BEGINNING WITH THE END IN MIND: A PROPOSAL FOR A JURY INSTRUCTION FOR THE “SUBSTANTIAL SIMILARITY” ANALYSIS FOR MUSIC COPYRIGHT

By Lisa M. Field, Thomas Jefferson School of Law

I. INTRODUCTION

The application of copyright law to music has created much confusion in the courts, especially when those courts are asked to instruct a jury. This problem was highlighted in this year’s California Central District Court case, Williams v. Bridgeport Music, Inc. The court asked a jury to decide whether a 2014 song by popular artists Pharrell Williams and Robin Thicke, “Blurred Lines,” infringed upon the copyright of the famous 1977 song by Marvin Gaye, “Got to Give it Up.” The jury rendered a verdict for defendant Bridgeport Music and the Gaye’s family for $7.4 million dollars.

The Bridgeport case illuminated the ambiguity of the copyright infringement schema and its impact on today’s music industry. The backlash from critics regarding the jury’s verdict flamed concerns among musicians regarding the point at which inspiration crosses over into infringement. This concern is not new. In 1965, Paul McCartney suffered the same fear. McCartney woke in the night when the song “Yesterday” came to him in a dream. He struggled for months before becoming convinced that he did not subconsciously “copy” the song. He decided to write lyrics and released it to become an overwhelming hit. Since then the problem for musicians has become more real. The digital age has exponentially increased the amount of music created providing even more influences for musicians to draw upon. Musicians have legitimate concern that they could be incorporating something they have heard or combining so much of their personal influences that it amounts to copying. They know even subconscious copying will result in liability for copyright infringement. This fear of liability has great potential to stifle creativity and expression.

1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(a) (2014).
3 Id.
4 Id.
6 Id.
7 Id.
9 Id.
10 See Fred Fisher, Inv. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1924) (holding the two works were too similar to find anything but infringement, even though the composer was unconscious of any plagiarism); see also Bright
The Bridgeport case has stoked the ongoing debate over what constitutes infringement while the number of infringement suits continues to rise. One only need look to the internet for the flurry of diverging legal opinions regarding Bridgeport to understand the need for clarity. At the heart of the debate, and central to an infringement analysis, is whether there is “substantial similarity” between two works. Despite the growing number of claims, the legal standard for “substantial similarity” in music remains inconsistent. Courts have varied approaches in analyzing whether a defendant has infringed. The Ninth Circuit applies the dual-pronged extrinsic and intrinsic test, which the Second Circuit abandoned in favor of the ordinary observer approach. Courts in other circuits have adopted some form of either of these tests, yet no court applies a uniformed or consistent standard.

While there has been much scholarly review on reforming the music infringement analysis, there is a lack of guidance on providing clear instructions to the jury—the ultimate finder of fact. Many Circuit Courts provide manuals of model jury instructions; however, none of these courts provide jury instructions specific to infringement of a musical work. The Ninth Circuit had incorporated a general infringement instruction but has since withdrawn its substantial similarity instruction from its Manual Model for Civil Jury Instructions.

The Ninth Circuit needs a music-specific model instruction for “substantial similarity” because the lack thereof only contributes confusion and uncertainty to an area of copyright law that is already difficult to grasp. Such an instruction will provide a starting point for attorneys handling music infringement cases, save time and effort in crafting special instructions, improve legal accuracy by reducing appeals based on instructional error, and provide musicians concerned by the specter of infringement with much needed guidance.

Musicians could look to experts and have a musicologist review similarities in copyrightable elements. But any disagreement among the experts creates a triable issue of fact for the jury to decide. Whether it is a musician who believes their work has been copied, or the

Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 181 (S.D.N.Y. 1976) (finding that defendant’s song “My Sweet Lord” infringed upon the song “He’s so Fine” even though defendant’s copying was subconscious).

Cronin, supra note Error! Bookmark not defined., at 1192.


Id.

Id. at 542.


Jamie Lund, An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement, 11 Va. Sports & Ent. L.J. 160 (2011) (stating that a review of jury instructions revealed that a court has not included musical elements in an infringement instruction).


Nimmer & Nimmer, supra note 1, at § 13.03(a) (“The determination of similarity that will constitute a [substantial and infringing] similarity presents one of the most difficult questions in copyright law . . . .”).


Swirsky v. Carey, 376 F.3d 841, 844 (9th Cir. 2004).
diligent musician trying to limit their liability, the court’s inconsistent outcomes leave musicians and their attorneys unsure if their claim of infringement is valid.22 This article examines the current infringement law in the Ninth Circuit and seeks to mold the language into a model jury instruction so that the law may be justly applied to the facts.

II. CREATING AN ORIGINAL MUSICAL WORK AND FINDING INFRINGEMENT

A. Obtaining a Copyright in a Musical Work

The Copyright Act does not define the term “musical work” but it specifies that “musical works, including any accompanying words” are protected.23 In order for a musical work to be copyrightable it must contain two components: originality and creativity.24 The Copyright Act states that for a musical work to receive copyright protection it must be “fixed in any tangible medium of expression.”25 A musical work is fixed in a tangible medium of expression when it is written in notation form, such as sheet music, or recorded.26

Music is the main form of expression that people experience through their ears,27 and due to its intangible nature, it is more difficult to analyze than other creative works that can be seen or touched.28 To analyze music, courts first break songs down into their basic elements.29 Historically, these basic elements have been melody, harmony, rhythm, and lyrics, though other elements have been considered.

Not all elements of a musical work fall under protection of copyright.30 A musical work is constructed from a combination of twelve tones in the musical scale.31 A limited combination of chords exists within the twelve tone scale—not all of which are pleasing to listeners.32 Basic elements of music used frequently by musicians are termed scènes à faire and considered

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22 Baker, supra note 20, at 1584 (1992) (pointing out that a successful song or work will draw multiple claims from plaintiffs who think they thought of the idea first).
24 Nimmer & Nimmer, supra note 1, at § 13.03(a).
26 Robert Brauneis, Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance, 17 TUL. J. TECH & INTELL. PROP. 1, 2 (2014) (comparing the 1909 Copyright Act that only covered compositions to the 1976 Copyright Act, which now includes recordings).
27 Livingston & Urbinato, supra note 8, at 230.
28 See Baker, supra note 20, at 1584 (contending that music is more vulnerable to plagiarism).
29 N. Music Corp v. King Record Distrib. Co., 105 F. Supp. 393, 396 (S.D.N.Y 1952) (“We now examine the rhythm, harmony and melody of both songs to determine whether similarity exists.”).
30 Jeffrey Cadwell, Comment, Expert Testimony, Scènes à Faire, and Tonal Music: A (Not So) New Test For Infringement, 46 SANTA CLARA L. REV. 137, 163, (2005) (discussing scènes à faire, the basic patterns most musicians are likely to use in creating music); see also, e.g., Hobbs v. John, 722 F.3d 1089, 1095 (7th Cir. 2013) (finding no infringement of Elton John’s song “Nikita” in part because the theme of an impossible love story between a Westerner and a Communist during the Cold war was commonplace and not protetable).
31 Olufunmilayo B. Arewa, Recalibrating Copyright: Continuity, Contemporary Culture and Change: Institute for Intellectual Property & Information Law Symposium: A Musical Work is a Set of Instructions, 52 HOUS. L. REV. 490 (2014) (distinguishing musical works with limited number of notes available from literary works with one million to two million possible English words available).
32 Gaste v. Kaiserman, 863 F.2d 1061, 1068–69 (2d Cir. 1988) (“[W]e are mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music.”).
musical ideas.\textsuperscript{33} Musical ideas, such as simple chord progressions and common rhythms, are not protected by copyright.\textsuperscript{34} Additionally, a protected element of music may fall outside the realm of copyright protection if it is considered quantitatively or qualitatively insignificant.\textsuperscript{35} However, it is possible for a composer to take several basic musical elements and combine them in a unique way that constitutes a musical expression protected by copyright.\textsuperscript{36}

B. Finding Infringement of a Musical Work: The “Substantial Similarity” Test

If a plaintiff owns a valid copyright in a song, a musician infringes upon the work when (1) the defendant had access to plaintiff’s work; and (2) the work has “substantial similarity” to the plaintiff’s work.\textsuperscript{37} Access to the work is typically found when the plaintiff’s song has been widely distributed.\textsuperscript{38} The court will apply an inverse ratio rule between access and substantial similarity.\textsuperscript{39} Some scholars have suggested the inverse ratio rule is unnecessary because even when a defendant admits to hearing the plaintiff’s song, a substantial similarity test will always be involved.\textsuperscript{40}

Once a plaintiff’s ownership in copyright and a defendant’s access to the work has been established, the issue becomes whether the works are substantially similar as to constitute infringement\textsuperscript{41} and this is where the majority of the confusion lies. The Ninth Circuit approach to the substantial similarity analysis in copyright infringement is two part: the extrinsic test and the intrinsic test.\textsuperscript{42}

The extrinsic test is an objective test and considers whether the two works are similar in their ideas and expression.\textsuperscript{43} As part of the extrinsic test, a court may only consider the protected elements of a song.\textsuperscript{44} Because this is an objective test, it may be decided as a matter of law and ruled upon by a judge in a motion for summary judgment.\textsuperscript{45} However, in a trial, a jury must find there is enough evidence to satisfy both the extrinsic test and intrinsic test.\textsuperscript{46} The dissection

\textsuperscript{33} Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004) (citing Rice v. Fox Broad. Co., 330 F.3d 1170, 1174 (9th Cir. 2003)) (defining the scènes à faire doctrine as “commonplace expressions [that] are indispensable and naturally associated with the treatment of a given idea”).

\textsuperscript{34} Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977) (citing Mazer v. Stein, 347 U.S. 201, 217-18 (1954)) (“It is an axiom of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself.”).

\textsuperscript{35} Newton v. Diamond, 388 F.3d 1189, 1194 (9th Cir. 2004) (holding that the the three-note segment melody in question was not qualitatively or quantitatively significant to warrant infringement).

\textsuperscript{36} Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000) (citing Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977)) (“It is well settled that a jury may find a combination of unprotectible [sic] elements to be protectible [sic] under the extrinsic test . . . .”); Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004) (criticizing the district court’s measure by measure comparison of the note sequences in the choruses).

\textsuperscript{37} Swirsky, 376 F.3d at 844.

\textsuperscript{38} NIMMER & NIMMER, supra note 1, at § 13.03.

\textsuperscript{39} Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000).

\textsuperscript{40} See NIMMER & NIMMER, supra note 1, at § 13.03 (discussing whether there is evidence of proof of access and stating “[n]either may a showing of substantial similarity ever be avoided”).

\textsuperscript{41} Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

\textsuperscript{45} Krofft, 562 F.2d at 1164.

\textsuperscript{46} Swirsky, 376 F.3d at 844.
process requires breaking the works down to their individual elements and comparing them.\textsuperscript{47} For this test, music experts can testify to help a judge or jury analyze similarities in those elements.\textsuperscript{48} The extrinsic test is satisfied when the evidence reveals enough qualitative and quantitative similarity between the individual elements of the songs to infer copying has taken place.\textsuperscript{49}

C. The “Total Concept and Feel” Approach

The intrinsic test for “substantial similarity” is subjective and always left to the jury.\textsuperscript{50} The jury determines whether there is substantial similarity between the songs from the perspective of the average listener.\textsuperscript{51} At trial, the jury will not be permitted to consider analytic dissection and expert testimony when applying the intrinsic test.\textsuperscript{52} A plaintiff will prevail if the jury, as the average listener, hears a substantial similarity between the two works as a whole.\textsuperscript{53} For this prong, the Ninth Circuit developed the “total concept and feel” approach.\textsuperscript{54} This approach asks the jury to make a subjective decision as to whether there is substantial similarity in “total concept and feel” between the songs as a whole.\textsuperscript{55} It is in this intrinsic analysis that an issue of fact exists “which a jury is peculiarly fitted to determine.”\textsuperscript{56}

D. The Jury is the Last Word

The jury’s role is critical in the intrinsic test because they represent the public for whose taste the work is addressed.\textsuperscript{57} The policy behind this test is that the plaintiff has a legally protected interest in the work that derives from the public’s appreciation of it.\textsuperscript{58} Thus, policy dictates that the public is in the best position to determine whether there is substantial similarity.\textsuperscript{59}

Distinguishing between the extrinsic test and intrinsic test is a difficult task and jury instructions are crucial in providing guidance.\textsuperscript{60} It is important that jury instructions are not

\textsuperscript{47} Id. at 845.
\textsuperscript{48} Miah Rosenberg, Note, Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit, 39 U.C. DAVIS L. REV. 1669, 1674 (2006) (arguing that expert testimony should be used in both the extrinsic test and the intrinsic test where expert testimony is not permitted).
\textsuperscript{49} Id.
\textsuperscript{50} Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1164–65 (9th Cir. 1977) (citing Arnstein v. Porter, 154 F.2d 464, 468-69 (2nd Cir. 1946)).
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 1167 (citing Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970)) (finding that the defendants “captured the total concept of feel” of plaintiffs television show in their commercials); see also Three Boys Music Corp. v. Bolton, 212 F.3d 477, 483-86, (9th Cir. 2000).
\textsuperscript{55} NIMMER & NIMMER, supra note 1, at §13.03 (reviewing the development of the “total concept and feel” approach in the Ninth Circuit).
\textsuperscript{56} Id. (citing Arnstein v. Porter, 154 F.2d 464, 472–73 (2nd Cir. 1946)).
\textsuperscript{57} Arnstein, 154 F.2d at 473.
\textsuperscript{58} Id.
\textsuperscript{60} Arnstein, 154 F.2d at 476 n.1 (Clark, J., dissenting) (“I find nowhere any suggestion of two steps in adjudication of this issue, one of finding copying which may be approached with musical intelligence and assistance of experts,
erroneous or inadequate as that may be the basis for granting a new trial. Jury instructions must reflect the current law and while one source of law is appellate opinions, using the language from an appellate court is not appropriate because the court does not write for a lay audience. Studies have shown that plain-language jury instructions increase juror comprehension. Further, standardized instructions are helpful to the parties because they provide a clear instruction based on current law, in addition they eliminate time spent in creating special instructions that may later be found to be in error or prejudicial following a motion for new trial or on appeal.

In the recent Bridgeport case, the defendants filed a motion for a new trial alleging, among other claims, that one of the jury instructions was erroneous and prejudicial. While the court ultimately found that the instruction was not prejudicial, a well-crafted standard instruction could have eliminated a question of error and preserved judicial resources.

III. CLEARING UP THE “BLURRED LINES” OF “SUBSTANTIAL SIMILARITY” FOR THE JURY

A. Eliminating The Double Usage of the Term “Substantial Similarity”

Courts use the term “substantial similarity” in back to back instructions for the extrinsic and intrinsic tests in a manner that confuses jurors. A jury in a case for infringement will be asked to decide two issues using the term “substantial similarity” in two different ways: (1) using objective criteria to decide whether there is enough similarity between the works to constitute substantial similarity (the extrinsic test); and (2) whether a reasonable listener when looking at the works as a whole would find them substantially similar (the intrinsic test). The term takes on different meanings in each test and accordingly, should not be used in back to back instructions.

The terms substantial and similar in the extrinsic test misleads a jury into comparing whether the musical elements are similar on a side by side, note by note basis which is not the correct analysis. The correct analysis is whether there are enough similarities rise to a substantial level. The instruction for the extrinsic test can be made clearer by eliminating the term substantial similarity from the jury instruction.

and another that of illicit copying which must be approached with complete ignorance; nor do I see how rationally there can be any such difference, even if a jury—the now chosen instrument of musical detection—could be expected to separate those issues and the evidence accordingly.”).
B. Replacing the term “Total Concept and Feel”

The intrinsic text is problematic for several reasons. In the intrinsic test, the jury is asked to completely disregard the music expert’s testimony regarding individual elements of the song and listen to the song from the perspective of the uninformed average listener. It is difficult for a juror to forget the expert testimony and make a new analysis free of bias. The instruction must make clear how the intrinsic approach is distinct from the extrinsic test while instructing the jury to listen to the song in its entirety from the perspective of the uninformed average listener.

Further, using the term “total concept and feel” is confusing because it implies that the music makes the listener feel a certain way. Music usually invokes a feeling in the listener, a sensation, such as happy, sad, or energized, and a juror may misunderstand the term “feeling” to be an identifier of a song’s mood or genre, elements not protected by copyright. Still further, it is important to avoid words with multiple meanings. The word “feel” can imply that something can be touched, making this test especially difficult to apply to music, as music is an aurally stimulated sensation. Listeners should be assessing whether the song’s overall impression is so similar that it has exceeded the demand for the plaintiff’s song so much so that it replaced the need for the original. An instruction that includes the term “overall impression” would better serve a juror’s analysis because it eliminates the word “feel” and instructs the jury to compare the overall impressions made by the song.

The intrinsic test also differs from the extrinsic in that, unlike the extrinsic test, the intrinsic test requires the jury to analyze the work as a whole rather than analyzing the separate musical elements. The term “as a whole” is useful for lawyers, but rarely appears in non-legal writing and should be avoided in jury instructions. One scholar has suggested that, in writing plain language jury instructions, the phrase “entire”, should be used in its place with the added term "and not just bits and pieces of it.” This phrase is clearer and distinguishes the intrinsic test from the extrinsic test.

C. Use Your Words: Including Musical Terminology in the Instruction

A typical juror will not have a working knowledge of music theory, which makes analyzing two works under the extrinsic and intrinsic tests even more difficult. The abstract nature of perceiving something aurally makes communicating about it with others a challenge.
One scholar has argued that jurors listening to audio recordings will make the wrong comparisons in musical elements because it is outside their normal experience.83

Music’s primary value is being heard. While most jurors will vary greatly in their ability to hear and understand music,84 juror unfamiliarity can be overcome with education.85 Rudimentary musical education should be worked in to the trial proceedings and incorporated into jury instructions because without the terms in front of them for reference, the average listener is not likely to be able to recall and discuss the musical elements they heard during the trial.86 It is critical that the jurors be able to have the verbiage necessary to discuss the particular similarities between songs.87 Whether the jurors are making an objective analysis under the extrinsic test or subjective analysis under the intrinsic test, jurors need the proper tools to categorize the musical elements and identify, analyze, and discuss the similarities and dissimilarities between the songs.88

IV. A PROPOSED JURY INSTRUCTION FOR SUBSTANTIALLY SIMILARITY IN MUSIC INFRINGEMENT

Eliminating the double usage of the term substantially similar, replacing the words “feel” and “as a whole,” and adding music terminology will provide guidance in analyzing a valid claim for music infringement not only for jurors but for musicians and attorneys as well. The following is a proposed model instruction for the Ninth Circuit’s extrinsic and intrinsic test for substantially similarity.

A. Proposed Instruction for the Extrinsic Test

The term “objective or extrinsic” text as used in these instructions means that the plaintiff must show that the defendant’s song, [identify song], contains enough similar musical elements in quantity or quality to plaintiff’s song, [identify song], that it could be objectively inferred that copying has taken place. In making this determination you may consider melody, harmony, lyrics, and rhythm. You may also consider the expert’s testimony regarding additional similar musical elements. While some musical elements alone may be common place and general ideas, a unique combination of common place elements in defendant’s song which are similar to those in plaintiff’s song, may be enough to infer copying has taken place. If you have found that there are enough similar protectable elements between the songs to infer that copying has taken place, go to the instruction for the intrinsic test.

B. Proposed Instruction for the Intrinsic Test

In order to show substantial similarity under the “subjective or intrinsic” test the plaintiff must show that the average listener would conclude that the overall impression of the expression in defendant’s entire song, [identify work], and not just bits and pieces of it, is substantially similar to the expression in plaintiff’s song, [identify work]. Original expression is those unique

83 Lund, supra note 16, at 139.
84 Livingston & Urbinato, supra note 8, at 280–81.
85 Baker, supra note 20, at 1619.
86 Gherman, supra note 77, at 513 (discussing the juries difficult task as an average listener).
87 Id.
88 Id.
aspects of plaintiff’s song that are not common or ordinary to the genre or to music generally. To find substantial similarity in expression you must consider the combination of all of the musical elements, the melody, harmony, rhythm, and lyrics, together as an entire work.

V. CONCLUSION

Copyright law was intended to protect and foster creativity in the different forms of expression.\textsuperscript{89} Music is an exceptional form of expression and one that is inherently unique because it cannot be seen or touched.\textsuperscript{90} In the last one-hundred years the way we create and listen to music has drastically changed however copyright law has failed to change with it.\textsuperscript{91} Thus, we are left with a vague and ambiguous body of law that seems unfair and inconsistent.

Musicians who feel that copyright law does not protect them will not feel encouraged to create or release more music which is a loss not only for the musician but also for the music-appreciating public in general. It would be a shame for the world to be deprived of the next “Yesterday”. While the separate circuits remain consistently inconsistent, a standardized jury instruction for the Ninth Circuit will provide a uniform foundational analysis for attorneys and musicians evaluating claims and enable juries to reach more accurate and educated findings in the infringement analysis thus resulting in more consistent and fair outcomes that will encourage creativity rather than stifle it.

\textsuperscript{89}See U.S. CONST., art. I § 8, cl.8.
\textsuperscript{90}NIMMER & NIMMER, supra note 1, at § 13.03(a).
\textsuperscript{91}Cronin, supra note Error! Bookmark not defined., at 1194.