

## Knowing how to play a jury

### Maybe attorneys in *Gaye* case used old-fashioned psychology

**P**harrell Williams and Robin Thicke got to give it up to Marvin Gaye's heirs. Well, not so much "got to" as "had to," to the tune of \$7.36 million, striking a loud dissonant chord with the music industry.

Most music copyright cases settle before trial, but the dispute over whether Williams and Thicke's No. 1 hit "Blurred Lines," which earned more than \$16 million in profit, improperly infringed on the beloved Marvin Gaye song "Got To Give It Up" went to the end. The case has captivated the music industry, Hollywood and the legal community.

Some music critics applauded the ruling. They think Thicke's song is just a thin copy of Gaye's hit, while others (lawyers) mourn the blow to copyright law, and still others (musicians) lament the apparent death of all future musical creativity.

But while the verdict is highly controversial, perhaps it doesn't so much make new law as prove old truths — this may merely have been a prime-time example in which a jury ruled for the more sympathetic party. Experienced trial lawyers know that cases are won on that simple premise — likeability equals credibility.

The musical drama began when Gaye's heirs heard "Blurred Lines," a catchy tune that evoked the feeling of a 1970s party atmosphere complete with cheers and bottle clanks. Or perhaps it actually began with Thicke's 2013 *GQ* interview: "Pharrell and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye's 'Got To Give It Up.' I was like, 'Damn, we should make something like that, something with that groove.'"

Before the Gaye heirs could file suit, Thicke and Williams beat them to the punch and filed a declaratory judgment action against the heirs. The heirs counterclaimed.

The Copyright Act of 1976 grants protection to "original works of authorship fixed in a tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."

The Gaye family only had copyrights to the musical composition of "Got To Give it Up," not the sound recording (the former protects chords, melody and lyrics; the latter protects actual performance with sound engineers).

Thus, the complete songs at issue (recordings with party atmosphere) were never played for the jury.

Instead, jurors were treated to complex analyses by expert musical-



#### Everyday IP

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ogists arguing that the fundamental chords, melodies and lyrics (no party atmosphere) do or do not meet the substantially similar standard for finding infringement, as well as a live performance by Thicke in an effort to show how easily songs can be shown to sound alike.

But did the jurors actually base the verdict on sound comparison and expert analyses, or did they just find Thicke incredibly unlikeable?

The judge instructed the jury about meeting the copying standard: "the Gaye parties have the burden of proving ... the Thicke parties copied original elements from the copyrighted work" (Instruction No. 27) and "the Gaye Parties may show the Thicke parties copied from the work by showing ... that the Thicke parties had access to the Gaye parties' copyrighted work and that there are substantial similarities between the Thicke parties' work and original elements of the Gaye parties' work" (Instruction No. 28).

There was also an instruction as to believability and consideration of witness testimony: "whether other evidence contradicted the witness' testimony" and "any other factors that bear on believability" (Instruction No. 9). That instruction may have cost Thicke the case.

Thicke gave the jurors plenty of reason to doubt his credibility.

While Side A — his *GQ* interview — plainly stated his access and outright intent to copy the mood of Gaye's song, on the flip Side B, he said he did not base "Blurred Lines" on Gaye's song.

He admitted during his sworn deposition to being high on drugs and alcohol throughout the recording and promotion of the song. He also conceded he took songwriting credit, but it was Williams who created most of the song. Not a sympathetic or likeable character.

Gaye's attorney knew his subjects and his audience.

He immediately attacked the musicians' credibility in his opening.

"They will smile at you and they will be charming. Keep one thing in mind: They are professional performers."

During trial, he repeatedly reminded the jury that Thicke and Williams changed their stories. And he hammered it home in his closing: "Yes, we copied. Yes, we took it. Yes, we lied about it ... It boils down to this: Who do you believe? ... Are you going to believe Robin Thicke, who told us he's not an honest person?"

Did the jurors get it "right" regarding copying? Maybe, maybe not. But as with any jury trial, maybe they just went with what felt right.

How sweet it is ... ■

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