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Appeal Filed by STRUCTURED ASSET SALES, LLC v. SHEERAN, 2nd Cir., June 16, 2023

2023 WL 3475524
United States District Court, S.D. New York.

STRUCTURED ASSET SALES, LLC, Plaintiff,
v.
Edward Christopher SHEERAN, p/k/a Ed Sheeran, SONY/ATV Music Publishing, LLC, Atlantic Recording Corporation d/b/a Atlantic Records, BDi Music Ltd., Bucks Music Group Ltd., the Royalty Network, Inc., David Platz Music (USA) Inc., Amy Wadge, Jake Gosling and Does 1 Through 10, Defendants.

18 Civ. 5839 (LLS)
|
Signed May 16, 2023

Synopsis
Background: Limited liability company (LLC) with an 11.11% interest in right to receive royalties from copyrighted sheet music of the song "Let's Get It On" brought action against the co-authors, producer, publishers, and distributors of allegedly infringing song "Thinking Out Loud." The District Court, Louis L. Stanton, J., 2022 WL 4544479, denied defendants' renewed motion for summary judgment. Defendants moved for reconsideration.

Holdings: The District Court, Stanton, J., held that:

[1] reconsideration was warranted to prevent manifest injustice, and

[2] combination of chord progression and harmonic rhythm in "Let's Get It On" was too commonplace to merit copyright protection, precluding finding of infringement.

Motion granted; complaint dismissed.

West Headnotes (25)

[1] **Federal Civil Procedure** Power of court
Under rule governing judgment on multiple claims, a court has the inherent power to reconsider any of its decisions prior to the entry of a final judgment adjudicating all claims at issue. Fed. R. Civ. P. 54(b).

[2] **Federal Civil Procedure** Extraordinary remedy; motion not favored
A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality.

[3] **Federal Civil Procedure** Grounds and Factors
Reconsideration is warranted where there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

[4] **Federal Civil Procedure** Discretion of court
The decision as to whether to grant a motion for reconsideration lies squarely within the court's discretion.

[5] **Copyrights and Intellectual Property** Copying
Copyrights and Intellectual Property Substantial similarity in general
To establish claim of copyright infringement, plaintiff with valid copyright must demonstrate that: (1) defendant has actually copied plaintiff's work, and (2) copying is illegal because substantial similarity exists between defendant's work and protectable elements of plaintiff's.

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[6] **Copyrights and Intellectual Property** Copying, access, and similarity

Court can decide as matter of law that there is no substantial similarity between works because similarity between two works concerns only noncopyrightable elements of plaintiff's work.

[7] **Copyrights and Intellectual Property** Viewpoint for making comparison; "ordinary observer" test

Test for substantial similarity, as an element of copyright infringement, in music infringement cases is whether plaintiff can prove that defendant took from plaintiff's works so much of what is pleasing to ears of lay listeners, who comprise audience for whom such music is composed, that defendant wrongfully appropriated something which belongs to plaintiff.

[8] **Copyrights and Intellectual Property** Similarity

When a song's aesthetic appeal is due largely to unprotectable elements, court's analysis of substantial similarity, as an element of copyright infringement, must be more discerning, and ignore those aspects of the work that are unprotectable lest courts conflate mere copying with wrongful copying.

[9] **Copyrights and Intellectual Property** "Total concept and feel" test

Copyrights and Intellectual Property Similarity

In determining substantial similarity, as an element of copyright infringement, in a music infringement case, court is not required to compare only those elements that are themselves copyrightable; instead, court is principally guided by comparing the contested work's total concept and overall feel with that of the allegedly infringed work.

[10] **Copyrights and Intellectual Property** "Total concept and feel" test

A defendant may infringe on a plaintiff's copyrighted work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff's work of art, the excerpting, modifying, and arranging of unprotectable components, are considered in relation to one another.

[11] **Copyrights and Intellectual Property** Compilations

Where a work relies on the compilation or arrangement of unprotectable elements, it is only eligible for copyright protection if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

[12] **Summary Judgment** Copyrights

District court improperly disregarded issue of numerosity for selection-and-arrangement claim of copyright infringement when it originally denied motion for summary judgment brought by co-authors, producer, publishers, and distributors of allegedly infringing song “Thinking Out Loud,” and thus reconsideration of motion was warranted to prevent manifest injustice, in action brought by limited liability company (LLC) with 11.11% interest in right to receive royalties from copyrighted sheet music of song “Let's Get It On”; although courts in relevant circuit had not yet applied principle of numerosity to musical compositions at time of original denial, courts in circuit had since begun to weigh numerosity of elements when deciding whether their combination was protectable by copyright.

[13] **Copyrights and Intellectual Property** Musical works and accompanying words

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The scope of copyright protection in musical composition only extends to the deposit copy.

[14] Copyrights and Intellectual Property Musical works and accompanying words

Combination of chord progression and harmonic rhythm in song "Let's Get It On" was too commonplace to merit copyright protection as a matter of law, precluding finding of copyright infringement by co-authors, producer, publishers, and distributors of allegedly infringing song "Thinking Out Loud"; both chord progression and harmonic rhythm were used in several songs both before the release of "Let's Get It On" and between release of "Let's Get It On" and "Thinking Out Loud," with chord progression even being taught for many years as popular chord progression in introductory guitar and piano books, and combination of the chord progression and harmonic rhythm was also commonplace, with at least four songs released prior to "Let's Get It On" using the same combination.

[15] Copyrights and Intellectual Property Musical works and accompanying words

Unprotected musical elements might be so selected and arranged that they form a whole whose patterns and effects are protectable by copyright.

[16] Copyrights and Intellectual Property Musical works and accompanying words

When unprotected musical elements have been so selected and arranged that they form a whole whose patterns and effects are protectable by copyright, the scope of that protection is limited to the particular way in which the unprotected elements form the coherent pattern or design and does not extend to the underlying elements themselves.

[17] Copyrights and Intellectual Property Musical works and accompanying words

A protectable "mosaic," or work formed from the selection and arrangement of unprotected musical elements, may be formed from unprotected "chips," but it needs a number of them, not one or two, to be protectable by copyright.

[18] Copyrights and Intellectual Property Musical works and accompanying words

The arrangement of only one or two unprotected musical elements into a whole is not protectable by copyright, as it is devoid of any contribution from the author and is nothing more than an impermissible attempt to copyright what is already in the public domain and capture what is freely available to all to use.

[19] Copyrights and Intellectual Property Musical works and accompanying words

Requiring numerous unprotected musical elements to be present before determining whether their selection and arrangement is protectable by copyright reinforces the constitutional requisite that a copyrighted work, or piece of work, be original enough to warrant protection. U.S. Const. art. 1, § 8, cl. 8.

[20] Copyrights and Intellectual Property Originality and Creativity of Work

The constitutional requirement that a copyrighted work, or piece of a work, be original enough to warrant protection is the sine qua non of copyright. U.S. Const. art. 1, § 8, cl. 8.

[21] Copyrights and Intellectual Property Musical works and accompanying words

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To form a whole that is protectable by copyright, the selection and arrangement of unprotected musical elements cannot be so mechanical or routine as to require no creativity whatsoever.

[22] Copyrights and Intellectual Property Musical works and accompanying words

Requiring numerous unprotected musical elements to be combined before finding that the selection and arrangement of such elements is protectable by copyright prevents the misapplication of copyright law and ensures it is not being used to protect combinations that occur routinely without any minimal creative contribution attributable to the author.

[23] Copyrights and Intellectual Property Musical works and accompanying words

There is no bright-line rule dictating the threshold over which a specific number of unprotectable elements in a musical work must pass to become sufficiently numerous to protect the aesthetic decision to select and arrange them in an original way.

[24] Copyrights and Intellectual Property Musical works and accompanying words

In the context of determining whether the combination of unprotectable elements in a musical composition is sufficiently numerous to warrant copyright protection of the combination, "numerous" requires more than just a commonplace chord progression and harmonic rhythm.

[25] Copyrights and Intellectual Property Musical works and accompanying words

If selection and arrangement of unprotectable musical elements, in their combination, is so commonplace that it has come to be expected as matter of course, then it lacks the minimal creative spark required by the Copyright Act and Constitution to be original and thus protectable. U.S. Const. art. 1, § 8, cl. 8; 17 U.S.C.A. § 101 et seq.

Attorneys and Law Firms

Hillel Ira Parness, Parness Law Firm, PLLC, New York, NY, for Plaintiff.

Andrew Mark Goldsmith, Donald S. Zakarin, Giovanna Maria Marchese, Ilene Susan Farkas, Pryor Cashman LLP, New York, NY, for Defendants Edward Christopher Sheeran, Sony/ATV Music Publishing, LLC, Atlantic Recording Corporation.

Andrew Mark Goldsmith, Donald S. Zakarin, Ilene Susan Farkas, Pryor Cashman LLP, New York, NY, for Defendants BDi Music Ltd., Bucks Music Group Ltd., David Platz Music (USA) Inc., Amy Wadge, Jake Gosling.

Andrew Mark Goldsmith, Pryor Cashman LLP, New York, NY, for Defendant The Royalty Network, Inc.

OPINION & ORDER

LOUIS L. STANTON, UNITED STATES DISTRICT JUDGE

***1** This case presents the question of whether the song "Thinking Out Loud" infringes the copyright of "Let's Get It On." On September 29, 2022, the Court denied defendants' Renewed Motion for Summary Judgment dismissing the case. Defendants now move for reconsideration of that Order.

For the following reasons, defendants' Motion for Reconsideration is granted and the complaint is dismissed.

Background

The Court assumes the parties' familiarity with this case and recounts only what is necessary to decide defendants' Motion for Reconsideration.

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Ed Townsend and Marvin Gaye Jr. wrote and internationally released the song "Let's Get It On" in 1973. Dkt. No. 102 ("Third Amended Complaint") ¶ 1; Dkt. No. 201 ("Defendants' Rule 56.1 Statement") ¶ 17. On July 17, 1973, Townsend applied to copyright the song with the U.S. Copyright Office. Dkt. No. 201 ¶ 19. In support of that application, he deposited with the Copyright Office a copy of the sheet music. Id. ¶ 20. The sheet music, which is known as the "Deposit Copy," was subsequently registered under Registration No. EP 314589.[1] Id. ¶ 21. Plaintiff, Structured Assets Sales, LLC ("SAS") has an 11.11% beneficial interest in the right to receive royalties from the copyright of "Let's Get It On." Dkt. No. 102 ¶ 18; Dkt. No. 201 ¶ 18.

1 Marvin Gaye Jr. created a Sound Recording of "Let's Get It On," which was commercially released. The Sound Recording was never copyrighted and is not at issue in this dispute.

In February 2014, defendants Ed Sheeran and Amy Wadge co-authored the song "Thinking Out Loud." Dkt. No. 201 ¶ 24. Days later, Sheeran recorded, and co-defendant Jack Gosling produced, what would become the commercially released version of the song. Id. ¶ 26; Dkt. No. 102 ¶ 25. "Thinking Out Loud" was released to great commercial and critical success, including a Grammy Award for Song of the Year. Dkt. No. 102 ¶ 17. Co-defendants SONY/ATV Music Publishing, Atlantic Recording Company d/b/a Atlantic Records, BDi Music Ltd., Bucks Music Group Ltd., The Royalty Network, Inc., and David Platz Music (USA) Inc., as publishers and distributors of "Thinking Out Loud," facilitated and assisted with its distribution, promotion, and sales.

SAS alleges that "Thinking Out Loud" infringes on the copyright of the sheet music of "Let's Get It On." Defendants moved for Summary Judgment dismissing the case and SAS cross-moved for Summary Judgment granting it profits from Sheeran's live performance of "Thinking Out Loud."[2] Dkt. No. 202; Dkt. No. 205.

2 The parties' initial motions for summary judgment were denied with leave to renew after SAS amended its Experts' Reports. Dkt. No. 198. The parties thereafter filed Renewed Motions for Summary Judgment, which the Court denied in part and granted in part. Dkt. No. 211. It is that denial which defendants urge the Court to reconsider.

In its Order denying defendant's Motion for Summary Judgment, the Court recognized that this Circuit treats the question of whether "particular elements of a work demonstrate sufficient originality and creativity to warrant copyright protection as a question for the factfinder." Matthew Bender & Co. v. W. Pub. Co., 158 F.3d 674, 681 (2d Cir. 1998). With this in mind, the Court held that the parties' dispute over the originality of the selection and arrangement of the combination of two commonplace musical building blocks–the chord progression and harmonic rhythm-in "Let's Get It On" was a genuine dispute necessitating denial of defendants' motion.

***2** Defendants filed a motion for reconsideration urging the Court to reconsider its findings on liability and grant Summary Judgment dismissing the case, or in the alternative to certify the question of how to satisfy the numerosity requirement under the selection and arrangement test for infringement. Dkt. No. 212. SAS promptly opposed the Motion for Reconsideration. Dkt. No. 214.

Legal Standards

1. Motion for Reconsideration

[1] [2] [3] [4] Under Rule 54 of the Federal Rules of Civil Procedure, the Court has the inherent power to reconsider any of its decisions prior to the entry of a final judgment adjudicating all claims at issue. Fed. R. Civ. P. 54(b). A motion for reconsideration is "an extraordinary remedy to be employed sparingly in the interests of finality." Drapkin v. Mafco Consol. Grp., Inc., 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011). Reconsideration is warranted where there is an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." DiLaura v. Power Auth. of New York, 982 F.2d 73, 76 (2d Cir. 1992). The decision as to whether to grant a motion for reconsideration lies squarely within the court's discretion. Analytical Survs., Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012).

2. Copyright Infringement

[5] [6] To establish a claim of copyright infringement, "a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff's work; and (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectable elements of plaintiff's." Peter F. Gaito Architecture, LLC v. Simone

Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010). The Court can decide as a matter of law that there is no substantial similarity between the works because "the similarity between two works concerns only non-copyrightable elements of the plaintiff's work." Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 240 (2d Cir. 1983).

[7] **[8]** The test for substantial similarity in music infringement cases is whether a plaintiff can prove that "defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such ... music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff." Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997) (alteration in original). When, as here, the song's aesthetic appeal is due largely to unprotectable elements, the Court's analysis of substantial similarity "must be more discerning, and ignore those aspects of a work that are unprotectable ... lest [courts] conflate mere copying with wrongful copying." Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95, 102 (2d Cir. 2014).

[9] **[10]** **[11]** In doing so, the Court is not required to "compare only those elements which are themselves copyrightable." Peter F. Gaito Architecture, LLC, 602 F.3d at 66. Instead, the court is " 'principally guided by comparing the contested work's total concept and overall feel with that of the allegedly infringed work.' " Nwosuocha v. Glover, No. 21 CIV. 04047, 2023 WL 2632158, at *4 (S.D.N.Y. Mar. 24, 2023) (quoting Peter F. Gaito Architecture, LLC, 602 F.3d at 66). "This is so because 'the defendant may infringe on the plaintiff's work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff's work of art–the excerpting, modifying, and arranging of unprotectable components–are considered in relation to one another.' " Peter F. Gaito Architecture, LLC, 602 F.3d at 66 (quoting Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2d Cir. 2003)); see also McDonald v. West, 138 F. Supp. 3d 448, 456 (S.D.N.Y. 2015), aff'd, 669 F. App'x 59 (2d Cir. 2016) (same). "[W]here a work relies on the compilation or arrangement of unprotectable elements, it is only eligible for copyright protection 'if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.' " Threeline Imports, Inc. v. Vernikov, No. 15 Civ. 02333, 2016 WL 11472749, at *13 (E.D.N.Y. Oct. 28, 2016) (quoting Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003)).

Analysis

1. Reconsideration is Warranted

***3** **[12]** Defendants argue that reconsideration is proper to avoid clear error because the Court overlooked the numerosity requirement for selection and arrangement claims of infringement. Dkt. No. 213 at 5. SAS responds that defendants have not identified any controlling decisions that the Court has overlooked or any intervening change of controlling law. Dkt. No. 214 at 1.

[13] The Court denied Defendant's Renewed Motion for Summary Judgment, in part, because its sister action Griffin v. Sheeran, which arose from the same nucleus of facts and asserted the same claim of infringement, was proceeding to trial. Summary Judgment dismissing the claim was denied in Griffin in January 2019. Griffin v. Sheeran, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019). Afterward, the Ninth Circuit decided Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020), which is one of the clearest articulations of how copyright law applies to musical compositions. This Court has already adopted and applied to this case one holding of Skidmore: that the scope of copyright protection only extends to the Deposit Copy, here the sheet music of "Let's Get It On." Skidmore also expressly laid out a numerosity requirement for selection and arrangement copyright claims holding that protection applies to "a combination of unprotectable elements ... only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." Id. at 1074.

The numerosity requirement has been alluded to, but not strictly followed, in the Second Circuit. Compare Peter F. Gaito Architecture, LLC, 602 F.3d at 66 (finding infringement when "numerous aesthetic decisions embodied in the plaintiff's work of art–the excerpting, modifying, and arranging of [unprotectable components] ... –are considered in relation to one another") with Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1004 (2d Cir. 1995) ("What is protectible then is the author's original contributions, the original way in which the author has 'selected, coordinated, and arranged' the elements of his or her work."). There have been few opportunities to apply the principle of numerosity to musical compositions. In its Order denying Summary Judgment dismissing the claim, this Court declined to grapple with whether a numerosity requirement should be imposed

and instead found that there is no bright-line rule requiring it. Dkt. No. 211.

Since then, courts in this Circuit have started to weigh the numerosity of the elements when deciding whether their combination should be protected. In Nwosuocha v. Glover, 21 Civ. 04047, 2023 WL 2632158 (S.D.N.Y. Mar. 24, 2023), the Court implied a high threshold for numerosity when it found that a combination of eight unprotected musical elements was "categorically ineligible for copyright protection." Id. at *7. Having previously disdained the issue of numerosity, the Court finds that it improperly disregarded it in denying defendants' motion to dismiss without weighing whether and how to apply the requirement.

2. Defendants' Renewed Motion for Summary Judgment is Granted

[14] SAS alleges that the combination of the chord progression and the harmonic rhythm used in "Thinking Out Loud" is substantially similar to that in "Let's Get It On," and thus infringes the work. SAS acknowledges, and the Court concurs, that the chord progression and harmonic rhythm, in isolation, are not individually protected. The question then is whether two common elements are numerous enough to make their combination eligible for copyright protection.

***4** **[15]** **[16]** **[17]** **[18]** Unprotected musical elements might be so selected and arranged that they form a whole whose patterns and effects are protectable. See Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2d Cir. 2003). The scope of that protection is limited to the particular way in which the unprotected elements form the coherent pattern or design and does not extend to the underlying elements themselves. See id. at 136. Thus, a protectable mosaic may be formed from unprotected chips, but it needs a number of them: not one or two. Otherwise, the arrangement is devoid of any contribution from the author. It is nothing more than an impermissible attempt to copyright what is already in the public domain and capture what is freely available to all to use. Deciphering what constitutes a protectable, original selection and arrangement from a combination of unprotected properties has long vexed the courts.

[19] **[20]** **[21]** **[22]** The numerosity requirement springs from the nature of that postulate. Requiring numerous unprotected elements to be present before determining whether their selection and arrangement is protectable reinforces the constitutional requisite that a copyrighted work, or piece of a work, be original enough to warrant protection. See Peter F. Gaito Architecture, LLC, 602 F.3d at 66. That is "the *sine qua non* of copyright." Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). The selection and arrangement of unprotected musical elements "cannot be so mechanical or routine as to require no creativity whatsoever." Id. at 358, 111 S.Ct. 1282. Requiring numerous elements prevents the misapplication of copyright law and ensures it is not being used to protect combinations that occur routinely without any minimal creative contribution attributable to the author.

[23] **[24]** Numerous means "many; great in number." Numerous, Oxford English Dictionary (3d. ed. 2003). There is no bright-line rule dictating the threshold over which a specific number of unprotectable elements in a work must pass to become sufficiently numerous to protect the aesthetic decision to select and arrange them in an original way. Nonetheless, common sense dictates that in the context of a musical composition, "numerous" requires more than just a commonplace chord progression and harmonic rhythm to warrant protecting their combination.[3] See Nwosuocha v. Glover, 21 Civ. 04047, 2023 WL 2632158, at *7 (S.D.N.Y. Mar. 24, 2023) (holding that the eight musical elements in plaintiff's song "lack sufficient originality alone, or as combined, to merit compositional copyright protection or are categorically ineligible for copyright protection"). To protect an arrangement with few parts may be to read the numerosity requirement out of the law. That is especially true here where the chord progression and the harmonic rhythm (how the chord progression is played) in "Let's Get It On" do not form a pattern, but instead essentially merge into one element.

3 Outside of the musical context, the "combination of two unprotectable elements" has been found to be "not sufficiently numerous or original to constitute original work entitled to copyright protection." Beyond Blond Prods., LLC v. Heldman, 479 F. Supp. 3d 874, 883 (C.D. Cal. 2020), aff'd sub nom. Beyond Blond Prods., LLC v. ComedyMX, LLC, No. 21-55990, 2022 WL 1101756 (9th Cir. Apr. 13, 2022).

This Court is not aware of any case upholding a selection and arrangement claim based on the combination of two commonplace, unprotectable musical elements. Courts often evaluate combinations of at least three common musical elements and still find their selection and arrangement to be unoriginal. See Gray v. Hudson, 28 F.4th 87, 102 (9th Cir. 2022) ("This combination is unoriginal because it is really nothing more than a two-note snippet of a descending minor

scale, with some notes repeated."); Peters v. West, 776 F. Supp. 2d 742, 751 (N.D. Ill. 2011), aff'd, 692 F.3d 629 (7th Cir. 2012) (holding the combination of three unprotected elements is not protectable); Cottrill v. Spears, No. 02-3646, 2003 WL 21223846, at *9 (E.D. Pa. May 22, 2003), aff'd, 87 F. App'x 803 (3d Cir. 2004), as amended on reh'g (June 2, 2004) (holding four commonplace musical elements are not numerous enough to warrant protection). In Satava, a case not about music but about glass jellyfish sculptures, the court dismissed a selection and arrangement claim of infringement because the combination of six commonplace elements "lacks the quantum of originality needed to merit copyright protection." Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003).

***5** **[25]** At some level, every work is the selection and arrangement of unprotectable elements. Musical compositions chiefly adhere to this template. All songs, after all, are made up of the "limited number of notes and chords available to composers." Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988). Within that limited number, there are even fewer ways to combine the elements in a manner that is pleasing to the ears. That means a songwriter only has finite options for playing a commonplace chord progression. The options are so few that many combinations have themselves become commonplace, especially in popular music. If the selection and arrangement of unprotectable elements, in their combination, is "so commonplace that it has come to be expected as a matter of course," then it lacks the "minimal creative spark required by the Copyright Act and the Constitution" to be original and thus protectable. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991).

It is an unassailable reality that the chord progression and harmonic rhythm in "Let's Get It On" are so commonplace, in isolation and in combination, that to protect their combination would give "Let's Get It On" an impermissible monopoly over a basic musical building block. "Let's Get It On's" chord progression was used at least twenty-nine times before appearing in "Let's Get It On" and was in another twenty-three songs before "Thinking Out Loud" was released. See Dkt. No. 179 Ex. 2 ("Defendants' Expert's Report") at Visual Exhibit H. It is so ubiquitous that it has been taught for many years (the issue of this publication in the exhibit was dated as 2000) as a popular chord progression in introductory books on how to play guitar and piano. See id. at ¶¶ 34-36 (citing Money Chords: A Songwriter's Sourcebook of Popular Chord Progressions and Guitar for Advanced Beginners). The harmonic rhythm was used in at least eight other songs before "Let's Get It On" and in another fifteen before the release of "Thinking Out Loud." Dkt. No. 179 Ex. 9 ("Defendants' Expert's Report") at 9-10. It is so common that Mr. Sheeran himself used it, or a similar version, in at least twenty additional songs he wrote before writing "Thinking Out Loud." Dkt. No. 179 Ex. 2 at Visual Exhibit I.

The combination is commonplace. Amy Wadge, who co-wrote "Thinking Out Loud," used a nearly identical combination in one of her prior songs, "Better Than Me." Id. at ¶ 63 (the only difference between "Thinking Out Loud" and this prior work by Wadge is that the prior work also happens to anticipate the third chord change). Defendants' experts also identified, undisputed by SAS's expert,[4] at least four songs that were released prior to "Let's Get It On" that used virtually the same combination. Id. at ¶¶ 43-46, 56-60; 107 (discussing examples of prior art, including the songs "Georgy Girl," "Since I Lost My Baby," "Downtown," and "Get Off Of My Cloud"); Dkt. No. 179 Ex. 20 ("Defendants' Expert's Rebuttal Report") ¶¶ 26-38. The combination has also been used in songs that were released after "Let's Get It On" but before "Thinking Out Loud." Dkt. No. 179 Ex. 2 ¶ 4 (discussing "I've Got Love On My Mind"); Id. Ex. 9 at 38 (discussing "Do It To Me"). While the appearance of the combination in other songs has no bearing on whether it is original in "Let's Get It On," it does illustrate how multiple songwriters have combined the two commonplace elements in the same manner for years.

4 SAS's expert, Dr. Covach, did not dispute that the songs used the same combination of elements. Rather, he argued that other, potentially more popular, versions of the songs did not use the combination. Dkt. No. 200 Ex. 9 ¶¶ 10-13.

The selection and arrangement of these two musical elements in "Let's Get It On" is now commonplace and thus their combination is unprotectable. If their combination were protected and not freely available to songwriters, the goal of copyright law "[t]o promote the Progress of Science and useful Arts" would be thwarted. U.S. Const. art. I § 8. The Copyright Act envisioned that there will be unprotectable elements-based works "in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection." Feist Publications, Inc., 499 U.S. at 358, 111 S.Ct. 1282.

***6** As a matter of law, the combination of the chord progression and harmonic rhythm in "Let's Get It On" is too commonplace to merit copyright protection.

Conclusion

To prevent manifest injustice, defendants' Motion for Reconsideration is granted. Dkt. No. 212. There 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. Accordingly, their Motion for Summary Judgment is granted. The Complaint is dismissed with prejudice.

Plaintiff's renewed cross-motion for Summary Judgment is denied.

So Ordered.

All Citations

--- F.Supp.3d ----, 2023 WL 3475524, 2023 Copr.L.Dec. P 32,135

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