Give Me The Beat Boys,¹ and Free My Copyrighted Creativity

An Examination of Music Copyright Infringement Through the Lens of the Ninth Circuit’s ‘Blurred Lines’ Opinion

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¹ Dobie Gray, Drift Away, on Drift Away (MCA Records 1973).
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Contemporary rappers/singers Pharrell Williams, Robin Thicke, and Clifford Harris, Jr (better known as rapper T.I.) topped charts in 2013 with their controversial lyrics and catchy tunes in the song “Blurred Lines.” Thicke was vocal about the influence singer Marvin Gaye had on his style. Marvin Gaye had his heyday in the 1960s through ’80s, and was known for his soulful Rhythm and Blues Motown hits. In Williams v. Bridgeport Music, Inc., the question was whether Gaye’s influence on Thicke was merely inspiration, or whether the three singer-songwriters for “Blurred Lines” had copied from Gaye’s so-called “disco-funk classic” song “Got to Give It Up” impermissibly.

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3 See Anthony Mandler, Robin Thicke Admits Drug Abuse, Lying to Media in Wild “Blurred Lines” Deposition (Exclusive), THE HOLLYWOOD REPORTER (Sept. 15, 2014, 9:00 AM PT), http://www.hollywoodreporter.com/thr-esq/robin-thicke-admits-drug-abuse-732783 (outlining Thicke’s media appearances where he mentions Marvin Gaye and says “Got to Give It Up” is “one of his favorite songs of all time” and told Pharrell they should make a song with “that groove,” but in his deposition, Thicke claims the interviews were a false origin story meant to give him some credit for “Blurred Lines” but Pharrell really wrote “almost every single part of the song”). See also Williams v. Bridgeport Music, Inc., No. CV13-06004-JAK(AGRx), 2015 WL 4935277 (C.D. Cal. Feb. 25, 2015) (Testimony of Defendant’s Witness, Robin Alan Thicke) (Thicke affirms that “Got to Give It Up” is a ‘classic’ and ‘one of his favorite songs of all time’); D.I. 172 (Notice of Motion and Motion in Limine to Exclude Evidence of Plaintiffs’ Press Statements, dated Jan. 6, 2015).


5 Jody Rosen, Robin Thicke on ‘Blurred Lines’ and Learning From His Mistakes, N.Y. TIMES (July 1, 2015), https://www.nytimes.com/2015/07/05/arts/music/robin-thicke-on-blurred-lines-and-learning-from-his-mistakes.html?_r=0.
This paper will review music copyright litigation principles generally, including the substantial similarity test and the most prominent evidentiary concerns for courts, while focusing primarily on the Ninth Circuit. It will explore case law in the Ninth Circuit leading up to the “Blurred Lines” decision, discuss the aftermath of “Blurred Lines,” and consider alternatives to the current music copyright litigation practice that might avoid another such surprising outcome.

I. Music Copyright Principles in the Ninth Circuit

There are two copyrights for music, the sound recording copyright and the musical composition copyright, and they may have different “authors” who own the rights.\(^6\) To establish music copyright infringement, a plaintiff must prove: (1) copyright ownership and (2) copyright infringement.\(^7\) Evidence of copying can be either direct or indirect. Proof of direct copying is rare.\(^8\) Usually plaintiffs must rely on indirect evidence to prove in the first prong that the defendant had “access” to the plaintiff’s work and the plaintiff’s existing work and defendant’s new work are similar, then in the second prong that the intended audience of the defendant’s work would find the protectable elements of the two works “substantially similar.”\(^9\)

\(^6\) *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1248-49 (C. D. Cal. 2002) (finding a musical composition’s copyright “protects the generic sound that would necessarily result from any performance of the piece” whereas the sound recording is “the sound produced by the performer’s rendition of the musical work”) (citations omitted).

\(^7\) *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (citing *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)) (infringement means that “the defendant copied protected elements of the plaintiff’s work”).

\(^8\) *Id*.

\(^9\) *Id*. 
The substantial similarity test for comparing two musical works has varying applications across different circuit courts.10 The two most prominent approaches were established by the Second and Ninth Circuits, respectively.11 The Ninth Circuit uses the extrinsic/intrinsic similarity test.

A. Extrinsic Test

In the “extrinsic test,” a court measures whether the works in question are similar by using external, objective criteria.12 The complicated nature of the extrinsic test makes it difficult for even experienced music copyright courts to apply.13

Courts perform an “analytical dissection” of the works with the help of expert testimony.14 “Analytical dissection” means dividing the works “into their constituent elements, and comparing those elements for proof of copying as measured by ‘substantial similarity.’”15 Courts should differentiate between protected and unprotected elements.16 Unprotectable

10 See ROBERT C. OSTERBERG & ERIC C. OSTERBERG, Chapter 3: Test for Substantial Similarity, in SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW, pt. 1, at 3-1, 3-2 to 3-52 (2012).
11 Id. at 3-2 n.1 to 3-3 (explaining that Second Circuit’s decision in Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) established copying/unlawful appropriation test and Ninth Circuit’s decision in Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977) established extrinsic/intrinsic test).
12 Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).
13 See OSTERBERG & OSTERBERG, supra note 10, at 3-30. The Ninth Circuit conceded this point in Swirsky v. Carey, writing that the test (assessing the similarity of ideas and expression between two works) “provides an awkward framework for copyrighted works like music or art objects, which lack distinct elements of ideas and expression.” Swirsky, 376 F.3d at 848.
14 See Three Boys, 212 F.3d at 485.
16 Court should only measure the defendant’s work’s substantial similarity to the protected elements of the plaintiff’s work. See Swirsky, 376 F.3d at 845. Elements between the two songs that are similar but can be attributed to an unprotectable construct will not be sufficient to find copyright infringement and the fact finder should filter them out of their final analysis. See Newton, 204 F. Supp. 2d at 1249 (citing Sony Pictures Enter., Inc. v. Fireworks Enter. Group, Inc., 156 F. Supp. 2d 1148, 1157 (C.D. Cal. 2001)).
constructs include *scenes a faire*, the idea/expression dichotomy, elements in the public domain, and *de minimis* sampling.

**B. Intrinsic Test**

A case only reaches the intrinsic test (based on subjective elements) once the extrinsic test is satisfied. The intrinsic test asks “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.” A jury’s assessment of the factors for the intrinsic test is often called the ‘lay listener’ test.

The Ninth Circuit has found that the subjective intrinsic test was “virtually devoid of analysis,” and scholars have described it as “no more than the visceral reaction of the lay observer.” Both sides typically play musical clips in court to try and sway the jury to find

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17 *See Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942) (defining *scenes a faire* as “small details” that are situationally common and recur or are nearly inevitable in certain genres and are therefore deemed unoriginal or unprotectable).


19 Elements in the public domain are elements for which the author(s) have not secured copyright protection. *See, e.g.*, 17 U.S.C. § 103 (1909 Act) (if work was copyrighted by publication with notice but not promptly deposited with U.S. Copyright Office it could fall into public domain).

20 *See OSTERBERG & OSTERBERG*, *supra* note 10, at 3-24.

21 *Swirsky*, 376 F.3d at 485; *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003) (finding summary judgment is necessary when extrinsic test not met because “a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests”). The extrinsic test is satisfied if the trier of fact finds a substantial similarity of ideas. *See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

22 *Swirsky*, 376 F.3d at 485 (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991) (internal quotations omitted)).

23 *Smith*, 84 F.3d at 1220-21.

24 *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990).

25 *OSTERBERG & OSTERBERG*, *supra* note 10, at 3-23.
either that there is or is not substantial similarity in the “total concept and feel” of the two juxtaposed works.\(^{26}\)

**C. Evidentiary Concerns**

Which elements of a copyrighted work are protectable under the Copyright Act is a question of law for a court to decide.\(^{27}\) Here, “Got to Give It Up” was registered under the 1909 Copyright Act because it was registered in 1977,\(^{28}\) prior to the effective date of the current Copyright Act on January 1, 1978.\(^{29}\) The only registration at that time was for the deposit copy of the written musical score.\(^{30}\) In support of his registration, Gaye submitted a “lead sheet” containing “the lyrics and some of the melodic, harmonic, and rhythmic features that appear in the recorded work,” although Gaye himself did not fluently read sheet music or write sheet music of his own songs.\(^{31}\)

\(^{26}\) The jury is not supposed to use expert evidence or extrinsic factors to decide this prong of the test. *See Krofft*, 562 F.2d at 1164–65 (citing *Arnstein*, 154 F.2d at 468-69). The playing of music in court is especially complicated in cases like *Williams v. Bridgeport Music, Inc.* where there was no copyright on the sound recording. *See, infra*, note 38. Scholars have commented that juries must have very short memories to perform this task adequately. *See, e.g.*, Jeffrey Cadwell, Comment, *Expert Testimony, Scenes A Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 163 (“The ideal judge or jury, then, must have a “conveniently short” memory in order to separate the testimony presented by the expert on copying from their decision on improper appropriation.”)

\(^{27}\) *See Feist*, 499 U.S. at 348-51.


\(^{31}\) The initial registration was under Registration Number EP 366-530 in 1977 and was renewed as RE 910-939, and the copyright ownership transferred to the Gaye family after Marvin’s death. *See Williams*, 2014 Dist. LEXIS 182240 at *3-4 (Summary Judgment Order).
D. Expert Witnesses and Lay Jury

Expert witness testimony is one of the more confusing elements for a lay jury to digest.\textsuperscript{32} Expert testimony is allowed for the extrinsic test but not for the intrinsic test.\textsuperscript{33} The jury is then forced to distinguish between whether an artist has copied the expression of an idea or merely just the idea\textsuperscript{34} and whether the copying was unlawful without the help of expert testimony.\textsuperscript{35} The problem is both substantive and procedural: with the intrinsic test that relies on the “total concept and feel” of two works as the deciding factor for infringement (substantive) \textit{and} with the lay jury that is meant to interpret it (procedural).\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{32} See Debra Presti Brent, \textit{The Successful Musical Copyright Infringement Suit: The Impossible Dream}, 7 U. Miami Ent. & Sports L. Rev. 229, 247 (“Both parties in an infringement suit must synthesize the technical factors that constitute a musical composition into concise, lay-person language to avoid confusing or misguiding the factfinder.”). Additionally, the Fourth Circuit found that:
\begin{quote}
(0)nly a reckless indifference to common sense would lead a court to embrace a doctrine that requires a copyright case to turn on the opinion of someone who is ignorant of the relevant differences and similarities between two works. Instead, the judgment should be informed by people who are familiar with the media at issue.
\end{quote}


\item \textsuperscript{33} See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1165-65 (9th Cir. 1977) (citing \textit{Arnstein v. Porter}, 154 F.2d 464, 468-69 (2d Cir. 1946)).

\item \textsuperscript{34} See \textit{Swirsky v. Carey}, 376 F.3d 841, 848 (9th Cir. 2004) (“The application of the extrinsic test, which assesses substantial similarity of ideas and expression, to musical compositions is a somewhat unnatural task, guided by relatively little precedent.”).

\item \textsuperscript{35} See \textit{Williams v. Bridgeport Music, Inc.}, 2014 Dist. LEXIS 182240, at *3 (Order Re: Plaintiffs’ and Counter-Defendants’ Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment Order) for discussion.

\item \textsuperscript{36} But see Austin Padgett, \textit{The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation}, 7 Pierce L. Rev. 125, 137-46 (Dec. 2008) (describing procedural and substantive proposed reforms to music copyright).
\end{itemize}

The “Blurred Lines” case was complicated for multiple reasons. Because the Gaye estate owned the copyright to the underlying musical work but not to the sound recording, the actual sound recording of “Got to Give It Up” (“Give”) was not played in court. The case seemed to hinge on popular opinion of Robin Thicke’s many media appearances talking about his inspiration from Gaye and on the complicated instructions the court gave the jury before deliberation.

A. California District Court Case

On August 15, 2013, Pharrell Williams, Robin Thicke, and Clifford Harris, Jr. together with Interscope Records, UMG Recordings, Inc., Star Trak Entertainment, LLC, and Universal Music Distribution (“Interscope”) filed an action (collectively as the “Thicke Parties”) in the United States District Court for the Central District of California seeking a declaratory judgment against the Gaye Estate that their song “Blurred Lines” (“Blurred”) did not infringe on Marvin Gaye’s composition “Give.” There were several motions and cross-motions. In ruling on these pretrial motions, the district court concluded that for the analytic dissection in the extrinsic

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38 The district court agreed with the Thicke Parties that elements in Marvin Gaye’s sound recordings that were not contained in the copyright deposit sheets are not protected under the 1909 Act, but it allowed admission of edited sound recordings that were meant to remove any elements not included in the lead sheets (defining the parameters of Gaye’s copyright). See Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx) at 3-6 (C.D. Cal. Jan. 28, 2015) (Sound Recording Order).

39 The district court denied the Motion for Summary Judgment on October 30, 2014, after a hearing on the Motion on October 20, 2014. Williams, 2014 Dist. LEXIS 182240 at *3 (Summary Judgment Order).
test, the “lead sheet” deposited with the Copyright Office in 1977 defined the scope of Gaye’s copyright, which likely impacted the outcome of the case at trial.\footnote{\textit{Williams}, 2014 Dist. LEXIS 182240 at *29 (Summary Judgment Order).}

The district court also determined “elements that appear in the Gaye sound recordings, but are absent from the copyright deposit sheets – the only publications submitted by [the Gaye Estate] as evidence of their copyright ownership – are not protected by the copyrights asserted by [the Gaye Estate].”\footnote{\textit{Williams}, No. LA CV13-06004 JAK (AGRx) at 3 (Sound Recording Order).} Yet the court allowed the Gaye Estate to create “mash-up” sound tracks of “Give” that were meant to “strike[ ] an appropriate balance between presenting a record that contains what is reflected in the deposit copy, without including potentially prejudicial sounds that are not protected.”\footnote{\textit{Id.} at 5.} The court reasoned that jurors (“the ordinary person”) could likely not read sheet music, making the lead sheet “inadequate” for the intrinsic test.\footnote{\textit{Id.} at 4-5.}

After a seven day trial,\footnote{\textit{Williams v. Bridgeport Music, Inc.}, No. LA CV13-06004 JAK (AGRx), 2015 U.S. Dist. LEXIS 97262, at *3 (C.D. Cal. July 14, 2015).} the jury unanimously found that two of the Plaintiffs (Williams and Thicke) had infringed the Defendants’ copyright in “Give” by composing “Blurred.”\footnote{\textit{Williams}, 2015 U.S. Dist. LEXIS 97262, at *3.} The jury ordered damages totaling $7.2 million overall.\footnote{\textit{Williams}, 2015 WL 4935288 (C.D. Cal. Mar. 10, 2015) (Reading of the Verdict) (finding Thicke and Williams owed Gaye estate $4 million in copyright damages, and measured their individual profits gained from the infringement to be approximately $1.8 million for Thicke and $1.6 million for Williams).} Inexplicably, the jury found Harris (also known as T.I.) and Interscope did not infringe, although Harris, exactly like Williams and Thicke, had an ownership stake in “Blurred” and had helped compose the song, and Interscope
produced and distributed the album on which the song was published. The Thicke Parties and Gaye Estate each filed motions. The court denied the Thicke Parties’ requests except remittitur. It attributed the jury’s finding that Harris and Interscope were not liable to a “specific instructional error” and granted the Gaye Estate’s motion for declaratory relief, finding Harris and Interscope liable for infringement.

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47 See id. at *1-4; Jason Palmer, Note: “Blurred Lines” Means Changing Focus: Juries Composed of Musical Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries, 18 VAND. J. ENT. & TECH. L. 907 (2016) (highlighting two problems with Williams’ verdict: (1) jury finding Harris and Interscope were not liable for infringement but on another part of form indicated they both committed ‘innocent infringement’; and (2) finding Harris not liable for infringement even though Harris, Williams, and Thicke each owned percentage share in song). The district court found that because the jury found “Blurred” to be an infringing work, as a matter of law, Harris was thus liable for infringement. See Williams, 2015 U.S. Dist. LEXIS 97262, at *121.

48 The Thicke parties filed a Motion for judgment as a Matter of Law, Declaratory Relief, a New Trial, or Remittitur. The Gaye Estate filed motions for: (1) Declaratory Relief, asking the court to declare that Harris and Interscope were equally liable for copyright infringement; (2) Injunctive Relief or Ongoing Royalties; and (3) Prejudgment Interest. The Defendants’ Motion for Declaratory Relief was granted, their Motion for Injunctive Relief or Ongoing Royalty was granted in part (denied as to injunctive relief and granted as to ongoing royalty), and their Motion for Prejudgment Interest was granted in part. Id. at *4-6.

49 Id. at *71, 92-93; D.I. 423 (Order dated July 14, 2015) (“July 14 Order”). The district court remitted the award of actual damages and the award of profits from Williams. The court explained that counsel for both parties had answered the jury’s question about damages stating that “approximately $8 million was received by the writers of Blurred Lines in publishing revenue” so that figure was to be used to calculate actual damages but not profits. After the trial ended, the defendants stated this number was “grossly inaccurate” and they should have double checked the stipulation because “the [ ] amount of publishing revenue was [approximately $6 million] for all three writers.” July 14 Order at 29. Thus, the court found the $4 million in actual damages exceeded the amount supported by evidence (it was not actually 50% of the writers’ earnings) and actual damages was reduced to approximately $3 million (half of the actual earnings). July 14 Order at 30-31. The award for profits against Williams was remitted to $357,630.96, making the award $5.3 million in total damages. July 14 Order at 34.

50 The court found that the error was in Jury Instructions 24 and 35 and in not “instruct[ing] the jury that the distribution of infringing works constitutes copyright infringement,” although that justification for the inconsistent verdicts does not explain the discrepancy with Harris. Williams, 2015 U.S. Dist. LEXIS 97262, at *117-19. The court concluded that “the jury would have reached a contrary result had it been correctly instructed.” Id. at *121 n.36.
B. Ninth Circuit Appeal

The Thicke Parties appealed to the Ninth Circuit Court of Appeals on August 23, 2016.\(^{51}\) Among the issues raised on appeal, the Thicke Parties asserted that the district court should not have denied summary judgment because Defendants’ musicologist expert Judith Finell based her testimony about similarities between “Blurred” and “Give” solely on the sound recording of “Give,” which was not protected by copyright.\(^ {52}\) The Thicke parties also objected to the Gaye Estate’s expert testimony.\(^ {53}\) On the contrary, the Gaye Estate argues that the entire sound recording of “Give” should have been allowed, not just a mash-up recording, as supported by their amici.\(^ {54}\) Additionally, evidence about press statements about being inspired by Marvin

\(^{51}\) *Williams*, No. 15-56880 (9th Cir. 2016) (Opening Br. of Pls.-Appellants-Cross-Appellees) (hereinafter “Pls.’ Br.”).

\(^{52}\) *Id.* at 8-13; *but see Williams*, 2015 WL 4742406 (Feb. 25, 2015) (Expert Trial Transcript, Testimony of the Gaye Estate’s Expert Witness, Judith Finell) (describing her methodology of analyzing the similarities by listening to the songs but stating she reviewed the “Give” lead sheet and contends that all the elements she identified as similar to “Blurred” are contained therein).

\(^{53}\) *Id.* at 15-16. The Thicke Parties asserted that the Gaye Estate’s experts improperly based their testimony at trial on the “Give” sound recording, and the district court denied a Daubert hearing on Finell’s opinion, to which the Thicke Parties objected because it covered musical elements not present in the deposit copy. *Id.*

\(^{54}\) Br. of *Amicus Curiae* of the Inst. for Intell. Prop. & Soc. Just. Musician and Composers & Law, Music, & Bus. Professors in Support of Appellees, No. 13-cv-060005 JAK (AGRx), at 5, (9th Cir. 2016) (hereinafter Appellee’s Amicus Br.). However, they admit that “[p]honorecordings of course were deposited for sound recording copyrights starting in 1973 when federal protection for them was first adopted.” *Id.* at 15. Nonetheless, the *amici* argue that for purposes of this litigation, even if Marvin Gaye had deposited a sound recording at the Copyright Office for the sound recording copyright, a court would not have been allowed to use that recording for an analysis of possible infringement of the written score. *Id.* at 27-37. They find this is discriminatory in light of the aural tradition of Rhythm and Blues and similar genres where artists could not write complete scores in European staff notation. *Id.* at 37-42. They also note that other similarly situated cases (“where the composer composed in the studio to a phonorecording”) used the entire phonorecording as evidence at trial. *Id.* at 30. *See Three Boys*, 212 F.3d at 477; *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009). However, this author notes that in *Three Boys*, the trial court made a ruling that the deposit copy was a “complete copy” and encompassed all of the essential elements in the recorded version of the song, unlike in *Williams*. *Three Boys*, 212 F.3d at 486-87. Moreover,
Gaye or “Give” were permitted into evidence.\textsuperscript{55} Finally, the Thicke Parties objected to jury instructions\textsuperscript{56}

In support of the Thicke Parties, a large group of musicologists submitted an \textit{amicus curiae} brief to provide an expert interpretation of the alleged similarities between “Blurred” and “Give.”\textsuperscript{57} They assert Finell and Monson “departed from the basic principles and rules for comparing two works in a copyright infringement context” by manipulating the transcripts and misaligning notes between and within the works to make them appear similar.\textsuperscript{58}

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\textit{Bridgeport} is entirely distinguishable from this action because the infringement was based on musical compositions \textit{and} sound recordings, and the court held that the “composition of [the plaintiff’s song] is embedded in the sound recording.” \textit{Bridgeport}, 585 F.3d at 273.

\textsuperscript{55} Thicke said in an interview that he was discussing how “Give” was one of his favorite songs before feeling inspired to write “Blurred Lines” to emulate Gaye’s ‘groove.’ \textit{See} Stelios Phili, \textit{Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film}, GQ (May 6, 2013 9:20 PM), http://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy. However, there is a difference between “lawful inspiration,” that is in line with the Constitutional purpose of copyright law (“[t]o promote the Progress of Science and useful Arts’) and unlawful infringement, based on findings of access (likely aided by evidence of inspiration) and substantial similarity. \textit{See} Hajir Ardebili, \textit{Paying Homage or Literary Larceny: Sharpening the Blurred Lines Between Inspiration and Infringement}, 31-SUM COMM. LAW. 10 (2015) (quoting U.S. CONST., art. I, § 8).

\textsuperscript{56} Pls.’ Br., No. 15-56880 at 30, 38, 40 (stating that court did not limit the jury’s decision-making to protected elements of “Give” and asserted that based on protected elements, there is no reasonable juror who could find substantial similarity between “Blurred” and “Give”).

\textsuperscript{57} Br. of \textit{Amicus Curiae} Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees, No. 15-56880, at 2 (9th Cir. 2016) (hereinafter Appellants’ Musicologists’ Br.) (“there can be no genuine disagreement among experts as to the fact that there is no harmonic similarity between “Blurred” and “Give” because the chord progressions in both works were entirely different”).

\textsuperscript{58} \textit{Id.} at 4; \textit{c.f.} Appellee’s Amicus Br. at 25-26.
In support of the Gaye estate, *amici* counter that Finell’s testimony about the bass line is at the beginning of the lead sheet. The *amici* also argue that Finell and Monson “properly interpreted the sparse lead sheet’s various themes and hooks.”

### CONCLUSIONS AND SOLUTIONS

#### III. The Future of Music Copyright in the Aftermath of “Blurred Lines”

The reactions to the jury verdict in *Williams* have been widespread and somewhat varied. Although there is a general consensus among media outlets and experts, both musical and legal, that the decision was erroneous and should be overturned, there has been disagreement about whether the decision will have a “chilling” effect on future musicians’ creativity.

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59 Appellee’s Amicus Br. at 24-25.
60 *Id.* at 25-26 (finding the Thicke parties’ expert “seemed to interpret the lead sheet through the lens of the Western classical or formal music tradition . . . [that] works more as blinders that obscure than as glasses that sharpen analysis” for the modern genre of music in the instant matter).
making an individual assessment, the author looks to other recently decided music copyright cases as well as scholarly commentary about potential solutions to “fix” music copyright.

One year after the “Blurred Lines” decision, the Central District of California addressed whether the band Led Zeppelin had infringed on the copyright for the band Spirit’s song “Taurus” when it composed “Stairway to Heaven.” The jury trial had many elements similar to “Blurred Lines,” including that the sound recording could not be played in court. After a unanimous jury found no substantial similarity, the plaintiff (the Trust acting on behalf of Randy Wolfe’s estate) filed an appeal in the Ninth Circuit on July 25, 2016, and it is currently pending. Commentators have compared this case to “Blurred Lines” and debated which of the outcomes will become the primary precedent.

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64 But in Skidmore, this was because the original recording of “Taurus” was made prior to the effective date of the Sound Recording Act of 1971 and was unprotected by copyright. Unlike in “Blurred Lines,” the experts for both Plaintiff and Defendant played the sheet music for “Taurus” in court for the intrinsic test. The plaintiff’s expert played it on guitar (the instrument used in the actual sound recording) while the defendants’ expert played it on piano. See Lamis G. Eli, Led Zeppelin Prevails in Copyright Infringement Case: Now on Appeal in Ninth Circuit, LEXOLOGY (Sept. 7, 2016), http://www.lexology.com/library/detail.aspx?g=596f001f-e115-4631-8559-0de2af069605. This option was suggested to the Williams court but was then replaced by the “mash-up” sound recordings after the district court’s decision on the Motion in Limine. See Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx) at 3-6 (C.D. Cal. Jan. 28, 2015) (Sound Recording Motion).


66 See Eli, supra note 64. See also Ken Clark & Dillon Collett, How the (Copyright Test) Was Won: Led Zeppelin Victorious in “Stairway to Heaven” Suit, LEXOLOGY (July 27, 2016), http://www.lexology.com/library/detail.aspx?g=ed8bceda-070f-4007-b472-7d7ac25bea11 (““Blurred Lines” was considered an homage to Gaye, not a direct rip-off. While some worried
Many scholars have opined about what happened in the “Blurred Lines” case, why music is a particularly difficult genre about which to ask lay juries to decide copyright infringement cases, and how to best change the copyright system in the United States. Besides arguments that the lay jury should be replaced in music copyright cases because of the difficult nature of the subject matter (a substantive change), or at least that the jury should be given expert guidance throughout both extrinsic and intrinsic tests, scholars also suggest establishing a special copyright tribunal or court, either for music alone or copyright generally. Patent appeals all go to one court, the Federal Circuit, and this has been suggested as an outline for the restructuring of copyright litigation as well. Other suggestions for solutions include specialized jury

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68 See generally Palmer, supra note 47.


instructions for music copyright cases and changing the procedural aspect of the similarity test (how it is framed).

The lay listener test developed as a market test because juries were supposed to represent the typical audience for the music in question. Yet this is difficult to replicate where there are two different markets with two different sets of “ordinary listeners.” Can one assume that those listening to the same radio station that will play “Blurred” and be inspired to buy the song will also be listening to the Oldies station that will play “Give”? In fact, it seems the infringement has had the opposite effect on “Give” and boosted its sales.

**IV. Conclusion/Solution**

Ultimately, this author recommends a new scheme for music copyright: replace the lay jury with music experts for music copyright cases and have only three specialized appellate

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74 See *Krofft*, 562 F.2d at 1164 (quoting *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579, 582 (9th Cir. 1944) (finding works in question should be tested by “the observations and impressions of the average reasonable reader and spectator”). Jaime Walsh, *No Justice for Johnson? A Proposal for Determining Substantial Similarity in Pop Music*, 16 DePaul-CA J. Art & Ent. L. 261, 298 (Spring 2006) (“One can assume if that if the works don’t sound substantially similar to the ordinary listener, then one would not supplant the other in the market.”).

music copyright courts (the Second, Sixth, and Ninth Circuits). Putting music experts on the jury for music infringement cases would solve the problem of the difficult subject matter and ensure that the results of music copyright cases would be more consistent, because the jurors would fully understand the question before them and would be better able to filter out unprotected elements. The musical jurors would walk into the courtroom with the knowledge of the many different music elements and then would not be confused, at a minimum, by the musical technicalities as they heard evidence about which elements were covered by the party’s copyright. This could refocus the jury to the ultimate question of whether the copying was unlawful. It would also benefit the accuracy of the infringement analysis because the jurors would be able to decipher which musicologists were credible and which made a more convincing argument, tasks that cannot normally be reviewed by courts on appeal. Additionally, it would solve the problem of the “lay listener” test for cases where no sound recording is copyrighted, such as in “Blurred Lines” and “Led Zeppelin,” because all of the jurors would be able to read sheet music.

A set of three designated music copyright appellate courts would also give a more consistent outcome for music copyright cases without running the risk of having one court with too much power, as is the criticism of the patent system and the Federal Circuit. The Second, Sixth, and Ninth Circuits already hear the majority of copyright cases, and consolidating the rest of the music copyright cases in those three courts would allow for those circuits and their judges to become music copyright experts. Splitting the burden between the three would provide

76 See Katherine Lippman, Comment, The Beginning of the End: Preliminary Results of an Empirical Study of Copyright Substantial Similarity Opinions in the U.S. Circuit Courts, 2013 Mich. St. L. Rev. 513, 541 (2013) (finding 30.8% of opinions studied came from Second Circuit; 24.8% from Ninth Circuit; and 7.3% from Sixth Circuit).
a much-needed difference of opinion that would allow for the further development of the law of music copyright. With these two changes, a problematic result like that in “Blurred Lines” would be nearly impossible, and the system could run smoothly and effectively. As for the upcoming outcome in “Blurred Lines”: the decision should be overturned on appeal based on the erroneous jury instructions and evidentiary admittances that show the verdict was not supported by the requisite “substantial evidence.”