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Casting the First Stone: The Future of Music Copyright Infringement Law After Blurred Lines, Stay with Me, and Uptown Funk

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Casting the First Stone: The Future of Music Copyright Infringement Law After *Blurred Lines*, *Stay with Me*, and *Uptown Funk*

*Regina Zernay**

Abstract

Music copyright infringement has traditionally been considered very difficult to prove in court. The outcomes of three recent controversies, however, suggest that the way infringement cases are brought and resolved may have undergone a significant change. The first case was the highly publicized *Blurred Lines* lawsuit in 2013, whose songwriters were accused of infringing Marvin Gaye's *Got to Give It Up*. The second case alleged that Sam Smith's 2014 Grammy-award winning song *Stay with Me* infringed the chorus of Tom Petty's *I Won't Back Down*. The third case involved the huge hit song *Uptown Funk* and the 1970s hit *Oops Upside Your Head*.

Despite the courts' historical propensity toward favoring alleged infringers, the Marvin Gaye estate won in court, and the *Stay with Me* and *Uptown Funk* infringement claims were amicably settled before lawsuits could be filed. Each case represents a departure from the traditional methods of resolving copyright infringement claims.

This Comment analyzes whether a significant change has occurred in the way music copyright infringement suits are resolved. The ultimate goals of this Comment are to provide readers with a better understanding of the current state of music copyright law and offer information that may help avoid or minimize the impact of infringement claims.

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INTRODUCTION

Until recently, if a songwriter brought a copyright infringement claim, the odds of winning were low because the hurdles to proving the claim were high. Changes, though, have appeared on the horizon, and as David Bowie once warned, "look out you rock 'n' rollers."[1] The new movement in copyright law is shifting to recognize broader similarities like style and genre as legitimate bases for infringement claims, creating entirely new litigation opportunities, coupled with corresponding risks for artists.

For a number of reasons, it was traditionally considered quite difficult to succeed at winning a music copyright infringement claim in court, and settlement was rare.[2] In the past, infringement may have been found when a song incorporated a melody nearly identical to a widely distributed song,[3] or when sound recordings were sampled[4] without permission.[5] Rarely were cases won for simply emulating a style or genre.[6]

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1 DAVID BOWIE, *Changes*, *on* HUNKY DORY (RCA Records 1971).

2 *See, e.g.*, Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 229 (1990) (representing the historical view that considered "[m]usical copyright protection . . . a misnomer," and under the traditional regime, "[a] plaintiff seeking to protect his property interest finds little sympathy from the judiciary."); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 741–42 (2010) (criticizing the existing standard for demonstrating copyright infringement in 2010, stating "[o]ur rules for proving copyright infringement make little sense"); Michelle V. Francis, *Musical Copyright Infringement: The Replacement of Arnstein v. Porter–A More Comprehensive Use of Expert Testimony and the Implementation of an "Actual Audience" Test*, 17 PEPP. L. REV. 493, 494 (1990) (citing A. SHAFTER, MUSICAL COPYRIGHT 146 (2d ed. 1932)) (reflecting the traditional belief that "'[t]he determination of [copyright] infringement is one of the most difficult of all legal questions'"); William R. Coulson, *They're Playing Our Song! The Promise and the Perils of Music Copyright Litigation*, 13 J. MARSHALL REV. INTELL. PROP. L. 555, 575 (2014) ("So, do composers ever 'borrow' from each other? Of course, it happens. Examples abound. Even if it amounts to larceny, is it easy to prove? Decidedly not."); Telephone Interview with Robert M. Barta, Attorney at Law, Rosoff, Schiffres & Barta (Aug. 15, 2016) (entertainment attorney who represented several songwriters in successful copyright infringement claims during the 1990s) [hereinafter Barta Interview] ("[In the 1990s,] cases were fought and very few settled. . . . It was difficult to pursue the claim. Many artists did not have the money or resources to challenge established record companies. It was difficult, expensive, and [the labels and their insurers] fought at every avenue possible."); *infra,* Part II.C. (providing descriptions of several cases demonstrating the difficulty of proving music copyright infringement under the traditional regime).

3 *See, e.g.*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 997 (2d Cir. 1983) (citing Warner Bros. v. American Broad. Companies, 654 F.2d 204, 207 (2d Cir. 1981)) (affirming the district court's holding that George Harrison's *My Sweet Lord* infringed on *He's So Fine*); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000) (affirming the district court's holding that Michael Bolton's *Love is a Wonderful Thing* infringed on the Isley Brothers song of the same name).

4 "Sampling" is defined as "the act of using a small part of a recording (such as a song) as part of another recording." *Sampling*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/sampling (last visited Mar. 26, 2016) [http://perma.cc/MWL2-FXUS]. The sampling described in this Comment will generally refer to instances where a portion of a sound recording has been copied, as recorded, and inserted into a new

Despite the same legal climate, at least three recent cases exhibited vastly different responses to music copyright infringement claims. Each signals that the copyright landscape may be undergoing significant and remarkable changes.

The first was the widely publicized *Blurred Lines* case, currently under appeal.[7] In 2013, representatives for the estate of legendary singer/songwriter Marvin Gaye contacted the writers of the hit song *Blurred Lines* to address concerns that *Blurred Lines* copied elements of Gaye's 1977 song *Got to Give It Up*.[8] Instead of settling out of court, the *Blurred Lines* songwriters' representatives sued the Gaye estate, seeking a declaratory judgment from the court stating that no infringement had occurred.[9] The Gaye estate responded with a counterclaim accusing the *Blurred Lines* songwriters of copyright infringement.[10] In 2015, the jury unexpectedly held in favor of the Gaye estate, awarding damages of more than $7 million.[11]

The second controversy involved Sam Smith's Grammy-award winning song *Stay with Me*. In 2014, publishers in charge of Tom Petty's 1989 hit song *I Won't Back Down* contacted Smith's representatives to discuss the strong melodic similarities

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composition, with or without alteration.

5 *See, e.g.*, Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (ordering a temporary injunction against Biz Markie's album *I Need A Haircut* for sampling music without permission from the copyright owner).

6 *See, e.g.*, Joanna Demers, *Sound-Alikes, Law, and Style*, 83 UMKC L. REV. 303, 303 (2014). Merely one year before the 2015 *Blurred Lines* decision, "sound-alike" recordings were considered legal. As Demers explains, "[i]n the wake of lawsuits against unauthorized sampling, the new sound-alike has assumed a prominent position among today's pop musicians. Instead of stealing musical objects from the past, artists create semblances of the past, and these semblances are perfectly legal." *Id. See also* Todd Davidovits & Graham Day, *Recent Developments in Copyright: Blurred Reasoning and I Won't Back Down Until You Stay with Me*, JD SUPRA (Mar. 26, 2015), http://www.jdsupra.com/legalnews/recent-developments-in-copyright-blurre-53935/ ("In the absence of an actual sample, merely emulating the production elements or atmosphere of an earlier recording has typically not provided a strong basis for finding infringement of a sound recording copyright.") [http://perma.cc/ZS8Q-FBS5].

7 Tim Kenneally & Pamela Chelin, *Robin Thicke, Pharrell Williams Appeal 'Blurred Lines' Copyright Infringement Lawsuit*, THE WRAP (Dec. 8, 2015, 12:59 PM), http://www.thewrap.com/robin-thicke-pharrell-williams-appeal-blurred-lines-copyright-infringement-lawsuit/ [http://perma.cc/MVD8-KNX3].

8 *See* Complaint for Declaratory Relief at 4, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Aug. 15, 2013), 2013 WL 4271752 [hereinafter Williams Complaint].

9 *Id.* at 5.

10 Defendants' Frankie Christian Gaye and Nona Marvisa Gaye First Amended Counterclaims at 12, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Oct. 30, 2013), 2013 WL 6079472 [hereinafter Frankie & Nona Gaye First Amended Counterclaim]; Defendant Marvin Gaye III's Counterclaim & Demand for Trial of Causes by Jury at 11, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK-AGR (C.D. Cal. Nov. 19, 2013), 2013 WL 6831871 [hereinafter Marvin Gaye III's Counterclaim].

11 Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx), 2015 WL 1036137, at *3 (C.D. Cal. Mar. 10, 2015) [hereinafter *Blurred Lines* Special Verdict].

between the two songs.[12] Rather than employing the preemptive strike tactic utilized by the *Blurred Lines* legal team, Smith's representatives settled, giving the writers of *I Won't Back Down* songwriting credit and a percentage of royalties for *Stay with Me*.[13] The matter was put to rest before a lawsuit was filed.[14]

The third incident surfaced in 2015, when concerns were raised that a vocal rhythmic pattern in the monster-hit *Uptown Funk* sounded similar to a pattern featured in the 1970s hit *Oops Upside Your Head*.[15] Instead of contacting *Uptown Funk* representatives directly, the publishers of *Oops Upside Your Head* filed a copyright infringement claim with online video distributor YouTube.[16] As a result, all payments for *Uptown Funk*'s YouTube plays were frozen until the issue was resolved.[17] *Uptown Funk* representatives settled quickly, giving the writers of *Oops Upside Your Head* songwriting credit and royalties.[18]

Some may argue that these cases suggest stronger protections for songwriters have emerged. In many ways, though, this new setting may provide fertile ground for unwarranted accusations of copyright infringement.

As noted scholar Tim Wu observed, "[t]here is no question that Pharrell was inspired by Gaye and borrowed from him; he has freely admitted as much. But, by that standard, every composer would be a lawbreaker."[19] In light of what appears to be a lower threshold for proving copyright infringement, while it may be easier for a songwriter to demonstrate infringement, it also may be easier for a songwriter to be found guilty of it. The scenario brings to mind the old adage, "let he that is without sin cast the first stone."[20] Like villagers armed with stones,

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12 Brian Mansfield, *Sam Smith to Pay Tom Petty Royalties on 'Stay with Me,'* USA TODAY (Jan. 26, 2015, 11:38 AM), http://www.usatoday.com/story/life/music/2015/01/26/sam-smith-stay-with-me-tom-petty-i-wont-back-down/22346051/ [http://perma.cc/H7JU-SP28].

13 *Id.*

14 *Id.*

15 Daniel Welsh, *'Uptown Funk' Gets Five New Co-Writers Following Claim By 'Oops Upside Your Head' Singers, Gap Band*, HUFFINGTON POST (May 1, 2015, 10:32 AM), http://www.huffingtonpost.co.uk/2015/05/01/uptown-funk-oops-upside-your-head-co-writers_n_7187434.html [http://perma.cc/P9D9-YXKQ].

16 Ed Christman, *'Uptown Funk!' Gains More Writers After Gap Band's Legal Claim*, BILLBOARD (May 1, 2015), http://www.billboard.com/articles/news/6553522/uptown-funk-gains-more-writers-after-gap-bands-legal-claim [http://perma.cc/7W8Q-M5UL].

17 *Id.*

18 *Id.*

19 Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out*, THE NEW YORKER (Mar. 12, 2015), http://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out [http://perma.cc/BS44-74NP].

20 *John* 8:1–11 (King James). An adulterous woman was brought to Jesus, who was told that the law's punishment for adultery was death by stoning. The villagers asked Jesus what they should do. Jesus responded by saying "he that is without sin among you,

songwriters have been given a more effective weapon to defend their copyrights. However, this weapon may easily be turned against the songwriters it is supposed to protect.

The outcomes of music copyright infringement cases are more uncertain than before, and neither the average songwriter nor the general legal practitioner has enough information about the current music copyright landscape and how to maneuver around its various pitfalls. Even as of this writing, reports of high-profile copyright infringement claims continue to surface in the media, with at least two new accusations of infringement against the writers of *Uptown Funk*[21] and, most notably, the highly publicized copyright infringement suit against Led Zeppelin for their classic song *Stairway to Heaven*, originally released more than forty years ago.[22] Though the jury found that Stairway to Heaven did not infringe the 1968 Spirit song *Taurus*, the decision is now being appealed.[23] Whether or not they realize it, songwriters may be facing an increased danger of committing copyright infringement, and without knowing more, they are risking much greater liability.

This Comment aims to fill that informational gap. It analyzes whether a significant and permanent change has occurred in the way that music copyright infringement suits are brought, examines the legal predicates contributing to that development, and evaluates how new cases wrestling with these emerging copyright complexities will ultimately be resolved. Part I gives a brief history of the copyright laws and describes how courts have traditionally evaluated infringement claims. Part II takes a closer look at the *Blurred Lines* case and compares it with recent cases, including *Stay with Me* and *Uptown Funk*. Finally, Part III examines how much the risk of infringement has increased in the aftermath of *Blurred Lines* and considers whether protective measures, such as more widely available and

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let him first cast a stone at her." The villagers walked away without throwing a single stone. *Id.*

21 *See* TMZ Staff, *Girl Group Claims YOU STOLE 'UPTOWN FUNK' FROM US!!!*, TMZ (Feb. 23, 2016, 12:40 AM), http://www.tmz.com/2016/02/23/bruno-mars-uptown-funk-the-sequence-funk-you-up-cease-and-desist/ [http://perma.cc/7CAF-P2VH]; Hanna Flint, *This '80s Serbian Pop Song Sounds A LOT Like Mark Ronson and Bruno Mars' Uptown Funk*, METRO UK (Aug. 11, 2015, 10:07 AM), http://metro.co.uk/2015/08/11/this-80s-serbian-pop-song-sounds-a-lot-like-mark-ronson-and-bruno-mars-uptown-funk-5337031/ [http://perma.cc/N5K5-6TSN].

22 Libby Hill, *Led Zeppelin's 'Stairway to Heaven' Heading to Copyright Trial*, L.A. TIMES (Apr. 12, 2016, 12:30 PM), http://www.latimes.com/entertainment/music/la-et-ms-led-zeppelin-stairway-to-heaven-copyright-trial-20160412-story.html [http://perma.cc/F2TY-DCV8].

23 Assoc. Press, *Appeal Filed in Copyright Case of Led Zeppelin's "Stairway,"* YAHOO! MUSIC (July 27, 2016), https://www.yahoo.com/music/appeal-filed-copyright-case-led-zeppelins-stairway-194436584.html [http://perma.cc/4B2F-S6KF].

affordable songwriter insurance, will emerge. The goals of this Comment are to give the reader a better understanding of the current state of music copyright law, and offer information that may help avoid or minimize the impact of infringement claims.

I. THE COPYRIGHT CLAUSE AND TRADITIONAL FINDINGS OF MUSIC COPYRIGHT INFRINGEMENT

Congress passed the first copyright laws in 1790,[24] and since then, U.S. copyright laws have undergone a great number of changes, expanding both the protections that copyright laws provide and the categories of works that are eligible for copyright protection.[25] Discussing the details of over 200 years of copyright evolution extends far beyond the scope of this Comment.[26] However, there are several important points that must be explained in order to understand the information contained herein.

Section A of Part I will briefly explain the original purpose of the Copyright Clause and how the resulting laws evolved to protect musical compositions and sound recordings. Section B provides a general explanation of what constitutes copyright infringement. Section C describes the traditional approach used by courts to evaluate claims of music copyright infringement.

By the end of Part I, the reader should have a general understanding of the primary goal of the Copyright Clause, some familiarity with the requirements for copyright protection, and an awareness of the high level of proof required to show music copyright infringement under the courts' traditional standard of evaluation.

A. Copyrights in General

The ability to copyright creative works has long, deep roots that lead back to the Constitution. The Copyright Clause is found in the U.S. Constitution, Article I, Section 8, Clause 8,[27] and it granted Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[28] It has been said that *promoting the*

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24 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1–OV (Matthew Bender, rev. ed. 2015).

25 ALEXANDER LINDEY & MICHAEL LANDAU, 1 LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 1:1 (3d ed. 2016).

26 For a detailed explanation of the evolution of U.S. Copyright law, please consult NIMMER & NIMMER, *supra* note 24, considered one of the leading treatises on U.S. copyright law.

27 LINDEY & LANDAU, *supra* note 25, § 1:1.

28 U.S. CONST. art. I, § 8, cl. 8.

progress of science and useful arts is the primary goal of the copyright provision.[29]

Granting Congress the power to pass laws that provide copyright protection was only the first step in creating the current copyright laws in the United States. The next crucial step was Congress's passage of the Copyright Act of 1790.[30] Under this first Act, copyright protection was provided for books, maps, and charts, and limited to an initial term of fourteen years plus an additional fourteen-year renewal.[31]

The "Copyright Act" is a term used generally to refer to what is codified in Title 17 of the U.S. Code.[32] Since Congress enacted the Copyright Act of 1790, U.S. copyright laws have been amended several times.[33] In addition to the current version of the Act, many aspects of the previous versions of copyright laws are still present and, depending on the circumstances, still applicable.[34] One significant result is that the copyright date of a work usually determines which version of the Act applies to a cause of action.[35] This date issue is pertinent here because the 1977 copyright date of *Got to Give It Up* excluded it from protection under the Copyright Act of 1976, which did not take effect until January 1, 1978 and offered more protection for songwriters.[36]

Though the text of the Copyright Act of 1790 only provided copyright protection for books, maps, and charts,[37] songwriters received copyright protection for musical compositions by registering them as books under the 1790 Act.[38] Over time, other creative works were added to the list of subject matter eligible for copyright protection, and two of these additions constitute the creative works that songwriters may currently copyright in order to protect their music. The first of these additions was musical

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29 NIMMER & NIMMER, *supra* note 24, § 1.03 (emphasis added). For an interesting discussion that examines the parameters of the Copyright Clause, see TOM W. BELL, INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD 15–20 (2014).

30 *See* LINDEY & LANDAU, *supra* note 25, § 1:1.

31 *Id.*

32 *See* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 3 (4th ed. 2015).

33 *Id.* at 4.

34 NIMMER & NIMMER, *supra* note 24, § 1–OV.

35 *Id.*

36 Williams v. Bridgeport Music, Inc., No. LACV13-06004 JAK (AGRx), 2015 WL 7877773, at *9–10 (C.D. Cal. Oct. 30, 2014) [hereinafter Order Regarding Summary Judgment].

37 LINDEY & LANDAU, *supra* note 25, § 1:1.

38 William F. Patry, *Copyright Law and Practice, Chapter 1 – Introduction: The First Copyright Act*, DIGITAL LAW ONLINE, http://digital-law-online.info/patry/patry5.html (last visited Aug. 25, 2016) ("Although musical compositions did not receive express statutory protection until 1831, they too were registered under the 1790 Act as books.") [http://perma.cc/73GA-2H4Q].

compositions, enacted in 1831.[39] The second was protection for sound recordings, granted in 1972.[40] The duration of copyright protection was also expanded to cover the life of the author plus seventy years.[41]

A musical composition and a sound recording are two different things and receive separate copyrights.[42] A musical composition "consists of music, including any accompanying words . . . . [and] may be in the form of a notated copy (for example, sheet music) or in the form of a phonorecord (for example, cassette tape, LP, or CD)."[43] A sound recording "results from the fixation of a series of musical, spoken, or other sounds."[44] Put differently, the musical composition is the sequence of musical notes and words that make up a song, combined in a specified manner. Though this musical composition can be recorded many different ways, the specific combination of its words and music is the fixed expression being copyrighted, and can be identified with as little as sheet music.[45] A sound recording is a particular recorded version of the musical composition, fixed in an audio recording.[46] While the sound recording is a representation of the underlying musical composition, the copyright of the sound recording only covers the particular audio performance that has been recorded, not the underlying musical composition.[47]

The complete list of creative works eligible for copyright protection is provided in § 102 of the Copyright Act as codified today.[48] In addition, § 102 excludes "any idea, procedure, process, system, method of operation, concept, principle, or discovery" from copyright protection.[49] Knowing which creative works are excluded could be considered as important as knowing which works are eligible, for if it can be shown that a work falls within one of the excluded categories, an infringement claim can be

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39 LINDEY & LANDAU, *supra* note 25, § 1:1.

40 *Id.*

41 *Id.* Note, however, that the 70-year term refers to single authors. For joint authors and works for hire, see 17 U.S.C.A. § 302 (West 2016) of the Copyright Act.

42 LINDEY & LANDAU, *supra* note 25, § 9.4.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 17 U.S.C.A. § 102 (West 2016) ("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. Works of authorship include . . . musical works, including any accompanying words . . . [and] sound recordings.").

49 17 U.S.C.A. § 102(b) (West 2016).

defeated since the work was never eligible for copyright protection in the first place.[50]

Breaking down § 102, we see there are three requirements for subject matter to be considered copyrightable[51]: (1) "fixation" in a tangible medium of expression;[52] (2) "originality," requiring that the work be an original work of authorship;[53] and (3) the work must not fall within one of the categories excluded for copyright protection by § 102(b).[54] If a defendant in a copyright infringement claim can show the plaintiff's allegedly infringed work fails to satisfy any of the § 102 requirements, the plaintiff's work may be denied eligibility for copyright protection and, accordingly, the plaintiff's infringement claim will fail.

Otherwise, if a creation satisfies all three of the requirements in § 102, the subject matter may be copyrighted. The benefit of a copyright is that it provides the copyright owner a set of exclusive and enforceable rights, all of which are described in § 106 of the Copyright Act (subject to certain limitations, outlined in §§ 107 through 122 of the Act).[55]

Having provided a general background about the primary goal of the Constitution's copyright provision and a description of the how the Copyright Act evolved to protect musical compositions and sound recordings, we will now discuss situations where third parties violate the exclusive rights of copyright owners, also known as copyright infringement.

B. What Constitutes Copyright Infringement[56]

On the surface, copyright infringement may seem easy to define. Simply put, copyright infringement occurs when any of the exclusive rights granted to the copyright owner under the Copyright Act have been violated.[57] Once an infringement has occurred, the owner may sue the alleged infringer to enforce the rights that have been violated.[58] Additionally, as in *Blurred Lines*, to prevent a potential infringement suit, a new work's

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50 *See* COHEN ET AL., *supra* note 32, at 90–109; *infra* Part I.B.

51 *See* COHEN ET AL., *supra* note 32, at 51.

52 *Id.* at 51–52.

53 *Id.* at 51, 62.

54 *Id.*

55 17 U.S.C.A. § 106 (West 2016).

56 Given the rich history of U.S. Copyright Law and its mutable nature, the question of what constitutes copyright infringement cannot be fully answered within a few short paragraphs. For those interested in a more detailed discussion, see NIMMER & NIMMER, *supra* note 24.

57 Catherine Palo, *Copyright Infringement Litigation*, *in* 77 AM. JUR. TRIALS 449 § 23 (updated Feb. 2016).

58 *Id.*

authors may sometimes seek a declaratory judgment from the court stating their work has not infringed an earlier creation.

Delving a little deeper reveals that proving infringement is rather complex. There are two basic prerequisites for demonstrating copyright infringement: (1) ownership of a valid copyright by the plaintiff, and (2) copying by the defendant.[59] The difficulty lies in successfully establishing the presence of both requirements.

The first prerequisite, ownership, consists of:

> (1) originality in the author; (2) copyrightability of the subject matter; (3) a national point of attachment of the work . . . ;[60] (4) compliance with applicable statutory formalities;[61] and (5) (if the plaintiff is not the author) a transfer of rights or other relationship between the author and the plaintiff. . . . [62]

While showing all five ownership requirements may seem daunting, registration with the U.S. Copyright Office "constitutes *prima facie* evidence in favor of the plaintiff" for the first four requirements.[63] If the copyright owner is also the author of the work, the fifth ownership requirement does not apply.[64]

When responding to an allegation of copyright infringement, a defendant may challenge the plaintiff's copyright ownership as a defense and "will prevail in an infringement action [if] the plaintiff has failed to establish by a preponderance of the evidence the required element[] of ownership . . . ."[65] Part II's discussion of *Blurred Lines* observes that the *Blurred Lines* legal team questioned the ownership of *Got to Give It Up* as a defense.[66]

The second prerequisite required for proving infringement, "copying by the defendant," consists of two separate elements: "copying in fact," and "copying as a legal proposition."[67] To show the first element, copying in fact, the plaintiff must demonstrate that the defendant "used the plaintiff's material as a model,

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59 NIMMER & NIMMER, *supra* note 24, § 13.01.

60 *Id.* § 5.05 (explaining that, under § 104 of the Copyright Act as currently codified, not all foreign nationals are eligible for copyright protection in the United States, however, a foreign national may be able to receive copyright protection through "four 'points of attachment,'" based on the "'nationality of the author, place of first publication of the work, place of fixation of the sounds embodied in a sound recording, and the situs of a constructed architectural work.'").

61 *Id.* § 13.01 n.9 ("[T]he formal requirements for copyright subsistence (and hence, ownership) have lessened over time, and are basically inapplicable to works created during the Berne era [referring to the Copyright Act as amended by The Berne Convention Implementation Act of 1988, discussed *supra* Part I.A.].").

62 *Id.* § 13.01.

63 *Id.*

64 *Id.*

65 *Id.* § 13.01.

66 *Infra* Part II.A.

67 NIMMER & NIMMER, *supra* note 24, § 13.01.

template, or even inspiration."[68] If copying in fact can be shown, then the plaintiff must also demonstrate the presence of the second element, copying as a legal proposition, by showing that "the defendant's work is substantially similar to plaintiff's work such that liability may attach."[69] Thus, a plaintiff must first prove that the defendant has, in fact, copied the plaintiff's work. Once copying has been shown, the plaintiff must then prove that what has been copied is legally protected, because, as previously discussed, not everything is copyright-eligible.[70]

Element one, copying in fact, means that the plaintiff has proven in a "factual sense," that the defendant copied the plaintiff's material.[71] One way of proving copying in fact is through direct evidence, such as presenting a party who witnessed the copying, or a showing of identical copies.[72] Direct evidence is often unobtainable though, and when direct evidence cannot be produced, courts will consider indirect evidence.[73] Copying in fact can be proven with indirect evidence if the copyright owner can produce the two components of (1) "proof of *access*,"[74] plus (2) "*substantial similarity*"[75] (also known as "probative similarity" and not to be confused with "copying as a legal proposition," which courts also call "substantial similarity").[76] Thus, an owner may indirectly prove copying occurred by showing the alleged infringer had somehow been exposed to the first work, and the resulting creation is very much like the first work.[77]

Next, consider the second element to show copying by the defendant: "copying as a legal proposition," also known as "substantial similarity."[78] The essence of this element is that

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68 *Id.*

69 *Id.*

70 *See* 17 U.S.C.A. § 102(b) (West 2016); *supra* Part I.A.

71 NIMMER & NIMMER, *supra* note 24, § 13.01.

72 *See, e.g.*, Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 343–44, 361 (1991) (demonstrating direct proof of copying when the plaintiff, a phone book company, showed the defendant's competing phone book included over a thousand entries identical to those listed in the plaintiff's phone book, including four fake entries planted in the plaintiff's phone book for the purpose of detecting future copying by others).

73 NIMMER & NIMMER, *supra* note 24, § 13.01.

74 *Id.* (emphasis added).

75 *Id.* (emphasis added).

76 One must be warned of the confusing dual usage of the term "substantial similarity." As mentioned, element one, "copying in fact," can be demonstrated through a combined showing of "access" plus "substantial similarity." Confusingly, element two of copying by a defendant, "copying as a legal proposition," is also often referred to as a "substantial similarity" test. This duplicate naming problem has led Nimmer to suggest that the "substantial similarity" prong of the indirect evidence test for element one, copying in fact, instead be referred to as a "probative similarity" test. NIMMER & NIMMER, *supra* note 24, § 13.01.

77 *Id.*

78 *Id.*

even if copying has occurred, a plaintiff must show what was copied is actually protected by copyright law, otherwise no infringement can be found.[79] If the portions copied were not copyrightable for any reason (e.g., the material is excluded from copyright protection by 17 U.S.C. § 102(b);[80] the copying constituted fair use;[81] the material was in the public domain and freely available for use; the portion copied was so small that it is *de minimis*, or too minute to be actionable; the elements copied were *scenes a faire*, or scenes or elements that are virtually essential in order to portray a topic or convey a tone or setting),[82] infringement is unlikely to be found.[83]

It is useful to keep the defenses against copying as a legal proposition in mind, as we will see that additional defenses utilized by the *Blurred Lines* legal team included claims that the similarities were uncopyrightable, excluded from copyright protection, or *de minimis*.[84]

In addition to the general components described above, the circuits employ different tests to evaluate "copying as a legal proposition" or substantial similarity.[85] The primary case discussed in this Comment, *Blurred Lines*, took place in the Ninth Circuit. The Section that follows will focus on the Ninth Circuit test and examine the traditional outcome of music copyright infringement.

C. How Substantial Similarity was Traditionally Determined

The source of the Ninth Circuit's two-prong substantial similarity test is *Sid & Marty Krofft Television Products., Inc. v. McDonald's Corp.*[86] Prong one of the Ninth Circuit's substantial similarity test, the extrinsic test, is an objective analysis conducted by the trier of fact that is limited to examining only

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79 *Id.*; *see, e.g., Feist*, 499 U.S. at 363–64 (holding that while copying as a factual matter was shown, copying as a legal proposition had not been established because the copied information was merely raw data that did not "owe its origin" to Rural and had not been "selected, coordinated, or arranged" in at least a minimally creative way, thus no copyright infringement occurred).

80 *See* 17 U.S.C.A. § 102(b) (West 2016); *supra* Part I.A.

81 "Fair Use" is a complex defense that merits a discussion of its own and extends far beyond the parameters of this Comment. For a discussion of the fair use doctrine, see ALAN LATMAN, S. JUDICIARY COMM., COPYRIGHT LAW REVISION STUDY 14: FAIR USE OF COPYRIGHTED WORKS, *in* NIMMER AND NIMMER, *supra* note 24.

82 This does not represent an exhaustive list of potential defenses against claims of copying as a legal proposition (substantial similarity). For a more in-depth look at these and other potential defenses, see NIMMER & NIMMER, *supra* note 24, § 13.03(B).

83 *Id.*

84 *See supra* Part II.

85 NIMMER & NIMMER, *supra* note 24, § 13.03(E)(3).

86 Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163–64 (9th Cir. 1977).

"specific criteria which can be listed and analyzed."[87] Because it is meant to be objective, the trier of fact's personal responses are not relevant, however "analytic dissection and expert testimony" may be considered during the trier of fact's analysis.[88]

Prong two is an intrinsic test designed to determine "whether there is substantial similarity in expressions."[89] The intrinsic test "depend[s] on the response of the ordinary reasonable person. . . . [and] is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test."[90] Additionally, "[b]ecause this is an intrinsic test, analytic dissection and expert testimony are not appropriate."[91]

As the primary focus of this Comment is how the *Blurred Lines* court applied the Ninth Circuit test, it seems most effective to utilize the district court's description of the Ninth Circuit test when it evaluated the *Blurred Lines* legal team's motion for summary judgment.[92] The court first explained under what circumstances a motion for summary judgment would be denied in a copyright infringement suit:

> A motion for summary judgment in a copyright infringement suit necessarily fails when there is "a genuine issue regarding whether the ideas and expressive elements of the works are substantially similar. . . . A 'genuine issue ' exists when the plaintiff provides indicia of 'a sufficient disagreement' concerning the substantial similarity of two works 'to require submission to a jury.'" . . . "For the purposes of summary judgment, only the extrinsic test is important because the subjective question whether works are intrinsically similar must be left to the jury." . . . If there is not sufficient evidence to permit a trier of fact reasonably to find that extrinsic similarity exists, summary judgment of non-infringement must be granted . . . .[93]

Thus, in the Ninth Circuit, if a court finds enough of a disagreement between parties about whether a substantial similarity exists between two works, it must deny summary judgment. The court determines whether the disagreement is sufficient based solely on its objective extrinsic analysis of the evidence because the intrinsic analysis "must be left to the jury."[94]

The court then explained that "in applying the extrinsic test, a court considers expert testimony in order to perform [an]

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87 *Id.* at 1164.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 Order Regarding Summary Judgment, *supra* note 36, at *6.
93 *Id.* (citations omitted).
94 *Id.*

'analytical dissection of a work.'"[95] This analysis requires the trier of fact to break down the creative works being compared into their individual elements, and identify which of those elements are (and are not) protected by copyright.[96]

Unprotected elements may still factor into the extrinsic evaluation. The court cited *Brown Bag v. Symantec*,[97] which the court explained made clear that "[a]lthough copyright protection is not afforded to certain elements of a work . . . copyright may inhere, under appropriate circumstances, in the selection and arrangement of unprotected components."[98]

In sum, the Ninth Circuit extrinsic test requires the trier of fact to: (1) break down each creative work into its individual elements; (2) distinguish between which elements are and are not protected by copyright; (3) compare the *protected* elements between each work to determine if substantial similarity exists; and (4) compare the *body of unprotected elements* of each work to determine if substantial similarity exists between each work's collection of unprotected elements. If substantial similarity is found between the protected elements of each work or the collected body of unprotected elements in each work, the plaintiff will succeed at showing substantial similarity for the purposes of the extrinsic test and the plaintiff's claim will survive summary judgment. The case is then placed in the hands of the jury, who is responsible for prong two of the Ninth Circuit's substantial similarity test, a subjective intrinsic analysis.

Prior to *Blurred Lines*, it was considered very challenging to succeed in proving copyright infringement.[99] One notable example is *Selle v. Gibb*.[100] Though not a Ninth Circuit case, *Selle v. Gibb* illustrates how difficult it could be to survive a court's scrutiny of a music copyright infringement claim. Plaintiff Ronald Selle sued the Bee Gees over the band's hit song *How Deep Is Your Love*, alleging the song infringed Selle's song *Let It End*.[101] The trial court "denied defendants' motion for a directed verdict and submitted the issue to the jury."[102] During the trial, a member of the Bee Gees mistook *Let It End* for *How Deep Is Your*

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95 *Id.*

96 *Id.* (citing Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004) (citations omitted)).

97 Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1776 n.4 (9th Cir. 1992).

98 Order Regarding Summary Judgment, *supra* note 36, at *6 (citing *Symantec*, 960 F.2d at 1476).

99 *See* Brent, *supra* note 2; Lemley, *supra* note 2; Francis, *supra* note 2; Coulson, *supra* note 2; *see also supra* Part II.

100 Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984).

101 *See id.* at 898.

102 *See id.* at 900.

Love when a "musical skeleton" of *Let It End* was played in court.[103] The jury "returned a verdict in plaintiff's favor on the issue of liability . . . ."[104] However, the trial court "granted the defendants' motion for judgment notwithstanding the verdict and, in the alternative, for a new trial," which Selle appealed.[105]

The court of appeals affirmed the trial court's holding which rejected the jury's decision in favor of the plaintiff and granted the defendants' motion for judgment notwithstanding the verdict.[106] Despite the presence of over thirty identical notes and more than forty identical rhythmic patterns, testimony by an expert witness who said such a level of similarity could not have occurred independently, a jury decision in favor of the plaintiff, and a defendant mixing up the two songs in court during the trial, the court still refused to support a finding of access or infringement.[107]

In the 2003 Ninth Circuit case *Newton v. Diamond*, an exact copy of six seconds of Newton's sound recording was sampled and looped to repeat more than forty times in a Beastie Boys song.[108] Though the sound recording had been properly licensed, no license had been secured for the use of the musical composition. Despite this identical copying, the court found the use of the sample was *de minimis* and therefore not infringing, because the copyrighted portion only consisted of three identical notes.[109] In a case where repeated copying was absolutely proven, three identical protected notes were not enough to find infringement of a musical composition.

Another illustrative Ninth Circuit case is *Three Boys Music Corp. v. Bolton*.[110] In *Three Boys Music*, while infringement was found based on a combination of five unprotectable elements, the elements shared between the songs were so similar that even the defendant's expert witness acknowledged their similarities.[111] The musicologist for the defendant "conceded that there were similarities between the two songs and that he had not found the combination of unprotectible elements in the [plaintiffs'] song" in

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103 *See Selle*, 741 F.2d at 903; *Selle v. Gibb*, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, http://mcir.usc.edu/cases/1980-1989/Pages/sellegibb.html ("The plaintiff made much of the fact that Maurice Gibb identified plaintiff's song as his own 'How Deep is Your Love' when it was played for him at trial.") [http://perma.cc/4BK8-EJS5].

104 *Selle*, 741 F.2d at 898.

105 *Id.*

106 *Id.*

107 *Id.* at 899–906.

108 Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2003).

109 *Id.* at 1190, 1196–97.

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

111 *Id.* at 485–86.

any songs written prior to the plaintiffs' creative work.[112] Though the court only evaluated a body of five unprotectable elements, the level of proof was still arguably high because both parties acknowledged their similarities in court.[113]

One more example is *Swirsky v. Carey*.[114] In *Swirsky*, the district court originally granted the defendants' motion for summary judgment, in part "because it found no precedent for substantial similarity to be 'founded solely on similarities in key, harmony, tempo or genre, either alone or in combination.'"[115] However, on appeal, the court reversed because the plaintiff's expert witness stated "the two songs' choruses shared a 'basic shape and pitch emphasis' in their melodies, which were played over 'highly similar basslines and chord changes, at very nearly the same tempo and in the same generic style.'"[116] The songs' choruses were sung in the key of B-flat, which the plaintiff's expert called a "suspicious coincidence."[117] The plaintiff's expert witness also testified that the choruses "shared a similar structure in that measures five through seven of each chorus were 'almost exactly' the same as the first three measures of each chorus."[118] *Swirsky* indicates that, prior to *Blurred Lines*, even when two songs' choruses share an identical key, nearly identical structures, and very similar bass lines, chord changes, tempos, and generic styles, the application of the law, despite being reversed in the court of appeals, was sufficiently unclear that it was originally dismissed under summary judgment.

Looking broadly at how the courts determined whether music copyright infringement occurred in past cases, it seems safe to say that, prior to *Blurred Lines*, a plaintiff could not easily prove an infringement had occurred. Plus, with two layers of evaluation for similarity—one based on the objective viewpoint of the trier of fact and the other resting on the opinions of a reasonable person—many individuals would have to agree that two songs were substantially similar before infringement could be found. As several cases have suggested, this was no easy feat, and a copyright owner was more likely than not to fail in an infringement claim.

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112 *Id.*
113 *Id.*
114 Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004).
115 *Id.* at 846.
116 *Id.* at 845.
117 *Id.*
118 *Id.*

The above-described music copyright landscape, with many filters and safeguards in place to limit infringement findings, is the legal environment in which the *Blurred Lines* controversy arose. The question raised was whether *Blurred Lines* infringed on Marvin Gaye's *Got to Give It Up* when there were no identical chord progressions, lyrics, or vocal melodies. Based on the courts' past behavior, the lack of identical elements likely worked against the Marvin Gaye estate. Despite the absence of traditional similarities, the Gaye estate was originally awarded more than $7 million in damages. In Part II, this Comment will discuss *Blurred Lines* and compare it to the outcomes in *Stay with Me* and *Uptown Funk*.

II. *BLURRED LINES*, *STAY WITH ME*, AND *UPTOWN FUNK*

The precedent set by music copyright infringement cases in the pre-*Blurred Lines* world strongly suggested that a party bringing an infringement suit faced a significant risk of losing. *Blurred Lines*, however, may be said to have upset prior precedent. Critics of the *Blurred Lines* decision have suggested the case was an evaluation of whether the "feel" and "style" of the song was copied from Marvin Gaye's *Got to Give It Up*, elements not previously considered protectable under copyright law.[119] In finding that *Blurred Lines* infringed, many have expressed concern that the holding sets a new and arguably lower standard for proving music copyright infringement.[120] The *Blurred Lines* decision, however, may have been the result of other factors independent of the music itself. There has been considerable discussion about the effect of Robin Thicke's contradictory statements and the negative impact it had on the jury, as well as the influence of the expert witnesses involved.[121] Despite these speculations, the settlements in *Stay with Me* and *Uptown Funk*

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119 *See, e.g.*, Adam R. Bialek, *California Jury Finds "Blurred Lines" Infringed "Got To Give It Up": Society's Mixed Signals On Copying and Intellectual Property Rights,* 27 INTELL. PROP. & TECH. L.J. 14, 15 (2015) ("What is clear is that the line between copying and evoking a 'feel' regarding music has just been blurred."); Keith Murphy, *7 Reasons the 'Blurred Lines' Verdict Should Have Everyone Spooked*, BET (last visited Feb. 10, 2016), http://www.bet.com/music/photos/2015/03/7-reasons-the-blurred-lines-verdict-should-have-everyone-spooked.html#!031315-music-questlove ("[M]ake no mistake this is FEEL not actual melody.").

120 *See, e.g.*, Bialek, *supra* note 119 ("Insofar as the jury's verdict may not end the legal analysis in this case, courts will need to evaluate where 'ideas' depart from 'expression' and what 'transformative' truly means in the context of fair use."); Wu, *supra* note 19 ("Consider the sheer number of creators who would be affected if such rulings were levied more widely. Everyone knows that the Rolling Stones borrowed their style from Chuck Berry and other rhythm-and-blues artists. Rush's first album sounds a lot like Led Zeppelin—who copied Robert Johnson, among others.").

121 *See, e.g.,* Emily Miao & Nicole E. Grimm, *'Blurred Lines' Artists Lose Multimillion-Dollar Copyright Lawsuit*, 22 WESTLAW J. INTELL. PROP. 1, 4 (2015).

may suggest that other songwriters and their representatives do not want to take their chances in court.

This Part provides a more detailed description of the *Blurred Lines* case, a discussion about factors that might have influenced the *Blurred Lines* outcome, and an analysis of the out-of-court settlements in *Stay with Me* and *Uptown Funk*.

A. The *Blurred Lines* Case

When the Marvin Gaye estate contacted representatives for *Blurred Lines* songwriters Robin Thicke and Pharrell Williams in 2013 about *Blurred Lines'* possible infringement on Marvin Gaye's *Got to Give It Up*, rather than settle out of court, lawyers for Thicke and Williams forcefully struck back by suing for a declaratory judgment stating that no infringement occurred.[122] The following examination of the *Blurred Lines* case discusses how its result differs from the holdings in traditional music copyright infringement cases.

1. The Complaint for Declaratory Relief

Blurred Lines was written by Pharrell Williams, Robin Thicke, and Clifford Harris, Jr. (a.k.a. T.I.), and released in or around March 2013.[123] At the time the *Blurred Lines* songwriters filed their complaint for declaratory relief in August 2013, the song had already been viewed more than 140 million times on YouTube.[124] By the time it was awarded Billboard's Song of the Summer, one month after the complaint was filed in September 2013, *Blurred Lines* had held the number one spot on the Billboard Hot 100 chart for twelve weeks, sold 5.4 million downloads, and set the record for the highest weekly audience in the twenty-three-year history of Billboard's Radio Songs chart.[125]

In the complaint filed on August 15, 2013, the *Blurred Lines* songwriters/plaintiffs launched a preemptive strike. The songwriters/plaintiffs stated they were contacted by the Marvin Gaye estate, who claimed *Blurred Lines* infringed on Marvin Gaye's song *Got to Give It Up* and that if the songwriters did not "pay a monetary settlement of the Gayes' claim," the Gayes would "initiate litigation for copyright infringement . . . ."[126] Rather than

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122 *See generally* Williams Complaint, *supra* note 8.

123 *Id.* at 6.

124 *Id.*

125 Gary Trust, *Robin Thicke's 'Blurred Lines' Is Billboard's Song of the Summer*, BILLBOARD (Sept. 5, 2013), http://www.billboard.com/articles/news/5687036/robin-thickes-blurred-lines-is-billboards-song-of-the-summer [http://perma.cc/HC29-J37N].

126 Williams Complaint, *supra* note 8, at 16.

wait to be sued, the *Blurred Lines* songwriters initiated a declaratory judgment action.

The *Blurred Lines* songwriters/plaintiffs denied any infringement, claiming "there are no similarities" between the two songs "other than commonplace musical elements."[127] The complaint stated that "[t]he basis of the Gaye defendants' claims is that 'Blurred Lines' and 'Got To Give It Up' 'feel' or 'sound' the same."[128] However, the *Blurred Lines* plaintiffs defended themselves by stating: "Being reminiscent of a 'sound' is not copyright infringement. The intent in producing 'Blurred Lines' was to evoke an era. In reality, the Gaye defendants are claiming ownership of an entire genre, as opposed to a specific work . . . ."[129]

The *Blurred Lines* plaintiffs requested one of two alternative declaratory judgments from the court.[130] The first was a court declaration stating "the Gayes do not have an interest in the copyright to the composition 'Got To Give It Up' sufficient to confer standing on them to pursue claims of infringement of that composition[.]"[131] In the alternative, the *Blurred Lines* team requested a declaration that "'Blurred Lines' does not infringe 'Got To Give It Up' or otherwise violate the Gayes' rights."[132] Both alternatives attempted to defeat a claim of infringement on the part of the Gaye estate before the claim could be raised.

Alternative number one attacked the Gayes' ownership of the copyright for *Got to Give It Up*, a tactic discussed in Part I, Section B of this Comment.[133] Note also that if the *Blurred Lines* team received either of the declaratory judgments sought, the Gaye estate would be prevented from succeeding in a copyright infringement claim, and no settlement between the two parties would be necessary. Some may say the *Blurred Lines* team was correct in this course of action, as the courts' history of reluctance to find infringement suggested the Gaye estate did not have a strong case. However, others may believe that reacting with a preemptive lawsuit was overconfident.

2. The Gaye Estate's Counterclaims

In response to the *Blurred Lines*' songwriters' complaint for declaratory relief, the Gaye estate filed two counterclaims accusing the *Blurred Lines* songwriters of infringing *Got to Give*

127 *Id.* at 1.
128 *Id.* at 2.
129 *Id.*
130 *Id.* at 22.
131 *Id.*
132 *Id.*
133 *See supra* Part I.B.

It Up.[134] The first counterclaim was filed on October 20, 2013, by Marvin Gaye's son, Frankie Christian Gaye, and daughter, Nona Marvisa Gaye ("Frankie & Nona Gaye's first amended counterclaim").[135] The second was filed on November 19, 2013, by Marvin Gaye's son, Marvin Gaye, III ("Marvin Gaye, III's counterclaim").[136] Most of the allegations in Frankie & Nona Gaye's first amended counterclaim are reiterated in Marvin Gaye, III's counterclaim.[137]

Frankie & Nona Gaye's first amended counterclaim stated that Frankie Christian Gaye, Nona Marvisa Gaye, and Marvin Gaye, III were the children of Marvin Gaye, and co-owners of the musical composition of *Got to Give It Up*.[138] This statement may have served as a response to the questions regarding the Gaye estate's ownership and legal standing to bring suit.

The counterclaim then accused the *Blurred Lines* songwriters of:

> [B]latant copying of a constellation of distinctive and significant compositional elements of Marvin Gaye's classic #1 song, "Got to Give it Up" [as well as] the duplicitous actions by defendant Thicke of first publicly admitting "Got to Give it Up" was used in creating "Blurred Lines," in order to take advantage of the legend and utmost credibility of Marvin Gaye, and to drive sales, but then joining with his collaborators to file a lawsuit against Marvin Gaye's children when they rightfully raised concerns about his unlawful copying.[139]

In support of the Gaye estate's accusations against Thicke, the counterclaim cited both a *GQ* magazine interview of Robin Thicke dated May 7, 2013, and a *Billboard* magazine interview of Thicke dated July 9, 2013, where Thicke said he told Pharrell Williams during the *Blurred Lines* writing sessions that *Got to Give It Up* was one of his "favorite songs of all time," and they should write something with a similar "groove" or "feel."[140] Thicke was accused of changing his story after filing the complaint for declaratory relief, citing an interview with "celebrity gossip website, *TMZ*," where Thicke denied having Marvin Gaye in mind when he wrote *Blurred Lines*.[141]

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134 *See generally* Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10; Marvin Gaye III's Counterclaim, *supra* note 10.

135 *See* Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 11–12.

136 Marvin Gaye III's Counterclaim, *supra* note 10, at 22.

137 *See generally* Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10; Marvin Gaye III's Counterclaim, *supra* note 10.

138 *See* Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 11–13.

139 *Id.* at 4.

140 *Id.* at 5.

141 *Id.* at 6.

By describing Thicke's contradictory media statements, the Gaye estate's legal team accomplished two things. First, it undermined Thicke's credibility. As we will see later in this Section, Thicke's character may have played an important role in the large settlement awarded by the jury. Second, the Gaye estate's legal team presented evidence that Thicke admitted to having access to *Got to Give It Up*, which is the first element required to demonstrate "copying in fact" using indirect evidence.[142]

The counterclaim also alleged that an "ordinary observer would recognize this appropriation," followed by a list of supporting comments from *New York Times* writer Rob Hoerburger, music critic Paul Cantor, Marvin Gaye biographer David Ritz, and *Bloomberg Business Week's* Paul Barrett.[143] The counterclaim reinforced this allegation by stating that "ordinary observers all over the world have remarked that the two songs sound the same, which they do."[144] In making these statements, the Gaye estate's lawyers laid the groundwork for establishing that an "ordinary lay observer" could detect the similarities between the two songs, which, if true, would satisfy prong two of the Ninth Circuit's substantial similarity test, the intrinsic analysis.[145]

The counterclaim then described the elements the Gaye estate believed were substantially similar between the two songs:

> The substantial similarities found in "Got to Give it Up" and "Blurred Lines" are the result of many of the same deliberate creative choices made by their respective composers, far surpassing the similarities that might result from attempts to evoke an "era" of music or a shared genre, as the Blurred Writers wrongly asserted in this action. . . . Many of the main vocal and instrumental themes of "Blurred Lines" are rooted in "Got to Give it Up"; namely, the signature phrase, vocal hook, backup vocal hook, their variations, and the keyboard and bass lines. Those important and distinctive compositional elements are substantially similar in "Blurred Lines" and "Got to Give it Up." Moreover, the shared departures from convention, such as the unusual cowbell instrumentation, omission of guitar, and use of male falsetto, all contribute further to the finding of substantial similarity here.[146]

Note that what is missing is any evidence that the two songs have any identical or nearly identical vocal melodies, chord progressions, or lyrics—elements traditionally considered required for a finding of infringement.[147] Rather, the Gaye

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142 *See supra* Part I.B.
143 Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 7.
144 *Id*. at 34.
145 *See supra* Part I.C.
146 Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 37, 38.
147 *See supra* Part I.C.

estate's counterclaim describes what appear to be similarities indirectly related to each other, such as themes that are "rooted" in *Got to Give It Up*, or similar musical choices such as "unusual" or omitted instrumentation and a falsetto vocal technique.[148] One could argue that such an indirect relationship was not commonly viewed by courts as sufficient for a finding of infringement. If so, it may be said that the Gaye estate presented a new theory of infringement for the court to consider.

Finally, and importantly, Frankie & Nona Gaye's first amended counterclaim included a preliminary musicology report comparing the recorded versions of the two songs, written by musicologist Judith Finell.[149] The report stated there was a "constellation"[150] of at least eight substantially similar compositional features between the two works, observing that "[t]heir substantially similar elements in both their vocal melodies and instrumental accompaniments occur simultaneously in each work, coinciding to form a similar 'constellation' of features."[151] Ms. Finell expressed her belief that "[t]he two songs' substantial similarities surpass the realm of generic coincidence, reaching to the very essence of each work."[152] She also opined that "the ordinary 'lay' listener would likely recognize the substantial similarities" between the two songs, and preliminarily concluded that *Blurred Lines* was not created independently of *Got to Give It Up*.[153] By providing a written report from an expert musicologist, the Gaye estate's legal team formed the basis for an argument that their infringement claim should survive the extrinsic analysis, prong one of the Ninth Circuit's substantial similarity test.[154]

In summary, the Gaye estate's counterclaims addressed the question of their ownership of the *Got to Give It Up* copyright. The counterclaims then provided evidence showing a strong

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148 Frankie & Nona Gaye First Amended Counterclaim, *supra* note 10, at 37, 38.

149 JUDITH FINELL, PRELIMINARY REPORT: COMPARISON OF "GOT TO GIVE IT UP" AND "BLURRED LINES" (2013), http://www.hollywoodreporter.com/sites/default/files/custom/Documents/ESQ/musicologyblurred.pdf [http://perma.cc/QU2D-3YM9].

150 The repeated use of the term "constellation" does not appear to be defined in Frankie & Nona Gaye's First Amended Counterclaim or Judith Finell's musicology report. Merriam-Webster dictionary defines "constellation" as "a group of stars that forms a particular shape in the sky and has been given a name; [a] group of people or things that are similar in some way." *Constellation*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/constellation [http://perma.cc/MH4H-N24D]. Based on the plain language definition and the context in which "constellation" is used throughout the *Blurred Lines* court documents, it may be acceptable to infer that "constellation" in this context refers to the group of elements that are considered similar between the two songs, forming a particular or identifiable body of sound.

151 FINELL, *supra* note 149, at 6.

152 *Id.* at 7.

153 *Id.* at 8, 47.

154 *See supra* Part I.C.

likelihood of Robin Thicke's access to *Got to Give It Up* and placed Thicke's character into question due to his inconsistent statements to the media. Finally, the Gaye estate appeared to provide the factual foundation necessary to set up a claim that its allegations would meet both prongs of the Ninth Circuit substantial similarity test.

3. The Plaintiffs'/Counterdefendants' Motion for Summary Judgment

On July 22, 2014, attorneys for the *Blurred Lines* songwriters filed a Motion for Summary Judgment.[155] First, the *Blurred Lines* legal team argued that the Gaye estate did not own copyrights for the musical elements allegedly shared by the two songs.[156] The attorneys pointed out the fact that the Gaye estate only owned the copyright for the musical composition, not the sound recording, of *Got to Give It Up,* noting that the copyrights are not the same.[157] The *Blurred Lines* attorneys then stated that many of the alleged "similarities" cited by the Gaye estate were based on "commonplace elements" only found in the sound recording of *Got to Give It Up*[158] and absent from the sheet music submitted to the Copyright Office when the musical composition was registered in 1977.[159] The attorneys argued that since the musical elements in question were not part of the sheet music submitted, the musical elements were "not part of [Marvin Gaye's] copyrighted composition that Defendants claim to own."[160] This argument urged the court to limit the Gaye estate's copyright-protected materials to what was noted in the sheet music, excluding the Gaye estate from claiming ownership of any musical elements found only in the sound recording.

Attorneys for the *Blurred Lines* songwriters also attacked the allegation of substantial similarity, stating "[t]here is no substantial similarity in the melody, harmony, rhythm, structure, or lyrics" between the two songs.[161] The attorneys highlighted the fact that Judith Finell's musicology report "[did] not contain *two consecutive notes* with the same pitch and duration and placement in the measure (*i.e.,* rhythm) in both songs,"

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155 Plaintiffs and Counter-Defendants' Notice of Motion and Motion for Summary Judgment or, in the Alt., Partial Summary Judgment; Memorandum of Points and Authorities, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. July 22, 2014), 2014 WL 5026250 [hereinafter Williams Motion for Summary Judgment].

156 *Id.* at 1.

157 *Id.* at 2, 6.

158 *Id.* at 1–2.

159 *Id.* at 1.

160 *Id.* (emphasis in original).

161 *Id.* at 8.

emphasizing that "*[t]his is highly unusual in an infringement claim*."[162] The motion identified several missing similarities:

> The melodies of the two songs are different. There is no melodic phrase in BLURRED that also appears in GIVE. The harmonies are not similar. There is no sequence of two chords played in the same order and for the same number of measures (duration) in GIVE and BLURRED. GIVE and BLURRED do *not* contain *three* chords in common. . . . The rhythms are different. . . . The structures also are very different. . . . The lyrics are entirely different. There are no lyrical phrases in common. There is no substantial similarity between the two works.[163]

In short, the *Blurred Lines* team argued that the long list of significant differences between the works negated a claim of "substantial similarity."

The legal team devoted an entire section to its contention that the musicologist's preliminary report failed to identify any substantial similarity between *Blurred Lines* and *Got to Give It Up*.[164] As previously mentioned, a claim will not survive summary judgment in the Ninth Circuit if the party alleging infringement cannot demonstrate a genuine issue of material fact regarding the substantial similarity between the two works.[165]

The motion claimed that the eight similarities identified in the musicology report were "unprotectable *ideas* that are the basic building blocks of composition available to all composers," and as *ideas* (which are not copyrightable), they were not eligible for copyright protection.[166] The motion also challenged the contention that the constellation of unprotectable elements created a combination sufficiently original to qualify for copyright protection.[167] The *Blurred Lines* legal team strongly asserted that "[i]t would turn copyright law on its head to allow the Gayes to claim a copyright in the 'combination' of musical building blocks . . . when the actual similarity in notes is virtually non-existent."[168]

The *Blurred Lines* lawyers engaged in a detailed discussion claiming only three of the eight alleged similarities were "reflected in the [*Got to Give It Up*] Copyright Deposit," and since the remaining five similarities were excluded from the copyright deposit (as discussed above), they were not protected by

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162 *Id.* at 2.
163 *Id.* at 8–9 (citations omitted).
164 *Id.* at 9–23.
165 *See supra* Part I.B–C.
166 Williams Motion for Summary Judgment, *supra* note 155, at 10.
167 *Id.* at 10–11.
168 *Id.* at 12.

copyright.[169] The *Blurred Lines* team then attempted to have the court dismiss the three remaining alleged similarities as both non-original and therefore uncopyrightable elements, as well as so insignificant that they were *de minimis*.

Summarizing, the *Blurred Lines* legal team argued that most of the elements in question were solely featured in the sound recording of *Got to Give It Up*, which the Gaye estate did not own, and the remaining musical elements in question were uncopyrightable. The *Blurred Lines* legal team relied heavily on the fact that there were no identical melodic or harmonic phrases, vocal melodies, chord progressions, or lyrics between *Blurred Lines* and *Got to Give It Up*, and claimed that, as a result, no substantial similarity between the songs existed. Arguments were raised stating that the majority of similarities identified by expert musicologist Judith Finell were uncopyrightable ideas or concepts. The copyrightability of the collective body of uncopyrightable musical elements was also challenged, as the *Blurred Lines* attorneys contended that the arrangement of the musical elements was not sufficiently original to merit protection.

4. Counterclaimant's Opposition to Motion for Summary Judgment

In September 2014, the Gaye estate filed a Joint Memorandum of Points and Authorities in Opposition to Plaintiffs and Counterdefendants' Motion for Summary Judgment.[170]

Many of the Gaye estate's arguments had already been raised in their counterclaims. However, perhaps the most novel and important new point was an argument that urged the court to consider "[t]he overall impact of a combination of elements" to determine infringement, even if the individual elements were not copyrightable, identical, or even very similar when compared alone.[171] The Gaye estate cited both *Swirsky* and *Three Boys Music* as two cases where courts compared a combination of "unprotectable elements" yet still concluded that the similarities were sufficient to at least survive summary judgment (*Swirsky*) or uphold a jury finding of substantial similarity (*Three Boys Music*).[172] Notably, unlike the *Blurred Lines* case, the common

169 *Id.* at 14–23.

170 Counter-Claimants' Joint Memorandum of Points and Authorities in Opposition to Plaintiffs and Counter-Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGGRx) (C.D. Cal. July 22, 2014), 2014 WL5408808 [hereinafter Opposition to Summary Judgment].

171 *Id.* at 18–22.

172 *See* Swirsky v. Carey, 376 F.3d 841, 843 (9th Cir. 2004); Three Boys Music Corp. v.

elements between the songs in both *Swirsky* and *Three Boys Music* were nearly identical when compared by themselves.[173] In comparing *Blurred Lines* to *Swirsky* and *Three Boys Music*, the Gaye estate arguably attempted to expand what qualifies as copyright infringement from what may be called "a grouping of similar unprotectable elements that are nearly identical" to a standard that could be described as "a grouping of similar unprotectable elements that, taken together, sound similar to a grouping of the same similar unprotectable elements *despite the absence of identical or nearly identical copying of any one of the individual elements*."

If the court accepted the Gaye estate's proposed theories, copyright infringement would be expanded to include not only groupings of identical or nearly identical uncopyrightable elements, but groupings or shared creative choices that result in an overall sound or feel that is considered a similar expression of an idea, even in the absence of identical or nearly identical melodies, sequences of notes, chord progressions, lyrics, or other individual elements. Though not specifically stated in the Gaye estate's opposition to summary judgment, this was arguably the legal leap the Gaye estate asked the court to make.

5. Order Regarding the Plaintiffs' and Counterdefendants' Motion for Summary Judgment

On October 30, 2014, the district court issued its order regarding the *Blurred Lines* team's motion for summary judgment.[174] As described in Part I, Section C, the court first explained under what circumstances a motion for summary judgment would be granted.[175] The court must conduct prong one of the substantial similarity test, an objective extrinsic test comparing the *protected* elements between each work as well as the *body of unprotected elements* of each work to determine if substantial similarity exists.[176] If the court finds "indicia of 'a sufficient disagreement' concerning the substantial similarity of two works,"[177] the infringement claim survives summary judgment and moves to the jury.[178] The jury then conducts prong two, the subjective intrinsic analysis.[179]

Bolton, 212 F.3d 477, 480 (9th Cir. 1999).

173 *See Swirsky*, 376 F.3d 841, 845–46; *Three Boys Music*, 212 F.3d 477, 485–86.

174 Order Regarding Summary Judgment, *supra* note 36, at *1.

175 *See supra* Part I.C.

176 Order Regarding Summary Judgment, *supra* note 36, at *6.

177 *Id.* (citing Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1472 (9th Cir. 1992) (citations omitted)).

178 *Id.*

179 *Id.* at *6.

Once again, note that the extrinsic test described by the district court did not state or cite any cases showing that a body of unprotected elements *that are not individually identical or nearly identical to each other* qualifies for copyright protection.

First, the court agreed that the Copyright Act of 1909 applied to the Gaye estate's copyright, and limited copyright protection to the lead sheet deposited with the Copyright Office.[180] Limiting protection to the lead sheet drastically reduced the list of comparable elements.[181] The alleged infringements were whittled down to five items: "[the] 11-note signature phrase, four-note hook, four-bar bass line, 16-bar harmonic structure and four-note vocal melody."[182]

The court then evaluated each of the protected elements in question, comparing the arguments made by the Gaye estate's expert witnesses, Judith Finell and Ingrid Monson,[183] with the responses from the *Blurred Lines* team's musicologist, Sandy Wilbur.[184] Ultimately, the court denied summary judgment.[185]

The first alleged similarity was the signature phrase, described by Finell as "[a] phrase . . . within a longer melody, similar to a sentence within a paragraph or a line within a poem."[186] Finell alleged that the signature phrases of the two songs were substantially similar because both phrases repeated their starting tone several times, contained "a similar series of scale degrees with similar rhythms," used identical rhythms for the first six tones, utilized the same device of a melodic "tail" (melisma) on their last lyric,[187] and featured substantially similar melodic contours.[188]

Wilbur disagreed, "claim[ing] that the melody, harmony, and rhythm of the songs are different . . . [n]o other notes in the Signature Phrases have the same pitch and placement . . . the starting tones are different in each song, and are played over different chords"; Finell's analysis was "incomplete"; and "a complete comparison of the melodic phrases and harmonies shows that there are substantial differences."[189] Wilbur also

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180 *Id.* at *8–9.

181 *Id.* at *19.

182 *Id.*

183 *Id.* at *3–4 ("Ingrid Monson is the Quincy Jones Professor of African American Music at Harvard University. Defendants retained her as an additional expert.").

184 *Id.* at *12–16.

185 *Id.* at *20.

186 *Id.* at *12 (citation omitted).

187 Finell defines a "melisma" as "a vocal melody in which one syllable or lyric is held while sung with several successive pitches, rather than a single pitch for each syllable." *Id.*

188 *Id.*

189 *Id.* at *13.

"dismiss[ed] the identical rhythm of the first six notes of each signature phrase as a 'common musical idea or device,'"[190] noting that Chuck Berry's *Johnny B. Goode*, the Beatles' *Hard Day's Night*, and War's *Low Rider* served as three examples of songs preceding *Got to Give It Up* that utilized the same rhythmic pattern.[191] Wilbur categorized melismas at the end of melodic phrases as "common musical device[s], and that those in 'Got to Give It Up' and 'Blurred Lines' differ based on the pitches, rhythm, placement and melodic contour of the sustained lyric."[192] Wilbur also characterized the melodic contours of the signature phrases as "substantially different" and "commonplace."[193]

Regarding the second alleged similarity, claiming that "three of the four notes of the songs' hooks are identical in scale degree," Wilbur noted that "Finell fail[ed] to space the hooks correctly within the measure, and . . . omit[ted] the subsequent melisma to give a misleading impression of similarity."[194] In other words, the hooks themselves differed because the notes were different, played in a different rhythmic pattern, and Finell omitted the ending notes of the *Blurred Lines* hook.

In terms of the third alleged similarity, the opening bass line, Finell claimed that "the bass line that begins in bars 1–4 of 'Blurred Lines' and is repeated throughout the song is similar to the bass line in bars 1–4 of 'Got to Give It Up.'"[195] However, Wilbur argued that "the four bars of each song have only three notes in common . . . [and] the differences between the bass lines outweigh the similarities."[196] The only commonality Wilbur acknowledged between the two bass lines was that "'the bass play[s] the root of the chord,' a 'commonplace idea' and 'the most fundamental role of the bass in popular music.'"[197] Wilbur cited Curtis Mayfield's *Superfly* as "prior art," or an example of a song that preceded *Got to Give It Up* which also featured the bass playing the root of the chord.[198]

The Gaye estate's second expert witness, Ingrid Monson, provided the arguments for the last two elements between *Blurred Lines* and *Got to Give It Up* considered by the court. In terms of harmonic similarity, Monson claimed that "the

190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.* at *14.
195 *Id.* at *15.
196 *Id.*
197 *Id.*
198 *Id.*

resemblance of the melodies is so strong that the chord progression on 'Got to Give It Up' can serve as a substitute progression for 'Blurred Lines.'"[199] Though Wilbur's analysis was completed before Monson's declaration, the court appeared to interpret Wilbur's prior report as an argument refuting Monson's claim that the chord progression in one song could replace the chord progression of the other.[200]

Finally, Monson claimed that "there is a substantial similarity between a portion of the lead vocal melody of 'Got to Give It Up' and a melodic line in 'Blurred Lines.'"[201] Monson identified three notes in the vocal melodies of both songs that "chromatically ascend" (or go up in pitch). Though the melodies were not identical in pitch or in the note progression in which they ascended, Monson described the three-note ascent in each song as "recognizably related."[202]

In summary, despite the Gaye estate's expert witnesses identifying aspects of the five elements in question as "substantially similar," the *Blurred Lines* team's expert witness provided evidence that the similarities were generally quite limited and accompanied by a far greater number of dissimilarities, arguably suggesting that the elements were more different than the same. Additionally, the *Blurred Lines* team's expert argued that many of the features, including those that were allegedly "identical" according to the Gaye estate's experts, were commonly used musical tools or devices utilized in songs written before the creation of *Got to Give It Up*.

The court rejected the argument that the elements which were commonplace were not eligible for protection.[203] Instead, the court said "the combination and selection of these elements may be considered under the extrinsic test because 'the over-all impact and effect indicate substantial appropriation.'"[204]

In the end, after boiling down the list of allegedly similar elements to only those components protected by the Gaye estate's copyright, the district court was convinced that both the remaining shared elements were sufficiently similar and the expert witnesses' opinions about these similarities were disparate enough to have presented a "genuine issue of material fact" that

199 *Id.* at *17.
200 *Id.*
201 *Id.* at *18.
202 *Id.*
203 *Id.* at *19.
204 *Id.* (citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

merited a jury's evaluation. As a result, the Gaye estate's allegations survived the motion for summary judgment.[205]

The court's decision to deny summary judgment seems to suggest that under the new *Blurred Lines* standard, songs which contain elements that are not identical or nearly identical, or only possess rather distant similarities that are commonplace and unprotectable in and of themselves, may still be considered infringing if expert testimony is presented that argues substantial similarity exists. Furthermore, the absence of nearly identical melodies, lyrics, chord progressions, and note sequences will no longer suffice as a defense against an infringement allegation so long as an expert witness claims the songs are "substantially similar."

It is worth noting that, had the *Blurred Lines* legal team's motion for summary judgment succeeded, the case would never have gone to a jury.[206] This may come as a surprise for those outside of the legal field, as many may assume that filing a lawsuit automatically guarantees a jury trial. This is not the case for copyright infringement suits, as a claim of infringement will not be heard by a jury if it does not survive a motion for summary judgment.[207]

6. The Jury Verdict

The jury was empaneled on February 24, 2015, and the trial proceeded for seven days.[208] During this time, the lawyers for both sides presented the jurors with many of the same arguments described above.[209] Musical interpretations of the *Got to Give It Up* sheet music originally deposited with the Copyright Office were presented to the jurors and compared with *Blurred Lines*.[210] Expert testimony was also presented,[211] as it appears

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205 *Id.* at *19–20.

206 *See supra* Part I.C.

207 *Id.*

208 Proceedings: (In Chambers) Order Re Plaintiffs and Counter-Defendants' Motion for Judgment as a Matter of Law, Declaratory Relief, A New Trial, or Remittitur; Defendants and Counter-Claimants' Joint Post-Trial Motion for Declaratory Relief; Defendants and Counter-Claimants' Joint Post-Trial Motion for Injunctive Relief, or in the Alternative, for Ongoing Royalties; Counter-Claimants' Joint Motion for Prejudgment Interest, Williams v. Bridgeport Music, Inc., No. LACV13-06004JAK (AGRX), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

209 *See* Defendant Bridgeport Music, Inc. et al.'s Opening Statement, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Feb. 24, 2015), 2015 WL 4935274 [hereinafter Gaye Estate Opening Statement]; Plaintiff Pharrell Williams et al.'s Opening Statement, Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK (AGRx) (C.D. Cal. Feb. 24, 2015), 2015 WL 4935275 [hereinafter Williams Opening Statement].

210 *See* Defendant Bridgeport Music, Inc. et al.'s Closing Statement, Williams v. Bridgeport Music, Inc., No. CV 13-06004-JAK (AGRx) (C.D. Cal. Mar. 5, 2015), 2015 WL 4935286 [hereinafter Gaye Estate Closing Statement]; Pharrell Williams et al.'s Closing

the jurors were charged with conducting both extrinsic and intrinsic tests.[212]

The jury instructions seem to have incorporated the lower standard of proof employed by the district court.[213] In describing the intrinsic similarity test, the court explained that "[i]ntrinsic similarity is shown if an ordinary, reasonable listener would conclude that the total concept and feel of the Gaye parties' work and the Thicke parties' work are substantially similar."[214] The *Blurred Lines* legal team would later claim in its motion for judgment as a matter of law that the breadth of this jury instruction and its failure to limit the intrinsic evaluation to protectable elements was erroneous.[215] The court rejected this argument, stating that it adequately instructed the jury elsewhere to limit its evaluation to protectable elements.[216] The court also defended a jury instruction regarding the extrinsic test, stating that a finding of substantial similarity *did not require that each individual element was substantially similar*, so long as there was "enough similarity between a work of the Gaye Parties and an allegedly infringing work of the Thicke Parties to comprise a substantial amount."[217] Though the similarity between the district court's evaluation and the jury instructions may be subtle, instructing jurors to evaluate the overall work without any requirement of nearly identical elements seems to mirror the broader standard utilized by the district court in its decision to deny summary judgment.

After deliberating for two days, the jury returned its verdict on March 10, 2015.[218] The jury found that copyright infringement had occurred, but only on the part of Robin Thicke and Pharrell Williams.[219] The jury awarded the Gaye estate $4,000,000 for actual damages.[220] Additionally, the jury found that, due to the infringement, Thicke profited by $1,610,455.31 and Williams

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Statement and Defendant's Rebuttal, Williams v. Bridgeport Music, Inc., No. CV 13-06004-JAK (AGRx), 2015 WL 4935287 (C.D. Cal. Mar. 5, 2015) [hereinafter Williams Closing Statement].

211 *See* Gaye Estate Closing Statement, *supra* note 210; Williams Closing Statement, *supra* note 210.

212 Jury Instructions at 69, Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Mar. 10, 2015), 2015 WL 1322666 [hereinafter Jury Instructions].

213 *Id.* at No. 3.

214 *Id.*

215 Order Re Plaintiffs and Counter-Defendants' Motion for Judgment as a Matter of Law, Williams v. Bridgeport Music, Inc., No. LACV1306004JAKAGRX (C.D. Cal. July 14, 2015), 2015 WL 4479500, at *18.

216 *Id.*

217 *Id.* at *19.

218 *Id.* at *1.

219 *Id.*

220 *Blurred Lines* Special Verdict, *supra* note 11.

profited by $1,768,191.88.[221] In total, the Gaye estate was awarded more than $7.3 million.[222]

Since the jury verdict, the district court has reduced the amount awarded to $5.3 million,[223] and the case is currently being appealed.[224]

The *Blurred Lines* result was quite unexpected in light of prior cases. As compared to *Selle v. Gibb*—where the court rejected the jury's finding of infringement and ultimately decided that no infringement occurred, despite twenty-four identical notes in the first eight bars, thirty identical rhythms throughout the song, fourteen identical notes, eleven identical rhythms in the last four bars of both songs, and a member of the Bee Gees mixing up his song with Selle's[225]—it seemed unlikely that *Blurred Lines* would have been viewed as infringing since the similarities between *Blurred Lines* and *Got to Give It Up* were considerably fewer than in *Selle v. Gibb,* and none were identical.

Compared to *Newton v. Diamond*, where the infringement was said to be *de minimis* when three notes were copied exactly and looped to repeat more than forty times,[226] it seemed that *Blurred Lines* could have qualified for a *de minimis* defense, since there were only five elements in question, most of which were commonly used in other songs of a similar genre and not identical.

Blurred Lines did not appear to meet the high level of proof demonstrated in *Three Boys Music*, where the elements shared between the songs were so similar that even the expert witness for the alleged infringer acknowledged their similarities.[227]

Nor did *Blurred Lines* appear to exhibit as many similarities as found in *Swirsky*, where the district court initially granted the defendant's motion for summary judgment even though the two songs' choruses shared an identical key, nearly identical structures, and very similar bass lines, chord changes, tempos, and generic styles.[228]

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221 *Id.*

222 Order Re Plaintiffs and Counter-Defendants' Motion for Judgment as a Matter of Law, Williams v. Bridgeport Music, Inc., No. LACV13-06004JAK(AGRX), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

223 Anthony McCartney, *Judge Trims 'Blurred Lines' Song Dispute Verdict to $5.3M*, ASSOC. PRESS (July 15, 2015, 4:14 AM), http://bigstory.ap.org/urn:publicid:ap.org:520edacfc62c4b4292b4fac3bac5dd9c [http://perma.cc/T652-E2RW].

224 Kenneally & Chelin, *supra* note 7.

225 Selle v. Gibb, 741 F.2d 896, 899, 905–06 (7th Cir. 1984).

226 Newton v. Diamond, 388 F.3d 1189, 1190, 1196–97 (9th Cir. 2003).

227 Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485–86 (9th Cir. 2000).

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

The legal precedent suggested by these and other prior cases seems to have shifted following the *Blurred Lines* holding. Even where elements are not close enough to be considered "nearly identical" or unique enough to be protectable under copyright law, now all that appears necessary to survive summary judgment is an expert witness who will testify that there is a "substantial similarity" between two songs.

B. Factors Which May Have Contributed to the Outcome

By itself, the decision to deny the *Blurred Lines* legal team's motion to dismiss represents an unusual holding on the part of the district court.[229] The jury decision which followed has also been viewed as remarkable, and some observers have questioned whether the jury outcome was too greatly influenced by negative opinions about Robin Thicke.[230] Some may wonder if *Blurred Lines* is simply an anomaly. For a fully informed discussion, it may be wise to consider some of the exogenous factors that could have contributed to the *Blurred Lines* verdict.

A major deciding factor appears to have been the Gaye estate's use of expert musicologists. The effect of this was noted in the district court's decision to deny summary judgment.[231] The jury may have also been strongly influenced by expert testimony. Some have noted that the jury "put significant weight on the expert witness for the Gaye family, musicologist Judith Finell . . . ."[232] Another commentator suggested it was the musicologists' breaking down of the groove into "something 'scientifically quantifiable,' that effectively convinced the jurors that . . . 'Blurred Lines' was in some part derived from Gaye's work."[233]

The use of expert testimony, however, is not uncommon in music copyright infringement cases and considered appropriate for consideration when conducting the extrinsic analysis test.[234] Thus, it is unlikely that expert testimony could be viewed as peculiar to the *Blurred Lines* case. For jurors conducting both extrinsic and intrinsic tests, it may be safe to say that the effect

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229 *See supra* Part II.A.

230 *See* Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1231 (2015).

231 Order Regarding Summary Judgment, *supra* note 36, at *3, *14.

232 *See* Emily Miao & Nicole E. Grimm, *'Blurred Lines' Artists Lose Multimillion-Dollar Copyright Lawsuit,* 22 WESTLAW J. INTELL. PROP. 1, 4 (2015).

233 Matthew D. Morrison, *Gaye vs. Thicke: How blurred are the lines of copyright infringement?*, OXFORD U. PRESS BLOG (Mar. 26, 2015), http://blog.oup.com/2015/03/blurred-lines-copyright-infringement/ [http://perma.cc/N8JJ-43T4].

234 *See supra* Part I.C.

of expert testimony in future cases will likely be similar to the effect it had in *Blurred Lines*.

Commentators have also suggested that Robin Thicke's contradictory statements greatly influenced the jurors. Observers have stated that "[w]hether this case could have been decided differently had Thicke not contradicted himself is debatable."[235] Thicke's contradictory statements to the media regarding the influence of *Got to Give It Up* on the writing of *Blurred Lines*[236] were blamed for "cast[ing] him in an unfavorable light before the jury that no doubt influenced the jury's verdict."[237] It seems reasonable to speculate that Thicke's inconsistent media statements and his poorly timed denial of Marvin Gaye's influence on his songwriting (after the *Blurred Lines* suit was filed)[238] may have created a perception on the part of jurors that Thicke was dishonest. Thicke's contradictory statements were also blamed for conceding access to *Got to Give It Up*, with one observer noting that "[w]ith respect to access, Robin Thicke was his own worst enemy."[239]

However, it is unlikely that Thicke is the first party in an infringement suit to displease a jury.[240] Considering the nature of the accusation, plagiarism—which is, at its core, a form of theft—it seems inevitable that some infringement suits will include parties that behave in a manner frowned upon by jurors (whether it is a songwriter who is shamelessly infringing or a copyright holder who is sinister enough to falsely accuse an innocent songwriter). With this likelihood in mind, it does not seem reasonable to say an infringement case involving parties that jurors do not care for is unusual. So, while Thicke's behavior might have been a major factor in the jury's verdict, his allegedly poor character is not so uncommon that the jury's reaction would be unlikely to occur again. Quite the contrary. It seems more likely that if a disagreeable party appears before a jury, the jury will leverage a similarly severe verdict.

In evaluating the media's comments about the *Blurred Lines* outcome, it seems a word of caution is in order. The media appears to have focused its criticism of the *Blurred Lines* decision

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235 Miao & Grimm, *supra* note 121, at 5.

236 *See supra* Part II.A.2.

237 Miao & Grimm, *supra* note 121, at 4.

238 *See id.*

239 LINDEY & LANDAU, *supra* note 25, § 1:115.50.

240 For example, Ira Arnstein, the plaintiff in the well-known music copyright case *Arnstein v. Porter*, was described as "an eccentric (some say crazy) songwriter who had filed five separate lawsuits (all unsuccessful) against various music and film entities and individuals, often alleging wild conspiracies." COHEN ET AL., *supra* note 32, at 275. *See generally* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

on the jury's response to the *Blurred Lines* songwriters, saying little if anything about the district court's surprising decision to deny summary judgment before the jury heard the case. From a legal standpoint, to view the *Blurred Lines* decision solely as a failure to appease the jury is not only misleading but also a potential tactical error. Not only must legal teams defending against infringement claims be mindful of their clients' behavior in the event that a case goes to a jury, they must also remain acutely aware of the increased possibility that a jury trial will occur.

Evaluating the effect of expert testimony and Robin Thicke's character on the verdict of *Blurred Lines*, it seems sound and perhaps safest to conclude that both factors greatly influenced the district court's and the jury's decisions. However, because the presence of these factors is likely to be seen in other similar cases, rather than saying these factors set the *Blurred Lines* case apart, it seems more appropriate to anticipate that these factors will play an equally important role. The bigger lesson is that parties should be extremely mindful of the value and effect of expert testimony, and must exercise greater caution when speaking in public, communicating with the media, and appearing before juries.

Approaches to music copyright infringement cases may have already begun adapting to *Blurred Lines*. At least two other hit songs came under fire for copyright infringement as the *Blurred Lines* courtroom battle raged on, but, unlike *Blurred Lines*, the issues were quickly settled before lawsuits could be filed. The next Section discusses the different approaches taken when infringement claims were made against the writers of *Stay with Me* and *Uptown Funk*.

C. The Settlements in *Stay with Me* and *Uptown Funk*

1. *Stay with Me*

Stay with Me is the Grammy-award winning hit song written by British artist Sam Smith and British writers James Napier and William Phillips.[241] When *Billboard* magazine featured Sam Smith on its front cover in December 2014, *Stay with Me* held the number one spot on three Billboard charts: two weeks on Billboard's Mainstream Top 40 chart, two weeks on Billboard's Adult Top 40 chart, and five weeks on Billboard's Adult

241 *'Stay with Me' Wins Grammy for Best Song*, SAN DIEGO UNION TRIBUNE (Feb. 8, 2015, 7:57 PM), http://www.sandiegouniontribune.com/sdut-stay-with-me-wins-grammy-for-best-song-2015feb08-story.html [http://perma.cc/8CNJ-28Q7].

Contemporary chart.[242] By this time, Nielsen Music reported that Smith's album *In the Lonely Hour* had scanned[243] more than 900,000 copies, and *Stay with Me*, its lead single, had already sold three million copies.[244]

Earlier that same year, in July 2014, a YouTube video surfaced showing several similarities between *Stay with Me* and the hit song *I Won't Back Down*, written by Tom Petty and Jeff Lynne.[245] *I Won't Back Down* was the first single from Tom Petty's solo record *Full Moon Fever*, released in 1989,[246] and spent fifteen weeks on Billboard's Hot 100 chart, peaking at number twelve.[247]

Shortly after the above-mentioned *Stay with Me/I Won't Back Down* YouTube video was released, in or around July 2014, publishers for Petty and Lynne contacted Smith's publishers about the similarities between the two songs.[248] Smith's representatives took the opposite approach chosen by *Blurred Lines* representatives.[249] Unlike *Blurred Lines*, where the alleged infringers went on the offensive by filing suit for a declaratory judgment, Smith's representatives amicably gave Petty and Lynne a share of both songwriting credit and royalties before a suit was filed.[250] The settlement between Smith and Petty was reached in October 2014 (the same month that the district court denied the *Blurred Lines* legal team's motion to dismiss), but

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242 *See* Chris Willman, *Billboard Cover: Sam Smith on 'Stay with Me,' 'SNL' Jitters and 'Striving to Be a Career Artist,'* BILLBOARD (Dec. 12, 2014), http://www.billboard.com/articles/events/year-in-music-2014/6405529/sam-smith-stay-with-me-number-one-charts-2014-billboard-cover [http://perma.cc/3R72-M77V].

243 Nielsen "scans" refer to Nielsen's music sales measurement system, which it describes as "the authority in tracking what music people are buying both in-store and digitally. Nielsen compiles data from more than 39,000 retail outlets globally, to help record labels, publishers, artists, artist management and performance rights organizations understand what albums, singles and music videos people are buying, and where they're buying them." *Music Sales Measurement,* NIELSEN, http://www.nielsen.com/us/en/solutions/measurement/music-sales-measurement.html [http://perma.cc/V6LM-SBMG].

244 Willman, *supra* note 242.

245 Josh Dickey, *Grammys: Sam Smith's 'Stay with Me' is Your Song of the Year,* MASHABLE (Feb. 8, 2015), http://mashable.com/2015/02/08/grammys-sam-smiths-song-of-the-year/#lXygWoV3Uqqp [http://perma.cc/HY3W-E92L].

246 *Id.*

247 *Tom Petty – Chart History*, BILLBOARD, http://www.billboard.com/artist/430102/tom-petty/chart [http://perma.cc/S7BB-4LZU].

248 Brian Mansfield, *Sam Smith to Pay Tom Petty Royalties on 'Stay with Me,'* USA TODAY (Jan. 26, 2015, 11:38 AM), http://www.usatoday.com/story/life/music/2015/01/26/sam-smith-stay-with-me-tom-petty-i-wont-back-down/22346051/ [http://perma.cc/9N2V-L49R].

249 *See* Davidovits & Day, *supra* note 6 ("[U]nlike the 'Blurred Lines' dispute, both sides [of the Sam Smith/Tom Petty dispute] appear to have approached the situation with a cooperative attitude, and reached a mutually agreeable resolution without resorting to the courts. . . . By contrast, Thicke and Williams did not 'back down' and paid the price.").

250 *Id.*

media reports about the agreement began to surface in late January, only a few weeks prior to the *Blurred Lines* verdict.[251]

Though the *Stay with Me/I Won't Back Down* settlement and the *Blurred Lines* decision were within weeks of each other, the outcomes of the two cases were quite different. The four-month turnaround time for the *Stay with Me/I Won't Back Down* songwriter agreement was remarkably swift, especially when compared to the nearly three years it took to decide the *Blurred Lines* case, which is still being appealed.[252] Though Petty arguably had a strong claim against Smith because of the glaring similarity between the chorus melody in *Stay with Me* and the verse melody in *I Won't Back Down,*[253] Smith resolved the matter by agreeing to give Petty and Lynne 12.5% each of the songwriting credit and a percentage of royalties.[254] The *Blurred Lines* songwriters, by comparison, were originally ordered to pay more than seven million dollars in damages.[255] Though Smith might have been guilty of actions that more closely resembled traditional infringement, he may have avoided years in court and millions of dollars in damages by choosing the opposite strategy employed by the *Blurred Lines* songwriters and agreeing to settle.[256]

2. *Uptown Funk*

Uptown Funk is the second-longest running number one song of all time and, in just under a year, was certified nine times

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251 *See, e.g.*, *id.*; Daniel Kreps, *Tom Petty on Sam Smith Settlement: 'No Hard Feelings. These Things Happen,'* ROLLING STONE (Jan. 29, 2015), http://www.rollingstone.com/music/news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-20150129 [http://perma.cc/6VUX-DNAU]; Andy Halls & Natalie Edwards, *Sam Owes Petty Cash for Hit Song*, THE SUN (Jan. 24, 2015, 8:00 PM), http://www.thesun.co.uk/sol/homepage/showbiz/bizonsunday/6294030/Sam-Smith-settles-up-royalty-dispute-with-Tom-Petty-and-Jeff-Lynne.html [http://perma.cc/X7EK-53G9].

252 Kenneally & Chelin, *supra* note 7.

253 Mansfield, *supra* note 248 (*quoting* Dr. E. Michael Harrington, the Music Business Program Faculty Chair at SAE Institute Nashville. Dr. Harrington has taught courses and conducted training courses in music licensing and intellectual property at several universities, including the Berklee College of Music, William Paterson University, and Harvard Law School. He has also served as an expert witness and consultant in music copyright issues involving the Dixie Chicks, Woody Guthrie, Deadmau5, Lady Gaga, Danger Mouse, Steven Spielberg, Samsung, HBO, Food Network, White Stripes, Black Keys, Lauryn Hill & The Fugees, Tupac Shakur, AT&T, Keith Urban, Mariah Carey, the Monkees, Ne-Yo, Avril Lavigne, Britney Spears, 2 Live Crew, Rascal Flatts, Ford, Heinz, Publix, and others. *Meet Dr. Harrington*, EMICHAELMUSIC, http://www.emichaelmusic.com/meet-dr-harrington/ [http://perma.cc/A3LB-VFWK].

254 Halls & Edwards, *supra* note 251.

255 Williams Motion for Summary Judgment, *supra* note 155, at 1.

256 It is possible that the high level of similarities between the two songs may have also influenced Smith's decision to settle, but it is unknown whether and to what degree this is true.

platinum in the United States.[257] The song spent fourteen consecutive weeks in the number one position of Billboard's Hot 100 chart in 2015.[258] Six parties were originally listed as writers of the song: producer Mark Ronson, singer Bruno Mars, Jeffrey Bhasker, Phillip Lawrence, Nicholas Williams (aka Trinidad James), and Devon Gallaspy.[259]

In February 2015, just a few weeks after the settlement between Smith and Petty was reported in the media, Minder Music, publishers for the five songwriters who wrote the Gap Band's 1979 hit *Oops Upside Your Head*, contacted the content management system of online video website YouTube, claiming *Uptown Funk* infringed their copyright.[260] Upon receiving infringement claims, YouTube "stops paying publishers and moves the proceeds into an escrow account."[261] Instead of going to court, in April 2015, just two months after the YouTube claim was filed, the five *Oops Upside Your Head* writers were added to the list of *Uptown Funk* songwriters.[262] This revision freed up the money in YouTube's escrow account, and the songwriters' shares were divided up to match the percentages agreed upon in the settlement agreement.[263]

The decision to give the *Oops Upside Your Head* songwriters writing credit was made relatively quickly.[264] The claim was submitted sometime in February 2015 to YouTube, a secondary contact, and not directly to representatives of the *Uptown Funk* songwriters. Nonetheless, by early May 2015, the media reported that a settlement had been reached.[265]

Much like *Stay with Me/I Won't Back Down*, the *Uptown Funk/Oops Upside Your Head* songwriter agreement took approximately four months to achieve, a much speedier resolution as compared to *Blurred Lines*.[266] Unlike the strong melodic similarities between *Stay with Me* and *I Won't Back Down*, however, the most prominent similarity cited between *Uptown Funk* and *Oops Upside Your Head* was a vocal rhythmic

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257 Hugh McIntyre, *Taylor Swift, 'Uptown Funk!' Rule Billboard's Year-End Lists*, FORBES (Dec. 9, 2015, 6:10 PM), http://www.forbes.com/sites/hughmcintyre/2015/12/09/taylor-swift-uptown-funk-rule-billboards-year-end-lists/#5a4cb43d126f [http://perma.cc/GH4A-PXVH].

258 *Id.*

259 Christman, *supra* note 16.

260 *Id.*

261 *Id.*

262 *Id.*

263 *Id.*

264 *Id.*

265 *Id.*

266 *See, e.g.*, *id.*

pattern, not a melody, which does not even appear until approximately two and a half minutes into *Uptown Funk*.[267] One cannot help but wonder if a rhythmic pattern would not have been viewed as an infringement prior to the *Blurred Lines* decision. Perhaps it may have even been considered *de minimis*.[268] After *Blurred Lines*, though, there may be reason to suspect that an identical and prominent vocal rhythmic pattern, coupled with an expert witness, may have been sufficient at least to survive summary judgment.[269] Rather than deal with a lawsuit, *Uptown Funk*'s representatives instead chose to give up a portion of the songwriting on a huge hit song.

3. The Role of Technology

What may be most remarkable about both *Stay with Me/I Won't Back Down* and *Uptown Funk/Oops Upside Your Head* is the prominent role of technology. As previously mentioned, Tom Petty's publishers contacted Sam Smith's representatives soon after the YouTube video surfaced showing the similarities between *Stay with Me* and *I Won't Back Down*.[270] In the *Uptown Funk/Oops Upside Your Head* controversy, Minder's tactic of filing a claim with YouTube rather than directly with *Uptown Funk*'s songwriters immediately caused YouTube to stop paying any monies earned from *Uptown Funk* video plays.[271] The abrupt cessation of payments effectively hit the publishers and songwriters of *Uptown Funk* in the pocket without ever having to sue. The strategy of contacting YouTube directly rather than filing suit may suggest that alternative approaches to music copyright infringement are developing alongside new music delivery methods like YouTube.

Entertainment lawyer Robert M. Barta observed that technology may be playing an even more important role in prompting settlements, as reflected in the fact that "[m]usic copyright infringement cases are settling more readily now.

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267 *See* Daniel Welsh, *'Uptown Funk' Gets Five New Co-Writers Following Claim By 'Oops Upside Your Head' Singers, Gap Band*, HUFFINGTON POST (May 1, 2015, 10:32 AM, last updated May 1, 2015, 10:59 AM), http://www.huffingtonpost.co.uk/2015/05/01/uptown-funk-oops-upside-your-head-co-writers_n_7187434.html [http://perma.cc/6SPW-QW6N]; Chris Rizik, *The Gap Band Wins Credit and Royalties for Ronson/Bruno Mars Hit "Uptown Funk"*, SOULTRACKS (May 4, 2015), http://www.soultracks.com/story-gap-band-uptown-funk-settlement [http://perma.cc/3968-3GAV]; Jeremy D. Larson, *8 Artists That Could Sue 'Uptown Funk' on the Same Grounds as 'Blurred Lines,'* RADIO (Mar. 11, 2015, 1:44 PM), http://radio.com/2015/03/11/8-artists-that-could-sue-uptown-funk-on-the-same-grounds-as-blurred-lines [http://perma.cc/KZG3-GWVG].

268 *See supra* Part I.C.

269 *See supra* Part II.A.

270 Dickey, *supra* note 245.

271 Christman, *supra* note 16.

Plaintiffs are able to show consistencies and similarities in their music through the use of specialized software that previously didn't exist."[272]

The increased use of automated software systems designed to identify copyright infringement may also play a significant role in future cases.[273] Automated systems designed to help detect infringement are already in use at sites like YouTube and Facebook.[274]

Filing online infringement claims, using specialized software to demonstrate infringement, and the employment of automated systems to detect infringement may only be the tip of the technological iceberg. While it is not possible to address all of the various ways software and technology could be used to regulate copyright infringement here, it is well worth mentioning and likely merits a Comment of its own.

Though both cases involved parties who could afford to challenge infringement claims in court, the alleged infringers chose instead to settle quickly out of court, giving up royalties and songwriting credit. The next Section examines some of the reasons why *Stay with Me* and *Uptown Funk* settled.

4. Reasons Why *Stay with Me* and *Uptown Funk* Were Settled Out of Court

There are a number of reasons why parties in a copyright infringement suit may choose to settle rather than go to court.[275] The parties in *Stay with Me* and *Uptown Funk*, however, may have had an additional incentive to settle after observing the *Blurred Lines* court battle.

Settling copyright infringement cases, and cases in general, may offer several benefits.[276] For example, in his article examining the operational aspects of corporate social responsibility groups, which often use the threat of lawsuits to

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272 *See* Barta Interview, *supra* note 2.

273 *See, e.g.,* Austin M. Phillips, *Whether It Is Fair (Use) or Not, Copyright Law Needs Automated System* (May 9, 2016) (unpublished Comment, Chap. U. Dale E. Fowler School of Law) (on file with author); Yvette Joy Liebesman, *Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes*, 35 AIPLA Q.J. 331, 356 (2007).

274 *See, e.g.*, *YouTube Taps into Audible Magic for Content Filtering*, REPRISE MEDIA (Feb. 23, 2007), https://www.reprisemedia.com/post/youtube-taps-into-audible-magic-for-content-filtering/ [http://perma.cc/4FVU-6R9Q]; Ted Mann, *How to Get Around That Pesky Copyrighted-Audio Filter on YouTube and Facebook*, TURKEY MONKEY (July 19, 2009), http://www.turkeymonkey.com/2009/07/19/how-to-get-around-that-pesky-copyrighted-audio-filter-on-youtube-and-facebook/ [http://perma.cc/JGD2-92BF].

275 *See, e.g.*, Palo, *supra* note 57, § 124.

276 *Id.*

negotiate "monetary and action-based" settlements with corporations,[277] Donald J. Kochan explained that:

> When faced with a lawsuit or the threat of a viable liability claim, it is entirely possible that the judgment value is far exceeded by the external effects of the litigation on the corporation and the corporation's own interests in preserving its brand, image, reputation, customer base, investor interest, and the like. Thus, corporations will often even settle when they could win the substantive lawsuit but do not wish to incur the incidental expense of the litigation and collateral damage along the way. Moreover, if there is an ambiguous or uncertain risk, which may very well be the case in newly developing liability regimes, then the corporation may want to be risk averse—again motivating settlement.[278]

While a songwriter may not be a corporate entity, as a public figure, a songwriter may share many of the same concerns as a corporation in terms of damage to public perception and reputation. The cost of litigation is also a concern that corporations and songwriters have in common. Finally, like the corporations described in the corporate social responsibility group scenario, songwriters are dealing with an unknown level of risk, as it is not yet clear how *Blurred Lines* will influence future infringement cases. Facing a similar set of drawbacks and risks, a songwriter may also decide that settling out of court is the more appropriate course of action.

A similar comparison can be drawn with employment claims. For employers, the unpredictable nature of litigation is a factor, as well as the risks of negative publicity or an adverse ruling.[279] A settlement may also allow a party to negotiate an agreement that is more favorable than a courtroom verdict.[280] Many of the factors an employer evaluates when deciding whether or not to settle—the unpredictable nature of litigation, the risk of negative publicity, and the opportunity to negotiate a mutually beneficial agreement—also merit consideration when a songwriter is contemplating settlement. After weighing these and other factors, a songwriter may decide that settlement is the better option.

In addition to the general benefits of settlement, the *Blurred Lines* verdict may have created greater incentive for settlement in music infringement controversies. At least one observer has noted that "[t]he 'Blurred Lines' case may have changed what constitutes

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277 Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective,* 17 CHAP. L. REV. 413, 449, 474 (2014).

278 *Id.* at 450.

279 Richard F. Busch, II, *Designing Effective Conflict Management System*, 27 COLO. LAW. 63, 65 (1998).

280 *Id.*

copyright infringement in pop music, and musicians—specifically R&B artists—are being more careful, giving their influences writing credits and royalties to avoid similar situations."[281] *Stay with Me* and *Uptown Funk* were listed as two examples of this, along with recent charting artists like Miguel and Jidenna, who gave other songwriters (Billy Corgan from the Smashing Pumpkins and Iggy Azalea, respectively) writing credit after their songs were released.[282] During a radio interview, Jidenna admitted the decision to give Iggy Azalea songwriting credit was motivated by the *Blurred Lines* verdict.[283] These statements suggest that concerns raised by the outcome in *Blurred Lines* have made the settlement of music copyright infringement cases a more attractive option.

In the case of *Uptown Funk*, at least one songwriter's representative admitted that *Blurred Lines* might have been a deciding factor for settlement. "In wake of the landmark 'Blurred Lines' verdict, which is currently under appeal, the music industry is being 'more cautious,' noted Danny Zook, [*Uptown Funk* co-writer Trinidad] James's manager."[284] When asked if he believed the *Blurred Lines* verdict influenced the *Uptown Funk*'s songwriters' decision to settle, Zook observed that "[n]obody wants to be involved in a lawsuit. Once a copyright dispute goes to a trial, [if a jury is used], it is subject to be decided by public opinion—and no longer resolved based entirely on copyright law."[285] Zook's observations suggest that in the aftermath of *Blurred Lines*, songwriters and their representatives may believe they now face a greater risk of liability for infringement.

It is possible that the potential expense of going to trial also served as a deterrent.[286] Illustrating the high cost of a music copyright infringement trial, after the *Blurred Lines* verdict, the Gaye estate unsuccessfully sued for legal costs, citing over $3

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281 Blake Brittain, *Musicians More Careful After 'Blurred Lines' Case*, BLOOMBERG BNA (Sept. 17, 2015), http://www.bna.com/musicians-careful-blurred-n17179936188/ [http://perma.cc/RWY4-URGH].

282 *Id.*

283 *Id.*

284 Latifah Muhammad, *'Uptown Funk' Writers to Split Royalties With the Gap Band*, BET (May 4, 2015, 6:25 PM), http://www.bet.com/news/music/2015/05/04/uptown-funk-splits-writing-credits-with-the-gap-band.html [http://perma.cc/J9CW-6A7X].

285 Christman, *supra* note 16.

286 Settlement in copyright cases is sometimes viewed as a form of risk-avoidance. For example, see Palo, *supra* note 57, § 124, advising that to avoid greater costs, "[i]f the client has limited funds, it may be expedient to take a consent decree, particularly if the client is a defendant. The cost to each party continuing with the litigation may greatly exceed the amount of damages and profits involved and, accordingly, the sum required to reach a settlement with the plaintiff."

million in attorneys' fees and allowable expenses (nearly half of the amount awarded in the suit).[287]

Thus, while the settlements in *Stay with Me* and *Uptown Funk* may have been motivated by the general benefits of settlement, the outcome in *Blurred Lines* seems to have played an influential role. At the very least, it seems safe to say that *Blurred Lines* has increased the level of concern over infringement liability. Though it is possible that the *Blurred Lines* decision could be overturned on appeal, it seems wiser for songwriters and their representatives to assume the decision will remain in effect and act accordingly.

Although songwriters appear to be acknowledging the greater risk of infringement they may now be facing, there has been little discussion about safeguards or protections that could lower this risk. The next Part of this Comment will examine what protections are currently available for songwriters and consider whether additional safeguards will emerge.

III. THE HIGHER LIKELIHOOD OF COPYRIGHT INFRINGEMENT AND THE ROLE OF INSURANCE

One cannot help but wonder what level of infringement risk songwriters now face. It is therefore useful to examine what measures are currently in place to protect songwriters, and if the available measures are not sufficient, consider whether other options will emerge.

A. Forms of Songwriter Insurance Currently Available

An internet search for the term "insurance for songwriters" only yields a small number of pertinent results.[288] The most affordable version of songwriter insurance appears to be group insurance offered through Nashville Songwriters Association International ("NSAI").[289] NSAI President Steve Bogard explained

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287 *See* Corrected Memorandum of Points & Authorities in Support of Motion for an Award of Attorneys' Fees & Costs at 3, 10, Williams v. Bridgeport Music, Inc., No. LA CV13-06004-JAK (AGRx) (C.D. Cal. Jan. 12, 2016), 2016 WL 409534; Ashley Cullins, *Judge Denies Marvin Gaye Family's Request for Pharrell and Robin Thicke to Pay Their Legal Fees*, BILLBOARD (Apr. 12, 2016), http://www.billboard.com/articles/business/7332999/judge-denies-marvin-gaye-family-request-pharrell-robin-thicke-legal-fees [http://perma.cc/7R4K-TQ4H].

288 Results of a search for "insurance for songwriters" include, for example, *Music Publisher, Composer & Songwriter Insurance*, ROBERTSON TAYLOR ENTERTAINMENT INSURANCE WORLDWIDE, http://rtworldwide.com/us/music-event-insurance/music-publisher-composer-songwriter-insurance/ (last visited Mar. 11, 2016) [http://perma.cc/LKC7-NJJ6]; *First Group Copyright Infringement Insurance Policy Created for Songwriters/Composers*, SESAC (Feb. 1, 2011), http://www.sesac.com/News/News_Details.aspx?id=1449 [hereinafter First Group Insurance] [http://perma.cc/G7T8-6YMY].

289 *See* First Group Insurance, *supra* note 288.

that the NSAI's group songwriter insurance plan offers policy amounts beginning at $100,000 in coverage for less than $1600 annually, which Bogard stated should be sufficient to protect most songwriters from infringement claims.[290]

However, a policy like NSAI's group plan may not offer sufficient or appropriate protection for the majority of songwriters, especially with the newly increased potential for infringement findings. Given this greater risk of liability, industry officials may need to evaluate and help develop a more suitable form of insurance to protect songwriters. The next Section considers whether better forms of songwriting insurance are likely to emerge.

B. The Emergence of a New Form of Songwriter Insurance

Though songwriters' risk of exposure to infringement liability may have increased due to the *Blurred Lines* verdict, what is not clear is whether the risk has become so great that more appropriate forms of insurance will be necessary.

Some evidence suggests that when the legal system increases its enforcement of a law, a corresponding increase in the demand for insurance related to the legal issue occurs.[291] For example, an international study evaluating factors that might influence the demand for Property Casualty Insurance ("PCI") in several countries stated that "the enforcement of property rights creates an economic incentive to acquire and insure property, since government and legal enforcement of property rights help to protect individuals from loss or damage to the asset."[292] In essence, individuals who possess property rights in countries where property rights are enforced are more likely to obtain property insurance.[293]

Granted, there are some differences between property casualty insurance and insurance for songwriters, especially because the songwriters and their representatives (such as music publishing companies) seeking insurance will likely be those trying to minimize infringement liability.[294] Despite the

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290 *Id.*

291 *See* Neil Esho et al., *Law and the Determinants of Property-Casualty Insurance*, 71 J. RISK & INS. 265, 268 (2004).

292 *Id.*

293 *See id.*

294 E-mail from anon. source, owner of a record label and two music publishing companies (one BMI registered and one ASCAP registered), to author (Aug. 15, 2016) (on file with author) [hereinafter Label Owner Interview] ("[T]he vast majority of songwriters will never make enough money to be sued and plaintiffs' attorneys will generally only sue when there is a possibility of recovery. The small percentage of songs where there is enough money to support a recovery are almost always controlled by a publisher. They are

differences, the underlying principle, that a change in the level of legal enforcement of a property right can increase the demand for insurance, still seems applicable. Considering the change in the law, which may be unfavorable to songwriters and their representatives as defendants, it seems reasonable to suspect that songwriters and their representatives may be motivated to obtain insurance to help mitigate the increased risk.

It is important to keep in mind that the cost of insurance and the probability of loss may also affect the demand for songwriter insurance. The international PCI study observed that "[t]he demand for any product or service is affected by price" and "[d]emand for insurance should be positively related to the likelihood of incurring losses due to adverse events."[295] It may be too soon to determine what songwriters consider "too expensive" in terms of songwriting insurance, as it is not yet clear what typical damage awards in successful infringement suits will be.

Another consideration is how an insurance company would determine which songs are insurable. One suggested option is the development of software to determine if a song is infringing and therefore uninsurable.[296] Based on the way content recognition software works (such as the software utilized by YouTube to detect infringing content),[297] a modification to the existing software may be enough to provide the foundation for a new system that evaluates songs for insurability.

However, one industry veteran warns that "[i]t is possible that someone could come up with [software to detect music plagiarism], much like that used by schools. But someone would have to feed in all of the music masters and all of the lyrics . . . and probably all of the individual instruments by track/channel . . . and it still wouldn't catch songs which were cited for 'infringing the feel' of another song."[298]

Also unclear is how much of an increase in infringement suits will occur, or how songwriters as defendants will generally fare in such suits. For the purposes of this Comment, perhaps it is enough to say that both the price of insurance and the probability of loss will play significant roles in determining

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the consumers of the insurance because they'll bear the brunt of the legal action. . . . If there is a market, it is probably with the music publishers.").

295 Esho et al., *supra* note 291, at 270–71.

296 *See, e.g.,* Liebesman, *supra* note 273; E-mail from Tom W. Bell, Professor of Law, Chapman U. Dale E. Fowler School of Law, to the author (Aug. 19, 2016) (on file with author).

297 *See, e.g.*, Jonathan Strickland, *How Content-Recognition Software Work*s, HOWSTUFFWORKS (July 16, 2007), http://computer.howstuffworks.com/content-recognition.htm [http://perma.cc/ZU3Z-4R35].

298 Label Owner Interview, *supra* note 294.

whether obtaining songwriter insurance becomes a widely accepted practice.

It is unknown what the full effects of the *Blurred Lines* decision will be, and it is unwise to assume that the *Blurred Lines* songwriters will win their appeal. For the time being, it may be safest to assume that the *Blurred Lines* standard will influence the outcome of music copyright infringement suits, at least in the Ninth Circuit.

CONCLUSION

It has been said that imitation is the sincerest form of flattery.[299] However, in the new world of music copyright infringement, imitation may be the most expensive compliment a songwriter can give. The post-*Blurred Lines* environment exposes songwriters to a greater risk of infringement than ever before, such that liability can attach to as little as emulating the style or genre of another song. Under this standard, nearly every songwriter could be found liable for some form of infringement. Until greater protections are available, songwriters and their representatives should proactively anticipate infringement accusations from the moment of a song's creation and brace themselves for the lawsuits to come. After all, though some may wish to cast stones, today's victim may easily become tomorrow's offender.

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299 Charles Caleb Colton, *in* BRAINY QUOTE, http://www.brainyquote.com/quotes/quotes/c/charlescal203963.html [http://perma.cc/Q88B-26TW].