RESOLUTION ALLEY
Appellate Mediation: A Dispute Resolution Process Worth Considering

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

The objective of a mediation is to engage a neutral, disinterested third-party's assistance in facilitating a discussion amongst the parties to assist them in arriving at a mutually consensual resolution. Many mediators and advocates have long advised that, in order to maximize savings in both time and cost, an early mediation is worth attempting.[1] Yet if the participants to a dispute ever come to the realization that they share the objective of informally resolving a dispute, there is hardly a wrong or bad time to try mediation as a dispute resolution mechanism. It can even be employed after a judgment has already been entered in the trial court in favor of one party.

Take, for example, the "Blurred Lines" case. In March 2015, after a two-week trial, an eight-person Los Angeles jury unanimously concluded that Pharrell Williams and Robin Thicke infringed upon Marvin Gaye's 1977 hit song "Got to Give It Up" when they penned their 2013 hit "Blurred Lines." The jury found that both men borrowed heavily from Gaye's song, and rejected their denials of copying and their contention that, while they had been influenced by the song, they had merely been inspired by a genre, a groove, or a feeling. The jury's damages award of nearly $7.4 million (which the court later reduced to $5.3 million in response to a post-trial motion) is one of the largest in music copyright history. Claiming that the verdict set "a horrible precedent for music and creativity" and stifles artists and musicians who are trying to recreate an era or genre of music,[2] Williams and Thicke filed an appeal in the Ninth Circuit Court of Appeals.

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By this time, a trier of fact and a court have already designated the Gaye heirs as the "winners" and Williams and Thicke as the "losers" of this copyright infringement dispute. Moreover, generally, pursuing an appeal is much less costly than litigating a case through the trial process. So why would the parties even consider mediating now?

First, much can happen in an appeal. For example, prevailing on an appeal often means a remand back to the trial court where the parties will likely encounter additional motion practice, followed by another jury trial and/or post-trial motion practice, followed by perhaps yet another appeal. An appellate court could also modify the judgment below in whole or in part based upon the issues raised in the appeal. Only a pure affirmance upholds in full the Gaye heirs' multi-million dollar award, and then there may be some delay associated with ultimately collecting the monetary award, even if the appeal has been bonded. That is, the odds are that the parties will be afforded the opportunity to spend even more money and commit more time, perhaps to additional litigation, before achieving a final resolution. Thus, an appeal may not be the end of a dispute, but, rather, a new beginning.

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Second, while the outcome of an appeal remains pending, it creates uncertainty for all of the parties as to whether the judgment will be upheld. Relinquishing the dispute to a third-party to resolve—in this case, a panel of judges who will opine about the state of music copyright law and the evidence adduced at the trial—often leads to unpredictable results. That uncertainty can be a key driver in encouraging the use of mediation at the appellate level.[3] Notwithstanding the finality of a jury verdict like the one obtained by the Gaye heirs, each party has a significant risk that it will be unsuccessful on appeal. This uncertainty militates in favor of trying a process that eliminates that uncertainty and puts control of the outcome in the parties' hands. Moreover, the unpredictability of results on appeal, and with litigation in general, creates additional uncertainty. For example, the pending appeal will undoubtedly serve as an impediment to continued exploitation of the "Blurred Lines" sound recording. Resolving the appeal quickly and with certainty, facilitated by a properly trained mediator, may remove this risk for the parties. In a mediation, the parties are in control and have the opportunity to develop a solution that may be a much better outcome than what the courts can and will provide.

Third, engaging in the appellate process usually involves a lengthy time commitment. In appellate practice, the parties have to account for the varying pace and workload of different authoring judges, as well as time for

concurrences, dissents, rehearing briefing and consideration, remand, and the possibility of an *en banc* rehearing. Thereafter, there is the possibility of one or more parties desiring to file a petition for a writ of *certiorari* in the U.S. Supreme Court. Even though the likelihood of any particular petition being granted is slim, the associated delay before the mandate is returned to the appellate court, and ultimately to the trial court, can be extensive. By contrast, a mediation process is comparatively much faster. After an initial pre-mediation call to discuss preliminary matters such as the content of any pre-mediation submissions and a mediation engagement agreement, the actual session itself can be scheduled. Some mediations can be completed in one session, ending with the parties entering into a binding term sheet with the help of the mediator; others may require additional meetings and/or communications over the phone, sometimes stretching out over several months, before either a resolution is reached or an impasse is declared. Mediation is a process, not an event, and it can take time for that process to bear fruit. That time, however, is largely in the control of the parties, unlike the time they spend pursuing the appeal, and is more than likely shorter than the time needed for an appeal to be completed.

Fourth, mediation at the appellate level may come at an opportune time. By a trial's conclusion, all of the parties have likely had a number of wins and losses before the trial court. For example, even though he successfully obtained a favorable verdict, the attorney for the Gaye heirs also publicly complained that the trial court prohibited him from playing the actual sound recording of "Got to Give It Up," while the jury was permitted to hear "Blurred Lines."[4] In such a case, the parties may welcome pursuing mediation on appeal, as they have little to lose in trying. As compared to briefing and arguing the appeal, the cost to mediate is also quite affordable. Although the parties will still incur certain costs associated with preparing for and participating in the mediation session, the possibility of achieving a resolution between them makes investing in this process worthwhile. Moreover, because the parties voluntarily undertake to enter into the process, no party can be compelled to reach a resolution that is not in its interest, unlike an appellate court's decision, which may be unfavorable to one or all of the parties.

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Fifth, simply engaging in a mediation process can be beneficial for the parties. Although they may have good reasons for pursuing an appeal and have optimistic views on ultimately prevailing, the parties in an appeal have also likely spent money, time, and other resources to get to this point. They have understandably become entrenched in their positions, particularly if one party has emerged as the "winner" following a trial (like the Gaye heirs here) or obtained a summary judgment determination in its favor. By its very nature, litigation is about taking (adverse) positions, and an appeal, by its nature, is a process in which a panel of judges will vindicate one or more of those positions through an adjudicatory process. A mediation, by contrast, eschews any validation of those prior positions, but, rather, attempts to facilitate a resolution of the parties' own making in a manner that makes business and emotional sense for them. As part of that process, mediators typically challenge the assumptions that the parties and their counsel may have made and, if asked, may provide evaluative feedback about the strengths and weaknesses of the case. If a resolution is achieved, mediation offers peace and a return to a life without litigation and its attendant costs and distractions. If not, at the very least, the counsel may leave the mediation session able to write a better, more focused brief or give a sharper appellate argument.

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Sixth, unlike litigation and, in particular, a jury trial, mediation is a confidential process designed to protect the party's motivations, fears, personal embarrassment, and other concerns from the public at large, the court system, and, to some extent, from the other involved parties. For example, under examination at trial, Thicke testified that he was high on vodka and Vicodin during interviews with the press when he and Williams stated that they were inspired by Marvin Gaye and wanted to channel "Got to Give It Up" in "Blurred Lines."[5] A mediation of the pending appeal would ensure that other, similar confessions would be spared public disclosure. The confidentiality afforded by the mediation process typically manifests itself in three ways: (1) the court, aside from any administration of the mediation, will not know anything about the substance of the mediation and may not even know the identity of the mediator; (2) nothing that takes place in the context of the mediation, including anything that is said, can be used prospectively outside the mediation itself; and (3) mediators will maintain the confidentiality of the proceedings, including any confidences shared by the parties, and, in most jurisdictions, cannot be compelled to testify as to what transpired during the mediation process. These protections hopefully allow for frank, open, and candid discussions where the parties may speak freely with at least the mediator, if not with each other, always with an eye towards achieving a resolution. There are no written transcripts or opinions,

and the terms and conditions of any resolution may also be cloaked in confidentiality, subject to any reporting or other legal requirements.

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Finally, sometimes, even in the case of commercial disputes, money alone is not the best or only resolution of an appeal. Perhaps the products or services at issue are no longer of principal importance to the business. Maybe the company is looking for a graceful way to exit a long-running dispute that has been a drain on both time and resources. The Gaye heirs possibly value recognition and acknowledgment of Marvin Gaye's contribution to American music as much as they care about maximizing their monetary damages award. A mediated resolution could result in a creative and/or innovative solution that may be a "win-win" outcome or result in face-saving solutions for all concerned. In part, this is accomplished by spending time during the mediation exploring options for mutual gain and shared interests. The parties themselves may uncover and create these options, with or without the assistance of experienced and prepared mediators and advocates. Additionally, when the parties agree upon a resolution that best meets their interests, they are more likely to honor their agreement.

The reasons discussed above, among others, suggest that a mediation at the appellate level is worth considering. While the parties may be more entrenched from a positional bargaining perspective because some decision maker has already made a determination on the merits of the dispute, the uncertainties and risks involved on appeal are concomitantly more refined and better defined for the parties.

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All that said, despite every good reason to believe that appellate mediation may be a worthwhile alternative for the parties in the "Blurred Lines" case, that dispute may present some unique issues of music copyright law that will drive the parties to continue pursuing the appeal. For example, in late August 2016, a group of over 200 composers, artists, and other musical groups filed an amicus brief in the Ninth Circuit, expressing concern that the proceedings in the trial court could have an "adverse impact on their own creativity, on the creativity of future artists, and on the music industry in general."[6] The gist of their concern appears to be the view that this case may have arguably created a new legal precedent for music copyright infringement based upon having copied a feel or groove.[7] However, unless one or all of the parties absolutely believes it is necessary to have an appellate court resolve the case in order to establish a precedent in the music industry, the appeal nonetheless presents an opportune moment in time to see if a mediation might lead to a mutually acceptable resolution. We will have to wait and see what happens next.

Endnotes

1. In such cases, participants (or, more likely, their counsel) often express that they know too little information about the other party's case for the mediation session to result in a resolution. That impediment can be overcome by enlisting the mediator's assistance to carefully craft a limited exchange of information and documents within the confines of the mediation process, thereby providing some disclosure of the strengths and weaknesses of each participant's case. Thereafter, the mediation session will likely be more meaningful and productive, perhaps even resulting in a satisfactory outcome.
2. Ann Oldenburg, *'Blurred Lines' Jury Finds for Marvin Gaye*, USA Today (Mar. 11, 2015) (quoting statement from Pharrell Williams and argument by his counsel), *available at* http://www.usatoday.com/story/life/music/2015/03/10/blurred-lines-trial-verdict/24492431/.
3. For a discussion on how uncertainty in the application of the copyright fair use doctrine can potentially be solved using mediation and early neutral evaluation, *see* Theodore K. Cheng, *Solving Fair Use Disputes Through Mediation and Early Neutral Evaluation*, NYSBA Entertainment, Arts and Sports Journal, Vol., 27, No. 1 (Spring 2016), at 76.
4. Pamela Chelin, *'Blurred Lines' Verdict: Robin Thicke, Pharrell Williams to Pay $7.4 Million in Copyright Case*, The Wrap (Mar. 10, 2015), *available at* http://www.thewrap.com/blurred-lines-verdict-robin-thicke-pharrell-williams-lose-copyright-case-to-marvin-gayes-family/.
5. *Id.*
6. Associated Press and Paul Schrodt, *Why Hundreds of Musicians Are Supporting Pharrell and Robin Thicke in 'Blurred Lines' Appeal*, Business Insider (Sept. 1, 2016) (quoting from amicus brief), *available at* http://www.businessinsider.com/ap-more-than-200-musicians-support-blurred-lines-appeal-2016-8.
7. *Id.; but see, e.g.*, Eriq Gardner, *Why the 'Blurred Lines' Verdict Is an Uphill Battle for Copycats*, Billboard (Mar. 13, 2015) (characterizing the jury's verdict as "hollow" and arguing that "[t]here's not much legal precedent from the jury's decision, and every reason to believe it will be a rare one"), *available at* http://www.billboard.com/articles/business/6502022/why-blurred-lines-verdict-uphill-battle-copycats.

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