

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-Appellees-Cross-Appellants.

*On Appeal From The United States District Court
For The Central District of California
Hon. John A. Kronstadt, District Judge
No. 13-cv-06004 JAK (AGRx)*

**THIRD BRIEF ON CROSS APPEAL OF PLAINTIFFS-APPELLANTS-CROSS-
APPELLEES PHARRELL WILLIAMS, ROBIN THICKE, CLIFFORD HARRIS, JR.,
AND MORE WATER FROM NAZARETH PUBLISHING, INC.**

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INTRODUCTION AND SUMMARY OF ARGUMENT

As shown in the opening brief of the “Blurred Lines” parties, the two songs in this case are not the same, and the district court should have granted summary judgment. Rather than address the fatal flaws in their musicology evidence, the Gayes attempt to distract the court with irrelevant issues and assert a copyright in musical elements beyond those found in their copyrighted work, which is the lead sheet (and not the sound recording) to Marvin Gaye’s musical composition “Got To Give It Up.”

For example, the Gayes suggest (Br. 1-3) that their copyright precludes other musical artists like Pharrell Williams and Robin Thicke from being inspired by the “*groove*” or “*feeling*” of “Got To Give It Up.” But a “groove” or “feeling” cannot be copyrighted, and inspiration is not copying. To the contrary, the “primary objective of copyright” is “[t]o promote the Progress of Science and useful Arts” by “encouraging others to build freely upon the ideas and information conveyed by a work.” *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 349–350 (1991) (citation omitted).

The Gayes also seek to distract by focusing (Br. 1, 3) on the state of mind Williams and Thicke had when composing “Blurred Lines.” But as the Gayes elsewhere concede (Br. 62), the artists’ subjective intent is wholly irrelevant to copyright infringement, which has no intent element. Thus it is pure misdirection

to suggest that Williams and Thicke had Marvin Gaye “at the top of their minds in creating their song ‘Blurred Lines’” (Br. 1).

Similarly irrelevant is the Gayes’ anecdotal evidence (Br. 2) about how they or others thought that “Blurred Lines” “sounded just like” the *sound recording* of “Got To Give It Up.” The sound recording is irrelevant to the copying analysis here. The only copyrighted work at issue in this case is the lead sheet deposited in the copyright office. No other version of “Got To Give It Up” was published. And under the Copyright Act of 1909, which governs the copyright in Marvin Gaye’s pre-1972 musical composition, copyright protection could be secured by publication of sheet music, whether a full musical score or a lead sheet, but could not be secured by creation or publication of a sound recording.

Thus the central issue in this appeal is simply whether there is substantial similarity between protectable elements in the *lead sheet* for “Got To Give It Up” and corresponding elements of “Blurred Lines.” There is not. As the district court should have found at summary judgment, there is no objective substantial similarity between any aspect of “Blurred Lines” and the so-called (1) signature phrases, (2) four-note hooks, (3) four-bar bass lines, (4) four-note vocal melody or (5) harmonic structure that are the only protectable elements contained in the “Got To Give It Up” lead sheet. And if these individual protectable elements are not substantially similar in the two songs, then neither is their combination. Thus

plaintiffs’ musicology experts should not have been permitted to depict a supposed “constellation” of supposed similarities based on disparate melodic fragments. And any such combination would merit only thin copyright protection, requiring the Gayes to show virtual identity between the relevant constellations of features—a standard the Gayes implicitly concede (Br. 41-43) that they cannot meet. The songs are not the same. Listening to the only recording of the lead sheet in evidence (ER2307) and “Blurred Lines” (ER2445) underscores that the similarities claimed by the Gayes’ experts Finell and Monson are undetectable to the ear and made of whole cloth.

For these reasons and those set forth in the “Blurred Lines” parties’ opening brief and further below, this case never should have gone to trial, and this Court should reverse or vacate the judgment below: *First*, the district court erred in denying summary judgment by failing to apply this Court’s extrinsic test for substantial similarity. That error is legal in nature and reviewable even after trial. Musical composition cases enjoy no special immunity from the obligation to apply the extrinsic test for objective substantial similarity—even where there is competing expert musicology testimony. *Second*, the instructions on subconscious copying and substantial similarity were erroneous and prejudicial, warranting new trial. *Third*, new trial is alternatively warranted because the district court should not have permitted the Gayes’ improper musicological expert evidence and

because any finding of substantial similarity in this case is against the great weight of the evidence. *Fourth*, the awards of hypothetical-license damages, profit and royalties are not supported by admissible evidence. And *fifth*, the district court lacked any basis to override the jury verdict by imposing liability on Clifford Harris (and the Interscope Parties). The Gayes cannot explain why Harris's Seventh Amendment rights can or should be ignored here.

On the cross-appeal by the Gayes, this Court should affirm. *First*, the Court should reject the Gayes' argument that the copyrighted work here extends beyond the lead sheet, in which a copyright was secured by publication. If the Court does reach the broader statutory question, it should affirm the district court's interpretation of the Copyright Act of 1909 as excluding publication of a musical composition through creation of a sound recording. *Second*, this Court should deny any remand to reconsider the Gayes' motion for attorneys' fees and costs.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT OF NON-INFRINGEMENT

A. The Denial Of Summary Judgment Was Legal Error And Is Therefore Appealable Even After Trial

This Court may—and should—reverse the district court's denial of summary judgment. Such post-trial review is typically not available where the district court errs at summary judgment in finding a triable question *of fact*, but as the Gayes acknowledge (Br. 30-31), this Court has long held that it may reverse even after

trial where the district court makes *legal* errors in denying summary judgment that, if not made, necessarily would have resulted in summary judgment. *See Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902-05 (9th Cir. 2004); *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014) (“This general rule . . . does not apply to those denials of summary judgment motions where the district court made an error of law that, if not made, would have required the district court to grant the motion.”).

Here, the district court’s error at summary judgment was legal, not factual, and thus falls within this well-established exception. Specifically, the court erred legally by (1) relying on the testimony of the Gayes’ musicology experts Finell and Monson even though they failed to confine themselves to the protectable elements of “Got To Give It Up” contained within the lead sheet filed as the deposit copy; (2) failing to apply this Court’s extrinsic test by actually comparing the two works for substantial similarity after filtering out the unprotectable elements; and (3) failing to find a lack of objective substantial similarity under that test. This Court should thus reverse despite the fact that the case was tried to judgment.

Nonetheless, the Gayes argue, citing (Br. 30-31) the Supreme Court’s 2011 decision in *Ortiz v. Jordan*, 562 U.S. 180, 183-84, 190 (2011), that any appealable denial of summary judgment after trial must concern “‘*purely* legal issue[s]’ that [can] be resolved ‘with reference only to undisputed facts’” (emphasis added).

This Court, however, has rejected that position, holding that *Ortiz* “expressly declined to consider whether such ‘purely legal issue[s]’ are appealable after a full trial on the merits,” and therefore that “prior [Ninth Circuit] precedents such as *Banuelos* remain binding.” *Fireman’s Fund Ins. Co. v. N. Pac. Ins. Co.*, 446 F. App’x 909, 911 (9th Cir. 2011); *see also Ortiz*, 562 U.S. at 892 (“We need not address this argument . . .”). Since *Ortiz*, this Court has reviewed a summary judgment decision after trial where the district court made a legal error in failing to determine whether an insurer “failed to ‘exercise reasonable diligence’”—an issue that surely is not “purely legal.” *Fireman’s Fund*, 446 F. App’x at 911.

Even accepting the Gayes’ position, the resolution of substantial similarity in this case presents a legal issue that *can* be resolved at summary judgment “with reference only to undisputed facts,” and the district court erred in holding that the issue of substantial similarity was for the jury just because the musicology experts presented conflicting opinions. Under the district court’s approach, musical composition cases would enjoy special immunity from summary judgment determinations merely because the parties offer competing musicology experts. But this Court has countenanced no such exception, and has repeatedly *affirmed* summary judgment for music copyright defendants even where the parties’ expert musicology evidence conflicted. *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 877-79 (9th Cir. 2016) (affirming summary judgment of insufficient objective

substantial similarity between plaintiffs’ musical composition and Madonna’s song “Vogue” despite conflicting expert testimony); *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004) (affirming summary judgment of insufficient objective substantial similarity between plaintiffs’ musical composition and Beastie Boys’ song “Pass the Mic” despite conflicting expert testimony).

This Court has repeatedly held that the extrinsic test for substantial similarity is properly resolved by a district court at summary judgment because, unlike the intrinsic test for subjective similarity that is the exclusive province of the jury, the extrinsic test looks only to *objective* similarities between *protectable* elements of the asserted works and the corresponding elements of the accused works. The *protectability* of elements of a copyrighted work is a question of law for the court, *see Feist*, 499 U.S. at 348-51, and *objective* substantial similarity likewise may be commonly decided by the court at summary judgment as a matter of law. *See, e.g., Basile v. Sony Pictures Entm’t, Inc.*, No. 14-56418, 2017 WL 745698, at *1 (9th Cir. Feb. 27, 2017) (treating substantial similarity between protectable elements as “the dispositive *legal* issue” at summary judgment (emphasis added)); *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624-25 (9th Cir. 2010) (noting that, if copyright plaintiffs “fail to satisfy the extrinsic test, they cannot survive a motion for summary judgment”); *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006) (collecting cases affirming summary judgment in

favor of copyright defendants on the issue of substantial similarity, and noting that a “plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment”).

Summary judgment is warranted where there is lack of objective substantial similarity under the extrinsic test in musical composition copyright cases no less than in cases involving copyrights in literature or television or movie scripts. Just as musicology experts may disagree about relevant similarities in melody, harmony, key, pitch, tempo, chords, rhythm and meter, so experts in literature/television/movie cases may disagree about similarities in plot, themes, dialogues, setting, characters, mood, pace or sequence. But expert opinions cannot alter the underlying melody, harmony, etc. in the works, and thus in musical composition copyright cases, no less than in literary cases, the district court must undertake an objective comparison between the works itself.

The Gayes thus are simply wrong to argue (Br. 31-32, 34-35) that substantial similarity was necessarily an issue of fact for the jury in this case. While the intrinsic test is the province of the jury, on summary judgment, “only the extrinsic test is important,” as it “serve[s] the purpose of permitting summary judgment in clear cases of non-infringement.” *Swirsky v. Carey*, 376 F.3d 841, 845, 848 (9th Cir. 2004). The existence of conflicting expert reports did not relieve the district court of the obligation to compare protectable elements in “Got To Give It Up”

with corresponding elements in “Blurred Lines” for objective substantial similarity. The district court accordingly committed reversible legal error. As detailed in the next section, a proper application of the extrinsic test would have resulted in a finding of no substantial similarity.

B. The Gayes Fail To Show Objective Substantial Similarity Between The Protectable Elements Of The Works

Contrary to the Gayes’ suggestion (at 34-35), this Court reviews the district court’s summary judgment ruling *de novo*. *Banuelos*, 382 F.3d at 902 (“A district court’s decision to deny a summary judgment motion is reviewed *de novo*.”). Applying *de novo* review, this Court should reverse and direct entry of judgment in favor of the “Blurred Lines” parties because the Gayes failed to demonstrate a triable issue as to objective substantial similarity between the lead sheet deposit copy of “Got To Give It Up” and “Blurred Lines.”

First, the Gayes fail (at 35-39) to rehabilitate their musicology experts’ evidence at the summary judgment stage. While they suggest that the district court properly considered the Finell and Monson expert testimony at summary judgment, they fail to confront the fact that the Finell and Monson reports at that stage were erroneously based solely on the *sound recording* and not the deposit copy. *Second*, the Gayes fail (at 39-41) to excuse the district court’s failure to compare the works for objective substantial similarity. While they emphasize that the court undertook detailed analysis of the elements of the copyright in “Got To Give It Up,” they

ignore the fact that the district court never compared “Blurred Lines” to “Got To Give It Up” after filtering out unprotected elements. *Third*, they fail to show how any remaining similarity after that filtration is substantial, as this Court’s precedents require.

1. The District Court Erred In Relying On Expert Testimony That Was Improperly Based On The Sound Recording

The Gayes offer no persuasive response to the “Blurred Lines” parties’ argument (Op. Br. 26-27) that neither Finell nor Monson opined at summary judgment on the question of substantial similarity between the *deposit copy* of “Got To Give It Up” and “Blurred Lines.”

First, the Gayes wrongly argue (Br. 37) that Finell and Monson “submitted declarations that each element, individually considered, demonstrated substantial similarity.” But the evidence the Gayes cite instead confirms that their experts concluded that an “*aggregation* of similar features in the two works results in their two substantially similar “[*c*]onstellations.” ER2004 (emphases added).¹ The declarations nowhere discuss how similarities between particular protectable elements are sufficient to render the works substantially similar. *See, e.g.*, ER2008, ER2050 (discussion of “hooks”). Nor would such an analysis carry weight because, as the “Blurred Lines” parties explained (Op. Br. 35-38), the individual

¹ The Gayes have reproduced the summary judgment declaration of Judith Finell, contained in the Excerpts of Record at ER2002, in the Supplemental Excerpts of Record at SER82.

elements are not substantially similar. For example, the so-called “hooks” differ in pitch, rhythm, chords, harmonies, lyrics, and placement in the work:

Musical Example 2a: "Give it Up" Hook

Musical Example 2b: "Blurred" Hook

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

Blurred 0:49 take a good girl

The image shows two musical staves. The top staff is for "Give it Up" and the bottom staff is for "Blurred Lines". Both are in G major (one sharp) and 4/4 time. The "Give it Up" hook is highlighted in yellow and consists of a dotted quarter note on G4, followed by an eighth note on A4, and a quarter note on B4. The "Blurred Lines" hook consists of a quarter note on G4, followed by an eighth note on A4, and a quarter note on B4. The lyrics are "keep on danc - in'" for "Give it Up" and "take a good girl" for "Blurred Lines".

Op. Br. 35 (citing ER125; ER2133, ER2141-43, ER2051-52).

Second, the Gayes likewise err in contending (Br. 37) that the “constellation” of factors on which their experts relied “was based on elements found in the lead sheet.” The Gayes’ own citations (to SER92, ER2012) confirm that Finell relied on the sound recording as the basis of her opinion. Finell stated that, in her view, the “lead sheet is only a partial and incomplete sketch of the fuller work as embodied in the recording,” and that ““Blurred Lines’ corresponds more closely with the recording of ‘Got to Give it Up,’ thus allowing the more informative and complete comparison of the two.” ER2012. Reliance on elements from the sound recording not reflected in the lead sheet was improper.

The Gayes cannot excuse their experts’ errors by pronouncing (Br. 10) that the lead sheet may “convey a considerable amount of information to a skilled performer, particularly one who is aware of the conventions and expectations associated with the musical genre.” This is a copyright case—not a patent case

where it might be relevant how a person of skill in the art construes a claim. Accordingly, the issue is whether there was copying of the *copyrighted work*, requiring “objective comparison of specific expressive elements.” *Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062 (9th Cir. 2016) (quoting *Benay*, 607 F.3d at 624). And extrapolating how a work might be performed is “beyond consideration in [a] claim for infringement of [the] copyright in the underlying composition.” *Newton*, 388 F.3d at 1194 (holding that “Newton’s copyright extends only to the elements that he fixed in a tangible medium—those that he wrote on the score”).

The Gayes inappropriately cite (Br. 38) Finell’s pre-trial declaration regarding the scope of the lead sheet (SER465-66) to support their argument, but that declaration was not available at summary judgment. *Compare* SER470 with ER0110. In addition, the declaration contradicts the district court’s prior ruling because, in it, Finell contends that the lead sheet embodies elements not present in the deposit copy.² Thus, even if the Gayes could rely on such evidence as the basis for the district court’s determination that a triable issue of fact existed, the court definitively rejected the idea that it could read into the lead sheet elements that do not exist on paper. *Compare* ER122-30 (district court October 2014 summary judgment ruling that deposit copy did not contain “hooks with backup vocals,”

² Finell submitted this declaration even though she admitted that she lacked any expert qualifications to opine on the legal question of the scope of the Gayes’ copyright. ER101, ER703 (Finell testifying that she had “never” before been “asked the legal question in terms of what is copyrighted”).

“Theme X,” “backup hooks,” “descending bass melody,” “keyboard rhythms” and “unusual percussion choices”) with SER465-66 (Finell January 2015 declaration opining that some of these elements are supposedly “found in the deposit copies”).

Finally, the Gayes mistakenly cite (Br. 38-39) *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000), and *Swirsky*, 376 F.3d at 848, as supporting their experts’ failure to properly limit any analysis to elements found in the deposit copy. Neither does so. To the contrary, both cases hold that a plaintiff must prove that the defendant “copied **protected** elements of the plaintiff’s work.” *Three Boys*, 212 F.3d at 481 (emphasis added); see *Swirsky*, 376 F.3d at 845 (substantial similarity analysis depends on “**protected** elements of the copyrighted work”) (emphasis in original). Thus, any protected elements here must be found **in** the deposit copy.

The same is true even if the Gayes seek to rely, as in *Three Boys*, on a protected “combination of unprotectible elements.” Here, the district court correctly held that the unprotected elements are not included **at all** in the “Got To Give It Up” deposit copy. ER119. These elements are thus not analogous to “unprotectible elements” as used in *Three Boys*, like *scenes-a-faire*, that are included in the copyrighted work but not independently subject to copyright protection because they are too commonplace. Even in “combination,” the Gayes may not rely on unprotectable elements unless they are a part of the copyrighted

work. *See Newton*, 388 F.3d at 1196 (faulting expert’s “fail[ure] to distinguish between the sound recording . . . and the composition”); *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1450 (9th Cir. 1988) (discounting testimony of expert who compared unprotectable elements).

In any case, if the Gayes’ copyright were in fact premised on a “constellation” or compilation of unprotectable elements, it would enjoy only “thin” protection, *see Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989); *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (1994), and copying could be shown only if the copyrights defendants had made a “bodily appropriation” thereof—or “copying or unauthorized use of substantially the entire item,” *Harper House*, 889 F.2d at 205. Here, the “Blurred Lines” parties plainly did not “bodily appropriate” the selection or arrangement of protectable elements in “Got To Give It Up.” Indeed, the Gayes implicitly concede (Br. 62) that they cannot meet such a standard of “virtual identity.”

2. The District Court Erred In Failing To Compare The Two Works For Objective Substantial Similarity

In response to the “Blurred Lines” parties’ showing that the district court erroneously failed to compare the two works after its filtration analysis, the Gayes argue that the court (1) “fully immersed . . . itself in the detail of the musicological analysis” (Br. 39) and (2) “did not attempt to substitute [its] own musicological

analysis for [the expert analysis]” (Br. 40-41). Even if true, neither argument is availing.

While the district court undertook a detailed analysis of the protectable elements in the Gayes’ copyright, ER122-30, the Gayes err (Br. 40 (citing ER133)) in concluding from that filtration analysis that the district court found evidence of six similarities between the two works. To the contrary, at the conclusion of an 11-page analysis, the district court held only that the Gayes had “offered sufficient evidence to create triable issues as to whether their 11-note signature phrase, four-note hook, four-bar bass line, 16-bar harmonic structure and four-note vocal melody *are protectable expressions.*” ER133 (emphasis added). As to the question of substantial similarity, the court conducted no analysis other than to state that no triable issues of fact existed because the parties’ respective experts had disagreed on the question. ER133. The court never applied the extrinsic test to determine whether objective substantial similarity actually existed.

Moreover, the Gayes are wrong to argue (Br. 40) that “all that was needed to send the case to the jury was evidence of substantial similarity as to at least one element.” To the contrary, the Gayes’ burden was to show substantial similarity to a non-*de minimis* portion of the lead sheet for “Got To Give It Up” *as a whole*—not just any isolated similarity. As this Court reiterated in *Newton*, “[e]ven where the fact of copying is conceded, no legal consequences will follow from that fact

unless the copying is substantial.” *Newton*, 388 F.3d at 1193. And “[s]ubstantiality is measured by considering the qualitative and quantitative significance of the copied portion *in relation to the plaintiff’s work as a whole.*” *Id.* at 1195; *see id.* at 1193 (noting that “the principle that trivial copying does not constitute actionable infringement has long been a part of copyright law,” and that a party alleging infringement must show not only some copying but that copying “has been done to an unfair extent” (quoting *West Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909) (opinion of Judge Learned Hand))).

This Court has long enforced this basic principle even in music composition copyright cases. In both *Newton* and *VMG Salsoul*, for example, this Court affirmed summary judgment for music copyright defendants on the ground that, notwithstanding substantial similarity in certain particular elements, the defendants had copied only *de minimis* portions of the plaintiff composers’ compositions as a whole. *See Newton*, 388 F.3d at 1196; *VMG Salsoul*, 824 F.3d at 878-79.

While the Gayes suggest (Br. 40-41), relying on *Swirsky*, that the district court had correctly chosen not to usurp the role of the musicologist, that is incorrect. The Gayes effectively concede that the district court failed to undertake the substantial similarity analysis by merely leaving “*to the jury* to choose between the competing opinions” (emphasis added). *Swirsky* does not support the district

court's truncated analysis. To the contrary, *Swirsky* confirms that the extrinsic test requires a district court on summary judgment to “consider[] whether two works share a similarity of ideas and expression as measured by external, objective criteria.” *Swirsky*, 376 F.3d at 845; *see id.* (extrinsic test requires “comparing [relevant] elements for proof of copying as measured by ‘substantial similarity’” to “protected elements of the copyrighted work”) (quotation omitted). *Swirsky* thus plainly instructs that a district court should itself conduct an objective substantial similarity analysis under the extrinsic test, making its own independent assessment of relevant and admissible expert testimony. The district court here failed to do so.

As the “Blurred Lines” parties explained (Op. Br. 28-29), under the Gayes’ approach, no court could ever grant summary judgment in a musical composition copyright case. Yet this Court’s precedent not only permits, but requires, the district court to conduct such an analysis, resulting in summary judgment when a court finds a lack of substantial similarity as a matter of law. The district court’s failure to conduct this analysis here requires reversal.

3. The Protectable Elements Of “Got To Give It Up” Are Not Objectively Substantially Similar To Corresponding Elements Of “Blurred Lines”

As the “Blurred Lines” parties demonstrated (Op. Br. 30-38), any proper substantial similarity analysis at the summary judgment stage would have

concluded, as a matter of law, that the protectable elements of the works are not substantially similar.

The Gayes attempt to avoid this conclusion by arguing (Br. 41-43) that the “virtual identity” test does not apply to musical compositions. As the “Blurred Lines” parties explained (Op. Br. 31), even if the “virtual identity” test does not apply, the works fails the ordinary test for substantial similarity. But the “virtual identity” test should be applied here because, when limited to its few protected expressions (or, as the Gayes might have it, to a “combination of unprotectible elements”), the Gayes’ copyright in the deposit copy is thin. *Cf. Tisi v. Patrick*, 97 F. Supp. 2d 539, 544 (S.D.N.Y. 2000) (holding chord progression “so common to rock and pop genres (indeed, to every type of Western music) that it alone does not make the songs sound any more similar than countless other songs”); *id.* (finding “a tambourine and drum play[ing] on the second and fourth beats” is a “basic percussion rhythm [that] is extremely common in the pop rock genre”). The Gayes are incorrect to argue (Br. 42) that the “virtual identity” standard is limited to “strictly factual or functional” works. In fact, that standard has been applied to works as diverse as a glass jellyfish sculpture, *Satava v. Lowry*, 323 F.3d 805, 812-13 (9th Cir. 2003); a body of a fashion doll, *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 914-15 (9th Cir. 2010); and a graphical user interface, *Apple*, 35 F.3d at 1442-43, 1446-47.

Independent of whether the “virtual identity” standard applies here, the “Blurred Lines” parties demonstrated that the evidence at the summary judgment stage warrants judgment as a matter of law because that evidence failed to show any substantial similarity in what the court found to be the only five “protectable expressions” contained in the lead sheet. *See* Op. Br. 32-38; ER133 (listing Finell’s “11-note signature phrase, four-note hook, [and] four-bar bass line” and Monson’s “16-bar harmonic structure and four-note vocal melody”). The Gayes largely do not dispute the “Blurred Lines” parties’ showing that there are no objective substantial similarities in these elements:

Signature Phrase. The Gayes do not dispute that the so-called “signature phrases” are in different keys and have different rhythms and lyrics in addition to their placement at different places of each song (Op. Br. 33 (citing ER2129-41)), or that the so-called “Got To Give It Up” “signature phrase” appears only *once* in the 204-measure deposit copy (*compare* Op. Br. 32-33 *with* Gaye Br. 18-19). The Gayes acknowledge differences between the phrases in the two songs, admit that Finell and Monson relied on transcriptions of the sound recording as opposed to the lead sheet, and point to no similarities in the harmony or even the rhythm beyond the common device of repeated eighth notes. Gaye Br. 18-19. The Gayes further fail to dispute that, in straining to find similarities between the “signature phrases,” Finell isolated short groups of two or three notes, which are

unprotectable as a matter of law, *see, e.g., Newton*, 388 F.3d at 1196-97, and ignored the notes between, before and after those groups, which are emphasized and change the overall sound of the “signature phrases.” *See Op. Br. 34*. Nor do the Gayes dispute the “Blurred Lines” parties’ showing (*Op. Br. 34 n.10*) that Finell altered the “melismas” in each “signature phrase” by comparing the first two notes only even though a “melisma” is a vocal melody “in which one syllable or lyric is held” over several pitches (*ER2015*).

Four-Note Hooks. The Gayes likewise do not dispute that the four-note hooks do not have the same pitches (6-1-2-1 in “Got To Give It Up” and 6-1-1-1 in “Blurred Lines”), rhythm, chords, harmonies, or lyrics. *See Op. Br. 35*. The only purported similarities the Gayes identify are in the admittedly *different* melody and *different* rhythm. *Gaye Br. 19-20*.

Four-Bar Bass Lines. In discussing the “bass melody” (*Br. 21-22*), the Gayes similarly fail to explain how the commonplace ideas in the four-bar bass line, like playing the first scale degree, are anything more than trivial (*ER2152-53*). As the “Blurred Lines” parties explained (*Op. Br. 36-37*), these commonplace ideas not only are unprotectable, but any similarities between the “Got To Give It Up” and “Blurred Lines” bass lines are *de minimis*.

Four-Note Vocal Melody. The Gayes have no response to the “Blurred Lines” parties’ showing (*Op. Br. 37*) that no objective substantial similarity exists

between the melody sung to “*move it up*” in “Got To Give It Up” and “*hey, hey, hey*” in “Blurred Lines.” The Gayes did not introduce this similarity at trial and nowhere address in their brief how the district court could have relied on it at summary judgment to find a triable issue as to substantial similarity.

Harmonic Structure. The Gayes similarly omit from their brief any discussion of the purported similarity in “harmonic structure” that Monson had identified. As the “Blurred Lines” parties explained (Op. Br. 37-38), no such “harmonic structure” similarity exists because the chords and chord patterns are entirely dissimilar.

In sum, the Gayes point to no triable issue on the question of substantial similarity at the summary judgment stage. The Court may confirm as much by listening to the audio of the “Got To Give It Up” deposit copy and the “Blurred Lines” sound recording. *Compare* ER2307 (audio file of deposit copy) *with* ER2445 (“Blurred Lines” sound recording); *cf. VMG Salsoul*, 824 F.3d at 879 (this Court concluding, “[a]fter listening to the recordings” itself, that any copying of plaintiffs’ composition by Madonna’s song “Vogue” was *de minimis*). This Court should direct entry of judgment in favor of the “Blurred Lines” parties.³

³ The Gayes argue in a footnote (Br. 35 n.12) that this Court may affirm the judgment on the alternate ground that the Gayes presented “ample direct evidence of copying.” The Gayes do not identify any such “direct evidence of copying,” and there is none. Unlike the jazz club owners in *Range Road Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1152 (9th Cir. 2012) (cited at Gaye Br. 35 n.12)

II. ALTERNATIVELY, THE JUDGMENT SHOULD BE VACATED AND THE CASE REMANDED FOR NEW TRIAL

Even if the Court declines to reverse and direct entry of judgment for the “Blurred Lines” parties, it should nonetheless vacate and remand for new trial. Two of the jury instructions should be found erroneous on this Court’s *de novo* review, and the district court abused its discretion in several rulings concerning the admission of evidence—in all instances prejudicing the “Blurred Lines” parties. The Gayes fail to offer a persuasive response.

A. The Gayes Fail To Defend Instructions 42 And 43

The Gayes fail to refute the “Blurred Lines” parties’ showing that errors in Instructions 42 and 43 were prejudicial and require a new trial.⁴

no evidence shows the “Blurred Lines” artists performed “Got To Give It Up” or played unauthorized recordings of it. *Cellular Accessories for Less, Inc. v. Trinitas, LLC*, 65 F. Supp. 3d 909 (C.D. Cal 2014), is similarly distinguishable because at least some of the written product descriptions in that case were “identical” and copied “verbatim” and, in any event, the defendants there had failed to separate protectable and unprotectable elements, *id.* at 916 & n.3.

⁴ The Gayes’ waiver argument (Br. 60 n.25) is meritless. As the Gayes omit to note, the district court concluded in ruling on post-trial motions that the “Blurred Lines” parties “preserved” their objections to Instructions 42 and 43 by timely objecting to them. ER21, 23; *see Harper House*, 889 F.2d at 207 (rejecting waiver argument where district court “addressed on the merits” defendants’ instructional-error argument and “did not understand defendants” to have waived such an argument”). The “Blurred Lines” parties were not required to restate their objections when the district court read the instructions in final form and invited “editorial suggestions” only. *See id.* (the “failure to object may be disregarded if the party’s position has previously been clearly made to the court and it is plain that further objection would be unavailing”).

1. Instruction 42 On “Subconscious Copying” Was Erroneous And Prejudicial

(a) Instruction 42 Was Legally Erroneous

As the “Blurred Lines” parties demonstrated (Op. Br. 38-40), the district court erred in instructing the jury (ER1548) that, to find copying of “Got To Give It Up,” the jury did not need to find that the “Blurred Lines” parties “consciously or deliberately copied” but only that they “subconsciously copied” the song. Contrary to the Gayes’ mischaracterization (Br. 61), the “Blurred Lines” parties’ challenge to Instruction 42 does not go “to ‘formulation’” but rather to whether it is a “correct statement of the law.” The “Blurred Lines” parties argue that Instruction 42 misstates the law because the artists’ subjective intent was irrelevant to any issue before the jury. Because access to the work was not contested, the sole element of copying for the jury to decide was substantial similarity, but the subconscious copying instruction invited a finding of infringement without considering similarity at all. *See* Op. Br. 39. This legally erroneous instruction is thus subject to *de novo* review and not to review for mere abuse of discretion.

The Gayes miss the mark in arguing (Br. 61-62) that, even if Instruction 42 erroneously invited the jury to find infringement based solely “subconscious copying,” the error was cured by “other instructions [that] made clear that the jury could not find infringement without finding substantial similarity.” The “other instructions” the Gayes cite—Instructions 27 and 28 (ER1689-90; *see* ER22)—

informed the jury only that its task was to find actionable *copying*, and that the Gayes “*may*” prove this by showing access and “substantial similarities.” In turn, Instruction 42 erroneously told the jury that, “to find that the [‘Blurred Lines’] parties *copied* [‘Got To Give It Up’]” . . . [i]t is sufficient if you find that the [‘Blurred Lines’] parties *subconsciously copied [the song]*.” ER88 (emphasis added). Neither that instruction nor any others told the jury that actionable copying required substantial similarity apart from any “subconscious copying.” At a minimum, Instruction 42 rendered the instructions as a whole misleading. *See Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996) (“Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading.”).

The Gayes also argue (Br. 62) that an instruction on “subconscious copying” was needed so that the jury could “reconcile admitted access with non-willful copying.” But the Gayes’ own concession that copyright infringement requires no element of intent belies any such need. Moreover, even if it were appropriate to instruct the jury that it need not find “conscious[] or deliberate[]” copying to find infringement—as the first sentence of Instruction 42 arguably does—this would not justify the inclusion of the misleading second sentence in Instruction 42, which authorized the jury to find *infringement* if there was “subconscious copying,” without also applying the substantial similarity test. ER87. The Gayes’ lone

authority on this issue, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997-98 (2d Cir. 1983), itself recognized that infringement requires both access and substantial similarity, and permitted a finding of subconscious copying only where both access and substantial similarity were undisputed.

(b) Errors In Instruction 42 Were Prejudicial To The “Blurred Lines” Parties

The Gayes do not dispute that prejudice is presumed from an erroneous instruction, *see Dang v. Cross*, 422 F.3d 800, 811 (9th Cir. 2005), or that Instruction 42 caused great prejudice to the “Blurred Lines” parties, as evidenced by the Gayes’ focus at trial (and here, *see* Br. 1) on Williams’s and Thicke’s alleged subjective intent to copy. That prejudice is confirmed by the fact that the jury split the verdict, finding liability against Williams and Thicke but not against third composer Harris, who was not alleged to share that intent.

The Gayes argue (Br. 62-63 n.26) that Instruction 42 was “harmless error” because they “claimed direct copying,” and thus allegedly did not have to prove access and substantial similarity. But, as the Gayes’ authority holds, direct evidence of copying applies only where a copyrighted work is reproduced “*in toto*.” *See Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012). Whatever the Gayes may have “claimed,” there was no evidence of such wholesale appropriation here (the Gayes do not argue otherwise), and “direct copying” thus provides no basis for the jury to have found infringement

without considering substantial similarity. The Gayes also argue (Br. 63 n.26) that any error was harmless because the jury allegedly was erroneously not instructed that, under the “inverse ratio rule,” the high degree of access they had shown allowed them to make a lesser showing of substantial similarity. But in fact the jury *was* instructed (ER87-88 (Instruction 41)) to consider “access” in “determining whether there is substantial similarity,” and even where the inverse-ratio rule applies, the jury must still find substantial similarity.

2. Instruction 43 On “Substantial Similarity” Was Erroneous And Prejudicial

Like the district court, the Gayes do little to defend (Br. 63-65) the language of Instruction 43, which arguably was the most important instruction in the case because it purported to tell the jury how to apply the substantial-similarity test. Indeed, the Gayes omit to mention, let alone defend, the language in Instruction 43 that told the jury it “*must consider* the elements of each of the works and decide if they are substantially similar,” including some elements (such as “Theme X,” bass melodies and keyboard parts) that the district court correctly found on summary judgment as a matter of law are *not* protected by the Gayes’ copyright. ER88 (emphasis added). Thus, even if, as the Gayes argue (Br. 63-64), other instructions told the jury to distinguish between “protectable” and “unprotectable” elements, the plain language of Instruction 43 prohibited the jury from doing this, and at a

minimum instructed them erroneously that “Theme X,” bass melodies and keyboard parts *are protectable* because they “*must*” be considered.

The Gayes mischaracterize *Harper House* (Br. 64 n. 64) by arguing that the trial court there “failed to instruct the jury at all on distinguishing between protectable and unprotectable elements” (citing *Harper House*, 889 F.2d at 206-08). To the contrary, this Court in *Harper House* recognized that, in other instructions, the trial court had “cautioned” the jury to “limit its review to protectable material.” 889 F.2d at 207. This Court still held those other instructions inadequate, however, because they “did not adequately explain to the jury which material was, in fact, protectable.” *Id.* “[G]iven the negative connotations to ‘copying,’ there was an obvious risk of an improper verdict for plaintiffs, and a need for further instructions to protect legitimate activity and avoid the suffocation of competition.” *Id.*

The same is true here. Apart from background instructions regarding the distinction between unprotectable ideas and protectable expressions, the jury was not instructed about which material at issue was protectable, or even how to make that determination.

The Gayes also err in arguing (Br. 64) that it would have been “error” for the district court to specifically identify the unprotectable elements of the copyrighted

work. Not so. District courts in other copyright cases routinely do so.⁵ The district court's very failure to do so is what required reversal in *Harper House*. And the Gayes misplace reliance (Br. 65) on *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 989 (9th Cir. 2009), which **approved** the district court's having "specifically identified the unprotected elements" in the jury instructions. Indeed, it was even more important in this case than in *Harper House* or *Dream Games* for the district court to identify the unprotectable elements of the Gayes' copyrighted work because the jury here was exposed not only to musical elements that were unprotectable by copyright (such as strings of three or fewer notes, *see* Op. Br. 34), but also to elements that were not even included in the Gayes' narrow copyright in the deposit copy.

Moreover, even if the district court was not required to specifically identify the unprotectable elements in "Got To Give It Up," it still was error for it to affirmatively instruct the jury that it "**must**" consider elements that are unprotectable (or at least that the jury reasonably could have found were unprotectable based on the evidence).

⁵ *See, e.g.*, Op. Br. 43 n.13 (citing the recent music copyright case involving Led Zeppelin's "Stairway to Heaven"). There, the court specifically identified and instructed the jury to "disregard" unprotectable elements including descending chromatic scales, arpeggios or short sequences of three notes.

Finally, the Gayes again fail to dispute that errors in Instruction 43 were prejudicial to the “Blurred Lines” parties because the jury was exposed to pervasive expert testimony about unprotected elements of “Got To Give It Up,” such that there was at least a “risk of an improper verdict” for the Gayes. *Harper House*, 889 F.3d at 207. Nor have the Gayes made any showing that “it is more probable than not that the jury would have reached the same verdict had it been properly instructed.” *Dang*, 422 F.3d at 811 (quotation omitted). If judgment is not entered for the “Blurred Lines” parties, then a new trial should be ordered based on instructional errors.

B. The Gayes Fail To Overcome The District Court’s Evidentiary Errors

1. The Gayes Only Confirm That Finell Relied On Elements Improperly Outside The Lead Sheet

In response to the “Blurred Lines” parties’ argument that Finell improperly based her testimony on unprotected elements outside the lead sheet, the Gayes argue (Br. 67-70) only that what the lead sheet encompasses is a factual question subject to differing interpretations. But protectability is a question of law not subject to varying factual interpretations. The district court correctly ruled that the Gayes’ copyright in “Got To Give It Up” was limited to the lead sheet but abused its discretion in not limiting the expert testimony at trial to protectable elements within the lead sheet’s four corners.

As the “Blurred Lines” parties explained (Op. Br. 44-46), the deposit copy does not contain “Theme X,” any keyboard parts, or the descending bass line. ER776, ER797-98, ER807-08, ER1840, ER1986. Yet, despite limiting the Gayes’ copyright to the deposit copy, the district court allowed Finell to testify that such unprotected elements are “implied” by the deposit copy, and thus included in the Gayes’ copyright. ER772-74, ER782-83, ER798. But “a copyright does not encompass designs that vary in essential respects from what was presented to the Copyright Office. Otherwise, the purposes of the deposit requirement would be nullified.” *Nicholls v. Tufenkian Imp./Exp. Ventures, Inc.*, 367 F. Supp. 2d 514, 520 (S.D.N.Y. 2005) (citing *Three Boys*, 212 F.3d at 486-87). That is because “[c]opyright protects only an *author’s expression* of an idea.” *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 207 (9th Cir. 1988) (emphasis added).⁶ Thus, for example, it is improper for the Gayes to rely (Br. 21) on their expert’s stretch to find similarities between “Blurred Lines” and a so-called “modified ‘mirror’ inversion of Theme X as it is found in the” sound recording because that admitted “deposit copy variant” does not actually appear in the deposit copy. Moreover,

⁶ For this same reason, the *amicus* brief from 14 musicologists submitted in support of the Gayes (Dkt. 47) is wrong to advocate a standard for interpreting the scope of the Gayes’ copyright whereby a consideration of the notations actually appearing on the lead sheet “is just the beginning of the analysis” (*id.* at 15), and “the role of the performer is primary” (*id.* at 16 (quoting *Harvard Dictionary of Music* 570)).

because the scope of the copyright is a question of law, it is not even a proper subject of expert testimony. And, even if it were, Finell acknowledged she was not qualified to give such testimony. ER101, ER703.

This Court's decision in *Swirsky* is not to the contrary. While the Gayes characterize *Swirsky* (Br. 67) as permitting the extrapolation of new elements from the deposit copy, *Swirsky* does not stand for such a proposition. As recognized in the very passage the Gayes quote (Br. 68), the material relevant to a substantial similarity analysis is limited "to 'protected elements' of the copyrighted work." *Swirsky*, 376 F.3d at 849. The district court should have excluded any testimony as to what is "implied" in the deposit copy.

The Gayes do not contest that, if the district court abused its discretion in admitting Finell's testimony on these unprotected elements, then the testimony was prejudicial. Nor could they. As explained, the court specifically identified these unprotected elements in instructing the jury that it "*must*" consider *all* elements of "Got To Give It Up," including the unprotected elements "Theme X," "bass melodies," and "keyboard parts." ER1548 (emphasis added). Finell described these very elements as the "heartbeat" and "pulse" of "Got To Give It Up," despite their omission from the lead sheet. ER629, ER642, ER644, ER661, ER2419. And Finell was the star witness in the Gayes' case, which the Gayes do not dispute. The admission of Finell's testimony as to unprotected elements in violation of

Federal Rules of Evidence 401, 403, and 702 “more probably than not” “tainted the verdict.” *Harper v. City of L.A.*, 533 F.3d 1010, 1030 (9th Cir. 2008) (quotations omitted).

2. The Gayes Offer No Defense Of Monson’s Use Of “Mash-Ups”

Nowhere in the nearly 90 pages of their brief do the Gayes explain how or why the district court’s admission of Monson’s “mash-up” sound recordings and Monson’s testimony on them was proper. As the “Blurred Lines” parties explained (Op. Br. 46), such evidence was not only was inadmissible but prejudicial.

The “Blurred Lines” parties specifically argued (Op. Br. 46) that the district court abused its discretion in permitting Monson to testify about “mashed-up” sound recordings that overlaid excerpts of “Blurred Lines” and “Got To Give It Up” in a single sound recording. ER864-68. These mash-ups included elements nowhere present in the deposit copy, including Marvin Gaye’s own vocals. ER868. These mash-ups and the related testimony had no relevance to the issue before the jury and, to the contrary, were likely to cause confusion because “any number of melodies . . . could fit over the relatively simple chord pattern of” “Blurred Lines.” ER900-03. Federal Rule of Evidence 403 required exclusion of such evidence. This Court should grant a new trial based on the prejudicial admission of this irrelevant testimony.

C. The Gayes Fail To Obviate The Need For A New Trial Based On The Great Weight Of The Evidence

1. The Gayes Point To No Relevant Evidence To Support A Finding Of Extrinsic Substantial Similarity

The Gayes all but ignore the “Blurred Lines” parties’ showing (Op. Br. 47-51) that the evidence at trial cannot support a finding of substantial similarity. They do not dispute (Br. 69-70) that they presented no evidence of two of the five “protectable expressions” the district court considered on summary judgment. And they do not rely on “Theme X,” keyboard pitches and rhythms, or the descending bass line—nor could they because these elements are not found in the deposit copy. *See* Op. Br. 50. Instead, the Gayes point (Br. 69 n.30) to the “additional elements of similarity found in the lead sheet, “including word painting and the parlendo section,” the edited sound recording and musical excerpts, and the “mash ups.”

None of this evidence supports a finding of substantial similarity. As explained (Op. Br. 46), the mash-ups should not have been admitted. The Gayes therefore cannot rely on such evidence to support the jury’s verdict.

Further, as the “Blurred Lines” parties explained, “Got To Give It Up” and “Blurred Lines” have *no two consecutive words in common*. Op. Br. 48 (citing ER346, ER1031-32). The district court recognized in its post-trial ruling that “word painting” is not a protectable element, ER14, and the Gayes do not

challenge this ruling. Even if “word painting” were protectable as a separate means, the Gayes do not identify a similar rhythm, melody, or harmony in the use of such “word painting.”

As to the parlando section, once again the Gayes ignore the “Blurred Lines” parties’ argument that the deposit copy of “Got To Give It Up” indicates no particular singing style for the “parlando,” and therefore that Finell’s “parlando” testimony was rooted in the sound recording. ER1079-82. Beyond that, the Gayes never identify any similarity between the rap and the parlando, other than a structural one based on the Gayes’ mistaken belief that the rap/parlando sections start at the same bar. Gaye Br. 23 (asserting both the rap and parlando start at measure 73); ER1080 (parlando starts at measure 65). Absent any similarity in the lyrics, rhythms, melodies, or harmonies for these spoken-word sections, any similarity in “structure” is—at most—*de minimis* because “the average audience would not recognize the appropriation.” *Newton*, 388 F.3d at 1193.⁷

2. This Gayes Fail To Defend Any Implicit Jury Finding Of Intrinsic Substantial Similarity

If the extrinsic test is not satisfied, the Court need not reach the evidence on the intrinsic test. *See Swirsky*, 376 F.3d at 845 (noting that substantial similarity

⁷ The Gayes’ musicologist *amici* fail to rehabilitate Finell’s flawed musicological analysis because they too rely on alleged similarities in such facially unprotectable elements as “the thought expressed in Marvin Gaye’s *parlando*” and the “sound of the music enact[ing] the meaning of the words being sung.” Dkt. 47 at 10-11.

requires both extrinsic and intrinsic similarities). The Gayes suggest that this Court may not second-guess the jury's implicit finding of subjective similarity under the intrinsic test. But just as the Court may conclude after itself "listening to the recordings" that any substantial similarity is *de minimis*, *VMG Salsoul*, 824 F.3d at 879 (cited at Op. Br. 51), so this Court may itself listen to the audio exhibit of the deposit copy (ER2307) and the sound recording of "Blurred Lines" (ER2445), and conclude that no reasonable juror could find that the two works have a substantially similar "total concept and feel."

III. THE GAYES FAIL TO SUPPORT THE AWARDS OF ACTUAL DAMAGES, PROFITS, AND A RUNNING ROYALTY

The Gayes fail to demonstrate that the testimony of their damages expert, Nancie Stern, meets the test for admissible and non-speculative evidence. Stern's use of a 50% base rate, which fails to account for any of the *Georgia-Pacific* factors, cannot be used to support the damages award or the running royalty. The district court abused its discretion in holding otherwise.

A. The Gayes Fail To Identify Admissible Evidence Supporting Hypothetical-License Damages

Contrary to the Gayes' argument (Br. 71), Stern did not "follow[] established precedent regarding a hypothetical license negotiation." She failed to consider any of the factors relevant to such an analysis and instead employed the same sort of "rule of thumb" approach that the Federal Circuit has explicitly

rejected. The judgment of \$3,188,527.50 in actual damages, even as remitted from \$4 million, lacks supports in any admissible evidence.

1. The Gayes Fail To Show Stern’s Testimony Was Admissible

The “Blurred Lines” parties demonstrated (Op. Br. 52-55) that the district court abused its discretion by admitting Stern’s testimony regarding a “hypothetical license,” which was the sole evidence of actual damages that the Gayes offered. Rather than pointing to any objective evidence supporting Stern’s selection of a 50% license rate, the Gayes instead explain (Br. 72-73) that “the essence of [Stern’s] testimony was that the reasonable and standard price the composer will require and the subsequent user will pay for the right to use the heart of the music is at least 50%.” This argument highlights exactly why Stern’s testimony was inadmissible.

First, Stern’s generalized approach fails to comply with the requirement that an expert link a proposed license rate “to the relevant facts and circumstances of the particular case at issue and the hypothetical negotiations that would have taken place in light of those facts and circumstances at the relevant time.” *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011); *see Gaylord v. United States*, 777 F.3d 1363, 1368 (Fed. Cir. 2015) (“hypothetical-negotiation determination must be tied to the particular work at issue and its marketplace

value”). As the “Blurred Lines” parties demonstrated (Op. Br. 52-54)—and the Gayes effectively concede—Stern failed to undertake such an analysis.

Second, the “essence” of Stern’s approach is exactly what the Federal Circuit identified as a “flawed” approach in *Uniloc*. Because the Gayes presented no objective evidence to support the 50% license as a fair measure of market value, Stern’s testimony cannot be distinguished from the 25% rule of thumb that the Federal Circuit rejected in *Uniloc*, 632 F.3d at 1315. The Gayes attempt (Br. 75) to distinguish *Uniloc* because the parties there sought to apply the rule of thumb “without any analysis of particular facts,” whereas here, Stern supposedly “sharply focused on the quality and amount of Give appropriated in Blurred and what license terms would ordinarily be negotiated for the rights to do so,” *id.* But even if Stern had conducted such analysis (she did not), it would not serve to distinguish *Uniloc*. Rather, *Uniloc* held that it was “of no moment that the 25 percent rule of thumb is offered merely as a starting point to which the *Georgia–Pacific* factors are then applied to bring the rate up or down,” because “[b]eginning from a fundamentally flawed premise and adjusting it based on legitimate considerations specific to the facts of the case nevertheless results in a fundamentally flawed conclusion.” 632 F.3d at 1317; *see also id.* at 1311-12 (explaining flawed expert methodology of starting at 25% and adjusting for application of *Georgia-Pacific* factors). Here, not only did Stern start with the 50% license fee, but she failed to

apply *any* of the *Georgia-Pacific* factors. Thus, Stern’s methodology is even more flawed than the methodology the Federal Circuit rejected in *Uniloc*.

Third, the Gayes wrongly argue (Br. 74) that “Appellants essentially assert that, in the absence of actual prior license of Give itself, no competent expert opinion based on such experience could be rendered.” But Stern’s failure to include any objective evidence of market value is not limited to her failure to include licenses for “Got To Give It Up.” She failed to point to any Marvin Gaye song that had received a 50% license rate or, for that matter, any other song that did. ER965; *see generally* ER953-75. Faced with this undisputed fact, the Gayes wrongly rely (Br. 74) on *Oracle Corp. v SAP AG*, 765 F.3d 1081 (9th Cir. 2014), to argue that a copyright plaintiff need not present evidence of benchmark agreements. But this Court explained that, absent such benchmark agreements, “it may be difficult for a plaintiff to establish the amount of such damages without undue speculation in the absence of such evidence.” *Id.* at 1093. The Gayes offer nothing to remove Stern’s testimony from the category of “undue speculation.”

Finally, the Gayes attempt in a footnote (Br. 72 n.32) to excuse Stern’s reliance on alleged similarities between “Blurred Lines” and the sound recording of “Got To Give It Up,” including unprotected elements not in the deposit copy. ER961-64. But Stern never identified the specific elements on which she relied, instead speaking only generically of “the melody and instrumentation around the

melody.” ER969-70. Thus, nothing links Stern’s analysis to the protected elements at issue.

As the “Blurred Lines” parties’ explained (Op. Br. 52-54), the lack of any objective foundation for Stern’s opinion renders it inadmissible and unreliable. *Cf. Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007) (damages properly based on “at least six estimates of the fair market value” of infringed work); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708-09 (9th Cir. 2004) (damages supported by evidence of prior quote for use of copyrighted material).

2. The Gayes Cannot Justify The Actual Damages Award Based On Stern’s Testimony

The Gayes also fail in their attempt to defend Stern’s testimony in support of the remitted damages award of \$3,188,527.50. As an initial matter, the Gayes do not dispute that a district court’s denial of a motion for a new trial is reviewed for abuse of discretion, but argue that “the verdict will not be overturned unless the damages are ‘grossly excessive or monstrous.’” Gaye Br. 70 (quoting *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1191 (9th Cir. 2002) (citation omitted). But the case the Gayes cite addresses the specific argument that the damages award was grossly excessive such that “the size of the damages awards meant that the jury must have been motivated by sympathy or sheer guesswork.” *Hemmings*, 285 F.3d at 1191. Indeed, the case this Court cited in *Hemmings* confirms that the Court “must uphold the jury’s ‘finding of the amount of damages unless the amount is

‘grossly excessive or monstrous,’ clearly not supported by the evidence, *or* ‘only based on speculation or guesswork.’” *L.A. Mem’l Coliseum Comm’n v. NFL*, 791 F.2d 1356, 1360 (9th Cir. 1986) (emphasis added). An argument that the damages are excessive is a separate basis for new trial distinct from any argument that the damages are speculative or unsupported by the evidence.

The “Blurred Lines” parties demonstrated (Op. Br. 56-57) that, even if Stern’s opinion were admissible, it fails to provide any non-speculative evidence to support the damages award. The Gayes confirm (Br. 72) that Stern relied on purported “[i]ndustry standards” that provide that, “where the use involves the melody or hook of the song, the license rate is 50% or more.” Because no one testified that “Blurred Lines” adopts wholesale the melody, rhythm, and harmonies of “Got To Give It Up,” not even Stern’s own testimony supports an award of 50% of the total publishing revenues of “Blurred Lines.” Indeed, the Gayes undermine their own position in arguing (Br. 73 n.33) that, in certain instances, the license fee for the use of music would exceed 50%. That the “Beatles would demand and receive far more” than 50% for a song that used the entirety of the melody and harmony of the Beatles’ “Let It Be,” *id.*, however, contradicts Stern’s testimony that her approach allocates “50 percent for the music, 50 percent for the lyrics.” ER958. “[T]he absolute absence of evidence to support the jury’s verdict makes

[refusal to grant a new trial] an error in law.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quotations omitted).

B. The Gayes’ Awards Of Profits Are Not Supported By Any Competent Evidence

The Gayes likewise offer no persuasive response to the argument that the awards of \$1,768,191.88 in profits against Thicke and \$357,630.96 against Williams are excessive. The Gayes first argue (Br. 76) that the profits awards were supported by the fact that the “protected elements of Give appeared throughout Blurred, and that these elements constituted the heartbeat of the songs.” But Finell identified the “heartbeat” of “Got To Give It Up” as a series of elements that do not appear in the deposit copy and are not protected. ER558-61, ER621, ER629, ER642, ER661.

The Gayes also argue (Br. 76) that the “Blurred Lines” parties had the burden of proving apportionment and failed to meet it. But the only admissible evidence in the record demonstrated that—at most—only a small fraction of “Blurred Lines” relates to “Got To Give It Up” and that the revenues from “Blurred Lines” relate to factors unrelated to the music and lyrics, such as the music video of the song and the popularity of the performers. ER1289-1306, ER1337-61. For this reason, the only profits award with any support in the record would set profits “attributable to the infringement” at 5% of the non-publishing revenues from “Blurred Lines.” ER1122-23.

C. The Gayes Cannot Defend The Award Of A Running Royalty

The Gayes do not dispute that, without admissible evidence to support the 50% license rate, the district court abused its discretion by awarding a running royalty of 50% of future “songwriter and publishing revenue” as an alternative to a permanent injunction. Because the running royalty relies on Stern’s flawed testimony, the running royalty rate should be vacated or, alternatively, reduced to no more than 5% of future publishing revenues. *See* Op. Br. 54-57.

IV. THE GAYES CANNOT DEFEND THE JUDGMENT AGAINST HARRIS, WHICH CONTRADICTS THE JURY VERDICT

Williams, Thicke and Harris join in and incorporate by reference the answering/reply Brief of Appellants-Cross-Appellees Interscope *et al.*, which shows that the Gayes have no credible defense of the district court’s entry of judgment against Harris and the Interscope parties. *See* Reply Br. of Interscope *et al.* (Dkt. 63).

As to Harris specifically, the Gayes offer no explanation of how the district court’s alleged erroneous omission of an instruction on “distributor” liability could have led the jury to find no liability against Harris—who was a composer, not a distributor, of “Blurred Lines.” Recognizing this deficiency in the district court’s reasoning, the Gayes argue (Br. 79) that Harris “authorized the distribution” of “Blurred Lines,” but they offer no factual or legal support for this statement, and there is none. Nor do the Gayes attempt to reconcile the jury’s finding of liability

against two of the composers of “Blurred Lines”—Thicke and Williams—but not the third—Harris. As shown above, and in the Interscope parties’ brief, the only plausible reconciliation of the split verdict is that the jury was mis-instructed regarding the standards for finding infringement, and misled by irrelevant and prejudicial evidence of Thicke’s and Williams’s (but not Harris’s) alleged “intent” to copy “Got To Give It Up.” The judgment against Harris should be reversed.

V. ON CROSS-APPEAL, THIS COURT SHOULD NOT DISTURB THE DISTRICT COURT’S RULING LIMITING THE COPYRIGHT TO THE LEAD SHEET DEPOSITED WITH THE COPYRIGHT OFFICE

In their cross-appeal, the Gayes attempt (Br. 43-58) to assign error to the district court’s holding that the Gayes’ copyright in “Got To Give It Up” was limited to the scope of the lead sheet. Contrary to the Gayes’ framing of this argument, however, the district court did not hold that the lead sheet deposited with the Copyright Office set forth the scope of the copyright for “Got To Give It Up.” Rather, the district court held (ER119) that the Gayes had not provided any evidence that anything other than the lead sheet constituted the *published* (and thus copyrighted) version of “Got To Give It Up.” Thus this Court need not reach the Gayes’ argument on cross-appeal that the district court should have interpreted the scope of copyright based on the sound recording. Even if the Gayes could demonstrate that the district court erred in not considering the sound recording,

such error would at most require vacatur and remand for a new trial—and not reversal.

A. The District Court Properly Limited The Gayes’ Copyright To The Lead Sheet As The Published Work

The Gayes wrongly contend (Br. 46, 52) that the district court erred in rejecting the Gayes’ argument that the “Got To Give It Up” sound recording provided the “best evidence” of the scope of the copyright. The district court correctly determined that only published works (here, the lead sheet) could establish the scope of the copyright.

1. The Lead Sheet Is The Only Published Work

As a preliminary matter, the question at issue in the Gayes’ cross-appeal is *not* whether the scope of the “Got To Give It Up” copyright is limited to the deposit copy as a matter of law. The Gayes cannot base their cross-appeal on this ground because the district court held that “the scope of Defendants’ copyrights is not, as a matter of law, limited to the lead sheets deposited with the Copyright Office in 1976 and 1977.” ER118. The Gayes ultimately acknowledge as much. Gaye Br. 51 (“[T]he ruling of the trial judge refusing to limit the copyright to the lead sheet was correct.”).⁸

⁸ To the extent the Gayes argue (Br. 51), that the sound recording is the “best evidence” of the published work, this argument is a red herring. *First*, as described in the text, the only published work itself is the lead sheet. *Second*, the Copyright Act does not place any limits on what can be notated in sheet music, nor

As a precursor to this ruling, however, the district court explained that the Gayes could have obtained protection under the Copyright Act either by publishing the works with notice or by “composing, but not publishing them, and making the necessary deposits with the Copyright Office.” ER118. Thus, to extend the scope of the copyright protection beyond the lead sheet, the Gayes had to have shown that there was a more detailed published work, but there is none. The Gayes’ cross-appeal, therefore, challenges only the district court’s conclusion that the Gayes “offered no evidence that, prior to the registration of the copyrights, ‘Got to Give It Up’ . . . was published or reduced to a manuscript form that was more complete than what is included in the lead sheets.” ER118. But this holding is correct.

“Under the 1909 Act, an unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme.” *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995), *superseded by statute on other grounds*, 17 U.S.C. § 303(b) (1997) (citing *Roy Exp. Co. Establishment of Vaduz v. CBS, Inc.*, 672 F.2d 1095, 1101 (2d Cir. 1982)); *see also ABKCO Music, Inc. v.*

do the Gayes point to any. *Finally*, contrary to the arguments of *amicus* the Institute For Intellectual Property and Social Justice, the Copyright Act does not discriminate “against traditionally marginalized composers,” Dkt. 46 at 5, because the Act preserves the common law protections for sound recordings. *See infra*, 41 & n.10.

LaVere, 217 F.3d 684, 688 (9th Cir. 2000) (same, quoting *La Cinega*). Thus, “Got To Give It Up” had no protection under the Copyright Act (and had protection only under common law) until it was published or deposited with the Copyright Office. *See id.*; *see also Rosette v. Rainbo Record Mf’g Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff’d* 546 F.2d 461 (2d Cir. 1976) (explaining that, under the 1909 Act, a “new statutory method of copyright was provided in Section 11 for unpublished works”); Copyright Act of 1909, 35 Stat. 1075, § 9 (allowing author to “secure copyright for his work by publication thereof with the notice of copyright required by this Act”); *id.* § 10 (permitting “registration of . . . claim to copyright by complying with the provisions of this Act, including the deposit of copies”).

The evidence clearly established that the lead sheet for “Got To Give It Up” with the copyright symbol was the only publication of the song. ER2410 (deposit copy); ER2446 (listing no other prior publication). On this basis alone, the district court correctly concluded that the Gayes had not established that “Got To Give It Up” was published prior to deposit of the lead sheet with the Copyright Office. Absent another publication, only the deposit copy lead sheet is protected under the 1909 Act.

2. Sound Recordings Do Not Qualify As Published Works Under the 1909 Act

Having succeeded in persuading the district court that the copyright is not limited to the lead sheet, the Gayes instead argue that, “[d]espite ruling that the scope of the copyright could be established with evidence outside the lead sheet, the District Court excluded the best evidence: the recording made at the very moment Marvin Gaye composed Give in studio.” Gaye Br. 52. But the Gayes fail to confront the district court’s logic: if the copyright is not based on the deposit copy, it must be based on a prior publication of the work. To rely on the sound recording to expand the scope of the copyright beyond the lead sheet, the Gayes must show that the sound recording qualifies as a publication. They cannot do so.

As an initial matter, the Gayes are wrong to argue that “[w]hether distribution of the phonorecord constitutes publication has no bearing on the question of copyright scope.” Gaye Br. 54. The 1909 Act set up a system by which an unpublished work lost common law protection and entered the public domain. *ABKCO Music, Inc.*, 217 F.3d at 688. A published work, however, could receive federal copyright protection under the 1909 Act.⁹ *Id.* A sound recording

⁹ For this reason, the Gayes are wrong to assert (Br. 57) that “[t]ying the scope of protection to when or how a work was ‘published’ is not in accord with the broad protection for creative works intended by the Copyright Clause, with any court decision in the last century, or with the intent of Congress.” Authors received “broader rights under the common law copyright,” *Rosette v. Rainbo Record Mfg*

cannot be deposited with the Copyright Office under the 1909 Act, as the Gayes conceded (at 44). *See* M. Nimmer & D. Nimmer, 1 NIMMER ON COPYRIGHT § 2.05[A] (2017) (“[I]n order to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form.”) (quoted at ER119). Thus, if a sound recording does not constitute a publication, the sound recording does not qualify for federal copyright protection.

As the district court held, ER119, and as Congress has made clear, a sound recording does not qualify as a publication. In the 1997 Amendment of the Copyright Act, Congress explicitly provided that “[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.” 17 U.S.C. § 303(b) (1997) (quoted at ER119). Despite this clear legislative statement, the Gayes argue (Br. 52) that “the 1997 Amendment has no bearing on the issue of the scope of a copyright.” But they provide no support for this argument.

In fact, the only cases the Gayes cite (Br. 54-56) to support their argument for expanding the scope of the copyright are easily distinguished. *Three Boys* involved the question of whether an inaccurate deposit copy invalidated the copyright registration, which would mean the court would not have subject-matter

Corp., 546 F.2d 461, 463 (2d Cir. 1976), which would be lost when a publication that renders a work eligible for Copyright Act protection.

jurisdiction. 212 F.3d at 480, 486-87. The Gayes argue (Br. 55 n.22) that the jury's consideration of sound recordings "means that both courts in *Three Boys* believed the Isley Brothers' copyright extended to the elements contained in the sound recording." But this issue was not before the Court. *See id.* And the 1976 Act applied to the work at issue in *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 272 (6th Cir. 2009) (cited at Gaye Br. 56), under which a sound recording may qualify as a published work.

Because the copyright attaches either to the published work or work deposited with the Copyright Office prior to publication, the fact that the sound recordings do not qualify as publications has a direct bearing on this question.¹⁰ Under the 1909 Act, a sound recording does not qualify as a publication and a sound recording may not be deposited with the Copyright Office. For this reason, the Gayes may not rely on the sound recording to establish the scope of the copyright in "Got To Give It Up." Therefore, the only work subject to the

¹⁰ The Gayes argue that the 1909 Act could have "limit[ed] musical composition copyrights to sheet music using standard notation" but did not, pointing to the language of Section 1(e) of the 1909 Act to argue that "protection extends to 'any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.'" Gaye Br. 48. But the quoted portion of Section 1(e) refers back to Section 1(a), which refers to the right "[t]o print, reprint, publish, copy, and vend the copyrighted work." Copyright Act of 1909, 35 Stat. 1075, § 1. This provision offers no support for the Gayes' argument.

protections of the Copyright Act is the lead sheet deposited with the Copyright Office.¹¹

B. If The Gayes' Copyright Is Not Limited To The Published Lead Sheet Deposited With The Copyright Office, A New Trial Is Warranted

While the Gayes assert (Br. 29) that they “raise the [lead sheet] issue protectively on cross-appeal so that if for any reason the matter is returned to the District Court for a new trial the Gayes will be free to introduce the sound recording and establish similarities based on it,” the Gayes’ cross-appeal implicates numerous issues in the “Blurred Lines” parties’ appeal. If this Court, in deciding the scope of the “Got To Give It Up” copyright, determines that the district court erred, it should remand the case for a new trial.

First, the Gayes have not limited their arguments regarding the proper scope of the “Got To Give It Up” copyright to this one issue on the cross-appeal. Rather, throughout their brief, the Gayes argue that the sound recording informs and is the “best evidence” of the copyright, just as they argue in the cross-appeal. *Compare* Gaye Br. 26 (“If this Court disagrees with the lead sheet limitation imposed by the District Court, it eliminates virtually all of the grounds asserted as error by the

¹¹ The Gayes are wrong to argue (Br. 52) that the district court’s interpretation of the 1997 Amendment would “effectuate the perverse result of eviscerating the rights of composers under the 1909 Copyright Act.” To the contrary, the 1997 Amendment leaves in place the common law protections for sound recordings that otherwise would have been held to have entered the public domain. *ABKCO Music*, 217 F.3d at 688.

Thicke parties and reinforces the correctness of the decision below.”) *with id.* at 43-44 (“[T]he District Court properly considered testimony about what a musicologist skilled in the art could discern from the lead sheet—but it is also entirely moot if the comparison should not have been confined to the lead sheet in the first place.”).

Second, the Gayes are wrong to frame this argument as excusing the district court’s evidentiary errors. The parties must play by the same ground rules in the district court. The “Blurred Lines” and “Got To Give It Up” sound recordings are not substantially similar, and if a comparison of sound recordings is to be in play, then the “Blurred Lines” parties should be able to present their case to a jury on their dissimilarity. Because the “Blurred Lines” parties submitted expert testimony based on the lead sheet, any holding that the Gayes’ copyright encompasses more than the lead sheet requires a remand for a new trial to ensure that both parties are permitted to submit testimony in accordance with the correct legal framework.

Finally, the Gayes—while not urging a new trial—effectively acknowledge that any error in interpreting the scope of the copyright would require a new trial. Gaye Br. 86 (“In the event the matter is remanded for a new trial (which the Gayes do not urge), the Court should confirm that the scope of the copyright in the Give composition may be established with the author’s contemporaneously made studio

recording.”). As the Gayes imply, expanding the scope of the Gayes’ copyright would lead to different evidence.

Should this Court conclude that the Gayes’ copyright in “Got To Give It Up” encompasses more than the lead sheet, it should remand this matter for a new trial.

VI. ON CROSS-APPEAL, THIS COURT SHOULD NOT REMAND ON ATTORNEYS’ FEES AND COSTS

A. The District Court’s Order Denying The Gayes’ Request For Attorneys’ Fees Should Be Affirmed

The Gayes fail to identify any abuse of discretion supporting their request that the district court be ordered to “take another look” at their application for attorneys’ fees. *Gaye Br. 85; Marshall & Swift/Boeckh, LLC v. Dewberry & Davis LLC*, 586 F. App’x 448, 449 (9th Cir. 2014). The Gayes premise their request on the Supreme Court’s intervening decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1989 (2016), which held that, while reasonableness of the losing party’s position must be given “significant weight” in an award of attorneys’ fees, it cannot be treated as “rais[ing] a presumption against granting fees.” The Gayes argue that, because the district court gave “considerable weight” to the “objective reasonableness of the [“Blurred Lines”] Parties’ positions,” the court erred under *Kirtsaeng*. *Gaye Br. 85*. But even under *Kirtsaeng*, giving “considerable weight” to the reasonableness of a party’s positions is not error; instead, the Gayes must show that the district court gave this factor near dispositive weight. *See Choyce v.*

SF Bay Area Indep. Media Ctr., No. 14-17318, 2016 WL 6123539, at *1 (9th Cir. Oct. 20, 2016) (“The district court gave ‘substantial weight’ to the objective reasonableness of [plaintiff’s] position but did not rely exclusively on it, and thus the Supreme Court’s recent decision in *Kirtsaeng* . . . does not require a different result.”).

The Gayes cannot make this showing. The district court weighed reasonableness as but one factor among others in its analysis and correctly noted its discretion to award attorney fees “even when a party acted reasonably.” ER140. While the Gayes urged that the “Blurred Lines” parties’ “objectively unreasonable” litigation conduct supported an award of fees (ER145), the district court reasoned that “Blurred Lines” parties had shown “that their overall defense against the claims of infringement was reasonable and non-frivolous” (ER147). In the end, the district court held that, “[b]eyond the success on the merits, little else support[ed] [the Gayes’] position,” as the case “presented novel issues,” and the public policy of the Copyright Act was not served by an award of fees. ER142-43, ER148. *Kirtsaeng* therefore does not warrant “another look.” Gaye Br. 85.

B. The District Court’s Order Apportioning Costs Among The Gayes’ Claims For Relief Should Be Affirmed

The district court appropriately awarded costs under Federal Rule of Civil Procedure 54(d)(1) to each party with respect to the claim for relief on which each prevailed, and that decision should be upheld. ER0002-3. The “district court’s

denial of costs is reviewed for an abuse of discretion.” *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 968 (9th Cir. 1999). Here, the district court awarded costs to the Gayes as prevailing party on their claim that “Blurred Lines” infringes “Got To Give It Up,” and awarded costs to the “Blurred Lines” parties as the prevailing party on the Gayes’ claim that “Love After War” infringes “After the Dance.” ER2-3, ER64-65. The Gayes argue that courts should not be permitted to apportion costs, and that, despite losing their second claim for infringement, they nonetheless should be awarded costs incurred for bringing that claim. Gaye Br. 85-86. This result would be inequitable because the Gayes chose to present two distinct infringement claims as one.

The Gayes’ view (Br. 85) that Rule 54(d) allows “(at most) one prevailing party” also contradicts Supreme Court precedent. Evaluating a statute that, like Rule 54, also awards costs to “the prevailing party,” the Supreme Court explained that courts can “properly award fees to both parties” in a suit involving mixed judgments, recognizing that a defendant who loses on one claim should not bear costs incurred defeating another. *See Fox v. Vice*, 563 U.S. 826, 833, 835 (2011) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435, n. 10 (1983)); compare 42 U.S.C. § 1988(b) with Fed. R. Civ. Pro. 54(d)(1). The Ninth Circuit has since extended the holding of *Fox v. Vice* to another statute employing the phrase “the prevailing party.” *C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1249-50 (9th Cir.

2015).¹² The Gayes' citation to out-of-circuit decisions is therefore inapposite, for they rely on the word "the" in the phrase "the prevailing party" to find that Rule 54 only permits one prevailing party. *Cf. Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010); *see, e.g., FLIR Sys., Inc. v. Sierra Media, Inc.*, 965 F.Supp.2d 1184, 1198-1201 (D.Or. 2013) (rejecting *Shum*). The district court correctly apportioned costs to each party on the claim for which it was the prevailing party.

CONCLUSION

The judgment should be reversed. Alternatively, the judgment should be vacated and the case remanded for new trial.

Dated: New York, New York
April 24, 2017

Respectfully submitted,

s/ Kathleen M. Sullivan

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¹² Moreover, under Rule 54(d), the Ninth Circuit previously noted that "[i]n the event of a mixed judgment . . . it is within the discretion of a district court to require each party to bear its own costs." *Amarel v. Connell*, 102 F.3d 1494, 1523-24 (2d Cir. 1996).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 28.1-1(b), the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,502 words.

DATED: April 24, 2017

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By s/ Kathleen M. Sullivan

Kathleen M. Sullivan

Attorney for Plaintiffs-Appellants-Cross-Appellees Pharrell Williams, Robin Thicke, Clifford Harris, Jr., and More Water From Nazareth Publishing, Inc.

CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, a member of the Bar of this Court, hereby certify that on April 24, 2017, I electronically filed the foregoing “Third Brief On Cross-Appeal Of Plaintiffs-Appellants-Cross-Appellees Pharrell Williams, Robin Thicke, Clifford Harris, Jr., And More Water From Nazareth Publishing, Inc.” 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/Kathleen M. Sullivan