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Uncovering the Confusing Influence Experts Have on Music Copyright Cases

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Uncovering the Confusing Influence Experts Have on Music Copyright Cases

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Honors Project

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I. Introduction

Perhaps one of the starkest examples of court failings in music copyright is the recent *William v. Bridgeport Music, Inc.* ruling in 2015, also known as the *Blurred Lines* case.¹ In this case, Pharrell Williams and Robin Thicke preemptively sued the Gaye family and Bridgeport Music, Inc. for declaratory judgement that “Blurred Lines” did not infringe on Marvin Gaye’s “Got to Give it Up,” after which the Gaye family countersued to get an infringement judgment.² The jury awarded the Gaye family \$5.3 million in December 2015, which led to widespread outrage in the music industry.³ The problem was how the court procedurally reached its verdict. *Business Insider* asserts that the jury set a new legal precedent, overturning “traditional legal understanding of music copyright.”⁴

Legal scholars have long criticized the merits of copyright, whether it be debating the benefits of copyright protection, or dissecting the methods courts use to determine illegal copying.⁵ Music copyright, in particular, has been debated in a range of scholarly articles whose authors discuss the problems inherent in applying the boundaries of intellectual copyright protection on the medium of music. In a 1988 *Fordham Law Review* article by Michael Der

¹ Paul Schrodt, "The \$5 million 'Blurred Lines' legal fight over the song's 'vibe' could permanently change the music industry," *Business Insider*, accessed March 27, 2017, <http://www.businessinsider.com/blurred-lines-case-music-copyright-2015-12>.

² Ibid; *Pharrell Williams et al v. Bridgeport Music Inc et al*, Docket No. 2:13-cv-06004 COMPLAINT accessed February 12, 2017, <http://mcir.usc.edu/inplay/Documents/williamscomplaint.pdf>.

³ Eriq Gardner, "'Blurred Lines' Appeal Gets Support From More Than 200 Musicians," *The Hollywood Reporter*, Accessed March 27, 2017, <http://www.hollywoodreporter.com/thr-esq/blurred-lines-appeal-gets-support-924213>.

⁴ Paul Schrodt, "The \$5 million 'Blurred Lines' legal fight over the song's 'vibe' could permanently change the music industry," *Business Insider*, accessed March 27, 2017, <http://www.businessinsider.com/blurred-lines-case-music-copyright-2015-12>.

⁵ Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," *Harvard Law Review* 84 (1970); Michelle V. Francis, "Musical Copyright Infringement: The Replacement of *Arnstein v. Porter* – A More Comprehensive Use of Expert Testimony and the Implementation of an “Actual Audience” Test,” *Pepperdine Law Review* 17 (1990); Wendy J. Gordon, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,” *Stanford Law Review* 41 (1989).

Manuelian⁶ advances the idea that difficulties in music copyright originate in limitations of expert testimony.⁷ Other authors such as Austin Padgett⁸ in a *New Hampshire Law Review* article,⁹ and Pamela Samuelson¹⁰ in her 2013 *Northwestern University Law Review* article,¹¹ scrutinize the various tests courts use. The tests that courts use in copyright infringement cases, whether in subjects like bookkeeping or films, rely on a concept known as the idea-expression dichotomy. The idea-expression dichotomy is a concept perpetuated by the legal system that makes a distinction between the idea that underlies a creative work, and the results of that idea as expressed in a tangible format, such as clearly delineated character in a book.¹² The recent *Blurred Lines* case has also garnered the attention of legal scholars. For example, Jason Palmer,¹³ in his 2016 *Vanderbilt Journal of Entertainment & Technology Law* article, argues that the unfortunate results stemmed from the inadequacies of the trier of fact; since the judge or jury usually does not have any musical training, changing the methodology of an infringement test will not lead to better outcomes because they will not fully understand the results of any tests.¹⁴ Palmer makes a persuasive case that tweaking the tests will not fix the problem. However, I argue that the idea-expression dichotomy is especially problematic in music copyright because it

⁶ Michael der Manuelian is currently a contracts lawyer in New York City. A previous version of the cited essay won the first prize in the 1988 Nathan Burkan Memorial Competition at the Fordham University School of Law

⁷ Michael Der Manuelian, “The Role of the Expert Witness in Music Copyright Infringement Cases,” *Fordham Law Review* 57 (1988): 127-147.

⁸ Austin Padgett was a J.D. candidate at the Franklin Pierce Law Center as of 2009. The cited article was the winning entry in the second annual Pierce Law Student Symposium writing competition.

⁹ Austin Padgett, “The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation,” *Pierce Law Review* 7 (2008): 125-149.

¹⁰ Pamela Samuelson is the Richard M. Sherman '74 Distinguished Professor of Law and Information Management at the University of California, Berkeley.

¹¹ Pamela Samuelson, “A Fresh Look at Tests for Nonliteral Copyright Infringement,” *Northwestern University Law Review* 107 (2013): 1821-1850.

¹² Edwards Samuels, “The Idea-Expression Dichotomy in Copyright Law,” *Tennessee Law Review* 56 (1989): 347-349.

¹³ Jason Palmer is a 2017 J.D. candidate at the Vanderbilt University Law School.

¹⁴ Jason Palmer, ““Blurred Lines” Means Changing Focus: Juries Composed of Musical Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries,” *Vanderbilt Journal of Entertainment and Technology Law* 18 (2016): 907-934.

informs how courts create infringement tests and by extension—as seen in the *Blurred Lines* case—allows expert witnesses free reign to make any kind of claim in their music analysis.

II. An Overview of Music Copyright

Intellectual property is protected under the United States Constitution.¹⁵ The Constitution calls for the restriction of people’s free usage of a creator’s property so as to promote economic and creative activities.¹⁶ The rationale is that if intellectual property is not protected, artists and inventors would not produce new creations lest the fruits of their labor be enjoyed without compensation.¹⁷ Of course, this rationale is based on particular perspectives of human understanding that ignores reasons other than profit, such as personal passion, that one might produce new works. More recently, the Copyright Act of 1976 explicitly expanded the scope of an author’s “writing” in order to include other mediums such as software, motion pictures, and sound recordings—that is, mediums that did not exist when the Founding Fathers wrote the Constitution.¹⁸

¹⁵ US Constitution Article I Section 8 Clause 8. “The Congress shall have power... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

¹⁶ *Ibid.*

¹⁷ Stephen Breyer, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs,” *Harvard Law Review* 84 (1970): 291-313; *Mazer v. Stein*, 347 US 201 (1954). “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”

¹⁸ 17 U.S. Code § 102 (a).

A. Elements of Infringement

1. Ownership

To establish infringement, the plaintiff must prove two components: first, the plaintiff must have ownership of a valid copyright, and second, the alleged copying must have used protected material from the copyrighted work.¹⁹ According to the American Bar Association, one of the bases for copyright ownership is “originality in the author” as well as proof of registration of a valid copyright.²⁰ It should be noted that courts tend to use creativity and originality synonymously.²¹ The importance of originality in a copyrighted work cannot be understated; as the Supreme Court noted in 1954,²² and as was later echoed in 1975,²³ the purpose of copyright law is to spur the creation of new works for the public good. As such, works that do not have even a modicum of creativity or originality may not be protectable even if a copyright is properly registered. For example, a defendant may have used a setting reminiscent of a scene in the plaintiff’s story which, at the same time, might not be considered infringement if the copied setting was commonplace or at the very least, used in a work that preceded both the plaintiff and defendant’s work.²⁴ A defendant could also argue that although there are segments that are

¹⁹ Jason E. Sloan, “An Overview of the Elements of a Copyright Infringement Cause of Action – Part I: Introduction and Copying,” *American Bar Association*, accessed April 11, 2017, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/elements_of_a_copyright.html.

²⁰ *Ibid.*

²¹ Aaron Keyt, “An Improved Framework for Music Plagiarism Litigation,” *California Law Review* 76 (1988): 428 at note 36; Paul M. Grinvalsky, “Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement,” *California Western Law Review* 28 (1992): 398-400.

²² *Mazer v. Stein*, 347 US 201 (1954). “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”

²³ *Twentieth Century Music Corp. v. Aiken*, 422 US 151 (1975). “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”

²⁴ Richard Jones, “The Myth of Idea/Expression Dichotomy in Copyright Law,” *Pace Law Review* 10 (1990): 591.

identical to the original work, the segment appeared in a third work preceding both works, showing that the relevant portion of the plaintiff's work was not original and therefore not protectable.²⁵

2. Copying

To prove copying, the plaintiff has to first show with a preponderance of evidence that the defendant had access to the original work.²⁶ In lieu of definitive proof of access, a plaintiff can attempt to prove by implication that the defendant had access by demonstrating that the two works in question are so similar that the defendant must have copied from the original.²⁷ This sort of similarity is called substantial similarity. It should be noted that the plaintiff must still show that the defendant had some possibility of viewing the material. One way this can be shown is to argue that the original work was so popular that the defendant must have heard of seen or otherwise witnessed the original work at some point.²⁸ There is also a more stringent form of similarity called striking similarity which the plaintiff is required to show if there is no circumstantial evidence that the defendant had access.²⁹ What distinguishes striking and substantial similarity? Courts are not clear where the line is drawn and they do not try to clarify

²⁵ Ibid., 592.

²⁶ Palmer, "'Blurred Lines' Means Changing Focus," 915.

²⁷ John Autry, "Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works," *Journal of Intellectual Property Law* 10 (2002): 113-114.

²⁸ Alice J. Kim, "Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases," *Columbia Journal of Law & the Arts* 19 (1994): 111; Jeffrey Cadwell, "Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement," *Santa Clara Law Review* 46 (2005): 140-142; Michelle V. Francis, "Musical Copyright Infringement: The Replacement of *Arnstein v. Porter* – A More Comprehensive Use of Expert Testimony and the Implementation of an "Actual Audience" Test," *Pepperdine Law Review* 17 (1990): 502-503.

²⁹ Autry, "Toward a Definition of Striking Similarity," 115.

the ambiguity.³⁰ However, in music cases, courts tend to rule that there is striking similarity if a higher proportion of the original work was simply copied, without considering the role of originality or creativity.³¹ Harking back to the significance of originality, the *Arnstein* case discussed in the following section helped to form a distinction between misappropriation and merely copying in music copyright cases.

B. Arnstein & Krofft

Originally, copyright laws in the United States mostly covered works of writing.³² While music copyright slowly became recognized in courts during the 19th century,³³ it was not until 1946 in *Arnstein v. Porter* that a truly definitive test for what constituted music copyright was developed.³⁴ In this groundbreaking case, the court stated that since it is hard to determine copyright infringement through direct copying, a two-prong test should be used instead.³⁵ The first part of the Arnstein test uses expert testimony to determine if the two works are similar as a whole. When two works are considered strikingly similar, access can be inferred.³⁶ The second prong requires the finder of fact to listen to the two works in the role of a lay-listener and make their judgement as to if the two works are similar enough to merit infringement.³⁷ Judges have previously stated that this prong comprises listening for the “groove” or “feel” of the works and comparing them.

³⁰ *Ibid.*, 114.

³¹ *Ibid.*, 140.

³² Breyer, “The Uneasy Case for Copyright,” 283 at note 11.

³³ J. Michael Keyes, “Musical Musings: The Case for Rethinking Music Copyright Protection,” *Michigan Telecommunications and Technology Law Review* 10 (2004): 410-419.

³⁴ *Ibid.*

³⁵ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946)

³⁶ *Ibid.*

³⁷ *Ibid.*

Arnstein was a very influential case and the two-prong test that resulted from it was what defined the elements of infringement discussed in Part II A.³⁸ The importance of this case lay not necessarily on the elucidation of the test itself, but on the fact that it cast the lay listener test as an economic consideration, meaning that the court “place[d] the primary value of a piece of music in the portion that makes it popular with, or at least recognizable to, the public.”³⁹ Another significance of the *Arnstein* case is that it imposed boundaries on the use of experts, limiting them to take part only in the copying stage of the test.⁴⁰

Court rationale in assessing similarity between two works did not change⁴¹ until the milestone *Sid & Marty Krofft v. McDonald’s Corp.* case in 1977. In this case, the Ninth Circuit Judge Carter asserted that the court in *Arnstein* had actually hinted at the concept of the idea-expression dichotomy when it had made its two-prong test.⁴² In the decision, the judge argued that it was a matter of due course to further refine the test into what the *Arnstein* court had intended all along and delineated what is now known as the extrinsic-intrinsic test.⁴³ In the extrinsic-intrinsic test, the court must first look at the extrinsic portion of the work and, through analytical dissection by an expert, determine if ideas in the original work have been copied in the new work.⁴⁴ Experts are used in this portion of the tests because, according to the court, the idea portion of a work can only be found through objective analysis.⁴⁵ If ideas have been copied, the trier of fact must finally determine if there is enough copying of expression to warrant

³⁸ Cadwell, “Expert Testimony, Scenes a Faire, and Tonal Music,” 130-140.

³⁹ *Ibid.*, 146.

⁴⁰ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946)

⁴¹ Francis, “Musical Copyright Infringement” 495-496 citing *Selle v. Gibb*.

⁴² *Krofft v. McDonald’s Corp.* 562 F.2d 1157 (9th Cir. 1977) “When the court in *Arnstein* refers to ‘copying’ which is not itself an infringement, it must be suggesting copying merely of the work’s idea.”

⁴³ *Ibid.* “But there also must be substantial similarity not only of the general ideas but of the expressions of those ideas as well. Thus, two steps in the analytic process are implied by the requirement of substantial similarity.”

⁴⁴ Jones, “The Myth of the Idea/Expression/Dichotomy in Copyright Law,” 581.

⁴⁵ Kim, “Expert Testimony and Substantial Similarity,” 114-115.

infringement.⁴⁶ Expressions, and not ideas, must be looked at to determine infringement because of a precedent set in the Supreme Court: *Mazer v. Stein* stated that “a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”⁴⁷ The circularity in the court’s language is the root of confusion in how to apply the *Krofft* test in music copyright cases.⁴⁸

III. Inherent Problems in Music Copyright

A. In General

In his *Guide to Musical Analysis*, Nicholas Cook states that music is “surely among the most baffling of the arts in its power to move people profoundly whether they have any technical expertise or intellectual understanding of it.”⁴⁹ Aaron Copland, the famed American composer, wrote that music “is the freest, the most abstract, the least fettered of all the arts: no story content, no pictorial representation... need hamper the intuitive functioning of the imaginative mind.”⁵⁰ Indeed, music is harder to grasp and harder to decipher compared to other artistic forms such as literature and the visual arts. One thing does remain constant. Whether it be divine providence from up above, or merely the result of an odd evolutionary byproduct, as several

⁴⁶ Jones, “The Myth of the Idea Expression/Dichotomy in Copyright Law,” 581.

⁴⁷ *Mazer v. Stein*, 347 U.S. 201 (1954).

⁴⁸ Kim, “Expert Testimony and Substantial Similarity,” 114-115.

⁴⁹ Nicholas Cook, *A Guide to Musical Analysis*, (Oxford: Oxford University Press, 1987), 1.

⁵⁰ Aaron Copland, *Music and Imagination* (Cambridge, MA: Harvard University Press, 1953), 7.

scientists have argued, there is little doubt of the power of music to move.⁵¹ However, there is little agreement on why that is.⁵²

There are several fundamental features that delimit music, such as time, melody, and harmony. These elements are what are represented in a lead sheet, which is what is often scrutinized in a music infringement case. Unlike a full score, which includes the notes for the various vocal or instrumental parts in a composition, a lead sheet typically only contains the main melody, including its temporal aspects, the harmony indicated by chord symbols, and any lyrics that a composition may have.

Time in music can be broken into two main components: tempo and rhythm. Tempo refers to the speed of music, or how fast the “beat” is.⁵³ Rhythm, on the other hand, is a precise pattern or arrangement of pitches in terms of duration.⁵⁴

One of the most obvious components of music is melody. Defined as “a sweet or agreeable succession or arrangement of sounds” by the *Merriam-Webster Dictionary*, the melody is what people typically hum when they refer to a tune.⁵⁵ A melody can also be thought of as the tune of a piece and is most memorable about a popular work of music. In Western music, there are twelve tones that repeat in a cycle. The tones are generally arranged into a scale or key that

⁵¹ Oliver Sacks, *Musicophilia: Tales of Music and the Brain* (United States: Random House, 2007), x-xv. In the preface, Sacks describes the various intellectual giants who have attempted to draw out the secrets of music. The book as a whole contains twenty-nine case studies of music’s effect on people; Joanne Lipman, “Is Music the Key to Success?” *The New York Times*, accessed March 27, 2017, <http://www.nytimes.com/2013/10/13/opinion/sunday/is-music-the-key-to-success.html>. This article provides anecdotal evidence indicating that those who are successful have had music as a significant part of their lives, suggesting that there is a certain power to music.

⁵² Stefan Koelsch, “Emotion and Music,” in Jorge Armony & Patrik Vuilleumier, *The Cambridge Handbook of Human Affective Neuroscience* (New York: Cambridge University Press, 2013): 299; Copland, *Music and Imagination*, 17. Copland professes to have the final say about music: “The precise meaning of music is a question that should never have been asked, and in any event will never elicit a precise answer.”

⁵³ Justin London, “Tempo (i),” *Grove Music Online*, Accessed April 10, 2017, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/27649>.

⁵⁴ Justin London, “Rhythm,” *Grove Music Online*, Accessed April 10, 2017, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/45963pg1>.

⁵⁵ “Melody,” *Merriam-Webster Dictionary*, Accessed March 27, 2017, https://www.merriam-webster.com/dictionary/melody?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

does not necessarily use all twelve pitches. Western Art music may use additional notes that lie in between the conventional twelve notes, known as microtones, but they generally do not appear in popular music.⁵⁶

Related to melody is harmony, which in the *Oxford Dictionary* is defined as “The combination of simultaneously sounded musical notes to produce a pleasing effect.”⁵⁷ A melody is a series of notes and can be understood to be placed “horizontally” in time while harmony can be thought of as placed “vertically,” as multiple notes are played at the same time in a chord. Another way to consider harmony is like the background that sets the stage in a play where the main actor known as the melody stands front and center. There are different schools of thought on how harmonies are arranged. For example, popular music generally uses a form of harmony with a tonal center, meaning that notes in a scale are given different significance in a hierarchy.⁵⁸ In this kind of music, chords are played in a specified progression that usually ends in a chord that feels like “home.”⁵⁹ Another type of harmonic system is the atonal system, where all twelve notes are used without any one note being leaned upon.⁶⁰ Harmony in this type of system is not usually thought of as a series of chord progressions.

The combination of melody, harmony, time and tempo defines the basic structure of a work of music. It seems on the surface that an infinite number of arrangements of musical elements can be made, implying that there should also be an infinite number of music works that can be written. Since there are so many possible music works, it should be a simple matter for

⁵⁶ Paul Griffiths, et al, "Microtones," *Grove Music Online*, Accessed April 10, 2017, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/18616>.

⁵⁷ "Harmony," *Oxford Living Dictionary*, Accessed March 27, 2017, <https://en.oxforddictionaries.com/definition/harmony>.

⁵⁸ Charles Hamm, et al, "Popular Music," *Grove Music Online*, Accessed April 10, 2017, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/A2259148>.

⁵⁹ *Ibid.*

⁶⁰ "Atonal," *The Oxford Dictionary of Music*, Accessed April 10, 2017, <http://www.oxfordmusiconline.com/subscriber/article/opr/t237/e617>.

composers to create original works and avoid infringing on others. Clearly, this is not the case. According to Judge Learned Hand in *Darrell v. Joe Morris Music Co.*, “It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear.”⁶¹ A quandary arises merely from the definitions of harmony and melody used in common parlance. Both the *Merriam-Webster Dictionary* and the *Oxford Dictionary* used terms such as “pleasing,” “agreeable,” and “pleasant” in their definitions. Humans have vast preferences in music.⁶² For example, atonal works such as Alban Berg’s *Wozzeck* will undoubtedly sound dissonant to most listeners yet others find it “pleasant,” or at the very least, something worth listening to despite the dissonance. If a music infringement case arises where the style of music is alien to the judge or jury, it seems likely that it would be more challenging for the trier of fact to unearth the needed element of originality or creativity in a plaintiff’s piece. This is because in the context of copyright, the purpose of which is to incentivize creativity through economic protection, if a trier of fact simply does not like the music they are hearing, they might assign it less value than the kind of music they enjoy.

Another issue with attributing infringement in music is conclusively showing what is original in the plaintiff’s work from an objective standpoint.⁶³ Each genre of music, such as pop, jazz, or classical music, has recurring combinations of musical tropes that can be labeled as *scènes à faire*.⁶⁴ For instance, a harmonic progression such as I-V-vi-IV is extremely common and manifests itself in many popular songs.⁶⁵ These recurring patterns are not protected under

⁶¹ *Darrell v. Joe Morris Music Co.*, 113 F.2d (2d Cir. 1940)

⁶² Koelsch, “Emotion and Music,” 287.

⁶³ Cadwell, “Expert Testimony, Scenes a Faire, and Tonal Music” 149.

⁶⁴ *Ibid.*, 148-149. Citing *Alexander v. Haley* which was an infringement case involving works of writing, but this concept of *scènes à faire* can be applied to music.

⁶⁵ “The Four Chords of Pop,” TV Tropes, accessed April 11, 2017, <http://tvtropes.org/pmwiki/pmwiki.php/Main/TheFourChordsOfPop>.

copyright as they do not have the element of originality because they are considered *scènes à faire*.⁶⁶ To determine if there has been infringement, a trier of fact would have to identify not only what attributes are shared between the two works in question, but also figure out whether or not the copied part has been derived from or is part of typical patterns seen within the genre of the work—and this is no easy task.⁶⁷

Another issue with music copyright is the medium in which the musical work is protected. In the current U.S. system, a composer must submit a deposit copy as part of the process to register a copyright.⁶⁸ The copyright court prefers a printed copy over a sound recording, but accepts either.⁶⁹ While composers of published works created on or after January 1, 1978 are expected to submit a full score and parts, the Copyright Office had accepted less complete versions such as lead sheets⁷⁰ before that date.⁷¹ A problem arises at this point in the copyright system as lead sheets generally reflect the barebones of a composition and do not necessarily include all the specific musical details that would characterize a specific performance of the work. Since the ownership of a copyright is based on the deposit copy, if two works are being scrutinized based on just the lead sheets, the basic nature of both works can lead to the perceived existence of similarities when there are actually none, such as in the *Blurred Lines* case.

⁶⁶ Cadwell, “Expert Testimony, Scenes a Faire, and Tonal Music,” 148-149.

⁶⁷ See “Jazz Has Got Copyright Law and That Ain’t Good,” *Harvard Law Review* 118 (2005): 1940-1961. This article describes the particular problems that arise when attempting to apply broad copyright conceptions onto a specific genre like jazz. Because jazz performances are based on “standards,” on which improvisations is expected, jazz performers do not usually gain the protection of copyright because in the eyes of the law, this kind of borrowing does not contain a minimum level of creativity or originality.

⁶⁸ “Copyright Registration for Musical Compositions,” *United States Copyright Office*, accessed March 27, 2017, <https://www.copyright.gov/circs/circ50.pdf>.

⁶⁹ *Ibid.*

⁷⁰ Lead sheets are a simplified form of musical notation that only contains the essential elements of a song such as the lyrics, the chord progression, and main melody.

⁷¹ “Copyright Registration for Musical Compositions,” *United States Copyright Office*, accessed March 27, 2017, <https://www.copyright.gov/circs/circ50.pdf>.

The fact that the Copyright Office also accepts sound recordings of the work poses another issue. When experts make their arguments, they are expected to rely on the deposit copy—whatever its form. However, if the deposit copy for a work is a recording or merely a lead sheet, some experts create their own transcription of the work, and in the case of a lead sheet, this may be based on an outside sound recording.⁷² A situation can occur where an expert may create the transcription in such a way as to make the two works more or less similar than they might have been otherwise. Similarly, an expert could play the two works from written deposit copies on a keyboard during the trial to make them sound similar, as the judge in *Arnstein* noted.⁷³ This problem is due to the mixing of different ways of storing music as well as certain preferences on what music is. Is the copyrighted musical work the score or is it the sound that one hears when it is performed or played from a recording?

⁷² Judith Greenberg Finell, "Using an Expert Witness in a Music Copyright Case," Judith Finell Music Services Inc., Accessed March 27, 2017, <http://www2.jfmusicervices.com/using-an-expert-witness-in-a-music-copyright-case/>.

⁷³ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); Jamie Lund, "An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement," *Social Science Research Network*, accessed March 27, 2017, <https://ssrn.com/abstract=2030509> at 39. Lund discusses the results of an experiment in which participants were asked to evaluate a pair of songs that were in a copyright litigation case. The participants were split into two groups, one of which heard the songs performed similarly with the same timbre, orchestration, and style. The other group heard the same pair of songs performed dissimilarly. The experiment suggested that those who heard the songs played similarly were more likely to assess the two songs as similar while the opposite was true of those who heard the songs played dissimilarly.

B. The Pervading Influence of the Idea-Expression Dichotomy in Copyright

In his 1990 *Pace Law Review* article, Richard Jones⁷⁴ states that “fundamental to traditional copyright doctrine is the claim that copyright only protects an author’s particular expression of an idea and never the idea itself.”⁷⁵ According to Jones, the dichotomy would at best be an unnecessary step in copyright cases while at worst, serve to confuse and mislead the trier of fact.⁷⁶ This concept, known as the idea-expression dichotomy, was originally applied to literal copying, such as between two bookkeeping systems, and became explicit in 1880 in *Baker v. Selden*, in which the court ruled that while the plaintiff’s specific form of bookkeeping was protected as an expression, he only had copyright on the exact arrangement of columns and rows and not the general idea of a bookkeeping system.⁷⁷

The idea-expression dichotomy was later applied to non-literal copying by Judge Learned Hand.⁷⁸ In his opinion in *Nichols v. Universal Pictures, Inc.*, Judge Learned Hand described what is now called the abstraction test to help sort the difference between idea and expression between two plays: “Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. [H]ere is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ideas.”⁷⁹ The expansion of the idea-expression doctrine continued and was eventually

⁷⁴ Richard Jones holds a Ph.D. from Columbia University in history and philosophy of religion as well as a J.D. from the University of California at Berkeley. He has written numerous books on philosophical and religious subjects.

⁷⁵ Jones, “The Myth of the Idea Expression/Dichotomy in Copyright Law” 551, citing *Narell v. Freeman* 872 F.2d 907, 910 (9th Cir. 1989) and *Warner Bros. v. American Broadcasting Companies* 654 F.2d 204, 208 (2d Cir. 1981) as examples.

⁷⁶ Jones, “The Myth of the Idea Expression/Dichotomy in Copyright Law,” 607.

⁷⁷ *Baker v. Selden* 101 U.S. 99 (1879).

⁷⁸ Edward Samuels, “The Idea-Expression Dichotomy in Copyright Law,” *Tennessee Law Review* 56 (1989): 339-340.

⁷⁹ *Nichols v. Universal Pictures, Inc.*, 45 F.2d 119 (2d Cir. 1930).

codified in the Copyright Act of 1976 which stated that “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.”⁸⁰

Jones acknowledges that there has been a lot of criticism of the idea-expression dichotomy but most miss the most crucial issue.⁸¹ The first problem with the idea-expression dichotomy is defining each term. At what point does an idea become an expression? Judge Learned Hand certainly attempted to elucidate it with his abstraction test but even then, the test did not provide a definitive answer, recognizing that the point of importance differs depending on the context. Despite Judge Hand’s attempt, courts are still inconsistent in their use of “expression” or “idea.”⁸² In fact, the distinction between expression and idea is practically nonexistent because of the circularity in which they are defined.⁸³ “Expression” may refer to any and all incorporation of an idea or it can refer only to protectable ideas.⁸⁴ “Idea” is often defined in relation to an “expression.”⁸⁵ Just like ambiguity present in what music is “pleasing” and therefore more likely to be protected, the ambiguity of idea versus expression is also prone to the influence of the trier of fact’s natural values and preferences.

Even if courts were consistent in their use of “expression” and “idea,” the prime issue that Jones brings to the forefront is the notion that an “idea cannot exist apart from some expression.”⁸⁶ In simple terms, the moment a person has an idea, it is already expressed as a

⁸⁰ 17 U.S. Code § 102 (b).

⁸¹ Jones, “The Myth of the Idea Expression/Dichotomy in Copyright Law,” 552.

⁸² *Ibid.*, 567.

⁸³ Edward Samuels, “The Idea-Expression Dichotomy in Copyright Law,” 371 at footnote 230. Citing Robert Libott, “Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World,” 14 *University of California Los Angeles Law Review*. 735 (1967): 737-743.

⁸⁴ Jones, “The Myth of the Idea Expression/Dichotomy in Copyright Law,” 567.

⁸⁵ Edward Samuels, “The Idea-Expression Dichotomy in Copyright Law,” 371 at footnote 230. Citing Robert Libott, “Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World,” 14 *University of California Los Angeles Law Review*. 735 (1967): 737-743.

⁸⁶ Jones, “The Myth of the Idea Expression/Dichotomy in Copyright Law,” 552.

human conception.⁸⁷ An example that Jones uses to illustrate the problem is in writing. Jones asserts that the substance or central message of a writing cannot be changed without inevitably changing the form of the writing because “the form does not add something to an idea existing independently of all expression.”⁸⁸ For example, titles, slogans, and catch phrases are typically viewed as “ideas” by courts and therefore unprotectable; yet these objects are expression since they are formed from tangible words.⁸⁹

C. *Blurred Lines*

As the *Blurred Lines* case took place in California, it fell under the jurisdiction of the Ninth Circuit, which applies the *Krofft* test in copyright cases.⁹⁰ During the court proceedings, Judith Finell,⁹¹ the Gaye family’s expert witness, submitted a preliminary report that outlined eight similarities between the two works and why she thought there was substantial similarity between “Blurred Lines” and “Got to Give It Up.”⁹² These features are:⁹³

1. signature phrase in main vocal melodies.
2. hooks.
3. hooks with backup vocals.
4. core theme, or “Theme X.”

⁸⁷ *Ibid.*, 564

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 569.

⁹⁰ *Williams v. Bridgeport Music, Inc.*, (C.D. Cal. Dec. 2, 2015); *Williams v. Bridgeport Music, Inc.*, (C.D. Cal. Aug 15, 2013); *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240.

⁹¹ Judith Finell is a musicologist and is the president of a music consulting firm in New York. Finell has consulted in music copyright litigation as well as testified as an expert witness for over twenty years.

⁹² *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, 8. Of the eight points of similarity, points 3, 4, 5, 7, 8, and partially point 6 were disregarded because they do not appear on the deposit copy lead sheet.

⁹³ *Ibid.*

5. backup hooks.
6. bass melodies.
7. keyboard parts.
8. unusual percussion choices.

The expert on Williams' side, Sandy Wilbur,⁹⁴ submitted a 55-page declaration that included a comparative analysis of the songs in question as well as a critique of Finell's preliminary report.⁹⁵ One of Wilbur's criticisms was that "Finell's 'eight similarities are primary melodic,' but '[t]here are not two consecutive notes in any of the melodic examples in the Finell report that have the same pitch, the same duration, and the same placement in the measure.'"⁹⁶ Wilbur also wrote that many of the similarities that Finell had found were unoriginal and were found in many songs prior to the two works in question. A declaration by Ingrid Monson,⁹⁷ another expert fielded by the Gaye family as well as a follow-up declaration by Finell critiqued Wilbur's statements in turn.⁹⁸ Monson disagreed that several works that Wilbur had claimed were prior art had much in common with "Got to Give it up."⁹⁹ Finell, on the other hand, rebuked Wilbur, stating that her analysis was equivalent to "deconstruct[ing] and microscopically dissect[ing] the individual similar features in isolation, outside the context of the entire work."¹⁰⁰

⁹⁴ Sandy Wilbur is a musicologist educated at Yale and U.C. Berkeley. Wilbur has consulted in music copyright litigation for over twenty years.

⁹⁵ *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, 8.

⁹⁶ *Ibid.*

⁹⁷ Ingrid Monson is Quincy Jones Professor of African American Music at Harvard.

⁹⁸ *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, 8-9.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, 9.

One instance of substantial similarity asserted by Finell is the sharing of a signature phrase.¹⁰¹ In her initial report, Finell described five points of similarity between the two signature phrases. These are:¹⁰²

1. Both repeat their starting tone several times.
2. Both contain the identical scale degree sequence of 5-6-1 followed by 1-5. Finell defines a “scale degree” as “the position in a particular scale of each tone,” and states that “[t]wo melodies containing a similar series of scale degrees with similar rhythms usually sound similar.”
3. Both contain identical rhythms for the first six tones.
4. Both use the same device of a melodic “tail” (melisma) on their last lyric, beginning with the scale degrees 1-5. Finell defines a “melisma” as “a vocal melody in which one syllable or lyric is held while sung with several successive pitches, rather than a single pitch for each syllable.”
5. Both contain substantially similar melodic contours (melodic outlines/design)

Finell also provided a transcription of the two phrases in question:

¹⁰¹ Ibid., 16.

¹⁰² Ibid.

Musical Example 1A: "Give It Up" Signature Phrase

5 5 5 5 6 1 2 1 5 6

I used to go out to parties

c (rhythms) d (melisma)

Musical Example 1B: "Blurred" Signature Phrase

3 3 #2 3 5 6 1 1 1 5 4 3

And that's why I'm gon' take a good girl

c (rhythms) d (melisma)

In her declaration, Wilbur stated that she found no similarities between the signature phrases transcribed by Finell, stating that only one note in both phrases has the same pitch and placement.¹⁰³ Finell fought back by arguing that Wilbur was taking a literal approach in her methodology and that she “fails to consider the overall role of the signature phrase in the songs.”¹⁰⁴ Which expert is correct?

Judith Finell used a variety of techniques, one of which is akin to Schenkerian analysis, to assert the existence of substantial similarity in the two signature phrases. Schenkerian analysis is an investigative technique that is accepted, taught, and used in today’s academic circles.¹⁰⁵ In using Schenkerian analysis, a musician can purportedly distill a piece of music into its purest form harmonically and melodically.¹⁰⁶ Schenkerian analysis is based on finding tones of elaboration based on a pre-established hierarchy of levels and gradually removing them, leaving

¹⁰³ Ibid., 17.

¹⁰⁴ Ibid., 18.

¹⁰⁵ Cristobal L. Garcia Gallardo, "Schenkerian Analysis and Popular Music," *TRANS-Transcultural Music Review* 5 (2000), Accessed April 16, 2017, <http://www.sibetrans.com/trans/articulo/240/schenkerian-analysis-and-popular-music>.

¹⁰⁶ Ibid.

only the bare essence of the piece. In Paul Grinvalsky's¹⁰⁷ words from his 1991 *California Western Law Review* article, "the resulting visual aid, preserves a generalized statement of what the piece is about (the idea) upon which the composer articulated his particular elaboration (the treatment or expression of the idea)."¹⁰⁸ Schenkerian analysis creates a series of abstractions almost exactly like Judge Learned Hand's abstraction test. An example of Schenkerian analysis is shown below:¹⁰⁹

Example 7

a. Menuett I from J.S. Bach's *Partita* for keyboard in B flat major, mm. 1–8



b. A reduction of 7a



The investigation done regarding 'b' found in Example 1A about the signature phrase by Finell is not Schenkerian but it is based on a similar process of reducing and eliminating extraneous information as stated during the second day of trial proceedings.¹¹⁰ This picking and

¹⁰⁷ Paul Grinvalsky is part of a law firm in San Diego that takes intellectual property cases, among others.

¹⁰⁸ Paul M. Grinvalsky, "Idea-Expression in Musical Analysis and the Role of the Intended Audience," 416.

¹⁰⁹ Jason Yust, "Voice-Leading Transformation and Generative Theories of Tonal Structure," *Music Theory Online* 21 (2015), Accessed March 27, 2017, <http://www.mtosmt.org/issues/mto.15.21.4/mto.15.21.4.yust.html>.

¹¹⁰ "Blurred Lines Trial - Transcript Exhibit A-F," *Williams v. Bridgeport Music, Inc.*, February 25, 2015, 76-79, accessed September 22, 2016 <https://www.scribd.com/doc/259730573/Blurred-Lines-Trial-transcript-Exs-A-F>. "Part of my training is to understand what are the most important notes in a melody and which are less important. There's a kind of hierarchy in music. So the most important notes we often refer to as target notes. They're the main notes... I look at them but if they differ and all the target notes are similar, then I still would consider that possibly quite similar." It should be noted that the trial proceedings happened after the declarations submitted by the expert witnesses. The quote from the trial proceeding is used because it details Finell's analytic approach which

choosing of notes can be seen in the second point of similarity, that Finell identifies as ‘b’, which is that both songs contain an identical sequence of scale degrees of 5-6-1 followed by 1-5. Scale degree 2, which is placed squarely between the 5-6-1 and 1-5 sequence in “Got to Give It Up” is glossed over by Finell and thus not mentioned in her points of similarity.¹¹¹ This could be because scale degree 2 is a dissonant note starting on a weak beat of the measure, therefore lowering its significance. One problem with ignoring the scale degree 2 in Musical Example 1A (“Got to Give It Up”) is that it could imply dominant harmony leading into the second measure; dominant harmony is not implied in Musical Example 1B (“Blurred”). Finell also overlooks the fact that both segments begin on different scale degrees, with “Got to Give It Up” starting on scale degree 5 and “Blurred Lines” starting on scale degree 3. Differences in scale degrees are usually seen as significant in music especially if focusing only on the melodic aspect of the music.

Another instance where scale degree matters is in the melisma. In “Blurred Lines,” the melisma is written using scale degrees 1, 5, 4, and 3. This melisma is essentially an arpeggiation of the tonic triad that is filled using scale degree 4. While it the melisma in “Got to Give It Up” does start with and share scale degrees 1 and 5 with the melisma in “Blurred Lines,” the presence of scale degree 6 at the end makes it more harmonically ambiguous. Moreover, the melodic contour is different in the melismas; the melisma in “Got to Give It Up” has a down and up

presumably did not change between the time of the declaration and the time of the court proceeding. The next footnote also shows that arguments made in the declaration are being examined during the trial.

¹¹¹ “Blurred Lines Trial - transcript Exhibit G”, *Williams v. Bridgeport Music, Inc.*, 79, February 26, 2015, accessed September 22, 2016, <https://www.scribd.com/document/259730552/Blurred-Lines-Trial-transcript-Exhibit-G-pdf/>. Finell does not mention the sixth note in “Got to Give It Up.”

“Q. In your opinion, are the notes being sung in those two phrases identical?”

A. Out of the six notes, five are identical, yes.

Q. And the sixth note?

A. The sixth one is just a repeat of one of the other five identical notes in the case of Blurred Lines.

Q. Okay. With respect to the signature phrases....”

motion while the melisma in “Blurred Lines” only has a downward motion. The differences in analysis rest on what level of detail the experts use. In this case, Finell only wrote about the scale degree similarities between two melismas in the signature phrase.

At what level of detail should an expert look at the melodic contour? Similar to the previous point, the similarity is dependent on the level of abstraction or detail that is used. For example, Finell claimed that the phrase in both pieces contained substantially similar melodic contours. If the level of abstraction in determining the contour is defined as “does the melody end on a higher or lower note than it started?” then Finell would be correct that the melodic contour of the first six notes is similar. If the level of abstraction used is slightly more detailed and is defined as “does the melody end on a higher or lower than it started, and where is the middle note in relation to the first and last note of the melodic sequence?” then Finell’s argument about the substantial similarity of the melodic contours would be much weaker. A more detailed look at the signature phrase that makes a distinction between the contour of the section labeled ‘c’ in example 1 and the contour of melisma labeled ‘d’ would note the differences mentioned above.

The second point regarding the hook that Finell made also points to the difference in levels of examination that experts can make. Finell defined a hook as “the most important melodic material of the work, that which becomes the memorable melody by which the song is recognized.”¹¹² In the example shown below, Finell asserts that because three of the four notes in the hook are the same scale degrees, they are substantially similar:¹¹³

¹¹² *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, 18.

¹¹³ *Ibid.*, 18-19.

Musical Example 2A: "Give It Up" Hook

3:12

Keep on dan - in'

Musical Example 2B: "Blurred" Hook

:49

take a good girl

However, the example submitted by Wilbur paints a completely different picture. As shown below, Finell chose to disregard the metric placement of the signature hooks—a difference that can completely change how it sounds.¹¹⁴ Wilbur also correctly notes that the omission of the melisma following the hook in “Blurred Lines” can give a misleading impression of similarity.¹¹⁵ Finally, as Wilbur highlights, the only unique note in the four-note hook, scale degree 2, that Finell conjured, is actually significant because it adds tension to the hook.¹¹⁶

Musical Example 2a: "Give it Up" Hook

Give it Up

3:12

keep on dan - in'

Musical Example 2b: "Blurred" Hook

Blurred

0:49

take a good girl

¹¹⁴ This is a point that marks ambiguity of the idea-expression dichotomy. While what Finell did is misleading on an “objective” level, in which the metric placement of the hooks is different, it is *important* because of difference in the audible impact changing the metrical placement creates. This difference in hearing is what courts try to determine in the “intrinsic” prong of the infringement test.

¹¹⁵ *Ibid.*, 19.

¹¹⁶ *Ibid.*

The kind of analysis that Finell and Wilbur did is in accordance with the idea-expression dichotomy. Within this context, experts try to reveal the “true” essence of the songs they are tasked to analyze. The main area of contention between the experts of each side as illustrated in *Blurred Lines* was implicitly a debate on what level of abstraction and detail the works should be looked at.¹¹⁷ However, the kind of analysis allowed by the idea-expression dichotomy, in which chopped-up pieces of music can be served without context, allows experts to cook up a medley of misleading statements. This opens the door for Finell and other experts to insert their own biases and preferences into what the core of the work is, making the extrinsic, “objective” portion of the test, just another test of subjectivity.

IV. Conclusion

Ultimately, the court ruled in favor of the Gaye family, setting a precedent that has been viewed as having the potential to stifle creativity in the arts.¹¹⁸ Just as Jones foresaw, the judgement was “not clarified by introducing the jargon of the idea-expression dichotomy.”¹¹⁹ Not once in the declarations submitted by experts in the court proceedings did any expert mention whether the parts that were identified as substantially similar were creative or original—the judge who read the declarations did not mention them in his opinion.

¹¹⁷ *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, 18, 22.

¹¹⁸ Tim Wu, “Why the “*Blurred Lines*” Case Should be Thrown Out,” *The New Yorker*, accessed March 27, 2017, <http://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out>; Brief of 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants as Amicus Curiae, *Williams v. Bridgeport Music, Inc.*, Undecided; Ben Sasario & Noah Smith, ““Blurred Lines’ Infringed on Martin Gaye’s Copyright,” *New York Times*, accessed March 27, 2017, https://www.nytimes.com/2015/03/11/business/media/blurred-lines-infringed-on-marvin-gaye-copyright-jury-rules.html?_r=0.

¹¹⁹ Jones, “The Myth of the Idea/Expression Dichotomy in Copyright law,” 605.

Jones asserted that the only relevant elements in an infringement case are already included.¹²⁰ These elements: creativity and originality are already part of a formula for striking similarity theorized by John Autry in his 2002 *Journal of Intellectual Property Law* article.¹²¹ Based on his findings, Autry's criteria on what similarity means are creativity and identity.¹²² Furthermore, the distinguishing factor between striking similarity and substantial similarity is quantity.¹²³ If courts were simply able to sick the hounds (experts) on tangible elements of the music instead of having them hare off to abstract-la-la-land, controversial results like in *Blurred Lines* may not have occurred. It is true that in musical terms, Finell would have had to try to include additional material based on the recording that was not found in the lead sheet deposit copy. However, current copyright deposit requirements are much more stringent, preferring a full score of a musical work versus a lead sheet or even a sound recording.¹²⁴ With higher quality scores instead of lead sheets to argue an infringement case from, there would be fewer opportunities for experts to interpret and thus potentially manufacture evidence that may not be legitimate, leading to fairer results.

¹²⁰ Ibid., 590-92.

¹²¹ Autry, "Towards a Definition of Striking Similarity," 130-131. In this article, Autry attempted to pinpoint the criteria for striking similarity, a form of similarity in which more shared elements are found than substantial similarity in copyright cases. Autry even states that comparing the mood of two works is a counterproductive strategy because courts generally cannot separate idea from the expression of the idea in the first place

¹²² Ibid., 140. Creativity is the degree of originality in the "older" work. Identity is exact likeness e.g. if there is close identity between two works, then they have nearly identical passages.

¹²³ Ibid.

¹²⁴ "Copyright Registration for Musical Compositions," *United States Copyright Office*, accessed March 27, 2017, <https://www.copyright.gov/circs/circ50.pdf>.

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