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# Backing Down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works

Nicholas Booth

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# BACKING DOWN: BLURRED LINES IN THE STANDARDS FOR ANALYSIS OF SUBSTANTIAL SIMILARITY IN COPYRIGHT INFRINGEMENT FOR MUSICAL WORKS

*Nicholas Booth\**

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I. INTRODUCTION

Music is a strange art space. On the one hand, it is a seemingly limitless expression of boundless creativity that answers to no one. On the other, music works within a complex set of rules from which even the most talented of musicians cannot escape. These rules are collectively compiled by musicians and scholars alike and are referred to as music theory. Put simply, music theory tells us how music works. It is both a set of instructions and a definitional guide. Any attempts to step outside the boundaries of music theory will invariably lead to an unpleasant-sounding mess of notes or, in some cases, an expansion of those boundaries and an increased understanding of them. This makes music quite unique when compared with other art forms. While music lends itself to a wide range of experimental possibilities, unlike literature or physical works of art, it cannot successfully operate outside of its theoretical framework. This limitation creates unique problems in the realm of copyright law when applied to music. Due to the intractability of the theoretical boundaries within which music operates, similarities and partial replications between musical works are inevitable, especially in the genre of popular music. However, according to U.S. copyright law, infringement can be determined based on the “substantial similarity between copyrighted work and alleged infringing work.”<sup>1</sup> While this standard might be workable when applied to other forms of original work, it opens the door to misapplication in the realm of music since it is possible for musical works to borrow from the same musical concepts while retaining their distinct uniqueness. In March 2015, a U.S. District Court for the Central District of California jury ruled that Robin Thicke and Pharrell Williams’s song *Blurred Lines* infringed on Marvin Gaye’s song *Got to Give It Up*, which was written more than thirty years prior.<sup>2</sup> The jury found that Thicke and Williams’s song infringed on Gaye’s song primarily on the grounds that the two songs were “substantially similar.”<sup>3</sup> Around the same time, Sam Smith and Tom Petty reached a settlement wherein Smith agreed to give Petty songwriting credit and pay him royalties for Smith’s 2014 song *Stay With Me* because, allegedly, it was substantially similar to Petty’s 1989 hit *I Won’t*

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<sup>1</sup> Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

<sup>2</sup> Blake Brittain, *Musicians More Careful After ‘Blurred Lines’ Case*, BLOOMBERG BNA, Sept. 16, 2015.

<sup>3</sup> Williams v. Bridgeport Music, Inc., 2014 U.S. Dist. LEXIS 182240 (C.D. Cal. 2014), *aff’d*, 2015 U.S. Dist. LEXIS 97262 (C.D. Cal. July 14, 2015).

*Back Down*.<sup>4</sup> Neither of the two songs shared the same lyrics, key, tempo, or rhythm; the only similarity between the two songs was the progression.

Because music operates within a set of rules distinct from all other arts, it should be treated differently when considered in the context of copyright infringement. The practice of musical borrowing has been long-standing, and in many aspects has been the driver in the development of music throughout history. One of the primary objectives of music is to appeal to the listener's senses. The principles and ideas of music theory guide the musician as he composes creative musical works. To allow musicians to appropriate and exploit musical theory as a de facto hedge against otherwise legitimate creative practices in order to minimize personal business risk is both logically unsound and antithetical to the objectives and underlying principles of copyright law. "The general purpose of copyright law is to promote the creation of original works of literature, art, music, and drama."<sup>5</sup> Affording protection to artists for employing certain musical techniques will inevitably produce a chilling effect on other artists and discourage them from creating new works. When deciding on copyright infringement cases in music, courts must strive to better understand and respond to the unique issues intrinsic to music as an art form.

The substantial similarity test used in copyright infringement cases causes problems when employed in the music context. Courts have historically had difficulties distinguishing between the original ideas of artists and musical ideas that exist within the public domain that were created in accordance with the dictates and practices of music theory, and the two are often confused and conflated. When courts issue copyright infringement rulings against artists for borrowing from the same music theory concepts as other artists, they undermine the very reason that copyright law was created in the United States: to incentivize artists to create. Musical artists have been borrowing sounds and ideas from other artists since the inception of music. If our courts continue to issue rulings that have the effect of restricting the creation of new musical scores through the imposition of a standard that requires complete distinctness from any other musical piece, we will soon be living in a world wherein few artists will be willing to even attempt to compose anything new, an outcome that would likely result in a deterioration of profitability in the industry due to a fall in consumer demand. Ironically, the popular music genre would likely

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<sup>4</sup> Mike Ayers, *Sam Smith Gives Tom Petty Songwriting Credit for 'Stay With Me,'* WALL ST. J. (Jan. 26, 2015, 12:00 PM), <http://blogs.wsj.com/speakeasy/2015/01/26/sam-smith-gives-tom-petty-songwriting-credit-for-stay-with-me/>.

<sup>5</sup> M. ELAINE BUCCIERI, CAUSE OF ACTION FOR COPYRIGHT INFRINGEMENT UNDER THE FEDERAL COPYRIGHT ACT OF 1976, 9 CAUSES OF ACTION 2D 65 (1997).

suffer the most from this chilling effect, since it is within this sphere of the music industry that most copyright infringement cases occur.

The current standard employed to establish copyright infringement in music is far too lenient and allows courts to find infringement where it does not exist, thus running counter to the policy considerations of copyright law in the United States which are primarily aimed at encouraging and incentivizing artists to create. This Note will propose that the U.S. adapt their legal standards for identifying copyright infringement to fit within an appropriate musical context and, further, to distinguish between the original ideas of the artist and musical ideas that derive their existence from music theory, only affording protection to the former.

## II. BACKGROUND

### A. HISTORY OF COPYRIGHT PROTECTION IN THE UNITED STATES

The value of the creation of ideas was so important to our country's founders that they incorporated it within the Constitution of the United States.<sup>6</sup> Article I, Section 8, Clause 8, known as the "Copyright Clause," gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>7</sup> "Copyright statutes were originally enacted for literary property."<sup>8</sup> Even after copyright laws were extended to protect music in 1831, they only offered protection against the unauthorized printing and distribution of sheet music.<sup>9</sup> It wasn't until 1972, as ideas surrounding intellectual property were evolving, that these protections were expanded to encompass the actual audio recordings of that music.<sup>10</sup> Shortly thereafter, in 1976, Congress started work on the fourth general revision of U.S. copyright law.<sup>11</sup> Recognizing that, in order to preserve the value of the useful arts, it would be necessary to afford artists and creators the ability to monetarily capitalize on their work the Copyright Act of 1976 extended the term of protection for works created on or after January 1, 1978 to the life of the author plus fifty years after the author's death.<sup>12</sup> This was extended even longer, to seventy years, with the passage of the Sonny Bono

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<sup>6</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>7</sup> *Id.*

<sup>8</sup> Olufunmilayo B. Arewa, *From J.C. Bach To Hip Hop: Musical Borrowing, Copyright And Cultural Context*, 84 N.C.L. REV. 547, 555 (2006).

<sup>9</sup> *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/circs/circ1a.html> (last visited Jan. 13, 2016).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Copyright Term Extension Act, also referred to as the “Mickey Mouse Act” in 1998.<sup>13</sup> Throughout the years, numerous other additions and revisions have been made to the copyright laws.<sup>14</sup> These provisions are collectively codified in Title 17 of the United States Code.<sup>15</sup>

## B. FEATURES OF COPYRIGHT PROTECTION

Copyright protection gives to the author “exclusive property rights in the work, such as the sole right to reproduce, adapt, distribute, display and perform the work.”<sup>16</sup> “To qualify for copyright protection, the work must be an original creation.”<sup>17</sup> To be original, a work must be (1) independently created, and (2) possess some minimal degree of creativity.<sup>18</sup> This does not mean, however, that the original creation must be novel and new; “[r]ather, a work which resembles another is entitled to copyright protection so long as the similarities in the two works are not the result of illicit copying.”<sup>19</sup> “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.”<sup>20</sup> Ideas themselves may not be copyrighted; only the original expression of those ideas can be protected.<sup>21</sup> Similarly, facts, “which are not created, but merely discovered,” are not entitled to protection.<sup>22</sup>

## C. COPYRIGHT INFRINGEMENT

1. *Elements and Substantial Similarity.* There are two necessary elements to establish copyright infringement: “(1) ownership of a valid copyright, and (2)

<sup>13</sup> *Id.*; Olufunmilayo B. Arewa, *Copyright On Catfish Row: Musical Borrowing, Porgy And Bess, And Unfair Use*, 37 RUTGERS L.J. 277, 286 (2006).

The CTEA lengthened the term of copyright protection in the United States by twenty years, extending copyright protection to seventy years beyond the life of individual creators of copyrighted works, leading it to be called the “Mickey Mouse” Law on account of its rescuing Mickey Mouse from becoming part of the public domain.

<sup>14</sup> *E.g.*, Digital Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992); Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-417, 118 Stat. 2341 (2004).

<sup>15</sup> 17 U.S.C. §§ 101–1332 (2012).

<sup>16</sup> *Id.* § 106.

<sup>17</sup> BUCCIERI, *supra* note 5, § 2.

<sup>18</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); *see* 17 U.S.C. § 102(a).

<sup>19</sup> *Feist Publ’ns, Inc.*, 499 U.S. at 348; 17 U.S.C. § 102(a).

<sup>20</sup> 17 U.S.C. § 102(b).

<sup>21</sup> BUCCIERI, *supra* note 5, § 9.

<sup>22</sup> *Id.*

copying of constituent elements of the work that are original.”<sup>23</sup> While the first element is easy to prove, the second element requires a much more scrupulous analysis. Not only must it be determined as a matter of fact whether or not copying actually occurred, but it must also be determined as a matter of fact and law whether or not what was copied fell under the copyright protection.<sup>24</sup> In some instances, such as direct reproduction and distribution, this will be easy to prove; one can merely point to the evidence to show that the work was infringed on. However, in other cases, such as with derivative works, performances and displays, a definitive conclusion will not always be as easy to reach. In the absence of direct evidence to establish copying, “a plaintiff may indirectly establish copying by proving that defendant had ‘access’ to the copyrighted work and the accused work is ‘substantially similar’ to the copyrighted work. To prove ‘access,’ a plaintiff must establish only that defendant had the opportunity to see the work.”<sup>25</sup> Generally, substantial similarity is determined using a two-step test that “permits a finding of infringement only if plaintiff proves both substantial similarity of general ideas under the “extrinsic” (or “objective”) test and substantial similarity of the protectable expression of those ideas under the “intrinsic” (or “subjective”) test.”<sup>26</sup> The extrinsic test involves an in-depth analysis of works, where expert testimony is often appropriate to consider the “articulable similarities” between the works, while the intrinsic test uses a subjective standard, allowing the trier of fact to consider the “total concept and feel” of the works to determine if they are substantially similar.<sup>27</sup> “The intrinsic test . . . is satisfied if an ordinary, reasonable person would conclude that [the] defendant unlawfully appropriated the plaintiff’s protectable expression by taking material of substance and value.”<sup>28</sup> The First Circuit has also referred to this as the “ordinary observer” test.<sup>29</sup> The plaintiff bears the ultimate burden of proof in proving substantial similarity.<sup>30</sup> No intent is necessary to establish infringement, and a person can be held liable for the unconscious copying of another’s work.<sup>31</sup>

One common way that courts administer the intrinsic test to determine substantial similarity is through the “Lay Listener Test,” under which jurors listen

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<sup>23</sup> *Feist Publ’ns, Inc.*, 499 U.S. at 361.

<sup>24</sup> Elga A. Goodman, Kristina K. Pappa & Brent A. Olson, *Elements of Copyright Infringement*, 49 N.J. PRAC., BUSINESS LAW DESKBOOK § 11:12 (2015–2016 ed.).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Mont. Silversmiths, Inc. v. Taylor Brands, LLC*, 850 F. Supp. 2d 1172, 1186 (D. Mont. 2012); Goodman, Pappa & Olson, *supra* note 24.

<sup>28</sup> Goodman, Pappa & Olson, *supra* note 24.

<sup>29</sup> *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 62 (1st Cir. 2000).

<sup>30</sup> BUCCIERI, *supra* note 5, § 4.

<sup>31</sup> *Id.* § 21.

to the sound recordings and compare and contrast them.<sup>32</sup> The “Lay Listener Test” has been criticized as creating confusion and prejudice amongst the jury, as it will often be difficult for a lay juror to distinguish between the compositional elements of the works and the performance elements as expressed in the works.<sup>33</sup>

2. *Existence of an Original Musical Work.* In determining the existence of an original musical work, “[i]t has been said that a musical work consists of rhythm, harmony, and melody—and that the requisite creativity must inhere in one of these three.”<sup>34</sup> In U.S. courts, certain rules and precedent have been created with respect to music. However, these rules vary amongst the Circuits. Generally speaking, in deciding whether or not musical works are substantially similar as a whole, courts will look to a variety of different musical elements to determine similarity including, but not limited to: “(1) patterns and groupings of notes and musical phrases, (2) melodies, (3) metric structure, (4) harmony, (5) unexpected departures from the normal metric structure, and (6) particularly intricate measures or sections.”<sup>35</sup> Song lyrics are treated like normal written works and are examined for similarities in their themes, plots, ideas, and writing styles.<sup>36</sup> Compositions containing both lyrics and instrumental aspects are examined for similarities in both their musical and lyrical structure.<sup>37</sup>

3. *Two Separate Copyrights for Musical Recordings.* Under U.S. copyright law, a musical recording is afforded two separate copyrights: “(1) a copyright in the underlying composition (the ‘Composition Copyright’) and (2) a copyright in

<sup>32</sup> Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137 (2011).

<sup>33</sup> *Id.* at 138.

Playing the sound recording in a Composition Copyright case invites the jurors to make the wrong comparison, comparing the sound recordings, rather than the compositional elements underlying each recording. To test this potential for prejudice, an experiment was conducted replicating the Lay Listener Test in a controlled setting. Experiment participants were presented two pairs of music from actually litigated composition infringement cases. The participants were asked to assess the similarity of the allegedly infringing compositions as would jurors performing the Lay Listener Test. One set of participants heard the songs performed similarly, i.e. same timbre, orchestration, tempo, key, and style. The other participants heard the identical compositions but performed differently, i.e. different timbre, orchestration, tempo, key, and style. Participants consistently rated compositions performed similarly as being more compositionally similar than identical compositions played dissimilarly, suggesting that the Lay Listener Test introduces prejudicial elements into the jury’s determination of substantial similarity.

<sup>34</sup> MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.05 (2015).

<sup>35</sup> BUCCIERI, *supra* note 5, § 38.

<sup>36</sup> *Id.* § 35.

<sup>37</sup> *Id.*

the sound recording itself (the 'Recording Copyright')."<sup>38</sup> The composition copyright has existed since copyright protections were extended to music.<sup>39</sup> It affords the most expansive protection of the two.<sup>40</sup> The composition copyright protects the actual song itself, in its bare bones; rhythm, harmony, melody, and lyrics, as well as the rights to any future performances of the song.<sup>41</sup> This means that the composer (or, if applicable, a composition copyright transferee), may profit from anyone who wants to cover the song in the future.<sup>42</sup> This includes covers that incorporate the artist's own unique interpretation of the piece.<sup>43</sup> In 1971, recognizing that the music industry was suffering significant negative impacts to profitability as a result of the unauthorized copying and distribution of music recordings, Congress passed the Sound Recording Act of 1971, later incorporated into the Copyright Act of 1976.<sup>44</sup> The Act defined a sound recording as "works that result from the fixation of a series of musical, spoken, or other sounds."<sup>45</sup> This introduced the recording copyright to the music scene.<sup>46</sup> While narrower in scope, protecting only the particular recorded performance of the musical work, the recording copyright typically protects a wider range of "performance elements embodied in the sound recording, for instance phrasing, style, genre, tempo, key, timbre, and orchestration."<sup>47</sup> Stated differently, the recording copyright protects "those performance choices that differentiate one version of the same song from another."<sup>48</sup>

The availability of separate copyright protections for compositions and performances makes sense in the field of music where borrowing ideas from others is standard practice in the industry and in many ways a part of the art form.<sup>49</sup> However, the emergence of a separate and distinct copyright has not come without problems and challenges, particularly in the wake of the digital age where it is possible to compose and record a song simultaneously.<sup>50</sup> In *Bridgeport Music Inc. v. UMG Recordings, Inc.*, the plaintiff, Bridgeport Music, Inc., the owner of the copyrights to the hit song *Atomic Dog* by funk legend George

<sup>38</sup> Lund, *supra* note 32, at 138; 17 U.S.C. § 102(a) (2012).

<sup>39</sup> Lund, *supra* note 32, at 141.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 143.

<sup>42</sup> *Id.* at 142.

<sup>43</sup> *Id.* at 145.

<sup>44</sup> *Id.* at 141.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 144–45.

<sup>48</sup> *Id.* at 145.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

Clinton & The Parliament Funkadelics, brought suit against the defendant, UMG Recordings Inc., who owned the rights to the song *D.O.G. In Me* by the R&B group Public Announcement.<sup>51</sup> Bridgeport alleged that the song *D.O.G. In Me* infringed on *Atomic Dog* “based on the use of the phrase ‘Bow wow wow, yippie yo, yippie yea’ (the ‘Bow Wow refrain’), as well as use repetition of the word ‘dog’ in a low tone of voice at regular intervals and the sound of rhythmic panting in ‘D.O.G. in Me.’”<sup>52</sup> UMG argued that, while the sheet music for *Atomic Dog* did contain the Bow Wow refrain, it did not contain the rhythmic use of the word “dog” or the panting.<sup>53</sup> Rejecting this argument, the Sixth Circuit held that “[t]he sheet music . . . was created long after the song was composed. Uncontroverted testimony at trial established that the song was composed and recorded in the studio simultaneously and, therefore, that the composition was embedded in the sound recording.”<sup>54</sup> Critics have contended that the holding pushes the “boundaries of musical copyright too far.”<sup>55</sup> However, the decision has not been overturned.

Another related issue that the courts have struggled with in copyright law is how to treat sampling in infringement cases.<sup>56</sup> Sampling is defined as “the act of using a small part of a recording (such as a song) as part of another recording.”<sup>57</sup> “Generally, an artist who is sampling will take a previously popular song, incorporate a more modern sound, and repeat it throughout the new song.”<sup>58</sup> However, as technological capabilities have increased, so have the capabilities and talents of sampling artists. Artists now have the ability to compile samples of other works into completely new compositions, deriving

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<sup>51</sup> *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009).

<sup>52</sup> *Id.* at 272.

<sup>53</sup> *Id.* at 279.

<sup>54</sup> *Id.* at 276.

<sup>55</sup> *See* NIMMER & NIMMER, *supra* note 34, § 2.05.

[The holding] stretches matters too far to conclude that everything on the recording forms part of the musical composition. If George Clinton’s distinctive voice or the timbre of guitars and drums were copied by defendant, any redress would lie solely for the sound recording copyright, not for that of the musical composition. Based on those considerations, it would seem that element (1) constitutes part of lyrics that, combined with the music, forms the subject musical composition, but that elements (2) and (3) belong on the sound recording side of the ledger. As such, this decision would seem to push the boundaries of musical copyright too far.

<sup>56</sup> *Id.* at 149.

<sup>57</sup> MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/sampling> (last visited Feb. 1, 2017).

<sup>58</sup> Lund, *supra* note 32, at 145.

their essence from, but remaining unique and distinct from the prior works.<sup>59</sup> This poses challenges to the existing copyright law framework.

When an artist wants to lawfully make a sampled recording, they must obtain the correct licenses and pay the original artist(s) for the use of the recording. Because sampling implicates not just the Recording Copyright, but also the Composition Copyright of the underlying song, there are two separate licensing processes involved.<sup>60</sup>

The obvious concern is that this will discourage not only the advancement and promotion of the arts, but also technological innovation. Courts have encountered difficulties in striking an agreeable balance “between the need to protect artists from audio piracy and the goal of fostering the ability of new artists to draw on previous media. . . .”<sup>61</sup> In *Bridgeport Music, Inc. v. Dimension Films*, the plaintiffs alleged that the song *100 Miles and Runnin*, used in the movie *I Got the Hook Up*, infringed on the copyrights of the song *Get Off Your Ass and Jam* by George Clinton & The Parliament Funkadelics.<sup>62</sup> Experts for the plaintiffs testified that the creators of *100 Miles and Runnin* used a two-second sample from *Get Off Your Ass and Jam*, lowered the pitch, “looped” and extended the sample to sixteen beats, and used the sample throughout the song.<sup>63</sup> The district court granted the defendant’s summary judgment on the grounds that the sample was “legally insubstantial and therefore [did] not amount to actionable copying.”<sup>64</sup> The Sixth Circuit reversed, reasoning that sampling even a small portion of another artist’s work is still taking their work product, which is something of value.<sup>65</sup> The court made the distinction between *de minimis* copying of a composition and a sound recording, and reasoned that infringement could occur in the latter, but not the former.<sup>66</sup> However, the court did not appear to anticipate the phenomenon of compositional sampling.<sup>67</sup>

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<sup>59</sup> See, e.g., *Girl Talk*, <http://illegal-art.net/girltalk/> (last visited Oct. 19, 2016).

<sup>60</sup> Lund, *supra* note 32, at 145.

<sup>61</sup> John Lindenbaum, *Music Sampling And Copyright Law*, Princeton University Center For Arts And Cultural Policy Studies (Apr. 8, 1999), <https://www.princeton.edu/~artspol/studentpap/undergrad%20thesis%20JLind.pdf>.

<sup>62</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>63</sup> *Id.* at 796.

<sup>64</sup> *Id.* at 797.

<sup>65</sup> *Id.* at 801–02.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* “We do not see this as stifling creativity in any significant way. It must be remembered that if an artist wants to incorporate a ‘riff’ from another work in his or her recording, he is free

4. *Music Theory.* To be able to analyze music for substantial similarity, as this Note will attempt in the next section, it is first important to possess a basic understanding of musical elements and music theory. As previously stated, the basic compositional elements of a musical work are its rhythm, harmony, and melody.<sup>68</sup> Rhythm is defined as “[t]he systematic arrangement of musical sounds, principally according to duration and periodic stress.”<sup>69</sup> Harmony is “[t]he combination of simultaneously sounded musical notes to produce chords and chord progressions having a pleasing effect.”<sup>70</sup> Melody is “[a] sequence of single notes that is musically satisfying.”<sup>71</sup> While the definitions of harmony and melody sound the same, they are two distinct concepts. Melody is essentially the tune of the song, i.e., that you might whistle. Harmony, on the other hand, complements and supports the melody, providing structure to the song. Stated another way, “[h]armony often adds a framework or context for the melody, like a setting in a story.”<sup>72</sup> It can be helpful to think of harmony as the rhythm guitarist playing the chords, and the melody as the lead guitarist playing the hook.

There are a multitude of different performance elements that can be analyzed when determining substantial similarity, but for purposes of forming a basic understanding of music theory, this Note will only focus on four: tempo, key signature, orchestration, and style/genre. Tempo is the “speed at which the music proceeds”<sup>73</sup> It is similar to rhythm, but focuses more on the speed of the song as a whole rather than the speed at which the notes are played. It is often referred to in terms of beats per minute (BPM). Key signature is essentially the “note/pitch that is considered home” for the song.<sup>74</sup> Each key contains a set amount of sharps or flats. It determines the rules for the song, instructing the musician what notes can or cannot be played. Orchestration refers to the “type of instruments or different timbres/sounds that are present in the piece, as a function of the particular parts they are playing.”<sup>75</sup> Finally, style refers to the

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to duplicate the sound of that ‘riff’ in the studio.” This reasoning ignores the fact that the value of compositional sampling is in the fact that the samples are taken from the original works.

<sup>68</sup> Lund, *supra* note 32, at 143.

<sup>69</sup> *Rhythm*, OXFORD DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/rhythm](http://www.oxforddictionaries.com/us/definition/american_english/rhythm) (last visited Feb. 1 2017).

<sup>70</sup> *Harmony*, OXFORD DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/harmony](http://www.oxforddictionaries.com/us/definition/american_english/harmony) (last visited Feb. 1, 2017).

<sup>71</sup> *Melody*, OXFORD DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/melody](http://www.oxforddictionaries.com/us/definition/american_english/melody) (last visited Feb. 1, 2017).

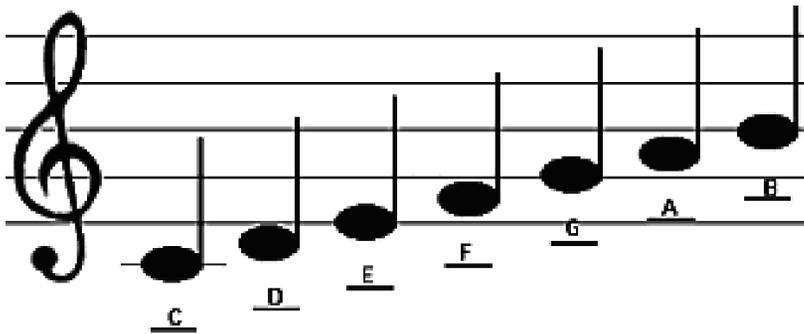
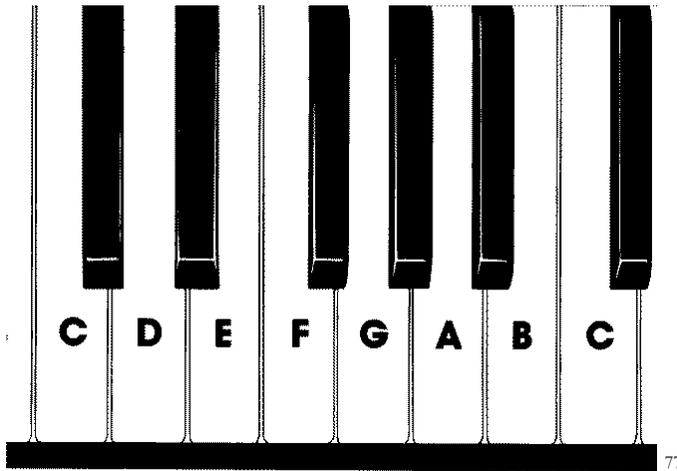
<sup>72</sup> *Melody vs. Harmony: Definitions And Examples*, STUDY.COM, <http://study.com/academy/lesson/melody-vs-harmony-definitions-and-examples.html> (last visited Feb. 1, 2017).

<sup>73</sup> Lund, *supra* note 32, at 146.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

“certain interpretational choices that are consistent for a particular genre or way of playing. These common interpretational choices might include instrumentation, interpretation of rhythmic features . . . , or other elements, accompaniments, or textures that are consistent with a particular style of music.”<sup>76</sup> In any given piece of music, all of these elements can be changed or altered.



<sup>76</sup> *Id.*

<sup>77</sup> [Http://www.academiamusical.com.pt/wp-content/uploads/2014/10/keyboard.gif](http://www.academiamusical.com.pt/wp-content/uploads/2014/10/keyboard.gif) (last visited Feb. 7, 2017). This piano diagram may be helpful for the foregoing discussion.

<sup>78</sup> [Http://braillebug.afb.org/brailledots\\_music.gif](http://braillebug.afb.org/brailledots_music.gif) (last visited Feb. 7, 2017). This musical staff might also be helpful.

Modern Western music theory is based on the chromatic scale, where each incremental step is equal and referred to as a “half tone” or “semitone.”<sup>79</sup> The chromatic scale establishes the fundamental building blocks on which the Western music theory system is based. There are thirteen notes on the chromatic scale, starting with the root note or “tonic” note, and ending with the “octave” tonic note; exactly twice the pitch frequency of the root note.<sup>80</sup> Notes range from A to G, and all notes except for B and E include “semitone modifiers”; sharps (#’s) or flats (b’s) that either raise or lower the tone of the note.<sup>81</sup> One could play the chromatic scale on the piano by starting at a given note and playing every key on the piano until arriving at the next octave of that note. To illustrate, a chromatic scale in the key of C would look like this:

C-C#-D-D#-E-F-F#-G-G#-A-A#-B-C

Or

C-Db-D-Eb-E-F-Gb-G-Ab-A-Bb-B-C



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Notice that there exists an overlap between the notes containing sharps and the notes containing flats. These are called “enharmonics”; they are identical pairs of notes that can be notated in two ways.<sup>83</sup>

The major scale is arguably the most recognizable in Western music. It is the classic tune of *Do-Re-Mi* sung by Julie Andrews and the Von Trapp children in the 1965 film *The Sound of Music*.<sup>84</sup> The major scale consists of eight notes, the tonic (I), supertonic (II), mediant (III), subdominant (IV), dominant (V),

<sup>79</sup> *Music Theory For The Chromatic Harmonica*, Music Theory I, HARP ON!, <http://www.angelfire.com/music/HarpOn/theory1.html> (last visited Feb. 1, 2017). There are various other systems of music theory that incorporate different incremental steps, such as atonal, microtonal, and other culture-specific tonal systems, but for purposes of this Note, it is only necessary to focus on the basic Western music theory system, specifically, the major scale.

<sup>80</sup> *See id.*

<sup>81</sup> *Id.* Sharps raise the tone of the note by a half-tone and flats lower the tone of the note by a half-tone.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *THE SOUND OF MUSIC* (20th Century Fox 1965).

submediant (VI), leading tone (VII), and octave tonic (VIII).<sup>85</sup> There are five whole tone intervals and two half tone intervals in the scale.<sup>86</sup> The whole tone intervals are between the I and II, the II and III, the IV and V, the V and VI, and the VI and VII.<sup>87</sup> The half tone intervals are between the III and IV, and the VII and VIII.<sup>88</sup> One could play the C major scale on the piano by starting at C, and playing every white key until reaching the octave. To further illustrate, the major scale in the key of C looks like this:

C--D--E-F--G--A--B-C<sup>89</sup>



In numerical terms, it would look like this:

I--II--III-IV--V--VI--VII-I

This numerical scheme can be used to determine what notes are in the major scale for any given key.

One common tool that musicians and music theory scholars use to determine what notes are in a given key is the circle of fifths. The circle of fifths tells a musician which sharps or flats occur in each key. It was originally developed by the Greek scholar and philosopher Pythagoras in the sixth century B.C.<sup>91</sup> The circle consists of twelve points, each assigned a pitch value which is the “perfect fifth” away from the preceding pitch value, hence the name “circle of fifths.”<sup>92</sup>

<sup>85</sup> *Diatonic Scale*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Diatonic\\_scale#Major\\_scale](https://en.wikipedia.org/wiki/Diatonic_scale#Major_scale) (last visited Feb. 1, 2017).

<sup>86</sup> See *Music Theory For The Chromatic Harmonica*, *supra* note 79.

<sup>87</sup> See *id.*

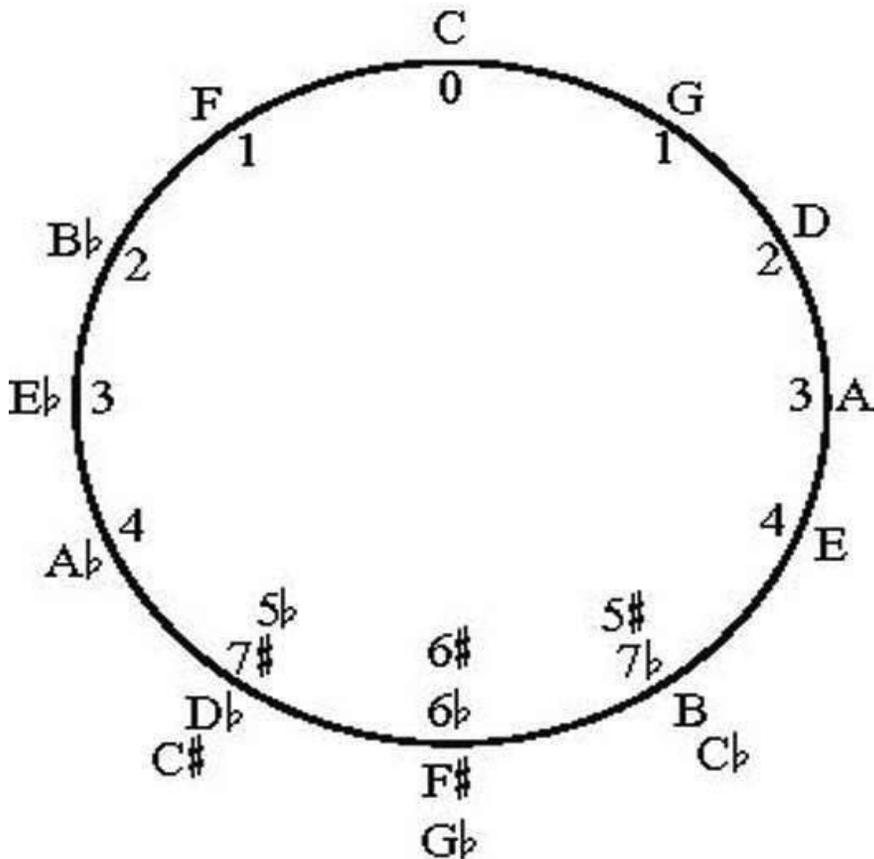
<sup>88</sup> See *id.*

<sup>89</sup> “--” indicates a whole tone interval and “-” indicates a half tone interval.

<sup>90</sup> *Id.*

<sup>91</sup> Michael Pilhofer & Holly Day, *The Circle of Fifths: A Brief History* (Feb. 23, 2009), <http://www.dummies.com/how-to/content/the-circle-of-fifths-a-brief-history.html>.

<sup>92</sup> *Id.* It is called a “perfect fifth” because the fifth note in the both major and minor scale is always seven half tones away from the root note.



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To determine the number of sharps that are in a given key, one would count clockwise from C at the top of the circle. For example, the key of C would have zero sharps, the key of G would have one sharp, the key of D would have two sharps, and so on. The order of sharps is as follows:

F C G D A E B

So, if a song was written in the key of A, it would have three sharps; F#, C#, and G#, and the scale would look like this:

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<sup>93</sup> *Id.*

A B C# D E F# G#

Conversely, to determine the number of flats in a given key, one would count counterclockwise from C. So the key of C would have zero flats, the key of F would have one flat, the key of Bb would have two flats, and so on. The order of flats is the same as the order of sharps, but in reverse order:

B E A D G C F

So, if a song was written in the key of Eb, it would have three flats: Bb, Eb, and Ab.

Once the key in a given song is known, the basic ground rules for what can be played in that key are made available, e.g., notes, chords, etc. Chords, in their most basic structure, are comprised of three notes, called “triads”: a “root” note, a third, and a fifth.<sup>94</sup> Major triads are “built with a major third and a perfect fifth from the root.”<sup>95</sup> Minor triads are built with a minor third and a perfect fifth from the root.<sup>96</sup> To illustrate, a C major triad would look like this:



and a C minor triad would look like this:

C Eb F

<sup>94</sup> *Introduction to Chords*, MUSICTHEORY.NET, <http://www.musictheory.net/lessons/40> (last visited Feb. 1, 2017).

<sup>95</sup> *Id.* As you recall from the numerical sequence for the major scale, a major third is always four half tones away from the root, and a perfect fifth is always seven half tones away from the root.

<sup>96</sup> *Id.* A minor third is always three half tones away from the root.

<sup>97</sup> [https://upload.wikimedia.org/wikipedia/commons/thumb/c/c1/C\\_triad.svg/200px-C\\_triad.svg.png](https://upload.wikimedia.org/wikipedia/commons/thumb/c/c1/C_triad.svg/200px-C_triad.svg.png) (last visited Feb. 1, 2017).



98

Recall the notes in the C major key that were shown earlier. If we built triads with each note in that key using only the notes available, the following progression would result:

C d e F G a b<sup>o</sup> 99, 100

Or if we were in the key of A major, which has three sharps, the chord sequence would be as follows:

A b c# D E f# g#<sup>o</sup> 101

If in every major key, we mapped the chords in the same fashion, a pattern would emerge, and the numerical chord sequence for the major scale would become apparent:

I ii iii IV V vi vii<sup>o</sup>

Using this numerical chord sequence, together with the circle of fifths and order of sharps and flats, we can determine exactly which chords may be played in any given key, as well as what individual notes may be played. This is extremely useful for musicians because it establishes the framework for creating music. Once the theoretical boundaries have been established, the musician has

<sup>98</sup> [Http://www.ukuleletricks.com/wp-content/uploads/2010/10/c-minor-chord-stacked.jpg](http://www.ukuleletricks.com/wp-content/uploads/2010/10/c-minor-chord-stacked.jpg).

<sup>99</sup> In music theory, a lower case letter denotes a minor chord, and a “<sup>o</sup>” symbol denotes a diminished chord, where the chord is built on a minor third and a diminished fifth (the minor third is three half tones away from the root, and the diminished fifth is six half tones away from the root).

<sup>100</sup> C is made up of C E G; d is made up of D F A; e is made up of E G B; F is made up of F A C; G is made up of G B D; a is made up of A C E; and b<sup>o</sup> is made up of B D F.

<sup>101</sup> A is made up of A C# E; b is made up of B D F#; c# is made up of C# E G#; D is made up of D F# A; E is made up of E G#; f# is made up of F# A C; and g#<sup>o</sup> is made up of G# B D.

guidance necessary to compose a piece. The aforementioned basic rules provide only seven notes and seven combinations of notes that can be played in any given key, thus presenting somewhat of a catch-22 for musicians because, while the rules of music theory are intended to provide musicians with the ability to create, they also constrict them within the parameters of those rules.

5. *“Blurred Lines” Case.* Courts have been inconsistent in their analyses of musical works in copyright infringement cases, especially in their ability to distinguish between original ideas and music theory concepts. In *Williams v. Bridgeport Music, Inc.* (‘Blurred Lines’ case), a Ninth Circuit case, Pharrell Williams and Robin Thicke (the Plaintiffs) sought a finding under the Declaratory Judgment Act<sup>102</sup> that their song *Blurred Lines* did not infringe on Marvin Gaye’s 1976 song *Got to Give It Up*.<sup>103</sup> Gaye’s children (the Defendants), who claimed an ownership interest in the composition, counterclaimed, alleging that *Blurred Lines* did infringe on *Got to Give It Up*.<sup>104</sup> Williams and Thicke then filed a motion for summary judgment as to both their request for declaratory relief and the defendants’ counterclaims.

The Defendants hired Judith Finell, a musicologist, to provide expert testimony as to the similarity between *Got to Give It Up* and *Blurred Lines*.<sup>105</sup> Finell prepared an eighteen-page Preliminary Report wherein she claimed eight substantially similar features between the two songs.<sup>106</sup> Those features were: the “[s]ignature phrase in [the] main vocal melodies,” “[h]ooks,” “[h]ooks with backup vocals,” the “[c]ore theme, or ‘Theme X,’” “[b]ackup hooks,” “[b]ass melodies,” “[k]eyboard parts,” and “[u]nusual percussion choices.”<sup>107</sup> While none of these features were exactly the same, Finell opined that they were a “‘constellation of . . . substantially similar features’” that, taken together, cut to the “‘very essence’” of the work.<sup>108</sup>

The Plaintiffs hired Sandy Wilbur as their expert musicologist.<sup>109</sup> Wilbur prepared a fifty-five-page Declaration comparing the two songs and critiquing Finell’s preliminary report.<sup>110</sup> “Wilbur found no substantial similarity between the melodies, rhythms, harmonies, structures and lyrics of ‘Blurred Lines’ and ‘Got to Give It Up,’ and concluded that the songs were not substantially

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<sup>102</sup> 28 U.S.C. § 2201 (2010).

<sup>103</sup> *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240 (C.D. Cal. Oct. 30, 2014).

<sup>104</sup> *Id.* at \*1.

<sup>105</sup> *Id.* at \*6.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at \*7.

<sup>108</sup> *Id.* at \*6–7.

<sup>109</sup> *Id.* at \*7.

<sup>110</sup> *Id.*

similar.”<sup>111</sup> In regards to the eight similarities highlighted by Finell, Wilbur contended that “Finell’s ‘eight similarities [were] primarily melodic,’ but ‘there [were] *no two consecutive notes* in any of the melodic examples in the Finell Report that [had] the same pitch, the same duration, and the same placement in the measure.’”<sup>112</sup> Additionally, Wilbur asserted that “many of the purported similarities [were] unoriginal,” and that “many comprise ‘the basic building blocks of musical composition that are present, if not inevitable, in many songs’ or were found in prior art.”<sup>113</sup> Finell responded to these criticisms in a forty-one-page Declaration, in which she described the opinions of Wilbur as “‘deconstructing and microscopically dissecting the individual similar features in isolation, outside the context of the entire work.’”<sup>114</sup>

The Court began their discussion by laying out the standards for copyright infringement in the context of a summary judgment inquiry in the Ninth Circuit, including the direct access and substantial similarity inquiries,<sup>115</sup> and the two-part analysis for determining substantial similarity.<sup>116</sup> The court stated that “in applying the extrinsic test, a court considers expert testimony in order to perform what is called “analytical dissection” of a work. “‘Analytical dissection’ requires breaking the works ‘down into their constituent elements, and comparing those elements for proof of copying as measured by substantial similarity.’”<sup>117</sup>

The Court began their analytical dissection by analyzing the signature phrase of the two songs. Finell described a “phrase” as “‘a passage within a longer melody, similar to a sentence within a paragraph or a line within a poem . . . The signature phrase is a primary identifying feature of a song and one of its most memorable elements.’”<sup>118</sup> Finell alleged the following five similarities with respect to the songs’ signature phrases:

- A. Both repeat their starting tone several times;
- B. Both contain the identical scale degree sequence of 5-6-1 followed by 1-5 . . . ;

<sup>111</sup> *Id.* at \*8.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at \*10.

<sup>115</sup> *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

<sup>116</sup> *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). The Ninth Circuit employs the objective extrinsic test and the subjective intrinsic test. “For the purposes of summary judgment, only the extrinsic test is important because the subjective question whether works are intrinsically similar must be left to the jury.” *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, at \*15 (C.D. Cal. Oct. 30, 2014).

<sup>117</sup> *Williams*, 2014 U.S. Dist. LEXIS 182240, at \*15.

<sup>118</sup> *Id.* at \*34.

- C. Both contain identical rhythms for the first six tones;
- D. Both use the same device of a melodic “tail” (melisma) on their last lyric, beginning with the scale degrees 1-5. Finell define[d] a “melisma” as ‘a vocal melody in which one syllable or lyric is held while sung with several successive pitches, rather than a single pitch for each syllable’;
- E. Both contain substantially similar melodic contours.<sup>119</sup>

Wilbur responded by claiming that the melody, harmony, and rhythm of the two songs were different.<sup>120</sup> She claimed that, with the exception of one note, “[n]o other notes in the Signature Phrases [had] the same pitch and placement.”<sup>121</sup> Additionally, Wilbur contended that the harmonies of the two songs were different “in that both measures of the ‘Got to Give It Up’ signature phrase are A7,<sup>122</sup> whereas the first measure of ‘Blurred Lines’ is E and the second measure is A,” and that the rhythms were also different.<sup>123</sup>

Wilbur addressed each similarity identified by Finell.<sup>124</sup> First, Wilbur expressed that “the starting tones [were] different in each song, and . . . played over different chords.”<sup>125</sup> Additionally, Wilbur stated that “repeating a starting tone several times in a row is a commonplace musical idea.”<sup>126</sup> Second, Wilbur alleged that “Finell’s analysis of the scale sequence [was] incomplete.”<sup>127</sup> Third, Wilbur dismissed “the identical rhythm of the first six notes of each signature phrase as a ‘common musical idea or device,’ ” and provided examples: “[t]he 1958 Chuck Berry song ‘Johnny B. Goode,’ the 1964 Beatles song ‘Hard Days Night,’ and the 1975 War song ‘Low Rider.’ ”<sup>128</sup> Fourth, Wilbur “opine[d] that a melisma at the end of a melodic phrase is a common musical device, and that those in ‘Got to Give It Up’ and ‘Blurred Lines’ differ[ed] based on the pitches, rhythm, placement, and melodic contour of the sustained lyric.”<sup>129</sup> Finally, Wilbur claimed that the melodic contours were “substantially different,” and

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<sup>119</sup> *Id.* at \*34–35.

<sup>120</sup> *Id.* at \*35.

<sup>121</sup> *Id.* at \*35–36.

<sup>122</sup> An A7 chord is comprised of A, C#, E, and G, whereas an A chord is comprised of A, C#, and E.

<sup>123</sup> *Williams v. Bridgeport Music, Inc.*, LA CV13-06084 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at \*36 (C.D. Cal. Oct. 30, 2014).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*36–37.

<sup>129</sup> *Id.* at \*37.

that “‘there [was] nothing original about that overall contour, which is commonplace.’”<sup>130</sup>

The Court next analyzed the hook of the two songs.<sup>131</sup> “Finell define[d] a hook as ‘the term used in popular and commercial music for the most important melodic material of the work, that which becomes the memorable melody by which the song is recognized . . . it is usually the passage in the chorus in which the title lyrics are sung.’”<sup>132</sup> Finell contend[ed] that three of the four notes of the songs’ hooks [were] identical in scale degree.”<sup>133</sup> Wilbur responded by arguing that the notes that were different “significantly changes the effect of each hook. ‘In [“Got to Give It Up”], the note is the 2nd scale degree . . . , which creates tension. In [“Blurred Lines”], the note is the 1st scale degree . . . , the most stable [one].’”<sup>134</sup>

In the Court’s analysis of the bass melodies, Finell asserted that the bass line at the beginning of *Got to Give It Up* was substantially similar to the bass line in *Blurred Lines*.<sup>135</sup> In response, Wilbur contended that the bass lines only had three notes in common, and argued that “the differences between the bass lines outweigh the similarities.”<sup>136</sup> Wilbur also claimed that “the only similarity between the bass patterns is that ‘the bass play[s] the root of the chord,’ which she dismis[s]e[d] as a ‘commonplace idea’ and ‘the most fundamental role of the bass in popular music.’”<sup>137</sup>

In the Court’s analysis of the keyboard parts, the issue boiled down to the similarity between a single chord used in each song; an A7 chord in *Got to Give It Up*, and an A chord in *Blurred Lines*.<sup>138</sup> The Court stated that “[b]y itself the repetition of a single, common chord is not a sufficiently original expression to merit copyright protection. However this individually unprotected element may be considered in combination with other features for purposes of analytic dissection.”<sup>139</sup>

The Court analyzed the harmonic similarities between the two songs.<sup>140</sup> Ingrid Monson, the Quincy Jones Professor of African American Music at

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at \*38.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at \*39.

<sup>135</sup> *Id.* at \*41.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*42.

<sup>138</sup> *Id.* at \*45.

<sup>139</sup> *Id.* at \*45–46.

<sup>140</sup> *Id.* at \*48.

Harvard University, testified as an additional expert on behalf of the Defendants.<sup>141</sup> In her analysis of the two songs, she asserted that

[t]he 16 bar verse in “Got to Give It Up” is comprised of A7 for 8 bars followed by the progression D7/E7/E7/B7/D7/E7/A7/B7 . . . In functional terms this progression is IV/V of V/ V/ IV/ I/ V of V. The harmonic progression in “Blurred Lines” for the 16 bar verse is A/ A/ A / A/ E/ E/ E/ E repeated twice, in functional terms I-V-I-V-I-V-I-V.<sup>142</sup>

Monson contended that “in effect the harmonic progression of Blurred Lines reduces the Got to Give It Up progression to an alternation from tonic (I) to dominant (V).”<sup>143</sup>

Wilbur’s declaration pre-dated Monson’s, but it nevertheless concluded that there was no substantial similarity between the two songs because

“there is no sequence of two chords played in the same order and for the same number of measures (duration) in [‘Got to Give It Up’] and [‘Blurred Lines’]”, “there are no three chords in common in [‘Got to Give It Up’] and [‘Blurred Lines’]”, and [‘Got to Give It Up’] has “a minor or bluesy sound” where “[‘Blurred Lines’] has a major sound.”<sup>144</sup>

After analyzing the alleged similarities, the Court proceeded to identify the protectable elements of the work.<sup>145</sup> The Court stated that

[a]lthough a work must be original to be protected by copyright under the relevant statutes and under the Constitution, only a ‘modicum of creativity’ is required for copyright eligibility . . . Further, copyright law protects only “an author’s expression; facts and ideas within a work are not protected.” Where music is concerned, fundamental building blocks, such as individual notes and chords, do not warrant copyright.<sup>146</sup>

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<sup>141</sup> *Id.* at \*9.

<sup>142</sup> *Id.* at \*48.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at \*49.

<sup>145</sup> *Id.* at \*51.

<sup>146</sup> *Id.*

However, the Court balanced this consideration by noting that “[t]he Ninth Circuit has cautioned that the creativity requirement should not be applied too stringently, and that a very limited arrangement of notes may be sufficiently original to warrant copyright protection,” as long as that arrangement is “qualitatively important” to the work as a whole.<sup>147</sup>

The Court then proceeded to discuss “scenes a faire.”<sup>148</sup> The Court stated that

[c]ommonplace expressions within a genre, which are called “scenes a faire,” are not protected by copyright because the “expressions are indispensable and naturally associated with the treatment of a given idea.” However, “it is inappropriate to grant summary judgment on the basis of scenes a faire without independent evidence, unless the allegation of scenes a faire is uncontested.”<sup>149</sup>

The Court determined that the “[d]efendants [had] offered sufficient evidence to create triable issues as to whether their 11-note signature phrase, four-note hook, four-bar bass line, 16-bar harmonic structure and four-note vocal melody are protectable expressions,” and noted that “to the extent that any of these elements is itself not protectable, the combination and selection of these elements may be considered under the extrinsic test because ‘the over-all impact and effect indicate substantial appropriation.’”<sup>150</sup> Thus, the Court concluded that there was a genuine issue of material fact as to whether elements of *Blurred Lines* were substantially similar to elements of *Got to Give It Up*.<sup>151</sup>

### III. ANALYSIS

#### A. SAM SMITH BACKING DOWN

Even a cursory theoretical analysis and comparison of Tom Petty’s *Won’t Back Down* and Sam Smith’s *Stay With Me* reveals numerous significant differences between the two songs, effectively invalidating the assertion that *Stay With Me* and *Won’t Back Down* are two versions of the same song. Petty’s song is written in the key of G major and is played at a moderato speed of

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<sup>147</sup> *Id.* at \*52.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*52–53.

<sup>151</sup> *Id.* at \*54–55.

approximately 120 BPM in a 4/4 time signature.<sup>152</sup> Its chord progression is Em D G, and departs from this progression, incorporating the C chord throughout the verses and the chorus.<sup>153</sup> It features two rhythm guitars, one lead guitar, a bass guitar, drums, and vocals. Smith's song is written in the key of C major, but often assumes the feel of its relative minor A.<sup>154</sup> It is played at an andante speed of around 84 BPM, and features a piano, bass, drums, organ, strings, and vocals (at some points using a choir).<sup>155</sup> Its chord progression is Am F C throughout.<sup>156</sup>

Viewed in the aggregate, while *Won't Back Down* and *Stay With Me* do share some theoretical similarities, they also exhibit significant relative differences. The lyrics share no obvious similarities in their themes, ideas, or writing styles. The songs feature different instruments, and are played using different tempos. Played on top of each other, they would sound completely different to the lay listener. Even if the two songs were transposed into the same key, while they would share some of the same chords, the progressions of those chords would not be the same. Significant definitive alterations would have to be undertaken for the two songs to sound anything alike. Sam Smith should have done his homework on music notation before backing down to Tom Petty. Unfortunately, the consequences of his fickleness may reach well beyond his own label.

Tom Petty's and Sam Smith's songs are not the first to share musical similarities, and they certainly won't be the last. In fact, many popular songs share even more theoretical similarities than Petty's and Smith's without enduring any level of scrutiny. For instance, the numerical chord progression I V vi IV has been extremely popular since the days of Johann Pachelbel and even earlier. It is found in such songs as The Beatles' *Let It Be*, The Rolling Stones's *Beast of Burden*, Bob Marley's *No Woman No Cry*, Phish's classic hit *Farmhouse*, and many more.<sup>157</sup> In fact, many of these songs also share the same key and use the same chords. Still, if a layperson were to listen to any of these songs played unaltered back to back, most would not notice any significant

<sup>152</sup> "Moderato" is the Italian musical term for a moderate tempo. A "time signature" is a notational tool that specifies how many beats are in a given measure (the top number), and what note value is to be assigned to each beat (the bottom number). In modern day rock music, as well as numerous other genres, a 4/4 time signature is extremely common.

<sup>153</sup> Numerically, this would be vi V I and the C chord would be the IV chord.

<sup>154</sup> In music, relative keys share the same key signatures. In major keys, the relative minor is the perfect fifth of the key, and in minor keys, the relative major is the third of the key.

<sup>155</sup> "Andante" is the Italian musical term for a moderately slow tempo.

<sup>156</sup> Numerically, this would be vi IV I.

<sup>157</sup> The Axis of Awesome, *The Axis of Awesome 4 Chords (2011) Official Music Video.wmv* (Aug. 5, 2011), <https://www.youtube.com/watch?v=R2De2cK1mDw>.

similarities or even recognize the identical progression. Chord progressions, especially simplistic short-winded phrases commonplace in popular music, are musical ideas that can be legitimately shared in the creative process. To view them as original thoughts, belonging exclusively to a certain musician is to misunderstand the communal quality of the medium. “There are only a few ways you can arrange horizontal bars of blue on a canvas, just as there are only a few ways you can arrange basic major and minor triads into a three-chord riff.”<sup>158</sup>

#### B. PROBLEMS WITH CURRENT COPYRIGHT INFRINGEMENT STANDARDS FOR MUSICAL WORKS

The current standards employed to determine copyright infringement in the United States are not properly suited for the musical context; namely, the tests for determining substantial similarity. Courts often misapply the extrinsic test when employing the use of expert testimony, and improperly instruct the juries on the intrinsic test.

1. *Inverse Ratio Rule.* One issue unique to musical works in copyright infringement cases is the relationship between access and substantial similarity. Under what is termed the “inverse ratio rule,” “a lower standard of proof of substantial similarity [is required] when a high degree of access is shown.”<sup>159</sup> In music infringement cases, especially those involving popular works, access is almost always presumed. But the problem with this consideration of access is that any musician with even a modicum of proficiency in music will technically have “access” to those fundamental aspects of music inherent in any work. Unlike a painting or work of literature, where one would need to physically see and/or experience the work to be considered as having access to it, a musician may have access to knowledge of the components of certain facets of a particular piece without ever having heard it. The standard of proof for substantial similarity in music infringement cases should remain fairly consistent, and the inverse ratio rule impairs this consistency.

2. *Extrinsic Analysis.* Expert testimony in music infringement cases is often a necessary and highly useful tool in determining copyright infringement. However, the 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 that

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<sup>158</sup> Adam Ragusea, *The Real Reason People Keep Plagiarizing Tom Petty*, SLATE (Jan. 27, 2015, 4:02 PM), [http://www.slate.com/blogs/browbeat/2015/01/27/tom\\_petty\\_s\\_copyright\\_settlement\\_why\\_sam\\_smith\\_didn\\_t\\_really\\_plagiarize.html](http://www.slate.com/blogs/browbeat/2015/01/27/tom_petty_s_copyright_settlement_why_sam_smith_didn_t_really_plagiarize.html).

<sup>159</sup> *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

is outside the scope of their duties as an expert. This creates the potential for faulty judgments and unnecessary advancement into costly litigation that forces the employment of juries to scrutinize intricate and minute pieces of a musical work and conduct the intrinsic test for infringement.<sup>160</sup> Often, an understanding of the complexities of an extrinsic analysis by experts of compositional elements in a musical work are outside a jurors typical “range of experience” and, coincidentally, they have difficulty understanding what to look for when analyzing the works for substantial similarity.<sup>161</sup>

Another problem with the use of expert testimony is the self-serving nature of each side’s analysis of the work. Each expert can choose either to focus on similarities or differences in the work that bolsters their position, or ignore those that weaken it. In the *Blurred Lines* case, the expert testimony of Marvin Gaye opined that while none of the features between *Got To Give It Up* and *Blurred Lines* were exactly the same, they were a “‘constellation of . . . substantially similar features’” that, taken together, cut to the “‘very essence’” of the work.<sup>162</sup> An expert witness involved in the extrinsic analysis of musical works should be testifying objectively about the compositional elements of musical works, and should not be engaging in a subjective analysis of the works’ “total concept and feel.”<sup>163</sup> That portion of the test for substantial similarity is to be left up to the jury to determine.

In determining substantial similarity between musical works, courts should rely most heavily on the first prong test: objective similarity. If two works do not share the same or *substantially* the same relevant compositional elements, they are not objectively similar, and therefore, an analysis of their intrinsic similarity is not necessary.<sup>164</sup> Courts must remain steadfast in ruling on these

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<sup>160</sup> See, e.g., *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, at \*36 (C.D. Cal. Oct. 30, 2014).

<sup>161</sup> Lund, *supra* note 32, at 139 (“The jurors are being asked to look *beyond* the performance as expressed in the recording, and focus on the underlying musical ideas embodied in the recording.”); *id.* at 149 (“However, allowing jurors to listen to sound recordings of the pieces invites the juror to make the wrong comparison: comparing the recordings, rather than the compositional elements underlying each recording. This is especially so because an understanding of musical composition may be outside a normal juror’s range of experience.”).

<sup>162</sup> *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240 (C.D. Cal. Oct. 30, 2014).

<sup>163</sup> See Goodman, Pappa & Olson, *supra* note 24.

<sup>164</sup> E.g., QUEEN & DAVID BOWIE, *Under Pressure*, on HOT SPACE (EMI Elektra 1982), VANILLA ICE, *Ice Ice Baby*, on TO THE EXTREME (SBK Records 1990). These two songs’ hooks were essentially identical in both their compositional elements and style. The only difference was a single note added to *Ice Ice Baby* that to most lay listeners would go unnoticed. The parties eventually settled out of court, and Vanilla Ice agreed to give writing credits and pay royalties to Queen and Bowie. Skppy1225, “Under Pressure” and “Ice Ice Baby” *Similarity* (Apr. 24, 2007), <https://www.youtube.com/watch?v=kk6NhjD3Dbg>. “Relevant compositional elements” include those that form any

objective findings and not be swayed by the subjective leanings of the experts providing them. Unlike a painting or a sculpture, where every minute detail such as a stroke of a brush or the contour and texture of the marble used can be analyzed, music operates within a more structured and orderly framework. When comparing musical works, it is usually a simple matter to determine whether or not they are objectively the same or substantially similar because they can be mapped out into sheet music and easily analyzed. The buck should usually stop here in music infringement cases once it is determined that the works are not objectively similar.

3. *Burden of Proof.* In moving for declaratory relief in a copyright infringement case involving musical works, the burden is on the moving party to prove that the alleged infringing works are not the same or substantially similar to each other. Once that party offers proper evidence to provide proof, the burden then shifts to the opposing party to rebut that evidence, a finding that should be easy to determine since the musical works currently are or can be written out on sheet music.<sup>165</sup> If the opposing party cannot offer such proof, the extrinsic test is then completed, and no further analysis is necessary.

4. *Original Ideas vs. Musical Concepts.* In order for the copyright infringement standards applied in the U.S. to be compatible with the unique requirements of musical works, courts must be vigilant in distinguishing between fundamental musical concepts and original works of the artist, and must be wary of any semblance of objective analysis that injects subjective conclusions, and be must careful to avoid opening the doors to misperception and misapplication within the judicial system. The purpose of the extrinsic test is not to determine whether a work infringes on another work's "total concept and feel," but rather to identify whether the two works are so objectively similar that a subjective analysis of these similarities is necessary. This standard should be extremely stringent, and in those cases in which relevant objective similarities are found, it should be an elementary task for a jury to identify or dispel any substantial similarities between the works.<sup>166</sup> Courts should consistently disallow jury trials that fail to pass the muster of the extrinsic test.

5. *Intrinsic Analysis.* Problems are inevitable when juries are asked to excessively scrutinize the intricate compositional features of musical works.

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part of the artist's actual *original* work and not fundamental musical ideas that make up the basic building blocks of musical composition that comprises any song.

<sup>165</sup> Since this sort of evidence would generally be very black-and-white, any disputes as to the evidence presented would likely be regarding to the accuracy of the sheet music itself.

<sup>166</sup> An average juror should have no problems analyzing the similarities and differences between Bob Marley's *No Woman No Cry* and The Beatles's *Let It Be* and be able to conclude that, based on the aggregate of musical features, the two songs are not substantially similar.

Oftentimes the jurors do not understand the nature of the task they are being asked to perform or have difficulty grasping the complexities of music theory and the analyses provided by experts.<sup>167</sup> Juries also have difficulty distinguishing between the composition copyright and the recording copyright, and courts likewise struggle in properly instructing them on what to look for in each.<sup>168</sup> Compound these problems with requiring a jury to perform a subjective analysis of musical pieces whose objective similarities are questionable at best, and the potential for error and/or misapplication is significantly heightened. Courts should be scrupulous with respect to jury instructions in these cases to ensure fair and consistent rulings.

6. *Chilling Effect.* The misapplication of copyright infringement standards for musical works such as in the *Blurred Lines* case create powerful and lasting ramifications for the music industry and the artists and creators who define that industry. Many musicians are worried that the holding in the *Blurred Lines* case will open the floodgates of litigation to artists whose works share similar intrinsic “feels” with others. This is especially so in R&B music and similar genres, because “[t]raditionally, genres like R&B and hip-hop are more rhythm-based, and don’t include sheet music,” which creates the “opportunity for lots of mistakes to be made by a judge and jury and their best guess of what the sheet music should look like.”<sup>169</sup> Another possible negative impact is the very real potential for a chilling effect on artists’ creativity. Blake Brittain, in his article *Musicians More Careful After ‘Blurred Lines’ Case*, noted that since the *Blurred Lines* case ruling was issued, “there has been a noticeable uptick in musicians adding writing credits for influences on hit songs . . . specifically for R&B songs.”<sup>170</sup> While writing credits for musical inspiration is generally a harmless

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<sup>167</sup> See The Axis of Awesome, *supra* note 157.

<sup>168</sup> See Lund, *supra* note 32, at 147 (“Notwithstanding U.S. copyright law’s doctrinal distinction between Composition Copyright and Recording Copyright, courts continue to play sound recordings to jurors in a Composition Copyright case to assess whether the pieces are substantially similar. This practice ignores the fact that each type of copyright has a different scope and invites jurors to make the wrong comparison: to compare the sound recordings of the two songs rather than the underlying compositions.”); *id.* at 148 (“Evaluating the substantial similarity of a Composition Copyright case is difficult because jurors cannot typically make a lay comparison of two music compositions: comparison of recorded sound is within the range of a typical juror’s common experience, comparison of written sheet music is not.”).

<sup>169</sup> Blake Brittain, *Musicians More Careful After ‘Blurred Lines’ Case*, BLOOMBERG BNA (Sept. 16, 2015), <http://www.bna.com/musicians-careful-blurred-n17179936188/>.

<sup>170</sup> *Id.*

Mark Ronson and Bruno Mars credited the Gap Band on their 2015 mega-hit “Uptown Funk,” due to similarities between the chorus of that song and the Gap Band’s “Oops Up Side Your Head.” Miguel, whose 2015 album “Wildheart” peaked at No. 2 on the Billboard chart, credited Smashing

and honorable way for an artist to show respect for other artists whose works had significant influence on their own, it loses its noble character when those writing credits were coerced by the lingering potential of a lawsuit. And it is not difficult to see how this coercion could lead to an artist abstaining from creating anything whatsoever, for fear that their work would be deemed unoriginal, and that they would have to pay their penance to another.<sup>171</sup> Not only would this chilling effect have repercussions on artists' creative capabilities, but also on the music industry and the audience it serves. It would also have the effect of undermining the major policy consideration inherent in the protection of copyrights: to incentivize artists to create.

### C. PROPOSED SOLUTIONS

While the problems in copyright infringement standards highlighted in the *Blurred Lines* case are significant, viable solutions to reverse these trends are not far from reach. For example, courts, when analyzing musical works for copyright infringement, must be cognizant of the unique nature of music and its unique differences in contrast with other art forms. Music is not a boundless world of expression, but rather, it possesses structure and limits. Access to musical works is not the same as access to other forms of artistic expression because many of the fundamental concepts of music are accessible to anyone with a basic understanding of music. Therefore, the inverse ratio rule must be revised to recognize this uniqueness, and its scope limited to only direct access to another's work.<sup>172</sup>

1. *Extrinsic Analysis.* Next, courts, when analyzing musical works for substantial similarity, must apply the greatest weight to the extrinsic analysis of the works involved. They must ensure that they only rule on the objective aspects of this analysis and not the subjective opinions of those proffering evidence or testimony. When objectively analyzing works, they should look for significant compositional elements that are either the same as or so substantially similar that a layperson would be unable to distinguish between them. Only following the successful completion of that test may the court move the case on

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Pumpkins frontman Billy Corgan on the song "Leaves," based on similarities with the Pumpkins' 1996 hit "1979." Jidenna's "Classic Man," which peaked at #22 on the Billboard Top 100 this summer, includes a writing credit for Iggy Azalea due to similarities between the bassline of "Classic Man" and Azalea's 2014 hit "Fancy."

<sup>171</sup> *Id.* "The specter of the "Blurred Lines" case hangs over every writing credit."

<sup>172</sup> "Direct access" in this sense would mean availability and actual access of the musical work.

to the intrinsic portion of its analysis. This will aid in avoiding costly litigation and the greater potential for misapplication in the further handling of the case.

2. *Intrinsic Analysis.* If the extrinsic test for substantial similarity is performed properly, juries should not have much difficulty in analyzing works subjectively for similarities. These similarities should be extremely noticeable to them, and they should be able to account for those objective similarities when analyzing the works in their entirety while maintaining a focus on the various elements that separate those works. Nevertheless, if an intrinsic analysis of musical works is deemed necessary, courts must strive to ensure that the jury is properly instructed on how to analyze those works, distinguishing the composition copyright from the recording copyright. A clear understanding of the nature of the intrinsic analysis, coupled with a thorough weeding-out process in the extrinsic analysis, will help to ensure that rulings in music infringement cases are accurate and reliable.

Some would argue that a changing of standards in copyright infringement for musical works is unnecessary. They argue that courts need only reverse course and return to the original ideas of copyright protection. When asked about the *Blurred Lines* decision and its impact for the future, Jonathan D. Reichman of Kenyon & Kenyon LLP in New York stated that “most future cases will draw back to the old copyright infringement paradigm . . . [C]ourts are cognizant of the impact of decision on the commercial marketplace, and the attention generated in the artistic community with the risk of a ‘chilling event,’ and it could become a factor.”<sup>173</sup> Whether the standards for copyright infringement in music are revised or whether there is merely a return to a stricter adherence to the current standards in place, it is clear courts must do more to ensure their decisions reflect a more comprehensive understanding of the medium of music.

#### IV. CONCLUSION

The Intellectual Property Clause in the Constitution states that the purpose of copyright protection is “[t]o promote the Progress of Science and useful Arts.”<sup>174</sup> Since that clause was written, our copyright laws in the United States have dramatically shifted from this original policy consideration, and have moved toward a focus on the economic incentives involved in copyright, primarily as a result of the tainting nature of lobbyists and special interests. But the Intellectual Property Clause was not designed solely to protect the big

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<sup>173</sup> Brittain, *supra* note 169.

<sup>174</sup> U.S. CONST. art. I, § 8, cl. 8.

names and industry moguls from theft of their Mickey Mouse tee shirts or “baby baby” lyrics, but also to protect the little guy—the artist who creates for passion, purely for the sake of creativity and enjoyment. Undoubtedly, it is important that economic incentives are provided to these artists to motivate them to continue to create. But when these incentives are nullified by other economic factors that are unsupportive of the creative process, the policies and values of copyright protection are lost. It is absolutely vital that our courts return to standards that comport with the policy considerations originally established in the Constitution of the United States. Until this happens, estates like the children of Marvin Gaye will continue to proverbially dig around his grave, searching for loose change, without paying any regard to the health and well-being of the music industry as a whole, or for the fostering of creativity and inspiration in the artists who make up the industry.

Our courts must avoid sliding down a slippery slope when analyzing works for substantial similarity. This necessitates a thorough understanding of the stringent standards involved in its analysis and a steadfast adherence to them. First, a court must find objective substantial similarity between works in order for them to be analyzed subjectively for similarity by a jury. This analysis should be straightforward with an intense focus on the compositional elements of the works as they are mapped onto sheet music or other media. If works are determined to be objectively substantially similar, then courts must ensure that juries possess a proper understanding of the task set before them in subjectively analyzing the works to ensure that they are examined properly.

