MUSICAL INNOVATION'S SWORN ENEMY:

THE INFRINGER♦

"What is American about the American popular song changes with the qualities of the innovations each of the innovators brings to his work." – James T. Maher[1]

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[1] James T. Maher, *Introduction* to ALEC WILDER, AMERICAN POPULAR SONG: THE GREAT INNOVATORS 1900-1950 xxiii, xxv (James T. Maher, ed. 1972) (emphasis omitted).

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INTRODUCTION

Throughout the recent history of contemporary popular music there have been countless instances of composers creating works, knowingly or not, that at their core are simply reproductions of past works.[2] One of the most recent—and perhaps most notable—cases being that of Robin Thicke and Pharrell Williams's misappropriation of Marvin Gaye's classic, "Got To Give It Up," in their hit "Blurred Lines."[3] These cases present examples where the latter creator was held accountable for infringing on the copyright—*arguably earned through musical innovation*—of the infringed party. However, there are increasingly more instances where an infringed creator has been denied the protections afforded by Article I, Section 8, Clause 8 of the U.S. Constitution.[4]

The framers of the Constitution recognized that protecting the works of their country's citizens would encourage cultural advancement.[5] However, if a creator happens to produce a work completely of his own volition, which is identical to the work of another, both creators are protected, yet the former is not protected against the latter's work.[6] When a work is created, but which already exists, it cannot be said that "progress" has occurred. It seems, in instances of identical independent creation where no protection can be afforded to the first creator, progress and innovation are stifled. In the instance of two creators each independently creating the same original work, current copyright law does not provide a solution to the lack of

[2] *See generally* Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004); Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924).

[3] *See* Williams v. Bridgeport Music, Inc., Case No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. 2015).

[4] *See* Ellis v. Diffie, 177 F.3d 503 (6th Cir. 1999) (affirming the lower court's finding that infringement had not occurred); Repp v. Webber, 858 F.Supp. 1292 (S.D.N.Y. 1994) (finding two songs do not share a striking similarity to justify a finding of copying).

[5] *See* U.S. CONST., art. I, § 8, cl. 8. ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *see also* Authors Guild v. Google, Inc., 804 F.3d 202, 212 (2d Cir. 2015) ("The ultimate goal of copyright is to expand public knowledge and understanding"); Goldstein v. California, 412 U.S. 546, 555 (1973) ("As employed, the terms 'to promote' are synonymous with the words 'to stimulate,' 'to encourage,' or 'to induce.'").

[6] *Fred Fisher, Inc.*, 298 F. at 147 ("the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted.").

progress.[7] However, the inescapable pitfall of independent creation—which hinders progress—can be addressed by ensuring that those who create new works do not infringe on the creators' works that have gone before them. Increasing the threshold by which an infringement action may be successful—even at this fundamental level of creative similarity—may help spark the arguably slow-moving progression of music.

The field of music is particularly susceptible to this type of non-progressive, independent creation.[8] So much of our music relies on the foundations laid down by those who have gone before us.[9] Thus, it is entirely common for a composer to create a work before which has already been created.[10] Take, for example, Sam Smith's recent hit "Stay With Me"—simply a restatement of Tom Petty's "I Won't Back Down."[11] Here, Mr. Petty recognized that "these things can happen. Most times you catch it before it gets out the studio door but in this case it got by."[12] Mr. Petty recognizes that, as a creator, he has a responsibility to assess his compositions to ensure that they are not merely a collection of his past musical experience.

Composers should seek to create fresh new works that add to the artistry of music, rather than rely on the innovation brought forth by their influences.[13] This Note, in seeking to justify the application of a less onerous standard to prevail in musical infringement lawsuits, will examine the doctrines surrounding liability in cases of musical infringement and subconscious copying as well as the various

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[7] *Id.*

[8] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 346 (1989) ("Since most popular songs have simple melodies and the number of melodic variations is limited, the possibility of accidental duplication of several bars is significant.").

[9] "Music, more than any other art, is born under the law of tradition." AARON COPELAND, MUSIC & IMAGINATION 61 (1980) (quoting musicologist Frederick Goldbeck).

[10] "[T]he hack song writer assimilates nothing; he stays on the surface of change, deliberately imitating innovation. His contribution is cliché." Maher, *in* AMERICAN POPULAR SONG, *supra* note 1, at xxviii.

[11] Brian Mansfield, *Sam Smith to Pay Tom Petty Royalties on 'Stay With Me'*, USA TODAY (Jan. 26, 2015, 11:38 AM), http://www.usatoday.com/story/life/music/2015/01/26/sam-smith-stay-with-me-tom-petty-i-wont-back-down/22346051 ("Michael Harrington, a professional musicologist who specializes in federal copyright matters, also heard the similarity when a friend played him Smith's record several months ago. 'It got to the chorus, and I just started smiling,' Harrington says. 'I said, "Oh, yeah, that's *I Won't Back Down*." That's pretty close, just the slightest differences. Especially compared to what's in court these days, this one is really solid.'").

[12] Daniel Kreps, *Tom Petty on Sam Smith Settlement: 'No Hard Feelings. These Things Happen'*, ROLLING STONE (Jan. 29, 2015), http://www.rollingstone.com/music/news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-20150129 (quoting Tom Petty's statement).

[13] "It is the unconscious role of the innovator to conserve in his creative reflexes both past and contemporary innovation while moving his own work in new directions." Maher, *in* AMERICAN POPULAR SONG, *supra* note 1, at xxvii.

considerations that must be considered in a musical infringement action in Part I. While applying a higher standard to creators may seem like an outrageous proposal, Part II of this Note will seek to explore the effects that creative accountability could have on the market and the progress of music as a whole. Part III of this Note will offer several approaches that a court hearing a musical infringement lawsuit may adopt to create an enhanced doctrine of creative accountability. This Note argues that requiring a lower standard to prevail in such cases will force music creators to evaluate their works in light of their influences and in a manner more conducive to the progress of the art. Finally, Part IV explores the world of musical theater, which provides an illustration of how proposals analogous to those presented here do, in fact, promote musical innovation and progress.

It is useful to bear in mind the proposals set forth in Part III, while becoming acquainted with the legal background of a musical infringement action. This Note proposes three modifications to the doctrine surrounding musical copyright infringement. First, access—an essential element for establishing that a copying-in-fact has occurred—should be a rebuttable presumption to tip the scale in favor of a plaintiff alleging infringement. In today's Internet age, it is certain that any individual with access to the Internet has access to the work alleged to have been infringed upon. This is clear by virtue of the fact that the reader of this Note may easily access and listen to all the compositions referenced herein.

Second, an artist's performance on a sound recording should not be distinguished from the songwriter's compositional intent. That is, the substantial similarities between two contested musical works which constitute infringement should include the contributions of the artist in light of the increasingly individual expressions found in today's popular music. This would include—in instances where the work in question was simultaneously created and recorded simultaneously—features that under current law would be disregarded, such as the artist's stylistic performance of a composition as captured on the recording. These features should be included in the initial inquiry of whether the two works in question are substantially similar as well as considered part of the compositional structure of a work.

Third, the initial, objective similarity inquiry should include recording and production techniques as evidence of copying. The total concept and feel of today's popular music results from very specific production techniques.[14] This Note proposes that these elements should

[14] For example, the creative process used in much of today's popular music involves the creation of original textures that are born in the studio. Once a song becomes a hit, the textures and techniques used to create that hit song are often copied, creating works that produce a similar feel to that of the original hit song, even where the underlying compositions are unalike.

be added to the roster of elements that help to establish objective similarity (i.e., support an inference that copying has occurred), which is generally required at the outset of an infringement action.

Finally, for readers who believe a more rigorous standard would stifle creativity: if the effect of a higher standard of originality (i.e., a lower standard for establishing infringement) for new works reduces the amount of creators who are able to create new works, it follows that those creators who remain will be those who rise to the challenge of bringing to their audience new and exciting works. This will have the beneficial effect of enhancing the quality of music throughout the industry, while removing those creators who do not add to the artistry of musical creation. Additionally, as explained in Section II of this Note, the reduced number of musical works in the market will increase the value of those works that are able to enter the market.[15]

I. BACKGROUND

Composers and creators of music rely on, much like our legal system, those who have gone before them.[16] Unlike our legal system, which requires a slow and steady progression, music should be set free to explore the endless stretches of the musical universe. As renowned jazz guitarist and composer Pat Metheny stated:

> [W]e all have to rise to this challenge, and it's a big one: the challenge to recreate and reinvent the music to a new paradigm resonant to *this* era, a new time. It's simply not gonna cut it to just keep looking back, emulating what has already been done with just a slightly different spin on it.[17]

While some reliance on past works is inevitable, a composer should set out to create essentially original works.[18] Unfortunately, this is not always the case.

In fact, there are many instances where a composer creates a new work, only to find that it is merely a copy of a work that the composer heard at some earlier point in their life.[19] When this occurs, it may be complete coincidence, a result of the later composer's subconscious memory, or willful infringement.[20] In every case, music as a whole

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15 *See* discussion *infra*, Part III.

16 "Music, more than any other art, is born under the law of tradition." COPELAND, *supra* note 9 (quoting musicologist Frederick Goldbeck).

17 Pat Metheny, Keynote Address at the IAJE Conference (January 2001), *in* LLOYD PETERSON, MUSIC AND THE CREATIVE SPIRIT: INNOVATORS IN JAZZ, IMPROVISATION, AND THE AVANT GARDE (2006), at 317, 322.

18 *Id.*

19 *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180 (S.D.N.Y. 1976) ("Nevertheless, it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine.").

20 Examples of complete coincidence, subconscious copying, and willful infringement can be

would benefit from a more stringent application of the doctrines that determine whether infringement has occurred. What follows is brief overview of the development of the copyright law in the United States as embodied in the United States Code and the case law that emerged from the enforcement of those laws.

A. *The Copyright Act*

The Constitution provides protection to authors for their works in the interest of progress.[21] The first federal copyright law enacted in 1790 provided protection only for books, maps, and charts.[22] This protection extended to musical compositions in 1831 when Congress amended the law through the Copyright Act of 1831.[23] The 1831 Act also granted protection for a twenty-eight-year term with an optional fourteen-year extension.[24] This amendment, however, only extended copyright protections to the production and distribution of musical works, which in 1831 was only the printing and sales of sheet music.[25] The 1831 Act was revised in 1870, granting authors the right to create their own derivative works,[26] and once again in 1897, granting music owners the exclusive right to publicly perform their works.[27]

The third general revision of U.S. copyright law was the 1909 Copyright Act. The 1909 Act extended the maximum term of protection to fifty-six years, broadened the subject matter of copyright protection, and reduced the procedural requirements for securing a valid copyright.[28] Additionally, "proprietors of musical compositions were granted initial mechanical recording rights, subject to a compulsory

found respectively in: Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924) (complete coincidence); *Bright Tunes Music Corp.*, 420 F. Supp. 177 (subconscious copying); Williams v. Bridgeport Music, Inc., Case No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. 2015) (willful infringement).

[21] U.S. CONST., art. I, § 8, cl. 8 (granting Congress the power "to Promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[22] Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790) (current version at 17 U.S.C. § 102 (2012)).

[23] Copyright Act of 1831, ch. 16, § 4, 4 Stat. 436 (1831) (current version at 17 U.S.C. § 102 (2012)) (adding musical compositions to the list of protected works and extending the initial copyright term to twenty-eight years); *see also* Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 254 (2013).

[24] Copyright Act of 1831, ch. 16, § 4 (repealed 1870).

[25] *See* Maria A. Pallante, *ASCAP at 100*, 61 J. COPYRIGHT SOC'Y 545, 545–46 (2014).

[26] Act of July 8, 1870, ch. 230, §§ 86–111, 16 Stat. 198, 212–216 (1870) (current version at 17 U.S.C. § 102 (2012)).

[27] *See* Act of Mar. 3, 1897, ch. 392, 29 Stat. 694 (1897) (current version at 17 U.S.C. § 102 (2012)); *see also* Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1158–59 (2007).

[28] Copyright Act of 1909, ch. 320 § 23, 35 Stat. 1075, 1080 (repealed 1976).

licensing provision."[29] The 1909 Act also extended federal copyright protection to "mechanical" reproductions of songs in "phonorecords"—in those days, piano rolls and records.[30]

The 1909 Act was full of formal requirements that were often overlooked, causing many works to inadvertently enter the public domain. The 1976 Copyright Act eliminated many of these formalities and extended federal copyright protection to all works that are fixed in a tangible form.[31] The 1976 Act also made clear that sound recordings are included in the definition of "tangible form."[32] Today, some works are still under the protection of the 1909 Act, however, this Note will focus on works subject to the 1976 Act.

The 1976 Act grants copyright protection to "original works of authorship fixed in any tangible medium of expression."[33] Musical works, dramatic works, and sound recordings are all included in section 102's provisions.[34] The term "original" was expounded upon in the landmark 1991 Supreme Court case, *Feist Publications Inc. v. Rural Telephone Service Co., Inc.*, which established the sole basis for copyright protection.[35] The Court held that "original, as the term is used in copyright, 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."[36]

Feist was a landmark decision in which the defendant, a publishing company specializing in area-wide telephone directories, copied the listings published in the plaintiff's directory.[37] The Supreme Court explained that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity."[38] The telephone listings were not original to the plaintiff and, therefore, uncopyrightable.[39] The Court further explained that while facts are not copyrightable, collections of

[29] ALLAN DUMBRECK & GAYLE MCPHERSON, MUSIC ENTREPRENEURSHIP 222 (Bloomsbury Methuen Drama, 2016).

[30] *See* U.S. Copyright Office, Copyright and the Music Marketplace (2015), at 17 ("With the 1909 Copyright Act, federal copyright protection for musical works was further extended by adding an exclusive right to make 'mechanical' reproductions of songs in 'phonorecords'—in those days, piano rolls, but in the modern era, vinyl records and CDs").

[31] Copyright Act of 1976, 17 U.S.C. § 102 (2012) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression").

[32] 17 U.S.C. § 102 (a)(7).

[33] 17 U.S.C. § 102 (a).

[34] *Id.*

[35] Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

[36] *Id.* at 363–64 ("As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity . . . . [C]opyright rewards originality, not effort.").

[37] *Id.* at 342.

[38] *Id.* at 363.

[39] *Id.*

facts, however, may be subject to copyright protection, but such protection will not extend to a collection whose selection, coordination, and arrangement "utterly lacks originality."[40] The plaintiff's listings were facts, the arrangement of which lacked the necessary originality for copyright protection. As such, the defendant's use of the plaintiff's listings did not constitute infringement.[41]

B. *The Musical Copyright Infringement Doctrine*

Musical infringement has been around as long as music itself, but when Congress gave authors of musical works a copyright in those works, the doors to the musical infringement lawsuit opened. This Note relies on the musical infringement action as an essential cog in the engine of musical innovation. Currently, section 106 of the Copyright Act of 1976 grants the author of a copyrighted work the exclusive rights to:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> 6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[42]

A plaintiff in an infringement suit has the initial burden of demonstrating (1) ownership of a valid copyright; and (2) a violation of one of the exclusive rights granted in section 106 (e.g., the right of reproduction).[43]

Musical copyright infringement suits of the late nineteenth and

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[40] *Id.* at 363–64 ("As a statutory matter, 17 U.S.C. § 101 does not afford protection").

[41] *Id.*

[42] Copyright Act of 1976, 17 U.S.C. §106 (2012).

[43] *See Feist*, 499 U.S. at 361 ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); *see also* Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092 (2d Cir. 1977) ("In order to prove infringement a plaintiff must show ownership of a valid copyright and copying by the defendant.").

early twentieth centuries often relied on the musical sensibilities of the judge presiding over the case.[44] Courts also began to rely on access and similarity as the key elements in infringement cases.[45] Without the possibility that the defendant had access to the infringed work, it is logically impossible that an infringement occurred. Over the course of time, the Second and Ninth Circuits have developed the predominant approaches, with the other Circuits more or less adopting either the Second or Ninth Circuit approach.[46]

1. The Second Circuit Approach

The essential elements of the Second Circuit approach were laid out in *Arnstein v. Porter*,[47] one of many cases brought to court by the mentally questionable Ira Arnstein.[48] Ira Arnstein alleged that Cole Porter, a famous American songwriter, infringed on several of his original compositions.[49] Arnstein even went so far as to assert that "Porter never wrote original songs but lifted them all from his works."[50] Arnstein was appealing the trial court's grant of summary judgment to Porter.[51]

The *Arnstein* court explained that liability is premised on the fact that (a) the defendant had copied the work; and (b) the copying went so far as to constitute improper appropriation.[52] In the end, the judge found there are some similarities in the parties' works such that "if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence."[53] The court reversed the trial court's grant of summary judgment to the defendant, Cole Porter, but, before doing so, managed to lay the foundation of today's infringement doctrine.[54]

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44 Livingston & Urbinato, *supra* note 23 at 256; *see also* Haas v. Leo Feist, Inc., 234 F. 105, 107 (S.D.N.Y. 1916) ("I rely upon such musical sense as I have.").

45 Livingston & Urbinato, *supra* note 23 at 257; *see also* Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 275 (2d Cir. 1936) ("The plaintiff's case depends upon access and similarity . . . ."); Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924) ("Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity, which amounts to identity.").

46 Livingston & Urbinato, *supra* note 23 at 261.

47 Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

48 Livingston & Urbinato, *supra* note 23 at 257 (noting that Arnstein lost all of the infringement cases he brought, "which arguably betrayed a deteriorating mental state.") (footnote omitted); *see also* Arnstein v. Porter, No. 29-754, 1945 WL 6897 (S.D.N.Y. 1945) (Caffey, J., plurality) ("I feel warranted in characterizing as fantastic the story on the subject told in the plaintiff's behalf.")

49 *See generally* Arnstein v. Porter, 66 U.S.P.Q. 281 (S.D.N.Y. 1945).

50 WILLIAM MCBRIEN, COLE PORTER 274 (2000).

51 *Arnstein*, 154 F.2d at 468.

52 *Id.* at 468 (The "two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went to far as to constitute improper appropriation.").

53 *Id.* at 469.

54 *Id.* at 475.

a. Copying

Arnstein laid out the two-pronged approach the Second Circuit has developed. As to the first prong—copying in fact—direct evidence can prove that the defendant had copied the work.[55] However, copying is most often proven through circumstantial evidence, usually by demonstrating that the defendant had access to the work in question and that there are similarities between the two works in question.[56] Expert testimony is relevant at this stage of the inquiry to help establish that the similarities warrant an inference of copying.[57] Remember, as later discussed, this Note proposes that access at this stage should be presumed to have occurred.[58]

This prong may still be satisfied where evidence of access is missing if the similarities are "so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."[59] When determining whether the first prong is satisfied, access and similarity are both factors, not elements, to be weighed together to determine whether the defendant had, in fact, copied the plaintiff's work.[60] Once it is established that the defendant had copied in fact or access and similarity support an inference of copying, the plaintiff must then demonstrate that the defendant had unlawfully appropriated the plaintiff's work.

b. Unlawful Appropriation

Once it is established that the defendant had copied the work—either through access and similarity or a striking similarity—he must be shown to have unlawfully appropriated the plaintiff's work.[61] This is established by the response of the ordinary lay listener.[62] Dissection[63]

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55 Livingston & Urbinato, *supra* note 23, at 258; *see also* Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987) (defendant admitted to copying plaintiff's work); Ulloa v. Universal Music & Video Distrib. Corp., 303 F. Supp. 2d 409, 412–13 (S.D.N.Y. 2004) (defendant admitted copying plaintiff's vocal phrase but argued that it was not copyrightable).

56 Livingston & Urbinato, *supra* note 23, at 257; *see also Arnstein*, 154 F.2d at 468 ("evidence [of copying] may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying."); Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999) ("Direct evidence of copying is rare, so frequently the plaintiff will attempt to establish an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue."). Note here that the court uses the phrase "substantial similarity." This standard is reserved for the second prong of the Second Circuit test, but is often confused with the similarity used in the first prong to infer copying.

57 *Arnstein*, 154 F.2d at 468 ("On this issue, analysis ('dissection') is relevant, and the testimony of experts may be received to aid the trier of the facts.").

58 *See* discussion *infra* Part IV.

59 *Arnstein*, 154 F.2d at 468.

60 *Ellis*, 177 F.3d at 507 ("[T]he stronger the similarity between the two works in question, the less compelling the proof of access needs to be.").

61 *Arnstein*, 154 F.2d at 468.

62 *Id.*

and expert testimony are irrelevant at this stage of the inquiry.[64] The factfinder, whether judge or jury, determines whether the works are similar enough to establish that the defendant has infringed on the plaintiff's work.[65]

If the factfinder determines that the "defendant took from [the] 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, [then the] defendant wrongfully appropriated something which belongs to the plaintiff."[66] What is most notable is that *Arnstein* justified this description of unlawful appropriation with economic considerations: "[t]he plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts."[67]

Courts refer to this requirement as "substantial similarity."[68] The Second Circuit has defined substantial similarity as "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[69] Additionally, this final determination of similarity is not to be confused with the initial inquiry as to whether the defendant had in fact copied the plaintiff's work.[70] The second prong must take into account only those parts of the plaintiff's work that are protected by copyright.[71] It is also possible for the "similarities between the plaintiff's and defendant's work [to be] so extensive and striking as, without more, both to justify an inference of

63 A musical analysis of the works in question.

64 *Arnstein*, 154 F.2d at 468.

65 *Id.*

66 *Id.* at 473.

67 *Id.*; *see also* Jeffrey Cadwell, *Expert Testimony, Scènes à Faire, and Tonal Music: A (Not So) New Test For Infringement*, 46 SANTA CLARA L. REV. 137, 146 (2005) ("Arnstein v. Porter's innovation is that it casts the foundation for the lay listener test as primarily an economic consideration.").

68 Alan Latman, *"Probative Similarity" As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1189 (1990) ("Not only must defendant copy, rather than independently create, and not only must he or she copy protected material, but also such protected material must be 'substantial.' Thus, to satisfy this requirement, plaintiff would have to show a substantial degree or order of similarity or 'substantial similarity' between the works of plaintiff and defendant.").

69 Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706, 711 (S.D.N.Y 1987) (citing Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir.1966)).

70 Latman, *supra* note 68, at 1189–90 ("'Substantial similarity,' while said to be required for indirect proof of copying, is actually required only after copying has been established to show that enough copying has taken place. A similarity, which may or may not be substantial, is probative of copying if, by definition, it is one that under all the circumstances justifies an inference of copying.").

71 Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) *copying of constituent elements of the work that are original*.") (emphasis added).

copying and to prove improper appropriation."[72] The holistic, two-pronged approach developed in *Arnstien v. Porter* has remained virtually unchanged today.[73] When a defendant has wrongfully appropriated the elements of a composition that are original to the plaintiff, the defendant is liable for infringement.

2. The Ninth Circuit Approach

The Ninth Circuit has developed a similar approach, which, over time, has fallen more in line with the Second Circuit's approach.[74] The Ninth Circuit uses an (a) extrinsic test, in which expert testimony and dissection are relevant, followed by an (b) intrinsic test, in which the opinion of the lay listener is the only relevant factor.[75] The court laid out this approach in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, distinguishing the initial "extrinsic test" from the later "intrinsic test."[76] In *Krofft*, the plaintiff alleged that the defendant's "McDonaldland" ad campaign infringed on the plaintiff's *H. R. Pufnstuf* television series.[77] The court explained the test to apply in a copyright infringement action and affirmed trial court's finding that the defendant had infringed the plaintiff's copyright.[78]

a. The Extrinsic Test

The extrinsic test, as explained in *Krofft*, asks the trier of fact to objectively compare the individual elements of the works in question:

> We shall call this the 'extrinsic test.' It is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. Moreover, this question may often be decided as a matter of law.[79]

At this initial step, the plaintiff must identify similarities of "concrete elements based on objective criteria."[80] This most often

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[72] Arnstein, 154 F.2d at 468–469.
[73] Livingston & Urbinato, *supra* note 23 at 260.
[74] *Id.* at 261.
[75] *Id.*; *see also* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) ("There must be ownership of the copyright and access to the copyrighted work. But there also must be substantial similarity not only of the general ideas but of the expressions of those ideas as well. Thus two steps in the analytic process are implied by the requirement of substantial similarity.").
[76] *Id.* at 1164 (explaining the Ninth Circuit approach to infringement cases).
[77] *Id.* at 1161.
[78] *Id.* at 1179.
[79] *Id.* at 1164.
[80] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (citation omitted).

requires analytical dissection and expert testimony.[81]

The extrinsic test acts a gatekeeper, preventing a case from getting to a jury—where lay listeners can find substantial similarity even when the works are completely unalike—unless there are clear objective similarities found among the works.[82] Examples of objective criteria in musical infringement cases have included, but are not limited to: (1) melody, (2) harmony, (3) rhythm, (4) pitch, (5) tempo, (6) phrasing, (7) structure, (8) chord progressions, (9) lyrics, (10) title hook phrase, (11) shifted cadence, (12) instrumental figures, (13) verse/chorus relationship, and (14) a fade ending.[83] In this stage of the Ninth Circuit inquiry, features such as recording and production techniques should be included to help the plaintiff establish objective similarity.[84]

Finally, elements that are not protected (e.g., *scenes a faire*[85] or works in the public domain) must be distinguished from those original to the plaintiff.[86] This caveat, however, is complicated by the fact that the existence of un-protectable features within two works may still support a finding that a copying has occurred.[87] The necessity of filtering out those elements which are not protected adds an additional layer of difficulty to both stages of the Ninth Circuit approach, especially when a jury is charged with determining whether an infringement has occurred.[88]

b. The Intrinsic Test

Once the objective extrinsic test is satisfied, the factfinder then

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[81] *Id.* ("The extrinsic test often requires analytical dissection of a work and expert testimony.").

[82] *See* Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004) ("If Swirsky cannot present evidence that would permit a trier of fact to find that he satisfied the extrinsic test, he necessarily loses on summary judgment because a 'jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests.'") (citations omitted); *see also* Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994) ("[A] plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment, because a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests.") (citation omitted).

[83] *See Swirsky*, 376 F.3d at 849 (9th Cir. 2004); *see also Three Boys Music Corp*, 212 F.3d at 485 (9th Cir. 2000).

[84] *See* discussion *infra* Part III.

[85] *See* discussion *Infra* Part I.D.

[86] *See* Rice v. Fox Broad. Co., 330 F.3d 1170, 1174 (9th Cir. 2003) ("In applying the extrinsic test, we must distinguish between the protectable and unprotectable material because a party claiming infringement may place no reliance upon any similarity in expression resulting from unprotectable elements.") (citations omitted) (quotations omitted).

[87] Cavalier v. Random House, Inc., 297 F.3d 815, 826 (9th Cir. 2002) ("This does not mean that at the end of the day, when the works are considered under the intrinsic test, they should not be compared as a whole. Nor does it mean that infringement cannot be based on original selection and arrangement of unprotected elements. However, the unprotectable elements have to be identified, or filtered, before the works can be considered as a whole.") (citing Apple Computer, Inc. v. Microsoft Corp. 35 F.3d 1435, 1446 (9th Cir. 1994)).

[88] For a discussion on the difficulties of "filtering out" uncopyrightable elements within musical compositions, *see* Jamie R. Lund, *Music Copyright Project*, JLUNDLAW.COM, http://www.jlundlaw.com/p/music-copyright-project.html (last visited November 5, 2016).

determines whether the two works in question are substantially similar.[89] More specifically, "[t]he intrinsic test is subjective and asks whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."[90] Analytic dissection and expert testimony are not appropriate during the intrinsic test.[91] If the factfinder determines that the defendant's work captures the total concept and feel of the plaintiff's work, the defendant will be liable for infringing the plaintiff's work. The other circuits have adopted the Second or Ninth Circuit approaches, sometimes adding their own modifications.[92]

C. *The Subconscious Copying Doctrine*

Subconscious copying, sometimes referred to as "cryptomnesia,"[93] "can lead to inadvertent plagiarism if the writer fails to acknowledge unwittingly an earlier source due to the failure to recognize his or her own thoughts and words as unoriginal."[94] This phenomenon has been brought into the limelight most recently in *Williams v. Bridgeport Music, Inc.*, the case involving the Robin Thicke song "Blurred Lines" and the Marvin Gaye classic "Got To Give It Up."[95] However, many other instances involving cryptomnesia have been alleged[96] and, in many cases, settled.[97]

The concept of subconscious copying was first introduced in the context of musical copyright infringement by Judge Learned Hand in *Fred Fisher, Inc. v. Dillingham*.[98] There, renown composer Jerome Kern had unknowingly included an ostinato[99] in his composition "Kalua" that originated in the plaintiff's composition "Dardenella."[100]

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89 Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (1977) ("substantial similarity in expressions . . . depending on the response of the ordinary reasonable person.") (citations omitted).

90 Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 985 (9th Cir. 2017) (quotations omitted) (citations omitted).

91 *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164.

92 Livingston & Urbinato, *supra* note 23 at 261; *see also Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164 ("It is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test.").

93 *See, e.g.*, RONALD T. KELLOGG, THE PSYCHOLOGY OF WRITING 85 (1994) ("the belief that a thought is novel when in fact it is memory.").

94 *Id.*

95 Williams v. Bridgeport Music, Inc., Case No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. 2015).

96 *See, e.g.*, Kreps, *supra* note 12. Justin Beiber's hit "Sorry" allegedly copies artist Hinterland's song "Ring the Bell" and Sam Smith's song "Stay With Me" was a mere copy of Tom Petty's hit "Won't Back Down" (the latter two artists settled and Sam Smith gave Tom Petty writing credit on his song).

97 *Id.*

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

99 *Ostinato*, NEW ENCYCLOPEDIA BRITANNICA (15th ed. 2007) (A repetitive musical motif in the lower voices of a composition.

100 *Fred Fisher, Inc.*, 298 F. at 148.

In *Fisher*, Judge Hand stated that even though Mr. Kern had innocently appropriated the ostinato figure contained in his own composition, "[i]t is no excuse that in so doing his memory has played him a trick."[101] Judge Hand begrudgingly found Mr. Kern liable for infringement.[102] However, understanding the unfortunate circumstance Mr. Kern found himself, the court only required that he pay the statutory minimum.[103]

Following *Fisher*, very few cases have been decided based on the subconscious copying doctrine.[104] One of the most widely known instances of this application is the lawsuit involving George Harrison's "My Sweet Lord" and the Chiffons' "He's So Fine."[105] The court found that a substantial similarity existed between the two songs to such an extent that the opinion declared that Harrison's "My Sweet Lord" was "the very same song" as the Chiffons' "He's So Fine."[106] The court determined Harrison had access to the Chiffons' composition by virtue of the song's popularity, and substantial similarities exist in light of the almost identical motifs used throughout the songs.[107]

Michael Bolton arguably fell victim to cryptomnesia when he composed his 1991 hit "Love Is A Wonderful Thing."[108] In *Three Boys Music Corp. v. Bolton*, Bolton was accused of infringing on the copyright of the Isley Brothers' tune of the same name.[109] Again, the Ninth Circuit found that Bolton had the requisite access, and the songs in question were substantially similar.[110] Interestingly, the overall harmonic structures and musical forms of these songs are very dissimilar from a compositional standpoint, indicating that perhaps Bolton only subconsciously copied the title of the Isley Brother's

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101 *Id.*

102 *Id.*

103 *Id.* at 147 ("Mr. Kern swears that he was quite unconscious of any plagiarism, and on the whole I am disposed to give him the benefit of the doubt."); *see also* 17 U.S.C. § 504(c)(2) (2012) ("In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200.").

104 Carissa L. Alden, Note, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 CARDOZO L. REV. 1729, 1736 (2008) ("In the more than eighty years that have passed since the *Fred Fisher* case, only three other cases have been decided under the subconscious copying doctrine.").

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

106 Alden, *supra* note 104, at 1737; *see also Bright Tunes Music Corp.*, 420 F.Supp. at 180–81 ("Nevertheless, it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.").

107 *Id.*

108 Alden, *supra* note 104, at 1738.

109 Three Boys Music Corp. v. Bolton, 212 F.3d 477, 483 (9th Cir. 2000) ("The Isley Brothers' access argument was based on a theory of widespread dissemination and subconscious copying.").

110 *Id.* at 489 (affirming the lower court's decision and leaving the jury's determination undisturbed).

song.[111]

Overall, it is not uncommon for a composer to subconsciously copy the works that serve as their influences.[112] Many jazz improvisers do this very same thing—instantaneously while performing—though in context, improvisation is distinguishable from composition.[113] It is in a musician's nature to copy their influences or to reinterpret them in a meaningful way.[114] However, could it not be that to require a creator to "catch it before it gets out the studio door"[115] would result in more innovative musical structures? To require creators to monitor their works in light of the possible influences that may be reflected, or worse, copied in their creations? To raise the bar by which all composers are judged could possibly increase the innovativeness of music being created today.

D. *The Scenes a Faire Analysis*

Musical works fall into numerous different genres, each with certain features, rhythms, harmonies, and other practices that are commonplace. For example, a blues song is *usually* 12 bars in length and, at its harmonic core, follows this basic harmonic formula:

||: I7 / / / | / / / / | / / / / | / / / / | IV7 / / / | / / / / |

| I7 / / / | / / / / | V7 / / / | IV7 / / / | I7 / / / | V7 / / / :||[116]

In an alleged infringement action, this harmonic progression could be "explained by the common-place presence of the same or similar 'motives' within the relevant field."[117] Thus, when two musical works are presented to the jury, the jury must filter out those expressions that are essential to the genre because "those expressions are treated like

111 This Note's author would argue that any "lay observer" would not recognize these two songs as the same composition.

112 *See* Landes & Posner, *supra* note 8, at 346–47 (1989) ("A significant difference between literary and musical copyright is that courts hold that accidental duplication may infringe a songwriter's copyright if his song has been widely performed. Since most popular songs have simple melodies and the number of melodic variations is limited, the possibility of accidental duplication of several bars is significant. Widespread playing of these songs on the radio makes it likely that the second composer will have had access to the original work, which both increases the likelihood of accidental duplication and reduces the cost of avoiding it.").

113 *See generally* Metheny, *supra* note 17.

114 *See id.*at 322 (musicians should "recreate and reinvent the music to a new paradigm resonant to *this* era, a new time.").

115 Kreps, *supra* note 12 (quoting Tom Petty discussing his settlement regarding Sam Smith's composition "Stay With Me").

116 GUNTHER SCHULLER, EARLY JAZZ: ITS ROOTS AND MUSICAL DEVELOPMENT 347 ("The most common form is the twelve-bar blues set in the following chord progression: I-IV-I-V-I . . . the most basic musical form in jazz.").

117 Swirksy v. Carey, 376 F.3d 841, 850 (9th Cir. 2004) (first quoting Smith v. Jackson, 84 F.3d 1213, 1219 (9th Cir. 1996); then quoting Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003)) (musical infringement action).

ideas and therefore not protected by copyright."[118]

In *Velez v. Sony Discos*, the court held that an eight-measure phrase found in both plaintiff's and defendant's compositions "has been a widely used structural device for over 50 years. Therefore, the use of this structural element is not protectable, and cannot form the only basis for establishing substantial similarity in the pieces of music."[119] *Valez* presents a unique illustration of *scenes a faire* because the plaintiff attempted to establish similarity by asserting his use of an eight-measure phrase, followed by another eight-measure phrase—nevermind the musical content of those eight-measure phrases—constituted infringement. The defendant's expert witness explained that:

> [T]he two eight-measure phrase structure is "one of the most commonplace structural ideas in Western music," and that "dividing an individual Verse into two eight-measure phrases is analogous to the idea of dividing a dramatic play into three acts or a fourteen-line sonnet into an eight-line octet and a six-line sextet."[120]

Here, the plaintiff boldly claimed protection for perhaps the most widely used *scene a faire* available in Western music. While *scenes a faire* can explain many similarities found between two musical works, the problem, as discussed in the following section, is how exactly these *scenes a faire* are filtered out when the factfinder must determine whether an infringement has occurred.[121]

E. *The Difficulty of Substantial Similarity*

Music presents a particularly difficult medium for a jury to determine whether two works are substantially similar enough for a finding of infringement. Take, for example:

> If the new air be substantially the same as the old, it is no doubt a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty; and the addition of variations makes no difference, the original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment.[122]

Here, Justice Nelson discusses how infringement of an original work can be masked through variation, arrangement, or re-orchestration. "Playing the sound recording in a composition copyright case invites the jurors to make the wrong comparison, comparing the sound

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[118] *Id.*
[119] Velez v. Sony Discos, 2007 U.S. Dist. LEXIS 5495 *1, *12 (S.D.N.Y. 2007).
[120] *Id.* at *31–32.
[121] Lund, *supra* note 88.
[122] Jollie v. Jaques, 13 F. Cas. 910, 913 (Cir. Ct. S.D.N.Y. 1850).

recordings, rather than the compositional elements underlying each recording."[123] The "genius" of the original work should not be allowed to be masked by the mere "mechanic in music."[124]

This is only one of the difficulties when presenting to a jury two musical works: how can you rely on the lay listener to determine whether the defendant's work is simply a variation of the plaintiff's work? The dissent in *Arnstein v. Porter* raised this very issue:

> I find nowhere any suggestion of two steps in adjudication of this issue, one of finding copying which may be approached with musical intelligence and assistance of experts, and another that of illicit copying which must be approached with complete ignorance; nor do I see how rationally there can be any such difference, even if a jury—the now chosen instrument of musical detection—could be expected to separate those issues and the evidence accordingly.[125]

Additionally, when a musical work contains both original features and features in the public domain it is difficult to trust the jury to ignore those features that are not afforded protection. "The threshold question is what characteristics of [plaintiff's] design have gained copyright protection."[126] Copyright protection extends only to those features original to the plaintiff.[127] In such instances, a more discerning lay observer test is required.[128]

Finally, as seen in *Swirsky v. Carey*, courts also require a listener to separate the performance of an artist on a recording from the compositional intent of the songwriter.[129] Extra notes added to a composition by the performer are not "structural" to the composition and, therefore, are not subject to the composition's copyright protections.[130] As to this last point, this Note proposes that, in cases where a work in question was composed within the studio, such features should not be separated from the underlying compositional work.[131]

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123 Lund, *supra* note 88.

124 *Jollie*, 13 F. Cas., at 913.

125 Arnstein v. Porter, 154 F.2d 464, 476 n.1 (2d Cir. 1946) (Clark, J., dissenting).

126 Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d 64, 65 (2d Cir.1974).

127 Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) ("copyright protection extends only to those components of the work that are original to the author. . . .").

128 Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001) (holding that a "more discerning" observer is required when features of the infringed work are in the public domain).

129 Swirksy v. Carey, 376 F.3d 841, 847 (9th Cir. 2004) ("Dr. Walser testified that he did not notate these ornaments in his transcriptions, or take them into account in his opinion, because he 'took that to be a matter of the singer customizing the song and regarded those notes as not structural; they are ornamental.'" The court "consider[ed] only [the defendant's] appropriation of the song's compositional elements and . . . remove[d] from consideration all the elements unique to [the plaintiff's] performance.") (citations omitted) (quotations omitted).

130 *Id.*; *see also* Newton v. Diamond, 349 F.3d 591, 595 (9th Cir. 2003) ("This is particularly true with works like 'Choir,' given the nature of jazz performance and the minimal scoring of the composition.").

131 *See* discussion *infra* Part IV.

Amplifying this dilemma is the current state of the music industry and the process by which music is now created.[132]

> When the first music copyright cases were reported . . . the music industry revolved around printed sheet music. It thus made sense for Congress and courts to treat music like other works. Since then, however, technological and social developments have significantly altered the musical landscape. In light of these challenges, some experts now argue that the ordinary observer standard is fundamentally out-of-date and no longer applicable to the modern day music industry.[133]

Much of today's copyrighted music is only written down after the fact.[134] Therefore, when a copyright registration is obtained, the score given to the U.S. Copyright Office is often not a true representation of what the composer actually expressed.[135] This problem, however, in light of the Copyright Office's policy regarding deposit copies for copyrighted works, can be circumvented if the registrant files the sound recording embodying the musical work as the deposit copy.[136]

II. THE ECONOMIC ARGUMENT FOR GREATER COPYRIGHT PROTECTIONS AND ITS EFFECT ON THE MUSICAL MARKETPLACE

The Constitution provides a creator with an incentive to create new works for the progress of "science and the useful arts."[137] Balancing the incentives to create new works and public access to those works is the central problem copyright law seeks to address.[138] This Note proposes that increasing the protections afforded to musical compositions will have beneficial effects on both the quality and economic value of works that enter the market.

Put simply, there are two costs incurred in the production of a new

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132 *See* Francescatti v. Germanotta, No. 11 CV 5270, 2014 WL 2767231 *1, *9 (N.D. Ill. 2014) ("Exacerbating the difficulty with the inherently subjective ordinary observer standard is the dramatic degree to which the music industry has evolved over the course of the last century."); *see also* J. Michael Keys, *Musical Musings: The Case For Rethinking Music Copyright Protection*, 10 Mich. TELECOMM. & TECH. L. REV. 407, 430.

133 *Francescatti*, 2014 WL 2767231, at *9 (citing Keys, *supra* note 132) (other citations omitted).

134 *E.g.*, *id.* ("Moreover, in contrast to the Gaga Song that was created in large part on computers that utilize software to record and manipulate sounds, the Francescatti Song was composed primarily by live musicians playing live instruments in the recording studio.").

135 *See* Marc D. Ostrow, *Blurred Lines In the Difference Between Copyright In a Song and a Recording*, OSTROWESQ.COM (Mar. 12, 2015), http://ostrowesq.com/blurred-lines-in-the-difference-between-copyright-in-a-song-and-in-a-recording.

136 *See* U.S. COPYRIGHT OFFICE, CIRCULAR 56A, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS (2012), (explaining that a deposit copy for a music composition—as distinguished from a sound recording—may consist of a sound recording of the work.)

137 U.S. CONST., art. I, § 8, cl. 8.

138 Landes & Posner, *supra* note 8, at 326.

work: (1) the cost of expression, and (2) the cost or reproducing the expression (e.g., copies of a book or song).[139] Therefore, in a strict economic analysis, an author will only create a new work if the revenues expected are greater or equal to the cost of expression and reproduction.[140] Demand for the work in addition to the amount of similar competing works available in the market affect the expected revenues from that work:

> The greater the number of such works (past and present), the lower the demand for any given work. Thus, the number of works and the number of copies per work will be determined simultaneously, and the net effect of this interaction will be to reduce the number of works created.[141]

Borrowing Posner's formulae, this economic analysis takes the following form:

> The basic economics of copyright protection can be brought out more clearly by a formal model. We assume for the sake of simplicity that authors and copiers produce quality-adjusted copies that are perfect substitutes. Let p equal the price of a copy, $q(p)$ the market demand for copies of a given work, x and y the number of copies the author and the copiers produce, respectively (so $q = x + y$), c the author's marginal cost of a copy (assumed to be constant), and e the author's cost of creating the work (that is, the cost of expression). To simplify further, we ignore the other fixed costs of creating and publishing a work and assume that demand is not subject to uncertainty. We denote the level of copyright protection by $z \geq 0$ where $z = 0$ means no copyright protection. The level of copyright protection involves such considerations as the necessary degree of similarity between two works before infringement can be found, the elements in a work that are protected, and the period of time for which the work is protected.[142]

As z (the level of copyright protection) increases, so does the creator's cost of expression.[143] This is the result of the increased cost of avoiding liability for infringement of other pre-existing works.[144] Additionally, R represents a creator's gross profits, therefore $R = q(p - c) - e(z)$.[145] Thus, new works will only be created if $R \geq e(z)$.[146]

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139 *Id.* at 326–27.
140 *Id.* at 328.
141 *Id.*
142 *Id.* at 333–34.
143 *Id.* at 337 ("The cost of expression to authors of copyrighted works increases as copyright protection increases. The less material an author (not a copier) can borrow from other copyright holders without infringing their copyrights, the greater the cost of creating his work.").
144 *Id.* at 335.
145 This assumes no other creators are copying the original creators work.
146 Landes & Posner, *supra* note 8, at 335.

Thus, the higher the value of *z*, the greater the cost of expression (*e*), because a creator must now take these additional copyright protections (e.g., the lower degree of similarity necessary for a finding of infringement) into account. The effect the increased value of *z* has on the number of new works created is, because of the increased cost of expression, fewer creators will be able to achieve revenues that are greater than or equal to the cost of expression ($R \geq e(z)$). As Posner notes, the greater the number of competing works available in the market, the lower the demand for any given work.[147] The inverse of which must also be true; therefore, the lower the number of competing works in the market, the higher the demand. As demand, represented by $q(p)$, rises, so does the value of a work that is placed in the market.

Currently, the music industry is flooded with works, many similar to one another.[148] If higher protections are afforded to those artists demonstrating originality (e.g., the need for artists to verify their work is more than a mere collection of their influences, subconsciously or otherwise), only those artists who can achieve $R \geq e(z)$ (revenues greater than the cost of expression) will continue to create new works. Those artists who can achieve $R \geq e(z)$ are those artists who will add to the artistry and promote the progress of music. An additional benefit of raising *z* (copyright protections) is that the market would become less overwhelmed by those artists who are, subconsciously or not, copying the success of their peers. A market with less musical works flooding its shelves will cause the value of those works that do enter the market to rise.

Fears that increasing the initial cost of expression may stifle creativity can by subsided by the addition of protections that do not raise the cost of expression. Examples of such protections include abrogation of the exemptions found in section 110,[149] extending the time period in which copyright protections cover, or adopting some of the moral rights found in European copyright law.[150] These enhanced rights can help offset the increased cost of creation that the proposals in the following section would incur on the creator but are outside the scope of this Note. However, the proposals that follow would not produce such increased costs so as to require such measures.

147 *Id.* at 337 ("Although the author's gross profits will increase with greater copyright protection until copiers cease making copies—after which additional copyright protection can yield no benefit since there are no more competitors to exclude—net profits need not rise.").

148 *See, e.g.*, Country Music.

149 *See* 17 U.S.C. § 110 (2012).

150 For example, in France, an artist is entitled to a royalty when their work is subsequently sold for an increased value. C.P.I. art. L. 122-8 (Fr.).

III. HOW TO PROMOTE MUSICAL INNOVATION

There are several tools that may be employed to encourage creators of new works to innovate. As previously explained, during the initial inquiry, both the Second and Ninth Circuit approaches rely primarily on establishing both access and similarity.[151] This initial inquiry is then followed by a lay observer test which the factfinder will ultimately establish whether the defendant has misappropriated so much of the work of the plaintiff that an infringement has occurred.[152] A closer look at each of these inquiries provides several points in which modification to the standards currently applied may provide greater protection to the plaintiff. Greater protection to the plaintiff, this Note proposes, will require subsequent creators to rely on musical innovation to avoid liability for infringement. This need to innovate will remove some creators from the market, resulting in both enhanced quality of music in the market and greater economic value for those works.

A. *Access Should Be a Rebuttable Presumption in Light of The Uniform Availability of Music in Today's Market*

In light of the fact that evidence of direct copying is rare in a musical infringement lawsuit, the initial inquiry, in general, must establish that the defendant had access to the allegedly infringed work.[153] While there are instances where the similarities can be "so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result,"[154] the majority of musical infringement cases must establish that the defendant had access to the plaintiff's work. Access should, as a result of the Internet's prolific dissemination of all music in all genres, become a rebuttable presumption in the musical infringement lawsuit.[155] This presumption

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151 Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) ("evidence [of copying] may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying."); *see also* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) ("There must be ownership of the copyright and access to the copyrighted work.").

152 *See Arnstein*, 154 F.2d at 473 (if it is determined that the "defendant took from [the] 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 [then the] defendant wrongfully appropriated something which belongs to the plaintiff"); *see also Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164 ("substantial similarity in expressions . . . depending on the response of the ordinary reasonable person.").

153 *See Arnstein*, 154 F.2d at 468 ("evidence [of copying] may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying."); Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999) ("Direct evidence of copying is rare, so frequently the plaintiff will attempt to establish an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue.").

154 *Arnstein*, 154 F.2d at 468.

155 *See, e.g.*, Paul Resinkoff, *YouTube Accounts for 40% of All Music Listening, and 4% of All*

will shift the burden of proof to the defendant at the outset of the litigation. As access is only a piece of the initial inquiry, such a change will tip the scales in favor of progress and innovation while still allowing the defendant an opportunity to assert independent creation or lack of similarity.

This presumption will not go so far as to cause the defendant to be guilty until proven innocent because access is only the first part of a successful infringement action. Much like the affirmative defense of fair use—where the defendant must establish fair use—the burden should be on the defendant to show that he has not accessed the work in question. Upon a showing of no access, the defendant will, in many cases, avoid liability on the basis that without access to the work in question, no infringement could have occurred. If the defendant cannot rebut this presumption, there remain many more opportunities to avoid liability, particularly with evidence of independent creation,[156] lack of similarity[157] and the use of musical expressions that are not copyrightable.[158] This simple presumption strikes a fair balance between protecting pre-existing works, the defendant's ability to assert independent creation, and the overall goal of encouraging musical innovation.

B. *The Artist's Performance on a Sound Recording Should Not Be Distinguished from the Songwriter's Compositional Intent*

In both the Second and Ninth Circuit approaches, similarity—in addition to access (as a rebuttable presumption)—is a factor in determining whether the two works should be judged by the factfinder, the ultimate arbiter of infringement.[159] Today's music is often composed at the same time it is recorded.[160] The composition that results from this approach is often never written down and the resulting recording reflects not only the artist's performance, but also the writer's

Music Revenues, DIGITAL MUSIC NEWS (OCT. 9, 2015), http://www.digitalmusicnews.com/2015/10/09/youtube-accounts-for-40-of-all-music-listening-and-4-of-all-music-revenues.

156 *See* Ellis v. Diffie, 177 F.3d 503 (6th Cir. 1999) (affirming the lower court's finding that infringement had not occurred because there was sufficient evidence of independent creation).

157 *See* Repp v. Webber, 858 F. Supp. 1292 (S.D.N.Y. 1994) (finding two songs do not share a striking similarity to "Till You" and "Close Every Door" to justify a finding of copying).

158 *See* Swirksy v. Carey, 376 F.3d 841, 850 (9th Cir. 2004) (expressions that are essential to the genre because "those expressions are treated like ideas and therefore not protected by copyright").

159 *See* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (requiring a showing of similarity between the works in question); *see also* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) (applying an extrinsic test to establish objective similarity before the intrinsic test is applied to a jury).

160 *See* Francescatti v. Germanotta, No. 11 CV 5270, 2014 WL 2767231, at *1, *9 (N.D. Ill. 2014) ("Moreover, in contrast to the Gaga Song that was created in large part on computers that utilize software to record and manipulate sounds, the Francescatti Song was composed primarily by live musicians playing live instruments in the recording studio.").

compositional intent.

Note that when registering for a copyright, a creator may now submit as a deposit copy a recording of the work being registered.[161] Ideally, most songwriters would do this, but as is normally the case, the deposit copy typically a lead sheet.[162] This can cause several problems when a plaintiff subsequently alleges infringement of their work. To illustrate, when Marvin Gaye, or likely his publisher, registered the copyright for his hit "Got to Give It Up," it is most likely that only a lead sheet was deposited. As a result of this, "the judge instructed the jury to only consider the sheet music, not Marvin Gaye's recording, a copyright that Gaye's family doesn't own." Because a lead sheet is a means of notating the basic elements of a musical work, and does not include the elements born in the studio, "[i]t would be very difficult to convey the 'groove' of the 'Got to Give It Up,' including the beat and other elements in the sheet music to the song as opposed to the recording of it."[163]

The question of similarity at this stage should be expanded to include musical features born in the studio—especially in instances where the copyright is defined by a lead sheet written and deposited after the song was written and recorded. Courts, expert witnesses, and jurors should not distinguish the artist's or studio musicians' performances from the song's compositional elements in these instances.[164]

In other words, the reasoning in *Swirsky v. Carey* should not be used to argue that the artist's performance is not part of the heart of the composition. In *Swirsky*, the expert witness "testified that he did not notate these ornaments in his transcriptions, or take them into account in his opinion, because he 'took that to be a matter of the singer customizing the song and regarded those notes as not structural; they are ornamental.'"[165] The court "consider[ed] only [the defendant's] appropriation of the song's compositional elements and must remove from consideration all the elements unique to [Plaintiff's] performance."[166] Instead, in instances where the writing of a musical work and the recording of that work happen simultaneously, the recording should act as a tangible expression of the composition, even

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[161] *See* U.S. COPYRIGHT OFFICE, CIRCULAR 56A, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS (2012).

[162] "[A] lead sheet consists only of the song's melody line, lyrics and the chord symbols that represent the song's harmonies." Ostrow, *supra* note 135.

[163] *Id.*

[164] Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003) (Newton's expert Dr. Christopher Dobrian stated, "the contribution of the performer is often so great that s/he in fact provides as much musical content as the composer.") (quotations omitted).

[165] Swirksy v. Carey, 376 F.3d 841, 847 (9th Cir. 2004).

[166] *Id.*

where the deposit copy is a simple lead sheet. Decisions that rely on the "total concept and feel" approach reflect this assertion.[167]

Additionally, when comparing works as a whole, the problems discussed earlier concerning the "filtering out" of unprotectable elements are completely eliminated. Finally, because this modification in favor of a finding of infringement occurs during the initial stages of litigation, the defendant maintains several opportunities to avoid liability. This slight modification—likely benefiting only those artists who simultaneously write and record their works in the studio—will slightly increase the chances of succeeding in an infringement action.

C. *The Initial Similarity Inquiry Should Reflect a Less Onerous Variation of the Ninth Circuit "Objective Similarities" Approach and Be Broadened to Include Recording and Production Techniques*

Another result of the simultaneous nature of composition and sound recording is the use of musical instruments and recording techniques that greatly influence both the underlying composition of a work and the overall concept and feel of the resulting recording. These techniques have such a large impact on the way popular music sounds today, that these approaches should be afforded some protection. Bear in mind that a similar approach was employed in *Fred Fisher, Inc. v. Dillingham*, where the court found Kern, the defendant, had subconsciously copied the plaintiff's "ostinato," i.e., bass line.[168] While a particular guitar tone or electronic sound cannot be protected on the basis of its tone, similarities in creative technique can help establish the necessary similarities required at the initial stages of establishing copying-in-fact.[169] This results in a balance of the creators' rights in their innovations and the defendants' right to use similar techniques.

The Ninth Circuit's "objective similarities" approach (the "extrinsic test") is the best means to employ such a balance. While

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[167] *See* Copeland v. Bieber, 789 F.3d 484, 489 (4th Cir. 2015) ("So under the intrinsic prong, we analyze works as cohesive wholes, without distinguishing between protected and unprotected elements, just as the works' intended audiences likely would encounter them in the marketplace.").

[168] *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924).

[169] *E.g.*, the use of similar vocal effects and electronic sounds should be included among the objective similarities established within the Ninth Circuit that justify an inference of copying. *See Swirsky*, 376 F.3d at 849 (9th Cir. 2004); *see also* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (Examples of objective criteria in musical infringement cases have included, but are not limited to: (1) melody, (2) harmony, (3) rhythm, (4) pitch, (5) tempo, (6) phrasing, (7) structure, (8) chord progressions, (9) lyrics, (10) title hook phrase, (11) shifted cadence, (12) instrumental figures, (13) verse/chorus relationship, and (14) a fade ending.); *but see* Shapiro, Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473, 474–75 (N.D. Ill. 1950) ("I might say briefly, however, that I agree with the defendant that this bass is too simple to be copyrightable; that it is a mechanical application of a simple harmonious chord; and that the purpose of the copyright law is to protect creation, not mechanical skill.").

traditionally expert witnesses consist almost exclusively of musicologists, the inclusion of recording engineers and sound designers into this inquiry is especially relevant. Engineers are able to identify similarities in recordings that a will pass straight through the ears of a musicologist. The addition of similar recording and production techniques to the roster of elements that may satisfy the Ninth Circuit extrinsic test will increase the chance of success in a musical infringement action, but not to a degree that is unfair to the defendant.

An infringement lawsuit should be placed into the hands of the factfinder if the plaintiff can establish that the defendant, through his use of similar recording and production techniques, has captured the "overall concept and feel" of the alleged infringed work. This expansion of the Ninth Circuit extrinsic test does not provide copyright protection for the techniques employed, but uses their presence to infer copying. In some instances, this will allow the plaintiff to present the contested works to the factfinder for a determination as to whether they share the same "concept and feel."

Overall, these slight modifications aim to favor a finding of infringement when a plaintiff alleges such infringement. Their goal, as applied to a musical work, is to impart a need for creators to self-regulate by assessing their new works in light of their potential influences. The end result should not be more successful infringement lawsuits but more innovative musical works entering the market. "The cost of expression to authors of copyrighted works increases as copyright protection increases. The less material an author (not a copier) can borrow from other copyright holders without infringing their copyrights, the greater the cost of creating his work."[170] As a result of the increased cost these proposals incur on those who wish to create music, it is likely that there would be less new works entering the market place.[171] As such, works innovative enough to enter a less saturated marketplace will have both a higher artistic and financial value to consumers. Finally, these modifications will advance the true principle upon which U.S. copyright law is based, "[t]o promote the Progress of Science and useful Arts . . . ."[172]

IV. INCREASED COSTS OF MUSIC EXPRESSION HAVE FOSTERED INNOVATION IN THEATRICAL MUSIC

> For reasons that remain without convincing explanations . . . the theater has been far more receptive to musical innovation in popular

[170] Landes & Posner, *supra* note 8, at 337.
[171] *See* discussion *supra* Part III.
[172] U.S. CONST., art. 1, § 8, cl. 8.

> song than the marketplace-oriented music publishing companies known collectively as Tin Pan Alley.
>
> — James T. Maher[173]

Interestingly, some scholars have noted that a great amount of musical innovation was born in musical theater.[174] Reasons as to why musical theater has played such a role in the innovation of popular music are unclear. Alec Wilder notes in his authoritative treatise on American popular music that this innovation can be attributed "to the fact that the better pop song writers were paying closer attention to the superior musical sophistication of the best theater songs."[175]

As an essential part of a musical theater performance, the music in musical theater must cater to the ticket purchasing audience who are "conditioned to expect a special quality in theater music."[176] This "special quality," at times, includes "[s]ubstitut[ing] ambience, tradition, and discipline for plot, situation, and characterization."[177] In addition, a theatrical performance requires a sense of orchestration that will add to the drama both within the work and the theater hall itself.[178] Perhaps these particular features of dramatic musical works, when combined with the audience's "handsome tolerance for innovation," create an environment ripe for innovation.[179]

Richard Posner would argue that all the above-mentioned features certainly raise the initial cost of expression.[180] However, unlike non-dramatic musical works, dramatic works *are* afforded some additional protections that do not increase the cost of expression.[181] For example, dramatic works are not included in some exemptions to infringement listed in 17 U.S.C. §110.[182] Dramatic works are also not subject to the compulsory license forced upon creators of non-dramatic musical works.[183]

The lack of exemptions with respect to dramatic works results in advanced protections afforded to authors of dramatic works, which may help further explain the "superior musical sophistication" among these works.[184] These protections foster the economic interests of the dramatic

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173 *See* Maher, *in* AMERICAN POPULAR SONG, *supra* note 1, at xxx.
174 *See id.*, at xxiv.
175 *See* ALEC WILDER, AMERICAN POPULAR SONG, *supra* note 1, at 370.
176 *See* Maher, *in* AMERICAN POPULAR SONG, *supra* note 1, at xxxv.
177 *See id.*
178 *See id.*, at xxxiv.
179 *See id.*, at xxxv.
180 Landes & Posner, *supra* note 8, at 337.
181 *See* 17 U.S.C. §110(3)–(11) (2012) ("dramatic works" are excluded from the exemptions to infringement).
182 *Id.*
183 *See* 17 U.S.C. § 115 (2012).
184 *See* ALEC WILDER, AMERICAN POPULAR SONG, *supra* note 1, at 370.

author, allowing him to ensure that the primary source of income for his work remains his:

> That the sorts of uses excused vary with the type of work protected suggests that Congress struck a considered economic balance with respect to each type of work. The bar to unauthorized public performances of dramatic works, including those not for profit, can be explained by the congressional assumption that a playwright's opportunity for recompense derives almost entirely from performances; to excuse any sort of performance would deprive him of his major source of income.[185]

This raises the following question: could additional copyright protections also help foster musical innovation outside of the dramatic arena? The phenomenon of dramatic musical works and innovation provides some evidence that a higher cost of expression coupled with additional protections for those expressions promotes innovation. What reasons remain to not extend this rationale to non-dramatic musical works?

In the realm of popular music, if the additional, and this Note's author would argue, slight, protections were to be granted, creators of new works would begin to account for their influences. This self-regulation alone must foster innovation. When presented with a problem, a composer worth the paper they writes on will overcome the obstacles that the above modifications present. The ingenuity required would result in interesting musical structures that seek to explore those stretches of music yet to be uncovered.

CONCLUSION

Today, the music industry is free from the oversight of publishers and record labels. Music creators can accomplish the writing, recording, and distribution of their works free from many of the requirements the industry used to impose on them. Creativity may be expressed with ease and shared across the world while, at the same time, access to music is on an entirely different level than before in history. It is in this context that an aspiring creator must realize their responsibility to monitor themselves when sending new works into the vast streams of the marketplace.

Allowing music to enter the marketplace without considering whether that music is truly original will have disastrous effects. These

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[185] Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1010 (1970) ("In the case of musical compositions, where public performance is permitted so long as its sponsors receive no profit, the assumption is that while free concerts will, to some extent, cut into the audience for paid performances, the composer enjoys compensating income from the sale of sheet music and records and from radio performances.") (footnote omitted).

musical works will only reduce the value of those innovative works that deserve a place in the market's repertoire and will slow the progression of music as a whole. To help foster an environment that encourages innovation, the courts should modify the current standards for establishing infringement.

The age-old requirement of access, in the absence of any evidence to the contrary, should be presumed to have occurred. In cases where the sound recording and the composition developed simultaneously within the studio doors, the sound recording should be considered the creator's composition in tangible form and the artist's expression should not be distinguished from the core composition. "Objective similarities" should extend to include the techniques employed in the expression of the song, including the approaches to production and recording employed in the song's creation.

These slight variations will require new works to achieve a greater level of sophistication while at the same time protecting those works that have earned the right to enter the marketplace. Those who create musical works should follow the example of Petty who, after settling with Smith, said, "these things can happen. Most times you catch it before it gets out the studio door but in this case it got by."[186] Further, the changes proposed here will likely reduce the number of musical works in the marketplace, which in turn will increase the value of those works that do enter the market place.[187] Therefore, such changes will promote, as the Constitution requires, the "progress of the useful arts and sciences."[188]

Stuart Anello[*]

[186] Kreps, *supra* note 12.

[187] Landes & Posner, *supra* note 8, at 328 ("The greater the number of such works (past and present), the lower the demand for any given work. Thus, the number of works and the number of copies per work will be determined simultaneously, and the net effect of this interaction will be to reduce the number of works created.").

[188] U.S. CONST., art. I, § 8, cl. 8.

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