JOHNSON & JOHNSON, LLP

email: dlifschitz@jjllplaw.com

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California Copyright Conference –Music Legal Eagles Panel

Music Litigation Round-Up

By Neville L. Johnson, Douglas L. Johnson, and Daniel B. Lifschitz

Tightening Substantial Similarity Requirements for Music

- *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)
- *Gray v. Perry*, No. 2;15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020)
- *Smith v. Weeknd*, No. CV 19-2507 PA (MRWx), 2020 U.S. Dist. LEXIS 130549 (C.D. Cal. July 22, 2020)

The Ninth Circuit has always been considered a difficult jurisdiction for copyright plaintiffs to prevail in, but for many years, the common wisdom in the entertainment industry was that, notwithstanding the courts' hostility to infringement suits, *music* plaintiffs generally stood a better chance than *literary* plaintiffs at surviving dispositive motion practice. The reasoning behind this belief was that while judges tend to feel fairly comfortable engaging in literary dissection to conclude that two works are not substantially similar, they are less comfortable with their own inherent expertise when analyzing music and, as such, tend to be more deferential to expert musicological opinions, allowing cases to proceed to the factfinder for ultimate resolution.

The foregoing trend hit an inflection point, however, in the 2018 decision of *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), in which the Ninth Circuit affirmed a jury verdict holding that "Blurred Lines" by Robin Thicke and Pharrell Williams infringed upon Marvin Gaye's "Got to Give It Up." A number of industry commentators felt that this opinion went too far in terms of allowing copyright plaintiffs to monopolize certain basic building blocks of music. This, combined with the United States Supreme Court getting rid of laches as a defense to damages for copyright infringement in 2014's *Petrella v. MGM,* 572 U.S. 663 (2014) stoked fears that a flood of stale infringement claims would soon overwhelm the courts under the *Williams* framework.

One of those follow-on claims was brought by Michael Skidmore, trustee for the estate of Randy Wolfe. Wolfe, professionally known by the stage name "Randy California," was the guitarist for the American rock band Spirit and wrote the group's 1967 instrumental track "Taurus" that, for decades, many people compared to 1971's "Stairway to Heaven" by Led Zeppelin. Skidmore took the *Petrella* decision as a sign to finally sue Led Zeppelin for the alleged infringement. As was typical for these cases, dueling expert reports were proffered, with the plaintiff's expert focusing on certain shared musical features between the two compositions and the defendant's expert focusing on minimizing those similarities in the face of the songs' differences. The Ninth Circuit did three things of note in disposing of the infringement claim:

1) It confirmed that, under the 1909 Copyright Act, a work's protection was circumscribed to the scope of whatever deposit copy was used to register it. Because the deposit copy for Taurus consisted of only the song's sheet music (which did not capture certain aspects of the composition present in its famous sound recording), the plaintiff was not able to pursue the infringement claim based on anything outside the deposit copy's four corners.

2) It formally disposed of the "inverse ratio" rule that formerly allowed a plaintiff to prevail on an infringement claim based on a lower level of substantial similarity when it could be shown that the defendant had a high degree of access to the plaintiff's work. The rule was originally intended to refer to *probative* similarities, which circumstantially indicate copying is likely to have occurred, but do not in and of themselves constitute a substantial appropriation – think, for example, of the seminal United States Supreme Court case of *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340 (1991), where the fact of copying was demonstrated by showing that fake phone numbers inserted into the plaintiff's phonebooks to detect illicit copying had wound up in the defendant's phonebooks. Thus, where a defendant had clear opportunities to copy a plaintiff's work, the inverse ratio rule would hold that the need for probative similarities (which are inherently conjectural) become less important. However, courts had frequently muddled application of the inverse ratio rule by using it to lower the level of *substantial* similarity required to prove infringement, which was increasingly dangerous in an age where digital distribution meant that the entire world has access to almost anyone's work if they simply visit a particular corner of the internet. The Ninth Circuit decided that the issues posed by the maldeveloped inverse ratio rule were now more trouble than the rule was worth and "join[ed] the majority of our sister circuits that have correctly chosen to excise it from copyright analysis."

3) It confirmed that copyright law's refusal to protect fundamental building blocks of creative expression extended to many of the basic musicological motifs that the plaintiff had claimed as infringing, including "common or trite musical elements" or "commonplace elements that are firmly rooted in a genre's tradition" such as "descending chromatic scales, arpeggios or short sequences of three notes." The court broke down the nature of the chromatic scale shared between Taurus and Stairway to Heaven much as they would break down the literary tropes presented in a screenplay case, showing a lesser deference to musicological experts in line with how the court has treated literary experts in recent years. It should also be noted that the Ninth Circuit held the plaintiff had failed to present a "selection and arrangement" theory of infringement, meaning a claim arguing that while the similarities he identified were individually unprotected, there was some protection in the particular novel manner by which those elements were combined. However, the opinion goes on to provide a significant amount of clarifying detail as to when and how such a theory may apply – a discussion that is arguably *dicta* given the court's disposal of the claim on a failure-to-raise basis, but which still provides good guidance for practitioners.

The immediate result of the *Skidmore* decision was an emboldened district court judiciary, which now feels more empowered to dispose of music infringement claims on the papers. The first application was in *Gray v. Perry*, where a jury had returned an infringement verdict against Katy Perry for her hit song "Dark Horse" on the basis that it copied, among other elements, a protectable eight-note ostinato from the plaintiff's song "Joyful Noise." The defense moved for judgment notwithstanding the verdict on the grounds that none of the elements identified as a basis for infringement were protectable under copyright. The district court agreed, holding that "the nine individual elements that plaintiffs identify in their opposition" to the defendant's motion "are precisely the kinds of commonplace elements that courts have routinely denied copyright protection, at least standing alone, as a matter of law[.]" The district court also tackled whether the elements constituted a protectable selection and arrangement, holding that "in each of the cases that addressed and found a protected combination of otherwise unprotectible elements, the protected combination concerned a mix of compositional elements present across a compositional work as a whole, not within a single portion of that composition." Here, there was nothing "particularly unique or rare" about the elements identified by the plaintiff, meaning it could not serve as the basis for an infringement claim, and the jury's contrary holding was overturned.

The same fate befell a different plaintiff a few months later in *Smith v. Weeknd,* which pit the plaintiff's song "I Need to Love" against The Weeknd's song "A Lonely Night." Using the same prevailing musicologist from the *Skidmore* case, the defense argued that the plaintiff was attempting to exert control over basic musical elements found in numerous well-known hit songs. The court agreed, holding that "there are no protectable similarities, and the other potential similarities are either not protectable musical conventions or are seen in prior compositions[.]" Furthermore, the selection and arrangement of unprotectable similarities between the two songs identified by the plaintiff was held to be "neither original" nor "shared 'in substantial amount.'"

The end result of the foregoing development is that music infringement cases have been downgraded in the eyes of most plaintiffs' attorneys and are now only as viable as most other type of infringement cases, leaving the *Williams* decision as an outlier rather than a bellwether.

Fair Use of Samples In-Studio

- *Chapman v. Maraj*, No. 2:18-cv-09088-VAP-SSx, 2020 U.S. Dist. LEXIS 198684 (C.D. Cal. Sep. 16, 2020)

Until recently, another longstanding piece of prevailing wisdom in the music industry was that sound recordings possessed outsized protection against "sampling" by third parties. This was largely promulgated by *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005), which bluntly held as follows: "Get a license or do not sample. We do not see this as stifling creativity in any significant way." The problem with this statement is that it ignored numerous basic principles of copyright law, which the Ninth Circuit confronted in *VMG Salsoul v. Ciccone,* 824 F.3d 871 (9th Cir. 2016). *VMG Salsoul* rejected *Bridgeport Music*'s inflexible rule in the face of copyright law's *de minimis* use defense, holding that Madonna's sampling of a fraction-of-a-second-long horn hit on her song "Vogue" was almost unrecognizable from the plaintiff's work. This has since opened the doors for further consideration of affirmative defenses against sampling.

A particularly notable development in the world of sampling defenses occurred in the case of *Chapman v. Maraj,* wherein Nicki Minaj was pursued by Tracy Chapman for sampling the latter's song "Baby Can I Hold You" without obtaining a license to do so – in fact, Chapman had *turned down* a license request from Minaj. However, the song Minaj had requested the license for, "Sorry," was subsequently leaked to a radio station and quickly went into wide unauthorized distribution online. Minaj defended against her conduct by saying that, to the extent she infringed upon Chapman's adaptation right, it was in the name of in-studio artistic experimentation and should be protected as fair use. The district court agreed, noting that the only way for an artist such as Chapman to evaluate a license request is to see how the licensee plans to use the work. Thus, "[a] ruling uprooting these common practices would limit creativity and stifle innovation within the music industry… contrary to Copyright Law's primary goal of promoting the arts for the public good." It must be noted, however, that this finding of fair use did not extend to exercise of the *distribution* right (*i.e.,* making the experimental track available to the public by leaking it to the radio station), only the in-studio experimentation that impinged on the adaptation right.

Determining When Joint Authorship Is Repudiated

- *Everly v. Everly*, 958 F.3d 442 (6th Cir. 2020)
- *Everly v. Everly*, No. 3:17-cv-01440, 2021 U.S. Dist. LEXIS 85155 (M.D. Tenn. May 4, 2021)

Coauthorship of a work is one of the trickier things to establish in the world of copyright, and many appellate decisions have chimed in on what it requires. In *Childress v. Taylor,* 945 F.2d 500 (2d Cir. 1991), for example, the Second Circuit held that it requires the authors to have prepared their contributions with the knowledge and intention that they would be merged as "inseparable or interdependent parts of a unitary whole." In *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000), the Ninth Circuit went further, noting that not only must a defendant have made *objective manifestations* of intent to share ownership of the copyrighted work with the plaintiff, but the plaintiff must have brought suit to establish their purported coauthorship within three years of those objective manifestations being plainly and expressly repudiated by the defendant.

Everly v. Everly is the most recent appellate court decision to shape the coauthorship doctrine and concerned the song "Cathy's Clown" by the Everly Brothers. Don and Phil Everly had originally both been credited as *coauthors* of the song, but after a dispute between the brothers in 1980, Phil gave up all his rights to Don (who claimed Phil's coauthorship credit was only given to further the band's image as a songwriting duo) through a written release. Don then exercised the Copyright Act's termination right in 2011 to reclaim the song from its publisher, Acuff-Rose, styling himself as its sole author. Phil's heirs then attempted to send similar termination notices on *his* behalf, leading to Don suing for a declaration that Phil had missed his three-year window to reestablish himself as coauthor of the song. The district court agreed with Don, but the Sixth Circuit reversed, holding that the "plain and express repudiation" required to start the statute of limitations on a coauthorship claim was not necessarily triggered by the facts in the record. Specifically, the court felt that the 1980 release signed by Phil could have been construed as a transfer of existing rights to Don rather than an acknowledgement of having no rights from inception, and there was no evidence that Phil was aware of Don's 2011 termination notice to Acuff-Rose presenting himself as a sole author. Accordingly, the court remanded the case.

Unfortunately for Phil's heirs, the Sixth Circuit's decision was only used by the district court to better paper its previous ruling for Don. The evidentiary record revealed that Don told Phil in a 1980 phone call that he was not a coauthor of "Cathy's Clown" and not entitled to continuing credit therefor. While Phil initially objected to Don's claims, he ultimately acquiesced and signed the written releases relinquishing "every claim of every nature" related to the song. Circumstantial evidence of the parties' conduct in the decades that followed indicated this was their settled understanding, notwithstanding periodic grumblings from Phil. Thus, because Phil had failed to establish his coauthorship within three years of it being repudiated by Don, it was too late for his heirs to establish that coauthorship in service of obtaining termination rights.

Anti-Bootlegging Law Developments

- *Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79 (D. Mass. 2020)
- *Kihn v. Bill Graham Archives, LLC*, 445 F. Supp. 3d 234 (N.D. Cal. 2020)

The anti-booglegging provisions of the Copyright Act are perhaps the most overlooked substantive right contained in Title 17 of the United States Code. Added as a standalone chapter of the Act to comply with treaty obligations, 17 U.S.C. § 1101 broadly prohibits the unauthorized trafficking of live musical performances recorded without the performers' consent. Much of the original litigation surrounding Section 1101 concerned its constitutional validity under the Intellectual Property Clause (as it regulates uncopyrightable works), with the courts instead holding that the law was supported by the Commerce Clause. However, judges have recently begun digging into the meat of the statute, with two district court decisions published last year establishing how the right works in both an individual action as well as in a class action context.

In the first decision, *Comerica Bank & Trust v. Habib,* the defendant was sued for posting five videos to YouTube consisting of live footage of Prince performing in concert in 2013 and 2015. The court noted several distinctive features of a Section 1101 claim: First, unlike a copyright claim, it does not require lawful fixation of the work being sued over, since the very nature of a bootleg is that the author did not consent to the fixation. Second, the only sections of the Copyright Act relevant to a Section 1101 claim are the ones it incorporates by reference, which only concern judicial remedies (and therefore eschew the Act's registration requirement as a prerequisite to filing suit). Third – and this is where the court arguably broke new ground – a bootlegger cannot rely on generalized statements by an artist expressing acquiescence to fan recordings as granting the bootlegger an implied license to record and exploit a performance. Rather, an implied license requires consideration of various factors only relevant to arms-length transactions (such as the duration of the parties' working relationship, the types of contracts they employ, and conduct indicating the author intended for the work's recipient to use it without their involvement). As Prince's estate argued, "Prince's broad, alleged statement made to the general public" that "fans sharing music with each other" was "cool" "does not set out any license terms, does not demonstrate an intent to contract with Habib, and indeed plainly has no relation to Habib."

The second decision, *Kihn v. Bill Graham Archives,* explored whose burden it is as an initial matter to establish whether the performers featured in a particular recording had consented to being recorded. The defendants, who had purchased the assets of the late concert promoter Bill Graham (including thousands of concert recordings of unknown provenance taken from the famous venues Graham had managed), argued that proving a lack of consent was an element of a plaintiff's affirmative claim under Section 1101, and that this made an anti-bootlegging class action against them unmanageable. The district court, however, disagreed, finding that consent has historically been an affirmative defense under the Copyright Act, meaning it is a defendant's burden to establish, as to hold otherwise would force plaintiffs to prove a negative. The court noted that ownership is presumed to vest in the authors of a work, meaning those who control the creative expression being documented – here, the performers – and that alienation of an author's ownership interest must be established by the purported transferee through evidence. Thus, it only made sense that the defense must substantiate how it purportedly acquired ownership. This decision is currently on appeal to the Ninth Circuit, fully briefed and awaiting oral argument.

Protecting Termination Rights Under Section 203

- *Waite v. UMG Recordings, Inc*., 450 F. Supp. 3d 430 (S.D.N.Y. 2020)
- *Waite v. UMG Recordings, Inc*., 477 F. Supp. 3d 265 (S.D.N.Y. 2020)

Another copyright doctrine currently being examined in a class context is the termination right under 17 U.S.C. § 203, which provides that the author(s) of a work created on or after January 1, 1978 can reclaim their ownership interests decades after transferring them away by sending a timely notice of termination to the relevant transferee(s). The statute also says that the termination right cannot be contractually alienated ahead of its vesting, although the Ninth Circuit has fudged that edict if the threat of looming termination is used as leverage for a contractual renegotiation.

The biggest carveout to the termination right's application is that it does not exist for works made "for hire" under the Copyright Act. This can happen in one of only two ways: either the work is created by an employee within the scope of their employment (in which case authorship vests in the employer), or the work is commissioned from an independent contractor pursuant to a written agreement designating it as "for hire." For works taking the second route, they cannot yet be extant at time of contract (as one cannot designate a work "for hire" retroactively) and, pursuant to 17 U.S.C. § 101, must be created "as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas[.]"

Of note is the fact that "sound recordings" are not one of the nine types of work capable of being made for hire by contract alone (although surprisingly lurid tales exist of past industry efforts to render them as such), and attempts to shunt them under other classifications (such as deeming albums "collective works" or "compilations") have been met with deep skepticism by courts. *Waite v. UMG Recordings* saw the record labels float a new trial balloon on challenging termination claims, which is to use initial ownership as a collateral attack on their availability. Whether sound recordings are capable of being contractually rendered works for hire or not, recording contracts almost ubiquitously include work for hire language as a prophylactic measure in the event it ends up being found enforceable somewhere down the line. Does such language trigger the three-year statute of limitations on contesting a disputed ownership claim, such that if an artist fails to sue over the contract within three years of execution, they lose not only the chance to establish their ownership rights, but any chance to exercise termination rights in the future?

The *Waite* court responded to the foregoing question in the negative, noting that the termination right exists specifically because artists were found to lack the negotiating strength to extract the full value of their services early in their careers, which is why they deserve the opportunity to eventually renegotiate the terms of (or otherwise end) a transferee's ownership of their work. This lack of leverage similarly leaves them without meaningful recourse to excise overbearing (and most likely legally inert) work for hire language in their recording agreements. Therefore, "[t]o restrict the termination right based on the artist's failure to bring a claim within three years of signing a recording agreement - a time during which the artist and recording company may still have disparate levels of bargaining power - would thwart Congress's intent and eviscerate the right itself." Thus, a transferee cannot deprive a transferor of their termination rights through work for hire designations where the designations are found to be legally unsupported.

Although largely favorable to artists, the *Waite* decisions do contain at least one finding sure to roil the transactional legal community, and that finding concerns the impact of artists using "loan out" companies to contract with third parties for intellectual property. Loan outs are a commonly used artifice in the entertainment world, wherein a business entity is established to serve as a liability buffer between an artist and those they contract with, as well as a vehicle for more effective tax planning. The loan out company employs the artist, then contracts with third parties to "loan out" the artist's services. Where the record label obtains an artist's recordings from their loan out company, how the loan out company acquired those rights is significant. If the artist creates the recordings within the scope of their employment by their own loan out company, the recordings are necessarily works for hire, and once they are transferred by the loan out company to the record label, there is no statutory mechanism available to later reclaim them.

The *Waite* court confirmed this grim reality for artists, holding that where chain of title documents indicated recordings were granted through loan out companies, the employee-artists had no right to terminate the grants under Section 203 of the Copyright Act. Although the artists attempted to argue that their loan outs acquired the recordings through transfers from the artists as owner-authors (placing the loan outs in the same grantee shoes as UMG), the court held that their complaint did not support the allegation, and attempts to further amend their complaint to salvage the theory with more evidence were rejected as futile. Although the court recognized that loan out companies were primarily used as tax planning devices, "people cannot use a corporate structure for some purposes - e.g. taking advantage of tax benefits - and then disavow it for others" – such as the requirement that a terminable grant be executed by the author of the work. Thus, artists who have used loan outs to transfer works without a clear chain of title showing that the works were first transferred from the artist to the loan outs risk never regaining their copyrights.

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Fighting for Legacy Artists' Streaming Rights

- *The Rick Nelson Company, LLC v. Sony Music Entertainment*, 1:18-cv-08791-LLS (S.D.N.Y.)
- *Leonard Williams v. Warner Music Group Corp.*, 2:18-cv-09691-JWH-PJW (C.D. Cal.)
- *David Marks v. UMG Recordings, Inc.*, 2:21-cv-04043-MCS-JPR (C.D. Cal.)

The advent of digital streaming has complicated the administration of contractual royalties for "legacy" artists who transferred their recordings to record labels decades ago under the assumption that the sale of records was, *and would always be,* the primary method by which those recordings are consumed. Fast forward to present day, however, and only 9% of industry revenue still comes from record sales, as opposed to the 85% now coming from digital streaming. Plainly, if legacy artists had no contractual entitlement to share in these streaming royalties, the core consideration underpinning their record deals would fail and their fundamental purpose would be frustrated, giving rise to colorable rescission claims. To forestall this outcome, each of the major record labels – Sony, Warner, and Universal – began paying digital streaming royalties to the artists on their rosters *irrespective* of whether their written agreements covered the matter.

To the artists on the receiving end of this new royalty stream, the labels' decision was certainly a welcome development. However, these artists were not privy to the full story. While the periodic royalty statements they received reflected a 50% royalty was being paid on digital streaming, those statements failed to disclose the methodology by which the labels were calculating that royalty, which turned out to be particularly significant with respect to monies collected outside the United States. Those monies first pass through the labels' foreign subpublishers, which typically assess a collection fee on the royalties before remitting the balance to the labels stateside, at which point the artists' royalties are calculated. However, where these subpublishers are either owned or controlled by the record labels, such fees are essentially the left hand paying the right hand, creating a perverse incentive to maximize those fees in an effort to minimize the money ultimately payable to the artists. In some cases, audits revealed these "intercompany charges" were deducting more than *two thirds* of all foreign monies collected.

Since the discovery of these practices by auditors, class action litigation has been filed against all three major record labels engaged in the practice, with only one to date – Sony –electing to do right by artists by entering into a class settlement, one that has returned more than $12 million dollars to affected artists while also uplifting their royalty rates by 36%. Comparatively, Warner was able to forestall class certification here in the Central District of California after losing a motion to dismiss the case by convincing the district court that an unrecouped class representative whose contract is silent on digital streaming cannot adequately represent recouped artists or those with express licensing or streaming language in their recording agreements. That decision was then affirmed by the Ninth Circuit on abuse-of-discretion grounds. As a result, a renewed request to brief certification for a narrowed class is currently pending in the district court, with the case having been reassigned to a different judge while on interlocutory appeal. Universal, utilizing the same counsel as Warner, is currently fighting their case under both Rules 9 and 12.

That is perhaps the most curious aspect of this litigation: while all three major labels have realized, to one degree or another, that they are the indisputable villains of the story being told, each has reacted to being cast for the role in very different ways. While Sony was quick to recognize the propriety of settlement, Warner took the most strident possible position in moving to dismiss the litigation against it, embracing the controversial notion that any streaming royalties paid to legacy artists are pure charity on the part of the label. Universal, perhaps in response to the shellacking Warner took in the trades for its harsh stance, seems to be trying to straddle a middle ground, focusing on the artists' supposed lack of rights to circumscribe the intercompany charge rather than on a predicate lack of entitlement to streaming royalties at all. As the Universal litigation is currently in its infancy, the efficaciousness of this strategy remains to be seen.