CRUSHING CREATIVITY: THE BLURRED LINES CASE AND ITS AFTERMATH*

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On March 10, 2015, the music world was stunned when a jury in Federal District Court in Los Angeles rendered a verdict in favor of the heirs of Marvin Gaye against Pharrell Williams and Robin Thicke, who, along with rapper Clifford Harris, Jr., professionally known as "T.I.," wrote the 2013 mega-hit song entitled "Blurred Lines." The eight-member jury unanimously found that Williams and Thicke had infringed the copyright to Marvin Gaye's "Got To Give It Up."[1] On appeal, the Ninth Circuit Court of Appeals affirmed the verdict and recently rejected Williams and Thicke's Petition for Rehearing *en banc*.

The case is significant for a number of reasons. In typical music copyright cases—at least successful ones—the two works share the same (or at least a similar) sequence of pitches, with the same (or at least similar) rhythms, set to the same chords. The Blurred Lines case was unique, in that the two works at issue did not have similar melodies; the two songs did not even share a single melodic phrase. In fact, the two works did not have a sequence of even two chords played in the same order, for the same

*. This article was adapted from an amicus curiae brief that was filed by the author on behalf of 212 songwriters, composers, musicians, and producers, in connection with the appeal of the Blurred Lines case to the Ninth Circuit Court of Appeals. *See generally* Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018) [hereinafter the Blurred Lines case].

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1. Though Williams and Thicke were both found liable for copyright infringement, T.I. was exonerated by the jury. Although the district court purported to overrule the jury and brought back in T.I. and the Interscope-related entities as defendants, the Ninth Circuit reversed that portion of the District Court's judgment. *The Blurred Lines Case*, 885 F.3d at 1182–83.

duration. They had entirely different song structures (meaning how and where the verse, chorus, etc. are placed in the song) and did not share any lyrics whatsoever.

The verdict in this case—assuming (perhaps naively) that it was based upon the music at all,[2] and not, for example, the jury's dislike for Robin Thicke and his admitted drug use—was no doubt based upon a perception that the overall "feel" or "groove" of the two works is similar, as songs of a particular genre often are. In essence, Williams and Thicke have been found liable for the infringement of an *idea*, or a series of *ideas*, and not for the *tangible expression* of those ideas, which is antithetical to Section 102(b) of the Copyright Act.[3] Such a result is very dangerous to the music community and is certain to stifle future creativity.

All music shares inspiration from prior musical works, especially within a particular musical genre. The import of the Blurred Lines case is, therefore, that songwriters can now be punished for creating new music that is merely *inspired* by prior works. By eliminating any meaningful standard for drawing the line between permissible *inspiration* and unlawful *copying*, the verdict is certain not only to impede the creative process and stifle future creativity, it ultimately does a disservice to past songwriters as well and adversely affects the entire music industry. The law, and specifically the intent behind the Copyright Act, would be much better served if the courts could provide clearer rules so that songwriters could know when the line is crossed, or at least where the line is.

I. DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT

Just prior to trial, the district court denied Williams and Thicke's motion for summary judgment based upon the declarations of two musicologists submitted by the Gayes, which were filled with abstract theories, identifying certain remote, seemingly unrelated, factors of alleged similarity.[4] The court dismissed—simply as "issues of fact"—the multitude of *dissimilarities* in the two works that were idengtified by Williams and Thicke's musicologist—including distinct, material differences in the actual *melodies* of the two songs.

Because "Got to Give it Up" was a pre-1978 composition and was recorded prior to 1972, the Court properly limited the Gayes' proof to

2. In the two days in which the jury deliberated, they did not once listen to any of the music.

3. 17 U.S.C. § 102(b) (2018).

4. Those theories were difficult enough (if not impossible) for trained musicians to understand; it is difficult to imagine how the Court could possibly fully grasp their import.

include only the deposit copy of the sheet music that was presented to the U.S. Copyright Office upon registration by Marvin Gaye's publisher and did not allow the jury to hear the entire sound recording. However, immediately following this ruling, the court systematically and completely emasculated the ruling in the following significant ways:

1. After the court had ruled on summary judgment that "Theme X" (a four-note melody) was not on the deposit copy, the court allowed the Gayes' musicologist to testify that her "Theme X" was different from the court's "Theme X," and that her "Theme X" was *implied*[5] in the deposit copy (as was much of the music that was contained in the sound recording).
2. The court allowed the Gayes' musicologist to further testify that although the keyboard part in "Got to Give it Up" similarly was not in the deposit copy, "professional musicians *would understand*[6]" to play the keyboard part as she transcribed it—and that keyboard part was the "heartbeat" of "Got to Give it Up."
3. The court allowed the Gayes' musicologist to use a transcription of the bass part from the sound recording that was different than the bass part on the deposit copy.
4. The court allowed the Gayes' musicologist to use sound bites from both works to show a "total concept and feel," while in actuality compounding the issue with an instruction to the jury to disregard the actual clips and only to consider the musicologist's "opinions."
5. The court allowed the Gayes' musicologist to present a "mashup" of the two works, which was prepared after the close of expert discovery, and which included the bass and keyboard elements (that were not in the deposit copy)—while excluding mashups that were prepared by Williams and Thicke's musicologist between "Got to Give it Up" and numerous old soul songs and many pop songs that could be played over the same four chords.
6. The court allowed a lay witness who was in charge of the

5. Even to a person with no musical training, the concept of certain music being *implied* by certain other music sounds a bit suspect; however, to anyone with a modicum of musical training, this concept is absurd.

6. Similarly, this concept makes no musical sense whatsoever.

> Marvin Gaye catalogue at Marvin Gaye's record label (which also happened to be Robin Thicke's record label), who does not even know how to read music, to testify that he listened to "Blurred Lines," and thought that it was similar to the "Got to Give it Up" *sound recording*.

At the same time, the district court *excluded* evidence that Marvin Gaye's own publisher strongly believed that there was no infringement. One of the functions of a music publisher is to police the copyrights of the songs in its catalogue, to assess whether or not its songwriters' music has been infringed, and to commence litigation against the infringers.

In this case, according to Marvin Gaye's publisher, EMI/Jobete, as stated in the Joint Rule 16(b) Report, EMI/Jobete

> first internally analyzed whether 'Blurred Lines' was an infringement of 'Got To Give It Up' and determined that there was no infringement. Thereafter, Jobete secured the opinion of an expert musicologist who similarly concluded that there was no basis for a claim of infringement. Jobete duly reported its determinations to Frankie and Nona Gaye's representatives . . . . Further Jobete advised that it could not, in good faith, bring infringement claims (either for 'Got To Give It Up' or for 'After The Dance' [another song that the Gayes claimed was infringed by Williams and Thicke] because its analysis, including expert analysis confirmed that neither work had ben infringed by Blurred Lines . . . . Jobete advised that, consistent with Rule 11 of the Federal Rules of Civil Procedure, it therefore could not and would not either defend Frankie and Nona Gaye [in Williams and Thicke's declaratory relief action] or pursue the infringement claim they demanded.[7]

Ultimately, the Gayes actually sued EMI/Jobete for not pursuing the infringement claim against Williams and Thicke.[8]

7. Joint Rule 16(b) Report at 5–6, Williams v. Bridgeport Music, Inc., LA CV13-06004 JAK (AGRx), 2016 U.S. Dist. LEXIS 193633.

8. This illustrates an important (perhaps rhetorical) question for the courts and the music world in general. If the executives at EMI/Jobete, whose job it is to assess copyright claims involving their songwriters, did not believe that "Blurred Lines" infringed "Got To Give It Up," and if the expert musicologist that EMI/Jobete hired to assist it in that determination did not believe that "Blurred Lines" infringed "Got To Give It Up," and if the lawyer that was hired by EMI/Jobete believed so strongly that there was no infringement that he advised EMI/Jobete that suing Williams and Thicke might very well be a violation of Rule 11, how in the world could a songwriter, with no experience policing copyrights, no experience as an expert musicologist, and no legal training, determine that his or her own song might be an infringement?

II. INFRINGEMENT OF AN IDEA, WHICH IS NOT COPYRIGHTABLE

It appears that the jury in this case was persuaded by a number of factors, including the foregoing similarities that were extraneous to the sheet music, interviews given by Robin Thicke, the number of musicologists that each side had (Gayes: two; Williams and Thicke: one), and the biased lay witness opinion. Not one of these factors had anything to do with any perceived similarity in pitch, rhythm, or chords, and not one of these factors constituted a proper basis for a finding of copyright infringement.

A result such as this, 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. The inherent danger of such a result is that, without drawing a proper line between what is an idea and what is an expression or between what is an influence and what is an infringement, future songwriters do not know whether their "influence" is going to land them with the next hit record or land them in court—or both, as demonstrated in this case.

Much has been said about Williams's and Thicke's apparent ability to afford to fund a case like this. Whether or not Williams and Thicke are able to afford to defend this case and pay a judgment, most of the musicians in the world are not in a position to do so. Clearly then, when a budding songwriter is contemplating the composition of a song, it is axiomatic that he or she is going to think twice before he or she writes a song that "feels" like a Marvin Gaye song or any other artist's song, always with one foot in the recording studio and one foot in the courtroom. This is an untenable situation that most certainly will not foster uninhibited creativity.

III. THE NINTH CIRCUIT DECISION

Devastated by the effect that the verdict would have on future songwriters and the music industry in general, Williams and Thicke appealed the case to the Ninth Circuit Court of Appeals. The Ninth Circuit—in a 2-1, very lengthy decision,[9] written by Judge Milan D. Smith Jr.—affirmed the bulk of the district court's decision and ignored the cries of the 212 Amicus songwriters (and dissenting judge Jacqueline H. Nguyen). The majority asserted that its entire decision was about narrow

9. *The Blurred Lines Case*, 885 F.3d at 1183.

procedural matters and concluded its decision by stating that: "[f]ar 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 maximize their odds of success."[10]

At the heart of the appeal was the issue of whether the copyright protection enjoyed by the Gayes was limited to the sheet music of "Got to Give it Up" that was deposited with the U.S. Copyright Office, or whether the jury could hear the sound recording as well. Williams and Thicke had successfully argued to the district court that because the Gaye song was created under the Copyright Act of 1909, the jury should not get to hear the sound recording. The Gayes' attorney argued at the district court and at the Ninth Circuit that their proof should not be so limited. On appeal, Williams and Thicke's attorney argued that Judge Kronstadt erred by initially restricting the Gayes' proof to the deposit copy but then allowing in bits and pieces of the sound recording through the testimony of the handsomely paid musicologist, Judith Finell.

The majority noted that Williams and Thicke's position that the scope of the Gayes' copyright was limited to the deposit copy did not appear to be specifically supported by any case law until the district court's ruling. However, the court decided to avoid the issue altogether: "Nevertheless, because we do not remand the case for a new trial, we need not, and decline to, resolve this issue in this opinion."[11]

The Court did affirm that the district court had discretion to allow testimony from both of the Gayes' music experts, which Williams and Thicke's lawyers claimed to have improperly incorporated opinions about the similarity of the sound recordings, notwithstanding its earlier limitation of proof to sheet music.

In response to Williams and Thicke's assertion that Judge Kronstadt erroneously denied their motion for summary judgment, the appellate court determined that the denial of summary judgment, after a complete trial on the merits, is not reviewable unless the issue is one of pure law. The court determined that this was not such a case: "The district court's application of the extrinsic test of similarity was a factbound inquiry far afield from decisions resolving 'disputes about the substance and clarity of pre-existing law.' The district court's ruling bears little resemblance to legal issues we have reviewed pursuant to our exception."[12]

10. *Id.* at 1182.
11. *Id.* at 1165–66.
12. *Id.* at 1166–67 (citations omitted).

With respect to Williams and Thicke's claim that the district court should not have allowed certain portions of the testimony of the Gayes' musicologists, the court pointed out that Finell "was impeached with her deposition testimony, in which she admitted that the rhythm of the keyboard parts in the sound recording of 'Got To Give It Up' is not notated in the deposit copy."[13] The court further noted that Williams and Thicke's expert disputed her testimony and that the whole thing "boiled down to a question of whose testimony to believe," which was the purview of the jury.[14] Ultimately, the court ruled that the verdict was not against the clear weight of the evidence.

The Blurred Lines decision was indeed a procedural one and is on very narrow grounds. The court held that the jury's verdict was not against the clear weight of evidence and refused to disturb or "second guess" the jury's fact-finding at trial. The court concluded that the district court did not abuse its discretion in denying Williams and Thicke's motion for a new trial.[15]

Even Williams and Thicke's contention that the damages were excessive was met with a purely procedural response. The jury had awarded the Gayes 50% of the publishing revenue from "Blurred Lines" as actual damages, which amounted to approximately $3.2 million. The court ruled that the Gayes' expert testimony in that regard was not speculative and, therefore, affirmed the amount. Similarly, the court determined that the jury's verdict awarding profits to the Gayes of $1.8 Million against Robin Thicke and $375,000 against Williams was "not clearly erroneous," nor was the continuing 50% royalty rate.[16]

The court did take exception to the district court's treatment of T.I. and the Interscope parties, but that was on procedural grounds as well. The jury had rendered a general verdict in favor of T.I. and the Interscope parties, finding (albeit inconsistently) that neither had violated the Gayes' copyright. The district court disregarded the jury's verdict in that regard and brought them back into the case.

The Ninth Circuit ruled that the Gayes waived their challenge to the consistency of the jury's verdict in this regard by not asserting their position at trial before the jury was discharged. The court went on, however, to rule that, even if the Gayes had properly preserved their

13. *Id.* at 1170.
14. *Id.*
15. *Id.* at 1172.
16. *Id.* at 1174.

challenge, "neither Federal Rule of Civil Procedure 50(b) nor our decisions in *Westinghouse* and *El-Hakem v. BJY Inc*. conferred authority on the district court to upset the jury's verdicts in this case."[17] The court further noted that "no evidence showed Harris was vicariously liable."[18]

The majority, by focusing on the procedural aspects of the case, minimized the precedential value of the appeal itself, ignoring the potentially catastrophic ramifications of the case as a whole. This cavalier dismissal by the majority precipitated a blistering dissent by Judge Jacqueline Nguyen and an actual rebuttal to the dissent by the majority.

Judge Nguyen writes: "The majority allows the Gayes to accomplish what no one has before: copyright a musical style."[19] She states further that: "'Blurred Lines' and 'Got to Give It Up' are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere."[20]

With respect to the expert musicologists, the dissent goes on:

> While juries are entitled to rely on properly supported expert opinion in determining substantial similarity, experts must be able to articulate facts upon which their conclusions—and thus the jury's findings—logically rely. Here, the Gayes' expert, musicologist Judith Finell, cherry-picked brief snippets to opine that a "constellation" of individually unprotectable elements in both pieces of music made them substantially similar. That might be reasonable if the two constellations bore any resemblance. But Big and Little Dipper they are not. The only similarity between these "constellations" is that they're both compositions of stars.[21]

Judge Nguyen then picks up on a theme that was forefront in the 212 Songwriters, etc. Amicus Brief, and that was that it is axiomatic that copyright laws do not protect *ideas*, but only the *expression* of ideas. In the Blurred Lines case, the only similarities that exist between the two compositions is the "idea" of, for example, clapping hands, yells, different instruments, etc.

Judge Nguyen goes on to challenge the majority to explain which elements of "Got to Give It Up" were protectable. She also does not believe

17. *Id.* at 1175 (citing Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply, Inc., 106 F.3d 894 (9th Cir. 1997) and El-Hakem v. BJY, Inc., 415 F.3d 1068 (9th Cir. 2005)).

18. *Id.*

19. *Id.* at 1183 (Nguyen, J., dissenting).

20. *Id.*

21. *Id.*

in the "sliding scale" of access vs. similarity, in other words, the more access can be proved, the less substantial the similarity that is required. The majority adopted the inverse ratio rule, which was designed for cases with limited *access*—essentially, the less likely the access, the more similarity that is necessary to prove "copying."[22] Judge Nguyen does not believe that, with undisputed access, the extent of similarity necessary to fulfill a plaintiff's burden of proof essentially dwindles down to nothing.[23]

In response, the majority strikes back, stating:

> [T]he dissent prophesies that our decision will shake the foundations of copyright law, imperil the music industry, and stifle creativity. It even suggests that the Gayes' victory will come back to haunt them, as the Gayes' musical compositions may now be found to infringe any number of famous songs preceding them. Respectfully, these conjectures are unfounded hyperbole. Our decision does not grant license to copyright a musical style or "groove." Nor does it upset the balance Congress struck between the freedom of artistic expression, on the one hand, and copyright protection of the fruits of that expression, on the other hand. Rather, our decision hinges on settled procedural principles and the limited nature of our appellate review, dictated by the particular posture of this case and controlling copyright law. 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 maximize their odds of success.[24]

A. THE DENIAL OF REHEARING *EN BANC*

After their appeal to the Ninth Circuit failed, Williams and Thicke filed a petition for an *en banc* rehearing of the case. Judge Nguyen was the sole judicial proponent of *en banc* review, which was therefore denied.

22. Although this rule makes sense in the context of proving "copying" (access plus substantial similarity), when there is limited or a low likelihood of access, it is absurd to suggest that, if access is 100% proved, no similarity whatsoever is necessary. Moreover, this "test" also ignores the requirement, independent of proof of *copying*, that *protectable elements* of the two works must be substantially similar in order to prove actual *infringement* through the extrinsic test. In other words, copying alone does not constitute infringement if the elements copied are not protectable. There must be substantial similarity in *copyrightable expression*. The inverse ratio rule is so controversial that, in an amended decision, the Ninth Circuit deleted the paragraph from its original opinion discussing the rule and its application. *Compare The Blurred Lines Case*, 885 F.3d at 1163, *with* Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018).

23. The inverse ratio analysis has been criticized and rejected in other jurisdictions. For instance, in Arc Music Corp. v. Lee, 296 F.2d 186, 188 (2d Cir. 1961), the Second Circuit ruled that access will not make up for a lack of similarity, "and an undue stress upon that one feature can only confuse and even conceal this basic requirement."

24. *The Blurred Lines Case*, 885 F.3d at 1182 (majority opinion).

IV. ALL MUSIC IS INPIRED BY OTHER MUSIC

From time immemorial, every songwriter, composer, and musician has been inspired by music that came before him or her. Even one of the musicologists for the Gayes admitted that, with respect to music: "*All composers share devices and building*." This is especially so within a particular musical genre. Virtually no music can be said to be 100% new and original.

David Bowie was influenced by John Coltrane, Velvet Underground, and Shirley Bassey, among others.[25] Lady Gaga was influenced by David Bowie, Elton John, and Queen, among others.[26] Elton John was influenced by The Beatles, Bob Dylan, The Kinks, and Elvis Presley, among others.[27] The Beatles were influenced by Chuck Berry, Cliff Richard, The Beach Boys, and Elvis Presley.[28] Elvis Presley's musical influences were "the pop and country music of the time, the gospel music he heard in church and at the all-night gospel sings he frequently attended, and the black R&B he absorbed on historic Beale Street as a Memphis teenager."[29]

Marvin Gaye, himself, was reportedly influenced by Frank Sinatra, Smokey Robinson, Nat "King" Cole, Sam Cooke, Ray Charles, Bo Didley, and James Brown.[30] In fact, "Got To Give It Up" was apparently inspired by Johnnie Taylor's song "Disco Lady."[31]

One can only imagine what our music would have sounded like if David Bowie would have been afraid to draw from Shirley Bassie, or if the Beatles would have been afraid to draw from Chuck Berry, or if Elton John would have been afraid to draw from the Beatles, or if Elvis Presley would have been afraid to draw from his many influences. Presumably, it would also be difficult for the Gayes to imagine if their father had been afraid to draw from Ray Charles or Bo Didley. Quite simply, if an artist is not

25. *Commencement 1999*, BERKLEE, https://www.berklee.edu/commencement/past (last visited Dec. 1, 2018).

26. Sam Stryker, *Lady Gaga and the Glam Rock Men Who Inspire Her*, MIC (Nov. 14, 2013), https://mic.com/articles/73263/lady-gaga-and-the-glam-rock-men-who-inspire-her#.YIo314rrY.

27. Neil McCormick, *Leon Russell Interview for the Union with Elton John*, TELEGRAPH (Oct. 13, 2013), https://www.telegraph.co.uk/culture/music/rockandpopfeatures/8062253/Leon-Russell-interview-for-The-Union-with-Elton-John.html.

28. *Ten Artists and Bands that Inspired the Beatles*, READER'S DIGEST U.K., https://www.readersdigest.co.uk/culture/music/ten-artists-and-bands-that-inspired-the-beatles (last visited Jan. 16, 2019).

29. *Elvis Presley Biography*, GRACELAND, https://www.graceland.com/elvis/biography.aspx (last visited Dec. 1, 2018).

30. *Marvin Gaye Influences*, SHMOOP, https://www.shmoop.com/whats-going-on/influences.html (last visited Jan. 16, 2019).

31. *See generally* GRAHAM BETTS, MOTOWN ENCYCLOPEDIA (2014).

allowed to display his or her musical influences, for fear of legal reprisal, there is very little new music that is going to be created, particularly with the limitations that already naturally exist in songwriting.

V. MUSIC COPYRIGHT CASES NEED A BRIGHT LINE TEST

In the world of film, television, and books, the universe of choices is unlimited. One can write about the past, the present, or the future; one can write about things that actually happened, things that one wished had happened, or things that could never happen—there is absolutely no limit beyond the author's imagination.

Yet, notwithstanding those unlimited options, there is somewhat of a bright line test for infringement (and for obtaining summary judgment) in the film/television/book world that does not exist in the music world. With a film, an expert conducts the extrinsic test by comparing the plots, sequence of events, characters, theme, mood, and pace of the two works. The expert also filters out all of the scènes à faire, such as a car chase in an action movie or a magician pulling a rabbit out of a hat.

A motion for summary judgment in such cases will weed out the protectable elements from the unprotectable elements. It will then demonstrate how the works are different with respect to protectable elements, and how any perceived similarities are based upon commonplace, unprotectable elements. The "language" spoken by the experts is typically one that the judge understands and can articulate freely.

In music, unlike film, etc., however, there is a "limited number of notes and chords available to composers," and composers are therefore much more restricted in their options.[32] There are literally twelve notes per octave, and not all of those notes can be used in the same song. As Judge Learned Hand once wrote: "It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism."[33]

Yet, notwithstanding the severe actual and practical limitation of choices in music cases, the line drawing that exists in film copyright cases does not appear to exist in music cases. Musicologists speak a language that is often foreign to judges (and juries), and therefore confuse judges

32. Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2nd Cir. 1988).
33. Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2nd Cir. 1940) (per curiam).

into denying summary judgment motions whenever two musicologists disagree.[34] There appears to be no easy way, no bright line, to determine in music cases—and it was certainly not done in this case—the difference between creating the same "feel" or "style,"[35] and infringing a copyright.[36]

This is particularly so when a plaintiff can hire three, four, or five musicologists, conflict out three of them that find no similarities between any protectable elements, and know that, even if he only has one musicologist that can argue a case for infringement, he will avoid summary judgment. This is exactly what happened in the Blurred Lines case. There were two or three musicologists that were initially consulted, rendered strong opinions of non-infringement, and ultimately were conflicted out of the case.[37]

VI. COPYRIGHT LAW SHOULD STIMULATE, NOT STIFLE, CREATIVITY

The "ultimate aim" of the Copyright Act is "to stimulate artistic creativity for the general public good," and most musicians applaud and

34. What the Gayes' musicologists did in this case to avoid summary judgment (and ultimately at trial) is the equivalent of an expert in a film case testifying that the word "destruction" was used four times in the first scene of one film and two times in the second scene of the second film. They might go on to say that the word "destruction" was followed by the words "of a house" in the first film, and "of a truck" in the second film, along with an explanation that "house" and "truck" both have five letters, and many *trucks* are parked at *houses*. Such testimony would be readily dismissed, if not laughed at, in a film case, and the motion for summary judgment granted. Unfortunately, the musical equivalent—which is essentially what occurred in this case—is not as easy to understand and dismiss.

35. Music law is further hampered by the Ninth Circuit's *intrinsic* test, in which a lay jury is asked to determine the "total concept and feel" of the works in question. Such a test simply does not work in a music context. One might argue that virtually every disco song has the same "total concept and feel." One could argue that every blues song or every rap song has the same "total concept and feel." This notion is antithetical to the reality of musicians' inspirations and borrowing and is entirely preventative of creativity.

36. Duke Law School music copyright law professor Jennifer Jenkins, after noting that "Got to Give It Up" was inspired by Johnnie Taylor's song "Disco Lady," writes that "Gaye cannot claim copyright over material that he himself borrowed." As professor Jenkins further discusses: "Copyright only covers 'original, creative expression.' Anything Marvin Gaye copied directly from his Motown, funk, or disco predecessors is not 'original' and should be off the table." She writes further: "In addition, copyright's "scènes à faire" doctrine allows anyone to use the defining elements of a genre or style without infringing copyright, because these building blocks are 'indispensible' to creating within that genre . . . . Many of the musical elements common to 'Blurred Lines' and 'Got To Give It Up' fall into these unprotectable categories." Jennifer Jenkins, *The "Blurred Lines" of the Law*, CTR. FOR THE STUDY OF THE PUB. DOMAIN, https://law.duke.edu/cspd/blurredlines (last visited Nov. 1, 2018).

37. This is another practice that should be discontinued. Expert witnesses, if they are to maintain any credibility of non-bias whatsoever, should be allowed to testify for whatever side they agree with, and not be immediately conflicted out from testifying in favor of the second party/attorney that calls them just because they were second. The Court could also retain its own expert(s) pursuant to Rule 706 of the Federal Rules of Evidence.

appreciate that endeavor.[38] However, they also understand that, like the music that was created before them, their own music will serve as building blocks for future songwriters, who will create their own music. As discussed in *Fogerty v. Fantasy, Inc.*, "copyright assures authors the right to their original expression, *but encourages others to build freely upon the ideas and information conveyed by a work*."[39]

As written by Peter Alhadeff and Shereen Cheong in the Berklee College of Music *Music Business Journal*, "The Lesson of Blurred Lines," quoting an interview with Berklee College of Music professor, Dr. E. Michael Harrington: "If you're not influenced by Marvin Gaye, there must be something wrong with you."[40] The authors go on to write: "[h]e could just as well be talking about James Brown, Chuck Berry, the Beatles, or Michael Jackson—all of them a product of their own influences. Copyright law should make musical creativity flourish, not stifle."[41]

Parker Higgins, director of copyright activism at the Electronic Frontier Foundation writes that

> [w]hen we say a song "sounds like" a certain era, it's because artists in that era were doing a lot of the same things—or, yes, copying each other. If copyright were to extend out past things like the melody to really cover the other parts that make up the "feel" of a song, there's no way an era, or a city, or a movement could have a certain sound. Without that, we lose the next disco, the next Motown, the next batch of protest songs.[42]

Finally, as written by composer Ron Mendelsohn, owner of production music company Megatrax:

> All musical works, indeed all creative works, are born from a spark of

38. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

39. Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) (emphasis added).

40. Dr. Harrington has analyzed more than 230 of Marvin Gaye's songs and uses his music in classes that he has taught. He agrees that the "groove" and "bounce" of the two works are similar, but is adamant that "[o]bjectively, there is NO protectable expression (melody, harmony, etc.) that has been copied by Thicke" and that "[t]here is no copying of copyrightable expression involving harmonies of the two songs. What is extremely close between the songs is the tempo . . . but tempo is not copyrightable." Peter Alhadeff & Shereen Cheong, *The Lesson of Blurred Lines*, MUSIC BUS. J. (Feb. 2016), http://www.thembj.org/2016/01/the-lesson-of-blurred-lines; *see also* Dr. E Michael Harrington, *Good News for Robin, Katy & One Direction: Music Copyright Expert Says Nobody's Ripping Off Anybody*, E MICHAEL MUSIC (Aug. 19, 2013), http://www.emichaelmusic.com/good-news-for-robin-katy-one-direction-music-copyright-expert-says-nobodys-ripping-off-anybody.

41. Alhadeff & Cheong, *supra* note 40.

42. Adam Pasick, *A Copyright Victory for Marvin Gaye's Family Is Terrible for the Future of Musis*, QUARTZ (Mar. 10, 2015), https://qz.com/360126/a-copyright-victory-for-marvin-gayes-family-is-terrible-for-the-future-of-music.

> inspiration. It is essential for musicians and composers to be able to find this spark anywhere and everywhere without having to constantly look over their shoulders and worry about being sued. To extinguish this spark, to replace it with fear, is to stifle creativity and deprive society of the next generation of great artists and new music. And yes, artists should be able to talk freely about their sources of inspiration without having to worry about their exuberant proclamations being played back as damning evidence in a court of law.[43]

VII. THE CELEBRATION OF INFLUENCES SHOULD BE ENCOURAGED

Mendelsohn's last point is an especially important one. In addition to the potential adverse impact that this case is certain to have on future songwriters, this case will have a lasting effect on past songwriters and musicians as well. Many interviews were played during the trial in which Pharrell Williams and Robin Thicke both expressed that they loved Marvin Gaye, and wanted, as an homage to him, to create a song that had the *feel* of "Got To Give It Up." One might ask if there could possibly be a better legacy for a songwriter than to inspire other songwriters to write music and expressly pay homage to him or her for inspiring that music—publicly, on national television and elsewhere, keeping his name and his music alive for generations to come.

Yet there can be no doubt in this case that the jury was swayed, at least in part (arguably in *large* part), by hearing such interviews. Ultimately, the jury held Williams and Thicke liable for copyright infringement and rendered an award of several million dollars against them. It is difficult to imagine a songwriter that comes along after this case publicly affording *any* credit to *any* influence that he or she receives from *any* songwriter.

CONCLUSION

It is apparent that the denial of summary judgment and the ultimate verdict in this case were based upon an undeniable musical inspiration, the overall look and feel of the two works, and a series of random, coincidental, and unimportant alleged similarities between unprotectable elements in the *sound recording* of "Got To Give It Up" (random elements that were *not* in the "Got To Give It Up" deposit copy) and "Blurred Lines."

43. Ron Mendelsohn, *Will the "Blurred Lines" Decision "Stifle Creativity"?*, MEGATRAX (Apr. 1, 2015), http://blogtrans.megatrax.com/will-the-blurred-lines-decision-stifle-creativity.

Many important popular songs in the modern era would not exist today if they were subjected to the same scrutiny as "Blurred Lines" was in this case. This case, which was based upon such factors—with no similarities in melody, with virtually no similarities with the music notation on the actual deposit copy, and simply based on a "groove"—will clearly stifle future creativity, will undoubtedly diminish the legacies of past songwriters, and, without a doubt, is antithetical to the principals of the Copyright Act.