

No. 15-56880
Nos. 16-55089, 16-55626 (consolidated)

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHARRELL WILLIAMS, ET. AL.,

Plaintiffs-Appellants-Cross-Appellees,

v.

FRANKIE CHRISTIAN GAYE, ET AL.,

Defendants/Appellants-Cross-Appellants,

On Appeal from the United States District Court
For the Central District of California
Case No. CV13-06004-JAK (AGRx)
Hon. John A. Kronstadt, District Court Judge

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**BRIEF OF *AMICUS CURIAE* MUSICOLOGISTS IN SUPPORT
OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the amici is a corporation that issues stock or has a parent corporation that issues stock.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief and no person or entity – other than the amicus curiae, its members, or its counsel – contributed funds for preparing or submitting the brief.

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INTEREST OF AMICI CURIAE

Amici are musicologists and music theorists who research, teach and write about music and music composition. Amici believe that the Ninth Circuit should overturn the verdict in this case because it was based on testimony establishing musical similarities between the disputed songs that do not, in fact, exist. Amici are further concerned that were the verdict to stand, it would curtail creativity in the field of popular music, inhibiting songwriters by the threat of far-fetched claims of infringement bolstered by speculative and misleading musical testimony like that presented by defendants in this case.

ARGUMENT

The District Court, relying on musical analysis by the Gaye family's expert musicologists,¹ and despite the fact that GIVE² and BLURRED³ are objectively dissimilar, allowed this case to go to a jury, which found GIVE and BLURRED to be substantially similar. Amici believe that the District Court failed in its "gatekeeping function" because it was improperly influenced by the misleading visual evidence that Ms. Finell prepared and by Professor Monson's largely irrelevant comparisons of the two works. A straightforward comparison by the Court of any protected expression in the two musical compositions should have demonstrated that they are thoroughly dissimilar.

¹ The Gaye parties offered the testimony of two separate musicologists Ms. Judith Finell ("Finell") and Professor Ingrid Monson ("Monson").

² GIVE is "Got to Give It Up" composed by Marvin Gaye.

³ BLURRED is "Blurred Lines" composed by Pharrell Williams, Robin Thicke, and Clifford Harris, Jr.

Musical works can involve many elements such as melody, rhythm, harmony, tempo, key, and key signature. In music copyright infringement disputes, however, as here, the allegations of similarity invariably focus on the melodies of two songs. In the case at hand, the Court largely based its denial of summary judgment on Ms. Finell's claim that a bass line and two separate snippets of melody were similar, and Professor Monson's claim that an additional snippet of melody was similar. ER 132-33. The determination of substantial similarity of melody must involve direct comparison of the melodic information recorded in the registered visual sheet music or score. If it is a short melody of only three or four notes, then the melodies (pitch plus rhythm) must be nearly identical to be deemed similar. To allow one person to monopolize short, simple, and non-identical melodic snippets would cause uncertainty and impinge on creative freedom.

As demonstrated below, Ms. Finell and Professor Monson's melodic comparisons presented *non-corresponding* portions of the melodies of the two works and distorted the duration and placement of notes in their presentation. But when the melodies in question are aligned as they are actually notated, their melodies and harmonies are demonstrably unrelated.

As further demonstrated below, Professor Monson claimed a single instance of harmonic similarity, even though the chords and tones making up the harmonic progression in question were different in the selected portions of the two songs that she compared. As Amici establish below, there can be no genuine disagreement among experts as to the fact that there is no harmonic similarity between BLURRED

and GIVE because the chord progressions in both works were entirely different.

I. The GIVE Deposit Copy Conveys Any Protectable Musical Expression in this Work

GIVE was written in 1976 and registered under the 1909 Copyright Act (the “1909 Act”), 35 Stat. 1075. Under the 1909 Act, as the Court below held, ER 120-21, the copyright protection for GIVE is limited to any protectable original expression contained in the sheet music that Gaye deposited in the United States Copyright Office (the “GIVE Deposit Copy”), ER 2410-16. 35 Stat. 1075, §§9-12; ER 117-119. The GIVE Deposit Copy expressed GIVE in very precise musical notation and the legally protected work was limited to the musical expression in the GAYE Deposit Copy. It follows that only that fixed expression can be used to evaluate similarity between GIVE and BLURRED.

Important Music Fundamentals

The fundamental elements of musical works are melody, harmony and rhythm, which can be precisely recorded in symbolic notation. The GIVE Deposit Copy uses this standard notation which includes: (i) a staff (five horizontal parallel lines), (ii) vertical lines (or “bar lines” that divide the horizontal staff lines into “measures”), (iii) a key signature (three sharps (“#” signs) at the beginning of each piece), (iv) a time signature (4/4 here), (v) musical notes (circles with or without duration-indicating stems), (vi) rests (to indicate silence between notes), and (vii) the letters and numbers on top of the staff to indicate the chord symbols (in which several notes are played simultaneously to create harmony).

In both BLURRED and GIVE, there are four quarter note beats to each measure (indicated by a 4/4 at the outset of each piece of sheet music). By definition, this means that a whole note (open circle with no stem) lasts for four beats in the measure, a half note (open circle with a stem) lasts for two beats in the measure, a quarter note (blackened circle with a stem) lasts for one beat in the measure, an eighth note (blackened circle, stem with a flag for one eighth note, and two stems connected by a horizontal beam for more than one eighth note in succession), lasts for one half a beat, and a sixteenth note (an eighth note with two flags or parallel beams connecting two such notes) lasts for a quarter of a beat.

In comparing two works to establish melodic similarities or differences for the purposes of copyright analysis under the 1909 Act, musicologists should never embellish this notation by suggesting things a “musician should know” in the written music. Neither should a musicologist in such cases make something dissimilar appear to be similar by juxtaposing elements of the musical compositions occur in unrelated places in the respective sheet music.

By relying on embellished transcriptions and aligning notes out of the sequence in which they actually appear in each song, Ms. Finell and Professor Monson’s analyses departed from the basic principles and rules for comparing two works in a copyright infringement context. It is thereby required that the comparison be limited to an alignment of the works as fixed – without unsubstantiated implications and variances. This is no different than analyzing similarities in other forms of expression. Nobody would find two literary works similar simply because an expert moved around words, paragraphs and punctuation or

eliminated portions of one or the other. Neither should Courts be influenced by musicologists' reports if they likewise manipulate musical notation to create false notions of similarity.

II. Defendants' Expert Reports Do Not Establish Any Substantial Similarity Between the Melodies of the Two Songs

Melody is typically the most distinctive, and memorable musical aspect of a popular song, because that is what listeners can most readily comprehend, recall and replicate. Melodic lines comprise pitches sounded for particular durations. No one can claim to own a three or four-note sequence, or a mere rhythmic pattern, without reference to the particular pitches, their durations, and their metric placements⁴ in the measures. It is only the combination of pitches and rhythms that constitutes melody, and just a few pitches in a particular rhythmic pattern is unlikely to constitute protectable original expression. By isolating sequences of a few pitches out of the musical context in which they occurred -- i.e., without regard to their duration and their placement in the musical phrase -- Ms. Finell presented inaccurate and overly speculative musical analyses. *See Swirsky v. Carey*, 376 F. 3d 841 (9th Cir. 2004).

If the melodies of two songs are dissimilar, no other musical parameter (harmony, instrumentation, dynamics, etc.) can render them

⁴Metric placement refers to the location of the notes within the meter of the song which provides the pattern of pulse and accent that is the beat. It is shorthand for the continuum of stressed notes within a measure. For example, in 4/4 time, a quarter note on the first beat of the measure is a strong downbeat while an eighth note on the second half of the first beat would be considered off the beat.

similar. Accordingly, songs with identical chord progressions but different melodies are fundamentally different works. Likewise, the same pitches set to a different rhythm result in a different melody. *See id.* at 847-48.

A. An Accurate Comparison of the “Signature Phrases” of BLURRED and GIVE Demonstrates That They Are Dissimilar

Based upon her fanciful alignment of the pitches and the rhythms of the two songs, Ms. Finell testified that the so-called “signature phrases” of BLURRED and GIVE are similar. As presented in the summary judgment ruling below, Ms. Finell presented the “signature phrases” to the District Court as follows:

Musical Example 1A: "Give It Up" Signature Phrase

Musical Example 1B: "Blurred" Signature Phrase

ER 2049, ER2129, ER2132, ER123, (referred to herein as “**Chart I**”).

There are several clear errors in Chart I. To illustrate this, Amici attach the following chart (Chart II) which compares the second measure of GIVE as presented by Ms. Finell to the actual second measure of GIVE in the GIVE Deposit Copy:

This chart was prepared by Amici for this Appeal and is a comparison of the notes and rests⁵ that Ms. Finell presented as measure two of the “significant melody” in GIVE, ER 2049, ER2129, ER2132, ER123, and the actual notes and markings in the second measure of this phrase in the GIVE Deposit Copy. ER 2411 (**Chart II**).

As is readily apparent from visual inspection, the final note in GIVE – the F sharp (the note on the first space of the staff), is incorrectly written in Ms. Finell’s chart as an eighth note followed by a quarter note rest.⁶ But the actual notation in the GIVE Deposit Copy indicates rather an eighth note tied⁷ to a quarter note. A true comparison between the GIVE Deposit Copy and BLURRED is illustrated in the chart that follows (Chart III) which shows clearly that

⁵A rest is a marking on the sheet music that signifies silence. The rests in question in this case are either a half note rest (a small black rectangle on the third line) signifying two beats of silence, or, as in this example, a quarter note rest (a squiggly line) signifying one beat of silence.

⁶ Finell’s presentation of the measure also uses durational markings that, while accurate depictions of the length of the notes, omit critical markings in the GIVE Deposit Copy that differentiates the second measure in the GIVE Deposit Copy from Finell’s presentation of measure two.

⁷A “tie” in musical notation is a curved line connecting the heads of two notes of the same pitch and name, meaning they are a single note with a duration equal to the sum of the individual notes’ values.

the two last notes on the fourth beat of the measure have different durations:

This chart was prepared by Amici for this Appeal and is a comparison of what Ms. Finell presented as measure two of the “significant melody” in GIVE, ER 2049, ER2129, ER2132, ER123 and



the actual BLURRED sheet music ER 2301. (Chart III).⁸

The divergence between the melodic lines, which the District Court should have seen on visual inspection, makes the two phrases significantly different because it changes the duration of the final note in the phrase.

Chart I also reveals, in several ways, how Ms. Finell selectively isolated bits and pieces of three sets of note sequences and, without regard to their placement in the measures, based her assertion of similarity on this cherry-picking of musical information. These isolated similarities of de minimis pitch sequences alone have no probative import on the issue of musical similarity. This is especially true given that the de minimis sequence in question is an utterly commonplace melodic kernel found in innumerable works across music genres for

⁸ This chart portrayed the notes in BLURRED as being an octave lower than the chart prepared by Ms. Wilbur for this case. ER 2298-2306. But the parties did not make an issue of this and for the purposes of this analysis, that is of no moment.

centuries. A more detailed examination of Ms. Finell's approach reveals the following:

First, in Chart I, in Ms. Finell's bracketed "a" sequences, she simply omits a note she identifies as "#2"⁹ in the BLURRED sequence, as it inconveniently indicates a divergence from the GIVE melody, and undermines her claim that the remaining sequence of pitches (three "3"s in BLURRED versus three "5"s in GIVE) are similar. This divergence is significant and conveys to the listener a very different melodic character. Moreover, the "3"s and the "5"s represent different notes in the scale.

Second, in the bracketed "b" sections of Chart I, Finell extracts two commonplace note sequences (the 5-6-1 and 1-5 sequences) from the rhythmic and metric contexts in which they actually occur. In so doing, she misleadingly implies that the mere existence of a few common pitches, in isolation from their rhythmic characteristics and metric position, indicates melodic similarity. In fact, the different placement of the 5-6-1 sequences (the "b" bracketed notes) in the melodies in question renders the musical effects of these pitch sequences quite dissimilar.

In GIVE, the "5" occurs on a strong quarter-note beat (three)¹⁰; the "6" occurs on a weak eighth-note beat (the second half or "and" of the

⁹ The numbers correspond to a note's place in the scale with "1" being the tonic note (A here), "3" meaning the third note from the tonic in sequence, and "5" meaning the fifth note in sequence. The default description of a scale is based on its ascending form, i.e. from the lowest note to the highest.

¹⁰ A 4/4 piece has a quarter note metric pulse which means that when reading or listening to each measure one can count four quarter notes (or 1, 2, 3, 4), giving equal time to each of the four notes and separating

third beat); and the “1” occurs on a weak quarter-note beat (four). In BLURRED, by contrast, the “5” is on a weak eighth-note beat (the second half or “and” of the third beat); the “6” is on a weak quarter-note beat (four), and the “1” is on a weak eighth-note beat (the “and” of four). These contrasting metric placements, which can be seen from a visual inspection of Chart I (the 5-6-1 sequence [bracket “b”] in BLURRED is “shifted to the right” by one eighth note when compared with GIVE) are significant because notes that occur on the strong beats of a measure (beats one and three in these works) are perceived as emphasized, and thus considerably more hierarchically salient, than those that sound on the less emphasized weaker beats (notes falling on beats two and four at the quarter-note level, and notes falling on the second half—the “and”—of any quarter-note beat).

Third, the two “melismas”¹¹ at the end of the “signature phrases” in GIVE (the second half of the word “parties”) and BLURRED (the word “girl”) are also dissimilar in terms of their metric placement, melodic profile, and pitch content.

Fourth, the most distinctive melodic element of the “signature phrase” in GIVE is its ascent to the second step of the scale (the “B” under Ms. Finell’s “2”). This ascent does not occur in the “signature phrase” of BLURRED. The note following the 5-6-1 phrase in

each number in the count by an equal amount of time. The default behavior of this meter is that quarter note beats 1 and 3 are strong and quarter note beats 2 and 4 are weak. Similarly, if there are eighth notes in the measure, one can count “1 and, 2 and, 3 and, 4 and” to represent the beats of the measure in eight equal parts. In such case, any eighth note falling on the “and” of the beat is weak with respect to that beat.

¹¹ Melismas are notes sung to the same syllable of text.

BLURRED (the “A” or step “1” in Ms. Finell’s chart) is not only different from GIVE whose following note is “B” (step “2”), but occurs in a different measure, is shorter in duration than the corresponding portions of BLURRED and therefore bears no musical relationship to the “B” in GIVE.

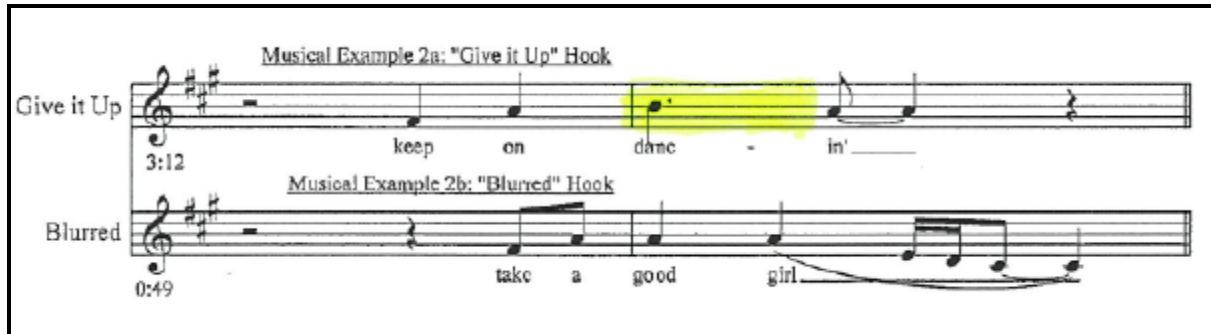
Finally, rather than consider the combination of musical elements that comprise melodic lines, Ms. Finell posits that the phrases are similar simply because: "both songs repeat their starting tones". ER 2048, ER 122. In fact, as demonstrated above, the starting tones of the two signature phrases are different, they repeat a different number of times and these phrases are set to different harmonic progressions (chords) and lyrics.

To summarize, an objective comparison of the signature phrases reveals that they are completely different, having different starting, middle, and end notes, and different pitch, harmonic, and rhythmic sequences.

B. The Melodic “Hooks” of GIVE and BLURRED Are Dissimilar

In her testimony, Ms. Finell presented the Court below with a distorted version of what she identified as the “hooks” of the two

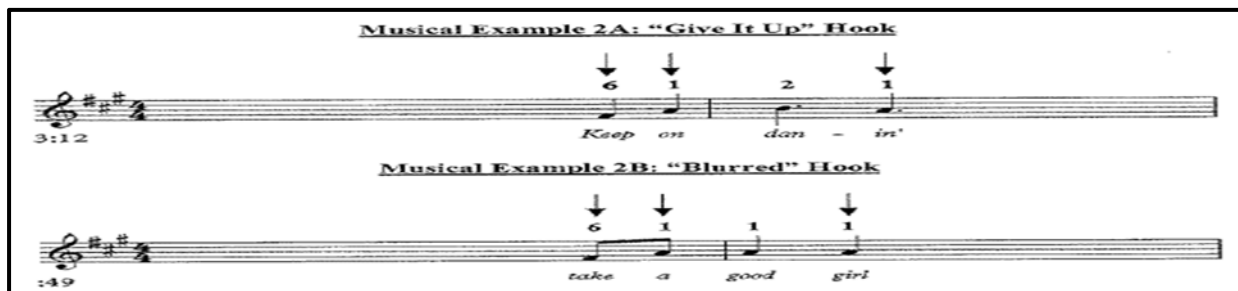
works.¹² Sandy Wilbur (“Wilbur”), appellants and counter-defendants’ expert, on the other hand, offered an accurate presentation of these two fragments (Chart V) that the District Court should have relied on to make its analytic comparisons of the two songs:



ER 2142, ER 125. (referred to herein as “**Chart V**”.)

Ms. Wilbur’s chart (as well as Ms. Finell’s chart) presents the most significant difference between these two phrases, the pitch B on the first beat of measure two of GIVE (the quarter note on the middle line of the staff) versus the pitch A on the first beat of BLURRED (the quarter note on the second space of the staff). These different pitches and durations result in phrases that sound completely different.

¹²



ER 2050-51; ER 125, ER 2141. (referred to herein as “**Chart IV**”.)

Comparing Ms. Finell's Chart IV with Ms. Wilbur's Chart V, one finds that Ms. Finell improperly aligned the "hooks" of the two songs. This misalignment reveals an effort to obscure the fact that the first notes of the hooks actually occur on different beats in the measure, creating significantly different melodies and overall musical effect.

In the first measure, Ms. Finell lined up the first two notes to make them seem of equal duration. She accomplished this by simply *omitting* the important rests¹³ preceding the notes in the first measure of each song, and then wrote the two quarter notes in GIVE to make them appear to rhythmically align with the two eighth notes in BLURRED, which they do not. The accurate representation of these notes is in Ms. Wilbur's Chart V, which shows that the first two notes of BLURRED, which are eighth notes, occur on beat four of the first measure of this example (the notes are preceded by a half note rest and a quarter note rest which take up the first three beats of the measure). The first two notes of GIVE, on the other hand, occur on beats three and four respectively (the notes are preceded simply by a half note rest taking up the first two beats of the measure). By aligning two quarter notes with two eighth notes, Finell created an illusion that these melodies are identical when in fact two eighth notes are half the duration of two quarter notes and this difference significantly affects the characters of the two "hooks".

To make her comparison even more opaque, Ms. Finell omitted three notes in the second measure at the end of her transcription of the two measure "hook" phrase in BLURRED in an attempt to make the

¹³ See fn 5.

two hooks resemble each other. In fact, the GIVE deposit indicates otherwise, as Ms. Wilbur's chart (Chart V) accurately demonstrates, the rhythms of these "hooks" are significantly different.

In its second measure, GIVE's hook contains a dotted quarter note (the dot after the note extends the duration of the quarter note by an additional half of its duration), followed by an eighth note tied to a quarter note¹⁴, and ending with a quarter note rest. The second measure of the hook of BLURRED, on the other hand, contains a quarter note followed by a quarter note, followed by two sixteenth notes and an eighth note tied to a final quarter note.

Not only are the pitches in the second measures of the hooks of the songs almost completely different, but they are also heard at different temporal points within the measures. Again, these divergences result in entirely different melodies with entirely dissimilar characters. This is readily apparent when the notes of the disputed songs are lined up as they were written, as in the Wilbur transcription above which was properly based on the GIVE Deposit Copy.

C. The Bass Lines of GIVE and BLURRED are Not Similar

To begin with, introductory bass lines in popular music commonly center on the tonic pitch (which here is an "A") to establish in the listener's ear the harmonic "home" of the music that follows. This pitch becomes the harmonic base of the song. Accordingly, any song in the key of A will typically open with that pitch in the bass line, and repeat that pitch many times in the bass line, sometimes just before the first

¹⁴ See fn. 7.

beat of a measure, and sometime on the first beat itself. Such a commonality has no significance whatever on the question of substantial similarity.

To support her assertion of similarity regarding the bass lines of the two songs, Ms. Finell did not refer to the GIVE bass line established in the GIVE Deposit Copy. Instead, she presented *her own version* of the GIVE bass line, which demonstrated different pitch durations than those on the GIVE Deposit Copy. Manipulating these durations in the GIVE bass line distorted the correct rhythm of the work in an attempt to create a false impression of similarity in these bass lines, which does not exist.

Amici present below an illustration of the clear differences between the actual GIVE Deposit Copy and Ms. Finell's presentation:



This chart was prepared by Amici for this Appeal and is a comparison of what Ms. Finell presented as the GIVE bass line, ER 2057, ER 128, and the bass line as notated in the first eight measures of the GIVE Deposit Copy, ER 2411 (**Chart VI**).

As is clear from Chart VI, Ms. Finell manipulated the GIVE bass line by assigning the notes different durations than those established by Marvin Gaye. This can be apparent by comparing each of the five measures of each bass line, each of which have notes of different

duration, metric placement and beat. For example, Ms. Finell’s version of the GIVE “hook” has ties connecting the last notes of measures 1, 2 and 3, with the first note of the corresponding next measures. The GIVE Deposit Copy has no such ties. Furthermore, the second notes of the first two measure in Ms. Finell’s version of the GIVE “hook” presents eighth notes when the GIVE Deposit Copy clearly indicates quarter notes.

If the Court had, in fact, been presented with an accurate comparison of what the *musical notation* of the two bass lines actually is, a visual inspection would have revealed what is clear to Amici: that these two bass lines are entirely different. Here is such an accurate comparison of the bass lines:



This chart was prepared by Amici for this Appeal and is a comparison of the actual bass line in the GIVE Deposit Copy, ER 2411, and the actual bass line in the BLURRED sheet music, ER 2299. (**Chart VII**).

As the correct alignment of the bass lines of the two songs indicates, the syncopated fragments comprising these two bass lines correspond neither rhythmically nor in pitch sequence, and are clearly dissimilar. For instance, in GIVE, the last bass note of the first three measures occurs in the third measure and is “tied” (by the slightly curved line below) to the first quarter note of the following measure.

This “tie” extends the duration of the single note that is tied (i.e. not reiterated)¹⁵. In BLURRED, on the other hand, in the parallel location there are two untied and therefore separate bass notes, one in the last beat of the third measure and one on the downbeat of one in the succeeding measure. This difference between the metric placement of these notes is extremely significant because it results in two very different sounding bass lines. *See* Chart VII.

D. Professor Monson’s Testimony Regarding Implied Melodic Similarities Is Indefensible

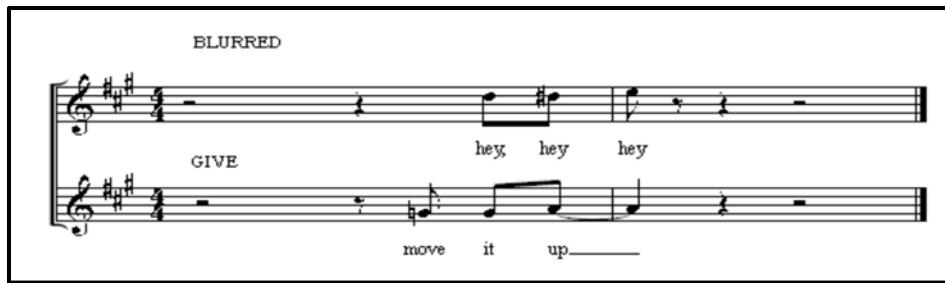
Professor Monson takes two slices of vocal melody out of context, a portion of the lead vocal of GIVE and a melodic vocal line from BLURRED, and claims that the fact that they both feature chromatic ascensions indicates musical similarity that cannot be attributed to coincidence. This is an invalid conclusion based on distortion of the musical evidence.

The notes of these two snippets of melody themselves are different (D-D#-E¹⁶ on BLURRED and G-G-A¹⁷ on GIVE), and the rhythms are also different. Here is the correct alignment of the musical notation of the relevant portions of the melodies in BLURRED and GIVE:

¹⁵ *See* fn. 7, *supra*.

¹⁶ These are the correct letter names in sequence of the three notes in the BLURRED fragment above.

¹⁷ These are the correct letter names in sequence of the three notes in the GIVE fragment above.



This chart was prepared by Amici for this Appeal and is a visual depiction of the portions of the GIVE Deposit Copy, ER 2413, and the BLURRED sheet music, ER 2299, which Professor Ms. Monson addresses (**Chart VIII**).

A visual comparison of these two measures reveals that the placement of the notes in the measures, their pitches and their durations are different. In BLURRED, the measures comprise a half-note rest, a quarter note rest, followed by three eighth notes with the last one landing on an eighth note which is the first beat of the following measure. In sharp contrast, in GIVE, the parallel measures begin with a half-note rest, an eighth rest, followed by three eighth notes tied to a quarter note on the first beat of the following measure. This simple shift of an eighth note changes the whole character of the melody and this melodic and metric dissimilarity result in works that have a markedly different musical character. This is the identical issue Amicus raises with respect to Ms. Finell’s discussion of bracket [b] in Chart I. See pages 10-11, *supra*.

Furthermore, Professor Monson’s statement that the two three-note phrases being compared both “chromatically ascend,” ER 131-32, ER 2080, is misleading. These two three note phrases ascend differently – BLURRED by two ascending chromatic half steps, and GIVE by one

ascending whole step. This seemingly minor difference in fact renders the melodies highly dissimilar in the eyes and ears of both performers and listeners.

E. Professor Monson Does Not Demonstrate Substantial Harmonic Similarities

The “harmony” of a popular song refers to the progression of chords -- simultaneous sounding pitches that typically serve as an underpinning for the melody. Popular music tends to use a very limited number of standardized and predictable chord progressions. Accordingly, the fact that two songs in a similar genre share a similar chord progression is mostly inconsequential on the question of infringing substantial similarity.

As one can easily see from the BLURRED sheet music in question, ER 2298-2306, BLURRED has only two chords throughout – an A chord and an E chord.¹⁸ GIVE, in contrast, has a progression of seventh chords¹⁹ throughout. ER 2410-2416. This harmonic progression

¹⁸ The chords in BLURRED and GIVE are indicated by the letters appearing on top of the staff. The “A” chord indicated is an A Major chord which consists of three notes, the root A, plus the 3 and 5 notes (C# and E). The “E” is an E major chord which also consists of three notes, the root E, plus the 3 and 5 notes (here G# and B)

¹⁹ The difference between an E and an E7 is that this notation indicates that the seventh note above the root of the chord (and E here) is to occur simultaneously with the basic E chord which creates a different harmony. (so the four notes are E-G#-B plus a D). The difference between an A and an A7 is that this notation indicates that the seventh note above the root of the chord (A here) is to occur simultaneously with the basic A chord which creates a different harmony. (so the four notes are A-C#-E plus a G). The inclusion of a seventh on top of the basic

contrasts starkly with the more rudimentary A and E chords alternating in BLURRED. In fact, the Court observed the fact that between the songs “the chords and tones differ.” ER 131. This observation should have ended the District Court’s inquiry as to whether there was any harmonic similarity. *See Williams*, 2014 WL 787773 at *17. Professor Monson’s contentions to the contrary that there is harmonic similarity are confusing and of no consequence for the following reasons:

First, Professor Monson’s conclusion that the chords in GIVE can substitute for the chords in BLURRED because of the “resemblance” of the two melodies, is of no moment as to whether BLURRED and GIVE are musically similar. ER 131, ER 2079-2081. The only relevant harmonies that the District Court should have considered are the *actual* harmonies in the two songs as fixed, and not harmonies that *might* effectively substitute for those used in in the other song.

Second, Professor Monson also bases her claim of harmonic similarity on the fact that the BLURRED chord progression, which she admits is different from the chord progression in GIVE, “prolongs the tonic”. ER 2080. The tonic, as set forth above, establishes in the listener’s ear the harmonic “home” of the music that follows. Prolonging the tonic is a technical term that means implying that the tonic is still the underlying harmony despite interpolation of non-tonic (“static”) harmonies between each instance where the tonic is sounded. Virtually *all* Western music throughout history has the fundamental behavior of centering on a single pitch (i.e. prolonging the tonic) to one degree or

major chord indicates a *bluesy feel* that does not exist in the straight major chords.

another. But whether or not the tonic has been prolonged has no bearing whatsoever as to whether these harmonies are the same.

Finally, Professor Monson disputes Ms. Wilbur's characterization of GIVE as having a "minor sound". But the nature of the "sound" of a song is not relevant to the question of the similarity of the music of the two works that is unequivocally established in the music notation of the songs. GIVE's harmonic content is made up of a series of seventh chords; that of BLURRED is comprised of only two major chords. In short, the harmonic progressions of the two songs are entirely dissimilar.

III. Conclusion

Amici contend that, despite their elaborate but misleading testimony, neither Ms. Finell nor Professor Monson demonstrated any significant similarities in the melody or harmony of BLURRED and GIVE. If this jury verdict is allowed to stand, it will set the dangerous precedent of allowing for academically speculative musical analyses to taint the forthright “analytic dissection” of two musical works by a District Court in a music copyright infringement lawsuit. This will have a deleterious effect on composers who will have the spectre of frivolous lawsuits hanging over them as they create new musical works tapping into the rich commonality of musical ideas that musicians have relied upon since time immemorial.

Amici urge this Court to reverse or vacate this verdict.

Dated: Encino, California
August 30, 2016

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C) AND
CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 5904 words.

DATED: August 30, 2016

FREUNDLICH LAW

s/Kenneth D. Freundlich
Kenneth D. Freundlich

Attorneys for Amici Curæ

CERTIFICATE OF SERVICE

I, Kenneth D. Freundlich, a member of the Bar of this Court, hereby certify that on August 30, 2016, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* MUSICOLOGISTS IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Kenneth D. Freundlich