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INTELLECTUAL PROPERTY
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Fuzzy Jury Instructions Affected 'Blurred Lines' Case

High-profile dispute reveals nuances in music copyright laws

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Singer-songwriters Robin Thicke, Clifford "T.I." Harris and Pharrell Williams' song "Blurred Lines" was released in 2013 and quickly climbed the charts to become the longest-running No 1 single of 2013. Unfortunately for Thicke and Williams, their success hit a sour note when the estate of legendary rhythm and blues artist Marvin Gaye received a $7.4 million jury verdict for copyright infringement. Additionally, the estate has since requested that all future sales of the song be enjoined.

On Aug. 15, 2013, after threats from the Gaye estate, Thicke and Williams sought declaratory judgment that "Blurred Lines" did not infringe Gaye's 1977 hit, "Got to Give It Up." The Gaye estate counterclaimed for copyright infringement. To establish that "Blurred Lines" infringed "Got to Give it Up," the estate was tasked to prove by a preponderance of a doubt that (1) a valid copyright existed; and (2) there was copying of constituent elements of the infringed work that were original. In other words, there must be substantial similarity between the two works.

Listening to the respective songs, it is easy to detect similarities between "Blurred Lines" and "Got to Give It Up." In fact, numerous "mashups" seamlessly merging the songs are readily found on the Internet. "Blurred Lines" is clearly evocative of "Got to Give It Up." Both share an R&B/funk flavor, with upbeat percussion, sparse instrumentation and similar vocal lines. Nevertheless, it is important to remember that the respective sound recordings are not the issue in this case, and that not all "copying" is unlawful. Yet, these two points appear to have been blurred in the jury instructions.

In 1977, when "Got to Give It Up" was released and registered with the U.S. Copyright Office, the Copyright Act of 1909 was controlling. Copyright protection extended only to what was registered with the U.S. Copyright Office. While sound recordings are subject to copyright under the (current) Copyright Act of 1976, that law did not take effect until Jan. 1, 1978. The 1909 act was applicable in cases where creation and publication of a work occurred before Jan. 1, 1978.

This means that the sound recording of "Got to Give It Up" was not itself subject to copyright

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protection. Rather, the copyright registration for "Got to Give It Up" covered only what was distilled in the (written) musical composition. When filing for copyright registration, Gaye submitted the "lead sheets," or sheet music, for the song, which included the lyrics and some of the melodic, harmonic and rhythmic features that appeared in the sound recording, to the U.S. Copyright Office. This submission constitutes the entirety of what was protectable under the copyright of "Got to Give it Up."

Both sides filed motions for summary judgment. In its motion, the Gaye estate argued that the copyrighted compositions consist of "the recorded work as performed by Marvin Gaye." The court denied summary judgment, finding that this argument misapplies a 1976 standard to compositions governed by the 1909 Copyright Act. Under the 1976 act, compositions are eligible for protection when they are fixed in "phonorecords," which include master recordings. Under the 1909 act, however, the act of recording or distributing recordings does not constitute the publishing of a composition; the work must be reduced to sheet music or other manuscript form.

The Gaye estate offered no evidence that, before registration of the copyright, "Got to Give It Up" was published or reduced to a manuscript form that was more complete than what is included in the lead sheets deposited with the Copyright Office. This means that even though certain elements may have been present in the sound recording of "Got to Give It Up," only those elements which were reduced to writing on the lead sheets were covered by the registration. One cannot simply listen to the respective sound recordings in order to make a determination of whether there is substantial similarity for purposes of copyright infringement; this misapplies the standard of what constitutes copyright infringement for a work protected under the 1909 act.

Expert Musicologists

In support of the respective summary judgment motions, three separate analyses of musicologists were submitted. Relying on these analyses, the court noted that this evidence provided indications of "a sufficient disagreement" concerning whether there were substantial similarities between the protected elements of "Got to Give it Up" and "Blurred Lines." The court therefore denied the motions, finding there was a genuine issue of material fact requiring a jury trial.

At trial, since the copyright at issue was the musical compositions rather than the sound recordings, each side was permitted to submit special recorded versions of their respective work for the jury to hear. In theory, playing a stripped-down version of "Got to Give It Up" for the jury, which would not include the same flourishes and improvisations of the commercially released version, should have been an advantage for Thicke and Williams. However, while the jury did not (at least in court) listen to the commercially released versions of "Blurred Lines" and "Got to Give It Up," the Gaye estate was permitted to play a version of "Got to Give It Up" which included parts that are featured in the commercial release yet not contained in the lead sheets submitted to the Copyright Office.

The Gaye estate received a further advantage with jury instructions which blurred the lines of copyright infringement in musical composition. The first notable issue in the jury instructions came at Instruction No. 27, which reads: "Anyone who copies original elements of a copyrighted work during the term of the copyright without the owner's permission infringes the copyright."

It is important to remember that the respective sound recordings are not the issue in this case, and that not all 'copying' is unlawful. Yet, these two points appear to have been blurred in the jury instructions.

This instruction obfuscates the basic concept of copyright law: that copyright protects the expression of an idea, but not the idea itself. To a juror, or indeed anyone unfamiliar with the intricacies and subtleties of copyright law, this distinction is easily misunderstood. An idea may indeed be original, but it is nevertheless only the expression of that idea that is protectable as a copyrighted work. With this instruction, the scales were quickly tipped in favor of the Gaye estate, especially considering Thicke's own testimony that one of his "favorite songs of all time was Marvin Gaye's 'Got to Give It Up,'" and after he told Pharrell this, "He was like, 'Damn, we should make something like that, something with that groove.'"

What the jury overlooked is that some copying, even of "original elements," is allowable to fulfill the purpose of the Copyright Act: to promote the progress of the "useful arts." Failure to allow for any "copying" would stifle the very purpose of copyright law, and indeed is not contemplated by the Constitution.

Instruction No. 43 blurs the line even further. It instructed the jury that the Gaye estate "must show that there is both substantial 'extrinsic similarity' and substantial 'intrinsic similarity' as to that pair of works." However, the court explained in the instructions that "extrinsic similarity" is shown "when two works have a similarity of ideas and expression as measured by external, objective criteria." Yet again, the court clouds the distinction between what copyright law protects: the "idea" versus the "expression." The court goes on to instruct the jury that "intrinsic similarity is shown if an ordinary, reasonable listener would conclude that the total concept and feel of the Gaye parties' work and the Thicke parties' work are substantially similar."

Jurors were not told to disregard similarities between unprotectable elements of the songs, similarities resulting from use of the same genre of music or the "groove." Furthermore, the jurors were not instructed to direct their considerations on the "total concept and feel" of "Got to Give It Up" as it was deposited with the Copyright Office, versus the actual commercial recordings of the song. By Thicke's own account, the very objective of "Blurred Lines" was to evoke the feel of "Got to Give It Up," but this is not prohibited under the Copyright Act. Without appropriate clarification to the jurors, it is no surprise that they found infringement.

Despite the media attention the case has received, the implications it will have for the music industry itself are probably minimal. In light of the dubious jury instructions, it will be interesting to see how the case fares on appeal (if indeed it is appealed). The case does however highlight the challenges of a jury trial and the importance of properly instructing a jury in the intricacies of copyright law.

So what's next in the "Blurred Lines" saga? On March 17, the Gaye estate submitted a motion requesting the court to overturn the jury's verdict that Clifford Harris, who rapped in the song, and Interscope Records Inc. were not liable for copyright infringement, and asking the court to stop all sales of "Blurred Lines." Thicke, Williams and the other parties named filed a motion to strike the Gaye estate's motion. The parties have agreed that, notwithstanding the remaining disputes, judgment should be promptly entered in accordance with the jury verdict. They had until April 13 to lodge a proposed judgment. This show is far from over. ■