Your Inside Track Newsletter

Description

Second Edition

New and Noteworthy:

Recent Developments in Music and Copyright

By Don Franzen

The Dark Horse Wins the Race

The long battle over whether Katy Perry infringed the copyright of the Christian Rap artist known as “Flame” may be over. Back in 2014, Marcus Gray, aka “Flame,” filed suit against Perry and others alleging Perry’s song “Dark Horse” contained a repeating ostinato figure that copied a similar ostinato in his song “Joyful Noise.” The pattern of notes in the two songs was similar: The

"Dark Horse" ostinato consists of a pattern of notes, represented as 3-3-3-3-2-2-1-5, while the "Joyful Noise" ostinato consists of two slightly different patterns, represented as 3-3-3-3-2-2-2-1 and 3-3-3-3-2-2-2-6. Both ostinatos also relied on a completely uniform rhythm, meaning each note is of equal duration in time. Flame's case survived a motion for summary judgment, and went to trial before a jury in Los Angeles, who found for Gray (Flame) and awarded the rapper $2.8 million in damages. Then, in an extraordinary move, District Court Judge Christina Snyder granted a post-trial motion to vacate the jury verdict. Judge Snyder's decision came within weeks of the Ninth Circuit's sweeping decision in *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020), which she cited in support of her order vacating the jury's verdict. On March 10 of this year, the Ninth Circuit affirmed Judge Snyder's decision. The thrust of the panel's decision is that, despite the similarity between the two musical figures, Flame's ostinato fails the test of "originality" – rather, in an opinion by Judge Milan D. Smith, Jr., the similarities in the two songs result from the use of commonplace, unoriginal musical elements. This case represents another in a series of consequential decisions by the Ninth Circuit on the subject of when the "selection and arrangement" of otherwise unprotectable musical elements can rise to the level of being entitled to Copyright protection. This case, along with *Skidmore*, may signal a retrenchment by the Ninth Circuit from the high watermark of the so-called "Blurred Lines" case, *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), in which a jury's verdict based on a "constellation of similarities" was upheld on appeal. The *Gray v. Perry* decision can be read in full here.

Go! Dr. Suess

A major "fair use" case—the battle over copyright infringement of the characters created by Theodor Geisel (penname "Dr. Suess")—has come to an end with a consent judgment. This followed a twisting path in the dispute between the authors of the book "Oh the Places You'll Boldly Go" (or "Boldly") and the holders of the copyright to Suess' books. "Boldly" recast images from Suess' books substituting Star Trek characters for Suess' figures. In December 2020 the Ninth Circuit ruled that the take-off (or "mash-up" as the defendants put it) of the characters created by Dr. Suess in "Boldly" was not "fair use." But the Ninth Circuit did not rule on whether "Boldly" was in fact a copyright infringement. So the case was remanded to the district court, where the attorneys for Dr. Suess took the audacious step of asking the court to rule that the book infringed Suess' copyrights as a matter of law. Here they failed, with the district court instead ruling in August 2021 that the issue of "substantial similarity" had to go to the jury. Here is Judge Samartino's ruling. This led to a stipulated consent decree in October 2021, with the authors of "Boldly" stipulating that the book "infringes the copyrights owned by [Dr. Suess Enterprises]" and to a permanent injunction against the further sale of "Boldly." Fortune may favor the bold, but not in this case. *Dr. Seuss Enterprises, L.P. v. ComicMix* 2021 WL 4710855 (S.D. Cal. October 8, 2021). What remains to be seen is how this case will impact fair use defenses in musical "mash-ups."

The Unhappy Flow of Flo & Eddie

Until 1972 phonorecords were not protected by federal copyright, but were protected, to some extent, by state law, such as California's Civil Code Section 980. Did the state law protections afford sound recording owners a right to performance royalties for digital transmissions (i.e., a digital public performance right)? Flo and Eddie, Inc. owns the master sound recordings by The Turtles made prior to 1972. The company filed suit in New York, Florida, and California against SiriusXM (and others) asserting the platform's transmission of the Turtles' recordings was in violation of its public performance rights. Both the Florida and New York cases were decided against Flo and Eddie, and now the Ninth Circuit has reached the same conclusion, holding that Section 980 only prohibited copying and sale of phonorecords, but did not bestow a public performance right. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 9 F.4th 1167 (9th Cir. 2021). Note: This issue, litigated across the country at great expense, may be effectively moot now that the Music Modernization Act has established digital public performance right for pre-1972 records.

Roll Over Beethoven: AI Has Finished Your Last Symphony

Beethoven finished nine symphonies, which became a talismanic number for composers who followed him—to go past nine symphonies was an act of hubris. Now, in an act of 21st-century hubris, Beethoven's unfinished sketches for a 10th symphony have been converted into a full symphony by artificial intelligence (AI). Led by Deutsche Telekom, a team of experts "fed" the computer Beethoven's compositions and his sketches for the unfinished 10th, along with compositions of composers that influenced Beethoven. The result was a realization of the 10th, performed for the first time in October 2021 at the Telekom Forum in Bonn, Germany. Here is a link announcing the premiere of the 10th. If you want to hear an excerpt of the faux Beethoven, it's available on Spotify, Amazon, Apple Music, and Pandora, click here. Question: who owns the copyright to this realization of Beethoven's 10th Symphony? Deutsche Telekom? The programmers? AI? Or is it public domain, having no "author"?

Think Twice Before You Take a Gun to Your Artwork!

Rapper Ryan Edward Upchurch recently learned that just because you own a piece of art, you don't get to do whatever you want with it. A dispute arose between Upchurch and visual artist Jacob Leveille, and Upchurch took a gun and shot two of Leveille's works (a portrait of Johnny Cash and one of Upchurch himself) full of holes. Upchurch filmed the event and posted it on social media, together with his own, negative comments about Leveille. The artist sued, invoking the Visual Artist's Rights Act (VARA), and claiming Upchurch violated his right of integrity to the works (this is a rare example of moral rights in American law). A district court in Florida recently turned down Upchurch's motion for summary judgment, finding that his conduct did not fall within "fair use" and a plausible VARA case was apparent on the facts. Droit Moral of the story: if you

commission artwork for an album, and intend to alter it, get a VARA release (which must be in writing). *Leveille v. Upchurch*, No.19-cv-00908-BJD-MCR (M.D. Fla. Oct. 15, 2021).

Purple Haze Over Settlement Releases?

Sony Music Entertainment and the estate of Jimi Hendrix filed suit in Manhattan federal court in January this year seeking to block a threat of copyright litigation in the United Kingdom over royalties from recordings by the late guitarist's band. After Hendrix's untimely death in 1970, the deceased bandmembers accepted settlement payments and signed releases in 1973. Now UK attorneys acting for their estates are questioning the validity of those releases and claim a right to "millions of pounds" in royalties going back to 1973. Sony and Hendrix dispute this, and have preemptively filed in the Southern District of New asking the court to declare the releases to be fully enforceable. The complaint filed by Sony and Hendrix can be found here. The bandmembers retorted in February this year by moving to have the case transferred back to the UK. For the Billboard article, click here.

What is in a Name?

Two major musical acts were recently in disputes over their names. In January this year, the Swedish pop group ABBA settled a dispute with an unauthorized British cover band going by the name "ABBA Mania." Having filed a lawsuit in New York in December of 2021, ABBA reached a settlement by which ABBA Mania would cease using the name.

Meanwhile, the country group formerly known as Lady Antebellum had to deal with a trademark infringement claim when they attempted to change their name to "Lady A" to avoid the racist connotations of the word "Antebellum." At the time, the band stated "We did not take into account the associations that weigh down this word referring to the period of history before the Civil War, which includes slavery." However, it turns out a blues singer by the name of Anita White had been performing under the same name, "Lady A," since 1987. This led to lawsuits back and forth, each side accusing the other of trademark infringement. In February this year, both Lady As reached a settlement by which they dismissed their lawsuits against each other. Evidently, they will continue to share the same band name.

In Case You Didn't Know—Defamation Law Applies to Social Media

Celebrity blogger Latasha Kebe—known as Tasha K—learned the hard way that defamation law applies to social media. In her blog postings, Tasha K asserted rap artist Card B was a prostitute, a user of cocaine, and had herpes. Cardi B's demands for retraction were shrugged off, and a lawsuit for libel and defamation followed that went to a jury in January 2022. Cardi B was handed a big win, with an initial verdict against the blogger of $1.25 million in actual damages, followed by a further award of $1.5 million in punitive damages. An appeal is expected. To read the Rolling Stone article about this case, click here.

No Laughing Matter

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. The case was filed by prominent copyright litigation attorney Richard Busch, known for his resounding win in *Williams v. Gaye* (the so-called "Blurred Lines Case"), among others. In a complaint filed in the Central District of California on February 7, 2022, Busch asserts "industry giants, such as the Defendant, took and exploited [Williams'] works solely to make themselves money while knowing it had no license and had not paid, and would not be paying, royalties to Robin Williams and/or the beneficiaries of his Estate." The full complaint can be read here. Busch has since filed on behalf of other prominent comics, and the cases have been consolidated. No laughing matter.

Copyright Board Doubles Down on AI

In a decision released on February 14, 2022, the Copyright Review Board affirmed the decision of the Registration Program to refuse registration of a two-dimensional artwork titled "A Recent Entrance to Paradise" authored, as claimed by registrant Steven Thaler, by "Creativity Machine." Below is the image in question.

In his application for registration, Thaler left a note for the Office stating that the Work “was autonomously created by a computer algorithm running on a machine” and he was “seeking to register this computer-generated work as a work-for-hire to the owner of the Creativity Machine.” The Review Board concluded: “human authorship is a prerequisite to copyright protection in the United States and that the Work, therefore, cannot be registered.” The full opinion can be read here

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Copyright Office Rolls Out Small Claims Court

The Copyright Alternative in Small-Claims Enforcement Act of 2019 (the “CASE Act”) was signed into law on December 27, 2020. The CASE Act establishes a new Copyright Claims Board (the “CCB”), designed to provide a less expensive and more efficient forum than the federal court for litigating certain copyright infringement claims. Three full-time judges, appointed by the Library of Congress, will be authorized to hear copyright infringement claims and disputes under the Notice and Takedown provisions of the Digital Millennium Copyright Act (DMCA). The process starts with a claim, which must be served on the responding party within 90 days, after which the respondent has 60 days to “opt-out” of the CCB proceeding—if opt-out is exercised, the case is dismissed and the parties are left to their remedies in federal court. The CCB also has limits on the damages it can award: $30,000. The CCB is open for business as of December 31, 2021, but it remains to be seen how many litigants will avail themselves of this more efficient, streamlined alternative to federal civil procedure. For more information, here is the Copyright Office’s explanation.

Twitter Still Rogue?

Twitter may still be the last frontier of the Wild West of copyright enforcement. According to the testimony of Recording Industry of America CEO Mitch Glazier in a Senate Subcommittee hearing on Intellectual Property from December 2020, the music industry has sent Twitter over 3 million infringement notices for 20,000 recordings from 2018 to 2020. Glazier also testified that Twitter did little to deal with such violations. A report on his testimony can be read here. Many complain that Twitter, unlike YouTube, prefers to rely on the “safe harbor” of the Digital Millennium Copyright Act by removing infringing content only when takedown notices are received. Now Congress has gotten into the act. In August 2021, a bipartisan group from the House of Representatives sent a letter to Twitter CEO Jack Dorsey asking whether the company intends to address the complaints about rampant copyright infringement on that platform. A spokesman for Twitter replied by saying “We dedicate significant resources to quickly respond to copyright takedown notices and comply with its legal obligations, pursuant to the Digital Millennium Copyright Act (DMCA). We’re committed to providing transparency around the unlawful uses of copyrighted material on our service, and we’ll continue to partner with artists, rights holders, and elected officials on these issues.” You can be sure that will not be the end of the matter.


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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.

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