SURVEY SAYS: “BLURRED LINES” CALL FOR RELIABLE AID IN THE ADJUDICATION OF COMPOSITION INFRINGEMENT ACTIONS

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I. INTRODUCTION

“[T]here are friends of mine, other musicians, that have spoken out publicly about this, about the injustice of the decision. Adam Levine, John Legend, Stevie Wonder. Unfortunately, they’re not on the jury.”¹ This was the statement made by artist Robin Thicke nearly six months after a California jury mandated that he, along with “Blurred Lines” co-writer Pharrell Williams, pay $7.4 million to the family of Marvin Gaye for copyright infringement of one of Gaye’s earlier works.² While both musicians publicly acknowledged Gaye as an inspiration,³ that inspiration alone does not constitute infringement of the earlier work.⁴ However, the jury, being comprised of eight laypersons untrained in differentiating between music composition and performance of such compositions, was left somewhat ignorant of this legal principle.⁵ When the court failed to establish clear boundaries for the jury to evaluate lawful copying of “concept and feel”⁶ versus unlawful copying of expression,⁷ it lead the jury to a misguided conclusion.⁸ So

² The jury was not asked to compare the music recordings, only the compositions reflected in the sheet music produced for each song. Given that only the compositions were under scrutiny in this case, the jury was only permitted to hear “stripped-down, edited versions” of the recordings. Wendy Gordon, The Jury in the ‘Blurred Lines’ Case was Misled, NEWSWEEK (Mar. 18, 2015, 2:30 PM), http://www.newsweek.com/jury-blurred-lines-case-was-misled-314836.
³ The Gaye family’s prosecution relied heavily on a July 2013 Billboard magazine interview with Thicke that, in part, read: “Pharrell and I were in the studio making a couple records, and then on the third day I told him I wanted to do something like Marvin Gaye’s “Got To Give It Up,” that kind of feel ‘cause it’s one of my favorite songs of all time. So he started messing with some drums and then he started going ‘hey, hey, hey’ and about an hour and a half later we had the whole record finished.” Alan Duke, Marvin Gaye Heirs Sue ‘Blurred Lines’ Artists, CNN (Nov. 1, 2013, 11:04 AM), http://www.cnn.com/2013/10/31/showbiz/blurred-lines-lawsuit/.
⁴ In a 2015 interview with Billboard Magazine, entertainment attorney Dina Lapolt was quoted as stating, “The attorney for Thicke, Williams and T.I. was spot-on during the trial’s opening arguments when he said ‘no one owns a genre or a style or a groove.’ Although Thicke and Williams admitted prior to the lawsuit that their songwriting was influenced by Gaye, it’s a sad day indeed when being influenced by an artist is considered copyright infringement.” Harley Brown, ‘Blurred Lines’ Verdict: Music Lawyers Weigh In, BILLBOARD (Mar. 11, 2015), http://www.billboard.com/articles/news/6495167/blurred-lines-verdict-music-lawyers-react.
⁵ While no member of the jury was a trained musician or a professional in the music industry, each party to the suit presented testimony from expert musicologists. Additionally, both Thicke and Williams testified in court. Kory Grow, Robin Thicke, Pharrell Lose Multi-Million Dollar ‘Blurred Lines’ Lawsuit, ROLLING STONE (Mar. 10, 2015) http://www.rollingstone.com/music/news/robin-thicke-and-pharrell-lose-blurred-lines-lawsuit-20150310. See infra Part IV.A.
⁶ Both musicians publicly acknowledged Gaye as an inspiration. The Gaye family’s prosecution relied heavily on a July 2013 Billboard magazine interview with Thicke that, in part, read: “Pharrell and I were in the studio making a couple records, and then on the third day I told him I wanted to do something like Marvin Gaye’s “Got To Give It Up,” that kind of feel ‘cause it’s one of my favorite songs of all time. So he started messing with some drums and
long as courts allow laypersons to inaccurately focus on similarities in performance of a composition instead of the underlying work itself, the creative community will be burdened with a fear of unwarranted infringement litigation.

II. Establishing Composition Infringement

To establish a prima facie copyright infringement action, each plaintiff must prove both “ownership of a valid copyright” and “copying of constituent elements of the work that are original.” Under U.S. copyright law, every song may qualify for two forms of doctrinally separate copyright protection: one for the underlying musical composition, and one for the sound recording of that composition. Copyright infringement occurs when one work is substantially similar to a previous work. Substantial similarity is assessed in musical composition actions by presenting the jury with recordings of each work in what is commonly called the Lay

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6 Copyright expert Wendy Gordon further questions the effect this case will have should an appeal to the 9th Circuit Court of Appeals be unsuccessful in stating, “[a]rtists seek inspiration from the past. Through borrowing and building upon ideas and “grooves” from those who came before, culture evolves. In this respect, the “Blurred Lines” verdicts had precedent for artists—and for the rest of us.” Gordon, supra note 2.

7 These aspects of the composition alone are not eligible for copyright protection. Under the 1971 Copyright Act, only an exact recording of the composition can be awarded copyright protection. Other parties may copy aspects of the sound recordings, so long as they do not duplicate the recording entirely. 17 U.S.C. §114(b) (2012).


9 Given that the 1976 Copyright Act has extensively relaxed formality requirements of registration, the first prong of this analysis is often met without much hesitation, should the plaintiff fail to provide evidence of formal registration with the United States Copyright Office, independent authorship of a protectable work will generally suffice. See, e.g., Erin Hogan, Approval Versus Application: How to Interpret the Registration Requirement Under the Copyright Act of 1976, 83 DENV. U. L. REV. 843, 846 (2006) (Stating that “[i]n addition to streamlining copyright law, the 1976 Act eliminated a number of statutory formalities that served as prerequisites to the existence of copyrights and recognized a creator's automatic copyright in an ‘original work of authorship fixed in a tangible medium.’”).


11 It is feasible that any musical work could also qualify for a third type of copyright protection, a derivative work copyright in the arrangement of the composition. 17 U.S.C. §101 (2012).


13 “Substantial Similarity” refers to the defendant’s practice in taking either a quantitatively or qualitatively significant portion of original expression that the plaintiff has previously protected. E.g., Baxter v. MCA, Inc., 907 F.2d 154 (9th Cir. 1990).

14 Assuming the copied work is copyrighted and that the copying is of copyrightable elements in the original work. See, e.g., Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).
Listener Test. The recordings are not provided to jurors as evidence themselves; instead, they are meant to serve only as a vehicle for presenting the underlying musical compositions for juries to evaluate through comparison. However, this practice disregards that each type of copyright protection is limited to a different scope, and therefore allows jurors to make inappropriate comparisons between the two works.

III. MISGIVINGS IN ADMINISTERING THE LAY LISTENER TEST

Generally speaking, the Lay Listener Test proves procedurally problematic in two respects: the manner in which composition cases are presented to the jury, and the ability of jurors to understand and respect the criteria for a finding of substantial similarity as outlined in the jury instructions. Not only is the Lay Listener Test problematic in its abilities to provide a fair jury trial, it also causes significant policy concerns in continued creation and dissemination of new creative works.

A. PRESENTATION TO JURY

i. IMPROPER FOCUS ON SOUND RECORDINGS

While the Lay Listener Test does resolve the issue of inadequate ability to read written musical works by the jury, it remains problematic in its inadvertent introduction of sound recordings into composition cases. Administration of the Lay Listener Test subconsciously encourages jurors to focus on the similarity of the performances, rather than the similarity of the compositions. While jury instructions attempt to focus jurors on the proper ‘substantial similarity’ standard of review, these instructions alone are not successful in overcoming personal

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17 Actions based on infringements of a composition copyright are a question of fact to be determined by a jury. *Arnstein*, 154 F.2d at 473. (“The question, therefore, is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”).

18 *Arnstein v. Porter* holds that “illicit copying” is an issue of material fact for the jury to determine, given the test for illicit copying is “the response of the ordinary lay hearer.” 154 F.2d at 468. Therefore, in order to determine substantial similarity in copyright composition cases, courts will typically play the competing works (or sections of those works) for the jury to evaluate. Upon presentation of both songs, jurors will usually be asked “whether [the] defendant took from [the] plaintiff’s work so much of what is pleasing to the ears of the lay listeners, who comprise the audience for whom such popular music is composed, that [the] defendant wrongfully appropriated something which belongs to the plaintiff.” *Id.*; Blume v. Spear, 30 F. 629, 631 (C.C.S.D.N.Y. 1887); see also Jamie Lund, An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement, 11 VA. SPORTS & ENT. L.J. 137, 148 (2011).


21 Lund, supra note 18, at 148; Gabriel Jacob Fleet, What’s in a Song? Copyrights Unfair Treatment of Record Producers and Side Musicians, 61 VAND. L. REV. 1235, 1240–42 (2008) (defining the scope of protection awarded by each right, and expanding on why these rights are often confused).

22 The Lay Listener Test is “poorly suited to weighing the ‘substantial similarity’ of musical compositions because it focuses on the lay listener’s attention on performance elements, such as tempo, pitch, orchestration, and style, which are not actually protected by the Composition Copyright.” Lund, supra note 18, at 175.
reactions to the musical works. 23 In short, the Lay Listener Test fails to create visible distinctions between the Composition Copyright and Recording Copyright in any given musical work.

ii. PRESENTATION TO AN INCORRECT AUDIENCE

The Lay Listener Test may be applied during analysis of both musical compositions and sound recordings of their performances 24; however, use of this test is flawed when considering the varied audiences each set of works are marketed toward. 25 The Lay Listener Test may be applicable to sound recordings, given that nearly all citizens are music consumers. 26 However, its relevance should be questioned in composition copyright cases where the intended audience would only be those capable of performing and/or recording the works. 27 Not only is the average consuming public not intended to purchase compositions in the manner it would purchase sound recordings, 28 but since the modern market for musical compositions exists almost entirely in copyright licensing, laypersons would have little access to these works. 29

When the general public does not constitute the audience for a work, courts do show deference in allowing only those with specialized expertise to assist in adjudication of the matter. 30 Being that musical compositions are uniquely accessible to those able to read them,

23 In a 2011 study, effect of listener perception was tested on laypersons through a series of tests that varied the manner of performance of the composition. The author of this experiment concluded that “when given a jury instruction on substantial similarity, 86.4% of participants who heard the songs performed similarly said that the songs were substantially similar—a significant majority. Participants who heard the songs performed differently went the exact opposite direction with 84.8% of participants finding that the songs were not substantially similar.” Id.; see also infra Part III.B.i.
26 Global information and measurement enterprise, The Nielsen Company, reported in early 2015 that 93% of the U.S. population actively listens music with average consumption times at approximately 25 hours per week. Average consumers will spend $109 annually in obtaining music, either through physical or online purchasing or by subscription of digital streaming services. Everyone Listens to Music, but How We Listen is Changing, NIELSEN (Jan. 22, 2015), http://www.nielsen.com/us/en/insights/news/2015/everyone-listens-to-music-but-how-we-listen-is-changing.html.
27 Charlotte A. Tschider, Automating Music Similarity Analysis in “Sound-Alike” Copyright Infringement Cases, 25 NYSBA ENT., ARTS & SPORTS L.J. 60, 62 (2014) (“Although music in general is created for an audience of non-musicians, the method and artistry of music production is highly specialized and requires a great deal of skill.”).
28 Lund, supra note 25, at 76–77 (opining that “[t]he general public is not the intended audience of copyrighted musical compositions . . . [a]rguably, only performers, music publishers, sound engineers, etc., can properly consume musical compositions. These groups, and not the general public, represent the target market for, and intended audience of, copyrighted musical compositions”).
29 Lund, supra note 25, at 76–77 (“Today’s ‘music publishers’ do not sell sheet music to the public but instead manage the copyrights to the musical compositions they control. The only direct participants in today’s market for composition copyrights are the songwriters that create the compositions; the publishers and performance-rights societies that manage them; and the performers, recording studios, and sound engineers that obtain licenses to record or perform the copyrighted compositions.”).
30 For example, in Whelan Assocs. v. Jaslow Dental Lab., a computer software infringement case, the court admitted evidence regarding whether a specialized audience of computer programmers would consider the works to be substantially similar. 797 F.2d 1222, 1232 (3d Cir. 1986). To help illustrate this point, Mark A. Lemley, the director of the Stanford University program in Law, Science & Technology writing for the Copyright Society of the U.S.A., stated, if the intended audience is more narrow in that it possesses specialized expertise, relevant to the purchasing decision, that lay people would lack, the court’s inquiry should focus on whether a
these reactions grounded in specialized knowledge should be the ones evaluated in determining substantial similarity.\textsuperscript{31} More importantly, since those versed in music analysis and creation are trained to notice aspects of sound recordings that a layperson may not notice, they will very likely obtain a more thorough impression of what original elements may or may not have been copied by the later work.\textsuperscript{32}

B. ABILITY OF JURORS TO EVALUATE

i. INNATE EMOTIONAL CONNECTIONS OF JURORS

Of great concern in composition infringement litigation is the instinctive nature by which laypersons consume music. Given that past experience and understanding so fundamentally help shape individual opinions about music, a strong argument can be made against the ability of laypersons to remain objective when comparing competing musical works.\textsuperscript{33}

Since individuals react to certain forms of musical expression differently and in varying contexts, “laypersons hearing a song from a completely detached, uninitiated perspective will find it difficult to overcome their predisposed sentiments and tastes in attempting to remain objective.”\textsuperscript{34} Furthermore, the pervasive nature of music in everyday life amplifies the instinctive member of the intended audience would find the two works to be substantially similar. Such an inquiry may include, and no doubt in many cases will require, admission of testimony from members of the intended audience or, possibly, from those who possess expertise with reference to the tastes and perceptions of the intended audience.


\textsuperscript{31} As one commentator mused, “we would not entrust the interpretation of our Constitution to everyday persons just because they would be more frequently affected by the results than our most esteemed legal scholars and judges. The fact remains that people creating and analyzing music are nearly always more knowledgeable about its structure than the average lay listener.” Eric M. Leventhal, Would You Want William Hung as Your Trier of Fact? The Case for a Specialized Musicology Tribunal, 90 TEX. L. REV. 1557, 1595 (2012). In further support of this proposition, a 2013 experiment conducted for the purpose of comparing the abilities of laypersons versus musicians in standard Lay Listener Test procedures, “[t]he musicians’ responses to open-ended questions indicated that they better understood the precise nature and quality of the similarities and differences between the songs than the laypeople respondents.” Furthermore, the experiment concluded “it appears that laypeople cannot be trained in a reasonable time frame to listen with a more discerning ear.” This determination was based on training sessions of varying degrees of time and specificity in musical evaluation with the layperson test groups. Lund, supra note 25, at 64.

\textsuperscript{32} Tschider, supra note 27.

\textsuperscript{33} Music has a relentless presence both in daily life and in its effects on the human brain. Psychologist and musician John Powell explores this relationship stating, “sometimes we can be familiar with something we really enjoy, but have no idea what it actually is. This is the relationship most of us have with music, pleasure without understanding.” HOW MUSIC WORKS: THE SCIENCE AND PSYCHOLOGY OF BEAUTIFUL SOUNDS, FROM BEETHOVEN TO THE BEATLES AND BEYOND (2010); see also J. Michael Keyes, Musical Musings: The Case for Rethinking Music Copyright Protection, 10 MICH. TELECOMM. & TECH. L. REV. 407, 423 (2004) (“Although it is readily admitted by those who study music that we still know relatively little about why music evokes such [intense physiological and emotional] effects within us, there is no question that music enjoys a unique place among artistic endeavors and the human experience associated therewith.”).

\textsuperscript{34} Leventhal, supra note 31, at 1575–76. For a more complete analysis of the psychology behind subjective versus objective music consumption, see Josh Srago, Better Sound Through Logic, SOUND REASON (Jan. 5, 2016) http://soundreason.org/2014/07/10/the-subjective-and-objective-experience-in-music/.
nature of individuals to connect what they hear with personal memories. Not only does a unique connection between music and the human brain exist, this relationship will undoubtedly vary between listeners. While it does stand to reason that attitudes toward music shaped by extrinsic circumstances are similar to personal opinions jurors are asked to set aside in other proceedings, the degree to which such connections are manifested may be too deep for even the juror himself to recognize or appreciate.

Since professionals have a greater understanding of the creation and promotion of certain bodies of musical works, they are more capable of viewing songs objectively and are likely less susceptible to influences based off emotional connection. As the Lay Listener Test currently operates, subjectivity creates inconsistent verdicts and leads to unnecessary licensing brought on by fear of litigation. This difficulty in producing unbiased determinations necessitates different treatment of musical copyrights in a courtroom setting.

**ii. Inabilities of Jurors to Accurately Identify and Apply Appropriate Legal Standards**

It may be difficult to grasp why particular expertise is required to evaluate music given that most areas of law present juror-expertise complications. This is especially true provided that copyright infringement stems from the basic concept of plagiarism, which all jurors are likely familiar with. However, in copyright infringement analysis, “the juror-expertise problem”

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35 Id. at 1573 (“From the moment we take our first breath, we are inundated by music in advertising and popular culture.”).
36 Id. at 1576; see also Ai Kawakami et al., Music Evokes Vicarious Emotions in Listeners, 5 Frontiers in Psychol. 1 (2014) (The analysis of this psychological experiment explains: “There are two types of emotions: perceived and felt. Perceived emotions concern what people perceive objectively, whereas felt emotions concern what people actually experience.”) This study further found, “that musically trained or experienced individuals perceived dissonant, minor-key music as unpleasant, but the stimuli did not evoke equally unpleasant emotions. As musically trained people have had more opportunity to listen to or play dissonant music than people who are not musically experienced, the emotion evoked by dissonant music was presumed to be influenced by musical experience.”
37 Id. at 1577.
38 Id. This trend is not unique to composition infringement actions; overprotective licensing practices are also present in digital sampling cases. Should reformation to the Lay Listener Test not occur, composition infringement cases may follow current digital sampling trends in frequent out of court settlement agreements. Lucille M. Ponte, The Emperor Has No Clothes: How Digital Sampling Infringement Cases are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform, AM. BUS. L.J. 518–20 (2006) (“With no clear consensus within the music industry, and little statutory guidance, many digital sampling cases were settled out of court.”).
39 Id. at 1576.
41 A central assumption of jury deliberations is that the trial’s outcome will only be determined through an evaluation of the evidence presented by each party in the courtroom. As one commentator explains, “jurors are typically instructed that they cannot draw on extraneous information in their deliberations. The rationale for prohibiting extraneous information is that the adversarial process would be compromised if jurors were allowed independently to investigate or to collect facts. The system would be jeopardized not only because the information was obtained without the court’s or counsel’s knowledge, but also because it was not subject to the tests and filters provided by the rules of evidence or the crucible of cross-examination.” Michael B. Mushlin, Bound and Gagged: The Peculiar Predicament of Professional Jurors, 25 YALE L. & POL’Y REV. 239, 241–42 (2007).
is enlarged even further because persons think they know what they hear when a professional analysis would elucidate their actual lack of context.”

Confusing legal jargon is not a new enemy to counselors working with a layperson jury.44 Aside from standard trial direction problems, jurors and judges are expected to apply difficult and generally unclear tests to somewhat vague materials in composition infringement cases; therefore, these decisions are inherently permeated by ambiguity.45 Not only are factual presentations in composition cases fairly imprecise, substantial similarity is ordinarily an exceptionally close question of fact.46 The importance of this factual specificity is illustrated by the universal reluctance of courts to grant summary judgment in infringement cases.47

Factual ambiguity presents unique problems in cases where cognitive biases tend to exist because “[o]bserver effects are most potent where ambiguity is greatest, when an observer’s judgment is most likely to succumb to expectation, subjective preference, or external utility.”48

Given that individuals tend to exercise greater caution in determining ambiguous situations,49 juries may be inclined to act in a biased manner by placing amplified demands on the party perceived to have acted in a riskier manner.50 As one commentator summarized, “situations of ambiguity, in which precautionary behavior will be especially difficult because of the ill-defined character of the risks, should be judged by more lenient liability standards. But, to the contrary, juries will be inclined to be particularly harsh in situations of ambiguity and uncertainty.”51 Not only are substantial similarity evaluations problematic during trial, the vague nature of the doctrine translates into significant confusion for artists in determining how to create new works that will not be subject to infringement action.52

43 Leventhal, supra note 31, at 1577.
45 Vagueness is, of course, not limited to copyright law. Many areas of law involving statutory interpretation face similar challenges. See generally, Ralf Poscher, Ambiguity and Vagueness in Legal Interpretation, in OXFORD HANDBOOK ON LANGUAGE AND LAW 128 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).
46 Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980).
47 In copyright infringement cases, courts have stated that “granting summary judgment, particularly in favor of the defendant, is a practice to be used sparingly.” Wickham v. Knoxville Int’l Energy Exposition, Inc., 739 F.2d 1094, 1097 (6th Cir. 1984); see also Irina D. Manta, Reasonable Copyright, 53 B.C. L. REV. 1303, 1136–37 (2012).
50 Manta, supra note 47, at 1331 (“[I]ndividuals tend to act with an overabundance of caution in ambiguous situations, even when they can fairly accurately assess risk. As a result, juries act in a biased manner and place exaggerated demands on parties that face uncertainty; indeed, jurors will see the risks that a defendant took as greater than they were and will view them as more reckless if the risks were uncertain.”).
51 Hastie & Viscusi, supra note 49, at 913.
52 Manta, supra note 47, at 1338 (“The empirical research casts concerns as to how judges and juries may adjudicate such situations of artistic uncertainty.”). See also, Infra Part III.C.
Additionally, bias is frequently present in copyright infringement actions in the form of “anchoring.”53 This form of bias occurs when “arbitrary set points to influence judgment” are utilized, whether inadvertently or in a calculated manner, during trial.54 In infringement actions, jurors are continuously asked to compare the allegedly infringing work to the original work and in doing so “decisionmakers are likely to overfocus on similarities to the original and gravitate toward a finding of liability, which favors plaintiffs.”55 This anchoring effect in comparison determinations poses an even greater threat when the original work is presented to the jury before the allegedly infringing work.56

The use of testimony in copyright infringement actions can also cause a hindrance in regards to juror evaluation of the case as a whole. A 2014 comparative study examining substantial similarity requirements in general suggested that additional information presented to a jury throughout trial could significantly influence juror opinions regarding infringement.57 The correlating publication of this experiment further suggested that juries are also often inappropriately swayed by testimony regarding the time and labor exercised in creation of the similar works, and that the jury’s “mere knowledge of copying has the tendency to make works seem more similar.”58 Of further concern is the presence of celebrity testimony in composition cases. Considering jurors are innately influenced by such public figures on a daily basis, they are far more likely to trust a well-known musician’s testimony than that of a less recognizable performer or songwriter.59

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53 Id. at 1341 (“The empirical research casts concerns as to how judges and juries may adjudicate such situations of artistic uncertainty.”).
55 Manta, supra note 47, at 1341–42 (“Under the current test, and due to the way that materials are presented to decisionmakers, as long as the two pieces bear some degree of similarity (which they usually do to make it to this stage of litigation) they may be perceived as more strikingly similar as a result of anchoring than they ever would have if they had been encountered by observers outside the courtroom.”).
56 Id. at 1342.
57 Authors state, “[c]opyright law treats it (substantial similarity) as a simple factual question, premised on a similarity comparison of the two works, in the rather naïve belief that lay decision-makers (i.e., juries) can cabin the question of similarity from other intuitions that are routinely at play in copyright infringement cases.” Shyamkrishna Balganes, Irina D. Manta, and Tess Wilkinson-Ryan, Judging Similarity, 100 IOWA L. REV. 267, 289 (2014).
58 Id. This finding is notable given the majority opinion in Feist Publications v. Rural Telephone Service Co., which alluded to disfavored treatment of works pleading protection under the “sweat of the brow doctrine.” 499 U.S. at 345. Under this doctrine registrants would seek protection of works lacking distinguishable creative elements, but still resulting from time intensive and/or laborious processes. In Feist, the majority criticized this doctrine due to its ability to render facts copyrightable and preclude future authors from using information that should remain in the public domain. Id. See also, Linda A. Tancs, Copyright- Fact Compilations- Sweat of the Brow Doctrine is Inapplicable and White Pages are not Sufficiently Original to Warrant Copyright Protection- Feist Publications v. Rural Tel. Serv. Co., 111 S.Ct.1282 (1991), SETON HALL L. REV., 448, 454-59 (1992).
59 One study on celebrity influence in the courtroom concluded that, “[t]he findings that people evaluate celebrities more positively and view them as less responsible indicate a potential problem with due process within the court system. Jared Chamberlain et. al, Celebrities in the Courtroom: Legal Responses, Psychological Theory and Empirical Research, 8 Vand J. Ent. & Tech. 551, 564 (2006). This issue not only arises when a celebrity testifies on his or her own behalf, but also when a celebrity is asked to serve as an expert witness at trial. One author illustrates this point in stating, “[w]hen world-renowned criminalist Henry Lee, who helped turn the tide for the O.J. Simpson defense team, enters the Scott Peterson case, we’re primed by journalists to think that now things are getting serious.” Katherine Ramsland, Famous Expert Witnesses May Sway Juries Unduly, PHILLY (Mar. 3, 2004), http://articles.philly.com/2004-03-03/news/25383364_1_expert-testimony-juries-albert-desalvo; see also Tina A. Brown, HARTFORD COURANT (Jan. 25, 2004), http://articles.courant.com/2004-01-25/news/0401250146_1_murder-case-jurors-jury-selection.
Given the complexity of many copyright infringement actions, it would follow that special verdict forms tailored to the issue would be an appropriate tool to aid in deliberations. However, special verdict forms are highly limited in their abilities to address societal issues as a whole, and frequently testimony of the parties involved rests upon the creative processes involved in producing the competing works. Moreover, studies have shown that jurors are commonly confused by elements presented in copyright infringement jury instructions, despite the way such instructions are delivered.

C. Policy Concerns in Continued Application of the Lay Listener Test

The Lay Listener Test not only fails artists during litigation of infringement actions, but also in continued creation and dissemination of new works. In serving as a mechanism for creative incentivization, “copyright must offer a degree of certainty and predictability in regulating and protecting [compositional] activity.” Administration of the Lay Listener Test affords current artists little means for assessing how much infringement is legal. Not only does this lead to uncertain outcomes in litigation, “musicians and songwriters frequently err on the side of licensing, seeking to avoid any complications, particularly in cases where the referential aspects of the newer work are most readily apparent.” The rise of digital technology has unarguably lead to great exploitation of copyright entitlements in music, however, given the cost and poor publicity associated with litigating infringement actions, reform of handlings of

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61 Elizabeth G. Thornburg, The Power and the Process: Instructions and the Civil Jury, 66 FORDHAM L. REV. 1837, 1863 (1998) (“[T]he jury will also be required to think about the negligence of specific acts separately from the issue of causation for each of those acts; they will be asked to analyze cause and effect separately as to each factual claim about negligence. This kind of narrow format, then, limits the kind of community values that the jury is allowed to apply and the way in which it is allowed to apply them.”).
62 Lund, supra note 18, at 174.
63 “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” U.S. CONST. art. I, §8, cl. 8. See generally, Joseph P. Bauer, Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies? 67 WASH. & LEE L. REV. 831 (“A regime authorizing the relatively unrestrained dissemination of literary, musical, artistic or other creations, and permitting discussions of or sharing information about those works, makes it more likely that new, different and better works will be created.”). 64 Aaron Keyt, An Improved Framework for Music Plagiarism Litigation, 76 CALIF. L. REV. 421, 440 (1988).
65 Manta, supra note 47, at 1131 (“Copying itself, is not necessarily illegal, and replicating de minimis amounts of copyrightable materials is not actionable.”). See also, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 n. 34 (1984).
67 Lori A. Morea, The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology, 28 CAMPBELL L. REV. 195 (2006); DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) (“The Internet must continue to support a legitimate market for copyrighted works as well as provide a platform for innovation and the introduction of new and dynamic services that drive digital commerce.”).
68 Leventhal, supra note 31, at 1586 (“[B]ecause the music industry has repeatedly shown a propensity to avoid litigation-particularly where the alleged infringing song is successful as is usually the case if litigation is brought—it is very difficult to determine the frequency of allegations.”). The “Blurred Lines” case discussed in the introduction of the piece was prominent in the media due to the parties´ involved and overall cost of litigation. One New York Times article discussing the case exemplified this by saying, “[t]he case was unusual not only for its large damages
such cases is crucial. Confusion surrounding application of the Lay Listener Test in composition cases may not only force musicians to shy away from creative issues with uncertain ramifications, it may also discourage new artists from disseminating new creative works through modern distribution channels for fear of infringement without recourse.

IV. SOLUTIONS TO THE LAY LISTENER TEST

In addition to the concerns previously outlined as being specific to composition infringement actions, the unsettled nature of copyright litigation in general gives rise to reform in the treatment of such cases. Given that “[t]here is, or has been, disagreement regarding almost every possible doctrine covered under federal copyright law from threshold issues of originality and ownership to infringement and damages,” venue selection poses a great hitch in copyright litigation. While the ability of parties to forum shop is at times inevitable, the playing field should be leveled through uniform evaluation measurements.

In assessing the problematic Lay Listener Test, there are three options for moving forward: continued use of the test as currently implemented, abandonment of the test as a whole, or adoption of a modified version of the lay listener test to help ease prejudicial effects of playing recordings for jurors. Given that it would be economically unrealistic to fill every

award but for the fact that it reached the level of a jury verdict at all. Music executives and legal experts said that while accusations of plagiarism—accompanying demands for credit and royalties—are common in the music industry, it is rare for a case to progress so far.” In further discussion of the lawsuit Charles Cronin, a specialist in copyright law, stated “[m]usic infringement claims tend to be settled early on, with financially successful defendants doling out basically extorted payoffs to potential plaintiffs rather than facing expensive, protracted and embarrassing litigation.” Ben Sisario & Noah Smith, ‘Blurred Lines’ Infringed on Marvin Gaye Copyright, Jury Rules, THE NEW YORK TIMES (Mar. 10, 2015), http://www.nytimes.com/2015/03/11/business/media/blurred-lines-infringed-on-marvin-gaye-copyright-jury-rules.html?

Leventhal, supra note 31, at 1586 (“As the music industry struggles to redefine its core business model, the legal field can do its part by offering suggestions to stem the tide of diminishing legitimacy and increasing cynicism toward the law of musical copyrights.”).

This is especially true given that many new artists are not currently “discovered” in a traditional sense by recording companies. See, e.g., Steve Knopper, The New Economics of the Music Industry: How Artists Really Make Money in the Cloud—Or Don’t, ROLLING STONE (Oct. 25, 2011), http://www.rollingstone.com/music/news/the-new-economics-of-the-music-industry-20111025.


Id. (“Many of the differences—often polar disagreements—still remain unresolved and will inevitably lead to forum shopping. The outcome of a case should not depend upon the jurisdiction in which the suit is initiated; it should be a function of the law.”).

Proponents of the continued use of the Lay Listener Test often liken the process to other jury trials in justifying that community standards should govern infringement cases. Austin Padgett, The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation, PIERCE L. REV. 125, 146 (2008) (“While a jury will not always consist of “reasonable persons” or “lay listeners,” it is the ideal body to apply those standards”).

While outside the scope of this piece, there are a few varying options for total replacement of the Lay Listener Test in composition cases. The most popular suggestion is the establishment of an expert jury, which would be held responsible for adjudicating all infringement cases. Given that lay jurors lack the requisite sophistication to read sheet music, composition of a jury who is well educated in music composition would likely be a successful alternative. However, implementing an entirely new manner of adjudication would likely be timely and financially uncertain. Lund, supra note 18, at 173. Another more unconventional alternative, yet one steadily gaining popularity as technology evolves, suggests the use of software to facilitate comparison of the competing works in a strictly technical manner. See generally Yvette Joy Liebesman, Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes, 35 AIPLA Q.J. 331 (2007).
composition adjudication process with professional musicians, the most feasible compromise would be the allowance of expert testimony to aid the jury in analysis. However, expert testimony in its current form is an inadequate remedy. Courts would be better served relying upon survey evidence, analogous to that used in trademark infringement litigation, to help juries evaluate composition actions.

A. Diminished Benefit of Traditional Expert Testimony

Considering the tendencies of jurors to unjustly rely upon emotional connections and faulty interpretations of the material to be evaluated, many scholars suggest the use of expert testimony to aid infringement adjudication processes. By using expert testimony, it would seem that jurors could benefit greatly in understanding technical similarities between two works. However, while the presence of expert witnesses may allude to more objective determinations of substantial similarity in compositions cases, that conclusion is not necessarily accurate.

To date, there is no set of analytical criteria for the field of forensic musicology and, given the subjective nature of music in general, it is unlikely courts (or experts) would be able to abide by such a rigid system of comparison. Expert musicologists called upon to aid in copyright litigation rely on a variety of analyses and toolsets, and therefore the reliability and consistency of their findings varies greatly. This variance causes unfair evaluations by the jury. “Battle of the Experts” concerns arise when the triable issues of any given case swerve away from actual findings of fact required by the jury and toward an unfair evaluation of which side’s expert is more believable. When presented with drastically different opinions from such musicologist expert witnesses, it has been proven that juries “give more credence to demonstrations that are easier to understand.” Of even greater concern, “when expert testimony conflicts, a jury may disregard the expert testimony on both sides, and make a subjective decision based solely on what it hears.”

75 “Rule 702 of the Federal Rules of Evidence, permits qualified experts to testify about their specialized knowledge only when the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.” Expert Legal Testimony, 97 HARV. L. REV. 797, 797 (1984).
76 One author suggests an accreditation program run by the United States Copyright Office to “create processes and procedures for specially trained and federal court-certified musicologists to provide objective musical analysis wherever expert testimony has previously been used.” Tschider, supra note 27.
77 “In copyright cases, musicological “experts” rely mostly on subjective process, rather than repeatable process and analytical rigor, resulting in little objectivity, reproducibility, or predictability, potentially because most expert witnesses are music experts, but not trained music analysts.” Id.
81 Baker, supra note 80, at 1612.
B. SURVEYS AS A SOLUTION TO COPYRIGHT LITIGATION

Despite the difficulties presented, juries should continue to hear infringement actions. The most equitable source of expert opinion to aid in this process would be the inclusion of statistical sampling of musical performers regarding the competing compositions. Paralleling trademark litigation practices, survey evidence collected from the intended audience of the works should be introduced to guide the jury through its decision-making process. Consumer surveys provide an accessible and reliable measure of reactions from the intended audience, and given that courts routinely rely upon survey evidence in trademark litigation, composition infringement could be addressed in a procedurally similar manner.

Admissibility of survey evidence has been rejected in copyright infringement actions, and courts typically cite such rejections on “perceived flaws in the surveys.” However, copyright surveying could model customary trademark practices in only targeting relevant audiences during the surveying process. In cases of composition infringement, such survey groups could easily be limited to only those with specialized expertise or experience in evaluating music. Additionally, in the administration of such surveys, subjects would be left unaware of the context of the pending litigation, further reducing potential personal biases.

82 While there is support for a tribunal composed entirely of music experts to oversee all copyright infringement actions, preserving the role of the jury is important to keep the democracy of the American legal system in place. See, e.g., Jason Mazzone, The Justice and the Jury, 72 BROOK. L. REV. 35, 37–38 (2000).
83 ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW, §3:2:2 (2011) (“[T]o apply the intended audience test, a court must both identify the intended audience, and either select only members of that audience for its jury or accept expert testimony concerning the intended audience’s reaction”).
84 For an overview of benefits in survey usage in trademark litigation, see Irina D. Manta, In Search of Validity: A New Model for the Content and Procedural Treatment of Trademark Infringement Surveys, 24 CARDOZO ARTS & ENT. L.J. 1027, 1036–41 (2007). While outside the scope of this piece, it should be noted that while surveying is common practice in trademark litigation there are critics of the inclusion of such evidence. See, e.g., Daniel Kegan, Surveys, Science & Skepticism, 53 ILLINOIS STATE BAR ASSOCIATION no. 2, 2014, at 2–3.
85 Trademark infringement actions evaluate a likelihood of confusion amongst consumers in regards to similar trademarks used in connection to competing goods. While the factors evaluating likelihood of confusion do vary across court circuits, one of the most determinative elements in each analysis is the presence of consumer surveys indicating whether the relevant consuming audience is prone to misunderstanding regarding the source of the goods. See, e.g., Larry C. Jones, Developing and Using Survey Evidence in Trademark Litigation, 19 MEM. ST. U. L. REV. 471, 473 (1989). As one expert notes, surveys are important because they “differ from other kinds of data-gathering approaches in an important way. A survey, when conducted properly, allows you to generalize about the beliefs and opinions of many people by studying a subset of them.”
86 MARK KASUNIC, CARNEGIE MELLON SOFTWARE ENGINEERING INST., DESIGNING AN EFFECTIVE SURVEY 3 (2005).
87 G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 873 F.2d 985, 995 (7th Cir. 1989) (holding that a trademark survey’s focus “on a thoroughly uninformed consumer audience renders [the] conclusions highly suspect”).
88 Lund, supra note 25, at 76–77 (Opining that “[t]he general public is not the intended audience of copyrighted musical compositions . . . [a]rguably, only performers, music publishers, sound engineers, etc., can properly consume musical compositions. These groups, and not the general public, represent the target market for, and intended audience of, copyrighted musical compositions.”).
89 Manta, supra note 47, at 1353.
Similar to concerns over the ability of jurors to understand substantial similarity, there is also fear that the doctrine would prove too unclear for test subjects to apply.90 However, like trademark surveying, copyright survey subjects would not be confronted with direct legal questions.91 For a trained musician or music analyst, providing an opinion on the similarity of musical works would not be challenging. Once a survey collecting such opinions has been performed, a jury would be able take the findings of the survey group into consideration in view of the applicable legal standards. If perceptions of members of the intended audience are introduced at trial, this reduces the need for jurors to rely on their own observations or assume what an intangible “reasonable observer” would perceive.92 In turn, it is highly likely that juries could generate a more impartial verdict.

A control stimulus93 could also be used to manage bias throughout the surveying process.94 In copyright infringement cases, the control stimulus would be able to present the same ideas through a different means of expression; therefore, giving courts more accurate “information as to whether it is the protectable or the unprotectable elements of a work that are leading to perceptions of similarity on the part of the intended audience.”95 Furthermore, the anchoring effects96 that are problematic at trial would be lessened given that the inclusion of a control stimulus that could better direct the survey audience to observation of both the protectable and unprotectable elements of each work.97 By providing each jury with tangible evidence from an experienced survey group, opportunities for bias and misunderstanding would very likely be negated.

V. CONCLUSION

90 For example, the Second Circuit expressed concern that survey questions would likely run the risk of being either too open-ended or conversely too specific. The court cited the question of “Do you think [one] is substantially similar to [the other]?” Warner Bros., 720 F.2d at 244-45; see also OSTERBERG, supra note 83, at §17:3.
91 Manta, supra note 84, at 1036–37. In published guidelines for conducting appropriate trademark surveys, MMR Strategy Group (an elite marketing research-based consulting firm) states the first challenge in survey writing in tailoring the questions to the survey audience. More specifically, “survey questions should be designed in a manner that can be understood by laypeople, who likely do not have a lawyer’s understanding of the law.” Bruce Isaacson, Asking the Right Questions, INTELL. PROP. MAG. (Oct. 2012), at 54.
92 Manta, supra note 47, at 1353. Jason E. Sloan, An Overview of the Elements of a Copyright Infringement Cause of Action- Part II: Improper Appropriation, ABA (2015) http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/part_2_elements_of_a_copyright.html (explaining that the goal of the “reasonable observer” is to determine whether an ordinary observer, “unless he set out to detect the disparities [between the works], would be disposed to overlook them, and regard their aesthetic appeal as the same.”); see also Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
93 In trademark surveying, control stimuli serve as “materials that survey subjects face that are supposed to represent the potentially infringing product or service.” By evaluating the original work and the allegedly infringing work against a neutral third work “researchers can compare the level of confusion of the potentially infringing product to a basic threshold.” Manta, supra note 84, at 1032–40.
95 Manta, supra note 47, at 1354.
96 See supra Part III.B.ii.
97 Manta, supra note 47, at 1354.
Musical compositions require special knowledge to evaluate, and only performers and experts in the field should be comparing such works under the Lay Listener Test. Given that statistical sampling is already common practice in trademark infringement actions, inclusion of survey evidence would not cause appreciable disruption procedurally in copyright litigation. By adopting the practice of entering survey evidence into such decision-making processes, juries would still be left to make ultimate decisions regarding the applicable laws. However, those decisions would be based on a much stronger foundation, supported by audience members capable of evaluating the similarity of the competing works.

98 For example, as stated by intellectual property litigator J. Michael Keyes, “[s]imilarity, in cases of music copyright infringement, the ‘reactions’ of listeners is at the heart of the inquiry as to whether there is an infringement. Because surveys ‘create an experimental environment from which to make informed inferences,’ they could be used by the trier of fact in music copyright infringement actions to make the ultimate determination of illicit copying.” Keyes, supra note 33, at 442.