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Tonal Concept and Feel

Joseph P. Fishman

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INTRODUCTION

In the world of music-copyright litigation, "feel" has lately become a controversial word. 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,"[1] 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.[2] Pharrell Williams, one of the defendants, similarly

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1 *See* Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

2 *See, e.g.*, Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants at 3, Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018) (No. 15-56880) [hereinafter Brief of Amici Curiae] ("[T]he verdict in this case, if based upon the music at all, was based upon the jury's perception that the overall 'feel' or 'groove' of the two works is similar, as songs of a particular genre often are."); Abraham Bell & Gideon Parchomovsky, *Restructuring Copyright Infringement*, 98 TEX. L. REV. 679, 681 (2020), https://texaslawreview.org/wp-content/uploads/2020/03/Parchomovsky.Printer.pdf [https://perma.cc/G3K8-3F9E] (arguing that, "while 'Blurred Lines' shared some of the 'feel' of Gaye's 'Got to Give It Up,' . . . . [the] jury decided that the appropriation of the mood and feel of Gaye's song was enough to ground a decision of infringement"); Peter Lee & Madhavi Sunder, *The Law of Look and Feel*, 90 S. CAL. L. REV. 529, 541 (2017), https://southerncalifornialawreview.com/wp-content/uploads/2017/03/90_529.pdf [https://perma.cc/B3JH-6MB7] (characterizing the copyright infringement suit as a dispute "involving the 'feel' of a 1970s song"); Amy X. Wang, *Why All Your Favorite Songs Are Suddenly Being Sued*, ROLLING STONE (Aug. 2, 2019, 12:46 PM), https://www.rollingstone.com/pro/features/katy-perry-led-zeppelin-ed-sheeran-music-lawsuits-865952/ [https://perma.cc/232J-UD2U] ("Throughout most of the last century, copyright lawyers and music creators held a default view that copyright claims were valid for lyrics and melody, but not for more abstract details such as rhythm, beats and feel. The 'Blurred Lines' case forever changed the status quo when [the] court . . . [held the appellants liable] for creating too similar of a 'vibe' to Gaye's 1977 hit 'Got to Give It Up.'"); *7 Reasons the 'Blurred Lines' Verdict Should Have Everyone Spooked*, BET (Mar. 13, 2015), https://www.bet.com/music/photos/2015/03/7-reasons-the-blurred-lines-verdict-should-have-everyone-spooked.html#!031315-music-pharrell-robin-thicke [https://perma.cc/UNC8-LB2K] (criticizing the verdict for creating an environment where "[t]he [f]eel of a [s]ong [c]an [n]ow [b]e [c]opyrighted").

tried to explain his disagreement with the outcome by insisting that "you can't copyright a feeling."[3]

In the few years since, the same criticism has been leveled against subsequent, equally newsworthy infringement trials involving Led Zeppelin and Katy Perry.[4] Those claims eventually lost, unlike the one in the *Blurred Lines* case, but they still proved remarkably hard to shake. After failing to secure a dismissal on summary judgment,[5] Led Zeppelin won at trial, only to see that verdict overturned on appeal; it took a rare en banc rehearing for the noninfringement verdict to be reinstated—six years after the case began.[6] The Katy Perry claim, meanwhile, would have ended in liability had the trial judge not vacated the jury's infringement verdict, a decision that at the time of this writing remains on appeal.[7]

Where a song's compositional details end and its overarching gestalt begins is, of course, endlessly contestable. Pretty much everyone agrees that a song's feel—whatever that is—shouldn't be proprietary. Indeed, in the *Blurred Lines* case itself, the Gaye estate expressly backed away from the notion that its claim was seeking protection for any such thing.[8] The trouble is trying to define what this unprotectable thing called feel is in any given case.

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[3] Ryan Reed, *Pharrell Reflects on 'Blurred Lines' Lawsuit Verdict: 'You Can't Copyright a Feeling'*, ROLLING STONE (Nov. 4, 2019, 9:41 PM), https://www.rollingstone.com/music/music-news/pharrell-rick-rubin-blurred-lines-lawsuit-verdict-908084/ [https://perma.cc/X695-R354].

[4] *See* Karl Fowlkes, *The Katy Perry Copyright Case Is Worrisome.*, MEDIUM: THE COURTROOM (Aug. 8, 2019), https://medium.com/the-courtroom/the-katy-perry-copyright-case-is-worrisome-c1385ac3e424 [https://perma.cc/7TXH-KV4C] (observing that, after a jury's finding of infringement in the Katy Perry copyright case, "[p]eople in the music business are worried that this ruling will lead to more rulings that unfairly penalize songwriters for making use of simplified musical elements, like a basic note or a song's 'feel'"); Bobby Owsinski, *Songwriters Could Actually Catch Break As DOJ Weighs In On "Stairway To Heaven" Case*, HYPEBOT (Sept. 2, 2019), https://www.hypebot.com/hypebot/2019/09/songwriters-could-actually-catch-break-as-doj-weighs-in-on-stairway-to-heaven-case.html [https://perma.cc/HG3L-FHMC] (contending that, "[f]or the past few years," high-profile copyright infringement lawsuits have placed "songwriters . . . under siege in the courtroom," where "[i]t seems like the feel of the song has more to do with the actual verdict than the melody").

[5] *See* Skidmore v. Led Zeppelin, No. CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006 (C.D. Cal. Apr. 8, 2016).

[6] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020) (en banc).

[7] *See* Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist LEXIS 46313 (C.D. Cal. Mar. 16, 2020); *see also* Bill Donahue, *Katy Perry Copyright Accuser Takes Case To 9th Circ.*, LAW360 (Apr. 16, 2020, 3:20 PM), https://0-www-law360-com.ben.bc.yu.edu/articles/1264505/katy-perry-copyright-accuser-takes-case-to-9th-circ-.

[8] *See* Reporter's Transcript of Trial Proceedings Day 7 – P.M. Session at 82, Williams v. Bridgeport Music, Inc., No. CV 13-06004-JAK (AGRx) (C.D. Cal. Mar. 5, 2015), ECF No. 339 ("This is not about era or feeling. This is about a specific song *Got to Give it Up* and the copying of it."); *see also* Richard Busch, *Marvin Gaye Family Lawyer: How I Won the 'Blurred Lines' Trial*, HOLLYWOOD REP. (Mar. 11, 2015, 4:02 PM), https://www.hollywoodreporter.com/thr-esq/marvin-gaye-family-lawyer-how-780743 [https://perma.cc/M48V-9YVM] (recounting the winning attorney's view that the accused infringers "wanted to litigate this in the press by continually saying that all they did was take a feeling," but that the case was in fact "a straight-up copyright claim over compositional elements").

Judges have an inevitably hard job trying to sift between a musical work's protectable and unprotectable content. It's fair to wonder, though, whether existing infringement doctrine makes that job harder than it needs to be. However unprotectable a song's feeling is, many courts still insist on measuring its "total concept and feel" under the standard originally articulated by *Roth Greeting Cards v. United Card Co.*, the quinquagenarian case at the center of this symposium.[9] That measurement is usually walled off from expert opinion and depends instead on the fact finder's lay reaction.[10] As others have noted, requiring such lay evaluation of music's total concept and feel—call it tonal concept and feel, perhaps—seems to invite mischief.[11] What, after all, could a fact finder applying that standard possibly be measuring if not a song's feeling?

Unsurprisingly, then, this test has become a common target for critics of today's music-infringement litigation trends.[12] Every so often, a litigant tries unsuccessfully to convince a court that the test should be jettisoned from music cases in particular.[13] Over two hundred composers

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9 Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).

10 *See infra* notes 42-56 and accompanying text.

11 *See, e.g.*, Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright's "Substantial Similarity" Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 580, 596 (2019), https://law.lclark.edu/live/files/28480-lcb232article3sprigmanpdf [https://perma.cc/7Y47-P5MU] (criticizing the standard for "invit[ing] the jury, in exercising its subjective judgment, to include similarities in ideas and other elements of works that the idea/expression distinction places outside the scope of copyright" and opening the door to liability "based on mere similarity in musical style or 'vibe'—both of which are unprotectable elements of musical composition").

12 While this Article's focus is the test's application in music cases, the test has also drawn criticism that is not specific to any particular category of subject matter. *See, e.g.*, U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.4 (3d ed. 2017), https://www.copyright.gov/comp3/docs/compendium.pdf [https://perma.cc/F55V-6NTJ] (refusing to consider a work's "look and feel" when assessing its originality for registration purposes and concluding that "[i]nvoking a work's 'feel' is not a viable substitute for an objective analysis of the work's fixed and creative elements"); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][c] (2020) (characterizing "feel" as "a wholly amorphous referent [that] merely invites an abdication of analysis"); ROBERT A. GORMAN ET AL., COPYRIGHT: CASES AND MATERIALS (9th ed. 2017) (posing the question of whether "the 'concept and feel' standard [is] facially inconsistent with the exclusion of 'concepts' from the subject matter of copyright under § 102(b)"); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 719 (2012), https://harvardlawreview.org/wp-content/uploads/pdfs/vol125_tushnet.pdf [https://perma.cc/K49M-DRFW] ("*Roth* is misguided. . . . *Roth* illustrates that the gestalt approach expands protection unpredictably . . . . Results in infringement are deliberately opaque: the factfinder is directed to the gestalt, but a gestalt can't be broken down."); Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1832-34 (2013), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1045&context=nulr [https://perma.cc/UJ9Q-M3LK] (cataloging multiple "troubling things" about the test, including that "it does not focus the trier of fact's attention on specific expressive elements of the plaintiff's work or on whether the defendant copied those expressive elements from the plaintiff's work" and that it "makes it too easy for unprotectable elements to be swept into the infringement analysis").

13 As I discuss below, however, it's usually the plaintiffs in these cases—not the defendants—who try to eliminate the test, convinced that they have a better shot at proving their case by delving into the musical weeds. *See* Baxter v. MCA, Inc., 812 F.2d 421, 424 n.2 (9th Cir. 1987) (declining to address the plaintiff's argument that a holistic test geared toward lay audiences doesn't work "in technical fields such as music because an infringer can easily deceive the unsophisticated by

argued in an amicus brief in the *Blurred Lines* case that the test is "hamper[ing]" music law and "does not work in a music context" because essentially every song within a given genre "has the same 'total concept and feel.'"[14] Several copyright scholars who would have preferred to see the defense win that case have similarly cast blame on the total concept and feel test for the outcome.[15]

In this brief symposium contribution, however, I want to explain why I disagree. Whatever problems the total concept and feel test creates in infringement doctrine generally, in music cases specifically it's nowhere near as bad as it's often portrayed. It's not that I think that liability was the normatively proper result in edge cases like *Blurred Lines* or its successors—as I've written about elsewhere, I don't.[16] I think, rather, that this part of the infringement test simply isn't doing all that much in these cases to begin with. Sure, I probably wouldn't affirmatively choose to include it in the infringement calculus if I were designing the music-copyright system from scratch. Yet the fact that it's ended up there turns out to be surprisingly inconsequential.

Instead, if you want to tinker with a doctrinal apparatus that's likely to have a significant effect on case outcomes, look in the opposite direction. Not to lay observer-oriented concept and feel, but instead to experts' finely grained technical analyses. Expert dissection is driving these music cases—particularly at the summary-judgment stage—more than the vagaries of feel are. Below I explain how.

I. A BRIEF HISTORY OF MUSICAL FEEL IN COPYRIGHT LAW

Roth, which involved the visual design of greeting cards, was a case about images.[17] It's sometime been said that visual works are where the

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immaterial variations in the copyrighted work," but noting in dicta that there was "[n]o compelling reason" to abandon it); Francescatti v. Germanotta, No. 11 CV 5270, 2014 U.S. Dist. LEXIS 81794, at *37-38 (N.D. Ill. June 17, 2014) ("Some experts go so far as to argue that the ordinary observer 'total concept and feel' standard should be altogether abandoned . . . . [but] attempts to entirely do away with the ordinary observer test with regard to musical works have been rejected."); Guity v. Santos, No. 18-cv-10387 (PKC), 2019 U.S. Dist. LEXIS 210125, at *15 (S.D.N.Y. Dec. 5, 2019) (rejecting the plaintiff's argument that "an ordinary observer with no musical background may very well be incapable of applying the 'total concept and feel test' to determine substantial similarity" as a "flatly incorrect characterization of the relevant standard").

14 Brief of Amici Curiae, *supra* note 2, at 12 n.4.

15 *See, e.g.*, Lee & Sunder, *supra* note 2, at 567 ("In 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."); Bell & Parchomovsky, *supra* note 2, at 685 (classifying the verdict as a paradigmatic case of "inadvertent infringement . . . involving nothing more than [the] appropriation of 'concept and feel'"); Sprigman & Hedrick, *supra* note 11, at 595.

16 Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861 (2018), https://harvardlawreview.org/wp-content/uploads/2018/05/1861-1923_Online.pdf [https://perma.cc/8ACM-WK6G].

17 Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

test is likely to perform best.[18] One major copyright treatise, for example, has argued that it fits well in cases dealing with visual subject matter because such "works can rarely be divided into chapters or paragraphs like textual works can and instead rely on perceptions of the whole to convey meaning."[19]

Yet while *Roth*'s particular formulation of a holistic similarity inquiry began with the visual arts, some judges in music cases were already applying its equivalent decades beforehand. In the 1939 edition of his first-of-its-kind music-copyright treatise, Alfred Shafter described a "'bold and intelligent' procedure of determining infringement suits" in which judges would determine upfront on a dispositive motion whether similarity was actionable.[20] "Usually expert testimony is obviated by this method," he continued, "since the judge is guided largely by ordinary observation—by the 'feel,' or intuitive reaction and effect upon comparing the two works."[21] A test that inquires into a work's "feel" using "ordinary observation" and "intuitive reaction and effect" sounds, of course, remarkably like *Roth*. To be sure, *Roth*'s version would typically reserve the issue for the jury rather than allow the court to resolve the case itself.[22] But the mode of inquiry is otherwise identical.

The idea of resolving music copyright cases through lay comparison began even earlier. Its earliest champion was Judge Learned Hand, who in 1910's *Hein v. Harris* defined infringement of a musical work as "similarity [that] is substantially a copy, so that to the ear of the average person the two melodies sound to be the same."[23] Hand did not rely on expert testimony. He preferred instead to, as he put it in a later case, "rely upon such musical sense as I have."[24]

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18 *See, e.g.*, Moon Hee Lee, Note, *Seeing's Insight: Toward a Visual Substantial Similarity Test for Copyright Infringement of Pictorial, Graphic, and Sculptural Works*, 111 NW. U. L. REV. 833, 847 (2017), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1276&context=nulr [https://perma.cc/HGJ5-ZD43] (arguing that, notwithstanding its flaws, "since the protectible aspects of visual works are 'their overall appearance,' the total concept and feel test is apt for the comparison of [pictorial, graphic, and sculptural] works"); GORMAN ET AL., *supra* note 12, at 690 ("The 'concept and feel' standard seems to find its way more into cases of pictorial copyright than literary copyright, probably because the pictorial work can be viewed in a single glance as a totality."). *But see* Tushnet, *supra* note 12, at 719 (noting the ease with which the test allows courts to slip into protecting uncopyrightable material in visual-works cases).

19 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:71 (2020).

20 ALFRED M. SHAFTER, MUSICAL COPYRIGHT 217 (2d ed. 1939) (quoting Lowenfels v. Nathan, 2 F. Supp. 73, 74 (S.D.N.Y. 1932)).

21 *Id.*

22 *See, e.g.*, Shaw v. Lindheim, 919 F.2d 1353, 1360 (9th Cir. 1990) (concluding that "a subjective assessment of the 'concept and feel' of two works . . . [is] a task no more suitable for a judge than for a jury").

23 Hein v. Harris, 175 F. 875, 877 (C.C.S.D.N.Y. 1910), *aff'd*, 183 F. 107 (2d Cir. 1910).

24 Haas v. Leo Feist, Inc., 234 F. 105, 107 (S.D.N.Y. 1916); *cf.* Paul W. Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. PITT. L. REV. 232, 236 n.23 (1955) (noting that Hand tried to identify how a piece would sound to an "average ear" without the help of experts).

But while Hand's method anticipated the modern total concept and feel test's aversion to expert opinion, it came nowhere near its holistic scope. Hand was more interested in counting notes. His usual approach was to carve out melodic sequences from the rest of the piece by changing the time values of the defendant's notes to match the plaintiff's, eliminating differences in pitch duration; transpose the defendant's work into the same key as the plaintiff's; and then line up the two altered staves side by side and measure the confluence of pitches.[25] In *Hein*, Hand's calculation was that a correspondence between thirteen out of seventeen totals bars of melody equals infringement.[26] And in 1916's *Haas v. Leo Feist, Inc.*,[27] Hand marked up an exhibit himself to show where he found note-for-note overlaps.[28] Thus, while Hand paved the way for judges to handle the similarity analysis without expert aid, he was hardly the holist that *Roth* would later envision.

Beyond Hand, however, other judges were content to rely on their aesthetic intuitions without getting into the melodic weeds. These cases, some of which Shafter cited in his treatise, share a closer family resemblance with *Roth*. In *Boosey v. Empire Music Co.*, for example, the court was tasked with comparing a plaintive English love ballad and a Tin Pan Alley ragtime number.[29] Before preliminarily enjoining the defendant, the judge recounted that he'd "had some one, indifferent to the controversy, play both songs for [him]," and found that "the sentiment of one song [was] about the same as the other."[30] Referring to himself as "the uninformed and technically untutored public," the judge disclaimed any interest in "the details" of one song or "the syncopated interpretation" of the other.[31] What mattered was a shared six-note phrase (what we might today call a hook) that, in the judge's view, had "the kind of sentiment in both cases that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater."[32]

Similarly, in *Park v. Warner Bros.*, the court concluded that "[w]hen the court has an opportunity of comparing the two works in question in a cause of copyright, it has before it all the data which are necessary to decide the question of infringement."[33] With that data in hand, the court

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[25] *See* Fishman, *supra* note 16, at 1880.
[26] *Hein*, 175 F. at 876.
[27] *Haas*, 234 F. 105.
[28] *See* Fishman, *supra* note 16, at 1881.
[29] Boosey v. Empire Music Co., 224 F. 646 (S.D.N.Y. 1915).
[30] *Id.* at 647.
[31] *Id.*
[32] *Id.*
[33] Park v. Warner Bros., 8 F. Supp. 37, 39 (S.D.N.Y. 1934) (citing Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930)).

cursorily found that "[t]he treatment of the idea involved in the two songs is different," and therefore no infringement had occurred.[34]

That's not to say that every court during this period was uninterested in the dissection of musicological minutiae, though even then it's not clear how often it actually moved the needle toward a particular outcome. In *Allen v. Walt Disney Productions, Ltd.*, for instance, the court spent considerable time walking through the details of both sides' experts, whose testimony it readily admitted.[35] Yet in the end, the court threw up its hands and confessed, "I cannot differentiate between the two sets of experts; neither can I say that complainant's experts are correct and the respondents' incorrect."[36] Even with all the expert materials in the record, the court ultimately fell back on its own instincts.[37] Using his "own musical sense, such as it is," the judge reasoned that "to my ear there is a similarity, but not such a similarity as would impress one. In other words, I would not take the one for the other."[38]

To some extent, it shouldn't be surprising that judges during this era were inclined to resolve cases themselves. Given that claims for injunctive relief were heard by courts sitting in equity, bench trials were the norm.[39] Nevertheless, even without a jury as a potential decisionmaker, it's still notable that courts were willing to decide these cases through motion practice, and, when they did decide them, consulted nothing more than the works themselves. By the 1940s, when equity practice had been replaced by the Federal Rules of Civil Procedure, Hand's reliance on the lay-audience was firmly rooted in the case law.[40] As Judge Leon Yankwich wrote in 1942, "it is not the dissection to which a musical composition might be submitted under the microscopic eye of a musician which is the criterion of similarity, but the impression which the pirated song or phrase would carry to the average ear."[41] A few years

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[34] *Id.* Two years earlier, the same judge had remarked in a dramatic-works case that "in view of the time which is saved by avoiding a trial," simply comparing the parties' works on paper "should become the usual method of dealing with copyright suits, unless, owing to nice questions of originality or access, oral evidence is indicated as necessary." Lowenfels v. Nathan, 2 F. Supp. 73, 75 (S.D.N.Y. 1932).

[35] Allen v. Walt Disney Prods., Ltd., 41 F. Supp. 134 (S.D.N.Y. 1941).

[36] *Id.* at 140.

[37] *Id.*

[38] *Id.*

[39] *See* Bruce E. Boyden, Daly v. Palmer, *or the Melodramatic Origins of the Ordinary Observer*, 68 SYRACUSE L. REV. 147, 174 (2018), https://lawreview.syr.edu/wp-content/uploads/2018/05/O-Boyden-Article-FINAL.pdf [https://perma.cc/FS23-Z4CU].

[40] In one case, the court admitted expert testimony but seemed to have wished that it hadn't, calling all of it superfluous. *See* Baron v. Leo Feist, Inc., 78 F. Supp. 686, 686-87 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 288 (2d Cir. 1949) ("[T]he musical experts for each side demonstrated, in their zealous partisanship, the doubtful function of the expert as an aid to the court in this class of litigation. Nevertheless, the inherent probabilities of the circumstances and the differing qualities of the testimony made the resolution of most of the issues of fact comparatively easy. The music itself lent itself quite readily to lay analysis and evaluation.").

[41] Carew v. R.K.O. Radio Pictures, Inc., 43 F. Supp. 199, 200-01 (S.D. Cal. 1942).

later, *Arnstein v. Porter* would famously hold that "[t]he impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff's or defendant's works are utterly immaterial on the issue of misappropriation . . . ."[42]

In a move that has come to define the contemporary copyright-infringement test, *Arnstein* categorized lay assessment as a factual issue for the jury, not a legal one for the court.[43] Because essentially every court in the country has since followed *Arnstein*'s lead on that question, judges today cannot easily resolve music-infringement questions themselves the way their early-twentieth-century predecessors did.[44] Yet even before *Arnstein*, let alone before *Roth* would arrive over two decades later, the relevant decisionmaker (whether judge or jury) was already measuring similarity through its own naive reaction to the music.

After the Ninth Circuit decided *Roth* in 1970, it soon incorporated the total concept and feel formulation into the "intrinsic" half of its intrinsic/extrinsic infringement framework.[45] Within that framework, adjudicating substantial similarity encompasses two steps: an intrinsic one meant to subjectively measure the fact finder's impressions of similarity, and an extrinsic one meant to objectively measure similarity between the works' specific, expressive components.[46]

Packaged into this two-part test, the total concept and feel formulation at first appeared in cases involving visual media. It would take nearly two decades for it to make its way into a published case involving musical works. That case was *Baxter v. MCA, Inc.*, in which the plaintiff claimed that the Academy Award–winning musical theme for the film *E.T.* infringed his earlier composition.[47] He had submitted

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42 Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).

43 *See id.* (dubbing the element of improper appropriation to be "an issue of fact which a jury is peculiarly fitted to determine"). For a discussion on this decision's influence on the infringement doctrine, see Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 796 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2592&context=faculty_scholarship [https://perma.cc/CX3J-B2ED] (explaining that the court's "decision in *Arnstein* is . . . to be credited with (or faulted for) giving juries significant control over the infringement analysis" and how it "in effect cabined trial courts' (i.e., judges') supervision over the question of copyright infringement").

44 *See* Balganesh, *supra* note 43, at 796 n.25 ("To the extent that a judge may grant summary judgment in some jurisdictions, it is only on the basis that no reasonable juror could have possibly arrived at a contrary decision.").

45 *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

46 *See, e.g.*, Shaw v. Lindheim, 919 F.2d 1353, 1356-57 (9th Cir. 1990). As the Ninth Circuit subsequently enumerated the two steps in a music infringement case: "Initially, the extrinsic test requires that the plaintiff identify concrete elements based on objective criteria. The extrinsic test often requires analytical dissection of a work and expert testimony. Once the extrinsic test is satisfied, the factfinder applies the intrinsic test. The intrinsic test is subjective and asks 'whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.'" Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (quoting Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991)).

47 Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir. 1987).

expert testimony opining that there was a high degree of similarity between the pieces.[48] The district court, however, all but ignored it and dismissed the case on summary judgment.[49] The court declared that it was the layman's ear that mattered—and that "[t]his Court's 'ear' is as lay as they come."[50]

The Ninth Circuit reversed, though without much explanation why.[51] It began by applying *Roth*'s total concept and feel standard to music, relying on its earlier visual-media precedents.[52] It agreed with the trial judge that analytic dissection and expert testimony were beside the point.[53] But it disagreed that anyone but the finder of fact was in a position to measure the relevant similarity, with or without experts.[54] "We do not suggest that our ears are any more sophisticated than those of the district court," it explained.[55] Still, "reasonable minds could differ"—a phrase it included twice in the span of three sentences without ever stating what the basis of that difference would be.[56]

II. TONAL CONCEPT AND FEEL TODAY

Since *Baxter*, the total concept and feel standard has become entrenched as a standard element of music-copyright infringement cases. Not only is it part of the black-letter test within jurisdictions that follow the Ninth Circuit's extrinsic/intrinsic framework,[57] but it's also frequently invoked in jurisdictions that don't.[58] In some of these cases, as in *Baxter*, the court's inability to definitively rule out dissimilarity in total concept and feel kept the plaintiff's claim alive.[59] Often the reasoning rests on little more than the court's discomfort trying to predict what a hypothetical jury might do, offering no justification for why the particular claim requires a jury to begin with.[60] Reading those cases, one might

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[48] *Id.* at 423.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 422.
[52] *Id.* at 424 (first citing Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977); then citing Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir. 1985); then citing Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984); and then citing Overman v. Universal City Studios, Inc., 605 F. Supp. 350, 353 (C.D. Cal. 1984)).
[53] *Id.* ("'Analytic dissection' and expert testimony are not called for; the gauge of substantial similarity is the response of the ordinary lay hearer.").
[54] *Id.* at 425.
[55] *Id.*
[56] *Id.*
[57] *See, e.g.*, Copeland v. Bieber, 789 F.3d 484, 489 (4th Cir. 2015).
[58] *See, e.g.*, McDonald v. West, 669 F. App'x 59, 60 (2d Cir. 2016); Lessem v. Taylor, 766 F. Supp. 2d 504, 513 (S.D.N.Y. 2011); Allen v. Destiny's Child, No. 06 C 6606, 2009 U.S. Dist. LEXIS 63001, at *22-23 (N.D. Ill. July 21, 2009).
[59] *See Baxter*, 812 F.2d 421.
[60] *See, e.g.*, *Copeland*, 789 F.3d at 494 (reversing a Rule 12(b)(6) dismissal because, after listening to the songs without any accompanying evidentiary record, the court concluded that the "choruses are similar enough and also significant enough that a reasonable jury could find the songs intrinsically similar"); *Allen*, 2009 U.S. Dist. LEXIS 63001, at *37 (concluding that a music teacher

fairly conclude that the total concept and feel standard is indeed contributing to the perceived expansion of copyright scope in today's music infringement cases.[61]

But these cases capture only a small part of what's going on when judges confront music infringement claims. For three reasons, total concept and feel turns out to be a comparatively insignificant problem when viewed in context. First, within the jurisdictions that apply the extrinsic/intrinsic framework, total concept and feel is almost never a battleground issue except at trial. Because only the extrinsic test is considered amenable for summary judgment,[62] a defendant filing a dispositive motion will always focus the argument on a lack of extrinsic similarity. At that stage, total concept and feel doesn't have much of a foothold to enter the discussion.

If most cases reached a trial, of course, the test would rear its head eventually. But they don't. 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. If one is concerned that it's too easy to incur infringement liability for derivative music, one should devote more scrutiny to how cases are handled on summary judgment, where most litigated cases rise or fall.[63]

To be sure, even a rare trial might exert some pressure on settlement values, as subsequent players continue to bargain in the shadow of the law.[64] Yet I'm skeptical that this particular law casts much shade. By the time the parties wind up litigating the intrinsic test, the court has almost

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is not "competent to speak on behalf of the average listener," and therefore declining to credit the teacher's opinion that listeners wouldn't notice the plaintiff's alleged similarities and holding that similarity between the works' total concept and feel "is best left for a jury to decide"); New Old Music Grp., Inc. v. Gottwald, 122 F. Supp. 3d 78, 95 (S.D.N.Y. 2015) (denying summary judgment over an alleged appropriation of a percussion line because, "in considering the 'total concept and feel' of these elements in combination," the selection and arrangement of independently unprotectable drum sounds might have itself been protectable); Griffin v. Sheeran, 351 F Supp. 3d 492, 501 (S.D.N.Y. 2019) (denying summary judgment because "[a] jury might side with either view" as to the works' total concept and feel).

61 *See supra* text accompanying notes 12-15.

62 *See, e.g.*, Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018) ("A district court applies only the extrinsic test on a motion for summary judgment, as the intrinsic test is reserved exclusively for the trier of fact.").

63 *See* Balganesh, *supra* note 43, at 793 ("While a vast majority of [copyright] claims either settle prior to trial or are instead dismissed through motions, . . . [there does exist] the rare occasion [when] a jury is indeed empaneled to hear a case . . . ."). Even when a case does reach trial, post-trial motions provide another opportunity for the extrinsic test to sort meritorious claims from unmeritorious ones, as the recent case against Katy Perry underscores. *See* Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist LEXIS 46313, at *39-40 (C.D. Cal. Mar. 16, 2020). There, the trial judge set aside the infringement verdict based on a lack of extrinsic similarity while still concluding that the jury was entitled to find intrinsic similarity in concept and feel. *Id.* at *54-55. The extrinsic test, in other words, did all the work. *See id.*

64 For the classic exploration of this issue, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6537&context=ylj [https://perma.cc/D5XP-QQE7].

certainly denied (or the parties have concluded that it wasn't even worth asking for) summary judgment on the extrinsic test. That sequencing means that before the intrinsic test can do any work sorting between winning and losing claims, the court has already signaled that the case could reasonably go either way. It's a crapshoot. And because the indeterminacy of the extrinsic test is responsible, it would remain a crapshoot no matter what we might do to total concept and feel within the intrinsic test. It's thus fair to expect that the intrinsic test's marginal effect on ex ante settlement values would be small, especially compared to the extrinsic one's.

What's more, the fact that only juries decide intrinsic similarity means that changing its definition would do little to produce clarity for future actors trying to decide what's permissible. A series of jury verdicts doesn't generate guidance. A series of judicial decisions resolving litigants' motions does. As Balganesh has argued, "discouraging summary judgment on the [similarity] question in an effort to have juries make the determination has prevented copyright jurisprudence from developing a coherent set of rules and principles that might guide the decision, thereby producing a body of decisions that appears inextricably ad hoc and arbitrary."[65] For those who worry that the current system is producing too much uncertainty, the best way to help is to give courts more power to act as gatekeepers *before* trial. Changing the substance of the intrinsic test without allocating it to a different decisionmaker would do little on that score.

Second, within the jurisdictions that allow judges greater leeway to address total concept and feel, it's not obvious that the standard excessively favors plaintiffs. Defendants have in fact repeatedly disposed of claims before trial under this standard.[66] If one is primarily concerned about a lack of analytical rigor, I concede that defense victories in themselves shouldn't assuage much. But if one is also concerned about high liability risk and the propertization of feel, as many contemporary critics are, then these decisions cast some doubt on the total concept and feel test's role.

Indeed, in some cases, plaintiffs have actively (though unsuccessfully) lobbied the court not to consider total concept and feel at all, evidently convinced that a purely dissective approach could at least

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[65] Balganesh, *supra* note 43, at 797.

[66] *See, e.g.*, Currin v. Arista Records, Inc., 724 F. Supp. 2d 286, 294 (D. Conn. 2010); Damiano v. Sony Music Entm't, Inc., 975 F. Supp. 623, 631 (D.N.J. 1996); Fulks v. Knowles-Carter, 207 F. Supp. 3d 274, 290-91 (S.D.N.Y. 2016); Pyatt v. Raymond, No. 10 Civ. 8764 (CM), 2011 U.S. Dist. LEXIS 55754 (S.D.N.Y. May 19, 2011); Batiste v. Najm, 28 F. Supp. 3d 595, 622-23 (E.D. La. 2014); Francescatti v. Germanotta, No. 11 CV 5270, 2014 U.S. Dist. LEXIS 81794 (N.D. Ill. June 17, 2014); Guity v. Santos, No. 18-cv-10387 (PKC), 2019 U.S. Dist. LEXIS 210125, at *10-15 (S.D.N.Y. Dec. 5, 2019).

muddy the waters enough to reach a jury. In *Francescatti v. Germanotta*, for example, the plaintiff argued that the EDM music at issue was too complex to lend itself to a holistic comparison and therefore demanded "computer analysis" accompanied by expert explanation.[67] The court rejected the argument, concluding that "[s]imply listening to the songs, as the law requires, reveals their utter lack of similarity."[68] In 2019, well after the *Blurred Lines* case had ended, the plaintiff in *Guity v. Santos* similarly viewed total concept and feel as a weakness rather than a strength.[69] He failed to convince the court that "an ordinary observer with no musical background may very well be incapable of applying the 'total concept and feel test' to determine substantial similarity," and the court dismissed the complaint for failure to state a claim.[70] Even in *Baxter*, the case that extended the total concept and feel standard into musical subject matter to begin with, the plaintiff had tried to foreclose that extension at the outset for fear that it would hurt his chances.[71] He insisted that a holistic test geared toward lay audiences wouldn't work "in technical fields such as music because an infringer can easily deceive the unsophisticated by immaterial variations in the copyrighted work."[72] Because the appeals court thought that a reasonable jury could have found for the plaintiff even with that test, it never needed to address the issue—and we've been running with the standard ever since.[73]

I don't mean to overplay the significance of these arguments, which don't reflect the full variety of music-infringement claims. Not every complaint's theory of similarity needs to wrap itself in total concept and feel in order to succeed. Those plaintiffs trying to zero in on a specific musical fragment don't stand much to gain from the standard, while those alleging a more abstract similarity permeating an entire song do. Nevertheless, even without knowing which category accounts for a bigger share of music-infringement allegations overall, it at least seems clear that the fragment-type claims are a major part of the picture. Many recent cases have been based on short snippets,[74] including the marquee

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67 *Francescatti*, 2014 U.S. Dist. LEXIS 81794, at *28-29.
68 *Id.* at *62.
69 *Guity*, 2019 U.S. Dist. LEXIS 210125, at *14-15.
70 *Id.* at *15-16.
71 *See* Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir. 1987).
72 *Id.* at 424 n.2.
73 *See id.* The court noted in dicta that it saw "[n]o compelling reason . . . to depart from the principles enunciated in *Krofft*, which reiterates that the test of substantial similarity depends upon the response of the ordinary lay listener." *Id.* (citing Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977)).
74 *See, e.g.*, Rose v. Hewson, No. 17cv1471 (DLC), 2018 U.S. Dist. LEXIS 14840 (S.D.N.Y. Jan. 30, 2018); Bowen v. Paisley, No. 3:13-cv-0414, 2016 U.S. Dist. LEXIS 114048 (M.D. Tenn. Aug. 25, 2016); TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588 (S.D.N.Y. 2013); First Amended Complaint, Dienel v. Warner-Tamerlane Publ'g Corp., No. 3:16-cv-00978 (M.D. Tenn. Sept. 6, 2016).

ones against both Katy Perry and Led Zeppelin that dominate current discussions. If we're going to talk about cases in which the total concept and feel standard hurts defendants, we also need to talk about the cases in which it may actively help them.

In his treatise eighty years ago, Shafter made an especially strong version of this argument: If judges apply a feel-oriented standard, it is defendants who most stand to benefit.[75] Shafter, like the plaintiff in *Baxter* decades later, was worried about songwriters using "camouflaging and decepti[on]" that an average listener test would never detect.[76] From the defendant's perspective, he surmised, allowing the judge to resolve the case on the papers through "ordinary observation" would offer an "admirable opportunity" to achieve a "prompt and summary disposal" of the case.[77] Whether or not history bears out Shafter's entire thesis, he may at least have been right that screening cases according to judges' intuition does not obviously disadvantage the accused.

This brings me to the third, and probably most significant, reason why total concept and feel deserves less attention: That attention should instead be going to the increased complexity that has built up within the analytical machinery. Controversial cases like *Blurred Lines* reach a jury not because of amorphous claims over feel, but because of highly technical claims over minutiae. Over the past two decades, the doctrine surrounding musical works has been experiencing two related shifts: (1) a more complicated definition of what counts as infringement and (2) a greater reliance on expert witnesses to explain that definition. Before the 1990s, music infringement cases virtually always turned on similarity in melody (and, if applicable, any accompanying lyrics).[78] Since then, however, courts have increasingly come to recognize various combinations of harmony, rhythm, timbre, tempo, genre, organizational structure, and percussion elements as representing potentially protectable material, whether or not a melody is copied along with them.[79] As the number of elements in play in any given case grows, judges are naturally going to have a harder time confidently applying the extrinsic test themselves. I will go out on a limb and venture that not even Judge Learned Hand could have performed his comparisons had he needed to manage half a dozen variables instead of just one.

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[75] SHAFTER, *supra* note 20, at 217-18.
[76] *Id.* at 213.
[77] *Id.* at 218-19.
[78] *See generally* Fishman, *supra* note 16.
[79] *See id.* at 1887-92. In an oft-cited passage, the Ninth Circuit has explained that "[t]here is no one magical combination of these factors that will automatically substantiate a musical infringement suit; each allegation of infringement will be unique." Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004).

Not surprisingly, then, experts have become virtually indispensable in music cases, particularly within the Ninth Circuit. In its original explication of the extrinsic test in 1977, the Ninth Circuit described expert testimony as potentially "appropriate."[80] In its 2000 decision in *Three Boys Music Corp. v. Bolton*, however, the court elevated the importance of expert evidence in music cases, declaring that "[t]he extrinsic test often requires . . . expert testimony."[81] Four years later, in *Swirsky v. Carey*, the court restated that proposition, but this time without the word "often"—experts were simply required, full stop.[82] Years later, that categorical requirement would end up playing a large role in the appeal of the *Blurred Lines* verdict.[83] Responding to an extremely detailed musicological analysis in the dissenting opinion, the appellate majority doubled down on the necessity of expert testimony:

> It is unrealistic to expect district courts to possess even a baseline fluency in musicology, much less to conduct an independent musicological analysis at a level as exacting as the one used by the dissent. After all, we require parties to present expert testimony in musical infringement cases for a reason.[84]

That last line is the key. Adjudicating claims of nonliteral musical similarity has become so intricate and multidimensional that, at least in the Ninth Circuit, the system can't even operate without experts on hand. Contrary to the way it's sometimes portrayed,[85] the *Blurred Lines* case didn't really involve any interesting legal questions about the protectability of a song's overall sound and feel.[86] It was fundamentally a case about the nitty gritty details that you would find when you peer underneath a work's hood.[87] A forty-one-page expert declaration that supported the infringement claim's leap over the summary judgment hurdle was built on "eight intersecting similarities,"[88] some of which comprised sub-elements that in turn were to be weighed differently according to a particular hierarchy,[89] which itself incorporated multiple

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[80] *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) ("Since [the determination of whether there is substantial similarity in ideas] is an extrinsic test, analytic dissection and expert testimony are appropriate.").
[81] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).
[82] *Swirsky*, 376 F.3d at 845.
[83] *See* Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).
[84] *Id.* at 1137.
[85] *Cf.* sources cited *supra* notes 14-15.
[86] *See Williams*, 895 F.3d 1106.
[87] *See id.*
[88] Declaration of Judith Finell in Support of Counter-Claimants' Joint Opposition to Plaintiffs & Counter-Defendants' Motion for Summary Judgment Or, in the Alternative, Partial Summary Judgment ¶ 13, at 3, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Oct. 20, 2014).
[89] *Id.* ¶ 23, at 5.

branches along a decision tree.[90] At trial, that expert devoted multiple demonstrative slides to each of those similarities, complete with transcriptions, visual diagrams, and timelines accurate to the millisecond showing how the corresponding audio clips matched up.[91] The trial exhibit color-coded this eight-part "composite of similarities" in a chronological bar chart.[92] In one particular sequence, less than one second of music from the work-in-suit merited five slides of comparative audio clips; pitch-shifted MIDI synthesizer renderings; and a time-stamped map of that one-second theme's "variants" recurring throughout the accused work.[93] The infringement allegation was, if nothing else, laden with detail.[94]

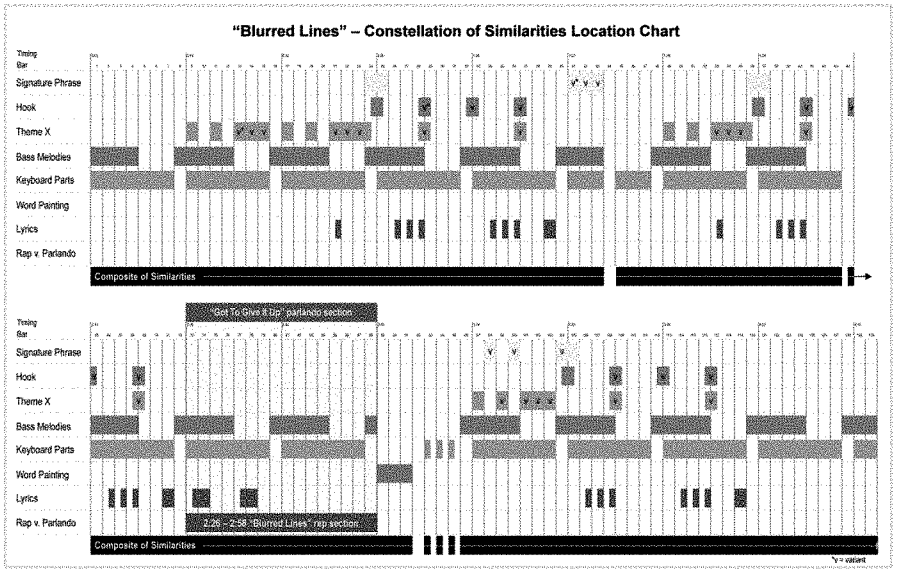

Figure 1: Slide From Gaye Estate's Demonstrative Exhibit in Blurred Lines Trial[95]

I've argued elsewhere that we're asking both courts and second comers to keep track of too many such details, and I've recommended a return to a melody-centered infringement test that would be more administrable and predictable.[96] Whether you agree with that prescription or not, however, let's not misdiagnose the problem. The outcome of the

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90 *Id.* ¶ 24, at 5-6.
91 *See* 5 Supplemental Excerpts of Record at 861-903, Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018) (No. 15-56880) [hereinafter Trial Exhibit 376].
92 *See infra* Figure 1.
93 Trial Exhibit 376, *supra* note 91, at 871-75.
94 *See* Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).
95 Trial Exhibit 376, *supra* note 91, at 890.
96 *See* Fishman, *supra* note 16.

Blurred Lines litigation wasn't a product of "feel" but of the technical and multivariable questions we now require experts to answer.

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For a doctrine that's been so pilloried as a general matter, total concept and feel might very well be music law's most surprisingly innocuous feature. It worked reasonably well in its early, pre-*Roth* incarnation, and it's done little to contribute to the sensational trials of today. Like many others, I'd like to see fewer of those trials, and more development of precedential ground rules concerning which kinds of musical copying are permissible. But the total concept and feel standard isn't doing much to stand in the way.