The *Blurred Lines* Controversy: Attaining IP Social Justice for African American Composers

© 2015 Lateef Mtima, Professor of Law, Howard University School of Law

Introduction

The ongoing litigation in *Williams v. Bridgeport Music, Inc.*[1] has proven a source of major controversy within the legal practice and scholarly communities. Included among the central issues in the case are such issues as the breadth of copyright protection in a music composition, the role of experts in the judicial resolution of claims of copyright infringement of a musical work, and the relevance of cultural standards for assessing music creativity and their impact in shaping copyright protection. The jury verdict and post-verdict rulings by the district court are under now consideration by the Court of Appeals for the Ninth Circuit, and the various appellate filings have illuminated broad schisms among legal experts and music creators alike.

The Proceedings in the District Court

This litigation involves the 2013 smash-hit song *Blurred Lines*, performed by Robin Thicke, and arose when the heirs of Motown legend Marvin Gaye contacted Thicke and his co-writer Pharell Williams and claimed that *Blurred Lines* impermissibly copies expressive elements from Gaye's 1976 smash-hit song *Got to Give It Up*. Thicke and Williams ultimately responded by filing an action in California District Court seeking a declaratory judgment that *Blurred Lines* does not infringe upon *Got to Give It Up*. The Gaye Estate in turn filed counterclaims for copyright infringement.

In order to prevail upon its claims for copyright infringement, it was necessary that the Gaye Estate demonstrate ownership of a valid copyright in *Got to Give It Up* and show that the defendants had copied protected elements of the work. While there was no dispute that the Estate holds a valid copyright in the work, an issue arose as to the scope of that copyright. At the time during which Gaye recorded *Got to Give It Up*, the Copyright Office did not accept sound recordings as copyright registration deposits but accepted only written music compositions, i.e., sheet music. Marvin Gaye, however, was not fluent in music notation and instead composed in the "aural tradition", meaning by ear.[2] Consequently it was Motown employees and not Gaye who prepared the sheet music copyright registration deposit for *Got to Give It Up*. In light of the copyright rules and administrative procedures in force at that time, it was thus unclear whether the copyright in *Got to Give It Up* was consequently restricted to the sheet music deposit version of the work or extended to all of the creative elements composed by Gaye and included on the sound recording of the composition.[3]

---

[1] Case 2:13-cv-06004-JAK-AGR Document 139 Filed 10/30/14

[2] The term "aural tradition" which was coined in the Amicus Brief of the Institute for Intellectual Property and Social Justice filed in the case, is to be distinguished from the familiar term "oral tradition," and instead refers to the "playing by ear" nature of the work of Gaye and many other popular composers who are able to learn to play and to compose music by listening to music being performed (and by watching the performers), and then composing directly to performances on instruments themselves. By contrast, "oral tradition" connotes folk and other traditions in which senior musicians directly instruct junior musicians in how to play particular songs as a means of preservation and transmission across generations.

[3] The Copyright Office has since changed its policy and now accepts sound recordings as copyright deposits.

Notwithstanding the issues regarding the scope of Gaye's copyright, the existence of a copyright registration for *Got to Give It Up* established the Estate's ownership of a valid copyright in the work. With respect to proving that Thicke and Williams had copied protected elements of *Got to Give It Up*, the Estate could satisfy this requirement with either evidence of direct copying (i.e. a witness to the act of copying) or through indirect evidence, by demonstrating that the defendants had access to *Got to Give It Up* and by further showing that the two works are "substantially similar".[4]

Identifying Protectable Expression in a Musical Work/Assessing Claims of Substantial Similarity

The copyright in a musical work extends to the protectable aspects of the composition. Where the composition contains both protectable and unprotectable elements, the copyright extends only to the protectable ones. *See e.g. Mattel, Inc. v. MGA Entertainment, Inc.,* 6161 F.3d 904 (9th Cir. 2010). Protectable aspects include discrete elements such as original melodic lines, harmonic lines, and percussive parts, as well as an original combination of these and other elements, even if some of the elements are individually not protectable. *Swirsky v. Carey,* 376 F.3d 841 (9th Cir. 2004). For example, the standard 12 bar blues chord progression is not itself protectable, but a particular original expression of it combined with other elements can be. Exactly where the line between protectable expression and nonprotectable expression is to be drawn is largely a matter of fact to be decided by the jury. *Swirsky v. Carey,* 376 F.3d 841 (9th Cir. 2004); *Three Boys Music Corp. v. Bolton,* 212 F.3d 477 (9th Cir. 2000). *See also Nichols v. Universal Pictures Corp.,* 45 F.2d 119, 121 (2d Cir. 1930) (application to literary works).

A subsequent composer presumptively violates the copyright in a prior, underlying work when her work is "substantially similar" with respect to its use of protectable expression taken from the first work. *Three Boys Music Corp. v. Bolton,* 212 F.3d 477 (9th Cir. 2000). In the Ninth Circuit, the substantial similarity inquiry is bifurcated into extrinsic and intrinsic evaluations. *Swirsky v. Carey,* 376 F.3d 841 (9th Cir. 2004). At the extrinsic stage, the court will dissect plaintiff's work down into its constituent elements, filter out any unprotected elements, and then determine whether there are any expressive, protectable elements common to both works. "'To the extent a plaintiff's work is unprotected or unprotectable under copyright, the scope of the copyright must be limited' prior to conducting this analysis." *Id.* If a court finds substantial similarity at the extrinsic analysis stage, the ultimate issue of infringement is then referred to the jury for an intrinsic (i.e. factual) determination of substantial similarity.

Because music composition is a complex domain with many attributes unknown to the lay person, special skills and training are typically required to identify the creative elements in a musical composition and to establish whether there is substantial similarity between two musical works. Under the Ninth Circuit's extrinsic/intrinsic approach, musicological experts testify as to the scope of protection in a musical work, including which aspects are creative either as individual musical elements or combinations thereof, and which aspects are not protectable as

---

[4] The defendants did not contest the validity of the Estate's copyright in *Got to Give It Up* or the allegation of access to the work. In fact, Thicke gave several public interviews in which he acknowledged that *Got to Give It Up* was one of his favorite songs, and in which he further declared his desire to produce to a similar song. Thus, the operative issue was whether *Blurred Lines* is "substantially similar" to *Got to Give It Up*.

musical *scenes a faire*. *Id.* If experts establish the presence of protectable expression in the underlying work the question of substantial similarity and infringement goes to the jury. *Id.* Moreover, where experts disagree about what is creative or unprotectable in a musical work, the resolution of the issue is not one of law for the court, but rather is a question of fact for the jury. Fed. R. Evid. 702-04; *Swirsky v. Carey,* 376 F.3d 841 (9th Cir. 2004); *Three Boys Music Corp. v. Bolton,* 212 F.3d 477 (9th Cir. 2000).

The Competing Expert Analyses

The Gaye experts identified a "constellation of protectable expression" in *Got To Give It Up* that they considered original and thus entitled to copyright protection (and which they found *Blurred Lines* had duplicated or otherwise used in violation of Gaye's copyrighted work). This included the "signature phrase," "hook," "theme X," bass melodies, keyboard parts, word painting, shared lyrics, and parlando, all represented in the lead sheet deposit copy of *Got To Give It Up*. Their testimony identified original creative elements particular to the song *Got To Give It Up*, and not merely general conventions of a genre, era, or style. As one expert established in her report, Gaye had creatively combined elements of various genres to create a unique, original amalgam in *Got To Give It Up* that gave birth to a wholly new style or genre. Thus, the protectable elements therein and their combination as put before the jury were particular to the composition *Got To Give It Up*, and were not merely unprotectable conventions of genre, era, or style.

The expert musicologists for the Gaye Estate further concluded that the two compositions are substantially similar—especially given the limited coverage that written music deposits provides for pop music compositions—in that both songs contain significant, musically important elements in common, and that these elements reflect originality on the part of Marvin Gaye. One of the Estate's experts further opined that the two works have "a constellation of eight substantially similar features," and that these similarities "surpass the realm of generic coincidence, reaching to the very essence of each work."

The Thicke experts conceded that certain of the creative elements of *Got to Give It Up* are present in *Blurred Lines.* For example, their expert stated that the signature phrase ("I used to go out to parties") and hook ("Keep on dancin'") are "important hook phrases" appearing in *Blurred Lines*. Nonetheless, defendants' expert musicologist took the position that musically, the two compositions have little in common. After analyzing the melodies, rhythms, harmonies, and structures of the written music composition of *Got to Give It Up*, she concluded that the two songs are not substantially similar, and that any common elements are unprotectable, i.e., non-literal *scenes a faire* material common to the relevant musical genre. Accordingly, at the close of discovery, defendants filed a motion for summary judgment, arguing that an extrinsic analysis of the works showed no substantial similarity and thus there was no basis upon which to refer the case to a jury.

The district court denied defendants' motion, finding that the Estate's experts had adduced evidence of extrinsic similarities between certain protectable elements of expression present in the two works. Among other things, the court did not accept the conclusions of defendants' expert that the similarities between the works involved only unprotectable *scenes a*

faire material. Moreover, the court regarded the disagreement between the parties' experts as a further indication of genuine issues of material fact appropriate for the jury to consider.

As discussed above, at the intrinsic stage of the substantial similarity analysis, the jury determines whether a reasonable listener would conclude that the total concept and feel of the two works are substantially similar. Given the issues surrounding the scope of the copyright in *Got to Give It Up*, the court did not permit the Gaye Estate to play the sound recording of *Got to Give It Up* for the jury, but rather restricted the evidence to elements within or indicated by the sheet music copyright deposit. Despite this restriction, the jury nonetheless found that the two works are substantially similar, and issued a verdict in favor of the Gaye Estate, awarding $7.4 million in damages. Thereafter, Williams and Thicke filed their notice of appeal with the United States Court of Appeals for the Ninth Circuit.

The Salient Issues on Appeal

Whether There Was Evidence of Extrinsic Similarity

Faced with the conflicting expert testimony, the trial court decided that the conflict created a factual issue to be resolved by the jury. Accordingly, the court denied the motion for summary judgment and referred the factual dispute to the jury.

As discussed above, where experts disagree about what is creative or unprotectable in a musical work, the resolution of the issue is not one of law for the court, but rather is a question of fact for the jury. Fed. R. Evid. 702-04; *Swirsky v. Carey,* 376 F.3d 841 (9th Cir. 2004); *Three Boys Music Corp. v. Bolton,* 212 F.3d 477 (9th Cir. 2000).Weighing all the evidence, including the conflicting expert testimony, the jury ultimately found that protectable expression in *Got To Give It Up* was infringed by *Blurred Lines*.[5] Although on appeal, defendants have essentially argued that the Estate's experts and/or their opinions are so devoid of credibility that there was no genuine issue of fact for the jury to resolve, given both the procedural posture of the case and the evidence in the record, this argument does not seem likely to prevail.

The Scope of the Copyright in Got to Give It Up

A more complicated issue before the Court of Appeals is the question of the scope of the copyright in *Got to Give It Up*. Under the 1909 Copyright Act, copyright protection was obtained

[5] Indeed, various non-party composers such as Smokey Robinson and others, noted the similarity between the songs. In an interview Robinson said, "Part of the melody is in there! ... It was absolutely a rip off!" Maricielo Gomez, *Smokey Robinson tells Howard "There's some good music being made today, man!" on the Stern Show,* October 1, 2014 (around 34:44 minute), http://blog.siriusxm.com/2014/10/01/smokey-robinson-tells-howard-theres-some-good-music-being-made-today-man-on-the-stern-show/; https://www.youtube.com/watch?v=PedzBpDNJrI. *See also* Rob Hoerburger, *Why 'Blurred Lines' Won't Go Away* New York Times, (August 8, 2013) http://6thfloor.blogs.nytimes.com/2013/08/08/why-blurred-lines-wont-go-away/?_r=1; Stephanie Penn, Album Review: Robin Thicke's "Blurred Lines" http://soultrain.com/2013/08/05/album-review-robin-thickes-blurred-lines/; Ray Rossi, *Is "Blurred Lines" a Rip of "Got to Give it Up"? – You Be the Judge*, (Aug. 21, 2013) http://nj1015.com/is-blurred-lines-a-rip-of-got-to-give-it-up-you-be-the-judge-pollvideo/ ("First time I heard 'Blurred Lines' I thought, 'whoa….that's 'Got To Give it Up!' ").

by the publication or registration of an expressive work. *Id.* at §§ 9-11. However, while the publication or registration of a work was the act by which copyright in the composition vested, the Act did not address whether said act also delineated the *scope* of the protected work itself. *See e.g. Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1342 (9th Cir. 1981). While it might seem to make sense that such written notations should delineate the work, that would mean that a simplified two-handed piano part version of a new symphonic work prepared for the amateur market, or a shorthand placeholder lead sheet used to identify the work solely for registration, would limit copyright to only what was notated for these limited purposes.

For a symphonic work, it is likely that the composer typically submits a fully scored version of the work to the Copyright Office for registration. In that case, the deposit copy would be the definitive version of the work—even though prior publication of simplified sheet music may have already vested copyright in the work. For composers like Gaye, however, writing a full score in European staff notation was not possible. Neither a published simplified sheet music, nor the lead sheets prepared by his publisher for pro forma registration accurately captured the full scope of his compositions. Only the sound recording—the tool of choice for composition and recordation of that composition—did this.

Moreover, with the addition of performance rights to the composer's bundle of exclusive rights, infringement of the copyright in a musical work was no longer limited to copying physical copies of the music. *See* Act of January 6, 1897, 29 Stat. 481 (Jan. 6, 1897). Unauthorized performance would also infringe rights in the musical composition. It did not matter whether musicians performed the music by ear, or from sheet music purchased legally, or from lead sheets or other notation created to recall the work to the mind of the performers. The performance rights in a musical work were no longer confined to the work's embodiment in any form or written notation.

In the case of *Got to Give It Up*, the registration deposit copy of the work is significantly different from the published commercial sheet music, and both of these are limited in comparison to what Gaye actually composed in the studio on the sound recording. Both the deposited lead sheet and the published sheet music represent only very limited notations of the work with multiple parts (vocals, keyboard, bass, percussion, etc.) composed by Gaye in the studio. Given the manner and medium in which Gaye composed, the sound recording provides the most accurate documentation of Gaye's composition. Indeed, some courts have allowed sound recordings as evidence of the music composition in cases such as this, where the composer composed in the studio directly to a sound recording. *See Three Boys Music Corp. v. Bolton,* 212 F.3d 477 (9th Cir. 2000); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009).

Intellectual Property Social Justice Issues Implicated in the Blurred Lines Litigation

The jury's verdict and the decision of the district have important implications for the intellectual property social justice principles of access, inclusion, and empowerment. *See e.g.* Peter Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier,* 5 Brigham-Kanner Prop. Rts. Conf. J. 147 (2016); Lateef Mtima and Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information,* 55 N.Y.L. Rev. 77, 80-84

(2010/11). At trial, the Estate's experts avoided certain traditional biases in determining which aspects of *Got To Give It Up* should be considered "creative." Their analyses identified how certain elements were original to the composer and were not merely standard, rote ingredients of a particular genre. As experts in the relevant music genres, including R&B and Soul, they explained why these elements are creative as a matter of music theory and/or are an original combination of elements from various genres.

By allowing the jury to undertake the intrinsic infringement determination, the court's decision served copyright social justice by preventing musicological bias against aural traditions from improperly denying copyright protection to creative elements in *Got To Give It Up*. In the view of some copyright scholars and practitioners, the decision corrects long-standing traditions within the field which have improperly denied protection to the creative output of marginalized creators and the resulting misappropriation of their work. *See, e.g.,* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection,* 21 Hastings Comm. & Ent. L.J. 339 (1999); Keith Aoki, *Distributive Justice and Intellectual Property: Distributive and Syncretic Motives in Intellectual Property Law* 40 U.C. Davis L. Rev. 717, 755 -62 (2007).[6] Allowing cultural bias to categorically deny copyright protection to aural musical expression discourages the participation of marginalized creators and communities in the copyright regime. Accordingly, the decision below avoids such distortion of copyright and instead affirms the rights of marginalized creators to protection for their work.

In addition, the prior Copyright Office policy that required written music notation for copyright registration, which in practice was taken to mean the formal staff notation originally developed in Europe for sacred and secular classical music traditions, was an equally important and damaging aspect of cultural bias that disfavored marginalized artists. The form-of-deposit discrimination problem arose because many of our nation's most gifted (and internationally acclaimed) composers who worked outside of the European classical or formal music tradition—albeit squarely within emerging twentieth century Western popular music genres—were not fluent in European staff notation. Nor was this mode of notation seen as particularly relevant to the aural music traditions in which they composed. Marvin Gaye was one of these composers—as were Robert Johnson, Hank Williams, Jimi Hendrix, Irving Berlin, Michael Jackson, Elvis Presley, Glenn Campbell, and many other American music innovators. This technical limitation had little impact on their ability to convey their compositions to other musicians to perform, as many musicians in the new pop, jazz, country, and other indigenous American genres also were not fluent in European staff notation. Such musicians, like the composers themselves, played by ear and by watching as others played.

At least two categories of problems resulted from the disconnect between the Copyright Office deposit policy and the inability of many American composers to read and write European staff notation. First, in many cases, these composers were not in a position to inscribe their compositions in such notation, and consequently were forced to rely on others where lead sheets or sheet music was deemed required. In many such cases, music publishers assigned an

---

[6] *See also,* Smokey Robinson Interviewed by Howard Stern on "The Howard Stern Show" on SiriusXM on September 30, 2014, http://blog.siriusxm.com/2014/10/01/smokey-robinson-tells-howard-theres-some-good-music-being-made-today-man-on-the-stern-show/; https://www.youtube.com/watch?v=PedzBpDNJrI (on composing music and exploitation of composers in the music business) (around the 10th minute).

employee trained in European staff notation to transcribe a recorded performance of the composition. The transcriber would transcribe what she considered the main melody and chords of the song. The result might or might not accurately represent the actual melody and chords composed, and might include or omit other important, original elements of the composition. If courts construe the composition as limited to that which could reasonably be interpreted from the lead sheet or sheet music inscribed by someone other than the composer—and in many cases with no direct involvement by the composer—then only an incomplete version of the composition would receive copyright protection.

Second, leaving composition transcription (and related copyright formalities) to a manager, record label, or music publisher created a moral hazard of composers being taken advantage of. We now know that a significant number of composers suffered this harm when their works registered in the names of others or registered with "co-authors" who played no actual role in composing the work. As the historical record reveals, many marginalized composers, especially those of color and outside both the European staff notation tradition and communities which offered better access to legal representation and information, were exploited badly in the twentieth century.[7]

Finally, the written notation mode of deposit and registration was not mandated by the Copyright Act of 1909. In fact, the Copyright Office did allow deposit of player piano rolls for a period in the 1920s and 30s for registration of musical composition copyrights. Nonetheless, from some time after the 1930s and before the 1980s, written music deposits were required for musical compositions.[8] Accordingly, the jury verdict and decision below helps mitigate decades of copyright abuse and may be a harbinger of changes that can curtail and discourage practices which undermine the fundamental objectives of copyright social utility and justice. [9]

Conclusion

In the 1970s, Marvin Gaye created a new style of R&B music, typified as much by his innovative orchestration of voices and instruments as by any particular melodic elements. While music copyright cases up to the mid-20th century often focused on catchy melodies, contemporary cases consider harmonic and rhythmic elements as well. The older view derived from a European — often "highbrow" — approach to music. This marginalized the influential harmonic and rhythmic innovations of artists of color from jazz on through rock and hip-hop. It also resulted in a disconnect between the dictates of the copyright law and how those dictates have been interpreted and applied by music theorists.

---

[7] In fact, when Congress added termination rights under Section 203 of the Copyright Act of 1976, the provision was largely motivated by narratives of such exploitation.

[8] Sound recordings of course were deposited for sound recording copyrights starting in 1973 when federal protection for them was first adopted.

[9] *See e.g. Overdue legal recognition for African-American artists in 'Blurred Lines' copyright case*, http://www.seattletimes.com/opinion/overdue-legal-recognition-for-african-american-artists-in-blurred-lines-copyright-case/

The jury verdict and the district court's decision may help to bring "custom" in the field of music theory more in line with the actual scope of copyright protection. The district court's rulings below would seem consistent with copyright law and jurisprudence. Moreover, the decision may be a critical legal victory for heretofore marginalized composers. If their legal victory is upheld, Marvin Gaye's heirs may have found a way to ensure legal recognition and respect for the valuable musical contributions of artists of color.