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Note

**Tons à Faire:
Strengthening the Scènes à Faire Doctrine for Music Copyright Cases**

Taylor Barlow

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“Three chords and the truth—that’s what a country song is.”

-Willie Nelson¹

I. Introduction

In May 2013, singer Robin Thicke said, “Pharrell [Williams] and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye’s ‘Got to Give It Up.’ I was like, ‘Damn, we should make something like that, something with that groove.’”² The song was “Blurred Lines” and it became one of the best-selling singles of all time en route to breaking the record for the largest radio audience in history.³ However, by the end of 2013, it also became the subject of a controversy between Thicke and Williams on one side and Marvin Gaye’s estate on

¹ Dotson Rader, Willie Nelson: ‘Three Chords and the Truth—That’s What a Country Song Is,’ *Parade* (June 27, 2010, 3:19 PM), <https://parade.com/49964/dotsonrader/willie-nelson-2/>.

² Stelios Phili, Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film, *GQ* (May 7, 2013), <https://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy>.

³ Blurred Lines, Wikipedia (April 2, 2020, 8:54 PM), https://en.wikipedia.org/wiki/Blurred_Lines.

the other.⁴ Gaye's estate alleged that Williams took more than just inspiration from "Got to Give It Up." They alleged that the "groove" from "Blurred Lines" infringed the "Got to Give It Up" copyright.⁵

After a seven-day trial and two days of deliberation, a jury agreed with the Gaye estate.⁶ The jury awarded more than seven million dollars in damages plus a fifty percent royalty on future revenues from the song.⁷ The Ninth Circuit affirmed the district court's decision finding actual damages and awarding the Gayes a running royalty⁸, leaving recording artists and music producers uneasy.⁹ The Gaye estate's success has emboldened others to bring infringement suits, leading to a series of high-profile cases involving Katy Perry, Ed Sheeran, Jimmy Page, Ariana Grande, Lil Nas X, Cardi B, and others.¹⁰ Musicologist Sandy Wilbur says pre-clearance requests from music companies have tripled since the *Blurred Lines* case.¹¹ Some artist managers are encouraging their artists to purchase errors-and-omissions insurance to protect themselves.¹²

For an infringement claim to succeed, the plaintiff must show ownership of a valid copyright and that unauthorized copying has occurred.¹³ Absent the direct admission of the defendant, copying is most commonly evidenced by showing the defendant had access to the source work and the two works are substantially similar, such that copying may be inferred.¹⁴ Copying may also be inferred without proof of access if the two works are so strikingly similar that they could not have been created independently of one another.¹⁵ Once copying has been proven, the plaintiff must prove that such copying was unauthorized and amounted to "improper appropriation."¹⁶

Circuits disagree about the timing and propriety of expert testimony and about the appropriate perspective from which to evaluate "substantial similarity."¹⁷ In the Second Circuit, qualified expert testimony may include an opinion on the similarity of two works to show likelihood of access, but the ultimate determination of misappropriation is left to the finder of fact, using the perspective of a "lay listener."¹⁸ The Fourth Circuit substitutes the perspective of an

⁴ See *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 12159220 (C.D. Cal. Oct. 6, 2015).

⁵ *Id.*

⁶ *Williams v. Gaye*, 885 F.3d 1150, 1159 (9th Cir. 2018).

⁷ *Id.* at 1162. This amount was later reduced to approximately \$5.3 million. *Id.* at 1162-63.

⁸ *Id.* at 1117.

⁹ See GQ, Pharell and Rick Rubin Have an Epic Conversation, YouTube (Nov. 4, 2019), <https://youtu.be/PnahkJevp64?t=1870> (31:10-34:28).

¹⁰ See *Gray v. Perry*, No. 2:15-cv-05642-CAS (JCx), 2017 WL 1240740 (C.D. Cal. Apr. 3, 2017); *Griffin v. Sheeran*, 351 F. Supp. 3d 492 (S.D.N.Y. 2019); *Skidmore v. Zepelin*, 925 F.3d 999 (9th Cir. 2019); *Complaint, Stone v. Grande*, No. 20-cv-441, 2020 WL 256480 (S.D.N.Y. Jan. 16, 2020); *Madison Bloom, Lil Nas X, Cardi B, More Hit With Copyright Infringement Lawsuit for "Rodeo," Pitchfork* (Oct. 4, 2019), <https://pitchfork.com/news/lil-nas-x-cardi-b-more-hit-with-copyright-infringement-lawsuit-for-rodeo/>.

¹¹ Amy Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, *Rolling Stone* (January 9, 2020), <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/>.

¹² *Id.*

¹³ *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992); *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 763 (2d Cir. 1991); *Weissmann v. Freeman*, 868 F.2d 1313, 1320 (2d Cir. 1989), cert. denied, 493 U.S. 883, (1989).

¹⁴ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

¹⁵ *Id.* at 469.

¹⁶ *Id.* at 468.

¹⁷ See *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731 (4th Cir. 1990), cert. denied, 498 U.S. 981 (1990); *Krofft v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Arnstein*, 154 F.2d 464.

¹⁸ *Arnstein*, 154 F.2d 464.

“intended listener” for the Second Circuit’s “lay listener.”¹⁹ In the Ninth Circuit, qualified expert testimony may include an opinion on whether elements that are substantially similar between two works amount to unprotectable ideas or are protectable expressions of those ideas.²⁰

None of these tests adequately account for the complexity of musical theory, nor for the realities of artistic inspiration and process. Simply asking whether two musical works are “substantially similar” disregards thousands of years of musical theory and understanding. There are certain elements of music that artists should be free to use and incorporate into their own musical works. The scènes à faire doctrine renders certain creative elements unprotectable, but this doctrine must be strengthened and expanded for use in music copyright cases. A new tons à faire doctrine is needed to release certain musical elements from the ownership of any one author and help “ensure a robust public domain of creative works.”²¹ Tons à faire would build upon the scènes à faire doctrine and expand the realm of unprotectable elements of musical creation. These foundational elements should be free for anyone’s use and for the greatest public benefit.

II. United States Copyright Law

A. Incentives

The United States Constitution authorizes Congress to extend copyright protection to “[a]uthors” for their “respective [w]ritings” to “promote the [p]rogress of [s]cience.”²² An assessment of the current status of copyright law, therefore, should assess whether current law does, in fact, “promote the progress of science.”²³ This clause not only enumerates one of Congress’s powers, but provides the policy goal toward which legislation should be directed and the lens through which that legislation should be subsequently interpreted. However, this goal creates a tension between two competing interests. First is the monopolistic protection given to authors and publishers as an economic incentive to create new works. Second is the public’s interest in having unrestricted access to these same works. If copyright protections are too expansive, other authors may be less inclined to create new works in that category for fear of infringement. Expansive protections may also reduce the raw materials available in the public domain with which new artists may create. If protections are too narrow, authors may lack adequate financial incentives to create new works. The appropriate balance is that where the costs of the monopoly do not inhibit the creation and dissemination of intellectual works.²⁴

The purpose of copyright protection was articulated in the legislative report of the 1909 Copyright Act.²⁵ In that report, Congress made clear that a grant of copyright protection is not based on natural or moral rights that authors have in their writings. Rather, the protection is given to encourage authors to create, and these creations are then disseminated to the masses. Exclusive rights are given, therefore, not primarily for the benefit of the author, but for the benefit of the public.²⁶ So courts should err on the side of expanding the public domain when deciding a close case.

¹⁹ *Dawson*, 905 F.2d 731.

²⁰ *Krofft*, 562 F.2d 1157.

²¹ *Williams v. Gaye*, 895 F.3d 1106, 1139 (9th Cir. 2018) (Nguyen, J., dissenting).

²² U.S. Const. art. I, § 8, cl. 8.

²³ Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 *BYU L. Rev.* 259, 261 (2013) (the word “science,” as used by the Framers, means general knowledge).

²⁴ 1 Howard B. Abrams & Tyler T. Ochoa, *The Law of Copyright* § 1:3 (2019).

²⁵ S. Rep. No. 1108, 60th Cong., 2d Sess. (1909)

²⁶ *Id.* at § 1:4.

B. Exclusive Rights

The Copyright Act grants to an author “exclusive rights to do and to authorize” any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.²⁷

This section is limited in various aspects by §§ 107-122 of the Act but provides the general scope of rights granted to an author in his or her work.²⁸ For musical works, this may be distilled to the rights of “production, distribution, and performance of substantially similar copies of the owner’s copyrighted work.”²⁹ It is in these rights that an author finds the financial incentive to create.

C. Probative and Substantial Similarity

The Supreme Court took up the first copyright case more than forty years after the first federal copyright act was enacted in 1790.³⁰ Since then, courts have struggled to strike the right balance that best promotes the progress of science. The various circuit courts have construed Supreme Court precedent differently, and a patchwork of tests and inconsistent outcomes have resulted.³¹ One element of confusion among courts surrounds the term “substantial similarity,” a standard that must be met to prove the copying element of an infringement claim. Professor David Nimmer, the foremost expert on copyright law, explains the confusion:

Two separate components actually underlie proof of copying, although few courts or commentators have historically differentiated among the different meanings of the term. First, there is the factual question whether the defendant, in creating its own rival work, used the plaintiff’s material as a model, template, or even inspiration. If the answer is “yes,” then one can conclude, as a factual proposition, that copying may have occurred. But the question remains whether such copying is actionable . . . appropriation, i.e., copying as a legal proposition—whether the defendant’s work is substantially similar to plaintiff’s work such that liability may attach.

...

²⁷ 17 U.S.C. § 106.

²⁸ *Id.* at §§ 107-22.

²⁹ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *30 (C.D. Cal. July 14, 2015).

³⁰ See *Wheaton v. Peters*, 33 U.S. 591 (1834).

³¹ See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); c.f., *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016); *Krofft v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977).

Professor Alan Latman wisely counsels that, in the previous formulation, the term “substantial similarity” be discarded in favor of “probative similarity.” In other words, when the question is copying as a factual matter, then similarities that, in the normal course of events, would not be expected to arise independently in the two works are probative of defendant’s having copied as a factual matter from plaintiff’s work. . . . Although the First Circuit has ruled to the contrary that probative copying arises only when the similarities relate to protectible elements, it is respectfully suggested that the panel confused the rule applicable to substantial similarity (which does indeed require similarities as to protectible elements) and inappropriately transported it to this domain.³²

According to Professor Nimmer, the term “substantial similarity” has been used by courts to refer to both a factual analysis (whether two works are so similar that access may be inferred to prove copying), and a legal analysis (whether the similarity in two works amounts to improper appropriation).³³ Professor Latman has proposed that the term “probative similarity” be applied to the factual analysis to bring some clarity to the courts’ analyses, but the term has not been universally adopted or has been adopted incorrectly.³⁴

While the differences between probative and substantial similarity seem inconsequential, the demarcation is key in triggering two distinct analyses. “[S]ubstantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement. . . . While a ‘(r)ose is a rose is a rose is a rose,’ substantial similarity is not always substantial similarity.”³⁵ Circuits have generally applied one of two tests in conducting these separate analyses of copying and infringement. The first, the *Arnstein* test, is followed by most circuits.³⁶ *Arnstein* requires a plaintiff prove copying in fact and improper appropriation.³⁷ The second, the *Krofft* test, is used by the Ninth Circuit.³⁸ *Krofft* provides a two-prong, “extrinsic” and “intrinsic” test that analyzes separately the idea and the expression of the source and infringing works.³⁹

Hereafter, “probative” similarity will be used to refer to the standard courts use to identify a degree of similarity that is so high it must be the result of copying. “Substantial” similarity will be used to refer to the standard courts use to identify the degree of similarity between the copyrightable elements of the source work and the allegedly similar elements of an infringing work.

i. Arnstein and Krofft Tests

The first element of the *Arnstein* test, copying in fact, may be proved with direct evidence where the defendant has either admitted to the copying or it was recorded or otherwise witnessed.⁴⁰ However, direct evidence of copying is rare; circumstantial evidence is much more common to allow an inference of copying.⁴¹ Such circumstantial evidence requires (1) a showing of the defendant’s access to the source work and (2) probative similarity between the source work and

³² 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §4 (2019) (citations omitted).

³³ *Id.*

³⁴ *Id.*; *Johnson v. Gordon*, 409 F.3d 12, 18–19 (1st Cir. 2005).

³⁵ *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975).

³⁶ *Arnstein*, 154 F.2d 464.

³⁷ *Id.*

³⁸ *Krofft v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977).

³⁹ *Id.*

⁴⁰ *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988).

⁴¹ *Ideal Toy Corp. v. Kenner Prods. Div. Gen. Mills Fun Grp.*, 443 F. Supp. 291, 302 (S.D.N.Y. 1977).

the infringing work.⁴² Once a plaintiff has proved a defendant copied the source work, through direct or indirect evidence, he or she must prove the works are substantially similar.⁴³ This similarity is meant to be judged by the “ear of the lay listener.”⁴⁴

The “extrinsic” prong of the Ninth Circuit’s *Krofft* test evaluates whether two works are substantially similar in their ideas.⁴⁵ The “intrinsic” prong evaluates whether the works are substantially similar in the expression of those ideas.⁴⁶ The extrinsic prong is decided as a matter of law, while the intrinsic prong is decided by the trier of fact. Expert testimony is only permitted for the extrinsic prong, as the intrinsic prong is to be determined by an “ordinary reasonable person.”⁴⁷

Despite subtle differences in the two tests, both require the court to evaluate the similarities between a source work and an allegedly infringing work. A standard for similarity is set by the courts. Unfortunately, it is a nebulous standard and designedly so. “Substantial similarity is an elusive concept, not subject to precise definition.”⁴⁸ The Ninth Circuit recognized the weaknesses of the *Krofft* test, and in doing so, highlighted the flaws of a “substantial similarity” standard generally:

We have referred to “the turbid waters of the ‘extrinsic test’ for substantial similarity under the Copyright Act.” The application of the extrinsic test, which assesses substantial similarity of ideas and expression, to musical compositions is a somewhat unnatural task, guided by relatively little precedent. Music is an art form that “produces sounds and expresses moods,” but it does not necessarily communicate separately identifiable ideas. The extrinsic test provides an awkward framework to apply to copyrighted works like music or art objects, which lack distinct elements of idea and expression. Nevertheless, the test is our law and we must apply it.⁴⁹

Courts have repeatedly failed to appreciate the complexity of music when adjudicating music copyright cases. The inconsistent and muddled determinations of substantial similarity in these cases exemplifies this failure.

ii. Substantial Similarity to Protectable Elements

The test of substantial similarity is further complicated by inconsistencies in what is to be the proper object of such an analysis. Courts, even those within the same circuit, disagree upon whether the analysis should be impression-oriented, or detail-oriented.⁵⁰ Those that have looked for similarity based on the overall *impression* of the work, evaluate the “concept and feel,”⁵¹ finding infringement despite different creative expressions.⁵² Those that choose the *detail*-oriented approach will dissect the two works to evaluate their parts and may find infringing similarities

⁴² *Arnstein*, 154 F.2d at 468

⁴³ *Arnstein*, 154 F.2d 464.

⁴⁴ *Id.* at 475.

⁴⁵ *Krofft*, 562 F.2d 1157.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988).

⁴⁹ *Swirsky v. Carey*, 376 F.3d 841, 848-49 (9th Cir. 2004) (citations omitted).

⁵⁰ Alfred Chueh-Chin Yen & Joseph P. Liu, *Copyright Law: Essential Cases and Materials* 252-53 (3d ed. 2016).

⁵¹ *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1111 (9th Cir. 1970).

⁵² See *Krofft*, 562 F.2d 1157 (9th Cir. 1977); *Sturdza v. United Arab Emirates*, 281 F.3d 1287 (D.C. Cir. 2002); *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.EN.Y. 1987).

therein, though the ordinary observer may not when observing the whole.⁵³ Whether a court's analysis is impression- or detail-oriented, the goal remains the same: to find and measure any similarities to the protectable elements of the copyrighted work. Protectable elements are limited to those that are "original works of authorship."⁵⁴ Courts have struggled to define what makes a work "original," but have developed several theories and doctrines to aid in the analysis. Two doctrines relevant to this discussion are the idea/expression dichotomy and *scènes à faire*.

1. Idea/Expression Dichotomy

a. Generally

Copyright protection extends to the expression of an idea, but never to the idea itself.⁵⁵ Where it is determined that there are only a limited few ways of expressing an idea, the idea is said to have merged with the expression, and the work is not protectable.⁵⁶ Extending protection to such works would extend protection to the ideas themselves and encroach upon territory better suited by patent law. This idea/expression dichotomy and the merger doctrine require courts to measure each contested work against the definitional continuum that exists between "idea" and "expression." However, the boundary between the two is ever-shifting, making this a difficult and fact-specific task.⁵⁷

b. Single Words and Short Phrases

Copyright protection will generally not be extended to single words and short phrases.⁵⁸ Single words and short phrases do not show the "modicum of creativity" necessary to enjoy copyright protection.⁵⁹ Furthermore, a single word or short phrase connotes an idea that can only be expressed using that word or short phrase, subjecting the same to the merger doctrine.⁶⁰

⁵³ See *Cooling Sys. and Flexibles v. Stuart Radiator*, 777 F.2d 485 (9th Cir. 1985); *Laureyssens v. Idea Grp.*, 964 F.2d 131 (2d Cir. 1992); *Ideal Toy Corp. v. Kenner Prods. Div. of Gen'l Mills Fun Grp.*, 443 F. Supp. 291 (S.D.N.Y. 1977).

⁵⁴ 17 U.S.C. § 102.

⁵⁵ See generally *Baker v. Selden*, 101 U.S. 99 (1879). See also 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

⁵⁶ See *Baker*, 101 U.S. 99.

⁵⁷ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) ("Nobody has ever been able to fix that boundary, and nobody ever can.").

⁵⁸ *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992).

⁵⁹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

⁶⁰ The exclusion of single words and short phrases from copyright protection is separate from copying that is deemed to be *de minimis* by the court and incorporated as a factor in the analysis of a fair use defense. Single words and phrases do not enjoy copyright protection, and therefore cannot be infringed, whereas *de minimis* copying is non-actionable infringement. See *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102-03 (2d Cir. 2014) ("Similarly, the 'merger doctrine' instructs that some ideas can only be expressed in a limited number of ways—single words or colors for example.").

1. Scènes à Faire

Scènes à faire is loosely French for “scenes which ‘must’ be done.”⁶¹ The term was probably first coined in the mid-to-late 1800s by an art critic, Francisque Sarcey.⁶² He used it to describe “obligatory” scenes, or “one[s] which the audience has been led to expect and which must be performed[.]”⁶³ In its evolution for legal application, it refers to “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic,” or “scenes which necessarily result from identical situations.”⁶⁴ The scènes à faire doctrine recognizes that certain artistic themes are, in fact, unprotectable ideas. Scènes à faire elements are innumerable, and may be found in virtually every creative medium – whether it be photography, cinema, literature, theater, music, or even software. Once the scènes à faire are stripped away from a copyrighted work, what is left is protected “against only virtually identical copying.”⁶⁵

Scènes à faire, though a prior-existing doctrine of copyright law, was first invoked by name in a legal setting by Judge Leon Yankwich in *Cain v. Universal Pictures*.⁶⁶ James Cain had written a book entitled *Serenade*, in which the protagonists take shelter in a small church during a storm. Universal Pictures, in its film *When Tomorrow Comes*, depicted a similar scene with characters taking shelter from a storm in a church, and Cain sued for infringement. Judge Yankwich recognized that *Serenade* was an original, expressive work generally entitled to broad copyright protection.⁶⁷ Given the lack of “similarity of subject or of characterization between the book” and the movie, however, Cain conceded that the alleged copying was limited “to the church sequence.”⁶⁸ Cain described various similar details that occur while the characters are in the church, including playing the piano, a prayer, and a “hunger motive.”⁶⁹ Judge Yankwich dismissed these similarities as “inherent in the situation itself.”⁷⁰ Regarding details that naturally flow from a particular situation, he explained: “They are what the French call ‘scènes à faire’. [sic] Once having placed two persons in a church during a big storm, it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should force themselves upon the writer in developing the theme.”⁷¹

Though the doctrine of scènes à faire is entirely judge-made, it has enjoyed widespread adoption as a foundational principle of copyright law. Courts differ on the precise definition, but it is generally accepted that certain necessary, indispensable, or inevitable elements of a creative

⁶¹ *Satava v. Lowry*, 323 F.3d 805, 810 n.3 (9th Cir. 2003); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13.03 (2019) (citations omitted).

⁶² Stanley Hochman, *McGraw-Hill Encyclopedia of World Drama: An International Reference Work in 5 Volumes* 254 (McGraw-Hill 1984).

⁶³ *Id.*

⁶⁴ *Reyher v. Child’s Television Workshop*, 533 F.2d 87, 92 (2d Cir. 1976); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982) (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

⁶⁵ *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (“When we apply the limiting doctrines, subtracting the unoriginal elements, *Ets-Hokin* is left with only a ‘thin’ copyright, which protects against only virtually identical copying.”).

⁶⁶ *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).

⁶⁷ *Id.* at 1016.

⁶⁸ *Id.* at 1016-17.

⁶⁹ *Id.* at 1017.

⁷⁰ *Id.*

⁷¹ *Id.*

work should not be copyrightable by any one author.⁷² A broad, and therefore flexible, definition has allowed the doctrine to be applied to many creative disciplines.

III. The *Blurred Lines* Case: A Casual Approach to Musical *Scènes à Faire*

Robin Thicke released “Blurred Lines” in 2013, and the song became an instant hit, albeit one that was saturated in cultural controversy.⁷³ The controversy entered the legal arena when Marvin Gaye’s estate accused Thicke and Williams of infringing Gaye’s “Got to Give it Up.”⁷⁴ The Williams parties sought declaratory relief in California’s Central District, and the Gaye estate countersued.

At trial, both parties retained “forensic musicologists”⁷⁵ as experts to aid the court in its application of the “extrinsic” test for probative similarity (according to the *Krofft* framework used in the Ninth Circuit). The Gaye’s expert, Judith Finell, prepared a preliminary report that identified a “constellation” of eight features that, in her opinion, were so similar between the two works as to “surpass the realm of generic coincidence, reaching to the very essence of each work.”⁷⁶ The eight features Finell identified were:

1. The signature phrase in main vocal melodies;
2. Hooks;
3. Hooks with backup vocals;
4. Core theme, or “Theme X”;
5. Backup Hooks;
6. Bass Melodies;
7. Keyboard parts; and
8. Unusual percussion choices.⁷⁷

In contrast, an expert for the Williams parties, Sandy Wilbur, prepared a declaration critiquing Finell’s analysis. Wilbur opined that the two works did not share significant similarities. She testified that the eight alleged similarities were primarily melodic but “[t]here [were] no two consecutive notes in any of the melodic examples in the Finell Report that have the same pitch, the same duration, and the same placement in the measure.”⁷⁸ Wilbur also attempted to show the alleged similarities were actually a type of musical *scènes à faire*; the similarities were not original

⁷² Compare *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir.), cert. denied, 429 U.S. 980 (1976) (defining *scènes à faire* as “sequences of events which necessarily follow from a common theme”), with *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (defining *scènes à faire* as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic”).

⁷³ See, e.g., Tricia Romano, ‘Blurred Lines,’ Robin Thicke’s Summer Anthem, Is Kind of Rapey, *Daily Beast* (July 11, 2017 10:22 PM), <https://www.thedailybeast.com/blurred-lines-robin-thicke-summer-anthem-is-kind-of-rapey>.

⁷⁴ Clifford Harris, Jr. (p/k/a “T.I.”) was also named as a party, but found not to be liable by the jury. This release from any vicarious liability was upheld by the Ninth Circuit, despite the trial judge’s attempt to impose such liability notwithstanding the jury’s verdict.

⁷⁵ Durand R. Begault, Heather D. Heise & Christopher A. Peltier, *Forensic Musicology-An Overview*, ResearchGate (June 14, 2016), https://www.researchgate.net/publication/303960871_FORENSIC_MUSICOLOGY-AN_OVERVIEW (“Forensic musicology refers to the application of musicological analysis and scholarship to a legal matter.”).

⁷⁶ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *3 (C.D. Cal. Oct. 30, 2014) (quoting Finell’s preliminary report).

⁷⁷ *Id.*

⁷⁸ *Id.* (emphasis omitted).

and “many comprise ‘the basic building blocks of musical composition that are present, if not inevitable, in many songs’ or were found in prior art”⁷⁹

Finell prepared a rebuttal declaration, arguing, *inter alia*, that Wilbur improperly “deconstruct[ed] and microscopically dissect[ed] the individual similar features in isolation, outside the context of the entire work.”⁸⁰ She also disagreed that the similar features were uncopyrightable ideas, but reiterated her position that the elements represented copyrightable expression.⁸¹

A second Gaye expert, Ingrid Monson, identified additional elements of similarity between the two works, including the use of a cowbell, hand percussion, drum set parts, background vocals, keyboard parts, and various harmonic and melodic elements.⁸²

On motion for summary judgment, the district court compared these testimonies and filtered out elements Wilbur claimed were not protectable, as they were not included in the 1977 deposit copy of “Got to Give it Up.”⁸³ These filtered elements included the backup/background vocals, “Theme X,” the descending bass line, keyboard rhythms, keyboard parts, percussion parts, the use of a cowbell, hand percussion, and drum set parts.⁸⁴ The district court then considered the

⁷⁹ Id. (quoting Declaration of Sandy Wilbur).

⁸⁰ Report or Affidavit of Judith Finell, at ¶73, *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 12159220 (C.D. Cal. Oct 6, 2015) (No. 2:13-CV-06004), 2014 WL 12725877.

⁸¹ Id.

⁸² *Williams v. Gaye*, 895 F.3d 1106, 1117 (9th Cir. 2018).

⁸³ Under the 1909 Copyright Act, authors were required to deposit a copy of their work with the Copyright Office, and comply with various other formalities in order to obtain copyright protection for that work. A failure to deposit under this 1909 Act could lead to forfeiture of the copyright. While deposited musical compositions were protected under the 1909 Act, sound recordings were not. Effective in 1972, sound recordings received limited protections, but notably, the right to public performance was excluded. Greater protections were not afforded sound recordings until the 1976 Copyright Act, which took effect in 1978 - after Gaye’s “Got to Give it Up” was released. The court in *Williams v. Gaye* described the significance of a deposit copy under the 1909 Act, and how the “Got to Give it Up” deposit copy affected scope of the song’s copyright protection:

Marvin Gaye composed “Got To Give It Up” before January 1, 1978, the effective date of the Copyright Act of 1976. Accordingly, the Copyright Act of 1909 governs the Gayes’ compositional copyright.

While the Copyright Act of 1976 protects “works of authorship” fixed in “sound recordings,” the 1909 Act did not protect sound recordings. It is well settled that “[s]ound recordings and musical compositions are separate works with their own distinct copyrights.” It remains unsettled, however, whether copyright protection for musical compositions under the 1909 Act extends only to the four corners of the sheet music deposited with the United States Copyright Office, or whether the commercial sound recordings of the compositions are admissible to shed light on the scope of the underlying copyright. Here, the district court ruled that the 1909 Act protected only the deposit copy of “Got To Give It Up,” and excluded the sound recording from consideration.

The Gayes cross-appeal the district court’s interpretation of the 1909 Act only in the event the case is remanded for a new trial. The parties have staked out mutually exclusive positions. The Gayes assert that Marvin Gaye’s studio recording may establish the scope of a compositional copyright, despite the 1909 Act’s lack of protection for sound recordings. The Thicke Parties, on the other hand, elevate the deposit copy as the quintessential measure of the scope of copyright protection. Nevertheless, because we do not remand the case for a new trial, we need not, and decline to, resolve this issue in this opinion. For purposes of this appeal, we accept, without deciding, the merits of the district court’s ruling that the scope of the Gayes’ copyright in “Got To Give It Up” is limited to the deposit copy.”

Id. at 1121 (citations omitted).

⁸⁴ Id. at 1117.

harmonic and melodic elements described by Monson and compared them with the opinions put forth by Wilbur. The court noted several disputes that still remained, including similarities between the songs' "signature phrases, hooks, bass lines, keyboard chords, harmonic structures, and vocal melodies."⁸⁵ Therefore, the Williams parties' motion for summary judgment was denied and the evidence was presented to, and further developed before, a jury. The jury ultimately found in favor of the Gaye parties, resulting in a damages award of nearly \$4 million and fifty percent of all future songwriting and publishing royalties.⁸⁶

Upon appeal, the Williams parties argued, *inter alia*, error in the district court's denial of summary judgment based on erroneous application of the extrinsic prong of the *Krofft* test, erroneous jury instructions, introduction of prejudicial testimony and evidence, and that the jury's verdict was against the clear weight of the evidence.⁸⁷ Unfortunately for the Williams parties, there were several procedural hurdles to overcome. Because the case was first presented before a jury which issued a verdict on the merits, the appellate court was bound by *Ortiz v. Jordan*, where the United States Supreme Court limited an appellate court's ability to review orders denying summary judgment after a full trial on the merits.⁸⁸ Second, the Williams parties did not move for judgment as a matter of law before the case was submitted to the jury, which failure waived the right to renew the motion after trial.⁸⁹ Precedent laid by the United States Supreme Court and the Ninth Circuit itself created a standard of review in this case that was extremely deferential to the district court's rulings and to the jury verdict. In a split, two-to-one opinion, the Ninth Circuit followed precedent and affirmed the jury's verdict.

In her dissent, Judge Nguyen vehemently disagreed with the majority's interpretation of precedent:

The majority insists that the verdict is supported by the evidence but tellingly refuses to explain what that evidence is. Instead, it defends its decision by arguing that a contrary result is impossible due to Williams and Thicke's purported procedural missteps. While the procedural mechanism for granting relief is beside the point given the majority's holding, there's no such obstacle here.⁹⁰

In an opinion that advocated for vacatur of the jury's verdict, Judge Nguyen relied upon an exception to *Ortiz*, previously carved out by the Ninth Circuit in *Escriba v. Foster Poultry Farms, Inc.*⁹¹ *Escriba* permits review of a denial of summary judgment "where the district court made an error of law that, if not made, would have required the district court to grant the motion."⁹² According to Judge Nguyen, if the *Krofft* test had been applied correctly, summary judgment would have been granted.⁹³ She also attempted to highlight a misconception of the majority surrounding the meaning of substantial similarity, and the role of experts in weighing it:

The majority ... mischaracterize[s] the facts as "hotly disputed" ... No one disputes that the two works share certain melodic snippets and other compositional elements that Finell

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1122.

⁸⁸ *Ortiz v. Jordan*, 562 U.S. 180 (2011).

⁸⁹ *Williams*, 895 F.3d at 1118; Fed. R. Civ. P. 50; see also *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009).

⁹⁰ *Williams*, 895 F.3d at 1150 (Nguyen, J., dissenting) (citations omitted).

⁹¹ *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014).

⁹² *Id.* at 1243.

⁹³ *Williams*, 895 F.3d at 1150 (Nguyen, J., dissenting) (citations omitted).

identified. The only dispute regarding these similarities is their legal import—are the elements protectable, and are the similarities substantial enough to support liability for infringement?

By characterizing these questions as a factual dispute among experts, the majority lays bare its misconception about the purpose of expert testimony in music infringement cases. As with any expert witness, a musicologist can't opine on legal conclusions, including the ultimate question here—substantial similarity.⁹⁴

The majority opinion in *Williams v. Gaye* would hardly be the first to confuse the issue of substantial similarity, but in doing so it, like the district court below, permitted issues of law to be disputed by experts and resolved by a jury where they should have been resolved by the judge.⁹⁵

Judge Nguyen's dissent implicitly recognized the need for an expanded definition of *scènes à faire* in the context of music copyright cases. Once unprotectable elements of the copyrighted work were identified and removed from consideration, she asserted that the Williams parties were entitled to judgment as a matter of law. The similarity of the remaining elements put forth by the plaintiffs were "insufficient to support a finding of substantial similarity" and could produce "no material factual disputes at trial."⁹⁶ Her thorough analysis of the allegedly similar elements and the level of protection each should be afforded is an analysis necessary to music copyright infringement cases.

The Williams parties petitioned the Ninth Circuit for a rehearing *en banc*, but their petition was ultimately denied.⁹⁷

IV. Tons à Faire: A Conceptual Shift for Scènes à Faire

A. The Emotional "Vibe" Of Music

Wilbur's contention in *Williams v. Gaye* that there are certain basic building blocks of music is not new. In fact, this idea was recognized in ancient Greece, several hundred years B.C.E. Philosophers, like Plato, sought to explain why certain musical elements were so foundational to the process of musical creation. Plato taught that different "modes" of music could affect a person's character – encouraging bouts of courage or temperance.⁹⁸ Aristotle taught that the Dorian mode "produces a moderate and settled temper," the Phrygian mode could "inspire enthusiasm . . . frenzy and all similar emotions," and the Lydian mode would "enfeeble the mind."⁹⁹ It is clear from millennia of human experience with, and interest in, music that different musical styles can arouse a variety of emotions in an audience. When seeking to elicit a particular emotion or feeling, a musician is limited to the use of musical elements that will accomplish that goal.

A 2017 study identified twenty-seven "distinct categories of emotion bridged by continuous gradients."¹⁰⁰ It found that "[e]motions are centered in subjective experiences that people represent, in part, with hundreds, if not thousands, of semantic terms. . . . By analyzing the

⁹⁴ *Williams*, 895 F.3d at 1151 (Nguyen, J., dissenting) (citations omitted).

⁹⁵ *Id.* at 1152 (Nguyen, J., dissenting) (citations omitted).

⁹⁶ *Id.* at 1139 (Nguyen, J., dissenting).

⁹⁷ *Id.* at 1138.

⁹⁸ Keith Aoki, James Boyle & Jennifer Jenkins, *Theft!: A History of Music* 19 (2017).

⁹⁹ *Id.*

¹⁰⁰ Alan S. Cowen & Dacher Keltner, Self-report captures 27 distinct categories of emotion bridged by continuous gradients, *Proceedings of the National Academy of Sciences* E7900, E7900 (2017).

distribution of reported emotional states we uncover gradients of emotion—from anxiety to fear to horror to disgust, calmness to aesthetic appreciation to awe”¹⁰¹

Though Plato and Aristotle were able to identify certain modes in music and the corresponding emotions they may influence, their theories do not represent the entire effect of music on human emotion. Music, properly composed, may have at least a limited effect upon any number of emotions within the gradients of emotion.¹⁰² In reflecting on his loss in *Williams v. Gaye*, Pharrell Williams said, “For a big part of my career, . . . what [I] always tried to do was reverse-engineer the songs that did something to [me] emotionally and figure out where the mechanism is in there . . . and try to figure out if [I] can build a building that doesn’t look the same, but makes you feel the same way.”¹⁰³ A search for this “mechanism,” whether Williams recognized it or not, is an expansion upon the work of Plato, Pythagoras, and countless others. The “idea” of causing a particular emotional response may only be “expressed” using a limited few musical elements, implicating the idea/expression dichotomy and the merger doctrine. Indeed, a musician seeking to follow a certain feeling may need to rely upon the same musical elements used by another musician.

B. Prior Applications of Scènes à Faire in Music Copyright Infringement Cases

Though more routinely applied to extra-musical copyright infringement cases, scènes à faire analyses have been conducted in a few notable cases involving music. Laying the foundation for the future application of scènes à faire, the Second Circuit noted that “simple, trite themes . . . are likely to recur spontaneously. . . . It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear.”¹⁰⁴ The Ninth Circuit later defined musical scènes à faire as “short musical phrases, usually comprised of only a few notes” that are “so common or trite [they are] not protectable.”¹⁰⁵ These elements are so indispensable to their “relevant field” that they are not copyrightable.¹⁰⁶ This definition focuses only on the tonal elements of a work and ignores the effect of rhythm, tempo, key, or genre. However, it was a much-needed attempt to adapt the scènes à faire doctrine for the realm of music copyright infringement. The Ninth Circuit later expanded the definition by evaluating pitch sequences in the context of genre, time signature, and underlying chord progressions.¹⁰⁷ The Ninth Circuit narrowly interpreted “relevant field” to mean “particular genre.”¹⁰⁸

Swirsky v. Carey perhaps provides the most valuable insight into the state of musical scènes à faire in American jurisprudence.¹⁰⁹ In *Swirsky*, Mariah Carey et al. were sued because Carey’s

¹⁰¹ *Id.*

¹⁰² See Klaus R. Scherer & Marcel R. Zentner, Emotional effects of music: Production rules *in* Music and Emotion: Theory and Research, 361 (Patrick N. Juslin & John A. Sloboda eds., 2001).

¹⁰³ See GQ, Pharrell and Rick Rubin Have an Epic Conversation, YouTube (Nov. 4, 2019), <https://youtu.be/PnahkJevp64?t=1678> (27:58-28:30).

¹⁰⁴ *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940).

¹⁰⁵ *Smith v. Jackson*, 84 F.3d 1213, 1216 nn.1, 3 (9th Cir. 1996).

¹⁰⁶ *Id.* at 1219.

¹⁰⁷ *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004), as amended on denial of reh’g (Aug. 24, 2004).

¹⁰⁸ See *id.* at 850. (“The songs *One* and *Jolly Good* are not in the same relevant “field” of music; *One* is in the hip-hop/R & B genre and *Jolly Good* is in the folk music genre. Thus, comparing the first measure of *One*’s chorus to the first measure of *Jolly Good* does not tell the court whether the first measure of *One*’s chorus is an indispensable idea within the field of hip-hop/R & B.”).

¹⁰⁹ *Id.*

song was allegedly similar to one written by Swirsky et al.¹¹⁰ The trial court initially granted summary judgment in Carey's favor because, *inter alia*, the alleged similarities were also found in the traditional folk song, "For He's a Jolly Good Fellow" and therefore not protectable as *scènes à faire*.¹¹¹ The Ninth Circuit disagreed with the analysis, finding that similarities "cannot be 'common-place' by definition if [they are] shared by only two songs."¹¹² The court neglected to recognize, nor evaluate the implications of, the fact that "For He's a Jolly Good Fellow" exists in the public domain. The Ninth Circuit's finding granted the "plaintiff protection to public domain elements that the public has a right to copy."¹¹³

The *Swirsky* court made efforts to provide valuable and in-depth analyses of *scènes à faire* and its application to the complex issues that arise in music copyright infringement cases. Unfortunately, judges and lay juries do not have the tools to conduct the requisite analysis of music in the broad context necessary to determine whether a work has been misappropriated.

C. The Need for Tons à Faire in Music Copyright Infringement Cases

To adequately adjudicate music copyright infringement cases, courts must consistently conduct a detailed idea/expression analysis, aided by experts, and expand their view of what is considered an unprotectable element of musical creation. These elements are not always as readily apparent as *scènes à faire* found in literature, film, or other plot-based works may be. To emphasize this distinction, a new doctrine of tons à faire must be applied, specifically and narrowly tailored to music copyright infringement cases. Tons à faire would recognize that certain musical elements, in combination or in isolation, may be so foundational to music or a particular genre that they are not protectable by copyright. The doctrine would also extend to elements that are used, or re-used, to elicit a particular emotion, insofar that the emotion can only be triggered by a limited number of musical elements. Lastly, it would allow parties to introduce evidence of "prior art," as the Williams parties attempted to do at the trial stage in *Williams v. Gaye*. This evidence would not be introduced to show copying by either party, but rather in support of an argument for tons à faire generally.

Narrowing the protection of copyright for musical works by expanding the *scènes à faire* doctrine to tons à faire helps to correct a systemic flaw. The current copyright regime fails to promote the public's access to general knowledge by overcompensating copyright owners beyond the value of what was infringed. Musical elements are not infinite, especially when artists are creating within a particular musical style. A robust tons à faire doctrine would allow artists to take inspiration from, and build upon, the work of others that have come before them, while still allowing artists to protect their sufficiently original creations. Tons à faire would not change the *scènes à faire* doctrine in form nor substance, but would serve as a mental signal post to courts that a unique analysis, divorced from the *scènes à faire* analysis of other copyright cases, is required.

The district court in *Williams v. Bridgeport* barred as cumulative the introduction of evidence to show allegedly infringing elements were, in fact, *scènes à faire*. The court in *Bridgeport* found that such a showing was not necessary because "[e]ven if [it] were deemed correct as a matter of law, the combination of unprotected elements may be protectable

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (referring to the comparisons between Carey's song and "For He's a Jolly Good Fellow").

¹¹³ *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 130 (2d Cir. 2003).

expression.”¹¹⁴ Similarly, the majority in *Williams v. Gaye* failed to conduct a scènes à faire analysis, only mentioning the doctrine in a footnote to the court’s recitation of the governing law.¹¹⁵ The district court’s lackadaisical approach to the doctrine and the Ninth Circuit’s failure to address it entirely show a lack of appreciation for the complexity of musical theory and the process of musical creation.

According to Paul Goldstein, a Stanford Law School professor and expert in music law, “[m]usic copyright infringement cases are infinitely more difficult than any other kind of copyright infringement case, period.”¹¹⁶ Plato recognized the complexity of music, theorizing that an understanding of the universe was dependent upon an understanding of arithmetic, geometry, astronomy, and music.¹¹⁷ Pythagoras established the “quadrivium,” elevating music above even arithmetic and geometry.¹¹⁸ He theorized that music is the application of the pure science of numbers evolving in time.¹¹⁹ This complexity, though revered anciently, has not enjoyed the same level of respect by American courts. It is insufficient to grant broad protection to musical works simply because they are “comprised of a large array of elements” rather than only five or six.¹²⁰ Such a simplification of musical composition and theory fails to recognize the historical development of music, the creative process, and the nature of music itself. While it is true that a combination of unprotectable elements *may* be copyrightable, it does not necessarily follow that such a combination *must* be so. The doctrine of scènes à faire must be expanded to render more elements of musical creation uncopyrightable as “artistic building blocks.”

The complexity of music copyright cases lays bare the need for expert testimony. Unfortunately, the adversarial system in which the testimony is presented necessarily leads to a lack of unbiased testimony. Judges seeking to apply the *Krofft* test must rely on fair experts to assist in dissecting the ideas within a musical work from their respective expressive elements. A precise understanding of the tests for probative and substantial similarity, coupled with a new tons à faire in music copyright cases would encourage judges to appoint their own experts.¹²¹ Court-appointed experts would be divorced from the interests of either party, and would prove invaluable “in situations where the court has little musical expertise and the parties’ experts deliver starkly different assessments of two works’ similarity.”¹²²

i. Skidmore v. Zeppelin – “Stairway to Heaven”

The Ninth Circuit has recently signaled a desire to minimize the precedential impact of *Williams v. Gaye*. In 2016, Michael Skidmore, as trustee of the Randy Craig Wolfe Trust, filed suit against Led Zeppelin and others alleging Led Zeppelin’s song “Stairway to Heaven” infringed

¹¹⁴ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGR), 2015 WL 4479500, at *8 (C.D. Cal. July 14, 2015).

¹¹⁵ *Williams v. Gaye*, 895 F.3d 1106, 1119 n.6 (9th Cir. 2018).

¹¹⁶ Ben Sisario, Original or Copied? ‘Stairway to Heaven’ Is Back in Court, N.Y. Times (Sept. 22, 2019), <https://www.nytimes.com/2019/09/22/business/media/stairway-to-heaven-copyright-appeal.html>.

¹¹⁷ Peter Lynch, Quadrivium: the noble fourfold way to an understanding of the universe, The Irish Times (July 20, 2017), <https://www.irishtimes.com/news/science/quadrivium-the-noble-fourfold-way-to-an-understanding-of-the-universe-1.3153793>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Williams*, 895 F.3d at 1120 (citing *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004), as amended on denial of reh’g (Aug. 24, 2004)).

¹²¹ See *Williams*, 895 F.3d at 1152 (9th Cir. 2018) (Nguyen, J., dissenting); Fed. R. Evid. 706.

¹²² *Williams*, 895 F.3d at 1152 n.14 (Nguyen, J., dissenting).

the copyright in a song written by Randy Wolfe: “Taurus.” Skidmore alleged that “the opening notes of Stairway to Heaven are substantially similar to the eight-measure passage at the beginning of the *Taurus* deposit copy.”¹²³ The jury returned a verdict for Led Zeppelin, finding no infringement, but Skidmore appealed. Skidmore argued, *inter alia*, that the district court should have instructed the jury that the “selection and arrangement of unprotectable musical elements are protectable...”¹²⁴ The Ninth Circuit ultimately found in favor of Led Zeppelin, and affirmed the trial court’s judgment that “Stairway to Heaven” did not infringe “Taurus.” Skidmore again appealed, petitioning the Ninth Circuit for *en banc* review, which petition was granted, and the case was reheard in 2019. The *en banc* rehearing came at a crucial time in music copyright law. The Ninth Circuit had issued their opinion in *Williams v Gaye* only one year prior, and various district courts in the circuit were now facing a multitude of other music copyright infringement cases.¹²⁵ Many artists, music industry professionals, and legal experts were wary of the result in light of the precedent set by *Williams*. Fortunately, the Ninth Circuit used *Skidmore v. Zeppelin* as an opportunity to correct course and clarify several points of music copyright law.

In its March 9, 2020 *en banc* opinion, the Ninth Circuit ruled that a showing of great access may not substitute for weak circumstantial evidence of copying (eliminating the so-called “inverse ratio” rule), and the scope of copyright protection for musical works under the 1909 Copyright Act is limited to the four corners of the deposit copy.¹²⁶ Importantly, the court also limited the scope of copyright protection for musical works by providing further clarity in two respects. First, in the merger doctrine’s implications for short musical sequences or phrases, and second, in the scope of copyright protection for “artistic building blocks.”¹²⁷

1. Merger Doctrine

As discussed *supra*, copyright protection will generally not be extended to single words and short phrases, because they represent an idea that may only be expressed in a limited number of ways.¹²⁸ Therefore, the expression of the idea merges with the idea itself and is unprotectable. Without electing to place a definite demarcation, the court implied that protectable expression cannot exist for sequences of three or four notes, and may not exist for sequences of as many as seven notes.¹²⁹ The protection depends on the originality of the sequence, not necessarily the length.

2. Artistic Building Blocks and Common Musical Elements

Without reference to *scènes à faire* by name, the court discussed “artistic building blocks,” emphasizing the same are not extended copyright protection. In music, there are seemingly infinite arrangements of notes and other musical elements, however only a subsection of these permutations are musically pleasant to the ear, and even fewer will elicit the intended emotional

¹²³ *Skidmore for Randy Craig Wolfe Tr. v. Led Zeppelin*, 905 F.3d 1116, 1122 (9th Cir. 2018), reh’g *en banc* granted sub nom. *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, 925 F.3d 999 (9th Cir. 2019), and on reh’g *en banc* sub nom. *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

¹²⁴ *Id.* at 1126.

¹²⁵ See *supra* note 9 and accompanying text.

¹²⁶ *Skidmore as Tr. for Randy Craig Wolfe Tr.*, 952 F.3d at 1064-69 (9th Cir. 2020); see also *Williams*, 895 F.3d at 1106 (The Ninth Circuit’s “inverse ratio” rule was one not adopted in most other circuits. It allowed for a more relaxed showing of substantial similarity if there was shown to be a high degree of access to the copyrighted work).

¹²⁷ *Id.* at 1071, 1075.

¹²⁸ *Supra* Section II.C.ii.1

¹²⁹ *Skidmore as Tr. for Randy Craig Wolfe Tr.*, 952 F.3d at 1071.

response.¹³⁰ This recognition was made by the dissent in *Williams v Gaye*, and incorporated by the majority in *Skidmore v. Zepelin*.¹³¹ Regarding common, unprotectable musical elements and aided by the experts' testimonies at trial, the court identified descending chromatic scales and arpeggios as unprotectable:

[I]t is useful to outline the essence of the “common musical elements” or building blocks. The chromatic scale is one of two principal scales in Western music. It consists of twelve pitches separated by a half-step. On a piano, this means playing the white and black keys in order from left to right. Three or more notes or pitches sounded simultaneously are called chords, and an arpeggio, sometimes called a broken chord, is “[a] chord whose pitches are sounded successively, . . . rather than simultaneously.”¹³²

The court's decision to describe, with specificity, certain unprotectable “building blocks” of music was a heartening development in music copyright jurisprudence.¹³³ A decision for the defendant, at least partly on the basis of scènes à faire, albeit by another name, was the first of its kind in recent memory. Had tons à faire been incorporated as a standard analysis undertaken in music copyright cases, such a clarification of law by the Ninth Circuit may not have been necessary.

a. *Gray v. Perry* – “Dark Horse”

Apparently following the Ninth Circuit's lead in *Skidmore v. Zepelin*, the Central District of California reversed a jury's verdict in *Gray v. Perry*, another recent and controversial music copyright infringement case. *Gray v. Perry* was a protracted legal dispute in which Marcus Gray, a Christian rapper, sued artists Katy Perry, Juicy J and other credited writers of the song, “Dark Horse” for alleged infringement of his song “Joyful Noise.”¹³⁴ The jury eventually found in favor of Gray and awarded damages accordingly.¹³⁵ However, many music industry insiders sided with the defendants' argument that a decision for the plaintiff allows him “to own the basic building blocks of music, the alphabet of music that should be available to everyone.”¹³⁶ One such “basic building block” was described by Charlie Harding, of *Vox*: “Both ‘Joyful Noise’ and ‘Dark Horse’ use derivative descending minor scales in a basic rhythm, and both use staccato downbeat rhythms on a high voiced synthesizer which is common in many trap beats.”¹³⁷ Popular music is mostly

¹³⁰ *Id.* (“One of our colleagues also expressed skepticism that three notes used in a song can be copyrightable by observing that of the “only 123 or 1,728 unique combinations of three notes,” not many would be useful in a musical composition.”) (citing *Williams*, 895 F.3d at 1144 n.6 (Nguyen, J., dissenting)).

¹³¹ *Id.*

¹³² *Id.* at 1070. (citing Arpeggio, Chromatic, and Chord, *Harvard Dictionary of Music* (Don Michael Randel ed., 4th ed. 2003)).

¹³³ *Id.*

¹³⁴ *Gray v. Perry*, No. 2:15-cv-05642-CAS (JCx), 2017 WL 1240740 (C.D. Cal. Apr. 3, 2017).

¹³⁵ This verdict was later vacated by *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 at *54 (C.D. Cal. Mar. 16, 2020).

¹³⁶ Andrew Dalton, Jury: Katy Perry's ‘Dark Horse’ copied Christian rap song, AP News (July 29 2019), <https://apnews.com/7eef738596e9458eacb9f9015d7fd7fe>.

¹³⁷ Alex Abad-Santos, A jury said Katy Perry's “Dark Horse” copied another song. The 2.8 million verdict is alarming, *Vox* (Aug. 2, 2019 2:02 PM), <https://www.vox.com/culture/2019/7/30/20747100/katy-perry-dark-horse-joyful-noise-copyright-2-8-million>.

written in the tonal system – a “hierarchical structure of tones and pitches.”¹³⁸ Electronic dance music, or EDM, requires certain predictability and rhythm to encourage dancing and excitement – many of these elements are reused and repurposed by music producers and DJs, especially to create the “drop” that is so popular in the genre. These are some basic building blocks of music that would have been identified through a rigid application of *tons à faire*, but until *Skidmore v. Zeppelin* and *Gray v. Perry* have been neglected by the courts.

Following the unfavorable jury verdict, the defendant parties in *Gray v. Perry* filed a renewed motion for judgment as a matter of law, or in the alternative for a new trial, on October 9, 2019.¹³⁹ After a series of subsequent filings by both parties and *amici*, and one week after the Ninth Circuit’s decision in *Skidmore v. Zeppelin*, the district court vacated the jury’s verdict, even citing *Skidmore v. Zeppelin* in doing so.¹⁴⁰

The district court built upon the findings of the Ninth Circuit and identified more unprotectable musical elements, again without naming *scènes à faire*. These elements identified by the district court (some which were previously identified by Harding) include:

- [T]he key or scale in which a melody is composed ...
- [A] phrase length of eight notes ...
- [A] pitch sequence, like a chord progression ...
- [Musical elements that are] determined by rules of consonance common in popular music ...
- [A] ‘rhythm of eighth notes’ ...
- [A]n evenly-syncopated rhythm ...
- [T]he use of an ostinato in a given composition ...
- [A] synthesized timbre ...
- [A] composition’s texture ... [meaning] the way a composition is ‘mixed’ to reveal ‘different elements’ of sound and its absence ...¹⁴¹

While it is unfortunate that neither the *Gray* nor *Skidmore* courts explicitly invoked the *scènes à faire* doctrine, their analyses show its detailed application nonetheless. A *tons à faire* doctrine would lend consistency to these analyses, and provide a signal and reminder for future courts to strictly gauge which elements are protectable before submitting the issue of substantial similarity to the jury.

D. Tons à Faire Effect on Financial Incentives

A robust *tons à faire* doctrine would not disincentivize artists from creating new works, because a financial incentive would still exist if a song has marketable appeal. The current breadth of copyright protection treats musical works as if they become fungible once certain elements are deemed to be similar. Short of virtual identicality, this is not the case. Even covers of a song, which by definition duplicate the “basic melody or fundamental character” of a source work, are not market substitutes for their respective source work.¹⁴²

¹³⁸ Jeffrey Cadwell, Comment, Expert Testimony, *Scènes à Faire*, and Tonal Music: A (Not So) New Test for Infringement, 46 Santa Clara L. Rev. 137, 157-58 (2005) (other available systems include, for example, dodecaphonicism or octatonicism). (For a more in-depth discussion of the tonal system, see pp. 153-57).

¹³⁹ *Gray*, 2020 U.S. Dist. LEXIS 46313 [pincite missing].

¹⁴⁰ *Id.* at *11.

¹⁴¹ *Id.* at *20-22.

¹⁴² 17 U.S.C. § 115(a)(2).

It is true, however, that an artist has a variety of monetization opportunities for a musical work. For example, an artist may create a work for the sole purpose of licensing that work for synchronization with an audiovisual work, or as an element of another artist's song. Infringement may impact these alternative revenue streams if the infringing work is a sufficient substitute for the source work relative to the licensee's needs. In these cases, the copyright holder should be entitled to damages that reflect the financial impact to the copyright holder. Widening the net of musical elements that should exist in the public domain through tons à faire may limit these income streams as the market corrects in response. It is also probable, however, that many potential licensees would continue to seek licensing agreements to avoid the uncertainty of litigation. The actual future effect is uncertain, but in the hierarchy of values that form the basis of copyright law, expanding the public domain carries more weight than the exclusive rights of authors.

Narrowing the scope of copyright protection for musical works would have the greatest financial impact on the market for enforcing exclusive rights through litigation. However, it is unclear whether such a market exists, or if it is sufficiently large to warrant consideration. One of the largest jury awards ever given in a music copyright case, \$5.4 million, was ordered against Michael Bolton for his 1991 song, "Love is a Wonderful Thing."¹⁴³ In the rapidly growing industry of recorded music, with 2018 revenues alone surpassing \$19 billion, even the largest judgments hardly register as a blip on the market radar.¹⁴⁴ If potential litigation awards are the incentive for some artists to create, then a narrow scope of protection may reduce or eliminate that incentive, but the overall potential effect seems negligible.

V. Conclusion

Especially in the case of music and other fine arts, new works of art are not created in isolation. Artistry is fluid and an artist's work is the result of inspiration taken from an unknowable number of sources, many of which are often subconscious influences.¹⁴⁵ The adage that "great artists steal" is a recognition of this concept. Unfortunately, the elements that may be "stolen" have remained largely unclear when it comes to music. In the wake of *Williams v. Gaye*, the confusion has become even more severe. Potential plaintiffs have taken advantage of the confusion, resulting in an uptick in the amount of music copyright infringement litigation. However, confusion and uncertainty hamper the fundamental basis of copyright protection: promoting the progress of science.

An expansion of the scènes à faire doctrine into tons à faire represents a conceptual shift regarding the originality requirement of music copyright law. It is well settled that a work must be original to enjoy protection, but the determination of what constitutes an original musical work remains obfuscated. The scientific and mathematical patterns in music should be considered unprotectable laws of nature, limiting copyright protection to the narrow artistic effects and expressions that make use of these laws. Courts, with great reliance on experts in musicology, music history, and musical theory, must recognize music's scientific and mathematical nature and build upon the unprotectable musical elements identified in *Skidmore v. Zippelin* and *Gray v. Perry*.

¹⁴³ Nancy Coleman, *Katy Perry's Copyright Case May Sound Familiar to These Stars*, N.Y. Times (July 31, 2019), <https://www.nytimes.com/2019/07/31/arts/music/katy-perry-christian-rap-copyright.html>.

¹⁴⁴ International Federation of the Phonographic Industry, *IFPI Global Music Report 2019*, IFPI (Apr. 2, 2019), <https://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2019>.

¹⁴⁵ See generally *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983).

A narrowing of the scope of copyright protections for musical works in this way will better meet the intent of the Framers by injecting the creative process with more certainty without significantly impacting an artist's financial incentive to create.

