Gaye v. Thicke

The "Blurred Lines" Between Music Copyright, Music Sampling & Fair Use

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Introduction

In August 2013, R&B crooner Robin Thicke, 10-time Grammy Award winning producer Pharrell Williams, and Atlanta rapper Clifford "T.I." Harris sued the Marvin Gaye Estate and Bridgeport Music for declaratory judgment,[1] after the Gaye estate claimed that Thicke's song "Blurred Lines" infringed Gaye's 1977 Billboard hit "Got to Give It Up." The estate challenged Thicke and Williams' claim, filing a countersuit, saying "Blurred Lines" copied the "feel" and "sound" of Gaye's song.[2] On March 10, 2015, a unanimous California jury found Thicke and Williams liable of copyright infringement in an unprecedented verdict, sparking a major conversation on copyright law, music sampling, fair use, inspiration, and artistic freedom.

In this paper, the *Gaye* lawsuit will be used as a research focal point in understanding the United States copyright laws, music sampling, and fair use. This paper will define what the terms "copyright," "copyright infringement," "music sampling" and "fair use" in accord with the United States statutory law, in addition to explaining the history of the U.S. copyright law, and how the Copyright Act of 1976 applies. Through scholarly research, an examination of three previous music copyright cases, and one recently closed case, this paper will also examine how the law protects musical composition, what areas of a musical recording are protected by copyright laws, and the available infringement defenses. This paper will lastly explain how the *Gaye* case became an importance for artists and industry music producers sampling music for inspiration from previous works.

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[1]Pharrell Williams et al. v. Bridgeport Music Inc et al., U.S. District Court, No. CV-6004-JAK (AGRx) [CD Ca. 2015] Judgment JS-6

[2] *Id.*

The first section of this paper will give a detailed summary of four scholarly articles about copyright, music sampling, and fair use, while introducing three previous musical copyright cases, *Cartier v. Jackson,*[3] *Three Boys Music v. Bolton,*[4] and *Bright Tunes Music v. Harrissongs Music.*[5] The *Bright Tunes* Music case was cited during the *Gaye* lawsuit, and another case recently settled in court, *Fahmy v. Jay-Z* .[6] The second section of this paper defines the legal terms "copyright," "copyright infringement," "music sampling," and "fair use," according to the law, and traces the history of the Copyright Act of 1976 and its current application in the courts. The third and fourth sections of this paper, will provide background for the *Gaye* case, and how the law was applied in the case verdict.

The section of this paper that follows is the Literature Review and will focus on what legal analysts have written about the issues pertaining to copyright, using popular music copyright cases.

Literature Review

According to Ronald B. Standler,[7] a practicing attorney and consultant in Massachusetts, the law defines copyright as legally belonging to the composer of a musical composition the moment that composition is "fixed in any tangible medium of expression."[8] In other words, the

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[3] Cartier v. Jackson 59 F. 3d 1046 (1995)

[4] Three Boys Music v. Bolton 212 F. 3d 477 (2000)

[5] Bright Tunes Music v. Harrisongs Music 420 F. Supp. 177 (S.D.N.Y. 1976)

[6] Fahmy v**.** Jay-Z et. al, 788 F. Supp. 2d 1072 (C.D. Cal. 2011)

[7] Ronald B. Standler, *Music Copyright Law in the USA*, DR. R STANDLER (Mar. 1, 2016), at http://www.rbs2.com/copyrm.pdf

[8] 17 U.S.C. § 102

moment a musical arrangement is written on paper or is arranged and exported into a sound recorded file on a computer, that material becomes the property of the composer of that arrangement. When making a musical recording, the work is most often technologically transcribed through the use of a magnetic tape recorder, previously known as an analog recording, and/or a multi-channel mixing board, connected to a computer.[9] The original recording of the song is then edited to produce what is known as a master recording.[10]

In order to copyright musical work, the physical master recording of the taped musical work must include "(1) the copyright symbol ©, (2) year of production, and (3) the composer's name,"[11] which in many cases is the song's leading producer. Before the recording is performed and/or distributed for sale, the work must be registered with the United States Copyright Office, in order to be protected from infringement. When distribution of a work is expected, the copyright symbol ℗ is used to provide notice of the copyright protection of a sound recording, known as a "phonogram," in addition to the copyright symbol ©.[12] The copyright symbol © provides protection of the sheet music related to a sound recording and the copyright symbol ℗ provides protection of the album of the sound recording. There are three circumstances when an album of a sound recording is distributed that the printing of both copyright symbols are present: "(1) copyright on the record album cover, album artwork, and album text, (2) copyright on the text of

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[9] Standler *supra* note *7*

[10] *Id.*

[11] 17 U.S.C 401(b)

[12] U.S. House of Representatives Report Nr. 94-1476, at p. 145, reprinted in U.S. Code Congressional And Administrative News, 5659, 5761

the notes about the music or performers [music credits], (3) copyright of the sheet music that was performed in the recording."[13] Having ownership of the master recording of a work that is copyrighted gives the owner of that master recording full authority over that work and its business ventures related to the work. For example, in a long term battle with his former business partner and friend Damond "Dame" Dash, Shawn "Jay-Z" Carter fought to obtain the masters of his 1996 freshman album "Reasonable Doubt," which Dame held possession of due to his part-ownership of Roc-A-Fella Records. In 2004, Dash, Carter, and another business partner sold 50 percent of their record label to Def Jam Recordings. As a result, Carter retained ownership of his masters as President of Def Jam Recordings at the time, thus gaining full profit and control for any further use of the album "Reasonable Doubt" and its songs.[14]

Standler goes on to define fair use as the legal defense against copyright infringement, in which a person uses the musical work and/or recording of another musical composer for non-profit gain.[15] Once the use of another person's musical work and/or recording is used for profit gain without the permission of the original composer, it is known as copyright infringement. Fair use, thus, does not apply when it comes to radio air play of copyrighted music. Radio stations pay copyright royalties to the songwriters and composers of songs through licenses purchased through those songwriters' and composers' publishing companies. These licenses are often facilitated through songwriting and composition publishing associations like American Society of

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[13] Standler *supra* note 7

[14] Zack O'Malley Greenburg, *Jay-Z's New Publishing Deal Is Just The Beginning*, FORBES MAGAZINE (Mar. 14, 2016), at http://www.forbes.com/sites/zackomalleygreenburg/2013/02/20/jay-zs-new-publishing-deal-is-just-the-beginning/#2e1787075bc7

[15] Standler *supra* note 7

Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and Society of European Stage Authors and Composers (SESAC).[16]

Standler defines music sampling as using previously recorded music and/or sound for profit.[17] The process of getting permission from the owners of original music being sampled is known as "sample clearance," and is required if copies are to be made and distributed to the public. According to business licensing attorney Richard Stim, when sampling music, there are two clearances required: (1) permission from the copyright owner of the song, usually the music publisher or producer, and (2) permission from the copyright owner of the master tapes, most commonly the record label.[18] Often times, when artists perform their concerts for major tours, they sample music from other artists, showing and paying homage to artists who have come before them. In these cases, sample clearance is not required by the law, due to the fact that the hosting venues of these shows pay blanket license fees to publishing affiliations and associations.[19]

In the case, *Fahmy v. Jay-Z* [20], Baligh Hamdi's nephew and estate holder, Osama Ahmed Fahmy, sued Carter, producer Timothy "Timbaland" Mosley, Paramount Pictures, EMI, and Warner Music Group for sampling a snippet of a flute composition from Hamdi's song "Khosara

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[16] Standler, *supra* note 7

[17] *Id.*

[18] Richard Stim, *When You Need Permission to Sample Others' Music,* NOLO, (Mar. 14, 2016), at http://www.nolo.com/legal-encyclopedia/permission-sampled-music-sample-clearance-30165.html

[19] *Id.*

[20] *Fahmy,* 788 F. 2d at 6

Khosara" in Carter's 1999 single "Big Pimpin'."[21] Carter and Mosley argued that they had paid $100,000 to EMI, who controlled the licensing to Hamdi's song outside of its Egyptian jurisdiction, in order to sample the flute composition in July of 2001—two year's after the song's release. In that instance, Hamdi's estate may have had an infringement case if the suit had been filed prior to the 2001 payment to EMI. However, the suit was filed in August 2007, eight years after the release of the song and six years after its licensing purchase.[22] Fahmy argued that despite EMI's ownership of the licensing and the timing of the lawsuit, Jay-Z's song "mutilated" the late composer's morality[23] and thus should be considered infringement. A judge ruled that Fahmy had no case, because the song's economic rights had been sold to EMI and the original song's morality outside of Egypt was not upheld in the U.S. court system.[24] In the U.S., moral rights to a copyrighted work refers to "the right to be known as an author to one's work and to withdraw a work from distribution.[25] Moral rights also refer to an author's right to "protect the integrity of a work by preventing others from deforming it or using it in a way that reflects poorly on the author."[26] In other words, though Fahmy's belief that "Big Pimpin'" may have gone

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[21] *Fahmy,* 788 F. Supp at 6

[22] Matthew Heller, *Jay-Z Says 'Big Pimpin" Copyright Suit Came Too Late,* LAW 360, (Mar. 14, 2016), at http://www.law360.com/articles/464386/jay-z-says-big-pimpin-copyright-suit-came-too-late

[23] Ben Sisario, *Jay Z and Timbaland Win Copyright Lawsuit Over 'Big Pimpin" Sample*, NEW YORK TIMES, (Mar. 14, 2016), at http://www.nytimes.com/2015/10/22/business/media/jay-z-and-timbaland-win-copyright-lawsuit-over-big-pimpin-sample.html?_r=0

[24] *Id., supra* note 21

[25] KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION, 259 (2013)

[26] Harry Henn, COPYRIGHT LAW: A PRACTIONER'S GUIDE 176 (1988)

against his uncle's morality for "Khosara, Khosara," because the rights to Hamdi's song belonged to EMI, EMI was now the owner of the song, and thus had right to distribute the song's composition however it pleased.

In the case *Cartier v. Jackson*[27], singer songwriter Crystal Cartier filed a lawsuit against pop-icon Michael Jackson, claiming his 1990 song "Dangerous" infringed her 1985 song "Dangerous." Cartier claimed Jackson had access to her song's demo through people who were close to him.[28] According to Charles Cronin et. al of USC Gould School of Law and Columbia Law School analysts, Cartier decided to pursue her case because Jackson's song had the same title.[29] According to U.S. copyright law, there is no protection of "names, titles, or short phrases or expressions."[30] During the trial, Cartier failed to produce a copy of her "Dangerous" demo tape, or a copy of the song's master to prove her case. The jury ruled in favor of Jackson, stating that the plaintiff failed to prove the infringement.

Three Boys Music v. Bolton[31] is a landmark music copyright case relating to The Isley Brothers' 1964 song "Love is a Wonderful Thing" and Michael Bolton's 1991 pop song "Love Is A Wonderful Thing."[32] The Isley Brothers sued Bolton for infringement, claiming that Bolton's

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[27] *Cartier,* 59 F. 3d at 3

[28] *Id.*

[29] Charles Cronin et al., *Crystal Cartier v. Michael Jackson 59 F.3d 1046 (10th Cir. 1995)*, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, (Mar. 14, 2016), at http://mcir.usc.edu/cases/1990-1999/Pages/cartierjackson.html

[30] United States Copyright Office, *Copyright Protection Not Available for Names, Titles, or Short Phrases,* CIRCULAR 34 1 (2015)

[31] *Three Boys Music,* 212 F. 3d at 4

[32] *Id.*

version of the song infringed on their original song's musical arrangement—not its lyrics. During the trial, music analysts showed that both songs shared repeating settings of the term "Love is a Wonderful Thing," "…both of which feature a long note on 'love' followed by notes of much briefer duration in a descending melodic sequence on the other words. Both songs have call-and-response gospel characteristics."[33] In 1964, The Isley Brothers registered "Love is a Wonderful Thing" for copyright protection. Despite similar musical composition, Bolton claimed to have never heard of the Isleys' song. The jury noticed too many similarities in the music and found Bolton liable for infringement, rewarding The Isley Brothers $5.4 million judgment—the largest damages awarded ever in music plagiarism.[34] The courts denied Bolton's motion for a new trial.

In the 1971 case, *Bright Tunes Music v. Harrisong's Music,*[35] former Beatle member, George Harrison, was found liable for infringement with his song "My Sweet Lord" of Ronnie Mack's "He So Fine," whose copyright license was issued to Bright Tunes Music.[36] During the case, musical analysts were also used to determine the similarities in musical composition. Despite minor differences between the two musical compositions, after analysts determined that Harrison's "My Sweet Lord" song "[used]…the melodic kernels of [the] plaintiff's universally popular number, in the same order and repetitive sequence..[with] 'identical harmonies,'" the jury ruled that Harrison "unconsciously misappropriated the musical essence of 'He's So

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[33] Cronin, *supra* note 29

[34] *Id.*

[35] *Bright Tunes Music* 420 F. Supp at 6

[36] *Id.*

Fine'."[37] The court ordered the defendant to pay $1,599,987 to the plaintiff—three-quarters of the North American revenue obtained from "My Sweet Lord," in addition to a fraction of Harrison's *All Things Must Pass* album. In his conclusions to the proceedings, Judge Richard Owen stated:

> Did Harrison deliberately use the music of "He's So Fine?" I do not believe he did so deliberately. Nevertheless, it is clear that "My Sweet Lord" is the very same song as "He's So Fine" with different words, and Harrison had access to "He's So Fine." This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.[38]

Bright Tunes Music set new legal precedents in regards to music copyright and infringement. The case proved that musical composition can not only be protected, but used as evidence to defend a party's case. Because the Copyright Act of 1976 had yet been enacted, it was the Copyright Act of 1909 that helped win this case. In most copyright infringement lawsuits, the defendant argues "homage" and "inspiration" from the musical composition of a previously recorded song, often times believing that if the words are different, their song is thus not copyright infringement. However, the law says otherwise. The next portion of this study will explain the history of both the Copyright Act of 1909 and 1976 and legally define the terms "copyright," "copyright infringement," "music sampling" and "fair use."

Copyright, Music Sampling & Fair Use:

Following the American Revolution, the United States government passed the Copyright Act of 1790, securing authors "the sole right and liberty of printing, reprinting, publishing, and

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[37] *Bright Tunes Music* 420 F. Supp at 6.

[38] *Id.*

vending…their maps, charts, and books."[39] Through the act, authors were able to receive protection of their written works for up to 14 years, having the right to renew their work one-time after that 14-year term was completed. For almost 41 years, the Copyright Act of 1790 set precedent until February 3, 1831, when the Copyright Act of 1831 was enacted, adding musical composition[40] to the list of statutory protected works. The Copyright Act of 1909 extended the copyright license term to 28 years, also offering a one-time renewal of the same value.[41] The act became a landmark statute in the United States statutory copyright law, and though it was later repealed, it remains in effect for works copyrighted before the Copyright Act of 1976 went into effect.[42] On October 19, 1976, The Copyright Act of 1976 became law, but did not go into effect until January 1, 1978. Under the Copyright Act of 1976, an extension term for works copyrighted before 1978, under the Copyright Act of 1909, "that had not already entered the public domain was increased from twenty-eight years [of protection] to forty-seven years [of protection]."[43] The act also expanded on the previous copyright law, defining the basic rights of copyright holders, fair use, and the protocol for the use of copyrighted work after the author's death.[44] Under section 102 of the act, the "works of authorships" are defined as

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[39] Copyright Act of 1790 1 Statutes At Large, 124, Section 1; (Mar. 1, 2016), at http://copyright.gov/history/1790act.pdf

[40] Standler, *supra* note 7

[41] Copyright Act of 1909; Section 23; (Mar. 1, 2016), at http://copyright.gov/history/1909act.pdf]

[42] *Copyright Act of 1976,* WIKIPEDIA (Mar. 1, 2016), at https://en.wikipedia.org/wiki/Copyright_Act_of_1976

[43] *Id.*

[44] 17 U.S. Code § 302

> (1)literary works, (2) musical works, including any accompanying words, (3) dramatic works, including any accompanying music, (4) pantomines and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, and (7) sound recordings[45] [and](8) architectural works.[46]

Section 107 of the act declares fair use as a non-criminal act of copying, explicitly applying to the "use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[47] In addition, Section 302 of the act extends protection of an author's work after the author's death for 50 years.

Prior to 1972, sound recordings were not protected by the law due to the fact that sound recordings were only readable "by way of machines." [48] As a result, the actual recording of a song was not copyrighted—the music sheet and the words to the song were. Historically, throughout the 19th century, the works of African American musicians, publishers, performers, and musical composers were "appropriated" in the

> …establishment of the nascent popular music industry through blackface minstrelsy—the first original and popular form of mass entertainment in North America. The founders of the US popular music industry—and those who would begin to claim copyrights through its sheet music—were mostly (white) men who, in blackface, 'appropriated' real and imagined performances of black culture and blended them with others (classical, Irish

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[45] 17 U.S. Code § 102

[46] *Id.* was amended in 1990

[47] 17 U.S. Code § 107

[48] Sound Recording Act of 1971, 85 STATUTES-AT-LARGE 391 (1971) U.S. CODE CONGRESSIONAL ADMINISTRATIVE NEWS 1566. The effective date of the 1971 amendments is 15 Feb 1972

> folk music, etc.) during enslavement, emancipation, and Jim Crow, into a complexly amalgamated popular style.[49]

After the Copyright Act of 1909, all publishers and authors, including musical composers, were permitted protection of their music scores, thus requiring record labels and anyone else who desired to use these written scores to ask for permission and/or pay for a fee[50] for the usage of the score's music; the sound recording of the music was still not protected by the law.

The United States law system defines "copyright" as "a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works." [51] The law defines copyright infringement as "…violat[ing] any of the exclusive rights of the copyright owner as provided by sections 106 through 122 [of the U.S. Copyright Law] or of the author as provided in Section 106A(a), or…import[ing] copies or phonorecords into the United States in violation of Section 602.[52] The United States law does not specifically define music sampling, as it falls under the copyright law, needing permission to be used in a different sound recording than its original. Standler defines music sampling as "the act of taking a portion, or sample, of one

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[49] Matthew D. Morrison, *Gaye vs. Thicke: How blurred are the lines of copyright infringement?,* OUP BLOG, (Mar. 14, 2016), at http://blog.oup.com/2015/03/blurred-lines-copyright-infringement/

[50] *Id.*

[51] U.S. Copyright Office, COPYRIGHT LAW OF THE UNITED STATES OF AMERICA AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE, (Mar. 1, 2016), at http://www.copyright.gov/title17/92chap1.html#101

[52] 17 U.S. Code § 501

sound recording and reusing it as an instrument or a sound recording in a different song or piece." [53] Under the U.S. Copyright Office Fair Use Index, fair use is

> a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use.[54]

Fair use "can be done without permission from the copyright owner…[and] is permissible when used to comment upon, criticize, or parody a copyrighted work." [55]

The next section of this paper will give a background reference into the *Gaye* case, before the following section directly applies the United States statutory copyright law and its definitions to the Gaye v. Thicke case.

Gaye v. Thicke

"Blurred Lines," a song written by Thicke, Williams, and Harris, was originally recorded in 2012, for Williams' label Star Trak Recordings.[56] On March 26, 2013, the song was released as Thicke's leading single off his sixth studio album, *Blurred Lines*. The single went on to be-coming the top-selling song that year, grossing more than 14.8 million units and setting the all-time record for reaching the largest U.S. radio audience; it also reached No.1 in 80 countries. [57]

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[53] Standler, *supra* note 7

[54] *supra* note 48

[55] Richard Stim, *What Is Fair Use,"* STANFORD UNIVERSITY LIBRARIES (Mar. 14, 2016), at http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/

[56] "Blurred Lines (feat. T.I. & Pharrell) - Single". iTunes. Apple. (Mar. 1, 2016), at https://itunes.apple.com/us/album/blurred-lines/id667067143

[57] Morrison *supra* 46

After an ongoing dispute over the song's originality, the "Blurred Lines" creators filed a lawsuit against the Gaye estate. The estate then filed a countersuit against Thicke and Williams for copyright infringement. More than a year later, United States District Court for the Central District of California Judge John A. Kronstadt denied Thicke and William's "motion for a court ruling stating that 'Blurred Lines' had not borrowed..from Gaye's song ['Got to Give It Up']." [58] The judge instead agreed to proceed with the Gaye estate's lawsuit, stating that the estate "[had] made a sufficient showing that elements of 'Blurred Lines' may be substantially similar to proceed, original elements of 'Got to Give It Up'."[59] Williams responded to the suit saying that the songs were "completely different…just simply go to the piano and play the two. One's minor and one's major…and not even in the same key."[60]

The R&B singer and producer went on to argue that "feel or sound" are not the same as infringement, "[if that was the case,] the Gaye defendants [claimed] ownership of an entire genre, as opposed to a specific work." [61] On February 10, 2015, the Gaye vs. Thicke trial began. The defenses argument in court was that the Gaye estate only had ownership of the lead sheet music to "Got to Give It Up"—not the rights of the song's sound recording. In 1977, when "Got to Give It Up" was first composed and released, the Copyright Act of 1976 had not yet gone into

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[58] Randy Lewis, *Robin Thicke, Pharrell Williams lost first round in 'Blurred Lines' case,* LOS ANGELES TIMES, (Mar. 14, 2016), at http://www.latimes.com/entertainment/music/posts/la-et-ms-robin-thicke-pharrell-williams-blurred-lines-marvin-gaye-lawsuit-20141030-story.html

[59] *Id.*

[60] Emerald Murrow, *Pharrell Talks About Battle Over 'Blurred Lines,'* ABC NEWS, (Mar. 14, 2016), at abcnews.go.com/Entertainment/wireStory/pharrell-talks-battle-blurred-lines-20245109

[61] *Williams et al.,* U.S. District Court, No. CV-6004 at 1

effect, thus leaving the copyright of the song's musical composition under the jurisdiction of the Copyright Act of 1909—only protecting the song's sheet music. The song's lyrics and actual sound recording was not protected under the law. The basis of copyright law, in relation to music recordings, are based on written work, lyrics or recording commonly owned by record labels; the "groove," "sound" and "feel" of a song are not defined by the law as musical elements.

To prove their case, the Gaye estate was expected to bare the burden of proof, demonstrating "(1) ownership of a valid copyright and (2) copying of [the] original constituent elements of the copyrighted work."[62] To their defense, the Gaye estate brought in musicologists Judith Finell and Ingrid Monson to break down the compositions of both songs. By using both songs' musical compositions, Finell and Monson proved that there was in fact copying and not just a copy of feeling, but a copying of musical composition.[63] The court asked the jury to find "(1) by a preponderance of evidence that the Thicke parties infringed Gaye's parties' copyright in the musical composition "Got to Give It Up" in "Blurred Lines," (2) by a preponderance of the evidence that the Thicke parties' infringement of the copyright in "Got to Give It Up" was willful, [and/or] (3) by a preponderance of the evidence that the Thicke parties' infringement of the copyright was innocent.[64] In other words, the jury was left with the decision to determine whether "Got to Give It Up" was used in "Blurred Lines" exploitably, or within inspiration. According to

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[62] 17 U.S.C. §§ 201–205, *Ownership Of Valid Copyright—Definition*

[63] Richard Busch, *Marvin Gaye Family Lawyer: How I Won the 'Blurred Lines' Trial (Guest Column*), BILLBOARD, (Mar. 1, 2016), at http://www.billboard.com/articles/news/6495237/marvin-gaye-lawyer-richard-busch-blurred-lines-trial-column

[64] Morrison, *supra* note 49

assistant professor and faculty fellow at NYU's Clive Davis Institute of Recorded Music, Matthew Morrison,

> It was the way in which groove was broken down into a traditional structural analysis, something that could be proven as a copyrightable text, something 'scientifically quantifiable,' that effectively convinced the jurors that there was 'direct and circumstantial evidence' that 'Blurred Lines' was in some part derived from Gaye's work.[65]

After less than five months after the trial started, a unanimous jury found that "Blurred Lines" infringed Gaye's 1977 song. The estate was originally awarded $7.4 million, however Judge Kronstadt cut it down to $5.3 million and awarded the Gaye estate 50 percent of future royalties from the song, and a portion of the revenue already made from the song.[66] The judge also rejected a motion for a new trial by the defendant, in addition to the injunction requested by the family. Rapper Harris was also found to have committed copyright infringement. Kronstadt said "the other elements for the jury's verdict mean he must be included in the judgment." [67]

An appeal was filed by Williams and Thicke. Gaye estate's lawyer, Richard Busch, told Billboard Magazine that the Gaye estate's suit was "over compositional elements [they] believed had been taken," without the permission of the Gaye family.[68] Busch also told Billboard Magazine that he believes the defense's biggest mistake was focusing on "specific note-for-note dif-

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[65] Morrison, *supra* note 49

[66] Anthony McCartney, *'Blurred Lines' copyright case not over,* THE ASSOCIATED PRESS, (Mar. 14, 2016), at http://www.usatoday.com/story/life/music/2015/07/15/lawyer-for-singers-blurred-lines-copyright-fight-not-over/30189927/

[67] *Id.*

[68] Busch, *supra* note 63

ferences between the lead sheets and the recording, arguing that because there supposedly wasn't identicality, there wasn't protection."

The following section of this study will apply the United States copyright law to the "Blurred Lines" case, using the Copyright Act of 1909 and 1976, and how the law defines copyright and infringement.

"…These Blurred Lines…"

As previously stated, the 1977 Marvin Gaye hit "Got to Give It Up" was protected under the Copyright Act of 1909. The law's protection of the song only ensured the copyright's owner—Gaye and his estate—protection of the song's musical composition recorded as a musical score sheet. After the enactment of the law, those who wished to use the musical composition from the copyrighted protected musical score sheet were required to obtain permission from the work's copyrighted owner and/or pay the copyrighted owner a fee[69] for the duplication and/or use of the original musical score. According to the law, Thicke and Williams were required by the Copyright Act of 1909 to seek permission from the Gaye estate and/or pay a licensing fee in order to use the musical score sheet of "Got to Give It Up"—similar to the licensing fees paid by Carter and Mosley to EMI for a snippet of Baligh Hamdi's "Khosara, Khosara."[70] In the original credits of "Blurred Lines," Gaye is not credited as a writer of the song; it was not until after the case that Gaye was included in the credits. When Williams failed to obtain permission and/or a license to use "Got to Give It Up's" musicality in Thicke's "Blurred Lines," and commercially profited off "Blurred Lines", the law defines this act as copyright infringement. Similar to *Bright*

[69] Morrison, *supra* note 49

[70] *Fahmy,* 788 F. 2d at 6

Tunes Music,[71] used as reference for the plaintiff in the *Gaye* case, scientific musicality that could be recorded and observed is what the jury used to find in favor of the plaintiffs in both cases—the harmonies, chords, notes and musical patterns observed in the sheet music was examined by the courts and musical analysts.

Despite Gaye's death in 1984, "Got to Give It Up" remained under copyright protection for another 50 years under the Copyright Act of 1976. The act expanded the terms of protection to 50 years after the creator's death. Applying the act's expansion, Gaye's "Got to Give It Up" would be protected until the year 2034, thus making his estate's lawsuit in 2013 confined within the law's protection.

When making a case against a copyright infringement claim, common legal defenses used are "(1) too much time has elapsed between the infringing act and the lawsuit, [known as statue of limitations defense], (2) the infringement was allowed under the fair use doctrine, (3) the infringement was innocent—the infringer had no reason to know the work was protected by copyright, (4) the infringing work was independently created—it wasn't copied from the original, and/or (5) the copyright owner authorized the use in a license."[72] Legally, the most common defense in a copyright infringement claim is fair use. Relating to Gaye vs. Thicke, the fair use doctrine, as defined by the law as the non-criminal use of a copyrighted work for purposes of education, comment upon, critique, or parody for non-profit gain,[73] does not apply. When "Blurred

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[71] *Bright Tunes Music* 420 F. Supp at 6

[72] *Copyright Registration, Notice, and Enforcement FAQ,* NOLO, (Mar. 1, 2016), at http://www.nolo.com/legal-encyclopedia/copyright-registration-notice-enforcement-faq-29067-6.html

[73] 17 U.S. Code § 107

Lines" was released for distribution and revenue was made off of the song's distribution, fair use was no longer a working defense, leaving Thicke's parties with the remaining four defenses listed. The Gaye estate's lawsuit was filed within almost two years following "Blurred Line's" original release date, nulling a statue of limitations defense. Gaye was an R&B icon during his time and remains one of the most popular R&B singers in the genre's history. The song "Got to Give It Up," according to Williams, was the inspiration for "Blurred Lines."[74] As a well-experienced music producer, Williams is familiar with music sampling, fair use, and copyright. He has used music licensing for purchase and sale of songs in the past. Thus, his defense of infringement innocence is not viable because of Williams' prior knowledge. There was also no proof that Williams or Thicke sought permission from the Gaye estate to use "Got to Give It Up's" musical score for reference, sampling, and/or duplication. That ruled out the defense that the copyright owner authorized the use of the song. Thicke's parties' main defense was their claim that "Blurred Lines," argued by the plaintiff as an infringed work, was indeed created independently from "Got to Give It Up." The defense failed to provide enough evidence of "Blurred Lines" being created independently from "Got to Give It Up" when musicologists Finell and Monson[75] stated the similarities in musicality, thus leading the court to rule in favor of the plaintiff against the defense.

The final section of this study will summarize this work's major focal points in relation to copyright infringement protection and how the future of the music industry will be heavily af-

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[74] *Williams et al.,* U.S. District Court, No. CV-6004 at 1

[75] Busch, *supra* note 63

fected if copyright laws are not improved and further developed to meet the demands of the digital age.

Conclusion

When the Gaye estate's lawsuit against Thicke and Williams went public, many in the music industry were shocked. Fellow musician and producer Ahmir "?uestlove" Thompson of music group The Roots defended Williams, saying that no crime was committed.

> Look, technically it's not plagiarized. It's not the same chord progression. It's a feeling. Because there's a cowbell in it and a Fender Rhodes as the main instrumentation—that still doesn't make it plagiarized. We all know it's derivative. That's how Pharrell works. Everything that Pharrell produces is derivative of another song—but it's a homage.[76]

When the verdict was released, artists from John Legend to Nile Rodgers were surprised. They said music inspiration from songs produced in the past has always been used in the composition of newer songs. Classical music critic, Mark Swed, told the Los Angeles Times that "many classical composers used material from previous composers."[77] He went on to say that John Williams, who became famous for his composition of the *Star Wars* soundtrack score, was heavily inspired and used a lot of the musical composition from the Scherzo of Erich Korngold's Symphony in F-Sharp Minor, written 25 years prior to Williams' *Star Wars* composition.

For many artists, checking the copyright ownership of a work is usually done by a record label and/or the producer of a song or an album's work. With most labels being connected to or

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[76] Jody Rosen, *Queslove on His New Album With Elvis Costello,* VULTURE (Mar. 14, 2016), at http://www.vulture.com/2013/09/questlove-on-his-new-album-with-elvis-costello.html#

[77] Mark Swed, *'Blurred Lines" verdict rock Amadeus and other great composers,* LOS ANGELES TIMES, (Mar. 14, 2016), at http://www.latimes.com/entertainment/arts/la-et-cm-blurred-lines-classical-notebook-20150314-column.html

having affiliation to publishing associations, lawsuits of copyright infringement are becoming less frequent, due to record label's ownership of the masters and copyright patents of many music catalogs. For example, in September 2003, Grammy-Award winning rapper and producer Kanye West released his debut single "Through the Wire," which sampled singer-songwriter Chaka Khan's 1985 single, "Through the Fire." Despite the differences in musical genres, West payed homage to Khan's song, released 18 years prior. In addition, West received musical clearance to sample Khan's song as a result of a publishing collaboration between Def Jam recordings, West's label, and Warner Bros. Records, who released Khan's "Through the Fire." Despite such, however, it seems that the law lacks an understanding of musical inspiration and homage, thus leaving a grey area, determining the difference between musical inspiration and exploitation of a previous work.

Regarding the *Gaye* case and its conjunction to copyright law and the future of music, Morrison wrote in Oxford Music Online…

> Albeit a difficult task, this significant case begs for new considerations of what constitutes intellectual property in music, for interrogating the full-range of music's constituent components beyond structural listening, and for how we understand the copyright potential of music beyond its textual and recorded basis. If artists, musicologists, litigators, and lawmakers begin to reorient themselves around the history and recent developments in copyright, as well as ideas of what might constitute intellectual property in music (i.e., sound and groove), we might find ourselves lobbying for changes to the 1976 Copyright Act that reflect 21st century needs, rather than trying to find ways around outdated laws and procedures in contentious litigations on sound.[78]

Morrison's suggestion that artists, musicologists, litigators and lawmakers work together to define what intellectual property in regards to music is, and how the law will specifically apply that

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[78] Morrison, *supra* note 49

definition fairly to current copyright law is crucial in the vastly growing digital age of music. If such suggestion is not considered, the future of music inspiration and exploitation will continue to be challenged. As a result, artists and musicians may limit their own First Amendment right to free speech in their music for fear of an infringement lawsuit.