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Litigation + Dispute Resolution

Ed Sheeran's Copyright Victory: A Win for Songwriters?

The Bottom Line

- The *Sheeran* trial was a win for an individual songwriter, but the long road to victory underscores how difficult it can be for an artist to defeat a copyright claim based on similarities arising from the use of commonplace musical "building blocks."
- Music producers and composers still lack clarity as to when the shared use of stylistic elements of a particular genre crosses the line from homage to infringement.

Acclaimed singer-songwriter Ed Sheeran recently took the witness stand in a New York City courtroom, where he sang, strummed his guitar and persuaded a jury that his 2014 hit *Thinking Out Loud* did not infringe the copyright in Marvin Gaye's 1973 classic, *Let's Get It On*. A victory for Sheeran and his fans, no doubt (he testified, perhaps with a bit of hyperbole, that he would quit music entirely if he were to lose at trial).

But was Sheeran's triumph also a win for songwriters generally? Maybe — but a minor one, at best.

Sheeran's Testimony Strikes a Chord with Jury

Listen to *Thinking Out Loud* and *Let's Get It On* – or even better, watch one of the videos that compare the songs – and you'll hear why the lawsuit, brought by the family of Gaye's co-author, had at least a surface appeal. Although the vocal melodies are quite different, the two tracks are similar in their chord progressions, tempos, drumbeats, bass lines and overall feel. So similar that, upon transposing them to the same key, they can be layered fairly seamlessly on top of one another. And at trial, the plaintiffs played what they hoped would be a "smoking gun" – a concert video in which Sheeran himself played a mashup where he moved smoothly back and forth between the two songs.

But commentators, songwriters and Sheeran himself clapped back and insisted that the songs' similarities arose from common musical "building blocks" that are not protectable under copyright law. Indeed, much of the similarity flows from the performance of the songs as soul ballads. Just as there are many similarities between *Johnny B. Goode, Hound Dog* and countless other rock songs that employ a 12-bar blues structure and style, similarities also naturally arise among songs like *Thinking Out Loud* and *Let's Get It On* because of their shared soul ballad *style* – a style of music that cannot be copyrighted. To illustrate the point, listen, for example, to singer-songwriter Van Morrison's soul ballad *Crazy Love*. Much of the similarity between *Let's Get It On* and *Thinking Out Loud* is also found in *Crazy Love* – which was released in 1970, three years before *Let's Get It On* – and, in fact, *Thinking Out Loud's* melody is closer to *Crazy Love* than to *Let's Get It On*. That doesn't mean Van Morrison should sue both Gaye and Sheeran; it just means that all three songs are performed in the same unprotectable style.

As it turned out, Sheeran didn't have to address several stylistic similarities between the recordings that could potentially have swayed the jury for Gaye's co-author because the jury wasn't allowed to hear Gaye's recording of *Let's Get It On*. For technical reasons relating to how musical compositions (the words and music underlying the recordings) were registered with the U.S. Copyright Office in the early 1970s, the jury was limited to reviewing the sheet music of *Let's Get It On* filed in the Copyright Office – which lacked notable elements of the recording – and a computer-generated recording based on that sheet music. As a result, the trial focused heavily on the works' similar chord progressions and related elements. And as Sheeran testified and reiterated afterward, those elements are merely "a songwriter's alphabet – our toolkit."

"Nobody owns them 'in the same way nobody owns the color blue,'" Sheeran said. As for the "smoking gun," Sheeran testified that "most pop songs can fit over most pop songs," a point Sheeran's team emphasized by playing a well-known video in which dozens of pop songs with similar or identical chord progressions are played one after another as if they were a single song.

Artists Face the Music

Sheeran's live testimony (and performance) obviously swayed the jury, and the Sheeran case is just the latest in a string of suits in which famous recording artists have gone to trial to defend against infringement claims. In each case, the question was whether the works were only similar as to unprotectable musical "*ideas*" or whether a combination of those ideas amounted to protectable *expression* under copyright law.

In fact, another case involving Gaye may have helped open the floodgates. In a controversial 2015 decision, an appeals court affirmed a multi-million-dollar jury verdict finding that Robin Thicke and Pharrell Williams infringed Gaye's *Got to Give It Up* with their composition and

recording of *Blurred Lines*. Although the songs there had shared elements, including similarities regarding instrumentation, drumbeats and use of falsetto singing – indeed, *Blurred Lines* was intended as an homage to *Got to Give It Up* – the harmonies and vocal melodies had many differences. The case ultimately left unanswered the question of what combination of otherwise unprotectable musical elements tipped the scales from homage to infringement. Accordingly, musicians, commentators and a stinging dissent criticized the *Blurred Lines* decision for, at bottom, granting copyright protection to an unprotectable style or groove.

Courts Change Their Tune

Since then, several cases, including Sheeran's, have gone the other way, finding that plaintiffs had shown insufficient similarity of *protectable* elements. In 2020, the U.S. Ninth Circuit Court of Appeals upheld a jury verdict finding that Led Zeppelin's *Stairway to Heaven* did not infringe the song *Taurus* by the band Spirit. Last year, the Ninth Circuit affirmed a lower court's decision to reverse a jury verdict against Katy Perry on the grounds that *Dark Horse*, the song about which she was sued, was only similar to the plaintiff's song with respect to commonplace, unprotectable musical building blocks.

Although Sheeran is undoubtedly pleased with the trial's outcome, the reality is that, like several other well-known artists, he had to go through the significant expense and inconvenience of a public trial to vindicate his rights. What if Sheeran had been a less persuasive witness? What if the plaintiff was permitted to play the actual recording of *Let's Get It On* for the jury? The result may well have been different, and who knows what might have happened on appeal since the similarities between *Thinking Out Loud* and *Let's Get It On* are arguably just as compelling as the shared elements that apparently supported the jury verdict in *Blurred Lines*.

The problem – as Sheeran himself stressed – is that pop songs rely on a relatively limited number of commonplace building blocks, and copyright law jurisprudence currently does not seem to provide an effective means to determine before trial what combination of otherwise unprotectable elements associated with a particular style becomes protectable under the law. Stated another way: it remains decidedly unclear when the shared use of stylistic elements of a particular genre crosses the line from inspiration to infringement. As a result, seemingly meritless infringement claims based on commonplace musical elements have been permitted to proceed to trial.

Unless and until a more effective system of weeding out baseless infringement claims is developed – and it's not clear whether such a regime is even possible – well-known songwriters and recording artists will remain at risk of having to go all the way to trial to defend their work. On the flip side, music producers and composers who seek to emulate the "groove," "feel," or

"sound" of well-known songs, including composers commissioned by advertisers to create music inspired by others, will need to tread very carefully when incorporating elements of a particular style or genre into their work because of lack of clarity about where the line is drawn between original musical expression and infringement.

The case is *Kathryn Townsend Griffin et al. v. Edward Christopher Sheeran, p/k/a Ed Sheeran et al.*, (S.D.N.Y.) 1:17-cv-05221-LLS.

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