

## Fair Use of Musical Works—An Empirical Study

Edward Lee

Fair use is routinely litigated as a defense in copyright cases involving all sorts of works ranging from computer programs to works of visual art. But, curiously, fair use appears to be far less prevalent in cases involving musical works. For example, in the recent high-profile case involving Marvin Gaye’s estate, Pharrell Williams and Robin Thicke didn’t even raise a fair use defense at all, despite its possible relevance.<sup>1</sup> The case is not singular. Of the dozens of music infringement cases decided under the Copyright Act, few have resolved—much less accepted—a fair use defense. The apparent dearth of fair use defenses in cases involving an allegedly infringing musical work is puzzling, given the number of such cases and how easy it is to raise a fair use defense to a claim of copyright infringement. While the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*<sup>2</sup> clarified the fair use doctrine and established the important inquiry of “transformative use,” the decision apparently had little impact on fair use in cases involving musical works—despite itself being a case involving a musical work (albeit a parody).<sup>3</sup>

This Article examines this anomaly. Part I discusses the results of an empirical study that examines the frequency in which fair use is litigated in copyright cases involving a musical work that allegedly infringes another musical work (“allegedly infringing musical work” cases, for short). Cases involving a defendant’s sampling of a sound recording were also tracked, but were not the focus of the study. The study examines two different data sets: (1) all copyright cases involving an allegedly infringing musical work that are listed on Pacer from approximately 2007, and (2) all copyright cases involving an allegedly infringing musical work applying the 1976 Copyright Act whose decisions were reported on Westlaw, even if in an unpublished or non-precedential decision. The two data sets were coded to identify if a fair use defense was raised and, if so, whether it was successful in cases that were decided. The study compares the results for music cases to a similar examination of copyright cases on Pacer and Westlaw involving (1) computer programs, and (2) pictorial or graphic works. My hypothesis is that courts consider fair use less frequently in cases involving an allegedly infringing musical work or, at least, that such cases do not commonly rely on fair use as a basis for the decision.

Assuming the study confirms my hypothesis, Part II considers possible explanations for this anomaly, including that (1) defendants may be forgoing raising fair use as a defense, (2) courts may be deciding cases for defendants on other grounds (e.g., lack of access or substantial similarity to the plaintiff’s work, de minimis copying or copying an uncopyrightable element) even when fair use is raised, and (3) the case law may be less receptive to fair use in music cases. The Part evaluates the validity of each theory and ramifications for music and copyright.

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<sup>1</sup> Pharrell Williams and Robin Thicke initiated the lawsuit seeking declaratory judgment (that their song “Blurred Lines” did not infringe the copyright to Marvin Gaye’s “Got to Give It Up,” but a declaratory judgment action would not have precluded a fair use defense. See Eriq Gardner, *Robin Thicke Suits to Protect ‘Blurred Lines’ from Marvin Gaye’s Family (Exclusive)*, THE HOLLYWOOD REPORTER, Aug. 15, 2013, <http://www.hollywoodreporter.com/thr-esq/robin-thicke-sues-protect-blurred-607492>.

<sup>2</sup> 510 U.S. 569 (1994).

<sup>3</sup> The Supreme Court recognized that 2 Live Crew’s parody song of another musical work (“Oh, Pretty Woman”) can be a fair use in part because the parody use was transformative—it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 579.