

WILLIAMS V. GAYE: BLURRING THE LINES OF COPYRIGHT INFRINGEMENT IN MUSIC

Paymaneh Parhami[†]

I. INTRODUCTION

Music is one of the oldest and most widely enjoyed modes of artistic expression, yet the protection it receives under copyright law remains a subject of continuing debate. When composers draw inspiration from previous works in the creation of their own new works, to what extent should the law control, penalize, or compensate for the use of such inspiration? Contemporary singer-songwriters Pharrell Williams, Robin Thicke, and Clifford Harris, Jr., composers of the 2013 global best-selling single “Blurred Lines,”¹ proudly revealed in several interviews that they had received inspiration for their hit song from Marvin Gaye’s 1977 hit song “Got to Give It Up.”² This revelation inspired a flurry of events that began with a copyright infringement demand by Marvin Gaye’s children on Thicke and Williams, and culminated in the Central District of California’s affirmation of a jury verdict of infringement, awarding the Gayes \$3,188,527.50 in actual damages, profits of \$1,768,191.88 against Thicke, and \$357,630.96 against Williams and More Water from Nazareth Publishing, and a running royalty of 50% of the future songwriting and publishing revenues from “Blurred Lines.”³

The Ninth Circuit affirmed this verdict in *Williams v. Gaye* on March 21, 2018, holding that “Blurred Lines” did in fact infringe the Gayes’ copyright in “Got to Give it Up.”⁴ The court accepted the district court’s characterization of the issue as a factual one, and reasoned that the jury had correctly confined

DOI: <https://doi.org/10.15779/Z380R9M466>

© 2019 Paymaneh Parhami.

[†] J.D. Candidate, 2020, University of California, Berkeley, School of Law.

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

2. Stelios Phili, *Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film*, GQ (May 6, 2013), <https://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy> [<https://perma.cc/JJX3-5TBS>] (On the origin of “Blurred Lines,” Robin Thicke stated, “Pharrell and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye’s ‘Got to Give It Up.’ I was like, ‘Damn, we should make something like that, something with that groove.’”).

3. *See Bridgeport Music*, 2015 WL 4479500.

4. *Williams v. Gaye*, 885 F.3d 1150, 1160 (9th Cir. 2018).

its analysis to solely protectable elements since it only considered the sheet music of “Got to Give It Up” on file at the Copyright Office.⁵

When asked about his reaction to the jury verdict, Robin Thicke emphasized that he “know[s] the difference between inspiration and theft. I’m constantly inspired, but I would never steal.”⁶ The Ninth Circuit’s decision, however, blurs this line between inspiration and theft. By failing to distinguish between protectable and unprotectable elements in music, the Ninth Circuit ignores the various limiting doctrines of copyright law that exclude certain elements from legal protection. Its decision imposes a chilling effect on musical creativity and innovation by leaving the door open for future composers to seek copyright protection over entire styles and grooves.

This Note seeks to show how a particular limiting doctrine of copyright law, the *scenes a faire* doctrine, constitutes an already-existing yet underutilized tool that can bring the tradition and necessity of sharing common elements in music into legal consideration. Part II introduces the various legal rules for determining copyright infringement, with a particular emphasis on the Ninth Circuit’s controversial approach. Part III summarizes the facts and holding of *Williams v. Gaye*. Part IV first argues that the protectability of musical elements should be a question of law, not fact. Second, it shows how courts have used the *scenes a faire* doctrine in music cases to exclude common elements from protection. Third, it argues that both the traditions in music history and the necessities of musical innovation require the sharing of common elements between works. Finally, it provides some examples of alleged similar elements between “Blurred Lines” and “Got to Give It Up” and shows how each should have been classified as *scenes a faire*, hence falling out of the scope of copyright protection. Part V concludes with an overarching suggestion for future courts and also highlights one possible avenue for reform.

II. LEGAL BACKGROUND

A. COPYRIGHT INFRINGEMENT FOR MUSICAL WORKS

1. *Proving Copyright Infringement Requires a Showing of Copying and Improper Appropriation*

When determining copyright infringement generally, courts require a showing of both copying and improper appropriation.⁷ Copying signifies that the work was copied from an existing copyrighted work rather than

5. *Id.* at 1169.

6. Jody Rosen, *Robin Thicke on ‘Blurred Lines’ and Learning From His Mistakes*, N.Y. TIMES (July 1, 2015), <https://www.nytimes.com/2015/07/05/arts/music/robin-thicke-on-blurred-lines-and-learning-from-his-mistakes.html> [https://perma.cc/2NRZ-PTVA].

7. See PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 10.0, 10:1–2 (3d ed. 2018).

independently created.⁸ Improper appropriation indicates that the defendant copied too much protected expression—in other words, actionable copying as a legal proposition.⁹ In theory, each of these tests should constitute a separate stage of analysis.¹⁰ In *Arnstein v. Porter*, a musical infringement case, the Second Circuit described the tests for copyright infringement in a clear and systematic fashion.¹¹ The court noted that only after copying is established, either by direct or circumstantial evidence, does the issue of improper appropriation arise.¹² In practice, however, courts sometimes blend these two steps or use some of the same evidence to prove both copying and improper appropriation.¹³

To determine copying, courts use both direct and circumstantial evidence.¹⁴ In some cases, courts use direct evidence to prove that the defendant copied from the plaintiff's composition.¹⁵ Courts, however, routinely rely on circumstantial evidence to prove copying.¹⁶ There are two typical types of circumstantial evidence: access (proven through wide dissemination or dealings with a publisher or record company) and substantial similarity (proven through melodic, harmonic, and rhythmic similarities and/or parallel musical “errors”).¹⁷ The Ninth Circuit, using the inverse ratio rule, allows higher showings of access to lower the degree of substantial similarity required, and vice versa.¹⁸

To determine improper appropriation, courts use a variety of tests that operate somewhat differently depending on the subject matter of the works in question.¹⁹ In musical infringement cases, courts typically apply the protected

8. 2 MELVILLE D. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.01[A] (2018).

9. 4 MELVILLE D. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[B] (2018).

10. *Id.*

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

12. *Id.* at 468.

13. *See* GOLDSTEIN, *supra* note 7, at § 10.3, 10:44–46.

14. *Id.* at 10:46.

15. *See, e.g.*, *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984).

16. *See, e.g.*, *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 (11th Cir. 1986); *Nom Music, Inc. v. Kaslin*, 227 F. Supp. 922, 927 (S.D.N.Y. 1973).

17. *See, e.g.*, *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *ABKO Music, Inc. v. Harrison's Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *Nordstrom v. Radio Corp. of Am.*, 251 F. Supp. 41, 42 (D. Colo. 1965) (holding that defendant's composition replicated “plaintiff's error in introducing eight bars of new material from the twenty-fifth to the thirty-second bars of his song, rather than only four bars needed to complete the correct metric structure”).

18. *See, e.g.*, *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

19. *See* GOLDSTEIN, *supra* note 7, at 10:2.

expression and audience tests to determine improper appropriation.²⁰ The protected expression test requires the plaintiff to show that at least some of the elements that the defendant copied constitute protected subject matter.²¹ To determine protected expression, courts must usually first dissect the plaintiff's composition to determine which elements are protectable by copyright law, and then dissect the defendant's work to determine which of the plaintiff's protected elements it copied.²² Courts essentially take a qualitative approach to determining protected subject matter, as they consistently reject quantitative approaches such as the "six bar rule" that reflects some musicians' apparent belief that any phrase less than six bars long can be copied by others.²³ Courts usually focus heavily on melody, since it offers the greatest potential for originality and memorability, although they have sometimes protected rhythm, harmony, and tone color as well.²⁴

2. *Limiting Doctrines Filter Out Unprotectable Elements from Copyright Protection*

Courts also use a variety of doctrines to identify and filter out unprotectable elements from copyright protection as part of the protected expression analysis.²⁵ For one, the "idea/expression" dichotomy reflects the doctrine that only expressions of ideas, not ideas themselves, may be protected by copyright; thus, all unprotectible "ideas" must be filtered out from the analysis.²⁶ This boundary between "idea" and "expression," however, is imprecise. As Judge Learned Hand observed: "Nobody has ever been able to fix that boundary, and nobody ever can."²⁷ "No principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*."²⁸ In the context of music, the Supreme Court stated: "A musical composition is an intellectual creation which first exists in the mind of the composer The statute has

20. *See id.* at 10:2–3. In cases involving literary works, however, courts rarely apply the audience test explicitly, focusing instead on the protected expression test. In cases involving pictorial and sculptural works, courts sometimes decline to test protected expression and focus instead on the audience test. In cases involving factual and functional works, such as computer programs, courts tend to focus primarily on protected expression.

21. *Id.* at 10:1.

22. *Id.* at 10:52.

23. *Id.* at 10:52–53.

24. *See, e.g.,* *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 397 (S.D.N.Y. 1952) ("[W]e find that the rhythmic pattern of both songs in suit is virtually identical and that the high point of the melody of each song occurs at precisely the same place.").

25. *See* NIMMER & NIMMER, *supra* note 9, at § 13.03[B][2].

26. *See* 17 U.S.C. § 102(b) (2018); *see also* *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("Copyright . . . protection is given only to the expression of an idea—not the idea itself.").

27. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

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

not provided for the protection of the intellectual conception apart from the thing produced.”²⁹ Over time, the idea/expression doctrine has evolved to the point where “idea” simply means everything that is not expression.³⁰ 17 U.S.C. § 102(b) lists a whole category of items to be excluded from copyright protection, such as procedures, systems, processes, methods of operation, principles, and concepts.³¹ The term “idea” has come to refer to all of these unprotected categories.³²

Additionally, copyright does not protect material in the public domain, even when incorporated into a copyrighted work.³³ The public domain refers to a “hodgepodge of unprotectible matter [created] without overarching justification” by the Copyright Acts of 1909 and 1976, court decisions, and Copyright Office regulations.³⁴ Some common categories of the public domain include works whose copyright has expired, works whose copyright protection was forfeited, works ineligible for copyright protection, and/or works dedicated to the public domain.³⁵ The Ninth Circuit has warned that “we must be careful in copyright cases not to cheat the public domain.”³⁶

The doctrines of merger and *scenes a faire* also render certain elements uncopyrightable.³⁷ The merger doctrine states that when expression “merges” with idea, such that a given idea is inseparably tied to expression, the expression may be freely copied in order to avoid conferring a monopoly over the idea itself.³⁸ The idea and expression are said to have “merged” where there is essentially only one way, or a very limited number of ways, to express the idea, or where the “expression is essential to the statement of the idea.”³⁹ For similar reasons, the *scenes a faire* doctrine (in French, meaning “scenes that must be done”) precludes certain elements that are standard, stock, or common in

29. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908).

30. See GOLDSTEIN, *supra* note 7, at 2.3.1.

31. See 17 U.S.C. § 102(b) (2018).

32. See GOLDSTEIN, *supra* note 7, at 2.3.1.

33. See, e.g., *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1494 (10th Cir. 1993), *cert. denied*, 510 U.S. 916 (1993); see also *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992) (“Such material is free for the taking . . .”).

34. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 976 (1990).

35. See Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, in *LAND AND CONTEMPORARY PROBLEMS* 147, 149–50 (James Boyle, ed., 2003).

36. *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003).

37. See NIMMER & NIMMER, *supra* note 9, at § 13.03[A][4].

38. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 535 (6th Cir. 2004).

39. *CCC Info. Servs. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 68 (2d Cir. 1994); see also *Warren Publ’g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1519 n.27 (11th Cir. 1997).

a particular category from copyright protection.⁴⁰ These elements follow naturally from a work's theme rather than from the author's creativity.⁴¹ For example, "foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop, are venerable and often-recurring themes of police fiction," and hence not protectable.⁴² In the context of music, one court stated that choosing a barroom with a jukebox as the setting in which to unfold the familiar theme of a broken-hearted lover seeking solace in country music "cannot be attributed to any unique creativity on the part of the songwriter."⁴³

After applying the protected expression test in which unprotectible elements are filtered out, courts will then apply the audience test, which requires that the intended audience find elements in the defendant's work to be substantially similar to protected elements in the plaintiff's work.⁴⁴ The audience test poses the problem that sometimes works, which upon dissection appear the same, note-for-note, may sound different to the intended audience, while works that are different upon dissection may sound similar to the intended audience.⁴⁵

Each of these tests and subtests for copying and improper appropriation poses unique challenges for courts that consider copyright infringement in musical works. The vocabulary of music (twelve notes) is much more limited than the vocabulary of literature, drama, and the visual arts.⁴⁶ Further, "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."⁴⁷ There are also a limited number of tempos and rhythms, and "these appear to have been long since exhausted; originality of rhythm is a rarity, if not an impossibility."⁴⁸ The limited vocabulary and tools of music composition decrease the likelihood that similarities alone can prove copying.⁴⁹ As the Second Circuit stated, "with the relatively few musical

40. See NIMMER & NIMMER, *supra* note 9, at § 13.03[F][3].

41. See *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 319 (6th Cir. 2004).

42. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).

43. *Black v. Gosdin*, 740 F. Supp. 1288, 1293 (M.D. Tenn. 1990).

44. See GOLDSTEIN, *supra* note 7, at 10:1–2.

45. See Jeffrey G. Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. (ASCAP) 81 (1977).

46. See generally DAVID BOYDEN, *AN INTRODUCTION TO MUSIC* (2d ed. 1971).

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

48. *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952).

49. See, e.g., *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973) (holding that striking similarities that suffice to conclude issue of copying apart from proof of access must be "of a kind that can only be explained by copying, rather than by coincidence,

intervals that exist and the vast amount of music in the public domain it is rash to infer that a sequence that may be found in a melody is copied from any particular song containing the same sequence, rather than taken from other sources.”⁵⁰ The limited musical tools also decrease the value of similarities in proving improper appropriation, since fewer musical phrases will merit copyright protection.⁵¹

3. *Ninth Circuit Approach to Determining Copyright Infringement*

The following two Sections discuss in further depth two tests unique to the Ninth Circuit’s approach to determining copyright infringement.

a) Inverse Ratio Rule for Copying

To establish copying, the Ninth Circuit uses the inverse ratio rule when assessing the “inextricable” relationship between access and substantial similarity.⁵² This rule operates like a sliding scale: the greater the showing of access, the lower the showing of substantial similarity is required.⁵³ Thus, a plaintiff’s “case is strengthened considerably by [the defendant’s] concession of access to their works.”⁵⁴ Likewise, the greater the showing of substantial similarity supporting an inference of copying, the lower the evidence of access need be.⁵⁵ The Ninth Circuit has explicitly stated that this rule “assists only in proving copying, not in proving unlawful appropriation.”⁵⁶ Thus, after proving copying rather than independent creation, the plaintiff must still prove that the defendant’s copying was of “protected expression that amounts to unlawful appropriation.”⁵⁷ The Second and Seventh Circuits reject the inverse ratio

independent creation, or prior common source”); *Jewel Music Publ’g Co. v. Leo Feist, Inc.*, 62 F. Supp. 596, 598 (S.D.N.Y. 1945) (“Similarity, even a striking similarity, may be arrived at honestly.”).

50. *Arnstein v. Broadcast Music*, 137 F.2d 410, 412 (2d Cir. 1943).

51. *See, e.g., Brodsky v. Universal Pictures Co.*, 149 F.2d 600, 601 (2d Cir. 1945) (“Everyone, acquainted with actions for the invasion of musical copyrights, knows how often the same short musical sequences recur spontaneously, and what a feeble proof of plagiarism is their reappearance in a later composition.”); *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976) (finding the four-note “building block” unprotectable).

52. *See Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

53. *See id.* at 485.

54. *Metcalf v. Bochco*, 294 F.3d 1069, 1075 (9th Cir. 2002).

55. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018).

56. *Id.*

57. *Id.*

rule.⁵⁸ The Second Circuit has referred to the rule as an “ingeniously fabricated principle of law” that has no basis in the federal law of copyright.⁵⁹

Commentators have also criticized the use of the inverse ratio rule to determine copying. For example, Melville Nimmer finds the notion that powerful proof of access “can substitute for demonstration of the requisite degree of substantial similarity” inherently flawed.⁶⁰ Since a defendant may have high access to a plaintiff’s work and still produce a non-actionable product, “access logically exerts no impact on copying as a legal matter.”⁶¹ William Patry reasons that “the inverse ratio theory confuses fundamental principles of infringement analysis: access is relevant only in establishing the act of copying, not in establishing the degree thereof.”⁶² In other words, higher showings of access should not lower the degree of substantial similarity required. Access should instead be treated as a fixed requirement that, once met, has no influence on the second requirement of substantial similarity. The Second Circuit, in its rejection of the theory, described it as “a superficially attractive apophthegmatic” that leads to the illogical outcome that proof of actual access will render a showing of similarities entirely unnecessary.⁶³ Nonetheless, the Ninth Circuit continues to use this test as the standard for determining the degree of substantial similarity required to prove copying.

b) Intrinsic and Extrinsic Tests for Substantial Similarity

Once the Ninth Circuit establishes copying, it then uses two tests—the intrinsic and extrinsic tests—to determine whether the plaintiff’s and defendant’s works are substantially similar for purposes of improper appropriation.⁶⁴ In order for a jury to make a finding of substantial similarity, it must find evidence on both tests.⁶⁵ The extrinsic test is objective, considering “whether two works share a similarity of ideas and expression as measured by external, objective criteria.”⁶⁶ The test requires “analytical dissection of a work and expert testimony.”⁶⁷ For analytical dissection, the works must be broken “down into their constituent elements” to compare “those elements for proof

58. See *Arc. Music Corp. v. Lee*, 296 F.2d 186 (2d Cir. 1961); see also *Peters v. West*, 692 F.3d 629 (7th Cir. 2012) (stating that it has never endorsed the proposition that “a ‘high degree of access’ justifies a ‘lower standard of proof’ for similarity”).

59. *Arc. Music Corp.*, 296 F.2d at 187.

60. NIMMER & NIMMER, *supra* note 9, at § 13.03[D].

61. *Id.*

62. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:91 (2018).

63. *Arc. Music Corp.*, 296 F.2d at 187.

64. See *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

65. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003).

66. *Swirsky*, 376 F.3d at 845.

67. *Id.*

of copying as measured by ‘substantial similarity.’”⁶⁸ On a motion for summary judgment, a district court applies only the extrinsic test, as the intrinsic test is left solely for the trier of fact.⁶⁹ The Ninth Circuit maintained that in analyzing musical compositions under the extrinsic test, it has “never announced a uniform set of factors to be used . . . music is comprised of a large array of elements, some combination of which is protectable by copyright.”⁷⁰ This dissection, however, requires the consideration of melody, harmony, rhythm, and tempo in combination—“to pull these elements out of a song individually, without looking at them in combination, is to perform an incomplete and distorted musicological analysis.”⁷¹

Conversely, the intrinsic test is subjective, asking “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”⁷² This test involves only the response of the ordinary observer—dissection and expert testimony are impermissible.⁷³ The trier of fact may “find that the over-all impact and effect indicate substantial appropriation,” even if “any one similarity taken by itself seems trivial.”⁷⁴

Not all circuits use the extrinsic and intrinsic tests as part of the infringement analysis. The Second Circuit, for example, uses a different two-step analysis, in which the first step—dissection—determines whether copying has occurred.⁷⁵ During this step, expert testimony may, but need not be, permitted.⁷⁶ If copying has been proven, the second step then determines whether the copied elements resulted in substantial similarity in expression between the parties’ works.⁷⁷ Expert testimony is not permitted at this step, with the exception of computer program infringement.⁷⁸ While the Second Circuit does often employ the Ninth Circuit’s intrinsic “total-concept-and-

68. *Rice v. Fox Broad. Co.*, 148 F. Supp. 2d 1029, 1051 (C.D. Cal. 2001).

69. *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010).

70. *Swirsky*, 376 F.3d at 849.

71. *Id.* at 848.

72. *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991).

73. *See* PATRY, *supra* note 62, at § 9:235.

74. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1169 (9th Cir. 1977).

75. *See* PATRY, *supra* note 62, at § 9:137; *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (providing a foundational opinion which established the basic two-step analysis); *see also* *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958).

76. PATRY, *supra* note 62, at § 9:137.

77. *Id.*

78. *Id.*

feel” test as part of this second step, it does not split up the analysis into intrinsic and extrinsic stages.⁷⁹

Some scholars have criticized the Ninth Circuit’s use of the intrinsic and extrinsic tests in determining substantial similarity. For example, Patry questions, “why two different examinations of the same issue, similarity in expression?”⁸⁰ He maintains that the double examination of similarity is futile, and that “the only apparent difference between the objective and subjective inquiries is that the subjective inquiry is to be determined by the trier of fact acting as an ordinary observer without expert testimony, while the objective inquiry may be assisted by experts and ‘analytic dissection.’”⁸¹ In addition to being redundant, the objective test is not truly objective—“the reaction of an expert is every bit as subjective as that of a member of a jury.”⁸² Moreover, in the intrinsic analysis, the jury will find it hard to ignore the expert testimonies when determining substantial similarity.⁸³ Nimmer likewise criticizes the “total-concept-and-feel” test as “threatening to subvert the very essence of copyright,” since “concepts” should not be protectable by copyright law, and trying to capture the “feel” of a work runs counter to analysis.⁸⁴

Mark Lemley criticizes both the Ninth and Second Circuits’ approaches to determining substantial similarity, arguing that under these approaches jurors will not exclude unprotected material from comparison.⁸⁵ Since juries are not properly educated on the differences between protectable and unprotectable elements, they are more likely to find infringement where they should not.⁸⁶ For example, he notes, jurors will not know which elements are *scenes a faire*, and hence unprotectable, in the music industry without some expert testimony on standard chord progressions.⁸⁷ The intrinsic test, however, makes it impossible to use analytical dissection or expert testimony.⁸⁸ Thus, he maintains that expert testimony and dissection of elements should have a more central role in both the copying and improper appropriation prongs of

79. *Id.* at § 9:235; *see also* *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 92 (2d Cir. 1976). Where parties’ works contain a significant amount of public domain material, the Second Circuit instead uses the “more-discerning-observer” test, which requires that public domain materials be left out of the comparison of the look and feel of the two works. *See* PATRY, *supra* note 62, at § 9:137.

80. PATRY, *supra* note 62, at § 9:235.

81. *Id.*

82. *Id.*

83. *Id.*

84. NIMMER & NIMMER, *supra* note 9, at § 13.03[A][1][c].

85. Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 737–38 (2010).

86. *Id.* at 739.

87. *Id.* at 738.

88. *Id.*

analysis.⁸⁹ Further, the dissection of unprotectable elements could be treated as a question of law, not fact, reserving the question of whether the copying was unlawful for the court.⁹⁰

III. CASE SUMMARY

A. FACTS

“Blurred Lines” was the global best-selling single in 2013.⁹¹ In June 2012, Pharrell Williams and Robin Thicke wrote and recorded “Blurred Lines,” with Clifford Harris, Jr. separately writing and recording a rap verse that was added to the track seven months later.⁹² The song has been described as a “bubbly bit of disco-shuffling R&B” with racy content.⁹³ Others have noted its “blending [of] vintage funk and modern flair.”⁹⁴ While some of the technicalities were disputed at trial, the song was widely believed to sample and be inspired by the sound of Marvin Gaye’s song “Got to Give It Up.”⁹⁵

In 1977, Marvin Gaye released the hit song “Got to Give It Up,” reaching number one on Billboard’s Hot 100 that same year.⁹⁶ The song has disco and R&B influences, with doo-wop styled scatting and a funk and jazz-influenced vamp.⁹⁷ In 1977, Jobete Music Company, Inc. registered “Got to Give It Up” with the United States Copyright Office, depositing six pages of handwritten sheet music.⁹⁸ As Gaye did not write or read sheet music, an unidentified transcriber notated the sheet music, attributing the song’s words and music to

89. *Id.* at 740.

90. *Id.* at 741.

91. *Williams v. Gaye*, 885 F.3d 1150, 1160 (9th Cir. 2018).

92. *Id.*

93. Chris Payne, *R&B Single Review: “Blurred Lines” Robin Thicke*, BILLBOARD (Apr. 17, 2013), <https://www.billboard.com/biz/articles/news/1558928/rb-single-review-blurred-lines-robin-thicke> [<https://perma.cc/58YC-YWPL>].

94. Jackson Howard, *Single Review: Robin Thicke’s “Blurred Lines” Successfully Samples Classic Beats for Layered Product*, MICH. DAILY (Apr. 4, 2013), <https://www.michigandaily.com/arts/04single-review-robin-thicke-blurred-lines-successfully-samples-classic-beats-produce-layered-pr04> [<https://perma.cc/3HKK-BJSH>].

95. *See id.*; *see also* Phili, *supra* note 2. On the origin of “Blurred Lines,” Robin Thicke in an interview stated, “Pharrell and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye’s ‘Got to Give It Up.’ I was like, ‘Damn, we should make something like that, something with that groove.’”

96. *Gaye*, 885 F.3d at 1160.

97. *See Got to Give It Up—Marvin Gaye Song Info*, ALLMUSIC, <https://www.allmusic.com/song/got-to-give-it-up-mt0030492705> [<https://perma.cc/9SZ2-49ET>] (last visited Dec. 23, 2019).

98. *See Gaye*, 885 F.3d at 1160.

Marvin Gaye.⁹⁹ The song is now owned by Frankie Christian Gaye, Nona Marvisa Gaye, and Marvin Gaye III, Gaye's children.¹⁰⁰

B. PROCEDURAL HISTORY

After hearing “Blurred Lines,” the Gayes made an infringement demand on Williams and Thicke, threatening to initiate litigation for copyright infringement if they did not pay a monetary settlement of the Gayes' claim.¹⁰¹ When negotiations failed, Thicke, Williams, and Harris (“Thicke Parties”) filed for a declaratory judgment of non-infringement in the United States District Court for the Central District of California on August 15, 2013.¹⁰² The Gayes counterclaimed against the Thicke Parties, alleging that “Blurred Lines” infringed the copyright in “Got to Give It Up.”¹⁰³

The district court denied the Thicke Parties' subsequent motion for summary judgment on October 30, 2014.¹⁰⁴ The court determined that the lead sheet music that Marvin Gaye deposited with the Copyright Office defined the scope of protectable materials since “Got to Give It Up” was registered while the 1909 Copyright Act was in effect.¹⁰⁵ The court thus confined its attention to the sheet music in conducting the extrinsic test for substantial similarity of the two works.¹⁰⁶ In support of their motion for summary judgment, the Thicke Parties presented evidence that some of the musical elements identified by Judith Finell, a musicologist employed by the Gayes as an expert witness, in her preliminary report and declaration appeared in the sound recording of “Got to Give It Up” but not in the deposit copy.¹⁰⁷ Thus, the court treated those elements as unprotected and filtered them out in its “analytic dissection” of the two works.¹⁰⁸ Even after this filtering, the court concluded that a reasonable jury could still find infringement, and thus sent the issue to trial.¹⁰⁹ It appears that at the summary judgment stage, the Thicke Parties did not

99. *See id.*

100. *See id.*

101. Complaint for Declaratory Relief, ¶ 16, Williams v. Bridgeport Music, No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Aug. 15, 2013).

102. *Id.*

103. *Id.*

104. Williams v. Bridgeport Music, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *5 (C.D. Cal. July 14, 2015).

105. *Id.* The 1909 Copyright Act, unlike the 1976 Act, required the use of visible notation to acquire protection in a composition. Therefore, under this Act, a musical work had to be reduced to sheet music or other manuscript form in order to obtain copyright protection. *See* 1 MELVILLE D. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2018).

106. *Bridgeport Music*, 2015 WL 4479500, at *5–6.

107. *Id.* at *5.

108. *Id.*

109. *Id.*

submit any further evidence showing the unprotectability of certain musical elements, nor did the court rule that any additional elements were unprotectable as a matter of law. The court simply filtered out the elements that were not present in the deposit copy, but treated all the elements in the deposit copy as protectable by copyright law without citing any rationales for this approach.

At trial, the court instructed the jury that it must find both access and substantial similarity, using the inverse ratio rule, to establish infringement.¹¹⁰ After a seven-day trial and a two-day deliberation period, the jury returned a verdict on March 10, 2015, finding by a preponderance of the evidence that the Thicke Parties “infringed the Gaye Parties’ copyright in the musical composition ‘Got to Give It Up’ in ‘Blurred Lines.’”¹¹¹ On May 1, 2015, the Thicke Parties moved for judgment as a matter of law (JMOL), declaratory relief, or a new trial.¹¹²

In their 50(b) motion for JMOL, the Thicke Parties argued that the musicologist Finell’s testimony should have been “precluded entirely,” and that the failure to do so or to hold a pretrial Daubert hearing constituted prejudicial error.¹¹³ They argued that reliable methodology did not support Finell’s opinion that certain elements were “implied” from the deposit copy even though they did not actually appear in it.¹¹⁴ Further, they argued that the jurors were exposed to unprotected musical elements about which they should not have heard.¹¹⁵ In rejecting this argument, the court stated that the protectability of the four-note “Theme X” sequence “was a question of fact for which expert testimony was appropriate [emphasis added].”¹¹⁶

The district court also denied the Thicke Parties’ request for a Rule 50(b) JMOL because they had failed to file a pre-verdict Rule 50(a) motion.¹¹⁷ While at the close of evidence on March 5, 2015, the Gayes stated their intention to “move under Rule 50 for judgment as a matter of law,” the Thicke Parties simply opposed this motion without explicitly moving for JMOL or stating an intent to do so.¹¹⁸ Thus, the court stated that the Thicke Parties had waived the right to move for JMOL and that “at most, they may seek review of the sufficiency of the evidence in support of the verdict to determine whether

110. *Id.*

111. *Id.* at *1. The jury also found that Harris and the Interscope Parties did not infringe this copyright.

112. *Id.* at *2.

113. *Id.* at *6.

114. *Id.*

115. *Id.*

116. *Id.* at *7 (emphasis added).

117. *Id.* at *3–4.

118. *Id.* at *4.

there was plain error.”¹¹⁹ Even if proper Rule 50(a) and 50(b) motions had been filed and the verdict were reviewed under the substantial evidence standard (a lower burden for the moving party than plain error), the court decided that the Thicke Parties had not shown that such relief was warranted.¹²⁰ Additionally, the court denied the Thicke Parties’ request for retrial because they had not demonstrated that the clear weight of the evidence, an even lower burden than the substantial evidence standard, favored retrial.¹²¹

In denying the defendants’ motion for JMOL, the court defined the question of protectability of musical elements as a factual question for the jury. Additionally, it relegated authority on this question to the musical expert employed by the Gayes. The court did not cite any authorities for treating the protectability of musical elements as a factual question, nor did it outline any relevant legal standards to which the jury or the musical experts should have adhered when deciding which elements were protectable. While the Thicke Parties admitted audio examples of prior art to argue that some elements of “Got to Give It Up” were unprotected *scenes a faire*, the court did not comment further or engage with this argument.¹²²

After rejecting additional arguments by the Thicke Parties and consistently deeming extrinsic similarity as “a matter on which reasonable experts could disagree,”¹²³ the district court affirmed the jury verdict of infringement.¹²⁴ It awarded the Gayes \$3,188,527.50 in actual damages, profits of \$1,768,191.88 against Thicke, and \$357,630.96 against Williams and More Water from Nazareth Publishing, and a running royalty of 50% of the Thicke Parties’ future songwriting and publishing revenues.¹²⁵ The court denied the Gayes’ motion for attorney’s fees and apportioned costs between the parties.¹²⁶ Both parties appealed.¹²⁷

On March 21, 2018, the Ninth Circuit affirmed on narrow grounds the district court’s ruling that “Blurred Lines” infringed the Gayes’ copyright in “Got to Give It Up.”¹²⁸ The court affirmed the district court’s instruction to the jury that it must find both access and substantial similarity to establish infringement using the inverse ratio rule, and that a finding of substantial

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at *11.

123. *Id.* at *9.

124. *Id.* at *47.

125. *Id.* at *47–48.

126. *Id.*

127. *Williams v. Gaye*, 885 F.3d 1150, 1163 (9th Cir. 2018).

128. *Id.* at 1160.

similarity must involve both extrinsic and intrinsic tests.¹²⁹ The court rejected the Thicke Parties' argument that the Gayes' copyright has only thin protection, reasoning instead that musical compositions are not confined to a narrow range of expression.¹³⁰ While noting that the issue remains unsettled, the court accepted, without deciding, the merits of the district court's ruling that the scope of the defendants' copyright was limited to the sheet music deposited with the Copyright Office, and did not extend to sound recordings, since "Got to Give It Up" was composed pre-1978 and thus fell under the 1909 Act.¹³¹

The court concluded that the district court's order denying summary judgment was not reviewable after a full trial on the merits, and that the district court did not abuse its discretion in denying a new trial.¹³² Further, the court held that the district court did not erroneously instruct the jury to consider unprotectable elements of "Got to Give It Up."¹³³ The court reasoned that the jury instruction was correct because the district court made clear that "the jury could consider only elements in the deposit copy."¹³⁴ Thus, "since the district court instructed the jurors that the deposit copy, not the commercial sound recording, was the copyrighted work in the case," the Ninth Circuit concluded that the jurors had correctly confined their analysis to solely protectable elements.¹³⁵

Additionally, the Ninth Circuit held that the district court did not abuse its discretion in admitting portions of Finell's testimonies.¹³⁶ Finally, the court held that the verdict was not against the clear weight of the evidence because there was at least some evidence of extrinsic and intrinsic similarity between the two songs.¹³⁷

Judge Jacqueline Nguyen wrote a vigorous dissenting opinion, arguing that the majority allows the Gayes to copyright a musical style, that the two songs are not objectively similar, and that the majority sets a dangerous precedent for future musicians and composers.¹³⁸ She noted that the *scenes a faire* doctrine bars common, stock, or standard elements from copyright protection, but did

129. *Id.* at 1163–64.

130. *Id.* at 1164–65.

131. *Id.* at 1165–66.

132. *Id.* at 1166–67.

133. *Id.* at 1168–70.

134. *Id.* at 1169.

135. *Id.*

136. *Id.* at 1170–71.

137. *Id.* at 1171–72.

138. *Id.* at 1183–97 (Nguyen, J., dissenting).

not elaborate on which specific elements in the works at hand were unprotectable under this doctrine.¹³⁹

The majority retorted that even if Judge Nguyen’s musical analysis were correct, the procedural limitations of this particular case prevented them from entering JMOL for the Thicke Parties.¹⁴⁰ The *scenes a faire* doctrine was only mentioned once by the majority in a footnote.¹⁴¹ Judge Nguyen replied that the majority relied too heavily on musical experts and mischaracterized the dispute as a factual one, when in fact “the only dispute regarding these similarities is their legal import—are the elements protectable, and are the similarities substantial enough to support liability for infringement?”¹⁴²

IV. ANALYSIS

Part IV first argues that the protectability of musical elements should be a question of law, not fact. Second, it shows how courts have used the *scenes a faire* doctrine generally and in music cases particularly to exclude common elements from protection. Third, it argues that both the traditions in music history and the necessities of musical innovation require the sharing of common elements between works. Finally, it provides some examples of alleged similar elements between “Blurred Lines” and “Got to Give It Up” and shows how each should have been classified as *scenes a faire*, hence falling out of the scope of copyright protection.

A. PROTECTABILITY OF MUSICAL ELEMENTS SHOULD BE A QUESTION OF LAW, NOT FACT

The Ninth Circuit majority argued that the procedural constraints of this case limited them to reach their outcome.¹⁴³ Although the majority contended that it could not review the district court’s denial of summary judgment for legal error after a full trial on the merits, it recognized that an exception to this general rule exists.¹⁴⁴ According to *Escriba v. Foster Poultry Farms, Inc.*, the Ninth Circuit may review “denials of summary judgment motions where the district court made an error of law that, if not made, would have required the district court to grant the motion.”¹⁴⁵ The problem here lies in the fact that the Ninth Circuit did not view the Thicke Parties’ arguments as “‘purely legal’ issues

139. *See id.* at 1185.

140. *Id.* at 1178 (majority opinion).

141. *Id.* at 1164.

142. *Id.* at 1195 (Nguyen, J., dissenting).

143. *Id.* at 1166–67 (majority opinion).

144. *Id.* at 1166.

145. 743 F.3d 1236, 1243 (9th Cir. 2014) (quoting *Banuelos v. Constr. Laborers’ Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004)).

capable of resolution ‘with reference only to undisputed facts.’”¹⁴⁶ The extrinsic test for substantial similarity should be objective, involving expert testimony, analytical dissection, and filtration of unprotectable elements.¹⁴⁷ While not every expert will be credible or agree on each issue, the experts must nevertheless be subjected to objective legal standards and doctrines which remove certain elements from protection. Nevertheless, the Ninth Circuit contended that the district court’s application of the extrinsic test was a “factbound inquiry far afield from decisions resolving ‘disputes about the substance and clarity of pre-existing law.’”¹⁴⁸ The protectability of musical elements, however, should be considered a question of law, not fact.

As explained in Part II of this Note, courts routinely apply the protected expression test as part of the improper appropriation prong of the infringement analysis. Even in the Ninth Circuit’s unique tests of intrinsic and extrinsic similarity within the broader improper appropriation analysis, the extrinsic test should be objective and require analytical dissection of unprotectable elements according to the relevant limiting doctrines. Here, however, the Ninth Circuit erroneously contended that the protectability of musical elements was a question of fact, not law. If this were true, then the utilization of both intrinsic and extrinsic tests would be wholly redundant and unnecessary. This is because the main difference between the two tests lies in the identity of the test-conductor, with the extrinsic test conducted by experts and the court’s “analytical dissection,” while the intrinsic test is conducted by the jury—ordinary observers considering the total look and feel of the two works without expert testimony. If the Ninth Circuit defines the extrinsic test as a “factbound inquiry,”¹⁴⁹ then there would be no need for both intrinsic and extrinsic tests. Moreover, the fact that the extrinsic test is objective means that it must consider certain overarching standards, doctrines, and rules when determining whether the two works are substantially similar for purposes of improper appropriation.

It is true that the *application* of the extrinsic test relies on established facts in the record, and in its review of the district court’s application of this test, the Ninth Circuit would certainly be limited to solely reviewing the factual record established at trial. Here, however, the Ninth Circuit did not even attempt to review the record to determine whether legal error had taken place. As discussed in Part III, the Thicke Parties did not set forth robust arguments and evidence for why the *scenes a faire* doctrine rendered certain elements

146. *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011); see *Gaye*, 885 F.3d at 1166.

147. See *supra* Part II.

148. *Gaye*, 885 F.3d at 1166 (quoting *Ortiz*, 562 U.S. at 189 (2011)).

149. *Id.*

commonplace and thus unprotectable.¹⁵⁰ Hence, if the Ninth Circuit had reviewed the district court's denial of summary judgment for legal error, it may have found the facts set forth by the Thicke Parties insufficient for reversing the district court's denial. On appeal, however, the Ninth Circuit's review of the district court's denial of summary judgment would have been not only possible but necessary to ensure that legal error had not occurred.

Moreover, the Ninth Circuit's assertion that the district court had not erroneously instructed the jury to consider unprotectable elements of "Got to Give It Up" was flawed. Just because the district court had instructed the jurors to confine their analysis to the elements present in the deposit copy did not necessarily mean that they correctly confined their analysis to solely protectable elements. If this were true, it would mean that all elements in the deposit copy are protectable by copyright. Without applying the protected expression test to the deposit copy, however, this conclusion is hasty and unfounded. The deposit copy could have contained, for example, unprotectable ideas, public domain elements, *scenes a faire* elements, and so on. As discussed later in this Note, the deposit copy did indeed contain many unprotectable *scenes a faire* elements.

Finally, the Ninth Circuit erroneously rejected the Thicke Parties' argument that "Got to Give It Up" enjoyed only thin protection.¹⁵¹ The Ninth Circuit has previously held that if a wide range of expression exists for a work, then copyright protection is "broad" and a work will infringe only if it is substantially similar to the copyrighted work.¹⁵² Conversely, if only a narrow range of expression is possible, then copyright protection is "thin" and a work must be virtually identical to infringe.¹⁵³ For example, there are many ways to make an aliens-attack movie, "but there are only so many ways to paint a red bouncy ball on blank canvas."¹⁵⁴ Thus, the former merits broad copyright protection, whereas the latter merits only thin protection. In this case, however, the Ninth Circuit contended that "musical compositions are not confined to a narrow range of expression," distinguishing music from a page-shaped computer desktop icon or a glass-in-glass jellyfish sculpture.¹⁵⁵ This line of reasoning fails to correctly identify the category in question. If the category were music in general, then it is true that a fairly wide range of expression would exist. But in music, the style and conventions of each genre constrain the range of possible expression. For example, the R&B genre uses predictable

150. *See supra* Section III.B.

151. *See id.* at 1164.

152. *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913–17 (9th Cir. 2010).

153. *Id.* at 914.

154. *Id.* at 913–14.

155. *Gaye*, 885 F.3d at 1164–65.

patterns of chords and structure, characterized by the meshing of simple repetitive parts with mellow lyrics and tone.¹⁵⁶ In contrast, the classical genre is distinguished by the use of written musical notation that is strictly studied and followed before performance, with much less room for improvisation.¹⁵⁷ In this case, the correct category would be R&B/jazz/disco, not music generally. Moreover, as discussed in Part II, the range of expression for music is further constrained by the fact that the entire musical scale is comprised of only twelve notes, and only certain combinations of these notes sound aesthetically pleasing to the human ear.¹⁵⁸ Thus, “Got to Give It Up” should have enjoyed only thin protection, since the correct category is R&B/hip-hop, not music generally, and the range of expression within this genre is constrained by the common style and musical conventions associated with it.

Especially for, but not limited to, works with only thin protection, courts must explicitly elucidate which elements or categories of elements are unprotectable under the various limiting doctrines such as the *scenes a faire* doctrine. As Pamela Samuelson highlights, courts have traditionally neglected to identify the relevant categories that should be filtered out of copyright protection, such as processes, systems, public domain elements, and *scenes a faire* elements.¹⁵⁹ Although not every category of unprotectable element will be present in every work, courts should at least identify these categories when instructing juries or making judgments as triers of fact.¹⁶⁰ Especially when dealing with works that have thin protection, courts should give greater emphasis to analytic dissection, similar to the filtration test set forth in *Computer Associates International, Inc. v. Altai, Inc.*, so that unprotectable elements are filtered out of the infringement analysis, most importantly when conducting the intrinsic “look-and-feel” test.¹⁶¹ In *Altai*, the Second Circuit set forth a famous three-part test for nonliteral infringement of computer programs.¹⁶² This test involves abstraction, filtration, and comparison, with all three steps involving, or at least allowing, expert testimony.¹⁶³ Samuelson notes that some

156. Alexander Stewart, *Funky Drummer: New Orleans, James Brown and the Rhythmic Transformation of American Popular Music*, 19 POPULAR MUSIC 293, 298 (2000).

157. Michael Kennedy, THE OXFORD DICTIONARY OF MUSIC 178 (2006).

158. *See supra* Section II.A.

159. Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1842 (2013).

160. *See id.*

161. *See id.* at 1843; 982 F.2d 693, 706–11 (2d Cir. 1992).

162. 982 F.2d 693 (2d Cir. 1992).

163. *Id.* at 713.

courts have already adopted an *Altai*-like filtration test in thin copyright non-software cases.¹⁶⁴

Among all the limiting doctrines that filter out unprotectable elements from copyright protection, the *scenes a faire* doctrine is particularly relevant to music. The remainder of this Note will examine the *scenes a faire* doctrine and its interaction with music cases, history, and composition, and argue that the doctrine should be more widely utilized in copyright infringement cases involving musical works. It will then show some examples of *scenes a faire* elements in “Blurred Lines” and “Got to Give It Up” that should have fallen out of the scope of copyright protection.

B. THE *SCENES A FAIRE* DOCTRINE IN MUSIC CASES

Nineteenth-century drama critic Francisque Sarcey was perhaps the first to use the phrase *scenes a faire* to mean “an obligatory scene,” one which, for one reason or another, an audience expects and ardently desires.¹⁶⁵ In 1942, Judge Leon Yankwich of the Southern District of California introduced the phrase *scenes a faire* into United States copyright law.¹⁶⁶ In *Cain v. Universal Pictures Co.*, in which the plaintiff claimed that a church sequence appearing in the motion picture “When Tomorrow Comes” infringed a similar scene from his novel “Serenade,” Judge Yankwich maintained that the small details in the events that occurred in the church in both works, such as playing the piano, prayer, and hunger, were inherent in the situation itself—“they are what the French call ‘scenes a faire.’”¹⁶⁷

While courts have not arrived at a single definition of the *scenes a faire* doctrine, many use the definition set forth in *Alexander v. Haley*: “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”¹⁶⁸ This definition includes two major strands of the doctrine. The first is that there are certain scenes or elements that must be included in a particular context because they flow naturally from that context.¹⁶⁹ The second is that certain scenes are standard

164. Samuelson, *supra* note 159, at 1843; *see, e.g.*, *Kohus v. Mariol*, 328 F.3d 848, 855–56 (6th Cir. 2003) (drawing of latch design); *R. Ready Prods., Inc. v. Cantrell*, 85 F. Supp. 2d 672, 675, 683 & n.10 (S.D. Tex. 2000) (advertising materials for automobile sales).

165. WILLIAM ARCHER, *PLAY-MAKING, A MANUAL OF CRAFTSMANSHIP* 147, 148 (1960).

166. Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79, 80 (1989).

167. 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).

168. 460 F. Supp. 40, 45 (S.D.N.Y. 1978); *see, e.g.*, *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980); *Anderson v. Paramount Pictures Corp.*, 617 F. Supp. 1, 2 (C.D. Cal. 1985).

169. Some courts also use the terminology of “necessity” for this first strand of the doctrine. *See* Kurtz, *supra* note 166, at 81.

or “stock” in a given category.¹⁷⁰ Under either strand of the doctrine, *scenes a faire* are considered unprotected by copyright.¹⁷¹

In the context of musical works, the Ninth Circuit has further explained the meaning of the *scenes a faire* doctrine. In *Smith v. Jackson*, the owners of song copyrights brought an infringement action against musicians.¹⁷² The Ninth Circuit affirmed the district court’s granting of partial summary judgment for the musicians based on the *scenes a faire* assertions of the musicians’ expert witness as compared to the declarations of the copyright owners’ expert witness.¹⁷³ The Ninth Circuit reasoned that summary judgment was appropriate because the district court carefully considered all the material in the record regarding *scenes a faire* motives¹⁷⁴ and only granted summary judgment for the motives that raised no issues of genuine fact.¹⁷⁵ The court defined *scenes a faire* as “a motive that is so common or trite it is not protectable.”¹⁷⁶ Thus, the court acknowledged that even a phrase of a few musical notes can constitute *scenes a faire* and hence fall out of the scope of protection.

The court also stated that the “presumption of originality” created by a copyright determination did not apply to the inquiry into whether certain motives in the copyrighted songs were *scenes a faire*.¹⁷⁷ Further, the musicians did not have to prove that the owners of the song copyrights had access to *scenes a faire* motives.¹⁷⁸ Instead, a *scenes a faire* analysis requires examining “whether ‘motive’ similarities that plaintiffs attribute to ‘copying’ could actually be explained by the commonplace presence of the same or similar motives within the relevant field.”¹⁷⁹ Thus, a *scenes a faire* finding does not turn on whether a plaintiff copied prior art.¹⁸⁰

In *Swirsky v. Carey*, the Ninth Circuit held that the district court erred in finding the first and fifth measures of the plaintiff’s song to be unprotectable

170. *See id.*

171. *See, e.g.,* *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117 (9th Cir. 1987); *Whelan Assocs., Inc. v. Jaslow Dental Lab, Inc.*, 797 F.2d 1222 (3d Cir. 1986); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984); *Reyher v. Children’s Television Workshop*, 533 F.2d 87 (2d Cir. 1976).

172. 84 F.3d 1213 (9th Cir. 1996).

173. *Id.* at 1220.

174. The Ninth Circuit defined a musical motive as “a short musical phrase, usually comprised of only a few notes.” *Id.* at 1216 n.1.

175. *Id.* at 1220.

176. *Id.* at 1216 n.3.

177. *Id.* at 1219.

178. *Id.*

179. *Id.*

180. *Id.*

as a matter of law under the *scenes a faire* doctrine.¹⁸¹ While the defendant, Mariah Carey, argued that certain elements of the plaintiff's song were similar to those of the popular folk song "For He's a Jolly Good Fellow" (and hence unprotectable as *scenes a faire*), the Ninth Circuit noted that the plaintiff's song and "Jolly Good" were in different genres of music—the plaintiff's in the hip-hop/R&B genre and "Jolly Good" in the folk music genre.¹⁸² Thus, any comparisons between the two did not shed light on which elements in the hip-hop/R&B genre could be considered *scenes a faire*.¹⁸³ Furthermore, simply comparing the first measures of each song did not tell the court whether the first measure of the plaintiff's song was an indispensable idea within the field of hip-hop/R&B because by definition, a musical measure cannot be "commonplace" if it is only shared by two songs.¹⁸⁴ As for the fifth measure of the plaintiff's song, Mariah Carey did not introduce any independent evidence to show that that measure was more similar to "Jolly Good" than to her song.¹⁸⁵ Since the *scenes a faire* allegation was contested, summary judgment on the basis of *scenes a faire* without independent evidence was inappropriate.¹⁸⁶

C. SCENES A FAIRE LESSONS FROM MUSIC HISTORY AND COMPOSITION

1. *Music History Shows a Strong Tradition of Free Sharing of Common Musical Elements*

In Western society, music began as an oral tradition and was neither objectified in written texts nor commodified.¹⁸⁷ Music belonged to the realm of collective expression, believed to proceed from a divine origin.¹⁸⁸ The

181. 376 F.3d 841, 849–50 (9th Cir. 2004).

182. *Id.* at 850.

183. *Id.*

184. *Id.*

185. *Id.* The Ninth Circuit did not explain why its method of determining whether a phrase is *scenes a faire* consisted of simply testing whether the plaintiff's musical phrase is more similar to some other stock element rather than the defendant's phrase. This test for *scenes a faire* does not appear to be supported by other case law and is not logical, since a musical phrase could be *more* similar to another common musical phrase than the defendant's phrase, yet not be similar enough to the common phrase to be considered common itself. Additionally, comparing an element to only one other element, even in a famous song, does not establish that the element in the famous song is itself common. In other words, just because "Jolly Good" is a famous song does not necessarily mean that the specific phrase within it is considered commonplace. Upon close examination, the court did not offer any explanation for using this type of test.

186. *Id.*

187. Michael W. Carroll, *Whose Music Is It Anyway—How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1419 (2004).

188. DONALD J. GROUT & CLAUDE V. PALISCA, *A HISTORY OF WESTERN MUSIC* 2–3 (6th ed. 2001). The word "music" derives from Latin *musica* and Greek *mousike*, and originally

Greeks viewed music as part of a set of mathematical, harmonic relations that governed the universe and were not susceptible to individual claims of ownership.¹⁸⁹ No individual persona, either cultural or legal, had emerged to claim a piece of music as a product of their own labor.¹⁹⁰

Only at the end of the Middle Ages did the social role of the composer arise and musical texts become the objects of property rights.¹⁹¹ Musicians' guilds, such as those led by Johann Sebastian Bach's family, had the exclusive right to perform music within city walls, and musical repertoires could only be accessed through musicians.¹⁹² Later in the Renaissance period, the development of music publishing revolutionized the landscape, with publishers receiving royalties with copyright-like attributes and composers becoming vested with property-like entitlements to their music.¹⁹³

Throughout this history, musicians freely borrowed from existing musical works when creating new works.¹⁹⁴ Guild members regularly borrowed and revised popular melodies and songs composed by others.¹⁹⁵ The twelfth to fourteenth centuries saw the development of motet melodies, which were "independent samples or samplelike melodies that strategically reference or engage musical repertoires."¹⁹⁶ Composers and performers freely utilized this common stock of motet melodies without acknowledgment.¹⁹⁷ For example, George Frideric Handel, a famous German-British Baroque composer from the seventeenth to eighteenth centuries, borrowed common musical ideas with exceptional frequency.¹⁹⁸ Some of the composers he borrowed from included Reinhard Keiser and Giovanni Porta.¹⁹⁹ Composer Johann Mattheson, one of Handel's musical contemporaries, argued that "borrowing is permissible, but what is borrowed must be repaid with interest: that is, one must so arrange and

referred to art presided over by the Muses. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1490 (16th ed. 1971).

189. EDWARD LIPPMAN, *A HISTORY OF WESTERN MUSICAL AESTHETICS* 8 (1992).

190. Isobel Henderson, *Ancient Greek Music*, in 1 *THE NEW OXFORD HISTORY OF MUSIC: ANCIENT AND ORIENTAL MUSIC* 1, 400 (Egon Wellesz ed., 1957) ("The modern figure of the pure composer, who is neither poet nor player, was unknown to antiquity.").

191. Carroll, *supra* note 187.

192. JACQUES ATTALI, *NOISE: THE POLITICAL ECONOMY OF MUSIC* 15 (Brian Massumi trans., Wlad Godzich & Jochen Schulte-Sass eds., 1985).

193. *Id.*

194. Carroll, *supra* note 187, at 1411.

195. GROUT & PALISCA, *supra* note 188, at 58 (noting that minstrels "sang, played, and danced to songs composed by others or taken from the popular repertory, no doubt altering them or making up their own versions as they went along").

196. *Id.* at 659.

197. *Id.*

198. Christopher Hoyt, *The Work of the Bee: Musical Borrowings & Trinitarian Echoes*, 31 *TOUCHSTONE: A JOURNAL OF MERE CHRISTIANITY* 46 (2018).

199. *Id.*

elaborate the imitations that they produce a better and more beautiful effect that the pieces from which they are borrowed.”²⁰⁰

2. *Music Composition Necessitates the Sharing of Common Elements in the Creative Process*

While the history of music allowed borrowing without acknowledgement, history is not the only justification for allowing the free sharing of common musical elements. The necessities of musical creativity also require the sharing and utilization of such stock motifs. As Jessica Litman argues, it is not possible for authors or composers to expunge common elements from their subconscious memory when creating their own works.²⁰¹ Further, the actual process of authorship and composition is characterized by the transformation and recombination of expression into new forms.²⁰² This process necessarily involves the use of prior common elements when revising and building upon the works of others.²⁰³ Expression does not come out of thin air—it is inspired by the works of prior authors and musicians.²⁰⁴

Specifically in the context of music composition, borrowing is a necessary element of creativity. In music pedagogy, the Orff-Shulwerk and Kodaly methods are among the most influential philosophies of music education still used today.²⁰⁵ Three core aspects of this approach include recitation or imitation, improvisation, and the featured use of quality and authentic exemplar models.²⁰⁶ The recitation/imitation step involves playing a piece of music or part thereof, and then echoing, imitating, or copying it.²⁰⁷ Next, the improvisation step involves experimenting and innovating on established musical structures and patterns, usually introduced through a model piece of music.²⁰⁸ Finally, the composition step involves creating a new piece inspired during the listening, recitation, and improvisation steps.²⁰⁹ Thus, one of the most widely-used methods of teaching music composition to students involves

200. *Id.* at 47.

201. Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 240 (1991).

202. *Id.* at 244.

203. *Id.*

204. See Ursula K. Le Guin, *Talking about Writing*, in LANGUAGE OF THE NIGHT 195, 197 (1979) (“And of course fiction is made out of the writer’s experience, his whole life from infancy on, everything he’s thought and done and seen and read and dreamed.”).

205. See Janet R. Barrett & Peter Webster, *New Thinking for the Study of Music Teaching and Learning*, in THE MUSICAL EXPERIENCE: RETHINKING MUSIC TEACHING AND LEARNING (2014).

206. See NATALIE SARRAZIN, *MUSIC AND THE CHILD* (2016).

207. See Katherine Halcrow, *Imitation and Innovation: Harnessing the Principles of Music Pedagogy for the Writing Classroom*, 26 LITERACY LEARNING: THE MIDDLE YEARS 48, 52 (2018).

208. *Id.*

209. *Id.*

the imitation and recitation of previous pieces of music, from the process of which original composition arises.

Indeed, many argue that the human brain is wired for patterns and symbolic thinking.²¹⁰ The creative process relies on the breaking and reinventing of patterns.²¹¹ It can be argued, then, that we “invent” rather than “create”—in other words, we build upon previous patterns rather than create all these patterns from scratch.²¹² Thus, imitation of and improvisation on old themes is a core authorial technique, sometimes done even subconsciously.²¹³

Modern copyright laws do not take the history of musical borrowing and its necessity for creativity into as much consideration as they should. For example, much of the modern music sampling that has evolved from the tradition of musical motets and sharing would now incur liability.²¹⁴ As Michael Carroll argues, the idea/expression dichotomy and fair use limits on copyright infringement claims have not done enough to privilege acceptable conduct.²¹⁵ As digital technology has further facilitated traditional borrowing in music, modern copyright rules that greatly restrict musicians’ freedom to practice this tradition should be revised.²¹⁶ Similarly, Olufunmilayo Arewa notes that while copying is a key element of musical creativity and collaboration, copyright conceptualizations of creativity tend to stigmatize acts of copying and sharing.²¹⁷ Courts should instead take more account of dominant musical practices within musical genres and the role of oral and written traditions in music.²¹⁸

The *scenes a faire* doctrine constitutes an already-existing yet underutilized tool that can bring into legal consideration the tradition of sharing common elements in music as well as the necessity of imitation for musical composition and creativity. By identifying and removing from protection common elements in each genre, the doctrine can serve as an important limit on the infringement claims of musicians and record labels. Courts should more routinely use the *scenes a faire* doctrine to recognize that common musical motifs within each genre cannot be protected by copyright law. The origin and development of music composition have hinged on free sharing and inspiration from other

210. See MICHAEL C. CORBALLIS, *THE RECURSIVE MIND: THE ORIGINS OF HUMAN LANGUAGE, THOUGHT, AND CIVILIZATION* (2011).

211. Halcrow, *supra* note 207, at 52.

212. See GEORGE STEINER, *GRAMMARS OF CREATION* (2002).

213. See *id.*

214. See Carroll, *supra* note 187, at 1495.

215. *Id.* at 1495–96.

216. *Id.* at 1496.

217. Olufunmilayo B. Arewa, *Copyright and Cognition: Musical Practice and Music Perception*, 90 ST. JOHN’S L. REV. 565, 571 (2016).

218. *Id.* at 575.

composers. Moreover, the very act of music composition involves the imitation and reinvention of previous works, and thus requiring composers to expunge such common elements from their subconscious mind would impinge on creativity. The music industry requires such a limiting principle as *scenes a faire* to recognize and take into account this necessity in musical innovation.

D. *SCENES A FAIRE* ELEMENTS IN “BLURRED LINES” AND “GOT TO GIVE IT UP”

The Gayes’ expert witness, musicologist Finell, alleged that many similar elements existed between “Blurred Lines” and “Got to Give It Up.”²¹⁹ This Section will analyze three of these major elements²²⁰ and show how each should be classified as *scenes a faire*, hence falling out of the scope of copyright protection.

219. Counter-Claimants’ Joint Statement of Genuine Disputes in Resp. to Pls.’ and Counter-Defs.’ Uncontroverted Facts and Conclusions of Law in Supp. of Counter-Claimants’ Opp’n to Pls.’ and Counter-Defs.’ Mot. for Summ. J. or, in the Alternative, Partial Summ. J. at 3–109, *Williams v. Bridgeport Music*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. Sep. 8, 2014).

220. These elements are: (1) each phrase begins with repeated notes; (2) each phrase begins with the same rhythm; and (3) each phrase ends on a melisma (one syllable sung over multiple pitches).

Figure 1. Signature Phrases in “Got to Give It Up” and “Blurred Lines”

The image shows a musical staff in treble clef with a key signature of one sharp (F#) and a 4/4 time signature. The melody starts at measure 19. The notes are E4, E4, E4, F#4, G4, A4, B4, A4, G4, F#4, E4. Above the staff, there are annotations: 'a' above the first three E notes, 'b' above the last three notes (F#, G, A), and 'd (melisma)' below the last three notes. Below the staff, there are annotations: 'c (rhythms)' below the first six notes and 'd (melisma)' below the last three notes. The lyrics are: "I used to go out to par - ties".

*Signature Phrase in “Got to Give It Up”
(Trial Exhibit 376-3)*

The image shows a musical staff in treble clef with a key signature of one sharp (F#) and a 4/4 time signature. The melody starts at measure 47. The notes are C#4, C#4, B#4, C#4, D#4, E4, F#4, E4, D#4, C#4, B#4, A#4, G#4, F#4, E4. Above the staff, there are annotations: 'a' above the first three notes (C#, C#, B#), 'b' above the last three notes (D#, E, F#), and 'd (melisma)' below the last three notes. Below the staff, there are annotations: 'c (rhythms)' below the first six notes and 'd (melisma)' below the last three notes. The lyrics are: "And that's why I'm gon' take a good girl".

*Signature Phrase in “Blurred Lines”
(Trial Exhibit 376-3)*

1. *Repeated Notes*

In “Got to Give It Up,” the Signature Phrase (see above Figure) begins with the note “E” repeated four times (corresponding to the lyrics “I used to go”). In “Blurred Lines,” it begins with the note “C sharp” repeated twice, followed by “B sharp,” and then “C sharp” again (corresponding to the lyrics “And that’s why I’m”). While the sequence in “Blurred Lines” only contains three rather than four consecutive repeating notes, the use of a three- or four-note repeating sequence is a common practice not only in the R&B/hip-hop genres, but in virtually all musical genres. In the R&B/hip-hop genre, the popular song “Thrift Shop” by Macklemore and Ryan Lewis, ranked by Billboard as number two in the “Greatest of All Time Hot R&B/Hip-Hop Songs,”²²¹ starts off with a cyclical pattern of four consecutive repeating notes, corresponding to the lyrics “What, what, what, what?”²²² Likewise, the popular R&B song “If I Ain’t Got You” by Alicia Keys, ranked number thirty-three on

221. *Greatest of All Time Hot R&B/Hip-Hop Songs*, BILLBOARD, <https://www.billboard.com/charts/greatest-r-b-hip-hop-songs> [https://perma.cc/VZC5-MZ4G] (last visited Dec. 12, 2018).

222. Macklemore & Ryan Lewis, *Thrift Shop* (Macklemore LLC 2012).

the same chart,²²³ contains four repeating notes in the chorus, corresponding to the lyrics “people want it all” (starting on the second syllable of the word “people”).²²⁴ The song “Trap Queen” by Fetty Wap, another popular R&B/hip-hop song ranked number forty-six on that same chart,²²⁵ contains two sets of four repeating notes in the chorus, corresponding to the lyrics “I just left the mall, I’m gettin.’”²²⁶

Outside the R&B/hip-hop genre, the use of four repeating notes can be found in countless songs. The popular song “Happy Birthday,” repeatedly used as an example by Finell,²²⁷ begins with a four-note sequence (corresponding to the lyrics “Happy Birthday”) with two identical consecutive notes, a third different note, and a fourth note identical to the first two—the same structure as the “Blurred Lines” opening signature phrase described above. In the classical genre, Beethoven’s Fifth Symphony (also used by Finell as an example),²²⁸ one of the most well-known compositions in classical music and most frequently played symphonies,²²⁹ famously begins with a four-note sequence of three identical notes (D) followed by a different fourth note (E flat).

Thus, the phrases of four repeated notes in “Blurred Lines” and “Got to Give it Up” should have been considered *scenes a faire*—standard, stock, or common in a particular category—and hence unprotectable.

2. *Similar Rhythms*

Finell argued that another similarity between “Blurred Lines” and “Got to Give It Up” lies in the fact that both signature phrases begin with the same

223. *Greatest of All Time Hot R&B/Hip-Hop Songs*, BILLBOARD, <https://www.billboard.com/charts/greatest-r-b-hip-hop-songs> [https://perma.cc/VZC5-MZ4G] (last visited Dec. 12, 2018).

224. Alicia Keys, *If I Ain’t Got You* (J Records 2004).

225. *Greatest of All Time Hot R&B/Hip-Hop Songs*, BILLBOARD, <https://www.billboard.com/charts/greatest-r-b-hip-hop-songs> [https://perma.cc/VZC5-MZ4G] (last visited Dec. 12, 2018).

226. Fetty Wap, *Trap Queen* (RGF Productions 2014).

227. *See, e.g.*, Order Ruling on Plaintiffs’ and Counter-Defendants’ Evidentiary Objections in Supp. of Mot. for Summ. J. or, in the Alternative, Partial Summ. J. at 49, *Williams v. Bridgeport Music*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. Oct. 30, 2014).

228. *Id.* at 52.

229. ROBERT H. SCHAUFFLER, BEETHOVEN: THE MAN WHO FREED MUSIC 211 (1933).

rhythm.²³⁰ Both phrases begin with six consecutive eighth notes.²³¹ In “Blurred Lines,” this eighth note sequence corresponds to the lyrics “And that’s why I’m gon’ take,” and in “Got to Give It Up,” it corresponds to the lyrics, “I used to go out to.” Many songs utilize this rhythm of six consecutive eighth notes. In the R&B/hip-hop genre, Macklemore’s “Thrift Shop” begins with six consecutive eighth notes, corresponding to the lyrics “What, what, what, what? What, what”²³² Fetty Wap’s “Trap Queen” also utilizes this rhythm, corresponding to the lyrics “I just left the mall, I’m”²³³ The song “Please Mr. Postman” by the Marvelettes, ranked number twenty-four on the greatest R&B/hip-hop songs chart,²³⁴ contains six repeating eighth notes, corresponding to the lyrics, “Is there a letter in”²³⁵ In other genres, this rhythmic phrase is frequently used, as well. For example, in the pop genre, Selena Gomez’s popular song “Bad Liar” contains six consecutive eighth notes corresponding to the lyrics “I’m tryin’, I’m tryin’”²³⁶ Likewise, Ariana Grande’s popular pop song “breathin’ [sic] utilizes this rhythmic phrase, corresponding to the lyrics “breathin’ and breathin’ and”²³⁷

Thus, the phrases of six consecutive eighth notes in “Blurred Lines” and “Got to Give it Up” should have been considered *scenes a faire* and hence unprotectable.

3. *Melisma*

A third similarity alleged by Finell was the use of melisma²³⁸ at the end of both signature phrases.²³⁹ In “Blurred Lines,” the melisma corresponds to the

230. Counter-Claimants’ Joint Statement of Genuine Disputes in Resp. to Pls.’ and Counter-Defs.’ Uncontroverted Facts and Conclusions of Law in Supp. of Counter-Claimants’ Opp’n to Pls.’ and Counter-Defs.’ Mot. for Summ. J. or, in the Alternative, Partial Summ. J. at 37, *Williams v. Bridgeport Music*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. Sep. 8, 2014).

231. An eighth note is a rhythmic unit of measurement in music that corresponds to exactly half of the value of one quarter note and twice the value of one sixteenth note.

232. Macklemore & Ryan Lewis, *Thrift Shop* (Macklemore LLC 2012).

233. Fetty Wap, *Trap Queen* (RGF Productions 2014).

234. *Greatest of All Time Hot R&B/Hip-Hop Songs*, BILLBOARD, <https://www.billboard.com/charts/greatest-r-b-hip-hop-songs> [<https://perma.cc/VZC5-MZ4G>] (last visited Dec. 12, 2018).

235. The Marvelettes, *Please Mr. Postman* (Motown Records 1961).

236. Selena Gomez, *Bad Liar* (Interscope Records 2017).

237. Ariana Grande, *breathin’* (Republic Records 2018).

238. Melisma is a musical technique in which one syllable is sung over multiple pitches.

239. Counter-Claimants’ Joint Statement of Genuine Disputes in Resp. to Pls.’ and Counter-Defs.’ Uncontroverted Facts and Conclusions of Law in Supp. of Counter-Claimants’ Opp’n to Pls.’ and Counter-Defs.’ Mot. for Summ. J. or, in the Alternative, Partial Summ. J. at 40, *Williams v. Bridgeport Music*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. Sep. 8, 2014).

word “girl,” and in “Got to Give It Up,” it corresponds to the second syllable in the word “parties.” Melisma is a commonplace musical technique used in countless songs. In the R&B genre, Mariah Carey’s song “Vision of Love,” which topped the charts in 1990, popularized the use of melisma in mainstream R&B music.²⁴⁰ The song heavily utilizes melisma, such as on the words “love,” “me,” “dream,” “nights,” “all,” and “eventually” (on the last syllable).²⁴¹ Whitney Houston’s hit “I Will Always Love You,” ranked number six on the greatest R&B/hip-hop songs chart,²⁴² also heavily utilizes melisma, such as on the words “I” and “you.”²⁴³ Al Green’s popular R&B song “Let’s Stay Together” from 1972, ranked number nine on the same chart,²⁴⁴ utilizes melisma, such as on the words “me,” “need,” and “see.”²⁴⁵

In other genres, melisma has been used for centuries. The well-known Christian hymn “Gloria in excelsis Deo” repeatedly utilizes a long melisma on the first syllable of the word “Gloria.” Handel’s “For Unto Us a Child is Born” from his Messiah Part I (1741) also utilizes a long melisma on the word “born.” In contemporary pop music, Ariana Grande’s song “breathin” utilizes many melismas on words such as “take,” “away” (second syllable), and “breathin” (second syllable).²⁴⁶

Thus, the use of melisma in “Blurred Lines” and “Got to Give it Up” should have been considered *scenes a faire* and unprotectable. As melisma is a common technique used not only in the R&B genre but in widely varying musical genres for centuries, it “cannot be attributed to any unique creativity on the part of the songwriter.”²⁴⁷

V. CONCLUSION

As musicians continue to innovate and compose new works, predictable boundaries must exist between legal inspiration and improper appropriation in

240. *100 Greatest Singers of All Time*, ROLLING STONE (Dec. 3, 2010), <https://www.rollingstone.com/music/music-lists/100-greatest-singers-of-all-time-147019/patti-smith-2-39552/> [https://perma.cc/E2JL-GEW8]; see “*Vision of Love*” Sets off Melisma Trend, VILLAGE VOICE (Feb. 4, 2003), <https://www.mcarchives.com/index.asp?id=1457> [https://perma.cc/3LQR-BFRM].

241. Mariah Carey, *Vision of Love* (Columbia Records 1990).

242. *Greatest of All Time Hot R&B/Hip-Hop Songs*, BILLBOARD, <https://www.billboard.com/charts/greatest-r-b-hip-hop-songs> [https://perma.cc/VZC5-MZ4G] (last visited Dec. 12, 2018).

243. Whitney Houston, *I Will Always Love You* (RCA Records 1974).

244. *Greatest of All Time Hot R&B/Hip-Hop Songs*, BILLBOARD, <https://www.billboard.com/charts/greatest-r-b-hip-hop-songs> [https://perma.cc/VZC5-MZ4G] (last visited Dec. 12, 2018).

245. Al Green, *Let’s Stay Together* (Hi Records 1971).

246. Ariana Grande, *breathin* (Republic Records 2018).

247. *Black v. Gosdin*, 740 F. Supp. 1288, 1293 (M.D. Tenn. 1990).

order for creativity to flourish within appropriate constraints. Since the protectability of musical elements should be a question of law, it should be addressed at the stages of summary judgment, judgment as a matter of law, or judgment notwithstanding the verdict. Hence, the Ninth Circuit here did have the power to reverse the district court's finding of infringement, as the majority of the similarities between the two songs consisted of commonplace *scenes a faire* elements, which, as a matter of law, must be filtered out of the improper appropriation analysis.

Looking ahead, courts should explicitly identify the differences between protectable and unprotectable elements in music, drawing on limiting doctrines such as *scenes a faire*. With the help of musical experts, courts must filter out these unprotectable elements before allowing the jury to conduct the improper appropriation analysis. Simply deferring to musical experts and juries without providing them with any guidance as to the proper limiting doctrines will lead to the overprotection of common tools, themes, and styles, which will effectively hamper future musical innovation.

The *scenes a faire* doctrine may ideally operate differently in the copying versus improper appropriation stages of analysis. Where it has been established that a defendant has legally "copied" a musical style associated with a particular composer (as arguably occurred in this case), there may be an argument for providing the composer with some compensation without a finding of infringement. Thus, one possible avenue for copyright reform may consist in some sort of compulsory "inspiration license," by which creators of popular motifs receive compensation even while future generations are allowed to use them and flourish.

Regardless, a finding of infringement should never ensue from the utilization of common musical elements. Especially since music composition frequently, necessarily, and many times inadvertently draws from common themes from previous works, the law must not restrict the use of common musical elements. The future of music itself depends upon the use and recombination of previous tools and motifs in innovative ways.

