COPYRIGHT
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CLASS 11: SUBSTANTIAL SIMILARITY ANALYSIS:
THE SPECIAL CASE OF COPYING IN MUSIC
Class Outline

- Contemporary substantial similarity analysis in music
Copyright Infringement Analysis

Preliminary inquiries: Do we have a registered, copyrighted work, and do we know (without dispute) who the author(s) is? If the answer to both is “yes”…

(1) Copying-in-Fact asks whether there was actual copying; i.e. is there evidence of access (+ smell test for similarity; in 2\textsuperscript{nd} Circuit, this is called “probative similarity”; in other circuits, it’s often erroneously referred to as “substantial similarity”). In the 9\textsuperscript{th} Circuit, this is where the judge will conduct their “extrinsic” analysis//the 2\textsuperscript{nd} will “filter out unprotectable elements”//the 6\textsuperscript{th} will “abstract” copyrightable elements only, then…

(2) Off to the jury for Copying-in-Law, which asks if the copying was improper. This is done by conducting a (true, actual) substantial similarity analysis. The 9\textsuperscript{th} Circuit calls this the “intrinsic” test//in all circuits, it is essentially a “lay observer/lay listener” standard (supposedly; experts have entered the picture).
GQ: What’s the origin story behind your new single "Blurred Lines"?

Robin Thicke: Pharrell and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye’s "Got to Give It Up." I was like, "Damn, we should make something like that, something with that groove." Then he started playing a little something and we literally wrote the song in about a half hour and recorded it. The whole thing was done in a couple hours—normally, those are the best ones. Him and I would go back and forth where I’d sing a line and he’d be like, "Hey, hey, hey!" We started acting like we were two old men on a porch hollering at girls like, "Hey, where you going, girl? Come over here!" That’s why, in the video, we’re doing all these old men dances. It was great.
<table>
<thead>
<tr>
<th>Clip 1</th>
<th>Clip 2</th>
<th>Clip 3</th>
<th>Clip 4</th>
<th>Clip 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Got to Give It Up</td>
<td>Blurred Lines</td>
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</tbody>
</table>
Finell:

1. Signature phrase in main vocal melodies
2. Hooks
3. Hooks with backup vocals
4. Core theme, or “Theme X”
5. Backup hooks
6. Bass melodies
7. Keyboard parts
8. Unusual percussion choices
“copyright “does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes.”
Otherwise unprotectable individual elements may be protectable in combination if they are found to be:

1. Numerous enough; and

2. Arranged in a sufficiently original manner.
Dark Horse vs Joyful Noise

Dark Horse hook

[Music notation]

Dark Horse verse

[Music notation]

Joyful noise hook

[Music notation]