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From Blurred Lines to Blurred Law: An Assessment of the Possible Implications of "Williams v. Gaye" in Copyright Law

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J.D. Candidate, 2021, University of Georgia School of Law. I would like to thank the Editorial and Executive Boards of the Journal of Intellectual Property Law for all of their help, as well as Professor Stephen Wolfson and friend Ian Kecskes for inspiring this Note's entertainment theme. I dedicate this Note to my loving parents, Steve and Amy Patton. Thank you for your constant support and encouragement throughout my life. I would also like to dedicate this Note to my college professor and mentor, Dr. Charles S. Bullock, III. Dr. Bullock was instrumental in my academic and professional development. Thank you for challenging me, giving me the confidence to pursue my goals and for helping me discover my love for writing.

FROM BLURRED LINES TO BLURRED LAW: AN ASSESSMENT OF THE POSSIBLE IMPLICATIONS OF *WILLIAMS V. GAYE* IN COPYRIGHT LAW

*Hannah Patton**

* J.D. Candidate, 2021, University of Georgia School of Law. I would like to thank the Editorial and Executive Boards of the Journal of Intellectual Property Law for all of their help, as well as Professor Stephen Wolfson and friend Ian Kecskes for inspiring this Note's entertainment theme. I dedicate this Note to my loving parents, Steve and Amy Patton. Thank you for your constant support and encouragement throughout my life. I would also like to dedicate this Note to my college professor and mentor, Dr. Charles S. Bullock, III. Dr. Bullock was instrumental in my academic and professional development. Thank you for challenging me, giving me the confidence to pursue my goals and for helping me discover my love for writing.

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I. INTRODUCTION

"'. . . [W]e should make something like that, something with that groove.'"[1] When R&B singer-songwriter Robin Thicke stated those now infamous words in a May 2013 interview for *GQ* magazine, he was at the height of his music career. His new single, "Blurred Lines," featuring T.I. and Pharrell Williams, was a chart-topping sensation.[2] With an upbeat tempo and rhythmic hook, the song was an instant hit, catching the attention of a wide audience of music listeners, and it quickly became apparent that its popularity would be anything but short-lived. After its successful debut, "Blurred Lines" continued to hold the number one spot on Billboard's Hot 100, R&B, Hip-Hop, and Pop charts, while steadily climbing to the top of others, making it Billboard's "Song of the Summer."[3] Furthermore, the accompanying music video was equally, if not more, successful, as it went viral with more than 62 million views in three months.[4] Clearly, the "groove" that inspired Thicke was something special—or was it?

This "groove" Thicke mentioned in the GQ interview was a tribute to Marvin Gaye's 1977 hit "Got To Give It Up."[5] When asked to describe the origin of his new single "Blurred Lines," Thicke recalled a conversation he had in the studio with collaborator Pharrell Williams.[6] Specifically, Thicke said he stated to Williams that "one of [his] favorite songs of all time was Marvin Gaye's 'Got To Give It Up,'" and he and Williams "should make something like that, something with that groove."[7] Within a half-hour of experimenting with the "groove," Thicke and Williams wrote "Blurred Lines," and the entire song was recorded and finished within two hours.[8] At the time, Thicke likely considered his

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[1] Stelios Phili, *Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film*, GQ (May 7, 2013), https://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy.

[2] Gary Trust, *Robin Thicke's 'Blurred Lines' is Billboard's Song of the Summer,* BILLBOARD (Sept. 5, 2013), https://www.billboard.com/articles/news/5687036/robin-thickes-blurred-lines-is-billboards-song-of-the-summer (discussing the immediate success of "Blurred Lines" on Billboard's music charts).

[3] *Id.*

[4] Jason Lipshutz, *Robin Thicke, Miley Cyrus, & Clearing Up Blurred Lines in Music Videos (Opinion),* BILLBOARD (June 25, 2013), https://www.billboard.com/articles/columns/pop-shop/1568125/robin-thicke-miley-cyrus-clearing-up-blurred-lines-in-music-videos (discussing the public reception of Robin Thicke's provocative music video for his hit single, "Blurred Lines").

[5] *See MARVIN GAYE – "GOT TO GIVE IT UP (PT.1)",* CLASSIC MOTOWN, https://classic.motown.com/story/marvin-gaye-got-give-pt-1(last visited Sept. 22, 2020, 3:28 p.m.) (providing an overview of the writing, recording, and production of Marvin Gaye's "Got To Give It Up" and the "Blurred Lines" copyright infringement controversy).

[6] Phili, *supra* note 1.

[7] *Id.*

[8] *Id.*

interview answer a harmless, typical response to a common question in the music industry. He, like many other R&B singer-songwriters, clearly admired Gaye's music and likely considered him a creative influence for his artistry and craft. Therefore, what was the harm in describing the inspiration for the song he and Williams created?

However, after the interview was published, Thicke was confronted with backlash from members of Marvin Gaye's estate, who claimed that "Blurred Lines" copied the composition of Gaye's "Got To Give It Up."[9] In response to the accusations that this hit single was not an original, the "Blurred Lines" collaborators filed suit against the Gaye family and Bridgeport Music, Inc.[10] in California federal court in August 2013.[11] They sought a declaratory judgment that their composition did not infringe on Gaye's 1977 hit.[12] In March 2018, after a five-year legal battle of counter-claims and appeals, the Ninth Circuit Court of Appeals settled the matter.[13] The court affirmed the California District Court's verdict that Thicke and Williams were liable for copyright infringement and awarded the Gaye family $5.3 million in damages.[14]

Upon the announcement of the Ninth Circuit's decision, panic spread throughout the entertainment industry. Many began to fear that the Ninth

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[9] Eriq Gardner, *Robin Thicke Sues to Protect 'Blurred Lines' from Marvin Gaye's Family (Exclusive)*, HOLLYWOOD REPORTER (Aug. 15, 2013), https://www.hollywoodreporter.com/thr-esq/robin-thicke-sues-protect-blurred-607492 (providing overview of filing of initial lawsuit by Marvin Gaye's estate).

[10] Bridgeport Music, Inc. is a music publishing company founded in Michigan in 1969. The company was initially included as a defendant because it alleged separately that "Blurred Lines" was an infringement of Funkadelic's hit song "Sexy Ways." *See* Eriq Gardner, *Funkadelic's 'Sexy' Dropped From 'Blurred Lines' Lawsuit,* BILLBOARD (Mar. 27, 2014), https://www.billboard.com/articles/news/6028892/funkadelics-sexy-ways-dropped-from-blurred-lines-lawsuit (discussing the removal of Bridgeport Music, Inc. from *The Blurred Lines Case*).

[11] Complaint for Declaratory Relief, Williams v. Bridgeport Music, Inc., No. 2:13CV06004, 2013 WL 4271752 (C.D. Cal. Aug. 15, 2013). Initially, the case was filed by Thicke and Williams as *Williams v. Bridgeport Music, Inc*., No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. 2015). On appeal, the parties agreed to dismiss Bridgeport Music, Inc. from the case; therefore, the case proceeded as *Williams v. Gaye*. *See* Eriq Gardner, *'Blurred Lines' Lawsuit No Longer Involves Funkadelic's 'Sexy Ways',* HOLLYWOOD REPORTER (Mar. 27, 2014), https://www.hollywoodreporter.com/thr-esq/blurred-lines-lawsuit-no-longer-691729. Due to the high amount of media exposure surrounding the litigation, the matter became popularly known as *The Blurred Lines Case*. For the sake of convenience, this Note adopts this nomenclature going forward.

[12] *See* Gardner, *supra* note 9 (discussing the allegations contained in Pharrell Williams and Robin Thicke's initial complaint in *The Blurred Lines Case*).

[13] *See* Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018)(affirming district court's judgement that Williams and Thicke infringed "Got To Give It Up.").

[14] 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.

Circuit's decision could establish a precedent that a "vibe, feeling, or genre" of music, elements that traditionally are not covered by copyright, would now be subject to protection.[15] Therefore, many contend that *The Blurred Lines Case* could ultimately result in a "chilling effect" on creativity[16] because it would encourage litigants to base infringement suits on the "feel" of the song as opposed to how "it is actually written."[17]

As one of the most controversial and high-profile copyright infringement suits of the decade, *The Blurred Lines Case* and its possible implications for the music industry have received thorough examination by pundits, academics, and lawyers alike.[18] Moreover, the fear that immediately paralyzed an entire field of artists still pervades the music industry post-*Blurred Lines.* In fact, the increased number of infringement suits and substantial damage awards for plaintiffs since the Ninth Circuit ruled in favor of the Gaye family have worsened this fear.[19]

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[15] Ed Christman, *'Blurred Lines' Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should be Nervous*, BILLBOARD (Mar. 13, 2015), https://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and; *see also* Olivia Lattanza, *The Blurred Protection for the Feel or Groove of a Song under Copyright Law: Examining the Implications of Williams v. Gaye on Creativity in Music,* 35 TOURO L. REV. 723, 726 (2019)(asserting that "the Ninth Circuit's affirmance of the jury's decision inappropriately expanded the scope of copyright protection to the feel or groove of a song," which will "substantially diminish the creative output of artists.").

[16] Megan Coane & Maximillian Verrelli, *Blurred Lines? The Practical Implications of Williams v. Bridgeport Music,* AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/blurring_lines_the_practical_implications_of_williams_v_bridgeport_music/#6; *see also Regrettable Denouement in the "Blurred Lines" Dispute,* GEORGE WASHINGTON LAW BLOGS: MUSIC INFRINGEMENT RESOURCE, https://www.hollywoodreporter.com/thr-esq/robin-thicke-sues-protect-blurred-607492 (discussing the potential "chilling effect" on creativity and the rise in similar, opportunistic claims following the Ninth Circuit's decision in *The Blurred Lines Case*).

[17] *See* Christman, *supra* note 15.

[18] *See, e.g.*, Regina Zernay, *Casting the First Stone: The Future of Infringement Law After* Blurred Lines*,* Stay with Me*, and* Uptown Funk*,* 20 CHAP. L.R. 177 (2017) (analyzing the current state of music law and determining whether any significant change has occurred in the way copyright infringement suits are resolved); *see* Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath,* 92 S. CAL. L. REV. POSTSCRIPT 67, 68 (2018)(arguing that the "Blurred Lines" songwriters were found liable for an idea rather than a tangible expression of an idea as required by the Copyright Act (the Act); thus, to preserve the intent of the Act, courts must provide clearer rules for songwriters); *see* Coane & Verrelli, *supra* note 16; *see also* Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out,* NEW YORKER,(Mar. 12, 2015), https://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-outd (arguing that the *Blurred Lines Case* verdict should be "thrown out" because "to say something 'sounds like' something else does not amount to copyright infringement").

[19] *See* Jem Aswad, *Katy Perry's 'Dark Horse' Case and Its Chilling Effect on Songwriting,* VARIETY (Aug. 6, 2019), https://variety.com/2019/biz/news/katy-perry-dark-horse-lawsuit-joyful-

However, music is just one area of copyright law. Was it possible that other creative industries should share this concern as well?

This Note seeks to examine the following questions: given the rise of copyright infringement claims in the music industry and the substantial uncertainty surrounding creativity that exists in this area of copyright law after *The Blurred Lines Case*, can artists expect this trend to spread to other types of protected creative works, in particular, motion pictures and other audiovisual works? Or, is it more probable that the implications of *The Blurred Lines Case* will remain contained within the music industry? In the case of the latter, does this mean that different kinds of creative works are treated differently under copyright? If so, should this disparity be permitted?

By conducting a thorough analysis of *The Blurred Lines* holding, its implications, and copyright law, this Note argues that the results of the present case is unlikely to spread to other areas of copyright law. Part II provides a general background of copyright law. Part II also provides a more detailed discussion of *The Blurred Lines Case*, to serve as context for stating and analyzing the questions presented here.

In Part III, this Note conducts an analysis of the current state of other areas of copyright law, focusing on film, motion pictures, and other audio-visual works. Specifically, this section will analyze case law to determine what facts, arguments, and methods of reasoning are typically presented by plaintiffs in these kinds of infringement lawsuits. Then, it will assess the relative success of these plaintiffs in obtaining verdicts in their favor. After this undertaking, this Note predicts how the implications of *The Blurred Lines Case* are not likely to spread beyond the film industry. Part III of this Note then argues that the application of copyright protection varies across different types of creative works. Finally, Part III considers arguments as to whether this disparity in protection should be permitted.

noise-chilling-effect-on-songwriting-1203292606/ (arguing that the increase in substantial verdicts in music copyright infringement cases post-*Blurred Lines* reveals a need to eliminate the role of the jury in future cases).

II. BACKGROUND

A. COPYRIGHT LAW

1. Source and Purpose of U.S. Copyright Law

U.S. copyright law begins with Article I, Section 8, Clause 8 of the U.S. Constitution, which is commonly referred to as "the Copyright and Patent Clause."[20] This clause provides that Congress "shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[21]

The Court has generally interpreted the Copyright Clause to mean that the purpose of copyright protection is to "enrich[] the general public through access to creative works,"[22] and to "motivate the creative activity of authors and inventors by the provision of a special reward"[23] that exists "in the form of control over the *sale or commercial use* of copies of their works."[24] Thus, these characterizations of the Copyright Clause demonstrate that the authority to grant copyright to an individual rests "on the dual premises that the public benefits from the creative activities of authors and that copyright protection is a necessary condition to the full realization of those creative activities."[25] This rationale allows for the implicit assumption that "absent a public benefit, the grant of copyright to individuals would be unjustified."[26]

The Copyright Clause gives Congress the power to enact legislation "to provide copyright protection to the extent [it] sees fit."[27] That is, copyright is protected solely by statute, as the Constitution neither confers nor requires copyright protection.[28]

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[20] 18 AM. JUR. 2D *Copyright and Literary Property* § 1 (2020) (citing Golan v. Holder, 565 U.S. 302 (2012); Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005)).

[21] U.S. CONST. art. I, § 8, cl. 8 [hereinafter *the Copyright Clause*].

[22] Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979, 1982 (2016)(quoting Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994)).

[23] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[24] Goldstein v. California, 412 U.S. 546, 555 (1973) (emphasis added).

[25] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (Matthew Bender, Rev. Ed.).

[26] *Id.* (citing Omega S.A. v. Costco Wholesale Corp., 776 F.3d 692,698 (9th Cir. 2015)(Wardlaw, J., concurring)).

[27] 18 AM. JUR. 2D *Copyright and Literary Property* § 1 (2020) (citing Darden v. Peters, 488 F.3d 277 (4th Cir. 2007)).

[28] *Id.* at § 3 (citing *Darden*, 488 F.3d 277 and Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881 (9th Cir. 2005)); *see also Sony*, 464 U.S. at 430 (explaining how "the protection given to copyrights is wholly statutory").

2. Development of U.S. Copyright Law

In 1790, the First Congress brought forth the principles of the Copyright Clause by enacting the first copyright law, the Copyright Act of 1790.[29] The initial scope of the 1790 Act was "relatively limited," offering protection for "books, maps, and charts for a period of only fourteen years with a renewal period for another fourteen years."[30] Congress amended the 1790 act several times throughout the nineteenth century, changing the scope of protected works, duration of protection, and the registration process.[31] For example, the amendments expanded the scope of protection to include "historical and other prints," dramatic works, photographs, visual art, and expanded the exclusive rights of authors to include the right of public performance for dramatic works and musical compositions and the right to create derivative works.[32]

The next major copyright legislation passed by Congress was the Copyright Act of 1909.[33] Signed into law by President Theodore Roosevelt, the key features of this legislation included both a copyright term and renewal term of 28 years, and also granted the author the ability to terminate any transfer of their copyright between the initial and renewal periods.[34] The 1909 Act experienced three significant phases of amendment.[35] First, three years after its enactment, the 1909 Act was amended to extend protection to motion pictures.[36] Second, in 1953, the 1909 Act was further amended to extend recording and performing rights to nondramatic literary works.[37] Finally, in 1972, Congress again extended copyright protection to sound recordings that were fixed and first published after the date of enactment.[38]

In October 1976, President Gerald Ford signed the first and most recent major revision of copyright law since 1909: the Copyright Act of 1976 ("the 1976 Act").[39] The 1976 Act significantly changed modern copyright law because it

[29] Timeline of Copyright Law in the United States: Eighteenth Century, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Sept. 24, 2020).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

[34] Timeline of Copyright Law in the United States: 1900-1950, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_1900-1950.html (last visited Sept. 24, 2020).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Timeline of Copyright Law in the United States: 1950-1997, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_1950-1997.html (last visited Sept. 24, 2020).

greatly altered the term of protection for new works.[40] Rather than protecting works for a term of years with a renewal period, the 1976 Act provided that new works created on or after January 1, 1978 were protected for the life of the author plus seventy years.[41] Additionally, the right to terminate transfer of the copyright between the initial and renewal terms was eliminated and replaced with the right to terminate transfer after 35 years, subject to specific procedures.[42]

While the 1976 Act remains the current statutory authority on copyright law in the United States, Congress has amended it multiple times since its enactment.[43] These revisions have primarily occurred in response to rapidly changing technologies; for example, given the creation of new mediums of expression, Congress has added protection for computer programs.[44] Amendments to the 1976 Act have also occurred to reflect the United States' treaty obligations with other nations, such as the Berne Convention and the Protection of Literary and Artistic Works.[45]

Thus, as copyright law has evolved in the United States, protection under the 1976 Act has greatly expanded.[46] After years of legislative efforts, in an ever-advancing world, to comport statutory law with the principles of the Copyright Clause, the thrust of the 1976 Act's protection is summarized as follows:

> authors of original expression shall enjoy the exclusive right to (1) copy their work; (2) distribute copies to the public; (3) prepare "derivative works" based upon their work, including translations, motion picture versions of novels, arrangements, abridgements, and the like; (4) publicly perform their work, including live performances, broadcasts, and streaming over the Internet; and (5) publicly display their work, including displaying artwork in public places on websites.[47]

3. Substantive Requirements and Subject Matter of Copyright

The summary of provisions of the 1976 Copyright Act given above dictates what *rights* are available to authors under the statute. The following paragraphs will explain how authors may assert these exclusive rights. First, this Note will discuss the substantive requirements of copyright protection. Second, given

40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 NEIL WEINSTOCK NETANEL, COPYRIGHT: WHAT EVERYONE NEEDS TO KNOW 1 (2018).
47 *Id.* at 3.

these requirements, this Note will list the kinds of works that may be protected by copyright.

There are two main requirements that must be met for a creative work to be subject to copyright. First, the 1976 Act provides protection for "original works of authorship."[48] The modern statute fails to provide a definition for what constitutes "originality." However, the relevant House Report explained that this omission was purposeful because the legislature intended to incorporate without changing the standard of originality established by courts under the 1909 Act.[49]

Since the 1909 Act also lacked a definition for originality, courts filled in the gap by uniformly inferring the originality requirement from the fact that copyright could only be claimed by "'authors' (or their successors in interest)."[50] Specifically, courts reasoned that since the author is the "'originator'" or "'beginner'" and "'first mover of anything' . . . [,] a work is not a product of an author unless it is original."[51] Thus, courts construe the meaning of originality to mean "only that the work owes its origin to [its] author, *i.e.,* is independently created rather than copied from other works."[52]

Second, in order to be eligible for protection under the statute, the original work must be "fixed in any tangible medium of expression."[53] This language simply requires a work of original authorship to have some physical manifestation.[54] This "broad language" was used to "avoid . . . artificial and largely unjustifiable distinctions," where "statutory copyrightability" in some cases "was made to depend upon the form or medium in which the work was fixed."[55] Therefore, under the 1976 Act, "it makes no difference what the form, manner, or medium of fixation may be."[56]

Taken together, these two requirements allow the following conclusion: so long as a creative work owes its origin to the author, and it has been fixed in some form of tangible medium through which "the work can be perceived and communicated,"[57] the requirements of the statute are satisfied, and copyright protection is triggered.[58] As indicated in the language of the statute, the

48 17 U.S.C. § 102 (2019).

49 1 NIMMER, *supra* note 25, at §2.01[A] (quoting H.R. REP NO. 94–1476, at 51 (1976)).

50 *Id.* at 2 (citing An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, 35 Stat. 1075 (1909)).

51 *Id.* (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351-52 (1991); Medforms, Inc. v. Healthcare Mgmt. Sols., Inc., 290 F.3d 98, 103 (2d Cir. 2002)).

52 *Id.* (citing *Feist*, 499 U.S. at 345).

53 17 U.S.C. § 102 (2019).

54 1 NIMMER, *supra* note 25, at § 1.08.

55 H.R. REP NO. 94–1476, at 52 (1976).

56 *Id.*

57 NETANEL, *supra* note 46, at 5.

58 *Id.*

following categories of works of authorship may be subject to copyright protection: (1) literary works; (2) musical works; (3) dramatic works; (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.[59]

4. Establishing a Copyright Infringement Claim

To establish a claim for copyright infringement, a party must satisfy two requirements: (1) ownership of a valid copyright, and (2) that another person or entity copied the constituent elements of the work that are original.[60] It is generally accepted as impossible to prove prong two's infringement requirement by direct evidence because the availability of a witness testifying to copying rarely exists.[61] Therefore, a party may use circumstantial evidence to prove an infringer had "access" to the protected work and that the two works share "substantial similarity."[62]

a. Access

Courts may define "access" as "the actual viewing and knowledge" of a protected work.[63] Similar to the difficulty of establishing direct evidence of copying, plaintiffs may also find it near impossible to show that the defendant actually viewed or had knowledge of the work.[64] Thus, courts have determined that, if actual evidence of access is unavailable, showing that the defendant had an opportunity to view the work is sufficient to allow the factfinder to conclude copying as a factual matter.[65]

The implication of this allowance is that the factfinder has the discretion to disregard a defendant's uncontroverted testimony that no such access was available at all.[66] Thus, this approach may be fairly characterized as guaranteeing plaintiffs a finding of infringement.[67] However, it is important to note that opportunity to view a work "does not encompass any bare possibility in the sense that anything is possible."[68] Instead, "there must be a reasonable possibility of

59 17 U.S.C. § 102 (2019).

60 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (citing Harper v. Row, 471 U.S. 539 at 548 (1985)).

61 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[B](Matthew Bender, Rev. Ed.).

62 *Id.*

63 *Id.* at § 13.02[A].

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

viewing plaintiff's work," rather than a "bare" one.[69] Distinguishing a "reasonable" from a "bare" possibility is "anything but straightforward, which often makes the determination a "close question."[70]

As indicated above, plaintiffs in a copyright infringement suit are typically required to demonstrate access and substantial similarity.[71] However, where the similarity between two works is so "sufficiently striking" that the "only explanation for the similarities . . . must be 'copying rather than … coincidence, independent creation, or prior common source,'"[72] the factfinder "may . . . infer copying on that basis alone."[73] This concept is known as the "Inverse Ratio Rule," and its acceptance and degree of application varies widely among federal circuit courts.[74]

b. Substantial Similarity

Substantial similarity is just as, if not more, vital to a plaintiff's infringement claim.[75] This question is also one of the more complicated areas of copyright law.[76] Specifically, courts find it both "difficult to define and vague to apply"[77] given Congress' lack of statutory guidance and the Supreme Court's silence as to what constitutes "substantial." The analysis has ultimately been left to the discretion of the lower courts; consequently, a wide range of approaches are comprised in case law.[78]

Nevertheless, the vital inquiry here concerns "improper appropriation," and while approaches may vary, it is generally understood that a "slight" or "trivial" similarity is not considered "substantial." [79] Yet, "exact reproduction" or "near identity" are not necessary.[80] One potentially instructive way to conceptualize this element of an infringement claim is in terms of what the work is not. For example, where there is no dispute as to the validity of the plaintiff's copyright, access, or the "very strong resemblances" between two works, a court may find

[69] *Id.*
[70] *Id.*
[71] *Id.* at § 13.01[B].
[72] *Id.* at § 13.02[B] (citations omitted).
[73] *Id.*
[74] *Id.* at § 13.03[D].
[75] *Id.* at § 13.03[A].
[76] *Id.*
[77] 2 JOHN GLADSTONE MILLS III ET AL., PATENT LAW FUNDAMENTALS § 6:70 (2d ed. 2011).
[78] *See id.* ("Several approaches, some interrelated, are taken by courts in analyzing works for substantial similarity.").
[79] 4 NIMMER, *supra* note 61, at § 13.03[A].
[80] MILLS, *supra* note 77.

that substantial similarity is lacking where the defendant copied only the unprotected elements of the plaintiff's work.[81]

5. Limits of Copyright Protection

The preceding paragraphs provided an overview of the development of copyright law in the United States and an explanation of both the scope and substantive requirements of protection. While the general trend in this area of law may be fairly characterized as an expansion and responsiveness to advancement, several limitations on protection have remained constant. The most relevant limitation for the purposes of this Note is the "idea/expression dichotomy".[82] This phrase refers to the longstanding principle of copyright law that protection "extends only to the form in which an author expresses her ideas, not to the ideas themselves."[83]

The idea/expression dichotomy, which was codified in the 1976 Act[84], seeks to strike a balance between the First Amendment and the Copyright Act "by permitting the free communication of facts while still protecting an author's expression."[85] When construing the statute, the Supreme Court has held that "no author may copyright his ideas or the facts he narrates,"[86] because "[c]opyright laws are not restrictions on freedom of speech."[87] Rather, as the Court has explained, "the Framers intended copyright itself to be the engine of free expression," because in creating "a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[88] Thus, the economic philosophy underlying the Copyright Clause "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[89]

Despite the widespread reliance on the idea/expression dichotomy by courts, many commentators consider it an illusory distinction.[90] For instance, critics

81 4 NIMMER, s*upra* note 61, at § 13.03[A] (citing Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95, 101-02 (2d Cir. 2014)).

82 NETANEL, *supra* note 46, at 2.

83 *Id.*

84 *See* 17 U.S.C. § 102(b) (2019) ("In 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.").

85 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).

86 *Id.*

87 *Id.* (citing New York Times Co. v. United States, 403 U.S. 713, 726 (1971)).

88 *Id.* at 558.

89 *Id.* (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

90 *See* Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law,* 10 PACE L. REV. 551, 552-553 (1990)(arguing that "the distinction between the idea and expression

contend that the relationship between idea and expression is best conceptualized as a continuum because the difference between the two is not binary.[91] It is one of degree.[92] The idea-expression dichotomy is also considered impracticable because courts and commentators consistently fail to "define or clarify exactly what they mean" when using the terms "idea" and "expression."[93] This aspect of copyright law is not the focus of this Note; therefore, further elaboration of the idea/expression dichotomy debate is unnecessary. However, acknowledging its presence in the copyright landscape leads this discussion to the next major area of relevant background information: *The Blurred Lines Case*.

B. THE BLURRED LINES CASE

1. The Blurred Lines Case: Factual Background and Procedural History

The Blurred Lines Case started with a preemptive strike by the three composers of the hit single from which the litigation derives its name: Robin Thicke, Pharrell Williams, and T.I.[94] The trio filed a complaint seeking a declaratory judgment that they were not liable for copyright infringement in response to a communication from Marvin Gaye's estate that (1) they believed that the trio's "Blurred Lines" infringed on Gaye's "Got To Give It Up," and (2) if the trio did not pay a monetary settlement of the Gaye estate's claim, the Gaye estate would initiate litigation for copyright infringement.[95]

The trio argued that the Gaye estate's claims did not constitute a basis for copyright infringement because "being reminiscent of a 'sound' is not copyright infringement."[96] More specifically, they contended that the intent in creating "'Blurred Lines' was to evoke an era."[97] Thus, "the Gaye defendants are claiming ownership of an entire genre, as opposed to a specific work."[98] This preemptive

dichotomy is misguided and irrelevant."); *see also* Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements,* 66 IND. L. J. 175 (1990)(evaluating how subjective artistic values held by judges affect determinations of copyright infringement).

91 Jones, *supra* note 90, at 578, 598.

92 *Id.*

93 *Id.* at 565.

94 *See supra* Part I (summarizing the events that led to the filing of this lawsuit).

95 *Id.*; *see also* Complaint for Declaratory Relief at 2, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Aug. 15, 2013), 2013 WL 4271752 (seeking a declaratory judgment that Williams and Thicke's composition did not infringe on Gaye's 1977 hit).

96 Complaint for Declaratory Relief at 2, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Aug. 15, 2013), 2013 WL 4271752.

97 *Id.*

98 *Id.*

strike prompted a counterclaim by the Gaye estate alleging that "Blurred Lines" infringed on Gaye's "Got To Give It Up."[99]

After losing on their motion for summary judgment, the case proceeded to trial. The jury found the "Blurred Lines" composers liable for copyright infringement and awarded the Gaye Estate $4 million in damages and $3.7 million in profits.[100] Due to the publication of "Got to Give It Up" before 1978, the old statutory framework of the 1909 Copyright Act applied instead of the 1976 Act.[101] Therefore, the court ruled that protection afforded by the older statutory framework did not extend to the commercial sound recordings of "Got to Give It Up" or "Blurred Lines."[102]

After the verdict announcement, many artists, reporters, industry insiders, and experts voiced various critiques.[103] In addition to the common contention that the denial of the "Blurred Lines" songwriters' motion for summary judgment was improper, the main criticism was that the jury instructions were erroneous.[104] Critics asserted that the judge blurred the distinction of what constitutes copyright infringement by failing to instruct the jury to limit its evaluation to only the protectable elements of copyright.[105] This presumptively allowed the jury to consider copying an idea as infringement.[106] Also, many felt that the jury went beyond the scope of the evidence by subconsciously incorporating the inadmissible sound recordings.[107] The two songs were erroneously played during the course of the Gayes' expert testimony.[108] Therefore, to many, it appeared as though the jury reached a conclusion unsupported by the weight of the evidence.[109]

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99 John Quagliariello, *Blurring the Lines: The Impact of Williams v. Gaye on Music Composition*, 10 HARV. J. SPORTS & ENT. L. 133, 137 (2019).

100 *Id.* at 138; *see also* Williams v. Gaye, 895 F.3d 1106, 1118 (9th Cir. 2018).

101 Quagliariello, *supra* note 99, 137-38.

102 *Id.*

103 *Id.* at 138.

104 *See* Coane & Verrelli, supra note 16 (arguing that the "misleading and inconsistent" jury instructions in *The Blurred Lines Case* were a deciding factor in the verdict against Thicke and Williams).

105 *See id.* (discussing how the jury was told that they could find infringement if "they perceive that the 'total concept and feel' of the two works are 'substantially similar.'").

106 *See id.* (explaining how critical reactions to *The Blurred Lines Case* spurred from the impression that the court had found that paying homage to a "vibe and/or feel" or "genre" of a previously released and inadmissible master recording constitutes infringement: "[t]his should not have been the case, as many of those elements were excluded as evidence by virtue of the sound recordings [under the 1909 Act].").

107 Quagliariello, *supra* note 99, at 139.

108 *Id.*

109 *Id.* at 138.

2. The Blurred Lines Case: The Appellate Decision

a. The Majority

Despite the widespread expectation that the "Blurred Lines" songwriters would win on appeal,[110] the Ninth Circuit affirmed the jury's verdict in part and upheld the remitted damages award for the Gaye Estate.[111] The majority rejected the "Blurred Lines" parties' contention that the Gayes' copyright enjoyed only "thin protection," stating that "[m]usical compositions are not confined to a narrow range of expression."[112] The majority explained that music is "comprised of a large array of elements, some combination of which is protectable by copyright."[113] Therefore, a party need only demonstrate through expert testimony that the similarity between two works is (1) "substantial" and (2) "to the protectable elements."[114] Because the Gayes were not required to prove "virtual identity" to establish their infringement claim, the court subjected their copyright to broad protection.[115]

Moreover, the majority stated that their decision was a narrow one, and that it "turned on the procedural posture of the case."[116] Thus, because a high degree of deference was given to findings of the judge and jury during the trial, the majority found that the district court did not misstate the law in instructing the jury.[117] Additionally, the majority concluded that the district court did not abuse its discretion in formulating the instructions.[118] The majority also found that the district court did not fail to improperly include the commercial sound recordings of the two works,[119] did not improperly admit expert testimony based on unprotected elements,[120] and that the jury's verdict was not against the clear weight of the evidence.[121]

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110 *See* Tim Wu, *Why the "Blurred Lines" Verdict Should be Thrown Out,* THE NEW YORKER (Mar. 12, 2015, https://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out (predicting that the ruling against Thicke and Williams will be reversed because "to say that something 'sounds like' something else does not amount to copyright infringement.").

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

112 *Id.* at 1120.

113 *Id.* (quoting Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004).

114 *Id.*

115 *Id.* (holding that "the Gayes' copyright is not limited to only thin copyright protection").

116 *Id.* at 1138.

117 *Id.*

118 *Id.*

119 *Id.* at 1107.

120 *Id.* at 1125.

121 *Id.*

b. The Dissent

Judge Nguyen's dissent sharply disagreed with the majority's reasoning and conclusions; also, much of her criticisms and arguments embody the general consensus across multiple sectors that the Ninth Circuit wrongly decided *The Blurred Lines Case.*[122] Focusing significantly more on the musical elements of the two works than the majority, Judge Nguyen criticized the majority's analysis for the following reasons. First, by deciding the case on purely procedural grounds, the majority missed the actual issue at hand—whether attempting to evoke a "Marvin Gaye style" crossed the legal line into infringement. Second, the majority failed to distinguish what elements of "Got To Give It Up" should have received protection. Finally, even if all the elements of Gaye's song were protectable, the combination of those elements do not satisfy the substantial similarity standard.[123]

Judge Nguyen's sharpest words for the majority still echoes among critics *of The Blurred Lines Case* decision today. In her opinion she states that "the majority establishe[d] a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere."[124] In creating this precedent, Nyguyen continues, "the majority allowed a musical style or 'groove' to be copyrighted," which will ultimately create a chilling effect on creativity.[125] As described in the introduction, this is an ongoing and contentious debate in the music industry.[126] For the purposes of this Note, however, it is a framework for analyzing the issue at hand: whether this potential trend of an unprecedented scope of copyright protection will spill over into other areas of copyright law, specifically film and motion pictures.

III. ANALYSIS

The focus of this Note's analysis shifts to a different area of copyright law: film and motion pictures. First, this Note discusses and analyzes the current state of film copyright law. Second, based on my findings, this Note predicts the relative likelihood of a post-*Blurred Lines* landscape spilling over into in the film industry. Finally, this Note analyzes whether a disparity in how different works are treated under copyright exists and considers whether any such differential treatment should be permitted.

122 *Id.* at 1138 (Nguyen, J., dissenting).

123 Quagliariello, *supra* note 99, at 140-41.

124 *Williams,* 895 F.3d at 1138.

125 Quagliariello, *supra* note 99101, at 141.

126 *See supra* Part I (noting the tension between creativity and ownership rights inherent in copyright protection).

A. COPYRIGHT LAW AND FILM

The previous discussion of *The Blurred Lines Case* prompts an even more specific question within the broader one presented here: what aspects of film could leave the industry susceptible to a copyright infringement claim, and subsequent decision, like *Blurred Lines?* By analyzing recent copyright infringement cases in the film industry, this section seeks to exemplify the possible opportunities for the controversy from the music industry to spread into film. Before conducting this analysis, it is important to first acknowledge a key caveat in this area of copyright law: the scènes à faire doctrine. Translated as "scenes which must be done,"[127] this doctrine provides that copyright protection does not extend to "similarity of incidents or plot that necessarily follow[] from a common theme or setting."[128] For example, where two works shared common themes such as "electrified fences" and "dinosaur nurseries," no infringement was found because they "flowed from the concept of a dinosaur zoo."[129]

As a result of this doctrine, factfinders automatically treat copyright infringement claims concerning film differently than those that deal with music. Specifically, it appears that the scènes à faire doctrine works against liberal copyright awards to plaintiffs by forcing the factfinder to filter through the unprotected elements and tease out the soundness of a plaintiff's claim. In other words, the scènes à faire doctrine operates as a preliminary inquiry and, ultimately, a mitigating factor on the difficulties of the substantial similarity prong.

1. Marcus v. ABC Signature Studios, Inc.

In *Marcus v. ABC Signature Studios, Inc.*, the works disputed concerned two different television scripts about a family moving to a new neighborhood and navigating "black" stereotypes.[130] In *Marcus,* Plaintiff alleged that defendant used plaintiff's submission of a script in a screenwriter contest sponsored by defendant's production company to develop the pilot for an ABC series called *Black-ish.*[131] Plaintiff's infringement claim primarily focused on similarities between the theme and plot of the two works.[132]

The circuit court granted the defendant's motion to dismiss, stating that "[a] work's theme is its overarching message," and thus, "[t]here is no protection for

127 4 NIMMER, s*upra* note 61, at § 13.03[B][4] (quoting Schwarz v. Universal Pictures Co., 85 F. Supp. 270 (S.D. Cal. 1949)).

128 *Id.*

129 Cavalier v. Random House, Inc., 297 F.3d 815, 823 (9th Cir. 2002).

130 Marcus v. ABC Signature Studios, Inc., 279 F.Supp. 3d 1056, 1059-60 (C.D. Cal. 2017).

131 *Id.* at 1059.

132 *Id.* at 1059-61.

stock themes or themes that flow necessarily from a basic premise."[133] For example, the court acknowledged that the two works shared the element of "acting black"; but, because it did not exist as an underlying message in the works, the court denied that this constituted a theme.[134] Furthermore, since any attempts by characters in defendant's work to use dialogue to "act black" were "extremely brief," they were "not a large point of contention" in the plot.[135] Additionally, in *Marcus,* the court stated that the similar themes of "moving into the majority culture [and] constantly feel[ing] . . . out of place" did not amount to infringement because it arose from a basic plot idea.[136] Therefore, it was not protected, and the court was required to "disregard [the theme of feeling out of place] . . . in looking at Plaintiff's ability to plead substantial similarity."[137] The *Marcus* court also rejected claims of substantial similarity regarding the plots of the two works.[138] For instance, the court stated that the shared elements of characters from both works receiving internal promotions at their jobs and the show's subsequent exploration of the "characters' reactions to those promotions" were "basic plot ideas . . . 'not protected by copyright law.'"[139]

2. Sheldon Abend Revocable Trust v. Spielberg

In *Sheldon Abend Revocable Trust v. Spielberg*, plaintiff brought an infringement action alleging that Spielberg's motion picture, *Disturbia,* infringed on plaintiff's copyright in a short story entitled *Rear Window* and "the derivative Alfred Hitchcock film of the same name."[140] The court granted defendants' motion for summary judgment.[141]

While the court did not explicitly refer to the scènes à faire doctrine, the court's influence is implicit within its reasoning. Prior to applying the substantial similarity test, the court stated that where, as in *Sheldon*, "a work is an amalgamation of protectible and unprotectible elements," the court must "first filter [the unprotectible elements] out from consideration."[142] For example, the court reasoned that the similarity of plot points of "peril" and "suspense"

133 *Id.* at 1067 (quoting Silas v. Home Box Off., Inc., 201 F.Supp. 3d 1158, 1180 (C.D.Cal., 2016)).

134 *Id.*

135 *Id.*

136 *Id.* at 1068.

137 *Id.*

138 *Id.* at 1065-66.

139 *Id.* at 1067 (quoting Campbell v. Walt Disney Co., 718 F. Supp. 2d 1108, 1112 (N.D. Cal. 2010)).

140 Sheldon Abend Revocable Tr. v. Spielberg, 748 F.Supp. 2d 200, 202 (S.D.N.Y. 2010).

141 *Id.*

142 *Id.* at 204.

between the two works was "broad" and at a "level of generality [that] is not probative for the question of infringement."[143]

These cases are just a snippet of the overarching theme observed in copyright cases in the film industry. Taken together, it appears that the application of copyright protection is much more restrained in the film industry. The scènes à faire doctrine explains this difference, since it operates as a filter on a plaintiff's claim, with the principal effect of extracting the protectable elements of the work from the unprotectable ones. Thus, the substantial similarity inquiry is much more precise and consistent in infringement cases regarding the film industry.

It follows, therefore, that film artists are engaged in a much more stable industry that is not susceptible to a decision like *The Blurred Lines Case*. If true, then it also follows that the prospect of a spillover of any potential "chilling effect" on creativity from the music to film industry is also quite slim. Accordingly, does this mean that different kinds of works are treated differently under copyright? If so, is this apparent differential treatment an acceptable feature of copyright law? Or, should it be troubling? The following section seeks to assess these and similar questions.

B. DIFFERENTIAL TREATMENT BETWEEN KINDS OF WORKS

As discussed in the preceding section, it appears that infringement cases in this area are not susceptible to the same kind of uncertainty that currently pervades the music industry. Therefore, a disparity in treatment among various works in copyright does appear to exist. The next inquiry, then, is whether this disparity in treatment under copyright should be acceptable.

The differential treatment is unacceptable for two reasons. First, consider the plain language of the Copyright Act. § 102 of the Copyright Act lists categories of works of authorship that are subject to copyright protection and conveys the idea-expression dichotomy as a limitation on protection. This section does *not* provide any notion or indication that the extent of copyright protection may vary across the categories of works of authorship. Thus, differential treatment constitutes a misinterpretation and misapplication of the Copyright Act.

Second, differential treatment of protected works conflicts with common understandings of fairness. Allowing differential treatment among works of authorship creates the implication that certain works of authorship are more deserving of protection than others. This implication is problematic because it could create a de facto hierarchy among infringement claims, communicating that some kinds of creative works are more worthy of protection than others. Consequently, plaintiffs may opt to forgo the time and expense of litigation. Plaintiffs may reasonably infer from the collective body of infringement case law

[143] *Id.* at 208.

that courts predetermine the merits of a claim on the basis of what *kind* of protected work is at issue rather than whether infringement actually occurred. Hierarchical protections, whether perceived or actual, within copyright may also leave many authors feeling unmotivated to protect their creative works through registration at all. In particular, the registration process may seem futile to authors within "lesser valued" categories, since they could not reasonably expect to also enjoy the full force of protections guaranteed by the Copyright Act. Therefore, differential treatment of protected works is fundamentally unfair as it may create substantial uncertainty for some authors' ability to assert and/or maintain valid ownership rights of their creative works.

IV. CONCLUSION

After *The Blurred Lines Case,* panic spread throughout the music industry. Many perceived the decision as a dangerous expansion of copyright protection. Specifically, it was inferred from the majority's opinion that the "groove" or "feel" of a song could now be protected under copyright. Thus, it was asserted that the ultimate implication of the decision would be a chilling effect on creativity in the industry because songwriters would now create their works with uncertainty of litigation.

While a great deal of attention has been given to the implications of this decision in the music industry, the impact of *The Blurred Lines Case* in other areas of copyright has received little attention, especially in film and motion picture. As assessed in the preceding section, it appears that possible implications of *The Blurred Lines Case* are contained within the music industry. In particular, the application of copyright protection is much more restrained in the film industry, because the scènes à faire doctrine operates as a filter on a plaintiff's claim, with the principal effect of extracting the protectable elements of the work from the unprotectable ones.

Consequently, a disparity in treatment among works exists in copyright law. Allowing differential treatment among works of authorship creates the implication that certain works of authorship are more deserving of protection than others. These findings prompt the following questions: should particular measures should be taken to address the disparity? If so, by what means? This Note does not seek to answer these questions; instead, this Note considers the probability of a particular trend in one area of copyright, spreading into another. The findings presented indicate that the probability is slight, because a disparity of treatment exists among protected works in copyright. Thus, further research, study, and analysis of this current landscape in copyright law, which is beyond the scope of this Note, is necessary to answer these two questions. In the meantime, the line between paying homage and copyright infringement is an increasingly blurred, litigiously risky, and expensive one to test. Singer-

songwriters, musicians, and producers alike should tread lightly in their creative process: that "groove" you are using may be a hit in more than one way.