
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 73 | ISSUE 1 FALL 2020

COPYRIGHT INFRINGEMENT ANALYSIS IN MUSIC: KATY PERRY A "DARK HORSE" CANDIDATE TO SPARK CHANGE?

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ABSTRACT

The music industry is at a crossroad. Initial copyright infringement judgments against artists like Katy Perry and Robin Thicke threaten millions of dollars in damages, with the songs at issue sharing only very basic musical similarities or sometimes no similarities at all other than the "feel" of the song. The Second Circuit's "Lay Listener" test and the Ninth Circuit's "Total Concept and Feel" test have emerged as the dominating analyses used to determine the similarity between songs, but each have their flaws. I present a new test—a test I call the "Holistic Sliding Scale" test—to better provide for commonsense solutions to these cases so that artists will more confidently be able to write songs stemming from their influences without fear of erroneous lawsuits, while simultaneously being able to ensure that their original works will be adequately protected from instances of true copying.

* J.D. Candidate, Rutgers Law School, January 2021. I would like to thank my advisor, Professor John Kettle, for sparking my interest in intellectual property law and for his feedback and guidance while I wrote this Note, and my Senior Notes & Comments Editor, Ernesto Claeyssen, for his suggestions during the drafting process. I would also like to thank my parents and sister for their unending support in all of my endeavors, and my fiancée for her constant love, understanding, and encouragement while I juggled writing this Note, working full time, and attending night classes.

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INTRODUCTION

On July 29, 2019, a jury found that Katy Perry infringed the 2009 Christian rap song "Joyful Noise" with her 2013 hit "Dark Horse" in *Gray v. Perry*.[1] Coming on the heels of the final decision in *Williams v. Gaye*,[2] where Robin Thicke and Pharrell Williams were ultimately found liable[3] for infringing Marvin Gaye's "vibe" with their 2013 hit "Blurred Lines,"[4] the music industry is at an interesting crossroad. The backlash against these decisions[5] highlights the competing interests of musicians, as they struggle between desiring the freedom to emulate those who influenced them, while also wanting to ensure that their own original works are protected from illegal copying.

Perry, Thicke, and Williams are not alone in facing infringement allegations and lawsuits. Notably, Vanilla Ice, George Harrison, Michael Bolton, and Led Zeppelin have all also famously dealt with infringement claims.[6] Some of these issues have been resolved as one would expect.[7]

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1. Katy Perry's initial motion for summary judgment was denied. Gray v. Perry, No. 2:15-cv-05642-CAS (JCx), 2018 WL 3954008, at *8 (C.D. Cal. Aug. 13, 2018). After going to trial, the jury found that she unlawfully copied "Joyful Noise," and on August 1, 2019, the jury ordered $2.78 million in damages, with Perry personally responsible for $500,000. Alex Abad-Santos, *A Jury Said Katy Perry's "Dark Horse" Copied Another Song. The $2.8 Million Verdict is Alarming*, VOX (Aug. 2, 2019, 2:02 PM), https://www.vox.com/culture/2019/7/30/20747100/katy-perry-dark-horse-joyful-noise-copyright-2-8-million. Since that ruling, the United States District Court for the Central District of California has vacated these jury verdicts and granted Perry's motion for judgment as a matter of law. Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275221, at *18 (C.D. Cal. Mar. 16, 2020).

2. 895 F.3d 1106 (9th Cir. 2018).

3. *See id.* at 1117–18 (discussing the trial phase of the case).

4. *See* Chris Cooke, *Blurred Lines Song-Theft Ruling Stands as Supreme Court Deadline Passes*, COMPLETE MUSIC UPDATE (Dec. 13, 2018), https://completemusicupdate.com/article/blurred-lines-song-theft-ruling-stands-as-supreme-court-deadline-passes/ (stating that Thicke and Williams agreed that "Blurred Lines" shared a similar "vibe" to "Got to Give It Up," but not to the point of being infringement).

5. *See id.* ("The judgement [sic] was controversial within much of the songwriting community because many felt it set a dangerous precedent that could result in a flood of copyright infringement lawsuits against songs that had been influenced by earlier works.").

6. The Led Zeppelin case, for example, only seems to recently have met its end, with the Ninth Circuit finally declaring that there was no infringement. Skidmore *ex rel.* Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1079 (9th Cir. 2020) ("The trial and appeal process has been a long climb up the *Stairway to Heaven*. . . . We affirm the judgment that Led Zeppelin's *Stairway to Heaven* did not infringe Spirit's *Taurus*.").

7. Vanilla Ice, for example, settled his case with Queen and David Bowie out of court because the alleged infringement was so obvious. Jordan Runtagh, *Songs on Trial: 12 Landmark Music Copyright Cases,* ROLLING STONE (June 8, 2016, 4:24 PM), https://www.rollingstone.com/politics/politics-lists/songs-on-trial-12-landmark-music-copyright-cases-166396/vanilla-ice-vs-queen-and-david-bowie-1990-61441/.

However, the "Dark Horse" case and the "Blurred Lines" case both demonstrate a trend in cases that seemingly go against the grain, and their questionable findings serve as the inspiration for this Note.[8]

Part I of this Note will address intellectual property law and how copyright law fits into it. This will include a brief history of copyright and how it came into being, including the Copyright Acts of 1909 and 1976, as well as areas that are protected by copyright. Part II will focus on copyright law and how it relates specifically to musical works and the music industry. It will break down what constitutes music infringement, discuss the dominant infringement tests used in different federal circuits (specifically the Second and Ninth Circuits), explore what makes music different than other copyrightable works and why it should be unique within the copyright sphere, and take a deeper dive into notable music infringement cases throughout history. Finally, Part III will present my proposed "Holistic Sliding Scale" test for music infringement cases. It will break down my test, the reasoning behind it, how it relates to the "substantial similarity" element of music infringement, and why it would be preferable to other tests. Then I will apply it to the notable cases to demonstrate that it would lead to more commonsense results in cases of this nature.

I. INTELLECTUAL PROPERTY LAW & COPYRIGHT

Generally speaking, intellectual property encompasses rights in seven major areas: (1) Undeveloped Ideas; (2) Unfair Competition; (3) Trade Secrets; (4) Right of Publicity; (5) Trademarks; (6) Patents; and (7) Copyrights.[9] This Note, however, is limited to a discussion of copyright principles.

A. History of Copyright

Congress derives its right to create copyright laws from the Constitution.[10] Copyright protects "original works of authorship fixed in

8. *See* Gray v. Perry, No. 2:15-cv-05642-CAS (JCx), 2018 WL 3954008, at *1 (C.D. Cal. Aug. 13, 2018); Williams v. Gaye, 895 F.3d 1106, 1115 (9th Cir. 2018).

9. *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 25, at vii–viii (Clark et al. eds., Found. Press, 5th ed. 2002) (listing major areas of intellectual property law to be discussed throughout the casebook).

10. Under the "Patents and Copyrights" clause, the Constitution explicitly grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device,"[11] and authors of copyrighted works retain certain exclusive rights.[12]

1. Copyright Act of 1909

Under the 1909 Copyright Act, publication marked the dividing line between state and federal protection.[13] State common law protected a work until its publication, and federal statutory copyright protected a work from the moment of publication through the expiration of a fixed statutory term.[14] Notably, the 1909 Act had strict notice requirements,[15] and if a work was published without the required notice, it fell into the public domain.[16]

2. Copyright Act of 1976

The 1976 Copyright Act became effective on January 1, 1978, and it eliminated common law copyright for most purposes and made "federal

11. 17 U.S.C. § 102(a) (2012); *see also* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008) (noting that determining whether a work is "fixed" involves two requirements: an "embodiment" requirement, where a work must be placed in a medium such that it can be perceived, reproduced, etc. from that medium; and a "duration" requirement, where a work must remain embodied "for a period of more than transitory duration").

12. Copyright owners are entitled to each of the following exclusive rights:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106. Owners also have the exclusive right to authorize others to do any of these things. *Id.*

13. GOLDSTEIN, *supra* note 9, at 568.

14. *Id.*

15. The statutorily-required copyright notice had to appear on all publicly distributed copies. *Id.*

16. *Id.*

copyright attach not from the moment of a work's publication,[17] but from the moment of its first fixation in tangible form."[18] Under the 1976 Act, the copyright statutory term is measured for most purposes by the life of the author plus seventy years.[19]

3. Berne Convention Implementation Act of 1988

The Berne Convention Implementation Act of 1988 conformed U.S. law to the Berne Convention's[20] requirements and became effective on March 1, 1989.[21] Most dramatically, it made copyright notice optional as opposed to mandatory.[22]

It is important to have a basic understanding of these Acts and Amendments, because the rights and responsibilities for an author's work will vary depending on which Act's rules govern it.[23]

B. Copyrightable Subject Matter

Currently, copyrightable subject matter includes: literary works; musical works (including any accompanying words); dramatic works (including any accompanying music); pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and

17. Publication is defined as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101. Further, "[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication." *Id.* However, "[a] public performance or display of a work does not of itself constitute publication." *Id.*

18. GOLDSTEIN, *supra* note 9, at 568–69.

19. 17 U.S.C. § 302(a). For joint works (a work "prepared by two or more authors who did not work for hire"), the copyright lasts for 70 years after the last surviving author's death. *Id.* § 302(b). For anonymous works, pseudonymous works, and works made for hire, the term of protection is "95 years from the year of [the work's] first publication, or . . . 120 years from the year of its creation, whichever expires first. *Id.* § 302(c).

20. The Berne Convention refers to the "Convention for the Protection of Literary and Artistic Works," as well as "all acts, protocols, and revisions thereto." *Id.* § 101. The Convention was originally signed in Berne, Switzerland, on September 9, 1886. *Id.*

21. GOLDSTEIN, *supra* note 9, at 569–70.

22. *See id.* at 570 ("[T]he Berne Implementation Act entirely eliminated the notice requirement in order to bring United States copyright law into compliance with the Berne Convention for the Protection of Literary and Artistic Works.").

23. If a work was published before January 1, 1978, the 1909 Act's rules will govern; if copies or phonorecords were publicly distributed on or after January 1, 1978, but before March 1, 1989, the 1976 Act's rules will govern; and if it's after March 1, 1989, the 1988 Berne Convention Amendments are in effect. *Id.*

other audiovisual works; sound recordings;[24] and architectural works.[25] Viewed more simply, copyright protection extends to the *expression* of an idea, not the underlying idea itself, and the more creative the expression, the broader the scope of protection.[26]

II. COPYRIGHT IN MUSIC

A. Copyright Law in the Music Industry

Generally speaking, to establish copyright infringement, a plaintiff must prove ownership of the copyright right infringed, as well as unlawful copying or use of the copyrightable expression.[27] In music, it is often difficult to prove direct copying; therefore, a plaintiff is allowed to satisfy the "unlawful copying" element through evidence by demonstrating two elements: (1) that the defendant had access to the work; and (2) that the two works are substantially similar.[28]

1. Access

In order to show that a defendant had access to a copyrighted work, a plaintiff must show "a reasonable possibility, not merely a bare possibility" that the defendant had the opportunity to view (or in the case of music, hear) the copyrighted work.[29] In the event that direct access

24. Sound recordings were given federal copyright protection in 1972. *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, COPYRIGHT.GOV, https://www.copyright.gov/docs/sound/ (last visited Nov. 3, 2020).

25. 17 U.S.C. § 102(a). However, copyright protections are not applicable to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.* § 102(b).

26. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (noting that ideas themselves are not protectible, but rather only the expression of ideas).

27. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (stating plaintiff must prove "ownership of a valid copyright, and . . . copying of constituent elements of the work that are original"); Swirsky v. Carey, 376 F.3d 841, 844 (9th Cir. 2004) (explaining that plaintiffs must show (1) ownership of the copyright; and (2) that defendant copied protected elements of their work); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (noting that two separate elements must be shown in an infringement case: (1) "that defendant copied from plaintiff's copyrighted work;" and (2) that the copying, if proved, amounted to "improper appropriation").

28. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000) ("[P]roof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar.'").

29. Art Attacks Ink, LLC v. MGA Ent. Inc., 581 F.3d 1138, 1143 (9th Cir. 2009).

cannot be shown, a plaintiff may prove access circumstantially either by: "(1) establishing a chain of events linking the plaintiff's work and the defendant's access[;] or (2) showing that the plaintiff's work has been widely disseminated."[30] In music cases, oftentimes the more successful avenue in proving access is by showing widespread dissemination "through sales of sheet music, records, and radio performances[,]" although these may be difficult judgment calls for courts to make in deciding where an alleged infringement falls on the "access spectrum."[31] In some cases, where the works at issue are so alike as to be "strikingly similar," access may be inferred.[32] In other circumstances, the "inverse ratio rule" is used; under this rule, if a high degree of access is shown, a lower standard of proof for substantial similarity is required.[33]

2. Substantial Similarity

After access has been demonstrated, the final element a plaintiff must prove is that the two pieces are "substantially similar."[34] Importantly, what must be substantially similar is the protectible element, or copyrightable expression, of the piece.[35] However, while it is essential to distinguish between protected and unprotected elements of a work, "substantial similarity can be found in a combination of elements, even if those elements are individually unprotected."[36]

B. Music Infringement Tests Used in Different Circuits

Currently, two tests reign supreme when determining substantial similarity between two musical works: (1) the "Lay Listener" or "Ordinary Observer" test developed by the Second Circuit; and (2) the

30. *Id.*

31. *Three Boys Music*, 212 F.3d at 482 (internal quotations omitted).

32. *See* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) (stating that if there is no direct evidence of access, it may be presumed "by proof of similarity which is so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.").

33. Swirsky v. Carey, 376 F.3d 841, 844 (9th Cir. 2004).

34. *Three Boys Music*, 212 F.3d at 481.

35. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (holding that only the expression of ideas, not the ideas themselves, are protectible, and that infringement may only be found where the part of the work taken is both substantial and a protectible expression of an idea).

36. *Swirsky*, 376 F.3d at 848.

"Total Concept and Feel" test, with a two-pronged "Extrinsic" and "Intrinsic" approach, developed by the Ninth Circuit.[37]

1. Second Circuit "Lay Listener" Test

In the Second Circuit, determining whether infringement has occurred becomes a question of "whether [the] defendant took from [the] plaintiff's work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that [the] defendant wrongfully appropriated something which belongs to the plaintiff."[38] Both the question of whether there was copying and whether there was improper appropriation are issues of fact to be determined by the trier of fact.[39] The Second Circuit tends to focus more on the economic value of an artist's work, and as such, the legal protections are not based on an artist's reputation as a musician, but rather on "his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts."[40]

If this test seems vague, it is because by design, it is. In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*,[41] Judge Learned Hand noted that "[t]he test for infringement of a copyright is of necessity vague. . . . Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."[42] Expert testimony is allowed; however, it is only allowed to "assist in determining the reactions of lay

37. Approximately two-thirds of the federal circuits follow one of these two tests. *See* Eric Rogers, *Substantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis Among the Federal Circuits*, 2013 MICH. ST. L. REV. 893, 911 (2013) (showing flowchart of substantial similarity tests broken up by federal circuit in "Figure 1"). The remaining third follow some variation of the "abstraction/filtration/comparison" test, where the court identifies and removes all unprotectible elements from the original work, and then analyzes the remaining protectible elements for substantial similarity between the original work and the allegedly infringing work. *See id.* at 909–11.

38. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946). In this case, the plaintiff alleged that the defendant had infringed copyrights to several of the plaintiff's musical compositions, as well as "infringement of his rights to other uncopyrighted musical compositions, and wrongful use of the titles of others," and sought $1 million in damages from the alleged plagiarism. *Id.* at 467. The defendant denied having ever seen or heard any of the compositions at issue, nor having "had any acquaintance with any persons said to have stolen any of them." *Id.*

39. *Id.* at 469.

40. *Id.* at 473.

41. 274 F.2d 487 (2d Cir. 1960).

42. *Id.* at 489.

auditors."[43] For determining infringement, expert musicians' opinions on the musical excellence of the works "are utterly immaterial."[44]

The mindset of the Second Circuit seems to be that if an ordinary listener would overlook the differences between two works unless explicitly seeking them out, that is not enough to find infringement; otherwise, protection against infringement would be denied for reasons totally unrelated to the work's purpose.[45]

2. Ninth Circuit "Total Concept and Feel" Test

The Ninth Circuit's "Total Concept and Feel" test[46] uses a two-part analysis to determine whether two works are substantially similar: an "extrinsic" test, followed by an "intrinsic" test.[47] For the "extrinsic" test, the plaintiff is tasked with "identify[ing] concrete elements based on objective criteria,"[48] and analysis is based upon "whether two works share a similarity of ideas and expression based on external, objective criteria."[49] For this prong, both analytic dissection and expert testimony are welcome,[50] and it is held during the summary judgment phase of a case.[51] The "intrinsic" test, on the other hand, is a subjective test that is applied to the factfinder (e.g., the jury) after the extrinsic test has been satisfied, and "asks 'whether the ordinary, reasonable person would find

43. *Arnstein*, 154 F.2d at 473.

44. *Id.*

45. *Peter Pan Fabrics*, 274 F.2d at 489. In fact, sixteen years before the lay listener test was outlined in *Arnstein*, Judge Learned Hand stated that in his opinion expert testimony in infringement cases "ought not to be allowed at all" and that "in the future [it should] be entirely excluded, and the case confined to the actual issues; that is, whether the defendant copied [the work], so far as the supposed infringement is identical." Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930).

46. The test was first introduced in *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970). In that case, the plaintiff was suing for damages and injunctive relief for the alleged copyright infringement of seven studio greeting cards. *Id.* at 1107. The court looked at all of the elements of the greeting cards, including the "text, arrangement of text, art work, and association between art work and text" as a whole, and ultimately found infringement of the cards, holding that the offending cards had the same "total concept and feel" as the original copyrighted cards. *Id.* at 1109–11.

47. Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996).

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

49. *Smith*, 84 F.3d at 1218.

50. *Id.*

51. Miah Rosenberg, Note, *Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit*, 39 U.C. DAVIS L. REV. 1669, 1673–76, 1674 n.27 (2006) (describing Ninth Circuit extrinsic test and its use during summary judgment motions).

the total concept and feel of the works to be substantially similar.'"[52] For this prong, no expert assistance allowed.[53]

C. What Makes Music Different Than Other Copyrightable Works?

Compared to other copyrightable works, music is unique. Unlike virtually all other copyrightable works, in which authors have a seemingly endless supply of combinations with which to work with (e.g., words with which to write a literary work or body movements with which to create a choreographic work), music authors deal with a finite supply of material with which to create their original works.[54] Due to this fact, music should be treated differently than other copyrightable works when analyzing for infringement, as repetition of musical themes and combinations of notes is significantly more likely.

Further, musicians often draw inspiration for their works from other musicians who came before them.[55] Seemingly every interview with a popular musician includes questions surrounding the artist's influences.[56] Musicians tend to be quite open about where they draw their

52. *Three Boys Music*, 212 F.3d at 485 (quoting Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991)).

53. Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994).

54. While the literal number of ways musical notes may be combined may be large, the number of combinations that are actually pleasing to a listener's ear is significantly smaller, and thus the possibility of overlap is much greater. *See* Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) ("It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism.").

55. Musicians drawing inspiration from other composers who came before them is both a common and legitimate reason for potential similarity, and in the music realm it is a necessary and inevitable part of the writing process. *See* Iyar Stav, *Musical Plagiarism: A True Challenge for the Copyright Law*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 3–4 (2014) (discussing influence as a source of musical similarity, describing it as a "legitimate explanation," and noting that "[m]usic is never composed in a vacuum; rather, it is necessarily influenced by other compositions").

56. *See, e.g.*, Paul Custer, *The Reverb Interview: Conor Oberst*, DENV. POST: THE KNOW (June 2, 2011, 6:00 AM), https://theknow.denverpost.com/2011/06/02/conor-oberst-interview/32775/ (asking singer-songwriter and member of the band "Bright Eyes," Conor Oberst, what his favorite albums were throughout different stages of his life); Sosefina Fuamoli, *Frank Ocean Talks Influences and New Music in New Interview*, TONE DEAF (Oct. 1, 2019), https://tonedeaf.thebrag.com/frank-ocean-new-music-influences-new-interview/ (discussing the contemporary music and music scenes that influence Frank Ocean in his current songwriting projects, including "Detroit, Chicago, techno, house, [and] French electronic"); Katrina Nattress, *Mark Hoppus Reveals the Band That Has Most Influenced His Songwriting*, IHEARTRADIO (Dec. 18, 2019), https://www.iheart.com/content/2019-12-18-mark-hoppus-reveals-the-band-that-has-most-influenced-his-songwriting/ (discussing

inspiration from, and it is not uncommon for original songs to share a combination of influences from numerous other previous musicians and musical genres.[57] Musicians may be specifically influenced by other artists or bands, or more generally influenced by one or more musical styles from different periods of history (e.g., classical, jazz, new wave, etc.).[58] This constant sharing of musical expression is unique compared to other works, and copyright law should mitigate for it.

D. Famous Cases

Over the years, there have been a number of cases involving famous musicians and bands. While the results of some are as one would expect, others seemingly fall outside the realm of common sense.

1. "Joyful Noise" (Flame) & "Dark Horse" (Katy Perry)

In March 2008, Christian rap and hip-hop artists Marcus Gray (known as "Flame"[59]), Chike Ojukwu, and Emanuel Lambert released the song "Joyful Noise" on Gray's album, *Our World Redeemed*,[60] and received a fair amount of praise and success.[61] Ojukwu recorded the beat that ultimately became the musical backdrop for the song in 2007, while

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how Blink-182's bassist and singer considered Robert Smith and The Cure as his biggest songwriting influences growing up); Jim Sullivan, *Tom Scholz on Brad Delp: 'Best Male Studio Singer I've Ever Heard'*, BEST CLASSIC BANDS, https://bestclassicbands.com/tom-scholz-boston-interview-2017-4-14-17/ (last visited Nov. 3, 2020) (interviewing member of the band Boston, including questions about who his general influences are, as well as any influences he had from rock bands of the 1960s).

57. *See* Fuamoli, *supra* note 56 (discussing Frank Ocean's new music being influenced by styles and music from nightlife and club music); Sullivan, *supra* note 56 (talking about how Tom Scholz drew influence from a wide range of sources when writing his music, including classical music, as well as music he listened to in the 1960s by The Kinks, The Yardbirds, The Animals, Steppenwolf, Jeff Beck, and Jimmy Page).

58. *See, e.g.*, Caren Gibson, *'Kill 'Em All': The Influence of Metallica's Murderously Good Debut Album*, UDISCOVERMUSIC (July 25, 2020), https://www.udiscovermusic.com/stories/metallica-debut-album-kill-em-all/ (noting how Metallica built the sound of their signature speed metal debut album by drawing from their influences from the "New Wave Of British Heavy Metal" and making changes to them).

59. Gray v. Perry, No. 2:15-cv-05642-CAS (JCx), 2018 WL 3954008, at *1 (C.D. Cal. Aug. 13, 2018).

60. *Id.* at *1–2.

61. The album debuted at number five on the Billboard Gospel Chart, as well as number one on the Christian Music Trade Association R&B and Hip-Hop Chart. *Id.* at *2. It also received numerous award nominations, most notably for Best Rock or Rap Gospel Album at the Grammy Awards in 2009. *Id.*

Gray, Lambert, and Lecrae Moore wrote and recorded the lyrics and hook.[62]

In September and October 2013, Katy Perry commercially released "Dark Horse" as a single, as well as a part of her newest album, *Prism*,[63] and it became wildly successful.[64] Two of the writers came up with the instrumental music of the song in March 2013, while Perry and other writers created the vocal melody and lyrics.[65]

In 2014, Gray and his collaborators sued Perry and her co-writers, alleging that the memorable musical backdrop from "Dark Horse" was an illegal infringement of the beat from "Joyful Noise."[66] In July 2019, a nine-member federal jury in California unanimously found that all of the defendants were liable for copyright infringement.[67] On August 1, 2019, the jury awarded the plaintiffs $2.78 million in damages, with Perry personally responsible for $500,000.[68] Most recently, the United States District Court for the Central District of California vacated this ruling and granted Perry's motion for judgment as a matter of law because the plaintiffs "fail[ed] to satisfy the extrinsic test."[69]

2. "Got to Give It Up" (Marvin Gaye) & "Blurred Lines" (Robin Thicke)

In 1976, Marvin Gaye recorded the song "Got to Give It Up."[70] After being released in 1977, the song was partially made famous on the

62. *Id.* at *1.

63. *Id.* at *2.

64. In 2014, "Dark Horse" ranked number two worldwide in digital sales (including single-track downloads and track-equivalent streams), selling 13.2 million copies. RIAA, IFPI DIGITAL MUSIC REPORT 2015: CHARTING THE PATH TO SUSTAINABLE GROWTH 12 (2015), https://www.riaa.com/wp-content/uploads/2015/09/Digital-Music-Report-2015.pdf. It was also nominated for a Grammy, and Perry performed the song during the 2015 Super Bowl halftime show. Andrew Dalton, *Jury: Katy Perry's 'Dark Horse' Copied Christian Rap Song*, ASSOCIATED PRESS (July 30, 2019), https://apnews.com/article/7eef738596e9458eacb9f9015d7fd7fe.

65. *Gray*, 2018 WL 3954008, at *2.

66. Emily Zemler, *Katy Perry's 'Dark Horse' Copied Christian Rapper Flame, Jury Finds*, ROLLING STONE (July 30, 2019, 4:21AM), https://www.rollingstone.com/music/music-news/katy-perry-dark-horse-lawsuit-flame-865058/.

67. *Id.* Interestingly, Perry and Sarah Hudson, who both only wrote the lyrics to the song, and "Juicy J," who only wrote his rap verse, were all found liable despite the fact that they had nothing to do with writing the actual music, which was the focus of the case. Dalton, *supra* note 64.

68. Abad-Santos, *supra* note 1.

69. Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275221, at *18 (C.D. Cal. Mar. 16, 2020).

70. Williams v. Gaye, 895 F.3d 1106, 1116 (9th Cir. 2018).

television show "Soul Train,"[71] and ultimately reached number one on Billboard's "Hot 100" list.[72] Importantly, the deposit copy for the copyright registration was not the commercial sound recording, but rather "six pages of handwritten sheet music attributing the song's words and music to Marvin Gaye,"[73] and was transcribed and notated for registration purposes after Gaye recorded the song.[74] After Gaye's death, his estate inherited the copyrights for his musical compositions, including the one for "Got to Give It Up."[75]

In June 2012, Pharrell Williams and Robin Thicke wrote and recorded the song "Blurred Lines."[76] Clifford Harris, Jr. (aka "T.I.") also wrote and recorded a rap verse for the song, which was added to the track seven months later.[77] The single was released in 2013, and it became the best-selling single in the world for that year.[78]

After the Gayes heard "Blurred Lines," they made an infringement demand on Williams and Thicke, but negotiations between the parties ultimately failed.[79] After negotiations broke down, Williams, Thicke, and Harris filed suit for "declaratory judgment of non-infringement."[80] The Gayes then countersued, claiming that "Blurred Lines" illegally infringed "Got to Give It Up."[81] Because the case was in the Ninth Circuit, during the summary judgment phase the district court conducted the "extrinsic" analysis of the "Total Concept and Feel" test; however, it ruled that the copyright protection only extended to the sheet music that made up the deposit copy and not the commercial sound recording, and filtered out several elements it determined to be unprotectible under the Copyright Act of 1909.[82] Ultimately, the court concluded that there were "genuine issues of material fact," denied summary judgment, and proceeded to the jury phase, where the "intrinsic" analysis would be performed.[83]

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71. Wesley D. Few, LLC, *Blurred Lines v. Got to Give It Up: 7 Things You Need to Know About the Pharrell / Marvin Gaye Copyright Lawsuit*, S.C. INTELL. PROP. LITIG. (Mar. 18, 2015), http://www.iptrialssc.com/blurred-lines-v-got-to-give-it-up-7-things-you-need-to-know-about-the-pharrell-marvin-gaye-copyright-lawsuit/.

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

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1117.

83. *Id.*

During the trial phase, the district court only allowed sound recordings of "Got to Give It Up" that were "edited to capture only elements reflected in the deposit copy"[84] to be played for the jury; as a result, the jury did not hear the commercial sound recording during trial,[85] instead only listening to a re-recorded version derived from the protected sheet music.[86] After a seven-day trial and two days of deliberation,[87] the jury found that Williams and Thicke were liable for copyright infringement (it did not find Harris liable)[88] and awarded the Gaye Estate $7.3 million in royalties and damages.[89] On appeal, the Ninth Circuit Court of Appeals affirmed the ruling against Thicke and Williams.[90]

3. "Under Pressure" (Queen & David Bowie) & "Ice Ice Baby" (Vanilla Ice)

In September 1981, the British band Queen and David Bowie, while improvising around a yet-unfinished Queen song during a jam session at Mountain Studios in Montreaux, Switzerland, recorded what ultimately became the hit pop collaboration, "Under Pressure."[91] It was released as

84. *Id.*

85. *Id.*

86. Wesley D. Few, LLC, *supra* note 71. The court also supposedly believed that listening to the actual version of the song could unduly influence the jury, due to the "fame and status of Marvin Gaye." *Id.*

87. *Williams*, 895 F.3d at 1117–18.

88. *Id.* at 1118. During the trial, Thicke supposedly testified that he was drunk and using Vicodin at the time he recorded the song, that "Blurred Lines" had the "feel" of "Got to Give It Up," that "Got to Give It Up" was an inspiration in creating "Blurred Lines," and that "Got to Give It Up" was "on his mind" during recording. Wesley D. Few, LLC, *supra* note 71.

89. Zosha Millman, *One Way or Another, the "Blurred Lines" Lawsuit Will Make Room for Change*, LEXBLOG (Mar. 13, 2015), https://www.lexblog.com/2015/03/13/one-way-another-blurred-lines-lawsuit-will-make-room-change/.

90. *Williams*, 895 F.3d at 1138. However, it is noteworthy that the court affirmed "on narrow grounds . . . turn[ing] on the procedural posture of the case, which requires . . . review[ing] the relevant issues under deferential standards of review." *Id.* It is also important to note that in the dissent, Circuit Judge Nguyen stated that while "'Blurred Lines' clearly shares the same 'groove' or musical genre as 'Got to Give It Up,'" a song's "groove" is not a protectible idea; Nguyen further noted that "[i]f an author uses commonplace elements that are firmly rooted in the genre's tradition, the expression is unoriginal and thus uncopyrightable." *Id.* at 1140–41 (Nguyen, J., dissenting).

91. *Under Pressure*, THIS DAY IN MUSIC, https://www.thisdayinmusic.com/liner-notes/under-pressure/ (last visited Nov. 3, 2020). The song completed mixing a couple weeks later in New York at Power Station Studio. *Id.*

a single on October 26, 1981, and became a hit both in the United States and abroad.[92]

In 1990, Robert Van Winkle—better known as "Vanilla Ice"—released his first record for SKB Records, *To the Extreme*, which included the single "Ice Ice Baby."[93] The song became wildly popular, and later that year it became the first rap song to be Billboard's number one single.[94]

After its initial success, "Ice Ice Baby" later became notorious not for its lyrics or subject matter, but for its copying of Queen and David Bowie's "Under Pressure."[95] Vanilla Ice sampled the bassline from "Under Pressure" to serve as the beat for "Ice Ice Baby," but did so without permission or license from Queen or Bowie, and without paying any sort of songwriting credit or royalties.[96] When the similarity was pointed out, Vanilla Ice infamously said that the two selections were different, because he had added an extra note to the beat.[97] Queen and Bowie threatened a copyright infringement claim against Vanilla Ice, which was ultimately settled out of court for an undisclosed sum, with the Queen members and Bowie all also receiving songwriting credits for "Ice Ice Baby."[98]

4. "He's So Fine" (The Chiffons) & "My Sweet Lord" (George Harrison)

In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,[99] former Beatles member George Harrison was sued for allegedly infringing the song "He's So Fine," composed by Ronald Mack and recorded by the group

92. *Id.* The song reached number twenty-nine on the U.S. Billboard "Hot 100" and spent two weeks at number one on the UK singles chart during an eleven-week run. *Id.*

93. *Vanilla Ice Biography*, BIOGRAPHY (Sept. 4, 2019), https://www.biography.com/musician/vanilla-ice.

94. Ludovic Hunter-Tilney, *The Life of a Song: 'Ice Ice Baby'*, FIN. TIMES (Mar. 27, 2015), https://www.ft.com/content/f60d803a-ce64-11e4-86fc-00144feab7de.

95. *See* Runtagh, *supra* note 7.

96. *Under Pressure*, THIS DAY IN MUSIC, *supra* note 91.

97. Runtagh, *supra* note 7. He pointed to this extra note as sufficient reason for the two selections to be considered completely different, stating, "It's not the same," despite being identical in all other notable ways. Kasper Hartwich, *Vanilla Ice Denies Ripping Off Queen and David Bowie's Under Pressure*, YOUTUBE (Mar. 12, 2013), https://www.youtube.com/watch?v=a-1_9-z9rbY.

98. Runtagh, *supra* note 7. Later on after the settlement, Vanilla Ice claimed that instead of paying out royalties to Queen and Bowie, he bought the publishing rights to "Under Pressure," as that ended up being the less expensive option. *Under Pressure*, *supra* note 91.

99. 420 F. Supp. 177 (S.D.N.Y. 1976).

The Chiffons in 1962, with his hit "My Sweet Lord."[100] Harrison's first solo single was recorded in 1970,[101] was released on January 15, 1971,[102] and ultimately spent several weeks in the number one spot on the billboard charts.[103]

"He's So Fine" was also a hit song. It spent five weeks at number one on the billboard charts in the United States, and on June 1, 1963, it was the number twelve song on the charts in England, at the same time that The Beatles had the number one song in England.[104] The court discussed the similarities between the two songs, including nearly identical repetitions of two different phrases or "motifs,"[105] the inclusion of a grace note in the second motif, and the identical harmonies.[106] After a discussion about the composition of "My Sweet Lord," the court found that Harrison had illegally copied "He's So Fine."[107] Ultimately, Harrison had to pay $587,000 for the infringement.[108]

5. "Love Is a Wonderful Thing" (The Isley Brothers) & "Love Is a Wonderful Thing" (Michael Bolton)

The rhythm and blues group The Isley Brothers helped shape soul music over two decades throughout the 1960s and 1970s with songs such as "Shout" and "It's Your Thing,"[109] and have since been inducted into the Rock and Roll Hall of Fame in recognition of their accomplishments.[110] In 1964, they wrote, recorded, and received a copyright for the song "Love

100. *Id.* at 178–79.
101. *Id.* at 178.
102. Runtagh, *supra* note 7.
103. *Id.*
104. *Bright Tunes Music*, 420 F. Supp. at 179. This information led the court to note that Harrison "was aware of He's So Fine." *Id.*
105. The court noted that "[w]hile neither motif is novel, the four repetitions of [motif] A, followed by four repetitions of [motif] B, is a highly unique pattern." *Id.* at 178.
106. *Id.*
107. *Id.* at 180–81. Perhaps the most interesting part of the holding is the fact that the court did not believe that Harrison consciously or purposely copied the Chiffons hit. *See id.* However, the court stated that even though it did not believe that Harrison deliberately infringed the song, "it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. That is under the law, infringement of copyright, and is no less so even though subconsciously accomplished." *Id.* at 180–81.
108. Runtagh, *supra* note 7.
109. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 480 (9th Cir. 2000) (noting that, in addition to "Shout" and "It's Your Thing," the group "helped define the soul sound of the 1960s" and "mastered the funky beats of the 1970s" with the hits "Twist and Shout," "This Old Heart of Mine," "Who's That Lady," and "Fight the Power").
110. *Id.*

Is a Wonderful Thing,"[111] and in 1966 their label, United Artists,[112] released the track as a single on a forty-five record.[113] Despite its early predictions of success,[114] the song never truly reached "hit" status.[115] In 1991, the song was released as part of the compilation CD "The Isley Brothers—The Complete UA Sessions."[116]

In the same year that The Isley Brothers' "Love Is a Wonderful Thing" was released on CD, singer/songwriter Michael Bolton released a hit of his own with the same name.[117] Bolton had made a name for himself by highlighting his soul influences from the 1960s,[118] which helped make him famous in the 1980s and 1990s.[119] He wrote his "Love Is a Wonderful Thing" with Andrew Goldmark in 1990, and released it both as a single and on his "Time, Love and Tenderness" album in 1991.[120] At the end of that year, "Love Is a Wonderful Thing" sat at number forty-nine on Billboard's pop chart.[121]

In 1992, Bolton was sued for copyright infringement for "Love Is a Wonderful Thing."[122] In the district court, a jury ultimately ruled against Bolton, finding that "[sixty-six] percent of the profits from commercial uses of ["Love Is a Wonderful Thing"] could be attributed to the inclusion of infringing elements," and that twenty-eight percent of the "Time, Love and Tenderness" album's profits could be attributed to the song.[123] The damages resulted in a $5.4 million award for The Isley Brothers, with Bolton personally responsible for $932,924.[124] When the case went before

111. *Id.*

112. United Artists was a famous Motown label. *Id.* The group recorded "Love Is a Wonderful Thing" for the label in 1964, signed with the label a year later, and subsequently had three hits in the "top-100" charts. *Id.*

113. *Id.*

114. *See id.* (noting that many industry publications, including "Cash Box," "Gavin Report," and "Billboard" all predicted success for the single).

115. *Id.* The song only reached 110 on the Billboard "Bubbling Under the Hot 100" chart and failed to reach top-100 status on any other charts. *Id.*

116. *Id.* at 480–81.

117. *Id.* at 481.

118. For example, Bolton had covered famous soul songs such as Percy Sledge's "When a Man Loves a Woman" and Otis Redding's "(Sittin' on the) Dock of the Bay." *Id.*

119. *See id.* (noting that Bolton "gained popularity in the late 1980s and early 1990s by reviving the soul sound of the 1960s").

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 480–81. At the time of the ruling, this was the largest monetary award in the history of music plagiarism. Runtagh, *supra* note 7.

the Ninth Circuit on appeal, the court upheld the district court's finding.[125]

6. "Taurus" (Spirit) & "Stairway to Heaven" (Led Zeppelin)

One of the more closely followed music infringement cases in recent memory pitted the 1968 instrumental track "Taurus" by the band Spirit against the classic rock epic "Stairway to Heaven" by Led Zeppelin.[126] "Taurus" was written by Randy Wolfe, the guitarist for the California-based rock band,[127] whereas "Stairway to Heaven" was written by Jimmy Page and Robert Plant.[128] While "Taurus" never achieved any major success, "Stairway to Heaven" not only achieved immense success and popularity,[129] it also cemented Led Zeppelin as one of the most iconic rock bands in the history of music.[130]

In 2014, Michael Skidmore, a trustee for Randy Wolfe's estate,[131] sued Led Zeppelin, alleging that Page and Plant stole the opening guitar sequence from "Stairway to Heaven" from a section of "Taurus."[132] After

125. *Three Boys Music*, 212 F.3d at 480. Despite Bolton's argument that The Isley Brothers' expert "failed to show that there was copying of a *combination* of unprotectible elements," the court refused to say that the jury's finding to the contrary was clearly erroneous, and noted that "[i]t is well settled that a jury may find a combination of unprotectible elements to be protectible." *Id.* at 485–86.

126. Amy X. Wang & Jon Blistein, *All You Need to Know About Led Zeppelin's 'Stairway to Heaven' Case*, ROLLING STONE (Sept. 24, 2019, 6:04 PM), https://www.rollingstone.com/music/music-news/led-zeppelin-stairway-to-heaven-appeal-retrial-889336/.

127. *See id.*

128. Page wrote the music and worked out the arrangement with bassist and keyboardist John Paul Jones, with Plant later writing the lyrics. Michael Hann, *Stairway to Heaven: The Story of a Song and Its Legacy*, GUARDIAN (Oct. 22, 2014, 5:16 AM), https://www.theguardian.com/music/2014/oct/22/stairway-to-heaven-unreleased-mix-led-zeppelin-iv-remastered.

129. *See* Skidmore *ex rel.* Wolfe Tr. v. Led Zeppelin, 905 F.3d 1116, 1122 (9th Cir. 2018) (describing the song "Stairway to Heaven" as a "timeless classic"), *rev'd en banc,* 952 F.3d 1051 (9th Cir. 2020).

130. *See* Hann, *supra* note 128 (noting that even though "[e]very major rock band of the early 70s had their own equivalent of Stairway [to Heaven], their own big, meaningful statement . . . only Stairway [to Heaven] is known to everyone"); *500 Greatest Songs of All Time*, ROLLING STONE (Dec. 11, 2003, 9:00 AM), https://www.rollingstone.com/music/music-lists/500-greatest-songs-of-all-time-151127/led-zeppelin-stairway-to-heaven-2-70822/ (listing "Stairway to Heaven" at number thirty-one on its list of the "500 Greatest Songs of All Time").

131. Jonathan Stempel, *U.S. Appeals Court to Revisit Led Zeppelin 'Stairway' Decision*, REUTERS (June 10, 2019, 4:04 PM), https://www.reuters.com/article/us-music-ledzeppelin/u-s-appeals-court-to-revisit-led-zeppelin-stairway-decision-idUSKCN1TB2DF. Wolfe passed away when he drowned in 1997. *Id.*

132. Wang & Blistein, *supra* note 126.

being transferred out of the United States District Court for the Eastern District of Pennsylvania,[133] the United States District Court for the Central District of California denied summary judgment.[134] A jury later found for Led Zeppelin, but on appeal the United States Court of Appeals for the Ninth Circuit vacated the judgment in part and remanded for a new trial.[135] After going back to trial, the Ninth Circuit has seemingly put the final nail in the coffin, declaring that Led Zeppelin did not infringe Spirit's song.[136] The case presented an opportunity for the Supreme Court of the United States to specifically address music infringement for the first time,[137] which could have potentially pitted the Second Circuit's "Lay Listener" test against the Ninth Circuit's "Total Concept and Feel" test; unfortunately, however, the Court denied certiorari in October 2020.[138]

III. HOLISTIC SLIDING SCALE TEST

My test aims to find a way to successfully allow for musicians to not only be influenced by others (as will inevitably happen) and draw on those influences in the creation of their own original works, but also

133. Skidmore v. Led Zeppelin, 106 F. Supp. 3d 581, 588–89 (E.D. Pa. 2015).

134. Skidmore v. Led Zeppelin, No. CV 15-3462 RGK (AGRx), 2016 WL 1442461, at *19 (C.D. Cal. Apr. 8, 2016). While the court found that Skidmore showed neither a "striking similarity" between the two songs nor evidence of direct access or circumstantial access through widespread dissemination, it found that he did show circumstantial access through chain of events (regularly playing "Taurus" at live shows, including ones that Led Zeppelin also performed at), and that he showed enough of a substantial similarity of protectible elements that the issue should proceed to a jury. *Id.* at *12–17.

135. The court vacated in part and remanded the jury verdict in favor of Led Zeppelin due to "deficiencies in the jury instructions on originality and the district court's failure to include a selection and arrangement jury instruction." Skidmore *ex rel.* Wolfe Tr. v. Led Zeppelin, 905 F.3d 1116, 1137 (9th Cir. 2018), *rev'd en banc,* 952 F.3d 1051 (9th Cir. 2020). The court also held that "the district court abused its discretion by not allowing the sound recordings of 'Taurus' to be played to prove access." *Id.* After being remanded for a new trial, an eleven-judge panel heard arguments on September 23, 2019, and much of Skidmore's argument was that the jurors should be allowed to listen to a sound recording of the two songs. Wang & Blistein, *supra* note 126. Instead of hearing the sound recording, the jury heard a performance of the full deposit copy of the song "Taurus," and ultimately found that while Skidmore owned the copyright to "Taurus," and that Led Zeppelin had access to it, "the two songs were not substantially similar under the extrinsic test." *Skidmore*, 905 F.3d at 1124. Sound recordings were not given federal copyright protection until 1972, and prior to that only the sheet music for a song was copyrightable. *A Study On the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, *supra* note 24.

136. Skidmore *ex rel.* Wolfe Tr. v. Zeppelin, 952 F.3d 1051, 1079 (9th Cir. 2020).

137. Wang & Blistein, *supra* note 126.

138. Skidmore v. Led Zeppelin, No. 20-142, 2020 WL 5883816, at *1 (U.S. Oct. 5, 2020).

provide protection for those works from true copying. Ultimately, the goal is to provide a test that allows for these complex issues to have commonsense solutions.

A. Proposed Test

My test encompasses the "substantial similarity" element of infringement, including borrowing from the "striking similarity" analysis from the "access" element, and creates a "sliding scale" between how complex the allegedly infringing selection of a musical work is with how substantially similar it is to the original work. Effectively, the more foundational or simplistic the allegedly infringing selection, the more "strikingly similar" it must be to the original work (i.e., the closer to an exact duplication it must become). Likewise, as the complexity of the combination of notes, rhythm, phrasing, lyricism, melody, harmony, etc. increases, it becomes a more unique and creative expression of an idea, and the similarity does not need to be as striking, instead simply using the normal "substantial similarity" standard. The standard would not ever fall below a "substantial similarity" standard. As noted earlier, it is the *expression* of an idea that is protectible by copyright, and not simply the idea itself,[139] so as this expression becomes more complex and unique, the requisite similarity standard necessary to demonstrate infringement should likewise relax, and vice versa.

There is already precedent for this idea; the uniqueness of the section of a song alleged to have been infringed has already been viewed as an important factor in analyzing the similarity between two works,[140] and a sliding scale analysis for determining substantial similarity has been used in some circumstances.[141] While my test is novel because it uses a

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139. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (holding that only the expression of ideas, not the ideas themselves, are protectible, and that infringement may only be found where the part of the work taken is both substantial and a protectible expression of an idea).

140. *See* Selle v. Gibb, 741 F.2d 896, 904 (7th Cir. 1984) (noting that when determining whether access to a work should be presumed due to striking similarity, "[a]n important factor in analyzing the degree of similarity of two compositions is the uniqueness of the sections which are asserted to be similar").

141. The First Circuit uses a sliding scale analysis to determine whether an element of a work is copyrightable to begin with. In analyzing the dichotomy between ideas and expressions of ideas, the First Circuit looks to how many ways a given idea can be expressed. Rogers, *supra* note 37, at 906. Under the First Circuit's analysis, "[i]f an idea can only be expressed one way, the material is a purely noncopyrightable idea . . . [h]owever, as an idea . . . can be expressed in a growing number of ways, the protection given to the expression of the idea . . . grows accordingly." *Id.* In practice, this analysis causes the First Circuit to follow the Second Circuit's "Lay Listener Test," despite not

sliding scale to determine the burden for similarity necessary to find infringement, the fact that sliding-scale analyses already exist in other forms shows that courts may be amenable to using a new sliding scale test for a different analysis. The holistic nature of my test draws from principles of both the Second Circuit's "Lay Listener" test and the Ninth Circuit's "Total Concept and Feel" test, but builds on both of them by introducing the sliding scale element to determine the applicable burden the plaintiff must satisfy.[142]

B. Benefits

One of the issues with the current dominating tests is the fact that juries often conflate protectible and unprotectible elements, and end up finding defendants guilty of infringement for elements that were never protectible in the first place.[143] This issue is exacerbated by the use of

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explicitly doing so. *Id.* The "inverse ratio rule," described earlier, is another example of courts using a sliding scale as part of its analysis for infringement. *See supra* Part II.A.1 (describing how the inverse ratio rule is used in analyzing the relationship between access and substantial similarity).

142. I agree with the Second Circuit's emphasis on using a layperson's opinion to determine similarity, since the layperson ultimately determines the economic value of a musical piece when it is first released, and the economic value of a musical piece is the lynchpin that drives the infringement lawsuit in the first place. *See supra* Part II.B.1. I also agree with the subjective nature of the "intrinsic" analysis of the Ninth Circuit's "Total Concept and Feel" test, and believe that a broader, more holistic impression of a selection will more consistently yield commonsense results to these types of cases. *See supra* Part II.B.2; *see also* Stav, *supra* note 55, at 17 (describing the "Total Concept and Feel" test as "examin[ing] each work as a whole, ideas and expressions, to obtain the subject work's general impression without scrutinizing the work's intricate details to determine whether there is substantial similarity between the two works").

143. *See* Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 138–39 (2011) (discussing issues in jury determinations using the "Lay Listener" test in "Composition Copyright" cases and "Recording Copyright" cases, noting that playing audio recordings in a "Composition Copyright" case "invites the juror to make the wrong comparison by comparing the sound recordings rather than the compositional elements underlying each recording," and that this could cause undue prejudice "because it creates an unavoidable risk that the jury will reach the wrong conclusion"); Olivia Lattanza, Note, *The Blurred Protection for the Feel or Groove of a Song Under Copyright Law: Examining the Implications of* Williams v. Gaye *on Creativity in Music*, 35 TOURO L. REV. 723, 726 (2019) (examining the *Williams v. Gaye* case, arguing that jury instructions should be reconsidered, since they "may have inaccurately evaluated the similarity in groove, which is not protectible, rather than comparing the protected musical elements," and noting that the decision "improperly reinforces the notion that creating the 'feel' of another song constitutes copyright infringement even if the melody and notes are completely different"). *See also* Nicole Lieberman, *Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law*, 6 N.Y.U. J. INTELL. PROP. & ENT. L. 91, 120–

expert testimony. While the use of experts is important and necessary in many cases in order to educate factfinders and allow them to make informed decisions,[144] in a music context it may inappropriately sway factfinders into finding differently than they normally would, since the expert chooses the details to highlight from the selection of the song at issue.[145] This pointed dissection, while attempting to single out and emphasize specific protectible elements, loses sight of the true heart of the musical works in question, and allows for infringement findings that are erroneous to the common eye and ear.[146]

My test, on the other hand, mitigates these issues. Instead of attempting to filter out every unprotectible element from the song in question and only presenting what remains, my test recognizes the potential for conflation and mitigates for it by taking a more holistic approach to the substantial similarity analysis. By not focusing simply on the notes, or the chord progression, or the lyrics, etc., in isolation, my test allows the factfinder to analyze how all of these elements relate to and interact with each other. This, in effect, changes the analysis from a purely elemental approach to a holistic one. Instead of viewing a musical work as a combination of protectible and unprotectible elements, it views the entire piece as a single original work.[147] By viewing musical works in this fashion, the competing interests of musicians—allowing for influence

21 (2016) (noting that in practice, instructions to lay jurors in copyright infringement cases "may wrongly suggest that any copying, including copying of an idea, counts as infringement"). Lieberman went on to state that "[w]ithout detailed analysis, filtering out unprotectable [sic] ideas, or guidance from experts on the artistic merits of the works at issue, little assurance remains that jurors will decide the issue of misappropriation in keeping with the law," and that "it seems naïve to believe jurors are capable of understanding the complexities of copyright law, particularly the ever elusive idea-expression distinction." *Id.* at 117, 120.

144. Rosenberg, *supra* note 51, at 1676–77 ("Expert testimony can elucidate complex material, helping the trier of fact understand the facts at issue.").

145. *See id.* at 1685 ("Selective reduction is problematic in legal contexts . . . because there is no consensus as to which elements the factfinder ought to highlight in determining substantial similarity.").

146. *See id.* (noting that "musicologists can selectively reduce works in vastly different ways . . . [which] artificially makes songs more or less similar, depending on musicologists' subjective choice of elements to highlight"); Lattanza, *supra* note 143, at 725–26 (noting that sound recordings would have been a better tool for jurors in the *Williams v. Gaye* case, but because they were excluded from the trial, "the jurors were most likely influenced by [expert testimony] in determining that the songs had a similar vibe").

147. In this way, my test attempts to capture the intent behind the Second Circuit's "Lay Listener" test and the "intrinsic" component of the Ninth Circuit's "Total Concept and Feel" test. *See supra* text accompanying note 141 (discussing how my test relates to the Second and Ninth Circuit tests).

while still providing protection from infringement—are both addressed and embraced.

C. Potential Issues

While my Holistic Sliding Scale Test would be beneficial, there are potential issues to its widespread implementation. First, courts have recently rejected using the "inverse ratio rule" for the relationship between access and similarity. In *Guzman v. Hacienda Records and Recording Studio, Inc.*,[148] the Fifth Circuit felt the facts of the case in question did not "provide an appropriate occasion to adopt the sliding scale analysis as the law of [the] circuit."[149] The Ninth Circuit also expressly rejected the rule in *Skidmore ex rel. Wolfe Trust v. Led Zeppelin*.[150] And in *Hoff v. Walt Disney Pictures*,[151] the Ninth Circuit rejected the plaintiff's contention that his necessary showing of substantial similarity was relaxed due to increased access, stating that in order to prove unlawful appropriation, the substantial similarity that must be proven "does not vary with the degree of access the plaintiff has shown."[152] The fact that courts have been averse to applying the inverse ratio rule could signal that they would also be averse to applying a similar "sliding scale" to substantial similarity analysis.

However, the inverse ratio rule applies more to the relationship between access and substantial similarity, as opposed to similarity itself. Also, the Ninth Circuit did not completely reject the inverse ratio rule; instead, it merely noted that it only applies when determining copying, whereas it does not apply when demonstrating unlawful appropriation.[153] My test assumes access and is designed to determine the similarity of the two works; since similarity is inherently related to the copying element, my test is aligned with current jurisprudence.

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148. 808 F.3d 1031 (5th Cir. 2015).

149. *Id.* at 1040.

150. 952 F.3d 1051, 1079 (9th Cir. 2020) ("We take [this] opportunity to reject the inverse ratio rule, under which we have permitted a lower standard of proof of substantial similarity where there is a high degree of access. This formulation is at odds with the copyright statute and we overrule our cases to the contrary."), *cert. denied sub nom.* Skidmore v. Led Zeppelin, No. 20-142, 2020 WL 5883816 (U.S. Oct. 5, 2020). Interestingly, one of the cases overruled by this holding was *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000). *Skidmore*, 952 F.3d at 1066.

151. No. EDCV 19-00665 AG (KKx), 2019 WL 6329368 (C.D. Cal. Aug. 19, 2019).

152. *Id.* at *2. In rejecting the plaintiff's contention, the court cited *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018), which noted that the inverse ratio rule "assists only in proving copying, not in proving unlawful appropriation."

153. *See Skidmore*, 952 F.3d at 1079.

Another possible criticism of my test is that it does not necessarily provide a bright-line rule as to what constitutes infringement; instead, there is still an element of vagueness. This vagueness, however, is a necessary part of infringement analysis for music. I agree with Judge Learned Hand's analysis in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*[154] when he said that "[t]he test for infringement is of necessity vague."[155] Music infringement cases need to be fact-specific; attempting to come up with a bright-line rule that will apply to all foreseeable music infringement cases is a futile endeavor. Instead, my test remains flexible in the face of unforeseeable changes to the music industry, while still maintaining the ability to apply to cases as they currently exist.

D. Factors to Consider

Under my test, there are a number of important factors to consider. They include: (1) Amount Allegedly Infringed; (2) Importance to the Works; (3) Composition; and (4) Melody (broken up further into two elements—complexity and uniqueness).

1. Amount Allegedly Infringed

For the "Amount Allegedly Infringed" factor, the question is simply, "How much of the original piece is alleged to have been copied?" If more of the original piece has been copied, the analysis would tilt against a stricter similarity standard, and vice versa.

2. Importance to the Works

For the "Importance to the Works" factor, the factfinder asks, "How important is the selection to the overall work?" Digging deeper, the analysis would seek to determine how important the selection is to the original work, as well as how important it is to the allegedly infringing work. By asking this question, the factfinder is determining whether the "heart" of the original work is being infringed, as well as whether the selection in question goes to the "heart" of the new work.[156] If the allegedly infringing selection is not important to the original work or to

154. 274 F.2d 487 (2d Cir. 1960).
155. *Id.* at 489.
156. *See More Information On Fair Use*, COPYRIGHT.GOV https://www.copyright.gov/fair-use/more-info.html (last visited Nov. 3, 2020) (noting that in some situations, "using even a small amount of a copyrighted work was determined not to be fair [use] because the selection was an important part—or the 'heart'—of the work").

the new work, it makes less sense to find an artist guilty of infringement, and thus a stricter similarity standard would be appropriate. If the selection is important to either piece—or both pieces— however, a finding of infringement may be more justified, and so the traditional standard makes sense.

3. Composition

For the "Composition" factor, we look to the physical instruments, vocals, and lyrics for evidence of unlawful copying. We analyze whether the new work uses the same composition and instrumentation for the selection or if it is different, i.e., whether it is a vocal melody being played on a guitar—or vice versa—or a guitar part being played by the same guitar, or a vocal melody again being sung as a vocal melody, etc. The more the composition and instrumentation is the same, the more likely it is infringement, and vice versa.

4. Melody

Building off the "Composition" factor, we then begin to analyze the melody itself, considering in particular two sub-factors: complexity and uniqueness. "Complexity" considers how simple or complex the series of notes, rhythm, phrasing, etc. are to the selected melody. The more complex the combination of instrumentation in the melody, the lower the standard of similarity that is necessary to show infringement; the simpler the selection, the higher the burden of similarity to find infringement. For "Uniqueness," the factfinder looks to how unique the selection is. Is it merely a derivation of a minor scale, or some other foundational building block of a song? Or is it a unique interpretation of music theory not often seen or heard?[157] These types of clues, when

157. For example, the band Tool tends to use very unique time signatures in their songs, as well as unique changes in time signatures. Greg Kennelty, *TOOL's Maynard James Keenan Discusses Odd Time Signatures with Sammy Hagar*, METAL INJECTION (July 3, 2019), https://metalinjection.net/av/tools-maynard-james-keenan-discusses-odd-time-signatures-with-sammy-hagar (quoting interview between Tool frontman Maynard James Keenan and former Van Halen frontman Sammy Hagar, where Keenan attributed his ability to write in "odd time signatures" to his unusual breathing rhythms while running cross-country in high school, stating that "naturally it's easier for me to write things that are outside four-four"); *see also Top 10 Weirdest Odd-Time Signature Songs*, ULTIMATE GUITAR (Aug. 2, 2014, 1:26 AM), https://www.ultimate-guitar.com/news/wtf/top_10_weirdest_odd-time_signature_songs.html (listing Tool's song "Schism" as the number one "weirdest odd-time signature song of all time," specifically noting its "47 time switches"). If Tool were suing another artist, and the allegedly infringing work used the same unique

combined with the "Complexity" element of the "Melody" factor, can help show infringement.

This factor is perhaps the most important to the Holistic Sliding Scale Test, as it truly goes to the heart of similarity. In cases where the other factors may point to infringement, the "Melody" factor may be dispositive on its own, particularly if the allegedly infringing selection is overly simple and common.[158] In these cases, the simple nature of the selection, coupled with how common it is, creates a difficult standard of similarity to overcome, which will help eliminate erroneous infringement findings, and ultimately deter frivolous infringement cases from being brought in the first place.

E. Application to Previous Cases

To determine whether the Holistic Sliding Scale Test would have any merit, it is helpful to see how it would be applied to the cases discussed earlier. If it would provide commonsense results than the actual results—including finding the same way as the actual case—then it would have merit. It is important to emphasize that the Holistic Sliding Scale Test relates only to the "substantial similarity" standard. In my analysis I will often make predictions as to the ultimate finding of the case (i.e., infringement or no infringement); however, these findings would still be subject to the other necessary factors (such as the "Access" prong discussed earlier[159]), and ultimately a factfinder determining whether the selection satisfies either the heightened or usual burden that my test would determine.

1. "Joyful Noise" (Flame) & "Dark Horse" (Katy Perry)

As stated earlier, Katy Perry's "Dark Horse" was originally found to have infringed "Joyful Noise" to the tune of $2.78 million in damages.[160] While the court eventually vacated this judgment,[161] under the Holistic Sliding Scale Test, this ruling would have been correct from the beginning. For the reasons set forth below, it would likely have come to

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time signature, or the same changes in time signatures, it would be evidence in support of infringement.

158. An overly simple selection shows a lack of complexity, and a common melody shows a lack of uniqueness. Under these circumstances, a stricter similarity standard would be more appropriate, even if the other factors point to a more relaxed standard.

159. *See supra* Part II.A.1 (discussing the "Access" prong of an infringement case).

160. Dalton, *supra* note 64.

161. Gray v. Perry, No. 2:15-cv-05642-CAS-JCx, 2020 WL 1275221, at *18 (C.D. Cal. Mar. 16, 2020).

a more commonsense finding of no infringement right away, due to not meeting the requisite similarity standard.

a. Amount Allegedly Infringed

The selection in question for the Katy Perry case ultimately breaks down to a simple descending pattern stemming from a minor scale.[162] In "Joyful Noise," the pattern repeats for the entire length of the song; in "Dark Horse," the pattern repeats throughout each of the verses, with a different pattern being played during the chorus hook.[163] Because the selection dominates significant portions of both the allegedly infringing song as well as the original song, this factor would not increase the similarity necessary to find infringement.

b. Importance to the Works

The prevalence of the selection throughout both songs is undeniable. Considering the fact that the phrase repeats throughout the entirety of "Joyful Noise," as well as throughout all verses of "Dark Horse," it is fair to say that it is integral to the construction of both songs.[164] Since the selection is so important to both works, this factor would also not increase the similarity standard.

c. Composition

As stated earlier, for the "Composition" factor we look to the physical instruments, vocals, and lyrics of each song, and how the selection manifests through these vehicles.[165] The selection in "Joyful Noise" and "Dark Horse" involves the use of neither vocals nor lyrics, so we focus instead on the similarity in the instrumentation between the two.[166] Both songs use a "high voiced synthesizer" to play the songs;[167] however, the synthesizer in "Dark Horse" has a more "breathy" quality to it than the one in "Joyful Noise."[168] Ultimately, though, the instrumentation does

162. *See* Abad-Santos, *supra* note 1.

163. *Compare* fanatic116, *Joyful Noise LYRICS – Flame feat. Lecrae*, YOUTUBE (July 19, 2019), https://www.youtube.com/watch?v=jTLeHuvHXuk [hereinafter *Joyful Noise*], *with* Katy Perry, *Katy Perry – Dark Horse (Official) ft. Juicy J*, YOUTUBE (Feb. 20, 2014), https://www.youtube.com/watch?v=0KSOMA3QBU0 [hereinafter *Dark Horse*].

164. *See Joyful Noise*, *supra* note 163; *Dark Horse*, *supra* note 163.

165. *See supra* Part III.D.3.

166. *See Joyful Noise*, *supra* note 163; *Dark Horse*, *supra* note 163.

167. Abad-Santos, *supra* note 1.

168. *Cf.* Brian McBrearty, *Gimme 3 Minutes to Tell You Why Dark Horse is Not Joyful Noise*, MUSICOLOGIZE (July 23, 2019), http://www.musicologize.com/occams-razor-says-

not have to be identical to merit using the normal similarity standard, and while the difference in sound quality between the two synthesizers is noteworthy, the instrumentation as a whole between the two works merits the traditional "substantial similarity" standard as opposed to a "striking similarity" standard.

d. Melody

The "Melody" standard can drive the Holistic Sliding Scale analysis towards a "striking similarity" standard despite the other factors pointing to the traditional standard,[169] and this case serves as a perfect example of this application. Each of the previous factors point towards a "substantial similarity" standard; however, the allegedly infringing selection is both incredibly simple and very common.

For the "Complexity" element, the selection would clearly point to a stricter standard of similarity. The series of notes, rhythm, and phrasing in the selected melody is a simple derivation of a "descending minor scale in a basic rhythm,"[170] and have also been described as building blocks that are "fundamental aspects of pop music."[171] Because the selection lacks complexity, a higher burden would be necessary to satisfy the similarity element of infringement.

The "Uniqueness" element also points to a stricter standard. The songs both share "fundamental aspects of pop music,"[172] and one commentator described the synthesizer sound as "so historically significant that it took [him] only [thirty] seconds to find it in [his] studio."[173] Further, the "staccato downbeat rhythms on a high voiced

this-is-why-dark-horse-is-not-joyous-noise/ (arguing that the synthesizer melody in "Dark Horse" derives more from the Art of Noise song "Moments in Love" as opposed to "Joyful Noise").

169. *See supra* Part III.D.4 (noting that the "Melody" factor could ultimately be dispositive on its own, provided that the composition and uniqueness are simple and common enough).

170. Abad-Santos, *supra* note 1.

171. *Id.*

172. *Id.*

173. McBrearty, *supra* note 168. McBrearty further states that the song "Moments in Love" by Art of Noise more likely served as the inspiration for both songs, as opposed to "Dark Horse" borrowing from "Joyful Noise." *See id.* To give a sense of the prevalence and pervasiveness of this selection, the pattern in "Moments in Love" has been sampled in 133 other songs (which would not take into account derivations of the instrumentation or melody, leading to the conclusion that it has potentially influenced countless others in addition to these 133 songs). *See Moments in Love*, WHOSAMPLED, https://www.whosampled.com/Art-of-Noise/Moments-in-Love/sampled/ (last visited Oct. 24, 2020).

synthesizer . . . is common in many trap beats."[174] Because the uniqueness of the selection is so low, a stricter standard of similarity is necessary, especially when combined with the lack of complexity in the melody.

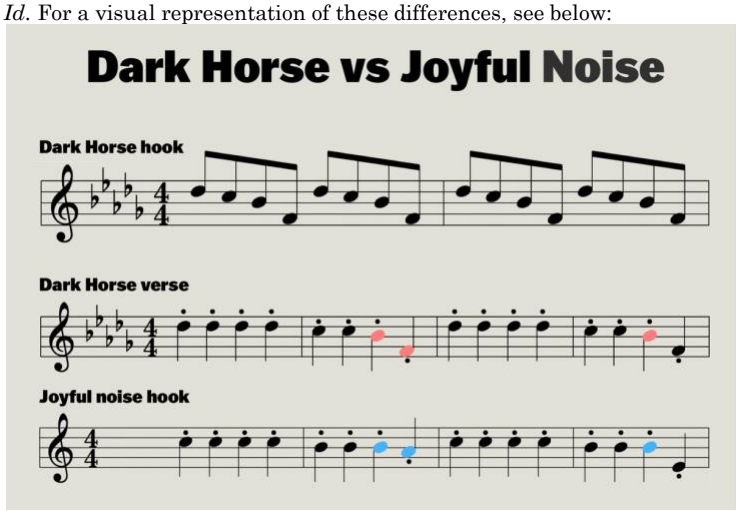
e. Conclusion

Because the similarity standard would fall under a "striking similarity" standard, the two selections would have to be nearly identical to have a finding of infringement. However, the songs are in different keys, have a different tempo (aka the beats per minute are different), and the notes in the melodies are not the same.[175] Combined with the fact that the songs share no lyrical similarities, as well as significant differences in other instruments layered on top of the selection at issue,[176] the selection would likely not meet the similarity burden. As a result, Perry would not be held liable for infringement, fixing the original ruling in the actual case.

2. "Got to Give It Up" (Marvin Gaye) & "Blurred Lines" (Robin

174. Abad-Santos, *supra* note 1.

175. *Id.* For a visual representation of these differences, see below:



Id.

176. For example, "Joyful Noise" layers guitar parts over the selection throughout the song, along with other instruments, whereas "Dark Horse" does not, and the other instruments "Dark Horse" does add are not the same as "Joyful Noise." *Compare Joyful Noise*, *supra* note 163, *with Dark Horse*, *supra* note 163.

Thicke)

Like "Dark Horse," the "Blurred Lines" ruling would be fixed under the Holistic Sliding Scale Test. The similarity standard would be heightened, and ultimately would likely lead to a finding of no infringement.

a. Amount Allegedly Infringed

The "Blurred Lines" case is unique compared to some of the other famous cases. Whereas other cases have specific series of notes, phrases, motifs, or song structures that the plaintiff alleges to have been infringed, this case has none of those.[177] Because there is no specified selection that could have been alleged to have been copied, this factor points to a stricter similarity standard.

b. Importance to the Works

Like the "Amount Allegedly Infringed" factor, it is difficult to isolate the importance of a selection to each work, since there is no specific selection alleged to have been infringed. Instead, the Gayes alleged that the "groove" and "feel" of the song were copied by Thicke and Williams; however, the dissent correctly pointed out that a song's "groove" is not a protectible idea,[178] and that when an author "uses commonplace elements that are firmly rooted in the genre's tradition, the expression is unoriginal and thus uncopyrightable."[179] In this case, the only thing alleged to have been infringed is the "groove" and "feel," and despite the potential importance the groove and feel may have to each of the songs, they are not protectible, and thus the "Importance to the Works" factor also points to the "striking similarity" standard.

c. Composition

Once again, there is no specified selection to analyze in this case. Due to this fact, the "Composition" factor, like the "Amount Allegedly

177. *See* Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath*, 92 S. CAL. L. REV. POSTSCRIPT 67, 67–68 (2018) (noting that "Blurred Lines" and "Got to Give It Up" "did not . . . share a single melodic phrase," nor did they "have a sequence of even two chords played in the same order, for the same duration," and "[t]hey had entirely different song structures . . . and did not share any lyrics whatsoever.").

178. *See* Williams v. Gaye, 895 F.3d 1106, 1140 (9th Cir. 2018) (Nguyen, J., dissenting).

179. *Id.* at 1141 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 363 (1991)).

Infringed" factor and the "Importance to the Works" factor, is moot and as a result would point to a heightened similarity standard.

d. Melody

The "Melody" factor would be the only factor under the Holistic Sliding Scale Test that the plaintiffs would be able to cling to in this case. Because this factor emphasizes the composition and uniqueness of the works, the plaintiffs would likely attempt to argue—not unlike the actual case—that Thicke and Williams unlawfully copied the "groove" and "feel" of the song, through their use of instrumentation, rhythm, and tempo. However, the overall "groove" and "feel" of songs in the same genre often share many similarities,[180] and just because this may be true, it does not mean that these elements amount to a protectible expression of an idea.[181] Coupled with the unprotectible nature of a song's "groove" or "feel,"[182] this factor would also point to a higher standard, likely leading to no liability for infringement.

e. Conclusion

Each of the previous factors lead to a "striking similarity" standard, due in large part to a lack of any tangible selection that could have been infringed, along with the case resting on unprotectible elements. Therefore, the Holistic Sliding Scale Test would likely correct the Ninth Circuit's ruling, providing a more commonsense resolution to the case which would not stifle creativity for musicians moving forward.[183]

3. "Under Pressure" (Queen & David Bowie) & "Ice Ice Baby" (Vanilla Ice)

In perhaps the clearest example, Vanilla Ice's "Ice Ice Baby" would be infringement under the Holistic Sliding Scale Test. The original case was settled,[184] but the result of the would-be case is clear.

180. McPherson, *supra* note 177, at 68.

181. *Cf. id.* (arguing that the jury may have wrongfully found Thicke and Williams guilty of infringing an idea or series of ideas, rather than a tangible expression of an idea).

182. *See Williams*, 895 F.3d at 1140. (Nguyen, J., dissenting).

183. *See* McPherson, *supra* note 177, at 68 (arguing that the verdict would "adversely affect[] the entire music industry" because it would "eliminat[e] any meaningful standard for drawing the line between permissible *inspiration* and unlawful *copying*").

184. Runtagh, *supra* note 7.

a. Amount Allegedly Infringed

Similar to the "Dark Horse" case, the amount allegedly infringed in "Ice Ice Baby" is relatively limited;[185] however, it is found throughout the entire song, first in the introduction and then repeating during each chorus.[186] Likewise, the phrase is dominant throughout the original "Under Pressure" song by Queen and David Bowie.[187] As a result, this element would not increase the similarity standard under the Holistic Sliding Scale Test.

b. Importance to the Works

The phrase in question is integral to both songs. Not only does it serve as the primary hook to "Ice Ice Baby," but it also serves as the initial (and repeated) hook throughout "Under Pressure."[188] As a result, the selection significantly points to the "heart" of both pieces, and as a result would lead to the usual standard for similarity.

c. Composition

Despite the fact that it was a limited selection alleged to have been infringed, the composition of each work was nearly identical. Both selections used the bass guitar for the primary phrase and a piano for a shorter, secondary phrase, and the notes were the same for each,[189] with the only difference being an added note in "Ice Ice Baby."[190] Although the lyrics and vocal melodies are different, the instrumentation of this phrase is nearly identical; as such, the requisite standard for similarity would lean towards the traditional "substantial similarity" standard.

d. Melody

Interestingly, the "Complexity" element of this factor may actually point towards a stricter standard for similarity. The phrase is not overly

185. *See supra* Part III.E.1.a.

186. *See* Roman Hapyak, *Ice Ice Baby Lyrics*, YOUTUBE (Dec. 6, 2009), https://www.youtube.com/watch?v=prN3bPmDqr4 [hereinafter *Ice Ice Baby*].

187. *See* QueenHouse85, *Queen & David Bowie – Under* Pressure *(Classic Queen Mix)*, YOUTUBE (Mar. 19, 2013), https://www.youtube.com/watch?v=YoDh_gHDvkk [hereinafter *Under Pressure*].

188. *Ice Ice Baby*, *supra* note 186; *Under Pressure*, *supra* note 187.

189. *Compare Ice Ice Baby*, *supra* note 186, *with Under Pressure*, *supra* note 187.

190. As stated earlier, Vanilla Ice unsuccessfully *tried* to argue that this extra note changed the entire makeup of the selection, despite the obviousness of it being nearly identical. *See* Hartwich, *supra* note 97.

complex, and consists mostly of a repeating bassline. However, despite its simple nature, Vanilla Ice's version is nearly identical, and as a result would not require a stricter standard, though it would likely satisfy the stricter similarity standard if necessary.

The "Uniqueness" element follows a similar line of logic; there is nothing overly unique about the selection, but the copying is so similar that the traditional "substantial similarity" standard is more appropriate. Again, it would likely satisfy both the traditional standard as well as the "strict similarity" standard, and would likely lead to an ultimate finding of infringement.

e. Conclusion

Under any test, this case would have likely been infringement, and the Holistic Sliding Scale Test is no different. Even though the dispute never made it to trial, my test would correctly result in a finding of infringement, and would protect the original artists from true copying.

4. "He's So Fine" (The Chiffons) & "My Sweet Lord" (George Harrison)

While not as blatantly obvious as Vanilla Ice's "Ice Ice Baby," George Harrison's "My Sweet Lord" would also likely be infringement under the Holistic Sliding Scale Test, in keeping with the actual finding in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*[191] As shown below, every factor of my test points towards the traditional standard for similarity, and likely a finding of infringement.

a. Amount Allegedly Infringed

In this case, the allegedly infringing selection dominates the entire song.[192] The repeating motifs repeat throughout the whole length of the song, and this is not only the case in "My Sweet Lord," but also in "He's So Fine."[193] Under the Holistic Sliding Scale Test, this would keep the

191. *See supra* Part II.D.4.

192. "He's So Fine" is described by the court as "a catchy tune consisting essentially of four repetitions of a very short basic musical phrase . . . motif A . . . followed by four repetitions of another short basic musical phrase . . . motif B" while "My Sweet Lord" likewise "also uses the same motif A . . . four times, followed by motif B, repeated three times, not four" with "a transitional passage of musical attractiveness of the same approximate length" replacing the fourth repetition of motif B. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 178 (S.D.N.Y. 1976).

193. *See id.* at 180–81.

traditional standard for similarity, which would weigh in favor of finding infringement—as in the original case.

b. Importance to the Works

Unlike other allegedly infringing songs, where the selection may be ancillary, the repeating motifs throughout "My Sweet Lord" are integral to the piece. In fact, without these motifs, the song simply would not exist. Under the Holistic Sliding Scale Test, this would be an indication of infringement, as it goes to the "heart" of the piece at a foundational level. Further, this finding would only be strengthened when considering the fact that the repeating motifs also go to the "heart" of the original work (in this case, "He's So Fine"). Therefore, the "Importance to the Works" factor would lean towards a simple "substantial similarity" standard, and also weighs in favor of an infringement finding.

c. Composition

The allegedly infringing musical pattern is a vocal melody in both songs. Because the instrumentation (in this case a vocal melody) is the same in both pieces,[194] as opposed to the use of instruments to play the same general tune, under the Holistic Sliding Scale Test the burden of similarity would not increase, and the melody would not need to be as identical for a finding of infringement to be justified.[195] Unfortunately for Harrison, the lack of a strict burden would not help, as even the district court described "My Sweet Lord" as "the same song as He's So Fine with different words."[196] Therefore, the "Composition" factor also leans towards the normal similarity standard.

d. Melody

The allegedly infringing selection in these songs was relatively basic, consisting of vocal melodies and harmonies.[197] Under the "Complexity" element of the "Melody" factor of my test, this would merit a stricter analysis of similarity;[198] however, this strict burden is somewhat offset by the unique nature of the combination and repetition of motifs, as well

194. This includes the vocal harmonies, which the court described as being "identical" in both pieces. *Id.*
195. *See supra* Part III.D.3.
196. *Bright Tunes Music*, 420 F. Supp. at 177, 181.
197. *See id.* at 178 (noting that "neither motif is novel").
198. *See supra* Part III.D.4.

as the inclusion of a specific grace note in motif B.[199] Even though there seems to be no uncommon music theory, unusual instrumentation, or unique combination of musical styles used, this highly unique combination of motifs points the "Uniqueness" element towards the traditional similarity standard.[200] Because the "Complexity" element is offset by the "Uniqueness" element, we are left with the "substantial similarity" analysis under this factor. This burden would almost unquestionably be met, as nearly every part of the vocal melody of the song was identical,[201] and thus the "Melody" factor would likely point to an infringement finding.

e. Conclusion

Because all of the factors—and most importantly, the "Melody" factor—ultimately do not point to a stricter standard, the Holistic Sliding Scale Test would correctly come to the same conclusion as the court in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*

5. "Love Is a Wonderful Thing" (The Isley Brothers) & "Love Is a Wonderful Thing" (Michael Bolton)

In the case involving Michael Bolton's "Love Is a Wonderful Thing," the jury seemed to have conflated protectible and unprotectible elements of the two songs,[202] resulting in a finding of infringement that was not merited. Under the Holistic Sliding Scale Test, infringement would likely not have been found.

a. Amount Allegedly Infringed

It is difficult to pinpoint the exact amount alleged to have been infringed. In the original case, the Isley Brothers' music expert "testified that the two songs shared a combination of five unprotectible

199. *See Bright Tunes Music*, 420 F. Supp. at 178 (stating that "the four repetitions of [motif] A, followed by four repetitions of [motif] B, is a highly unique pattern . . . [and] in the second use of the motif B series, there is a grace note inserted.").

200. *See supra* Part III.D.4.

201. *See Bright Tunes Music*, 420 F. Supp. at 180 (stating that "in musical terms, the two songs are virtually identical except for one phrase. There is motif A used four times, followed by motif B, four times in one case, and three times in the other, with the same grace note in the second repetition of motif B.").

202. The jury found a combination of unprotectible elements to have been uniquely compiled, and found infringement based on that. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).

elements[.]"[203] These five elements are peppered throughout the song, but like the "Blurred Lines" case, they seem to point more towards the overall "feel" of the song as opposed to specific selections that were copied. As a result, the Holistic Sliding Scale Test would require a stricter standard for similarity, making it more difficult to find infringement.

b. Importance to the Works

This element would also likely require a stricter standard for similarity. While each of the elements alleged to have been infringed exist throughout the song, they are all generalized components of the song's total makeup. For example, the "title hook phrase"[204] seemingly only consists of the phrase "love is a wonderful thing,"[205] which by itself would not be protectible.[206] The fact that this was also the title of both songs may have had some undue influence on the jury's findings. Because the elements the jury rested its findings on appear to be more general, they are therefore less important to each overall work. As a result, the stricter standard would be used, and they would have to be more identical in order to find infringement.

c. Composition

While the two songs share a similar musical "feel," the composition does not share enough specific elements to escape a stricter similarity standard. Both pieces use horn sections and a similar overall soulful style, but the Bolton song is a much slower tempo than the one by the Isley Brothers, and the lyrics differ significantly (other than the title phrase).[207] Further, while the initial phrase in each chorus share very similar melodies, the composition of the chorus as a whole has almost no

203. *Id.* These five elements were: "(1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending." *Id.*

204. *Id.*

205. *See* Michael Bolton, *Michael Bolton – Love Is a Wonderful Thing*, YOUTUBE (June 14, 2011), https://www.youtube.com/watch?v=H_ezMbv2sr4 [hereinafter *Love Is a Wonderful Thing (Bolton)*].

206. *See Three Boys Music*, 212 F.3d at 485 (listing the "title hook phrase" as one of five "unprotectible elements").

207. *Compare Love Is a Wonderful Thing (Bolton)*, *supra* note 204, *with* Repunza, *Love Is a Wonderful Thing – The Isley Brothers*, YOUTUBE (Dec. 27, 2009), https://www.youtube.com/watch?v=zGAQ5oWuhC8 [hereinafter *Love Is a Wonderful Thing (The Isley Brothers)*].

melodic similarity.[208] As a result, the "Composition" factor would also point to a stricter similarity standard, and likely a finding of no infringement.

d. Melody

Due to the general nature of the allegedly infringing elements, the complexity is predictably relatively low, and the uniqueness is relatively common. Bolton was famously influenced by the soul music of the 1960s,[209] and his songs reflect the common elements of that musical style. The fact that the plaintiffs had to rely on a combination of unprotectible elements in order to win the case points to the simplicity and commonality of the style encompassed in each work, and under the Holistic Sliding Scale Test they would have had to satisfy a stricter standard of similarity in order to prevail.

e. Conclusion

When taking all factors into account, it seems as though Bolton was inspired by the soul sound that the Isley Brothers helped shape, and then built upon it, as opposed to unlawfully copying it. The question then becomes not whether two songs sound vaguely similar because they share similar influences and musical stylings, but whether they rise to the level of unlawful infringement. In this case, the songs undeniably share a similar sound, but not to an extent that should have resulted in millions of dollars in damages. The ability to draw inspiration from an artist's influences is an important interest to protect, and unlike the result in the actual case, the Holistic Sliding Scale Test would have protected that interest. It would have required a heightened "striking similarity" standard for the substantial similarity element, and the Isley Brothers likely would not have satisfied this standard.

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208. *See* Patrick Savage et al., *Quantitative Evaluation of Music Copyright Infringement*, *in* PROCEEDINGS OF THE 8TH INTERNATIONAL WORKSHOP ON FOLK MUSIC ANALYSIS (FMA2018) 61, 63 (Andre Holzapfel & Aggelos Pikrakis eds., 2018), https://www.researchgate.net/publication/324861654_Quantitative_evaluation_of_music_copyright_infringement (noting that the melodic similarity of the entire chorus was only 36%, as opposed to 86% of the chorus's opening phrase). The Holistic Sliding Scale Test would mitigate for attorneys and experts limiting the selection that jurors would hear in this way (which could unduly influence them towards an erroneous finding of infringement), instead focusing on each piece as a whole.

209. *See Three Boys Music*, 212 F.3d at 481 (noting that Bolton "gained popularity . . . by reviving the soul sound of the 1960s).

6. "Taurus" (Spirit) & "Stairway to Heaven" (Led Zeppelin)

As stated earlier, the Supreme Court of the United States recently denied certiorari, simultaneously denying us any chance to see how it would settle the conflict between the Second and Ninth Circuit tests.[210] It is one of the more nuanced of all the cases; however, under the Holistic Sliding Scale Test, despite the factors leaning in different ways, it would lead to a "striking similarity" standard, and likely come to the correct result of no infringement.[211]

a. Amount Allegedly Infringed

The first factor weighs slightly for Spirit. According to the version of "Taurus" on Spotify, the song is two minutes, thirty-seven seconds long, and the disputed selection begins approximately forty-four seconds in, continuing for effectively the rest of the song.[212] In "Stairway to Heaven," the selection is the introduction to the song, starting right at the beginning and lasting for a significant portion of the more than eight-minute song.[213] Because the allegedly infringing selection accounts for significant portions of each song, the normal standard would be used to determine similarity.

b. Importance to the Works

In this case, the first and second factors work in tandem. Considering the fact that the allegedly infringing selection takes up so much of Spirit's track, it is fair to say that it goes to the "heart" of "Taurus." The selection is also very important to "Stairway to Heaven," leading it to be included

210. *See supra* Part II.D.6.

211. It is important to note that regardless of the burden my test would impose, Spirit would still have to overcome the issue regarding sound recordings vs. deposit copy sheet music copyright protections at the time the songs were written and released, which could ultimately make an infringement finding difficult no matter which burden they would have to meet. *See* Wang & Blistein, *supra* note 126 (noting that sound recordings did not receive copyright protection until 1972, and as a result the jurors in this case had to hear a performance of the deposit copy to determine infringement instead of hearing recordings of the two songs).

212. *See* Spirit, *Taurus*, SPOTIFY, https://open.spotify.com/album/3TX6HT0emzfmlwsiMpE9CX?highlight=spotify:track:56LAHIIyWXTg7vYmVSGBUf (last visited Nov. 3, 2020).

213. The selection lasts until approximately two minutes, thirty-one seconds into the song, and the entire song is over eight minutes long. If taking the general chord structure into account, the selection lasts even longer. *See* Led Zeppelin, *Stairway to Heaven – Remaster*, SPOTIFY, https://open.spotify.com/album/4Ig8dzqOkvkGDzaUof9lK?highlight=spotify:track:5CQ30WqJwcep0pYcV4AMNc (last visited Nov. 3, 2020).

on multiple charts listing some of the greatest guitar parts of all time.[214] As a result, the "Importance to the Works" factor also leans toward the traditional "substantial similarity" standard.

c. Composition

While there are some differences in the instrumentation between the two songs—"Taurus" includes string accompaniments, while "Stairway to Heaven" uses flutes lightly playing in the background—at their core the instrumentation is effectively the same, since they are both played on a guitar.[215] Because the instrumentation is so similar, the "Composition" factor also points to the normal standard for similarity.

d. Melody

So far, each factor has pointed to a "substantial similarity" standard as opposed to a "striking similarity" standard under the Holistic Sliding Scale Test.[216] However, both the "Complexity" and "Uniqueness" elements of the "Melody" factor lean more toward the heightened standard. For the "Complexity" element, ultimately the melody is a simple A minor chord progression, made up of fingerpicking along each descending chord that is played.[217] This is not complex, and in fact is quite common, particularly in songs with blues influences.[218]

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214. *See The 100 Greatest Guitar Riffs of All Time*, GuitarPlayer (Aug. 30, 2016), https://www.guitarplayer.com/technique/the-100-greatest-guitar-riffs-of-all-time (listing "Stairway to Heaven" at number 29 on "The 100 Greatest Guitar Riffs of All Time"); *The Best Acoustic Rock Intros of All Time*, GUITARPLAYER (Apr. 15, 2020), https://www.guitarplayer.com/players/the-top-10-acoustic-intros (listing "Stairway to Heaven" on the list of ten of the greatest acoustic introductions ever); *cf. The 20 Best Rock Guitar Intros of All Time*, GUITAR WORLD (Aug. 15, 2019), https://www.guitarworld.com/artists/20-best-rock-guitar-intros-all-time-video (listing Led Zeppelin's "Heartbreaker" as the number three best rock guitar intro of all time, but stating that "'Stairway to Heaven' may seem like the more obvious Led Zeppelin track to include here").

215. *Compare* Spirit, *supra* note 212, *with* Led Zeppelin, *supra* note 213.

216. *See supra* Part III.E.6.a–c.

217. *See* Joe Blevins, *A Guitarist On Whether "Stairway to Heaven" Really Rips Off "Taurus"*, AV CLUB (June 15, 2016, 1:45 PM), https://news.avclub.com/a-guitarist-on-whether-stairway-to-heaven-really-rips-1798248408 (noting the similarity in the chord progressions); TJR, *Stairway to Heaven vs. Taurus Guitar Examination Led Zeppelin vs. Spirit*, YOUTUBE (Nov. 20, 2014), https://www.youtube.com/watch?v=PCEg9gMJakU [hereinafter *Stairway to Heaven vs. Taurus Comparison*] (discussing and demonstrating the similarities and differences between the two works).

218. *See* Spencer Leigh, *When It Comes to Songwriting,* There's *a Fine Line Between Inspiration and Plagiarism*, INDEP. (July 8, 2010, 12:00 AM), https://www.independent.co.uk/arts-entertainment/music/features/when-it-comes-to-songwriting-theres-a-fine-line-

Additionally, using a minor chord with a descending bassline is very common,[219] and thus the "Uniqueness" element aligns with the "Complexity" element.

While there are interesting similarities in the selection,[220] ultimately the works are not complex nor unique enough to merit the traditional similarity standard. As a result, the "Melody" factor points toward the heightened "striking similarity" standard for similarity under the Holistic Sliding Scale Test.

e. Conclusion

The lack of complexity and uniqueness to the selection work against Spirit in this case. Despite the first three factors pointing to the "substantial similarity" standard, the "Melody" factor makes a strong case for a heightened standard. Because this factor may override the others,[221] it is possible that the Holistic Sliding Scale Test would require a "striking similarity" standard for the similarity element in the infringement case.[222] Ultimately, it would be up to the factfinder to determine whether the similarities are striking enough to find Led Zeppelin liable. However, despite being more nuanced than the other cases, it is likely that this case would result in no infringement under the Holistic Sliding Scale Test, just as it ultimately did in the actual case.[223]

CONCLUSION

The Holistic Sliding Scale Test would help allow music artists to achieve both of their competing interests.[224] It protects against erroneous infringement claims, while simultaneously providing protection against legitimately unlawful copying; it helps to mitigate for the potential harm

between-inspiration-and-plagiarism-2021199.html (discussing previous lawsuits against Led Zeppelin, with one commentator noting that "[y]ou can't copyright the blues").

219. *Stairway to Heaven vs. Taurus Comparison*, *supra* note 217.

220. *See id.* (noting that both songs are in the key of A minor, feature an A minor chord with a descending bassline, have the same descending bassline, are fingerpicked along the same meter, and have a similar tone).

221. *See supra* Part III.D.4.

222. This case is closer than the others, though.

223. Despite the similarities, it is important to keep in mind that just because two works may sound similar (or one may have influenced the other), it does not necessarily merit liability for infringement.

224. These competing interests, once again, are the desire to have the freedom to compose works based off of the influence and inspiration of other artists, while still maintaining the ability to ensure that the artist's own original works are protected from unlawful copying.

of juries conflating protectible and unprotectible elements, as well as the undue influence of expert testimony; and it allows for commonsense results to infringement cases, while still being flexible enough to account for their complexity. An important consideration to keep in mind is that in many cases these works *will* sound similar, and the determinations are close calls.[225] The key distinction, therefore, is not whether the songs are similar, but whether they are similar enough to justify an infringement suit that could result in potentially millions of dollars in damages. The Holistic Sliding Scale Test attempts to rectify this conflation.[226]

225. Obvious cases rarely make it to trial, after all.

226. By increasing the burden a plaintiff must overcome to demonstrate similarity in questionable cases, the Holistic Sliding Scale Test will not only provide for the proper dispensation of these cases, but serve as a deterrent for parties who would bring frivolous cases in the first place.