Interpolation, Litigation, and Copyright Confusion: How the Music Industry's Influence Is Hindering Creativity

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Introduction

William Faulkner once said, "Immature artists copy, great artists steal."[1] Years before Faulkner, Igor Stravinsky remarked, "A good composer does not imitate; he steals."[2] Decades before that, T.S. Eliot wrote, "[I]mmature poets imitate; mature poets steal . . . ."[3] Eliot supposedly flipped the phrase from an 1892 article by W.H. Davenport Adams, which claimed, "[G]reat poets imitate and improve, whereas small ones steal and spoil."[4] Over a century later, Steve Jobs ushered the saying into the digital age, claiming,

1. Alex Lungu, *The Creativity Delusion: Geniuses Steal*, COPY-ME (Dec. 9, 2019), https://web.archive.org/web/20200305153340/http://copy-me.org/2019/12/the-creativity-delusion-part-3-geniuses-steal/.

2. *Good Artists Copy; Great Artists Steal*, QUOTE INVESTIGATOR (Mar. 6, 2013), https://quoteinvestigator.com/2013/03/06/artists-steal/

3. Lungu, *supra* note 1.

4. *Id.*

"[G]ood artists copy; great artists steal."[5] Jobs attributed the quote to Pablo Picasso.[6]

This idea—that memorable artistry is a product of "stealing"—rings true in much of the creative marketplace, where familiar elements frequently resurface amid fluctuating trends. The phenomenon of creative borrowing is especially resonant in the practice of songwriting, which sees participants dipping from a somewhat shallow pool of musical building blocks.[7] But the habit of repurposing musical elements that have been heard before is not a byproduct of the modern age; in fact, this phenomenon can be traced back to the fourteenth century.

Many musical modes of the Renaissance era subsisted on borrowing, relying on "the notion that to work from an earlier model was not only permissible, but commendable."[8] Borrowing became even more fashionable in the Baroque era, with examples too numerous to list.[9] Antonio Lotti's *Missa Sapientiae* can be heard in several well-known works from Bach, Handel, and Zelenka; in the eighteenth century, such borrowing and adaptation was considered a form of flattery.[10] Antonio Vivaldi famously recycled the iconic melody from *Spring: La Primavera* in several different works, revealing his era's taste for referential compositions.[11]

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5. Dan Farber, *What Steve Jobs Really Meant When He Said 'Good Artists Copy; Great Artists Steal'*, CNET (Jan. 28, 2014, 8:24 AM), https://www.cnet.com/tech/tech-industry/what-steve-jobs-really-meant-when-he-said-good-artists-copy-great-artists-steal/.

6. *Id.*

7. *See* Zorah Susan Abraham, *Music Piracy, Legal Issues in Copyright of Music and Towards Combating Music Piracy*, 4 INT'L J. L. MGMT. & HUMANITIES 5650, 5653 (2021) ("The elements or building blocks of music are what lawyers would call 'ideas' in copyright law: rhythm, melody, harmony counterpoint, form, methods of instrumentation in arrangements and their rules and principles."); Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1870–73 (2018) (recognizing that lyrics and melody are most commonly heralded by copyright courts as the "protectable" elements of a song, while additional elements like rhythm and harmony are viewed as unprotectable); *see also* Nastia Voynovskya, *Copyrighting the 'Building Blocks' of Music? Why the Katy Perry Case Alarms Producers*, KQED (Aug. 6, 2019), https://www.kqed.org/arts/13863015/perry-dark-horse-flame-joyful-noise-copyright-infringement-precedent.

8. Franklin B. Zimmerman, *Musical Borrowings in the English Baroque*, 52 MUSICAL Q. 483, 483 (1966).

9. *Id.*

10. *Borrowing Baroque*, TAFELMUSIK (Oct. 31, 2019), https://tafelmusik.org/explore-baroque/articles/borrowing-baroque/.

11. Switched On Pop, *Good Artists Borrow, Great Artists Steal*, VOX, at 37:25–41:00 (Oct. 21, 2016), https://switchedonpop.com/episodes/47-good-artists-borrow-great-artists-steal-the-chainsmokers-closer?rq=borrow [hereinafter Switched On Pop, *Good Artists Borrow*].

These historic pieces are continually borrowed to this day, with artists like Lady Gaga and Bright Eyes blatantly referencing the melodies of Bach and Beethoven, respectively.[12] Those works' place in the public domain means that musical reference to them can be made by any artist in any fashion. But the public domain—and the creative playground it constructs—has been steadily shrinking over the last century.[13] The liberal sharing of musical ideas that characterized the Baroque era has been overridden in recent decades, as exclusive copyright protection has grown longer and stronger than ever before.[14]

Establishing authorship in this songwriting context is complicated; even a song created in a vacuum, entirely devoid of external inspiration, is nonetheless destined to incorporate elements that have been played before.[15] Music is an artform that owes its evolution not to the invention of new elements but rather to the changing combinations of the same basic materials. A songwriter might lay claim to a song's particular combination of rhythms, notes, and/or lyrics, but the law does not permit them to own the individual beats, notes, and words it contains.[16] U.S. copyright law forms a critical boundary between ownership and universality, generally seeking to protect an author's right to control their original compositions without hampering creative freedom.[17]

The music industry, on the other hand, is a machine that concerns itself only with the practical ramifications of copyright law, having little use for its foundational principles. The industry instead focuses on the exclusive rights that copyright ownership affords, insisting that the law should vigilantly protect those rights and ensure compensation for copyright owners.[18] An increasing emphasis on copyright holders' rights might sound justified to those with the "starving artist" trope in mind, as many songwriters receive

12. *Borrowing Baroque*, *supra* note 10.

13. *The Incredible Shrinking Public Domain*, DUKE L. SCH. CTR. FOR THE STUDY OF THE PUB. DOMAIN, https://web.law.duke.edu/cspd/publicdomainday/2022/shrinking/ (last visited Jan. 7, 2023).

14. *See A Brief History of Copyright in the United States*, U.S COPYRIGHT OFF., https://www.copyright.gov/timeline/ (last visited Jan. 7, 2024).

15. *See* Peter S. Menell, *Reflections on Music Copyright Justice*, 49 PEPP. L. REV. 533, 560–65 (2022); JAMES BOYLE, JENNIFER JENKINS & KEITH AOKI, THEFT! A HISTORY OF MUSIC 252–53 (2017); Kirby Ferguson, *Everything Is a Remix Part 1 (2021), by Kirby Ferguson*, YOUTUBE (Sept. 7, 2021), https://www.youtube.com/watch?v=MZ2GuvUWaP8.

16. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020).

17. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991).

18. *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 39–40, 253–80 (2008).

only skimpy compensation for their creative labor.[19] But as most high-profile copyright lawsuits show, a successful song's creators and its copyright holders are rarely the same person; in fact, these songs' copyrights are often split among several parties, many of whom played no part in creating the music central to the legal dispute.[20]

The volume of music copyright cases initiated by copyright holders whose stake in a song is strictly financial—not authorial—is rapidly increasing.[21] Control over the trajectory of popular music and the creativity behind it has been concentrating within the music industry for over a century, but this power imbalance became especially troubling for songwriters in the late twentieth century.[22] The crackdown on sampling—a practice that involves isolating and imbedding part of a song's sound recording into a separate, newly created work—is attributable to the industry's influence on copyright enforcement.[23] Multiple federal courts sided with industry professionals who characterized any trace of unlicensed sampling as theft.[24] Intense regulation of borrowed musical ideas virtually eliminated sampling in the 1990s, when several courts insisted that even one second of an unlicensed sample could constitute infringement.[25] Today, the scrutiny that plagues sound recordings

19. *See, e.g.*, Travis M. Andrews, *In the Spotify Era, Many Musicians Struggle to Make a Living*, WASH. POST (Nov. 10, 2023, 6:00 AM), https://www.washingtonpost.com/arts-entertainment/2023/02/04/spotify-grammys-songwriters-payment-musicians/.

20. *See* JIM JESSE, THE MUSIC COPYRIGHT MANUAL 17–22, 31–35 (1st ed. 2016); Tim Ingham, *The Three Major Music Publishers Now Own or Control over 10 Million Songs Between Them (Kind Of)*, MUSIC BUS. WORLDWIDE (Oct. 20, 2022), https://www.musicbusinessworldwide.com/the-three-major-music-publishers-now-own-or-control-over-10-million-songs-between-them-kind-of/.

21. *See, e.g.*, Ellie Solomon, *Taylor Swift Attempts to Shake Off Copyright Lawsuit*, FORDHAM INTELL. PROP., MEDIA & ENT. L.J. (Sept. 27, 2022), http://www.fordhamiplj.org/2022/09/27/taylor-swift-attempts-to-shake-off-copyright-lawsuit/; Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006, 1:50 PM), https://slate.com/culture/2006/11/the-shady-one-man-corporation-that-s-destroying-hip-hop.html; Reuters, *Ed Sheeran Beats Second 'Let's Get It On' Copyright Lawsuit*, NBC NEWS (May 17, 2023, 7:39 AM), https://www.nbcnews.com/news/us-news/ed-sheeran-beats-second-lets-get-copyright-lawsuit-rcna84832.

22. *See* Jem Aswad, *Songwriters Are Getting Drastically Short-Changed in the Music-Streaming Economy, Study Shows*, VARIETY (Apr. 19, 2021, 1:33 PM), https://variety.com/2021/music/news/songwriters-short-changed-music-streaming-economy-midia-1234954984/.

23. *See Independent Lens: Copyright Criminals* (PBS television broadcast Jan. 19, 2010); LESSIG, *supra* note 18, at 38–43.

24. *See generally* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004); Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

25. *Bridgeport Music, Inc.*, 383 F.3d at 399–402; *Grand Upright Music, Ltd.*, 780 F. Supp. at 183–84.

is now creeping into compositions—the musical content that a recording emits.

To "interpolate" a song is to take a recognizable musical motif from that song's composition, whether a lyric or a combination of notes, and imbed that musical nugget into an entirely new work.[26] Like sampling, interpolation involves borrowing from the sonic substance of a given song; but instead of taking from the recording itself, interpolation borrows only from the song's composition—its lyrics, notes, or rhythm.[27] The practice itself is not new; one popular example is David Bowie's 1975 hit "Young Americans," which infuses the opening line of the Beatles' "A Day in the Life" into its lyrics, thus creating an interpolation.[28] The Beatles were also known to interpolate, incorporating the tune of the French national anthem, "La Marseillaise," into their 1967 song "All You Need Is Love."[29] Long before any of the Beatles were born, Tchaikovsky interpolated "La Marseillaise" when he quoted the anthem in his famous "1812 Overture."[30] Popular music has always reinvented itself in relation to other songs, striving to be both "novel and reminiscent of something that people have heard before."[31] Interpolation is simply a means of doing so explicitly.

The frequency of interpolations has surged in the last several years—a phenomenon that is anything but coincidental.[32] The problem rests not with interpolations themselves but rather how the music industry is mischaracterizing them. By broadly defining interpolations to encompass

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26. *Sampling, Interpolations, Beat Stores and More: An Introduction for Musicians Using Preexisting Music*, U.S. COPYRIGHT OFF. (Dec. 2021), https://www.copyright.gov/music-modernization/educational-materials/Sampling-Interpolations-Beat-Stores-and-More-An-Introduction-for-Musicians-Using-Preexisting.pdf.

27. *Id.*

28. DAVID BOWIE, *Young Americans*, *on* YOUNG AMERICANS (RCA Records 1975); THE BEATLES, *A Day in the Life*, *on* SGT. PEPPER'S LONELY HEARTS CLUB BAND (Parlophone Records 1967).

29. THE BEATLES, *All You Need Is Love* (Parlophone Records 1967); BOYLE ET AL., *supra* note 15, at 149.

30. BOYLE ET AL., *supra* note 15, at 252.

31. Switched On Pop, *Good Artists Borrow*, *supra* note 11, at 41:52.

32. *See* Switched On Pop, *Invasion of the Vibe Snatchers*, VOX, at 10:50-12:00 (Sept. 13, 2022), https://switchedonpop.com/episodes/invasion-of-the-vibe-snatchers [hereinafter Switched On Pop, *Invasion of the Vibe Snatchers*]; Elias Leight, *Why You're Hearing More Borrowed Lyrics and Melodies on Pop Radio*, ROLLING STONE (July 5, 2018), https://www.rollingstone.com/music/music-news/why-youre-hearing-more-borrowing-on-pop-radio-627837/.

even uncopyrightable resemblances between songs,[33] the industry pulls more songs into potential infringement territory—a hotseat most easily avoided by purchasing a license from the copyright holders behind the original song. The licenses required to interpolate an existing song are paid to the composition copyright holder, and major record labels and music publishing companies have raced to acquire as many composition copyrights as they can afford.[34] Given the capital at these industry titans' disposal, the copyright-ownership balance is tipping dramatically in their favor.

The industry's persistent blurring of the line that separates actual interpolations from innocuous inspiration is changing not only the way popular songs are credited but how they are *created*.[35] Capitalizing on copyright ownership and its exclusive privileges, many major labels and publishers have taken to arranging interpolations that incorporate compositions which the company has already purchased, thus bringing two (or more) copyright interests onto the pop charts at once.[36] These interpolation factories showcase the financial incentive underlying the recent influx of interpolations—and the industry's desire to expand the boundaries of interpolations altogether. But this changing climate of songwriting credits and copyright ownership negatively affects any songwriter who hopes to steer clear of interpolations and the costs that accompany them.

Ideally, copyright jurisprudence would establish a clear zone of creative freedom, clarifying the elements that all songwriters are free to employ without risking copyright infringement. In the past decade, however, copyright caselaw has grown inconsistent, with the "Blurred Lines" decision further stretching the legal parameters of "protectable" musical elements.[37] The widening discrepancies among federal court decisions have only enabled more abuses among copyright collectors. While courts fail to set consistent standards for infringement, the music industry pushes a bright-line rule for songwriters to follow: if it sounds familiar, get permission.[38] By expanding the bounds of what qualifies as an interpolation, the new industry norm is to

33. *See infra* Part III; *see also What's "Interpolating", and How Did It Force Olivia Rodrigo to Share Deja Vu Writing Credits with Taylor Swift?*, AUSTL. BROAD. CORP: TRIPLE J (July 13, 2021), https://www.abc.net.au/triplej/news/olivia-rodrigo-taylor-swift-deja-vu-interpolation/13443342; Leight, *supra* note 32.

34. *See infra* Section III.B.

35. *Id.*

36. *Id.*

37. *See* Nicholas Booth, Note, *Backing Down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works*, 24 J. INTELL. PROP. L. 99, 124–27 (2016).

38. *See infra* Section III.A.

assume the copyrightable nature of any recognizable elements. This expansion of recognized ownership has driven an influx of infringement claims, with powerful copyright holders poised to attack high-earning songs that arguably trespass on their musical property.[39]

Fearing costly infringement lawsuits, contemporary artists are pressured to get permission from any copyright holders whose works may—or may not—resemble that artists' latest song.[40] Within such a hostile creative climate, extreme risk-avoidance is often the move; many popstars now enlist musicologists to scan their songs for potential similarities before they release a new work.[41] This extreme caution, fueled by a misconception of what qualifies as a bona fide interpolation, regularly results in an expanded number of songwriting credits.[42] In an already competitive music marketplace, this means that songwriters' income shares are now being divided among a growing number of people.[43] And major industry players are buying up artists' catalogs at an alarming rate, acquiring control of the musical compositions and any future "derivative" use of them.[44] By stretching the bounds of what constitutes an interpolation, the music industry garners more licensing fees for their newly acquired copyrights. The confusion among songwriters and lack of consensus among courts has enabled powerful copyright holders to capitalize on both actual interpolations and mere melodic similarities.

While multiple music commentators have discussed the interpolation trend and the music industry's burgeoning copyright investments, legal scholarship has yet to explore the way these phenomena intersect with copyright jurisprudence. This Comment argues that the music industry's expanding copyright holdings and its efforts to redefine interpolation are draining modern songwriting of its creativity. Thus, original songwriting, which is currently jeopardized by the music industry's financial motives, is best protected by federal courts—which already have the tools required to curb baseless infringement lawsuits. Part I contextualizes songwriting as both a creative practice and a copyrightable subject matter. Part II details how

39. *See infra* Section III.D.

40. Dorian Lynskey, *How Many People Does It Take to Write a Hit Song in 2019?*, GQ (Nov. 2, 2019), https://www.gq-magazine.co.uk/culture/article/long-songwriting-credits.

41. Switched On Pop, *Invasion of the Vibe Snatchers*, *supra* note 32, at 22:10; MARK SAVAGE, *Ed Sheeran Sings Nina Simone During Shape of You Copyright Case*, BBC NEWS (Mar. 8, 2022, 10:32 AM), https://www.bbc.com/news/entertainment-arts-60661895.

42. *See infra* Section III.B.

43. *See infra* Section III.B.

44. *See infra* Section III.E.

courts have reiterated and legitimized the music industry's hostile attitude toward unlicensed sampling and how those lawsuits rendered the artform inaccessible to most creators. Part III examines how the music industry continues to shape copyright practices and how its investment in interpolations ultimately harms songwriters, whose access to creativity and compensation is threatened by the industry's financial motives. Finally, Part IV explores the existing defenses and limitations to copyright infringement that courts should consider to foster more cohesive caselaw and protect creative expression.

I. Songwriting: How It's Made and Why That Matters

The human brain is a compost pile of remembered conversations, media, songs, and various snippets of information; no new idea emerges from the heap totally clean. Of all these various clips stuck in the human consciousness, songs are arguably the stickiest. This is because songs are usually *designed* to be remembered. Most songs are uniquely affected by external concerns, like marketability, because listeners are more likely to seek out (and compensate) songs that linger in their minds. Copyright law, however, favors works that are entirely original because musical creations with a high degree of independent authorship—as opposed to copying from prior works—are least likely to be held liable for infringement.[45] This relationship between marketability and copyrightability encourages songwriters to chase after a paradoxical dream: to make music that is both memorable *and* highly original. But no song exists in a vacuum, untouched by extraneous input, regardless of how "original" it may seem. Songs are born mid-conversation, inherently responding to and interacting with prior works from their inception.

Brian Wilson's adoration of the Ronettes' "Be My Baby" is detectable in several Beach Boys tunes,[46] the same way ABBA's "Waterloo" piano chord movements are imitated in Elvis Costello's work,[47] and Bob Dylan's distinctive syllable emphasis[48] is mimicked by hundreds of contemporary

45. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (2023) [hereinafter NIMMER ON COPYRIGHT].

46. *Compare* THE RONETTES, *Be My Baby* (Philles Records 1963), *with* THE BEACH BOYS, *Don't Worry Baby*, *on* SHUT DOWN VOLUME 2 (Capitol Records 1964).

47. *Compare* ABBA, *Waterloo*, *on* WATERLOO (Epic Records 1974), *with* ELVIS COSTELLO AND THE ATTRACTIONS, *Oliver's Army*, *on* ARMED FORCES (Radar Records 1979).

48. *See* Michael Daley, *Vocal Performance and Speech Intonation: Bob Dylan's "Like a Rolling Stone,"* 22 ORAL TRADITION 84, 84–96 (2007).

Americana artists.[49] Inspiration is in everything, even those works which strive for daring originality above all else. Annie Clark (better known as St. Vincent), with her offbeat, persona-driven guitar rock, is a modern reflection of David Bowie. It is easy to explain how the chorus of St. Vincent's "Severed Crossed Fingers" almost perfectly matches the changes in the chorus to another song: "Life on Mars."[50] But should she have credited the copyright holders of that track for her likely unintentional homage? Those chord changes and instrumental swells are sonic ingredients that have been sprinkled into thousands of songs without legal interference; why should Clark's apparent Bowie inspiration make her use of those elements any less lawful? Even where songwriters actively avoid the arrangements and chord choices of their heroes, they are nonetheless limited by the medium itself.

Song construction, put simply, is the making and arranging of sounds. The origin story of most any musician begins with placing notes into basic chord shapes or melodic sequences; but no matter how rudimentary, a person's first attempts at music-making are highly formative on a cellular level.[51] "Our motor memory creates imprints of those familiar physical patterns our fingers form, connected directly to the immediate effect of hearing those forms played."[52] Recent MIT research confirms that music has a unique and instinctual impact on the mind; human brains have some neural pathways that are exclusively activated by music.[53] This undoubtedly contributes to the massive volume of songs that sound like familiar favorites; it is a challenge for songwriters to resist drawing upon the chords and rhythms that they learned during their earliest stages of music-making. But even where

49. *See e.g.*, KEVIN MORBY, SINGING SAW (Dead Oceans 2016); WAXAHATCHEE, SAINT CLOUD (Merge Records 2020); THE TALLEST MAN ON EARTH, THE WILD HUNT (Dead Oceans 2010); THE WAR ON DRUGS, LOST IN THE DREAM (Secretly Canadian Records 2014); JAKE BUGG, JAKE BUGG (Mercury Records 2012).

50. ST. VINCENT, *Severed Crossed Fingers*, *on* ST. VINCENT (Loma Vista Recordings 2014); DAVID BOWIE, *Life on Mars?*, *on* HUNKY DORY (RCA Records 1971); *see* Zach Baron, *St. Vincent: Our David Bowie*, GQ (Feb. 1, 2015), https://www.gq.com/story/st-vincent-luxembourg.

51. Paul Zollo, *Songwriter U: How to Avoid Repeating the Same Musical Patterns*, AM. SONGWRITER, https://americansongwriter.com/songwriter-u-avoiding-same-patterns/ (last visited Jan. 7, 2024).

52. *Id.*

53. Anne Trafton, *Music in the Brain*, MIT NEWS (Dec. 16, 2015), https://news.mit.edu/2015/neural-population-music-brain-1216/. These quick-forming neurological patterns can only be overridden "with active, conscious attempts to go different places, without which one's subconscious instincts will rule." Zollo, *supra* note 51.

songwriters actively avoid the conventions of popular music, their creations are bound by the parameters of the artform itself.

Practically every song is an assortment of notes found in the chromatic scale.[54] The chromatic scale contains the twelve available pitches in Western music, each note a half step (or semi-tone) above or below the notes surrounding it.[55] However, many songs incorporate an even narrower range of pitches, employing the major or minor scale—both of which contain only seven unique notes.[56] It is critical to understand that Western musicians create songs within this limited spectrum of notes, and pop songs are even more limited in their pursuit of universally pleasing combinations.

To be wholly "original" and "independent" in the creation of a new song is an impossible task. Every pitch has been played before, and there are only so many combinations that will satisfy the average ear. Popular taste favors traditional melodic structures and familiar chords; Tom Petty has fifteen certified-Gold albums not because he broke the mold but because he wrote within it.[57] In Petty's words, "Songwriters come to me . . . and say 'Check out this chord I put in here! It has *never* been used in a song before!' And I tell them, 'Yeah, it's never been used because it does not *sound good*!'"[58] Almost every song on Petty's "Greatest Hits" record orbits the D, A, G, and E major chords, suggesting that he earned a place in the Songwriters Hall of Fame by sticking to the basics.[59] "When [songwriters] find something that really works, they'll use it again and again . . . ."[60]

While a song's construction tends to begin with simple chord choices, the final product is often the result of multilayered collaboration. A pop song's formation is typically a meeting of more than a few minds, with different creators responsible for the lyrics, melody, chords, rhythm, and various other ingredients that combine to create a song's holistic flavor. Once the song's

54. *See* Dan Farrant, *A Guide to the Chromatic Scale*, HELLO MUSIC THEORY, https://hellomusictheory.com/learn/chromatic-scale/ (last updated Sept. 20, 2023). Consider a piano: one can play any key, then move one key to the right or left along the keyboard exactly twelve times; the final key played will be exactly one octave above or below the pitch of the starting key.

55. *Id.*

56. Jerald C. Graue, *Common Scale Types*, BRITANNICA, https://www.britannica.com/art/scale-music/Common-scale-types (last visited Jan. 7, 2024).

57. Billboard, *Tom Petty by the Numbers: A "Breakdown" of 40 Years of Hits*, SPIN (Oct. 3, 2017, 4:07 PM), https://www.spin.com/2017/10/tom-petty-billboard-chart-numbers/.

58. Zollo, *supra* note 51.

59. *Tom Petty*, SONGWRITERS HALL OF FAME, https://www.songhall.org/profile/tom_petty (last visited Jan. 7, 2024).

60. Switched On Pop, *Good Artists Borrow*, *supra* note 11, at 34:38.

writers and performers have brought their respective ideas to fruition, the song is recorded—a process that involves its own bevy of creative inputs. Producers, mixing engineers, and mastering technicians are among the usual collaborators who shape the way a song sounds.[61]

Acting as a producer for the Talking Heads, Brian Eno suggested that the band play their cover of Al Green's "Take Me to the River" as slowly as they could without losing the groove.[62] His influence as a producer is hugely responsible for that track's appeal; the tune itself has been covered countless times, but the Talking Heads' rendition remains the highest charting recording.[63] Even so, Sire Records (a subsidiary of Warner Music Group) owns that sound recording copyright, so it is likely the label—not Eno or the band—that retains royalties for that recording's continued success.[64] This is standard for most major label-backed artists; in signing with a label, artists are usually required to grant the label ownership of the copyrights to any sound recordings they create during the contract's duration.[65] Although the production of a pop record is often a complex, multifaceted collaboration, its subsequent earnings typically flow in a direct line back to the label.[66] Once the creation process has concluded, only those who own the copyrights are free to shape the future of that work—and profit from its success.

Such copyright deals insinuate that creative works can be attributed to a definite source (or *sources*, as is the case with samples and interpolations). If a work's copyright ownership is clear-cut and traceable, the industry is better equipped to demand proper crediting and licensing whenever that work is used. In the twenty-first century, the economic stakes of the music business are higher than ever, and licensing comprises the bulk of all music-based revenue.[67] In 2022, worldwide licensing revenue climbed to $340.8 billion,

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61. A. Rothstein, *The Music Production Team: Collaborative Goals,* IPR COLL. OF CREATIVE ARTS (Oct. 4, 2020), https://www.ipr.edu/blogs/audio-production/the-music-production-team-collaborative-goals/.

62. Stephen Kallao & Kimberly Junod, *Chris Frantz's Memoir Explores Talking Heads, Tom Tom Club from the Inside*, NPR (Jan. 15, 2021, 3:56 PM), https://www.npr.org/2021/01/15/957219721/chris-frantzs-memoir-explores-talking-heads-tom-tom-club-from-the-inside.

63. *Take Me to the River*, SONGFACTS, https://www.songfacts.com/facts/talking-heads/take-me-to-the-river/ (last visited Jan. 7, 2024).

64. *Talking Heads – Take Me to the River*, DISCOGS, https://www.discogs.com/release/1677399-Talking-Heads-Take-Me-To-The-River (last visited Jan. 8, 2024).

65. JESSE, *supra* note 20, at 18–22.

66. *Id.*

67. Paul Sweeting & Todd Longwell, *The Rights & Royalties Revolution in Music and Media: A VIP+ Special Report*, VARIETY (Sept. 22, 2021, 9:00 AM), https://variety.com/2021/biz/news/music-royalties-changing-rights-streaming-1235054953/.

with the entertainment licensing sector contributing most heavily at $138.1 billion.[68] The music industry benefits from turning a blind eye to the amorphous nature of musical creativity and the grey areas of authorship that it entails because authorship forms the basis for copyright protectability, which forms the basis for compensation.[69]

Despite the music industry's insistence that creative contributions can be dissected neatly and credited accordingly, some songwriters view authorship as a product of collective consciousness. For example, Mountain Goats' frontman John Darnielle resists the notion that a band's collaboration might be attributed to a single person: "Music is the story of people making something together that outgrows all of them and is bigger than them, and of which they should all be in awe."[70]

Copyright law implicitly rejects this concept of song creation, for such a highly cooperative framework threatens the law's reliance on clear-cut authorship.[71] If authorship is uncertain, the copyright ownership that traditionally flows from that authorship also becomes uncertain. But if songwriters give up the guise of the "ingenious creator" and recognize their simultaneous contributions and takings from the greater musical canon, copyright laws might be able to redefine creativity to "allow for what has been a standard practice in art since the beginning."[72] Such a shift is unlikely, however, as it would threaten the current system's regulation and monetization of musical idea exchanges. Even so, there are ways to pull copyright law back to its conceptual center and balance the scale between private interests and the creative commons that all music-makers should be free to explore.[73]

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68. *See Global Licensing Industry Study*, LICENSING INT'L, https://licensinginternational.org/get-survey/ (last visited Mar. 7, 2024).

69. 17 U.S.C. §§ 106, 201.

70. Song Exploder, *The Mountain Goats – Cadaver Sniffing Dog*, SONG EXPLODER (May 15, 2019), https://songexploder.net/the-mountain-goats. The transcript of this podcast episode is available at *The Mountain Goats - Cadaver Sniffing Dog: Episode 159*, SONG EXPLODER, https://songexploder.net/transcripts/the-mountain-goats-transcript.pdf (last visited Mar. 7, 2024).

71. Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 101 (2d Cir. 1951) (explaining that the term "original" as it establishes copyright protection simply "means that the particular work 'owes its origin' to the 'author'"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

72. Michael W. Harris, *Have I Heard That Before? Copyright's Impact on Drawing Inspiration from Music's Past*, LANDSLIDE, Jan./Feb. 2020, at 17, 19.

73. *See infra* Part IV.

A. The Evolution and Expansion of Copyright Law

Ironically, U.S. copyright law is itself a product of copying. England's 1710 Statute of Anne ("Statute") served as the blueprint for the first U.S. copyright statute, the Copyright Act of 1790.[74] In the eighteenth century, the Statute's focus was limited to written works; copying only became a concern when the printing press facilitated faster, easier reproduction of those works.[75] The House of Lords used the Statute to curb publishers' attempts to monopolize the printing industry.[76] Despite publishers' claims that they were entitled to perpetual copyright protection, the judiciary broadly enforced the Statute's limited copyright term of fourteen years and vested in *authors*—not publishers—the exclusive, assignable right to print and reprint their creations.[77]

The nation's founders translated the Statute into both the U.S. Constitution and the Copyright Act of 1790.[78] The "Progress Clause" of the Constitution articulated copyright regulation's overarching purpose: "[t]o 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."[79] The 1790 Act specified that authors were entitled to a copyright term of fourteen years, renewable once for an additional fourteen years.[80] The Constitution instructs that creative "progress" is the true aim of copyright protection, and the 1790 Act ensured ongoing contributions to the public domain by limiting copyright holders' exclusive ownership to fourteen-year periods. Taken together, these measures suggest that creative evolution is fostered by *access* to others' ideas rather than their prolonged isolation.

Over time, however, expanding copyright durations overpowered the public domain's promise of access. The Copyright Act of 1909 doubled the initial ownership term to twenty-eight years and elaborated that the "exclusive rights" of copyright holders included the "sole right to reproduce,

74. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 6–7 (2022) (citing the Statute of Anne 1710, 8 Ann. c. 19 (Eng.); Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124) .

75. *Id.* at 6.

76. *Id.* at 7.

77. *Id.*

78. *Id.*

79. U.S. CONST. art. I, § 8, cl. 8.

80. FROMER & SPRIGMAN, *supra* note 74, at 7.

adapt, distribute, display, and perform the work."[81] The 1909 Act crystallized federal music copyright law, embracing musical compositions within its coverage of "all writings,"[82] and the Sound Recording Act of 1971 extended federal copyright protection to sound recordings.[83] Considered together, these Acts recognized the existence of two distinct copyrights within every recorded musical work: one copyright for a song's written composition and one for its recorded incarnation.[84] These distinct copyrights help to explain the judiciary's response to sampling, as well as the recent ubiquity of interpolations, which Section I.C explores in further detail.[85]

The parameters of ownership for musical works hit another growth spurt in 1976, when the Congress expanded both the shelf life and scope of federal copyright protection.[86] The revised law extended protection to unpublished works, recognizing copyright in all "original works of authorship fixed in any tangible medium of expression."[87] This pertained to both compositions and sound recordings captured in "phonorecords."[88] In addition, this revision stretched the duration of copyright protection to the author's life plus an additional fifty years.[89] This period was augmented again in 1998, when the Sonny Bono Copyright Term Extension Act granted copyrights a shelf life of seventy years after the author's death.[90] Early U.S. copyright law "never intended to provide the copyright owner with the exclusive right to the use of the copyrighted work but permitted such work to be used by the public in various ways not constituting an infringement."[91] Creators were effectively promised a set of exclusive rights and royalties *in exchange* for their

81. Theodore Z. Wyman, *Litigating Fair Use Defense in Copyright Law*, *in* 136 AMERICAN JURISPRUDENCE TRIALS 193, § 3 (Laws. Coop. Publ'g 2014), 136 AMJUR TRIALS 193 (Westlaw) (citing the Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075 (1909) (codified at 17 U.S.C. § 106)).

82. Olivia Lattanza, Note, *The Blurred Protection for the Feel or Groove of a Song Under Copyright Law: Examining the Implications of* Williams v. Gaye *on Creativity in Music*, 35 TOURO L. REV. 723, 727 (2019).

83. Sound Recording Act, Pub. L. No. 92–140, 85 Stat. 391 (1971).

84. 17 U.S.C. § 102(a)(2), (7).

85. *See infra* Section I.C.

86. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

87. 17 U.S.C. § 102(a).

88. *Id.* § 101.

89. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

90. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

91. Alexander M. Selkirk, Jr., *Fair Use and the Copyright Act of 1976*, 49 N.Y. STATE BAR J. 558, 561 (1977).

contributions to the public domain—not by virtue of their creations alone.[92] Copyright protection was thus designed to incentivize artists to share their works with society; exclusivity was not the goal but rather a means to cultivate a deeper and more diverse well of shared creativity.

As the market for musical works has grown, an industry has developed to manage—and capitalize on—popular demand. It seems no coincidence that the window of exclusive rights that coincides with copyright ownership of those works has also grown exponentially. Expansion of copyright terms would be less problematic if the bounds between protectable (i.e., ownable) and un-protectable (i.e., communal) elements of musical works were clear. But as the legal response to sampling and the industry's treatment of interpolation demonstrate, the zone of copyrightable material has rather flexible edges and casts a menacing shadow.

B. The Infringement Test Proves an Unsafe Bet

To warrant copyright protection in the first place, a work must be an "original work[] of authorship fixed in [a] tangible medium of expression."[93] But the threshold for originality in the copyright context is surprisingly easy to satisfy. The Supreme Court defines originality rather meagerly in the copyright context, claiming originality "means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[94]

Essentially, the law does not require that works be utterly unique or unaffected by others to qualify as "original" and thus copyrightable. For a creator to be granted copyright registration in a work, they must simply produce tangible expression that bears at least *some* trace of personal creativity.[95] This modest threshold for originality establishes copyright eligibility, revealing how easy it is for a recorded work to enter the protective reach of copyright law. A work's copyrightability, however, does not create a surefire case for infringement against subsequent works.[96] Proving that one's "original" work has been *infringed* by another creation is a much higher standard than merely establishing the existence of a copyright.[97]

The Supreme Court set an enduring standard for copyright-worthy "originality" in the 1991 case *Feist Publications, Inc. v. Rural Telephone*

92. *See id.*
93. 17 U.S.C. § 102(a).
94. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
95. *Id.*
96. *Id.* at 348.
97. *Id.* at 348–49.

Service Co.[98] This case held that copyright protection is only awarded to the works that bear the requisite degree of original authorship, noting that originality is not synonymous with novelty.[99] The Court clarified that a creation can resemble another work without infringing on its copyright, so long as its similarities were not achieved by copying.[100] Many copyright cases have lost sight of the *Feist* standard, looking instead toward the colloquial concept of originality by insisting that a new work not resemble its predecessors.[101] But this general principle—that any modicum of musical creativity warrants copyright enforceability—should not punish similarities in a field that draws from such a shallow pool of resources.

Just because a work has the requisite "modicum of creativity" to classify it as an original work does not mean any similar-sounding work that comes after necessarily spells copyright infringement.[102] Even seasoned judges struggle with this crucial difference between originality as it forms the basis for copyright and originality as it supports an infringement claim.[103] A recent infringement lawsuit against Taylor Swift's "Shake It Off" was revived by the Ninth Circuit after the district court erroneously claimed that the lyrics "players gonna play" and "haters gonna hate" lacked requisite originality for copyright protection.[104] The Ninth Circuit reminded the parties that the standard for originality is surprisingly low, giving the plaintiffs sufficient standing to have their case heard.[105] Nonetheless, the Ninth Circuit's willingness to entertain the claim does not necessarily mean those lyrics will support an eventual finding of infringement. In the copyright context, originality is simply a song's ticket for entry into the copyright ballgame; a

98. *Id.* at 363–65.

99. *Id.* at 345.

100. *Id.*

101. *See, e.g.*, Gray v. Perry, No. 2:15-cv-05642, 2020 WL 1275221 (C.D. Cal. March 16, 2020); Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).

102. *See, e.g.*, Feist, 499 U.S. at 345–46.

103. *See* NIMMER ON COPYRIGHT, *supra* note 45, § 2.01 (2024) (discussing the confusion surrounding the threshold for originality to qualify for a copyright and the threshold for originality to establish a prima facie case for infringement).

104. *See* Hall v. Swift, 786 F. App'x 711, 712 (9th Cir. 2019); *see also* Bill Donahue, *Taylor Swift's Five-Year Legal Battle over 'Shake It Off,' Explained*, BILLBOARD (Aug. 10, 2022), https://www.billboard.com/pro/taylor-swift-shake-it-off-legal-battle-explained [https://perma.cc/5NYF-3DDV].

105. *Hall*, 786 F. App'x at 712; Donahue, *supra* note 104.

finding of infringement warrants additional steps—and bears several limiting factors designed to keep creative exercise (relatively) free and fair.[106]

Methods for finding copyright infringement of musical works have been murky from the start, and their criteria have only grown more muddled in recent history. Despite the vast transformation of technology since the seventeenth century, the infringement barometer established by the 1850 music copyright case *Jollie v. Jaques* has not changed much.[107] "[T]he legal framework employed by *Jollie*—the 'substantially similar' metric, the use of expert testimony, and the protection of the plaintiff's market—is essentially the same framework under which the federal judiciary currently labors when assessing music copyright infringement claims."[108] To prevail in an infringement suit today, a copyright holder must be able to prove that (1) they own a valid copyright in a protected work; (2) that work was copied; and (3) that such copying was "substantial enough to constitute improper appropriation."[109] The first element is almost always satisfied in modern cases, as copyright is established immediately upon a work's fixation in a tangible medium[110] and only a modicum of creativity is needed to make the work copyrightable.[111] Typically, proof of copyright infringement hinges on these second and third elements, commonly known as "access" and "substantial similarity."[112]

Though the Supreme Court has weighed in on the originality requirement by clarifying what a work must show before it can be worthy of copyright protection, there has been no similar guidance where the infringement test is concerned. Most courts follow a two-part test for infringement, looking first for "copying in fact" (whether there is factual evidence to prove that the defendant copied from the plaintiff's work) and then "copying in law" (whether the defendant's copying was sufficient to establish his infringement

106. *See infra* Part IV.

107. Jollie v. Jaques, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437).

108. J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 412 (2004).

109. Jarvis v. A & M Recs., 827 F. Supp. 282, 288 (D.N.J. 1993).

110. 17 U.S.C. § 102.

111. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121–22 (2d Cir. 1930).

112. *See* NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 17.17 (2017, rev. Aug. 2023), https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Instructions_2023_08_0.pdf ("Copying—Access and Substantial Similarity").

liability).[113] This first prong, copying in fact, often involves a question of whether the defendant had "access" to the plaintiff's work.[114] In the streaming era, there is little question about whether a defendant had access to a digitally released work; society's ever-tightening connection to the internet is likely to provide sufficient "circumstantial" evidence in cases where access is less than obvious.

Most recorded music is instantly stream-able by anyone with internet access, so it is a steep uphill battle for any artist to argue they had no access to the complainant's song.[115] In the twentieth century it was feasible that a court might find circumstantial evidence insufficient; if the complainant's song was not a radio hit or personally linked to the defendant, access was a tricky element to satisfy.[116] In the modern era, however, courts appear reluctant to dig into this question of circumstantial evidence. The Ninth Circuit assumed Katy Perry's access to a song by a rapper whose song received moderate play on Christian radio, looking to Perry's history as a Christian artist as evidentiary support.[117] Given the current popularity of streaming and the low threshold for circumstantial evidence,[118] the mere online presence of the defendant seems likely to constitute sufficient access.

Artists are also disadvantaged by citing their songwriting influences too openly; courts have occasionally depicted these acknowledgments of inspiration as evidence of unlawful copying.[119] With access being assumed in most cases, the crucial debate typically lies in the copying in law prong of the infringement test, commonly known as the "substantial similarity" test.

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113. FROMER & SPRIGMAN, *supra* note 74, at 214.

114. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000) ("Proof of copyright infringement is often highly circumstantial, particularly in cases involving music."); ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983) (explaining that wide dissemination of a work supports a finding of defendant's access to the work); Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999) ("Access is essentially 'hearing or having a reasonable opportunity to hear the plaintiff['s] work and thus having the opportunity to copy.'" (alteration in original)).

115. *See How Streaming Audio and Video Change the Playing Field for Copyright Claims*, 18 J.L. & POL'Y 419, 449–50 (2009) ("When a copyright holder allows their copyrighted works to stream over the Internet, they are, in effect, giving anyone with a computer and Internet connection continuous, uninterrupted access to their work until it is taken down.").

116. *See* Selle v. Gibb, 741 F.2d 896, 901–02 (7th Cir. 1984).

117. Rick Beato, *Katy Perry Vs. Flame Lawsuit: Let's Compare!*, YOUTUBE (July 30, 2019), https://www.youtube.com/watch?v=W4MuhPqfIk4.

118. *See* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 396 (6th Cir. 2004) (highlighting the popularity of digital streaming).

119. *See* Williams v. Gaye, 895 F.3d 1106, 1117 (9th Cir. 2018); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 483–84 (9th Cir. 2000).

The substantial similarity test has received inconsistent applications and outcomes among the courts, making it unpredictable and conducive to frivolous infringement claims.[120] Though the circuit courts vary in their substantial similarity protocol, most circuits endow a jury with the final say on whether overarching similarity exists.[121] The 1946 case *Arnstein v. Porter* established a substantial similarity test, commonly dubbed the "lay listener" test, that still remains the guiding rule for the Second Circuit.[122] The question adopted by the *Arnstein* court was "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."[123] Variations on the *Arnstein* test are currently employed by the First, Third, Fifth, and Seventh Circuits, which task the jury with deciding whether the holistic appeal of the songs are unlawfully similar.[124]

Other circuits have broadened the *Arnstein* test to include both a subjective and objective component, attempting to balance the listener's interpretation and hard evidence. To prove substantial similarity in the Ninth, Fourth, and Eighth Circuits, plaintiffs must meet both an extrinsic and intrinsic test.[125] First, the extrinsic test requires plaintiffs to identify concrete similarities between the works using objective criteria, such as the notes, rhythms, or lyrics used.[126] This stage often involves expert testimony from musicologists.[127] If this objective extrinsic test is met and the case cannot be decided as a matter of law, then the evaluation proceeds to the intrinsic stage.[128] The intrinsic test requires the factfinder to make a more subjective ruling on the similarity between the songs.[129] Judges have the discretion to

120. Jarrod M. Mohler, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 971–72 (2000).

121. Jospeh M. Santiago, *The "Blurred Lines" of Copyright Law: Setting a New Standard for Copyright Infringement in Music*, 83 BROOK. L. REV. 289, 290 (2017).

122. *Id.* at 294–95.

123. *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).

124. Nicole K. Roodhuyzen, Note, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J. L. & POL'Y 1374, 1391–97 (2007).

125. *Id.* at 1398–406.

126. *Id.* at 1398–99.

127. *See* Michael Der Manuelian, *The Role of The Expert Witness in Music Copyright Litigation*, 57 FORDHAM L. REV. 127, 128 (1988) ("Both parties usually come armed with experts, and the ensuing battle often constitutes a significant segment of a music infringement trial.").

128. Roodhuyzen, *supra* note 124, at 1399.

129. *Id.* at 1400.

craft their own jury instructions, typically asking jurors whether the "total concept and feel" of the works is substantially similar.[130] This subjective stage rests on the human jurors' perceptions of the music rather than any fact-based criteria; it's unsurprising, then, that the substantial similarity test tends to yield widely varied results.[131] The lack of uniformity among courts has bred uncertainty among the music industry at large, underscoring the belief that any notable similarities between high-profile songs could easily result in a costly infringement suit.[132]

Where courts perceive that access and similarity are satisfied, a finding of unlawful copying is likely to follow. Copying does not need to be malicious; in fact, it does not even need to be conscious.[133] Judge Learned Hand addressed subconscious copying in a 1924 case, acknowledging that "[e]verything registers somewhere in our memories, and no one can tell what may evoke it."[134] Even so, copyright infringement will not be excused due to a "trick" of one's memory.[135] A district court found George Harrison liable for infringement where he was presumed to have heard the complainant's work on the radio and *subconsciously* incorporated it into his own song.[136] The court acknowledged that Harrison did not purposely copy The Chiffons' work, but his act of unknowingly blending an old, familiar tune into a new creation constituted infringement.[137]

Cases built upon "subconscious copying" suggest that any detectable influences may establish copyright infringement—regardless of whether the later song's resemblance was intentional. Findings of infringement where similarities are purely accidental seem to suggest that songwriting should happen in isolation; pure, "independent" creations are allowed, but those tainted by outside influences could support infringement claims. This defies the Court's insistence in *Feist* that infringement claims be used only to rectify

130. Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970); *see also* Michael L. Sharb, Comment, *Getting A "Total Concept and Feel" of Copyright Infringement*, 64 U. COLO. L. REV. 903, 908–09 (1993).

131. The Ninth Circuit admitted to the incongruity of its own decisions when it recognized that the songs at issue in *Skidmore v. Zeppelin* sounded far more similar than those at issue in *Williams v. Gaye*, yet only *Williams* resulted in a finding of infringement. Santiago, *supra* note 121, at 289–90.

132. *See infra* Section III.A.

133. Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924).

134. *Id.*

135. *Id.* at 148.

136. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976).

137. *Id.*

clear acts of copying—not merely accidental symmetry.[138] "[A] work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[139] In an internet-centric climate where access is virtually guaranteed, the judiciary's willingness to punish a songwriter's purely *subconscious* emulation of another tune is especially threatening to creators. It seems the only stopgap to prevent unreasonable findings of infringement is the substantial similarity test, but incongruity among the courts makes that appear an unsafe bet.

With such unpredictable tests for copyright infringement, the modern songwriter's job appears more treacherous than ever. Even so, creativity need not incur such legal uncertainty. There are several well-established exceptions within copyright law that were designed to contour *every* infringement test, no matter which court is applying it, and carve out space for songwriters to borrow from one another without penalty.[140] Doctrines such as fair use, *scènes à faire*, de minimis copying, and thin copyright each attempt to ensure fairness in infringement cases, protecting certain similarities that do not violate the principles of copyright law.[141] The problem, though, is not only that courts fail to uniformly apply these limiting factors but also that the music industry has adopted its own *modus operandi*.

The current trend in the industry is to assume the unlawful—or at least actionable—nature of any noticeable similarity between songs.[142] This assumption has cultivated a culture of licensing and crediting at any sign of a sonic crossover; if a new song is found to resemble an older hit, the latest custom is to call the similarity an "interpolation" and negotiate accordingly.[143] Before diving into the interpolation phenomenon, it is important to note how the copyrights within a musical work are divided. The way in which music copyright generates revenue, and to whom that revenue goes, helps to explain why interpolations, bona fide or not, are becoming so popular. For many drivers within music industry, it is not just about following the rules and avoiding lawsuits; interpolations can pay if one plays their copyright cards right.

138. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).
139. *Id.* at 345.
140. *See infra* Part IV.
141. *See infra* Part IV.
142. *See infra* Part III.
143. *See infra* Part III.

C. How a Song Makes Money: A Tale of Two Copyrights

According to U.S. copyright law, any newly written and recorded song harbors two distinct copyrights: one for its composition (the music and lyrics composed by the songwriter(s)) and one for its sound recording or master (the series of sounds fixed in a transmittable medium).[144] This structure explains why the Grammy's "Song of the Year" and "Record of the Year" awards are two distinct categories; the former is meant to recognize the composition itself—the "song"—while the latter recognizes the specific recording of a given song—the "record."[145] When an artist independently composes, records, and distributes a song, that artist retains ownership of both the composition and sound recording copyrights. This is rarely the case with high-profile artists, however, as their involvement with the music industry often results in various assignments of their copyright holdings.[146] Artists who do not singlehandedly produce, record, and distribute their works typically cede a portion—if not all—of their composition and/or sound recording copyrights to publishing companies and record labels, respectively.[147]

The two-pronged music copyright scheme is what simultaneously permitted, and even compelled, Taylor Swift to re-record her first six albums. Swift's first record label, Big Machine, sold the sound recording rights to those albums against Swift's wishes.[148] Swift responded by refusing to renew her contract with Big Machine and choosing to re-record those albums on her own terms—effectively letting her retain not only the publishing rights but also the master recording rights to those revamped works.[149] Big Machine possessed only the sound recording copyrights to those works—not the rights to their underlying compositions; this distinction is what now enables Swift, the primary songwriter and composition copyright holder, to re-record the music and lyrics of those existing songs. Swift is not the only artist to re-record her songs as a departure from her old label; Frank Sinatra, the Everly

144. 17 U.S.C. §§ 102, 106, 114.

145. *See, e.g.*, Morgan Enos, *2024 Grammys: See the Full Winners & Nominees List*, GRAMMY AWARDS (Nov. 10, 2023, 10:16 AM), https://www.grammy.com/news/2024-grammys-nominations-full-winners-nominees-list.

146. JESSE, *supra* note 20, at 17–22, 32–34.

147. *Id.*

148. Raisa Bruner, *Here's Why Taylor Swift Is Re-Releasing Her Old Albums*, TIME (Oct. 27, 2023, 9:58 AM), https://time.com/5949979/why-taylor-swift-is-rerecording-old-albums/.

149. *Id.*

Brothers[150], and JoJo[151] have all done the same, showcasing how songwriters are impacted—and often disadvantaged—by the dual-copyright structure.

While the ownership of an original composition is automatically vested in its author, it is common for songwriters to cede a portion of their composition copyright to a music publisher. Publishing deals implicate the song's composition copyright, which is often divided evenly between a song's writers and any publisher with whom the writer has contracted.[152] Such fifty-fifty publishing splits are not mandated by copyright law, but they are a consequence of common industry practice—particularly where the major labels (all of which have their own in-house publishing wings) draft potential artists' contracts.[153] Commercial artists often contract with a publishing company that assists that artist in distributing, promoting, and collecting any royalties for their works.[154] In the streaming era, publishers are often responsible for licensing the use of the composition and collecting streaming royalties that are then shared with the artist.[155]

Much like sound recording rights, the sale of an artist's publishing rights can significantly limit their creative control. For example, the Beatles sold their publishing rights at the dawn of their career in the late 1960s, only for those rights to eventually be bought by Michael Jackson in the 1980s; Jackson's ownership of the publishing rights facilitated the use of "Revolution" in a Nike commercial without any of the Beatles' consent.[156] When the Beatles sued, they could only challenge Nike's use of the sound recording, as their claim to the composition belonged exclusively to

150. Kyle Munzenrieder, *Taylor Swift's Plan to Re-Record Her Music Isn't Actually Uncommon*, W MAG. (Nov. 17, 2020), https://www.wmagazine.com/story/taylor-swift-re-record-frank-sinatra/amp.

151. Taylor Weatherby, *JoJo on Rerecording Her First Two Albums After Legal Battle: 'This Is Closing a Chapter for Me*,' BILLBOARD (Jan. 15, 2019), https://www.billboard.com/music/pop/jojo-interview-new-versions-the-high-road-old-albums-8493194/.

152. Dmitry Pastukhov, *Music Publishing 101: Copyrights, Publishing Royalties, Common Deal Types & More*, SOUNDCHARTS (Nov. 20, 2019), https://soundcharts.com/blog/how-the-music-publishing-works.

153. JESSE, *supra* note 20, at 31–34.

154. *See* GEORGE HOWARD, MUSIC PUBLISHING 101, at 3 (2004); DON PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 206–28 (6th ed. 2006).

155. *See* Pastukhov, *supra* note 152.

156. The Beatles sued both Nike and their former label, EMI Records, for using the master recording of their song without permission; the parties ultimately settled out of court on undisclosed terms. Robert Hilburn, *Beatles Sue Nike over Use of Song*, L.A. TIMES (July 29, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-07-29-ca-4364-story.html.

Jackson.[157] Once such rights are contracted away, they can be almost impossible to recoup. John Fogerty, chief songwriter for Creedence Clearwater Revival, was only able to buy back the band's publishing rights after his former label changed ownership.[158] Fogerty ceded ownership of his compositions to Fantasy Records when he was just a teenager, and he only reclaimed them in 2023 after a fifty-year struggle.[159]

While many up-and-coming artists sign away their publishing rights prior to major commercial success, such transactions started trending more recently among famous, older artists. Multiple legacy artists such as Bob Dylan and Paul Simon have sold portions of their writer's share as well as their publishing share, selling their lyrics and music for hundreds of millions.[160] Relinquishing publishing rights appears to be a beneficial move for artists who prefer immediate payouts over continued control of their catalogs.[161] While the artists who sell their composition copyrights reap the short-term rewards, the buyers of those copyrights stand to coast on their royalties far into the future.

The publishing rights of retiring artists have become a hot commodity within the pop music industry thanks in large part to the recent interpolation phenomenon. As major labels and their in-house publishers acquire the copyrights to older works, contemporary popstars reference those retro melodies and lyrical motifs with increasing regularity. One who owns the composition copyright to a given song is free to recycle and remix its musical elements without fear of infringement. Even so, the original *recording* of that song is a different animal, often bearing a distinct set of owners. The interpolation trend cannot be fully investigated without first considering the copyright regime's treatment of sound recording copyrights—particularly its crackdown on unlicensed sampling.

157. *Id.*

158. Sam Cabral, *Creedence Clearwater Revival's John Fogerty Wins Music Rights*, BBC NEWS (Jan. 14, 2023, 8:05 AM), https://www.bbc.com/news/world-us-canada-64270913.

159. *Id.*

160. Syb Terpstra, *Why Do Artists Sell Their Music Rights? And What Exactly Are They Selling?*, LEXOLOGY (July 15, 2021), https://www.lexology.com/library/detail.aspx?g=b67e5d80-aaee-4b39-a003-998cff216db0.

161. Tim Ingham & Amy X. Wang, *Why Superstar Artists Are Clamoring to Sell Their Music Rights*, ROLLING STONE (Jan. 15, 2021), https://www.rollingstone.com/pro/features/famous-musicians-selling-catalog-music-rights-1114580/.

II. Sampling: Cultural Misunderstanding Breeds Costly Consequences

The music industry's embrace of interpolation can be explained, at least in part, by the destruction of sampling as a universally viable art style. The practice of sampling involves taking an isolated section from an existing sound recording and imbedding it in a new song; the sampled piece of audio might be looped throughout the song or used only as a fragment.[162] While some deride sampling for its absence of traditional musicianship, the practice is highly creative in its use of collage.[163] For example, many hip-hop artists that sample abide by an informal ethical code, which insists that the sampling process involves a thoughtful selection of references.[164] True hip-hop artists do not use sampling as an easy way to splice together a song but rather as a way to craft a "new approach to familiar material."[165]

In addition to its thematic value, sampling presents sonic innovations that no other artform can capture. Sampling is uniquely valuable to music makers because it's the only method for seamlessly transporting the *timbre* of a song.[166] Samples do not simply transfer a series of notes or sounds; they allow the timbre of a specific recording—and often the meaning attached to it—to be placed into a new context.[167] It is not the sounds within a recording that artists strive to recontextualize, but rather the *sound* of those sounds. "The reason why people sample is because you get an instant vibe, and an instant sound, from that original recording that you can't get by recording somebody playing a horn . . . part of it's the ambience, part of it's the atmosphere."[168]

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162. NATE SLOAN & CHARLIE HARDING, SWITCHED ON POP: HOW POPULAR MUSIC WORKS, AND WHY IT MATTERS 125 (2020).

163. The artform was elevated throughout the 1980s by rap groups like De La Soul, Public Enemy, and The Beastie Boys, who turned samples into sound collages. *See* BEASTIE BOYS, PAUL'S BOUTIQUE (Capitol Records 1989); DE LA SOUL, 3 FEET HIGH AND RISING (Tommy Boy Music 1989); PUBLIC ENEMY, IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam Recordings 1988). Rather than using a single sample to underscore an entire song, these groups incorporated numerous samples in carefully constructed, transformative arrangements. *Independent Lens: Copyright Criminals*, *supra* note 23.

164. Amanda Webber, *Digital Sampling and the Legal Implications of Its Use After* Bridgeport, 22 ST. JOHN'S J. LEGAL COMMENT. 373, 380–81 (2007).

165. *Id.*

166. Timbre is the tone, color, or character of a given sound; unlike pitch or volume, timbre is that ineffable quality that gives a trumpet and a flute, when playing the same note, such disparate flavors. *Guide to Timbre in Music: 7 Ways to Describe Timbre*, MASTERCLASS (June 7, 2021), https://www.masterclass.com/articles/guide-to-timbre-in-music.

167. *See* SLOAN & HARDING, *supra* note 162, at 127.

168. JOSEPH G. SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 73–74 (2004).

Only sampling allows for such an "expanded timbral language" within one work.[169] It is a mode of creation that is evocative in a totally singular way, which makes the policing of it all the more problematic for musical creators. "Sampling puts [the listener] in a very specific place that evokes and metaphorizes memory," simultaneously enriching a song's meaning and igniting the human brain in a distinctive way.[170] The Books, a musical duo known for their use of found sounds, create elaborate audio collages that combine instrumental recordings with a variety of samples.[171] The Books' music plays on the human brain's instinct to bridge the gap between unrelated bits of audio—a listening experience made possible by the liberal use of samples. Band-member Paul de Jong says it is "irrelevant" who originated the recordings themselves; what "is relevant is that there is a universal humanity."[172] When creative methods such as sampling are reserved for the affluent few who can afford licensing or risk litigation, copyright law reframes artists' expressions of humanity as a mere commodity.

Drummer Clyde Stubblefield unknowingly birthed what would become one of the most widely circulated samples of the 1990s when he created the drum pattern for James Brown's "Funky Drummer," the recording of which became the backbone of hits like "Fight the Power" and "Mama Said Knock U Out" among dozens of others.[173] While listening to a litany of songs that feature near-identical "Funky Drummer" beats, Stubblefield admitted he could not tell which songs used a bona fide sample or merely a soundalike recording.[174] Creating a track that mimics an existing recording does not necessarily run afoul of that sound recording copyright; it is only infringement if it takes substantially from the copyrightable elements of that composition.[175]

Any tracks that did not sample Stubblefield but rather independently recorded their own copycat drum track did not violate copyright law. This is because common rhythms like Stubblefield's are unprotectable "building

169. SLOAN & HARDING, *supra* note 162, at 127.

170. *Id.* at 126.

171. Jacob Ganz, *The Books: Making Music Through Found Sound*, NPR (Sept. 3, 2010, 2:35 PM), https://www.npr.org/2010/09/03/129607098/the-books-making-music-through-found-sound.

172. *Id.*

173. *Independent Lens: Copyright Criminals*, *supra* note 23.

174. *Id.*

175. Shawn Setaro, *Soundalike Songs Are a Two-Faced Business*, MEDIUM (Mar. 5, 2015), https://medium.com/cuepoint/soundalike-songs-are-a-two-faced-business-f44ca9678bef.

blocks" of music.[176] Cases that rebuke unlicensed sampling assert that *any* unauthorized use of original sound recordings violates copyright law—even though a practically indistinguishable soundalike recording does not.[177] Rigid prohibitions against sampling fail to see the silliness of this distinction, opting to enforce a blanket ban on the entire artform rather than weigh the practical effect of permitting modest samples.

Unsurprisingly, financial prospects quickly overshadowed the artistic merits of sampling.[178] In 1987, rap composed 11.6% of total music sales, but by the turn of the century, rap had established itself as "a culture," responsible for nearly *half*.[179] Not long after this rise in revenue, the legal system sunk its teeth into the practice of sampling and began punishing any artists who remixed others' sound recordings without a license.[180] This insistence on licensing for *any* use of a sound recording, regardless of whether the recording contained a protectable expression, seems a far cry from the intent of music copyright law, which sought to promote creative exercise. While the underlying *composition* within a sample might be so commonplace as to be ineligible for copyright protection, any unlicensed use of the *sound recording* is deemed off-limits. The owners of a song's sound recording can gatekeep the recorded material as though it were physical property; the music itself, however, is not especially important. Even producer Steve Albini, who critiques sampling as "extraordinarily lazy," disagrees with policing it. "I'm allowed to have an opinion on whether or not sampling is cool . . . , but I don't think we need to get the law involved."[181]

One of the first sampling lawsuits to go to trial came in 1987, when musician Jimmy Castor sued the Beastie Boys for using the recorded phrase "Yo, Leroy" as featured on Castor's 1977 album.[182] The parties settled the

176. *See supra* note 7 and accompanying text; *see infra* note 393 and accompanying text.

177. *See* SLOAN & HARDING, *supra* note 162, at 122–23.

178. The influence of money in the music sphere has been prevalent since the mercantile age. Similarities between songwriters' works—and even blatant copying of previous material—was not considered problematic until music publishing became a lucrative business; as competition among music publishers increased, musical borrowing shifted from being a merely aesthetic choice to an economic concern. *See* Zimmerman, *supra* note 8, at 484.

179. André Sirois & Shannon E. Martin, *United States Copyright Law and Digital Sampling: Adding Color to a Grey Area*, 15 INFO. & COMM. TECH. L. 1, 9 (2006).

180. *See*, *e.g.*, Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004).

181. *Independent Lens: Copyright Criminals*, *supra* note 23.

182. Don Snowden, *Sampling: A Creative Tool or License to Steal?: The Controversy*, L.A. TIMES (Aug. 6, 1989, 12:00 AM), https://www.latimes.com/archives/la-xpm-1989-08-06-ca-454-story.html; Terence McArdle, *Jimmy Castor Dead at 71; '70s Songs Became*

dispute out of court, but the sampling dam had only just begun to break.[183] The year 1991 ushered in the publicized crusade against sampling, with hip hop stars De La Soul and Biz Markie paying the price for their use of unlicensed sound bites. De La Soul were sued by '60s rock group The Turtles for using a clip of their song "You Showed Me" without permission.[184] Though the dispute was settled out of court, De La Soul was forced to pay roughly $1.7 million for their sampling sins.[185] That same year witnessed the first evaluation of sampling in court.[186] Rapper Biz Markie was sued for his unlicensed use of a Gilbert O'Sullivan sample, and the district court's determination tightened the reins on hip-hop production.[187] Judge Duffy did not disguise his feelings on the subject when he admonished the rapper with a verse from Exodus, "Thou shalt not steal," and contended that unlicensed sampling merits criminal penalties.[188] Both of these actions sent out a warning to hip-hop artists everywhere: sample without a license, and you might get sued. Biz Markie named his following album *All Samples Cleared!*—a move that epitomized artists' simultaneous disdain for and submission to the rigid copyright regime.[189]

Though courts across the country seemed to present a united front in their attack on sampling, their respective justifications were far from uniform. In *Jarvis v. A & M Records*, the Third Circuit exhibited a far more tempered approach than Judge Duffy's.[190] It acknowledged that cases involving sampling necessarily provide direct evidence of copying, as sampling involves the actual taking and remixing of the original song's recorded audio.[191] Even so, the *Jarvis* court did not neglect to evaluate the songs' musical similarities; instead, it decided that the determinative question in sampling cases "is whether the copying amounted to an unlawful

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Popular Among Sampling Hip-Hop Artists, WASH. POST (Jan. 19, 2012, 1:10 PM), https://www.washingtonpost.com/entertainment/music/jimmy-castor-dead-at-71-70s-songs-became-popular-among-sampling-hip-hop-artists/2012/01/19/gIQAbbkCBQ_story.html.

183. DAN LEROY, PAUL'S BOUTIQUE 46 (2009).

184. Snowden, *supra* note 182.

185. Alex Fewtrell, *Classic Copyright Cases – De La Soul*, BRIFFA (Feb. 28, 2020), https://www.briffa.com/blog/classic-copyright-cases-de-la-soul/.

186. Snowden, *supra* note 182.

187. *See generally* Grand Upright Music Ltd. v. Warner Bros. Recs., Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

188. *Id.* at 183 (quoting *Exodus* 20:15).

189. *Independent Lens: Copyright Criminals*, *supra* note 23.

190. *Compare* Jarvis v. A & M Recs., 827 F. Supp. 282, 289 (1993), *with Grand Upright Music Ltd.*, 780 F. Supp. at 185.

191. *Jarvis*, 827 F. Supp. at 289.

appropriation."[192] This decision challenged the notion that all sampling is stealing,[193] focusing instead on whether the borrowed elements actually qualify as protectable expressions.[194] Still, the Third Circuit's unlawful appropriation test was not embraced across the board; the Sixth Circuit subsequently adopted Judge Duffy's rigid prohibition of sampling in *Bridgeport Music, Inc. v. Dimension Films*—a case many consider the death knell for sampling.[195]

In its decision, the *Bridgeport* court bypassed any examination of musical similarity, asserting that "*no amount* of copying of a musical recording could be insubstantial with respect to the sound recording copyright, even though it may be insubstantial with respect to the musical composition copyright."[196] Statutory acknowledgment of sound recordings as copyrightable entities was intended to place recordings on par with written compositions, requiring a showing of substantial similarity to prove infringement in either case.[197] Contrary to this, the Bridgeport court mischaracterized the standards applicable to sound recordings and targeted not the specific sample at issue but sampling as a practice.[198] This turn allowed the court to find infringement where a three-note sample of Funkadelic's "Get Off Your Ass and Jam" had been slowed down and placed intermittently within N.W.A.'s "100 Miles and Runnin.'"[199] The court defended the purported reasonableness of its holding by reassuring that "the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made."[200]

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192. *Id.* at 299.

193. *Grand Upright Music Ltd., 780 F. Supp. at 183.*

194. "[I]t is not unlawful to copy non-copyrightable portions of a plaintiff's work . . . ." *Jarvis*, 827 F. Supp. at 291.

195. *See* Matthew R. Brodin, Comment, *Bridgeport Music, Inc. v. Dimension Films: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims — The Sixth Circuit's Flawed Attempt at a Bright-Line Rule*, 6 MINN. J.L. SCI. & TECH. 825, 863–66 (2005); M. Leah Somoano, Note, Bridgeport Music, Inc. v. Dimension Films*: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L. J. 289, 300–05 (2006).

196. Recent Case, Bridgeport Music, Inc. v. Dimension Films, *383 F.3d 390 (6th Cir. 2004)*, 118 HARV. L. REV. 1355, 1355 (2005) (emphasis added).

197. *Id.*

198. Somoano, *supra* note 195, at 302–05.

199. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004); FUNKADELIC, *Get Off Your Ass and Jam, on* LET'S TAKE IT TO THE STAGE (Westbound Records 1975); N.W.A., *100 Miles and Runnin'*, *on* 100 MILES AND RUNNIN' (Priority Records 1990).

200. *Bridgeport Music, Inc.*, 383 F.3d at 398.

If the purpose of copyright is to preserve authorial integrity by permitting creators a reasonable zone of control over their works, the *Bridgeport* case ignored the zone's limitations where sound recordings are concerned. This case departs from the long-held test for infringement, which requires proof of actual copying *and* a showing of substantial similarity.[201] In requiring this substantial similarity evaluation, courts consider the musical meat of the relevant songs; this step ensures that infringement is found only where a substantial amount of the artist's protectable expression has been copied.[202] By exempting recordings from this substantial similarity test, the *Bridgeport* court provided that any artist who samples may be penalized for a technicality; actual resemblance to the original work becomes irrelevant.[203]

Because N.W.A.'s song contained a snippet of a Funkadelic recording, the *Bridgeport* court deemed the use unlawfully derivative—without pausing to consider that the Copyright Act's restriction of "derivative works"[204] might not implicate *anything* that includes minimal traces of the original.[205] "The court found that the sound recording copyright owner's right to create a derivative work leads to a strict prohibition of sampling, but even a purely textual analysis of the statute proves this interpretation misguided."[206] Section 101 of the Copyright Act states that a "derivative" work—whether it be a composition or a sound recording—is one that is "based upon" the preexisting work, suggesting a strong connection between the two creations.[207]

This "derivative" classification should only apply where a work "has *substantially* copied from a prior work."[208] Common examples of derivative works, as this term is used in the Copyright Act, include movie adaptations of novels or updated versions of computer software.[209] Perhaps this legal exclusion should control where a sample provides the foundation to a new work, but where a sample is merely a musical flourish—one ingredient

201. FROMER & SPRIGMAN, *supra* note 74, at 229; *see, e.g.*, Jarvis v. A & M Recs., 827 F. Supp. 282, 288 (D.N.J. 1993).

202. FROMER & SPRIGMAN, *supra* note 74, at 229.

203. *Bridgeport Music, Inc.*, 383 F.3d at 398.

204. *See* 17 U.S.C. § 106.

205. *See id.* § 106(2) (granting copyright owners the exclusive right "to prepare derivative works").

206. Recent Case, *supra* note 196, at 1359.

207. *See* 17 U.S.C. § 101.

208. NIMMER ON COPYRIGHT, *supra* note 45, § 3.01 (2004).

209. Brian Farkas, *Derivative Works Under U.S. Copyright Law*, NOLO, https://www.nolo.com/legal-encyclopedia/derivative-works-under-u-s-copyright-law.html (last visited Jan. 9, 2024).

within a complex recipe—a court should not hold that substantial copying has taken place. Moreover, federal courts should consider the artistic expression *within* the sampled sound recording.[210] Where, as in the *Bridgeport* case, the derivative work incorporates a small sample and utterly transforms its sonic character, it is easy to see that it is not the song itself but rather the artform that is held in contempt.

The Ninth Circuit's reasoning in *Newton v. Diamond*, a factually similar sampling case, displays how sampling decisions change where courts follow both steps of the infringement test.[211] In *Newton*, the court considered whether a three-note sequence—much like the sample used in *Bridgeport*—constituted infringement of the original song's composition copyright.[212] The court held that the music contained within the sample was not a protectable part of the original song's composition, relying on the de minimis defense to copyright infringement.[213] The same infringement analysis should apply to cases concerning sound recording copyrights, but decisions like *Bridgeport* insist otherwise.

Another Ninth Circuit case applying the de minimis defense to sound recordings, *VMG Salsoul v. Ciccone,* explicitly rejected *Bridgeport*'s sampling decree.[214] Whereas *Newton* applied the de minimis defense to the composition within a sample, *VMG* extended the defense to the recording itself, placing the copyrights for sound recordings and compositions on equal footing.[215] Though *VMG* was decided in 2016, there is no sign that the tendency among high-profile artists to license *any* sample for fear of being sued has dissipated.

In the post-*Bridgeport* atmosphere, it is easier to cover a song in its entirety than it is to obtain a license for a sample. This is because sampling implicates both sets of the sampled song's copyright holders: those who own the composition copyright *and* those who own the sound recording copyright.[216] This practical necessity for *both* sets of copyright holders' permission is

210. "[B]oth 114(b) and 101 require 'substantial similarity' between the copyrighted work and the new work to prove that there has been an illegal appropriation." Brodin, *supra* note 195, at 861.

211. *See* Newton v. Diamond, 204 F. Supp. 2d 1244, 1248–49 (C.D. Cal. 2002); *see also* Jennifer R. R. Mueller, *All Mixed Up:* Bridgeport Music v. Dimension Films *and De Minimis Digital Sampling*, 81 IND. L.J. 435, 436–37 (2006).

212. *Newton*, 204 F. Supp. 2d at 1246–47; Mueller, *supra* note 211, at 437.

213. *Newton*, 204 F. Supp. 2d at 1260; Mueller, *supra* note 211, at 437.

214. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

215. *Compare Newton*, 204 F. Supp. 2d at 1256, *with VMG Salsoul, LLC*, 824 F.3d at 886.

216. Sam Claflin, Note, *How to Get Away with Copyright Infringement: Music Sampling as Fair Use*, 26 B.U. J. SCI. & TECH. L. 159, 163 (2020).

reinforced by cases like *Bridgeport* and *Grand Upright*, which deemed any unlicensed samples a violation of both copyrights.[217] It is exceptionally rare that a well-known performer will personally own both—or even one—of these copyrights.

Most high-earning artists are signed to a record label, which typically contracts to own the sound recording copyrights of any songs released under that label. Artists often assign their sound recording and composition copyrights to labels in exchange for the label's production, distribution, and promotion resources.[218] All three of the major record labels (Sony, Warner, and Universal) have their own in-house publishing companies, which manage the royalties and licensing fees generated by their label's artists.[219] Ultimately, this means major labels are likely to hold both the sound recording and composition copyrights of their represented artists' works, though not always in their entirety.

Ariana Grande, Post Malone, and The Weeknd are all signed to Universal-owned record labels, with Universal Music Publishing Group acting as their publisher; this means Universal has a stake in both the master and composition copyrights for each of these artists' works.[220] If a small-time artist wants to legally sample a recent Ariana Grande song, they must first get licenses from Universal for both their use of the sound recording and the musical composition. Assuming Universal even permits such licenses to use their copyright holdings, the licensure's cost is entirely within Universal's discretion.[221] Additionally, traditional publishing deals split a song's composition copyright between the publishing company and the songwriters, so if a song had multiple songwriters, their composition copyright will be divided further.[222] Requiring every controlling copyright holder's seal of approval before a sample may be cleared makes the artform cost-prohibitive for most artists. "The *Biz Markie* and *Bridgeport* verdicts birthed a lucrative marketplace for copyright attorneys, publishing companies, and recording owners, in which a single sample clearance routinely sells for $10,000."[223]

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217. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 399–400 (6th Cir. 2004); Grand Upright Music Ltd. v. Warner Bros. Recs., Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991).

218. *See* JESSE, *supra* note 20, at 17–22.

219. *Id.* at 34.

220. *Artists & Writers*, UNIVERSAL MUSIC PUBL'G GRP., https://www.umusicpub.com/us/Artists.aspx (last visited Jan. 9, 2024).

221. *See, e.g.*, Suzanne Kessler et al., *Symposium Panel: Bringing Blurred Lines into Focus*, 3 BELMONT L. REV. 103, 109 (2016).

222. JESSE, *supra* note 20, at 31–35.

223. SLOAN & HARDING, *supra* note 162, at 122.

Requiring artists to obtain licenses for their samples does not sound unfair on its face; any substantial use of another person's work warrants some degree of permission and/or compensation. But there are no legal guidelines to regulate the licensing process, and it is often the song's copyright holders—not its creators—who use their leverage to make licenses egregiously expensive, if not totally forbidden. This imbalanced bargaining power primarily disadvantages industry outsiders who lack the finances or connections to afford sampling rights. "[W]hile major label-affiliated artists can use their status and financial capital to bypass the obstacles, it is practically impossible for independent artists to afford sampling and participate in modern music's sonic creativity."[224] The modern state of sampling reflects the music industry at large, catering to the wealthy while handcuffing the creative mobility of the masses. Those elite artists who can afford to attain sampling licenses frequently use samples to showcase their status: "[Kanye] West flaunts his samples the same way he flaunts his cars, his clothes, his jewelry and his art collection."[225] Though it has come to symbolize an artist's affluence, the practice of sampling began as a means to create new kinds of referential songs.

As sampling grows excessively expensive, it loses touch with its role in hip hop's inception. Bobbito Garcia of the Rock Steady Crew recounts that early hip hop "was always a culture of borrow and take because it was a culture founded upon a lack of resources."[226] Public Enemy's Hank Shocklee laments the current gatekeeping of the creative mode that shaped his career: "Jay-Z and Kanye can afford to pay the sample rates, but not the kids starting out in their own little home studio in their house."[227] Legal gatekeeping of sampling changes not only the sound of rap but also its substance, preventing many artists from using historically salient clips in their creations.[228]

Though it's impossible to capture the precise essence of an original sound recording without sampling, many artists have taken up an

224. Sean M. Corrado, Note, *Care for a Sample?: De Minimis, Fair Use, Blockchain, and an Approach to an Affordable Music Sampling System for Independent Artists*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 181 (2018).

225. Chris Richards, *The Court Case That Changed Hip-Hop — from Public Enemy to Kanye — Forever*, WASH. POST (July 6, 2012, 12:44 PM), https://www.washingtonpost.com/opinions/the-court-case-that-changed-hip-hop--from-public-enemy-to-kanye--forever/2012/07/06/gJQAVWr0RW_story.html.

226. *Independent Lens: Copyright Criminals*, *supra* note 23.

227. Richards, *supra* note 225.

228. Erik Nielson, *Did the Decline of Sampling Cause the Decline of Political Hip Hop?*, ATLANTIC (Sept. 18, 2013), https://www.theatlantic.com/entertainment/archive/2013/09/did-the-decline-of-sampling-cause-the-decline-of-political-hip-hop/279791/.

alternative mode of musical borrowing. In lieu of jumping through hoops to acquire a sample, some artists simply clone the music they seek to incorporate. "Licensing can be both prohibitively costly and difficult to obtain, so it isn't uncommon to create replayed samples . . . of an original song with similar instrumentation."[229] M.I.A.'s "Paper Planes" is a prime example of this technique; the entire song revolves around a looped chord progression from the Clash's "Straight to Hell."[230] The loop is not a true sample of the Clash's sound recording, but rather a faithful recreation of their performance. This practice of "interpolation" allows artists to manually recreate a piece of music to sidestep the costs of sampling. Interpolations implicate only the composition of the underlying song, so the sound recording copyright holders have no leverage over the licensing. But recent trends in pop music have changed the tides of composition copyright holdings, moving ownership out of songwriters' control and into the hands of high-powered publishing companies.

III. Interpolation: A License to Vibe

Interpolation has been happening for centuries; it's only recently that we have sought to name, regulate, and monetize this musical phenomenon. Recognizability has always been the name of the pop music game, but the rules have suddenly changed: those who fail to obtain a license and risk an infringement lawsuit are not passing go. Decades ago, samples were labelled as unlicensed "derivative works" that infringed one's exclusive copyright privileges.[231] Now, the music industry is pushing interpolations into this "derivative" category and insisting that licenses are required not only to use a sound recording, but also to use virtually any recognizable content within one. Many label-backed artists now seek permission from a composition's copyright holders before they attempt to reinvent any of its previously marketed traits. This consequential shift in the culture of musical borrowing is neatly illustrated by a trend that has weaved across popular songs for nearly a century: whistling.

In the late 1950s, both Pat Boone's "Love Letters in the Sand" and Guy Mitchell's "Singing the Blues" marked radio hits with whistle motifs at their

229. SLOAN & HARDING, *supra* note 162, at 123.

230. M.I.A., *Paper Planes*, *on* KALA (Interscope Records 2007); THE CLASH, *Straight to Hell*, *on* COMBAT ROCK (CBS Records 1982).

231. *See supra* Part II.

center.[232] Otis Redding's "(Sittin' On) The Dock of the Bay" brought whistling to the top of the charts again in 1968.[233] Twenty years later, Bobby McFerrin's whistle-centric "Don't Worry Be Happy" proved to be another huge hit.[234] The trend became especially hard to ignore when Flo Rida's "Whistle" dominated the pop charts in 2012.[235] This trend characterized numerous indie rock hits of the late 2000s: Peter Bjorn and John's "Young Folks," Edward Sharpe & The Magnetic Zeroes "Home," The Black Keys' "Tighten Up," and Foster the People's "Pumped Up Kicks."[236] That list names only the most popular examples of the trend; indie playlists far and wide are riddled with countless other whistle-based tracks.

The most recent whistle song to hit the pop charts is OneRepublic's 2022 hit "I Ain't Worried."[237] The song features a vibe very similar to most of the other whistle-based grooves of the last couple decades, but its credits reveal an important shift in the whistle-song timeline: "I Ain't Worried" claims to be an interpolation of Peter Bjorn and John's "Young Folks."[238] The writers behind the 2006 hit "Young Folks" received songwriting credits for OneRepublic's hit; this means that the whistle motif in "I Ain't Worried" is not attributed to the shared pool of musical phenomena, but rather a particular set of authors—Peter Morén, Björn Yttling, and John Eriksson.[239] Songs featuring a whistled melody line perforated the pop music charts for decades, but now this musical trope has been credited to a particular source. Why would OneRepublic, or perhaps their label (a subsidiary of Universal Music

232. PAT BOONE, *Love Letters in the Sand*, *on* PAT'S GREATEST HITS (Dot Records 1957); GUY MITCHELL, *Singing the Blues* (Columbia Records 1956).

233. OTIS REDDING, *Sittin' on the Dock of the Bay*, *on* THE DOCK OF THE BAY (Volt Records 1968); Tom Eames, *The Story of . . . 'Dock of the Bay' by Otis Redding*, SMOOTH RADIO (July 15, 2020, 5:01 PM), https://www.smoothradio.com/features/the-story-of/dock-of-the-bay-otis-redding-meaning-lyrics-facts/.

234. BOBBY MCFERRIN, *Don't Worry, Be Happy*, *on* SIMPLE PLEASURES (Manhattan Records 1988).

235. FLO RIDA, *Whistle*, *on* WILD ONES (Poe Boy Records 2012); Gary Trust, *Flo Rida's 'Whistle' Works Way to Top of Hot 100*, BILLBOARD (Aug. 15, 2012), https://www.billboard.com/music/music-news/flo-ridas-whistle-works-way-to-top-of-hot-100-480425/.

236. PETER BJORN AND JOHN, *Young Folks*, *on* WRITER'S BLOCK (Wichita Records 2006); EDWARD SHARPE AND THE MAGNETIC ZEROS, *Home*, *on* UP FROM BELOW (Rough Trade Records 2010); THE BLACK KEYS, *Tighten Up*, *on* BROTHERS (Nonesuch Records 2010); FOSTER THE PEOPLE, *Pumped Up Kicks*, *on* TORCHES (Columbia Records 2010); *see* Switched On Pop, *Invasion of the Vibe Snatchers*, *supra* note 32.

237. ONEREPUBLIC, *I Ain't Worried*, *on* TOP GUN: MAVERICK (MUSIC FROM THE MOTION PICTURE) (Interscope Records 2022).

238. Switched On Pop, *Invasion of the Vibe Snatchers*, *supra* note 32.

239. *Id.*

Group),[240] care about crediting a trend that's been circulated freely for so long? This shift can be traced, at least in part, to a particularly questionable case that dramatically altered the music copyright landscape in 2018.

The *Williams v. Gaye* case made countless headlines and brought the credibility of copyright caselaw to an all-time low. The Ninth Circuit found Pharrell Williams and Robin Thicke's hit "Blurred Lines" liable for infringing Marvin Gaye's 1977 song "Got to Give It Up."[241] The court's opinion was widely criticized for deviating drastically from the extrinsic test for substantial similarity and instructing the jury to consider elements of the plaintiff's composition that were not protected by copyright.[242] The jury was specifically instructed to assess the "total concept and feel" of the songs for substantial similarity, even though Gaye's copyright was supposed to be strictly limited to the copyrightable elements found in the *written* composition (called the "deposit copy").[243] The Ninth Circuit ultimately looked beyond the deposit copy's copyrightable elements to argue that the defendants' appropriation of Gaye's "groove" and "vibe" warranted a finding of copyright infringement—to the tune of $5.3 million outright and 50% of "Blurred Lines" future royalties.[244]

The court not only disregarded the bounds of the deposit copy's material, but it also based its decision on generic elements that were not "original" to the plaintiff's song.[245] In essentially claiming that the *feel* of Gaye's song merited exclusive copyright protection, the Ninth Circuit sent a shock through the music industry.[246] Common grooves, genre signifiers, and popular "vibes" that were formerly ripe for appropriation appear to be slipping off the creativity table. It is likely that this case encouraged the

240. *Our Labels & Brands*, UNIVERSAL MUSIC GRP., https://www.universalmusic.com/labels/ (last visited Jan. 9, 2024).

241. Williams v. Gaye, 895 F.3d 1106, 1138 (9th Cir. 2018).

242. *See* 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-314856; Keith Harris, *The Blurred Lines Verdict Proves Only One Thing: You Can't Second-Guess a Jury*, GUARDIAN (Mar. 11, 2015, 8:24 AM), https://www.theguardian.com/music/musicblog/2015/mar/11/the-blurred-lines-verdict-pharrell-robin-thicke-marvin-gaye.

243. BOYLE ET AL., *supra* note 15, at 195–96.

244. Althea Legaspi, *'Blurred Lines' Copyright Suit Against Robin Thicke, Pharrell Ends in $5M Judgment*, ROLLING STONE (Dec. 13, 2018), https://www.rollingstone.com/music/music-news/robin-thicke-pharrell-williams-blurred-lines-copyright-suit-final-5-million-dollar-judgment-768508/.

245. *See Williams*, 895 F.3d at 1138–52 (Nguyen, J., dissenting).

246. *See generally* Edwin F. McPherson, *Crushing Creativity: The Blurred Lines and Its Aftermath*, 92 S. CAL. L. REV. POSTSCRIPT 67 (2018).

current music industry practice of calling almost any borrowed motif an "interpolation." Fear of unruly copyright law appears to be tightening the reins on creativity yet again. What *Bridgeport* and *Grand Upright* did to sampling, *Williams v. Gaye* appears to be doing to interpolations. "Get a license or do not sample" is a mantra that continues to shape the creative landscape, wherein artists now need a license to vibe.

A. Look Before You Release: Risk Avoidance in the Music Industry

While several copyright cases in the wake of *Williams v. Gaye* signal a return to more rigid infringement standards,[247] the recent influx of copyright infringement lawsuits sends a threatening message to songwriters. The first half of the twentieth century witnessed roughly twenty copyright lawsuits go to trial, but the second half of the century saw that number double to forty-three lawsuits.[248] The frequency of infringement cases has skyrocketed since, with at least fifty-two music copyright lawsuits occurring within the first decade of the twenty-first century.[249] That number more-than-doubled from 2010 to 2019—a phenomenon many scholars attribute to the "Blurred Lines" decision.[250] Plaintiffs are encouraged by these climbing numbers and the Ninth Circuit's ostensibly lowered burden of proof, resulting in an "avalanche effect" of infringement lawsuits.[251]

The defendants swept into the lawsuit avalanche are, unsurprisingly, of the millionaire variety. Ed Sheeran recently fielded two major infringement lawsuits with Gaye overtones, though neither suit was brought by anyone who directly shaped the hit at issue (Marvin Gaye's "Let's Get It On").[252] An infringement claim from the estate of Marvin Gaye's former co-writer, Ed

247. *See generally, e.g.,* Gray v. Hudson, 28 F.4th 87 (9th Cir. 2022); Skidmore v. Zeppelin, 952 F.3d 1051 (9th Cir. 2020).

248. Keyes, *supra* note 108, at 418.

249. *Cases 2000-2009*, GEO. WASH. L.: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/cases-2/2000-2009/ (last visited Jan. 10, 2024).

250. *Cases 2010-2019*, GEO. WASH. L.: MUSIC COPYRIGHT INFRINGEMENT RES., https://blogs.law.gwu.edu/mcir/cases-2/2010-2019/ (last visited Jan. 10, 2024); Jonathan Bailey, *Why Are There So Many Pop Music Lawsuits*, PLAGIARISM TODAY (Mar. 8, 2022), https://www.plagiarismtoday.com/2022/03/08/why-are-there-so-many-pop-music-lawsuits/.

251. Amy X. Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, ROLLING STONE (Jan. 9, 2020), https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/.

252. Victoria Bekiempis, *Ed Sheeran's Copyright Trial, Explained*, VULTURE (May 17, 2023), https://www.vulture.com/article/ed-sheeran-copyright-lawsuit-over-marvin-gaye-song-explained.html#.

Townsend, was filed first in 2016.[253] A near-identical suit was filed a year later, this time by Structured Asset Sales—an LLC founded by investment banker David Pullman that focuses on music copyright acquisition.[254] The backing elements of Sheeran's "Thinking Out Loud" resemble Gaye's 1973 song, as several YouTube comparisons elucidate,[255] but the district court appeared to follow the *Skidmore v. Zeppelin* decision in finding for Sheeran.[256] The presiding judge noted that the "backing pattern," which the plaintiff's experts highlighted as the infringing material, consists only of the "chord progression, the harmonic anticipation of chord changes (both of which are commonplace and unprotectable), and a bass line" which was not included in Gaye's deposit copy and thus not considerable.[257] Sheeran's lawyer described the songs' commonalities as "the letters of the alphabet of music," and the verdict seems to amplify this sentiment.[258]

Sheeran won another lawsuit over his song "Shape of You," receiving $1.1 million in damages.[259] The "Shape" case was initiated by songwriter Sami Chokri, who claimed Sheeran's 2017 smash hit infringed on his 2015 track "Oh Why." Sheeran and his co-writers successfully argued that the songs'

253. Daniel Kreps, *Copyright Infringement Lawsuit over Ed Sheeran's 'Thinking Out Loud' Headed to Trial*, ROLLING STONE (Sept. 30, 2022), https://www.rollingstone.com/music/music-news/copyright-infringement-lawsuit-ed-sheeran-thinking-out-loud-marvin-gaye-trial-1234602815/.

254. Ben Beaumont-Thomas, *Ed Sheeran Beats Second Lawsuit over Thinking Out Loud and Let's Get It On*, GUARDIAN (May 17, 2023, 5:00 AM), https://www.theguardian.com/music/2023/may/17/ed-sheeran-beats-second-lawsuit-over-thinking-out-loud-and-lets-get-it-on; *see Structured Asset Sales, LLC*, OPEN CORPS., https://opencorporates.com/companies/us_ca/200828510074.

255. *See* Consequence, *Ed Sheeran's "Thinking Out Loud vs Marvin Gaye's "Let's Get It On,"* YOUTUBE (Jan. 4, 2019), https://www.youtube.com/watch?v=HcBIYoJCebs; Rick Beato, *Ed Sheeran Vs. Marvin Gaye Lawsuit: Let's Compare!*, YOUTUBE (July 2, 2018), https://www.youtube.com/watch?v=0kt1DXu7dlo.

256. In *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (2020), the Ninth Circuit found that the guitar melody of Led Zeppelin's 1971 hit "Stairway to Heaven" did not infringe Spirit's 1968 song "Taurus" and declared that copyright protection for original selection and arrangement requires more than a mere "combination" of musical building blocks. *See* Beaumont-Thomas, *supra* note 254.

257. *See* Structured Asset Sales, LLC v. Sheeran, 559 F. Supp. 3d 172, 174 (S.D.N.Y. 2021).

258. Benjamin Lee, *Ed Sheeran Cleared of Infringing Copyright in Marvin Gaye Lawsuit*, GUARDIAN (May 4, 2023, 1:46 PM), https://www.theguardian.com/music/2023/may/04/ed-sheeran-verdict-not-liable-copyright-lawsuit-marvin-gaye.

259. Emily Zemler, *Ed Sheeran Awarded Over $1.1 Million in Legal Fees in 'Shape of You' Copyright Case*, ROLLING STONE (June 22, 2022), https://www.rollingstone.com/music/music-news/ed-sheeran-shape-of-you-trial-win-1333494/.

similarities—their common use of the minor pentatonic scale and the fact they "both have vowels in them"—are unprotectable.[260] Responding to claims that his song also ripped off TLC's 1999 hit "No Scrubs," Sheeran admitted he changed the similarities that his musicologist had detected between the two songs and even sought clearance from TLC's writers.[261] The "No Scrubs" composers were ultimately given a credit on Sheeran's track after its release[262]—a phenomenon that's become fairly commonplace in the pop music realm.[263]

In response to the unpredictable legal landscape of music copyright, the music industry has chosen the path of least resistance by leaning into licensing. Many labels are *assuming* the copyrightable nature of borrowed motifs—even where only a few notes are shared—and bargaining for interpolation rights to those elements preemptively. This insurance measure is not only for artists who actively incorporate another song's characteristics but for any new creation that *might* be found to resemble an existing composition. As a result, musicologists are becoming a staple within many large record labels, analyzing upcoming releases for any potential similarities to other works.[264] But this musicologist-fueled caution breeds overcorrection and over-crediting.

Maroon 5's 2019 hit "Memories" was flagged by their label's in-house musicologist as a potential infringement of Bob Marley's "No Woman, No Cry."[265] Prior to releasing "Memories," Maroon 5's attorney contacted Primary Wave—the publishing company that owns Bob Marley's composition copyrights—and negotiated for a license to interpolate the song.[266] Instead of risking a potential lawsuit, Maroon 5 chose to alert Marley's publisher of the similarities and wage a deal preemptively.[267] This may seem inconsequential, as it was only a minor expense for an established band like Maroon 5, but the ultimate effect on music composition at large is concerning.

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260. SAVAGE, *supra* note 41.

261. *Id.*

262. *Id.*

263. Rich Juzwiak, *Beyoncé's 'Break My Soul' and the Long Tail of 'Show Me Love'*, N.Y TIMES (June 27, 2022), https://www.nytimes.com/2022/06/27/arts/music/beyonce-break-my-soul-robin-s-show-me-love.html.

264. This practice is known as "pre-emptive musicology." Switched On Pop, *Invasion of the Vibe Snatchers*, *supra* note 32.

265. *Id.*

266. *Id.*

267. *Id.*

The only shared characteristics between "Memories" and "No Woman, No Cry" are their chord progressions and the general themes of love and loss. But themes are not copyrightable.[268] And the "Memories" chord progression is the same "immortal" progression made famous by Pachelbel's Canon in D.[269] It seems contrary to age-old principles of songwriting to argue that this chord progression could foster an infringement lawsuit, and it is especially harmful to suggest that the Marley estate should have exclusive control over that progression. Yet, Maroon 5's willingness to label their song as an interpolation of Marley's "No Woman, No Cry"—a fact which Primary Wave proudly displays on its website[270]—suggests that those elements *can* be owned, and that a company like Primary Wave gets to decide how much it will cost everyone else to use them.

Songwriters are the ones most negatively impacted by the privatization of once-shared musical themes, as risks heighten and financial rewards wane. "The average number of credited songwriters in the US market's Top 10 streaming hits of 2018, per-track, was a surprisingly high **9.1**."[271] Hip hop's prevalence on the American charts contributes significantly to this number, as the genre's top-selling artists often incorporate samples in their tracks.[272] The pop genre contributes as well, as it witnesses "the near-complete decline of the solo singer-songwriter pop hit, and the near-complete dominance of songs written by committee."[273] Industry-backed popstars like Dua Lipa and Justin Bieber work with songwriting partners on virtually all of their tracks.[274] This method offers greater financial security to labels, enabling

268. *Id.*

269. *Maroon 5's New Song, "Memories," Is Basically Pachelbel's Canon*, CBC MUSIC (Sept. 20, 2019), https://www.cbc.ca/amp/1.5291343; *see* Booth, *supra* note 37, at 122; *see also* Victoria Longdon, *These Four Chords Are at the Heart of Every Pop Song*, CLASSIC FM (Feb. 28, 2019, 5:06 PM), https://www.classicfm.com/discover-music/music-theory/four-chords-every-pop-song.

270. *Maroon 5 — Bob Marley Interpolation*, PRIMARY WAVE, https://primarywave.com/sync/bob-marley/ (last visited Jan. 10, 2024).

271. Tim Ingham, *How to Have a Streaming Hit in the USA: Hire 9.1 Songwriters (And a Rap Artist)*, MUSIC BUS. WORLDWIDE (Jan. 6, 2019), https://www.musicbusinessworldwide.com/how-to-have-a-streaming-hit-in-the-us-hire-9-1-songwriters-and-a-rap-artist/ (alteration in original).

272. Tim Ingham, *Hardly Anyone on the Pop Charts Writes Their Own Music (Alone) Anymore*, ROLLING STONE (Apr. 1, 2019), https://www.rollingstone.com/music/music-features/hardly-anyone-in-the-pop-charts-writes-their-own-music-alone-anymore-815333/.

273. *Id.*

274. *See Dua Lipa*, ALL MUSIC, https://www.allmusic.com/album/dua-lipa-mw0002958693/credits (last visited Jan. 10, 2024); *Future Nostalgia*, WIKIPEDIA, https://en.wikipedia.org/wiki/Future_Nostalgia (last visited Jan. 10, 2024); *Justice (Justin Bieber Album)*,

them to produce chart-topping tracks at top speed. But the creeping influx of interpolations is also adding to this average, as the copyright climate suggests that credit must be given for melodic similarities—even where it might not be due.

It's become increasingly common for songwriting credits to be doled out as a defensive measure.

> Rather than risk the time, cost and reputational damage of a trial, potential defendants take the pragmatic route of offering a share of songwriting in advance, which is how, for example, Right Said Fred ended up being credited on Taylor Swift's 'Look What You Made Me Do' without even having to call their lawyers.[275]

Where an artist dares to employ interpolations *and* samples into a new work, the song's credits can swell to an impressive size. Travis Scott's "Sicko Mode" is one such example, crediting a total of thirty songwriters—but less than a third of them actually participated in the song's recording.[276] The insistence on accounting for every copyright holder's stake has made songwriters' hopes of achieving originality even loftier. As songwriters lose their authorial autonomy, the revenue they stand to make from songwriting credits also shrinks. "The more we widen the idea of what an author or co-author is, the more we risk making a never-ending chain of who warrants a credit."[277]

Unlike popstars, the songwriters behind most contemporary hits usually lack label representation, leaving them without the protection of on-call musicologists and comprehensive insurance policies.[278] If songwriters wish to independently protect themselves by purchasing error-and-omissions

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WIKIPEDIA, https://en.wikipedia.org/wiki/Justice_(Justin_Bieber_album) (last visited Jan. 10, 2024); *Changes (Justice Bieber Album)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Changes_(Justin_Bieber_album) (last visited Jan. 10, 2024).

275. Lynskey, *supra* note 40.

276. *Who Wrote "Sicko Mode" by Travis Scott?*, GENIUS, https://genius.com/Travis-scott-sicko-mode-lyrics/q/writer (last visited Jan. 10, 2024). The song interpolates Uncle Luke's "I Wanna Rock" and samples Notorious B.I.G.'s "Gimme the Loot," which in itself samples three other songs. Patrick Lyons, *How Travis Scott's 'Astroworld' Embraces His Southern Rap Roots Like Never Before*, BILLBOARD (Aug. 7, 2018), https://www.billboard.com/music/rb-hip-hop/travis-scott-astroworld-southern-rap-roots-8469081/; Candice Nembhard, *Here Are All the Samples Travis Scott Used on 'Astroworld'*, HIGHSNOBIETY, https://www.highsnobiety.com/p/travis-scott-astroworld-samples/ (last visited Jan. 10, 2024).

277. Ethan Millman, *'No Shelf Life Now': The Big Business of Interpolating Old Songs for New Hits*, ROLLING STONE (Sept. 7, 2021), https://www.rollingstone.com/pro/features/olivia-rodrigo-doja-cat-interpolation-music-1220580/.

278. Wang, *supra* note 251.

insurance for their works, the coverage could set them back anywhere from $20,000 to $250,000 annually.[279] When a song is accused of copyright infringement for its perceived similarity to an existing work, it is the song's composers who pay the price. Most high-profile hits are penned by multiple songwriters—many of whom cannot field the costs of a copyright lawsuit.[280] This combination of financial instability and creative vulnerability drives songwriters to seek licensing rights over modest similarities; artists are compelled to seek permission preemptively, since most could not afford to ask for forgiveness in court. Songwriters bear the cost of using samples and interpolations in their works but rarely reap the benefits when their works are licensed; those fees usually end up in the hands of lawyers, intermediaries, or third-party copyright holders.[281] While many songwriters feel the financial sting of an ever-expanding share of credits, record labels and publishing companies are finding ways to profit off the interpolation machine.

B. Copyright Is Currency, and Music Publishers Carry a Big Purse

The uncertainty of what is or is not fair game for songwriting fodder has instilled fear among composers and their representatives, whose livelihood depends on generating new works. Those who simply own the copyrights to already-written works, however, have found themselves in an advantageous position.[282] While copyright law intimidates artists who attempt to create new songs without stepping on "protected" sounds, copyright holders with no skin in the songwriting game are eagerly capitalizing on these newfangled restrictions.[283] Multiple labels and publishing companies are buying up the publishing rights to numerous songs from previous decades, using their ownership of these copyrights to play offense and defense simultaneously.[284] Once an entity has secured the rights to a song's compositional elements, they can charge whatever they please for the rights to interpolate that song. Some industry executives have gone even further, buying the publishing rights to artists' entire catalogs.[285] These entities can also wield their

279. *Id.*

280. Switched On Pop, *Pop's Worst Kept Secret Ft. Emily Warren*, VOX (June 22, 2021), https://switchedonpop.com/episodes/pops-worst-kept-secret-emily-warren?rq=secret [hereinafter Switched On Pop, *Pop's Worst Kept Secret*]; Wang, *supra* note 251.

281. BOYLE ET AL., *supra* note 15, at 184.

282. Harris, *supra* note 72, at 19.

283. *See* Ingham & Wang, *supra* note 161.

284. *See id.*

285. Switched On Pop, *Invasion of the Vibe Snatchers*, *supra* note 32.

exclusive copyright privileges defensively against any works they believe *should* have acquired their permission.

Companies who own thousands of hit songs and have the financial means to incur court costs can—and often do—sue any artist whose work might be infringing on their musical territory.[286] "With the classic hit marketplace heating up, there is risk that the purchasers of music catalogs could seek to monetize those assets through infringement lawsuits that the artists and prior catalog owners would have deemed unworthy."[287] The rising number of infringement lawsuits, and the major labels initiating them, suggests that this is not a "risk" but a certainty. Lucas Keller, founder of music management company Milk and Honey, condemns the copyright holders who weaponize their catalogs against new creations: "Heritage publishers who aren't making a lot of money are coming out of the woodwork and saying, 'We're going to take a piece of your contemporary hit.'"[288] Savvy music industry moguls have accrued catalogs of publishing rights not only to reap money from licensing and lawsuits but also to push those old songs into the modern marketplace. Interpolations allow publishers to fuse an old song into a new creation, ultimately profiting off both songs' copyrights simultaneously. While the "Blurred Lines" decision has made original hitmaking appear rather treacherous, simply interpolating a pre-existing song—with legal clearance up-front—appears a safe bet.

The rise of interpolation is driven in large part by "financially-backed publishing companies looking for new revenue sources."[289] One such publishing company is Primary Wave, which holds the composition copyrights to the catalogs of Bob Marley, Stevie Nicks, Prince, Whitney Houston, and countless other legends.[290] The company's website proclaims its talent for "re-introducing classic artists and their music into the modern marketplace"—a direct nod to its interpolation efforts.[291] Justin Shukat, president of Primary Wave's publishing department, is open about their mission to revivify older songs in the company's catalog and make them profitable again.[292] To do this, publishers encourage new uses of their songs—whether in film and

286. *See e.g.,* Todd Spangler, *Peloton Settles Legal Fight with Music Publishers*, VARIETY (Feb. 27, 2020, 6:46 AM), https://variety.com/2020/digital/news/peloton-settles-music-publishers-lawsuit-1203517495/.

287. Menell, *supra* note 15, at 602 (footnotes omitted).

288. Wang, *supra* note 251.

289. Switched On Pop, *Invasion of the Vibe Snatchers*, *supra* note 32, at 13:40.

290. *About*, PRIMARY WAVE, https://primarywave.com/about-pw/ (last visited Jan. 12, 2024).

291. *Id.*

292. *Id.*

television synchronization spots, samples, cover versions, or interpolations—that will implicate the song's publishing copyright.[293] When the composition of that song is used for any of those purposes, the publisher is entitled to royalties as the composition's copyright owner.[294] Thus far, TikTok has proven a lucrative ground for Primary Wave's interpolation efforts. Doja Cat and SZA's "Kiss Me More" interpolates Olivia Newton-John's 1981 hit "Physical," to which Primary Wave owns the publishing copyright.[295] When the song became TikTok famous and climbed to Number 2 on *Rolling Stone*'s Top 100 Songs chart, Primary Wave retained a healthy portion of those composition royalties.[296] Doja Cat has received similar traction for her song "Freak," which interpolates the work of yet another Primary Wave artist, Paul Anka.[297]

Primary Wave is among the publishing companies who, seeing the fruits of the interpolation tactic, have moved to develop interpolation factories within their own walls. Several publishers with large rosters of older material have taken to hosting songwriting camps, bringing producers and songwriters together for a few days of collaboration.[298] These camps are engineered with interpolation at the core; participants are specifically tasked with situating fresh ideas on the backs of yesteryear's hits.[299] Primary Wave Creative Vice President Franny Graham describes their camp's emphasis on existing copyrights: "We wanted everyone to have fun, be as creative as you want, make whatever you'd like, but use our catalog as a starting point."[300]

When publishers enlist artists to bring their dormant material back into the mainstream, they collect royalty revenues from their signed songwriters' credits on the new track.[301] Additionally, the publicity can drive younger listeners to seek out and stream the older track. Companies that deal in not only music publishing but also artist management have the unique ability to

293. *Music Royalties 101 – Intro to Music Royalties*, ROYALTY EXCH. (Feb. 10, 2021), https://www.royaltyexchange.com/blog/music-royalties-101-intro-to-royalties.

294. *Id.*

295. *Kiss Me More Interpolations*, GENIUS, https://genius.com/Doja-cat-kiss-me-more-sample/interpolations (last visited Jan. 12, 2024); *Olivia Newton-John*, PRIMARY WAVE, https://primarywave.com/writer/olivia-newton-john/ (last visited Jan. 12, 2024).

296. Millman, *supra* note 277; Kristin Robinson, *How Primary Wave Proved Everything Old Is New Again with Yung Gravy's Radio Hit*, BILLBOARD (Sept. 9, 2015), https://www.billboard.com/pro/primary-wave-yung-gravy-radio-hit-sample-strategy/.

297. Millman, *supra* note 277.

298. *Id.*; Switched On Pop, *Invasion of the Vibe Snatchers*, *supra* note 32.

299. Millman, *supra* note 277.

300. *Id.*

301. *Id.*

keep it all in the family, profiting off their representation of old and new artists simultaneously. One such entity is Electric Feel, a record label/publisher/artist management company.[302] When companies manage to source new hits using only their own artists and producers, they stand to keep all the copyright revenue for themselves.

The success of these blatantly referential tunes can be attributed in large part to the zeitgeist's obsession with nostalgia. Young audiences have shown a dedicated interest in pop cultural history, making relics of decades past uniquely profitable.[303] Anne Marie's 2018 hit "2002" nods deliberately to a slew of early '00s hits in its lyrics, referencing songs from Britney Spears, Jay-Z, *NSYNC, and Nelly in the span of a single chorus.[304] Though few songs are quite so obvious, many pop hits have achieved great success by taking the highly referential songwriting route.

Dua Lipa's 2020 disco anthem "Don't Start Now" is a testament to the contemporary demand for dated trends, so it's fitting that the track appeared on an album titled *Future Nostalgia*.[305] In achieving its nostalgic feel, "Don't Start Now" appropriates numerous identifiable disco motifs.[306] The track seemingly nods to Nile Rogers, founder of the band Chic, with its distinctive funk bass and punchy rhythm guitar; the synth accents mimic the works of Giorgio Moroder, the "father of disco;" the distinctive use of Latin percussion mirrors the dance break in the Bee Gees' "You Should Be Dancing;" the orchestral flourishes and lyrical choices obviously reference Gloria Gaynor's "I Will Survive;" and the song's second chorus features a collage of "crowd sounds" that reflect Marvin Gaye's atmospheric "Got to Give It Up."[307] Thus, not only does Lipa's song consist almost entirely of borrowed motifs and recognizable vibes, it daringly nods to the song that ignited the most controversial copyright dispute of the last decade.[308] And these choices work—the song currently touts well over two billion streams

302. *About*, ELECTRIC FEEL, https://www.electricfeelent.com/ (last visited Jan. 12, 2024).

303. *See* Valentina Caballero, *The Nostalgia Generation: Romanticizing the Past to Capture the Attention of Young Consumers*, FORBES & FIFTH, Fall 2020, at 149, http://www.forbes5.pitt.edu/article/nostalgia-generation.

304. *2002 [Lyrics]*, GENIUS, https://genius.com/Anne-marie-2002-lyrics (last visited Jan. 16, 2024) ("Oops, I got 99 problems singing bye, bye, bye / Hold up, if you wanna go and take a ride with me / Better hit me, baby, one more time.")

305. DUA LIPA, *Don't Start Now*, *on* FUTURE NOSTALGIA (Warner Records 2020).

306. *Id.*

307. Switched On Pop, *Dua Lipa's Disco Fever*, VOX (Jan. 14, 2022), https://switchedonpop.com/episodes/dua-lipas-disco-fever?rq=fever.

308. *See* McPherson, *supra* note 246.

on Spotify and ranked among the ten most-played songs on both U.S. and U.K. radio in 2020.[309]

Even more impressive, however, is the track's refusal (at least up to the time of writing) to identify itself as an interpolation.[310] Not one of the disco-era legends that "Don't Start Now" openly appropriates have been given a songwriting credit.[311] This is not to say Dua Lipa and her team have not interpolated elsewhere. Another track on *Future Nostalgia*, "Physical," takes a lyric directly from Olivia Newton-John's 1981 hit of the same title and gives Newton-John an interpolation credit because of it.[312] Lipa's interpolation credit on "Physical" and the absence of interpolation credits on "Don't Start Now" point to the crux of the infringement debate: what features of a given song are copyrightable and what parts are open to anyone?

It seems that Lipa's camp agrees with the dissenting opinion in *Williams v. Gaye*: "commonplace elements that are firmly rooted in the genre's tradition" are "unoriginal and thus uncopyrightable."[313] If any of the copyright holders behind those disco references sue for infringement, there is nothing to prevent the "Blurred Lines" reasoning from rearing its unruly head against Lipa and her songwriting team. But if Gaye's estate hopes to take Lipa to task for what sounds like another "Got to Give it Up" homage, it will not be without irony. After all, Gaye's hit also borrowed some tricks from the popular songs that preceded it—namely Johnnie Taylor's "Disco Lady," the Bee Gees "You Should Be Dancing," and War's "Low Rider."[314] Regardless of whether a retro-inspired tune like "Don't Start Now" will breed legal action, it's crucial to remember that popstars like Dua Lipa have the resources to risk court battles whereas small-time songwriters do not. The greatest risk to independent creators is the possibility that the industry's interpolation pressure will influence the courts. If the judiciary allows

309. *USA: Most Played Songs on the Radio in 2020*, WARM (Jan. 15, 2021), https://www.warmmusic.net/post/most-played-songs-on-the-radio-us-in-2020; *Top 100 2020*, UK CHARTS, https://www.uk-charts.co.uk/index.php/charts/2020-s/39-2020/492-top-100-2020-full-year (last visited Jan. 16, 2024).

310. *Don't Start Now*, ALLMUSIC, https://www.allmusic.com/album/dont-start-now-mw0003332720/credits (last visited Jan. 16, 2024).

311. *Id.*

312. *See Physical: Interpolations*, GENIUS, https://genius.com/Dua-lipa-physical-sample/interpolations (last visited Jan. 18, 2024).

313. Williams v. Gaye, 895 F.3d 1106, 1141 (9th Cir. 2018) (Nguyen, J., dissenting).

314. JOHNNIE TAYLOR, *Disco Lady* (Columbia Records 1976); BEE GEES, *You Should Be Dancing*, *on* CHILDREN OF THE WORLD (RSO Records 1976); WAR, *Low Rider*, *on* WHY CAN'T WE BE FRIENDS? (United Artists Records 1975); *see* BOYLE AT AL., *supra* note 15, at 195.

copyright law to further accommodate music's most powerful investors, musical creativity will pay the price.

C. Is Taste the Test?

As interpolation grows more prevalent on the pop charts, similar-sounding songs are subjected to more calculating scrutiny. Those without the means to play the interpolation game are, ostensibly, trying to create totally original songs, staving off accusations of stealing wherever they dip into audibly familiar territory. With the widespread expectation that interpolation warrants a licensing fee or royalty payout, new works that accidentally invoke familiar sounds are thrust into the same category as intentional interpolations and are expected to share authorial credit. The copyright regime, as it stands, disadvantages writers who arrive latest to the songwriting party and seek to create something entirely their own. The later a work arrives, the larger its sea of predecessors.

This reality benefits interpolators, however, as their creations can enjoy the positive feedback that older hit songs have been cultivating for decades. The body of recorded works has grown exponentially since the radio-reliant days of The Beatles and The Bee Gees; now, with roughly 100,000 songs uploaded to streaming platforms every day, the possibility of stepping on an existing song's toes is practically guaranteed.[315] There's no question of whether a potential infringer had access to a given work when a song's mere existence on the internet renders it universally discoverable.[316] And it's not just the copyright holders themselves who are persecuting copycats; music listeners across the internet are eager to highlight the similarities between popular songs.[317] Modern listeners have the power to alter an artist's online reception from the soapbox that is social media.[318] While an artist's perceived credibility might not impact record sales, it does stand to impact the way they are perceived by a jury.

Olivia Rodrigo is a prime example of a contemporary starlet subjected to the policing of the virtual masses in the streaming era. The internet's response

315. Tim Ingham, *It's Happened: 100,000 Tracks Are Now Being Uploaded to Streaming Services Like Spotify Each Day*, MUSIC BUS. WORLDWIDE (Oct. 6, 2022), https://www.musicbusinessworldwide.com/its-happened-100000-tracks-are-now-being-uploaded/.

316. *See supra* footnotes 114–118 and accompanying text.

317. Myra Interiano et al., *Musical Trends and Predictability of Success in Contemporary Song In and Out of the Top Charts*, 5 ROYAL SOC'Y OPEN SCI., article no. 171274, May 2018, at 7, https://royalsocietypublishing.org/doi/epdf/10.1098/rsos.171274.

318. *See* Ross Crupnick, *Music Scores a Gold Record on the Social Media Charts*, MUSICWATCH (Aug. 6, 2018), https://musicwatchinc.com/blog/music-scores-a-gold-record-on-the-social-media-charts/.

to Olivia Rodrigo's 2021 album *Sour* was largely positive, but many listeners were skeptical of the young star's integrity as a songwriter.[319] Several TikToks and YouTube videos went viral highlighting the similarities between Rodrigo's songs and tracks by Paramore, Taylor Swift, and Elvis Costello.[320] The virtual policing of Rodrigo's aural "theft" ostensibly pressured Rodrigo into granting writing credits to several artists, including Taylor Swift and members of Paramore.[321] Though Rodrigo had openly cited these artists as inspiration,[322] it's unclear whether a jury would have found her music to be an actionable infringement.

The "Blurred Lines" decision suggests that admitting the sources of one's inspiration might be used to support a finding of infringement, as the Ninth Circuit viewed Thicke and Williams' desire to emulate Gaye as proof of copying.[323] For Rodrigo, the internet's critics acted as a makeshift jury, demanding that she cede credit and compensation to the artists who inspired her hits.[324] Those who labelled Rodrigo a thief likely felt a small victory when she ceded some credit to her forerunners; but her haters likely fail to realize that this outcome impacts much more than the popstar's pride. The trend of artists over-crediting and compensating others for songs that are merely

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319. Alex Gallagher, *Olivia Rodrigo Responds to Criticism over 'Sour' Songwriting Credits: "Nothing in Music Is Ever New"*, NME (Oct. 6, 2021), https://www.nme.com/news/music/olivia-rodrigo-responds-to-criticism-over-sour-songwriting-credits-nothing-in-music-is-ever-new-3063586.

320. *See* Jarred Jermaine, *Do These Songs Sound Similar to You?*, TIKTOK (May 21, 2021), https://www.tiktok.com/@jarredjermaine/video/6964862940818230533?lang=en; Chanel Vargas, *Olivia Rodrigo Meets Paramore in This Pop-Punk "Good 4 U" x "Misery Business" Mashup*, POPSUGAR (May 25, 2021, 2:10 PM), https://www.popsugar.com/entertainment/olivia-rodrigo-good-4-u-misery-business-mashup-video-48338455; Adamusic, *Olivia Rodrigo, Taylor Swift – Deja Vu x Cruel Summer (Mashup)*, YOUTUBE (Apr. 2, 2021), https://www.youtube.com/watch?v=lxgxTvUfBBI.

321. Jem Aswad, *Olivia Rodrigo Gives Taylor Swift Songwriting Credit on Second 'Sour' Song, 'Déjà Vu'*, VARIETY (June 9, 2021, 7:54 AM), https://variety.com/2021/music/news/olivia-rodrigo-taylor-swift-songwriting-credit-deja-vu-1235015769/; Jem Aswad, *Olivia Rodrigo Adds Paramore to Songwriting Credits on 'Good 4* U', VARIETY (Aug. 25, 2021, 7:38 AM), https://variety.com/2021/music/news/olivia-rodrigo-paramore-good-4-u-misery-business-1235048791/.

322. Rodrigo gushed about her desire to emulate Swift's song: "I love 'Cruel Summer.' It's one of my favorite songs ever. I love the yell-y vocals in it, like the harmonized yells that she does. . . . I wanted to do something like that." Brittany Spanos, *'The Breakdown': Olivia Rodrigo Details the Making of Psychedelic New Song 'Déjà Vu'*, ROLLING STONE (Apr. 7, 2021), https://www.rollingstone.com./music/music-news/olivia-rodrigo-breakdown-deja-vu-1150041/.

323. Williams v. Gaye, 895 F.3d 1106, 1123 (9th Cir. 2018).

324. Gallagher, *supra* note 319.

referential harms songwriters across the board—primarily those whose labor fuels the modern star-making machine.

Though there are plenty of examples in which copyright holders or internet critics take aim against wrongful copying, songwriters are generally less willing to attack others for musical borrowing. Many artists acknowledge that borrowing is integral to musical creation,[325] as there are only so many ways to make a certain style of song. Even the identifying features that allow us to distinguish one musician from another are not as distinct or original as they might seem. Ray LaMontagne's vocal style borrows from Joe Cocker, who borrowed from Ray Charles, who borrowed from Nat King Cole,[326] and the list stretches onward in both temporal directions. When the internet highlighted the resemblance Olivia Rodrigo's "Brutal" bore to Elvis Costello's 1978 song "Pump It Up," Costello countered with some words on the ubiquity of musical borrowing: "It's how rock and roll works. You take the broken pieces of another thrill and make a brand new toy. That's what I did."[327]

When Lorde's 2021 single "Solar Power" was outed for its resemblance to Primal Scream's "Loaded," the band's frontman responded by giving Lorde his blessing. Lorde recounted Gillespie's assurance: "He was like, 'these things happen, you caught a vibe that we caught years ago.' And he gave us his blessing. So let the record state 'Loaded' is 100 percent the original blueprint for this, but we arrived at it organically, and I'm glad we did."[328] Despite Gillespie and Costello's rejection of the interpolation game, not every legacy artist has declined the financial kickback of an interpolation credit. In fact, some have deliberately sought it out.

In 2015, Tom Petty was granted a slice of the songwriting credit for Sam Smith's hit "Stay With Me."[329] Petty seemingly believed his 1989 hit "Won't Back Down" earned him authorial entitlement to the common descending chorus melody that Smith's song also used; the parties quickly came to an agreement following Petty's threat of legal action.[330] This trend of altering songwriting credits after a song has been released is becoming fairly

325. Alison P. Wynn, Note, *Copyright Law-Unique Characteristics of Music Warrant Its Own System: How Adopting the Intended Audience Test Can Save Music Copyright Litigation*, 39 W. NEW ENG. L. REV. 1, 14 (2017).

326. BOYLE ET AL., *supra* note 15, at 212.

327. Millman, *supra* note 277.

328. *Id.*

329. *See* Daniel Kreps, *Tom Petty on Sam Smith Settlement: 'No Hard Feelings. These Things Happen'*, ROLLING STONE (Jan. 29, 2015), https://www.rollingstone.com/music/music-news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-35541/.

330. *Id.*

common.[331] To avoid the costly possibility of litigation, contemporary artists opt to wage private deals with their musical predecessors, often giving over songwriting credits and portions of composition royalties in the process. Even so, the Grammy Foundation did not consider Tom Petty a co-writer of "Stay With Me" when the track won Song of the Year in 2014; Petty got an interpolation credit and a royalty cut but no Grammy award out of Smith's song.[332]

Though the frequency of such deals is on the rise, it's not unprecedented for songwriting credits to fluctuate following a song's release. This has occurred several times throughout rock history, particularly where gospel and blues songs are concerned. The Rolling Stones' rendition of "Prodigal Son," a composition written by Reverend Robert Wilkins, was erroneously credited to the Stones on *Beggar's Banquet*; the improper credit was swiftly corrected and royalties paid to Wilkins.[333] A similar mix-up occurred with Cream's cover of Skip James' "I'm So Glad," which was also corrected post-release.[334]

Credit alteration also takes place when an artist is sued for plagiarizing another songwriter's work, as has been the case with Led Zeppelin several times. Though the blues-rock icons won their lawsuit against Michael Skidmore over "Stairway to Heaven," the band has previously yielded songwriting credits—and out-of-court settlements—to blues progenitors such as Jake Holmes, Willie Dixon, and Howlin' Wolf.[335] As time stretches on, musical borrowing becomes increasingly taboo. Whereas Led Zeppelin was challenged for appropriating the specific works of other artists, Greta Van Fleet (Gen Z's leading white-male-blues-rock band) are vilified for resembling Zeppelin's overarching *sound*. *Pitchfork*'s scathing critique of the band's "costume[d]" Led Zeppelin imitation is quick to criticize the newcomers for their appropriation, while conveniently ignoring Zeppelin's

331. Millman, *supra* note 277; *see supra* note 321.

332. Harris, *supra* note 72, at 20.

333. Richard Harrington, *Singing All the Way to Court*, WASH. POST (Sept. 28, 1980, 8:00 PM), https://www.washingtonpost.com/archive/lifestyle/1980/09/28/singing-all-the-way-to-court/8a31570f-a265-47d3-bd89-bc8b0dd9868b/.

334. Tony Glover, *The Rolling Stones' "Prodigal Son": A Song Confusion*, ROLLING STONE (Mar. 1, 1969, 6:30 PM), https://www.rollingstone.com/music/music-news/the-rolling-stones-prodigal-son-a-song-confusion-176514/amp/.

335. Carman Tse, *This Isn't the First Time Led Zeppelin Has Been Accused of Ripping Off Someone Else's Song*, LAIST (June 15, 2016, 11:00 PM), https://laist.com/news/entertainment/this-isnt-the-first-time-led-zeppelin-has-been-accused-of-ripping-off-someone-elses-song.

own appropriations.[336] Zeppelin gave the creative output of black blues artists a white presentation and made a killing off an industry that favored white performers.[337]

The culture of over-cautious crediting that now colors the music industry has convinced listeners that Greta Van Fleet is wrong for copping a style that has already been worn. Interpolation tells a story in which the first ones to claim a given sound deserve continuous credit for having gotten there earliest. This emphasis on ownership and credit implies that any act of remixing older material must be policed; but with so many centuries of musical creation already behind us, the only thing left to do is *re*-do. This, at least, is one response to critics of newcomers like Greta Van Fleet. But then again, those who despise Greta Van Fleet's Zeppelin appropriations might simultaneously appreciate Janelle Monae's Prince-derived singles.[338] Whether an homage is adored or abhorred, the intrinsically evocative nature of music is undeniable.

Songs are emotional conduits, making it nearly impossible to listen to any piece of music with purely objective, analytical ears. "Music has a deep effect on individuals, 'speak[ing] to us in mysterious and profound ways and invok[ing] within us numerous physiological and emotional responses.'"[339] Music triggers involuntary responses in humans at every developmental stage, proving that our reactions to the medium are not calculated but instinctive.[340] Even renowned music publications like *Pitchfork* and *Rolling Stone* do not rate musical works according to any identifiable formula; such ratings are born entirely of a critic's personal response to a given piece of music, not any sort of technical parameters.[341] "Even deeper, because of its

336. Jeremy D. Larson, *Anthem of the Peaceful Army*, PITCHFORK (Oct. 23, 2018), https://pitchfork.com/reviews/albums/greta-van-fleet-anthem-of-the-peaceful-army/.

337. The fact that BBC Radio initially declined to play the Rolling Stones' singles on account of Mick Jagger sounding "too black" is a testament to this prejudice. BOYLE ET AL., *supra* note 15, at 146.

338. *See* Rhian Daly, *There's a Very Good Reason Why Janelle Monae's Huge New Single Sounds Like Prince*, NME (Feb. 26, 2018), https://www.nme.com/news/music/theres-good-reason-janelle-monaes-huge-new-single-sounds-like-prince-2249246.

339. Wynn, *supra* note 325, at 12 (quoting Keyes, *supra* note 108, at 421).

340. Keyes, *supra* note 108, at 421–22.

341. *See* Kelsey Borovinsky, *Pitchfork's Reviews Section By the Numbers*, PITCHFORK (May 26, 2021), https://pitchfork.com/features/lists-and-guides/25-years-of-pitchfork-reviews-by-the-numbers/; *see also* Joe Levy, *Rolling Stone at 50: How Magazine's Album Reviews Became a Cultural Fixture*, ROLLING STONE (Apr. 18, 2017), https://www.rollingstone.com/music/music-news/rolling-stone-at-50-how-magazines-album-reviews-became-a-cultural-fixture-114391/.

communicative power, the emotional responses evoked from music make it distinctive from other forms of artistic expression."[342] It's unrealistic to assume those emotions do not influence the judges and juries tasked with deciding copyright decisions. Even so, the intrinsically human response to music seems more influential in some cases than others.

In 2000, the Ninth Circuit found Michael Bolton liable for infringing the Isley Brothers' gospel-infused track "Love is a Wonderful Thing" with his 1991 pop tune of the same name.[343] Despite the fact 129 other songs share that title, the circuit court believed Bolton's tune ripped off the Isley Brothers in particular; its finding was supported by only a modest showing of access and substantial similarity.[344] This case exhibits how an artist's public acknowledgment of inspiration often supports a finding of infringement.[345] Additionally, the case's outcome is more easily justified by human bias than a strict adherence to copyright law. Copyright scholar Peter Menell suspects that the jury verdict stemmed from the belief "that Bolton owed a debt to the R&B artists who influenced his development and that this case provided a means to repay that debt."[346] Of the eight music critics polled by Entertainment Weekly, only two of them "considered the songs musically similar, whereas all of them trashed Bolton for cultural appropriation."[347]

Similarly, the Ninth Circuit's adjudgment of the "Blurred Lines" creators is easiest to justify when considering the human opinions at play within a jury. Pop music is laboriously engineered to prey upon the average listener's senses.[348] It is important to recognize that "Blurred Lines" not only preyed upon listeners' ears, but also came across as predatory in its subject matter and presentation.[349] Both the song's music video and its live debut at the 2013 VMA's catered to the male gaze, and disappointed viewers were quick to point the foam finger at Thicke and Pharrell, whose song seemingly endorsed

342. Wynn, *supra* note 325, at 12–13.

343. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 480 (9th Cir. 2000), *overruled by* Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020).

344. *Id.* at 486.

345. *Id.*

346. Menell, *supra* note 15, at 571.

347. *Id.* at 573.

348. *See* Theodor W. Adorno, *On Popular Music [1941]*, *in* CULTURAL THEORY AND POPULAR CULTURE 197, 206 (John Storey ed., 2d ed. 1998), https://www.amherst.edu/media/view/91838/original/Adorno%2B-%2BOn%2BPopular%2BMusic.pdf.

349. J'Na Jefferson, *The Murky Legacy of Robin Thicke's 'Blurred Lines' Five Years Later: Op-Ed*, BILLBOARD (Mar. 26, 2018), https://www.billboard.com/music/rb-hip-hop/robin-thicke-blurred-lines-five-year-anniversary-8260940/.

female objectification and questionable standards of sexual consent.[350] The public response to "Blurred Lines" was one of widespread disdain, despite its thirty-three-week stay on the Billboard Hot 100 and nearly two-month reign as the Number 1 song.[351] Right on the heels of its release, *Rolling Stone* published a scathing critique of the song, even circling back in 2022 to reaffirm that it remains one of the worst songs of all time.[352] In 2013, Edinburgh University Students' Association banned the song, followed by roughly twenty other student unions in the United Kingdom.[353] Some have speculated that the perceived sleaziness of the song and its singer may have impacted the jury's evaluation of copyright infringement.[354] It's likely that almost any person—even one tasked with upholding fairness and objectivity—would struggle to advocate for the merits of a song they intensely dislike. Several theories about the jury's decision-making process "boil down to the universal observation that, throughout the legal proceedings, Robin Thicke came across like an asshole."[355] Much like the jury's unsympathetic assessment of Michael Bolton's tune, the unexpected "Blurred Lines" verdict signifies the "strong emotional sway" that occasionally shapes copyright infringement outcomes.[356] In a copyright system that equips human jurors with such critical decision-making power, it's vital that courts firmly define the limiting factors the law provides.

D. Creativity Succumbs to Corporate Ambition

As the music industry grows in both its copyrights and its capital, the future of the public domain appears less promising for creators. "[Humans] believe that ideas are property, and we're excessively territorial when we feel that property belongs to us."[357] Instead of limiting humankind's more selfish

350. *Id.*

351. *Id.*

352. *See* Rob Sheffield, *'Blurred Lines': The Worst Song of This or Any Other Year*, ROLLING STONE (Dec. 6, 2013), https://www.rollingstone.com/music/music-news/blurred-lines-the-worst-song-of-this-or-any-other-year-187383/; Brian Hiatt, *The Worst Songs Ever, from 'Blurred Lines' to 'Twinkle Twinkle Little Bitch'*, ROLLING STONE (Aug. 19, 2022), https://www.rollingstone.com/music/music-features/worst-songs-of-all-time-ever-made-1234578171/.

353. Lynskey, *supra* note 40.

354. Menell, *supra* note 15, at 589.

355. *See id.*; *see also* Andy Hermann, *Smug Turd of a Pop Song 'Blurred Lines' Has Now Ruined the Music Industry*, VILLAGE VOICE (Mar. 13, 2015), https://www.villagevoice.com/2015/03/13/smug-turd-of-a-pop-song-blurred-lines-has-now-ruined-the-music-industry/.

356. Menell, *supra* note 15, at 573.

357. Kirby Ferguson, *Everything Is a Remix Remastered (2015 HD)*, YOUTUBE (May 16, 2016), https://youtu.be/nJPERZDfyWc?si=MQY-hLsINsVTzTNV.

impulses, copyright law has indulged them with "ever-broadening protections and massive rewards."[358] Though copyright protection did not set out to gatekeep certain modes of creativity from the masses, this outcome is necessitated by enlarging zones of exclusivity.

Steve Jobs famously touted the belief that "great artists steal," expressing pride over his appropriation of a stolen idea to develop the first Macintosh computer.[359] Jobs openly admitted his intellectual thievery to the press, claiming the Apple team has "always been shameless about stealing great ideas."[360] Though he was eager to defend his own execution of a stolen idea, Jobs dramatically changed his tune when Apple's ideas were appropriated. Jobs asserted his plans "to destroy Android, because it's a stolen product," claiming he was "willing to go thermonuclear war" in response to their appropriation of Apple technology.[361] Jobs's beliefs about the free exchange of creativity seemed to shift in direct correlation with his success; as his assets increased, his generosity declined—a phenomenon that pervades the entirety of the intellectual property sphere.

The music industry largely mirrors Jobs' mentality, leaning further into acquisition as profits increase. The *Bridgeport* case famous for prohibiting unlicensed sampling was just one of many infringement suits filed by Bridgeport Music, Inc.—a one-man publishing company that is frequently criticized as a "copyright troll."[362] Music producer Armen Boladian founded Bridgeport in 1969, just one year after he started his own record label, Westbound Records.[363] Bridgeport is a "catalog company," meaning its assets are composed entirely of music copyrights.[364] To call Bridgeport a company may be a bit of a stretch, though, since it has no employees—only Boladian as its sole publisher and payee.[365]

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358. *Id.*

359. *Triumph of the Nerds: The Television Program Transcripts: Part III*, PBS, https://www.pbs.org/nerds/part3.html (last visited Jan. 18, 2024).

360. *Id.*

361. Farber, *supra* note 5.

362. Fred Von Lohmann, *Sample Trolls Killing Hip Hop?*, ELEC. FRONTIER FOUND. (Nov. 17, 2006), https://www.eff.org/deeplinks/2006/11/sample-trolls-killing-hip-hop; Wu, *supra* note 21.

363. *History*, BRIDGEPORT MUSIC, INC., https://bridgeportmusicinc.com/history.html (last visited Jan. 18, 2024) [hereinafter *History*, BRIDGEPORT MUSIC]; *Music*, WESTBOUND RECORDS, https://westboundrecords.bandcamp.com/music (last visited Oct. 23, 2022).

364. Wu, *supra* note 21.

365. *Id.*; *see History*, BRIDGEPORT MUSIC, *supra* note 363.

George Clinton, funk pioneer and founder of legendary groups Parliament and Funkadelic, signed to Westbound Records shortly after its founding.[366] The musician does not deny contracting with Boladian for music production, but he denies claims that he relinquished his publishing rights.[367] Clinton claims that Boladian forged his signature on a contract ceding his publishing rights, and he has waged several lawsuits to recoup these rights from Boladian.[368] Even so, Boladian maintains that the contract was legitimate and continues to hold the publishing rights to roughly 170 of Clinton's songs.[369]

Although evidence of the initial agreement is sparse, Bridgeport's eventual wielding of Clinton's copyrights is well-documented. Ramona DeSalvo, a member of Bridgeport's legal team, estimated that the publisher initiated nearly 600 lawsuits, suing "everyone who'd ever made a rap record or who ever thought about making a rap record."[370] This litany of lawsuits targeted virtually every artist who had sampled a George Clinton song in Bridgeport's catalog.[371] Boladian effectively weaponized his copyright ownership, taking action to penalize anyone who had used even a minute snippet of Clinton's music.[372] This legal stampede antagonized hip hop artists at large, while also directly defying the ethos of Clinton—without whom such copyrights would not exist. Clinton has openly expressed his appreciation for the art of sampling and maintains that artists are "not supposed to get sued all over the place for doing it."[373]

Despite Clinton's public contempt for Boladian's practices, the Bridgeport Music, Inc. website still lauds Funkadelic's music as the crowning glory of

366. *History*, BRIDGEPORT MUSIC, *supra* note 363.

367. *See* Lauretta Charlton, *George Clinton Believes Our Music Copyright Laws Are Broken . . . and That Aliens Exist*, VULTURE (May 4, 2015), https://www.vulture.com/2015/05/george-clinton-on-aliens-and-lawsuits.html; Allison Keyes, *George Clinton Fights for His Right to Funk*, NPR: THE RECORD (June 6, 2012, 4:00 PM), https://www.npr.org/sections/therecord/2012/06/06/154451399/george-clinton-fights-for-his-right-to-funk; *see also* Boladian v. Clinton, No. 277314, 2008 WL 3852155 (Mich. Ct. App. Aug. 19, 2008) (per curiam).

368. Keyes, *supra* note 367.

369. *Id.*

370. Kessler et al., *supra* note 221, at 109.

371. *Id.* at 117.

372. *Id.*

373. Jeremiah Alexis, *George Clinton: 'We Never Minded Them Sampling'*, RED BULL (Feb. 20, 2017, 1:08 AM), https://www.redbull.com/us-en/george-clinton-on-samples-youtube-and-youth; *see also* Michael A. Gonzales, *George Clinton Talks About His Favorite Parliament-Funkadelic Samples*, COMPLEX (Jan. 31, 2012), https://www.complex.com/music/2012/01/george-clinton-talks-about-his-favorite-parliament-funkadelic-samples/funk-gets-stronger-killer-millimeter-longer-version.

its catalog and "the foundation for much of rap."[374] The site even flaunts the ubiquitous samples spawned by Clinton's work, which "breathe life into some of the most legendary rap jams ever."[375] This credit is naturally undercut by a not-so-humble reminder that all of these works "can be attributed to the legendary vision of one man, Armen Boladian, who allowed his artists complete creative freedom."[376] The irony of the site's statements is surely not lost on the countless artists who have been sued by Bridgeport for their own attempts to exercise creative freedom by way of sampling. Despite Bridgeport's reputation as an outlier among copyright holders, "[t]he vast majority of the nation's valuable copyrights are owned not by creators, but by stockpilers of one kind or another, and Bridgeport is just a particularly pernicious example."[377]

Most sampling lawsuits originate with publishers or labels, while the artists whose work is argued over play no role in the legal pursuit. For example, in 2012, the Beastie Boys were sued for sampling a drum fill that was originally recorded by the go-go band Trouble Funk.[378] But the members of Trouble Funk were not aware of the sample, nor were they privy to the lawsuit against the Beastie Boys; it was the band's publishing company, Tuff City, who challenged the songs over two decades after their release.[379] Adding insult to injury, Tuff City filed the suit one day before Beastie Boys' founder Adam Yauch died of cancer.[380]

The acquisitiveness among copyright holders is encapsulated in Warner Chappell Music's response to a YouTube video covering its initial loss in a music copyright lawsuit. Warner Chappell is the publisher for pop artist Katy Perry, and in 2014 the pair were sued for copyright infringement by SoundCloud rapper Flame.[381] The suit alleged that Perry's song "Dark

374. *History*, BRIDGEPORT MUSIC, *supra* note 363.

375. *Id.*

376. *Id.*

377. Wu, *supra* note 21.

378. Richards, *supra* note 225.

379. *Id.*

380. Chris Richards, *Beastie Boys Sued over Trouble Funk Samples, Legendary Go-Go Band Was Unaware of Lawsuit or Adam "MCA" Yauch's Death*, WASH. POST (May 8, 2012, 2:31 PM), https://www.washingtonpost.com/blogs/arts-post/post/beastie-boys-sued-over-trouble-funk-samples-legendary-go-go-band-was-unaware-of-lawsuit-or-adam-mca-yauchs-death/2012/05/08/gIQAtrLzAU_blog.html?tid=a_inl_manual.

381. Emily Zemler, *Katy Perry's 'Dark Horse' Copied Christian Rapper Flame, Jury Finds*, ROLLING STONE (July 30, 2019), https://www.rollingstone.com/music/music-news/katy-perry-dark-horse-lawsuit-flame-865058/.

Horse" lifted a three-note ostinato from Flame's "Joyful Noise."[382] Popular music vlogger Adam Neely made a video responding to the lawsuit, in which he defended Perry's right to use the garden-variety ostinato in her song.[383] Neely pointed out that dozens of composers have used the same ostinato, highlighting that the element is highly unoriginal and thereby unprotectable.[384]

Neely's video quickly garnered the attention of several media outlets and roughly three million viewers on YouTube.[385] Neely defended the rights of Perry and Warner Chappell to create and release the song because he "truly believe[d] the lawsuit was bad . . . for the artform of music making."[386] Warner Chappell responded by claiming rights to the advertising revenue for Neely's video, contending that it unlawfully features the song's melody.[387] The irony—which Neely points out in a follow-up video—is that his video used only the ostinato at issue in the lawsuit; he does not include the song's chorus.[388] Further enriching the irony, Warner Chappell's infringement claim cites to part of the video that features the Joyful Noise ostinato—*not* the one used in "Dark Horse."[389] It appears that the publishing company, despite its eagerness to cash in on music copyrights, has little mind for music itself.

In Neely's follow-up video, he remarks the callousness of Warner Chappell's decision to "specifically target" the revenue of a YouTuber who came to its defense.[390] The conduct of Warner Chappell in this scenario, while darkly comical, is not remotely surprising in the grand scheme of music copyright disputes. The internal structure of the music industry puts songwriters with minimal foresight and bargaining power at the mercy of copyright holders. Labels and publishers leverage exclusive recording artist

382. *See id.*

383. Adam Neely, *Why the Katy Perry/Flame Lawsuit Makes No Sense*, YOUTUBE (Aug. 2, 2019), https://www.youtube.com/watch?v=0ytoUuO-qvg.

384. *Id.*

385. *Id.*; Adam Neely 2, *Warner Music Claimed My Video for Defending Their Copyright in a Lawsuit They Lost the Copyright For*, YOUTUBE (Feb. 6, 2020), https://www.youtube.com/watch?v=KM6X2MEl7R8; Jeremy Hobson & Serena McMahon, *Musician Says Katy Perry's 'Dark Horse' Copyright Infringement Verdict Sets a 'Dangerous Precedent'*, WBUR (Aug. 14, 2019), https://www.wbur.org/hereandnow/2019/08/14/katy-perry-dark-horse-copyright-infringement-case.

386. Neely 2, *supra* note 385.

387. This is a claim Warner Chappell has since rescinded. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

agreements that place a bulk of copyright ownings in their hands, overtaking songwriters in the battle for creative control.[391]

This power imbalance is what emboldened Fantasy Records to sue songwriter John Fogerty for plagiarizing his own material. When Creedence Clearwater Revival ("CCR") signed to Fantasy Records in 1969, they signed over copyright ownership of both their masters and compositions to Fantasy and its subsidiary, Jondora Music Publishing.[392] The contract ensured that Fantasy and Jondora controlled the band's musical output for the foreseeable future; but even after Fogerty, CCR's frontman and principal songwriter, escaped the Fantasy contract, the label still attempted to control his songwriting.[393] Claiming that Fogerty's 1985 release "The Old Man Down the Road" was too similar to his 1970 Fantasy-owned hit "Run Through the Jungle," Jondora sued Fogerty for "copying" his signature songwriting style.[394] A jury trial found that the songs lacked sufficient similarity to support an infringement claim, but Fogerty was still out $1 million in legal fees.[395]

Though Fogerty ultimately recouped his legal expenses—having successfully appealed to the Supreme Court in 1994—he was nonetheless tormented for much of his adult life by a label contract he executed in his early twenties.[396] Fortunately, Fogerty's courtroom experiences reinforced his freedom to create, ruling against the label which sought primarily to flex their control.[397]

Fogerty's story not only illustrates the music industry's tendency to abuse its artists but also the authority of the judiciary to combat these copyright abuses. Federal judges have the ultimate authority to shape copyright law, protecting it from the misgivings of copyright holders—and even juries.[398] It's the judiciary's responsibility to keep copyright law tethered to its principles, namely the promotion of creative progress and an expansive

391. Hank Bordowitz, *The 1969 Creedence Clearwater Revival Recording Contract and How it Shaped the Future of the Group and Its Members*, 12 J. MUSIC & ENT. INDUS. EDUCATORS ASS'N 69, 73 (2012), https://www.meiea.org/resources/Journal/Vol.12/MEIEA_Journal_vol_12_no_1_2012.pdf.

392. *Id.*

393. *See* Joe Daly, *That Time John Fogerty Was Sued for Plagiarising John Fogerty*, LOUDER (Dec. 30, 2022), https://www.loudersound.com/features/that-time-john-fogerty-was-sued-for-plagiarising-john-fogerty.

394. *Id.*

395. *Id.*

396. Bordowitz, *supra* note 391, at 83–84.

397. *Id.*

398. *See* Selle v. Gibb, 741 F.2d 896, 903 (7th Cir. 1984).

public domain, despite the music industry's beliefs about song creation and who should benefit from its success.

E. The Music Industry: As Capital Increases, Creators Weaken

The music industry has turned to interpolations not just because nostalgia is trending, but because this category of songs pays out to a bigger web of copyright holders. To safely take part in the interpolation trend, hitmakers must obtain permission from the copyright holders behind the source material. The major labels are leaning into the law's emphasis on licensing and permission not because it's the equitable thing to do, but because they have bolstered their copyright holdings and want a return on those investments. A 2018 BuzzAngle Music report found that 62.1% of all streams were attributed to songs that had been released over a year and a half ago.[399] Though major labels continue expanding their roster of new talents, an impressive store of their resources is being spent on yesterday's stars. The last few years saw label titans buying back the recording and publishing rights to many of their artists' catalogs, "in some cases paying a premium for rights they had previously given back to creators in exchange for extending their contracts so they can control more of the music that will drive returns for decades to come."[400]

Major labels are buying up as much prime musical real estate as they can afford, recognizing that copyright holdings are the current marketplace's cash cow. The bulk of the music industry's profits are now a result of "catalog" records rather than new releases.[401] The three major music labels appear to be in a spending war with each other, racing to buy up successful indie labels and further consolidate the music industry's wealth. In September of 2021, Warner Chappell Music bought David Bowie's publishing rights for an estimated $250 million, making Warner the owner of every composition Bowie wrote from 1968 onward.[402] In December of that year, Sony Music Group acquired Bruce Springsteen's entire collection of

399. Jamie Powell, *The Death of Cultural Transmission*, FIN. TIMES (Apr. 4, 2019), https://www.ft.com/content/a5e031e7-e683-36b1-a263-b0cac05fbeee.

400. *The 2022 Billboard Power List Revealed*, BILLBOARD (Jan. 26, 2022), https://www.billboard.com/business/business-news/billboard-2022-power-list-1235022798/.

401. Tim Ingham, *Over 73% of the US Music Market is Now Claimed by Catalog Records, Rather Than New Releases*, MUSIC BUS. WORLDWIDE (Jan. 6, 2022), https://www.musicbusinessworldwide.com/over-82-of-the-us-music-market-is-now-claimed-by-catalog-records-rather-than-new-releases2/.

402. Beaumont-Thomas, *supra* note 254.

master recordings and publishing rights.[403] Universal Music Publishing Group amassed "Bob Dylan's entire 60-year, 600-song catalog—one of the most prestigious in music—for an undisclosed price."[404]

Beyond the major label circle, billionaire investors are buying their way into the copyright ownership scheme. Irving Azoff's new company Iconic Artists Group has already purchased rights from the Beach Boys, David Crosby and Linda Ronstadt.[405] Jody Gerson, Universal's CEO of Publishing, commented on the burgeoning interest in music publishing: "Now there are these players who are just buying up these rights, and they're calling these catalogs 'asset classes.'"[406] Gerson distinguished herself from these rival investors, stating that she believes "music is not an asset class," but "an art."[407] Regardless of its purported ethos, Universal's publishing revenue played a crucial role in propelling the company's net worth to $53.9 billion by the end of 2022.[408]

"Since 2017, none of the top 10 streamed tracks in the U.S. were written and sung by the same person."[409] Professional songwriter Emily Warren has penned hits for the likes of Dua Lipa, the Chainsmokers, and a host of other contemporary chart-toppers.[410] Even so, her talent has been routinely discounted by the music industry's higher-ups; Warren has been subject to requests from popular artists' managers and publishers who feel entitled to her share of the composition copyright.[411] It is increasingly common for major label artists (often at the insistence of their record labels) to demand a portion of the publishing rights for songs that were written by someone else (or sometimes an entire team of songwriters).[412] This practice is reminiscent of the traditional dynamic, wherein artists—who actually wrote their songs—

403. Press Release, Sony Music, Sony Music Group Announces Acquisition of Bruce Springsteen's Music Catalogs (Dec. 16, 2021), http://www.sonymusic.com/sonymusic/smg-announces-acquisition-of-bruce-springsteens-music/.

404. *The 2022 Billboard Power List Revealed*, *supra* note 400.

405. Angie Martoccio, *Linda Ronstadt Sells Catalog to Irving Azoff's Iconic Artists Group*, ROLLING STONE (Mar. 22, 2021, 10:00 AM), https://www.rollingstone.com/pro/news/linda-ronstadt-irving-azoff-catalog-1144437/amp/.

406. *The 2022 Billboard Power List Revealed*, *supra* note 400.

407. *Id.*

408. *Id.*

409. Casey Mendoza, *Do Pop Stars Write Their Own Songs?*, NEWSY (Jan. 25, 2022, 10:00 PM), https://www.newsy.com/stories/do-pop-stars-write-their-own-songs/.

410. Switched On Pop, *Pop's Worst Kept Secret*, *supra* note 280.

411. *Id.*

412. John Seabrook, *Inside the Song Machine: How Today's Hits Are Manufactured*, GIZMODO (Nov. 9, 2015), https://gizmodo.com/inside-the-song-machine-how-todays-hits-are-manufactur-1741383777.

were compelled to give away the publishing rights to publishing companies in exchange for promotion and other promises from the company.[413] Ultimately, a songwriter's share of the composition copyright determines the amount of payment they stand to receive for that song's sales, streams, radio plays, public performances, and synchronization licenses on film or television.[414] "Today, a top artist can insist on a full share of the publishing [rights] even though they had nothing to do with writing the song."[415] Where songwriters are urged to give up meaningful shares of this copyright, they also give up any future revenue that copyright entails.

Emily Warren started The Pact to protect fellow pop songwriters from being pressured to give up a percentage of their publishing royalties—a phenomenon that has grown more common as the music industry begins to recognize the value of a hit song's publishing rights.[416] The Pact specifically critiques those who request publishing shares without contributing to the songwriting process.[417] Songwriters like Warren are refusing to give up portions of their publishing revenue because, as they explain, the business of songwriting is financially unstable even without these unwarranted pay cuts.[418] "[T]here's a tremendous amount of money that gets away from the artist as other players step in and help with music distribution and sales."[419]

Even when working for the biggest names in pop music, songwriters don't stand to make significant money unless their tune hits the terrestrial radio charts.[420] "Nothing but a radio single has value," Warren claims, which is why songwriters are so reluctant "to make an interesting song [or] a slow song."[421] The payment structure at play in the music industry not only disadvantages songwriters, but creativity at large. Songwriter Helienne Lindvall admits that writers only make "enough to buy a couple of lattes" from the songs that don't make the charts, which "leaves very little leeway

413. *Id.*

414. *See Music Royalties 101 – Publishing Royalties*, *supra* note 293.

415. Seabrook, *supra* note 412.

416. Jem Aswad, *Who Is the Songwriters' Group the Pact, and What Do They Want?*, VARIETY (Mar. 30, 2021, 4:49 PM), https://variety.com/2021/music/news/who-is-songwriters-group-the-pact-1234941186/.

417. *See* Switched On Pop, *Pop's Worst Kept Secret*, *supra* note 280.

418. *Id.*

419. Amy X. Wang, *Musicians Get Only 12 Percent of the Money the Music Industry Makes*, ROLLING STONE (Aug. 7, 2018), https://www.rollingstone.com/pro/news/music-artists-make-12-percent-from-music-sales-706746/.

420. Switched On Pop, *Pop's Worst Kept Secret*, *supra* note 280.

421. *Id.*

for experimentation."[422] Warren reiterates this, admitting that she makes roughly $8 on songs that peak solely on the streaming charts.[423] As of 2023, streaming has eclipsed all other forms of music consumption, making the songwriter's struggle for income an even greater challenge.

According to the Recording Industry Association of America's 2022 report, streaming was responsible for roughly 84% of the total revenue from recorded music.[424] While physical and digital music sales have shrunk to mere droplets within the revenue pool, streaming-related profits have grown exponentially since 2010.[425] IFPI reported that subscription-based streaming services expanded the global music market by 18.5% in 2021 alone.[426] But this revenue is divided several times—and in startling portions—before it returns to the songwriters who created the stream-able content in the first place.[427] A 2018 Citigroup report showed that the amount of money U.S. music listeners were spending had reached an all-time high, but only 12% of that revenue actually reached the creators themselves.[428]

Despite Spotify founder Daniel Ek's dream of supporting a million artists' livelihoods with streaming royalties alone,[429] the net earnings of a majority of the platform's creators are measly. While the "top tier" of Spotify artists share 90% of the total streaming revenue, the remaining 98.6% of its contributors average about twelve dollars per month for their works;[430] this trend is reflected by the music market at large, wherein 77% of all profits are generated by only 1% of all participating artists.[431] Even so, this sizable chunk of revenue attributed to the superstars of the moment is split numerous

422. Lynskey, *supra* note 40.

423. Switched On Pop, *Pop's Worst Kept Secret*, *supra* note 280.

424. Joshua P. Friedlander & Matthew Bass, *Mid-Year 2022 RIAA Revenue Statistics*, RIAA, https://www.riaa.com/wp-content/uploads/2022/09/Mid-Year-2022-RIAA-Music-Revenue-Report-1.pdf (last visited Mar. 11, 2024).

425. *See IFPI Global Music Report: Global Recorded Music Revenues Grew 18.5% in 2021*, IFPI (Mar. 22, 2022), https://www.ifpi.org/ifpi-global-music-report-global-recorded-music-revenues-grew-18-5-in-2021/.

426. *Id.*

427. Wang, *supra* note 419.

428. *Id.*

429. Jem Aswad, *Spotify's Daniel Ek Talks Royalties, Data-Sharing, the Future: 'I Was Never a Disrupter'*, VARIETY (Apr. 10, 2019, 7:55 PM), https://variety.com/2019/biz/news/spotify-daniel-ek-talks-royalties-future-freaknomics-disrupter-1203186354/.

430. Tim Ingham, *Spotify Dreams of Artists Making a Living. It Probably Won't Come True*, ROLLING STONE (Aug. 3, 2020), https://www.rollingstone.com/pro/features/spotify-million-artists-royalties-1038408/.

431. Seabrook, *supra* note 412.

ways among the various copyright holders who have secured their cut of that popstar's tunes.[432]

Streaming's steady ascent predominantly benefits major labels and publishers, who stand to receive up to 70% of the royalties for their monetized content.[433] Spotify, the top earner among streaming services in the U.S., currently forwards copyright holders just over one half of "all net receipts attributable to streams of their artists."[434] Essentially, Spotify retains half of every artist's profit and gives the remainder back to the parties who own the relevant copyrights.[435] This illustrates why songwriters like Lindvall and Warren are so desperate to land their songs on terrestrial radio, where the payment system remains fairly straightforward and composition copyright holders receive the bulk of generated royalties.[436]

The modern songwriter's financial incentive to write cookie-cutter pop hits further hinders creativity in the pop music sphere, magnifying the threat that the "Blurred Lines" verdict poses to creators in a marketplace that favors homogeneity. The homogeneity of the pop music charts proves that playing into musical trends is a lucrative practice, yet copyright lawsuits reveal the huge financial risks associated with copying someone else's song. The career of a pop songwriter striving to make original work rests tenuously on a tightrope between these two possibilities.

As if the copyright revenue reserved for pop songwriters were not already endangered, the industry's sharpening focus on interpolations threatens to squeeze those shares even tighter. Modern songwriters are now feeling pressure, from both the industry and music listeners at large, to dole out interpolation credits to artists who did not write their songs.[437] With interpolations being more broadly pushed by copyright holders with revenue and influence at their disposal, less-established songwriters are often at their mercy; this means songwriters in the pop sphere have to accept even smaller slices of the publishing pie.[438] Similarly, artists are forced to refrain from sampling unless they can afford a license from the track's relevant copyright

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432. Ingham, *supra* note 430.

433. Jamie Powell, *The Strong Arm of the Major Labels*, FIN. TIMES (June 6, 2019), https://www.ft.com/content/d136b75e-755e-362b-b8d6-affae61aadd6.

434. Ingham, *supra* note 430.

435. *Id.*

436. *The Mechanics of Music Distribution: How It Works, Types of Music Distribution Companies + 35 Top Distributors*, SOUNDCHARTS (Dec. 31, 2023), https://soundcharts.com/blog/music-distribution [https://perma.cc/7U3J-DX9U].

437. *See supra* text accompanying notes 32–34, 416–418.

438. Millman, *supra* note 277.

holders.[439] This reflects a stark departure from the hip hop origins of sampling, which dealt in collage and homage without any expectation of compensation.[440] In the age of unregulated sampling, authorship was earned by one's creative labor—not merely passive copyright ownership.[441] Today, the cost of creativity is increasing, yet the creators are pressured to slice into their earnings anyway.

Music as a profession appears to be growing unsustainable for artists across the financial spectrum,[442] and copyright abuse is contributing to the problem. If artists at the top of the earning pyramid regularly depend on career songwriters to spearhead their compositions, and those songwriters' livelihoods depend on radio singles rather than offbeat album tracks, the creative progress might struggle to survive among the most popular ranks. Even those in the more modest earning caliber (those with success in the "indie" or "alternative" spheres) are struggling to maintain full-time pursuits of music.[443]

Many would agree that copyright protections should not be weaponized against artists, as this goes against the foundational purpose of copyright law: to promote creative progress. Yet the increasing scope of what aspects require a license and the increased policing of creative borrowing threaten

439. *See supra* Part II.

440. *See supra* Part II.

441. *See supra* Part II.

442. Animal Collective canceled their European tour, citing the fact that the music industry cultivates "an economic reality that simply does not work and is not sustainable." Juliana Kaplan, *It's Not Just Taylor Swift. Musicians Describe the 'Demented Struggle' of Touring in a Shrinking Industry Where One Giant Company Sells the Tickets for Most Major Venues.*, BUS. INSIDER (Jan. 8, 2023, 11:52 AM), https://www.businessinsider.com/musicians-make-money-touring-taylor-swift-tickets-ticketmaster-live-nation-2022-12?amp. Amid their 2022 tour, Pavement guitarist Scott Kannberg lamented venue promoters' unnecessary cuts into the band's primary source of touring revenue, tweeting, "Live nation took 30% [of our merch sales] last night for doing NOTHING." spiral stairs (@spiralmusic), TWITTER, (Oct. 21, 2022, 6:13 PM), https://twitter.com/spiralmusic/status/1583597344511365120?s=46&t=nwrGCb3ShC9lvQ0kkmwP3Q; *see also* David Browne & Ethan Millman, *How the Concert Merch Crisis Might Be Hurting Your Favorite Artist*, ROLLING STONE (Oct. 1, 2023), https://www.rollingstone.com/pro/features/concert-t-shirts-merch-merchandise-1231190/; Amanda Hatfield, *Lorde Talks Touring: "A Demented Struggle to Break Even or Face Debt"*, BROOKLYN VEGAN (Nov. 10, 2022), https://www.brooklynvegan.com/lorde-talks-touring-a-demented-struggle-to-break-even-or-face-debt/. Explaining her decision to cancel her 2022 North American tour, Santigold stated, "I will not continue to sacrifice myself for an industry that has become unsustainable for, and uninterested in the welfare of the artists it is built upon." Matthew Ismael Ruiz, *Santigold Cancels North American Tour*, PITCHFORK (Sept. 26, 2022), https://pitchfork.com/news/santigold-cancels-north-american-tour/.

443. Andrews, *supra* note 19.

those who strive to bring innovation into the musical fore. Those who benefit from copyright law's increasing exclusivity and enforcement are often the executives and purse-holders; the creative laborers don't get to experience the benefits themselves, no matter how many times they are reminded of copyright law's progressive, humanist purpose. In a climate where music making is becoming increasingly difficult in a practical sense, the law should not make it equally difficult in a creative sense.

IV. Solutions That Have Been Sidelined

The bulk of copyright law comes from federal court decisions—not the Constitution or the latest iteration of the Copyright Act. Even so, the Constitution articulates the spirit of copyright law in the Progress Clause, reminding that copyright protection should function to *encourage* new creations—not stifle them.[444] Within those constitutional parameters, Congress has gradually cultivated a body of statutory law, consolidated in the amended Copyright Act of 1976, that gives more specific instructions to courts.[445] Unfortunately, copyright infringement resides in a statutory gap. There is no definitive test that has been mandated for all courts to use when faced with infringement disputes, making this area of case law especially incongruent.[446]

While many scholars propose new and alternative means of deciding infringement disputes, balance and fairness among courts does not depend on innovation but simply *application*. Rather than devise a solution from scratch, courts should take a note from interpolation and use what has already been created. To foster more consistent outcomes that honor the law's constitutional basis, courts must remember not only the privileges that copyright protection expressly provides but also those it does *not*. The limiting doctrines of fair use, *de minimis non curat lex*, *scènes à faire*, and "thin" copyright were widely adopted by courts to address gaps left by the legislature.[447] The statutory language of the Copyright Act predominantly covers the rights exclusive to copyright holders,[448] necessitating the courts' inclusion of these doctrines which bring creativity at large back into focus.

444. *See* U.S. CONST. art. I, § 8, cl. 8; Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 355 (1991).

445. *See, e.g.*, Silvers v. Sony Pictures Ent., Inc., 402 F.3d 881, 886 (9th Cir. 2005) (citing 17 U.S.C. 501 (1976); H.R. REP. NO. 94-1476, *reprinted in* 1976 U.S.C.C.A.N. 5659).

446. *See supra* Section I.B.

447. *See* John Tehranian, *Toward a* New *Fair Use Standard: Attributive Use and the Closing of Copyright's Crediting Gap*, 96 S. CAL. L. REV. 1, 3 (2022).

448. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432–33 (1984).

In adopting these doctrines that have since become integral to copyright law, the judiciary showed an allegiance to the Constitution and its desire to keep artistic works reasonably accessible.

Courts and commentators seem to agree on the purpose of copyright law as it applies to music: to promote creativity by protecting artists' right to be compensated for that creativity. But when music enters the courtroom, emotional impulses have a way of drowning out the practical core of copyright law. Even more concerning is the threat that the music industry's power poses to infringement outcomes; if copyright law is pressured into appeasing private investors, its public-minded principles are sure to be lost in the struggle. Despite these looming threats to creative freedom, courts are equipped to find certainty—even in cases that orbit the amorphous, emotional subject of music. Limiting doctrines such as fair use, de minimis, *scènes à faire*, and thin copyright emphasize that certain instances of "copying" are simply not punishable by law.[449] Each of these limitations enforce fair findings of copyright infringement while preventing courts from interfering with creative progress.

In using the term "interpolation" to refer to the use of chord progressions and unprotectable genre signifiers, the music industry encourages licensing where it is not required by copyright law.[450] Courts would likely agree with major labels and publishers that true interpolations—like samples—warrant a license for their use to be lawful.[451] But much of what currently passes for an "interpolation" by music industry standards should not support a finding of copyright infringement, as they don't violate what is actually *protectable* in another's work.[452] Those unprotectable elements that are being wrongfully categorized as interpolations do not warrant a license or other permission to legitimize their use. The easiest way for courts to re-define interpolations and safeguard acceptable similarities is to use the tools that already reside in their arsenal. These doctrines point to the copyright precept that only certain aspects within a given work may be excluded from other creators. Many ingredients intrinsic to songwriting are simply not distinctive enough to support an infringement claim.

Where songs incorporate only a small or inconsequential portion of a prior work, the de minimis defense should neutralize infringement claims. The de minimis use doctrine derives its name from principle that the law does not concern itself with minimal or insignificant matters, supporting the idea that

449. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575–79 (1994).
450. *See supra* Section III.B.
451. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801–02 (6th Cir. 2005).
452. *See supra* Part III.

infringement suits are reserved for instances of significant appropriation rather than minor amounts of similarity.[453] When applied, the defense reaffirms a key tenet of copyright law: that not all similarities between musical works are *actionable*.[454] The de minimis defense should apply to both the sampling and interpolation contexts, as sound recordings deserve the same infringement analysis (i.e., one that evaluates substantial similarity) as musical compositions.[455] Even so, a fraction of cases have neglected to apply the de minimis defense to sampling cases, expanding the extent of copyright protection applicable to sound recordings.[456] This blanket prohibition of sampling has been discredited by numerous courts including the Ninth Circuit,[457] which has applied the de minimis doctrine to both compositions *and* sound recordings.[458] In the 2016 case *VMG v. Ciccone*, the court clarified that it is noticeable, widely recognizable similarities between two works—not any signs of trivial copying—that stand to support infringement claims for sound recordings and/or compositions.[459] When applied correctly, de minimis reminds copyright holders that their exclusive rights are not without limits; brief snippets of music that do not appropriate critical elements of an original work may be used freely—despite what the industry might have songwriters believe.

Where the use of a prior work exceeds the narrow scope of a de minimis defense, fair use should kick in to assess whether such use is sufficiently transformative to override standard licensing requirements. Fair use is better understood as an "excused infringement" than a defense, as fair use analysis should be applied only after a finding of substantial similarity between the works.[460] In echoing the Supreme Court's endorsement of fair use, the Ninth

453. David S. Blessing, Note, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2408 (2004).

454. *See* Newton v. Diamond, 204 F. Supp. 2d 1244, 1256 (C.D. Cal. 2002) (quoting Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217 (2d Cir. 1998)).

455. Recent Case, *supra* note 196, at 1355–59.

456. *See* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 394–95 (6th Cir. 2004); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 184–85 (S.D.N.Y. 1991).

457. *See* VMG Salsoul, LLC, v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016) ("[A]lmost every district court not bound by [the *Bridgeport*] decision has declined to apply *Bridgeport*'s rule.").

458. *See* Newton v. Diamond, 204 F. Supp. 2d 1244, 1260 (C.D. Cal. 2002); *VMG Salsoul, LLC*, 824 F.3d at 878.

459. *VMG Salsoul, LLC*, 824 F.3d at 877–78.

460. Blessing, *supra* note 453, at 2409.

Circuit reiterates the purpose behind copyright regulation: "The fair use doctrine 'permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"[461]

Like de minimis, the fair use doctrine paves a viable path for sampling and interpolation alike, emphasizing how critical *context* is to any evaluation of copyright infringement. Fair use carves out a vital exception to traditional copyright regulation by clarifying that creative copying—even where the copying is substantial—does not automatically qualify as infringement.[462] Fair use is important for the argument it represents: that creators should be allowed to draw from and re-contextualize existing works, so long as the new creation would not have a particularly unfair impact on its source material. Fair use undercuts the idea that copyright's main function is to protect exclusive ownership interests. Instead, it suggests that copyright law necessitates some degree of accessibility and exchange among creators if it hopes to achieve its principal goal of creative progress.

Fair use doctrine undoubtedly applies to musical works, but it is rarely used in such cases.[463] "This avoidance of fair use is especially puzzling given how music is composed of discrete, identifiable combinations of notes, much in the way that literary works contain words that may be quoted for fair use."[464] The fair use exception could apply to many instances of sampling, so long as the new works are sufficiently "transformative, socially valuable" derivations of the original work.[465] Interpolations usually re-contextualize small portions of published, well-known works and often enhancing the market value of those songs in the process; it seems possible, then, that fair use should apply to certain interpolations as well. This outcome would undoubtedly inconvenience the copyright investors who profit from interpolations and the licenses they frequently require, but regardless of its possible impact on specific cases, the mere creation of fair use and its codification in the Copyright Act support a creative climate in which public access is not subjugated to private ownership. Courts disservice songwriters, and the holistic purpose of copyright law, every time they leave fair use out of the conversation.

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461. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1175 (9th Cir. 2013) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

462. *See id.* at 1177–78.

463. Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1877 (2018).

464. *Id*.

465. Claflin, *supra* note 216, at 161.

Scènes à faire highlights the difference between "original," copyrightable elements of a creation and an artform's "stock elements" that cannot be claimed by anyone individually.[466] This judicially crafted doctrine refers to the common tropes or elements that are practically indispensable to a certain genre, positing that such "naturally associated" or "inevitable" features are not eligible for copyright protection.[467] *Scènes à faire* means that "[e]xpressions drawn from a common source are per se unprotected because they are not derived from an author's creativity but are instead taken from the public domain."[468] Things like the "Scotch snap" or the Migos' flow—two recognizable lyrical cadences prevalent in rap music—might qualify as *scènes à faire*, rendering them accessible to artists across genre-lines.[469] A true application of the *scènes à faire* doctrine would remove classic genre signifiers from any evaluation of substantial similarity, thus heightening the standard for infringement.[470] This defense could successfully combat arguments like that of the *Williams v. Gaye* majority, which contended that a popular '70s funk groove was sufficiently copyrightable material.[471] Though the *scènes à faire* is infrequently applied in music copyright cases,[472] it appears to be gaining traction—particularly as it coincides with the concept of "thin" copyright.[473]

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466. BOYLE ET AL., *supra* note 15, at 195.

467. *See* Swirsky v. Carey, 376 F.3d 841, 849–50 (9th Cir. 2004); Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942); *see also* Taylor Barlow, *Tons à Faire: Strengthening the Scènes à Faire Doctrine for Music Copyright Cases*, 20 VA. SPORTS & ENT. L.J. 106, 113–14 (2021).

468. Robert Kirk Walker, *Breaking with Convention: The Conceptual Failings of* Scènes à Faire, 38 CARDOZO ARTS & ENT. L.J. 435, 444 (2020).

469. BOYLE ET AL., *supra* note 15, at 195; *see also* Wayne Marshall, *Ariana Grande Was Accused of Copying '7 Rings,' Again and Again . . . and Again: But Did She Actually Do Anything Wrong?*, VULTURE (Apr. 1, 2019), https://www.vulture.com/2019/04/did-ariana-grande-copy-7-rings.html.

470. *See* Ets-Hokin v. Skyy Spirits Inc., 323 F.3d 763, 766 (9th Cir. 2003).

471. Williams v. Gaye, 895 F.3d 1106, 1123 (9th Cir. 2018).

472. *See* Barlow, *supra* note 467, at 118–19.

473. *See* Gray v. Hudson, 28 F.4th 87, 97–98 (9th Cir. 2022) (stating that the *scènes à faire* doctrine requires that any expressions which "are indispensable and naturally associated with the treatment of a given idea," must be "treated like ideas and therefore not protected by copyright"); *see also* Swirsky v. Carey, 376 F.3d 841, 850 (9th Cir. 2004) (finding that *scènes à faire* did not apply to the case because the songs belonged to different genres and a musical element must be shared by more than two works to be considered "commonplace.").

The limiting principle of "thin" copyright derives from the idea-expression dichotomy,[474] which specifies that copyright protection extends only to expressions but not any "idea, procedure, process, system, method of operation, concept, principle, or discovery."[475] The applicability of thin copyright in a given case hinges upon the "range of expression" available to that idea.[476] The Ninth Circuit has held that while photographs of live animals in their natural environments can only be expressed in a narrow range of ways, non-realistic depictions of animals are subject to a broad range of expression; the court thus concluded that the former category of animal depictions merited only thin copyright protection.[477]

In the seminal copyright case *Feist v. Rural*, the Supreme Court rejected the "sweat of the brow" approach to intellectual property, clarifying that human labor alone will not justify one's claim to any such labored-upon property.[478] The Court instead reinforced "originality"[479] as the necessary condition for copyright enforceability, emphasizing that "copyright protection may extend *only* to those components of a work that are original to the author."[480] The Court made clear that to be original in a copyright context, a work must have "some minimal degree of creativity" that is not merely copied from other works.[481] The work doesn't have to be novel, either, so long as the author did not arrive at such similarities by copying.[482] Over a century before *Feist*, the Court held that the constitutional definition of "author" meant "he to whom anything owes its origin; originator; maker."[483] But any elements which an author derives from the surrounding world—which the author did not create but merely discovered—cannot claim to have the requisite character of originality.[484] Mapping this principle onto the musical context, it is easy to see that modern-day songwriters are not

474. The idea/expression dichotomy originated in the 1879 case *Baker v. Selden* and received further discussion in subsequent cases; the dichotomy was first codified in the Copyright Act of 1976. *See* 101 U.S.C. § 99; Mazer v. Stein, 347 U.S. 201, 217 (1954); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548 (1985).

475. 17 U.S.C. § 102(b).

476. Williams v. Gaye, 895 F.3d 1106, 1141 (9th Cir. 2018).

477. *See* Satava v. Lowry, 323 F.3d 805, 812–13 (9th Cir. 2003).

478. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 360–61 (1991); *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 16 (Jonathon Bennett ed., 2008) (1690).

479. *See Feist*, 499 U.S. at 364.

480. *Id.* at 348 (emphasis added).

481. *Id.*

482. *Id.* at 345–46.

483. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884).

484. *Feist*, 499 U.S. at 347.

"creating" the melodies and rhythms in their works but merely discovering age-old elements in their own time.

Because the concept of "origination" does not suit the many recycled elements that color the popular music charts, *Feist's* discussion of compilations provides a useful framework for analyzing music copyright law. Infringement considerations are supposed to exclude any musical "building blocks": elements so prevalent in Western music as to render them uncopyrightable.[485] The Ninth Circuit identified descending chromatic scales, arpeggios, and short sequences of three notes among the "common musical elements" that are exempt from copyright protection.[486] The *Feist* opinion found that any factual compilation is subject only to "thin" copyright, meaning a valid copyright over such a work will not prevent others from using or copying the facts within the compilation.[487] If courts treated basic note combinations or drum patterns as "facts" within the musical context, the test for copyright infringement would become much simpler—and harder to meet. Only the author's specific selection and arrangement of those facts will receive copyright protection, as that is where the author's creativity lies.[488] Thin copyright requires near identical similarity for work to be found guilty of infringement, making disputes over small phrases and hooks unsupportable.[489]

Not only does thin copyright promote creative progress by protecting the store of uncopyrightable elements with which every artist can experiment, it also provides a fairly straightforward test for infringement. "Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement."[490] This test requires a finding of near identical compositions, making the similarity analysis far clearer than the traditional search for "substantial similarity."[491] Two of the most recent high-profile copyright disputes were decided on the basis of thin copyright. The *Gray v. Hudson*

485. Batiste v. Najm, 28 F. Supp. 3d 595, 615 (E.D. La. 2014) (excluding the "harmonic and rhythmic building blocks of music" from infringement analysis); Griffin v. Sheeran, 351 F. Supp. 3d 492, 497 (S.D.N.Y. 2019) (clarifying that unprotected elements "include key, meter, tempo, common song structures, common chord progressions, common melodies, and common percussive rhythms").

486. Skidmore v. Zeppelin, 952 F.3d 1051, 1069–70 (9th Cir. 2020).

487. *Feist*, 499 U.S. at 349.

488. *Id.* at 348.

489. *See* Ets-Hokin v. Skyy Spirits Inc., 323 F.3d 763, 766 (9th Cir. 2003).

490. *Feist*, 499 U.S. at 349.

491. *Id.*

court analyzed the two songs through the lens of thin copyright and found on appeal that Katy Perry's "Dark Horse" did not infringe.[492] "[T]the ostinatos at issue here consist entirely of commonplace musical elements, and [] the similarities between them do not arise out of an original combination of these elements."[493]

Thin copyright's heightened standard for infringement supported a similar outcome in *Skidmore v. Zeppelin*: "Given the thin protection afforded the selection and arrangement of basic musical elements at issue here, Skidmore could prove infringement only if the relevant passages of *Taurus* and *Stairway to Heaven* are virtually identical. They are not."[494] Thin copyright supports the notion that musical compositions should be evaluated "as a structure of relationships," comprised of sonic elements whose value is derived from their role within the holistic work.[495] Small musical elements often lack intrinsic meaning or present themselves as uncopyrightable fundamentals of music composition. It should not automatically be considered copying where elements of a song's recording or composition are borrowed and re-contextualized, unless those elements are worthy of copyright protection in and of themselves.[496] In deciding these recent cases on thin copyright grounds, the Ninth Circuit reveals its alignment with the dissenting opinion in *Williams v. Gaye*, which critiqued the majority's consideration of unprotectable elements.[497]

Looking beyond her discussion of copyright law's limitations, Judge Nguyen's *Williams* dissent highlights the theme that binds all these concepts together: judicial control. One of Judge Nguyen's key complaints about the majority opinion lied in its willingness to let musicologists and jury members tackle issues of law that should have been reserved for the judges.[498] Regardless of how the music industry's insiders choose to define interpolations or infringement, courts have the ultimate power to decide what copyright law will and won't accept. Even where juries are employed to decide infringement disputes, judges retain the power to clarify and uphold

492. Gray v. Hudson, 28 F.4th 87, 103 (9th Cir. 2022).

493. *Id*. at 92.

494. Skidmore v. Zeppelin, 952 F.3d 1051, 1080 (9th Cir. 2020) (Watford, J., concurring) (en banc).

495. Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 437 (1988).

496. "[P]reservation of context must be a crucial element of copying." *Id.* (emphasis omitted).

497. Williams v. Gaye, 895 F.3d 1106, 1140–50 (9th Cir. 2018) (Nguyen, J., dissenting) (citations omitted).

498. *Id.* at 1152.

copyright law. *Selle v. Gibb* is a novel case for its exemplification of this principle; where the jury decided against the foundational tenets of copyright law, the presiding judge overturned their verdict.[499] His judgment notwithstanding the verdict operated to ensure that copyright law did not overstep its bounds; after all, it is judges, not juries, who bear the responsibility of knowing the law and facilitating its purpose. This practice should not be used to nullify the jury's role in copyright cases, of course, but it's a critical stopgap to consider when such subjective issues veer off the copyright course. Music is a highly evocative, interpretable medium, which makes the reinforcement of legal guidelines all the more critical in copyright decisions.

Copyright infringement and its standards are a product of judicial invention. Fittingly, the power to redefine and remind the public of the relevant standards and guiding principles of copyright law also lies within the courts. Copyright protection does not need to soften, but a distinction must be made between unlicensed "derivative works" and permissible, inevitable borrowing within music. This vital dividing line has already been created by the judiciary, as the defenses of de minimis, fair use, *scènes à faire*, and the limitations of thin copyright have demonstrated. This multifaceted method for distinguishing between truly derivative and merely similar works means nothing, however, if courts choose to ignore it. Recognized limitations of copyright law combine to form a sufficient boundary line, separating the uncopyrightable, unoriginal aspects of musical creation from those deserving of protection and enforcement. The existing limitations on copyright infringement coexist like a neglected puzzle; if courts combined and applied these limiting factors in every infringement analysis, copyright protection would be far more likely to stay within its intended bounds. However, these defenses and limiting factors are too seldom considered simultaneously—if at all—in music copyright cases.

Conclusion

Over the last half century or so, the legal treatment of music has steadily detached itself from the reality of music-making; copyright protection and its exclusive privileges have expanded while courts have failed to uniformly defend methods of creativity that warrant universality. Music is a creative mode dependent on borrowing. Even so, copyright law too frequently does somersaults to avoid this truth in its assessments of songwriting, choosing instead to focus on music as a copyrightable medium with exclusive

499. Selle v. Gibb, 741 F.2d 896, 905–06 (7th Cir. 1984).

privileges. "[B]orrowing and copying music between artists is a common practice—'[f]or the most part, taking someone else's musical idea and developing it in a new way is largely understood as part of musical culture and thus entirely consistent with cultural norms.'"[500] Bob Dylan borrowed heavily from the style and compositions of folk pioneer Odetta.[501] Dave Grohl's Nirvana-era drumming patterns were lifted from classic disco songs.[502] And Bruce Springsteen claims that nearly all of his major hits are just derivations of The Animals' "We Gotta Get Out of This Place."[503]

There is a rich lineage of legendary acts emulating the stylistic choices of other artists. This cross-pollination is integral to the creative progression. Looking at it from a purely structural rather than cultural standpoint, "music is the most restrictive art form there is."[504] Pop music is even more limited, as mainstream preferences are resigned to a fairly narrow range of notes and rhythms.[505] The Billboard Hot 100 frequently reflects this, with multiple chart-toppers bearing uncannily similar rhythms and production choices.[506] It only makes sense, then, that a medium so dependent on borrowing have clear limitations to its zones of exclusive copyright control. Compensation for artists is not the problem; it is the unnecessary privatization of commonly borrowed elements that transforms copyright protections into blockades of musical progress.

The characterization of songs as hard-edged entities bearing exclusive rights is necessary for the current copyright scheme, which has evolved to prioritize private ownership over the public domain. "[E]xclusive rights themselves came to be considered the point [of copyright law], so they were strengthened and expanded, and the result hasn't been more progress or more

500. Wynn, *supra* note 325, at 13 (quoting Carys Craig & Guillaume Laroche, *Out of Tune: Why Copyright Law Needs Music Lessons*, *in* INTELLECTUAL PROPERTY FOR THE 21ST CENTURY: INTERDISCIPLINARY APPROACHES 43, 47 (B. Courtney Doagoo et al. eds., 2014)).

501. *See* Guilbert Gates, *Listen to Bob Dylan's Many Influences*, N.Y. TIMES (Oct. 15, 2016), https://www.nytimes.com/interactive/2016/10/14/arts/music/bob-dylan-influences-playlist-spotify.html; Mike Boehm, *Dylan to Chapman, They All Owe Odetta*, L.A. TIMES (June 20, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-06-20-ca-1631-story.html.

502. Gil Kaufman, *You Won't Believe Which Funky Drummers Dave Grohl Was 'Ripping Off' on Nirvana's 'Nevermind,'* BILLBOARD (July 1, 2021), https://www.billboard.com/music/rock/dave-grohl-nirvana-influence-disco-drums-pharrell-9595601/.

503. Menell, *supra* note 15, at 563.

504. Santiago, *supra* note 121, at 290–91.

505. "[W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear." Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d. Cir. 1940).

506. Switched On Pop, *Good Artists Borrow*, *supra* note 11.

learning—it's been more squabbling and more abuse."[507] The industry's attempt to corner common musical tropes does not square with the way the songwriting sausage is made.[508] Popular musicians and the publications devoted to them have long recognized that songwriting is an artform sustained by its influences, indivisible from its sonic ancestry.[509]

The law, on the other hand, sidesteps the fact that all music is derivative—a reality that is particularly undeniable in a technological era where centuries of compositions are so easily accessed and absorbed by modern music-makers. Copyright law's policing of "derivative works" wrongfully hinders artists who openly remix or infuse existing works into new creations.[510] In popular music, it's *all* derivative—a fact that often encourages findings of infringement when it should be tempering them. While many songwriters fear courts and the expensive legal battles they represent, those same courts also hold the tools songwriters need to escape meritless infringement claims. Limiting doctrines, which the judiciary created to keep copyright law in line with the Constitution's intended balance of exclusivity and accessibility, stand to bring copyright law back to its ideological center. Copyright law would benefit from a judicial *interpolation* of sorts, wherein courts employ and combine the limiting doctrines that have already been created. Courts already have all the instruments necessary to protect creativity, they've just yet to be played in harmony.

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507. Ferguson, *supra* note 357, at 33:38.

508. *See id.*; BOYLE ET AL., *supra* note 15.

509. *See* BOYLE ET AL., *supra* note 15; *see also* Angie Martoccio et al., *The Biggest Influences on Pop in the 2010s*, ROLLING STONE (Dec. 23, 2019), https://www.rollingstone.com/music/music-lists/biggest-pop-influences-on-2010s-927808/edm-boom-927832/; Heran Mamo, *From Little Richard to Joni Mitchell & More, Which Artist Has Been Most Influential for Other Musicians? Vote!*, BILLBOARD (May 28, 2020), https://www.billboard.com/music/music-news/most-influential-artist-poll-little-richard-joni-mitchell-nirvana-9392396/.

510. *See* Brodin, *supra* note 195, at 857.