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COPYRIGHT LAW—UNIQUE CHARACTERISTICS OF MUSIC WARRANT ITS OWN SYSTEM: HOW ADOPTING THE INTENDED AUDIENCE TEST CAN SAVE MUSIC COPYRIGHT LITIGATION

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COPYRIGHT LAW—UNIQUE CHARACTERISTICS OF MUSIC WARRANT ITS OWN SYSTEM: HOW ADOPTING THE INTENDED AUDIENCE TEST CAN SAVE MUSIC COPYRIGHT LITIGATION

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Music has been a crux of everyday life for decades. Almost ninety-one percent of the United States population listens to music, and spends more than twenty-four hours a week listening to their favorite songs—making music one of the top forms of entertainment for most Americans. Music has unique qualities that differentiate it from other works of authorship, which must be recognized by copyright law.

The current subjective measure used to determine unlawful appropriation of copyrightable work is not sufficient. A minority of courts have expanded the current "ordinary observer" standard to consider the "intended audience" of the specific work—claiming the "ordinary observer" lacks the necessary skill and expertise to properly test for subjective copying.

This Note will argue that the Intended Audience Test should apply in all music copyright infringement cases as a better measure for unlawful appropriation. A change in the subjective test is necessary to foster a more accurate measure of malicious copying versus music production with use of musical influences; to align with today's landscape of individualized and highly personal consumption of music; and to better promote the main purpose of copyright law, which is to foster the greatest amount and highest quality of creative works in the public domain.

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INTRODUCTION

The hit song "Blurred Lines," by Robin Thicke, Pharrell Williams, and T.I., was at the center of a media frenzy in early 2015 due to the artists' alleged infringement on the Marvin Gaye classic, "Got to Give It Up."[1] Faced with the threat of multiple infringement claims from Gaye's family, the trio filed a preemptive complaint for declaratory relief in 2013, seeking confirmation that their song did not violate Gaye's copyrightable material.[2] In the complaint, the artists detailed their respect and admiration for Marvin Gaye, and their intent to "evoke an era" in the production of the song—not maliciously copy Gaye's work.[3]

Gaye's family fought back by filing numerous counterclaims detailing Thicke's public admission to using Gaye's song as inspiration during production, the media coverage commenting on the similarities between the songs, and an expert musicologist report listing a variety of supposedly similar compositional features between the works.[4] Gaye's original copyright protection extended only to the music underlying "Got to Give it Up," however, and not the sound recording, as the registered copyright was based on a "lead sheet" of musical notation.[5] Aside from the lyrics, the lead sheet contained "virtually no original musical expression, and it is immediately apparent upon seeing it that its symbolic notation is a transcription by a literate musician of a sound recording of quasi-improvised vocalizing involving no more than a handful of pitches."[6] Regardless, the District Court denied Thicke and Williams' preemptive claim and motion for summary judgment, and permitted the Gaye family's counterclaim for copyright infringement to proceed.[7] The

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1. Kory Grow, *The 'Blurred Lines' Legal Battle Explained: What Comes Next*, ROLLING STONE (Mar. 20, 2015), http://www rollingstone.com/music/news/the-blurred-lines-legal-battle-explained-what-comes-next-20150320 [https://perma.cc/D7LF-MZ9M].

2. Complaint for Declaratory Relief at 2, Williams v. Bridgeport Music, Inc., No. 13-06004 (C.D. Cal. 2013).

3. *Id.* ("Being reminiscent of a 'sound' is not copyright infringement. The intent in producing 'Blurred Lines' was to *evoke an era*. In reality, the Gaye defendants are claiming ownerships of an entire genre, as opposed to a specific work, and Bridgeport is claiming the same work.") (emphasis added).

4. Defendants' Counterclaims at 15–16, Williams v. Bridgeport Music, Inc., No. 13-06004 (C.D. Cal. 2013).

5. Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1230 n.227 (2015) ("A 'lead sheet' is a score, in manuscript or printed form, that shows only the melody, the basic harmonic structure, and the lyrics (if any) of a composition.") (internal quotations omitted).

6. *Id.* at 1230.

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

trial began in February of 2015.[8]

During trial, Williams took credit for most of the production process of "Blurred Lines," claiming Thicke was only present after Williams produced the majority of the music and wrote the lyrics.[9] Williams testified that the 1970s feeling of Marvin Gaye's sound inspired "Blurred Lines," but pleaded that he never copied his work—adding that Gaye was "one of the ones we look up to the most," since he had grown up with Motown music.[10] Further, when asked if his song has a similar "feel" to Gaye's classic, Williams replied, "feel . . . not infringement."[11]

After more than a year of legal battles, the jury ordered Williams and Thicke to pay $7.4 million[12] to the Gaye family for the infringement of "Got to Give it Up."[13] The large damage award, the immense media coverage, and the lengthy and detailed judicial process all demonstrate today's relevancy of music copyright law.[14]

In its aftermath, the "Blurred Lines" case "prompted debate in music and copyright circles about the difference between plagiarism and homage, as well as what impact the verdict [will] have on how musicians create work in the future."[15] Critics of the current copyright system suggests that, "[g]iven that the only commonalities between the works were non-copyrightable generic musical and sonic elements, it appears that the verdict was based mainly on the jurors' opprobrium of the

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8. *See* Austin Siegemund-Broka, *'Blurred Lines' Trial Opens As Jurors Hear Dueling Arguments About What's At Stake*, BILLBOARD (Feb. 24, 2015), http://www.billboard.com/articles/news/6480482/blurred-lines-trial-robin-thicke-pharrell [https://perma.cc/Q46E-TNT5].

9. Ben Sisario & Noah Smith, *Pharrell Williams Acknowledges Similarity to Gaye Song in 'Blurred Lines' Case*, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/2015/03/05/business/media/pharrell-williams-acknowledges-similarity-to-marvin-gaye-song-in-blurred-lines-case html [https://perma.cc/Z6F8-Y7CP].

10. *Id.* (quoting Pharrell Williams).

11. *Id.*

12. In a July 2015 post-trial decision, the District Court reduced the jury award to $5.3 million, but granted Gaye's family 50% of future royalties from "Blurred Lines." Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *47–48 (C.D. Cal. July 14, 2015).

13. *Pharrell Williams and Robin Thicke to Pay $7.4m to Marvin Gaye's Family Over Blurred Lines*, THE GUARDIAN (Mar. 11, 2015), https://www.theguardian.com/music/2015/mar/10/blurred-lines-pharrell-robin-thicke-copied-marvin-gaye.

14. Jon Caramanica, *What's Wrong With the 'Blurred Lines' Copyright Ruling*, N.Y. TIMES (Mar. 11, 2015), http://www nytimes.com/2015/03/12/arts/music/whats-wrong-with-the-blurred-lines-copyright-ruling html [https://perma.cc/9VS7-BNQM].

15. Ben Sisario & Noah Smith, *'Blurred Lines' Infringed on Marvin Gaye Copyright, Jury Rules*, N.Y. TIMES (Mar. 10, 2015), http://www nytimes.com/2015/03/11/business/media/blurred-lines-infringed-on-marvin-gaye-copyright-jury-rules html?_r=0 [https://perma.cc/89T3-SQE3].

characters and veracity of Robin Thicke and Pharrell Williams, as depicted by Gaye's attorney."[16] Williams also spoke out about the negative impact this judicial decision will have on the future of music production and creativity.[17] An utmost concern is whether the decision stretched the boundaries of copyright protection to include the "feel" or "vibe" of the song—something inherently available for secondary users to build upon.[18]

Fear that the "Blurred Lines" verdict would impede the future of music production and artist creativity was the basis of Williams and Thicke's decision to file a notice of appeal to the Ninth Circuit at the end of 2015.[19] In conjunction with the appeal, over two hundred musicians signed onto an *amicus curiae* brief in late 2016,[20] detailing their collective

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16. Cronin, *supra* note 5, at 1231.

17. Daniel Kreps, *Pharrell Talks 'Blurred Lines' Lawsuit for First Time*, ROLLING STONE (Mar. 19, 2015), http://www.rollingstone.com/music/news/pharrell-talks-blurred-lines-lawsuit-for-first-time-20150319 [https://perma.cc/7F7D-G5KB].

> The verdict handicaps any creator out there who is making something that might be inspired by something else. This applies to fashion, music design . . . anything. If we lose our freedom to be inspired, we're going to look up one day and the entertainment industry as we know it will be frozen in litigation. This is about protecting the intellectual rights of people who have ideas. Everything that's around you in a room was inspired by something or someone. If you kill that, there's no creativity.

Id. (quoting Pharrell Williams); Michael Miller, *Pharrell on 'Blurred Lines' Verdict: 'There Was No Copyright Infringement'*, PEOPLE (Mar. 20, 2015, 7:25 PM), http://www.people.com/article/pharrell-speaks-blurred-lines-no-copyright-infringement [https://perma.cc/QW68-ZW6K] ("If that verdict stands, people can't be inspired by anything, companies can't be inspired by anything, or else they're liable for suit.") (quoting Pharrell Williams).

18. Adam Pasick, *A Copyright Victory for Marvin Gaye's Family is Terrible for the Future of Music*, QUARTZ (Mar. 10, 2015), http://qz.com/360126/a-copyright-victory-for-marvin-gayes-family-is-terrible-for-the-future-of-music/ [https://perma.cc/CFK9-F68V].

> When we say a song 'sounds like' a certain era, it's because artists in that era were doing a lot of the same things—or, yes, copying each other. If copyright were to extend out past things like the melody to really cover the other parts that make up the 'feel' of a song, there's no way an era, or a city, or a movement could have a certain sound. Without that, we lose the next disco, the next Motown, the next batch of protest songs.

Id. (quoting Parker Higgins, director of copyright activism at the Electronic Frontier Foundation)

19. Tim Kenneally & Pamela Chelin, *Robin Thicke, Pharrell Williams Appeal 'Blurred Lines' Copyright Infringement Lawsuit*, THE WRAP (Dec. 8, 2015, 12:59 P.M.), http://www.thewrap.com/robin-thicke-pharrell-williams-appeal-blurred-lines-copyright-infringement-lawsuit/.

20. It is important to note that the *amici curiae* brief was not commissioned or paid for by Williams, Thicke, or anyone on their legal team, but rather was the offspring of the two hundred twelve musicians' collective concerns that this verdict threatens the future of creativity, music production, and the music industry as a whole. Randy Lewis, *More Than 200 Musicians Rally Behind Appeal of 'Blurred Lines' Verdict*, L.A. TIMES (Aug. 31, 2016, 11:45 A.M.),

concern regarding the negative impact the verdict could have "on their own creativity, on the creativity of future artists, and on the music industry in general."[21] It further threatened that if the judgment is allowed to stand, it could "punish songwriters for creating new music that is *inspired* by prior works."[22] It concludes by pleading to the Ninth Circuit to overturn the verdict because if becomes the standard, it "would clearly stifle future creativity, would undoubtedly diminish the legacies of past songwriters, and, without a doubt, would be antithetical to the principals of the Copyright Act."[23]

Not all copying is actionable under copyright law.[24] However, as the "Blurred Lines" case demonstrates, the infringement analysis utilized today does not always adequately account for the core characteristics of music, and thus has the potential to produce inaccurate findings of copyright infringement and meritless liability for musicians.

This Note describes the inefficiencies of the copyright system's test for infringement based on the continued use of the Ordinary Observer Analysis as a measure for subjective copying. It argues that the Intended Audience Test should be applied in all copyright infringement cases involving musical works as a better subjective measure for illicit copying.

To set the groundwork for this thesis, Part I details the background of copyright law, beginning with its origins in the United States Constitution. Part I also discusses Congress's numerous attempts to create a functioning statutory scheme that best promotes the two aims of copyright law—protecting the creative expression of artists, and benefitting society through a multitude of creative works in the public domain. Finally, Part I will provide a background of specific characteristics of music production and consumption that are changing the

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http://www.latimes.com/entertainment/music/la-et-ms-blurred-lines-appeal-musicians-20160831-snap-story html.

21. Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants at 2, Williams v. Gaye, 2015 WL 4479500 (C.D. Cal. 2015), *appeal docketed*, No. 15-56880 (9th Cir. Dec. 7, 2015). Notable artists who signed onto the brief include Hans Zimmer, Phillip Bailey, Verdine White, and Ralph Johnson of Earth, Wind & Fire, Rich Robinson of The Black Crowes, John Oates of Hall & Oates, R. Kelly, Jennifer Hudson, Patrick Monahan of Train, Jean Baptiste, Rivers Cuomo of Weezer, and Mat Kearney. *Id.* at i–iv.

22. *Id.* at 2.

23. *Id.* at 17. An additional *amici curiae* brief was filed by musicologists detailing their fears that if the verdict stands, "it would curtail creativity in the field of popular music, inhibiting songwriters by the threat of far-fetched claims of infringement bolstered by speculative and misleading musical testimony." Amicus Curiae Brief of Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees at 1, Williams v. Gaye, 2015 WL 4479500 (C.D. Cal. 2015), *appeal docketed*, No. 15-56880 (9th Cir. Dec. 7, 2015).

24. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

way to evaluate these works under copyright law.

Part II explains the current analysis for copyright infringement using hypothetical parties—Band X and Band Y. It details Band X's infringement claim against Band Y, and the steps Band X must go through under the current system. Part II also discusses the various tests for substantial similarity as used within the federal circuit courts of appeal.

The role of the Intended Audience Test within the analysis for substantial similarity is discussed in Part III. Additionally, Part III describes the origins of the Intended Audience Test, its current applications, and a recent case declining to apply the test to a music infringement suit.

Finally, Part IV details a three-prong argument as to why the Intended Audience Test will provide a more modern and effective subjective analysis for copyright infringement actions. First, normalcies in music production are not accounted for in today's infringement analysis, which creates the possibility of inaccurate infringement decisions. Next, music consumption has shifted due to a new digital landscape, causing the "ordinary observer" to be an inadequate subjective measure for illicit copying. Finally, more accurate infringement analyses resulting from implementation of the Intended Audience Test will better promote the main purpose of copyright law—to benefit the public domain.

I. BACKGROUND

A. *The Origins and Purpose of Copyright Law*

1. The Constitution and the Copyright Act Throughout Time

The United States Copyright Office defines copyright law as "that body of exclusive rights granted by law to authors for protection of their work."[25] This protection is a "principle of American law" and allows "an author of a work [to] reap the fruits of his or her intellectual creativity for a limited period of time."[26] The author's exclusive rights over the protected work are meant to incentivize and promote creativity through a national copyright system.[27]

Congress's copyright power stems from the Constitution: "[t]he Congress shall have the Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[28] This

25. *A Brief Introduction and History*, U. S. COPYRIGHT OFFICE, http://copyright.gov/circs/circ1a html [perma.cc/5XG5-XL5W].

26. *Id.*

27. *Id.*

28. U.S. CONST. art. I, § 8, cl. 8.

confers onto Congress the ability to enact a body of copyright law to protect the works of creators in order to promote the public welfare.[29]

The Copyright Act of 1790 was Congress's first exercise of this explicit power, after conflicting state copyright laws made the need for a national system overly evident.[30] Congress modeled the Act after Parliament's Statute of Anne,[31] the British copyright law passed in 1710 that granted authors full control over their works.[32] However, as technology developed through the nineteenth century, the introduction of new types of works necessitated the expansion of further protections under the 1790 Act.[33]

In 1909, a more substantial change adapted the 1790 Act to the ever-increasing technological advances of the time.[34] The 1790 Act was overhauled to significantly increase the scope of protection for copyright holders due to the new mechanisms for creating and distributing works of authorship—sound recordings[35] being one of the most prominent.[36] However, when the 1909 Act became inefficient due to further technological advances, there was again interest to reform the Copyright Act in the mid-twentieth century.[37] This time the process took over two decades—beginning with the Copyright Office's report in 1955, and ending with the reformed Act taking effect in 1976.[38]

Currently, The Copyright Act of 1976 is the basis of American copyright law.[39] Under Section 102, copyright protection applies to

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29. *See A Brief Introduction and History*, *supra* note 25.

30. ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 386 (Vicki Been et al. eds., 4th ed. 2007).

31. The Statute of Anne 1710, 8 Ann. c. 19.

32. Katie M. Benton, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 64 (2008).

33. MERGES ET AL., *supra* note 30.

34. *Id.*

35. It was not until 1972 that "sound recordings" of musical compositions were considered to be "works of authorship," which required protection under the copyright clause. Ryan Lloyd, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 148 (2014).

36. MERGES ET AL., *supra* note 30.

37. *Copyright Timeline: A History of Copyright in the United States, 1976: Revision of the U.S. Copyright Act*, ASS'N OF RES. LIBR., http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.Vo2JdPGEKQF [https://perma.cc/8U8M-7VPA].

38. MERGES ET AL., *supra* note 30, at 387.

39. The Copyright Act of 1976, Pub. L. No. 94-553, 1976 U.S.C.C.A.N. (90 Stat. 2541); *see* MERGES ET AL., *supra* note 30, at 387 ("After two decades of study, negotiation, and debate, Congress approved the 1976 Act, which continues to serve as the principle framework for copyright protection in the United States.").

"original works of authorship fixed in any tangible medium of expression."[40] The scope of protection extends to a variety of literary and artistic works because the 1976 reformation needed to account for technological developments at the time and their impact on copyright law.[41] The revision also better addressed what constituted an infringement—laying out the idea-expression dichotomy to clearly define what is and is not protected under the Act.[42]

2. The Rights of Copyright Holders

Section 106 of the Copyright Act grants copyright holders exclusive rights to their protected work for a limited time.[43] This includes the right to make copies and bring suit for infringement; the right to prepare derivative works that are in different forms or slightly altered; the right to control the sale and distribution of the original or derivative works; the right to control the public performance and display of the work; the right of anti-circumvention; and the moral rights to claim authorship over the work.[44] The copyright holder does not have to obtain a registered copyright before exercising these exclusive rights because his expression is protected at the moment of creation.[45]

The rights described in Section 106 are not meant to limit secondary use of protected material in the public domain, but rather to prevent unlawful infringement of the holder's protected expression.[46] Copyright law does not prevent independent creation of similar works, and thus a mechanism for determining illicit copying in violation of the copyright versus lawful secondary creation is necessary.[47]

3. Competing Public Policy—Balancing the Purposes of Copyright

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40. Despite specifying the protected works must be "tangible," implying there must be a physical component to the work, the Copyright Act also protects forms of authorship normally considered "intangible," such as sound recordings and audiovisual works. 17 U.S.C. § 102 (2015).

41. *Copyright Timeline*, *supra* note 37.

42. 17 U.S.C. § 102 (2015) ("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."); *see also* Sid & Marty Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 n.6 (9th Cir. 1977) (highlighting the criticism often associated with this idea-expression analysis, but noting that no other viable option exists to balance the two competing interests of copyright law—protecting the artist and permitting society to benefit and progress from the use of the work).

43. 17 U.S.C. § 106 (2015).

44. MERGES ET AL., *supra* note 30, at 388–89.

45. *Id.* at 388.

46. *Id.* at 389.

47. *Id.*

Law

Copyright law's "philosophical foundations" are often debated, creating uncertainty as to the true purpose of copyright law.[48] The "natural right" of authors to control the use of their works has been a predominate factor in determining the scope of copyright protection.[49] However, there is a utilitarian function of copyright law that competes against the monopoly interest of copyright holders—the necessity to enrich the public domain[50] with creative, artistic, and literary works.[51]

Copyright law must balance these two competing interests to best promote the "harvest of knowledge" for society as a whole.[52] There are numerous societal benefits that stem from a constant production of creative works in the public domain.[53] This includes the vast influx of new knowledge for follow-up creators to use and build upon, the educational value of creative material on society's knowledge and culture, and consumptive and economic uses of artistic works to increase the cultural landscape.[54]

With these societal benefits in mind, note that the "exclusive rights" associated with copyright protection have been known to create a quasi-monopoly for artists over their protected work.[55] The exaggerated length and scope of copyright protection can actually work to hinder the benefit to the public domain.[56] Despite arguments that the monopoly privileges

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48. *Id.* at 390.

49. *Id.*

50. Séverine Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain*, WORLD INTELL. PROP. ORG. 6 (May 7, 2010), http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev_study_inf_1.pdf [https://perma.cc/RVS4-FTG8] ("The public domain is generally defined as encompassing intellectual elements that are not protected by copyright or whose protection has lapsed, due to the expiration of the duration for protection.").

51. MERGES ET AL., *supra* note 30, at 390–91.

52. Pierre N. Leval, Commentary, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

53. Dusollier, *supra* note 50, at 13.

54. *Id.* at 14.

55. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) ("The monopoly created by copyright thus rewards the individual author in order to benefit the public."); *see also* Leval, *supra* note 52, at 1109.

> The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists . . . in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.

Id.

56. William Patry, *Time to Update Copyright Law?*, CNN (Jan. 31, 2012, 4:30 PM),

of copyright holders are counter-balanced against "numerous and substantial exceptions and limitations to protection," the copyright system is primarily a mechanism for fostering creativity and enriching the public with a multitude of artistic expression.[57] The scope of protection for holders must be restricted by exceptions and limitations in order to promote that purpose.[58]

This monopolistic system was never the intention, nor the purpose, of copyright law.[59] The privileges granted from copyright protection are not meant to be all-encompassing or overly restrictive on secondary users, but rather are to "motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[60] However, Congress is tasked with defining the scope of protection for copyright holders, while also aiming to promote a multitude of artistic expression for the public, and thus, striking the perfect balance has not been easy.[61]

Evidence exists that copyright protection was always intended to be limited—beginning with the origins of copyright law.[62] The time restriction noted in the text of the Constitution confirms that the protection

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http://www.cnn.com/2012/01/31/opinion/patry-copyright-law/ [https://perma.cc/FBP2-KNZX] (arguing the 1909 Act had a more sensible term of protection—28 years with the possibility of an additional 28 years if the copyright holder filed a renewal—so that artists were still very much protected, but consumers were better able to benefit from the works).

57. MERGES ET AL., *supra* note 30, at 388; Karen Bevill, *Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311, 313 (1999) ("As a society, we value the arts and wish to foster creativity through the granting and enforcement of copyrights").

58. *Sony Corp. of Am.*, 464 U.S. at 429 ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.").

59. H.R. REP. NO. 60-2222, at 7 (1909).

> The main object to be desired in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.

Id.

60. *Sony Corp. of Am.*, 464 U.S. at 429.

61. *Id.* (suggesting Congress's difficult task of balancing the two competing interest is one reason why the Copyright Act has been amended previously).

62. U.S. CONST. art. I, § 8, cl. 8.

Congress can grant to copyright holders is not absolute.[63] In drafting the copyright clause, the Framers of the Constitution "balance[d] the competing interests of incentivizing creation and ensuring freedom to information by limiting the term of copyright."[64] It was the intention of the Framers to make this protection penetrable for the good of the public.[65]

Legislators attempted to further limit copyright holders' exclusive rights to their protected work to better balance the two competing interests.[66] In addition to the limited time of copyright protection, which is the life of the artist plus seventy years,[67] copyright law limits owners' protection through means such as the fair use, first sale, merger doctrines, and compulsory licensing.[68] These modifications to copyright law shift the monopoly of artists, and demonstrate Congress's attempts to promote the goal of enriching the public domain with creative works.[69]

Regardless of the two competing interests at stake—the artists' protection versus enrichment of the public domain—copyright jurisprudence indicates protection for the artists is always secondary.[70] The protection that copyright law grants is not meant to be an impenetrable shield for the creator, but rather a mechanism of incentivizing the production of creative works in order to "stimulate activity and progress in the arts for the intellectual enrichment of the public."[71] This is what copyright law was intended to do—this is its

63. *Id.* (referring to the copyright protection as extending only "for limited times"); *see also* Leval, *supra* note 52, at 1108 ("[T]he right may be conferred only 'for limited times' confirms that it was not seen as an absolute or moral right, inherent in natural law").

64. Lloyd, *supra* note 35, at 149.

65. THE FEDERALIST NO. 43 (James Madison) ("The utility of this power will scarcely be questioned . . . . The public good fully coincides in both cases with the claims of individuals.").

66. Lloyd, *supra* note 35, at 149.

67. 17 U.S.C. § 302 (2015) (applying only to works created on or after January 1, 1978).

68. Lloyd, *supra* note 35, at 149; *see* 17 U.S.C. §§ 107–22 (2015).

69. Lloyd, *supra* note 35, at 149; *see also* MERGES ET AL., *supra* note 30, at 387 ("[T]he 1976 Act weakened intellectual property protection by establishing several new compulsory licensing regimes, approving numerous exceptions from liability, codifying the fair use doctrine that had been developing through the courts, and preempting most state and common law protections that impinge upon federal copyright protection.").

70. United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) ("The copyright law . . . makes reward to the owner a secondary consideration."); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly [to copyright holders] lie in the general benefits derived by the public from the labors of authors.").

71. Leval, *supra* note 52 ("The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations.").

primary goal.[72]

B. *Music and the Law*

The interaction of music and law is uniquely distinct to copyright litigation—"[w]hile the first is commonly regarded as a rule-free zone, the second is in itself the origin for rules."[73] Historically, courts have applied copyright law to music just like any other work of authorship.[74] With the introduction of music copyright law in the early 1800s, courts included it with other works of authorship because the role of music in everyday life at that time was much less complex and required less differentiation.[75] However, as music developed and started to hold a "prominent stature in society," music copyright law remained comparatively stagnant.[76]

Music has a deep effect on individuals, "speak[ing] to us in mysterious and profound ways and invok[ing] within us numerous physiological and emotional responses."[77] When listening to music, nearly every region of the brain is actively working, making it a highly technical neurological process.[78] It takes multiple neural regions to break down and comprehend the various musical elements of a song, such as tempo, pitch, and timbre.[79] Even deeper, because of its communicative power, the emotional responses evoked from music make it distinctive from other forms of artistic expression.[80]

Although there is limited understanding as to why humans are affected so deeply by music, there is no doubt it is crucial to human nature and the way we lead our daily lives.[81] Conforming music to fit in the narrowly tailored box that is copyright law does not adequately measure

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72. *See* Arden v. Columbia Pictures, Indus., 908 F. Supp. 1248, 1259 (S.D.N.Y. 1995) (stating that the main goal of fostering creativity is a core consideration in determinations regarding substantial similarity); *see also* Pendleton v. Acuff-Rose Publ'ns, Inc., 605 F. Supp. 477, 484 (M.D. Tenn. 1984) (arguing that fostering creativity and allowing the public to benefit from creative works is a fundamental objective of copyright law).

73. Iyar Stav, *Musical Plagiarism: A True Challenge for the Copyright Law*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 2 (2014).

74. J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 410 (2004).

75. *Id.* at 419.

76. *Id.*

77. *Id.* at 421.

78. DANIEL J. LEVITIN, THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION 84 (Penguin Group (USA) Inc., 2007).

79. *Id.*

80. Keyes, *supra* note 74, at 422–23 ("It inspires, consoles, motivates, awakens, and energizes us unlike other artistic endeavors. It can make us weep or give us intense pleasure.") (internal quotations omitted).

81. *Id.* at 423.

how music is perceived and comprehended by society, nor does it promote copyright law's broader policy goals.[82] The law needs to be "tailored to provide greater flexibility in the manner in which people are allowed to respond to music that they perceive."[83] Therefore, necessary changes to music copyright law are crucial to differentiate it from other forms of authorship.[84]

C. *Characteristics of Music Production*

Elements of music production distinguish it from all other forms of authorship.[85] For example, borrowing and copying music between artists is a common practice—"[f]or the most part, taking someone else's musical idea and developing it in a new way is largely understood as part of musical culture and thus entirely consistent with cultural norms."[86] From the days of classical composers studying similar concepts, to the new era of sampling and digital manipulation that transforms past musical creations, copying has always been at the root of music production.[87] Even the two hundred twelve songwriters, composers, producers, and musicians who backed the *amici curiae* brief in favor of overturning the "Blurred Lines" verdict, recognize that "[a]ll music shares inspiration from prior musical works, especially within a particular musical genre."[88] This endorsement by the industry's top talent supports the conclusion that borrowing and copying as a part of music production, is not only theoretically accurate, but the practical applications of these characteristics are also widely recognized and utilized within the music industry.[89]

The artists' collective sentiment in their brief to the Ninth Circuit is that "[v]irtually no music can be said to be 100% new and original."[90] As evidence to support this notion, the brief cites a string of famous musical inspirations, noting how each inspiration shaped the production of legendary music that came after it—specifically, it notes how Elton John was influenced by The Beatles, who were influenced by Elvis Presley,

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82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Carys Craig & Guillaume Laroche, *Out of Tune: Why Copyright Law Needs Music Lessons*, *in* INTELLECTUAL PROPERTY FOR THE 21ST CENTURY: INTERDISCIPLINARY APPROACHES 43, 47 (B.C. Doagoo et al. eds., 2014).

86. *Id.*

87. *Id.* at 48.

88. Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers, *supra* note 21.

89. *Id.*

90. *Id.* at 9.

who was inspired by pop, country, gospel, and R&B music he listened to as a teenager growing up in Memphis.[91] The brief goes on to question whether music legends, including Marvin Gaye, would have been able to cultivate such powerful and memorable music if they had been afraid to draw inspiration from past idols.[92]

For music creation to continue to expand and prosper, adaptation of past musical works through copying and borrowing is necessary.[93] This is because there are only a limited number of musical note combinations that are pleasing to the Western listener, making the possible combination of notes for new musical works highly limited.[94] Characteristics of a particular genre will also control compositional choices and dictate tonalities of musical works.[95]

Judge Learned Hand even recognized these limitations in 1940 by writing: "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. Recurrence is not therefore an inevitable badge of plagiarism."[96] These constraints greatly impact music production and limit the range of expression available to musicians—making the artist's ability to produce music free from any past expression close to impossible.[97] Rather than viewing adaptation of past musical works as illicit copying, artists recognize that their works will be used as building blocks for future creators to produce their own music—a fact currently ignored by copyright law.[98]

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91. *Id.*

92. *Id.* at 9–10 ("Quite simply, if an artist is not allowed to display his or her musical influences, for fear of legal reprisal, there is very little new music that is going to be created, particularly with the limitations that already naturally exist in songwriting.").

93. Craig & Laroche, *supra* note 85, at 48.

94. Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 262 (2013).

95. *Id.*

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

97. Livingston & Urbinato, *supra* note 94, at 263.

98. Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers, *supra* note 21, at 13.

> All musical works, indeed all creative works, are born from a spark of inspiration. It is essential for musicians and composers to be able to find this spark anywhere and everywhere without having to constantly look over their shoulders and worry about being sued. To extinguish this spark, to replace it with fear, is to stifle creativity and deprive society of the next generation of great artists and new music. And yes, artists should be able to talk freely about their sources of inspiration without having to worry about their exuberant proclamations being played back as damning evidence in a court

D. *Music Consumption Over Time*

Music continues to be a constant pulse in society.[99] However, the way individuals consume music is changing dramatically.[100] The increase in streaming technology created a shift from traditional mediums, like radio and hard-copy CDs, to a more online-driven music experience.[101] Currently, an astounding seventy-five percent of the U.S. population listens to music online.[102]

On-demand and curated streaming services, such as Pandora, Spotify, and YouTube, are now an integral part of how the everyday American obtains and consumes music.[103] A Nielsen[104] study of media consumption during 2014 showed a fifty-four percent increase in on-demand streaming, and over 164 billion songs streamed through audio and video platforms.[105] Another Nielsen study showed a total of over 135 billion songs streamed in the first half of 2015 alone—indicating this trend is growing, and fast.[106]

Music consumption is not only shifting to a primarily online format, it is also going mobile—the study reported forty-four percent of participants use smartphones to listen to music each week rather than home computers.[107] Expenditures on music have also largely shifted to online streaming services because of the relatively low cost of obtaining

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of law.

Id. at 15 (quoting Ron Mendelsohn, owner of production company Megatrax).

99. *Nielsen Music 360 Report: 2015 Highlights*, NIELSEN 6 (2015), http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2015-reports/music-360-2015-highlights-sept-2015.pdf [https://perma.cc/ADW3-547N].

100. *See id.*

101. *See* Armen Boyajian, *The Sound of Money: Securing Copyright, Royalties, and Creative "Progress" in the Digital Music Revolution*, 62 FED. COMM. L.J. 587, 589 (2010) ("Compared to the costly production and distribution methods that characterized the age of tangible media (e.g., LPs, analog tapes, CDs, and DVDs), the advent of digitally compressed audio formats and online networks has opened superior channels for the proliferation of music.").

102. *Nielsen Music 360 Report: 2015 Highlights*, *supra* note 99.

103. *See* Jacob Ganz, *How Streaming Is Changing Music*, NPR MUSIC (June 1, 2015, 10:20 AM), http://www npr.org/sections/therecord/2015/06/01/411119372/how-streaming-is-changing-music [https://perma.cc/4J4N-2TQX].

104. *About Us*, NIELSEN, http://www nielsen.com/us/en/about-us html [https://perma.cc/P98N-59MB] (providing in-depth studies of media consumption throughout the world to help businesses get a complete view of trends and habits of consumers).

105. *2014 Nielsen Music Report*, NIELSEN (Jan. 7, 2015), http://www nielsen.com/us/en/press-room/2015/2014-nielsen-music-report html [https://perma.cc/KE4Q-8EST].

106. *Nielsen Music 360 Report: 2015 Highlights*, *supra* note 99, at 3.

107. *Id.*

these services, their user-friendly nature, and the expansive song library available.[108]

Although this emerging digital marketplace allows a broader spectrum of music to reach consumers, the increased usage of on-demand and curated streaming services, at home or on the go, has shifted daily music consumption to a more personalized format.[109] This is due to the design of on-demand streaming platforms, which is geared towards promoting individualized consumption of music.[110]

For example, to create the most personalized listening experience, Spotify utilizes music intelligence that generates "the right listening experience at the right time."[111] This is done through a comprehensive system of analyzing the makeup of songs, discovering what is being said about music online, and researching how people are listening to it.[112] After tracking each user's listening habits, individual "taste profiles" are created to produce the most individualized listening experience.[113] The taste profiles break down into "taste clusters" that often highlight the user's favorite genre of music versus what they are listening to as background music while focused on something else.[114] Taste clusters allow Spotify to promote the most accurate scope of songs, artists, and playlists to fit the unique taste of the listener.[115] Spotify also offers its "Discover Weekly" playlist, based off each user's taste profile, to highlight new music in the specific genre in which the user is interested.[116]

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108. *Id.* at 5–6.

109. *See* Marc Hogan, *How Playlists Are Curating the Future of Music*, PITCHFORK (July 16, 2015), http://pitchfork.com/features/articles/9686-up-next-how-playlists-are-curating-the-future-of-music/ [https://perma.cc/K9T6-AHHE] (detailing the lengths on-demand streaming services are going through to differentiate themselves by helping users customize their playlists and other listening patterns).

110. Alex Heath, *Spotify is Getting Unbelievably Good at Picking Music—Here's an Inside Look at How*, TECH INSIDER (Sept. 3, 2015, 9:23 AM), http://www.techinsider.io/inside-spotify-and-the-future-of-music-streaming [https://perma.cc/8QPA-QNLR] (claiming that it is Spotify's mission to make the most personalized music listening service ever); *see also* John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or its Foe?*, NEW YORKER (Nov. 24, 2014), http://www newyorker.com/magazine/2014/11/24/revenue-streams [https://perma.cc/9YGH-FUN4].

111. Heath, *supra* note 110 (quoting Jim Lucchese, CEO of The Echo Nest, Spotify's music intelligence company).

112. *Id.*

113. *Id.*

114. *Id.* (describing the background music as the user's "lean back" listening experience).

115. *Id.*

116. *Id.* ("[Matt] Ogle gives a simple analogy for how Discover Weekly works: You've been playing song A and song C a lot, but it turns out that when other people play those songs together in their playlists there's a song B that you've never heard before. Discover Weekly

Through the use of the customized playlists, these on-demand streaming platforms provide music suggestions to users in the exact style they enjoy without having to search for it.[117]

Streaming services grow in popularity daily, and consumers shift to sites like Spotify in record numbers because of their customizable services.[118] The unique features of streaming services, specifically the ability to customize the listening experience, make them a great fit in today's musical landscape.[119] Instead of forcing listeners to sort through every music genre, streaming services allow today's listener to personalize their music choices.[120]

II. THE COPYRIGHT INFRINGEMENT ANALYSIS & THE VARIOUS MEASURES OF SUBSTANTIAL SIMILARITY

When a party feels his copyrighted work has been copied, he can file an infringement claim against the alleged infringer in federal court.[121] However, a copyright infringement claim is deceivingly complex, as it involves many steps for a claimant to succeed once at trial.[122] To ensure the most accurate depiction of how an infringement suit operates under current copyright law, this section of the Note presents hypothetical parties to an infringement claim—Band X wants to bring a claim against Band Y for infringing on their copyrighted work under Section 501 of the

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gives you song B.").

117. *Id.* ("I see Discover Weekly as one of the first products from this new era of personalization, but ultimately we'd love for everything you interact with on Spotify to feel like there's a bit of you in it.") (quoting Matt Ogle, Spotify employee in charge of Discover Weekly playlist).

118. Spotify has doubled its paid subscribers to 20 million in the last year, and has an additional 55 million free users accessing its music library of over 35 million songs. *Id.*

119. Jareen Imam, *Young Listeners Opting to Stream, Not Own Music*, CNN (June 16, 2012, 3:39 PM), http://www.cnn.com/2012/06/15/tech/web/music-streaming/ [https://perma.cc/67HX-TYWL].

120. *Id.*

121. 17 U.S.C. § 501 (2015).

122. Jason E. Sloan, *An Overview of the Elements of Copyright Infringement Cause of Action – Part I: Introduction and Copying*, A.B.A. YOUNG LAWS. DIV., https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/elements_of_a_copyright html [https://perma.cc/N4CC-3D38].

> [The infringement analysis] does not lend itself to helpful generalizations because the test for infringement is necessarily vague. This allows for the test to be applied to various types of works and contexts regardless of the nature of the copying. To further complicate copyright infringement actions, different courts have applied the elements of infringement in somewhat conflicting ways, resulting in the creation of exceptions and carve-outs based on the particular facts at hand.

Id.

Copyright Act.[123] To do this, Band X must first establish a valid copyright on its work, and then prove that Band Y unlawfully copied protectable elements of that work.[124]

A registered copyright, granted under Section 410 of the Copyright Act, provides prima facie proof of a valid copyright.[125] If Band X has a copyright certificate, Band Y may rebut its validity by taking on the burden of proving the falsity of an improperly granted certificate.[126]

Once a valid copyright has been established, the burden shifts to Band X, the copyright holder, to prove copying of protectable material.[127] At this stage in the analysis, simply identifying commonalities between the two works is not sufficient proof.[128] Therefore, to effectively prove infringement of copyrighted material, Band X must prove: (1) actual copying, and (2) that a substantial amount of copying occurred, which warrants a finding of unlawful appropriation of its protectable expression.[129]

A. *Step One: Actual Copying*

Actual copying is often difficult to prove because obtaining direct evidence of copying—through Band Y's own admission, witness testimony, or a record of Band Y's physical copying—is rare.[130] Therefore, most infringement actions instead utilize the *inference* of actual copying.[131] To prove actual copying through inference, Band X must prove Band Y had access to the work and that probative similarity exists between the works.[132]

1. Access

The element of access requires Band X to prove the reasonable possibility that the accused work was available to Band Y, the alleged infringer.[133] Reasonable possibility of access may be proven from

123. 17 U.S.C. § 501(a) (2015) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author.").

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

125. 17 U.S.C. § 410 (2015).

126. Bevill, *supra* note 57, at 316.

127. Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303, 1331 (2012).

128. *See Arnstein*, 154 F.2d at 468.

129. *Id.*

130. Timothy L. Warnock, *"Access" and "Striking Similarity" in Copyright Infringement Litigation*, 3 LANDSLIDE 18, 18 (2010).

131. Copeland v. Bieber, 789 F.3d 484, 488 (4th Cir. 2015).

132. *Id.*

133. Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988).

widespread dissemination of Band X's work[134] or from a proven link between Band X's work and Band Y.[135] However, if the two works are so "strikingly similar" that it makes Band Y's independent creation is unreasonable, then access may be inferred.[136]

2. Probative Similarity

In determining the probative similarity[137] between Band X's copyrighted work and Band Y's alleged copy, courts consider unoriginal or non-protectable elements of the work.[138] At this stage, the court assesses whether there are enough elements of copying to go forward with the infringement claim.[139] This inquiry is necessary to prove that factual copying occurred, and to negate claims that Band Y independently created the alleged infringing work, free from the use of Band X's protected expression.[140]

Band Y may rebut any of the circumstantial evidence associated with actual copying.[141] Band Y can provide evidence that its work was, in fact, independently created, or evidence that shows that there is no reasonable possibility of access to Band X's work to negate claims of actual copying.[142]

B. *Step Two: Unlawful Appropriation*

As actual copying can be insufficient to prevail on an actionable infringement claim, Band X must next establish unlawful appropriation to succeed in an infringement action.[143] The test for unlawful appropriation requires Band X to prove that Band Y's infringing work is substantially

134. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983); *see* 4 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 13.02[A] (explaining that a copyrighted work becomes widely disseminated by extensive publication or through modern technology, such as the Internet, which can make almost any work accessible to the larger public).

135. De Acosta v. Brown, 146 F.2d 408, 410 (2d Cir. 1944).

136. Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984).

137. In copyright literature, probative similarity is often referred to as "substantial similarity" by courts in proving actual copying. Alan Latman, *"Probative Similarity" As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1189–90 (1990). However, "substantial similarity" is relevant in proving unlawful appropriation of Band X's copyrightable expression, after actual copying has been inferred. *Id.*

138. Sloan, *supra* note 122.

139. *Id.*

140. *Id.*

141. *Id.*

142. Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984).

143. DSC Commc'ns Corp. v. DGI Techs., Inc., 898 F. Supp. 1183, 1188 (N.D. Tex. 1995), *aff'd*, 81 F.3d 597 (5th Cir. 1996).

similar to their protected material.[144] At this stage, the determination regarding "substantial similarity" is made.[145]

Copyright protection only extends to the artist's expression, not facts or ideas, and this separation plays a large role in the ultimate determination of substantial similarity.[146] This idea-expression dichotomy acts as the dividing line between protected material under copyright law and unprotected material that should remain in the public domain for future use.[147] The distinction between protectable and non-protectable material speaks to the balancing of the two policy considerations of copyright law—protecting the creators and benefitting the public.[148] The idea-expression dichotomy shapes the court's ultimate determination of substantial similarity.[149] In this process, courts aim to find substantial similarity between the works only in their expression—if they share mere ideas, there is no infringement.[150]

The courts currently utilize a variety of tests to measure whether there is substantial similarity in copyright infringement cases.[151] The application of these tests, and the language used to describe the process, is quite complicated, as courts often attempt to re-work the tests to clarify misunderstandings.[152] However, these alterations often lead to more uncertainty as to what it actually means for works to be "substantially similar," and leave no foundation for any standardized test.[153] This is one reason there is currently a split in the circuit courts regarding the proper

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144. Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 141 (2d Cir. 1992).

145. *DSC Commc'ns Corp.*, 898 F. Supp. at 1188 ("Not all copying is copyright infringement. The second question that must be analyzed is whether the copying at issue is legally actionable. This question involves a comparative analysis of the two works at issue to determine whether they are substantially similar.").

146. 17 U.S.C. § 102(b) (2015).

147. Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL'Y 1375, 1381 (2007).

148. *See supra* Section I.A.3.

149. Roodhuyzen, *supra* note 147, at 1382.

150. There are issues regarding the accuracy of the court's evaluation between what constitutes expression versus an idea. *Id.* There is currently no bright line rule to make this determination, and courts are often left to their own devices in making these conclusions. *Id.* However, this issue is not within the scope of this Note, and will not be addressed outside of acknowledging that the court must make this distinction in determining substantial similarity.

151. *See* discussion *infra* Sections II.B.1–3.

152. Roodhuyzen, *supra* note 147, at 1382.

153. Ambiguity in the realm of substantial similarity tests results in unpredictable results and ad hoc judicial decision-making. *Id.* This raises the question of whether the Supreme Court should formulate one single test, or if there should even be a test at all. *Id.* However, arguments regarding whether the existence of a test in is the best interest of the copyright system is outside the scope of this Note.

way to test for substantial similarity.[154]

The following sections briefly discuss the different tests used in the circuit courts as a means for analyzing substantial similarity. The majority of circuits follow the traditional Ordinary Observer Analysis,[155] others utilize the Extrinsic/Intrinsic Analysis,[156] and some follow a version of the Abstraction-Filtration-Comparison Analysis.[157] Although the specifics of the tests vary, there is a constant in each—the subjective determination for unlawful appropriation.[158] The Intended Audience Test should replace the subjective determination for unlawful appropriation in all current infringement analyses involving musical works.

1. The Ordinary Observer Analysis

The landmark case *Arnstein v. Porter* developed the framework for copyright infringement.[159] Although criticized as highly plaintiff-friendly[160] and oftentimes overbroad in its subjective analysis,[161] the structure set up in *Arnstein* remains the basis for all substantial similarity tests applied today.[162]

In the *Arnstein* decision, the Second Circuit Court of Appeals created a two-step infringement test requiring: (1) evidence of access and probative similarity, and (2) a finding of illicit copying amounting to unlawful appropriation.[163] The second step in the analysis uses the

154. *Id.*

155. Peel & Co., Inc. v. Rug Mkt., 238 F.3d 391, 398 (5th Cir. 2001); Dawson v. Hinshaw Music Inc., 905 F.2d 731, 733 (4th Cir. 1990); Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608 (1st Cir. 1988); Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614–15 (7th Cir. 1982); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

156. Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

157. Kohus v. Mariol, 328 F.3d 848, 855 (6th Cir. 2003); Sturdza v. United Arab Emirates, 281 F.3d 1287, 1297 (D.C. Cir. 2002); Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 834 (10th Cir. 1993).

158. Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996) (detailing the subjective component of the abstraction-filtration-comparison analysis); *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164 (detailing the subjective component of the extrinsic/intrinsic analysis); Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (detailing the subjective component of the "ordinary observer" analysis).

159. *Arnstein*, 154 F.2d at 464.

160. Cronin, *supra* note 5, at 1193.

161. *See* Roodhuyzen, *supra* note 147, at 1390–91.

162. Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL-LAC J. ART & ENT. L. 43, 46 (1995).

163. *Arnstein*, 154 F.2d at 468.

perspective of the "ordinary lay hearer."[164] The assumption that the "ordinary observer" is the proper subjective measure stems from the Court's finding that copyright law is meant to protect the artist from lost financial returns resulting from infringing work.[165] The Court reasoned since the "ordinary observer" is part of the audience that interacts with the work in the marketplace, it is he who should determine whether the copying amounts to unlawful appropriation, and thus infringement liability.[166]

Despite its longevity and prominence in copyright history, many critics have highlighted the ineffectiveness of the *Arnstein* analysis.[167] Even the dissenting opinion gravely critiqued the majority's finding that the "ordinary observer" is the best measure of subjective similarity.[168] These criticisms, as well as judicial decisions deviating from the original *Arnstein* procedure, exemplify the downfalls of the Ordinary Observer Analysis.

2. The Extrinsic/Intrinsic Analysis

One of the first recognized variations of the *Arnstein* decision was the development of the Extrinsic/Intrinsic Analysis in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corporation*.[169] In this case, the Ninth Circuit Court of Appeals reformulated the two-part test established in *Arnstein* based on the idea-expression dichotomy of copyright law.[170] The extrinsic prong is an objective determination for

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164. *Id.* To constitute unlawful appropriation, the Court must determine "whether defendant took from plaintiff's works so much of what is pleasing to the ears of the lay listeners, who compromise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff." *Id.* at 473.

165. *Id.*

166. *Id.*

167. Paul M. Grinvalsky, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395, 397 (1992) ("The result [of the ordinary observer analysis] is a finding of infringement where perhaps none exists, chilling the creation of new musical works. Or, equally as unfortunate, a finding of no infringement where unlawful copying has actually occurred.").

168. *Arnstein*, 154 F.2d at 475–76 (Clark, J., dissenting).

> Of course, sound is important in a case of this kind, but it is not so important as to falsify what the eye reports and the mind teaches. Otherwise plagiarism would be suggested by the mere drumming of repetitious sound from our usual popular music . . . particularly when ears may be dulled by long usage, possibly artistic repugnance or boredom, or mere distance which causes all sounds to merge.

Id.

169. 562 F.2d 1157 (9th Cir. 1977).

170. *Id.* at 1164.

probative similarity[171] between the works' "criteria which can be listed and analyzed."[172] This process allows the use of expert testimony and analytic dissection[173] to aid the trier of fact.[174] The intrinsic prong utilizes the "ordinary observer" standard from *Arnstein* to make a subjective evaluation regarding unlawful appropriation.[175] There is a finding of intrinsic similarity if "the ordinary observer, unless he set out to detect disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[176] At this stage, expert testimony and analytic dissection is not considered.[177]

As with the Ordinary Observer Analysis, this test is criticized as well.[178] Inclusion of expert testimony and analytic dissection in the extrinsic prong, but exclusion during the intrinsic prong, presents challenges for the fact finder, who might be the decision-maker during the entire infringement analysis.[179] Shifting from the extrinsic prong to the intrinsic prong, but asking the fact finder to ignore the information utilized in making an extrinsic determination, is close to impossible.[180] This raises doubts as to accuracy of the test's subjective determination, and due to these inefficiencies, the test does not apply easily to complex, technical subject matter, such as in music cases.[181]

3. The Abstraction-Filtration-Comparison Analysis

A minority of courts apply the Abstraction-Filtration-Comparison

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171. The *Krofft* opinion described the extrinsic analysis as a determination of "substantial similarity in ideas" because of its foundation in the idea-expression dichotomy. *Id.* However, this language is misleading and confusing, since a finding of probative similarity does not only focus on non-protectable material (ideas), but rather on similarities in the entirety of the work. Broaddus, *supra* note 162, at 51 nn.44–47. Later decisions in the Ninth Circuit have modified the *Krofft* analysis to avoid these problems. *Id.*

172. *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164.

173. Analytic dissection "involves breaking works down into their constituent elements and comparing those elements to determine whether the similarities that exist are in the unprotectable elements (for example ideas or scenes a faire)." Roodhuyzen, *supra* note 147, at 1399.

174. *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164.

175. *Id.* ("The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and spectator.") (quoting Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1944)).

176. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d. Cir. 1960).

177. Livingston & Urbinato, *supra* note 94, at 261.

178. Shyamkrishna Balganesh et al., *Judging Similarity*, 100 IOWA L. REV. 267, 269 (2014).

179. *Id.*

180. *Id.*

181. Roodhuyzen, *supra* note 147, at 1402.

Analysis for substantial similarity.[182] The Tenth Circuit Court of Appeals outlined the three-step test as follows:

> At the *abstraction* step, we separate the ideas (and basic utilitarian functions), which are not protectable, from the particular expression of the work. Then, we *filter* out of the nonprotectable components of the product from the original expression. Finally, we *compare* the remaining protected elements to the allegedly copied work to determine if the two works are substantially similar.[183]

The "ordinary observer" methodology is applied during the comparison step of this process, but considers only protectable elements of the copyrighted work, rather than the works in their entirety.[184] Since the goal of the analysis is to filter out the protectable expression from the non-protectable ideas, this test is also criticized as being vague and difficult to apply, as there has been no clear direction or procedure on how the filtration occurs.[185]

III. THE INTENDED AUDIENCE TEST: THE CURRENT STATE OF THE ANALYSIS AND APPLICATIONS THAT DEVIATE FROM THE "ORDINARY OBSERVER"

A constant throughout the numerous tests for substantial similarity is the subjective component—would the "ordinary, lay listener" find illicit copying.[186] In situations where the works at issue are more technical and require greater skill, a minority of courts adopted a variation from the default "ordinary" recipient of the copyrighted material.[187] This is the Intended Audience Test.

A. *A Change to* Arnstein

One of the first alterations to *Arnstein*'s Ordinary Observer Analysis was in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc*.[188] In this case, competing computer programs involved subject matter so complicated (for its time) that an ordinary lay jury or judge would have

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182. Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1288 (10th Cir. 1996).

183. *Id.* at 1284–85 (emphasis added).

184. *Id.* at 1288.

185. Roodhuyzen, *supra* note 147, at 1408 ("[T]his test does not provide much guidance on how to [filter out the non-protectable elements] and offers little direction to answer the ultimate question of whether a work has been improperly appropriated.").

186. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (detailing the subjective component of the "ordinary observer" analysis); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) (detailing the subjective component of the extrinsic/intrinsic analysis); *Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1288 (detailing the subjective component of the abstraction-filtration-comparison analysis).

187. Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 736 (4th Cir. 1990).

188. 797 F.2d 1222 (3d Cir. 1986).

found it impossible to make determinations regarding substantial similarity.[189] The court did not apply *Arnstein's* bifurcated analysis, where a finding of probative similarity is followed by the substantial similarity analysis.[190] Rather, it made one determination regarding substantial similarity utilizing the expert testimony, and combined it with the opinions of the lay listener.[191] The court found it necessary to consider a narrower audience in its application of the substantial similarity test because the scope of the original work was beyond the comprehension of the general public.[192]

With the shift in software cases utilizing a more focused audience as the measure for the subjective component of the substantial similarity test, one question was left unanswered—whether this analysis would extend to other works of authorship, particularly music.[193] *Dawson v. Hinshaw Music, Inc.* was the first extension of the Intended Audience Test to music copyright law.[194]

This case involved an interpretation of the spiritual song "Ezekiel Saw de Wheel" by the international composer William Levi Dawson.[195] Although the words and melody of the song were considered to be in the public domain, Dawson obtained a registered copyright of his particular arrangement.[196] Forty years later, a secondary composer made an arrangement of the song, and granted Hinshaw Music exclusive rights to

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189. Philip C. Baxa & M. William Krasilovsky, *Dawson v. Hinshaw Music, Inc.: The Fourth Circuit Revisits Arnstein and the "Intended Audience" Test*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 91, 94–95 (1991).

190. *Whelan Associates, Inc.*, 797 F.2d at 1232.

191. *Id.*

> [T]he distinction between the two parts of the *Arnstein* test may be of doubtful value when the finder of fact is the same person for each step: that person has been exposed to expert evidence in the first step, yet she or he is supposed to ignore or 'forget' that evidence in analyzing the problem under the second step. Especially in complex cases, we doubt that 'forgetting' can be effective when the expert testimony is essential to even the most fundamental understanding of the objects in question.

Id.

192. *See id.* at 1233 (noting the imperfections in the ordinary observer test made it inefficient in this case because of the particularly complex subject matter of computer programs); *Dawson*, 905 F.2d at 735 ("[T]he advent of computer programming infringement actions has forced courts to recognize that sometimes the non-interested or uninformed lay observer simply lacks the necessary expertise to determine similarities or differences between product.").

193. *See* Baxa & Krasilovsky, *supra* note 189.

194. 905 F.2d 731 (4th Cir. 1990).

195. *Id.* at 732.

196. *Id.*

it.[197] When Dawson became aware of this subsequent arrangement, he filed suit for copyright infringement.[198]

Through the testimony of multiple experts, the district court found substantial similarities between the two arrangements under the objective component of the Ordinary Observer Analysis.[199] When making a determination regarding the subjective component, the court noted that the expert testimony, which was so persuasive under the objective prong, was now "irrelevant to and inadmissible under the second prong to show substantial similarity constituting infringement of expression."[200]

The district court did not find subjective similarity because Dawson only supplied the sheet music for the two pieces, so the fact finder did not have enough evidence to draw from.[201] Without more, the fact finder, acting as the "ordinary, lay observer," did not have the necessary knowledge about sheet music to detect requisite similarities between the works that would constitute unlawful appropriation.[202]

The lack of substantial similarity was the issue on appeal.[203] Here the court adopted the Intended Audience Test as a more accurate measure of subjective similarity:

> [A]s demonstrated [by the lower court], obedience to the undisputed principles of copyright law and the policy underlying the ordinary observer test requires a recognition of the limits of the ordinary *lay* observer characterization of the ordinary observer test. Those principles require orientation of the ordinary observer test to the works' intended audience, permitting an ordinary *lay* observer characterization of the test only where the lay public fairly represents the works' intended audience.[204]

The court rationalized the adoption of this standard from the methodology used in the hallmark case, *Arnstein v. Porter*, which stressed using the audience for whom the work was created as the most accurate gauge of whether the alleged infringer took something of value from the copyright holder.[205] Using this foundation, but acknowledging the classification as the "ordinary, lay listener" may have been overly broad,

197. *Id.*
198. *Id.*
199. *Id.* at 733.
200. Baxa & Krasilovsky, *supra* note 189, at 97.
201. *Dawson*, 905 F.2d at 733.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 734.

the court noted:

> Although *Arnstein* does not address the question directly, we read the case's logic to require that where the intended audience is significantly more specialized than the pool of lay listeners, the reaction of the intended audience would be the relevant inquiry. In light of the copyright law's purpose of protecting a creator's market, we think it sensible to embrace *Arnstein*'s command that the ultimate comparison of the works at issue be oriented towards the works' intended audience.[206]

It is here the court shifts the traditional Ordinary Observer Analysis to require a deeper intrinsic analysis if the works are directed to a narrower, more specialized audience.[207] As the court notes, a group "familiar with the media at issue" should be the one to make the subjective analysis, as utilizing a more educated audience when considering complex subject matter avoids infringement cases turning on the opinion of someone who is ill-informed to make a subjective determination.[208]

B. *Dawson's Limits*

Since the *Dawson* decision, the Intended Audience Test has been applied in a limited number of circumstances.[209] Despite the *Dawson* line of reasoning, it is precedent to find the general public as the "intended audience," unless the target audience possesses a specialized expertise or specific knowledge of the work that makes its judgment a better measure of subjective similarity.[210]

Since existing precedent urges courts to consider the general public as the appropriate subjective measure, the Fourth Circuit Court of Appeals declined to apply the Intended Audience Test in a more recent music copyright infringement claim.[211] In *Copeland v. Bieber*, musician Devin Copeland brought an infringement action against pop stars Usher and

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206. *Id.*

207. *Id.* at 734–35.

208. *Id.* at 735.

209. *See* Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001) (finding that where the work is child-oriented, like a costume depicting a life-sized purple dinosaur, children are the proper audience to measure intrinsic similarity); *see also* Kohus v. Mariol, 328 F.3d 848 (6th Cir. 2003) (extending the intended audience rule to include highly technical patent drawings that would require interpretational guidance for the lay public to understand).

210. *Dawson*, 905 F.2d at 737 ("[A] court should be hesitant to find that the lay public does not fairly represent a work's intended audience . . . . To warrant departure from the lay characterization of the ordinary observer test, 'specialized expertise' must go beyond mere differences in taste and instead must rise to the level of the possession of knowledge that the lay public lacks.").

211. Copeland v. Bieber, 789 F.3d 484 (4th Cir. 2015).

Justin Bieber, alleging three versions of their song, "Somebody to Love," infringed on his copyrighted work of the same name.[212] On appeal, Copeland insisted that a highly specialized group of individuals be considered as the "intended audience," rather than the general public.[213] His argument rested on the fact that his work was meant for industry professionals, not the "ordinary observer."[214] However, the Court was not convinced industry professionals represented the work's audience—focusing only on who would make-up the "buyer" or "recipient" in the artist's market.[215]

This Note argues the Fourth Circuit should have found Copeland deserving of a specialized group of individuals, and thus, applied the Intended Audience Test. Although not addressed in the opinion, the "general public," while possibly the end recipient of the work, lacked the specialized knowledge necessary to make a subjective evaluation in the substantial similarity analysis.[216] From the time of its creation, the Intended Audience Test prevented an uneducated "ordinary observer" from making subjective determinations in infringement cases, regardless of who was considered the "buyer" of the work.[217] Refusing to consider the specialized "intended audience" of music industry professionals, the *Copeland* court, caused a musically untrained and uneducated general public to make the subjective determination, which greatly affected the outcome of the case.[218]

IV. UNIQUE CHARACTERISTICS OF MUSIC WARRANT ITS OWN SYSTEM

A wide variety of works are covered under current copyright law,

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212. *Id.* at 487.

213. *Id.* at 490.

214. *Id.* ("The 'market' Copeland was trying to reach, in other words, was the Ushers of the world, and Copeland would be harmed if industry professionals believed his song was substantially similar to those of the defendants even if the general public saw no resemblance."); *see* Appellants' Opening Brief at 30, Copeland v. Bieber, 789 F.3d 484 (4th Cir. 2015) (No. 2:13-cv-00246-AWA-TEM).

215. *Copeland*, 789 F.3d at 491.

216. Appellants' Opening Brief, *supra* note 214, at 30.

217. *See id.* at 29–30.

> [O]nly a reckless indifference to common sense would lead a court to embrace a doctrine that requires a copyright case to turn on the opinion of someone who is ignorant of the relevant differences and similarities between two works. Instead, the judgment should be informed by people who are familiar with the media at issue.

Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 735 (4th Cir. 1990).

218. *Copeland*, 789 F.3d at 494–95 (ruling in favor of the Appellant—even though the general public was used as the intended audience—based on a finding that a reasonable jury could find intrinsic similarity solely on the similar language in the choruses).

and for the sake of uniformity, only one set of laws is imposed on them.[219] However, music deserves its own copyright system, and the current application of the test for subjective similarity should be adjusted to better represent the functions of music today. While the "one-size-fits-all" formulation of copyright law may have been sufficient throughout history, sociological and technological changes in the way people create, listen to, and perceive music brings the need for change in the law to the forefront.[220]

Judicial and legislative bodies controlling how copyright law operates are not taking into account the unique cultural and technological processes of society's interaction with music.[221] Overlooking these distinctive characteristics regarding the public's production and consumption of music, and continuing to broadly categorize it with other forms of authorship, creates an outdated and ineffective music copyright system.[222]

The Intended Audience Test should be applied in all subjective determinations of unlawful appropriation in music copyright cases. Music is a highly skilled and technical work of authorship, and the "ordinary observer" lacks the knowledge necessary to make accurate determinations of unlawful appropriation.[223] By adopting the Intended Audience Test in music copyright cases, an output of more precise infringement claims will result, and the ineffectiveness of the Ordinary Observer Analysis in music copyright cases will be combatted.[224]

A. *The Current System Does Not Account for the Common Practices of Music Production*

The current copyright system, and specifically the test for substantial similarity, punishes artists for music production resulting from modern techniques and practices.[225] Since the current system utilizes the

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219. Roodhuyzen, *supra* note 147, at 1384.

220. Keyes, *supra* note 74.

221. *Id.* at 419.

222. *Id.* at 420; *see also* Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 424 (1988) (arguing copyright law is a self-perpetuating cycle that "work[s] a disservice on unestablished songwriters").

223. Eric Rogers, S*ubstantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis Among the Federal Circuits*, 2013 MICH. ST. L. REV. 893, 912–15 (2013).

224. *See* discussion *infra* Sections IV.A–C.

225. JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 4 (The Univ. of Ga. Press, 2006).

> Transformative appropriation, the act of referring to or quoting old works in order to create a new work, has always been a key element in thriving musical cultures. Today, appropriation connotes an exclusive or unauthorized seizure of materials. But

subjective measure of the "ordinary observer," who might be unaware of common compositional characteristics of music production, imprecise and unfair judicial decisions result.[226]

This highly damaging system results in artist liability for simply adhering to industry norms.[227] The adoption of the Intended Audience Test in all music infringement analyses would combat this problem by allowing a more skilled and experienced party, who possesses knowledge of these production characteristics, to make the subjective determinations present in all measures for substantial similarity.

There is no intent requirement for a copyright infringement action; therefore, subconscious copying is actionable.[228] Numerous past infringement actions demonstrate this phenomenon[229]—oftentimes involving cases where courts feel obligated to find subconscious copying simply because they see no other explanation for the similarity.[230] The basis for this type of infringement liability "seems predicated on the notion that copying is copying, whether done intentionally or innocently."[231] However, previously explained characteristics of music production exemplify why this practice unfairly punishes musicians.[232]

Characteristics unique to music production make it "both deserving and in need of special consideration."[233] Music borrowing and copying between artists, as well as the constraints of musical composition,

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transformative appropriation has historically functioned in a spirit of sharing, friendly competition, and homage.

Id.

226. *See* Manta, *supra* note 127, at 1336–37.

227. *See* DEMERS, *supra* note 225, at 7.

228. Livingston & Urbinato, *supra* note 94, at 268 ("The defendant's 'innocence' or lack of willful intent can certainly shield him from enhanced damages but has no bearing on the question of whether he unlawfully appropriated the plaintiff's original expression.").

229. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 480 (9th Cir. 2000) (basing defendant Bolton's access to plaintiff's song, even after denying ever hearing it, on its popularity during the 1960s—almost 25 years before Bolton produced his own song); ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 999 (2d Cir. 1983) (holding former Beatles member liable for infringement even after he presented extensive evidence of the independent production of his song, but admitting to hearing plaintiff's song previously); Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924) (believing the defendant did not consciously copy elements of plaintiff's work, Judge Learned Hand felt obligated to impose liability because of the virtual identity of a characteristic element of the two works).

230. Rebecca Skirpan, *An Argument that Independent Creation is as Likely as Subconscious Copying in Music Infringement Cases* (2013) (unpublished Law Student Scholarship, Seton Hall Law), Paper 112, http://scholarship.shu.edu/student_scholarship/112.

231. Livingston & Urbinato, *supra* note 94, at 269.

232. *See supra* Subpart I.C.

233. Craig & Laroche, *supra* note 85, at 48.

highlight the need for special consideration in terms of copyright protection.[234] Since copyright law is not in line with these creative processes in the music industry, a severely insufficient infringement test results.[235]

The need for a more tailored infringement analysis is also clear when considering the idea-expression dichotomy of copyright protection in the context of musical works.[236] Unlike literary or poetic works, where paraphrasing exact language can express the same idea in a lawful way, reformulating musical works to express the same idea without infringing expression is close to impossible.[237] This idea is emphasized by the finite number of pleasing compositions available to musicians, paired with the limiting characteristics specific to that artist's musical genre.[238]

Punishing artists for following the common practice of the music industry by drawing inspiration and ideas from musical influences is not an appropriate system.[239] The Intended Audience Test would serve to account for these common practices of the music industry because the group making the subjective decisions regarding infringement would be aware of these characteristics.

Further, the reason for adopting the Intended Audience Test also speaks to the type of illicit copying against which copyright law is meant to protect. In *Lyons Partnership v. Morris Costumes, Inc.*, when narrowing the audience to children because of the child-centered nature of the work, the court stated the basis for adopting the Intended Audience Test is to prevent against "knock-offs," which could diminish a holder's economic market and potential financial returns.[240]

Accounting for the creator's economic interest in his work makes the Intended Audience Test a better measure of when an alleged infringer uses a copyrighted work as influence or inspiration versus maliciously aiming to gain profits from the copyrighted material.[241] Malicious infringement should always be punishable. However, when it comes to music, liability for the utilization of influential works creates a system of fearful

234. *Id.*

235. *Id.* ("The features of musical culture and the ubiquity of musical borrowing reveal a dramatic divergence between the shared norms and practices of music culture and a doctrinal copyright approach.").

236. *See id.* at 50–51.

237. *Id.* at 51 ("[A] sufficiently different musical expression will almost necessarily express a different idea.").

238. *See supra* Subpart I.C.

239. *See* DEMERS, *supra* note 225, at 5.

240. Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 802 (4th Cir. 2001).

241. *See* Grinvalsky, *supra* note 167, at 423.

musicians and individuals with a limited number of musical works to enjoy.[242]

B. *The Shift in Music Consumption Causes the "Ordinary Observer" to Lack the Adequate Knowledge for Effective Subjective Determinations*

Personalized music consumption makes the need for the adoption of the Intended Audience Test even more essential. The growing trend of personalized music consumption through on-demand and curated streaming services demonstrates the power of digital technology to reach more listeners than ever before.[243] However, the archaic system of copyright law is bogging down the growth of digital music technology. Because the current system is outdated and ineffective, it works against digital technology by minimizing its impact and limiting creative practices.[244] As the opportunities created by the ever-expanding digital world continue to clash with the traditional norms of copyright law, the need for a change is evident.[245]

People's appetite for music consumption has not changed, but the way we individually tune into music can be truly unique.[246] Listeners can access the specific music they want, at the touch of a button: all due to the advent of new digital mediums.[247] The 2014 boom of music streaming, and the continued growth into 2015, highlight how dynamic the music landscape truly is.[248] There has been a shift away from uniformity of music consumption, and an increase in the personalization of the music

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242. *See* DEMERS, *supra* note 225, at 10; Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers, *supra* note 21 (arguing that upholding the "Blurred Lines" verdict, whereby Williams and Thicke used Gaye's classic as inspiration for the hit song, the courts would essentially "eliminat[e] any meaningful standard for drawing the line between permissible *inspiration* and unlawful *copying*," which would be "certain to stifle creativity and impede the creative process.").

243. CARYS J. CRAIG, COPYRIGHT, COMMUNICATION, AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 1 (Edward Elgar Publishing Limited 2011) ("Digital technologies . . . have the potential to alter and subvert power structures by changing the ways in which we access, engage with, and participate in the creation of [information] resources").

244. *Id.* ("Networked technologies present unprecedented opportunities for creative expression and participation in public discourse; but these technologies, and the activities they facilitate, are subject to legal regimes that allocate exclusive rights over information resources, restricting their creation, dissemination, and development.").

245. *See id.* at 1–2.

246. *Everyone Listens to Music, but How We Listen is Changing*, NIELSEN (Jan. 22, 2015), http://www.nielsen.com/us/en/insights/news/2015/everyone-listens-to-music-but-how-we-listen-is-changing html [https://perma.cc/HX7Z-9YXW].

247. *Id.*

248. *Id.*

experience.[249]

The more personalized nature of music consumption through online streaming platforms greatly limits the music to which the everyday listener is exposed.[250] Music listeners now can zero-in on their preferred taste and exclude the rest.[251] This is unlike older mediums, such as radio, where the listener is not in control of what is being played, or CDs, where the listener was forced to purchase a "prepackaged bunch of songs."[252] The highly customized nature of the listening experience on sites like Spotify creates blinders for the listener to focus solely on their preferred genre or style of music.[253]

The assumption that the "ordinary observer" or the "general public" is the best representation of the intended audience in musical copyright infringement cases is inadequate because of today's expanding digital technology.[254] With statistics proving the popularity of on-demand streaming services, and due to the individualization of music consumption achieved through these on-demand streaming services, not every member of the public possesses the knowledge to decide what is illicit copying for specific types of music.[255]

By listening to only what is pleasing to the individual listener, the rest of the works in the music landscape go ignored.[256] This makes a hip-hop fan an inadequate measure for unlawful appropriation when it involves two works that would fall into the genre of country or electronic dance music.[257] Each style of music has unique characteristics that only avid listeners of that style would be able to distinguish between.[258] What may sound the same to a non-country fan might be easily recognizable as a distinctive musical characteristic to a lover of country music.[259]

As a society, we value advances in digital technologies.[260] The creation of on-demand streaming services has allowed the world of music

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249. *See id.*

250. Heath, *supra* note 110.

251. *Id.*

252. TIMOTHY D. TAYLOR, STRANGE SOUNDS: MUSIC, TECHNOLOGY AND CULTURE 19 (Routledge, 2001).

253. Heath, *supra* note 110.

254. *See supra* Subpart I.D.

255. *Id.*

256. Heath, *supra* note 110.

257. ROY SHUKER, POPULAR MUSIC: THE KEY CONCEPTS 99–100 (Routledge, 2nd ed. 2005).

258. *Id.*

259. *Id.*

260. CRAIG, *supra* note 243.

to advance, and fans to get more out of their listening experience. Unfortunately, with those advances, the shift in music consumption has created an inadequate "ordinary observer." To better cater to a world of on-demand streaming, the Intended Audience Test should be adopted in all music infringement cases. With the adaptation of a more effective copyright system, technology's power and reach will continue to prosper.[261]

C. *Extending the Intended Audience Test for Musical Works to Better Promote the Main Purpose of Copyright Law*

The Intended Audience Test would better support the purpose of copyright law if applied to all music infringement cases. As previously explained, there are two competing interests of copyright law—granting creators rights over their works and the utilitarian function to benefit the public domain.[262] However, copyright jurisprudence is clear that a benefit to the public domain, with a constant flow of creative works, always outweighs the former.[263]

The current Ordinary Observer Analysis applied in music infringement cases results in misguided and inaccurate subjective determinations of substantial similarity, which can eventually have disastrous effects on the number of creative works produced for the public domain.[264] For example, a 2014 study measured the factors used by the fact-finder, acting as the "ordinary observer," when making the subjective determination in infringement cases.[265] The study hypothesized that when given additional information regarding the works and the creators' efforts, as well as identifying one party as the "wrongdoer," the "ordinary observer" found more similarities and less dissimilarities resulting in greater plaintiff-friendly results.[266] The result suggests the "ordinary observer" is in fact sensitive to additional information presented to him, and as a result, his subjective determination is subject to multiple cognitive and moral biases.[267] This shows the "ordinary observer" has the potential to make inaccurate findings on substantial similarity.[268]

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261. *Id.* at 1–2.

262. *See supra* Section I.A.3.

263. *See supra* Section I.A.3.

264. *See* DEMERS, *supra* note 225, at 10.

265. *See* Balganesh et al., *supra* note 178 (testing the substantial similarity determinations of subjects presented with a pair of images and criteria normally given to fact-finders during the course of infringement actions).

266. *Id.* at 271.

267. *Id.* at 289.

268. *Id.*

This study also detailed the extensive process the "ordinary observer" embarks on when making subjective determinations.[269] First, one must determine the similarities and dissimilarities between the two works.[270] Despite seeming fairly straightforward, the "ordinary observer" oftentimes requires more background knowledge to recognize the ways in which the works are either similar or dissimilar, making the process quite complex.[271] Further, the nature of the discretion that goes into making a subjective determination of what is "substantial" enough similarity creates deviations in the standard being applied.[272] In short, the nature of this subjective analysis creates inconsistent results because the process is inherently complex and prone to personal biases.[273]

Aside from inaccurate findings of substantial similarity based on inevitable biases, the lay observer often lacks knowledge regarding the complexities of musical composition, allowing for injudicious subjective analyses.[274] For example, due to society's aural appreciation of music, hearing-based evaluations can dominate subjective determinations and confuse an actual finding of infringing expression with what might just sound the same.[275] Another musical hurdle for the "ordinary observer" is deciding if what is musically similar is inherent due to the subject matter, or if it actually amounts to appropriation of copyrighted material.[276] For example, many phrases in rock songs end with a "cadence" to finish off the musical phrase and connect it smoothly with the next.[277] Without a foundational knowledge of rock music composition, the "ordinary observer" may find similarities in the cadence of two rock songs—a well-known characteristic to musicians and industry professionals—and use it

269. *Id.* at 275.

270. *Id.*

271. *Id.*

272. *Id.* at 275–76 (arguing that depending on the particular "ordinary observer" the determination of what is considered "substantial" similarity could include anything from "more than not" to "highly").

273. *Id.* at 276 ("[T]he substantial similarity test requires jurors and judges to work through a complex and ill-defined cognitive task, and is therefore vulnerable to biased reasoning."); *see* Manta, *supra* note 127, at 1338–43 (arguing the reasonable listener test is prone to "hindsight bias," when the fact finder is more likely to find substantial similarity once probative copying has been established, "anchoring bias," which occurs when the plaintiff's original work becomes the anchor to measure the defendant's work against, and "confirmation bias," which leads the fact finder to make a determination consistent with the issue at hand).

274. Craig & Laroche, *supra* note 85, at 58.

275. *Id.* ("Musical laypersons are more likely to conflate [aural and musical similarity] because of their unspecialized understanding of music.").

276. *Id.*

277. WALTER EVERETT, THE FOUNDATIONS OF ROCK: FROM "BLUE SUEDE SHOES" TO "SUITE: JUDY BLUE EYES" 134–35 (Oxford Univ. Press, 2009).

as a basis for finding substantial similarity.[278]

With an influx of plaintiff-friendly decisions regarding substantial similarity, secondary musicians are unfairly accused for unlawful copying.[279] This could discourage the wrongfully accused, as well as other musicians afraid of liability, from creating new music—especially music inspired by past musical works.[280] Also, in the long term, this system creates a lower quality of musical works in the public domain because new works lack the inspirations and influences due to the creators' fears of copyright liability.[281]

Finding substantial similarity within the specificities and technicalities of musical composition is a task too burdensome for the "ordinary observer" to bear.[282] When a court utilizes the Intended Audience Test rather than the traditional Ordinary Observer Analysis, a presumption of higher skill and expertise regarding the subject matter of the works at issue exists.[283] This means the designated "intended audience" will find similarities where the "ordinary observer" will not, and is better qualified to determine if those similarities are the kind that warrants a finding of unlawful appropriation.[284]

Erroneous infringement analyses by the "ordinary observer" hinder the core purpose of copyright law by unduly restricting the creative process.[285] Reliance on the subjective findings of an "ordinary observer" risks over-inclusion of creative works meant for the public domain under

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278. Craig & Laroche, *supra* note 85, at 60.

279. *Id.* at 56 (concluding the potential biases associated with the "ordinary observer" analysis result in decisions favoring the plaintiff claiming infringement over the defendant tasked with refuting the claim).

280. DEMERS, *supra* note 225; *see* Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers, *supra* note 21, at 8.

> The inherent danger [in the "Blurred Lines" verdict] is that, without drawing a proper line . . . between what is an influence and what is an infringement, future songwriters do not know whether their "influence" is going to land them with the next hit record or land them in court—or both, as demonstrated in this case.

Id.

281. DEMERS, *supra* note 225; *see* Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers, *supra* note 21, at 8.

> [W]hen a budding songwriter is contemplating the composition of a song, it is axiomatic that he or she is going to think twice before he or she writes a song that "feels" like a Marvin Gaye song or any other artist's song, always with one foot in the recording studio and one foot in the courtroom.

Id.

282. Craig & Laroche, *supra* note 85, at 57.

283. *See supra* Subpart III.A.

284. Craig & Laroche, *supra* note 85, at 58.

285. *Id.* at 51.

the umbrella protection of copyright law—a grave policy concern for this area of law.[286]

Also, more consistent and accurate holdings would put litigants, judges, and critics of the current system at ease. Adopting the Intended Audience Test in music infringement cases will not only provide more accurate subjective determinations of substantial similarity, but also increase the number and quality of musical works in the public domain.[287] It will better promote copyright law's ultimate goal—enriching the public domain with quality musical works.

CONCLUSION

Imagine a world without music. Silence would ring down the aisles as you grocery shop on Sunday mornings. Pianos would only serve as overly elaborate coffee tables. Without musical cues, moviegoers would be unable to detect dramatic moments. Music infiltrates almost every facet of our world. The law must promote as much of this creative spirit as possible. However, as the current copyright system stands, the law cultivates the opposite effect.

Due to its unique production characteristics, music creation is different from any other form of authorship—warranting a specialized test for infringement. Further, as technology continues to break new ground, music discovery and consumption are shifting to a more online platform. While the growth of on-demand streaming services has dramatically changed the music experience for listeners, the test for copyright infringement has lagged behind.

The greatest concern under the current copyright regime is that by continuing to utilize the "ordinary observer" as the subjective measure for unlawful appropriation, the copyright system produces inaccurate infringement results. By unfairly punishing musicians, a sense of fear is created—fear that by trying to represent an era of music and paying homage to a legendary musician, such as the case with "Blurred Lines," an artist opens himself up to the possibility of grave copyright liability. The current copyright system jeopardizes the future of music creation.

Similar to the decision in *Copeland v. Bieber*,[288] courts are often reluctant when confronted with the opportunity to apply the Intended Audience Test to music infringement cases. The creation of the Intended Audience Test for software infringement analyses, as well as the extension of the test to other forms of authorship, exemplifies situations where the

286. *Id.* at 67.

287. *Id.* at 51.

288. 789 F.3d 484 (4th Cir. 2015).

need for specialization and expertise in the subjective measure for unlawful appropriation is necessary. By adopting the Intended Audience Test a more specialized group would decide the subjective measure required in the substantial similarity analysis. This will result in a heightened standard of analysis for infringement cases, and produce more accurate and efficient results. Musicians will be able to create without fear of liability, and the quality of music in the public domain would increase significantly.