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The “Blurred Lines” of Copyright Law

SETTING A NEW STANDARD FOR COPYRIGHT INFRINGEMENT IN MUSIC

INTRODUCTION

In 2014, a relatively obscure band, Spirit, sued rock legends Led Zeppelin for copyright infringement. The musical world was turned upside down, faced with the possibility that Led Zeppelin had copied significant parts of its iconic 1971 song “Stairway to Heaven” from the Spirit track “Taurus.”¹ As many hoped, the jury cleared the band of these allegations in 2016.² Musicians Robin Thicke and Pharrell Williams also found themselves in the same position in 2013. Marvin Gaye’s estate accused the pair of copyright infringement, alleging that the hit song, “Blurred Lines,” copied the Marvin Gaye song “Got to Give It Up.”³ Unlike the members of Led Zeppelin, Thicke and Williams lost in 2015, and the Gaye Estate was awarded roughly \$3.5 million in damages along with a royalty of 50 percent of revenues regarding songwriting and publishing of “Blurred Lines”—which was awarded to mitigate the original verdict of \$7.4 million in damages.⁴

The different outcomes of these two cases raise interesting questions about how copyright law is applied to music. Based on the two rulings, one would assume that “Stairway to Heaven” simply must not have sounded like “Taurus,” and conversely, “Blurred Lines” must have sounded like “Got to Give It Up.” Delving into the cases though, it becomes clear that it is not that simple. Interestingly, the court itself found that “Stairway

¹ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at *1 (C.D. Cal. Apr. 8, 2016).

² *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *56; Kory Grow, *Led Zeppelin Win in ‘Stairway to Heaven’ Trial*, ROLLING STONE (June 23, 2016), <http://www.rollingstone.com/music/news/led-zeppelin-prevail-in-stairway-to-heaven-lawsuit-20160623> [<https://perma.cc/3PTW-N4FD>].

³ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *1–2 (C.D. Cal. July 14, 2015).

⁴ *Id.* at *147 (C.D. Cal. July 14, 2015); Daniel Kreps, *‘Blurred Lines’ Ruling Sliced to \$5.3 Million, With a Catch*, ROLLING STONE (July 15, 2015), <http://www.rollingstone.com/music/news/blurred-lines-ruling-sliced-to-5-3-million-with-a-catch-20150715> [<https://perma.cc/357R-QVTI>].

to Heaven” resembled “Taurus” a lot more clearly than “Blurred Lines” resembled “Got to Give It Up.”⁵ Despite this, the jury ruled the opposite way.⁶

Problematic legal tests lead to such uninformed, subjective jury decisions in copyright infringement cases. To succeed on a copyright infringement claim, a “plaintiff must prove (1) ownership of the copyright; and (2) “infringement—that the defendant copied protected elements of the plaintiff’s work.”⁷ Further, in determining infringement, a plaintiff must ultimately prove that “defendant copied from plaintiff’s copyrighted work and . . . that the copying (assuming it to be proved) went so far as to constitute improper appropriation” of the work.⁸ Because a plaintiff usually cannot provide direct evidence of copying, one “may establish copying by showing that [the] defendant had access to plaintiff’s work and that the two works are ‘substantially similar’ in idea and in expression of the idea.”⁹

The circuits are torn and have their respective tests for determining “substantial similarity.”¹⁰ The judges initially evaluate the songs for similarities, taking into account factors such as chord patterns, lyrics, melodies, and song structure.¹¹ And if a case cannot be decided as a matter of law, the decision falls to the jury, where the evaluation becomes more subjective.¹² Regardless of how the circuits describe their tests, however, the juries are instructed to take a more subjective point of view, evaluating music on simply how it sounds.¹³

This note argues that due to constraints unique to the musical medium, copyright infringement in music is deserving of its own test, specifically one not based on the subjective feelings of a jury. Music is unique. It is the only artistic medium

⁵ Compare *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *50–51 (“While it is true that a descending chromatic four-chord progression is a common convention that abounds in the music industry, the similarities here transcend this core structure. For example, the descending bass line in both *Taurus* and *Stairway to Heaven* appears at the beginning of both songs, arguably the most recognizable and important segments.”), with *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at *54 (C.D. Cal. Oct. 30, 2014) (finding that there was a genuine issue of material fact due to “a sufficient disagreement” amongst the musical experts involved in the case (quoting *Brown Bus Software v. Symantec Corp.*, 960 F.3d 1465, 1472 (9th Cir. 1992))).

⁶ See *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *51.

⁷ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (citing *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)).

⁸ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

⁹ *Smith*, 84 F.3d at 1218 (quoting *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)).

¹⁰ See *infra* Sections I.B–C.

¹¹ See *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *50–51.

¹² See *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *Zeppelin*, 2016 U.S. Dist. LEXIS 51006, at *51.

¹³ See, e.g., *id.* at *49–51.

that we can only hear, and if we interpret it differently, the legal process in which we scrutinize it ought to be different as well. Furthermore, analysis of music history and theory will reveal that music is the most restrictive art form there is. While a novel can consist of any arrangement of words and has unlimited options for plot or character interaction, Western music is limited to a twelve-note octave, thereby putting a hard cap on chord structures, progressions, and possible arrangements.¹⁴ Additionally, musicians throughout the ages have drawn on artists that came before them as influence,¹⁵ and a jury that is given a vague and broad test to determine what is "copying," can easily confuse influence with copying.

Keeping these factors in mind, this note ultimately argues that the current test interferes with the very nature of copyright law. Though the circuits have different tests for what constitutes copyright infringement, they can all agree that, at the foundation of copyright law, "ideas" are not copyrightable, only how they are expressed.¹⁶ The jury instructions, as they stand now, allow for mere musical ideas¹⁷ to be confused with copyrightable expression,¹⁸ which is precisely what occurred in the *Williams* case. This note suggests a new test—the Unique Quality Test—that will work to preserve artistic integrity as well as the common practice of drawing from previous musicians' influence without running into the issue of infringement.

Part I provides the foundations of copyright law and how it has been applied to music in a variety of cases over the years. This discussion illustrates how vague tests have led to inconsistent and arbitrary rulings. Part II focuses on why music in particular should have its own test. A new test is needed because people interpret music differently and it is fundamentally limited as compared to other artistic mediums. Furthermore, applications of the traditional tests in other artistic forms highlight the flaws in applying the same standards to music. Part III provides an in-depth analysis of the

¹⁴ See *infra* Section II.B.

¹⁵ See, e.g., *METAL: A HEADBANGER'S JOURNEY* (Seville Pictures 2005) ("Every cool riff has already been written by Black Sabbath. Anything everyone else does is just basically ripping it off. Either you're playing it slightly different or fast or slow, but . . . [t]hey did everything already." (statement by musician Rob Zombie)), <http://www.imdb.com/title/tt0478209/quotes> [<https://perma.cc/XER9-PGXC>].

¹⁶ See Mark Avsec, "Nonconventional" Music Analysis and "Disguised" Infringement: Clever Musical Tricks to Divide the Wealth of Tin Pan Alley, 52 CLEVELAND ST. L. REV. 339, 352–53 (2005).

¹⁷ See *Baker v. Selden*, 101 U.S. 99, 105 (1880); see also *infra* note 28 ("[t]he description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.").

¹⁸ See *infra* note 28 ("The object of the one is explanation; the object of the other is use. The former may be secured by copyright.").

Skidmore and *Williams* cases, noting the flaws with the legal standards in light of a greater understanding of why music needs its own test. Finally, Part IV introduces the Unique Quality Test, exhibiting how it will better benefit the music industry as well as hold up the foundational theories behind copyright law.

I. “YES, THERE ARE TWO PATHS YOU CAN GO BY”¹⁹:
BACKGROUND ON THE SECOND AND NINTH CIRCUIT
INFRINGEMENT TESTS

An understanding of the basic nature of copyright law as it currently stands is important in order to realize how the courts have hesitated to create clear and definite rules when it comes to adjudicating a music infringement case. The following Sections establish the foundations of copyright law and the competing tests the Second and Ninth Circuits utilize when deciding infringement cases. When paired with the conflicting case law from each circuit, one can gain an understanding of why a clearer legal test is needed.

A. Rules of Infringement in Copyright Law

Proof of infringement in a copyright case regarding music is often based upon circumstantial evidence, and a plaintiff has a number of things to prove.²⁰ In an infringement case, “[a] copyright plaintiff must prove (1) ownership of the copyright; and (2) infringement—that the defendant copied protected elements of the plaintiff’s work.”²¹ Due to the circumstantial nature of these claims, direct evidence of copying is rarely available.²² A plaintiff can establish copying, however, “by showing that [the] defendant had access to plaintiff’s work and that the two works are ‘substantially similar’ in idea and in expression of the idea.”²³

A plaintiff can show that a defendant had access to their work by either establishing “a particular chain of events” connecting “the plaintiff’s work and the defendant’s access to that work,” or by showing that “the plaintiff’s work has been

¹⁹ LED ZEPPELIN, *Stairway to Heaven*, on LED ZEPPELIN IV (Atlantic Records 1977).

²⁰ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at *13 (C.D. Cal. Apr. 8, 2016).

²¹ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (citing *Smith v. Jackson*, 84 F.3d 1213, 1218, (9th Cir. 1996)).

²² *Id.* at 481.

²³ *Smith*, 84 F.3d at 1218 (quoting *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)).

widely disseminated.”²⁴ Music experts can attest to a particular chain of events, such as an artist sending a song to be used by a recording company, and a plaintiff can “show that its work was widely disseminated through sales of sheet music, records, and radio performances” in the particular defendant’s region.²⁵ Courts have also noted that access “is sometimes accompanied by a theory that copyright infringement of a popular song was subconscious.”²⁶

Proving “substantial similarity” in regard to idea and expression is where courts have been unable to develop a bright-line approach, leading to a multitude of problems for artists.²⁷ At a fundamental level, copyright law has established that “ideas” alone cannot be protected, but rather, the “expression” of those ideas can be.²⁸ This theory has been compromised in the music world, however, by the courts’ unclear and varying positions on judging “substantial similarity.”²⁹ Remarkably, the courts have purposely taken a vague approach to addressing this issue, which has contributed to the overall ambiguous and unclear nature of copyright law in music.³⁰ Judge Learned Hand set forth

²⁴ *Three Boys Music*, 212 F.3d at 482 (citations omitted).

²⁵ *Id.* (citation omitted).

²⁶ *Id.* For a further exploration of this point see *infra* Section I.D.

²⁷ See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (“If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue . . . the test is the response of the ordinary lay hearer; accordingly, on that issue, ‘dissection’ and expert testimony are irrelevant.” (footnote omitted)); *Skidmore v. Zeppelin*, CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at *49 (C.D. Cal. Apr. 8, 2016) (“In analyzing musical compositions under the extrinsic test, [the Ninth Circuit has] never announced a uniform set of factors to be used.” (alteration in original) (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)); *Pyatt v. Raymond*, 10 Civ. 8764 (CM), 2011 U.S. Dist. LEXIS 55754, at *12 (S.D.N.Y. May 19, 2011) (“[T]he [c]ourt is guided ‘by comparing the [work’s] total concept and overall feel’ with that of the allegedly infringing work.” (quoting *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010))).

²⁸ See, e.g., *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (“[T]hat a whole work is copyrighted does not mean that every element of it is copyrighted; copyright protection extends only to those components of the work that are original to the creator.” (citing *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991)); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250–52 (1903) (In finding that prints were copyrightable even when based on depictions of real life, the Court noted “there is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines, and colors, are the original work of the plaintiffs’ designer.”); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58–60 (1884) (In *Burrow-Giles*, the Court held that a photograph was copyrightable because the piece was indicative of the “original mental conception” of the author, fitting the requirement that “ideas in the mind of the author are given visible expression” in a copyrightable work.); *Baker v. Selden*, 101 U.S. 99, 105–07 (1880) (In finding that the copyrightability of a bookkeeping system only extended to the description of said system and not the system itself, the Court held that “[t]he description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright.”).

²⁹ See *supra* note 27 and accompanying text.

³⁰ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

that “[t]he test for infringement of a copyright is of necessity vague,” purporting that wherever the line between an idea and expression of that idea is drawn would seem arbitrary anyway.³¹ The circuit splits and case law that have followed are indicative of this hesitance to define a clear line regarding infringement in music. A greater understanding of the theory behind music itself can help to inform the courts on how to clearly draw the line between idea and expression when it comes to music, allowing for a straight-forward approach for determining substantial similarity between two musical works.

After determining whether a defendant actually copied the work—something a plaintiff can prove through circumstantial evidence and a judge may decide as a matter of law—the court must then decide whether the defendant essentially copied too much.³² The court must ultimately decide whether the works in questions are “substantially similar,” something that would constitute an “improper appropriation” of the work in question.³³ Noted copyright scholar, Alan Latman, has observed that two aspects of an infringement suit are often confused.³⁴ Latman found the Second Circuit’s language in *Arnstein v. Porter* “instructive,” quoting Judge Frank’s conclusion that “[i]t is important to avoid confusing two separate elements essential to a plaintiff’s case in such a suit: (a) that defendant copied from plaintiff’s copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation.”³⁵

Once copying has been established, the Second and Ninth Circuits are split over how to properly address the latter aspect—that the copying went so far as to constitute improper appropriation—of the copyright infringement paradigm.³⁶ The Second Circuit test focuses on the determination of the “lay listener[,]”³⁷ and the fact that some part of the defendant’s work

³¹ *Id.*; see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (2011) (quoting *Peter Pan Fabrics Inc.*, 274 F.2d at 489); *infra* Part V.

³² See *supra* note 3 and accompanying text.

³³ Alan Latman, *Probative Similarity As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1192 (1990) (quoting *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)).

³⁴ *Id.*

³⁵ *Id.* (quoting *Arnstein*, 154 F.2d at 468). To find an instance of copying, courts have often found a reasonable inference upon a review of the “evidence of reasonable access” to the work, the “chain of events” leading up to the alleged infringement, or how widely disseminated the alleged infringed work was. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000); *Arnstein*, 154 F.2d at 468.

³⁶ See *supra* note 27 and accompanying text.

³⁷ See *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 734 (4th Cir. 1990) (“Under the facts before it, with a popular composition at issue, the *Arnstein* court appropriately perceived “lay listeners” and the works’ “audience” to be the same”); *Arnstein*, 154 F.2d at 473 (“The question, therefore, is whether defendant took from

has to be substantially similar to the plaintiff's work to the composer's intended audience, which typically consists of the average popular-music listener.³⁸ Meanwhile, the Ninth Circuit uses a two-pronged "extrinsic" and "intrinsic" analysis in determining whether there is substantial similarity in the expression of the works at hand.³⁹ Despite the split, neither circuit has managed to come up with a clear and determinative test, resulting in often ambiguous or contradictory rulings and jury decisions.

B. The Second Circuit: Lay Listener Test

The Second Circuit introduced the lay listener test in *Arnstein v. Porter*.⁴⁰ The court established that, once copying has been proven, the issue of "illicit copying (unlawful appropriation)" arises and is something that occurs if the works are found to be substantially similar.⁴¹ The test, according to the court, depends on the response of the "ordinary lay hearer," making the distinction that analysis and dissection of the music is not relevant here, like it is in the court's determination of whether copying occurred.⁴² Unlike that initial determination, the court is only concerned with how the lay listener interprets the sound of the music, noting that "[t]he impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff's or defendant's works are utterly immaterial on the issue of misappropriation."⁴³

Arnstein highlights some major issues with how copyright infringement of music has been interpreted and adjudicated—issues that have manifested in the *Williams* and *Skidmore* rulings. For one, the Second Circuit suggests that the opinions of a musical expert as well as a proper analysis of the features of a piece of music (such as chords, melodies, tone, and more) are not relevant to the determination of the lay listener.⁴⁴ This notion ultimately seems to rely on the assumption that music ought to only be judged from an economic standpoint, foregoing the artistic nature of the medium. Purporting that the reaction of the lay listener is the deciding factor because the success of the work depends on their consumption of it, seems to

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.").

³⁸ *Arnstein*, 154 F.2d at 473; see also Avsec, *supra* note 16, at 348.

³⁹ *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

⁴⁰ *Arnstein*, 154 F.2d at 473.

⁴¹ *Id.* at 468.

⁴² *Id.*

⁴³ *Id.* at 473.

⁴⁴ *Id.*

suggest that music only exists for monetary purposes. This assumption may stem from Judge Hand's hesitation to draw a line when it comes to substantial similarity and what constitutes stealing the "expression" rather than the "ideas" behind the piece.⁴⁵ The courts, unable to establish that line, chose instead to over-simplify the interpretation of music.⁴⁶

A court's hesitation to rule on music infringement as a matter of law—whether copying actually occurred—is strongly apparent in *Repp v. Webber*.⁴⁷ In this case, musician Ray Repp accused famous playwright Andrew Lloyd Webber of infringing on Repp's work, "Till You," in his "Phantom of the Opera" song from the eponymous musical.⁴⁸ The court granted Webber's motion for summary judgment due to the fact that Repp had failed to establish access and otherwise could not prove that the pieces were so "strikingly similar" that an inference could be justified to prove improper appropriation.⁴⁹ This was even in spite of the availability of the song and precedent finding infringement with as little as subconscious copying.⁵⁰

A comparison of the two songs, Repp's "Till You" and Webber's "Phantom," makes it clear that this ruling contradicts that in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, by failing to consider subconscious copying.⁵¹ In *ABKCO*, the court found that ex-Beatle George Harrison could have subconsciously stolen the music to his song "My Sweet Lord," making up for lack of access.⁵² The *Repp* court, however, failed to find access despite evidence that Repp's song had been distributed and advertised.⁵³ While the court found that this dissemination only reached a limited audience, an argument can be made by comparing the two songs that the similarities are in fact so striking that access can be inferred.⁵⁴ As in the two works in question in *ABKCO*, the

⁴⁵ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); see also *NIMMER & NIMMER*, *supra* note 31, at § 13.03[A] (quoting *Peter Pan Fabrics, Inc.*, 274 F.2d at 489)).

⁴⁶ See *Infra* Part II.

⁴⁷ *Repp v. Webber*, 858 F. Supp. 1292 (S.D.N.Y. 1994).

⁴⁸ *Id.* at 1295.

⁴⁹ *Id.* at 1303.

⁵⁰ See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997–98 (2d Cir. 1982).

⁵¹ See *Repp*, 858 F. Supp. at 1301–03; compare *RAY REPP, Till You*, on *BENEDICAMUS* (K&R Records 1978) at 0:25, with *ANDREW LLOYD WEBBER, The Phantom of the Opera*, on *THE PHANTOM OF THE OPERA* (Polydor Records 1986) at 0:20; but see *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997–98 (2d Cir. 1982). (finding that Harrison's access to the song was rather remote, with a small window of popularity occurring years prior to the release of *My Sweet Lord*).

⁵² *ABKCO*, 722 F.2d at 997–98 (2d Cir. 1982).

⁵³ *Repp*, 858 F. Supp. at 1301–03.

⁵⁴ *Id.*

songs at issue in *Repp* both feature a similar chord progression and almost exact vocal melodies aligned overtop.⁵⁵ In both cases, two songs with arguably similar sound and melody were put to task, but one defendant was found guilty of infringement and the other was not, exhibiting how vague rules result in arbitrary decisions.

These unclear conclusions and methodologies have persisted into more recent music infringement cases. In *Pyatt v. Raymond*, famous pop artists Usher and Alicia Keys were sued for infringement, with Pyatt claiming that Usher's hit song "Caught Up" had stolen from the plaintiff's own copyrighted work.⁵⁶ Pyatt offered up evidence of access, showing that the plaintiff had some dealings with the same record company, MBK Entertainment, and had initially been instructed to submit lyrics, songs, and more.⁵⁷ After this, MBK decided to change the deal, asking for Pyatt's permission to use the songs for Usher's upcoming album; the plaintiff did not accept this deal.⁵⁸ Despite rejecting the offer to essentially become a writer for Usher, the plaintiff found that Usher's "Caught Up" strongly resembled Pyatt's own song.⁵⁹ With this context in mind, both access and possible copying are plausible.

Despite this plausibility, the court, applying the lay listener test, found that because the "total concept and overall feel"—another vague approach to determining substantial similarity—of the songs were different, the claim would be dismissed.⁶⁰ The court noted that the music of the two recordings was "entirely dissimilar," the vocals utilized different styles, and the lyrics had little to no similarity.⁶¹ Ultimately, this led the court to conclude that no "average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."⁶²

On its face, the court may have made the right call in *Pyatt v. Raymond*. If the concept and feel of two works are dissimilar, it is likely that infringement did not occur. When applied against a defendant, however, the total concept and feel model seems to interfere with the whole foundational thesis in copyright law—that ideas cannot be copyrighted, but their

⁵⁵ Compare RAY REPP, *supra* note 51 at 0:25, with ANDREW LLOYD WEBBER, *supra* note 51, at 0:20.

⁵⁶ *Pyatt v. Raymond*, 10 Civ. 8764 (CM), 2011 U.S. Dist. LEXIS 55754, at *12 (S.D.N.Y. May 19, 2011).

⁵⁷ *Id.* at *6.

⁵⁸ *Id.* at *6–7.

⁵⁹ *Id.*

⁶⁰ *Id.* at *12 (quoting *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010)).

⁶¹ *Id.* at *26.

⁶² *Id.* at *27 (quoting *Peter F. Gaito Architecture, LLC*, 602 F.3d at 66 (2d Cir. 2010)).

expression can be.⁶³ This note argues that the total concept and feel of a song constitutes an idea rather than expression.⁶⁴

Despite this point, it is worth noting that the total concept and feel model does not even seem to be evenly applied across the Second Circuit. For example, the court refrained from sending the pieces in question to the jury in *Pyatt v. Raymond*, but did so in *New Old Music Group, Inc. v. Gottwald*.⁶⁵ The plaintiff, New Old Music Group, alleged that the defendant had stolen a drum part from Black Heat's "Zimba Ku" and used it in the Jessie J song "Price Tag."⁶⁶ To gain an understanding of the drum part in question, the court broke down the composition, finding that while the various rhythms on their own may not be copyrightable, the sequencing of them may be.⁶⁷ The court ultimately concluded that based on the total concept and feel of the drum elements in their featured sequence, the court could not, as a matter of law, conclude that "the select[ion], coordinat[ion], and arrange[ment]' of these elements is so unoriginal that the Zimba Ku drum part is not protectable," and allowed the case to go to the jury to further determine substantial similarity.⁶⁸

Pyatt and *New Old Music Group* accentuate a number of issues with judging music infringement by the total concept and feel mechanism—something that is prevalent in the *Bridgeport* ruling. For one, total concept and feel denotes the idea behind a piece, not the expression of it.⁶⁹ Furthermore, this particular measure of whether copying actually occurred is not applied evenly across the circuits. In *Pyatt*, the court considered the lyrical content and "overall musical impression" between the two works at issue before coming to the conclusion that the pieces were so dissimilar that a reasonable jury would not be able to conclude that the pieces were substantially similar.⁷⁰ However, in *New Old Music Group*, the court would not rule as a matter of law over a simple drum beat, hearkening back to the hesitance to do so seen in previous cases such as *Repp*.⁷¹ These different outcomes exhibit the vagueness of total concept and feel—does it apply to the full song and entire

⁶³ See *supra* note 28 and accompanying text.

⁶⁴ For further discussion see *infra* Part II.

⁶⁵ Compare *Pyatt v. Raymond*, 10 Civ. 8764 (SM), 2011 U.S. Dist. LEXIS 55754, at *13 (S.D.N.Y. May 19, 2011), with *New Old Music Group, Inc. v. Gottwald*, 122 F. Supp. 3d 78, 94 (S.D.N.Y. 2015).

⁶⁶ *New Old Music Group, Inc.*, 122 F. Supp. 3d at 82.

⁶⁷ *Id.* at 95.

⁶⁸ *Id.* at 95–98 (alteration in original) (quoting *Velez v. Sony Discos*, No. 05 Civ. 0615(PKC), 2007 WL 120686, at *7 (S.D.N.Y. Jan. 16, 2007).

⁶⁹ See *infra* Section III.C.

⁷⁰ *Pyatt*, 2011 U.S. Dist. LEXIS 55754, at *27.

⁷¹ *New Old Music Group, Inc.*, 122 F. Supp. 3d, at 95–98; *Repp v. Webber*, 858 F. Supp. 1292, 1292–93 (S.D.N.Y. 1994).

composition? To just a small part of a song?—a vagueness that is inherent in how courts apply music infringement law.

C. *The Ninth Circuit: Extrinsic and Intrinsic Analysis*

Unlike the Second Circuit's lay listener test, the Ninth Circuit utilizes a two-pronged "extrinsic"—done by the court—and "intrinsic"—done by the jury—analysis when deciding whether a defendant ultimately infringed upon a copyrighted work.⁷² The 1977 case, *Sid & Marty Krofft Television Productions Inc. v. McDonald's Corp.*, introduced the test.⁷³ In this case, which dealt with an infringement claim over the alleged adaptation of the McDonald's characters from a copyrighted children's television program, the court sought to create a limiting principle in copyright law.⁷⁴ Concerned with preserving the difference between ideas and expression, the court developed a principle that attempted "to reconcile two competing social interests: rewarding an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from use of the same subject matter."⁷⁵

Responding directly to the *Arnstein* court—which adapted the lay listener test in the Second Circuit—the court in *Sid* set out to explicitly establish a test that would determine the similarity of expression of ideas as opposed to just the ideas themselves, albeit missing the mark.⁷⁶ Regarding the test, the court first looked at whether there was substantial similarity in the ideas, helping to determine whether copying actually occurred.⁷⁷ The court stated that this is a factual test and is called the extrinsic test.⁷⁸ This aspect of the test depends "on specific criteria which can be listed and analyzed," for example in an art piece; "the type of artwork involved, the materials used, the subject matter, and the setting for the subject."⁷⁹ At this

⁷² See, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 489 (9th Cir. 2000) (affirming the trial court's holding that Michael Bolton's "Love Is a Wonderful Thing" infringed on the Isley Brothers' song of the same name); *Sid & Marty Krofft Television Prods v. McDonald's Corp.*, 562 F.2d 1157, 1161, 1164, 1179 (9th Cir. 1977) (affirming the district court holding where defendants had been found guilty of infringing a group of children's show characters); *Straughter v. Raymond*, Case No. CV 08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 at *54–55 (C.D. Cal. Aug. 19, 2011) (holding that there was "a genuine issue of material fact as to whether" two songs were "substantially or strikingly similar to protectable elements").

⁷³ See *Sid & Marty Krofft Television Prods*, 562 F.2d at 1164.

⁷⁴ *Id.* at 1162–63.

⁷⁵ *Id.* at 1163.

⁷⁶ See *id.* at 1165; *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

⁷⁷ *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164.

⁷⁸ *Id.* (citations omitted).

⁷⁹ *Id.*

point, since the factual material is focused, expert testimony and analytic dissection is key.⁸⁰

Next, if there is substantial similarity in the ideas, then the fact-finder must determine whether the same can be said about the expression.⁸¹ This element is called the intrinsic test, and depends “on the response of the ordinary reasonable person,” the jury.⁸² This element is considered to be intrinsic because it does not rely on the factual matter and analysis that is seen in the extrinsic portion of the test.⁸³ As exhibited by the conflicting outcomes of the *Led Zeppelin* and *Bridgeport* cases, both of which were argued in the Ninth Circuit, the extrinsic/intrinsic analysis is plagued by the same shortcomings of the Second Circuit lay listener test.⁸⁴

These issues appear in a case such as *Straughter v. Raymond*.⁸⁵ In this case, the artist Usher was accused of infringement⁸⁶ and the court addressed the difficulty of analyzing a musical work specifically.⁸⁷ Here, the court noted the many factors that go into a musical composition, and how it is difficult to balance factors that are not protectable under copyright law—such as rhythm, melody, harmony, and phrasing—with elements that are protected, such as musical expression.⁸⁸ Despite highlighting this issue, the court followed precedent set by *Three Boys Music Corp. v. Bolton*, which states that the extrinsic test can be satisfied by exhibiting copying of a “combination of unprotectable elements.”⁸⁹ Perhaps a large number of similarities would suggest that copying occurred, but the court failed to show how the aggregate of all copied, yet unprotectable elements when viewed in isolation, can transcend the level of protection that is given to expression rather than ideas. A group of combined ideas that are not afforded protection under copyright law does not necessarily lead to a certain kind of expression.⁹⁰ This uncertainty of the idea/expression dichotomy lends itself to the disproportionate rulings seen later in *Skidmore* and *Williams*.⁹¹

Ultimately, the respective tests of the Second and Ninth Circuits present issues specifically related to the analysis of

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* (citations omitted).

⁸³ *Id.* at 1164 (citation omitted).

⁸⁴ *See infra* Part III.

⁸⁵ *Straughter v. Raymond*, Case No. CV 08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 (C.D. Cal. Aug. 19, 2011).

⁸⁶ *Id.* at *3–4.

⁸⁷ *Id.* at *5–7, 43.

⁸⁸ *Id.* at *42–43.

⁸⁹ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

⁹⁰ To be discussed in greater detail under the Unique Quality Test. *See infra* Part IV.

⁹¹ *See infra* Part IV.

music infringement.⁹² Those issues can be summed up as follows; (1) The failure to “draw a line” between ideas and their expression has led to uneven and inconsistent applications of the various tests the courts use to determine infringement, (2) this has resulted in either a hesitance to rule as a matter of law in some cases or an over-eagerness to do so in others, and (3) courts find themselves contradicting the fundamental idea versus expression dichotomy by allowing rulings based on musical ideas anyway.

D. Further Issues: Subconscious Copying

Another aspect made available by the courts for proving that copying has occurred is known as “subconscious copying.”⁹³ The Second Circuit addressed this issue in both *ABKCO Music Inc. v. Harrisongs Music LTD*⁹⁴ and *Three Boys Music Corp.*⁹⁵ In *Three Boys*, a jury concluded that Michael Bolton’s “Love is a Wonderful Thing” infringed on an Isley Brothers song that had the same name.⁹⁶ In affirming the jury decision, the court noted that proof of access is “sometimes accompanied by [the] theory that copyright infringement of a popular song was subconscious,” asserting that copying can be found with no proof of any sort of artistic intent to do so.⁹⁷

The element of subconscious copying is particularly troublesome in music. Ruling on an element like this interferes with something that is essential to the creation of music—musical influence. Rooted in tradition, musicians have always been influenced by those that came before them, adopting different styles, techniques, themes, and more from these artists to create their own sound, or their own expression of a type of music.⁹⁸ While songs may sound similar on the surface, the underlying compositions may be entirely different, something often lost on courts and juries alike.⁹⁹ A song may have a similar beat to it—which would lend itself to the idea of a similar “total concept and feel”—but there may be an entirely different composition aside from that beat (the notes, chords, structure, melodies, harmonies, and more).¹⁰⁰ Entire genres of music are

⁹² Issues that this note’s proposed Unique Quality Test addresses. See *infra* Part IV

⁹³ *Three Boys Music Corp.*, 212 F.3d at 482–83.

⁹⁴ *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1982).

⁹⁵ *Three Boys Music Corp.*, 212 F.3d at 482–83.

⁹⁶ *Id.* at 480.

⁹⁷ *Id.* at 482.

⁹⁸ Avsec, *supra* note 16, at 352.

⁹⁹ Margit Livingston and Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 228 (2013).

¹⁰⁰ See *infra* Section II.B.

built upon similar sounds, feelings, and types of music, and something like subconscious copying can (and has) resulted in rulings that punish musicians for exhibiting their influences and using them to form a new kind of expression.¹⁰¹ In a copyright regime like this, essentially any band could succeed on a claim of infringement because most, if not all, genres of music have a rich history of influence at this point in time.

Subconscious copying, and the ability of courts and juries to conflate this with musical influence is something that concerns musicians, and is an issue that relates to the application of copyright law to music specifically. Music specifically requires a different kind of test because of the unique aspects that form the artistic medium.

II: “THERE’S STILL TIME TO CHANGE THE ROAD YOU’RE ON”¹⁰²: WHY MUSIC SHOULD HAVE ITS OWN TEST

Music is a unique art form and is deserving of a different standard and test when it comes to determining whether copyright infringement has occurred. As the preceding case law has shown, the courts have had a hard time deciding music infringement cases.¹⁰³ They have tried different tests, all of which lead to inconsistent or contradictory applications and rulings of the various standards used to determine infringement.¹⁰⁴ This Part addresses what makes music different as well as why the current tests are better suited for other artistic mediums.

A. Music is Interpreted Differently and Should Therefore Be Judged Differently

The human brain interprets music much differently than other mediums, such as literature or film, that are also often featured in copyright infringement cases.¹⁰⁵ This warrants the implementation of a different test when the court or the jury is deciding on an infringement question.

The interpretation of music is different in its most basic form; it is the only artistic medium we strictly hear. Copyright scholars Margit Livingston and Joseph Urbinato have explored

¹⁰¹ See, e.g., *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *49 (C.D. Cal. July 14, 2015) (“Although the Thicke Parties conceded access to ‘Got to Give It Up,’ the jury could have concluded that they intended only to copy unprotected elements of the song in ‘Blurred Lines,’ but accidentally or subconsciously copied protected elements.”).

¹⁰² LED ZEPPELIN, *Stairway to Heaven*, on LED ZEPPELIN IV (Atlantic Records 1977).

¹⁰³ See *supra* Sections I.B–C.

¹⁰⁴ See *supra* Sections I.B–C.

¹⁰⁵ See Livingston & Urbinato, *supra* note 99, at 262.

this notion.¹⁰⁶ They argue that the issues of applying copyright infringement doctrine to music stem from music's unique qualities, namely that "music is the only type of creative work that humans experience primarily through the ear."¹⁰⁷ When analyzing other art forms, such as literature or film, we have the benefit of utilizing our other senses, and the two authors argue that this should have a substantial impact on how the courts weigh elements of an infringement suit such as "access, independent creation, infringement, and the use of the experts."¹⁰⁸

Numerous scientific studies have been done that indicate that the brain interprets and retains musical information in a unique way.¹⁰⁹ For example, concert pianist and author, Natasha Spender, has opined that music is "one of the most highly organized in respect of perceptual and motor activities that occur in sequence, each individual component occupying a very small interval of time."¹¹⁰ Studies have shown that the interpretation and analysis of music requires both hemispheres of the brain, with different aspects of musical composition attributed to different areas.¹¹¹ For example, "rhythmical, temporal, and sequential components of music" have been attributed to the left hemisphere while other aspects such as the perception of melody and pitch have been attributed to the right.¹¹² Making matters even more interesting, other studies have suggested that this can often vary from person to person.¹¹³

These studies indicate the complexity that goes into the analysis of music as a unique medium. Due to how quickly music occurs—we hear and interpret it in a continuous and uninterrupted manner—our brains are essentially at a deficit when we do it. This is as opposed to, for example, comparing two paintings for infringement. Both paintings can be studied, side by side, with different or unique qualities appearing to us visually, something that cannot be done with two songs. As we have seen, basing legal decisions on musical interpretations has proven to be difficult due to these issues. A study regarding music perception

¹⁰⁶ *Id.* at 227.

¹⁰⁷ *Id.* at 230.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 262.

¹¹⁰ Natasha Spender, *The Neuropsychology of Music: Apropos 'Music and the Brain'*, 119 *MUSICAL TIMES* 676, 676 (1978); *Natasha Spender Obituary*, *THE GUARDIAN*, <https://www.theguardian.com/theguardian/2010/oct/22/natasha-spender-obituary> [<https://perma.cc/H2QL-EK2X>].

¹¹¹ Hervé Platel et al., *The Structural Components of Music Perception: A Functional Anatomical Study*, 120 *BRAIN* 229, 230 (1997).

¹¹² *Id.*

¹¹³ Donald A. Hodges, *Implications of Music and Brain Research*, 87 *MUSIC EDUCATORS J.* 17, 19–20 (2000).

indicated how analyzing different aspects of musical composition, on an individualized level, can be difficult.¹¹⁴ Subjects were asked to perform tasks in a PET scanner, with some tasks, like recognizing timbre,¹¹⁵ proving to be easier than others like those involving pitch¹¹⁶ and rhythm.¹¹⁷ These test results are indicative of issues that judges or jurors may have when asked to rule on a particular aspect of a piece of music.

Further issues play into the difficulties judges or jurors experience. For example, the reliance on the aural skills of fact finders is problematic because those abilities might be lacking due to tone deafness, as noted by intellectual property attorney, J. Michael Keyes.¹¹⁸ Ultimately, someone that is tone deaf lacks in the ability to properly perceive or remember musical sounds.¹¹⁹ This kind of impairment could easily lead to improper rulings and determinations of whether infringement occurred. Additionally, in recent years and amidst countless infringement suits in the music industry, the idea of “disguised” infringement” has come about, as discussed by intellectual property attorney Mark Avsec.¹²⁰ Avsec argues that the sheer amount of copyright infringement suits have confused judges and juries alike, and that essentially too much thought is going into it—if pieces do not sound alike on the surface, they are likely not similar.¹²¹ All of these factors indicate how difficult it can be to analyze two songs for the purpose of proving infringement, a process that would be greatly simplified, for the benefit of the artist, with the introduction of a new legal standard for music.

¹¹⁴ Platel et al., *supra* note 111, at 229, 234–37 (“Though many subjects realized that the task involving timbre was easier, most of them said that this was only relative and that the task demanded attention throughout scanning. The pitch task was felt by all the subjects to require the most mental focusing relative to the other tasks. Rhythm and familiarity tasks seemed to demand fewer attentional resources. The subjects reports are consistent with the observed results and confirm that pitch and familiarity tasks are not identical in terms of cognitive processing.”).

¹¹⁵ “[T]he quality given to a sound by its overtones: such as (a) the resonance by which the ear recognizes and identifies a voiced speech sound, (b) the quality of tone distinctive of a particular singing voice or musical instrument.” *Timbre*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/timbre> [<https://perma.cc/LZX4-V6NL>].

¹¹⁶ “The pitch of a note accords to the frequency of its vibrations.” *Pitch*, NAXOS, <http://www.naxos.com/mainsite/NewDesign/fglossary.files/bglossary.files/Pitch.htm> [<https://perma.cc/6CLS-LE5A>].

¹¹⁷ Platel et al., *supra* note 111, at 229, 236.

¹¹⁸ J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. TECH. L. REV. 407, 436–47 (2004) (“Tone deafness or ‘amusia’ is the broad clinical term referring to a spectrum of maladies effecting the brain and its ability to process music.” (footnote omitted)).

¹¹⁹ *Id.* (“[T]one deafness effects an individual’s ability to perceive, produce, or remember musical sounds.” (footnote omitted)).

¹²⁰ Avsec, *supra* note 16, at 343.

¹²¹ *Id.*

B. Music Is Fundamentally Limited as Compared to Other Mediums

Another key factor that sets music apart from other artistic mediums is how fundamentally limited it is. Artists of literary or dramatic pieces have an almost unlimited range of options when it comes to crafting their work; a writer “has tens of thousands of words to use in an innumerable variety,” and “[a] painter has . . . hundreds of colors . . . and dozens of media in which to render a work.”¹²² This is simply not the case for music, and it is something that should be taken into account when determining whether infringement occurred.

As copyright professors Margit Livingston and Joseph Urbinato have pointed out, music as we know it today is heavily dictated by the overall formal and tonal practices developed in Western music tracing back to the 1800s.¹²³ At a fundamental level, music has adapted to and become limited by what is pleasing to the human ear.¹²⁴ These limits are all dictated by tonality, which “may be defined as a musical theoretical concept centered on one primary pitch or tone[,] . . . which at least seven other pitches or chords gravitate away from and finally back to.”¹²⁵ These pitches are limited to a certain number of keys (both major and minor), based off of which note is designated as the “tonic” within the twelve note chromatic scale,¹²⁶ and can then be adapted into various “modes” by “start[ing] on a different scale degree of the major scale.”¹²⁷ In addition, there are also the melodic minor and harmonic minor scales, which represent variants of the natural minor.¹²⁸

¹²² Livingston & Urbanito, *supra* note 99, at 263.

¹²³ *Id.* at 241.

¹²⁴ *Id.* at 262.

¹²⁵ *Id.* at 240 (footnote omitted).

¹²⁶ Mark DeVoto, *Key: Music*, ENCYCLOPEDIA BRITANNICA, <https://www.britanica.com/art/key-music> [<https://perma.cc/NG89-MQG6>] (A “[k]ey, in music, [is] a system of functionally related chords deriving from the major and minor scales, with a central note, called the tonic (or keynote). The central chord is the tonic triad, which is built on the tonic note. Any of the 12 tones of the chromatic scale can serve as the tonic of a key. Accordingly, 12 major keys and 12 minor keys are possible, and all are used in music. In musical notation, the key is indicated by the key signature, a group of sharp or flat signs at the beginning of each staff.”).

¹²⁷ *Modes*, MUSIC THEORY FUNDAMENTALS, <http://musictheoryfundamentals.com/MusicTheory/modes.php> [<https://perma.cc/8SX3-KE72>] (“Each mode starts on a different scale degree of the major scale.”).

¹²⁸ Willie Myette, *Natural, Harmonic, and Melodic Minor*, MUSIC THEORY ONLINE (2016), <https://musictheoryonline.com/natural-harmonic-and-melodic-minor/> [<https://perma.cc/PKG3-ZR4V>] (“The harmonic minor scale differs from the natural minor scale in only one way—the 7th scale degree is raised by half-step. . . . When playing the ascending form of the melodic minor scale, only the 3rd scale degree is

To this day, all music draws from these basic foundational elements, and the use of these elements is quite important to the crafting of a piece of music. Scales are integral to the development of a piece of music that would be appealing to a listener.¹²⁹ Out of scales, chords are built and sequenced, creating progression and harmony.¹³⁰ Once the artist has these basic building blocks—as governed by these rules of Western tonality—they can then develop unique melodies from complimentary scale tones, creating harmonious arrangements, and a pleasing listening experience overall.¹³¹

Musicians to this day can only draw from certain tonal structures when it comes to writing music, and these rules that govern music have been determined by what is pleasing to the human ear. This is where the copying or infringement often times becomes confused with either drawing on past music for the sake of inspiration and influence or just by following along these existing structures.¹³² Artists often use their influences to craft new and unique music, and this has the potential of being confused with copyright infringement.¹³³ Another issue with not having a separate test for music, is the fact that the musical work can be judged on elements that ought not to be copyrightable, relating back to the idea versus expression dichotomy. These tonal structures that serve as foundational building blocks for music, are not what makes one piece of music distinguishable from another.

Musical “borrowing,” as one could say, is something that is fundamental to the creation of music, and something that has been practiced for centuries. For example, the renowned classical composer Wolfgang Amadeus Mozart did not simply create all of his work from scratch.¹³⁴ The composer crafted his unique work by blending different elements of the styles of music

lowered by half-step. The scale is the same as the major scale with the exception of the lowered 3rd. When descending, the scale reverts to the natural minor form.”)

¹²⁹ Paul Hindemith & Arthur Mendel, *Methods of Music Theory*, 30 MUSICAL Q. 20, 24–25 (1944).

¹³⁰ In *Methods of Music Theory*, Paul Hindemith and Arthur Mendel explain the basic theory behind harmony as follows: (1) “[t]he tonal unit for harmonic purposes is known as the interval;” (2) “[t]he superior force that determines the progression of the intervals is expressed in church modes” (a point that Hindemith argues and that has adapted more to be rooted in physics); (3) “[t]he harmonic unit is known as the chord;” (4) “[t]he units (Chords) are either found in nature ([through] major and minor triads) or formed by inversion;” and (5) “[t]he progression of chords is determined by the root chord.” *Id.* at 26.

¹³¹ *Id.*

¹³² As seen, arguably, in *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *48–50 (C.D. Cal. July 14, 2015).

¹³³ See *supra* Section I.D.

¹³⁴ J. Peter Burkholder, *Music Theory and Musicology*, 11 J. MUSICOLOGY 11, 21–22 (1993).

prominent in his day, such as dances, fanfares, and operas.¹³⁵ This tradition has continued on to popular music today—just think of all of the modern pop artists that are compared to or draw their influence and inspiration from Michael Jackson. Not to mention the fact that the majority of popular music seems to have found a sort of formula for success—one that sees the use of the same 4/4 timing as well as similar phrasing and melodic sensibilities amongst countless artists.¹³⁶

This blending of musical styles is something that has always played a major role in music. It all relates back to the limited nature of music itself, those basic tonal and chord structures, and is something that could easily be mistaken for “copying.” Despite this, the melody of a song, something that makes the piece of music unique, is not solely defined by the tones and chords used.¹³⁷ The chords used, while they may be repeated in works because of the limited nature of musical compositions, serve as a stepping stone for the unique blending of melody and harmony that a musician creates.¹³⁸ It is in this unique blending that the true “expression” lies in a musical piece. Courts should not be ruling on specific elements of a piece alone, but rather should take account of everything—chords, melodies, rhythm, and personhood—together. These elements are rooted in the history of musical composition and development, and ought to be considered in the formulation of a test for musical copyright infringement.

C. Applications in Other Mediums

Finally, applications of the various standards for finding copyright infringement in other art forms exhibit why music ought to be judged by its own standard. By looking at how the court thought about and ruled in cases involving mediums such as books,

¹³⁵ *Id.* at 22.

¹³⁶ Joe Bennett, *Wanna Write a Pop Song? Here's a Fool-Proof Equation*, WASH. POST (June 27, 2014), https://www.washingtonpost.com/posteverything/wp/2014/06/27/wanna-write-a-pop-song-heres-a-fool-proof-equation/?utm_term=.5bce9030f0e6 [<https://perma.cc/JGN9-LPXE>].

¹³⁷ Hindemith & Mendel, *supra* note 129, at 24–25. See *Skidmore v. Led Zeppelin*, CV 15-3462 RGK (AGRx), 2016 Dist. LEXIS 51006, at *35 (C.D. Cal. Apr. 8, 2016) (“The expert reports point out structural commonalities shared by both songs, but striking similarity is an exceedingly high bar that requires a much greater showing. In fact, Plaintiff’s experts admit that other works use ‘similar descending minor harmonic patterns.’ Even though the expert also states that *Taurus* and *Stairway to Heaven* ‘depart from the traditional sequence in similar and significant ways,’ the fact remains that the primary feature in both works is a common musical structure. Thus, the Court cannot definitively say based on the evidence provided that the two works bear a striking similarity.” (internal citations omitted)).

¹³⁸ This notion will ultimately form the foundation of the Unique Quality Test, see *infra* Part IV.

art, film, television, and more, one can see how it is simply easier and more natural to judge these mediums as opposed to music.

For example, in *Baker v. Selden*, the court dealt with a claim of infringement in regard to a book that featured a ledger system.¹³⁹ Simply put, the court could actually *look* at the books in question, examining and weighing the differences and similarities between the two.¹⁴⁰ Similarly, in *Seltzer v. Green Day*, the band Green Day was accused of infringing on artist Derek Seltzer's drawing *Scream Icon* in their music videos and stage backdrops; the court was able to study the artistic works side by side, ultimately noting the transformative value of the latter pieces.¹⁴¹ The Ninth Circuit could simply view the works and see the physical changes between the two.¹⁴² Such comparison is much more straightforward than comparing two musical works at separate times by ear.

Cases like this exhibit the sort of detail that can arise more expansively when one is seeing something rather than listening to it. For example, in *Ideal Toy Corporations v. Kenner Prods. Div. of Gen. Mills Fun Grp, Inc.*, the court was tasked to compare a set of toys that were allegedly infringing on *Star Wars* toys.¹⁴³ Naturally, the court was able to describe in great detail based on what the judges saw, for example, "C-3PO . . . is a humanoid robot of a gleaming brass- or gold-colored metal[,] . . . [h]is metal plates overlap at various joints but do not cover his stomach areas, through which complicated wiring is displayed."¹⁴⁴ The court was able to reach a specific explanation of what makes this toy unique.¹⁴⁵

It is much harder to accomplish such specificity when analyzing music. Though music can be broken into components such as harmony, melody, and rhythm, these are not things that necessarily ought to be deemed copyrightable when viewed in isolation.¹⁴⁶ Furthermore, *Ideal Toy* also relied on background information, with the court going into the specific background of the stories behind the particular sets of toys.¹⁴⁷ This kind of analysis is also seen in *Denker v. Uhry*, a case involving an

¹³⁹ *Baker v. Selden*, 101 U.S. 99, 100 (1880).

¹⁴⁰ *Id.*

¹⁴¹ *Seltzer v. Green Day*, 725 F.3d 1170, 1177 (9th Cir. 2013).

¹⁴² *Seltzer*, 725 F.3d at 1176–77.

¹⁴³ *Ideal Toy Corp. v. Kenner Prods. Div. of Gen. Mills Fun Grp, Inc.*, 443 F. Supp. 291, 293 (S.D.N.Y. 1977).

¹⁴⁴ *Id.* at 297.

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* Section II.B.

¹⁴⁷ *Ideal Toy Corp.*, 443 F. Supp. at 297.

infringement claim in regard to novels that had become films.¹⁴⁸ In this case, the court provided in-depth analysis of the plots of each film, as well as dialogue, characters, and more.¹⁴⁹ In both *Ideal Toy* and *Denker*, the more straight-forward analysis lent itself to the burdens of proving infringement—the court was easily able to dismiss each claim at the summary judgment stage without getting bogged down in the kinds of confusing and uncertain deliberations seen in music cases.¹⁵⁰ Similarly, in *Murray v. NBC*, where an employee claimed that the network had stolen his idea for “The Cosby Show,” the court looked extensively into elements of the show such as “program format, titles, set designs, theme music, stories, scripts, and art work” as well as the overarching identity of the program, ultimately affirming the district court’s decision to grant summary judgment for the defendant.¹⁵¹

A court simply does not have as much to digest when it comes to music. While a musical work can be broken up into its respective elements, those elements still are part of the song itself, and are otherwise not necessarily elements that ought to be considered protectable. Furthermore, other mediums such as “audiovisual works,”¹⁵² allow the benefit of using multiple senses to interpret and describe the piece in question. This differs from music, which we can only hear and are forced to interpret as it plays.¹⁵³

Overall, it is much more difficult for the court, and humans as a whole, to compare two pieces of music to each other. In contrast, one can put two books together, side by side, and evaluate the similarities and differences at once. This is not possible with music. Simply put, listening to two musical work at once would be distracting and ultimately lead nowhere, which forces judges and juries to listen one by one, which is difficult enough to do. For the forgoing reasons, it is clear that music needs to be judged by its own standard when determining whether copyright infringement occurred.

¹⁴⁸ *Denker v. Uhry*, 820 F. Supp. 722, 723, 736 (S.D.N.Y. 1992).

¹⁴⁹ *Id.* at 724–28.

¹⁵⁰ *Id.*; *Ideal Toy Corp.*, 443 F. Supp. at 297.

¹⁵¹ *Murray v. NBC*, 844 F.2d 988, 993 (2d Cir. 1988).

¹⁵² 17 U.S.C. § 101 (2012) (“‘Audiovisual works’ are works that consist of a series of related images which are intrinsically intended to be shown by the use of machine, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.”).

¹⁵³ *See supra* Section II.A.

III. STAIRWAY TO HEAVEN AND BLURRED LINES

Skidmore v. Led Zeppelin and *Williams v. Bridgeport Music, Inc.* are prime examples that indicate a need for a new, unique music copyright infringement test. *Bridgeport* in particular, due to its ruling against Robin Thicke and Pharrell Williams for their supposed infringement in their hit *Blurred Lines*, has received considerable backlash from the music industry and community, with over 200 musicians signing the brief for the ongoing appeal.¹⁵⁴ This ruling sparked a lot of concern in the music industry, with musicians and producers alike calling for reform to protect their ability as artists to draw on musical influence and style.¹⁵⁵ This Part explores the rulings in *Skidmore* and *Bridgeport* in-depth, highlighting the issues that are present in the proceedings and illustrating how the “Unique Quality” test will rectify those issues.

A. *Skidmore v. Led Zeppelin*

The *Skidmore v. Led Zeppelin* case, heard in the Ninth Circuit, involved legendary rock band Led Zeppelin combatting a claim that they had infringed on the song “Taurus” by the band Spirit with their song “Stairway to Heaven.”¹⁵⁶ The estate for Randy Craig Wolfe, the guitarist of Spirit, offered some evidence indicating that Led Zeppelin had allegedly infringed on the song.¹⁵⁷ Skidmore claimed, and Led Zeppelin refuted, that the two bands had a history of performing together and had interacted a number of times at festivals, giving Zeppelin the opportunity to hear the song “Taurus” plenty of times.¹⁵⁸

¹⁵⁴ Legal Entertainment, *Pharrell Williams ‘Blurred Lines’ Appeal Starts Friday*, FORBES (Oct. 5, 2017), <https://www.forbes.com/sites/legalentertainment/2017/10/05/pharrells-blurred-lines-appeal-starts-tomorrow/#7396ffb32812> [https://perma.cc/4KHU-7C6S]; Evan Minsker, “*Blurred Lines*” Appeal Gets Support from More Than 200 Musicians, PITCHFORK, (Aug. 30, 2016), <http://pitchfork.com/news/67932-blurred-lines-appeal-gets-support-from-more-than-200-musicians/> [https://perma.cc/F93B-ESKG].

¹⁵⁵ Rawiya Kameir, *Four Industry Experts Explain What’s Wrong with Current Copyright Laws*, FADER, (June 19, 2015), <http://www.thefader.com/2015/06/19/music-copyright-laws-robin-thicke-marvin-gaye> [https://perma.cc/2UWQ-8KYX].

¹⁵⁶ *Skidmore v. Zeppelin*, CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at *1–7 (C.D. Cal. Apr. 8, 2016). This suit was brought by “Michael Skidmore, as trustee for the Randy Craig Wolfe Trust.” Randy Craig Wolfe was the guitarist and songwriter for the band Spirit. This issue arises years later from the original release of *Stairway to Heaven* as a result of Led Zeppelin releasing a remastered version of the original album. *Id.*

¹⁵⁷ *Id.* at *2, 6–7.

¹⁵⁸ *Id.* at *4–5.

Furthermore, plaintiffs offered a musical expert that attested to the similarities between the two pieces of music.¹⁵⁹ The expert contended that both songs contained “repeated ‘A’ sections consisting of a four-measure descending A minor guitar pattern,” and that “[i]n both songs, the ‘A’ sections are separated by a longer ‘B’ section, or bridge.”¹⁶⁰ The plaintiff’s expert admitted to some differences, namely an extended introduction in “Taurus” and a difference in repeated sections, but ultimately concluded that “nearly 80% of the pitches of the first eighteen notes match, along with their rhythms and metric placement” and noted an unusual variation on “the traditional chromatic descending bass line.”¹⁶¹

The court employed the Ninth Circuit’s extrinsic and intrinsic tests.¹⁶² While noting that the Ninth Circuit has never set out a uniform set of factors to use while judging the music in its extrinsic factual analysis, the court contended that “[s]o long as the plaintiff can demonstrate, through expert testimony that . . . the similarity was ‘substantial’ and to ‘protected elements’ of the copyrighted work, the extrinsic test is satisfied.”¹⁶³ The court ultimately found that the similarities in “Taurus” and “Stairway to Heaven” “transcend[ed] [the] core structure” of the songs, despite the descending chord progression being a “common convention” in the music industry.¹⁶⁴ Specifically, the court noted that the progressions both appear at the beginning of the pieces, “arguably the most recognizable and important segments,” and that the lines are played “at the same pitch, repeated twice, and separated by a short bridge in both songs.”¹⁶⁵ With this, the court found that the pieces were similar enough to go onto to the intrinsic test which asks the jury to assess the “concept and feel” of the two works.¹⁶⁶ The jury disagreed, finding that Led Zeppelin had not infringed.¹⁶⁷

¹⁵⁹ *Id.* at *7–8.

¹⁶⁰ *Id.* at *8.

¹⁶¹ *Id.* at *8–9.

¹⁶² See *supra* notes 56–60 and accompanying text.

¹⁶³ *Zeppelin*, 2016 U.S. Dist. LEXIS 51006, at *49 (omission in original) (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)).

¹⁶⁴ *Id.* at *50.

¹⁶⁵ *Id.* *50–51 (citing *Swirsky*, 376 F.3d at 851).

¹⁶⁶ *Id.* at *51 (quoting *Scentsy, Inc. v. Harmony Brands, LLC*, 585 F. App’x 621, 622 (9th Cir. 2014); *Shaw v. Lindheim*, 919 F.2d 1353, 1360 (9th Cir. 1990)).

¹⁶⁷ Kory Grow, *Led Zeppelin Win in ‘Stairway to Heaven’ Trial*, ROLLING STONE (June 23, 2016), <http://www.rollingstone.com/music/news/led-zeppelin-prevail-in-stairway-to-heaven-lawsuit-20160623> [<https://perma.cc/3PTW-N4FD>].

B. Williams v. Bridgeport Music, Inc.

Williams v. Bridgeport Music, Inc., also decided in the Ninth Circuit, offers another modern copyright infringement case—albeit one with a completely different outcome. The estate of Marvin Gaye alleged that Robin Thicke and Pharrell Williams, composers of the song “Blurred Lines,” infringed on Gaye’s song “Got to Give It Up.”¹⁶⁸ The Gaye party offered a number of musical experts that testified to the similarities between the two pieces.¹⁶⁹ For example, a musicologist contended that several “substantially similar features” could be seen in the two pieces—including signature phrase in main vocal melodies, hooks, backup vocals, core theme, backup hooks, bass and keyboard melodies, and unusual percussion choices—and that these similarities surpass the realm of generic coincidence.¹⁷⁰ Defendants, on the other hand, argued that the only subject matter protected by copyright would be in the musical composition, and that other aspects such as “groove” or “feel”¹⁷¹ are not things that ought to be regarded as protected material.¹⁷²

Interestingly, the court rejected the Gaye party’s argument here, noting that they did “not offer evidence that the copyrighted compositions encompass subject matter beyond the lead sheets,” or the original copyrighted sheet music that features the musical composition.¹⁷³ During the court’s dissection of the pieces, it analyzed each element of the song that could be gleaned from the musical composition.¹⁷⁴ After comparing the expert analyses on both sides, the court found that there was “a sufficient disagreement” over whether substantial similarity was present, indicating that the ruling would go on to a jury to conduct an “intrinsic” analysis.¹⁷⁵ The court indicated that these disputes dealt with “signature phrases, hooks, bass lines, keyboard chords, harmonic structures and vocal melodies,” all of which are

¹⁶⁸ *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *1–2 (C.D. Cal. July 14, 2015).

¹⁶⁹ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240 at *6–7 (C.D. Cal. Oct. 30, 2014).

¹⁷⁰ *Id.* at *6–7.

¹⁷¹ Stephen Graham, *Justin Timberlake’s Two-Part Complementary Forms: Groove, Extension, and Maturity in Twenty-First-Century Popular Music*, 32 *American Music* 4, 452 (2014) (In describing groove-based music, the author found that “its surging climaxes, its syncopations, and its moments of dynamic or textural release create rise-and-fall and forward-directed tension” and “a sense of linearity and movement.”).

¹⁷² *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240 at *17–18 (C.D. Cal. Oct. 30, 2014).

¹⁷³ *Id.* at *24.

¹⁷⁴ *Id.* at *32–55.

¹⁷⁵ *Id.* at *54.

elements that are key to an “extrinsic test.”¹⁷⁶ Furthermore, despite defendant’s arguments that these are not protectable elements of a work, the court referred to precedent that allows for a combination of these elements to form expression.¹⁷⁷

Ultimately, the jury ruled against Thicke and Williams, finding that infringement did occur.¹⁷⁸ As argued in an amicus brief for the current appeal, while the songs do not share “a sequence of even two chords played in the same order and for the same duration,” and additionally that the songs feature entirely different song structures and no lyrical similarities, the jury found otherwise.¹⁷⁹ The jury’s analysis here ultimately came down to the groove of the song, and Thicke and Williams were found guilty for this reason alone.¹⁸⁰

C. Analysis and Issues

The contradictory rulings in these two cases are truly perplexing, and are indicative of the problems that still prevail in copyright infringement analysis today. *Skidmore*, though it reached an arguably correct decision, indicates some of these issues. First, based on the analysis of music theory and structure, a music infringement case like this, given the evidence and analytical dissection of the works, should not have survived the extrinsic test employed by the court.¹⁸¹

In determining that the case ought to go to the jury, as a result of passing through the court’s extrinsic test for similarity, the court found that based on the chords used, their structure and repetition, as well as the fact that they were played in the same pitch, the songs were substantially similar enough to move on to the trier of fact.¹⁸² This is particularly problematic in the realm of music, and is ultimately allowing courts to rule on the ideas behind music rather than the expression of it. Music is a medium that is fundamentally different than other artistic forms

¹⁷⁶ *Id.* (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992)).

¹⁷⁷ *Id.* at *61–62 (citing *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848 (9th Cir. 2012); *Swirsky v. Carey*, 376 F.3d 841, 847–48 (9th Cir. 2004)).

¹⁷⁸ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *147 (C.D. Cal. July 14, 2015).

¹⁷⁹ Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants at 2–3, *Williams v. Gaye*, CA No. 15-56880 (9th Cir. filed Oct. 30, 2016) [hereinafter Brief for Amici Curiae], https://www.scribd.com/document/322595201/Brief-of-Amici-Curiae-212-Songwriters-Composers-Musicians-And-Producer#fullscreen&from_embed [<https://perma.cc/S5YE-DKCCQ>].

¹⁸⁰ *Id.* at 3.

¹⁸¹ See *supra* Part II.

¹⁸² *Zeppelin*, 2016 U.S. Dist. LEXIS 51006, at *61.

that these tests are better suited for.¹⁸³ Music is unique and fundamentally limited by certain sets of tonal structures that have been historically determined to be pleasing to the human ear.¹⁸⁴ Ultimately, what makes a piece of music original is how an artist takes these fundamental musical stepping stones and crafts a unique melody while blending with these tonal structures.¹⁸⁵

Based on how limited music is as an artistic medium, it is unfair and problematic to assess factors such as tonal structure and chord use as anything other than ideas that should not be protected under copyright law. As the test stands, musicians are clearly being punished by an unclear and misguided series of tests, and ultimately for their use of musical ideas rather than a clearly defined musical expression.

This is clear in both *Skidmore* and *Williams*. In *Skidmore*, the two pieces of music passed through the extrinsic test entirely based on musical ideas, namely the use of similar chords and song structure.¹⁸⁶ While the court asserted that this copying of ideas is occurring at some kind of heightened level, it ultimately fell back on the lackluster assertion that the circuit has never drawn a clear line for this.¹⁸⁷ The same can be said for *Williams*, where the court allowed for a combination of ideas, such as chords, notes, rhythms, and drum beats, to count as expression, noting that the Ninth Circuit has refused to “narrow the ‘large array of elements’ of which music is comprised to a ‘uniform set of factors’ whose similarity must be shown.”¹⁸⁸ What can be gleaned from this, is the fact that because of a refusal to set a clear line between what is a musical idea and what is musical expression, essentially any array of musical ideas can be viewed as expressive by the court and passed along to a jury. In *Skidmore*, this was done merely on the use of chords and structure, while *Williams* involved a number of factors, all of which were contended with by Thicke and Williams’ musical experts.¹⁸⁹

Clearly, it is time for courts to draw a line between what constitutes a musical idea and what constitutes musical expression. As seen by these two cases, any number of different

¹⁸³ See *supra* Part II.

¹⁸⁴ Livingston & Urbinato, *supra* note 99, at 239, 240–41, 254.

¹⁸⁵ Hindemith & Mendel, *supra* note 129, at 26; see *supra* Part II.B.

¹⁸⁶ *Skidmore v. Zeppelin*, No. CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at *49–50 (C.D. Cal. Apr. 8, 2016).

¹⁸⁷ *Id.* at *49–50.

¹⁸⁸ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240 at *62 (C.D. Cal. Oct. 30, 2014) (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)).

¹⁸⁹ *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *9, 35; *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *20–31 (C.D. Cal. July 14, 2015).

musical factors and ideas can result in the copying determination being passed along to the jury, and this is particularly problematic. *Skidmore* and *Williams*, initially, seem like they should have different outcomes. The court noted in *Skidmore* that *Stairway to Heaven* employed similar chords, progression, and overall atmosphere and expression, and on the other hand, in *Williams*, the court sent the case to the jury mainly because there was a disagreement between musical experts and seemingly the court did not want to go against precedent and draw a line for the distinction between idea and expression in music.¹⁹⁰ Despite this, the respective juries found Led Zeppelin innocent and Thicke and Williams guilty of infringement.¹⁹¹

The intrinsic aspect of the test does not call for the use of an expert's testimony or an objective analysis of the pieces of music; rather, it relies on the overall feel of the piece.¹⁹² The problem though is not only how vague this is, but also the fact that music has historically relied on the use of influence and blending of musical genres.¹⁹³ Given the lack of instruction here, a jury could be capable of determining that essentially any song "feels" like another one. One could take any modern artist from any genre of music¹⁹⁴ and trace the artist's sound to those that came before, artists that influenced them individually or the genre as a whole. With the logic given to juries that copying occurred when a song "feels" like another one, literally any artist could easily be accused of copyright infringement. The fact that some get off the hook, like Led Zeppelin in *Skidmore*, is simply unexplainable under these circumstances. Ultimately, the idea of total concept and feel in the musical medium is clearly indicative of a musical idea rather than the expression of a number of ideas, a concept which is backed by the over 200 musicians that signed onto Thicke and Williams' appeal, and something that makes it

¹⁹⁰ *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *50; *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240 at *54 (C.D. Cal. Oct. 30, 2014).

¹⁹¹ *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *56; Kory Grow, *Led Zeppelin Win in 'Stairway to Heaven' Trial*, ROLLING STONE (June 23, 2016), <http://www.rollingstone.com/music/news/led-zeppelin-prevail-in-stairway-to-heaven-lawsuit-20160623> [<https://perma.cc/3PTW-N4FD>]; *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *147 (C.D. Cal. July 14, 2015); Daniel Kreps, *'Blurred Lines' Ruling Sliced to \$5.3 Million, With a Catch*, ROLLING STONE (July 15, 2015), <http://www.rollingstone.com/music/news/blurred-lines-ruling-sliced-to-5-3-million-with-a-catch-20150715> [<https://perma.cc/357R-QVTT>].

¹⁹² *Skidmore*, 2016 U.S. Dist. LEXIS 51006, at *51.

¹⁹³ Burkholder, *supra* note 134, at 22.

¹⁹⁴ Musical genres are "a unique category of composition with similar style, form, emotion, or subject." *Genre*, ON MUSIC DICTIONARY, <http://dictionary.onmusic.org/terms/1567-genre> [<https://perma.cc/Q7TG-NK59>].

clear that music, as a unique art form, requires a unique test for determining whether infringement occurred.¹⁹⁵

IV. SETTING A NEW STANDARD: THE UNIQUE QUALITY TEST

An analysis of the inconsistent and unclear applications of the various copyright tests involving music exhibits the need for a unique test when it comes to determining whether infringement occurred. As observed earlier, courts have been apprehensive to draw a clear line between what is an idea and what is an expression in the realm of music.¹⁹⁶ But in an artistic medium that is so fundamentally limited compared to others and built on influence and blending of previous musical elements, there is a need for that line to be drawn. By failing to understand the nature of music itself, courts have allowed artists to be punished for infringing on musical ideas¹⁹⁷ that should not be deemed protectable under copyright law.

The Unique Quality Test would rectify this issue. It would allow protection for musicians' original musical expression, while ensuring that artists would not be punished for employing the use of musical influence. Several authors have recognized a need for a regime change when it comes to the determination of music copyright infringement, but have missed the mark on establishing a clear test that draws a necessary line between idea and expression. For example, some scholars have suggested the implementation of a music-use compulsory license.¹⁹⁸ Accordingly, this would serve as a fee that musicians could pay based on "(1) the amount of music borrowed, and (2) the number of phonorecords produced by the borrower."¹⁹⁹ This solution, however, does not take into account the fact that music is built on influence and borrowing of styles and genres. This solution rests on an assumption that musicians will purposely copy another piece of music, be aware of this copying, and then pay the other artist accordingly. As examined in this note, however, just because two pieces of music sound similar, it does not mean they are. An artist could have incorporated their influence or previous works in a unique way that should not be considered infringement, and the compulsory license test fails to take that into account.

¹⁹⁵ Brief for Amici Curae, *supra* note 179, at 3.

¹⁹⁶ See generally *Skidmore v. Zeppelin*, CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at *9, 35 (C.D. Cal. Apr. 8, 2016); *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *20-31 (C.D. Cal. July 14, 2015).

¹⁹⁷ See *supra* Section II.B.

¹⁹⁸ See *Keyes*, *supra* note 118, at 439.

¹⁹⁹ *Id.*

On the other hand, others have made the argument that “[c]ourts should be aware of music’s unique qualities when shaping the legal doctrine governing infringement disputes to ensure that plaintiff composers can adequately protect themselves from plagiarism and defendant composers can fend off unjustified attacks on their authorial integrity.”²⁰⁰ The proponents of this methodology take a step in the right direction, proposing an increased standard of “striking similarity” for music cases—so striking that only copying could explain the resemblance in the music—and offer that courts “should give particular weight to musical experts’ analyses that perform a pitch-by-pitch comparison of disputed works.”²⁰¹ A heightened standard like this could be beneficial in certain circumstances where the chord use and melodic expression are extremely and obviously similar, but in a case like *Bridgeport*, where the jury ruled on the overall feel of the pieces, this standard still would not be helpful.²⁰² Adding “striking” to the substantial similarity dichotomy does not do much to alleviate the vagueness of the test, and a jury could still easily find that a feel or groove of a song is strikingly similar without much to go on.

The Unique Quality Test would work to protect artists’ musical expression while shielding them from futile suits involving elements of musical pieces that are clearly just ideas that should not be protected under copyright law. This test would hone in on what makes a particular song unique, what signifies the artist’s true intentions and original forms of musical expression. The test would take into account musical ideas, but the ruling would ultimately never depend solely on said ideas. In determining whether infringement occurred, the court, or jury, or both would look at how an artist took the unprotectable elements of music composition, such as chords and structure, and arranged their own protectable melody ontop, creating a blend of protectable and unprotectable elements that form a unique musical expression. The test would be applied at both stages of the infringement dichotomy—whether copying occurred and whether there was an unlawful appropriation of the work.²⁰³

The Unique Quality Test would alleviate the confusion of determining whether two songs are substantially similar by effectively replacing that qualifier at both stages of the inquiry.

²⁰⁰ Livingston & Urbanito, *supra* note 99, at 263.

²⁰¹ *Id.* at 291–92.

²⁰² See *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *51–52 (C.D. Cal. July 14, 2015).

²⁰³ *Arnstein v. Porter*, 154 F.2d 464, 472–73 (2d Cir. 1946).

So, in an infringement suit featuring two songs, a judge would still determine whether copying occurred as a matter of law, but by utilizing the heightened Unique Quality Test. If the judge determines that there was copying, the jury would be instructed to make their determination of an unlawful appropriation of the work at hand by applying the Unique Quality Test as well.

Looking at the Unique Quality Test through the lens of a case that almost arose between musician Joe Satriani and the band Coldplay further explains what the test is getting at and how a court would apply it.²⁰⁴ In 2009, Satriani claimed that Coldplay's "Viva la Vida" contained "substantial, original portions" of his 2004 instrumental song "If I Could Fly."²⁰⁵ The case was settled outside of court,²⁰⁶ but still serves as an excellent example of possible infringement that could be found under the Unique Quality Test. Beginning at fifty seconds into the song, Satriani plays a melodic guitar solo over a set of four chords.²⁰⁷ Analysis of this aspect of the song indicates that the chords themselves would not be something that could be protected, but rather are a progression that has been utilized countless times in music. A particular chord progression, as discussed above, is something that has been deemed pleasing to the ear over the course of music history.²⁰⁸ There are only so many of these progressions that could work, and therefore the progression itself is something that cannot be protected.²⁰⁹ The guitar solo and melodic phrasing that Satriani places overtop of the chords, however, is something that would be protectable. Satriani has crafted this melody in a way that has not been done previously and that blends with the chords underneath it, creating a pleasing sound, indicating a unique form of musical "expression."

Coldplay's "Viva la Vida" clearly exhibits the same chord pattern—this can be heard from the beginning of the song.²¹⁰ This alone is not problematic. But once the lyrical melody begins is where we start to see that infringement could have occurred. Coldplay's

²⁰⁴ Gil Kaufman, *Coldplay, Joe Satriani Settle Copyright Infringement Case*, MTV (Sept. 16, 2009), <http://www.mtv.com/news/1621614/coldplay-joe-satriani-settle-copyright-infringement-case> [<https://perma.cc/WEU4-QU3J>]; Daniel Kreps, *Satriani's "Viva La Vida" Copyright Suit Against Coldplay Dismissed*, ROLLING STONE (Sept. 16, 2009), <http://www.rollingstone.com/music/news/satrianis-viva-la-vida-copyright-suit-against-coldplay-dismissed-20090916> [<https://perma.cc/BH9B-SZJ6>].

²⁰⁵ Kaufman, *supra* note 204.

²⁰⁶ *Id.*

²⁰⁷ See JOE SATRIANI, *If I Could Fly, on IS THERE LOVE IN SPACE?* (Epic Records 2004) at 0:49.

²⁰⁸ See *supra* Section II.B.

²⁰⁹ See *supra* Section II.B.

²¹⁰ See COLDPLAY, *Viva la Vida, on VIVA LA VIDA OR DEATH AND ALL HIS FRIENDS* (Parlaphone 2008) at 0:00.

singer, Chris Martin, sings "I used to rule the world, seas would rise when I gave the word" in the exact same melodic pattern as Satriani's guitar melody.²¹¹ Given that it can be shown that access had occurred, which is likely given the status of Joe Satriani in the rock music world, this would be enough to satisfy that infringement had occurred under the Unique Quality Test. The way the melodies are crafted to fit along the tonal structures in the two songs are exactly the same; assuming copying has already been established,²¹² Martin's later version clearly indicates an infringement of a protectable element of Satriani's song—the actual musical expression, not just the chords or overall feel of the work.

Repp v. Webber is another example, as long as access had been proven, of where infringement likely could have occurred under the Unique Quality Test. In this instance, both pieces utilize a similar chord structure, which we have seen is something that ought not be protected under copyright law as a musical "idea."²¹³ Like in the Satriani and Coldplay case, however, the vocal melodies situated on top of the two are almost exactly the same.²¹⁴ If access could be established in this instance, it is likely that infringement occurred due to the fact that the unique aspects of the musical pieces, what make them recognizable on their own, are almost exactly the same.

Had the courts applied the Unique Quality Test in *Skidmore* and *Williams*, the outcomes would have been quite different and would have provided a favorable outcome in terms of protection for musicians. Infringement clearly did not occur. After an introduction, "Taurus" goes into a descending chord pattern that is similar to what we hear in the beginning of "Stairway to Heaven."²¹⁵ Despite this slight similarity, Led Zeppelin goes on to introduce a unique vocal melody overtop, as well as varying instrumental arrangement that also blend together with this basic chord pattern to create something pleasing to the listener. These aspects of "Stairway to Heaven" are not heard in "Taurus," and are what make "Stairway" a unique form of musical expression. Clearly, the fact that there were similarities in the chords used should not have been enough to send the case to the jury. Though the jury ruled in

²¹¹ Compare JOE SATRIANI, *supra* note 207, at 0:49, with COLDPLAY, *supra* note 210, at 0:13.

²¹² See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

²¹³ See *supra* note 55 and accompanying text.

²¹⁴ *Id.*

²¹⁵ Compare LED ZEPPELIN, *Stairway to Heaven*, on LED ZEPPELIN IV (Atlantic Records 1977) at 0:00, with SPIRIT, *Taurus*, on SPIRIT (Ode Records 1968) at 0:47.

favor of Led Zeppelin, this could have easily gone the other way, and there should not have been an opportunity for that to occur.

On the other hand, *Williams* would have resulted in a favorable ruling for Thicke and Williams under the Unique Quality Test. Ultimately, the jury ruling in this case relied on the feel and groove of the two songs, and upon listening to the two, this must have been due to a fairly similar drumbeat and possibly based off of the use of falsetto²¹⁶ vocals.²¹⁷ Otherwise, as Thicke and Williams' lawyers attested to, there are no similarities in melody, instrumental parts, or lyrical content.²¹⁸ Overall tone and feel represents more of a musical "idea" rather than "expression." Given the fact that the court sent the case to the jury only due to the difference in the opinions of experts, rather than in *Skidmore* where the court indicated actual similarity between the two pieces, it only bolsters the argument that no unique aspects of Gaye's work were infringed upon.²¹⁹ "Blurred Lines," while imploring a similar drumbeat and R&B feel, presents its own unique vocal melodies and musical phrases on top of the unprotectable feel of the song. Ruling otherwise opens the door for countless similar rulings. If a simple drumbeat is enough to find a ruling of infringement, any song in any genre could result in a similar determination.

The Unique Quality Test would rectify the foregoing issues for musicians—protecting their original forms of musical expression while shielding them from fruitless lawsuits that could result in rulings based solely on musical "ideas." Legislative action is not needed to implement the change, as courts could simply administer the test on their own. As this note has shown, the traditional Second and Ninth Circuit tests seem to fit better with other kinds of artistic forms, and the Unique Quality Test would specifically apply as a sort of heightened test for music. Music is deserving of its *own* test, so amending the Copyright Act to accomplish this would be too expansive, as it would then likely apply to all other artistic mediums.

By continuing to employ a vague test, one where courts have been hesitant to draw a clear line between what is a musical idea and what is musical expression, courts have allowed for rulings to occur that go against the fundamental aspects of

²¹⁶ *Falsetto*, ONMUSIC DICTIONARY, <http://dictionary.onmusic.org/terms/1378-falsetto> [<https://perma.cc/JJ8T-YGDD>] (last visited Oct. 2, 2017) (Falsetto refers to "[a] technique in which a mature male voice can reach notes of the soprano or alto range.")

²¹⁷ Brief for Amici Curiae, *supra* note 179, at 3.

²¹⁸ *Williams v. Bridgeport Music, Inc.*, LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *66–67 (C.D. Cal. July 14, 2015).

²¹⁹ *Id.* at *54.

copyright law. It is foundational in copyright law that ideas are not protectable elements. A study of music theory, however, shows that an idea in music is different than that in other artistic mediums. Musicians are vastly more limited in their craft than others, and a court ruling there is infringement based on aspects of music such as chord usage and tonal structure ignores what makes music unique. Ultimately, courts need to be making these determinations based on the original and unique qualities that artists instill into their musical work—something that can be accomplished with the Unique Quality Test.

CONCLUSION

Music is unique, and is thus deserving of a unique legal standard. The Unique Quality Test would ultimately serve the best interest of artists and musicians, allowing them to create and produce music that is not only original, but also draws from their influences. Music is fundamentally limited in its nature, and musicians are always finding ways to build off of what artists before them have done, adding their own creative tinge to it in the process. When it comes to determining copyright infringement, courts are not equipped with appropriate legal tests and standards to deliberate over such a nuanced artistic medium. With the Unique Quality Test, judges and juries would be able to evaluate music in a more informed light, establishing a clearer line for what copying really means when it comes to music. Then ultimately the line between copying and influence in music will not be so blurred.

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