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Software Licensing

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“Blurred Lines” Infringement Case: Implications for Software Developers

Recently, a federal jury found that the song “Blurred Lines,” by Pharrell Williams, Robin Thicke, and Clifford Harris, Jr., was substantially similar to the song “Got to Give it Up,” by Marvin Gaye, and awarded over \$7 million in copyright infringement damages. Because the similarities between the songs were largely based on several very small elements, the case suggests some potentially important implications for software developers.

The case was brought by Williams *et al.* seeking a declaratory judgment that their songs did not infringe on Marvin Gaye’s songs. Thus, in a twist on the conventional copyright infringement case, Williams *et al.* (the folks accused of copyright infringement) were the Plaintiffs and the successors to the copyright of Marvin Gaye (the folks whose rights were allegedly infringed) were the Defendants. In the Blurred Lines case, expert reports were provided on both sides and, as you can imagine, the expert opinions were frequently conflicting.

According to the *New York Times*, the analysis and disputes between the experts involved “passages as short as four notes.” [“Blurred Lines’ Infringed on Marvin Gaye Copyright, Jury Rules,” October 10, 2015.] In the

October 2014 summary judgment decision (Summary Judgment Ruling) that allowed this case to go to trial, the expert for the Defendants found eight features of the songs that were similar. [Williams *v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240 (Oct. 30, 2014).] The analysis of both experts on all points was very detailed. For example, the Defendant’s expert found that the signature musical phrase in “Blurred Lines” was similar to the signature phrase in “Got to Give it Up” in that (among other things) both songs repeated their starting tone several times and both contained identical rhythms for the first six tones. By contrast, the Plaintiff’s expert found that only one note in the signature phrases of both songs had the same pitch and placement (but not the same duration).

Now, imagine two experts engaged in the same sort of analysis, but instead of musical songs, they are comparing computer programs. In such a case, the experts would be dissecting routines, sub-routines, and likely even smaller snippets or phrases of code to determine similarities and differences. To most code writers I work with, that kind of analysis is far from their everyday thoughts as they go about their work.

Software developers are not only tasked with writing code that will automate certain functions, but also with doing so quickly and efficiently with limited resources. They also frequently are required to meet certain non-functional specifications and conform to various requirements. So much

of the “big picture” frequently is dictated by utilitarian concerns (which would not be protectable by copyright). However, the individual choices made in composing the code that achieves those goals are left to the human code writer. While two stories may have similar plots (which, very generally, is not copyright protectable), the composition that defines the way in which those plots are stitched together and unfold represents the creative choices of the author (and is protectable by copyright). Similarly, two computer programs may perform similar or the same functions, but the code that defines the way in which those functions are executed represents the creative expression of the code writer.

Even after an extensive analysis of the individual features alleged to be similar, in the Summary Judgment Ruling in the Blurred Lines case, the court found that even if the individual elements were not protectable (and thus could not be infringing, individually), infringement could result from the combination and selection of the elements and the “overall impact and effect.” [Williams *v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, *citing Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (citations omitted).]

While we don’t know what was in the minds of the jurors, I suspect that they were largely influenced by this last criterion. In the Ninth Circuit (where this case was decided), the jury is charged with evaluating the intrinsic similarity of the works. Intrinsic similarity is based “on the response of the ordinary reasonable person.” [Sid & Marty Krofft Television Products, Inc. *v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).]

For software developers, the concern is that even when there is no

literal copying and even when an analysis of the individual elements of code does not support a finding of substantial similarity (*i.e.*, copyright infringement), there may still be copyright infringement (at least in the Ninth Circuit), if the response of the ordinary reasonable person to the overall computer program, module, routine or sub-routine suggests substantial similarity. Are two computer programs substantially similar merely

because an ordinary person would see similarities in features and functions and decide that the overall effect of the programs is similar? Hopefully not. Such a result would stifle competition and would likely give copyright a greater scope of protection than was originally intended.

In copyright infringement cases, evaluating substantial similarity is, perhaps, the (pronounced “*thee*”) most difficult

task. In software cases, jury verdicts such as that in the “Blurred Lines” case make this task even more difficult.

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