IP ENSight

IP ENSight
7 March 2018

IP: will you be a player or a hater?

by Waldo Steyn

Taylor Swift has been in the IP spotlight again and, as always, there are valuable lessons to be learned.

The singer was recently sued in a US court for copyright infringement. The case was brought by two songwriters, Sean Hall and Nathan Butler, who claimed that certain lyrics that feature in Taylor Swift's song *Shake it Off* – "Cause the players gonna play, play, play / And the haters gonna hate, hate, hate, hate" – infringe their copyright in the lyrics of a song they wrote called *Playas Gon' Play* (performed by a group called JLW) – "Playas, they gonna play, and haters, they gonna hate."

The judge rejected the claim. His reasoning will be enlightening for those who are a tad out of touch with modern culture: "By 2001 American popular culture was heavily steeped in the concepts of players, haters and player-haters ... the concept of actors acting in accordance with their essential nature is not at all creative, it is banal. The alleged infringed lyrics are short phrases that lack the modicum of originality and creativity required for copyright protection."

This case raises interesting copyright issues. Copyright protects a range of so-called "works", including written works, artistic works and musical works, as well as things like computer software, sound recordings, films and broadcasts. Copyright comes into existence as soon as the work is made and, in most countries, no registration is required or even possible. As a result of an international convention, the right is for all intents and purposes worldwide. So, for example, something written in South Africa enjoys copyright throughout the world. The person who creates the work will be the owner of the copyright, although there are certain exceptions regarding employees and people who are commissioned to create certain works.

Copyright lasts for a very long time – 50 years in the case of South Africa, and even longer in certain countries. Copyright is a very powerful right – the owner has the exclusive right to exploit the work, in the sense that they can sue anyone who copies the work, or a substantial part of it, claiming an interdict (injunction) and damages. Unsurprisingly, copyright infringement claims are common in the music industry, and we've reported on various cases, including the one where Robin Thicke and Pharrell Williams were successfully sued for copyright infringement by the estate of the late Marvin Gaye – the estate had argued that the song *Blurred Lines* infringed the copyright in a song called *Got To Give It Up*, and was awarded damages of USD7.3-million.

But there's one tricky aspect of copyright that I haven't yet discussed, and it's the one that this latest case turned on – originality. It's often said that copyright is about graft rather than craft, or that it protects the "sweat of the brow." What this means is that a work, be it writing, art, music, etc doesn't need to be good or weighty in order to enjoy copyright. What it must be, however, is original, in the sense that it must have been the creator's own work. Or, to put it differently, the work must not have been copied from another source. As a result, very mundane things like catalogues and directories have been held to enjoy copyright. As have very small things, like single sentences, tweets and newspaper headlines.

Yet, despite this low threshold, there is a certain *de minimis* (minimum) requirement, in the sense that the law will not protect something that is totally banal. And that is where the songwriters' claim fell short – the judge felt that the words in question were so commonplace and banal that they simply did not meet the originality threshold that copyright law imposes.

This case reminds us that Taylor Swift really is a player when it comes to IP. She clearly understands that IP is a revenue-generator. She understands the concept of celebrity endorsement, which means that celebrities can license companies to use their names, images, signatures and catchphrases for all manner of goods or services. She understands that, in order to do this, she really should have trade mark registrations. She's famous for even registering lyrics of her songs as trade marks, such as "this sick beat", "cause we never go out of style" and "the old Taylor can't come to the phone right now."

Taylor Swift has no doubt been advised that even without trade mark registrations, she has a certain amount of legal protection because of her fame. Rihanna successfully sued UK clothing chain Topshop for passing off after the chain used a photo of her on clothing without consent, because the court was persuaded that many consumers would wrongly believe that Rihanna had endorsed the product. But this case was a close-run thing, and it would have been a lot easier if Rihanna had been able to rely on trade mark registrations.

Swift has also been very astute about avoiding reputational damage. For example, she famously registered various top-level domain names like www.taylorswift.porn and www.taylorswift.adult. She did this simply to ensure that no-one can operate porn sites under her name.

The question that celebrities need to ask themselves is this: will I be an IP player or an IP hater?

Waldo Steyn

IP | director

cell: +27 82 382 6404

info@ENSafrica.com
level 2 BBBEE rating (South Africa)