"Distinctive Sounds": A Critique of the Transformative Fair Use Test in Practice and the Need for a New Music Fair Use Exception

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INTRODUCTION

For centuries, copying a master or revered teacher has been the primary method for all artists—musicians, painters, sculptures, poets, playwrights, and the like—to learn their respective crafts.[1] Copying and modifying the work of venerated artists has also been a traditional point of departure for new generations to innovate beyond the achievements of their predecessors.[2] The Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts,"[3] resulting in our modern regime of patent, trademark, and copyright law. Over time, however, this artistic tradition of copying has collided with more modern concepts of intellectual property rights, especially copyright protections.[4] The advent of the internet as well as state-of-the-art recording and mixing software

1. *See generally* HAROLD BLOOM, THE ANXIETY OF INFLUENCE (2d ed. 1997).

> Poetic Influence—when it involves two strong, authentic poets—always proceeds by a misreading of the prior poet, an act of creative correction that is actually and necessarily a misinterpretation. The history of fruitful poetic influence, which is to say the main traditions of Western poetry since the Renaissance, is a history of anxiety and self-saving caricature of distortion, of perverse, willful revisionism without which modern poetry as such could not exist.

Id. at 30.

2. *Id.*

3. U.S. CONST. art. I, § 8, cl. 8.

4. *See* Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 1999 (2011).

> Because innovation usually requires some form of creativity as an antecedent, intellectual property law generally should also promote, and certainly should not impede, creativity. Despite the value of facilitating creativity for intellectual property law . . . the legislative and judicial development of intellectual property law has paid remarkably little attention to modern knowledge concerning how to promote creativity.

Id.

has vastly increased opportunities to copy, remix, sample, parody, and otherwise alter the work of other artists, particularly musicians.[5]

This brave new world of opportunity comes with inherent problems of line drawing when it comes to addressing similarity in music. For the purposes of copyright law, it can be remarkably difficult to determine what constitutes creative borrowing versus outright stealing. Despite more rigorous modern copyright laws (and their related penalties), the practice of copying another artist remains as commonplace as ever in the modern music industry.[6] In fact, recording and remixing software has made it possible to *exactly* replicate another artist's finished work, even if the exact copy constitutes only one layer[7] of a newly composed work by the copying artist.[8] Is this borrowing act one of inspiration, homage, creativity, or theft?[9]

While courts have begun to recognize that new artistic works may borrow heavily from other artists while still creating a distinct musical work,[10] the difference between lawfully copying and unlawfully stealing material is by no means clear. The transformative fair use doctrine, adopted by the Supreme Court in *Campbell v. Acuff-Rose Music*,[11] was the first real attempt by the Court to grapple with the difficult question of legitimate (i.e., "transformative") borrowing in new works of music. The *Campbell* decision created a regime which established that "[a] derivative work is transformative if it ***uses a source work in completely new or unexpected ways***. Importantly, a work may be transformative, and thus a

5. *See* Guilda Rostama, *Remix Culture and Amateur Creativity: A Copyright Dilemma*, WIPO MAG. (June 2015), http://www.wipo.int/wipo_magazine/en/2015/03/article_0006.html [https://perma.cc/Q59R-HK8N].

6. *Id.*

7. A typical remix track contains many "layers" of audio files, repurposed and reprocessed to combine with each other in the new track. MartyParty, *Everything You Always Wanted to Know About Remixes, But Were Afraid to Ask*, THUMP (Oct. 4, 2013), https://thump.vice.com/en_us/article/everything-you-always-wanted-to-know-about-remixes-but-were-afraid-to-ask [https://perma.cc/XBC2-2KTR].

8. *See, e.g.*, Prince v. Cariou, 714 F.3d 694, 712 (2d Cir. 2013).

9. In *Cariou*, the Second Circuit found that appropriation artist Richard Prince had made a fair use of Patrick Cariou's *Yes Rasta* photographs in Prince's *Canal Zone* painting series by sufficiently transforming the original, even though in some cases Prince had used photographs from *Yes Rasta* in their entirety. *Id.*

10. *Id.*

11. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

fair use, even when all four of the statutory factors[12] would traditionally weigh against fair use[.]"[13]

More than twenty years after *Campbell v. Acuff-Rose Music*, transformative fair use has become the predominant test courts have used to evaluate cases of copyright infringement in the music industry.[14] The test's widespread use has, perhaps inevitably, led to a significant broadening in the scope of what copying may pass as a transformative fair use.[15] In fact, courts have generally concluded that a transformative fair use analysis renders most alleged copyright infringements distinct, non-infringing works from the original.[16] While this state of affairs is certainly a victory for creative license generally, the transformative fair use inquiry is notoriously unpredictable. The inquiry is extremely subjective and prone to producing different results depending on the trier of fact in any given case of infringement.[17]

Musical artists must be free to make art within the widest possible parameters (including various forms of appropriation) without being viewed as stealing each other's work, so as not to stifle creativity. This article will discuss the implementation and effect of the transformative fair use standard for questions of music copyright infringement and propose two solutions: Congress should (1) enact a new Fair Use Exception to the Copyright Act specifically for music and (2) expand the role of the expert musicologist in these difficult and extremely technical music copyright cases. Part I will address the origins of the transformative fair use doctrine

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12. The four statutory factors for a finding of fair use are: (1) purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for the copyrighted work. 17 U.S.C. § 107. These factors are discussed more in depth later in this Article.

13. *Understanding Fair Use*, U. MINN. LIBS. (2016) (emphasis in original), https://www.lib.umn.edu/copyright/fairuse [https://perma.cc/5HK3-7DHR].

14. Jose Sariego, *Fair-Use Defense Missing in Music-Sampling Cases*, LAW360 (Nov. 22, 2016), https://www.law360.com/articles/863335/fair-use-defense-missing-in-music-sampling-cases [https://perma.cc/RVQ5-8X5C] (remarking on the strange lack of a fair use defense being raised in modern music-sampling cases).

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

16. *Id.*

17. *See* Prince v. Cariou, 714 F.3d 694, 713 (2d Cir. 2013) (Wallace, J., concurring in part and dissenting in part).

> The majority relies on the Seventh Circuit decision in Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012), for the proposition that all the Court needs to do to determine transformativeness is view the original work and the secondary work and, apparently, employ its own artistic judgment. . . . [W]hile I admit freely that I am not an art critic or expert, I fail to see how the majority in its appellate role can ''confidently'' draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.

Id.

and the first case in which the Supreme Court used the doctrine to find a new work was transformative of the original and therefore not a copyright infringement. Part II will discuss recent cases in which transformative fair use doctrine has been inconsistently applied and will demonstrate its resultant shortcomings. Finally, Part III will propose both expanding the role of the expert musicologist in these cases and enacting a new fair use exception to the Copyright Act specifically for music, which more fairly addresses the kinds of creative, distributive, and legal issues facing the music industry today.

I. BACKGROUND

Congress passed the Copyright Act of 1976, in large part, to provide further protections to copyright owners in an era where technological advances (radio, film, television, sound recordings) had outpaced the parameters of the 1909 Copyright Act.[18] The Copyright Act was not intended to absolutely preclude all uses of previously copyrighted works, however. The Act carves out limitations on exclusive rights under fair use and provides four factors to use when determining fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[19]

Section 107 of the Act further provides that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."[20] In practice, these four statutory factors provide little guidance to courts in making actual fair use determinations and frequently lead to differences of opinion between judges.[21]

The idea of transformative fair use as a helpful judicial gloss on section 107 was first posed in the 1990 *Harvard Law Review* article entitled *Toward a Fair Use Standard* by Pierre N. Leval.[22] Judge Leval urged courts, which were frequently divided on matters of fair use, to

18. *See generally* H.R. REP. NO. 94–1476 (1976).

19. 17 U.S.C. § 107 (1976).

20. *Id.*

21. *See* Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987); New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989).

22. *See generally* Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

adopt a new guiding principle of "transformative use" as a "cogent set of governing principles . . . soundly rooted in the objectives of the copyright law."[23] Judge Leval opined:

> [T]he answer to the question of justification [of fair use] turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[24]

Judge Leval's conception of transformative fair use on its face is certainly an idea most artists would agree is an acceptable standard in theory. As Judge Leval describes it in the excerpt above, the transformative use test ideally allows for both creative manipulation of the work of prior artists, giving the material new meaning or purpose, while still protecting the rights of the original author.[25] Academically, the test seems to be a fair method of acknowledging the legitimate interests of artists on both sides of an infringement accusation and attempting to provide a reasonable method of settling these sensitive disputes. One important point Judge Leval's proposal overlooks, however, is how to designate a party adequately equipped to make reliable, fair determinations of what transformative actually means in real circumstances with real facts. Judge Leval also does not address whether this judgment can feasibly be made without passing artistic quality judgments; rather, he seems to assume that judges will be able to make these determinations without crossing over from law to artistic criticism.

After the publication of Judge Leval's article, the actual implementation of the transformative fair use standard was far from straightforward. In 1994, the *Campbell v. Acuff-Rose Music* Supreme Court decision was first to make transformative fair use the deciding factor

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23. *Id.* at 1105.

24. *Id.* at 1111.

25. John Hollander, Review, *"The Anxiety of Influence,"* N.Y. TIMES: BOOKS (Mar. 4, 1973), http://www.nytimes.com/books/98/11/01/specials/bloom-influence.html [https://perma.cc/78PT-852R] ("Poets and prophets, like magicians, learn their craft from predecessors. And just as magicians will invoke the real or supposed source of an illusion as part of the patter . . . the most ambitious poets also take some stance about sources in the past, perhaps for an analogous purpose.").

to find that copyright infringement had *not* occurred.[26] In this case, Acuff-Rose Music, the company that held the copyright to Roy Orbison's rock ballad "Oh, Pretty Woman," sued the members of a rap group for copyright infringement.[27] The rap group, 2 Live Crew, had produced a song called "Pretty Woman," which they claimed was a commercial parody of the original work.[28] The Court was tasked with determining whether 2 Live Crew's song was fair use within the meaning of section 107 of the Copyright Act.[29]

The Court held that the commercial value of the song parody did not create a presumption against fair use, and it also adopted Judge Leval's transformative fair use analysis.[30] So-called transformative fair use occurs when a new work does not merely supersede the original but alters the original work with "new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"[31] Additionally, the Court stated that "the more transformative the new work, the less [significant the] other factors, like commercialism . . . may weigh against a finding of fair use."[32]

Artistic works that parody other works have obvious transformative characteristics.[33] The Court reasoned in this case that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[34] The *Campbell* Court, however, was concerned that its decision should not be read as an invitation for future courts to engage in musical or artistic criticism or questions of taste. The parody versus satire analysis was not to be taken as a judgment of whether the new work was artistically valuable or not. Rather, "[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use."[35]

In this case, the Court found that 2 Live Crew's song could reasonably be considered a commentary or criticism of the original song: in an effort to contrast the naiveté of the original era with the grittiness of

26. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 578.
31. *Id.* at 579 (citing Leval, *supra* note 22, at 1111).
32. *Id.*
33. *Id.*
34. *Id.* at 580–81.
35. *Id.* at 582.

modern life on the street, 2 Live Crew juxtaposed the romance of the original song with jeering and crude sexual comments.[36] The Court found that "[i]t is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works."[37]

The Court went on to determine that, though 2 Live Crew had copied the opening base riff and a substantial portion of the lyrics, these quotations, which go to the "heart" of the original (a finding that usually weighs against fair use), did not amount to infringement because this feature "most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."[38]

A few years after the *Campbell* decision, in another calculated attempt to update copyright law for a new technological era, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995.[39] This Act created the first limited public performance right in sound recordings within American copyright law.[40] Under the Act, the public performance right only covers digitally transmitted performances and is subject to an exemption for digital broadcasts.[41]

Continuing its attempts to bring copyright law up to speed with new digital technology, Congress then enacted the Digital Millennium Copyright Act (DMCA) in 1998.[42] This law enacted two 1996 World Intellectual Property Organization treaties (the Copyright Treaty[43] and the Performances and Phonograms Treaty[44]) and provided additional guidance on important matters of copyright in the digital era.[45]

Title IV of DMCA is of particular interest to the music industry. It contains exceptions to section 112 of the Copyright Act for making ephemeral recordings and for "webcasting" of sound recordings on the

36. *Id.* at 583.

37. *Id.*

38. *Id.* at 588–89.

39. Pub. L. No. 104-39, 109 Stat. 336 (1995).

40. *See id.*

41. *Id.*

42. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

43. WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNRIDC/94, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157 [https://perma.cc/P4CZ-EMUK].

44. WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, CRNR/DC/95, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477 [https://perma.cc/7QKJ-AQYH].

45. *The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary*, U.S. COPYRIGHT OFFICE, 1 (1998), https://www.copyright.gov/legislation/dmca.pdf [https://perma.cc/5YVJ-S256].

Internet.[46] An "ephemeral recording" is made to facilitate a transmission, such as a radio broadcast or streaming.[47] Under the exemption, for example, "a radio station can record a set of songs and broadcast from the new recording rather than from the original CDs."[48] Prior to the DMCA, section 112 only permitted a transmitter to make and keep (for just six months, therefore "ephemeral") a single copy of a work so long as the transmitter was already entitled to transmit a public performance or display of the work.[49]

These copyright innovations of the late 1990s indicated congressional willingness to reimagine the Copyright Act in light of new advances in digital technology. These updates to the law were promising to artists looking to continually innovate in the digital music space, inspired by the work of other artists, without being accused of copyright infringement. In the courts, the transformative fair use inquiry continued to develop and shape copyright law as it was applied to more cases.

II. CRITIQUE

While the Court's application of the transformative fair use standard in *Campbell* is certainly creative and ground-breaking, the inquiry twenty years later has become too broad. The application of the doctrine with time has also become inexact and inconsistent: while some courts pardon as fair use many works that are almost blatant instances of artistic stealing, they also label as infringement works that are likely acceptable fair use.[50]

A. Blurred Lines: Has the Transformative Use Test Gotten Out of Hand?

A prime example of this inconsistency in the application of the transformative fair use inquiry is the 2015 "Blurred Lines" case (*Williams v. Bridgeport Music, Inc.*) which held that copyright can protect not just sheet music but additionally a rhythmic "groove," expanding protections for the original work and creating a higher bar for the possibly infringing work to meet before being considered fair use.[51]

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46. *Id.*

47. *Id.* at 14.

48. *Id.*

49. 17 U.S.C. § 112 (1976).

50. *See* Prince v. Cariou, 714 F.3d 694, 712 (2d Cir. 2013) (finding through a transformative fair use inquiry that copying the entirety of an original work may constitute a fair use if the original is sufficiently transformed). *Contra* Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *2 (C.D. Cal. July 14, 2015), *affirmed* Williams v. Gaye, No. 15-56880 (9th Cir. 2018) (finding through a transformative fair use inquiry that something as elemental as a rhythm and blues "groove" could be infringed).

51. *Williams*, 2015 WL 4479500, at *1.

In 2015, the United States District Court for the Central District of California decided a case which suggested that a musical/rhythmic "groove" may be protected by copyright in addition to sheet music.[52] In *Williams,* Pharrell Williams and Robin Thicke, writers of the 2013 song (appropriately titled) "Blurred Lines,"[53] brought suit against the children of singer-songwriter Marvin Gaye, who owned the copyright to Gaye's song "Got to Give It Up,"[54] seeking declaratory relief.[55] The plaintiffs claimed that the Gaye family believed that the song "Blurred Lines" infringed their copyright on "Got to Give It Up," and sought a declaration from the court that "Blurred Lines" did not infringe the copyright in the earlier song.[56] The Gaye family countersued.[57]

The jury found by a preponderance of the evidence that Pharrell Williams and Robin Thicke's song "Blurred Lines" had infringed the copyright of the Gaye family on "Got to Give It Up."[58] This finding was undoubtedly influenced by statements both Williams and Thicke had made to the press before writing "Blurred Lines" that they were inspired by "Got to Give It Up" and were thinking of writing a song based upon it.[59] Additionally, and no doubt also very persuasively, the jury was permitted during trial to listen to master recordings of both works.[60] This made it possible for members of the jury to take note of many production similarities between the compositions.[61]

No matter what piece of evidence the jury found most persuasive, in the end it awarded the Gaye family hefty damages.[62] This award was met with a fair amount of shock and incredulity in the music industry.[63] This disbelief was based in "the idea that the court had found that paying homage by imitating the 'feel' and/or 'vibe' of a previously released

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52. *Id.*

53. PHARELL WILLIAMS & ROBIN THICKE, BLURRED LINES (Star Track Recordings 2013).

54. MARVIN GAYE, GOT TO GIVE IT UP (Motown Records 1977).

55. *Williams*, 2015 WL 4479500, at *1.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at *12.

60. Megan Coane & Maximillian Verrelli, *Blurring Lines? The Practical Implications of* Williams v. Bridgeport Music, LANDSLIDE, Vol. 8, No. 3 (Jan.–Feb. 2016), http://www.americanbar.org/publications/landslide/2015-16/january-february/blurring_lines_the_practical_implications_of_williams_v_bridgeport_music.html#6 [https://perma.cc/J62Z-6NJ2].

61. *Id.*

62. *Williams*, 2015 WL 4479500, at *47–48 (awarding actual damages of $3,188,527.50, awarding Williams's profits in the amount of $357,630.96, and awarding an ongoing royalty of 50% of songwriter and publishing revenues of "Blurred Lines").

63. *See* Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out*, NEW YORKER (Mar. 12, 2015), http://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out [https://perma.cc/CSB6-4L36].

master recording, and more generally genre, was found to be infringement."[64] Typically, "feel" and "vibe" elements from a recording are not considered by juries in infringement cases because sound recordings are generally inadmissible[65] as evidence.[66] As it stands, the ruling in this case seems to suggest—contrary to hundreds of years of artistic tradition[67]—that being inspired by, or paying homage to, a previous artist or genre of music inevitably amounts to copyright infringement, or (perhaps more cynically) it amounts to infringement when an artist announces to the press the intention to create a work inspired by someone else. Limiting artists' freedom to take inspiration from each other, based on a single jury's finding that the new work was insufficiently "transformative," hardly seems to further the goal of promoting "the Progress of Science and useful Arts."[68] Instead, it expressly limits this progress when it admittedly rests on the shoulders of prior artists.

The ruling in the "Blurred Lines" case, while founded on a transformative fair use analysis, arguably runs afoul of other aspects of copyright law. Under U.S. copyright law, while fixed expression is protectable,[69] the underlying ideas are not.[70] This means that while authors are free to artistically express themselves on any given subject, then obtain copyright protection over that expression, they are not entitled to copyright protection over the subject itself.[71] The First Amendment protects the rights of non-copyright holders to speak about ideas that copyright holders may have previously used as the basis for their protectable expression.[72] A musical "groove" like the one at issue in the "Blurred Lines" case might

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64. *Id.*

> There is no question that Pharrell was inspired by Gaye and borrowed from him; he has freely admitted as much. But, by that standard, every composer would be a lawbreaker. The question is not whether Pharrell borrowed from Gaye but whether Gaye owned the thing that was borrowed. And this is where the case falls apart. For it was not any actual sequence of notes that Pharrell borrowed, but rather the general style of Gaye's songs. That is why "Blurred Lines" sounds very much like a Marvin Gaye song. But to say that something "sounds like" something else does not amount to copyright infringement.

Id.

65. *See* FED. R. EVID. 1002. The "best evidence rule" typically allows for only the original copy of a work to be admissible as evidence.

66. Coane & Verrelli, *supra* note 60.

67. *See* BLOOM, *supra* note 1.

68. U.S. CONST. art. I, § 8, cl. 8.

69. 17 U.S.C. § 102(a) (1990).

70. Id. § 102(b); Feist Publications v. Rural Telephone, 499 U.S. 340, 363 (1991) (holding telephone numbers and addresses in a telephone directory were not protectable by copyright); Hoehling v. Universal City Studios, 618 F.2d 972, 979 (2d Cir. 1980) (holding *scenes a faire*—certain characters, locales, backgrounds, or events synonymous with covering a certain topic—were not protectable by copyright).

71. *See* discussion, *supra* note 70.

72. *See* U.S. CONST. amend. I.

very easily be considered an underlying musical idea: a groove is "a pronounced enjoyable rhythm,"[73] serving as a rhythmic, often repetitive, foundation for a musical work. Grooves are often synonymous with musical "feel," and are frequently aimed at eliciting a rhythmic response from listeners like foot-tapping or dancing. Most genres of popular music have readily identifiable "grooves" or isolated rhythms that immediately place a particular work within a recognized genre such as rhythm & blues, Latin, funk, etc. To allow individual artists to have copyrights over these rhythms would not only be an impermissible grant of copyright over an idea, but it would also spell disaster for the creativity of the music industry, especially when the transformative fair use analysis is so inexact and so dependent on the jury in any given case.

But what does the "Blurred Lines" case really mean for the ongoing employment of the transformative fair use test? Is the standard becoming stricter, more likely to find infringement, or is this particular case a unique ruling? How much musical material is now at risk of being labelled infringement because it calls to mind a previous song in a similar genre or style in the mind of an untrained juror? Are music copyrights now limited to the finite number of "grooves" possible to compose?

Music and entertainment lawyers have debated the significance of the "Blurred Lines" decision.[74] While some saw the ruling as a damper on burgeoning creativity, others read the verdict as an anomalous instance in which a music copyright case actually went to trial and a sympathetic jury awarded considerable damages.[75] The problem this case definitely highlights, however, is that the transformative fair use test is too inexact in the hands of any given fact-finder without the required music education to make reliably fair determinations that both maximize artistic freedom and protect the legitimate rights of music copyright owners.

B. Is the Transformative Fair Use Test Jury-Friendly in Complex Music Copyright Cases?

Music copyright experts have long identified the intrinsic problems with allowing juries to make factual determinations in this complicated and nuanced area of law. In their article for the American Bar Association's Intellectual Property Law Section's publication, Megan Coane and Maximillian Verrelli point out that there is an inherent difficulty in allowing complex issues of fair use in a specialized field to

73. *Groove*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/groove [https://perma.cc/EZH5-KTF9].

74. Coane & Verrelli, *supra* note 60.

75. *Id.*

go to a jury.[76] Music copyright is just such a specialized field: not only are most jurors not at all familiar with copyright law—an incredibly complicated framework of statutes, case law, and international treaties—they might be even less familiar with music theory and music history.[77] Potential jurors may also be tone deaf, unable to read printed music, rhythmically challenged, or simply apathetic.

In any jury trial, the jury depends on the judge (with the help of the litigants) to provide appropriate instructions on the applicable law, as well as how the jury may consider the evidence before it.[78] Problems inevitably arise, however, when the judge in a given matter does not possess the requisite musical knowledge to pass reliable, fair, and consistent instructions along to a jury (that may or may not be able to use that knowledge effectively).[79] Coane and Verrelli correctly point out that, "[l]ike a recipe, the instructions contain the steps the jury should follow, along with questions it should resolve and the criteria it should use. But if a judge's recipe is bad, it's likely that the cake—the jury's decision—will be bad, too."[80]

Of course, juries in any type of case, criminal or civil, are unpredictable by their very nature. In some areas of law, "the issues have been taken from the jury for being too difficult for anyone but an expert to understand."[81] Issues in music copyright cases, though incredibly intricate, are not typically considered quite complex enough to meet that threshold, with courts usually leaving questions of infringement and damages in the hands of the jury despite their complexity.[82]

But is music copyright infringement, with all its complexities, really a matter that can be adequately explained—within the time it takes to try a case—to a jury unfamiliar with music theory, music history, and copyright law to the point where that jury can reliably render a fair verdict? These tasks are prohibitively difficult and would require hours of expert testimony to "teach" a jury what to look and listen for in an already highly

76. *Id.*

77. *See* Laura Pelligrini, *Music Education In Public Schools Gets a Passing Grade*, NATIONAL PUBLIC RADIO (Apr. 6, 2012, 4:00 PM), http://www.npr.org/sections/therecord/2012/04/06/150133858/music-education-in-public-schools-gets-a-passing-grade [https://perma.cc/65U4-UGVH] (estimating from the findings of the Department of Education's 2012 report on arts education in public schools that currently 2.1 million children in the United States lack any music instruction in school).

78. *See* FED. R. EVID. 105.

79. Coane & Verrelli, *supra* note 60.

80. *Id.*

81. *Id.*

82. *Id.*

contested area of scholarship, a project that arguably wastes valuable time and resources.[83]

In copyright infringement cases where a fair use defense has been raised, juries must determine (1) whether copying did occur, and if so, (2) whether the copying was legally improper. "In copyright law, the second criterion can get very fuzzy. With such unhelpful names—'substantial similarity test' or 'improper appropriation'—the judge essentially asks the jury to determine whether the copying of protected elements was 'too much.'"[84] Unfortunately, most jurors, inexperienced in music, are not going to approach these cases with a mind to preserving artistic freedom or identifying legitimate and intentional acts of music copyright infringement. They are far more likely to make an infringement determination based on a "gut" feeling and to be motivated by a desire to end deliberations and return to their own lives as quickly as possible.[85]

Arguably, the first question before a jury in an infringement case—whether copying has occurred at all—is also likely to be beyond the skill set of a jury uneducated in music. Armed only with the testimony of experts, it is unlikely that juries with no other musical training will be able to make a fair and reliable determination of whether outright copying has actually occurred, or whether two songs within the same genre bear a passing similarity to each other. "Anytime you go to a jury, you are taking a crap shoot of what they will understand and get out of the testimony. . . . You could have the musicologist testify for hours and hours, and at the end no one will know which way is up."[86] This situation does not bode well for any of the parties involved in music copyright litigation. Even assuming the transformative fair use test is a good and reliable one with which to analyze fair use defenses, a jury—lost in hours of expert musicology testimony that it lacks the expertise to understand—is not an adequate safeguard of artists' freedom or music copyrights.

The "Blurred Lines" case has been roundly criticized from all angles, primarily because the case seemed to expand the rights of music copyright owners far beyond what they were previously understood to encompass. Peter Oxendale, a prominent British forensic musicologist involved as an

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83. Judges have broad discretion to run their court rooms and have "control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time . . . . " FED. R. EVID. 611. It is unlikely that judges in music copyright cases would find extended jury music education to be a fitting use of time at trial.

84. Coane & Verrelli, *supra* note 60.

85. *See generally id.*

86. Ed Christman, *Blurred Lines Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous*, BILLBOARD (Mar. 13, 2015), http://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and [https://perma.cc/A7K9-WAAA].

expert in the case, finds the verdict completely ridiculous and expected it to be overturned on appeal.[87] "Those songs only share a groove. A jury can say the sky is green, but that doesn't mean it is."[88] Given the limited style characteristics most popular song writers and producers employ to produce a marketable sound, sharing a so-called "groove" is in fact very common. Songs in the same genre, i.e., rhythm and blues, rap, etc., are likely to demonstrate their place in that genre with very recognizable characteristics and references.[89]

As such, the average listener, someone untrained in music theory or music history, may hear similarities between musical works even when no foul play has occurred.[90] Joe Bennet, a forensic musicologist at Boston Conservatory of Music, explains that in the popular music sphere, "[m]ost songwriters follow a strict set of rules—songs being three to four minutes long or having four beats to a bar—so there is actually much scope for similarity. But the truth is that many songwriters do use other people's music for inspiration."[91] Musical artists may depend on the creativity of others for inspiration, as well as to mimic the same qualities that make a particular type of song a hit, without nefarious or infringing intentions.[92]

There is only so much variety a composer can work with when a particular genre or audience has very clear expectations of how a song ought to sound. While society may be taken with the romantic myth of creative inspiration, "every songwriter is partly a product of their influences. Allowing yourself to be influenced by a song—just not copying the melody, chords or lyrics—is perfectly fine."[93] In a nutshell, the combination of original creativity and outside influence is the core of what musical composition actually is.[94] In fact, "[many] famous songs have been created using reference tracks and there's nothing wrong with

87. Alex Marshall, *The Man Musicians Call When Two Songs Sound Alike*, N.Y. TIMES (Oct. 11, 2016), http://www.nytimes.com/2016/10/12/arts/music/the-man-musicians-call-when-two-tunes-sound-alike.html?smprod=nytcore-iphone&smid=nytcore-iphone-share. The verdict was in fact affirmed by the Ninth Circuit in March of 2018.

88. *Id.*

89. For example, most musical genres rely on recognizable, standardized musical formulas to package musical material and cue the listener's expectations. Some examples of these forms include twelve bar blues, the da capo aria, sonata form, etc. Most pop songs follow a very standard form of alternating verses and chorus with a bridge before the final chorus. Beyond form, most musical genres also share common style features that give individual songs an identifiable link to the genre, such as a heavy back-beat in rock-and-roll, improvisatory solos in jazz and blues, and brilliant scales and arpeggios in instrumental concertos.

90. Marshall, *supra* note 87.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* BLOOM, *supra* note 1.

that. . . . [t]here would be no Beethoven without Haydn."[95] A demand that every piece of newly composed music be absolutely and entirely original would not only be completely unfeasible, it would also discount all the good art made as a result of inspiration from another artist.

C. The Modern State of Copyright Law is Over-Protective

Two predominant narratives have emerged to explain the modern direction and growing depth of copyright law. One explains the need for complex laws in the area "as a way to ensure an adequate revenue stream for copyright owners as technologies change and business models shift."[96] This view is held by music publishers and other behemoths of the music industry looking to protect their business models in an age where almost any piece of music can be found somewhere on the internet by looking hard enough. The other narrative sees the current copyright regime, "particularly those changes put in place by Congress in the last twenty years, as protecting incumbent businesses from the full-throttle competition of the digital age."[97] It is little wonder that artists get caught in the middle of this fight between the music industry and new media.

In a generation where music becomes more and more heavily influenced by sources, genres, and works from all over the world, it is also important to preserve the musician/performer/composer's ability to borrow extensively as a form of creativity. This is especially true in the case of so-called "mash-ups"—musical works formed from a collection of elements gathered from previous works, layered together to form a new work. Uncertainty in the changing nature of copyright law and sky-high licensing costs "have pushed this genre underground, stunting its development, limiting remix artists' commercial channels, depriving sampled artists of fair compensation, and further alienating netizens and new artists from the copyright system."[98] In order for copyright law in the United States to fulfill its commission to promote the arts, Congress must develop a better way to facilitate the creativity of artists at the forefront of new music, rather than prioritizing the interests of established industry stakeholders. There must be a more satisfying "resolution of the trade-offs among authors' rights, cumulative creativity, freedom of expression, and overall functioning of the copyright system."[99] Our current system underperforms.

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95. *Id.*

96. Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 582 (2014).

97. *Id.*

98. Peter S. Menell, *Adopting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 441 (2016).

99. *Id.*

Recent case law proves encouraging in this particular arena. In a case where sampling was at issue, the Ninth Circuit recently found that Madonna Louise Veronica Ciccone and her producer had not infringed copyrighted material by sampling short horn riffs (lasting less than a second) into her iconic song "Vogue," emphatically rejecting the Sixth Circuit's 2005 bright-line rule that all unlicensed sampling constitutes copyright infringement.[100] Madonna and her legal team did not bother with raising a fair use defense in the case.[101]

III. PROPOSAL

It is important to evaluate all aspects of a piece of music—score, recording, etc.—before making a fair use determination. The testimony of expert musicologists and theorists is critical for maximum understanding of the issues, for accuracy, and for fairness. Only an expert can tease out important distinctions between musical ideas and musical expression—what is merely inspired by a particular artist versus what is directly copied.

The role of the jury in music copyright infringement cases must be significantly minimized. Jury verdicts are inherently problematic because of the incredibly specialized knowledge required to make fair use determinations. It is very likely impossible to bring juries "up to speed" over the course of a music copyright infringement trial in order to enable them to make fair and just decisions about whether musical copying has occurred and whether it is lawful under the fair use exception or not.

Comparing any two musical works involves the ability to conduct a stylistic analysis of many different musical features, not just "vibe" and "feel" as in the *Blurred Lines* case, but chordal progressions, melodic and harmonic lines, articulation and phrasing markings, text, meter, tempi, and many, many other factors. The ability to recognize copying of any number of these features is, in fact, a very high-level exercise for which extensive specialized training is required. A musically uneducated jury simply cannot make these nuanced determinations when even the most experienced musicologists may disagree over what types of stylistic similarities or confluence of similarities more strongly suggest music copyright infringement.

Given the profound changes since the 1976 Copyright Act, not only in music itself, but also the ways it is produced, distributed, and incorporated into new works, it seems only logical to create a new copyright fair use exception specifically for music. The transformative fair

100. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 884 (9th Cir. 2016) (affirming the district court's rejection of the rule set forth in Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005)).

101. *Id.*

use analysis began down the path to this conclusion, but rather than sufficiently adapting the existing Act into a workable solution, it ultimately further complicated music copyright infringement questions by requiring inexperienced juries to do too much musical analysis, resulting in unfair and inconsistent verdicts.

It is also patently ridiculous to assume that the same Act and set of analytical tools can be applied to works of literature, photography, painting, film, and many other art forms as are applied to music (in both its recorded and written form) in order to determine whether copyright infringement has taken place. These art forms are all unique, not only because they produce distinct artistic products but because the culture of artistic copying, for learning purposes as well as an artistic choice, is unique to each discipline. While the multi-million-dollar popular music industry may care very much about setting clear rules for what is "inspiration" versus what is stealing, the visual arts may be far less interested in this inquiry and more interested in another facet of intellectual property law.

> Some level of protection is needed in order to provide an incentive for the creation and distribution of works of authorship. How much protection is the fundamental question. When elements of the copyright system hinder dissemination of copyrighted works without providing adequate benefits to the creators or distributors of works, those elements of the system should be eliminated. The Copyright Act is no longer responsive to the reality of the digital world.[102]

Some critics of the Copyright Act have even suggested doing away with it altogether.[103]

A new Music Copyright Fair Use Exemption would necessarily contain the following provisions:

1. Style feature comparisons, including analysis of rhythm, meter, harmonic structure, tempi, articulation, instrumentation, etc., enabling the court to find infringement more likely in cases

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102. *See, e.g.*, Kimberly L. Craft, *The Webcasting Music Revolution is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1 (2001) (arguing that the major industry players' constant fighting, in and out of court, leaves behind the artists and consumers as casualties); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003).

103. *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002); *see also* John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1, 1994), https://www.wired.com/1994/03/economy-ideas; Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741 (2001); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

where a significant number of style features overlap (in the absence of parody). This provision would be by far the most probative, and expert musicologists would be absolutely necessary to this portion of the analysis.

2. Mixed media questions tending to indicate fair use, i.e.,
    a. Is the new work in a different media than the preexisting work?
    b. Does the new work employ the original media but also add new media?
    c. Is the original's media particularly significant to the essence of the original work? Does the new work merely emulate that essence or instead attempt to exactly replicate it?
    d. Do initial drafts of the alleged infringing work include less of the original work than the final version?
3. Remix provisions establishing more permissive "ground rules" for sampling, altering, and layering the work of other artists, i.e., allowing direct copying where the sampled original work becomes an entirely new artistic expression (essentially, transformative fair use in the context of sampling).
4. Extra-musical factors that lead to a finding of infringement, for instance:
    a. Testimony indicating the creators of the new work resorted to direct "copy and pasting" without any intent to pay homage, create a parody, or otherwise reinvent aspects of the original work.
    b. Evidence the infringing parties relied extensively on scores or sound recordings of the original work, especially if the infringing parties made copies of the original's scores or sound recordings during the composition process.

This more in-depth analysis will not only better answer questions of infringement but allow creative musical artists to borrow with more freedom.

CONCLUSION

The transformative fair use standard has expanded in a way that makes cases of fair use in music too unpredictable and unfair. While the transformative fair use test was the first important step away from the original four factors test of section 107—which has become increasingly

unhelpful in the digital music age—the transformative fair use test itself has eventually complicated rather than solved the original test's problems. This uncertainty both hampers creativity and gives copyright holders of music legitimate cause to worry about the true scope of their rights.

Because similarities in musical works can be extremely hard to quantify, music copyright infringement cases need a better system for characterizing those similarities legally so that fairer outcomes are reached more frequently by courts. It is extremely unlikely that a jury with no musicological experience would be able to weigh in fairly on these complicated matters that divide expert musicologists.

The most workable solution is a new fair use exemption to the Copyright Act specifically for music to clarify the rules. This new exemption would codify by statute the sorts of music-specific considerations to be weighed when making a fair use determination. There must be an expanded role for the expert witness in cases of music copyright infringement or transformative use defenses. Only experts can tease out subtle but important differences between original and secondary works, thereby increasing artistic freedom while preserving the rights of established artists. Judges should not be art critics, but musicologists are, and they should also be called upon to fill that role in court when necessary. The Copyright Act should be amended to include a more precise definition of infringement in the music space, including style features, expanding the role of the expert witness, and diminishing the importance of the jury.