A constellation of inconsistencies: questioning the blurred lines of music copyright infringement

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The 2013 hit song *Blurred Lines* will be remembered for posing an unprecedented threat to the creative soul of the music industry. Following a highly publicised court battle in 2015, Robin Thicke and Pharrell Williams were found to be liable for infringement of the mode of expression in Marvin Gaye's song *Got to Give it Up* (*Williams v. Gaye*, 2018). Mode of expression refers to the style, genre and sound of a song, referred to as a constellation by the *Blurred Lines* court. In copyright terms a constellation is a combination of elements that individually are considered to fall outside the parameters of copyright protection; this judgment caused significant unrest in the music industry. The verdict affirmed by the Ninth Circuit Appellate Court[1] in July 2018, was a controversial decision, setting a precedent that songs could infringe upon a combination of similarities, a groove, style or genre, blurring the lines between inspiration and theft.

The concluding appellate judiciary opinion highlighted a number of inconsistencies and ambiguities in copyright law and infringement procedures: a lack of guidelines for protected and unprotected elements in a musical work; subjective interpretation of the law by judges, expert witnesses and jury; misguided tests of substantial similarity; and the surfacing of constellation theory. Constellation theory broadens the scope of infringement litigation by suggesting that unprotected elements can become protected if presented in combination. Academics and music media expressed concern that the *Blurred Lines* verdict of infringement by constellation insinuated that to be inspired by the work of others constituted wrongdoing; to copyright a style or genre of a song would be, 'antithetical to the reality of musicians' inspirations and borrowing and is entirely preventative of creativity' (McPherson, 2018, p. 78).

Despite concerns, infringement by constellation has not since been proven in court. Predicted to be a landmark case in changing the landscape of music copyright, and consequently the practice of musical creativity, *Blurred Lines* instead exposed the questionable legal practice of

[1] The Ninth Circuit is a federal court of appeals that has appellate jurisdiction across fifteen districts on the west coast of the United States, including California.

constellation theory and inconsistencies within it, paving the way for change in infringement procedures; subsequent high-profile constellation cases such as *Skidmore v. Led Zeppelin* (2020) and *Gray v. Perry* (2020) appear to be turning the tables, with courts deciding that constellations are not protectable.

This paper aims to identify the reasons why constellation theory is considered a threat to creators and to question why copyright law and infringement procedures remain ambiguous despite calls for clarity. Following a brief overview of United States (U.S.) copyright law and infringement procedures, the relationship between processes of musical creativity and constellation theory will be discussed. Inconsistencies between constellation theory and U.S. copyright law doctrines will then be identified before discussing why copyright law remains so ambiguous considering the potential implications for musical creativity.

U.S. Copyright Law and Infringement Procedures

Musical compositions and sound recordings hold different exclusive rights; this paper concerns itself with musical compositions. Copyright subsists in original 'musical works; including any accompanying words' (*U.S. Copyright Act 1976*), so long as they are recorded in a tangible form; manuscript or sound recording. Originality refers only to expression of ideas, not the underlying ideas themselves. The U.S. Copyright Act 1976 states that copyright protection subsists only in the music and lyrics of a musical work; broadly this has been interpreted to mean that only melodic lines are protectable. Elements, such as, backing tracks, chord progressions, instrumentation, song titles, commonly used phrases, style and genre are public domain and not normally protected. To be granted copyright protection in the U.S., songwriters must register their work with the Copyright Office by submitting a deposit copy; until the enactment of the U.S. Copyright Act 1976 in 1978, only manuscripts were permissible for registration; this would traditionally only include a melodic line, harmonic progression and lyrics, of which only the melodic line and lyrics are protected by law.

Copyright infringement of a musical work refers to the wilful or subconscious copying or unauthorised use of copyrighted materials. For a case to be heard the plaintiff[2] must state a detailed complaint of infringement. A summary judgement[3] to dismiss the case can be passed in favour of the plaintiff or later for the defendant[4] should they file a rebuttal to the claim proving their innocence. To win in court, plaintiffs must prove ownership of copyright in the original work, that the defendant had access to that work, and that there is substantial similarity between the two. Processes between circuits differ, however the Ninth Circuit, where most infringement cases are heard, requires proof that copying occurred, and to what extent that copying was unlawful, known as the Arnstein Test[5] of "access" and "probative similarity" (Balganesh, 2016; Jones, 1993; Ranger-Murdock, 2020). To test substantial similarity, the court employs the extrinsic-intrinsic test, known as the Krofft Test;[6] the extrinsic test involves analytic dissection, including abstraction of unprotected elements from the deposit copy, and expert testimony from both parties; the intrinsic test turns to a jury of laypersons to decide the similarity between the overall feel of each work (Jones, 1993; Lost in Music, 2021; Ranger-Murdock, 2020). Rather than take a case to trial, the plaintiff and defendant can come to an agreement or financial arrangement out of court – known as a settlement – and the case can be voluntarily withdrawn.

Creativity and Constellations

U.S. copyright law was designed to motivate creativity as a matter of 'public interest in the progress of science and useful arts' (*U.S. Const.*, art. I, sec. 8, cl. 8). Creativity is the cornerstone of the music industry and many agree that it should be protected and encouraged rather than stifled by copyright law (Demers, 2006; Jones, 1993; Kuivila, 2016; Lessig, 2004, 2005; Palmer, 2017; Parhami, 2019; Vaidhyanathan, 2001). Schiffer (1996, quoted in

[2] The plaintiff is the party that brings a case against another, usually the owner of the infringed work.
[3] A summary judgment is a fast-tack procedure for disposing of a case that can be passed in favour of either party.
[4] The defendant is the party that the case is filed against, usually the owner of the infringing work.
[5] The Arnstein Test was first introduced by Judge Frank of the Second Circuit (Arnstein v. Porter, 1946).
[6] The Krofft Test was introduced by the Ninth Circuit court (Krofft v. McDonald's, 1977).

McIntyre, 2011, p. 5) describes creativity as 'the ability to take existing objects and combine them in different ways for new purposes'. Demers (2006, pp. 8-9) calls this 'transformative appropriation' – the art of transforming pre-existing works – referring to duplication and allusion specifically; duplication meaning the copying of a pre-existing work, allusion meaning to pass reference to – or be inspired by – a pre-existing work's genre or style. 'Perhaps no area of human creativity relies more heavily upon appropriation and allusion, borrowing and imitation, sampling and intertextual commentary than music' (Coombe, 2006, p. ix).

Demers has concerns about the evolution of copyright law since the 'the advent of recording and replay technologies in the early twentieth century' (Demers, 2006, p. 9), which left courts unable to clarify the difference between the copying, duplication and transformation of a song. Infringement was essentially redefined 'to include… both forms of transformative appropriation; duplication *and* allusion' (2006, p. 9). For the law to conclude that to allude to or be inspired by another song's mode of expression through a constellation of unprotected ideas sets a dangerous precedent as inspiration drives creativity. Haydn was inspired by Bach, Mozart was inspired by Haydn, Beethoven was inspired by Mozart, and so on. Lady Gaga has been influenced by Elton John, Elton John by the Beatles and the Beatles by Elvis Presley, who himself appropriated music by pop, country, gospel and R&B artists. Marvin Gaye had many of his own inspirations and *Got to Give It Up* was apparently inspired by Johnnie Taylor's *Disco Lady* (McPherson, 2018, p. 76). 'All creative works, and especially music, are a product of their author's environment and exposure to other works' (Kuivila, 2017, p. 265).

Copyright law potentially threatens creativity because 'music is a finite art that draws from a finite domain of accepted quantitatively definable sonic devices' (Kuivila, 2016, p. 265). Commercial songwriting increasingly relies on simplified formulaic structures which limit theoretical design and increase the chances of similarity. Songwriters therefore employ creativity in combining expression of ideas to create an original work. 'An artist's musical expression is inextricably linked to the mechanics of the music. The sequencing of notes and

chords, the harmony, melody, beat, tempo, composition, and lyrics all work together to create a musical expression' (Castanaro, 2008, p. 1282). By allowing the constellation, or combination, of ideas and unprotected expressions of ideas to be protected by copyright, the law fails to acknowledge this creative process, potentially restricting creativity.

Additionally, technology drives creativity and copyright law has failed to adapt. 'Together with the emergence of copyright, technological means provide the basis for the modern music industry' (Tschmuck, 2017, p. 51). The democratisation of music technology allows users access to the same samples, plug-ins and patches; consequently, produced music begins to have sonic commonalities. We live in a digital age where everything is available immediately and in abundance, including access to the works of others for wilful or subconscious inspiration. Patry acknowledges 'digital abundance' and refers back to the purpose of copyright law to motivate creativity as a matter of public interest: 'Authors are part of the public too… authors have a compelling interest in being able to copy from other authors in the creation of new works' (2012, p. 132). Copyright infringement's constellation theory should not defy evolving creative practice or the cultural and social realities of making music in the 21st century.

Constellation Theory

During the *Blurred Lines* case, constellation theory was rarely cited as the form of infringement beyond court dockets with reports of favouring words such as style, groove, genre and sound, yet they illustrate the same concept. 'If we look to fashion trends instead of music, "style" generally refers to a constellation of features in a context in which the elements of these groups are constantly changing' (Selfridge-Field, 2017). Constellation theory is the legal argument that a substantially similar constellation, or combination, of elements in a song constitutes infringement. The use of constellation theory in the *Blurred Lines* case caused a furore in the music industry as many were largely unaware that such a theory of infringement existed. The court's decision to allow a constellation of unprotected elements was troubling as:

> 'the absence of nearly identical melodies, lyrics, chord progressions, and note sequences will no longer suffice as a defense against an infringement allegation, so long as an expert witness claims the songs are "substantially similar"' (Zernay, 2017, p. 207).

To protect a constellation of unprotectable ideas is contradictory to the rules of copyright law as it fails to draw a line between unprotectable ideas and protectable expression, the central concept of copyright protection and the key distinction in identifying infringement; the idea/expression dichotomy.

Ranger-Murdoch proposes that constellation theory poses two problems:

> (1) Because of the innate, overlapping qualities of music, the constellation theory is not a good proxy to analyze copying in musical compositions; and (2) by permitting this theory, the Ninth Circuit has been able to avoid defining what constitutes protectable expression in music (Ranger-Murdoch, 2020, p. 1069).

Both problems allude to the failure of courts to define the concepts of the idea/expression dichotomy doctrine, the purpose of which is to limit the scope of copyright protection. Courts cannot effectively give instruction on how to analyse musical works for infringement if ideas and expressions of ideas cannot be defined or separated; '[p]ermitting the constellation theory allows the court to continue to avoid doing so' (Ranger-Murdoch, 2020, p. 1070). The idea/expression dichotomy was first recognised by Judge Learned Hand during the *Nichols v. Universal Pictures* case:

> Upon any work…a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out… but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which apart from their expression, his property is never extended. Nobody

> has been able to fix that boundary, and nobody ever can (*Nichols v. Universal Pictures,* 1930).

The idea/expression dichotomy attempts to set boundaries by implementing analytic dissection and abstraction of unprotected elements, and by questioning substantial similarity to find infringement. What has not been made clear in music infringement litigation is that layered uses of similar expressions are often part of the public domain[7], therefore a constellation may not be an infringement. This is closely related to the doctrine of merger which can be applied by courts when an idea and expression are inseparable or intrinsically connected. If there are a limited number of ways to express an idea, the expression of that idea cannot be protected; any protection of that expression would then protect the idea making it impossible for others to make use of that idea. For example, harmonic function – the relationship of a chord to the tonic of a key – is an idea; a harmonic progression - such as I-V-vi-IV, popular across all genres - is an expression. To allow protection of harmonic progressions would allow protection of harmonic function which is essential to the creation of music. Layered expressions in the public domain, and those protected by the doctrine of merger are problematic, further complicating constellation theory, suggesting that creators could be liable for infringement of a combination of unprotected ideas even when melodic lines are not similar.

> A result such as [*Blurred Lines*], in which the melodies are not even close to being similar, is very dangerous, in that it does not distinguish between an *idea* and the expression of that *idea,* nor does it distinguish between the *influence* of a predecessor's music and the unlawful *copying* of that music… future songwriters do not know whether their "influence" is going to land them with the next hit record or land them in court (McPherson, 2018, p. 71).

[7] Public Domain refers to the collection of creative works and processes where no exclusive intellectual property rights apply.

The Ninth Circuit fails to distinguish between protectable and unprotectable elements in music and consequently 'ignores the various limiting doctrines of copyright law that exclude certain elements from legal protection' (Parhami, 2019, p. 1114); the idea/expression dichotomy and the doctrine of merger. This adds uncertainty to the Ninth Circuit's practice of intrinsic testing where a jury of laypersons are asked to determine misappropriation by substantial similarity through the test of "total concept and feel" based on their overall impression of a work. During the *Blurred Lines* case, the jury were instructed 'that they can find infringement if they perceive that the "total concept and feel" of the two works "are substantially similar"' (Gordon, 2015), however, the judiciary panel failed to instruct the jury to disregard unprotectable elements. The 'application of the "total concept" doctrine becomes dangerously close to extending protection to uncopyrightable and ill-defined ideas like genre, style, or vibe' (Kuivila, 2016, p. 258). Without clarity, "total concept and feel" shifts judgment away from musical content to the comparison of complete audible versions of the works in question which problematically leads juries to find infringement in overall feel; "total concept and feel" is an unguided test of constellation theory with no separation of protected and unprotected elements.

Several academics have criticised the "total concept and feel" test (Lemley, 2010; Nimmer and Nimmer, 2018; Patry, 2017) as the reaction of a jury layperson is subjective. '[J]urors will not exclude unprotected material from comparison. Since juries are not properly educated on the differences between protectable and unprotectable elements, they are more likely to find infringement where they should not' (Lemley, 2010, pp. 737-9). Additionally, every layperson's opinion of similarity will vary dependent on musical aptitude and social and cultural influences. The research of Flexer and Grill (2016) has found that the level of agreement between listeners in judgments of similarity rarely exceeds sixty percent and that tests of similarity perform differently across genres. In contrast, the work of Aucouturier and Pachet (2002) found that listeners focus on timbral similarity and often decided that works were similar even when listening to works of different genres. Arewa (2016) has discussed the fact that cultural

perspectives have an impact on cognition and perception in discussions of copyright and similarity. ‘Sound is more prone to variations in perception, cognitive filtering, and fluctuations in attention that notation... legal discussions of music copyright usually ignore these aspects of musical experience’ (Selfridge-Field, 2017, p. 272).

Despite reasonable concern within the music industry, the use of constellation theory in music infringement cases is not unprecedented; finding infringement by constellation was central to two preceding music infringement cases (*Three Boys Music Corp*. v. Bolton, 2000; *Swirsky v. Carey*, 2004). The Ninth Circuit Appellate Court has previously stated that:

> It is well settled that a jury may find a combination of unprotectible elements to be protectible under the extrinsic test because “the over-all impact and effect indicate substantial appropriation” (*Malkin v. Dubinsky*, 1956, quoted in *Three Boys Music Corp. v. Bolton*, 2000).

The *Malkin v. Dubinsky* case of 1956 took its lead from the Second Circuit *Arnstein v. Porter* case of 1946, and later informed the Ninth Circuit during the *Three Boys, Swirsky* and *Blurred Lines* trials. The *Arnstein* opinion stated that the question of infringement should be:

> whether defendant took from the plaintiff’s work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff (*Arnstein v. Porter*, 1946).

This does not suggest that a constellation of unprotected ideas should be protectable, only that works should be deemed substantially similar by an audience of lay listeners; the reference to works as a whole has been subjectively interpreted by later judiciaries. *Arnstein* was a landmark case that standardised trial procedures for infringement cases, notably in the

Ninth Circuit, establishing the concepts of access and probative similarity, expert testimony, and substantial similarity. It did not, however, pioneer constellation theory, which has evolved from infringement cases of other mediums: Universal Pictures was found not to have infringed on a constellation of expressions of ideas in Nichol's play *Abie's Irish Rose* in 1930; United Card Co. was found to have infringed on Roth's Greeting Cards by constellation of artistic and textual elements in 1970.

Despite the judiciary panel's comment during the *Three Boys* case that a combination of unprotectable elements can be found to be protectable. Unlike *Blurred Lines,* in both the *Three Boys* and *Swirsky* cases significant similarities in individual elements were evident; during the *Three Boys* case the defendant's musicologist admitted these similarities in court. In the case of *Swirsky*, the district court originally granted a summary judgment to the defendant as they could not find substantial similarity 'solely on similarities in key, harmony, tempo or genre, either alone or in combination' (*Swirsky v. Carey*, 2004, p. 846). Summary judgment was reversed, however, when the plaintiff's musicologist later declared a number of significant similarities between melodic lines, bass lines, chord progression, tempo and style (Zernay, 2017, p. 193). During the *Blurred Lines* trial, the Gaye parties' musicologist admitted in court that there was no similarity between the individual elements that formed her constellation. Inconsistent approaches to constellation theory between courts and musicologists expose issues of misinterpretation and lack of clarity. What is clear is that the outrage caused by the verdict of the *Blurred Lines* was surprising considering that constellation theory was not a new legal concept in music infringement cases.

This paper has thus far identified the reasons why constellation theory is considered a threat to the creative music industry, 'inhibit[ing] the process by which later artists draw inspiration from earlier artists to create new popular music' (Lost in Music, 2015). Artists and academics believe that more clarity on the rules of copyright law – with clear definitions of ideas and expressions – and guidance on infringement procedures will aid creators moving forward,

ensuring they understand how not to infringe on another's work (Jones, 1993; Ranger-Murdoch, 2020; Samuelson, 2013; Selfridge-Field, 2017); by setting boundaries between idea and expression copyright can protect composition rather than style (Kuivila, 2016, p. 263). However, there is a danger that too much protection could also stifle creativity and the reason why courts have failed to offer any clarity on copyright protections and infringement procedures should be questioned.

Samuelson suggests that copyright law is intentionally ambiguous to protect the U.S. constitution's first amendment which protects freedom of speech and that 'free expression interests [are] at stake in copyright cases involving nonliteral infringement' (Samuelson, 2013, p. 1827). Others believe that some ambiguity is necessary in addressing the balance between the interests of creators and the public domain (Patry, 2012), to 'motivate authors' creative activity and "allow the public access to the products of their genius"' (*Sony Corp.v. Universal City Studios*, quoted in *Williams v. Gaye*, 2018). Ambiguity in copyright law provides space for music creators to grow, change and adapt without legal restrictions that may prevent them from doing so. Legal ambiguity and inconsistent verdicts allow courts to bend to the specific needs of individual cases. The music industry is a vast universe of genres that may have specific needs from copyright law. R&B and hip-hop may need some flexibility in the law to allow sampling; pop music may need some versatility to accommodate formulaic hit song writing reliant on limited harmonic progressions and structures; house music may need some flexibility to allow for its generic off beat drum pattern. While the Appellate Court were unable to overturn the *Blurred Lines* verdict, the majority panel did warn future litigators that to twist the rules of copyright by constellation for financial gain may not be in the interests of creativity.

> Far from heralding the end of musical creativity as we know it, our decision, even construed broadly, reads more accurately as a cautionary tale for future trial counsel wishing to maximise their odds of success (*Williams v. Gaye*, p. 1182).

Conclusion

For a moment in time, constellation theory threatened creative processes in the music industry, suggesting that songwriters could be sued for infringement of another work's style, groove or genre. This paper has identified a number of inconsistencies in constellation theory that appear to be at odds with the intentions of the copyright regime and copyright doctrines established to protect and motivate creativity: the idea/expression dichotomy and the doctrine of merger. The test of "total concept and feel" exacerbates these inconsistencies by suggesting that juries can find infringement in works that allude to another's style and genre. However, at the time of the *Blurred Lines* case constellation theory had been available argument in infringement litigation for many years without threat to musical creativity. Findings in subsequent cases also suggest that courts are now carefully considering the impact of constellation theory. Being open to interpretation and allowing space for evolving creative practices, copyright law may remain ambiguous for the greater good. Musical creativity and copyright law appear to work in symmetry. Both have vague processes and both music and copyright are open to interpretation. Music is influenced by past composers and copyright infringement verdicts are influenced by the findings of past cases. Music is creatively produced for public interest and copyright was enacted to serve public interest. Perhaps both have been working in harmony all along?

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