Your Inside Track Newsletter

Description

Third Edition

Interview with Richard Busch

default watermark

Part II

By Judith Finell

Part I of the interview appeared in the Second Edition of *Your Inside Track*â?¢ Newsletter.

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 rulingâ??and it was a very important ruling, and this might be more information than you need, but I think itâ??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 usâ??the district judge didâ??that threatened the entire litigation. The very first case was this Dimension Films case involving a song by George Clinton, â??Get Off Your Ass and Jam.â?• 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 samplingâ??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 donâ??t use any of the actual sounds from the sound recording, you have to get a license for the compositionâ??which is usually compulsory, but you donâ??t have to get a license for the master so it allowed people to do covers without the sound recording owner getting anything.

default watermark

Judith Finell

Right.

Richard Busch

But the tradeoff was that thereâ??s language in the statute that saysâ??and I donâ??t have it in front of meâ??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 soundsâ??the actual soundsâ??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* analysisâ??and the 6th circuit agreed with us.

Judith Finell

Thatâ??s really revolutionary, yes.

Arguing the other side: *VMG Salsoul v. Ciccone*

Richard Busch

Yeah, thatâ??s how *Dimension Films* got decided, and it obviously changed the entirety of our litigationâ??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 donâ??t know of any courts outside the 6th Circuit that actually followed it. I know the 11th Circuit, out of Florida, didnâ??t. And the 9th Circuit, you know, I was representing Shep Pettibone a few years ago, whoâ??s a famous music producer. He was accused of actually sampling his own music in Madonnaâ??s song â??Vogue.â?• He had created a song called â??Love Break,â?• and they claimed [to be the] owner of that sound recording. Itâ??s a really interesting story. I donâ??t know if this is too much information but itâ??s reallyâ??

Judith Finell

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

default watermark

Richard Busch

Yeah, so the fact pattern [of *VMG Salsoul v. Ciccone*] is really unbelievable. Shep worked for the Salsoul Orchestra in the early â??80s, and he created a song called â??Love Breakâ?• that had some horn hits in it. And then he was the producer of the song â??Vogue,â?• and there was an engineer on the song â??Vogueâ?• to whom Shep gave his start as Shepâ??s personal assistant, and the opponents believedâ??Shep denied itâ??but they believed that Shep sampled the horn hits in Madonnaâ??s â??Vogueâ?• from his [own] song â??Love Break.â?• So, fast forward now from the late 80s to 2007 or 2008. And that engineer who worked with Shep on â??Vogueâ?• now has become a very successful music businessman. He buys the Salsoul Orchestra catalog thinking that he knows that Shep sampled â??Love Breakâ?• in â??Vogueâ?• â??with the intention of now basically getting his money back from purchasing the Salsoul Orchestra catalogâ??by suing Shep and Madonna for copyright infringement of Shepâ??s own song â??Love Breakâ?• for the use of this horn hit. I mean, you canâ??t make this stuff up, right?

Judith Finell

No, I have never heard that background story.

Richard Busch

Yeah, so thatâ??s what happened. He worked as an engineer on â??Vogue,â?• 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 â??Vogue.â?• Iâ??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 canâ??t make this stuff up. So anyway, we argued, and the horn hit on â??Vogueâ?• 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, â??Wait a second, how can Mr. Busch come into the court and argue itâ??s *de minimis*? He was the lawyer on *Dimension Films*.â?• I say, you know, â??I was young then, I was stupid.â?•

default watermark

Judith Finell

Did you actually say that in court?

Richard Busch

No, I didnâ??t say that.

Judith Finell

No?

Richard Busch

Didnâ??t know what I was doing, I was crazyâ?¦ No, I just said, â??Look, true, I did. But, you know, courts havenâ??t followed it. And itâ??s still not the law in the 9th Circuit. Itâ??s the law in the 6th circuit. But here are the reasons that itâ??s come under criticism and Iâ??m representing Shep now, and these are the arguments Iâ??m making.â?• And in a two-to-one decision, the 9th Circuit said the *de minimis* analysis applied and affirmed the courtâ??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 â??Will there be a Supreme Court ruling on it?â?• I doubt it. And the reason why I doubt it is because music sampling isnâ??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 casesâ??you donâ??t have the digital copying of sampling unlicensed samples as in the wild west, like it was 20 years ago. You just donâ??t have it anymore.

Judith Finell

Yes.

Richard Busch

And so I donâ??t think itâ??s front and center. I donâ??t think it comes up that often, so the chances of it going to the Supreme Court for a decision on the merits, although interestingâ??and maybe I get to argue both sides!â??would be unlikely, in my view.

default watermark

Judith Finell

Thank you. Thatâ??s really a helpful answer. Terrific.

Richard Busch

Yep.

Constitutional Challenge of the Music Modernization Act

Judith Finell

Thank you. The next question isâ??about [your] constitutional challenge of the MMA [Music Modernization Act], and weâ??d like to hear about that and what you plan.

Richard Busch

Okay, so because itâ??s an active case, I canâ??t really get into all the details, but Iâ??ll be happy to give you the publicly available information, and since Iâ??m litigating the case, what weâ??re arguing. Iâ??m representing Eight Mile Style, which is Eminemâ??s music publisher, and we are suing Spotify for copyright infringement. I handled several other cases against Spotify

that settledâ??Iâ??m not at liberty to discuss settlementsâ??but they settled. This one is unique because not only do we have the issue of copyright infringement, weâ??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, Iâ??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 donâ??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]. Thatâ??s the part that weâ??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 attorneysâ?? fees, and statutory damages for willful infringement can be as much as $150,000 per copyrighted work. So, to say that youâ??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 didnâ??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 didnâ??t pay.

default watermark

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 thereâ??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 formsâ??certified monthly statementsâ??certified annual statements, certified statements of account. And we are arguing that they didnâ??t do that. They didnâ??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, â??commercially reasonable effortsâ?• to match the compositions owned by the publishers and songwriters with the sound recordings that are on Spotifyâ??s platform. And we argue that they did not; weâ??re going to argue they did not engage in commercially reasonable efforts to do that.

So thatâ??s it in a nutshell, itâ??s much broader than that, but thatâ??s it in a nutshell. And thatâ??s our primary argument, that they didnâ??t do the things necessary to enjoy this limitation of liability. On the other hand, or in the alternative, weâ??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 weâ??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 didnâ??t file a lawsuit by January 1 of 2018, you donâ??t have these rights to sue for statutory damages to get your attorneysâ?? fees, basically. And, by the way, if they didnâ??t have a license, thereâ??s no way to define what â??royaltiesâ?• 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 thatâ??s in place! So to even say theyâ??re entitled to royalties is not a remedy at all, because, for example, in the Eminem case, weâ??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. Thereâ??s a case called *Davis v. Blige*, itâ??s a case where Mary J. Blige was suedâ??and the facts are not that important for purposes of our discussionâ??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 infringementâ??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.

default watermark

So, when Congress in October or November of 2018 enacted the MMA, and retroactively said anyone who didnâ??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 Constitutionâ??or taking property retroactively that had already vested. And we also argue they are violating the Fifth Amendment because thereâ??s a violation of substantive and procedural due process, and because youâ??re taking away from something that has already vested in themâ??that is, this property right of copyright infringement. Iâ??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 itâ??s â??very substantial,â?• that our attack on a constitutional claim is very substantial, meaning, as I take it, that he agrees with our position. So thatâ??s our case on the constitutional claim in a nutshell. Does that make sense to you?

Judith Finell

Thank you very much. Itâ??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

Iâ??m not sureâ??Iâ??m not sure that it would. I havenâ??t really looked at it. Thereâ??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 Iâ??m not sure, if we win on this issue, whether that would mean the entire MMA is struck down. I donâ??t believe it would [be]. I think it would just mean that [it would be] this provision, the limitation of liability provision, because itâ??s not necessary for the other parts of the MMA. It doesnâ??t really affect the other parts of the MMA. So, Iâ??m pretty sure that it would not bring down the entirety of the MMA.

Judith Finell

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

Richard Busch

Thereâ??s a lot of criticism of it, you know. Thereâ??s a lot of criticism that youâ??re putting money in a black box and giving it all to the majors based on publisher share. I mean, thatâ??s part of it. Thereâ??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 publishersâ?? compositionsâ?? 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 donâ??t think itâ??s a good thing. There are others who support it. But, you know, I donâ??t think that striking the liability provision to DSPs would render the entire MMA invalid or unconstitutional.

default watermark

â??Blurred Linesâ?• Misperceptions and Legacy

Judith Finell

Thank you. Okay, to change the subject, we will turn to â??Blurred Lines,â?• 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 â??Blurred Linesâ?• 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 â??Blurred Linesâ?• case? Looking back historically on what came out of that and led to some of the other decisionsâ??like Katy Perry, Led Zeppelin, and allâ??do you feel it was a detrimental outcome? How do you see the outcome of the â??Blurred Linesâ?• case and its impact within the legal system?

Richard Busch

Well, it certainly hasnâ??t been detrimental for me, if youâ??re asking me that. I think itâ??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

default watermark

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 differentâ??I thinkâ??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 â??Blurred Linesâ?• would bring down the music industry, and that â??Blurred Linesâ?• 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. Itâ??s been, believe it or not, six years now since we tried â??Blurred Lines,â?• and there still is music, you know? There has notbeen an onslaught of copyright infringement claims along the lines of â??Blurred Lines,â?• you know, with the â??Blurred Linesâ?• 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 creativityâ??it does the contrary, it does the exact opposite. If you think youâ??re going to get caught if you do something wrong, what do you do? You donâ??t do something wrong, correct? If you think you can get away with something, then youâ??re more prone to try to get away with it. And thatâ??s the same thing that happened with â??Blurred Linesâ?•: it encouraged creativity. I donâ??t buy that it was about a genre, or an era, and it didnâ??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, â??You know what? Heâ??s got a point,â• and they settled it. There was a case with â??Uptown Funkâ• that was in the news, with Mark Ronson. They settled it. There are a couple of other examples that Iâ??m aware of. Same thing. So I think it helped. It didnâ??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 â??Blurred Linesâ• went too farâ??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 thatâ??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 â??Blurred Linesâ• 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 â??Blurred Lines,â• so [â??Blurred Linesâ•] is having a neutralizing effect, and itâ??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. â??Blurred Linesâ• didnâ??t do anything to COVID, you know. Itâ??s become something of a one-off story, which is great with me because itâ??s something that I will always be very proud of being a part of. We went up against all the oddsâ??astronomical odds against usâ??and we prevailed. And in no small part because of you.

default watermark

Judith Finell

Well, thank you.

Richard Busch

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

Judith Finell

I remember you said this during the case, or after the case, that one danger wasâ??I believeâ?? 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. Letâ??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 theyâ??re hearing of it. Some people will know all this and they donâ??t need this. But for people who are reading this for the first time, hearing about this for the first time, Iâ??ll set the stage, if youâ??d like.

Judith Finell

Thank you, yes, please do.

Richard Busch

default watermark

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 canâ??t find any cases prior to â??Blurred Linesâ?• 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 â??Blurred Linesâ?• trial, the district court in â??Blurred Linesâ?• 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 donâ??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 itâ??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 itâ??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. Iâ??m not telling you anything you donâ??t know, Judith, but Iâ??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 itâ??s created by someone, not usually the author, because the author often doesnâ??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 â??Blurred Linesâ?• case said, â??Iâ??m going to rule that the only elements protected are the elements reflecting the lead sheet of Marvin Gayeâ??s song â??Got to Give It Up,â?? because Marvin Gayeâ??s song â??Got to Give It Upâ?? was created in 1977, before January 1 of 1978, when the 1976 Copyright Act became effective.â?• 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 â??Blurred Linesâ?• from â??Got to Give It Upâ?• down to five or six. And even those, we made arguments that it was reflected by the lead sheet because itâ??the elements in the lead sheetâ??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 couldnâ??t play Marvin Gayeâ??s â??Got to Give It Upâ?• [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 werenâ??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 â??How did you win?â?• And you know, thatâ??s a story for another time.

default watermark

The issue that weâ??re talking about here is what you asked, which was what Iâ??ve said beforeâ??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 whatâ??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 â??Give to Give It Up,â?• but some unknown transcriber. And whatever they decided to put on a lead sheet, that becomes the composition â??Got to Give It Up.â?• How seriously asinine is that, right? Itâ??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 didnâ??t have to really attack that lead sheet issue because we won. And theyâ??the opposing appellantsâ??actually argued that the court let into evidence things that werenâ??t in the lead sheet. It was addressed by the 9th Circuit, and in our case, the panel saidâ??they dropped a footnote and basically suggested they agreed with usâ??that the claim shouldnâ??t be limited to the lead sheet. They made the point of noting that even the Copyright Office says they donâ??t have to keep lead sheets. They donâ??t have to keep the deposit copies. So how could you ever know what was on a lead sheet if the Copyright Office isnâ??t required to keep it? Nonetheless, thatâ??s what happened.

So then fast forward to the Led Zeppelin case. They lost, and thatâ??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 arenâ??t made that should be made, things happen. Iâ??m not saying the lawyer was bad or good, Iâ??m just saying that, in general, those things happen. They

loseâ??the plaintiffâ??and the court follows the â??Blurred Linesâ?• judge and restricts the plaintiffâ??s case to the elements in the lead sheet. It didnâ??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 didnâ??t sound alike, and they lost. Goes up to the 9th Circuit, and for whatever reason, the 9th Circuit ruled. Iâ??ve read the decision, and I disagree with it, but they ruled. Iâ??d like to think that if I were the plaintiffâ??s lawyer in that case, we would have won, but thatâ??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 whatâ??s on file at the Copyright Officeâ??thatâ??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 Gayeâ??s family is not directly involved in this case, but thereâ??s a claim being brought by Marvinâ??s co-writer [of â??Letâ??s Get It Onâ?•] against Ed Sheeran, for his [Sheeranâ??s] song â??Thinking Out Loud.â?• 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 â??Letâ??s Get It Onâ?• with the recording or with a full transcription of the entire composition and call it a new arrangement of the original songâ??and sue on that arrangement!

default watermark

Judith Finell

Wow, thatâ??s a major decision.

Richard Busch

Yes. And, so, this is something thatâ??s been accepted. Itâ??s been discussed in legal circles. And so now thereâ??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 wonâ??t be able to get statutory damages or attorneysâ?? fees because in order to get statutory damages or attorneysâ?? 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 itâ??s a post-infringement copyright registration. You might want to argue, â??Well no, the original was on file, too,â?• 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. Thatâ??s what is happening, and so the decision does not have the teeth ultimately that it could

have if we werenâ??t able to do that.

Judith Finell

So youâ??re saying that the recordingâ??all the elements that are on the recording and not in the original lead sheetâ??will now be encompassed in this [musical] arrangement?

Richard Busch

Yes.

Judith Finell

But doesnâ??t that make it a derivative work? I mean, itâ??s a different kind of claim?

default watermark

Richard Busch

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

Judith Finell

But itâ??s theâ??itâ??s basically the first recording of that composition. Is that the idea?

Richard Busch

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

Judith Finell

I see. Okay. Thatâ??s very important.

Richard Busch

Oh, itâ??s huge. Itâ??s not really a change, just something that people realize you could do to deal with this problem.

Judith Finell

Itâ??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, Iâ??ve not heard you speak on that before, so itâ??s important. Thank you.

default watermark

Richard Busch

Welcome.

default watermark


default watermark

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 Eminemâ??s recording agreement entitled him and his production company to 50 percent of the labelâ??s net receipts for permanent download revenue (which spawned numerous class actions), and the â??Blurred Linesâ?• 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.

Â© 2022 Your Inside Trackâ?¢ LLC

*Your Inside Track*â?¢ reports on developments in the field of music and copyright, but it does not provide legal advice or opinions. Every case discussed depends on its particular facts and circumstances. Readers should always consult legal counsel and forensic experts as to any issue or matter of concern to them and not rely on the contents of this newsletter.

default watermark

Date Created
August 15, 2022
Author
judith-finell