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Mozart V. Beethoven: Consequences of Ninth Circuit Copyright Law on Classical Creativity

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**MOZART V. BEETHOVEN: CONSEQUENCES
OF NINTH CIRCUIT COPYRIGHT LAW ON
CLASSICAL CREATIVITY**

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I. INTRODUCTION

Borrowing and copying in music have been pervasive throughout the ages. Historical master composers such as Beethoven,¹ Bach,² Handel,³ Brahms,⁴ Gershwin,⁵ Rachmaninoff,⁶ and more have been accused of outright copying, as have modern composers.⁷ Indeed, “[T]he idea of the composer as a singular genius blazing an original path was essentially alien before the advent of Beethoven” in the early Romantic period.⁸ It was artistic to use prior material—it showed creativity to take a melody or harmonic idea and to make it new.⁹ If Beethoven, Bach, Handel, Brahms, Gershwin, Rachmaninoff, or even Mozart were constrained to only using sufficiently new material, would we have the masterpieces in the repertoire that we are lucky enough to have today? Without this tradition of copying, years and years of musical traditions would not have been. And then the next generation would not have developed new genres based on those traditions. And so on and so forth.

However, changes in how musicians and composers make their money has necessitated a change in the law. During the Classical era of music, composers often relied heavily on wealthy patrons of music for their income.¹⁰ For example, composer Joseph Haydn’s income was primarily paid by the Hungarian Esterházy Princes,¹¹ and Beethoven relied heavily on various wealthy noblemen, including the Archduke Rudolph, for his living.¹² Through this system, composers would be paid a living wage to compose, conduct

1. See Stephen M. Klugewicz, *Copying Mozart: Did Beethoven Steal Melodies for His Own Music?*, THE IMAGINATIVE CONSERVATIVE (Feb. 21, 2018), <https://theimaginativeconservative.org/2018/02/copying-mozart-beethoven-stephen-klugewicz.html> [<https://perma.cc/7TSQ-SYYJ>].

2. Alex Ross, *The Golijov Issue: Borrowed Music, or Stolen?*, THE NEW YORKER (Feb. 21, 2012), <https://www.newyorker.com/culture/culture-desk/the-golijov-issue-borrowed-music-or-stolen> [<https://perma.cc/7DX9-2K4G>].

3. *Id.*

4. See Klugewicz, *supra* note 1.

5. See Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 301 (2006).

6. See Klugewicz, *supra* note 1.

7. Ross, *supra* note 2.

8. Ross, *supra* note 2.

9. See JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 8 (2006).

10. Miles Hoffman & Renee Montagne, *Financing the Classics: Beethoven’s Benefactor*, NPR (Dec. 25, 2007, 12:09 AM), <https://www.npr.org/templates/story/story.php?storyId=17272855> [<https://perma.cc/TX5C-UHS9>].

11. See J. PETER BURKHOLDER, DONALD JAY GROUT & CLAUDE V. PALISCA, A HISTORY OF WESTERN MUSIC 527–29 (8th ed. 2010).

12. Hoffman & Montagne, *supra* note 10.

performances, and maintain the musicians and instruments of the court.¹³ While musical patronage still exists,¹⁴ popular musicians of today primarily make their money through royalties based on sales of their music.¹⁵ Thus, in today's system, is it not most "just, that an author should reap the pecuniary profits of his own ingenuity and labour[?]"¹⁶ Copyright protections exist, at least in part, for this very goal: to prevent others from surreptitiously stealing a creator's idea to pass off as his or her own and make money.¹⁷

That said, while copyright protection exists to prevent actual copying, it does not exist to prevent accidental similarity.¹⁸ Indeed, independent creation of the same expression is a complete defense to a copyright infringement claim.¹⁹ Yet, recent Ninth Circuit precedent seems to condemn just such accidental similarity by broadening its copyright infringement standard far too much, capturing music that, to the average listener, does not sound all that similar. This sets a dangerous precedent, which threatens to hinder creative development within a given genre of music.

This Comment proceeds in four parts. Part I discusses and analyzes copyright infringement law in the Ninth Circuit as it stands today, with particular focus on the Pharell Williams/Robin Thicke and Marvin Gaye controversy over the songs *Blurred Lines* and *Got To Give It Up* and the Katy Perry and Marcus Gray controversy over the songs *Dark Horse* and *Joyful Noise*. Part II briefly discusses the tradition of musical borrowing in Western Art Music²⁰ of the seventeenth through nineteenth centuries. Part III applies

13. BURKHOLDER, GROUT & PALSICA, *supra* note 11, at 528–29.

14. Hoffman & Montagne, *supra* note 10.

15. Amy X. Wang, *How Musicians Make Money—Or Don't at All—in 2018*, ROLLING STONE (Aug. 8, 2018, 10:21 AM), <https://www.rollingstone.com/pro/features/how-musicians-make-money-or-dont-at-all-in-2018-706745/> [<https://perma.cc/V8GK-4JBG>].

16. *Millar v. Taylor* [1769] 98 Eng. Rep. 201, 252, *overruled by* *Donaldson v. Beckett* [1774] 1 Eng. Rep. 837.

17. For discussions on other philosophical foundations of copyright infringement law, see Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 350–53 (1988).

18. 2 JAY DRATLER & STEPHEN M. MCJOHN, *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY* § 5.01, at 5–6 (2013).

19. *Id.* at 5–3.

20. The term “Western Art Music” is used throughout this Comment to refer to “the vast and immensely varied repertoire extending from medieval chant, Josquin, Monteverdi, Bach, Mozart, Chopin, Puccini, and Stravinsky to recent works of, say, Libby Larsen or the late György Ligeti.” Ralph P. Locke, *On Exoticism, Western Art Music, and the Words We Use*, 69 ARCHIV FÜR MUSIKWISSENSCHAFT 318, 320 (2012). Western Art Music is, in other words, synonymous to what

recent Ninth Circuit precedent, as discussed in Part I, to a hypothetical copyright infringement suit between Mozart and Beethoven, concerning the opening sections of two famous classical works: Mozart's *Symphony No. 38 in D Major, K. 504* ("Prague") and Beethoven's *Symphony No. 2 in D Major, Op. 36*. This imaginary copyright infringement lawsuit will demonstrate how today's standards of music copyright infringement law are inhibiting musical creativity by disallowing accidental musical borrowing. Part IV concludes that musical copyright infringement laws today should be curtailed, allowing musical ideas that have been accidentally borrowed from older music to survive copyright infringement accusations.

II. BACKGROUND

A. *The Law*

Copyright infringement law in the Ninth Circuit has two elements, the second of which breaks down further into sub-elements.²¹ The elements of the plaintiff's prima facie case are as follows: (1) the plaintiff must own a valid copyright,²² and (2) the defendant must have actually copied protected elements of the copyrighted work.²³ The second element—that the defendant must have actually copied the protected elements of the copyrighted work—can be proven through showing either (1) direct evidence that the defendant actually copied the plaintiff's work or (2) circumstantial evidence.²⁴ Because "witnesses and honest thieves [are] often lacking," direct evidence of copying-in-fact is hard to come by; therefore, circumstantial evidence more often rules the day in copyright disputes.²⁵ Circumstantial evidence must consist of "fact-based showings that the defendant had access to the plaintiff's work and that the two

many call "classical music." *Id.* However, "certain readers may erroneously take . . . [the phrase 'classical music'] as equivalent to 'the Classic[al] era' . . . which is often understood to have lasted from something like 1750 to around 1810 and to have included, among much else, the music of Haydn, Mozart, and early-to-mid Beethoven." *Id.*

21. *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018) (citing *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004)).

22. For a plaintiff to own a valid copyright, the work must be an "original work[] of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (2020). Ownership of a valid copyright is not at issue in any of the below discussed cases, real or hypothetical, and is, thus, not further discussed in this Comment.

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

24. *Id.* (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000)).

25. Nicole Lieberman, *Un-blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law*, 6 N.Y.U. J. INTELL. PROP. & ENT. L. 91, 93 (2016).

works are substantially similar.”²⁶ Simply put, the plaintiff must show both (1) access and (2) substantial similarity.²⁷

First, “access” is necessary to prove that the defendant copied protected elements of the plaintiff’s work.²⁸ The plaintiff must show that there is a reasonable possibility that the defendant had access to the plaintiff’s work, not just a “bare possibility.”²⁹ Access can be proven with either direct evidence or circumstantial evidence.³⁰ While direct evidence would be ideal for the plaintiffs, it is, again, not often likely that it exists. Circumstantial evidence of access consists of either (1) a chain of events linking the plaintiff’s work and the defendant such that the defendant had access to that work or (2) a showing by the plaintiffs that their work was “widely disseminated.”³¹ For a work to be “widely disseminated, it must achieve a high degree of commercial success or be readily available in the relevant market.”³² Evidence of commercial success is often the most important piece of widespread dissemination and can include quantitative evidence of distribution through relevant mediums such as radio and television.³³ However, “evidence required to show widespread dissemination will vary from case to case.”³⁴

Second, in the Ninth Circuit, there is a “two-part test for substantial similarity: an extrinsic test and an intrinsic test.”³⁵ The extrinsic test is an objective one and may be applied by the court on a motion for summary judgment: the test “considers whether two works share a similarity of ideas and expression as measured by external, objective criteria.”³⁶ In order to determine this, the court breaks down works into elements and compares the elements to see if they are substantially similar.³⁷ For musical works, the extrinsic test is satisfied if the plaintiff can show through expert testimony that the similarity

26. *Williams*, 895 F.3d at 1119 (internal quotations omitted) (quoting *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)).

27. *Gray v. Perry*, No. 15-cv-05642-CAS (JCx), 2018 WL 3954008, at *3 (C.D. Cal. Aug. 13, 2018) (quoting *Three Boys Music Corp.*, 212 F.3d at 481).

28. *Id.*

29. *Id.* (quoting *Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009)).

30. *Id.* at *4 (citing *Three Boys Music Corp.*, 212 F.3d at 482).

31. *Id.*

32. *Id.* (quoting *Loomis v. Cornish*, No. CV 12-5525 RSWL (JEMx), 2013 WL 6044345, at *10 (C.D. Cal. Nov. 13, 2013), *aff’d*, 836 F.3d 991 (9th Cir. 2016)).

33. *Id.* at *5 (citing *Loomis*, 836 F.3d at 997).

34. *Id.* (quoting *Loomis*, 836 F.3d at 997).

35. *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018) (citing *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004)).

36. *Id.* (citing *Benay v. Warner Bros. Ent., Inc.*, 607 F.3d 620, 624 (9th Cir. 2010)).

37. *Id.* (citing *Rice v. Fox Broad. Co.*, 148 F. Supp. 2d 1029, 1051 (C.D. Cal. 2001)).

between the protected elements of the copyrighted work and the defendant's work are substantial.³⁸ There is not a uniform test for analyzing music under the extrinsic test.³⁹ In *Williams v. Gaye*, the court noted that the extrinsic test “considers whether two works share a similarity of ideas and expression as measured by external, objective criteria.”⁴⁰ This requires “analytical dissection of a work and expert testimony.”⁴¹ This analytical dissection “requires breaking the works ‘down into their constituent elements, and comparing those elements for proof of copying as measured by ‘substantial similarity.’”⁴²

However, this is not the end of the analysis.⁴³ The intrinsic test, which may only be applied by a trier of fact, is a subjective test that asks “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”⁴⁴ Of course, because jury deliberations are private, it is difficult to know exactly what juries consider to be most important in applying this test.

The Ninth Circuit also distinguishes between “broad” and “thin” protection of works as a whole. The court in *Williams v. Gaye* based its determination of whether a work is entitled to broad or thin protection on “the ‘range of expression’ involved.”⁴⁵ If a work encompasses a concept that has a wide range of possible expressions, the corresponding protection for that work is broad, and another work will infringe if that other work is substantially similar.⁴⁶ On the other hand, if there is a narrow range of expression embodied in the copyrighted work, the corresponding protection for that work is thin, and another work will only infringe if that other work is “virtually identical.”⁴⁷ For example, “[T]here are a myriad of ways to make an ‘aliens-attack movie,’ but ‘there are only so many ways to paint a red bouncy ball on blank canvas.’ Whereas the former deserves broad copyright protection, the latter merits only thin copyright protection.”⁴⁸ In general, as illustrated in *Williams v. Gaye*, musical compositions embody a broad range of expression.⁴⁹ As the court put

38. *Id.* at 1120 (internal quotations omitted) (quoting *Swirsky*, 376 F.3d at 849).

39. *Gray*, 2018 WL 3954008, at *6 (citing *Swirsky*, 376 F.3d at 849).

40. *Williams*, 895 F.3d at 1119 (quoting *Swirsky*, 376 F.3d at 845).

41. *Id.* (quoting *Swirsky*, 376 F.3d at 845).

42. *Id.* (quoting *Swirsky*, 376 F.3d at 845).

43. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

44. *Id.* (quoting *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)).

45. *Williams*, 895 F.3d at 1120 (quoting *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010)).

46. *Id.*

47. *Id.*

48. *Id.* (citation omitted) (quoting *Mattel, Inc.* 616 F.3d at 913–14).

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

it, “[m]usic . . . is not capable of ready classification into only five or six constituent elements,’ but ‘is [instead] comprised of a large array of elements,’ . . . ‘some combination of which is protectable by copyright.’”⁵⁰

Finally, it is important to note that there is a thin line between those elements of music that are protectable and those that are not.⁵¹ Copyright protections extend only to “the particular expression of an idea and never to the idea itself.”⁵² This matters in musical copyright disputes because it is often difficult to determine where the unprotectable musical “idea” ends and the protectable “expression” of that idea begins.⁵³ For example, the court in *Metcalf v. Bochco*⁵⁴ posited that “[e]ach note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection.”⁵⁵ To make matters worse, this is not for judges to parse out, but for the fact finder as a part of the subjective intrinsic test for substantial similarity.⁵⁶ This dichotomy between ideas and expression is particularly difficult to parse in music cases, where ideas and expressions of those ideas all sound like music to the lay juror.⁵⁷

B. Williams v. Gaye

i. Background

The controversy between Robin Thicke and Pharrell Williams (hereinafter Williams) and Marvin Gaye’s family (hereinafter the Gaye Family) began when the Gaye Family accused Williams of copyright infringement.⁵⁸ The Gaye Family threatened litigation if Williams did not pay their requested monetary settlement.⁵⁹ Williams subsequently filed for a declaratory judgment, claiming that they “did not incorporate or otherwise use the composition ‘Got To Give it Up’ in ‘Blurred Lines.’”⁶⁰ The Gaye Family filed a cross-complaint, and then Williams moved for summary judgment.⁶¹ In their cross-complaint, the Gaye

50. *Id.* (quoting *Swirsky*, 376 F.3d at 849).

51. Lieberman, *supra* note 25, at 93–94.

52. *Id.*

53. *See id.* at 94.

54. 294 F.3d 1069 (9th Cir. 2002).

55. *Id.* at 1074.

56. *See* Lieberman, *supra* note 25, at 94.

57. *See id.*

58. *See* Complaint for Declaratory Relief at 4, *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773 (C.D. Cal. Oct. 30, 2014).

59. *Id.* at 4–5.

60. *Id.* at 5.

61. Lieberman, *supra* note 25, at 131.

family laid out eight “substantially similar features” under the extrinsic test of element two that the two songs shared: “(1) the signature phrase; (2) hooks; (3) hooks with backup vocals; (4) the core theme in ‘Blurred Lines’ and the backup hook in ‘Got to Give It Up’; (5) backup hooks; (6) bass melodies; (7) keyboard parts; and (8) unusual percussion choices.”⁶²

The district court denied Williams’s motion for summary judgment, finding that the extrinsic test,⁶³ which required the court to break down and compare the elements of the two works for substantial similarity,⁶⁴ was satisfied.⁶⁵ Therefore, the case moved to trial for the jury to determine if the intrinsic test was satisfied.⁶⁶ The jury found for the Gaye Family.⁶⁷ Williams appealed to the Ninth Circuit, which, in relevant part, affirmed.⁶⁸

ii. The Court’s Findings and Analysis

First, the court noted that the Gaye Family’s copyright qualified for broad protection because it was more like the “aliens-attack movie” than the “red bouncy ball on blank canvas.”⁶⁹ That is, there is a wide range of expression and a large array of elements that go into a song or piece of music, “some combination of which is protectable by copyright.”⁷⁰ Therefore, the court determined that the Gaye Family did not need to “prove virtual identity to substantiate their infringement action,” but only substantial similarity.⁷¹ The district court, after filtering out several unprotectable elements in its extrinsic analysis, focused on the harmonic and melodic similarities between the two songs.⁷² Because there were disputes as to the similarity of the songs’ “phrases, hooks, bass lines, keyboard chords, harmonic structures, and vocal melodies,” the Central District of California allowed the case to proceed to trial, meaning the song passed the extrinsic test phase.⁷³

Next, during the intrinsic phase, at trial, the Gaye Family’s expert, Judith Finell, gave her opinion that “nearly every bar of ‘Blurred Lines’ contain[ed]

62. *Id.* at 132.

63. *See supra* Part II.A.

64. *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018).

65. Lieberman, *supra* note 25, at 132.

66. *See id.*

67. *Id.*

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

69. *Id.* at 1120 (quoting *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010)).

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

71. *Id.*

72. *Id.* at 1117.

73. *Id.*; *see also Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *19–20 (C.D. Cal. Oct. 30, 2014).

an element similar to ‘Got To Give It Up[,]’ both at the structural level and the sectional and phrasing level.⁷⁴ Additionally, in her expert opinion, Finell opined as follows:

“Blurred Lines” virtually exudes “Got To Give It Up.” This is due to the many tangible shared similar compositional features, but also to a subtle but very distinctive way in which these features are combined in a final artistic whole in both songs

....

The link between the two works is undeniable—especially considering the multitude of tiny creative details that blend to form the completed work.⁷⁵

These features, in her opinion, formed “musical seeds from which both songs gr[ew] and develop[ed] from beginning to end[,]” not just isolated instances.⁷⁶ The jury ultimately found that Williams and Thicke infringed upon the Gaye Family’s copyright.⁷⁷ Therefore, because the jury found for the Gaye Family, the jury must have found that the “total concept and feel” of the piece was substantially similar as well.⁷⁸

C. Gray v. Perry

i. Background

In 2014, a Christian rap/hip-hop music group including Marcus Gray (P/K/A Flame), Lecrae Moore (P/K/A Lecrae), Emanuel Lambert, and Chike Ojukwu (hereinafter Gray) filed a copyright infringement action against Katheryn Elizabeth Hudson (P/K/A Katy Perry), Jordan Houston (P/K/A Juicy J), Lukasz Gottwald (P/K/A Dr. Luke), and others (hereinafter Perry) in the Central District Court of California.⁷⁹ Gray alleged that the Katy Perry song *Dark Horse* infringed upon their song *Joyful Noise*.⁸⁰ Four years later, Perry filed for summary judgment.⁸¹ Gray then filed an opposition to the motion for

74. *Williams v. Gaye*, 895 F.3d at 1117–18.

75. Judith Finell MusicServices Inc. expert opinion at 4, *Williams*, 895 F.3d 1106 (No. 13-cv-06004-JAK-AGR).

76. *Id.*

77. *Williams*, 895 F.3d at 1118.

78. *See supra* Part II.A.

79. *Gray v. Perry*, No. 15-cv-05642-CAS (JCx), 2019 WL 2992007, at *1 (C.D. Cal. July 5, 2019).

80. *Id.*

81. *Gray v. Perry*, No. 15-cv-05642-CAS (JCx), 2018 WL 3954008, at *1 (C.D. Cal. Aug. 13, 2018).

summary judgment and a statement opposing some of Perry's facts.⁸² The district court held a hearing and found for Gray, denying Perry's motion for summary judgment.⁸³

In its opinion denying the motion for summary judgment, the court established the following uncontroverted facts.⁸⁴ Gray composed and recorded the song *Joyful Noise* in 2007.⁸⁵ The song became a part of the album *Our World Redeemed*, which was published in 2008 but not sold or otherwise commercially released.⁸⁶ Instead of selling the album, Gray released at least five videos on YouTube and Myspace.⁸⁷ The album was number five on the Billboard Gospel Chart and number one on the Christian Music Trade Association (CMTA) R&B/Hip-Hop Chart.⁸⁸ By 2011, *Joyful Noise* had been played over 1.5 million times on Myspace, and by 2012, the song had over 1.3 million views on YouTube.⁸⁹ Additionally, the album was nominated for Rap/Hip-Hop Gospel Album of the Year at the Stellar Award Show held at the Grand Ole Opry in Nashville, Tennessee and Best Rock or Rap Gospel Album at the fifty-first Annual Grammy Awards Show.⁹⁰ The song *Joyful Noise* was nominated for Best Rap/Hip-Hop Song of the Year at the fortieth annual GMA Dove Awards.⁹¹

On the other side, the song *Dark Horse* was written throughout the spring and summer of 2013 by Walter, Gottwald, Perry, Hudson, and Sandberg.⁹² The song was commercially released as a single song and as a part of the Katy Perry album, *Prism*, later that same year.⁹³ *Dark Horse* is not a Christian song, and none of the people involved in the creation of the song ever claimed to have heard the song *Joyful Noise*, or indeed any of Gray's music.⁹⁴ Additionally, it was undisputed that the *Dark Horse* creators had "never met, received music from, attended concerts by, or watched television interviews of Gray, Lambert, Ojukwu, or Lecrae."⁹⁵ Moreover, the *Dark Horse* creators claimed they "were

82. *Id.*

83. *Id.* at *1, *8.

84. *Id.* at *1.

85. *Id.*

86. *Id.* at *2.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

not ‘in the practice of’ listening to or searching for Christian music.”⁹⁶ Nonetheless, against this landscape, Gray claimed that Perry copied *Joyful Noise* when they wrote *Dark Horse*.⁹⁷

ii. The Court’s Findings and Analysis

Gray did not present any direct evidence that Perry copied their work, so Gray had to rely on circumstantial evidence to show actual copying: (1) “that the defendant had ‘access’ to the plaintiff’s work[;] and [(2)] that the two works are ‘substantially similar.’”⁹⁸ First, the court found that the Gray and the plaintiffs met their burden of showing access.⁹⁹ To show access, the plaintiffs relied on a “wide dissemination” theory, and the court held that they met their burden here.¹⁰⁰ To meet this burden, the court reasoned that the plaintiffs were required to “set out specific facts showing a genuine issue for trial as to whether there is a reasonable possibility that defendants had the chance to view the protected work.”¹⁰¹ Additionally, “as a general matter, it appears that in order for a work to be widely disseminated, it must achieve a high degree of commercial success or be readily available in the relevant market.”¹⁰² The court held that all that was needed here to meet this burden was the millions of views and plays of *Joyful Noise* on YouTube and Myspace.¹⁰³ Even though the two genres—Christian hip-hop/rap and commercial pop—are very different, and even though *Joyful Noise* was not *commercially* disseminated, it was enough that the song achieved critical success and some views.¹⁰⁴

The court also held that the two pieces were substantially similar enough to warrant passing the summary judgment stage.¹⁰⁵ Because the intrinsic test of the Ninth Circuit is to be applied only by the jury, just the extrinsic test is important at the summary judgment stage.¹⁰⁶ Again, the extrinsic test requires “similarity in protected elements of the copyrighted work.”¹⁰⁷ The court reasoned that the songs were comprised of “some combination” of

96. *Id.*

97. *Id.* at *3.

98. *Id.* (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000)).

99. *Id.* at *5.

100. *Id.*

101. *Id.* at *4.

102. *Id.* (quoting *Loomis v. Cornish*, No. CV 12-5525 RSWL (JEMx), 2013 WL 6044345, at *41 (C.D. Cal. Nov. 13, 2013), *aff’d*, 836 F.3d 991 (9th Cir. 2016)).

103. *Id.* at *5.

104. *Id.*

105. *Id.* at *7.

106. *Id.* at *6 (quoting *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004)).

107. *Id.* (emphasis omitted) (quoting *Swirsky*, 376 F.3d at 845).

copyrightable elements and uncopyrightable elements.¹⁰⁸ To determine that there were enough similar copyrightable elements between the two songs to warrant passing the summary judgment stage, the court relied on the expert musicologist reports of both sides.¹⁰⁹

Gray's expert report relied on one substantially similar element of the songs: a "descending ostinato" comprised of "two-bar units of eight beats in length . . . [with] eight even quarter notes in duple meter time in a stiff and mechanical style . . . [and a high] timbre of the upper and primary voice."¹¹⁰ Gray's expert concluded as follows:

[T]he "ostinato in Dark Horse clearly borrows a memorable and highly characteristic combination of discrete and specific musical elements heard in Joyful Noise" and that "[g]iven the important structural function and expressive use of the ostinato in Dark Horse, Joyful Noise can be said to have provided essential and highly characteristic musical materials for Dark Horse."¹¹¹

On the other side, Perry's expert disagreed that there were substantial similarities between the two songs. Perry's expert stated that "'Dark Horse'" does not share any significant structural, harmonic, rhythmic, melodic, or lyrical similarities, individually or in combination, with "'Joyful Noise.'"¹¹² Even though Perry's musicology expert strongly opposed the report, the court, at least at first, found that Gray's expert testimony was sufficient to raise a genuine issue of material fact as to substantial similarity.¹¹³ It was enough that Gray "identified particular features of the works which, taken in combination, could support a finding of substantial similarity by a reasonable jury."¹¹⁴ Additionally, the court acknowledged that Gray relied on several individually unprotectable elements; however, the "extrinsic test can be satisfied by showing a copying of a 'combination of [enough] unprotectible elements.'"¹¹⁵

Thus, the case went forward to a jury trial. After a nearly three-week trial, the jury entered a verdict, finding Perry liable to Gray for copyright infringement, and awarded Gray \$2.8 million in damages.¹¹⁶ Perry filed an

108. *Id.* (emphasis omitted) (quoting *Swirsky*, 376 F.3d at 845).

109. *Id.* at *6–7.

110. *Id.* at *6.

111. *Id.* at *7.

112. *Id.*

113. *Id.*; see *Gray v. Perry*, No. 15-CV-05642-CAS-JCx, 2020 WL 1275221, at *10–13 (C.D. Cal. Mar. 16, 2020), for the eventual decision overturning this initial finding.

114. *Gray*, 2018 WL 3954008, at *7.

115. *Id.* at *8; *Gray*, 2020 WL 1275221, at *6–7.

116. *Gray*, 2020 WL 1275221, at *1.

opposed motion for judgment as a matter of law, which was supported by an amicus brief submitted by a group of musicologists.¹¹⁷ In response, the court issued an amended and superseding opinion that granted the motion, vacating the jury's verdict.¹¹⁸ In that decision, the court concluded that Gray failed to satisfy the extrinsic test because the individually unprotectable elements of the descending ostinato were not "'numerous enough' and 'arranged' in a sufficiently original manner to warrant copyright protection."¹¹⁹

While juries may have found that both Perry and Williams infringed, many listeners not involved in the case were appalled that the seemingly small similarities between two songs could even be grounds for a copyright infringement lawsuit.¹²⁰ The songs at issue in *Williams v. Gaye* and *Gray v. Perry* were considered substantially similar enough without actual copying. Thus, almost any song in a given genre could be substantially similar enough to another song in the same genre. There were some undeniable similarities between the songs in each suit, but the same can be said for many popular songs of the last few decades.¹²¹ In fact, musical borrowing has existed for

117. *Id.*

118. *Id.* at *18.

119. *Id.* at *10. The court determined that the ostinato was not unique or rare in its pitch sequence, resolution, rhythm, development, placement, mode, sound, or purpose as an ostinato; those combination of elements did not make the ostinato protectable when it would, on its own, be unprotectable. *Id.* at *10–11. While the court cited some Ninth Circuit precedent to support this notion, it cited and discussed even more precedent that supported the jury's determination that the extrinsic test was satisfied, including *Williams v. Gaye*. *Id.* at *8–10. Thus, the instant decision is surprising, considering the court's earlier decision and Ninth Circuit precedent. As for the access issue, the court determined that there was enough evidence presented by Gray at trial to support the jury's finding that Perry had access to *Joyful Noise*. *Id.* at *13–14.

120. See, e.g., Chelsea Wong & Thomas Huthwaite, *This "Dark Horse" Decision is Anything but "Joyful Noise" for Katy Perry*, BALDWINS INTEL. PROP. (Aug. 28, 2019), <https://www.baldwins.com/news-resources/news/this-dark-horse-decision-is-anything-but-joyful-noise-for-katy-perry> [<https://perma.cc/X8GS-H7RS>] ("Perry is likely to appeal, and so she should. The current outcome could set a troubling and uninspiring precedent for artists. Like most contemporary popular hip-hop songs, Gray's Joyful Noise hooks the listener with a catchy beat, but can Gray really own a beat when it is arguably shared by thousands of other musical works?"); Rhodri Marsden, *If you Think Robin Thicke's Blurred Lines Plagiarises Marvin Gaye, You Don't Understand Songwriting*, NEWSTATSMAN (March 12, 2015), <https://www.newstatesman.com/culture/2015/03/if-you-think-robin-thicke-blurred-lines-plagiarises-marvin-gaye-you-dont-understand> [<https://perma.cc/5D3A-77ZN>] ("Let's be clear: these two songs are fundamentally different. . . .Were it not for the similarity of the sparse arrangement (an offbeat electric piano figure and a cowbell clanking away at 120bpm) the court case wouldn't even have taken place.").

121. See, e.g., Axis of Awesome, *4 Four Chord Song*, YOUTUBE (Dec. 10 2009), <https://www.youtube.com/watch?v=5pidokakU4I> [<https://perma.cc/DWS7-RNU4>] (singing an example of nearly forty songs over the same four chords).

substantially longer than the last few decades and was viewed with an entirely different tone.¹²²

III. THE TRADITION OF MUSICAL BORROWING IN WESTERN ART MUSIC

Musical borrowing “lie[s] at the very heart of Western musical practice.”¹²³ A nineteenth-century British music critic wrote of the music of his time and before: “[W]hen art seems to have reached its very utmost perfection . . . there must be a considerable portion of unconscious imitation in almost all [creators’] productions.”¹²⁴ There are only so many permutations of musical notes possible within a set style that makes up a genre. Moreover, reworking already-composed material, whether the composer’s own work or another composer’s work, was common and even standard among Western Art Music composers such as Mozart and Haydn.¹²⁵ Composers often borrowed from their own prior works, from other composers’ music without permission to parody or honor that composer, and even outright intentionally plagiarized other composers’ music.¹²⁶

The tradition of intentional plagiarism litters the works of famous Western Art Music composers. Baroque composers Johann Sebastian Bach and George Frederic Handel arranged works of many of their contemporary composers without crediting them and passed them off as their own.¹²⁷ For example, in oratorio *Israel in Egypt*, researchers have found that Handel copied the works of at least four different composers and passed it off as his own.¹²⁸ Additionally, composers Philidor, Gossec, Floquet, and more all copied from Gluck’s opera *Orphée et Euridice*.¹²⁹

While being caught copying so overtly may have “embarrassed [composers] slightly,” it was not condemned.¹³⁰ In fact, some music critics of the time considered it impressive that composers were able to steal from other composers and seamlessly incorporate those themes and ideas into their own

122. See *infra* Part III.

123. Charles Michael Carroll, *Musical Borrowing—Grand Larceny or Great Art?*, 18 COLL. MUSIC SYMP. 11, 11–12 (1978).

124. F.W. Horncastle, *Plagiarism*, 4 Q. MUSICAL MAG. & REV. 141, 147 (1822).

125. Constantin von Sternberg, *On Plagiarism*, 5 MUSICAL Q. 390, 391 (1919).

126. Carroll, *supra* note 123, at 12.

127. *Id.* at 15.

128. *Id.* Those composers were Antonio Alessandro Boncompagno Stradella, Johann Caspar Kerll, Dionigi Era, and Francesco Antonio Urio. *Id.*

129. *Id.* at 15–16.

130. *Id.* at 16.

works.¹³¹ Even if critics were not impressed with the copying, they would often dismiss it as “trifles” because at least the work advanced the progress of the music, which was more important than individual ownership of intellectual property.¹³² What was important was the progress of art, not the ownership of art.

Classical composers of Western Art Music also borrowed in more subtle manners to allude purposefully to the works of other composers.¹³³ Romantic era composers Franz Schubert and Robert Schumann, both admirers of Beethoven, were known to allude to Beethoven’s works in their own works.¹³⁴ Schubert quoted Beethoven’s Ninth Symphony *Ode to Joy* theme in his own Ninth Symphony.¹³⁵ Schumann quoted Beethoven’s song, *An die ferne Geliebte*, in his *Fantasy in C Major*, using Beethoven’s lyrics set in a clearly similar style.¹³⁶ Neither composer attained permission nor were they expected to: it was nothing less than “great art” to borrow from other composers to further musical progress.¹³⁷

To analyze, or even list, every composer who accidentally emulated or outright stole from other composers is well beyond the scope of this Comment. Countless musicological articles and books have been written on the subject.¹³⁸

131. *Id.* “It takes a great [deal of] talent to steal in this manner.” *Id.*

132. *Id.* For example, critics claim the following about the composer François-André Philidor: [A]ll the excellent parts of his opera [*Ernelinde*] are stolen from the great modern musicians of Italy [including Gluck]. They are challenging him and attempting to prove his plagiarisms by a comparison with the works of these great masters These assertions, difficult to establish definitely, are basically trifles and redound to the glory of this music whoever the composers may be.

Id. In fact, Gluck himself, after viewing *Ernelinde*, did not comment on the obvious copying of his own work but instead offered a fair opinion on Philidor’s work, stating that “[t]his opera is a richly-mounted watch, decorated with the most precious stones, whose interior movement is worthless.” *Id.* at 16–17. One scholar noted, “[H]ow could Gluck possibly have sat through the performance [of Philidor’s *Ernelinde*] without recognizing his own music, and later commenting on the fact” if he was offended or even concerned about the copying? *Id.*

133. Myung-Ji Lee, *The Art of Borrowing: Quotations and Allusions in Western Music* (May 2016) (unpublished D.M. dissertation, University of North Texas) (on file at the University of North Texas Digital Library).

134. Carroll, *supra* note 123, at 17–18.

135. *Id.* at 17.

136. *Id.* at 17–18.

137. *Id.*

138. See Ctr. for the Hist. of Music, Theory, and Literature, Indiana University Jacobs School of Music, *An Annotated Bibliography, MUSICAL BORROWING & REWORKING*, <http://www.chmtl.indiana.edu/borrowing/> [<https://perma.cc/QB8C-H9JB>].

Musical copying was common in ninth-century Gregorian Chant tropes,¹³⁹ late Medieval and Renaissance polyphonic masses,¹⁴⁰ fifteenth-century and sixteenth-century madrigals,¹⁴¹ instrumental works of the classical and romantic periods,¹⁴² and even modern and post-modern compositions of the twentieth century.¹⁴³

Today, outright intentional copying is, of course, prohibited. However, while modern copyright law now prohibits actual copying, it is not supposed to prohibit accidental similarity or independent creation.¹⁴⁴ Independent creation still allows for creativity within a given genre by allowing music that is similar, but not actually copied, to survive a copyright infringement suit.¹⁴⁵ This allows music within a given genre to progress and develop. However, the Ninth Circuit has expanded copyright infringement law to cover inadvertent borrowing between songs that do not sound substantially similar to the average listener. With this precedent, almost any two pieces of music in a given genre could be substantially similar. To demonstrate this, this Comment will analyze the openings of Beethoven's *Symphony No. 2 in D, Op. 36*¹⁴⁶ and Mozart's *Symphony No. 38 in D, K. 504 "Prague,"*¹⁴⁷ to show how a seemingly unique and original piece of music could have, if today's copyright laws applied in 1800, been subject to copyright infringement liability.

139. See, e.g., David A. Bjork, *The Kyrie Trope*, 33 J. OF THE AM. MUSICOLOGICAL SOC'Y 1 (1980).

140. See, e.g., Mark Everist, *Reception and Recomposition in the Polyphonic "Conductus cum caudis": The Metz Fragment*, 125 J. OF THE ROYAL MUSICAL ASS'N 135 (2000).

141. See, e.g., Rudolf Henning, *A Possible Source of Lachrimae?*, 16 THE LUTE SOC'Y J. 65 (1974).

142. See, e.g., BARBARA R. BARRY, *Debt and Transfiguration: Mozart's "Haydn" Quartets by Way of Haydn's Opus 33*, in THE PHILOSOPHER'S STONE: ESSAYS IN THE TRANSFORMATION OF MUSICAL STRUCTURE 73 (2000); Mijai Youn Auh, *Piano Variations by Brahms, Liszt and Friedman on a Theme by Paganini* (May 1980) (D.M. dissertation, Indiana University) (ProQuest); Barbara R. Barry, *The Hidden Program in Mahler's Fifth Symphony*, 77 THE MUSICAL Q. 47 (1993).

143. See, e.g., Randall Everett Allsup, *Sequoias, Mavericks, Open Doors . . . Composing Joan Tower*, 19 PHIL. OF MUSIC EDUC. REV. 24 (2011); Nicolaus A. Huber, *John Cage: Cheap Imitation*, 1 NEULAND 135 (1980); Allen Forte, *Olivier Messiaen as Serialist*, 21 MUSIC ANALYSIS 3 (2002).

144. DRATLER & MCJOHN, *supra* note 18, at 5-3.

145. *Id.*

146. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [<https://perma.cc/766S-BBWT>].

147. *Symphony No. 38 in D Major ("Prague"), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

IV. MOZART V. BEETHOVEN

This Comment uses a hypothetical case between Mozart and his *Prague Symphony* and Beethoven and his *Symphony No. 2* for two reasons. First, one may find that the two pieces sound little, if not nothing, alike.¹⁴⁸ At first listen, the very first opening notes of each could be described as similar, but the pieces quickly diverge and do not easily remind one of the other. One may also find that there is no melody or discernable harmony in common between the two pieces. Second, there is no evidence that Beethoven had any intention of borrowing from or copying Mozart when he wrote his *Symphony No. 2*. Unlike in the situations described above where composers would honor their predecessors by borrowing ideas, harmonies, or melodies, Beethoven did not indicate that he was honoring or attempting to emulate Mozart in any way.¹⁴⁹ Thus, the similarities between the openings of *Symphony No. 2* and *Prague Symphony* were inadvertent and should not be subject to an infringement suit.¹⁵⁰ Indeed, while copyright protects original works, “‘originality’ does not require ‘novelty.’”¹⁵¹ Copyright infringement laws are too harsh, as illustrated by the fact that even the opening of Beethoven’s *Symphony No. 2*, which many would likely find sounds nothing like the opening of Mozart’s *Prague Symphony*, would be found infringing in the Ninth Circuit.

A. Assumptions

To start, this Comment must address the obvious difficulties in this imaginary lawsuit between Mozart and Beethoven regarding the similarities between the opening measures of the *Prague Symphony* and the opening measures of the *Symphony No. 2*, respectively. First, copyright laws as we know them today did not exist in the time of Mozart or Beethoven. Mozart lived 1756–1791, and Beethoven lived 1770–1827.¹⁵² At those times,

148. Compare Mozart: *Symphony No.38 in D, K.504 “Prague” – 1. Adagio – Allegro*, YOUTUBE (Jan. 10, 2019), <https://www.youtube.com/watch?v=3X3IeHpH5Mk> [<https://perma.cc/2JCC-AYWH>], with Beethoven *Symphony No 2 D major Leonard Bernstein Wiener Philharmoniker*, YOUTUBE (Feb. 13, 2016), <https://www.youtube.com/watch?v=70e28x9OaPQ> [<https://perma.cc/GS6B-ZG4s>] (paying close attention to the first three minutes).

149. See *supra* Part III.

150. Recall that independent creation is a complete defense to a copyright infringement suit. DRATLER & MCJOHN, *supra* note 18, at 5-3.

151. U.S. COPYRIGHT OFF., THE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 308.1 (3d ed. 2017), <https://www.copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf> [<https://perma.cc/KA78-JTPM>].

152. Cliff Eisen & Stanley Sadie, *Mozart, (Johann Chrysostom) Wolfgang Amadeus*, GROVE MUSIC ONLINE (Jan. 20, 2001),

England's Statute of Anne, also known as the Copyright Act of 1710, was the first law to assign copyright protection to authors of works instead of to only publishers.¹⁵³ A similar system developed in France at around the same time.¹⁵⁴ Additionally, musical compositions were not protected in the United States until 1831.¹⁵⁵ However, for the purposes of this Comment, the Ninth Circuit's current copyright infringement law and precedent will be applied as if it existed during the lives of Mozart and Beethoven.

Second, both Mozart and Beethoven were of German descent and resided in various places around Europe.¹⁵⁶ Neither of them ever visited the United States, let alone lived there such that United States' laws would apply to them or their works.¹⁵⁷ Moreover, the United States was not officially a country independent of Britain until fifteen years prior to Mozart's death.¹⁵⁸ To that end, this Comment will disregard the nationalities of Mozart and Beethoven and apply United States' laws as if both were United States citizens who created works in the United States.

Third, for there to be a lawsuit for copyright infringement, there must be a party that owns the copyright of one piece who sues another for infringement.¹⁵⁹ Because Beethoven's *Symphony No. 2* was completed in 1802,¹⁶⁰ eleven years after Mozart's death,¹⁶¹ Mozart could not have sued Beethoven for copyright infringement. Therefore, the copyright, if Mozart retained it through his life,

<https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-6002278233?result=6&rskey=j2s9jS&mediaType=Article> [<https://perma.cc/B7YB-9CMW>]; Joseph Kerman, Alan Tyson, Scott G. Burnham, Douglas Johnson & William Drabkin, *Beethoven, Ludwig van*, GROVE MUSIC ONLINE (Jan 20, 2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000040026?rskey=ODSd9Z&result=1#omo-9781561592630-e-0000040026-div1-0000040026.1> [<https://perma.cc/6KMX-NPHW>].

153. DEMERS, *supra* note 9, at 15.

154. *Id.* at 15–16.

155. An Act to Amend the Several Acts Respecting Copyrights, ch. 16, sec. 1(1831) (“any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any . . . musical composition, which may be now made or composed”).

156. Eisen & Sadie, *supra* note 152; Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152.

157. *See generally* Eisen & Sadie, *supra* note 152; Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152 (containing thorough descriptions of each composer's life and travels).

158. *The Declaration of Independence, 1776*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1776-1783/declaration> [<https://perma.cc/62HY-BLD6>].

159. *See supra* Part II.A.

160. Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152.

161. Eisen & Sadie, *supra* note 152.

to the *Prague Symphony* would have most likely passed to Mozart's surviving wife or children.¹⁶²

The copyright at the time of this imaginary suit, around 1802, after Beethoven completed his *Symphony No. 2*, may have been in the hands of a publisher, though this is unclear. Near the end of Mozart's career, the publisher Artaria & Co. published many of his works.¹⁶³ However, little information survives on exactly which pieces Artaria published.¹⁶⁴ That being said, even if Artaria did own the publishing rights to the *Prague Symphony*, this Comment will proceed as if the Mozart estate owned a valid copyright and sued Beethoven for copyright infringement.

B. Application

The prima facie case of copyright infringement is that (1) the plaintiff owns a valid copyright and (2) the defendant actually copied protected elements of that copyrighted work.¹⁶⁵ As stated earlier, this Comment will assume that the Mozart estate owns a valid copyright.¹⁶⁶ Circumstantial evidence is required here to support the proposition that Beethoven copied Mozart, as there is, unsurprisingly, no direct evidence that Beethoven actually copied Mozart's *Prague Symphony* in his *Symphony No. 2*.¹⁶⁷ Therefore, Mozart must show that (1) Beethoven had access to the *Prague Symphony* and (2) the *Prague Symphony* and *Symphony No. 2* are substantially similar.¹⁶⁸

To prove that Beethoven had access to Mozart's *Prague Symphony*, Mozart must show that there was a reasonable possibility that Beethoven had access to Mozart's work, not just a bare possibility.¹⁶⁹ To show the reasonable possibility of access, Mozart can either show direct evidence of access or circumstantial evidence of access. Direct evidence of the reasonable possibility of access might consist of testimony or other direct evidence that Beethoven had heard

162. U.S. COPYRIGHT OFFICE, COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE 167 (2020), <https://www.copyright.gov/title17/title17.pdf> [<https://perma.cc/KW5A-P4ZW>]; see Staffan Albinsson, *Early Music Copyrights: Did They Matter for Beethoven and Schumann?*, 43 INT'L REV. AESTHETICS & SOCIO. MUSIC 265, 273 (2012).

163. See Rupert Ridgewell, *Mozart's Publishing Plans with Artaria in 1787: New Archival Evidence*, 83 MUSIC & LETTERS 30, 44, 47 (2002).

164. See generally *id.* (discussing Mozart's publishing relationship with the publishing house Artaria).

165. See *supra* Part II.A.

166. See *supra* Part IV.A.

167. See *supra* Part II.A.

168. See *supra* Part II.A.

169. See *supra* Part II.A.

or seen a score of Mozart's *Prague Symphony*. It is most likely that Beethoven will deny ever having heard the *Prague Symphony*, just as Perry did in *Gray v. Perry*, to defend himself.¹⁷⁰ Additionally, there is likely no direct evidence that Beethoven heard a concert in which Mozart's *Prague Symphony* was played or studied the score. Therefore, Mozart will need to rely on circumstantial evidence.

Fortunately for Mozart, there is circumstantial evidence that shows that Beethoven had access to his *Prague Symphony*. To show circumstantially that there is a reasonable possibility that the defendant had access to the plaintiff's work, the plaintiff must show either (1) a chain of events linking the plaintiff's work and the defendant such that the defendant had access to that work or (2) wide dissemination.¹⁷¹ Because a chain of events would likely require concert attendance records, notes by Beethoven on his studies, or some other linking evidence, Mozart is much more likely to demonstrate access via wide dissemination.

However, Mozart can prove access through proof of wide dissemination of this particular work. While the particular evidence required for a showing of wide dissemination depends on the facts of the case and therefore varies, it often includes commercial success or significant availability in the relevant market.¹⁷² Commercial success looked different in the eighteenth century than it does today; unlike the plaintiffs in *Gray v. Perry*, Mozart cannot rely on YouTube and Myspace views as evidence.¹⁷³ However, considering the time, the *Prague Symphony* did indeed enjoy commercial success and was likely in Beethoven's relevant market.¹⁷⁴ Therefore, it is likely that Mozart can show that "there is a reasonable possibility that defendants had the chance to view the protected work."¹⁷⁵ Mozart can make four main arguments that the *Prague Symphony* was commercially successful and in Beethoven's relevant market, assuring that Beethoven actually heard or saw the piece: (1) the success of the *Prague Symphony*; (2) the success and widespread dissemination of Mozart's music, especially in the places Beethoven frequented; (3) the fact that Beethoven and his teachers were interested in Mozart's music such that he was likely to have heard or seen the *Prague Symphony*; and (4) the fact that the

170. *See supra* Part II.A.

171. *See supra* Part II.A.

172. *See supra* Part II.A.

173. *See supra* Part II.A.

174. Erin Naillon, *Mozart and Prague*, PRAGUE BLOG, <https://www.private-prague-guide.com/article/Mozart-and-prague> [<https://perma.cc/SK5U-8WLP>].

175. *Gray v. Perry*, No. 15-cv-05642-CAS (JCx), 2018 WL 3954008, at *4 (C.D. Cal. Aug. 13, 2018).

instrumental parts of the *Prague Symphony* were published at a similar time to when Beethoven began to compose *Symphony No. 2*.

First, the *Prague Symphony* was highly successful in its time. Written in 1786, it was premiered in Prague in 1787 to great success; Mozart performed an encore at the concert for over a half-hour due to the crowd's accolades.¹⁷⁶ Mozart even left the city with a commission for a new opera.¹⁷⁷ The symphony was so popular in Prague that ten years after the concert, the Prague schoolmaster Franz Niemetschek noted that "the symphonies [Mozart] composed for this occasion are real masterpieces of instrumental composition . . . This applied particularly to the grand . . . [*Prague Symphony*], which is always a favorite in Prague, although it has no doubt been heard a hundred times."¹⁷⁸ It was around the timeframe of Niemetschek's above quote that Beethoven travelled to Prague.¹⁷⁹ It is not merely a "bare possibility" that Beethoven heard the *Prague* symphony if it was played over one hundred times in that city, but it is a "reasonable possibility."¹⁸⁰ Indeed, Beethoven even performed two Mozart pieces in three concerts in Prague while he was touring.¹⁸¹

Additionally, Mozart's music in general was played all over Europe and especially in the places Beethoven frequented.¹⁸² Throughout his life, Beethoven lived in or traveled to many of the same places that Mozart also frequented, including Vienna and Prague.¹⁸³ During Beethoven's first visit to Vienna in 1787, he even met and played for Mozart.¹⁸⁴ Note that this meeting

176. Dr. Beth Fleming, *Mozart Festival Program Notes: Wolfgang Amadeus Mozart, Symphony No. 38 in D Major (Prague), K. 504*, SYMPHONY SILICON VALLEY, [https://web.archive.org/web/20150418080826/https://www.symphonysiliconvalley.org/concerts.php?pagecontID=56&showID=12].

177. *Id.* The opera he was commissioned for was his famous *Don Giovanni*, which premiered in Prague less than a year later. *Id.*

178. Fleming, *supra* note 176.

179. Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152.

180. Gray, 2018 WL 3954008, at *5.

181. Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152. One of the pieces was Mozart's B-flat Piano Concerto, which was written for Prague. *Id.*

182. See Mary L. Kerbs, The Compositional Influence of Wolfgang Amadeus Mozart on Ludwig van Beethoven's Early Period Works (Apr. 18, 2018) (presented at 2018 Young Historians Conference).

183. See generally Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152.

184. *Did Beethoven Meet Mozart?*, CLASSIC FM (Jan. 6, 2020, 11:33 AM), [https://www.classicfm.com/composers/beethoven/guides/beethoven-and-mozart/ [https://perma.cc/8UKW-C37G]]. Mozart allegedly was impressed with the young Beethoven and agreed to take him on as a student; however, Beethoven's mother's health was deteriorating so he

was the same year that Mozart premiered the *Prague Symphony*, so it is a reasonable possibility that the young Beethoven, while trying to secure Mozart as a teacher, would have extensively studied Mozart's recent works.¹⁸⁵

This evidence is even more convincing than the evidence presented in *Gray v. Perry* because it demonstrates that Mozart's *Prague Symphony* was widely disseminated in Beethoven's relevant market. In *Gray v. Perry*, the plaintiffs, Gray, prevailed on a motion for summary judgment by showing that their song accumulated over three million online views.¹⁸⁶ This result was despite the fact that Gray's song was in the niche Christian hip-hop market, while Perry's song was in the commercial pop market.¹⁸⁷ Here, Mozart's *Prague Symphony* was perhaps played "a hundred times" in Prague and no doubt many times in Vienna and other markets in which Mozart was popular.¹⁸⁸ For a single piece to be played this many times at this time in the small geographical area would mean that a large majority of the concert-going population would have heard it. Because Beethoven was a member of this music community, it seems clear that Beethoven would have heard the *Prague Symphony*.¹⁸⁹

Third, it is very likely that Beethoven heard the *Prague Symphony* because he was taught in, and later composed in, the same tradition as Mozart. Beethoven's first important teacher once remarked that Beethoven "would surely become a second Wolfgang Amadeus Mozart if he were to continue as he has begun," when speaking of Beethoven's great talent as a child prodigy.¹⁹⁰ Beethoven's teacher clearly was familiar with Mozart's work and would likely have had Beethoven study the works if he were to become "a second . . . Mozart" as both a composer and performer.¹⁹¹ In fact, Beethoven was well versed in the Viennese classical tradition; experts have classified the

instead returned to Bonn to be with her. *Id.* He never had the chance to study with him beyond a lesson or two, as the next time Beethoven returned to Vienna, Mozart had died. *Id.*; Eisen & Sadie, *supra* note 152.

185. Kerbs, *supra* note 182.

186. *Gray v. Perry*, No. 15-cv-05642-CAS (JCx), 2018 WL 3954008, at *2 (C.D. Cal. Aug. 13, 2018). While this opinion was superseded in March, 2020, the more recent case still determined that "a reasonable jury could have concluded from this evidence that the relevant defendants who composed the allegedly infringing ostinato in 'Dark Horse' had a reasonable opportunity to have encountered 'Joyful Noise'" for the same reasons as its original opinion. *Gray v. Perry*, No. 15-CV-0564-CAS-JCx, 2020 WL 1275221, at *14 (C.D. Cal. Mar. 16, 2020).

187. See *Gray*, 2018 WL 3954008, at *2–3.

188. Fleming, *supra* note 176. *But see* Anthony Suter, *Symphony No 38 Prague K. 504*, REDLANDS SYMPHONY, <https://www.redlandssymphony.com/pieces/symphony-no-38-prague-k-504> [<https://perma.cc/6T86-8AT6>].

189. Kerbs, *supra* note 182, at 1–2.

190. Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152.

191. *Id.*

end of Beethoven's first period of compositions as his Vienna period.¹⁹² Mozart himself was a Viennese composer, and Beethoven often emulated his music within this period of composition.¹⁹³ Therefore, it is likely that Beethoven knew the music of Mozart, including the *Prague Symphony*, extremely well. Moreover, there is evidence that Beethoven copied passages of other Mozart works to study them.¹⁹⁴

Finally, the published parts of Mozart's *Prague Symphony* were first published around the same time as Beethoven began composing *Symphony No. 2*. The instrumental parts were published by Johann André in Offenbach, Germany, in 1800.¹⁹⁵ Beethoven likely began sketching the beginning of *Symphony No. 2* around the same time, as it was completed in 1802.¹⁹⁶ Additionally, there is some evidence that the *Prague Symphony* was actually performed at a concert in Vienna at the end of 1800, at the time Beethoven was there.¹⁹⁷ These facts make it even more likely that Beethoven heard or saw Mozart's *Prague Symphony*. For all these reasons, Mozart would prevail on the first element—access—of the prima facie case for copyright infringement.

Next, to prove that the *Prague Symphony* and *Symphony No. 2* are substantially similar, Mozart must satisfy the two-part test for substantial similarity, which is both extrinsic and intrinsic.¹⁹⁸ The extrinsic test may be applied by the court, while the intrinsic test must be applied by the trier of fact. This Comment will act as if the trial is a bench trial, making the judge the trier of fact, so that both tests can be analyzed. The extrinsic test is objective and will be satisfied if Mozart can demonstrate that the protectable elements of the *Prague Symphony* are substantially similar to *Symphony No. 2*. Using the framework set forth in *Williams v. Gaye*, this Comment concludes that Mozart will prevail in both the extrinsic and intrinsic tests.

First, like the court in *Williams v. Gaye*, this Comment notes that Mozart qualifies for broad protection with regards to the *Prague Symphony* because a symphony has a wide range of expression and a large array of elements, “some

192. *Id.*

193. *Id.*

194. Roger Kamien, *The Slow Introduction of Mozart's Symphony No. 38 in D, K.504 ("Prague"): A Possible Model for the Slow Introduction of Beethoven's Symphony No. 2 in D, Op. 36*, 5 *ISR. STUD. MUSICOLOGY* 113, 113 (1990).

195. *Id.* at 115–16.

196. *Id.* at 114–16; Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152.

197. Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152, at 116.

198. *See supra* Part II.A.

combination of which is protectable by copyright.”¹⁹⁹ Therefore, like the court in *Williams v. Gaye* concluded, Mozart does not need to “prove virtual identity to substantiate” his infringement action, but only substantial similarity.²⁰⁰ Again, like the court in *Williams v. Gaye*, this Comment will focus on harmonic and melodic similarities between the *Prague Symphony* opening and the *Symphony No. 2* opening.

At first listen, the similarities between the two openings are not exactly striking; however, just like in *Williams v. Gaye*, the opening sections of the two pieces of music here track each other both at the structural level and sectional and phrasing levels below the surface.²⁰¹ The “subtle and distinctive way[s]” in which the similar features, like structure, phrasing, and harmony, “are combined in a final artistic whole in both” the *Prague Symphony* and *Symphony No. 2* is undeniable.²⁰² These similarities are as follows: (1) structural-level form; (2) unusual melodic and harmonic details; and (3) noted use of enharmonic motifs.²⁰³ Taken together, “some combination” of these similar elements are protectable by copyright; therefore, Mozart will prevail on at least the extrinsic portion of our imaginary copyright infringement suit.²⁰⁴

First, the large-scale structure of both symphonic sections is undeniably similar. Both symphonies open with similar and unusual directions: Mozart’s with “adagio,” meaning “at ease” or “leisurely,”²⁰⁵ and “adagio molto,” meaning “much” or “very”²⁰⁶ adagio. These both denote a slow tempo,²⁰⁷ which is quite unusual as an opening to a symphony, as most symphonies in the

199. See *supra* Part II.B.ii; Jan Larue, Eugene K. Wolf, Mark Evan Bonds, Stephen Walsh & Charles Wilson, *Symphony* (*Fr. symphonie, symphonie; Ger. Sinfonie, Symphonie; It. sinfonia*), GROVE MUSIC ONLINE (April 27, 2006), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000027254?rskey=btjcb&result=1#omo-9781561592630-e-0000027254-div1-0000027254.1> [<https://perma.cc/2XHL-SG3C>]; *Williams v. Gaye*, 895 F.3d 1106, 1120 (9th Cir. 2018) (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)).

200. See *supra* Part II.B.ii.

201. See Kamien, *supra* note 194, at 114; *supra* Part II.B.ii.

202. See *supra* Part II.B.ii.

203. See Kamien, *supra* note 194, at 114; see generally Judith Finell MusicServices Inc. expert opinion, *supra* note 75 (showing how an expert musicology witness separates and analyzes elements of music for purposes of court).

204. *Williams*, 895 F.3d at 1120 (quoting *Swirsky*, 376 F.3d at 849).

205. David Fallows, *Adagio* (*It.: ‘at ease’, ‘leisurely’*), GROVE MUSIC ONLINE (2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000000149?rskey=E7XxTy&result=1> [<https://perma.cc/R8XK-ABCS>].

206. *Molto* (*It.: ‘much’, ‘very’*), GROVE MUSIC ONLINE (2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000018915?rskey=tZqFJR&result=1> [<https://perma.cc/F774-9BSW>].

207. Fallows, *supra* note 205.

classical period open with a fast tempo.²⁰⁸ Both opening sections are a similar length: Mozart's is 36 measures, while Beethoven's is 33.²⁰⁹ Mozart's and Beethoven's opening sections are split into three main subsections: (1) an opening subsection, which is centered in the main tonic key of D-major; (2) a contrasting second section, which is centered in the closely-related minor-key of D-minor; and (3) the conclusion, which centers around the dominant²¹⁰ pedal-point or repeated note until it resolves in the next "allegro" section.²¹¹ Additionally, each of these subsections are of virtually identical length in both Mozart's and Beethoven's pieces.²¹² Not only is the fact of an adagio at the beginning of a symphony unusual enough to warrant comparison but the fact that the subsections track almost measure-to-measure suggests that the pieces are substantially similar.

Second, several melodic and harmonic motifs are similar between the two pieces, both in pitch and location. The opening measure of the Mozart Symphony begins on a two-beat chord, played loudly by the whole orchestra, centered on the tonic note D (see Appendix A).²¹³ While it is typical to have the beginning of a piece open on the tonic chord, it is notable that Beethoven chose the same key, loud volume, and exact orchestration as Mozart for this opening chord.

Next, the interesting and unique harmony in the opening measure of Beethoven's piece clearly tracks the opening phrase of Mozart's piece. While Mozart's lilting melody is longer and more chromatic than Beethoven's simple and operatic melody, they share similar melodic progressions; Beethoven's

208. Larue, Wolf, Bonds, Walsh & Wilson, *supra* note 199.

209. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [<https://perma.cc/766S-BBWT>]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

210. The dominant is the fifth note in a scale and one of the most important notes in classical music because the chord built on the dominant has a lot of tension that "wants" to resolve to the tonic, or main, note of the pitch-center. See Janna Saslaw, *Dominant (i)*, GROVE MUSIC ONLINE (2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000053791?rsk=Sk5V6A&result=3> [<https://perma.cc/BKJ2-NJLQ>].

211. See Kamien, *supra* note 194, at 117.

212. See *id.*

213. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [<https://perma.cc/766S-BBWT>]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

melody can be heard as a condensed and simplified version of Mozart's.²¹⁴ Both melodies, appearing in the string section of the orchestra, feature an unusual series of harmonic underpinnings where the dominant²¹⁵ resolves to a secondary-dominant of the supertonic (the chord based on the second scale degree) instead of the expected tonic (the chord based on the first scale degree) (see Appendix B).²¹⁶ This progression is unusual enough that it can be seen as substantially similar and not just a coincidence.²¹⁷ Additionally, in the top voice in both pieces, the non-chord tone D is metrically stressed due to its placement at the beginning of the measure and then resolves to the chord-tone C-sharp (circled in Appendix B).²¹⁸ This is unusual because it is placed on the down-beat of the measure; therefore, it adds uncertainty to the sound of the melody because it sounds dissonant. These features, taken together with their parallel locations and pitch centers, suggest that the first phrase of each piece are substantially similar.

In the second phrase of the opening sections of both Mozart's and Beethoven's pieces, there are more substantial harmonic and melodic similarities. Both pieces have a clear emphasis on the sixth scale degree, called the submediant.²¹⁹ This is an unusual chord to emphasize in a major key like the two phrases are in.²²⁰ This can be seen in Appendix C, showing measure

214. Kamien, *supra* note 194, at 118, 121.

215. Saslaw, *supra* note 210.

216. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [https://perma.cc/766S-BBWT]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [https://perma.cc/U7R5-RAN4].

217. To explain why this is unusual is too complicated and far outside the scope of this Comment. For more information, see Chuku Onyemachi, *Here are Two Ways to Resolve Dominant Seventh Chords*, HEAR & PLAY, <https://www.hearandplay.com/main/resolve-dominant-seventh-chords> [https://perma.cc/PZ2Y-FYU7].

218. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [https://perma.cc/766S-BBWT]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [https://perma.cc/U7R5-RAN4].

219. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [https://perma.cc/766S-BBWT]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [https://perma.cc/U7R5-RAN4].

220. *Submediant*, GROVE MUSIC ONLINE (2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000027060?rsk=y=uNTo62&result=1> [https://perma.cc/8VWF-79RL].

twelve of the Mozart piece and measure nine of the Beethoven piece.²²¹ More examples litter the opening material in both the Mozart and Beethoven pieces. For example, in the Mozart piece, there is similar emphasis on the submediant in measure four.²²² In the Beethoven piece, emphasis on the subtonic comes in measures six, eight, and eleven.²²³

At the end of the first section in D-major of both pieces, another substantially similar melodic motif is featured in both the Mozart and the Beethoven pieces. Just prior to the second section in D-minor, the rhythmic pattern of the triplet appears for the first time in the piece (see Appendix D).²²⁴ This occurs in measure fifteen of the Mozart piece in the first violin part and in measure seven of the Beethoven piece in both the first and second violin parts.²²⁵

The second sections of the opening of both pieces change to D-minor and have a “tense and contrasting” feel, which are both twelve measures long.²²⁶ These twelve measures have even more noticeable substantial similarities than their corresponding first sections. First, both Mozart and Beethoven begin the phrase with an ascending arpeggio on the dominant chord accompanied by pedal tone sixteenth notes in which the first is played louder than the rest (see Appendix E).²²⁷ The arpeggio in the Mozart piece is ornamented while the arpeggio in the Beethoven piece is not, but this does not change the underlying

221. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [<https://perma.cc/766S-BBWT>]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

222. *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

223. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [<https://perma.cc/766S-BBWT>].

224. Kamien, *supra* note 194, at 122; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

225. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [<https://perma.cc/766S-BBWT>]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

226. Kamien, *supra* note 194, at 123.

227. *Id.*

harmonic similarities between the two.²²⁸ Additionally, it is unsurprising that the Mozart passage is more ornamented because the style of the Mozart opening section of the *Prague Symphony* is more ornamented as a whole than that of the Beethoven *Symphony No. 2*. The melodies still sound similar, especially because of the identical accompanying sixteenth notes and similar harmonic structure.

The harmonies featured in the openings of both pieces' second sections are also similar in that the minor tonic and major submediant chords are repeatedly emphasized.²²⁹ This occurs in measures eighteen through twenty-eight of the Mozart piece and measures eleven through twenty-one of the Beethoven piece.²³⁰ Moreover, these sections are exactly ten measures long in both pieces.²³¹ Finally, both pieces end with a long concluding section where the dominant chord is emphasized.²³² While these sections are not identical in length, they do end up sounding identical in length because the shorter section, the Mozart, concludes with a fermata.²³³ As is clear from this analysis, the Mozart *Prague Symphony* and the Beethoven *Symphony No. 2* opening adagio sections are substantially similar both harmonically and melodically, lending support for the conclusion that, by applying the Ninth Circuit test, Beethoven infringed upon Mozart's copyrights.

Third, the Beethoven and Mozart pieces have similar use of enharmonic motifs. Enharmonic notes are those that sound the same but are written differently on the page.²³⁴ For example, the note D-flat, which sounds halfway between the notes D and C, is an enharmonic to the note C-sharp, which also sounds halfway between the notes D and C. The difference lies in the how it is conceptualized: it is either a half-step lower than D or a half-step higher than C. Either way, the note sounds exactly the same to the ear. These enharmonic

228. *Symphony No. 2 in D Major, Op. 36*, http://ks4.imslp.net/files/imglnks/usimg/8/86/IMSLP00603-Beethoven_-_Symphony_No.2_Mov_1.pdf [<https://perma.cc/766S-BBWT>]; *Symphony No. 38 in D Major (Prague), K. 504*, http://imslp.eu/files/imglnks/euimg/1/15/IMSLP339904-PMLP01570-nma-mozart-38-full-score_cropped.pdf [<https://perma.cc/U7R5-RAN4>].

229. Kamien, *supra* note 194, at 123.

230. *Id.* at 120.

231. *Id.*

232. *Id.* at 126.

233. A fermata instructs the orchestra to hold the note beyond its usual value. David Fuller, *Fermata (It.: 'pause')*, GROVE MUSIC ONLINE (2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000009487?rskey=RNBRa3&result=1> [<https://perma.cc/8LL6-7RGM>].

234. Julian Rushton, *Enharmonic*, GROVE MUSIC ONLINE (2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000008837> [<https://perma.cc/5XVJ-RD84>].

motifs, particularly the enharmonics A-sharp/B-flat and D-sharp/E-flat, are sprinkled throughout both pieces. To a listener they may not sound like anything, but while looking at the score, it is clear that these were purposefully inserted.²³⁵ Enharmonics play an important role in both the Mozart and the Beethoven pieces;²³⁶ the similarity is substantial enough that, taken together with the other aforementioned similarities, it becomes clear that Beethoven did copy Mozart's *Prague Symphony* when he composed his *Symphony No. 2*.

As noted above, music copyright lies less with the small individual details and more with the whole sound of similar-ness of the two pieces of music; this is something only the trier of fact can determine using the intrinsic test. However, even the untrained listener can note some similarities between two opening slow sections in the same key, with the same length, and some of the same melodies and details.²³⁷ With a persuasive expert at trial, there is little doubt that a jury, following instructions crafted after the precedent set in *Williams v. Gaye*, would come to the conclusion that Beethoven infringed upon Mozart's copyright.

V. ARGUMENT

That Mozart would prevail in this imaginary copyright infringement suit against Beethoven shows a failure of Ninth Circuit music copyright precedent to do what it is supposed to do: stop illegal stealing of music.²³⁸ Instead, the Ninth Circuit precedent has evolved into an all-encompassing test that captures music that was not consciously copied from other music. If *Symphony No. 2* and *Prague Symphony* are considered substantially similar enough to overcome a lack of evidence of true copying, then numerous other pieces of music from the Classical Period could be substantially similar enough to another piece from the Classical Period. Indeed, copyright should immunize independent creation; just because something is similar does not mean it is subject to a copyright infringement suit.²³⁹ However, Ninth Circuit precedent allows just that.

If this precedent had existed when Mozart and Beethoven were living, it would have had a chilling effect on the output of some of the most prolific and important composers in history. Countless composers throughout history have taken inspiration from other composers.²⁴⁰ If musical output of master

235. Kamien, *supra* note 194, at 124–25.

236. *Id.*

237. *See generally id.*

238. DEMERS, *supra* note 9.

239. DRATLER & MCJOHN, *supra* note 18, at 5-3, 5-23–5-24.

240. *See* Ctr. for the Hist. of Music, Theory, and Literature, *supra* note 138.

composers were limited, music might not be where it is today and humanity might be missing some of the great masterworks that make up the repertoire.

This chilling effect would compound over time. For example, Mozart was known to have copied early-classical composer Franz Joseph Haydn.²⁴¹ If Mozart could not have done this, then a few of his pieces would not have existed or would not have been as impressive. Then, as we know, Beethoven was known to have copied Mozart. If Beethoven could not have done this, again, a few of his pieces may not have existed or have been as impressive. This could continue throughout the ages—from Beethoven, to Brahms,²⁴² to Mahler,²⁴³ and so on and so forth. Beyond actual copying, which is supposed to be prohibited by copyright infringement law, Ninth Circuit precedent has expanded to the point of disallowing independent creation that barely sounds similar. If this were applied to Western Art Music, where would the status of music be? If the great masters of composition could not have improved, learned from, and expanded on the masters of the past, music would likely not be as far advanced as it is today.

One reason that copying may have occurred so often during the classical period is that composers were trained by studying the music of the past.²⁴⁴ The same way that law students learn how to apply new law by studying historical cases, composers learn how to compose new pieces by studying historical music. Beethoven studied Mozart while learning to compose.²⁴⁵ This tradition even continued in more modern music: blues and rock artists are known to hone their craft by “jamming around a known tune to construct new songs.”²⁴⁶ In fact, there is research that shows that music can become literally engrained in the neurons in human brains, making it nearly impossible to create something too different from that which we have already heard.²⁴⁷

241. See Mark Evan Bonds, *Replacing Haydn: Mozart's 'Pleyel' Quartets*, 88 *Music & Letters* 201 (2007).

242. Krista L. Cox, *If Mozart and Beethoven Were Alive Today, Would they Be Guilty of Copyright Infringement?*, ABOVE THE L. (Nov. 15, 2018, 11:28 AM), <https://abovethelaw.com/2018/11/if-mozart-and-beethoven-were-alive-today-would-they-be-guilty-of-copyright-infringement/?rf=1>.

243. *Id.*

244. See Ctr. for the Hist. of Music, Theory, and Literature, *supra* note 138 (showing the extent of musical borrowing).

245. Kerman, Tyson, Burnham, Johnson & Drabkin, *supra* note 152.

246. Philip Ball, *Musicians Are Wired to Steal Each Other's Work*, THE ATLANTIC (Sept. 14, 2016), <https://www.theatlantic.com/science/archive/2016/09/music-plagiarism/499985/> [https://perma.cc/GW6Y-QPJH]. This is how the band Led Zeppelin composed. *Id.*

247. See generally Petr Janata, Jeffrey L. Birk, John D. Van Horn, Marc Leman, Barbara Tillmann & Jamshed J. Bharucha, *The Cortical Topography of Tonal Structures Underlying Western Music*, 298 *SCIENCE* 2167 (Dec. 13, 2002).

Humans can only be so creative, and “[i]n some ways, . . . to be successful as a [composer], you have to utilize elements of existing music.”²⁴⁸ This is how genres are created and how they are improved upon: composers explore a creative style within a set of parameters—e.g., sad stories and “twang” make up the “country” genre; repetitious and rhythmic music along with rhymed rapping makes up the “hip-hop” genre; light and clear textured symphonic music with a predictable harmonic progression makes up the “classical period” genre, etc.—and move on when the style is spent.²⁴⁹

For the above reasons, music copyright law of the Ninth Circuit is too stringent and needs to be relaxed. The advancement of art relies upon the art that already exists; without the music of Beethoven and Mozart, perhaps we would not have the music of Stravinsky, Cage, and even modern popular music. It is to the benefit of humanity to allow musicians to explore within a genre to a greater extent than they are allowed to by Ninth Circuit precedent.²⁵⁰ Indeed, it is the intent of copyright infringement law to increase creativity by disallowing copying²⁵¹ but still allowing independent creation within a genre. The Ninth Circuit’s laws have gone too far, as is made evident by the shocking result in *Williams v. Gaye*.²⁵² Creators need leeway to create to advance art for the benefit of all humanity.

248. Ball, *supra* note 246.

249. Jocelyn R. Neal, *Country music*, GROVE MUSIC ONLINE (July 10, 2012), <https://0-www-oxfordmusiconline-com.libus.csd.mu.edu/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-1002224075?rskey=paiCRA&result=4> [<https://perma.cc/PEUS-97UH>] (link requires credentials to login); David Toop, *Rap*, GROVE MUSIC ONLINE (July 10, 2012), <https://0-www-oxfordmusiconline-com.libus.csd.mu.edu/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-1002225387?rskey=RVMpMI&result=1> [<https://perma.cc/G83D-EQZV>] (link requires credentials to login); Elaine Sisman, *Variations*, GROVE MUSIC ONLINE (2001), <https://0-www-oxfordmusiconline-com.libus.csd.mu.edu/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000029050#omo-9781561592630-e-0000029050-div1-0000029050.8> [<https://perma.cc/V854-V5EE>] (link requires credentials to login).

250. See *Gray v. Perry*, No. 15-cv-05642-CAS (JCx), 2018 WL 3954008, at *8 (C.D. Cal. Aug. 13, 2018); *Williams v. Gaye*, 895 F.3d 1106, 1138 (9th Cir. 2018).

251. See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1335 (2015).

252. See Krista L. Cox, *Blurred Lines: Can You Copy a Music Genre?*, ABOVE THE L. (Mar. 23, 2018, 10:43 AM), <https://abovethelaw.com/2018/03/blurred-lines-can-you-copy-a-music-genre/> [<https://perma.cc/KBS6-73HW>].

Because copyright infringement law is so murky, with no clear line as to what is protected and what is not,²⁵³ it is difficult to say what word or particular line of reasoning should be changed. However, it is clear that it should be changed, lest this “dangerous precedent . . . [strike] a devastating blow to future musicians and composers everywhere.”²⁵⁴ A possible solution, which should be adopted, was offered by Judge Nguyen in her dissent to the Ninth Circuit’s decision in *Williams v. Gaye*.²⁵⁵ Judge Nguyen stated that Williams should have been entitled to judgment as a matter of law because the similarities (phrase structure, hook with backup vocals, short melody, and harmonic hook)²⁵⁶ between the Williams and Gaye songs were merely stylistic, emulating genre similarities, not actual similarities such that actual copying can be inferred.²⁵⁷

If this line of reasoning were applied to *Mozart v. Beethoven*, Beethoven, too, would have been entitled to judgment as a matter of law, saving *Symphony No. 2* from an untimely death and preserving the masterwork for future generations.

VI. CONCLUSION

Music borrowing has been a common tool of composers throughout history. This is not surprising because all creative works share some sort of inspiration from those of the past. However, the recent cases *Williams v. Gaye* and *Gray v. Perry* show that copyright infringement laws have become so strict as to restrict composers from taking inspiration from prior works, even by accident. This in turn has a chilling effect on the creation of new works. For example, Beethoven did not appear to have outright copied Mozart but perhaps only took inspiration from Mozart’s *Prague Symphony* when he composed the opening section of his *Symphony No. 2*. If modern copyright infringement laws applied in Beethoven’s time and place, Mozart would prevail on a suit against Beethoven for copyright infringement. The effect of this would be the restriction of creativity and the progress of the musical arts within a given genre. Therefore, copyright infringement law should be relaxed, allowing more leeway in musical creativity.

253. *Williams*, 895 F.3d at 1120 (explaining that the line between copyrightable elements and uncopyrightable elements is difficult to draw because musical works have a “large array of elements, some combination of which [are] protectable by copyright”).

254. *Williams v. Gaye*, 885 F.3d 1150, 1183 (9th Cir. 2018) (Nguyen, J., dissenting).

255. *Id.*

256. Lieberman, *supra* note 25, at 132.

257. *Williams*, 885 F.3d at 1183–84, 1186.

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APPENDIX A

FIGURE 1.A: MOZART OPENING MEASURE

Adagio

Violino I

Violino II

Viola I,II

Violoncello e Basso



FIGURE 1.B: BEETHOVEN OPENING MEASURE

Adagio molto. ♩ = 84.

Violino I.

Violino II.

Viola.

Violoncello e Basso.



APPENDIX B

FIGURE 2.A: MOZART OPENING PHRASE

Adagio

Violino I

Violino II

Viola I,II

Violoncello e Basso

p

V

V/II

FIGURE 2.B: BEETHOVEN OPENING PHRASE

Adagio molto. ♩ = 84.

Oboi.

Fagotti.

ff

p

V

V/II

APPENDIX C

FIGURE 3.A: MOZART EMPHASIS OF THE SUBMEDIANT

Adagio

Violino I

Violino II

Viola I,II

*Violoncello
e Basso*

vii^{o7}/VI VI

Detailed description: This figure shows a musical score for an Adagio movement. It consists of four staves: Violino I, Violino II, Viola I,II, and Violoncello e Basso. The key signature is one sharp (F#) and the time signature is common time (C). The music is in a submediant position, with a common chord of F#m7b9/VI VI. The notation includes a treble clef for the violins and a bass clef for the viola and cello/bass. The notes are: Violino I (F#, A, C, E), Violino II (F#, A, C, E), Viola I,II (F#, A, C, E), and Violoncello e Basso (F#, A, C, E).

FIGURE 3.B: BEETHOVEN EMPHASIS OF THE SUBMEDIANT

Adagio molto. ♩ = 84.

Fagotti.

V/Vi

Detailed description: This figure shows a musical score for an Adagio molto movement. It consists of a single staff for Fagotti. The key signature is one sharp (F#) and the time signature is 4/4. The music is in a submediant position, with a common chord of V/Vi. The notation includes a bass clef. The notes are: F#, A, C, E.

APPENDIX D

FIGURE 4.A: MOZART FIRST TIME TRIPLETS APPEAR

Adagio



FIGURE 4.B: BEETHOVEN FIRST TIME TRIPLETS APPEAR

Adagio molto. ♩ = 84.



APPENDIX E

FIGURE 5.A: MOZART ARPEGGIO AND ACCOMPANIMENT

Adagio

FIGURE 5.B: MOZART ARPEGGIO AND ACCOMPANIMENT

Adagio molto. $\text{♩} = 84.$