



Can You Name that Tune?

By Anthony Corleto,
Kara Thorvaldsen,
Nicole Haimson

Music artists have found it difficult to discern which creative grounds are safe to tread and which creative paths lead to copyright issues in recent years.

Minor Drop, Major Infringement?

When law and pop culture intersect, everyone has an opinion. Several recent high-profile copyright cases involving chart-topping songs have drawn attention to an area of the law that is not well understood. This article

will explain the path from *Williams v. Gaye* (“*Blurred Lines*”), to *Skidmore v. Led Zepelin* (“*Stairway to Heaven*”), and *Gray v. Perry* (“*Dark Horse*”), so that you can throw down the law the next time you hear one of these songs at a cocktail party.

Blurred Lines began as an equitable action by Pharrell Williams, Robin Thicke, and the rapper “TI” to declare their song “Blurred Lines” was not infringing against Marvin Gaye’s 1976 hit, “Got to Give It Up.” Marvin Gaye’s estate counterclaimed for a declaration of infringement and for damages. “Blurred Lines” was *Billboard*’s 2013 “Song of the Summer.” It was ubiquitous because it

was catchy. With a party background, funky bass, a smooth hook, and a dose of cowbell, “Blurred Lines” was the perfect summer party song. Was it a coincidence that Marvin Gaye scored a hit with the same elements in “Got to Give It Up” a few decades earlier? Did Gaye’s creation preclude others from using that recipe? A jury decided that it was copyright infringement, and an appeals court upheld the verdict, primarily on procedural grounds, but not without a stinging dissent warning that the decision upended the concept of “protectable expression” and would open the floodgates for composers to claim rights in a genre.

■ Tony Corleto, a partner in the Stamford and White Plains offices of Wilson Elser, handles commercial litigation and transactions for a diverse body of client organizations. His clients include sport governing bodies, software developers, market research organizations general and trade contractors and insurance companies. He has litigated commercial disputes involving trademark, copyright, trade dress, and patent infringement claims. Mr. Corleto also has managed numerous transactions involving licensing, executive employment, spin-offs, mergers, buy-backs, and technology transfers. His recent engagements also include a trademark dispute over machine tool parts, a copyright dispute involving a housewares designer, and various trade secret matters between competitors. Kara Thorvaldsen is a partner in the Boston office of Wilson Elser. With a focus on complex commercial litigation, she regularly represents clients in trademark, copyright, and unfair competition claims in state and federal courts, and before the Trademark Trial and Appeal Board. Nicole Haimson is an associate in the Albany office of Wilson Elser. A civil litigator who focuses her practice on intellectual property, corporate, commercial litigation, and insurance defense matters, she also handles claims related to construction defects, product liability, employment, and healthcare.



Central to the outcome in *Blurred Lines* was how the “inverse ratio” rule factored into the “substantial similarity” test. The inverse ratio rule is a doctrine in copyright law that provides that the greater evidence there is that a defendant had access to a copyrighted work, the less similar the infringing work needs to be to give rise to an inference of copying. Not long after the *Blurred Lines* verdict made headlines, however, the U.S. Court of Appeals for the Ninth Circuit abandoned the rule in its *Stairway to Heaven* decision, in a move that likely gave the music industry some comfort. This was followed quickly by a federal court decision throwing out a verdict against Katy Perry that her single “Dark Horse” infringed the copyright of a little-known song by a niche artist.

To understand how these cases came about and what they mean for the future, we look first at the elements of an infringement claim: the plaintiff needs to show that (1) the plaintiff owns the work, and (2) the defendant copied protected elements of the work. Copying is frequently proved by circumstantial evidence that the defendant had “access” to the claimed work and that the two works are “substantially similar,” i.e., they are too similar for the accused work to be original.

Substantial similarity is determined by two tests: an extrinsic test focuses on whether protectable portions of the two works when analyzed objectively are substantially similar; an intrinsic test focuses on whether the overall impressions of the works are substantially similar.

- The extrinsic test involves breaking down the work into constituent elements, identifying protectable elements, and determining whether there is substantial similarity between the protectable elements. Expert testimony, typically from a musicologist, is generally used. Motions for summary judgment and directed verdict typically rely on the extrinsic test.
- The intrinsic test, focusing on subjective impression, is reserved for the trier of fact. If the copyright claim survives the extrinsic test, a jury may determine “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.” In other words, members of a jury are

trusted to “know [similarity] when they hear it.”

“Blurred Lines”

In 2018, the Ninth Circuit affirmed a significant jury verdict in favor of Marvin Gaye’s estate against Williams and Thicke. See *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (*Blurred Lines*). The decision garnered significant interest and consternation; critics predicted that it would allow artists to copyright musical styles or genres. The decision warrants a closer look, however, because it rests on very narrow grounds.

“Got to Give It Up” was recorded in 1976 and released in 1977, missing the January 1978 effective date of the 1976 Copyright Act. Under the applicable 1909 Copyright Act, protection of a song extends only to the written music filed with the U.S. Copyright Office at registration, not the sound recording heard on the radio. The deposit copy of “Got to Give It Up” consisted of six pages of sheet music handwritten by an unidentified transcriber (Marvin Gaye did not read music). *Id.* at 1160. Not every aspect of the sound recording was reflected on the deposit copy.

Cross-motions for summary judgment based on the extrinsic test presented expert musicologist reports for each side. *Id.* at 1161. Gaye’s expert identified eight similarities between the songs:

1. signature phrase;
2. hooks (a repeated phrase, lyrical, musical or both, that grabs the ear of the listener);
3. hooks with backup vocals;
4. a musical theme identified as “Theme X”;
5. backup hooks;
6. bass melodies;
7. keyboard parts; and
8. unusual percussion choices.

Thicke’s expert opined that there were no substantial similarities among *protectable elements*; some similar elements were not part of the deposit (the copy of the work presented); and others were too common to protect. Rather than resolve the issue of competing protectable-element claims based on the extrinsic test, the district court held that issues of fact warranted a trial and denied the parties’ motions for summary judgment.

At trial, the judge denied Gaye’s request to play the sound recording of “Got to Give It Up.” As a result, certain aspects of the song, such as the party noise, cowbell, and some other elements that were not evident in the transcript (deposit copy), were not presented to the jury. However, the Thicke parties testified that they were familiar with and inspired by Gaye’s song—circum-

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stantial evidence of copying. Given these admissions and the duration of time that “Got to Give It Up” was accessible, it was easy for a jury to infer copying under the inverse ratio test.



Perhaps most critical to the ultimate result was that neither side moved for judgment as a matter of law, and the case was given to the jury. *Id.* at 1161. The jury sided with the Gaye estate, awarding significant damages, including 50 percent of the “Blurred Lines” future royalties.

Both sides appealed, raising a myriad of issues, including the import of the 1909

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Copyright Act deposit limitation, the propriety of the district court’s denial of summary judgment, the accuracy of the jury instruction on inverse ratio, and the appropriateness of the award.

In a decision that reads as a rebuttal to the dissent, the majority held that it could not review how the district court applied the extrinsic test to deny summary judgment. Because a ruling on a motion for summary judgment is merely “a step” on the road to trial, it is not reviewable on appeal. *Id.* at 1166. In contrast, the dissent examined, point by point, why the extrinsic test was not satisfied, beginning with the fundamental position that protectable elements of the deposit copy should have been determined as a matter of law. The majority held that all of the jury instructions were proper, and there was no reversible error.

Most importantly, because the Thicke parties had not requested judgment as a matter of law before the case was given to the jury, the court could not consider a Federal Rule of Civil Procedure 50(b) motion to set aside the verdict, or in the alternative, a motion for a new trial. *Id.* at 1179. The majority predictably refrained from expressing any opinion on the jury ver-

dict, but certainly, the decision emphatically explained that the majority had no choice but to uphold the verdict because of the procedural misstep.

“Stairway to Heaven”

In 2014, the estate of Randy Wolfe, lead guitarist of the band Spirit, sued Led Zeppelin for using the opening notes of Spirit’s song “Taurus” in the iconic “Stairway to Heaven.” On March 9, 2020, the Ninth Circuit affirmed the jury’s verdict in favor of Led Zeppelin. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (*Stairway to Heaven*).

At trial, Led Zeppelin admitted that the band members “crossed paths” with Spirit; they appeared in concert together at least once, and Jimmy Page owned the Spirit album that included “Taurus.” This familiarity with Spirit’s music led the jury to find “access.” *Id.* at 1057–60. Turning to the first part of substantial similarity in the extrinsic test, the jury found that the protectable elements in “Taurus” and “Stairway to Heaven” were not similar enough. The jury did not reach the intrinsic test. *Id.* at 1061, 1065.

As with *Blurred Lines*, the Ninth Circuit affirmed application of the 1909 Copyright Act; the “Taurus” copyright was registered in 1967, before the 1976 Copyright Act became effective. *Id.* at 1062–64. In line with the procedure in *Blurred Lines*, the Ninth Circuit held that the sound recording was correctly precluded, and thus not considered for the substantial similarity test. *Id.* at 1064.

Critically, in *Stairway to Heaven*, the Ninth Circuit rejected the inverse ratio rule, joining the majority of federal circuits. *Id.* at 1065–69. The rule favored widely popular compositions, allowing a lower standard of proof for substantial similarity: popularity, opportunity, and time support “access,” and greater access required less similarity for infringement to be found.

The court reasoned that the inverse ratio rule is flawed because it is confusing, un tethered to the language of federal copyright law, and conflated the issues of access and substantial similarity, which Congress intended to be two distinct tests. The court acknowledged that access often is easily proved in our digitally connected world,

so the inverse ratio rule “unfairly advantages those whose work is most accessible.” *Id.* at 1068. It noted that “nothing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.” *Id.* The court also stated that “complete access without any similarity should never result in infringement liability because there is no infringement,” and use of the inverse ratio rule might result in such liability. *Id.* at 1069.

This ruling was a notable shift in the application of copyright law to musical composition within the Ninth Circuit, a major hub for the entertainment industry.

Dazed and Confused Yet?

Four years ago, fresh from the *Blurred Lines* verdict, the music industry press wondered what a loss for Led Zeppelin would mean for artists. *See* Keith Harris, *What Happens If Led Zeppelin Lose the “Stairway to Heaven” Trial?*, *Rolling Stone* (June 22, 2016). The *Blurred Lines* decision was viewed by many as overextending copyright and protecting elements common to a genre or style of music, in this instance, the “communal party” style of Marvin Gaye’s “Got to Give It Up.” Taken to the extreme, *Blurred Lines* could support challenges based on common chord sequences (e.g., eight-bar blues).

Fast forward to 2020, and the Ninth Circuit seemingly goes the other way in favor of the alleged copy. The Spirit versus Led Zeppelin controversy set up the same quandary on a distinct element of style, the descending bass line under an arpeggiated, minor-chord sequence. Known as the “minor drop,” this technique is found in many popular songs, including Pink Floyd’s “Shine on You Crazy Diamond” (G minor); the Beatles’ “Michele” (F minor), and “Something” (A minor); Tom Petty’s “Into the Great Wide Open” (D minor); and Leon Russell’s “The Masquerade” (C minor).

Were “Blurred Lines” and “Stairway to Heaven” actual copies of prior work, or were they merely influenced by other popular music of the day? Neither Thicke and Williams nor Zeppelin argued that they transformed or made “fair use” of prior work, commonly asserted defenses to copyright infringement. Instead, each took the position that their creation was original.

However, Thicke admitted that he wanted to create the “feel” of Gaye’s work. Jimmy Page gave no quarter to Spirit. Can we harmonize these dissonant results?

The Blurred Lines Dissent

Judge Nguyen’s dissent in *Blurred Lines* recognized the fundamental distinction between an unprotectable idea, such as the communal party style or the minor drop, and protectable expression, meaning the composition itself. *Williams*, 895 F.3d at 1183.

Citing and quoting *Feist Publications v. Rural Telephone*, 499 U.S. 340, 345–48 (1991), for the proposition that information without originality cannot be protected by copyright, Judge Nguyen observed, “Originality... accommodates authors’ need to build on the works of others by requiring copyrightable expression to be independently created and have ‘at least some minimal degree of creativity.’” *Williams*, 895 F.3d at 1185. From that, Judge Nguyen extrapolated, if an author uses “commonplace elements that are firmly rooted in the genre’s tradition, the expression is unoriginal and thus uncopyrightable.” *Id.*

Further extrapolating the “idea-expression” dichotomy, Judge Nguyen observed that “even original expression can be so intimately associated with the underlying idea as to be unprotectable.” *Id.* at 1189. Under the doctrine of *scènes à faire*, “expressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law.” *Id.* (citing *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003)). The doctrine of merger provides that “where an idea contained in an expression cannot be communicated in a wide variety of ways,” the “idea and expression may merge... [such] that even verbatim reproduction of a factual work may not constitute infringement.” *Id.* (citing *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 617 (9th Cir. 1996). See also *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (“Similarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market.”) (quoting *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994)).

After the district court refused to instruct the jury on the inverse ratio rule

in *Stairway to Heaven*, the jury was left to examine Spirit’s actual composition, as reflected in the deposit that accompanied its copyright registration. *Skidmore*, 952 F.3d at 1060. Comparing the score of each song, the jury found that there was no substantial similarity under the extrinsic test. To these writers’ ears, although the notes are distinctly different, they sound similar. Had the court not rejected the inverse ratio rule, would the jury have reached a different result?

“Dark Horse”

In August 2018, a jury awarded \$2.8 million to little-known artist Marcus Gray, a/k/a “Flame,” against pop star Katy Perry. Gray claimed that Perry’s “Dark Horse” copied the introductory ostinato (repetitive phrase) from his song “Joyful Noise.” Unlike the Thicke parties in *Blurred Lines*, Perry moved for judgment as a matter of law and renewed that motion at the close of evidence. On March 16, 2019, the U.S. District Court for the Central District of California granted Perry’s motion for judgment as a matter of law. *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. Lexis 46313 (C.D. Cal. Mar. 16, 2020) (*Dark Horse*).

As in *Blurred Lines* and *Stairway to Heaven*, Gray tried to prove infringement by showing access and substantial similarity. Setting out the standard for the extrinsic test, the court followed the same method as in *Blurred Lines* and *Stairway to Heaven*, identifying protectable elements and determining objective similarity.

Relying on *Stairway to Heaven*, the court observed:

A collection of otherwise unprotected elements may be found eligible for copyright protection under the extrinsic test, but “only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes and original work of authorship.” For a plaintiff that seeks to apply this theory of protection to “works where there is a narrow range of available creative choices, the defendant’s work would necessarily have to be ‘virtually identical’ to the plaintiff’s work in order to be substantially similar.”

Id. at 10. (internal citations omitted).

The court went on to examine elements of the ostinato that Gray’s musicologist

identified as similar to Perry’s and determined that none were protectable because they were common building blocks of musical composition: the key, a phrase of eight notes, a pitch sequence, evenly syncopated rhythm, the timber of the notes, and the “texture” of the sound. Finding that the claimed ostinato consisted solely of unprotectable elements, the court held that the combination of those elements was not original enough to merit protection as a “portion” of the copyrighted work.

Moreover, the court held that even if the claimed ostinato were protectable as a combination, it would only be entitled to “thin” protection. In other words, because the Gray ostinato consisted only of unprotectable elements, Perry’s would have to be “virtually identical” to find infringement. The court held that it was not a matter of law, and the case should not have been submitted to the jury.

Conclusion

The Ninth Circuit’s rejection of the inverse ratio rule in *Stairway to Heaven* restored order in the musical universe. But for that rule, *Blurred Lines* might not have gone to the jury, because there was no evidence that protectable elements were copied from “Got to Give It Up.” To line up the printed score, the Gaye experts had to time-shift the Thicke recording and print a score from that manipulation. By definition, “Blurred Lines” was not a copy.

The Ninth Circuit’s recent reliance on actual copying of *protectable* elements, while recognizing the role of unprotectable musical conventions and the reality that artists are creatively influenced by other artists, gives greater clarity to copyright holders. These principles were applied precisely and correctly in *Dark Horse*. The case is now on appeal to the Ninth Circuit. Only time will tell whether the trend toward a more precise and objective analysis of copyright infringement in musical compositions will continue. In the meantime, you now should be equipped to provide an informed opinion on the next copyright infringement claim to hit the pop music scene.

