Copyright Protection Designed for Music's Illusory Innovation Space: A Sliding Scale Framework of Broad to Thin Protection

I. Introduction

Since the *Williams v. Gaye* case, where a jury found Pharrell Williams and Robin Thicke's "*Blurred Lines*" infringed upon Marvin Gaye's "*Got to Give it Up*", music copyright disputes have increasingly captured media attention on "Why All Your Favorite Songs Are Suddenly Being Sued"[1] with winking headlines about the "Music Industry's 'Blurred Lines' on Copyright".[2] And it seems no modern artist is safe. Lady Gaga's "Shallow", Lizzo's "Truth Hurts", Sam Smith's "Stay with Me", Coldplay's "Viva La Vida", Ed Sheeran, Lana Del Rey, Cardi B, Miley Cyrus, Carrie Underwood, and Kendrick Lamar have all been accused of copyright infringement.[3]

The copyright lawsuits against Led Zeppelin, Pharrell Williams, and Katy Perry illustrate an ambiguous framework that lacks predictability and permits increasingly narrow claims of infringement. This is problematic as musicians need clarity on what may be referenced as a musical idea and what are protected musical expressions. Era-inspired works like "Uptown Funk,"[4] which was hit with three copyright lawsuits, exemplify the current framework's overbroad protection which risks punishing the creation of permissible inspired works.[5] And with 40,000 songs uploaded per day to Spotify, music's drastic growth comes with more fear of liability.[6]

The current framework overlooks the fact that all music draws upon prior works for inspiration.[7] The fundamental building blocks (melody, harmony, and rhythm), which are limited to a finite system, create the backbone of a musical composition upon which all secondary

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[1] Amy X. Wang, *Why All Your Favorite Songs Are Suddenly Being Sued*, ROLLING STONE (Aug. 2, 2019), https://www.rollingstone.com/music/music-features/katy-perry-led-zeppelin-ed-sheeran-music-lawsuits-865952.
[2] Edward Lee, *Can 'Fair Use' Clear Up Music's Blurred Lines on Copyright?*, BILLBOARD (Jul. 19, 2018), https://www.billboard.com/articles/business/8466118/fair-use-doctrine-blurred-lines-copyright-edward-lee-op-ed.
[3] Libby Torres, *33 artists whose hits were accused of ripping off other songs*, INSIDER (Oct. 16, 2019), https://www.insider.com/songs-that-allegedly-stole-from-other-songs-2018-3.
[4] Michelle Kaminsky, *Bruno Mars And Mark Ronson's 'Uptown Funk' Faces (Yet Another) Copyright Infringement Suit*, FORBES (Dec. 30, 2017), https://www.forbes.com/sites/michellefabio/2017/12/30/bruno-mars-and-mark-ronsons-uptown-funk-faces-yet-another-copyright-infringement-suit/#1f829c0770c0.
[5] Randall Roberts, *How the 'Blurred Lines' case could have chilling effect on creativity*, LOS ANGELES TIMES (Mar. 6, 2015), https://www.latimes.com/entertainment/music/la-et-ms-blurred-lines-notebook-pharrell-williams-robin-thicke-marvin-gaye-20150306-column.html.
[6] Wang, *supra* note 1.
[7] *See* Brief of Amici Curiae 212 Songwriters et al. in Support of Appellants at 9, Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018) (No. 15-56880), 2016 WL 4592129 [hereinafter *Williams Amici Brief of 212 Songwriters*] ("From time immemorial, every songwriter, composer, and musician has been inspired by music that came before him or her… This is especially so within a particular musical genre. Virtually no music can be said to be 100% new and original.").

elements rest upon.[8] This article proposes a sliding scale framework between broad and narrow protection dependent on the primary or secondary role of allegedly infringing elements.

II. The Current Substantial Similarity Framework

A. *Access and the Extrinsic – Intrinsic Analysis of Musical Works*

When a plaintiff holds a valid copyright to a song, a musical artist infringes upon that copyright if the plaintiff can prove circumstantial copying by showing that (1) the defendant had access to the plaintiff's work; and (2) that the two works share substantial similarities.[9] Access may be based on a theory of widespread dissemination and subconscious copying."[10] Courts have applied an "inverse-ratio rule", in which a lower standard of proof of substantial similarity is required when a high degree of access can be shown.[11]

In order to determine the substantial similarity prong, courts employ the extrinsic and intrinsic test. The first "extrinsic" test considers whether two works share similar ideas and expressions, as an idea alone is not protectable, but the expression of an idea can be.[12] This test limits protection solely to protectable elements by breaking the works down into their constituent elements, then comparing those elements for substantial similarity.[13] Because it is essential that courts filter out unprotectable elements such as ideas and scènes à faire[14], musical experts and analytic dissection is recommended to help a judge or jury analyze alleged similarities in those elements.[15] Extrinsic analysis of elements in the illusory space of music can be difficult to grasp, especially since the Ninth Circuit in *Swirsky v. Carey* expressly refused to announce a uniform set of factors for analyzing musical compositions.[16] Fortunately, specific examples of some unprotected musical elements have developed as "expressions that are standard, stock, or common" are not protectable (e.g., arpeggios, chromatic scales).[17]

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[8] Wang, *supra* note 1 ("Christopher Buccafusco, a law professor who specialized in music copyright… tells Rolling Stone, 'The world of musical composition is not that broad… Most musicians are working in a finite innovation space. There are not a lot of sounds generally pleasing to people's ears and not that many ways to say, 'Love is a wonderful thing.'").
[9] Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018).
[10] *Id.* at 1123.
[11] Rice v. Fox Broad. Co., 330 F.3d 1170, 1178 (9th Cir. 2003).
[12] Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).
[13] *Id.*
[14] *Rice*, 330 F.3d 1178 (defining "scènes à faire as expressions indispensable and naturally associated with the treatment of a given idea [which] "are treated like ideas and are therefore not protected by copyright.").
[15] Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002).
[16] *Swirsky*, 376 F.3d at 849 ("In analyzing musical compositions under the extrinsic test, we have never announced a uniform set of factors to be used. We will not do so now.").
[17] Standard musical elements such as arpeggios (i.e., notes of a chord played in sequence) or chromatic scales are not independently protectable under copyright law. *See* Compendium (Third) § 802.5(A) (citing "chromatic scales" and "arpeggios" as "examples of common property musical material"). And certain short musical phrases, even if novel, may not "possess more than a *de minimis* quantum of creativity" and thus unprotectable. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991); *see* Compendium (Third) §§ 313.4(C), 802.5(B).

If "extrinsic" substantial similarity is not found, the inquiry ends.[18] Otherwise, courts proceed to the intrinsic test, the subjective counterpart reserved for the jury. This test asks juries to determine whether the average listener could hear substantial similarities in the "total concept and feel" of the two works."[19] Analytic dissection and expert testimony presented during the extrinsic test are expressly excluded.[20]

B. *The Ninth Circuit has held that Musical Works Enjoy Broad Copyright Protection*

A work is broadly protected if there is a wide range of expression. Under "broad" copyright protection, infringement is found if the work is substantially similar to the original copyrighted work.[21] But if there is a narrow range of expression, then copyright protection is "thin" and the work must be "virtually identical" in order to infringe.[22]

A combination of unprotectable elements may be eligible for copyright protection, but only if those elements are numerous enough, their selection and arrangement original enough, and their combination constituted an original work of authorship.[23] *Satava v. Lowry* makes clear that "copyright on these original elements (or their combination) is "thin", comprising no more than his original contribution to ideas already in the public domain."[24] Thin copyright only protects against "virtually identical copying".[25]

Though music can be a "combination of unprotectable elements", the Ninth Circuit contrarily afforded it "broad" protection per *Swirsky's* categorization of music as a "large array of elements", thus a broad range of expression.[26] Thus, alleged infringing musical works do not need to meet *Satava's* higher "virtually identical" standard, only "substantially similar".[27]

III. Current Policy Issues and Proposal of a Revised Framework

A. *The Ninth Circuit Should Drop the Illogical Inverse-Ratio Rule.*

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[18] *Swirsky*, 376 F.3d at 845.
[19] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)
[20] Sid & Mart Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).
[21] *Id.*
[22] Williams v. Gaye, 895 F.3d 1106, 1120 (9th Cir. 2018) ("To illustrate, there are a myriad of ways to make an 'aliens-attack movie,' but 'there are only so many ways to paint a red bouncy ball on blank canvas.' Whereas the former deserves broad copyright protection, the latter merits only thin copyright protection.").
[23] Satava v. Lowry, 323 F.3d 805, 811 (2003).
[24] *Id.*
[25] *Id.* at 812; *see also*, Ets–Hokin v. Skyy Spirits, Inc., 323 F.3d at 766 (9th Cir.2003) ("When we apply the limiting doctrines, subtracting the unoriginal elements, Ets Hokin is left with ... a 'thin' copyright, which protects against only virtually identical copying."); Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1449 (9th Cir. 1994) ("When the range of protectable expression is narrow, the appropriate standard for illicit copying is virtual identity.").
[26] Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004) ("Music, like software programs and art objects, is not capable of ready classification into only five or six constituent elements; music is comprised of a large array of elements, some combination of which is protectable by copyright.").
[27] *Id.*; *see also*, Williams v. Gaye, 895 F.3d 1106, 1120 (9th Cir. 2018) ("We reject the Thicke Parties' argument that the Gaye's' copyright enjoys only thin protection. Musical compositions are not confined to a narrow range of expression.").

The Ninth Circuit has held that when a high degree of access is shown, a lower standard of proof for substantial similarity is required (the "inverse-ratio rule").[28] In *Skidmore v. Led Zeppelin*, Michael Skidmore, trustee of the Randy Wolfe Trust, claimed that Led Zeppelin's "Stairway to Heaven" infringed upon Wolfe's song "Taurus".[29] The Ninth Circuit directed the district court to consider this doctrine, unless plaintiff's proof of access was "insufficient to trigger the inverse-ratio rule".[30]

This rule has been widely condemned by sister circuits and legal scholars.[31] While proving access to plaintiff's work is a necessary element to show the probability of copying, "more access" does not logically "trigger" an increased probability that the defendant copied from that plaintiff. To illustrate, while Led Zeppelin may have had some access to "Taurus", they also had far more access to widely popular songs (e.g., "Let It Be" by the Beatles, "Mary Had a Little Lamb"). "More access" does not make it more likely that Led Zeppelin copied from those works instead of "Taurus".[32] Simply put, "more access" is not probative of copying.

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[28] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000); *see also*, Rice v. Fox Broad. Co., 330 F.3d 1170, 1178 (9th Cir. 2003).

[29] Skidmore v. Led Zeppelin, 905 F.3d 1116, 1122 (9th Cir. 2018).

[30] In *Skidmore*, the Ninth Circuit evaded applying the inverse-ratio rule "as the jury did not reach the question of copying, the inverse ratio rule was not relevant, and any error in not including it was harmless." However, the court still noted that "there was substantial evidence of access, and indeed, the jury found that both James Page and Robert Plant had access to 'Taurus.' On remand, the district court should reconsider whether an inverse ratio rule instruction is warranted unless it determines, as a matter of law, that Skidmore's "evidence as to proof of access is insufficient to trigger the inverse ratio rule."). *Id.* at 1130–31 (9th Cir. 2018).

[31] *See, e.g.*, *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961); 3 William F. Party, *Patry on Copyright* § 9:91, at 9-243 (West 2007) (concluding that "[i]t is time the inverse ratio 'theory' be killed off permanently"); Alan Latman, *Probative Similarity As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 Colum. L. Rev. 1187 (1990); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. Copyright Soc'y U.S.A. 719, 721 (2010); David Aronoff, *Exploding the Inverse Ratio Rule*, 55 J. Copyright Soc'y U.S.A. 125 (2008).

[32] Brief Amici Curiae of 19 Intellectual Property Professors in Support of Petitioner Led Zeppelin, Skidmore v. Led Zeppelin, 905 F.3d 1116, 1122 (9th Cir. 2018) (No. 16-56057) [hereinafter Skidmore Amici Brief of IP Professors].

Consequently, the Ninth Circuit should align with other circuits who have dropped the inverse-ratio rule.[33] In *Rentmeester v. Nike*, the Ninth Circuit seemed to move in this direction.[34] Yet, the *Skidmore* court still reinforced its relevance by instructing the application of the inverse-ratio rule.[35] As the *Skidmore* case is being reheard en banc, the Ninth Circuit should take the opportunity to abandon the rule and affirm that a "showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown."[36]

B. Music's Finite Innovation Space is Misaligned with Absolute Broad Protection

In *Williams*, the Ninth Circuit held that musical works enjoyed broad copyright protection, thus not requiring "virtual copying" to prove infringement. On counterclaim by Marvin Gaye's' family, the jury found that plaintiff Pharrell Williams' song "*Blurred Lines*" infringed upon Gaye's song "*Got to Give It Up*" ("*Give It Up*").[37] Williams argued that because the alleged infringing elements of "*Give It Up*" were unprotectable elements, it should only enjoy thin protection in accordance to *Satava*.[38] The court disagreed, holding that musical compositions are broadly protected since they are "not confined to a narrow range of expression".[39] Per *Swirsky*, music "is not capable of ready classification into only five or six constituent elements; music is comprised of a large array of elements, some combination of which is protectable by copyright."[40]

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[33] The Second, Seventh and Eleventh Circuits have likewise dropped the inverse ratio rule. See Arc Music Corp. v. Lee, 296 F.2d 186, 187 (2d Cir. 1961) ("the rule is superficially attractive… [but] upon examination confuses more than it clarifies.. access will not supply the lack of similarity, and an undue stress upon that one feature can only confuse and even conceal this basic requirement."); Peters v. West, 692 F.3d 629, 635 (7th Cir. 2012) ("we have never endorsed the other side of the inverse relation: the idea that a "high degree of access" justifies a "lower standard of proof" for similarity. This [access] issue is independent of the question whether an alleged infringer breached his duty not to copy another's work. Once a plaintiff establishes that a defendant could have copied her work, she must separately prove—regardless of how good or restricted the opportunity was—that the allegedly infringing work is indeed a copy of her original."); Beal v. Paramount Pictures Corp., 20 F.3d 454, 460 (11th Cir. 1994) ("the inverse-ratio rule has never been applied in this Circuit").

[34] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1124 (9th Cir. 2018) ("The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown.").

[35] Skidmore v. Led Zeppelin, 905 F.3d 1116, 1130-31 (9th Cir. 2018).

[36] *Rentmeester*, 883 F.3d at 1124.

[37] Co-Plaintiffs Pharrell Williams, Clifford Harris Jr. (p/k/a "T.I."), and Robin Thicke, along with the manufacturer and distributor of "Blurred Lines" initially sought declaratory judgment of non-infringement. The copyright owners of "*Give It Up*", the Gaye family, counterclaimed for copyright infringement. After a seven-day trial and two days of deliberation, a jury found copyright infringement and awarded the Gaye family $4 million in actual damages. Williams v. Gaye, 895 F.3d 1106, 1118 (9th Cir. 2018)

[38] Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003)

[39] *Id.* at 811.

[40] Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004)

Because of the illusory nature of ideas and expression in a musical context, the *Williams* court misapplied the test for substantial similarity and consequently protected musical style/genre ("ideas") under the guise of protecting an original combination of elements ("expression"). First, it is important to properly understand music's finite innovation space from both case law and music professionals.[41] Western music is primarily a "tonal system", a hierarchical and relational system of tones (e.g. the notes of a major or minor scale), in which there are only a limited number of possible pitch and harmonic relationships.[42] Furthermore, the tonal system's hierarchy of predominate chords and pitches create "patterns and tendencies… common to virtually all musical works composed in the tonal system".[43] From here, songwriters draw upon a common vocabulary of fundamental elements to create melody[44], harmony[45], and rhythm[46]. Melody, harmony, and rhythm comprise the "backbone" of a musical composition and thus its most important elements.[47] A combination of secondary elements are then used to enhance the appeal of the work, but they are fundamentally enhancements of the "backbone's" primary elements.[48] Historically, pre-*Swirsky* courts accordingly focused on the primary

[41] Wang, *supra* note 1 ("the world of musical composition is not that broad… Most musicians are working in a finite innovation space.")

[42] *See generally* Carol L. Krumhansl & Lola L. Cuddy, *A Theory of Tonal Hierarchies in Music, in Music Perception*, 51 (M.R. Jones et al. eds., 2003).

[43] Jeffrey Cadwell, *Expert Testimony, Scenes A Faire, and Tonal Music: A (Not So) New Test for Copyright Infringement*, 46 Santa Clara L. Rev. 137, 155-158 (2005) (arguing functional constraints make music prone to tendencies and commonalities).

[44] "Melody" comprises a succession of pitches, each sounded for a particular duration. It is the most distinctive and memorable musical aspect in general because melody is what listeners most readily comprehend, recall and replicate. *See* Fishman, J. P., *Music as a matter of law*, Harvard Law Review, Vol. 131, pp. 1861-1923 (2018).

[45] "Harmony" is the relationship between two or more pitches that are sounded simultaneously or in close succession (e.g., arpeggios). These pitches constitute a "chord." The harmonic progression of a composition is the sequence of chords that provide the support for its melodies.

[46] "Rhythm" is the pattern of sounds and silences in a piece of music as determined by the sequence and duration of the notes being performed or the beats of a percussion instrument.

[47] Musical works are built from a "common vocabulary of fundamental elements like pitch, duration, meter, key and timbre… Using these basic elements, composers build more complex structures like chords and melodic and rhythmic motifs, which they further develop and combine to create the rhythmically structured melodies and underlying harmonic progressions that constitute the original backbone of a musical work. Accordingly, the most important elements of a musical composition are its melody, harmony and rhythm." Amici Curiae Brief of Musicologists in Support of Defendants-Appellees at En Banc Rehearing, Skidmore v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2018) (No. 16-56057), 2019 WL 2996345 (C.A.9), at 7-8

[48] While particular combinations and deployments of these secondary elements (e.g., tempo, instrumentation, phrasing) may enhance the appeal of a musical work, these are "fundamentally enhancements of the primary melodies, harmonies, and rhythm. There is no music without melody, harmony and rhythm; a musical work comprised of a constellation of elements like key, meter, dynamic markings, and designated instrumentation is meaningless. All songwriters choose from among these commonplace elements in forging their original musical expression." *Id.*

elements, even to the point of excluding the other primary elements to solely focus the inquiry on melody.[49]

The *Williams* court's view that music as incapable of "ready classification into a few constituent elements", overlooks the hierarchical importance in the roles of primary and secondary elements in music composition. And while there may be a wide array of elements, the *Williams* court's view fails to realize that the primary elements which constitute the "backbone" of a musical work are systemically constrained to a narrower range of expression.[50] These are even further constrained because, as Judge Learned Hand said, "while there are an enormous number of possible permutations of the musical notes… only a few are pleasing; and much fewer still suit the infantile demands of the popular ear… recurrence is not therefore an inevitable badge of plagiarism."[51]

Furthermore, the sharing of structural elements are especially common within a particular musical genre.[52] Each musical genre has its own common patterns which can be classified as scènes à faire.[53] The scènes à faire doctrine allows anyone to use the defining elements of a genre or style without infringing copyright, because these building blocks are "indispensable" to creating within that genre.[54] The *Williams* court's failure to hold a musical combination of unprotected elements to the virtually identical standard, broadens infringement to common patterns used to invoke the "style" or "feel" of an era.[55] In effect, this prevents artists from referencing previous material, particularly problematic as all music is inspired by prior music.[56]

C. A Revised Framework Designed for Music's Innovation Space is Needed

i. Current Policy Considerations Illustrated through Williams

In designing an updated infringement framework for musical work, competing policies must be considered. The *Williams* case illustrates the problems of the current framework. Williams

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[49] N. Music Corp. v. King Record Distributing Co., 105 F. Supp. 393, 400 (S.D.N.Y. 1952) ("Neither rhythm nor harmony can in itself be the subject of copyright… it is in the melody of the composition - or the arrangement of notes or tones that originality must be found.").

[50] Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2nd Cir. 1988) ("limited number of notes and chords available to composers").

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

[52] Williams Amici Brief of 212 Songwriters, *supra* note 7 ("All composers share devices and building. This is especially so within a particular musical genre. Virtually no music can be said to be 100% new and original.").

[53] Cadwell, *supra* note 46, at 165.

[54] Jennifer Jenkins, *The "Blurred Lines"* of the Law, DUKE LAW CENTER FOR STUDY OF THE PUBLIC DOMAIN (Mar. 10, 2015), https://web.law.duke.edu/cspd/blurredlines.

[55] Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath,* MCPHERSON LLP (Feb. 7, 2019), https://mcpherson-llp.com/articles/crushing-creativity-the-blurred-lines-case-and-its-aftermath (quoting Parker Higgins, director of copyright activism at the Electronic Frontier Foundation, that "when we say a song 'sounds like' a certain era, it's because artists in that era were doing a lot of the same things – or, yes, copying each other. If copyright were to extend out past things like the melody to really cover the other parts that make up the 'feel' of a song, there's no way an era, or a city, or a movement could have a certain sound. Without that, we lose the next disco, the next Motown, the next batch of protest songs.").

[56] Wang, *supra* note 1 (quoting composer and producer Gregory Butler, "You've made it illegal to reference previous material. I'm never going to come up with something so radically different that it doesn't contain references to something else.").

had said he was inspired by the "late-70's feeling" by using elements from that era, which Gaye claimed infringed on "Give It Up's" originality.[57] But in fact, many elements in "Give It Up" are unoriginal staples of funk music, from the bass line, falsetto, and hook elements.[58] To prove that the alleged infringing elements were scènes à faire, Williams' experts cited prior works that utilized the same elements.[59] However, the district court ruled that per *Swirsky* the expert testimony failed to show that "*Blurred Lines*" was "more similar" to these prior works than it was to "*Give It Up*".[60] But this "more similar" focus was misplaced, as the issue in both *Swirsky* and *Williams* was whether the individual elements were scènes à faire, not whether the works were entirely unoriginal. Because the district court failed to properly consider the issue at summary judgment of whether the defendants copied original elements, the case proceeded to a jury.

The current framework intended for judges to play a "gate-keeping" role in applying the extrinsic test at summary judgment.[61] But when the court bypasses actual consideration of the protectability of the elements themselves, problems compound when proceeding to intrinsic analysis. The "total concept and feel" test asks juries to decide whether the two works are substantially similar. Yet, research shows that non-musicians are significantly more likely to find similarity between musical works based off a particular timbre or shared performance style.[62] Thus, the unprotectable sounds of instruments or vocal styles shared within a genre can have a prejudicial effect on a jury's perception of musical similarity between the two works.[63] This is further complicated as the intrinsic analysis expressly prevents expert testimony who could mitigate this subtle risk.[64] Here, the *Williams* jury found similarity where the 70's-inspired "*Blurred Lines*" shared similar unprotectable timbre and genre elements with "Give It Up".[65]

ii. A New Sliding Scale Framework that Properly Categorizes Elements

Competing policy interests are remedied in a new framework that allows for a sliding scale between broad and thin copyright protection, based upon the hierarchical importance of the alleged infringing musical elements. At the extrinsic stage, musical works that share similar melodies, the most important of the primary "backbone" elements, should enjoy broad protection subject to the "substantial similarity" standard. Harmonic and rhythmic elements are probative

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[57] Roberts, *supra* note 5.
[58] Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK, 2014 WL 7877773, at 19 (C.D. Cal. Oct. 30, 2014) (including "Low Rider" by War from 1975, "Superfly" by Curtis Mayfield from 1972 and "Funkytown" by Lipps Inc. from 1980).
[59] *Id.* at 4, 13, and 15 (including "*Low Rider*" by War from 1975, "*Superfly*" by Curtis Mayfield from 1972 and "*Funkytown*" by Lipps Inc. from 1980).
[60] *Id.* at 19.
[61] Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 Stan. L. Rev. 791, 860 (Forthcoming 2016).
[62] Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, SSRN ELECTRONIC JOURNAL (March 29, 2012), https://ssrn.com/abstract=2030509.
[63] *Id.*
[64] Sid & Mart Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).
[65] Williams v. Gaye, 895 F.3d 1106, 1115 (9th Cir. 2018)

as primary elements, but by themselves do not warrant broad protection. However, when rhythmic or harmonic elements are combined with numerous shared secondary elements, it may rise to a level that warrants broad protection. Secondary elements, as functional enhancements of the primary elements, lean towards thin protection if shown to be unoriginal and unprotected. Thus, an original combination of secondary elements may only be infringed upon if the works are "virtually identical". If extrinsic similarity is found, the intrinsic test should allow for music expert testimony. Jurors in each unique case need genre-specific guidance on applicable similarity standards in order to distinguish a genre's unprotectable sounds and performance styles from an original work's non-genre protectable "concept and feel".

This framework balances multiple interests. Placing utmost importance on melodic similarity comports with the policy behind those who argue that copyright should be restricted to only melody.[66] It also aligns with pre-*Swirsky* case law that historically focused the inquiry to melody.[67] And the inclusion of less important elements also generally comports with post-*Swirsky* precedents analyzing music as a "large array of elements" with a comparably wider range of expression than other mediums.[68]

Original copyright holders may argue that copyright law should protect original combination of elements beyond their melodies. However, copyright law has often withheld such overbroad protection from creative expression that theoretically could be protected.[69] When Congress extended protection to choreography but withheld it from "social dance steps and simple routines", it explicitly linked musical and choreographic works as categories that did not extend to a full range of creative authorship.[70]

In any case, the sliding scale still considers the original combination of elements by appropriately aligning the similarity standard with *Satava* when necessary. This framework balances the desire to protect original combinations with the danger of overbroadly reaching into the unprotectable defining elements of genre. Allowing rhythmic and harmonic primary elements the opportunity to lean towards broad protection gives courts room to address each unique combination. This aligns with current case law's view that "there is no magical combination of factors… each allegation of infringement will be unique".[71]

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[66] Skidmore Amici Brief of IP Professors, *supra* note 33.
[67] Judge Learned Hand concluded in Hein v. Harris that infringement occurs only when "to the ear of the average person the two [parties'] melodies sound to be the same." 175 F. 875 (C.C.S.D.N.Y.), aff'd, 183 F. 107 (2d Cir. 1910). And under an earlier Copyright Act, the Supreme Court stated that copyright protects against copying "the compilation of notes which, when properly played, produces the melody which is the real invention of the composer." White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 11 (1908).
[68] Williams v. Gaye, 895 F.3d 1106, 1120 (9th Cir. 2018) ("they are unlike a page-shaped computer desktop icon or a "glass-in-glass jellyfish sculpture").
[69] For example, in architectural works, protection is extended only to "buildings" and not other kinds of structures of architectural creativity (e.g. bridges, dams, walkways). Architectural Works Copyright Protection Act, Pub. L. No 101-650, 104 Stat. 5089, 5133 (1990).
[70] Jessica Goudreault, *Copyrighting the Quotidian: An Analysis of Copyright Law for Postmodern Choreographers*, 39 Cardozo L. Rev. 751, 767 (2017); see also, H.R. Rep. No. 94-1476, at 53-54 (1976).
[71] Williams, 895 F.3d 1120.

This sliding scale presents more guidance at the summary judgment stage than the current amorphous framework which refused a uniform set of factors. This allows the court to play its gate-keeping role more effectively and set more precedent, which would in turn make the law more predictable. It provides clearer margins for artists to create new music. They would now know that their inspired works are absolutely permissible if their melodies are dissimilar and the other elements are not "virtually identical".

iii. Applicability of the New Framework Illustrated through Gray

In *Gray v. Hudson*, plaintiff Marcus Gray claimed defendant Katy Perry's song "*Dark Horse*" infringed upon his song "*Joyful Noise*", based entirely on the alleged similarity of an ostinato.[72] At issue were five common musical elements:

1) a pitch sequence of scale degrees 3-3-3-3-2-2;
2) rhythm;
3) timbre ("pingy" synthesizer sound);
4) phrase length;
5) the "placement" of the ostinato"[73]

Beginning with the first prong of access, the new framework would not include the inverse-ratio rule even if Perry had "more access" to Gray's work because of "*Joyful Noise's*" widespread popularity. However, as this was not the case with "*Joyful Noise*" the district court here appropriately did not consider the inverse-ratio rule anyways.[74]

As for the substantial similarity prong, the new framework would examine the importance of the alleged infringing elements. Gray claims that the ostinatos share the primary element rhythm. However, here the rhythm element would lean heavily towards thin copyright as it is particularly unprotectable. The shared rhythm is exceptionally unoriginal as a basic pattern of repeating evenly spaced notes of equal length notes, an utterly commonplace sequence that is ubiquitous throughout all genres of western music.[75]

Next, the secondary elements would be examined for their protectability. Here, where they are largely unoriginal and combined with the exceptionally basic and ubiquitous rhythm, the sliding scale would hold "*Joyful Noise*" to thin copyright protection. Therefore, in order for extrinsic similarity to be found, "*Dark Horse's*" ostinato must be virtually identical. This is not

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[72] An "ostinato" is a continually repeated musical phrase or rhythm.

[73] Brief of Amicus Curiae Musicologists in Support of Defendants' Renewed Motion for Judgment As a Matter of Law or, Alternatively, for a New Trial at 4, Gray v. Perry, 2:15-cv-05642-CAS-JC (Dec. 5, 2019) [hereinafter Gray Amicus Brief of Musicologists].

[74] The court held that "[d]ue to the millions of views and plays of "joyful Noise" on YouTube and Myspace… and the success and popularity of "*Joyful Noise*" in the Christian hip-hop/rap industry… there is more than a "bare possibility that defendants – who are experienced professional songwriters – had the opportunity to hear "*Joyful Noise*". Minutes on Defendants' Motion for Summary Judgment, Gray v. Perry, Case 2:15-cv-05642-CAS-JCx (2018) [hereinafter Gray Civil Minutes].

[75] Gray Amicus Brief of Musicologists, *supra* note 76, at 9.

the case as the ostinatos differ in the notes used, order of pitches, portamento use, and ostinato length.[76] Thus, the inquiry would and should have ended here.

Instead, the unguided jury here proceeded to the intrinsic test and found that the total concept and feel of the works were substantially similar. Under a revised framework, a musicologist could provide guidance by testifying on the common use of ostinatos and synthesizer sounds within the hip-hop genre, particularly the sub-genre of "Trap Music" upon which these beats were based upon.[77] A jury could have reasonably found that the works are not virtually identical as "*Dark Horse*" is lyrically and compositionally different except for an arguable ostinato.

IV. Conclusion

This proposed sliding scale framework provides clarity, guidance, and predictability in *Swirsky's* ambiguous absence of factors for analyzing musical works. It accounts for the policy considerations of those arguing for protection strictly limited to melody, while simultaneously avoiding drastic upset of Ninth Circuit precedents that gave import to non-melodic elements as part of music's wider range of expression. And for many modern artists, it provides much needed creative boundaries in music's innovation space.

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[76] *Id.* at 10.

[77] For example, an expert could have testified that "in rap, especially Southern rap, the repetitive, ringing ostinato is an alarum that signifies fights, mayhem, and death…. One can trace the uses of ostinato in the South back to Three 6 Mafia's horrorcore-leaning early music… At the time, the dominant styles of LA and NYC rap were sample-based, which meant that the synth-based beats of the South stood out… The ostinatos of Trap Music buck trends of conventional, "nice" harmony (pun intended) and unbalance the listener." Phil Witmer, *21 Savage's 'Issa Album' Sounds Chilling Because Music Theory*, VICE (Jul. 12, 2017), https://www.vice.com/en_us/article/xwzv8a/21-savages-trap-sounds-chilling-because-music-theory.