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## **“...if you listen very hard...”: Stairway To Heaven Verdict May Have Unblurred Lines In Music Infringement Cases**


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Among the last few lines of Led Zeppelin’s rock ballad *Stairway to Heaven* are the lyrics “And if you listen very hard/The tune will come to you at last./When all are one and one is all...” Spirit guitarist Randy Wolfe brought suit against Led Zeppelin for copyright infringement, apparently thinking that one did not even have to listen very hard to hear the similarities between the Zeppelin song and his song *Taurus* after a side-by-side comparison. After the recent victory of Marvin Gaye’s heirs in the *Blurred Lines* suit against Robin Thicke and Pharrell Williams, where the similarities were, to many, not as striking when the songs were juxtaposed, the Spirit plaintiffs may have had visions of victory and “all that glitters is gold.” But, last month, a California jury rejected the Wolfe claim, and “it really makes me wonder” what the implications may be for music copyright infringement claims.

When another Los Angeles jury decided in 2015 that Pharrell Williams and Robin Thicke’s 2013 mega-hit infringed Marvin Gaye’s 1977 single *Got to Give It Up*, many saw music copyright claims as having potentially lost their moorings. That was because *Blurred Lines* did not copy any substantial note progression or lyrics, but rather seemed to emulate or imitate a feeling or vibe from *Got to Give It Up*. But experts contended that “it is not copyright infringement to write a song with the same ‘groove’ or ‘feel’ as another. That’s how creativity works: new musicians build on the genres and styles that preceded them.” Indeed, a sense emerged that the victory of the Gaye heirs was the result of a blurring of legal lines more than anything else—as a Duke law professor noted:

 This case also involves another legal wrinkle: because “Blurred Lines” did not use Gaye’s performance of “Got To Give It Up” (this is not a case where they “sampled” a recording of Gaye’s performance), the only relevant musical elements were those in Gaye’s *composition*, which under the law was limited to the music and lyrics that were on the sheet music deposited with the Copyright Office. Many of the features that make the songs sound similar – including the falsetto and the use of a cowbell to provide rhythmic accents – were not part of Gaye’s composition. The core elements of the compositions – the melody and harmony in each song, for example – are not substantially similar.

So how did the jury find copyright infringement? One possibility is that the test for copyright infringement in the Ninth Circuit (the jurisdiction that includes Los Angeles) skewed their analysis. Under Ninth Circuit law, the ultimate determination is called the “intrinsic” test, where jurors are asked whether “the ordinary, reasonable listener would conclude that the *total concept and feel*” of the works in question is “substantially similar.” It is very difficult to compare “total concept and feel” without erroneously taking into account all of the unprotectable elements mentioned above. Not surprisingly, this standard has been criticized by copyright scholars and rejected by other legal jurisdictions.

[Jennifer Jenkins, *The “Blurred Lines” of the Law*]

Professor Jenkins concluded that the *Blurred Lines* “verdict skewed the balance between rights and freedoms in a way that would severely stifle musical creativity. If musicians throughout history were not free to capture the ‘groove’ or style of another song, and had to avoid channeling their influences for fear of a copyright lawsuit, then much of the music we love might not exist. Let’s hope the legal lines are not irrevocably blurred.”

Such hopes seem to have been vindicated with the *Stairway to Heaven* result. Industry experts think that last month’s verdict should help to rein in music copyright claims, especially those asserting influence, feel or vibe type complaints as copyright infringement claims. That may be the product of a more accurate application of the relevant law and evidentiary standards in the more recent case. For example, the jury compared acoustic guitar versions of *Taurus* and *Stairway to Heaven*, and the recorded album version of *Taurus* was excluded from the evidence, thus avoiding some of the concerns raised by Professor Jenkins. Further, though much attention and expert testimony in the *Stairway to Heaven* trial was devoted to detailed musicological comparison of a descending chromatic scale alleged to be in both songs, it appears that that scale “is exceedingly common in popular music and isn’t subject to copyright protection,” as one commentator noted. This vindicated not only commentators like Professor Jenkins, but long-standing legal concepts summed up long ago and well by Judge Learned Hand in *Darrell v. Joe Morris Music Co.*, 113 F. 2d 80 (2d Cir. 1940): “It must be remembered that while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism.”

So, as we began, we end, quoting some of *Stairway to Heaven*’s lyrics—“...And it’s whispered that soon, if we all call the tune, Then the piper will lead us to reason...” While some have concluded, with some accuracy, that the *Stairway to Heaven* verdict “created a sharper, clearer line in terms of what is protectable and what is not in music,” a note of caution must sound. We still must be led to reason. That verdict is not a test or a precedent that can easily be applied to other cases unless an appellate court affirms that result with an appropriate explanation of the legal standards to be applied in such cases. For now then, we can only imagine the exact parameters that such a court may set. “Ooh, it makes me wonder.”

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