Copyright Disincentives

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Over the last decade, a spate of high-profile copyright infringement lawsuits rattled the music industry. Controversy followed in the wake of multi-million-dollar damages awards, with criticism emanating from courts, scholars, and musicians alike. The basic logic of the critique is sound: the specter of such massive liability for small and inadvertent similarities disincentivizes the creation of new music. But the disincentive effect remains curiously under-theorized. This Article develops the literature's first nuanced account of this disincentive theory, drawing on analysis of hundreds of copyright dockets as well as interviews with musicians to show that the feared disincentive has not come to pass.

In doing so, this Article makes several contributions to the copyright literature. First, it provides a necessary deconstruction and explication of the disincentive theory currently lacking in the literature. Second, it brings to bear substantial new evidence on the state of infringement litigation in the music industry, going well beyond the small handful of widely reported jury trials. Specifically, this Article analyzes an original dataset culled from the dockets of hundreds of infringement actions, supplemented by interviews with musicians, to assess whether high-profile litigation translates into disincentives across the field. Both lines of inquiry show that disputes take place only at the highest end of the market. Third, it extrapolates from both theory and evidence to shed new light on both the feared disincentive effect and responsive policy prescriptions. Theoretically, the absence of a disincentive effect permits further consideration of the goals and effects of the infringement remedy. This Article posits that infringement litigation might serve beneficial distributive ends and develops a limitation on damages in certain cases to mitigate the rise of financialization and opportunistic suits in the music industry.

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INTRODUCTION

Over the last two decades, few songs have garnered more attention than Robin Thicke and Pharrell Williams's *Blurred Lines*. Described as "terrible, tacky, [and] derivative" by the Village Voice,[1] "the worst song of this or any other year" by Rolling Stone,[2] and "a poisonous time capsule" by Pitchfork,[3] it nevertheless spent twelve weeks atop the Billboard Hot 100[4] and generated nearly $17 million in profits in just two years.[5] But the song's problems went beyond the aesthetic: after years of litigation, the Ninth Circuit upheld a jury verdict finding that *Blurred Lines* infringed the copyright in legendary Motown artist Marvin Gaye's *Got To Give It Up*.[6] That verdict awarded the Gaye estate millions of dollars in damages.[7]

The decision provoked withering criticism from songwriters and copyright scholars alike. Many argued that verdicts like this one would deal a devastating blow to new creativity because the specter of massive infringement liability would deter new works.[8] Now, a decade after

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1. Andy Hermann, *Smug Turd of a Pop Song 'Blurred Lines' Has Now Ruined the Music Industry*, VILL. VOICE (Mar. 13, 2015), https://www.villagevoice.com/smug-turd-of-a-pop-song-blurred-lines-has-now-ruined-the-music-industry/ [https://perma.cc/4K3L-KMAT].

2. Rob Sheffield, *'Blurred Lines': The Worst Song of This or Any Other Year*, ROLLING STONE (Dec. 6, 2013), https://www.rollingstone.com/music/music-news/blurred-lines-the-worst-song-of-this-or-any-other-year-187383/ [https://perma.cc/M666-7PQR].

3. Jayson Greene, *"Blurred Lines," Harbinger of Doom*, PITCHFORK (Mar. 29, 2023), https://pitchfork.com/features/article/robin-thicke-blurred-lines-10-years-later/ [https://perma.cc/U23B-7VPC].

4. *See 2013 Year-End Hot 100 by the Numbers*, BILLBOARD (Dec. 13, 2013), https://www.billboard.com/pro/2013-year-end-hot-100-by-the-numbers/.

5. *See* Williams v. Bridgeport Music, Inc., No. 13-cv-06004, 2015 WL 4479500 (C.D. Cal. July 14, 2015), at *25 (describing evidence of profits earned by various parties from *Blurred Lines*).

6. *See* Williams v. Gaye, 895 F.3d 1106, 1127–28, 1138 (9th Cir. 2018).

7. *See id.* at 1128–30 (upholding damages award and award of ongoing share of royalties).

8. *See, e.g.*, Joseph Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1865 (2018) ("It's tough to overstate the amount of controversy that the case has generated."); Allen Madison & Paul Lombardi, *Blurred Justice*, 39 LOY. L.A. ENT. L. REV. 145, 149 (2019) ("If inspiration was actionable, it would diminish the incentive to make new music."); Amy X. Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, ROLLING STONE (Jan. 9, 2020), https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/ [https://perma.cc/2PX7-TVQ7] ("Across genres, artists are putting out new music with the same question in the backs of their minds: Will this song get me sued?"); Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity*, SLATE (Mar. 12, 2015), https://slate.com/news-and-politics/2015/03/blurred-lines-verdict-is-wrong-williams-and-thicke-did-not-infringe-on-marvin-gaye-copyright.html ("[I]n the wake of 'Blurred Lines,' musicians face a daunting task. They not only have to fear unintentionally copying three notes. They also

conclusion of the trial, it is possible to evaluate this disincentive theory. This Article examines whether *Williams v. Gaye*, and other high-profile infringement lawsuits that followed it, pose the dire threat to creativity posited by scholars,[9] judges,[10] and critics.[11] Drawing on analysis of hundreds of copyright infringement suits as well as interviews with musicians, this Article deconstructs the disincentive theory to show that a significant disincentive effect is unlikely to exist.

Disincentive theory follows from the prevailing theory of the purpose of copyright law. The purpose of copyright, according to the courts, is to provide "the economic incentive to both create and disseminate ideas."[12] While it has never been easy to make a living as a musician, the streaming era has made profiting from recorded music especially difficult.[13] To have one's meager earnings sapped (if not erased) by damages awards would be catastrophic to all but the most successful artists. Faced with that calculation, it would border on irrational to create new works. But the calculation is not so simple.

A deterrent effect depends on salience: a musician who is unaware of the *Williams* verdict cannot be deterred by it. But the mechanism by which the

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have to fear that some other, maybe older or even dead musician, will challenge their great new song on copyright grounds just for incorporating some similar—and maybe very familiar—musical elements."); Wendy Gordon, *The Jury in the 'Blurred Lines' Case Was Misled*, NEWSWEEK (Sept. 11, 2015), https://www.newsweek.com/jury-blurred-lines-case-was-misled-314856 [https://perma.cc/W3LE-VFC5] (critiquing jury instructions in *Blurred Lines* lawsuit and observing that "[i]t's no wonder that the outcome of this case makes musicians nervous").

9. *See* sources cited *supra* note 8.

10. *See, e.g.*, *Williams*, 895 F.3d at 1138 (Nguyen, J., dissenting) ("[T]he majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.").

11. *See, e.g.*, Hermann, *supra* note 1 (arguing that the *Blurred Lines* verdict has "set a chilling precedent for the entire music industry, and all of popular music will likely suffer the effects for years to come").

12. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 39–40 (2021) (quoting Harper & Row, Pubs., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)); *see also* Julie Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 142 (2011) ("The statement that the purpose of copyright is to furnish incentives for authors has attained the status of a rote incantation."); Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1021 (2019) ("Copyright law in the United States today is typically justified by the need to provide authors with economic incentives to create original works.").

13. *See, e.g.*, Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 327–28 (2013) (reporting results of a survey of musicians, including that "78% of revenue has an indirect or no relationship to copyright" and that the share of income attributable to sound recordings is no higher than 9% for any income bracket).

verdict leads to a disincentive remains under-theorized. This Article takes up the task of deconstructing the disincentive theory to evaluate whether, and in what circumstances, a disincentive effect may arise. Initially, it looks to the musician's perspective, identifying various ways in which the specter of infringement liability might interact with the creative process. But the theory is not complete without also accounting for the plaintiff's motivations. After all, copyright law's impressive array of remedies are worth little when pressed against a defendant with few resources,[14] and federal litigation is a costly enough enterprise that pressing the suit itself requires significant resources.[15] Combining these inquiries, the most problematic case—in which a superstar backed by a major label sues a little-known newcomer for infringement—seems unlikely to arise.

This Article uses evidence from the courts and from working musicians to illuminate whether a significant disincentive effect is likely to exist. It draws from an original dataset culled from several years' worth of copyright infringement actions. Analysis of that dataset reveals no evidence to suggest a spate of problematic lawsuits against smaller artists. Nearly every one of the hundreds of actions analyzed involves claims against major stars and whichever of the "Big Three" record labels[16] holds the relevant rights. Opportunism seems the most likely explanation for infringement litigation,

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14. *See, e.g.*, Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music Cases: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH L. 227, 283 (2013) (noting that defendants in infringement actions involving musical works "are invariably highly successful music producers, composers, or performers"); Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1191 n.13 (2015) ("While the plaintiffs in music copyright infringement disputes are typically unknown individuals, the names of defendants are commonly well-known songwriters, recording companies, or successful bands."); Madison & Lombardi, *supra* note 8, at 202 ("Had [*Blurred Lines*] not been financially successful, the Gaye family would not have pursued litigation.").

15. *See, e.g.*, Daryl Lim, *Substantial Similarity's Silent Death*, 48 PEPP. L. REV. 713, 719 (2021) (noting that, "[o]n average, copyright cases cost between four hundred thousand to two million dollars to litigate"); Ben Depoorter & Robert Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 343 (2013) (noting that "litigating a small copyright claim (for an amount in controversy of less than $1 million) costs on average $303,000 through the end of discovery, and $521,000 through trial").

16. *See, e.g.*, Thomas D. Haley, *The Second Life of Information*, 77 FLA. L. REV. 1607, 1623 (2025) (describing the "Big Three" record labels—Universal Music Group, Sony Music Entertainment, and Warner Music Group); Dan Rys, *Record Label Market Share Year-End 2024: REPUBLIC Dominates, Interscope Ends on a High*, BILLBOARD PRO (Jan. 15, 2025), https://www.billboard.com/pro/record-label-market-share-year-end-2024-republic-interscope-warner/ (reporting approximately 79% market share for "Big Three" labels at the end of 2024).

a conclusion bolstered by the fact that a significant percentage of these actions are brought pro se.[17]

Of course, there are other ways that the recent spate of infringement actions might have harmful downstream impacts. To evaluate whether some other mechanism exists—such as widespread use of cease-and-desists or a prevailing sense in the community that risk abounds—I interviewed musicians about their experiences in the field.[18] Although all were aware of the controversy around *Blurred Lines*, none felt it had any effect on their own musical practices, nor those of anyone they knew.

The current state of affairs, then, does not suggest a disincentive crisis. Large numbers of bullying claims—suits against smaller musicians, particularly by major industry players—do not appear to exist. The suits that *do* exist lack salience to most players. These findings have important theoretical and practical implications, which this Article explores.

Theoretically, in the absence of a disincentive effect, it is not clear that the outcome of *Williams* contravenes copyright or other policy goals. It could, for example, be viewed as a salutary redistribution of windfall profits—an expression of the belief that it is not fair for the borrowing artists to reap a disproportionate share of the rewards.[19] As both courts and scholars note, much of musical expression relies on the same "building blocks"—a common cache of melodies, arrangements, and other features.[20] It may well be that it is unfair to hold one musician liable for millions of dollars in damages for unavoidable reuse of basic elements of music.[21] But

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17. *See infra* note 128 and accompanying text.

18. The interviewees span a range of roles, including as members of independent bands, educators, and touring musicians. A full list and description of interviewees is set forth in Appendix A, *infra*.

19. *See, e.g.*, Sean O'Connor, Lateef Mtima, and Lita Rosario, Opinion, *Overdue Legal Recognition for African-American Artists in "Blurred Lines" Copyright Case*, SEATTLE TIMES (May 20, 2015), https://www.seattletimes.com/opinion/overdue-legal-recognition-for-african-american-artists-in-blurred-lines-copyright-case/ [https://perma.cc/VU3X-PWZU] (arguing that "[w]ith its victory, the Gaye estate may have finally found a way to legal recognition and respect for the valuable musical contributions of artists of color").

20. *See, e.g.*, Madison & Lombardi, *supra* note 8, at 151 ("Notably, there is very little original expression in popular music. Most of what listeners hear are building blocks from a vast historical trove of previously expressed ideas, processes, procedures, methods, concepts, principles, and discoveries.") (footnote omitted); Williams v. Gaye, 895 F.3d 1106, 1142 (9th Cir. 2018) (Nguyen, J., dissenting) ("Musical compositions are expressed primarily through the building blocks of melody, harmony, and rhythm.").

21. *See, e.g.*, Livingston & Urbinato, *supra* note 14, at 291 (discussing "the inevitable similarities between two musical compositions in the same genre" and "the limitations of

it is equally unfair to allow one musician to reap disproportionate rewards for what, on this theory of creativity, often amounts to little more than luck—to say nothing of copyright's sordid history in allowing white musicians to freely appropriate the vital original contributions of Black musicians.[22] Indeed, contrary to the widespread criticism of the case, some heralded the outcome of *Williams* on that basis.[23]

But even if the redistribution of windfall profits represents an acceptable equilibrium for copyright policy, it is a perilous one, dependent on the whims of individual litigants. Increasing trends of financialization in the industry threaten to upend that equilibrium, as evidenced by the trend of firms acquiring troves of copyrights and using them to demand co-authorship credit from popular artists.[24] Infringement suits thus represent, at best, a crude mechanism for redistribution.

To preserve possible pro-social uses of infringement litigation while reducing opportunistic suits by financial entities, this Article proposes a new legislative solution in the form of a damages limitation. Copyright law permits a prevailing plaintiff to choose between statutory and actual damages.[25] The limitation would remove the choice, limiting the plaintiff to

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Western tonal music and the wealth of public domain music that constitutes the field from which all modern composers harvest").

22. *See, e.g.*, Olufunmilayo Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 599 (2010) (discussing how "hierarchies of culture and power have played an important role in shaping both copyright and musical industry structures through which copyright is often applied"); K. J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'N. & ENT. L.J. 339, 368 (1998) (noting that "[t]he treatment of Black artists by the music industry and the copyright system reveals a pervasive history of infringement"); Lateef Mtima, *Copyright and Social Justice in the Digital Information Society: "Three Steps" Toward Intellectual Property Social Justice*, 53 HOUSTON L. REV. 459, 482 (2015) (noting that "[m]arginalized groups in the developed world as well as communities in many developing nations perennially suffer the misappropriation and inequitable exploitation of their indigenous knowledge and cultural expression"); Christopher Buccafusco, *There's No Such Thing as Independent Creation, and It's a Good Thing, Too*, 64 WM. & MARY L. REV. 1617, 1662 (2023) (noting that "the rock 'n' roll musicians of the 1960s through 1980s are figured as original creators, despite their massive borrowing from earlier, often Black, musicians who receive no credit").

23. *See, e.g.*, O'Connor et al., *supra* note 19.

24. *See, e.g.*, Kristelia García, *The Emperor's New Copyright*, 103 B.U. L. REV. 837, 869–72 (2023) (describing rise of "interpolation credit . . . offered by the songwriter(s) or other copyright holder to a third-party songwriter who did not participate in the composition process in any meaningful way"); Mark A. Lemley, *Authoring While Dead*, 59 GA. L. REV. 385, 393 (2024) (noting "nearly forty" instances of this practice).

25. *See* 17 U.S.C. § 504(a) (providing that "an infringer of copyright is liable for either (1) the copyright owner's actual damages and any additional profits of the infringer . . . or (2) statutory damages").

the lesser of the two. It would operate where the plaintiff is a non-author and acquired copyright in the allegedly infringed work, thus mitigating the trend of firms trolling for windfall verdicts and spurious co-authorship credits.

This Article deconstructs the disincentive theory, making theoretical contributions to discussions of copyright's optimal role in society and practical contributions to designing the right creative incentives. It proceeds as follows. In Part I, it presents the literature's first nuanced account of the disincentive theory. That theory suggests that disincentive effects will most likely arise when musicians with relatively low ability to pay a judgment are subjected to infringement suits brought by plaintiffs with a significant resource advantage—suits that are categorically unlikely to exist. Part II turns from theory to evidence, using two approaches to shed light on how the disincentive theory plays out on the ground. Using analysis of the dockets of the federal courts to assess what types of claims actually exist, this Part reveals that the vast majority of suits appear to be opportunistic, involving claims against stars and their labels alleging that hit songs infringe plaintiffs' works. It then reports on interviews of musicians, all of which suggest that fear of litigation, to the extent it exists, is cabined to participants at the high end of the market. In light of the lack of feared disincentivizing lawsuits, Part III considers a different way to think about the state of infringement litigation in the music industry: that such litigation may, in theory, advance pro-social interests, including the remedying of historical inequities and redistributing windfall profits. But relying on infringement litigation to advance these interests seems precarious. Part IV thus proposes a limitation on damages in suits brought by non-authors, with the aim of better aligning copyright law with those social goals.

I. THE DISINCENTIVE THEORY OF MUSICAL WORKS

The existence of a disincentive effect attributable to high-profile infringement claims would seem difficult to prove—one cannot prove works that do not exist would have come into being were it not for infringement judgments.[26] Although courts and commentators alike worry about this possibility, the means by which a disincentive effect might arise remain under-theorized. Analysis typically does not proceed beyond the fact

26. For instance, as Fishman notes, "[m]ore or less protection doesn't just mean more or less stuff gets made. It can also mean that whatever stuff does get made is going to look or sound different." Fishman, *supra* note 8, at 1913.

that infringement liability can be very costly, and that, rationally, those costs might deter the creation of new works.

This Part develops a more nuanced theory of creative disincentives in order to evaluate the likelihood and magnitude of any possible disincentive effect and the conditions under which it would occur. It begins by discussing the critical features of copyright law that support the theorized disincentive. It then deconstructs the basic theory into components that bear on the two variables of the equation—the disincentive to create and the incentive to sue. Considering different configurations of those components suggests that a significant disincentive effect is unlikely to exist.

A. The Law of Music

Within any given song reside two distinct copyrightable works—the "musical work" and the sound recording.[27] Although Congress saw fit to define only one of those terms,[28] the distinction is fairly straightforward—a sound recording is what you listen to; a musical work is the composition performed to create the sound recording. Multiple sound recordings of the same musical work can exist, and copyright law even provides for a compulsory license for musical works, allowing musicians to record covers of songs without first obtaining permission from the rightsholder.[29] Sound recordings, meanwhile, are subject to a unique limitation. For most types of copyrightable works, infringement of the reproduction right is established by showing that the infringing work is "substantially similar" to the plaintiff's work.[30] But the Copyright Act permits musicians to create substantially similar sound recordings, even those that "imitate or simulate those in the copyrighted sound recording," so long as they do not actually sample that original recording.[31]

Infringement litigation can implicate the musical work, the sound recording, or both, and the potential disincentives that might arise vary with

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27. *See* 17 U.S.C. § 102 (defining scope of copyrightable subject matter to include both "musical works, including any accompanying words," and "sound recordings").

28. "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work . . . ." 17 U.S.C. § 101.

29. *See* 17 U.S.C. § 115 (establishing compulsory license for musical works).

30. *See, e.g.*, Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018) ("To infringe, the defendant must also copy enough of the plaintiff's expression of those ideas or concepts to render the two works 'substantially similar.'").

31. 17 U.S.C. § 114(b).

the aspect of the work challenged. The recent spate of high-profile cases, and the critiques thereof, primarily involve disputes over musical works. This Part explores the background of some of these cases in order to develop the disincentive theory as it relates to musical works, and contends that disincentive effects are more likely to flow from claims involving musical works than those involving sound recordings.

B. High-Profile Infringement Litigation

Over the last decade, a string of infringement actions have attracted significant critique. The trend begins with *Williams v. Gaye*.[32] In 2013, Pharrell Williams, Robin Thicke, and Clifford Harris, Jr. released the massively popular single *Blurred Lines*.[33] Not long after, the family of Marvin Gaye "made an infringement demand on Williams and Thicke after hearing 'Blurred Lines,'" claiming that the song infringed Gaye's 1976 song *Got To Give It Up*.[34] Williams, Thicke, and Harris then sued, seeking a declaratory judgment of non-infringement; the Gayes counterclaimed for infringement.[35] Following the typical pattern for such cases, the parties introduced expert testimony reaching disparate conclusions about similarities between the works.[36] Trial ensued, with the jury finding Williams and Thicke, but not Harris or the record labels who released *Blurred Lines*, liable for infringement, awarding the Gayes more than $7 million in damages.[37] The district court remitted some of the damages awards, down to a total of roughly $5 million; reversed the verdict in favor of Harris and the labels; and awarded the Gayes "a running royalty of 50% of future songwriter and publishing revenues from 'Blurred Lines.'"[38] In 2018, the Ninth Circuit reinstated the verdict in favor of Harris and the labels but otherwise affirmed the judgment of the district court.[39]

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32. *See generally* 895 F.3d 1106 (9th Cir. 2018).
33. *Id.* at 1116.
34. *Id.*
35. *Id.*
36. *Id.* at 1117.
37. *Id.* at 1118. Specifically, the jury awarded "$4 million in actual damages, $1,610,455.31 in infringer's profits from Williams . . . and $1,768,191.88 in infringer's profits from Thicke." *Id.* The awards of actual damages "amounted to approximately 40% of [defendants'] non-publishing profits from 'Blurred Lines.'" *Id.* at 1129.
38. *Id.* at 1118.
39. *Id.* at 1138.

Criticism of the district court's decision arose swiftly; as Fishman notes, "[i]t's tough to overstate the amount of controversy that the case has generated."[40] Within days of the jury's verdict, prominent copyright scholars took to the popular press to denounce the result as a dire threat to the creative enterprise. Raustiala and Sprigman declared that "the biggest losers" in the litigation were not Williams and Thicke, but rather "all of us who love music."[41] Gordon similarly opined that "the 'Blurred Lines' verdict sets bad precedent for artists—and for the rest of us."[42] Wu argued that "[t]o suggest that this verdict will encourage better songwriting is to misunderstand the history of the arts" and suggested the trial was little more than "a referendum on Thicke's character."[43] Criticism in this mode continued through the Ninth Circuit's ruling on the appeal, with Judge Nguyen opining, in dissent, that "the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere."[44] This response declines to compare the jury's damages award of roughly $7 million (later remitted to roughly $5.3 million) to the stipulated profits attributable to *Blurred Lines*, which at the time of trial amounted to $16.7 million, leaving defendants with a more than healthy profit.[45] But it appears to represent the prevailing view among scholars and commentators, and would remain so with respect to a number of subsequent infringement actions involving hit songs.[46]

Beyond the enormity of the damages awarded, criticism also focused on the apparent expansion of what constitutes protectable expression in

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40. Fishman, *supra* note 8, at 1865.

41. Raustiala & Sprigman, *supra* note 8.

42. Gordon, *supra* note 8.

43. Tim Wu, *Why the "Blurred Lines" Copyright 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.

44. Williams v. Gaye, 895 F.3d 1106, 1138 (9th Cir. 2018) (Nguyen, J., dissenting).

45. *See* Williams v. Bridgeport Music, Inc., No. 13-cv-06004, 2015 WL 4479500, at *25 (C.D. Cal. July 14, 2015) (describing evidence of profits earned by various parties from *Blurred Lines*).

46. *See, e.g.*, Joseph P. Fishman, *Tonal Concept and Feel*, 38 CARDOZO ARTS & ENT. L.J. 655, 665 (2020) (noting concern over "high liability risk" related to musical works); Lim, *supra* note 15, at 716 ("Since a federal jury decided Robin Thicke's hit song 'Blurred Lines' copied Marvin Gaye's 'Got to Give it Up' several years ago, the music industry has vexed over the line between homage and infringement."); Peter Lee & Madhavi Sunder, *The Law of Look and Feel*, 90 S. CAL. L. REV. 529, 567 (2017) (arguing that "[i]n the realm of 'sound and feel,' the victory of Marvin Gaye's estate in its copyright infringement suit against Robin Thicke and Pharrell Williams suggests that expansive protection of moods, feelings, and zeitgeist may chill future musical creation").

musical works. This line of critique looks to the absence of "note-to-note melodic correspondence"[47] between the two songs and emphasizes "that the only commonalities between the works were non-copyrightable generic musical and sonic elements."[48] *Williams*, and other suits that followed, raised concerns that what might best be described with amorphous terms like "feel" and "groove" would be treated as subject to copyright protection.[49] Thus, the verdict signaled not only the risk of massive liability but also a shift toward a larger and less clear concept of the bases of liability.

C. Deconstructing the Disincentive Theory

The idea that outcomes like that in *Williams v. Gaye* disincentivize creativity begins from the basic logic of deterrence: if particular conduct is deemed infringing and leads to significant liability, it is risky for anyone to engage in that conduct.[50] This was the theory behind the Recording Industry Artists of America's long and unpopular quest to put an end to online file-sharing, in which the RIAA sued scores of unsuspecting Americans for copyright infringement.[51] Consider the prominent case *Capitol Records, Inc. v. Thomas-Rasset*.[52] Jammie Thomas-Rasset, a single mother of four children, was found by a jury to have infringed copyright in 24 songs by

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47. Fishman, *supra* note 8, at 1864.

48. Cronin, *supra* note 14, at 1231.

49. *See, e.g.*, Fishman, *supra* note 46, at 655 ("Musical feel, some have argued, is becoming too propertized. When a jury in 2015 found the writers of the hit song 'Blurred Lines' liable for infringing Marvin Gaye's 'Got to Give It Up,' observers protested that the two songs' true point of similarity was nothing more than their shared feel—something that should be freely available to anyone."); Peter S. Menell, *Reflections on Music Copyright Justice*, 49 PEPP. L. REV. 533, 575 (2022) ("To many musicians and scholars, Williams's and Thicke's *Blurred Lines* merely imitated Marvin Gaye's 'groove' in *Got to Give It Up*, and 'grooves' should not be copyrightable.").

50. *See, e.g.*, Madison & Lombardi, *supra* note 8, at 149 ("If inspiration was actionable, it would diminish the incentive to make new music."); Livingston & Urbinato, *supra* note 14, at 232 ("An infringement standard that is too broad—that is, finds liability frequently—will potentially result in the underproduction of creative works and the failure to reward those who have created something genuinely original.").

51. *Recording Industry Begins Suing Individual Sharers of Copyrighted MP3 Files*, HISTORY (May 17, 2025), https://www.history.com/this-day-in-history/september-8/riaa-begins-suing-individual-sharers-of-copyrighted-mp3-files [https://perma.cc/WC2U-L4CQ].

52. *See* 692 F.3d 899 (8th Cir. 2012).

sharing them on the file-sharing service Kazaa.[53] For her trouble, a jury at one point assessed damages against her in the amount of $1,920,000.[54] Intuitively, widespread awareness of the fact that one could face such enormous liability by engaging in file-sharing[55] would deter some people from doing so.

Copyright law does not forbid only verbatim copying. Rather, the exclusive right to reproduce a copyrighted work may be infringed by a later work that is "substantially similar" to the infringed work.[56] Such a rule greatly expands the protection afforded by copyright and thus gives additional force to the baseline assumption of a disincentive effect. It stands to reason that a person will usually know if they are engaged in verbatim copying. But it is much easier to create a work that is substantially similar to another work without intending to do so, especially in light of the notoriously evasive and fact-specific application of the substantial similarity test.[57] As Judge Learned Hand observed in one of copyright's most influential opinions, "as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that . . . the decisions cannot help much in a new case."[58]

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53. *Id.* at 910; Dave Itzkoff, *Woman Fined $1.92 Million for Music Piracy*, N.Y. TIMES: ARTSBEAT (June 19, 2009), https://archive.nytimes.com/artsbeat.blogs.nytimes.com/2009/06/19/woman-fined-192-million-for-music-piracy/.

54. 692 F.3d at 901. This was the verdict in the second of three trials on damages; on appeal, the Eighth Circuit reinstated the first jury's verdict of $222,000. *Id.* at 901–02.

55. *See, e.g.*, David Kravets, *Jury in RIAA Trial Slaps $2 Million Fine on Jammie Thomas*, WIRED (June 18, 2009), https://www.wired.com/2009/06/riaa-jury-slaps-2-million-fine-on-jammie-thomas/ [https://perma.cc/8VFS-UMNK].

56. *See, e.g.*, Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020) (stating that copyright infringement requires a showing of "unlawful appropriation"; that "the hallmark of 'unlawful appropriation' is that the works share *substantial* similarities"; and that "only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability").

57. *See, e.g.*, Fishman, *supra* note 8, at 1870 ("Few are satisfied with the muddle that is copyright's substantial-similarity test, and this Article is not the first to lament the pathological uncertainty surrounding its application."); Lim, *supra* note 15, at 717 (describing the substantial similarity test as "a patchwork of rhetoric resting on confusing generalizations that ultimately translate into 'I'll know it when I see it' determinations. . . . The debate has gone on for decades, and there is no end in sight.").

58. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). Modern courts have not made much headway on this front. *See, e.g.*, Rentmeester v. Nike, Inc., 883 F.3d 1111, 1121 (9th Cir. 2018) ("We do not have a well-defined standard for assessing when similarity in selection and arrangement becomes 'substantial,' and in truth no hard-and-fast rule could be devised to guide determinations that will necessarily turn on the unique facts of each case.").

In the world of music, the distinction between disputes over verbatim copying and mere substantial similarity finds expression in cases involving sampling and cases involving alleged infringement only of a musical composition. Viewed through the eyes of the federal courts, "'[s]ampling' . . . means the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo."[59] This is verbatim copying, albeit usually of a very small portion of a sound recording.[60] And, significantly, it does not happen by accident.[61] As such, for purposes of exploring disincentive effects, it implicates a very different set of legal rules and policy issues. Sampling's importance to modern music production can hardly be overstated,[62] and the choice of legal rules to govern sampling logically would seem to impact creative practices.[63] But the conscious nature of sampling makes the potential disincentive categorically different from that suggested by criticism of *Williams*. Accordingly, I limit my analysis to cases like *Williams*, in which a later musical composition is alleged to be substantially similar to another without any claim of verbatim copying of any portion of the sound recording.

A disincentive effect makes sense as the assumed default case.[64] Consider a basic form of the disincentive theory, in which a given musician,

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59. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 875 (9th Cir. 2016).

60. *See, e.g.*, *id.* at 874 (noting that the sample at issue consisted of "a 0.23-second segment of horns from an earlier song").

61. *See, e.g.*, Lemley, *supra* note 24, at 393 n.28 ("Unlike similarity of musical compositions, which may or may not be evidence of copying, . . . sampling of a sound recording is presumably always a copy and generally a conscious decision to copy.").

62. *See, e.g.*, Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 630 (2006) ("Repetition expressed through sampling and looping has been, for much of the history of hip hop, an inherent part of what makes hip hop music identifiably hip hop.").

63. As one example, the Ninth Circuit in *VMG Salsoul* broke from the Sixth Circuit on the question of whether the *de minimis* defense to copyright infringement applies to sampling. The Sixth Circuit, in *Bridgeport Music, Inc. v. Dimension Films*, parsed the provisions of § 114(b) of the Copyright Act to conclude that the *de minimis* defense does not apply to sound recordings, and announced a rule of "[g]et a license or do not sample." 410 F.3d 792, 801 (6th Cir. 2005). The Ninth Circuit disagreed, finding "*Bridgeport*'s reasoning unpersuasive." *VMG Salsoul*, 824 F.3d at 874. While the cautious musician might do well to observe the Sixth Circuit's rule in any event, the Ninth Circuit's reading of the statute provides more potential leeway. *See also* Arewa, *supra* note 62, at 638–41 (proposing a shift to liability rules for music copyright).

64. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Restructuring Copyright Infringement*, 98 TEX. L. REV. 679, 719–20 (2020) (noting that, with respect to "'inadvertent infringements' . . . the concern that should guide lawmakers should be to limit overdeterrence,

upon completion of a new work, must evaluate their ability to pay an assumed judgment for copyright infringement. Where the expected amount of the judgment exceeds the musician's ability to pay, the musician rationally will withhold the new work.[65] In this case, a disincentive effect exists. Where the musician's ability to pay exceeds the expected amount of judgment, a disincentive may still be present—for instance, if the musician expects that the value of the judgment will exceed the amount of profit they expect to earn from the work, they might rationally withhold it even if they otherwise possessed sufficient resources to pay the judgment. In this simplified form, the logic of the disincentive theory is apparent and appealing.

But while logic suggests that infringement verdicts disincentivize creativity, logic alone fails to reveal a mechanism to generate a disincentive effect.[66] That gap must be bridged by salience, and the salience of infringement judgments cannot be assumed.[67] Suppose, for instance, that the

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which may result in the dampening of incentives to create"); *see also id.* at 718 ("When information and transaction costs are high, users will copy less protected expression than they are legally entitled to or refrain from using expression altogether."); Depoorter & Walker, *supra* note 15, at 343 ("Overall, false positive claims disrupt the balance of legal incentives necessary for the investment of labor and capital in new works of creative expression by discouraging fair use and creating disincentives to the development of new technology."); Fishman, *supra* note 8, at 1890 (arguing that expanding scope of protectable elements of musical compositions "constrains downstream composers").

65. *See, e.g.*, Lim, *supra* note 15, at 718 (arguing that the "indeterminacy" of the substantial similarity standard "may result in false positives and chill efforts by rivals as well as those in ancillary markets from developing non-infringing works, and even cause them to abandon their efforts if they cannot afford to face those unnecessarily heightened risks"); *cf.* Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829, 1842 (2011) (arguing that "copyright discourse should also consider the legal risks of copyright frameworks, particularly as those risks relate to varied types of creators, particularly those who are not lawyers and who may not have ready access to or funds to pay legal advisors"); Depoorter & Walker, *supra* note 15, at 343–44 ("[L]itigating a small copyright claim (for an amount in controversy of less than $1 million) costs on average $303,000 through the end of discovery, and $521,000 through trial. Such high litigation costs, coupled with the risk of incurring statutory damages and an opponent's attorney's fees, provides a strong incentive for defendants to settle, even if the alleged claim is of questionable merit. In most instances, it is more cost-effective to simply capitulate.").

66. Just as the RIAA's litigation campaign did little to slow illicit file sharing. *See, e.g.*, Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1254–55 (2011) (summarizing the music industry's litigious campaign against file sharing and asking: "why has the legal battle against file sharers been so ineffective?").

67. As Fishman recognizes, "[i]ndividuals in many creative communities are not especially conscious of copyright law in the midst of the creative process. They are affected by its restrictions only after the fact—when gatekeepers like publishers, distributors, and insurers

Blurred Lines dispute was handled entirely in arbitration, with none but the parties and their attorneys ever learning of the existence of the dispute or its outcome. In such a circumstance, any disincentive effect would likewise be limited to the parties themselves. More generally, our hypothetical musician's expectations around possible damages for infringement must derive from a variety of external sources.

Most treatment of the disincentive effect created by infringement liability examines the issue at a high level. For instance, Bell and Parchomovsky turn to law and economics to suggest the existence of a disincentive:

> When facing a vague standard, actors cannot know for certain how much to invest in precautions taken in order to avoid liability. But they know that there is no symmetry between under- and over-investment. Underinvestment in precautions exposes one to the full brunt of civil (and criminal) liability. Overinvestment, by contrast, buys one immunity. Hence, under conditions of uncertainty, a rational actor would always choose to err on the side of safety and overinvest in precautions.[68]

Indeed, they go so far as to argue that "[g]iven the volume of copyrighted content and the lack of a cost-effective way to readily identify protected content and its proprietors, it makes more sense from a purely utilitarian standpoint to abstain from creating."[69] This formulation neglects at least two important considerations, however: baseline awareness of the rule (regardless of the rule's vagueness) and subjective perceptions about the likelihood and cost of suit. Again, the music industry's experience with suing individuals over file sharing demonstrates that, despite clear rules and widely reported and severe consequences for violating those rules, people

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intervene." Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1389 (2015). Silbey finds that intellectual property law often matters to creators not at the outset of their creative endeavors but rather "in the middle of the professionalization of the individual or business as either (1) an effect on personal or ethical impulses or (2) an external framework imposed upon the situation by lawyers or business managers." Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and "Work-Makes-Work," Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2129 (2011).

68. Bell & Parchomovsky, *supra* note 64, at 717.

69. *Id.* at 718.

are not deterred when they think they are unlikely to be on the receiving end of enforcement efforts.[70]

Thus, to evaluate the possibility of disincentive effects more thoroughly requires deconstructing the theory into constituent elements. Here, I identify four elements that could affect the salience of infringement verdicts and therefore bear on the disincentive effect: the perceived likelihood of suit, the costs of litigation and damages, the cost of avoidance, and community norms. There is significant interaction between each of these factors, but each possesses unique implications for the possible disincentive effect. In any given musician's creative calculus, the aggregate of these factors weighs against that musician's ability to pay. As in the simplified theory discussed above, where the cost suggested by the factors exceeds ability to pay, a disincentive effect occurs, as the musician rationally decides not to create (or shelves a work in some stage of completion). And even where the cost does not exceed ability to pay, non-negligible costs may still disincentivize creativity, especially where such costs exceed anticipated profit from the work.

Consideration of those four elements illuminates the circumstances in which a disincentive effect may arise. But for such an effect to matter requires an additional step, from the circumstances that govern any one musician's decision-making to the frequency with which those circumstances arise. The disincentive theory thus further requires analysis of what types of claims will most likely be brought. The magnitude and effect of disincentives to create turns on the incentives to sue in the first place. Those incentives, too, must be deconstructed. In this Part, I focus on the most plausible and rational incentive—the pursuit of economic gain.[71] Components of that incentive include the similarity of the two works, the strength of the claim of copying in fact, the potential damages available, and the defendants' ability to pay.

Understanding the situations in which a disincentive effect is likely to arise enables finer-grained analysis of what interests copyright law does and should protect. Policy prescriptions premised on the existence of a disincentive effect will miss the mark without a deeper understanding of the

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70. *See, e.g.*, Depoorter et al., *supra* note 66, at 1254–55.

71. The recent trend of anticipatory credits, even when a claim of infringement would seem to be weak, suggest that opportunism, rather than moral disapproval or irrational pique, is driving disputes in this area. *See, e.g.*, Lemley, *supra* note 24, at 396 (discussing interpolation credit being given in cases that are "not remotely a copyright infringement").

circumstances in which such an effect might arise.[72] The relevance of each of these factors to the disincentive theory will be explored in turn.

1. Disincentives to Create

a. The Perceived Likelihood of Suit

Whether a given musician will be deterred by infringement verdicts turns first on whether that musician perceives any likelihood that such a fate might befall them. In the extreme cases, a musician certain that anything they create will lead to a lawsuit will likely cease creating;[73] one who is equally certain they will never be sued will likely give no further thought to the matter.[74] Many components of this perception will vary, but some apply across the board. In particular, both the number of verdicts and the number of cases filed, as well as popular awareness of the same, should affect the perceived likelihood of suit. The disincentive effect will be strongest when there are lots of infringement verdicts, an even larger number of lawsuits, and widespread reporting on and discussion of these lawsuits. Conversely, the effect will be weaker when there are fewer verdicts and fewer filings, as well as when less attention is focused on the lawsuits.

Other case-specific factors may influence the likelihood of suit, such as the presence or absence of a deep-pocketed defendant. A financially motivated plaintiff has little reason to bring suit against a defendant who cannot likely pay the judgment. Successful artists, and those backed by major labels, thus typically have more reason to fear a lawsuit than unknown artists.[75] Similarly, the reach of any given song may bear on the

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72. *See, e.g.*, Arewa, *supra* note 62, at 629–30 (arguing that "frameworks should be developed that better accommodate varying aesthetics of artistic production, including those that base their creations on existing materials. This would entail, for example, developing judicial doctrine, crafting legislative solutions, and establishing commercial practices that are based on accurate representations of musical creation.").

73. *See, e.g.*, Bell & Parchomovsky, *supra* note 64, at 718 (arguing that given high potential liability for infringement, "it makes more sense from a purely utilitarian standpoint to abstain from creating").

74. *See, e.g.*, Depoorter et al., *supra* note 66, at 1255 (noting that litigation is unlikely to deter infringing behavior where individuals believe "that the probability of getting caught remains remote").

75. *See, e.g.*, Livingston & Urbinato, *supra* note 14, at 283 (noting that, in infringement actions over musical works, "defendants . . . are invariably highly successful music producers, composers, or performers"); Cronin, *supra* note 14, at 1191 n.13 ("While the plaintiffs in music copyright infringement disputes are typically unknown individuals, the names of defendants are commonly well-known songwriters, recording companies, or successful bands.").

likelihood of suit—the more people hear a song, the more likely somebody will notice similarities to another song.

b. Damages and Litigation Costs

The relevance of the cost of a lawsuit is similarly straightforward. A musician anticipating the possibility of being ordered to pay approximately $4.5 million in damages (the amount potentially owed by Thicke following the conclusion of the *Blurred Lines* proceedings) would be rational to decide to do something else.[76] Additionally, assuming for the sake of argument that knowledge of copyright remedies is widespread, the availability of statutory damages would suggest this factor will generally support the existence of a disincentive effect. So long as the plaintiff registers copyright in their work before infringement occurs, that plaintiff may elect statutory damages ranging in the ordinary case from $750–$30,000 per work infringed, and up to $150,000 if the court finds willful infringement.[77] For most people, these are significant amounts, and awareness of possibly incurring such liability may push them not to create. Moreover, "copyright infringement is a strict liability tort,"[78] rendering such damages easier to obtain. And even if a musician accused of infringement believes they will win, they may not have the resources to fight. Just litigating an infringement dispute threatens to bankrupt all but the already successful.[79]

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76. This analysis sets aside, for the moment, the reality that Thicke nevertheless profited substantially from *Blurred Lines*. At the time of trial, the parties stipulated that Thicke had accrued profits of $5,658,214 from the song. *See* Williams v. Bridgeport Music, Inc., No. CV13-06004, 2015 WL 4479500, at *25 (C.D. Cal. July 14, 2015). His maximum potential exposure amounted to $4,617,038.38, representing the entire $2,848,846.50 award of actual damages (for which Thicke was jointly liable with Williams) and $1,768,191.88 in infringer's profits (for which Thicke was severally liable). *See* Amended Judgment at 1–2, Williams v. Bridgeport Music, Inc., No. 573 (C.D. Cal. Dec. 6, 2018). He thus stood to retain more than $1,000,000 in profit even if he was somehow unable to obtain contribution from other jointly liable defendants on the actual damages award. And he would also continue to receive 50% of his previous share of royalties going forward. *See id.* at 2.

77. 17 U.S.C. § 504(c)(1)–(2) (providing for election between actual and statutory damages and enumerating statutory damages). A plaintiff who does not register copyright before the infringement begins is barred from electing statutory damages or receiving an award of attorney's fees. *See* 17 U.S.C. § 412.

78. Bell v. Wilmott Storage Servs., LLC, 12 F.4th 1065, 1081 (9th Cir. 2021).

79. *See, e.g.*, Lim, *supra* note 15, at 719 ("On average, copyright cases cost between four hundred thousand to two million dollars to litigate."); Depoorter & Walker, *supra* note 15, at 343 (noting that "litigating a small copyright claim (for an amount in controversy of less than $1 million) costs on average $303,000 through the end of discovery, and $521,000 through trial").

c. The Cost of Avoidance

Perceptions of the cost of avoidance are harder to pin down and will differ according to the facts of each potential case. In situations of unconscious copying, the perceived cost of avoidance encapsulates judgments about the preceding factors—the musician must ask themself how likely it is that their song is similar to another one, how likely they are to be sued, how much they might have to pay, and what else they could do to minimize those risks. Indeed, the basic form of the disincentive theory embeds an assumption that the expected cost of avoidance exceeds the expected gain from creating a work.

However, it is possible to identify several considerations that might influence these perceptions. Genre, for example, may be relevant. A genre built around a relatively small set of common musical elements would be more susceptible to disincentive effects if a court found infringement based on those elements, as it would be relatively difficult to create new works within the genre without using the infringed elements. As Arewa notes,

> music is often characterized to a significant degree by particular configurations of notes that may depend, for example, on harmonic progressions or other musical factors. As a consequence, each of the twelve tones in the musical scale is typically not equally likely to be utilized in particular configurations of musical expression in most music genres.[80]

A musician working in that genre might conclude that, to avoid allegations of infringement, they are better off refocusing on another genre, thus incurring switching costs, or leaving the industry altogether. Artists working in broader genres, or across genres, might feel less constrained by such a verdict.

This factor may also be more susceptible to private ordering than the preceding two, however, as one method of avoidance is simply to buy off potential plaintiffs. This may be seen, for example, in the rising practice of "interpolation credits" being granted to authors of earlier songs that bear some degree of resemblance to later hits. Lemley notes that "it is surprisingly common for artists to engage in anticipatory interpolation credit, adding a prior songwriter as a co-author before releasing the song at

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80. Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 490 (2014).

all."[81] That practice fixes the cost of avoidance more precisely than would normally be possible; it also arguably creates a range of problems for copyright law and the public interest.[82]

d. Community Norms

Last, the degree of copying that is tolerated, and the methods by which copying is policed, may vary across different communities. Substantially similar works are most likely to arise within, rather than across, communities and genres.[83] A given community's attitude about similarities, and even outright copying, will affect the likelihood of a disincentive effect. Where a given community tolerates or promotes musical borrowing, for instance, infringement verdicts even within that community would be less likely to create a disincentive effect than in a community that rigorously polices similarity. Self-regulation and private ordering may also be more effective in communities that promote borrowing. Such norms would thus also influence the perceived likelihood of suit.

In other ways, however, norms may create disincentives. Damages are not the only cost borne by an infringer—they may also suffer reputational harm, even if their infringement was inadvertent.[84]

2. The Effect of Different Configurations

Deconstruction of the disincentive theory reveals significant variance in the potential strength and impact of any given infringement verdict. To illustrate that variance, consider two possible scenes responding to the *Blurred Lines* verdict: the cutthroat pop market and the local experimental noise scene.

Begin with the cutthroat pop market. What money may be earned in the market for recorded music mostly accrues to the most successful, and to the record labels with whom they contract.[85] Plausible assumptions about how

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81. Lemley, *supra* note 24, at 399 (identifying pre-release interpolation credit "in sixteen of the thirty-eight cases" of interpolation credit documented, "and another eleven cases . . . were likely anticipatory but could not be confirmed").

82. *See, e.g.*, *id.* at 413–24; García, *supra* note 24, at 869–72.

83. *See, e.g.*, Arewa, *supra* note 80, at 490.

84. *See, e.g.*, Lemley, *supra* note 24, at 401 (noting that "artists may feel that they have to bend over backwards to give credit to avoid being accused of 'thievery' in the court of public opinion").

85. *See, e.g.*, García, *supra* note 24, at 874 (observing that "the market for content creation is widely considered to be a winner-take-all market" in which "there tends to be a handful of

the disincentive factors play out in this scenario suggest a disincentive effect. Perceived likelihood of suit may be high in light of, for example, the *Blurred Lines* verdict and the wide coverage it received. Many stories following that verdict suggest widespread concern about infringement suits among songwriters in this space.[86] The amount of potential damages, never that low given the existence of statutory damages, is significant, especially for songs that do hit. The cost of avoidance may be very high, particularly in cases of unconscious infringement. A songwriter working with a major star backed by a major label might have the means to buy off a potential claim with a license or a credit, but only if they know in advance of the similarity. Finally, community norms, to the extent they exist at this level, will be more fragile because of the high stakes—borrowing is more tolerable when the borrower is not disproportionately rewarded. Thus, in this scenario, the existence of a disincentive effect would not be surprising in a case in which the potential defendant lacked significant resources to pay a judgment.

By way of contrast, consider a small, local scene making music that the general public might find unlistenable. Artists within this scene regularly collaborate, and subtle but recognizable interpolation of other artists' work is celebrated. The factors in this scenario do not suggest a disincentive effect. It is unlikely that there are many, if any, infringement disputes involving music like that produced in this scene, and none of its participants receive significant income from their recorded music. Copyright is not top of mind for members of the scene, and thus few, if any, even know that copyright registration is a prerequisite to a suit for infringement. In such a case, perceived likelihood of suit would be low. A claim of infringement would be expensive, contrary to norms of borrowing, and unlikely to recover significant damages with statutory damages off the table due to the likely failure to register. Even if a participant were to violate norms by copying too much from another work, it seems likely such a violation would be handled within the scene rather than by recourse to the federal courts to

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superstars who enjoy incredible commercial success, while everyone else toils in relative obscurity"); Glynn Lunney, *Copyright and the 1%*, 23 STAN. TECH. L. REV. 1, 3 (2020) (observing that "superstar artists, such as [Taylor] Swift, already earn more from a single hit than the average college-educated American will earn in a lifetime," and that "copyright is already awarding superstar artists a disproportionate share of society's wealth for their labor"); Arewa, *supra* note 22, at 613–14 (arguing that "for a creator making a decision about whether to produce a new work (i.e., invest in her creative portfolio), a lottery model may provide a more instructive picture of the creator's investment decision").

86. *See supra* note 8 and accompanying text.

obtain nominal damages. In sum, the existence of the *Blurred Lines* verdict seems far less likely to be salient to musicians in this scenario, and therefore unlikely to create a disincentive effect.

To guide analysis and exploration, it is helpful to consider the strong and weak cases in a more generalized form. In the strong case for a disincentive effect, perceived likelihood of suit will be high. Objective indicators supporting such a perception might include a large number of lawsuits against members of the same genre or scene, widespread reporting on those lawsuits, and a composition that closely adheres to genre conventions.[87] Potential damages will be high relative to the ability of a given competing musician to pay them. Cost of avoidance will be high due to an inability to survey the field ex ante. Community norms will favor ruthless competition and litigiousness, with no pro-borrowing norm.

In the weak case, perceived likelihood of suit will be low. Objective indicators in this case might include few if any lawsuits within the genre or scene and a high degree of originality in the composition. Available damages will be low due to infrequent registration by musicians in the genre and low to zero expected revenue accruing from the composition. Cost of avoidance will be low due to the high degree of originality, the minimal likelihood of suit, and the minimal damages that might be owed in the event of suit. Community norms will favor borrowing and internal resolution of disputes, and disfavor resort to allegations of infringement.

3. Incentives to Sue

Whether viewed as opportunistic[88] or rent-seeking,[89] plaintiffs in infringement suits usually want a payday.[90] Whether they will be able to

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87. It bears noting that even critics of *Williams* and its ilk recognize that lawsuits of this type are not widespread, and more broadly that plaintiffs in copyright infringement actions usually lose. *See, e.g.*, Fishman, *supra* note 46, at 664 ("The recent cases involving Katy Perry, Pharrell Williams, and Led Zeppelin gained widespread media attention precisely because trials over music infringement are so phenomenally rare."); Lim, *supra* note 15, at 720 ("Compared to patent plaintiffs, copyright plaintiffs do abysmally.").

88. *See* Lemley, *supra* note 24, at 423 (discussing rise of "opportunistic plaintiffs we might call interpolation trolls").

89. *See* García, *supra* note 24, at 878 (defining rent seeking and noting that "[i]nstead of increasing productivity or output—conventionally efficient outcomes from an economic perspective—rent seeking is merely redistribution of extant wealth").

90. *See, e.g.*, Livingston & Urbinato, *supra* note 14, at 283 ("The plaintiffs are convinced that more powerful figures in the music industry have stolen and exploited their work. The defendants believe that the plaintiffs are trying to piggyback on the defendants' fame and

obtain one large enough to warrant a lawsuit turns on a combination of the strength of the possible claim and the amount, both legally and practically, they may be able to recover.

a. The Degree of Similarity Between Works

As noted above, in cases of non-verbatim copying, a plaintiff may still prevail on a claim of infringement if the accused work is "substantially similar" to the plaintiff's work.[91] Courts and juries apply that standard to assess whether the defendant engaged in "unlawful appropriation" of "protected elements of the plaintiff's work."[92] Naturally, accused works with a high degree of similarity to a plaintiff's works will more likely be found infringing than works with a low degree of similarity. As such, incentives to sue will be directly correlated to similarity.

b. The Strength of the Claim of Copying in Fact

Doctrinally, total identity between works may not be enough to establish infringement. In American copyright law, "[n]o matter how similar the plaintiff's and the defendant's works are, if the defendant created his independently, without knowledge of or exposure to the plaintiff's work, the defendant is not liable for infringement."[93] Thus, even when a high degree of similarity is shown, a plaintiff must also prove that the defendant actually copied the plaintiff's work.[94] Direct evidence of copying, such as an admission by the defendant, would be ideal for the plaintiff. But direct evidence will rarely be available, and courts have long held that "[a] copyright plaintiff may prove copying with circumstantial, rather than direct, evidence".[95] In the ordinary case, that "involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two

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economic success by alleging plagiarism." (citation omitted)); Depoorter & Walker, *supra* note 15, at 344 (noting that, "from an economic perspective, copyright holders have an incentive to attempt to enforce their interests as broadly as possible, as the foreseeable rewards exceed the accompanying risks").

91. Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018) (quoting Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996)).

92. Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018) (quoting Arnstein v. Porter, 154 F.2d 464, 468–69 (2d Cir. 1946)).

93. *Id.* at 1117.

94. *See, e.g.*, *id.* ("Proof of copying by the defendant is necessary because independent creation is a complete defense to copyright infringement.").

95. *Williams*, 895 F.3d at 1119.

works are 'substantially similar.'"[96] A circumstantial showing might include that the plaintiff's song was popular and widely distributed,[97] or that the parties worked in similar genres or scenes.[98] The showing will thus be easier for plaintiffs with more popular works.

c. The Potential Damages Available

As in the disincentive case, whether the plaintiff registered copyright will affect their entitlement to statutory damages.[99] Where actual damages are low, and statutory damages unavailable, there will be little reason to sue. Conversely, where actual damages (including, crucially, infringer's profits) are high, plaintiffs will be incentivized to sue. The availability of statutory damages likewise increases incentives to sue.[100]

d. The Defendant's Ability to Pay

Closely related to the amount of damages available is whether any defendant can actually pay them. Discrepancies are most likely to exist where statutory damages are available against an individual defendant who is not wealthy and whose infringing song has not been successful in the market. If that infringement is willful, the plaintiff might be awarded as much as $150,000 in statutory damages,[101] but the defendant likely cannot pay any significant portion of that. In suits for actual damages, ability to pay will track with the amount of damages, which are based on the plaintiff's loss and the infringer's profits.[102]

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96. *Id.* (quoting Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000)). Courts have further recognized that variations of the term "substantial similarity" are somewhat overloaded in infringement analysis and require different tests depending on whether copying in fact or unlawful appropriation is being assessed. *See, e.g.*, *Rentmeester*, 883 F.3d at 1117 ("Unfortunately, we have used the same term—'substantial similarity'—to describe both the degree of similarity relevant to proof of copying and the degree of similarity necessary to establish unlawful appropriation. The term means different things in those two contexts.").

97. *See, e.g.*, *Bolton*, 212 F.3d at 482–83 ("The Isley Brothers' access argument was based on a theory of widespread dissemination and subconscious copying.").

98. *Cf.* Gray v. Perry, No. 2:15-CV-05642, 2018 WL 3954008, at *4 n.3 (C.D. Cal. Aug. 13, 2018) (describing plaintiffs' argument that Katy Perry had access to plaintiffs' Christian rap song because of "Perry's history as a Christian artist").

99. *See supra* note 76 and accompanying text.

100. *See, e.g.*, Depoorter & Walker, *supra* note 15, at 344 (noting that, despite high costs of litigation, "the potential rewards available to plaintiffs under the statutory damage provisions in the Copyright Act change the arithmetic").

101. 17 U.S.C. § 504(c)(2).

102. 17 U.S.C. § 504(b); *see also* Cronin, *supra* note 14, at 1192 n.13 (noting that defendants "in music copyright infringement disputes . . . are commonly well-known

e. Generalizing the Strong and Weak Incentives to Sue

As with disincentives, a generalized form of the strong and weak incentives to sue illuminates the situations in which actions are most likely to arise. In the strong case, the plaintiff will have significant evidence of both similarity and copying, creating a reasonable likelihood of prevailing at trial (or forcing a significant settlement). The accused work will have been a hit, generating large amounts of profit that the plaintiff can seek to obtain as actual damages. The defendants will be able to satisfy a judgment for such damages or pay a significant settlement to avoid trial.

In the weak case, there will be little similarity between the two works and no plausible showing of access. The accused work will be little known and will have generated little if any profit. The defendant will be an individual or entity without substantial wealth and thus be unable to satisfy a judgment for statutory damages.

4. Combining the Inquiries

Although many permutations of the disincentive factors exist, theorizing the general forms of the strong and weak disincentive conditions, and the strong and weak incentives to sue, suggests situations in which disincentives are more likely to arise. That analysis in turn shows that verdicts like that in *Williams* are unlikely to create a disincentive effect, because cases in which a defendant is unable to pay a judgment are unlikely to arise, or even be perceived as likely to arise.

Several of the post-*Williams* cases illustrate the combination of satisfying many of the elements of the disincentive effect and involving a high incentive to sue. Consider, for example, the dispute over Katy Perry's *Dark Horse*. Plaintiffs in that case released their song *Joyful Noise* in 2008, and while the album on which it appeared "did not achieve significant commercial success or playtime on the radio, it received millions of views on YouTube and Gray's MySpace page," and the album "was also nominated for a Grammy award in the 'Best Rock or Rap Gospel Album' category in 2009."[103] Perry's *Dark Horse*, meanwhile, was created in 2013 and became a hit.[104] Evaluating the factors discussed above, the perceived

songwriters, recording companies, or successful bands"). The ability to recover may be impeded if the defendants dissipate their assets before judgment, of course.

103. Gray v. Hudson, 28 F.4th 87, 93 (9th Cir. 2022).

104. *Id.*

likelihood of suit is high in this situation. Given that *Dark Horse* was a hit, the available damages would be high—indeed, the jury found infringement and awarded the plaintiffs $2.8 million in damages, although that judgment was vacated by the district court.[105] Because this appears to have been an instance of unconscious copying, the cost of avoidance is high. Finally, community norms would not seem to constrain suit given that plaintiffs and defendants were not part of the same musical scene, and defendants' song competed in the top end of the pop market.

As for incentives to sue, the most that can be said for the degree of similarity between the songs in a piece of legal scholarship is that the district court let the case go to the jury, and the jury found *Dark Horse* infringed on *Joyful Noise*; a finding that was subsequently vacated by the district court on the grounds that the portion of *Joyful Noise* at issue was not copyrightable.[106] The evidence of access could perhaps have been stronger, but likewise sufficed to let the question go to the jury, which found copying.[107] As noted above, available damages were significant due to the success of *Dark Horse* in the market. Defendants' ability to pay is therefore presumptively high, and the presence of Capitol Records as a defendant provided access to the deep pockets of its parent Universal Music Group,[108] by a fair margin the largest record label in the world.[109] Accordingly, every factor suggests a high incentive to sue.

Yet the presence of the disincentive effect ultimately turns on the defendants' ability to pay. In this case, as in *Williams*, the disincentive breaks down in light of the amount of profit involved. The jury found that 22.5% of defendants' net profits from *Dark Horse* were attributable to the infringement.[110] A $2.8 million verdict may attract headlines, but its capacity to deter diminishes in light of the fact that it was assessed against over $12 million in profit, leaving the defendants nearly $10 million in the

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105. *Id.* at 92.

106. *Id.*

107. Gray v. Perry, No. 2:15-CV-05642, 2020 WL 1275221, at *14 (C.D. Cal. Mar. 16, 2020) ("[T]he Court believes the evidence presented by plaintiffs at trial was sufficient to support the jury's finding as to access.").

108. *See Capitol Music Group*, UNIVERSAL MUSIC GRP., https://www.universalmusic.com/label/capitol-music-group/ [https://perma.cc/J5Z3-EYWJ] (listing Capitol Records as one of Universal Music Group's labels and brands).

109. *See supra* note 16 and accompanying text.

110. Special Verdict (Phase II) at 5, Gray v. Perry, No. 2:15-CV-05642, No. 467 (C.D. Cal. Aug. 1, 2019), 2019 WL 7040069.

black. And, of course, the defendants ultimately prevailed in the litigation.[111]

The paradigmatic case for a disincentive effect is one in which the defendant subconsciously infringed the plaintiff's work, and the judgment exceeds the defendant's ability to pay. Realistically, such a result would obtain only in a suit for statutory damages by a well-resourced plaintiff against a defendant without significant resources, a category of dispute I refer to as a "bullying claim." If actual damages exceed the amount of available statutory damages, it will be because the defendants profited substantially.[112] The amount of profits awarded should reflect the degree to which those profits are attributable to the infringement,[113] and defendants in such cases generally retain most of their profits.[114]

The most problematic case, then, is one that seems unlikely to exist. Consider its features. The plaintiff must first be entitled to statutory damages, meaning the plaintiff has the sophistication to have registered copyright protection for its work before the defendant infringes. The plaintiff must also convince the court to award statutory damages toward the higher end of the range—the Copyright Act authorizes statutory damages "in a sum of not less than $750 or more than $30,000 as the court considers just."[115] As with actual damages, the amount of statutory damages assessed should track to some extent the blameworthiness of the defendant's conduct.[116] In the most problematic case for purposes of

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111. *See* Gray v. Hudson, 28 F.4th 87, 92 (9th Cir. 2022) (affirming district court's grant of judgment as a matter of law to defendants on the basis "that the evidence at trial was legally insufficient to show that the Joyful Noise ostinato was copyrightable original expression").

112. An award of actual damages under the Copyright Act includes both "the actual damages suffered" and "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b). In theory, a defendant's infringing song might inflict significant actual damages on a plaintiff despite the absence of profit attributable to the infringement. In practice, it is difficult to envision how this might occur.

113. *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 487 (9th Cir. 2000) ("A successful copyright plaintiff is allowed to recover only those profits that are 'attributable to infringement.'") (quoting 17 U.S.C. § 504(b))).

114. *See, e.g.*, *Gray*, 28 F.4th at 95 (noting that the jury found "that plaintiffs were entitled to 22.5% of defendants' net profits"); Williams v. Gaye, 895 F.3d 1106, 1128–29 (9th Cir. 2018) (noting that jury awarded plaintiffs "50% of the publishing revenues for 'Blurred Lines'" based on a "hypothetical license rate of 50%" and "approximately 40% of [defendants'] non-publishing profits" as damages).

115. 17 U.S.C. § 504(c)(1).

116. The factors considered by courts assessing statutory damages implicate both blameworthiness and concepts related to actual damages: "To set the amount of the statutory damage award, courts generally look to the following factors under the Copyright Act: (1) 'the

disincentives, any award of statutory damages should thus be toward the lower end of the range. Considering the theorized elements of the incentive to sue, there is little reason to believe cases like this will be brought—even with a very strong case for infringement, an economically motivated plaintiff would not seek an uncollectible judgment for a small amount. More concretely, it is not surprising that Katy Perry's *Dark Horse* provoked an opportunistic lawsuit; it would be surprising for Converge to face litigation over their song of the same name.[117]

In short, theorizing the disincentive effect reveals a disconnect between the conditions under which a disincentive effect would most likely occur and the types of cases that are likely to be brought. I do not suggest that this is a reason to do nothing. To the contrary, as set forth in Part IV, I believe copyright law should be reconfigured to incentivize socially beneficial copying and to mitigate the possibility of both opportunistic and irrational suits through limitations on actions brought by non-authors that acquire copyrights.[118] But I do contend that apocalyptic proclamations about the disincentive effect of *Williams* and its like rely on assumptions that are theoretically unsound.

* * *

Analyzing the constituent elements of the disincentive theory based on plausible assumptions suggests there is additional complexity to the problem of whether a disincentive effect exists. To address that complexity requires replacing assumptions with evidence. The next Part attempts to bring some evidence to bear on several disincentive factors.

II. EVALUATING DISINCENTIVES

The potential disincentive effect created by decisions like *Williams* turns on multiple, testable factors. Whether multimillion-dollar infringement

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expenses saved and the profits reaped,' (2) 'the revenues lost by the plaintiff,' (3) 'the value of the copyright,' (4) 'the deterrent effect on others besides the defendant,' (5) 'whether the defendant's conduct was innocent or willful,' (6) 'whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced,' and (7) 'the potential for discouraging the defendant.'" Manno v. Tenn. Prod. Ctr., Inc., 657 F. Supp. 2d 425, 433 (S.D.N.Y. 2009) (quoting Fitzgerald Publ'g Co. v. Baylor Publ'g Co., 807 F.2d 1110, 1117 (2d Cir. 1986)). Additionally, "[i]n the context of copyrighted music, courts often focus on the royalties that the infringer avoided paying." *Id.*

117. *See* CONVERGE, *Dark Horse*, *on* AXE TO FALL (Epitaph 2009).

118. *See infra* Part IV.

verdicts deter creativity depends on those verdicts' salience to musicians. Salience, in turn, depends on a number of factors, including the perceived likelihood of suit, the cost of litigation and amount of available damages, the cost of avoidance, and community norms. Critiques of *Williams* and its ilk implicitly presume salience. But a musician will not be deterred by a verdict of which they are unaware, no matter the size of the damages award. Even a musician aware of these outcomes would not worry about them if the musician believed nobody would hear their work, or that anybody who they might plausibly infringe would not sue. In short, disincentives depend on musicians' awareness and fear of enforcement mechanisms.

To assess the likelihood of a disincentive effect, I evaluate both objective and subjective indicators of salience. Objectively, I look to court records. If differently situated musicians are being subjected to a sufficient amount of litigation claiming infringement of musical works, it would provide evidence supporting a generally high perceived likelihood of suit, supporting the view that such litigation disincentivizes new creativity. Conversely, if few such cases are being brought, rational perception of the perceived likelihood of suit should be lower. Likewise, if suits tend to involve similarly situated musicians, any disincentive effect is more likely to be cabined to that context. The identity of the defendants also bears on the issue because disincentives ultimately turn on ability to pay. Whether suits are being brought against hitmakers and major labels—who may be able to shrug them off as the cost of doing business—or relatively unknown artists and independent labels matters.

Subjectively, I interviewed six musicians about their experiences in creating and recording music to attempt to determine if mechanisms other than litigation may be creating a disincentive effect. These interviews revealed wide disparities in knowledge of, and attention to, copyright law. Yet none of the interviewees felt that infringement verdicts had a meaningful effect on their creative practice, nor were any aware of instances of infringement disputes in their own communities. In sum, I find there is little, if any, reason to fear a significant disincentive effect attributable to high-profile infringement litigation yielding enormous damages.

A. Docket Analysis

Federal courts possess exclusive jurisdiction over claims of copyright infringement.[119] Thus, if rightsholders are bringing large numbers of lawsuits claiming infringement of musical works, the dockets of the federal district courts will hold the evidence. Accordingly, I analyzed hundreds of dockets to provide insight into the likelihood of a disincentive effect. In particular, I tried to identify instances of inherently problematic "bullying claims"—cases in which a major industry player sues a smaller player for infringement only of a musical work. In all those hundreds of dockets, I did not identify a single such case. Rather, the evidence from the dockets is not consistent with a strong disincentive effect.

1. Methodology

To conduct this analysis, research assistants and I used Bloomberg Law to search federal court dockets. To begin, we filtered all federal district court dockets based on several criteria. The search was limited to civil actions with "Nature of Suit" code "Property Rights - Copyright (820)."[120] To yield a reviewable number of results, results were further filtered based on Bloomberg's "Industrial Classifications"[121] to limit results only to cases including a party classified by Bloomberg as being part of the music industry. Several hundred dockets matched these criteria; broken down by year, the number of matching cases per year ranged from a low of fifty-one in 2021 to a high of 181 in 2019.

As discussed above, this Article focuses on the possible disincentive effect created by cases that involve a claim for infringement of a musical work by a work that is not alleged to sample the original work. For every docket matching these search criteria, we reviewed the complaint to

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119. *See* 28 U.S.C. § 1338(a) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to . . . copyrights.").

120. The "nature of suit code is a tool for categorizing the types of cases filed in the federal courts." *Frequently Asked Questions*, PACER, https://pacer.uscourts.gov/help/faqs/what-nature-suit-code [https://perma.cc/7MWM-PT34]. A plaintiff indicates the nature of suit by checking the appropriate box on the required Civil Cover Sheet form.

121. As part of its various service offerings, Bloomberg maintains the "Bloomberg Industry Classification Standard," in which it "organiz[es] legal entities and securities into consistent peer groups according to specific activities and risk categories." *Reference Data*, BLOOMBERG PRO. SERVS., https://www.bloomberg.com/professional/products/data/enterprise-catalog/reference/ (last visited Jan. 17, 2026). Without applying this additional filter, the search returns more than 1,000 dockets just for the first six months of 2024.

determine if the case involved this type of claim. All cases asserting such claims were included in the dataset and coded on several procedural issues—the docket number, the names of all plaintiffs and defendants, the court in which the case is docketed, the date filed, the procedural posture at the time of coding, whether the plaintiff proceeded pro se, and the date on which each entry was coded. We also coded for a number of substantive matters—the peak chart position of the accused song, the peak chart position of the artist credited with the accused song, and the presence of one of the "Big Three" labels as a defendant. Selection and coding took place from July 2024 to February 2026. The resulting dataset includes 156 cases filed between 2016 and 2025.[122] As of February 2026, eighteen of these cases were still pending.

Certain edge cases help explain the selection criteria. First, some cases involve claims for infringement of both the musical work and the sound recording. Where it clearly appeared from the complaint that both claims turned only on the presence of an uncleared sample, the case was omitted from the dataset. However, if the allegations suggested infringement of the musical work separate from the use of the uncleared sample, the case was included. Second, disputes over credit—i.e., cases in which the plaintiff alleges to have been involved in the creation of the accused work—were omitted. Such cases technically involve a claim that defendants infringed plaintiffs' musical works. However, the basic claim in such cases is that defendants were well aware of plaintiffs' involvement in the creation of their works and sought to cut plaintiffs out of any resulting profits. That type of case therefore does not involve the subconscious copying that animates the theorized disincentive effect.

a. Limitations of the Docket Dataset

I developed search criteria intended to surface relevant cases while not producing an impractically large number of total results. Resort to the Bloomberg industry filter poses the largest risk of omitting relevant results. For example, a case in which the rights to the original work are owned by an individual or entity not classified by Bloomberg as falling within the music industry could be omitted. Such a case would be relevant to the disincentive inquiry, and such a plaintiff might still enjoy the sizable resource advantage that would make the case inherently problematic.

122. The number of cases filed per year ranged from a low of thirteen in 2017 to a high of nineteen in 2025.

Alternatively, inaccurate references to industry players might lead to cases involving entities that would otherwise be properly classified being missed by the industry filter. Finally, lawsuits by individuals against individuals would likely be missed.

As a check on the possibility that the industry filter excluded a significant number of cases that would fit the criteria for inclusion in the dataset, I reviewed all cases filed in a randomly selected month (October 2016) using the same search criteria but without applying the industry filter. Of the 360 results, only one met the criteria for inclusion that had previously been excluded by the industry filter,[123] suggesting that the industry filter did not exclude many responsive cases.

However, these possible limitations of the dataset are unlikely to significantly impact the analysis. Because the most concerning cases would be those in which a major industry player sues a smaller player, the likelihood of clerical errors in the filing is relatively small. It is more likely that such errors caused lawsuits *against* major record labels to be missed. In addition, the results suggest that Bloomberg has accurately classified the most significant players in the industry—the "Big Three" record labels and their key affiliates, such as entities administering publishing rights—as all of these entities appear frequently in the results. Finally, as discussed in more detail below, none of the musicians I interviewed were aware of infringement disputes involving anyone they knew, suggesting at the very least that actions between smaller players are not widespread.

2. Results of the Docket Analysis

Many of the intuitions that follow from deconstructing the disincentive theory are borne out by analysis of the dockets. In particular, the theory suggests that most cases will involve popular songs and artists, backed by major labels. That is reflected in the data: of 156 cases analyzed, only six did not involve at least one of the "Big Three" labels (or one of their subsidiaries) as a defendant. Indeed, forty-six cases involved claims against two of these labels, and nineteen were brought against all three.[124] The

123. Arnett v. Jackson, No. 5:16-CV-872 (E.D.N.C., filed Oct. 27, 2016). It should be noted that Sony Music Holdings Inc. was named as a defendant in this case. Two others met the criteria for inclusion but were properly classified by Bloomberg and already included in the data set.

124. Befitting its status as the largest of the "Big Three" labels, Universal and its subsidiaries were defendants in eighty-nine cases, beating out Sony's eighty-six and Warner's fifty-nine.

prevalence of major-label defendants suggests opportunism motivates many of these suits.

That suggestion is further supported by analysis of the songs alleged to infringe and the artists behind them. For each case in the dataset, we identified the highest chart position of the accused song and the highest chart position ever achieved by the artist behind that song.[125] In 126 cases, the accused song charted in the Billboard Hot 100—including thirty-seven cases in which the accused song hit number one on the charts—and another eleven charted just below.[126] Turning to artists, in 147 cases, an artist behind an accused song charted in the Billboard Hot 100,[127] including *100* cases involving claims against an artist with a Billboard number one hit and thirty-one cases involving claims against an artist charting lower in the top ten. Popular artists were often behind accused songs that failed to chart—of the thirty such cases analyzed, ten involved an artist with a number one hit, and another eleven involved artists who had charted in the Hot 100 with other songs. In short, the vast majority of cases analyzed involved alleged infringement by very popular artists in very popular songs, backed by the most dominant companies in the industry. Those results are not unexpected, and do not suggest that a significant disincentive effect is likely to result.[128]

The outcome of the cases likewise does not suggest that musicians routinely face massive liability. The most frequent outcomes were victories for defendants: defendants prevailed on motions to dismiss in thirty-five cases, on summary judgment in twelve, and at trial in one.[129] Another

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125. Many cases involved multiple accused songs and artists. For these cases, while we coded the chart positions of each song and its associated artist, this analysis includes only the highest charting song and artist from each case.

126. Among accused songs that charted, the lowest peak chart position was 124.

127. One case involved a claim against an artist with a chart peak of 119.

128. A final point suggesting opportunism as the primary motive is the significant number of cases brought pro se. A total of thirty-nine cases were initiated pro se. In two of those cases, plaintiffs obtained representation during the pendency of the case; two other cases were initially brought by counsel, but counsel later withdrew leaving the plaintiff to proceed pro se. These plaintiffs were generally unsuccessful—eighteen lost on defendants' motions to dismiss, and another sixteen were dismissed on the court's own motion. Only two obtained settlements.

129. The lucky winner in that trial, Ed Sheeran, prevailed on summary judgment in a related case shortly thereafter. Structured Asset Sales, LLC v. Sheeran, 120 F.4th 1066, 1072–73 (2d Cir. 2024) ("On May 4, 2023, the jury in *Griffin* found that Sheeran did not infringe the *Let's Get It On* copyright. Twelve days later, the district court [in *Structured Asset Sales*] granted Sheeran's motion for reconsideration and awarded him summary judgment.") (footnote omitted).

twenty cases were dismissed on the court's own motion.[130] Settlements were also common, with twenty-three cases settling before the court adjudicated a motion to dismiss, twenty before summary judgment, and two before trial.[131]

The story told by the dockets is not one suggesting a disincentive effect. The absolute number of cases filed is relatively small, with no more than nineteen cases filed in a single year over the period analyzed.[132] Nearly all of these cases were brought against stars and major labels. Defendants obtained judgment in their favor in a plurality of cases and settled most of the rest. Perhaps these parties would prefer to be free of this type of opportunistic litigation, but evidence from the dockets suggests post-*Williams* lawsuits are nothing more than the cost of doing business.

B. Interviews

Evidence from the dockets shows that for most musicians there is little reason to fear infringement liability: almost all copyright suits are filed against those with the deepest pockets. But federal lawsuits are not the only way the specter of infringement can disincentivize creativity. A paucity of trials, and indeed of actively litigated cases more generally, does not settle the issue, as the existence of these disputes might on its own deter the creation of new works.[133] Even if the objective evidence does not bear it out, musicians may yet fear that writing a song could expose them to ruinous liability, thus chilling creation.

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130. Sixteen of these were brought *pro se*. These dismissals were often for failure to effect service on defendants.

131. It is likely that these figures slightly understate the number of cases that settled. Settlements were often accompanied by voluntary dismissals, but in twenty-two cases that were voluntarily dismissed by plaintiffs, we were unable to find evidence of a settlement. Some number of these presumably settled.

132. By way of comparison, in 2023 the performing rights organization Broadcast Music Inc. filed approximately fifty lawsuits against restaurants and bars alleging that defendants were publicly performing works to which BMI controls the rights without a license. Major labels were often co-plaintiffs in these lawsuits. *See, e.g.*, Broadcast Music, Inc. v. Warehouse 18 Venues, LLC, No. 5:23-CV-195 (W.D.N.C. Dec. 7, 2023).

133. *See, e.g.*, Fishman, *supra* note 46, at 664 (noting that "even a rare trial might exert some pressure on settlement values, as subsequent players continue to bargain in the shadow of the law"); García, *supra* note 24, at 872 (arguing that rising prevalence of anticipatory interpolation credits "can disadvantage smaller artists with fewer resources who simply can't afford to pay off all comers," and thus "may discourage these artists from creating music in the first place, to society's detriment").

To gain insight into the possibility that a disincentive lurks in the shadow of infringement—that is, the subjective view of musicians in gauging their own exposure—I interviewed musicians about their background and current musical endeavors.[134] The highlight of these interviews, for purposes of analyzing the disincentive theory, is that none of the interviewees felt that *Williams*, or the prospect of infringement liability more broadly, affected their creative process, nor were any aware of anything like an infringement dispute involving anybody they knew.

1. Creative Process

The interviewees possessed a range of backgrounds and experiences working in music; displayed varying levels of familiarity with, and regard for, copyright; and noted a number of concerns with the modern music industry. For example, one interviewee is a classical musician, composer, and music professor, who expressed gratitude for the existence and function of copyright law but noted occasional concern about "resemblances" in their compositions.[135] Another describes their work as a mix of folk, ambient, and experimental, runs a small label releasing music on cassette tape, and has "no understanding of copyright law."[136]

2. Lack of Plaintiff Interest Outside of the Biggest Hits

Several interviewees tied their lack of concern about liability to the fact that they were not working in pop music or did not have the high profile of a Robin Thicke or Pharrell Williams. They reported, for instance, that their absence from the charts made suing them unattractive for potential plaintiffs. One noted that " . . . I'm not worried about it. And I don't even think the rich people worry about it because they still make a ton of money. My hypothesis is that it's not stopping anyone."[137] Another stated: "I think if I was in the pop world it might be a little more of a concern," but it was

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134. I interviewed six musicians from October 2024 to January 2025. All interviews were conducted via videoconference and on a confidential basis. Each involved a loosely structured conversation running for approximately an hour. More information about the interview participants can be found in Appendix A, *infra*.

135. Interview with Interviewee C, classical and concert musician, composer, and retired professor of music (Jan. 7, 2025).

136. Interview with Interviewee B, independent musician and label operator (Oct. 24, 2024).

137. Interview with Interviewee A, independent musician (Oct. 2, 2024).

"not the kind of thing that keeps me up at night."[138] They further noted that they had never heard of a jazz musician suing another over similarities between songs.[139]

For one interviewee, the notion of being sued for infringement provoked the wry observation that "if they [hypothetical plaintiffs] want to do a dispute, I would be thrilled if they thought it were worth their while."[140] That person further noted that they "haven't run into any of those situations or circumstances, but if I did, I wouldn't be too worried about it."[141]

Only one expressed any concern, in that they "occasionally . . . have worried about resemblances, oftentimes unintentional, other times intentional in the sense of, oh, I'd like to write something that's a little bit like this, but then hoping thoroughly to disguise it and not do so, so to those degrees I can't say I've been without concerns about the matter."[142] But they further observed that "I don't think my music is of enough interest to anybody that it would ever in one way or another likely have consequences."[143] When asked what form that concern takes, they responded: "Normally enough to make me worry for a day or two and then try to gain what I believe the more wholesome perspective on it. So nothing concrete."[144]

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138. Interview with Interviewee D, touring and recording jazz musician (Jan. 7, 2025). Similarly, Interviewee B felt that

> most of the music I consume is very small scale, people working independently who also don't exist in any sort of industry sphere where they would come into contact with anyone who would do that sort of thing. It's in the same part of my brain that registers Billboard charts or the Rock and Roll Hall of Fame. It's the sort of thing that's kinda fun to go online and read Boomers' angry comments about, but at the end of the day, I don't think it impacts my own writing or consumption or anything day to day that much.

Interview with Interviewee B, *supra* note 136.

139. *Id.*

140. Interview with Interviewee F, touring and recording jazz and classical musician, arranger, music teacher, and video creator (Jan. 9, 2025).

141. *Id.* They did acknowledge, however, that "maybe my tune would change if it was a mega hit and I was making millions of dollars." *Id.*

142. Interview with Interviewee C, *supra* note 135.

143. *Id.*

144. *Id.*

3. Lack of Similarity

Several interviewees reported that they simply did not think their music was similar enough to popular genres and works to attract potential claims. One interviewee noted, for instance, that their band was "so off doing [their] own thing" that they did not worry about infringement allegations coming their way.[145] Another stated: "I'm not going to put out a song or record a song if I didn't think it was wholly my own," because "I would have to not be myself as an artist, I would have to just be like, 'hey, I'm gonna create a real banger here and it's gonna be a guaranteed success because it sounds kinda just like these ones and they were successes and people won't be able to really place it.' That isn't my process for composing, that isn't my process for creativity, so that wouldn't even be an authentic mode of creation. So I can't envision I would be doing that."[146]

4. Community Norms and Common Musical Practices

That is not to say that latent similarity to others' musical works never crossed any of the interviewees' minds. Significantly, however, copyright did not seem to enter into their concerns in this regard.

One recalled an instance when they realized something they wrote seemed to them vaguely similar to another local band in the same scene. Their concern was reputational rather than legal: "I don't want them to somehow hear our stuff and feel like we've copied them in any way. So it's more of like a cred thing."[147]

Another interviewee distinguished between intentional homage and inadvertent similarity, although they felt neither was in any sense wrong: "I feel like if I was to knowingly make a reference in that way, I think that's cool, and I think that's a different thing than trying to write your own melody and by accident stumbling backward into another song that you already know, that's a very different thing that I think would deter me from releasing something if I felt that I had done that."[148] When asked why they would not release their work in that scenario, they responded: "I guess it would just feel like it wasn't totally mine, which is kind of counter to

145. Interview with Interviewee A, *supra* note 137.
146. Interview with Interviewee F, *supra* note 140.
147. Interview with Interviewee A, *supra* note 137.
148. Interview with Interviewee B, *supra* note 136.

everything else I've said, but there's things that you know and things that you feel."[149]

Along these lines, many noted that similarities, both intentional and subconscious, are part and parcel of musical practice. One observed that "anyone who is involved in any creative pursuit knows that these things are cyclical, there's ideas that come and go over and over again."[150] As another remarked, "there's only twelve notes in our Western canon, it's bound to happen."[151] That sentiment was echoed by others, with one noting that almost anything in 3/4 or 4/4 time and a "standard major or minor key is a derivative of something that has already been written."[152]

5. *Williams* as Outlier

Despite its lack of impact on their processes, however, several of the interviewees expressed criticism of *Williams*. As many other commentators have remarked, one stated that "a groove alone can't be protected."[153] Even then, their concern was somewhat tempered, as they noted that "it's when bad actors make these moves in bad faith that I am much more critical."[154] One noted that "when the 'Blurred Lines' verdict came out, a lot of people that I follow were pretty shaken by the precedent they felt it set."[155] They elaborated: "I guess that's what didn't sit right with the people I was following about it is how do you quantify something like that? Like these have the same vibe, and the precedent that that sets of, well, if you get the right dozen people in the room together and they all agree that these are the same then you can have your livelihood sort of squashed?"[156]

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Ultimately, like the docket analysis, the interviews did not suggest a disincentive effect flowing from high-profile infringement verdicts. All the interviewees agreed that such cases did not affect their creative process. Yet they also tended to agree that infringement liability for small similarities

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149. *Id.*

150. Interview with Interviewee B, *supra* note 136.

151. Interview with Interviewee E, independent musician, composer, music educator, sound designer, and music technology developer (Jan. 8, 2025). *See infra* Appendix A.

152. Interview with Interviewee F, *supra* note 140.

153. Interview with Interviewee E, *supra* note 151.

154. *Id.*

155. Interview with Interviewee B, *supra* note 136.

156. *Id.*

between works is not consonant with the reality of how music is and always has been made. That sentiment suggests that reforms would be necessary to align copyright law with musical practice. The next Parts evaluate policy goals related to copyright and music, and potential reforms designed to achieve those goals.

III. THE ROLE OF INFRINGEMENT SUITS

The preceding Parts argue that both theory and evidence suggest that infringement suits in the music industry are unlikely to create a meaningful disincentive effect. But what function might they otherwise serve? As a policy matter, it would be unwise to reject the assumption of a disincentive in the absence of some other compelling role for the infringement remedy. At the same time, if infringement actions could advance pro-social goals without imposing meaningful creative disincentives, it would likewise be unwise to jettison a useful mechanism. Identifying beneficial goals advanced by infringement suits further helps tailor copyright law to achieve those goals, including the proposed reforms I develop in Part IV. In the same way, an understanding of the function of the infringement suits that do exist cautions against significantly curtailing the infringement remedy.[157] Such a change would mostly benefit entrenched interests without providing a countervailing benefit to society.[158]

In this Part, I contend that infringement suits in the music industry could, at least in theory, serve beneficial ends in that they constitute a second-best means of redistribution. As García notes, the existing "winner-take-all" structure of the market "leaves powerful content owners, platforms, and artists to successfully negotiate terms and conditions that benefit them to the detriment of differently situated, less powerful parties. Many contemporary copyright analyses ignore these distributive concerns, to their peril."[159] Infringement suits are one of the very few means by which those less powerful parties can leverage a greater and more appropriate share of the rewards. Such redistributions may be justified on two primary grounds:

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157. *See, e.g.*, Livingston & Urbinato, *supra* note 14, at 232 (arguing that "it is essential to craft, as best one can, an infringement standard that properly rewards creators and deters infringers").

158. *See, e.g.*, Lunney, *supra* note 85, at 3 ("From a distributive justice perspective, broadening copyright to ensure that superstars such as [Taylor] Swift earned more for their music would shift wealth from the poor to the rich. That is not distributive justice, but its opposite.").

159. García, *supra* note 24, at 874.

remedying inequities in the historical apportionment of profits in the music industry and mitigating windfall profits going forward. While a redistributive purpose may not be served by every verdict, neither do these verdicts appear likely to create a disincentive effect. This analysis casts in a different light the argument advanced by proponents of the disincentive theory that cases like *Williams* involve attempts to obtain damages for use of the basic building blocks of creativity: if both plaintiff and defendant have used the same building blocks, and defendant relied on the plaintiff's use in developing their own, it is unjust to allow the defendant to reap disproportionately more of the reward.[160] However, the lack of a large number of such suits, and the lack of success of most of the suits that are commenced, suggests this mechanism may be more effective in theory than in reality.

A. The Cost of Doing Music Business

Theory and evidence both suggest the same cause for infringement suits in the music industry: opportunism. The rational plaintiff will only incur the costs of suit if they expect to profit in the end. The economics of the situation work out such that, as Depoorter contends, "copyright holders have an incentive to attempt to enforce their interests as broadly as possible, as the foreseeable rewards exceed the accompanying risks. This calculation is what has given rise to the phenomenon of 'copyright trolling,' as well as a proliferation of uncontested false positives."[161] Opportunism extends beyond litigation as well—as García notes, it helps explain the rise of "clearance culture" in creative industries, because "once there is an established market for licensing a particular use, a use that was fair in theory may cease to be fair in practice."[162] Both García and Lemley rightly identify these practices as instances of rights accretion, a concept developed

160. It should be noted that some critics of the *Williams* decision recognize that notions of fairness may in part explain the jury's decision, even if those critics argue it is the wrong result for the public. *See, e.g.*, Raustiala & Sprigman, *supra* note 8 (noting that "[a]s a matter of basic fairness the jury's decision may make some sense. Maybe Marvin Gaye, having supplied some crucial inspiration for 'Blurred Lines,' should have just been given a share of the money the song took in"). *But see* Wu, *supra* note 43 ("The [Gaye] estate's lawyers, taking advantage of the fact that Gaye is considerably more popular and respected than Thicke, made a dispute between two groups of wealthy people seem like a battle between good and evil.").

161. Depoorter & Walker, *supra* note 15, at 344–45 (quoting James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 88 (2012)).

162. García, *supra* note 24, at 850.

by Gibson that he succinctly and memorably summarizes: "Better safe than sued."[163] I do not suggest this type of opportunism is harmless. But, in the specific context of evaluating the possible disincentive effect of high-profile litigation over inadvertent infringement of musical works, I take up Gibson's "normative questions: Do we care? Is accretive expansion of intellectual property rights a problem? If so, what are the possible solutions?"[164] In this context, one could plausibly answer the first question very simply: no.

The most likely scenario in which infringement actions will be brought, and the one I find in almost all litigated cases, is against a successful artist, backed by a major label, often involving a hit song.[165] Lawsuits of this type, rather than representing a dire threat to creativity, are best understood as the cost of doing business. To be clear, I would agree with the critics if theory or evidence showed a significant number of bullying lawsuits against independent artists. Having found none, it remains to examine whether practices in the shadow of the law nevertheless exert a disincentive effect. Here, again, I agree with both García and Lemley—the issuance of anticipatory interpolation credit is not *per se* problematic, but becomes so if it moves beyond the top of the market.[166] Yet, as with actual litigated cases, I find no evidence to suggest it has done so, and it seems unlikely that it ever will. Opportunistic capitalist overreach is both the cause and the scope of the problem.[167]

The fact remains, however, that existing law *permits* the assertion of bullying claims, whether in litigation or in the form of legal demands. I next evaluate plausible pro-social uses of these mechanisms before turning, in

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163. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007); *see* García, *supra* note 24, at 850 (describing "clearance culture" as the practice of "clearing music samples, book excerpts, film clips, and other media whose use most likely doesn't require licensing under the statute"); Lemley, *supra* note 24, at 390 (describing rise of anticipatory interpolation credits as "a form of the rights accretion that Jim Gibson warns us about").

164. Gibson, *supra* note 163, at 931.

165. *See supra* Part II.

166. *See, e.g.*, García, *supra* note 24, at 874 ("The potential concern here lies not with platforms and content owners engaging in private ordering . . . but rather with the resulting impact of those private deals on comparatively less powerful and less knowledgeable third parties who were not party to the agreement in question."); Lemley, *supra* note 24, at 426 ("Interpolation credit that reflects fear or uncertainty about the threat of copyright litigation, or opportunistic behavior by industry giants and trolls set up for that purpose, is not so good.").

167. *See, e.g.*, Lemley, *supra* note 24, at 401 (noting that "powerful forces in the music publishing industry seem to be pushing interpolation credit").

Part IV, to legal reforms that seek to limit problematic practices while still advancing distributive goals.

B. Infringement as Redistribution

In some cases, infringement verdicts could serve pro-social ends. Now as ever, financial rewards in the music industry accrue disproportionately to those at the top.[168] That discrepancy reflects, among other things, historical and ongoing inequality. As Arewa explains:

> [H]ierarchies of culture and power have played an important role in shaping both copyright and musical industry structures through which copyright is often applied. In the blues context, hierarchies relating to race were inextricably intertwined with copyright treatment of blues artists. Such hierarchies were by no means limited to race; hierarchies relating to gender were evident, for example, in the treatment of blues queens, whose role in the early commercial successes of blues was diminished as a consequence of their gender. Similarly, status hierarchies contributed to the treatment of musicians categorized within the "hillbilly" music genre, which was a corresponding category to "race" records for rural white performers. Treatment of performers by the music industry varied based on performers' assigned trade categories.[169]

Greene notes that "[t]he treatment of Black artists by the music industry and the copyright system reveals a pervasive history of infringement."[170] Greene further emphasizes that "[a] strikingly consistent characteristic of cultural appropriation is its one-way direction—white performers obtaining economic and artistic benefits at the expense of minority innovators.

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168. *See, e.g.*, Arewa, *supra* note 22, at 614 ("The unpredictability of potential rewards reflects and reinforces the star system now widespread in the music industry. This star system underscores the skewed distribution of rewards that are evident in the musical arena."); García, *supra* note 24, at 874 (noting that "the market for content creation is widely considered to be a winner-take-all market"); *cf.* Lunney, *supra* note 85, at 39–40 (observing that "a relative handful of super-popular games in copyright's tall peak command virtually all the demand").

169. Arewa, *supra* note 22, at 599.

170. Greene, *supra* note 22, at 368.

Copyright law has provided very little protection from such exploitation."[171] Indeed, as Mtima shows, the problem spans intellectual property law writ large: "Marginalized groups in the developed world as well as communities in many developing nations perennially suffer the misappropriation and inequitable exploitation of their indigenous knowledge and cultural expression, often at the hands of established intellectual property stakeholders, who in turn insist upon the utmost respect and protection for their own rights and interests."[172] Discussion of the role of infringement verdicts must bear in mind this legacy. Indeed, O'Connor, Mtima, and Rosario heralded the outcome in *Williams* as both consistent with copyright law and as countering an "older focus on literal melodic copying [that] systematically disfavored artists of color."[173]

More broadly, new works build on old ones.[174] As Arewa notes, "[m]usical borrowing, which includes a range of practices from copying to more subtle influences, is a pervasive aspect of musical production."[175] Livingston and Urbinato contend that "[a]lthough the practice of borrowing developed at a time when public bodies or private patrons supported musicians, the notion of a shared cultural heritage, to which we are all heirs, arguably has as much relevance today as it did during the time of Bach and

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171. *Id.* at 368–69; *see also* Arewa, *supra* note 62, at 617 (noting "a general pattern in which '[Elvis] Presley often took part of the songwriting credit on tunes by black songwriter Otis Blackwell and frequently covered songs recorded by black artists for struggling independent labels'") (citation omitted). Thus, while Wu's critique of *Williams* foregrounds the importance of borrowing throughout musical history, his examples evince exactly this kind of appropriation. *See* Wu, *supra* note 43 ("Everyone knows that the Rolling Stones borrowed their style from Chuck Berry and other rhythm-and-blues artists. Rush's first album sounds a lot like Led Zeppelin—who copied Robert Johnson, among others.").

172. Mtima, *supra* note 22, at 482.

173. O'Connor et al., *supra* note 19; *see also id.* ("With its victory, the Gaye estate may have finally found a way to legal recognition and respect for the valuable musical contributions of artists of color.").

174. *See, e.g.*, Buccafusco, *supra* note 22, at 1644–45 (noting that "cognitive neuroscience . . . increasingly suggests that creativity is dependent on memory"); Olufunmilayo Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 485 (2007) (discussing "the myriad ways in which new creations may involve borrowing, other types of copying and uses of existing texts, use of broader cultural conventions that might inform varied texts, and interaction with formulaic aspects of texts"); Fishman, *supra* note 8, at 1916–17 (noting that "[m]usical traditions like jazz, blues, and hip-hop rely heavily on musical borrowing that copyright's basic machinery has had trouble processing"); Depoorter & Walker, *supra* note 15, at 330 ("Every form of creative expression—from the crudest imitation to the highest reaches of originality—draws in part from prior art, both in form and substance.").

175. Arewa, *supra* note 62, at 550.

Beethoven."[176] But the winner-take-all nature of the music industry permits the few to appropriate substantially all of the monetary rewards attributable to that shared heritage, and indeed to dictate the terms on which everyone else participates.[177] As Lunney argues, "[i]f all or most of what copyright does is enrich the one percent, then it cannot be justified. Such a copyright regime is neither fair, efficient, nor just."[178]

Lawsuits for copyright infringement may be a crude method of clawing back some of the windfall profits obtained by the lucky winners of the copyright lottery,[179] but few other extant options in the law present themselves.[180] Infringement litigation at least has the potential to provide a remedy for individual instances of wrongful appropriation. Given that the outcomes in even the most widely criticized cases still leave the defendants with seven-figure profits,[181] one might find the current state of infringement jurisprudence preferable because it preserves a mechanism for redistribution.[182]

That optimism is, however, tempered by analysis of the dockets and decided cases. As discussed in Part II, while several infringement actions are brought each year, many appear frivolous and most are unsuccessful. In multiple cases close enough to go to the jury, courts have found for defendants as a matter of law,[183] even where the jury has found

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176. Livingston & Urbinato, *supra* note 14, at 290–91.

177. *See, e.g.*, Haley, *supra* note 16, at 1625–27 (discussing dominance of the music industry by "Big Three" labels).

178. Lunney, *supra* note 85, at 7.

179. *See, e.g.*, Arewa, *supra* note 22, at 613–14 ("For a creator making a decision about whether to produce a new work (i.e., invest in her creative portfolio), a lottery model may provide a more instructive picture of the creator's investment decision.").

180. Legislative reforms directly addressing these disparities would undoubtedly provide better solutions. *See, e.g.*, K. J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1223–25 (2008) (proposing statutory levies on internet music sales and on works whose term of protection was extended by the Copyright Term Extension Act of 1998 as a way to redress "appropriation of creative product" from Black artists facilitated by copyright law).

181. *See supra* note 76.

182. I recognize that, as Raustiala and Sprigman contend, "[b]asic fairness is not the goal of our copyright system. The reason we have copyright . . . is to adequately incentivize artists to produce new creative works. Copyright, at bottom, is about ensuring the flow and growth of culture." *See* Raustiala & Sprigman, *supra* note 8. But if, as I suggest, infringement actions are not impeding creativity, there is no reason we cannot leverage the mechanism to advance goals like fairness and equity.

183. *See, e.g.*, Skidmore v. Led Zeppelin, 952 F.3d 1051, 1079 (9th Cir. 2020) (affirming judgment for defendant following jury verdict for defendant).

infringement.[184] In terms of directly advancing distributive goals, actions for infringement do not seem likely to yield significant, systemic results. Additionally, it should be noted that the distributive story is not always straightforward. Shabalala identifies complexities that arise when a member of a community engages in a form of exit by taking some traditional knowledge or cultural expression outside the community to claim proprietary rights, such as copyright, over that knowledge or cultural expression.[185] As he argues, such an individual may thus violate a duty owed to the community.[186] This concern mirrors to some extent the common building-block argument against infringement liability in cases like *Williams*—in both situations, an individual lays claim to a piece of common heritage that does not properly belong to any individual. Shabalala further contends that such actions can imperil the protection of traditional knowledge and cultural expression.[187] That possibility thus complicates the argument that infringement actions can advance the goal of achieving more equitable distribution of windfall profits in the music industry. But neither does it suggest that the ultimate infringer should be relieved of liability. Rather, it underscores the need for further inquiry to develop a more comprehensive and effective legislative response.[188]

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184. *See, e.g.*, Gray v. Hudson, 28 F.4th 87, 92 (9th Cir. 2022) (affirming district court's vacatur of jury verdict for plaintiffs and entry of judgment as a matter of law in favor of defendants).

185. *See* Dalindyebo Shabalala, *Do We Need Exit Rules for Traditional Knowledge? Lessons from Solomon Linda and the "Mbube"/"The Lion Sleeps Tonight" Case*, 12 QUEEN MARY J. INTELL. PROP. 532, 533 (2023).

186. *Id.* at 550 (suggesting the need "to establish that duties and obligations need to be attached to *both* the work and the person from the community when they exit/work outside the community") (emphasis added).

187. *Id.* at 533 (raising, in the context of protection for traditional knowledge and cultural expression, "the question of whether the primary problem for much of what we think of as misappropriation is that insiders, members of the community, cross the boundary of the community and 1) make claims themselves, or 2) collaborate with outsiders to make claims, or 3) engage in relationships (commercial or otherwise) with outsiders that result in the outsider misappropriating the TK/TCE").

188. *See id.* at 549 (arguing "for a separate and distinct form of protection for traditional knowledge and traditional cultural expressions precisely because the attempt to stretch copyright to accommodate these concerns weakens and makes copyright less effective as a tool for commercialization of specific kinds of work").

IV. ALIGNING REMEDIES

While the current state of infringement actions in the world of music may be tolerable, that is not a reason to avoid seeking a better system still. This Part first posits policy goals that ought to be served by copyright law and the infringement remedy. It then develops a proposed reform to mitigate problematic trends of financialization in the music industry—a limitation on damages in the form of an imposed election of the lesser as between statutory and actual damages. This limitation would apply to claims for inadvertent infringement of a musical work unless brought by an original author of the infringed work or their statutory successors. Such a limitation would cut off a troubling source of opportunistic litigation and mitigate the trend of anticipatory interpolation credits while having relatively little negative impact on musicians' ability to monetize their work.

A. Policy Goals

The constitutional purpose of copyright law is "[t]o promote the Progress of Science and useful Arts".[189] The primary goal of copyright, then, is to provide incentives for both the creation and dissemination of new works.[190] And, throughout the history of American copyright law, courts have emphasized economic incentives to the exclusion of any other form of incentive.[191] The disincentive theory fits neatly into this approach to

189. U.S. CONST. art. I, § 8.

190. *See, e.g.*, Haley, *supra* note 16, at 1664 (observing that "[t]he constitutional authority for the existence of copyright law suggests an incentive-based rationale"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[C]opyright supplies the economic incentive to create and disseminate ideas.").

191. *See, e.g.*, Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1751–52 (2012) (noting that "[a]ccording to utilitarian theory, copyright law provides the incentive of exclusive rights for a limited duration to authors to motivate them to create culturally valuable works" because "[w]ithout this incentive . . . authors might not invest the time, energy, and money necessary to create these works"); Cohen, *supra* note 12, at 142 (arguing that "[t]he statement that the purpose of copyright is to furnish incentives for authors has attained the status of a rote incantation"); Gilden, *supra* note 12, at 1021 (noting that "[c]opyright law in the United States today is typically justified by the need to provide authors with economic incentives to create original works"); Jake Linford, *Copyright and Attention Scarcity*, 41 CARDOZO L. REV. 143, 148–47 (2020) (noting that "[u]nder the modern neoclassical economic justification, the Copyright Act aims to incentivize creation by creating

copyright—it posits that fear of costly litigation will cause musicians to expect reduced or even negative financial returns and withhold new works as a result. The more nuanced version of the theory developed above, however, necessitates a similarly targeted approach to reform, one that is more attentive to non-economic incentives to create.[192]

Although I find infringement actions in the music industry unlikely to impede creativity, the current state of copyright jurisprudence leaves open the possibility of increasing litigation to the point that the disincentive effect arises. If such actions served the distributive goals discussed in the previous Part, that might counsel in favor of leaving well enough alone. But some claims seem categorically unlikely to serve any pro-social purpose: claims brought by financial players that have acquired copyrights, perhaps with the sole purpose of bringing claims for infringement. Indeed, at first blush, buying potential claims would not seem to advance any copyright goal. A claim for infringement by a finance firm that has bought a copyright with the intention of using it to bring suit, or otherwise simply exploiting its exchange value, does not incentivize creativity; Structured Asset Sales, LLC is not in the business of creating original works.[193] Such entities would also be disproportionately likely to demand anticipatory interpolation credit. As Lemley documents, "there are companies out there affirmatively promoting [interpolation credits]. Primary Wave has been buying up rights to classic songs, including Bob Marley, and approaching songwriters to offer them use of the songs in their own new works in exchange for co-

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artificial scarcity, providing a set of rules that allow the author to 'realize whatever exchange value (if any) their works of authorship are capable of commanding'") (citation omitted).

192. *See, e.g.*, Fromer, *supra* note 191, at 1747 (developing the concept of "expressive incentives," which encompasses "the ways in which copyright and patent law can protect creators' labor and personhood interests and employ rhetoric communicating concern for these 'expressive incentives'"); Cohen, *supra* note 12, at 143 (noting that "[e]verything we know about creativity and creative processes suggests that copyright plays very little role in motivating creative work"); Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 232 (2014) (observing that "the preeminence of economic analysis has gradually begun to diminish over the past two decades"); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 514 (2009) ("Psychological and sociological concepts can do more to explain creative impulses than classical economics."); Eric Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. STATE U. L. REV. 623, 641 ("One thing that humans don't have in economic models, but do have in real life, is intrinsic motivation.").

193. *See* Structured Asset Sales, LLC v. Sheeran, 120 F.4th 1066, 1070 (2d Cir. 2024) ("Plaintiff-Appellant Structured Asset Sales, LLC . . . is a firm that purchases royalty interests from musical copyright holders, securitizes them, and sells the securities to other investors.").

authorship credit.[194] These practices advance neither copyright's purpose nor other pro-social goals, and copyright law ought not tolerate them.

B. Deterring Claim-Buying

The most significant feature of copyright law in incentivizing claim buying is the outsized damages available in infringement actions. Reducing the potential exposure of a musician creating a new work would diminish incentives to sue. I therefore propose limiting the damages available in inadvertent infringement suits over musical works as a mechanism by which to limit that potential exposure. The limitation would apply to all non-author plaintiffs who acquired the copyright in question, while leaving the standard array of remedies available to musicians who retain copyright in their works and to their statutory successors.

A copyright is an exploitable asset, and the financial world has taken note. Recent years have seen increasing financialization in the music industry, from popular artists selling the rights to their back catalogs[195] to the outright securitization of catalogs of copyrights.[196] From the standpoint of economic incentives, such activities are both expected and encouraged. At the same time, an increased presence of purely financial players in the music industry in turn increases the likelihood of opportunistic litigation. These entities exist outside any artistic community and therefore are not influenced by community norms. Rather, they have every incentive to rigorously police even the most tenuous claim of infringement to obtain valuable interpolation credits[197] or seek windfall damages awards.[198] The

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194. *See* Lemley, *supra* note 24, at 402. As Lemley notes, companies are more likely than artists to demand such credits, in part because "they see interpolation credits as an untapped revenue source." *Id.* at 402–03 (noting instances of musicians opposing the practice of interpolation credits, even when credit is demanded by the musician's own publisher).

195. *See, e.g.*, Jem Aswad, *Bob Dylan Sells Recorded-Music Catalog to Sony Music*, VARIETY (Jan. 24, 2022), https://variety.com/2022/music/news/bob-dylan-sells-recorded-music-catalog-to-sony-music-1235161614 (reporting on sale of "Bob Dylan's entire back catalog of recorded music, as well as the rights to multiple future new releases" to Sony Music Entertainment for as much as $200 million, and noting late 2020 sale of Dylan's "song catalog to Universal Music Publishing for an amount sources say was near $400 million").

196. *See, e.g.*, *Structured Asset Sales*, 120 F.4th at 1070 (noting that plaintiff in infringement suit against Ed Sheeran "is a firm that purchases royalty interests from musical copyright holders, securitizes them, and sells the securities to other investors"); *see* Haley, *supra* note 16, at 1616–19 (describing assetization process in the music industry).

197. *See, e.g.*, Lemley, *supra* note 24, at 402 (noting that "Primary Wave has been buying up rights to classic songs, including Bob Marley, and approaching songwriters to offer them use of the songs in their own new works in exchange for co-authorship credit").

increasing presence of these types of firms in the industry thus increases the risk of all types of infringement claims, and with them the possibility of a real disincentive effect.

There are many different ways a damages limitation could function. From the perspective of discouraging claim buying, the most thorough approach would be to bar damages of any kind in subconscious infringement cases. Such a rule would amount to a no-cost compulsory license. However, in light of the most prevalent and predicted types of infringement actions,[199] that rule would obviate the potentially beneficial goals of infringement actions previously identified, thus favoring popular artists and major labels at the expense of everyone else.[200]

Another approach would be to bar one or the other category of damages. That approach too would not be a close fit for the types of cases that exist. A rule that precludes an award of statutory damages would do little to discourage opportunistic plaintiffs, for whom multi-million-dollar actual damages awards constitute most of the incentive to sue. Conversely, barring actual damages but leaving open statutory damages would leave little known independent musicians susceptible to claims brought for reasons that are not consonant with policy goals.

Accordingly, I propose a damages limitation that precludes a non-author plaintiff from electing the type of damages it seeks to recover, and instead defaults to the lesser of statutory or actual damages in each case. This approach leaves open the possibility of meaningful recovery in appropriate cases while insulating musicians from both opportunistic suits and bullying claims. A musician who feels they have been ripped off by a hitmaker can still obtain significant redress, but the opportunist or claim buyer will have less incentive to sue without the ability to pursue a multi-million-dollar judgment. Bullying claims against independent musicians will be both less likely and less impactful given the very low amount of actual damages that might be available. Among these approaches, the imposed election best addresses both the prevalent and predicted types of actions.

Applying the imposed damages election to claims brought by non-author plaintiffs that acquire the copyright in question significantly mitigates this risk without unduly interfering with musicians' ability to market the

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198. *See, e.g.*, *Structured Asset Sales*, 120 F.4th at 1070 (noting that plaintiff "owns a one-ninth interest in the royalties from *Let's Get It On*" in the form of one-third of the one-third share originally owned by the song's co-writer Ed Townsend).

199. *See supra* Sections I.C, II.A.

200. *See, e.g.*, Lunney, *supra* note 85, at 7.

copyright in their works. It would completely eliminate the possibility of a windfall; the most such a plaintiff could ever receive in a suit would be $150,000, and then only if the infringement was so egregious that it justified awarding the maximum possible statutory damages for a willful infringement.[201] Since the damages limitation would only apply in cases of inadvertent infringement, it would not impair valuable licensing markets. For example, the market for licensing a musical work for inclusion in television and film would be unaffected, as using a copyrighted work in such a medium would not be inadvertent. Moreover, injunctive relief would remain available.[202]

I recognize, however, that such a rule could cut off a potential source of income for musicians. Ownership of copyright in a song that is arguably infringed by a big hit comes with the potential to bring a very lucrative lawsuit. Limiting the damages obtainable by an assignee in such a case dramatically reduces the value to an acquirer; to obtain the full litigation value would require the original owner to bring suit themself. Such a rule would also be expected to diminish the amount an acquirer would pay in all circumstances as the rights acquired no longer carry the full range of possible damages.

At the same time, the connection between these theoretical costs and the goals of copyright is tenuous at best. From an economic incentives standpoint, any effect on creativity indulges the notion that a musician's decision whether to create a new work turns on the belief that the work they have not yet created will someday be infringed by another work that also has not yet been created, and that the latter work will be successful enough to warrant a federal lawsuit. Preserving the ability to assign such a claim will not induce more creativity. But it would incentivize further financialization of the music industry, pulling more and more of the already scarce financial rewards away from any person or entity even tangentially involved in the creative endeavor.[203] Accordingly, limiting an assignee to the lesser-damages election would help reduce opportunistic suits without significantly impacting creative incentives.

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201. *See* 17 U.S.C. § 504(c)(2).

202. *See* 17 U.S.C. § 502(a) ("Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.").

203. *See, e.g.*, Haley, *supra* note 16, at 1666 (observing that "the current form of the streaming music market entails the severing of the relationship between any given work and the financial rewards attributable to that work").

The duration of copyright requires consideration of imposing a limitation on the author's heirs.[204] One potential approach follows from the Copyright Act's provisions for termination of transfers. Section 203, which provides for termination of a transfer "of any right under a copyright," exercisable by the author or, after the author's death, by a successor specified by the terms of the statute.[205] Congress provided the termination right in response to "the information-deficit-driven valuation problem" that arises from the fact "that author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position."[206] Congress also placed limits on the ability to contract away the termination right.[207] Allowing the right to obtain the full array of remedies to descend according to the statutory order of succession would seem to be in keeping with the policy underlying the termination of transfers, although it might carry some increased risk of opportunistic litigation.

C. Evaluating Alternative Reforms

Disputes over inadvertent infringement of musical works have provoked a variety of proposed reforms. Many seem to take a strong disincentive effect as given, resulting in proposals that, at best, would do little to achieve the policy goals discussed above. But these proposals must also be evaluated in light of the evidence that the vast majority of the litigation in this space is pressed against superstars and major labels. While many reforms might be effective at reducing that litigation, the benefits would accrue almost exclusively to the existing winners in a winner-take-all market. In my view, the imposed damages election developed above would provide a more tailored solution.

As a starting point, clear rules in this arena arguably present clear advantages. Even when considering the possibility that constraints can enhance creativity, Fishman shows that broader protection with clearer rules will pose less of an obstacle to creativity than narrower protection with

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204. Indeed, it was the estate of Marvin Gaye that brought the claim in *Williams*. Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

205. 17 U.S.C. § 203(a)(1).

206. Lydia Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1345 (2021).

207. *See* 17 U.S.C. § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.").

indefinite rules.[208] In later work, grappling in part with the result in *Williams*, Fishman thus proposes a bright-line rule: that melody alone should be protected.[209] The starting point of his analysis is historical, as he shows that courts throughout the nineteenth and twentieth centuries treated melody as the only protectable component of a musical work.[210] But the reason for his proposed solution is purely utilitarian:

> The conventional, melody-obsessed wisdom is the right approach after all—it's just the rationale that needs to change. Infringement doctrine's emphasis on a work's melody should be justified not as a recognition of its composer's creativity but rather as a facilitation of downstream composers' future creativity. Music cases have provided subsequent generations with what by copyright's standards is an uncharacteristically clear boundary to work around: to avoid infringement, avoid the tune. Because music is perceived to be relatively modular, with melody often distinguishable from other constitutive elements, both downstream composers and judges can confine their infringement inquiry to a narrow field.[211]

The clarity gained by such a rule comes at too high a cost, however. First, as Fishman himself notes, exclusive focus on melody "reflects European aesthetic norms that don't represent much of modern musicmaking, especially within genres pioneered by black artists."[212] His choice of a melody-only rule, however, reflects concern that decisions like *Williams* "increase the number of musical elements that are fair game in infringement actions," to nobody's benefit.[213] That reasoning carries more force in a world rife with infringement suits creating significant disincentive effects. In the absence of such effects, however, it imposes distributive issues to solve a problem that does not warrant doing so.

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208. *See* Fishman, *supra* note 67, at 1387 ("[F]rom a creating-around perspective, uncertain copyright scope has an added layer of perniciousness. Even if a copyright owner overclaims his actual property right, downstream creators could create around it so long as the wrongly extended boundaries are clear. . . . If the boundaries are fuzzy, however, the chill on create-around efforts compounds the overclaiming problem.").

209. *See generally* Fishman, *supra* note 8.

210. *See id.* at 1870–82.

211. *Id.* at 1869–70.

212. *Id.* at 1916.

213. *Id.*

Second, the melody-only rule further embeds what amount to aesthetic judgments about what elements of music are worthy of protection.[214] Here, I agree with Fishman that although legal rules impact the ways in which music develops, those impacts are not inherently problematic.[215] At the same time, law carries expressive value, and a rule that so clearly privileges certain aesthetic approaches should be a rule of last resort. In one of copyright's classic cases, Justice Holmes opined that "[a] rule cannot be laid down that would excommunicate the paintings of Degas."[216] Neither, absent some more compelling justification, should we adopt a rule that would denigrate The Dead C.

Another approach, advocated by Livingston and Urbinato, would alter the standard of similarity necessary for a finding of infringement. They propose that "courts should increase the standard for infringement in music cases to 'striking similarity'"—that is, "courts should require plaintiffs to prove that the two works in question are so similar to each other that only copying can explain the resemblance."[217] They contend that this standard "would recognize the inevitable similarities between two musical compositions in the same genre," "acknowledge the limitations of Western tonal music and the wealth of public domain music that constitutes the field from which all modern composers harvest," and "discourage plaintiffs with weaker cases who are hoping to spur financially successful defendants to settle."[218] Raising the bar in this way might, in theory, discourage some opportunistic litigation. But its deterrent effect would be indirect—with a higher bar to clear, more cases would be susceptible to dismissal or summary judgment. Given the amount of damages potentially available, not many opportunistic plaintiffs would be deterred.

In a similar vein, Craig proposes reversing the "total concept and feel" test of substantial similarity into a rule that "[i]f a defendant's work is substantially different, in its total concept and feel, from the plaintiff's

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214. As Fishman puts it, by treating melody as the only protectable component of a musical work, "[c]onsciously or not, courts adopted the view of nineteenth-century European music theorists and critics who saw melody as a musical work's aesthetic core." *Id.* at 1869; *see also* Arewa, *supra* note 62, at 625 (arguing that courts' "focus on melody rather than on harmony or rhythm . . . reflects a bias towards aspects of musical expression that lend themselves to notation").

215. *See* Fishman, *supra* note 8, at 1915 ("Law-induced redirection, in itself and without more, is normatively neutral—neither benefit nor cost. That music, or any art form, shifts with the legal winds does not ipso facto make it less valuable as a work of authorship.").

216. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

217. Livingston & Urbinato, *supra* note 14, at 291.

218. *Id.*

work, it is not an infringing copy thereof."[219] This approach would likewise only indirectly deter opportunistic suits, especially when the later work is in a similar genre to the earlier work.

Bell and Parchomovsky take aim at damages. For cases involving "inadvertent infringement," a category that would include the claims of infringement with which I am concerned, they advocate limiting potential remedies to compensatory damages, a rule that "would afford copyright owners an opportunity to collect full compensation for the losses they suffered as a result of the infringement, without possibility for windfalls."[220] Like the Fishman approach, this rule might reduce the amount of opportunistic litigation, but at the cost of disparaging infringed works. To treat the damages awards in cases like *Williams* as representing a windfall for the plaintiff implicitly regards the plaintiff as undeserving of any remedy. The damages assessed in these cases represent a jury's view of a fair apportionment of the profits when a later work incorporates an earlier one.[221] If the plaintiff in such a case is entitled to any remedy at all, why should they not share in the profits to the extent those profits are deemed attributable to their work? Put otherwise, if a jury determines that 40% of the success of a hit song is attributable to an earlier work that the defendant used without credit or compensation, allowing the defendant nevertheless to keep close to 100% of the profits represents a windfall in favor of the defendant.

Fishman asserts that "[a]chieving a copyright system that is sensitive to a wider array of creators is of course a worthy goal, but decisions like 'Blurred Lines' haven't shown us how to get there."[222] But neither have critics of *Williams* shown that it creates a significant disincentive problem, much less one that warrants changes to copyright law that would seem mostly to advantage incumbents. The damages limitation I propose here, applied only in cases brought by a non-author plaintiff, would reduce problematic litigation and align copyright law with creative practice.

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219. Carys J. Craig, *Transforming "Total Concept and Feel": Dialogic Creativity and Copyright's Substantial Similarity Doctrine*, 38 CARDOZO ARTS & ENT. L.J. 603, 651 (2020).

220. Bell & Parchomovsky, *supra* note 64, at 723.

221. *See supra* note 114 and accompanying text.

222. Fishman, *supra* note 8, at 1918.

V. CONCLUSION

A decade after *Blurred Lines*, the feared creative disincentive flowing from infringement litigation is susceptible to evaluation. Deconstructing the disincentive theory suggests that a significant disincentive effect is unlikely to occur. That conclusion is bolstered by both analysis of the dockets of the federal district courts and interviews with musicians working in a variety of genres and capacities. Yet the opportunity to reconsider the function and goals of the infringement remedy should still be taken. By limiting the type of damages available in certain categories of infringement disputes involving musical works, copyright law might discourage opportunistic and wasteful litigation.

APPENDIX A: BRIEF DESCRIPTIONS OF EACH INTERVIEWEE

Interviewee	Interview Date	Role
A	October 2, 2024	Independent musician
B	October 24, 2024	Independent musician and label operator
C	January 7, 2025	Classical and concert musician, composer, and retired professor of music
D	January 7, 2025	Touring and recording jazz musician
E	January 8, 2025	Independent musician, composer, music educator, sound designer, and music technology developer
F	January 9, 2025	Touring and recording jazz and classical musician, arranger, music teacher, and video creator