

Let's Not Get It On: Battle of the Greatest Hits

Article By:

Kavya Rallabhandi

The US Court of Appeals for the Second Circuit affirmed a district court ruling that Ed Sheeran's 2014 hit "Thinking Out Loud" does not infringe the copyright on Marvin Gaye's 1973 classic "Let's Get It On." *Structured Asset Sales, LLC v. Sheeran*, Case No. 23-905 (2d Cir. Nov. 1, 2024) (Calabresi, Parker, **Park**, JJ.)

In 1973, Ed Townsend and Marvin Gaye wrote the Motown hit "Let's Get It On." Townsend subsequently registered a copyright for the song's melody, harmony, rhythm, and lyrics by sending the deposit copy of sheet music to the US Copyright Office. Townsend, Gaye, and Motown Records each held a one-third share in the copyright. Structured Asset Sales (SAS) purchases royalty interests from musical copyright holders, securitizes them, and sells the securities to other investors. SAS owns a one-ninth interest in the royalties from "Let's Get It On." Townsend's remaining two-ninths share in the copyright is split between Kathryn Griffin, Helen McDonald, and the estate of Cherrigale Townsend.

In 2014 Ed Sheeran and Amy Wadge wrote the global chart-topper and Grammy-award-winning song "Thinking Out Loud." In 2018, SAS brought a copyright infringement suit against Sheeran, Wadge, and various entities that produced, licensed, and distributed "Thinking Out Loud" (collectively, Sheeran). SAS alleged similarities in harmonies, drums, bass lines, tempos, and chord progression combined with anticipation (harmonic rhythm). SAS's lawsuit followed the Griffin/McDonald/estate of Cherrigale Townsend's 2017 lawsuit against Sheeran (*Griffin* lawsuit) alleging materially similar claims.

The district court determined that SAS's infringement claim was limited to the scope of Townsend's registration as reflected in the deposit copy (*i.e.*, the sheet music) and excluded the sound recording of "Let's Get It On." As evidence that the songs were similar, SAS's expert witness testified that the "Let's Get It On" deposit copy included an inferred bass line that matched the bass line in Gaye's sound recording of "Let's Get It On" and the bass line in "Thinking Out Loud." The district court rejected this testimony, concluding that "copyright law protects only that which is literally expressed, not that which might be inferred or possibly derived from what is expressed."

The district court then denied Sheeran's two motions for summary judgment without prejudice, determining that whether chord progression and harmonic rhythm in "Let's Get It On" demonstrated sufficient originality and creativity to warrant copyright protection was a factual question to be determined at trial. Sheeran filed a motion for reconsideration. After the jury in the *Griffin* lawsuit

found that Sheeran did not infringe the “Let’s Get It On” copyright, the district court granted Sheeran’s motion for reconsideration and concluded that “[t]here is no genuine issue of material fact as to whether defendants infringed the protected elements of [‘Let’s Get It On’]. The answer is that they did not.” SAS appealed.

SAS argued that the district court erred in limiting the evidence SAS could present to support its infringement claim and in granting summary judgment in favor of Sheeran. The Second Circuit rejected both arguments.

The Second Circuit explained that excluding the audio recording of “Let’s Get It On” was not error because the 1909 Copyright Act protects only what was submitted to the Copyright Office at the time of registration. Material and elements not appearing in the deposited sheet music are not registered and are thus irrelevant to an action alleging infringement of the registered work. Viewing solely the deposited sheet music, the Second Circuit affirmed the district court’s exclusion of the audio recording in the present action and expert testimony regarding the inferred bass line in the deposit copy.

The Second Circuit also affirmed the district court’s summary judgment ruling because “[t]he four-chord progression at issue – ubiquitous in pop music – even coupled with a syncopated harmonic rhythm, is too well-explored to meet the originality threshold that copyright law demands.” The Court stated that no jury could find that (taken as a whole) “Let’s Get It On” and “Thinking Out Loud” are substantially similar because of differences in the melody and lyrics.

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