CA No. 15-56880
Nos. 16-55089 and 16-55626 (Consolidated)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHARRELL WILLIAMS, ET AL.,
*Plaintiffs-Appellant*s

v.

FRANKIE CHRISTIAN GAYE, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. JOHN A. KRONSTADT, DISTRICT JUDGE
CASE NO. CV-13-06004-JAK (AGRx)

BRIEF OF AMICI CURIAE
212 SONGWRITERS, COMPOSERS,
MUSICIANS, AND PRODUCERS
IN SUPPORT OF APPELLANTS

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Shane Minor

Mark Holding

Nick Jarjour

Nick Raphael

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I. STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

Counsel for the parties did not author this brief. The parties have not contributed any money that was intended to fund the preparation or submission of the brief. No persons other than amici curiae or their counsel contributed money that was intended to fund the preparation or submission of the brief.

II. CONSENT OF THE PARTIES

Counsel for the parties have consented to the filing of this brief.

III. INTEREST OF THE AMICI CURIAE

Amici represent songwriters, composers, musicians, and producers from the United States and other countries who create music in many different genres that is protected under U.S. copyright law. That music entertains and enriches the lives of countless people, in the United States and around the world. Amici and the professionals that they represent will therefore undoubtedly be affected by, and consequently have a significant interest in, the outcome of this critically important case.

IV. INTRODUCTION

Amici are concerned about the potential adverse impact on their own creativity, on the creativity of future artists, and on the music industry in general, if the judgment in this case is allowed to stand. The verdict in this case threatens to punish songwriters for creating new music that is *inspired* by prior works. All music shares inspiration from prior musical works, especially within a particular musical genre. By eliminating any meaningful standard for drawing the line between permissible *inspiration* and unlawful *copying*, the judgment is certain to stifle creativity and impede the creative process. The law should provide clearer rules so that songwriters can know when the line is crossed, or at least where the line is.

In typical music copyright cases – at least successful ones – the two works share the same (or at least similar) sequence of pitches, with the same (or at least similar) rhythms, set to the same chords. This case is unique, in that the two works at issue, Marvin Gaye's "Got To Give It Up" and Appellants' "Blurred Lines," do not have similar melodies; the two songs do not even share a single melodic phrase. In fact, the two works do not have a sequence of even two chords played in the same order and for the same duration. They have entirely different song structures (meaning how and where the verse, chorus, etc. are placed in the song), and do not share any lyrics.

Quite clearly, the verdict in this case, if based upon the music at all, was based upon the jury's perception that the overall "feel" or "groove" of the two works is similar, as songs of a particular genre often are. In essence, the Appellants have been found liable for the infringement of an *idea*, or a series of *ideas*, and not for the *tangible expression* of those ideas, which is antithetical to Section 102(b) of the Copyright Act. Such a result, if allowed to stand, is very dangerous to the music community, is certain to stifle future creativity, and ultimately does a disservice to past songwriters as well.

V. ARGUMENT

A. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT AND THE SUBSEQUENT JURY TRIAL.

The District Court denied Appellants' motion for summary judgment because Respondents (hereinafter "the Gayes") submitted declarations by two musicologists that were filled with abstract theories, identifying certain remote, seemingly unrelated, factors of alleged similarity.[1] The court dismissed – simply as "issues of fact" – the multitude of dissimilarities in the two works that were identified by Appellants' musicologist –including distinct, material differences in

[1] Those theories were difficult enough (if not impossible) for trained musicians to understand; it is difficult to imagine that the court fully grasped their import.

the actual *melodies* of the two songs.

Because "Got to Give it Up" was a pre-1978 composition, and was recorded prior to 1972, the court did properly limit the Gayes' proof to include only the deposit copy of the sheet music that was presented to the U.S. Copyright Office upon registration by Marvin Gaye. However, immediately following this ruling, the court systematically and completely emasculated the ruling in the following significant ways:

1. After the court had ruled on summary judgment that "Theme X" (a four-note melody) was not on the deposit copy, the court allowed the Gayes' musicologist to testify that her "Theme X" was different from the court's "Theme X," and that her "Theme X" was *implied* in the deposit copy (as was much of the music that was contained in the sound recording);
2. The court allowed the Gayes' musicologist to further testify that, although the keyboard part in "Got to Give it Up," similarly was not in the deposit copy, "professional musicians would understand" to play the keyboard part as she transcribed it – and that keyboard part was the "heartbeat" of "Got to Give it Up";
3. The court allowed the Gayes' musicologist to use a transcription of the bass part from the sound recording that was different than the bass

part on the deposit copy;

4. The court allowed the Gayes' musicologist to use sound bites from both works to show a "total concept and feel," while in actuality compounding the issue with an instruction to the jury to disregard the actual clips, and only to consider the musicologist's "opinions."

5. The court allowed the Gayes' musicologist to present a "mashup" of the two works, which was prepared after the close of expert discovery, and which included the aforementioned bass and keyboard elements (that were not in the sound recording) – while excluding mashups that were prepared by the Appellants' musicologist between "Got to Give it Up" and numerous old soul songs and many pop songs that could be played over the same four chords.

6. The court allowed a lay witness who was in charge of the Marvin Gaye catalogue at Marvin Gaye's record label (which also happened to be Robin Thicke's record label), who does not even know how to read music, to testify that he listened to "Blurred Lines," and thought that it was similar to the "Got to Give it Up" *sound recording*.

B. MARVIN GAYE'S OWN PUBLISHER BELIEVED THAT THERE WAS NO INFRINGEMENT, AND REFUSED TO SUE.

At the same time, the District Court *excluded* evidence that Marvin Gaye's own publisher did not believe that there was an infringement. One of the functions of a music publisher is to police the copyrights of the songs in its catalogue, to assess whether or not its songwriters' music has been infringed, and to commence litigation against the infringers.

In this case, according to Marvin Gaye's publisher, EMI/Jobete, as stated in the Joint Rule 16(b) Report, EMI/Jobete "first internally analyzed whether 'Blurred Lines' was an infringement of 'Got To Give It Up' and determined that there was no infringement. Thereafter, Jobete secured the opinion of an expert musicologist who similarly concluded that there was no basis for a claim of infringement. Jobete duly reported its determinations to Frankie and Nona Gaye's representatives . . . . Further Jobete advised that it could not, in good faith, bring infringement claims (either for 'Got To Give It Up' or for 'After The Dance' [another song that the Gayes claimed was infringed by Appellants] because its analysis, including expert analysis confirmed that neither work had ben infringed by Blurred Lines . . . . Jobete advisd that, consistent with Rule 11 of the Federal Rules of Civil Procedure, it therefore could not and would not either defend Frankie and Nona Gaye [in Appellants' declaratory relief action] or pursue the

infringement claim they demanded." Joint Rule 16(b) Report, Dkt. 48, at 5-6. Ultimately, the Gayes actually sued EMI/Jobete for not pursuing the infringement claim against Appellants.[2]

C. BECAUSE THE MELODIES OF THE TWO SONGS ARE COMPLETELY DIFFERENT, APPELLANTS HAVE BEEN HELD LIABLE ESSENTIALLY FOR INFRINGING AN *IDEA*, WHICH IS NOT COPYRIGHTABLE.

It appears that the jury in this case was persuaded by a number of factors, including: the foregoing similarities that were extraneous to the sheet music; interviews given by the Appellant; the number of musicologists that each side had (Gayes: 2; Appellants: 1); and the biased lay witness opinion. Not one of these factors had anything to do with any perceived similarity in pitch, rhythm, or chords, and not one of these factors constituted a proper basis for a finding of

[2] This illustrates an important (perhaps rhetorical) question for Amici. If the executives at EMI/Jobete, whose job it is to assess copyright claims involving their songwriters, did not believe that "Blurred Lines" infringes "Got To Give It Up," and the expert musicologist that EMI/Jobete hired to assist it in that determination did not believe that "Blurred Lines" infringes "Got To Give It Up," and the lawyer that was hired by EMI/Jobete believed so strongly that there was no infringement that he advised EMI/Jobete that suing Appellants might very well be a violation of Rule 11, how in the world could a songwriter, with no experience policing copyrights, no experience as an expert musicologist, and no legal training, determine that his or her own song might be an infringement?

copyright infringement.

A case such as this, in which the melodies are not even close to being similar, is very dangerous, in that it does not distinguish between an *idea* and the expression of that *idea*; nor does it distinguish between the *influence* of a predecessor's music and the unlawful *copying* of that music. The inherent danger of such a result is that, without drawing a proper line between what is an idea and what is an expression, or between what is an influence and what is an infringement, future songwriters do not know whether their "influence" is going to land them with the next hit record or land them in court – or both, as demonstrated in this case.

Much has been said about the Appellants' apparent ability to afford to fund a case like this. Whether or not *Appellants* are able to afford to defend this case and pay a judgment, most of the musicians in the world are not in a position to do so. Clearly then, when a budding songwriter is contemplating the composition of a song, it is axiomatic that he or she is going to think twice before he or she writes a song that "feels" like a Marvin Gaye song or any other artist's song, always with one foot in the recording studio and one foot in the courtroom. This is an untenable situation that most certainly will not foster uninhibited creativity.

D. ALL MUSIC IS INPIRED BY OTHER MUSIC.

From time immemorial, every songwriter, composer, and musician has been inspired by music that came before him or her. Even one of the musicologists for the Gayes admitted that, with respect to music: ***"[a]ll composers share devices and building***," [Dkt. 112-3, at 7-8]. This is especially so within a particular musical genre. Virtually no music can be said to be 100% new and original.

David Bowie was influenced by John Coltrane, Velvet Underground, and Shirley Bassey, among others. (www.billboard.com 1/12/16 - David Bowie - 1999 commencement address to Berklee College of Music graduating class). Lady Gaga was influenced by David Bowie, Elton John, and Queen, among others. (www.mic.com). Elton John was influenced by The Beatles, Bob Dylan, The Kinks, and Elvis Presley, among others. (www.mtv.com). The Beatles were influenced by Chuck Berry, Cliff Richard, The Beach Boys, and Elvis Presley. (www.liverpoolcityportal.co.uk). Elvis Presley's musical influences were "the pop and country music of the time, the gospel music he heard in church and at the all-night gospel sings he frequently attended, and the black R&B he absorbed on historic Beale Street as a Memphis teenager." (www.elvis.com).

Marvin Gaye, himself, was reportedly influenced by Frank Sinatra, Smokey Robinson, Nat "King" Cole, Sam Cooke, Ray Charles, Bo Didley, and James Brown. (www.shmoop.com). In fact, "Got To Give It Up" was apparently inspired

by Johnnie Taylor's song "Disco Lady." Graham Betts, *Motown Encyclopedia* (2014).

One can only imagine what our music would have sounded like if David Bowie would have been afraid to draw from Shirley Bassie, or if the Beatles would have been afraid to draw from Chuck Berry, or if Elton John would have been afraid to draw from the Beatles, or if Elvis Presley would have been afraid to draw from his many influences. Presumably, it would also be difficult for the Gayes to imagine if their father had been afraid to draw from Ray Charles or Bo Didley. Quite simply, if an artist is not allowed to display his or her musical influences, for fear of legal reprisal, there is very little new music that is going to be created, particularly with the limitations that already naturally exist in songwriting.

E. THERE IS A BRIGHT LINE TEST IN FILM, TELEVISION, AND BOOK COPYRIGHT CASES THAT DOES NOT, AS A PRACTICAL MATTER, EXIST IN MUSIC CASES.

In the world of film, television, and books, the universe of choices is unlimited. One can write about the past, the present, or the future; one can write about things that actually happened, things that one wished had happened, or things that could never happen – there is absolutely no limit beyond the author's

imagination.

Yet, notwithstanding those unlimited options, there is somewhat of a bright line test for infringement (and for obtaining summary judgment) in the film/television/book world that does not exist in the music world. With a film, an expert conducts the extrinsic test by comparing the plots, sequence of events, characters, theme, mood, and pace of the two works. The expert also filters out all of the scènes à faire, such as a car chase in an action movie or a magician pulling a rabbit out of a hat.

A motion for summary judgment in such cases will weed out the protectable elements from the unprotectable elements. It will then demonstrate how the works are different with respect to protectable elements, and how any perceived similarities are based upon commonplace, unprotectable elements. The "language" spoken by the experts is typically one that the judge understands and can articulate freely.

In music, unlike film, etc., however, there is a "limited number of notes and chords available to composers (*Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2nd Cir. 1988)), and composers are therefore much more restricted in their options. There are literally twelve notes per octave, and not all of those notes can be used in the same song. As Judge Learned Hand wrote: "It must be remembered that while there are an enormous number of possible permutations of the musical notes of the

scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism." *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 46 U.S.P.Q. 167 (2nd Cir. 1940).

Yet, notwithstanding the severe actual and practical limitation of choices in music cases, the line drawing that exists in film copyright cases does not appear to exist in music cases. Musicologists speak a language that is often foreign to judges (and juries), and therefore confuse judges into denying summary judgment motions whenever two musicologists disagree.[3] There appears to be no easy way, no bright line, to determine in music cases – and it was certainly not done in this case – the difference between creating the same "feel" or "style,"[4] and infringing a

[3] What the Gayes' musicologists did in this case to avoid summary judgment (and ultimately at trial) is the equivalent of an expert in a film case testifying that the word "destruction" was used four times in the first scene of one film and two times in the second scene of the second film. They might go on to say that the word "destruction" was followed by the words "of a house" in the first film, and "of a truck" in the second film, along with an explanation that "house" and "truck" both have five letters, and many *trucks* are parked at *houses*. Such testimony would be readily dismissed, if not laughed at, in a film case, and the motion for summary judgment granted. Unfortunately, the musical equivalent – which is essentially what occurred in this case –is not as easy to understand and dismiss.

[4] Music law is further hampered by the Ninth Circuit's *intrinsic* test, in which a lay jury is asked to determine the "total concept and feel" of the works in question. Such a test simply does not work in a music context. One might argue that virtually every disco song has the same "total concept and feel." One could argue that every blues song or every rap song has the same "total concept and feel." This notion is antithetical to the reality of musicians' inspirations and borrowing, and is entirely preventative of creativity.

copyright.[5] This is particularly so when a plaintiff can hire three, four, or five musicologists, conflict out three of them that find no similarities between any protectable elements, and know that, even if he only has one musicologist that can argue a case for infringement, he will avoid summary judgment.

F. COPYRIGHT LAW SHOULD PROTECT ORIGINAL MUSIC, WITHOUT STIFLING CREATIVITY.

To be clear, Amici are grateful for the laws that protect their own creations. The "ultimate aim" of the Copyright Act is "to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), and Amici applaud and appreciate that endeavor. However, they also understand that, like the music that was created before them, their own music will serve as building blocks for future songwriters, who will create their own music.

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[5] Duke Law School music copyright law professor Jennifer Jenkins, after noting that "Got to Give it Up" was inspired by Johnnie Taylor's song "Disco Lady," writes that "Gaye cannot claim copyright over material that he himself borrowed." As professor Jenkins further discusses: "Copyright only covers 'original, creative expression.' Anything Marvin Gaye copied directly from his Motown, funk, or disco predecessors is not 'original' and should be off the table." She writes further: "In addition, copyright's "scènes à faire" doctrine allows anyone to use the defining elements of a genre or style without infringing copyright, because these building blocks are 'indispensible' to creating within that genre . . . . Many of the musical elements common to 'Blurred Lines' and 'Got To Give It Up' fall into these unprotectable categories." J. Jenkins, *The "Blurred Lines" of the Law*. www.web.law.duke.edu/cspd/blurredlines/.

As discussed in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994): ". . . copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."

As written by Peter Alhadeff and Shereen Cheong in the Berklee College of Music *Music Business Journal*, "The Lesson of Blurred Lines," quoting an interview with Berklee College of Music professor, Dr. E. Michael Harrington:[6] "If you're not influenced by Marvin Gaye, there must be something wrong with you." The authors go on to write: "He could just as well be talking about James Brown, Chuck Berry, the Beatles, or Michael Jackson – all of them a product of their own influences. Copyright law should make musical creativity flourish, not stifle." www.thembj.org2016/01/.

Parker Higgins, director of copyright activism at the Electronic Frontier Foundation writes that: "[w]hen we say a song 'sounds like' a certain era, it's because artists in that era were doing a lot of the same things – or, yes, copying

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[6] Dr. Harrington has analyzed more than 230 of Marvin Gaye's songs, and uses his music in classes that he has taught. He agrees that the "groove" and "bounce" of the two works are similar, but is adamant that "[o]bjectively, there is NO protectable expression (melody, harmony, etc.) that has been copied by Thicke" and that "[t]here is no copying of copyrightable expression involving harmonies of the two songs. What is extremely close between the songs is the tempo . . . but tempo is not copyrightable." www.emichaelmusic.com/good-news-for-robin-katy-one-direction-music-copyright-expert-says-nobodys-ripping-off-anybody/.

each other. If copyright were to extend out past things like the melody to really cover the other parts that make up the 'feel' of a song, there's no way an era, or a city, or a movement could have a certain sound. Without that, we lose the next disco, the next Motown, the next batch of protest songs."

http://ratter.com/ratter/all/archive/213510.

Finally, as written by composer Ron Mendelsohn, owner of production music company Megatrax: "All musical works, indeed all creative works, are born from a spark of inspiration. It is essential for musicians and composers to be able to find this spark anywhere and everywhere without having to constantly look over their shoulders and worry about being sued. To extinguish this spark, to replace it with fear, is to stifle creativity and deprive society of the next generation of great artists and new music. And yes, artists should be able to talk freely about their sources of inspiration without having to worry about their exuberant proclamations being played back as damning evidence in a court of law."

http://blogtrans.megatrax.com/will-the-blurred-lines-decision-stifle-creativity/

G. COPYRIGHT LAW SHOULD NOT INHIBIT SONGWRITERS FROM CELEBRATING THEIR INFLUENCES.

Mendelsohn's last point is an especially important one. In addition to the potential adverse impact that this case might have on future songwriters, this case,

if not reversed, will have a lasting effect on past songwriters and musicians as well. Many interviews were played during the trial in which Williams and Thicke both expressed that they loved Marvin Gaye, and wanted, as an homage to him, to create a song that had the *feel* of "Got To Give It Up." One might ask if there is a better legacy for a songwriter than to inspire other songwriters to write music and pay homage to him for inspiring that music – publicly, on national television and elsewhere, keeping his name and his music alive for generations to come.

Yet, there can be no doubt in this case that the jury was swayed, at least in part (arguably in *large* part), by hearing such interviews. Ultimately, the jury held Appellants liable for copyright infringement, and rendered an award of several million dollars against them. It is difficult to imagine a songwriter that comes along after this case publicly affording *any* credit to *any* influence that he or she receives from *any* songwriter.

VI. CONCLUSION

It is apparent that the denial of summary judgment and the ultimate verdict in this case were based upon an undeniable musical inspiration, the overall look and feel of the two works, and a series of random, coincidental, and unimportant alleged similarities between unprotectable elements in the *sound recording* of "Got To Give It Up" (random elements that were not in the "Got To Give It Up"

deposit copy) and "Blurred Lines."

Many important popular songs in the modern era would not exist today if they were subjected to the same scrutiny as "Blurred Lines" was in this case. Allowing this judgment to stand, based upon such factors – with no similarities in melody, with virtually no similarities with the music notation on the actual deposit copy, and simply based on a "groove," would clearly stifle future creativity, would undoubtedly diminish the legacies of past songwriters, and, without a doubt, would be antithetical to the principals of the Copyright Act.

Dated: August 30, 2016

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VII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,717 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Word Perfect 14-point Times New Roman font.

Dated: August 30, 2016

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By: /s/ Edwin F. McPherson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit, by using the appellate CM/ECF system on August 30, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 30, 2016

/s/ Edwin F. McPherson
EDWIN F. McPHERSON