Federal Appeals Court 'Blurred Lines' Decision is, in Fact, Not so Blurry

By Joel G. MacMull, Esq.

On Wednesday, March 21, 2018, a three-member split panel of the United States Court of Appeals for the Ninth Circuit ruled that the 2013 Robin Thicke and Pharrell Williams smash hit 'Blurred Lines' infringed the copyright in Marvin Gaye's song 'Got To Give It Up.' See *Williams v. Gaye*, No. 15-56880. The decision upheld a Los Angeles' jury's 2015 verdict awarding Gaye's heirs over $5 million dollars in damages, further ruling that the jury's award of actual damages, infringers' profits, and a continuing or "running" royalty, were all appropriate.

In upholding the jury's damages award, the court rejected the Appellants' argument that indistinguishability is the relevant test. Rather, the court explained:

> *There is no one magical combination of…factors that will automatically substantiate a musical infringement suit, and as each allegation of infringement will be unique, the extrinsic test is met, [s]o long as the plaintiff can demonstrate, through expert testimony…, that the similarity was 'substantial' and to 'protected elements' of the copyrighted work. We have applied the substantial similarity standard to musical infringement suits before, and see no reason to deviate from that standard now. Therefore, the Gayes' copyright is not limited to only thin copyright protection, and the Gayes need not prove virtual identity to substantiate their infringement action.*

Judge Nguyen, however, issued a vigorous dissent. She wrote that 'Blurred Lines' and 'Got To Give It Up' were not objectively similar as a legal matter using an extrinsic test because the two songs differed in melody, harmony, and rhythm. She further warned that the majority's refusal to compare the two works properly allowed the defendants to copyright a musical style – something that, until now, has never been protectable under the Copyright Act.

It is this concept, the protectabilty of a musical style – as opposed to a song's lyrics or aural elements, i.e., the arrangement of its notes – that has received a lot of attention following the decision. Major publications such as Variety, Slate, Rolling Stone and Billboard have all warned of the parade of horribles that may follow in the decision's wake, but which, based on the specific facts of the case, is exaggerated in my view.

Quite simply, the appellate court did was it was supposed to here. That is, it reviewed the record on appeal and concluded that the jury's findings were substantially supported by the evidence. It did not, by contrast, chose to reweigh the evidence presented to the jury and overturn its verdict merely because it disagreed with its conclusion. It is worth noting too that among the testimony elicited during the trial were the defendants' admissions that the two songs were similar.

So, while it is predictable that this decision may in the short term give rise to a spike in copy-cat lawsuits as opportunists seek a windfall from deep-pocketed artists and their recording labels, the discovery phase of litigation will in the vast majority of these cases put these claims to rest. Further, once the dust settles it is likely that the legal landscape will look much as it does now, which is a good thing, as this intellectual property lawyer is too old to learn to dance to a different beat!

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Environmental Tips From One of Our Environmental Attorneys

By Douglas I. Eilender, Esq.

Don't Ignore Construction/Development Related Issues During Your Environmental Due Diligence.

Appropriate environmental due diligence on commercial real estate typically consists of a Phase I Environmental Site Assessment/ Preliminary Assessment Report ("Ph I/PAR"). This includes a visual site inspection and review of aerial photographs, Sanborn Maps, historical regulatory records and databases. The Phase I/PAR identifies what one would consider routine environmental issues, such as past manufacturing operations, underground storage tanks, trench drains, sumps or other issues that could adversely impact the subsurface or air quality of the property in question. What people sometimes miss are environmental issues related to construction, renovation or re-development. For example, if the building was built in the 1970s and you plan on performing a gut renovation, an asbestos survey should be completed so that you can get a handle on the estimated asbestos abatement costs. If there is a Deed Notice/Soil Remedial Action Permit in place due to the presence of historic fill or other residual soil contamination and a redevelopment is planned, the incremental increase in construction costs to dispose of the impacted soil and other NJDEP administrative requirements should be determined. Depending on the particular issue and proposed project/development, these construction and incremental increased costs attributable to pre-existing environmental conditions can add up. Failing to consider these costs and creating accurate budgets during due diligence can create major obstacles that can and should be avoided.

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