Cassels

Manhattan Jury Finds That Ed Sheeran Did Not Copy Marvin Gaye's 'Let's Get It On'

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On May 4, 2023, Ed Sheeran won his years-long copyright dispute with the heirs of Ed Townsend, who co-wrote the 1973 hit, *Let's Get It On*. A jury determined that Sheeran's Grammy award-winning song, *Thinking Out Loud*, did not infringe Marvin Gaye's soul classic.

The Townsend heirs argued that Sheeran and his co-writer knowingly plagiarized the song's iconic four-chord sequence. Their musicologists asserted that 70% of *Thinking Out Loud* is derived from *Let's Get it On* and that the melodic, harmonic, and rhythmic compositions of *Thinking Out Loud* were substantially similar to the drum composition from *Let's Get it On.*

Sheeran vehemently denied copying the song, threatening to quit making music if he was found liable for infringement. He testified that *Thinking Out Loud* was entirely his own creation and, supported by the evidence from his musicologists, that both songs use a common chord progression in pop music.

Early in the trial, lawyers for Townsend's heirs showed the jury a concert video of Sheeran singing a mashup of both songs. Characterized as both a "confession" and "smoking gun" by Townsend's heirs, Sheeran denied that the video proved anything. Sheeran testified that most pop songs fit over most pop songs and that he would have to be an "idiot" to perform that mashup on stage if he had plagiarized Marvin Gaye's hit.

After only three hours of deliberations, the jury found that Sheeran independently created *Thinking Out Loud* and did not infringe the copyright in *Let's Get It On*.

Interestingly, the increasing prevalence of expert evidence in music infringement cases is a relatively recent phenomenon. Until the 1950s, those cases were determined by the impressions left on the untrained ears of listeners. While a Canadian court has yet to have the occasion to determine a famous copyright infringement case, it is likely that expert evidence would similarly be required to make any determination.

It is fairly unlikely that any such future case in Canada would be brought in front of a jury, though. In *Henni v Food Network Canada Inc.,* the British Columbia Supreme Court struck a jury notice in a copyright infringement case. The court found that copyright infringement actions are generally unsuitable for jury trials because they require nuanced factual findings and complex legal analysis. The court held that it would be "exceptionally difficult" to instruct a jury on the nuances of copyright analysis and expect them to apply

those instructions correctly. Furthermore, the vast majority of copyright infringement cases are heard in the Federal Court, where jury trials are not available at all.

If such a case was brought in Canada, the central question would be whether a “substantial part” of the work has been reproduced. In *Cinar*, the Supreme Court of Canada observed that substantial part is a flexible notion and a matter of fact and degree, decided by its quality rather than its quantity. Liability for copyright infringement can be avoided by proving independent creation or that the defendant had no access to the work. However, with the development of modern technology, it is harder now than ever to deny access to a copyrighted work—particularly one with the world-wide popularity of *Let’s Get it On.*

Artists seeking to protect their works from copyright infringement claims should consider documenting their creative process. As US District Court Judge Louis Stanton told the jury in Sheeran’s case, “independent creation is a complete defense, no matter how similar that song is.” Artists should be equipped with evidence to show that, despite any similarities to another musical work, their work was the result of an independent exercise of skill and judgment.
