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BREAKING UP MELODIC MONOPOLIES: A NEW APPROACH TO ORIGINALITY, SUBSTANTIAL SIMILARITY, AND FAIR USE FOR MELODIES IN POP MUSIC

*Johannes Hoffman**

Progress in the arts—the fundamental goal of copyright law in the United States—requires a balance between granting creators exclusive rights over their works and allowing others the room to create new works. This is particularly crucial in pop music, where melodies are composed within narrow musical structures out of a limited set of notes. Recent verdicts, however, have shown that courts are becoming more willing to find copyright infringement based on relatively simple melodies in pop music, even where such melodies do not constitute the "hook" or most memorable part of the allegedly infringing work. This Note posits that, in order to restore the necessary balance to promote progress in pop music, courts should apply a new test for originality, substantial similarity, and fair use with regard to melodies.

INTRODUCTION

> [W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism.[1]

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When Judge Learned Hand made this statement in 1940, he accurately identified a critical characteristic of melodies in popular music: they are practically finite.[2] The notes in pop song melodies are typically constructed using chords structured on the seven notes of a particular scale or those seven notes themselves.[3] The vast majority of pop songs are written in a 4/4 time signature, which provides a rhythm most listeners find to be the easiest and most enjoyable to follow.[4] Given this relatively narrow playing field, it is therefore inevitable that musicians will occasionally step on each other's toes out of "creative necessity."[5] In fact, such overlap is often not considered a bad thing; it has been common throughout our history for musicians to "borrow" from other works in creating new ones.[6] This is readily apparent in pop music, where artists normally build on well-established chord progressions and song structures, perhaps more so than in any other genre of music.[7] What sets many pop songs apart from one another, therefore, is not their "notes and rhythms" but their "context and style."[8]

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[1] Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940).

[2] Robert Rogoyski, *The Melody Machine: How to Kill Copyright, and Other Problems with Protecting Discrete Musical Elements*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 403, 419 (2006).

[3] Kelsey McKinney, *The Music Theory Principle That Unifies 2016's Radio Hits*, VOX (Dec. 26, 2016, 9:00 AM), https://www.vox.com/culture/2016/12/26/13956220/top-40-ambiguous-key-centers-bieber-chainsmokers-adele.

[4] *See Time Signatures in Popular Music*, SIGNATURE SOUND STUDIOS (Mar. 2, 2011), https://www.signaturesound.com/timesignatures/.

[5] Rogoyski, *supra* note 2, at 409.

[6] J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 429 (2004) ("Whether considering the plain chant melodies of medieval times, the complex contrapuntal works of J.S. Bach, or the popular musical works of 20th Century composers and musicians, music borrowing has been an historical practice that has been part of numerous compositional palettes and is actually woven into the psyche of the composer's existence.").

[7] *See* The Axis of Awesome, *4 Chords*, YOUTUBE (July 20, 2011), https://www.youtube.com/watch?v=oOlDewpCfZQ.

[8] Shaad D'Souza, *How Katy Perry's "Dark Horse" Lawsuit Could Change Pop Forever*, THE FADER, (Aug. 1, 2019), https://www.thefader.com/2019/08/01/katy-perry-dark-horse-lawsuit-blurred-lines-copyright-essay-2019 [hereinafter D'Souza, *Dark Horse*].

Musicians create their works under the shadow of copyright law.[9] As enumerated in the United States Constitution, the aim of American copyright law is to "promote the Progress of . . . useful Arts."[10] This policy objective, underlying to various extents all forms of intellectual property, requires a critical balance between protecting creators' ownership over their works and allowing other creators the freedom to build on top of existing works to create new ones. American copyright law is embodied in the Copyright Act of 1976 (the "Act"), which pursues the Constitution's goal by granting creators a list of exclusive rights over their works.[11] For example, a copyright owner has the exclusive right to reproduce their work and create derivative works based on the original work.[12] In doing so, the Act ostensibly incentivizes the creation of new works by assuring creators that their labor will be rewarded.[13]

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[9] *Id.* In relevant part, the Copyright Act protects "musical works, including any accompanying words" and "sound recordings." 17 U.S.C. §§ 102(a)(2), (a)(7) (2018). The Act's protections do not extend, however, 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." § 102(b).

[10] U.S. CONST. art. I, § 8, cl. 8.

[11] A copyright owner has the rights:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based on the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work . . . ;
> (4) . . . to perform the copyrighted work publicly;
> (5) . . . to display the copyrighted work publicly; and
> (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission.

§ 106(a).

[12] *Id.*

[13] *See* Authors Guild v. Google, 804 F.3d 202, 212 (2d Cir. 2015) ("The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption."); *see also* Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110

On the other hand, the Act limits the reach of owners' exclusive rights so as not to stifle other artists' creativity.[14] One such limitation is the fair use doctrine embodied in § 107 of the Act.[15] Under this provision, the use of another's work that is otherwise entitled to the exclusive rights enumerated in § 106 will not constitute infringement under certain circumstances amounting to permissible fair use of the copyrighted work.[16] While § 107, providing an affirmative defense to copyright infringement, lists possible qualifying uses, it neither mandates a finding of fair use for those uses nor is its list exhaustive.[17] Instead, a fair use determination

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PENN ST. L. REV. 111, 114 (2005) (explaining that granting authors rights in their works incentivizes the creation of new works).

[14] *See, e.g.*, § 102(b) ("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, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[15] [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include–

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 107.

[16] *Id.*

[17] "[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." *Id.*

consists of weighing four factors on a case-by-case basis.[18] Those factors are:

> (1) the purpose and character of the use . . . ;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used . . . ; and
> (4) the effect of the use upon the potential market for . . . the copyrighted work.[19]

Ultimately, the fair use doctrine allows courts to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[20]

As Judge Hand recognized, progress in pop music depends on copyright law's recognition of the fact that there will inevitably be melodic overlap when artists create new works.[21] Compositionally, pop songs operate within narrow confines—they are generally about three minutes long, employ a verse-chorus structure,[22] and center on a simple and memorable hook[23] that will appeal to a wide audience.[24] Therefore, perhaps more so than in other musical genres that are less married to convention, this results in a limited set of "building blocks" with which pop musicians can compose new works.[25] Granting too much protection over melodies in pop music,

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[18] Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1258–59 (11th Cir. 2014).

[19] § 107.

[20] Stewart v. Abend, 495 U.S. 207, 236 (1990).

[21] *See* Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940).

[22] The chorus is often the focal point of the song and, in pop music, has the same lyrics each time that part is repeated. Verses, on the other hand, often come in between choruses and typically contain different lyrics. *See How to Structure a Pop Song*, ATLANTA INST. MUSIC & MEDIA (Mar. 25, 2019), https://www.aimm.edu/blog/how-to-structure-a-pop-song.

[23] The hook is what is considered to be the most memorable part of a song, and it is "often the chorus." Tom Cole, *You Ask, We Answer: What's A Hook?*, NPR MUSIC (Oct. 15, 2010, 6:52 PM), https://www.npr.org/sections/therecord/2010/10/15/130588663/you-ask-we-answer-what-s-a-hook.

[24] *See id.* (explaining that the hook is "the part of the song that everybody from Mom and Dad to the kids know[s]").

[25] Andrew Dalton, *Jury: Katy Perry's "Dark Horse" Copied Christian Rap Song*, ASSOCIATED PRESS NEWS (July 30, 2019), https://apnews.com

then, shrinks an already-thin musical arsenal and stifles creativity by making artists fearful of liability for copyright infringement.[26] This is precisely the result that the fair use doctrine seeks to avoid.[27]

Recent case law, however, indicates that courts have begun to lose sight of this wisdom.[28] In July 2019, a jury in the United States District Court for the Central District of California handed down a problematic verdict in *Gray v. Perry*, one which extraordinarily risks stifling pop composers' melodic creativity.[29]

Plaintiff Marcus Gray is a Christian rap artist who performs under the moniker "Flame" and released a song named "Joyful Noise" in 2009.[30] Up until this case began, he had been described as a "relatively unknown artist."[31] Defendant Katy Perry is a pop superstar who released a song named "Dark Horse" in 2013.[32] Taken as a whole, the songs are quite dissimilar.[33] They are in different key signatures, have different chord progressions, and mostly use different instruments and tones.[34] "Dark Horse" has a more intricate structure that involves an intro, pre-chorus, and bridge, whereas "Joyful Noise" has a more straightforward verse-chorus structure that is typical of rap music.[35] Furthermore, "Dark Horse" is a blend of "pop, trap, and hip-hop," whereas "Joyful Noise" could be

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/7eef738596e9458eacb9f9015d7fd7fe?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP; *see also* D'Souza, *Dark Horse*, *supra* note 8 (noting that pop music is "built on the transference of creativity between artists" and that "melodies . . . reappear simply because music tends to inspire other music").

[26] *See* D'Souza, *Dark Horse*, *supra* note 8.

[27] *See* Stewart v. Abend, 495 U.S. 207, 236 (1990).

[28] *See* Williams v. Gaye, 885 F.3d 1150, 1166 (9th Cir. 2018).

[29] Dalton, *supra* note 25.

[30] Alex Abad-Santos, *A Jury Said Katy Perry's "Dark Horse" Copied Another Song. The $2.8 Million Verdict Is Alarming*, VOX (Aug. 2, 2019, 2:02 PM), https://www.vox.com/culture/2019/7/30/20747100/katy-perry-dark-horse-joyful-noise-copyright-2-8-million.

[31] Dalton, *supra* note 25.

[32] *Id.*

[33] *See* Abad-Santos, *supra* note 30.

[34] *See id.* For example, "Dark Horse" is in the key of Bb minor, while "Joyful Noise" is in C major. *Id.*

[35] *See id.*

considered to fit squarely within the category of hip-hop.[36] Additionally, the songs have drastically different lyrical themes: "Joyful Noise" is an overtly religious song whereas "Dark Horse" has themes of seduction.[37]

What the songs *do* have in common is a high-pitched synth-like instrument playing a similar melody.[38] Although each is played in a different key and involves different notes, they mostly involve the same intervals[39] and therefore sound alike.[40] In "Dark Horse," the melody only appears during the verses and occupies the background to Perry's vocals.[41] In "Joyful Noise," the melody is an ostinato, which means it is played throughout the entire piece.[42]

Being four measures long and consisting of just a few different notes, the "Joyful Noise" melody is arguably very simple.[43] At trial, Perry's attorney explained to the jurors that the plaintiffs were "trying to own basic building blocks of music" and that "the musical patterns in dispute were as simple as 'Mary Had a Little Lamb.'"[44] In fact, entertainment journalist Alex Abad-Santos has pointed out that an older song from the 1980s has a nearly identical melody to the one at issue in *Perry*.[45] Nevertheless, the jury found that "Dark Horse" was substantially similar to "Joyful Noise" and constituted

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[36] Dalton, *supra* note 25.

[37] *Joyful Noise Lyrics*, GENIUS, https://genius.com/Flame-joyful-noise-lyrics (last visited Feb. 4, 2020); *Dark Horse Lyrics*, GENIUS, https://genius.com /2218830 (last visited Feb. 4, 2020).

[38] Abad-Santos, *supra* note 30.

[39] An interval is the "relationship between two pitches." HARVARD DICTIONARY OF MUSIC 413 (Don Michael Randel ed., 4th ed. 2003).

[40] *Id.*

[41] Gray v. Perry, No. 2:15-cv-05642-CAS(JCx), 2019 WL 2992007, at *12 (C.D. Cal. July 5, 2019).

[42] *Id.*; HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 624.

[43] *See* Abad-Santos, *supra* note 30.

[44] Dalton, *supra* note 25.

[45] Abad-Santos, *supra* note 30 (indicating that the underlying melody in "Moments in Love" by Art of Noise is similar to the one at issue in *Perry*).

infringement.[46] Judgment was entered against Perry in the amount of $2.8 million.[47]

Indeed, courts have been inconsistent in drawing the line between musical elements that are not protected—and thus available for the public to use—and musical elements that are protected.[48] This inconsistency is especially apparent in cases involving "short sequences of notes."[49] A more specific set of criteria for evaluating infringement of musical compositions is needed to bring the standards for melodies in line with those for short phrases in lyrics (which face difficulty showing originality meriting copyright protection) and therefore better serve copyright law's goal of encouraging the creation of new works and progress in the arts, rather than stifling such advances.[50]

Part I of this Note explains the fundamental aspects of music theory applicable to pop music songwriting and provides an overview of recent case law regarding music copyright infringement. Part II provides an overview of copyright law and courts' tests for determining infringement with regard to musical compositions. Part III proposes that, in determining whether a melody is sufficiently original to justify copyright protection, courts should use a sliding-scale test based on the complexity of the melody. In deciding whether a defendant's work is substantially similar to that of a plaintiff suing for copyright infringement, courts should also consider the extent to which the melody at issue constitutes a substantial portion of the secondary work, such as the hook. If the melody is sufficiently original and a secondary work's melody is found to be substantially similar, courts should proceed to a fair use analysis. In determining whether a melody is

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[46] Lauren Berg, *Katy Perry Copied Christian Rap for 'Dark Horse,' Jury Says*, LAW360 (July 29, 2019, 8:12 PM), https://www.law360.com/articles/1182537.

[47] Abad-Santos, *supra* note 30. It does not appear that Perry's counsel raised a fair use defense. *See Gray*, 2019 WL 2992007, at *1–23.

[48] Yvette Joy Liebesman, *Revisiting Innovative Technologies to Determine Substantial Similarity in Musical Composition Infringement Lawsuits*, 59 IDEA 157, 162 (2018).

[49] Rogoyski, *supra* note 2, at 408.

[50] U.S. CONST. art. I, § 8, cl. 8.

transformative under the fair use doctrine,[51] courts should consider contextual differences between the works such as the genre, message, and character of the artist. The target audiences of both works should also be significant in weighing the fourth factor, the potential effect the secondary work would have on the market for the copyrighted work. Such a test would serve copyright law's goal of promoting progress in the arts by tolerating the inevitable overlap in melodies in pop music as well as allowing artists to incorporate established, simple melodies in new contexts to create transformative works.

I. FUNDAMENTAL MUSICOLOGY AND THE PROBLEMATIC TREND IN RECENT MUSIC COPYRIGHT CASE LAW

To analyze court rulings in this area, it is critical to understand the specific aspects of music that are the subject of litigation. Two key elements in music are melody and rhythm.[52] Melody is a "coherent succession of pitches"[53] that comprise "the tune or theme around which a piece of music is constructed."[54] A melody may span one or more measures, which the casual listener will recognize when counting "1—2—3—4" to a song that is in the time signature of 4/4.[55] Rhythm, on the other hand, refers to the timing of notes,[56] indicated by designating a note as being a whole, half, quarter,

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[51] 17 U.S.C. § 107 (2018).

[52] HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 499.

[53] *Id.*

[54] John R. Autry, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, 10 J. INTELL. PROP. L. 113, 121 (2002).

[55] A measure is a "unit of musical time consisting of a fixed number of note-values of a given type, as determined by the prevailing meter, and delimited in musical notation by two bar lines." HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 496. Time signature is the "sign placed at the beginning of a composition to indicate its meter," often in "the form of a fraction." *Id.* at 893. Meter is the "pattern in which a steady succession of rhythmic pulses is organized; also termed time." *Id.* at 506.

[56] Rhythm is defined as the "pattern of movement in time." *Id.* at 723. It is related to tempo, which is the "speed at which music is performed." *Id.* at 873.

eighth, or sixteenth note.[57] A familiar example of a piece of music primarily consisting of quarter notes is "Jingle Bells."[58]

There are twelve distinct notes in Western music, but only seven are used in some keys.[59] A song's key is comprised of notes from a "particular major or minor scale."[60] The key of C major, for example, consists of the notes C, D, E, F, G, A, and B.[61] In total, there are twenty-four different keys.[62] "Dark Horse," for instance, is in the key of Bb minor.[63] "Joyful Noise," on the other hand, is in C major.[64]

Melodies in different key signatures may still consist of similar intervals and sound similar as a result. An interval is the "relationship between two pitches."[65] For example, playing the note C and then the note B results in an interval called a minor second.[66] C# to C is a minor second as well.[67] A classic example of this interval is the theme from *Jaws*, which repeats a minor second to build tension.[68] Therefore, a melody written in one key signature can

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[57] *Note Duration*, MUSIC THEORY, https://www.musictheory.net/lessons/11 (last visited Feb. 4, 2020).

[58] *Jingle Bells Sheet Music*, CHRISTMAS MUSIC SONGS, https://www.christmasmusicsongs.com/jingle-bells-sheet-music.html (last visited Feb. 4, 2020).

[59] HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 757–58.

[60] *Id.* at 442. Scale is a "collection of pitches arranged in order from lowest to highest or from highest to lowest." *Id.* at 757.

[61] *The Major Scale*, MUSIC THEORY, https://www.musictheory.net/lessons/21 (last visited Feb. 4, 2020).

[62] HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 442.

[63] *See* Abad-Santos, *supra* note 30 (indicating the key signature of "Dark Horse" on the sheet music).

[64] *See id.* (indicating the key signature of "Joyful Noise" on the sheet music).

[65] HARVARD DICTIONARY OF MUSIC, *supra* note 39.

[66] *See id.*

[67] *See id.*

[68] Giorgio Biancorosso, *The Shark in the Music*, 29 MUSIC ANALYSIS 306, 306 (2010).

be transposed[69] to a higher key, resulting in a different set of notes, but can still sound like the same melody.

The two-measure synth[70] melody in question in *Gray v. Perry* repeats throughout the verses of "Dark Horse."[71] It consists of only four different notes and is played as follows: C#— C#— C#— C#— C—C—A#—F.[72] Each is a quarter note played staccato—as a note of shortened duration.[73] Throughout the verses, the melody mainly sits in the background while Perry sings.[74] That same instrument plays a different melody underneath Perry's vocals during the song's intro and chorus,[75] which in pop music is generally considered to be the "hook" or most memorable part of a song.[76] That melody is as follows: C#—C—A#—F. Each is played as an eighth note.[77]

On the other hand, the four-measure melody in "Joyful Noise" is an ostinato that is played throughout the entire song.[78] This is typical of most rap beats.[79] The first two measures consist of the notes C—C—C—C—B—B—A, while the last two measures

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[69] Transposition involves "raising or lowering each pitch of the original music by precisely the same interval." HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 904.

[70] A synthesizer is "[a]n instrument that produces sounds, modifies them, and in some circumstances orders them in time by purely electronic means." HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 862.

[71] Abad-Santos, *supra* note 30.

[72] *Id.*

[73] *Id.*; HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 839 ("Notes to be played in this fashion, marked by a dot (now most common), a solid black wedge, or a vertical stroke above or below, are decisively shortened in duration and thus clearly separated from the note following.").

[74] KATY PERRY, *Dark Horse*, *on* PRISM (Capitol Records 2013).

[75] *See* Abad-Santos, *supra* note 30.

[76] Cole, *supra* note 23.

[77] Abad-Santos, *supra* note 30.

[78] An ostinato is a "short musical pattern that is repeated persistently throughout a performance or composition or a section of one." HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 624.

[79] *See* Phil Witmer, *21 Savage's 'Issa Album' Sounds Chilling Because Science Says It Should Be*, VICE (July 12, 2017, 3:44 PM), https://www.vice.com/en_us/article/xwzv8a/21-savages-trap-sounds-chilling-because-music-theory.

consist of the notes C—C—C—C—B—B—F.[80] Each is played as a staccato quarter note.[81] While the notes in the verse of "Dark Horse" are not identical to those in the "Joyful Noise" melody, they sound alike because they contain similar intervals—the transition in the "Dark Horse" melody from C# to C and the transition in the "Joyful Noise" melody from C to B both result in a minor second.[82] This similarity is bolstered by the fact that both are played as quarter notes.[83]

Perry's verdict has already sent shockwaves throughout the music industry and raised concerns about its potentially stifling impact on artists' creativity.[84] However, it is only the latest development in a recent trend of courts finding infringement on questionable grounds.[85] In *Williams v. Bridgeport Music, Inc.*, which revolved around a lawsuit brought in 2015, a jury found that artists Pharrell Williams and Robin Thicke's song "Blurred Lines" infringed on Marvin Gaye's "Got to Give It Up" "simply because the 'groove' of the two songs sounded similar."[86] Williams and Thicke were open about the fact that Gaye's song inspired "Blurred Lines," but there are multiple compositional differences between the two songs.[87] Many in the music industry decried the verdict as opening the floodgates to litigation against songs that are merely inspired by or pay homage to prior works.[88] Nevertheless, the verdict was upheld on appeal because the Ninth Circuit found that

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[80] *See* Abad-Santos, *supra* note 30.

[81] *See id.*

[82] *Id.*

[83] *Id.*

[84] Dalton, *supra* note 25; D'Souza, *Dark Horse*, *supra* note 8.

[85] *See* Williams v. Bridgeport Music, Inc., No. LA CV13-06004-JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

[86] John Quagliariello, *Blurring the Lines: The Impact of* Williams v. Gaye *on Music Composition*, 10 HARV. J. SPORTS & ENT. L. 133, 138 (2019) (citing *Bridgeport Music, Inc.*, 2015 WL 4479500, at *1).

[87] Williams v. Gaye, 885 F.3d 1150, 1161 (9th Cir. 2018). Defendants' expert noted differences between the songs regarding, *inter alia*, bass lines and keyboard parts. *Id.*

[88] Amy Phillips, *Jury Rules Pharrell and Robin Thicke's "Blurred Lines" Copied Marvin Gaye*, PITCHFORK (Mar. 10, 2015), https://pitchfork.com/news/58743-jury-rules-pharrell-and-robin-thickes-blurred-lines-copied-marvin-gaye/.

the verdict in the lower court was not against the clear weight of the evidence.[89] In a more recent case, the estate of one of Marvin Gaye's co-writers brought suit against singer-songwriter Ed Sheeran, claiming that Sheeran's song "Thinking Out Loud" infringed on Gaye's song "Let's Get It On."[90] While that case has not yet gone to trial, the Southern District of New York denied Sheeran's motion for summary judgment, which asserted that the allegedly infringing elements were "commonplace."[91]

Numerous other infringement claims based on musical elements are currently being brought against high-profile musicians or being settled out of court.[92] This suggests that there may be a change in the landscape of copyright law that grants more power to plaintiffs and pressures defendants to settle claims based on simple, arguably commonplace musical elements.[93] For example, the band Radiohead recently settled a lawsuit against Lana Del Rey over alleged similarities between the former's "Creep" and the latter's "Get Free."[94] Aside from some melodic similarities, however, the songs merely share a chord progression, which is an unprotectable musical element in copyright.[95] While the motivations for the settlement are unclear, it is possible that the current litigious atmosphere in pop

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[89] *Williams*, 885 F.3d at 1172.

[90] Griffin v. Sheeran, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019).

[91] *Id.*

[92] Shaad D'Souza, *Lil Nas X and Cardi B Sued for Copyright Infringement*, THE FADER (Oct. 7, 2019), https://www.thefader.com/2019/10/07/lil-nas-x-cardi-b-sued-copyright-infringement-rodeo-2019.

[93] *Id.*; Laura Snapes, *Lana Del Rey Claims Her Copyright Dispute with Radiohead Is Over*, THE GUARDIAN (Mar. 26, 2018), https://www.theguardian.com/music/2018/mar/26/lana-del-rey-claims-copyright-dispute-radiohead-over-creep-get-free.

[94] *Id.*

[95] *Griffin*, 351 F. Supp. 3d at 497 ("[U]nprotectable elements include key, meter, tempo, common song structures, common chord progressions, common melodies, and common percussive rhythms."); Niko Kommenda, *Did Lana Del Rey Plagiarise Radiohead? A Note-by-Note Analysis*, THE GUARDIAN (Mar. 26, 2018), https://www.theguardian.com/music/ng-interactive/2018/mar/26/did-lana-del-rey-plagiarise-radiohead-note-by-note-analysis.

music made Del Rey's counsel uncertain as to their likelihood of success at trial.[96]

Unlike cases claiming infringement of melodies, this trend does not appear to have affected infringement cases based on lyrics.[97] Decided in early 2018, *Hall v. Swift* involved claims that lyrics in the chorus of Taylor Swift's "Shake It Off" infringed on the group 3LW's song "Playas Gon' Play."[98] The lyrics at issue were two three-word phrases found in both songs' choruses: "players gonna play" and "haters gonna hate."[99] The lyrics at issue were found to be "not sufficiently creative to warrant protection" because they simply communicated the "concept of actors acting in accordance with their essential nature."[100] Similarly, in *Oyewole v. Ora*, the Southern District of New York rejected claims that The Notorious B.I.G.'s song "Party and Bullshit" and Rita Ora's "How We Do (Party)" infringed on the plaintiff The Last Poets's work "When the Revolution Comes," despite all three works having used the phrase "party and bullshit."[101] The court found that the defendants' use of the phrase "party and bullshit" qualified as fair because the defendants' use was "sufficiently transformative" in that defendants used the phrase in different contexts to convey very different messages.[102]

One possible reason for this disparity could be that factfinders are typically not musicians themselves and therefore do not come to court with the background knowledge necessary to fully understand

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[96] *See* Snapes, *supra* note 93.

[97] *See* Oyewole v. Ora, 291 F. Supp. 3d 422, 434 (S.D.N.Y. 2018).

[98] Hall v. Swift, No. CV 17-6882-MWF(ASx), 2018 WL 2317548, at *1 (C.D. Cal. Mar. 2, 2018).

[99] *Id.* at *1–2.

[100] *Id.* at *8. The Ninth Circuit recently reversed, finding that the lower court erroneously "constituted itself as the final judge of the worth of an expressive work" in determining that the short phrase was not sufficiently original to warrant protection under the Copyright Act. Hall v. Swift, No. 18-55426(ADH)(JBO)(KKL), 2019 WL 5543864, at *1 (9th Cir. Oct. 28, 2019).

[101] *Oyewole*, 291 F. Supp. 3d at 436.

[102] *Id.* at 434 (finding that the plaintiff's song criticizes those who would "'party and bull shit' until the revolution comes," whereas the defendants' songs use the phrase to glorify such a lifestyle).

expert testimony or evaluate the originality of a melody.[103] On the other hand, factfinders are obviously experienced with written and spoken language and therefore may be better equipped to recognize when a phrase or lyric is not sufficiently original and therefore not entitled to copyright protection.[104] However, there is no reason why short melodies such as the one in *Perry* should be treated differently than short lyrical phrases such as those seen in *Swift* and *Oyewole*; just as the limited words in a language make the reoccurrence of short phrases inevitable and permissible, there are only so many "permutations of the musical notes of the scale . . . that are pleasing."[105] Furthermore, like lyrics, melodies can be used to communicate artistic messages.[106] Incorporating a familiar melody in a new context can create an intriguing creative contrast that allows listeners to think of the melody in a new way.[107]

II. THE CURRENT FRAMEWORK OF MUSIC COPYRIGHT LAW

The Copyright Act grants exclusive rights to creators.[108] However, these rights are limited to only original elements so as to avoid stifling the creation of new works.[109] To establish a claim for copyright infringement, a plaintiff must show that the defendant's work is substantially similar, which often involves an analysis of the defendant's access to a work, expert testimony regarding the musicological aspects of the works, and lay listeners' reactions to the works.[110] Even if a defendant's work is found to be substantially

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[103] *See* Jamie Lund, *Fixing Music Copyright*, 79 BROOK. L. REV. 61, 64 (2013).

[104] *See Hall*, 2018 WL 2317548, at *8 (holding that the short lyrical phrase was too commonplace to be protectable).

[105] Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940).

[106] Jayson Greene, *United Nations: The Next Four Years*, PITCHFORK (July 15, 2014), https://pitchfork.com/reviews/albums/19638-united-nations-the-next-four-years/ (noting that the guitar riff in a song is reminiscent of the theme from *The Phantom of the Opera* and describing it as a "fascinating little quote").

[107] *See id.*

[108] *See infra* Section II.A.

[109] *See id.*

[110] *See infra* Section II.B.

similar, however, the fair use doctrine is available as an affirmative defense.[111]

A. What Musical Elements Are Protectable Under Copyright Law?

U.S. copyright law aims at promoting the creation of new works with the assumption that doing so will enrich our culture.[112] This policy goal necessitates a balance between two competing interests: those of the first author and those of others who seek to build upon prior works.[113] Granting exclusive rights[114] to an author incentivizes the creation of new works because that author can feel assured that the fruits of their labor will not go unrewarded.[115] On the other hand,

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[111] *See infra* Section II.C.

[112] *See* U.S. CONST. art. I, § 8, cl. 8; *see also* Craig Joyce & L. Ray Patterson, *Copyright in 1971: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article 1, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 912–13 (2003) ("[T]he Founders viewed the Copyright Clause and the Free Press Clause . . . as complementary components of a coherent schema for fostering the creation and dissemination of learning throughout the new nation.").

[113] *See* JULIE COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 8 (4th ed. 2015).

[114] A copyright owner has the rights:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based on the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work . . . ;
> (4) . . . to perform the copyrighted work publicly;
> (5) . . . to display the copyrighted work publicly; and
> (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106(a) (2018).

[115] *See* Authors Guild v. Google, 804 F.3d 202, 212 (2d Cir. 2015) ("The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption."); *see also* Lemley, *supra* note 13 ("Copyright operates to promote [the promotion of learning, the provision of public access, and the protection of public domain] by

limiting the scope of those rights opens the door for other artists to create new works without walking on eggshells for fear of infringement liability.[116] Tipping the balance too far in one direction or another, therefore, threatens to deter the creation of new works, either because creating new works would no longer be profitable or because it would subject one to liability.[117] For this reason, the Copyright Act does not prohibit *all* forms of copying—ideas, for example, are not protectable under the Act such that their copying is unlimited.[118] Doing otherwise would place an undue burden on creativity by preventing new creators from building on top of others' previous works.[119]

Instead, copyright protection under the Act applies to "original works of authorship," a category which includes musical works and their accompanying words.[120] With regard to musical compositions, "individual elements of a song, such as notes or a scale, may not be protectable."[121] For example, an owner of a copyright for a musical composition could not protect the use of a C major chord in a song.[122] Doing so would grant one artist a monopoly over the essential building blocks of a song, thereby limiting other artists' ability to create new works.[123]

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granting individual rights for individual works. These rights provide authors with incentives to create new works.").

[116] *See* COHEN ET AL., *supra* note 113.

[117] *See, e.g.*, *Authors Guild*, 804 F.3d at 212 ("[G]iving authors *absolute* control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge.").

[118] "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, regardless of the form in which it is described, explained, illustrated, or embodied in such work." § 102(b).

[119] *See* Mattel, Inc. v. MGA Entertainment, Inc., 616 F.3d 904, 913–14 (9th Cir. 2010).

[120] § 102(a).

[121] Skidmore v. Zeppelin, 905 F.3d 1116, 1126 (9th Cir. 2018).

[122] *See* Swirsky v. Carey, 376 F.3d 841, 851 (9th Cir. 2004) ("[O]ne would not want to give the first author a monopoly over the note B-flat, for example.").

[123] *See id.*

A copyrightable work only requires minimal creativity,[124] however, as "[t]here is a low bar for originality."[125] In fact, "a combination of unprotectable elements is eligible for copyright protection . . . if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship."[126] In other words, while a single note is not copyrightable, a sequence of several notes may be.[127] Given the "low bar for originality," even a musical phrase as short as four notes can be protectable under the Act.[128]

The exact point at which a sequence of notes becomes protectable, however, is unclear.[129] In fact, for any subject matter, but especially for musical compositions, "no bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity."[130] In *Newton v. Diamond*, the Ninth Circuit held that a sequence of "C—D[b]—C, over a held C note . . . lacked sufficient originality to merit copyright protection."[131] In *Elsmere Music v. National Broadcasting Co*., however, the court found a sequence of D—C—D—E to be protectable.[132] To be sure, there is more to a melody's originality than the variety of notes played and the number of times they are repeated—rhythm is essential to a melody's character.[133]

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[124] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991).

[125] *Swirsky*, 376 F.3d at 851.

[126] Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003).

[127] *Swirsky*, 376 F.3d at 851.

[128] Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741, 744 (S.D.N.Y. 1980).

[129] *Compare* Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004), *with Elsmere Music, Inc.*, 482 F. Supp. at 744.

[130] Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987).

[131] *Newton*, 388 F.3d at 1190.

[132] *Elsmere Music, Inc.*, 482 F. Supp. at 744.

[133] *See Newton*, 388 F.3d at 1196 (noting that defendants' expert witness described the challenged portion of plaintiff's composition as being a "common building block tool" that lacked "any distinct melodic, harmonic, rhythmic or structural elements").

Nevertheless, courts' analysis of originality with regard to melodies appears to lack formal guidelines.[134]

B. Establishing a Claim for Music Copyright Infringement

Even if a musical composition is sufficiently original to warrant protection, its owner still must show infringement in litigation.[135] A claim for copyright infringement requires that a "defendant copied from [a] plaintiff's copyrighted work" and "that the copying . . . went so far as to constitute improper appropriation."[136] The first of these requirements is satisfied by showing "access plus substantial similarity of expression between the works" or "'striking' similarity between the works."[137] Access refers to the likelihood that the defendant had heard the plaintiff's work.[138] The analysis considers the popularity of a song measured by objective factors such as record sales and radio performances.[139] The plaintiffs in *Gray v. Perry*, for example, sought to establish widespread dissemination through the number of plays "Joyful Noise" had on Myspace and YouTube.[140] Under the Ninth Circuit's Inverse-Ratio Rule, a weak showing of substantial similarity between songs can

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[134] *Compare Newton*, 388 F.3d at 1190, *with Elsmere Music, Inc.*, 482 F. Supp. at 744.

[135] *See Newton*, 388 F.3d at 1192 (holding that even if plaintiff's musical composition were sufficiently original, defendants' use was "*de minimis*" and therefore not actionable).

[136] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[137] Yvette Joy Liebesman, *Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes*, 35 AIPLA 331, 336 (2007) [hereinafter Liebesman, *Using Innovative Technologies*].

[138] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) ("Circumstantial evidence of reasonable access is proven in one of two ways: (1) a particular chain of events is established between the plaintiff's work and the defendant's access to that work (such as through dealings with a publisher or record company), or (2) the plaintiff's work has been widely disseminated.").

[139] *Id.* at 482–83.

[140] Gray v. Perry, No. 2:15-cv-05642-CAS(JCx), 2019 WL 2992007, at *1 (C.D. Cal. 2019).

be outweighed by a stronger showing of access.[141] Therefore, even if the second artist's song only contains a minor element found in the primary artist's song, the second artist may be found to have copied the primary artist's song if that song was, for example, a Top 40 hit.[142]

The Ninth Circuit, the predominant circuit in music copyright issues, applies a two-part objective-extrinsic and subjective-intrinsic test to determine questions of substantial similarity.[143] First, "[t]he extrinsic test considers whether two works share a similarity of ideas and expression as measured by external, objective criteria."[144] This determination requires that the court "distinguish between the protected and unprotected material in a plaintiff's work" and often involves expert testimony from musicologists who analyze the works' melodic, harmonic, rhythmic, and structural elements.[145] For example, an expert witness may testify that two songs are in the same key signature, use similar chord changes, and have similarly structured choruses.[146] This analysis can become quite technical and go as far as to highlight not only the notes in a melody, but how those notes work harmonically with basslines and chord progressions.[147] Such elements are sometimes presented to a jury using visual transcriptions created by the expert musicologist.[148] Courts have often reached inconsistent results based on such expert testimony,[149] and some have criticized this approach as ignoring the

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[141] *See Bolton*, 212 F.3d at 486. For example, a song by a relatively unknown artist with a small audience would not have a strong showing of access. But if a defendant's song has an identical melody to the plaintiff's as opposed to just a *similar* melody, that weak showing of access can be outweighed. *See id.*

[142] *See id.*

[143] Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

[144] *Id.*

[145] Liebesman, *Using Innovative Technologies*, *supra* note 137, at 337–39 (quoting *Swirsky*, 376 F.3d at 845).

[146] *See Swirsky*, 376 F.3d at 845.

[147] *See id.* at 847 ("Dr. Walser opined that, even though measure three of both choruses were not identical in numerical pitch sequence or note selection, they both 'emphasized the second scale degree, C, over an A in the bass, resolving to the third scale degree, D, over a D in the bass in the last half of the measure.'").

[148] *See Swirsky*, 376 F.3d at 846.

[149] *See* Autry, *supra* note 54, at 113.

cultural elements of genre.[150] While experts in musicology may be able to effectively analyze a musical composition in terms of music theory, they may lack an understanding of the particular nuances of a genre.[151]

In *Perry*, the defendants' expert identified the musical element at issue as an ostinato and listed the moments in which it appears in each song.[152] He also noted that "Dark Horse" is in the key of Bb minor and employs instruments such as synthesizers, electric guitar, sub bass, and electronic drums.[153] His analysis also included a quantitative value assessment, which "quantifies the amount of music at issue within the overall composition."[154] The expert found that the music at issue constituted only 3.6% of the overall composition because it consisted of 207 "note heads" out of a total of 3,087 throughout the musical portion of the song, which made up half of the overall composition next to the lyrics.[155]

The expert's *qualitative* value assessment then measured the importance of the musical element at issue to the overall composition.[156] The hook of a song, for example, is often of higher importance than other elements because it is more memorable.[157] Therefore, even if a hook takes up only a small portion of the overall music, its quantitative value may be increased because of its importance to the song.[158] The expert in *Perry* found that the qualitative value of the challenged ostinato in "Dark Horse"

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[150] Liebesman, *Using Innovative Technologies*, *supra* note 137, at 345 ("A classically trained musician could listen to a rap or jazz song without fully appreciating rhythmic nuances or subtle melodic changes in the singer's voice.").

[151] *Id.* ("A classically trained musician could listen to a rap or jazz song without fully appreciating rhythmic nuances or subtle melodic changes in the singer's voice.").

[152] Report or Affidavit of Lawrence Ferrara, Ph.D., Gray v. Perry, No. 215-cv-05642-CAS(JCx), 2019 WL 4541739, at *3 (C.D. Cal. 2019).

[153] *Id.* at *4–5.

[154] *Id.* at *8.

[155] *Id.* at *12.

[156] *Id.* at *13.

[157] *Id.*

[158] *Id.*

weighed in favor of decreasing its quantitative value because of its limited importance to the song.[159]

The intrinsic test, on the other hand, requires the factfinder to determine "whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."[160] As the name implies, the intrinsic test essentially measures the average listener's gut reaction to songs' similarities.[161] This involves an inquiry as to "whether [the] defendant took from [the] plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that the defendant wrongfully appropriated something which belongs to the plaintiff."[162]

A plaintiff will not succeed in an action for infringement if the defendant's use of the work is found to be *de minimis*, which means that the amount taken is so small that "the average audience would not recognize the appropriation."[163] In other words, the question is whether an ordinary non-musician would realize that the second work took a creative element from the primary work.[164] The copied element must be substantial, where substantiality is "measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."[165] The substantiality of the copied portion to the *defendant's* work, however, is not a relevant factor.[166] For example, the fact that the challenged melody in "Dark Horse" only occurs during the verses is

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[159] *Id.*

[160] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (quoting Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991)).

[161] *See id.*

[162] Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (suggesting that a "lay listener" is the average audience member who lacks musical expertise).

[163] Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004).

[164] *See id.* at 1193.

[165] *Id.* at 1195.

[166] *Id.* (citing Worth v. Selchow & Righter Co., 827 F.2d 569, 570 n.1 (9th Cir. 1987)).

irrelevant under the current scheme.[167] Instead, the fact that the ostinato in "Joyful Noise" occurs throughout the entire song would currently preclude a finding of *de minimis* use.[168]

C. *The Fair Use Doctrine as Applied to Other Types of Infringement*

The fair use doctrine is meant to further "copyright law's goal of 'promoting the Progress of Science and useful Arts'"[169] by protecting secondary works that transform an original work into "new information, new aesthetics, new insights and understandings." It provides for an affirmative defense against infringement, and it is "intended to protect secondary works that 'add value to the original,' that use the original work 'as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.'" [170] While the Act lists numerous purposes that fall within fair use, its language indicates that the list is not exhaustive.[171]

The test for fair use considers "the purpose and character of the use[,] . . . the nature of the copyrighted work[,] . . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "the effect of the use upon the potential market for or value of the copyrighted work."[172] The first of these factors

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[167] *Worth*, 827 F.2d 569, 570 n.1; *see also* Abad-Santos, *supra* note 30 (indicating that the melody at issue in *Gray v. Perry* occurs during the verse of "Dark Horse").

[168] *See Newton*, 388 F.3d at 1195; *see also* Abad-Santos, *supra* note 30 (indicating that the melody at issue in *Gray v. Perry* is present throughout the entirety of "Joyful Noise").

[169] Cariou v. Prince, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998)).

[170] Oyewole v. Ora, 291 F. Supp. 3d 422, 433 (S.D.N.Y. 2018) (quoting *Castle Rock Entm't, Inc.*, 150 F.3d at 142).

[171] "[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (2018).

[172] *Oyewole*, 291 F. Supp. 3d at 432.

considers "whether the new work uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created."[173] Therefore, even if a new work borrows elements from an earlier work, fair use may provide a defense against infringement if the new work has transformed the copied element into a new context with a new message.[174] In *Oyewole v. Ora*, the defendants had a fair use defense against infringement because their use of the phrase "party and bull shit" was sufficiently transformative: "'Party and Bullshit' and 'Party' transform the purpose of the phrase 'party and bullshit' from one of condemnation to one of glorification."[175] Therefore, this first factor weighs in favor of a defendant if that defendant uses an earlier work in such a way that its meaning and character is transformed.[176]

The second factor, the nature of the copyrighted work, considers "whether the [original] work is expressive or creative . . . with greater leeway being allowed to a claim of fair use where the work is factual or informational."[177] As such, the indisputably expressive and creative nature of songs—and the melodies within them—weighs against a finding of fair use.[178] However, some courts consider this factor to "be of limited usefulness where the creative work of art is being used for a transformative purpose."[179] Therefore, the fair use doctrine could ostensibly permit the use of a protected melody if the other factors weigh in favor of the defendant's use.[180]

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[173] TCA Television Corp. v. McCollum, 839 F.3d 168, 180 (2d Cir. 2016).

[174] *See id.* at 179.

[175] *Oyewole*, 291 F. Supp. 3d at 434.

[176] *See id.*

[177] Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006) (quoting 2 HOWARD B. ABRAMS & TYLER T. OCHOA, THE LAW OF COPYRIGHT § 15:52 (2006)).

[178] *See id.*

[179] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006).

[180] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (holding that the nature of the copyrighted work does not "help much in separating the fair use sheep from the infringing goats" in a case involving a transformative work).

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, measures both the quantity and quality of what the secondary artist has taken.[181] A secondary use may take only a small percentage of an overall work, but that percentage may nonetheless constitute the "heart" of the work.[182] With regard to quantity, the court in *Oyewole* noted that the phrase "party and bullshit" was repeated several times at the end of the plaintiff's song but did not appear anywhere else.[183] The amount used in the defendants' songs, therefore, was fairly low.[184] With regard to quality, the court found that although the phrase "party and bullshit" reinforced the plaintiff's message that "their listeners should prepare for and commit to the revolution," it was not "critically important to the song's message."[185] The phrase, therefore, did not constitute the heart of the work.[186] Like the aforementioned *de minimis* use doctrine, this factor does not consider how much the copied portion comprises the secondary artist's work or whether it constitutes the heart of the secondary work.[187]

The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, looks to "whether the secondary use usurps the market of the original work."[188] In other words, in determining whether there has been market harm, courts look to whether consumers who would otherwise be in the market for the original work would turn to the secondary work as a

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[181] Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013). This factor parallels the criteria for *de minimis* use. Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004).

[182] Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1275 (11th Cir. 2014); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 540–41 (1985) (holding that the fair use doctrine does not apply merely because a defendant has only used an "insubstantial portion" of a plaintiff's work).

[183] Oyewole v. Ora, 291 F. Supp. 3d 422, 435 (S.D.N.Y. 2018).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Compare* Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004), *with* Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013).

[188] Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006).

substitute.[189] This includes a consideration of the original work's target audience.[190] If the secondary work appeals to a different category of consumers than does the original, a court may find that the market for the original work has not been harmed.[191] Such a finding is even more likely if the secondary use is transformative.[192] In *Oyewole*, the court found that this factor weighed in the defendants' favor because it was "unlikely that [d]efendants' target audience and [plaintiff's] audience [we]re the same."[193] Without explicitly stating so, the court appears to have seen a distinction between the appeal of the plaintiff's overtly political music and that of mainstream rap and pop music.[194] The court also noted that, even if the plaintiff and defendants' works shared the same audience, the differences between the works precluded a finding that such an audience would turn to the defendants' songs as a substitute for "When the Revolution Comes."[195]

The fair use defense, however, is rarely raised in copyright infringement cases involving musical works.[196] One possible reason for this is that defendants often find other ways to defeat an infringement claim, such as showing that they lacked access to a plaintiff's work or that their works were not substantially similar.[197] However, even defendants who ultimately lose infringement cases appear to pass on the fair use defense.[198] Another possible reason is the mere "lack of clear precedent," which may make litigators

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[189] *See Cariou*, 714 F.3d at 708–09.

[190] *Id.* at 709.

[191] *Id.* (holding that the market harm factor favored defendant because defendant's artwork appealed to a different sort of collector than plaintiff's).

[192] Castle Rock Entm't, Inc. v. Carol Publ'g. Grp, Inc., 150 F.3d 132, 145 (2d Cir. 1998).

[193] Oyewole v. Ora, 291 F. Supp. 3d 422, 436 (S.D.N.Y. 2018).

[194] *See id.*

[195] *Id.*

[196] Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1900 (2018).

[197] *Id.* at 1902–03.

[198] *Id.* at 1904.

uneasy about pursuing—and courts hesitant to rule on—such arguments.[199]

III. A NEW APPROACH FOR COURTS EVALUATING CLAIMS FOR COPYRIGHT INFRINGEMENT BASED ON MELODIES

Over the past several decades, defendants have largely been able to defeat infringement claims in music cases.[200] However, the current trend in such cases indicates that defendants' fortunes may be changing.[201] Courts have recently been adept at finding short lyrical phrases insufficiently original for protection against infringement, or, if protectable, subject to the fair use doctrine.[202] But the same cannot be said of cases involving short melodies in musical compositions.[203] While lyrics may more obviously serve as a vehicle for an artist's message, the use of a melody can have communicative value as well.[204] Melodies, therefore, deserve similar treatment under copyright law.

Although evaluating questions of originality and fair use must necessarily involve some level of discretion,[205] it is clear that courts need a more structured approach in the context of musical

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[199] *Id.* at 1919–20.

[200] *Id.* at 1897, 1900 (finding that from 1978 to 2018, 82.7% of music cases resulted in a finding of no infringement).

[201] D'Souza, *Dark Horse*, *supra* note 8.

[202] *See* Oyewole v. Ora, 291 F. Supp. 3d 422, 434 (S.D.N.Y. 2018); *see also* Braham v. Sony, No. 2:15-cv-8422-MWF(GJSx), 2015 WL 7074571 (C.D. Cal. Nov. 10, 2015) (holding that the phrases "[p]layas, they gonna play" and "haters, they gonna hate" lacked the "modicum of originality and creativity required for copyright protection"). *But cf.* Hall v. Swift, 782 F. App'x 639 (9th Cir. 2019), *opinion amended and superseded*, 786 F. App'x 711 (9th Cir. 2019) (reversing a dismissal of a lawsuit involving the same lyrics, holding that the complaint plausibly alleged originality).

[203] *See* Dalton, *supra* note 25.

[204] Greene, *supra* note 106 (noting that the guitar riff in a song is reminiscent of the theme from *The Phantom of the Opera* and describing it as a "fascinating little quote").

[205] Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1259 (11th Cir. 2014) ("Fair use must be determined on a case-by-case basis, by applying the four factors to each work at issue.").

compositions.[206] A new approach to originality, substantial similarity, and fair use is needed to ensure that infringement cases are dealt with in a thorough and productive manner. Such a test would help prevent the "basic building blocks"[207] of musical composition from being monopolized at the expense of future creators and would better enable copyright law's fundamental goal of promoting progress in the arts.

A. A New Test for Originality with Regard to Melodies

First, courts should apply a sliding-scale test based on the complexity of the allegedly infringed melody to determine whether a melody is sufficiently original to be protectable. The more complicated the melody—*i.e.*, spanning more measures, involving a more intricate arrangement of notes and rhythms—the more likely the melody will be sufficiently original. On the other hand, the simplicity of a melody should weigh against a finding of originality. For example, a two-measure melody consisting of only three different notes all played as quarter notes would be less likely to be original than a four-measure melody consisting of seven different notes and involving a combination of quarter notes, eighth notes, and sixteenth notes.[208] Such a finding would be rebuttable by a showing that the melody is "common, trite, and generic."[209]

This would not be a bright line rule and would therefore leave room for some level of judicial discretion. Furthermore, such a test

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[206] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (noting that judges may not be qualified to make determinations regarding an artistic work's merit).

[207] Dalton, *supra* note 25; *see also* Swirsky v. Carey, 376 F.3d 841, 851 (9th Cir. 2004) ("[O]ne would not want to give the first author a monopoly over the note B-flat for example.").

[208] "Types of notes are classified and named according to the relationship of their duration to one another." HARVARD DICTIONARY OF MUSIC, *supra* note 39, at 571. Quarter notes last for one quarter of a measure. *See id.* Eighth notes, on the other hand, are twice as fast as quarter notes. *See id.* The challenged melody in *Perry*, for example, consists exclusively of quarter notes. Abad-Santos, *supra* note 30.

[209] Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004).

is not drastically different from courts' current approach,[210] but the sliding-scale would define the parameters in which courts' discretion can be used. It would not raise the "low bar for originality"[211]—it would simply place that bar in sharper relief. This would allow for a case-by-case analysis while reflecting the principle that judges may be ill-equipped to make determinations about a work's artistic merit.[212]

With regard to *Gray v. Perry*, the melody in "Joyful Noise" could arguably still be considered original under this sliding-scale test.[213] To be sure, very similar melodies have appeared in earlier works besides those of Gray and Perry, and the use of only several different notes all played as quarter notes indicates that the melody is quite simple.[214] Nevertheless, it *does* have "distinct melodic . . . rhythmic [and] structural elements."[215] Given the "low threshold for originality," the melody would likely still be protectable.[216]

B. Revising the De Minimis Use Doctrine: Including Extent of the Challenged Melody's Use in the Secondary Work

In analyzing songs' substantial similarity, courts should also consider the extent to which the challenged melody is a substantial portion of the *defendant's* song and find the use to be *de minimis* when the defendant has used the melody as a background element rather than the focal point of a song.[217] In other words, when a defendant has used the challenged melody as the hook of their song, that use will not be *de minimis* because a hook is typically the song's

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[210] *See id.* at 1195.

[211] *Swirsky*, 376 F.3d at 851 (quoting ETS–Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1073 (9th Cir. 2000)).

[212] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[213] FLAME, *Joyful Noise*, *on* OUR WORLD REDEEMED (Cross Movement Records 2008).

[214] *See* Abad-Santos, *supra* note 30.

[215] *Newton*, 388 F.3d at 1196.

[216] *See Swirsky*, 376 F.3d at 851.

[217] *See Newton*, 388 F.3d at 1195.

most memorable element.[218] However, when a challenged melody only appears during a verse and is played by an instrument intended to take a backseat to a vocal melody, that use should be found to be *de minimis*.[219]

In applying this revision to the *de minimis* use doctrine to *Perry*, a court would find that the melody in "Joyful Noise" comprises a significant portion of the work because it is an ostinato played throughout the entire song.[220] However, in examining the use of the melody in "Dark Horse," that court would note that the challenged melody only appears in the verses and occupies the background to Perry's vocals.[221] The court would further note that the melody is not the hook of the song. This would result in a finding that the melody does not constitute a significant portion of "Dark Horse" and that the use is, therefore, *de minimis*.[222]

To be sure, this would be a radical revision of courts' approach to substantial similarity.[223] Realistically, courts would be very reluctant to entertain such a departure from precedent.[224] However, given the limited compositional tools available to pop music creators and the resulting likelihood of overlap, such an expansion would allow musicians the necessary space to create freely when their uses of protected melodies do not constitute the hooks of their songs.[225]

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[218] *See* Report or Affidavit of Lawrence Ferrara, *supra* note 152.

[219] Abad-Santos, *supra* note 30.

[220] *Newton*, 388 F.3d at 1195; FLAME, *Joyful Noise*, *supra* note 213.

[221] KATY PERRY, *Dark Horse*, *supra* note 74.

[222] *See* Report or Affidavit of Lawrence Ferrara, *supra* note 152.

[223] *See Newton*, 388 F.3d at 1195.

[224] Lee, *supra* note 196, at 1906 (claiming that judicial minimalism discourages courts from breaking with precedent).

[225] *See* Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) ("Recurrence is not . . . an inevitable badge of plagiarism.").

C. *Extending the Fair Use Doctrine to Transformative Melodies That Do Not Usurp the Copyrighted Work's Market*

If a plaintiff's melody is nonetheless found to be protectable, and a defendant's melody is substantially similar, courts should proceed to a fair use analysis. In analyzing the purpose and character of the use, courts would analyze the message and artistic character of the parties' songs. As in *Oyewole v. Ora*, where the court considered the different connotations of the challenged lyrics, courts would consider the overall themes of songs that contain a substantially similar melody.[226] A court applying this test to the facts in *Perry* would note that the plaintiff's song has an overtly religious message that glorifies Christianity, whereas the defendant's song is sexually suggestive and contains themes of seduction.[227] Beyond the songs' articulated messages, courts would also consider songs' differences in tone and style in determining the purpose and character of the use. This would entail an examination of the genre into which each work falls. A melody played by a banjo in a bluegrass song, for example, may be transformative if played by a synthesizer in a rap song.

With regard to the songs in *Perry*, this point of analysis would be a closer call because both melodies are played by a synth-like instrument and both songs contain elements of rap music.[228] However, the overall musical tone of each work is dissimilar: "Joyful Noise" has a minimalist rap beat while "Dark Horse" is a pop song with grandiose instrumentation.[229] Ultimately, this factor would weigh in the defendant's favor because the melodies, though compositionally similar, serve different artistic and expressive

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[226] Oyewole v. Ora, 291 F. Supp. 3d 422, 434 (S.D.N.Y. 2018).

[227] Gray v. Perry, No. 2:15-cv-05642-CAS(JCx), 2019 WL 2992007, at *1 (C.D. Cal. 2019); KATY PERRY, *Dark Horse*, *supra* note 74; FLAME, *Joyful Noise*, *supra* note 213.

[228] Abad-Santos, *supra* note 30.

[229] KATY PERRY, *Dark Horse*, *supra* note 74; FLAME, *Joyful Noise*, *supra* note 213.

purposes.[230] As such, Perry's use of the challenged melody would be considered transformative.[231]

In analyzing the effect of the use upon the potential market for a plaintiff's copyrighted work, courts would look to the target audiences of both works.[232] This factor would weigh in favor of a defendant's use of a protected melody if the defendant's song would not provide listeners with a substitute for or usurp the market of the plaintiff's song.[233] Whereas the purpose and character of the use would turn on the artistic elements of a genre, this factor would examine the commercial scope of a genre and inquire as to each song's potential fan base. An R&B artist whose song copies a melody from another R&B song, for example, would likely be found to have usurped the market from the owner of the original work.

On the other hand, in *Perry*, the works occupied different genres—"Joyful Noise" is a Christian rap song and "Dark Horse" is a mainstream pop song.[234] As in *Oyewole*, where the court found that the target audiences for the songs were not the same, a court would find that Christian rap has a different target audience than does mainstream pop music.[235] Moreover, the characteristics of Perry herself would bolster this finding—she is considered by some to be a sex symbol and is known for having lyrical themes that could be characterized as risqué by conservative standards.[236] This makes

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[230] *See* D'Souza*, Dark Horse*, *supra* note 8.

[231] Because the use would be found transformative, the second fair use factor regarding the nature of the copyrighted work would be deemphasized. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (holding that the nature of the copyrighted work does not "help much in separating the fair use sheep from the infringing goats" in a case involving a transformative work).

[232] *See* Cariou v. Prince, 714 F.3d 694, 709 (2d Cir. 2013) (holding that the market harm factor favored defendant because defendant's artwork appealed to a different sort of collector than plaintiff's).

[233] *See* Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998); *see also Cariou*, 714 F.3d at 709 ("[A]n accused infringer has usurped the market for copyrighted works . . . where the infringer's target audience and the nature of the infringing content is the same as the original.").

[234] *See* D'Souza, *Dark Horse*, *supra* note 8.

[235] Oyewole v. Ora, 291 F. Supp. 3d 422, 436 (S.D.N.Y. 2018).

[236] KATY PERRY, *Dark Horse*, *supra* note 74; *see also* KATY PERRY, *I Kissed a Girl*, *on* ONE OF THE BOYS (Capitol Records 2008).

it unlikely that Christian music listeners would turn to "Dark Horse" as a substitute for "Joyful Noise." This finding would be further supported by the purpose and character inquiry, where it would have been found that Perry's use of the melody was transformative.[237] The market harm factor, therefore, would weigh in favor of the defendant.

It could be argued that such an approach inappropriately tasks courts with making aesthetic determinations about music.[238] However, this would be a reasonable extension of the fair use doctrine as it has been applied to lyrics as well as other artforms.[239] Pop music heavily relies on context.[240] While compositional aspects such as melody are obviously essential to a song's success, what largely sets artists apart are their personas and the messages being conveyed by their songs.[241] When short melodies such as the one in question in *Perry* appear in different songs, they take on a different character depending on the kind of artist, genre, and song involved.[242] This approach is, therefore, consistent with the principles of the fair use doctrine by protecting secondary works that transform an original work into new understandings without usurping the market for the original work.[243]

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[237] *See Oyewole*, 291 F. Supp. 3d at 436 ("Even if [the target audiences are the same], Defendants' works are significantly different from Oyewole's and thus do not 'provid[e] the public with a substitute for ["When the Revolution Comes"].'" (citations omitted)).

[238] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (holding that courts should not determine the aesthetic value of works of art).

[239] *See Oyewole*, 291 F. Supp. 3d at 432–36; *see also* Cariou v. Prince, 714 F.3d 694, 709 (2d Cir. 2013) (holding that the defendant had a fair use defense where he appropriated the plaintiff's photographs for use in paintings and collages).

[240] *See* D'Souza, *Dark Horse*, *supra* note 8.

[241] *See id.*

[242] *See id.*

[243] *Oyewole*, 291 F. Supp. 3d at 433, 436.

CONCLUSION

Copyright law's aim is to promote progress in the arts.[244] This is best achieved when a balance is struck between protecting artists' original works and allowing other artists the space to create their own works without fear of liability.[245] Given the nature of musical composition, melodies in pop music are inherently finite.[246] The current scheme of copyright law does not accurately reflect this reality, as courts appear to be developing a greater proclivity for granting melodic monopolies to plaintiffs.[247]

Courts should use a sliding-scale test for originality based on the complexity of the plaintiff's melody.[248] Under such a test, the simpler the melody, the less likely that melody will be found sufficiently original for copyright protection.[249] Next, in determining whether a secondary work is substantially similar to the plaintiff's work and whether the *de minimis* use doctrine should apply, courts should consider whether the challenged melody constitutes a significant portion of the *secondary* work.[250] Finally, in determining whether a secondary work is entitled to a fair use defense, courts should find the use transformative when it places the melody in a new artistic context based on the creative characteristics of the original and secondary works' genres.[251] Courts should also examine the differences in songs' respective target audiences in determining whether the use of the melody in the secondary work usurps the market of the original.[252]

Such a test would serve copyright law's goal of promoting progress in the arts by tolerating the inevitable overlap in melodies

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[244] U.S. CONST. art. I, § 8, cl. 8.

[245] *See* D'Souza, *Dark Horse*, *supra* note 8.

[246] *See* Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940).

[247] *See* D'Souza, *Dark Horse*, *supra* note 8.

[248] *See supra* p. 789.

[249] *See supra* pp. 788–89.

[250] *See supra* p. 790.

[251] *See supra* pp. 791–92.

[252] *See supra* pp. 792–94.

in pop music[253] as well as by allowing artists to incorporate established, simple melodies in new contexts to create transformative works. Failing to take such measures threatens to further upset the critical balance of copyright law and shut the door to new creations in pop music.

[253] *See* Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) ("Recurrence is not . . . an inevitable badge of plagiarism.").