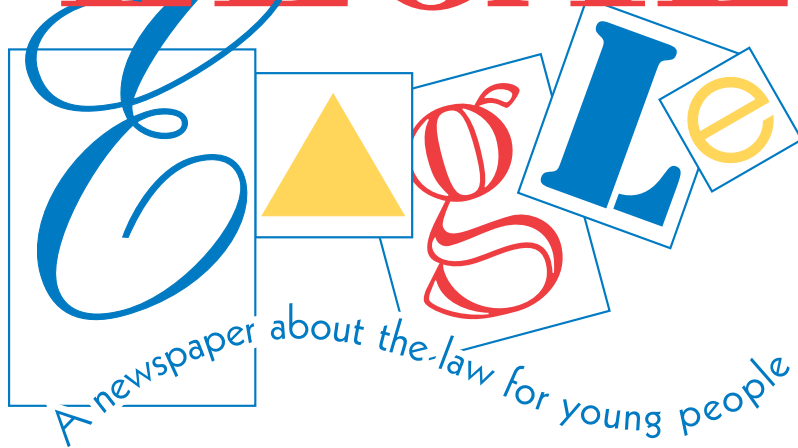


THE LEGAL



SPRING 2016

Blurring Artistic Lines for Songwriters

by Robin Foster

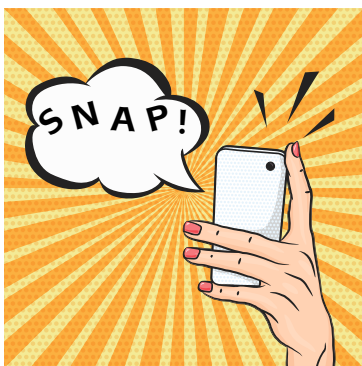
When does an artist cross the line between inspiration and infringement? That was the question at the heart of a lawsuit over the biggest hit song of 2013, “Blurred Lines,” which garnered a Grammy nomination for record of the year and reportedly earned nearly \$17 million for its songwriters Robin Thicke and Pharrell Williams.

CONTINUED ON PAGE 6



Snapchat—Does Your Privacy Disappear Along with Your Snap?

by Barbara Sheehan



Snapchat gained almost instant success after its launch in 2011 when it introduced a way to send messages that self-destruct within seconds of being viewed. Today, the messaging app boasts more than 100 million daily active users, most between the ages of 13 and 24, with nearly 50 percent below the age of 18.

The “disappearing” feature that people loved about Snapchat got the company into legal trouble three

CONTINUED ON PAGE 4

Climate Change: A Problem Without Borders

by Jodi L. Miller

Climate change is a complex issue and affects everyone on the planet to differing degrees—no matter political or religious affiliation or economic status.

In a 2014 speech given in Jakarta, Indonesia, Secretary of State John Kerry said, “When I think about the array of global threats—terrorism, epidemics, poverty, the proliferation of weapons of mass destruction—all challenges that know no borders—the reality is that climate change ranks right up there with every single one of them.

And it is a challenge that I address in nearly every single country that I visit as Secretary of State, because President Obama and I believe it is urgent that we do so.”

While some dispute that the planet is warming, and there have been controversies as to the extent of the warming and whether it is even true, there is verifiable evidence that we are experiencing record high temperatures. Since record keeping began in 1880, according to the National Oceanic and Atmospheric Administration (NOAA), 2015 was the warmest year on record, with the warmest year before that being 2014. NOAA claims that 2015 is the fourth year in the 21st century to set a new global record. In fact, 15 of the 16 warmest years, according to NOAA, have occurred since 2000.

So, what does it mean when we say that climate change affects everyone? Statistics provided by the Bill and Melinda Gates Foundation revealed that 32 million people worldwide were forced to flee their homes in 2012 as a result of disasters (floods, severe



CONTINUED ON PAGE 4



This publication was made possible through funding from the IOLTA Fund of the Bar of New Jersey.

Jodi L. Miller
EDITOR

EDITORIAL ADVISORY BOARD

John J. Henschel, Esq.
CHAIR

Mary M. Ace, LCSW
Risa M. Chalfin, Esq.
Eli L. Eytan, Esq.
James J. Gerrow Jr., Esq.
John F. Gillick, Esq.
Hon. Lisa James-Beavers, ALJ
Stuart M. Lederman, Esq.
Louis H. Miron, Esq.
Steven M. Richman, Esq.
Margaret Leggett Tarver, Esq.
Kimberly A. Yonta, Esq.
Thomas A. Zeringo

NEW JERSEY STATE BAR FOUNDATION BOARD OF TRUSTEES

Steven M. Richman, Esq.
PRESIDENT
Lynn Fontaine Newsome, Esq.
FIRST VICE PRESIDENT
Susan A. Feeney, Esq.
SECOND VICE PRESIDENT
Norberto A. Garcia, Esq.
TREASURER
Kathleen N. Fennelly, Esq.
SECRETARY
Angela C. Scheck
EXECUTIVE DIRECTOR

TRUSTEES

Paulette Brown, Esq.
Hank P. Butehorn, Esq.
Paris P. Eliades, Esq.
Eli L. Eytan, Esq.
William Ferreira, Esq.
John F. Gillick, Esq.
Robert B. Hille, Esq.
John E. Keefe Jr., Esq.
William A. Kraus, Esq.
Ralph J. Lamparello, Esq.
Ronald G. Lieberman, Esq.
Louis H. Miron, Esq.
Evelyn Padin, Esq.
Anna P. Pereira, Esq.
Thomas H. Prol, Esq.
Charles J. Stoia, Esq.
Miles S. Winder III, Esq.
Kimberly A. Yonta, Esq.

U.S. Supreme Court Protects Cell Phone Privacy

by Phyllis Raybin Emert

Do the police need a warrant to search your cell phone if you're arrested? In a rare unanimous decision, the U.S. Supreme Court answered that question in June 2014 and said yes, they do. The two cases, *Riley v. California* and *U.S. v. Wurie* were combined into one, with Chief Justice John Roberts Jr. delivering the Court's opinion.

Riley v. California

In the first case, police in San Diego stopped David Riley for driving with expired registration tags, then learned that he was driving with a suspended driver's license as well. Following police procedure, the officer searched the car and found two concealed handguns. The police then searched Riley and found "items associated with the 'Bloods' street gang." They seized a smart phone from Riley's pants pocket and discovered it contained gang terms.

At the station, a more intensive search of the phone turned up photos and videos that implicated Riley in an earlier shooting. Riley's attorneys tried to suppress evidence from the cellphone at his trial claiming the search violated the Fourth Amendment since the police had no warrant. The trial court rejected that claim and Riley was convicted and sentenced to 15 years to life in prison. His attorneys **appealed**, but the California Court of Appeals **affirmed** the conviction.

U.S. v. Wurie

In the second case, Boston police arrested Brima Wurie for distributing crack cocaine. He was taken to the police station, where police took possession of his two flip-top phones. Every few minutes "the police noticed that the phone was repeatedly receiving calls from a source identified as 'my house.'" The officers were able

to access the phone's call log and trace the call.

After obtaining a search warrant for Wurie's apartment, the police found cocaine, marijuana, firearms, bullets and cash. Wurie was charged with distributing drugs and possession of guns and ammunition. His attorneys claimed the evidence found in the apartment was "the fruit of an unconstitutional search of his cell phones..." The District Court denied the motion and Wurie was convicted and sentenced to 262 months in prison. The First Circuit Court of Appeals **reversed** the lower court decision and **vacated** the convictions, ruling that the officers should have obtained a warrant before searching the phone.

Fourth Amendment

The Fourth Amendment to the U.S. Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The focus of the U.S. Supreme Court's decision was the Fourth Amendment and how it applied to modern technology. The question, according to the Court's opinion, was whether "by accessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental [police] interests."

Chief Justice Roberts wrote in the Court's opinion that it is reasonable for the police to search a person who has been arrested for possible weapons that might endanger officers,

or to search a vehicle for weapons and evidence. “Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape,” the chief justice wrote. “The officer can physically examine the phone but the “data on the phone can endanger no one.” Chief Justice Roberts stated that data on a cellphone may be wiped clean remotely or encrypted. He explained that to prevent wiping, the officer can simply disconnect a phone from the network by turning off the phone or removing its battery. To prevent encryption, the phone can remain on and be placed in an aluminum-foil lined bag (called Faraday bags) that the police can carry with them.

Aspects of the case

“The United States [government] asserts that a search of all data stored on a cell phone is ‘materially indistinguishable’ from searches of...physical items...[carried by an arrestee],” wrote the chief justice. “That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones...implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”

Chief Justice Roberts continued, “A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary...Today...many of the more than 90 percent of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives...Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two...”

Professor Bernard W. Bell, who teaches constitutional and privacy law at Rutgers Law School—

Newark, believes this Supreme Court decision is “a promising signal of a fundamental shift in the Court’s approach to assessing an individual’s “reasonable expectation of privacy... This new approach might also give privacy more protection against developments in technology.” Professor Bell says that “while a person would not carry around a record of his or her life in a wallet, the person is likely to do so in a cell phone—a person may carry on their cell phone a thousand pictures recording aspects of their lives or a



list of the contact information for all the people they know.”

Warrantless search exceptions

“Exigent circumstances,” according to Professor Bell, are “situations which require some urgent, immediate action to prevent a harm or as the Court described it a ‘now or never’ situation.” He gives three examples.

“First,” Professor Bell says, “let’s say FBI agents have learned that a suspect will use the clock on his phone to detonate a device at noon and the agents only manage to arrest the suspect at 11:59 a.m. The suspect is carrying a cell phone when arrested. The police need to get into the phone immediately to try to stop the timer.”

Professor Bell’s second example: “The police have good reason to believe it likely that the suspect they have just arrested has texted an accomplice who is the one who will carry out a violent attack at a

school, and observed that the suspect appeared to be sending a text just before he was arrested. They would need to take urgent, immediate action to look at the text message and who it was addressed to in order to attempt to stop the accomplice.”

In Professor Bell’s third example, an abduction scenario is outlined. “Let’s say the police are pretty certain that the victim needs medication to prevent them from suffering a serious medical problem. The police arrest the kidnapper with his phone, but the kidnapper won’t tell the police where the victim is. The police would need to search the phone immediately to see whether they could figure out... one or more locations.”

Cost of privacy

“Modern cell phones...hold for many Americans ‘the privacies of life,’ the chief justice wrote. “The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.” Chief Justice Roberts called the Fourth Amendment “one of the driving forces behind the Revolution itself,” and explained “privacy comes at a cost.” A warrant is “an important working part of our machinery of government, not merely an inconvenience.”

Jeffrey L. Fisher, one of the lawyers for David Riley, told *The New York Times*, “The decision brings the Fourth Amendment into the 21st Century. The core of the decision is that digital information is different. It triggers privacy concerns far more profound than ordinary physical objects.”

Neither Riley nor Wurie benefited from the Court’s decision. Further proceedings at the lower court level found sufficient evidence, apart from that taken from their cell phones, to uphold their convictions. 🔪

years after it launched when it was revealed that the messaging app misrepresented what it could do. The Federal Trade Commission (FTC), an agency that protects consumers against deceptive business practices, brought the case against Snapchat. In its complaint, the FTC said that Snapchat misrepresented its app by claiming that messages would disappear forever, when in fact that was not true. The FTC also said that Snapchat put users' private information at risk by not putting appropriate security measures in place.

What did Snapchat do wrong?

According to the FTC, here's how Snapchat marketed its app to users in its early days: "You control how long your friends can view your message—simply set the timer up to ten seconds and send. They'll have that long to view your message and then it disappears forever."

Most social media users today know that's not entirely true—there are workarounds that enable recipients to save "snaps" if they are determined to do so. But that was not so obvious when Snapchat first came out.

One of the early mistakes Snapchat made was storing video files in a place where they could be accessed and saved. This left people's private "snaps" and photos open to being accessed by clever recipients, who were able to use their technology know-how to get around the system.

This problem—and Snapchat's delay in addressing it—was among the issues cited by the FTC in its complaint. "This method for saving video files sent through the application was widely publicized as early as December 2012," the FTC stated in the complaint. "Snapchat did not **mitigate** this flaw until October 2013, when it began encrypting video files sent through the application."



Beware the third-party app

Another problem that arose for Snapchat was the development of third-party apps, which were designed to get around Snapchat's disappearing feature. Even though Snapchat was warned about this possibility, it continued to misrepresent that senders controlled how long recipients could view a snap, the FTC said.

Additionally, some Snapchat recipients began saving snaps by simply taking a screenshot of a message. Snapchat told its users, from October 2012 to February 2013, that it would notify senders immediately if a recipient took a screenshot, but this promise was flawed, the FTC noted, since Snapchat's notification did not work with all devices.

Friends in strange places

Behind the scenes, the FTC also uncovered issues with how Snapchat was protecting users' privacy. One of the problems the FTC noted in its complaint was that Snapchat misrepresented how it was collecting information about users.

"Snapchat transmitted geolocation information from users of its Android app, despite saying in its privacy policy that it did not track or access such information," the FTC said.

The FTC further noted that from Sept. 2011 to December 2012, Snapchat failed to verify the phone numbers iOS users entered into the "Find Friends" feature. Because of this, "consumers were actually sending their personal snaps to complete strangers who had registered with phone numbers that did not belong to them," the FTC said. Snapchat's security failure "resulted in a security breach permitting attackers to compile a database of 4.6 million Snapchat usernames and phone numbers," the FTC said.

CONTINUED ON PAGE 5

Climate Change CONTINUED FROM PAGE 1

storms, earthquakes, forest fires, droughts, etc.), 98 percent of the displacement was related to climate change. In addition, the World Health Organization (WHO) reports climate change has the "potential to affect human health in a number of ways, for example by altering the geographic range and seasonality of certain

infectious diseases and disturbing food-producing ecosystems." WHO states on its website that climate change "already claims tens of thousands of lives a year from diseases, heat and extreme weather."

What can the law do?

Given the devastating effects of a warming planet, perhaps it is not

surprising that nearly 200 countries gathered in Paris in December 2015 to reach a consensus of what should be and could be done to deal with this global problem.

In 1992, 197 countries (including the U.S.) **ratified** the United Nations Framework Convention on Climate Change (UNFCCC), which set out a framework within which countries

CONTINUED ON PAGE 7

Settling up

Snapchat agreed to settle the charges with the FTC in May 2014. Per the settlement, Snapchat must implement a comprehensive privacy program that will be monitored by an independent privacy professional for the next 20 years. Also, Snapchat is prohibited from misrepresenting the extent to which it maintains the privacy, security, or confidentiality of users' information.

"If a company markets privacy and security as key selling points in pitching its services to consumers, it is critical that it keep those promises," said FTC Chairwoman Edith Ramirez in a May 2014 press release announcing the agency's settlement with Snapchat, which was finalized in December 2014 after a public comment period. "Any company that makes misrepresentations to consumers about its privacy and security practices risks FTC action."

Snapchat is one of many companies, including Google Inc. and Facebook, that have been targeted by the FTC. Penalties for some companies that have failed to heed the FTC's warnings have involved significant fines. For example, Google Inc. was given a \$22.5 million civil penalty in 2012 for violating an earlier privacy settlement with the FTC.

Snapchat's blog post after the FTC settlement stated: "When we started building Snapchat, we were focused on developing a unique, fast, and fun way to communicate with photos....While we were focused on building, some things didn't get the attention they could have. One of those was being more precise with how we communicated with the Snapchat community."

Today, Snapchat's practices can easily be found online in its Privacy Policy, where it clearly states how user information is handled and what users can expect.

What does it mean and what was learned?


So, what does the FTC settlement mean for Snapchat users?

"Snapchat's only significant repercussion was that they were required to implement a privacy program that must be overseen and audited by an independent third party," says Jeffrey Neu, a Red Bank attorney who specializes in technology, media and Internet matters. "The FTC cannot issue fines on a first offense of this type, and so they were somewhat limited in what they can do to punish Snapchat," Neu says. "It does mean that Snapchat will have some limitation on their actions in the future."

Snapchat users can take some comfort in knowing that the FTC is keeping tabs and seems to be taking a strict stance on regulating mobile apps. But caution is still advised.

According to Neu the "key takeaways" from the settlement is that when you give your personal information to a company, you should be very careful about who that company is.

"Just because they say they are protecting your data, doesn't mean they are, and in general, even if they are, hacking and data breaches are a common occurrence today," Neu says. "The modern world requires some information to be available to function with a bit more ease. But it also requires vigilance on the part of consumers. At this point in time, anonymity and the Internet do not coexist."

The rule of thumb in dealing with the Internet is that once you've created something it becomes very difficult to delete it. Evan Spiegel, one of Snapchat's founders even said in an interview, "Nothing ever goes away on the Internet." 

Another Lesson Snapchat Learned

Say you have a great idea for an app. You talk about it with a couple of buddies, you work together to create it, and then you find yourself pushed out of the group. The app goes on to become massively popular and is estimated to be worth billions of dollars. What do you do?

That is what reportedly happened to Reggie Brown, who originally co-founded Snapchat along with his Stanford University fraternity brothers Evan Spiegel and Bobby Murphy. Brown sued for a share of the profits in 2013 and settled his case with Snapchat for an undisclosed amount in September 2014. Estimates of what the company is worth vary since it has yet to turn a profit; however, some are as high as \$20 billion.

So, what does this mean for up-and-coming app creators who are talking with their friends about ideas for a new app? If you have a good idea for an app that you share with others, does that entitle you to some of the profits if it takes off?

According to attorney Jeffrey Neu, "In general, if you don't have a patent, copyright, or trademark, and don't have an NDA (non-disclosure agreement), there is no claiming of rights of intellectual property ownership. Just talking about it does not give you a right," Neu says. "You have to take the steps of creating that idea and implementing it to have rights."

—Barbara Sheehan

Blurring Artistic Lines CONTINUED FROM PAGE 1

The heirs of R&B legend Marvin Gaye sued Thicke and Williams for copyright infringement. The legal drama began in August 2013, when Thicke, Williams, and rapper T.I. (who also made an artistic contribution to the song) made an unusual move, preemptively suing the Gaye heirs claiming no infringement after receiving threats of legal action from the Gaye estate. The estate, which represents Marvin Gaye's three children, then filed a lawsuit seeking \$25 million in damages, claiming Thicke, Williams, and T.I. copied Gaye's 1977 hit song "Got to Give It Up."

Copyrighting a vibe

According to court documents, lawyers for Thicke and Williams argued, "The intent in producing 'Blurred Lines' was to evoke an era. In reality, the Gaye defendants are claiming ownership of an entire genre, as opposed to a specific work..." Williams testified the only similarity between his song "Blurred Lines" and Gaye's "Got to Give It Up" was the feel or vibe of the song. While he acknowledged Gaye as one of his idols, Williams stated he was not thinking about Gaye or "Got to Give It Up" while writing "Blurred Lines." He testified that he wrote nearly all of the lyrics and melody for "Blurred Lines," even though Thicke is listed as a co-writer on the song. In his own testimony, Thicke confirmed Williams' account and admitted to very little input.

During the course of the March 2015 trial, the judge instructed the jury to consider the copyright infringement claim based on Gaye's "Got To Give It Up" sheet music alone since Gaye's copyright for the song applies only to the written notes and lyrics on paper. His copyright did not extend to the recorded version of the song. Members of the jury were not allowed to listen to recordings of both songs. Instead, the jury was required to make a decision based on the *written* lyrics, chords, and melodies in "Got To Give It Up," not based on the song's sound or feel.

According to music critic Chris Richards, in his column for *The Washington Post*, the written patterns in the songs are different, although they may sound similar in tempo and bass line, with both songs having "cowbell-ish percussion that plunkity-plunks at a similar tempo...." As for the written lyrics, Richards pointed out that "Blurred Lines'" verse "Shake your rump, get down, get up-a" might evoke "Move it up, turn it round, shake it down,"

from "Got to Give It Up," but do not overlap any more than that.

"While 'Blurred Lines' might lack imagination, Thicke and Williams ultimately only seem guilty

of stealing a vibe," Richards wrote. "If vibes are now considered intellectual property, let us swiftly prepare for every idiom [expression] of popular music to go crashing into juridical oblivion, because music is a continuum of ungovernable hybridity, a dialogue between generations where the aesthetic inheritance gets handed down and passed around in every direction. To try and **adjudicate** influence seems as impossible as it does insane."

It happens

Music is a form of creative expression, and songwriters across the ages have been inspired, influenced, and have paid homage to music that came before. Legal claims against "borrowing" from a previously recorded tune are not new. Last year, crooner Sam Smith's hit "Stay With Me" was accused of being similar to rocker Tom Petty's 1989 hit, "I Won't Back Down." In an out-of-court settlement, lawyers for Smith and the songs' co-writers James Napier and William Phillips acknowledged a resemblance between the two songs, although the team argued it had not been "previously familiar" with the Petty song. In an out-of-court agreement, Petty and Jeff Lynne were listed as co-writers on Smith's "Stay With Me," and awarded 12.5 percent of the song's royalties. Citing no hard feelings toward Smith, Petty told *Rolling Stone* magazine, "All of my years of songwriting have shown me these things can happen...A lot of rock-n-roll songs sound alike."

The most recent controversy surrounding sound-alike songs is over the Mark Ronson and Bruno Mars hit "Uptown Funk." Possibly to avoid a lawsuit, Ronson and Mars gave all five writers of The Gap Band's 1979 song "Oops Upside Your Head" songwriting credits on "Uptown Funk." Then, in February 2016, members of the female rap group The Sequence claimed that their song, "Funk You Up," also from 1979, was used as inspiration for the Ronson/Mars hit. The group threatened a lawsuit; however, at press time nothing had been filed.

The terms sampling, inspired by, or influenced by are not legal but **vernacular** terms, according to Steven Schechter, an entertainment lawyer in Fair Lawn, and each has the potential to violate federal copyright law. Schechter explains that any infringement of copyright comes down to unlawful copying, in which there must be "substantial copying of the original work." Infringement cases are determined on a case-by-case basis, meaning the only way to know if a particular work commits copyright infringement is to take it to trial and await a jury's decision. There are, however, fair use exceptions to



federal copyright law. According to Schechter, under fair use, if the second work is not a substitute for the original work, but transforms it in some creative way, the second work may not necessarily violate copyright. Unfortunately, there is no way to know if a new work falls under the fair use exception until after a trial. As a general rule, the more creative a work, the more protection it has under federal copyright law.

Chilling verdict

In March 2015, a Los Angeles jury ruled against Thicke and Williams, awarding the Gaye family nearly \$7.4 million in compensation. Rapper T.I. and the record companies would not owe anything. In a joint statement released after the decision, Williams, Thicke, and T.I. said, “While we respect the judicial process, we are extremely disappointed in the ruling made today, which sets a horrible precedent for music and creativity going forward. ‘Blurred Lines’ was created from the heart and minds of Pharrell, Robin and T.I. and not taken from anyone or anywhere else.”

Marvin Gaye’s former wife told *The New York Times*, “I hope people understand that this means Marvin deserves credit for what he did back in 1977.”

In a *Financial Times* article about the decision, Williams said, “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 litigation.”

Following the verdict, both sides filed documents with the court. Lawyers for the Gaye estate asked the court to “correct the jury’s verdict” by naming rapper T.I. and the record labels UMB Recordings, Star Trak, and Interscope as also liable for compensation. Lawyers for Thicke and Williams requested a new trial, which the U.S. District Court Judge denied. The judge did, however, reduce the jury’s \$7.4 million award to \$5.3 million, and included rapper T.I. and the record labels in the liability case. According to the judge’s new ruling, 50 percent of future royalties on “Blurred Lines” will go to the Gaye family. In December 2015, lawyers for Thicke and Williams **appealed** the court’s decision to the Central District of California, Western Division Court.

Speaking to *The New York Times*, Robin Thicke cautioned, “If the verdict holds up, I believe that it will have a ripple effect on the arts and the industry in general. I mean, if you made the first superhero movie, do you own the concept of the superhero?... Inspiration can be subliminal. As a songwriter, you’re obviously trying to create a brand-new feeling that comes from your heart. But you can’t help but be inspired by all of the greatness that came before you.”

Climate Change CONTINUED FROM PAGE 4

could work to address climate change and seek to limit temperatures. Efforts to address the issue more specifically have been attempted, beginning in 1995 in Berlin (and every year since), with not much progress made.

The agreement reached in Paris last year is to limit global temperature increase to 2 degrees Celsius (3.6 degrees Fahrenheit), which is essentially the “red line” scientists have drawn where the destructive effects of climate change will become dangerous. All countries are required to take some action to achieve this goal and in addition agree to “pursue efforts” to limit the temperature rise to just 1.5 degrees Celsius. According to the agreement, the countries would reconvene every five years to

report on their progress and update their pledges.

“I think the Paris outcome is going to change the world,” Christopher B. Field, a leading climate scientist from the U.S., told *The New York Times*. “We didn’t solve the problem, but we laid the foundation.”

What does it mean?

When nearly 200 countries agree



on anything, the historic significance can’t be ignored.

“A written document such as an agreement or treaty, or even a commercial contract, represents an investment of time, money and emotion,” says Steven M. Richman, an international law attorney. “While certainly there are nations or people who sign documents without meaning it, this particular document, drafted pursuant to a significant and decades-old treaty, with that level of commitment, does reflect a serious set of aspirations, goals and commitment.”

Richman notes that the agreement reached in Paris is not a treaty itself, but “a legal instrument developed in furtherance of the UNFCCC,” the treaty

CONTINUED ON PAGE 8

the U.S. ratified in 1992 and is still in force today. He explains that a treaty is legally binding and has “constitutional standing as the law of the land because it was ratified after advice and consent of the U.S. Senate.” International agreements other than treaties are still binding, according to Richman, but are formed differently; they may be concluded by the President pursuant to an existing treaty, or as authorized by legislation, or otherwise based on a constitutional source, such as the foreign policy power of the president.

In terms of the Paris Agreement, the blog of the U.S. State Department states: “The Agreement contains some legally binding provisions, such as the transparency provisions, and some non-legally binding provisions, such as the emissions targets themselves.”

“The bottom line,” Richman says, “is that an international agreement and a treaty are both binding; to challenge it, one would have to argue that the agreement ‘should’ have been a treaty in terms of whether it was properly instituted.”

A stay on clean power

In February 2016, the U.S. Supreme Court issued a **stay** to the Clean Power Plan (CPP), which was the cornerstone of the Obama Administration’s climate change agenda and would help in reaching the goals promised in Paris. The CPP would limit greenhouse gas emissions from power plants. Utility companies, coal miners and 29 states are currently suing the government in lower courts, claiming that the Environmental Protection Agency overstepped its authority with the enactment of the CPP.

The U.S. Court of Appeals for the D.C. Circuit is scheduled to hear oral arguments in the case in June. Depending on the

outcome, the case may find its way to the U.S. Supreme Court. Until the case is resolved, none of the provisions of the CPP can be put in place. How does this affect the agreement reached in Paris?

“Perhaps the more persuasive view, as gleaned from the various commentators, is that if the stay is upheld and the CPP is struck down, the U.S. may pursue other alternatives to meet the Paris Agreement goals and commitments, and as such may be delayed,” says Richman.

So, what happens if the U.S. is not able to live up to the goals outlined in Paris? According to Richman, the UNFCCC does contain a dispute resolution mechanism; however, the Paris Agreement does not. “Without set remedies, compliance may well be a function more of political peer pressure and credibility than legal **redress**,” Richman says.

What the future holds

According to a December 2015 *Washington Post*/ABC News poll, 63 percent of Americans claim climate change is a serious problem, but only 47 percent want the federal government to do more than it is currently doing to deal with the problem.

The top emitter of greenhouse gases is China, followed closely by the United States. “It only takes three economies—the United States, China and India—to get to more than 40 percent of all global greenhouse gas emissions,” according to an article written by Bruce Jones and Adele Morris for the Brookings Institute, an American think tank located in Washington, D.C. Jones is vice president and director of Brookings’ Foreign Policy Program and Morris is a senior fellow and policy director for the Climate and Energy Economics Project.

Their article went on to say: “Yes, many countries will suffer if the world gets dramatically hotter—but not all countries, and not equally. We know an increasing amount about who will lose (India, North Africa, the American Midwest) and who will win (the UK, parts of northern Europe) in a slightly hotter world.”

Some scientists were not happy with the results in Paris and wished the agreement had gone further. President Obama, while acknowledging the agreement is not perfect, said it is “our best chance to save the only planet we have.”

Michael Levi, an expert on energy and climate change policy at the Council on Foreign Relations, told *The New York Times*, “The world finally has a framework for cooperating on climate change that’s suited to the task. Whether or not this becomes a true turning point for the world, though, depends critically on how seriously countries follow through.”



adjudicate—to act as a judge.

affirm—to uphold, approve or confirm.

appealed—when a decision from a lower court is reviewed by a higher court.

mitigate—alleviate or lessen.

ratified—approved or endorsed.

redress—satisfaction, in the form of compensation or punishment, for an injury or wrongdoing.

reverse—to void or change a decision by a lower court.

stay—an order to stop a judicial proceeding or put a hold on it.

vacate—to set aside or cancel.

vernacular—common daily speech or lingo.