

Apportioning copyright damages: the case of ‘Blurred Lines’

Doug Bania*

Most of the existing literature on copyright infringement is concerned with the *valuation* of intellectual property rather than the *apportionment* of the value that is directly attributable to the intellectual property asset at issue. Further, few of the currently proposed IP valuation methods and little of the literature addressing the determination of damages appears directly applicable to the case of copyright in the context of artistic productions. Within the creative arts, recorded music offers a particularly complex and interesting case within which to explore this issue, as different portions of the relevant copyright to the recorded song may be held by different persons. The apportionment of potential damages therefore requires two steps or determinations. The first takes place in what we might refer to as the work’s legal or intellectual property context: how current copyright law divides up the copyright to that work and which part or parts of the copyright are relevant to charges of infringement. The second takes place within the work’s economic or non-intellectual property context: how various factors contribute to that work’s financial value.

To demonstrate the multiple factors involved in the process of making these determinations, this article examines the case of the recent highly publicized charges of copyright infringement made against the creators of the hit song ‘Blurred Lines’, Pharrell Williams, Robin Thicke and Clifford Harris, Jr, by the estate of the late Marvin Gaye, Jr. This analysis is based on an expert report on the allocation of potential damages conducted by our consulting firm at the behest of the law firm representing the creators of ‘Blurred Lines’. We were asked not to determine whether any copyright infringement actually occurred, but rather to calculate what percentage of the earnings of the song would be attributable to such infringement if it were found to have indeed taken place. Following a brief description of the history of and parties in this case, the article discusses the methods used to apportion the value of the copyrighted intellectual property within a legal and economic context.

* Email: dougbania@neviium.com.

The author

- Doug Bania (CLP, MA) is a principal of Nevium, an intellectual property consulting firm, and member of the American Bar Association. He has more than a dozen years’ experience in analysing and valuing intellectual properties and intangible assets, including song royalties, trade marks, publicity rights, internet assets, and copyrights in a variety of contexts.

This article

- Using data collected by the author’s firm as consultants in the recent ‘Blurred Lines’ case, in which the family of Marvin Gaye, Jr accused Pharrell Williams, Robin Thicke and Clifford Harris, Jr of infringing musical elements of Gaye’s ‘Got to Give It Up’, this article addresses the relatively neglected issue of the apportionment of value that is directly attributable to an intellectual property asset.
- Such apportionment is particularly complex in the case of recorded music, which may include multiple copyright holders and requires two steps described in the article. The first is determining what portion of the copyright to a work is relevant to charges of infringement; the second is determining the multiple factors that contribute to the financial success of that work.
- The author argues that in this case, in which the supposedly infringed musical elements are covered by only half of one of the two relevant copyrights and in which much of the song’s value is demonstrably attributable to non-copyright factors, considerably less than a quarter of the value of the ‘Blurred Lines’ could rightfully be attributed to the contested elements protected by Gaye’s copyright.

‘Blurred Lines’ and the alleged infringement

The case for which this report was prepared was a lawsuit by the three artists who created the song against publicized charges by Frankie Christian Gaye, Nona Marvisa Gaye and Marvin Gaye, III, alleging that ‘Blurred Lines’ so closely resembled certain musical elements of Marvin Gaye’s 1977 ‘Got to Give it Up’ as to be liable for copyright infringement.¹ In their complaint, the creators of ‘Blurred Lines’ stated that they had the utmost respect for Marvin Gaye and argued that, by alleging that their work had the same feel or sound as the earlier song, the Gaye family was trying to claim ownership of an entire genre rather than a specific work (although a trial jury subsequently found the artists liable for copyright infringement, the judge later reduced the awarded damages and the case is expected to be appealed.)

The parties

Pharrell Williams, Robin Thicke and Clifford Harris, Jr (plaintiffs and performing artists) collectively wrote, composed, produced and published the song ‘Blurred Lines’; Williams also served as the producer of the sound recording of both the song and Thicke’s album of the same name. Each of the plaintiffs was already an established artist in the field and had contributed to several hit songs and albums before the release of ‘Blurred Lines’. Frankie Christian Gaye, Nona Marvisa Gaye and Marvin Gaye, III (the defendants) are the children of Marvin Gaye, Jr (‘Gaye’) and holders of the copyright to Gaye’s musical composition ‘Got to Give it Up’. Universal Music Group (UMG) is a global leader in music recording, publishing and merchandising and the parent company of Interscope Records and a partner in Star Trak Entertainment, which acted as the label companies for the album *Blurred Lines*. Although UMG was not originally a plaintiff in the case and was not accused of infringement by the defendants, it played a major role in the financial success of the recording and provided much of the information on which our report was based.

Key events

According to the timeline of key dates related to the song compiled as part of our report, ‘Blurred Lines’ became popular and achieved a large volume of sales within a relatively short period of time. In the five months between March 2013 and August 2013, the music videos

and the single for ‘Blurred Lines’ were released, sales peaked, claims that the song had copied Marvin Gaye’s ‘Got to Give it Up’ surfaced, and a pre-emptive complaint was filed by the performing artists. During this period, ‘Blurred Lines’ received a great deal of media attention regarding the raciness and alleged misogyny of the accompanying music videos, and Thicke, Williams and Harris appeared in public and on social media numerous times to promote or perform the song.

Thicke debuted the unrated version of the ‘Blurred Lines’ music video featuring three topless women in skin-coloured thongs on his YouTube channel. When it was pulled from YouTube because of its explicit content, Thicke uploaded the video to VEVO.com and a tamer version of the video featuring the three women wearing clothes was posted on YouTube. On 15 April 2013, UMG’s marketing team started promoting the song to Rhythm Radio stations, later followed by Pop and Urban radio outlets. Marketing activities for the song and album began to increase in mid-May, corresponding with a performance of the song by the artists on NBC’s *The Voice*, the first of many nationally televised performances of ‘Blurred Lines’. These marketing activities peaked in July 2013, corresponding with several interviews and live performances in connection with the release of Thicke’s *Blurred Lines* album on 30 July. Roughly two weeks later, on 15 August 2013, the plaintiffs filed a legal complaint in response to public comments made by the defendants citing Gaye’s influence on the song.

According to data collected in October 2014, more than 90 per cent of the total purchases of ‘Blurred Lines’ had occurred by the end of January 2014 and, by that spring, most of the marketing activities related to the song and album had slowed and the song fell off most of the major song charts.

IP-related factors in the value of ‘Blurred Lines’

Perhaps the most important point to keep in mind when attempting to determine how much of the financial success of an artistic creation is attributable to the ownership of its copyright is that the express purpose of copyright protection is to allow the creator of an original concept or expression an exclusive ability to benefit from the use or expression of that creation for a given period of time, which does not in itself entitle its holder to any economic benefit from that creation. Although this

¹ *Williams and others v Bridgeport Music Inc and others*, Case No 2:13-cv-06004, US District Court for the Central District of California.

exclusive right allows the copyright holder to seek compensation or damages, should another party make commercial use of the copyright-protected expression without permission, other assets and resources must be invested before revenue can be generated from the sale of the artistic creation.

The author of a novel, for instance, typically cannot reap financial benefits from that creation until a publisher invests the necessary capital to print, distribute and promote it in book form. In the music industry, a songwriter who writes a song does not make money simply from the act of writing or committing the music and lyrics to paper. Rather, to benefit financially from their creations, songwriters generally employ a publisher or agent to promote the song to other artists or record the song themselves and work with a record label to promote the resulting sound recording. Recording artists generally rely on the record label's financial resources, marketing and promotional skills, and relationships with radio, television and other media outlets to generate economic benefit from their songs and the recordings of them. In both these forms of publication and distribution, the initial creator of the intellectual property typically shares any profits generated by the work with those other contributors to its success.

A notable way in which music presents a more complex case than most other creative products, however, is that every recorded song is awarded two copyrights, which may or may not be held by the same artist, and often only a portion of one of those two copyrights may have been infringed. These two copyrights are

- the *composition copyright*, which covers the composition of a song's music and lyrics.
- the *sound recording copyright*, which covers the recording of the composition onto a re-playable medium.

Together, these two copyrights protect the recorded versions of both Gaye's 'Got to Give it Up' and the performing artists' 'Blurred Lines'. In this case, the legal proceedings were limited to the alleged use of musical elements related to the composition of the song and made no claim that 'Blurred Lines' infringed any element of the sound recording of 'Got to Give it Up'. The claims of the defendants in this case were accordingly limited to only one of the two copyrights to the song and thus to only half of the economic benefits achieved from the creation, composition, recording, performance, distribution and sale of 'Blurred Lines'.

Further complicating the copyright issue in the case of a musical composition is that the creator of the lyrics and the creator of the music or melody may not be the

same person. In instances in which a composition has been created by multiple artists, ownership of that composition is generally split evenly between the authors of the lyrics and the authors of the music/melody. In this case, since the lyrics of 'Blurred Lines' were not at issue in the alleged copyright infringement, the musical elements allegedly infringed by the plaintiffs included only one half of the elements covered by the composition copyright for 'Got to Give it Up', or only roughly one quarter of the song's total copyright protection.

In short, based on the legal parsing of the copyright protection afforded to recorded musical compositions and given that the defendants alleged that only a portion of the components of 'Blurred Lines' imitated 'Got to Give it Up', only a fraction of the economic benefits received by the performing artists can be legally attributed to the alleged act of infringement. As this discussion has shown, any use of the claimed musical elements therefore cannot be claimed to have contributed more than a quarter of the success of 'Blurred Lines,' even if the composition of 'Blurred Lines' had infringed 100 per cent of the composition of 'Got to Give it Up'. Further, the overwhelming contribution of non-IP related factors discussed below would strongly argue that the actual contribution of the claimed musical elements to the success of 'Blurred Lines' was in fact significantly less than 25 per cent.

Non-IP factors in the value of 'Blurred Lines'

The clearest evidence that intellectual property protected by copyright cannot be considered solely responsible for the commercial or financial success of a song is that some songs achieve widespread popularity and generate substantial revenues and profits for their artists, producers and record labels, and some songs do not, despite being composed of the same elements and protected by equivalent copyrights. In this case, the reported revenues generated by 'Got to Give it Up' in 2012 and 2013 were \$74 412 and \$82 291, respectively. Between 1 April 2013 and 30 September 2014, in comparison, 'Blurred Lines' had generated more than \$4.2 million. In 2013, 'Blurred Lines' topped the 2013 Billboard Hot 100 list for 12 weeks and was ultimately ranked the number 2 song of the year. As of 5 October 2014, the single had been purchased over 7.2 million times and the videos had been viewed approximately 383 million times.

Given the difference in revenues earned by the two songs during the period in question and that intellectual properties do not generate economic benefits by themselves, much of the success and economic value of

‘Blurred Lines’ must be attributed to the human and financial capital invested in its success. This capital includes (i) the talent, skill and reputation of the artists, which is very difficult to measure objectively, and (ii) the impact of promotion, media attention and social media, which is easier to measure and was the subject of our report.

To identify the non-IP factors that contributed to the song’s economic success, we conducted the following:

- Interviews with employees of UMG;
- Review of weekly sales data obtained from SoundScan;
- Review of news and media events related to the song;
- Collection and analysis of the marketing and promotional events; undertaken by UMG and the performing artists between March 2013 and October 2014;
- Review of the ‘Blurred Lines Marketing Plan’ developed and implemented by UMG;
- Review of radio spin data;
- Review of data on YouTube views of the videos and of social media activities related to the song;
- Collection and analysis of social media activities related to the song.

Based on this information, we attempted to identify those factors or events that contributed to increased sales of ‘Blurred Lines’ as represented by the SoundScan data. Factors that were followed by a change in the volume of scans were identified as having had a significant impact on the sales of ‘Blurred Lines’. SoundScan is an online service that tracks the sales of music and video releases via barcode scans at checkout lanes and Internet downloads. The SoundScan data therefore represent the volume of units sold per week and are widely used in the music industry to measure the relative success of a song or album, including determining Billboard rankings. This analysis identified several non-IP, or non-copyright, factors that directly contributed to the success of ‘Blurred Lines’, which are discussed below:

- Awareness created by the video of the song;
- Marketing activities undertaken by UMG to promote the song;
- Radio play and media attention given the song;
- Social media activities related to the song.

Video views and sales

The music videos created by Thicke were released before release of the single and before either UMG or Star Trak had invested in promoting the song. In February 2013, prior to the videos’ release, Thicke’s YouTube channel

had received 85 865 video views but, by the end of March 2013, following the release of the ‘Blurred Lines’ video, they had increased to over 1.5 million views. The unrated version of the ‘Blurred Lines’ video was released on YouTube and taken off shortly thereafter, sparking Thicke to tweet on 30 March that ‘YouTube took down the Unrated version of #BLURREDLINES because it was too hot! You can still view it here on @VEVO.’ The resulting attention undoubtedly led to increased views, media interest and sales.

Although the audience of Thicke’s YouTube channel is typically 55 per cent male and 45 per cent female, in March 2013 the male portion of Thicke’s audience increased to 86 per cent and the viewership of the videos was 88 per cent male, suggesting that the increase in traffic was due more to the visual content of the videos than to the lyrics or musical elements of the song.

In addition to creating initial awareness for the song, the videos appear to have maintained a high level of public awareness for ‘Blurred Lines’ during 2013 and to have sparked or played a role in many of the marketing activities that followed. A comparison of the number of viewer reviews of the video on iTunes and the SoundScan data shows that peaks and declines in the two data sets appear to correspond, indicating a positive correlation between consumer awareness surrounding the videos and the sales of the song. In short, the evidence indicates that the videos made a substantial contribution to the success of ‘Blurred Lines’, a conclusion echoed by a member of the marketing department at UMG: ‘I believe that “Blurred Lines” became a phenomenon with an extremely racy video that catapulted all of the opportunities going forward.’

Marketing events and sales

Following the release of the videos, UMG’s marketing and promotions departments took primary responsibility for the marketing of ‘Blurred Lines’. According to the interviewed UMG employees, this was a rare case in which the video paved the way for future marketing efforts and the success of a recorded song. To further support the song, UMG utilized a push marketing strategy involving print and live interviews, television and radio appearances, concert tours and live performances, internet marketing, radio plays, social media, retail promotions, street marketing, word of mouth and internet blogs. UMG and Thicke also hired third-party firms to manage publicity, search engine optimization (SEO), internet marketing, visual asset housing facility, web banner design and social media management for marketing support. According to UMG employees, the marketing campaign was one of the most

robust and labour-intensive campaigns on which they had ever worked. According to documents provided by UMG, the organization promoted the song and album with 240 individual events and an investment of roughly \$3.6 million dollars in marketing efforts.

As can be seen in Figures 1A and 1B, a comparison of the SoundScan data and the timing and volume of key marketing events related to 'Blurred Lines'—including live television appearances and performances, radio interviews, promotional events, social media events, performances by the performing artists in major markets in the United States and a commercial for another product based

on the theme of the videos—revealed that these marketing activities were closely followed by increases in sales. UMG's marketing and promotional efforts were also instrumental in arranging a performance of the song by the artists on *The Voice* on 14 April 2013, after which weekly sales increased from fewer than 70 000 to over 200 000 units.

Throughout June 2013, weekly sales figures increased following interviews and live performances by the artists. A short period of decline in the SoundScan data in July 2013 coincided with a dip in marketing events and was halted following Thicke's interviews with Ryan Seacrest, *Vanity Fair*, and Howard Stern on Sirius Radio

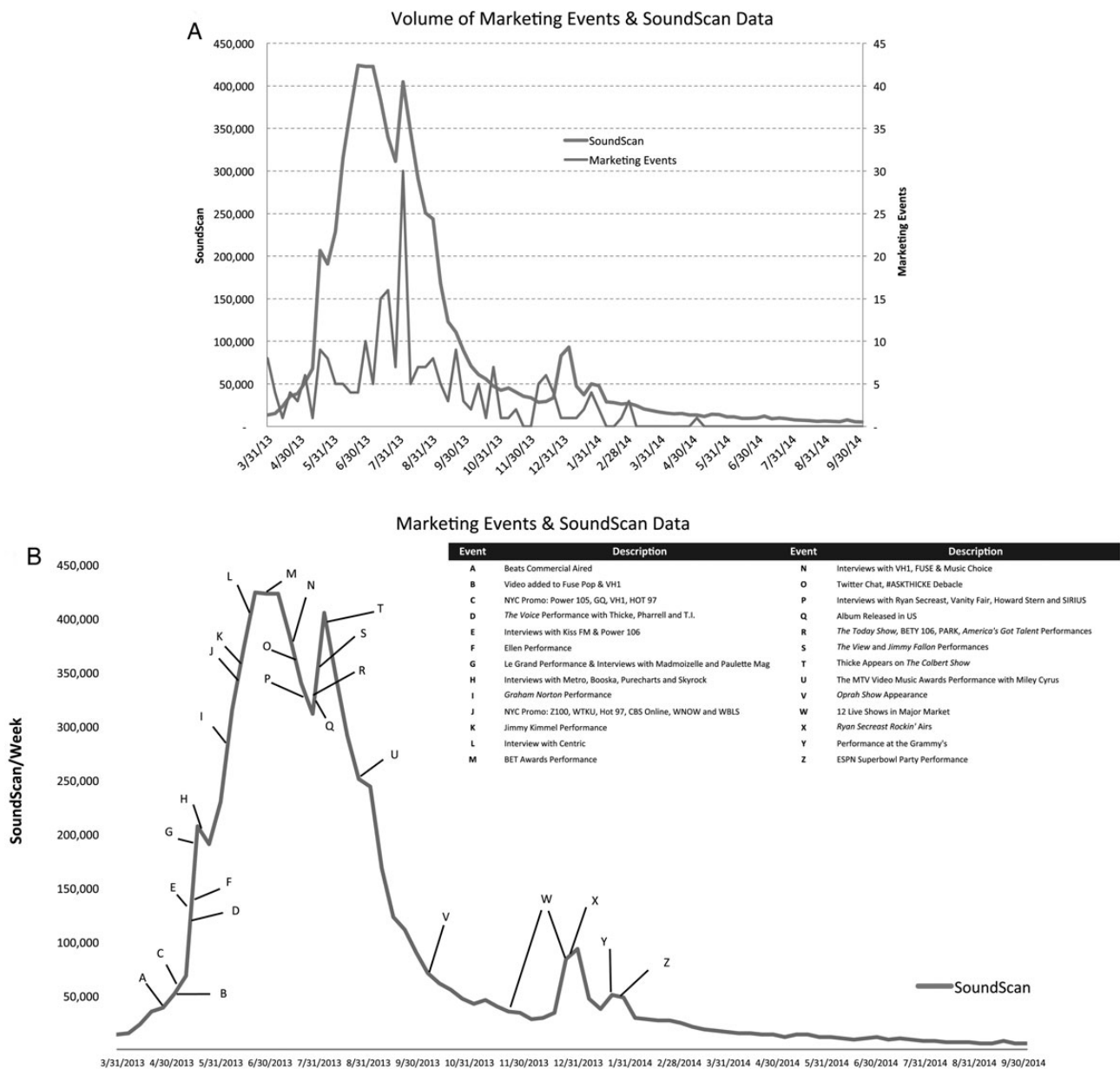


Figure 1. Correlation between marketing events and SoundScan sales data.

and performances of the song on *The Today Show*, *The Jimmy Fallon Show*, *The View* and *America’s Got Talent*, all of which were coordinated by UMG; sales rebounded from 312 000 to 405 000 units the week after these events. These events were followed by no real key marketing events for roughly three weeks, and the absence of marketing activities corresponded to declining sales during that period. In late 2013, a few short-lived periods of sales increases corresponded with the dates that Thicke was performing in major U.S. markets and making appearances on nationally televised programs. A comparison of the SoundScan data to the amount of UMG’s marketing expenditures for each month shows a similar pattern. When marketing activities slowed, sales volumes declined.

Radio play, media attention and sales

We also analysed the radio spin history for ‘Blurred Lines’ provided by UMG and compared SoundScan data to the number of times the song was first spun on a given radio station and with the size of the market in which the song was first played on those radio stations. As shown in Figure 2, it appears that initial radio spins and the size of the radio markets in which they occurred were quickly followed by sales growth. This radio exposure and the related economic success of the song was the result of the sales skills and closing ability of UMG’s marketing team, which also conducted extensive target market studies to determine where to focus their attention to maximize the return on their efforts.

The number of times ‘Blurred Lines’ was mentioned in the media also provides an indication of the reach of

the marketing and promotional efforts related to the song. Reviewing a 470-page compilation of media and press clippings regarding ‘Blurred Lines’, which ranged from press releases to articles in *People* magazine and the *New York Post*, we found that, during April 2013, UMG had uncovered 11 mentions of Robin Thicke and/or ‘Blurred Lines’ in the media, but that number rose to almost 140 following the artists’ performance of the song on *The Voice* in May, corresponding with the increase in sales tracked by SoundScan.

Accordingly, the data on radio play and media attention also support the contention that marketing and promotional activities made a direct and substantial contribution to the financial success of the song.

Social media and sales

A review of the large volume of activity related to ‘Blurred Lines’ on Twitter, Facebook, and YouTube also reveals a high correlation between the volume of social media attention and the volume of sales. Our review of UMG’s marketing documents and of statements by UMG employees indicated that much of the social media activity related to the song was consciously created to increase awareness of the song and lead social media users to purchase it and the *Blurred Lines* album on iTunes.

As shown in Figure 3, a comparison of the SoundScan data with the number of first-round ‘re-tweets’ with the hashtag #blurredlines and of times Twitter users tagged a Tweet from one of the performing artists including the hashtag #blurredlines as a ‘favourite’ indicates the same general pattern: the more activity on Twitter, the greater

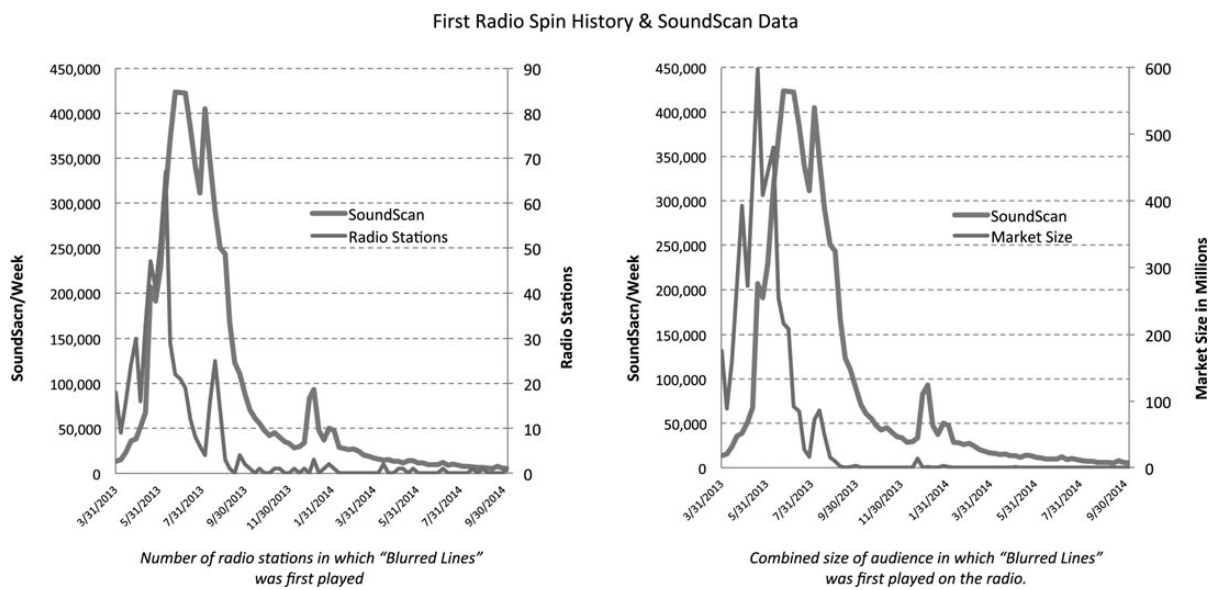


Figure 2. Correlation between radio play and SoundScan sales data.

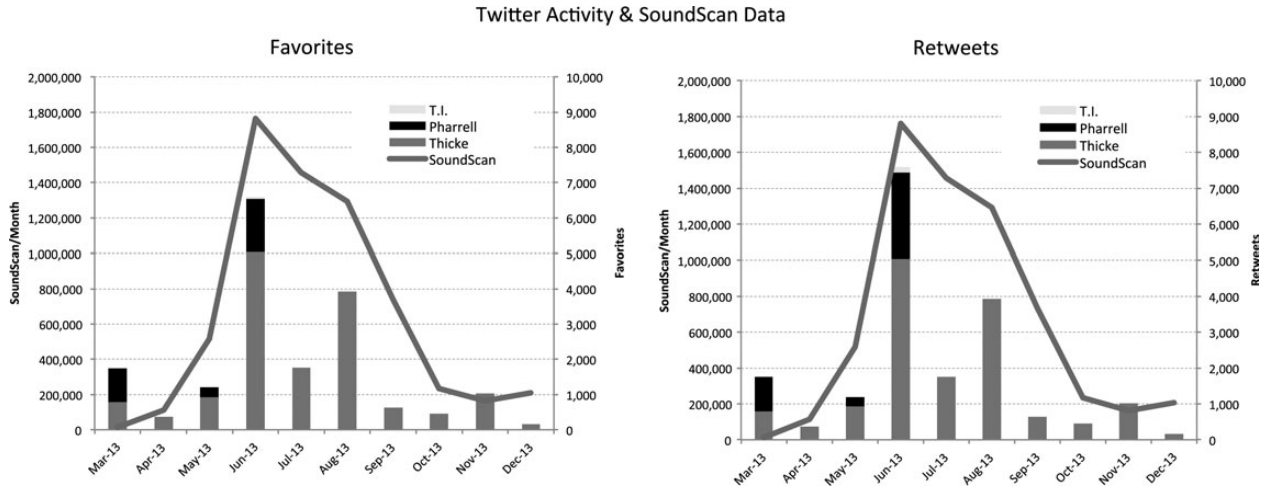


Figure 3. Correlation between Twitter activity and SoundScan sales data.

the sales of the song. Both sales and the Twitter chatter peaked during July 2013. A similar pattern was found by comparing sales records to the number of ‘likes’ received by a post from Thicke’s Facebook mentioning the term ‘Blurred Lines’.

To simplify and track the process of internet marketing, UMG management utilized smartURL, an online service whose Real-Time Stats tool allows subscribers to view the performance of their links on a daily basis. UMG inserted two different smartURL hyperlinks, one for the album and one for the song, into the majority of the Internet and social media accounts related to ‘Blurred Lines’ that directed users to iTunes, where they could purchase the song or the *Blurred Lines* album. These links resulted in 899 496 clicks to iTunes. As might be expected, this data set and the SoundScan data followed nearly identical patterns: the more clicks the ads received, the greater the sales.

That the timing of social media activities corresponds with higher sales volumes indicates that social media activity also greatly contributed to the success of ‘Blurred Lines’.

Making sense of multiple factors

As the analysis above demonstrates, most of the financial success of ‘Blurred Lines’ can be attributed to a combination of multiple factors beyond the claimed musical elements of

the song itself, including substantial contributions by the videos of the song, extensive marketing and promotional efforts, radio play and media attention, and social media discussion and promotions (this finding may have been the basis on which the judge in the case subsequently approved adding the involved record companies to the liable parties and ruled that Williams had not been shown to be a ‘practical partner’ in the song’s success.) Although the individual contributions of each of these various expenditures of human and economic resources undoubtedly overlapped and cannot be determined with great accuracy, their demonstrated impact leaves little doubt that, even if the plaintiffs had infringed in the defendant’s copyright over the claimed musical elements of the song’s composition, those elements played only a small part in the financial success of ‘Blurred Lines’, and therefore the defendants should be entitled to only a fraction of any economic benefits derived from its creation, production, distribution, and sale (this reasoning seems reflected by the judge’s later reducing Williams’s share of total damages to approximately 10 per cent.) Further, the increasing impact that opportunities for mass marketing offered by the Internet and social media can have on the success and value of products within today’s music industry suggests that the apportionment of the value of copyright has become far more complex than ever imagined by the original framers of U.S. copyright law.