

Legal & Business Affairs

Case Study: 'Blurred Lines' vs. 'Got To Give It Up'

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Nowadays, one of the biggest issue the music industry faces is the infringement of intellectual property and the unauthorised use of musical works by others. Intellectual property is a general term for rights such as copyright, trademark, design, and patent. Generally, intellectual property is associated with the 'creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce', according to the World Intellectual Property Organisation (n.d.). Therefore, copyright in music comprises of the 'rights granted by law to the creator of an original literary, artistic or other intellectual work, including songs and sound recordings, as stated by Gammons (2013, p.190). In the UK and Europe, copyrights exist for 70 years after the death of the last composer of a song. This means revenue generated from this track will go to the creators and their relatives 70 years after the last songwriter has passed away. After this period the song will go into public domain, which means that everyone is allowed to use the creation in his or her productions without the need for permission. However, if someone chooses to use a copyrighted work and uses a music sample, a previously recorded piece of music and/or sound for profit, before the end of this period, a so-called 'sample clearance' has to be fulfilled. This means in order to legally distribute sampled music to the public the ownership's permission has to be cleared first. When sampling a piece of music two types of clearances are required, according to Stim (n.d.). First and foremost it is necessary to receive copyright permission as well as a license from the owner, which in most cases is the music publisher or the producer. The other approval has to be given by the owner of the master tapes, which most commonly are the record companies. In creative industries, especially in music, one of the most common reasons litigations originate is the infringement of copyright, which is 'the use of a copyright song, composition or sound recording without a valid licence in place, according to Kirstein (2015, p.201). One of the most popular legal cases in music history involving the infringement of copyright is the lawsuit of Robin Thicke's and Pharrell Williams' song 'Blurred Lines' against Marvin Gaye's 'Got To Give It Up'.

In 2013, Robin Thicke and Pharrell Williams released one of the most popular songs to date called 'Blurred Lines'. This record not only reached the number one spot in the charts in multiple countries but also had to face some backlash not just from the media but also with a lawsuit. Short after the release of the song, the peers of the musical icon Marvin Gaye sued Thicke and Williams, and More Water from Nazareth

Publishing who collects royalties on behalf of Williams, for copyright infringement on Gaye's hit single 'Got To Give It Up'. It was claimed that 'Blurred Lines' was very similar to Marvin Gaye's composition and the case went to court in the US in 2015. The verdict resulted in a payment of damages of over \$7 million by Thicke and Williams to the plaintiff. The rapper T.I., originally Clifford Harris Jr., who also features on the song, was found not liable in the case and was, therefore, dismissed from the responsibility for damages. Three years later, the verdict was upheld and the Ninth Circuit Court of Appeals panel, included of three judges, again voted in a two-to-one decision of 'Blurred Lines' having infringed the law of copyright. (Collen, 2018)

As per Collen (2018), it was in the Appeals Court's position to decide whether the musical recording should be considered for judgement or the written sheet music for this situation. For the reason that Gaye's hit was first composed and released in 1977 and the US Copyright Act of 1976 has not gone into force until 1978 the Act of Copyright from 1909 needed to be considered. Therefore, only the sheet music of the two compositions had been examined. As claimed by Adli (2018), sheet music can be defined as 'the written notes that identify pitches (melodies), cords or rhythms of a song or musical piece'. Thus, sheet music does not include the digital performance of sound recordings. Expert witnesses were hired by the plaintiffs to prove that the opponent has infringed copyright. It was claimed that each phrase begins with repeated notes and that these phrases have three equivalent pitches in the first measure and two in the second part. Furthermore, each phrase begins with the same rhythm and ends on a melisma, one word sung over multiple pitches. However, these points are not under copyright protection, as claimed by Collen (2018). The judge that voted against the liability of Thicke and Williams, Jacqueline Nguyen, believed the songs differ in melody, harmony, and rhythm. According to Bogosian (2015), the only thing resembles 'Blurred Lines' and 'Got To Give It Up' is the groove. In addition, due to the contribution of a verse of the rap artist T.I. in this project the rhythm of the song is not able to be the same as in 'Got To Give It Up'.

Before any decisions were made, the plaintiffs, in this case, the Gaye estate, had to prove that, firstly, they 'owned the copyright in the infringed work' and, secondly, 'the defendant copied protected elements from the copyrighted work', according to the United States of Appeals (2018). According to Gardner (2018), the Ninth Circuit adhered to the 'inverse ratio rule' for this case, which implies that the more proof of access there is the less substantial similarity of two works is necessary and vice versa. Due to the popularity of Gaye's song, the record was clearly accessible for Thicke and Williams, which meant less substantial similarity had to be proven of the two creations. Moreover, the Ninth Circuit also had to agree on what legal framework of copyright infringement would be suitable for this situation. According to Sanders (2018), there are two legal frameworks that can be distinguished. The first one, which was also chosen for the 'Blurred Lines' case, is that the plaintiff has to prove that the defendant had, first and foremost, access to the copyrighted work and then whether the pieces of work have a "substantial similarity". The second legal framework signifies that the plaintiff must prove the "copying" and the "unlawful appropriation". In order to prove the "copying" of a work, the plaintiff has to justify the access as well as the "probative similarity", which can be compared to "substantial similarity". As per the United States of Appeals (2018), for the proof of "substantial similarity" of "Blurred Lines" and "Got To Give It Up" the court ordered a test involving two parts, and extrinsic test and an intrinsic test. The extrinsic test is objective and considers whether two creations are similar in ideas and expression and is measured by criteria externally and objectively. The extrinsic test required to analyse the two works, the sheet music, by breaking each one down in their constituent elements and compare these elements to prove the copying measured by "substantial similarity". The intrinsic test, on the other hand, deals subjectively with a justification. This means this test considers whether the ordinary person would find the two creations substantially similar. In "substantial similarity" one of the requirements are the protected elements of the copyrighted work. Therefore, it is necessary to distinguish between unprotected and protected material of the plaintiff's work. "Substantial similarity" can be found in a combination of elements even if those are not protected. For example, a single note in a composition is not protectable but a range of notes in a song can be copyright protected. This principle is especially relevant in the application of the intrinsic test. (The United States of Appeals, 2018, pp. 17-18).

The end verdict of this case does not merely indicate that Thicke and Williams owed \$5.3 million but also would also have to pay royalties of 50% of future songwriting and publishing revenues made from the song to the Gaye family. Furthermore, the Gaye estate also accomplished to copyright a musical style, which comes as a first in the music industry. For the future, this could mean that musicians working and creating music within this genre have to claim copyright permission from the owners, in this case, the Gaye's. According to Busch, the lawyer of the Gaye family, this verdict will protect songwriters and will inspire new artists to produce their own musical creations. However, Adli (2018) believes otherwise and is certain that this case could have a huge impact on the obstruction of artistic creativity. Furthermore, as stated by Pharrell Williams (2015), *"The verdict handicaps any creator out there who is making something that might be inspired by something else."* The record producer believes that this applies to anything including music, fashion or design. Losing the freedom of inspiration would mean that one day the entertainment industry would be covered in litigation. Therefore, it is necessary to protect the creator's intellectual rights. Further, the 'Blurred Lines' case is an encouragement for litigation from copyright owners of older records to receive damages for copyright infringement from current songs, as claimed by Bogosian (2015). Furthermore, many other musicians and creators came together to petition against this case claiming the punishment of the lawsuit would harm the creativity of emerging artists and damage the music industry as a whole. With the outcome of this case, it is believed that there is also a high likelihood that whole genres will disappear in the near future. Furthermore, this could also evoke a discouragement for new artists to create music due to the fear of infringing copyright with their compositions.

Moreover, according to Adli (2018), the implication of this case could mean a possible change of intellectual property law could come into place in the foreseeable future. This could imply that every groove inspired by someone else's work has to be recorded on paper and licensed from the original owner as a new copyright regulation. As claimed by Nguyen (2018), an issue with music cases involving copyright infringement is that most of the time the judges are not trained in music, which can often affect the verdict for the defendant in a negative way. In the "Blurred Lines" case it was particularly difficult due to the lack of knowledge of sheet music and the skill of examining two pieces in similarity.

Other famous lawsuits involving copyright infringement are Ed Sheeran's "Thinking Out Loud" and Marvin Gaye's "Let's Get It On" where similar issues occurred and "substantial similarity" was found in the musical elements of the two works, according to the Guardian (2019). However, this lawsuit has not settled yet. Furthermore, Mark Ronson was sued by four different artists of copyright infringement on his hit single 'Uptown Funk' (featuring Bruno Mars) and needed to give 3.4% royalty to every four members of the band Gap Band as compensation, as stated by Runtagh (2016).

A solution for such difficult cases could be the adoption of 'fair use'. Fair use can be described as 'a legal concept that allows the reproduction of copyrighted material without obtaining permission and without paying a fee or a royalty', according to Pool and Wright (2011, p.45). Therefore, fair use could be utilised to borrow copyrighted music for the creation of a new, transformative piece of work, as claimed by Lee (2018). However, an issue appearing with this idea is that it would not work for every legal case and can only be adopted in certain scenarios. In 1994, fair use was granted for the legal case involving Campbell vs. Acuff-Rose Music where 2 Live Crew's parody rap of Roy Orbison's "Oh, Pretty Woman" were put against each other. The Supreme Court implied that such transformative work and the creation of new expressions should be encouraged and not punished. Thus far, however, fair use has only been successful outside the music scene.

According to Lee (2018), Thicke and Williams had the option to invoke fair use by telling the jury that a small part from Marvin Gaye's 'Got To Give It Up' was used in 'Blurred Lines' but they gave it a whole different meaning and expression. However, most artists decide to avoid a fair use claim in order to not lose or be questioned their reputation as a great and unique musician. Nevertheless, for fair use to be fully applied in the music industry the Supreme Court needs to make clear decisions about it. The writer believes, without the application of fair use more lawsuits could arise in the future and more current artists could find themselves in a courtroom soon to fight, most likely unsuccessfully, against copyright infringement of an older hit.

Overall, the “Blurred Lines” lawsuit has raised many questions about the overall infringement of copyright in the music industry. It is possible in the case of a change in copyright law; creators will need to ask for permission from the ownership even if such inspires an idea. For the music, industry this could imply that aspiring upcoming musicians have to be more cautious when producing new music. This could interfere with their creativity and influence their workflow in a negative way. Therefore, it could be of great importance in the future to train upcoming artists in copyright law to inform them what they can and cannot do in their musical process right from the beginning to avoid legal issues at a later date.

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