Loyola of Los Angeles
Entertainment Law Review

Volume 39 | Number 2 Article 3

Spring 4-16-2019

# Blurred Justice

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# BLURRED JUSTICE

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This article discusses a recent controversial copyright case involving inspiration. Marvin Gaye's family, who owns the copyright to "Got to Give It Up," claimed that "Blurred Lines," made famous by Robin Thicke, infringes on the family's copyright. The Gaye family prevailed at trial. At summary judgment, the Federal District Court permitted the case to go to trial without determining whether there were elements to "Got to Give It Up" that were unprotected as unoriginal, commonplace musical ideas, or musical building blocks. Had the court made such a determination, it is doubtful the case would have gone to trial. The summary judgment phase of litigation is supposed to weed out obviously unmeritorious cases such as this one. On appeal, the majority declined to address the merits of the case, but the dissenting judge examined "Got to Give It Up" and "Blurred Lines," and concluded, consistent with this article, that no infringement occurred as a matter of law because "Got to Give It Up" contained no protected elements that were substantially similar.

This article also analyzes the two songs in detail from a music theory perspective and concludes that the similarities between the two songs were unprotected and that the protected elements were not similar. Accordingly, the District Court should have granted summary judgment holding that there was no infringement. Further, the Gaye family should not have succeeded at trial. In our view, the litigation process failed, and we make some recommendations on how to improve the court's review at summary judgment for music copyright cases.

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> The underlying idea . . . even if original, cannot be removed from the public realm; but its expression . . . can be protected. Needless to say, the line is a blurry one.
>
> – Matthews v. Freedman, 157 F.3d 25, 27 (1st Cir. 1998) (Boudin, J.).

## I. INTRODUCTION

In 2013, Robin Thicke released a song entitled, "Blurred Lines," written primarily by Pharrell Williams.[1] "Blurred Lines" is catchy, and it rose to the top of the music charts quickly all over the world.[2] Some listeners thought the song sounded very similar to Marvin Gaye's 1977 hit, "Got to Give It Up."[3] The Gaye family agreed but took no immediate legal action.[4] Pharrell Williams and Robin Thicke ("Thicke parties") admit their song was inspired by "Got to Give It Up."[5] The Thicke parties filed a preemptive suit in 2013 asking the court to declare that their song, "Blurred Lines," did not infringe on the copyright of Marvin Gaye's song, "Got to Give It Up."[6]

Prior to trial, the Thicke parties motioned for summary judgment, arguing that, as a matter of law, no infringement occurred because the songs were not substantially similar.[7] Both parties submitted reports authored by expert witnesses—"forensic" —musicologists, opining on the similarity and

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1. Williams v. Bridgeport Music, Inc., No. LA CV13–06004 (AGRx), 2014 WL 7877773, at *2 (C.D. Cal. Oct. 30, 2014).

2. *See* Opening Brief of Plaintiffs-Appellants-Cross-Appellees Pharrell Williams, Robin Thicke, Clifford Harris, Jr., and More Water from Nazareth Publishing, Inc. at 17, Williams v. Gaye, No. 15-56880 (9th Cir. Aug. 23, 2016).

3. *See* Defendants' Frankie Christian Gaye & Nona Marvisa Gaye First Amended Counterclaims at 3-4, Williams v. Bridgeport Music, Inc., No. LA CV13–06004 JAK (AGRx) at *3 (C.D. Cal. Oct. 30, 2013).

4. *See* Eriq Gardner, *Robin Thicke Sues to Protect 'Blurred Lines' from Marvin Gaye's Family*, HOLLYWOOD REP. (Aug. 15, 2013, 6:13 PM), https://www.hollywoodreporter.com/thr-esq/robin-thicke-sues-protect-blurred-607492 [https://perma.cc/8YFX-DV8S].

5. *See* Opening Brief of Plaintiffs-Appellants-Cross-Appellees, *supra* note 2, at 2.

6. Complaint at 1, Williams v. Bridgeport Music, Inc., No. LA CV13–06004 (C.D. Cal. Oct. 30, 2014), 2013 WL 4271752, at *1.

7. *Williams*, 2014 WL 7877773 at *1.

dissimilarity of the two songs.[8] The court denied the motion, holding that the alleged factual dispute over the similarity of the two songs was sufficient to warrant a trial.[9] Although the parties made opposing arguments, there was not much of a factual dispute over what constituted the unprotected elements in the songs, but there was sufficient evidence to show that the songs were so dissimilar that no infringement of any copyright protected material occurred as a matter of law. It is our opinion that the court should have granted the motion and declared as a matter of law that the song, "Blurred Lines," by Pharrell Williams and Robin Thicke, did not infringe on the copyright pertaining to "Got to Give It Up" by Marvin Gaye.

At trial, the parties presented more evidence to a jury regarding whether the Thicke parties copied "Got to Give it Up." The Thicke parties fought an uphill battle because the jury was never instructed about which elements of the songs were considered unprotected elements. For example, the use of a guitar sound in a song is not subject to copyright protection because many popular songs have guitar sounds. Without any instruction that a guitar sound is not subject to copyright and not to be considered in reaching a verdict, a jury that hears two songs with guitar would be permitted to find the songs substantially similar, and thus an infringement occurred, even if there were no other similarities. In the "Blurred Lines" case, many of the musical elements the Gaye family claimed "Blurred Lines" infringed on "Got to Give it Up" were not subject to copyright protection. In the "Blurred Lines" case, many of the musical elements the Gaye family claimed "Blurred Lines" infringed on "Got to Give it Up" were not subject to copyright protection, but the court declined to ferret out which elements those were on summary judgment—which should have ended the proceedings—and at trial—which would have properly framed the facts at issue for the jurors. Unsurprisingly, the jury found that the songs were substantially similar, making the Thicke parties liable for infringement. The jury verdict was incorrect and unwarranted because with the protected elements filtered out, the songs are objectively dissimilar.

The district court proceedings as described present a unique factual posture. An appropriate analogy would be a case where the dispositive issue was whether it was raining at the time of an event. The record reflected that at the time of the event the sky was dark and the ground was dry. The plain-

8. *See id.* at *20–21.

9. *See id.*

tiff alleged it was raining because the sky was dark, and presented appropriate evidence on summary judgment, expert opinions that such a dark sky occurs when it rains. The defendant did not dispute that the sky was dark at the time of the event. Rather, the defendant claimed it was not raining because the record reflected the ground was dry at that time. The defendant presented appropriate evidence on summary judgment: expert reports opining that if the ground was dry then it could not have been raining. Both parties and their experts said the other expert was wrong, but neither disputed that the sky was dark and the ground was dry at the time of the event.

Who wins? Both experts are competent and neither is lying. At first glance, it may appear to a judge that there is a factual dispute because the parties made opposing arguments based on the summary evidence presented by their experts. This dispute is not an obvious legal dispute, but there are only two kinds of disputes in such a case, legal or factual. Since the facts are not in dispute, this is a legal dispute. It requires the judge to rely on common sense, however. A dark sky does not categorically imply rain, but a dry ground categorically negates the assertion that rain was present. Accordingly, the defendant should win on summary judgment. If the case goes to trial, the evidence the parties will present will be only more detailed evidence that the sky was dark and that the ground was dry and the meaning of these two conditions. The lawyers and the experts might be able to convince a jury of lay people that it was raining, in which case the defendant who objectively should have won ought to be able to rely on the appeal process.

Here, the Gaye family argued that the songs are substantially similar based on evidence presented that a pitch here and a pitch there were the same, that the same instrument was used in both songs, and that a particular musical technique was used in both songs. This is akin to arguing that it was raining because the sky was dark. A pitch here and there, a similar technique, and a particular instrument in common do not categorically imply that the songs are substantially similar. There is a limited number of note combinations in music. Identical pitches are likely to occur in two songs, just as a broken clock will reflect the correct time twice a day. It is the rhythm and placement of the pitch in a song that determines whether the two identical pitches support a conclusion that the songs are substantially similar.

On March 21, 2018, the Ninth Circuit Court of Appeals affirmed the jury verdict. Judge Jacqueline H. Nguyen dissented. The majority affirmed on procedural grounds, while Judge Nguyen conducted a thorough legal

analysis of the undisputed facts presented at summary judgment and at trial. On July 11, 2018, the Ninth Circuit denied a request for rehearing.[10]

In our view, the songs are objectively different in all material respects relevant to a copyright claim. Accordingly, affirming the district court's denial of summary judgment and the jury's finding of substantial similarity have dealt a serious injustice to the Thicke parties and songwriters in general. Judge Nguyen's dissent accomplished what the district court judge failed to do on summary judgment. She examined the record and reached a conclusion as a matter of law that the songs were sufficiently different to preclude a finding that the songs were substantially similar.

On summary judgment, the district court misapplied Ninth Circuit law, and, as a result, erroneously failed to block the case from going to trial. The jury verdict against the Thicke parties at trial was also incorrect because the court permitted the jury to consider material unprotected by copyright law in reaching its verdict. From an objective standpoint, "Blurred Lines" did not infringe on the protected elements of "Got to Give It Up." There were no material facts in dispute. The Ninth Circuit requires district court judges to filter out unprotected elements of a song in a copyright claim so that the jury may address only the protected elements. In this particular case, the task was left to a dissenting Ninth Circuit judge. Also, the district court presumably misunderstood the Gaye family's position regarding unprotected musical elements.[11] The family's expert was not responsive to any of the "Blurred Lines" assertions that many musical elements were unprotected commonplace ideas.[12] Copyright law is supposed to protect the copyright holder against another from reproducing their work, but not against others drawing inspiration from the copyright holder's work.[13] If inspiration was actionable, it would diminish the incentive to make new music.

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10. *See* Williams v. Gaye, 885 F.3d 1150, *reh'g denied*, 2018 WL 3382875, at *1151 (9th Cir. 2018).

11. *See* Declaration of Judith Finell at 2–3, Williams v. Bridgeport Music, Inc., No. CV13-06004 (C.D. Cal. Oct. 30, 2014), ECF No. 112-3, at 1; Williams v. Bridgeport Music, Inc., No. LA CV13–06004 (AGRx), 2014 WL 7877773, at *12–19 (C.D. Cal. Oct. 30, 2014).

12. *Declaration of Judith Finell*, *supra* note 11, at 2–3.

13. *See* Meg Franklin, *Copyright Law: Defining the Line between Inspiration and Infringement*, UNIV. CIN. L. REV., (Oct. 19, 2016), https://uclawreview.org/2016/10/19/copyright-law-defining-the-line-between-inspiration-and-infringement/ [https://perma.cc/Y6B8-XL4G].

Although the Ninth Circuit affirmed the trial verdict and, accordingly, the mistaken summary judgment order, the majority opinion on appeal focused on procedural issues.[14] Although the majority's analysis assumed there were material issues in dispute, Judge Nguyen's dissenting opinion demonstrates and concludes that there were none.[15] The majority left untouched the legal and factual issues discussed in this Article and raised in the dissenting opinion, so they remain a tangled mess. The majority did not see fit to filter out the unprotected building blocks or examine the evidence to see if the songs are objectively similar or dissimilar. In her dissent, Judge Nguyen called this outcome a "devastating blow to future musicians and composers everywhere."[16] Judge Nguyen's dissent is consistent with our legal and factual analysis here, and is understandably harsh on the majority's decision.

This Article argues that the case should have been decided on summary judgment in the district court's order denying summary judgment in October of 2014.[17] This case should have been dismissed on summary judgment in favor of the Thicke parties. The district court judge failed to delve into the facts presented, which caused the summary judgment process to break down. Perhaps this was because the judge believed the experts, or perhaps because he misunderstood the law. Regardless, his error was repeated in the jury trial, and, on appeal, the majority similarly ignored the facts of the case.

Part II discusses the legal framework for the lawsuit and identifies some misunderstandings about the law that led to the denial of summary judgment and a jury verdict against the Thicke parties. Part III analyzes the music at issue in the context of music theory. Both Parts II and III analyze the case and the songs, while Part IV concludes that most of the musical elements in "Got to Give It Up," including those at issue, are not protected under copyright law. Thus, the protected elements of "Got to Give It Up" are materially different from the alleged infringing elements in "Blurred Lines." Accordingly, this Article concludes that the Gaye family should have lost the case

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14. *See* Opening Brief of Plaintiffs-Appellants-Cross-Appellees, *supra* note 2, at 23–57.

15. *See id.* at 58 ("To the contrary, there were no material factual disputes at trial. Finell testified about certain similarities between the deposit copy of the "Got to Give It Up" lead sheet and "Blurred Lines." Pharrell Williams and Robin Thicke don't contest the existence of these similarities. Rather, they argue that these similarities are insufficient to support a finding of substantial similarity as a matter of law. The majority fails to engage with this argument.").

16. *See id.* at 57.

17. *Williams*, 2014 WL 7877773, at *22.

on summary judgment and, failing that, the court should have granted a motion for judgment notwithstanding the verdict.

## II. DEFICIENCIES IN THE LEGAL FRAMEWORK

The summary judgment process is intended to end cases where the outcome is obvious.[18] In this case, the outcome should have been obvious. The trial process in this case also failed. Had the court allowed the jury to examine both songs through the proper lens, it is unlikely they would have found infringement.

### *A. Copyright Protection*

Copyright protects original expression; ideas, facts, functionality, and other non-original elements are not protected.[19] The summary judgment process should put trial court judges in a position to act as a gatekeeper to separate the original from the elements that are not original.[20] Notably, there is very little original expression in popular music.[21] Most of what listeners hear are building blocks from a vast historical trove of previously expressed ideas, processes, procedures, methods, concepts, principles, and discoveries.[22] Judge Nguyen's dissent on appeal shows that judges are capable of understanding these distinctions and conducting a thorough analysis.[23]

These building blocks, much like an elephant in a painting, are in the public domain. By public domain, we mean subject matter that the public is free to use in artistic expression free of any copyright claims.[24] The elephant

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18. FED. R. CIV. P. 56(a).

19. *See generally* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (declining to provide copyright protection to factual information); Baker v. Selden, 101 U.S. 99 (1879) (holding that copyright protection does not extend to facts, ideas, systems, concepts, methods, and discoveries).

20. *Feist Publ'ns, Inc.*, 499 U.S. 340 at 359.

21. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 489 (9th Cir. 2000).

22. 17 U.S.C. § 102(b) (2018).

23. *See generally* Williams v. Gaye, 885 F.3d 1150, *reh'g denied*, 2018 WL 3382875 (9th Cir. 2011).

24. Although not an authoritative legal source, Wikipedia sheds light on the meaning of public domain. Wikipedia provides as follows: "Definitions of the boundaries of the *public domain*

is a building block in all the different paintings where the elephant is the subject. A painter may make original choices manifested in the painting subject to copyright protection—such as color, size, and effect—but the elephant itself is in the public domain and the recognizable shape of an elephant cannot be protected by a single individual. Further, no matter how creative a painter thinks he is by putting the elephant in a small room and painting the scene, the idea of an elephant in a room is not an original idea, and it is not subject to copyright protection.[25] Similarly, a brushstroke used to blur the elephant would be a method also not subject to copyright protection.[26] In the instant case, the judge on summary judgment and the jury at trial mistook the non-original building blocks in "Blurred Lines" for original, protectable elements taken from "Got To Give It Up." The district court judge should have prevented the case from going to trial during the summary judgment phase of the litigation. And the Ninth Circuit should have vacated the jury verdict and found for the Thicke parties based on the analysis in Judge Nguyen's dissent.

### *B. Summary Judgment*

At summary judgment, a judge acts as a gatekeeper.[27] This phase of litigation takes place before a trial.[28] A trial is an opportunity for the parties to present a factual dispute to a neutral fact finder such as a judge or jury.[29] A motion for summary judgment, however, asks a court to look at evidence

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in relation to copyright, or intellectual property more generally, regard the *public domain* as a negative space; that is, it consists of works that are no longer in copyright term or were never protected by copyright law." *Public Domain*, WIKIPEDIA (2018), https://en.wikipedia.org/wiki/Public_domain [https://perma.cc/GRZ6-QDX3] [emphasis added].

25. 17 U.S.C. § 102(b).

26. *Id.*

27. *See* FED. R. CIV. P. 56(a).

28. *See id.*

29. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) ("The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.").

before a trial and determine whether there are any facts in dispute.[30] If there are no determinative facts in dispute, there is no reason to hold a trial.[31]

For example, assume a driver receives a parking ticket for parking in a crosswalk and is expected to pay or challenge the ticket in court. Further assume that before going to trial, the driver files a motion for summary judgment with an expert report that includes a photograph of the car at the time the ticket was issued sitting perfectly in a valid parking space and not in a crosswalk. The photograph is likely sufficient for the presiding judge to decide the case in the driver's favor. If the person who issued the ticket argues to the contrary and presents an expert report stating that the photo is inaccurate along with disputed facts irrelevant to the court's determination, that does not mean there are still facts in dispute for resolution at trial. Rather, the judge is supposed to act as a gatekeeper. To the extent that the photograph is a valid depiction of the car when ticketed, there are still no determinative facts in dispute regardless of what the ticket-giver's expert report states. If the judge determines there are no material facts at issue, the case is dismissed. However, if the judge determines there are material facts at issue, the case will continue to trial. To decide whether to dismiss the "Blurred Lines" case before trial, the district court should have correctly applied the music copyright test during the summary judgment phase. Filtering out the building blocks would have left two songs dissimilar as a matter of law.

### *C. The Music Copyright Test in Summary Judgment*

The district court in this case presented parts of the Ninth Circuit test correctly. A claimant establishes a copyright violation by showing "(1) ownership in the copyrighted work, and (2) copying of constituent elements of the work that are original."[32] In many cases, such as the "Blurred Lines" litigation, the ownership is not contested.[33] Thus, copying of original elements becomes the only issue in dispute.

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30. FED. R. CIV. P. 56(a).

31. *See id.*

32. Williams v. Bridgeport Music, Inc., No. LA CV13–06004 (AGRx), 2014 WL 7877773, at *5 (C.D. Cal. Oct. 30, 2014) (quoting *Feist Publ'ns, Inc.*, 499 U.S. 340 at 361).

33. *See id.*

To determine whether there was sufficient copying to constitute infringement, courts examine whether the alleged defendant's work is substantially similar to the claimant's work.[34] Substantial similarity involves a two-part test: "an objective extrinsic test and a subjective intrinsic test."[35] The extrinsic test is an objective test to determine whether as a matter of law two songs are or are not substantially similar.[36] Courts in the Ninth Circuit apply the extrinsic test in summary judgment to separate protected elements from the unprotected elements, such as ideas and *scènes à faire*.[37] The intrinsic test is a subjective test. After the unprotected elements have been filtered out of a song, a jury may determine whether they are substantially similar.[38]

In *Swirsky v. Carey*, the Ninth Circuit recognized that a court may determine that a musical idea in a song is not protected by copyright.[39] The court in the "Blurred Lines" case did not determine whether any of the elements of "Got to Give It Up" constituted unprotected ideas, despite there being expert opinion to that effect.[40] Although *Swirsky* noted that "[n]o federal court has stated that a musical motive is not protectable because it is an idea," future trial courts should take to heart that the Ninth Circuit recognized musical ideas as unprotected and should make such determinations in the future.[41] Making such determinations is necessary to give effect to the seminal Supreme Court copyright case, *Baker v. Selden*, which held that original

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34. *See id.*

35. *See id.* (quoting Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004)).

36. *See* Benay v. Warner Bros. Entm't Inc., 607 F.3d 620, 624 (9th Cir. 2010).

37. *See* Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1443 (9th Cir. 1994). ("The district court was nevertheless obliged to identify similarities, determine their source, and decide which elements are protectable … It is not easy to distinguish expression from ideas, particularly in a new medium. However, it must be done." (citing *Baker*, 101 U.S. at 99)).

38. *See Swirsky*, 376 F.3d 841 at 845.

39. *See id.* at 851.

40. *Williams*, 2014 WL 7877773 at *19. *See* Declaration of Sandy Wilbur at 4:1–8:3, Williams v. Bridgeport Music, Inc., No. LA CV13–06004 (C.D. Cal. Oct. 30, 2014), 2015 WL 13547242, at *3.

41. *See id.* at n.18. It is curious that *Swirsky* defined musical "motive" using a thesaurus instead of a dictionary. The dictionary definition of motive includes an idea. *See Motive*, AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1991) (defining motive as follows: "motive. . . A motif in art, literature, or music"); *see Motif*, AMERICAN HERITAGE COLLEGE

expressions are subject to copyright but facts, ideas, systems, concepts, methods, and discoveries are not; and to the extent that any of these merge with an expression, the expression itself is not subject to copyright.[42]

The Ninth Circuit has also considered expert opinion on the *scènes à faire* doctrine, which could be considered a corollary of *Baker v. Selden*, in a music case.[43] "Under the *scenes a faire* [sic] doctrine, when certain commonplace expressions are indispensable and naturally associated with a given idea, those expressions are treated like ideas and therefore not protected by copyright."[44]

The district court in the "Blurred Lines" case acknowledged that there are unprotected elements in copyrighted works.[45] Despite this acknowledgment, the court did not attempt to identify those elements of "Got to Give It Up."[46] The court found triable issues as to a number of elements despite independent evidence that the elements for which copyright protection was still an issue were "commonplace in the genre or anticipated by earlier works."[47] The court decided not to address whether any of the musical elements at issue were unprotected because they were *scènes à faire*.[48] *Scènes à faire* in music, as the court correctly stated, includes "commonplace expressions within a genre."[49] Under *Swirsky v. Carey*, according to the court, "it is inappropriate to grant summary judgment on the basis of *scènes à faire*

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DICTIONARY (3d ed. 1991) (defining motif in part as follows: "motif . . . a dominant theme or central idea").

42. *See Baker*, 101 U.S. at 99.

43. *See Swirsky*, 376 F.3d at 849–50.

44. *See id.* at 850.

45. *See Williams*, 2014 WL 7877773 at *18 (quoting *Apple*, 35 F.3d at 1446, "[T]he unprotectable elements have to be identified, or filtered, before the works can be considered as a whole.").

46. *See id.*

47. *See Williams*, 2014 WL 7877773 at *19.

48. *See id.*

49. *See id.*

without independent evidence, unless the allegation of *scènes à faire* is uncontested."[50] The logic of this statement is valid, but the premise is mistaken. The expert for the Thicke parties presented independent evidence of unprotected elements.[51] Based on *Swirsky*, the court could have found in favor of summary judgment because independent evidence of *scènes à faire* was presented to the court.

In *Swirsky*, the court addressed two measures where *scènes à faire* was in dispute.[52] The proponent of applying *scènes à faire* presented an expert opinion, i.e., independent evidence, that the *scènes à faire* doctrine made one measure unprotected.[53] The court considered the expert's opinion and, after careful analysis, rejected the claim that the measure constituted *scènes à faire*.[54] As to the other measure, the proponent of *scènes à faire* presented no expert opinion, i.e., no independent evidence that the measure contained *scènes à faire*.[55] It was language regarding the second measure—where no expert opinion was presented—that the district court quoted.[56] The district court mistakenly gave effect to this language despite the presentation of independent evidence.[57] Furthermore, the court incorrectly weighed this evidence against the Thicke parties despite the presentation of independent evidence.[58] The court should have identified the *scènes à faire* and considered

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50. *See id.*

51. *See* Declaration of Sandy Wilbur, *supra* note 40, at 4:1–8:3.

52. *See Swirsky*, 376 F.3d at 851.

53. *See id.* at 850 (considering testimony by Dr. Walser with respect to the first measure of the claimant's song).

54. *See id.*

55. *See id.* ("The district court also erred in finding the fifth measure of *One* to be a *scènes à faire* as a matter of law. Carey introduced no independent evidence showing that measure five of *One* was more similar to *Jolly Good* than *Thank God;* she relied exclusively on Dr. Walser's opinion that measure five was "almost identical" to measure one of *One*.").

56. *See Williams*, 2014 WL 7877773, at *19 (quoting *Swirsky*, 376 F.3d at 850, "[i]t is inappropriate to grant summary judgment on the basis of *scènes à faire* without independent evidence, unless the allegation of *scènes à faire* is uncontested.").

57. *See id.*

58. *See id.*

the expert's opinion. As such, the court should have granted summary judgment for the Thicke parties.

### *D. The Blurred Lines Case in District Court*

With the summary judgment motion in the case at hand, the Thicke parties presented sufficient expert opinion to show that no infringement occurred as a matter of law,[59] which should have barred the case from going forward. There is very little originality in popular music. The expert for the Thicke parties, musicologist Sandy Wilbur, provided sufficient opinion evidence in her expert report to show that there were very few original elements to "Got to Give It Up."[60] The expert also showed that each of the specific elements in "Got to Give It Up" for which an infringement claim was made is unoriginal.[61] At summary judgment, one would expect the copyright owner making the infringement claim to respond to a showing that the song at issue was made up of unprotected and unoriginal building blocks, but the Gaye family did not seriously dispute this opinion evidence.[62] Accordingly, assuming the protected elements were different, which they were, summary judgment was appropriate.

The district court's decision did not address the Thicke parties' expert opinion demonstrating the vast number of unprotected unoriginal elements in "Got to Give It Up."[63] Nor did the court address the Gaye family's expert's purported responses to the Thicke parties' expert's showings.[64] Had

59. *See* Declaration of Sandy Wilbur, *supra* note 40, at 2:4–2:9.

60. *See* Declaration of Sandy Wilbur, *supra* note 40, at 12 (providing expert opinion evidence that the claimed similarities constituted unprotected elements that the district court labeled *scènes à faire* at summary judgment, *Williams*, 2014 WL 7877773, at *23–24).

61. *See* Declaration of Sandy Wilbur, *supra* note 54, at 13:10–43:36.

62. *See generally* Plaintiffs and Counter-Defendants' Notice for Motion and Motion for Summary Judgement or, in the Alternative, Partial Summary Judgement; Memorandum of Points and Authorities at 10:24–10:27, Williams v. Bridgeport Music, Inc., 300 F.R.D. 120 (S.D.N.Y. 2014) (No. 14 Misc. 73–Pl.) (Defendants contend the eight unprotectable elements are simply commonplace devices or ideas standing alone and thus not protectable, but argue the elements are protectable in the aggregate as combined).

63. *See generally Williams*, 2014 WL 7877773.

64. *See generally id.*

the court analyzed the Gaye family's expert's responses, it would have noticed that the responses to allegations of unprotected elements were not actually responsive.

The Gaye family's expert's response to the Thicke parties' expert's opinions that certain elements were unoriginal, commonplace, or building blocks did not dispute whether they were unprotected by copyright as unoriginal, commonplace, or building blocks.[65] For example, the Thicke parties' expert opined that similar elements in the "Got to Give It Up" signature phrase were "a common musical idea or device," "a common musical device," and that "there [was] nothing original about [the] overall contour, which is commonplace."[66] In response, the Gaye's expert, musicologist Judith Finell, stated that the opinion "fails to consider the overall role of the signature phrases in the songs, 'microscopically analyzing each compositional element in isolation, rather than evaluating the full combination of all 5 component elements within the same phrase.'"[67] There is nothing in this response that disputes the claim that the similar elements in the signature phrase are unprotected by copyright because they are unoriginal, commonplace, and constitute mere building blocks rather original expression.

As a more general response to opinions on elements that are unoriginal, commonplace, or building blocks, the Gaye family's expert stated, "[r]educing elements of musical expression to common devices or building blocks is inaccurate."[68] To illustrate this "inaccuracy," the expert offered the Guggenheim Museum in New York as an example.[69] She stated, "[o]ne could deconstruct and reduce its brilliantly curved walls, skylight, and distinctive rotunda to mere elements of concrete, glass, and metal, namely . . . building blocks."[70] This example proves the opposite of what Ms. Finell intended as can be shown by seeing how a hypothetical case based on the example would play out. Let us assume that a copyright claim has been made against the

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65. *See, e.g.*, Williams v. Bridgeport Music, Inc., No. 13-06004 (C.D. Cal. July 14, 2015), 2015 WL 4479500, at *15.

66. *See, e.g.*, *id.* at *13.

67. *See id.* at *19 (in response to the opinion that the opening bass line).

68. Declaration of Judith Finell at 4, Williams v. Bridgeport Music, Inc., No. CV13-06004 (C.D. Cal. Oct. 30, 2014), ECF No. 112–3, at 17.

69. *Id.* at 18.

70. *See* Declaration of Judith Finell, *supra* note 68, at 4.

Guggenheim. As it has a copyright claim against it, the Guggenheim is analogous to the Thicke parties. Let us further assume that the New York Museum of Modern Art ("MoMA") is the claimant suing the Guggenheim. As the copyright holder making a claim, the MoMA is analogous to the Gaye party. Assume, for argument's sake, that MoMA sued the Guggenheim, claiming that the Guggenheim infringed on the MoMA's idea of putting modern art in a building with cornered walls, stairs, bricks, and glass. The founders of the Guggenheim had visited the MoMA, which inspired them to build their own museum with modern art in it. Like the MoMA, the Guggenheim building consists of walls, stairs, bricks, and glass, but used these "building blocks" differently by creating curves and unique architectural designs with those building blocks.[71] Even though both museums used the same "building blocks," ("concrete, glass, and metal") the Guggenheim building looks very different from the MoMA.[72] Like "Blurred Lines," use of these same building blocks does not make the Guggenheim merely "an assembly of architectural materials and 'devices.'" Rather, its "iconic design" is "original . . . artistic expression" rather than an infringing rendition of the MoMA.[73] The Gaye family's expert mixed up which party would be analogous to the Guggenheim in her example. It was "Blurred Lines," not "Got to Give it Up."

In addition to the lack of originality in most of the constituent elements, the Gaye family's expert demonstrated, perhaps unknowingly, that each alleged infringing element was different in "Blurred Lines" than in "Got to Give It Up."[74] These differences escaped the district court judge, but not the dissenting appellate judge, Judge Nguyen. She showed that the similarities were unprotected and the protected elements were different as a matter of law, i.e., not substantially similar based on the objective facts of the case.[75] Yet the lawsuit went on to a full jury trial.[76] The fact that there was a jury trial indicates that the summary judgment process failed to enable the district court to act as a proper gatekeeper.

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71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.*

75. *See generally Williams*, slip op. at 57.

76. *Williams*, 2014 WL 7877773, at *20.

At trial, the court excluded an important video from evidence.[77] We feel the video would have helped the jury understand the points made here. The court, however, found that it was more prejudicial than probative.[78] The video shows a group, Axis of Awesome, demonstrating that the vast majority of popular music songs use the same building blocks, and that it is the melody and the lyrics that makes the songs unique and different.[79] In the video, Axis of Awesome played 36 songs using the same four chords and nearly the same instrumentation.[80] The songs all sound different because the melodies flowing from the lyrics are all different. Once the unprotected elements are removed—instrumentation, vocal timbre, rhythm, etc.—the Gaye family's infringement claim fails because the melody and lyrics for "Blurred Lines" are different than the melody and lyrics for "Got to Give It Up."[81] The Gaye family would not have been prejudiced by the jury seeing the video at trial. Rather, the video is probative because it would have illustrated to the judge and the jury the elements in "Got to Give It Up" that should have been deemed unprotected as unoriginal, commonplace, or building blocks. Judge Nguyen referred to this video in her dissent.[82] The jury could have made a more informed decision after hearing it.

### *E. The Case on Appeal to the Ninth Circuit*

In district court, the summary judgment process and the trial process failed. The Ninth Circuit did not rectify these failures on appeal. Like the trial judge, the majority opinion did not independently compare the two songs in order to assess the evidence the experts presented.[83] This was a failure in the litigation process. Two objectively different songs should not be able to survive summary judgment, a trial, and an appeal, but that is what happened here. The similar elements of the songs were not protectable by

77. *See Williams*, 2015 WL 4479500, at *10.

78. *Id.*

79. *See* Random804, *Axis of Awesome - 4 Chord Song (with Song Titles)*, YOUTUBE (Dec. 10, 2009), https://www.youtube.com/watch?v=5pidokakU4I [https://perma.cc/VG7L-8Y9P].

80. *See id.*

81. *See infra* Part III.B.

82. *See Williams*, slip op. at 60.

83. *See generally id.* at 16.

copyright (a purely legal issue), and the protectable elements of the songs were objectively dissimilar. The objective nature of the differences is what makes a judicial comparison of the songs a legal issue.

One failure in the appellate process occurred when the majority held that the district court's summary judgment order was not subject to appellate review.[84] The majority relied on *Ortiz v. Bright*.[85] *Ortiz* held that a summary judgment order involving disputed facts is not subject to review.[86] There, however, the court did not reach the issue of whether a summary judgment order is reviewable in a case presenting purely legal issues with no facts in dispute.[87] Our position, consistent with Judge Nguyen's, is that there were no material facts in dispute so the case should have been decided as a matter of law at summary judgment or, failing that, on appeal to the Ninth Circuit.

Another failure in the appellate process was the majority's refusal to conduct any independent examination of the objective facts. The majority held that "the verdict was not against the clear weight of the evidence."[88] One would think that to have any weight, evidence would have to be material or bear on the issue. In reaching its holding, the majority noted that there must be "an absolute absence of evidence to support the jury's verdict" to overturn the jury verdict.[89] Here, there was no material evidence to support the verdict. The evidence the majority pointed to was Ms. Finell's testimony "that nearly every bar of 'Blurred Lines' contains an area of similarity to "Got to Give it Up."[90] This assertion is meaningless generally and in the context of this case. Two piano pieces played solely on a piano are going to sound similar in every bar regardless of how dissimilar they are. "Blurred Lines" and "Got to Give it Up," as Judge Nguyen pointed out, contain musical similarities to "Happy Birthday."[91] Substantial similarity must come from

84. *See id.* at 24.

85. *Williams*, slip op. at 23.

86. Ortiz v. Jordan, 562 U.S. 180, 183–84 (2011).

87. *See id.* at 190.

88. *See Williams*, slip op. at 33.

89. *See id.* at 34–35.

90. *See id.* at 13.

91. *See id.* at 67–68.

original, protected material, which does not arise in the use of a particular instrument (like a guitar, keyboard, or Coke bottle as alleged in this case), in the use of a singing technique (like melisma or parlando as alleged in this case), or the pitch of a note (without reference to rhythm or placement as alleged in this case).

Ms. Finell also testified that a collection of unprotectable elements may constitute a protected constellation.[92] This is accurate. *Feist Communications v. Rural Telephone* held that a compilation of unprotected facts can be sufficiently original to merit copyright protection.[93] There, however, the phone book at issue did not have a sufficiently original selection or arrangement of unprotected elements to merit protection.[94] It follows that even if a "constellation" of unprotected elements was protected as a whole, the alleged infringing work would still have to contain a substantially similar constellation. Here, Ms. Finell's testimony makes no showing that the constellation had sufficient originality to be protected nor any showing that "Blurred Lines" contained a substantially similar constellation. Alleging that similar constituent parts were present cannot be sufficient. Otherwise every song with a vocalist, a rhythm guitar, a drum set, and a bass—a constellation of unprotectable constituent parts present in virtually every rock song in the 1970s and 1980s—is substantially similar.

In her dissent, Judge Nguyen addressed both of these failures. Thus, a third failure of the appellate process was the refusal to give credit to a colleague who was willing to roll up her sleeves and wade through the record. Judge Nguyen's analysis of the record established that the issue was purely legal, so *Ortiz* does not apply.[95] Her analysis also established that there were no material facts in dispute,[96] so the holding on the weight of the evidence should have gone to the Thicke parties. The majority reached its holdings without conducting its own independent analysis of the record.

Judge Nguyen's dissent thoroughly analyzes each relevant infringement claim. One of the most important points is that she acknowledged the

92. *See id.* at 57.

93. *Feist Publ'ns, Inc.*, 499 U.S. 340 at 357.

94. *See id.* at 362.

95. *See Williams*, slip op. at 80–81.

96. *See id.* at 80.

idea/expression dichotomy. Only artistic expression is protected by copyright. Ideas underlying the artistic expression are not protected. She noted, "But for the freedom to borrow others' ideas and express them in new ways, artists would simply cease producing new works—to society's great detriment." These two songs are similar in the same way that two paintings may have similar color schemes. If one were to observe that a Jackson Pollock painting had the same color scheme as an El Greco painting, one could not credibly suggest the Jackson Pollock painting infringed on the El Greco painting because El Greco has recognizable objects in his paintings and the Jackson Pollock painting has none. The two songs at issue perhaps share some similar sounds in the same way the two paintings share similar colors. As Judge Nguyen concluded, the Gaye family identifies a few allegedly infringing elements in both songs that are not protectable "[a]nd when considered in the works as a whole [the] similarities aren't even perceptible."

Judge Nguyen examines the "signature phrase," the "hook" phrase, and "Theme X" in "Got to Give it Up."[97] She noted that the "signature phrase" is made up of some unprotected elements.[98] Taken together, these elements could be protected and an infringement would occur if the signature phrase in "Blurred Lines" were substantially similar.[99] But these phrases are not similar at all.[100] The "hook" phrase in "Got to Give it Up" has a sequence of four notes lasting 2.5 seconds.[101] Such a sequence is common and not subject to copyright protection and is objectively dissimilar to the allegedly infringing phrase in "Blurred Lines."[102] She found Theme X likewise unprotectable and dissimilar.[103]

97. *See id.* at 66–76.

98. *See id.* at 66.

99. *See id.* at 71–72.

100. *See id.* at 72.

101. *See id.* at 73.

102. *See id.* at 75.

103. *See id.* at 76.

Judge Nguyen looked at other allegations as well. She examined Gaye family claims regarding the keyboard parts, the bass line, and "word painting, parlando, and lyrics."[104] The keyboard parts in "Got to Give it Up" should not have been a part of the case, yet Ms. Finell was permitted to testify for the Gaye family about them at trial. Copyright protection extends to expression fixed in a tangible form.[105] The tangible form at issue in the case is the sheet music on file with the Copyright Office, and it contains no keyboard parts.[106] Ms. Finell testified that the "lead sheet" that was on file represents "musical shorthand for musicians."[107] Essentially she suggests that the keyboard part is implied by this shorthand. On this basis, Judge Nguyen concluded that the keyboard parts were not subject to copyright protection.[108]

Nevertheless, Judge Nguyen compared the keyboard parts in "Got to Give it Up" to the keyboard parts in "Blurred Lines" and found that there was no substantial similarity.[109] "Blurred Lines" goes back and forth between an A chord and an E chord.[110] Neither of these chords appear in the deposit copy. Rather, all six of the chords that appear in the deposit copy are seventh chords.[111]

Judge Nguyen compared the bass line in each song for substantial similarity. The bass line in the deposit copy for "Got to Give it Up" she noted, is problematic. Only the first eight measures are notated. Further, Ms. Finell's transcription from the sound recording (which was beyond the scope of the lawsuit) was different from the deposit copy. She also noted that beyond the first eight measures, the bass line was not fixed in a tangible form and was thus not subject to copyright protection.

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104. *See id.* at 77–79.

105. *See* 17 U.S.C. § 102(a).

106. *Williams*, 885 F.3d at 77.

107. *See id.* at 76.

108. *See id.*

109. *See id.*

110. "Got to Give It Up" is in A major and "Blurred Lines" is in G major, however, throughout this paper we give them in the same key because it is customary to do so when making comparisons.

111. *See id.* at 77.

After acknowledging the legal problems with the bass line, Judge Nguyen determined that the bass line was so typical in the genre that it didn't warrant protection because its expression merged with the idea. Moreover, she found that the notes, harmonies, and rhythms were all different so they could not be substantially similar.

The Gaye family claimed copyright protection for the word painting, parlando, and lyrics in "Got to Give it Up."[112] Judge Nguyen noted that the Gaye family's expert admitted that word painting and parlando were common techniques.[113] She opined, "[t]o say these two songs are substantially similar because they employ devices common to songwriting would be like saying two songs are substantially similar because they both have guitar solos in the middle even though the solos themselves bear no resemblance."[114] Judge Nguyen also noted that lyrical themes are not subject to copyright protection.[115]

Judge Nguyen's analysis is a model for judges analyzing claims on summary judgment and on appeal. Her analysis required a review of evidence presented only by Ms. Finell, the copyright claimant's expert.[116] Further, she noted that there was no dispute over whether there were some similarities in the songs, but rather the "legal import" of the similarities.[117] The majority opinion held otherwise, suggesting "[i]t is unrealistic to expect district courts to possess even a baseline fluency in musicology, much less to conduct an independent musicological analysis at a level as exacting as the one used by the dissent."[118] At summary judgment, if a judge finds such an analysis outside the court's competency, the answer is not to deny summary judgment and hold a trial. Rather, a court has options.

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112. *See id.* at 78.

113. *See id.* at 78–79.

114. *See id.*

115. *See id.* at 79.

116. *See id.* at 81 ("But my 'musicological exegesis' . . . concerns evidence of extrinsic similarity that *Finell* presented at trial. No one disputes that the two works share certain melodic snippets and other compositional elements that Finell identified. The only dispute regarding these similarities is their legal import—are the elements protectable, and are the similarities substantial enough to support liability for infringement?" [emphasis in original]).

117. *See id.*

118. *See id.* at 55.

### *F. Judicial Options for Improved Summary Judgment Findings*

Courts have a number of options they can consider to make better determinations when deciding copyright music cases. We have some suggestions. First, we suggest that judges listen to the Axis of Awesome video. As discussed above, watching the video provides an education as to the elements of songs that are original and those that are commonplace building blocks.

Second, we suggest that judges listen to the songs at issue in the cases before them. In any given case, if the parties are reasonable and their experts succeed at doing their jobs, the case should not end up in trial and may even be able to settle before any summary judgment motions are filed. Facts are facts. The parties ought to be able to tell if their facts are better than their adversaries. A judge who has listened to the songs can better understand the factual assertions to aid in settlement discussions, deciding on summary judgment, and admitting evidence at trial, but that does not appear to be what happened in this case. If a painting were the subject of a copyright dispute, a district court judge would not examine only the expert reports before the court and ignore the painting or give it only a cursory look. The judge would read the reports and examine the painting to see which party should prevail based on which expert opinion made sense in the context of his examination. As discussed above, this case was like a trial over whether it was raining and weighing the assertion of dark clouds against an absence of water on the ground. The district court judge in this case did not show the same familiarity with these songs that we presume he would have of rain or a copyright case involving paintings. This does not mean he did not listen to the songs. The hope is that listening to the songs aids the judge in the litigation process, but perceiving discrete parts of a musical piece can be difficult for the untrained ear, which is why we make the next recommendation.

Third, we suggest talking to a music theorist about the case. Music is perhaps the most abstract of the arts.[119] For this reason, the job of the experts and the courts in a music copyright case is a difficult one. The expert reports in this case are confusing. The nature of these reports made it difficult to tell that the Gaye family was alleging that there was rain because there was a dark cloud and that the Thicke parties countered with the fact that the ground was dry. A music theorist can help a court see these distinctions.

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119. *See* ROBERT GREENBERG, HOW TO LISTEN TO GREAT MUSIC: A GUIDE TO ITS HISTORY, CULTURE, AND HEART 46 (Penguin Books 2012).

There are two procedural mechanisms that permit courts to talk to a music theorist.[120] In a case like this with detailed expert reports that are facially contradictory, the Federal Rules of Evidence permit a judge to appoint a neutral expert to decipher the expert reports.[121] Another procedural mechanism that permits a judge to consult a music theorist is the court's inherent authority to take judicial notice of legislative facts.[122] A court is not required to ignore relevant information and scholarship that neither party has presented.[123] A court may consult with a law clerk about a case. Under the judicial notice doctrine, a court is not barred from going beyond law clerks to an expert—such as a music theorist.[124]

Our point here is not undermined by the thorough analysis conducted by Judge Nguyen in this case. She performed the analysis our justice system ought to be able to expect from federal judges. She recognized which elements of a song are not subject to copyright protection and that the similarities in the songs are these types of elements. She also recognized how different from an objective standpoint the two songs are with respect to all the protected elements. We agree with her conclusion that there was no copyright infringement here. If a judge is unable to conduct an analysis like the dissent's, we believe there are independent musicologists that would be happy to help.

These songs do not sound the same overall. The melodies are different. The harmonic progression is different. The similarities are similarities shared by songs of similar style—instrumentation, compositional techniques, etc. Even though "Blurred Lines" pays homage to "Got to Give It Up," the song does not did not copy any material protected by copyright. We now turn to a detailed analysis of the songs that are the subject of the copyright claim.

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120. *See* FED. R. EVID. 706.

121. *See id.*

122. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE 377–79 (4th ed. 2017).

123. *See id.* at 381–82.

124. *See generally id.* at 378–79.

## III. DEFICIENCIES IN THE COPYRIGHT CLAIM

The court should have found the copyright claim lacked merit as a matter of law. This part analyzes the music and the claims and concludes that although songs and recordings are copyrightable, the form, harmony, rhythm, style, instrumentation, and timbre in this case are not subject to copyright protection. Moreover, the lyrics, melody, form, bass, and harmony are all substantially different between the two songs.

### *A. Art Music, Popular Music, and Folk Music*

Music is perhaps the most abstract of all the arts. An explanation of its types in relationship to each other and the people involved in it, as explained in the next few paragraphs, will help one better understand "Blurred Lines" and "Got to Give It Up" and the musicians behind them. Much of this information is not cited because it is considered standard encyclopedic knowledge in the field of music.

Art music—also known as formal music, serious music, erudite music, or legitimate music—sometimes shortened to legit music—is an umbrella term used to refer to musical traditions implying advanced structural and theoretical considerations and a written musical tradition. The notion of art music is well-defined in contrast to two other types of music, namely popular music and folk music. The art music with which we are most familiar originated in Western Europe, and later spread to all of Europe and North America, as well as parts of South America. The collective culture of these regions is referred to as western civilization. Music from other parts of the world, whether it be art, popular, or folk music, is referred to as world music. Western art music is often called classical music, but this term is ambiguous because the classical style period refers to western art music specifically from about 1730 to 1820.

Popular music has wide appeal to large audiences and is typically distributed through the music industry. It is often enjoyed and performed by people with little or no musical training. Although the term folk music is applied to multiple types of music, in academic circles it is generally applied to music of simple character and anonymous authorship from a specific country or region with an oral tradition. The boundaries between art music, popular music, and folk music are vague.

### 1. Musicians

The popular music industry tends to refer to every type of musician as an artist. However, this designation is too broad to be useful and a refinement of it is beneficial. A composer is someone who crafts music and writes specific notes for specific instruments. People who create popular music rarely write specific notes for specific instruments because the music is mostly improvised, thus they are typically not composers. A player is someone who plays an instrument, regardless of the type of music. In a professional orchestra, usually every player has an advanced degree and/or has studied at a conservatory or university. Each instrument in the orchestra has a pedagogical tradition that goes back hundreds of years. Although players of popular music rarely have any significant amount of musical training or education, some do play with as much virtuosity as orchestral players. Since the voice is an instrument, singers are technically players, but they are usually called vocalists or singers instead of players.

Composers of art music write music with and without lyrics. Composers of art music rarely write their own lyrics, and instead set existing poetry. A songwriter is someone who writes lyrics and melodies to be sung. In the songwriter tradition, the music that accompanies each song can be played by various instruments, with various harmonies and rhythms, and in various styles and ways. It is important to emphasize that songwriting and composing are usually distinct from each other. A singer-songwriter is a songwriter who performs their own songs. An arranger is someone who casts existing music in a new way usually to meet a specific purpose. In popular music, it is common for people to serve multiple roles, including songwriting, singing, playing multiple instruments, and dancing, and when they do, the designation performer is appropriate. A band is a group of people who play together. Band members can contribute to the creation of a song so that it is a collaborative process. In popular music, it is common for bands and performers to elicit the help of songwriters. Sometimes in popular music, singers or performers purchase the rights to songs from songwriters so that they can take writing credit.

### 2. Songs

People who lack music education tend to refer to all music as songs. A song, however, is a specific genre of music with lyrics. Music without words is called a piece, composition, or work. It can be referred to by its genre, such as a symphony, sonata, or string quartet, or it can simply be called music. Some genres can be confusing for people not educated in music. For example, a string quartet is a type of composition that is played by a string

quartet ensemble. The term "genre" has multiple connotations. The music industry uses it to distinguish rock, from pop, hip hop, etc., but from an art music perspective, these distinctions are called styles. The most defining and important characteristic of a song is its lyrics. The lyrics are more important than the melody to which they are sung because the melody stems from how the lyrics are spoken and articulated. When lyrics are written to be sung over an existing melody, it often creates a poor song. In a good song, the sung melody contributes to the meaning of the lyrics. The music that accompanies a song is the least defining characteristic of a song. In fact, a skilled arranger can convincingly write an accompaniment for most any song with a variety of harmonies, rhythms, textures, and instruments in any style.

### *B. Structure and Elements of Music*

In the following sections of this Article, we will break down the musical aspects of "Blurred Lines" and "Got to Give It Up." Specifically, we will discuss the text, form, structure, performance practice, instrumentation, timbre, and the melody, harmony, and rhythm. Sandy Wilbur outlines some of this in her "Definition of a Musical Composition" right before she explains her methodology.[125] Judith Finell foregoes clearly defining nomenclature and instead haphazardly puts necessary definitions throughout her declaration and in footnotes.[126]

#### 1. The Lyrics and Their Meaning

Sandy Wilbur, expert witness for the plaintiffs, writes, "[t]here is no substantial similarity between the lyrics of BLURRED and GIVE. They have no lyrical phrases in common."[127] In her declaration, Judith Finell, expert witness for the defendants, often refers to specific lines of lyrics to bring attention to melodic similarities, but she does not comment on the meaning of the whole songs.[128] Considering that the lyrics are the most important

125. *See* Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *2–3 (C.D. Cal. Oct. 13, 2014); Declaration of Judith Finell at 82–83, Williams v. Bridgeport Music, Inc., No. CV13-06004 (C.D. Cal. Oct. 30, 2014), ECF No. 112–3, at 23.

126. *See generally id.* at 12–19.

127. *See Williams*, 2014 WL 7877773, at *8.

128. *See generally* Declaration of Judith Finell, *supra* note 125, at 2–3.

aspect of a song, we next examine the lyrics to "Got to Give It Up" and "Blurred Lines."[129]

In the first stanza to "Got to Give It Up," Gaye admits that he was previously a wallflower, but has recently chosen to move onto the dance floor and take a chance. In the second two stanzas he describes dancing unself-consciously, first alone, and then with a woman who seems interested in pursuing a romance. In the final stanza, his elation is palpable as he recognizes that the woman's interest in him may extend beyond the club, and that a subsequent sexual encounter with her is likely. We are given no information to the contrary to think that he is incorrect, but it should be noted that although he tells her "you can love me when you want to," neither her intent nor consent are verbally established, and he is basing his conclusion on non-verbal clues and his own assumptions of her intentions. Throughout, the song has repetitive dance-centric text, involving the audience in the narrative action. The main textual theme in the song is that one must leave one's comfort zone (in this case, through dancing) in order to find love.

> [Verse 1]
> I used to go out to parties…
>
> [Verse 2]
> No more standin'…
>
> [Verse 3 (lengthened)]
> Move your body…
>
> [Bridge]
> Move it up turn it 'round…
>
> [Verse 4 (abbreviated)]
> You're movin' your body…
>
> [Coda]
> Keep on dancin'…[130]

129. Special thanks to Katherine Price for her insight into the textual analysis given in this paper.

130. *See Marvin Gaye: Got to Give it Up Lyrics*, LYRICWIKI, http://lyrics.wikia.com/wiki/Marvin_Gaye:Got_To_Give_It_Up [https://perma.cc/4YGN-3NU5].

The text to "Blurred Lines" is significantly more complex. The opening stanza indicates that there is an ongoing communication disconnect between Thicke and the woman he fancies. Before each chorus, he indicates that a previous (or current) relationship attempted to tie this woman to a marriage or domestic life, but that he feels his role is to release her from her commitment to what he views as an oppressive situation. In the chorus, he bemoans the contrast between this woman's romantically unavailable and sexually conservative surface image, and her (potentially alcohol-induced) loose and suggestive behavior. In the second verse, he admires her body in jeans, and accepts a hug from her, asking if the action is merely platonic. In the bridge rapped by T.I., his sexual attributes are emphasized, and he exhorts the current woman as more appealing than his previous romantic entanglement. He comments that her previous man was foolish to not fully appreciate her impressive body. He assures her however that he, himself, is essentially a nice guy who will nonetheless provide an exciting and stimulating sexual encounter. The bridge ends with dance-centric lyrics that hint at the intrinsic connection between pleasure and pain. The final verse is more nebulous, but in it, he seems to note that his Jamaican-bought cologne—perhaps implying marijuana—is always effective in its intended purpose, and transitions into language indicating that his relationship with this woman is now off to a good start. The third and final statement of the chorus reemphasizes the confusion between the woman's unavailable status and what the singer sees as her sexual pursuit of him. Therefore, the initial communication disconnect becomes the more of a focus for the song. Throughout the song, the repetitive dance-centric text "[e]verybody get up, WOO [h]ey, hey, hey" is not structural to the song's form, but merely accompanies vocals that are part of the rhythm section, so they are left off in the lyrics below.

[Introduction]

[Verse 1]
If you can't hear…

[Pre-chorus 1]
Ok, now he was close…

[Chorus 1]
Good girl…

[Verse 2]

What do they make…

[Pre-chorus 2]
Ok, now he was close…

[Chorus 2]
Good girl…

[Bridge]
One thing I ask of you…

[Verse 3 (abbreviated)]
Baby, can you breathe…

[Chorus 3]
Good girl…

[Codetta][131]

Throughout the song, we are faced with three possible explanations to resolve the communication failure. The song leaves us to wonder whether: 1. he is incorrectly reading come-ons into her unintentionally ambiguous behavior (the she's-not-that-into-you solution); 2. she is unfairly leading him on with no real intention of pursuing him romantically (she is friend-zoning him); 3. the whole process is a gradual loosening of her own urges and unfulfilled sexual desires, which have heretofore been suppressed by a patriarchal system (a generous application of third-wave feminism). However, by the end of the song, with several kinds of consent-limiting substances at play, the singer's assumptions of the woman's interest in him are most likely not only faulty, but they also suggest that the song as a whole encourages sexually predatory behavior. At the very least, the lyrics encourage the audience to view an ambiguous situation from the vantage point that most benefits the self, and to disregard contrasting readings of the situation, regardless of the potential consequences. There are various themes in this song: 1. frustration of ambiguity in a romantic pursuit; 2. women are inherently sexual, and traditional social restraints on their sexual behavior are unnecessarily restrictive; 3. opportunism in sexual relationships is fine, and fidelity is easily brushed aside when a better prospect comes along.

131. *See Robin Thicke: Blurred Lines Lyrics*, LYRICWIKI, http://lyrics.wikia.com/wiki/Robin_Thicke:Blurred_Lines [https://perma.cc/WZH9-W3SY].

The two songs have some textual similarities: 1. the women in both songs are nameless, voiceless, and defined entirely by the shape and movement of their bodies and the intentions that the singers assume of them; 2. in both songs, the singers' assumptions of the women's intentions are that they deeply desire him. Neither of these characteristics are particularly unique in disco and R & B. The differences in the two songs' texts are many, but the main differences include: 1. "Got to Give It Up" involves a personal growth narrative, while "Blurred Lines" examines an aspect of relational communication; 2. "Got to Give It Up" is an open narrative, which examines the singer's personal past and a potential romantic future with very few other restrictions, while "Blurred Lines" is very specific about the barriers to a potential romance; 3. "Got to Give It Up" involves only two people in the narrative, while "Blurred Lines" focuses almost obsessively on the woman's previous relationship, and makes a point to assert the singer as superior; 4. the primary theme of "Got to Give It Up" of leaving one's comfort zone to find love is not present in "Blurred Lines" if we take the singer's assumptions to be valid; 5. the primary themes of "Blurred Lines" (i.e., ambiguity, sexual suppression/freedom of women, and opportunism vs. fidelity) are not present in "Got to Give It Up"; 6. the dance-hall setting is inherently present in the narrative of "Got to Give It Up," while the setting is unclear in "Blurred Lines"; 7. the dance-centric background text in "Got to Give It Up" is directly related to the narrative and characters, while in "Blurred Lines" it merely serves as an accompaniment to a rhythmic backdrop; 8. "Got to Give It Up" is more focused on action and behavior, while "Blurred Lines" is more focused on the physical body and appearances.

The second stanza of each verse of "Blurred Lines" has the same text. In it, the singer dismisses legal, religious or moral, and social parameters to a woman's behavior, encouraging an animalistic or natural approach to sexuality. Through its repetition, this becomes a primary theme in the song, that an ideal sexual situation is one of the natural world, devoid of socially constructed human restraint. This theme is almost antithetical to "Got to Give It Up," which encourages socially constructed rituals, in this case dancing, as traditional catalysts to romance. To be sure, "Got to Give It Up" stresses that in order to find fulfillment, one must cast aside self-consciousness and fear of social judgment, so the theme of returning to natural impulse is present here, but only psychologically. "Blurred Lines," by contrast, engages in various kinds of psychological complexities, while at the same time stressing a sexuality that mimics animal mating.[132]

132. Special thanks to Shane Semmler, Ph.D. for his observations given in this paragraph.

## 2. Form

Most music can be understood in terms of melody, harmony, and rhythm. A melody is a tune or line composed from a succession of tones that is perceived as an entity. A piece of music may have no melody, a single melody, or multiple simultaneous melodies. When a piece of music has multiple melodies, the melodies are called voices or lines, even if they are played by instruments rather than sung. Harmony is the process by which individual or multiple tones can be understood or heard. Harmonies or chords are made when multiple different tones are sounded simultaneously. The bass is the lowest note in a harmony. The bass line is a succession of tones incorporating the bass notes. In most types of music, the bass line serves a special purpose of clarifying the function of the harmonies. Rhythm is the arrangement of the durations of tones and silences. Beat is the periodic pulse that we entrain to when we listen to music—in other words, it is what we tap our foot or move our body to. Meter is the systematic arrangement of beats into regular groupings. Tempo is the speed of the beats.

In addition to melody, harmony, and rhythm, music can be understood as a hierarchy of structures. Motives and chords combine to make subphrases and progressions that combine to make phrases that combine to make whole sections that combine to make entire pieces.

The outline of the forms of "Got to Give It Up" and "Blurred Lines" are given by Sandy Wilbur and Dr. Ingrid Monson, and their forms differ from ours only because of subtleties in nomenclature.[133] In her declaration, Judith Finell does not break down the forms.[134] A song's structure emanates from its text, and in a traditional song, the structure has verses and choruses. When a song has a repeating pattern of verses and/or choruses, it is strophic. A song that is not strophic is through-composed. Both "Got to Give It Up" and "Blurred Lines" are strophic, which is not unique because most popular songs are strophic. Their forms are given below.

133. *See Williams*, 2014 WL 7877773, at *6.

134. *See generally* Declaration of Judith Finell, *supra* note 125.

| "Got to Give It Up" | "Blurred Lines" |
|---|---|
| Verse 1 | Introduction |
| Verse 2 | Verse 1 |
| Verse 3 (lengthened) | Pre-chorus 1 |
| Bridge | Chorus 1 |
| Verse 4 (abbreviated) | Verse 2 |
| Coda | Pre-chorus 2 |
| | Chorus 2 |
| | Bridge |
| | Verse 3 (abbreviated) |
| | Chorus 3 |
| | Codetta |

An introduction is an opening passage or section that precedes the main content of the music. The music and text of "Got to Give It Up" begin with a single chord, which is not really substantial enough to warrant an introduction label. The entire harmonic material of "Blurred Lines" is played before verse 1, which substantiates an introduction.

"Got to Give It Up" begins with three verses and has no chorus. Good music usually modulates, goes to contrasting material, and/or culminates in a climax. Gaye helped accomplish this sensation by lengthening the third verse. A bridge is a contrasting section that prepares for the return of the original material. The bridge in "Got to Give It Up" contrasts the verses with its dance-centric text, while at the same time, it does not substantially contribute to the textual narrative. "Got to Give It Up" is in the key of A major, while its bridge is in the contrasting key of A minor, which also gives the music a sense of having gone somewhere away from the opening material. The music gradually returns to the initial material in verse 4, which is followed by a coda, which is a passage or section that brings a piece of music to an end. The shortened verse 4 balances the lengthened verse 3. The coda in "Got to Give It Up" is almost half the length of the entire song. It has dance-centric text that repeats over a single chord.

After the introduction in "Blurred Lines," there is a repeating pattern of verses and choruses. The first two choruses are divided into two stanzas. The first stanza is the pre-chorus and the second stanza is the chorus. The pre-choruses are labeled as bridges in some analyses, but they are not bridges because they do not prepare for the return of the initial material. Instead, they prepare the choruses. The real bridge in "Blurred Lines" is also divided into two stanzas. The first stanza is rapped, and the second stanza has dance-centric text that some refer to as a breakdown. Unlike in "Got to Give It

Up," "Blurred Lines" has no contrasting key. The new singer and change in singing style serve as the contrasting element in the bridge. The opening material then returns with verse 3, which is shortened compared to the other verses. A codetta is a short or small coda. In the codetta in "Blurred Lines," the song ends with the vocals from the rhythm section.

Music analyses often use letters to refer to sections. If two or more sections are similar enough, they will be represented by the same letter. If they are different enough, then they will be represented by different letters. It is customary to not assign letters to introductions and codas. It is also customary that verses, choruses, and bridges substantiate as sections. That being the case, the structures of the two songs are given below.

| | |
|---|---|
| "Got to Give It Up" | A A A B A |
| "Blurred Lines" | A B A B C A B |

Furthermore, since the choruses and bridge in "Blurred Lines" each divide into two substantial sections, its form can be further elaborated as shown below. In the example below, the first two B sections from above are elaborated into two sections, the bridge is elaborated into two sections, and the rest of the letters are incremented accordingly.

| | |
|---|---|
| "Blurred Lines" | A B A B C A B |
| elaborated | A B C A B C D E A C |

Educated musicians immediately hear the stark contrast in structure between the two songs, but even the layman can hear how striking the dissimilarity is when it is pointed out. We have shown that the two texts have contrasting themes and differ drastically, and as a result the forms that emanate from them differ drastically as well.

## 3. Melody

As stated above, the lyrics are the most important and defining characteristic of a song. Because the melody to which the lyrics are sung emanates from how the lyrics are spoken and articulated, it is the second-most important and defining characteristic. Comparing and contrasting lyrics or harmony can be done quite objectively; comparing and contrasting melodies, however, is no easy or task. Neither Sandy Wilbur nor Judith Finell make

use of the body of literature and research that is available to compare and contrast melodies.[135]

There are numerous methods to compare and contrast melodies used in music plagiarism cases. In the *Southern California Law Review*, Maureen Baker gives an overview of them and discusses their advantages and disadvantages.[136] The methods she covers are traditional notation and analysis, the chromatranscription [sic] process, graphic illustrations, and table illustrations.[137] She breaks down each of these methods and deems them all to be inadequate because, "inaccuracies make the pieces appear more similar than they actually are,"[138] "a song which does not have many similarities at all, and which would not be found to be substantially similar by any jury, may still exhibit similarities when represented,"[139] and "[there are] similarities when no actionable similarities exist."[140]

The applications of methods used have been inconsistent, and for the most part, have not gone under the scrutiny of peer review of music scholarship.[141] Fortunately, there are some methods to compare and contrast melodies that are deemed acceptable in music scholarship.[142]

Most of the existing research on musical similarity focuses on cognitive psychology or computing.[143] Ludger Hofmann-Engl in his 2005 paper, "An Evaluation of Melodic Similarity Models," offers a good place to start an

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135. *See generally Williams*, 2014 WL 7877773; Declaration of Judith Finell, *supra* note 125.

136. Maureen Baker, Note, *La[w]—A Note to Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1604 (1992).

137. *Id.* at 1589, 1596, 1601, 1603, 1605.

138. *Id.*

139. *Id.*

140. *Id.* at 1606.

141. *Id.* at 1611–12.

142. *See generally* Ludger Hoffman-Engl, *An Evaluation of Melodic Similarity Models*, CHAMELEON GROUP OF COMPOSERS (2005), http://www.chameleongroup.org.uk/research/evaluation.pdf [https://perma.cc/W5WG-5Z3U].

143. *Id.*

investigation of this research.[144] Guillaume Laroche in his 2011 paper, "Striking Similarities: Toward a Quantitative Measure of Melodic Copyright Infringement," proposes that the Proportional Transportation Distance (PTD) is most suitable for determining similarity in copyright cases.[145] PTD was developed by Rainer Typke *et al*.[146] Laroche exams eighteen pairs or works from copyright infringement cases from the last hundred years, and compares rulings of copying to measurements of dissimilarity.[147] Below, we use his methodology to quantify the dissimilarity between the melodies from "Got to Give It Up" and "Blurred Lines."

A melody is a linear succession of pitches and rhythms. In the case of a song, the melody is the musical line to which the lyrics are sung. In his melodic analyses, Laroche takes the metrics of "pitch and rhythm as . . . two separately quantified parameters"[148] "because cognitive psychology does not yet understand the mind's balancing act when it assesses musical similarity, it is impossible to fully adjust . . . [for the] blending [of] metrics."[149] Likewise, we will take the metrics of pitch and rhythm as separate parameters. Later in this paper, we will separately comment on the rhythmic aspects of the two songs.

The summary judgment, the declaration of Sandy Wilbur, and the Judith Finell preliminary report devote much discourse in comparing two specific melodic fragments.[150] These two fragments were of particular interest

144. *Id.*

145. Guillaume Laroche, *Striking Similarities: Toward a Quantitative Measure of Melodic Copyright Infringement*, 25 INTÉGRAL 39, 53 (2011).

146. Rainer Typke et al., *Using Transportation Distances for Measuring Melodic Similarity*, UTRECHT UNIVERSITY 1 (2003), http://www.cs.uu.nl/research/techreps/repo/CS-2003/2003-024.pdf [https://perma.cc/9WHW-YT7Y].

147. Laroche, *supra* note 145, at 72.

148. *See id.* at 53.

149. *See id*. at 52.

150. Plaintiffs and Counter-Defendants' Notice for Motion and Motion for Summary Judgement or, in the Alternative, Partial Summary Judgement; Memorandum of Points and Authorities at 14, Williams v. Bridgeport Music, Inc., 300 F.R.D. 120 (S.D.N.Y. 2014) (No. 14 Misc. 73–Pl.); *see* Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, Williams v. Bridgeport Music, Inc., (No. 13-06004), 2015 WL 4479500 (C.D. Cal. Jan. 6, 2015); Judith Finell, *Preliminary Report: Comparison of "Got to Give It Up" and "Blurred Lines"*, HOLLYWOOD REP.

in the case because they are the two most similar fragments between the two songs. In each document, the two fragments are referred to as "signature phrases."[151]

Applying the PTD method as used by Laroche shown in the example below, gives a pitch dissimilarity of 1.81 and a rhythm dissimilarity of 0.19.[152] The smaller the number, the more similar the melodies are, where 0 indicates identicalness. Of the eighteen pairs of compositions examined by Laroche, only three have pitch dissimilarity measurements greater than the 1.81 calculated here, which implies that the melodies to "Got to Give It Up" and "Blurred Lines" are less similar than fifteen of eighteen pairs of compositions examined by Laroche.[153] By way of comparison, applying the PTD method to the hooks in the Isley Brothers' version and Michael Bolton's version of "Love Is a Wonderful Thing," at issue in *Three Boys Music Corp*, results in a pitch dissimilarity of 0.4 and a rhythm dissimilarity of 0.1.[154] These results are significant because the Ninth Circuit in *Three Boys Music Corp* affirmed a jury finding of infringement based on testimony that the songs shared a copyrightable combination of unprotected elements.[155] In that case, the songs were nearly identical according to the PTD method, whereas in the "Blurred Lines" case, this method shows the songs are materially different.

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1, 2 https://www.hollywoodreporter.com/sites/default/files/custom/Documents/ESQ/musicologyblurred.pdf [https://perma.cc/Z5FE-AK9B]. *See generally* Declaration of Judith Finell, *supra* note 125.

151. We find it disconcerting that no one, not even the expert musicians, used proper musical terminology. A phrase is the smallest complete musical structure and ends in a cadence. The two fragments are neither complete structures nor do they end in cadences. Instead of being phrases, these two fragments qualify as sub-phrases, which is proper musical terminology.

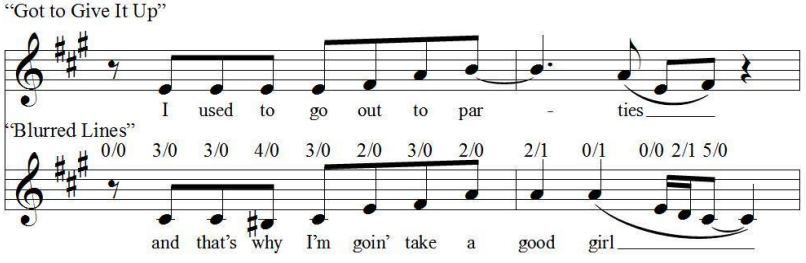
152. The technicalities of the measurements are beyond the scope of this paper, but you may read how they were calculated in Laroche's paper footnoted above. "Got to Give It Up" is in A major and "Blurred Lines" is in G major, however, our example gives them both in the same key because it is customary to do so when making comparisons.

153. *See* Laroche, *supra* note 145, at 73.

154. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 480 (9th Cir. 2000).

155. *See id.* at 485.

In the copyright infringement cases examined by Laroche, the first lines between the pieces or the main themes/choruses between the pieces are compared.[156] Here, we compare the first line of "Got to Give It Up" to the chorus of "Blurred Lines." Although these two melodic fragments are the most similar between the two songs, their dissimilarity can be considered to be further enhanced because they are from different formal sections.




It is common for melodic contours to be examined in copyright infringement cases, but two melodic fragments may indeed have identical contours even though their pitch material may not be similar at all. Laroche writes, "[f]ew of contour theory's many extensions have been applied to comparisons of two pieces by unrelated composers, since in many ways such an application goes against the theory's philosophical underpinnings as a mechanism for understanding transformations within a unified work."[157] Because music scholarship has presently not prepared us with the appropriate tools for comparing contours between pieces, we will forgo analysis of the contours. It then follows that the contour analyses by the expert witnesses in this case should not be taken as reliable.

### 4. Performance Practice

Above, we first examine the lyrics as the most important and defining characteristic of the songs, and then we examine the forms and melodies because they emanate from the lyrics. Before we examine other aspects of the songs, such as bass, harmony, rhythm, and timbre, some comments on performance practice will help put them into perspective. Performance practice is the way in which music is performed so that it is authentic within its style. The performance practices we outline below weigh heavily on any similarities or dissimilarities between "Got to Give It Up" and "Blurred Lines," but

156. Laroche, *supra* note 145, at 59.

157. *Id.* at 48.

in their declarations, neither Sandy Wilbur nor Judith Finell explain performance practice.[158]

Given the style of performance practice, Marvin Gaye likely had a vision for his song, and then he wrote the lyrics and the melody. Gaye likely did not compose the bassline or percussion parts. While the players were jamming together in the studio, he gave verbal instructions to them, and then they improvised.[159] Each player extemporaneously provided their own part congruent to the tradition of their instrument within the capability of their training.[160] As the song progressed, they responded to each other's playing and made changes to what they played.[161] All of this is a common and normal performance practice for a song in this style.

Robin Thicke and Pharrell Williams also had a vision for their song, but their song was created from a different performance practice, a more recent one which is common, normal, and related to new technologies which were unavailable in the 1970s. Their work does not involve live musicians playing, improvising together, and responding to each other. Instead, they recorded short snippets, used existing samples, and looped the sounds with software. Their bassline is eight measures long, and then loops almost without variation for the whole song. They used one recording of "Hey, hey, hey" and one recording of Williams yelping "Woo!" and used software to insert the snippets into the song wherever they wanted or needed them. The differences between these two performance practices are so striking that they fundamentally affect almost every aspect of similarity and dissimilarity between the two songs.

### 5. Accompaniment

The accompaniment includes the bass, harmonies, rhythms, and background sounds. Earlier in this paper, we defined a popular song as the lyrics and the melody to which they are sung. The accompaniment is not a defining feature of a popular song itself, but it is a defining feature of a particular rendition or recording of it. Our stance is partly influenced by determining

158. *See* Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, *supra* note 150; Declaration of Judith Finell, *supra* note 125.

159. *See Williams* 2014 WL 7877773 at *2.

160. *See* Chris Dobrian, *Thoughts on Composition and Improvisation*, U.C. IRVINE (1991), http://music.arts.uci.edu/dobrian/CD.comp.improv.htm [http://perma.cc/Y7VJ-3KKP].

161. *See id.*

which components belong to the song and which components belong to the recording. This issue is introduced in the declarations by Sandy Wilbur and Judith Finell as to whether the deposit copies or recordings represent the songs.[162] In this copyright infringement case, the copying accusation was based on observations made between the recordings and not the songs themselves.[163] We find this troubling because the Gaye family does not own the copyright to the recording, but they do, however, own the copyright to the song.[164] Judith Finell argues that the recording of "Got to Give It Up" represents the song in its most complete form.[165] Below, we will show that is not true. As we have been continually showing throughout this paper, the two songs have very little in common. In the discussion above, we primarily focused on the songs, but in the discussion below, we will focus particularly on the specific recordings of the songs.

"Got to Give It Up" and "Blurred Lines" each have dozens of cover versions. Covers can be put into three categories: 1. a creative cover is a cover where the performer(s) reinvent a song into a new rendition and is a unique expression, which is essentially an arrangement; 2. an imitative cover is a cover where the performer(s) merely just imitate an existing rendition; 3. a parody cover is a cover where the performer(s) keeps the song recognizable, but changes the lyrics and/or music to make a statement, which is usually satirical or humorous.[166] An example of a creative cover is "Somewhere Over the Rainbow/What a Wonderful World" by Israel Kamakawiwo'ole; an example of an imitative cover is "Drift Away" by The Neville Brothers; and an example of a parody cover is almost any song by Weird Al Yankovic.

Creative covers often offer new ways to accompany and harmonize songs. They exemplify our claim that a popular song is its lyrics and the melody to which they are sung, and not its accompaniment. Of the dozens

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162. *See* Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, *supra* note 150; Declaration of Judith Finell, *supra* note 125.

163. *See id.*

164. *See Williams*, 2014 WL 7877773, at *7.

165. Declaration of Judith Finell, *supra* note 125, at 10.

166. *See generally* Cristyn Magnus et al., *Judging Covers*, 71:4 THE J. OF AESTHETICS AND ART CRITICISM 361, 362–68 (2013) (arguing that there are "mimic" covers, "rendition" covers, "transformative" covers, and "referential" covers, while noting there are other possibilities and ways to categorize these songs).

of covers of "Got to Give It Up" and "Blurred Lines" we listened to, one in particular exemplifies our point. "Blurred Lines" by Postmodern Jukebox featuring Robyn Adele Anderson on vocals, is a bluegrass barn-dance rendition. Except for the continual repetition of two chords, the accompaniment does not at all resemble Thicke and Williams' recording. The band changes the harmonic progression during the bridge, and Anderson even makes subtle changes to the lyrics so that they are less misogynistic. All of this shows that the recognizable features of a song, and indeed "Blurred Lines" specifically, are the song's melody and lyrics, not the song's harmony or accompaniment.

### 6. Bass

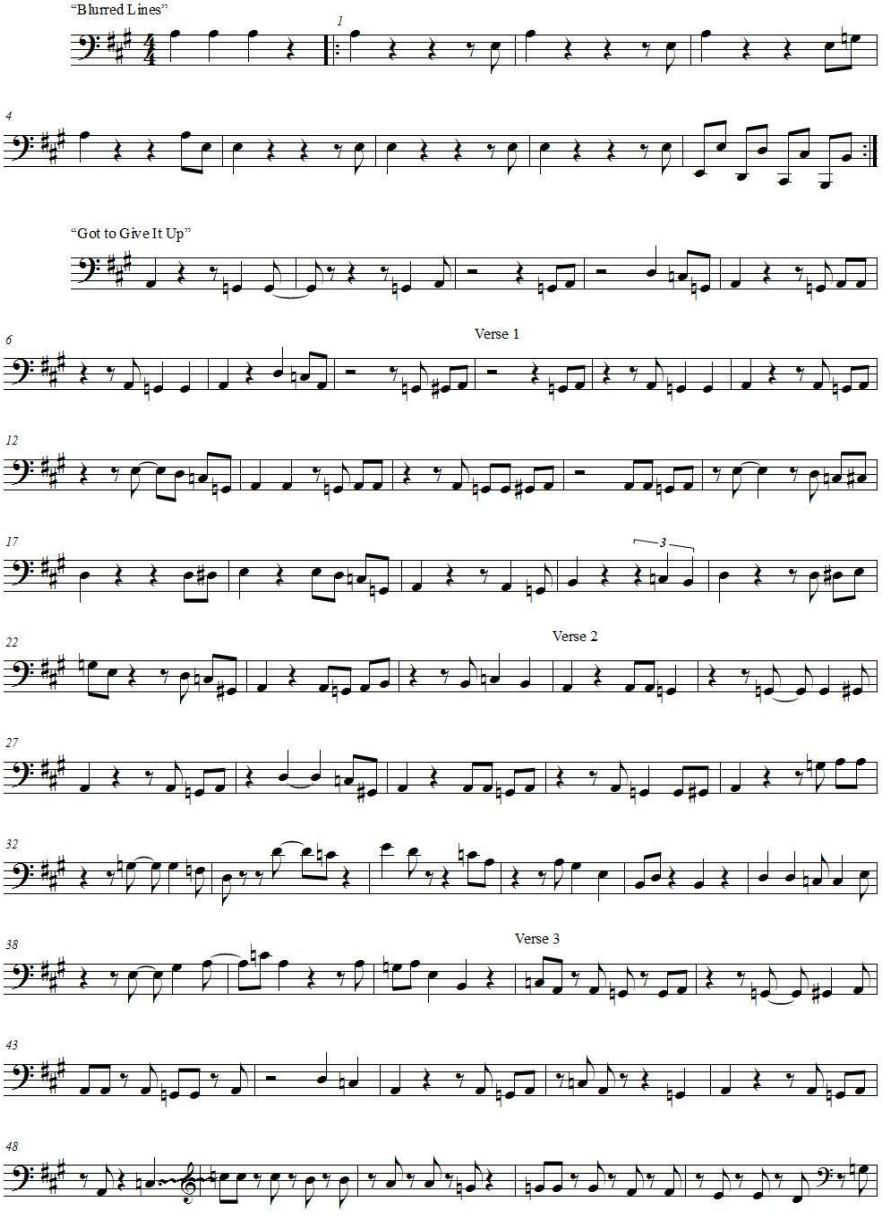
The bassline in the recording of "Got to Give It Up" was improvised based on verbal instructions from Gaye. The player continually made changes to it as he responded to the other players, and therefore the song features variation on the bassline throughout the song. By contrast, the bassline in the recording of "Blurred Lines" is an eight-measure sample that is continually looped almost without variation for the whole song. It really doesn't make sense to say one copied the other; the PTD measurement of dissimilarity would vary drastically depending on which measures were compared. Taking the most similar eight measures from "Got to Give It Up" would be methodologically defunct because it would be done without respect to the formal sections or stylistic/performance practice methods. Both Sandy Wilbur and Judith Finell make unnecessary and irrelevant comparisons between the bass lines, and the methods they use have the same problems as their analyses of the melodies.[167]

Partial transcriptions of the basslines appear in the preliminary reports and declarations by the expert witnesses.[168] To be thorough, below we provide a complete transcription of the bass from the recording of "Got to Give It Up" and a transcription of the repeating eight measures from the recording

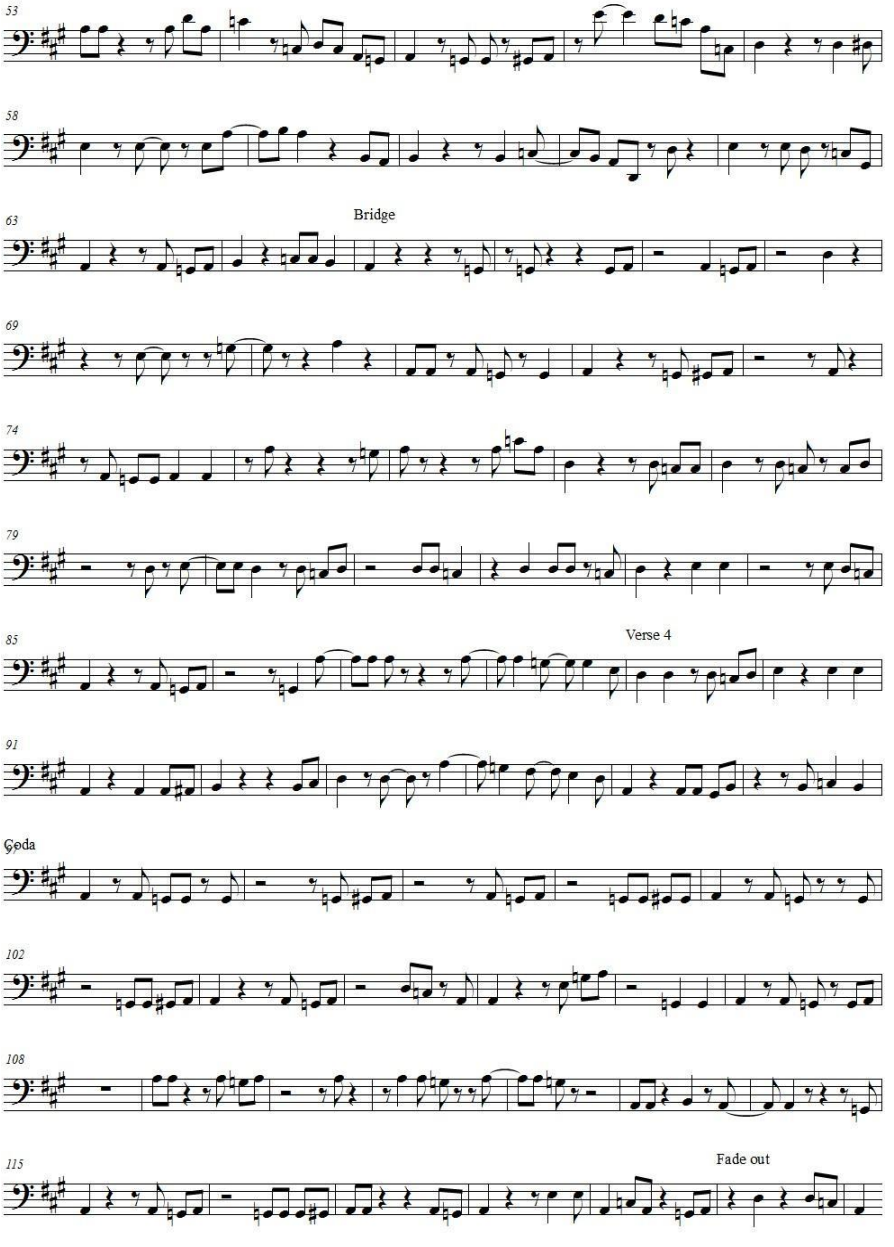
167. *See generally* Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, *supra* note 150; Declaration of Judith Finell, *supra* note 125.

168. *See generally* Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, *supra* note 150, at 12; Declaration of Judith Finell, *supra* note 125, at 13–15.

of "Blurred Lines."[169] Notably, the bassline to "Got to Give It Up" in the recording differs substantially from the sheet music provided in the case.[170]




169. Special thanks to University of South Dakota, Music Department student assistant Kristopher Ohrland for making the transcription to "Got to Give It Up."




170. *See* Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, *supra* note 150, at 11–13.

## 7. Harmony

In the type of music we are discussing here, the bassline provides fundamental support for the harmonies. The verses in "Got to Give It Up" are harmonized with a chain of dominant seventh chords (see below). The bridge switches to minor seventh chords. Throughout, "Blurred Lines" is harmonized with two major triads.[171] These two songs come from two different harmonic styles, and they differ more than they are similar. Furthermore, the chords shown below are the chords used in the recordings, but it is perfectly feasible to harmonize the sung melodies with different combinations of chords, either by chord substitution or by complete reharmonization.

"Got to Give It Up"

| | |
|---|---|
| Verses: | A7\|\|\|\|\|\|\|D7\|E7\|A7\|B7\|D7\|E7\|A7\|B7\| |
| Bridge: | A7\|\|\|\|\|\|\|a7\|\|\|d7\|\|\|\|\|\|\|a7\|\|\| |

"Blurred Lines"

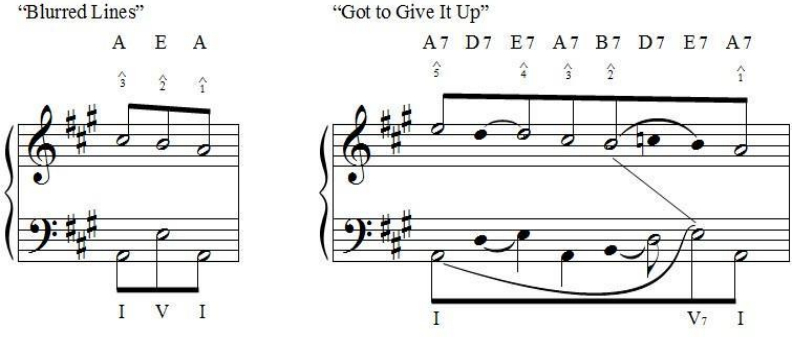
| | |
|---|---|
| Throughout: | A\|\|\|E\|\|\| |

The two harmonic progressions do have one significant thing in common: they both emphasize the relationship between the tonic and dominant. The tonic is the tonal center of a composition. Music feels like it can come to rest or to end on the tonic. The dominant is a harmonic area that is in opposition to the tonic, and it feels like it must resolve to the tonic. "Got to Give It Up" has motion from the tonic A7 to the dominant E7, and then back to the tonic A7 (the intervening chords before the E7 are called dominant preparations). "Blurred Lines" continually alternates between the tonic A and the dominant E. This commonality between the two songs is a fundamental characteristic of tonal music and is an insignificant comparison because it is characteristic of nearly every piece of tonal music in western civilization.

Heinrich Schenker (1868–1935) was an Austrian music theorist who devised a method for analyzing the fundamental structure of tonal music. He called the fundamental structure the *Ursatz*. Music theorists often interpret music as having two possible fundamental structures which emanate linearly as follows: 1. descending from scale degrees 3 to 1; or 2. descending from scale degrees 5 to 1. Music theorists often refer to these as a 3-line and a 5-line respectively. These are the two possible ways in which the fundamental

171. In the figure, "Blurred Lines" is transposed to the same key as "Got to Give It Up" for comparison, as is customary to do when making comparisons.

structure of tonal music may emanate. "Blurred Lines" has a fundamental structure that emanates as a 3-line, while "Got to Give It Up" has a fundamental structure that emanates as a 5-line, as shown in the example below.[172] These two songs differ substantially in that they each have one of the two possible fundamental structures in tonal music, as shown in the graphs below.




We have been operating under the assumption that the two songs must be put into the same key for easy comparison, but they are in two different keys. For most people, this is irrelevant. But for Pharrell Williams, who is the primary writer of "Blurred Lines," the difference in keys is perceptually extreme because he has synesthesia.[173] To synesthetes, the difference in the songs because of their different keys is cognitively drastic such that any similarity between them would be limited.[174] Williams calls the two songs "completely different . . . . Just simply go to the piano and play the two. One's minor and one's major. And not even in the same key."[175]

172. Special thanks to Dr. David Heyer for his feedback on the Schenker graphs.

173. *Pharrell Williams on Juxtaposition and Seeing Sounds*, NPR (December 13, 2013 12:01 AM), http://www.npr.org/sections/therecord/2013/12/31/258406317/pharrell-williams-on-juxtaposition-and-seeing-sounds [https://perma.cc/PH9S-2CW6].

174. Jörg Jewanski, *Synaesthesia*, GROVE MUSIC ONLINE (2001), http://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000048564 [http://perma.cc/UK7G-D527] ("Stimuli to one sensory input will also trigger sensations in one or more other sensory modes").

175. Emerald Murrow, *Pharrell Talks About Battle Over 'Blurred Lines,'* ABC7 EYEWITNESS NEWS (Sept. 13, 2013, 7:45 AM), http://abc7.com/archive/9247035/ [https://perma.cc/S528-EEE4].

## 8. Timbre

Timbre, or tone color, is the physical property of sound that makes a particular sound distinct from another.[176] Here, we would like to point out some timbral observations in the recordings to "Got to Give It Up" and "Blurred Lines" that Sandy Wilbur and Judith Finell do not address, and that we have not found discussed elsewhere.[177]

Gaye and Thicke both use falsetto, which is not unique to this style of music, and falsetto is known to have been used by many ancient cultures.[178] There are, however, some subtle differences in their vocal production techniques. Gaye sings sharp throughout the whole song, while Thicke tends to sing flat, especially in his lower register when he is not using falsetto. Although these differences are likely due to their vocal production techniques, they may also be influenced by studio mixing, or in "Blurred Lines," by Auto-Tune.[179]

"Got to Give It Up" makes use of a bottle as a percussion instrument, where it is struck repetitively to characteristic rhythms.[180] These rhythms are not unique in music. Nor is the use of bottles. To play chromatic pitches, bottles can be filled with different amounts of liquid. During the bridge in "Got to Give It Up," the bottle becomes harder to hear. It returns to full volume before the coda. When it does return, however, its pitch has changed, and it sounds less reverberant. This suggests that some liquid that was in the bottle was drunk during the bridge. "Blurred Lines" makes use of a sampled cowbell, where it is struck repetitively, and more quickly and to different

176. Murray Campbell, *Timbre*, GROVE MUSIC ONLINE (2001), http://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000027973 [https://perma.cc/57FK-TVYU] ("A term describing the tonal quality of a sound").

177. *See* Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, *supra* note 150, at 12; Declaration of Judith Finell, *supra* note 125, at 1–3.

178. V.E. Negus et al., *Falsetto*, GROVE MUSIC ONLINE (July 25, 2013), http://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000009270 [https://perma.cc/L646-FH5Y].

179. Auto-Tune is an audio processor created by Antares Audio Technologies which uses a proprietary device to measure and alter pitch in vocal and instrumental music recording and performance. U.S. Patent No. 5,973,252.

180. Declaration of Judith Finell, *supra* note 125, at 26; *see also* Fred Bronson, *Got to Give It Up, Pt. 1*, SUPER SEVENTIES ROCKSITE!, https://www.superseventies.com/sw_got-togiveitup.html [https://perma.cc/38S9-VT9U].

characteristic rhythms than the ones used in "Got to Give It Up."[181] These rhythms are not unique in music, and the cowbell is a standard percussion instrument. None of the timbres and instruments and their combinations employed in "Got to Give It Up" and "Blurred Lines" are unique and/or innovative.

### 9. Hooks

Of the eight similarities between "Got to Give It Up" and "Blurred Lines" that Judith Finell and Sandy Wilbur deliberated over, the experts focus on: Similarity 2 (Hooks), Similarity 3 (Hooks with Backup Vocals), Similarity 4 (Core Theme in "Blurred Lines" and Backup Hook in "Got to Give It Up"), and Similarity 5 (Backup Hooks).[182] We feel that their use of hooks warrants some comments.

A hook is the part in a song that captures or "hooks" a listener.[183] According to Joe Stuessy and Scott Lipscomb, a hook is "usually a specific line of lyrics and its associated melody in a song that is intended to be particularly appealing and memorable; the hook line is usually repeated often throughout the song; sometimes a hook can be instrumental."[184] According to Michael Campbell and James Brody, a hook is "a catchy melodic idea in a *rock*-era song. It usually comes in the *chorus*, where it can be repeated frequently."[185] Hook is a term that is generally not used in music academia or scholarship but is used to describe aspects of popular music for non-musicians.

The hook in "Blurred Lines" is the many lines of text in the verses and choruses set to the following rhythm.[186]

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181. Declaration of Judith Finell, *supra* note 125, at 26.

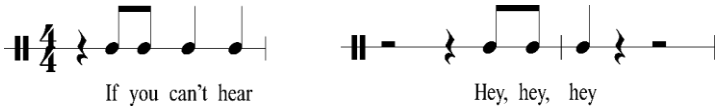
182. Plaintiffs and Counter-Defendants' Notice for Motion and Motion for Summary Judgement or, in the Alternative, Partial Summary Judgement; Memorandum of Points and Authorities at 10, Williams v. Bridgeport Music, Inc., 300 F.R.D. 120 (S.D.N.Y. 2014) (No. 14 Misc. 73–Pl.).

183. JOE STUESSY & SCOTT LIPSCOMB, ROCK AND ROLL: ITS HISTORY AND STYLISTIC DEVELOPMENT 413 (7th ed. 2013).

184. *Id.*

185. MICHAEL CAMPBELL & JAMES BRODY, ROCK AND ROLL: AN INTRODUCTION 393 (1st ed. 1999).

186. Based on the way this hook emanates, it is called a motive in traditional musical nomenclature. This rhythm is slightly modified throughout to accommodate various declarations of




This rhythm is set to lines of text in the verses like "If you can't hear," "If you can't read," and "From the same page" and in the choruses like "I know you want it" and "Can't let it get past me." This part of the vocal melody is the hook because it is appealing, repeated frequently, and is in the chorus and the main body of the song. Although it is possible for a song to have more than one hook and for a hook to be in an instrument instead of the voice, we don't think the other aspects of the song that Finell and Wilbur described as hooks are actually hooks. Such aspects don't hook a listener into the songs, they are not very memorable and are not heard in the main lyrics, melodies, and bass lines. There are, however, numerous contradictory definitions of hook, and the distinctions between them can be subtle, but even with these contradictions and subtleties, we do not feel the term "hook" has been consistently or adequately applied by either of the expert witnesses.

"Got to Give It Up" has a wandering vocal melody, an improvised bass line that never repeats the same material, and an improvised rhythmic accompaniment that varies from measure to measure. In the main body of the song, there is nothing that is repeated frequently enough or that is memorable enough to constitute a hook. After the main body of the song ends, and where the coda begins, the text "Keep on dancing" is repeated. This is the only aspect of the song that fits the definition of a hook, but it leaves us to wonder if it really can be a hook because it occurs after the main body of the song has ended.

## 10. Style

The analysis provided by Sandy Wilbur is substantially more correct and relies more on a traditional approach than the analysis provided by Judith Finell.[187] Wilbur clearly states her methodology, while Finell does not.[188]

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the syllabification. The memorable figure in the accompanying vocals set to the text "Hey, hey, hey" also resembles this hook, but starts in a different metric location.

187. *See* Declaration of Sandy Wilbur, Williams v. Bridgeport Music, Inc., No. LACV13-06004 (C.D. Cal. Oct. 30, 2014), 2015 WL 13547242, at *14.

188. *See generally id.* at *1–2.

Wilbur spends a lot of time focusing on the microstructure (foreground elements) irrelevant to the comparison of "Got to Give It Up" and "Blurred Lines."[189] Wilbur provides several comparisons of other songs as counter-examples.[190] She identifies the main reason why the recording of "Blurred Lines" does not infringe upon the copyright of "Got to Give It Up": "Any perceived similarity in the sound of the recordings of BLURRED and GIVE does not relate to their underlying compositions but instead concerns arrangement, performance or production elements that are not original to GIVE."[191]

Judith Finell argues, "the similar features operate in combination with one another—intersecting and co-existing—and they permeate 'Blurred Lines.' They are undeniably linked to 'Got to Give It Up.' 'Blurred Lines' simply would not be recognizable without them."[192] She then says, "[t]his aggregation of similar features in the two works results in their two substantially similar 'Constellations.'"[193] She continually states that elements work in conjunction by emphasizing the term "constellation," but this is a term that is not typically used in music discourse. She dismisses differences that do exist between the two songs.[194] She makes numerous statements that directly contradict what is found in music textbooks.[195] She writes in a verbose manner, likely done intentionally to confuse and mislead the jury. Maureen Baker writes:

> Moreover, musicologists are permitted to abuse their responsibility and discretion, often presenting confused and convoluted testimony to the jury. This testimony is typically designed to obscure or highlight similarities, and to divert the jury's attention from more reliable music interpretations. The jury, however,

189. *Id.* at 11–13.

190. *Id.* at 12–15.

191. Declaration of Sandy Wilbur at 43, Williams v. Bridgeport Music, Inc., No. 2:13-cv-06004 (C.D. Cal. July 14, 2014).

192. Declaration of Judith Finell, *supra* note 125, at 2.

193. *Id.*

194. *See id.*

195. *Id.*

> does not have the required education to evaluate the relative reliability of each styles of analysis.[196]

Finell provided a mashup of the two songs to convince the jury of copying.[197] To the jury, the mashup sounds as if the melody to "Blurred Lines" seamlessly floats over the top of the accompaniment to "Got to Give It Up." To a music theorist, the mashup sounds grindingly dissonant because the melody does not properly harmonize with the accompaniment and the structures do not properly align. A skilled mashup artist can combine almost any two songs so that they sound somewhat compatible. In her declaration, Wilbur points these things out and correctly writes, "mashups are not meaningful evidence of extrinsic similarity between any two works . . . . My opinion is that mashups, including those submitted by the Defendants here, are not a proper, let alone generally accepted, forensic musicological practice."[198] Although she is correct, she could have supported this by citing relevant music cognition literature.

What makes the recordings of "Got to Give It Up" and "Blurred Lines" sound similar to some listeners is that they have stylistic similarities. It is rare and perhaps nonexistent in music history for a style of a piece of music to be so unique that the style is considered a unique expression. No copying occurred in the protected elements. Style is an idea or concept, and according to the U. S. Code, Title 17, Chapter 1, Code 102, it cannot be copyrighted: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[199]

A style cannot be copyrighted because a style is not a unique artistic expression. Consider a style such as the tango. The tango is a dance and musical style that is accompanied by characteristic rhythms and chords and has a rich and controversial cultural history. It has African and European

196. Baker, *supra* note 136, at 1587.

197. *See Williams*, 2014 WL 7877773, at *11.

198. Declaration of Sandy Wilbur in Support of Plaintiffs' Motions In Limine, *supra* note 150, at 14–15.

199. 17 U.S.C. § 102(b) (2018).

influences and originated along the River Plate between Argentina and Uruguay.[200] However, a brief survey of tango musical literature reveals hundreds of tangos by hundreds of composers, each with more similarities to each other than "Got to Give It Up" and "Blurred Lines" share.[201] The fact that two tangos can be extremely similar, and sometimes have some identical elements, does not constitute plagiarism.

### *C. Forensic Musicology*

Musicology is the scholarly analysis of and research on music.[202] In other words, a musicologist is one who studies music. Historical musicology is the most prominent subdiscipline of musicology, but other subdisciplines of musicology deal with world music, physics, mathematics, physiology, psychology, sociology, philosophy, technology, education, performance practice, and research. In every discipline, not just in musicology, a terminal degree—a Ph.D. in the case of music scholarship—and a record of publication within reputable sources in the field give an individual credibility. Music theory is a subdiscipline of musicology that deals with, among other things, pure analysis.[203] Music theorists are the most qualified people to understand and explain the structure and details of music, including whether or not, and/or by how much one piece of music plagiarizes another.

"Forensic musicology refers to the application of musicological analysis and scholarship to a legal matter."[204] Although this definition is concise, a clear codification of the interworking of forensic musicology is elusive.[205] In fact, most music scholars are unaware that forensic musicology exists as

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200. *See* Gerard Béhague, *Tango*, GROVE MUSIC ONLINE (Jan. 20, 2001), http://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000027473 [https://perma.cc/J2SU-6SGT].

201. *See generally id.*

202. *See* Durand R. Begault et al., *Forensic Musicology—An Overview* (June 2014), https://www.researchgate.net/publication/303960871_FORENSIC_MUSICOLOGY-AN_OVERVIEW [https://perma.cc/N462-2FGW].

203. *See id.*

204. *Id.*

205. *See id.*

a sub-discipline in their field.[206] For forensic musicology to have the same stature as other disciplines, it would seem that a terminal degree relevant to the particular legal issue (a Ph.D. in historical musicology for researching the history of music, a Ph.D. in music theory for analyzing music, a Ph.D. in computer science for analyzing digital synthesis, a J.D. for copyright questions, etc.) and publications relevant to the area of study would qualify one's credibility in it. The American Musicological Society lists 26 forensic musicologists on its website.[207] For many of the people and services on the list, finding their credentials is difficult and at times impossible. Furthermore, many of the people on the list do not have terminal degrees and/or their degrees are in subjects not immediately relevant to musicology. Notwithstanding, there are a small number on the list who appear to be extremely qualified, such as M. Fletcher Reynolds who holds both a Ph.D. in music theory and a J.D., and his dissertation, *Music Analysis for Expert Testimony in Copyright Infringement Litigation*, focuses on forensic musicology.[208] According to Begault *et al*., "the field of forensic musicology has no stated methodology by which an objective forensic determination can be made. Expert opinions based merely on subjective impression or from 'golden ear' analysis are pseudo-scientific and not objectively based."[209] Work is being done to codify the methodologies to rectify the glaring inconsistencies in the field of forensic musicology.[210]

The expert witnesses for both the parties in the "Blurred Lines" case are forensic musicologists. Sandy Wilbur for the plaintiffs holds a master of arts degree in ethnomusicology and has significant experience in the legal field.[211] According to her website,

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206. *See id.*

207. *Forensic Musicology*, AM. MUSICOLOGICAL SOC'Y (Jan. 14, 2018, 2:27 PM), http://www.ams-net.org/forensic-musicology.php [https://perma.cc/SS5F-2BDP].

208. M. Fletcher Reynolds, *Copyright Law and Music Plagiarism Analysis*, MUSIC ANALYST (Jan. 18, 2018, 6:16 PM), http://www.musicanalyst.com/ [https://perma.cc/BWP2-VQ7B].

209. *See* Begault et al., *supra* note 202.

210. *See id.*

211. *Sandy Wilbur CV*, MUSICOLOGY, http://www.musicology.com/pdf/CV.pdf [https://perma.cc/AUE4-E3F2].

> Ms. Wilbur is well-known among copyright and entertainment attorneys, advertising agencies, music producers, publishers, record companies and film and television companies for her expertise in matters relating to music copyright infringement, sound-alike and public domain issues. She is frequently contracted to research, compare and contrast one piece of music with another; clear original music before it is broadcast or released; analyze samples or potential samples; research the origins and/or public domain status of a particular song; and consult with attorneys regarding potential or pending litigation.[212]

Judith Finell for the defendants holds a master of arts degree in musicology and has published numerous articles.[213] According to her website,

> She has written numerous articles and a book in the area of contemporary music and copyright infringement and has appeared in trials on Court TV and before the American Intellectual Property Law Association. She is on the board of the Copyright Society of the U.S.A., and has appeared as a guest lecturer at the law schools of UCLA, Columbia, Vanderbilt, George Washington, NYU, and Fordham as well as the Beverly Hills Bar Assn., LA Copyright Society, and the American Independent Music Publishers."[214]

Judith Finell also employs expert musicians to assist her, namely Marianne Csizmadia (master of music), Ray Iwazumi (doctorate of musical arts in a concentration unspecified on the website), and Aaron Wunsch (doctorate of musical arts in piano performance).[215]

Sandy Wilbur, Judith Finell, and Judith Finell's assistants all hold advanced degrees in music, but none of them hold an advanced degree in music

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212. *About Musiodata*, MUSIODATA (Jan. 20, 2018, 12:01 PM), http://www.musicology.com/about.html [https://perma.cc/SEG9-X8HX].

213. *Judith Finell*, JUDITH FINELL MUSICSERVICES INC. (Jan. 20, 2018, 4:32 PM), http://www2.jfmusicservices.com/judith-finell/ [https://perma.cc/2PD9-5JRM].

214. *Id.*

215. *Our Team*, JUDITH FINELL MUSICSERVICES INC., http://www2.jfmusicservices.com/our-team/ [https://perma.cc/4W83-G98J].

theory.[216] Music theorists specialize in musical analysis more than any other sub-discipline in the field of music, and a terminal degree and peer-reviewed publications give credibility in one's field.[217] Neither Wilbur nor Finell has peer-reviewed publications in music theory.[218] The declarations by both expert witnesses rely heavily on musical analysis, but the expert witnesses have suspect credentials when it comes to musical analysis. The declarations by both Sandy Wilbur and Judith Finell are riddled with inconsistencies, and for the most part do not reflect current scholarship.

### *D. What Is Copyrightable?*

United States Code, Title 17, Chapter 1, Section 102 reads:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device . . .
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[219]

In this part of the paper, we will examine which similarities and differences between "Blurred Lines" and "Got to Give It Up" are actually copyrightable. We will first break down the components of the songs, and then their recordings.

A popular song is defined by its lyrics and the melody to which they are sung. The bass, harmonies, rhythms, instruments, and style can emanate in numerous ways such that the accompaniment is not a defining feature of

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216. *See Sandy Wilbur CV*, *supra* note 211; *Judith Finell*, *supra* note 213; *Our Team*, *supra* note 215.

217. *See generally* Kris P. Shaffer, *A Proposal for Open Peer Review*, 20 MUSIC THEORY ONLINE 1, 1 (2014), http://mtosmt.org/issues/mto.14.20.1/mto.14.20.1.shaffer.php [https://perma.cc/3JQM-AUXK].

218. According to their published resumes. *See Sandy Wilbur CV*, *supra* note 211; *Judith Finell*, *supra* note 213; *Our Team*, *supra* note 215.

219. 17 U.S.C. § 102(b).

a popular song. An accompaniment, however, is a defining feature of a recording or particular rendition of a song. To make this distinction, the table below breaks down the components of the two songs separately from the components of their recordings.

| | Similar | Copyrightable |
|---|---|---|
| Songs | | Yes |
| Lyrics | No | Yes |
| Melody | No | Yes |
| Form | No | No |
| Recordings | | Yes |
| Bass | No | Yes |
| Harmony | No | No |
| Rhythm/Groove | Yes | No |
| Style | Yes | No |
| Instrumentation | Yes | No |
| Timbre | Yes | No |

The lyrics of a song and the melody to which they are sung are copyrightable. In our analysis above, we show that the lyrics between "Blurred Lines" and "Got to Give It Up" are substantially dissimilar. We use current research and the PTD method to measure the dissimilarity between the most similar melodic fragments between the two songs. The measurements show that the pitch dimension between the fragments is substantially dissimilar, in fact more so than fifteen out of the eighteen pairs of songs in the copyright cases examined by Laroche. A song's form is a result of how its lyrics and melody manifest. "Blurred Lines" and "Got to Give It Up" both have strophic forms, but this is not unique because most songs are strophic, and thus, form is not copyrightable. Besides from being strophic, their forms differ substantially.

A recording of a song is copyrightable, however the Gaye family does not own the copyright to the recording of "Got to Give It Up," so any similarities that exist between the recordings should not matter in this case.[220] But since the jury made its decision based on impressions they got from recordings, similarities between the components of the recordings are given below. Some of the similarities that do exist are arguably not striking enough

220. *See Williams* 2014 WL 7877773, at *9–10.

to constitute copying, but they are described below as similarities nonetheless to give the benefit of doubt.

A bass line is similar to a melody in that it can be a unique expression, and thus can be copyrightable.[221] The main difference between the bass lines between the two songs stems from their different performance practices. The bass line to "Got to Give It Up" is improvised, and it varies drastically from place to place in the song. The bass line to "Blurred Lines" is only eight measures that are looped through the whole song with very little variation. Although bass lines can be compared like melodies, the different performance practices between these two bass lines makes a comparison going against the philosophical underpinnings of the PTD method. Bass lines support harmony. Even though harmonic progressions are not copyrightable, the two songs have different harmonic styles (one has two triads, and the other has six seventh chords), and different harmonic progressions. Although the two songs do not share any exact rhythms, they do have some rhythmic similarities that are understood to be part of the grooves behind them. Rhythms are so commonplace that they are not a unique expression, so they are not copyrightable.[222] Their grooves, along with all their other components such as lyrics, melodies, bass lines, harmonies, and instruments, contribute to their styles. Although their styles are not identical, they do have some stylistic similarities. Style is an idea and not a unique expression, and thus is not copyrightable.[223] Instrumentation and timbre are also not copyrightable.[224] It is ludicrous that the instrumentation was even a factor of the plagiarism claim because there are tens of thousands of songs and pieces of music with identical instrumentations. Timbre is just a byproduct of the instrumentation, but we list it separately here because the use of falsetto was a factor in the plagiarism claim. Falsetto is a vocal technique that goes back to ancient cultures, and its use is so common place that it is not copyrightable. None of the similarities between "Blurred Lines" and "Got to Give It Up" are from components that are copyrightable.

221. *See id.* at *15.

222. *See* Swirsky v. Carey, 376 F.3d 841, 850 (9th Cir. 2004).

223. *See generally id.*

224. *Id.*

## IV. CONCLUSION

Music copyright cases are difficult for courts, but they can be improved. This Article recommends that judges utilize two procedural mechanisms in cases like this with detailed expert reports that are contradictory on their face.[225] The Federal Rules of Evidence permit a judge to appoint a neutral expert to decipher the expert reports.[226] Also, it is within a judge's inherent authority to take judicial notice of legislative facts.[227] "Legislative" here is not a reference to legislative history, though legislative history could be a legislative fact. Rather, judicial notice of legislative facts means that when the court deliberates, the judge is not required to ignore relevant public information the parties failed to present.[228] The judge may also consult a person.[229] If this were not the case, a judge would not be permitted to place heavy reliance on law clerks for their deliberations. Taking judicial notice of legislative facts does not limit a judge to law clerks and treatises. The judge may also call a music theorist for assistance.[230]

Had the court appointed an expert or relied on judicial notice of legislative facts and talked to one, it is hard to see how this case would have gone to trial. These songs do not sound the same overall. The melodies are different. The harmonic progression is different. The similarities are similarities shared by songs of similar style— instrumentation, compositional techniques, etc. Even though "Blurred Lines" pays homage to "Got to Give It Up," the song does not copy any material protected by copyright.

The district court acknowledged songs have unprotected elements.[231] In the Summary Judgment Order, however, it failed to inquire whether "Got

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225. A close examination of the expert reports shows that the Gaye family does not seriously dispute that elements of "Got to Give It Up" are unprotected as unoriginal, commonplace musical ideas, or musical building blocks.

226. *See* FED. R. EVID. 706.

227. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE 377–78 (4th ed. 2017).

228. *See id.*

229. *See id.*

230. *See id.* at 380.

231. Williams v. Bridgeport Music, Inc., No. LA CV13–06004 (AGRx), 2014 WL 7877773, at *14 (C.D. Cal. Oct. 30, 2014).

to Give It Up" contained unprotected elements despite Supreme Court precedent that a copyright claim is not proper for unprotected elements of copyrighted works such as ideas, process, discoveries, etc.[232] *Scènes à faire* is but one example of an idea unprotected by copyright law. The court justified bypassing an examination of the songs to determine whether there were unprotected elements based on a misunderstanding of *Swirsky v. Carey*, which the court thought rejected the *Swirsky* trial court's consideration of ideas and *scènes à faire*.[233] But that's not what happened. The Ninth Circuit did not reject consideration of evidence of unprotected elements on summary judgment.[234] Rather, the Ninth Circuit disagreed with the conclusions the *Swirsky* trial court reached based on the evidence presented.[235]

In an interview with GQ, Thicke said:

> Pharrell and I were in the studio and… I was like, Damn, we should make something like that, something with that groove. Then he started playing a little something and we literally wrote the song in about half an hour and recorded it. He and I would go back and forth where I'd sing a line and he'd be like, "Hey, hey, hey!" We started acting like we were two old men on a porch hollering at girls like, "Hey, where you going, girl? Come over here!"[236]

Within the deposition, Thicke later stated that, he was "high on Vicodin and alcohol when [he] showed up at the studio . . . Pharrell had the beat and

232. *See* Williams v. Bridgeport Music, Inc., No. 13–06004 (C.D. Cal. July 14, 2015), 2015 WL 4479500, at *5.

233. *Id.* at *8.

234. Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004).

235. *Id.* at 850.

236. Stelios Phili, *Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film*, GQ (May 6, 2013), https://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy [*http://perma.cc/XAL2-X7VT*].

he wrote almost every single part of the song."[237] Williams later corroborated that Thicke had very little to do with writing the song.[238] It appears that Williams, inspired by Marvin Gaye, is the true creator of "Blurred Lines," although Thicke owns 20% of the writing credits.[239]

Had the song not been financially successful, the Gaye family would not have pursued litigation. Charles Cronin observes, "[the] typical plaintiff in a music infringement suit is… [someone] of modest means who asserts that a lucrative hit by…a popular musician is based on musical expression from an earlier work by the plaintiff."[240] Every successful song, even if inspired by another song, should not become the subject of an expensive and exhausting trial. The summary judgment process should prevent it.

Our stance that the song and recording of "Blurred Lines" does not infringe upon the copyright of the song and recording of "Got to Give It Up" is not unique.[241] In August 2016, more than 200 musicians, including among others, Rivers Cuomo of Weezer, John Oates of Hall & Oates, R. Kelly, Hans Zimmer, Jennifer Hudson as well as members of Train, Linkin Park, Earth, Wind & Fire, The Black Crowes, Fall Out Boy, The Go-Gos and Tears for Fears, filed an *amicus curiae* brief stating that "the verdict in this case threatens to punish songwriters for creating new music that is inspired by prior works."[242] The Gaye family should be honored that Williams found inspiration in their father's work.

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237. Eriq Gardner, *Robin Thicke Admits Drug Abuse, Lying to Media in Wild "Blurred Lines" Deposition (Exclusive)*, HOLLYWOOD REP. (Sept. 15, 2014, 9:00 AM), https://www.hollywoodreporter.com/thr-esq/robin-thicke-admits-drug-abuse-732783 [https://perma.cc/EFL6-Z6MU].

238. Sean Michaels, *Robin Thicke Reportedly Says He Lied About Co-Writing Blurred Lines*, GUARDIAN (Sept. 16, 2014, 3:35 AM), https://www.theguardian.com/music/2014/sep/16/robin-thicke-lied-co-written-blurred-lines-pharrell [https://perma.cc/KHN8-3YUG].

239. *See* Gardner, *supra* note 237.

240. Charles Cronin, *Concepts of Melodic Similarity in Music-Copyright Infringement Suits*, 11 COMPUTING IN MUSICOLOGY 187, 189 (1998).

241. *See* Eriq Gardner, *"Blurred Lines" Appeal Gets Support From More Than 200 Musicians*, HOLLYWOOD REP. (Aug. 30, 2016, 1:31 PM), https://www.hollywoodreporter.com/thr-esq/blurred-lines-appeal-gets-support-924213 [https://perma.cc/U6K7-KYPP].

242. *Id.*

Numerous authors acknowledge problems that permeate music copyright cases.[243] We agree with Maureen Baker's assessment of the situation, and her proposed solution.[244] Our suggestion that courts appoint an independent expert music theorist or judicially notice a music theorist could work in tandem with Ms. Baker's proposal.

243. *See* Maureen Baker, *La[w]—A Note to Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1604 (1992).

244. *Id.* at 1624.