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CAUGHT BY THE ACT: DOES THE COPYRIGHT ACT OF 1909 POSE LEGAL DISASTERS FOR MODERN MUSIC?

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ABSTRACT

The music industry has changed. With more music being released than ever before, it becomes increasingly difficult to separate inspiration from plagiarism. The Ninth Circuit Court of Appeal's decision in *Williams v. Gaye* demonstrates how blurry our current legal standards are when it comes to distinguishing modern music using old laws. This note argues that the Ninth Circuit was incorrect in evaluating Robin Thicke and Pharrell William's song "Blurred Lines" under the Copyright Act of 1909. This note discusses some of the problems with the current legal standard when judging modern music using the legal standards of the Copyright Act of 1909. This note presents new ways of evaluating modern music developed by legal scholars that are more just and fair. Finally, this note argues that had the Ninth Circuit used its judicial discretion to evaluate the facts under the Copyright Act of 1976, it would have found in favor Robin Thicke and Pharrell Williams.

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I. INTRODUCTION

The digital age has changed the music industry. Anyone can listen to their favorite songs from today, their childhood, or different eras.[1] Anyone can create music because of the ample access to instruments, digital programs, and online tutorials.[2] Anyone can become a music star, thanks to the use of social media and music distribution websites.[3] As music becomes easier to listen to, create, and distribute, the difference between inspiration and copyright infringement becomes increasingly vague due to the number of songs produced.

Robin Thicke and Pharrell Williams' "inspiration" cost them $7.4 million and 50% of all future royalty earnings on their song "Blurred Lines."[4] When Thicke and Williams sought a declaratory judgment that their song did not infringe Marvin Gaye's "Got to Give It Up," Gaye's estate filed a counterclaim for copyright infringement.[5] The United States Court of Appeals for the Ninth Circuit heard the case to decide whether the song "Blurred Lines" was substantially similar to "Got to Give It Up."[6] While the Ninth Circuit's main focus was on the case's procedural posture, Judge Nguyen's

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[1] Patrik Wikstrom, *The Music Industry in an Age of Digital Distribution*, OPENMIND BBVA (2013), https://www.bbvaopenmind.com/wp-content/uploads/2014/04/BBVA-OpenMind-The-Music-Industry-in-an-Age-of-Digital-Distribution-Patrik-Wikstrom.pdf.pdf. This article details the history of music distribution and explains the growth of the industry thanks to services like Spotify and Apple Music.

[2] Will Butler, *Is It Too Easy to Make Music?*, NPR (Jan. 12, 2010), https://www.npr.org/sections/allsongs/2010/01/is_it_too_easy_to_make_music_1.html. Stores like Guitar Center have made it easy for any aspiring musician to get their hands on a low-cost instrument. Music production has been made easier through the invention of affordable digital programs such as FL Studio, GarageBand, and Ableton. YouTube has made it even easier for young musicians to get free access to education on how to play these instruments and use these programs. Anyone can become a producer or songwriter if they have access to these materials and the dedication to learn. *Id.*

[3] Natalie Robehmed, *How These Independent Artists Reached No. 1 on the iTunes Chart*, FORBES (July 24, 2015), https://www.forbes.com/sites/natalierobehmed/2015/07/24/how-these-independent-artists-reached-no-1-on-the-itunes-chart/. Service providers such as DistroKid, Amuse, United Masters, and more allow small content creators to get their music on big platforms like Spotify and Apple Music for a small annual fee. Some of them take a small portion of the royalties earned on these songs, while others allow artists to take full compensation. These sites allow people to start their music careers themselves as opposed to needing to be signed by a label. *Id.*

[4] Williams v. Gaye, 895 F.3d 1106, 1128-29 (9th Cir. 2018).

[5] *Id.* at 1116.

[6] *Id.*

dissenting opinion brings attention to the possible ripple effects of the Court's holding. One major dispute between the parties was whether the Copyright Act of 1909 or the Copyright Act of 1976 applied to the case.

This case note will discuss policy arguments for using judicial discretion in applying the Copyright Act of 1976 to songs that may fall outside its purview along with new tests for substantial similarity. Part II of this case note will discuss the basis for copyright protection, differences between the Copyright Act of 1909 and the Copyright Act of 1976, and the legal standards for copyright infringement. Part III will discuss the court's decision and reasoning while paying specific attention to some of the arguments made by Judge Nguyen. Part IV will analyze the Court's discussion and application of the Copyright Act of 1909 and speculate whether the outcome would be different if the Copyright Act of 1976 were applied instead. In Part V, this case note will conclude by discussing whether the court was correct when it held that the Copyright Act of 1909 was the applicable copyright law. It will illustrate the various policy arguments for why the *Williams v. Gaye* court should have used its judicial discretion to decide the case under the Copyright Act of 1976 and why future courts should follow this example.

II. BACKGROUND

This section will discuss the background material necessary to understand copyright infringement in the field of music. Subsection A will discuss the basis for copyright protection and differences between the Copyright Act of 1909 and the Copyright Act of 1976. Subsection B will discuss what constitutes copyright infringement in the Ninth Circuit.

A. Copyright Protection

The basis for copyright protection is found in the United States Constitution. Article 1, Section 8, Clause 8 states: "The Congress shall have power to . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [7] Throughout our nation's history, copyright protection has evolved as courts have interpreted the meaning of this clause.[8] The first Copyright Act was enacted in 1790.[9] In 1831, Congress amended the Copyright Act to include protection for musical compositions.[10] By the 1900s, it became necessary to compile and codify the bills and judicial decisions into one cohesive doctrine.

The Copyright Act of 1909 was the result of years of litigation and discussion.[11] Under the Copyright Act of 1909, copyright protection existed when a work was

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[7] U.S. CONST. art. I, § 8, cl. 8.

[8] Charles, Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1194-1204 (2015).

[9] ROBERT A. GORMAN, ET AL., COPYRIGHT CASES AND MATERIALS 5 (9th ed. 2016).

[10] Act of February 3, 1831, ch. 16 *Stat.* 436.

[11] Cronin, *supra* note 8, at 1204.

published with copyright notice affixed to the work.[12] While the Copyright Act of 1909 did not define publication, it stated that "'the date of publication' shall in the case of a work in which copies are reproduced for sale or distribution be held to be the earliest date when the copies of the first authorized edition are placed on sale, sold, or publicly distributed[.]"[13] Alternatively, one could register and deposit copies of the unpublished work with the United States Copyright Office.[14] Works published without proper copyright notice fell into the public domain.[15] The Copyright Act of 1909 extended the renewal term of protection by fourteen years, which increased the maximum protection to fifty-six years.[16] The Copyright Act of 1909 protected musical compositions and their performance.[17] However, it did not protect sound recordings until the 1970s.[18]

The Copyright Act of 1976 expanded and refined copyright protection. Under the Copyright Act of 1976, an "original work[] of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated . . . ." may receive copyright protection.[19] The Copyright Act of 1976 provides eight categories of protected works and it does not limit protection to only these categories.[20] Copyright owners enjoy the exclusive rights to (1) reproduce; (2) create derivatives; (3) distribute; (4) publicly perform; (5) publicly display; and (6) perform digitally their works.[21] The Act gives more federal protection to music, because there is protection in sound recording and the underlying composition.[22] The Copyright Act of 1976 changed the term of copyright protection to the life of the author, plus fifty years (now seventy-five years) after the author's death.[23] The effective date of the Copyright Act of 1976 is January 1, 1978, meaning "Got to Give It Up" barely falls out of its reach.[24]

B. Elements of Copyright Infringement

A copyright owner can bring a claim of copyright infringement against an infringer.[25] A party prevails on a copyright infringement claim if they can prove (1) that they own a valid copyright; and (2) the defendant copied protected elements of the copyrighted work.[26] Copying is demonstrated by showing that two works are

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[12] 35 Stat. 1075 (1909) (amended 1976).
[13] *Id*. at 1087.
[14] *Id*. at 1079.
[15] 17 U.S.C. § 104A(h)(6)(C)(i) (2022).
[16] Gorman, *supra* note 9, at 7.
[17] 35 Stat. 1075, at 1076.
[18] Lisa J. Kona, *Copyright Protection Against Unauthorized Digital Sampling: Abandonment of the Lay Audience Test in Determining Substantial Similarity in Musical Compositions*, 3 J.F.K. U.L. REV. 25, 29 (1991).
[19] 17 U.S.C. § 102(a) (2022).
[20] *Id*.
[21] *Id.* at § 106.
[22] WILLIAM F. PATRY, PATRY ON COPYRIGHT §7:42 (2008).
[23] 17 U.S.C. § 302 (2022).
[24] *Id.* at § 301.
[25] *Id.* at § 501.
[26] Swirsky v. Carey, 376 F.3d 841, at 844 (9th Cir. 2004).

substantially similar.[27] In music cases, infringement can occur if one copies or makes unauthorized derivative works of a musical composition or sound recording.[28] A musical composition is usually comprised of sheet music and lyrics.[29] It is made up of rhythms, harmonies, and melodies.[30] On the other hand, a sound recording "result[s] from the fixation of a series of musical, spoken, or other sounds."[31] The copyright of a musical composition is the basic sound when the notes are played, while the copyright of a sound recording is "how the musicians played the notes."[32]

A plaintiff can prove copying through circumstantial or direct evidence.[33] Direct evidence is preferred, but when it is unavailable, "proof . . . that the defendant had 'access to the plaintiff's work'" will suffice.[34] Recently, *Skidmore v. Led Zeppelin* decided that a high degree of access to a copyrighted work does not justify a lower standard of proof to show substantial similarity in copyright infringement actions.[35] Access can still be used as circumstantial evidence for copying, but it can no longer prove substantial similarity.[36]

The Ninth Circuit uses a two-part test to determine whether two works are substantially similar.[37] This two-part test consists of an extrinsic and intrinsic test.[38] The intrinsic test is reserved for the trier of fact.[39] The extrinsic test may be used by the court on motions for summary judgment because the test is objective.[40] The extrinsic test considers whether two works are substantially similar using objective criteria.[41] Courts apply this test using expert testimony and a dissection of the works

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[27] *Id.*

[28] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 213 (10th ed. 2019). If one were to create an unauthorized parody using the exact instrumental of the song, this is an unauthorized derivative work. Likewise, if someone downloads a song off YouTube and burns it to a CD, both instances are unauthorized uses. Technology and websites have made this even easier with websites such as https://320ytmp3.com which allows a user to paste the link to a YouTube video and download the mp3 file of the audio. *Id.*

[29] Batiste v. Lewis, 976 F.3d 493, 505 (5th Cir. 2020).

[30] N. Music Corp. v. King Rec. Distrib. Co., 105 F.Supp. 393, 398 (S.D.N.Y. 1952).

[31] 17 U.S.C. § 101.

[32] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 878 (9th Cir. 2016). Courts should look at the notes that are written on a composition. Each artist will play notes in their own ways utilizing breaks, slides, and pauses. These things can influence the way the notes sound in a particular song, but this should not be analyzed by the courts in this stage of the analysis. *Id.*

[33] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000).

[34] *Id.*

[35] Skidmore v. Led Zeppelin, 952 F.3d 1051,1065 (9th Cir. 2020). *Skidmore* overruled numerous copyright cases that employed the use of direct and circumstantial evidence of copying as a factor of their analysis. It will be interesting to see how courts navigate musical copyright infringement going forward and if this ruling will impact the way we view the substantial similarity test. *Id.*

[36] *Id.*

[37] *Swirsky*, 376 F.3d at 845.

[38] *Id.*

[39] Benay v. Warner Bros. Ent., Inc., 607 F.3d 620, 624 (9th Cir. 2010). The intrinsic test is a subjective test that asks the jury to determine what the ordinary or reasonable person would think. Different jurisdictions use a similar test, but they all have slightly different names to classify them. *Id.*

[40] *Id.*

[41] *Swirsky*, 376 F.3d at 845. Objective criteria can consist of multiple things. In this case, the court looked at the chord changes, tempo, the notes of the melody, the lyrics, and the basic shape and pitch emphasis of the chorus. Other courts have utilized the experts in the case to analyze various

at issue.[42] If the objective similarities between two works are trivial, the court cannot find infringement.[43] What is trivial can become difficult in music copyright cases. There are only a limited number of musical notes, a combination of those notes, and their phrasing[44] Bare rhythmic patterns that are short and common are not protectable.[45] Simple basslines that are mechanical applications of chords are not protectable.[46] While case law has established these principals, this area of the law can still change based on the judge and jurisdiction.

III. FACTS OF THE CASE

Marvin Gaye is most famous for his song "I Heard It Through the Grapevine," which spent seven weeks at the top of the United States' charts when it was released in 1968.[47] His other hit single, "Got to Give It Up," was a song that he did not want to write at first.[48] The Motown engineer and producer, Art Stewart, pushed him to create it.[49] Marvin Gaye recorded and released the song in 1976.[50] "Got to Give It Up" became Marvin Gaye's third song to hit the Billboard Hot 100 list.[51] In 1977, Jobete Music Company, Inc. registered the song with the United States Copyright Office and deposited copies of the sheet music.[52] Marvin Gaye's song became so "instrumental" in the music scene that many artists were influenced by the song. Some artists who have borrowed segments of the song, or cite the song as influence include Madonna,

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other objective elements of the two songs at issue. Each case varies as experts use different aspects in their analysis depending on the case at hand. *Id.*

[42] *Three Boys Music Corp.*, 212 F.3d at 485.

[43] Peters v. West, 692 F.3d 629 (7th Cir. 2012). Peters argued that the line "Trying to get a model chick like Kate Moss" in his song *Stronger* was substantially similar to Kanye West's line "You could be my black Kate Moss tonight" in his song *Stronger*, but the court stated that the lyrics are not the same at all. Just because the two verses used the same pop culture reference does not mean that one infringed on the other in a substantial way. *Id.*

[44] Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 288 (2013). There are only twelve notes an artist can use to create a melody. There are a limited number of combinations of those notes that sound auditorily appeasing to the ear of Western listeners. That means that the only thing that allows musicians to vary their compositions is the speed in which they play those notes, the pitch in which they play those notes, and the order in which they play them. When you compare this phenomenon to other works in copyright law, it is no surprise that substantial similarity is an issue in music copyright cases. *Id.*

[45] *Batiste*, 976 F.3d at 505.

[46] Shapiro, Bernstein & Co. v. Miracle Rec. Co., 91 F. Supp. 473, 474 (N.D. Ill. 1950).

[47] JEREMY SIMMONDS, THE ENCYCLOPEDIA OF DEAD ROCK STARS: HEROIN, HANDGUNS, AND HAM SANDWICHES 190 (2008).

[48] Marvin Gaye, "Got To Give It Up (Pt. 1)", CLASSIC MOTOWN, (last visited Aug. 21, 2021), https://classic.motown.com/story/marvin-gaye-got-give-pt-1/.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Williams*, 895 F.3d at 1116 (noting that the copies that were deposited at the Copyright Office were not written by Marvin Gaye. Marvin Gaye could not write or read sheet music and instead, an unidentified transcriber notated the sheet music. This did not affect Gaye's protection of the work).

Notorious B.I.G, and Aaliyah.[53] The most recent adaptation, "Blurred Lines," put Motown in the spotlight again.

In 2012, Robin Thicke teamed up with Pharrell Williams in a three-day studio session to create the Billboard hit "Blurred Lines."[54] While Williams took the position that his song was only influenced by "Got to Give It Up," he told GQ magazine, "[o]ne of my favorite songs of all time was Marvin Gaye's 'Got to Give It Up' . . . We should make something like that, something with that groove."[55] They did, and not only was it a catchy song, but it peaked on the Billboard charts at number one for ten weeks.[56] The song won numerous awards and earned a significant amount of royalties.[57] "Blurred Lines" currently has 760 million views on YouTube and 616 million streams on Spotify.[58]

A. Procedural History

Gaye's estate sent a demand letter to Williams and Thicke after hearing "Blurred Lines," but negotiations failed.[59] On August 15, 2013, Williams and Thicke filed suit for a declaratory judgment of non-infringement.[60] Gaye's estate filed a counterclaim against the parties for copyright infringement.[61] On October 20, 2014, the district court denied Williams' and Thicke's motion for summary judgment, and the case went to trial.[62] While the parties disagreed about which Copyright Act applied to the case, the

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[53] Marvin Gaye, "Got to Give It Up (Pt. 1)," *supra* note 48. Madonna released her song "Give It 2 Me" in 2008 featuring Pharrell Williams which has 83 million views on YouTube. The song clearly borrows from Gaye's "Got to Give It Up's" general groove and beat. Notorious B.I.G. released his album *Ready to Die*, also in 2008, which began with the song "Intro" which has 1.5 million views on YouTube. "Intro" features samples of audio from many famous songs including the cover of "Got to Give It Up" by Aaliyah. Aaliyah's cover was released in 1996 and currently has 600,000 views on YouTube. The fact that there are other versions of Marvin Gaye's song makes one question Gaye's estate's intentions in pursuing legal action against Thicke and Williams. *Id.*

[54] James C. McKinley Jr., *Robin Thicke, a Romantic, Has a Naughty Hit*, N.Y. TIMES, July 19, 2013, at AR15.

[55] Ben Sisario, *Songwriters Sue to Defend a Summer Hit*, N.Y. TIMES, Aug. 16, 2013, at B6. This quote was significant during the trial. The fact that Williams and Thicke publicly admitted to drawing inspiration from Gaye's song did not work in their favor, and I think that other artists have taken note of this in their conversations with the press today.

[56] *Id.*

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

[58] *Robin Thicke*, SPOTIFY, https://open.spotify.com/artist/0ZrpamOxcZybMHGg1AYtHP (last visited Sept. 24, 2021), *Robin Thicke – Blurred Lines ft. T.I., Pharrell (Official Music Video)*, YOUTUBE, https://www.youtube.com/watch?v=yyDUC1LUXSU (last visited Sept. 24, 2021). These numbers are not stagnant, and likely, the numbers have substantially grown since the time of the last viewing. The court did not order that the songs be taken down. As a result of the trial, Gaye's estate will continue to reap the royalty benefits from all streaming platforms.

[59] *Williams*, 895 F.3d at 1116.

[60] *Id.*

[61] *Id.* at 1117.

[62] *Id.*

district court ruled that the Copyright Act of 1909 should apply.[63] Deciding the case under the Copyright Act of 1909 meant that only the compositional sheet music deposited with the Copyright Office could be protected, not the sound recording.[64] There was a seven-day trial consisting of testimony from Thicke, Williams, and the parties' experts.[65] After the trial, the jury found in favor of Gaye's estate, and the district court entered judgment on December 2, 2015.[66] Williams and Thicke promptly filed an appeal to the United States Court of Appeals for the Ninth Circuit.[67]

B. Ninth Circuit Court of Appeals Decision

The Ninth circuit held that Thicke and Williams infringed on Gaye's copyright.[68] However, the court's holding turned on the procedural posture of the case.[69] The court briefly discussed the relevant issues of substantial similarity and found that the district court properly applied the relevant principles to the case.[70] It was the dissenting opinion by Judge Nguyen that analyzed the case in detail on the issue of substantial similarity.[71]

The court defined the required elements of copyright infringement and the necessary tests used to prove substantial similarity.[72] Williams argued that Marvin Gaye's copyright should only be afforded thin copyright protection.[73] The court disagreed, reiterating that musical compositions are not confined to a narrow range of expression.[74] The Ninth Circuit compared musical compositions, which are only comprised of "five or six constituent elements" with "a page-shaped computer desktop icon" or a "glass-in-glass jellyfish sculpture."[75] The court drew on these examples from *Apple Comput., Inc. v. Microsoft Corp.* and *Satava v. Lowry* as the governing standards.[76]

Marvin Gaye's musical composition for "Got to Give It Up" was created before January 1, 1978, meaning the Copyright Act of 1909 applies.[77] It was still undecided,

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[63] *Id*. at 1121.

[64] *Williams*, 895 F.3d at 1121.

[65] *Id*. at 1117.

[66] *Id*. at 1133. The initial judgment was $3,188,527.50 in actual damages, profits of $1,768,191.88 against Thicke and $357,630.96 against Williams, and a running royalty of 50% of future songwriter and publishing revenues received by Williams, Thicke, and Harris. This judgment is one of the largest to have been given by a jury in music copyright cases.

[67] *Id*. at 1119.

[68] *Id*. at 1138.

[69] *Williams*, 895 F.3d at 1138.

[70] *Id*. at 1137.

[71] *Id*. at 1138.

[72] *Id*. at 1137.

[73] *Id*. at 1120.

[74] *Swirsky*, 376 F.3d at 845.

[75] Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1444 (9th Cir. 1994) (holding that the idea of an icon in a desktop metaphor that represents documents stored on a computer can be expressed in a limited amount of ways and therefore the doctrine of merger applies); Satava v. Lowry, 323 F.3d 805, 810 (Cal. 2003) (holding that the idea of a glass-in-glass jellyfish sculpture naturally flows from the idea of the sculpture and therefore the doctrine of merger applies).

[76] *Williams*, 895 F.3d at 1120.

[77] *Id*. at 1121.

and the court did not answer, on whether the copyright of a musical composition stops at the four corners of the document.[78] The Gaye estate's cross-appeal only questioned the district court's interpretation of the Copyright Act of 1909 if the court remanded the case for a new trial.[79] The court did not remand the case and did not resolve this particular issue; instead, it gave deference to the district court.[80]

C. Nguyen's Dissent

Judge Nguyen began her historic dissent by saying, "the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere."[81] She critiqued the majority for failing to engage in the argument for substantial similarity as a matter of law.[82] Judge Nguyen analyzed substantial similarity under the extrinsic test, finding that Williams and Thicke were entitled to judgment as a matter of law.[83] She noted that while the two songs shared the same groove or musical genre, that was not enough for protection.[84] Judge Nguyen rejected the court's use of *Apple Computer* and *Satava* because, under the majority's reasoning, these works should have been broadly protected.[85] She went on to say that the court did not clearly explain or identify what elements were protected in "Got to Give It Up."[86]

Judge Nguyen framed the issues as whether Thicke and Williams took too much from Marvin Gaye's "Got to Give It Up" and focused her dissent on whether the two works were substantially similar to one another.[87] The court had to decide whether specific elements of the two works were protected, and not the features as a whole.[88] Each of these features, Judge Nguyen said, were not protectable elements: the use of repeated notes, the melodic snippets, the rhythmic pattern that lacks originality, the keyboard parts, and the bassline.[89] Judge Nguyen commented on the procedural posture of the case but made a point to say that it did not impact her analysis.[90] In her opinion, the court was permitted to rule on the substantial similarity issue.[91] Judge Nguyen concluded that "whether considered micro- or macroscopically, 'Got to Give It Up' and 'Blurred Lines' are objectively dissimilar" and that Williams and Thicke should have been entitled to judgment as a matter of law.[92]

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[78] *Id*. at 1120.
[79] *Id*. at 1121.
[80] *Id*. at 1120.
[81] *Williams*, 895 F.3d at 1138.
[82] *Id*. at 1139.
[83] *Id*.
[84] *Id*. at 1140.
[85] *Id*. at 1141.
[86] *Williams*, 895 F.3d at 1141.
[87] *Id*. at 1142.
[88] *Id*.
[89] *Id*. at 1148.
[90] *Id*. at 1150.
[91] *Williams*, 895 F.3d at 1148.
[92] *Id*. at 1152.

IV. ANALYSIS

This section argues that if the court used its judicial discretion and applied the Copyright Act of 1976, it would have achieved a correct and equitable result, and ruled in favor of Thicke and Williams.[93] In support of this argument, this section demonstrates that sound recording analysis provides more equitable results in cases. In addition, the goals of copyright protection are not adequately furthered by our judicial holdings.[94] Finally, this section concludes by proposing that future courts should use the Copyright Act of 1976 in their decisions alongside new substantial similarity standards proposed by scholars that are better suited for music of the modern age. If the *Williams* court considered this standard, it would have reached a different result.

A. The State of Music Today

Sound recording analysis is a better standard when dealing with modern music because an artist's expression is what makes songs unique.[95] Under the Copyright Act of 1909, sound recordings produced by the artists are not protected.[96] Courts only analyze the expression of the ideas as notes written down in their composition.[97] Courts have continuously stated that there is only a modicum of notes that can be used to make an auditorily pleasing song.[98] Melodies in modern music tend to follow a specific structure, which is less complex and more speech-like.[99] Most modern songs utilize only the major and minor scales in regular 4/4 time.[100] Artists then push the boundaries to create new and creative "pop" music by blending genres.[101] A major trend

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[93] *Id*. at 1138.

[94] Grand Upright Music Ltd. v. Warner Bros. Rec., Inc., 780 F. Supp. 182 (S.D.N.Y. 1991). As discussed further in the article, rulings such as Judge Duffy's "Thou shall not steal" put a strict limitation on the bounds of an artist's creative expression. Future courts should not follow Judge Duffy's reasoning and allow for borrowing where it promotes creativity. *Id.*

[95] *See* Livingston & Urbinato, *supra* note 44, at 281. Livingston argues that what drives sales in the modern era is an artist's "mystique, charisma, glamour, and vocal ability" and not the originality or sophistication of a particular song.

[96] *N. Music Corp*., 105 F. Supp. at 397 ("It is only the method or way of putting the idea into a form [the composition] that can be copyrighted.")

[97] *Id*. (comparing the musical notes of two songs reveals that 16 of the notes were common to both songs); Nom Music, Inc. v. Kaslin, 227 F. Supp. 922, 928 (S.D.N.Y. 1964) (where the court found that there was a total of 59 notes that were identical in both works).

[98] Jones v. Supreme Music Corp., 101 F. Supp. 989, 992 (S.D.N.Y. 1951). The court notes that given the number of notes in a musical scale and how even fewer of those iterations are pleasing to the popular ear, recurrence should not be a "badge of plagiarism."

[99] *See* Livingston & Urbinato, *supra* note 44, at 240. Most modern music in the United States follows basic structures operating on the major and minor scales. Each song usually changes every eight-bar segment and repeats these segments in the chorus of the song.

[100] *Id*. at 240. A 4/4-time signature simply means that there are four beats per measure. Tonality is the idea that one primary tone will have at least seven other tones that gravitate away from and back to the primary again. Each tone is arranged in a fixed segment of whole and half steps. For instance, in the key of C major, the pitches that gravitate away from and back to the root note C are C, D, E, F, G, A, B, and C. Each key has its notes that flow from it. *Id.*

[101] LIL NAS X, OLD TOWN ROAD (Columbia Rec. 2018) (A country-rap song); POST MALONE, OZZY OSBOURNE, & TRAVIS SCOTT, TAKE WHAT YOU WANT (Republic Rec. 2019) (A trap-rock song);

of modern music is to sample other songs and shape them in a way in which they are only slightly recognizable.[102] Together, these factors create multiple problems for the substantial similarity test in the twelve circuits.

Music copyright cases are challenging because it is hard to separate protectable material from non-protectable material. Pre-1976 music copyright cases have taken different approaches to evaluating the similarity of two works. In *Nom Music, Inc. v. Kaslin*, the court conducted a qualitative and quantitative analysis of two compositions.[103] Judge Cooper concluded that because twenty-three bars (out of thirty-two) of the two songs were identical or similar, the defendant's work was an infringement.[104] In *Williams*, the dissent conducted a similar analysis of "Blurred Lines" and "Got to Give It Up."[105] Based upon this analysis, Judge Nguyen rejected the Gaye estate's argument that the songs share four similar elements.[106] Gaye's estate argued that because "(a) each phrase begins with repeated notes; (b) the phrases have three identical pitches in a row in the first measure and two in the second measure; (c) each phrase begins with the same rhythm; (d) each phrase ends on a melisma" the two works must be substantially similar.[107] Judge Nguyen disagreed, explaining that repeating notes are not original, a three-note phrase is not sufficient for originality, a bare rhythmic pattern is not original, and a melisma is a common musical technique.[108] The outcome and analysis used by Judge Nguyen is correct, but it is not easily applicable to other cases because there are too many questionable variables.

Modern music copyright cases continue to be the battlegrounds for music experts.[109] While many cases hinge on the failures of an expert's methodology and analysis, more courts are starting to understand that when one strips the elements of a song down, the artist's musical expression is the only protectable aspect of a song.[110] In *Moore v. Columbia Pictures Indus., Inc.*, the court relied on the expert witnesses of

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MACHINE GUN KELLY, YUNGBLUD, & TRAVIS BARKER, I THINK I'M OKAY (Bad Boy Rec. & Interscope Rec. 2019) (A rap-rock song); MORGAN WALLEN, BROADWAY GIRLS (Republic Rec. Unreleased) (A trap-country song). These songs are a small selection of modern works that are working to blend genres to make original sounds.

[102] Cronin, *supra* note 8, at 1234. Sampling is the use of a portion of a sound recording in a new work. Usually, an artist will take a few seconds and loop it (play it on repeat) and add other elements around it such as drums or bass.

[103] *Nom Music, Inc.*, 227 F. Supp. at 926. The court looks at the bars of each song and looks at how many notes are similar between each bar in the two songs.

[104] *Id.* at 927.

[105] *Williams*, 895 F.3d at 1143.

[106] *Id.*

[107] *Id.* A melisma is when a singer sings one sound, for example, the vowel sound "ah," on different notes. An example of this is the song "Hallelujah" by Leonard Cohen. When Cohen sings the word 'hallelujah' for the final time he is using a melisma on the sound "ou." *Id.*

[108] *Id.* at 1143-44.

[109] Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987) (expert opinion evidence may be used in the first step of the substantial similarity test to show the similarity of ideas).

[110] Boone v. Jackson, 206 F. App'x. 30, 32 (2d Cir. 2006) (Court concluded that the plaintiff's expert undermined his conclusions by conceding that the two songs had different lyrics and rhythmic constructions); McRae v. Smith, 968 F. Supp. 559, 568 (D. Colo. 1997) (Plaintiff's expert failed by focusing on aspects of the songs that are common to the genre of the songs); Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 944 (8th Cir. 1992) (Plaintiff's expert admitted the plausibility that the defendant's song was not copied from the plaintiff's song).

the two parties.[111] The defendant's experts all concluded that the similarities between the two songs could be attributed to the "R&B/hip-hop" genre.[112] If the *Williams* court considered the sound recordings of the two works, it would come to the same conclusion. The elements of the two songs are common among the most popular songs as well as songs of the classic Motown genre.[113] Williams stated that his intent was to capture the feel of classic Motown.[114] What makes "Blurred Lines" unique is how Williams and Thicke were able to modernize Motown music through their artistic expression of ideas.

B. A Short Tutorial on How to Promote Constitutional Values

The goal of copyright law is to promote and protect "the progress of science and useful arts."[115] Our case law should strike a balance between protecting the artist's rights while allowing for future generations to progress forward.[116] The music industry and courts have stifled creativity by only allowing sampling from other songs when the artist receives permission to do so.[117] We are living in a "permissions" culture that favors big labels as those labels can afford and have the social resources to obtain a license for samples; meanwhile, smaller artists do not have the same luxury.[118] Holdings like Judge Duffy's "Thou shalt not steal" do nothing but label modern musicians as pirates.[119] In reality, sampling and building on of the music of the past benefits all parties involved and allows artists to push the boundaries of their creativity.[120]

Mike Schuster, David Mitchell, and Kenneth Brown conducted a study which demonstrates that the original song's sales increase when an artist samples a song.[121] The study analyzed the sales of 450 songs that used samples.[122] Schuster then used

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[111] *Moore*, 972 F.2d at 945. The defendants had submitted affidavits of four expert witnesses including a professional musician, a University of Minnesota music professor, a producer/songwriter, and a musicologist. The plaintiff offered the expert testimony of one professional musician. *Id.*

[112] *Id.* at 946 ("Given the strength and depth of MCA's experts' testimony, particularly in light of the inconclusive and unsubstantiated testimony of Moore's witness, we are convinced that under the extrinsic test established by *Hartman*, a reasonable factfinder could not find that "On Our Own" is substantially [like] "She Can't Stand It.")

[113] *All Music*, MOTOWN (last visited Oct. 16, 2021), https://www.allmusic.com/style/motown-ma0000002735?1634396230888. Motown music was a style of music that was prevalent in the 1960s. It is characterized by basic rhythmic bouncing bass and drums with the utilization of strings, horns, woodwinds, piano, and extra percussion elements.

[114] Sisario *supra* note 55, at B6.

[115] U.S. CONST. art. I, § 8, cl. 8.

[116] Joanna Demers & Paul G. Lyons, *Steal This Music: How Intellectual Property Law Affects Musical Creativity*, 2007 SYRACUSE SCI. & TECH. L. REP. 1, 7 (2007).

[117] *Id.* at 90. The content providers are determined to immortalize the name of their artists and are not eager to give up these without requisite fees. Small artists who do not have the contacts or financial support find it difficult to be creative with this kind of gatekeeping. *Id.*

[118] *Id.*

[119] *Grand Upright Music Ltd.*, 780 F. Supp. at 182.

[120] Demers & Lyons, *supra* note 116, at 87.

[121] Mike Schuster, David Mitchell & Kenneth Brown, *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AMER. BUS. L.J. 177, 184 (2019).

[122] *Id.* at 202. This data was collected from multiple sources including "Sampling Songs" (a list of the top Billboard songs from 2006 to 2015) and sales data from Nielsen's Soundscan. The sales data

the website WhoSampled.com, a website that any member of the public can use, to find exactly what song was sampled. The study concluded that there "was no evidence that repeated sampling of an original work (in multiple sampling works) negatively influence[d] the expected increase in post sampling sales."[123] The study illustrates that not only do artists pay homage to other artists, or different eras of music, but they also introduce new audiences to old music.[124]

The *Williams* majority failed to consider policy arguments. At no point in the judicial opinion does the court discuss any benefits that the Gaye estate could have already attained from Thicke and Williams' song.[125] Thicke and Williams introduced a new generation to the Motown genre and style.[126] Courts fail to realize that if modern music does not incorporate the songs of older generations, those songs will slowly fade out of the public eye, and no one will be able to profit from them.[127]

C. Got to Give Up the Blurred Standards

Our current copyright infringement standards do not adequately address musical works.[128] To prove infringement, a plaintiff must demonstrate ownership of a valid copyright and that the defendant copied protectable elements of the copyright.[129] Copying is shown through direct and indirect evidence.[130] In the past, courts have utilized an "inverse-ratio" rule where "a lower standard of proof [is required] on substantial similarity when a high degree of access is shown."[131] This has since been overruled by *Skidmore*, which seems to put all works, regardless of access, on a similar stage.[132] Courts in the Ninth Circuit then employ the intrinsic and extrinsic tests to determine whether the works are substantially similar.[133] Given the *Skidmore*

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offered by Soundscan is not open to the public, it is only offered to paying subscribers. I would have liked to check this data personally for this analysis, but it was unavailable.

[123] *Id*. at 208.

[124] *Id*. at 212.

[125] *Williams*, 895 F.3d at 1115.

[126] Sisario, *supra* note 55, at B6. Williams had testified during the trial that he "h[ad] been channeling that feeling, that late- '70s feeling."

[127] Schuster, Mitchell, & Brown, *supra* note 121, at 219. Sampling allows artists to honor and promote the work of other artists. Some people are exposed to old music through their parents and grandparents, but if that is the only source of information then the scope is limited. Sampling allows younger generations to experience and get introduced to music they may not have. *Id.*

[128] Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 281 (1993).

[129] *Swirsky*, 376 F.3d at 844; *Three Boys Music Corp.*, 212 F.3d at 481.

[130] *See* L.A. Printex Indus. v. Aeropostale, Inc., 675 F.3d 841, 846 (9th Cir. 2012) (explaining the general test for establishing copyright infringement and proving copying); Selle v. Gibb, 741 F.2d 896, 900 (7th Cir. 1984) (providing the test for musical compositions).

[131] Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) (stating that access is not relevant to the intrinsic test and is to only be used in the determination of whether works are similar under the extrinsic test).

[132] *Skidmore*, 952 F.3d at 1079 (holding that a high degree of access to a copyrighted work does not mean that a lower standard of proof to show substantial similarity is required in a copyright infringement action).

[133] *Swirsky*, 376 F.3d at 845 (explaining the general extrinsic test for substantial similarity).

holding, and the inconsistencies in rulings regarding the substantial similarity test, it is time for courts to re-evaluate and utilize new tests in the future.[134]

Many scholars have proposed new methods and tests of substantial similarity in music cases. Some of these tests rely on databases and technology that catalog features of songs and mathematically compare them with one another.[135] These tests assume that one can boil down an artist's expression to a system, when in reality, the protection of modern music lies in artistic expression.[136] Other scholars have proposed a reversal of the order of the substantial similarity test in which the first prong would rely on the reasonable layperson test.[137] This test could be more burdensome on courts because it relies on the judge's subjective opinion of whether the two works are substantially similar.[138] As the fact-finder still needs to consider the substantial similarity of the questioned works, trials will be more likely to proceed and the standards for a summary judgment motion are not met.[139] The best method is for courts to consider the market effects of two works.[140] Margit Livingston, a Professor of Law with a Masters in Theatre Arts, argues:

> The ultimate standard under copyright law should be whether the defendant has interfered with the plaintiff's market by copying the plaintiff's work. If copying has occurred to some degree but most lay listeners would not find the two works substantially similar, then presumably the defendant's work is not a substitute for the plaintiffs. In other words, consumers would not purchase the defendant's work in lieu of the plaintiffs.[141]

A market effects analysis takes the pressure off courts to settle the battle between musicology experts and best considers the value of music.[142] This new standard strikes the balance between protecting the rights of a copyright holder and allowing artists to use old music in more creative ways.

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[134] *Compare* Allen v. Destiny's Child, 2009 WL 2178676, at *12 (N.D. Ill. July 12, 2009) (finding a three-note sequence combined with common musical elements was not protected) and Morrill v. Stefani, 338 F. Supp. 3d 1051, 1060-1061 (C.D. Cal. 2018) (combination of five common musical elements in an entire song is not protectable) *with Williams*, 895 F.3d at 114 (holding that copyright infringement occurred where six similar musical elements appear in both songs).

[135] Robert J.S. Cason & Daniel Müllensiefen, *Singing from the Same Sheet: Computational Melodic Similarity Measurement and Copyright Law*, 26 INT'L REV. L., COMPUT. & TECH. 25, 30-33 (2012). Cason and Müllensiefen discuss multiple objective tests that approach music from technical analysis. The Mega-Element Analysis (MEA) compares two songs using a detailed feature description and compiles them in a database. Similarly, the Mathematic Modelling Analysis (MMA) tries to model songs at the level of sound waves and analyze the distance or similarity between the physical models. *Id.*

[136] *Id.*

[137] Jones, *supra* note 128, at 303. Under Jones' test, the factfinder would listen to the songs without first listening to expert testimony to decide of potential similarity. If the factfinder finds that they sound similar, they will then listen to the competing evidence from the defendant to show that while there are similarities of ideas, there are no similarities in the expression of the ideas, and/or that the expression is something in the public domain. *Id.*

[138] *Id.*

[139] *Id.*

[140] *See* Livingston & Urbinato, *supra* note 44, at 274.

[141] *Id.*

[142] *Id.*

Had the *Williams* court analyzed the sound recordings of the two songs using Livingston's test, the court would have found in favor of Williams because the court would have analyzed the current market of each song.[143] Marvin Gaye released his song in the 1970s. It has a particular demographic (presumably people in their 60s to 70s and people who are interested in Motown music).[144] In contrast, "Blurred Lines" appeals to a modern demographic.[145] The court would evaluate the actual harm done to Gaye's estate by looking at consumer data such as sales and streaming revenue.[146] It would have found that "Blurred Lines" had a positive effect on the revenue and notoriety of "Got to Give It Up."[147] Accordingly, the court should have ruled in favor of Williams because Gaye's estate suffered no actual financial harm.

V. CONCLUSION

The music industry has changed since 1909, and courts need to adapt to this change. The Ninth Circuit should have used its judicial discretion to decide *Williams* under the Copyright Act of 1976. Had the court exercised its discretion, it would have held for Williams and Thicke.

Analyzing what the composition states and what the sound recording reflects is the more equitable solution for copyright disputes.[148] Modern music is about blending and referencing our past to create new works that follow basic structures that most listeners can follow.[149] Qualitative and quantitative analysis of a piece of paper that

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[143] *Id*. at 274.

[144] MARVIN GAYE, GOT TO GIVE IT UP (Tamla Records 1977).

[145] Billboard, *Chart History Robin Thicke* (last visited Oct. 16, 2021) https://www.billboard.com/music/Robin-Thicke/chart-history/HSI/song/777630. Blurred Lines hit number on the Billboard charts on June 21, 2013 and stayed on the charts for 48 weeks. The number of weeks it spent on the charts indicates that a larger demographic found the song enjoyable. The song went on to win multiple awards. *Id*.

[146] *See* Livingston & Urbinato, *supra* note 44, at 274.

[147] GOOGLE TRENDS, *Got to Give It Up* (last visited Oct. 16, 2021) https://trends.google.com/trends/explore?date=2009-01-01%202019-01-01&geo=US&q=Got%20to%20Give%20It%20Up. By using Google Trends and inputting the search term "Got to Give It Up" we can track how often the term is searched on Google. I was able to create a data set tracking the searched term from 2009 (when the song was released on YouTube) to 2018 (some years after Blurred lines was released, but before the lawsuit ensued). What we see is that before the release of "Blurred Lines" in 2014, there was little to no popularity, but after the release of "Blurred Lines" we see a massive spike of popularity. This could indicate that "Blurred Lines" had a positive effect on the notoriety of "Got to Give It Up" given no other reasonable alternative explanation. To my knowledge, "Got To Give It Up" was not used in any film or show or sampled by another artist. *Id*.

[148] *See* Livingston & Urbinato, *supra* note 44, at 281.

[149] LIL NAS X, OLD TOWN ROAD (Columbia Rec. 2018) (A country-rap song); POST MALONE, OZZY OSBOURNE, & TRAVIS SCOTT, TAKE WHAT YOU WANT (Republic Rec. 2019) (A trap-rock song); MACHINE GUN KELLY, YUNGBLUD, & TRAVIS BARKER, I THINK I'M OKAY (Bad Boy Rec. & Interscope Rec. 2019) (A rap-rock song); MORGAN WALLEN, BROADWAY GIRLS (Republic Rec. Unreleased) (A trap-country song). Artists continue to put out songs that blend genres. I want to point out, though, that the market for these kinds of songs is currently limited to big corporations. Independent artists must choose between sampling a song without permission and risk litigation and struggling to create something independently. Big corporations have the capital to pay for licenses if an original author threatens litigation.

describes the song in notation is not suited to deal with this issue.[150] Strict, objective analysis strips away freedom of expression and allows for monopolies in free trade musical ideas.[151] If more courts rule in the same manner as the *Williams* court, we will approach Judge Nguyen's prophecy of copyrighting the vibe of a song, thus, stripping many artists of creative expression.[152]

The overarching goal of copyright law is to promote and protect "the progress of science and useful arts."[153] As the music industry starts to shift to a melting pot of expression, we need to conform to reality.[154] The reality is if an old song from the 1970s gets sampled in a Drake track, the 1970s song is going to get another chance at being profitable.[155] Strict "Thou shalt not steal" holdings stifle creativity and pad the pockets of the original authors.[156] Allowing for borrowing allows all parties to benefit and contributes to the expansion of musical creativity.

Applying the Copyright Act of 1976, rather than the Copyright Act of 1909, will not solve every problem. Keeping this in mind, courts should still consider new ways of determining substantial similarity.[157] Courts should consider actual damage and market effects in its analysis. The *Williams* court should have considered the damages to Gaye's estate by the release of "Blurred Lines."[158] Had the court used its judicial discretion to decide the case under the Copyright Act of 1976, Williams and Thicke would have prevailed, and creativity would be protected. Courts in the future should not adhere to the *Williams* holding, and instead, should pave the way for more fairness, the success of other artists, and above all, creativity.

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[150] *Nom Music, Inc*., 227 F. Supp. at 926.

[151] *Id*; *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes uses the metaphor of the "marketplace of ideas" in a case about free speech. I use this idea though to describe music because, in a similar sense, we are buying and trading our ideas and expression as well. As we have described, there is only a modicum of notes and musical arrangements that are auditorily pleasing. Allowing an artist to hold copyrights to specific patterns takes that expression out of the market and it could allow one artist to hold monopolies on multiple expressions in the market. *Id*.

[152] *Williams*, 895 F.3d at 1140.

[153] U.S. CONST. art. I, § 8, cl. 8.

[154] MORGAN WALLEN, BROADWAY GIRLS (Republic Rec. Unreleased) (A trap country song). This song is the clearest example of a "melting pot of expression." It blends the culture of rap and hip/hop with the southern influences of country. The global market of music is going to continue to allow for this blend of expression of cultures and genres.

[155] *See* DRAKE, HOTLINE BLING (Cash Money Rec.; Young Money Rec.; Republic Rec. 2015) *and* GOOGLE TRENDS, Timmy Thomas *Why Can't We Live Together* (last visited Oct. 29, 2021) https://trends.google.com/trends/explore?date=all&geo=US&q=Timmy%20Thomas%20%20Why%20Can%27t%20We%20Live%20Together. Drake's song *Hotline Bling* sampled Timmy Thomas' *Why Can't We Live Together*. Using Google Trends, we can see that after Drake's song was released and received recognition at the 2016 music awards, there is a spike in internet interest in Thomas' song.

[156] *Grand Upright Music Ltd.*, 780 F. Supp. 182.

[157] *See* Margit Livingston & Joseph Urbinato, *supra* note 44, at 274.

[158] GOOGLE TRENDS, *Got to Give It Up* (last visited October 16, 2021) https://trends.google.com/trends/explore?date=2009-01-01%202019-01-01&geo=US&q=Got%20to%20Give%20It%20Up. Again, this data calls into question whether actual damage resulted to Gaye's estate.