

## Reading Between The 'Blurred Lines': Copyright Takeaways

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In 1976, Marvin Gaye recorded the song “Got to Give It Up.” In 1977, the song was registered with the U.S. Copyright Office. When the registration was filed, Gaye and his publisher, Jobete Music, submitted to the Copyright Office a “lead sheet” as their copyright deposit. A lead sheet consists of sheet music typically containing only some of the lyrics and some of the melodic, harmonic and/or rhythmic features that appear in the sound recording of a musical composition. Pharrell Williams, Robin Thicke and Clifford Harris are the composers of “Blurred Lines,” which was released in 2013.

In August 2013, Williams, Thicke and Harris (collectively, “plaintiffs”) filed a preemptive lawsuit against Frankie Christian Gaye, Marvin Gaye II and Nona Marvisa Gaye (the “Gaye heirs”) seeking a declaratory judgment that their hit song “Blurred Lines” did not infringe Gaye’s “Got to Give It Up.” The Gaye heirs counterclaimed against Thicke, Williams, Harris and various third-party defendants for copyright infringement. In March 2015, the jury found Thicke and Williams liable for copyright infringement and awarded the Gaye Heirs \$4 million in actual damages and an additional approximately \$1.6 million from Williams and \$1.76 million from Thicke in profits earned from the infringement.



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The scope of the evidence presented to the jury was in large part limited by the court’s ruling on the plaintiffs’ earlier motion for summary judgment seeking a determination in their favor on both their request for declaratory relief and the Gaye heirs’ counterclaims for copyright infringement. In their motion for summary judgment, the plaintiffs argued that the lead sheet defined the scope of the Gaye heirs’ copyright protection. In other words, the only musical elements protected by the Gaye heirs’ copyright were those contained in the lead sheet that was deposited with the Copyright Office in 1977. The plaintiffs maintained that any other elements of the song contained in Gaye’s recording of “Got to Give It Up,” “such as the ‘groove’ of the sound recording, the sounds of the instruments, or other recording or performance elements (e.g., falsetto singing, party noise) — simply have no bearing on the infringement claim” and should be disregarded.[1]

The Gaye heirs contended that their claims were not limited to the elements in the lead sheet. Rather, they argued that copyright protection should extend to the composition as reflected in Gaye’s studio recording, especially because prior to 1978 the Copyright Office refused to accept recordings as

deposits. The Gaye heirs also presented expert testimony that a deposit copy is “not intended to represent fully the composition. At best, it is a skeletal representation or sketch, and usually shows only the most basic vocal melodies, typically only a single iteration of the beginning sections, some beginning lyrics, and chord indications.”[1]

The court did not adopt either argument entirely. First, it held that, because “Got to Give It Up” was created and registered prior to the effective date of the 1976 Copyright Act, publication and registration issues are governed by the 1909 Copyright Act. Under the 1909 act, statutory copyright protection was obtained in one of two ways: (1) publishing the work with the proper notice or (2) composing, but not publishing the work, and making the necessary deposit with the Copyright Office.

The court then held that the scope of the copyright in “Got to Give It Up” was not, as a matter of law, limited to the lead sheet deposited with the Copyright Office in 1977. If, prior to registration, “Got to Give It Up” had been reduced to sheet music or another manuscript form that was more complete than what was included in the lead sheet, broader copyright protection may have been available. However, the Gaye heirs offered no evidence that “Got to Give It Up” had been otherwise published as that term is defined under the 1909 act. The court rejected the Gaye heirs’ argument that the copyrighted composition consisted of “the recorded work as performed by Gaye”[3] because under the 1909 act, the act of recording or distributing a recording did not constitute the publication of the composition embodied therein.

Accordingly, the court held that the Gaye heirs failed to produce evidence that created a genuine issue of material fact as to whether the copyright in “Got to Give It Up” encompassed material other than that reflected in the lead sheet deposited with the Copyright Office and that, for purposes of the analytic dissection performed in connection with the motion for summary judgment, the lead sheet would define the scope of the composition. Notwithstanding this ruling, the court denied the motion for summary judgment, finding that genuine issues of material fact existed concerning the extrinsic similarity of the works.

The court did not consider whether “Got to Give It Up” and “Blurred Lines” were “intrinsically” similar (i.e., whether an ordinary reasonable person would find the total concept and feel of the works to be substantially similar) as this is an issue solely for the trier of fact. The plaintiffs therefore filed a motion in limine to exclude evidence of the sound recording at trial on the grounds that it contains subject matter that is not protected by the Gaye heirs’ copyright and its admission into evidence would be irrelevant and prejudicial.

In ruling on the motion in limine, the court noted that the Gaye sound recording embodies some of the elements that appear in the lead sheet deposited with the U.S. Copyright Office, as well as additional elements that do not appear in the lead sheet. For those reasons, the court held that relevant portions of the Gaye sound recording that substantially reflect the subject matter of the copyright deposit sheets could have probative value with regard to the intrinsic characteristics of the work.

Pursuant to the court’s order on the motion in limine, the Gaye heirs were entitled to seek admission into evidence at trial of a sound recording that was edited to remove all unprotected elements such as percussion and background vocals. The court also stated that any potential prejudice to Pharrell and Thicke caused by the airing of Gaye’s voice, which is not protected, is something that could perhaps be addressed by a limiting instruction. Edited versions of the sound recording were ultimately played to the jury.

Despite the fact that the jury verdict was against Pharrell and Thicke, the court's ruling to limit the copyrighted work to the lead sheet undoubtedly gave them a huge advantage before the jury. Although it is difficult, if not impossible, to measure the effect of that advantage, it may be the case that the amount of the judgment would have been substantially larger had the jury been entitled to listen to the entire unedited version of the Gaye recording.

There were a number of post-trial motions filed. The plaintiffs filed a motion for judgment as a matter of law, declaratory relief, a new trial, or remittitur. Their request for a new trial was based on, among other things, that the Gaye heirs' primary musicology expert, Judith Finell, was permitted to testify about a number of "similarities" between the two works based on elements that do not appear in the deposit copy of "Got to Give It Up."

On July 14, 2015, the court denied the plaintiffs' request for judgment as a matter of law, declaratory relief and for a new trial. The court rejected, among other things, the plaintiffs' arguments that the admission of Finell's testimony was prejudicial error. The court did, however, grant in part the plaintiffs' request for remittitur, finding that the amount of damages awarded exceeded the amount that could be reasonably supported by the evidence and reducing the amount of actual damages suffered as a result of the infringement from \$4 million to \$3,188,527. The court also reduced the award of Williams' profits from \$1,610,455.31 to \$357,630.96, finding that Williams was liable to the Gaye heirs only for his share of profits and, therefore, the jury's award — which was almost two times the amount of Williams' actual profits — was excessive.

The Gaye heirs filed three post-trial motions: (1) a motion for declaratory relief seeking a declaration that Clifford Harris and the record companies also are liable for copyright infringement or, alternatively, a request for judgment against them as a matter of law, (2) a motion for injunctive relief, or in the alternative, for ongoing royalties, and (3) a motion for prejudgment interest. The court granted the motion for declaratory relief or judgment as a matter of law, declaring Thicke and Williams liable for copyright infringement, entering judgment as a matter of law against Clifford Harris and the record companies, and declaring that any past or ongoing exploitations or performances of "Blurred Lines" constitute infringement of "Got to Give It Up." The court denied the request for injunctive relief but granted the Gaye heirs' request for an ongoing royalty of 50 percent of the songwriter and publishing revenue of "Blurred Lines." The court also granted, in part, the motion for prejudgment interest.

Although none of the post-trial motions directly address the court's ruling on the scope of the copyright in "Got to Give It Up," if the case is appealed to the Ninth Circuit, the issue of how to define the scope of the copyright protection will almost certainly be raised. Due to that issue, and others, this case will continue to be closely watched by the music industry.

Moreover, in light of the recent U.S. Supreme Court decision in *Petrella v. MGM*, 134 S. Ct. 1962 (U.S. 2014), there will undoubtedly be more copyright infringement cases filed in the future based on musical compositions registered under the 1909 act than there would have been otherwise. In *Petrella*, the Supreme Court allowed the plaintiff to bring a claim for copyright infringement even though she delayed filing the claim for 18 years. The Supreme Court held that laches cannot be invoked to preclude a claim seeking damages within three years of filing the complaint.[4]

It is difficult to predict how the Ninth Circuit will decide the issue. Although on its face the position of Pharrell and Thicke has merit, it does not seem to address the evidentiary issue equitably because, prior to 1978, the Copyright Office refused to accept recordings as deposits and the distribution of a recording did not constitute a publication of the musical composition. The requirements of the 1976 act relating to

registration contrast markedly with the requirements of the 1909 act. Whereas under the 1909 act, a composition had to be reduced to sheet music or other manuscript form, under the 1976 act, compositions are eligible for statutory copyright protection when they are fixed in any tangible medium including a sound recording, and a sound recording can be used as a deposit copy for a musical composition.

Gaye recorded “Got to Give It Up” at his studio in 1976 and released it in March 1977 prior to registration of the copyright. If the composition had been recorded and the copyright registered after the effective date of the 1976 act (Jan. 1, 1978), Gaye could have deposited the sound recording with the Copyright Office, and the sound recording would have defined the scope of copyright protection. Moreover, had Gaye’s 1977 registration with the lead sheet used as the deposit copy been governed by the 1976 act, the court may have decided the issue differently. Under the 1976 act, Gaye’s 1976 studio recording would have been a more complete version of the composition eligible for copyright protection. Thus, under the 1976 act, even if the lead sheet was used as the deposit copy for the composition, the court may have held that the sound recording defined the scope of copyright protection.

In the meantime, attorneys representing clients with musical compositions originally registered with the Copyright Office under the 1909 act may want to consider taking steps to help their clients avoid the same disadvantages that the Gaye heirs faced. As a general matter, Copyright Office regulations permit only one registration for the same version of a particular work.[5] Supplemental registrations are not appropriate to correct errors on the copies or phonorecords of the work in question or to reflect changes in the content of the work.[6] According to the Supplementary Copyright Registration Circular, if a work has been changed since registration was made and if the changes are sufficient for the work to be considered a “derivative work,” the proper procedure is to make a new basic registration for the revised version to cover the additions or revisions.[7]

Thus, attorneys representing clients with musical compositions registered under the 1909 act may want to consider, after exploring all of the ramifications, the possibility of filing a new application for copyright registration for the composition using a sound recording (as opposed to sheet music) as the deposit copy. One ramification, however, may be the loss, in any judicial proceeding, of the presumption of the validity of the copyright afforded a certificate of registration made before or within five years after the first publication of the work.[8] Of course, the loss of the presumption would most likely apply solely to the material in the sound recording that does not also appear in the sheet music filed with the original certificate under the 1909 act. Depending upon when the infringement commenced, the filing of the new certificate may also impact the plaintiff’s ability to recover statutory damages and legal fees.[9]

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[1] Motion for Summary Judgment, Case No. LA CV13-06604, ECF Dkt. 89 at 14-15.

[2] Williams v. Bridgeport Music Inc., 2014 U.S. Dist. LEXIS 182240, at \*19-20 (C.D. Cal. Oct. 30, 2014).

[3] Id. at \*23.

[4] Petrella v. MGM, 134 S. Ct. 1962 (U.S. 2014).

[5] 37 C.F.R. § 202.3(b)(11).

[6] 17 U.S.C. § 408(d); 37 C.F.R. § 201.5(b)(2)(iii)(B); United States Copyright Office, Circular 8, "Supplementary Copyright Registration."

[7] United States Copyright Office, Circular 8, "Supplementary Copyright Registration."

[8] 17 U.S.C. § 410(c).

[9] 17 U.S.C. § 412(2).