

Anti-Troll Legislation: Too Much of a Good Thing?

CONGRESS SHOULD MAKE SURE PROPOSED ACT DOESN'T THWART INNOVATION

By **SCOTT LYDON** and **JUSTIN DURELLI**

Recent media attention has brought the term "patent troll" out of the obscure patent attorney lexicon and into the public realm of discussion. The increased debate surrounding the so-called abusive practices of patent trolls has inspired Congress to twice consider legislative reform. While supporters of reform believe that it will help to reduce shakedowns faced by companies across the

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country, detractors warn that its provisions may make it more difficult and costly for all patentees to bring patent infringement suits, not just patent trolls, ultimately stifling national innovation.

The term "patent troll" is typically applied to entities that do not make or sell a patented product (that is, "practice" a patented invention), but rather use patent rights for the sole purpose of eliciting payments from practicing

businesses. While nonpracticing entities, also referred to as NPEs, argue that they are merely establishing licensing relationships, a legitimate form of business, targeted practicing businesses complain that too often these arrangements amount to nothing more than a shakedown based on meritless claims.

Recognizing that the more abusive practices of patent trolls or NPEs will continue to persist because companies frequently, regardless of the merits of the patent troll's claim, settle and make payments in order to avoid the more costly option of patent litigation, Congress has twice attempted to pass legislation to address this issue. In December 2013, such a measure was approved by the House of Representatives but failed to pass in the Senate. Most recently, on Feb. 5, House Judiciary Committee Chairman Bob Goodlatte introduced the Innovation Act, a bipartisan bill designed to address the problem of abusive patent litigation. The Innovation Act aims to reign in patent trolls' abusive practices in a number of ways, such as heightening the pleading requirements, determining validity early in the process and awarding attorney fees of frivolous lawsuit. Congress ultimately hopes to address the concern that payments to patent trolls are stifling innovation in the U.S. by diverting money from jobs and product development.

Licenses and Sales

Critics of the Innovation Act, on the other hand, argue that it is the act itself that would ultimately stifle innovation because the law

would make it more difficult and costly for all patent holders to enforce their intellectual property, not just patent trolls. First, critics argue, the act would negatively impact innovative companies which often have large patent portfolios, only a part of which may cover one or more commercial products. The legislation, as it is written, may cover those noncommercial patents held by innovative companies as well as patents held by traditional "patent trolls," ultimately making it more difficult for practicing companies to defend their rights and recoup their investments.

Second, critics argue, the proposed act would hurt single inventors and small companies which do not have the means to put their invention into practice alone but are instead incentivized by the monetary returns the patent system affords through patent licensing or sales. Reducing the ability to collect on those monetary returns, critics argue, has the parallel effect of diminishing the incentive for inventors to apply for patents and ultimately release their inventions to the public. This effect would be contrary to one of the central purposes of the patent system, which is to make available to the public new ideas and discoveries.

The current patent system is based on quid pro quo: the inventor discloses the invention to the public for a right to exclude others from making or selling the invention for a period of



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time, after which the invention is dedicated to the public. The current law does not include a requirement to practice the invention to be able to exclude others for the period of time.

While it is too soon to tell for certain what the ultimate effects of the Innovation Act might be should it be implemented in its entirety, Congress would be wise to adopt a balanced approach to legislation to avoid overly restricting all patentees' rights to enforce their intellectual property. ■

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■ From FUZZY on PAGE S2

that this argument misapplies a 1976 standard to compositions governed by the 1909 Copyright Act. Under the 1976 act, compositions are eligible for protection when they are fixed in "phonorecords," which include master recordings. Under the 1909 act, however, the act of recording or distributing recordings does not constitute the publishing of a composition; the work must be reduced to sheet music or other manuscript form.

The Gaye estate offered no evidence that, before registration of the copyright, "Got to Give It Up" was published or reduced to a manuscript form that was more complete than what is included in the lead sheets deposited with the Copyright Office. This means that even though certain elements may have been present in the sound recording of "Got to Give It Up," only those elements which were reduced to writing on the lead sheets were covered by the registration. One cannot simply listen to the respective sound recordings in order to make a determination of whether there is substantial similarity for purposes of copyright infringement; this misapplies the standard of what constitutes copyright infringement for a work protected under the 1909 act.

Expert Musicologists

In support of the respective summary judgment motions, three separate analyses of musicologists were submitted. Relying on these analyses, the court noted that this evidence provided indications of "a sufficient disagreement" concerning whether there were substantial similarities between the protected elements of "Got to Give It Up" and "Blurred Lines." The court therefore denied the motions, finding there was a genuine issue of material fact requiring a jury trial.

At trial, since the copyright at issue was the

musical compositions rather than the sound recordings, each side was permitted to submit special recorded versions of their respective work for the jury to hear. In theory, playing a stripped-down version of "Got to Give It Up" for the jury, which would not include the same flourishes and improvisations of the commercially released version, should have been an advantage for Thicke and Williams. However, while the jury did not (at least in court) listen to the commercially released versions of "Blurred Lines" and "Got to Give It Up," the Gaye estate

It is important to remember that the respective sound recordings are not the issue in this case, and that not all 'copying' is unlawful. Yet, these two points appear to have been blurred in the jury instructions.

was permitted to play a version of "Got to Give It Up" which included parts that are featured in the commercial release yet not contained in the lead sheets submitted to the Copyright Office.

The Gaye estate received a further advantage with jury instructions which blurred the lines of copyright infringement in musical composition. The first notable issue in the jury instructions came at Instruction No. 27, which reads: "Anyone who copies original elements of a copyrighted work during the term of the copyright without the owner's permission infringes the copyright."

This instruction obfuscates the basic concept of copyright law: that copyright protects the expression of an idea, but not the idea itself. To a juror, or indeed anyone unfamiliar with the intricacies and subtleties of copyright law, this distinction is easily misunderstood. An idea may indeed be original, but it is nevertheless only the expression of that idea that is protectable as

a copyrighted work. With this instruction, the scales were quickly tipped in favor of the Gaye estate, especially considering Thicke's own testimony that one of his "favorite songs of all time was Marvin Gaye's 'Got to Give It Up,'" and after he told Pharrell this, "He was like, 'Damn, we should make something like that, something with that groove.'"

What the jury overlooked is that some copying, even of "original elements," is allowable to fulfill the purpose of the Copyright Act: to promote the progress of the "useful arts." Failure

to allow for any "copying" would stifle the very purpose of copyright law, and indeed is not contemplated by the Constitution.

Instruction No. 43 blurs the line even further. It instructed the jury that the Gaye estate "must show that there is both substantial 'extrinsic similarity' and substantial 'intrinsic similarity' as to that pair of works." However, the court explained in the instructions that "extrinsic similarity" is shown "when two works have a similarity of ideas and expression as measured by external, objective criteria." Yet again, the court clouds the distinction between what copyright law protects: the "idea" versus the "expression." The court goes on to instruct the jury that "intrinsic similarity is shown if an ordinary, reasonable listener would conclude that the total concept and feel of the Gaye parties' work and the Thicke parties' work are substantially similar."

Jurors were not told to disregard similarities between unprotectable elements of the songs,

similarities resulting from use of the same genre of music or the "groove." Furthermore, the jurors were not instructed to direct their considerations on the "total concept and feel" of "Got to Give It Up" as it was deposited with the Copyright Office, versus the actual commercial recordings of the song. By Thicke's own account, the very objective of "Blurred Lines" was to evoke the feel of "Got to Give It Up," but this is not prohibited under the Copyright Act. Without appropriate clarification to the jurors, it is no surprise that they found infringement.

Despite the media attention the case has received, the implications it will have for the music industry itself are probably minimal. In light of the dubious jury instructions, it will be interesting to see how the case fares on appeal (if indeed it is appealed). The case does however highlight the challenges of a jury trial and the importance of properly instructing a jury in the intricacies of copyright law.

So what's next in the "Blurred Lines" saga? On March 17, the Gaye estate submitted a motion requesting the court to overturn the jury's verdict that Clifford Harris, who rapped in the song, and Interscope Records Inc. were not liable for copyright infringement, and asking the court to stop all sales of "Blurred Lines." Thicke, Williams and the other parties named filed a motion to strike the Gaye estate's motion. The parties have agreed that, notwithstanding the remaining disputes, judgment should be promptly entered in accordance with the jury verdict. They had until April 13 to lodge a proposed judgment. This show is far from over. ■

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