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Introduction

In June 2013, Robin Thicke, Pharrell Williams, and Clifford Harris, Jr. (hereinafter, the “Thicke Parties”) released the single titled ‘Blurred Lines’. Seemingly overnight, its record-breaking success was apparent. It climbed the Billboard magazine’s “Top 100” song chart and resided as the #1 hit for twelve consecutive weeks.[[2]](#footnote-2) It was named as the “Song of the Summer” and was the first summer season #1 hit by a lead male solo artist since 2004.[[3]](#footnote-3) Collectively, Thicke, Williams, and their assisting production entities profited approximately seventeen million dollars from the single’s success.[[4]](#footnote-4)

Two years after the initial release, the song reached headlines again.[[5]](#footnote-5) Marvin Gaye’s estate had filed a responding claim to a declaratory lawsuit initiated by the Thicke Parties, alleging that ‘Blurred Lines’ infringed on the copyright of Gaye’s 1977 smash hit, ‘Got to Give It Up’.[[6]](#footnote-6) The news of this quickly circled media outlets in what would soon become one of the contemporary music industry’s most notorious cases.[[7]](#footnote-7) The Gaye estate eventually won approximately seven million for the claimed infringement,[[8]](#footnote-8) making it the highest damage amount ever rewarded for a domestic copyright infringement claim.[[9]](#footnote-9) Cementing the district court’s decision, besides various procedural and evidentiary errors, was the notion that substantial similarities between the “groove” or “feel” of compositions can be enough to inculpate an alleged infringer—a novel statement for copyright law.[[10]](#footnote-10) The decision in *Williams v. Bridgeport Music, Inc.* quickly reverberated across the national music industry and proved highly controversial: some applauded its progressive viewpoint, while others lauded it as an improper application of an otherwise familiar copyright regime.[[11]](#footnote-11) The district court’s decision was appealed and upheld.[[12]](#footnote-12)

The controversy surrounding the *Williams* decision is vested in the notion that there are particular elements of a song that can be copyrighted, and that groove and feel have never been included in that compilation.[[13]](#footnote-13) The United States Copyright Act (hereinafter, the “Copyright Act”) does not enumerate specific musical components as protectable or unprotectable, and thus many musical copyright truisms have resulted from jurisprudence in the wake of vague statutory authority. Historically, courts have found the elements affixed to the literal sheet music (hereinafter, “deposit copy”)—such as note and chord progression, lyrics, and base lines—to be validly protectable in a composition.[[14]](#footnote-14) This lack of a definitive legal standard has resulted in inconsistent interpretation across courts and, as a result, has presented serious challenges for musicians in seeking and maintaining copyright protection.[[15]](#footnote-15) The genre of rap disproportionately absorbs this flippancy compared to more traditional genres. Rap songs do not typically have note progressions to affix to a sheet of music; indeed, in the genre’s infancy, rap songs barely even had definitive lyrics. Rap operates almost entirely without the security of predictable copyright protection—its essence is a freeform, spontaneous spoken word performance, overlaying an unscripted, often toneless beat.[[16]](#footnote-16) This has often resulted in rap songs largely circumventing copyright protection eligibility.[[17]](#footnote-17)

The ruling in *Williams* was a landmark decision in its effects on musical copyright law. Per this ruling, musicians may now seek recovery on what they feel is a copyright infringement on their groove, vibe, and/or feel, regardless of any literal or individualized elemental copying by the offending song. This Note argues that the rap genre, in particular, stands to serve as one of the decision’s most impacted audiences. The essence of rap music is predicated on elements of music that have been historically unprotected by the Copyright Act, such as vibe, feel, and groove, and this litigation’s decision may predispose rap songs to a wider degree of legal protection. Alternatively, because rap utilizes so few mechanical components in the creation of its songs, this ruling may constrict the ability of rappers to create without fear of infringing on the vibe or groove of another and may lead to policed monopolization of structural elements once widely and expectantly shared across record labels and production teams. This Note will analyze the realities of both scenarios, review the legal implications of granting copyright protection to such elements, offer recommendations as to how the current United States copyright paradigm can be revised so as to provide adequate preparation for any future similarly-postured cases, and further examine varying viewpoints as to how the music industry as a whole could be disrupted by such a dramatic change in what constitutes protectable elements of a composition.

Part I explains the history of the Copyright Act, observing its many iterations and how they have restructured the forms of “art” that are considered sufficiently worthy of legal protection. Part II presents the history behind the genesis and uprising of rap music in the United States. Particular attention will be drawn to the socioeconomic climate in which rap originated and the traditional stylistic elements in what constitutes a rap composition. Part III explores the historical and current tensions between copyright law and rap music, discussing the tensions that arise from the application of a legal regime to a genre, and music as an art form generally, whose core elements are statutorily undefined. Part IV explains the litigation progeny of the *Williams* suit, examining the controversial nature of the district court’s decision, the merits of the subsequent appeal, and its resulting appellate decision. Lastly, Part V considers both real and speculative implications of the *Williams* holding on rap musicians, copyright law, and the music industry in general. In light of the Ninth Circuit’s decision, understanding the realities of this litigation and preemptively preparing developed responses would be best practice for lawmakers and music industry professionals, as *Williams* will certainly not be the last case of its kind. Such preparation will soften the blow of *Williams*-style rulings for all affected parties. In particular, three modifications to the existing copyright paradigm are proposed: (1) Section 102(a) should be amended to include a formally enumerated list of protected musical components in compositions; (2) lawmakers and music industry professionals should develop a quantification model to measure these components to serve as concrete evidentiary proof in cases of alleged infringement; and (3) if amending the Copyright Act is unduly burdensome, courts should consider during assessment of musical copyright infringement: (A) if a song was both written and recorded at the same time, combining artist’s performance techniques on sound recordings and the songwriter’s composition into one singular assessment of initial similarity, or (B) allowing the inclusion of production, performance, and recording techniques in their substantial similarity assessment. Part V additionally reviews certain other tertiary benefits and problems associated with the courts adopting a tightened copyright regime.

I. The United States Copyright Regime and Rap Music

A predictable protection scheme in copyright law would provide rap artists, and musicians generally, with the security needed to produce, license, and record their compositions in a way that would dependably earn income. It would also give requisite cautionary notice to rap artists who are considering modeling their work off of another musician’s song on what breaches inspiration to infringement. Economically, a reliable protection scheme benefits the record companies, publishers, and artists by ensuring less waste in the production and subsequent copyright registration of rap songs that incorporate popular but legally difficult traits, such as freestyled lyrics and a holistic absence of structural elements. However, American copyright legislation has only incorporated music in relatively recent history, making the copyrightability of music a somewhat uncharted field for legislators and artists alike. Further, the technological advances of recent history have changed the definition of what is protectable for music in copyright law and have transformed the way music is created, distributed, and consumed, complicating the ability of the courts to grasp a reliable *per se* guideline for attributing copyright protection. What follows is a brief review of the statutory development of copyright law in the United States and the resulting legal standards used in litigation to assess musical copyright infringement.

A. Legislative History of the Copyright Act

The United States has long known some form of a copyright regime, which has become far more complex than its original drafting over the course of history. The United States Constitution, originally created in 1787, vested in Congress “the power to promote the progress of science and useful arts, by securing for limited times to authors and investors the exclusive right to their respective writings and discoveries.”[[18]](#footnote-18) In 1790, Congress passed the first iteration of the Copyright Act, granting copyright protection only to maps, charts, and books.[[19]](#footnote-19) Over time, Congress greatly expanded the protected list, largely in response to a rapidly evolving technological climate, which both created new methods of artistic expression and changed how creative products were disseminated. Apart from expanding the eligible subject matter of copyright protection, each revision of the Copyright Act brought changes to the formal requirements in securing a copyright, including the duration of copyright ownership, the way in which a copyright is affixed, and the eligibility of parties to claim legitimate ownership title.

Following a series of amendments and lobbying by creative industry professionals, Congress overhauled the Copyright Act in 1976, which is its contemporary controlling form. Currently, the Copyright Act extends protection to any *original works of authorship* that are *fixed* in any *tangible medium of expression*.[[20]](#footnote-20) “Expression” is significant—the Copyright Act explicitly does not protect mere ideas.[[21]](#footnote-21) The grant of copyright protection affords varying degrees of proprietorship in the work, including, but not limited to, exclusivity regarding reproductions, derivative remakes, and distribution.[[22]](#footnote-22) Section 106 of the Copyright Act defines six exclusive rights of a copyright owner, and Section 114 elaborates on the scope of said rights.[[23]](#footnote-23) If a third party appropriates a copyrighted work in any one of these enumerated fashions, the copyright owner may pursue a copyright infringement claim against the third party if the copyright is federally registered.[[24]](#footnote-24) Registration entitles a copyright owner, if successful in an infringement suit, to statutory damages up to one hundred and fifty thousand dollars per work.[[25]](#footnote-25)

B. Copyright Law’s Application to Music

Copyright in music is possible in two forms: musical compositions and sound recordings. Musical compositions refer to the tangible deposit copy that hosts all the musical elements of a song, which a songwriter creates. Sound recordings refer to the actual audio recording of a song that an artist creates. Within one song, the songwriter owns the copyright in the musical composition, and the artist owns the copyright in the sound recording, unless the artist both wrote and recorded the song, in which case the artist would own both copyrights.[[26]](#footnote-26) These variations became statutorily enumerated under the Copyright Act at vastly different times; musical compositions became protectable in 1831, while sound recordings gained protectability in 1972, over a hundred years later. The late addition of sound recordings was a response by Congress to a changing technological and commercial climate in the music industry. Newly available technologies, such as the Internet, facilitated the rapid and simplistic distribution, consumption, and piracy of sound recordings. This newfound dissemination enabled unprecedented exploitation of sound recordings, thus highlighting the necessity of separate protection in order to properly account for royalties. While music owners had the exclusive right to publicly perform their works in 1897,[[27]](#footnote-27) performance techniques employed during the creation of sound recordings are not considered when assessing copyright infringement.

As mentioned, these two kinds of copyrights can, and often do, coexist within one song across multiple parties. Of great importance to this Note is that the timing of a song’s creation determines the scope of what is protectable within it—if a song was created prior to the addition of sound recordings as a copyrightable artwork, then the sole basis of assessing infringement must lie within what is displayed or inferred from the deposit copy. Structural musical elements found solely in a sound recording cannot be considered as evidence of infringement if the contested song was created at a time when the deposit copy was the only legally protectable element of the song.

C. Pursuing a Copyright Infringement Suit: Copying in Fact, Substantial Similarity, the Extrinsic and Intrinsic Tests, and the Defense of De Minimis

Proving *per se* copyright infringement requires establishing both the ownership of a valid copyright and a violation of an exclusive right.[[28]](#footnote-28) Beyond this *per se* standard, the United States Code offers no statutory guidance on the proper pursuit of a musical copyright infringement claim, meaning it has been the courts’ responsibility to define the procedure. In order to successfully bring suit for music copyright infringement, a copyright owner has the burden of proving both copying in fact, measured by a judge, and substantial similarity, measured by a jury.[[29]](#footnote-29) Copying in fact is proven by showing that (1) the defendant had access to the original work prior to the contested work’s creation, and (2) the dueling works, when compared, are strikingly similar.[[30]](#footnote-30) The necessity of independently showing both access and striking similarity is disputed across the federal circuit courts.[[31]](#footnote-31) For circuits that do not require independent showing of the two, access to the work can be simply inferred if the similarity between the works is striking.[[32]](#footnote-32) Striking similarity is statutorily undefined, but courts have held this to mean distinctive similarity in two works that raises suspicion.[[33]](#footnote-33) It does not need to be proven that the access was direct, or that the copying was even intentional.[[34]](#footnote-34) Indeed, intent is moot if the overall copying is found to infringe—copyright law follows a strict liability standard. Moreover, the finding of copying in fact can be vested in subconscious activity, further affirming the notion of strict liability.[[35]](#footnote-35)

If access and/or striking similarity are shown, courts will then move to determine the existence of substantial similarity between the works.[[36]](#footnote-36) In the Ninth Circuit, which is the controlling jurisdiction for the *Williams* litigation and thus the persuasive authority for this Note’s analysis, substantial similarity is shown through a two-part test of extrinsic and intrinsic similarity.[[37]](#footnote-37) Extrinsic similarity, assessed only by the judge, is proven through an expert testifier’s objective analytical dissection of the works, breaking down their constituent elements and reviewing their characteristics.[[38]](#footnote-38) If the judge is unconvinced by the expert analysis, the extrinsic test fails and the case is dismissed. A sufficient showing of similarity through the extrinsic test is necessary for the case to move to trial, where the intrinsic test is then performed. Intrinsic similarity is tested by examining whether a reasonable layperson (i.e., the jury), upon interaction of the “total concept and feel” of the works in dispute, detects enough similarity that the works are immediately confusable.[[39]](#footnote-39) The analysis, colloquially called the “ordinary observer test” or the “audience test,” reasons that if the alleged infringer had prior exposure to the original work and the dueling works are so similar that immediate confusion arises, then the alleged infringer must have modeled her work by copying and not by mere coincidence, independent creation, or prior common source.[[40]](#footnote-40) For both the extrinsic and intrinsic tests, substantial similarity can be found by the review of a compilation of elements even if some or all are individually unprotectable, though this concept was heavily challenged in *Williams* by the Thicke Parties. In the Second Circuit, which is equally influential in adjudicating music infringement cases, substantial similarity can only be measured using protectable elements.[[41]](#footnote-41) Both extrinsic and intrinsic similarity must be shown to satisfy substantial similarity,[[42]](#footnote-42) and if such similarity is proven, infringement is found.

While the Ninth Circuit has historically allowed for unprotectable elements to be considered during the “total concept and feel” analysis, this general notion of elemental protectability negates the entire idea that certain works of authorship are entitled to copyright protection while others are not. Such vast judicial discretion on what the jury ultimately reviews to be substantially similar has resounding implications depending on when the song was created. As mentioned inSection I.B, *supra*, deposit copies and sound recordings were entitled copyright protection at different points in time, and are capable of containing differing elements—lyrics, melody, and chord progression in one, and beat, groove, and feeling in the other, respectively. This means that, in theory, a judge could submit arguably *per se* uncopyrightable elements to the jury for consideration. This is exactly what happened in *Williams*, although the Ninth Circuit has allowed for this before in seminal cases such as *Swirsky v. Carey*. As will be argued, clarity from either the Copyright Act or courts regarding what musical elements are protectable or not would remedy this arbitrary system, and eliminate the need for copyright owners to waste resources litigating against the review of any particular element during an infringement assessment.

The threshold of substantial similarity has certain boundaries. Copyright holders, notwithstanding their statutorily enumerated ownership, may not hold others liable for infringement for an insubstantial violation of any one of their exclusive rights.[[43]](#footnote-43) Even if defendants concede copying between works, no legal consequences will follow from that fact unless the copying is substantial.[[44]](#footnote-44) The defense of *de minimis* addresses this notion, and is commonly invoked in copyright infringement claims to insulate the alleged infringer from liability of un-actionable copying. *De minimis* embodies the legal maxim “*de minimis non curat lex*,” loosely translated to “the law does not concern itself with trifles.”[[45]](#footnote-45) Copyright defendants often assert *de minimis* as an affirmative defense, arguing that their alleged copying is too trivial or minor to justify liability for infringement.[[46]](#footnote-46) In practice, what determines actionable copying has proven to depend on a variety of factors, from the degree to which the plaintiff’s material is plainly observable in the defendant’s work to the significance of the copied material, and from the protectability of the material copied to the impact that the copying will have on the plaintiff’s market.[[47]](#footnote-47) *De minimis* can be seen as a conceptual balancing tool between the interests of authors in the control and exploitation of their works and the society’s competing interest in the free flow of knowledge, information, and creativity.

D. The Application of Copyright Infringement Standards to Music and Rap: The Burden of Subjectivity

As a result of the lack of statutory clarity, the findings of copying in fact, substantial similarity, and *de minimis* are ultimately subjective and case-specific value judgments: “[i]f so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy.”[[48]](#footnote-48) In observation of this reality, the questions then necessarily become “[w]hen is the value of the original sensibly diminished” and “[w]hen is the copying substantially injurious”?[[49]](#footnote-49) The subjective nature of the application of these doctrines carries challenging implications particularly in the music context. As music is readily accessible and intended for mass consumption, it is unavoidable—and to a certain extent encouraged—that other artists may be influenced by a song and its underlying components in the creative development of their own compositions. Moreover, when an artist samples a portion of another artist’s song, what amount of sampling crosses the threshold of inspiration to infringement?[[50]](#footnote-50) Do certain structural elements of a song, if emulated, legally diminish the value of the original more so than others? What of musical genres that predominantly subsist on less structural, and consequently less measurably “value-adding” elements? Are their patron artists faced with a higher burden of proof in copyright infringement claims? If your work belongs to these genres, how do you circumvent copyright infringement while maintaining adherence to your genre’s overall aesthetic? These questions suggest important consequences in the application of copyright law to music and highlight the potential for significantly inconsistent litigation results. Indeed, this likelihood has already been realized in some capacity—for example, the Sixth Circuit and the Ninth Circuit disagree as to whether the concept of *de minimis* even applies to sound recordings at all, with the Ninth Circuit holding in favor and the Sixth Circuit arguing against such an application.[[51]](#footnote-51)

Rap music is inordinately predisposed to these potential obstacles. Given its reliance on ethereal elements such as beat, feel, groove, and vibe, copyright infringement claims for rap songs are exceedingly difficult to prove. These elements, when allegedly infringed, must be shown as protected expressions and not simply ideas that can only be expressed in a limited amount of ways, constituting a “*scène-à-faire*” of the genre as a whole.[[52]](#footnote-52) This is assuming that these elements are even measurable at all, which is challenging without the structure and notation capability traditionally found in other musical elements, such as chord progression and melody. It bears reminding that if a song was written by one person and recorded by another, the former owns the deposit copy, and the latter owns the recording. If an artist owns only the sound recording and is pursuing an infringement suit, it is much more challenging to argue measurable copying when all a court can do is hear the recording, and it is exponentially more difficult when performance techniques used during recording production are not accounted for during infringement assessment. Rap artists rely heavily on said performance techniques during their creative production, and as will be argued, formally accounting for these performance techniques—as well as either statutorily defining what elements are protectable or eliminating the concept of elemental protectability altogether in assessing infringement—would greatly assist both rap artists and musicians in general in the pursuit of infringement claims. A brief review of rap’s genesis in the United States and its traditional stylistic characteristics proves illustrative of the tension between rap music and domestic copyright law.

II. The History of Rap in the United States

A. The Sociocultural Origin of Rap Music

A now widely commercialized and popular genre, rap has a young but ambitious history with the United States. It is disingenuous to explore the contours of what constitutes rap music without the frame of its social context.[[53]](#footnote-53) Rap’s contemporary personality reflects the culture of the young, urban, working-class African Americans who originally used the genre as a vehicle to express their discomfort with their socioeconomic positioning in the American society.[[54]](#footnote-54) While music is inherently shared, experienced, and created indiscriminately across populations, it is indisputable that rap and the surrounding hip-hop culture in the United States owe their collective genesis to the African American community. Rap songs are often illustrative of a struggle for equitable recognition that is personal and unique to this affinity group, causing rap and its identity politics to be somewhat inseparable. Further, the stylistic elements of rap music, as discussed *infra*, are strongly tied to African populations worldwide, making this disclaimer both responsible and necessary in assessing rap as a genre.

While its precise date of origin is unknown, many sources indicate that the birth of rap music in the United States took place in the early 1970s in the Bronx borough of New York City.[[55]](#footnote-55) At the time, the presiding demographic was intensely diverse across racial and economic spectrums, with the majority of the poorest residents being African American.[[56]](#footnote-56) Three significant events in the Bronx have been attributed to the rise of rap.[[57]](#footnote-57) First, in 1959, parks commissioner Robert Moses initiated the construction of an expressway through the center of the borough.[[58]](#footnote-58) This construction displaced businesses and factories as well as much of the middle and upper class German, Italian, Irish, and Jewish populations.[[59]](#footnote-59) The area became relatively uninhabitable, and the remaining occupants were largely Hispanic and African American, impoverished and unable to relocate.[[60]](#footnote-60) Accompanying this new climate was an onslaught of crime, drug presence, and unemployment—effects of the new emptiness and ramifications of the preexisting tense social climate trailing the Jim Crow era.[[61]](#footnote-61)

Secondly, a decade after the expressway installation, in 1969, a 15,382-unit co-op apartment complex was completed in the northern edge of the Bronx, further accelerating the exodus of upper and middle class families and leaving the Bronx in a cemented state of poverty.[[62]](#footnote-62) As the vacancies in this and other housing complexes rose, landlords began to sell these units to slumlords who capitalized on their power by renting the units to the newly abundant low-income residents.[[63]](#footnote-63) As the Bronx became more flushed with these complexes, whose residents were mostly impoverished African American families, slumlords gained more control, and trends of mismanagement and abuse soared.[[64]](#footnote-64)

The surmounting urban decay and political disenfranchisement, as well as the increase of the close-quartered housing complexes, were opportune for the exacerbation of the preexisting crime, drug abuse, and impoverishment, leading to the third event attributed to rap’s uprising: a surge in gang presence.[[65]](#footnote-65) Residents began to form gangs as a way of establishing a class-oriented enclave of security while local politicians failed to provide structural and financial assistance.[[66]](#footnote-66) These gangs, while normalized as cesspools of violence and corruption, offered a sense of unity and stability for the community, serving as much a unifying social outlet as a sub-political regime.[[67]](#footnote-67) These gangs were enabled in form and power by the close living quarters that the co-op complexes provided—residents of the area were familiar with one another and had access to the same informational, financial, and social resources as a result of pervasive gang control. As the demographic changed, so too did the social climate: clubs formed and began hosting dance parties for the community, featuring microphone controllers (hereinafter, “MC” or “MCs”) and disc jockeys (hereinafter, “DJ” or “DJs”), and catalyzing what is now familiarized as rap music.[[68]](#footnote-68)

B. Styling a Rap Composition: What Is Rap Made of?

The art of rapping itself—the rhymes spoken over the beats produced by DJs—began as an oral commentary by an MC about the record-turning capabilities of a DJ. MCs would introduce the DJs, who were generally local artists familiar to the audience and their upcoming playlists.[[69]](#footnote-69) MCs’ commentaries, often spoken in rhyme and typically unscripted, would overlay the beat and bridge the gap between songs, providing a rhythmic transition into the following set.[[70]](#footnote-70) As the club scene gained popularity, this practice began to attract wider audiences.[[71]](#footnote-71) MCs, capitalizing on their newfound spotlight, moved their performances from appreciation of the performing DJ to more personal narratives, carving a space for them to be recognized as artists in and of themselves.[[72]](#footnote-72) Notable MCs included Afrika-Bambaataa, the once leader of one of the premiere aforementioned gangs, the Black Spades.[[73]](#footnote-73) Kool Herc and Grandmaster Flash have also been attributed as major influences to this scene—their samplings of jazz, reggae, and funk, paired with rhyming vocals, diversified the genre and expanded rap’s mainstream consumptive accessibility.[[74]](#footnote-74)

Apart from MCs popularizing the genre in dance scenes throughout the 1970s, the stylistic techniques of MCs’ performances are not coincidental and can be greatly attributed to influences that significantly predate rap. African oral traditions of *nommo* and *griotism* are notable.[[75]](#footnote-75) *Nommo* is an Afrocentric term describing the power of the word to generate and create reality, calling on the speaker of the word and the listener to be in unity as they affirm this shared reality.[[76]](#footnote-76) The point of *nommo* is building community—as a concept, it substantiates the power of language and story to define reality for a group of active listeners.[[77]](#footnote-77) In its relation to rap, *nommo* affirms its spoken word phenomenon in that “artists are unlocking the keys to finding themselves and helping others experience what they have experienced.”[[78]](#footnote-78) On the other hand, *griotism* refers to the practices of *griots* or respected historians and orators.[[79]](#footnote-79) The term originated from Malian cosmology but has since spread in its application across various communities in Africa.[[80]](#footnote-80) *Griots* were “keepers and purveyors of knowledge, including tribal history, family lineage, and news of births, deaths, and wars.”[[81]](#footnote-81) When *griots* travelled, they spread and made accessible knowledge through spoken word to local tribes, and for this reason they were viewed as important unifiers of these communities.[[82]](#footnote-82) When the United States brought African Americans stateside during the slave trade, these traditions stayed within African American communities and were utilized by slaves to communicate in resistance of subjugation by their masters.[[83]](#footnote-83) Relatedly, rhyming games proved important in this context. Slaves often faced punishment for speaking in foreign tongues; so, to circumvent their masters, rhyming games and metaphors were employed as communication and entertainment tools across slave communities.[[84]](#footnote-84) The concepts of *nommo*, *griotism*, and rhyming games proved pervasive in African American communities and were manifest in the behavior of MCs when rapping: MCs used the art of rhyming spoken word to captivate audiences with narratives, forming temporary realities within the shared experience of a dance party. Rap has, and still enjoys, these elements of rhyme and unscripted spoken word as its very essence—these are the stylistic components to which the genre owes its base.

Alongside oral traditions influencing the lyrical practice, rap’s musical styling was heavily influenced by reggae, jazz, and blues.[[85]](#footnote-85) One style of reggae known as “toasting,” originating from Jamaica, has been immensely foundational in the formation and success of the rap genre.[[86]](#footnote-86) Toasting, originally referring to slurs of varying length spoken by Jamaican DJs over music to encourage dancers, came to incorporate DJs cutting back and forth between the vocal and instrumental tracks while adjusting the bass and treble of the music.[[87]](#footnote-87) Professor Henry Rhodes describes four ways in which reggae’s toasting technique and rap music are similar.[[88]](#footnote-88) First, both musical styles are based on pre-recorded sounds and beats.[[89]](#footnote-89) Second, both types of music rely on a strong beat undertone on which spoken word was overlaid.[[90]](#footnote-90) Third, both rap and toasting use a temporal element to sync the spoken word with the beat undertone.[[91]](#footnote-91) Fourth, the genres concern themselves with similar content matter—personal narratives, advocacy, nonsense, and insult-based messages are commonly seen as the centerpiece of a composition incorporating rap and/or toasting.[[92]](#footnote-92) The shared elements of toasting and rap illustrate additional stylistic components that are commonly attributed to rap music today—heavy, breaking beats with a timely and rhythmic lyrical verse overlay. Kool Herc, mentioned *supra*, was seen as a pioneer of integrating toasting techniques into his DJ sets, further cementing the influence of reggae on rap music.[[93]](#footnote-93) Playing only the parts of songs that he knew would ignite his audience, DJ Herc often sampled the record areas that featured drums, bass, and rhythm guitar stripped to their barest essence, known informally as “break-beat.”[[94]](#footnote-94) A turntable with two records was essential for this technique, and this setup became the conventional way DJs performed with their MCs.[[95]](#footnote-95) Grandmaster Flash pioneered the technique of “punch phasing,” which is used to accentuate the beat and rhythm for the dancing crowd by hitting a particular break on one turntable while the other record is still playing.[[96]](#footnote-96)

Rap music, then, is a genre of substantial cultural history and stylistic development. Pulsing beat, rhythm, rhyme, sampling, and unscripted spoken word are at its core, and, without these elements, the genre would cease to exist. While openly and heavily influenced by other genres, rap has come to assume its own unique identity and holds a venerable position in the musical patronage of the United States. Popularly enjoyed, and now widely commercialized, rap has secured itself with American listeners as a lucrative genre worthy of artistic appreciation.

III. Copyright Law’s Impact on Rap

The genre of rap fits imperfectly with copyright law as it exists today. To understand this imperfect fit, it is useful to reexamine the historically copyrightable elements of a song. As mentioned in Section I.B, *supra*, the scope of a song’s copyright protectability depends on when the song was created. Deposit copies and sound recordings were granted protection at vastly different times and carry different attributes—deposit copies display measurable and visual elements such as melody, chord progression, and lyrics, while sound recordings embody intangible elements such as groove, feel, and vibe. Sound recordings, then, carry a largely indefinable set of characteristics, frustrating the ability to individually use them in proving infringement when the copying is indirect. As mentioned, while both musical compositions and sound recordings as terms are statutorily protected, the actual elements within each have no such legislative definition, but rather have been subject to judicial interpretation regarding their sufficient value in proving infringement.

Generally speaking, both the lyrics and the main melody line serve as obvious indicators of direct copying. Lyrics are infinitely capable of rearrangement and novelty, and melody lines can be readily supplemented by changing intervals, time values of notes (e.g., eighth note, quarter note, etc.), and varying degrees of note repetition and tone, making exact replication of these components of songs almost certainly intentional. Other elements of a song, such as chord progression and beat, have seen less consistent results in the courtroom as definitively showing infringement but have been noted as useful indicia. The determination of what constitutes copyright infringement in a song is ultimately made by examining the components of the song holistically—while one element of a song is not typically dispositive of infringement, commonplace courtroom practice is to review the song as an entire summation, not merely piece-by-piece. This is congruent with the doctrines of substantial similarity and *de minimis*—a song must be reviewed in its entirety, such that the infringement is substantial enough to qualify as harmful to the original piece and not just trivially burdensome.

For rap songs, this practice of holistic review is complicated. As mentioned, performance techniques used during the production of sound recordings are currently ineligible for consideration in infringement suits, and due to the genre’s traditionally spontaneous nature, rap songs are often rewritten simultaneously as the recording is taking place. This creates a void of accountability in these songs’ creative production. Further, rap songs conventionally do not embody such otherwise traditionally protectable musical elements, besides lyrics, and they are generally created without melodies or chords. Consequently, there is typically either limited or a total lack of note progression to affix to a sheet of music and register with the United States Copyright Office (hereinafter, the “Copyright Office”) as the song’s tangible and definitive deposit copy.

If rap songs predominantly utilize bass lines, rhythm, and beat, this comprises minimal substance that would merit the successful pursuit of a copyright infringement claim, as any deposit copy or sound recording reviewed would hardly surpass the requisite “substantial” threshold and provide a holistic impression of similarity. Even getting to the point of assessing substantial similarity is challenging, as host elements such as vibe, groove, and feel are traditionally considered mere ideas as opposed to original expressions, invalidating copyright eligibility.[[97]](#footnote-97) Rap is unique in its elemental minimalism—few other music forms utilize such a low number of legally recognized compositional elements in the creation of their songs. While neither of the songs in question in *Williams* are of the rap genre, the litigation proves illustrative of this ongoing tension.

IV. *Williams v. Bridgeport Music, Inc.*: Analysis

A. Procedural Background

In 2013, the single ‘Blurred Lines’ was released to the public. This song was composed by the Thicke Parties, with distribution and reproduction assistance by Interscope Records, UMG Recordings, Inc., Star Trak Entertainment, LLC, and Universal Music Distribution.[[98]](#footnote-98) Marvin Gaye, an American songwriter and performer, wrote, composed, and recorded the song ‘Got to Give It Up’ in 1976, and registered the musical composition (but not the sound recording) with the Copyright Office in 1977.[[99]](#footnote-99) Nona Marvisa Gaye, Frankie Christian Gaye, and Marvin Gaye III (hereinafter, the “Gaye Parties”) are survivors of the now deceased Marvin Gaye, and owners of his copyright in ‘Got to Give It Up’.[[100]](#footnote-100)

On August 15, 2015, the Thicke Parties filed a complaint in the District Court for the Central District of California seeking declaratory relief against the Gaye Parties.[[101]](#footnote-101) The complaint alleged that the Gaye Parties believed that ‘Blurred Lines’ infringed the copyright in ‘Got to Give It Up’, and that such copyright infringement did not in fact exist.[[102]](#footnote-102) Two months later, the Gaye Parties filed a counterclaim alleging that the Thicke Parties had indeed infringed on the copyright of ‘Got to Give It Up’ via the recording, reproduction, performance, distribution, and sale of ‘Blurred Lines’.[[103]](#footnote-103) Because this court follows Ninth Circuit progeny, the probative elements for copyright infringement were, in sequence, (1) copying in fact, and (2) substantial similarity, measured by a satisfaction of both the extrinsic and intrinsic tests. While copying in fact was conceded, the Thicke Parties maintained that the similarity between the compositions was insufficient to amount to infringement.[[104]](#footnote-104) After consideration of expert testimony and analysis per the extrinsic test, the court found that the extrinsic test was satisfied in that there were evident factual disputes on similarity.[[105]](#footnote-105) Trial ensued, and a jury was empaneled, per the intrinsic test, to assess the overall substantial similarity of the works.[[106]](#footnote-106)

As per the aforementioned practice of holistic review, the jury considered testimony regarding a multitude of compositional elements in determining whether copyright infringement existed between the two songs. Notably, the elements considered by the jury were those that were approved by the court as satisfactory of the extrinsic test’s objective similarity metric. These elements included, but were not limited to, (1) “Theme X,” (2) the keyboard parts, (3) bass melody, (4) signature phrase, (5) lyrics, (6) edited and transcribed sound recordings, and (7) the admission of “mash-ups.”[[107]](#footnote-107) Given full consideration of the evidence presented, the jury found the two works were sufficiently substantially similar to constitute infringement and awarded the Gaye Parties approximately seven million dollars in damages.[[108]](#footnote-108)

B. Thicke Parties’ Motion for Retrial

After the trial’s conclusion, the Thicke Parties filed a motion for a retrial, calling for a review of the sufficiency of the considered evidence to determine whether there was plain error.[[109]](#footnote-109) Alleging significant misapplication of various copyright legal standards and vast evidentiary errors,[[110]](#footnote-110) the Thicke Parties contested that the verdict was contrary to the clear weight of the evidence presented and, as such, merited a retrial.[[111]](#footnote-111) In summation, the Thicke Parties contested the following: (1) the evidence approved as admissible by the extrinsic test, and (2) the subsequent jury instructions, particularly Jury Instruction 43.[[112]](#footnote-112) The Thicke Parties contended that the extrinsic analysis advanced to the jury compared unprotected elements of ‘Got to Give It Up’ with ‘Blurred Lines’, and as such the jury was improperly exposed to characteristics which proved determinative in their finding of intrinsic similarity.[[113]](#footnote-113)

Critical to their argument was the timing of the creation and registration of ‘Got to Give It Up’. Because the song was created in 1976 and registered in 1977,[[114]](#footnote-114) the composition was still bound by the 1909 Copyright Act, which required formal publication to the Copyright Office of any work of art in order to receive protection.[[115]](#footnote-115) The deposit copy, and not the sound recording, of ‘Got to Give It Up’ was the only work of art registered with the Copyright Office, and thus, according to the Thicke Parties, should have been the controlling item in determining infringement.[[116]](#footnote-116) Certain elements of this song existed independently between its deposit copy and sound recording, yet many elements debated at trial were those comprised in the sound recording. Thus, the Thicke Parties alleged that the consideration of the sound recording’s various compositional elements, in determining substantial similarity, was improper and prejudicial.[[117]](#footnote-117) Because of the controversial permissibility of these elements, the Thicke Parties claimed that the application of the intrinsic test was improperly deliberated and manipulated by the jury instructions.[[118]](#footnote-118) Both the expert testimony and the jurors’ exposure to the composition included interaction with said elements. This prejudicial posture, the Thicke Parties argued, sufficiently warranted a new trial.[[119]](#footnote-119)

C. District Court’s Verdict

1. Alleged Evidentiary Errors: Judith Finell

A significant portion of the Thicke Parties’ demand for retrial rested on the court’s application of the extrinsic test. Judith Finell, a musicologist designated by the Gaye Parties as their expert testifier before and during the trial, had submitted as pretrial evidence a preliminary report that identified several similarities between the two pieces.[[120]](#footnote-120) Elements of note were Theme X and the keyboard parts, which she had originally claimed to find in the sound recording, and then adjusted her opinion to state that these elements were also found in the deposit copy.[[121]](#footnote-121) The court claimed that her opinion, though it had changed, was “based on her experience and expertise in how to evaluate the sheet music” and allowed the statement to be admissible for jury consideration.[[122]](#footnote-122) In opposition, the Thicke Parties had filed a motion for summary judgment and presented testimony of Sandy Wilbur, an opposing musicologist. Wilbur highlighted that some of the elements identified by Finell in her preliminary report appeared in the sound recording of ‘Got to Give It Up’, but not in the deposit copy; the jury’s resulting exposure to such unprotected elements was impermissible and forced them to face the “impossible task of having to constantly distinguish between the select parts of what they saw and heard each day that they could consider later in reaching their verdict, and the parts they could not.”[[123]](#footnote-123) The summary judgment motion by the Thicke Parties was denied.[[124]](#footnote-124) The court determined that the individually unprotectable qualities of these elements could be disregarded for purposes of the “analytic dissection” performed in connection with the extrinsic test and were thus permissible for jury consideration during the intrinsic test.[[125]](#footnote-125)

The Thicke Parties, in their retrial demand, alleged that Finell’s testimony should have either been dismissed entirely before trial for prejudicial error, or, if not entirely, then at least in part.[[126]](#footnote-126) In particular, the Thicke Parties contested the findings of objective similarities in the following elements, with their respective arguments attached: (1) Theme X and the keyboard parts, which were not in the deposit copy of ‘Got to Give It Up’; (2) the lyrics, because there were no two words in a row in common in both songs; (3) the signature phrases, which had only five pitches in common and hosted different rhythms and placements; (4) the “hooks” or signature phrases, because the ‘Got to Give It Up’ hook appeared only twice in ‘Blurred Lines’ and shared only three notes; (5) the bass melody, in which only three notes are shared; (6) the “word painting,” which simply applied scrutiny to otherwise unprotected ordinary words; and (7) the “rap v. parlando” comparison, the only claimed similarity in that the sections of each song began in the same measure.[[127]](#footnote-127)

The court rejected these propositions and found that no part of Finell’s analysis was prejudicial. Regarding Theme X, which was a four-note sequence of 3-3-2#-3 sung in the backup vocals of ‘Blurred Lines’, the court concluded that it was sufficiently similar to the sequence 5-5-6-5, which appeared in the deposit copy of ‘Got to Give It Up’. The court stated, “[w]hether the visible notation that appeared on the deposit copy was sufficient to include in the copyright in ‘Got to Give It Up’, a protectable interest in this four-note sequence was a question of fact for which expert testimony was appropriate. Finell was a qualified expert, and the Gaye Parties made a sufficient threshold showing that she “reliably applied the principles and methods [of her expertise] to the facts of the case.”[[128]](#footnote-128)

With respect to the keyboard parts, Finell testified that, while not literally visibly noted, “[t]he keyboard pitches and rhythmic expression are clearly indicated by the lead sheet,” and that the chords and bass parts reduced to notation in the deposit copy implied the keyboard parts that were protected by the deposit copy.[[129]](#footnote-129) The court determined that the scope of what constitutes “tangible notation” in a deposit copy advanced by the Thicke Parties’ retrial request was improperly narrow,[[130]](#footnote-130) and held that under the 1909 Copyright Act, a “musical composition might . . . have claimed copyright if reduced to a visibly intelligible form using a system other than our conventional system of musical notes.”[[131]](#footnote-131) Therefore, Finell relied on inferential notation in opining that the fixation of the keyboard parts was enough, from an expert’s perspective, to at least be admissible for jury consideration.[[132]](#footnote-132) The Thicke Parties also contended that the keyboard part constituted an unprotected *scène-à-faire*, because all professional musicians would theoretically be able to play this sequence, making it commonplace and ordinary knowledge in musical compositions.[[133]](#footnote-133) The court rejected this as well, stating that a combination of unprotected elements may be protectable expression, and “substantial similarity can be found in a combination of elements, even if those elements are individually unprotected.”[[134]](#footnote-134) The court used similar reasoning in rejecting the assertions that the bass melody,[[135]](#footnote-135) signature phrases, hooks, lyrics, and word painting were unprotectable and thus should not have been forwarded to the jury, deferring strongly to the notion that it is not up to the court to debate musicology, and that reasonable experts could disagree on the subject matter.[[136]](#footnote-136) Discerning clear factual disputes on these elements, it was deemed proper and not prejudicial to have forwarded these elements to the jury for consideration.[[137]](#footnote-137)

2. Alleged Instructional Errors: Jury Instruction 42 and Jury Instruction 43

While this case addressed a litany of procedural issues, most pertinent to this note’s discussion is the review of both Jury Instruction 42 and Jury Instruction 43.[[138]](#footnote-138) In Jury Instruction 42, the jury was told that subconscious copying is suggestive of infringement even where access is conceded.[[139]](#footnote-139) The Thicke Parties contended that Instruction 42 should not have been administered, because “[t]he relevant question for assessing actionable ‘copying’ is whether the works are substantially similar based on the extrinsic/intrinsic test—not whether . . . [the Thicke Parties] ‘subconsciously copied.’”[[140]](#footnote-140) They further claimed that subconscious copying is relevant only when it is disputed that the defendant did not have initial access to the work, which they originally conceded.[[141]](#footnote-141) The Thicke Parties alleged that Instruction 42 was “prejudicial based on the improper admission of evidence that Thicke and Williams were influenced by the ‘groove’ and ‘feel’ of [‘Got to Give It Up’],” and that it “improperly presented an alternative route by which the jury could find copying without finding substantial similarity between the works.”[[142]](#footnote-142) The Gaye Parties countered that the Instruction was appropriate given that “the principle [of subconscious copying] has also been applied where access was conceded, but the infringer denied actual copying.”[[143]](#footnote-143)

Jury Instruction 43 provided guidance on the proper application of the standard of infringement, including the finding of substantial similarity via both a showing of extrinsic and intrinsic similarity.[[144]](#footnote-144) The jury was instructed to consider elements from the forwarded extrinsic testimony, such as bass melodies, Theme X, and rap v. parlando, and moreover was coached on the intrinsic test requiring a finding of substantial similarity in the total concept and feel of the compared songs.[[145]](#footnote-145) In considering whether there was substantial similarity, the jury was instructed to examine the qualitative and quantitative nature of the copied portions.[[146]](#footnote-146) The Thicke Parties contended that Instruction 43 was erroneous and prejudicial in that it (1) “permitted the jury to find infringement based on alleged similarities in elements of Gaye’s work that are not protectable by copyright or included in Gaye’s narrow copyright in the deposit copy for [‘Got to Give It Up’],” and (2) invited a “freewheeling assessment of similarity based on any and all elements of Gaye’s work, or the work as a whole.”[[147]](#footnote-147) Moreover, the Thicke Parties asserted that Instruction 43 erroneously instructed that similarity between the elements need not be “identical” to be “substantial,” the wording of which was argumentative and unnecessary, causing an unfavorable bias for finding infringement.[[148]](#footnote-148)

The court rejected the Thicke Parties’ contention that the jury was improperly coached regarding both instructions. With respect to Instruction 42, the court held that the Thicke Parties’ rebuttal was a misinterpretation of precedent—citing *Three Boys Music Corp. v. Bolton*, the court noted that it is not required to explicitly limit the subconscious copying analysis to instances when access is disputed.[[149]](#footnote-149) Moreover, although the Thicke Parties conceded access to ‘Got to Give It Up’, the jury could have concluded that they intended only to copy unprotected elements of the song in ‘Blurred Lines’ but accidentally or subconsciously copied protected elements.[[150]](#footnote-150) This instruction merely illustrated that if these facts were found, the Thicke Parties would be liable for infringement. Regarding Instruction 43, the court held that the jury was properly instructed to decipher the unprotectable elements of the songs in considering the totality of the elements.[[151]](#footnote-151)

In review of the admissibility of Finell’s expert testimony, its accompanying controversial elements, and the subsequent approval of the jury’s performance of the intrinsic test, the court found that the Thicke Parties had not presented any instructional or evidentiary error that warranted a new trial or other relief. The court subsequently denied the Thicke Parties’ motion for retrial, thus cementing the decision that groove and feel are potentially copyrightable aspects of a song.

D. Appeal of the District Court Ruling

The Thicke Parties filed an appeal of the district court’s decision with the Ninth Circuit Court of Appeals on April 24, 2017.[[152]](#footnote-152) In the appeal, amongst other allegations, the Thicke Parties contended that the sound recording of ‘Got to Give It Up’ was unprotected by copyright. Thus, reliance by the jury in assessing infringement on any elements found in the sound recording was improper.[[153]](#footnote-153) Citing *Swirsky*, they urged that one could not combine unprotected elements into a protectable phenomenon if the original work (i.e., the sound recording) was unprotected in the first instance.[[154]](#footnote-154) Therefore, the court’s decision to include these elements as materially disputed protected items was prejudicial and improper.[[155]](#footnote-155) Further, they contested that the ‘Got to Give It Up’ deposit copy included any showing of similarity to ‘Blurred Lines’ in the “hooks with backup vocals,” “Theme X,” “backup hooks,” “descending bass melody,” “keyboard rhythms,” and “unusual percussion choices,” and thus exposure of these elements to the jury for consideration was prejudicial and biased in favor of finding for the Gaye’s.[[156]](#footnote-156) Put succinctly, they argued that one cannot copyright a groove or a feel, and that the predication of an infringement verdict on such elements was a gross misapplication of copyright law.[[157]](#footnote-157) On March 21, 2018, the Ninth Circuit federal appeals court upheld the district court’s decision, reaffirming the jury’s finding that the Thicke Parties had indeed infringed on Gaye’s valid copyright.[[158]](#footnote-158)

V. The Unintended Impact of *Williams v. Bridgeport Music, Inc.* on Rap Artistry

A. A New Legal Precedent: Reactions to Williams v. Bridgeport Music, Inc.

The verdict in *Williams* proved immediately controversial. Critical to the controversy was that no literal copying of any element of ‘Got to Give It Up’ had taken place by ‘Blurred Lines’—instead, the court classified groove, vibe, and feel, as copyrightable for the first time in musical copyright history.[[159]](#footnote-159) This notion upset longstanding legal precedent to the contrary and was strongly received by both supporters and objectors. Aside from the disruption to traditional copyright law, media outlets reported that the *Williams* decision stood to permanently change the business model of the music industry, both in scope of liability by artists for copyright infringement and in royalty payment expectations from artists due to newfound copyright eligibility.[[160]](#footnote-160) These voices argued that concepts like feel, groove, and vibe had never been attributed any quantifiable metric and are unable to be measured as tangible expressions. This litigation has raised significant considerations both for the current application of copyright law towards music and for certain conventions of the music industry.[[161]](#footnote-161)

B. The Potential Implications on Rap Artistry: Ownership Predictability and Elemental Quantification Within a Redefined Copyright Scheme

The legal implications of heightened judicial scrutiny towards music copyright infringement are readily apparent. These implications concern both the statutory drafting of the Copyright Act and the legal standards by which infringement is measured. First and foremost, now that elements such as groove and vibe are recognized by courts as potentially copyrightable song components, the Copyright Act should more formally accommodate for the protectability of such elements and many others. The vagueness of the contemporary Copyright Act, as applied to music, has enabled virtually limitless interpretation by courts as to what, how, and when emulation constitutes copyright infringement, and perhaps the *Williams* litigation is a moment of reckoning for the accumulated tensions of such a subjective regime. The most obvious and formal solution to this problem would be a legislative amendment to the Copyright Act that statutorily enumerates an exhaustive list of elements as legally protectable, modeled similarly to the list of protectable works of authorship already found in its Section 102(a).[[162]](#footnote-162) Enumerating an exhaustive list of elements as protectable would serve as a useful predictability metric during the litigation of music copyrights. Particularly for genres (such as rap) that predominantly subsist on largely unquantifiable elements, this lack of statutory recognition makes claiming copyright eligibility on songs comprised of such elements uniquely challenging, specifically in surpassing the idea/original expression barrier. This makes such predictability highly useful. To be sure, legislative reform is notoriously arduous and is accompanied by a host of procedural and practical obstacles that make this solution immediately unrealistic, but the impact of such legislative reform bears further consideration, particularly as cases such as *Williams* gain traction.

If Section 102(a) were amended to include an exhaustive list of defined protectable musical elements, the issue then becomes formally quantifying a vibe or groove for purposes of originality and, in turn, for showing infringement. Federal legislators would need to work with music industry professionals to develop a quantification model for these elements that would properly meet the fixation requirement of the Copyright Act and then disseminate this model industry-wide for uniform application and usage. The notion of quantifying musical production is not unprecedented, and could serve both as a concrete proof of similarity in infringement claims and as a metric to ensure creative production value retention.[[163]](#footnote-163) The existence of such copyrightability would allow rap artists to claim ownership over a significantly larger portion of their works and theoretically enable rap artists to pursue litigation regarding infringement over said works in a much more serious capacity. The implications of this type of quantification model surpass the genre of rap; other genres that operate using minimally stylistic nonvisual templates (e.g., reggae and electronic dance music) may experience an uptick in the predictability of what exactly is copyrightable in their compositions as a result of such legislative reform.

In addition, regarding traditional infringement doctrines, the application of the *de minimis* defense would be significantly affected by such statutory definition—if more elements in songs are granted copyright protectability, then the usage of such elements necessarily cannot so swiftly be trivialized as insubstantial in the “total concept and feel” of the song. This reinforces the heightened ability for rap artists to pursue and succeed in infringement claims for their works—diminishing the strength of this defense is an important triumph for musicians who operate in minimalist, predominantly non-visually notated genres such as rap. The amount of preparation required to accommodate such changes in the copyright regime, coupled with the fact that courts are now recognizing groove and vibe as copyrightable components of a song, makes it clear that such mindfulness from both lawmakers and the music industry is at least responsible, and at most potentially necessary.

C. The Effect of a Tightened Copyright Regime on Proving Similarity in Infringement: The Unique Roles of Groove and Vibe in Performance Techniques and Deposit Copies

Statutorily recognizing certain musical elements as protectable necessarily leads to quantification considerations, because, as discussed, the Copyright Act requires any protectable work of authorship to be fixed in a tangible medium,[[164]](#footnote-164) and something cannot be fixed at all (i.e., unquantifiable and thus ineligible for copyright protection) if its nature is both wholly intangible and non-visual. If these newly introduced elements are truly unquantifiable, the issue of concretely proving similarity in infringement claims between such elements is still unresolved.

An alternative solution, should statutory revision prove unrealistic or unduly burdensome, is twofold. First, if an allegedly infringing song was written at the same time that it was recorded, the artist’s performance techniques on a sound recording should be considered by the factfinder alongside, and not distinguished from, the songwriter’s written composition in measuring substantial similarity during infringement claims. Often, when creators submit a deposit copy to the registration office, it comes in the form of a lead sheet.[[165]](#footnote-165) Lead sheets typically notate the basic elements of a musical work, but they do not account for the production, recording, and performative techniques born in the studio that would be embodied in a full recording. Typically, a lead sheet that is submitted as a deposit copy is meant to represent the entire composition, despite the fact that many songs today are both composed and recorded simultaneously.[[166]](#footnote-166) This means that the lead sheet is not representative of any of the compositional additions that resulted from the artist’s studio performance, and legally it means that those performative elements, which can often turn into measurable structural elements in a song, are not considered in proving infringement. These performative techniques employed by artists have been called “ornamental, not structural,” and have historically been disregarded during the similarity assessment of songs.[[167]](#footnote-167) For genres like rap, which heavily rely on impromptu performance techniques born during studio production, this can be a fatal blow. In instances of concurrent development, combining the performance on a sound recording with the sheet music in a similarity inquiry would allow for a more holistic and realistic review of how most music is currently produced.[[168]](#footnote-168) This solution would also arguably eliminate any need to statutorily enumerate any particular elements as protectable or not, because the notion of protected versus unprotected elements would be moot. Eliminating the elemental protectability inquiry in similarity assessments reduces the possibility of subjective and inconsistent litigation results and optimizes litigant efforts in ensuring that no time is spent adjudicating which musical elements are sufficiently original to merit copyrightability. This type of solution reflects and more accurately honors decisions which have relied on the “total concept and feel” approach.[[169]](#footnote-169)

Secondly, courts should uniformly adopt the inclusion of production, performance, and recording techniques in their substantial similarity assessments. While not specifically affording copyright protection to these techniques, they should at least be used in jurisprudence to infer copying. This aligns with the notion of assessing the “total concept and feel” of the artist’s creations, while additionally informing defendants of their rights to use (or not use) similar techniques. Of course, one particular note, chord, or bass line cannot reasonably be protected on the basis of its tone alone,[[170]](#footnote-170) as this would hardly surpass the idea/expression barrier. However, reviewing similarities in creative techniques would help establish the requisite similarity to proving infringement and more properly account for the overall holistic original creativity of the song.[[171]](#footnote-171)

D. Rebuttal: In Consideration of a Tightened Copyright Regime

While rappers and other musicians may experience heightened copyright predictability in their works as a result of the *Williams* holding, the most popular rebuttal is that this verdict severely stifles the musical creation and production processes by blurring the concept of inspiration. In the words of Voltaire, “originality is nothing but judicious imitation. The most original writers borrowed one from another.”[[172]](#footnote-172) The same can be said for musicians. It is commonplace that music has an implicit borrowing cultural norm—indeed, the practical function of genres literally is to serve as templates by which patron artists can model their conforming works. The pervasiveness of borrowing in the music industry highlights the importance in defining what triggers infringement. Borrowing spans across genres, and merely emulating the groove and vibe of host nonvisual elements has never before been considered as a cause of action for copyright liability.

To allow elements such as vibe, feel, and/or groove to be protected by the copyright paradigm would surely ignite a new wave of litigation in an already exceedingly litigious industry.[[173]](#footnote-173) Moreover, the music industry is one of the most heavily regulated markets as it stands today.[[174]](#footnote-174) To add these elements to the copyright regime would not only augment the policing of musical creation, but also require heightened scrutiny and potential amendment of the Copyright Act as previously discussed. Voiceless as it is regarding what elements are capable of receiving copyright protection within music, this verdict pressurizes the need for such clarity. It is undisputed that the law behind musical copyright infringement is murky and inconsistently litigated, particularly with the circuit split regarding what constitutes substantial similarity. Musicians of all genres now need to be exceedingly cautious in their treatment and usage of these elements so as to avoid exposing their creative production to potential copyright infringement liability.

Conclusion

In light of the *Williams* litigation, all participants of the music industry should be mindful of the complications that will undoubtedly now arise. Since the verdict was upheld, the music industry should be prepared to address how these newfound elements of intellectual property are going to be treated, either by some quantification model or by an industry-wide conversation regarding the differences between co-opting, stealing, and simply being “inspired.”[[175]](#footnote-175) For rap artists in particular, a heightened mindfulness would be useful in considering the implications of this litigation. The music industry and lawmakers should view this case as a cautionary tale for the future of copyright law in the eyes of the courts and prepare for the ramifications of cases similarly postured. Perhaps the *Williams* progeny reflects a normative shift in how courts, as well as the musically-consuming public, value music and artistic protection. The music industry and lawmakers alike should be mindful of such a potentially dramatic change in mindset. The implications of this holding will undoubtedly have resounding effects on not only the music industry, but U.S. copyright law overall.

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2. Billboard.com is a premier website for music industry statistics, news, and alerts. The website’s “Top 100” chart is frequently cited for its prestigious reputation. *See* Gary Trust, *Robin Thicke’s ‘Blurred Lines’ Is Billboard’s Song of the Summer*, Billboard (Sept. 9, 2013), http://www.billboard.com/articles/news/5687036/robin-thickes-blurred-lines-is-billboardssong-of-the-summer. [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. Pamela Chelin, *Court Case Reveals Exactly How Much Money Pharrell and Robin Thicke Made Off ‘Blurred Lines’*, Business Insider (Mar. 4, 2015), https://www.businessinsider.com/court-case-reveals-exactly-how-much-money-pharrell-and-robin-thicke-made-off-blurred-lines-2015-3. [↑](#footnote-ref-4)
5. Madeline Boardman, *Marvin Gaye’s Family & Robin Thicke: Son May Sue Over ‘Blurred Lines’ And ‘Got to Give It Up’*, Huffington Post (Aug. 22, 2013), https://www.huffingtonpost.com/2013/08/22/marvin-gayes-family-robin-thicke-sue-blurred-lines-got-to-give-it-up\_n\_3796321.html. [↑](#footnote-ref-5)
6. Williams v. Bridgeport Music, Inc., LA CV13–06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. July 14, 2015). [↑](#footnote-ref-6)
7. Megan Coane & Maximillian Verrelli, *Blurring Lines and the Practical Implications of* Williams v. Bridgeport, A.B.A.: Landslide Mag. (Jan.–Feb. 2016), https://www.americanbar.org/content/dam/aba/publications/landslide/2016-january-february/ABA\_LAND\_v008n03\_\_blurring\_lines\_the\_practical\_implications\_of\_williams\_v\_bridgeport\_music.authcheckdam.pdf. [↑](#footnote-ref-7)
8. *See* Anandashankar Mazumdar, *Brief Says ‘Blurred Lines’ Shouldn’t Have Gone to Jury*, Bloomberg BNA (Aug. 30, 2016), https://www.bna.com/brief-says-blurred-n73014447003/ (The Gaye estate was awarded millions in damages by a jury. The decision to have a jury at the trial was extremely controversial); *see* *also* Austin Siegemund-Broka, *‘Blurred Lines Trial’: Marvin Gaye’s Family Seeks $25 Million in Closing Argument*, Rolling Stone (Mar. 5, 2015), http://www.hollywoodreporter.com/thr-esq/blurred-lines-trial-marvin-gayes-779673?mobile\_redirect=false; Alex Stedman, *‘Blurred Lines’ Jury Orders Pharrell, Robin Thicke to Pay $7.3 Million to Marvin Gaye’s Family*, Variety (Mar. 10, 2015), http://variety.com/2015/music/news/blurred-lines-verdict-pharrell-robin-thicke-ordered-to-pay-7-3-million-to-marvin-gaye-family-1201450117/ (The damage amount was eventually reduced to $5.3 million). *See generally* Daniel Kreps, *‘Blurred Lines’ Ruling Sliced to $5.3 Million, With a Catch*, Rolling Stone (July 15, 2015), https://www.rollingstone.com/music/news/blurred-lines-ruling-sliced-to-5-3-million-with-a-catch-20150715. [↑](#footnote-ref-8)
9. Kory Grow, *Robin Thicke, Pharrell Lose Multi-Million Dollar ‘Blurred Lines’ Lawsuit*, Rolling Stone (Mar. 10, 2015), http://www.rollingstone.com/music/news/robin-thicke-and-pharrell-lose-blurred-lines-lawsuit-20150310. [↑](#footnote-ref-9)
10. *Williams*, 2015 WL 4479500, at \*16–17. It should also be noted that copyright infringement cases have often invoked the “total concept and feel” approach when measuring similarity, but it is the isolation of “feel” as an individual element that was novel here. [↑](#footnote-ref-10)
11. *See generally* Kal Raustilia & Christopher J. Sprigman, *Squelching Creativity: What the ‘Blurred Lines’ Team Copied Is Either Not Original or Not Relevant*, Slate (Mar. 10, 2015), http://www.slate.com/articles/news\_and\_politics/jurisprudence/2015/03/\_blurred\_lines\_verdict\_is\_wrong\_williams\_and\_thicke\_did\_not\_infringe\_on.html. *See* Louis Barabbas, *The Thicke of it: Influence vs. Theft*, Louis Barabbas Blog (Mar. 11, 2015), https://louisbarabbas.com/the-thicke-of-it-influence-vs-theft/. [↑](#footnote-ref-11)
12. Ben Sisario, *‘Blurred Lines’ Verdict Upheld by Appeals Court,* N.Y. Times (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/business/media/blurred-lines-marvin-gaye-copyright.html. [↑](#footnote-ref-12)
13. U.S. Copyright Off., Compendium of U.S. Copyright Office Practices § 802.3 (3d ed. 2017) (The U.S. Copyright Office lists melody, rhythm, harmony, and lyrics as elements of musical works typically subject to copyrightable authorship, though this list is not exhaustive.). More generally, 17 U.S.C.A §102(a) (1990) states,

[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a [machine](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=17-USC-825312327-364936160&term_occur=2&term_src=title:17:chapter:1:section:102) or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

*Id.* [↑](#footnote-ref-13)
14. Coe W. Ramsey, *Music Law 101: What Does Copyright Law Protect?*, REVERBNATION Blog (Apr. 25, 2018), https://blog.reverbnation.com/2018/04/25/music-law-101-what-does-copyright-law-protect/. [↑](#footnote-ref-14)
15. Courts have created vastly different standards for what constitutes copyright infringement. The Second and Ninth Circuits, for example, employ completely different methods for assessing substantial similarity; this divergence amongst the circuits has obvious implications for what constitutes infringement. [↑](#footnote-ref-15)
16. Henry A. Rhodes, *The Evolution of Rap Music in the United States*, Yale-New Haven Teachers Inst. (1993), http://teachersinstitute.yale.edu/curriculum/units/1993/4/93.04.04. x.html. [↑](#footnote-ref-16)
17. This is not to say that all rap music that has ever been produced is ineligible for copyright protection. Indeed, many rap compositions have been registered with the United States Copyright Office, particularly now that sound recordings are an enumerated protectable work of art, and the genre has gained mainstream popularity. This is simply a statement that the genre as a whole subsists on stylistic elements that have historically faced difficulty in receiving copyright protection. [↑](#footnote-ref-17)
18. U.S. Const. art. I, § 8. [↑](#footnote-ref-18)
19. Kevin Parks, Music and Copyright in America 3 (2012); *see also* Cohen et al., Copyright In a Global Information Economy 27–28 (4th ed. 2015). [↑](#footnote-ref-19)
20. *See* 17 U.S.C.A. § 102(a)(7) (1990) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced[,] or otherwise communicated, either directly or with the aid of a machine or device.”). [↑](#footnote-ref-20)
21. 17 U.S.C.A. § 102(a) states, “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.* [↑](#footnote-ref-21)
22. *See* 17 U.S.C.A. § 106 (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (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.”). [↑](#footnote-ref-22)
23. *See id*; *see also* 17 U.S.C.A. § 114 (“(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4). (b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs . . . .”). [↑](#footnote-ref-23)
24. *See* Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC, No. 17-571, 2019 U.S. LEXIS 1730, at \*19 (Mar. 4, 2019) (“[T]he Copyright Act safeguards copyright owners, irrespective of registration, by vesting them with exclusive rights upon creation oftheir works and prohibiting infringement from that point forward. If infringement occurs before a copyright owner applies for registration, that owner may eventually recover damages for the past infringement, as well as the infringer’s profits. She must simply apply for registration and receive the Copyright Office’s decision on her application before instituting suit.”). [↑](#footnote-ref-24)
25. *See* 17 U.S.C.A. § 504(c)(2). [↑](#footnote-ref-25)
26. This statement is an overly simplified explanation of the ownership scheme, meant to generally highlight the musical copyright dichotomy. It is solely meant for illustrative purposes and is in no way meant to be exhaustive in review. In reality, there are likely other industry players who have ownership rights, such as music publishers and recording labels. Such an extensive discussion is not necessary for the purposes of this note. For a general understanding of how the music industry handles copyright ownership, see generally Donald S. Passman, All You Need to Know About the Music Business (9th ed. 2015). [↑](#footnote-ref-26)
27. Act of Mar. 3, 1897, ch. 392, 29 Stat. 694 (1897); *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). [↑](#footnote-ref-27)
28. Feist Publ’ns v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 341 (“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.”). [↑](#footnote-ref-28)
29. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000). It should be noted that there is a significant circuit split between the Ninth Circuit and the Second Circuit regarding the treatment of assessing copyright infringement. The Ninth Circuit is considered an outlier; many other circuits follow the Second Circuit’s methodology. In the Second Circuit, substantial similarity is not split between the extrinsic/intrinsic tests—it is measured as one composite inquiry. *Williams* is a Ninth Circuit case, and as such, Ninth Circuit law will be the focus of this note’s analysis. The extrinsic/intrinsic tests are not statutorily required by the Copyright Act and should not be viewed as inherent in copyright law; they are particular tests developed by the Ninth Circuit to assess copyright infringement. [↑](#footnote-ref-29)
30. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1172 (9th Cir. 1977). [↑](#footnote-ref-30)
31. *See* Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984); *see* *also* Ty v. GMA Accessories, Inc., 132 F.3d 1167 (7th Cir. 1997). [↑](#footnote-ref-31)
32. *See* Arnstein v. Porter, 154 F.2d 464, 469 (2d Cir. 1946). [↑](#footnote-ref-32)
33. *See* cases cited *supra* note . [↑](#footnote-ref-33)
34. *See* *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1172. [↑](#footnote-ref-34)
35. *See* *Three Boys Music Corp.*, 212 F.3d at 481 (“Everything registers somewhere in our memories, and no one can tell what may evoke it. . . . Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author’s rights. It is no excuse that in so doing his memory has played him a trick.”) (quoting Learned Hand, J.’s opinion in Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147–48 (S.D.N.Y. 1924)); *see also* Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 17 (9th Cir. 1933) (“[A]n intentional copying is not a necessary element in the problem if there has been a subconscious but actual copying.”). [↑](#footnote-ref-35)
36. *Three Boys Music Corp.*, 212 F.3d at 481. [↑](#footnote-ref-36)
37. *Id.* [↑](#footnote-ref-37)
38. Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004). [↑](#footnote-ref-38)
39. *Id.* at 845; *Three Boys Music Corp.*, 212 F.3d at 485. [↑](#footnote-ref-39)
40. Eric Osterberg, *Copyright Litigation: Analyzing Substantial Similarity*, Osterberg LLC (Sept. 25, 2013), http://www.osterbergllc.com/wp-content/uploads/2013/09/Practical-Law-Article.pdf. [↑](#footnote-ref-40)
41. Mattel, Inc. v. MGA Entm’t, Inc., 616 F.3d 904, 916 (9th Cir. 2010); *Swirsky*, 376 F.3d at 845. *But* *see* Mannion v. Coors Brewing Co.**,** 377 F. Supp. 2d 444, 462 (S.D.N.Y. 2006). [↑](#footnote-ref-41)
42. Josh H. Escovedo, *The Blurred Lines of an Infringement Action,* IP L. Blog (Mar. 6, 2015), http://www.theiplawblog.com/2015/03/articles/copyright-law/the-blurred-lines-of-an-infringement-action/. [↑](#footnote-ref-42)
43. Lee S. Brenner & Allison S. Rohrer, *The De Minimis Doctrine: How Much Copying Is Too Much?* 24 Comm. Law. 9 (2006). [↑](#footnote-ref-43)
44. *Id.* [↑](#footnote-ref-44)
45. *Id.* [↑](#footnote-ref-45)
46. *Id.* [↑](#footnote-ref-46)
47. *Id.* [↑](#footnote-ref-47)
48. *Id.* [↑](#footnote-ref-48)
49. *Id.* [↑](#footnote-ref-49)
50. “Sampling,” as used in this note, is meant to express ordinary and commonplace usage of a part of something that belongs to another (i.e., trying the qualities of an object or getting a representative experience of something). In the musical context, genres of music contain certain traits specific to their sound, and artists of that genre naturally emulate that sound to conform to that genre. Unless otherwise specified, it is not meant to convey the implications behind the legal term of “sampling.” Put in its most general form, “sampling” in the legal context of music is when a musician uses a component of another musician’s work in her own song via digitally encoding or extracting music or sound and reusing it as part of a composition or recording. The legal topic of sampling in music is complex, and a substantial discussion of such is not necessary or relevant to the argument of this Note, as no sampling existed between ‘Got to Give It Up’ and ‘Blurred Lines’ and thus was not a considered element at trial. Sampling in the musical sense is a common tactic used by rap artists in the creation of songs, but its discussion is not merited in the context of *Williams* and rap artistry. For a formal definition of this concept, see *Sample*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/sample. [↑](#footnote-ref-50)
51. Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2003); Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798–99 (6th Cir. 2005). [↑](#footnote-ref-51)
52. For a conceptual analysis of the *scène-à-faire* doctrine, see Hoehling v. Universal City Studios, Inc.*,* 618 F.2d 972, 979 (2d Cir. 1980). [↑](#footnote-ref-52)
53. Becky Blanchard, *The Social Significance of Rap & Hip-Hop Culture*, EDGE (July 26, 1999), https://web.stanford.edu/class/e297c/poverty\_prejudice/mediarace/socialsignificance.htm. [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. Rhodes, *supra* note 15. [↑](#footnote-ref-55)
56. *Id.* [↑](#footnote-ref-56)
57. *Id.* [↑](#footnote-ref-57)
58. *Id.* [↑](#footnote-ref-58)
59. *Id.* [↑](#footnote-ref-59)
60. *Id.* [↑](#footnote-ref-60)
61. *Id.* [↑](#footnote-ref-61)
62. *Id.* [↑](#footnote-ref-62)
63. *Id.*  [↑](#footnote-ref-63)
64. Emmett George Price, Hip Hop Culture 7 (2006). [↑](#footnote-ref-64)
65. Rhodes, *supra* note 15. [↑](#footnote-ref-65)
66. *Id.* [↑](#footnote-ref-66)
67. *Id.* [↑](#footnote-ref-67)
68. Blanchard, *supra* note 52. [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. *Id.* [↑](#footnote-ref-70)
71. *Id.* [↑](#footnote-ref-71)
72. *Id.* [↑](#footnote-ref-72)
73. *Id.*; *see also* Rhodes, *supra* note 15. [↑](#footnote-ref-73)
74. Tristan Michael Pelton, *Rap/Hip Hop | The Black Past: Remembered and Reclaimed*, BlackPast (June 16, 2007), http://www.blackpast.org/aah/rap-hip-hop. For further historical discussion, see James Haskins, One Nation Under a Groove: Rap Music and Its Roots (2000); Adam Woog, From Ragtime to Hip-Hop: A Century of Black American Music (2007). [↑](#footnote-ref-74)
75. Blanchard, *supra* note 52. [↑](#footnote-ref-75)
76. *See* Molefi K. Asante, The Afrocentric Idea(1987); Melbourne S. Cummings & Abhik Roy, *Manifestations of Afrocentricity in Rap Music*, 13 How. J. Comm. 59 (2002). [↑](#footnote-ref-76)
77. Asante, *supra* note 75. [↑](#footnote-ref-77)
78. Felicia R. Walker & Viece Kuykendell, *Manifestations of Nommo in Def Poetry*, 36 J. Black Stud. 229 (2005). [↑](#footnote-ref-78)
79. Blanchard, *supra* note 52. [↑](#footnote-ref-79)
80. *Id.* [↑](#footnote-ref-80)
81. *Id.* [↑](#footnote-ref-81)
82. *Id.* [↑](#footnote-ref-82)
83. *Id.* [↑](#footnote-ref-83)
84. *Id.* [↑](#footnote-ref-84)
85. *See generally* Raymond Codrington, *In the Beginning: Hip Hop’s Early Influences*, OUPblog (Aug. 4, 2006), https://blog.oup.com/2006/08/in\_the\_beginnin/. [↑](#footnote-ref-85)
86. Rhodes, *supra* note 15. [↑](#footnote-ref-86)
87. *Id.* [↑](#footnote-ref-87)
88. *Id.* [↑](#footnote-ref-88)
89. *Id.* [↑](#footnote-ref-89)
90. *Id.* [↑](#footnote-ref-90)
91. *Id.* [↑](#footnote-ref-91)
92. *Id.* [↑](#footnote-ref-92)
93. *Id.* [↑](#footnote-ref-93)
94. *Id.* [↑](#footnote-ref-94)
95. *Id.* [↑](#footnote-ref-95)
96. *Id.* [↑](#footnote-ref-96)
97. Taylor Moore, *Blurring the Lines in Music Copyright Will Hurt Artists and Online Hosts*, Ctr. For Democracy & Tech. (Sept. 22, 2016), https://cdt.org/blog/blurring-the-lines-in-music-copyright-will-hurt-artists-and-online-hosts/. [↑](#footnote-ref-97)
98. Williams v. Bridgeport Music, Inc., LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at \*1 (C.D. Cal. July 14, 2015). [↑](#footnote-ref-98)
99. *Id.* at \*2. [↑](#footnote-ref-99)
100. *Id.* at \*1. [↑](#footnote-ref-100)
101. *Id.* at \*2. [↑](#footnote-ref-101)
102. *Id.* [↑](#footnote-ref-102)
103. *Id.* at \*2–3. [↑](#footnote-ref-103)
104. *Id.* at \*11. [↑](#footnote-ref-104)
105. *Id.* at \*3. [↑](#footnote-ref-105)
106. *Id.* at \*4. [↑](#footnote-ref-106)
107. *Id.* at \*21­–34. [↑](#footnote-ref-107)
108. Chelin, *supra* note 3. [↑](#footnote-ref-108)
109. *Williams*, 2015 WL 4479500, at \*11–13. [↑](#footnote-ref-109)
110. This decision reviewed a litany of alleged classes of error, ranging from procedural, to damage allocation, to evidentiary. This Note only reviews the alleged misapplication of copyright law, of which the discussion resides largely in the evidentiary analysis. [↑](#footnote-ref-110)
111. *Williams*, 2015 WL 4479500, at \*11–13. [↑](#footnote-ref-111)
112. *Id.* at \*53. [↑](#footnote-ref-112)
113. *Id.* [↑](#footnote-ref-113)
114. *Id.* at \*2. [↑](#footnote-ref-114)
115. The 1909 Copyright Act was in effect until January 1, 1978. The 1976 Copyright Act eliminated the formal submission requirement for fixation and instead triggered fixation at the moment of creation. Act of Oct. 19, 1976, Pub. L. No. 94–553, 90 Stat. 2541 (1976). [↑](#footnote-ref-115)
116. *Williams*, 2015 WL 4479500, at \*14. [↑](#footnote-ref-116)
117. *Id.* [↑](#footnote-ref-117)
118. *Id.* [↑](#footnote-ref-118)
119. *Id.* [↑](#footnote-ref-119)
120. *Id.* [↑](#footnote-ref-120)
121. *Id.* at \*16–17. [↑](#footnote-ref-121)
122. *Id.* at \*16. [↑](#footnote-ref-122)
123. *Id.* at \*14. [↑](#footnote-ref-123)
124. *Id.* at \*93. [↑](#footnote-ref-124)
125. *Id.* [↑](#footnote-ref-125)
126. *Id.* at \*18–19. [↑](#footnote-ref-126)
127. *Id.* at \*52. [↑](#footnote-ref-127)
128. *Id.* at \*22–23. [↑](#footnote-ref-128)
129. *Id.* at \*23. [↑](#footnote-ref-129)
130. *Id.* The Thicke Parties claimed that the keyboard parts cannot be protected because they were not fixed in the deposit copy of ‘Got to Give It Up’ in a tangible form, and that the 1909 Copyright Act required the use of visible notation to acquire protection in a composition. [↑](#footnote-ref-130)
131. *Id.* at \*24 (quoting Melville B. Nimmer & David Nimmer, 1 Nimmer on Copyright § 2.05[A]) (internal quotations omitted). [↑](#footnote-ref-131)
132. *Id.* [↑](#footnote-ref-132)
133. *Id.* [↑](#footnote-ref-133)
134. *Id.* at \*25 (citing Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004)). [↑](#footnote-ref-134)
135. *Id.* [↑](#footnote-ref-135)
136. *Id.* [↑](#footnote-ref-136)
137. *Id.* [↑](#footnote-ref-137)
138. *Id.* at \*45–46, \*51–54. [↑](#footnote-ref-138)
139. *Id.* at \*45–46. Jury Instruction 42 stated, “[i]n order to find that the Thicke Parties copied either or both of the Gaye Parties’ songs, it is not necessary that you find that the Thicke Parties consciously or deliberately copied either or both these songs. It is sufficient if you find that the Thicke Parties subconsciously copied either or both of the GayeParties’ songs.” *Id.* [↑](#footnote-ref-139)
140. *Id.* at \*47–48 (citing Three Boys Music Corp.v. Bolton, 212 F.3d 477, 482–85 (9th Cir. 2000)). [↑](#footnote-ref-140)
141. *Id.* [↑](#footnote-ref-141)
142. *Id.* at \*48. [↑](#footnote-ref-142)
143. *Id.* [↑](#footnote-ref-143)
144. *See id.* at 51–53. Jury Instruction 43 stated,

[i]n order for the Gaye Parties to meet their burden of proof to show by a preponderance of the evidence that there is substantial similarity between one of the Gaye Parties’ works and one of the Thicke Parties’ works, the Gaye Parties must show that there is both substantial “extrinsic similarity” and substantial “intrinsic similarity” as to that pair of works. Extrinsic similarity is shown when two works have a similarity of ideas and expression as measured by external, objective criteria. To make this determination, you must consider the elements of each of the works and decide if they are substantially similar. This is not the same as “identical.” There has been testimony and evidence presented by both sides on this issue, including by expert witnesses, as to such matters as: (a) for ‘Got to Give It Up’ and ‘Blurred Lines’, the so-called “Signature Phrase,” hook, “Theme X,” bass melodies, keyboard parts, word painting, lyrics, rap v. parlando; and (b) for “After the Dance” and “Love After War,” the chorus vocal melody and chords. The Gaye Parties do not have to show that each of these individual elements is substantially similar, but rather that there is enough similarity between a work of the Gaye Parties and an allegedly infringing work of the Thicke Parties to comprise a substantial amount. Intrinsic similarity is shown if an ordinary, reasonable listener would conclude that the total concept and feel of the Gaye Parties’ work and the Thicke Parties’ work are substantially similar. In considering whether extrinsic or intrinsic similarities are substantial, you may consider whether portions allegedly copied are either qualitatively or quantitatively important to either of the Gaye Parties’ works. A portion of a work is qualitatively important if, regardless of its size, it is shown to be very important to that work. The copying of a qualitatively important portion of a work may support a finding of substantial similarity even if that portion is very short. A portion of a work is quantitatively important if it comprises a significant portion of the work.

*Id.* [↑](#footnote-ref-144)
145. *Id.* [↑](#footnote-ref-145)
146. *Id.* [↑](#footnote-ref-146)
147. *Id.* at \*53–54. [↑](#footnote-ref-147)
148. *Id.* at \*54. [↑](#footnote-ref-148)
149. *Id.* at \*50; *see also* Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 17 (9th Cir. 1933) (“[A]n intentional copying is not a necessary element in the problem if there has been a subconscious but actual copying.”). [↑](#footnote-ref-149)
150. *Williams*, 2015 WL 4479500, at \*49; *see also* Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1166 (C.D. Cal. 2002) (“Direct infringement does not require intent or any particular state of mind.”). [↑](#footnote-ref-150)
151. *Williams*, 2015 WL 4479500, at \*56. [↑](#footnote-ref-151)
152. Ashley Cullins, *‘Blurred Lines’ Appeal Brief Says Artists Can’t Copyright a Groove*, Hollywood Rep. (Apr. 26, 2017, 4:29 PM), https://www.hollywoodreporter.com/thr-esq/blurred-lines-appeal-brief-says-artists-cant-copyright-a-groove-997767. [↑](#footnote-ref-152)
153. *Id.* [↑](#footnote-ref-153)
154. *Id.* [↑](#footnote-ref-154)
155. *Id.* [↑](#footnote-ref-155)
156. *Id.* [↑](#footnote-ref-156)
157. For an overview of the initial oral arguments, which began on October 6, 2017, see generally Yuntao Cui, Williams v. Gaye*: ‘Blurred Lines’ Appeal Hearing Centers on Admissibility of Evidence About Original Sound Recording*, Harv. J.L. & Tech. Digest (Oct. 31, 2017), http://jolt.law.harvard.edu/digest/williams-v-gaye-blurred-lines-appeal-hearing-centers-on-admissibility-of-evidence-about-original-sound-recording. *See also* Anandashankar Mazumdar, *‘Blurred Lines’ Appeal Hinges on Marvin Gaye Record as Evidence*, Bloomberg BNA (Oct. 6, 2017), https://www.bna.com/blurred-lines-appeal-n73014470673. [↑](#footnote-ref-157)
158. Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018); *see also* Sisario, *supra* note . [↑](#footnote-ref-158)
159. Paul Schrodt, *The $5 Million ‘Blurred Lines’ Legal Fight Over the Song’s ‘Vibe’ Could Permanently Change the Music Industry*, Bus. Insider (Dec. 15, 2015, 12:05 PM), http://www.businessinsider.com/blurred-lines-case-music-copyright-2015-12. Notably, courts have used the “total concept and feel” metric many times in adjudicating substantial similarity between two songs in copyright infringement claims, but “feel” as an individual element has never before been copyrightable. *See also* Colin Stutz, *The ‘Blurred Lines’ Appeal Failed – Now What?*, Billboard (Mar. 22, 2018), https://www.billboard.com/articles/news/8257580/blurred-lines-appeal-pharrell-robin-thicke-marvin-gaye-legal-analysis. [↑](#footnote-ref-159)
160. Stutz, *supra* note 158. [↑](#footnote-ref-160)
161. *Id.* [↑](#footnote-ref-161)
162. *See* 17 U.S.C.A. § 102(a). [↑](#footnote-ref-162)
163. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 326 (1989). [↑](#footnote-ref-163)
164. *See* 17 U.S.C.A. § 102(a)(7). [↑](#footnote-ref-164)
165. 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/ (“[A] lead sheet consists only of the song’s melody line, lyrics[,] and the chord symbols that represent the song’s harmonies.”). [↑](#footnote-ref-165)
166. *See* Francescatti v. Germanotta, No. 11 CV 5270, 2014 WL 2767231 (N.D. Ill. June 17, 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.”). [↑](#footnote-ref-166)
167. Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004). [↑](#footnote-ref-167)
168. *Id.* [↑](#footnote-ref-168)
169. *See* Copeland v. Bieber, 789 F.3d 484 (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.”). [↑](#footnote-ref-169)
170. *But see* Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924). [↑](#footnote-ref-170)
171. 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; *see also* Three Boys Music Corp. v. Bolton, 212 F.3d at 485 (9th Cir. 2000) (Examples of objective criteria in musical infringement cases include, 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.). [↑](#footnote-ref-171)
172. Daliah Saper, *The Copyright Question: The Difference Between Inspiration and Infringement*, Business.com (Feb. 22, 2017), https://www.business.com/articles/the-copyright-question-the-difference-between-inspiration-and-infringement/. [↑](#footnote-ref-172)
173. Tom Hawking, *A Brief History of Litigious Music Industry Idiocy*, Flavorwire (Aug. 18, 2011), http://flavorwire.com/202550/a-brief-history-of-litigious-music-industry-idiocy. [↑](#footnote-ref-173)
174. Paula Parisi, *Songwriters ‘More Heavily Regulated Than Pharmaceutical Companies’ and Other Takeaways from ASCAP Expo*, Yahoo! Music (Apr. 17, 2017), https://www.yahoo.com/music/songwriters-more-heavily-regulated-pharmaceutical-companies-other-takeaways-223838008.html. [↑](#footnote-ref-174)
175. Lauretta Charlton, *A Copyright Expert Explains the ‘Blurred Lines’ Ruling*, Vulture (Mar. 11, 2015), http://www.vulture.com/2015/03/what-the-blurred-lines-ruling-means-for-music.html. [↑](#footnote-ref-175)