

Paying the Piper: The Anatomy of a 9th Circuit Music Copyright Infringement Lawsuit

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INTRODUCTION: THE PRE-“BLURRED LINES” MUSIC COPYRIGHT INFRINGEMENT CLIMATE

In 2008, Coldplay released their hit song, “Viva La Vida,” which has since been downloaded over four million times.¹ A year later, Joe Satriani filed a copyright infringement lawsuit (“infringement lawsuit”) alleging that “Viva La Vida” sounded similar to Satriani’s instrumental track “If I Could Fly.”² The parties later settled out of court.³ In 2014, Sam Smith released his hit single “Stay With Me” which to this day has sold over four million digital copies.⁴ A year later, Smith settled out of court with Tom Petty after Petty alleged that “Stay With Me” sounded similar to his 1989 hit “I Won’t Back Down.”⁵ In the settlement terms, Smith agreed to pay ongoing royalties and give songwriter credit to Petty.⁶ These two settlement agreements are a microcosm of the many music copyright infringement allegations (“infringement allegations”) currently being

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1. Recording Industry Association of America, Search Result for “Viva La Vida”, <http://www.riaa.com/goldandplatinumdata.php?artist=%22Viva+la+Vida%22> (last visited Oct. 23, 2015).

2. Sean Michaels, *Coldplay Plagiarism Lawsuit Dismissed by Judge*, THE GUARDIAN (Sep. 16, 2009, 6:28AM), <http://www.theguardian.com/music/2009/sep/16/coldplay-joe-satriani-lawsuit-dismissed>.

3. *Id.*

4. Keith Caulfield, *Billboard 200 Chart Moves: Alanis Morissette's 'Jagged Little Pill' Hits 15 Million in U.S. Sales*, BILLBOARD (June 26, 2015, 4:48PM), <http://www.billboard.com/articles/columns/chart-beat/6612876/alanis-morissette-jagged-little-pill-chart-moves>.

5. Lorena O’Neil, *Sam Smith Will Pay Tom Petty Royalties for 'Stay With Me'*, CNN (Jan. 27, 2015, 4:38PM), <http://www.cnn.com/2015/01/26/entertainment/smith-petty-royalties-feat/>.

6. *Id.*

settled outside of court or decided at trial.⁷ This is in large part because infringement allegations usually do not survive summary judgment in cases that are not settled.⁸ However, a recent California case may signal the end of settling infringement allegations before trial.

In *Williams v. Bridgeport Music Inc.* (the “Blurred Lines” case), Marvin Gaye’s family obtained a landslide \$7.3 million verdict against Robin Thicke and Pharrell Williams.⁹ The “Blurred Lines” case result stands in stark contrast to the current music industry’s inclination toward settling. Some artists fear that the days of settling are over, and that the “Blurred Lines” verdict will chill the creative process among recording artists due to an increase in artists filing similar suits.¹⁰ While this note will ultimately argue that recording artists should not be alarmed by the “Blurred Lines” decision, understanding an infringement suit’s structure through the lens of the “Blurred Lines” case may assist artists in protecting themselves in the future. Courts will likely look to the “Blurred Lines” decision for guidance in copyright infringement trials moving forward, as a large percentage of infringement lawsuits, like the “Blurred Lines” case, originate in California in the United States Court of Appeals for the Ninth Circuit.

This paper proceeds in four parts. Part I lays out the background necessary for understanding a copyright infringement lawsuit’s elements. This section will begin by providing an overview of the “Blurred Lines” case, tracking the lawsuit from its

7. See Valeria M. Castanaro, “*It’s the Same Old Song*”: *The Failure of the Originality Requirement in Musical Copyright*, 18 Fordham Intell. Prop. Media & Ent. L.J. 1271, 1272 (2008) (Other famous settlements include Vanilla Ice settling with Queen and David Bowie because Ice’s song “Ice Ice Baby” sounds similar to Queen’s “Under Pressure,” and the rap group 2 Live Crew settling over a claim that their song “Pretty Woman” infringed on Roy Orbison’s song of the same title.).

8. See *Peters v. West*, 692 F.3d 629 (7th Cir. 2012); *Armour v. Knowles*, 512 F.3d 147 (5th Cir. 2007); *Pyatt v. Raymond*, 2011 WL 2078531 (S.D.N.Y. May 19, 2011), *aff’d*, *Pyatt v. Raymond*, 462 F. App’x 22 (2d Cir. 2012); *Lyles v. Capital*, 2012 WL 3962921 (S.D. Ohio Sept. 11, 2012); *Currin v. Arista Records, Inc.*, 724 F. Supp. 2d 286 (D. Conn. 2010). In each of these cases, either the district court granted a motion to dismiss music copyright infringement claims, or a circuit court affirmed the district court’s grant of a motion to dismiss.

9. *Williams v. Bridgeport Music Inc.*, No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

10. Ed Christman, “*Blurred Lines’ Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous*,” *BILLBOARD* (Mar. 13, 2015 3:49 PM), <http://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and>.

inception to the most recent developments, followed by a brief history of music copyright law in the United States.

Part II examines each element of a music copyright infringement claim (“infringement claim”) through the lens of the “Blurred Lines” case. For an infringement claim, a plaintiff must show (1) valid copyright ownership of a musical work and (2) that the defendant copied protected elements of the plaintiff’s work.¹¹ Lurking within these two elements are several sub-elements that a plaintiff must satisfy to prevail at trial. As such, this paper will thoroughly dissect both infringement claim elements, unpacking the issues that plaintiffs and defendants encounter while addressing each element’s components.

Part III offers recording artists advice on how to avoid ending up in court after creating a song that may sound substantially similar to another artist’s work. This part will also discuss and dispel several of the music industry’s fears about the negative effects the “Blurred Lines” verdict might have on recording artists.

Part IV concludes this note by discussing the most likely effect the “Blurred Lines” verdict will have on recording artists in the music industry.

I. BACKGROUND

A. *The “Blurred Lines” Case Overview*

Marvin Gaye was a famous American singer and songwriter.¹² In 1976, Gaye recorded the hit song “Got to Give It Up.”¹³ Gaye registered the “Got to Give It Up” musical composition with the United States Copyright Office (“Copyright Office”) later that year.¹⁴ The composition registered with the Copyright Office represented “the lyrics and *some* of the melodic, harmonic, and rhythmic features that appear in the recorded work.”¹⁵ After his death in 1984, Gaye’s family (“Gaye Parties”) came into ownership of the copyright interest in “Got to Give It Up.”¹⁶

Robin Thicke and Pharrell Williams (“Thicke Parties”) are two popular recording artists who released the song “Blurred Lines”

11. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

12. *Williams v. Bridgeport Music Inc.*, No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *1 (C.D. Cal. Oct. 13, 2014).

13. *Id.*

14. *Id.* at 2.

15. *Id.* (emphasis added).

16. *Id.* at 5.

in 2013.¹⁷ “Blurred Lines” has sold over six million digital copies, and the corresponding music video has been viewed over 250 million times on Vevo and YouTube.¹⁸

After hearing “Blurred Lines,” the Gaye Parties threatened the Thicke Parties with legal action, alleging that “Blurred Lines” infringed on “Got to Give It Up” because the two songs sounded substantially similar, especially in terms of their respective drum beats and bass lines.¹⁹ After making a six-figure settlement offer to the Gaye Parties, which the Gaye Parties declined to accept, the Thicke Parties filed a preemptive complaint seeking declaratory relief that their song did not infringe on the Gaye Parties’ 1976 song.²⁰ The Gaye Parties responded with two counterclaims against the Thicke Parties.²¹ In one of the counterclaims, the Gaye Parties alleged that “Blurred Lines” infringed their copyright interest in “Got to Give It Up.”²²

Both parties agreed to try the Gaye Parties’ infringement counterclaim to a jury.²³ The trial began in February 2015 and lasted for seven days.²⁴ After a two-day deliberation, the jury found that “Blurred Lines” infringed the Gaye Parties’ copyright in “Got to Give It Up” and awarded the Gaye Parties \$4 million in actual damages.²⁵ The jury further awarded the Thicke Parties’ “Blurred Lines” sales profits to the Gaye Parties, totaling \$3.3 million in punitive damages.²⁶ In total, the jury awarded the Gaye Parties \$7.3 million.²⁷

In June 2015, both the Thicke Parties and the Gaye Parties filed motions with the California district court in response to the February verdict.²⁸ The court examined the Thicke Parties’ request for remittitur and the Gaye Parties’ “Motion for Injunctive Relief or an Ongoing Royalty.”²⁹ After reviewing the case, the court remitted both the Gaye Parties’ actual damages award from \$4 million to \$3.3

17. *Williams v. Bridgeport Music Inc.*, No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *1-2 (C.D. Cal. July 14, 2015).

18. *Williams*, 2014 WL 7877773, at *2.

19. Emily Miao et al., “*Blurred Lines*” Artists Lose Multimillion Copyright Dollar Lawsuit, 22 No. 9 Westlaw Journal Intellectual Property 1 (2015).

20. *Id.*

21. *Williams*, 2015 WL 4479500, at *1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 2.

million and the award of Williams' profits from \$1.6 million to \$350,000.³⁰ Regarding the Gaye Parties' motions, the court ruled that "any past and ongoing reproduction, preparation of derivative works, distribution, sale or other transfer of ownership, rental, lease, lending, or public performance of 'Blurred Lines'" by the Thicke Parties infringes the Gaye Parties' copyright in "Got to Give It Up."³¹ The court also granted the Gaye Parties' request for a "running royalty of 50% of the songwriter and publishing revenue of 'Blurred Lines'" in lieu of a full injunction that would have stopped the Thicke Parties from distributing and using "Blurred Lines" in the future.³²

The "Blurred Lines" case is a useful lens for examining copyright infringement litigation. Courts in the Ninth Circuit will likely look to the "Blurred Lines" case for guidance due to the sizeable amount of the jury verdict, the publicity surrounding the case, and the court's mostly logical and clear analysis. As such, comprehending the "Blurred Lines" case's background will give future litigants a solid foundation for understanding how courts in the Ninth Circuit will likely address infringement lawsuits.

B. A Brief History of United States Copyright Law

The Founding Fathers envisioned a country in which its people could create expressive works without fear of others stealing or plagiarizing those works.³³ This idea is incorporated into the Constitution, which grants federal copyright protection for creative works.³⁴ The Constitution gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."³⁵ While Congress may grant creators monopolies over their copyrightable works, this privilege is not limitless, nor is it a means of solely giving the creator a "special private benefit."³⁶ Rather, this limited grant is a "means by which an important public purpose may be achieved."³⁷ More accurately, the

30. *Id.* at 26–29.

31. *Id.* at 38.

32. *Id.*

33. See THE FEDERALIST No. 43 (James Madison) ("The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.").

34. U.S. CONST. art. I, § 8, cl. 8.

35. *Id.*

36. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

37. *Id.*

copyright privileges are “intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”³⁸

Pursuant to the Constitution, Congress enacted the first Federal Copyright Act in 1790 (“1790 Act”), which gave authors of books, maps, and charts sole rights to print, reprint, or publish their works for fourteen years from recordation.³⁹ In 1831, Congress amended the 1790 Act to include musical compositions in the form of sheet music.⁴⁰ In 1856, Congress extended the 1790 Act to protect “dramatic works” performed publically.⁴¹ In 1897, Congress responded to growing concern among musical artists by extending the 1790 Act to apply to anyone publically performing a protected musical work.⁴² This extension was a general protection that did not make any distinction between for-profit and not-for-profit public performances.⁴³ The 1897 amendment was therefore notoriously difficult to enforce, given the sheer number of people performing protected musical works in public.⁴⁴

Congress then enacted the Copyright Act of 1909 (“1909 Act”), prohibiting unauthorized public performance of a copyrighted musical work only when performed for profit.⁴⁵ The 1909 Act was likely an attempt by Congress to reach a balance between “permitting free enjoyment of music and allowing copyright owners sufficient protection for their marketable rights.”⁴⁶ Copyright protection only attached to musical works if the work was published with a notice of copyright affixed.⁴⁷ If the artist did not publish the work, he or she had to deposit the composition with the Copyright

38. *Id.*

39. *Id.*

40. Copyright Act of 1831, ch. 15, §§ 4, 1 Stat. 436 (current version at 17 U.S.C. § 102 (2006)).

41. Lydia Pallas Loren, *The Evolving Role of “For Profit” Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 260 (2010).

42. *Id.*

43. Copyright Act of 1897, ch. 4, § 29 Stat. 481 (codified as amended at 17 U.S.C. § 102 (2006)).

44. Joanna Demers, *Sound-Alikes, Law, and Style*, 83 UMKC L. REV. 303, 304 (2014).

45. Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075 (codified as amended at 17 U.S.C. § 102 (2006)).

46. Loren, *supra* note 41, at 280.

47. Martin Bresslera & Robert L. Seigel, *Retroactive Protection of Visual Arts Published Without a Copyright Notice: A Proposal*, 7 Cardozo Arts & Ent. L.J. 115, 121-22 (1988).

Office in order for federal law to protect the musical work.⁴⁸ One glaring issue with the 1909 Act was the legislature's failure to define "publication," an omission that causes a great amount of confusion to this day. The 1909 Act underwent several changes over the years as technology progressed. One key addition came when Congress enacted the Sound Recording Act of 1971, which recognized sound recordings as protected by federal copyright law.⁴⁹ Prior to this act, only state statutes and common law protected sound recordings.⁵⁰

The most significant change to the Copyright Act occurred in 1976. The Copyright Act of 1976 ("1976 Act") superseded the 1909 Act and granted the public expanded rights under federal copyright law.⁵¹ Instead of limiting protection to musical works published as musical compositions, copyright protection covered "original works of authorship fixed in *any* tangible medium of expression . . . [such as] musical works, including any accompanying words."⁵² The 1976 Act did not protect a recording artist's intangible ideas or emotions, only the expression of these ideas or emotions through a musical work.⁵³ The 1976 Act's goal was to "strike a balance between protecting original works and stifling further creativity."⁵⁴

II. THE ANATOMY OF A MUSIC COPYRIGHT INFRINGEMENT LAWSUIT

A. *The Elements of an Infringement Claim Overview*

To establish a claim for copyright infringement, the plaintiff must show (1) valid copyright ownership of an original musical work and (2) that defendant copied protected elements of the plaintiff's work.⁵⁵ The elements and related sub-elements are mapped out in the following chart:⁵⁶

48. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014).

49. Eric Charles Osterberg, *Should Sound Recordings Really Be Treated Differently than Other Copyrighted Works? The Illogic of Bridgeport v. Dimension Films*, 53 J. COPYRIGHT SOC'Y U.S.A. 619, 630 (2006).

50. *Id.*

51. See 17 U.S.C. § 106 (1976) (for example, expanding copyright protection to cover "reproduc[ing] the copyrighted work in copies or phonorecords").

52. 17 U.S.C.A. § 102 (1976) (emphasis added).

53. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

54. *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 656 (6th Cir. 2004).

55. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

56. Flowchart created by the author using www.draw.io.

B. Element #1: Showing Plaintiff's Valid Copyright Ownership

Historically, showing that the plaintiff owns a valid copyright interest in the musical work is the simplest element of an infringement claim to prove. A Copyright Office issuing a valid copyright certificate to the plaintiff constitutes prima facie evidence that the plaintiff's ownership is valid.⁵⁷ In the "Blurred Lines" case, neither party contested that the Gaye Parties owned the "Got to Give It Up" copyright.⁵⁸ However, this note will still briefly investigate the valid ownership element, as a defendant can still obtain summary judgment on this point.

If the defendant can show that the plaintiff's musical work is not sufficiently "original," the defendant may rebut a presumption of validity.⁵⁹ The defendant is not required to show that the plaintiff's *entire* musical work is unoriginal, rather only the parts that the plaintiff claims the defendant is infringing.⁶⁰ Courts in general have declined to define originality in copyright infringement cases.⁶¹ The term as used in the 1976 Act does not include any "requirements of novelty, ingenuity, or esthetic merit."⁶² The musical work need only be "original to the author and include a modicum of creative thought."⁶³ Musical works often satisfy the originality requirement, as they generally contain "some creative spark, 'no matter how crude, humble or obvious' it might be."⁶⁴

In order to show that the plaintiff's musical work is not original, a defendant needs to hire an expert musicologist.⁶⁵ The expert musicologist then must demonstrate that the plaintiff's work is not original by showing that it shares elements with either prior protected works or musical works not subject to copyright protection because they are in the public domain.⁶⁶

57. 17 U.S.C.A. § 410 (West 2015).

58. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *5 (C.D. Cal. Oct. 30, 2014).

59. Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15-SUM ENT. & SPORTS LAW. 3 (1997).

60. *Id.*

61. Castanaro, *supra* note 7, at 1277.

62. H.R. REP. NO. 94-1476 (1976).

63. Castanaro, *supra* note 7, at 1277.

64. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

65. Lepera, *supra* note 59, at 4.

66. *Id.*

C. Element #2: Showing Defendant Copied Protected Elements of Plaintiff's Work

If a plaintiff proves that his copyright ownership of an original work is valid, the plaintiff must then show that the defendant (1) copied (2) protected elements of the plaintiff's work.⁶⁷ The "Blurred Lines" court began their inquiry by first determining which parts of "Got to Give It Up" federal law protected.⁶⁸ To define the scope of protection, the court applied the 1909 Act's rule of law, as Gaye had copyrighted "Got to Give It Up" before Congress enacted the 1979 Act.⁶⁹ After the court determined the scope of protected elements, the court then examined whether the Thicke Parties had copied the protected elements.⁷⁰ In most cases, including the "Blurred Lines" case, direct evidence that the defendant copied the plaintiff's work is often not available.⁷¹ Thus the plaintiff can alternatively establish copying through circumstantial evidence by showing the defendant had (1) access to the plaintiff's work, and that (2) the two works are "substantially similar."⁷² To prove substantial similarity, the plaintiff must satisfy a dual extrinsic and intrinsic test.⁷³ This note will now examine each of these elements and sub-elements.

1. Defining the Scope of Protected Elements Before the 1976 Act

Several United States Courts of Appeals have ruled that the 1909 Act is the governing law in cases in which an artist registered his or her musical work prior to Congress enacting the 1976 Act.⁷⁴ Under the 1909 Act, an author may acquire statutory protection for a musical work through "publication" with proper notice of copyright.

67. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

68. *Id.* at 7-11.

69. *Id.* at 7.

70. *Id.* at 10.

71. Daniel E. Wanat, *Copyright Law: Infringement of Musical Works and the Appropriateness of Summary Judgment Under the Federal Rules of Civil Procedure, Rule 56(C)*, 39 U. Mem. L. Rev. 1037, 1040.

72. *Smith v. Jackson*, 84 F.3d 1213, 1219 (9th Cir. 1996).

73. *Id.* at 1218.

74. *See Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1427 (9th Cir. 1996) ("[T]he Copyright Act of 1909 is the applicable law in this case because the copyright was secured in 1968, prior to the adoption of the 1976 Act."); *see also Norris Indus. v. ITT Corp.*, 696 F.2d 918, 920 (11th Cir. 1983) (finding that Norris' first registered copyright was granted before the January 1, 1978 effective date of the 1976 Act and therefore the 1909 Act applied).

⁷⁵ Alternatively, if a composition's author "deposit[ed] a manuscript copy of the music as an *unpublished* work prior to the sale of records," then the federal statutory scheme will protect it.⁷⁶ Thus a court will find a plaintiff's work protected in either of two situations: when the plaintiff (1) publishes the compositions with proper notice or (2) deposits unpublished compositions with the Copyright Office.⁷⁷

Congress did not define publication in the 1909 Act.⁷⁸ The "Blurred Lines" court looked to Section 62 of the 1909 Act for guidance in defining the term.⁷⁹ In Section 62, "date of publication" is set "in the case of a work of which copies are reproduced for sale or distribution [as] the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority."⁸⁰ While this section does not specifically define publication, it tells artists when federal law begins to protect their musical works. Even though a small inferential leap is missing in the court's analysis, the "Blurred Lines" court seems to imply that a defendant "publishes" his musical work when copies are placed on sale, sold, or otherwise publically distributed.

After attempting to define publication, the court held that Gaye satisfied the second method for protecting a musical work under the 1909 Act because he deposited the composition with the Copyright Office in 1976.⁸¹ The scope of protected elements was not necessarily limited to the deposited composition.⁸² If Gaye had deposited other versions of the composition with the Copyright Office, these would also serve to define the scope of protection.⁸³ Thus, the court held that the Gaye Parties' copyright was "not, as a matter of law, limited to the lead sheets deposited with the Copyright Office in 1976 and 1977."⁸⁴

75. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014).

76. *Id.* (emphasis added) (internal citation omitted).

77. *Id.*

78. *Id.*

79. *Id.* at *8.

80. 1909 Act, § 62, 35 Stat. 1075, 1087-88.

81. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014) (depositing an unpublished work with the Federal Copyright Office as opposed to publishing the work with notice affixed).

82. *Id.*

83. *Id.*

84. *Id.* "A 'lead sheet' is 'a score, in manuscript or printed form, that shows only the melody, the basic harmonic structure, and the lyrics (if any) of a

Given that the lead sheets were not necessarily limiting, the Gaye Parties sought to broaden the scope of the musical work's protected elements, because the "Blurred Lines" song contained greater alleged similarities to the recorded version of "Got to Give It Up" than to the deposited lead sheets alone.⁸⁵ As such, the Gaye Parties claimed that the recorded version of "Got to Give It Up" was included within the scope of protected elements in the lead sheets because releasing the recorded version on phonograph constituted a publication.⁸⁶ However, the court disagreed.⁸⁷ The court interpreted the 1909 Act to mean that although the copyright was not limited to the lead sheets deposited with the Copyright Office, the Gaye Parties failed to publish or reduce the recorded version of "Got to Give It Up" to a more complete composition than the deposited lead sheets.⁸⁸ In coming to this conclusion, the court noted that releasing a phonograph did not constitute publication because Congress amended the 1976 Act to say that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of [the] musical work . . . embodied therein."⁸⁹ The amendment also worked retroactively because it "was a 'statement of what [the 1909 Copyright Act] has meant all along.'"⁹⁰ This meant that the amendment applied to both the 1976 Act *and* the 1909 Act. The Gaye Parties thus failed to provide evidence that their copyright in "Got to Give It Up" included extra material not included in the lead sheets.⁹¹ Had Gaye reduced "Got to Give It Up" to a set of written lead sheets and deposited them with the Copyright Office in 1976, the Gaye Parties could have used the compositions to expand the scope of protection. The court ultimately held that the lead sheets alone defined the scope of the copyright, and did not include the expanded "Got to Give It Up" recording which contained additional elements.⁹²

The "Blurred Lines" court engaged in problematic statutory interpretation when attempting to define publication for the purpose of defining the scope of protected elements. First, even though the

composition." Charles Cronin, *I Hear America Sing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187 (2015).

85. *Williams*, 2014 WL 7877773 at *7.

86. *Id.* at *9.

87. *Id.*

88. *Id.*

89. 17 U.S.C. § 303(b) (1998).

90. *Williams*, 2014 WL 7877773 at *9 (citing *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 691 (9th Cir. 2000)).

91. *Williams*, 2014 WL 7877773 at *10.

92. *Id.*

“Blurred Lines” court acknowledged that the 1909 Act did not define publication, they continued on and adopted a different phrase’s definition containing the word “publication” from another part of the 1909 Act, Section 62, even though Congress had specifically left “publication” undefined on purpose.⁹³ Second, using Section 62 of the 1909 Act to define publication means that an original work cannot be published, as Section 62 only refers to copies of works.⁹⁴ While this seemingly trivial discrepancy may not have any serious effect in the music world, it could bring serious repercussions in visual art sales.

Not only was the court’s interpretation questionable, it was also unnecessary. Even if the “Blurred Lines” court avoided looking to Section 62 to define publication, the court still would have reached the same conclusion regarding the musical work’s protected elements. As a matter of law, the recording could not be a publication due to Congress’s retroactive amendment to the 1976 Act.⁹⁵ Further, Gaye had deposited the original lead sheets with the Copyright Office satisfying one of the disjunctive requirements for copyright protection, thus forgoing the need for him to “publish” the lead sheets.⁹⁶ Thus the court’s attempt to define publication in this case should simply be taken as dicta.

Nevertheless, because the court *did* attempt to define publication, it is important to understand how other jurisdictions define the term, as a different approach may offer future litigants extra tools during trial. The United States Court of Appeals for the Eleventh Circuit found from surveying prior case law that publication occurs in two instances: (1) when “tangible copies of the work are distributed to the general public in such a manner as allows the public to exercise dominion and control over the work,” or (2) when “the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public.”⁹⁷ One

93. *Id.* at *9; see W. Russell Taber, *Copyright Déjà Vu: A New Definition of “Publication” Under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 867 n.71 (2005) (explaining that “Congress intentionally omitted the definition of publication under the 1909 Act . . . Congress apparently omitted the definition due to ‘the difficulty of defining the term with respect to works of art where no copies are reproduced.’”) (quoting Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT §4.04 (2004)).

94. Taber, *supra* note 93, at 867 n. 71.

95. *Williams*, 2014 WL 7877773 at *9 (citing *ABKCO Music, Inc.*, 217 F.3d at 691).

96. *Id.* at *8.

97. *Estate of Martin Luther King, Jr. v. CBS*, 194 F.3d 1211, 1215 (11th Cir. 1999).

disadvantage of the first approach is requiring that the copies be in “tangible” form.⁹⁸ Broadcasting a song over the radio or streaming the song over the Internet would not constitute a publication, as the song is not being distributed via “tangible copies.”⁹⁹ This result frustrates the 1909 Act’s underlying policy of providing creators with an economic incentive to create musical compositions.¹⁰⁰ While the second approach does not expose itself to the first approach’s “tangible” issue, the second approach allows for unapproved publication of the work.¹⁰¹

2. Defining the Scope of Protected Elements After the 1976 Act

For works copyrighted after Congress enacted the 1976 Act, “[c]opyright protection subsists . . . in original works of authorship fixed in *any* tangible medium of expression”¹⁰² The differences between the 1909 Act and the 1976 Act are vast. The 1976 Act abrogated the 1909 Act’s requirement that artists physically deposit a paper musical composition with the Copyright Office, and the Act greatly expanded a musical work’s protected elements.¹⁰³ Combined with the Sound Recording Act of 1971, “copyright protection *automatically* applies to original works of authorship when they are ‘fixed in any tangible medium of expression,’” such as a sound recording on a CD or phonograph, along with any other music the author has written down.¹⁰⁴ Had Gaye copyrighted the “Got to Give It Up” sheet music after the enactment of 1976 Act, the “Blurred Lines” court would likely have admitted the recorded version into evidence.

Although the 1909 Act was rigid in defining the scope of protection, the 1976 Act has often made it harder for courts to discern what elements of a musical work federal law actually protects.¹⁰⁵ This issue often comes up during infringement lawsuits in which a plaintiff’s musical work is not entirely his or her own

98. Taber, *supra* note 93, at 875.

99. *Id.*

100. Loren, *supra* note 41, at 281.

101. *Id.*

102. 17 U.S.C. §102 (1976) (emphasis added).

103. *Id.*

104. Williams v. Bridgeport Music Inc., No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014) (emphasis added); see also Osterberg, *supra* note 49, at 630 (explaining the Sound Recording Act of 1971).

105. Gabriel Jacob Fleet, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1236-37 (2008).

work, such as when session musicians fill in, or when there are multiple musicians in the plaintiff's band.¹⁰⁶

3. Showing Defendant Copied Plaintiff's Work

Once the court has ruled on which portions of the musical work are protected, the plaintiff must show the defendant actually copied the plaintiff's protected work.¹⁰⁷ When available, the plaintiff can use direct evidence that the defendant infringed the work to prove this element.¹⁰⁸ However, if the plaintiff does not have direct evidence of copying (a more common scenario), he may prove infringement by showing (1) the defendant had access to the infringed song and (2) a "substantial similarity" exists between the plaintiff's and the defendant's song.¹⁰⁹ Within the substantial similarity sub-element, the plaintiff must satisfy a dual extrinsic and intrinsic test.¹¹⁰

i. Using Direct Evidence to Prove Defendant Copied Plaintiff's Work

Proving that the defendant directly copied the plaintiff's musical work is difficult, as plaintiffs seldom possess direct evidence of copying.¹¹¹ When a plaintiff does provide direct evidence that the defendant copied his or her work, courts have noted that the evidence's presence is "unusual"¹¹² and "rare."¹¹³ While plaintiffs have successfully offered direct evidence in a few infringement lawsuits involving copying data and photography, the same cannot be said for musical works.¹¹⁴

In the "Blurred Lines" case, the Gaye Parties attempted to show they had direct evidence of copying.¹¹⁵ First, the Gaye Parties

106. *Id.*

107. Wanat, *supra* note 71, at 1040.

108. *Id.*

109. Fleet, *supra* note 105, at 1244.

110. Williams v. Bridgeport Music Inc., No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *6 (C.D. Cal. Oct. 13, 2014).

111. See Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) ("direct evidence of copying is not available in most cases").

112. Marshall & Swift v. BS & A Software, 871 F. Supp. 952, 959 (W.D. Mich. 1994).

113. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (in which there was direct evidence "of copying the very details of the photograph that embodied plaintiff's original contribution").

114. *Id.*

115. Williams, 2014 WL 7877773 at *11.

submitted evidence that shortly before composing “Blurred Lines,” Thicke told *GQ Magazine* that “‘Got to Give It Up’ was one of his ‘favorite songs of all time,’ and he wanted to ‘make something like that, something with that groove.’”¹¹⁶ He told this story not only to *GQ* but also to *Billboard.com*, *Twitter Take Over*, *VHI*, *Fuse TV*, and Oprah Winfrey.¹¹⁷ During his deposition, Thicke denied making such comments, and claimed that he was high and drunk during each interview.¹¹⁸ The court ultimately held that regardless of Thicke’s mental state, his statements did not constitute direct evidence of copying, as Thicke did not explicitly say that he intended to copy specific protected elements of “Got to Give It Up.”¹¹⁹ To establish direct copying, the Gaye Parties needed to show that the Thicke Parties “engaged in virtual duplication of a plaintiff’s entire work.”¹²⁰

The Gaye Parties also offered a Universal Music Enterprise (“Universal”) internal email as evidence. In the group email, a Universal executive discussed tying together “Got to Give It Up” and “Blurred Lines” for promotional purposes.¹²¹ When the Gaye Parties examined the executive at trial and asked about an email where he described “Blurred Lines” as “utterly based” on “Got to Give It Up,” the executive denied that these statements implied “Blurred Lines” was a copy.¹²² These emails were also held not to be direct evidence of copying.¹²³

It is therefore not enough for a plaintiff to offer evidence that the defendant told the media on several different occasions that he wanted to make a song just like the one he or she allegedly infringed. Likewise, internal emails similar to the executive’s email do not suffice. This is a high evidentiary bar, one that plaintiffs are unlikely to clear. Short of an admission akin to “I wanted to copy the hook and synthesizer melody in ‘Song xyz’ and that is exactly what I did,”

116. *Id.*

117. *Id.*

118. Eriq Gardner, *Robin Thicke's 'Blurred Lines' Deposition Unsealed: 'I Was High and Drunk' (Exclusive Video)*, THE HOLLYWOOD REPORTER (Oct. 24, 2015, 9:30 AM), <http://www.hollywoodreporter.com/thr-esq/robin-thickes-blurred-lines-deposition-834403>.

119. *Williams*, 2014 WL 7877773 at *11.

120. *Id.*

121. Daniel Siegal, *Universal VP Downplays Emails in 'Blurred Lines' IP Trial*, LAW360 (Feb. 26, 2015, 10:33 PM EST), <http://www.law360.com/articles/625874/universal-vp-downplays-emails-in-blurred-lines-ip-trial> (internal quotations omitted).

122. *Id.*

123. *Id.*

a plaintiff will have a very difficult time proving that a defendant directly copied his or her musical work.

ii. Using Indirect Circumstantial Evidence to Prove Defendant Copied Plaintiff's Work

In the likely event that a plaintiff cannot provide direct evidence that the defendant copied his musical work, the plaintiff will have to establish copying through circumstantial evidence.¹²⁴ The plaintiff can do this by showing that (1) defendant had “access” to the protected work and that (2) a “substantial similarity” exists between the two works.¹²⁵

a. Proving Defendant's “Access” to Plaintiff's Work

Although the Thicke Parties conceded that Thicke's admissions to the media fulfilled the access element, this element is worth exploring to benefit future litigants.¹²⁶ One court defined access as “hearing or having a reasonable opportunity to hear the plaintiff's work.”¹²⁷ A plaintiff need not prove that the defendant *actually heard* the musical work, only that the defendant had a *reasonable opportunity* to hear the work.¹²⁸ The plaintiff can use three theories to prove the defendant's access to the musical work when the defendant has not conceded this element.

The first theory is the “chain of events theory.”¹²⁹ Under this theory, the plaintiff would need to show that someone gave his protected musical work to another person, and then it passed through

124. *See Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1985) (noting a permissible inference of copying can be found if there is striking similarity); *see also Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 532 (5th Cir. 1994) (“As direct evidence of copying is uncommon, plaintiffs generally demonstrate copyright infringement indirectly or inferentially . . .”).

125. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

126. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *10-11 (C.D. Cal. Oct. 13, 2014).

127. *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991).

128. *See Bouchat v. Balt. Ravens, Inc.*, 241 F.3d 350, 354 (4th Cir. 2001) (“Bouchat was not required to prove that Modell in fact saw the drawings and copied them. Rather, Bouchat was merely required to prove that Modell had *access* to the drawings by showing Modell had the opportunity to view them.”); *see also Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (“We have defined reasonable access as ‘more than a “bare possibility.”’” (quoting *Jason v. Fonda*, 698 F.2d 966, 967 (9th Cir. 1982))).

129. *Three Boys Music Corp.*, 212 F.3d at 482.

various hands before arriving with defendant.¹³⁰ “Bare possibility” of access through “speculation or conjecture” will not satisfy the access element.¹³¹ In the music industry, the plaintiff can prove the chain of events theory most easily through the “corporate-receipt doctrine.”¹³² One version of this doctrine, the “bare corporate receipt doctrine,” says that the plaintiff can prove access by showing that the “company employing the alleged infringer received the work.”¹³³ While bare corporate receipt may be enough in some cases for the plaintiff to demonstrate that defendant had reasonable access to the work, such reasonableness would depend on the facts of the case before the court.¹³⁴ In most jurisdictions, courts hold that the “bare corporate receipt doctrine” is not enough on its own to establish access.¹³⁵ In those jurisdictions, the plaintiff still must show that there is a nexus between the corporation and the alleged infringer.¹³⁶

130. *See* Gaste v. Kaiserman, 863 F.2d 1061, 1067 (2d Cir. 1988) (explaining that “[a]ccess through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant’s access to a plaintiff’s work” even though it is an “attenuated chain of events”).

131. Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 265 (2013); *accord* Moore v. Columbia Pictures Indus., 972 F.2d 939, 942 (8th Cir. 1992).

132. *See* Livingston, *supra* note 131, at 265 (explaining the “corporate-receipt doctrine” as: “[I]f the defendant is a corporation, the receipt of the plaintiff’s work by one of the defendant’s employees constitutes receipt by the employee who actually composed the accused work, so long as there is some connection between the two employees.”).

133. Stacy Brown, *The Corporate Receipt Conundrum: Establishing Access in Copyright Infringement Actions*, 77 MINN. L. REV. 1409, 1411, 1413 (1993).

134. *See id.* at 1432 (“Despite the apparent deviation from the policy, the court held that it was not significant enough to raise a genuine issue of fact as to access.”).

135. *See id.* (pointing out that courts discredit the doctrine as unreasonable considering the realities of modern business).

136. *See* Jorgensen v. Epic/Sony Records, 351 F.3d 46, 53 (2d Cir. 2003) (“Bare corporate receipt[,] . . . without any allegation of a nexus between the recipients and the alleged infringers, is insufficient to raise a triable issue of access.”); *see also* Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346, 1357 (C.D. Cal. 1984) (“[W]here . . . there is little, if any, nexus between the individual who possesses knowledge of a plaintiff’s work and the creator of the allegedly infringing work, and where the defendant presents uncontroverted evidence negating transmission of the plaintiff’s work (any part of which, if true, would refute plaintiff’s case), the plaintiff must show something more than that he sent his work to a director who was under contract to the defendant and had an office on the defendant’s lot.”).

The second way a plaintiff can prove access is a combination of the “wide dissemination” and “subconscious copying” theories.¹³⁷ The plaintiff can prove wide dissemination by demonstrating that his or her musical work was “widely distributed through extensive radio or television airplay . . . record sales . . . [or] via the Internet . . . making practically any piece of music available (legally or illegally) with a mouse click.”¹³⁸ Even if during trial a defendant successfully shows he or she had no conscious intent to write a song similar to the plaintiff’s song, the wide dissemination and subconscious copying theories allow the plaintiff to argue that defendant’s infringement was subconscious.¹³⁹ In one well-known case, Bright Tunes Music Corporation alleged that former Beatles member George Harrison’s song “My Sweet Lord” infringed on its song “He’s So Fine.”¹⁴⁰ During cross-examination, Harrison admitted that he had heard “He’s So Fine” several years before writing “My Sweet Lord.”¹⁴¹ Despite going into detail about his self-directed creative process to lessen his admission’s incriminatory effect, the court held that Bright Tunes had established Harrison’s access to the work.¹⁴² Bright Tunes was also able to establish access by showing that in the same year Harrison heard “He’s So Fine,” its song was “Number One on the Billboard charts” in the United States for five weeks, and it was one of the “Top Thirty Hits” in the United Kingdom for seven weeks.¹⁴³

It should be noted that a plaintiff can show the defendant’s access on far less evidence than Bright Tunes used during their case. In a Ninth Circuit case, Three Boys Music Corporation alleged that Michael Bolton’s “Love Is a Wonderful Thing” infringed on their copyright on an Isley Brothers’ song of the same name.¹⁴⁴ On

137. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (explaining that “in music cases the ‘typically more successful route to proving access requires the plaintiff to show that its work was widely disseminated through sales of sheet music, records, and radio performances.’” (citing 2 Paul Goldstein, *Copyright: Principles, Law, and Practice* § 8.3.1.1., at 91 (1989))).

138. Livingston, *supra* note 131, at 265-66.

139. See *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924) (“[Defendant] must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity [between the musical works].”).

140. *Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 990 (2d Cir.1983).

141. *Id.* at 998.

142. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976).

143. *Abkco Music, Inc.*, 722 F.2d at 997.

144. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

appeal, the defendant parties contested the jury's finding that Bolton had reasonable access to the Isley Brothers' song.¹⁴⁵ The defendants argued that "access amount[ed] to a twenty-five-years-after-the-fact-subconscious copying claim."¹⁴⁶ The court conceded that the Isley Brothers' song never topped the Billboard charts, had not been released on CD until a year after Bolton released his song, that rhythm and blues experts testified that they never heard the Isley Brothers' song, and that Bolton never admitted to hearing the Isley Brothers' song.¹⁴⁷ Nevertheless, the court upheld the jury's verdict as supported by substantial evidence of access because it was "entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later."¹⁴⁸ Under the low evidentiary bar that this *Three Boys Music* ruling set, plaintiffs will likely have the easiest time proving access under the combined wide dissemination and subconscious copying theories.

The third theory for proving access involves the plaintiff showing a "striking similarity" between the musical works.¹⁴⁹ A plaintiff can use this theory when he is not able to establish access on a factual basis under the first two theories. To support this theory, the plaintiff must show that "the similarity is of a type which will preclude any explanation other than that of copying."¹⁵⁰ There is currently a circuit split over whether a striking similarity obviates any need to show access (the majority approach), or whether its existence is merely evidence of access requiring supplemental evidence (the minority approach).¹⁵¹ The distinction between the majority and minority approaches may be trivial, as there are internal inconsistencies within both types of jurisdictions' case law.¹⁵²

145. *Id.* at 484.

146. *Id.* (internal quotation omitted).

147. *Id.*

148. *Id.*

149. *See id.* at 485 ("[I]n the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were 'strikingly similar.'").

150. *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984).

151. *See Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1098-99 (C.D. Cal. 2001) (in which the court gave an exhaustive overview of how several circuit courts view the "striking similarity" theory, and how even within the Ninth Circuit there is no clear answer as to whether such evidence obviates or can be evidence of "access").

152. *See Livingston*, *supra* note 131, at 267 (citing *Bouchat v. Balt. Ravens, Inc.*, 228 F.3d 489, 494 (4th Cir. 2000) and *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997) ("A closer comparison of the majority and

Regardless of which type of jurisdiction the court is in, a plaintiff would be wise to argue that any evidence of a striking similarity between his work and defendant's work fulfills the access prong.

Once the plaintiff provides evidence that the defendant had access to his musical work, some courts will apply an "inverse ratio" rule.¹⁵³ This rule says that the more evidence the plaintiff has showing the defendant's access to the work, the less evidence of substantial similarity is needed, and vice versa.¹⁵⁴ In the "Blurred Lines" case, the Gaye Parties argued that because Thicke's statements to the media constituted such strong evidence of access, they were required to prove a lesser degree of substantial similarity between "Blurred Lines" and "Got to Give It Up."¹⁵⁵ The court disagreed and held that because the defendants conceded access, the inverse ratio rule did not apply.¹⁵⁶ While the Ninth Circuit has stood by the inverse ratio rule in the past, the rule has come into question recently, so it would be wise for the defendant to challenge the plaintiff if he or she uses the inverse ratio argument.¹⁵⁷

b. Proving Substantial Similarity

Once the plaintiff has shown that the defendant had access to the allegedly infringed musical work, the plaintiff must prove that his work and defendant's work are substantially similar.¹⁵⁸ The Ninth Circuit applies a two-part test to analyze this element: "an objective extrinsic test and a subjective intrinsic test."¹⁵⁹ In the "Blurred Lines" case, the court first applied the objective extrinsic

minority rules regarding access and striking similarity, however, reveals that the differences between them are less meaningful than at first glance. One court applying the majority rule stated that 'striking similarity is one way to demonstrate access.' In the same vein, a court applying the minority rule declared that the plaintiff 'must produce evidence of access, all right, but . . . a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access.'").

153. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGR), 2014 WL 787773, at *11 (C.D. Cal. Oct. 13, 2014).

154. *Id.*

155. *Id.*

156. *Id.*

157. See David Aronoff, *Exploding the "Inverse Ratio Rule,"* 55 J. COPYRIGHT SOC'Y U.S.A. 125, 140 ("[T]here exists no means of measuring either access or similarity, so the term 'ratio' is at best a misnomer that conveys an air of undeserved legitimacy to the [Inverse Ratio Rule].").

158. *Williams*, 2014 WL 787773, at *6.

159. *Id.*

test, then directed the jury to implement the subjective intrinsic test.¹⁶⁰

A court must grant summary judgment for the defendant if the plaintiff is not able to provide sufficient evidence such that a jury could reasonably find extrinsic similarity.¹⁶¹ The rationale is that without satisfying the extrinsic test, the plaintiff cannot satisfy the subjective intrinsic test. To carry out the extrinsic test, the court will perform an “analytical dissection” of the musical work by considering expert testimony.¹⁶² “Analytical dissection” requires “breaking the works ‘down into their constituent elements, and comparing those elements for proof of copying as measured by substantial similarity.’”¹⁶³ The Ninth Circuit inspects a diverse array of musical elements when deciding the extrinsic similarity issue. In the “Blurred Lines” case, the court inspected several of the musical work’s elements using expert testimony.¹⁶⁴ These elements included: the “signature phrase” (“a primary identifying feature of a song and one of its most memorable elements”); “hooks” (“the most important melodic material of the work, that which becomes the memorable melody by which the song is recognized”); “hooks with backup vocals”; “Theme X” (the “core theme”); “backup hooks”; “bass melodies” (including opening bass lines and descending bass lines); “keyboard parts”; “percussion choices”; “[h]armonic similarity”; and “[m]elodic similarity.”¹⁶⁵ These compose most of the elements the Ninth Circuit has considered in similar past cases.¹⁶⁶ The conflicts between the expert testimony from the Thicke and Gaye Parties concerning substantial similarity between “Blurred Lines” and “Got to Give It Up” were sufficient to raise a genuine issue of material fact, and thus preclude summary judgment.¹⁶⁷ The court concluded that the Gaye Parties had sufficiently proven that elements of “Blurred Lines” might be substantially similar to protected elements of “Got to Give It Up.”¹⁶⁸ Thus, because a

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* (quoting *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004), as amended on denial of reh’g (Aug. 24, 2004)).

164. *Id.* at *12-18.

165. *Id.*

166. See Miah Rosenberg, *Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit*, 39 U.C. DAVIS L. REV. 1669, 1674 (2006) (containing an exhaustive list of elements the Ninth Circuit has examined in the past when applying the extrinsic test).

167. *Williams*, 2014 WL 7877773, at *19.

168. *Id.* at *20.

genuine issue of material fact was present, the Gaye Parties satisfied the extrinsic test, and the substantial similarity issue went to the jury.¹⁶⁹

Once the plaintiff has satisfied the extrinsic test, the court employs the intrinsic test.¹⁷⁰ The intrinsic test is the substantial similarity element's subjective prong.¹⁷¹ It asks whether an "ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."¹⁷² This means that the jury, acting as "ordinary, reasonable" people, must apply the intrinsic test and decide, based on the evidence and testimony before them, whether there is a substantial similarity between the songs in question.¹⁷³ During the "Blurred Lines" trial, the Gaye Parties' musicologists testified that multiple parts of "Blurred Lines" sounded substantially similar to protected elements in "Got to Give It Up."¹⁷⁴ Conversely, the musicologist the Thicke Parties hired testified that "Blurred Lines" was not substantially similar.¹⁷⁵ Ultimately, the jury found in favor of the Gaye Parties after applying the intrinsic test.¹⁷⁶

On appeal, the Thicke Parties argued that the evidence and testimony presented during the trial did not sufficiently support the jury's finding that there was substantial similarity between the songs.¹⁷⁷ Since the jury is uniquely tasked with applying the intrinsic test, courts typically should not and do not reverse the jury's decision unless defendant can show the jury's determination is against the great weight of the evidence or is "otherwise improper."¹⁷⁸ The "Blurred Lines" court determined that the jury's

169. *Id.* at *19.

170. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *21 (C.D. Cal. July 14, 2015).

171. *Id.* (internal quotations omitted).

172. *Id.*

173. *Id.*

174. *Williams*, 2014 WL 7877773, at *3 (One of the Gaye Parties' musicologists, Judith Finell, testified that a "preliminary review comparing 'Give It Up' and 'Blurred' has revealed a constellation of eight substantially similar features thus far").

175. *See id.* at *3 (The Thicke Parties' musicologist, Sandy Wilbur, testified that "[t]here are no two consecutive notes in any of the melodic examples in the Finell Report that have the same pitch, the same duration, and the same placement in the measure.") (emphasis omitted).

176. *Williams*, 2015 WL 4479500, at *1.

177. *Id.* at *22.

178. *Id.* (citing *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)).

conclusion did not fall into either of these exceptions, and upheld their finding.¹⁷⁹

The Thicke Parties' greatest mistake was letting the substantial similarity issue reach the jury and not finding some way to settle with the Gaye Parties. It was far too risky for the Thicke Parties to believe that the jury would limit themselves to considering only protected elements of a song (namely the lead sheets) and not the recorded version of "Got to Give It Up." Due to the 1909 Act controlling the scope of protection in "Got to Give It Up," the judge allowed the Gaye Parties to reconstruct the song using only those elements in the deposited compositions, and not those elements in the recorded version of the song.¹⁸⁰ The judge permitted this to counter any prejudicial effect stemming from disallowing all recorded materials at trial for the Gaye Parties, as jurors are not often expert sheet music readers.¹⁸¹ The Gaye Parties then compared the new restricted recording, as well as the sheet music, with "Blurred Lines" at trial.¹⁸²

Given how prevalent the wide dissemination theory is in proving access, it seems odd that the court would not consider this theory at the intrinsic test stage of the case. "Got to Give It Up" is a well-known song, entering the Billboard 100 immediately when Gaye released it in 1977.¹⁸³ Similarly, the album "The Very Best of Marvin Gaye," which contained "Got to Give It Up," made the Billboard 100 in 2001.¹⁸⁴ "Blurred Lines" has been purchased over six million times, and the music video for the song had been watched over 250 million times online.¹⁸⁵ It would not be an unrealistic inferential leap to suggest that, given how widely disseminated both songs are, one or more jury members had heard both songs, and these jury members considered Gaye's recorded song even though they were instructed by the court not to do so. Hence, non-protected

179. *Id.*

180. Trial Motion, Memorandum and Affidavit at 13 n.8, *Williams v. Bridgeport Music Inc.*, No. 2:13-cv-06004-JAK-AGR, 2015 WL 4055871 (C.D. Cal. June 1, 2015) ("Plaintiffs submitted their own self-created recording of their purported representation of the lead sheet elements of 'Got to Give it up.'").

181. *Id.*

182. *Williams*, 2015 WL 4479500, at *7.

183. *Billboard Charts Archive, The Hot 100—1977 Archive*, BILLBOARD, <http://www.billboard.com/archive/charts/1977/hot-100> (last visited Oct. 26, 2016).

184. Keith Caulfield, *Billboard 200 Chart Moves: Marvin Gaye Sales Up 246% After 'Blurred Lines' Trial*, BILLBOARD (Mar. 20, 2015, 7:42 PM), <http://www.billboard.com/articles/columns/chart-beat/6509353/marvin-gaye-got-to-give-it-up-sales>.

185. *Williams v. Bridgeport Music Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at *2 (C.D. Cal. Oct. 13, 2014).

elements of “Got to Give It Up” might have influenced the jury’s decision. This is an issue that future defendants should recognize and account for if the 1909 Act is controlling in their case. Given that the “Blurred Lines” court declined to overturn the jury’s verdict when the Thicke Parties made a similar argument, it may be impossible to restrict the jury’s consideration strictly to the musical work’s protected elements, even with crystal clear jury instructions.

III. ADVICE FOR AVOIDING LITIGATION

With this framework, litigants can successfully navigate an infringement lawsuit by anticipating and preparing for issues that may arise during trial. In the wake of the “Blurred Lines” case, defendants would be wise to avoid going to trial altogether, as the outcome can be unpredictable. The Thicke Parties’ limitation of the jury’s consideration to the lead sheets benefitted them greatly, yet even with this constraint, the Gaye Parties prevailed. If a party is able to win with such a hindrance, future litigants should be wary of trial. To avoid trial, future defendants can avoid several mistakes the Thicke Parties made before stepping foot into the courthouse, which likely affected the trial’s outcome. If future defendants can learn from the Thicke Parties’ pre-trial errors, they can avoid going to trial altogether and forgo catastrophic economic losses.

The first error the Thicke Parties made was not crediting their influences before releasing “Blurred Lines.” Both Williams and Thicke are talented recording artists. Williams has worked as a recording artist and producer since 1992.¹⁸⁶ His résumé boasts collaborations with some of the most highly respected and well-known recording artists in the industry, including Daft Punk, Jay-Z, Britney Spears, and Snoop Dogg.¹⁸⁷ Similarly, Thicke has worked in the music industry for over fifteen years and possesses a prolific pop discography.¹⁸⁸ In an interview after the “Blurred Lines” trial, Williams opined that the jury’s verdict would hinder “any creator out there who is making something that might be inspired by something else” and that “[e]verything that’s around you in a room was inspired by something or someone. . . . If you kill that, there’s no

186. Andy Kellman, *Pharrell Williams—Biography*, BILLBOARD, <http://www.billboard.com/artist/332084/pharrell-williams/biography> (last visited Oct. 26, 2016).

187. *Id.*

188. Robin Thicke Biography, BILLBOARD, <http://www.billboard.com/artist/367025/robin-thicke/biography> (last visited Oct. 26, 2016).

creativity."¹⁸⁹ Reading between the lines, Williams seems to suggest that “Got to Give It Up” inspired “Blurred Lines,” but that the law does not punish a musical work for being inspired by another work. While he is technically correct, this is a weak argument for an artist like Williams. Given the Thicke Parties’ long history in the music industry, they should have known to credit Gaye, especially after Thicke expressly stated that Gaye influenced him.¹⁹⁰ While recording artists do not need to be omniscient beings, it is clear that “Blurred Lines” and “Got to Give It Up” sound similar enough that the Thicke Parties should have feared putting the substantial similarity question to a jury. Experienced recording artists like the Thicke Parties should be cognizant of their musical work’s influences. One defense might be, “I listen to thousands of songs a week; I cannot possibly keep track of everything that makes its way into my music.” Nevertheless, when a song like “Blurred Lines” treads the fine line between replicating the feel of a song versus sounding substantially similar to a song, it is not enough to rely on this excuse. An artist need only be vigilant of the law, not fearful. If an artist believes in good conscience that his work does not sound substantially similar to another, this would come to light in either a settlement discussion or during litigation via one of the many elements discussed.

A second error by the Thicke Parties was preemptively suing the Gaye Parties for declaratory relief. The Thicke Parties offered the Gaye Parties a six-figure settlement to avoid litigation, which the Gaye Parties declined.¹⁹¹ As a result, the Thicke Parties likely felt that their only options were to continue increasing the settlement amount or litigate. A settlement rejection does not necessarily warrant a preemptive suit, even under the guise of insuring that Los Angeles was the venue for the eventual trial.¹⁹² Preemptively suing another party under similar facts to those in the “Blurred Lines” case instantly makes the moving party look like the bad guys. A better route would have been for the Thicke Parties to publicize that the Gaye Parties had turned down multiple settlement offers and sincere

189. Daniel Kreps, *Pharrell Talks ‘Blurred Lines’ Lawsuit for First Time*, ROLLING STONE (Mar. 19, 2015), <http://www.rollingstone.com/music/news/pharrell-talks-blurred-lines-lawsuit-for-first-time-20150319>.

190. *Williams*, 2014 WL 7877773 at *11.

191. Alex Pham, *Marvin Gaye’s Family Rejected Robin Thicke’s Six-Figure Offer*, BILLBOARD (Aug. 23, 2013, 10:30 AM), <http://www.billboard.com/articles/news/5672505/marvin-gayes-family-rejected-robin-thickes-six-figure-offer>.

192. Christman, *supra* note 10.

apologies from two of Gaye's biggest fans. The Gaye Parties then might have filed suit. Once they filed suit, the Gaye Parties' public image might have changed from that of a family concerned over Gaye's rights to the image of a family who were predominantly interested in seeing how much money they could get out of two famous pop artists. As such, the second piece of advice for potential defendants is to avoid underestimating how trial maneuvers may affect their image to the jury and public.

Looking forward to the future, it is unlikely the frequency of infringement suits will increase. A potential plaintiff should recognize the uniqueness of the facts of the "Blurred Lines" case and realize that, unless his situation matches the "Blurred Lines" facts, he will not be successful. First, "Got to Give It Up" and "Blurred Lines" sound incredibly similar, even to a layperson. Although the court disallowed the jury from considering the "Got to Give It Up" recording, the jury's verdict is likely a reflection of the similarity between the "Got to Give It Up" recording and "Blurred Lines." Second, a court will likely throw out a plaintiff's claim for not overcoming any one of the multiple elements or sub-elements that the plaintiff must satisfy to survive a motion for summary judgment. Third, the potential plaintiff would need his or her adversaries to act like the Thicke Party did before trial and during depositions in order for the odds to be stacked in his or her favor.¹⁹³

IV. CONCLUSION

When an interviewer asked Williams how he thought the "Blurred Lines" verdict would affect recording artists, he said that the jury's decision would chill recording artists' creative process.¹⁹⁴ It is important to note that this statement's source is from one of the parties who recently lost a sizeable infringement lawsuit. While his reaction is understandable, his prediction may not reflect the verdict's true effects on the music industry. The more likely result is that recording artists will become more mindful of giving credit where credit is due. If being a more conscientious artist is a bad trait that causes a "creative chill," perhaps recording artists need to

193. Alex Young, *Video Released of Pharrell, Robin Thicke's Depositions in "Blurred Lines" Case*, CONSEQUENCE OF SOUND (Oct. 24, 2015, 12:35 PM), <http://consequenceofsound.net/2015/10/video-released-of-pharrell-robin-thickes-depositions-in-blurred-lines-case/> (containing videos of Williams being evasive and disrespectful during a deposition and of Thicke admitting he was intoxicated during previous media interviews).

194. Christman, *supra* note 10.

reevaluate their principles rather than the judiciary needing to reevaluate a jury's verdict.