Advertising Producers Association

The US Court of Appeals Decision in Williams v Gaye and What it Means for Music in Commercials

Advice for advertisers and agencies commissioning music for commercials - and the prodcuction, post-production and editing companies working with them.

The US Court of Appeals published its decision in the appeal of Pharrell Williams and Robin Thicke ("Williams") against the judgement in favour of the estate of Marvin Gaye ("Gaye") that the song Blurred Lines (the best selling song of 2013) infringed the copyright of Marvin Gaye's Got To Give It Up.

It is an 89 page judgement and legally complex. We will try and make it simple in this note but we are limited by the fact that it isn't - experts don't agree as to whether it is a radical change in the law or not - but we will summarise what we think it means and, most importantly, offer you as someone who commissions music for commercials, practical advice as to how to minimise risk.

It upheld the decision of the lower court that the rights of Gaye were infringed by Williams and ordered that Williams pay Gaye US$5.3 million and 50% of ongoing royalties.

The court did not rehear the merits of the case, so much as analyse the way that the lower court had reached its decision and conclude the lower courts decision was legally sound.

There is a small possibility of a further appeal to the US Supreme Court being allowed but they only hear a tiny number of cases per year, based upon their consideration of the importance of the legal principles involved, so we should regard this as the final decision.

The lower courts (now approved decision) is a confusing one, difficult to translate into clear and practical advice for brands, agencies, production companies, editors and music companies involved in creating music for commercials.

The central point though is that previously the analysis of whether one song had infringed the copyright of another was, so far as possible, an objective one, based on comparing a sequence of notes, melody or lyrics. So a composer, possibly with the aid of a musicologist to make those comparisons, could create a song that was in the same style as another song, provided all those elements were different.

Under that test, Blurred Lines was different- neither the sequence of notes, melody or lyrics were similar to Got To Give It Up but the lower court decided that copyright had been infringed by Blurred Lines as the overall sound was similar, based on rhythm patters and vocal styles.

From the earlier judgement upheld by the appeal court " as we have observed previously, "music ... is not capable of ready classification into only five or six constituent elements," but is instead "comprised of a large array of elements, some combination of which is protectable by copyright." . . . As "[t]here 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." Id. We have applied the substantial similarity standard to musical infringement suits before . . . and see no reason to deviate from that standard now."

So the court did not think it was changing the law- it felt it was applying existing legal principles- but, in our view they were and they did. In doing so, they made it extremely difficult for a musicologist, lawyer, expert of anyone at all to give advice as to whether a copyright claim against a composer or performer of a new piece of music that bore any resemblance to an existing piece had infringed the rights of the composer of the earlier piece and risked being sued.

Ironically, the dissenting Judge in the Appeal Court, Judge Nguyen concluded that the judgement would not only be bad for people creating music but Gaye too "They own copyrights in many musical works, each of which (including 'Got to Give It Up') now potentially infringes the copyright of any famous song that preceded it..."

What conclusions can we draw from this?

This is what is difficult because there are factual points here that effected the conclusions the court reached.

As above, giving definitive advice and thus for an advertiser to know whether they are infringing the rights of a composer of a piece of a song that has any similarity with the new song is going to be difficult.

At worst though, it means that copying a musical style or genre could be an infringement of copyright. We think it would need to be a distinctive style of one artist or song though- not just "disco" or "funk" because an artist or composer could not establish that they had copyright in such a broad genre/style.

So how do you, as an advertiser or agency, brief a music composer?

The practice of sound-alikes- creating a song that sounds like the work of another artist (whose work the advertiser can't afford to use) is very dangerous now- we would counsel against it.

We think you should still refer to artists and songs as a reference point- without those- it is very difficult to create a brief or avoid a massive process of trial and error- but refer to several of each and make clear in the brief that they all reference points and are not to be copied.

Don't nominate only one song or artist- four or five would be better.

Don't allow the director or editor or anyone else to nominate one song or artist or to put any track on the film and then share it.

If you think it sounds like another song, even if elements such as note sequence, melody and lyrics are different, don't use it.

Will using a library track save you?

Not necessarily, many tracks were created as sound-alikes- songs that evoke a track or artist without copying it or them. Some of those, at least, will infringe the rights of the copyright holder in the work they are trying to sound like, under the Gaye v Williams principles.

Will using a musicologist save you?

Again, not necessarily. Previously, they could opine based on a comparison of sequences of notes, melody and lyrics, so a client or advertising agency could be confident that if they said it didn't infringe the rights in the original it was based on or inspired by, it did not infringe rights in it. Now it is about overall sound too, that is much harder to be sure of an opinion on- as we saw in the Blurred Lines case, where both parties had reports from musicologists to support the view point. It is still worth having their advice but their advice is likely to be much more cautious than pre Gaye v Williams.

What would the position be under English law?

We don't know but US and English copyright law is very similar and any infringement could end up in a US court anyway, as with commercials being visible their via being online, an action could be commenced there for what we would regard as a British commercial.

Have as early a discussion with a music production company as possible, giving as many references as possible and making clear they are inspiration and guidance and not to be copied.

Make sure the music company you work with understands these issues-as the APA Music Production Group members, below, do- and has professional indemnity insurance.

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ALERT! We are going to add a session on the implications of this judgement, presented by music and legal experts, to our Audio Post Workshop, 19th April 2018 - see a-p-a.net for details.