound as though an artist is copying from another musician when the artist is simply following common musical and compositional practices.[158] Because the courts continue to place emphasis on the lay-listener, the traditional substantial similarity tests become even more difficult to apply.[159] Lay-listeners have difficulty separating elements that are so common to a genre as to be unprotectable from those elements that are protectable and unique to the songwriter or composer.[160]

The failure to apply an adequate standard for substantial similarity in music copyright infringement cases has caused an uproar in the music community, altering the way the music business operates and potentially disincentivizing artists from creating.[161] An examination of the difficulties in applying current substantial similarity analysis to cases involving music illustrates that the court is in need of an updated approach that accounts for music's unique aspects.[162]

A. Wide Dissemination and The Theory of Subconscious Copying

Courts utilize a strict liability approach in cases of copyright infringement, meaning an infringer is liable for infringement even if he or she did not intend to

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Any Way You Want It, *on* DEPARTURE (Columbia 1980); ANDREA BOCELLI*, Con Te Partirò (Time to Say Goodbye)*, *on* SARAH BRIGHTMAN IN CONCERT (Nemo 1997); RACHEL PLATTEN, *Fight Song*, *on* FIGHT SONG (Columbia 2015); COLDPLAY, *Up & Up*, *on* A HEAD FULL OF DREAMS (Parlophone 2016). "Since You Been Gone," "Any Way You Want It," "Con Te Partirò (Time to Say Goodbye)," "Fight Song," and "Up & Up" all use a I–V–vi–IV chord progression in G major. It is common in all genres of music for artists to use the same or similar chord progressions because there are limited combinations of chord progressions.

157. *See* Livingston, *supra* note 113, at 254 (arguing musicians follow "a common standard" and "[o]nly the greatest, most influential, and most original composers" depart from this standard). Some elements are so common to a genre that they do not receive copyright protection, such as a bossa nova groove, commonly used in Latin jazz music. These elements are continually borrowed and often define a genre. *See* JOÃO GILBERTO, *Desafinado*, *on* 20 GRANDES SUCESSOS DE JOAO GILBERTO (1959) (illustrating the use of a bossa nova groove in Latin music); ANTÕNIO CARLOS JOBIM, *Corcovado*, *on* THE COMPOSER OF DESAFINADO, PLAYS (1960) (illustrating the use of a bossa nova groove in Latin music).

158. *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir.1983) (finding infringement where a work was widely distributed and the defendant subconsciously copied the original work); *but see* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (finding the defendant did not subconsciously copy the original work).

159. *See* Keyes, *supra* note 23, at 409.

160. *See id.* (arguing the substantial similarity test is "flawed because it assumes that there is only one reasonable way to perceive a piece of music").

161. *See* Hermann, *supra* note 99 (discussing the use of forensic musicology in music copyright infringement cases).

162. *See* Jones, *supra* note 9, at 277 ("The substantial similarity standard is particularly difficult to define and implement in the litigation of music copyright actions. Despite numerous attempts, the federal courts have failed to formulate a fully utilitarian framework for determining musical substantial similarity.").

infringe or did not know that the material was protected under copyright law.[163] However, copyright law does not afford protection against an author who has independently created a work; thus, a plaintiff must show that the defendant obtained the protected expression of the plaintiff's work and copied this expression.[164]

A plaintiff must prove the defendant had access to the plaintiff's work.[165] Mere speculation will not suffice to prove access.[166] Rather, there must be reasonable opportunity for the defendant to hear or view the plaintiff's work.[167] Circumstantial evidence may be used to prove access when the plaintiff's work has been widely disseminated, which can be demonstrated by high record sales, extensive radio play, a high number of streams, or television airplay.[168] Additionally, plaintiffs can pursue the theory that there is a reasonable "chain-of-events" linking the plaintiff's work to the defendant's access, such as dealings with the same publisher or record label.[169] This chain-of-events theory has additionally been defined as a "nexus," "connection," or "crossed-paths" between the copyright holder and the alleged infringer.[170]

In cases of music copyright infringement, plaintiffs will typically have

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163. *See* COHEN, *supra* note 22, at 251 (discussing "innocent" infringement); *see also* Religious Tech. Ctr. v. Netcom Online Commun. Servs., Inc., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) ("[C]opyright is a strict liability statute . . . .").

164. *See* COHEN, *supra* note 22, at 258 (discussing the defense of independent creation).

165. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977) (providing the defendant must have "an opportunity to view or to copy plaintiff's work" to prove access); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (holding a defendant must have "a 'reasonable opportunity' or 'reasonable possibility' of viewing the plaintiff's work . . . ."); Jason v. Fonda, 698 F.2d 966, 967 (9th Cir. 1982) (holding reasonable access requires "more than a 'bare possibility'" that defendant viewed or heard plaintiff's work).

166. *See id.*

167. *See Three Boys*, 212 F.3d at 482 (describing the requirements for proof of access).

168. *See* BRABEC, *supra* note 82, at 82–83 (discussing the various and complex means of distributing music).

169. *See Three Boys*, 212 F.3d at 482 (describing circumstantial evidence of reasonable access).

170. *See* Livingston & Urbinato, *supra* note 113, at 265 ("Where the plaintiffs have submitted their works to music publishers and record labels, they often can satisfy the chain-of-events theory and establish a reasonable possibility of access through the corporate-receipt doctrine. Under this doctrine, if the defendant is a corporation, the receipt of the plaintiff's work by one of the defendant's employees constitutes receipt by the employee who actually composed the accused work, so long as there is some connection between the two employees."). The "chain-of-events" theory was utilized by Michael Tisi in his action against Richard Patrick, Filter, and Warner Brothers Records. Tisi v. Patrick, 97 F. Supp. 2d 539, 541 (S.D.N.Y. 2000). Tisi submitted demonstration tapes ("demos") to Warner Brothers Records in 1994. *See id.* Tisi argued the court could infer Patrick's and Filter's access to his material because Filter was signed to Warner Brothers Records. *See id.* at 547–48. The court disagreed, finding Tisi failed to establish that Patrick or Filter had access to Tisi's tapes, and the connection was too attenuated. *See id.* A similar situation arose in *Dimmie v. Carey*, in which Dimmie argued her submission of a demo to Columbia Records showed Carey had access to Dimmie's demo. 88 F. Supp. 2d 142, 146 (S.D.N.Y. 2000). The court found this was insufficient to show Carey's access to Dimmie's demo because there was no evidence that Carey had reviewed the tapes prior to composing the allegedly infringing tune. *See id.* at 148.

greater success proving access through circumstantial evidence of wide dissemination of the copyright holder's work.[171] A plaintiff utilizing the theory of access through wide dissemination would demonstrate that his or her work was widely distributed to the public through various media outlets.[172] When a plaintiff can show a tune has been widely disseminated, the court is willing to infer subconscious copying.[173] Subconscious copying is found where the evidence does not compel a finding of access, but the works are so strikingly similar that the second work cannot possibly be a work of independent creation.[174] Wide dissemination as a means of proving access coupled with the theory of subconscious copying was first put forth by Judge Learned Hand in a 1924 music copyright infringement case.[175] In *Fred Fisher, Inc. v. Dillingham*, the court found the defendant composer had "probably unconsciously" copied an ostinato from the plaintiff's commercially successful composition.[176] Judge Hand reasoned that a defendant's unconscious copying is no excuse for infringing the author's rights.[177]

Nearly sixty years later, subconscious copying was the primary theory used to reach the Second Circuit's decision in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*[178] In *ABKCO*, George Harrison's 1970 hit song "My Sweet Lord"

171. *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983) (holding defendant subconsciously copied the plaintiff's original work); *see also Three Boys*, 212 F.3d at 483 ("[T]he theory of subconscious copying has been applied to songs that are more remote in time.").

172. *See* Livingston & Urbinato, *supra* note 113, at 265 ("[P]laintiffs can attempt to show that defendants had the necessary access through a theory of widespread dissemination. Traditionally, plaintiffs employing this theory would demonstrate that their musical works were widely distributed through extensive radio or television airplay or record sales.").

173. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180 (S.D.N.Y. 1976); *Three Boys*, 212 F.3d at 482–83; Livingston, *supra* note 113, at 266 ("[T]he courts have allowed striking similarity between the two works to serve as a substitute for access or as an inferential basis for access.").

174. *See ABKCO*, 722 F.2d at 998 ("[T]he problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders. We therefore see no reason to retreat from this circuit's prior position that copyright infringement can be subconscious.").

175. *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924) (dictating the theory of subconscious copying).

176. *See id.* ("Whether he unconsciously copied the figure, he cannot say, and does not try to. Everything registers somewhere in our memories, and no one can tell what may evoke it."); *see also* HANNING, *supra* note 73, at A18 (defining an ostinato as a "[s]hort musical pattern that is repeated persistently throughout a piece or section"); MusicCorner, *What's an Ostinato? | David Writes an Earworm*, YOUTUBE (Nov. 29, 2016), https://www.youtube.com/watch?v=jK2IOfGTRIs (explaining an ostinato using basic musical patterns). For examples of ostinatos in popular music, *see* QUEEN, *Under Pressure*, *on* HOT SPACE (EMI 1982); THE VERVE, *Bittersweet Symphony*, *on* URBAN HYMNS (Hut 1997); DAFT PUNK, *Around the World*, *on* HOMEWORK (Virgin Records 1997); COLDPLAY, *Clocks*, *on* A RUSH OF BLOOD TO THE HEAD (Parlophone 2002); ELBOW, *One Day Like This*, *on* THE SELDOM SEEN KID (Fiction Records 2008).

177. *See Fred Fisher*, 298 F. at 148 ("Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick.").

178. *See ABKCO*, 722 F.2d at 999; *see also* Selle v. Gibb, 741 F.2d 896, 903–04 (7th Cir.

was at issue when the copyright holder of "He's So Fine," made famous by The Chiffons, brought an action for copyright infringement.[179] "He's So Fine" was widely distributed and commercially popular, becoming the number one single on the Top 40 charts in March 1963.[180] The court found a number of similarities in the structures and melodies of the two works.[181] Harrison admitted to hearing The Chiffons' tune at some time in the past; however, he remained adamant that he did not rely on other musical works when composing "My Sweet Lord."[182] Despite Harrison's extensive testimony on his autonomous songwriting process, the Second Circuit upheld the lower court's decision, finding Harrison had subconsciously copied the melody of "He's So Fine."[183]

The Isley Brothers argued a similar theory of subconscious copying after wide distribution to support their infringement action against Michael Bolton in *Three Boys Music Corp v. Bolton*.[184] However, in contrast to ABKCO, Bolton had no recollection of ever hearing the Isley Brothers's song.[185] In *Three Boys*, famed R&B group the Isley Brothers alleged Michael Bolton's 1991 song "Love is a Wonderful Thing" infringed on the Isley Brothers' 1966 tune "Love is a Wonderful Thing."[186] The Isley Brothers argued that Bolton grew up listening to their music and relied on the testimony of three disc jockeys that confirmed their 1966 hit was widely disseminated on radio and television stations where Bolton

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1984) ("'Striking similarity' is not merely a function of the number of identical notes that appear in both compositions. An important factor in analyzing the degree of similarity of two compositions is the uniqueness of the sections which are asserted to be similar."); Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1170 (7th Cir. 1997) ("If . . . two works are so similar as to make it highly probable that the later one is a copy of the earlier one, the issue of access need not be addressed separately, since if the later work was a copy its creator must have had access to the original.").

179. *See ABKCO*, 722 F.2d at 990.

180. *See All US Top 40 Singles for 1963*, TOPWEEKLY, https://top40weekly.com/1963-all-charts/#US_Top_40_Singles_for_the_Week_Ending_30th_March_1963 (last visited Feb. 3, 2021). "He's So Fine" was No. 4 on the Top 40 charts on March 23, 1963. *See id.* One week later, the song reached No. 1 on the Top 40 charts. *See id.* "He's So Fine" stayed at the No. 1 spot for four consecutive weeks. *See id.*

181. *See ABKCO*, 722 F.2d at 999. George Harrison's vocals in "My Sweet Lord" would be considered the melody of the piece. *See* GEORGE HARRISON, *My Sweet Lord*, *on* ALL THINGS MUST PASS (Apple 1970). In the context of "He's So Fine," The Chiffons vocals, beginning with "He's so fine / Wish he were mine," would be considered the melody of the song. *See* THE CHIFFONS, *He's So Fine*, *on* HE'S SO FINE (Laurie Records 1963). Melody is considered the most highly protected element of a musical work. *See* Fishman, *supra* note 76, at 1862. Structure typically receives a lower degree of protection. The structure refers to the relationship between the different parts of the song. *See supra* note 79 and accompanying text. For instance, The Beach Boy's "Kokomo" begins with the chorus, transitioning into a verse. *See* THE BEACH BOYS, *Kokomo*, *on* COCKTAIL (Elektra Records 1988). The chorus of "Kokomo" begins with "Aruba, Jamaica, oh I want to take ya / Bermuda, Bahama, come on pretty mama" and is followed by the verse. *See id.*

182. *See ABKCO*, 722 F.2d at 997–98.

183. *See id.* at 998 ("[T]he similarity was so striking and where access was found, the remoteness of that access provides no basis for reversal.").

184. *See* 212 F.3d 477, 483, 487 (9th Cir. 2000).

185. *See id.* (discussing Bolton's extensive record collection as a teenager and his lack of memory regarding the Isley Brothers' tune at issue).

186. *See id.* at 480–81 (discussing the release of The Isley Brothers' "Love is a Wonderful Thing" and Bolton's "Love is a Wonderful Thing" and the Isley Brothers' claims).

and his co-writer grew up.[187] Unlike *ABKCO*, the court found that the Isley Brothers' theory of wide dissemination and subconscious copying was improper because the Isley Brothers failed to claim Bolton's work was strikingly similar to the Isley Brothers' "Love is a Wonderful Thing."[188] While the court found Bolton was not liable for infringement, it did recognize that the theory of subconscious copying could have provided a favorable outcome for the Isley Brothers had the songs been strikingly similar, as the theory of reasonable access through wide dissemination was entirely plausible.[189]

The theory of subconscious copying due to wide dissemination is problematic when considering the technological shifts in music consumption.[190] Due to the way in which music permeates Western culture, the theory may not be as plausible as it was in the 1970s case against George Harrison or the 2000s case against Michael Bolton.[191] Years ago, an individual's primary source of non-live music was the radio and the individual's record or CD collection.[192] Now, music is more accessible than ever before.[193] An individual living in Western civilization simply cannot escape music; music typically plays at social gatherings, on television, in grocery stores, in retail stores, on airplanes, and even at gasoline pumps.[194] With the advent of Spotify, Apple Music, Pandora, YouTube, and other digital streaming services, a listener has access to millions of songs with the tap of a smartphone screen.[195] A recent Live Nation study found 69% of listeners are consistently searching for new music, illustrating the

187. *See id.* at 483 ("Bolton confessed to being a huge fan of the Isley Brothers and a collector of their music.").

188. *See id.* at 484 ("The appellants contend that the Isley Brothers' theory of access amounts to a 'twenty-five-years-after-the-fact-subconscious copying claim.' Indeed, this is a more attenuated case of reasonable access and subconscious copying than *ABKCO*.").

189. *See id.* ("It is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later.").

190. *See* Livingston & Urbinato, *supra* note 113, at 266 (arguing "[a]n alleged infringer would have almost presumptive access to music that is readily available on the Internet").

191. *See* Spotify Technology S.A., *Financials*, SPOTIFY (2020), https://investors.spotify.com/financials/default.aspx (reporting an increase by 0.95% in listenership from the previous quarter, with 299 million monthly active users).

192. *See* Dann Albright, *The Evolution of Music Consumption: How We Got Here*, TECHNOLOGY NEWS (Apr. 30, 2015), https://www.makeuseof.com/tag/the-evolution-of-music-consumption-how-we-got-here/ (discussing the evolution of music consumption from the early days of the phonograph in 1877 up to the advent of digital on-demand streaming).

193. *See* Keyes, *supra* note 23, at 418 ("The internet has made procurement of all types of music incredibly easy, and monstrously cost effective, which has lured users to this new medium in unparalleled droves.").

194. *See* Keyes, *supra* note 23, at 424 ("[M]usic continually finds us through numerous musical mouthpieces and across multiple public and private venues.").

195. *See* SPOTIFY, https://www.spotify.com/us/ (last visited Sept. 17, 2020) (illustrating a music platform in which a user can access a freemium model or pay a subscription fee for on-the-go access to millions of songs); APPLE, https://music.apple.com/us/browse (last visited Sept. 17, 2020) (illustrating a subscription-based digital on-demand streaming service where a subscriber pays a fee for access to a vast amount of content); PANDORA, https://www.pandora.com (last visited Sept. 17, 2020) (illustrating a streaming service with a freemium model as well as a subscription model, where subscribers pay a fee for easy access to millions of songs).

massive amount of music the typical listener absorbs.[196] Independent musicians can easily accomplish wide distribution in the current digital climate.[197] Where an artist used to depend on a record label for guaranteed wide distribution, several services—such as Tunecore, DistroKid, and CDbaby—allow independent artists to pay a small fee to release music on a number of platforms, including iTunes, Spotify, and Apple Music.[198] Because music is so ingrained in U.S. culture and wide distribution can be accomplished with increasing ease, the court's presumption of subconscious copying through wide distribution in music copyright infringement cases is questionable.[199] When a song is widely disseminated on any of the numerous platforms available, it cannot be so easily assumed that a listener—and subsequent composer—was *actually* exposed to the copyrighted work that was allegedly infringed or had significant enough access to a copyrighted work as to subconsciously copy it.[200] Moreover, all Western music draws from earlier works and is grounded in tonal practices.[201] Thus, an alleged infringer's work could sound similar to a plaintiff's work not because the alleged infringer necessarily subconsciously copied a plaintiff's widely

196. LIVE NATION ENTERTAINMENT, THE POWER OF LIVE: GLOBAL LIVE MUSIC FAN STUDY 11 (2018).

197. *See* CDBABY, https://cdbaby.com (last visited Sept. 17, 2020); TUNECORE, https://www.tunecore.com (last visited Sept. 17, 2020); DISTROKID, https://distrokid.com (last visited Sept. 17, 2020). CDbaby, TuneCore, and DistroKid are among the many platforms in which any recording artist can pay a fee to have their music widely distributed.

198. *See* Billboard Staff, *Chance The Rapper Says Success as an Independent Artist Is Attainable If You're Patient*, BILLBOARD (Dec. 27, 2017), https://www.billboard.com/articles/news/8078732/chance-the-rapper-success-independent-artist. Chance The Rapper is an excellent example of an unsigned artist who accomplished wide distribution and excelled without being signed to a record label. *See id.* He argues that artists today do not need a label, publisher, or distributor to achieve success. *See id.*

199. *See* Keyes, *supra* note 23, at 425 ("With the degree of music infiltrating our daily lives, musicians are going to be—at a bare minimum—subconsciously affected.").

200. *See* Mansoor Iqbal, *Spotify Usage and Revenue Statistics (2020)*, BUSINESS OF APPS (Oct. 30, 2020), https://www.businessofapps.com/data/spotify-statistics/. As of October 2020, Spotify had 50 million songs available on its on-demand digital streaming platform. *See id.* Spotify is only one of the many online streaming platforms available to the music consuming public. Platforms such as bandcamp, YouTube, and SoundCloud allow artists to post their work on the internet and require no subscription fee for listeners. *See* BANDCAMP, https://bandcamp.com (last visited Feb. 3, 2021); SOUNDCLOUD, https://soundcloud.com (last visited Feb. 3, 2021); YOUTUBE, https://youtube.com (last visited Feb. 3, 2021). Some artists widely distribute their music on a single platform, making it more difficult for such artists to argue that there was subconscious copying if the alleged infringer did not have a subscription to the service on which the music was released. *See* Dan Rys, *Beyonce's 'Lemonade' Release: Tidal Has Streaming Exclusive 'In Perpetuity,' Purchase Exclusive Ends at 10 P.M.*, BILLBOARD (Apr. 24, 2016), https://www.billboard.com/articles/news/7341800/how-long-beyonce-lemonade-tidal-streaming-exclusive. For instance, Beyonce's "Lemonade" album was released exclusively on Tidal, a music streaming platform, in 2016. *See id.* If Beyonce were to bring a copyright infringement action against an alleged infringer who did not have a Tidal subscription and Beyonce argued access on the basis that her music was widely distributed, this could be problematic because the defendant would not have had access to the streaming platform that released the album.

201. *See* Livingston & Urbinato, *supra* note 113, at 270 ("All Western musical compositions draw to a large extent on earlier works, are grounded in a common vocabulary, and must sound pleasing or acceptable to the human ear, at least to some degree.").

distributed song, but because the musical phrase is common to Western musical practices.[202] The current substantial similarity tests do not account for the newfound ease of procuring and distributing music.[203]

B. Stylistic Practices in Musical Genres and Musical Borrowing Through the Ages

Historically, musicians have enjoyed the practice of borrowing musical material from each other and adhering to stylistic guidelines and patterns set forth by listener preferences.[204] These practices date back to the Middle Ages, when Christian communities would incorporate features of Greek music and the music of other cultures on the eastern Mediterranean Sea into their liturgical music.[205] As Christianity spread, the popularity of chants began to grow, as these chants were a principal feature of communal liturgy.[206] Courtly and traditional non-sacred songs that were intended for entertainment purposes or to communicate feelings were performed by troubadours who wandered from hamlet to hamlet to perform musical works.[207] Both the secular music popularized by troubadours and liturgical chant developed genres and borrowed melodies and lyrics to suit the tastes and interests of those in the region.[208]

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202. *See id.* ("[S]ome element of subconscious copying may exist in almost all works."). For instance, the first three notes of the chorus of the children's song "The Excavator Song" by Blippi sound very similar to the first three notes of the chorus of "Every Breath You Take" by the Police. Blippi's songwriter likely derived inspiration from The Police or subconsciously copied the three-note melody. *See* Blippi – Topic, *The Excavator Song*, YOUTUBE (Oct. 7, 2020), https://www.youtube.com/watch?v=YAguWAJTmBM; THE POLICE, *Every Breath You Take*, *on* SYNCHRONICITY (A&M 1983). Contrast The Drifter's "Save the Last Dance for Me" and Zac Brown Band's "Start Over." In this case, both songs sound similar but subconscious copying is unlikely because both draw from similar stylistic and tonal practices. *See* THE DRIFTERS, *Save the Last Dance*, *on* SAVE THE LAST DANCE (Atlantic 1960); ZAC BROWN BAND, *Start Over*, *on* WELCOME HOME (Elektra 2017).

203. *See* Keyes, *supra* note 23, at 426 ("Music is disseminated through a vast reservoir of media. Because of this, music bombards individuals on a systematic and daily basis.").

204. *See id.* at 426 ("The history of western music . . . demonstrates this phenomenon of musical borrowing to prodigious proportions."); HANNING, *supra* note 73, at 6 (discussing how early Christian church music was shaped by currents in the larger society, "as with music in any age"); Livingston & Urbinato, *supra* note 113, at 254 ([M]usicians [follow] a common standard.").

205. *See* HANNING, *supra* note 73, at 22 (discussing the musical practices of the early Christian church).

206. *See id.* at 27 (discussing the popularity of chants and the prominence of chants in early Christian liturgies); *see also* Universal Catholic Media, *Gregorian Chants | Sung by Monks of the Abbey of St Ottilien, Germany*, YOUTUBE (Aug. 24, 2020), https://www.youtube.com/watch?v=X-pcZaH1UFE (providing an example of Gregorian chants).

207. *See* HANNING, *supra* note 73, at 22 (discussing non-sacred songs that eventually gained popularity throughout Europe); Keyes, *supra* note 23, at 427 ("Throughout the first millennia, chant melodies spread throughout Europe and Asia and various regions altered these melodies to suit [their] own particular tastes and interests."). Troubadours were popular in castles and courts, especially in France. *See* HANNING, *supra* note 73, at 44. These troubadours are thought to have taken a great deal of inspiration from Moorish Spain and spread Spanish artforms northward. *See id.* Poetically, troubadours often played on similar themes, such as love, morality, and politics. *See id.* at 45.

208. *See id.* at 33, 44–45. The troubadours served as a model for the German Minnesinger.

Other examples of the common practice of musical borrowing and adherence to style and genre abound through the Baroque period (1600-1730), during which time collaboration among musicians and artists resulted in the creation of opera.[209] The Eighteenth Century saw composers, such as Vivaldi, Rameau, J.S. Bach, and Handel, synthesizing Baroque genres into three kinds of concertos, thus adhering to the stylistic preferences of the time.[210] During the Classical period (1730-1820), which brought the rise of the symphony, composers continued to adjust to the changing tastes of the public and substantially borrowed from a vast array of musical sources in creating new works.[211] For instance, Mozart was influenced by Johann Schobert and J.C. Bach, emulating Schobert's harpsichord writing through thick chordal textures and using Bach's compositions as inspiration for stunning concertos.[212] Additionally, Beethoven borrowed from Haydn, Handel, and J.S. Bach, and Brahms would later borrow from Beethoven.[213]

The practice of musical borrowing and genre has endured far beyond the Baroque, Classical, and Romantic (1800-1850) periods.[214] Popular jazz began to permeate American culture toward the end of the Nineteenth Century.[215] Following World War II, there was a decline in financial support for big bands, and musicians began playing in smaller groups, called combos.[216] Although styles differed from region to region, jazz was particularized by its use of several musical practices, such as a focus on solo voices and improvisation, and the use of interpolation: the borrowing of pre-existing musical material and improvising to create a new work. [217] Jazz also derived its unique sound from the third, fifth,

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See id. at 47. Minnesingers adapted the troubadour's song, or canso, for German tastes by changing troubadour melodies to church modes and changing the songs to a triple meter. *See id.*

209. *See id.* at 172 (discussing the transition between the Renaissance and Baroque periods and the advent of opera).

210. *See id.* at 261–63 (discussing the musical contributions of Vivaldi, Rameau, J.S. Bach, and Handel and the stylistic elements of concerto grosso, solo concertos, and concertino common in the Baroque period).

211. *See id.* at 341 (discussing Haydn's adjusting to "changing taste of the times" and drawing on many musical sources, such as folk, gallant, *empfindsam*, and other Baroque styles).

212. *See* HANNING, *supra* note 73, at 353 (discussing Mozart's early musical training and his "uncanny aptitude" to "imitat[e] others' works and synthesiz[e] various national styles").

213. *See id.* at 372–73, 384. Beethoven trained with Haydn in 1792 and Beethoven subsequently began composing quartets and symphonies, both genres Haydn was known for. *See id.* In his compositions, Beethoven used fugal texture, a technique popularized by J.S. Bach and Handel. *See id.* Beethoven influenced a number of composers in the later Romantic Era, including Brahms. *See id.* at 462.

214. *See* Livingston & Urbinato, *supra* note 113, at 245–46 (discussing Impressionism, the first major classical harmonic style of the Twentieth Century).

215. *See* Keyes, *supra* note 23, at 428 (discussing the popularity of jazz, growing out of American spirituals).

216. *See* HANNING, *supra* note 73, at 608 (discussing developments in jazz and the period immediately following the end of World War II).

217. *See id.* at A15 (defining improvisation as "[s]pontaneous invention of music while performing, including devising variations, embellishments, or accompaniments for existing music"); *see also* Michel8665, *Miles DAVIS – Improvisation*, YOUTUBE (Feb. 25, 2013), https://www.youtube.com/watch?v=bCa3iyBekCs (demonstrating improvised jazz).

and seventh scale degrees lowered by a half-step, widely known as the "blue" notes.[218] The advent of jazz ushered in a new era of music and gave rise to the relatively simple harmonic, tonal, and rhythmically clear style of modern pop.[219]

These common borrowing practices that have endured throughout the history of Western music can likely be attributed to the limited combinations in music that would be pleasing to the ear of a typical Western audience.[220] Artists seeking to compose for a general audience select from a pool of limited combinations of tonality and follow conventional tonal practices and patterns.[221] The contemporary era has additionally spurred two trends leading to greater borrowing and simplicity when adhering to stylistic practices.[222] The first of

218. *See* Keyes, *supra* note 23, at 428 (defining interpolation as the "process of borrowing pre-existing musical material and improvising to create a new musical work"); Livingston & Urbinato, *supra* note 113, at 250 ("[Jazz's] characteristic melodic and harmonic idiom often includes a half-step lowering of the third, fifth, and seventh, interchanged or combined with the corresponding diatonic intervals."). For examples of jazz techniques and the use of the "blue" third, fifth, and seventh, *see* BILLIE HOLIDAY, *Strange Fruit*, *on* BILLIE HOLIDAY AT JATP (Commodore 1954); LOUIS ARMSTRONG, *La Vie En Rose*, *on* LA VIE EN ROSE (Decca 1950); THE DAVE BRUBECK QUARTET, *Take Five*, *on* TIME OUT (Columbia 1959); MILES DAVIS, *All Blues*, *on* KIND OF BLUE (Columbia 1959); JOHN COLTRANE, *Giant Steps*, *on* GIANT STEPS (Atlantic Studios 1960); THELONIOUS MONK, *Blue Monk*, *on* THE COMPLETE PRESTIGE RECORDINGS (Prestige 1954); DIZZY GILLESPIE, *A Night in Tunisia*, *on* BIRKS WORKS: THE VERVE BIG-BAND SESSIONS (Verve Records 1995).

219. *See* Livingston & Urbinato, *supra* note 113, at 250 ("Though jazz or pop may incorporate any other technique mentioned above, the relatively simple homophonic, tonal, and rhythmically clear styles of the Common Practice Period prevail."); Fishman, *supra* note 76, at 1916-17 ("Musical traditions like jazz, blues, and hip-hop rely heavily on musical borrowing.").

220. *See* Livingston & Urbinato, *supra* note 113, at 227 ("Tonality in Western music offers finite compositional choices that will be pleasing or satisfying to the ear."); Fishman, *supra* note 76, at 1914 ("[T]he market for expressive works is often beset by herd behavior . . . . Consumption choices can be referenda on the power of social influence as much as on artistic value."). Unlike other artforms, music is aural and does not "penetrate the human brain primarily through the optic system." *See* Livingston & Urbinato, *supra* note 113, at 263. Artists constructing visual artforms, such as literary or dramatic works or works of visual art or architecture, have a vast number of creative options in style, color, word choice, media choice, and more. *See id.* ("A painter has literally hundreds of colors to choose from and dozens of media in which to render a work. A novelist has tens of thousands of words to use in an innumerable variety of formulations."). Due to these vast creative options, it is highly unlikely an original visual or literary work will resemble a second visual or literary work. *See id.* Music is far different because there is a much smaller pool of creative options that will be pleasing to the Western listener. *See id.* at 270. Because there are limited options, it is more likely that two songs will sound similar to one another. *See id.*; *but see* Loew's Inc. v. Wolff, 101 F. Supp. 981, 988 (S.D. Cal. 1951) ("[T]here are approximately thirty-six basic plots in all writing. Consequently, assertions of similarity and of plagiarism are practically a concomitant of all story writing.").

221. *See* Livingston & Urbinato, *supra* note 113, at 262 ("[T]he conventional tonal practices of Western music limit the combinations of notes that will sound pleasing or acceptable to the Western listener."). Almost all modern music is tonal, meaning it does not largely depart from the key in which the song is composed. There are 12 keys, each with 12 tones and 7 notes. Because the composer does not largely depart from the key, there are a limited number of combinations available. For an example of an atonal composition, *see* Arnold Schönberg Center, *Arnold Schoenberg: Piano Concerto op. 42 (Excerpt)*, YOUTUBE (Feb. 20, 2007), https://www.youtube.com/watch?v=A-fyWc6Mpd8.

222. *See* Keyes, *supra* note 23, at 429 ("Consider further the current technological realities that have ushered in the relatively new phenomenon of music sampling, the practice of manipulating

these trends is the spectacle of a performance being nearly as important as its pure musical presentation.[223] To be crowd pleasing and maintain the visual aspects of a performance artists have simplified their music.[224] The second is the advent of sampling, which has increased the amount of musical borrowing and ushered in a significant number of infringement suits.[225] Sampling occurs when a songwriter or producer embeds a portion of a sound recording in a new work and is common in all genres of music.[226]

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existing sound recordings and extracting from them short musical interludes and snippets. This technological reality has led to significant amounts of infringement suits . . . ."); Livingston & Urbinato, *supra* note 113, at 253 ("In the contemporary era, the music itself has assumed a lesser role in popular musical presentations. Much of today's vocal pop music incorporates a theatrical staging of the song . . . . This style of presentation has at least as much to do with the visual as with the purely musical presentation.").

223. *See* Livingston & Urbinato, *supra* note 113, at 253 (discussing the contemporary era of music).

224. *See id.* (noting the prominence of visual displays in musical performances). Coldplay utilized Xylobands, flashing light up bracelets synchronized to the music, during the band's Head Full of Dreams tour in 2017. Each concert goer was given a bracelet upon entry to the show. *See* Coldplay, *Coldplay - Paradise (Live in São Paulo)*, YOUTUBE (Dec. 6, 2018), https://www.youtube.com/watch?v=AwcWwQwjGTY. Beyond these visual displays in lighting and effects, many artists are well-known for their simultaneous dancing and singing, including Lady Gaga, Shakira, Jennifer Lopez, Madonna, and Beyonce. *See* Lady Gaga, *Lady Gaga – VMA Performance 2020*, YOUTUBE (Sept. 4, 2020),https://www.youtube.com/watch?v=lo1lCSr5Kxg; NFL, *Shakira & J. Lo's Full Pepsi Super Bowl LIV Halftime Show*, YOUTUBE (Feb. 2, 2020), https://www.youtube.com/watch?v=pILCn6VO_RU; Madonna, *Madonna – Hung Up (Live at Coachella 2006)*, YOUTUBE (May 20, 2020), https://www.youtube.com/watch?v=P24CuD5HgU0; Turtle Goddess, *Beyoncé Live at NFL Super Bowl 2013 Halftime Show HD 1080P*, YOUTUBE (Feb. 26, 2014), https://www.youtube.com/watch?v=uxVeJpYNE4Q.

225. *See* Keyes, *supra* note 23, at 429 (discussing music technology and sampling litigation).

226. *See* HANNING, *supra* note 73, at A20 (defining sampling as "a process of creating new compositions by patching together snippets of previously recorded music"); Jack Needham, *A History of Sampling and a Guide to Getting Them Cleared*, RED BULL (NOV. 15, 2019, 1:00 AM), https://www.redbull.com/us-en/sampling-history-and-how-to-not-get-sued ("[S]ampling is the art of taking one part of an existing track and, by looping it, turning it into a new one."). Sampling has become so prevalent in the modern music industry that entire websites are dedicated to discovering what samples are used in a given work. *See* WHOSAMPLED, https://www.whosampled.com (last visited Jan. 13, 2021). Additionally, producers and audio engineers have derived significant income from selling "sample packs," containing various instrumental samples or other sound recordings available for download. *See Taylor Larson Drum Samples – Drumforge – DrumShotz Taylor Larson and Luke Holland (WAV)*, AUDIO PLUG IN (July 6, 2020), https://audioplugins.net/taylor-larson-drum-samples/; PRODUCER LOOPS, https://www.producerloops.com (last visited Jan. 13, 2021). Currently, there exists a split between the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals as to whether sampling requires a license to use the sound recording. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) ("Get a license or do not sample."); VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016) (holding that the de minimis exception in copyright infringement "applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions"). *See also* SUGAR HILL GANG, *Rapper's Delight*, *on* SUGAR HILL GANG (Sugar Hill 1979) (sampling Chic's "Good Times"); VANILLA ICE, *Ice Ice Baby*, *on* HOOKED (Ultra Records 1989) (sampling Queen's "Under Pressure"); THE NOTORIOUS B.I.G., *Mo Money Mo Problems*, *on* LIFE AFTER DEATH (Bad Boy/Arista 1997) (sampling Diana Ross's "I'm Coming Out"); BEYONCE, *Crazy in Love*, *on* DANGEROUSLY IN LOVE (Columbia 2003) (sampling The Chi-Lites's "Are You My Woman (Tell Me So)"); MADONNA, *Hung Up*, *on* CONFESSIONS ON A DANCE FLOOR (Warner Bros. 2005) (sampling ABBA's "Gimme! Gimme! Gimme! (A Man After Midnight)"); M.I.A.,

The longstanding principles of musical borrowing and adherence to stylistic practices coupled with changes in musical production and consumption have given rise to many of the difficulties facing courts in music copyright infringement cases.[227] Due to the way in which music permeates the everyday life of the ordinary individual, stylistic patterns are familiar to most average listeners.[228] Whether or not he or she realizes it, a fan of country music will expect a snare drum hit on the second and fourth beat of every measure and twangy vocals because these stylistic practices characterize the country genre.[229] Therefore, stylistic practices, which are unprotected musical elements common to a genre of music, could sound familiar to the ordinary observer, risking the potential for a finding of copyright infringement where infringement has not occurred.[230]

If the ordinary observer is an individual unskilled in the art, he or she will face additional problems in attempting to separate the protectable elements of a piece of music from a defendant's permissible borrowing of musical elements in the public domain.[231] How will the ordinary observer tell the difference between

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Paper Planes, *on* KALA (Interscope 2006) (sampling The Clash's "Straight to Hell"); DAFT PUNK, *Harder, Better, Faster, Stronger*, *on* DISCOVERY (Warner Music 2007) (sampling Edwin Birdsong's "Cola Bottle Baby"); ZAC BROWN BAND, *Toes*, *on* THE FOUNDATION (Atlantic 2008) (sampling King Dead's "Not a Worry"); DISTURBED, *Living After Midnight*, *on* ASYLUM (Metal Hammer 2010) (sampling Judas Priest's "Life After Midnight"); AVENGED SEVENFOLD, *Retrovertigo*, *on* THE STAGE (Capitol 2017) (sampling Mr. Bungle's "Retrovertigo"); SAM HUNT, *Hard to Forget*, *on* SOUTH SIDE (MCA Nashville 2020) (sampling Webb Pierce's "There Stands the Glass").

227. *See* Keyes, *supra* note 23, at 430 (arguing copyright law discounts the practice of musical borrowing and this has "cooled expressive musical activity").

228. *See* Livingston & Urbinato, *supra* note 113, at 266 (discussing the public's high degree of access to music).

229. *See* GARY ALLAN, *Best I Ever Had*, *on* TOUGH ALL OVER (MCA Nashville 2005); TIM MCGRAW, *Last Dollar (Fly Away)*, *on* LET IT GO (Curb 2007); DIERKS BENTLEY, *Drunk on a Plane*, *on* RISER (Capitol Nashville 2014); CARRIE UNDERWOOD, *Smoke Break*, *on* STORYTELLER (Arista Nashville 2015); CAYLEE HAMMACK, *Family Tree*, *on* IF IT WASN'T FOR YOU (Capitol Nashville 2020).

230. *See* Baxter v. MCA, Inc., 812 F.2d 421, 421 (9th Cir. 1987). In *Baxter*, the District Court for the Central District of California granted summary judgment for the defendants, finding the court could not "hear any substantial similarity between defendant's expression of the idea and plaintiff's . . . . [T]he court could not even tell what the complaint was about." *See id.* at 423. However, the Ninth Circuit Court of Appeals reversed the district court's finding of summary judgment, concluding "reasonable minds could differ as to the issue." *See id.* at 425. The procedural history of *Baxter* indicates a lay-listener has difficulty in establishing whether there is even a possibility of substantial similarity. *See id.* The soca drum groove, common in the Caribbean or calypso music, provides an example of an unprotectable element of a work that is common to a genre and can make two works sound similar. *See Groove Essentials #32: Soca*, VIC FIRTH, https://vicfirth.zildjian.com/education/groove-essential-32-soca.html (last visited Jan. 13, 2021) (illustrating a drum groove common to a certain genre). This drum groove is characterized by the succession of snare hits on the sixteenth note and the eighth note, and the bass drum hit on each quarter note. *See id.* Although this drum groove would not be considered a protectable aspect of a musical piece because it is so widely used and part of a genre, the use of the groove can make songs sound very similar to the untrained ear. *See* ZOELAH, *You Alone*, *on* BEACH CHAIR RIDDIM (2020); SAVANNA, *Name Man*, *on* NAME MAN (2021).

231. *See* 17 U.S.C. § 102(b); 37 C.F.R. § 202.1(a) (discussing unprotectable elements such

the public domain descending chromatic scale in Led Zeppelin's "Stairway to Heaven" from the protected melody?[232] The lay-listener will have to engage in a high degree of musical analysis in an attempt to un-hear those unprotected elements in the public domain and compare only the protected elements in the works.[233] This analysis is premised on the assumption that the ordinary observer does not suffer from tone deafness and understands what is and is not protectable in music.[234] Further, the previously discussed doctrine of subconscious copying becomes more problematic when taking into account these common musical patterns.[235] A plaintiff in a musical copyright infringement case could very well argue that a defendant subconsciously copied the plaintiff's widely disseminated work when the defendant merely adhered to stylistic practices of the genre.[236] Courts appear to wholly disregard these common musical practices in current copyright infringement analysis.[237]

C. Impacts on Musicians and The Music Industry

Due to the technological changes in the last several years and the preferred method of music consumption shifting to digital on-demand streaming, artists are making less money from recorded music.[238] Some industry analysts argue

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as "[w]ords and short phrases . . . ."); 37 C.F.R. § 202.1(d) (directing "[w]orks consisting entirely of information that is common property containing no original authorship" do not receive copyright protection); *see also* Keyes, *supra* note 23, at 431 (arguing the average juror does not have the ability to "perceive and process musical sounds").

232. *See* LED ZEPPELIN, *Stairway to Heaven*, *on* LED ZEPPELIN IV (Island 1971); Skidmore v. Led Zeppelin, 952 F.3d 1051, 1058 (9th Cir. 2020) (discussing the use of a five note descending chromatic scale in "Stairway to Heaven" and "Taurus").

233. *See* Sprigman & Hedrick, *supra* note 101, at 574 ("[R]elying on the holistic impression of an ordinary listener or observer is precisely the sort of approach least likely to respect the boundary between unprotectable ideas and protected expression.").

234. *See* Keyes, *supra* note 23, at 437 (discussing recent studies finding tone deafness is far more common than previously believed, with as many as one in four adults having difficulties recognizing tunes and one in twenty having severe tone deafness).

235. *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir.1983) (finding infringement where a work was widely distributed, and the defendant subconsciously copied the original work).

236. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 483 (9th Cir. 2000) (illustrating a plaintiff's arguing subconscious copying for a widely disseminated work despite defendant having no recollection of hearing plaintiff's work); Livingston & Urbinato, *supra* note 113, at 269 (arguing Western musical compositions all draw on earlier works, thus subconscious copying can theoretically exist in all works). For instance, a soca artist can argue an individual copied his widely distributed composition and the copying is evidenced by the use of a soca drum groove. *See supra* note 230 and accompanying text. However, the artist of the second work was likely adhering to the stylistic practices of the genre by using the soca drum groove and was not copying the first work.

237. *See* Keyes, *supra* note 23, at 430 ("[M]usic copyright law needs to be reconsidered and shifted from its present static, copyright-holder-take-all state to a fluid paradigm . . . .").

238. *See* AUDIO MONITOR U.S., *supra* note 128, at 13 ("[Y]ounger generations shun traditional methods of listening, opting instead to use digital methods of consumption."); Dmitry Pastukhov, *What Music Streaming Services Pay Per Stream (And Why It Actually Doesn't Matter)*, SOUNDCHARTS BLOG (June 29, 2019), https://soundcharts.com/blog/music-streaming-rates-payouts ("[T]he average observed per-stream payout on Apple Music is $0.00551 vs. $0.00318 for Spotify.").

recorded music and compositions are primarily a means of generating notoriety in order to obtain later revenue from live music events, merchandise sales, sponsorships, and other ancillary revenue streams.[239] Despite the expectation of glamourous on-stage performances, the public has recently seen a number of artists choosing to perform without lavish visual displays, including Lady Gaga and Bradley Cooper's performance of "Shallow" at the 2019 Oscars as well as John Legend's stripped down piano and vocal ballad at the 2020 Democratic Convention.[240] As the shift toward a more raw portrayal of artists has magnified the focus on music, alleged copyright infringement has become more conspicuous, generating a larger number of music copyright infringement suits in the last decade.[241] The growing number of copyright infringement actions in music could also be attributed to the courts' expanding definition of musical creativity.[242] Recent judicial decisions have marked a departure from melody as the most protected element in a musical work, leading to a perceived broadened scope of copyright protection for musical works.[243] Many notable artists have recently battled copyright infringement allegations, including Justin Bieber, Sam Smith, Katy Perry, Ariana Grande, and Taylor Swift.[244] Perhaps the most notable

239. *See* BRABEC, *supra* note 82, at 115 (discussing 360 deals). 360 deals allow a record company to keep a portion of an artist's music publishing rights, merchandising income, touring income, and revenue generated from other sources. *See id.* These deals have grown increasingly common as record labels argue less money is made from recorded music alone. *See id.*

240. *See* Lady Gaga, *Lady Gaga, Bradley Cooper - Shallow (From A Star Is Born/Live From The Oscars)*, YOUTUBE (Feb. 25, 2019), https://www.youtube.com/watch?v=JPJjwHAIny4&list=RDbm-9vk1fkJc&index=6; PBS NewsHour, *WATCH: John Legend Performs at the 2020 Democratic National Convention | 2020 DNC Night 2*, YOUTUBE (Aug. 18, 2020), https://www.youtube.com/watch?v=yaqmVRMwQaw.

241. *See* Livingston & Urbinato, *supra* note 113, at 254 ("With other variables stripped away, one can discern more easily whether a song or other piece of music closely resembles an earlier work.").

242. *See* Keyes, *supra* note 23, at 418 ("From 1950 through 2000, there were forty-three reported cases dealing with music copyright infringement—nearly twice as many as compared to the period between 1900-1950—and many more disputes that never ripened into litigation as a result of out-of-court settlements.").

243. *See* Fishman, *supra* note 76, at 1909 (discussing the expansion of the "judicial conception of musical creativity," broadening the scope of copyright protection in music).

244. *See* Copeland v. Bieber, 789 F.3d 484, 495 (4th Cir. 2015) (holding "a reasonable jury could find that the Copeland song and the Bieber and Usher songs are intrinsically similar"); Daniel Kreps, *Sam Smith on Tom Petty Settlement: 'Similarities' But 'Complete Coincidence'*, ROLLING STONE (Jan. 26, 2015, 4:19 PM) https://www.rollingstone.com/music/music-news/sam-smith-on-tom-petty-settlement-similarities-but-complete-coincidence-34776/ (discussing Sam Smith's settlement with Tom Petty after discovering slight similarities in Smith's use of a three-chord descending line in "Stay With Me" and Petty's use of a three-chord descending line in "I Won't Back Down"); Jon Blistein, *Katy Perry Wins Appeal in 'Dark Horse' Infringement Case*, ROLLING STONE (Mar. 18, 2020, 9:44 AM), https://www.rollingstone.com/music/music-news/katy-perry-dark-horse-copyright-win-appeal-969009/ (discussing rapper Flame's copyright infringement action against Katy Perry for allegedly infringing on his song "Joyful Noise" in Katy Perry's hit 2013 song "Dark Horse"); Complaint & Demand for Jury Trial at 1, Stone v. Grande, No. 20-cv-4413 (S.D.N.Y. 2020) (discussing plaintiff's allegation that Ariana Grande's "7 Rings" infringes on plaintiff's song "You Need It I Got it"). Taylor Swift is facing a lawsuit for the alleged use of lyrics from 2001 recording of "Playas Gon' Play" by 3LW in Swift's 2014 hit "Shake It Off." *See* Bruce Harring, *Taylor Swift 'Shake It Off' Copyright Lawsuit Can Proceed, Judge Rules*, DEADLINE (Sept.

case wreaking havoc on the music industry stems from what has now become the infamous *Blurred Lines* case.[245]

In 2018, the Ninth Circuit Court of Appeals upheld the district court's decision that Robin Thicke and Pharrell Williams were liable for copyright infringement for using portions of Marvin Gaye's "Got to Give It Up" as inspiration for their hugely popular tune "Blurred Lines."[246] This verdict shocked music intermediaries and musicians across the United States.[247] The court found a "constellation" of similarities between the basslines, keyboard parts, hooks, and the main theme of the two pieces.[248] Typically, these peripheral parts would receive thin copyright protection because they are often dictated by the genre and the notes used are limited by the chosen key.[249] While the court found the

3, 2020, 8:06 PM), https://deadline.com/2020/09/taylor-swift-shake-it-off-copyright-lawsuit-can-proceed-1234570803/ (discussing the denial of Swift's motion to dismiss, finding songwriters Sean Hall and Nathan Butler "have sufficiently alleged a protectable selection and arrangement or a sequence of creative expression").

245. *See* Williams v. Gaye, 895 F.3d 1106, 1106 (9th Cir. 2018); Andrea Mandell, *"Blurred" Verdict Is Bad News for Music Biz*, USA TODAY (Mar. 10, 2015, 6:59 PM), https://www.usatoday.com/story/life/music/2015/03/I-o/pharrell-responds-music-industry-reacts/24727763/ (discussing how the *Blurred Lines* verdict gave rise to a "new ambulance-chasing business . . . in the music industry").

246. *Williams*, 895 F.3d at 1116.

247. *See id.* at 1138 (Nguyen, J., dissenting) (arguing the verdict established "a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere"); Gibbs, *supra* note 3 (discussing reactions to the *Blurred Lines* verdict from those in the music industry); *see also* Fishman, *supra* note 76, at 1872 ("[S]everal prominent musicologists who specialize in music copyright disputes have expressed exasperation that the law in the wake of the 'Blurred Lines' verdict might suddenly protect something more than melody.").

248. *See Williams*, 895 F.3d at 1117 ("[T]here is a 'constellation' of eight similarities between 'Got to Give It Up' and 'Blurred Lines,' consisting of the signature phrase, hooks, 2 hooks with backup vocals, . . . 3 backup hooks, bass melodies, keyboard parts, and unusual percussion choices."). A hook is a musical phrase that "hooks the listener in" and is the most memorable part of a musical work. *See What Exactly Is a Hook in Songwriting?*, ATLANTA INSTITUTE OF MUSIC & MEDIA (Mar. 29, 2019), https://www.aimm.edu/blog/what-exactly-is-a-hook. It often repeats multiple times throughout the work. *See id.* For instance, in Tom Petty's "Free Fallin'" one of the hooks is the vocal melody, where Tom Petty declares "Cause I'm Free / Free Fallin'." *See* TOM PETTY, *Free Fallin'*, *on* FULL MOON FEVER (MCA 1989). Although the hook is often the most important part of the song, the Marvin Gaye Estate's arguments for the similarities between the hooks in "Blurred Lines" and "Got to Give It Up" were weak. *See* Williams v. Bridgeport Music, Inc., 2014 U.S. Dist. LEXIS 182240, at *38–41 (C.D. Cal. Oct. 30, 2014). The Gaye Estate's expert compared the back-up vocals of the hooks and the emphasis on certain lyrics within each song's hooks, which are often peripheral when examining the substantial similarity between two works. *See id.* While three of the four notes in the hooks shared the same scale degree, the rhythms of each song's hooks were different. *See id.* at *38–39. Additionally, the Marvin Gaye Estate's expert conceded that the note the hooks did not share "significantly change[d] the effect of each hook." *See id. See also* Austin Siegemund-Broke, *How Similar Is 'Blurred Lines' To A 1977 Marvin Gaye Hit?*, HOLLYWOOD REPORTER (Mar. 3, 2015, 5:00 AM), https://www.hollywoodreporter.com/thr-esq/how-similar-is-blurred-lines-778635 (providing a comprehensive description of the Marvin Gaye Estate's argued similarities between the "signature phrase," hook, keyboard and bass parts, lyrics, and main theme of the works).

249. *See Williams*, 2014 U.S. Dist. LEXIS 182240, at *41. There were only three notes in common between the twelve-note opening bass parts of each song. *See id.* The bass part repeating every eight measures was not considered because it was not in the "Got to Give It Up" deposit copy. *See id.* at *44. The court recognized the keyboard part's repetition of a "common chord is not a

"heartbeat" of the songs was similar, there were no note-to-note melodic or harmonic similarities typically required to show substantial similarity.[250] Additionally, the court found lyrical similarities because both songs centered on the same core theme.[251] The alleged lyrical similarities were particularly shocking when one considers how many songs have been written using the same lyrical themes, such as love or revenge.[252] Thus, the Ninth Circuit's finding departed from the musical hierarchy of protected elements and essentially expanded the scope of copyrightable expression in music by allowing the Marvin Gaye Estate to copyright a musical style and musical themes.[253]

Faith, however, was somewhat restored in the court's ability to decide music copyright infringement cases when the Ninth Circuit Court of Appeals reached its verdict in *Skidmore v. Led Zeppelin*.[254] Led Zeppelin's 1971 hit "Stairway to Heaven" was at issue in the case.[255] The action was brought by

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sufficiently original expression to merit copyright protection." *See id.* at *45–46. However, the court "considered [the keyboard part] in combination with other features for the purposes of analytic dissection." *See id.* at *46.

250. *See Williams*, 895 F.3d at 1117. Courts do not typically find harmonies to be determinative of substantial similarity in musical copyright infringement cases. *See* Fishman, *supra* note 76, at 1863–64 (discussing a musical hierarchy and how the melodies of "Blurred Lines" and "Got to Give It Up" lacked a "note-to-note melodic correspondence"). However, many vocal groups have become popular because of their creative choices in vocal harmonies. *See* THE SUPREMES, *Where Did Our Love Go*, *on* WHERE DID OUR LOVE GO (Motown 1964); THE TEMPTATIONS, *My Girl*, *on* THE TEMPTATIONS SING SMOKEY (Motown 1965); THE BEACH BOYS, *Wouldn't It Be Nice*, *on* PET SOUNDS (Capitol 1966); FLEETWOOD MAC, *Go Your Own Way*, *on* RUMOURS (Warner Bros. 1977); BEE GEES, *More Than A Woman*, *on* SATURDAY NIGHT FEVER (RSO 1977); NSYNC, *(God Must Have Spent) A Little More Time On You*, *on* 'N SYNC (Trans Continental Records 1997); BACKSTREET BOYS, *Shape of My Heart*, *on* BLACK & BLUE (Jive 2000); ONE DIRECTION, *What Makes You Beautiful*, *on* UP ALL NIGHT (Syco 2011); FIFTH HARMONY, *That's My Girl*, *on* 7/27 (Epic 2016).

251. *See Williams*, 2014 U.S. Dist. LEXIS 182240, at *40.

252. *See* ELTON JOHN, *Your Song*, *on* ELTON JOHN (Uni 1970); BEE GEES, *How Deep Is Your Love*, *on* SATURDAY NIGHT FEVER (RSO 1977); STEVIE WONDER, *I Just Called To Say I Love You*, *on* THE WOMAN IN RED (Motown 1984); WHITNEY HOUSTON, *I Will Always Love You*, *on* I WILL ALWAYS LOVE YOU (Arista 1992); BACKSTREET BOYS, *I'll Never Break Your Heart*, *on* BACKSTREET BOYS (Jive 1996); ELLA FITZGERALD & LOUIS ARMSTRONG, *The Nearness of You*, *on* THE COMPLETE LOUIS AND ELLA ON VERVE (Verve 1997); COLDPLAY, *Fix You*, *on* X&Y (Parlophone 2005); BEYONCE, *Crazy In Love*, *on* DANGEROUSLY IN LOVE (Columbia 2003); JASON MRAZ, *I'm Yours*, *on* WE SING. WE DANCE. WE STEAL THINGS. (Atlantic 2008); *see also* CARRIE UNDERWOOD, *Before He Cheats*, *on* SOME HEARTS (Arista Nashville 2005); BEYONCE, *Irreplaceable*, *on* B'DAY (Columbia 2006); ADELE, *Rolling in the Deep*, *on* 21 (Columbia 2011); TAYLOR SWIFT, *Look What You Made Me Do*, *on* REPUTATION (Big Machine 2017); DEMI LOVATO, *Sorry Not Sorry*, *on* TELL ME YOU LOVE ME (Island 2017).

253. *See Williams*, 895 F.3d at 1138 (Nguyen, J., dissenting). Prior to the *Blurred Lines* decision, the court did not typically find substantial similarity where there were no melodic similarities between two works. *See* Fishman, *supra* note 76, at 1882–83 (arguing the melody is the most protectable aspect of a musical work as a "musical work is the melody–no more, no less"). Thus, the case was a departure from previously held conceptions about copyright protection in musical compositions. *See id.* at 1862 ("Recent judicial decisions are beginning to break down the old definitional wall around melody, looking elsewhere within the work to find protected expression.").

254. *See* 952 F.3d 1051, 1063 (9th Cir. 2020).

255. *See id.* at 1056.

Michael Skidmore on behalf of the Randy Craig Wolfe Trust.[256] In 1966 or 1967, Wolfe wrote and registered "Taurus," a song that would later be released by his band Spirit.[257] Because the song was registered prior to Congress granting copyright protection to sound recordings, Skidmore was only able to introduce sheet music as evidence of Led Zeppelin's infringement.[258] Skidmore identified an eight-measure passage that Led Zeppelin allegedly infringed.[259] Members of Led Zeppelin maintained the chord sequence at issue had "been around forever" and the Ninth Circuit ultimately agreed, finding Led Zeppelin was not liable for copyright infringement because each song had a distinct melody.[260] Unlike the Ninth Circuit's decision in *Blurred Lines*, the *Skidmore* court recognized common musical practices as a factor and adhered to the perceived musical hierarchy with melody as the most protected element of a work.[261] *Skidmore* reached its conclusion in March 2020 when the U.S. Supreme Court rejected Skidmore's petition for certiorari.[262]

Despite the favorable, and arguably correct, outcome of *Skidmore*, the *Blurred Lines* decision and the onslaught of music copyright infringement cases in the last several years has changed the landscape of the music industry.[263]

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256. *See id.*

257. *See id.*

258. *See id.* at 1060. The district court allowed only the introduction of the sheet music for "Taurus" because "Taurus" was a pre-1976 work and the 1909 Act controlled. *See id.* at 1057–58. Thus, Skidmore did not hold a copyright in the song's sound recordings and could only receive copyright protection for the elements found in the sheet music, which was the deposit copy. *See id.* However, experts were able to introduce various exhibits demonstrating how the sheet music would sound and exhibits comparing the notation of the works side by side. *See id.* at 1058–59. For example, expert guitarist Kevin Hanson was able to play both pieces of music on guitar to demonstrate the similarities between the two works. *See* Ginni Chen, *Expert Testimony Plays Key Role in Led Zeppelin Copyright Infringement Case*, EXPERT INSTITUTE (Feb 11, 2021), https://www.expertinstitute.com/resources/insights/led-zeppelin-copyright-infringement-case-hinges-on-expert-testimony/ (discussing how the use of experts impacted the *Skidmore* verdict); *see also* Alexander Wolfe, *Case Comment: Skidmore v. Led Zeppelin: Changing Music Infringement Analysis in the Ninth Circuit*, 23 U. DENV. SPORTS & ENT. L. J. 1, 10 (2020) (arguing the *Skidmore* verdict will likely have a "significant impact on the music industry" because pre-1976 works will face deposit copy limitations).

259. *See Skidmore*, 925 F.3d at 1057–58.

260. *See id.* at 1080; *Has The Chord Progression in "Stairway to Heaven" Been Around "Forever"?*, CBS NEWS (June 17, 2016, 11:36 AM), https://www.cbsnews.com/news/led-zeppelin-stairway-to-heaven-guitarist-jimmy-page-chord-progression/ (discussing Jimmy Page's insistence that "the chord sequences are very similar because that chord sequence has been around forever").

261. *See Skidmore*, 925 F.3d at 1059–60 (recognizing that the allegedly infringing eight bar musical phrase was preceded and followed by different notes, thus the two songs had completely different melodies). The court also noted that "[t]he world of copyright protection for music changed dramatically during the twentieth century" and allowed "those changes [to] dictate [the] analysis." *See id.* at 1060.

262. *See* Skidmore v. Led Zeppelin, 141 S. Ct. 453, 454 (2020) (denying Skidmore's petition for a writ of certiorari).

263. *See* Hermann, *supra* note 99 (discussing how the *Blurred Lines* verdict "generated a great deal of uncertainty in the music industry over where the line between inspiration and imitation now lies"); Fishman, *supra* note 76, at 1866 (discussing the "sea change" experienced by the music industry following the *Blurred Lines* verdict) (internal citations omitted).

Artists have changed the way they write and credit music by crediting a large number of individuals for contribution to a sound recording or musical composition rather than engaging in permissible musical borrowing and adhering to common stylistic practices.[264] Anyone who happens to be in the room when a song is recorded or created, as well as any artist the songwriter might draw inspiration from, could receive songwriting credit, leading to decreased royalties for each creator.[265] Additionally, artists have been more willing to settle copyright infringement disputes even where the artist's tune is undoubtedly distinct from the accuser's work.[266] These new practices are a sharp departure from the goals of copyright law.[267] Rather than incentivize artists to create for the betterment of society, copyright infringement findings by courts have staunched the free flow of musical ideas, leaving artists to create in the threatening shadow of potential copyright litigation.[268]

III. A NEW TEST FOR THE MODERN ERA OF MUSIC

While the legislature has accounted for the everchanging music industry and dynamic technologies that have changed the landscape of music consumption, the judiciary continues to treat music like any other artform.[269] The courts are in dire need of a more effective means of addressing the unique

264. *See* Bobby Owsinski, *It Looks Like You Need 9.1 Songwriters To Write A Hit Song These Days*, MUSIC 3.0 (Jan. 11, 2019), https://music3point0.com/2019/01/11/songwriters-hit-song/#ixzz6Wif0vZlP (discussing the large number of songwriters and producers on hit songs).

265. *See* Jason Palmer, *NOTE: "Blurred Lines" Means Changing Focus: Juries Composed of Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries*, 18 VAND. J. ENT. & TECH. L. 907, 926–28 (2016) (describing the negative effects of the *Blurred Lines* decision on the music industry and musicians); Fishman, *supra* note 76, at 1867 (discussing the "Blurred Lines' Effect" in which musicians prophylactically give songwriter credits to "anyone who has previously written a vaguely reminiscent song"). These credited songwriters are occasionally a part of several performing rights organizations, resulting in confusion as to which songwriter should be paid and how much. Crediting artists that the songwriter draws inspiration from is especially problematic for newer artists who rely on income from publishing royalties and have fewer ancillary revenue streams (i.e. live music events, merchandise sales, sponsorships, etc.). These lesser-known artists are forced to pay out large sums of their publishing royalties to superstar artists that already have a large following. This ultimately disincentivizes musicians from entering the music market and progressing the field of music.

266. *See* Booth, *supra* note 145, at 121–22 (discussing the Tom Petty and Sam Smith dispute, in which Smith settled and offered Petty songwriting credits for "Stay With Me" despite there being "numerous significant differences" between "Won't Back Down" and "Stay With Me").

267. *See* Jones, *supra* note 9, at 281 ("Prohibiting the liberal borrowing of ideas would stifle the free flow of ideas necessary to facilitate true creativity.").

268. *See* Fishman, *supra* note 76, at 1866 ("Many musicians, accustomed to imitating nonmelodic elements of the music they hear, now worry that the legal shadow in which they've long worked is shifting unpredictably.").

269. *See generally* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (providing more efficient royalty payments for artists as well as other copyright reform that is conducive to the changing landscape of music consumption and technology); Keyes, *supra* note 23, at 410 ("[T]he courts have historically treated music just like other types of works of authorship, and, consequently have approached the legal issues of protection and infringement of music like those other types.").

attributes of music and recent technological shifts in music consumption.[270] If courts are to remain insistent that the lay-listener is best equipped to make the decision of whether two musical works are substantially similar, jurors must be given the necessary tools to understand what they are hearing.[271] Courts should provide testimony by a neutral expert musicologist to educate jurors on common musical practices and unique musical attributes—such as the limited combinations in Western tonality, a musician's adherence to the stylistic practices of a genre, and musical borrowing—prior to the introduction of testimony by opposing experts.[272]

A. The Use of Neutral Expert Testimony to Educate Jurors

Copyright music cases have notoriously turned into a battle of the experts as both the plaintiff and defendant hire musicologists to advocate for the "correct" way to hear the songs at issue.[273] This is perhaps why the Second Circuit is wary of allowing expert testimony, permitting such testimony only when it is absolutely necessary to help the average listener distinguish the similarities between the two works' protectable elements.[274] The Ninth Circuit, on the other hand, allows expert testimony in the initial objective analysis but not in the second intrinsic analysis.[275] Regardless of when the prejudicial expert testimony is introduced, the use of such testimony is unhelpful if jurors are given no context of music theory and common musical practices prior to hearing the testimony.[276]

The appointment of a neutral third-party expert musicologist could assist jurors in undertaking the complex task of determining substantial similarity in

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270. *See infra* Part II (discussing common musical practices, modern music consumption, and compositional techniques).

271. *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (utilizing the perspective of an ordinary observer in the court's analysis of substantial similarity); Sid & Marty Krofft TV Prods. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977) (utilizing the perspective of the lay-listener in the court's analysis of substantial similarity).

272. *See* Kim, *supra* note 75, at 109 (arguing the judgment of substantial similarity in music infringement cases "should be informed by people who are familiar with the media at issue"); Keyes, *supra* note 23, at 431 (discussing how jurors are asked to put themselves in the place of the ordinary observer).

273. *See* Keyes, *supra* note 23, at 434 ("There are significant procedural and logistical drawbacks to allowing experts to testify as to how they subjectively believe a lay, reasonable listener would hear a piece of music. This entire inquiry presupposes that there actually is an objective standard through which music perception can be gauged and arrived at with any degree of accuracy.").

274. *See Arnstein*, 154 F.2d at 473 (permitting testimony in the objective analysis); *see also* Keyes, *supra* note 23, at 434–35 ("[T]he expert seeks to convince the fact finder that there are 'objective similarities' between the two works . . . . Second, once the expert assists in establishing 'objective similarities,' the expert can help establish that these objective similarities constitute 'illicit appropriation.'").

275. *See* Cavalier v. Random House, Inc., 297 F.3d 815, 821–22 (9th Cir. 2002) (discussing "scenes-a-faire," unprotectable elements of a work common to a genre, in the objective analysis).

276. *See* Keyes, *supra* note 23, at 431 (discussing how the use of prejudicial experts can have a tendency to "distort[] the judicial process").

musical works.[277] Under this approach, neutral expert testimony would be given prior to jurors hearing any evidence and prior to the presentation of any prejudicial expert testimony.[278] This neutral testimony would consist of an overview of common musical practices and basic music theory using visual representations of classical works that are not currently at issue, such as depictions of sheet music or graphics to break down musical works for the lay-listener.[279] The neutral expert might also consider providing a variety of aural examples from various pieces of music that are not at issue to demonstrate chord progressions, grooves, rhythm, harmony, melody, and many other aspects of a musical work that are important to understand how music is composed and communicated.[280] Such testimony would help jurors effectively evaluate the plaintiff's and the defendant's experts and distinguish the elements of a work that are protectable from those that reside in the public domain.[281] Additionally, jurors would have the opportunity to ask the neutral expert questions, which could further the educational process and prepare the jurors to better dissect the copyright holder's and the alleged infringer's songs.[282]

Both the plaintiff and defendant would contribute funds to a pool to hire the neutral expert.[283] The judge might then find an individual to act as a neutral expert, likely choosing from a list of musicologists pre-approved by the court.[284]

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277. *See* Kim, *supra* note 75, at 122 ("Expert testimony should be admitted for the benefit of the trier of fact, at every step of the analysis.").

278. *See* Livingston & Urbinato, *supra* note 113, at 273 (arguing some courts tended to believe that "a party could buy any particular music . . . analyst's 'expert' opinion").

279. *See* James Gutierrez, *An Enactive Approach to Learning Music Theory? Obstacles and Openings*, FRONTIERS IN EDUCATION (Nov. 19, 2019), https://www.frontiersin.org/articles/10.3389/feduc.2019.00133/full (discussing conventional and unconventional ways of teaching music theory). Examples would assist jurors in breaking down the particular elements of a musical work, assisting in determining whether two songs are actually substantially similar. In no circumstances would a neutral musicologist use examples drawn from the works at issue.

280. *See id.*; *infra* Part II (discussing musical practices and common compositional techniques). The neutral expert musicologist could give jurors background regarding typical musical practices, including musical borrowing and adherence to stylistic practices as well as an overview of Western tonality.

281. *See* Kim, *supra* note 75, at 122 (discussing the necessity of expert testimony to assist jurors).

282. *See id.* (advocating for increased use of experts in music copyright infringement cases). To prevent bias and remain as neutral as possible, jury questions would be submitted to the judge prior to the neutral expert answering. Any questions that would favor one party over the other would not be asked of the neutral expert. Permitted questions could include questions about basic music theory, including rhythm, melody, and harmony, as well as more complex questions that might lend some assistance in determining substantial similarity, such as questions about the use of ostinatos and chromatic scales.

283. *See* Jones, *supra* note 9, at 296 (discussing how plaintiffs and defendants can buy expert opinions). If the plaintiff were to pay the neutral expert, the expert may feel inclined to provide testimony that would favor the plaintiff rather than providing neutral and nonbiased testimony. The same might occur if the defendant hires the expert. Therefore, contributing to a pool for funding a neutral expert musicologist would prevent the expert musicologist from being biased.

284. *See* Sanja Kutnak Ivkovic & Valerie Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 442 (2001) ("The United

Because a plaintiff would have to contribute funds to a pool to provide a neutral expert, the cost of litigation would increase; in turn, the plaintiff bringing the copyright infringement action might be less eager to pursue a frivolous or meritless copyright infringement action.[285] Thus, neutral expert testimony could benefit a judicial system where court resources are often overstretched and delays are not infrequent.[286]

Currently, the court introduces expert testimony by opposing sides before jurors even have a basic understanding of music.[287] Thus, jurors are unable to assess the credibility of the plaintiff's or the defendant's expert musicologists.[288] Further, these musicologists use terms that can confuse an ordinary observer with no skill in the art.[289] These issues lend to the argument that the admission of opposing expert testimony causes greater juror confusion than clarity in deciding the issue of substantial similarity.[290] By admitting expert testimony before jurors have any understanding of music, jurors are forced to make blind assumptions and decipher unfamiliar musical terms put forth by the experts.[291]

States Supreme Court has concluded that trial judges should act as gatekeepers of expert testimony, making preliminary scientific evaluations before allowing an expert to testify in the presence of the jury . . . ."). The judge would be best equipped to select a neutral expert because he or she can ensure the neutrality of the expert. *See id.*

285. *See* Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CAL. L. R. 905, 906 (2020) (discussing how high costs dissuade litigation).

286. *See* Mary Lee Luskin & Robert C. Luskin, *Why So Fast, Why So Slow? Explaining Case Processing Time*, 77 J. CRIM. L. & CRIMINOLOGY 190, 190 (1986) ("[I]t is a common perception that cases generally take too long to wind their way through American courts."); Newman, *supra* note 285, at 905 (discussing common complaints about the court system, including the court system moving too slow); Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 634 (2010) ("[F]rivolous cases seem to abound. But as much as everyone seems to be against frivolous cases, frivolous cases seem to be everywhere.").

287. *See* Sid & Marty Krofft TV Prods. v. McDonald's Corp., 567 F.2d 1157, 1164 (9th Cir. 1977) (discussing the extrinsic analysis in substantial similarity at which point, expert testimony is permissible).

288. *See* Kim, *supra* note 75, at 126 (arguing expert guidance "might well be necessary in so technical and multi-faceted a discipline as music"); Ivkovic & Hans, *supra* note 284, at 441 ("Jurors are laypersons with no specific expert knowledge, yet they are routinely placed in situations in which they need to critically evaluate complex expert testimony.").

289. *See generally* HANNING, *supra* note 73, at A9–A24 (providing a glossary of simple and complex terms in Western music). Because juries are meant to reflect the face of society, it is highly probable that the average juror will not have skill in the art of music and composition. Thus, the average juror will not understand the meaning of a number of basic musical terms (i.e. rhythm, chord progression, melody, tonic, interval, modal, tempo), let alone the more complex terms that could dictate substantial similarity in cases of musical copyright infringement (i.e. ostinato, cadence, diatonic, mixolydian, motive). Additionally, the average juror could be tone-deaf, creating further difficulties for a juror attempting to determine substantial similarity in music. *See generally Music to Their Ears It Is Not*, HARVARD HEALTH (Sept. 2007), https://www.health.harvard.edu/newsletter_article/Music_to_their_ears_it_is_not (discussing tone deafness in adults and those who cannot perceive music).

290. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930) (finding that expert testimony "cumbers the case and tends to confusion").

291. *See* Jones, *supra* note 9, at 303 (arguing that the order of the Ninth Circuit's extrinsic/intrinsic test should be switched to allow the fact finder to "listen to the songs in question without having heard any potentially prejudicial expert testimony").

The current approach of allowing experts to testify prior to jurors possessing the necessary musical tools is also problematic because it does not account for the subjectivity of music.[292] Music is an abstract artform that can be heard and interpreted in several ways.[293] Before jurors are even able to form their own opinions about works, they are bombarded by the plaintiff's and the defendant's expert musicologists who advocate for the "right" way to hear the music.[294] Thus, the court attempts to place music in an objective framework in which there is a "right" way to hear music and a "wrong" way to hear music, with each expert advocating for their interpretation.[295] Rather than immediately barraging jurors with terms they will not understand, the jurors should first have the ability to form their own subjective opinion of the works.[296] As an ordinary observer, the juror would then be able to better evaluate which expert's opinion he or she more closely aligns with.[297]

Such an approach would also benefit a tone-deaf juror.[298] If the tone-deaf juror has a basic understanding of music theory and common musical practices, she will not have to rely on her perception of the music alone.[299] Rather, the tone-deaf juror will be able to engage in some level of theoretical analysis to supplement her subjective understanding of the works.[300] This analysis would

292. *See* Keyes, *supra* note 23, at 432 ("A piece of music may be perceived differently by two individuals, but that does not mean that one perception is 'right' and one is 'wrong.'").

293. *See id.* ("[M]usic perception is an inherently subjective process that differs from individual to individual.").

294. *See* Sid & Marty Krofft TV Prods. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) (discussing the use of expert testimony in the initial extrinsic analysis); Jones, *supra* note 9, at 296 ("[A] juror listening to an articulate, impressively credentialed expert offer extended testimony about the intricacies of the songs' structural similarities . . . could easily be convinced that the songs sound similar when he may not have reached such a conclusion had he listened to the material prior to hearing the expert testimony."); *see also* N. Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 397 (S.D.N.Y. 1952) ("Expert testimony has been offered by both sides. Much of it is in conflict.").

295. *See* Keyes, *supra* note 23, at 434 (discussing the problems with courts "attempting to fit an inherently subjective inquiry into an objective mold").

296. *See id.* (discussing the subjectivity of music).

297. *See id.* (noting the way in which individuals hear music differently).

298. *See id.* at 437 (discussing tone deafness in adults). Tone-deafness is typically equated with an individual's inability to carry a tune while singing. *See* HARVARD HEALTH, *supra* note 289. More accurately, tone deafness refers to an individual who, quite literally, has an inability to perceive music. *See id.* Those who suffer from tone deafness are unable to hear differences in pitch, meaning how high or low notes are. *See id.* Thus, deciphering a simple melody can be an extremely complicated task for a tone-deaf person. *See id.* Research has shown one in 20 individuals suffers from true tone deafness. *Id.* Although an attorney may ask a potential juror about whether he or she is tone-deaf during jury selection, a tone-deaf person can still end up as a juror because a "person who is tone-deaf may not even know that they are tone-deaf." *See* Esther Murimi, *In the World of One Who is Musically Tone-Deaf*, MERRIAM MUSIC (Aug. 11, 2017), https://www.merriammusic.com/teachers/vocal/musically-tone-deaf/.

299. *See* Keyes, *supra* note 23, at 431 ("[T]he current legal test of 'substantial similarity' overlooks some of the inherent problems that are possessed by jurors . . . .").

300. *See* Kim, *supra* note 75, at 128 (advocating for the use of expert testimony at all levels of analysis to aid all triers of fact). A neutral expert could provide methods of musical analysis that are more visual, thus assisting a tone-deaf juror who is unable to comprehend pitch.

allow the tone-deaf juror to make a decision regarding the substantial similarity of the works more effectively.[301]

Jurors may have a tendency to react to who the expert is rather than fully absorbing the expert's opinion.[302] For instance, the plaintiff's expert may be more likable than the defendant's expert or perhaps, the defendant's expert may appear more credible than the plaintiff's expert.[303] Thus, the jury can get distracted by who the expert is rather than the accuracy of the expert's testimony.[304] Providing neutral expert testimony prior to the juror's hearing the evidence presented by prejudicial experts could dispense with the issue of likability over accuracy.[305] Because the jurors would have prior knowledge of music and music theory provided by a neutral expert, jurors could better assess the credibility of the opinion of the plaintiff's expert or the defendant's expert and may be less likely to become enraptured with the expert's personality or credentials.[306]

Not only would the introduction of neutral expert testimony be helpful for jurors, but it would also be helpful for judges because judges are likely to have as little musical training as jurors.[307] In fact, judges have historically engaged in a level of visual bias in music copyright disputes by relying primarily on the visual markings of a score rather than the aural expression of the work.[308] Learning about music from a neutral expert witness might dispense with this visual bias by giving judges the necessary tools to aurally interpret a work more accurately.[309] Moreover, this approach would assist judges in giving appropriate

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301. *See id.* ("[T]o remove expert testimony from any part of the action is to shoot the trier(s) of fact in the foot.").

302. *See* Ivkovic & Hans, *supra* note 284, at 445 ("[E]xperts emphasized that jurors placed more importance on personality and physical attractiveness in assessing expert credibility than did judges.").

303. *See* Williams v. Gaye, 895 F.3d 1106, 1139 (9th Cir. 2018) (Nguyen, J., dissenting) ("The majority, like the district court, presents this case as a battle of the experts in which the jury simply credited one expert's factual assertions over another's. To the contrary, there were no material factual disputes at trial.")

304. *See* Ivkovic & Hans, *supra* note 284, at 458 ("[J]urors associate the following with credible testimony: lack of bias; good credentials; a pleasant personality; a clear, objective, focused, not overly long presentation that utilizes diagrams and models; use of lay terms; a presentation that is complete, consistent, and not too complex; knowledgeability in the area of expertise; and familiarity with the case.").

305. *See id.* at 464 ("[J]urors definitely used credentials to evaluate the credibility of an expert witness. They discussed institutional affiliation, specialization, education, research, and professional activity . . . . Credentials were also used to evaluate credibility in combination with other categories, such as familiarity with the case or presentation style.").

306. *See id.* at 459–60 (providing charts indicating how expert witnesses build credibility with jurors); *see also* Jones, *supra* note 9, at 303 (arguing that the "fact finder should listen to the songs in question without having heard any potentially prejudicial expert testimony").

307. *See* Fishman, *supra* note 76, at 1908 ("Plenty of legal decisionmakers aren't fluent in musical terminology.").

308. *See id.* at 1886 (describing the visual bias of judges in musical copyright infringement disputes).

309. *See* Kim, *supra* note 75 at 126 ("[G]uidance might well be necessary in so technical and multi-faceted a discipline as music.").

jury instructions.[310] If she had more music knowledge, a judge would be able to effectively communicate to the jury which elements of the works are protected and which elements reside in the public domain.[311]

Courts implementing this approach may experience some backlash, particularly because experts, in both the extrinsic and probative similarity tests, are put on the witness stand to identify objective similarities *and* educate the jurors.[312] However, an expert's objective testimony regarding the extrinsic similarities between the pieces at issue often goes beyond advocating about objective similarities and leads to providing substantive conclusions about the similarity of the works.[313] If a prejudicial expert reaches subjective conclusions, the expert does not in effect provide a juror with an impartial understanding of music theory and common music practices.[314] Rather, the jury's education will extend only to those aspects of music that will benefit the plaintiff or the defendant.[315] The use of neutral experts to educate jurors prior to prejudicial testimony would thus be more in-line with the goal of expert testimony in both the Second Circuit's "ordinary observer" test and the Ninth Circuit's extrinsic/intrinsic test because jurors would actually be educated by an objective expert and could effectively decide the objective similarities of the works without resorting to the influence of the prejudicial expert's subjective conclusions.[316]

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310. *See* Megan Coane & Maximillian Verrelli, *Blurred Lines? The Practical Implications of Williams v. Bridgeport Music*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/blurring_lines_the_practical_implications_of_williams_v_bridgeport_music/ (last updated Feb. 2016) ("A closer look may show that the judge erred in his instructions to the jury by blurring the lines between what does and doesn't constitute copyright infringement.").

311. *See id.* (discussing the improper jury instructions that led to a finding of substantial similarity in the *Blurred Lines* case).

312. *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (discussing the use of experts in aiding the trier of fact in determining objective similarities); Sid & Marty Krofft Prods. v. McDonald's Corp., 567 F.2d 1157, 1164 (9th Cir. 1977) (discussing the idea/expression dichotomy in the extrinsic test); Keyes, *supra* note 23, at 434 ("Experts provide layers of testimony that not only help educate the jury on the particularities and peculiarities of music, but also on how these experts believe the music in question would be perceived by a 'reasonable listener.' Thus, the expert takes on at least two different roles in music copyright litigation, both of which are inextricably intertwined with the Plaintiffs' burden of proof."); Livingston & Urbinato, *supra* note 113, at 264 ("Plaintiffs typically establish probative similarity through the testimony of experts who dissect the two works and seek to determine whether the works are similar in their musical construction.").

313. *See supra* notes 138–48 and accompanying text.

314. *See* Keyes, *supra* note 23, at 431 ("While musicologists can certainly add valuable testimony at trial, they have been allowed to testify far beyond their respective fields of expertise, which necessarily distorts the judicial process."); Livingston & Urbinato, *supra* note 113, at 271 ("Courts reference[] the need to incorporate expert opinions into the litigation process.").

315. *See* Kim, *supra* note 75, at 123 (arguing experts should be used to "ensure objectively correct and consistent results in infringement litigation"). For instance, a defendant's ostinato in a given piece of music could be substantially similar to a plaintiff's ostinato. An expert for the defendant could decide to ignore the importance of the ostinato and choose not to educate the jury about this element of the musical work. Provided the plaintiff's expert did not testify about the ostinato, the defendant could win the action due to the jury's misunderstanding of the ostinato in the context of the musical work.

316. *See* Livingston & Urbinato, *supra* note 113, at 239 ("The music expert can put a

B. The Use of Neutral Expert Testimony in the Context of Blurred Lines and Skidmore

Had the court used neutral expert testimony to educate jurors prior to the introduction of plaintiff and defendant's expert witnesses, the outcome of the *Blurred Lines* case would likely have been different.[317] An examination of the use of neutral expert testimony as a means of educating jurors will be examined in the context of the *Blurred Lines* case, illustrating that if this proposal had been applied, the jury would have found in favor of Thicke and Williams.[318] Conversely, an application of the proposal to *Skidmore* will show that the use of a neutral expert would have resulted in the same favorable outcome for Led Zeppelin.[319]

The Marvin Gaye Estate hired expert musicologist Judith Finell to provide testimony about the similarities between "Got to Give It Up" and "Blurred Lines."[320] Although Finell did not discuss any features that were exactly the same in her lengthy preliminary report, she noted eight similarities that, taken together, created a "constellation" of substantially similar features.[321] Williams and Thicke hired Sandy Wilbur, who submitted a fifty-five-page declaration critiquing Finell's report and finding there were no substantial similarities between the melodies, rhythms, harmonies, structures, and lyrics of "Blurred Lines" and "Got to Give It Up."[322] Additionally, Wilbur asserted that many of the purported similarities were unoriginal and basic building blocks in musical compositions.[323] Thus, this case turned into the classic battle of the experts with both experts sharply divided in their opinions of the pieces at issue.[324]

A primary issue with the approach taken by both experts in the *Blurred Lines* case is that both aggregated their objective findings to arrive at a subjective

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musicological framework around both works and give an opinion as to whether the patterns of notes and chords appearing in the defendant's work are likely to have been the product of independent creation, reliance on a common public domain source, or copying of the plaintiffs work.").

317. *See* Williams v. Gaye, 895 F.3d 1106, 1138 (holding in favor of the Marvin Gaye Estate).

318. *See id.* (finding substantial similarities between Robin Thicke and Pharrell Williams's "Blurred Lines" and Marvin Gaye's "Got to Give It Up").

319. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1063 (9th Cir. 2020) (holding in favor of Led Zeppelin and finding no substantial similarity between the eight bar passages in Led Zeppelin's "Stairway to Heaven" and Taurus's "Spirit").

320. *See Williams*, 895 F.3d at 1117.

321. *See id.* at 1117–18 ("Finell testified that 'Blurred Lines' and 'Got to Give It Up' share many similarities, including the bass lines, keyboard parts, signature phrases, hooks, 'Theme X,' bass melodies, word painting, and the placement of the rap and 'parlando' sections in the two songs."); *see also supra* notes 241–44 and accompanying text (discussing the argued similarities between "Blurred Lines" and "Got to Give It Up").

322. *See* Williams v. Bridgeport Music, Inc., 2014 U.S. Dist. LEXIS 182240, at *8 (C.D. Cal. Oct. 30, 2014) (discussing Wilbur's report, in which she stated that "[t]here are no two consecutive notes in any of the melodic examples in the Finell Report that have the same pitch, the same duration, and the same placement in the measure").

323. *See Williams*, 895 F.3d at 1145.

324. *See id.* at 1117 ("The experts disagreed sharply in their opinions, which they articulated in lengthy reports.")

conclusion about the substantial similarities between "Got to Give It Up" and "Blurred Lines."[325] Thus, prior to having a basic understanding of music theory, the *Blurred Lines* jury was inundated with the conclusions of both Finell and Wilbur and likely faced greater difficulty reaching their own subjective conclusions regarding the substantial similarity of the pieces.[326] Did jurors understand the difference between the unprotected bassline and the protected melodies?[327] The jury's lack of understanding of music theory and traditional music copyright protections is evident by the outcome of the case, in which two songs that merely *sounded* similar were instead found *substantially* similar.[328] Had the jurors been given educational instruction prior to hearing the testimony of Finell and Wilbur, the jurors would have learned basic music theory and common musical practices, and understood that substantial similarity is not typically found where the songs at issue share no note-for-note melodies or substantially similar rhythms, harmonies, structures, or lyrics.[329] In other words, the jurors would have likely determined that "Blurred Lines" and "Got to Give it Up" were not substantially similar.[330]

In *Skidmore*, the use of neutral third-party expert testimony would have

325. *See* Booth, *supra* note 145, 123–24 (arguing the issue with music infringement cases is that experts reach substantive conclusions when these experts should be providing neutral, objective testimony).

326. *See Williams*, 895 F.3d at 1117–18.

327. *See supra* notes 248–50 and accompanying text.

328. *See Williams*, 895 F.3d at 1138 (Nguyen, J., dissenting) ("The majority allows the Gayes to accomplish what no one has before: copyright a musical style."); *How Similar Are Blurred Lines and Got to Give It Up? – Video*, THE GUARDIAN (Mar. 11, 2015 8:01 AM), https://www.theguardian.com/music/video/2015/mar/11/blurred-lines-got-to-give-it-up-video (comparing the introduction of "Blurred Lines" to the introduction of "Got to Give It Up").

329. *See* Fishman, *supra* note 76, at 1862 (discussing the courts' adoption of melody as the "site of originality and . . . the litmus test for similarity"); Regina Zernay, *Casting the First Stone: The Future of Music Copyright Infringement Law After Blurred Lines, Stay with Me, and Uptown Funk*, 20 CHAPMAN L. REV. 177, 179 (2017) (recognizing that "[r]arely were cases won for simply emulating a style or genre" prior to the *Blurred Lines* verdict).

330. *See Williams*, 895 F.3d at 1139 (Nguyen, J., dissenting) (discussing how "the jury simply credited one expert's factual assertions over another's" rather than assessing the substantial similarity of the pieces); *see also* Amar Toor, *200 Musicians Voice Support for Pharrell and Robin Thicke in Blurred Lines Appeal*, THE VERGE (Aug. 31, 2016, 7:25 AM), https://www.theverge.com/2016/8/31/12725910/blurred-lines-pharrell-robin-thicke-case-appeal-marvin-gaye; Eriq Gardner, *"Blurred Lines" Appeal Gets Support From More Than 200 Musicians*, HOLLYWOOD REPORTER (Aug. 20, 2016, 1:31 PM), https://www.hollywoodreporter.com/thr-esq/blurred-lines-appeal-gets-support-924213 (showing how individuals trained in the art believe "Blurred Lines" and "Got to Give It Up" are not substantially similar). Nile Rodgers, famed guitarist, singer-songwriter, record producer, arranger, composer, and co-founder of the band Chic, was among the many musicians that believed the court should have ruled in favor of Robin Thicke and Pharrell Williams. *See* Luke Morgan Britton, *Nile Rodgers Says 'Blurred Lines' and Marvin Gaye's 'Got to Give It Up' 'Didn't Really Sound Alike*,*'* NME (Mar. 22, 2015), https://www.nme.com/news/music/marvin-gaye-4-1211752 ("Compositionally, purely compositionally, I don't think they should have lost that case. 'Got to Give It Up' is clearly a blues structure, ['Blurred Lines'] isn't at all."); *but see* MSNBC, *Motown Legend Reacts to 'Blurred Lines' Verdict | msnbc*, YOUTUBE (Mar. 16, 2015), https://www.youtube.com/watch?v=CoD2tEahPx4 (discussing Marvin Gaye's percussionist's belief that "Blurred Lines" and "Got to Give It Up" are substantially similar).

supported the court's finding that "Stairway to Heaven" and "Taurus" were not substantially similar.[331] Expert musicologist Dr. Alexander Stewart testified on behalf of Skidmore, arguing that the combination of five musical elements created substantial similarity between an eight-bar passage in the introduction of the two tunes.[332] Led Zeppelin's musicologist disagreed.[333] Dr. Lawrence Ferrara testified that the two pieces of music were distinct and the similarities between the two pieces were unprotectable or random.[334] After the instrumental introduction, the songs bore no similarity.[335] As in the *Blurred Lines* case, both experts reached a subjective conclusion about the passages at issue.[336] However, the jurors agreed with Dr. Ferrara's interpretation, finding that "Stairway to Heaven" and "Taurus" were not substantially similar.[337]

Had the court employed neutral expert testimony prior to Dr. Ferrara's and Dr. Stewart's testimony, the jurors likely would have reached the same conclusion but with a better understanding of the expert's testimony.[338] A neutral expert may have provided the jurors with an understanding of common musical practices, including the frequent use of descending chromatic scales and arpeggios, both of which were found in the Led Zeppelin and Spirit musical passages.[339] This would have increased the efficiency of the trial because the prejudicial experts hired by both parties would not have been required to simultaneously educate the jurors and advocate for the "correct" interpretation of the passages at issue.[340] Rather, testimony would only have been necessary

331. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1057 (9th Cir. 2020) (holding in favor of Led Zeppelin).

332. *See id.* at 1059.

333. *See id.* at 1060 ("[T]he similarity in the three two-note sequences is not musically significant because in each song the sequences were preceded and followed by different notes to form distinct melodies.").

334. *See id.* at 1059–60 ("Dr. Ferrara testified that the similarities claimed by Skidmore either involve unprotectable common musical elements or are random.").

335. *See id.*

336. *See* Williams v. Bridgeport Music, Inc., 2014 U.S. Dist. LEXIS 182240, at *8 (C.D. Cal. Oct. 30, 2014); *Skidmore*, 925 F.3d at 1059–60.

337. *See Skidmore*, 925 F.3d at 1057.

338. *See* Kim, *supra* note 75, at 109. Kim advocates that decisions involving music copyright must be made by people who are "familiar with the media at issue." *See id.* Providing neutral testimony to educate jurors would allow the jurors to familiarize themselves with music, the media at issue, thus allowing them to reach an accurate finding.

339. *See Skidmore*, 925 F.3d at 1059 (discussing the use of arpeggios and chromatic scales in "Taurus" and "Stairway to Heaven"); *see also* Carmine Silano, *Carmine Silano – Piano Fast Ascending/Descending Arpeggios*, YOUTUBE (May 31, 2009), https://www.youtube.com/watch?v=jTiC5EezjdQ (illustrating ascending and descending piano arpeggios); R.E.M., *Everybody Hurts*, *on* AUTOMATIC FOR THE PEOPLE (Warner Bros. 1992) (illustrating the use of guitar arpeggios); EricBlackmonGuitar, *The Chromatic Descending Piano Run Fingering Trick For Piano Solos – KoolPiano*, YOUTUBE (Mar. 11, 2018), https://www.youtube.com/watch?v=nZ5jMBtPz8E (illustrating a descending chromatic scale on piano on the right hand from 0:11 to 0:46); METALLICA, *Master of Puppets*, *on* MASTER OF PUPPETS (Elektra 1986) (illustrating the use of descending chromatic scales); LED ZEPPELIN, *Dazed and Confused*, *on* LED ZEPPELIN (Tower 1967) (illustrating the use of descending chromatic scales on guitar from 0:40 to 1:13).

340. *See* Kim, *supra* note 75, at 114 (discussing the extrinsic analysis, during which time

regarding the experts' opinions of "Taurus" and "Stairway to Heaven" and the jurors would have been better equipped to assess the credibility of the experts' testimony.[341] Though the *Skidmore* jury would have reached the same conclusion that the pieces were not substantially similar because many of the allegedly copied elements were common musical practices, the jurors would have been given a better, more educated opportunity to interpret the pieces and the trial would have been more efficient.[342]

Courts ask jurors to engage in an impossible task.[343] Jurors must determine how an ordinary observer would aurally perceive two works while simultaneously engaging in a high level of musical analysis requiring them to unhear elements of a work that are in the public domain and compare only the elements that are protected.[344] However, jurors lack the musical know-how to interpret the complexities of music, whether from their own perspective or the perspective of an ordinary observer.[345] Throughout this difficult analysis, jurors are bombarded with the conflicting opinions of prejudicial experts, further contributing to juror confusion.[346] Providing jurors with neutral expert testimony at an early stage of trial would give them a more legitimate opportunity to make a fair and accurate assessment of substantial similarity and allow jurors to assess the credibility of prejudicial experts.[347] Ultimately, such an approach would provide litigants with a more reasonable jury decision than what might be possible under the current model.[348] Neutral expert testimony would also be helpful to judges, who are challenged with providing accurate jury instructions regarding protected and unprotected musical elements.[349]

CONCLUSION

Since copyright protection was first extended to music in 1831, both the

expert testimony is used to aid the trier of fact); Keyes, *supra* note 23, at 431–32 (discussing the subjectivity of music).

341. *See* Kim, *supra* note 75, at 121–22 (noting that jurors cannot "turn off" and form subjective opinions after hearing the opinions of prejudicial experts).

342. *See* Keyes, *supra* note 23, at 431 (noting that prejudicial experts have reached far beyond the context of their respective duties); Booth, *supra* note 145, at 124–25 (discussing how prejudicial experts often impermissibly reach subjective conclusions).

343. *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (setting out a difficult analysis for juries who are tasked with determining substantial similarity); Palmer, *supra* note 265, at 907 (noting that jurors are "tasked with deciphering the indecipherable").

344. *See Arnstein*, 154 F.2d at 473 (describing the two-factor substantial similarity test).

345. *See id.* (discussing how the ultimate question of substantial similarity hinges on a lay-listener standard).

346. *See* Kim, *supra* note 75, at 121 (discussing the difficulties jurors face in the current approach to substantial similarity).

347. *See infra* Section III.A.

348. *See* Williams v. Gaye, 895 F.3d 1106, 1138 (9th Cir. 2018) (finding copyright infringement where the melodies of the two works were not similar); Booth, *supra* note 145, at 100–01 (discussing the multitude of problems plaguing copyright infringement analysis in the music context); Keyes, *supra* note 23, at 438 ("Music copyright is broken.").

349. *See* Fishman, *supra* note 76, at 1871 (discussing the need for a "dialogue between legal scholars and musicologists").

music industry and the technology within it have significantly changed.[350] Despite the massive changes culminating over the past 200 years, the analysis of substantial similarity in music copyright infringement cases has remained stagnant.[351] The time has come for the judiciary to account for the unique aspects of music in copyright infringement cases and the technological and social changes in the music industry.[352] By introducing objective expert testimony to educate juries, the judiciary can account for the uniqueness of music as an artform.[353] Regardless of the changes implemented, the ultimate goal of the Copyright Clause in the United States Constitution is to encourage musicians to create music to benefit the public welfare.[354] However, the rigid, unnuanced application of the substantial similarity test in music copyright infringement cases risks disincentivizing composers.[355] As such, the United States judiciary should make significant efforts to protect a vital component of culture and history and assure its continued creation.[356]

350. *See infra* Part I (discussing the development of copyright in music and changes in music consumption).

351. *See Arnstein*, 154 F.2d at 468 (dictating the "ordinary observer" test).

352. *See* Keyes, *supra* note 23, at 438.

353. *See infra* Part III (advocating for the use of neutral expert testimony to supplement the extrinsic/intrinsic test and the "ordinary observer" test).

354. *See* U.S. CONST. art. I, § 8, cl. 8.

355. *See infra* Section I.B (discussing the development of copyrights in music and the goal of copyright law).

356. *See* Livingston & Urbinato, *supra* note 113, at 294 ("The public now apparently views music as part of our cultural heritage that we should enjoy and build upon with virtually no barriers.").