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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

*Olivia Lattanza**

I. INTRODUCTION

The notion that “[a]ll music shares inspiration from prior musical works”¹ creates a tension in music copyright infringement cases because the distinction between inspiration and copying of another musician’s work is often blurred. In *Williams v. Gaye*,² the Ninth Circuit largely affirmed the judgment of the district court entered after the jury verdict finding that Pharrell Williams’ and Robin Thicke’s (“Thicke Parties”)³ hit “Blurred Lines” infringed Marvin Gaye’s song “Got to Give It Up.”⁴ Although the Ninth Circuit’s decision turned on procedural grounds, namely the court’s deferential

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¹ Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants at 2, *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (CA No. 15-56880).

² 885 F.3d 1150 (9th Cir. 2018).

³ The Ninth Circuit uses “Thicke Parties” to represent Pharrell Williams, Robin Thicke, Clifford Harris, Jr., and More Water from Nazareth Publishing, Inc. *Id.* at 1159. For this Note, “Thicke Parties” will specifically focus on Williams and Thicke.

⁴ *Williams*, 885 F.3d at 1183.

review of the jury's decision,⁵ this case does not exemplify a straightforward application of copyright law for several reasons.

While the 2013 hit "Blurred Lines" is subject to the protections under the Copyright Act of 1976, Gaye's song, which was composed prior to January 1, 1978, is protected under the Copyright Act of 1909.⁶ Specifically, Marvin Gaye ("Gaye") recorded "Got to Give It Up" in 1976, but he did not notate the deposit copy,⁷ as he neither wrote nor "fluently read sheet music."⁸ Instead, Jobete Music Company, Inc. registered "Got to Give It Up" in 1977 with the Copyright Office by depositing sheet music of a transcribed version of Gaye's recorded song.⁹ After Gaye's death, Frankie Christian Gaye, Nona Marvisa Gaye, and Marvin Gaye III ("Gaye Parties") inherited the copyright in Gaye's song.¹⁰ Notably, the difference in copyright protection under each act is central in determining which aspects of the song are protected.¹¹ While the actual sound recording of "Blurred Lines" is protected under the 1976 Act, the only protection of "Got to Give It Up" under the 1909 Act is in the musical composition.¹²

As a result, the district court excluded the sound recordings of both songs because sound recordings are not protected under the 1909 Act.¹³ This meant that the jury did not compare the recorded versions of both songs, but only compared the "musical compositions" of

⁵ *Id.* at 1182.

⁶ *Id.* at 1165; *see Dolman v. Agee*, 157 F.3d 708, 712 n.1 (9th Cir. 1998) ("The 1909 Act is the applicable law in cases in which creation and publication of a work occurred before January 1, 1978, the effective date of the 1976 Act.").

⁷ A deposit copy is a copy of the copyright holder's work that is sent to the Copyright Office as part of the application for registration. For a musical work, the notation of a deposit copy is the process of writing the musical elements and lyrics of a song on the sheet music. The deposit copy, or the sheet music of the song, is then sent to the Copyright Office as part of the application for copyright registration. Here, Gaye did not notate the deposit copy himself. This means that he did not personally write or transcribe the notes, lyrics, and other musical elements of "Got to Give It Up" on the sheet music that was sent to the Copyright Office for registration.

⁸ *Williams*, 885 F.3d at 1160.

⁹ *Id.*

¹⁰ *Id.* Gaye's children inherited their father's copyright in "Got to Give It Up" because copyrights, like other personal property, can be inherited when the copyright owner dies.

¹¹ Beth Hutchens, *How Sweet it is to be Sued by You (for Copyright Infringement)*, IPWATCHDOG (Feb. 19, 2015), <http://www.ipwatchdog.com/2015/02/19/how-sweet-it-is-to-be-sued-by-you-for-copyright-infringement/id=54955>.

¹² *Id.*

¹³ *Williams*, 885 F.3d at 1165. For an explanation of the protection of sound recordings under the 1976 Act, see Part II.A.

elements extracted by the experts.¹⁴ The lack of similarities between the notated musical elements on the written compositions suggests that the songs are not substantially similar under the 1909 Act.¹⁵ In identifying the musical features present in both songs, the Gayes' expert relied on elements that are not individually protectable.¹⁶ However, if the two songs were evaluated under the 1976 Act, there may be a stronger argument that the songs are substantially similar.¹⁷ Specifically, the sound recordings represent similar stylistic and sonic choices, including "the male falsetto and the use of a cowbell."¹⁸ However, as this case is governed under the 1909 Act, the similarities between the sound recordings are irrelevant.¹⁹

Most importantly, the similarities between the songs are not within the melody, lyrics, or harmony, but rather in the overall sound, groove, and vibe.²⁰ As the similarity in groove is not readily identifiable by looking at the musical compositions, the jury most likely found similarities based on the “mash-up” recording of the songs, which was inappropriately admitted because it contained unprotectable elements.²¹ While the actual sound recordings would be the best source for evaluating the similarity in groove, the jurors were most likely influenced by the Gaye Parties’ expert musicologists in

¹⁴ David Post, *Blurred Lines and Copyright Infringement*, WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/03/12/blurred-lines-and-copyright-infringement/?noredirect=on&utm_term=.128eb87d3b5.

¹⁵ See *id.* (“That the experts found similarities that are not apparent from simply listening to the two recordings should be . . . entirely irrelevant to the case.”).

¹⁶ *Williams*, 885 F.3d at 1187 (Nguyen, J., dissenting).

¹⁷ See Tim Wu, *Why the “Blurred Lines” Copyright Verdict Should Be Thrown Out*, NEW YORKER (Mar. 12, 2015), <https://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out>. If the Gaye family had a broader copyright under the 1976 Act, the family might have a stronger argument in having ownership of their father’s “particularly distinctive style choices.” *Id.*

¹⁸ *Id.* In my opinion, while both songs used the cowbell and male falsetto voice, this does not indicate that the district court's decision was correct. In fact, the use of these sonic elements does not suggest that the similarities between the songs extended beyond the groove and feel. Instead, it is possible that Williams and Thicke used the cowbell and falsetto voice for the main purpose of evoking a vibe similar to Gave's.

¹⁹ See *id.* (explaining that the copyrights in the composition and the sound recording are distinct).

²⁰ Post, *supra* note 14.

²¹ For an explanation of “mash-ups” in this case, see *infra* note 159 and accompanying text. At trial, the jury heard “three audio-engineered ‘mash-ups’” of the songs prepared by the Gaye Parties’ experts “to show the melodic and harmonic compatibility” of both songs. On the other hand, the Thicke Parties’ expert “prepared and played a sound recording containing her rendition of the deposit copy of ‘Got To Give It Up.’” *Williams*, 885 F.3d at 1162.

determining that the songs had a similar vibe because the actual sound recordings were excluded. Specifically, the jury found similarities in the groove based on the improper expert testimony on musical similarities “that were extraneous to the sheet music.”²² This Note supports the argument that the courts should reconsider how jurors are instructed in music copyright infringement cases because the jurors may have inaccurately evaluated the similarity in groove, which is not protectable, rather than comparing the protected musical elements.²³ Thus, this decision is groundbreaking as it improperly reinforces the notion that creating the “feel” of another song constitutes copyright infringement even if the melody and notes are completely different.²⁴

Consequently, the Ninth Circuit’s affirmance of the jury’s decision inappropriately expanded the scope of copyright protection to the feel or groove of a song.²⁵ Virtually every song or musical work is inspired at least in part by some other artist or musical genre.²⁶ By protecting the feel or groove of a song, the Ninth Circuit’s decision will substantially diminish the creative output of artists, regardless of whether the sound recordings or musical compositions are compared.²⁷ This Note will argue that the similarities in the overall feel in the intrinsic analysis stage²⁸ should not result in copyright infringement, especially when the songs are only comparable in their musical style. Therefore, in music copyright infringement cases, the Ninth Circuit should create a more precise rule for determining the “total concept

²² Brief of Amici Curiae, *supra* note 1, at 7.

²³ See Melinda Newman, *Top Lawyers on What Songwriters Must Learn From ‘Blurred Lines’ Verdict*, FORBES (Mar. 11, 2015, 12:18 PM), <https://www.forbes.com/sites/melindanewman/2015/03/11/top-lawyers-weigh-in-on-the-blurred-lines-verdict-and-what-songwriters-must-learn/#327891976bfa>; see also Brief of Amici Curiae, *supra* note 1, at 12 n.4.

²⁴ Taylor Turville, *Emulating vs. Infringement: The “Blurred Lines” of Copyright Law*, 38 WHITTIER L. REV. 199, 199 (2018).

²⁵ See Wu, *supra* note 17 (predicting that the Ninth Circuit would reverse the district court’s holding against Thicke because it “was a mistake”). As Wu’s article was written prior to the Ninth Circuit’s decision, it is interesting that he believed that Thicke would win the appeal.

²⁶ Turville, *supra* note 24, at 218.

²⁷ See Brief of Amici Curiae, *supra* note 1, at 3, 10; see also Randy Lewis, *More Than 200 Musicians Rally Behind Appeal of ‘Blurred Lines’ Verdict*, L.A. TIMES (Aug. 31, 2016), <http://www.latimes.com/entertainment/music/la-et-ms-blurred-lines-appeal-musicians-20160831-snap-story.html> (“The friend of the court brief argues that the ‘Blurred Lines’ verdict was flawed and that if it remains on the books it would create a profound chilling effect in the creative community because the similarities . . . had more to do with the general feel rather than specific musical elements in common.”).

²⁸ See *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (“[T]he subjective ‘intrinsic test’ asks whether an ‘ordinary, reasonable observer’ would find a substantial similarity of expression of the shared idea.” (citation omitted)).

and feel” of a work with respect to the feel of a song in the intrinsic analysis stage.²⁹

Part II of this Note will explain the essential elements of a copyrightable work under copyright law and a history of copyright law under the 1909 Act and the 1976 Act. This section will also discuss originality and creativity in musical works and the extrinsic and intrinsic tests for substantial similarity in music copyright infringement cases. Part III will analyze various music copyright infringement cases leading up to *Williams v. Gaye*. Part IV will explore the background and procedural posture of this case, including the expert testimony by the parties’ expert musicologists and the arguments presented by the Thicke Parties on appeal. Part V will analyze the Ninth Circuit’s decision and its impact on the future of creativity in music. This section will also examine whether the jury in this case, and in all music infringement cases, should be instructed differently when tasked with determining the substantial similarity between two songs. Lastly, Part VI will conclude by summarizing the main points regarding the Ninth Circuit’s decision and the impact it will have on musicians who create songs that are inspired by other musical artists and genres.

II. OVERVIEW OF COPYRIGHT LAW

A. Scope of Protection Under the 1909 Act and the 1976 Act

In the United States Constitution, the Framers encouraged the creation of works “[t]o promote the Progress of Science and useful Arts.”³⁰ Historically, the Copyright Act of 1909 granted copyright protection to “all writings” within an initial period of 28 years.³¹ All works subject to the 1909 Copyright Act “had to be published with notice or a deposit had to be made in the Copyright Office.”³² The failure to fulfill these requirements resulted in a forfeiture of protection

²⁹ For a proposed rule that would apply equally to musical compositions and sound recordings, see Part V.D.

³⁰ U.S. CONST. art. 1, § 8, cl. 8.

³¹ PETER S. MENELL ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2018, at 495 (2018). After the initial period of 28 years ended, the work could be renewed for another 28 years. *Id.*

³² Hutchens, *supra* note 11; *See generally* Act of Mar. 4, 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (1909) (stating the relevant language for the entire 1909 Act).

of the work.³³ For musical compositions, “the work had to be reduced to sheet music or other manuscript form” in order to satisfy “the notice and deposit requirements” to obtain copyright protection.³⁴ Thus, the scope of copyright protection began with the date of publication of a work under the 1909 Act.³⁵

Subsequently, the Copyright Act of 1976 “expanded both the scope and duration of protection.”³⁶ The 1976 Act relaxed the notice and registration requirements³⁷ and extended the length of copyright protection “to the life of the author plus 50 years.”³⁸ Compared to the 1909 Act, copyright protection under the 1976 Act is secured “in original works of authorship fixed in any tangible medium of expression,”³⁹ meaning that these works have copyright protection even if they are not published.⁴⁰ The 1976 Act further expanded copyright protection to include both “musical works”⁴¹ and “sound

³³ MENELL ET AL., *supra* note 31.

³⁴ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2018).

³⁵ MENELL ET AL., *supra* note 31, at 521.

³⁶ *Id.* at 495.

³⁷ See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 888, 892 (2019) (holding that under the registration approach, a copyrighted work is registered, and the copyright holder can initiate an infringement suit, only after the Copyright Office examined the copyright application and registered the work).

³⁸ MENELL ET AL., *supra* note 31. The Sonny Bono Copyright Term Extension Act of 1998 extended this term by another 20 years, giving copyright protection for the author’s life plus 70 years. *Id.* at 613-14. However, “if anonymous works, pseudonymous works, or works made for hire, [the term is] 95 years from publication, or 120 years from creation, whichever is less.” *Id.* at 614. A pseudonymous work is defined as “a work on the copies or phonorecords of which the author is identified under a fictitious name.” 17 U.S.C. § 101 (2018). An anonymous work is defined as “a work on the copies or phonorecords of which no natural person is identified as author.” *Id.* A work made for hire is defined as “(1) a work prepared by an employee within the scope of his or her employment,” or it may be “(2) a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree . . . that the work shall be considered a work made for hire.” *Id.*

³⁹ 17 U.S.C. § 102(a). For the fixation requirement, “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* § 101.

⁴⁰ MENELL ET AL., *supra* note 31.

⁴¹ 17 U.S.C. § 102(a)(2).

recordings,”⁴² among other categories of copyrightable works.⁴³ There is copyright protection in the “music, lyrics, and arrangements” of a musical work that are fixed in some “tangible medium of expression,” such as “written on paper” or “pressed onto a phonorecord.”⁴⁴ For sound recordings, there is copyright protection in “the fixation of a series of musical, spoken, or other sounds” in the recorded version of a work.⁴⁵ Thus, with the rise of technological advancements during the twentieth century “for creating and distributing works of authorship,” a significant change in copyright law from the 1909 Act to the 1976 Act was allowing copyright protection beginning with fixation rather than publication of the work.⁴⁶

B. Originality and Creativity

To succeed on a claim of copyright infringement, it is necessary to show “ownership of a valid copyright” and the “copying of constituent elements of the work that are original.”⁴⁷ Generally, any work subject to copyright protection must contain original expression and creativity.⁴⁸ For a work to be original, the author must show it was “independently created rather than copied from other works.”⁴⁹ A work may be original even if it closely resembles another work because only independent creation, not novelty, is required.⁵⁰ In fact, “the requisite level of creativity is extremely low” for a work to be considered original.⁵¹ There only needs to be a “minimal level of

⁴² *Id.* § 102(a)(7). Sound recordings are defined as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” *Id.* § 101.

⁴³ *See id.* § 102 (identifying the eight categories of works that are subject to copyright protection).

⁴⁴ MENELL ET AL., *supra* note 31, at 532-33. For a definition of fixation, see *supra* note 39.

⁴⁵ 17 U.S.C. § 101.

⁴⁶ MENELL ET AL., *supra* note 31.

⁴⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). It is important to note that these elements to succeed on a claim of copyright infringement are applied to claims under both the 1909 Act and the 1976 Act.

⁴⁸ NIMMER, *supra* note 34, § 2.05[B].

⁴⁹ *Id.* § 2.01[A][1] (citing *Feist*, 499 U.S. at 345).

⁵⁰ *Feist*, 499 U.S. at 345; NIMMER, *supra* note 34, § 2.05[A].

⁵¹ *Feist*, 499 U.S. at 345.

creativity,”⁵² which is represented by “a spark of distinctiveness in *copyrightable expression*.”⁵³

For musical works, originality is evident by the composer’s own effort and contribution to the song.⁵⁴ In popular music, it is common for songs to have similarities to prior songs, so “only independent effort, not novelty” is required for a work to be original.⁵⁵ Likewise, creativity is represented by the musician’s use “of rhythm, harmony, and melody.”⁵⁶ However, the melody of a song is the most common source for copyright protection.⁵⁷ While “a musical theme may be suggestive of prior works,” a work will be creative as long as “the overall impression is of a new work.”⁵⁸

C. Access and Substantial Similarity

In music copyright infringement cases, it is often difficult to obtain direct evidence of copying.⁵⁹ In these situations, “a plaintiff may prove copying indirectly, with evidence showing that the defendant had access to the copyrighted work and that the purported copy is ‘substantially similar’ to the original.”⁶⁰ Under the inverse ratio rule, which serves as a sliding scale, the courts “require a lower standard of proof on substantial similarity when a high degree of access is shown.”⁶¹ To prove access to a musical work, the plaintiff may “show that its work was widely disseminated through sales of sheet

⁵² *Id.* at 358.

⁵³ NIMMER, *supra* note 34, § 2.01[B][2].

⁵⁴ *Id.* § 2.05[B].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (citing *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393 (S.D.N.Y. 1952)).

⁵⁹ *Copeland v. Bieber*, 789 F.3d 484, 488 (4th Cir. 2015); *see also* *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (“Proof of copyright infringement is often highly circumstantial, particularly in cases involving music.”).

⁶⁰ *Copeland*, 789 F.3d at 488.

⁶¹ *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1361-62 (9th Cir. 1990); *Sid & Marty Krofft Television Prods. Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)). For the inverse ratio rule, “if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying.” *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

music, records, and radio performances.”⁶² Thus, the initial step of determining whether access has been satisfied is crucial because even if two songs are very similar, a suit of copyright infringement will not succeed if there is no proof of access.⁶³

While each circuit uses its own modified tests for substantial similarity, the different circuits generally take a two-step approach.⁶⁴ To determine substantial similarity, the Ninth Circuit utilizes a two-part test that includes “an objective extrinsic test and a subjective intrinsic test.”⁶⁵ Typically, the Ninth Circuit requires that both the extrinsic and intrinsic tests are satisfied to succeed on a claim of music copyright infringement.⁶⁶ However, this test is modified when the court grants a motion for summary judgment for either the plaintiff or defendant, as “only the extrinsic test is important because the subjective question whether works are intrinsically similar must be left to the jury.”⁶⁷ When applying the extrinsic test, “analytic dissection and expert testimony” are admissible in order to analyze objective criteria in the musical works.⁶⁸ After the plaintiff establishes that the two songs are “sufficiently similar” under the extrinsic test, the court must proceed to the intrinsic test in order to examine whether the works

⁶² *Three Boys Music*, 212 F.3d at 482 (quoting 2 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 8.3.1.1, at 91 (1989)).

⁶³ *Selle v. Gibb*, 741 F.2d 896, 899 (7th Cir. 1984).

⁶⁴ See generally 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (2018) (explaining the various tests used by the different circuits for substantial similarity).

⁶⁵ *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). Several circuit courts utilize different tests for establishing copyright infringement, while other circuits use variations of the Ninth Circuit test. For the Second Circuit, two elements must be established: “(a) that defendant copied from plaintiff’s copyrighted work and (b) that the copying (assuming it to be proved) went to [sic] far as to constitute improper appropriation.” *Arnstein*, 154 F.2d at 468. For the Sixth Circuit, this circuit uses a similar two-step test like the Ninth Circuit, but there are differences between the tests in both circuits. *Stromback v. New Line Cinema*, 384 F.3d 283, 294 (6th Cir. 2004) (citing *Murray Hill Publ’ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 318 (6th Cir. 2004)).

⁶⁶ Miah Rosenberg, *Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit*, 39 U.C. DAVIS L. REV. 1669, 1676 (2006).

⁶⁷ *Swirsky*, 376 F.3d at 845; see Rosenberg, *supra* note 66, at 1673 (“Under the extrinsic portion, if the plaintiff, the copyright holder, fails to show sufficient similarity between her song and the defendant’s song, the court will grant the defendant’s motion for summary judgment.”); see also *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 (9th Cir. 1983) (“A grant of summary judgment for plaintiff is proper where works are so overwhelmingly identical that the possibility of independent creation is precluded. Similarly, summary judgment for defendant is appropriate where works are so dissimilar that a claim of infringement is without merit.” (internal citations omitted)).

⁶⁸ *Sid & Marty Krofft Television Prods. Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

are substantially similar.⁶⁹ The intrinsic test will only be reached if the plaintiff adequately demonstrated that the two works were similar under the extrinsic test,⁷⁰ along with instances when a motion for summary judgment was denied. In the subjective intrinsic test, the jury is presented with “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”⁷¹ Unlike the extrinsic test, “analytic dissection and expert testimony” are not admissible under the intrinsic test.⁷²

III. MUSIC COPYRIGHT INFRINGEMENT CASES

To underscore the intricate and novel issue presented in *Williams v. Gaye*, a brief application of copyright law in past music copyright infringement cases will be examined. First, this section will discuss cases in which musicians copied from other musicians and will further describe what the plaintiff needed to prove to establish copying. Second, this section will discuss how these cases applied the test for substantial similarity.

In some instances, a plaintiff may make a blatant and direct showing of copyright infringement.⁷³ For example, in the song “Ice Ice Baby,” Vanilla Ice sampled and copied the bass line in the Queen and David Bowie song “Under Pressure” without asking for permission, resulting in a clear case of copyright infringement.⁷⁴ However, absence of deliberate copying of another musical work does not prevent liability for copyright infringement.⁷⁵ Specifically, in George Harrison’s solo song “My Sweet Lord,” he was found to have subconsciously⁷⁶ plagiarized the “pleasing combination of sounds” of

⁶⁹ Rosenberg, *supra* note 66, at 1673-74.

⁷⁰ *Id.* at 1676.

⁷¹ Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (quoting Pasillas v. McDonald’s Corp., 927 F.2d 440, 442 (9th Cir. 1991)).

⁷² *Krofft*, 562 F.2d at 1164.

⁷³ See Joe Lynch, 8 *Songs Accused of Plagiarism That Hit No. 1 on the Billboard Hot 100*, BILLBOARD (Mar. 13, 2015), <https://www.billboard.com/articles/news/list/6501950/song-s-accused-plagiarism-no-1-hot-100-blurred-lines> (explaining that many hit songs sound very similar to previously released songs due to theft or coincidence).

⁷⁴ 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/george-harrison-vs-the-chiffons-1976-64089/>.

⁷⁵ Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976).

⁷⁶ For a definition of subconscious plagiarism, see *infra* note 78 and accompanying text.

“He’s So Fine” by The Chiffons.⁷⁷ Subconscious plagiarism occurs when a musician uses a “combination of sounds” that he believes will be pleasing to listeners “[b]ecause his subconscious knew it already had worked in a song his conscious mind did not remember.”⁷⁸ In this case, Harrison had access to “He’s So Fine” because this song was at the top of the charts in both the United States and England.⁷⁹ In “My Sweet Lord,” Harrison used the same musical motif patterns as in “He’s So Fine” to fit the words of his song, and he also used identical harmonies.⁸⁰ However, the district court recognized that Harrison and his group member, Billy Preston, were not “conscious of the fact that they were utilizing the He’s So Fine theme.”⁸¹ Although Harrison may not have deliberately copied the elements of “He’s So Fine,” the district court held that Harrison was liable for copyright infringement because both songs were “virtually identical” and he had access to the song.⁸² Subsequently, the Second Circuit affirmed the district court’s decision of copyright infringement, explaining “that copyright infringement can be subconscious.”⁸³

Additionally, in *Selle v. Gibb*,⁸⁴ Ronald Selle brought a copyright infringement suit against the Bee Gees arguing that their hit song “How Deep Is Your Love” copied his song “Let it End.”⁸⁵ At trial, the plaintiff’s expert witness testified that there were “striking similarities” between the songs, specifically in the Bee Gees’ use of identical “rhythmic impulses” and notes from Selle’s song.⁸⁶ Although the jury found in favor of Selle, the judge granted the Bee Gees’ motion for judgment notwithstanding the verdict because Selle failed to show that the Bee Gees had access to his song.⁸⁷ In fact, the Bee Gees introduced a work tape at trial showcasing their creative process of composing “How Deep is Your Love.”⁸⁸ Thus, “a bare possibility” or

⁷⁷ *Bright Tunes Music*, 420 F. Supp. at 180.

⁷⁸ *Id.*

⁷⁹ *Id.* at 179.

⁸⁰ *Id.* at 178.

⁸¹ *Id.* at 180.

⁸² *Id.* at 180-81; *see Williams v. Gaye*, 885 F.3d 1150, 1171 n.16 (9th Cir. 2018) (explaining that the factfinders listened to the sound recordings in several cases evaluated under the 1909).

⁸³ *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983).

⁸⁴ 741 F.2d 896 (7th Cir. 1984).

⁸⁵ *Id.* at 898.

⁸⁶ *Id.* at 899.

⁸⁷ *Id.*

⁸⁸ *Id.*

the “inability to raise more than speculation” of access to a song is insufficient to prevail on a copyright infringement claim even if there is a striking similarity between songs.⁸⁹

In *Three Boys Music Corp. v. Bolton*,⁹⁰ the Ninth Circuit affirmed a jury verdict finding Michael Bolton’s 1991 song “Love Is a Wonderful Thing” infringed the Isley Brothers’ 1964 hit with the same name.⁹¹ Evidence of access was provided and the jury found that Bolton was not only a fan and collector of the Isley Brothers’ music, but he also had access to the 1964 hit on both the radio and television.⁹² The Isley Brothers maintained that Bolton’s widespread access to “Love Is a Wonderful Thing” resulted in his subconscious copying of their song.⁹³ The court reasoned that it was plausible to presume that Bolton subconsciously copied the Isley Brothers’ song.⁹⁴ Specifically, as Bolton was “obsessed with rhythm and blues music,” it is possible that he would subconsciously remember this Isley Brothers’ song that was repeatedly played when he was a teenager.⁹⁵ Further, on the recorded sessions of “Love Is a Wonderful Thing,” Bolton questioned whether he was copying Marvin Gaye’s song “Some Kind of Wonderful.”⁹⁶ Although he mistakenly believed that he copied Gaye, the court reasoned that this statement suggested “that Bolton believed he may have been copying someone else’s song.”⁹⁷

Next, the jury found infringement based on the substantial similarity of five unprotectable musical elements.⁹⁸ These elements included “the lyric, rhythm, and pitch” of “the title hook phrase,” “the shifted cadence,” “the instrumental figures,” “the verse/chord relationship,” and “the fade ending.”⁹⁹ The court explained that while these elements were individually unprotectable, the court will not disturb the jury’s determination of substantial similarity because the

⁸⁹ *Id.* at 903, 905.

⁹⁰ 212 F.3d 477 (9th Cir. 2000).

⁹¹ *Id.* at 480.

⁹² *Id.* at 483.

⁹³ *Id.* For a definition of subconscious plagiarism, see *supra* note 78 and accompanying text.

⁹⁴ *Id.* at 484.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 485; see *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (stating that courts have considered different elements of a musical composition when determining substantial similarity).

⁹⁹ *Three Boys Music*, 212 F.3d at 485.

combination of elements was very similar.¹⁰⁰ In fact, Bolton's expert musicologist acknowledged that these musical elements between the two songs were similar.¹⁰¹ Consequently, the Ninth Circuit applied judicial deference to the jury's verdict in finding a case of copyright infringement.¹⁰²

As identified in these cases, the courts do not apply a fixed set of objective elements to compare two songs, and the courts may examine a combination of unprotectable elements.¹⁰³ Specifically, "[m]usic, like software programs and art objects, is not capable of ready classification into only five or six constituent elements; music is comprised of a large array of elements, some combination of which is protectable by copyright."¹⁰⁴ Typically, courts consider specific musical elements, such as "melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics."¹⁰⁵ However, these elements often need to be considered in combination with other musical elements to determine whether the works are substantially similar.¹⁰⁶ For instance, while a chord progression may not be a protectable element on its own, two works may be substantially similar when examining the chord progression in combination with the rhythm and pitch patterns.¹⁰⁷ An analysis of individual musical elements in isolation will most likely result in "an incomplete and distorted musicological analysis."¹⁰⁸ Nevertheless, while a combination of unprotectable musical elements may result in copyright protection for

¹⁰⁰ *Id.* at 485-86. The majority opinion in *Williams v. Gaye* explained that as in *Three Boys Music*, the court will apply deference to the jury's verdict. *Williams v. Gaye*, 885 F.3d 1150, 1172 n.17 (9th Cir. 2018). In a way, *Three Boys Music* is the forerunner of *Williams* because the court applied similar reasoning when giving full deference to the jury's determination of substantial similarity.

¹⁰¹ *Three Boys Music*, 212 F.3d at 485.

¹⁰² *Id.* at 482. It is important to note that the court expressed that it may not have reached the same conclusion as the jury on the issue of access and subconscious copying. However, the court "will not disturb the jury's factual and credibility determinations on the issue." *Id.* at 485.

¹⁰³ *Swirsky*, 376 F.3d at 849.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* "In addition, commentators have opined that timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, basslines, and new technological sounds can all be elements of a musical composition." *Id.*

¹⁰⁶ *Id.* at 848.

¹⁰⁷ *Id.*; see *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) ("Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection.").

¹⁰⁸ *Swirsky*, 376 F.3d at 848.

a song, the courts should closely consider the originality of these individual elements within a song before finding substantially similarity.¹⁰⁹

There are several ways that copyright infringement may occur in music copyright lawsuits. In some instances, the plaintiff can show that the defendant copied parts of his or her song.¹¹⁰ Even if direct copying is not proven, the court may consider whether an artist subconsciously plagiarized another musician's work.¹¹¹ However, it is more common that the plaintiff will have to show that both songs are substantially similar. These cases showed that the courts will examine whether the defendant had access to the plaintiff's work in determining substantial similarity. Under the extrinsic test, the plaintiff must show that both songs contain a sufficient degree of similar elements. Then, the jury will apply the intrinsic test to evaluate whether a reasonable listener would find both songs to be similar. The music copyright infringement cases discussed in this section serve as a guide for the analysis of *Williams v. Gaye* in the subsequent section.

IV. BACKGROUND OF *WILLIAMS V. GAYE*

Initially, Williams and Thicke preemptively filed suit for a declaratory judgment in reaction to the Gayes' allegations that "Blurred Lines" infringed "Got to Give It Up" and the Gayes' demands for monetary compensation.¹¹² The Gaye family then counterclaimed for copyright infringement of Gaye's song.¹¹³ Subsequently, the district court denied the motion for summary judgment brought by Williams and Thicke.¹¹⁴ To determine whether the songs were substantially similar, the jury heavily relied on the expert testimony presented by both parties.¹¹⁵

¹⁰⁹ See *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("[A] combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.").

¹¹⁰ For a brief example of direct copying, see *supra* notes 73-74 and accompanying text.

¹¹¹ See *supra* note 78 and accompanying text.

¹¹² Hutchens, *supra* note 11.

¹¹³ *Id.*

¹¹⁴ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *1 (C.D. Cal. Oct. 30, 2014).

¹¹⁵ Post, *supra* note 14.

A. Substantial Similarity and Access in *Williams v. Gaye*

Judith Finell, the expert musicologist for the Gaye family, identified eight similarities between “Blurred Lines” and “Got to Give It Up.”¹¹⁶ These elements include the “signature phrase in main vocal melodies,” the “hooks,” the “hooks with backup vocals,” the “core theme,” or “Theme X” of the song, the “backup hooks,” the “bass melodies,” the “keyboard parts,” and the “unusual percussion choices.”¹¹⁷ For the signature phrase, Finell identified the phrase with the lyrics “and that’s why I’m gon’ take a good girl” in “Blurred Lines” and with the lyrics “I used to go out to parties” in “Got to Give It Up.”¹¹⁸ Finell argued that both signature phrases repeat the starting note, “contain the identical scale degree sequence of 5–6–1 followed by 1–5,” “contain identical rhythms for the first six tones,” use a melisma¹¹⁹ on the last lyric, and “contain substantially similar melodic contours.”¹²⁰ In comparison, Sandy Wilbur, the musicologist for the Thicke Parties, stated that she did not find any substantial similarity between the songs, given that “the melody, harmony, and rhythm of the songs are different.”¹²¹ Instead, Wilbur only found one single note with “the same pitch and placement” within both signature phrases.¹²²

Next, Finell maintained that “three of the four notes of the songs’ hooks are identical in scale degree”; however, Wilbur argued that Finell inaccurately spaced the hook within the measure of each song.¹²³ For the opening bass line, Finell found that the repeated bass line in bars 1–4 of “Blurred Lines” is similar to the opening bass line in measures 1–4 of Gaye’s song.¹²⁴ However, Wilbur disputed this finding, arguing “that the differences between the bass lines outweigh the similarities” because only three notes are similar within these four measures.¹²⁵ Further, Finell claimed that the descending bass line at

¹¹⁶ *Williams*, 2014 WL 7877773, at *3.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *12.

¹¹⁹ Melisma is defined as “an ornamental phrase of several notes sung to one syllable of text, as in plainsong or blues singing.” *Melisma*, DICTIONARY.COM, <https://www.dictionary.com/browse/melisma?s=t> (last visited Mar. 9, 2019).

¹²⁰ *Williams*, 2014 WL 7877773, at *12.

¹²¹ *Id.* at *13.

¹²² *Id.*

¹²³ *Id.* at *14.

¹²⁴ *Id.* at *15.

¹²⁵ *Id.*

every eighth measure in “Blurred Lines” is similar to an irregularly occurring bass melody in “Got to Give It Up.”¹²⁶ Additionally, while Finell maintained that the keyboard parts in “Blurred Lines” and “Got to Give It Up” are similar, Wilbur argued that the “rhythm transcribed by Finell does not appear in the copyright deposit,” indicating that only the similarity in pitches can be analyzed.¹²⁷

In music copyright infringement cases, the courts consistently focus on the melodies of two different songs in determining whether songs are substantially similar under copyright law.¹²⁸ The melodic line of a song includes particular pitches, the duration and placement of these pitches, and rhythmic patterns.¹²⁹ In finding similarities between the bass melodies and rhythmic patterns as described above, Finell essentially made comparisons of the melodies that “distorted the duration and placement of notes in their presentation.”¹³⁰ Thus, in isolating individual sequences of pitches, Finell conducted “overly speculative musical analyses.”¹³¹

In evaluating Thicke’s access to Gaye’s song, the district court examined interviews and deposition testimony demonstrating that Thicke was influenced by Gaye and “Got to Give It Up” when creating “Blurred Lines.”¹³² In fact, Thicke told one magazine that he wanted to create a groove similar to Gaye’s song in “Got To Give It Up.”¹³³ Because the Thicke Parties’ motion for summary judgment was denied due to the material issues of fact for the extrinsic elements of the songs, the case was presented to the jury in order to evaluate the songs’ intrinsic similarities.¹³⁴ Subsequently, a jury was empaneled on February 24, 2015 to evaluate the substantial similarity between the songs.¹³⁵ During the trial, which lasted seven days, the jurors listened to expert testimony from both sides and were presented with a

¹²⁶ *Id.* at *16.

¹²⁷ *Id.*

¹²⁸ Brief of Amicus Curiae Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees at 2, *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (CA No. 15-56880).

¹²⁹ *Id.* at 5.

¹³⁰ *Id.* at 2.

¹³¹ *Id.* at 5.

¹³² *Williams*, 2014 WL 7877773, at *10.

¹³³ *Id.* at *11.

¹³⁴ *Id.* at *20; *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004) (explaining that “only the extrinsic test” for substantial similarity is relevant for considering motions of summary judgment).

¹³⁵ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

comparison of the deposit copy of “Got to Give It Up” with “Blurred Lines.”¹³⁶ After two days of deliberating on the testimony presented at trial, the jury found the Thicke Parties liable for copyright infringement of Gaye’s song.¹³⁷

B. The Ninth Circuit Appeal

On appeal, the Thicke Parties argued that the district court’s denial of their summary judgment motion was erroneous “in its application of the extrinsic test for substantial similarity.”¹³⁸ However, the Ninth Circuit rejected this argument based on the Supreme Court’s decision in *Ortiz v. Jordan*,¹³⁹ which held that a party may not appeal a denial of a summary judgment motion after a full trial on the merits.¹⁴⁰ Despite the exception to the rule when there is an error of law, the Ninth Circuit reasoned that the exception did not apply in this case because “the district court’s application of the extrinsic test of similarity was a factbound inquiry.”¹⁴¹

Next, the Thicke Parties moved for a new trial because there were erroneous jury instructions, the district court improperly admitted portions of the Gayes’ expert testimony, and “the verdict [was] against the clear weight of the evidence.”¹⁴² First, the Ninth Circuit held that Jury Instructions 42 and 43 were not erroneous.¹⁴³ In Jury Instruction 42, the jurors were told that they did not have to “find that the Thicke Parties consciously or deliberately copied” Gaye’s song.¹⁴⁴ Instead, the instruction indicated that a finding of subconscious copying by the Thicke Parties was sufficient in order to determine that “Got to Give It

¹³⁶ *Id.*; Regina Zernay, *Casting the First Stone: The Future of Music Copyright Infringement Law After Blurred Lines, Stay with Me, and Uptown Funk*, 20 CHAP. L. REV. 177, 207 (2017).

¹³⁷ *Williams*, 2015 WL 4479500, at *1.

¹³⁸ *Williams v. Gaye*, 885 F.3d 1150, 1166 (9th Cir. 2018).

¹³⁹ 562 U.S. 180 (2011).

¹⁴⁰ *Id.* at 184.

¹⁴¹ *Williams*, 885 F.3d at 1166.

¹⁴² *Id.* at 1167; see Eriq Gardner, *Appeals Court Skeptical About Overturning Marvin Gaye Family’s “Blurred Lines” Victory*, HOLLYWOOD REP. (Oct. 6, 2017, 12:49 PM), <https://www.hollywoodreporter.com/thr-esq/appeals-court-skeptical-overturning-marvin-gaye-family-blurred-lines-victory-1046549> (“The appellants are contending that Judge Kronstadt committed reversible error a few different ways.”).

¹⁴³ *Williams*, 885 F.3d at 1168, 1170.

¹⁴⁴ *Id.* at 1167.

Up” was copied.¹⁴⁵ In opposition to Jury Instruction 42, the Thicke Parties argued that this instruction improperly gave the jury the opportunity “to place undue weight” on their statements acknowledging their inspiration and access to “Got to Give It Up.”¹⁴⁶ Although the Thicke Parties did admit their access to Gaye’s song, the court pointed to the relevancy of access in this particular instruction.¹⁴⁷ Specifically, the court applied the inverse ratio rule, which acts like a sliding scale for substantial similarity and access.¹⁴⁸ Under this rule, “[t]he greater the showing of access, the lesser the showing of substantial similarity is required.”¹⁴⁹ Thus, the court held that Instruction 42 was applicable because Thicke’s statements indicating his access to Gaye’s song resulted in requiring a lesser showing of infringement in the substantial similarity stage.¹⁵⁰

Additionally, Jury Instruction 43 instructed the jury that the Gaye Parties must demonstrate both extrinsic and intrinsic similarities between the songs in order to prove that the works are substantially similar.¹⁵¹ First, the jury was told that two works are extrinsically similar when there is “a similarity of ideas and expression as measured by external, objective criteria.”¹⁵² Second, the jury was told that there is intrinsic similarity between the works “if an ordinary, reasonable listener would conclude that the total concept and feel of the Gaye Parties’ work and the Thicke Parties’ work are substantially similar.”¹⁵³ The Thicke Parties argued that the district court improperly instructed the jury to evaluate musical elements that are not protected elements in the deposit copy, specifically “‘Theme X,’ the

¹⁴⁵ *Id.* In *Three Boys Music*, the jury found that Bolton subconsciously plagiarized the Isley Brothers’ song based on his access to their song while growing up. Although the Ninth Circuit affirmed the jury’s findings, the court expressed that it did not agree with this conclusion regarding subconscious plagiarism and access. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000). In this way, the Ninth Circuit in *Williams* went a step further than *Three Boys Music* by stating in the jury instruction that subconscious plagiarism was sufficient to find copying.

¹⁴⁶ *Williams*, 885 F.3d at 1167.

¹⁴⁷ *Id.* at 1168.

¹⁴⁸ *Id.* at 1163.

¹⁴⁹ *Id.*; see *Three Boys Music*, 212 F.3d at 485; see also *Swirsky v. Carey*, 376 F.3d 841, 844-45 (9th Cir. 2004) (explaining that since Carey had a high amount of access to Swirsky’s song, the burden of proving substantial similarity is lessened).

¹⁵⁰ *Id.* at 1168.

¹⁵¹ Jury Instructions No. 43 at 46, *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 1322666 (C.D. Cal. Mar. 10, 2015).

¹⁵² *Id.*

¹⁵³ *Id.*

descending bass line, and keyboard parts.”¹⁵⁴ The Thicke Parties asserted that the instruction was erroneous because the jury was told that it “must consider” musical elements that they believe to be unprotectable in order to evaluate substantial similarity.¹⁵⁵ However, the court downplayed these words to underscore the jury’s role in evaluating the objective elements in the extrinsic test for substantial similarity.¹⁵⁶

Second, the Thicke Parties argued that the Gayes’ expert testimony was based on unprotectable musical elements of Gaye’s song, specifically “‘Theme X,’ the descending bass line, and the keyboard parts.”¹⁵⁷ While Finell admitted on cross-examination that features of these elements were not written in the deposit copy, the Ninth Circuit gave the jury the role of determining whose expert testimony concerning the deposit copy was believable.¹⁵⁸ In addition, the Thicke Parties claimed that allowing the jury to hear the audio “mash-ups” overlapping Gaye’s vocals with “Blurred Lines” in Dr. Ingrid Monson’s testimony was erroneous because it included unprotectable musical elements.¹⁵⁹ However, the Ninth Circuit held that “[t]he district court did not abuse its discretion in admitting portions of the Gayes’ experts’ testimony,” reasoning that it repeatedly

¹⁵⁴ *Williams*, 885 F.3d at 1168. In this case, the Thicke Parties argued that several musical elements used in the court’s analysis were unprotectable because they were not notated in the deposit copy. *Id.* For a discussion of protectable and unprotectable musical elements, see *supra* notes 103-09 and accompanying text. Typically, these musical elements are not protectable because individual notes or single chords are critical for the foundation of a musical work. For example, a descending bass line is not protectable because there is no creative organization of notes when playing a descending melodic line. For the same reason, a single pitch on the keyboard cannot be individually protectable.

¹⁵⁵ *Williams*, 885 F.3d at 1168. While the jury in *Three Boys Music* also analyzed a combination of unprotectable musical elements, that case did not use this language that the jury “must consider” the unprotectable elements.

¹⁵⁶ *Id.* at 1169.

¹⁵⁷ *Id.* at 1170.

¹⁵⁸ *Id.* In *Three Boys Music*, the jury was also presented with conflicting testimony from expert musicologists in determining whether there was infringement. The court was unwilling “to interfere with the jury’s credibility determination” for its evaluation of substantial similarity. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000). “Because the jury needs to be educated, the musicologist would appear to play a necessary part in the proceedings.” Maureen Baker, *La[w]—A Note To Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1619 (1992).

¹⁵⁹ *Williams*, 885 F.3d at 1170 (explaining that the “mash-ups” contained “the keyboard parts, bass melodies, and Marvin Gaye’s vocals,” which are unprotectable elements).

made sure that the experts only discussed the sheet music in their testimony.¹⁶⁰

Third, the Ninth Circuit dispelled the claim that the jury verdict was “against the clear weight of the evidence” because there was no “absolute absence of evidence supporting the jury’s verdict.”¹⁶¹ Specifically, the court relied on its deferential standard of review and its reluctance in music copyright infringement cases to reverse the jury’s findings on appeal, mainly due to the difficulties in showing substantial similarity and access.¹⁶² Thus, the Ninth Circuit held “that the district court did not abuse its discretion in denying the Thicke Parties’ motion for a new trial.”¹⁶³

In the dissenting opinion, Judge Jacqueline Nguyen cautioned that the majority opinion allowed “the Gayes to accomplish what no one has before: copyright a musical style.”¹⁶⁴ She emphasized that the two songs “are not objectively similar” because there are clear differences in the “melody, harmony, and rhythm.”¹⁶⁵ Judge Nguyen argued that Judith Finell, the Gayes’ musicologist, “cherry-picked brief snippets to opine that a ‘constellation’ of individually unprotectable elements in both pieces of music made them substantially similar.”¹⁶⁶ Judge Nguyen recognized the importance of expert testimony “to assist jurors who are unfamiliar with musical notation in comparing two pieces of sheet music for extrinsic similarity in the same way that they would compare two textual works.”¹⁶⁷ However, she explained that the experts must present facts that are logically related to their conclusions, and Finell failed to do this by choosing to compare isolated and unprotectable elements.¹⁶⁸ Based on the lack of extrinsic similarities between both songs, Judge Nguyen reasoned that the Thicke Parties should have been “entitled to judgment as a matter of law.”¹⁶⁹

Likewise, Judge Nguyen argued that “by refusing to compare the two works, the majority establishes a dangerous precedent that

¹⁶⁰ *Id.* at 1171.

¹⁶¹ *Id.* at 1171-72.

¹⁶² *Id.* at 1172 (citing *Three Boys Music*, 212 F.3d at 481).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1183 (Nguyen, J., dissenting).

¹⁶⁵ *Id.* (Nguyen, J., dissenting).

¹⁶⁶ *Id.* (Nguyen, J., dissenting).

¹⁶⁷ *Id.* at 1196-97 (Nguyen, J., dissenting).

¹⁶⁸ *Id.* at 1183 (Nguyen, J., dissenting).

¹⁶⁹ *Id.* at 1184 (Nguyen, J., dissenting).

strikes a devastating blow to future musicians and composers everywhere.”¹⁷⁰ The majority dismissed and rebutted Judge Nguyen’s fears on the future of musical creativity as “unfounded hyperbole.”¹⁷¹ Also, the majority declared that its decision does not give copyright protection for the groove or style of a song, reiterating that this decision rested “on settled procedural principles and the limited nature” of the court’s appellate review.¹⁷² However, Judge Nguyen cautioned against the “uncritical deference to music experts,” emphasizing that judges must determine whether the musical elements are substantially similar based on the law.¹⁷³ Thus, the Ninth Circuit should have vacated this verdict because the musical elements were not substantially similar.¹⁷⁴ Notwithstanding the majority opinion, the dissenting opinion more accurately depicts the similarities, or rather the lack of similarities, between both songs. The subsequent section of this Note will illustrate the flawed errors in this decision and the negative implications on musical creativity.

V. THE IMPLICATIONS OF *WILLIAMS V. GAYE* ON MUSICAL CREATIVITY

A. The Major Errors in the Ninth Circuit’s Analysis

The Ninth Circuit’s decision improperly expanded the scope of copyright protection to the feel or groove of a song.¹⁷⁵ In the dissenting opinion, Judge Nguyen adamantly disagreed with the majority’s decision by emphasizing that the two songs do not have similar musical elements.¹⁷⁶ The majority opinion, on the other hand, declared that unlike the limited protections under the 1909 Act in this case, most cases in the future will come under the 1976 Act, providing protections for works in sound recordings.¹⁷⁷ Hypothetically, if this case had been

¹⁷⁰ *Id.* at 1183 (Nguyen, J., dissenting).

¹⁷¹ *Id.* at 1182.

¹⁷² *Id.*

¹⁷³ *Id.* at 1197 (Nguyen, J., dissenting).

¹⁷⁴ *Id.* (Nguyen, J., dissenting).

¹⁷⁵ See Wu, *supra* note 17 (“The question is not whether Pharrell borrowed from Gaye but whether Gaye owned the thing that was borrowed. And this is where the case falls apart. For it was not any actual sequence of notes that Pharrell borrowed, but rather the general style of Gaye’s songs. That is why ‘Blurred Lines’ sounds very much like a Marvin Gaye song.”).

¹⁷⁶ *Williams*, 885 F.3d at 1183 (Nguyen, J., dissenting).

¹⁷⁷ *Id.* at 1182 n.27 (citing 17 U.S.C. § 102). For a discussion of the scope of protection under the 1909 Act and the 1976 Act, see Part II.A. of this Note.

decided under the formalities of the 1976 Act, it is possible that the Gaye Parties may have prevailed on a claim for substantial similarity.¹⁷⁸ That is, the 1976 Act affords broader copyright protection to the recorded versions of the songs, allowing protections for an artist's sonic choices, namely with the use of a cowbell and falsetto vocals in this case.¹⁷⁹ However, as this case falls under the 1909 Act, the Gaye Parties should not have prevailed because Williams did not copy or "borrow any note sequences" from Gaye's musical composition.¹⁸⁰

Moreover, even if the protections for the sound recordings under the Copyright Act of 1976 applied in this case, that does not change the fact that the groove or style of a musical genre "is an unprotectable idea."¹⁸¹ Professor Tim Wu of Columbia Law School emphasized the distinction between taking specific musical patterns from another artist and simply sounding like another style.¹⁸² He stated, "to say that something 'sounds like' something else does not amount to copyright infringement."¹⁸³ Thus, while "Blurred Lines" and "Got to Give It Up" have an overall similar feel, the protection of the groove is inappropriate, especially because the protectable melody and lyrics are completely different.¹⁸⁴

Kathleen Sullivan, who represented Williams and Thicke, persuasively argued that this case is not about a comparison between the similarities in the sound recording, groove, or inspiration between "Blurred Lines" and "Got to Give It Up."¹⁸⁵ Instead, she emphasized that this case is about the substantial similarities of the musical elements in the deposit copies of both songs, including "the melody,

¹⁷⁸ See Wu, *supra* note 17.

¹⁷⁹ *Id.* For a comparison of the protection of sound recordings and musical compositions under the 1976 Act, see *supra* notes 41-45 and accompanying text.

¹⁸⁰ *Id.*

¹⁸¹ Williams, 885 F.3d at 1185 (Nguyen, J., dissenting).

¹⁸² Wu, *supra* note 17.

¹⁸³ *Id.*

¹⁸⁴ Post, *supra* note 14. For a discussion on the consequences of protecting the groove or style of a musical composition or sound recording, see Part V.C.

¹⁸⁵ Oral Argument at 1:22, Williams v. Gaye, 885 F.3d 1150 (2018) (No. 15-56880), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012297. While this case was about the deposit copies of the songs, it is important to recognize that a mere similarity in the groove or inspiration of a song will not result in copyright infringement in the sound recording. For an explanation on the inability to copyright a groove, see *infra* notes 236-244 and accompanying text.

lyrics, harmony, chords, [and] instrumentation.”¹⁸⁶ Sullivan argued that the instructions did not correctly advise the jury on the test for substantial similarity because the instructions should have informed the jury that it needed to determine whether there were substantial similarities between only the protectable musical elements in the deposit copies of the songs, not the unprotectable elements as well.¹⁸⁷ Instead, Jury Instruction 43 instructed the jury that it “must consider” the musical elements of both songs, thereby failing to advise the jury to only examine the similarity between the protectable musical elements.¹⁸⁸ This instruction even listed unprotectable musical elements for the jury to consider that were not in the deposit copy.¹⁸⁹ Because Finell admitted that “Theme X,” the keyboard parts, and “the descending bass line” were not notated in the deposit copy, Sullivan expressed to the panel that Jury Instruction 43 should not have instructed the jury to examine these elements.¹⁹⁰

Additionally, Sullivan emphasized that the Gaye Parties had to prove that the songs were substantially similar based on the protectable musical elements in the written deposit copies because the sound recordings contain unprotectable elements.¹⁹¹ However, she emphasized that the district court’s exclusion of the sound recording was insufficient because it was introduced through the “mash-ups” of Gaye’s vocals.¹⁹² Next, Sullivan acknowledged that the Gaye Parties did have copyright protection in the melody, chords, instrumentation, and lyrics in the deposit copy of “Got to Give It Up.”¹⁹³ Nevertheless, she argued that Gayes’ musicology experts essentially embellished and altered the deposit copy, which is “a travesty” because elements cannot be made up if they are not present in the lead sheet.¹⁹⁴

In *Three Boys Music*, the jury’s reliance on unprotectable musical elements is essential for analyzing the musical elements in *Williams*, as *Three Boys Music* is the prevailing Ninth Circuit case on

¹⁸⁶ *Id.* at 1:34.

¹⁸⁷ *Id.* at 3:44.

¹⁸⁸ *Id.* at 58:40.

¹⁸⁹ *Id.* at 14:20.

¹⁹⁰ *Id.* at 16:00.

¹⁹¹ *Id.* at 56:31.

¹⁹² *Id.* at 56:44.

¹⁹³ *Id.* at 57:33.

¹⁹⁴ *Id.* at 57:45. Throughout the oral argument, Sullivan referred to the deposit copy as the “lead sheet.” The lead sheet is another way of describing the fundamental musical elements and structure of a song that is written on the sheet music.

this issue.¹⁹⁵ In both cases, the Ninth Circuit was unwilling to overturn the jury's findings that there was substantial similarity in the unprotectable musical elements.¹⁹⁶ In *Three Boys Music*, the deposit copy contained "the song's essential elements such as the title hook, chorus, and pitches."¹⁹⁷ The jury in that case found that the combination of unprotectable elements was so similar that the songs were substantially similar.¹⁹⁸ In fact, a combination of unprotectable elements may accurately result in a finding of copyright infringement.¹⁹⁹ However, compared to *Three Boys Music*, this Ninth Circuit decision wrongly allowed the Gayes' "musicologists to draw inferences beyond what was expressed in the sheet music."²⁰⁰ Moreover, *Three Boys Music* does not involve a comparison of the groove or feel of the songs, further distinguishing these cases. Thus, by finding similarities in the "unprotectable elements like the 'groove' on Marvin Gaye's hit,"²⁰¹ the jury's reliance on these unprotectable elements was entirely improper.

B. The Role of the Jury in Music Copyright Infringement Cases

Sullivan's arguments are critical in examining how the court should have presented the evidence to the jury in this music copyright infringement case. During the oral argument, Sullivan explained that "the sound recording is not properly evidence of the" musical elements in the sheet music.²⁰² Also, she argued that the district court should not have admitted elements from the sound recordings through the Gayes' expert testimony and "mash-ups" because the protectable elements were only within the lead sheet.²⁰³ Judge Nguyen responded to Sullivan's arguments by recognizing that the sound recordings may contain unprotectable musical elements that "may unduly sway the jurors."²⁰⁴ This point is supported by the fact that juries do not

¹⁹⁵ For a discussion of this case, see *supra* notes 90-102.

¹⁹⁶ See *supra* note 102 and accompanying text.

¹⁹⁷ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000).

¹⁹⁸ *Id.* at 485.

¹⁹⁹ See *supra* notes 105-09 and accompanying text.

²⁰⁰ Gardner, *supra* note 142.

²⁰¹ *Id.*

²⁰² Oral Argument, *supra* note 185, at 55:50.

²⁰³ *Id.* at 56:29.

²⁰⁴ *Id.* at 55:59.

customarily hear only portions of songs instead of hearing the complete versions of the songs.²⁰⁵ Thus, if the jury determined that “Blurred Lines” and “Got to Give It Up” were similar based on unprotectable elements, such as the feel and musical genre, this decision was erroneous.²⁰⁶

The tenuous role of the jury in music copyright infringement cases was represented in a mock trial of this case by Professor Jennifer Jenkins from Duke Law School.²⁰⁷ As a professor of Music Copyright, Professor Jenkins discussed “the detailed legal and musicological arguments” with her class.²⁰⁸ As this mock trial was conducted before the actual jury’s verdict, Professor Jenkins asked her students which party should win this case “based on the law.”²⁰⁹ In a unanimous decision, the students believed that the Thicke Parties should prevail.²¹⁰ Professor Jenkins stated that copyright infringement occurs when a musician copies a substantial degree of protectable elements from another musician.²¹¹ In this case, she explained that an analysis of the protectable musical elements “was limited to the music and lyrics” notated in the deposit copy of “Got to Give It Up.”²¹² Upon examination of both compositions, the notated musical elements that comprised the melodic line and harmony were not substantially similar.²¹³ Instead, Professor Jenkins explained that the songs are sonically similar with the use of falsetto vocals and “a cowbell to provide rhythmic accents.”²¹⁴ However, as the falsetto and cowbell vocals were not notated in Gaye’s composition submitted to the Copyright Office, these two similar musical elements are not included in the analysis of substantial similarity. She stated, “[t]hat’s what is lacking in the ‘Blurred Lines’ case, and why, based on the law, my students would have unanimously ruled for Pharrell and Thicke.”²¹⁵ However, a vital aspect of this mock trial was that the class correctly

²⁰⁵ Newman, *supra* note 23.

²⁰⁶ *Id.*

²⁰⁷ Jennifer Jenkins, *The “Blurred Lines” of Law*, CTR. FOR STUDY PUB. DOMAIN, <https://law.duke.edu/cspd/blurredlines/> (last visited Mar. 9, 2019).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

predicted that the lay jurors would actually find that the Thicke Parties infringed Gaye's song.²¹⁶ Professor Jenkins explained that the Ninth Circuit intrinsic test may have misrepresented the jurors' examination of copyright infringement.²¹⁷ She explained, "[i]t is very difficult to compare 'total concept and feel' without erroneously taking into account all of the unprotectable elements."²¹⁸ The students' evaluations of who should win, and who they predicted would actually win, indicate the questionable role of juries in making accurate judgments based on the current instructions given for the intrinsic test in these very difficult music cases.

C. Music Theory, Borrowing, and Inspiration When Creating Musical Works

Additionally, virtually all music is inspired by another genre, style, or musician in some way.²¹⁹ In fact, "[i]n the field of popular songs, many, if not most, compositions bear some similarity to prior songs."²²⁰ This section will argue that an artist's growth in musical creativity and authenticity is nurtured by an artist being inspired by another artist.

In the Western classical music tradition, a musical piece is limited to a scale of only twelve notes.²²¹ Harmonically, three notes are formed together to create a single chord, resulting in several three-note chord combinations that can create a chord progression.²²² Theoretically, there is a massive number of chord progressions that could be created by playing different chords together.²²³ However, this tradition of music favors specific chord progressions as being "more conventional over others," inevitably leading to continuously repeating chord progression patterns in all types of songs.²²⁴ For example, the chord progression I-V-vi-IV is one of the most frequently used chord

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Turville, *supra* note 24, at 218.

²²⁰ NIMMER, *supra* note 34, § 2.05[B].

²²¹ Brief of Public Knowledge as Amicus Curiae in Support of Plaintiffs-Counter-Defendants-Appellants at 4, *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (CA No. 15-56880).

²²² *Id.* (explaining that a series of chords create a single chord progression, which serves as the harmonic foundation for a song).

²²³ *Id.*

²²⁴ *Id.* at 4-5.

progressions among musicians in popular music.²²⁵ It is quite striking that this particular chord progression is continuously recycled by countless musicians throughout different periods of music history.²²⁶ Musical experts state that this chord progression, along with its variations like the vi-IV-I-V progression, is commonly used by musicians because “it can be played over and over and return smoothly to the first chord each time,” while also providing “emotional heft.”²²⁷ Additionally, the repetition of musical patterns in various types of musical works is exemplified by the recurrence of the authentic cadence V-I³ in Mozart’s *Eine Kleine Nachtmusik* and Disney’s *Do You Want to Build a Snowman* from the movie *Frozen*.²²⁸ Thus, these examples illustrate that the recurrence of a single musical pattern “encourages creativity” and “can support a multitude of creative works.”²²⁹

Additionally, composers often borrow musical elements from other artists and musical works in order to evoke certain “emotional and psychological responses from listeners.”²³⁰ In fact, musical borrowing of prior works can be found in classical compositions, film scores, and vastly ranging musical genres.²³¹ For instance, the famously “accelerating two-note pattern” in the film *Jaws* creates a psychological response of fear and danger in any audience member watching the film.²³² While this musical theme is associated with *Jaws*, this two-note pattern was first utilized at the start of Dvořák’s fourth movement of the Ninth Symphony *From the New World* in

²²⁵ *Id.* at 5.

²²⁶ See random804, *Axis of Awesome, 4 Four Chord Song*, YOUTUBE (Dec. 10, 2009), <https://www.youtube.com/watch?v=5pidokakU4I> (demonstrating a humorous performance of the popular chord progression I-V-vi-IV in many songs); see also Alan White, *73 Songs You Can Play With The Same Four Chords*, BUZZFEED (Apr. 29, 2014, 9:56 AM), <https://www.buzzfeed.com/alanwhite/73-songs-you-can-play-with-the-same-four-chords> (listing 73 songs that use the chord progression I-V-vi-IV, including Journey’s “Don’t Stop Believin,” Andrea Bocelli’s “Time To Say Goodbye,” Toto’s “Africa,” Bon Jovi’s “It’s My Life,” Lady Gaga’s “Poker Face,” Kelly Clarkson’s “Behind These Hazel Eyes,” Adele’s “Someone Like You,” Elton John’s “Can You Feel The Love Tonight,” and The Beatles’ “Let It Be”).

²²⁷ Marc Hirsh, *Striking a Chord*, BOSTON GLOBE (Dec. 31, 2008), http://archive.boston.com/ae/music/articles/2008/12/31/striking_a_chord/.

²²⁸ Brief of Public Knowledge as Amicus Curiae, *supra* note 221, at 4-5.

²²⁹ *Id.* at 6.

²³⁰ *Id.* at 8.

²³¹ *Id.* at 13.

²³² *Id.* at 9.

order to dramatically introduce the main melody.²³³ This example shows that different genres of musical works frequently borrow musical patterns from one another to create a similar feeling of “dramatic tension.”²³⁴ Most importantly, it exemplifies that musical borrowing “is an important tool in the toolbox of composition, one that ought to be available to all musicians.”²³⁵

In a way, the feel and groove of a song is analogous to the *scènes à faire* doctrine.²³⁶ In order to evoke a particular musical genre or era, there may be no other way to express this musical idea²³⁷ without using elements that are inherent in that genre or song.²³⁸ Because specific musical elements are essential for evoking a certain genre, the *scènes à faire* doctrine will prevent copyright infringement when applying these essential elements.²³⁹ Similarly, Professor Wu argued that:

To suggest that this verdict will encourage better songwriting is to misunderstand the history of the arts. The freedom of artists and other creators to borrow from each other is connected with the principle that ideas cannot be copyrighted, a notion that is essential to free speech and artistic expression.²⁴⁰

In this case, the groove is the equivalent of an idea or a *scène à faire*, meaning that the groove in “Got to Give It Up” cannot be copyrighted.²⁴¹ In fact, the similarities between “Blurred Lines” and “Got to Give It Up” are derived from musical elements that are not

²³³ *Id.* (illustrating that this two-note pattern was also used in the film *Inception* to evoke the same emotional response of urgency).

²³⁴ *Id.* at 10.

²³⁵ *Id.*

²³⁶ See *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004) (“Under the *scènes à faire* doctrine, when certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea, those expressions are treated like ideas and therefore not protected by copyright.”). For example, the Sixth Circuit stated that stock images of a college fraternity include “parties, alcohol, co-eds, and wild behavior.” *Stromback v. New Line Cinema*, 384 F.3d 283, 296 (6th Cir. 2004).

²³⁷ See *infra* text accompanying note 241 for an explanation that ideas are not copyrightable.

²³⁸ See *Jenkins, supra* note 207 (“No one owns the 12 bar blues, or the I-IV-V chord progression, or the two-step, or a descending melodic line, regardless of who originated them. Many of the musical elements common to ‘Blurred Lines’ and ‘Got To Give It Up’ fall into these unprotectable categories.”).

²³⁹ *Id.*

²⁴⁰ Wu, *supra* note 17.

²⁴¹ See cases cited *supra* note 236.

protectable.²⁴² Precisely, comparable to the *scènes à faire* doctrine, an attempt to channel the feel or groove of another time period should not result in copyright infringement because certain elements are so natural and fundamental to a specific musical style.²⁴³ However, by finding that the Thicke Parties were liable for copyright infringement, the Ninth Circuit inaccurately likened the groove to a protectable idea under copyright law, which directly conflicts with Section 102(b) of the 1976 Act.²⁴⁴

Moreover, if artists are unable to draw on their musical influences due to fear of copyright infringement, the degree of creativity in music will be severely limited.²⁴⁵ The possibility of diminished musical creativity directly conflicts with the Framers' intent under the Constitution to encourage the creation of works in furtherance of art and science.²⁴⁶ It is unfathomable to consider what music would sound like today if past artists were ambivalent to grow and learn from their musical influences.²⁴⁷ In many famous classical works, composers such as Beethoven and Mozart masterfully recycled their own musical works and developed variations based on the works of other composers.²⁴⁸ For popular music, consider today's standard of music "if the Beatles would have been afraid to draw from Chuck Berry, or if Elton John would have been afraid to draw from the

²⁴² Jenkins, *supra* note 207.

²⁴³ *Id.*

²⁴⁴ Brief of Amici Curiae, *supra* note 1, at 3; see 17 U.S.C. § 102(b) (2018) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

²⁴⁵ Brief of Amici Curiae, *supra* note 1, at 3, 10.

²⁴⁶ See U.S. CONST. art. 1, § 8, cl. 8.

²⁴⁷ Brief of Amici Curiae, *supra* note 1, at 10.

²⁴⁸ See Zachary Lewis, *Pop Artists Including Billy Joel, Alicia Keys, Sting Mine Music of Classical Composers When Writing Their Songs*, PLAIN DEALER (July 1, 2012, 6:00 AM), https://www.cleveland.com/musicdance/index.ssf/2012/07/pop_artists_including_billy_jo.html (explaining that pop artists recycle the works of classical composers, just as classical composers reused their own works and the compositions of other composers. For example, under Billy Joel's vocals in the song "This Night," listeners can hear the slow second movement of Beethoven's "Pathétique" Sonata, which also draws on an earlier Mozart sonata); see also Anthony Tommasini, *The Big 4 of Vienna: One Faces Elimination*, N.Y. TIMES (Jan. 10, 2011), <https://www.nytimes.com/2011/01/11/arts/music/11vienna4.html> (stating that Haydn taught Beethoven motivic development, or "bits and pieces of music" that serve as the musical structure for creating a symphony, and Beethoven expanded upon Haydn's teachings when incorporating motivic development into his own works, such as the "Eroica" Symphony).

Beatles.”²⁴⁹ In fact, “it would also be difficult for the Gayes to imagine if their father had been afraid to draw from Ray Charles or Bo Diddley.”²⁵⁰ It is possible that many of these songs would not even exist if they had received the level of scrutiny applied by the Ninth Circuit in evaluating “Blurred Lines.”²⁵¹

Lastly, consider an up-and-coming musician who is inspired by the artists that paved the way for a specific genre of music.²⁵² This musician may aspire to be a pop star, a country singer, or even a rapper. By drawing inspiration from his musical influences, this musician learned the necessary fundamentals to write and compose songs. Prior to the Ninth Circuit decision in *Williams*, this budding musician would not fear drawing on the influences of other musicians, so long as the song was made with his own creative expression. However, the result in this hypothetical may be quite different after this case because the court’s decision blurs the line between an idea and the expression of an idea, along with blurring the distinction between being influenced by an artist and unlawfully copying that artist.²⁵³ Unlike the *Thicke* Parties that could afford a copyright infringement suit, most up-and-coming musicians do not have the means to defend themselves in this manner.²⁵⁴ Thus, our budding musician will now “think twice before he or she writes a song that ‘feels’ like a Marvin Gaye song or any other artist’s song” in order to prevent future litigation.²⁵⁵ Therefore, the Ninth Circuit’s decision creates a dangerous impediment to musical creativity as musicians will be overly cautious when making music because they will not know whether drawing inspiration from a song will result in copyright infringement.²⁵⁶

Consequently, the jury’s task of determining the “total concept and feel” of two songs under the Ninth Circuit’s intrinsic analysis stage “simply does not work in a music context.”²⁵⁷ In particular, given that there are only a finite number of possible notes and chords, the courts

²⁴⁹ Brief of Amici Curiae, *supra* note 1, at 10.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 17.

²⁵² In this paragraph, consider this hypothetical musician as a model for all budding and up-and-coming musicians who would like to create music for everyone to hear.

²⁵³ Brief of Amici Curiae, *supra* note 1, at 8.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 12 n.4.

have recognized that some pieces will contain “common themes.”²⁵⁸ In fact, Judge Learned Hand stated, “[i]t 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.”²⁵⁹ Specifically, there is no clear test to determine whether a song evokes a similar feel or whether it infringes the copyright in another song.²⁶⁰ In this case, it is evident that “Blurred Lines” and “Got to Give It Up” are similar in their “sonic environment,” but the core elements of melody, rhythm, and lyrics are not similar.²⁶¹ Therefore, in determining substantial similarity in musical works, the Ninth Circuit should create a more precise rule for determining the “total concept and feel of a work” so that musicians will know whether their inspiration and borrowing of another work constitute copyright infringement.

D. Proposed Rule for the Intrinsic Analysis Test

The decision in *Williams v. Gaye* illustrates that the Ninth Circuit should clarify the rule under the intrinsic analysis test for the jury’s determination of substantial similarity. The proposed rule in this section will not recommend the elimination of the intrinsic analysis test or that the Ninth Circuit should develop a brand-new test for evaluating whether two works are substantially similar. Instead, the Ninth Circuit should reevaluate how the jury is instructed in determining “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”²⁶²

As seen in this case, the intrinsic test presents the opportunity for an erroneous evaluation of the substantial similarity between two songs. For instance, in cases involving celebrity musicians, the jury may be susceptible to applying their preconceived admiration or distaste for particular artists when determining whether copyright infringement has occurred. Here, it is possible that the jurors’ musical preference for Gaye may have colored their interpretation of whether

²⁵⁸ *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988).

²⁵⁹ *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940).

²⁶⁰ Brief of Amici Curiae, *supra* note 1, at 12-13.

²⁶¹ Post, *supra* note 14.

²⁶² *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)).

Thicke and Williams copied Gaye's song.²⁶³ Also, it is possible that Thicke's unreliable and shocking testimony about his drug use may have inappropriately swayed the jury's finding of infringement.²⁶⁴ In these instances, the Ninth Circuit should remind the jury that only the musical elements in the songs are evaluated when considering whether copyright infringement occurred.²⁶⁵

Additionally, while the jury is correctly told to consider the "total concept and feel" of two songs, the intrinsic test does not specifically state that the jury must not evaluate whether the overall feel, groove, or vibe of the two songs are substantially similar. The Ninth Circuit should clearly state to the jury that it must only consider the "total concept and feel" of the objective elements identified by the expert musicologists during the extrinsic analysis phase. By providing explicit instructions that the overall groove and feel of a song are not protected under copyright law, the Ninth Circuit will better inform and guide the jury. As it may be difficult for the jurors to isolate the overall sound of a song from the individual musical elements, the Ninth Circuit should consider emphasizing the distinction between these two components.²⁶⁶ For example, the court can state that while two songs may have a similar vibe, there is no copyright infringement for an artist's attempt to evoke the sound of another musical style, genre, or artist. Instead, the Ninth Circuit should tell the jury that it must only find copyright infringement between songs that sound similar when an artist directly copies protectable musical elements. Thus, the court must clearly and explicitly tell the jury that only the specific musical

²⁶³ See Wu, *supra* note 17 (stating that while "Gaye is widely revered," Thicke was viewed "as enormously unappealing" during the trial and many people view "Blurred Lines" as "morally objectionable").

²⁶⁴ See August Brown, *Robin Thicke on 'Blurred Lines': 'I was High on Vicodin and Alcohol'*, L.A. TIMES (Sept. 15, 2014, 7:19 PM), <https://www.latimes.com/entertainment/music/posts/la-et-ms-robin-thicke-blurred-lines-deposition-high-vicodin-alcohol-20140915-story.html> (discussing that Thicke admitted in his deposition testimony that he was intoxicated and on Vicodin while recording "Blurred Lines" and while giving interviews about the song to the media); see also Wu, *supra* note 17 (explaining that Williams wrote "Blurred Lines" and Thicke admitted that he did not write the song, meaning he most likely lied to Oprah Winfrey in a previous interview).

²⁶⁵ This is critical because the Ninth Circuit inaccurately let the jury examine the overall groove of the songs in this case.

²⁶⁶ Nicholas Booth, *Backing Down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works*, 24 J. INTELL. PROP. L. 99, 128 (2016) (discussing that courts should make sure that the jury is clear on the difference between the copyrights in the composition and the recording for the intrinsic analysis test in order to produce accurate results in music copyright infringement cases).

elements identified by the experts during the extrinsic analysis test are analyzed for substantial similarity. A revised rule for the intrinsic analysis test is both essential and workable because the language only has to be modified to better assist the jury. By changing the language of the intrinsic analysis test, the Ninth Circuit may potentially avoid erroneous jury verdicts, which will further encourage creativity for artists when producing musical works.

VI. CONCLUSION

The Ninth Circuit decision in *Williams v. Gaye* has serious implications for the future of creativity in musical works. In upholding the jury's verdict that Thicke and Williams infringed Gaye's song, when there was no similarity in the melody, lyrics, or harmonies, the Ninth Circuit essentially declared that the groove of a song is subject to copyright protection. While the majority opinion emphasized that this case hinged on procedural grounds, the protections under the 1909 Act, and a deferential standard of review, the implications on musical creativity in evoking a style fosters new concerns for musicians and artists. Specifically, it is nearly impossible to say that a song is completely original without drawing inspiration from another artist, style, or genre. If the groove of a song is protected under copyright law, musicians will be overly cautious about drawing on the style of another artist or genre, thereby stifling creativity. It is vital for the Ninth Circuit to reconsider the intrinsic analysis test with respect to the groove or feel of a song to clearly signify the line between infringement and inspiration. Therefore, with the addition of more specific and precise instructions for the jury during the intrinsic analysis test, the importance in copyright law of developing creative and imaginative musical works will remain preserved.