Bright Lines: Musicologists Police the Boundaries of Copyright Law DECEMBER 4, 2019

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Todd Decker is a music historian who chairs the music department at Washington University in St. Louis. A few years ago, a local attorney called the department looking for help on a case. The lawyer represented Flame, a little-known Christian rapper who claimed that Katy Perry had ripped off his song in her 2014 smash hit "Dark Horse."

Decker had never worked on a lawsuit before, but he volunteered his services as a forensic musicologist — an expert who parses melodies and chord structures to determine if two songs are "substantially similar." In doing so, he found himself thrust into the middle of one of the hottest debates in music.

Ever since the "Blurred Lines" verdict in 2015, artists have been fearful of getting hit with a frivolous infringement suit. In that case, a jury found that Pharrell Williams and Robin Thicke had stolen elements of Marvin Gaye's "Got to Give It Up," and Gaye's family was awarded more than $5 million in damages. Other acts have since found themselves in the crosshairs — including Perry, Led Zeppelin, Ed Sheeran, and Lizzo, who in October sued three writers who claimed credit for her hit "Truth Hurts."

In the "Blurred Lines" case, musicologist Judith Finell testified that the song had appropriated a "constellation of similarities" from Gaye's song. This was seen by many — including many musicologists — as hocus-pocus, but it persuaded the jury.

"I think it's a terrible and very dangerous precedent," says Charles Cronin, a professor who runs an online database of music copyright cases. "The new normal is that there's a sense of uncertainty as to what is impermissible borrowing."

Sandy Wilbur, the musicologist who represented Williams and Thicke, said that the case had "opened the floodgates to those who believe that a groove, feel, or sound-alike constitute unauthorized copying." Claims of infringement are usually settled without litigation, in part because juries can be so unpredictable.

"The truth is, it's often very difficult for the average person to understand some of the nuances and technical aspects of the music presented at trial," Wilbur says. "Often the jury makes a judgment based on first impressions that have little or nothing to do with the music itself."

As a musicologist, Decker did not agree with the "Blurred Lines" verdict. But to his ears, the Katy Perry case was different. At a trial this past summer, he testified that "Dark Horse" lifted a repeating eight-note phrase from Flame's 2008 song, "Joyful Noise."

“It was a pretty open-and-shut, old-time example of borrowing,” Decker says. “It was a melody. You could sing it. I sang it over and over again in court.”

The jury agreed, awarding Flame a $2.8 million judgment.

But the reaction to the verdict mirrored the horrified reaction to “Blurred Lines,” and revived the industry’s fears about frivolous suits.

Decker found himself being attacked on Twitter and YouTube. One YouTuber, Adam Neely, made a video that racked up 2.4 million plays in which he castigated Decker as a sellout who had helped foster a “corporate capitalist hellscape.”

“It was nuts,” Decker says.

Decker came to believe that it is impossible to explain the case to someone who wasn’t there, and that the public discourse about the case had nothing to do with the facts and the law that were presented to the jury.

“These cases feed certain musically interested folks on the internet who want to get mad at power structures,” he says. “We beat them because we had a better argument. That’s what happens in a court of law.”

The murkiness of copyright law long predates “Blurred Lines.” The law protects the expression of an idea, but not the idea itself, leaving it to juries to assess where the line is. “Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression,’” wrote Judge Learned Hand in 1960. “Decisions must therefore inevitably be ad hoc.”

In that respect, “Blurred Lines” was nothing new. It relied on a string of other cases, and established no new legal precedent. In upholding the verdict, the 9th Circuit Court of Appeals countered claims that the case would inhibit creativity or tilt the law against artists, calling that “unfounded hyperbole.”

“Our decision does not grant license to copyright a musical style or ‘groove,’” wrote Judge Milan D. Smith, Jr. “Nor does it upset the balance Congress struck between the freedom of artistic expression, on the one hand, and copyright protection of the fruits of that expression, on the other hand.”

Richard Busch, the Gaye family’s attorney, says he is tired of the music industry’s alarmist narrative around the case. He says there are no more copyright suits now than there were before the case.

“I don’t think that ‘Blurred Lines’ opened the floodgates to anything,” he says. “We put on a very strong case of musical misappropriation of the actual elements of ‘Blurred Lines.’ Everything else is just loser talk. They copied the song and they got caught.”