

# **WILLIAMS v. GAYE**

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## **United States Court of Appeals for the Ninth Circuit 885 F.3d 1150 (2018)**

### **OPINION**

M. SMITH, Circuit Judge:

After a seven-day trial and two days of deliberation, a jury found that Pharrell Williams, Robin Thicke, and Clifford Harris, Jr.'s song "Blurred Lines," the world's best-selling single in 2013, infringed Frankie Christian Gaye, Nona Marvisa Gaye, and Marvin Gaye III's copyright in Marvin Gaye's 1977 hit song "Got To Give It Up." Three consolidated appeals followed.

Appellants and Cross-Appellees Williams, Thicke, Harris, and More Water from Nazareth Publishing, Inc. (collectively, Thicke Parties) appeal from the district court's judgment. They urge us to reverse the district court's denial of their motion for summary judgment and direct the district court to enter judgment in their favor. In the alternative, they ask us to vacate the judgment and remand the case for a new trial, on grounds of instructional error, improper admission of expert testimony, and lack of evidence supporting the verdict. If a new trial is not ordered, they request that we reverse or vacate the jury's awards of actual damages and infringer's profits, and the district court's imposition of a running royalty. Finally, they seek reversal of the judgment against Harris, challenging the district court's decision to overturn the jury's general verdict finding in Harris's favor.

Appellants and Cross-Appellees Interscope Records, UMG Recordings, Inc., Universal Music Distribution, and Star Trak, LLC (collectively, Interscope Parties) appeal from the district court's judgment. They urge us to reverse the judgment against them, challenging the district court's decision to overturn the jury's general verdict finding in their favor.

Appellees and Cross-Appellants Frankie Christian Gaye, Nona Marvisa Gaye, and Marvin Gaye III (collectively, Gayes) appeal from the district court's order on attorney's fees and costs. They request that we vacate and remand for reconsideration the district court's denial of attorney's fees, and award them their costs in full. The Gayes also protectively cross-appeal the district court's ruling limiting the scope of the Gayes' compositional copyright to the four corners of the sheet music deposited with the United States Copyright Office. In the event a new trial is ordered, the Gayes urge us to hold that Marvin Gaye's studio recording of "Got To Give It Up," rather than the deposit copy, establishes the scope of the

Gayes' copyright under the Copyright Act of 1909.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Our law requires that we review this case, which proceeded to a full trial on the merits in the district court, under deferential standards of review. We accordingly decide this case on narrow grounds, and affirm in part and reverse in part.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. "Got To Give It Up"**

In 1976, Marvin Gaye recorded the song "Got To Give It Up" in his studio. "Got To Give It Up" reached number one on Billboard's Hot 100 chart in 1977, and remains popular today.

In 1977, Jobete Music Company, Inc. registered "Got To Give It Up" with the United States Copyright Office and deposited six pages of handwritten sheet music attributing the song's words and music to Marvin Gaye. Marvin Gaye did not write or fluently read sheet music, and did not prepare the deposit copy. Instead, an unidentified transcriber notated the sheet music after Marvin Gaye recorded "Got To Give It Up."

The Gayes inherited the copyrights in Marvin Gaye's musical compositions.

### **B. "Blurred Lines"**

In June 2012, Pharrell Williams and Robin Thicke wrote and recorded "Blurred Lines." Clifford Harris, Jr., known popularly as T.I., separately wrote and recorded a rap verse for "Blurred Lines" that was added to the track seven months later. "Blurred Lines" was the best-selling single in the world in 2013.

Thicke, Williams, and Harris co-own the musical composition copyright in "Blurred Lines." Star Trak and Interscope Records co-own the sound recording of "Blurred Lines." Universal Music Distribution manufactured and distributed "Blurred Lines."

### **C. The Action**

The Gayes made an infringement demand on Williams and Thicke after hearing "Blurred Lines." Negotiations failed, prompting Williams, Thicke, and Harris to file suit for a declaratory judgment of non-infringement on August 15, 2013.

The Gayes counterclaimed against the Thicke Parties, alleging that

“Blurred Lines” infringed their copyright in “Got To Give It Up,”<sup>11</sup> and added the Interscope Parties as third-party defendants.

#### **D. The District Court’s Denial of Summary Judgment**

The district court denied Williams and Thicke’s motion for summary judgment on October 30, 2014.

##### **1. The District Court’s Interpretation of the Copyright Act of 1909**

The district court ruled that the Gayes’ compositional copyright, which is governed by the Copyright Act of 1909, did not extend to the commercial sound recording of “Got To Give It Up,” and protected only the sheet music deposited with the Copyright Office. The district court accordingly limited its review of the evidence to the deposit copy, and concluded there were genuine issues of material fact.

##### **2. The Evidence**

The Thicke Parties relied upon the opinion of musicologist Sandy Wilbur. The Gayes relied upon the opinions of Dr. Ingrid Monson, the Quincy Jones Professor of African American Music at Harvard University, and musicologist Judith Finell. The experts disagreed sharply in their opinions, which they articulated in lengthy reports.

Finell opined that there is a “constellation” of eight similarities between “Got To Give It Up” and “Blurred Lines,” consisting of the signature phrase, hooks,<sup>2</sup> hooks with backup vocals, “Theme X,”<sup>3</sup> backup hooks, bass melodies, keyboard parts, and unusual percussion choices.

Wilbur opined that there are no substantial similarities between the melodies, rhythms, harmonies, structures, and lyrics of “Blurred Lines” and “Got To Give It Up,” and disputed each area of similarity Finell identified. The district court compared Finell’s testimony with Wilbur’s and, pursuant to the extrinsic test under copyright law, meticulously filtered out elements Wilbur opined were not in the deposit copy, such as the backup vocals, “Theme X,” descending bass line, keyboard rhythms, and percussion parts.

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<sup>1</sup> The Gayes asserted a second counterclaim alleging that Thicke’s song “Love After War” infringed their copyright in Marvin Gaye’s composition “After the Dance.” The jury found against the Gayes on the second counterclaim, and judgment was entered against them. On appeal, the second counterclaim is relevant only to the issue of costs.

<sup>2</sup> According to Finell, the term “hook” refers to the most important and memorable melodic material of a piece of popular music.

<sup>3</sup> Finell named a repeated four-note backup vocal in “Got To Give It Up” as “Theme X.”

The district court also filtered out several unprotectable similarities Dr. Monson identified, including the use of a cowbell, hand percussion, drum set parts, background vocals, and keyboard parts. After filtering out those elements, the district court considered Dr. Monson's analysis of harmonic and melodic similarities between the songs, and noted differences between Wilbur's and Dr. Monson's opinions.

After performing its analytical dissection, as part of the extrinsic test, the district court summarized the remaining areas of dispute in the case. The district court identified disputes regarding the similarity of the songs' signature phrases, hooks, bass lines, keyboard chords, harmonic structures, and vocal melodies. Concluding that genuine issues of material fact existed, the district court denied Williams and Thicke's motion for summary judgment.

### **E. Trial**

The case proceeded to a seven-day trial. The district court ruled before trial that the Gayes could present sound recordings of "Got To Give It Up" edited to capture only elements reflected in the deposit copy. Consequently, the commercial sound recording of "Got To Give It Up" was not played at trial.

Williams and Thicke testified, each acknowledging inspiration from Marvin Gaye and access to "Got To Give It Up."

Finell testified that "Blurred Lines" and "Got To Give It Up" share many similarities, including the bass lines, keyboard parts, signature phrases, hooks, "Theme X," bass melodies, word painting, and the placement of the rap and "parlando" sections in the two songs. She opined that nearly every bar of "Blurred Lines" contains an element similar to "Got To Give It Up." Although the district court had filtered out "Theme X," the descending bass line, and the keyboard rhythms as unprotectable at summary judgment, Finell testified that those elements were in the deposit copy.

Dr. Monson played three audio-engineered "mash-ups" she created to show the melodic and harmonic compatibility between "Blurred Lines" and "Got To Give It Up." She testified that the two songs shared structural similarities on a sectional and phrasing level.

Wilbur opined that the two songs are not substantially similar and disputed Finell and Dr. Monson's opinions. Wilbur prepared and played a sound recording containing her rendition of the deposit copy of "Got To Give It Up."

Neither the Thicke Parties nor the Gayes made a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) before the case was submitted to the jury.

On March 10, 2015, after two days of deliberation, the jury returned mixed general verdicts. The jury found that Williams, More Water from Nazareth Publishing, and Thicke infringed the Gayes' copyright in "Got To Give It Up." In contrast, the jury found that Harris and the Interscope Parties were not liable for infringement. The jury awarded the Gayes \$4 million in actual damages, \$1,610,455.31 in infringer's profits from Williams and More Water from Nazareth Publishing, and \$1,768,191.88 in infringer's profits from Thicke.

#### **F. The District Court's Order on Post-Trial Motions**

The district court ruled on the parties' various post-trial motions in an omnibus order.

The Thicke Parties filed a motion for judgment as a matter of law, a new trial, or remittitur. The district court denied the Thicke Parties' motion for judgment as a matter of law and motion for a new trial, but remitted the award of actual damages and the award of Williams' profits.

The Gayes filed three motions, seeking (1) a declaration that Harris and the Interscope Parties were liable for infringement; (2) injunctive relief or, in the alternative, ongoing royalties; and (3) prejudgment interest. The district court construed the Gayes' motion for declaratory relief as a post-trial motion for judgment as a matter of law, and granted the motion, overturning the jury's general verdicts in favor of Harris and the Interscope Parties. The district court denied the Gayes' request for injunctive relief, but awarded them a running royalty of 50% of future songwriter and publishing revenues from "Blurred Lines." The district court granted in part the Gayes' motion for prejudgment interest.

#### **G. The Judgment and Order on Attorney's Fees and Costs**

The district court entered judgment on December 2, 2015. The court awarded the Gayes \$3,188,527.50 in actual damages, profits of \$1,768,191.88 against Thicke and \$357,630.96 against Williams and More Water from Nazareth Publishing, and a running royalty of 50% of future songwriter and publishing revenues received by Williams, Thicke, and Harris.

On April 12, 2016, the district court denied the Gayes' motion for attorney's fees and apportioned costs between the parties. The parties timely appealed.

### **ANALYSIS**

#### **I. Governing Law**

We begin by discussing the law applicable to this case.

## A. Elements of a Copyright Infringement Claim

To prevail on a copyright infringement claim, a plaintiff must show that (1) he or she owns the copyright in the infringed work, and (2) the defendant copied protected elements of the copyrighted work. *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004). A copyright plaintiff may prove copying with circumstantial, rather than direct, evidence. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000). “Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had ‘access’ to the plaintiff’s work and that the two works are ‘substantially similar.’” *Id.* (quoting *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) ).

Access and substantial similarity are “inextricably linked.” *Id.* at 485. We adhere to the “inverse ratio rule,” which operates like a sliding scale: The greater the showing of access, the lesser the showing of substantial similarity is required.<sup>66</sup> See *Swirsky*, 376 F.3d at 844; *Three Boys Music*, 212 F.3d at 485. Williams and Thicke readily admitted at trial that they had a high degree of access to “Got To Give It Up.” The Gayes’ burden of proof of substantial similarity is lowered accordingly. See *Swirsky*, 376 F.3d at 844–45; see also *Metcalf v. Bochco*, 294 F.3d 1069, 1075 (9th Cir. 2002) (“The [plaintiffs’] case is strengthened considerably by [the defendant’s] concession of access to their works.”).

We use a two-part test for substantial similarity: an extrinsic test and an intrinsic test. *Swirsky*, 376 F.3d at 845. For a jury to find substantial similarity, there must be evidence on both the extrinsic and intrinsic tests. *Id.* (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003) ). A district court applies only the extrinsic test on a motion for summary judgment, as the intrinsic test is reserved exclusively for the trier of fact. *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010).

The extrinsic test is objective. *Swirsky*, 376 F.3d at 845. It “considers whether two works share a similarity of ideas and expression as measured by external, objective criteria.” *Id.* Application of “[t]he extrinsic test requires ‘analytical dissection of a work and expert testimony.’” *Id.* (quoting *Three Boys Music*, 212 F.3d at 485). An analytical dissection, in turn, “requires breaking the works ‘down into their constituent elements, and comparing those elements for proof of copying as measured by ‘substantial similarity.’”” *Id.* (quoting *Rice v. Fox Broad. Co.*, 148 F.Supp.2d 1029, 1051 (C.D. Cal. 2001) ).

The intrinsic test, on the other hand, is subjective. *Three Boys Music*, 212 F.3d at 485. It “asks ‘whether the ordinary, reasonable person would find the total

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<sup>6</sup> To be clear, we do not “redefin[e] the test of substantial similarity here,” or negate the requirement that there be substantial similarity. See *Three Boys Music*, 212 F.3d at 486. Although the dissent criticizes the inverse ratio rule, the rule is binding precedent under our circuit law, and we are bound to apply it.

concept and feel of the works to be substantially similar.’ ” *Id.* (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991) ).

“Because the requirement is one of substantial similarity to *protected* elements of the copyrighted work, it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.”<sup>77</sup> *Swirsky*, 376 F.3d at 845. Still, “substantial similarity can be found in a combination of elements, even if those elements are individually unprotected.” *Id.* at 848; *see also Metcalf*, 294 F.3d at 1074 (“Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection.”); *Three Boys Music*, 212 F.3d at 485–86 (upholding jury’s finding of substantial similarity based on “a combination of unprotectible elements”). This principle finds particular relevance in application of the intrinsic test, as a trier of fact may “find that the over-all impact and effect indicate substantial appropriation,” even if “any one similarity taken by itself seems trivial.” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1169 (9th Cir. 1977) (quoting *Malkin v. Dubinsky*, 146 F.Supp. 111, 114 (S.D.N.Y. 1956) ), *superseded in part on other grounds*, 17 U.S.C. § 504(b); *see also Three Boys Music*, 212 F.3d at 485.

## **B. The Standard of Similarity for Musical Compositions**

We have distinguished between “broad” and “thin” copyright protection based on the “range of expression” involved. *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010). “If there’s a wide range of expression ..., then copyright protection is ‘broad’ and a work will infringe if it’s ‘substantially similar’ to the copyrighted work.” *Id.* (citation omitted). On the other hand, “[i]f there’s only a narrow range of expression ..., then copyright protection is ‘thin’ and a work must be ‘virtually identical’ to infringe.” *Id.* at 914 (citation omitted). To illustrate, there are a myriad of ways to make an “aliens-attack movie,” but “there are only so many ways to paint a red bouncy ball on blank canvas.” *Id.* at 913–14. Whereas the former deserves broad copyright protection, the latter merits only thin copyright protection. *See id.*

We reject the Thicke Parties’ argument that the Gayes’ copyright enjoys only thin protection. Musical compositions are not confined to a narrow range of

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<sup>77</sup> “Copyright protection subsists ... in original works of authorship,” including “musical works” and “any accompanying words,” that are “fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). Generally speaking, copyright law does not protect ideas, but rather, protects the expression of ideas. *See id.* § 102(b); *Rice*, 330 F.3d at 1174. For example, elements of an original work of authorship may be unprotectable by reason of the *scenes a faire* doctrine. *See Swirsky*, 376 F.3d at 849–50. According to that doctrine, “when certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea, those expressions are treated like ideas and therefore not protected by copyright.” *Id.* at 850.

expression.<sup>8</sup> See *Swirsky*, 376 F.3d at 849 (noting that “[m]usic ... is not capable of ready classification into only five or six constituent elements,” but “is comprised of a large array of elements”). They are unlike a page-shaped computer desktop icon, see *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994), or a “glass-in-glass jellyfish sculpture,” *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003). Rather, as we have observed previously, “[m]usic ... is not capable of ready classification into only five or six constituent elements,” but is instead “comprised of a large array of elements, some combination of which is protectable by copyright.” *Swirsky*, 376 F.3d at 849. As “[t]here is no one magical combination of ... factors that will automatically substantiate a musical infringement suit,” and as “each allegation of infringement will be unique,” the extrinsic test is met, “[s]o long as the plaintiff can demonstrate, through expert testimony ..., that the similarity was ‘substantial’ and to ‘protected elements’ of the copyrighted work.” *Id.* We have applied the substantial similarity standard to musical infringement suits before, see *id.*; *Three Boys Music*, 212 F.3d at 485, and see no reason to deviate from that standard now. Therefore, the Gayes’ copyright is not limited to only thin copyright protection, and the Gayes need not prove virtual identity to substantiate their infringement action.

### **C. The Copyright Act of 1909**

Marvin Gaye composed “Got To Give It Up” before January 1, 1978, the effective date of the Copyright Act of 1976. Accordingly, the Copyright Act of 1909 governs the Gayes’ compositional copyright. See *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 429 F.3d 869, 876 (9th Cir. 2005); *Dolman v. Agee*, 157 F.3d 708, 712 n.1 (9th Cir. 1998).

While the Copyright Act of 1976 protects “works of authorship” fixed in “sound recordings,” 17 U.S.C. § 102, the 1909 Act did not protect sound recordings. It is well settled that “[s]ound recordings and musical compositions are separate works with their own distinct copyrights.”<sup>9</sup> See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 877 (9th Cir. 2016) (quoting *Erickson v. Blake*, 839 F.Supp.2d 1132, 1135 n.3 (D. Or. 2012) ). It remains unsettled, however, whether copyright protection for musical compositions under the 1909 Act extends only to the four corners of the sheet music deposited with the United States Copyright Office, or whether the commercial sound recordings of the compositions are admissible to shed light on

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<sup>8</sup> Even the de minimis exception, which renders insignificant copying inactionable, does not require a standard of similarity as exacting as virtual identity. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016) (“A ‘use is de minimis only if the average audience would not recognize the appropriation.’” (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004) )).

<sup>9</sup> 17 U.S.C. § 102(a)(2) protects “musical works,” while § 102(a)(7) protects “sound recordings.” “ ‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds ..., regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” 17 U.S.C. § 101.



the scope of the underlying copyright. Here, the district court ruled that the 1909 Act protected only the deposit copy of “Got To Give It Up,” and excluded the sound recording from consideration.

The Gayes cross-appeal the district court’s interpretation of the 1909 Act only in the event the case is remanded for a new trial. The parties have staked out mutually exclusive positions. The Gayes assert that Marvin Gaye’s studio recording may establish the scope of a compositional copyright, despite the 1909 Act’s lack of protection for sound recordings. The Thicke Parties, on the other hand, elevate the deposit copy as the quintessential measure of the scope of copyright protection.<sup>10</sup> Nevertheless, because we do not remand the case for a new trial, we need not, and decline to, resolve this issue in this opinion. For purposes of this appeal, we accept, without deciding, the merits of the district court’s ruling that the scope of the Gayes’ copyright in “Got To Give It Up” is limited to the deposit copy.

## **II. The District Court’s Order Denying Summary Judgment is Not Reviewable After a Full Trial on the Merits.**

The Thicke Parties seek review of the district court’s order denying their motion for summary judgment, contending that the district court erred in its application of the extrinsic test for substantial similarity.

The order is not reviewable. The Supreme Court has squarely answered the question: “May a party ... appeal an order denying summary judgment after a full trial on the merits? Our answer is no.” *Ortiz v. Jordan*, 562 U.S. 180, 183–84 (2011). ....

## **III. The District Court Did Not Abuse its Discretion in Denying a New Trial.**

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<sup>10</sup> To our knowledge, the Thicke Parties’ position had not found support in case law until the district court’s ruling. *See Three Boys Music*, 212 F.3d at 486 (observing, in the context of subject matter jurisdiction, that “[a]lthough the 1909 Copyright Act requires the owner to deposit a ‘complete copy’ of the work with the copyright office, our definition of a ‘complete copy’ is broad and deferential”); *see also* 17 U.S.C. § 704 (providing that the Register of Copyrights and the Librarian of Congress may destroy or otherwise dispose of original deposit copies if certain facsimile requirements are met); *Marya v. Warner/Chappell Music, Inc.*, 131 F.Supp.3d 975, 982 (C.D. Cal. 2015) (observing that “[t]he Copyright Office no longer has the deposit copy” of the work at issue, which was registered in 1935); 2 Nimmer on Copyright § 7.17[A] (2017) (noting that “[t]he function of deposit is to provide the Library of Congress *via* the Copyright Office with copies and phonorecords of all works published within the United States,” and that the argument “that deposit has a copyright as well as an archival function” is “attenuated by the fact that the Library of Congress need not add all deposited works to its collection” or “preserve those works which it does add to its collection”).

We review the district court's denial of a motion for a new trial for abuse of discretion. *Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (citing *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 728 (9th Cir. 2007) ). We may reverse the denial of a new trial only if the district court "reaches a result that is illogical, implausible, or without support in the inferences that may be drawn from the record." *Id.* (quoting *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) ). "The abuse of discretion standard requires us to uphold a district court's determination that falls within a broad range of permissible conclusions, provided the district court did not apply the law erroneously." *Id.* (quoting *Kode*, 596 F.3d at 612).

The Thicke Parties argue that a new trial is warranted on three grounds: (1) Jury Instructions 42 and 43 were erroneous; (2) the district court abused its discretion in admitting portions of Finell and Dr. Monson's testimony; and (3) the verdict is against the clear weight of the evidence. We disagree, and discuss each ground in turn.

### **A. Instructions 42 and 43 Were Not Erroneous.**

We review de novo whether jury instructions state the law accurately, but review a district court's formulation of jury instructions for abuse of discretion. *Id.* at 1085 (citing *Hunter v. County of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011) ). "In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered." *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005) (alteration in original) (quoting *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001)).

#### **1. Jury Instruction 42**

The Thicke Parties argue that Instruction 42 allowed the jury to place undue weight on Williams and Thicke's statements claiming inspiration from "Got To Give It Up" and Marvin Gaye. The district court instructed the jurors:

In order to find that the Thicke Parties copied either or both of the Gaye Parties' songs, it is not necessary that you find that the Thicke Parties consciously or deliberately copied either or both of these songs. It is sufficient if you find that the Thicke Parties subconsciously copied either or both of the Gaye Parties' songs.

Because direct evidence is rare, copying is usually circumstantially proved by a combination of access and substantial similarity. *See Swirsky*, 376 F.3d at 844. As the Thicke Parties acknowledge, access may be "based on a theory of widespread dissemination and subconscious copying." *Three Boys Music*, 212 F.3d at 483. In short, there is no scienter requirement. *See id.* at 482–85. Instruction 42 stated as much.

The Thicke Parties argue that Instruction 42 was nonetheless inappropriate, because the issue of access was not at issue. Not so. First, the fact that the Thicke Parties conceded access to “Got To Give It Up” does not diminish the importance of access to the case. To the contrary, access remains relevant. Our inverse ratio rule provides that the stronger the showing of access, the lesser the showing of substantial similarity is required. *See id.* at 485.

Second, and dispositive here, the instructions as a whole make plain that a circumstantial case of copying requires not just access, but also substantial similarity. Instructions 28 and 41 provide that copying may be proven by demonstrating access plus substantial similarity.<sup>12</sup> Instruction 43 further underscores that the Gayes “must show that there is both substantial ‘extrinsic similarity’ and substantial ‘intrinsic similarity’ as to that pair of works.” Looking to the jury instructions as a whole, *see Dang*, 422 F.3d at 805, it is clear that the district court properly instructed the jury to find both access and substantial similarity.

In light of the foregoing, we conclude that the district court did not err in giving Jury Instruction 42.

## **2. Jury Instruction 43**

The Thicke Parties argue that Instruction 43 erroneously instructed the jury to consider unprotectable elements. Specifically, they contend that the district court instructed the jury that it “must consider” elements that they contend are not present in the deposit copy: “Theme X,” the descending bass line, and keyboard parts. Instruction 43 states, in pertinent part:

Extrinsic similarity is shown when two works have a similarity of ideas and expression as measured by external, objective criteria. To make this determination, you must consider the elements of each of the works and decide if they are

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<sup>12</sup> Instruction 28 provides: “The Gaye Parties may show the Thicke Parties copied from the work by showing by a preponderance of the evidence that the Thicke Parties had access to the Gaye Parties’ copyrighted work and that there are substantial similarities between the Thicke Parties’ work and original elements of the Gaye Parties’ work.” That the instruction uses the permissive “may” presents no problem. It simply reflects the fact that the Gayes may, but are not required to, prove copying by way of a circumstantial theory, rather than a direct one.

Instruction 41 provides: “If you conclude that the Thicke Parties had access to either or both of the Gaye Parties’ works before creating either or both of their works, you may consider that access in connection with determining whether there is substantial similarity between either or both pairs of works.” Instruction 41’s use of “may” is not problematic either. In line with our inverse ratio rule, the instruction permits the jury to consider access “in connection with” substantial similarity.

substantially similar. This is not the same as “identical.” There has been testimony and evidence presented by both sides on this issue, including by expert witnesses, as to such matters as: (a) for “Got to Give It Up” and “Blurred Lines,” the so-called “Signature Phrase,” hook, “Theme X,” bass melodies, keyboard parts, word painting, lyrics, [and] rap v. parlando .... The Gaye Parties do not have to show that each of these individual elements is substantially similar, but rather that there is enough similarity between a work of the Gaye Parties and an allegedly infringing work of the Thicke Parties to comprise a substantial amount.

First, the Thicke Parties take the word “must” out of context. Instruction 43’s use of the word “must” serves to underline the extrinsic test’s requirement that the jury compare the objective elements of the works for substantial similarity.

Second, Finell testified that “Theme X,” the descending bass line, and the keyboard parts are reflected in the deposit copy, while Wilbur testified to the contrary. The experts’ quarrel over what was in the deposit copy was a factual dispute for the jury to decide. Even if Instruction 43’s inclusion of contested elements could have led the jury to believe that the elements were in the deposit copy, and to consider them as protectable elements for purposes of the substantial similarity analysis, we cannot view Instruction 43 in isolation. In light of the jury instructions as a whole, we do not conclude that the district court’s listing of elements in Instruction 43 prevented the jury from making a factual determination of what was in the deposit copy.

The instructions on whole make clear that the jury could consider only elements in the deposit copy. Instruction 28 states that the Gayes bear “the burden of proving that the Thicke Parties copied original elements from the Gaye[s]’ copyrighted work.” Instruction 35, in turn, defines the Gayes’ copyrighted work. Instruction 35 informed jurors that at the time the copyright in “Got To Give It Up” was registered, “only written music could be filed by a copyright owner with the Copyright Office as the deposit copy of the copyrighted work.” In contrast, “[r]ecordings of musical compositions could not be filed with the Copyright Office at that time.” The district court cautioned the jurors to distinguish between the commercial sound recording of “Got To Give It Up” and the deposit copy, noting that “although [a] sound recording[ ] of ‘Got to Give It Up’ ... w[as] made and released commercially, th[e] particular recording[ ] [is] not at issue in this case, w[as] not produced into evidence, and w[as] not played for you during the trial.” What was at issue was “testimony from one or more witnesses from each side about what each thinks is shown on the deposit copy for each composition,” as well as “recorded versions of each work that each side has prepared based on what each side contends is shown in the deposit copy that was filed with the Copyright Office.” In short, the district court instructed the jurors that the deposit copy, not the commercial sound recording, was the copyrighted work in the case.

*Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197 (9th Cir. 1989), is not helpful to the Thicke Parties. In *Harper House*, we held that the district court erred in failing to give jury instructions that “adequately distinguish[ed] between protectable and unprotectable material.” 889 F.2d at 207–08. The copyrighted works at issue in *Harper House* were organizers, which receive “extremely limited protection” and are “compilations consisting largely of uncopyrightable elements,” such as “blank forms, common property, or utilitarian aspects.” *Id.* at 205, 207–08.

Suffice to say, musical compositions are not like organizers, and this case is easily distinguishable. The jury never heard the commercial sound recording. Elements indisputably present only in the sound recording, such as the use of cowbell and party noises, were never played at trial. Had that been the case, the district court would have had to instruct the jury to distinguish between elements in the commercial recording and elements in the deposit copy. Instead, the jury heard sound clips edited to capture elements that the experts testified were in the deposit copy. The question of which expert to believe was properly confided to the jury.

The district court did not err in giving Instruction 43.

### **B. The District Court Did Not Abuse its Discretion in Admitting Portions of Finell and Dr. Monson’s Testimony.**

We review the district court’s evidentiary rulings for abuse of discretion. *Wagner v. County of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013). The Thicke Parties contend that the district court abused its discretion in admitting portions of Finell and Dr. Monson’s expert testimony, arguing that they based their testimony on unprotectable elements. We disagree.

#### **1. Finell’s Testimony**

The Thicke Parties object only to three portions of Finell’s testimony: her testimony regarding “Theme X,” the descending bass line, and the keyboard parts. Finell testified that “Theme X,” the descending bass line, and the keyboard rhythms were in the deposit copy.

Finell was cross-examined for four hours. During cross-examination, Finell conceded that the notes of “Theme X” were not written on the sheet music, and she was questioned about her testimony that the notes of “Theme X” were implied in the deposit copy. She also acknowledged that the bass melody she presented at trial differed from that notated in the deposit copy. She was impeached with her deposition testimony, in which she admitted that the rhythm of the keyboard parts in the sound recording of “Got To Give It Up” is not notated in the deposit copy.

Wilbur disputed her testimony, opining that “Theme X,” the descending

bass line, and the keyboard rhythms are not contained in the deposit copy. The dispute boiled down to a question of whose testimony to believe. Both experts referenced the sound recording. Both experts agreed that sheet music requires interpretation.<sup>14</sup> The question of whose interpretation of the deposit copy to credit was a question properly left for the jury to resolve. *See Three Boys Music*, 212 F.3d at 485–86 (“We refuse to interfere with the jury’s credibility determination[.]”). Therefore, the district court did not abuse its discretion by permitting Finell’s testimony.

## **2. Dr. Monson’s Testimony**

The Thicke Parties argue that the district court abused its discretion in allowing Dr. Monson to play audio “mash-ups” superimposing Marvin Gaye’s vocals from “Got To Give It Up” onto the accompaniment in “Blurred Lines,” and vice versa. They argue that the “mash-ups” contained unprotectable elements, such as the keyboard parts, bass melodies, and Marvin Gaye’s vocals.<sup>15</sup>

This argument faces the same hurdle as the Thicke Parties’ objection to Finell’s testimony. Dr. Monson testified that there were structural similarities between the two songs at a sectional level and at a phrasing level, and used the “mash-ups” to demonstrate the songs’ shared harmonic and melodic compatibility. We have permitted similar expert testimony in the past. *Cf. Swirsky*, 376 F.3d at 845–47 (holding that district court erred in discounting expert’s testimony regarding structural similarities between two choruses). Dr. Monson was cross-examined on her opinion, and the jury was free to weigh her testimony as it saw fit.

Our decision in *Three Boys Music* confirms that the district court acted within its discretion. *Three Boys Music* was a 1909 Act copyright infringement case in which the jury heard not only a rendition of the deposit copy, *see* 212 F.3d at 486, but the complete commercial sound recording of the copyrighted song. Although the sufficiency of the deposit copy arose in the context of subject matter jurisdiction in *Three Boys Music*, our treatment of the issue lends support for our present conclusion. In *Three Boys Music*, the defendants argued that there were “inaccuracies in the deposit copy.” 212 F.3d at 486–87. While the plaintiffs’ expert

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<sup>14</sup> On cross-examination, Wilbur acknowledged that a lead sheet reflects a simplified version of a chord pattern in a composition, and that chord notation is merely representational.

Wilbur also acknowledged that she relied on her interpretation of what was contained within the lead sheet to create her recording of “Got To Give It Up.” She admitted that she made choices to deviate from the sheet music, and that her choices were informed by her musical training and knowledge. For example, despite the sheet music’s instruction to continue playing a bass line throughout the song, she chose not to do so in certain parts of the song, knowing that playing the bass line would clash with certain chords.

<sup>15</sup> Although the “mash-ups” used Marvin Gaye’s vocals, the parties have not disputed whether Marvin Gaye’s vocals were notated in the deposit copy.

testified that “the song’s essential elements” were in the deposit copy, the defendants argued that “the majority of the musical elements that were part of the infringement claim” were not in the deposit copy. *Id.* at 486. Despite the fact that the jury heard the complete sound recording, which differed from the deposit copy, we still upheld the jury’s verdict finding for the plaintiffs.<sup>16</sup> *Id.* at 486–87.

Here, the district court excluded the commercial sound recording of “Got To Give It Up” from trial, and vigilantly policed the admission of testimony throughout trial, repeatedly instructing counsel to ensure that the experts tethered their testimony to the sheet music. The district court did not abuse its discretion in admitting portions of the Gayes’ experts’ testimony.

### **C. The Verdict Was Not Against the Clear Weight of the Evidence.**

The Thicke Parties argue that the verdict is against the clear weight of the evidence, maintaining that there is no extrinsic or intrinsic similarity between the two songs.

We are bound by the “ ‘limited nature of our appellate function’ in reviewing the district court’s denial of a motion for a new trial.” *Lam*, 869 F.3d at 1084 (quoting *Kode*, 596 F.3d at 612). So long as “there was some ‘reasonable basis’ for the jury’s verdict,” we will not reverse the district court’s denial of a motion for a new trial. *Id.* (quoting *Molski*, 481 F.3d at 729). “[W]here the basis of a Rule 59 ruling is that the verdict is not against the weight of the evidence, the district court’s denial of a Rule 59 motion is virtually unassailable.” *Id.* (quoting *Kode*, 596 F.3d at 612). When that is the case, we reverse “only when there is an *absolute absence of evidence* to support the jury’s verdict.” *Id.* (quoting *Kode*, 596 F.3d at 612). “It is not the courts’ place to substitute our evaluations for those of the jurors.” *Union Oil Co. of Cal. v. Terrible Herbst, Inc.*, 331 F.3d 735, 743 (9th Cir. 2003). Of note, we are “reluctant to reverse jury verdicts in music cases” on appeal, “[g]iven the difficulty of proving access and substantial similarity.”<sup>17</sup> *Three Boys Music*, 212 F.3d at 481.

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<sup>16</sup> It appears that factfinders have listened to commercial sound recordings in other music copyright infringement cases governed by the 1909 Act. *See, e.g., Repp v. Webber*, 892 F.Supp. 552, 558 (S.D.N.Y. 1995) (“Having listened to the two songs at issue, however, the Court cannot say as a matter of law that they do not share any substantial similarities.”); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177, 180 (S.D.N.Y. 1976) (noting that the similarity between the songs “is perfectly obvious to the listener”), *aff’d sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *N. Music Corp. v. King Record Distrib. Co.*, 105 F.Supp. 393, 398 (S.D.N.Y. 1952) (“We have suffered through the playing of the commercial recordings.”).

<sup>17</sup> Our conclusion in *Three Boys Music* provides an example of the deference we must apply in reviewing the jury’s verdict. Although that case presented “a weak case of access and a circumstantial case of substantial similarity,” we held that “neither issue warrants reversal of the jury’s verdict.” 212 F.3d at 486.

The Thicke Parties face significant, if not unsurmountable, hurdles. First, we are generally reluctant to disturb the trier of fact's findings, and have made clear that "[w]e will not second-guess the jury's application of the intrinsic test." *Id.* at 485. Second, our review is necessarily deferential where, as here, the district court, in denying the Rule 59 motion, concluded that the verdict was not against the clear weight of the evidence. Finell testified that nearly every bar of "Blurred Lines" contains an area of similarity to "Got To Give It Up." Even setting aside the three elements that trouble the Thicke Parties ("Theme X," the bass line, and the keyboard parts), Finell and Dr. Monson testified to multiple other areas of extrinsic similarity, including the songs' signature phrases, hooks, bass melodies, word painting, the placement of the rap and "parlando" sections, and structural similarities on a sectional and phrasing level. Thus, we cannot say that there was an absolute absence of evidence supporting the jury's verdict.

We conclude that the district court did not abuse its discretion in denying the Thicke Parties' motion for a new trial.

#### **IV. The Awards of Actual Damages and Profits and the District Court's Running Royalty Were Proper.**

##### **A. The Award of Damages Was Not Based on Undue Speculation.**

We afford "great deference" to a jury's award of damages and will uphold the award "unless it is 'clearly not supported by the evidence' or 'only based on speculation or guesswork.'" *In re First All. Mortg. Co.*, 471 F.3d 977, 1001 (9th Cir. 2006) (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986)). We will uphold an award of hypothetical-license damages "provided the amount is not based on 'undue speculation.'" *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1088 (9th Cir. 2014) (quoting *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004) ). "The touchstone for hypothetical-license damages is 'the range of [the license's] reasonable market value.'" *Id.* (alteration in original) (quoting *Polar Bear Prods., Inc.*, 384 F.3d at 709)).

Here, the jury awarded the Gayes actual damages in the amount of 50% of the publishing revenues for "Blurred Lines." The Thicke Parties ask us to vacate the award of \$3,188,527.50 (remitted by the district court from the jury's original award of \$4 million), because it was based upon an unduly speculative hypothetical license rate of 50%. We disagree. ....

#### **CONCLUSION**

We have decided this case on narrow grounds. Our conclusions turn on the procedural posture of the case, which requires us to review the relevant issues



under deferential standards of review. For the foregoing reasons, we reverse the district court's entry of judgment against Harris and the Interscope Parties, and affirm the remainder of the district court's judgment, and its order denying attorney's fees and apportioning costs.

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART.

NGUYEN, Circuit Judge, dissenting:

The majority allows the Gayes to accomplish what no one has before: copyright a musical style. "Blurred Lines" and "Got to Give It Up" are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.

While juries are entitled to rely on properly supported expert opinion in determining substantial similarity, experts must be able to articulate facts upon which their conclusions—and thus the jury's findings—logically rely. Here, the Gayes' expert, musicologist Judith Finell, cherry-picked brief snippets to opine that a "constellation" of individually unprotectable elements in both pieces of music made them substantially similar. That might be reasonable if the two constellations bore any resemblance. But Big and Little Dipper they are not. The only similarity between these "constellations" is that they're both compositions of stars.

## I.

When a court, with the assistance of expert testimony, is able to determine substantial similarity (or lack thereof) under the extrinsic test, judgment must be given as a matter of law. *See Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010). If, for example, the defendant copied verbatim most of the plaintiff's work, then the plaintiff is entitled to a finding of substantial similarity as a matter of law. *See Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1232 (11th Cir. 2002) ("[E]ven a casual comparison of the two compositions compels the conclusion that the two compositions are practically identical."). Conversely, if the objective similarities between the two pieces are merely trivial, then a verdict for the plaintiff could not stand. *See Peters v. West*, 692 F.3d 629, 636 (7th Cir. 2012) (affirming dismissal of infringement suit where the two songs "share[d] only small cosmetic similarities"); *Newton v. Diamond ("Newton II")*, 388 F.3d 1189 (9th Cir. 2004) (affirming grant of summary judgment to defendants who appropriated a de minimis portion of the plaintiff's musical composition and used it throughout their own work).

The majority, like the district court, presents this case as a battle of the

experts in which the jury simply credited one expert's factual assertions over another's. To the contrary, there were no material factual disputes at trial. Finell testified about certain similarities between the deposit copy of the "Got to Give It Up" lead sheet and "Blurred Lines." Pharrell Williams and Robin Thicke don't contest the existence of these similarities. Rather, they argue that these similarities are insufficient to support a finding of substantial similarity as a matter of law. The majority fails to engage with this argument.

Finell identified a few superficial similarities at the "cell" level by focusing on individual musical elements, such as rhythm or pitch, entirely out of context. Most of these "short ... pattern[s]" weren't themselves protectable by copyright, and Finell ignored both the other elements with which they appeared and their overall placement in each of the songs. Her analysis is the equivalent of finding substantial similarity between two pointillist paintings because both have a few flecks of similarly colored paint. A comparison of the deposit copy of "Got to Give it Up" and "Blurred Lines" under the extrinsic test leads to only one conclusion. Williams and Thicke were entitled to judgment as a matter of law.

## II.

### A.

The purpose of copyright law is to ensure a robust public domain of creative works. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). While the Constitution authorizes Congress to grant authors monopoly privileges on the commercial exploitation of their output, *see* U.S. Const. art. I, § 8, cl. 8, this "special reward" is primarily designed to motivate authors' creative activity and thereby "allow the public access to the products of their genius." *Sony Corp.*, 464 U.S. at 429. Accordingly, copyrights are limited in both time and scope. *See* U.S. Const. art. I, § 8, cl. 8 (providing copyright protection only "for limited Times"); *Sony Corp.*, 464 U.S. at 432 ("This protection has never accorded the copyright owner complete control over all possible uses of his work."); *see also Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964) ("[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.").

An important limitation on copyright protection is that it covers only an author's expression—as opposed to the idea underlying that expression. *See* 17 U.S.C. § 102(a) ("Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression ... from which they can be perceived, reproduced, or otherwise communicated ..."); *id.* § 102(b) ("In no case does copyright protection ... extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in [the author's original] work."). Copyright "encourages others to build freely upon the ideas and information

conveyed by a work.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985) ).

The idea/expression dichotomy, as this principle is known, “strikes a definitional balance between the First Amendment and the Copyright Act.” *Bikram’s Yoga Coll. of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015) (quoting *Harper & Row*, 471 U.S. at 556) (alteration in *Harper & Row* omitted). Because “some restriction on expression is the inherent and intended effect of every grant of copyright,” *Golan v. Holder*, 565 U.S. 302, 327–28 (2012), the idea/expression dichotomy serves as one of copyright law’s “built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (citing *Harper & Row*, 471 U.S., at 560).

Such accommodations are necessary because “in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout.” *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (Story, J.)). Every work of art “borrows, and must necessarily borrow, and use much which was well known and used before.” *Id.* (quoting *Emerson*, 8 F. Cas. at 619); see 1 Melville D. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.05[B] (rev. ed. 2017) (“In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.”).<sup>11</sup> But for the freedom to borrow others’ ideas and express them in new ways, artists would simply cease producing new works—to society’s great detriment.

## B.

“Blurred Lines” clearly shares the same “groove” or musical genre as “Got to Give It Up,” which everyone agrees is an unprotectable idea. See, e.g., 2 William F. Patry, *Patry on Copyright* § 4:14 (2017) (“[T]here is no protection for a communal style ....”). But what the majority overlooks is that two works in the same genre must share at least some protectable expression in order to run afoul of copyright law.

Not all expression is protectable. Originality, the “*sine qua non* of

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<sup>1</sup> As an example, Williams and Thicke attempted to show the jury a video demonstrating how a common sequence of four chords serves as the harmonic backbone of innumerable songs. See Axis of Awesome, *4 Chord Song (with song titles)*, YouTube (Dec. 10, 2009) <https://www.youtube.com/watch?v=5pidokakU4I> (singing 38 popular songs over the same chord progression, ranging from “Let It Be” by the Beatles to “If I Were a Boy” by Beyoncé). “Blurred Lines” employs only two chords—the first two from this sequence. The district court prevented the jury from hearing this evidence. However, the court allowed the jury to hear mashups of “Blurred Lines” played together with “Got to Give It Up,” which the Gayes used to show that the two songs were harmonically similar.

copyright,” accommodates authors’ need to build on the works of others by requiring copyrightable expression to be “independently created by the author” and have “at least some minimal degree of creativity.” *Feist*, 499 U.S. at 345, 348. If an author uses commonplace elements that are firmly rooted in the genre’s tradition, the expression is unoriginal and thus uncopyrightable. *See id.* at 363.

Even original expression can be so intimately associated with the underlying idea as to be unprotectable. Under the doctrine of *scènes à faire*, “expressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law.” *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (citing *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983) ). The doctrine of merger provides that “where an idea contained in an expression cannot be communicated in a wide variety of ways,” the “idea and expression may merge ... [such] that even verbatim reproduction of a factual work may not constitute infringement.” *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 617 (9th Cir. 1996); *see also Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (“[S]imilarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market.” (quoting *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994) )).

The majority begins its analysis by suggesting that the Gayes enjoy broad copyright protection because, as a category, “[m]usical compositions are not confined to a narrow range of expression.” Maj. Op. at 1164. But the majority then contrasts this protected category as a whole with specific applications of other protected categories—the “page-shaped computer desktop icon” in *Apple Computer* (an audiovisual work) and the “glass-in-glass jellyfish sculpture” in *Satava* (a pictorial, graphic, and sculptural work)—that were entitled only to thin copyright protection due to the limited number of ways in which they could be expressed. That’s a false comparison. Under the majority’s reasoning, the copyrights in the desktop icon and glass jellyfish should have been broad. Like musical compositions, both audiovisual works and pictorial, graphic, and sculptural works can be expressed in myriad ways.

More importantly, “[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected.” *Feist*, 499 U.S. at 348. Application of the extrinsic test “requires breaking the [copyrighted and allegedly infringing] works down into their constituent elements, and comparing those elements for proof of copying as measured by substantial similarity.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004) (internal quotation marks omitted). “Because the requirement is one of substantial similarity to *protected* elements of the copyrighted work, it is essential to distinguish between the protected and unprotected material ....” *Id.* We then “apply the limiting doctrines, subtracting the unoriginal elements,” to determine how “broad” or “thin” the remaining copyright is. *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (citing *Apple Computer*, 35 F.3d at 1442).

The majority doesn't explain what elements are protectable in "Got to Give It Up," which is surprising given that our review of this issue is de novo. *See Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010). But by affirming the jury's verdict, the majority implicitly draws the line between protectable and unprotectable expression "so broadly that future authors, composers and artists will find a diminished store of ideas on which to build their works." *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1225 (11th Cir. 2008) (quoting *Meade v. United States*, 27 Fed.Cl. 367, 372 (Fed. Cl. 1992) ).

Worse still, the majority invokes the oft-criticized "inverse ratio" rule to suggest that the Gayes faced a fairly low bar in showing substantial similarity just because Williams and Thicke conceded access to "Got to Give It Up."<sup>33</sup> *See* Maj. Op. at 1163. The issue, however, isn't whether Williams and Thicke copied "Got to Give It Up"—there's plenty of evidence they were attempting to evoke Marvin Gaye's style. Rather, the issue is whether they took too much.

Copying in and of itself "is not conclusive of infringement. Some copying is permitted." *Newton II*, 388 F.3d at 1193 (quoting *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909) (Hand, J.)). Copying will only have legal consequences if it "has been done to an unfair extent." *Id.* (quoting *West Publ'g*, 169 F. at 861). In determining liability for copyright infringement, the critical and ultimate inquiry is whether "the copying is substantial." *Id.*

Requiring similarities to be substantial is of heightened importance in cases involving musical compositions. Sound recordings have "unique performance elements" that must be "filter[ed] out ... from consideration." *Newton II*, 388 F.3d at 1194. Thus, the range of musical expression is necessarily more circumscribed when music is written down than when it is performed. "Given the limited number of musical notes (as opposed to words in a language), the combination of those notes and their phrasing, it is not surprising that a simple composition of a short length might well be susceptible to original creation by more than one composer." *Calhoun*, 298 F.3d at 1232 (footnote omitted).

### III.

The Gayes don't contend that every aspect of "Blurred Lines" infringes "Got to Give It Up." Rather, they identify only a few features that are present in both works. These features, however, aren't individually protectable. And when

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<sup>3</sup> *See* 4 Nimmer & Nimmer, *supra*, § 13.03[D] (discussing "[t]he flawed proposition that powerful proof of access can substitute for demonstration of the requisite degree of substantial similarity"); 3 Patry, *supra*, § 9:91 ("The inverse ratio theory confuses fundamental principles of infringement analysis: access is relevant only in establishing the act of copying, not in establishing the degree thereof. Once copying is established, access is irrelevant and the inquiry shifts to the final stage of the infringement analysis, material appropriation. At that stage, substantial similarity is the sole issue." (footnote omitted)).

considered in the works as a whole, these similarities aren't even perceptible, let alone substantial.

Musical compositions are expressed primarily through the building blocks of melody, harmony, and rhythm.<sup>4</sup> See *Newton v. Diamond* (“*Newton I*”), 204 F.Supp.2d 1244, 1249 (C.D. Cal. 2002) (citing 3 Nimmer & Nimmer, *supra*, § 2.05[D] ); Randel, *supra*, at 481 (“The whole of music is often informally divided into three domains: melody, harmony, and rhythm.”); see generally Aaron Copland, *What to Listen for in Music* 33–77 (McGraw–Hill 1957). The deposit copy of “Got to Give it Up” employs these components through a melodic line, an introductory bass line, and chord indications, with the additional feature of lyrics.

The melodic line and the associated lyrics are notated throughout the deposit copy. The bass line is notated for only the first eight measures, at the end of which the phrase “bass simile” indicates that the bass line should continue in a similar manner. As is typical of a lead sheet, the chords are not expressed with individual notes indicating pitch and duration. Rather, the chords are described by name (e.g., “A7” for a chord containing the pitches A, C#, E, and G) at places in the song where the harmony changes.

## **A. Alleged Melodic Similarities**

### **1. The “Signature” Phrase**

Finell dubbed a 10–note melodic sequence in the deposit copy the “Signature Phrase.” She argued that it corresponded to a 12–note sequence in “Blurred Lines,” notwithstanding that “no two notes have the same pitch, rhythm and placement,” as the district court correctly observed.

Finell identified four similar elements, none of which is protectable: (a) each phrase begins with repeated notes; (b) the phrases have three identical pitches in a row in the first measure and two in the second measure; (c) each phrase begins with the same rhythm; and (d) each phrase ends on a melisma (one word sung over multiple pitches).

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<sup>4</sup> Of course, these aren't the only elements through which a musical idea can be expressed in tangible form. See *Swirsky*, 376 F.3d at 848–49. Other elements include tempo (the speed at which a composition is played), dynamics (the volume of sound), and instrumentation. See *id.* Many elements can be broken down into constituent elements. For example, melody is a sequence of pitches played successively; harmony is a group of pitches played simultaneously; and a chord progression is a sequence of harmonies. See Don Michael Randel, *The New Harvard Dictionary of Music* 366, 481–82 (1986). The analysis will generally focus on the most relevant subset of elements, which depends on the nature of the music at issue. See *Swirsky*, 376 F.3d at 849. Finell did not compare the songs' overall harmonies because she felt “that wasn't the most important similarity.”



### a. Repeated Notes

The Signature Phrase begins in “Got to Give It Up” with a note repeated four times. In “Blurred Lines,” it begins with a note repeated twice, followed by a different note, followed by the first note.<sup>66</sup> The use of repeating notes is obviously not original to “Got to Give It Up.” Finell repeatedly used the song “Happy Birthday to You” and the opening to Beethoven’s Fifth Symphony as musical examples. Each of these famous melodies from the nineteenth century begins with repeated notes. Therefore, the use of repeated notes is not protectable.

### b. Pitch Similarity

Although the Signature Phrase starts on different pitches in each piece, Finell identified three consecutive ascending pitches that were the same in both pieces, and two consecutive descending pitches that were the same. She believed this similarity to be the most important.

In assessing the similarity of two pieces of music, it’s important to keep in mind “the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music.” *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) (citing *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936)). Substantial similarity “must extend beyond themes that could have been derived from a common source or themes that are so trite as to be likely to reappear in many compositions.” *Id.* at 1068–69 (citing *Selle v. Gibb*, 741 F.2d 896, 905 (7th

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<sup>66</sup> Finell attempted to minimize the significance of the third note in “Blurred Lines” moving to a neighboring pitch rather than repeating. However, she previously testified that the neighboring pitch—a sharp second scale degree (indicated “#2” in her exhibit)—was a “broken rule” that “stands out.” Thus, the most prominent note in the four-note sequence in “Blurred Lines” is the one that differs from the corresponding sequence in “Got to Give It Up.”

Cir. 1984) ).

Three consecutive pitches is just the sort of common theme that will recur in many compositions.<sup>77</sup> We have not yet addressed whether three pitches are protectable as a matter of law. While “a single musical note would be too small a unit to attract copyright protection ..., an arrangement of a limited number of notes can garner copyright protection.” *Swirsky*, 376 F.3d at 851. Thus, we held in *Swirsky* that a melody of seven notes is not unprotectable as a matter of law. *Id.* at 852.

In *Newton II*, we considered a three-note musical phrase that the defendants sampled (*i.e.*, copied exactly) from the sound recording of a copyrighted musical composition and used repeatedly throughout their work. Although we did not decide whether this six-second segment was original enough to be protected, we held that “no reasonable juror could find [it] to be a quantitatively or qualitatively significant portion of the [four-and-a-half-minute] composition as a whole.” *Newton II*, 388 F.3d at 1195. The district court reached the originality issue. In a “scholarly opinion,” it ruled that the three-note phrase—even in combination with the background musical elements—was insufficiently original to warrant copyright protection. *Id.* at 1190; *see Newton I*, 204 F.Supp.2d at 1253 (“Many courts have found that nearly identical or more substantial samples are not susceptible to copyright protection.”).

The two- and three-note melodic snippets at issue here, taken in isolation from their harmonic context, are even less original than the three-note segment at issue in *Newton*. When played, each snippet lasts less than a second in a composition that lasts over four minutes. They are not individually protectable.

### **c. Rhythmic Similarity**

The first measure of the Signature Phrase in both works begins with a rhythm of six eighth notes. A bare rhythmic pattern, particularly one so short and common, isn’t protectable. *See Batiste v. Najm*, 28 F.Supp.3d 595, 616 (E.D. La. 2014) (“[C]ourts have been consistent in finding rhythm to be unprotectable.”); *N. Music Corp. v. King Record Distrib. Co.*, 105 F.Supp. 393, 400 (S.D.N.Y. 1952) (“[O]riginality of rhythm is a rarity, if not an impossibility.”); *see also Berlin*, 329

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<sup>77</sup> There are only 12<sup>3</sup> or 1,728 unique combinations of three notes, and many of them are unlikely to be used in a song. *See Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940) (per curiam) (“[W]hile 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.”). Finell testified that it’s “unusual” to use the five notes that fall between the seven notes of the scale. Demand for unique three-note combinations would quickly exhaust their supply. In 2016 alone, the Copyright Office registered over 40,000 sound recordings. *See United States Copyright Office, Fiscal 2016 Annual Report* 17.



F.2d at 545 (“[W]e doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.”). Here, the rhythmic pattern lasts approximately 1.5 seconds and consists of an eighth note repeated without any variation. Similar patterns are found in numerous other works. This element, devoid of its melodic and harmonic context, lacks any originality.

#### **d. Melisma**

The final syllable of the lyrics in each phrase spans multiple pitches—three in “Got to Give It Up” and two in “Blurred Lines.” Melisma, however, is “a common musical technique” and, as such, unprotectable. *McDonald v. West*, 138 F.Supp.3d 448, 458 (S.D.N.Y. 2015). Use of melisma on the final syllable of a lyrical phrase is particularly “basic and commonplace.” *Id.* (involving melisma on the final syllable of “We made it in America”). For example, any time one sings “Happy Birthday” to a person with a one-syllable name, the person’s name is sung as a two-note melisma at the end of the phrase “Happy Birthday, dear \_\_\_\_\_.”

#### **e. The Signature Phrases as a Whole Are Not Substantially Similar**

Even when each element is not individually protectable, “[t]he particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element,” *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002). Here, as Finell concedes, the Signature Phrase has “very few notes,” lasting less than four seconds. Therefore, even assuming that the Signature Phrase as a whole is protectable, its protection is thin.

There is very little similarity between the two songs’ Signature Phrases. Both melodies rise and fall. But they begin and end on different pitches. The highest, longest, most stressed pitch in each phrase is different—in “Blurred Lines,” this pitch is consonant with the underlying harmony; in “Got to Give It Up,” it is dissonant. One phrase has 10 notes; the other, 12. The five identical pitches in each of the phrases have different rhythmic placement within the measure and therefore receive different stress. And only two of these identical pitches have similar underlying harmonies.<sup>88</sup> The harmony changes halfway through the Signature Phrase in “Blurred Lines” but remains the same in “Got to Give It Up.” The lyrics in each phrase are different. The Signature Phrase occurs in different places within each piece. In “Got to Give It Up,” the Signature Phrase is the very

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<sup>88</sup> In “Got to Give It Up,” the entire Signature Phrase is harmonized to an A7 chord. In “Blurred Lines,” the first measure is harmonized to an E chord while the second measure is harmonized to an A chord. Seventh chords, such as A7, have the same three pitches as their underlying triads—here, an A chord—plus an additional pitch. See Copland, *supra*, at 66–67, 105 S.Ct. 471. Finell explained that the unique pitch in a seventh chord “add[s] an extra color” to the harmony.

first phrase sung. In “Blurred Lines,” the Signature Phrase is not sung until 28 seconds later—after several lines of verse.

The various unprotected elements identified by Finell don’t even coincide with one another in that short, four-second snippet. And her narrow focus on these elements ignored the different harmonies in each phrase. “To pull these elements out of a song individually, without also looking at them in combination, is to perform an incomplete and distorted musicological analysis.” *Swirsky*, 376 F.3d at 848.<sup>9</sup>

Given the lack of similarities between the Signature Phrases, there is no basis to conclude that they are substantially similar. “The most that can be said is that the two segments bear some relation to one another within a finite world of melodies. Given the limited musical vocabulary available to composers, this is far from enough to support an inference of [infringement].” *Johnson v. Gordon*, 409 F.3d 12, 22 (1st Cir. 2005).

## 2. The “Hook” Phrase

Finell describes the Hook Phrase as the four melodic pitches in “Got to Give It Up” sung to the lyrics “keep on dancin’.” She opined that “Blurred Lines” has similar Hook Phrases in two different places: one is the four pitches in the Signature Phrase sung to the lyrics “take a good girl”; the other is the five pitches sung to the lyrics “I hate these blurred lines.”

There are basic conceptual problems with Finell’s analysis. She describes the same four pitches in “Blurred Lines” as being similar to two unrelated phrases in “Got to Give It Up”—the Signature Phrase and the Hook Phrase. It is difficult to see how anything original in each of these two different phrases could be distilled into the same four-note phrase in “Blurred Lines.”

In any event, the Hook Phrase in the deposit copy lacks sufficient originality to be protected. Its sequence of four pitches, lasting 2.5 seconds, is common. For example, Beyoncé, Jennifer Hudson, and Anika Noni Rose memorably sang it to the lyrics, “We’re your dreamgirls.” See Henry Krieger & Tom

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<sup>9</sup> The majority fundamentally misunderstands *Swirsky* on this point. See Maj. Op. at 1181–82. *Swirsky* did not hold that two works sharing multiple unprotected elements in disparate places are extrinsically similar. Were that the case, the entire Western canon would be extrinsically similar, since all of this music contains the same twelve individually unprotected notes. The difference between *Swirsky* and this case is that in *Swirsky*, there was a coincidence of the unprotected elements (chord progressions, rhythm, and pitch sequence) within each song that occurred at the same relative place (the chorus) in both. See *Swirsky*, 376 F.3d at 848. Here, Finell examined the various elements in isolation, which is precisely what we criticized in *Swirsky*. See 376 F.3d at 848 (“[N]o approach can completely divorce pitch sequence and rhythm from harmonic chord progression, tempo, and key ....”).

Eyen, *Dreamgirls* measures 25–26 (Universal–Geffin Music 1981).



Hook Phrase in "Got to Give It Up"



Hook Phrase in "Blurred Lines"



Hook Phrase in "Dreamgirls"

Even if the Hook Phrase pitches were protectable, there is no substantial similarity between its expression in the two songs. See *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936) (Hand, J.) (“The first phrase of the infringing chorus consists of the same four notes as the first phrase of the copyrighted song; that particular sequence can be found in several earlier musical pieces and its spontaneous reproduction should be no cause for suspicion.”).

At most, three of the four pitches are the same,<sup>10</sup> and the different pitch is sung to what Finell described as the “money words” on “the strongest beat.” The phrase’s rhythms and underlying harmonies are different. Moreover, the phrases are sung at different places in each song. In “Got to Give It Up,” the Hook Phrase is sung at the end of part 1 in a fade out. In “Blurred Lines,” it is sung as the chorus in the middle of the song.

### 3. Theme “X”

Theme X refers to another four-note melodic sequence. In the deposit copy, Theme X is sung to the lyrics “Fancy lady.” In “Blurred Lines,” it is first sung to the lyrics “If you can’t hear.” Like the Hook Phrase, Theme X is both unprotectable and objectively dissimilar in the two songs.



Theme X in "Got to Give It Up"

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<sup>10</sup> Finell cited two examples of the Hook Phrase in “Blurred Lines,” but they share only the last two pitches of their four- and five-note sequences. These two shared pitches are both tonic notes, which Finell described as “very common” in melodies.



Theme X in "Blurred Lines"



Theme X in "Happy Birthday to You"

The pitches and rhythm of Theme X in the deposit copy are identical to those sung to "Happy Birthday" and numerous other songs. None of the Theme X pitches in the deposit copy are the same as in "Blurred Lines." To see any correspondence between the two four-note sequences, one would have to shift and invert the pitches, a feat of musical gymnastics well beyond the skill of most listeners. Where short and distinct musical phrases require such contortions just to show that they are musically related, there is no basis to find them substantially similar. *See Johnson*, 409 F.3d at 22; *see also Arnstein*, 82 F.2d at 277.

The harmonies accompanying Theme X also differ between "Got to Give It Up" and "Blurred Lines." Structurally, Theme X appears in completely different places in the two songs. In the deposit copy, it repeats several times in succession near the end of the piece. In "Blurred Lines," it is the very first line of verse near the beginning of the song and repeats periodically throughout the song.

## **B. Other Alleged Similarities**

### **1. Keyboard Parts**

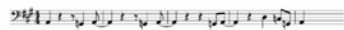
Finell testified that the keyboard parts in "Got to Give It Up" (meaning the chords and their rhythms played over the bass line) had "many important similarities" to those in "Blurred Lines." However, there are no keyboard parts in the deposit copy. Finell explained that a lead sheet is essentially "musical shorthand for musicians," who "would understand how [the keyboard parts are] to be played." But because "[a] sound is protected by copyright law only when it is 'fixed in a tangible medium,'" *Newton II*, 388 F.3d at 1194 (quoting 17 U.S.C. § 102(a)), the deposit copy's unwritten keyboard parts are not protected expression.

To the extent the chord indications sufficiently express the keyboard parts, there is no substantial similarity between the two works. "Blurred Lines" contains only two chords throughout the entire piece—an A chord and an E chord—that alternate every four measures. The deposit copy contains neither of these chords. The chords it does contain—A7, D7, E7, B7, Dm7, and Am7—change in a much more irregular pattern. For example, the first 16 measures have a sustained A7 harmony, and the next 8 measures change harmonies every measure.

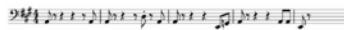
### **2. Bass Line**

Finell opined that the bass melodies in “Got to Give It Up” and “Blurred Lines” are similar. However, when comparing them, she showed the jury the version of the “Got to Give It Up” bass line that she had transcribed from the sound recording. Because several notes were different in the deposit copy, her testimony on this issue was of questionable value. *See Newton II*, 388 F.3d at 1196. It’s also doubtful that the unexpressed portions of the baseline beyond the first eight measures of the deposit copy are sufficiently fixed in a tangible medium to warrant protection.

Even assuming the implied bass line in the deposit copy is sufficiently fixed, it’s the type of expression that is so standard in the genre that it merges with the idea and is therefore unprotectable in and of itself. *Cf. Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F.Supp. 473, 474 (N.D. Ill. 1950) (concluding that bass line was not copyrightable where it was “mechanical application of a simple harmonious chord”). Any thin protection that might lie in the “Got to Give It Up” bass line would not support a finding of substantial similarity between these two bass lines given their different notes, harmonies, and rhythms.



Bass Line in “Got to Give It Up” (Deposit Copy)



Bass Line in “Blurred Lines”

The only similarity between the bass lines is that they repeat the note A in most of the measures. However, in “Got to Give It Up” the note is syncopated so that it sounds before the downbeat in the second, third, and fourth measures, whereas in “Blurred Lines” the note is played on the downbeat. Moreover, the note A is the root of the chord in each song (A7 in “Got to Give It Up,” A in “Blurred Lines”). As the expert for Williams and Thicke testified without contradiction, it is commonplace for the root of a chord to appear in a bass line because it establishes the chord.

### 3. Word Painting, Parlando, and Lyrics

Word painting and parlando are common devices.<sup>11</sup> As Finell acknowledged, word painting has “been used for many centuries,” and parlando has been employed for “many years before ... rap was used as an art form.” The deposit copy’s use of these techniques in the abstract is not protectable expression, and there is no evidence that the specific applications of these techniques in the two pieces are similar. To say these two songs are substantially similar because they employ devices common to songwriting would be like saying two songs are substantially similar because they both have guitar solos in the middle even though

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<sup>11</sup> Word painting is a compositional technique in which the music can be used to illustrate the words in the lyrics, such as setting the word “higher” to an ascending melody. Parlando is spoken word or rap in the middle of a song.

the solos themselves bear no resemblance. Similarly, lyrical themes about liberation and sexual activity are not protectable in the abstract. *See Edwards v. Raymond*, 22 F.Supp.3d 293, 301 (S.D.N.Y. 2014) (citing *Feist*, 499 U.S. at 344–45); *see also Peters*, 692 F.3d at 636.

### **C. Overall Lack of Similarity**

Even considering all of these individually unprotectable elements together, *see Metcalf*, 294 F.3d at 1074, there is no evidentiary basis to conclude that the two works are substantially similar. *See Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1040 (5th Cir. 2015) (finding no similarity where “the alleged compositional similarities running between the songs in their entirety, *i.e.*, their melodies, rhythmic patterns, lyrical themes, and instrumental accompaniment, were either common to the ... genre or common in other songs”).

The two pieces have different structures. Finell acknowledged that “Got to Give It Up” lacks a chorus whereas “Blurred Lines” has a “pretty common structure for a popular song” in that it consists of a verse, pre-chorus, and chorus. The two songs’ harmonies share no chords.

The discrete elements identified by Finell don’t occur at the same time within the musical theme or phrase in each piece. And with the exception of *parlando*, the various themes and phrases she identified don’t occur in corresponding places in each piece. Thus, whether considered micro- or macroscopically, “Got to Give It Up” and “Blurred Lines” are objectively dissimilar. Williams and Thicke are entitled to judgment as a matter of law.

### **IV.**

The majority insists that the verdict is supported by the evidence but tellingly refuses to explain what that evidence is. Instead, it defends its decision by arguing that a contrary result is impossible due to Williams and Thicke’s purported procedural missteps. *Maj. Op.* at 1178–83. While the procedural mechanism for granting relief is beside the point given the majority’s holding, there’s no such obstacle here.

I agree that we normally are not at liberty to review the district court’s denial of summary judgment after a full trial on the merits. *See Ortiz v. Jordan*, 562 U.S. 180 (2011). This rule makes eminent sense. Once a trial has concluded, any issues relating to the merits of the parties’ dispute “should be determined by the trial record, not the pleadings nor the summary judgment record.” *Id.* at 184 (quoting 15 Alan Charles Wright et al., *Federal Practice & Procedure* § 3914.10 (2d ed. 1992 & Supp. 2010)). However, there is little difference between reviewing a summary judgment ruling and a jury verdict other than the source of the factual record, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986), and here there are no material factual disputes. A completed trial does not prevent us from

reviewing the denial of summary judgment “where the district court made an error of law that, if not made, would have required the district court to grant the motion.” *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014).

The majority conveniently ducks any review of the evidence by mischaracterizing the facts as “hotly disputed,” Maj. Op. at 1178–79, and accusing me of “act[ing] as judge, jury, and executioner,” *id.* at 47, by “weigh[ing] the experts’ credibility, resolv[ing] factual conflicts, and set[ting] forth [my] own findings on the extrinsic test,” *id.* at 53. But my “musicological exegesis,” *id.* at 48, concerns evidence of extrinsic similarity that *Finell* presented at trial. No one disputes that the two works share certain melodic snippets and other compositional elements that *Finell* identified. The only dispute regarding these similarities is their legal import—are the elements protectable, and are the similarities substantial enough to support liability for infringement? *See Mattel*, 616 F.3d at 914 (“We review de novo the district court’s determination as to the scope of copyright protection.” (citing *Ets–Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000))); *Benay*, 607 F.3d at 624 (“Substantial similarity is a fact-specific inquiry, but it ‘may often be decided as a matter of law.’ ” (quoting *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006) )).

By characterizing these questions as a factual dispute among experts, the majority lays bare its misconception about the purpose of expert testimony in music infringement cases. As with any expert witness, a musicologist can’t opine on legal conclusions, including the ultimate question here—substantial similarity. *See Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008); Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 Fordham L. Rev. 127, 138 (1988) (“[E]xpert analysis is not relevant to the determination of substantial similarity of expression of ideas.”); *see also Swirsky*, 376 F.3d at 851 (“[A] musicologist is not an expert on what the term ‘idea’ means under the copyright laws.”). Her role is to identify similarities between the two works, describe their nature, and explain whether they are “quantitatively or qualitatively significant in relation to the composition as a whole,” *Newton II*, 388 F.3d at 1196. The value of such testimony is to assist jurors who are unfamiliar with musical notation in comparing two pieces of sheet music for extrinsic similarity in the same way that they would compare two textual works.

This result would never stand in copyright cases involving works in other media. We “frequently” conclude as a matter of law that two works of language or visual art fail the extrinsic test for substantial similarity. *Benay*, 607 F.3d at 624 (quoting *Funky Films*, 462 F.3d at 1077); *see, e.g., Briggs v. Sony Pictures Entm’t, Inc.*, No. 14-17175, 714 Fed.Appx. 712, 2018 WL 1099694, at \*1 (9th Cir. Mar. 1, 2018) (screenplays); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018) (photograph); *Silas v. Home Box Office, Inc.*, No. 16-56215, 713 Fed.Appx. 626, 2018 WL 1018332 (9th Cir. Feb. 22, 2018) (television show); *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768 (9th Cir. 2018) (drawing); *Mintz v. Subaru of Am.*,

*Inc.*, No. 16-16840, 716 Fed.Appx. 618, 2017 WL 6331141 (9th Cir. Dec. 12, 2017) (advertising image and phrase); *Edwards v. Cinelou Films*, 696 Fed.Appx. 270 (9th Cir. 2017) (film); *Heusey v. Emmerich*, 692 Fed.Appx. 928 (9th Cir. 2017) (screenplay and film); *Braddock v. Jolie*, 691 Fed.Appx. 318 (9th Cir. 2017) (novel and film); *Basile v. Twentieth Century Fox Film Corp.*, 678 Fed.Appx. 576 (9th Cir. 2017) (stories and film); *Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062 (9th Cir. 2016) (video game), *cert. denied*, --- U.S. ----, 138 S.Ct. 422, 199 L.Ed.2d 323 (2017); *see also Mattel*, 616 F.3d at 917–18 (vacating jury determination of substantial similarity between dolls). This case should be no different.

## V.

The Gayes, no doubt, are pleased by this outcome. They shouldn't be. They own copyrights in many musical works, each of which (including "Got to Give It Up") now potentially infringes the copyright of any famous song that preceded it.

That is the consequence of the majority's uncritical deference to music experts.

Admittedly, it can be very challenging for judges untrained in music to parse two pieces of sheet music for extrinsic similarity. But however difficult this exercise, we cannot simply defer to the conclusions of experts about the ultimate finding of substantial similarity. While experts are invaluable in identifying and explaining elements that appear in both works, judges must still decide whether, as a matter of law, these elements collectively support a finding of substantial similarity. Here, they don't, and the verdict should be vacated.

I respectfully dissent.