

1 KING, HOLMES, PATERNO & BERLINER, LLP  
HOWARD E. KING, ESQ., STATE BAR NO. 77012  
2 STEPHEN D. ROTHSCHILD, ESQ., STATE BAR NO. 132514  
ROTHSCHILD@KHPBLAW.COM  
3 SETH MILLER, ESQ., STATE BAR NO. 175130  
MILLER@KHPBLAW.COM  
4 1900 AVENUE OF THE STARS, 25<sup>TH</sup> FLOOR  
LOS ANGELES, CALIFORNIA 90067-4506  
5 TELEPHONE: (310) 282-8989  
FACSIMILE: (310) 282-8903

6 Attorneys for Plaintiffs and Counter-  
7 Defendants PHARRELL WILLIAMS,  
ROBIN THICKE and CLIFFORD  
8 HARRIS, JR. and Counter-Defendants  
9 MORE WATER FROM NAZARETH  
PUBLISHING, INC., PAULA MAXINE  
10 PATTON individually and d/b/a  
HADDINGTON MUSIC, STAR TRAK  
11 ENTERTAINMENT, GEFFEN  
RECORDS, INTERSCOPE RECORDS,  
12 UMG RECORDINGS, INC., and  
UNIVERSAL MUSIC DISTRIBUTION

13 UNITED STATES DISTRICT COURT

14 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

15 PHARRELL WILLIAMS, an  
individual; ROBIN THICKE, an  
16 individual; and CLIFFORD HARRIS,  
JR., an individual,

17 Plaintiffs,

18 vs.

19 BRIDGEPORT MUSIC, INC., a  
20 Michigan corporation; FRANKIE  
CHRISTIAN GAYE, an individual;  
21 MARVIN GAYE III, an individual;  
NONA MARVISA GAYE, an  
22 individual; and DOES 1 through 10,  
inclusive,

23 Defendants.

CASE NO. CV13-06004-JAK (AGRx)  
Hon. John A. Kronstadt, Ctrm 750

**PLAINTIFFS AND COUNTER-  
DEFENDANTS' REPLY IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT OR, IN  
THE ALTERNATIVE, PARTIAL  
SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date: October 20, 2014  
Time: 8:30 a.m.  
Ctrm: 750

Action Commenced: August 15, 2013  
Trial Date: February 10, 2015

24 AND RELATED COUNTERCLAIMS.  
25

26  
27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**INTRODUCTION**

The notes do not lie. They are not the same here. Defendants’ expert, Judith Finell, testifies that substantial extrinsic similarity turns on the songs having a “series” of notes with a “high degree of similarity” in pitch, duration, and placement. [Declaration of Judith Finell (“Finell Decl”), 5:7-12, ¶¶ 22-24.] Ms. Finell does not dispute Sandy Wilbur’s transcriptions, or her analysis of the pitch, duration, and placement of the notes, or Ms. Wilbur’s conclusions (among others) that there are no two consecutive notes with the same pitch, duration, and placement in BLURRED and GIVE. [See generally, Finell Decl.] Ms. Finell concedes as she must that the mere *idea* of repeating a starting tone, using a cowbell, an open hi-hat, a melisma, etc., is (a) not original and (b) irrelevant to similarity. Ideas are not protectable. The *expression* of those ideas is what matters. Here, it is different.

That Robin Thicke claimed in the press to having been inspired by Marvin Gaye is irrelevant. Plaintiffs are huge Marvin Gaye fans. They do not deny access to GIVE. Even if Thicke’s statements were true, however, it would not matter. It is not infringement to be inspired by another song or even to imitate its ideas. Indeed, promoting this type of inspiration is the fundamental purpose of the Copyright Act.

The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ ... To this end, copyright assures authors the right to their original expression, but **encourages others to build freely upon the ideas and information conveyed by a work.**

*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–350, 111 S.Ct. 1282, 1289–1290, 113 L.Ed.2d 358 (1991)(emphasis added)(citation omitted).

It is only infringement when the (a) **original** (b) **expression** of another artist’s work, as fixed in a tangible medium, is copied. There is no copying here. As shown in the Motion, there is no substantial extrinsic similarity between the songs. The Court should grant the Motion for one reason: the songs are not the same.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

II.

ARGUMENT

**A. Defendants’ Right to Sue Is Limited to Material In the Copyright Deposit**

Defendants attempt to distinguish the authorities cited in the Motion (pp. 6-8) by citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9<sup>th</sup> Cir. 2000). In *Three Boys*, the defendants argued that the court lacked jurisdiction over the entire case because the deposit copy sheet music differed from the sound recording of the song. The Ninth Circuit affirmed jurisdiction, finding that the plaintiff’s musicologist had “testified that the deposit copy included all of the song’s essential elements such as the title, hook, chorus.” *Id.* at 486 (emphasis added). The court held, *inter alia*, that “any inaccuracies in the deposit copy were minor and do not bar an infringement action.” *Id.* at 486-87. But Plaintiffs/Counter-Defendants here do not argue that the Court lacks jurisdiction over the entire case, and *Three Boys* does not address the scope of copyright at issue in the Motion. [See Motion, 6-8 (citing *Shady Records, Inc. v. Source Enterprises, Inc.*, 2005 WL 14920 (S.D.N.Y. January 3, 2005)).]

*Three Boys* holds that “minor” inaccuracies in the deposit copy will not deprive the court of jurisdiction over the lawsuit. Here, alleged **Similarities 3, 4, 5, 6C, 7, and 8** are not contained in the GIVE Copyright Deposit. [Counter-Claimants Joint Statement of Genuine Disputes (“CC Stmt”), Fact 14.] The Copyright Deposit here does not contain “all essential elements.” *Three Boys*, 212 F.3d at 486-87.

Defendants also attempt to distinguish *Shady Records* on grounds that it was decided under the 1909 Copyright Act, and that the 1978 Act has different deposit copy provisions. In *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9<sup>th</sup> Cir. 1998), the court considered the requirement for a deposit copy under the 1978 Copyright Act and held that a “bona fide copy” of the original work is required, and that it must be “virtually identical” to the original. *Id.* at 1212 (citing *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1322 (9<sup>th</sup> Cir. 1986)). This comports with the holding in *Three Boys* allowing only for “minor” inaccuracies. Neither case holds that, even if many

1 essential elements are not included in the deposit copy, those elements still are  
2 registered for protection under the Act: if that were true, why require any deposit?

3 In *Lucky Break Wishbone Corp. v. Sears, Roebuck & Co.*, 2007 WL 4561124  
4 (W.D. Wash. Dec. 18, 2007), the court noted that *Three Boys* did not address the  
5 “bona fide” copy issue, *id.* at \*1 fn. 1, and held that the plaintiff could not sue over  
6 a version of its work that it had not submitted with the deposit copy. *Id.* at \*1; *see*  
7 *also Amini Innovation Corp. v. Anthony California, Inc.*, 2004 WL 5545445 at \*6  
8 (C.D.Cal. Dec. 3, 2004)(registration limited to sculpture described in application).

9 At a minimum, Defendants are not entitled to the presumption of validity  
10 afforded a copyright registration (17 U.S.C. § 410(c)) with respect to any elements  
11 not contained in their Copyright Deposit. *Express, LLC v. Fetish Group, Inc.*, 424  
12 F.Supp.2d 1211, 1219 (C.D. Cal. 2006)(“The Court finds that the scope of the  
13 registered copyright is relevant to the scope of the presumption of validity”); *M & D*  
14 *Int’l Corp. v. Chan*, 901 F.Supp. 1502, 1510 (D. Hawaii 1995) (“A more modest  
15 application of this principle ... would deprive a plaintiff ... of the presumption ...  
16 where the exemplar of the allegedly infringed ... work differs from the version  
17 depicted in ... [the deposit copy] alleged to confer copyright protection”).

18 Here, Defendants put on no evidence that any of the musical elements in  
19 Similarities 3, 4, 5, 6C, 7, and 8 are original to GIVE and *not* contained in prior art.  
20 [See Counter-Claimants’ Joint Evidence (“CCJE”).] Without the presumption of  
21 validity, Defendants have not met their burden to show that the alleged Similarities  
22 are original and subject to protection. *Express, LLC*, 424 F.Supp.2d at 1219.

23 **B. There Is No Disputed Material Fact: The Notes Speak for Themselves**

24 Defendants put on no evidence to dispute the accuracy of the transcriptions in  
25 the Wilbur Declaration or her analysis of the pitches, durations, placement, chords,  
26 and rhythms in each of the alleged eight Similarities. There is no dispute as to what  
27 the notes are in each song. [See generally, CCJE, CCJS, Finell Decl.] As patiently  
28 explained by Ms. Wilbur in her Declaration, the pitch, duration, and placement of

1 notes in the alleged Similarities are not the same and often not original to GIVE.

2 Defendants’ transparent efforts to create factual disputes by purporting to  
3 “dispute” every Fact in the Separate Statement [*see generally* CC Stmt] or object to  
4 Wilbur’s Declaration in toto do not merit a response. Defendants submit no  
5 evidence to contradict the undisputed Facts or the accuracy of Wilbur’s analysis.

6 Defendants argue that Ms. Wilbur’s methodology is supposedly improper  
7 because—God forbid—she breaks down each alleged Similarity by its notes (pitch,  
8 duration, and placement), chords, and prior art to determine what original elements,  
9 if any, are similar. In conducting its analytic dissection, the Court likewise should  
10 consider each undisputed Fact and confirm for itself that—despite the clearly biased,  
11 unsupported conclusions of Ms. Finell—Defendants submit no evidence to remotely  
12 challenge Ms. Wilbur’s neutral analysis of the extrinsic aspects of the two songs.

13 Ms. Finell’s forty-one page Declaration contains not a single transcription.  
14 The reason is obvious: transcriptions reveal how different the notes are. The few  
15 transcriptions in the Declaration of Irene Monson (“Monson Decl”) in fact support  
16 Plaintiffs—*e.g.*, by showing that the cowbell parts in both songs are generic Latin  
17 rhythms and not original or protectable [Monson Decl, 4-6, ¶¶ 24-29], and by  
18 illustrating (unintentionally, no doubt) the facially obvious difference in the notes.

19 **C. There Is No Substantial Similarity to Any Series of Notes in GIVE**

20 “A musical composition consists of rhythm, harmony, and melody, and it is  
21 from these elements that originality is to be determined.” *Newton v. Diamond*, 204  
22 F.Supp.2d 1244, 1249 (C.D. Cal. 2002). “A musical composition captures an  
23 artist’s music in written form.” *Id.* A composition is reflected by written notes.

24 Ms. Finell agrees: “A song is traditionally defined by its vocal melodies  
25 (pitch and rhythm), harmonies, lyrics, and structure.” [Finell Decl, 7:12-13, ¶ 30.]

26 Ms. Finell admits that, for substantial similarity, it is the similar notes that matter:

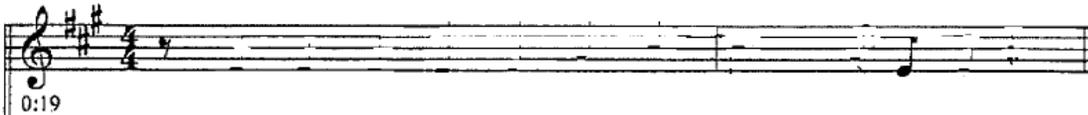
27 The hierarchy of factors in assessing compared melodies for  
28 substantial similarity is:

- 1 A. Similar series of pitches
- 2 B. Similar series of durations within similar pitches
- 3 C. Similar rhythmic placement (positioning) within similar series of pitches and durations.

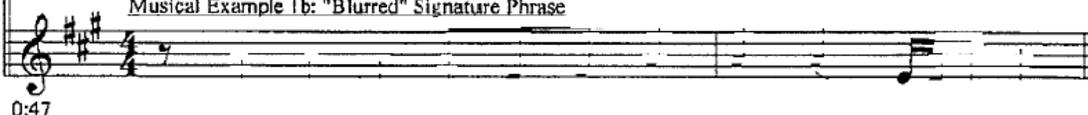
4 [Finell Decl, 5:10-15, ¶ 23.] “[I]f two melodies do not contain a *high degree*  
 5 *of similar pitches ... in a similar rhythm,*” then placement in the measure does  
 6 not matter because the melodies are not similar. [Finell Decl, 5:17-19, ¶ 24.]

7 Alleged Similarity 1 (Signature Phrases): It is undisputed that: (a) an accurate  
 8 transcription of the Signature Phrases is at ¶ 84 of the Wilbur Decl; (b) there is not a  
 9 single note with the same pitch, duration, and placement in each Phrase; (c) there is  
 10 only one note with the same pitch and duration (but not placement); (d) the chords  
 11 are different; and (e) the seventh note of GIVE is a 2<sup>nd</sup> scale degree, held for two  
 12 beats and thus emphasized, that does not appear in BLURRED. [CC Stmt, Facts 23-  
 13 25.] That each Phrase repeats its starting tone, contains a melisma, etc., are just  
 14 *ideas*. [*Id.*] Extrinsic similarity requires similarity of *expression*. *Sony Pictures*  
 15 *Entertainment, Inc. v. Fireworks Entertainment Group, Inc.*, 156 F.Supp.2d 1148,  
 16 1157 (C.D. Cal 2001). The first four notes of GIVE are e-e-e-e; for BLURRED,  
 17 they are c#-c#-b#-c#. The notes are played over different chords: E in BLURRED;  
 18 A7 in GIVE. Beethoven’s Fifth Sympony (da-da-da-dum) repeats its starting tone.  
 19 [Finell Decl, 8:18-20, ¶ 36.] Repeating a starting tone is a mere *idea*. As another  
 20 example, the very commonplace pitch sequence 5-6-1 occurs at a different place in  
 21 the measure in each two-measure Phrase, and occurs over different chords, and  
 22 preceded and followed by different notes. [CC Stmt, Facts 28-30.] Below is the  
 23 transcription of the two Signature Phrases, which is undisputed [Stmt, Fact 24], but  
 24 with all the notes that undisputedly are not the same pitch and placement whited out:

25 Musical Example 1a: "Give it Up" Signature Phrase

26 Give it Up 

27 Musical Example 1b: "Blurred" Signature Phrase

28 Blurred 

1 Alleged Similarity 2 (Hooks): The transcription of the Signature Phrases is  
 2 set forth at ¶ 143 of the Wilbur Decl. There is no dispute that: (a) the notes have  
 3 different duration and placement; (b) the chords are different; (c) the third note of  
 4 the four-note GIVE hook is a 2<sup>nd</sup> scale degree that is **held and emphasized** (“keep  
 5 on **danc**—ing”) and that does not appear in BLURRED. [CC Stmt, Facts 36-37.]  
 6 There is no note with the same pitch, duration, and placement in the measure, as can  
 7 be seen visually in the undisputed transcription below. [CC Stmt, Facts 36-37.]

8 **Musical Example 2a: "Give it Up" Hook**

9 Give it Up 3:12  
 keep on danc - in' \_\_\_\_\_

10 **Musical Example 2b: "Blurred" Hook**

11 Blurred 0:49  
 take a good girl \_\_\_\_\_

12 [Stmt, Fact 36 (incorporating Wilbur Decl, p. 26, ¶ 143).]

13 Alleged Similarity 3 (Hook Backup Vocals): it is undisputed that: (a) backup  
 14 vocals are commonplace; (b) in GIVE there are backup vocals for each lead vocal  
 15 note, while in BLURRED the first two notes have no backup vocal; and (c) there is  
 16 only one backup vocal note in GIVE (two-part harmony), whereas in BLURRED  
 17 there are two backup vocal notes (three-part harmony), and the pitches (harmonies)  
 18 of the backup vocal notes thus are different. [CC Stmt, Facts 38-40.] An accurate  
 19 transcription of the backup vocals is set forth at p. 27, ¶ 156 of the Wilbur Decl.

20 Alleged Similarities 4-5 (Theme X): It is undisputed that: (a) an accurate  
 21 transcription of the so-called Theme X in each song is set forth at p. 29, ¶ 168, of the  
 22 Wilbur Decl; (b) chromatic movement by a half step is a commonplace idea; (c) the  
 23 duration, order, and placement of the Theme X notes is different in BLURRED and  
 24 GIVE; (d) prior art (“Working In a Coal Mine”) is more similar to BLURRED than  
 25 GIVE with respect to the Theme X is (see Wilbur Decl, p. 32, ¶ 183, which  
 26 illustrates this point). [CC Stmt, Facts 41-47.] The Theme X phrase in GIVE is not  
 27 found in BLURRED with the same order, duration, and placement of the two notes.  
 28

1           Alleged Similarity 6A/6B (Bass Patterns): The only notes in bass pattern 6A  
2 with the same pitch and placement are the 1<sup>st</sup> scale degree on the first beat of the  
3 first measure and offbeat (+) of the fourth beat of the first two measures—but the  
4 prior art song, “Superfly,” also plays the 1<sup>st</sup> scale degree in exactly this fashion. It is  
5 a generic idea for the bass to play the root (1<sup>st</sup> scale degree) on the first beat of the  
6 measure and as a lead-in note to the first beat. [CC Stmt, Facts 48-53.] The bass  
7 patterns here have nothing in common other than the commonplace idea of playing  
8 the root on the downbeat and on the eighth note lead-in to the downbeat. In  
9 contrast, GIVE does not play the root on the downbeat of the second, third, and  
10 fourth measures, while BLURRED does play the root on each downbeat, and thus  
11 GIVE has a more syncopated rhythm than BLURRED. [Wilbur Decl, ¶ 202.]

12           The two descending bass patterns (Musical Example 6B) use wholly different  
13 rhythms and have no notes with the same pitch and placement in the measure. A  
14 descending bass pattern itself is a commonplace idea. [CC Stmt, Facts 54-58.]

15           Alleged Similarity 7 (Keyboards): It is undisputed that having a keyboard  
16 play chords on the offbeat is a generic device. Here, the keyboard parts have  
17 different pitches, durations, and rhythms. [Stmt, Facts 59-63; CC Stmt, Facts 59-  
18 63.] There is no substantial extrinsic similarity as to original expression in GIVE.

19           Alleged Similarity 8 (Cowbell/Hi-Hat): The use of a cowbell is a generic  
20 device, and the actual cowbell rhythms in BLURRED and GIVE are not similar.  
21 [Stmt/CC Stmt, Facts 64-67.] Defendants’ expert, Ms. Monson, testifies that the  
22 cowbell parts in GIVE and BLURRED “are taken from rhythms associated with the  
23 Latin music genres known as salsa.” [Monson Decl, 4:23-24, ¶ 24.] Defendants  
24 thus admit that the cowbell part in GIVE is generic and not original or protectable.

25           Similarly, the use of an open hi-hat (including on the offbeat of the fourth  
26 beat) is generic, found in prior art, and not original to GIVE. [CC Stmt, Fact 68.]  
27 Ms. Monson testifies that the open hi-hat occurs at different places—at the end of  
28 the two measure phrase in GIVE, and in the middle of the two-measure phrase in

1 BLURRED. [Monson Decl, 1:21-28, ¶ 23.] One note (or splash) of a hi-hat—is not  
 2 protectable by itself, and particularly when the placement in each song is different.

3 **D. Ninth Circuit Precedent Favors Summary Judgment Here**

4 There can be no infringement for copying ideas alone. *Fryberger v. Int'l*  
 5 *Business Machines Corp.*, 842 F.2d 525, 529 (9<sup>th</sup> Cir. 1987)(“[T]o the extent that the  
 6 similarities ... are confined to ideas and general concepts, these similarities are  
 7 noninfringing”); *VMG Salsoul, LLC v. Ciccone*, 2013 WL8600435 at \*8 (C.D.Cal.  
 8 Nov. 18, 2013)(overall concept of call and response pattern was not protectable).

9 “This principle, known as the idea/expression or fact/expression dichotomy,  
 10 applies to all works of authorship.” *Feist*, 499 U.S. at 350. Here, the mere *ideas* of  
 11 repeating a note, using backup vocals, a cowbell, a descending bass pattern, etc. are  
 12 not protectable. *Fryberger*, 842 F.2d at 529. That is true whether the ideas are  
 13 considered individually or as a “constellation” of unprotected ideas.

14 The actual expression of those ideas is not similar here. Since there are no  
 15 substantial extrinsic similarities in the notes of the eight alleged Similarities, then  
 16 the combined expression of the eight alleged Similarities also lacks any meaningful  
 17 extrinsic similarity. No matter how many times you add zero to zero, the answer is  
 18 still zero. The whole cannot be greater than its parts. The parts here are not similar.

19 Numerous cases hold that only a few common notes is not enough to show  
 20 infringement.<sup>1</sup> In *Newton v. Diamond*, 388 F.3d 1189 (9<sup>th</sup> Cir. 2003), the court held  
 21 that the defendants’ “use of a brief segment of [the plaintiffs’] composition,  
 22

---

23 <sup>1</sup> *McDonald v. Multimedia Entertainment, Inc.*, 1991 WL 311921 at\*4 (S.D.N.Y.  
 24 July 19, 1991) (scale degree sequence 5-1-6 not protectable); *Allen v. Destiny’s*  
 25 *Child*, 2009 WL 2178676 at \*12 (N.D. Ill. July 21, 2009)(common three note phrase  
 26 was not protectable); *Jean v. Bug Music, Inc.*, 2002 WL 287786 at \*6 (S.D.N.Y.  
 27 Feb. 27, 2002)(three note sequence C-B flat-C not protectable); *Landy v. Atlantic*  
 28 *Recording Corp.*, 2007 WL 4302074 at \*7 (E.D. La. Dec. 4, 2007)(pitches G, A,  
 and C in bass lines did not show substantial similarity); *Johnson v. Gordon*, 409  
 F.3d 12, 22 (1<sup>st</sup> Cir. 2005)(descending scale pattern 5-5-4-3-2-1 was commonplace).

1 consisting of three notes separated by a half-step over a background C note, is not  
2 sufficient to sustain a claim of infringement.” *Id.* at 1196. In assessing originality,  
3 courts must be “mindful of the limited number of notes and chords available to  
4 composers and the resulting fact that common themes frequently appear in various  
5 compositions, especially in popular music.” *Newton v. Diamond*, 204 F. Supp. 2d  
6 1244, 1253 (C.D. Cal. 2002)(quoting *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d  
7 Cir.1988). That GIVE and BLURRED use the root of the chord in the bass line or  
8 have one or two common notes in a vocal melody is not substantial similarity.

9 *Three Boys*, cited by Defendants, is inapposite because it did not involve  
10 extrinsic similarity. The court simply affirmed a jury verdict, refusing to “interfere  
11 with a jury’s credibility determination” and finding that the jury’s substantial  
12 similarity determination was not “clearly erroneous.” *Id.* at 485-86. The reported  
13 decision does not reveal what the evidence of extrinsic similarity was or what the  
14 five unprotectable elements in that case consisted of in extrinsic terms. *See id.*

15 In *Swirsky v. Carey*, 376 F.2d 841 (2004), cited by Defendants, the Ninth  
16 Circuit criticized the trial court for looking at pitch sequence and rhythm without  
17 also considering “harmonic chord progression, tempo, and key.” *Id.* at 848. Here,  
18 the Finell Report does not consider harmony or chords. But Ms. Wilbur does, and  
19 she shows that there are no similarities in harmony or chords. [CC Stmt, 5-6.]

20 **E. Defendants’ Other Evidence Is Irrelevant**

21 The sole issue on this Motion is extrinsic similarity. “Extrinsic analysis is  
22 objective and depends on ‘specific criteria which can be listed and analyzed,’ not  
23 ‘the responses of the trier of fact.’” *McIntosh v. Northern California Universal*  
24 *Enterprises Co.*, 670 F.Supp.2d 1069, 1088 (E.D. Cal. 2009).

25 Here, the Motion concedes access. Whether Thicke made statements about  
26 being inspired by Marvin Gaye is relevant only to access so has no bearing here.  
27 Defendants’ hearsay media articles similarly have no bearing on extrinsic similarity.

28 Likewise, Defendants’ so-called mash-ups are not relevant or admissible.

1 Whether the vocal melody of BLURRED—after being digitally altered to adjust  
2 pitch and tempo so it fits less awkwardly—can be digitally inserted onto the  
3 instrument track of GIVE proves nothing. It does not show that any *series of notes,*  
4 *chords, or rhythms* in the BLURRED vocal melody were copied from GIVE. There  
5 is no way to tell from the mashup. It is a truism that, if the tempos are adjusted to  
6 match, the resulting (highly discordant) mashup will have the same tempo. The  
7 internet is full of mashups of disparate songs, often for humorous purposes. None of  
8 those mashups mean that one song copied any sequence of notes from the other one.

9 Defendants seek to confuse and mystify the Court with extraneous manner  
10 and the impassioned but poorly reasoned advocacy of their paid musicologists in the  
11 hopes of avoiding the elephant in the room: the notes of the songs are not the same.

12 **F. The Court Should Grant Summary Judgment on the WAR Claim**

13 Defendants put on no evidence to dispute the careful analysis by Ms. Wilbur  
14 showing that the only *extrinsic* similarity between WAR and DANCE is one note in  
15 the chorus (repeated in each two bar phrase), and the occurrence of two similar  
16 chords in the chorus. [CC Stmt, Facts 77-97.] Given that every other note and  
17 chord in the eight measure chorus is different, and there is nothing remotely similar  
18 in any other portion of the two songs, there is no substantial extrinsic similarity.

19 **III.**

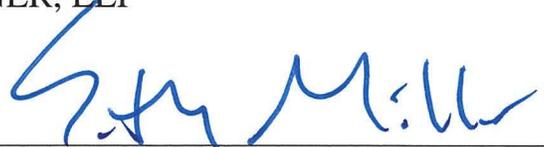
20 **CONCLUSION**

21 For the foregoing reasons and as shown in the Motion, the Court should grant  
22 the Motion and enter summary judgment in favor of Plaintiffs/Counter-Defendants.

23 DATED: September 22, 2014

KING, HOLMES, PATERNO &  
BERLINER, LLP

26 By: \_\_\_\_\_



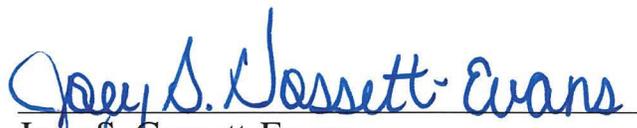
27 HOWARD E. KING  
SETH MILLER

28 Attorneys for Plaintiffs and Counter-Defendants

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2014, I electronically filed the foregoing **PLAINTIFFS AND COUNTER-DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** with the Clerk of the Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

  
Joey S. Gossett-Evans