crowell moring

CLIENT ALERT

Is Copyright Law Even Blurrier After the "Blurred Lines" Ruling?

Mar.20.2015

Recent Happenings in APRM
March 2015

Unintended Comparative Claims and Lack of Clear Disclosures

Robin Thicke and Pharrell Williams wrote in their August 2013 complaint for declaratory relief that they intended "to evoke an era" when they wrote that year's mega pop-R&B hit "Blurred Lines." Marvin Gaye's family replied with their October 2013 counterclaims that the artists engaged in "blatant copying of a constellation of distinctive and significant compositional elements" of Gaye's 1977 hit "Got to Give it Up." On Tuesday, March 10, 2015, a California federal jury in the C.D. Cal. sided with Gaye's family and awarded them nearly $7.4 million in damages for copyright infringement.

The facts of the case are a bit unusual, including Thicke's wildly varying public statements about writing the song- first telling *GQ Magazine* in 2013 that Gaye's "Got to Give it Up" was his favorite song and that he told Williams he wanted to "make something like that, something with that groove," and later testifying in depositions and during the trial that he was too high on Vicodin and alcohol to write the song. No, Thicke said, Williams was the sole author.

The proceedings were unusual as well. Thicke and Williams, under suspicion that the Gaye family was going to sue for copyright infringement, filed a lawsuit in August 2013, seeking a judicial declaration that they had not infringed. The strategy backfired. Of course, the Gaye family replied in October 2013 with counterclaims against Thicke, Williams, and a variety of additional defendants, for copyright infringement of several of Gaye's songs, including "Got to Give it Up." More significantly, after a highly publicized jury trial featuring competing expert testimony between each side's musicologists, the jury sided with the Gaye family and their expert, who said that "Blurred Lines" copied eight distinct elements from "Got to Give it Up."

In light of the verdict, there is much speculation about what this ruling will mean for music and creative expression going forward. Will it mean the end of sampling? Isn't all pop music based on the same basic, melodic structure? Will it change the way these types of cases are tried? Will artists, brands and agencies be able to produce new expressions that are inspired by prior works? Is the "vibe" of a work protectable under copyright law?

Copyright law still requires actual copying of the prior work and substantial similarity between the works in order to find infringement. This decision raises questions, however, about the line between copying and being inspired by or influenced by a prior work. The decision also highlights several important considerations when looking for inspiration for a new work in past creations.

The first lesson, which Thicke learned the hard way, is to be cautious in any public statements surrounding the new work. The Gaye family may still have filed an infringement suit, but Thicke and Williams faced a much tougher defense challenge because of Thicke's public statements. Second, though the lines are possibly becoming less clear, consideration still needs to be paid to the difference between "copying" and "being inspired by." Merely being inspired by a work is still permitted, but when defined characteristics of the original work are copied, including musical elements like notes, keys, chord progressions, lyrics, tempo and rhythm, the scale begins to tip in favor of a copyright infringement.

Third, when facing a copyright challenge, defendants need to be mindful of the risks and benefits of different legal strategies. In this case, for instance, Thicke and Williams filed a motion to keep the sound recording of Gaye's performance out of the courtroom. They argued that Gaye's copyright protection was limited to the elements in the sheet music on file with the Copyright Office, and the judge agreed. Jurors were thus left only with the sound recording of "Blurred Lines," a stripped down version of "Got to Give it Up," and Gaye's sheet music. The defense team praised the decision, commenting that the

decision "effectively eliminates five of their eight claims similarities," but that small victory may have backfired. The jurors, some of whom may have been unfamiliar with how to read music, were not able to listen to the songs and make their own determination about whether they sounded the same.

In an interview given to the *Hollywood Reporter*, an attorney for the defendants predicted the end of pop creativity if the verdict stands, saying in part: "No longer will it be safe to create music in the same style or genre of a prior song." The lawyer for the Gayes disagreed, saying, that the defendants did more than evoke a genre: "We didn't view it like this at all. Yes, it involved a big, popular song, but this was a straight-up copyright claim over compositional elements that we believed had been taken." He further pointed out that the defense made a tactical mistake by admitting similarity, but focusing instead on supposed note-for-note differences: "I don't think it's a good idea to tell the jury, 'Yes, we may have copied, but don't find us liable because there's not a perfect match.'"

At the time of this writing, post-trial motions were pending before the court, seeking to hold the music distributors and producers liable for damages as well. The jury's verdict had placed blame solely on the songwriters. A decision could affect more than payment of damages, but also whether the distributors might be enjoined from further distribution of "Blurred Lines."

In an era of constant access to the media and to all forms of expression, artists need to be more mindful about their actions surrounding new creations, especially those inspired by existing works.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

David Ervin
Partner – Washington, D.C.
Phone: +1 202.624.2622
Email: dervin@crowell.com