# Copyright Trial Defense Tips From 'Thinking Out Loud' Case

By **Jonathan Phillips and Latrice Burks** (July 17, 2023)

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It's no surprise that musicians around the world are rattled after watching Robin Thicke in 2015[1] and now Ed Sheeran take the stand to defend their respective musical compositions.[2]

Sheeran was accused in Kathryn Griffin v. Ed Sheeran of copying the building blocks of Marvin Gaye's classic "Let's Get It On" in his song, "Thinking Out Loud."

Days before the jury returned its verdict in May, Sheeran threatened to leave the music industry entirely if he lost his trial in the U.S. District Court for the Southern District of New York, demonstrating how stifled even the most successful musicians feel when it comes to creating new music in the shadow of copyright infringement claims.[3]

The good news is that musicians like Sheeran and their counsel need not panic, as there are specific steps that all songwriters and record labels can and should take when forced to defend against a copyright claim.

In this article, we address some of the successful strategies deployed by Sheeran's legal team in the "Thinking Out Loud" trial, and provide three concrete ways attorneys working with artists can position themselves to replicate that success.

**Have Your Day in Court — Why Musicians Should Take the Stand**

The "Thinking Out Loud" trial revealed that there is strength in a musician's testimony in combating a copyright claim. Taking the stand gives musicians an opportunity to speak truth to power.

While on the stand, an artist can explain to the jury the creative songwriting process. Most laypersons simply are not going to understand the depth and layers of an artist's creative songwriting process.

They are not going to understand the difference between legitimately allowing songwriting to be influenced by genres, styles and even specific songs — a hallmark of great songwriting, from Mozart to Muse — versus illegally copying someone else's work. Moreover, while expert testimony on these issues is obviously beneficial, it is inherently limited.

For one thing, in a battle of experts, the songwriter has an opportunity to break a tie as not only another expert, but the only expert who actually knows what went into writing the song at issue.

Furthermore, in taking the stand, the songwriter has an opportunity to offer the jury something the expert witness cannot — their intentions in writing the song the way they did. While intent is not an element of a copyright claim or defense, it most certainly is

important to a jury.

Thus, if the accusation of copyright infringement is meritless, there is enormous value in having the jury hear as much from the artist's own mouth.

The underlying benefit is simple: A songwriter's trial testimony reveals what exactly they do and how the process works, and provides the songwriter with an opportunity to portray themselves to the jury as a creative artist — and not as an idea thief. This approach led to a favorable verdict in Sheeran's case on May 4.

By playing guitar on the stand and talking directly to the jury, Sheeran made himself vulnerable, bringing the jury into the creative embryos of the "Thinking Out Loud" song — an intimate space — and ultimately helping demonstrate that the plaintiff could not establish the necessary elements of a copyright infringement claim.

So go on; have your day in court.

**Be Honest and Keep the Story Straight**

Honesty remains the best policy, and the "Thinking Out Loud" trial confirms this elementary premise. Sheeran never denied that "Thinking Out Loud" and "Let's Get It On" sound similar.

Instead, his defense was twofold: The chord progressions used in the two songs are not identical, and even if the chords were identical, they have been used numerous times before in other popular songs.

Sheeran's team never deviated from this narrative, which ultimately contributed to his trial success by bolstering his credibility. We often tell clients before they take the stand that we can deal with bad facts — it's our job to present a compelling story to the jury that convinces them to find in our client's favor despite the bad facts.

But once a client loses credibility, they lose the jury. There is no question, even to a layperson juror, that Gaye's "Let's Get It On" and Sheeran's "Thinking Out Loud" sound similar.

Instead of denying this, Sheeran was honest about — and even embraced — the similarities between the songs, playing portions of both for the jury.

Sheeran then used that to explain his creative thought process and demonstrate why the similarities in sound did not equate to infringement. Being honest worked.

**Avoid Blurring the Lines of Your Story**

A contrary lesson can be learned from Thicke's 2015 trial testimony in the U.S. District Court for the Central District of California that addressed copyright infringement claims brought by Gaye's estate in Pharrell Williams v. Bridgeport Music Inc.

During promotional interviews for his new album, Thicke was open about the influence of "Got to Give It Up" on his new song, "Blurred Lines."

Indeed, in an infamous GQ interview, Thicke acknowledged in 2013 that he and Williams essentially channeled the zeitgeist of Gaye when they wrote the hit song.[4]

One interviewer even referred to "Blurred Lines" as "Got to Give It Up, Part II" — a statement with which Thicke agreed during his deposition.[5] But when he took the stand at trial, Thicke sang a different tune. Thicke was confronted with the statements he had previously made to the media.

Rather than acknowledge the similarities between "Blurred Lines" and "Got to Give It Up," Thicke attempted to walk back those previous statements, claiming that he had not meant them, and was drunk and high for all the promotional interviews.

In doing so, Thicke blurred the lines of his story — and likely lost the jury. After a seven-day trial, the jury found that Thicke and Williams infringed on Gaye's copyright associated with "Got to Give It Up." The lesson? Never underestimate the importance of honesty and consistency when trying to win over a jury.

**Don't Forget the Policy Argument**

In law school, we are taught catchy one-liners — like, "Where do we draw the line?" — when learning about the role public policy plays in both enacting laws and enforcing them.

In practice, it is all too easy to become hyper-focused on just the facts and the elements of the claims. However, when defending against a copyright infringement claim, attorneys working with artists should keep policy implications in mind.

As with the songwriter's intent, how a verdict might affect society will not be found in the jury instructions. But it matters. Sometimes, lawyers serve as society's legal oracles, tasked with identifying potential unintended consequences and harm to judicial economy — before it's too late. This approach was used in Sheeran's defense.

Specifically, Sheeran and his attorney made policy arguments as to why losing his case would hurt all musicians, explaining that "we might as well say goodbye to the creative freedom of songwriters."[6]

Essentially, they pointed out that because there are only a certain number of chords available in a musician's toolbox, some songs are bound to sound similar.

So, where do we draw the line? If standard chord progressions could be copyrighted, then we would find millions of songs in violation of copyright law. This is not the creative world anyone wants to live in — and Sheeran's team made sure the jury understood that.

**Why Musicians Should Be Proactive**

The "Thinking Out Loud" trial undoubtedly shaped the future of copyright infringement litigation, restoring some optimism that musicians can draw on the influences of the past without crossing the line into infringement. But the threat of being sued for copyright infringement will never disappear.

While the lessons outlined in this article can help a songwriter's legal team develop a successful defense strategy at trial, there are also some proactive measures artists and record labels can utilize to put themselves in the best position for that strategy to succeed — or hopefully to avoid litigation altogether.

First, because intent matters to the jury, musicians should make sure they are educated on

what would cross the line and what wouldn't. While musicians are, understandably, primarily focused on their own creative expression, they should understand how much, and what elements, of a song can — and cannot — be similar to any particular musical inspiration.

This will allow them to be intentional in not crossing the line, which in turn will put them in a better position to demonstrate to a jury — as Sheeran did — the difference between sounding similar and copying, i.e., the line between influence and infringement.

Second, whenever there is a concern that a song sounds too similar to something else, musicians and record labels should consult with attorneys with musical expertise before a song is released.

Understanding the degree of risk that a song will draw a copyright infringement claim, and the likelihood of such a claim being successful, will allow the songwriter to consider making changes before it is too late.

Or, if the songwriter does not want to change anything, they can consider reaching out to the other artist and negotiate a noncollaborative songwriting credit. Failure to address the issue until after a song is released can be costly, both monetarily and reputationally.

In short, the message to songwriters and their counsel is simple: Don't be afraid, be smart. Understand the risks inherent in the songwriting process and be proactive in minimizing those risks.

Then, if despite doing everything right, you still face a copyright infringement claim, you will be in the best position to follow Sheeran's example and successfully defend your creativity and artistry at trial. Happy songwriting!

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[1] Pharrell Williams et al v. Bridgeport Music Inc et al, Case No. 2:13-cv-06004, United States District Court for the Central District of California, Decision Date: Mar. 10, 2015.

[2] Structured Asset Sales LLC v. Sheeran et al, Case No. 1:18-cv-05839, United States District Court for the Southern District of New York, Decision Date: May 16, 2023.

[3] "Ed Sheeran Testified That He Will Quit Music If He Loses Copyright Case," NowThis News, May 3, 2023. https://nowthisnews.com/news/ed-sheeran-testified-that-he-will-quit-music-if-he-loses-copyright-case.

[4] "Robin Thicke on that banned video, collaborating with 2 Chainz and Kendrick Lamar, and his new film," Stelios Phili, GQ, May 6, 2013. https://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy.

[5] "Robin Thicke takes the stand, plays keyboard in court during 'Blurred Lines' trial," ABC

7 News, Feb. 26, 2015. https://abc7.com/robin-thicke-pharrell-williams-blurred-lines-trial-tobin-willliams-copyright/535538/.

[6] "Ed Sheeran wins copyright case and claims that if he had lost "we might as well say goodbye to the creative freedom of songwriters," Ben Rogerson, MusicRadar, May 4, 2023. https://www.musicradar.com/news/ed-sheeran-lets-get-it-on-verdict.