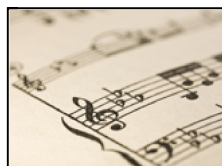


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Substantial Similarity

Copyright Verdict Against Robin Thicke Hit 'Blurred Lines' Stands (1)



By Anandashankar Mazumdar

A federal appeals court has upheld a ruling that Robin Thicke and Pharrell Williams's 2013 hit song "Blurred Lines" infringed a copyright in a 1977 Marvin Gaye song.

The U.S. Court of Appeals for the Ninth Circuit ruled March 21 that Gaye's "Got to Give It Up" was entitled to broad copyright protection, and that there was enough evidence in the record to justify a 2013 jury verdict in favor of Gaye's heirs.

"This is very shocking," copyright lawyer James G. Sammataro of Stroock & Stroock & Lavan LLP, Miami, told Bloomberg Law. "I think the general consensus has been that we can't wait for 'Blurred Lines' to be overturned."

Musicians and others in the music industry had voiced concern after the lower court ruling about losing the freedom to compose new works that were in the same genre or had the same instrumentation or feel of existing works.

Copyright lawyers and scholars have also expressed the concern that the ruling will encourage more litigation among those who hold rights in music, raising costs for creators and setting up exclusive rights around musical styles.

"Is this going to be a trend or is this going to be an anomaly?" Michael Hobbs, a copyright lawyer with Troutman Sanders LLP, Atlanta, asked Bloomberg Law. "Because if this is going to be a trend, then, oh boy, this has the potential of fundamentally changing copyright."

Mum on Influences

Musicians will have to be careful how openly they talk about their influences and inspirations, Hobbs said, but that won't be confined to music.

"Any time you have an influence, an homage, a tribute, whether it's music or art, theater, movies, you're going to have a real question of whether you have copyright infringement," he said.

That clashes with a basic principle of copyright law, according to another practitioner.

"It is perfectly legal under the Copyright Act for an author to be inspired by a prior work," Lee S. Brenner, a copyright lawyer with Kelley Drye & Warren LLP, Los Angeles, told Bloomberg Law. "The Copyright Act is designed to encourage free use of ideas and to 'build freely' upon those ideas. We are supposed to inspire each other."

The 2-1 majority opinion resisted the call to compare the two works to see whether they were sufficiently similar to each other to warrant a finding of infringement. That question of fact was decided by the jury, and it was inappropriate for the appeals court to second-guess it, particularly because the parties failed at the lower court to file a motion for judgment as a matter of law.

'Thick' Protection Encourages Litigation

The court also rejected Thicke and Williams's claims that Gaye's copyright protection should give his heirs "thin" protection supporting infringement only if the two works are virtually identical.

"Musical compositions are not confined to a narrow range of expression," the court said. When it comes to music, copyright protection extends to creative and original combinations of "a large array of elements."

This part of the ruling will "really open the door—for better or worse—to substantial similarity claims based on similar overall 'feel,'" Kristelia A. Garcia, a copyright law professor at the University of Colorado, Boulder, told Bloomberg Law. "Perhaps a hit for those who'd like to see less litigiousness in the copyright space, as I can only imagine this will encourage more of the same."

Importance of Lead Sheet Undetermined

The court declined to answer the question of whether the copy of Gaye's work deposited with the Copyright Office—the "lead sheet," which generally notes only the melody and lyrics of a song and not its instrumentation or other factors—defined the scope of the legal protection.

The appeals court affirmed an award of nearly \$5 million in damages and profits, and an ongoing 50-percent royalty.

Judge Milan D. Smith Jr. issued the court's ruling, joined by Judge Mary H. Murguia.

Dissent: Style of Music Protected

Judge Jacqueline H. Nguyen dissented from the ruling upholding the jury verdict on the grounds that it essentially allows the Gaye family to lay claim to ownership of an entire style of music. Nguyen noted that the two songs had different melodies, harmonies, and rhythms, and that the majority should have compared those aspects of the two songs.

The majority opinion disputed this conclusion.

"Our decision does not grant license to copyright a musical style or 'groove,'" it said. "Far from heralding the end of musical creativity as we know it, our decision, even construed broadly, reads more accurately as a cautionary tale for future trial counsel wishing to maximize their odds of success."

In a footnote, the court predicted that its ruling won't have significant future ramifications because it was decided under the Copyright Act of 1909, which covers all works created before 1978. Unlike current law, the 1909 law protects only musical compositions, not recordings made based on those compositions.

Because future disputes will be more likely to invite comparison of sound recordings rather than written music, the court said, "the reality is that, going forward, a number of the contentious issues presented in this case will occur with less frequency with the passage of time."

Quinn Emanuel Urquhart & Sullivan LLP represented Williams and Thicke. Arnold & Porter LLP represented Marvin Gaye's heirs.

The case is: Williams v. Gaye, 9th Cir., No. 15-56880, 3/21/18.

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