OUT OF TUNE: RECOMPOSING THE LINK BETWEEN MUSIC AND COPYRIGHT

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ABSTRACT

Music, like all art, is a form of creative expression. It is often referred to as "a universal language" for its seemingly inherent ability to appeal to people across cultures and divisions in society. Within the musical practice, however, the finite constructs of the Western musical tradition set the standards of music theory and traditions of composition, which are the building blocks of this so-called universal language. Because music is so universally appreciated, the copyright system in the United States has been established under the notion that music is universally understood and, therefore, can be analyzed universally. Under the current copyright system, for example, originality is one factor required for a work to be copyrightable. According to the law, originality is binary; either a work is original or it is not. This approach is entirely incompatible with the realities of music. This Note asserts that the originality requirement for copyright protection sets an unattainable standard for musicians, demonstrated by music theory and both historical and contemporary examples. This Note further demonstrates that over-reliance on expert testimony has proven detrimental to a recent string of music copyright infringement cases involving Katy Perry, Marvin Gaye, Pharrell Williams, and

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other world-famous musicians. Therefore, this Note proposes that in order for copyright law to align more closely with the art it seeks to protect, the United States Copyright Office should establish a Copyright Trial and Appeal Board, wherein administrative law judges with expertise in specific art forms are tasked with determining copyrightable elements in works of authorship within their areas of expertise.

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INTRODUCTION

In July 2019, a jury awarded a $2.8 million verdict to a relatively obscure Christian rapper, Flame, in a copyright

infringement lawsuit[1] that rocked the musical world.[2] The jury had concluded[3] that world-famous pop music sensation Katy Perry had infringed relatively-unknown Flame's 2008 song "Joyful Noise"[4] with her 2013 smash hit "Dark Horse."[5] Despite the songs being of different genres, having different lyrical contents, and possessing a host of other substantive differences, this jury unanimously came to the verdict that Perry had copied an eight-note, repeating, descending line known as an ostinato from Flame's song, which was legally tantamount to copying his entire song.[6]

Musicians and legal scholars alike questioned how this verdict could reasonably happen.[7] Simply put, the current copyright law regime is spread too thin. The Copyright Act of 1976 and subsequent case law applies the same one-size-fits-all approach to music as it does to all other artistic works.[8] This approach falsely presumes that musical works can meet a standard of originality,[9] and then assesses if infringement has occurred based on whether competing works are substantially similar.[10]

In contrast to the monolithic legal approach, musical preferences vary widely across cultures, generations, and communities.[11] Across these boundaries, disagreements arise as

1. Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275136, at *3–4 (C.D. Cal. Mar. 16, 2020); *see also* Emily Zemler, *Katy Perry's 'Dark Horse' Copied Christian Rapper Flame, Jury Finds*, ROLLING STONE (July 30, 2019, 4:21 AM), https://www.rollingstone.com/music/music-news/katy-perry-dark-horse-lawsuit-flame-865058/.

2. *See* Adam Neely, *Why the Katy Perry/Flame Lawsuit Makes No Sense*, YOUTUBE (Aug. 2, 2019), https://www.youtube.com/watch?v=0ytoUuO-qvg.

3. *Gray*, 2020 WL 1275136, at *3–4.

4. FLAME, LECRAE & JOHN REILLY, *Joyful Noise*, *on* OUR WORLD REDEEMED (Cross Movement Records 2008).

5. KATY PERRY & JUICY J., *Dark Horse*, *on* PRISM (Capitol Records 2014).

6. *Gray*, 2020 WL 1275136, at *1; Zemler, *supra* note 1.

7. *See* Neely, *supra* note 2.

8. *See* Copyright Act of 1976, 17 U.S.C. § 102(a).

9. *Id.*

10. *See* E. Am. Trio Prods. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 415 (S.D.N.Y. 2000); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 360–61 (1991).

11. *See* David J. Hargreaves, Chris Comber & Ann Colley, *Effects of Age, Gender, and Training on Musical Preferences of British Secondary School Students*, 43 J. RSCH. MUSIC EDUC. 242, 242 (1995).

to what should even be considered music. Likewise, there is wide disparity between the music on the Billboard charts and the "art music" studied and performed in orchestras, wind ensembles, jazz bands, choirs, and the like.[12] From composition to consumption, the reality for musicians and listeners is that "music" encompasses a host of radically different art forms and skill sets, each with its own set of technical nuances.

This Note attempts to bridge the disparate languages of law and music by rethinking longstanding legal theories from a musicological perspective. At present, the legal standard of originality is unattainable for musicians, as demonstrated by music theory and both historical and contemporary examples.[13] Copyright standards should be tailored to the technical nuances of the relevant art forms, such as music theory and compositional norms which do not apply to other works of authorship.

This Note therefore proposes that in order for copyright law to align more closely with the art it seeks to protect, the United States Copyright Office should establish a Copyright Trial and Appeal Board, wherein administrative law judges with expertise in specific art forms are tasked with determining copyrightable elements of works of authorship within their areas of expertise. Part I of this Note introduces the basics and some nuances of music as a technical discipline through not only the lens of traditional Western music theory, but also that of contemporary popular music production. Part II frames the current system of copyright law in the United States, its inception, and the standards it applies when determining a work's rights and possibility of infringement. Part III analyzes certain high-profile music copyright infringement cases to concretely demonstrate the major problems musicians face within the copyright system. Finally, Part IV proposes that the best revision to the copyright law system in the United States

12. *See* Justin Wildridge, *Classical vs. Popular Music (Differences Between Classical and Popular Music)*, CMUSE (Apr. 18, 2019), https://www.cmuse.org/classical-vs-popular-music/.

13. *Id.*

may be to draw upon patent law's approach to technically rigorous subject matter by establishing a copyright-focused parallel to the Patent Trial and Appeal Board, tasked with adjudicating the copyrightability of specific elements in works.

I. MUSIC

A. *Music Theory, Composition, and Production*

There are certain general features which are ubiquitous in nearly all musical styles. The most fundamental building block of music is the beat.[14] A beat is a division of a measure and can contain a note (or notes) or a rest, and can be further subdivided into smaller units.[15] Beats and their subdivisions are the primary rhythmic building blocks of music, carrying the pulse of the music.[16] A note is a single pitch and can be combined with other notes to form chords.[17] Notes represent pitches, which are the primary melodic building block of music,[18] while chords are the primary harmonic building block.[19] Chords within a key are represented by a Roman numeral that signifies their harmonic function.[20] Sequences of chords are generally referred to as chord progressions.[21] Notes are generally grouped into octaves,

14. *See Beat*, GEO. WASH. L. BLOGS: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/2018/12/20/beat/ (last visited Mar. 23, 2022); *Beat*, BRITANNICA, https://www.britannica.com/art/beat-music (last visited Mar. 23, 2022); NATE SLOAN & CHARLIE HARDING, SWITCHED ON POP: HOW POPULAR MUSIC WORKS, AND WHY IT MATTERS 10 (Suzanne Ryan, ed., 2020).

15. *See Beat*, BRITANNICA, *supra* note 14.

16. *See id.*

17. *See* Richard Wilde, *What Is the Difference Between Notes & Chords?*, GUITAR SKILLS PLANET (Dec. 21, 2020), https://guitarskillsplanet.com/what-is-the-difference-between-notes-and-chords/; *see also* SLOAN & HARDING, *supra* note 14, at 39.

18. *See* SLOAN & HARDING, *supra* note 14, at 23.

19. *See id.* at 40; *see also Chord*, GEO. WASH. L. BLOGS: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/2018/12/20/chord/ (last visited Mar. 23, 2022); *Chord*, BRITANNICA, https://www.britannica.com/art/chord-music (Aug. 12, 2013).

20. *See* Robert Hutchinson, *Roman Numeral Chord Symbols*, MUSIC THEORY FOR THE 21ST-CENTURY CLASSROOM, https://musictheory.pugetsound.edu/mt21c/RomanNumeralChordSymbols.html (last visited Mar. 23, 2022).

21. *See* SLOAN & HARDING, *supra* note 14, at 40.

referring to registers or ranges of pitch.[22] There are twelve distinct notes in an octave which then repeat in subsequent octaves.[23] The major scale is comprised of a specific set of eight notes, while a slightly different set of eight notes comprises the minor scale.[24] Other sets of notes comprise other scales and modes, which composers may choose to employ in their works.[25]

While these building blocks lay the foundation for nearly all music, many musicians in practice today utilize modern technology to write and produce their music through computer software called a digital audio workstation ("DAW").[26] Across pop, electronic, hip-hop, and other genres, DAWs such as Ableton, Pro Tools, and Logic Pro have become the primary creative interface for music producers worldwide.[27] Using a DAW allows the producer to manipulate not only the notes and rhythms of their composition, but also to have granular control over the timbre[28] of their recorded instruments and voices.[29] Many producers, for example, have signature "chains" or combinations of effects which they overlay on a vocal or instrumental recording to give it a recognizable, yet often

22. *See id.* at 24; *see also Octave*, GEO. WASH. L. BLOGS: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/2018/12/20/octave/ (last visited Mar. 23, 2022); *Octave*, BRITANNICA, https://www.britannica.com/art/octave-music (Apr. 28, 2017).

23. *See* SLOAN & HARDING, *supra* note 14, at 24.

24. *See id.* at 28; *Major & Minor*, GEO. WASH. L. BLOGS: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/2018/12/20/major-minor/ (last visited Mar. 23, 2022); *see also Scale,* GEO. WASH. L. BLOGS: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/2018/12/20/scale (last visited Mar. 23, 2022).

25. *See* SLOAN & HARDING, *supra* note 14, at 28; *see also Scale,* GEO. WASH. L. BLOGS: MUSIC COPYRIGHT INFRINGEMENT RES., *supra* note 24; Jerald C. Graue, *Scale*, BRITANNICA, https://www.britannica.com/art/scale-music (Oct. 23, 2017); Mieczyslaw Kolinski, *Mode*, BRITANNICA, https://www.britannica.com/art/mode-music (Sept. 9, 2010).

26. *See* ALAN P. KEFAUVER & DAVID PATSCHKE, FUNDAMENTALS OF DIGITAL AUDIO 63 (2007); SLOAN & HARDING, *supra* note 14, at 129–30.

27. *See* KEFAUVER & PATSCHKE, *supra* note 26, at 63; *see also* SLOAN & HARDING, *supra* note 14, at 129.

28. Timbre refers to the character or quality of a sound. *See* KEFAUVER & PATSCHKE, *supra* note 26, at 54; *see also Timbre*, GEO. WASH. L. BLOGS: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/2018/12/20/timbre/ (last visited Mar. 23, 2022); *Timbre*, BRITANNICA, https://www.britannica.com/science/timbre (Feb. 1, 2018).

29. *See* SLOAN & HARDING, *supra* note 14, at 128–32.

imperceptible, effect.[30] DAWs also allow producers to take existing sound libraries, such as percussion and bass sounds, and manipulate them to reach the precisely desired effect for the song they are writing in a way that traditional acoustic instruments or live electronic amplifiers inherently cannot replicate.[31]

B. *The Fluidity of Genre*

One may presume that artists within a particular genre follow similar sets of compositional and stylistic norms. Although this is true to an extent, genre classifications are not as descriptive as they may seem to an undiscerning observer.[32] For example, a categorization such as "classical music" may evoke imagery of highbrow musical snobbery to a non-musician.[33] However, a music historian could enumerate not only the differences between the baroque, romantic, classical, and post-modern styles,[34] but also how composers from each era influenced the likes of John Williams and Hans Zimmer as they were writing the iconic scores to *Star Wars*,[35] *Inception*,[36] and countless other films. Likewise, "jazz" has a variety of sub-genres including bebop, New Orleans, Big Band, cool, swing, Dixieland, and

30. *See* Yoni Leviatan, *Making Music: The 6 Stages of Music Production*, WAVES (May 18, 2021), https://www.waves.com/six-stages-of-music-production.

31. *See* SLOAN & HARDING, *supra* note 14, at 129, 131.

32. *See* Marc Arteaga, *Genres of Music Should Not Organize, They Should Describe*, THE HIGHLANDER (Jan. 7, 2020), https://www.highlandernews.org/37106/genres-of-music-should-not-organize-they-should-describe/.

33. *See* Charlie Albright, Opinion, *'Classical' Music Is Dying . . . and That's the Best Thing for Classical Music*, CNN (May 29, 2016, 8:44 AM), https://www.cnn.com/2016/05/29/opinions/classical-music-dying-and-being-reborn-opinion-albright.

34. *Classical Music Genres*, MUSIC GENRES LIST, https://www.musicgenreslist.com/music-classical/ (last visited Mar. 25, 2022).

35. *See* Jay Gabler, *Star Wars Music: What Were John Williams' Classical Influences?*, YOUR CLASSICAL (May 4, 2021), https://www.yourclassical.org/story/2015/10/20/star-wars-john-williams-influences.

36. *See* Robin Hilton, *The Music of 'Inception' Exposed*, NPR: ALL SONGS CONSIDERED (Aug. 2, 2010, 2:11 PM), https://www.npr.org/sections/allsongs/2010/08/02/128932586/the-music-of-inception-exposed.

ragtime.[37] Many of these styles influenced George Gershwin writing "Rhapsody in Blue"[38] and Leonard Bernstein writing *West Side Story*.[39] These sorts of sub-genre classifications are not only present in art music, but also across popular music genres. "Electronic music" is merely an umbrella term which encompasses electronic dance music (EDM), dubstep, progressive house, deep house, trance, drum and bass, lo-fi, and others.[40] But lo-fi is also considered a form of hip-hop with lo-fi "beats" (instrumental tracks) often serving as foundations for rap music.[41]

Regional stylings also underlie a significant degree of the variation in subgenres. In the mid-1990s, the rap world was seemingly split down the middle as the East Coast-West Coast rivalry hit fever pitch, with East Coast fans supporting The Notorious B.I.G. and their West Coast counterparts favoring Tupac Shakur.[42] The rock-and-roll of the British Invasion is radically distinct from Memphis rock-and-roll, and neither bear much resemblance to today's styles such as heavy metal and punk.[43] Soul music of the 1970s and 1980s was also largely regional in its variants, with distinct sounds coming from Philadelphia, Memphis, and Nashville.[44] The sound of

37. *Jazz Music Genres List*, MUSIC GENRES LIST, https://www.musicgenreslist.com/music-jazz/ (last visited Mar. 22, 2022).

38. GEORGE GERSHWIN, RHAPSODY IN BLUE (Victor Records 1924); *see Rhapsody in Blue*, REDLANDS SYMPHONY, https://www.redlandssymphony.com/pieces/rhapsody-in-blue (last visited Mar. 22, 2022).

39. Joshua Figueroa, *West Side Story, Sixty Years Later: How Bernstein Made Classical "Cool"*, KMFA89.5 (June 28, 2017), https://www.kmfa.org/pages/2011-west-side-story-sixty-years-later-how-bernstein-made-classical-cool.

40. MUSIC GENRES LIST, https://www.musicgenreslist.com (last visited Nov. 20, 2021).

41. *See Lo-fi Music: The Basics You Need to Start Making It*, LANDR, https://blog.landr.com/lofi/ (last visited Mar. 22, 2022); *see also* Dylan Green, *What Is Lo-Fi? A Conversation with Illohim*, DJ BOOTH (Mar. 2, 2021), https://djbooth.net/features/2021-03-02-what-is-lo-fi-illohim-interview-audiomack.

42. Meghan Giannotta, *East Coast vs. West Coast Rivalry: A Look at Tupac and Biggie's Infamous Hip-Hop Feud*, AMNY (Mar. 8, 2019), https://www.amny.com/entertainment/east-coast-vs-west-coast-rivalry-a-look-at-tupac-and-biggie-s-infamous-hip-hop-feud-1-13742586/.

43. *See* Prerna Das, *History of Rock and Roll*, EVOLUTION OF ROCK MUSIC, http://evolutionofrockmusic.weebly.com/history-and-evolution.html (last visited Mar 25, 2022).

44. *Silk Sonic's Retro Soul (with Tayla Parx)*, SWITCHED ON POP, at 10:42, 11:55, 13:20 (Apr. 5, 2021), https://switchedonpop.com/episodes/silk-sonics-retro-soul-tayla-parx.

Philadelphia soul has been credited with inspiring Bruno Mars and Anderson Paak in the composition of their first collaborative work as Silk Sonic, "Leave the Door Open."[45]

C. *The Flexibility of Musical Elements*

There are certain standard elements which exist in the vast majority of Western music: key, tuning, melody, harmony, chord structure and progression, rhythm, and meter.[46] However, there are numerous instances within both pop music and art music where these elements' rigidity has been tested. Certain pop musicians, such as Outkast and AJR, have composed works which do not maintain a consistent 4/4 or 3/4 meter (otherwise called time signature).[47] Similar to meter, key is often consistent throughout a particular work of pop music, a trend from which Beyoncé sought to deviate by ending her 2011 song "Love On Top" by repeating the chorus through a series of four modulations, with each repetition a semitone higher than the last.[48]

Alan Silvestri's musical score in the climactic fight scene of the 2019 film *Avengers: Endgame* also utilizes modulation to achieve a specific effect, cycling through six key centers—G minor, C minor, C# minor, D minor, back to G minor, A minor, E major—before finally concluding with the iconic *Avengers*

45. *Id.* at 13:20; SILK SONIC, *Leave the Door Open*, *on* AN EVENING WITH SILK SONIC (Aftermath Ent. & Atl. Recording Corp. 2021).

46. A portion of the musical analysis in this Note comes from the author's personal background as a musician. The author began playing piano at age seven and French horn at age eight. He then went on to earn a minor in Music Performance as part of his Bachelor of Arts degree from Franklin & Marshall College, where he played French Horn in the F&M Orchestra, Symphonic Wind Ensemble, and Philharmonia, and also conducted the F&M Pep Band and pit orchestras for the F&M Players productions of *Legally Blonde: The Musical* and *Urinetown*.

47. *See, e.g.*, AJR, *The Green and the Town*, *on* LIVING ROOM (Warner Records 2015) (beginning in 5/4, then alternating through various other time signatures); OUTKAST, *Hey Ya!*, *on* HEY YA! (Arista Records 2003). Some contend that the song is heard in 11/4. *See, e.g.*, Joeco (u/joeco23), *TIL "Hey Ya" Is Set in 11/4 Time*, REDDIT (July 7, 2017, 11:45 AM), https://www.reddit.com/r/Music/comments/6luhwi/til_hey_ya_is_set_in_114_time/. Others contend that it actually alternates between meters of 4/4 and 2/4. *See, e.g.*, SLOAN & HARDING, *supra* note 14, at 11–18.

48. BEYONCÉ, *Love on Top*, *on* 4 (Columbia Records 2011); *see also* SLOAN & HARDING, *supra* note 14, at 98–107.

theme in its original key of E major.[49] Silvestri's choice to utilize six key centers may have been an example of tone poetry, a compositional technique where some feature of the music is symbolic of a more general element about what the music represents.[50]

In another attempt to play with the rigidity of key, Childish Gambino broke from the traditional pitch tuning system by recording sections of his 2016 song "Redbone"[51] out of tune. This achieved a distinctly off-kilter and organic sonic effect, reminiscent of a live band, which would not have been possible had the song been fully recorded in tune. In a market where popular music is often highly processed with pitch correction technology employed to sound perfectly in tune, this sonic effect in "Redbone" makes the song distinct to listeners.

The technology behind pitch correction (popularly called "auto-tune" after the first commercially successful software designed to correct recorded pitch), when taken to its extreme, has given rise to entire sub-genres of hip-hop and pop music.[52] The genesis of this style is usually considered Cher's 1998 "Believe,"[53] which made extensive use of the Auto-Tune software to apply a never-before-possible robotic timbre to her voice.[54] The following decade, T-Pain became so well known for his heavy use of this effect (popularly dubbed "the T-Pain effect")[55] that an iPhone app called "I Am T-Pain" was released within the first two years of the App Store's creation, allowing

49. ALAN SILVESTRI, AVENGERS: ENDGAME (ORIGINAL MOTION PICTURE SOUNDTRACK) (Hollywood Records 2019).

50. The number six has deep-rooted symbolism in the Marvel Cinematic Universe, as there were six "Infinity Stones" that needed to be taken back to reverse the destruction of half the universe in *Avengers: Endgame*. *See* Eliana Dockterman, *Everything to Know About Marvel's Infinity Stones Before You See* Avengers: Endgame, TIME, https://time.com/5227586/mcu-six-infinity-stones/ (Mar. 10, 2019, 2:53 PM).

51. CHILDISH GAMBINO, *Redbone*, *on* AWAKEN, MY LOVE! (Glassnote Records 2016).

52. *See* Simon Reynolds, *How Auto-Tune Revolutionized the Sound of Popular Music*, PITCHFORK (Sept. 17, 2018), https://pitchfork.com/features/article/how-auto-tune-revolutionized-the-sound-of-popular-music/.

53. CHER, *Believe*, *on* BELIEVE (Warner Bros. Records 1998).

54. *See* Reynolds, *supra* note 52.

55. *See id.*

users to apply the auto-tune effect to their own recordings using only their phones.[56] This robotic precision has seen ebbs and flows in its popularity, but has nonetheless influenced the past two decades of pop music.[57]

Unlike keys, which are limited to the number of pitches in the chromatic scale, there are mathematically an infinite number of chord progressions.[58] Basic chords, like keys, are confined to the notes within the scale.[59] However, particularly in the modern day with the influence of jazz, there is a great deal of flexibility in the relationships of notes that can make up a chord.[60] There is likewise significant flexibility to the order which chords can be oriented with one another to create a chord progression.[61] Even so, there are a seemingly finite number of chord progressions which listeners will actually find appealing, due largely to the sonic relationships between the chords.[62] Because of this characteristic of musical taste, any once-original chord progression is bound to be reused.[63] Many even become ubiquitous within genres or time periods. John Coltrane's composition "Giant Steps" featured a chord progression unlike anything previously attempted.[64] It has since become a staple in the jazz repertoire.[65] The chord progression of I-vi-IV-V became ubiquitous in popular music of the 1950s and 1960s

56. *See "I Am T-Pain" Auto-Tune and Recording App Comes to iPhone*, ROLLING STONE (Sept. 4, 2009, 4:39 PM), https://www.rollingstone.com/music/music-news/i-am-t-pain-auto-tune-and-recording-app-comes-to-iphone-104445/.

57. *See* Reynolds, *supra* note 52.

58. *See* Ivan Jimenez, Tuire Kuusi & Christopher Doll, *Common Chord Progressions and Feelings of Remembering*, 3 MUSIC & SCI. 1 (2020).

59. *See generally* SLOAN & HARDING, *supra* note 14, at 39.

60. *Id.* at 39–40.

61. *Id.* at 40.

62. Cynthia R. Anderson & Thomas W. Tunks, *The Influence of Expectancy on Harmonic Perception*, 11 PSYCHOMUSICOLOGY: MUSIC, MIND & BRAIN 3 (1992).

63. *See* Kirby Ferguson, *Embrace the Remix*, YOUTUBE (Aug. 10, 2012), https://www.youtube.com/watch?v=L1s_PybOuY0.

64. JOHN COLTRANE, *Giant Steps*, *on* GIANT STEPS (Atlantic Records 1959).

65. *See* Estelle Caswell, *The Most Feared Song in Jazz, Explained*, VOX (Dec. 4, 2018, 3:30 PM), https://www.vox.com/videos/2018/12/4/18125993/john-coltrane-jazz-explained-improvisation-giant-steps.

(*e.g.*, Earth Angel,[66] Heart and Soul,[67] Stand By Me[68]),[69] and the traditional twelve-bar blues progression (I-I-I-I-IV-IV-I-I-V-IV-I-V) underlies jazz compositions across decades.[70] The prevalence of the chord progression featured in Johann Pachelbel's Canon[71] in pop music[72] has become an in-joke among musicians.[73]

When considering pop music, as opposed to classical music, music theorists have begun to apply novel analytical toolkits.[74] While harmonic analysis has reigned supreme for centuries, a new method called sonic analysis has begun to take hold within pop-centric musicology.[75] Where traditional music theory tends to favor viewing harmonic functions as the driving force behind why certain chords "work" better than others in certain contexts, sonic analysis methodology reconsiders this approach.[76] Where classical composers dealt heavily in the interplay between the tension of a building section and the release of a resolution, modern popular artists tend to favor repeating chord progressions without a clear resolution.[77] There is still significant attention paid to the relationships of tension and release, although these features come less from the harmonic function of the chords being performed.[78] Rather,

66. THE PENGUINS, *Earth Angel (Will You Be Mine)*, *on* EARTH ANGEL (Dootone Records 1954).

67. FRANK LOESSER & HOAGY CARMICHAEL, HEART AND SOUL (Famous Music Corp.1938).

68. BEN E. KING, *Stand by Me*, *on* DON'T PLAY THAT SONG! (Atco Records 1962).

69. *See* SLOAN & HARDING, *supra* note 14, at 43.

70. *See, e.g.*, CHUCK BERRY, *Johnny B. Goode* (Chess Records 1958); BIG BOY BRASS, *Raw Meat*, *on* BIG BOY BRASS (THE EP) (647104 Records 2018).

71. JOHANN PACHELBEL, CANON AND GIGUE FOR 3 VIOLINS AND BASSO CONTINUO (c. 1680–90).

72. *See, e.g.*, GREEN DAY, *Basket Case*, *on* DOOKIE (Reprise Records 1994); BLACKBEAR, *Smile Again*, *on* EVERYTHING MEANS NOTHING (Interscope Records 2020).

73. *See* RobPRocks, *Pachelbel Rant*, YOUTUBE (Nov. 21, 2006), https://www.youtube.com/watch?v=JdxkVQy7QLM.

74. Asaf Peres, *Sonic Functions: The Producer's Alternative to Harmonic Functions in Modern Music*, TOP40 THEORY (Sept. 21, 2018), https://www.top40theory.com/blog/sonic-functions-the-alternative-to-harmonic-functions-in-modern-music.

75. *Id.*

76. *Id*.

77. *Id.*; *see also* SLOAN & HARDING, *supra* note 14, at 47.

78. SLOAN & HARDING, *supra* note 14, at 46–48.

this role is supplanted by variations in production and instrumentation.[79] In fact, the traditional notion of cadences (harmonic resolutions) hardly exists at all in modern popular music, with the role of the climax being filled by either the "chorus" or the "drop."[80]

D. *The Influence of Non-Western Music*

Although this Note primarily addresses Western musical styles, there are many other rich musical traditions around the world that cannot be discounted, some of which have even had significant influence on Western music.[81] While studying the many ragas and talas of Hindustani and Carnatic tradition under Ravi Shankar in India, George Harrison is known to have incorporated his studies into his music with The Beatles and his subsequent solo career.[82] Likewise, Balinese gamelan was used to underscore combat scenes in the 1988 anime film *Akira*.[83] In some African cultures, heavily rhythmic musical styles are intrinsically linked to dance in a way unlike any Western musical tradition.[84] The influence of this rhythmic intensity can be seen across jazz, hip-hop, and rock music.[85]

79. *Id.* at 48–49.

80. *Id.* at 46–52.

81. *See* Dipankar De Sarkar, *50 Years of Beatles in India: How George Harrison Brought Indian Classical Music to Western Pop*, MINT LOUNGE (Jan. 19, 2018, 5:31 PM), https://www.livemint.com/Leisure/6ff69IEQkHAxkhssHQjd1L/50-years-of-Beatles-in-India-How-George-Harrison-brought-In.html.

82. *See id.*

83. *See* Paige Katherine Bradley, *Cue the Gamelan Music, Maestro, Because the Best Anime Ever Made Is Back in Theaters!*, VICE: GARAGE (Aug. 28, 2018, 1:38 PM), https://garage.vice.com/en_us/article/paw5bg/akira-30th-anniversary-anime-metrograph-kanye-approved.

84. *See* J. H. Kwabena Nketia, *The Interrelations of African Music and Dance*, 7 STUDIA MUSICOLOGICA 91, 99 (1965).

85. Mark Lincoln, *The Powerful Influence of African Culture on Modern Music*, JAMPLAY (Dec. 3, 2016), https://www.jamplay.com/articles/1-general/161-the-powerful-influence-of-african-culture-on-modern-music.

II. COPYRIGHT LAW

The right to govern over copyright is endowed to Congress by the Promotion Clause of the United States Constitution.[86] Congress first enacted the Copyright Act of 1790, which was a near verbatim replica of the British Statute of Anne, the world's first copyright statute.[87] The 1790 Act applied to authors of written works and was designed to incentivize these authors by granting them a monopoly over the printing of their works for a term of fourteen years, with optional extension of a second fourteen-year term.[88] The initial term was extended to twenty-eight years in 1831,[89] but the next major statutory revision of American copyright law was not until 1909.[90] The Copyright Act of 1909 broadened the scope of protectable works to include any published original works of authorship and also extended the optional term extension to twenty-eight years.[91] The Copyright Act of 1976 significantly revised the 1909 Act.[92] The term was amended to the life of the author plus seventy years, in order to fall in line with the dominant international standard of copyright terms based on the life of the author, as required in order for the United States to become signatory to the Berne Convention and TRIPS agreement.[93]

The current statute protects "original works of authorship fixed in any tangible medium of expression" including: "(1)

86. U.S. CONST. art I, § 8, cl. 8; *see also A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/ (last visited Mar. 31, 2022).

87. *The 18th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Mar. 31, 2022).

88. *Id.*

89. *The 19th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_19th_century.html (last visited Mar. 31, 2022).

90. *1900–1950*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html (last visited Mar. 31, 2022).

91. *Id.*

92. *1950–2000*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-2000.html (last visited Mar. 31, 2022).

93. *Id.*; Victoria A. Grzelak, *Mickey Mouse & Sonny Bono Go to Court: The Copyright Term Extension Act and Its Effect on Current and Future Rights*, 2 J. MARSHALL REV. INTELL. PROP. L. 95, 101 (2002); *see also* U.S. COPYRIGHT OFF., CIRCULAR 38A: INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 1 (2021), https://www.copyright.gov/circs/circ38a.pdf.

literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."[94] Of these categories, musical compositions are broadly covered by the second, while specific recordings of these compositions are separately protected by the seventh.[95] Regarding the "original" aspect of the statutory requirement, there is the notion of the idea and expression dichotomy.[96] This refers to an inherent theory to the originality element for copyright protection, setting forth that mere ideas are not protectable; rather, copyright protects expression.[97] The line between idea and expression in music can often be blurred, as will be explicated later.

Likewise, there are certain exclusive rights held by copyright owners, the violation of which exposes an infringer to liability to the rightful owner.[98] Among these is the right to reproduce the copyrighted work, often at issue in infringement actions involving musical works.[99] In order to prove infringement, a plaintiff must demonstrate substantial similarity between their copyrighted work and the allegedly infringing work,[100] in addition to access by the defendant to the copyrighted work.[101] Substantial similarity is assessed through the ordinary observer standard.[102] This means that for any copyright action pertaining

94. Copyright Act of 1976, 17 U.S.C. § 102(a).

95. *See id.*

96. *See, e.g.*, Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, L.L.C., 803 F.3d 1032, 1037 (9th Cir. 2015); Golan v. Gonzales, 501 F.3d 1179, 1184 (10th Cir. 2007).

97. *See, e.g.*, *Bikram's Yoga Coll.*, 803 F.3d at 1037; *Golan*, 501 F.3d at 1184.

98. *See* 17 U.S.C. § 501.

99. *See id.* § 106.

100. *See* 4 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 13.01 (2013); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 719 (2010).

101. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 181 (S.D.N.Y. 1976).

102. *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975).

to the substantial similarity of two competing works, the jury assessing the works will consist of "ordinary observers" representing the target market of the works. In the case of popular music, this is held to be the general public.[103] However, common law has allowed for a more discerning standard when considering art music.[104] The discerning listener standard applied in one case specifically to choir directors, holding that specific genres of choir arrangements are not intended for general market consumption, but rather have a specific base of purchasers who should serve as the standard-bearers of substantial similarity within the genre.[105]

Despite copyright law being established by federal statute, much of the legal doctrine derives from common law which is subject to circuit splits.[106] The disparate standards applied across jurisdictions will be explored further.

III. DISCONNECTS BETWEEN MUSIC AND COPYRIGHT

A. *Case Studies*

1. *"Blurred Lines" and "Got to Give It Up"*

The issue of assessing the similarity of popular musical works arose in 2014[107] when Marvin Gaye's estate sued Pharrell Williams and Robin Thicke (the "Williams parties") alleging that their 2013 hit "Blurred Lines"[108] infringed on Gaye's 1977 funk hit "Got to Give It Up."[109] The Williams parties asserted that there were no similarities in the "melodies, rhythms,

103. *See Arnstein*, 154 F.2d at 473.

104. *See* Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 732 (4th Cir. 1990).

105. *Id.* at 737.

106. *See infra* notes 231–32 and accompanying text.

107. *See* Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *11–12 (C.D. Cal. July 14, 2015), *aff'd sub nom.* Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018).

108. ROBIN THICKE, PHARRELL WILLIAMS & T.I., *Blurred Lines*, *on* BLURRED LINES (Star Trak Recordings 2013).

109. MARVIN GAYE, *Got to Give It Up*, *on* LIVE AT THE LONDON PALLADIUM (Art Stewart 1977).

harmonies, structures, and lyrics of 'Blurred Lines' and 'Got to Give It Up,'" and the claim was merely over musical ideas, rather than expressions which would be entitled to copyright protection.[110] In a controversial ruling, the Ninth Circuit held in favor of Gaye, declaring that the Williams parties had infringed upon Gaye's work.[111] The Ninth Circuit clarified that its holding narrowly pertains to the procedural history of this specific case and does not grant a copyright owner license to a "groove" or any other previously unprotectable element of a musical work.[112] Nonetheless, the dissenting opinion looks closely at the musical elements of the two works and analyzes their similarity from a novel musicological approach, rather than relying expressly on the arguments of the parties and the submissions of their amici.[113] In this manner, the dissent utilizes an intrinsic test rather than the extrinsic test employed by the majority.[114]

Judge Nguyen's dissent in *Williams* is rooted in the notion that "[t]he majority allows the Gayes to accomplish what no one has before: copyright a musical style," thereby "establish[ing] a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere."[115] The dissent continues to note that, despite the fact that copyright inherently restricts some expression, the idea/expression dichotomy is designed to serve as a First Amendment safeguard built directly into the law.[116] This acknowledges the reality that complete originality—in the abstract and non-legal sense—is rare in any art form.[117] It is a long-held understanding that borrowing from

110. Williams v. Gaye, 895 F.3d 1106, 1117 (9th Cir. 2018).

111. *Id.* at 1138.

112. *Id.*

113. *Id.* at 1143–50 (Nguyen, J., dissenting).

114. *See id.*

115. *Id.* at 1138.

116. *Id.* at 1140 (quoting Golan v. Holder, 565 U.S. 302, 327–28 (2012); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)).

117. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).

well-known prior works is especially common, and even necessary to the creation of musical works.[118]

This opinion continues by referring to the copies of each work's sheet music deposited with the Copyright Office.[119] In this reference, the dissent relies on the amicus curiae brief of musicologist Judith Finell on behalf of the Williams parties.[120] In the deposited copies, Finell identified a ten-note melodic sequence dubbed the "Signature Phrase" in "Got To Give It Up" and argued that it corresponded to a twelve-note sequence in "Blurred Lines."[121] Between these phrases, Finell distinguished four musical elements as justifying a holding of substantial similarity.[122] These elements were: "(a) each phrase begins with repeated notes; (b) the phrases have three identical pitches in a row in the first measure and two in the second measure; (c) each phrase begins with the same rhythm; and (d) each phrase ends on a melisma (one word sung over multiple pitches)."[123] The dissent also identifies and compares a "Hook Phrase" (represented by the "Blurred Lines" lyrics: "take a good girl" and "I hate these blurred lines") and another four-note melodic sequence called "Theme X" in both songs.[124] Regarding the Hook Phrase, Judge Nguyen draws comparison to a similar phrase performed by Beyoncé, Jennifer Hudson, and Anika Noni Rose in "Dreamgirls"[125] to justify the notion that the phrase is far too common throughout music to be protectable

118. *See id.*; *see also* 1 MELVILLE D. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[B] (rev. ed. 2017) ("In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.").

119. *Williams*, 895 F.3d at 1116–17.

120. *Id.* at 1117.

121. *Id.* at 1143 (Nguyen, J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.* at 1146–47.

125. BEYONCÉ KNOWLES, JENNIFER HUDSON & ANIKA NONI ROSE, *Dreamgirls*, *on* DREAMGIRLS: MUSIC FROM THE MOTION PICTURE (Music World Music, Columbia Records, Sony Urban Music 2006).

by a single artist.[126] Likewise, a phrase similar to Theme X in "Happy Birthday to You" supports the same conclusion.[127]

Ultimately, Judge Nguyen notes that "the majority's uncritical deference to music experts" results in the conclusion that even one of Marvin Gaye's musical works could "potentially infringe[] . . . o[n] any famous song that preceded it."[128] Acknowledging that judges without any musical training or background are unequipped to compare two pieces of sheet music and determine extrinsic similarity, this dissent warns that judges must not allow blind deference to the testimonies and conclusions of certain experts to supersede their own independent analysis of substantial similarity.[129]

In contrast, the majority holds that the relevant test is merely the extrinsic test of substantial similarity as "demonstrated through expert testimony."[130] The *Williams* court leans on the standard of reliance on expert testimony set forth in *Swirsky v. Carey*.[131] In *Swirsky*, this was justified by the understanding that "[m]usic . . . is not capable of ready classification into only five or six constituent elements," but is instead "comprised of a large array of elements, some combination of which is protectable by copyright."[132] Notably, the court in *Swirsky* declined to name a specific set of standards by which musical copyright infringement should be analyzed, instead noting that other jurisdictions have previously applied a multitude of disparate standards including:

> (a) "substantial similarity based on the combination of five otherwise unprotectable elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence;

126. *Williams*, 895 F.3d at 1146–47 (Nguyen, J., dissenting).

127. *Id.* at 1148.

128. *Id.* at 1152.

129. *Id.*

130. *Id.* at 1120 (majority opinion).

131. 376 F.3d 841, 845 (9th Cir. 2004); *Williams*, 895 F.3d at 1119.

132. *Swirsky*, 376 F.3d at 849.

> (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending;"[133]
>
> (b) "melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics . . . noting that the district court had compared idea, phraseology, lyrics, rhythms, chord progressions, 'melodic contours,' structures, and melodies under 'ordinary observer' test;"[134]
>
> (c) "pitch, chord progression, meter, and lyrics under extrinsic test;"[135]
>
> (d) "structure, melody, harmony, and rhythm under 'striking similarity' test;"[136]
>
> (e) "lyrics, melodies, and song structure;"[137]
>
> (f) "instrumentation and melody under the extrinsic test;"[138]
>
> (g) "melody and lyrics under 'striking similarity' test;"[139]
>
> (h) "chord progression, structure, pitch, and harmony under substantial similarity test."[140]

The *Swirsky* court finally noted that "commentators have opined that timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of

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

134. *Id.* (citing Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999)).

135. *Id.* (citing Cottrill v. Spears, No. 02–3646, 2003 WL 21223846, at *9 (E.D. Pa. May 22, 2003)).

136. *Id.* (citing Tisi v. Patrick, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000)).

137. *Id.* (citing McKinley v. Raye, No. Civ.A.3:96–CV–2231–P, 1998 WL 119540, at *5 (N.D. Tex. Mar. 10, 1998)).

138. *Id.* (citing Damiano v. Sony Music Ent., Inc., 975 F. Supp. 623, 631 (D.N.J. 1996)).

139. *Id.* (citing Sylvestre v. Oswald, No. 91 CIV. 5060 (JSM), 1993 WL 179101, at *4 (S.D.N.Y. May 18, 1993)).

140. *Id.* (citing Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 280 (S.D.N.Y. 1991)).

instruments, basslines, and new technological sounds can all be elements of a musical composition."[141] Despite each of these approaches existing in case law prior to *Swirsky* and *Williams*, each of these courts relied on the conclusion that there is no definitive combination of factors that serves as a prima facie definition of musical infringement.[142] Therefore, the extrinsic test should generally be met when the plaintiff demonstrates through sufficient expert testimony substantial similarity of protected elements.[143] Nonetheless, the pitfalls of this heavy reliance on expert testimony have become apparent in subsequent cases.

2. *"Dark Horse" and "Joyful Noise"*

One such case which readily demonstrates the inherent problems with reliance on expert testimony is the 2019 lawsuit between Katy Perry and Flame.[144] Katy Perry's ostinato in "Dark Horse" had a similar timbre to Flame's in "Joyful Noise," and the melodic contour was also similar, though not identical.[145] The key and tempo were also similar, though also not identical between the songs.[146] In fact, the only identical factors between the two musical phrases were their rhythm and length, with each consisting of eight consecutive eighth-notes.[147] Nonetheless, this jury ruled that Perry had copied Flame's ostinato.[148] Despite the vast differences between these works,

141. *Id.* at 848–49 (citing Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 244 (1990); Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 294–95 (1993)).

142. *Id.* at 849; Williams v. Gaye, 895 F.3d 1106, 1120 (9th Cir. 2018).

143. *Swirsky*, 376 F.3d at 849; *Williams*, 895 F.3d at 1119.

144. Gray v. Perry, No. 15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at *16 (C.D. Cal. Mar. 16, 2020); *see supra* Introduction.

145. *Gray*, 2020 U.S. Dist. LEXIS 46313, at *16; Brief for Musicologists as Amici Curiae Supporting Defendants-Appellees at 12, 19, Gray v. Perry, No. 15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020) (No. 20-55401); *see also* Neely, *supra* note 2.

146. *See Gray*, 2020 U.S. Dist. LEXIS 46313, at *39–40; *see also* Zemler, *supra* note 1; Neely, *supra* note 2.

147. *See Gray*, 2020 U.S. Dist. LEXIS 46313, at *16.

148. *Id.* at *3–4.

this verdict meant that these works were substantially similar and constituted infringement.

This jury verdict initially sent shockwaves throughout both the music industry and the legal arena.[149] From the jury's ruling in July 2019[150] until judgment as a matter of law was entered over eight months later in March 2020,[151] the consensus among musicians and music lawyers was that a significant injustice had been done by ruling in Flame's favor.[152] This belief was eventually submitted formally to the court as an amicus brief on behalf of fifteen musicologists arguing in Perry's favor.[153] Upon breaking down the circumstances at trial, it became apparent that the expert testimony of musicologist Todd Decker on behalf of Flame's "Joyful Noise" had, in essence, confused the jury of non-musicians with musical jargon.[154] The jury was so swayed by Decker's testimony as to rule that "Dark Horse" infringed on "Joyful Noise" through containing this similar ostinato pattern.[155]

Fortunately for Katy Perry, the District Judge later reversed the jury verdict and granted judgment as a matter of law, holding that "the jury's verdict is against the clear weight of the evidence."[156] However, the mere fact that a jury came to this conclusion raises a question as to whether other juries would be likely to rule similarly in other cases where the judge may not subsequently grant judgment as a matter of law against the

149. *See generally* Zemler, *supra* note 1.

150. *Gray*, 2020 U.S. Dist. LEXIS 46313, at *3–4.

151. Gene Maddaus, *Katy Perry Wins Reversal of 'Dark Horse' Copyright Verdict*, VARIETY (Mar. 17, 2020, 4:47 PM), https://variety.com/2020/music/news/katy-perry-dark-horse-reversal-1203537482/.

152. *See, e.g.*, Neely, *supra* note 2.

153. Brief for Musicologists as Amici Curiae Supporting Defendants-Appellees, *supra* note 145, at 2, Exhibit 1; *see also* Chris Eggertsen, *Musicologists Come to Katy Perry's Defense in 'Dark Horse' Case: Verdict Is 'Inhibiting the Work of Songwriters'*, BILLBOARD (Jan. 13, 2020), https://www.billboard.com/articles/business/legal-and-management/8547957/musicologists-katy-perry-dark-horse.

154. *See, e.g.*, Neely, *supra* note 2.

155. *See* Maddaus, *supra* note 151.

156. Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at *40 (C.D. Cal. Mar. 16, 2020).

jury's verdict.[157] This question, at its core, seeks to determine whether a jury of non-musicians is equipped to adjudicate substantial similarity over musical works. Further, while the judge ultimately ruled in favor of the argument of the majority of experts, it took a significant amount of time and mainstream publicity surrounding the jury's erroneous decision for these experts to become involved in the litigation.[158] Although the proper verdict was ultimately reached in this case, it would be naïve to presume that just any musician embroiled in a similar case would have the resources and clout to trigger the domino chain of media coverage which spurred the additional expert involvement that led to Perry's victory.

3. *"My Sweet Lord" and "He's So Fine"*

One of the most well-known and controversial music copyright infringement cases comes from George Harrison's "My Sweet Lord" and The Chiffons' "He's So Fine."[159] In Harrison's post-Beatles solo career, he was accused of copying the 1962 hit "He's So Fine" in his 1970 song "My Sweet Lord."[160] To oppose the infringement claim, Harrison would have needed to prove that he had never heard "He's So Fine"—an impossible task.[161] Harrison instead insisted that he had not intentionally copied "He's So Fine," and the Southern District of New York judge conceded that he believed the former Beatle.[162] However, the court nonetheless held that Harrison had subconsciously infringed upon The Chiffons' copyright, and specifically, the popularity of "He's So Fine" constituted a per se instance of access, as required for infringement.[163] The

157. *See id.*

158. *See, e.g.*, Zemler, *supra* note 1; Neely, *supra* note 2.

159. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).

160. *Id.* at 178.

161. *Id.* at 180–81.

162. *Id.* at 178–80.

163. *Id.* at 181.

decision was subsequently affirmed by the Second Circuit.[164] This set a controversial precedent, namely that intent to copy is not expressly required for infringement to be found, so long as the senior work is sufficiently popular.[165] Taken to the logical extreme, this holding has the potential to license any musician with a Billboard Hot 100 single or author with a New York Times bestselling novel to claim subconscious infringement against any similar junior work. This is not unlike the fear expressed by Judge Nguyen's dissent in *Williams*, that any musical work that one can own can "potentially infringe[] the copyright of any famous song that preceded it" merely by virtue of being second-in-time.[166]

B. *The Failure of "Originality"*

To reiterate, the section 102(a) of the Copyright Act of 1976 sets forth that "original works of authorship" are protected by federal copyright.[167] However, the aforementioned cases demonstrate that the majority of music falls into one of two extremes: either it is entirely original (whether within the fixed system of music theory conventions or circumventing it) or it is derivative.[168] The standard of originality in copyright context is generally held to be a low threshold, requiring only "at least some minimal degree of creativity."[169] While having a low originality requirement ensures a low barrier to copyright protection, it is fundamentally unsuited to an art form, like music, with a long and storied history of artists developing on existing works. For example, the tradition of *cantus firmus* in classical music history serves as the prototypical model of music's derivative nature.[170] Beginning in the 13th century and

164. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 997 (2d Cir. 1983).

165. *See id.* at 998–99.

166. Williams v. Gaye, 885 F.3d 1150, 1196 (9th Cir. 2018) (Nguyen, J., dissenting).

167. 17 U.S.C. § 102(a).

168. *See supra* Section III.A.

169. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

170. *Cantus Firmus*, BRITANNICA, https://www.britannica.com/art/cantus-firmus (last visited Mar. 29, 2022).

continuing until the Baroque period ending around 1750, *cantus firmus* was a compositional tactic wherein an existing melody would be set to new harmonies to create a new musical work.[171] Remnants of this tradition still exist through certain musical covers where an existing song is arranged to a different genre or harmonization scheme.[172]

1. *All the Music LLC*

To illustrate the finite nature of the Western musical system, Damien Riehl—a musician, technologist, attorney, and former copyright professor—and Noah Rubin—a software programmer—created All the Music LLC.[173] This project uses a software algorithm to systematically create every possible twelve-note melody.[174] It then saves the melodies as MIDI files to a three-terabyte hard drive so as to fix them in a tangible medium of expression.[175] Later iterations of the project also include rhythmic variations to the melodies.[176] Riehl and Rubin are frequently asked whether they intend to use this project to act as "copyright trolls" and sue unwitting musicians who compose melodies identical to the ones in their database.[177] Their consistent answer is that their intentions are just the opposite: All the Music helps songwriters by serving as a public reference database of free-to-use melodies.[178]

171. *See id.*

172. *See, e.g.*, Marc Silver, *Postmodern Jukebox Turns Back the Clock on Present-Day Pop Hits at the Birchmere*, WASH. POST (Jan. 15, 2015), https://www.washingtonpost.com/express/wp/2015/01/15/postmodern-jukebox-turns-back-the-clock-on-present-day-pop-hits-at-the-birchmere/.

173. TEDx Talks, *Copyrighting All the Melodies to Avoid Accidental Infringement, Damien Riehl*, YOUTUBE (Jan. 30, 2020), https://www.youtube.com/watch?v=sJtm0MoOgiU.

174. *See id.*; *see also* Alexis C. Madrigal, *The Hard Drive with 68 Billion Melodies*, THE ATLANTIC (Feb. 26, 2020), https://www.theatlantic.com/technology/archive/2020/02/whats-the-point-of-writing-every-possible-melody/607120/.

175. *FAQs*, ALL THE MUSIC LLC, http://allthemusic.info/faqs/ (last visited Mar. 29, 2022); *see* TEDx Talks, *supra* note 173.

176. ALL THE MUSIC LLC, *supra* note 175; *see* TEDx Talks, *supra* note 173.

177. *See* TEDx Talks, *supra* note 173.

178. ALL THE MUSIC LLC, *supra* note 175; *see* TEDx Talks, *supra* note 173.

The project stems from the notion that melodies are inherently mathematical in that they develop from a finite set of parts; therefore, overlap between melodies is inevitable.[179] This overlap may exist between works by different artists[180] or within one artist's individual discography.[181] Such overlap may come in varying degrees: the precise notes may be identical, or the melodic contour may be similar between two works.[182] In either instance, rhythmic variations may exist to different extents.

2. *"Netflix Trip" and "Human"*

An example of works with similar melodic contours and rhythms exists between AJR's 2017 "Netflix Trip"[183] and Jon Bellion's 2014 "Human."[184] Although there has never been a legal dispute between these works, the two are frequently compared by fans.[185] The verses in these two songs feature nearly identical rhythms and similar melodic structures without consisting of the same notes or intervals between notes.[186] Adam, Jack, and Ryan Met of AJR addressed this similarity in an interview, stating that the similarities were entirely subconscious and stemmed from their shared musical influences with Jon Bellion, naming Kanye West as one such influence.[187] Interestingly, Bellion also uses this very same

179. ALL THE MUSIC LLC, *supra* note 175; *see* TEDx Talks, *supra* note 173.

180. *See, e.g.*, AJR, *Netflix Trip*, *on* THE CLICK (AJR Productions 2017); JON BELLION, *Human*, *on* THE DEFINITION (Capitol Records 2014).

181. *See, e.g.*, JON BELLION, *Human*, *supra* note 180; JON BELLION, *Halloween*, *on* THE SEPARATION (Capitol Records 2013); JON BELLION, *Ooh (feat. Christianne Jensen)*, *on* THE DEFINITION (Capitol Records 2014).

182. *See supra* notes 144–48 and accompanying text.

183. *See* AJR, *Netflix Trip*, *supra* note 180.

184. *See* JON BELLION, *Human*, *supra* note 180.

185. *See* Katherine Valen, *Jon Bellion vs. AJR*, SCROLL ONLINE (Oct. 4, 2018), https://scrollonline.net/15431/a-e/jon-bellion-vs-ajr/.

186. *See* AJR, *Netflix Trip*, *supra* note 180; JON BELLION, *Human*, *supra* note 180.

187. Zach Sang Show, *AJR Talks The Click, Jon Bellion, and Shawn Mendes*, YOUTUBE (Aug. 2, 2017), https://youtu.be/UNZb3wQSAhw.

musical phrase in his other songs "Halloween"[188] and "Ooh,"[189] the latter of which was released on the same album as "Human."[190] This suggests that it is actually not coincidental that the phrase exists in multiple of his songs, but is rather used as a motif across his work. AJR similarly deliberately makes musical references through shared motifs between various songs on a single album.[191] Motivic variation as a compositional technique is common throughout music history.[192]

The similarity between "Netflix Trip"[193] and "Human"[194] raises a question as to how derivative the compositional style of any individual artist is from the artist's influences. It stands to reason that if these artists' shared influence of Kanye West was the primary driving factor between the compositional similarities between "Netflix Trip" and "Human" then, therefore, the standard of originality for short-form songs must look past mere compositional choices.

AJR has stated that their goal with "Netflix Trip" was to write a song which uniquely captures formative life experiences from the lens of growing up watching *The Office*.[195] To this end, they included such lines as "I had my first crush in season two," "I lost my grandpa during season six," and "I turned down Jameson when I was twelve / I spent that Friday night with Steve Carrell / the one where Dwight became the head of sales."[196] In contrast, Bellion's "Human" juxtaposes specific

188. JON BELLION, *Halloween*, *supra* note 181.

189. JON BELLION, *Ooh (feat. Christianne Jensen)*, *supra* note 181.

190. JON BELLION, *Human*, *supra* note 180.

191. *See, e.g.*, Cole, *All the Lyrical Easter Eggs in AJR's New Track "Bang!"*, ALT 104.5 (Feb. 20, 2020), https://alt1045philly.iheart.com/content/2020-02-20-all-the-lyrical-easter-eggs-in-ajrs-new-track-bang/; *see generally* AJR, NEOTHEATER (AJR Productions 2019).

192. *See* Mark DeVoto, *Sequence*, BRITANNICA, https://www.britannica.com/art/sequence-musical-composition (last visited Mar. 29, 2022).

193. AJR, *Netflix Trip*, *supra* note 180.

194. JON BELLION, *Human*, *supra* note 180.

195. AJR, *Netflix Trip*, *supra* note 180; *see* Jason Scott, *Interview | AJR Long for the Past but Push to the Future with New Album*, POPDUST (June 14, 2017), https://www.popdust.com/ajr-the-click-album-interview-2441343043.html.

196. *AJR – Netflix Trip*, GENIUS, https://genius.com/Ajr-netflix-trip-lyrics (last visited Nov. 9, 2021); AJR, *Netflix Trip*, *supra* note 180.

experiences with related and irrational fears to articulate the contradictory nature of the human mind through lines such as "I spent four thousand on the Mart McFlys / yet I'm still petrified of going broke" and "there's someone gorgeous in my bed tonight / yet I'm still petrified I'll die alone."[197]

The specific lyrical and broader thematic content of the songs serve vastly different purposes, with each being deeply personal to the respective songwriters. However, if subconscious "copying" can give rise to infringement,[198] then a court could feasibly rule that AJR's "Netflix Trip" infringed upon Jon Bellion's copyright to "Human" despite the innovative songwriting concept AJR employed when devising "Netflix Trip." There is also a chance that the two songs would not be considered substantially similar given that the notes themselves are different, albeit with similar melodic contours. The holding of such a dispute could be wildly different depending on which of the tests listed in *Swirsky*, if any, the court chose to apply. This demonstrates that the law is not consistent in its application, and its standards are fundamentally flawed.

3. *"Good 4 U" and "Misery Business"*

Although there have yet to be major judicial ramifications to the controversial decision in *Williams*, its ripple effects have been felt widely in the music industry. In May 2021, pop singer Olivia Rodrigo released her debut album *Sour*, which included the smash hit song "Good 4 U."[199] Shortly after its release, fans took to Twitter and TikTok noting similarities between "Good 4 U" and "Misery Business," a pop-punk hit released in 2007 by

197. *Jon Bellion – Human*, GENIUS, https://genius.com/Jon-bellion-human-lyrics (last visited Nov. 9, 2021); JON BELLION, *Human*, *supra* note 180.

198. *See generally* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (finding a composer infringed on a copyright by subconsciously copying another composition).

199. OLIVIA RODRIGO, *Good 4 U*, *on* SOUR (Geffen Records 2021).

Paramore.[200] Just a few short months later, in August 2021, Rodrigo (or, more accurately, her record label) retroactively listed Paramore members Hayley Williams and Josh Farro as co-writers on "Good 4 U" as a credit for Rodrigo's interpolation of Paramore's song.[201] Music industry analysts have noted that such "[r]etroactively-added songwriting credits have become increasingly common in recent years" in the wake of the "Blurred Lines," "Dark Horse," and "Stairway to Heaven" cases.[202] When another of Rodrigo's releases, "Brutal,"[203] received comparisons to Elvis Costello's 1978 "Pump It Up,"[204] Costello "shrugged it off" and stated that taking inspiration from earlier works is simply "how rock & roll works."[205]

C. *The Ordinary Observer Rule and Non-Musician Jurors*

As it stands, substantial similarity is assessed across jurisdictions through the ordinary observer standard. This standard creates a two-step analysis: the fact finder considers (1) expert testimony to decide whether the competing works are substantially similar such that the alleged infringer copied the earlier work, and if so; (2) whether the "lay-observer" would believe that the alleged copying was over "protectable aspects"

200. PARAMORE, *Misery Business*, *on* RIOT! (Fueled by Ramen 2007); *see* Sean Strife, *Olivia Rodrigo's "Good 4 U" Is Basically Paramore's "Misery Business"*, CHANNEL 955 (May 19, 2021), https://channel955.iheart.com/content/2021-05-19-olivia-rodrigos-good-4-u-is-basically-paramores-misery-business/.

201. Jem Aswad, *Olivia Rodrigo Adds Paramore to Songwriting Credits on 'Good 4 U'*, VARIETY (Aug. 25, 2021, 7:38 AM), https://variety.com/2021/music/news/olivia-rodrigo-paramore-good-4-u-misery-business-1235048791/.

202. *Id.* (noting that other hit songs such as Sam Smith's "Stay with Me," Mark Ronson and Bruno Mars's "Uptown Funk," and even other releases by Rodrigo herself have resulted in retroactive songwriting credits as a means of preventing possible litigation); *see also* Nilay Patel, *Good 4 Who? How Music Copyright Has Gone Too Far*, THE VERGE (Sept. 15, 2021, 10:00 AM), https://www.theverge.com/platform/amp/22672704/olivia-rodrigo-switched-on-pop-charlie-harding-music-copyright.

203. OLIVIA RODRIGO, *Brutal*, *on* SOUR (Geffen Records 2021).

204. ELVIS COSTELLO, *Pump It Up*, *on* THIS YEAR'S MODEL (Radar Records 1978).

205. Aswad, *supra* note 201.

of the earlier work.[206] The standard further contends that "[t]he second consideration has also been described as determining whether the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[207]

In practice, this means that for any copyright action pertaining to the substantial similarity of two competing works, the jury assessing the works will consist of "ordinary observers" representing the target market of the works. In the case of popular music, this is held to be the general public. However, common law has allowed for a discerning listener standard to apply to certain art music.[208] This standard applied specifically to choir directors, holding that specific genres of choir arrangements are not intended for general market consumption, but rather that choir directors should determine substantial similarity over choral works.[209]

Just as the court in *Dawson* found choir directors to be a discerning market,[210] the same could be found for listeners of many musical genres. The degree of creativity an EDM producer puts into their production work cannot be discerned by merely listening to the final product, but a close look at their DAW reveals the underlying nuances to the work.[211] Many producers have recognized that their fans are interested when they pull back the curtain to reveal their creative process, and have hence begun broadcasting their production via livestream

206. Cottrill v. Spears, No. 02-3646, 2003 U.S. Dist. LEXIS 8823, at *19 (E.D. Pa. May 22, 2003) (internal quotation marks omitted) (quoting Dam Things from Den. v. Russ Berrie & Co., 290 F.3d 548, 562 (3d Cir. 2002)).

207. *Id.* at *19–20 (internal quotation marks omitted) (quoting *Dam Things from Den.*, 290 F.3d at 562).

208. *See, e.g.*, Dawson v. Hinshaw, 905 F.2d 731, 737 (4th Cir. 1990) (remanding case where lower court failed to determine whether the song's intended audience was the lay public or a listener of special expertise).

209. *Id.* at 738 (remanding to lower court to determine "whether definition of a distinct audience [other than the ordinary listener] is appropriate").

210. *See id.* at 737–38.

211. *See* KEFAUVER & PATSCHKE, *supra* note 26, at 134; *see also* SLOAN & HARDING, *supra* note 14, at 128–35.

on platforms such as YouTube and Twitch.[212] Just as the creatives have begun to recognize the market interest in the nuances of their creative processes, so too should the legal system. The ordinary observer standard simply does not leave room for this reality.

Further, the ordinary observer rule attempts to put the burden for determining substantial similarity into the most neutral hands possible—a standard jury. The personal experiences and individual tastes of a juror, inherently informed by each juror's background, both contextualizes and limits jury deliberations. In these cases and others, the ordinary observer rule stands as an obstacle to adequately judging the technical rigor of the music in question.

IV. RETHINKING COPYRIGHT FOR MUSIC

A. *Establishing a Copyright Trial and Appeals Board*

The dissent in *Williams v. Gaye*[213] and the jury verdict in *Gray v. Perry*[214] firmly demonstrate that the standards for assessing copyright infringement between musical works are entirely broken. In particular, Judge Nguyen analyzed the similarity between Robin Thicke and Pharrell Williams' "Blurred Lines" and Marvin Gaye's "Got to Get It On" from a uniquely musicological lens in the *Williams* dissent, citing directly to the relevant measures of music every step along the way.[215] Although this approach makes some progress at capturing the musical nuances that have been missing from traditional legal analyses, it misses the overall context of each work by treating

212. *See, e.g.*, Slushii, *Porter Robinson – Something Comforting sapientdream Remix (Ableton Stream)*, YOUTUBE (Nov. 6, 2020), https://www.youtube.com/watch?v=Crghj5hGy4Y; AJR, *Breaking Down the Production of Come Hang Out & Turning Out Pt. ii*, YOUTUBE (Apr. 27, 2020), https://www.youtube.com/watch?v=Kx0pMAztWmY.

213. *See* Williams v. Gaye, 885 F.3d 1150, 1183–84 (9th Cir. 2018) (Nguyen, J., dissenting).

214. *See* Gray v. Perry, No. 15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020).

215. *See Williams*, 885 F.3d at 1187–91 (Nguyen, J., dissenting).

the music as a written work meant to be read rather than a sonic work meant to be heard.

Other authors have attempted to opine why music presents such a unique set of problems in the context of copyright compared to other art forms.[216] In doing so, some have proposed assorted changes to the interpretation of originality.[217] Nonetheless, each of these proposals fall short in that they rely on law that is based on the misguided notion that the works of musicians can be compatible with the abstract legal concept of originality, whether by existing or suggested standards.

The most effective path to remedying music copyright's set of problems may be, therefore, to look beyond originality frameworks and reinvent the wheel. Under the current system, the judges who preside over copyright cases have no expectation of any technical competence and are susceptible to ruling inconsistently, as history has shown.[218] Fortunately, judges with technical training already exist in the world of American intellectual property, as the United States Patent and Trademark Office has remedied this issue in patent law by

216. *See, e.g.*, Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 280–81 (2013); Wihtol v. Wells, 231 F.2d 550, 552 (7th Cir. 1956) ("Of all the arts, music is perhaps the least tangible."); Jones, *supra* note 141, at 278 ("Music is particularly ill-suited to the analysis . . . due to music's inherently distinctive features which dictate a different inquiry to determine substantial similarity."); Jeffrey Cadwell, Comment, *Expert Testimony, Scènes À Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 157 (2005) ("[M]usic's unique nature makes it difficult to draw a distinction between idea and expression."); Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 443 (1988) (observing that it is impossible to apply the standard infringement analysis to musical works: "I do not see how it can be done.").

217. *See, e.g.*, Valeria M. Castanaro, *"It's the Same Old Song": The Failure of the Originality Requirement in Musical Copyright*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1271, 1287 (2008) ("By raising the standard for originality, the access of the entire music catalogue made possible by the Internet could be used to prevent potential infringement disputes."); Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 494 (2009) ("Originality, the gateway to copyright's exclusion power, needs hoisting to avert what is now the more socially costly error––copyright grants that are not needed to incent creation."); Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 805 (1993) ("[I]f the courts analyze originality following the principles that I suggest, they will have to perform a more thorough and detailed analysis to determine copyright originality than the cursory and shallow treatment they frequently have applied in the past.").

218. *See supra* Section III.A.

establishing the Patent Trial and Appeal Board (PTAB) with its own set of judges who solely have jurisdiction over the validity of patents.[219] Judges on the PTAB are Administrative Law Judges (ALJs) who frequently have prior experience or training in a specific technical discipline.[220] They then maintain a docket of cases dealing with the technical area in which they are experts.[221]

If a parallel system to the PTAB, a hypothetical Copyright Trial and Appeal Board (CTAB), were established, then the specific ALJs could have prior training or experience in a specific art form protected by copyright. For example, a musician would preside over music cases while an author could preside over literary work cases. This would become more complicated when considering the fact that, under the current interpretation, software code is considered a literary work.[222] However, this CTAB would not be bound to the categories of the works of authorship as laid out in 17 U.S.C. § 102(a),[223] and therefore would be able to place computer programming experts in ALJ roles to adjudicate software copyright cases. Likewise, just as the PTAB has narrow jurisdiction over the validity of patents,[224] the CTAB would have to be narrow in its scope. Given that the dominant issue in copyright infringement matters often comes down to specific elements of competing works, it stands to reason that the CTAB could take the role of determining the copyrightability of these specific elements of competing works.

219. *See* Janet Gongola, *The Patent Trial and Appeal Board: Who Are They and What Do They Do?*, U.S. PAT. & TRADEMARK OFF. (Summer 2019), https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/patent-trial-and-appeal-board-who-are-they-and-what.

220. *Id.*

221. *See* U.S. PAT. & TRADEMARK OFF., ORGANIZATIONAL STRUCTURE AND ADMINISTRATION OF THE PATENT TRIAL AND APPEAL BOARD 2 (May 12, 2015), https://www.uspto.gov/sites/default/files/documents/Organizational%20Structure%20of%20the%20Board%20May%2012%202015.pdf.

222. *See, e.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1198 (2021).

223. *See* Copyright Act of 1976, 17 U.S.C. § 102(a).

224. *See* Gongola, *supra* note 219.

Constitutionally, the basis for copyright law stems from the same language as for patent law, the Promotion Clause of the Constitution.[225] These two legal doctrines have developed parallel to one another and were the first two forms of intellectual property recognized in the United States. Not until the twentieth century was trademark also recognized as federal law,[226] and this new form of intellectual property was constitutionally justified under the Commerce Clause, unlike its counterparts.[227] The Patent Office was expanded to the Patent and Trademark Office, thereby leaving copyright as the sole form of intellectual property without a dedicated trial and appeal board despite having a dedicated office.[228] The time has come for this intricate web of intellectual property in the United States to be reworked and for copyright to receive its own Copyright Trial and Appeal Board.

For music cases, this proposed CTAB would be well-suited to develop and apply a more appropriate standard which fundamentally reevaluates how it approaches assessing which elements of musical works are protectable and to what extent. In part, this should manifest in the form of an intrinsic test of the musical similarity, akin to the one applied in the dissent to *Williams*.[229] It is clear, however, that there is far more to the process of songwriting and composition than the mere notes and rhythms. Judge Nguyen's analysis in the *Williams* dissent was structured using the framework presented by an outside expert, still thereby giving substantial deference to this individual expert's framing of the works at hand.[230] A CTAB

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

226. *See generally* Lanham (Trademark) Act, 15 U.S.C. § 1051 (1946) (noting the establishment of the federal law in 1946).

227. *See generally* Zvi S. Rosen, *Federal Trademark Law: From Its Beginnings*, 11 AM. BAR ASS'N: LANDSLIDE 4 (Mar./Apr. 2019), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/federal-trademark-law/ (reviewing the history of federal trademark law and explaining its basis in the Commerce Clause).

228. *See Patent and Trademark Office (PTO)*, INC., https://www.inc.com/encyclopedia/patent-and-trademark-office-pto.html (Jan. 5, 2021).

229. *See* Williams v. Gaye, 885 F.3d 1150, 1187–90 (9th Cir. 2018) (Nguyen, J., dissenting).

230. *See id.*

judge who is a music expert themselves could weigh a variety of expert testimonies to determine the most compelling analysis. In cases such as between "Netflix Trip" and "Human," lyrical content holds the weight of a song's meaning to both its listeners and the artists behind it. Hence, a test which examines the artist's creative process in developing the work is also warranted to ensure that the musical analysis alone does not leave out key details about the works. Such an analysis would be outside of the proposed CTAB purview and would remain appropriate for the courts.

In developing standards for a CTAB music division to apply, it may be useful to look to the list of analytical frameworks enumerated by the court in *Swirsky*, which different courts have applied for assessing musical similarity.[231] *Swirsky* noted that each of these distinct frameworks exist in order to clarify that "[m]usic . . . is not capable of ready classification into only five or six constituent elements," but is instead "comprised of a large array of elements, some combination of which is protectable by copyright."[232] Thus, it is a logical conclusion that music as an art form can be broken apart into a variety of different "array[s] of elements."[233] Nonetheless, as *Swirsky* demonstrates, there is no definitive combination of factors that serves as a prima facie definition of musical infringement, and, therefore, the extrinsic test is met when the plaintiff demonstrates through expert testimony substantial similarity of protected elements.[234]

231. Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004); *see also* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000); Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999); Cottrill v. Spears, No. 02-3646, 2003 WL 21223846, at *9–10 (E.D. Pa. May 22, 2003); Tisi v. Patrick, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000); McKinley v. Raye, No. Civ.A.3:96-CV-2231-P, 1998 WL 119540, at *5 (N.D. Tex. Mar. 10, 1998); Damiano v. Sony Music Ent., 975 F. Supp. 623, 631 (D.N.J. 1996); Sylvestre v. Oswald, No. 91 CIV. 5060, 1993 WL 179101, at *4 (S.D.N.Y. May 18, 1993); Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 280 (S.D.N.Y. 1991); Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 248–89 (1990); Jones, *supra* note 141, at 294–95 (1993).

232. *Swirsky*, 376 F.3d at 849.

233. *Id.*

234. *Williams*, 885 F.3d at 1164–65 (quoting *Swirsky*, 376 F.3d at 849).

This illustrates a severe jurisdictional split, wherein the statutory framework of "substantial similarity" is presently far too vague for any meaningfully consistent justiciability.[235] Further, without a musically competent judiciary, it seems unlikely that a consistent standard which does justice to the technical rigor of the music at hand can be developed within the confines of the current framework. When examining each of the elements that courts have previously considered (as enumerated in *Swirsky*[236]), it becomes clear that the most frequently considered elements are those most accessible to non-musicians. When aggregated, these elements are, from most frequent to least: lyrics and melody; structure; rhythm; pitch; and chord progression.[237] The elements become more musically rigorous as they become less frequent in the list, which suggests judicial inertia towards diving deeply into the technical rigors of music. The proposed CTAB music division would be well-suited to take the existing standards as set forth in *Swirsky*, *Williams*, and the other cases cited in *Swirsky*, to develop a technically rigorous analytical framework that captures nuance like the non-musically trained courts have been unable or unwilling to do.

B. *The CASE Act as a First Step Towards a CTAB*

The most recent measure to reform copyright law took the form of the Copyright Alternative in Small-Claims Enforcement Act (the CASE Act),[238] passed by Congress as part of an omnibus spending and COVID-19 relief bill (Consolidated Appropriations Act)[239] on December 21, 2020.[240] This law

235. *See also* Livingston & Urbinato, *supra* note 216, at 291 ("[C]ourts should increase the standard for infringement in music cases to 'striking similarity.'").

236. *See Swirsky*, 376 F.3d at 849.

237. *See id.*

238. 17 U.S.C. §§ 1501–11.

239. Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

240. Claudia Rosenbaum, *Congress Passes CASE Act as Part of COVID-19 Relief Bill*, BILLBOARD (Dec. 22, 2020), https://www.billboard.com/articles/business/9503848/congress-case-copyright-reforms-covid-19-relief-bill/.

"create[d] the Copyright Claims Board, a body within the U.S. Copyright Office, to decide copyright disputes" wherein "damages awarded by the board are capped at $30,000."[241] While the CASE Act tribunal system opens the door to litigants without the means to undergo full-fledged litigation by providing an alternative dispute resolution system for copyright disputes with relatively small damages ($15,000 per work and $30,000 per claim),[242] it does not address the broader issues within copyright law described herein. Likewise, although the Copyright Claims Board it established will consist of three attorneys, two of whom must be knowledgeable in copyright law, there is no guarantee that these Board members will be knowledgeable within the *particular art or arts* pertinent to the case, precisely the issue at hand.[243] Nonetheless, the Copyright Office's willingness to propose to Congress such a tribunal system for resolving any copyright disputes at all, coupled with Congress's willingness to pass such a proposal as law (albeit within an omnibus spending package designated for COVID-19 relief), shows that there is legitimate hope for the CTAB proposed herein.

C. *Solving Tension Points*

If the solution to the broken standards of music copyright law is to establish a CTAB which takes on the role of determining the copyrightability of specific elements in works, then much of the tension inherent in the current system is lifted. Such a solution is narrow in scope, merely addressing discrete questions of law: the validity and breadth of copyright protection over specific elements of specific works. Once answered, these legal conclusions will act as a guide to the judges presiding over the infringement cases. However, critics may argue that establishing such a board is an extreme measure

241. S. 1273, 116th Cong. (2019); H.R. 2426, 116th Cong. (2019); *see* 17 U.S.C. §§ 1502(a), 1504(e)(1)(D).

242. *See* 17 U.S.C. §§ 1502, 1504(e).

243. *Id.* § 1502(b).

which raises more logistical and infrastructural questions to tackle.

Perhaps most significant questions would consider the CTAB's jurisdiction and where appeals would go. Regarding jurisdiction, this Note posits that the CTAB should have narrow subject matter jurisdiction over cases in which the underlying question is whether one work should be legally classified as derivative of another. This sort of narrow subject matter jurisdiction would provide an alternative venue to answer the specific questions of which elements are copyrightable in specific works, and in practice would be oriented around determining whether specific works are actually derivative or reproductions, or are merely in competition with one another. This would present a sort of "validity" question mirroring those which its counterparts, the PTAB and TTAB, are designed to answer. To take from the earlier examples: instead of filing suit for infringement against Katy Perry in court, Flame could have filed to have Dark Horse classified as a derivative work to Joyful Noise in the CTAB, which could then either give rise to directly awarding damages or could become part of a broader infringement suit in the appeals process. In essence, this would parallel a party challenging the validity of a patent, as Flame would be challenging the validity of Katy Perry's copyright over what was otherwise considered an original work of authorship. The CTAB could further mirror the PTAB and TTAB by appealing to the Federal Circuit. This would parallel trademark law's split between sending TTAB appeals to the Federal Circuit while appeals of District Court cases are sent to that District Court's respective Circuit Court of Appeals.

Further, a philosophical consideration of how specific works are classified will be deeply integral to the function of the CTAB, as any policy which singles out a classification of things will be subject to scrutiny over how those things are classified in practice. Here, the question may arise as to what constitutes music and, therefore, warrants the specific copyright analysis for music under the CTAB. Historically, this philosophical

question raises controversy outside of the law, with naysayers arguing that new developments and genres are not actually music. This argument has been made across genres, like hip-hop[244] and dubstep.[245] Each of these genres have eventually been accepted as music, though some such challenges persist. Nonetheless, these challenges would likely not survive a legal understanding of music given the history of the case law and the cultural understanding which universally consider these genres to be music.

The true test of the "what is music" question arises from the avant-garde work of composers such as Krzysztof Penderecki and John Cage. Penderecki is most known for his 1961 orchestral piece "Threnody for the Victims of Hiroshima," a work deliberately composed to make musical instruments sound as unmusical as possible as a sonic representation of the horrors of the atomic bomb dropping on Hiroshima, Japan.[246] One of Cage's most well-known works is "4'33"," a composition for solo piano consisting entirely of silence which premiered in 1952.[247] Each of these artists pushed the boundaries for what constitutes musical composition in a way that would surely challenge any legal understanding of music.

This Note will not weigh in on whether Penderecki's "Threnody" or Cage's "4'33"" should be considered musical works under the current system, as such a debate is outside the scope of this proposal. While the lines may be blurred between music and these "music-like works," a variety of boundaries can be drawn around the concept of "music" by musicologists, philosophers, legal practitioners, and others. To this end, a

244. Maddy Shaw Roberts, *US Political Commentator Ben Shapiro Says Rap Isn't Real Music*, CLASSIC FM (Sept. 17, 2019, 11:11 AM), https://www.classicfm.com/music-news/ben-shapiro-thinks-rap-isnt-music/.

245. *Is Dubstep Really Music?*, DEBATE.ORG, https://www.debate.org/opinions/is-dubstep-really-music (last visited Apr. 1, 2022).

246. James M. Keller, *Penderecki, Krzysztof: Threnody for the Victims of Hiroshima*, SFSYMPHONY (Sept. 2017), https://www.sfsymphony.org/Data/Event-Data/Program-Notes/P/Penderecki-Threnody-for-the-Victims-of-Hiroshima.

247. Will Hermes, *The Story of '4'33"'*, NPR (May 8, 2000, 12:00 AM), https://www.npr.org/2000/ 05/08/1073885/4-33.

CTAB could apply a coarse categorization which considers both music and "music-like works" (as Penderecki and Cage's compositions may be considered) under the same standard, thereby rendering moot any question of whether specific works are, in fact, music.

Once this question is out of the way, the tension surrounding why music copyright deserves to be analyzed extrajudicially may be addressed. Critics may argue that technical subject matter exists in many areas of law and that the entire purpose of expert testimony is to elucidate these technical areas for lay juries and judges. While this may be true in theory, the reality is that the numerous music copyright infringement case blunders previously discussed demonstrate that courts habitually get music copyright infringement cases wrong. At first, these holdings may have seemed like a fluke. However, as courts continue to make such significant errors in adjudicating music copyright infringement, the errors compound by becoming binding precedent and creating bad law. The proposed CTAB would ameliorate these issues by consistently addressing the discrete legal question of how specific elements in works merit copyright protection.

CONCLUSION

As a practical matter, it remains to be seen whether the amount of copyright infringement litigation in the courts justifies the creation of a CTAB as an issue of judicial resources. However, the technical rigors of music demonstrate handily the need for significant revision to the analytical frameworks applied in assessing copyright infringement of musical works. As Noah Rubin, creator of All the Music, has stated: "we have some decisions to make as a society about how we [want to] move forward with music copyright."[248] As we consider these

248. Andrew Torrez & Thomas Smith, *OA367: Interview with "All the Music" Creators!*, OPENING ARGUMENTS (Mar. 9, 2020), https://openargs.com/oa367-interview-with-the-all-the-music-creators/.

decisions, we are not bound to stick with broken systems merely because they are longstanding. Rather, copyright can and should be modeled after patent as to how to best handle technically rigorous subject matter in order to align legal standards with the art they seek to protect.