Committee Newsletter | Fall 2016

TABLE OF CONTENTS

Message From Your Committee Co-Chairs ................................................................. 2
From Anant K. Tamirisa and Keith Black

ARTICLES >>
How Landmark Ruling May Permanently Blur Lines of Copyright Protection .............. 3
By: Anant K. Tamirisa
Description: This article analyzes the potential impact of the recent Williams v. Bridgeport Music, Inc. decision on artists’ ability to incorporate their musical influences into their own original musical works.

Influencers and the FTC – How Social Marketing is Being Regulated ...................... 5
By: Keith Black
Description: This article discusses how the FTC is regulating “influencer” marketing and advertising on social media.

NEWS AND ANNOUNCEMENTS
Message From Your Committee Co-Chairs

From Co-Chairs Anant K. Tamirisa and Keith Black

Dear ABA YLD Entertainment and Sports Members,

As the newly appointed Co-Chairs of the ABA YLD Entertainment and Sports Industry Committee, we are both privileged and honored to lead a talented group of practitioners representing a multitude of specialties related to the practice of entertainment law. We hope to capitalize on the strides taken by our predecessors and look forward to planning many informative events and curating exceptional content for our membership.

The ABA YLD Entertainment and Sports Industry Committee is centered on serving the needs and interests of young lawyers whose clients are in the creative and sports industries. One of our main tenets this year is to focus on attracting more young practitioners to the practice of Entertainment & Sports Law and we welcome all of your comments and suggestions in accomplishing this endeavor.

Some great ways to participate this year are to write articles for the YLD quarterly newsletter, for the 101/201 series, participate in teleconferences or attend our in-person events. We will also host regular open conference calls that will cover upcoming news, events, and how to further your involvement with the committee (details of which you can find by clicking the link below to our website):

ABA YLD Entertainment and Sports Industry Committee website:
http://www.americanbar.org/groups/young_lawyers/committees/entertainment_sports.html

ABA Forum on the Entertainment & Sports Industries website:
http://www.americanbar.org/groups/entertainment_sports.html

Our contact info has been included below. Please feel free to reach out and connect if you have any questions or would like to find ways to participate. Thank you for your interest in the Entertainment & Sports Industry Committee and we look forward to working with each of you this year.

Keith Black & Anant Tamirisa

Anant Tamirisa
Director, Business & Legal Affairs, Pantelion Films / Lionsgate Entertainment
(310) 255-5793
atamirisa@pantelionfilms.com
atamirisa@lionsgate.com

Keith Black
Director, Business & Legal Affairs, Discovery Communications, LLC
(516) 859-8890
Keith.p.black@gmail.com

© 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
How Landmark Ruling May Permanently Blur Lines of Copyright Protection

By: Anant K. Tamirisa
Co-Chair, ABA YLD Committee on the Entertainment and Sports Industry

For centuries, music artists from all over the world have been greatly influenced by past artists when developing their individual styles. However, the District Court for the Central District of California’s landmark ruling in Williams v. Bridgeport Music, Inc. may cause songwriters to second guess whether to incorporate their creative influences into their musical compositions by blurring the lines of copyright protections.

The case at hand stems from the hit song “Blurred Lines” by Pharrell Williams, Robin Thicke and Clifford Harris (aka T.I.) (the “Thicke Parties”), which has achieved worldwide success since its release in 2013—topping the pop charts in at least 25 countries and garnering over 140 million views of the music video on YouTube to date. After noticing similarities between the 1977 song “Got to Give it Up” and “Blurred Lines,” the estate of Marvin Gaye (the “Gaye Estate”) brought a claim against the Thicke Parties asserting infringement of copyright. After a seven-day trial, the Williams jury found that the Thicke Parties had, in fact, infringed on the Gaye Estate’s copyright, and awarded the Gaye Estate a $5.3 million judgment of actual damages and profits plus a running royalty of fifty percent (50%) of songwriter and publishing revenues.

The court applied The Copyright Act of 1909 in its legal analysis, which grants copyright protection to a published work only if a written copy of the work (i.e., sheet music or other manuscript form) is registered with the U.S. Copyright Office with a copyright notice affixed to it. Gaye registered a simplified version of the sheet music to “Got To Give It Up” with the Copyright Office in 1977. Gaye’s Estate and the Thicke Parties presented evidence supporting their respective positions, including expert reports from musicologists opining whether the songs were “substantially similar,” but debate ensued between the parties after Gaye Estate experts based their opinions on musical recordings rather than a comparison of the manuscripts (as applicable under the 1909 Act).

The Thicke Parties promptly appealed the decision to the Ninth Circuit and argue that, because the 1909 Act only considers a song’s written lyrics, chords, and melody, the jury’s...
“substantial similarity” analysis should have been limited to comparing those three elements of the songs, which would have resulted in a different outcome. In addition, an amicus curiae comprised of more than 200 musicians filed a brief in support of the Thicke Parties, claim that the ruling “is very dangerous to the music community” and “[will] chill musical creativity and inhibit the process by which later artists draw inspiration from earlier artists to create new popular music.” The brief further asserts that, “by eliminating any meaningful standard for drawing the line between permissible inspiration and unlawful copying, the judgment is certain to stifle creativity and impede the creative process.” As stated by Defendant Pharrell Williams:

The verdict handicaps any creator out there who is making something that might be inspired by something else. This applies to fashion, music, design . . . anything. If we lose our freedom to be inspired we’re going to look up one day and the entertainment industry as we know it will be frozen in litigations. This is about protecting the intellectual rights of people who have ideas.

While the ruling may inhibit artists from exploring sounds and styles of previous eras in the songwriting process, others argue that the judgment gives urban artists—many of whom compose catchy riffs and baselines, only to have them sampled or remixed into hit pop and rap songs—a way to be fairly and meaningfully compensated for derivative uses of their works.

No matter which stance you take in this controversial case, it is clear that the ultimate outcome will have a lasting effect on the way composers incorporate their musical influences into their songs. Prohibiting artists from using these musical building blocks as a foundation for their works will significantly impinge their creative freedoms and cause artists to “hate [the] blurred lines” of copyright protection going forward—making it that much more important for entertainment practitioners to pay close attention to how Williams is ultimately resolved.

Influencers and the FTC – How Social Marketing is Being Regulated

By: Keith Black
Co-Chair, ABA YLD Committee on the Entertainment and Sports Industry

---

8 ROBIN THICKE, ET AL., BLURRED LINES (Star Trak Recordings 2013).
With the advent and proliferation of “second screens”—phones, tablets, laptops, and the like—societal distraction is at an all-time high. It seems people today are constantly connected, even while watching television, which poses unique challenges for marketing teams. Advances in technology have eroded many of the more traditional routes marketers used to effectuate brand awareness. For example, viewers with DVR devices are able to fast forward through commercial breaks and avoid marketing content entirely. In addition, viewers of live television that are distracted by Twitter, Instagram, or Facebook on their second screens avoid commercials just as easily.

As a result, advertisers have developed more innovative means of customer acquisition. Namely, companies have begun to pay “influencers”—people with well-trafficked social-media accounts—to post about the company’s products online in hopes of attracting potential consumers. For instance, Kim Kardashian has, on her Instagram account, posted photos clearly advertising a brand of vitamins. It’s not altogether uncommon for even minor or “web” celebrities to promote brands on their personal Instagram pages. Some of the bigger celebrities command up to $75,000 per Instagram post.

In response to the increased ubiquity of influencer advertising, the Federal Trade Commission (the “FTC”) has provided guidance on their expectations about what disclosures influencers must make in connection with social-media ads, as well as defining what responsibilities a brand has to ensure that proper disclosures are made. The FTC, in providing some loose guidelines, is seeking to provide more context as to what constitutes deceptive or unfair advertising practices.

Influencer-marketing is a relatively new phenomenon, so incidents where the FTC has provided guidance are few and far between. However, the FTC’s recent settlements with both Lord and Taylor and Warner Brothers provide some clarity as to what the FTC expects of companies using influencer-marketing.

---

9 See https://www.instagram.com/p/BG40uSHuS6A/?taken-by=kimkardashian&hl=en.


Nonetheless, familiarizing yourself with these rules may prove critical as influencer-marketing becomes more and more prevalent. More corporations will seek to spend big advertising dollars to directly reach consumers on social media. As this form of advertising becomes more prevalent, knowing what the rules state to properly advise your client will become crucial.

I. What Must Be Disclosed, and How

The FTC outlines two “big picture” requirements as to disclosures. First, it requires that the disclosure contains all “essential information” to consumers, and second, it requires that the disclosure be “clear and conspicuous.” The more nuanced details required for compliance with each of the two elements should be understood by any attorney seeking to advise corporation seeking to employ influencer-marketing.

A. Content of the Disclosure

The FTC clearly states that an influencer must disclose all “essential information” to consumers, or all information that a reasonable consumer would deem “material.”

The FTC provides the following example as guidance on this requirement: if a company gives an influencer an app for free, but is selling the app to consumers for 99 cents, disclosing that fact is probably enough to satisfy the FTC’s requirements; but if the company also gives the influencer $100 to review the app, simply stating that the app was free is not enough.

Unfortunately, there is no hard and fast rule defining what language an influencer must include in a product endorsement to comply with this rule. However, it would be prudent for companies using influencer-marketing to document their reasonable attempts to comply with the requirement, including the process by which they evaluate what facts may or may not be important to a disclosure. Maintaining such a record is probably critical in complying with the FTC’s rules, because the FTC requires advertisers to monitor the content of any disclosure. This record would help establish that the brand is seeking to monitor its advertising partners’ disclosures.

Being as clear as possible, as in saying “This is a paid endorsement,” or something to that effect, would probably be an acceptable way to disclose the company’s relationship to the influencer—but in many ways, it defeats the purpose of the “organic” nature of much of the marketing. This is a critical balancing act between the real needs and desires of an in-house marketing team. The reality is, the brand wants to contract with an influencer to make the advertisement seem or feel organic, and disclosure is inherently inorganic. Luckily, the FTC allows some leeway in making such disclosures, and notes that a compliant disclosure could be as saying “Company X sent me Product X, and I think it’s great.”

14 Id.
15 Id.
16 Id.
disclosures can be natural and organic, and can be made in the influencer’s voice. Maintaining an authentic voice is critical for successful influencer advertising, so the FTC attempts to balance the competing interests.

B. Must Be Clear and Conspicuous

Disclosures must also be “clear and conspicuous,” meaning that they must: (i) be made in close proximity to the endorsement; (ii) be made in a font that is easy to read and in a color that stands out on the given background; (iii) (if made in video form) remain on the screen long enough for the viewer to notice, read, and understand it; and (iv) (if in audio form) be read in a cadence that is easy to understand.

In sum, it is critical that an influencer does not hide the disclosure—for example, where an influencer is marketing a product through a YouTube video, it should make the disclosure in the video, rather than dropping it into the video’s description. Again, there are no rules outlining the parameters of these requirements, so a company must make a judgment call as to whether a given disclosure will be clear and conspicuous to the average target consumer.

It may be difficult to ascertain what type of disclosures will qualify in any given scenario, but a company can make a good faith attempt to comply by considering what would be conspicuous, which should be sufficient to avoid any major FTC penalties, particularly if the disclosure is made in the same form and format as the endorsement. If an influencer makes an audio endorsement, the disclosure should be in audio as well, and likewise, if the endorsement is made in a video, the disclosure should be within the video, too.

II. The Brands’ Responsibilities

It is important not only to know what the FTC’s rules state, but also why the rules exist. Essentially, most of the rules boil down to transparency in advertising—you need to be asking: Would a reasonable consumer want to know or be impacted by the brand's relationship with a particular influencer? Ultimately, the FTC will evaluate all disclosures in terms of both necessity and efficiency through the eyes of the reasonable consumer.

The FTC has made clear that the brand (or the party paying the influencer) is ultimately responsible for ensuring that the influencer makes necessary and proper disclosures.

---

17 Id.

18 Id.

Specifically, the FTC requires companies using influencer-marketing to take “reasonable steps” to monitor the influencer’s compliance with its disclosure obligations.20

The reason behind this is simple: brands are more capable of monitoring their own advertising platforms and actors than outsiders. In addition, the brands are the primary beneficiaries of such advertising. Brands will receive direct exposure, in their chosen demographic, by utilizing influencer marketing. Because the brands seek to benefit themselves by obtaining such exposure, the brands are primarily responsible for ensuring such advertising meets the FTC’s standards.

While the FTC has not clearly defined what qualify as “reasonable steps” to monitor advertising partners, a safe practice for any brand using influencer-marketing would be reviewing social media posts, reviewing videos, or making other reasonable endorsements to safeguard against any deficient disclosures.

III. Conclusion

The rules around influencers are relatively new. As technology continues to evolve and new social media formats and platforms emerge daily, the rules about advertising will likely continue to evolve. While the FTC does not provide definitive bright-line rules governing influencer advertising, it imposes considerable guidelines for brands to follow to avoid FTC fines. When advising a client who plans to use influencer-marketing, ensure that your client understands that it is responsible for instituting policies to comply with the FTC’s rules. Namely, the brand needs to make sure its influencers are providing consumers with a sufficient amount of information as to the nature of the relationship between the brand and the influence, in a form and format easily understood by the consumer. While black-letter law on the matter is sparse, the FTC does provide a loose outline of how to avoid liability and penalties.

20 Id.
NEWS AND ANNOUNCEMENTS

“Lions, Tigers, Pistons, and Red Wings too: Hot Topics in Professional Sports”
Recently Sponsored by the YLD Committee on the Entertainment and Sports Industry

Friday, October 21, 2016 from 12:45pm–2:00pm at the Westin Book Cadillac in Detroit, MI.

The moderated panel focused on current hot topics in sports law such as regulation of on-and-off-field conduct, player discipline, collective bargaining agreements, the emergence of daily fantasy sports, and the legalization of sports gambling.

Moderator: Reginald M. Turner, Member, Clark Hill, PLLC, Detroit, Michigan

Panelists:

• Robert E. Carr, Senior Vice President of Operations & Legal Affairs for Olympia Entertainment and Detroit Red Wings General Counsel, Detroit, Michigan

• Jay Colvin, Detroit Lions Senior Vice President of Legal Affairs and General Counsel, Detroit, Michigan

• Richard Haddad, Vice President & General Counsel at Palace Sports & Entertainment and Detroit Pistons, Auburn Hills, Michigan

• Amy Peterson, Detroit Tigers Associate Counsel, Detroit, Michigan

For more information on the upcoming Fall YLD Conference, visit:
http://www.americanbar.org/groups/young_lawyers/events_cle/2016_Fall_Conference.html.