

SYMPOSIUM PANEL: BRINGING BLURRED LINES INTO FOCUS

FEATURING:

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*Moderated by Professor Loren Mulraine*****

Moderator: Good afternoon, everyone. Prior to going to law school, my career was as a radio DJ, so I'm going to share some of my DJ skills and some music with you.

[Music Plays.]

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That's where we begin. The "Blurred Lines" case is one of the most talked about copyright infringement cases in recent years.¹ It started with the songwriters for "Blurred Lines," Robin Thicke, Pharrell Williams, who was also the producer, and T.I.² filing a declaratory judgment to see if the court would say their song was not infringing. Apparently, there was some saber-rattling on the part of the Marvin Gaye estate with regard to the song. So, the songwriters for "Blurred Lines" decided they would take the first step. They filed a lawsuit. Richard Busch and the firm King & Ballou here in Nashville represented the Marvin Gaye estate. The case went to trial. The verdict was that there was copyright infringement.³ If I were to ask this question to the audience—which I won't [Laughter.]—how many of you think there's infringement, half of you would say yes, and half would say no.

So, the first question to the panel is, good decision or bad decision? I'm going to save Sara Ellis for last because she worked on the case. By the way, I was very disappointed that in her bio she didn't mention that I taught her copyright law. Very disappointed about that, but we'll talk about it later when I might retroactively change her grade. [Laughter.] But meanwhile, Ms. Kessler?

Kessler: Well, I think that's a fair question, good decision or bad decision, and with my lawyer hat on, I would say it depends on which type of client you represent. Now, I'm not a litigator, and I do primarily transactional entertainment and intellectual property work, so I tend to represent songwriters and other creative individuals. On their behalf, I would say that it's a bad decision for them and for their future in doing what they love to do and taking inspiration on the past creative culture that came before them. One songwriter friend and former client said to me recently, when people ask him, "Who inspires you to write your songs?" He says his answer is: "Nobody. I live in a sealed box, and I have heard no music that came before me and before my being sealed in this box, and I have created everything independently." [Laughter.]

Moderator: Ramona, what are your thoughts?

DeSalvo: I'm going to take a different position. A jury decided there was copyright infringement. So, the result of that is what you have to look at. I think the case was good because I feel like the attorneys from King and Ballou tried that case, as Richard Busch said once, with one arm tied

1. *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500 (U.S.D.C. C.D. Cal. July 15, 2015).

2. T.I. is the stage name of rapper Clifford Joseph Harris Jr. Ben Sisario, *Marvin Gaye Family Files A Countersuit Over a Song*, N.Y. TIMES, October 31, 2013 at B2.

3. *Williams*, 2015 WL 4479500 at *48.

behind their back. Or both arms tied behind their back. Because they weren't allowed to play the song in the courtroom; well, portions of it, but not the song as it was recorded by Marvin Gaye. Can you imagine trying to prove a copyright infringement case without having the recording of the song? Robin Thicke and Clifford Harris and Pharrell heard the recorded version, and that's where they were found to have infringed that original song. So it's very different for us to be sitting here—well Sara Ellis is the exception—passing judgment on what the jury actually heard. The jury made the decision based upon the evidence that was in front of it, and I think it was an absolutely miraculous decision because there were some really adverse rulings for the defendants—who kind of feel like plaintiffs, because they brought an infringement action in response to the declaratory relief action—but they were the defendants.

Then there's questions though of—I think where people have gotten carried away a little bit in thinking it's bad is that they think it's a ban on a genre.⁴ Well, there wouldn't be a country song written that does not reference pickup trucks, trains, prisons, or getting drunk. [Laughter.] You couldn't write a country song if it was just about the genre. Especially in recent years, with all the bro country—everybody's in the hollow with a girl in cut-offs and a pickup truck, drinking under the moonlight. So there have been so many—I'm so ready to move on from that! [Laughter.] It's very successful right now, but that doesn't mean they're infringing on one another, even though they all tend to—maybe to someone like me—sound alike. That's why I switched to Christian music while I'm waiting for country music to wake up. So that's my opinion on that. I wasn't in the courtroom, but I think there are going to be a lot of misperceptions from people who don't understand the law or know the law or the facts that were in front of the jury or the law that the jury was deciding on. But everyone is going to have an opinion.

Moderator: So Sara, I'll tweak the question a little bit: *Why* was it the right decision? [Laughter.]

Ellis: It was the right decision for several reasons. First of all, there's clear infringement: the infringement was admitted by both Thicke and Williams in many interviews in which they talked about wanting to create a song like “Got to Give it Up.”⁵ Pharrell Williams gave two interviews, one in which

4. Some commentators have criticized of the outcome of the case, arguing that the finding of infringement reflects an improper protection of a genre, feel, or groove. *See, e.g.*, Jennifer Jenkins, *The “Blurred Lines” of the Law*, Duke Law Center for the Study of the Public Domain, <http://web.law.duke.edu/cspd/blurredlines/> [<https://perma.cc/HT3B-4VQW>].

5. *See Williams*, 2015 WL 4479500, at *12 (citing Stelios Phili, *Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film*, GQ.COM (May 6, 2013), <http://www.gq.com/story/robin-thicke-interview-blurred-lines->

he said he was inspired by “Got to Give it Up” and one where he said while making the song he was pretending he was Marvin Gaye, trying to get that sound. One of the defenses was independent creation, but independent creation kind of goes out the door when you admit publicly on multiple occasions that you did not independently create the song. And then, our musicologists—we had two extremely talented and skilled musicologists—found 16 substantial similarities between the works. Only eight of them we got to present at trial, and the jury, seven members of the jury, found unanimously that there was copyright infringement. And there wasn’t a taking of a genre or anything like that. It was very specific elements and very specific notes that were lifted right from “Got to Give it Up.”

Moderator: [To the audience] So, how many of you actually practice copyright litigation? Ok, so with that in mind, Ramona, could you tell us a little about the process of getting experts in a copyright infringement case?

DeSalvo: First thing, I’ve got to hear it. I have a pretty good ear for music, I’m not creative at all; I don’t write, but I listen to music. I have a pretty good catalogue in my head of music in all genres, especially now in rock and gangsta rap—of all things—

Moderator: I can see that. [Laughter.]

DeSalvo: Well, because of working on Bridgeport, which was all about sampling.⁶ What I do, is, I have to hear it first. The client has to tell me why they hear it. You know, “What do you think is similar about it?” And they come in and say, “They stole my song!” Well, I’ve had people come in and say, “Taylor Swift stole my song.” But, I’ve actually heard songs that are extremely similar, just playing them, and that’s what a jury hears. A jury isn’t going to think like lawyers or like musicologists, so you have to remember what the jury instruction ultimately is, and that’s usually where I start—I start with the jury instructions. Then once I decide that the elements are there, or my ears tell me it’s there, and I’m satisfied that there’s access, then I immediately go to a musicologist, and I generally go to more than one and say, “What do you think?” “What do you think?” If the client of course is willing to pay for that—and sometimes, I just do it because I want to know. On occasion, I’ve just gone to musicologists on my own where the client’s only paid for two, but I’m going to go to one more, and ask them, “What do you hear? Is there enough there? What is similar, what is distinctive about this song?” It’s the qualitative and the quantitative. How much? And is it the important part of the song that was taken? Because that matters.

music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy
[<https://perma.cc/NR9C-D9R8>].

6. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

In one case I had, with “Atomic Dog,” the infringing song—and it was found to be infringing—one of the arguments related to that “bow wow wow yippie yo yippie yay” phrase that you probably have all heard a million times in your life. Their argument was, “Well, it’s just at the end of the song. It’s unimportant. It doesn’t matter.” That’s not what matters. We’re looking at what’s important to the infringed song, so when we take the main identifier out of the infringed song and put it into an infringing song, that’s what a musicologist is going to look for. That’s what I’m going to look for. Then the musicologists explain it to me. I’ve worked with different musicologists. They explain it to me musically, and I have no talent musically, but I listen for how many elements the two songs have in common, what is unprotectable? You’ve got to get rid of those parts, the ones that are just generic and you’re going to hear it in a lot of songs—and then find out what the common elements are and ask, “Is it enough?” And if a musicologist comes back and says, “Well yeah, there’s a lot of things that are similar, but I’m not sure it’s enough,” well, I don’t take the case. I don’t go hunting for another musicologist, but what I do is compare the opinions of the musicologists that I do consult with. But I won’t file a copyright infringement case unless I’ve consulted with at least two musicologists.

Moderator: Suzanne, you do primarily transactional entertainment law. How does this case affect the way you advise clients?

Kessler: Well, I’m glad you phrased it that way, because when you asked is this a good decision or a bad decision, my reaction is not based on what the jury decided and what evidence was even necessarily in front of them. I’m talking from a transactional practitioner’s perspective, where your clients are coming to you and saying, “I’m now really paranoid about what I do, and I’m scared.” There seems to be so much controversy surrounding this particular verdict, and there are no bright lines for artists necessarily to follow in terms of where do you, of course, blur the line, between inspiration and infringement? I think that finding inspiration in the past has always been a part of the creative process in the songwriter’s craft. And, in fact, songwriters are always quoting their influences somehow. Kurt Cobain said when he was writing “Smells Like Teen Spirit,” that he was thinking about a song by the Pixies.⁷ And if you remember Lady Gaga and “Born this way” when that came out, and everyone said, including Madonna herself, that this is just “Express Yourself” over again.⁸ And there are so

7. David Fricke, Kurt Cobain, *The Rolling Stone Interview: Success Doesn’t Suck*, ROLLING STONE 674 (January 27, 1994).

8. Alice Gomstyn, *20/20 Exclusive: Madonna Breaks Silence on Gaga ‘Born This Way’ Controversy*, ABCNEWS.COM (2012), <http://abcnews.go.com/blogs/entertainment/2012/01/madonna-breaks-silence-on-gaga-born-this-way-controversy-2020-exclusive-tonight/> [<https://perma.cc/S83K-4FWA>].

many examples of that. Katy Perry's "Roar" compared to "Brave" by Sarah Bareilles.⁹

So from a practitioner's point of view, where you want to see your songwriting and artist clients have freedom in creating their crafts, it's a challenge to advise them on how to proceed when verdicts come out. And again, not a bad judgment necessarily based on what this jury decided based on these facts, but you don't want your creative songwriting community and artist community to feel so paranoid that they don't freely create and express what they want to. On the other hand, the easy solution might be to say, "Get a license. Go ask for permission. Pay for the use." How many people here have ever tried to license a sample into a song for example? Or anything similar to that? You're dealing with publishing companies and record labels, and if your request even somehow floats to the top of the list from way at the bottom of the pile, you're going to get quoted a very high price. It's going to take many, many months to get that license, and you might as well just not even use the sample.

I think that that's the main thing that my clients are thinking now: What do they do in the face of this? Do they change how they're doing things? One change that's happening right now is trying to take preemptive strikes against copyright infringement claims. Many artists, like Bruno Mars and others—Sam Smith and Tom Petty—are entering into settlement agreements in effect, before there is even really any claim to settle.¹⁰ For example, Sam Smith in "Stay With Me" gave Tom Petty writing credit and a portion of the royalties for the song.

Moderator: Likewise, with "Uptown Funk" and the Gap Band that's another piece of that. Without litigation.¹¹

DeSalvo: To speak to that, that's because it was Tom Petty and Sam Smith. If you're Hillbilly Jones from Tennessee and you say, "That's my song," you're not going to get that same response. You're going to get a lawsuit. For example, clearing the samples—I do a lot of sample clearances—and that's one of the things I tell them. I say if you're using this sample if you put this record out, you're infringing with the sample in it if you don't clear it first. But the second I try to clear that sample, they're going to go online

9. See Mesfin Fekadu, *Bareilles: Happy with success after Perry chatter*, CNSNEWS.COM (September 17, 2013), <http://cnsnews.com/news/article/bareilles-happy-success-after-perry-chatter> [<https://perma.cc/L2JV-DL9Z>].

10. Brian Mansfield, *Sam Smith To Pay Tom Petty Royalties On 'Stay With Me,' USA TODAY* (Jan. 26, 2015), <http://www.usatoday.com/story/life/music/2015/01/26/sam-smith-stay-with-me-tom-petty-i-wont-back-down/22346051/> [<https://perma.cc/EH6V-4DN5>].

11. Ben Sisario, *Mark Ronson's Hit 'Uptown Funk' Adds Five Writers*, N.Y. TIMES (May 1, 2015), <http://artsbeat.blogs.nytimes.com/2015/05/01/mark-ronsons-hit-uptown-funk-adds-six-writers/> [<https://perma.cc/6UCE-H64X>].

to try to find it to see if you're already using it. And if they say no, what do you do with the recording you already have existing? You've got to trash it, or you're going to get sued.

Kessler: Absolutely. Believe me, I worked in business and legal affairs for Universal Music Group and A&M Records, and there's no doubt about that because they, as intellectual property owners, want to protect their property and they will do what they need to do to protect it. And when you're in business and legal affairs and you're working as an attorney on behalf of one of those companies, that is your job.

Ellis: The reverse side of that is the artist who, thirty years ago wrote the songs to begin with and deserves to be credited for the use of those songs. For example, "Uptown Funk" gets inside your head. If you listen to the two portions that were at issue, they're extremely similar. In fact, they were the subject of many articles long before the settlement came out. There were independent people off the street who were noticing the similarities between the two and people writing about it, and then it even appeared on the Wikipedia page that it was an influence of the song. So I think that's actually a good example of where there's an unauthorized use that is clearly identified by the average listener, that gets settled and resolved out of court—which saves literally millions of dollars in attorney's fees. And that's the right way to do it—get a license beforehand or after the fact. If you realize you've made a mistake, fess up, and take care of the artist who wrote the music to begin with.

Moderator: If that doesn't happen and you end up in court, what's the greatest challenge for an attorney with regard to a copyright infringement case? Either Ramona or Sara?

Ellis: I'll let Ramona cover that.

DeSalvo: It depends on who's on the other side. Here, let me give you a tidbit of advice if you're thinking about doing this. I worked on the Bridgeport litigation, on behalf of Bridgeport, which was the George Clinton catalogue, the "Funkadelic" and all that stuff.¹² We sued everyone who'd ever made a rap record or who ever thought about making a rap record, so I ended up in this huge lawsuit with everyone on the other side. A wonderful experience. Around 600 cases. It took 6 years of litigating, and we got two verdicts for copyright infringement in our favor, which was wonderful. The rest of them settled. But what happened as a consequence of that is that I was conflicted out of ever representing anybody on the other side. But boy, I'm plaintiff's lawyer now! [Laughter.] I represent all the

12. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005).

little guys who want to go against the big guys—I don't know anybody named Hillbilly Jones—I just pulled that right out of the air earlier. [Laughter.] But that's who I represent. They're going to say something like, "I was at a recording studio and I was writing with this guy," or "I was recording one of my demos and there was this guy there. Later on I found out it was Toby Keith's cowriter"—I'm making this up, this didn't happen—"it was Toby Keith's cowriter who was in the studio listening to my song and now Toby Keith is singing my song. I want to sue him." I get a lot of that kind of stuff.

But so, the challenge is, well one—there has to be infringement. So once I feel like there is a viable case to go forward, the decision is for the plaintiff: Do they have the fortitude and the money to withstand the onslaught of a major label and the army of lawyers that they have? And that's the toughest part.

The good part about me having been in that role that I had at King & Ballow was that they don't intimidate me at all. [Laughter.] They try, but they don't intimidate me at all. If I had one copyright infringement case in my career and then decided to take on Universal, I would maybe be in a really different position. But having been through those cases I know how they operate. And like Suzanne said, Universal wants to protect their property. They don't want to give up either if they're infringing. I've gotten two verdicts against Universal for copyright infringement, and they fight to the death and they have more money than you can imagine, and they have insurance, and so it's really tough when you've got a little guy with a limited bank account. So, that's probably the biggest challenge.

And then people just get tired. They don't understand all the stuff that can happen in discovery, all the delays, and summary judgment—pointless summary judgments that they know they're going to lose, but they file anyway—and it's extremely expensive—just because maybe I'm going to trip up and the nine lawyers or the ten lawyers on the other side are going to do something that I didn't catch. It becomes extremely expensive, and clients get exhausted. They are largely in disbelief that the system functions the way it does, but if I can't have a settlement at the beginning, I have no control over the other side, and that's the worst part for the client. And then it becomes tough for me, because then I have a decision as a partner in a firm to decide, can my firm carry this? Can we devote the resources to this? And at what point do we stop? If there is no settlement, what do we do? We can't stop. We have to continue in the case, and then the question becomes: How do we manage that from a business standpoint? A lot of the cases drag on for so long because they pile on because they want to wear people out, and most people do wear out. And it's a tough position to be in. So, I'm in

the middle of a couple cases like that right now, representing individuals against major labels.

Moderator: It's always a battle when you're fighting the deep pockets. That's for sure. Sara, with regard to a similar question, what is the most difficult task for a jury in a case? I want you to answer that in a general sense and also specifically with regard to "Blurred Lines."

Ellis: Good question. It's probably just weighing all the evidence that's before them—especially weighing the credibility of the testimony they hear, whether it's the expert or a fact witness. And then weighing the actual evidence, such as the music and the pieces that are similar that have been presented to them and pieces they've been told are dissimilar that have been put before them. I think it's probably the same way that anybody looks at any decision. Just weighing all the evidence.

Moderator: How is the Blurred Lines case more or less challenging in that regard?

Ellis: Well, as Ramona talked about, the jurors were limited in what they were able to hear and what was put before them. Just for some background, under the 1976 Act, any works registered before 1978 could not have—as a musical composition you could not register as for proof of the work a sound recording.¹³ It had to be a lead sheet or a lyric sheet for the deposit copy. And the judge ruled in this case, if it was not in the deposit copy, if it was not physically written down on this piece of paper, then it was not part of the composition. So that means if you write the song and you write it back in the seventies, every hit of the drum, every note by every single instrument, every single word has to be on that sheet of paper or it is not protected. And because that was the case with "Got to Give it Up" the jury only got to hear what was on that piece of paper. They didn't get to hear the percussion; they didn't get to hear the party noises; they didn't get to hear literally half of the elements our experts identified that were similar and which Robin Thicke and Pharrell Williams had heard when creating their song. Instead they heard pieces of the sound recording of "Got to Give it Up" with all those things removed that our engineers basically broke apart. So they kind of had to listen to those pieces compared to a full version of "Blurred Lines" and a very, almost scientific analysis of the similarities between the two. And then taking the expert's testimony to interpret what they heard.

Moderator: So, my first song that I wrote for my band when I was in college, I literally, painstakingly wrote. I got a pencil and sheet music and

13. The Copyright Act of 1976, 17 U.S.C. § 114(b) (2012).

wrote the song out. It was by far the worst song I've ever written. [Laughter.] The reality is that if you were to pull up the Billboard charts right now and look at the Top 100, no songs are written up in that detail. So, is there an issue with regard to how the law is applied or how the law is written, Suzanne?

Kessler: I was just going to say, especially in the R&B genre, no one is writing the music down now. Everything is created in the studio—the groove and the feel of the way the music sounds—sometimes that just organically happens in the studio. Sometimes the studio musicians, themselves—the session players—are just making it up as they go along, and the end result is kind of an amalgam of creative expression of a variety of different people. No one necessarily—even though they might be inspired or influenced by previous songs or songwriters, and again, the “Blurred Lines” case aside—no one necessarily is going in deliberately trying to copy something. They might be evoking a certain groove, genre, or feeling, but I would say that in some cases it's just pure accident or coincidence. For example, Sam Smith, how old is he? In his early twenties maybe? I think he said that he had, never, literally heard of the Tom Petty song before. Literally. So he didn't have, arguably, the access to it. And that if Stay with Me in any way sounded like Tom Petty's song that it was pure accident and coincidental. Which also, by the way, back to “Blurred Lines,” this brings to bear the issue of the witnesses in terms of Robin Thicke and Pharrell Williams and what their testimony actually was and how they contradicted themselves and each other. Robin Thicke indicating that well maybe he didn't even write it because he was so high or drunk or whatever, that he didn't even know what he was doing.

Moderator: So, we've found the answer to the question what's the most difficult thing for the attorney. [Laughter.] That's the answer. Ramona?

DeSalvo: I had kind of a hybrid situation than you guys used in the “Blurred Lines” case. It was an argument because in the Atomic Dog case, there was—it's funny, the infringer's first name was Felony. It was so much for us to work with! [Laughter.] But in the Atomic Dog case, when that song was written—because that involved a 1982 song and a lead sheet that had been filed with the copyright office. So part of the argument in that case was, you can't use the recording because Capitol Records—or maybe it was Casablanca—owns the master, and we have to make the distinction between the sound recording and the musical composition. I was so pleased to find that actually in the lead sheet was written some of the things that they were complaining about. Just like Sara described—everything that needs to be in there. So, in the creation of Atomic Dog, if you know that song, there's panting, like a dog. And there's clapping, and there's that one

note base note, that very deep voice where the guy says, “dog dog.” Just a monotone punctuation—that’s in my head forever . . .

Kessler: Sing it for us, Ramona. [Laughter.]

DeSalvo: No. [Laughs.] That monotone punctuation, which is a single note melody—I didn’t know that until I talked with a musicologist either. But we had not just that phrase, but the additional elements that show that it was infringement. It wasn’t just the “bow wow” phrase. We had the clapping and the panting and they said, “But aha! It’s not in the lead sheet. You can’t take credit for that because it was created in the studio.” Well, it just so happened to be in the lead sheet, so we could take credit. We also had the songwriters explain in great detail how they created the song in the studio. And it was at a time when—as Suzanne said songs are created in the studio now and a lot of stuff is created digitally, people create tracks individually—but back then I guess it was less expensive than it is now and people just went into studios and recorded. If it took 24 hours, it took 24 hours. So the songwriters explained in great detail how they created each portion of the song, and that they were all in the studio for three days, and how they smelled after three days, and how they got the girls to come in and pant into the microphones, and how they got these other people to come in and clap. And they explained in great detail, maybe too much, actually, on how they had to prop up George Clinton, because he was so messed up that he kept falling from side to side and he literally—literally—sang that song off the top of his head in the studio. It’s a great story. But that’s how we got the recording in where in “Blurred Lines” they couldn’t. The songwriters said we wrote it and we recorded it as we wrote it. And then fortunately the lead sheet could back that up as well. So we were able to use the recording because it was how the song was created, even though it was created in the studio, and even though and George Clinton didn’t write or read sheet music.

Moderator: And the Parliament song was after 1978. So that as a difference as well.

Ellis: Yes. That’s the distinction. Now, if you write a song, when you register your song, Professor Mulraine—which I’m sure you do, as a copyright professor. [Laughter.] Now you can put a recording in as your deposit copy so if “Got to Give it Up” didn’t come out and get registered until 1978, after January 1, 1978, as opposed to before then, the jury would have heard the entire recording. And the entire recording that was deposited with the copyright office would have been the composition. And that’s why the judge’s ruling on what the jury could not hear and what was and wasn’t protected is harmful: because, back in the day, artists were not writing down every hit of the drum. They were not writing down the sound of every

clinking glass and party noise going on in the background of the song. It's also a disparity because if you can't afford to have someone transcribe it or if you don't read music, then you can't put a full copy of your work and register it with the copyright office. The decision harms older artists because the full scope of their compositions was not covered. And somehow, fortunately, we were still able to overcome that—like Richard has said, with one arm tied behind our back. But you know, the copyright office has realized—realized a long time ago—that the physically written down composition of the lead sheet was not an adequate representation of the work, and that's why you can now use a recording of it.

Moderator: It seems to me that when advising a client, you would tell them to make that deposit as close to the finished song as possible—as opposed to if you sit down and you strum the cords and sing it—that may not be the copy you want to send in.

Some critics say that the many musical elements common to “Blurred Lines” and “Got to Give it Up” fall into the unprotectable categories of groove or style. Sara, why don't you respond to that?

Ellis: Well, first, I definitely disagree with that. Surprise. [Laughs.] So, one, no: the similarities were not just the groove or the style or the genre. They were very specific patterns and rhythms that were taken from “Got to Give it Up.” And two, in the 9th Circuit, it's an overall concept or feel of the work that is protected; it's the way the elements interact; it's the way that they're constructed together. And the way that they were put together in “Blurred Lines” and the way that they were put together in “Got to Give it Up” was found to be substantially similar by the jury. So you can't look at the elements in isolation. You have to look at them together and how they interact. Not just in a musical way, but that's what the law actually says.

Moderator: What Sara is talking about there is that the Ninth Circuit uses the intrinsic test, which is whether the ordinary, reasonable listener would conclude that the total concept and feel of the works in question is substantially similar.¹⁴ So, I guess there perhaps would have been a different result in the Second Circuit or the Sixth Circuit.

Ellis: No, I think we still would have won. [Laughter.] The Sixth Circuit is actually, I think, a lot more friendly than the Ninth Circuit.

DeSalvo: The tests kind of strike me as a little bit similar though, because in the Sixth Circuit you have to filter out what would be unprotectable and

14. See, e.g., *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 (9th Cir.1994).

all that stuff which is kind of the extrinsic test anyway. You know, as according to the musicologists. And then, once you get out what doesn't belong, what's unprotectable, you get what remains and that's what the jury listens to. So the Sixth Circuit is to look at the work as a whole, taken as a whole, does one sound like the other?

I was thinking about something else related to an earlier question asked, and I'm sure Sara can appreciate this—all the lawyering and all the sleepless nights and all the motions and all the stuff that the lawyers get bogged down by details—juries are absolutely amazing because all they do is listen to the song. They go, “Yeah, that's right.” [Laughter.] It almost seems that simple sometimes. But we get all bogged down because we're making a record and making all the legal arguments, and we're protecting everything. But you really just have to trust the jury—that if you just talk to them, and you know that your case is right, and you present truthful evidence, and you don't have anybody lying on the stand, you're going to come across ok and not tick anybody off. The jury is going to listen to the music and decide if the songs sound the same. I was so paranoid—we worked all nights. I know Sara did—she worked like 22 hours a day. It's like being in the Olympics. You have to be in shape to do this. You cannot go into trial if you're not healthy, if you're not sleeping, because you don't sleep for like two weeks.

Ellis: The week before trial, from Monday morning to Friday night, I slept three-and-a-half hours.

DeSalvo: It's insane. It's absolutely insane. And then you have to have the mental acuity to bring this forward. So, I remember it being three o'clock in the morning before the one case we had against Bad Boy Records. And we took that song from cops you know, “bad boy bad boy whatcha gonna do?”¹⁵ [Laughter.] Because we knew we had them. So we were going to put that song in a closing argument—a little “bad boy bad boy,”—I can't sing, obviously. So there I was at three o'clock in the morning, and we had a videography company working overnight to put together this little video for our closing argument, and I thought, “Oh God do we need a license?” So there we were at three o'clock in the morning researching whether we needed a license to play that segment of that bad boys song in the courtroom. And I found, like, subsection 72xiii that said it was ok to play it in court. But what happened after the trial—when the jury foreman was interviewed he said, “I was wondering if they got a license for that bad boy song.” [Laughter.] I thought yes! I did it. Somebody thought of it. We got through to the jury on that issue.

15. INNER CIRCLE, *Bad Boys*, on *BAD TO THE BONE* (Island Records 1993).

But it's surprising after the trial, because the jury's like, "Of course they're similar." And all that hard work and everything was so worthwhile—even though the lawyers are killing themselves—it seems very simple, almost, from the jury's side. They just listen. And that's what this is about: Do the two songs sound alike? You wonder why you need an expert if all you have to do is rely on your ears; the experts explain why these things are alike, and then the jury hears it for themselves.

Moderator: Suzanne did you want to add something in there?

Kessler: I was just thinking as we're talking about all of this that again, in advising clients, the trend—especially in the R&B genre—is turning for the moment—perhaps accelerated due to the "Blurred Lines" case—the trend is turning toward flagging your own issue and going to other writers, where perhaps that inspiration, influence, or infringement has occurred, and offering credit and royalties upfront. One attorney I spoke with said that's what she's really advising her clients to do always across the board. But then I'm thinking, "Well what happens when that doesn't work?" and the credit is refused and the royalty offer is refused, and then you've basically flagged this issue that perhaps your client's song contains something that could be construed as infringement. So, where does this all shake out in that respect?

Moderator: Sometimes you really you have to make sort of a cost-benefit analysis in deciding which way to go with that. And that's a gut thing. You're not going to find that on page 371 of any of the casebooks. That really comes from you being in the trenches and knowing how this works.

In the patent world, there's a common problem known as the patent troll. Are there similar problems in copyright cases? If not trolls, then frivolous lawsuits? Now, think about that with regard to Hillbilly Jones who we were introduced to a little while ago. Are there problems like that? Are there problems—of course there are problems—but are they significant enough whereby we perhaps need to have some sort of solution to that?

DeSalvo: I'll tell you, I was at a music conference in France, and there was a guy on a panel that said the owner of Bridgeport was a copyright troll, and I'm like wait a minute, what are you talking about? I even confronted him afterwards and I told him I happened to be the lawyer in that case—after I'd calmed down, after I took my medication [Laughter]. And I thought that was really an awful thing to say.

What people didn't realize is why that man, Mr. Armen Boladian, was accused of being a troll was because he couldn't file the copyright infringement action because the issue of ownership had been tied up in

courts for about ten years.¹⁶ George Clinton signed those songs away to everybody; Armen Boladian just happened to be the first guy in line. And then when George Clinton needed money, he signed the same songs. He'd say, "Well they're my songs." He never got the concept of copyright ownership, and then he would infringe his own songs. He'd say, "How can I get sued for my own songs?" Well, because you stole it. You don't own it. There was a lot of that going on and for ten years there was litigation over the ownership. As soon as that was cleared he filed this massive lawsuit that was about—the complaint was 1200 pages long without any exhibits. And there were 500—the original case was 535 cases—and so then this man was accused of being a troll. He just went after everybody. And it was because there were ownership issues that had to be resolved to get George Clinton out of the way so he could prove ownership plus copying; those are the two elements for copyright infringement.¹⁷

But I haven't, I mean, I have read cases, primarily in attorney's fees cases, because, of course we're going to go after our fees when we win—but there are some cases out there; there are people who are targets. Stevie Wonder's a target. Mariah Carey's a target. Mary J Blige—some of these people are just targets and they'll say, "Oh that's my song." "Well, my song was on the Internet, so Mariah Carey must have heard my song." The Internet is not a basis for, you have to link it up to somebody, and you have to track it to that person. You can't just say, "Well I put it out there, so Mariah Carey must have visited my website and stolen it." But I have seen quite a few cases in the fee arena where the plaintiff who alleged infringement couldn't prove that they had even filed a copyright. They didn't have a deposit copy to show that it was created before the alleged infringing song, and then there were fees awarded against that person. I haven't seen it as a . . . It's out there. I wouldn't want to be Stevie Wonder or Mariah Carey—but, well, maybe I would—they have a lot more money than I do [Laughter.] But from a copyright standpoint, I don't know that it's necessarily a huge problem. And then there's the fee award—the fee shifting—that helps prevent some of that.

Moderator: Ok, well it looks like we have about five minutes or so, so I think this might be a good time to open the floor up to questions.

Audience Member 1: I was wondering, do these things never get returned on appeal, because they're so fact specific? Or do you see that?

DeSalvo: It does. On the one case that we had with Bad Boy, it went up on appeal, and then it went to the Supreme Court and cert was denied, and then

16. Boladian v. UMG Recordings, Inc., No. 03-2148, 2005 WL 14981 (6th Cir. Jan. 3, 2005).

17. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

it came back down, and then we ended up resolving it.¹⁸ Because we had the fees all the way up too; you have to recover those fees as well.

Do you want to say what happened on your post-trial motions, Sara?

Ellis: Well, we're still dealing with our post-trial stuff. The judgment should probably finally get entered within the next week or so, and then I can only assume the opposing party will file their notice of appeal. But the jury heard the appropriate facts; they were very limited on the facts they heard. I can't imagine there are any grounds for an appeal. There were no evidentiary decisions that were made that were harmful to Mr. Thicke and Mr. Williams that are overturnable.

DeSalvo: Just a little more to your question. It's funny now—it wasn't at the time—but our case wasn't reversed and the verdict was upheld for copyright infringement, but our damages were reduced because we received an unconstitutionally large amount of money in a verdict.¹⁹ Like, wow, what a job we did!

But it was unusual because they had filed a motion to say that one song was not protected under federal copyright because it was a pre-1972 sound recording. As it turned out, it was recorded in February 1972, but we didn't know which day. They brought in some records from the Country Music Hall of Fame to prove that it charted the week of February 11, 1972, when the cutoff was the 15th of February. So, that made us under state law, which was great because then we got punitive damages, which weren't available otherwise.

Audience Member 2: From a public policy standpoint, I find it really hard to see the social benefits associated with creating infringement in these kinds of contexts, especially given the massive transaction costs that come along with it, and especially given the availability of a mechanical license to cover songs. I wonder why wouldn't, at the very least, there be a mechanical license available to accomplish a similar goal in this context with respect to homages or something like that? Because it's very hard for me to see how the kinds of alleged infringements in question are any different than, for example, quoting a sentence in an essay.

Moderator: Well, if you have a derivative work, you're kind of taking it outside the realm of the mechanical license for a cover song. If you're

18. *Bridgeport Music, Inc. v. Justin Combs Publ'g Inc.*, No. 05-00155 (M.D. Tenn. March 20, 2006), *aff'd in part, rev'd in part*, 507 F.3d 470 (6th Cir. 2007), *cert. denied sub nom.* *Westbound Records, Inc. v. Justin Combs Publ'g Inc.*, 555 U.S. 818, 129 (2008).

19. *Bridgeport Music, Inc. v. Justin Combs Publ'g Inc.*, 507 F.3d 470, 486 (6th Cir. 2007).

doing a cover song, then obviously you're essentially using the song as written. You're not making any significant changes to the song. If you're doing that then you can get a mechanical license.

Audience Member 2: Well, I guess my point is, if we're going to allow somebody to get a mechanical license to use an entire work, why should we force them to pay more to use less of it?

Moderator: Because, as the copyright owner, it's my exclusive right to decide whether I want you to use my song in the way that you want to use it.

Ellis: Absolutely. Section 106 of the Copyright Act gives you the exclusive right to reproduce, distribute, display. It's your work, and you get to decide what anybody else does or does not do with it.²⁰ Same thing—if you own a house, you get to decide who comes in and who doesn't.

Audience Member 3: Pivoting off of that point, one of the things that I struggled with comparing this case to, and it's a circuit split issue, as you alluded to earlier, but is *Prince v. Cariou* which was a Second Circuit case that basically dealt with artists who took the photographs of another artist and painted over them.²¹ Usually with just very broad simple strokes, and in that case, the court found it to be a transformative work. It's not even actionable as of these facts by law this is a fair use. So what differentiates that? How do you distinguish the two?

Ellis: Well, I think they were wrong in that case. [Laughter.]

DeSalvo: Also, with fair use, it's really hard to say what fair use is. It's on a case-by-case basis. You literally have to know both the cases and exactly what's going on. I have people call me and go, "Is this fair use?" Listen. I can't tell you. I have to compare these. You really have to do an analysis when you look at the four factors under 107 to see what are you changing and how are you using it? You mentioned an homage, and one of the defenses in that Atomic Dog case was, "Oh, we were paying tribute to George Clinton and Atomic Dog." So, we were sitting at dinner that night, and the musicologist came in and said, "I just read the credits on the album. There's 102 credits on the album, including a credit to *their* dog, but not to George Clinton and Atomic Dog." [Laughter.] So that defense did not work, although that is a possibility. It might fall into that category, but you almost need a legal opinion on that before you write a song. Most songwriters aren't going to do that.

20. The Copyright Act of 1976, 17 U.S.C. § 114(b) (2012).

21. *Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013).

Moderator: A lot of these cases are going to come down to how much of the new work is made up of that infringing thing. And it can be an homage or it can be what we call quoting a song, but that's not copyright infringement. But that typically happens one time in a song. Where you will hear a line or a lyric that is talking about another song.

Audience Member 4: Once you find infringement, does that turn the new work into a derivative work, or is that a remedy that you can ask for? Or is it just, well, here's this work, Pharrell Williams still owns it, but you have to pay damages, and then do they continue to pay damages into the future?

Ellis: So, in this case we were awarded \$7.4 million from the jury, which was subsequently reduced slightly by the court. But the court also imposed a 50% royalty going forward on "Blurred Lines," so that's how it's taken care of. The court found that, based on our expert's testimony and what the work would have been licensed for, that would be a reasonable royalty going forward. That's how this court decided to handle it.

Moderator: That's not terribly uncommon: the copyright being split, essentially, moving forward. One of the examples we use in class is the Mariah Carey song, "Emotions," which was found to infringe the Emotions song, "Best of My Love," and when that case was decided, moving forward, all of Mariah Carey's records said, written by Mariah Carey and her producers as well as Maurice White and Alvin McKaye of Earth Wind and Fire who'd written "Best of My Love."²²

Audience Member 4: So, does the copyright change? Do they say we're going to also credit the original songwriter? Or are they just saying, well the song stays the same, and you're just entitled to a 50% royalty.

Moderator: In the case that I just mentioned, the copyright was changed.

Ellis: And I'm not sure how it's going to be eventually, but basically, the Gaye family will receive a 50% royalty from the appropriate entities.

DeSalvo: That's income participation. What the person whose song is taken—"my song is in that song, I own that," I am going to take my piece of the song and go hmm, what's left of your song? But if you use my song in there, and I get 50%, I want 50% of the copyright. I'm not going to settle for less revenue stream.

22. See Roger Friedman, *Mariah Carey Accused of Plagiarism*, FOXNEWS.COM (2004), <http://www.foxnews.com/story/2004/08/10/mariah-carey-accused-plagiarism.html> [<https://perma.cc/T66H-5SBK>].

Moderator: Right.

Audience Member 4: After that lawsuit, I guess what I'm saying is, is that a remedy that you can ask for—basically for ownership or just income participation?

DeSalvo: Ownership isn't a remedy recognized under the law, but I'm approaching it through declaratory relief. Declare my rights. Declare how much of my song is in that song, and then I'm going to get damages associated with that.

Ellis: Correct. I was going to say if you buy a copy of "Blurred Lines" in the future it's not going to list Marvin Gaye as a cowriter, but half of the royalties are going to go to the Gaye family.

Moderator: Let's give all our panelists a round of applause.