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WILL THE BLURRED LINES APPEAL BLUR THE STANDARD FOR COPYRIGHT INFRINGEMENT FOR A MUSICAL COMPOSITION?

In March 2015, a jury awarded the Estate of Marvin Gaye $7.3 million in damages, finding that the song "Blurred Lines" by Pharrell Williams and Robin Thicke infringed on the Marvin Gaye song "Got to Give it Up." Williams and Thicke have appealed the judgment to the 9th Circuit Court of Appeals. The verdict has caused great anxiety among songwriters, 212 of whom filed a brief with the 9th Circuit arguing that the jury verdict should be overturned. Among the 212 are some major songwriters and recording artists, including Earth, Wind & Fire, The Go-Go's, Jennifer Hudson, and R. Kelly.

To prove copyright infringement, the person claiming infringement, in this case the Estate of Marvin Gaye, must prove that the person accused of infringement, in this case Williams and Thicke, had "access" to the original copyrighted material. Second, the plaintiff must show that there is a "substantial similarity" between the two songs. The first element, "access" is rather easy for a plaintiff to prove where a writer of a hit song is claiming infringement of that song by another songwriter. A plaintiff need only demonstrate that the song was widely disseminated – which most any hit song is.

The second element, substantial similarity, is more difficult to prove. To prove "substantial similarity" the 8th Circuit (the federal appeals court with jurisdiction in Minnesota) uses a two-step analysis developed by the 9th Circuit. First, the courts apply what is known as an "extrinsic test". With the extrinsic test, the courts analyze whether the two songs in question share a similarity of ideas and expression measured by external, objective criteria. These objective criteria are elements such as melody, key signature, chord progression, tempo, bassline, and rhythm. In litigation, parties typically hire experts called "musicologists" to analyze and compare the two songs, sometimes comparing the two songs based on these criteria measure by measure. These musicology analyses are very involved and can be very expensive.

The second part of the "substantial similarity" test is the "intrinsic test." The intrinsic test asks whether the overall concept and feel of the songs are "substantially similar" to the ordinary listener (not an expert musicologist). In a litigation setting, the question of whether two songs are intrinsically similar is made by a jury.

The "substantial similarity" test is itself being tested right now by the Estate of Marvin Gaye's lawsuit. Williams and Thicke argue that the district court erred by submitting jury instructions that allowed the jury to improperly base their verdict on a finding of "subconscious copying" – a factor that Williams and Thicke argue should only have gone to the question of whether Williams and

Thicke had "access" to "Got to Give it Up." Access to "Got to Give it Up" was not in question in the case and Williams and Thicke argue that the jury should not have been allowed to base its finding of substantial similarity on subconscious copying.

The 212 songwriters who filed a brief in the case argue that the district court's judgment is in error because the infringement verdict was based solely on the jury's conclusion as to whether "Blurred Lines" had the same "vibe" as "Got to Give it Up." The 212 songwriters argue that because the lawsuit should have never survived the "extrinsic test" and should have been dismissed early on, the decision sets a dangerous precedent that will chill creativity because infringement lawsuits would be allowed to proceed solely on the basis of whether a song or a songwriter were *inspired* by another song, and not on whether actual copying occurred. Williams and Thicke argue that this decision, if left to stand, would leave no objective standard in place, inviting more copyright infringement litigation and subjecting songwriters to massive infringement liability solely for acting on the subconscious vibe or inspiration of another song or songwriter.

The entire music industry is closely watching this appeal, which is scheduled to be heard in October 2017.