

MUSIC

Blurred Lines: Pharrell Williams et al v Bridgeport Music et al

ED HEEREY

I'm tipping you're reading this column, in this magazine, because you have more than a passing interest in both music and law. That being the case, let me fill you in on the biggest musical case of the twenty-first century.

In one corner: the grown-up children of the late Marvin Gaye

A true megastar of soul music, Marvin Gaye topped the charts a dozen times in the US and around the world from his first big hit in 1967, *I Heard it Through the Grapevine*, to 1982's amorous *Sexual Healing*.

But there was another very serious side to his work, epitomised by his deeply stirring 1971 protest against both the Vietnam War and the treatment of its veterans,

What's Going On? That war inspired many a protest song, but few were more disarming and effective than this. Drawing in the listener with a bongo beat and sax solo, Gaye smoothly but soulfully opens a conversation with his mother and his brother (his brother Frankie was a Vietnam vet), before explaining to his authoritarian father: "*Father, father, we don't need to escalate, you see war is not the answer, for only love can conquer hate*".

Gaye died tragically in 1984, aged 44, shot by his father after intervening in an argument between his parents.

This case concerns Gaye's No 1 hit from the summer of 1977: *Got to Give it Up*, an infectious dance hit with Gaye's falsetto vocals sitting on top of a sparse arrangement of driving percussion, a syncopated cowbell, an intermittent bass riff and background party noise.



In the other corner: Pharrell Williams and Robin Thicke

At 42 years of age, Pharrell Williams has the modern music world at his feet. He has written for, produced and performed with all the biggest names of modern popular music, from Snoop Dogg to Daft Punk, Beyonce, Justin Timberlake, Madonna, Britney Spears and many in between. He has also enjoyed several massive hits on his own, notably *Happy* which won the BBC Music Award for Song of the Year in 2014 and a Grammy in 2015. In 2015 he also won the Top R&B Artist and Top R&B Album awards at the Billboard Music Awards.

It is no exaggeration to say that Marvin Gaye and Pharrell Williams are musical giants of their respective generations.

Robin Thicke is not quite in that league. The son of two TV actors (Alan Thicke from *Growing Pains* and Gloria Loring from *Days of our Lives*), Thicke grew up in Hollywood and gradually made a name for himself as an R&B singer, with some modestly successful hits.

Thicke's career suddenly took a sky-high trajectory in 2013 with the release of *Blurred Lines*, which he recorded with Pharrell Williams. The song was a worldwide smash hit, reaching number one in over 114 countries including a record-breaking 16 weeks at the top of the US Billboard chart.

You be the judge

If you are curious to form your own "untutored" view before reading further, get onto YouTube and look up *Robin Thicke – Blurred Lines VS Marvin Gaye – Got to Give it Up* which plays snippets of each song back to back. Do they sound similar to you?

Blurred lies?

While promoting the release of *Blurred Lines*, Thicke gave a series of interviews which were central to the case brought by the Gaye family.

On 7 May 2013, Thicke said in an interview with *GQ* magazine:

“On the third day I told him I wanted to do something kinda like Marvin Gaye’s *Got to Give it Up*”

Pharrell and I were in the studio and I told him that one of my favourite 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.’ Then he started playing a little something and we literally wrote the song in about half an hour and recorded it.

Thicke also told *Billboard* magazine on 9 July 2013:

Pharrell and I were in the studio making a couple of records, and then on the third day I told him I wanted to do something kinda like Marvin Gaye’s Got to Give it Up, that kind of feel ‘cause it’s one of my favourite songs of all time. So he started messing with some drums and then he started going ‘Hey, hey hey.’ and about an hour and a half later we had the whole record finished.

Thicke made statements to similar effect in numerous other interviews in print and on television, each time identifying *Got To Give It Up* as an inspiration for *Blurred Lines*.

Perhaps unsurprisingly, in light of Thicke’s statements in the media, Williams and Thicke received a demand from the Gaye family to assign copyright ownership of *Blurred Lines*. Williams and Thicke were first to bring the matter to Court, applying on 15 August 2013 to the United States District Court for a declaration that *Blurred Lines* did not infringe copyright in *Got To Give It Up*. On 30 October 2013, the Gaye family filed a counterclaim for copyright infringement.

A feature of United States litigation is that litigants are required to attend depositions prior to trial, where they are cross-examined by opposing counsel (without interference from any pesky judge). The evidence is video-taped and transcribed.

The good folks at www.hollywoodreporter.com have seen fit to upload full copies of the

“confidential” deposition transcripts of each of Williams and Thicke. Thicke’s transcript is quite a read. Focussing on his interviews in the media, he was asked:

Q. Did you have any conversation with Pharrell Williams during or before the creation of *Blurred Lines* in which you discussed with him Marvin Gaye’s song *Got to Give It Up*?

A. No.

Q. Do you consider yourself an honest person?

A. No. That’s why I’m separated. [Thicke had recently separated from his wife.]

Q. Do you make it a habit of being dishonest when you give interviews?

A. When I do – when I give interviews, I tell whatever I want to say to help sell records.

Thicke was taken to the above extract from his interview with *GQ* magazine:

Q. Is that statement true?

A. No.

Q. Why did you say it if it is not true?

A. Because after making six albums that I wrote and produced myself, the biggest hit of my career was written and produced by somebody else and I was jealous and I wanted some of the credit.

Q. . . . So it is your testimony that neither before the creation of *Blurred Lines* nor during the process did you and Pharrell discuss in any way, shape or form the song *Got to Give It Up*?

A. No.

Q. It is correct? What I just said is correct?

A. Yes, what you said is correct, that him and I did not discuss it. I tried to take credit for it later because he wrote the whole thing pretty much by himself and I was envious of that.

...

I was high on vicodin and alcohol when I showed up at the studio.

So my recollection is when we made the song, I thought I wanted – I – I wanted to be more involved than I actually was by the time, nine months later, it became a huge hit and I wanted credit.

So I started kind of convincing myself that I was a little more part of it than I was and I – because I didn't want him – I wanted some credit for this big hit.

But the reality is, is that Pharrell had the beat and he wrote almost every single part of the song.

... I offered no ideas to connect to anything to Marvin Gaye.

Q. *You didn't offer any ideas at all; right?*

A. *No, not really.*

When asked why he said he came up with the elaborate story about Marvin Gaye, Thicke deposed:

... I thought it would sell records.

I thought that it being my song – my idea would make it more personal because my music has always been so personal, that this was the first time I had a song out that wasn't personal and had nothing to do with me, and yet it was my biggest successful, which, you know, was very tough for me.

And so I lied in my story so I could at least make it seem like, hey, I'm the guy who came up with this great idea. And you know what? I didn't even use the Marvin Gaye thing until everyone started saying to me, "Hey, it's reminiscent of the Marvin Gaye song." And I was like, "Well, yeah, that was my idea. I wanted to do something like that." There was no other way for me to get credit for this biggest song of the year unless it was my idea.

Q. *Which none of it was?*

A. *Which none of it was my idea.*

Thicke was also taken to the above extract of his interview with *Billboard*

magazine and deposed that it was not true. He added: *"with all due respect, I was high and drunk every time I did an interview last year."* He also said that he was drunk and on vicodin when he appeared on *Oprah* to promote the song, but confirmed that he was not drunk or on any drugs during his deposition. (Vicodin is a combination opioid narcotic and analgesic prescription drug.)

When it was put to him that he did not appear either drunk or on vicodin in his video interviews, he said:

A. *Every day I woke up, I would take a vicodin to start the day and then I would fill up a water bottle with vodka and drink it before and during my interviews.*

During Williams' deposition he was asked if he had ever owned any version of the song *Got To Give It Up*, to which he said *"Believe it or not, no, I don't have it, but my aunt used to play it all the time."*

Williams confirmed that the song was written and recorded in about an hour and a half.

When asked to explain Thicke's interviews in the media, Williams said:

He is also a friend of mine, right, and this is public record. At the end of the day, he's a friend of mine and I'm not trying to, you know, belittle his character in any way, shape or form.

But this is what happens every day in our industry. You know, people are made to look like they have much more authorship in the situation than they actually do. So that's where the embellishment comes in.

Williams said *"Cowbell's been a staple in my production for about like 20 years."* However, when pressed, he could only identify three songs in which he had ever used a cowbell.

Williams denied that he and Thicke ever discussed Marvin Gaye's song *Got To Give It Up* any time during the making of the song *Blurred Lines*. But he was then taken to a media interview where he said:

And just for a bit of humor, the percussion that I use in Blurred Lines, aside from the music notation being completely different – completely different – the sheet music is available online, by the way, but the percussion – I was trying to pretend that I was Marvin Gaye and what would he do, had he went down to Nashville and did a record with pentatonic harmonies and more of a bluegrass chord structure.

Williams was asked:

Q: *Hold on. When you were creating Blurred Lines, were you trying to pretend that you were Marvin Gaye?*

A: *At that particular time, no, but as I look back, I feel that feeling.*

Williams confirmed that he played all the instruments in *Blurred Lines* and wrote all the vocal melodies, and all that Thicke did was ask for the second verse to be sung in falsetto.

When asked why Thicke had any ownership in the song and why Williams agreed to give up a percentage of the song, Williams said:

It's something that ... just happens in our business. Did he write a specific line? No. Did he ask that we sing high on the second verse? Yes. Did he give a basic demonstration of what that might be? Yes. But I wrote that second verse as well.

Q. *Do you know if he got 50 percent of the song?*

A. *No, I'm not that generous.*

At the very least, it was clear that Williams (and Thicke, to the extent that he created *Blurred Lines* at all) had knowledge of Gaye's *Got To Give It Up*, such that they could not avoid infringement on the basis that they created *Blurred Lines* independently of any knowledge of Gaye's song. But reference to the prior work is only one part of copyright infringement. It is also necessary (both in the United States and Australia) to demonstrate that the two works have sufficient objective similarity, such that the later work is truly a copy of the earlier work.

Battle of the musicologists

Each side called their own expert musicologists to give opinion evidence as to whether *Blurred Lines* was “substantially similar” to *Got To Give It Up*.

The Gaye family relied on Judith Finell, who identified “a constellation of eight substantially similar features” in the two songs, namely:

- (1.) the signature phrase: in *Blurred Lines* sung to the lyrics “And that’s why I’m gon’ take a good girl”; in *Got To Give It Up* sung to the lyrics “I used to go out to parties”;
- (2.) the vocal hook: in *Blurred Lines* sung to “take a good girl”, in *Got To Give It Up* sung to “keep on dancin’.”
- (3.) the backup vocal hook: in *Blurred Lines* sung to “good girl” and in “*Got To Give It Up*” to “keep on dancin’”.
- (4.) the “core theme” of each song: comparing the verse in *Blurred Lines* to the backup hook in *Got To Give It Up*;
- (5.) the backup hooks: “hey, hey, hey” in *Blurred Lines* and “dancin’ lady” in *Got To Give It Up*;
- (6.) the bass melodies, including an intermittent descending melody;
- (7.) the keyboard parts, with chords in rhythms emphasizing the offbeats, with shared pitches and rhythmic feature;
- (8.) unusual percussion choices, particularly a syncopated cowbell part and an open hi-hat.

Ms Finell also noted that both songs use distinctive falsetto vocals, both deviate from the norm by omitting a guitar and both contain party noises throughout the song.

Ms Finell concluded that the similarities between the songs “surpass the similarities that result from their shared genre, and are the result of many of the same deliberate creative choices made by their respective composers. Consequently,



Pharrell Williams

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rather than merely resembling one another stylistically, these two works sound substantially similar in many of their most distinctive features.”

Williams and Thicke relied on the report of another musicologist, Sandy Wilbur, who prepared a 55-page declaration containing a comparative analysis of the two songs. She found no substantial similarity between the melodies, rhythms, harmonies, structures and lyrics of the two songs and concluded that the songs were not substantially similar. She critiqued Ms Finell’s report, noting that “there are no two consecutive notes in any of the melodic examples in the Finell Report that have the same pitch, the same duration, and the same placement in the measure.” She also opined that many of the purported similarities are unoriginal,

and rather they comprise “the basic building blocks of musical composition that are present, if not inevitable, in many songs” or were found in prior art including *Low Rider*, *Superfly* and *Funkytown*.

The Gaye family also adduced a 30 page declaration from Professor Ingrid Monson, who carries the imposing title of the Quincy Jones Professor of African American Music at Harvard University. Professor Monson found at least seven similarities between the two songs and that the similarities were so pronounced that “direct copying” seemed likely.

Trial by jury

Williams and Thicke unsuccessfully applied for summary judgment, which was denied by Federal District

“Perhaps more than most, modern popular music is notoriously derivative.”

Court Justice John Kronstadt, who ruled on 30 October 2014 that there were genuine issues of material fact as to the “*extrinsic similarity*” of the two songs, and that the “*intrinsic similarity*” is a jury question.

A jury trial commenced in Los Angeles on 24 February 2015 and ran for seven days.

In a significant set-back for the Gaye family, the judge ruled prior to trial that the jury could not be played the full version of *Got To Give It Up* as recorded and published in 1977. Rather, because of the relevant legislation which applied at that time, the relevant copyright work was limited to the sheet music composition as noted on paper on file at the United States Library of Congress. At a late stage they were allowed to introduce recordings that were supposedly stripped of non-copyrighted elements. (To this extent, the jury did not hear precisely the same version of *Got To Give It Up* that you will hear in the YouTube link referred to above. In particular it is not clear from the available reports how much the recordings played to the jury lacked the full percussion parts you will hear in the commercially released version of *Got To Give It Up*.)

The jury selection process included an unusual question for each potential juror: whether they were offended by the music video for *Blurred Lines*, which featured bare-chested, nearly nude women. Some responded that they couldn't remain impartial and were dismissed. Other questions in the selection process included whether prospective jurors played a musical instrument or could read music, whether they knew Williams' work and liked it (Thicke's repertoire was not addressed) and whether they could judge celebrities fairly. Five women and three men finally passed this selection process.

In his opening to the jury, the Gaye family's attorney focused

on the inconsistency between the depositions of Thicke and Williams and their earlier interviews in the media to promote *Blurred Lines* in which they cited Gaye's song as their inspiration. He cautioned jurors about the oral evidence of Williams and Thicke: “*They will smile at you and they will be charming. Keep one thing in mind: They are professional performers.*”

The attorney for Williams and Thicke told the jury “*We're going to show you what you already know: that no one owns a genre or a style or a groove. To be inspired by Marvin Gaye is an honorable thing.*”

The jury was treated to rare details of the financial dividends of *Blurred Lines*, which earned US\$5.6 million for Thicke, US\$5.2 million for Williams and another US\$5-6 million for the record company, as well as an additional US\$8 million in publishing revenue.

The attorney for Williams and Thicke told jurors that there was more at stake than the millions in profits: “*This affects the creativity of young musicians who hope to stand on the shoulders of other musicians. Let my clients go forth and continue to do their magic.*”

Gaye's widow testified that when the family heard *Blurred Lines* they praised it and tweeted out a thanks to Williams and Thicke thinking that the duo had paid a licensing fee for the use of *Got to Give It Up*. The family learned later that no permission for use had been requested.

The jury was shown videos of the depositions of Thicke and Williams. Before the jury, Thicke repeated his claim that he was high on Vicodin and drunk during each of the media interviews where he identified Gaye's song as the inspiration for *Blurred Lines*. He was allowed to demonstrate on a keyboard how songs can have similar chord structures, comparing U2's *With Or Without You* to Youth Group's *Forever Young* and Michael

Jackson's *Man in the Middle* to the Beatles' *Let It Be*.

The jury deliberated for two days and delivered its verdict on 10 March 2015, finding infringement of copyright and awarding nearly US\$7.4 million to the Gaye family. On 14 July 2015, Kronstadt J ruled on several post-trial motions, with the result that the damages award was reduced to US\$5.3 million.

An appeal is pending.

My humble thoughts

When I first heard about the case in the news, I decided to conduct my own trial by jury. I arrived home to find a suitable jury of two 10 year olds, an 8 year old and a 5 year old all busily enjoying Friday night spag-bol. Suspecting (correctly) that they already knew *Blurred Lines* very well from its high exposure in recent years, I played them *Got To Give It Up* and asked if they could identify it. Within seconds of hearing the opening rhythm, one of the 10 year olds immediately stated that it was *Blurred Lines*.

A curious feature of this case is that the similarities between the songs are primarily rhythmic and structural rather than melodic. Lyrically they are entirely different. But there is no reason why melody and lyrics ought to be more important than rhythm and structure. After all, this is dance music.

How would the case fare in Australia? For better or worse, in our system cases such as these are determined by judges not juries, but they remain highly subjective and impressionistic. Copying a small but important part of a work can be enough to make out infringement. My money would be on the Gaye family.

But is it fair to monopolise a groove? Like many artforms, perhaps more than most, modern popular music is notoriously derivative. As Keith Richards said about Chuck Berry, “*I lifted every lick he ever played.*” The line between copying a style and copying a song will always be blurred. ■