# No. 15-56880

**Nos. 16-55089, 16-55626 (consolidated)**

==========

**IN THE**

## UNITED STATES COURT OF APPEALS

**FOR THE NINTH CIRCUIT**

---

PHARRELL WILLIAMS, ET. AL.,

*Plaintiffs-Appellants-Cross-Appellees,*

v.

FRANKIE CHRISTIAN GAYE, ET AL.,

*Defendants/Appellants-Cross-Appellants,*

---

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

==========

**BRIEF OF *AMICUS CURIAE* MUSICOLOGISTS IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES' PETITION FOR REHEARING EN BANC**

**Date of Decision: March 21, 2018**

**Judges: M. Smith Jr., Murguia, and Nguyen**

==========

**Kenneth D. Freundlich**
**FREUNDLICH LAW**
**16133 Ventura Blvd. Ste. 645**
**Encino, CA 91436**
**(310) 275-5350**

**April 23, 2018**

## IDENTITY OF AMICI

This brief of amici curiae is submitted on behalf of the following persons or entities:

| | |
|---|---|
| Nicole Biamonte, PhD<br>Associate Professor of Music Theory<br><br>Schulich School of Music<br>McGill University<br>Montreal, Canada<br><br>Editor-On-Chief, Music Theory Online | John Covach, PhD<br>Professor of Music Theory<br>Chair, The College Department of Music Director, Institute for Popular Music Mercer Brugler Distinguished Teaching Professor<br><br>The College Department of Music,<br>University of Rochester |
| Charles Cronin, PhD<br>B.M., J.D., M.A., Ph.D. (musicology)<br><br>M.I.M.S. (Masters, Information Management & Systems)<br><br>Lecturer in Law, University of Southern California Law School | Robert Fink, PhD<br>Professor IV<br>Department of Musicology<br>Chair, Music Industry Program<br>Vice-Chair of the Faculty<br><br>UCLA Herb Alpert School of Music<br>Professor in Humanities<br>UCLA |
| Michael Harrington, D.M.A.<br>Professor and Course Author<br>Berklee College of Music / Berklee Online<br>Boston, Massachusetts<br><br>Music Business Program Faculty Chair<br><br>SAE Institute of Technology<br>Nashville | Brad Osborn, Ph.D.<br>Assistant Professor of Music Theory<br><br>University of Kansas School of Music<br>Murphy Hall 332 |

| | |
|---|---|
| André O. Redwood, PhD<br>Independent Scholar<br><br>As of September 2018<br><br>Assistant Professor of Music Theory<br>University of Albany, SUNY | Eleanor Selfridge-Field, PhD<br>Consulting Professor, Music<br>541 Lasuen Mall<br>Braun Music Center #129<br><br>Stanford University<br>Stanford, CA 94305-3076, USA |
| Mark Spicer, Ph.D.<br>Professor of Music<br><br>Hunter College and the Graduate Center<br>City University of New York | Robert Walser, PhD.<br>Professor of Music<br><br>Case Western Reserve University<br>Cleveland Heights, OH |

## CORPORATE DISCLOSURE STATEMENT

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

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

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

Dated: April 23, 2018 **FREUNDLICH LAW**

s/ Kenneth D. Freundlich
Kenneth D. Freundlich

*Attorneys for Amici Curiae*

# TABLE OF CONTENTS

**Page**

INTEREST OF AMICI CURIAE ..... 1
ARGUMENT ..... 1
I. The Alleged Similarities Do Not Rise to the Level of Actionable Infringement as a Matter of Law ..... 1
a. Musical Works are Susceptible to Straightforward Comparison ..... 3
b. There is No Substantial Similarity Between the Melodies ..... 4
i. An Accurate Comparison of the "Signature Phrases" of BLURRED and GIVE (As Follows) Demonstrates That They Are Dissimilar ..... 6
c. The Melodic "Hooks" of GIVE and BLURRED Are Dissimilar ..... 9
d. The Two Theme "X" Phrases – a Finell-Identified Four Note Sequence – Are Entirely Dissimilar ..... 10
e. The Bass Lines of GIVE and BLURRED are Not Similar ..... 10
II. The Panel Majority's Decision Upholding an Instruction to the Jury that Access could be Considered in Connection with Determining Actionable Similarity Was Wrong and Musical Nonsense ..... 11
III. Conclusion ..... 15

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)(C) AND CIRCUIT RULE 32-1 ..... 16
CERTIFICATE OF SERVICE ..... 17

# TABLE OF AUTHORITIES

**Page(s)**

## Cases

*Arc Music Corp. v. Lee*,
296 F. 2d 186 (2d Cir. 1961) ..... 14

*Eaton v. NBC*,
972 F. Supp. 1019 (E.D. Va. 1997) ..... 14

*Peters v. West*,
692 F. 3d 629 (7th Cir. 2012) ..... 14

*Rentmeester v. Nike, Inc.*,
883 F.3d 1111 (9th Cir. 2018) ..... 13, 14, 15

## Miscellaneous

4 Melville D. Nimmer & David Nimmer, Nimmer on Copyright 13.03[D] (rev. ed 2017) ..... 13

3 William F. Patry, *Patry on Copyright* §9:91 (2017) ..... 13

## INTEREST OF AMICI CURIAE

Amici are musicologists and music theorists who research, teach and write about music and music composition. Amici believe that the panel majority's decision to affirm the verdict below should be reviewed *en banc* because (i) that verdict below is based on a demonstrably erroneous finding of musical similarity between the disputed songs, and (ii) because the District Court's instructions to the jury improperly established a lower standard of substantial similarity for well-known and widely distributed hit songs, based on the access evidence in this case, under the so-called "inverse ratio rule."

Amici further submit that *en banc* review is urgently needed because of the overwhelming importance of the outcome of this case for the sustained vibrancy of the American popular music industry. If allowed to stand, the panel's decision will unquestionably cast a pall on this industry, and specifically will inhibit songwriters at their core, given the threat of far-fetched claims of infringement bolstered by speculative and misleading musical testimony like that presented by the Gaye Parties in this case.

## ARGUMENT

### I. The Alleged Similarities Do Not Rise to the Level of Actionable Infringement as a Matter of Law

Judge Nguyen, in her dissent, meticulously analyzed the musical evidence presented below concluding that GIVE[1] and BLURRED[2] are not objectively similar as a matter of law under the extrinsic test

[1] GIVE is "Got to Give It Up" composed by Marvin Gaye.
[2] BLURRED is "Blurred Lines" composed by Pharrell Williams, Robin Thicke, and Clifford Harris, Jr.

*because they differ in melody, harmony and rhythm*. Slip op. 57. Amici agree with Judge Nguyen that parsing two pieces of music to determine extrinsic similarity may be difficult. Slip op. 84. Here, however, as Judge Nguyen has demonstrated, this difficulty can be surmounted by a straightforward comparison of the notated music without consideration of the partisan advocacy of the paid experts.

In this case there was no dispute as to the evidence and its sufficiency. From the record below, it is apparent that Judge Kronstadt failed in his gatekeeping role simply because the Court was faced with competing experts. Amici urge that the fact that the experts disagreed is not an appropriate basis on which to determine whether a case should go to a jury. Simply put, if two pieces of music share no similarities in melody, harmony or rhythm, as was the case here, Amici, like Judge Nguyen, believe such a case should have been disposed of by summary judgment and never proceeded to trial.[3]

Amici encourage this Court, *en banc,* to undertake a review of the music in this case, like Judge Nguyen's, to decide whether, as a matter of law, a comparison of the two songs could possibly support a finding of substantial musical similarity. Otherwise, this decision will stand as precedent in this Circuit, that to withstand summary judgment, plaintiffs may simply retain experts to flood the record with technical

[3] Amici express no opinion as to the procedural issues raised by the panel majority, only to say that the result in this case, with both district court and the panel majority failing to undertake any objective review of the music, is a musicological travesty creating a chilling effect on songwriters due to the uncertainty of where the Court will draw the line of creative expression versus permissible influence.

jargon and deceptive information to confuse the Court and have the matter sent to an equally confused jury.

Amici's previous brief detailed why BLURRED and GIVE are not objectively similar. Certain portions of that brief bear repetition as this Court considers whether to grant *en banc* review:

**a. Musical Works are Susceptible to Straightforward Comparison**

Musical notation is as straightforward as the visual recording of any form of expression. Sections of the sheet music for BLURRED and GIVE were the bases of the Gaye Parties' musicologists' testimony, and these were the bases for Judge Nguyen's detailed analysis of the two pieces of music.

The fundamental elements of musical works are melody, harmony and rhythm, which can be precisely recorded in symbolic notation. There is only one way to notate a melody, rhythm and harmony. The GIVE Deposit Copy, for example, which Judge Nguyen referred to and analyzed in her dissent, uses standard musical notation which includes: (i) a staff (five horizontal parallel lines), (ii) vertical lines (or "bar lines" that divide the horizontal staff lines into "measures"), (iii) a key signature (three sharps ("#" signs) at the beginning of each piece), (iv) a time signature (4/4 here), (v) musical notes (circles with or without duration-indicating stems), (vi) rests (to indicate silences), and (vii) letters and numbers above the staff to indicate the chord symbols (in which several notes are played simultaneously to create harmony). The same is true for the BLURRED sheet music.

In both BLURRED and GIVE, there are four quarter note beats to each measure (indicated by a 4/4 at the outset of each piece of sheet

music). By definition, this means that a whole note (open circle with no stem-) lasts for four beats in the measure, a half note (open circle with a stem-) lasts for two beats in the measure, a quarter note (blackened circle with a stem-) lasts for one beat in the measure, an eighth note (blackened circle, stem with a flag for one eighth note-, and two stems connected by a horizontal beam for more than one eighth note in succession-) lasts for one half a beat, and a sixteenth note (an eighth note with two flags- or parallel beams connecting two such notes-) lasts for a quarter of a beat. These are the rhythmic building blocks of all 4/4 melodies which both GIVE and BLURRED are.

**b. <u>There is No Substantial Similarity Between the Melodies of the Two Songs</u>**

Melody is typically the most distinctive and memorable musical aspect of a popular song because that is what listeners can most readily comprehend, recall and replicate. Melodic lines comprise pitches sounded for particular durations. No one should be permitted to claim to own a three or four-note sequence, or a mere rhythmic pattern, without reference to the particular pitches, their durations, and their metric placements[4] in the measures. That would be equivalent to allowing writers to own commonplace verbal expressions or even words, or for visual artists to have ownership of certain colors or commonly used shapes. It is only the combination of pitches and rhythms that

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

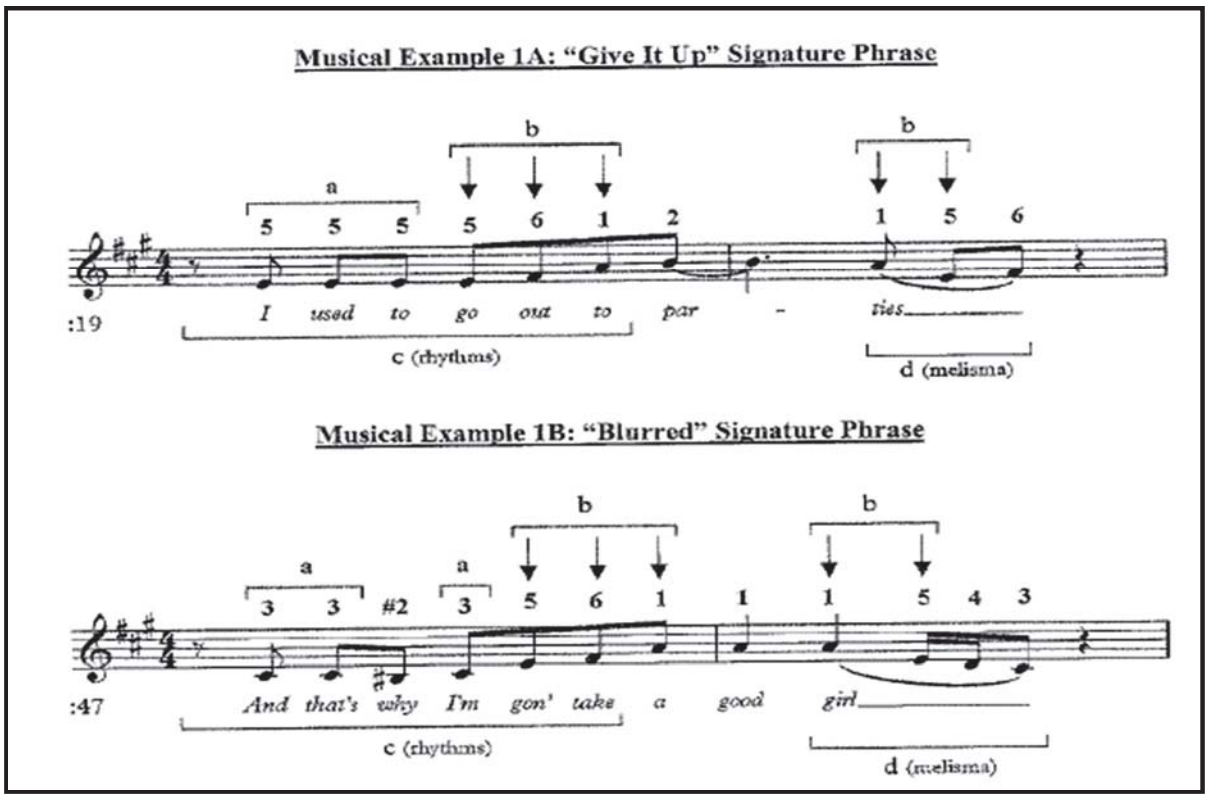
constitutes melody, and just a few pitches in a particular rhythmic pattern are unlikely to constitute protectable original melodic expression. Pitch sequences should never be analyzed without regard to their duration and their placement within a musical phrase.

If the melodies of two songs are dissimilar, no other musical parameter (harmony, instrumentation, dynamics, etc.) can render them similar. Accordingly, songs with identical chord progressions but different melodies are fundamentally different works. Likewise, the same pitches set to a different rhythm result in a different melody.

Judge Nguyen understood this fundamental truth when she reviewed the "Alleged Melodic Similarities." *Id.* at 66-76. Not one of the so-called similarities Ms. Finell identified is protectable musical expression – repeated notes, pitches in a row, rhythmic similarity at the outset of a phrase and the existence of a melisma – nor are they protectible as a "constellation".

The chart of Trial Exhibit 376-3 was also referred to in Amici's brief to the panel and supports Judge Nguyen's conclusion that all elements of the Gaye Parties' expert's (Judith Finell) alleged melodic similarities are commonplace and *de minimis* and therefore unprotectable. Moreover, every one of these elements are demonstrably dissimilar, as is apparent from a straightforward reading the notation on the page.

### i. An Accurate Comparison of the "Signature Phrases" of BLURRED and GIVE (As Follows) Demonstrates That They Are Dissimilar




The alleged "repeated notes" of the "signature phrase" are the 5-5-5-5- in GIVE versus the 3-3-#2-3 in BLURRED.[5] These are not only different notes in the scale (3 versus 5) but there are only two notes repeated in BLURRED versus four in GIVE. Simply repeating notes

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

like this should not be protectible in any event. And the #2 itself is a critical color note that is missing from the BLUR sequence.

Finell's analysis of "pitch similarity"' relied entirely on her selective analysis of bits and pieces of three sets of note sequences without regard to their placement in the measures, a distortion which Judge Nguyen laid bare in her comparison of the two charts. Ms. Finell even posited that the phrases are similar simply because: "both songs repeat their starting tones". ER 2048, ER 122. In fact, as the chart demonstrates, the starting tones of the two signature phrases are different, they repeat a different number of times, and these phrases are set to different harmonic progressions (chords) and lyrics. *Even if* both songs had identical starting tones, such a commonality would have no probative significance whatever on the question of musical similarity. There are innumerable works in every musical genre whose melodies open with repeating tones, like those of "Happy Birthday", "Baa Baa Black Sheep", "Yankee Doodle", and the opening of Beethoven's 5th Symphony, to name a few.

Ms. Finell's isolated similarities of *de minimis* pitch sequences – the 5-6-1 sequence and the 1-5 sequence she calls "b" have no probative import on the issue of musical similarity. These *de minimis* sequences comprise utterly commonplace melodic kernels found in innumerable works across music genres for centuries.

The most distinctive melodic element of the "signature phrase" in GIVE is its ascent to the second step of the scale (the darkened circle on the third line under Ms. Finell's "2"). This ascent does not occur in the "signature phrase" of BLURRED. The note following the 5-6-1 phrase in BLURRED (the darkened circle on the second space in Ms. Finell's

chart) is not only different from GIVE but is also shorter in duration than the corresponding portions of BLURRED (one with the dot after the darkened circle and one without) and therefore bears no musical relationship to the compared note in GIVE.

Regarding any alleged rhythmic similarity, Finell also argued similarity by comparing short rhythmic phrases that occur at different times in the songs at issue. For instance, this Court can see for itself that the placement of these sequences in the two pieces is different signifying different points of each song.

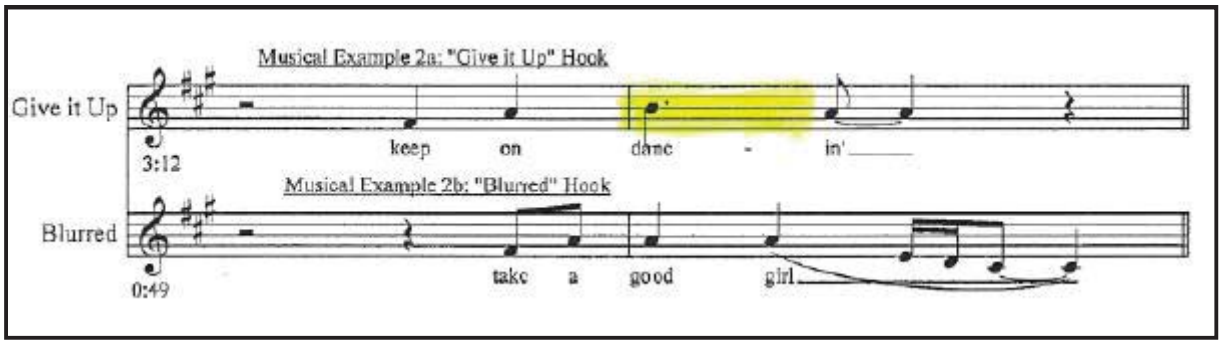
Finally, the two "melismas"[6] at the end of the "signature phrases" in GIVE (the second half of the word "parties") and BLURRED (the word "girl") are simply dissimilar in terms of their metric placement, melodic profile, and pitch content.

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

[6] Melismas are notes sung to the same syllable of text.

### c. The Melodic "Hooks" of GIVE and BLURRED Are Dissimilar

The melodic "hooks" of the songs are illustrated as follows:




ER 2142, ER 125.

One can *visually see* striking differences between these two phrases. First, the two notes in the first measure of each occur at different beats in the measure - the first two notes of BLURRED, which are eighth notes, occur on beat four of the first measure of this example (the notes are preceded by a half note rest and a quarter note rest which take up the first three beats of the measure); the first two notes of GIVE, on the other hand, occur on beats three and four respectively (the notes are preceded simply by a half note rest taking up the first two beats of the measure). This is a stark and critical difference in the two "hooks".

Moreover, there are critical differences between first note in the second measure of each (the pitch occurring on the first beat of measure two of GIVE with is the quarter note with a dot after it on the middle line of the staff) versus the pitch occurring on the first beat of BLURRED (the quarter note on the second space of the staff). These

different notes are of different durations (on a dotted quarter note and one a simple quarter note) which results in phrases that sound completely different.

Finally, as can be seen from examination of the chart, the notes following the first note in the second measure are different and occur at different places in the measure.

These differences significantly affect the characters of the two "hooks" and render them dissimilar.
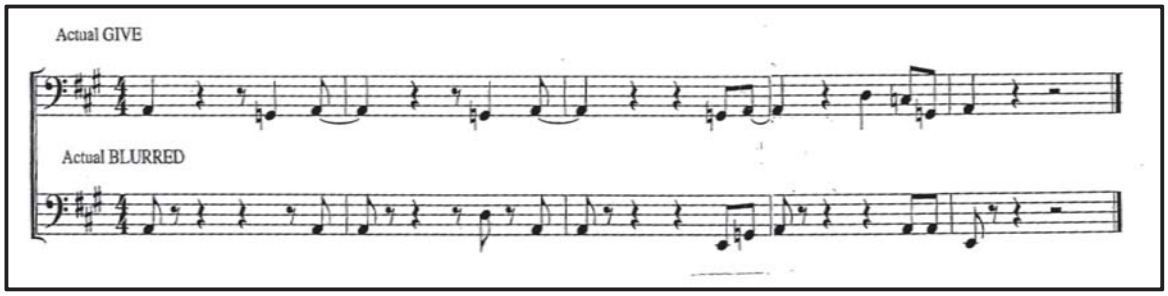
**d. The Two Theme "X" Phrases – a Finell-Identified Four Note Sequence – Are Entirely Dissimilar**

Judge Nguyen's dissent is musicologically correct. The phrases exemplified in the snippets of music Judge Nguyen displayed in her dissent, slip op. 75-76, make it plain that the notes are different in each, and it is also apparent from a review of these notes in a larger context as they appear at entirely different places in the two songs.

**e. The Bass Lines of GIVE and BLURRED are Not Similar**

Introductory bass lines in popular music commonly center on the "tonic" pitch to establish in the listener's ear the harmonic "home" of the music that follows. This pitch becomes the harmonic base of the song. Accordingly, any song in the key of A will typically open with that pitch in the bass line and repeat that pitch many times in the bass line, sometimes just before the first beat of a measure, and sometime on the first beat itself. Here, both songs open with bass lines on the tonic note A, which is commonplace and has no significance whatever on the question of substantial similarity.

The differences in these two base lines is apparent from a review of the sheet music itself displayed one on top of the other:




One can also *visually see* the striking difference here. The syncopated fragments comprising these two bass lines correspond neither rhythmically nor in pitch sequence and are clearly dissimilar. For instance, in GIVE, the last bass note of the first three measures occurs in the third measure and is "tied" (by the curved line across the bar) to the first quarter note of the following measure. This "tie" extends the duration of the single note that is tied (i.e. not reiterated). In BLURRED, on the other hand, in the parallel location there are two untied and therefore separate bass notes, one in the last beat of the third measure and one on the downbeat of one in the succeeding measure. This difference between the metric placement of these notes is extremely significant because it results in two bass lines very dissimilar both sonically and musically.

## II. The Panel Majority's Decision Upholding an Instruction to the Jury that Access could be Considered in Connection with Determining Actionable Similarity Was Wrong and Musical Nonsense

Jury Instruction 41, which told the jury it may consider access "in connection with" substantial similarity, wrongly misled the jury into

believing that, given conceded access here, they did not have to find "substantial" similarity but similarity of some lesser degree. This errant jury instruction is another independent basis to overturn this verdict.

The so-called "inverse-ratio rule" was misapplied by the panel majority to lower the standard for proof of actionable substantial similarity for songs with widespread distribution. But whether or not a person had access to another's work is irrelevant to whether two pieces of music are "substantially similar" and the jury instruction making access a possible factor in this analysis was wrong.[7] Indeed, the panel majority's misapplication of the rule would give every hit song more protection than a lesser known song (less proof of similarity required for infringement) simply because an alleged infringer is presumed to have access to a hit song with more exposure on terrestrial radio and its digital equivalents.

The Ninth Circuit's application of the "inverse ratio rule" has a checkered history. *See* slip op. 64 n. 30**.** But the panel majority's blanket statement that the stronger the showing of access, the lesser the showing of substantial similarity is required, is just plain wrong. *See id*. at 26. Because the dispositive issue here was whether the Thicke Parties unlawfully appropriated GIVE, the jury should have been instructed to disregard access, which was presumed here, in analyzing

[7] Amici submit that the "inverse ratio rule" making access relevant to substantial similarity analysis makes little sense, if it ever did, in this digital era when consumers and artists have access to everything through a myriad of online channels (i.e. Apple Music, Spotify, and YouTube).

substantial similarity, and not the opposite as Jury Instruction 41 instructed. The Ninth Circuit has recently clarified this point in *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018), where the Court held that the degree of access should have no effect on the determination of whether the alleged or proven copying constitutes "unlawful appropriation," *id.*, and therefore copyright infringement:

> "The substantial similarity standard represents copyright law's attempt 'to strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement.' (citation omitted). **That balance does not shift depending on how strong the plaintiff's proof of access may be**."

*Id.* (emphasis added)

Judge Nguyen's dissent makes this key point, citing to eminent copyright scholars who have roundly (and correctly) criticized letting proof of access have <u>any</u> effect regarding proof of actionable similarity. Slip op. 64 n. 30 (citing 4 Melville D. Nimmer & David Nimmer, *Nimmer on Copyright* 13.03[D] (rev. ed 2017) (discussing "[t]he flawed proposition that powerful proof of access can substitute for demonstration of the requisite degree of substantial similarity"), 3 William F. Patry, *Patry on Copyright* §9:91 (2017) ("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.")

This so-called "inverse-ratio rule" that access somehow bears on substantial similarity has also been rejected in other circuits. *See e.g., Peters v. West*, 692 F. 3d 629, 634 (7th Cir. 2012), *Arc Music Corp. v. Lee*, 296 F. 2d 186 (2d Cir. 1961), *Eaton v. NBC*, 972 F. Supp. 1019, 1026 n.12 (E.D. Va. 1997).

The panel majority's ratification of Jury Instruction 41 which permitted the jury to consider the degree of access (which was conceded here) in its determination of substantial similarity, conflicts with this Court's well-reasoned *Rentmeester* decision, the wisdom of copyright scholars, Courts outside this Circuit, and musicological pedagogy. Especially in light of the importance of this issue and the panel's departure from *Rentmeester*, *en banc* review is therefore warranted.

## III. Conclusion

Amici urge *en banc* review here because, (i) Judge Nguyen's strong and reasoned dissent is the benchmark for the required objective review that Judge Kronstadt failed to do under this Court's "extrinsic test", (ii) Jury Instruction 41 improperly injected the notion of the degree of access to lower the bar for determining substantial similarity (thereby contradicting this Court's well-reasoned *Rentmeester* decision), and (iii) the panel's decision, if allowed to stand, will set the dangerous precedent of allowing for speculative musical analyses to taint the forthright "analytic dissection" of two musical works by a District Court in a music copyright infringement lawsuit, chilling musical creativity.

Dated: Encino, California
April 23, 2018

Respectfully submitted,

s/ Kenneth D. Freundlich

Kenneth D. Freundlich
FREUNDLICH LAW
16133 Ventura Blvd., Suite 645
Encino, California, 91436

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

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 3,375 words.

DATED: July 23, 2018 FREUNDLICH LAW

s/ Kenneth D. Freundlich
Kenneth D. Freundlich

*Attorneys for Amici Curae*

## CERTIFICATE OF SERVICE

I, Kenneth D. Freundlich, a member of the Bar of this Court, hereby certify that on April 23, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kenneth D. Freundlich