Your INSIDE Track™

Music Law & Copyright Newsletter

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In This Issue

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SCAN ME

About the Editors

Don Franzen's legal practice covers the spectrum of the entertainment industry, including recording, television, film, live entertainment, copyright, trademarks, endorsements, corporate, tax and visa issues, and non-profit organizations. His clients include composers, producers, vocal and instrumental artists, as well as performing arts organizations. In addition to providing business and legal advice, he has acted an as a producer on recording, video, and theatrical projects. He also has established an expertise in commercial civil litigation, including appellate practice (State and Federal). He has lectured on entertainment law for Eastman School of Music, the Santa Monica College Academy of Entertainment, the Colburn School of Music, the California Institute of the Arts, and is a visiting professor at the Berklee School of Music (Valencia, Spain). Since 2009 he has taught courses on music and the law at the Herb Albert School of Music, University of California Los Angeles, and effective 2016 has been appointed as an adjunct professor as part of its Music Industry Program. Since 1997 he has been chosen as a Fellow of the Institute for the Humanities at the University of Southern California. He serves as the Legal Affairs Editor for the Los Angeles Review of Books, and has authored various essays and book reviews on legal topics. He is a founding director of the Los Angeles Opera, and a director of Heyday Books. In addition to his native English, he speaks Spanish, Italian and conversational German. He is married to Dale Franzen and proud father of three children. He may be reached by e-mail at donfranzen@yourinsidetrack.net.

Judith Finell is a musicologist and the president of Judith Finell MusicServices Inc., a music consulting firm in New York and Los Angeles, founded 25 years ago in New York. Since then, she has served as consultant and expert witness involving music copyright infringement, advised on artist career and project development, and a wide variety of music industry topics. Recently, Ms. Finell was honored to be the 2018 commencement speaker at UCLA's Herb Albert School of Music. She was also interviewed by NBC/Universal for a 2018 documentary entitled "The Universality of Music," in which she discussed the ways in which she sees music as being an international language that can bridge cultural barriers that spoken language does not.

Judith Finell was the testifying expert for the Marvin Gaye family in the milestone "Blurred Lines" case in Federal Court. She has testified in many other notable copyright infringement trials over the past 20 years. She and her team of musicologists regularly advise HBO, Lionsgate, Grey Advertising, CBS, Warner, Disney, and Sony Pictures on musical works for their commercials, films, and television series. Ms. Finell also frequently advises attorneys, advertising agencies, entertainment and recording companies, publishing firms, and musicians, addressing copyright issues, including those arising from digital sampling, electronic technology and Internet musical usage.

Ms. Finell was invited to teach forensic musicology at UCLA in 2018, where she continues to teach the only such course in the country. She holds an M.A. degree in musicology from the University of California at Berkeley and a B.A. from UCLA in piano performance. She has written numerous articles and a book in the area of contemporary music and copyright infringement and has appeared in trials on Court TV and before the American Intellectual Property Law Association. She is a trustee of the Copyright Society of the U.S.A., and has appeared as a guest lecturer at the law schools of Harvard University, UCLA, Stanford, Columbia, Vanderbilt, George Washington, NYU, and Fordham, as well as the Beverly Hills Bar Assn., LA Copyright Society, and the Association of Independent Music Publishers. She may be reached by e- mail at judi@jfmusicservices.com.

About YourInsideTrack™

We are presenting this newsletter to share new developments in music copyright, including trial results, deals, legislation, and technology impacting protections for intellectual property.

We will examine these through combined lenses of musicology and law. We will target game-changing decisions, settlements, and other news impacting the music industry and its content creators.

Music and sound design are increasingly embedded in many areas of our lives.

Most devices and software are identified with a sound mark or musical logo. Theme music and soundtracks appear in most film, television, video games, advertising, and public gatherings. Whenever new technologies are developed within the recording, publication, media, or broadcast industries, disputes invariably arise presenting legal challenges not yet considered or addressed.

Today, we are faced with AI-created music, boom sales of legacy music catalogs, sharing of music over social and streaming platforms, and new capacities at replicating and copying from pre-existing musical works and recordings – with and without permission.

We hope you will join us in our exploration of this newly growing landscape.

Frenemies: Collaboration and Conflict between Music Creators and Digital Platforms

Judith Finell, Musicologist

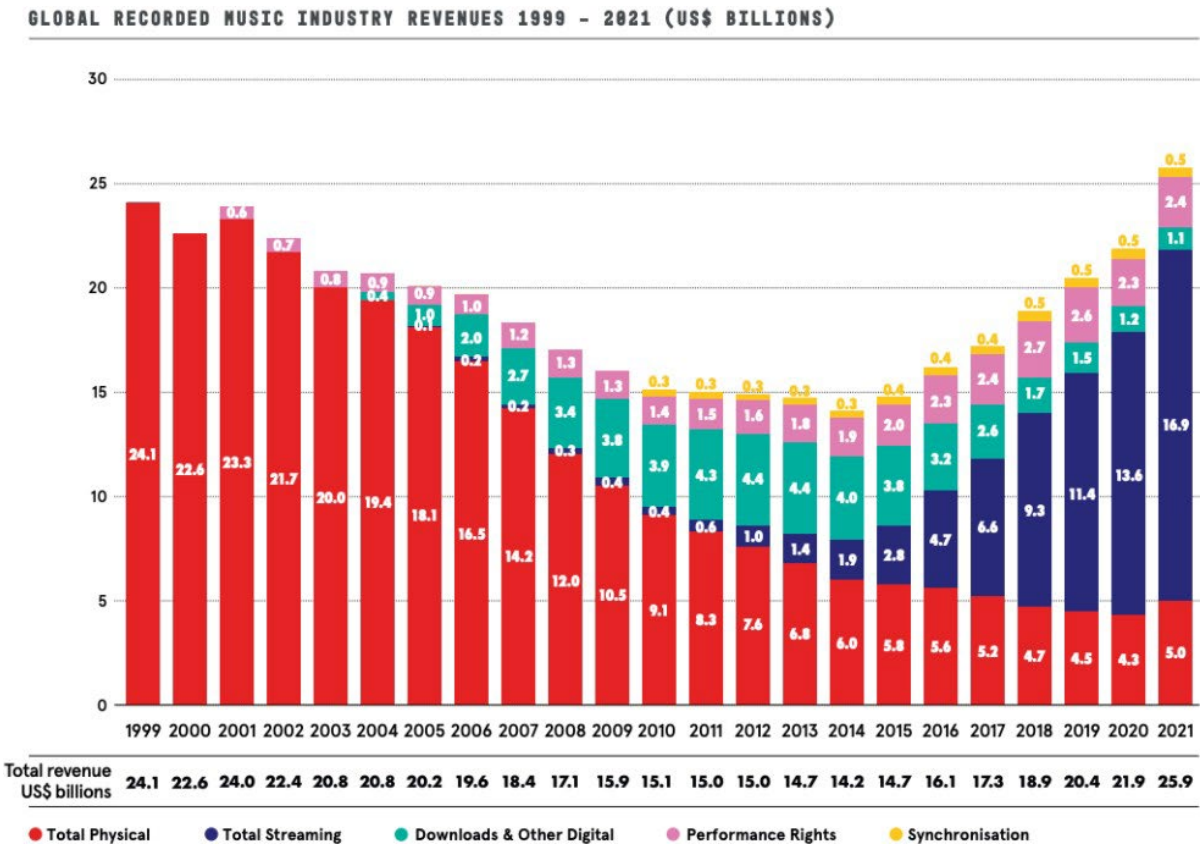
Ingenuity and technology continue to partner in making music more central to our lives. The pandemic has been a catalyst for new platforms for musical expressivity and circulation. With such social media as TikTok, the building of international audiences continues to expand beyond any earlier time. The regulation of the industry in protecting music copyright holders has evolved more gradually as has the music compensation system—lagging far behind music's high-speed technological enablers.

In the past two decades, the affordability of powerful home computers capable of sophisticated digital audio and video work have given creators access to tools rarely before used outside of professional recording studios. This environment has democratized not only music-making, but also its distribution, accessibility, and earnings opportunities. A symbiotic relationship between the more rigidly structured music industry, and the ever-changing music creation and distribution environment has developed. Accommodating one another in order to foster success and growth has become a challenge.

Historically, music and technology have long partnered to enhance modes of creation and audience access. The printing press expanded the opportunities for music to be heard, distributed, performed, and developed by musicians. Through the twentieth century, inventions expanding music's reach, including the phonograph, radio, television, photocopier, and compact disc, engendered love- hate responses from the music industry and its regulatory guardians. The twentieth century culminated in a wild west of digital sampling and filesharing, followed by legal disputes resulting in the takedown

of filesharing applications and the forced emergence of a licensing mechanism for the rampant digital sampling that was taking place.

Since the pandemic began in 2020, there has been an explosion of musical creation and a dramatic growth of new audiences. Some of these new developments and the legal challenges they pose will be discussed below.



Published by the International Federation of the Phonographic Industry

Gaming-Enabled Music: Creation and Usage

Videogame music, in particular, has changed tremendously, now basing music creation on game-player actions. The accompanimental underscore to many games now can change based on game-player actions. This is often achieved through the addition and subtraction of melodic, harmonic, and rhythmic layers to the musical score, which are triggered by the game-player's progress through the game.

However, the exact configurations and durations of each layer, in real-time, are dependent on the player's own choices and actions. The game-player can, in effect, mold pre-existing music as virtual musical "clay" to accompany game activities.

In addition to the underscore layers, the use of licensed third-party songs as part of the videogame package often conflicts with the needs of the game developers. For example, Rockstar Games has a long history of removing music from its *Grand Theft Auto* games when song licenses have expired. Some users have found this invasive because the company removed this music from the users' own devices via an update patch to a game that they had already purchased. It is tantamount to a customer purchasing a car with a crucial part like an engine being removed by the manufacturer after its purchase. The songs used in the game are operating under a licensing protocol at odds with the videogame in which they are housed. This presents a challenge for attorneys formulating agreements between game developers and songwriters whose works are incorporated in the game.

Virtual Performances/Virtual Reality Concerts

Broadcasts of performances have now entered a new level beyond terrestrial radio, television, and simulcasts. Virtual reality and interactive performances in the metaverse from avatars representing the musicians operating them have become a big part of the industry. A prominent example is the artist Lil Nas X's virtual performance within the game environment of *Fortnite* in 2020.

The nearly unlimited attendee capacity of online venues has also impacted the music industry. Traditionally, music and performance royalty yields have been based largely on the audience size within a brick-and-mortar concert hall. Virtual concert attendance has dramatically grown, due to the pandemic shutdown of live performance halls in 2020, stimulating the virtual audience numbers to grow from thousands to millions. Live concert venue capacities range from intimate 50-seat recital halls to stadiums seating 30,000, with finite seating that impacts the dollar amount that performing rights organizations ("PROs") pay in royalties to their constituent composers. For example, Carnegie Hall in New York seats approximately 2,700, Madison Square Garden 19,500, the Hollywood Bowl 18,000, and Yankee Stadium 50,000. The royalty system was designed to pay composers public performance royalties based on the audience size, number of repeat performances, and ticket sales. These metrics have changed with the technological expansion of virtual audiences. For example, when a concert is streamed world-wide, with nearly an infinite audience capacity, the numbers multiply dramatically.

Quantifying and defining the number of internet users attending a virtual event has become more specific and granular than was previously possible for PROs monitoring public performance payments to composers. Present-day virtual attendance reports yield more than sheer audience numbers, and can include demographic and internet browsing information allowing creators, distributors, and marketers to target potential viewers and future customers.

Additional developments in the concert field, including advances in hologram technology, allow the creation and performance of musical works by realistic- appearing live or deceased artists. Matters of privacy and rights of publicity in virtual environments are also a concern.

Social Media

Developments have been rapid in this arena. TikTok, a platform that enables the use of third-party audio in user videos, has presented many challenges. Additional social media platforms, such as

Facebook and Instagram, redistribute TikTok content. While enlarging the reach of these initial TikTok videos, this practice also challenges the limitations normally enforced by copyright laws and music licensing agreements. New considerations and media may demand newly adapted agreements.

In terms of monitoring usage, YouTube Content ID now provides copyright owners whose work is identified in other users' videos a streamlined alternative process for removing, blocking, or monetizing the use of that work. This option differs from a formal takedown notice as issued by a music publisher or record label or a copyright infringement claim in federal court. Rather, Content ID potentially allows creators and users to achieve mutually-beneficial solutions.

There has also been an explosion in the number of public performances of music licensed and tracked by the PROs on digital audio streaming services, such as Spotify, Apple Music, Pandora and the like. From 2015 to 2021, ASCAP reported performance royalty revenues as expanding from $1.01 billion to 1.3 billion, as shown below, in part due to the growth in digital audio performances:

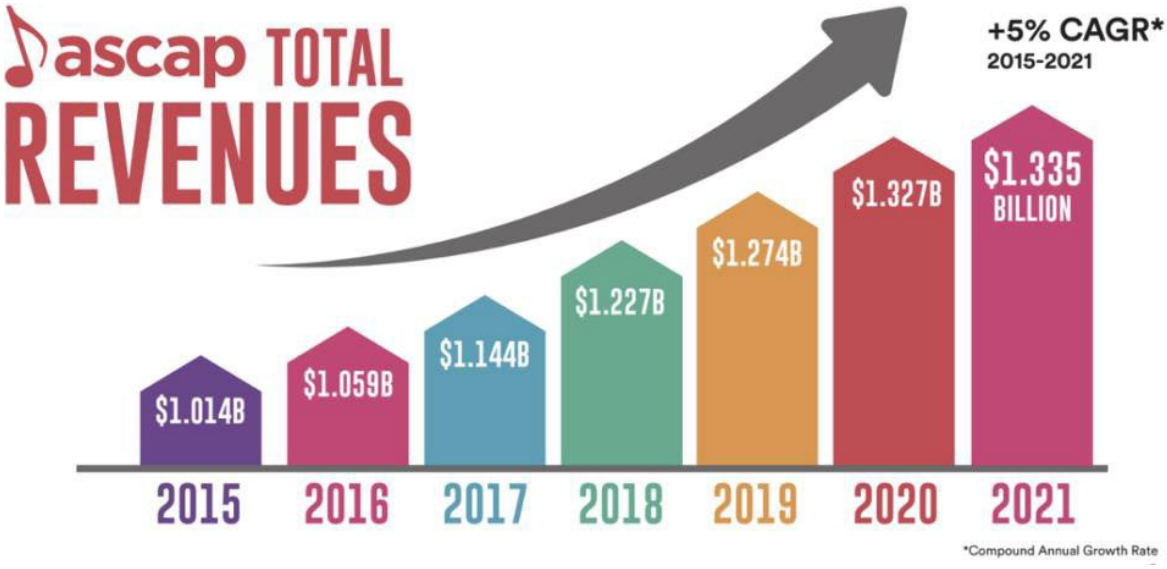


Image courtesy of The American Society of Composers, Authors and Publishers (ASCAP).

More impactful than most other world events, the pandemic encouraged two years of new musical collaboration models driven by social isolation, venue shut-downs, and restricted travel. The advent of near real-time web audio and video conferencing has allowed for live musical collaborations formally limited to onsite studio environments. More traditional modes of digital collaboration have become popularized too, such as musicians overdubbing one another from different locations and times. The effectiveness of these techniques has been increased by the affordability of high quality home studio equipment, and advances in video and audio capture on smartphones. However, the unauthorized use of third-party
materials, such as "beats," imbedded in new musical works is rampant, and due to be addressed by the industry and its legal representatives.

Artificial Intelligence-Created Music

Finally, as artificial intelligence uses continue to grow, protection and compensation for AI-created music remains to be addressed, given the current determination by the United States Copyright Office that only human-created artistic expression is subject to copyright protection. Further, the use of artificial intelligence in interpolating existing recordings and performances via deep learning bring the potential for unauthorized uses, including "deepfake" music videos, in which artificial content is created that realistically resembles someone's likeness, but whose words and actions are programmed by third-party users without permission. This raises first amendment, rights of publicity, fraud, fair use, parody, and many other issues.

The relationship between technological developers, user-programmers, and composers—and the music copyright and compensations systems—will continue to evolve. Most likely, new forms of litigation and enforcement will emerge in an effort to define the limitations and extensions of creativity protection. It should be a wild ride, filled with unexpected innovation and new challenges to the creative process.

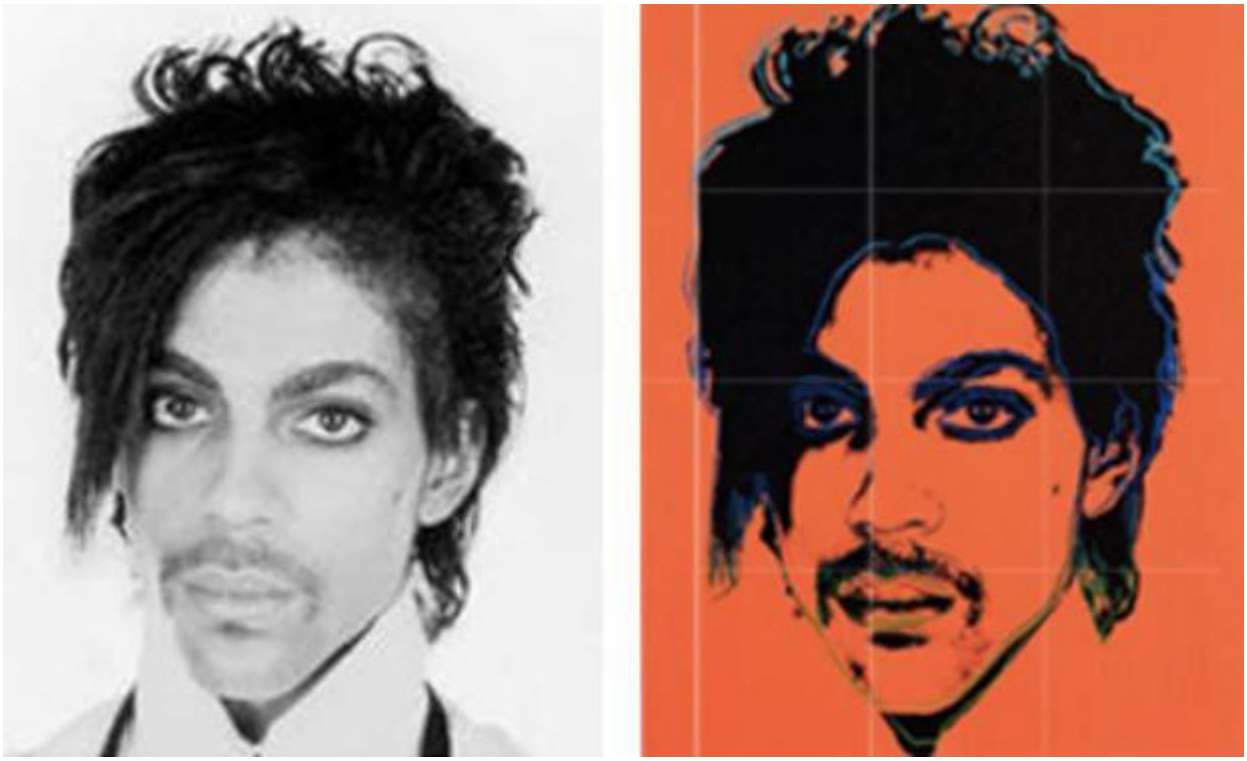
Dr. Geoffrey Pope assisted in the writing of this article.

New and Noteworthy:
Recent Developments in Music and Copyright

Don Franzen, Attorney

WARHOL GOES TO THE SUPREME COURT

In a case that could have far-reaching impact on all the creative arts, including music, the Supreme Court has agreed to take up the controversial decision of the Second Circuit in *Andy Warhol Foundation for the Visual Arts Inc. v. Lynn Goldsmith*. The case originated when the Andy Warhol Foundation sued photographer Lynn Goldsmith for a declaration that Warhol's series of lithographs entitled the "Prince Series" did not infringe her iconic photograph of Prince taken in 1981. The District Court ruled in Warhol's favor, finding that the Warhol prints constituted "fair use" of Goldsmith's photograph, but the Second Circuit reversed, finding that "fair use" did not apply. Comparing the two visual works, the Second Circuit concluded "the Prince Series retains the essential elements of the Goldsmith Photograph without significantly adding to or altering those elements" so that the "Prince Series is not 'transformative' …"



Goldsmith's 1981 photograph and one of Warhol's Prince Series images

On March 28th this year, the Supreme Court granted the Warhol Foundation's Petition for Certiorari, and on June 10th the Foundation filed its brief [*See* here] arguing the Second Circuit's application of the "transformative" element of the fair use doctrine is "cramped" because it focuses on whether the new work retains the "essential elements" of the prior work, rather than on whether the new work conveys a new "message or meaning." Warhol also argues the Ninth Circuit has it right, by emphasizing new "message or meaning" as the touchstone of transformative analysis, citing *Seltzer v. Green Day*, 725 F.3d 1170, 1175 (9th Cir. 1994). The case represents a rare opportunity for the Supreme Court to provide guidance on the meaning of the somewhat murky "transformative" test in fair use doctrine. As the Ninth Circuit commented in *Seltzer*, "… there is no shortage of language from …. court elucidating (or obfuscating) the meaning of transformation."

DID YOU GET A RELEASE FOR THAT ALBUM COVER?

Spencer Elden, who was photographed as a baby and his image used on the iconic cover of Nirvana's *Nevermind* album, filed suit in the Central District of California in August 2021, alleging the photo "exposed Spencer's intimate body part and lasciviously displayed Spencer's genitals from the time he was an infant to the present day." Baby Elden is depicted underwater grasping for a dollar bill dangledin front of him. According to the suit, this was tantamount to depicting the baby as a "sex worker." Also alleged in the complaint, no parent or guardian release was signed, and verbal promises to cover the infant's genitals were not honored.

Elden's case did not get off to a good start; a motion to dismiss was granted by Judge Fernando M. Olguin Moral in January this year, but Elden was granted the opportunity to file an amended

complaint. Moral of the story: Get a written release for any album photoshoot! Note that California law specifically allows for a parent or guardian to give a release for use of a photograph, California Code, Civil Code – CIV § 3344(a).

Plaintiff Elden holding the cover of the album "Nevermind"

DUA LIPA: BAD NEWS COMES IN THREES

For Dua Lipa, bad news in the form of lawsuits comes in threes. Twice in March of this year, the pop icon was sued for copyright infringement stemming from her hit song *Levitating*. The first lawsuit was filed in the Central District of California on March 1st by members of the band Artikal Sound System, who are the authors and copyright owners of the 2017 reggae composition *Live Your Life*. Without elaboration or analysis, the complaint alleges, "*Levitating* is substantially similar to *Live Your Life*. Given the degree of similarity, it is highly unlikely that *Levitating* was created independently from *Live Your Life*." The second lawsuit was filed on March 4th in New York on behalf of L. Russell Brown and Sandy Linzer, the composers of Cory Daye's 1979 disco song *Wiggle and Giggle All Night* and the 1980 song *Don Diablo*. Unlike the California case, this case sets forth musical examples in the complaint, including bar-by-bar comparisons between Levitating, Wiggle and Giggle, and *Don Diablo*. The two lawsuits offer contrasts in pleading style: the complaint in the *Live Your Life* case asserts "substantial similarity" without detailed musical analysis, whereas the *Wiggle and*

Giggle complaint offers several specific musical examples. By its lack of specificity, the California suit may be immune from a motion to dismiss (although discovery will require the plaintiffs ultimately to lay out their grounds for claiming substantial similarity), whereas the New York case might, by being more detailed, expose itself to an early motion to dismiss.

The third shoe dropped for Lipa in June of this year, when photographer Robert Barbera sued her in the Central District of California for using several photographs of Lipa herself on her Instagram account. As alleged by Barbera, he has registered copyrights in the photographs, and Lipa "without permission or authorization …actively copied, stored, and/or displayed Plaintiff's photographs on [her Instagram account] …" The images have since been taken down, according to the complaint. Warming to artists: don't assume just because the image is of yourself, you have an unfettered right to use it!

CAN AI BE AN AUTHOR?

The debate on AI and copyright continues. As reported in Issue No. 2 of this Newsletter, The Review Board of the US Copyright Office recently ruled a two- dimensional artwork entitled "A Recent Entrance to Paradise" could not be registered for copyright protection because it was authored by artificial intelligence without any creative input or intervention by a human being. Now Dr. Stephen Thaler (self-described as "in the business of developing and applying advanced artificial intelligence (AI) systems capable of generating creative output," and who unsuccessfully applied for a copyright in the name of his "Creativity Machine") has filed suit in Federal Court to overturn the

Review Board's decision. In Thaler v. Perlmutter, filed June 2, 2022. Dr. Thaler alleges that the Copyright Act gives "protection to 'original works of authorship,' a phrase which Congress left purposely undefined and for interpretation by the courts," and "at no point does the act limit authorship to natural persons." He also alleges "Copyright protection for AI-Generated Works is entirely consistent with the text and purpose of the Act." Thaler's complaint makes for interesting reading, and makes two arguments to support his position: one, that while the "Creativity Machine" is the "author" of the artwork, Thaler is the owner of the artwork under the personal property doctrine of "accession" (property created by a person's property belongs to the owner); and second, analogous to the "work for hire" doctrine, that the relationship between Thaler and the Creativity Machine is functionally equivalent to an "employer-employee" relationship. The latter argument would seem to run afoul of Thaler's principal motive in bringing this case, his desire to have the Creativity Machine declared an "author," since in a work for hire situation the employer is deemed the author. 17 U.S.C. 101.; (*See* https://www.copyright.gov › circs › circ09.pdf) "If a work is made for hire, *an employer is considered the author* even if an employee actually created the work" (italics added). With this case the issue is joined, and the courts will have to decide if AI can be an "author" (absent legislative action to clarify this question).

CAN YOUR LYRICS SEND YOU TO PRISON?

In a case that touches upon serious First Amendment issues, the Wisconsin Court of Appeals has been asked to decide whether the use of lyrics written by a rap artist can be admitted to prove guilt in a criminal trial. In the case against 17-year-old Tommy Canady for the murder of one Semar McClain, age 19, the evidence against Canady was largely circumstantial: no witness or evidence actually placed him at the crime scene. But, along with evidence that the two were seen arguing before McClain's death and that Canady possessed weapons akin to the ones the prosecution claimed were used to murder McClain, prosecutors were also allowed to play to the jury excerpts from Canady's rap song "I'm Out There" containing lyrics arguably depicting a murder similar to the one at trial. The jury asked to hear the song twice; it is hard to escape the conclusion that the song's lyrics failed to affect the jury's decision to convict. The court sentenced Canady to a minimum of 50 years in prison. Reliance on lyrics to support criminal prosecutions seems to be largely in cases involving rap artists. Would there be more reluctance to use lyrics to convict a country-western songwriter? While using rap lyrics as evidence may be problematic where First Amendment issues are involved, another recent case illustrates when the lyrics may be probative of a crime.

Recently, LA rapper Nuke Bizzle pleaded guilty to unemployment insurance fraud after rapping about "go[ing] to the bank" with a stack of unemployment checks. Some form of balancing test weighing free speech concerns, prejudice and probative value is needed. A recent op-ed piece in the *New York Times* argues for more stringent standards before such evidence can be introduced at trial.

Tommy Canady, who denies his guilt in the murder of Semar McClain

PANDORA STRIKES BACK!

As reported in Issue No. 2 of this newsletter, Robin Williams' estate recently brought a copyright infringement lawsuit seeking millions of dollars in royalties from Pandora in what may prove to be a precedent-setting case for payment of royalties to stand-up comics. Other prominent comics filed similar claims, and the cases have been consolidated as In re PANDORA MEDIA, LLC COPYRIGHT LITIGATION Master File No. 2:22-cv-00809-MCS-MAR (Central District California). The basic theory of the comics' case is that Pandora has failed to pay royalties on the copyright owned by each of the comedians in their routines (as opposed to license fees for streaming videos of their acts). Pandora is not amused. In a counterclaim filed on May 5th this year, the streaming platform has struck back with a novel theory: that the combined actions brought by the comedians amount to a "cartel" seeking to set prices, amount to ty-in sales, and an attempt to monopolize the "U.S. market for the rights to comedy routines embodied in comedy recordings" in violation of Sections 1 and 2 of the Sherman Antitrust Act. Lead counsel for the comics, Richard Busch, reacted to Pandora's counterclaim with the following quote to Billboard: "We have seen it, we vehemently disagree with it legally and factually, and we will be responding appropriately." Prediction: Pandora's counter-offensive will run into trouble under the Noer Pennington Doctrine, which generally exempts petitions for redress of rights in court from Antitrust liability.

RECORDING INDUSTRY SCORECARD: LABELS WINNING, ARTISTS GAINING?

By most metrics, 2021 was a bumper year for the recording industry. As reported by the Recording Industry Association of America (RIAA), paid streaming was up 23% to $9.5 billion. The average number of subscribers grew 11% to 75.5 million. Ad-supported streaming revenue grew 47% to $1.8 billion. Digital downloads fell only 12% to $587 million and accounted for just 4% of total revenue. Physical sales rose 42.3% to $1.66 billion despite a 21% decline in CD sales. Overall, the industry commanded nearly $15 billion. The catastrophic downturn of the recording business, triggered by widespread file sharing in the first decade of this century, has reversed with steady growth, fueled by streaming, in recent years. Recent economic studies argue copyrights in music are more valuable than ever.

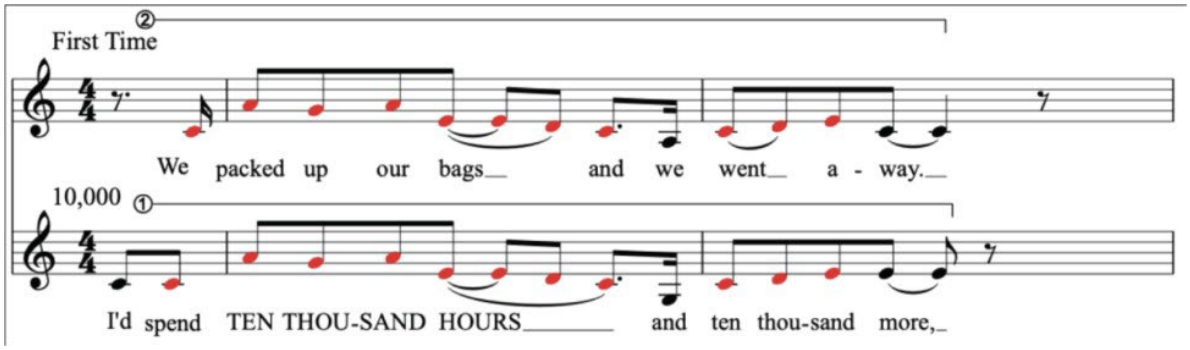
What remains to be addressed is a more equitable distribution of these surging revenues between labels and artists. One encouraging trend in this area is the weakening of big labels' insistence on all-encompassing "360" Deals that divert a percentage of an artist's overall entertainment earnings to the label. According to a recent Billboard article, leading music lawyers report that "the 360 deal has become more of a starting point than a foregone conclusion."

Another development is a recent self-described "historic" deal between music trade associations and collecting societies in France, setting a "minimum" streaming royalty rate of between 10% and 11% for artists —in effect lifting up artists with lower contractual rates.

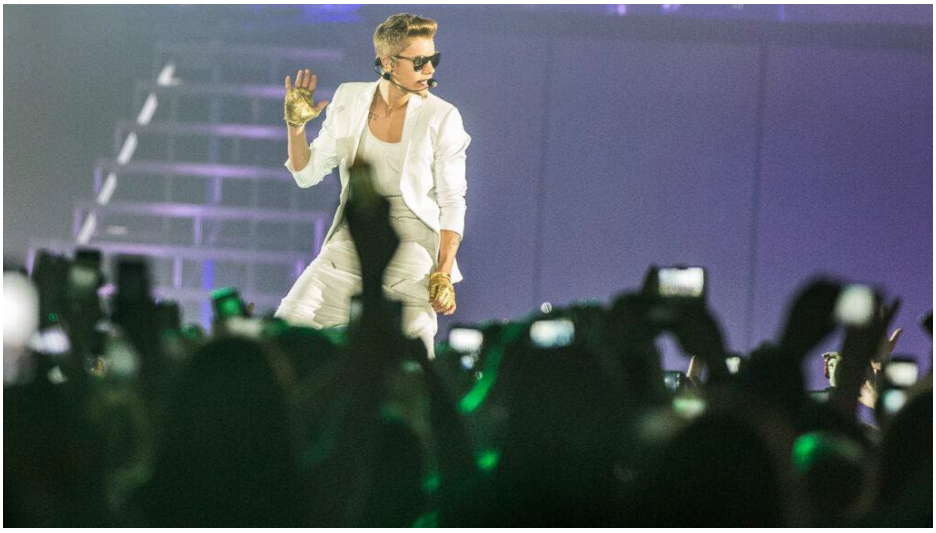
And in a positive development for songwriters, the major labels and publishers have reached an agreement before the Copyright Royalty Board to increase songwriter mechanical royalties on physical products and downloads to 12 cents for every track sold (up from the 9.1 cent rate in effect since 2008).

FORTY YEARS AND 10,000 HOURS LATER

A lawsuit filed in the Central District of California in April this year alleges the song "10,000 Hours" by Justin Bieber and duo Dan + Shay plagiarizes a song written over forty years ago by Palmer Rakes and Frank Fioravanti. The complaint is brought by a Nevada LLC, Melomega, which claims ownership of the earlier song's copyright. The complaint "[o]ne need only listen to First Time and the infringing 10,000 Hours to discern the unmistakable similarities between the songs." In some detail, the complaint presents the similarities in a bar-by-bar comparison, for example, as follows:



According to the plaintiff's expert, Dr. Alexander Stewart, "*First Time Baby* and *10,000 Hours* are practically the same song, and given the degree of similarity in these passages and other details … I consider it almost impossible that 10,000 Hours was created independently from First Time Baby." Relying on the doctrine of "striking similarity," Melomega also alleges access to First Time Baby is "inferred," but goes on to assert access on the basis that the song was released repeatedly via Orchard between 2017 and 2019 and widely available.



SHALT THOU STEAL FROM A BISHOP?

Ye, the artist formerly known as Kanye West, stands accused of stealing a recording by Texas Bishop David P. Moten in Ye's 2021 album *Donda*. In a lawsuit filed in the Northern District of Texas in May of this year, Bishop Moten alleges that over a minute of Ye's five-minute song *Come to Life* uses unlicensed samples of a recording of a sermon by Moten, such that "twenty percent (20%) of the entire sound recording *Come to Life* is comprised of unauthorized, unlicensed samples of the Sermon." At issue are both the Bishop's copyright in the sermons themselves as well as his claim to own the copyright in the recordings. The complaint seeks unspecified damages, attorney's fees, and costs.

IS A RECORD PRODUCER AN AUTHOR?

Can a record producer claim to be a co-author of a song? That's what a recording company who hired a producer to work on a hit album by 80s pop star Toni Basil argued. But in a memorandum decision (not for publication) in May this year, the Ninth Circuit upheld a trial court decision that

the indicia of joint authorship were not present. The producer was not, the court agreed, a "creative mastermind," and the process of recording and mixing were done at the singer's "direction consistent with her creative vision." Citing the Ninth Circuit's decision in *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000), the panel concluded all three factors developed in that case went against the producer: he did not exercise control over the recording, there was no objective manifestation of an intent to share authorship, and the success of the recording did not depend on the contributions of both producer and singer. Whatever may be true based on the facts of this case, a general rule cannot be abstracted from the decision. Some producers are equals to the musicians; Exhibit 1 being the case of George Martin, sometimes known as the "Fifth Beatle." The court's decision can be read here.

ALL I WANT FOR CHRISTMAS IS NO MORE LAWSUITS

In June Mariah Carey was sued by Andy Stone, a Mississippi songwriter, for allegedly stealing his song "All I want for Christmas is You" in her 90s smash hit with the same title. The complaint, filed in the Eastern District of Louisiana, where Stone states that he recently bought a copy of Carey's album, alleges that Stone wrote a song by the same title years before Carey released her album, and asserts causes of action in copyright, trademark and unjust enrichment. Tellingly, the complaint does not allege similarity between the songs apart from having the same title. A motion to dismiss may be expected, relying on the axiom that copyright protection does not extend to titles alone. The complaint can be read here.

A BRIDGERTON TOO FAR?

Songwriters Emily Baer and Abigale Barlow (known as Barlow and Baer) became Tik Tik sensations when they composed and performed songs based on the Netflix hit tv series *Bridgerton* (based on the romance novel by Julia Quinn). Both still in their 20s, Barlow and Baer went on to release an album, and in 2022 won the Grammy for Best Musical Theater recording. Billed as the Unofficial Brigderton Musical, all this was done without express permission from Netflix, Quinn, or the series producer Shonda Rhimes. But now, with a live stage musical, Barlow and Baer have gone a Bridgerton too far, or so at least alleges Netflix, which on July 29, 2022, filed suit in the District Court of Columbia for copyright and trademark infringement against the young songwriters. As alleged in the complaint, "Netflix owns the exclusive right to create Bridgerton songs, musicals, or any other derivative works based on Bridgerton. Barlow & Bear cannot take that right—made valuable by others' hard work—for themselves, without permission. Yet that is exactly what they have done." The complaint alleges a recent live stage production at the Kennedy Center "featured over a dozen songs that copied verbatim dialogue, character traits and expression, and other elements from *Bridgerton* the series." The complaint can be read here. When asked for comment by the NY Post, author Quinn replied: "I was flattered and delighted when they began composing Bridgerton songs and sharing with other fans on TikTok. There is a difference, however, between composing on TikTok and recording and performing for commercial gain." Shonda Rhimes also gave a statement to the NY Post, saying "What started as a fun celebration by Barlow & Bear on social media has turned into the blatant taking of intellectual property solely for Barlow & Bear's financial benefit." The issue of fair use is sure to figure in the outcome of this case, and the pending Supreme Court *Warhol* case may provide guidance to this case's outcome.

Copyright Gladiator, Part 2: An Interview with Richard Busch

Part I of the interview appeared in the Second Edition of Your Inside Track Newsletter.

Richard S. Busch is a Partner and Head of the Entertainment and Intellectual Property Sections of King & Ballow. His practice areas include Litigation (State and Federal), Entertainment Litigation, and Intellectual Property Litigation. Mr. Busch has litigated, and won many of the landmark music cases over the last 15 years, including *FBT v. Aftermath Records*, which established that Eminem's recording agreement entitled him and his production company to 50 percent of the label's net receipts for permanent download revenue (which spawned numerous class actions), and the "Blurred Lines" copyright infringement case. Mr. Busch most recently brought numerous actions against Spotify alleging that Spotify streams musical compositions on its platform without license or payment to publishers and songwriters, and challenging the constitutionality of the Music Modernization Act.

Split between the 9th Circuit and 6th Circuit on Bridgeport v. Dimension Films

Judith Finell

What do you think about the circuit split between the 9th Circuit and the 6th Circuit on the question of sampling in the Bridgeport cases? And will it be resolved in the Supreme Court?

Richard Busch

So, I won the [*Bridgeport Music, Inc. v] Dimension Films* case back in 2004 or 2005, which was a landmark ruling—and it was a very important ruling, and this might be more information than you need, but I think it's interesting. We had filed 482 lawsuits against the entire rap music industry for sampling. And what the court did was it stayed all the cases except the first ten to see how they played out and to see how we would handle the next 472 afterwards. And the judge made several rulings against us—the district judge did—that threatened the entire litigation. The very first case was this Dimension Films case involving a song by George Clinton, "Get Off Your Ass and Jam." And it was sampled in an NWA song, and it was in the movie *100 Miles and Running.* And the court found that it had been so cut up, sliced up, and used in a way that was unrecognizable, that it was a *de minimis* use of the master, even though they admitted sampling—digitally copying the master. So we appealed that, and we made a statutory argument that, in enacting the Copyright Act, there was a specific provision on sound recordings, and there was a give-and-take. Congress allowed musical covers without requiring a license to the sound recording owner. In other words, if you replay a

sound recording but don't use any of the actual sounds from the sound recording, you have to get a license for the composition—which is usually compulsory, but you don't have to get a license for the master so it allowed people to do covers without the sound recording owner getting anything.

Judith Finell

Right.

Richard Busch

But the tradeoff was that there's language in the statute that says—and I don't have it in front of me—but essentially it says that the owner of the sound recording has the absolute right and the exclusive right to recreate, adapt, change, alter any of the sounds—the actual sounds—in the sound recording. So we made the argument that by Congress saying that [sound recording owners] have the exclusive right to use any of the sounds, that meant that even 1 second of a sound digitally sampled was copyright infringement without regard to *de minimis* analysis—and the 6th circuit agreed with us.

Judith Finell

That's really revolutionary, yes.

Arguing the other side: VMG Salsoul v. Ciccone

Richard Busch

Yeah, that's how *Dimension Films* got decided, and it obviously changed the entirety of our litigation—and then we went from being a real underdog to settling most of the cases, and it was very successful. *Dimension Films* did that for us. Following *Dimension Films*, there was a lot of criticism of it, and I don't know of any courts outside the 6th Circuit that actually followed it. I know the 11th Circuit, out of Florida, didn't. And the 9th Circuit, you know, I was representing Shep Pettibone a few years ago, who's a famous music producer. He was accused of actually sampling his own music in Madonna's song "Vogue." He had created a song called "Love Break," and they claimed [to be the] owner of that sound recording. It's a really interesting story. I don't know if this is too much information but it's really—

Judith Finell

This is going to be read mostly by attorneys, so it would be very interesting. Please continue.

Richard Busch

Yeah, so the fact pattern [of *VMG Salsoul v. Ciccone*] is really unbelievable. Shep worked for the Salsoul Orchestra in the early '80s, and he created a song called "Love Break" that had some horn hits in it. And then he was the producer of the song "Vogue," and there was an engineer on the song "Vogue" to whom Shep gave his start as Shep's personal assistant, and the opponents believed—Shep denied it—but they believed that Shep sampled the horn hits in Madonna's "Vogue" from his [own] song "Love Break." So, fast forward now from the late 80s to 2007 or 2008. And that engineer who worked with Shep on "Vogue" now has become a very successful music businessman. He buys the Salsoul Orchestra catalog thinking that he knows that Shep sampled "Love Break" in "Vogue"—with the intention of now basically getting his money back from purchasing the Salsoul Orchestra catalog—by suing Shep and Madonna for copyright infringement of Shep's own song "Love Break" for the use of this horn hit. I mean, you can't make this stuff up, right?

Judith Finell

No, I have never heard that background story.

Richard Busch

Yeah, so that's what happened. He worked as an engineer on "Vogue," and 20 years later, he turns around and buys the Salsoul Orchestra catalog, and then turns around and sues Shep, even though he himself was an engineer on "Vogue." I'm guessing he thought he would make back his money for buying the catalog by suing Shep.

Judith Finell

Right.

Richard Busch

I know, you can't make this stuff up. So anyway, we argued, and the horn hit on "Vogue" was literally 1-second long, nothing. And of course, they argued *Bridgeport v. Dimension Films*. And, of course, I argued it was *de minimis*, and they said, "Wait a second, how can Mr. Busch come into the court and argue it's *de minimis*? He was the lawyer on *Dimension Films*." I say, you know, "I was young then, I was stupid."

Judith Finell

Did you actually say that in court?

Richard Busch

No, I didn't say that.

Judith Finell

No?

Richard Busch

Didn't know what I was doing, I was crazy… No, I just said, "Look, true, I did. But, you know, courts haven't followed it. And it's still not the law in the 9th Circuit. It's the law in the 6th circuit. But here are the reasons that it's come under criticism and I'm representing Shep now, and these are the arguments I'm making." And in a two-to-one decision, the 9th Circuit said the *de minimis* analysis applied and affirmed the court's granting a summary judgment. One 9th Circuit judge rejected it and said they should follow *Dimension Films*. This is just a long- winded way of getting to your ultimate question, which is "Will there be a Supreme Court ruling on it?" I doubt it. And the reason why I doubt it is because music sampling isn't what it once was, right? In the 1990s and early 2000s, everyone was sampling, not getting a license, you know, doing all those things. You know this, Judith, because you analyze a lot of claims and cases and potential cases—you don't have the digital copying of sampling unlicensed samples as in the wild west, like it was 20 years ago. You just don't have it anymore.

Judith Finell

Yes.

Richard Busch

And so I don't think it's front and center. I don't think it comes up that often, so the chances of it going to the Supreme Court for a decision on the merits, although interesting—and maybe I get to argue both sides!—would be unlikely, in my view.

Judith Finell

Thank you. That's really a helpful answer. Terrific.

Richard Busch

Yep.

Constitutional Challenge of the Music Modernization Act

Judith Finell

Thank you. The next question is—about [your] constitutional challenge of the MMA [Music Modernization Act], and we'd like to hear about that and what you plan.

Richard Busch

Okay, so because it's an active case, I can't really get into all the details, but I'll be happy to give you the publicly available information, and since I'm litigating the case, what we're arguing. I'm representing Eight Mile Style, which is Eminem's music publisher, and we are suing Spotify for copyright infringement. I handled several other cases against Spotify that settled—I'm not at liberty to discuss settlements—but they settled. This one is unique because not only do we have the issue of copyright infringement, we're also suing the Harry Fox Agency for contributory copyright infringement, and we have the complication of the MMA. So with respect to the MMA, I'm going to answer your question in two parts because our argument is that Spotify and the Harry Fox Agency did not comply with the MMA, and therefore they don't get the limitation of liability that is provided for in the MMA. But, if we cannot prove that they did not comply with the provisions of the MMA, or the court does not agree with us, then the alternative we are arguing is that the MMA is unconstitutional. And not the entire MMA, just one provision of it which limits the liability of DSPs [Digital Service Providers]. That's the part that we're attacking. So let me answer the question, therefore, in two ways. One, there is a provision in the MMA that says that if you did not file a lawsuit by January 1, 2018 against the DSP for copyright infringement, the liability of the DSP, your remedy, is limited to the actual royalties that were not paid by the DSP. And the Copyright Act provides for remedies involving statutory damages and attorneys' fees, and statutory damages for willful infringement can be as much as $150,000 per copyrighted work. So, to say that you're only able to get the undefined royalties that you were not paid for streams basically guts you the remedies of the Copyright Act. The law says if you didn't file a lawsuit by January 1, 2018, and you comply with the MMA, then the DSPs are insulated from liability beyond the royalties they didn't pay. The first thing that we are arguing is that Spotify and HFA [Harry Fox Agency] did not comply with the MMA to enjoy this liability limitation, and there's a whole set of things that are required to comply with the MMA: providing a full statement of account by a certain date, providing annual statements by a certain date, providing monthly statements in certain forms—certified monthly statements—certified annual statements, certified statements of account. And we are arguing that they didn't do that. They didn't provide those in the manner in which they were required. Also, they are required to engage in what is defined as, or described as, "commercially reasonable efforts" to match the compositions owned by the publishers and songwriters with the sound recordings that are on Spotify's platform. And we argue that they did not; we're going to argue they did not engage in commercially reasonable efforts to do that.

So that's it in a nutshell, it's much broader than that, but that's it in a nutshell. And that's our primary argument, that they didn't do the things necessary to enjoy this limitation of liability. On the other hand, or in the alternative, we're going to argue that that provision on the limitation of liability is unconstitutional. Why? Because the MMA first leaked that there might be a bill or something called the MMA in late 2017. And we're talking about November, December of 2017. Unless you were in the know, unless you were paying attention to these kinds of things, nobody knew about it, because it was not a law. And the law was enacted in October of 2018. And so in October of 2018, when the law got enacted, it retroactively provided that if you didn't file a lawsuit by January 1 of 2018, you don't have these rights to sue for statutory damages to get your attorneys' fees, basically. And, by the way, if they didn't have a license, there's no way to define what "royalties" a publisher would be entitled to, because a publisher is entitled to negotiate its own license with Spotify in the absence of a compulsory license or a direct license that's in place! So to even say they're entitled to

royalties is not a remedy at all, because, for example, in the Eminem case, we're arguing that we would have required certain things to allow the Eminem compositions to be on the platform. So, what royalties is Spotify liable for?

The bottom line is: it is a retroactive taking of a property right. There's a case called *Davis v. Blige*, it's a case where Mary J. Blige was sued—and the facts are not that important for purposes of our discussion—but what is important is the court confirmed in the *Davis v. Blige* case that copyright infringement is a property right that vests at the moment the copyright infringement takes place. At the very second it takes place. So in 2017, we alleged that Spotify was committing copyright infringement—all throughout 2017, a property right vested in Eight Mile Style Publishing for that copyright infringement claim, which includes the right to get statutory damages, attorneys fees, etc. So, when Congress in October or November of 2018 enacted the MMA, and retroactively said anyone who didn't file a lawsuit by January 1 of 2018 could not get these remedies, our argument is that they are violating the Takings Clause of the Constitution—or taking property retroactively that had already vested. And we also argue they are violating the Fifth Amendment because there's a violation of substantive and procedural due process, and because you're taking away from something that has already vested in them—that is, this property right of copyright infringement. I'll note that the scholar Lawrence Tribe, from Harvard University, who is one of the most famous constitutional scholars in the United States, was asked about our claim and commented that it's "very substantial," that our attack on a constitutional claim is very substantial, meaning, as I take it, that he agrees with our position. So that's our case on the constitutional claim in a nutshell. Does that make sense to you?

Judith Finell

Thank you very much. It's really helpful to hear your view on it, and also the validation by Professor Tribe. My followup question, then, is: could it bring down the entire MMA, and basically disband it?

Richard Busch

I'm not sure—I'm not sure that it would. I haven't really looked at it. There's a principle in the law that if a statute in part is declared unconstitutional, if you can save the rest of it while striking that portion, that you can do that. So I'm not sure, if we win on this issue, whether that would mean the entire MMA is struck down. I don't believe it would [be]. I think it would just mean that [it would be] this provision, the limitation of liability provision, because it's not necessary for the other parts of the MMA. It doesn't really affect the other parts of the MMA. So, I'm pretty sure that it would not bring down the entirety of the MMA.

Judith Finell

Okay. That's helpful to know because it took a long time to get the MMA in place. Right?

Richard Busch

There's a lot of criticism of it, you know. There's a lot of criticism that you're putting money in a black box and giving it all to the majors based on publisher share. I mean, that's part of it. There's an argument to be made that Spotify and others are incentivized not to match compositions [to the recordings] because their biggest customers are these majors who get the money in the black box because of their market share. And so what incentive do they have to match the smaller publishers' compositions' sound recordings? You know, there are a lot of conspiracy theories along those lines. There are a lot of people who criticize the MMA and don't think it's a good thing. There are others who support it. But, you know, I don't think that striking the liability provision to DSPs would render the entire MMA invalid or unconstitutional.

"Blurred Lines" *Misperceptions and Legacy*

Judith Finell

Thank you. Okay, to change the subject, we will turn to "Blurred Lines," and the fallout from the case over the past few years, and some of the cases that have referenced it. I would like to start with your view of the misunderstandings about how "Blurred Lines" supposedly affected future rulings and creativity. You know, of course, there was the dissent on appeal, all in terms of seeing it as a so-called style, vibe, et cetera. But really, how do you see the outcome of the "Blurred Lines" case? Looking back historically on what came out of that and led to some of the other decisions—like Katy Perry, Led Zeppelin, and all—do you feel it was a detrimental outcome? How do you see the outcome of the "Blurred Lines" case and its impact within the legal system?

Richard Busch

Well, it certainly hasn't been detrimental for me, if you're asking me that. I think it's been a very positive thing for me personally.

Judith Finell Yes, I understand.

Richard Busch

So are you asking detrimental to whom?

Judith Finell

Yes

Richard Busch

You know my feelings, as you and I have spoken many times about this, and you were the musicologist on the case.You know that the case, because of the PR machine that we faced on the other side, that the public began believing what they kept hearing from the PR from the other side to be true. You know for a fact that it was notabout a genre, you know it was not about an era of music. But you put together, in a very convincing way, this constellation of elements that showed that the composition was copied, and there were 15 different—I think—elements that were copied. We can get into the lead sheet issue if you want to for a minute after I answer this question. But the court, ruled, and I still think incorrectly, that our claims were limited to the elements reflected on a lead sheet deposited with the Copyright Office. So [that ruling] reduced our elements from 15 to five or six. Still, we were able to show that those five or six compositional elements were absolutely copied. The district judge agreed with us. He allowed that to go to the jury, and the jury rightfully found that there was copying of the composition. You know, this criticism that "Blurred Lines" would bring down the music industry, and that "Blurred Lines" would mean that no one could ever whistle again, and that no one could ever hum a tune without being sued for copyright infringement, is absurd. And the proof is in the pudding. It's been, believe it or not, six years now since we tried "Blurred Lines," and there still is music, you know? There has notbeen an onslaught of copyright infringement claims along the lines of "Blurred Lines," you know, with the "Blurred Lines" argument being made. There have been a handful, right? But, music keeps getting released and keeps getting played, and the world has not come to an end. And, so as far as that is concerned, in my view, it encouraged creativity. Because if people are concerned that they would be caught if they engaged in copyright infringement, it encourages people to create original music. So, to say that it stifles creativity—it does the contrary, it does the exact opposite. If you think you're going to get caught if you do something wrong, what do you do? You don't do something wrong, correct? If you think you can get away with something, then you're more prone to try to get away with it. And that's the same thing that happened with "Blurred Lines": it encouraged creativity. I don't buy that it was about a genre, or an era, and it didn't stifle creativity.

In fact, there are multiple examples of people settling claims and doing the right thing because they recognized that they did copy and they wanted to do the right thing. A prime example is Sam Smith and Tom Petty. You know, Tom Petty believed a song by Sam Smith was close to his or copied his, and Sam Smith listened to it and said, "You know what? He's got a point," and they settled it. There was a case with "Uptown Funk" that was in the news, with Mark Ronson. They settled it. There are a couple of other examples that I'm aware of. Same thing. So I think it helped. It didn't hurt.

And, as far as the cases that have come after, I think there are some activist judges out there that pay attention to the noise, and they are persuaded by these major record labels and this onslaught of PR that "Blurred Lines" went too far—and they tried to bring it back. The Katy Perry case is a good example of that. I think the jury ruled against Katy Perry and the district judge reversed the jury. The Led Zeppelin case is a little bit different because the plaintiff lost in that case, but that's an example of limiting the claim to the lead sheet. I think that the courts, at least in the 9th Circuit now, are trying to even the playing field and make "Blurred Lines" a one-off situation. And I would say that the pendulum is swinging a little bit back to the defense side as a reaction to "Blurred Lines," so ["Blurred Lines"] is having a neutralizing effect, and it's not bringing down the world. You know, dogs and cats are not living together. The world goes on as it was. COVID happened, you know.

"Blurred Lines" didn't do anything to COVID, you know. It's become something of a one-off story, which is great with me because it's something that I will always be very proud of being a part of. We went up against all the odds— astronomical odds against us—and we prevailed. And in no small part because of you.

Judith Finell

Well, thank you.

Richard Busch

That's my answer to your question. If you want to talk about the lead sheet issue, which survives "Blurred Lines," I'll be happy to talk about that as well. It's become less of an issue now than I feared that it would for a couple of reasons, but I'm happy to talk about that also, if you'd like me to.

Judith Finell

I remember you said this during the case, or after the case, that one danger was—I believe— that people could mine previous musical works, and take everything that was added after the lead sheet, and place it onto a new recording?

Richard Busch

Right, what I said was that. Let's back up for a second for people who are listening to this cold who may not be educated on this topic, and this is the first they're hearing of it. Some people will know all this and they don't need this. But for people who are reading this for the first time, hearing about this for the first time, I'll set the stage, if you'd like.

Judith Finell

Thank you, yes, please do.

Richard Busch

Historically, in every copyright infringement case, including those in the 9th Circuit, you played recordings of the old song versus the new song in court, and you determined whether they passed the extrinsic and intrinsic test. The extrinsic test is for the court to decide whether compositionally they are similar enough to go to the jury. The intrinsic test is when the jury just basically has an ordinary observer decide whether it sounds the same to them. If the judge lets the extrinsic test go to the jury, then the jury decides that point also. But, you know, we can't find any cases prior to "Blurred Lines" where the court did not just let the recording of the allegedly infringed composition be played and compared to the allegedly infringing composition. Well, right before the "Blurred Lines" trial, the district court in "Blurred Lines" made a first-of-its-kind decision. And what the court said was there are two Copyright Acts that are relevant: the 1909 Copyright Act and the

Copyright Act of 1976. There was a Copyright Act, I think, of 1791. I read that somewhere and I thought that was pretty funny. But, 1909 and 1976. The 1909 Copyright Act, according to the district judge, required publication of the composition in written form. And he also looked at this revision of the Copyright Act in 1997, I don't remember exactly what he said about that. Basically, he made the argument that the only elements protected under the 1909 Copyright Act were the elements in written sheet music, either published or filed in the Copyright Office. And, of course, under the 1976 Copyright Act it's different, because under it, copyright protection vests in the author at the moment of creation, and sound recordings are accepted after 1978. The 1976 Copyright Act addresses works created after January 1, 1978, even though it's the Copyright Act of 1976. But after 1978, at some point, the Copyright Office began accepting recordings as the deposit copy as reflecting the most accurate version of the composition. Before that, you had to deposit written sheet music, and usually in the form of a lead sheet. I'm not telling you anything you don't know, Judith, but I'll just say it for the record so everyone else can understand this: a lead sheet is basically a sketch, an outline of a composition, and it's created by someone, not usually the author, because the author often doesn't know how to transcribe sheet music. An author finds someone just to get the deposit copy of the composition on file with the Copyright Office. You have to deposit something that identifies the work. Now, historically, even prior to the Copyright Act of 1976, it was well established law that the deposit copy does not define the scope of the work. It just is meant to identify the work. Okay? Nonetheless, the district judge in the "Blurred Lines" case said, "I'm going to rule that the only elements protected are the elements reflecting the lead sheet of Marvin Gaye's song 'Got to Give It Up,' because Marvin Gaye's song 'Got to Give It Up' was created in 1977, before January 1 of 1978, when the 1976 Copyright Act became effective." So it was governed by the 1909 Copyright Act, not the 1976 Copyright Act. So overnight our claims went from 15 or 16 compositional elements that you identified as being copied by "Blurred Lines" from "Got to Give It Up" down to five or six. And even those, we made arguments that it was reflected by the lead sheet because it—the elements in the lead sheet—were something that a musician would understand what to play. Then the court also ruled that not only was our claim limited to the lead sheet, but also that we couldn't play Marvin Gaye's "Got to Give It Up" [in court] because to do so would be to expose the jury to elements in the recording that the judge found were not able to be sued upon from the composition because they weren't reflected in the lead sheet that was deposited. It was a body blow, to say the least. And it was devastating to our case, and everyone asks "How did you win?" And you know, that's a story for another time.

The issue that we're talking about here is what you asked, which was what I've said before—that this ruling is ridiculous on a practical level, because now anyone who wants to infringe on a pre-1978 composition could go to the Copyright Office and just see what's on the lead sheet and copy everything else from the Beatles, and from every Motown artist, and Elvis Presley, and everyone else. How asinine is that? And, then, now, Marvin Gaye is no longer the author of to "Give to Give It Up," but some unknown transcriber. And whatever they decided to put on a lead sheet, that becomes the composition "Got to Give It Up." How seriously asinine is that, right? It's complete disenfranchisement of these incredible songwriters, of what they created, because they all created music in the studio. So in my mind, it was a stupid decision, but nonetheless, it was the decision. And so on appeal, because we [already] won the case, we didn't have to really attack that lead sheet issue because we won. And they—the opposing appellants—actually argued that the court let into evidence things that weren't in the lead sheet. It was addressed by the 9th Circuit, and in our case,

the panel said—they dropped a footnote and basically suggested they agreed with us—that the claim shouldn't be limited to the lead sheet. They made the point of noting that even the Copyright Office says they don't have to keep lead sheets. They don't have to keep the deposit copies. So how could you ever know what was on a lead sheet if the Copyright Office isn't required to keep it? Nonetheless, that's what happened.

So then fast forward to the Led Zeppelin case. They lost, and that's why lawyers make a difference, and judges make a difference. You know, bad lawyers make bad law, bad judges make bad law. If arguments aren't made that should be made, things happen. I'm not saying the lawyer was bad or good, I'm just saying that, in general, those things happen. They lose—the plaintiff—and the court follows the "Blurred Lines" judge and restricts the plaintiff's case to the elements in the lead sheet. It didn't sound anything like the song that was recorded by the group Taurus that was at issue. And so they played the lead sheet versus the Led Zeppelin song, and it didn't sound alike, and they lost. Goes up to the 9th Circuit, and for whatever reason, the 9th Circuit ruled. I've read the decision, and I disagree with it, but they ruled. I'd like to think that if I were the plaintiff's lawyer in that case, we would have won, but that's neither here nor there. The 9th Circuit confirmed that decision, affirmed that decision in an *en banc* decision. And, so, the law of the 9th Circuit is that for pre-1978 compositions the claim is limited to either a publication of the sheet music or to what's on file at the Copyright Office—that's the law of the 9th Circuit. So it sounds like a devastating decision for songwriters of that era. Sounds like it could be a monumentally bad decision for historic songwriters. But the saving grace is: since that decision, there has been a kind of accepted way to get around that decision. And the accepted way comes from some discussion about it in legal circles by legal scholars and by something that has been, I believe, accepted by a court in the 2nd Circuit. Marvin Gaye's family is not directly involved in this case, but there's a claim being brought by Marvin's co- writer [of "Let's Get It On"] against Ed Sheeran, for his [Sheeran's] song "Thinking Out Loud." What happened there was the court was going to initially restrict the claim to the lead sheet after the 9th Circuit rule. But, what has been accepted is that now you can file a new copyright with the recording and call it a new arrangement. So, now the 1976 Copyright Act is deemed to be retroactive, number one. And number two, you can file a new copyright registration of "Let's Get It On" with the recording or with a full transcription of the entire composition and call it a new arrangement of the original song—and sue on that arrangement!

Judith Finell

Wow, that's a major decision.

Richard Busch

Yes. And, so, this is something that's been accepted. It's been discussed in legal circles. And so now there's nothing that prevents anyone from going and filing a new copyright registration for a pre-1978 song and either depositing the recording as the best example of the composition, or a full transcription of the actual composition, and just calling it a new arrangement of the original composition, and suing on that for copyright infringement. You probably won't be able to get statutory damages or attorneys' fees because in order to get statutory damages or attorneys' fees, the copyright registration has to have been on file at the time the infringement occurred. If you [register]

it after the infringement occurred, the argument would be that it's a post-infringement copyright registration. You might want to argue, "Well no, the original was on file, too," but you probably are going to lose that. But it is a way to get around this decision and kind of moot because it allows you to sue on the full composition if you do that. That's what is happening, and so the decision does not have the teeth ultimately that it could have if we weren't able to do that.

Judith Finell

So you're saying that the recording—all the elements that are on the recording and not in the original lead sheet—will now be encompassed in this [musical] arrangement?

Richard Busch

Yes.

Judith Finell

But doesn't that make it a derivative work? I mean, it's a different kind of claim?

Richard Busch

No, it's [now considered] the same composition, but it's just a new arrangement of the same composition.

Judith Finell

But it's the—it's basically the first recording of that composition. Is that the idea?

Richard Busch

The bottom line is you're [now] calling it a new arrangement of the same composition owned by the owners of the composition.

Judith Finell

I see. Okay. That's very important.

Richard Busch

Oh, it's huge. It's not really a change, just something that people realize you could do to deal with this problem.

Judith Finell

It's a solution. Definitely.

Richard Busch

I hope that was interesting and good. I hope you thought that was helpful.

Judith Finell

Very clear and helpful in navigating through a complex topic. And also, I've not heard you speak on that before, so it's important. Thank you.

Richard Busch

Welcome.
