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## Reflections on Music Copyright Justice

Peter S. Menell

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# Reflections on Music Copyright Justice

Peter S. Menell\*

## *Abstract*

*The digital revolution has upended many aspects of the copyright system, particularly as it relates to music. Drawing on creative, jurisprudential, technological, and social science insights, this article explores the broad range of music copyright justice concerns, ranging from file sharing to royalty distribution, copyright infringement standards, and the creation of music mashups.*

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## I. INTRODUCTION

I am honored to open this timely conference featuring scholars, judges, musicians, and practitioners exploring unresolved issues in music copyright law.<sup>1</sup> My goal in these opening remarks is to synthesize creative, jurisprudential, technological, and social science insights to sketch a framework for music copyright justice.

We are all the product of life experience and influences. To understand my perspective on copyright justice, you need to know a bit about my journey and those who inspired me. I have a vivid memory of hearing the Torah portion from the *Book of Judges* in my youth: “Justice, justice shall you pursue.”<sup>2</sup> Justice Ginsburg displayed this powerful message outside of her chambers.<sup>3</sup>

Like many adolescents growing up in the late 1960s, I struggled to make sense of the world around me. Let me take you back through the time tunnel<sup>4</sup> to meet a very confused adolescent me. Having been pushed ahead a year in school, I experienced elementary and middle school as the smallest kid in my grade. One of the ways that I dealt with that confusion was by receding into my bedroom and listening to music. I was drawn during my early youth to Tommy, the deaf, dumb, and blind boy featured in The Who’s 1969 rock opera.<sup>5</sup> I could relate to being shy, overlooked, and invisible. A few years later, *Who’s Next* was an epiphany.<sup>6</sup> *Baba O’Riley*’s insistent keyboard and lyrical phrase “teenage wasteland” deeply resonated with my personal experience.<sup>7</sup> *Won’t Get Fooled Again* spoke to the confusion in the larger world:

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1. See *Law Review Symposium Hindsight is 2020: A Look at Unresolved Issues in Music Copyright Law*, PEPP. CARUSO SCH. OF L. (Feb. 26, 2021), <https://law.pepperdine.edu/law-review/symposium/>.

2. See *Shofetim (parashah)*, *Deuteronomy* 16:20, WIKIPEDIA, [https://en.wikipedia.org/wiki/Shofetim\\_\(parashah\)](https://en.wikipedia.org/wiki/Shofetim_(parashah)) (last visited Feb. 17, 2022).

3. See Eduardo M. Peñalver, *Peñalver: Justice, Justice Shall You Pursue—Remembering Justice Ruth Bader Ginsburg ’54*, CORNELL CHRON. (Sept. 21, 2020), <https://news.cornell.edu/stories/2020/09/penalver-justice-justice-shall-you-pursue-remembering-justice-ruth-bader-ginsburg>.

4. See *The Time Tunnel*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Time\\_Tunnel](https://en.wikipedia.org/wiki/The_Time_Tunnel) (last visited Feb. 17, 2022). From 1966 to 1967, Irwin Allen created and produced *The Time Tunnel*, a science fiction television series in which a team of scientists and doctors travel through a time machine. *Id.* Perhaps appropriately for today’s lecture, the name of the experimental apparatus was Project Tic-Toc. *Id.*

5. See *Tommy (The Who album)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tommy\\_\(The\\_Who\\_album\)](https://en.wikipedia.org/wiki/Tommy_(The_Who_album)) (last visited Feb. 17, 2022).

6. See *Who’s Next*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Who%27s\\_Next](https://en.wikipedia.org/wiki/Who%27s_Next) (last visited Feb. 17, 2022).

7. See *Baba O’Riley*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Baba\\_O%27Riley](https://en.wikipedia.org/wiki/Baba_O%27Riley) (Feb. 14, 2022).

environmental degradation, anti-war protests, and political corruption.<sup>8</sup> Pete Townshend's rebellious guitar licks and Roger Daltrey's ear-splitting scream—the greatest in rock 'n' roll history—punctuated the Vietnam and Watergate eras and informed my political values.<sup>9</sup> Two years later, The Who released *Quadrophenia*, their second rock opera.<sup>10</sup> It could not have emerged at a more appropriate time in my own development. I had finally experienced a growth spurt and was trying to find my way through the social cliques of high school. The multiple narratives of *Quadrophenia* captured the different voices in my head and the confusion of the awkward teenage experience. Pete Townshend seemed to understand what I was dealing with. Rebellious rock 'n' roll music spoke to *My Generation*<sup>11</sup>—fueling our innate adolescent desire to question authority and think independently.

Gene Roddenberry, the visionary behind the original *Star Trek* series, also shaped my values and helped me to discover my path. The voyages of the Starship Enterprise—"to boldly go where no [hu]man has gone before"—inspired my interest in science and technology and profoundly influenced my social values.<sup>12</sup> "The show had an idealistic, '60s counterculture mind-set, imagining a 23rd-century world in which humans had outgrown war and

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8. See *Won't Get Fooled Again*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Won%27t\\_Get\\_Fooled\\_Again](https://en.wikipedia.org/wiki/Won%27t_Get_Fooled_Again) (last visited Feb. 17, 2022).

9. See *Pete Townshend*, THE WHO, <https://www.thewho.com/pete-townshend/> (last visited Feb. 17, 2022); *Roger Daltrey*, THE WHO, <https://www.thewho.com/roger-daltrey> (last visited Feb. 17, 2022).

10. See *Quadrophenia*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Quadrophenia> (last visited Feb. 17, 2022).

11. *My Generation* is the title of The Who's classic 1965 anthem. See *My Generation (album)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/My\\_Generation\\_\(album\)](https://en.wikipedia.org/wiki/My_Generation_(album)) (last visited Feb. 17, 2022). It was named the eleventh greatest song of all time by *Rolling Stone* magazine. *Id.*

12. As I would later discover, Martin Luther King Jr. was a dedicated Trekkie, and he and Coretta Scott King approved of his daughters watching the show because of its diverse cast and harmonious portrayal of race and geopolitical relations. See Lily Rothman, *Why Martin Luther King Jr. Loved Star Trek*, TIME (Sept. 7, 2016, 12:00 PM), <https://time.com/4478354/martin-luther-king-star-trek> When Dr. King became aware that Nichelle Nichols, the African-American actress who played the third in command on the USS Enterprise, was leaving the show, he implored her to remain:

I am the biggest Trekkie on the planet, and I am lieutenant Uhura's most ardent fan . . . . Do you not understand what God has given you? . . . You have the first important non-traditional role, non-stereotypical role. . . . You cannot abdicate your position. You are changing the minds of people across the world, because for the first time, through you, we see ourselves and what can be.

See *Nichelle Nichols*, PBS, <http://www.pbs.org/wnet/pioneers-of-television/pioneering-people/nichelle-nichols/> (last visited Feb. 17, 2022); see also Abby Ohlheiser, *How Martin Luther King Jr. Convinced 'Star Trek's' Lt. Uhura To Stay on the Show*, WASH. POST (July 31, 2015), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/07/31/how-martin-luther-king-jr-convinced-star-treks-uhura-to-stay-on-the-show/>.

prejudice.”<sup>13</sup> Roddenberry understood that copyright could serve as a transporter, and his storytelling transported me and countless others to a deeper understanding of the meaning of life.

Columbia House Record Club was my gateway drug to music addiction. I learned that I could get all sorts of great music by spending a dollar joining the club, buying one record, and quitting the club and rejoining and getting another five albums. I remember my mother’s shock when the first large package of records arrived while I was at school. When I came home that day, she was very angry. “What did you do? Where are we going to get the money for all these records?” And I said, “No, they’re almost free.” She didn’t believe me, but in fact, it was true. I later learned that it was inexpensive in part because the record clubs did not always compensate the artists appropriately. But for me, this was the opening into this great world.

The record clubs vastly expanded my record collection, exposing me to other talented musical composers and recording artists: from Led Zeppelin to The James Gang and Bruce Springsteen.<sup>14</sup> My love of rock ‘n’ roll inspired interest in recording and stereo technology and, ultimately, computers. I learned electronics through building amplifiers and audio speakers. And I can now say, thanks to copyright law’s statute of limitations,<sup>15</sup> I produced many mixtapes for myself and friends.

As a small kid who could not easily compete on the most physically demanding sports teams,<sup>16</sup> I found a home in my high school’s primitive computer lab, learning to program computers with punch cards. Combining recording and computer skills, I collaborated with a high school buddy who was

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13. See Richard Zoglin, *A Bold Vision: How Star Trek First Made It to the Screen*, TIME (July 21, 2016, 8:30 AM), <https://time.com/4406710/star-trek-history-excerpt/>. The show confronted contemporary social issues through clever plot twists. In an episode entitled *Let That Be Your Last Battlefield*, for example, the Enterprise crew encountered a planet in which the inhabitants’ bodies were half black and half white, but half of the population was black on their left side, and half were black on their right side. See *Let That Be Your Last Battlefield*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Let\\_That\\_Be\\_Your\\_Last\\_Battlefield](https://en.wikipedia.org/wiki/Let_That_Be_Your_Last_Battlefield) (last visited Feb. 14, 2022). The two groups harbored deep hatred toward each other. Roddenberry used this device to illustrate the senselessness of racial division. As Roddenberry observed, “Television was so tightly censored that science fiction was the only way to escape the taboos in politics, religion or anything else that was controversial.” See Zoglin, *supra*.

14. See *Bruce Springsteen*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Bruce\\_Springsteen](https://en.wikipedia.org/wiki/Bruce_Springsteen) (last visited Feb. 17, 2022); *James Gang*, WIKIPEDIA, [https://en.wikipedia.org/wiki/James\\_Gang](https://en.wikipedia.org/wiki/James_Gang) (last visited Feb. 28, 2022); *Led Zeppelin*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Led\\_Zeppelin](https://en.wikipedia.org/wiki/Led_Zeppelin) (last visited Feb. 17, 2022).

15. See 17 U.S.C. § 507.

16. Although my aspiration to play for the New York Knickerbockers never materialized, I did become a good ping pong player.

an avid photographer to mix the soundtrack for a multimedia slideshow. While such projects are routine today, it was pathbreaking in 1986. We used a primitive computer that allowed us to synchronize the soundtrack with dissolve commands for an array of six slide projectors. It was magical and delighted the hundreds of students, parents, and teachers.

These interests expanded and evolved during the next phase of my life. Just as I was heading off to college, a new band out of Boston released its debut album.<sup>17</sup> It would go on to break the sales records for debut records. *More than a Feeling*<sup>18</sup> filled the radio airwaves. It was engineered to perfection. And in fact, Tom Scholz, an MIT graduate who was working at Polaroid as an engineer, was responsible for the band's record-shattering debut album.<sup>19</sup> He brought an engineer's precision to the crafting of rock 'n' roll music during his spare time.

MIT also served me well. I was smitten with technology, public policy, and the academic world. I set off to pursue a Ph.D. in economics at Stanford and a law degree at Harvard, where my computer programming curiosity led to new discoveries. I became frustrated using a central campus mainframe computer to print symbolic notation. I often bicycled across campus to retrieve printouts from the computer center laser printer only to find "SYNTAX ERROR" printed across the wide sheets of paper. In 1981, IBM introduced its "Personal Computer" (or "PC").<sup>20</sup> The following year I learned that XyWrite,<sup>21</sup> a computer program designed to run on the IBM PC, could encode symbolic notation that could be printed on a dot matrix printer attached to a PC at your own desktop. Unfortunately, the IBM PC cost \$3,000, which was well beyond my graduate-student stipend. From perusing computer hobbyist magazines, however, I learned that most of the components—the monitor, disk drives, and peripheral devices—for the IBM PC were available for a relatively low cost. But without the IBM PC motherboard, there was no way to run XyWrite.

Fortunately, IBM introduced a university sales promotion around that time that enabled students to purchase the PC chassis and motherboard at a

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17. See *Boston (band)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Boston\\_\(band\)](https://en.wikipedia.org/wiki/Boston_(band)) (last visited Feb. 17, 2022).

18. See *More Than a Feeling*, WIKIPEDIA, [https://en.wikipedia.org/wiki/More\\_Than\\_a\\_Feeling](https://en.wikipedia.org/wiki/More_Than_a_Feeling) (last visited Feb. 17, 2022).

19. See *Tom Scholz*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tom\\_Scholz](https://en.wikipedia.org/wiki/Tom_Scholz) (last visited Feb. 17, 2022).

20. See *IBM Personal Computer*, WIKIPEDIA, [https://en.wikipedia.org/wiki/IBM\\_Personal\\_Computer](https://en.wikipedia.org/wiki/IBM_Personal_Computer) (last visited Feb. 17, 2022).

21. See *XyWrite*, WIKIPEDIA, <https://en.wikipedia.org/wiki/XyWrite> (last visited Feb. 17, 2022).

substantial discount. By obtaining the peripheral components directly from the manufacturers, I was able to assemble a fully functioning IBM PC for about \$1,500. Although still a lot of money, it was well worth the investment as a research tool and, more importantly, a research puzzle: How was IBM able to charge so much for a system largely comprised of components that cost just a fraction of the total price? Answering that question led me to intellectual property law.<sup>22</sup>

I met then-Judge, later Justice, Stephen Breyer in a seminar on law and public policy. Drawing on economic analysis and understanding of computer technology, I brought economic research on network effects together with the more traditional public goods problem animating intellectual property protection to develop a coherent framework for tailoring legal protection for computer software.<sup>23</sup> After a clerkship with Judge Jon O. Newman, another wise appellate judge with a deep interest in copyright law,<sup>24</sup> I entered the legal academy.

Soon after arriving at the University of California at Berkeley School of Law in 1990, I hatched the idea of developing a center on law and technology. The work that I had done on software was gaining traction in the courts as the first software copyright war unfolded.<sup>25</sup> The battle made its way to the U.S. Supreme Court in *Lotus v. Borland*, but ended with a whimper.<sup>26</sup> After the dust settled, I memorialized the death of copyright protection for the network features of computer software but not copyright protection in its entirety<sup>27</sup>—or at least, so we thought.<sup>28</sup> I was seen as a progressive force in the copyright

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22. See Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1330, 1345, n.147, 1362 (1987).

23. See *id.*; Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Applications Programs*, 41 STAN. L. REV. 1045 (1989).

24. See *Jon O. Newman*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jon\\_O.\\_Newman](https://en.wikipedia.org/wiki/Jon_O._Newman) (last visited Feb. 15, 2022); JON O. NEWMAN, *BENCHED: ABORTION, TERRORISTS, DRONES, CROOKS, SUPREME COURT, KENNEDY, NIXON, DEMI MOORE, AND OTHER TALES FROM THE LIFE OF A FEDERAL JUDGE* (2017); *Judge Jon O. Newman: A Symposium Celebrating His Thirty Years on the Federal Bench and an Occasion To Reflect on the Future of Copyright, Federal Jurisdiction, and International Law*, 46 N.Y.L. SCH. L. REV., no.1–2, 2002–2003.

25. See *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1025 (N.D. Cal. 1993); *Computer Associates International v. Altai, Inc.*, 982 F.2d 693, 697, 698, 705, 708, 712 (2d Cir. 1992).

26. See *Lotus Development Corp. v. Borland Intern., Inc.*, 516 U.S. 233 (1996) (affirming the First Circuit's decision with an equally divided Court).

27. See Peter S. Menell, *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, 43 ANTITRUST BULL. 651 (1998).

28. Oracle would later bring the API copyright dead back to life in 2010. See Peter S. Menell, *Rise of the API Copyright Dead: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software*, 31 HARV. J.L. & TECH. 305 (2018). More than a decade later,



field, bringing balanced analysis of computer technology economics and copyright law to bear on promoting progress.

Meanwhile, another digital copyright war was just beginning to unfold: the battle over digital piracy. And with the Berkeley Center for Law and Technology (BCLT) established by 1995, we were well-placed to take on those challenges. Around that time, a new constituency came to my door. Students wanted to study entertainment law. In my role as BCLT's Executive Director, I asked my colleagues, "Is anyone interested in teaching about the entertainment industries?," and no one volunteered. I thought, "I know a lot about copyright protection for computer software. This seems like a promising area for me to explore." I sought out people in the law and entertainment industries and discovered many knowledgeable and generous teachers. Before long, they were inviting me to participate in conferences and consulting projects and even to serve as a litigation consultant and expert witness in entertainment law matters.

I came to understand how entertainment industries were similar to and different from technology industries. It was all economics and technology, and the technology was changing rapidly. I resisted the academic tidal wave questioning the role of copyright protection for traditional media—books, music, and film—in the Digital Age.<sup>29</sup> There was reason to be cautious about how copyright would apply on the Internet. And even as the legal academy jumped headfirst into the "disruption is always good" camp, I held back. Even though the costs of distribution were falling, great content still required talent and investment. What institutions would support future Townshends, Roddenberrys, and other inspirational creative artists?

Drawing on this background, I will focus my remarks on music copyright justice for the Internet Age. There are four principal buckets: (1) full track distribution justice; (2) royalty distribution justice; (3) inspiration/infringement justice; and (4) mashup justice.

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the Supreme Court rendered a more definitive ruling on copyright protection and interoperability, with Justice Breyer writing for the majority. *See* Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021).

29. *See* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002); JESSICA D. LITMAN, DIGITAL COPYRIGHT (2001).

## II. FULL TRACK DISTRIBUTION JUSTICE

Before 1999, record stores were the primary distribution model for recorded music. In July 1999, that suddenly changed. Napster empowered individuals to share files rapidly, relatively anonymously, and without degradation.<sup>30</sup> Napster's viral spread abruptly brought concern about digital piracy to center stage in the music industry. Students in my spring 2000 intellectual property class were enthralled with this technology, and 17-year-old me would have loved it as much or more than they did.

And I had another challenge at home. Our kids were seven and ten years old. It was time for the "big talk." For IP law professors, since Napster, it begins with file sharing.

The years between my coming of age and 1999 helped me to appreciate that free is not necessarily the best price for creative works. Shortly after Napster's launch, there was a massive drop in record sales that could only be attributed to viral distribution made possible by file sharing technology.<sup>31</sup> While the widespread availability of sound recordings offered consumers short-run benefits—near instantaneous access to a universal music catalog—it undermined the ecosystem that supported and motivated artists to create new musical works and sound recordings. And with advances in bandwidth and file storage capacity, peer-to-peer technology would soon be capable of sharing feature-length motion pictures and television shows.<sup>32</sup>

Steve Jobs partially came to the rescue. For that holiday season, the kids got iPods and a weekly allowance in iTunes. So, everyone was happy. I narrowly avoided a generational rift, but there were other crises looming on the professional front.

My left brain—the analytical side—was concerned about the effect of copyright protection on technological innovation. Software didn't fit well into the copyright regime.<sup>33</sup> But my right brain—the imagination side—was

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30. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 99–100, 108–18 (2003).

31. See Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1 (2006) (concluding that the empirical evidence shows that file sharing caused a precipitous drop in record sales).

32. See Jennifer L. Schenker, *Internet Piracy of Movies Makes Big Leap Worldwide*, N.Y. TIMES (July 10, 2004), <https://www.nytimes.com/2004/07/10/business/worldbusiness/internet-piracy-of-movies-makes-big-leap-worldwide.html>.

33. See *Tailoring Legal Protection for Computer Software*, *supra* note 22, at 1329 ("It became evident by the mid-1970s that intellectual work embodied in new technologies—in particular, computer software—did not fit neatly within the traditional forms of legal protection for intellectual property."); *An Analysis of the Scope of Copyright Protection for Applications Programs*, *supra* note 23,

thinking about Pete Townshend, Gene Roddenberry, and other great creative artists. Could they have pursued their art without effective protection for copyrighted works? And what would happen in a world in which everything could be freely shared?

Unlike interoperability in the software copyright realm, which promoted innovation and long-term consumer benefits,<sup>34</sup> file sharing technology posed an existential threat to artistic creativity. Although Silicon Valley saw the issue as “freedom to tinker,” the adverse effects on creators and consumers were dire. As Moore’s Law expanded storage capacity and file-transfer speed, the ability to protect copyrighted works would vanish.<sup>35</sup> That was already occurring in the music field and would soon spread to film and other creative works. Copyright law needed to be enforceable on the Internet in order to promote progress in the creative arts.<sup>36</sup> This would serve the long-term interests of not only Hollywood but also Silicon Valley. I concluded that symbiosis, not a massive piracy loophole, was key to promoting technological and creative progress.<sup>37</sup>

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at 1046 (“Computer software, by its very nature as written work intended to serve utilitarian purposes, defies easy categorization within our intellectual property system.”).

34. See Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, 34 BERKELEY TECH. L.J. 219, 225–35 (2019).

35. *Envisioning Copyright Law’s Digital Future*, *supra* note 30, at 114.

36. See B Brief of Professors Peter S. Menell, David Nimmer, Robert P. Merges, and Justin Hughes, as Amici Curiae in Support of Petitioners, *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3443074](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3443074) [hereinafter Brief in Support of MGM].

37. See Peter S. Menell, *Design for Symbiosis: Promoting More Harmonious Paths for Technological Innovators and Expressive Creators in the Internet Age*, 55 COMM’NS ACM, no. 5, 2012, at 30–32.

*A. File Sharing Justice*

Against the riptide of academic opinion,<sup>38</sup> I filed a brief in support of the petitioners in the *Grokster* case.<sup>39</sup> Although I had (and continue to have) concerns about how record labels treat recording artists and composers,<sup>40</sup> I concluded that effective copyright protection is vital to free expression, artistic creativity, and symbiotic technological innovation.<sup>41</sup> If enterprises like Grokster were immunized from indirect liability, then important creative industries would be incapacitated. And there would be little incentive for innovators to develop technological platforms that balance access and protection.

The Supreme Court's decision holding Grokster liable for copyright infringement<sup>42</sup> helped to avoid rampant music (and film) piracy and facilitated the growth of legitimate streaming services, thereby generating substantial investment in content creation. As I look back now, nearly twenty years later, my judgment has been vindicated. Had Grokster prevailed, it is unlikely that

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38. See Brief of Amici Curiae Sixty Intellectual Property and Technology Law Professors and the United States Public Policy Committee of the Association for Computing Machinery in Support of Respondents, *Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 508123; Brief of Amici Curiae Internet Law Faculty in Support of Respondents, *Grokster*, 545 U.S. 913 (No. 04-480); Brief of Professors Edward Lee, Peter Shane, and Peter Swire as Amici Curiae in Support of Respondents, *Grokster*, 545 U.S. 913 (No. 04-480); Brief of Amici Curiae Law Professors in Support of Respondents, *Grokster*, 545 U.S. 913 (No. 04-480); Brief of Media Studies Professors as Amici Curiae in Support of Respondents, *Grokster*, 545 U.S. 913 (No. 04-480); Brief of Amicus Curiae Charles Nesson in Support of Respondents, *Grokster*, 545 U.S. 913 (No. 04-480); Amicus Brief of Malla Pollack and Other Law Professors Supporting Grokster, Ltd. et al., *Grokster*, 545 U.S. 913 (No. 04-480); Brief Amici Curiae of Felix Oberholzer-Gee and Koleman Strumpf in Support of Respondents, *Grokster*, 545 U.S. 913 (No. 04-480); Brief Amici Curiae of Computer Science Professors Harold Abelson, Thomas Anderson, Andrew W. Appel, Steven M. Bellovin, Dan Boneh, David Clark, David J. Farber, Joan Feigenbaum, Edward W. Felten, Robert Harper, M. Frans Kaashoek, Brian Kernighan, Jennifer Rexford, John C. Reynolds, Aviel D. Rubin, Eugene H. Spafford and David S. Touretzky Suggesting Affirmance of the Judgment, *Grokster*, 545 U.S. 913 (No. 04-480).

39. See Brief in Support of MGM, *supra* note 36. Beyond the risks to the copyright system posed by immunizing Grokster and similarly piratical peer-to-peer platforms, these companies' technology could be and was deployed to enable anyone on the Internet to rifle through the files of peer-to-peer users, often with the users being aware of such vulnerability. This fueled identity theft and other serious privacy invasions.

40. See *infra* Part II.

41. See Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235 (2014); see Brief in Support of MGM, *supra* note 36, at 11 ("[I]n copyright law, technology serves as a means to the end of promoting creation and dissemination of works of authorship—art, music, literature, film, and other expressive works. Technology provides the platforms for instantiation, reproduction, and distribution on which creative expression flourishes and commerce occurs.").

42. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

Spotify, Netflix, and other symbiotic platforms could have thrived. And Silicon Valley has been aided, not hindered, by such symbiosis. It continues to thrive and is now focused on developing distribution platforms that respect copyright, partnering with content industries, and producing content.

Although the *Grokster* decision has proven to be generative of symbiotic technological innovation and expressive creativity, several copyright reforms could improve full track distribution justice.

### *B. Making Available Justice*

In the confusion surrounding online copyright enforcement following Napster's meteoric rise, several organizations and professors (including some who were serving as counsel to file sharing companies) advocated that content owners pursue direct enforcement actions against file sharers rather than the platforms.<sup>43</sup> After such cases were filed, the Electronic Frontier Foundation (EFF) advocated a narrow conception of the distribution right based on a strict textualist reading of the statute: "The distribution right encompasses only the distribution of certain things ('copies or phonorecords'), to certain people ('the public'), in certain ways ('by sale or other transfer of ownership, or by rental, lease, or lending')." <sup>44</sup> Thus, in EFF's view, the copyright owners must prove actual distribution to third parties.

As the 1976 Copyright Act's legislative history demonstrates, Congress fully intended to impose liability on those who publish or make available copyrightable works without authorization.<sup>45</sup> The Tenth Circuit Court of Appeals<sup>46</sup> and the Copyright Office concur,<sup>47</sup> but wooden textualists might not be persuaded.<sup>48</sup>

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43. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004). A lawyer for the Electronic Frontier Foundation (EFF), which lists promoting privacy among its goals, went so far as to question why copyright owners were not suing file sharers. See *This American Copyright Life*, *supra* note 41, at 256–59.

44. See Brief Amici Curiae of Electronic Frontier Foundation, Public Knowledge, United States Internet Industry Association, and Computer & Communications Industry Association in Support of Defendant Jammie Thomas at 6, *Capitol Records v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-1497); Amicus Curiae Brief of the Electronic Frontier Foundation in support of Defendant's motion to dismiss the complaint, *Elektra Ent. Grp. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (No. 05 CV7340), 2007 WL 5157743.

45. See Peter Menell, *In Search of Copyright's Lost Ark: Interpreting the Right To Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1 (2011).

46. See *Diversey v. Schmidly*, 738 F.3d 1196, 1202, 1202 n.7 (10th Cir. 2013).

47. See U.S. COPYRIGHT OFF., *THE MAKING AVAILABLE RIGHT IN THE UNITED STATES: A REPORT OF THE REGISTER OF COPYRIGHTS* (Feb. 2016).

48. See Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious*  
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Although Congress provided ample basis for interpreting the scope of copyright's distribution right, it is worthwhile to explore whether technological evolution or other considerations shed new light on the justice of a "making available" interpretation. If anything, the digital era's enhanced privacy concerns strengthen the justification for the making available right.

Operating under the premise underlying the Copyright Act that enforcement of copyright's exclusive rights generally promotes progress in the creative arts, there are strong reasons against requiring copyright owners to prove actual distribution to establish a violation of the distribution right. First, when the Foo Fighters, Eminem, Lady Gaga, or an emerging artist releases a sound recording, there is no valid reason for a fan to place the entirety of that work in a share folder accessible to the world at large if the copyright owners do not consent. The argument that such uploading constitutes "user generated content" is baseless. The argument that "sharing" allows "sampling" is without basis in today's Internet ecosystem. Potential fans can easily (and legally) sample music on subscription- or ad-supported platforms or authorized download websites, such as Spotify, Amazon Music, Pandora, cdbaby, YouTube, and Apple's iTunes store. Furthermore, interpreting the distribution requirement so as to ensnare those who put copyrighted works into share folders without authorization in no way limits the defenses to liability. File sharers would still be entitled to raise fair use or any other defense to liability.

Second, effective deterrence of unauthorized distribution promotes progress in the creative arts (as viewed by the drafters of the Copyright Act) by allowing creators to determine whether and how to commercialize their works. It can also provide the basis for investing in new composers, producers, and recording artists. When peer-to-peer technology emerged two decades ago, there was concern that the major record labels had not adequately rolled out digital distribution outlets. Whether or not the record labels were justified in their actions, there is little question that substantial digital catalog and digital distribution services—from untethered downloads to subscription—exist in the market today. These outlets, however, are hampered by having to compete with the peer-to-peer black market. Effective enforcement against those who share full-length copyrighted sound recordings will channel consumers into the marketplace for copyrighted works—increasing the ability of creators to appropriate a return to their efforts, competition, and incentives to develop improved dissemination technologies and platforms.

Third, imposition of an actual distribution requirement substantially

raises the costs of enforcement, jeopardizes users' privacy interests, and imposes substantial burdens upon judicial administration. The difficulty of proving that a work placed in a file-share folder was downloaded by a third party puts copyright owners in the difficult position of seeking discovery of the contents of many computer hard drives and Internet traffic. On the judicial side of the ledger, dispensing with an actual distribution requirement would mean that most file sharing cases could be resolved on summary judgment. This would allow the courts to manage these cases relatively easily. And if the copyright owners stipulated to the minimum statutory damage award level, damages could also be resolved on summary judgment. By imposing a requirement to prove actual distribution, the courts open up a vast array of discovery complexities and jury issues that do little to address the core problem: deterring unauthorized distribution of copyrighted works. Showing that a computer user has placed a copyrighted sound recording, motion picture, novel, or other work in a share folder that is accessible to the public without authorization should be sufficient to prove a *prima facie* violation of the distribution right.

Hence, putting aside the potential for disproportionate financial penalties—which merits serious attention<sup>49</sup>—there is no downside to holding those who place copyrighted works in file-share folders without authorization liable for copyright infringement. Requiring proof of actual distribution unduly raises the costs of enforcement and reduces the deterrent effects of copyright enforcement. Most importantly, discouraging unauthorized file sharing of copyrighted works would channel fans of such works into the marketplace, which increases the rewards available to creators. Although it might also force some fans further underground, it is difficult to see how making enforcement more effective could result in a net increase in losses from unauthorized distribution. With advances in dissemination platforms, greater competition, and expanded licensing by copyrighted owners, there is good reason to believe that deterrence of unauthorized file sharing will channel more fans into the marketplace.

### *C. Enforcement Justice*

The record industry's fears of cannibalizing their existing compact disc revenue streams through digital distribution initiatives, a lack of effective encryption technologies, antitrust concerns, and adverse consumer reactions to

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49. See *infra* Section II.C.

content protection measures sabotaged its transition to online commerce.<sup>50</sup> The record labels' first online services, MusicNet and Pressplay, were overly cautious and clumsy. They lacked the functionality and flexibility of eMusic.com and other fledgling, non-major, authorized online services, which lacked decent catalogs. That is why Napster and its progeny so quickly blew the industry's services out of the water.

The record industry's lobbying strategy focused on prohibiting circumvention of technological protection measures,<sup>51</sup> limiting the entry of digital technologies, and strengthening deterrence through stronger sanctions.<sup>52</sup> Statutory damages had worked relatively well in the analog age in channeling bars, dance halls, and restaurants into obtaining ASCAP and BMI licenses.<sup>53</sup> The recording industry went with what it knew. The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 ramped up the statutory damage range to \$30,000 per infringed work and up to \$150,000 per infringed work for willful infringement.<sup>54</sup>

Napster's peer-to-peer file sharing service captivated America's youth, providing nearly instantaneous, convenient, and free access to an unprecedented collective archive. Anyone with a computer and access to the Internet could share and access just about any sound recording. The storm surge knocked out much of the music industry's business model in one fell swoop.

All of the storm planning that went into the WIPO Copyright Treaties, the DMCA, and ramping up of statutory damages did little to prepare copyright

50. See *Envisioning Copyright Law's Digital Future*, *supra* note 30, at 172–75; see also *id.* at 156–59 (discussing the Secure Digital Music Initiative (SDMI) debacle).

51. See *This American Copyright Life*, *supra* note 41, at 251. At the urging of content-industry lobbyists, President Clinton established the Information Infrastructure Task Force (IITF) in 1993 to develop a comprehensive framework. The IITF produced a “white paper” calling for strengthening copyright protections and prohibiting circumvention of technological protection measures put in place by copyright owners. See BRUCE A. LEHMAN, U.S. PATENT AND TRADEMARK OFF., INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995); cf. Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1996), [http://www.wired.com/wired/archive/4.01/white.paper\\_pr.html](http://www.wired.com/wired/archive/4.01/white.paper_pr.html). The nascent ISP industry organized opposition to the draft 1995 legislation, resulting in the bills stalling in committee. The Clinton Administration took its proposals to the World Intellectual Property Organization's (WIPO) diplomatic conference the following year. A compromise was achieved with negotiators agreeing to the anti-circumvention provision in conjunction with safe harbors for Internet service providers (ISPs). See WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997). Congress implemented the WIPO copyright treaties in the Digital Millennium Copyright Act of 1998 (DMCA). See Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified principally at 17 U.S.C. §§ 512, 1201–1205).

52. See *This American Copyright Life*, *supra* note 41, at 248–52, 302.

53. See *id.* at 244–49.

54. See Pub. L. No. 106-160, 113 Stat. 1774 (1999) (codified at 17 U.S.C. § 504(c)(2)).



owners for the onslaught. When the peer-to-peer technology hit, the recording industry's business and legal strategies backfired.<sup>55</sup>

The recording industry invoked copyright law's deterrence regime, focusing first on Napster. Although record companies initially succeeded in shutting down Napster,<sup>56</sup> more versatile file sharing networks—which facilitated file sharing without files or file names passing through their servers—quickly emerged in its wake.<sup>57</sup> Record labels lost the first round of litigation against Grokster and other services that were designed to avoid knowledge of file names.<sup>58</sup>

Although the record companies would eventually prevail in the U.S. Supreme Court,<sup>59</sup> the Recording Industry Association of America (RIAA) opted to launch a direct enforcement campaign against file sharers during the interim. It eventually sued tens of thousands of mostly high school and college students who were especially active on file sharing networks. The litigation proved to be especially costly in terms of legal fees, legal doctrine, and most importantly, public opinion. Although the overwhelming majority of defendants settled with payments of \$3,000 to \$5,000,<sup>60</sup> a few holdouts tested the viability of suing individuals for crushing liability.<sup>61</sup> The cases poured salt into the wounds opened by the mass litigation campaign. They reinforced the perception that copyright law disserves the public: it deprives consumers of easy access to a broad catalog of music, imposes grossly disproportionate penalties on those caught file sharing, and does little to support the artists.

This experience demonstrated that the large-hammer-deterrence approach to copyright enforcement in the Digital Age does not work particularly well. The solution lies not in further ramping up sanctions but in a more variegated enforcement regime that distinguishes between different classes of actors in

55. See *This American Copyright Life*, *supra* note 41, at 252–69.

56. See *id.* at 252–53.

57. See *id.* at 254.

58. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

59. See *id.*

60. See *This American Copyright Life*, *supra* note 41, at 259–60.

61. See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999 (D. Minn. 2011) (substantially reducing jury's statutory damages award on constitutional grounds); *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 116 (D. Mass. 2010) (same). The First Circuit overturned the lower court's decision reducing the jury's \$675,000 statutory damages award, see *Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011), and then upheld the lower court's decision following remand declining to reduce jury's award. See *Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013); *Sony BMG v. Tenenbaum*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Sony\\_BMG\\_v.\\_Tenenbaum](https://en.wikipedia.org/wiki/Sony_BMG_v._Tenenbaum) (last visited Feb. 8, 2022).

the content marketplace and uses nudges and carrots as well as the occasional stick. Thus, it is useful to distinguish between two classes of enforcement targets: (1) noncommercial, small-scale infringers such as individual file sharers and cumulative creators and (2) commercial and larger scale individuals and enterprises such as platform developers who facilitate widespread copyright infringement.

### 1. Noncommercial/Small-Scale Infringers

While the high-fine, low-enforcement-cost deterrence model may have functioned effectively in motivating restaurants, bars, and nightclubs to take ASCAP and BMI blanket licenses, it did not channel Internet Age consumers into content markets smoothly or effectively, and it caused significant collateral damage. Notwithstanding the hypocrisy of unauthorized file sharing,<sup>62</sup> the use of disproportionate cudgels against individuals bred resentment,<sup>63</sup> which is particularly dangerous in a technological era in which unauthorized access is a viable alternative and the use of such cudgels is costly and prone to numerous judicial impediments.

Copyright enforcement should encourage consumers to participate in a growing competitive marketplace for content. It should not be seen as an enforcement lottery—threatening crushing liability against file sharers. Thus, copyright law should address garden-variety file sharing not through costly and complex federal court proceedings but instead through streamlined, higher detection probability, low-fine means—more in the nature of parking tickets, with inducements and nudges to steer consumers into better (e.g., subscription) parking plans.

Congress's passage of the Copyright Alternative in Small-Claims Enforcement Act (the CASE Act) is a step in the right direction.<sup>64</sup> The CASE Act authorizes the establishment of the Copyright Claims Board to decide copyright infringement claims filed by any copyright holder, declarations of non-infringement brought by users, and misrepresentation claims (under the Digital Millennium Copyright Act). The streamlined process can be handled without hiring an attorney. In addition, discovery is much more limited than

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62. See Peter S. Menell, *File-Sharing Copyrighted Works Without Authorization: A Misguided Social Movement*, MEDIA INST. (Feb. 17, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3477653](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477653).

63. See *supra* note 61.

64. Copyright Alternative in Small-Claims Enforcement Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (codified at 17 U.S.C. §§ 1501–1511).

in district court litigation. Congress capped damages, thereby reducing the exposure of district court proceedings. For registered works, the CASE Act caps the statutory damage award at \$15,000 per work and \$30,000 per claim. Unregistered copyrighted works can also be pursued but are subject to half of these cap levels.

Nonetheless, the CASE Act falls short of thorough systematic recalibration of statutory damages. Moreover, it is a voluntary regime. Copyright owners can choose to pursue federal court actions, and respondents have sixty days to opt out after a claim is filed.

## 2. Commercial and Large-Scale Infringers

The sheer magnitude of potential copyright infringement exposure for even large commercial enterprises significantly backfired and undermined the public's and the judiciary's perceptions of the copyright system. Viacom's lawsuit against YouTube, for example, alleged willful infringement of 79,000 works.<sup>65</sup> At Viacom's prayer of \$150,000 per work, the litigation threatened nearly \$12 billion in monetary damages. Yet the actual harm was arguably modest and possibly non-existent. YouTube helped to popularize Viacom shows and likely increased Viacom's ability to monetize its content. Furthermore, Viacom was not seeking prospective relief, only a massive windfall. The absurdity of this damage award could well have persuaded the courts to construe the DMCA safe harbors more broadly than Congress intended.<sup>66</sup>

While lawsuits undoubtedly deterred some illegal activity, the mere threat of excessive penalties likely discouraged creators from pursuing original and transformative projects and hampered innovators seeking to develop balanced, symbiotic technologies. Recalibrating the statutory damages regime for the Internet Age is critical to restoring support for copyright protection. Such amendments should be done in conjunction with reforms to improve the clarity of copyright liability.

## III. ROYALTY DISTRIBUTION JUSTICE

Beyond the size of the music revenue pie, there have long been justice concerns regarding its *division* among songwriters, performing artists, music

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65. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012).

66. See Peter S. Menell, *Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of Viacom v. YouTube and UMG Recordings v. Shelter Capital Partners*, MEDIA INST. (May 3, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2049445](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049445).

publishers, and record labels. Summing up the view of many artists, The Eagles songwriter, singer, and guitarist Don Henley observed that:

The recording industry is a dirty business—always has been, probably always will be. I don’t think you could find a recording artist who has made more than two albums that would say anything good about his or her record company.

. . . .

. . . It doesn’t matter how well I’ve done, or how well anybody else has done, the point is [that] the business is simply not fair and people are getting ripped off.

Artists could be held to one record company, to one contract, for their entire careers. Artists never get a chance to go out and compete in the open marketplace to see what their true worth really is, like all other working people.<sup>67</sup>

Moreover, the industry has a long and painful history of racial discrimination resulting in structural imbalances.<sup>68</sup> The digital revolution has contributed to

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67. *Music Revolt*, PBS NEWSHOUR (July 4, 2002), <https://www.pbs.org/newshour/show/music-revolt>; Courtney Love, *Courtney Love Does the Math*, SALON (June 14, 2000), [https://www.salon.com/2000/06/14/love\\_7/](https://www.salon.com/2000/06/14/love_7/).

68. See Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, GEO. WASH. LEGAL STUD. RSCH. PAPER NO. 2020-56, 2 (May 2, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3591113](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591113); REEBEE GAROFALO & STEVE WAKSMAN, ROCKIN’ OUT: POPULAR MUSIC IN THE U.S.A. (6th ed. 2014) (tracing music and social history); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER, SOC. POL’Y & L. 365 (2008); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 592–96 (2010) (tracing the categorization of music along racial lines and the origins of the “race music” genre); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1193 (2008) (“The fleecing of Black artists was the basis of the success of the American music industry.”); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1998) [hereinafter *Copyright, Culture & Black Music*]; see also *Music Industry Action Report Card*, BLACK MUSIC ACTION COAL. 6 (2021), <https://www.bmacoalition.org/miareportcard> (“[W]hile companies took the generous and needed, but relatively easy lift of donating funds or matching employee donations[,] . . . few created mechanisms to tackle and change issues and systems such as talent and promotion pipelines internally. Only a handful had full, multi-tiered plans of action that covered both internal changes and community engagement and giving, and only two labels publicly addressed some form of revisiting and revising agreements for heritage artists.”); Ben Sisario, *A Race ‘Report Card’ Measures Whether the Music Industry Changed*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/22/arts/music/music-industry-race-report-card.html> (discussing the music industry’s progress in addressing racial

long-standing injustices and added new players to the mix.<sup>69</sup>

### A. Dividing the Digital Royalty Pie 1.0<sup>70</sup>

Shortly after the *Grokster* case, I received a call from attorneys representing F.B.T., Eminem’s production company. They believed that Universal Music Group (UMG) was shortchanging Eminem and F.B.T. on iTunes revenue. At the time, Eminem was the most successful artist in the world.<sup>71</sup> F.B.T. sought an opinion on the interpretation of Eminem’s recording contract royalty clause.

The clause “provided a rate in the 18 to 20% range based on the ‘full price records sold . . . through normal retail channels,’ with volume escalations.” It then stated:

Notwithstanding the foregoing: . . . On masters licensed by [the record label] to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from those other uses of the masters.<sup>72</sup>

Since Apple and other digital retailers required licenses to reproduce and distribute digital copies of the sound recordings—otherwise, they would be infringing the sound recording and musical composition copyrights—it was clear that the “Masters Licensed” clause applied and the labels should have been paying 50% of net receipts on digital transactions through Apple and other digital licensees. I advised F.B.T.’s counsel that this provision required UMG to pay iTunes royalties based on the “Masters Licensed” clause and that

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imbalance); Ben Sisario, *The Music Industry Is Wrestling with Race. Here’s What It Has Promised.*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/arts/music/music-industry-black-lives-matter.html> (discussing in the context of the Black Lives Matter movement the music industry’s promises to address its racist past).

69. See *Copyright, Culture & Black Music*, *supra* note 68, at 380 (discussing copyright law’s promotion of imitation and stating: “In practice . . . Black innovators in music have been powerless to prevent white imitators from capitalizing on their ground-breaking efforts, and, in a racially polarized society, reaping the profits of Black innovation and creativity.”).

70. This Section is a riff on my previous work in *This American Copyright Life*, *supra* note 41.

71. See *Eminem albums discography*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Eminem\\_albums\\_discography](https://en.wikipedia.org/wiki/Eminem_albums_discography) (last visited Feb. 17, 2022) (reporting that “Eminem is the best-selling hip hop artist of all-time and the best-selling artist of the 2000s with [U.S.] album sales at over 32.2 million during the decade”); *Eminem Top Selling Artist of the Decade*, MUSIC-NEWS.COM (Jan. 7, 2010), <https://www.music-news.com/news/UK/31647/Read>.

72. See Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment at 1, *F.B.T. Prods., LLC v. Aftermath Records*, No. CV 07-03314 PSG, 2009 WL 137021 (C.D. Cal. Dec. 3, 2008).

the provision was so clear that they did not need my assistance.

Nonetheless, Richard Busch, F.B.T.'s counsel, requested that I work with them to respond to the aggressive litigation barrage that they were facing. As I delved into the case, I came to realize why Universal Music Group—the world's largest record label—waged such an unrelenting fight. The 1998 Eminem-Aftermath contract reflected standard industry practice at the time, with the label paying a relatively low royalty rate on albums manufactured and sold by the label (the "Records Sold" clause) and 50/50 split of net receipts on licenses to third parties (the "Masters Licensed" clause).<sup>73</sup> The economic logic was straightforward: where the label did more work in manufacturing, distributing, and marketing the recording, it could justify a larger share of the proceeds. The principal master licenses had been for films and television programming and greatest hits albums, but there was no reason why this clause should not apply to iTunes revenues.

UMG never intended to delegate its digital sales to Apple or anyone else. In 1998, UMG established a specialized unit tasked with developing a plan for entering the digital marketplace.<sup>74</sup> It would eventually launch Pressplay, a joint venture with Sony Music Entertainment.<sup>75</sup> As an owner of this service, UMG could have treated digital download transactions under the "records sold" clause of its record deals. This initiative, however, was hampered by technical challenges and was never intended to rapidly displace its lucrative CD distribution business.

Napster's rapid emergence derailed UMG's digital market strategy.

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73. See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 108, 176 (4th ed. 2000).

74. It was initially called the Electronic Commerce and Advanced Technologies (eCAT) and renamed eLabs in 2000. See Don Waller, *UMG Uploads Its e-Commerce Efforts*, VARIETY (Jan. 18, 2000, 11:00 PM), <https://variety.com/2000/music/news/umg-uploads-its-e-commerce-effort-1117761035/>. In a 2012 interview, Mr. Kenswil would comment that "there was a general reluctance to outsource by licensing if you could do it yourself." See ARAM SINNREICH, *THE PIRACY CRUSADE: HOW THE MUSIC INDUSTRY'S WAR ON SHARING DESTROYS MARKETS AND ERODES CIVIL LIBERTIES* 51 (2013), available at [https://www.academia.edu/1511201/The\\_Piracy\\_Crusade\\_How\\_the\\_Music\\_Industry\\_s\\_War\\_on\\_Sharing\\_Destroy\\_Markets\\_and\\_Erodes\\_Civil\\_Liberties](https://www.academia.edu/1511201/The_Piracy_Crusade_How_the_Music_Industry_s_War_on_Sharing_Destroy_Markets_and_Erodes_Civil_Liberties).

75. See *Technology Briefing Internet: Pressplay to Start Today*, N.Y. TIMES (Dec. 19, 2001); Lori Enos, *Online Music Service Duet Renamed 'Pressplay' Amid Talk of Sony Exit*, E-COMMERCE TIME (June 12, 2001), <http://www.ecommercetimes.com/story/11174.html>; Pressplay offered consumers 300 streams and thirty downloads per month for \$9.95 a month, or 1,000 streams, 100 downloads and twenty songs that could be burned onto a CD or transferred to a portable player, for \$24.95 a month. See Catherine Greenman, *BASICS; Streaming Fishing: A Guide to Net Radio*, N.Y. TIMES (Apr. 18, 2002), <http://www.nytimes.com/2002/04/18/technology/basics-stream-fishing-a-guide-to-net-radio.html>.

Pressplay limped out of the starting gate and failed to gain traction,<sup>76</sup> providing Steve Jobs with the opportunity and leverage to persuade UMG and the other major record labels to license their sound recordings to the iTunes Music Store.<sup>77</sup> In conjunction with the popular iPod device,<sup>78</sup> iTunes succeeded in selling millions of downloads, which precipitated the battle over the division of digital royalties.

By licensing their catalogs to Apple's iTunes Music Store, UMG and the other major record labels exposed themselves to artists contending that download sales should be treated under the more favorable "Masters Licensed" clause of the standard agreements. UMG, nonetheless, contended that the "Records Sold" clause applied to digital downloads through licensee-third party online vendors<sup>79</sup> while at the same time undertaking a campaign to renegotiate active catalog artist agreements to exclude digital downloads from the "Masters Licensed" clause.<sup>80</sup>

Eminem's record deal put F.B.T. in an unusually favorable position to

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76. Pressplay and MusicNet, the other label-owned and developed online service, failed for a variety of reasons, including the challenge of competing with Napster and other "free" peer-to-peer services as well as technological limits on consumer autonomy, limited catalog selection, and low-quality audio. See Dan Tynan, *The 25 Worst Tech Products of All Time*, PCWORLD (May 26, 2006), [http://www.pcworld.com/article/125772.-3/the\\_25\\_worst\\_tech\\_products\\_of\\_all\\_time.html](http://www.pcworld.com/article/125772.-3/the_25_worst_tech_products_of_all_time.html); Adam Lashinsky, *Saving Face at Sony*, FORTUNE, Feb. 21, 2005, at 79 (reporting that Pressplay "initially failed to license music from competing labels and as a result never attracted many users" and was eventually abandoned); Fred Goodman, *Will Fans Pay for Music Online?*, 17 ROLLING STONE (Jan. 31, 2002) (noting limits on consumer autonomy as a major drawback).

77. See Chris Taylor, *Invention of the Year: iTunes Music Store*, TIME (Nov. 16, 2003), [http://www.time.com/time/specials/packages/article/0,28804,1935038\\_1935059\\_1935086,00.html](http://www.time.com/time/specials/packages/article/0,28804,1935038_1935059_1935086,00.html); Thomas K. Grose, *Sing When You're Winning*, TIME (Feb. 18, 2006), <http://www.time.com/time/magazine/article/0,9171,1161172-2,00.html> (noting that "the big breakthrough came from Apple, which finally convinced millions of consumers to pay for downloadable music").

78. STEVEN LEVY, *THE PERFECT THING: HOW THE IPOD SHUFFLES COMMERCE, CULTURE, AND COOLNESS* (2006).

79. See Letter to Heads of the Major Record Labels from 27 Artist Attorneys (Mar. 24, 2004) (stating that "[r]ather than recognize the arrangements between the major labels and independent electronic distributors as licensees, for which we feel there can be no bona fide legal dispute, and paying our clients according to the applicable ["masters licensed"] provision of their contracts, all five major record labels have adopted the position that paid downloads are equivalent to sales of CDs through retailers"), quoted in Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, , *supra* note 72, at 13–14.

80. See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 158–59 (6th ed. 2006) (stating that "[a]fter a lot of stumbling around, the industry has settled into a routine. Under all the deals made in the last few years, and in the renegotiations of older deals, [the recording artist] get[s its] royalty rate applied to the amount received by the company [for digital downloads, streaming-on-demand, ring tones and ring backs, non-interactive webcasting, satellite radio, and podcasting]").

challenge UMG's royalty payments.<sup>81</sup> Dr. Dre's UMG sub-label Aftermath Records signed Eminem through F.B.T. Productions to a record deal in 1998. A 2000 novation placed Eminem in a direct contractual relationship with Aftermath Records while retaining F.B.T.'s royalty stream and accounting right. With Eminem's career skyrocketing following chart-topping records and a starring role in the autobiographical film *8 Mile*, Aftermath sought a new, longer-term agreement in 2003.

By that time, UMG had entered into an agreement with Apple authorizing sale of UMG recordings through the iTunes Music Store. Consequently, UMG (and its affiliated sub-labels) sought to require all new and renegotiated recording agreements with artists to contain a provision excluding digital downloads from the "Masters Licensed" clause. Recognizing Eminem's strong bargaining position, his attorney declined to renegotiate that clause and it carried over to the 2003 agreement.

Following an accounting that revealed that UMG was not compensating F.B.T. at the 50/50 rate, F.B.T. filed suit.<sup>82</sup> In an ironic twist, the attorneys representing both sides of the 2003 contract—Gary Stiffelman on behalf of Eminem and Peter Paterno on behalf of Aftermath Records—had signed a letter to the heads of the major record labels stating that the standard "Masters Licensed" clause covered digital downloads from third parties.<sup>83</sup> Nonetheless, UMG did all that it could to fight their partners over this issue. They lost resoundingly at the Ninth Circuit:

[T]he agreements unambiguously provide that 'notwithstanding' the Records Sold provision, Aftermath owed F.B.T. a 50% royalty under the Masters Licensed provision for licensing the Eminem masters to third parties for any use. It was undisputed that Aftermath permitted third parties to use the Eminem masters to produce and sell permanent downloads and mastertones.<sup>84</sup>

Unfortunately, most active artists were forced to give up this provision,

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81. See *F.B.T. Productions, LLC v. Aftermath Records*, WIKIPEDIA, [https://en.wikipedia.org/wiki/F.B.T.\\_Productions,\\_LLC\\_v.\\_Aftermath\\_Records](https://en.wikipedia.org/wiki/F.B.T._Productions,_LLC_v._Aftermath_Records) (last visited Feb. 28, 2022); *Economic Analysis of Network Effects and Intellectual Property*, *supra* note 34, at 286.

82. See *Economic Analysis of Network Effects and Intellectual Property*, *supra* note 34, at 286–87.

83. See *supra* note 79.

84. See *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 967 (9th Cir. 2010); Eriq Gardner, *UMG Reaches Settlement in Trendsetting Suit Over Digital Revenue from Eminem Songs*, HOLLYWOOD REPORTER (Oct. 30, 2012), <https://www.hollywoodreporter.com/business/business-news/umg-reaches-settlement-trendsetting-lawsuit-384381/>.



meaning that they see relatively little from digital downloads.<sup>85</sup> Moreover, many have been pushed into so-called “360 Deals” which make it more difficult for them to gain artistic and commercial independence.<sup>86</sup> Many back catalog artists—those not releasing new records and therefore not pressured to renegotiate their record deals—were able to draw on the F.B.T. decision to obtain somewhat better compensation on digital downloads.<sup>87</sup>

In conjunction with file sharing threat,<sup>88</sup> the battle over digital download revenue created the dire ecosystem facing songwriters and performing artists during the first two decades of the Internet Age. They were being squeezed by two powerful and determined forces. Fans came to see recorded music as essentially a free good. Many had little compunction about downloading and sharing digital files. They rationalized “freeconomics” as good for artists as well as themselves. On the other side of the vise, and compounding the file sharing rationalization, record labels were willing to make absurd legal arguments to short-change recording artists—losing sight of how such machinations would undermine the marketplace for music as well as copyright’s legitimacy among consumers and recording artists. Recording artists can be the

85. See *supra* note 80.

86. See Megan Buerger, *Mac DeMarco Talks Starting His Own Label—In Hopes Of Being Left Alone*, BILLBOARD (Apr. 27, 2019) (quoting DeMarco: “Do not sign a 360 deal. I don’t care how much money they’re offering you, don’t [take it]. It’s an awful, awful idea. It’s a long time, a really long time. And they own your image. They take money from your merch on tour—nobody should touch that. . . . Do not give anybody that merch money, or your show money. They’re not on the stage, and they’re probably not even in the city [you’re playing]. Forget about it.”), <https://www.billboard.com/articles/columns/rock/8508776/mac-demarco-interview-indie-now-here-comes-the-cow-boy>; Daniel J. Gervais, Kent M. Marcus & Lauren E. Kilgore, *The Rise of 360 Deals in the Music Industry*, LANDSLIDE 40 (Mar./Apr. 2011). This is not to say that some established artists have not done well through 360 deals. Madonna and Jay-Z have obtained large advances for signing these contracts. It is less clear that lesser-known acts, which do not see large advances, will ultimately benefit from these arrangements.

87. See Kelly Knaub, *UMG, Artists Get Nod On \$11.5M Digital Royalty Settlement*, LAW360 (Apr. 14, 2016) (reporting that the district court approved a settlement establishing an \$11.5 million fund to resolve claims over the amount of royalties paid for the digital download of recorded music and providing a 10% increase in the royalty rate paid on those downloads in perpetuity), <https://www.law360.com/articles/784482/umg-artists-get-nod-on-11-5m-digital-royalty-settlement>; *UMG Reaches \$11.5M Class Action Settlement Over Digital Music Royalties*, TOP CLASS ACTIONS (Apr. 17, 2015), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/54063-umg-reaches-11-5m-class-action-settlement-over-digital-music-royalties/>; Eriq Gardner, *Rick James Estate Files Class Action Lawsuit Against Universal Music Over Digital Revenue*, HOLLYWOOD REPORTER (Apr. 4, 2011) (noting that “new class action lawsuit comes in wake of the U.S. Supreme Court’s decision not to review a case initiated by Eminem’s former Detroit-based producing partners, F.B.T. Productions, which won a lower 9th Circuit ruling last September deeming digital music to be more akin to a license than a physical sale of music”), <https://www.hollywoodreporter.com/business/business-news/rick-james-estate-files-class-174323/>.

88. See *supra* Part II.

best ambassadors for promoting music sales, yet UMG and other record companies were making it very difficult for artists to support the cause.<sup>89</sup> If artists are openly criticizing record companies, then consumers' file sharing norm is reinforced by the perception (and reality) that record labels exploit artists. This in turn reinforces the pressure on record labels to short-change artists as a way of satisfying investors, leading to a counterproductive spiral.

The digital distribution justice puzzle is multi-faceted. The Digital Age exacerbated long-standing tensions between labels and publishers, composers, and recording artists, as well as the structural racism that has long plagued the music industry.<sup>90</sup> Spotify and other online platforms could take advantage of mechanical compulsory license regimes to stream musical compositions, whereas they needed to negotiate licenses to stream sound recordings. The record labels' leverage skewed compensation toward recording artists and record labels, enabling them to get a significantly larger share of the streaming revenue as well as an equity stake in streaming services.<sup>91</sup> Moreover, whereas composers, publishers, recording artists, and record labels sought higher revenue from online services, upward pressure on subscription rates risks re-alienating music fans and channeling them back to piracy. Thus, music copyright owners must be careful not to hold out for too much revenue. As with Goldilocks and the three bears, the optimal price can't be too hot or too cold. Beyond a moderate subscription price, streaming consumers will revert to piracy.

YouTube's role further complicates the music marketplace. Although YouTube has vastly improved its content policing since its early versions, its free tier and low payouts to music copyright owners<sup>92</sup> depress music revenue. In 2018, 35% of respondents in an International Federation of the

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89. The record companies were making other strategic blunders undermining their relationship with recording artists at the same time that Napster was taking off. See David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y USA 387, 388–93 (2001) (chronicling the RIAA's backroom deal-making that resulted in a "technical amendment" to the Copyright Act cutting off recording artists' right to terminate transfers of copyrights and the decision to rescind the amendment when it came to light just as Napster emerged and labels needed artists' support); STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* (2017) (chronicling numerous strategic blunders by major record labels).

90. See *supra* note 68.

91. See *This American Copyright Life*, *supra* note 41, at 292–97.

92. See Chris Castle, *Streaming and the Embarrassment of COVID Riches*, MUSIC TECH POL'Y (Jan. 8, 2021), <https://musictechpolicy.com/2021/01/08/streaming-and-the-embarrassment-of-covid-riches/> (reporting that YouTube pays the lowest payout per streamed song, coming in at \$0.00074 per stream; by contrast, Spotify pays out \$0.00397 per stream and Apple Music pays \$0.00783 per stream, citing data from Statista).

Phonographic Industry (IFPI) survey reported that a main reason for not using an audio subscription service is that “anything they want to listen to is on YouTube.”<sup>93</sup> The estimated music revenue per YouTube user is less than \$1 per year, whereas Spotify generates approximately \$20 per user on an annual basis.<sup>94</sup> Such distortions reflect the challenges of adapting to the online piracy problems of the 2000 to 2010 period.

### *B. Dividing the Digital Royalty Pie 2.0*

Adapting the music industry to the Digital Age has produced new battle lines and rekindled age-old debates over the need for compulsory licenses that have long undergirded the music industry.<sup>95</sup> Music copyright owners’ push to end compulsory licenses, however, would likely backfire and re-alienate consumers who have gradually embraced subscription services over the past decade.<sup>96</sup> Especially in the shadow of the Internet’s file sharing promiscuity, the various interests must work together to provide consumers with easy access to a universal catalog at reasonable prices and fair distribution.<sup>97</sup>

Recognizing this reality, the major players in the industry—composers, publishers, recording artists, record labels, online service providers, streaming services, and consumer groups—in conjunction with policy-makers worked out the Music Modernization Act of 2018 (“MMA”),<sup>98</sup> a momentous compromise that reduces transaction costs, encourages registration of musical compositions and sound recordings, eliminates statutory damages windfalls, tilts royalty distribution toward parity between composers and recording artists, and promotes licensing rather than litigation.<sup>99</sup> By keeping compulsory

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93. See IFPI, MUSIC CONSUMER INSIGHT REP. 13 (2018), [https://www.ifpi.org/wp-content/uploads/2020/07/091018\\_Music-Consumer-Insight-Report-2018.pdf](https://www.ifpi.org/wp-content/uploads/2020/07/091018_Music-Consumer-Insight-Report-2018.pdf).

94. See *id.*

95. See *Antitrust Consent Decree Review—ASCAP and BMI 2014*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/ascap-bmi-decree-review> (last visited Feb. 28, 2022); U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 25 (Feb. 2015).

96. See IFPI, ENGAGING WITH MUSIC 5 (2021), <https://www.ifpi.org/wp-content/uploads/2021/10/IFPI-Engaging-with-Music-report.pdf>.

97. See *This American Copyright Life*, *supra* note 41, at 360–67.

98. See *The Creation of the Music Modernization Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/music-modernization/creation.html> (last visited Feb. 8, 2022); Adam Gorgoni, *The Music Modernization Act: A Songwriter’s Perspective*, in MUSIC LAW AND POLICY (Sean M. O’Connor ed., 2021).

99. See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018). See generally Tyler Ochoa, *An Analysis of Title II of Public Law 115-264: The Classics Protection and Access Act (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Oct. 24, 2018), <https://blog.ericgoldman.org/archives/2018/10/an-analysis-of-title-ii-of-public-law-115-264-the-classics->

licensing in place, the parties recognized that a free market approach would likely lead to fragmentation of online offerings, which could reinvigorate file sharing. The resolution, however, leaves the fairness with which the digital royalty pie is distributed up for grabs.

Songwriter Adam Gorgoni aptly summarizes the interplay of politics, markets, and consumer behavior that lies ahead:

The MMA, although not perfect, is at least in part a product of [songwriters'] engagement [with the political process]. It is also a product of compromise. To quote Bismarck: “[P]olitics is the art of the possible.” All the stakeholders depend on a healthy music business ecosystem. And songwriters are an indispensable part of that ecosystem. Those of us who are good enough and lucky enough to become professionals must receive a fair slice of the growing pie. After all, without our songs, there would be no pie at all.<sup>100</sup>

#### IV. INSPIRATION AND INFRINGEMENT JUSTICE

The third area of music copyright justice concerns the standards for assessing whether a new musical creation infringes a prior work. Recent high-profile cases involving Led Zeppelin’s *Stairway to Heaven*, Pharrell Williams and Robin Thicke’s *Blurred Lines*, and Ed Sheeran’s *Thinking Out Loud* illustrate the issue, as did litigation over Michael Bolton’s early 1990s hit *Love Is a Wonderful Thing*. Moreover, there has been an uptick in the frequency of music copyright infringement cases.<sup>101</sup>

*Stairway to Heaven* is a truly magnificent musical creation, perhaps the greatest in rock ‘n’ roll history. Derek and the Dominos’ *Layla*, The Who’s *Won’t Get Fooled Again*, Jimi Hendrix’s cover of Bob Dylan’s *All Along the Watchtower*, and Boston’s *More Than a Feeling* round out my top five. Like

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protection-and-access-act-guest-blog-post.htm; Tyler Ochoa, *An Analysis of Title I and Title III of the Music Modernization Act, Part 1 of 2 (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Jan. 22, 2019), <https://blog.ericgoldman.org/archives/2019/01/an-analysis-of-title-i-and-title-iii-of-the-music-modernization-act-part-1-of-2-guest-blog-post.htm>; Tyler Ochoa, *An Analysis of Title I and Title III of the Music Modernization Act, Part 2 of 2 (Guest Blog Post)*, TECH. & MKTG. L. BLOG (Jan. 23, 2019), <https://blog.ericgoldman.org/archives/2019/01/an-analysis-of-title-i-and-title-iii-of-the-music-modernization-act-part-2-of-2-guest-blog-post.htm>.

100. Gorgoni, *supra* note 98, at 15 (footnote omitted).

101. See *Music Copyright Infringement Resource*, GW L. BLOGS, <https://blogs.law.gwu.edu/mcir/> (last visited Feb. 13, 2022) (showing copyright infringement cases by year). Ed Sheeran himself has become an infringement suit magnet. See *infra* Section IV.E.1.

nearly all popular music hits, these works build to varying degrees on prior works. The line between inspiration, which ought to be permissible, and infringement, which is not, is among the murkiest—indeed blurred—in all of intellectual property law. The line can be further blurred by a social justice dimension: cultural appropriation. Cultural appropriation invokes concerns about racial discrimination.

### *A. Cumulative Musical Creativity*

All musicians develop their craft through inspiration and imitation. How copyright law deals with artists' evolution is critical to a healthy creativity ecosystem. Each generation needs its own voices, but they inevitably stand on the shoulders of those who inspired them. Bob Dylan, one of the most influential musicians in popular music history,<sup>102</sup> has said that his songs “didn’t get here by themselves.”<sup>103</sup> He credits country and western music as an early influence.<sup>104</sup> He was later swept up by “the rock ‘n’ roll of Chuck Berry and Little Richard.”<sup>105</sup>

In his teens, he discovered folk musicians like Odetta, and became enamored of Woody Guthrie, even imitating Guthrie’s Oklahoma twang. He arrived on the Greenwich Village

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102. See Saeed Ahmed, *Bob Dylan Songs That Changed the Course of History (an Incomplete List)*, CNN, <https://www.cnn.com/2016/10/13/entertainment/dylan-songs-history-trnd/index.html> (Oct. 13, 2016, 6:47 PM); Mikal Gilmore, *Bob Dylan, the Beatles, and the Rock of the Sixties*, ROLLING STONE (Aug. 23, 1990, 5:30 PM), <https://www.rollingstone.com/feature/bob-dylan-the-beatles-and-the-rock-of-the-sixties-176221/> (discussing Dylan’s immense influence on the Beatles); Andy Gill & Jack Shepherd, *70 Reasons Why Bob Dylan Is the Most Important Figure in Pop-Culture History*, INDEP. (Oct. 13, 2016), <https://www.independent.co.uk/arts-entertainment/music/features/70-reasons-why-bob-dylan-most-important-figure-pop-culture-history-2286368.html> (exploring Dylan’s broad and profound influence on music and culture). In 2008, the Pulitzer Prize Committee awarded Dylan a special citation for “his profound impact on popular music and American culture, marked by lyrical compositions of extraordinary poetic power.” See *The 2008 Pulitzer Prize Winner in Special Citations and Awards: Bob Dylan*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/bob-dylan> (last visited Feb. 13, 2022).

103. See Guilbert Gates, *Listen to Bob Dylan’s Many Influences*, N.Y. TIMES (Oct. 15, 2016), <https://www.nytimes.com/interactive/2016/10/14/arts/music/bob-dylan-influences-playlist-spotify.html>. In a first for a songwriter, the Nobel Prize Committee awarded Bob Dylan the 2016 Nobel Prize in Literature “for having created new poetic expressions within the great American song tradition.” See *The Nobel Prize in Literature 2016*, NOBEL PRIZE (Oct. 13, 2016), <https://www.nobelprize.org/prizes/literature/2016/summary/>.

104. See Gates, *supra* note 103.

105. See *id.* Dylan stated in his 1959 high school yearbook that his ambition was “[t]o follow Little Richard.” See *Bob Dylan*, THIS DAY IN MUSIC, <https://www.thisdayinmusic.com/artists/bob-dylan/> (last visited Nov. 7, 2021).

folk scene in New York in January 1961, and continued absorbing folk and traditional songs wherever he could find them—from fellow performers, from books like Alan Lomax’s “Folk Songs of North America,” and from records. And not only other music inspired him—poetry, literature and film have all made their way into his work.<sup>106</sup>

Dylan’s early work imitated, if not covered, classic folk tunes.<sup>107</sup> As he matured, “he was able to internalize these disparate influences[] and to transform them, with great courage and sensitivity, into a sound that was uniquely, unmistakably his own.”<sup>108</sup>

Eric Clapton, whom many consider to be the greatest guitarist in rock history,<sup>109</sup> acknowledges B. B. King, Muddy Waters, and Chuck Berry as inspirations for his musical style and foray into electric blues.<sup>110</sup> Clapton notes in the epilogue to his 2007 autobiography: “There are so many players I have admired and imitated, from John Lee Hooker to Hubert Sumlin, but the real king is B. B. He is without a doubt the most important artist the blues has ever produced . . . .”<sup>111</sup>

Like Clapton, Led Zeppelin also emerged from the American R&B tradition. Stephen Davis, author of *Hammer of the Gods: The Led Zeppelin Saga*,<sup>112</sup> explains that

when American blues stars would come to London, they were backed up—they needed backing bands, and it was

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106. Gates, *supra* note 103.

107. See Ben Lillie, *Everything Is a Remix: Kirby Ferguson at TEDGlobal 2012*, TEDBLOG (June 29, 2012, 7:35 AM), <https://blog.ted.com/everything-is-a-remix-kirby-ferguson-at-tedglobal-2012/> (“In 1964 Bob Dylan was near the pinnacle of his career, pouring out now-classic songs at a near-miraculous pace. But a few critics claim that he is stealing other people’s songs. Could it be true? Ferguson plays ‘Nottamun Town,’ a traditional folk song, then Bob Dylan’s ‘Masters of War,’ and asks us to hear the similarity—and it’s clear the melody and structure relate. He plays ‘The Patriot Game’ by Dominic Behan, then Dylan’s ‘With God on Our Side.’ (In this case Dylan admits he probably hear[d] the original and forgot about it, and later it probably ‘bubbled back up in his brain.’) Finally, he plays ‘Who’s Gonna Buy You Ribbons’ by Paul Clayton, then ‘Don’t Think Twice, It’s Alright’ by Bob Dylan—and yes, the lyrics are very similar.”).

108. See Gates, *supra* note 103.

109. See BOB GULLA, GUITAR GODS: THE 25 PLAYERS WHO MADE ROCK HISTORY 39–47 (2009); *Clapton Is God*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Clapton\\_is\\_God](https://en.wikipedia.org/wiki/Clapton_is_God) (last visited Feb. 17, 2021).

110. See ERIC CLAPTON, CLAPTON: THE AUTOBIOGRAPHY 37–38 (2007).

111. *Id.* at 325.

112. See STEPHEN DAVIS, HAMMER OF THE GODS: THE LED ZEPPELIN SAGA (2008).

usually the Yardbirds who backed them up. And so Jimmy Page, Eric Clapton, Jeff Beck, these great guitarists from the Yardbirds, all were sort of mentored by these geniuses coming through from Chicago: Howlin' Wolf, Sonny Boy Williamson, Muddy Waters. They backed them up and made records with them. . . .

So when it was time a few years later to form Led Zeppelin, Jimmy Page was in a hurry for material. He didn't have time to write a lot of new material, so they decided to appropriate, as it were, a lot of old blues songs and take credit for them, and that's pretty much the first two Led Zeppelin albums. . . .<sup>113</sup>

Notwithstanding their emergence as one of the greatest (and most influential) bands in rock 'n' roll history, many R&B historians view Led Zeppelin as copyright infringers and cultural appropriators.

[*You Need Love*] was originally written by Willie Dixon and sung by Muddy Waters, and Led Zeppelin takes this Muddy Waters old blues and adds some cannon fire, some explosive, just incredible singing and this repetitive riff and turns it into this very hypnotic, heavy-metal anthem, probably one of the most exciting things the band ever did.

And when you looked at the credits on [*Led Zeppelin II*], sure enough, you know, the composer's credits were Jimmy Page and Robert Plant and the other two guys in Led Zeppelin. So again, it took Willie Dixon years and years and many lawsuits [at a time when] Led Zeppelin ruled the booming record industry of the 1970s as its biggest act. Millions and millions of dollars were made off these songs, and the composers saw nothing until they had to sue, much, much later.<sup>114</sup>

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113. *Music Interviews: Led Zeppelin's Blues Roots*, NPR (Feb. 29, 2008, 9:00 AM), <https://www.npr.org/transcripts/87803133> (interview with Stephen Davis, author of *Hammer of the Gods: The Led Zeppelin Saga* (2008)).

114. *Id.*; Charles M Young, "I'm Not Such an Old Hippie": Robert Plant Stops Being Polite, *MUSICIAN* 45, 47 (June 1990) (quoting Plant acknowledging that he "nick[ed]" Dixon's composition,

Led Zeppelin eventually settled Dixon's infringement allegation regarding *Whole Lotta Love* and a second suit over *Bring It On Home*, a Dixon composition with the same title as Led Zeppelin's song.<sup>115</sup> Dixon obtained an undisclosed monetary sum and songwriting credit for *Bring It On Home* and co-authorship credit for *Whole Lotta Love*.<sup>116</sup>

Bruce Springsteen credits Eric Burdon and The Animals for inspiring his musical creativity, performance style, and social consciousness: "[T]he Animals were a revelation. The first records with full blown class consciousness that I had ever heard."<sup>117</sup> He credits Burdon's passionate vocals and the band's organ-heavy sound for inspiring much of his work. Springsteen acknowledges "stealing" the chords of *Don't Let Me Be Misunderstood* for *Badlands*.<sup>118</sup> During his 2012 keynote address at South by Southwest (SXSW), Bruce Springsteen grabbed an acoustic guitar and teased out the bass line and gritty, guttural vocals to The Animals' rock classic *We Gotta Get Out of This Place*. He then proclaimed: "That's every song I've ever written. . . . That's all of 'em. I'm not kidding either. That's *Born to Run*, *Born in the U.S.A.*, everything I've done for the past four years, including all the new ones."<sup>119</sup>

Tom Scholz, the mastermind behind the band Boston, recognizes Jeff Beck, Led Zeppelin, the James Gang, Iron Butterfly, The Kinks, the Yardbirds, and The Who as his most significant rock music influences.<sup>120</sup> Growing up in the 1960s in Toledo, Ohio, about 100 miles from Cleveland, Scholz was a huge fan of Joe Walsh, leader of the Cleveland-based James Gang. Scholz recently recalled that, "A lot of what I know about playing the guitar, I learned from listening to him."<sup>121</sup> An interviewer notes, "*James Gang Rides Again* . .

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that "[i]f the lyric hadn't been stolen, the music would have been lesser for it," and that Led Zeppelin should have credited Dixon, but seeking to downplay the transgression by noting that "it was so far away in time and influence that . . . well, you only get caught when you're successful").

115. See Jordan Juntagh, *Songs on Trial: 12 Landmark Music Copyright Cases*, ROLLING STONE (June 6, 2016), <https://www.rollingstone.com/politics/politics-lists/songs-on-trial-12-landmark-music-copyright-cases-166396/ray-parker-jr-vs-huey-lewis-and-the-news-1984-63701/>.

116. See *id.*

117. Andy Greene & David Marchese, *The Ties That Bind: Bruce Springsteen's 25 Biggest Heroes*, ROLLING STONE (Jan. 10, 2014, 4:40 PM), <https://www.rollingstone.com/music/music-lists/the-ties-that-bind-bruce-springsteens-25-biggest-heroes-32797/elvis-presley-4-56087/>.

118. See *id.*

119. See Pluto Nash, *Bruce Springsteen—2012 SXSW Keynote Address*, YOUTUBE (Jan. 23, 2016), <https://www.youtube.com/watch?v=VW05XedG4zk> (referring to the video timestamp from 23:05–25:10).

120. See Russell Hall, *Tom Scholz's Top 10 Favorite Albums of All Time*, GIBSON (Nov. 13, 2007), [http://aws2.gibson.com/News-Lifestyle/Features/en-us/Tom-Scholz\\_s-Top-10-Favorite-A.aspx](http://aws2.gibson.com/News-Lifestyle/Features/en-us/Tom-Scholz_s-Top-10-Favorite-A.aspx).

121. See Brad Wheeler, *The Enthusiast: Why Boston Was My Soundtrack for a Road Trip Home*,



. was the last album [Scholz] ever bought, or at least it was the last album he'd listened to completely before embarking on his career and mission with Boston."<sup>122</sup> Scholz said that before the Boston debut album, he "got everybody else away from [him] and stopped playing in bands. [He] did this so [he] could go figure things out, and to try things wherever [his] music imagination would go." Scholz said, "I knew Jeff Beck's *Truth* album inside out. The same was true of the first two Led Zeppelin albums and Joe Walsh's *James Gang Rides Again*."<sup>123</sup>

*More Than a Feeling*, the lead single from Boston's eponymous debut album, ruled the airwaves in the fall of 1976.<sup>124</sup> Scholz captured the essence of a hit rock song. As Mitch Weissman, a noted musician and star (portraying Paul McCartney) of the Broadway musical *Beatlemania*,<sup>125</sup> later observed:

I'll never forget where I was when I heard the first Boston album. I was in David Krebs' office, of music managers Leber-Krebs fame. They were also the producers of *Beatlemania* (the show I starred in for them) as well as [managers] for Aerosmith, Parliament Funkadelic [sic], Mahogany Rush, Ted Nugent, AC/DC and more later. . . .

As the fade-in intro to [*More Than a Feeling*] built up from the speakers, I was hooked. Then came the chorus, with its infectious chords and hand claps. Amazing. I turned to Tom Werman, legendary record producer and visiting at the moment. "Tom! Where have you heard this before, kind of?" He couldn't place it but it did sound familiar to him.

Then it struck me. The James Gang. The musical chorus/bridge to Joe Walsh's [*Tend My Garden*.]

"That's it!" agreed Tom. And as interviews would show

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GLOBE & MAIL, <https://www.theglobeandmail.com/arts/article-the-enthusiast-why-boston-was-my-soundtrack-for-a-road-trip-home/> (June 23, 2018); *James Gang*, WIKIPEDIA, [https://en.wikipedia.org/wiki/James\\_Gang](https://en.wikipedia.org/wiki/James_Gang) (last visited Feb. 17, 2022).

122. Wheeler, *supra* note 121.

123. Hall, *supra* note 120.

124. See *More Than a Feeling*, WIKIPEDIA, [https://en.wikipedia.org/wiki/More\\_Than\\_a\\_Feeling](https://en.wikipedia.org/wiki/More_Than_a_Feeling) (last visited Feb. 17, 2022).

125. See *Beatlemania (Musical)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Beatlemania\\_\(musical\)](https://en.wikipedia.org/wiki/Beatlemania_(musical)) (last visited Feb. 17, 2022).

later on, Tom Scholz was a major fan of Walsh himself.<sup>126</sup>

Scholz was a compositional engineering genius. From the fade intro to the power chords, hand claps, wistful mood, soaring guitar that blended perfectly with Brad Delp's pitch perfect vocals, he advanced the popular rock algorithm to a new level.<sup>127</sup>

\* \* \* \* \*

Contemporary artists proceed in the wake of their formative influences and inspire later generations.<sup>128</sup> Copyright law must not unduly restrain new artists' freedom to build on the works of others while ensuring that those forebearers' works are not infringed.

Copyright law's mechanical compulsory license invites newbies to hone their skills and develop their own style by recording covers of previously released musical compositions without the need to negotiate a license from the composer.<sup>129</sup> 17 U.S.C. § 114 allows them to produce nearly identical recordings without infringing copyright in the sound recording.<sup>130</sup> As musical artists mature, they inevitably experiment and develop their own compositions and styles. They draw on prior sources, some of which are in the public domain (such as standard chordal structures), and some of which are copyrighted works. That brings copyright's infringement standards and complex, fact-specific, and arcane litigation process into play.

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126. *Re-Boston*, THE LEFSETZ LETTER (Oct. 11, 2020), <https://lefsetz.com/wordpress/2020/11/10/re-boston/> (including a letter from Mitch Weissman on his thoughts about Boston). *Tend My Garden* was part of the *James Gang Rides Again* album. See Chris McRae, *Tend My Garden/Garden Gate—James Gang*, YOUTUBE (Sept. 3, 2008), <https://www.youtube.com/watch?v=KqeErugWXZ4>. Note the fade intro, chorus/bridge, and power chord with hand claps.

127. See Rick Beato, *What Makes This Song Great? Ep.71 BOSTON (#2)*, YOUTUBE (July 11, 2019), <https://www.youtube.com/watch?v=ynFNt4tgBJ0>.

128. See Gates, *supra* note 103 (describing that Nobel Prize winner and musician Bob Dylan found inspiration across various genres and eras to create his own sound that went on to influence American music).

129. See 17 U.S.C. § 115; Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA HIGH TECH. L.J. 215 (2012) (tracing the history of the mechanical compulsory license).

130. See 17 U.S.C. § 114(b) (providing that "[t]he exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording"); Brauneis, *supra* note 68 (tracing the interpretation of the sound-alike provision).

*B. Tracing the Source of Music Copyright Infringement Confusion*

Copyright infringement standards have always entailed some subjectivity. To prove copyright infringement, a copyright owner must show that the defendant actually copied original protected expression from the plaintiff's work resulting in substantial similarity of the protected expression.<sup>131</sup> The first stage of the analysis asks a factual forensic question: did the defendant copy the copyrighted work? The second stage of the analysis asks a legal question: did the defendant improperly or unlawfully appropriate protected expression?<sup>132</sup> This stage of the analysis requires the court to ascertain the protected elements through a process of abstracting the plaintiff's work and filtering out the unprotected aspects—the “objective” analysis. The fact-finder then decides whether defendant's work is substantially similar to copyright-protected elements of the plaintiff's work—the “subjective” determination.

What a judge or jury considers to be “substantially similar” depends on how the art is presented and the fact-finder's background, familiarity with the art, perception, and capacity to filter out unprotectable elements when they compare works. Even though particular elements of a work might lack originality or have unprotectable ideas or functional aspects, copyright protection extends to original *compilations* of unprotectable components.<sup>133</sup> As Judge Learned Hand recognized nearly a century ago,

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. . . . [T]here is a point in this series of abstractions where they are no longer protected . . . . Nobody has ever been able to fix that boundary, and nobody ever

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131. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). See generally Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791 (2016) (exploring the development of the infringement framework).

132. See *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) (synthesizing the modern test for improper appropriation); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

133. See 17 U.S.C. § 103(a) (“The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); *id.* § 101 (“A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”).

can.<sup>134</sup>

Thus, whether a subsequent work constitutes infringement is inherently uncertain in some cases.<sup>135</sup>

This is especially true of popular musical compositions. How a person perceives the entirety of a musical work or even just a musical hook in terms of its originality and substantiality will inevitably vary. Add in the additional stochastic factors of jury trials, expert witnesses, media attention, and judges' and jurors' opinions about celebrity and non-celebrity musicians, and it is plain to see that the outcome of many music copyright infringement cases will be difficult to predict.

The Ninth Circuit, however, has needlessly added to the inherent uncertainties of copyright law. Ostensibly following the traditional jurisprudential framework, the Ninth Circuit's opinion in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,<sup>136</sup> assesses improper appropriation based on the "extrinsic" and "intrinsic" test.<sup>137</sup> The extrinsic test confusingly considers "substantial similarities in ideas,"<sup>138</sup> which appears to contravene the statute's exclusion of protection for ideas.<sup>139</sup> The Ninth Circuit has further confused and arguably flouted copyright law's limiting doctrines by basing a copyright infringement determination on "total concept and feel" without undertaking a careful effort to filter out unprotectable expression.<sup>140</sup>

134. See *Nichols*, 45 F.2d at 121; see also *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc.").

135. See *Peter Pan Fabrics*, 274 F.2d at 489 ("The test for infringement of copyright is of necessity vague.").

136. 562 F.2d 1157 (9th Cir. 1977).

137. See *id.* at 1164. The Ninth Circuit states that its test is the "same type of bifurcated test" that was announced in *Arnstein*. See *id.* While both tests are bifurcated, the *Krofft* test is plainly different and deeply confusing.

138. See *id.*

139. See 17 U.S.C. § 102(b).

140. See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). Writing in dissent, Judge Kilkenny could not

follow the logic . . . in holding that the uncopyrightable words and the imitated, but not copied art work, constitutes such total composition as to be subject to protection under the copyright laws. . . . I call attention to the fact that a number of experts appeared in the lower court and testified that the phrases on the cards were in common use and that Roth's writer often obtained his ideas from others.

In these circumstances, we should not set aside the findings of the lower court.

*Id.* at 1111 (Kilkenny, J., dissenting). While original compilations of unprotectable elements, see *supra* note 133, the majority's casual use of the phrase "total concept and feel" is far too vague a

The *Krofft* decision also excludes consideration of expert testimony from the intrinsic stage of analysis.<sup>141</sup> This categorical rule makes little sense in cases involving technical subject matter.<sup>142</sup> Jurors might well need the assistance of musicologists to understand whether musical elements are unprotectable or unoriginal.

The Ninth Circuit's music copyright jurisprudence, as reflected in *Three Boys Music*<sup>143</sup> and *Swirsky*,<sup>144</sup> removes vital guardrails needed to prevent juries from basing copyright determinations on unfiltered comparisons of musical works, gut impressions, or forensic musicologists who are not attuned to how copyright differentiates between inspiration and infringement. In my view, neither case should have reached jury determinations, or at least not in the form that they did. The similarities were either too weak or based on unoriginal elements. Moreover, the Ninth Circuit should have reviewed the lower courts' handling of these matters far more carefully. Its confusing jurisprudence and lax standard of appellate review in these cases set the stage for the more recent controversies over *Blurred Lines* and *Stairway to Heaven*.

The Isley Brothers began performing in the early 1950s and achieved modest success in the late 1950s with their fourth single *Shout*.<sup>145</sup> Their 1962 cover of *Twist and Shout* reached the Top 20 *Billboard Hot 100*<sup>146</sup> and propelled them to a Motown deal.<sup>147</sup> They left Motown in 1968 and achieved their biggest hit in 1969 with *It's Your Thing*, which reached number two on the *Billboard Hot 100* and number one on the *Billboard R&B* chart and

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standard, especially in the hands of juries lacking a deep appreciation of the subtleties of copyright law's scope of protection.

The majority concludes that in the overall arrangement of the text, the art work and the association of the art work to the text, the cards were copyrightable and the copyright infringed. This conclusion, as I view it, results in the whole becoming substantially greater than the sum total of its parts.

*Roth Greeting Cards*, 429 F.2d at 1111 (Kilkenny, J., dissenting).

141. See *Sid & Marty Krofft*, 562 F.2d at 1164.

142. Cf. Shyamkrishna Balganesh & Peter S. Menell, *The Use of Technical Experts in Software Copyright Cases: Rectifying the Ninth Circuit's "Nutty" Rule*, 35 BERKELEY TECH. L.J. 663 (2020) (focusing on the need for expert testimony to enable lay fact-finders to assess similarities between two computer software programs).

143. 212 F.3d 477 (9th Cir. 2000).

144. 376 F.3d 841 (9th Cir. 2004).

145. See *The Isley Brothers*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Isley\\_Brothers](https://en.wikipedia.org/wiki/The_Isley_Brothers) (last visited Feb. 17, 2022).

146. See *Twist and Shout*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Twist\\_and\\_Shout](https://en.wikipedia.org/wiki/Twist_and_Shout) (last visited Feb. 17, 2022).

147. See *This Old Heart of Mine (Is Weak for You)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/This\\_Old\\_Heart\\_of\\_Mine\\_\(Is\\_Weak\\_for\\_You\)](https://en.wikipedia.org/wiki/This_Old_Heart_of_Mine_(Is_Weak_for_You)) (last visited Feb. 17, 2022).

garnered the group a Grammy Award for Best R&B Vocal Performance by a Duo or Group.<sup>148</sup> They would later go on to induction in the Rock and Roll Hall of Fame in 1992.<sup>149</sup>

The Isley Brothers' foray into music copyright law grew out of their song *Love Is a Wonderful Thing*, which was recorded in 1964 and released on a 45 rpm in 1966.<sup>150</sup> The song did not break the Billboard top 100. The song was not included on an album until March 1991, when it appeared on *The Isley Brothers—The Complete UA Sessions*.<sup>151</sup>

Singer/songwriter Michael Bolton gained popularity in the late 1980s and early 1990s by reviving the soul sound of the 1960s. His 1987 cover over Otis Redding's classic (*Sittin' on the*) *Dock of the Bay* reached number eleven on the *Billboard Hot 100*.<sup>152</sup> In 1990, Bolton recorded his album *Time, Love & Tenderness*, featuring a song entitled *Love Is a Wonderful Thing*.<sup>153</sup> The album was released in 1991 and shot to number one on the *Billboard 200* chart. It would go on to sell 16 million copies.<sup>154</sup> Three songs on the album charted on the U.S. *Billboard Hot 100*: his cover of Percy Sledge's *When a Man Loves a Woman* reached number one; *Love Is a Wonderful Thing* at number four; and the title cut *Time, Love & Tenderness* reached number seven.<sup>155</sup> American Music Awards named Bolton as "Favorite Pop/Rock Male Artist" in 1991 and *Time, Love & Tenderness* won "Favorite Pop/Rock Album" in 1992.<sup>156</sup>

In February 1992, The Isley Brothers sued Bolton alleging that his *Love Is a Wonderful Thing* infringed their mid-1960s song of the same title.<sup>157</sup>

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148. See *It's Your Thing*, WIKIPEDIA, [https://en.wikipedia.org/wiki/It%27s\\_Your\\_Thing](https://en.wikipedia.org/wiki/It%27s_Your_Thing) (last visited Feb. 17, 2022).

149. See *The Isley Brothers*, ROCK & ROLL HALL OF FAME, <https://www.rockhall.com/inductees/isley-brothers> (last visited Feb. 13, 2022).

150. See *Love Is a Wonderful Thing (Michael Bolton Song)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Love\\_Is\\_a\\_Wonderful\\_Thing\\_\(Michael\\_Bolton\\_song\)](https://en.wikipedia.org/wiki/Love_Is_a_Wonderful_Thing_(Michael_Bolton_song)) (last visited Feb. 17, 2022).

151. See *id.*; *The Isley Brothers—The Complete UA Sessions*, DISCOGS, <https://www.discogs.com/The-Isley-Brothers-The-Complete-UA-Sessions/release/1380331> (last visited Feb. 13, 2022); *The Complete UA Sessions: The Isley Brothers*, APPLE MUSIC, <https://music.apple.com/us/album/the-complete-ua-sessions/723687982> (last visited Feb. 13, 2022).

152. See (*Sittin' On*) *The Dock of the Bay*, WIKIPEDIA, [https://en.wikipedia.org/wiki/\(Sittin%27\\_On\)\\_The\\_Dock\\_of\\_the\\_Bay#Michael\\_Bolton\\_version](https://en.wikipedia.org/wiki/(Sittin%27_On)_The_Dock_of_the_Bay#Michael_Bolton_version) (last visited Feb. 17, 2022).

153. See *Love Is a Wonderful Thing (Michael Bolton Song)*, *supra* note 150.

154. See *Time, Love & Tenderness*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Time,\\_Love\\_%26\\_Tenderness](https://en.wikipedia.org/wiki/Time,_Love_%26_Tenderness) (last visited Feb. 17, 2022).

155. See *id.*

156. See *List of Awards and Nominations Received by Michael Bolton*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_awards\\_and\\_nominations\\_received\\_by\\_Michael\\_Bolton](https://en.wikipedia.org/wiki/List_of_awards_and_nominations_received_by_Michael_Bolton) (last visited Feb. 17, 2022).

157. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

Apart from the title phrase, which was part of the chorus in both songs, the songs featured different lyrics. Both songs were in the R&B style. Bolton and his co-author Andrew Goldmark denied hearing the The Isley Brothers' song, and the case proceeded to trial.

On the issue of factual copying,<sup>158</sup> The Isley Brothers presented evidence that Bolton and Goldmark grew up listening to R&B and that Bolton "appreciated a lot of Black singers," was the lead singer in a band that performed "covers" of popular songs by Black singers, and that his brother had a "pretty good record collection." Several disc jockeys testified that The Isley Brothers' *Love Is a Wonderful Thing* received regular radio air play and was played on music television shows in the northeast in 1966 and 1967, when Bolton was thirteen years old.<sup>159</sup> Ronald Isley testified that Bolton told him at the Lou Rawls United Negro College Fund Benefit concert in 1988: "I know this guy. I go back with him. I have all his stuff." Isley's wife corroborated his recollection, stating that she heard Bolton say, referring to Ronald Isley, "This man needs no introduction. I know everything he's done." Finally, on a work tape that he introduced to show independent creation, Bolton asked Goldmark if the song they were composing was Marvin Gaye's *Some Kind of Wonderful*.

Notwithstanding that The Isley Brothers' *Love Is a Wonderful Thing* never charted following its mid-1960s release and had not been released on an album until after Bolton and Goldmark created their song,<sup>160</sup> the district court concluded that there was sufficient evidence of access to present the factual copying issue to a jury with an inverse ratio test instruction.<sup>161</sup> The evidence of probative similarity was also weak. Apart from the title, chorus phrase (based on the title), and the R&B style of the two songs, the similarities were difficult to discern. The Isley Brothers' musicologist testified that the two songs "shared a combination of five unprotectable elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade

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158. *See id.* at 483–84.

159. Bolton produced copies of *TV Guide* from 1966 indicating that the television shows playing the song never aired in Connecticut, where he grew up. *See id.* at 484.

160. Three R&B experts—celebrated Motown songwriter Lamont Dozier (who co-authored The Isley Brothers' 1966 hit *This Old Heart of Mine (Is Weak for You)*), well-known New York disc jockey Bruce Morrow ("Cousin Brucie") who played Isley Brothers' records in 1966, and an R&B historian and record collector—testified that they never heard of the Isley Brothers' *Love Is a Wonderful Thing* before the lawsuit against Michael Bolton. *See* Petition for Writ of Certiorari at \*5, Bolton v. Three Boys Music Corp., 212 F.3d 477 (2000) (No. 00-689), 2000 WL 34000028.

161. *See Three Boys Music*, 212 F.3d at 484.

ending.”<sup>162</sup> Titles and other short phrases are generally not copyrightable.<sup>163</sup> Furthermore, Bolton pointed out the Copyright Office has registration for 129 songs titled *Love is a Wonderful Thing*, eighty-five of which were recorded prior to The Isley Brothers’ registration in 1964.

After hearing the evidence and listening to the two songs, the jury found for The Isley Brothers on both factual copying and substantial similarity of protected expression.<sup>164</sup> The district court declined to rule that the evidence was insufficient to support the jury’s verdict, and the Ninth Circuit affirmed, refusing to interfere with the jury’s credibility determinations, credit Bolton’s and Goldmark’s independent creation defense, or rule that the scope of The Isley Brothers’ copyright was limited to the deposit lead sheet and that the jury should not have been able to hear the Isley Brothers’ sound recording.<sup>165</sup>

It is difficult to see how the jury’s verdict comports with copyright law’s standards for factual copying or unlawful appropriation. It is possible that the jury was confused by the instructions and reached a gut-level determination based on the unprotectable title/chorus phrase. Relatedly, the jury might have perceived that Bolton owed a debt to the R&B artists who influenced his development and that this case provided a means to repay that debt.

The views of music critics following the decision support these hypotheses. Following the jury verdict, *Entertainment Weekly* conducted a poll of eight music critics regarding their assessment of the case:

Don McLeese, *Austin American-Statesman* Verdict: Innocent. “Bolton is mainly guilty of his typical triteness. His tune owes as much to the Young Rascals’ [*Love Is a Beautiful Thing*] as it does to the Isleys’ obscurity. I’d sooner string him up for the desecrations he has inflicted upon Percy Sledge and Otis Redding.”

David Browne, *Entertainment Weekly* Verdict: Innocent. Comment: “Michael Bolton is guilty of many things—oversinging, lack of musical imagination, overall hackdom—but

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162. See *id.* at 485.

163. See U.S. COPYRIGHT OFF., CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT 2 (Mar. 2021), <https://www.copyright.gov/circs/circ33.pdf> (“Words and short phrases, such as names, titles, and slogans, are uncopyrightable because they contain an insufficient amount of authorship.”). “The title or subtitle of a work, such as a book, a song, or a pictorial, graphic, or sculptural work” is not eligible for copyright protection.” *Id.* at 2–3.

164. See *Three Boys Music*, 212 F.3d at 484–85.

165. See *id.* at 484–87.



outright plagiarism doesn't seem to be one of them. The antiseptic white-boy funk of his [*Love*] seems miles removed—in terms of musical notes and spirit—from the Isleys' juiced-up, if generic, slice of pop-gospel."

Jon Garelick, *The Boston Phoenix* Verdict: Innocent. Comment: "I'd like to give the Isleys several million of Michael's dollars, but they're different songs. The Isleys' song pops with freshness and good humor. Bolton's is a turgid bore. If the decision stands, every pop songwriter will be able to sue every other pop songwriter. I also happen to believe Bolton when he says he never heard it."

James Bernard, *The Source* Verdict: Guilty. Comment: "I'm glad the Isleys won—they probably need the money—but they should be insulted at the very thought that there's any similarity between the two songs."

Dave Marsh, *Playboy* Verdict: Guilty. Comment: "I felt extremely pleased that Michael Bolton wanted to know what I thought. It's my hope that he will someday ask how much a critic might imagine he owes in reparations for butchering classic—as opposed to obscure—R&B."

Michael Walsh, *Time* Verdict: Innocent. Comment: "The verdict's an utter travesty rendered by unmusical jurors. Aside from the fact that they have the same title, and the melody begins on the third note of the scale, the two songs bear no resemblance in any significant musical way."

Havelock Nelson, *Rolling Stone* contributor Verdict: Guilty. Comment: "Bolton's song does bear a slight similarity to the Isleys'—enough to call it a knockoff. Both titles have a bright, gossypily feel and a similar, repeated hook line."

Craig Marks, *Spin* Verdict: Guilty. Comment: "Let's see: same title, near-identical melody, shameful track record . . . Michael Bolton, meet George Harrison. The American judicial system may be seriously flawed, but it can finally stand up and take a bow. Now if only they can make

restitution to the rest of the [B]lack musical community that Bolton has stolen from over the years.”<sup>166</sup>

These comments highlight the strong emotional sway that can influence music copyright infringement cases. Only two of the eight critics considered the songs musically similar, whereas all of them trashed Bolton for cultural appropriation.

The Ninth Circuit’s 2004 *Swirsky v. Carey*<sup>167</sup> decision reveals another gatekeeping failure. The case concerns two R&B songs released in the late 1990s. In 1997, Seth Swirsky and Warryn Campbell composed *One of Those Love Songs*, which was recorded by the musical group Xscape and released the following year.<sup>168</sup> Although that song did not chart, the album reached number twenty-eight on the U.S. *Billboard* 200 and number six on the *Top R&B/Hip Hop Albums* chart.<sup>169</sup> The following year Mariah Carey released *Thank God I Found You* on her *Rainbow* album.<sup>170</sup> The song was Carey’s fifteenth number one U.S. *Billboard* Hot 100 hit.

Swirsky and Campbell sued Carey for copyright infringement based on their allegation that the songs shared similar choruses. Forensic musicologist Dr. Robert Walser, on behalf of Swirsky and Campbell, testified that although the two songs had dissimilar lyrics and verse melodies, the choruses of the two songs shared “the basic shape and pitch emphasis of the melodies, plus their appearance over highly similar basslines and chord changes, at very nearly the same tempo and in the same generic style,” and were performed in the same key, something that he referred to as a “suspicious coincidence.”<sup>171</sup> He acknowledged, however, that “extensive vocal ornamentation of the basic notes of the melody is typical of the contemporary R&B genre in which both songs are performed, and that therefore precise comparison of the notes as sung may obscure ‘the extent to which the songs are actually heard as similar.’”<sup>172</sup> Much of Dr. Walser’s measure-by-measure analysis reflected his

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166. See Jeff Gordinier, *Critics Review Michael Bolton Case*, ENT. WKLY. (May 27, 1994, 4:00 AM), <https://ew.com/article/1994/05/27/critics-review-michael-bolton-case/>.

167. 376 F.3d 841 (9th Cir. 2004).

168. See *Traces of My Lipstick*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Traces\\_of\\_My\\_Lipstick](https://en.wikipedia.org/wiki/Traces_of_My_Lipstick) (last visited Feb. 17, 2022).

169. See *id.*

170. See *Thank God I Found You*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Thank\\_God\\_I\\_Found\\_You](https://en.wikipedia.org/wiki/Thank_God_I_Found_You) (last visited Feb. 28, 2022). *Thank God I Found You* was co-authored by Mariah Carey, Jimmy Jam, and Terry Lewis. *Id.*

171. See *Swirsky v. Carey*, 226 F. Supp. 2d 1224, 1227–28 (C.D. Cal. 2002), *rev’d*, 376 F.3d 841, 845 (9th Cir. 2004).

172. See *id.* at 1227 & n.4.

perception of similarity.<sup>173</sup>

The defendants responded that Dr. Walser's melodic similarities were overstated and to a large degree contradicted by his deposition testimony.<sup>174</sup> They also pointed out that Dr. Walser relied upon a subjective process of melodic "reduction" and completely ignored the differences in pitch and rhythmic emphasis between the two songs. They also noted that the melody of two of the measures were common music phrases, and many of the non-melodic elements were unoriginal.<sup>175</sup>

Based on a systematic assessment of the songs as a whole and measure by measure,<sup>176</sup> Judge Snyder concluded that the plaintiffs failed to pass the "objective" extrinsic test of similarity of ideas and expression. She faulted Dr. Walser's analytic methodology for relying on a subjective process of "selective reduction" of notes based on his assessment of whether notes are structural rather than ornamental and failing to consider rhythmic differences.<sup>177</sup> She also faulted Dr. Walser for not filtering out stock melodic phrases, such as that present in both the first measure of the plaintiffs' chorus and *For He's a Jolly Good Fellow*.<sup>178</sup> Drawing the evidence together, Judge Snyder concluded that six of the eight measures of the songs' choruses lacked objective similarity.<sup>179</sup> She also concluded that "any alleged similarity in key, harmonic structure, tempo or genre between [the two songs] is not sufficient to create a material question of fact under the extrinsic test" and granted the defendants' motion for summary judgment of non-infringement.<sup>180</sup>

In reversing the district court, the Ninth Circuit took a far more capacious view of the scope of copyright protection for musical works<sup>181</sup> and a far less deferential view toward a trial judge's assessment of the extrinsic test.<sup>182</sup> Following *Three Boys Music*, the Ninth Circuit interpreted the protectability of compilations of unprotectable elements broadly, emphasizing that the

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173. See *id.* at 1228 (explaining, for example, "the impression" left upon the listener).

174. See *id.* at 1228–29.

175. See *id.* at 1229.

176. See *id.* at 1228–34.

177. See *id.* at 1229.

178. See *id.* at 1233.

179. See *id.*

180. See *id.* at 1234.

181. See *Swirsky v. Carey*, 376 F.3d 841, 849–52 (9th Cir. 2004). For example, even though Dr. Walser admitted that the pitch sequence of the first measure of the plaintiffs' work was more similar to the pitch sequence in the first measure of *For He's a Jolly Good Fellow* than the pitch sequence of the defendant's work, the Ninth Circuit nonetheless held that it was not *scène à faire* because *For He's a Jolly Good Fellow* is a folk music song and the plaintiffs' song is a hip-hop/R&B song. *Id.*

182. See *id.*

definition of originality in the Ninth Circuit is broad, and originality means “little more than a prohibition of actual copying.”<sup>183</sup> Even though the court recognized that Dr. Walser’s methodology focused on “how the two choruses sounded to his expert ears,” it nonetheless rejected the district court’s observation that such testimony went to intrinsic rather than extrinsic criteria.<sup>184</sup> The Ninth Circuit disregarded the lower court’s focus on the actual musical transcriptions in conducting the extrinsic test. In so doing, the Ninth Circuit validated selective expert analyses as a basis for proceeding to trial.<sup>185</sup>

### C. *Blurred Lines*

The *Blurred Lines* controversy illustrates copyright law’s blurry inspiration-or-infringement line as well as the uncertainties surrounding copyright litigation. To many musicians and scholars, Williams’s and Thicke’s *Blurred Lines* merely imitated Marvin Gaye’s “groove” in *Got To Give It Up*, and “grooves” should not be copyrightable.<sup>186</sup> Unfortunately, much of what has been written about the decision overlooks the pathbreaking creativity of *Got To Give It Up*, the complex backstory of the case, and what transpired at the trial.<sup>187</sup> In my view, the district court and Ninth Circuit decisions are flawed, but not for the reasons that have been commonly asserted.

Robin Thicke and Pharrell Williams produced *Blurred Lines* in 2013,<sup>188</sup> a particularly tumultuous time in the music industry. The effects of peer-to-

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183. See *id.* at 849, 851 (quoting *Three Boys Music*, 212 F.3d at 489 (quoting *North Coast Industries v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir.1992))).

184. See *id.* at 847.

185. See Mark Avsec, “Nonconventional” Musical Analysis and “Disguised” Infringement: *Clever Musical Tricks To Divide the Wealth of Tin Pan Alley*, 52 CLEV. ST. L. REV. 339 (2004).

186. See Wendy Gordon, *The Jury in the ‘Blurred Lines’ Case Was Misled*, NEWSWEEK (Mar. 18, 2015, 2:30 PM), <http://www.newsweek.com/jury-blurred-lines-case-was-misled-314856>; Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity: What the ‘Blurred Lines’ Team Copied Is Either Not Original or Not Relevant*, SLATE (Mar. 12, 2015, 12:27 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/03/blurred\\_lines\\_verdict\\_is\\_wrong\\_williams\\_and\\_thicke\\_did\\_not\\_infringe\\_on.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/blurred_lines_verdict_is_wrong_williams_and_thicke_did_not_infringe_on.single.html); Tim Wu, *Why the “Blurred Lines” Copyright Verdict Should Be Thrown Out*, NEW YORKER (Mar. 12, 2015), <http://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out>.

187. See “*Blurred Lines*” of Copyright in Music, COLUM. L. NEWS (Apr. 15, 2015), <https://www.law.columbia.edu/news/archive/blurred-lines-copyright-music> (reporting that Robert Clarida, a well-known copyright attorney, and Judith Finell, a musicologist who served as an expert witness in the *Blurred Lines* litigation, “agreed that some of the press coverage of the verdict reflected a misunderstanding of the issues in the case, and that determining whether a work infringes is ultimately a question for jurors who hear all the evidence at trial”).

188. See *Blurred Lines*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Blurred\\_Lines](https://en.wikipedia.org/wiki/Blurred_Lines) (last visited Feb. 17, 2022). Rapper T.I. is also featured on *Blurred Lines*. *Id.*

peer technology were still reverberating. Record sales had been in steady decline for more than a decade, and streaming services were still struggling to work out licensing deals with copyright owners, attract subscription customers, and compete with piracy outlets. Record labels were desperate to build audiences for new releases.

Universal Music Group and the artists pulled out all the stops to promote *Blurred Lines*. Thicke and Williams granted numerous interviews, in which they spoke about their modeling *Blurred Lines* on Marvin Gaye's *Got To Give It Up*. In an interview with the *New York Times*, Thicke explained the genesis:

On the last day [of a three-day writing session with Williams], he told Mr. Williams he wanted to do something like Marvin Gaye's [*Got To Give It Up*]. Mr. Williams started playing a funk rhythm with syncopated cowbell accents on the drums, and that, coupled with a simple two-chord progression, became the spine of the track. Mr. Thicke improvised a melody and some lyrics about seducing another man's girlfriend.

"Within an hour and a half, we had the whole record recorded and finished, completed, magical," he said. T.I. added a rap several months later.<sup>189</sup>

A week after his *New York Times* interview, Thicke repeated the story in an interview with *Highsnobiety*: "[I] wanted to do something like Marvin Gaye's [*Got To Give It Up*] which is one of my favorite songs. Pharrell started messing with the drums, and an hour and a half later the whole record was done."<sup>190</sup>

Pharrell Williams similarly acknowledged the influence of Marvin Gaye and *Got To Give It Up* on the creation of *Blurred Lines*. In an interview for *HipHollywood* several months after *Blurred Lines* was released, Jasmine Simpkins asked Pharrell Williams whether he was inspired by Marvin Gaye's *Got To Give It Up*.<sup>191</sup> Williams responded:

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189. See James C. McKinley Jr., *Robin Thicke, a Romantic, Has a Naughty Hit*, N.Y. TIMES (July 19, 2013), <https://www.nytimes.com/2013/07/21/arts/music/robin-thicke-a-romantic-has-a-naughty-hit.html>.

190. See Joint Trial Brief of Counter-Claimants at 19, *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (No. CV13-06004-JAK).

191. See *Pharrell Williams Admits He Was Inspired by Marvin Gaye's 'Got To Give It Up.'*—*HipHollywood.com*, YOUTUBE (Oct. 31, 2013), <https://www.youtube.com/watch?v=yfJkRXcXZQQ>.

Oh, for sure. Totally, but what I tried, see this is the thing, what I tried to do was, I tried to take the feeling that *Got To Give It Up* gave me, but also tried to do, blend in southern white Baptist harmonies on the chorus and then, you know, sex is always a good element to inject in anything.<sup>192</sup>

The promotional efforts succeeded beyond even UMG's and the artists' wildest imagination. Although the song and promotional video were sharply criticized as misogynistic,<sup>193</sup> *Blurred Lines* topped the U.S. *Billboard Hot 100* for twelve consecutive weeks and became one of the best-selling singles of all time.<sup>194</sup> The song was nominated for Record of the Year and Best Pop Duo/Group Performance at the 56th Annual Grammy Awards.<sup>195</sup>

*Blurred Lines*' immense popularity, however, raised a red flag. Numerous music critics picked up on the similarities between *Blurred Lines* and *Got To Give It Up*. *New York Times*' music critic Rob Hoerburger commented:

Robin Thicke's [*Blurred Lines*] just notched its ninth week at No. 1 on Billboard's Hot 100, suggesting not only that it's the official summer song of 2013—an argument that was actually settled weeks ago—but also that its dominance might extend well into the fall. What is it that's giving this bouncy but seemingly lightweight track such staying power?

Well there's the irresistible, insistent groove, the bass line that keeps winding and pulsing and staying several steps ahead of boredom. And then there's the friendly rat-a-tat of the cowbell. . . .

But what I keep coming back to is the song's choice DNA. It's got Michael Jackson-like yelps throughout. And

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192. See *id.*

193. See Tricia Romano, 'Blurred Lines,' Robin Thicke's Summer Anthem, Is Kind of Rapey, DAILY BEAST, <https://www.thedailybeast.com/blurred-lines-robin-thicke-s-summer-anthem-is-kind-of-rapey> (July 11, 2017, 10:22 PM); Dorian Lynskey, *Blurred Lines: The Most Controversial Song of the Decade*, GUARDIAN (Nov. 13, 2013, 2:32 PM), <https://www.theguardian.com/music/2013/nov/13/blurred-lines-most-controversial-song-decade>; cf. Pharrell Says He's Embarrassed by "Blurred Lines," GQ (Oct. 14, 2019), <https://www.gq.com/story/pharrell-embarrassed-by-blurred-lines> (acknowledging belatedly the insensitivity of *Blurred Lines*).

194. See *Blurred Lines*, *supra* note 188.

195. See *56th Annual Grammy Awards*, WIKIPEDIA, [https://en.wikipedia.org/wiki/56th\\_Annual\\_Grammy\\_Awards](https://en.wikipedia.org/wiki/56th_Annual_Grammy_Awards) (last visited Feb. 17, 2022).

that bass line came right from Marvin Gaye's No. 1 hit from the summer of '77, [*Got To Give It Up*,] like '*Blurred Lines*,' a seeming throwaway (it was tacked onto a live album) that turned into a highlight of the singer's storied career. [*Got To Give It Up*] came out during a very good year for the music business—a year bookended by Fleetwood Mac's [*Rumours*] and the soundtrack to [*Saturday Night Fever*,] two of the biggest-selling albums of all time (and coincidentally the year Robin Thicke was born). Yet even by then the great pop-rock-soul-disco alliance was starting to splinter. . . .

But Gaye was having none of that. In [*Got To Give It Up*,] he hit all of his marks. The song was funky. It was soulful. It rocked. And though Gaye's rapturous falsetto sometimes obscured the lyrics, there was a real song there, too, about a wallflower who finds redemption through dancing. He was never more hopeful than when he sang, "No more standin' along the side walls." The song achieved a chart trifecta, reaching No. 1 pop, soul[,] and disco.

Thicke seemed to understand the song's universality, consciously or subconsciously. [*Blurred Lines*,] even in its title, is a song that's meant to decodify, destratify, deformat. And that's the spirit that makes the track more than just a tribute, and keeps it grabbing new audiences or holding on to the ones who have loved it all these weeks. Only time will tell if it will be one of the all-time great summer songs . . . . But as Gaye sings, "Long as you're groovin', there's always a chance."<sup>196</sup>

Music critic Paul Cantor posted: "You probably don't feel guilty for liking [*Blurred Lines*.] Maybe that's because it was originally a Marvin Gaye song ([*Got To Give It Up*]), and Marvin Gaye is f[\*\*\*]ing awesome."<sup>197</sup> David Ritz, co-author of Gaye's hit *Sexual Healing*,<sup>198</sup> commented in *Rolling*

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196. Rob Hoerburger, *Why 'Blurred Lines' Won't Go Away*, N.Y. TIMES: THE 6TH FLOOR (Aug. 8, 2013, 6:11 PM), <https://6thfloor.blogs.nytimes.com/2013/08/08/why-blurred-lines-wont-go-away/>.

197. Paul Cantor, *Why Don't We Have a Song of the Summer Yet?*, VICE (July 29, 2013), <https://www.vice.com/en/article/rknqa6/why-dont-we-have-a-song-of-the-summer-yet>.

198. See *Sexual Healing*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Sexual\\_Healing](https://en.wikipedia.org/wiki/Sexual_Healing) (last visited Feb. 17, 2022).

Stone that, “When I first heard Robin Thicke’s [*Blurred Lines*], my reaction was the same as millions of other R&B fans: ‘Hey, that’s Marvin Gaye’s [*Got To Give It Up*].”<sup>199</sup> Ritz noted how *Got To Give It Up* broke new ground: “Rather than follow the [disco] craze, he fought the craze, crafting an idiosyncratic groove completely foreign from the four-on-the-floor beat that typified disco.”<sup>200</sup>

With promotional buzz about the role of Marvin Gaye’s 1977 hit in *Blurred Lines* swirling, the Gaye family’s transactional attorney reached out to Peter Paterno, Thicke’s and Williams’s transactional attorney, to discuss recognition of Marvin Gaye’s contribution to *Blurred Lines*.<sup>201</sup> Paterno immediately referred the matter to his law partner Howard King, who fired off a declaratory judgment complaint on August 15, 2013, asserting that “there are no similarities between [*Blurred Lines*] and [*Got To Give It Up*] other than commonplace musical elements. . . . The reality is that the songs themselves are starkly different.”<sup>202</sup> Immediately after the filing of the declaratory relief action, Thicke changed his story about how *Blurred Lines* was conceived.<sup>203</sup>

The Gaye family turned to Richard Busch, the litigator with whom I had worked on the F.B.T. litigation.<sup>204</sup> The Gaye family opposed the declaratory judgment action, filed a counterclaim for copyright infringement, and requested a jury trial.<sup>205</sup> They hired forensic musicologist Judith Finell and ethnomusicologist Ingrid Monson, the Quincy Jones Professor of African American Music at Harvard University, to analyze the two works. Professor Monson had not previously worked as an expert witness but had views about unique innovative elements of *Got To Give It Up*:

In my work as a scholar of African-American music, I know

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199. David Ritz, *Robin Thicke, You’re No Marvin Gaye*, ROLLING STONE (Aug. 23, 2013, 7:00 PM), <https://www.rollingstone.com/music/music-news/robin-thicke-youre-no-marvin-gaye-65305/>.

200. *Id.*

201. See Tim Kenneally and Pamela Chelin, ‘*Blurred Lines*’ Trial Was Avoidable: Read Marvin Gaye Family’s Statement (Exclusive), THE WRAP (Mar. 18, 2015, 9:59 AM), <https://www.the-wrap.com/blurred-lines-trial-was-avoidable-read-marvin-gaye-family-s-statement-exclusive/>.

202. See Complaint for Declaratory Relief at 1–2, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. filed Aug. 15, 2015).

203. See Defendants’ First Amended Counterclaims, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK, 2013 WL 6079472 (C.D. Cal. Filed Oct. 30, 2013) [hereinafter First Amended Counterclaims]; *Robin Thicke: Gaye Was Not in My Head*, TMZ (Sept. 26, 2013, 12:41 AM), <https://www.tnz.com/2013/09/26/robin-thicke-marvin-gaye-lawsuit-songs-stevie-wonder/>. In an interview with celebrity gossip website TMZ following the lawsuit, Thicke responded “no” when asked if he was thinking of Marvin Gaye when he wrote *Blurred Lines*. *Id.* at 3.

204. See *supra* text accompanying notes 71–87.

205. See First Amended Counterclaims, *supra* note 203.



that some of the most innovative musical creativity in the genres of jazz, R&B, soul, gospel and hip-hop has taken place in the composition of exactly these accompaniment parts, which musicians call grooves or rhythmic feels. They are not mechanical styles but living, breathing complexes of melodies, rhythms and harmonies that artists have woven and re-woven into the extraordinary recorded archive that forms the lifeblood of African-American and other American popular music. The question of when an innovation in a groove becomes standardised and, hence, generic seems to me to be a fundamentally historical question, requiring careful comparison of specific examples. In the [*Blurred Lines*] infringement case, we showed that its authors were “‘channeling’” not a late 1970s feel, as Pharrell Williams argued, but, rather, a specific piece that served as a template.<sup>206</sup>

Based on the *Got To Give It Up* lead sheet and sound recording, Finell and Monson identified numerous similarities between the works at issue.<sup>207</sup> Counsel for Williams and Thicke sought to blunt the Gaye family’s infringement case by excluding the *Got To Give It Up* sound recording from the jury’s consideration.<sup>208</sup>

It is important to note that Marvin Gaye did not compose his songs on staff notation. Like many R&B artists, he was not trained in European notation, and he composed through the process of studio recording. Therefore, the lead sheets for his compositions were prepared after the fact for the limited purpose of getting copyright registrations filed. As a result, the lead sheets did not painstakingly capture every element of the actual recordings.

Notwithstanding the fact that the sound recording was the best evidence of Gaye’s composition, based on a cramped interpretation of the 1909 Copyright Act, Judge Kronstadt ruled that the copyright deposit sheet, rather than

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206. See Ingrid Monson, *Personal Take: On Serving as an Expert Witness in the ‘Blurred Lines’ Case*, in THE CAMBRIDGE COMPANION TO MUSIC IN DIGITAL CULTURE 60 (Nicholas Cook, Monique M. Ingalls & David Trippett eds., 2019).

207. See Judith Finell, Preliminary Report: Comparison of “Got To Give It Up” and “Blurred Lines,” Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2013 WL 6079472 (C.D. Cal. filed Oct. 17, 2013); Ingrid Monson, Report on the Infringement of Marvin Gaye’s “Got To Give It Up” and “After the Dance” at 6–11, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2013 WL 6079472 (C.D. Cal. filed Oct. 31, 2013).

208. See Notice of Motion and Plaintiffs’ Motion in Limine No. 1 to Exclude Evidence of Marvin Gaye Sound Recordings; Memorandum of Points and Authorities, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2013 WL 6079472 (C.D. Cal. filed Jan. 6, 2015).

the sound recording, defined the scope of the subject matter protected by *Got To Give It Up*.<sup>209</sup> As a result, the Gayes' experts were barred from basing their analysis on aspects of *Got To Give It Up* that were not reflected in the lead sheet deposit. Nor were they permitted to play the sound recording to the jury, something that was permitted in *Three Boys Music Corp. v. Bolton*.<sup>210</sup>

The court's ruling raises serious social justice concerns. The 1909 Act reflected the class of composers who were using copyright protection, music industry practices, and technologies of that time period. Musicians seeking copyright protection at the turn of the twentieth century had been trained in European musical traditions of staff notation and composed on sheet music. Over the course of the twentieth century, however, jazz, country, bluegrass, R&B, and rock 'n' roll artists transformed the American musical landscape. Relatively few of these composers, however, were trained in European musical tradition.<sup>211</sup> To limit the protection of their works to post hoc lead sheets hastily prepared solely for the technical act of registration erases potentially significant parts of the artist's musical creation.

The policy justification for this technical requirement is that the deposit copy serves as a form of notice of what is claimed. That justification has long been obsolete. The suggestion that Robin Thicke or Pharrell Williams obtained the *Got To Give It Up* lead sheet as part of their due diligence in composing *Blurred Lines* is ludicrous. Thicke and Williams knew of *Got To Give It Up* from the sound recording. As the deposition testimony revealed, Pharrell Williams, like Marvin Gaye, was "not comfortable" with musical notation. Had Gaye created *Got To Give It Up* in 1978, rather than 1977, Copyright Office procedures would have accepted the sound recording as the deposit copy.<sup>212</sup>

*Blurred Lines* counsel's strategy, however, backfired. After the litigation took shape, Pharrell Williams shifted his public statements to align with the lead sheet position. In a March 2014 interview with *XXL* magazine, he was asked about similarities between *Blurred Lines* and *Got To Give It Up*. In response, he explained:

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209. See (In Chambers) Order Re Admissibility of Sound Recording Evidence at Trial, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK, 2013 WL 6079472 (C.D. Cal. filed Jan. 28, 2015).

210. 212 F.3d 477, 486–87 (9th Cir. 2000) (ruling that the trial court did not err in admitting a sound recording as evidence of what was encompassed by a 1909 Act composition copyright).

211. See, e.g., *Swirsky v. Carey*, 376 F.3d 841, 845 & n.5 (9th Cir. 2004) (noting that neither of the parties in the case composed their songs on sheet music).

212. See U.S. COPYRIGHT OFF., CIRCULAR 50: COPYRIGHT REGISTRATION FOR MUSIC COMPOSITIONS 4 (Mar. 2021), <https://www.copyright.gov/circs/circ50.pdf>.

We're dealing with the idea that someone feels like a groove is proprietary, and it's not. Music is, and the notes are, and *when you look at the sheet music*, then you'd know. And just for a bit of humor, the percussion that I use on [*Blurred Lines*,] aside from the music notation being completely different, completely different—the *sheet music is available online, by the way*—but the percussion, I was trying to pretend that I was Marvin Gaye, and what he would do had he went down to Nashville and did a record with pentatonic harmonies, and more of a bluegrass chord structure. So unfortunately there's no comparison between the minor, bluesy chords he was playing and my major, bluegrass-y chords, and *that's very plain to see for anyone who can read music*.<sup>213</sup>

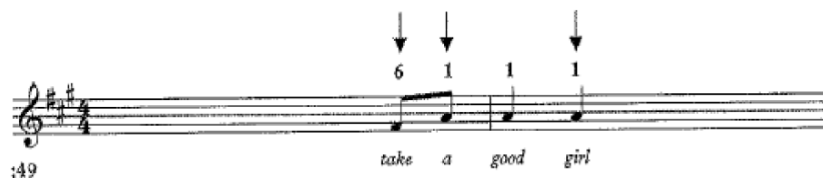
The clear implication of the italicized statements was that Williams could in fact read sheet music.

At Williams's deposition in the *Blurred Lines* litigation, Richard Busch asked Williams if he could name the notes in the following sheet music:<sup>214</sup>

**Musical Example 2A: "Give It Up" Hook**



**Musical Example 2B: "Blurred" Hook**



213. Dan Rys, *Pharrell Has Found His Happy Place in the Mainstream*, XXL (Mar. 4, 2014), <https://www.xxlmag.com/pharrell-found-happy-place-mainstream/> (emphasis added) (quoting Pharrell Williams).

214. Celeb Depositions, *Pharrell Williams: "You Were Trying to Pretend You Were Marvin Gaye?"*, YOUTUBE, at 12:44:43–12:45:17 (Apr. 9, 2021),

After studying the transcription for twenty-five seconds, Williams confessed that he was “not comfortable.”<sup>215</sup> When pressed, Williams reiterated repeatedly that he was “not comfortable.”<sup>216</sup> After Mr. Busch explained that he was required to answer his question and that “not comfortable” was not responsive, Williams stated that he could not answer at that time.<sup>217</sup>

Later in the deposition, Busch asked Williams about the writing of *Blurred Lines*:

Busch: Is it your testimony that you and Mr. Thicke never once during the creation of *Blurred Lines* spoke about, discussed, referenced the song *Got To Give It Up* by Marvin Gaye?

Williams: I did not go into the studio with the intention of making anything to feel like, to sound like Marvin Gaye.

Busch: But did the thought, did Marvin Gaye’s *Got To Give It Up* ever cross your mind at all at any time when you were creating *Blurred Lines*?

Williams: No.<sup>218</sup>

Thicke’s deposition also revealed troubling inconsistencies. Contrary to his public statements about suggesting to Williams that he “wanted to do something kind of like Marvin Gaye’s [*Got To Give It Up*,]” he claims that he did not make any such suggestion.<sup>219</sup> When confronted with his shift in public statements about the creation of *Blurred Lines*, Thicke stated: “I tell whatever I want to say to help sell records.”<sup>220</sup> As justification for his contradictory public statements, he stated that he was high and drunk every time he gave interviews in the prior year.<sup>221</sup> When asked whether he considered himself to be an honest person, he answered, “No.”<sup>222</sup>

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<https://www.youtube.com/watch?v=sOp17HQWc0Y> (showing the deposition of Pharrell Williams).

215. *Id.* at 12:45:17–12:45:48.

216. *Id.* at 12:45:48–12:48:48.

217. *Id.* at 12:46:14–12:46:16.

218. *Id.* at 13:15:43–13:16:00, 13:18:57–13:19:04.

219. *Id.* at 13:58:17–22.

220. *Id.* at 11:39:21–26.

221. *Id.* at 11:12:52–58.

222. *Id.* at 11:39:09–11.

The trial commenced on February 24, 2015.<sup>223</sup> The Gaye family's opening statement presented the contradictions between Thicke's and Williams's prior statements and their deposition testimony.<sup>224</sup> The jury heard the deposition excerpts as well as the contradictory evidence. Howard King, counsel for Thicke and Williams, offered an entirely different account of how *Blurred Lines* was created. "Mr. Williams wrote the music. Mr. Thicke showed up. They loved it. Mr. Thicke then performed some—at least one verse, added a verse, and, you know, they all shouted around like old men sitting on the porch, you know, hooting at young girls."<sup>225</sup> He sidestepped Williams's contradictory interview statements.

Testimony began the next day with Robin Thicke as the opening witness.<sup>226</sup> He attributed his inconsistent statements to memory lapses, substance abuse, the breakup of his marriage, and a white lie to claim co-author credit for *Blurred Lines*. Judith Finell then took the witness stand and summarized her methodology for comparing musical works.<sup>227</sup>

The third day of the trial began with testimony from Steven Weinger, Vice President of Artists and Repertoire for Universal Music Enterprises, where he was responsible for promoting UMG's back catalog.<sup>228</sup> In that capacity, he was familiar with Marvin Gaye's recordings and wrote the liner notes on the re-issue of *Live At The London Palladium*, the album on which *Got To Give It Up* initially appeared.<sup>229</sup> Weinger testified that he believed that *Blurred Lines* was "utterly based on *Got To Give It Up*," a statement against UMG's corporate interest.

Judith Finell then returned to the witness stand and explained that a lead sheet is meant as a "shorthand for what is intended by the composer" and that "[n]ot all the music is written out as it would be . . . in a classical musical work."<sup>230</sup> She then testified as to eight similarities between *Got To Give It Up* and *Blurred Lines*, ranging from melodic elements (pitches and rhythms) to

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223. See Reporter's Transcript of Trial Proceedings Day 1 at 1, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx), 2015 WL 4479500 (C.D. Cal. July 14, 2015).

224. *Id.* at 24–57.

225. *Id.* at 69.

226. See Reporter's Transcript of Trial Proceedings Day 2 at 4–29, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx), 2015 WL 4479500 (C.D. Cal. July 14, 2015) (detailing the trial testimony of Robin Thicke).

227. See *id.* at 64–92.

228. See Reporter's Transcript of Trial Proceedings Day 3 at 11–38, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015).

229. *Id.* at 13–14.

230. *Id.* at 40.

the bass line, hooks, lyrics, and use of word painting.<sup>231</sup> She was permitted to play audio keyboard renditions based on notes reflected in the lead sheet as well as demonstrate musical features on a keyboard in the courtroom. Using a demonstrative exhibit, she illustrated the eight similarities across the one-hundred thirty bars of each song and demonstrated how the distinctive rap parlando occur in the identical location in both songs preceded by and followed by the same bridge. Counsel for Thicke and Williams cross-examined Finell on the fourth day of the trial.<sup>232</sup>

Professor Ingrid Monson then took the stand.<sup>233</sup> Drawing on her historical research on American musical style, she testified that *Got To Give It Up*'s combination of bass line rhythm and offbeat harmonic accompaniment departed from prior genres and reflected significant innovation.<sup>234</sup> This opinion rebutted the anticipated testimony of Sandy Wilbur, the expert for Williams and Thicke.<sup>235</sup> Finally, Monson testified as to similarities at the sectional and phrasing levels.<sup>236</sup> Sandy Wilbur took the stand the next trial day for the purpose of rebutting Ms. Finell's and Professor Monson's testimony.<sup>237</sup> Hemmed in by her testimony in prior cases, she acknowledged that the lead sheets are inherently incomplete, require interpretation, and can be interpreted in different ways.<sup>238</sup>

After several corporate and damages-related witnesses, Pharrell Williams took the stand as the final witness.<sup>239</sup> He testified to his process for composing *Blurred Lines*, explaining that he composed the music and most of the lyrics before Thicke arrived at the studio.<sup>240</sup> On cross-examination, Busch highlighted contradictions with Thicke's testimony and pressed Williams on the inconsistencies in his *XXL* interview.

On the final day of trial, Judge Kronstadt instructed the jury, and the

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231. See *id.* at 40–177. Finell references a “constellation” of similarities. *Id.* at 75–76, 155.

232. See Reporter's Transcript of Trial Proceedings: Day 4, Feb. 27, 2015 at 5–49, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015).

233. See *id.* at 50–118.

234. See *id.* at 71–75.

235. See *id.* at 76–79.

236. *Id.* at 79–85.

237. See Reporter's Transcript of Trial Proceedings: Day 5, March 3, 2015 at 4–90, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015).

238. See *id.* at 29–35; Reporter's Transcript of Trial Proceedings: Day 7, March 5, 2015 at 76–77, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015) (Richard Busch's closing argument summary).

239. See Reporter's Transcript of Trial Proceedings: Day 6, March 4, 2015 at 94–147, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015).

240. See *id.* at 102–09.

parties' counsel presented their closing arguments.<sup>241</sup> Richard Busch emphasized Finell's and Monson's testimony, Thicke's numerous interviews highlighting his desire to create a song like *Got To Give It Up*, UMG's recognition of the similarity between the songs, the many music critics who recognized the similarities, and Thicke's and Williams's changed stories about the writing of the song after the litigation was launched.<sup>242</sup> In his closing, Howard King emphasized the potentially stifling effect of an infringement finding on musicians in general<sup>243</sup> and Pharrell Williams in particular, whom he praised as a "gifted, yet humble, producer and creator whose works have sold over a hundred million copies worldwide."<sup>244</sup> He downplayed the Thicke and Williams interviews referencing Marvin Gaye and *Got To Give It Up* and emphasized the need to focus on the four corners of the lead sheet.<sup>245</sup>

The jury found that *Blurred Lines* infringed *Got To Give It Up*.<sup>246</sup> Counsel for Thicke and Williams vowed to appeal. The decision sparked outcry from many in the music industry and legal academia who interpreted the decision as protecting a "groove" or genre.<sup>247</sup> There is little indication in these commentaries that the authors were familiar with the testimony and evidence presented at trial.

Richard Busch reached out after the decision to discuss the case. He shared the deposition testimony and evidence presented at the trial. Although I believed that a jury could have come out either way on the ultimate infringement question, it was not difficult for me to understand why the jury ruled as it did. I did not see how the Ninth Circuit could overturn the jury's verdict consistent with its music copyright decisions in *Three Boys Music*<sup>248</sup> and *Swirsky*.<sup>249</sup> I disagreed with those cases, but it would take an en banc court to

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241. See Reporter's Transcript of Trial Proceedings: Day 7, March 5, 2015 at 94–147, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015).

242. See *id.* at 75–100.

243. As a result of this statement, and later comment by Mr. Busch responding to it, Judge Kronstadt further instructed the jury that they should disregard whether a verdict in this case could have an effect beyond this case. See Reporter's Transcript of Trial Proceedings: March 6, 2015 at 9, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015).

244. *Id.* at 102.

245. See *id.* at 105–23.

246. See Special Verdict, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK, 2015 WL 4479500 (C.D. Cal. July 14, 2015).

247. See, e.g., Noah Feldman, 'Blurred Lines' Copyright Verdict Creates Bad Law for Musicians, CHI. TRIB. (Mar. 17, 2015), [www.chicagotribune.com/news/opinion/commentary/ct-blurred-lines-robinthicke-court-perspec-0317-20150316-story.html](http://www.chicagotribune.com/news/opinion/commentary/ct-blurred-lines-robinthicke-court-perspec-0317-20150316-story.html); Wu, *supra* note 186.

248. 212 F.3d 477 (9th Cir. 2000).

249. 376 F.3d 841 (9th Cir. 2004).

overturn them. I was troubled by the trial judge's exclusion of the *Got To Give It Up* sound recording, as it was the best evidence of what Marvin Gaye actually created, the Ninth Circuit had permitted a pre-1978 sound recording to be played in the *Three Boys Music* case, and it raised concerns about discriminatory effects on the many popular artists who are not trained in classical musical notation. I agreed to advise on the appeal.

The lead-up to the appeal reminded me a bit of the *Grokster* case,<sup>250</sup> with many legal academics reflexively aligning with Thicke and Williams. It did not appear that they were familiar with the record in the case, including Professor Monson's trenchant analysis of *Got To Give It Up*'s highly original structure. There was a lot more going on here than copying of a commonplace "groove."

Unlike in *Grokster*, many in the traditional music industry aligned with Thicke and Williams as well, emphasizing the precedential risk of the decision for music creators. Their position emphasized that this decision would produce a deluge of weak claims. Yet it is unclear how this decision moved the needle any more than the *Three Boys Music* case. Furthermore, it is difficult to imagine a more extreme and favorable set of facts for such a suit: a highly original, genre-creating musical work, public statements by the composers of the later work about creating a song to sound like the prior work, and the resulting song topping the charts. And even so, the costs to bring such a case are substantial and not without significant risk. The *Blurred Lines* case is highly unusual and easily distinguishable from most music infringement cases.<sup>251</sup> Musicians and producers appeared more interested in currying favor with the hot contemporary artist than respecting the breakthrough accomplishment of a deceased legend.

The Ninth Circuit affirmed the district court's infringement verdict largely based on the lax standards set forth in *Three Boys Music* and *Swirsky*.<sup>252</sup> While acknowledging that Judge Kronstadt's exclusion of the sound recording was arguably in conflict with prior authority,<sup>253</sup> the majority

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250. See *supra* text accompanying notes 38–39.

251. As music industry expert Bob Lefsetz observed following the verdict, "As for this decision producing a rash of these lawsuits, give me a break. Were the courts littered with cases after *Bright Tunes v. George Harrison* for 'He's So Fine'/'My Sweet Lord'? No. So the only story here is people might think a bit harder over whether they've copied a tune, and if they have, and the song makes bank, they're gonna get a phone call." Bob Lefsetz, *The Positive Lesson To Be Learned from "Blurred Lines" Verdict*, VARIETY (Mar. 26, 2015), <http://variety.com/2015/voices/columns/there-is-a-positive-lesson-to-be-learned-from-blurred-lines-verdict-1201459285/>.

252. See *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

253. See *id.* at 1121 & n.9 (citing *Three Boys Music*, 212 F.3d at 486 (observing, in the context of



was able to dodge the issue since there would not be a new trial.<sup>254</sup>

Judge Nguyen dissented based on her assessment that *Blurred Lines* and *Got To Give It Up* “are not objectively similar.”<sup>255</sup> She chided the majority for refusing to compare the works.<sup>256</sup> Her opinion critiques Finell for “cherry-pick[ing] brief snippets”<sup>257</sup> and offers detailed deconstruction of her analysis.<sup>258</sup> Judge Nguyen concluded that Finell’s testimony went beyond the permissible role of “identify[ing] similarities between the two works, describ[ing] their nature, and explain[ing] whether they were ‘quantitatively or qualitatively significant in relation to the composition as a whole,’” and intruded on the court’s role in determining the extrinsic test for substantial similarity.<sup>259</sup> She concluded that notwithstanding the challenge for judges “untrained in music to parse two pieces of sheet music for extrinsic similarity,” judges must not abdicate that responsibility by deferring to experts.<sup>260</sup>

In retrospect, Robin Thicke and Pharrell Williams would have been better served by sticking to their original account of how *Blurred Lines* was composed.<sup>261</sup> That would have removed the dishonesty and opened up a more forthright argument about whether a “groove” is protectable. They would still

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subject matter jurisdiction, that “[a]lthough the 1909 Copyright Act requires the owner to deposit a ‘complete copy’ of the work with the copyright office, our definition of a ‘complete copy’ is broad and deferential”) and 2 NIMMER ON COPYRIGHT § 7.17[A] (2017) (noting that “[t]he function of deposit is to provide the Library of Congress via the Copyright Office with copies and phonorecords of all works published within the United States,” and that the argument “that deposit has a copyright as well as an archival function” is “attenuated by the fact that the Library of Congress need not add all deposited works to its collection” or “preserve those works which it does add to its collection”)); *see also id.* at 1126 (noting that the Ninth Circuit’s decision in *Three Boys Music* allowed the jury to hear the full sound recording).

254. *See id.* at 1121.

255. *Id.* at 1138 (Nguyen, J., dissenting).

256. *See id.*

257. *Id.*

258. *See id.* at 1143–50.

259. *See id.* at 1151–52 (quoting *Newton v. Diamond*, 388 F.3d 1189, 1196 (9th Cir. 2004)).

260. *See id.* at 1152. Judge Nguyen suggests that this challenge could potentially be surmounted through a court-appointed expert pursuant to Federal Rule of Evidence 706. *See id.* at 1152 n.14. This approach raises a host of practical and due process issues, and it is not clear how such appointment would avoid the problem of experts overriding judge and jury determinations.

261. As Pharrell Williams’s later interview with Rick Rubin suggests, that account was likely true. *See Pharrell and Rick Rubin Have an Epic Conversation—GQ*, YOUTUBE, at 28:00–28:32 (Nov. 4, 2019), <https://www.youtube.com/watch?v=PnahkJevp64> (quoting Williams stating that he “reverse engineer[s] songs that did something to us emotionally and figure[s] where the mechanism is in there, and . . . tr[ies] to figure out if we can build a building that doesn’t look the same but makes you feel the same way. I did that in *Blurred Lines* and got myself in trouble”); *id.* at 30:27–30:33 (“I really made it [*Blurred Lines*] feel so much like it [*Got To Give It Up*], that people were like, oh, I hear the same thing.”).

likely have had to face a jury's resolution of perceptual similarities.

Although numerous musicians and legal scholars were quick to conclude that *Blurred Lines* was not similar enough to protected elements of *Got To Give It Up* to warrant a jury trial,<sup>262</sup> the Gaye family established access and proffered ample circumstantial evidence from music reviewers as well as a key UMG employee that the works bore similarity. Professor Monson made a strong case that *Got To Give It Up* broke new creative ground, thereby opening a wider range of protectability than in many other music copyright infringement cases. *Got To Give It Up* was not, in contrast to the Isley Brothers' *Love Is a Wonderful Thing*, routine creativity within an established genre.<sup>263</sup> Notwithstanding the district court's ruling limiting protection for *Got To Give It Up* to the lead sheet, Ms. Finell offered a "constellation" of similarities. Ms. Wilbur acknowledged that lead sheets were subject to a range of interpretations. Thus, there was in my view sufficient evidence to support the jury's verdict.

I would not, however, rule out the possibility that the jury was swayed by Ms. Finell's technical analysis of similarities or viewed *Blurred Lines* through a lens of cultural appropriation. The latter possibility is somewhat attenuated by the fact that Pharrell Williams is a Black R&B, rap, hip-hop artist, but his credibility was called into question by his inconsistent statements, and the jury could have viewed Robin Thicke as an opportunist.

The defense team should have been able to see the writing on the wall as the trial date approached. Thicke and Williams, as well as UMG, should have recognized that the similarity of the two songs in conjunction with their initial promotional campaign opened them up to a significant risk of a finding of copyright infringement. Negotiating a license under these circumstances would have been the better part of valor and avoided a Dickensian nightmare in which only the attorneys come out ahead.<sup>264</sup> I appreciate that many musicians and scholars view such an approach as capitulation, but it needn't be. As the cover license reflects, dividing the pie fairly is part of music copyright justice.<sup>265</sup> The difference is that such a license is not compulsory. But they

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262. See *supra* note 186.

263. In any case, the Isley Brothers did not proffer an expert like Professor Monson to prove that their composition broke the Motown R&B mold and created a new genre.

264. Cf. CHARLES DICKENS, *BLEAK HOUSE* 3 (1853).

265. See *supra* Part III; cf. Daniel Kreps, *Tom Petty on Sam Smith Settlement: 'No Hard Feelings. These Things Happen,'* ROLLING STONE (Jan. 29, 2015) (reporting that Sam Smith accorded Tom Petty and Jeff Lynne credit for Smith's 2014 hit *Stay with Me*, which shared a similar chorus with Petty's 1989 hit *I Won't Back Down*), <https://www.rollingstone.com/music/music-news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-35541/>. Smith denied ever hearing

are routine in the music industry, and the fact that UMG held interests in both *Got To Give It Up* and *Blurred Lines* provided the opportunity for a low-transaction-cost license.

Another lesson from this cautionary tale is that bully tactics can be bad business. Peter Paterno's decision to refer the matter to his litigation partner rather than to discuss an amicable solution produced a bad outcome for their clients, not to mention the confusion that it has bred within the music community.

The *Blurred Lines* saga highlights the reasons that copyright infringement analysis cannot always be boiled down to a purely objective test. Judge Nguyen's opinion highlights the challenges of delineating the inspiration/infringement boundary and the difficulties of implementing such a line by judges and juries untrained in music. Her suggestion that the inspiration/infringement line can be objectively stated and determined would require significant changes in music copyright infringement law and practice, especially in the Ninth Circuit. Perhaps recognizing this reality, Judge Nguyen voted to take the case en banc, but no other judge requested a vote to hear the matter en banc.<sup>266</sup> That opportunity was presented, but sadly forgone, a short time later.

#### D. Stairway to Missed Opportunity

As the *Blurred Lines* case was heating up, another headline-making copyright infringement lawsuit was brought alleging that Led Zeppelin's *Stairway to Heaven* infringed *Taurus*,<sup>267</sup> an acoustic instrumental by the band Spirit. The allegation of access is not far-fetched, as Led Zeppelin appeared on the same bill as Spirit during its inaugural U.S. tour two years before the release of *Stairway to Heaven*<sup>268</sup> and performed a cover version of Spirit's composition *Fresh Garbage*.<sup>269</sup> Furthermore, while Led Zeppelin is most closely associated with American blues and is viewed as one of the progenitors of heavy metal,<sup>270</sup> the band also drew from traditional acoustic folk

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Petty's song and claimed that the similarity was a coincidence, which would, if established, have been a complete defense, but he nonetheless concluded that according Petty and Lynne a 12.5% songwriting share was the better part of valor.

266. See *Williams v. Gaye*, 895 F.3d 1106, 1115 (9th Cir. 2018).

267. See *Taurus (Instrumental)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Taurus\\_\(instrumental\)](https://en.wikipedia.org/wiki/Taurus_(instrumental)) (last visited Feb. 17, 2022).

268. See Zeppelin "Toured With Spirit," LED ZEPPELIN OFF. F. (June 8, 2012), <https://forums.ledzeppelin.com/topic/17915-zeppelin-toured-with-spirit/>.

269. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1057 (9th Cir. 2020) (en banc).

270. See *Led Zeppelin*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Led\\_Zeppelin](https://en.wikipedia.org/wiki/Led_Zeppelin) (last visited Feb.

roots.<sup>271</sup>

The timing of the lawsuit, more than four decades after the release of *Stairway to Heaven*, has significant ramifications for music copyright litigation. In ruling that the equitable defense of laches is not available to copyright defendants in claims for damages, the Supreme Court's 2014 *Petrella v. Metro-Goldwyn-Mayer* decision<sup>272</sup> opened the way for copyright owners to bring lawsuits alleging infringement of age-old copyrighted works. Moreover, the *Taurus/Stairway to Heaven* dispute posed the inspiration/infringement question.

"Randy Wolfe, professionally known as Randy California, wrote the instrumental song *Taurus* in 1966 or 1967."<sup>273</sup> Prior to his death in 1997, Wolfe wrote in the liner notes to the 1996 reissue of Spirit's debut album, "People always ask me why [*Stairway to Heaven*] sounds exactly like [*Taurus*], which was released two years earlier. I know Led Zeppelin also played [*Fresh Garbage*] in their live set. They opened up for us on their first American tour."<sup>274</sup> In the wake of the Supreme Court's *Petrella* decision, Michael Skidmore, acting as co-trustee of the Randy Craig Wolfe Trust, filed an infringement action against Led Zeppelin, the members of the band, and the music companies involved in the direct, contributory, and vicarious infringement of *Taurus* through the iconic opening eight-measure passage of *Stairway to Heaven*. The *Taurus* lead sheet showed "five descending notes of a chromatic musical scale."<sup>275</sup>

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17, 2022).

271. See Tom Cole, *The Song Was So Good, Jimmy Page 'Borrowed' It*, NPR (June 2, 2015), <https://www.npr.org/sections/allsongs/2015/06/02/411486542/the-song-was-so-good-jimmy-page-borrowed-it> (reporting that Jimmy Page copied Bert Jansch's 1966 *Blackwaterside* "almost note for note" for Led Zeppelin's acoustic *Black Water Side* featured on its 1969 debut album without giving credit); *Black Mountain Side*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Black\\_Mountain\\_Side](https://en.wikipedia.org/wiki/Black_Mountain_Side) (last visited Feb. 28, 2022) (tracing the origins of *Black Water Side*: "Al Stewart, who followed Jansch's gigs, taught it to Page, who was a session musician for Stewart's debut album"). Jimmy Page often cited Scottish folk musician Jansch as an influence but did not credit him on the album. See Gavin Edwards, *Led Zeppelin's 10 Boldest Rip-Offs*, ROLLING STONE (June 22, 2016), <https://www.rollingstone.com/feature/led-zeppelins-10-boldest-rip-offs-223419/>. In Led Zeppelin's defense, *Blackwaterside* was based on folk melodies. Perhaps reflecting the creative debt, Robert Plant led a 2013 tribute concert in memory of Bert Jansch, who died in 2011. See Andrew Trendell, *Led Zeppelin's Robert Plant leads Bert Jansch Tribute Concert*, GIGWISE (Dec. 5, 2013), <https://www.gigwise.com/news/86701/>.

272. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014).

273. See *Skidmore*, 952 F.3d at 1056.

274. See *Taurus (Instrumental)*, *supra* note 267.

275. See *Skidmore*, 952 F.3d at 1058.



“The beginning of *Stairway to Heaven* also incorporates a descending chromatic minor chord progression in A minor.”<sup>276</sup> *Stairway to Heaven*, however, “has a different ascending line that is played concurrently with the descending chromatic line, and a distinct sequence of pitches in the arpeggios, which are not present in *Taurus*.”<sup>277</sup> Moreover, such descending chromatic progressions are common in many prior compositions<sup>278</sup> and, in any case, this passage is a relatively small component of *Stairway to Heaven*’s eight-minute magnum opus.

The district court denied the core defendants’ motion for summary judgment, and the case proceeded to trial.<sup>279</sup> Like Judge Kronstadt in the *Blurred Lines* case, Judge Gary Klausner ruled that the scope of copyright protection for *Taurus* was limited to the musical composition transcribed in the deposit copy.<sup>280</sup> Thus, only that document, and not a sound recording, could be used to prove substantial similarity between *Taurus* and *Stairway to Heaven*.<sup>281</sup>

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276. *Id.*

277. *See id.*

278. *See id.*

279. *See Skidmore v. Led Zeppelin*, No. CV 19-3462 RGK (AGRx), 2016 WL 1442461, at \*1, \*19 (C.D. Cal. Apr. 8, 2016) (dismissing the claims against defendants John Paul Jones, Super Hype Publishing, and Warner Music Group because they had not performed or distributed *Stairway to Heaven* within the three-year statute of limitations period preceding the filing of the complaint and denying the motion for summary judgment against the remaining defendants).

280. *See Skidmore*, 952 F.3d at 1058.

281. *Id.*

Furthermore, the district court granted Led Zeppelin's motion in limine to exclude *Taurus* sound recordings and expert testimony based on those recordings.<sup>282</sup>

At trial, Jimmy Page testified that he owned an album that contained *Taurus* in his large album collection but denied any knowledge of the song.<sup>283</sup> The evidence revealed, however, that Led Zeppelin and Spirit had crossed paths during the late 1960s.<sup>284</sup>

As regards substantial similarity,<sup>285</sup> Skidmore's musical expert acknowledged that a descending chromatic scale and arpeggios are common musical elements but nonetheless testified that the works compiled five less common musical elements: (1) both skip the note E and return to the tonic pitch, A; (2) the notes in the scale have the same durations; (3) both contain three two-note sequences—AB, BC, and CF#; (4) each has successive eighth-note rhythms; and (5) the songs have the same "pitch collection," meaning "certain notes appear in the same proportions in the beginning sequence."<sup>286</sup> Led Zeppelin's expert "testified that the similarities . . . either involve unprotectable common musical elements," are "random," or are "not musically meaningful."<sup>287</sup>

At the close of trial, Judge Klausner declined to instruct the jury on the inverse ratio rule and the selection and that original compilations of unprotectable elements were protectable. "Skidmore objected to the district court's decision to omit an inverse ratio instruction but did not do so as to the omitted selection and arrangement instruction."<sup>288</sup> The jury found that "Led Zeppelin had access to *Taurus*, but that the two songs were not substantially similar under the extrinsic test."<sup>289</sup>

On appeal, the Ninth Circuit panel reversed and remanded for a new trial on several grounds:<sup>290</sup> (1) that the district court's instruction that "common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes" are not protected by copyright without an instruction

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282. *See id.*

283. *See id.* at 1065.

284. *See id.* at 1057 (noting that "[i]t is undisputed that Spirit and Led Zeppelin crossed paths in the late 1960s and the early 1970s").

285. *See id.* at 1059–60.

286. *Id.* at 1059.

287. *Id.* at 1059–60.

288. *See id.* at 1060.

289. *Id.*

290. *See Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1130 (9th Cir. 2018), *on reh'g en banc*, 925 F.3d 999 (9th Cir. 2019).

that original compilations of unprotectable elements were protectable<sup>291</sup> was contrary to the *Swirsky* decision<sup>292</sup> that limited notes can be protected;<sup>293</sup> (2) that the district court declined to allow sound recordings of *Taurus* to be played to prove access which although harmless error should be rectified in a new trial;<sup>294</sup> and (3) that on remand, the district court should reconsider whether an inverse ratio instruction is warranted.<sup>295</sup> The Ninth Circuit panel upheld the district court's rulings limiting the *Taurus* copyright to the deposit copy and disallowing the jury from hearing the sound recording.<sup>296</sup>

The Ninth Circuit granted rehearing en banc,<sup>297</sup> finally opening up the opportunity to correct some of its confusing copyright infringement jurisprudence.<sup>298</sup> The court could have demystified its inscrutable “extrinsic”/“intrinsic” infringement analysis framework,<sup>299</sup> supplanted the lax standards reflected in *Three Boys Music* and *Swirsky* with clearer guidance, and corrected the obsolete limitation of pre-1978 musical composition copyrights to deposit copies. It failed on all counts.

Not only did the en banc court leave the confusing “extrinsic”/“intrinsic” infringement analysis framework in place, it needlessly focused on the inverse ratio rule. While the *Krofft* decision confused whether the inverse ratio rule applied to factual copying, unlawful appropriation, or both,<sup>300</sup> the Ninth Circuit recently clarified that it only applies to proof of actual copying.<sup>301</sup> Nonetheless, the en banc decision devotes much of its consideration to whether the inverse ratio applies to factual copying.<sup>302</sup> That issue, however, was moot as

291. *See id.* at 1128–29 (quoting Jury Instruction No. 16).

292. *See Swirsky v. Carey*, 376 F.3d 841, 851 (9th Cir. 2004).

293. *See Skidmore*, 905 F.3d at 1127–30.

294. *See id.* at 1130–31.

295. *See id.*

296. *See id.* at 1131–35.

297. *See Skidmore v. Zeppelin*, 925 F.3d 999, 999–1000 (9th Cir. 2019).

298. *See Skidmore v. Zeppelin*, 952 F.3d 1051, 1056 (9th Cir. 2020) (en banc) (explaining that the Ninth Circuit granted rehearing en banc to “address a litany of copyright issues, including the interplay between the 1909 and 1976 Copyright Acts, the inverse ratio rule, the scope of music copyright, and the standards for infringement”), *cert. denied*, 141 S. Ct. 453 (2020), *reh'g denied*, 141 S. Ct. 946 (2020).

299. *See supra* text accompanying notes 136–39.

300. *See* David Aronoff, *Exploding the “Inverse Ratio Rule,”* 55 J. COPYRIGHT SOC'Y U.S.A. 125, 135–36 (2008) (citing *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)).

301. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018), *overruled by Skidmore v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

302. *See Skidmore*, 952 F.3d at 1065–69 (finding that “[a]ccess does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work”). In so doing, the

the jury found actual copying even without an inverse ratio instruction.<sup>303</sup>

More troublingly, the court's conclusion is flawed, misleadingly supported, and nugatory. Unlike patent protection, copyright law requires that a copyright owner prove factual *copying*, not merely similarity of protected elements.<sup>304</sup> Without this predicate finding, there is no need for courts to expend the additional effort required to determine whether the appropriation was unlawful. As the *Blurred Lines* case illustrated, that inquiry can be especially complex.<sup>305</sup> Actual copying, however, is often proved through circumstantial evidence and the subconscious doctrine,<sup>306</sup> which adds to the complexity of

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court suggests that the weight of out-of-circuit authority, including the Second Circuit, rejects the inverse ratio rule entirely. *Id.* at 1068. The Second and Ninth Circuits are far and away the most significant copyright adjudication circuits, responsible for more than half of the nation's appellate copyright cases. See *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, U.S. CTS. (Feb. 13, 2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>. The *Skidmore* en banc opinion cites *Arc Music Corp. v. Lee*, 296 F.2d 186, 187–88 (2d Cir. 1961), as support for its proposition that the Second Circuit has abandoned the inverse ratio rule entirely. 952 F.3d at 1066. *Arc Music*, however, is ambiguous on whether it jettisoned the inverse ratio entirely, or only with regard to the unlawful appropriation prong of the infringement test. 296 F.2d at 187–88 (affirming the lower court's rejection of determining the "degree of similarity"). More recent Second Circuit jurisprudence makes clear that the Second Circuit applies the inverse ratio test for the actual copying prong. See *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 56 (2d Cir. 2003) ("There is an inverse relationship between access and probative similarity such that 'the stronger the proof of similarity, the less the proof of access is required.'" (citing DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.03[D], at 13–77)); see also *A Slice of Pie Prods., LLC v. Wayans Bros. Ent.*, 487 F. Supp. 2d 41, 47 n.4 (D. Conn. 2007) (stating that *Arc Music* only rejected the IRR as to the issue of unlawful appropriation, but not actual copying—a distinction not drawn in the decision).

The Ninth Circuit's discussion of the demise of the inverse ratio rule in other circuits is also inaccurate. It states that the Seventh Circuit decision in *Peters v. West*, 692 F.3d 629, 634–35 (7th Cir. 2012), rejects the test, whereas Judge Wood explains to the contrary that the Seventh Circuit has "occasionally endorsed something that comes close to this inverse approach"—citing *Selle v. Gibb*, 741 F.2d 896, 903 n.4 (7th Cir. 1984) and *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997)—and makes clear that the Seventh Circuit has only rejected the inverse ratio test with regard to unlawful appropriation, not factual copying. *Peters*, 692 F.3d 629, 634–35 (7th Cir. 2012). Thus, the Seventh Circuit is in line with the Ninth Circuit's *Rentmeester* decision and the Second Circuit's *Jorgensen* decision, and not the Ninth Circuit's en banc *Skidmore* decision. *Positive Black Talk Inc. v. Cash Money Records, Inc.* sidesteps the issue. 394 F.3d 357, 371 (5th Cir. 2004). In *Beal v. Paramount Pictures Corp.*, access to the plaintiff's work was conceded. 20 F.3d 454, 460 (11th Cir. 1994). Therefore, the court was focused solely on the unlawful appropriation question.

303. The jury found actual copying even without an inverse ratio instruction. See *supra* text accompanying note 289.

304. See *Skidmore*, 952 F.3d at 1070 ("Also, there can be no copyright infringement without actual copying. If two people independently create two works, no matter how similar, there is no copyright infringement unless the second person copied the first.").

305. See *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018).

306. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 181 (S.D.N.Y. 1976); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (L. Hand, J.) (stating



assessing whether actual copying has occurred.<sup>307</sup> Like the striking similarity doctrine,<sup>308</sup> courts developed the inverse ratio test as a pragmatic and logical tool for framing the inquiry.<sup>309</sup> Where a work is widely available, a lesser degree of similarity is required to meet the burden of proving actual copying.<sup>310</sup> This does not mean, however, that a case can proceed if the only similarity shown is unprotected material (or unoriginal compilations of unprotected material). A court may properly dismiss such a case without undertaking the unlawful appropriation stage of the infringement inquiry. Thus, the Ninth Circuit's jettisoning of the inverse ratio test as part of the actual copying prong merely rejects a sensible test.

Beyond this needless and unconvincing tangent, the Ninth Circuit's handling of the substantial similarity instructions is both flawed and toothless. Rather than directly address the flimsiness of Skidmore's similarity evidence on the merits,<sup>311</sup> the majority weaves together convoluted technicalities to affirm the lower court's handling of the jury instructions.<sup>312</sup> The discussion focuses on whether Skidmore was entitled to an instruction that copyright law protects original selection and arrangement of unprotectable elements.<sup>313</sup> Such protection is manifestly the law.<sup>314</sup> The record is clear that Skidmore

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that "unconscious plagiarism is actionable quite as much as deliberate").

307. See *Williams*, 895 F.3d at 1119 (explaining the complexities of proving copying for a copyright infringement claim).

308. See *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984) (holding the plaintiff failed "to meet his burden of proving 'striking similarity' between the two compositions"); *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir.1946).

309. See Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1188–89 (1990).

310. See Aronoff, *supra* note 300, at 125 ("Put most simply, the IRR holds that in a copyright infringement case, where a high degree of access by the defendant to the plaintiff's allegedly infringed work is shown, a lower degree of similarity will be required to establish infringement."). The Ninth Circuit appears to nullify its repudiation of the inverse ratio test for factual copying: "By rejecting the inverse ratio rule, we are not suggesting that access cannot serve as circumstantial evidence of actual copying in all cases; access, however, in no way can prove substantial similarity." See *Skidmore*, 952 F.3d at 1069. The inverse ratio test for factual copying was never much more than the logical proposition that access can serve as circumstantial evidence of actual copying. *Id.* at 1064. Where access is wide, then the circumstantial evidence of actual copying is inherently stronger. *Id.* at 1068 (arguing that there are flaws in this logic and outcome "where access is very high and similarity very low").

311. As I discuss below, Judge Watford's concurrence constructively takes on this task. See *infra* text accompanying note 355.

312. See *Skidmore*, 952 F.3d at 1072–77.

313. See *id.* at 1077 (discussing the Ninth Circuit's reasoning behind upholding the lower court's jury instructions).

314. See 17 U.S.C. § 103(a) ("The subject matter of copyright as specified by section 102 includes compilations . . ."); *id.* at § 101 (defining a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way

requested such an instruction, but murky on whether he preserved the objection.<sup>315</sup> The majority then rejects the need for the instruction on the strained ground that “Skidmore and his experts never argued to the jury that the claimed musical elements cohere to form a holistic musical design.”<sup>316</sup> The dissent shows that this contention does not square with the trial record or common sense.<sup>317</sup> As I discuss below,<sup>318</sup> the Ninth Circuit missed an ideal opportunity to clarify the inspiration/infringement line.

Finally, the Ninth Circuit’s handling of the lead sheet issue effectuates an anachronistic limitation on the scope of pre-1978 musical compositions that disenfranchises many popular artists—particularly those without classical musical training—from obtaining protection for the full scope of their creative efforts. It also treats the very best evidence of the musical composition, and the version that provided the most likely source of access for defendants, as inadmissible. In this respect, the Ninth Circuit’s decision is eerily reminiscent of *Supreme Records v. Decca Records*,<sup>319</sup> which disenfranchised Black performing artists of protection for their creative interpretations of musical compositions.<sup>320</sup>

#### *E. “Thinking Out Loud” About the Murky State of Music Copyright Infringement Law*

Notwithstanding Led Zeppelin’s ultimate success in the *Taurus/Stairway to Heaven* litigation, the courts have yet to root out the problems plaguing music copyright infringement jurisprudence. The Ninth Circuit’s

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that the resulting work as a whole constitutes an original work of authorship”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (explaining that even a work “that contains absolutely no protectible . . . expression” can meet “the constitutional minimum for copyright protection if it features an original selection or arrangement”).

315. *See Skidmore*, 952 F.3d at 1082–83 (Ikuta, J., dissenting) (summarizing the hasty handling of the instruction drafting). The prior appellate panel explained that the trial judge “specifically stated that [he] did not want any oral objections to [his] final jury instructions, as the parties had already submitted separate instructions and written objections to the other side’s proposed instructions.” *Id.* at 1126–27. Judge Ikuta explained why “even if Skidmore had forfeited his objection to the omission of the selection and arrangement instruction, the district court’s failure to give this instruction,” which was sought by both parties, was plainly erroneous, affected substantial rights, and “seriously impaired the fairness, integrity, or public reputation of judicial proceeding,” resulting in “a miscarriage of justice.” *Id.* at 1087–89 (Ikuta, J., dissenting).

316. *Id.* at 1075 (majority opinion).

317. *See id.* at 1084–86 (Ikuta, J., dissenting).

318. *See infra* Section IV.F.

319. 90 F. Supp. 904 (S.D. Cal. 1950).

320. *See Brauneis*, *supra* note 68.

jurisprudence exacerbates the inherent uncertainties in jury verdicts in music copyright cases. The overlay of cultural appropriation further complicates the puzzle. I am deeply troubled by aspects of the music industry's history of cultural appropriation and discrimination against Black artists (and other disadvantaged groups). However, courts should not conflate generalized cultural appropriation (such as general R&B) with work-specific copyright infringement. The Copyright Act is designed to address injustice related to work-specific infringement, and in that regard it is important that copyright law not define too narrowly what it protects as part of a work.<sup>321</sup> The Act is not designed to address the injustice of generalized cultural appropriation that is not connected with infringement of a properly defined work.

The challenge of differentiating inspiration and infringement remains. The litigation over Ed Sheeran's *Thinking Out Loud* could potentially impose liability based on the similarity of relatively common chord progression and rhythmic elements in Marvin Gaye's *Let's Get It On*.<sup>322</sup> Furthermore, the *Petrella* decision has opened a Pandora's Box of potential music copyright infringement lawsuits that threaten to undermine cumulative creativity.

### 1. The Sheeran Cases

Another major inspiration/infringement "perfect storm" is brewing over Ed Sheeran's 2014 megahit *Thinking Out Loud*.<sup>323</sup> Music fans quickly noticed similarities with *Let's Get It On*,<sup>324</sup> Marvin Gaye's 1973 hit co-authored by

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321. See *supra* Sections IV.B, IV.C, IV.D. As noted above, the Copyright Act can and should be interpreted to address this discriminatory practice associated with the evidence that is used to prove the copyrighted work. The Ninth Circuit's recent shift away from permitting sound recordings to be used as evidence of musical compositions for pre-1978 works is discriminatory against artists who create jazz, R&B, and other musical forms that are not based on European-style notation. It is inconsistent with the Copyright Act's inclusive approach to expressive creativity and ignores common-sense analysis of evidence.

322. See *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 499–501 (S.D.N.Y. 2019) (denying motion for summary judgment on the grounds that there were disputed facts regarding whether chord progression and harmonic rhythm of copyrighted songs were unprotectable as commonplace and whether musical elements in both songs were substantially similar).

323. See *Thinking Out Loud*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Thinking\\_Out\\_Loud](https://en.wikipedia.org/wiki/Thinking_Out_Loud) (last visited Feb. 17, 2022). *Thinking Out Loud* reached number one in the United Kingdom, Australia, and several other countries and number two on the U.S. *Billboard Hot 100* and won Song of the Year and Best Pop Solo Performance at the 58th Grammy Awards. See *id.* It became the first to be streamed over 500 million times on Spotify and is one of the most streamed songs in the UK. See *id.*

324. See Chi Chi Izundu, *Ed Sheeran Sued over Claims He's Ripped off a Marvin Gaye Song*, BBC (Aug. 10, 2016), <https://www.bbc.com/news/newsbeat-36624978>.

Gaye and producer Ed Townsend.<sup>325</sup> Sheeran contributed to the storm by performing a mash-up of the two songs in concert.<sup>326</sup> It does not help Sheeran's cause that he has been tagged with several other copyright infringement lawsuits.<sup>327</sup>

The Townsend estate brought suit against Sheeran in 2016.<sup>328</sup> In a separate 2018 lawsuit, Structured Asset Sales, which allegedly acquired an interest in the composition, is seeking more than \$100 million in damages.<sup>329</sup> In early 2019, the district court found sufficient similarities in bass lines, percussion, and "aesthetic appeal" to allow the case to proceed to trial.<sup>330</sup> He noted,

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325. See *Let's Get It On (Song)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Let%27s\\_Get\\_It\\_On\\_\(song\)](https://en.wikipedia.org/wiki/Let%27s_Get_It_On_(song)) (last visited Feb. 17, 2022).

326. See cool\_swan, *Thinking Out Loud (Lets Get It On) by Ed Sheeran*, YOUTUBE (Nov. 20, 2014), <https://www.youtube.com/watch?v=RxZjVZKVN7k> (beginning at 4:30).

327. Sheeran settled copyright infringement allegations over his 2017 chart-topping release *Shape of You*, granting the writers and producer of the TLC song *No Scrubs* writing credit. See *No Scrubs Writers Given Credit on Ed Sheeran's Shape of You*, BBC (Mar. 21, 2017), <https://www.bbc.com/news/newsbeat-39336424>. Sheeran also granted writing credit to the composers of the 2009 song *Amazing*, who alleged that Sheeran's 2015 hit *Photograph* derived from their work. See Eriq Gardner, *Ed Sheeran Gives Up Part Ownership of 'Photograph' in Settling Copyright Lawsuit*, HOLLYWOOD REP., <https://www.hollywoodreporter.com/business/business-news/ed-sheeran-settles-copyright-lawsuit-photograph-992354/> (Apr. 10, 2017); Hannah Ellis-Petersen, *Ed Sheeran May Regret Photograph That Led to \$20m Copyright Case*, GUARDIAN (Apr. 11, 2017), <https://www.theguardian.com/music/2017/apr/11/ed-sheeran-20m-dollar-copyright-claim-matt-cardle-x-factor> (quoting Dr. Joe Bennett, a musicologist based at Boston Conservatory at Berklee, who opined that, "[T]here are so many similarities between these two particular works, it is hard to dispute that it was obviously plagiarized[,] and I'm not surprised they settled"). Sheeran was also named in a lawsuit alleging that his co-authored composition *The Rest of Our Life*, which was recorded by Tim McGraw and Faith Hill, infringes the 2014 release *When I Found You* penned by Sean Carey and Beau Golden. See Eriq Gardner, *Ed Sheeran-Penned Song for Tim McGraw Is Target of Copyright Lawsuit*, HOLLYWOOD REP. (Jan. 10, 2018, 6:36 PM), <https://www.hollywoodreporter.com/business/business-news/ed-sheeran-penned-song-tim-mcgraw-is-target-copyright-lawsuit-1073696/>. Sheeran also settled that case. See Daniel Sanchez, *Ed Sheeran Settles 'The Rest of Our Life' Song Theft Lawsuit*, DIGIT. MUSIC NEWS (Nov. 12, 2018), <https://www.digitalmusicnews.com/2018/11/12/latest-ed-sheeran-the-rest-of-our-life-lawsuit-settled/>.

328. See Jon Blistein, *Ed Sheeran Sued for Allegedly Copying Marvin Gaye's 'Let's Get It On,'* ROLLING STONE (Aug. 10, 2016, 2:15 AM), <https://www.rollingstone.com/music/music-news/ed-sheeran-sued-for-allegedly-copying-marvin-gayes-lets-get-it-on-115793/>.

329. See Eriq Gardner, *Ed Sheeran's Copyright Battles Are Much Weirder Than Anyone Can Imagine*, HOLLYWOOD REP. (June 28, 2018, 9:31 AM), <https://www.hollywoodreporter.com/business/business-news/ed-sheerans-copyright-battles-are-weirder-anyone-can-imagine-1123850/>; Andrew Flanagan, *Ed Sheeran Sued for \$100 Million over Supposed Song Similarity*, NPR (June 28, 2018), <https://www.npr.org/2018/06/28/624405244/ed-sheeran-sued-for-100-million-over-supposed-song-similarity>. SAS, which purchased a share of the Townsend estate's interest from Townsend's son, was denied intervention in the suit filed in 2016. Laura Snapes, *Ed Sheeran Sued for Second Time over Marvin Gaye 'Rip-Off,'* GUARDIAN (June 29, 2018), <https://www.theguardian.com/music/2018/jun/29/ed-sheeran-sued-for-second-time-over-marvin-gaye-lets-get-it-on-claims>.

330. See *Griffin v. Sheeran*, 351 F. Supp. 3d 492 (S.D.N.Y. 2019); Kenzie Bryant, *A Jury Will*

however, that a jury would have to decide if the harmonic rhythm of *Let's Get It On* is too common to be protected.<sup>331</sup> He added that jurors “may be impressed by footage of a Sheeran performance which shows him seamlessly transitioning between [the songs].”<sup>332</sup> The defense counters that the “somber, melancholic tones, addressing long-lasting romantic love” of *Thinking Out Loud* make it different from *Let's Get It On*, which is a “sexual anthem.”<sup>333</sup>

The resolution of this dispute is difficult to predict. Sheeran cannot credibly deny access and familiarity with *Let's Get It On*, one of the biggest 1970s hits, prior to his composing *Thinking Out Loud*. Yet the principal musical similarity is the I-iii-IV-V chord progression,<sup>334</sup> about which the parties dispute whether it was commonplace prior to the release of *Let's Get It On*.<sup>335</sup> The parties also dispute whether the harmonic rhythm of that four-chord progression—the second and fourth chords being “anticipated” or placed ahead of the beat—is protectable.<sup>336</sup> Furthermore, the Sheeran case, like the *Three Boys Music* case, intermingles copyright infringement and cultural appropriation.<sup>337</sup>

## 2. The *Petrella* Cloud

By limiting the laches defense to injunctive relief, the Supreme Court's *Petrella* decision opened the way for copyright owners to bring lawsuits alleging age-old infringement of copyrighted works.<sup>338</sup> Just as the Randy Craig Wolfe Trust could sue Led Zeppelin over a decades-old song, other

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*Decide if Ed Sheeran Copied Marvin Gaye's "Let's Get It On,"* VANITY FAIR (Jan. 4, 2019), <https://www.vanityfair.com/style/2019/01/ed-sheeran-marvin-gaye-ed-townsand-thinking-out-loud-lets-get-it-on-copyright-suit-jurt>.

331. See Bryant, *supra* note 330.

332. See *id.*

333. See *id.*

334. See Griffin, 351 F. Supp. 3d at 498; Brian McBrearty, *Thinking Out Loud v. Let's Get It On | Analysis*, POPULAR MUSICOLOGY (Aug. 12, 2016), <http://www.popularmusicology.com/2016/08/12/musicology-thinking-loud-v-lets-get/>.

335. See Griffin, 351 F. Supp. 3d at 498.

336. See *id.*

337. See Atahabih Germain, *'We're Coming for Our 40 Acres': Daughter of Co-Writer of 'Let's Get It On' Calls Out Singer Ed Sheeran, Record Labels as Copyright Suit Nears Trial*, ATLANTA BLACK STAR (Sept. 27, 2020), <https://atlantablackstar.com/2020/09/27/were-coming-for-our-40-acres-daughter-of-co-writer-of-lets-get-it-on-calls-out-singer-ed-sheeran-record-labels-as-copyright-suit-nears-trial/>.

338. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677 (2014) (holding laches cannot be invoked to preclude adjudication of a claim for damages brought within the Copyright Act's three-year limitations period).

songwriters, their estates, and copyright proprietors could awaken long-sleeping dogs.<sup>339</sup> Based solely on Bruce Springsteen's magnanimous praise of The Animals in his 2012 keynote address at SXSW,<sup>340</sup> The Animals could allege that several of Springsteen's biggest hits infringe on their compositions.<sup>341</sup>

Similarly, the James Gang could pursue royalties from Boston's *More Than a Feeling*.<sup>342</sup> With Scholz's admission of access and proof of similarities, owners of *Tend My Garden* would be well-positioned to get over the factual copying prong of the infringement test. The case would then turn on musicologist testimony, jury instructions, atmospherics, and how lay jurors perceive the works (and the parties). To a trained musician, the songs might well sound different: *Tend My Garden* is basically a II-I-VII flat-IV progression whereas *More Than a Feeling* is a I-IV-VI-V progression. To a lay jury, however, they might seem pretty similar and infectious. The songs fade in and then are driven by infectious power chords and hand claps. They have similar structures, and Scholz's praise for the James Gang as well as Mitch Weissman's comments could persuade a jury that *More Than a Feeling* was more than mere inspiration.

Let me be clear that I think that such a case would be a travesty. As Weissman notes, "Scholz did indeed take his influences and make them his own,"<sup>343</sup> which is the critical distinction between inspiration and infringement.

Unless there was some deception or impediment to pursuing copyright enforcement actions, courts should not entertain stale claims. The common

339. See, e.g., Eriq Gardner, *Here's The Lawsuit Claiming Led Zeppelin Stole 'Stairway to Heaven,'* HOLLYWOOD REP. (June 2, 2014), <https://www.hollywoodreporter.com/business/business-news/heres-lawsuit-claiming-led-zeppelin-708742/>.

340. See *supra* text accompanying notes 117–19.

341. I don't expect that this is going to happen. Eric Burdon has praised Springsteen's work and his generous acknowledgement of The Animals' influence:

I thought it was very generous and brave of [Springsteen] to give us such high praise. It was a very moving experience to have our working class roots cited as one of his biggest influences. He is a true gentleman.

I understood what he was saying, since his work has always been very conscious of the working people, social justice. It meant a lot to me and it certainly put me in the spotlight.

See Ed Condran, *Eric Burdon, on Springsteen and Rock History*, COURIER TIMES (May 2, 2018, 8:00 PM). He also comes from an era in which musicians were less mercenary and opposed selling out. See Franz Nicolay, *The Rise and Decline of the "Sellout,"* SLATE (July 28, 2017, 5:56 AM), <https://slate.com/culture/2017/07/the-history-of-calling-artists-sellouts.html> (tracing the history of the term "sell out" and observing that "[a]fter its '90s peak, the stigma of 'selling out' went into remission").

342. See *supra* text accompanying notes 120–26.

343. See *Re-Boston*, *supra* note 126.

law doctrine of laches reflects justice, evidentiary, and efficiency concerns. Congress should reinstate the equitable doctrine of laches so as prevent pursuit of stale infringement claims.

With the classic hit marketplace heating up,<sup>344</sup> there is risk that the purchasers of music catalogs could seek to monetize those assets through infringement lawsuits that the artists and prior catalog owners would have deemed unworthy.<sup>345</sup> The pattern bears some resemblance to the patent monetization bonanza of the past two decades. Following the bursting of the dot-com bubble in 2000,<sup>346</sup> a trove of patents went on the bankruptcy auction block as start-ups ran out of investment capital. A new breed of patent monetization companies acquired the patents of these start-ups and then pursued aggressive enforcement campaigns that resulted in wasteful litigation that has undermined the patent system.<sup>347</sup> One of the lawsuits over Ed Sheeran's *Thinking Out Loud* is being pursued by one such monetization entity.<sup>348</sup>

#### *F. Clarifying Copyright Law's Blurred Inspiration/Infringement Line and Invigorating Gatekeeping*

Although the inspiration/infringement line can never be precisely drawn or made entirely objective, courts can clarify infringement jurisprudence and case management in several ways to reduce the risk of conflating inspiration and infringement. Most fundamentally, judges need to perform a principled and diligent gatekeeper role. They should guard against experts relying on speculative compositional analysis, faithfully apply copyright limiting doctrines, weed out cases that do not present sufficient proof of infringement, and

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344. See Tim Ingham & Amy X. Wang, *Why Superstar Artists Are Clamoring To Sell Their Music Rights*, ROLLING STONE (Jan. 15, 2021, 10:51 AM), <https://www.rollingstone.com/pro/features/famous-musicians-selling-catalog-music-rights-1114580/> (reporting that Bob Dylan, Stevie Nicks, Shakira, and several other prominent artists have sold their music catalogs for a host of reasons, including revenue, tax benefits, and personal circumstances).

345. See Amy X. Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, ROLLING STONE (Jan. 9, 2020), <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> (discussing current artists' growing fears over copyright lawsuits in the wake of the *Blurred Lines* decision).

346. See *Dot-com Bubble*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Dot-com\\_bubble](https://en.wikipedia.org/wiki/Dot-com_bubble) (last visited Feb. 17, 2022).

347. See JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2009).

348. Structured Asset Sales, owned by Investment banker David Pullman, holds a one-third interest in Marvin Gaye's *Let's Get It On*. See Jonathan Stempel, *Ed Sheeran Must Face Plagiarism Claim—Judge*, REUTERS (Mar. 30, 2021), <https://www.yahoo.com/now/ed-sheeran-must-face-plagiarism-193059648.html>.

where cases are worthy of jury consideration, carefully instruct the jury on the filtering of unprotectable elements and the subtle contours of the similarity threshold.

Some scholars and many musicians advocate limiting music copyright to melody.<sup>349</sup> The Copyright Act does not, however, limit the scope of music copyright protection to melody,<sup>350</sup> and such a restriction would discriminate against the creative contributions of artists working in genres such as jazz and R&B.<sup>351</sup> The Copyright Act expressly includes compilations, which provides sufficient berth to encompass melodic, rhythmic, and other elements of diverse musical forms.<sup>352</sup>

The inspiration/infringement dividing line derives from the idea/expression dichotomy. Confusing and loose standards, such as the extrinsic test's reference to similarities of ideas and expression, *Roth Greeting Card's* invocation of "total concept and feel," *Three Boys Music's* and *Swirsky's* uncritical protection for compilations of unprotectable elements, and *Swirsky's* lenient acceptance of experts engaging in "selective reduction" of musical transcriptions needlessly blur the inspiration/infringement line. It is here that the Ninth Circuit's en banc decision in *Skidmore* missed the opportunity to clarify music copyright infringement law.

Nonetheless, courts have gatekeeping authority to recognize the inspiration/infringement line, engage in thorough *Daubert* scrutiny of musicologists and their analytical methods,<sup>353</sup> apply filtration analysis, and refine jury instructions to avoid as much of the confusion as possible.<sup>354</sup> Judge Watford's concurring opinion in *Skidmore* provides a constructive blueprint:

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349. See Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1873–83 (2018).

350. 17 U.S.C. § 102.

351. See Monson, *supra* note 206.

352. 17 U.S.C. § 103.

353. See Avsec, *supra* note 185. Judge Nguyen proposed the use of court-appointed experts in music copyright infringement cases. See *Williams v. Gaye*, 895 F.3d 1106, 1152 & n.14 (9th Cir. 2018) (Nguyen, J., dissenting) (observing that "Federal Rule of Evidence 706, which allows courts to appoint their own experts, may be useful in situations where the court has little musical expertise and the parties' experts deliver starkly different assessments of two works' similarity"). This approach, however, puts a large thumb on the court appointed expert's side of the scale.

354. See, e.g., *Gray v. Perry*, No. 15-CV-05642-CAS-JCx, 2020 WL 1275221 (C.D. Cal. filed Mar. 16, 2020) (overruling jury determination that Katy Perry's *Dark Horse* infringed Marcus Gray's *Joyful Noise* under the extrinsic test based on the "commonplace" character of the allegedly similar elements, a determination that the compilation of such elements is only thinly protected, and an ultimate conclusion that "objective distinctions are substantial enough as to preclude a determination of virtual identity"); *Morrill v. Stefani*, 338 F. Supp. 3d 1051 (C.D. Cal. 2018); *Rose v. Hewson*, No. 17cv1471, 2018 WL 626350 (S.D.N.Y. Jan. 30, 2018).



At trial, Skidmore predicated his theory of originality on Taurus' selection and arrangement of five unprotectable musical elements . . . . None of those elements is subject to copyright protection in its own right; they belong to the public domain from which all musical composers are free to draw.

Skidmore can claim protection for the original selection and arrangement of those elements, but the scope of that protection depends on the "range of possible expression." *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994). There are relatively few ways to express a combination of five basic elements in just four measures, especially given the constraints of particular musical conventions and styles. For instance, once Randy Wolfe settled on using a descending chromatic scale in A minor, there were a limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear).

In light of the narrow range of creative choices available here, Skidmore "is left with only a 'thin' copyright, which protects against only virtually identical copying." *Ets-Hokin v. Sky Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003); *see also Apple Computer*, 35 F.3d at 1439 ("When the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity."). . . .

Contrary to Skidmore's contention, we have never held that musical works are necessarily entitled to broad copyright protection. We did state in *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), that "[m]usical compositions are not confined to a narrow range of expression." *Id.* at 1120. But we made that statement in the context of assessing the creative choices involved in composing an entire song, which of course could involve a broad range of expression. *See id.* at 1117–18, 1120. We had no occasion there to categorically exempt musical works from the same principles we use to assess the scope of copyright protection for all other works.

Given the thin protection afforded the selection and arrangement of basic musical elements at issue here, Skidmore could prove infringement only if the relevant passages of *Taurus* and *Stairway to Heaven* are virtually identical. They are not. Undeniable and obvious differences exist between the first four measures of both songs: The notes in the melodies are different; the use of the treble clef in conjunction with the bass clef is different; and the rhythm of eighth notes is different. Those facts preclude a finding of virtual identity. As a result, even if the district court had given the jury a selection-and-arrangement instruction, Skidmore's infringement claim would have failed as a matter of law.<sup>355</sup>

Judge Watford's approach provides a key to blunting the abdication of judicial gatekeeping and appellate review reflected in district and appellate court decisions in *Three Boys Music* and the appellate decision in *Swirsky*.<sup>356</sup> That said, it would be best for courts to use a sliding scale rather than a binary substantial similarity/virtual identity dichotomy.

## V. MUSIC MASHUP JUSTICE<sup>357</sup>

New musical genres differentiate generations and play a critical, formative role in each generation's values, self-identity, autonomy, and creative development. In the late twentieth century, advances in digital technology paved the way for rap and hip-hop genres. These musical art forms led to music mash-ups, which rely entirely on sampled sources to construct musical collages. Coinciding with the emergence of bootleg websites at the turn of the new millennium, music mash-ups emerged as a distinct genre which involved superimposing a vocal track from one recording onto the instrumental track of another. Well known to younger music fans, the mash-up genre is less familiar to older generations, a gap that can be attributed in part to the effects of copyright law.

Music mash-ups are as different as the artists who create them. Some

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355. *Skidmore v. Zeppelin*, 952 F.3d 1051, 1079–80 (9th Cir. 2020) (Watford, J., concurring) (en banc) (some citations omitted).

356. In view of her *Blurred Lines* dissent, see *supra* text accompanying notes 255–60, it was surprising that Judge Nguyen did not join in this concurrence. Perhaps that indicates judges' reticence to delve into technical areas in which expert opinion diverges.

357. This section remixes Peter S. Menell, *Adapting Copyright Law for the Mashup Generation*, 164 U. PENN. L. REV. 441 (2016).

combine an entire instrumental track from one recording with the entire vocal track of another recording. Others break the vocal tracks into samples and either superimpose a variety of recordings or use an eclectic collage technique weaving multiple samples—as many as thirty, and sometimes more—into a seamless composition. The mash-up genre went viral with the 2004 release of Danger Mouse’s *The Grey Album*,<sup>358</sup> seamlessly combining Jay-Z’s *The Black Album*<sup>359</sup> with The Beatles’ *The White Album*.<sup>360</sup> Although Danger Mouse released only 3,000 physical copies of the album and never intended to sell the album commercially, due in part to concerns about copyright infringement, the album unwittingly became an overnight digital sensation. After EMI, the owner of The Beatles’ sound recordings issued cease and desist letters to file sharing sites hosting *The Grey Album*, music activists mounted “Grey Tuesday,” a twenty-four-hour online protest promoting distribution of the album.<sup>361</sup> Approximately 170 websites went “grey” on February 24, 2004—muting the appearance of their home page while hosting copies of the album—leading to 100,000 downloads of the album on that day.<sup>362</sup> The album would garner favorable reviews from numerous critics as well as Best Album of 2004 honors from *Entertainment Weekly*.<sup>363</sup> Later that year, MTV introduced “Ultimate Mashups,” a series mashing together pairs of well-known recording artists.<sup>364</sup>

Artists such as Gregg Gillis, who performs under the stage name Girl Talk,<sup>365</sup> created marvelous meandering compositions by interweaving genres and samples entirely from existing recordings. A typical Girl Talk

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358. See *The Grey Album*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Grey\\_Album](https://en.wikipedia.org/wiki/The_Grey_Album) (last visited Feb. 17, 2022).

359. See *The Black Album (Jay-Z Album)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Black\\_Album\\_\(Jay-Z\\_album\)](https://en.wikipedia.org/wiki/The_Black_Album_(Jay-Z_album)) (last visited Feb. 17, 2022).

360. See *The Beatles (Album)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Beatles\\_\(album\)](https://en.wikipedia.org/wiki/The_Beatles_(album)) (last visited Feb. 28, 2022); *The Mouse That Remixed*, NEW YORKER (Feb. 1, 2004), <http://www.newyorker.com/magazine/2004/02/09/the-mouse-that-remixed>.

361. See Kembrew McLeod, *Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic*, 28 POPULAR MUSIC & SOC’Y 79, 80–81 (2005).

362. See Joseph Patel, *Grey Tuesday Group Says 100,000 Downloaded Jay-Z/Beatles Mix*, MTV NEWS (Mar. 5, 2004), <http://www.mtv.com/news/1485593/grey-tuesday-group-says-100000-downloaded-jay-zbeatles-mix>.

363. See JUNE SKINNER SAWYERS, READ THE BEATLES: CLASSIC AND NEW WRITINGS ON THE BEATLES, THEIR LEGACY, AND WHY THEY STILL MATTER, at xlvii (2006).

364. See Jeff Leeds, *Mix and Mash*, N.Y. TIMES (Jan. 9, 2005), <http://www.ny-times.com/2005/01/09/arts/music/09leed.html>.

365. See *Girl Talk (Musician)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Girl\\_Talk\\_\(musician\)](https://en.wikipedia.org/wiki/Girl_Talk_(musician)) (last visited Feb. 17, 2022).

composition, such as *Play Your Part (Pt. 1)*,<sup>366</sup> squeezed nearly thirty samples into five frenetic minutes. Listeners were quickly hooked by the dynamism, playfulness, and intrigue of Girl Talk and other mash-up artists.

As popular as they were, mash-ups raised copyright questions that had no clear answers. Embedded within some of Girl Talk's mashups are extended excerpts from popular copyrighted sound recordings, such as a ninety-second piano track from Derek and the Dominos' *Layla*<sup>367</sup> in *Down for the Count*<sup>368</sup> with a rap vocal track superimposed. Under the Sixth Circuit's questionable *Bridgeport* decision,<sup>369</sup> even a minuscule sample would be vulnerable. In contrast, the Second Circuit developed a body of case law offering a viable fair use defense for works considered "transformative" for collage-style works and works used for a different purpose.<sup>370</sup>

Fair use analysis does not offer certainty however, as it is nuanced, case-specific, and often subjective—in the eye, or more aptly, ear of the beholder. Gillis does not appear to be commenting on or parodying the *Layla* track—considerations that would favor his use—but rather using it for its distinctive musical qualities as well as for commercial purposes. And while the *Layla* piano track provides an exquisite backdrop for B.o.B's *Haterz Everywhere*,<sup>371</sup> it is not at all clear that this appropriation qualifies as fair use under current case law. Gillis's sample of Beyoncé's *Single Ladies (Put a Ring on It)*<sup>372</sup> in *That's Right*<sup>373</sup> is even more cavalier. The section beginning at 2:44 and running for seventy seconds appropriates the heart of Beyoncé's hit song with

366. See *Feed the Animals*, ILLEGAL TRACKLIST, <http://perma.cc/AVE7-6QZE> (Sept. 9, 2015).

367. *Layla*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Layla> (last visited Feb. 16, 2022).

368. See GIRL TALK, *Down for the Count*, on ALL DAY (Illegal Art 2010), <http://www.illegal-art.net/allday/> (last visited Feb. 16, 2022).

369. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (finding a two-second sample to be infringing). But see *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 880–87 (9th Cir. 2016); Eriq Gardner, *Madonna Gets Victory over 'Vogue' Sample at Appeals Court*, HOLLYWOOD REP. (June 2, 2016), <https://www.hollywoodreporter.com/business/business-news/madonna-gets-victory-vogue-sample-898944/>.

370. See *Cariou v. Prince*, 714 F.3d 694, 705–06 (2d Cir. 2013) (finding fair use in part because the artwork "manifest[ed] an entirely different aesthetic"); *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (finding fair use when the defendant's "purposes in using [the plaintiff's] image are sharply different from [the plaintiff's] goals in creating it"); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (finding fair use because the defendants used the concert posters as "historical artifacts").

371. B.O.B, *Haterz Everywhere (Featuring Rich Boy)*, on EASTSIDE (Atl. Recording Corp. 2007); *B.o.B*, WIKIPEDIA, <https://en.wikipedia.org/wiki/B.o.B> (last visited Feb. 17, 2022).

372. *Single Ladies (Put a Ring on It)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Single\\_Ladies\\_\(Put\\_a\\_Ring\\_on\\_It\)](https://en.wikipedia.org/wiki/Single_Ladies_(Put_a_Ring_on_It)) (last visited Feb. 17, 2022).

373. GIRL TALK, *That's Right*, on ALL DAY (Illegal Art 2010), <http://www.illegal-art.net/allday/>.

relatively little embellishment.

Among fans, the appreciation for Girl Talk's mash-ups owes as much or more to the creative contributions of the underlying composers and recording artists as it did to Gillis's creativity in mashing them together. Although Gillis has ample compositional talent, the copyright system lacks a workable method for allocating the fruits of his borrowing. To enable Gillis to commercialize these collages without according any value to the creators of the appropriated works seems questionable. It could be equally problematic if each underlying copyright owner could exercise veto power over mash-ups because then few, if any, mash-ups would be created, and those that are would be far less interesting or overtly parodic. The transaction costs alone would be prohibitive for most of Girl Talk's intensive musical collages.<sup>374</sup>

Creative Commons<sup>375</sup> provides a useful solution for some mash-up creators. A growing number of artists pre-authorize the use of their works in derivative works. Many of these authorizations, however, come with strings attached, such as prohibitions on commercial use and requirements that the derivative works be shared on the same terms as the sample. Furthermore, much of the most desirable mash-up source material—notably the most popular copyrighted musical compositions and sound recordings—are not within the Creative Commons pool.

I have suggested another approach for balancing the copyright infringement risks associated with cumulative creativity.<sup>376</sup> Due to the uncertainty surrounding the *de minimis* and fair use doctrines and cumulative creators, mash-up artists are often reluctant to rely on the fair use doctrine (because of its inherent uncertainty, the potentially harsh remedies for copyright infringement, and the practical inability to obtain effective preclearance rights). Moreover, copyright owners have no obligation under existing law to respond to a cumulative creator's inquiry. Thus, a familiar refrain in professional creative communities is "if in doubt, leave it out."

This problem could be alleviated through a cost-effective process for pre-clearing works. Under this mechanism, a cumulative creator has authority to make a formal offer of settlement to use copyrighted material for a project. If

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374. See KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 165–66 (2011) (detailing the high transaction costs associated with clearing samples).

375. See *Creative Commons Is Turning 20!*, CREATIVE COMMONS, <https://creativecommons.org/> (last visited Feb. 16, 2022).

376. See Peter S. Menell & Ben Depoorter, *Using Fee Shifting To Promote Fair Use and Fair Licensing*, 102 CAL. L. REV. 53 (2014).

the copyright owner does not respond to the offer, the cumulative creator would be permitted to use the work provisionally by paying the settlement amount into escrow. If the copyright owner rejects the proposed license fee and sues for infringement, the copyright owner will bear the cumulative creator's litigation costs if (1) the court determines that the use of the material qualifies as fair use or (2) the court determines that the fair use doctrine does not excuse the use but the cumulative creator's offer of settlement (the proposed license fee) exceeds the amount of damages that the court determines to be appropriate.<sup>377</sup> In the former case, the escrow amount is returned to the cumulative creator. In the latter case, the copyright owner receives the infringement award from the escrow account, and the remainder returns to the cumulative creator.

This proposal encourages copyright owners to take settlement offers seriously and negotiate around the fair use doctrine's inherent uncertainties. In so doing, it protects the reliance costs of cumulative creators, reduces transaction costs, and discourages holdout behavior. Overall, this mechanism should enrich cultural production by increasing the use of copyrighted content in follow-on works while fostering markets for cumulative creativity and providing fair compensation to copyright owners of underlying works.

Even if the preclearance transaction cost hurdle could be surmounted, there would remain impediments to mash-up creation. For example, it seems unlikely that Rick Springfield would be inclined to have *Jessie's Girl*<sup>378</sup> juxtaposed with a rap song celebrating oral sex.<sup>379</sup> Yet this use could possibly qualify for fair use. So neither extreme mash-up carte blanche nor copyright owner veto power is able to achieve the proper balance.

Legal uncertainty surrounding this new art form stunts and distorts its development and breeds contempt for the copyright system. The constraints and uncertainties surrounding copyright law, including the amorphous boundaries

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377. The Supreme Court's decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), expanded the possibility for works to be infringed but not subject to injunctive relief. See, e.g., *Salinger v. Colting*, 607 F.3d 68, 74–75 (2d Cir. 2010) (holding that “our Circuit’s longstanding standard for preliminary injunctions in copyright cases . . . is inconsistent with the ‘test historically employed by courts of equity’ and has, therefore, been abrogated by *eBay*”). See generally Matthew Sag & Pamela Samuelson, *The Hysteresis Thesis: An Empirical Study of Copyright Injunctions After eBay* (Jan. 31, 2022) (unpublished manuscript) (available on SSRN), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3898460](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898460) (reporting that courts have become more receptive to withholding injunctive relief after finding copyright infringement).

378. *Jessie's Girl* is a ballad about a young man's longing for his best friend's girlfriend. See *Jessie's Girl*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jessie%27s\\_Girl](https://en.wikipedia.org/wiki/Jessie%27s_Girl) (last visited Feb. 17, 2022).

379. See GIRL TALK, *Here's the Thing*, on FEED THE ANIMALS, at 03:48–04:20 (Illegal Art 2008) (mixing *Jessie's Girl* with Three 6 Mafia's *I'd Rather*, on *Last 2 Walk*).

of the fair use doctrine, have pushed the mash-up genre significantly underground. Much of this work is available through streaming services that operate under the radar or in a state of legal and commercial limbo. Mash-up artists, many of whom work as live performance DJs in dance clubs, distribute recordings of these works through unlicensed channels primarily to promote their live performance gigs. Major record labels have largely steered clear of signing and releasing mash-up artists out of concern for copyright liability and friction with their conventional artists.

Most mash-up music has been pushed into viral marketing and distribution through mash-up artist websites and file sharing platforms such as SoundCloud, a leading mash-up hub. While many of the mash-up websites initially operated without substantial interference from owners of the sampled works, that changed when the recording industry sought to monetize their catalog, and post-Napster generations became a greater share of the marketplace. For example, in June 2014, Kaskade, a popular mash-up artist and DJ, was the subject of dozens of takedown notices submitted to SoundCloud.<sup>380</sup>

While the distribution channels for mash-ups are largely user-uploaded and noncommercial (in the sense that listeners do not pay for access), some unlicensed mashups are available on YouTube, iTunes, Spotify, and Amazon, although their availability is limited and unpredictable. With regard to YouTube, it is unclear whether mash-up artists have been able to derive much, if any, revenue through advertising monetization because to benefit, artists must own all the “necessary rights to commercially use all visuals and audio elements.”<sup>381</sup> Uploaders who violate these rules are subject to takedown notices and may have their YouTube channels removed. The YouTube Content ID system rules also allow YouTube to divert the advertising revenue to the copyright claimant under certain circumstances.

While YouTube’s Content ID system represents an innovative solution to screening uploaded content, the lack of a sophisticated mechanism for dividing mash-up advertising revenue among the multiple creative influences (including the mash-up artists) limits the ability of this new creative force of mash-up artists from profiting directly from others’ enjoyment of their mash-ups. Other considerations, such as self-expression and promotion for live performances, provide indirect rewards for posting mash-ups. Given liability and platform concerns, many mash-up artists have taken a more cautious

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380. See Kaskade, *brb . . . Deleting SoundCloud.*, THIS IS A DYNASTY, <http://thisisadynasty.tumblr.com/post/87945465547/brbdeleting-soundcloud> (last visited Feb. 16, 2022).

381. *What Kind of Content Can I Monetize?*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2490020?hl=en> (last visited Feb. 16, 2022).

approach, keeping their works off of websites that charge for downloads, characterizing their works as experimental, and offering to remove mash-ups at the request of copyright owners of embedded works.

Copyright concerns have played a significant, but not particularly constructive, role in the emergence and evolution of the mash-up genre. While the protest over *The Grey Album* catapulted mash-up music onto the cultural radar, lingering concerns about copyright exposure have continued to limit the full blossoming of the genre. Legal uncertainty has important ramifications for the development of the music mash-up genre as well as for the larger creative and copyright ecosystems. The current circumstances push the growing community of music mash-up artists and fans outside of the copyright system and content marketplace. They also limit the ability of new generations of creators to test their talent and pursue financially sustainable careers.

A copyright system that fails to understand, accept, and embrace these formative and social processes sacrifices relevance among younger artists and fans. Growing distrust among this demographic will make the copyright system progressively less acceptable to a growing proportion of society. Since digital and Internet technology provide easy access to unauthorized sources of copyrighted works, failure to accommodate new and popular art forms such as mash-ups encourages “work-arounds” to copyright markets, alienates post-Napster generations (and increasingly those who grew up in the era in which copyright markets were obligatory) from copyright markets, and confronts judges responsible for adjudicating copyright disputes with difficult choices, as reflected in the file sharing and Internet safe harbor cases.

By extending a compulsory license to mash-up artists,<sup>382</sup> Congress can invigorate the copyright system and channel new generations of consumers and creators into well-functioning online marketplaces for digital content. By augmenting the cover license, which has been in place for more than a century, with digital technologies for identifying and tracking usage of preexisting copyright works, a remix compulsory license would provide a calibrated mechanism for enabling both mash-up artists and owners of sampled works to profit equitably from the public’s enjoyment of the resulting collages.

Such a regime would remove the dark cloud constraining and distorting the mash-up genre. It would not supplant fair use, but rather would sidestep its amorphous contours in those situations where mash-up artists choose to operate within the compulsory license regime. Others would be free to test

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382. See *Adapting Copyright Law for the Mashup Generation*, *supra* note 357, at 495–500 (sketching a blueprint for structuring a remix compulsory license).



the limits of fair use, but it seems likely that an increasing number of mash-up artists would prefer to avoid legal uncertainty and would see the virtue in sharing the proceeds of their success with those whom they sample. Opening up a compulsory license channel would stimulate copyright markets and expand the range of works available across a range of platforms—from YouTube to Spotify, iTunes, and SoundCloud. Consumers would see greater reason to participate in these markets, thereby further stimulating the creative arts.

This policy innovation would also signal that Congress seeks to embrace new creators and their fans through adapting copyright to the realities of the Internet Age. By moving copyright away from control towards calibrated compensation, Congress would recognize that remix artists and consumers play a vital role in the era of configurable culture, foster norms that channel modern creators and consumers into markets for copyrighted works, and begin the process of building intergenerational bridges.

## VI. CONCLUSION

Achieving music copyright justice remains an ongoing challenge. The digital piracy threat has been significantly addressed through the emergence of authorized streaming platforms. The Music Modernization Act provides a promising framework for improving the distribution of music revenues, although the proof lies in the politics surrounding its operations. Navigating the line between inspiration and infringement is a work in progress. And development of an equitable and efficient framework for music mashups remains to be resolved.

As policymakers, industry leaders, and judges grapple with these issues, it is important to bear in mind Van Morrison's observation that "Music is spiritual. The music industry is not."<sup>383</sup> We must not lose sight of copyright's role as a transporter. The importance of such transportation was beautifully captured in *Blinded by the Light*, a heartwarming film about a British-Pakistani teenager growing up in a working-class town north of London in the 1980s.<sup>384</sup> Struggling to deal with his family's expectations, xenophobia,

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383. *Van Morrison Quotes*, BRAINYQUOTE, [https://www.brainyquote.com/quotes/van\\_morrison\\_139058](https://www.brainyquote.com/quotes/van_morrison_139058) (last visited Feb. 16, 2022); see also *supra* text accompanying note 67.

384. See *Blinded by the Light (2019 Film)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Blinded\\_by\\_the\\_Light\\_\(2019\\_film\)](https://en.wikipedia.org/wiki/Blinded_by_the_Light_(2019_film)) (last visited Feb. 28, 2022). The film's title references Bruce Springsteen's song of the same name, which was featured on *Greetings from Asbury Park, N.J.*, his debut album in 1973. *Id.* The film "is based on [Safraz] Manzoor's 2007 memoir, *Greetings from Bury Park: Race, Religion and Rock 'n' Roll*." *Id.* Manzoor also co-wrote the script for *Blinded*

bigotry, and economic plight, pursue a career as a writer, and find love, Javed is inspired and ultimately liberated by Bruce Springsteen's powerful music and lyrics about ordinary people fighting to get by.

Javed's story speaks to the power of a robust music creativity ecosystem. It is cross-generational and cross-cultural. It's a story about how copyright protection promotes creativity and inspires others. It fosters kinship with everyone for whom music helped them to discover their own path. The value of a healthy infrastructure for creativity is inestimable. For that reason, we need to bring the technological and creative communities together in support of a healthy, balanced copyright system.

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