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## “It’s the Same Old Song”: The Failure of the Originality Requirement in Musical Copyright

Valeria M. Castanaro\*

Have you ever flipped through the radio stations and felt like you’re hearing the same song over and over again? Better yet, have you ever paused on one station thinking that one song was playing, but in fact a different song was being broadcast that sounded dubiously similar to the song you initially perceived? Billie Holiday once said: “If you copy, it means you’re working without any real feeling. No two people on Earth are alike, and it’s got to be that way in music or it isn’t music.”<sup>1</sup> If Billie Holiday was listening to the radio today, she wouldn’t know what to call the sound waves taking over the airwaves because to her, the barrage of copycat artists and dubiously similar songs simply would not be music. As a teenager, I was constantly subjected to my mother’s opinion that all of the music I listened to either sounded the same or was a rip-off of a song from her generation. As an adult reflecting on the music of my generation, I’m inclined to agree with her and have begun to wonder where the originality in music has gone—and how can we get it back?<sup>2</sup>

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<sup>1</sup> Billie Holiday, BrainyQuote, [http://www.brainyquote.com/quotes/authors/b/billie\\_holiday.html](http://www.brainyquote.com/quotes/authors/b/billie_holiday.html) (last visited Mar. 9, 2007).

<sup>2</sup> Alex Tyson, *Musicians Lose Artistic Integrity*, UNIVERSITY WIRE, May 26, 2006 (commenting on the lack of the originality in “new” music and hypothesizing as to why the art of copying music sells records).

Apparently, this is not an original question. In light of the recent copyright scandal centered on Avril Lavigne's 2007 summer hit, *Girlfriend*, many voices in popular culture have begun to question the originality requirement of musical works.<sup>3</sup> A 1970s musical group, The Rubinoos, brought suit for copyright infringement against Ms. Lavigne on May 25, 2007, claiming that her hit, *Girlfriend*, is an infringement upon their 1979 song, *I Wanna Be Your Boyfriend*.<sup>4</sup> Since the start of this controversy, it has also been said that *Girlfriend* sounds dubiously similar to Tony Basil's *Mickey*.<sup>5</sup> One newspaper writer, commenting on the frequency of the practice of copyright infringement in the musical world, said: "Granted, I'm no lawyer. But if I were Avril, I might go with the 'everyone else is doing it' defense."<sup>6</sup>

The existence of two songs sounding remarkably similar is not a new occurrence. We live in a musical era marked by covers, music sampling, and dubiously similar songs that are the product of both accidental and conscious borrowing.<sup>7</sup> When The Rubinoos released *I Wanna Be Your Boyfriend*, it was widely recognized among record reviewers and fans alike that the chorus melody bore a remarkable resemblance to that of the Rolling Stones' song *Get Off Of My Cloud*.<sup>8</sup> Other examples of songs that are suspiciously similar to those that came before them include Vanilla Ice's *Ice Ice Baby* (compared with David Bowie and Queen's *Under Pressure*),<sup>9</sup> 2 Live Crew's *Pretty Woman* (compared with Roy Orbison's song by the same name),<sup>10</sup> the Red Hot Chili Peppers' *Dani California*

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<sup>3</sup> See *infra* Part III.

<sup>4</sup> *Girlfriend* (Avril Lavigne Song), Wikipedia, [http://en.wikipedia.org/wiki/Girlfriend\\_\(Avril\\_Lavigne\\_song\)](http://en.wikipedia.org/wiki/Girlfriend_(Avril_Lavigne_song)) (last visited Mar. 10, 2008).

<sup>5</sup> Ernest Jasmin, *Hey, Your Influences are Showing*, THE NEWS TRIBUNE (Tacoma, Wash.), July 20, 2007.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* ("[O]bviously a lot of today's songs sound dubiously like yesterday's songs.")

<sup>8</sup> Ann Powers, *Critic's Notebook: Originality? Since When was that a Requirement?*, L.A. TIMES, Aug. 12, 2007, at F01.

<sup>9</sup> See Brian G. Bourke, *Ice Hot? Robert Van Winkle: Is He a For Real Act or Has He Got Us All Snowed?*, THE POST-STANDARD (Syracuse, NY), Mar. 7, 1991, at HJ.

<sup>10</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1993).

(compared with Tom Petty's *Mary Jane's Last Dance*),<sup>11</sup> and Michael Bolton's *Love is a Wonderful Thing* (compared with the Isley Brothers song by the same name).<sup>12</sup> I'm sure you can think of a plethora of songs that fit into this category. So the question remains: how can creativity and originality in the music industry work together with accountability to simultaneously protect the rights of original copyright holders and prevent stifling the creative process?

Angry pop-rock princess Avril is not the first of her peers to be the subject of copyright infringement allegations. These suits, brought by original artists against new artists who produce songs that sound remarkably like the original, are usually, but not always, settled out of court. In the case of the above mentioned Michael Bolton song, the original artists, the Isley Brothers, were awarded \$5.4 million in damages in 1994.<sup>13</sup> Similarly, Vanilla Ice was forced to share the royalties from *Ice Ice Baby* with David Bowie and Queen, the original artists of *Under Pressure*, for use of a seemingly similar bass line.<sup>14</sup> Further terms of the settlement also required that Vanilla Ice retroactively give David Bowie and the members of Queen songwriting credit.<sup>15</sup> George Harrison was not fortunate enough to settle his suit with the Chiffons out of court. In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, the district court found Harrison guilty of subconscious copyright infringement,<sup>16</sup> and he consequently paid damages in excess of \$500,000.<sup>17</sup>

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<sup>11</sup> See David Schmeichel, *Rename that Tune?; Creedence Clearwater Revival's John Fogerty is Not the Only Rocker Who's Been Accused of Rewriting History*, WINNIPEG SUN, July 26, 2007, at 38.

<sup>12</sup> *How They Measure Up*, LONDON FREE PRESS (Ontario), July 15, 2007, at E12.

<sup>13</sup> *Id.*

<sup>14</sup> Bourke, *supra* note 9.

<sup>15</sup> See *Ice Ice Baby*, Wikipedia, [http://en.wikipedia.org/wiki/Ice\\_Ice\\_Baby](http://en.wikipedia.org/wiki/Ice_Ice_Baby) (last visited Mar. 9, 2008); see, e.g., *Ice Ice Baby*, BMI Repertoire, <http://repertoire.bmi.com> (search for title "Ice Ice Baby") (listing David Bowie, the members of Queen, and Robert Van Winkle ("Vanilla Ice") as songwriters).

<sup>16</sup> See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (holding that copyright infringement exists under the law even if it is accomplished subconsciously).

<sup>17</sup> See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 508 F. Supp. 798, 801 (S.D.N.Y. 1981).

In light of these examples of similar songs, settlements, and actual litigation, it is clear that actual originality in music is on its way out, and technological advancements and the Internet seem to be the reason why. In response to the Internet's effect on pop music, Elton John "suggested that a five-year cyberspace shutdown might be the only way to renew the music's creativity."<sup>18</sup> Although it is true that the history of making music is deeply embedded in borrowing and sampling,<sup>19</sup> artists still like to think of their expression as original and unique.<sup>20</sup> Unfortunately, the public does not think a musical work that sounds dubiously similar to a previous work is original or unique, despite the artist's intention. The listening public deserves more in the way of creativity.<sup>21</sup>

This Note examines traditional copyright infringement, such as the alleged borrowing that is the subject of controversy in the Avril Lavigne situation, in light of new and advanced technology and media. Part I provides a legal background of copyright, detailing the purpose and rationale of the Copyright Act, the rights of a copyright holder, the interpretation of the originality requirement, and the elements of copyright infringement. Part II presents the conflict resulting from the inability of the current musical copyright regime to address the epidemic of traditional copyright infringement made easier by the Internet. Part III proposes that one way to address the inadequacy of the current musical copyright schema is to raise the bar for the originality requirement in musical copyright and to use the new level of access provided by the Internet to increase artists' awareness of, and accountability to, the existing catalogue.

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<sup>18</sup> Powers, *supra* note 8.

<sup>19</sup> Jasmin, *supra* note 5 (discussing the history of musical borrowing).

<sup>20</sup> Powers, *supra* note 8 ("Artists like to believe their self-expression is really theirs; perhaps even more importantly, the financial structure of the music industry, which rewards creativity when it's copyrighted, has upheld the idea that one person can 'own' a song.").

<sup>21</sup> *See id.* ("To music fans who still believe that heroic individualism is the essence of great music . . . they are the ones pop is leaving behind. Originality is dead. Long may creativity flower as it rises from the earth of a million songs . . . that have come before.").

## I. COPYRIGHT LAW

A major public policy concern has always been balancing the interests of promoting creativity in the arts and protecting the creator of the artistic expression.<sup>22</sup> Congress passed the Copyright Act of 1976, codified in Title 17 of the United States Code, as an extension of its power as provided for in the United States Constitution.<sup>23</sup> Article I, Section 8, Clause 8 of the Constitution states the following: “[t]he Congress shall have the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>24</sup> Congress exercised this power through different versions of the Act, the most recent being the Copyright Act of 1976.<sup>25</sup> The goal of the Copyright Act is to protect original works of authorship, while still promoting the creation of new works.<sup>26</sup> Copyright law promotes creativity by protecting original works from being copied in their use and enjoyment by the general public. This simultaneously creates incentives for authors by ensuring that credit is given where credit is due. At the same time, the protection of these works cannot be to such an extent as to stifle the creation of new works by new artists.<sup>27</sup>

Works that are entitled to copyright protection are defined in § 102 of the Copyright Act.<sup>28</sup> According to the statute, “musical works, including any accompanying words,” as well as “sound

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<sup>22</sup> See History of Copyright Law, Wikipedia, [http://en.wikipedia.org/wiki/History\\_of\\_copyright\\_law](http://en.wikipedia.org/wiki/History_of_copyright_law) (last visited Mar. 9, 2008).

<sup>23</sup> 17 U.S.C. § 101 (2000); U.S. CONST. art. I, § 8, cl. 8.

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>25</sup> The Copyright Act of 1976 is the governing body of law for determining whether or not a work is entitled to copyright protection, and if so, what constitutes infringement of the copyrighted work. See Randy S. Kravis, *Does a Song by any Other Name Still Sound as Sweet?: Digital Sampling and its Copyright Implications*, 43 AM. U. L. REV. 231, 239–40 (1993).

<sup>26</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 656 (6th Cir. 2004) (“The copyright laws attempt to strike a balance between protecting original works and stifling further creativity.”).

<sup>27</sup> See, e.g., *Meade v. United States*, 27 Fed. Cl. 367, 371–72 (1992) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429–30 (1984) (describing how Congress must balance the protection of work with the free flow of ideas)).

<sup>28</sup> 17 U.S.C. § 102 (a)(2), (7).

recordings,” are copyrightable expressions.<sup>29</sup> The artist who holds the copyright to an original work is entitled to exclusive rights in the work as provided in § 106 of the Act.<sup>30</sup> Section 106 provides the author of a musical work with the exclusive rights to reproduce or sell the copyrighted work, prepare derivative works, perform or display the work, and to perform the work publicly through the use of digital audio transmission.<sup>31</sup> Copyright infringement occurs when someone interferes with any of the exclusive rights of a copyright holder.<sup>32</sup> To avoid infringement, the individual seeking to use the copyrighted work must seek the permission of the copyright holder.<sup>33</sup> The exclusive rights of § 106 are subject to limitations, such as the fair use exception<sup>34</sup> and certain performances, as provided in §§ 107 through 122.<sup>35</sup>

A central component of copyright law is the doctrine of the idea-expression dichotomy. The idea-expression dichotomy acknowledges that there are two components to any copyrighted work: the ideas behind the work and the actual expression of those ideas that becomes the work. It is a generally accepted principle of copyright law that copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”<sup>36</sup> In determining what aspects of a work are entitled to copyright protection, the court must separate the elements of original expression in a work from the basic ideas embodied in the work.<sup>37</sup> Only the elements comprising original

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<sup>29</sup> *Id.*

<sup>30</sup> *See id.* § 106.

<sup>31</sup> *See id.* A derivative work is a musical work that includes significant portions of copyrighted material of an original, previously created work. *See id.* § 101.

<sup>32</sup> BLACK’S LAW DICTIONARY 796 (8th ed. 2004).

<sup>33</sup> *See* Joseph K. Christian, *Too Much of a Good Thing? Deciphering Copyright Infringement for the Musician*, 7 VAND. J. ENT. L. & PRAC. 132, 133 (2004) (interpreting the meaning of the exclusive rights in a copyrighted work to a copyright holder in music).

<sup>34</sup> Fair use entitles others to use a copyrighted work for certain purposes, such as educational use. The court examines four factors when deciding whether or not a potential infringement constitutes fair use: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used in relation to the work as a whole; and (4) effect of the use on the potential market or value of the copyrighted work. 17 U.S.C. § 107.

<sup>35</sup> *See id.* § 106; *see also id.* §§ 107–22.

<sup>36</sup> 17 U.S.C. § 102(b).

<sup>37</sup> *See* Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 836 (10th Cir. 1993).

expression receive copyright protection.<sup>38</sup> The concept behind the idea-expression dichotomy is related to the basic maxim of copyright law, which seeks to balance rewarding the author and allowing for the creation of new works.<sup>39</sup> Therefore, the exclusive rights of the copyright holder only extend to the protected elements.

Another fundamental aspect of copyright is that copyright protection may only be afforded to “original works of authorship.”<sup>40</sup> Throughout the history of copyright law, courts have declined to define the meaning of originality in this context.<sup>41</sup> The legislative history of § 102 explains that the phrase “original works of authorship” was purposely left undefined in order to allow the courts to develop the concept.<sup>42</sup> Originality is not meant to include “requirements of novelty, ingenuity, or esthetic merit.”<sup>43</sup> Only a minimal amount of originality is required for a work to qualify for protection.<sup>44</sup> The work simply needs to be original to the author and include a modicum of creative thought.<sup>45</sup> In the context of musical works, originality needs to be found in the song’s rhythm, harmony, or melody.<sup>46</sup> Originality is most often found in melody, however, a “musical theme” that is suggestive of a previous work may still be considered original if the “overall impression is of a new work.”<sup>47</sup> Despite this low threshold, the

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<sup>38</sup> See 17 U.S.C. § 102(b).

<sup>39</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 656 (6th Cir. 2004).

<sup>40</sup> 17 U.S.C. § 102(a).

<sup>41</sup> See 1-2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.01 (2007) (noting that there is no definition of originality in the statute and that the 1909 Act did not define or explicitly require originality) [hereinafter *NIMMER ON COPYRIGHT*].

<sup>42</sup> H.R. REP. NO. 94-1476 (1976), available at [http://www.law.cornell.edu/uscode/html/uscode17/usc\\_sec\\_17\\_00000102----000-notes.html](http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000102----000-notes.html).

<sup>43</sup> *Id.*

<sup>44</sup> ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 377 (4th ed. 2006) (citing *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951)); see also *Emanation Inc. v. Zomba Recording Inc.*, 72 F.App’x 187, 190 (5th Cir. 2003).

<sup>45</sup> MERGES ET AL., *supra* note 44, at 377 (“As developed by the courts, originality entails *independent creation* of a work featuring a *modicum of creativity*. Independent creation requires only that the author not have copied the work from some other source.”).

<sup>46</sup> See *NIMMER ON COPYRIGHT*, *supra* note 41, § 2.05(D).

<sup>47</sup> *Id.*



court has acknowledged that originality is an indispensable part of copyright.<sup>48</sup>

Violation of the exclusive rights to an original work of authorship constitutes copyright infringement, and § 501 of the Copyright Act governs infringing activity.<sup>49</sup> To prevail on a claim of infringement, the party asserting infringement must possess a valid copyright in the original work and must show that the defendant copied protected elements of the original work.<sup>50</sup> Ownership of a valid copyright is easily proven through a certification of copyright, which is issued to the holder by the Copyright Office.<sup>51</sup> After establishing ownership in a valid copyright, the holder must show that the accused infringed upon the holder's exclusive rights, either through direct or indirect evidence of copying.<sup>52</sup> If a presumption of infringement is shown, the defendant bears the burden of overcoming the presumption.<sup>53</sup>

The difficult element of copyright litigation lies within proving that the defendant actually copied the original work. To prove that actual copying has occurred, the copyright holder must show through direct or indirect evidence that the defendant had access to the copyrighted work and that there are probative similarities between the two works.<sup>54</sup> Direct copying occurs when the new work borrows verbatim from the original.<sup>55</sup> Factual copying is shown through evidence that the defendant had access to the original work before creating the infringing work, and probative similarities between the works.<sup>56</sup> In situations where the original and infringed work are "so strikingly similar" that the similarities

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<sup>48</sup> See *Feist Publ'ns. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991) (stating that although minimal, the requirement of originality is a necessary aspect of a copyrightable work).

<sup>49</sup> See 17 U.S.C. § 501 (2000).

<sup>50</sup> See, e.g., *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 831 (10th Cir. 1993).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 832.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 832–33.

<sup>55</sup> *Emanation Inc. v. Zomba Recording Inc.*, 72 F.App'x. 187, 189 (5th Cir. 2003).

<sup>56</sup> *Id.*

cannot reasonably be attributed to coincidence, the court can draw an inference of copying without evidence of access.<sup>57</sup>

Proving that the defendant had access to the original work is an issue in and of itself. Black's Law Dictionary defines access in the copyright context as: "an opportunity by one accused of infringement to see, hear, or copy a copyrighted work before the alleged infringement took place."<sup>58</sup> Courts generally require a showing of access in order to establish a prima facie case of infringement.<sup>59</sup> In determining whether or not access exists, the court looks to whether or not the alleged infringer "had a reasonable opportunity to view the copyrighted work."<sup>60</sup> A plaintiff can meet the burden of showing reasonable opportunity by producing evidence that the original work had been widely disseminated, or that the defendant had been exposed to the work through a chain of events.<sup>61</sup>

The issue of access can be overcome by showing that the similarities between the original and infringing work are substantial to the point that exceeds coincidence.<sup>62</sup> There have been cases where the proof of access was weak but the court found the similarities warranted a finding of infringement.<sup>63</sup> There have also been cases where the court found that, despite lack of evidence of access, the defendant was guilty of infringement because the songs were so similar that they would be identical to the ear of the "ordinary listener."<sup>64</sup> Finally, there have been situations where the court has held the defendant guilty of subconscious infringement. In the aforementioned case, the court

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<sup>57</sup> See *Ferguson v. Nat'l Broad. Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978).

<sup>58</sup> BLACK'S LAW DICTIONARY 14 (8th ed. 2004).

<sup>59</sup> See AM. JUR. 2d, *Copyright and Literary Property* § 206 (1985); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

<sup>60</sup> Kravis, *supra* note 25, at 245.

<sup>61</sup> See *Lassin v. Island Def Jam Music Group*, 2005 U.S. Dist. LEXIS 43862, at \*15-16 (S.D. Fla. Aug. 8, 2005).

<sup>62</sup> See generally Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 429 (1988) (discussing the changing concept of access in light of unconscious copyright infringement).

<sup>63</sup> See *id.* at 429.

<sup>64</sup> See *Dorchester Music Corp. v. Nat'l Broad. Co.*, 171 F. Supp. 580, 586-87 (S.D. Cal. 1959).

concluded that George Harrison had infringed upon the Chiffon's copyrighted material without even realizing he had done so.<sup>65</sup>

The test courts use in examining the similarities between two works does not necessarily examine the quantitative amount of the original work that has been copied. Rather, the court finds that there is a compelling interest in the significance of the copied portion to the original work as a whole.<sup>66</sup> A new work fails the substantial similarity test when a reasonable listener fails to see or hear how the new work incorporated something that does not exist in the original.<sup>67</sup> In order to constitute substantial similarity, "the 'total concept' and 'feel' of the two works must be similar."<sup>68</sup> In line with the substantial similarity test, courts have also adopted the de minimis doctrine, which applies in cases where the aspect of the work that is the subject of the alleged infringement is so miniscule that the law will not consider it.<sup>69</sup>

## II. "WHY'D YA HAVE TO GO AND MAKE THINGS SO COMPLICATED?":<sup>70</sup> THE CLASH BETWEEN THE INTERNET AND MUSICAL COPYRIGHT

### A. *Music as a Distinctive Genre of Copyright*

Music is a unique genre in the field of copyright protection. It is a special category deserving of independent copyright consideration. "The inherent nature of music makes it difficult to detect copyright violations."<sup>71</sup> Each musical composition and sound recording is composed of multiple elements working together. New technology and the digital world have created new and improved means for manipulating those elements in an

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<sup>65</sup> *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (holding that copyright infringement exists under the law even if it is accomplished subconsciously).

<sup>66</sup> See Courtney Bartlett, *Bridgeport Music's Two-Second Sample Rule Puts the Chill on the Music Industry*, 15 DEPAUL-LCA J. ART & ENT. L. & POL'Y 301, 311 (2005).

<sup>67</sup> See Kravis, *supra* note 25, at 245–46.

<sup>68</sup> *Id.*

<sup>69</sup> See Bartlett, *supra* note 66, at 312.

<sup>70</sup> AVRIL LAVIGNE, *Complicated*, on LET GO (Arista Records 2002).

<sup>71</sup> Christian, *supra* note 33, at 133.

original work and incorporating them into a new work.<sup>72</sup> The traditional lens for examining musical copyright is outdated because it fails to consider the complexity of a contemporary musical work.<sup>73</sup>

In some situations, it is difficult to reconcile a finding of actual infringement in light of the inevitable similarities that exist among musical works.<sup>74</sup> Musicians work with a finite set of notes and octaves in creating a composition. Further, the combination of these notes into sets of chords that are pleasing to the ear is also limited.<sup>75</sup> Despite the seemingly confined raw materials for creating a musical work, musicians are able to manipulate these finite elements into infinite possible compositions. In examining originality, copyright does not look to the actual notes or chords used, but rather combinations of notes and chords that are used to create tone, melody, harmony, and rhythm.<sup>76</sup>

Traditionally, it is believed that originality in a musical work lies in either the rhythm, melody, or harmony of the piece.<sup>77</sup> This notion of originality fails to account for the multitude of components that make up a musical work. Consequently, the frame of reference for musical copyright infringement is outdated because it fails to consider all of the possible aspects for originality in a musical work.<sup>78</sup> Additional technical elements that should be examined in determining the originality of a work are “patterns of notes, using a particular phrase as melody or accompaniment, the

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<sup>72</sup> See *id.* at 142.

<sup>73</sup> See Alan Korn, *Issues Facing Legal Practitioners in Measuring Substantiality of Contemporary Musical Expression*, 6 J. MARSHALL REV. INTELL. PROP. L. 489, 490–91 (2007).

<sup>74</sup> See Christian, *supra* note 33, at 133 (“These similarities demonstrate the need for a systematic method of distinguishing the acceptable similarities from the offensive takings.”).

<sup>75</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 653 (6th Cir. 2004) (stating the fact that there are a limited amount of notes and chords available to composers).

<sup>76</sup> See Ronald Smith, *Arrangements and Editions of Public Domain Music: Originality in a Finite System*, 34 CASE W. RES. L. REV. 104, 104 (1983) (“Copyright law seeks to determine whether a certain combination of tones is ‘original’ within this finite system.”).

<sup>77</sup> See NIMMER ON COPYRIGHT, *supra* note 41 and accompanying text.

<sup>78</sup> See Korn, *supra* note 73, at 490–91 (proposing that the lens for examining musical copyright is too limited in its consideration of what can make a musical work original).

chord structure of the piece, [and] the lyrics used in specific parts of the work.”<sup>79</sup>

Music is also a special genre of copyright with regard to the idea-expression dichotomy. The idea-expression dichotomy holds that only elements of original expression, separate from the basic ideas underlying the expression, are entitled to copyright protection.<sup>80</sup> The elements of musical works are not easily separated into those constituting original expression and those that are part of the basic, mechanical ideas.<sup>81</sup> An artist’s musical expression is inextricably linked to the mechanics of the music. The sequencing of notes and chords, the harmony, melody, beat, tempo, composition, and lyrics *all* work together to create a musical expression.<sup>82</sup> Individually, each of these components, except for the lyrics, constitutes an unoriginal, un-copyrightable idea. Collectively, certain lyrics set to certain notes and chords, played in a certain way creates an expression. It’s an expression that becomes an experience to the person who listens to and engages with it.<sup>83</sup> Removing the individual ideas would destroy the musical work as a whole. Simply put, “[i]n music, there is no ‘idea’ or ‘expression’ to be distinguished . . . it is an impossible distinction to make.”<sup>84</sup>

### *B. Changing Technology and Copyright*

Conflicts concerning copyright infringement, especially those arising out of musical works, are at the forefront of current discussions regarding the role of the Internet and advanced technology and the rights of copyright holders.<sup>85</sup> The advent of new technology and subsequent tension with copyright laws unequipped to respond is not a novel concern for the courts. When

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<sup>79</sup> Christian, *supra* note 33, at 135.

<sup>80</sup> See *supra* text accompanying notes 36–39.

<sup>81</sup> See Keyt, *supra* note 62, at 421–22 (explaining why music as a medium does not lend itself to the idea-expression dichotomy).

<sup>82</sup> See Smith, *supra* note 76, at 118.

<sup>83</sup> See J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 421, 424 (stating that music has “ethereal qualities” that affect and impact its listeners’ lives and experiences).

<sup>84</sup> Keyt, *supra* note 62, at 442–43.

<sup>85</sup> See Keyes, *supra* note 83, at 408–09.

Sony introduced the Beta Max, and its capabilities to tape one television program while the viewer was either not home or occupied with another program, the court was forced to decide whether or not these capabilities constituted infringement.<sup>86</sup> The Court held that the Beta Max's ability to shift time did not constitute infringement, and order was restored to the land of copyright litigation.<sup>87</sup>

More recently, the practice of music sampling has consumed conversation and litigation regarding musical copyright infringement. Although music sampling is not a novel practice, it has become a more prevalent custom in all musical genres.<sup>88</sup> Sampling allows one musician to directly lift some part of another artist's work and incorporate it into the musician's new work.<sup>89</sup> Courts have been divided on how to handle the issue of sampling and whether or not it constitutes infringement. This has resulted in a number of inconsistent decisions that introduced competing concepts over how much sampling was too much or too little to constitute infringement.<sup>90</sup> The Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films* made a controversial decision<sup>91</sup> holding that all sampling, whether it consisted of three notes or a full minute of an original work, constitutes infringement.<sup>92</sup>

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<sup>86</sup> See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>87</sup> See *id.*

<sup>88</sup> See Jeffrey F. Kersting, *Singing a Different Tune: Was the Sixth Circuit Justified in Changing the Protection of Sound Recordings In Bridgeport Music, Inc. v. Dimension Films?*, 74 U. CIN. L. REV. 663, 665–67 (2005) (discussing the history of sampling).

<sup>89</sup> Sampling (Music), Wikipedia, [http://en.wikipedia.org/wiki/Sampling\\_%28music%29](http://en.wikipedia.org/wiki/Sampling_%28music%29) (last visited Feb. 19, 2008).

<sup>90</sup> Different courts have approached the issue of determining what amount of sampling constitutes infringement in various ways. Compare, e.g., *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1259 (C.D. Cal. 2002) (holding that a sampled three-note sequence was too small to constitute infringement), with *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 656–68 (6th Cir. 2004) (holding that all sampling, even three notes, constitutes infringement).

<sup>91</sup> See generally Bartlett, *supra* note 66, at 320–21 (criticizing the *Bridgeport* court); see also M. Leah Somoano, *Bridgeport Music v. Dimension Films: Has Unlicensed Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELY TECH. L.J. 289 (2006); Kersting, *supra* note 88.

<sup>92</sup> *Bridgeport*, 401 F.3d at 656–68.

At times, Congress has responded to issues facing the court by passing new legislation that attempts to regulate the Internet and infringement.<sup>93</sup> In the 1990s, it was widely recognized that the copyright laws were inadequate in light of the changes in communication and availability of information made possible by the Internet and digital technology.<sup>94</sup> Limited to the provisions of the Copyright Act of 1976, the copyright laws were outdated and could not properly accommodate the consequences of such advancements.<sup>95</sup> Copyright holders, especially those holding rights to musical works, were scrambling to protect their work and found that they were somewhat powerless against the popularity of the World Wide Web.<sup>96</sup> Legislators and judiciaries were, and still are, forced to reexamine how best to protect musical works.<sup>97</sup>

In 1998, Congress passed the Digital Millennium Copyright Act (“DMCA”), which criminalized online or digital attempts to circumvent measures to protect copyrighted material from infringement.<sup>98</sup> Section 512, a provision of the DMCA, governs limitations on liability for Internet Service Providers (“ISPs”) relating to infringement of online material on websites they host.<sup>99</sup> Subsection (c) provides a safe harbor for ISPs, relieving them of liability for infringing activity if the ISP did not have control over the infringing content, expeditiously removed the infringing material, and did not directly benefit financially from the material.<sup>100</sup> ISPs that fail to meet all three requirements of the safe

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<sup>93</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984) (“[A]s new developments have occurred in this country, it has been Congress that has fashioned new rules that technology made necessary.”).

<sup>94</sup> See Brian Sanchez, *Legislative Update: The Section 115 Mechanical License and the Copyright Modernization Act*, 17 DEPAUL-LCA J. ART & ENT. L. & POL’Y 37, 42–43 (2006).

<sup>95</sup> See Korn, *supra* note 73, at 490.

<sup>96</sup> Copyrighted musical works were, and still are, made easily and readily available free of charge on countless Internet sites. See Keyes, *supra* note 83, at 418 (“The Internet has made procurement of all types of music incredibly easy, and monstrously cost effective, which has lured users to this new medium in unparalleled droves.”).

<sup>97</sup> See *id.* at 419–20 (“The basic and essentially exclusive philosophical inquiry posed by music copyright legislators and judicial decision makers has been this: are music copyright owners being adequately protected from others’ use of the musical material?”).

<sup>98</sup> See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>99</sup> 17 U.S.C. § 512 (2000).

<sup>100</sup> *Id.* § 512(c).

harbor provision are held responsible for the dissemination of, or access to, the infringing material hosted on their websites.<sup>101</sup>

In addition to digitalized technology concerns that are at the forefront of the current debate surrounding how to regulate Internet copyright, traditional means of infringement are still a prevalent concern for musical copyright holders.<sup>102</sup> The magnitude of copyright infringement claims is not fully realized in popular culture since most claims are settled prior to actual litigation.<sup>103</sup> Cases that have actually proceeded to litigation highlight that musical copyright infringement, whether through traditional or digitized means, has been, and continues to be, a compelling concern for the judiciary, yielding a variety of results.<sup>104</sup> In *McDonald v. Multimedia Entertainment, Inc.*, the Southern District of New York held that the use of one “rather unimportant” note by the defendant could not support a finding of infringement in light of the dissimilar nature of the rest of the two compositions.<sup>105</sup> In *Cottrill v. Spears*, the Eastern District of Pennsylvania held that although defendant, Britney Spears’ song entitled *What U See is What U Get*, was obviously similar to the plaintiff’s song, *What You See is What You Get*, this similarity in title, which was also reflected in both songs’ lyrics, “[was] not probative of copying as the phrase is a cliché and can be found in prior art.”<sup>106</sup> The court also found that the similarities in the two songs’ pitch, chords, tempo, and repetition of a single note in each verse was insufficient to warrant a finding of infringement.<sup>107</sup>

Not all copyright litigation has resulted in findings favoring the defendant. The court in *Baxter v. MCA, Inc.* held that there could

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<sup>101</sup> *Id.*

<sup>102</sup> *See* Keyes, *supra* note 83, at 418 (“From 1950 through 2000, there were forty-three reported cases dealing with music copyright infringement . . .”).

<sup>103</sup> *See id.* (stating the fact that many more disputes centered on music copyright infringement never ripened into litigation).

<sup>104</sup> *See* Christian, *supra* note 33, at 134–40 (discussing musical copyright infringement cases).

<sup>105</sup> *McDonald v. Multimedia Entm’t, Inc.*, 1991 U.S. Dist. LEXIS 10649, at \*7 (S.D.N.Y. July 19, 1991).

<sup>106</sup> *Cottrill v. Spears*, 2003 U.S. Dist. LEXIS 8823, at \*33 (E.D. Pa. May 22, 2003).

<sup>107</sup> *See id.* (holding that these similarities are common aspects of popular music and constitute insufficient similarity).



possibly be a finding of infringement even when the similarity between two works could be reduced to a short, six note sequence.<sup>108</sup> The case of *Fred Fisher, Inc. v. Dillingham* involved two songs that were popular at different times. The alleged infringement consisted of an eight note pattern that created the same effect in both pieces.<sup>109</sup> The court held that the defendant was liable for infringement, even though the act was done subconsciously by the defendant.<sup>110</sup> Finally, in *Jarvis v. A&M Records*, the court held that although common phrase and chord progressions are usually non-copyrightable, the phrasing in the original work was a copyrightable expression.<sup>111</sup>

The end of the twentieth and advent of the twenty-first centuries have been marked by technological advancement and an increasing presence of the Internet in everyday life. The changes brought by the Internet create unprecedented issues of copyright infringement that the courts are unsure what to do with, particularly with regard to musical works.<sup>112</sup> The court in *Bridgeport Music, Inc. v. Dimension Films* acknowledged and addressed the reality that technological advances have created a new set of infringement possibilities and copyright disputes.<sup>113</sup> Currently, there are no absolute, clear cut answers or guidelines to regulate infringing activity on the Internet.<sup>114</sup>

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<sup>108</sup> *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987).

<sup>109</sup> *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 146 (S.D.N.Y. 1924).

<sup>110</sup> *Id.* at 148.

<sup>111</sup> *Jarvis v. A&M Records*, 827 F. Supp. 282, 292 (D.N.J. 1993).

<sup>112</sup> Keyes, *supra* note 83, at 408–09 (“With the demise of Napster, the rise of peer-to-peer networking, and the onslaught of litigation orchestrated by the RIAA, the topic of music copyright has been thrust to the fore in business, scholarly and policy-making circles. . . . Policy makers are grasping for the ever-evasive answers as to how the law should be deployed and applied in the world of networked file-swapping, particularly in the context of music copyrights.”).

<sup>113</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 655 (6th Cir. 2004).

<sup>114</sup> See generally Symposium, *The Death or Rebirth of the Copyright*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1095 (2008); see also Christian, *supra* note 33, at 142 (“The music industry is in grave need of a standard by which to judge the many uses of fragmented copying.”).

III. "I'D RATHER BE ANYTHING BUT ORDINARY PLEASE":<sup>115</sup>  
PUMPING ORIGINALITY AND ACCOUNTABILITY  
INTO THE MUSICAL COPYRIGHT SCHEMA

A. *Reworking the Originality Requirement*

In the midst of a culture marked by copycat artists and technological advancements that encourage infringing activity, one may wonder what, if anything, can be done to bring original and creative music back from the dead. One possibility is to rework the existing originality requirement for musical copyright. By raising the standard for originality, the access of the entire music catalogue made possible by the Internet could be used to prevent potential infringement disputes.

In the current copyright regime for musical works, there is no definition of originality.<sup>116</sup> A work sufficiently meets the criteria for originality as long as it was independently created with a modicum of creativity.<sup>117</sup> The existing concept of originality is concerned only with the creative process and not the product. This is in direct opposition to the novelty standard required in patent law.<sup>118</sup> Novelty replaces originality in patent law.<sup>119</sup> In order to qualify for patent protection, a work must be novel, not just to the author but to the public at large. To receive patent protection "you must do something *new*."<sup>120</sup> While patent novelty goes a bit too far for musical copyright, the current minimal standard of originality does not require enough from the artist. A hybrid of copyright originality and patent novelty would best serve the interests of promoting the creation of new works without stifling the creative process in music. The hybrid would be simultaneously concerned with an independent creative process and would examine the product resulting from the process in light of the entire catalogue of already existing musical copyrights. To ensure that the revised requirement does not go beyond what is necessary

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<sup>115</sup> AVRIL LAVIGNE, *Anything But Ordinary*, on LET GO (Arista Records 2002).

<sup>116</sup> See *supra* text accompanying notes 41–47.

<sup>117</sup> MERGES ET AL., *supra* note 44.

<sup>118</sup> See *id.*

<sup>119</sup> See 35 U.S.C. § 102(a) (2000).

<sup>120</sup> ROBERT P. MERGES, *PATENT LAW AND POLICY* 161 (1992).

to provide the public with new and creative works, determining qualification for copyright protection would place more emphasis on the creative process than the resulting product.

Since musical works are made up of various technical elements, there is more than ample room in musical works for a higher standard of originality.<sup>121</sup> The originality requirement for musical copyright should be used to further the framers' intention of promoting creative works. Copyright laws should utilize originality as a tool to increase creativity among musical artists to ensure that they are in fact striving to produce something that is somewhat new. Requiring more than a modicum of creativity is the first step in forcing artists to realize the untapped potential for originality in musical works. Perhaps if Avril Lavigne, Vanilla Ice, Michael Bolton, and countless other artists had previously been held to a higher standard of originality, copycat works and costly lawsuits could have been avoided, and truly original musical works could have come to fruition instead.

*B. Using the Internet as a Shield Against Potential Infringement Claims*

Supporters of the current originality requirement in copyright are concerned that raising the bar would place too great a burden on artists and would, in effect, stifle the creative process.<sup>122</sup> These supporters are ignoring the possibility that a stronger originality requirement that would encourage accountability in the product does not have to affect the creative process.<sup>123</sup> Under the revised originality requirement, the creative process of an artist would remain unchanged. No additional steps are required until the creative process has ended and resulted in a musical piece. Further, that creative process, if independent and original to the artist, would be an important consideration in determining the original value of the musical work. Once the creative process is complete, and the musical work is in its final form, the artist would

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<sup>121</sup> See Smith, *supra* note 76, at 142.

<sup>122</sup> See Keyes, *supra* note 83, at 425 (claiming that copyright holders are given too broad a power over their works).

<sup>123</sup> *Contra* Bartlett, *supra* note 66, at 320 (arguing that requiring an artist to stop and obtain a license when wanting to sample is disruptive to the creative process).

have to examine that final product against the existing catalogue of copyrighted musical works.

Under the current test for copyright, an original artist must show that the alleged infringer had access to the original work.<sup>124</sup> The law as written encourages willful blindness. As long as an artist doesn't look, he may not be held responsible for what should be infringement. The message being sent is: if it can't be proven that I have heard the original work, then I have not infringed. On the other end of the spectrum, the law as written allows artists to be punished for subconscious copyright infringement.<sup>125</sup> In these situations, artists who unknowingly infringe upon an original work are held responsible for the infringement based solely on the "striking similarities" between the two works. The unsuspecting artist is dragged into a settlement or litigation and is forced to compensate the original artist for his subconscious violation. In both situations, either the willfully blind artist or the subconscious infringing artist is forced to partake in some legal proceeding, whether it is a settlement or litigation, to resolve the conflict.

The Internet has more or less defeated a defense to the access argument. Whether or not an infringing artist has actually had access is somewhat irrelevant in a society where anyone easily could have access in a matter of seconds.<sup>126</sup> The increased level of access made possible by the Internet could be used to force artists to be initially accountable for any possible infringement before receiving a copyright for the "new" work. In order to receive a copyright, an artist would have to search a database to see if the work he is claiming as his own has already been published by someone else. The database could be created by members of the music industry who would maintain and update the database, as well as deal with potential infringements that artists are made aware of through it.

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<sup>124</sup> See *supra* text accompanying notes 58–65.

<sup>125</sup> See Keyes, *supra* note 83, at 425 (arguing that the copyright laws are wrong to punish subconscious infringement).

<sup>126</sup> See *id.* at 418 ("[T]he Internet has made procurement of all types of music incredibly easy and monstrously cost effective . . ."); see also Keyt, *supra* note 62, at 429 (stating that copying is proved by the defendant's ability to access the plaintiff's work and the similarity between their works).

This database would allow an artist to search through the catalogue of copyrighted musical works by using segments of the new work. The artist could simultaneously search all of the technical elements, as well as the lyrics, working together to see if his creation mirrors one that already exists. The artist would be able to see if his chord sequence set to a certain tempo or rhythm, against a specific melody or harmony, and set to certain lyrics is already in the copyright catalogue. If there was a potential match, the artist would not be declined a copyright for his “new” work. He would, however, have to seek the appropriate permission from the original artist, through the regulators of the database, before being granted a copyright.

The process of seeking permission would involve some form of compulsory licensing as well as a sliding scale of compensation for the original author based on the amount and similarity of the potential infringement.<sup>127</sup> Upon learning of a potential infringement, an artist seeking copyright would contact a copyright regulatory board, associated with the database, and explain the nature of the similarities, or submit samples of the similar sound clips. The board would then decide the merits of the potential infringement claim and calculate the appropriate compensation to the original artist based on the amount, substantiality, similarity, and originality of the infringed segment.<sup>128</sup> If similarity was found between the two works in a way that an ordinary listener would determine the segments were similar but could still hear a slight difference, appropriate compensation might simply be an acknowledgment to the original artist in the new album.<sup>129</sup> The more similar two segments are, and the increasing length of similar

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<sup>127</sup> Other articles have suggested similar licensing schemes with regard to conflicts in musical copyright. See Kravis, *supra* note 25, at 273–75 (suggesting a modified compulsory licensing scheme to regulate the practice of music sampling); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 265–66 (2001) (suggesting a new collective licensing mechanism in which “[l]icenses could be tailored and priced depending on the nature of the transmission”).

<sup>128</sup> See generally Keyes, *supra* note 83, at 439 (encouraging a system that allows use of pre-existing work by new artists based on a fee that considers the amount of music borrowed and the number of phonorecords produced).

<sup>129</sup> See generally Smith, *supra* note 76, at 138–39 (suggesting a sliding scale approach to determine the extent of a work’s originality).

segments would increase compensation from acknowledgment to a monetary royalty that would be appropriate to reflect the original artist's interests.

New artists who conduct a good faith search under this scheme would be granted a compulsory license to the "borrowed" segment from the original work, as an incentive for new artists to comply with the provision. In exchange for the determined appropriate compensation, the original artist would be forced to allow the new artist to "borrow" the segment from the original work under a compulsory license. A compulsory license allows an artist to use the copyrighted work of another artist without explicit permission in exchange for a royalty payment.<sup>130</sup> Compulsory licensing is provided for in the Copyright Act with regard to musical works.<sup>131</sup> An artist seeking use of an existing copyrighted work is entitled to a compulsory license if he notifies the original author of his intent, or if the original author cannot be found, by filing notice in the Copyright Office.<sup>132</sup> The compulsory licensee may not change the basic, fundamental character of the work.<sup>133</sup> The concept of extending compulsory licensing in musical copyright has been a recent topic of debate with regard to digital sampling.<sup>134</sup> Those in favor of extending compulsory licensing find that its ability to guarantee access to the existing catalogue of copyrighted works will ensure that original artists are appropriately compensated for use of their works.<sup>135</sup> Other scholars argue that extending compulsory licensing would be unfair to original authors, because compulsory licensing forces the original artist to allow the new artist to use the work. They also argue that extending compulsory licensing would compromise the integrity of the original musical work, because the original artist is powerless to object to changes and manipulations of the original work by the new artist, so long as

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<sup>130</sup> BLACK'S LAW DICTIONARY 938 (8th ed. 2004).

<sup>131</sup> See 17 U.S.C. § 115 (2000).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Digital sampling is the process by which an artist copies part of another artist's work and incorporates the original work verbatim into the new work. See BLACK'S LAW DICTIONARY 1368 (8th ed. 2004).

<sup>135</sup> Kravis, *supra* note 25, at 274–75.

the new artist does not fundamentally change the character of the work.<sup>136</sup>

An extension of compulsory licensing in the proposed scheme for encouraging originality would serve to protect authors whose works are incidentally similar to those of new artists and would preempt unnecessary legal proceedings that result in the case of dubiously similar songs. For example, take the case of Avril Lavigne's current copyright controversy. Under the proposed system, Avril would have been made aware of the similar sounding Rubinoos' song prior to releasing *Girlfriend*. She then could have contacted the regulatory board to determine her next step. Depending on the board's analysis, the Rubinoos would have been properly notified and compensated. The pending litigation and possible settlement would not have started, saving Avril, and the Rubinoos, lawyer fees, court costs, and time.

This process would preempt the potential litigation or settlement proceedings that willfully blind or subconscious infringers face. An artist would have already conducted a good faith search for potential infringement. In many cases, this would circumvent the need for potential litigation by dealing with the problem before it becomes a problem. In the long run, artists would be saving money spent on lawyer's fees, expert witness testimony that is necessary in every copyright infringement case, and potential jury awards that would exceed the royalties allotted for on the sliding scale.<sup>137</sup> The artist would also avoid the embarrassment of any bad press that comes with allegations of infringement in the aftermath of releasing a popular work. The court would also benefit as this system would "help stem the swelling tide of music copyright infringement cases."<sup>138</sup> Most artists would prefer to conduct a search and face the possibility of

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<sup>136</sup> Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 551 (2006).

<sup>137</sup> See Christian, *supra* note 33, at 135.

<sup>138</sup> Keyes, *supra* note 83, at 439–40 (discussing the positive ramifications of this proposed compulsory license scheme on overcrowded court dockets and the increasing number of copyright infringement cases).

potentially paying the appropriate compulsory fee rather than “facing a potential lengthy and costly court battle.”<sup>139</sup>

*C. Old and New Protection for Musical Artists*

The traditional safeguards present in existing musical copyright law ensure that musical works would not be disadvantaged by a heightened standard of originality or the proposed process advocating accountability. Section 115 entitles any artist to a compulsory license in an endeavor to remake or “cover” an original work.<sup>140</sup> A compulsory license is in use as soon as the new artist distributes copies in a fixed tangible form to the public under the authority of the original artist.<sup>141</sup> In order to be entitled to a compulsory license, notice must be given to the copyright holder of the licensee’s intent.<sup>142</sup> Without this notice, a compulsory license will not be granted and the would-be licensee is liable for infringement.<sup>143</sup> The proposal in the previous section incorporates notice into the process through the suggested copyright regulatory board.

An important aspect of the compulsory license is that it allows the licensee to create his own sound recording of the original work, but it does not permit the licensee to copy the original recording.<sup>144</sup> This aspect of compulsory licensing is important to the purpose of the copyright schema previously proposed. It signifies that the licensee must put his own labor into creating the recording that triggers use of the license.<sup>145</sup> The licensee cannot merely lift or copy the original recording. The compulsory license provision gives new artists an overwhelming opportunity to use the existing catalogue. It also serves as a control on the exclusive rights and monopoly of a copyright holder.<sup>146</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> See 17 U.S.C. § 115 (2000).

<sup>141</sup> See Sanchez, *supra* note 94, at 39–42 (explaining compulsory licensing).

<sup>142</sup> See 17 U.S.C. § 115.

<sup>143</sup> See Sanchez, *supra* note 94, at 39–42 (explaining compulsory licensing).

<sup>144</sup> See *id.*

<sup>145</sup> See 17 U.S.C. § 115.

<sup>146</sup> See *Palladium Music, Inc. v. Eatsleepmusic, Inc.*, 398 F.3d 1193, 1198–1200 (10th Cir. 2005).



The proposed scheme does not defeat the traditional copyright defenses of fair use and de minimis use. Section 107 carves an exception in the exclusive rights of a copyright holder for “fair use” by others.<sup>147</sup> In determining whether or not a new work constitutes a fair use of an original work, the factors considered are: (1) the purpose and nature of the new work; (2) the nature of the copyrighted work; (3) the amount of the original work used and the substantiality of the used portion to the original work as a whole; and (4) the effect of the new work on the original’s potential in the marketplace.<sup>148</sup> The proposed standard for musical copyright in no way affects, changes, or limits the fair use defense. The de minimis doctrine provides that if the alleged infringement is essentially trivial, the court will not recognize it.<sup>149</sup> The sliding scale in the proposed process does not swallow the de minimis defense; instead, it incorporates it. After a potential infringement is brought to the copyright regulatory board, the board would analyze the situation to determine if an infringement worthy of recognition or compensation exists. It logically follows that if an artist reports a potential infringement that fits the de minimis standard, the board would conclude that the potential infringement is not worthy of recognition.

In addition to the existing protection afforded to new artists and copyright holders, the proposed originality and accountability standards offer new protection. In order to prevail on a claim of copyright infringement, the new procedure looks for originality in the work as a whole. It examines *all* of the components of a musical piece working together to determine whether or not it is similar enough to an already copyrighted work to constitute infringement. This concept realizes that originality lies within the work as a whole and not in a single, removed technical element.<sup>150</sup> Consequently, copyright infringement would be based and only

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<sup>147</sup> See 17 U.S.C. § 107.

<sup>148</sup> See *id.*; see generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1993).

<sup>149</sup> See, e.g., *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (“[A] taking is considered de minimis only if it is so meager and fragmentary that the average audience would not recognize the appropriation.”).

<sup>150</sup> See *Keyt*, *supra* note 62, at 433 (“[O]riginality is more likely to be found in the interaction and conjunction of elements than in the elements themselves . . .”).

exist in similarities resulting from all of the elements of a piece working together as a single expression.

#### CONCLUSION:

The question remains: will life be pumped back into the originality requirement for musical copyright or will the practices of copycats reign supreme? Since musical works are composed of a combination of elements working together, artists should be pushed to reach a little bit higher than authors of other copyrighted material in terms of creating original works. Originality in the creation of musical works does not have to be a dead or defeated concept. There is plenty of room for original thought and creativity in the musical world; however, the potential for it may never be realized if artists are not forced to think outside of the already constructed box.

The proposed resolution, discussed in the previous section, adds a concern for the *product* resulting from the creative process where the current concept for musical copyright is only concerned with the *process* itself. It heightens the requirement for a musical work to qualify as an “original work of authorship.” To continue balancing the competing interests of protecting the work of a copyright holder and not stifling the creative process, the second part of the resolution proposes using the availability of the musical catalogue on the Internet as a means of promoting accountability among artists after the completion of the creative process, but prior to distributing their work to the public. The sliding scale approach would allow the original artist to be acknowledged or compensated appropriately and would preempt potential litigation or infringement claims in the aftermath of the new artist promoting their new work.

Today’s alleged infringers are tomorrow’s artists who will be fighting for their rights as copyright holders to original works. It’s a well known fact in the music world that musicians get their inspiration and motivation from listening to other musicians.<sup>151</sup>

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<sup>151</sup> See Christian, *supra* note 33, at 142 (stating the belief that musicians are inspired by other musicians).

Doesn't the inspiring musician deserve credit or acknowledgment if his original work is the base of what another artist creates? Contemporary artists, who will eventually become inspiring musicians, would benefit from the protection their works would receive in the future under the proposed copyright scheme. Reworking the copyright regime for musical works could be the first step in a new direction that considers using the Internet to ameliorate, instead of only contribute to, copyright infringement. If the laws remain unchanged, we're going to be stuck with the same old song—and maybe it's time for something new.