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>>ALERT

THE NINTH CIRCUIT'S "BLURRED LINES" DECISION: WHAT ADVERTISERS SHOULD KNOW

In a much-anticipated decision, the Ninth Circuit Court of Appeals declined to overturn a 2015 jury verdict that Robin Thicke and Pharrell Williams' hit "Blurred Lines" infringed on Marvin Gaye's "Got To Give It Up." Even a casual comparison of the respective works reveals stylistic similarities, such as instrumentation, drum beat and the prominent use of falsetto, which traditionally have been considered unprotectable expression under copyright law. And while the combination of unprotectable elements may, as a whole, constitute protectable expression, many music copyright experts and music industry commentators were indeed surprised with the Ninth Circuit's decision, which in essence espoused the notion that merely evoking the overall "feel" or "style" of an earlier musical work may result in copyright infringement.

REACHING A DECISION

It is important to first clarify that the Ninth Circuit's decision was not a substantive analysis of the original copyright claims that "Blurred Lines" infringed "Got To Give It Up." Due to longstanding precedent that gives great deference to jury decisions, unless there is a clear absence of any reasonable justification, the appeals court's job is solely to determine whether the original case was properly conducted. The Ninth Circuit, therefore, largely avoided any analysis of the underlying copyright claim and instead focused on procedural issues, such as the validity of the lower court's jury instructions and admissibility of expert testimony.

That does not mean that the decision was reached free of impassioned disagreement. In a lengthy dissent, Judge Nguyen argued in part that because "Blurred Lines" and "Got To Give It Up" are "not objectively similar," the court erred in refusing to rule in favor of Pharrell and Thicke as a matter of law. Like many experts and commentators, Nguyen is of the opinion that the only objective substantial similarities between each song relate to unprotectable "commonplace elements that are firmly rooted in the genre's tradition." In other words, putting aside similarities in protectable elements, such as melody or lyrics, a musical "style" alone cannot be protected and, therefore, cannot be infringed. This notion squares with a basic tenet of copyright law: "Ideas" (e.g., a particular musical style) are not protectable; what is protectable is the expression of an idea (e.g., the melody that may be composed in a particular musical style).

Nevertheless, in a 2-1 decision, the majority declined to overturn the jury's original decision, deciding that the expert testimony given in the jury trial created genuine issues of fact that were for the jury alone to weigh and decide, and that the appeals court

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THE BOTTOM LINE

The Ninth Circuit's decision in the "Blurred Lines" case raises more uncertainty in the area of music copyright law. While many experts still maintain that "style" and "groove" are not protectable by copyright, the Ninth Circuit's decision to uphold the 2015 jury verdict establishes that a combination of "stylistic" genre elements can be protectable and therefore can form the basis of a copyright infringement claim. In light of this decision, and in anticipation of an uptick in copyright infringement litigation, advertisers should be especially cautious when commissioning original music based on or inspired by an underlying genre or style.

would not second guess them. The majority declined to allow the appeals court to act as "judge, jury and executioner" when a jury had at least a reasonable basis for their decision.

COPYRIGHT PROTECTION FOR "STYLE"

By declining to overturn a jury decision involving two songs whose respective melodies and harmonies were not objectively similar, the Ninth Circuit's decision makes one thing clear: the threshold for what musical expression warrants copyright protection has moved towards protection for underlying styles and grooves. The rest is, well, blurry. For example, the Ninth Circuit's decision raises the question of what combination of stylistic elements is protectable and which are not? When is it permissible to recreate a distinct "groove"? When does homage to traditions of a particular genre become theft? These questions will have to be fleshed out in the coming years, but courts are already seeing an increase of music infringement claims, and music producers and composers should carefully consider these potential risks when incorporating underlying styles and grooves in their works.

In advertising, there has always been risk when commissioning original music inspired by a certain source, in terms of avoiding copying pre-existing protectable elements such as melodies, hooks, bass lines, lyrics and the like. With the "Blurred Lines" decision offering potentially broader protection for existing works, advertisers must now tread more carefully when emulating stylistic elements that make up the overall "sound" or "feel" of a particular song, such as drum beats, instrumentations and other genre-specific stock elements. Because the jury in the 2015 decision did not explain why they thought "Blurred Lines" and "Got To Give It Up" were substantially similar, and because the Ninth Circuit decision does not delve into any substantive justification of that decision, it is unclear what combination of elements pushed "Blurred Lines" over the line. We do know that the experts in support of the Marvin Gaye estate cited non-identical themes and bass lines, as well as the combination of keyboard rhythms, drum patterns and vocal styles.

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