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Scènes à Faire in Music: How an Old Defense is Maturing, And How It can be Improved

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SCÈNES À FAIRE IN MUSIC: HOW AN OLD DEFENSE IS MATURING, AND HOW IT CAN BE IMPROVED

TORREAN EDWARDS*

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INTRODUCTION

Scènes à faire, in music, is a defendant’s tool to delineate for a court what some of the protectable and non-protectable elements of a work may be, and to defeat the standard substantial similarity test. The substantial similarity test over the preceding decades has become the dominant test used in evaluating copyright infringement disputes. To understand what the proper application of a scènes à faire defense should be, we must view what is actually in dispute in a copyright case, the process the court uses in evaluating the copyrighted material, and how scènes à faire has been applied in recent cases to find or distinguish infringement.

Most copyright infringement cases do not involve direct copying and arise, instead, where other similarities exist; so the tools used by courts must evolve to distinguish the nonliteral infringement. *Jollie v. Jacques*, one of the earliest cases of copyright infringement in the U.S., established the standard for “substantial similarity” when explicit copying is not found.¹ Since that time,

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1. See *Jollie v. Jacques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437).

other cases have added color to how a jury and court may determine the presence of similarity, and whether that similarity amounts to infringement. As this Comment will discuss, how *scènes à faire* has grown as a tool employed by the defense to help a court separate protectable from non-protectable elements, even in the presence of substantial similarity.² Case law, (including court settlements), show that the present standard, so heavily reliant on the subjective determinations of laypeople, leads to confounding inconsistencies.³ To modernize and operationalize the defense for modern use in music, the focus must turn to developing a test that is more rote and functional, which better distinguishes musical similarities that are and are not protectable.

First, this Comment will provide background on the test for copyright infringement used by the Fourth, Eighth, and Ninth Circuits. Second, the Comment will address what *scènes à faire* is and how recent cases have treated *scènes à faire* in music. Third and finally, the Comment will offer a suggestion as to a proper *scènes à faire* determination and analyze how *scènes à faire* should be applied.

I. COPYRIGHT INFRINGEMENT IN MUSIC IS OFTEN A PARADOXICAL CHALLENGE, BUT IF PROPERLY APPLIED, THE *SCÈNES À FAIRE* DOCTRINE CAN BE A RESOURCE TO COURTS

Copyright infringement is the unlicensed or unpermitted use of a copyrighted work.⁴ Copyright infringement has two elements: the possession of a copyright and actual copying the protected expression. Copying is shown through actual copying or substantial similarity. In the Ninth Circuit, in the absence of direct evidence of copying, a plaintiff must show access and substantial similarity.⁵

Since direct evidence of copying is not always available, a plaintiff may have to establish copying by proving (1) that the defendant had access to the

2. See *Merger and Scènes à Faire: Two Defenses to Substantial Similarity in Copyright Litigation*, Tannenbaum, Helpen, Syracuse, & Hirschtritt, LLP (2016) http://www.thsh.com/documents/December_2016/Merger-and-Sc%C3%A8nes-%C3%A0-Faire-Two.pdf [https://perma.cc/J7FA-DPD2].

3. See Reggie Ugwu, *Here's What Makes A Song A Rip-off, According To The Law How you think about music ≠ how the courts think about music.*, Buzzfeed News Reporter (March 6, 2015), https://www.buzzfeed.com/reggieugwu/what-the-law-says-about-music-plagiarism?utm_term=.tazrYdzOr#.yeVQZnMPQ [https://perma.cc/C77J-CWXJ].

4. CRAIG JOYCE ET. AL, COPYRIGHT LAW 655 (3rd ed. 1994).

5. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir.1946); Reggie Ugwu, *Here's What Makes A Song A Rip-off, According To The Law How you think about music ≠ how the courts think about music.*, Buzzfeed News Reporter (March 6, 2015), https://www.buzzfeed.com/reggieugwu/what-the-law-says-about-music-plagiarism?utm_term=.tazrYdzOr#.yeVQZnMPQ [https://perma.cc/C77J-CWXJ].

plaintiff's work and (2) that the two works are substantially similar.⁶ For the first element, access is decided based upon whether the trier of fact believes that the artist heard, or was likely to have heard, the other party's work.⁷ Access to the copyrighted work may be shown by demonstrating that the defendant had actual knowledge of the plaintiff's work, had a "reasonable opportunity" to access the plaintiff's work, or it can be proved through direct admission by the artist.⁸ In short, you cannot copy if you never knew the piece existed.

The second element of the Ninth Circuit test, substantial similarity, is determined based upon a two-part test.⁹ The "extrinsic test" is an "objective comparison of specific expressive elements" and it focuses on the "articulable similarities" between the two works.¹⁰ The second element is an intrinsic test, which determines whether or not a song's copyrightable elements "seem" to be similar.¹¹ Furthermore, an inverse ratio exists where the greater the access the less evidence is required of similarity.¹² This second element provides the most common area of frustration in modern case law and is the costliest when frustrated because of the deference to lower court judges and juries.

However, even when there is obvious access and the court finds the song's elements to be substantially similar, affirmative defenses and limitations on copyrighted material are available, such as fair use and *scènes à faire*. Copyright protection is limited to unique expressions of an idea, not an idea itself.¹³ No singular person can have ownership over that idea and deference should be given to new works, understanding that inspiration is not necessarily infringement.¹⁴ Furthermore, limitations exist that preclude the protection of certain material elements of a copyrighted work. One of those limitations is the doctrine of *scènes à faire*.

6. See *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

7. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[A] (Matthew Bender, Rev. Ed., 2013).

8. See *id.* at § 13.01[B].

9. See *Smith*, 84 F.3d at 1218.

10. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir.1994)).

11. *Id.*

12. See *Straughter v. Raymond*, No. CV 08-2170 CAS, 2011 WL 3651350, at *13 (C.D. Cal. Aug.19, 2011).

13. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[A]; *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983).

14. See *ABKCO Music, Inc.*, 722 F.2d. at 998 (quoting *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir.1940)).

II. SCÈNES À FAIRE

The confusing term “scènes à faire,” literally translated from the French means “scenes to do.” Originally a theater term that meant “the most important scene in a play or opera, made inevitable by the action which leads up to it.”¹⁵

In legal doctrine, however, scènes à faire has become the idea that new expressive work may come from a common idea, or motive (motif), that is germane to the genre.¹⁶ The common idea is integral to a given topic or theme and must be used in the treatment of the topic.¹⁷ Scènes à faire are pieces of the work that flow from the theme rather than a creator’s own mind.¹⁸ To determine whether a portion of a song is scènes à faire the court must explore whether “‘motive’ similarities that plaintiffs attribute to copying could actually be explained by the common-place presence of the same or similar ‘motives’ within the relevant field.”¹⁹ This remains true even if the plaintiff was first because the general aspects of plot, or theme, or sound have become public works.²⁰

A. Purpose as Originally Intended

The doctrine was intended to limit copyright protection to certain expressions, which may have been new, but were not the result of the author’s creativity; and instead done because of the topic itself and the “underlying unprotectable idea” should not be owned.²¹

The scènes à faire doctrine is an integral part of the copyright infringement analysis. Its application can help foster a new age of American creativity, or if misused, stifle it. While traditionally reserved for literature, stage works, and later film, it has also been applied with success to technological work, such as code and design elements. But even more recently we have seen the doctrine applied to music. This application raises several questions: how does one define a scènes à faire in music? Is scènes à faire limited to a melody or lyrics?

15. See *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 929 (7th Cir. 2003).

16. See *ETS-Hokin v. Skyy Spirits, Inc.*, 255 F.3d 1068, 1082 (9th Cir. 2000).

17. See *Atari, Inc. v. North American Phillips Consumer Electronics Corp.*, 672 F.2d 607, 616 (7th Cir.), cert. denied, 459 U.S. 880 (1982).

18. See *MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 194 (2d Cir. 2004).

19. See *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004), as amended on denial of reh’g (Aug. 24, 2004).

20. See Jessica Litman *The Public Domain*, 39 EMORY L.J. 965, 987-88 (1990); see also, *O’Rourke v. R.K.O. Radio Pictures, Inc.*, 44 F.Supp. 480 (D.Mass.1942); *Gropper v. Warner Bros. Pictures, Inc.*, 38 F.Supp. 329 (S.D.N.Y.1941). But see *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.1936), aff’d, 309 U.S. 390 (1940); *Stonesifer v. Twentieth Century-Fox Film Co.*, 48 F.Supp. 196 (S.D.Cal.1942), aff’d, 140 F.2d 579 (9th Cir.1944).

21. See *ETS-Hokin v. Skyy Spirits, Inc.*, 255 F.3d 1068, 1082 (9th Cir. 2000).

Before answering those questions, a modern definition of scènes à faire must be created. Early definition of the scènes à faire doctrine began in pictures, such as in the seminal case of *Cain v. Universal Pictures Co.*²² Here, Judge Yankwich declared that the scene in the plaintiff's film and Universal's movie were similar however could not be a copyright infringement.²³ Judge Yankwich held that scenes that are common faire, like a couple taking refuge in a church in that case, were archetypal and incorporated in many forms of literature. Judge Yankwich concluded the thematic commonality protected the scene from copyright infringement.²⁴ Judge Yankwich stated, "it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should force themselves upon the writer in developing the theme."²⁵

The doctrine, in application does not mean that all similar or archetypal scenes are scènes à faire and thus unprotectable; rather, a copyright owner must be able to demonstrate that the challenged work is largely similar to their own and not just the work's theme. The doctrine is meant to protect creators when their means of creating or expressing are restricted due to limited variations on the particular expression.²⁶ For instance, in *Ets-Hokin v. Skyy Spirits* the Ninth Circuit held that a photographer's work and the commercial work of the vodka company, were substantially similar because there are only so many ways to photograph a vodka bottle.²⁷ When the options for expression are limited, so shall the extension of copyright protection.²⁸

Scènes à faire must not be overused though, and juries must be informed of its limitations. For instance, scènes à faire is limited to its genre, as seen in *Swirsky v. Carey* a contested element from a "hip hop" song cannot be considered as scènes à faire in a country or folk song. That element may be unprotectable because of some other doctrine such as fair use, but it is not scènes à faire.²⁹ Also, the court in *Swirsky* strangely pointed out that scènes à faire requires exact adoption of the "scene," but being mostly the same (the contested element and the protected element) is no true scènes à faire.³⁰

22. See *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Ets-Hokin*, 255 F.3d at 1082.

27. *See id.*

28. *See id.*

29. *See Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004).

30. *See id.*

In Professor Nimmer's treatise on copyright he states that "this doctrine does not limit the subject matter of copyright; instead, [rather] it defines the contours of infringing conduct."³¹ It does not mandate that the copyright owner actually show that their work is copyrightable.³² And should a work not deserve protection, it should remain in the public domain for use.

B. Application in a Changing Copyright Landscape

Scènes à faire is also a tool, which can further develop the lay listener tests. Following *Kroft v. McDonald's* and *Arnstein*, the role of the lay listener in the determination of copyright infringement became substantially greater.³³ Expert testimony, or battles of the experts, was less favored in the time of *Arnstein*, and for a time after the judge or jury became the ultimate arbiter of what "sounded" similar.³⁴ If the trend resurfaces, properly formulated scènes à faire doctrine, correctly explained to triers of fact, can be used as a buffer for the dichotomy of experts and lay listeners.

While music is a subjectively expressive process, the risk in giving more power to lay listeners is that scènes à faire (and other noncopyrightable elements) may be improperly construed as protectable elements. In *Kroft*, instead of allowing expert testimony to color the elements for the jury that should have been considered as unprotectable, the court instead adopted an approach, which led to a subconscious inclusion of scènes à faire elements in their determination of infringement.³⁵ By preventing the jury from receiving expert advice of how certain elements of a work that may be similar, were not actually misappropriated, the court limits the lay listener's ability to analyze with full context.³⁶

Testimony clarifying the copyrightable elements in music can help provide greater reliability in the jury. In *Arnstein*, the court allowed the jury to hear testimony which was meant to ground their listening.³⁷ An expert listener will always have a distinct advantage over a lay listener and cannot impart all of their skill and experience in testimony. Such an advantage restricts a jury from properly listening. The knowledge/context an expert can provide can lead to greater reliability. While a striking similarity may be found, the jury does still

31. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][4] (Matthew Bender, Rev. Ed., 2013).

32. See *id.*

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

34. See *id.*

35. See *id.*

36. See *id.*

37. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

require help in discerning whether that similarity was illicit amounting to improper appropriation.³⁸

In the end, the ambition of copyright infringement is to protect the value of artistic expression, commercially, not merely in some virtuous idyllic sense. As such, the average consumer's perspective is the value that copyright seeks to protect. However, the average consumer, much like the average jury member, is not a musical savant or expert; yet, it is their judgment that dictates the commercial value of the expression. As such, the lay person test should not be discarded, but rather amended to include a substantive test articulated by experts when dealing with copyright generally, but particularly where a *scènes à faire* defense is broached.

Currently, there is a disconnect between the creative process of music and music's perception in the law. Since 1910, the copyright rule has subjected not only the written verse of a song, but also its recording to *scènes à faire*; allowing *scènes à faire* to be stretched to nonliteral elements like melody. The Copyright Act of 1976 included a section defining copyrightable elements of music.³⁹ A musical composition consists of music, including any accompanying words interpreted as including rhythms, chord progressions, lyrics, melodies and anything that possesses a minimal spark of creativity and originality.⁴⁰ There are two rules of copyright in music. The first rule considers the manuscript, the lyrics, and musical composition. The second rule is focused on sampling, the sound of the music and its actual recording. In nonliteral copying *scènes à faire* may be a defense to either component of copyright, and as courts have struggled mightily in determining what infringement is *scènes à faire* is a tool that could help clarify the lines.

Modern cases have struggled to deal with infringement even with the application of *scènes à faire*. In *Bridgeport Music v. Williams*, the family of soul singer Marvin Gaye sued Robin Thicke, Pharrell Williams, and their company for their appropriation of Mr. Gaye's song's melody.⁴¹ In this case,

38. See *Arnstein v. Porter*, 154 F.2d 464, 478 (2d Cir. 1946) (Clark, J., dissenting) ("Further, my brothers reject as 'utterly immaterial' the help of musical experts as to the music itself (as distinguished from what lay auditors may think of it, where, for my part, I should think their competence least)).

39. 17 U.S.C. §102(a)(2); Coe W. Ramsey & Amanda M. Whorton, *Music Law 101: What Does Copyright Law Protect?*, <https://blog.reverbnation.com/2018/04/25/music-law-101-what-does-copyright-law-protect/> [<https://perma.cc/A35J-NU69>].

40. Coe W. Ramsey & Amanda M. Whorton, *Music Law 101: What Does Copyright Law Protect?*, <https://blog.reverbnation.com/2018/04/25/music-law-101-what-does-copyright-law-protect/> [<https://perma.cc/A35J-NU69>].

41. See *Williams v. Bridgeport Music, Inc.*, LACV1306004JAKAGR, 2015 WL 4479500, at *11 (C.D. Cal. July 14, 2015), *aff'd in part, rev'd in part sub nom. Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018), *aff'd in part, rev'd in part sub nom, Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

the court was tasked with deciding on the nonliteral infringement upon the older song's groove and melody.⁴² There was no literal copying; but the jury found substantial similarity under the extrinsic and intrinsic tests.⁴³ In conjunction with the finding of access, this infringement case dealt a seven-million-dollar blow to Thicke and company.⁴⁴

An early dispute in this case was over the extrinsic test, where the two parties battled over the scope of the copyrightable material. While limiting the copyright to the lead sheets, the judge found enough similarity in objective elements to deny summary judgment and move the case to the jury for the application of the intrinsic test.⁴⁵ Challenges arise when the jury is comprised of laypersons, because without expert education the jury must rely on the song's feel to perform the test.⁴⁶ Without proper instruction, or understanding of *scènes à faire*, the elements of the recording, which were admittedly inspired by Gaye's work gave rise to a perhaps improper holding of infringement.

The court did consider *scènes à faire*; the court looked to see if in the nature of this type of soulful, upbeat tempo there were elements that must be done.⁴⁷ But, the jury could not properly distinguish protectable from the unprotectable, and the court, having found similarities within an 11-note signature phrase, four-note hook, four-bar bass line, 16-bar harmonic structure and four-note vocal melody itself, was unable to discard the verdict.⁴⁸ The attorneys, for Thicke, stated: "the jury blurred the lines between protectable elements of the musical composition and what is unprotectable, which is a musical style or genre, the groove exemplified by Marvin Gaye."⁴⁹ For its obvious weaknesses this case unfortunately stands in line with other precedent. *Scènes à faire*, here, should have distinguished the melody, that small string of notes, as something typical for this type of music and groove. In not understanding this the court failed.

Scènes à faire is often confused as merely a popular style, however, popularity does not equate to *scènes à faire*. *Swirsky v. Carey* is an example of a case where *scènes à faire* does not protect a defendant merely by popularity.⁵⁰

42. *Id.* at *14.

43. *See id.* at *18.

44. *See id.* at *1.

45. *See id.* at *5.

46. *See id.* at *18.

47. *Id.* at *5.

48. *Id.* at *19.

49. Harley Brown, 'Blurred Lines' Verdict: Music Lawyers Weigh In, *Billboard.com* (Mar. 11, 2015), <http://www.billboard.com/articles/news/6495167/blurred-lines-verdict-music-lawyers-react> [<https://perma.cc/JMZ2-W28Q>].

50. *Swirsky v. Carey*, 376 F.3d 841, 846 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004).

In this case Mariah Carey, world-renowned songwriter and vocalist, was accused of copying a series of choruses, small repeated elements of a song, by Seth Swirsky, a writer for the musical group Xscape and his co-author.⁵¹ The trial court found for summary judgment in favor of Carey claiming the plaintiff failed to present a triable issue regarding the first test, the extrinsic test, of substantial similarity.⁵² The lower court concluded certain parts of the song were not protectable as scènes à faire. In the end, the appeals court disagreed, finding there was no scènes à faire even given the clear similarities and popularity (access) of the song for “He’s a Jolly Good Fellow.”⁵³

To have a successful copyright claim a plaintiff must show that (1) he owns a copyright and (2) that the defendant copied.⁵⁴ The defendant’s copying need not be literal, word for word, copying.⁵⁵ Instead, where a substantial similarity exists a court may find copyright infringement.⁵⁶ But even in the event of a similarity the court can consider an array of defenses or proper uses for the material. Scènes à faire is such a defense. While it does not inherently void the copyright, the commonality trait prevents protection. In the event of a very popular song, access is presumed. And, due to the popularity of the song the similarity required is lowered. Thus, creating an inverse relationship between popularity and the similarity required to find infringement.⁵⁷

C. The Scènes à Faire Defense, When Properly Constructed, Will Color the Copyright Test the Court Has Become So Reliant On.

The two-part test, extrinsic versus intrinsic, is the basis for finding similarity. In the extrinsic test expert testimony is used to break down by objective criteria the elements of the song. In *Carey*, the extrinsic test was applied, and an expert found the choruses, though different in lyrics and melody, shared a basic shape and pitch emphasis in their basslines and tempo and style.⁵⁸ The lower court found those chord and tempo similarities to be one of scènes à faire.⁵⁹ The 9th Circuit however found that scènes à faire could not apply.⁶⁰ Scènes à faire requires the “motive” of a song to be a source of the

51. *Id.* at 844.

52. *Id.* at 843.

53. *Id.* at 845.

54. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir.1946).

55. *Id.* at 469.

56. *Id.*

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

58. *Swirsky v. Carey*, 376 F.3d 841, 847-48 (9th Cir. 2004), *as amended on denial of reh’g* (Aug. 24, 2004).

59. *Id.*

60. *See id.* at 849-50.

similarity that the court finds between the songs. And that motive must be commonplace in the genre as historically courts would search for novelty.⁶¹ In this case, though the 9th Circuit found no *scènes à faire* because the referenced chord elements were only mentioned in two songs, not common in the industry/genre.⁶² And, in this case, the progressions were not identical and thus not subject to *scènes à faire* for their “unique” expression could be protected.⁶³

In *scènes à faire*, when certain commonplace expressions are indispensable and naturally associated with the treatment of a given use, those expressions are treated like ideas and, therefore, not protected by copyright.⁶⁴ When the presence of *scènes à faire* is contested an independent evidentiary showing is necessary.⁶⁵

Scènes à faire alone cannot guide a court as it is a defense, but when invoked the court must ingest expert experience and testimony to make the distinction, or the savvy artist may defeat the valid claim with charisma or lose due to lack of it. “When people usually encounter a song, they encounter it as a sound recording, and there are a lot of creative decisions the performer made in that recording that have added to what was on the page,” Fakler said.⁶⁶ “So, a juror might hear similarities between two songs that are actually just similarities in the performances, not in the songs as written by the songwriter.”⁶⁷ The judge in the *Thicke* case ordered that only tracks, “restricted to disputed elements of the original compositions,” could be played for the jury. But to escape the restriction *Thicke* wisely took to the stand to demonstrate how certain pieces of songs could sound similar when he played Michael Jackson’s “Man in the Mirror” and The Beatles’ “Let It Be.”⁶⁸ However, because the artist was otherwise terse and careless in the courtroom, and attempted to use his use of illegal drugs as a defense, the artist lost even if, in a technical sense, he probably should not have.⁶⁹ The court did him no favors in preventing him from performing the actual contested elements.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. Reggie Ugwu, *Here’s What Makes A Song A Rip-off, According To The Law How you think about music ≠ how the courts think about music.*, BuzzFeed News Reporter (March 6, 2015), https://www.buzzfeed.com/reggieugwu/what-the-law-says-about-music-plagiarism?utm_term=.tazrYdzOr#.yeVQZnMPQ [<https://perma.cc/4GAK-AECX>].

67. *Id.*

68. *Id.*

69. Justin Maya, *Music’s ‘Blurred Lines’ verdict broadens copyright Protection.*, FIU Law Review, Student News FIU Law Review, (April 15, 2015).

This tactic was repeated in *Fogerty v. Fantasy* where artist John Fogerty was accused of plagiarizing himself.⁷⁰ John Fogerty was accused of infringing on an earlier work of his when he was part of one record label with a later work created when he was part of a different record label. Fogerty took the stand to defend his composition, but here the court allowed Fogerty to play his songs (the one in question for infringement and the prior). In performing, Fogerty was able to win the jury, and thus won the case by demonstrating differences in the songs.⁷¹ His ability to actually play his songs, and without proper color from expert witnesses, Fogerty was able to control the narrative and tenor of the trial.⁷² This goes to the fickle nature of the process, and how the admission of evidence can affect a *scènes à faire* defense ruling. The defense wishes to demonstrate, as Mr. Thicke's attorney attests, no artist "owns a groove."⁷³ Where there are "elements that must be done" to create a work in the genre, the court should protect the new work. Unfortunately, without a balance of laypeople and expert understanding, the rulings will remain woefully inconsistent.

A core purpose behind copyright protection is the protection of the market value of one's work. As stated prior, the challenge of copyrighting in popular music—the most commercially viable musical genre—is that the human ear relies on and enjoys patterns.⁷⁴ Musical patterns, like the A-B-C's or "nanny nanny boo boo" or "I know something you don't know," help create permanence, establish a prior connection to the music, and generate sales.⁷⁵ Without patterns much of music can seem nonsensical. *Scènes à faire* is the proper defense for those patterns no one should own.⁷⁶ However, to the lay ear, those patterns can create an infringing substantial similarity.⁷⁷ And similar patterns, such as the Millennial Whoop, are cropping up all over music.⁷⁸ The Millennial Whoop was found in over 30 pop songs in the 2010s, according to writer, Patrick Metzger, and his staff.⁷⁹ At least one of those led to a nonliteral

70. Ethan Trex, *The Time John Fogerty Was Sued for Ripping Off John Fogerty*, (April 13, 2011) <http://mentalfloss.com/article/27501/time-john-fogerty-was-sued-ripping-john-fogerty> [<https://perma.cc/R46X-F2D4>].

71. *Id.*

72. *Id.*

73. Reggie Ugwu, *Here's What Makes A Song A Rip-off. According To The Law How you think about music ≠ how the courts think about music*, BuzzFeed News Reporter (March 6, 2015).

74. Patrick Metzger, *The Millennial Whoop: The Simple Melodic Sequence That's Showing Up All Over Contemporary Pop*, Brow Beat Slate's Culture Blog, (August 26, 2016).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

copyright infringement claim featuring Ally Burnett's "Ah, It's a Love Song" and Carly Rae Jepsen's "Good Time."⁸⁰ First settling out of court, Jepsen apparently admitted infringement, but a later court case by her co-writer Adam Young had the work declared an original work.⁸¹ This shows the inconsistency and lack of logic often at play in copyright and further demonstrates why the standards and defenses need to be better understood and regimented for predictable outcomes.⁸²

CONCLUSION

The court must find a consistent approach to make *scènes à faire* a palatable tool in musical copyright: "choose one and make it repeatable." The challenges of *scènes à faire* are inherent in all of copyright, but particularly in music, and frankly, the law could use a lesson in music. Current doctrine regarding *scènes à faire* is difficult, and as shown in *Bridgeport*, it can be perverted or used in a lay person test to incriminate where the critical ear and voice of an expert is overridden. The key, in modernity, is to make *scènes à faire* a technical doctrine. Musical theorists have spent years studying progressions and metrics to not only produce music, but to define and distinguish it.

The commercial value of music obviously creates a challenge when considering the sole reliance upon expert testimony, as it is not the expert who is likely to be the primary consumer; however, the expert will be better situated than the layperson to determine whether a work is literally copied, or merely inspired. To give consistency to copyright cases, when the defense of *scènes à faire* is raised, the court should remove the layperson test and use a *scènes à faire* doctrine built solely on the technical opinion of expert testimony. The judge can evaluate the *bona fides* and the depth of analysis when deciding which analysis to adopt. Such as the eight-note analysis used by Dr. Walser in *Swirsky v. Carey*, or the ornamentation test used by the Ninth Circuit in *Newton v. Diamond*. Alternatively, the court should avoid the error in *Bridgeport*, and always allow the experts to specifically define for the jury the unprotectable elements of the song. In either case, the law needs to modernize and accept the reality that the current system is "blurred."

80. *Id.*

81. *Id.*

82. *Id.*