

No. \_\_-\_\_

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IN THE  
**Supreme Court of the United States**

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STRUCTURED ASSET SALES, LLC,

*Petitioner,*

*v.*

EDWARD CHRISTOPHER SHEERAN, PERSONALLY KNOWN AS ED  
SHEERAN, SONY/ATV MUSIC PUBLISHING, LLC, ATLANTIC  
RECORDING CORPORATION, DBA ATLANTIC RECORDS, BDI MUSIC  
LTD., BUCKS MUSIC GROUP LTD., THE ROYALTY NETWORK, INC.,  
DAVID PLATZ MUSIC (USA) INC., AMY WADGE, JAKE GOSLING,

*Respondents.*

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*On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Second Circuit*

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**PETITION FOR A WRIT OF CERTIORARI**

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March 6, 2025

## QUESTIONS PRESENTED

1. Did the Second Circuit Court of Appeals erroneously abdicate its responsibility to “decide legal questions by applying their own judgment” by instead “defer[ring] to an agency interpretation of the law,” in contravention of the clear guidance of this Court in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), in which this Court overruled *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), when, in deciding an important matter of first impression, it deferred to an administrative interpretation of The Copyright Act of 1909—a 116-year-old statute—promulgated by the United States Copyright Office in its administrative manual, the *Compendium of U.S. Copyright Office Practices*, and the 2020 view of the Ninth Circuit Court of Appeals that also deferred to the interpretation of the Copyright Office in the *Compendium*?

2. Did the Second Circuit erroneously decide an important and undecided question of federal law—a matter of first impression before the Second Circuit and this Court—namely whether the “deposit copy” submitted to the Copyright Office, and in particular handwritten sheet music submitted to the Copyright Office as deposit copies for musical compositions, prior to the point in time when the Copyright Office accepted sound recordings as deposit copies for music compositions (*i.e.*, 1978), works as a limitation on the legal scope of protection afforded by The Copyright Act of 1909?

## **PARTIES TO THE PROCEEDING**

The caption contains the names of all of the parties to the proceeding.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, Petitioner Structured Asset Sales, LLC states that it has no parent company, and no publicly held company holds more than ten percent of its stock.

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**DECISIONS BELOW**

The September 9, 2021 Order of the United States District Court for the Southern District of New York, granting Respondents’ *in limine* motion in part, rendering the District Court’s erroneous decision that the scope of copyright protection for the musical composition “Let’s Get it On” is defined and limited by the handwritten sheet music “deposit copy” submitted to the Copyright Office in 1973, and directing Petitioner to have its experts narrow their reports consistent with the “deposit copy” ruling, is included in the Appendix at 70a.

The September 29, 2022 Order of the United States District Court for the Southern District of New York, denying Respondents’ motion for summary judgment on the issue of copyright infringement, granting in part Respondents’ motion with respect to Petitioner’s experts, and granting Petitioner’s cross-motion with respect to damages arising from concert revenues, is included in the Appendix at 51a.

The May 16, 2023 Order of the United States District Court for the Southern District of New York, granting Respondents’ motion for reconsideration and renewed motion for summary judgment, is included in the Appendix at 36a. The May 16, 2023 Judgment following the May 16, 2023 Order is included in the Appendix at 34a.

The November 1, 2024 Order of a panel of the United States Court of Appeals for the Second Cir-

cuit, affirming the underlying decisions of the United States District Court for the Southern District of New York, is included in the Appendix at 3a.

The December 6, 2024 Order of the United States Court of Appeals for the Second Circuit, denying Petitioner’s petition for rehearing *en banc*, based on the panel’s failure to follow the guidance of the United States Supreme Court in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), in which the Supreme Court overruled *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is included in the Appendix at 1a.

## **JURISDICTION**

The Order of the United States Court of Appeals for the Second Circuit, affirming the decisions below, was entered on November 1, 2024. The Order of the United States Court of Appeals for the Second Circuit, denying Petitioner’s petition for rehearing *en banc*, was entered on December 6, 2024. The jurisdiction of this Court rests upon 28 U.S.C. § 1254.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Article III of the United States Constitution, which states as follows, in pertinent part:

### Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

### Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;....

## STATEMENT OF FACTS

The underlying case is about copyright infringement regarding two extraordinarily successful pieces of popular music: The 1973 iconic Marvin Gaye (“Gaye”) *Billboard* #1 hit “Let’s Get It On” (“LGIO”), and the 2014 Ed Sheeran (“Sheeran”) *Billboard* #2 hit “Thinking Out Loud” (“TOL”). Petitioner, one of the owners of the copyright in the LGIO musical composition,<sup>1</sup> maintains that Sheeran and the other Respondents are liable for copyright infringement by virtue of their recording, distribution and public performance of TOL.

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<sup>1</sup> Other owners of the LGIO musical composition were the plaintiffs in *Griffin v. Sheeran*, 17-cv-5221 (S.D.N.Y.) (“*Griffin*”), assigned to the same District Judge.

This Petition for *Certiorari*, however, is focused on what a 116-year-old statute—in this case the Copyright Act of 1909—says and does not say about the role or lack of a role of the so-called “deposit copy” in defining and limiting the scope of copyright protection, and the Second Circuit’s fundamental error when it failed to fulfill its obligation to decide this important question of law (in contravention of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)), and instead deferred to the statutory interpretation of **administrators** at the Copyright Office in their **administrative Compendium**, rather than deciding the issue themselves.

Four months **after** this Court issued its groundbreaking *Loper Bright* decision, overruling 40 years of precedent based on *Chevron*, a panel of the Second Circuit (having been provided the *Loper Bright* decision by Petitioner) openly defied this Court by deferring to and adopting the interpretation of the 1909 Copyright Act promulgated by the Copyright Office in its administrative manual—the *Compendium*, and deferring to and adopting the interpretation of the *Ninth Circuit* that **also** deferred to the *Compendium* in a pre-*Loper Bright* decision in 2020. A month after that, the full Second Circuit repeated the Panel’s violation when it denied Petitioner’s Petition for Rehearing *En Banc*.

Townsend and Gaye wrote, recorded and released LGIO in 1973. 78a, 92a. On July 17, 1973, Townsend applied for copyright protection for the LGIO musical composition with the U.S. Copyright Office. In support of that application, he deposited with the

Copyright Office handwritten sheet music in the “lead sheet” notation style as the “deposit copy,” resulting in Registration No. EP314589.<sup>2</sup> 78a. Petitioner has an 11.11% overall beneficial ownership interest in the right to receive royalties from the LGIO copyright and the right to sue on that interest.

In 2014, Sheeran and Wadge purportedly wrote TOL, and Respondents recorded, produced, and distributed it. TOL enjoyed commercial and critical success, including a Grammy Award for Song of the Year. According to publicly-available information, Sheeran performed TOL 456 times in concert between May 24, 2014 and August 28, 2019, and it was Sheeran’s fourth-most-frequently-performed song. On at least one documented occasion, Sheeran performed a live “mash-up” performance of TOL and LGIO in concert.<sup>3</sup>

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<sup>2</sup> Townsend secured a second registration in 1973 for the LGIO composition, Registration No. EU422281. Both were automatically renewed in 2000 under RE 0000848835 and RE 0000840063.

<sup>3</sup> See *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 501 (S.D.N.Y. 2019) (“A jury might side with either view; it may be impressed by footage of a Sheeran performance which shows him seamlessly transitioning between LGO and TOL”) (referencing *Griffin* ECF 82-2 (copy of video)). Another copy of the video was filed with the Court in *Structured Asset Sales v. Sheeran*, 20-cv-4329 (S.D.N.Y.) at ECF 91-14. The video has since been removed or blocked, but can be accessed at <https://www.dropbox.com/scl/fi/pfbdlyrw9vzuc9bm0okjy/Sheeran-LGIO.mp4?rlkey=1llej3iomx1l6c61az7z7ej36&dl=0> (see time index 4:25).

On April 14, 2020, Petitioner filed a new application with the Copyright Office to register the LGIO composition, submitting a sound recording of LGIO as its deposit copy. Petitioner filed in its own name and “on behalf of, and with the permission of,” the plaintiffs in the *Griffin* matter, who together with Petitioner comprised 100% of the holders of Townsend’s interests in the LGIO musical composition. The registration was granted on April 24, 2020, effective April 14, 2020, and received Registration No. PA0002238083. 75a.

### STATEMENT OF THE CASE

Petitioner initiated this case on June 28, 2018, after the District Court denied its request to join the *Griffin v. Sheeran* infringement case,<sup>4</sup> and filed the Third Amended Complaint (“Complaint”) on May 30, 2019. Respondents answered the Complaint on June 8-9, 2023.

On April 14, 2020, Petitioner obtained the new copyright registration for the composition which used a sound recording as its deposit, Registration PA0002238083. However, on May 13, 2020, the District Court denied Petitioner’s request for permission to file a Fourth Amended Complaint to add the 2020 Registration to the Complaint.<sup>5</sup>

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<sup>4</sup> *Griffin v. Sheeran*, 17-cv-5221, 2018 WL 11222864 (S.D.N.Y. June 11, 2018), *aff’d*, 767 F. App’x 129 (2d Cir. 2019).

<sup>5</sup> On April 8, 2020, Petitioner asked the District Court for permission to move “for a determination that the scope of

On April 5, 2021, Respondents moved *in limine* to preclude Petitioner’s musicology experts from offering **any** evidence in the case, and separately moved for summary judgment of dismissal. Petitioner opposed and cross-moved. On September 9, 2021, the District Court granted Respondents’ *in limine* motion in part, rendered its “deposit copy” decision, and directed Petitioner to have its experts narrow their reports consistent with the “deposit copy” ruling. 70a. On September 14, 2021, the District Court denied the summary judgment motions without prejudice to renewal after such revision.

On November 15, 2021, Respondents filed a second motion for summary judgment regarding copyright infringement, Petitioner’s musicology experts and the concert revenues issue. Petitioner opposed and cross-moved for summary judgment with respect to damages arising from concert revenues. On September 29, 2022, the District Court denied Respondents’ motion on the issue of copyright infringement, granted in part Respondents’ motion with respect to Petitioner’s experts, and granted Petitioner’s cross-motion with respect to damages arising from concert revenues. 51a. On October 13, 2022, Respondents moved for reconsideration of the District Court’s denial of their motion regarding

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the ‘Let’s Get It On’ copyright registrations upon which SAS sued are not limited to what appears on the sheet music deposit copy filed in 1973 and/or that a musicologist may interpret elements from sheet music in his capacity as an expert in the field.” . The Court denied Petitioner’s request.

copyright infringement or, in the alternative, for leave to appeal to this Court.

In April and May, 2023, a jury trial was held in *Griffin*. The jury returned a verdict for the defendants, finding that “defendant Sheeran establish[ed] by a preponderance of the evidence that he independently created ‘Thinking Out Loud’ and thus did not infringe the copyright of ‘Let’s Get it On.’” Jury Verdict, *Griffin*, 17-cv-5221, 2023 WL 3383215 (S.D.N.Y. May 4, 2023).

Although the *Griffin* verdict was not binding on Petitioner, on May 16, 2023, the District Court granted Respondents’ motion for reconsideration and renewed motion for summary judgment (36a) without specifically referencing the concert revenues issue, entering judgment dismissing the case on May 17, 2023. 34a.

Petitioner appealed the District Court’s Final Judgment and its underlying decisions to the Second Circuit Court of Appeals, which held oral argument on April 17, 2024.

On June 28, 2024, this Court issued its decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and writing, *inter alia*:

Judges have always been expected to apply their “judgment” independent of the political branches when interpreting the laws those branches enact. The Federalist No.



78, at 523. And one of those laws, the [Administrative Procedure Act, 5 U.S.C. §551 et seq.], *bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.*

....

Courts need not and under the APA *may not defer to an agency interpretation of the law* simply because a statute is ambiguous.

On July 2, 2024, Petitioner advised the Second Circuit of the *Loper Bright* decision and how Petitioner believed it was relevant to the case *sub judice*, specifically the proper interpretation of the 1909 Copyright Act.

On November 1, 2024, the Second Circuit panel released its Opinion, affirming the rulings of the District Court, including its adoption of, and reliance upon, the interpretation of the 1909 Copyright Act proffered by the *Compendium*. 3a.

On November 15, 2024, Petitioner moved for rehearing of the panel's decision *en banc*, focusing specifically on the proper interpretation of the 1909 Copyright Act and the improper reliance upon the *Compendium* by the panel, in light of the *Loper Bright* decision. On December 6, 2024 the Second Circuit denied the motion without providing any comment or analysis. 1a.

## REASONS FOR GRANTING THE PETITION

Rule 10 of this Court provides that the Court will grant petitions for certiorari “only for compelling reasons,” and that among the indicia of the character of the reasons the Court considers is “a United States court of appeals has decided an important question of federal law that **has not been, but should be, settled** by this Court, or has decided an important federal question in a way that **conflicts with relevant decisions of this Court.**” U.S. Sup. Ct. R. 10(c) (emphasis added). Both of the emphasized phrases are implicated here.

First, the Court of Appeals’ November 1, 2024 decision concerning the metes and bounds of protection afforded to rightsholders by the 1909 Copyright Act, and its December 6, 2024 denial of Petitioner’s motion for rehearing *en banc*, erroneously failed to decide a question of statutory interpretation, and instead relied upon and deferred to an administrative interpretation of the law promulgated by the Copyright Office in its *Compendium*, an approach that conflicts with this Court’s June 28, 2024 decision in *Loper Bright*, which instructed that judges—and not administrators—have the sole responsibility for interpreting the laws of the United States, and that deference to the views of administrators on questions of legal interpretation runs afoul of Article III of the United States Constitution.

Second, the question of federal law at the heart of this case—whether and the extent to which the “deposit copy” submitted to the Copyright Office defines and limits the scope of protection afforded by the 1909 Copyright Act to the rightsholders of musical compositions for which handwritten sheet music is submitted as its “deposit copy,”—is an important question of federal law that has not been, but should be, settled by this Court. The question has received increased attention in recent years as high-stakes copyright infringement conflicts between the owners of musical compositions protected by the 1909 Copyright Act, and those of musical works created years later and protected by the 1976 Copyright Act. The rights of thousands of legacy musical composers and artists, of many of the most beloved and enduring pieces of popular music, are at the center of the controversy. The broader issue—of whether and the extent to which the “deposit copy” (whether deposited under the 1909 Copyright Act or the 1976 Copyright Act) has any bearing on the scope of protection afforded by the Copyright Act, has practical implications for *all* copyright owners of *all* types of copyrighted works.

The erroneous “deposit copy” decisions of the district court and the Second Circuit caused a cascade of additional errors that severely prejudiced Petitioner. First, the lower courts’ erroneous “deposit copy” rulings, based on a layperson’s interpretation of the 1973 sheet music had the direct effect of narrowing the allowed scope of Petitioner’s copyright infringement claim to just two musical elements, to

the exclusion of the additional elements Petitioner claimed (in particular a fully-annotated bass line). Second, following the “deposit copy” ruling, Petitioner was ordered to remove from its musicology expert reports any reference to the sound recording, and any reference to any element that was not—again in the courts’ views—found on the handwritten sheet music. Third, Petitioner was further denied the opportunity to have its musicological experts opine as to **how** a **professional musician** would play that handwritten sheet music, and specifically their expert explanations as to what choices a professional musician would make when faced with the handwritten sheet music at issue, and that such musicians would in fact know to play the bass line despite its lack of complete annotation. Fourth, the lower courts erroneously imputed a bright-line requirement as to how many elements are required for “numerosity” in the context of a selection-and-arrangement claim, finding that **more than two** are required, despite the fact that no case—anywhere or ever—had rendered such an opinion. All of the foregoing was further compounded by the district court’s reversal of its own factual findings regarding the views of the experts, having first found that there were material disputed questions of fact among the experts as to the commonality of the remaining combination of elements, and then, just a few months later, taking the exact opposition position, and granting summary judgment to Respondents.

As reported by the *Wall Street Journal* regarding Justice Kavanaugh’s remarks at a 2024 judicial conference, in which he expressed his view that this Court should take more cases—and more important cases—each year, “These are not cases that are going to get a lot of public attention, but the kind of nuts-and-bolts cases where there is confusion in the courts, confusion about a prior decision of ours, confusion about a statute that Congress has passed. And I think we should jump in and try to clear up the confusion if we can....”<sup>6</sup> Petitioner respectfully urges that the Court grant **this** important Petition, to resolve the confusion that has arisen in recent years over the proper interpretation—specifically the proper **judicial**, and not **administrative**, interpretation of the 116-year-old Copyright Act of 1909.

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<sup>6</sup> Bravin, Jess, “Justice Brett Kavanaugh Wants More Cases—but Don’t Rush” (*Wall St. J.* May 12, 2024).

**I. THE SECOND CIRCUIT ERRED WHEN IT FAILED IN ITS DUTY TO DECIDE A QUESTION OF STATUTORY INTERPRETATION OF THE COPYRIGHT ACT OF 1909, DEFERRING INSTEAD TO THE ADMINISTRATIVE VIEW OF THE COPYRIGHT OFFICE PROMULGATED IN ITS ADMINISTRATIVE *COMPENDIUM*, AND PREVIOUSLY ADOPTED BY THE NINTH CIRCUIT IN *SKIDMORE V. LED ZEPPELIN*, AFTER THE SUPREME COURT OVERRULED *CHEVRON* IN *LOPER BRIGHT***

*Certiorari* is warranted, first and foremost, by the Second Circuit’s failure to decide a question of statutory interpretation and deference to an administrative interpretation of the statute, despite the Supreme Court’s recent guidance in the *Loper Bright* case, in which this Court overruled *Chevron* and the so-called “*Chevron* Doctrine.” The *Loper Bright* decision was issued on June 28, 2024, **after** briefing and the April 17, 2024 oral argument, but **before** the Panel’s decision on November 1, 2024, and before the denial of rehearing *en banc* on December 6, 2024.<sup>7</sup>

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<sup>7</sup> Roberts, C.J., delivered the opinion of the Court, in which Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Thomas, J., and Gorsuch, J., filed concurring opinions.

Petitioner demonstrated in its pre-*Loper Bright* briefing that all of the authority on which the District Court relied can be traced back to the statement of the law found in an administrative manual, the *Compendium of U.S. Copyright Office Practices*. The District Court cited: (i) *Merrell v. Tice*, 104 U.S. 557, 561 (1881); (ii) *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1063 (9th Cir.) (*en banc*), *cert. denied sub nom.*, 141 S. Ct. 453, *reh’g denied*, 141 S. Ct. 946 (2020) and (iii) the ***Compendium***. 71a. *Skidmore*, in turn, cited: (i) *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); (ii) the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1961); (iii) *Merrell* and (v) the ***Compendium***. *Skidmore*, 952 F.3d 1051, 1062-63.

*Merrell* (an 1881 case discussing the predecessor to the 1909 Copyright Act) speculated that a purpose of deposit copies was to “enable other authors to inspect them in order to ascertain precisely what was the subject of copyright.” *Merrell*, 104 U.S. at 561. Neither *Data General* nor the Report of the Register said that the deposit copy defines the bounds of copyright protection, but rather the opposite—that the deposit copy provides “**sufficient material to identify** the work” and is a “deposit of material **to identify** the work.” *Data General*, 36 F.3d at 1161-62 (emphasis added); Report of the Register at 71 (emphasis added).

Thus, the only authority cited by **any** of the courts on the question (the Ninth Circuit in *Skidmore*, the District Court and the Panel in *Sheeran*) of whether the deposit copy defines and limits the scope of copyright protection as a matter of law—is the *Compendium*. The District Court referenced the 2017 edition:

The Copyright Office instructs that “a registration for a work of authorship **only covers the material that is included** in the deposit copy(ies)” and “**does not cover authorship that does not appear** in the deposit copy(ies), even if the applicant expressly claims that authorship in the application.” U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*. § 504.2 (3d ed. 2017).

71a (emphasis added). The Panel similarly relied upon the 1967 edition of the *Compendium*: “the Office’s *Compendium of U.S. Copyright Office Practices* explained that ‘protection extends only to the **material actually deposited.**’ *Compendium of U.S. Copyright Office Practices* § 2.6.1.II.a (1st ed. 1967).” 18a (emphasis added).

It has long been recognized (well before *Loper Bright*) that the *Compendium* is an “administrative manual,” not legal authority in and of itself. *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 257 (2020); *Muench Photography, Inc. v. Houghton Mifflin Harcourt Pub. Co.*, 712 F. Supp.2d 84, 91



(S.D.N.Y. 2010), *reconsid. in part*, 09-cv-2669, 2010 WL 3958841 (S.D.N.Y. Sept. 27, 2010).

On June 28, 2024—after oral argument before the Panel—the United States Supreme Court issued its decision in *Loper Bright*. This Court explained the landscape created by *Chevron* and the *Chevron* Doctrine:

Our *Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess “whether Congress has directly spoken to the precise question at issue.” *Id.*, at 842, 104 S.Ct. 2778. If, and only if, congressional intent is “clear,” that is the end of the inquiry. *Ibid.* But if the court determines that “the statute is silent or ambiguous with respect to the specific issue” at hand, the court must, at *Chevron*’s second step, defer to the agency’s interpretation if it “is based on a permissible construction of the statute.” *Id.*, at 843, 104 S.Ct. 2778. The reviewing courts in each of the cases before us applied *Chevron*’s framework to resolve in favor of the Government challenges to the same agency rule.

*Loper Bright*, 144 S. Ct. at 2254. The question before this Court was “whether *Chevron* should be

overruled or clarified.” *Id.* at 2257. This Court explained that while there was a history of the courts affording deference to agencies when it came to questions of fact, “the Court did not extend similar deference to agency resolutions of questions of law.” *Id.* at 2258.

Further, this Court explained, the Administrative Procedure Act of 1946 reinforced the role of courts—not agencies—in deciding questions of law:

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that **courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide “all relevant questions of law”** arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions.

*Id.* at 2261 (emphasis added).

Ultimately, this Court reached the conclusion that “[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.” *Id.* at 2263. It elaborated:

In an agency case as in any other, though, even if some judges might (or might not)

consider the statute ambiguous, there is a best reading all the same—“the reading the court would have reached” if no agency were involved. *Chevron*, 467 U.S. at 843, n. 11, 104 S.Ct. 2778. It therefore makes no sense to speak of a “permissible” interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, ***Chevron’s* presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.** The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that “[t]he judiciary is the final authority on issues of statutory construction” and recognized that “in the absence of an administrative interpretation,” it is “necessary” for a court to “impose its own construction on the statute.” *Id.*, at 843, and n. 9, 104 S.Ct. 2778. *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construc-

tion—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency’s own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.

*Id.* at 2266 (emphasis added). This Court concluded as follows:

*Chevron* is overruled. **Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.** Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts **need not and under the APA may not defer to an agency interpretation of the law** simply because a statute is ambiguous.

*Id.* at 2273 (emphasis added).

One can view what the Copyright Office has done through *Compendium* either as an agency pronouncement of how to interpret the Copyright Act, or as a set of administrative rules promulgated based on the agency’s interpretation of the law. One can also view the language of the 1909 Copyright Act (discussed in detail below) as inherently clear or inherently ambiguous. It matters little, as

*Loper Bright* instructs that judges may not defer to the Copyright Office’s view as to how to interpret the 1909 Copyright Act. Petitioner maintains that the Panel relied upon the *Compendium*’s legal opinion. At the absolute minimum, the Panel turned to the *Compendium*’s pronouncement of the law to shore up its analysis. As reflected above, Petitioner maintains that that analysis was flawed and is undermined by, *inter alia*, the various justifications advanced over the years (including the “fair notice” justification advanced by the Panel). The *Compendium*’s view of the law should not enter into the analysis **at all**, and the analysis of the Ninth Circuit, the District Court and the Panel, all of which ultimately relied on the *Compendium*, should be abandoned so that this question can be analyzed properly, by judges. As the Supreme Court recently taught, “courts decide legal questions by applying their own judgment...courts, not agencies, will decide ‘all relevant questions of law.’”

Furthermore, as advanced by *amici* Randy Craig Wolfe Trust and Sound and Color, LLC (the plaintiffs in the *Skidmore* case), *Loper Bright* requires a fresh review of what the 1909 Copyright Act did and did not do, without the *Compendium*’s view coloring the analysis:

The Supreme Court overruled *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), holding that “courts need not ... defer to an agency interpretation of the law simply because a statute is ambiguous.”

The Copyright Office has claimed that the 1909 Act registration deposit strictly delimits the scope of copyright in a work. In fact, nothing in that Act states that the deposit defines scope—no court ever limited a copyright based on a deposit for over 100 years until *Led Zeppelin*.

*Loper Bright* now makes it clear that the Office’s interpretation of the 1909 statute is irrelevant. Respondents’ claim that *Skidmore* deference<sup>8</sup> still applies ignores that the Office has the right to promulgate rules, not interpret and create law.

Prior to 1976, common law governed the creation/scope of copyrights. *Roy Export v. Columbia Broadcasting*, 672 F.2d 1095, 1101 (2d Cir. 1982). The 1909 Act merely provided protections **for already existing works**. Registration with an administrative deposit was a way to obtain those protections; it had nothing to do with scope.

Only in the 1976 Act did Congress address creation/scope of copyright (incorporating the common law creation standard), creating a single federal system.

*Loper Bright* necessitates this Circuit doing what the lower court and the Ninth

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<sup>8</sup> *Amici* refer here to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which was unrelated to the *Skidmore* deposit copy case.

Circuit did not do: analyze the dual system in place from 1909 to 1978 and recognize the deposit did not determine scope.

Where there is no prejudice using an incomplete deposit there is no reason not to use the full work Defendants had access to and copied from. *Three Boys Music v. Bolton*, 212 F.3d 477, 486-87 (9th Cir. 2000). To hold otherwise promotes form over substance and creates absurdities abhorred by the law. Consider, “Let’s Get it On” was registered as a sound recording on June 15, 1973, (A317-18), before the composition was registered with a paper deposit on July 17, 1973. (A569-75). The composition should not be limited when the full version has always been on file with the Copyright Office.

The LGIO copyright was issued in 1973. The *Chevron* decision was rendered in 1984, and *Loper Bright* overruled *Chevron* forty years later, in 2024. The last 52 years have seen massive changes to the United States copyright regime, and to the music industry and music creators that the Copyright Act purports to protect. When Edward Townsend filed handwritten sheet music 87a-91a as the “deposit copy” for the registration of the LGIO musical composition, on July 17, 1973 (85a), the Copyright Office already had a copy of the LGIO sound recording in its files, having been filed a month earlier—on June 15, 1973. At that precise moment in

time, the Copyright Office had started accepting sound recordings as deposit copies for the registration of sound recordings, but was still a handful of years away from accepting sound recordings as deposit copies for the registration of musical compositions.<sup>9</sup>

Because of the Copyright Office's **administrative** procedures in place in 1973, if one went to the Copyright Office to file an application for the registration of a sound recording of a song, they would submit the sound recording as a deposit copy. If—five minutes later—they wished to file an application for the musical composition of the same song, their attempt to submit that same sound recording as a deposit copy would be rejected, and they would be told the Office accepted only sheet music. Mr. Townsend had no choice **but** to file the handwritten sheet music with his application, but this **administrative** wrinkle did not change the nature of his creation, or take away from the fact that the Copyright Office **already had in its files** the definitive version of the creation—the original commercially-recorded and released sound recording of the song.

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<sup>9</sup> By law (via the Copyright **Act**), sound recordings became copyrightable as works separate from musical compositions in 1972. By administrative fiat, however (by the Copyright **Office**), sound recordings were not accepted as deposit copies in connection with musical compositions until 1978.



Mr. Townsend was caught in a Catch-22 situation, whereby he had the sound recording, reflecting the best evidence of the true breadth of the LGIO composition, and indeed had already filed a copy of that sound recording for purposes of securing a copyright in the sound recording itself, but the same Copyright Office would not accept the sound recording for purposes of securing a copyright in the musical composition. Mr. Townsend could not, and his successors-in-interest including Petitioner cannot, control how the Copyright Office chooses to exercise its **administrative** power. However this Court, in the proper exercise of its **judicial** power, can render a proper interpretation of the Copyright Act of 1909, or direct the lower courts to do so, to eliminate any undue influence the Copyright Office's administrative decisions may have on the correct interpretation of the law.

And yet, the Copyright Office has promulgated an **administrative manual** that has for decades stated that "deposit copies" define and limit the scope of protection **as a matter of law**, leading to multiple courts erroneously adopting the Copyright Office administrators' views, abdicating their Constitutional responsibility to be our interpreters of the law. *Loper Bright* overruled *Chevron* because of this exact type of situation, where the motives, biases, or simply uninformed or misguided, views of administrators result in an erroneous interpretation of the law, and judges mistakenly award undue deference to those views, rather than making

the tough calls that they are specifically empowered and required to make.

The exceptional importance of this issue, especially after the *Loper Bright* decision, requires a legal analysis uninfluenced by the Copyright Office or the *Compendium*. Proper application of the Supreme Court’s decisions, here the June 2024 decision in *Loper Bright* overruling 40 years of precedent, is self-evidently a matter of exceptional importance, and for this additional reason Petitioner urges this Court to grant its Petition for *Certiorari*.

## II. NOTWITHSTANDING ITS IMPROPER RELIANCE ON THE LEGAL INTERPRETATION PROMULGATED BY THE COPYRIGHT OFFICE, AND THE NINTH CIRCUIT RELYING ON THE COPYRIGHT OFFICE, THE SECOND CIRCUIT WAS MISTAKEN IN ITS CONCLUSION ON THE “DEPOSIT COPY” ISSUE

In its most recent decision regarding the rights of copyright owners, and specifically the ability to seek damages going back more than three years via the discovery rule, this Court wrote “The text of the Copyright Act answers that question in favor of copyright plaintiffs.” *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 372 (2024) (Kagan, J.). The year before, considering the conflicting rights of one creator against those of a much more successful subsequent appropriator, this Court similarly rec-

ognized: “Lynn Goldsmith’s original works, like those of other photographers, are entitled to copyright protection, even against famous artists. Such protection includes the right to prepare derivative works that transform the original.” *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 550 (2023) (Sotomayor, J.). In 2014 and before that in 2005, this Court made clear that bringing new things (in those cases new technologies or technology products) to the public does not override the need to protect copyright creators. See *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 573 U.S. 431, 446-47 (2014) (“Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.”); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) (“the administration of copyright law is an exercise in managing the tradeoff” “between the respective values of supporting creative pursuits through copyright protection and promoting innovation”). Petitioner urges this Court to grant its Petition in order to protect not only Petitioner but the vast numbers of creators whose protection from subsequent infringers derives from the 1909 Copyright Act.

There can be no dispute that the Copyright Act of 1909 **does not say** that sheet music (handwritten or otherwise) is the only type of material that can be submitted as a deposit copy for a musical composition. Indeed, the Act **does not mention sheet music at all**. That was an **administrative im-**

plementation of the Copyright Office, backed up by the **administrative** pronouncement of the law in the *Compendium*. Nevertheless, the Second Circuit affirmed the District Court's conclusion on the "deposit copy" issue based on the word "complete" (advancing an argument which is not found in any decision by the District Court):

A composer seeking to protect a published musical work under the 1909 Act could do so by filing with the Copyright Office "two complete copies of the best edition thereof then published." 17 U.S.C. § 13 (1970). The statute thus makes clear that its enforceable protection for musical works is limited to the contents of the "complete copy" of the work filed with the Copyright Office at the time of registration. Extending its protection beyond the "complete copy" would negate the plain meaning of "complete."

16a-17a.

The Second Circuit then worked to reinforce its conclusion by pointing out that whereas the 1909 Copyright Act required submission of "complete" copies of musical compositions, Congress decidedly did **not** so require "complete" copies for other types of works:

The 1909 Act required less than a "complete copy" for works other than musical compositions. For example, for a motion picture, Congress authorized deposit of "a title and description, with not less than

two prints taken from different sections.” 17 U.S.C. § 12 (1970). And for “a work of art or a plastic work or drawing,” Congress authorized deposit of a “photograph or other identifying reproduction thereof.” *Id.* So Congress’s inclusion of “complete” to describe musical—but not other—works was deliberate.

17a.

The Second Circuit then attempted to justify its interpretation based on public policy:

This understanding complies with the principle of **fair notice** that led to public registration of copyrights in the first place. Even before the 1909 Act, the Supreme Court recognized that an important reason for requiring a deposit copy was to allow others “**to ascertain precisely what was the subject of copyright.**” *Merrell v. Tice*, 104 U.S. 557, 561 (1881). **One cannot fairly be liable for infringement without the ability to understand the contours of a prior creator’s rights.** That is why the “deposit (and accompanying registration) requirement was (as it still is) a condition precedent to the right to bring an infringement action.” 2 Nimmer on Copyright § 7.16[A][2][b] (2024); see 17 U.S.C. § 13 (1970); 17 U.S.C. § 411(a).

17a-18a (emphasis added).<sup>10</sup>

The “fair notice” policy justification, however, cannot be squared with the Panel’s statutory interpretation: If the **reason** that Congress required the submission of deposit copies was to provide “fair notice,” “to ascertain precisely what was the subject of copyright,” and to “to understand the contours of a prior creator’s rights,” Congress’s decision should not have—indeed **could not** have—declined to impose the “complete” requirement across the board.

Taking the first example provided by the Second Circuit—motion pictures—would the provision of “a title and description, with not less than two prints taken from different sections” really allow someone to “ascertain **precisely**” what the copyright covered? Would it really provide one “the ability to understand the **contours** of a prior creator’s rights,” making it “fair” to impose liability? Peti-

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<sup>10</sup> The full quote from *Merrell* is “Perhaps a certificate of the Librarian attached to a copy of the book, certifying that two copies of the same book, or of which that is a true copy, were deposited in his office on such a day, would be competent evidence, inasmuch as the Librarian’s office is a public one; the copyright books deposited with him are quasi-records, kept in his custody for public examination,—**one object no doubt being to enable other authors to inspect them in order to ascertain precisely what was the subject of copyright.**” *Merrell*, 104 U.S. at 561 (emphasis added). Petitioner pointed out to the lower courts that the concept of “enable[ing] other authors to inspect them” is likewise undermined by allowing “identifying” materials for an increasing list of work categories.

tioner submits that the answer to both questions is clearly “no.”

Petitioner raised this precise issue before the lower courts, demonstrating that the list of categories of works for which the Copyright Office accepts “identifying,” rather than “complete,” deposits, now numbers 20. To take the more modern example of computer code, the Copyright Office’s regulations allow for the submission of small portions of computer code—even if it does not contain trade secrets—that surely cannot serve to provide “fair notice” or allow one to “ascertain precisely” what is at issue. *See, e.g., 2021 Compendium* § 1509.1(F)(3) (with respect to “Source Code That Does Not Contain Trade Secret Material,” “applicant should submit one copy of the first twenty-five pages and the last twenty-five pages of the source code for that version” or “fifty pages that represent the specific version”).

Nobody who understands the music industry would ever suggest that songwriters consult the deposit copies on file with the Copyright Office as part of their creative (or clearance) process. To the extent they are aware of the music that preceded them, it is from hearing it on the radio, in movies, television and—for the last quarter century—the Internet. Sheeran himself testified at trial that he first **heard** LGIO as a child in one of the “Austin Powers” films, and also testified that **he cannot read or write sheet music**. Thus, even if Sheeran **had** obtained the handwritten sheet music deposit copy, it would have told him nothing with respect

to “the contours of a prior creator’s rights.” Hearing the song in “Austin Powers,” however (and however many hundreds or thousands of times thereafter), would have told him everything he would have needed to know.

Each of the Second Circuit and District Court in *Sheeran*, and the Ninth Circuit in *Skidmore*, struggled and failed to reconcile its interpretation of the 1909 Copyright Act with any cogent justification for such a reading. Indeed, the District Court came up with its own entirely different rationale for why matter outside the four corners of the deposit copy cannot be considered—“because they have not undergone the copyright process”—but this is yet another justification immediately undermined by the Copyright Office’s varying policies with respect to what need and need not be deposited for various work categories. It is beyond debate, for example, that the vast majority of computer code protected by the Copyright Act “ha[s] not undergone the copyright process.” And yet the Copyright Act protects the entirety of computer code referenced by—but decidedly not deposited with—an application.

These problems are compounded further by the interaction between the Copyright Act and the Berne Convention, which together allow parties to initiate copyright infringement actions in the United States based on the domestic infringement of a “foreign work”—a work whose copyright protection arose in a foreign jurisdiction. The validity of the foreign work is adjudged by the rules of the **foreign** jurisdiction. Thus, if the foreign jurisdic-



tion does not require registration as a prerequisite to initiating an infringement suit, the registration requirement under Section 411 of the Copyright Act—and therefore the deposit copy requirement—does not apply. In all such cases—U.S. copyright infringement cases based on the infringement of a foreign work from such a jurisdiction—there is nothing to provide “fair notice,” no way for “other authors to inspect them in order to ascertain precisely what was the subject of copyright,” and certainly no chance that the work at issue has “undergone the copyright process.”

The Second Circuit’s extrapolation from the administrative instruction to deposit “two complete copies of the best edition thereof then published” to mean that the scope of protection—as a matter of law—is limited to what was deposited, and only so limited with respect to some but not all categories of works was improper, and cannot be reconciled with common sense, once one recognizes the facts surrounding the composition at issue here. “Let’s Get It On” was registered at the Copyright Office as a sound recording (*see* 92a) on June 15, 1973, a month **before** the composition was registered with a paper deposit of handwritten sheet music on July 17, 1973 (78a-86a), meaning that the full original version of “Let’s Get it On,” as reflected by the original commercially-released sound recording, was already on file with the Copyright Office when the applications for the musical composition came in. The idea that the Copyright Office, or anyone visiting the Copyright Office, could have any doubt as

to what “Let’s Get It On” covered, when the sound recording of LGIO was already literally on file with the Office, defies logic. Courts have recognized a scope of protection for works broader than that reflected in an incomplete deposit copy. *Three Boys Music v. Bolton*, 212 F.3d 477, 486-87 (9th Cir. 2000). Where there is no prejudice using an incomplete deposit, there is no basis to limit not to use the full work Defendants had access to and copied from. Under the facts of this case, it is particularly bizarre to contemplate that the scope of protection for the musical composition should be limited to the handwritten sheet music when the sound recording was **already deposited** at the U.S. Copyright Office a month before the handwritten sheet music deposit came in.

For all of these reasons, this was and remains an issue of first impression concerning the proper interpretation of a 116-year old statute, and a matter of exceptional importance to creators of musical compositions—especially legacy creators who filed for protection in and before 1978 who are at risk of losing any practical ability to protect their creations—warranting a grant of the Petition for *Certiorari*. For 100 years, no court had rendered a legal opinion as to whether the scope of copyright protection was defined and limited by what was submitted as a deposit copy, until the Ninth Circuit’s *en banc* decision in *Skidmore* and the follow-on decisions of the District Court and Second Circuit’s decisions in *Sheeran*. Because those decisions improperly turned on a set of **administrative** poli-

cies and a pronouncement of the law promulgated by **administrators**, this Court should grant *Certiorari* so that a proper **judicial** opinion of statutory interpretation may be rendered on this issue of critical importance.

### CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of *Certiorari*.

March 6, 2025

Respectfully submitted,

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## **APPENDIX**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of December, two thousand twenty-four.

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Docket No: 23-905

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Structured Asset Sales, LLC,  
Plaintiff-Appellant,  
v.

Edward Christopher Sheeran, personally known as Ed Sheeran, Sony/ATV Music Publishing, LLC, Atlantic Recording Corporation, DBA Atlantic Records, BDi Music Ltd., Bucks Music Group Ltd., The Royalty Network, Inc., David Platz Music (USA) Inc., Amy Wadge, Jake Gosling,  
Defendants-Appellees.

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**ORDER**

Appellant, Structured Asset Sales, LLC, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel

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rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

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United States Court of Appeals  
For the Second Circuit

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August Term 2023  
Argued: April 17, 2024  
Decided: November 1, 2024

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No. 23-905

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STRUCTURED ASSET SALES, LLC,  
*Plaintiff-Appellant,*  
*v.*

EDWARD CHRISTOPHER SHEERAN, PERSONALLY KNOWN  
AS ED SHEERAN, SONY/ATV MUSIC PUBLISHING, LLC,  
ATLANTIC RECORDING CORPORATION, DBA ATLANTIC  
RECORDS, BDI MUSIC LTD., BUCKS MUSIC GROUP  
LTD., THE ROYALTY NETWORK, INC., DAVID PLATZ  
MUSIC (USA) INC., AMY WADGE, JAKE GOSLING,  
*Defendants-Appellees.\**

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Appeal from the United States District Court  
for the Southern District of New York  
No. 18-cv-5839, Louis L. Stanton, *Judge.*

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\* The Clerk is respectfully directed to update the caption accordingly.

Before:

CALABRESI, PARKER, and PARK, *Circuit Judges*.

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In this appeal from a judgment of the United States District Court for the Southern District of New York (Stanton, *J.*), we consider whether the district court erred by dismissing an action alleging that Ed Sheeran’s 2014 hit *Thinking Out Loud* infringes the copyright of Marvin Gaye’s 1973 classic *Let’s Get It On*. It did not. First, the Copyright Act of 1909 protects only the musical composition of *Let’s Get It On* as defined by the sheet music deposited with the Copyright Office in 1973. Second, we conclude that Plaintiff’s “selection-and-arrangement” theory, predicated on the combination of a four-chord progression and a syncopated harmonic rhythm, fails as a matter of law. Accordingly, we **AFFIRM** the judgment of the district court.

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HILLEL I. PARNESS, Parness Law Firm, PLLC, New York, New York, *for Plaintiff-Appellant*.

Alfred J. Fluehr, Francis Alexander, LLC, Media, Pennsylvania, *for amici curiae Randy Craig Wolfe Trust and Sound and Color, LLC*.

DONALD S. ZAKARIN, (Ilene S. Farkas, Andrew M. Goldsmith, and Brian M. Maida, *on the brief*) Pryor Cashman LLP,



New York, New York, *for Defendants-Appellees.*

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PARK, *Circuit Judge:*

The question in this case is whether the district court erred by dismissing an action alleging that Ed Sheeran’s 2014 hit *Thinking Out Loud* infringes the copyright of Marvin Gaye’s 1973 classic *Let’s Get It On*. It did not.

First, the Copyright Act of 1909 protects only the musical composition of *Let’s Get It On* as defined by the sheet music deposited with the Copyright Office in 1973 (“Deposit Copy”). The Deposit Copy does not encompass Gaye’s audio recording of the song. We thus affirm the decision of the district court to exclude evidence and expert testimony relating to musical elements outside the Deposit Copy.

Second, Plaintiff’s “selection-and-arrangement” theory fails as a matter of law. Even when combined, the four-chord progression and syncopated harmonic rhythm at issue are too unoriginal for copyright protection. Plaintiff failed to rebut evidence that this same combination appears in well-known songs predating *Let’s Get It On*, leaving no triable issues of fact as to the originality of the alleged combination. And no reasonable jury could find that the two songs, taken as a whole, are substantially similar in light of their dissimilar melodies and lyrics.

We affirm the judgment of the district court.

## I. BACKGROUND

### A. *Factual Background*

In 2014, Defendants-Appellees Ed Sheeran and Amy Wadge wrote the romantic ballad *Thinking Out Loud*. It topped global music charts and became one of the most-streamed songs in history, with over 3.8 billion streams on YouTube and 2.5 billion on Spotify.<sup>1</sup> At the 58th Grammy Awards in 2016, it won Song of the Year and Best Pop Solo Performance and earned a Record of the Year nomination.

Forty-one years earlier—in 1973—Ed Townsend and Marvin Gaye wrote *Let’s Get It On*. Gaye is a music icon and one of Motown’s biggest stars, and *Let’s Get It On* was one of his greatest hits. That same year, Townsend registered a copyright for *Let’s Get It On* by sending a copy of the five pages of sheet music for the song’s melody, harmony, rhythm, and lyrics—the “Deposit Copy”—to the Copyright Office. The copyright was registered as No. EP314589.

Plaintiff-Appellant Structured Asset Sales, LLC (“SAS”) owns a one-ninth interest in the royalties from *Let’s Get It On*—one third of Townsend’s one-third share. SAS is a firm that purchases royalty

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<sup>1</sup> See Ed Sheeran, *Thinking Out Loud*, YOUTUBE, <https://www.youtube.com/watch?v=lp-EO5I60KA> (accessed Oct. 31, 2024) [<https://perma.cc/C6T7-86FH>]; Ed Sheeran, *Thinking Out Loud*, SPOTIFY, <https://open.spotify.com/track/1Slwb6dOYkBIWal1PGtnNg> (accessed Oct. 31, 2024) [<https://perma.cc/J77G-6VRF>].

interests from musical copyright holders, securitizes them, and sells the securities to other investors. The record before us indicates that the remaining two thirds of Townsend’s interest (or two ninths) belong to Kathryn Griffin, Helen McDonald, and the Estate of Cherrigale Townsend. Successors to Gaye and Motown Records—including Defendant-Appellee Sony/ATV Music Publishing—own the remaining two thirds of *Let’s Get It On*.

## B. *Procedural History*

### 1. Griffin v. Sheeran

In 2017, Griffin, McDonald, and the Estate of Cherrigale Townsend brought a copyright infringement suit against Sheeran and various entities that produced, licensed, and distributed *Thinking Out Loud*.

The *Griffin* plaintiffs claimed that Sheeran plagiarized *Let’s Get It On*. They alleged that the songs’ similar harmonies, drums, bass lines, and tempos proved that Sheeran copied Townsend’s work. One alleged similarity is especially relevant here: the *Griffin* plaintiffs pointed to the combination of the chord progression in *Let’s Get It On* and the way anticipation was used in connection with that chord progression (“Harmonic Rhythm”) as evidence of Sheeran’s infringement.

As a co-owner of the rights to *Let’s Get It On*, SAS belatedly sought to join the *Griffin* lawsuit. But the district court denied leave to intervene, and we affirmed in an interlocutory appeal, *see Griffin v.*

*Sheeran*, 767 F. App’x 129 (2d Cir. 2019) (summary order). We wrote that denying leave to intervene would “not give rise to undue inefficiencies.” *Id.* at 134.

## 2. *This Lawsuit*

Unable to join *Griffin*, SAS filed this lawsuit in 2018 against Sheeran, Wadge, and those responsible for recording, distributing, and licensing *Thinking Out Loud* (collectively, “Sheeran”).<sup>2</sup> It was assigned to the same district judge.

SAS’s allegations in this action are materially the same as those at issue in *Griffin*: Sheeran copied *Let’s Get It On*, as evidenced by the chord progression and harmonic rhythm of the two songs and other similarities to elements found in Gaye’s audio recording. Sheeran moved for summary judgment in this case in April 2021.

## 3. *SAS’s Expert Testimony*

In September 2021, while Sheeran’s summary-judgment motion was pending, the district court resolved several of Sheeran’s motions in limine. It excluded, among other things, Gaye’s audio recording of *Let’s Get It On*.

The district court concluded that SAS’s infringement claim was limited to the scope of Townsend’s

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<sup>2</sup> Defendants-Appellees also include 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.; and Jake Gosling.

registration as reflected in the Deposit Copy. The district court thus prohibited SAS from comparing “elements in *Thinking Out Loud* [that] are similar to elements in the Gaye sound recording (but not the Deposit Copy),” and it excluded evidence (including expert opinions) regarding musical elements that are not notated in the Deposit Copy.

One such element outside the Deposit Copy was the “bass line” in Gaye’s recording: “There is no genuine question that there is no notation or specification of a bass line in the Deposit Copy. That has been accepted by both sides and is apparent from a visual inspection, and is beyond dispute.” Special App’x at 15.

One of SAS’s experts, John Covach, said that he could “infer” a bass line from the Deposit Copy. According to Covach,

The most direct and basic practice is for the bass line to be formed from the roots of each [of] the chords specified above the melody in the [Deposit Copy]. Since the chords specified are E<sup>b</sup>–G minor–A<sup>b</sup>–B<sup>b</sup>7, the most obvious bass line is simply a succession of the notes E<sup>b</sup>–G–A<sup>b</sup>–B<sup>b</sup>, and this is precisely what musicians would understand the [Deposit Copy] to be specifying. Thus, a specific bass line is indicated by the chord symbols on the [Deposit Copy], even though it is not notated separately.

App’x at 462-63.

Covach said his inferred bass line was “the simplest and most obvious bass line that one versed in

reading music would play if asked to play what is on the page.” Covach’s inferred bass line matched the bass line in Gaye’s sound recording of *Let’s Get It On* and the bass line in *Thinking Out Loud*. Covach thus pointed to his inferred bass line as an example of how the songs were similar. Sheeran moved to exclude Covach’s testimony on the ground that it “admittedly and necessarily rel[ied] on an element that is not expressed in the Deposit Copy.”

The district court agreed with Sheeran and excluded Covach’s opinions on an inferred bass line. It found that “[t]here is no bass line in the . . . Deposit Copy,” and it emphasized 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 denied Sheeran’s motion for summary judgment without prejudice to allow the parties the opportunity to account for its clarification about what was protected by Townsend’s registration.

#### 4. *Sheeran’s Renewed Summary-Judgment Motion*

Sheeran then renewed his motion for summary judgment. He argued that: “(i) the combination of two unprotectable elements is not sufficiently numerous or original to constitute an original work entitled to copyright protection under the ‘selection and arrangement’ theory of liability; and (ii) *Let’s Get It On*’s backing pattern is not identical or nearly identical to that in *Thinking Out Loud*.”

The district court denied Sheeran’s motion. *See Structured Asset Sales, LLC v. Sheeran*, 632 F. Supp. 3d 192 (S.D.N.Y. 2022). It concluded that, as in *Griffin*, “the question whether those elements [i.e., chord progression and harmonic rhythm] in [Let’s Get It On] demonstrate sufficient originality and creativity to warrant copyright protection is a factual question to be determined at trial.” *Id.* at 197 (quoting *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 497 (S.D.N.Y. 2019) (internal quotation marks omitted)). Sheeran then moved for reconsideration; that motion remained pending as *Griffin* proceeded to trial.

On May 4, 2023, the jury in *Griffin* found that Sheeran did not infringe the *Let’s Get It On* copyright.<sup>3</sup> Twelve days later, the district court granted

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<sup>3</sup> *Griffin* could proceed without SAS because a “joint owner is not required to join his other co-owners in an action for infringement.” *Davis v. Blige*, 505 F.3d 90, 99 (2d Cir. 2007); *see* 17 U.S.C. § 501(b) (The court “may require the joinder . . . of any person having or claiming an interest in the copyright.” (emphasis added)). If the *Griffin* plaintiffs had won, SAS could have enjoyed the benefits of the jury’s award because copyright co-owners owe one another an accounting of profits. *See, e.g., Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998). But if they lost, SAS could still pursue its own claims because Sheeran could not have used a verdict in his favor against SAS. *See, e.g., Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74, 79-80 (2d Cir. 2019) (explaining nonmutual offensive collateral estoppel); *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (“A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.”); Restatement (Second) of Judgments § 54. Congress thus gave district courts discretion to permit copyright-infringement suits to

Sheeran’s motion for reconsideration and awarded him summary judgment. *See Structured Asset Sales, LLC v. Sheeran*, 673 F. Supp. 3d 415 (S.D.N.Y. 2023). The district court concluded that reconsideration was warranted principally on the ground that its earlier decision had “overlooked” an issue that other district courts in the Second Circuit had only recently “started to weigh”: a “numerosity requirement for selection and arrangement claims of infringement.” *Id.* at 421, 422 (citing *Nwosuocha v. Glover*, No. 21-cv-4047, 2023 WL 2632158 (S.D.N.Y. Mar. 24, 2023); *see also Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1074 (9th Cir. 2020) (en banc) (“We have extended copyright protection 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.” (cleaned up))).<sup>4</sup>

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proceed without the participation of all co-owners. A sound exercise of that discretion should account for the inefficiencies of duplicative litigation—in particular, the possibility of inconsistent verdicts and potential unfairness to defendants.

<sup>4</sup> The *Nwosuocha* court granted the defendant’s motion to dismiss a copyright infringement claim based on the “‘distinct and unique vocal cadence, delivery, rhythm, timing, phrasing, meter and/or pattern’ or ‘flow’ as well as the ‘lyrical theme’ and ‘structure’ of the chorus.” 2023 WL 2632158, at \*7. Those elements “lack[ed] sufficient originality alone, or as combined, to merit compositional copyright protection or are categorically ineligible for copyright protection.” *Id.* We affirmed on other grounds and did not reach the numerosity issue. *See Nwosuocha v. Glover*, 2024 WL 2105473, at \*1-2.



The district court concluded on reconsideration 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, 673 F. Supp. 3d at 424-25. As it explained, “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.” *Id.* at 423. The district court went on to conclude that it was “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.” *Id.* at 424. For these reasons, the district court granted Sheeran’s motion for summary judgment. This appeal followed.

## II. DISCUSSION

We group SAS’s challenges under two headings. First, SAS challenges several rulings related to the scope of the 1973 copyright registration for *Let’s Get It On*. According to SAS, the district court erred by limiting the evidence it could present to support its infringement claim. That error, in SAS’s view, flowed from the district court’s misunderstanding of the scope of the 1973 registration. Second, SAS challenges the district court’s entry of summary judgment for Sheeran. In its view, a jury must determine, based on the similarities between

the two songs, whether Sheeran infringed the *Let's Get It On* copyright. Both challenges fail.

As to the first challenge, we affirm the district court's exclusion of evidence—including expert testimony—about anything beyond the four corners of the Deposit Copy, because the scope of a copyright in a musical work registered under the Copyright Act of 1909 (“1909 Act”) is limited to the elements found in the copy of the work deposited with the Copyright Office.

As to the second challenge, the district court also correctly concluded that Sheeran was entitled to summary judgment. We agree that SAS failed to raise a triable issue of fact as to whether the selection and arrangement of the musical building blocks here—a four-chord progression and syncopated harmonic rhythm whose combination undisputedly is present in other prominent musical works—is original enough to be protectable. And taken as a whole, no reasonable jury could find that *Thinking Out Loud* is so substantially similar to *Let's Get It On* as to support an inference of wrongful copying. SAS's claim thus fails as a matter of law.

#### A. *The Scope of Copyright Registration*

SAS argues that the district court's decision to limit the copyright registration to the four corners of the Deposit Copy was premised on an incorrect reading of the 1909 Act. On account of that misreading, according to SAS, the district court erroneously excluded key evidence of Sheeran's infringement.

The district court’s legal conclusions about the scope of the registration turn on the meaning of the 1909 Act, which we review de novo. *Mango v. Buzz-Feed, Inc.*, 970 F.3d 167, 170 (2d Cir. 2020).

1. *Legal Standards*

The 1909 Act governs here because it was the copyright law in effect in 1973, when the registration at issue was filed. *See Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 590 (2d Cir. 1999). The 1909 Act provided federal copyright protection for musical compositions against “any [public and for-profit] arrangement or setting of [the composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.” Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (codified as amended at 17 U.S.C. § 1(e)) (1970) (repealed effective 1978).

The 1909 Act imposed different registration requirements for published and unpublished works. A composer seeking to protect an unpublished musical work could do so “by the deposit, with claim of copyright, of one complete copy of such work” with the Copyright Office. 17 U.S.C. § 12 (1970). Published works, by contrast, could be protected by affixing a copyright notice (the familiar ©) “to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor.” *Id.* § 10. The author of the published work was then required “promptly” to

deposit “two complete copies of the best edition thereof then published” with the Copyright Office. *Id.* § 13 (emphasis added). If the author of the published work failed to comply with the deposit requirement, his rights under the 1909 Act would be unenforceable. *See id.* Thus, to secure an enforceable copyright of a musical work, whether published or not, the 1909 Act required depositing with the Copyright Office at least one “complete copy” of the work.

But a copyright notice cannot be affixed to sound, so distributing a sound recording (such as by broadcasting it over the radio) did not constitute “publication” under the Act. *Cf. Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 472 (1984) (Blackmun, *J.*, dissenting) (“Although the underlying musical work could be copyrighted, the 1909 Act provided no protection for a particular performer’s rendition of the work.”); *Agee v. Paramount Commc’ns, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (“It is clear that merely transmitting a sound recording to the public on the airwaves does not constitute a ‘distribution.’”). So a musical composition was “published” only if the sheet music were published. A composer seeking to protect a published musical work under the 1909 Act could do so by filing with the Copyright Office “two complete copies of the best edition thereof then published.” 17 U.S.C. § 13 (1970).<sup>5</sup> The statute thus makes

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<sup>5</sup> By contrast, the 1976 Copyright Act allowed registration of musical works by depositing sound recordings. *See* 17 U.S.C. § 301(c).

clear that its enforceable protection for musical works is limited to the contents of the “complete copy” of the work filed with the Copyright Office at the time of registration. Extending its protection beyond the “complete copy” would negate the plain meaning of “complete.”

Context reinforces this reading. The 1909 Act required less than a “complete copy” for works other than musical compositions. For example, for a motion picture, Congress authorized deposit of “a title and description, with not less than two prints taken from different sections.” 17 U.S.C. § 12 (1970). And for “a work of art or a plastic work or drawing,” Congress authorized deposit of a “photograph or other identifying reproduction thereof.” *Id.* So Congress’s inclusion of “complete” to describe musical—but not other—works was deliberate. See *PolSELLI v. Internal Revenue Serv.*, 598 U.S. 432, 439 (2023) (“We assume that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another section of the same Act.” (cleaned up)).

This understanding complies with the principle of fair notice that led to public registration of copyrights in the first place. Even before the 1909 Act, the Supreme Court recognized that an important reason for requiring a deposit copy was to allow others “to ascertain precisely what was the subject of copyright.” *Merrell v. Tice*, 104 U.S. 557, 561 (1881). One cannot fairly be liable for infringement without the ability to understand the contours of a prior creator’s rights. That is why the “deposit (and

accompanying registration) requirement was (as it still is) a condition precedent to the right to bring an infringement action.” 2 Nimmer on Copyright § 7.16 [A][2][b] (2024); *see* 17 U.S.C. § 13 (1970); 17 U.S.C. § 411(a).

The longstanding practices of the Copyright Office promote this interest in predictability and fair notice. For example, the Office’s *Compendium of U.S. Copyright Office Practices* explained that “protection extends only to the material actually deposited.” *Compendium of U.S. Copyright Office Practices* § 2.6.1.II.a (1st ed. 1967). Indeed, the Copyright Office was required to retain the deposit copies of unpublished works—for which there would be no other way of identifying the exact work protected by the statute—unless the copyright owner had a chance to claim and remove them. 17 U.S.C. § 214 (1970).

In short, the 1909 Act protects only what was submitted to the Copyright Office at the time of registration. We thus reach the same conclusion as the Ninth Circuit in *Skidmore*, 952 F.3d at 1063 (holding that for a musical work registered under the 1909 Act, “[t]he inescapable conclusion is that the scope of the copyright is limited by the deposit copy”).

## 2. *Application*

Under the text of the 1909 Act, the district court correctly confined this case to the Deposit Copy. Townsend mailed five pages of sheet music to the Copyright Office when he applied to register his

copyright in *Let's Get It On*. Those pages represented a “complete copy” of the work secured by the copyright. *See* 17 U.S.C. §§ 12-13 (1970). The scope of copyright protection for *Let's Get It On* under the 1909 Act is limited to the four corners of the Deposit Copy. Elements of Gaye’s popular audio recording of *Let's Get It On* that do not appear in the Deposit Copy are thus not protected by the registration.

SAS’s arguments to the contrary are unavailing. First, SAS argues that a plaintiff must show “access and substantial similarity to the work,” not to the deposit copy of the work. But that is not what the 1909 Act says. The Act “establishes a condition—copyright registration—that plaintiffs ordinarily must satisfy before filing an infringement claim and invoking the Act’s remedial provisions.” *Reed Elsevier v. Muchnick*, 559 U.S. 154, 158 (2010). And a musical “work” registered under the 1909 Act is the “complete copy” filed with the Copyright Office. SAS’s contrary understanding would allow infringement suits for unregistered copyrights.

Second, SAS argues that registration of the Deposit Copy “did not shrink the scope of protection already established at common law.” That is wrong. “[T]he securing of a statutory copyright, either by general publication with a proper notice or by registration of the work, ended the common-law protection.” *Shoptalk*, 168 F.3d at 590; *see also Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908) (common-law and statutory “rights do not co-exist in the same composition; when the statuto-

ry right begins the common-law right ends”); *Jewelers’ Mercantile Agency v. Jewelers’ Wkly. Publ’g Co.*, 155 N.Y. 241, 247 (1898) (“[N]o proposition is better settled than that a statutory copyright operates to divest a party of the common-law right.”). “[A] single work cannot be protected from copying under both federal and state law at the same time.” *Roy Export Co. Estab. v. Colum. Broad. Sys., Inc.*, 672 F.2d 1095, 1101 n.13 (2d Cir. 1982). So when Townsend registered the Deposit Copy, he lost any state common-law protections he may have enjoyed before. In any event, SAS did not bring a common-law claim, so this argument is not only wrong, but also irrelevant.

Finally, SAS argues that the deposit-copy rule would treat differently owners of U.S. works and foreign works, in “apparent violation” of the Berne Convention, which governs international enforcement of foreign copyrights. SAS notes that the Berne Convention obligates signatories to allow infringement suits, including in the United States, to enforce foreign copyrights regardless of any domestic requirements for registration. So if *Let’s Get It On* had been registered abroad in a jurisdiction without the deposit-copy rule, the entirety of Gaye’s sound recording could support SAS’s infringement claim. Even if true, this argument is of no moment because SAS is seeking to enforce a domestic copyright, not a foreign one.

In sum, the Deposit Copy filed with the Copyright Office under the 1909 Act defines the scope of a musical composition registered in 1973. 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. The district court properly confined SAS's case to the contents of the Deposit Copy and excluded evidence relating to Gaye's audio recording of *Let's Get It On*.<sup>6</sup>

### 3. *Evidentiary Challenge*

SAS challenges the district court's exclusion of John Covach's expert opinions about an "implied

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<sup>6</sup> In May 2020, during this litigation, SAS obtained a new copyright registration for the sound recording of *Let's Get It On*. SAS stated that it planned to seek permission to amend its complaint to add allegations related to its newly obtained registration. The district court wrote:

[I]f the Fourth Amended Complaint were filed in this case, I would incline towards severing its claims under the 1973 deposit copy and proceeding with preparing and trying them separately . . . . That being so, it is better to deny permission to file the Fourth Amended Complaint. Plaintiff may, without further correspondence or conferences if it wishes, file a formal motion for leave to file it, so the matter may be presented more fully.

Special App'x at 11-12.

SAS never moved to amend. We thus reject its argument that the district court erred by denying it leave to amend. Although the district court said that it would likely do so, it expressly invited SAS to file a motion to obtain a definitive answer. But SAS never filed a motion, so there is no denial by the district court to review. *See, e.g., United States v. Djibo*, 850 F. App'x 52, 57 (2d Cir. 2021) (summary order). SAS subsequently brought a separate action against Sheeran based on the 2020 registration. *See* Complaint, *Structured Asset Sales, LLC v. Sheeran*, 20-cv-4329 (S.D.N.Y. June 8, 2020), ECF No. 1.

bass line.” Rule 702 governs the admissibility of expert testimony: the expert must be qualified, his testimony must be helpful, and his conclusions must derive from reliable principles and methods. *United States v. Apple, Inc.*, 791 F.3d 290, 335 n.24 (2d Cir. 2015). We review the district court’s evidentiary ruling “under a highly deferential abuse of discretion standard,” reversing only if the decision is “manifestly erroneous.” *Bustamante v. KIND, LLC*, 100 F.4th 419, 426-27 (2d Cir. 2024) (cleaned up).

Covach conceded that the Deposit Copy “does not include a notated bass part,” and that the bass line he “posited” was merely one of “many possibilities.” Covach testified that he “inferred” the bass line—coincidentally the same bass line in the sound recording—from the Deposit Copy by selecting the lowest notes from each of the chords of the sheet music, which he claimed was the “most obvious bass line” to infer from the Deposit Copy.

There may be some instances in which expert testimony of this sort can aid the trier-of-fact in interpreting what, precisely, is represented in the four corners of the Deposit Copy. But on the record before us, the decision to exclude Covach’s proffered testimony was not manifestly erroneous. If, as Covach claimed, the “posited” bass line is indeed so “obvious” as to be implicit in the Deposit Copy, then considering the unwritten bass line alongside the written chord progression would not have affected whether the combination of these unprotected musical elements was original (as explained below), because the two elements, by

hypothesis, would go together. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 362 (1991) (“[T]he selection and arrangement of [elements] cannot be so mechanical or routine as to require no creativity whatsoever.”); *Matthew Bender & Co. v. W. Publ'g Co.*, 158 F.3d 674, 682 (2d Cir. 1998) (“[C]reativity inheres in making *non-obvious* choices from among more than a few options.” (emphasis added)). Therefore, we see no reason to disturb the district court’s decision to exclude Covach’s testimony as “non-helpful.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993) (cleaned up).

The district court correctly excluded Covach’s testimony and cabined the admissible evidence to the scope of the registration—the Deposit Copy.

## B. *Summary Judgment*

SAS also argues that the district court erred by granting summary judgment to Sheeran. Sheeran was entitled to summary judgment if “no genuine dispute of material fact” remained as to whether he infringed SAS’s copyright. Fed. R. Civ. P. 56(a). We review the decision to grant summary judgment *de novo* and draw all reasonable inferences and resolve all ambiguities in favor of SAS. *Island Software & Comput. Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 260 (2d Cir. 2005).

### 1. *Legal Standards*

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 protectible elements of plaintiff's." *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999) (cleaned up).

Direct evidence of copying is rare, so copying may be inferred when (1) a defendant had access to the original work; and (2) the defendant's work bears a "substantial similarity" to the original. *Lipton v. Nature Co.*, 71 F.3d 464, 470-71 (2d Cir. 1995). "The determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations." 4 Nimmer on Copyright § 13.03[A] (2024). "Slight or trivial similarities are not substantial and are therefore non-infringing," but "two works may not be literally identical and yet, for purposes of copyright infringement, may be found to be substantially similar." *Id.*

"The standard test for substantial similarity between two items is whether an 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same.'" *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001) (quoting *Hamil Am.*, 193 F.3d at 100). This test asks whether "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (cleaned up).

“[C]opyright protection may extend only to those components of a work that are original to the author,” meaning they were “independently created” and possess “some minimal degree of creativity.” *Feist*, 499 U.S. at 345.<sup>7</sup> Important here, music “borrows, and must necessarily borrow, and use much which was well known and used before.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (Story, *J.*)); 1 Nimmer on Copyright § 2.05[B] (2024) (“In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.”). Affording robust copyright protection for simple combinations of common musical elements could thwart, rather than encourage, creativity. *See Feist*, 499 U.S. at 349-50 (noting that the goal of copyright law is to “encourage[] others to build freely upon the ideas and information conveyed by a work”).

Copyright law accounts for both “the limited number of notes and chords available to composers

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<sup>7</sup> Although we generally “treat the question of whether particular elements of a work demonstrate sufficient originality and creativity to warrant copyright protection as a question for a factfinder,” *Matthew Bender & Co.*, 158 F.3d at 681, the record is sometimes clear enough that we can determine as a matter of law that a particular work or component thereof does not “possess more than a *de minimis* quantum of creativity,” *Feist*, 499 U.S. at 363. *See, e.g., Boone v. Jackson*, 206 F. App’x 30, 32 (2d Cir. 2006) (summary order) (concluding that plaintiffs had failed to raise a triable issue of fact as to whether the lyric “holla back” was original given that the defendants had identified over 30 contemporary American pop songs using the same phrase).

and the resulting fact that common themes frequently reappear in various compositions, especially in popular music.” *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988). Thus, basic musical building blocks like notes, rhythms, and chords are generally not copyrightable. See *Compendium of U.S. Copyright Office Practices* § 802.5(A) (3d ed. 2017) (“examples of common property musical material” include “chromatic scales” and “arpeggios”); 2 Patry on Copyright § 3:93 (2024) (“[M]usical compositions consisting of only a few musical notes, such as ‘mi do re so, so re mi do,’ diatonic or chromatic scales, and common chord progressions, are not protectable.”).

But a work consisting of unprotectable elements may still be protectable as an original “selection and arrangement” of those elements. *Feist*, 499 U.S. at 348. “What is protectible then is the author’s original contributions—the original way in which the author has selected, coordinated, and arranged the [unoriginal] elements of his or her work.” *Knitwaves*, 71 F.3d at 1004 (cleaned up). Whether a selection and arrangement of otherwise unprotectable elements is original enough to merit copyright protection “is a function of (i) the total number of options available, (ii) external factors that limit the viability of certain options and render others non-creative, and (iii) prior uses that render certain selections ‘garden variety.’” *Matthew Bender & Co.*, 158 F.3d at 682-83.

In a selection-and-arrangement case, our typical ordinary-observer test must be “more discerning.” *Hamil Am.*, 193 F.3d at 101. “[T]he term ‘substan-

tial similarity’ is properly reserved for similarity that exists between the protected elements of a work and another work.” *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 101 (2d Cir. 2014). So, when addressing a selection and arrangement of unprotectable elements, we “attempt to extract the unprotectible elements from our consideration and ask whether the protectible elements, standing alone, are substantially similar.” *Knitwaves*, 71 F.3d at 1002 (emphasis omitted).

## 2. *Analysis*

SAS argues that the selection and arrangement of two musical elements—*Let’s Get It On*’s chord progression and syncopated harmonic rhythm—is original enough to warrant copyright protection. On the record before us, we agree with the district court that SAS failed to raise a triable issue of fact that this combination of elements in the Deposit Copy is original and thus protectible.

### a. Chord Progression and Rhythm

*Let’s Get It On* uses a simple progression of four chords, three of which are the basic I–IV–V chords. That chord progression is not protectable on its own. *See, e.g., Gray v. Hudson*, 28 F.4th 87, 100 (9th Cir. 2022); *Batiste v. Najm*, 28 F. Supp. 3d 595, 615-16 (E.D. La. 2014) (collecting cases and concluding that “courts have been consistent in holding that the basic chord progressions so ubiquitous in popular music are unoriginal and, thus, unprotectable”); *see also Swirsky*, 376 F.3d at 848

(distinguishing between non-copyrightable “chord progressions” standing alone and a copyrightable “chorus,” which involves these progressions “in combination with rhythm and pitch sequence”); *Johnson v. Gordon*, 409 F.3d 12, 23-24 (1st Cir. 2005) (“[The III, II] harmonic progression, which is a stereotypical building block of musical composition, lacks originality.”). It is indisputable, and SAS properly conceded, that the chord progression in *Let’s Get It On*, standing alone, cannot support an infringement claim.

SAS also alleges that Sheeran copied the harmonic rhythm—or the timing of chord changes—from *Let’s Get It On*. What makes the harmonic rhythm special, according to SAS, is how the second and fourth chord changes come slightly ahead of the beat on which they might be expected to fall—a form of syncopation. But commonplace harmonic rhythms, like basic chord progressions, are unprotectable musical building blocks. “[C]ourts have been consistent in finding rhythm to be unprotectable,” *Batiste*, 28 F. Supp. 3d at 616, because “originality of rhythm is a rarity, if not an impossibility,” *N. Music Corp. v. King Rec. Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952). See *Darrell*, 113 F.2d at 80 (“trite” musical choices fall outside of copyright’s protections). *Let’s Get It On*’s harmonic rhythm is an unprotectable basic syncopation technique, and SAS does not argue otherwise.



b. Combination of Two Unprotectable Elements

SAS's primary argument is that, even if the chord progression and syncopated rhythm are individually unprotectable, the selection and arrangement of those two elements in *Let's Get It On* was sufficiently original to warrant protection. The record before us does not support this contention.

Sheeran's expert, Dr. Lawrence Ferrara, determined that the same combination of elements "was previously embodied in well-known songs including [*Georgy Girl*] and [*Since I Lost My Baby*] that pre-date [*Let's Get It On*]," and he therefore concluded that "[t]here is nothing particularly novel, unique, or distinctive about combining the centuries-old anticipation technique with any particular chord progression, let alone a commonplace chord progression." Covach did not dispute that Ferrara had identified at least two prior songs featuring the same combination of elements; he merely observed that the combination was not present in the most popular recorded version of either prior song. This is of no moment, however, where the evidence of prior usage is being offered to show that the similarities between the two works are based on "garden variety" elements in the public domain, *Matthew Bender & Co.*, 158 F.3d at 683, rather than to rebut an inference of actual copying by identifying an earlier "common source" to which both authors had access and from which both could have borrowed. *Compare Boone*, 206 F. App'x at 32, *with Gaste*, 863 F.2d at 1068-69.

Moreover, Covach did not provide any affirmative evidence to counter Ferrara’s analysis. He simply asserted that the combination of elements in *Let’s Get It On* was “unmistakable” and “noteworthy,” and that its use in *Thinking Out Loud* must therefore be a “specific reference” to Gaye’s and Townsend’s song. That mere assertion does not suffice to create a triable issue of fact on protectability. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (noting that “[a]n expert’s conclusory opinions” or “opinions that are without factual basis” are “inappropriate material for consideration on a motion for summary judgment”).

SAS’s selection-and-arrangement claim also fails because it risks granting a monopoly over a combination of two fundamental musical building blocks. The 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. *See, e.g., Skidmore*, 952 F.3d at 1075-76 (“[M]any works of art can be recast as compilations of individually unprotected constituent parts . . . deem[ing] substantially similar two vastly dissimilar musical compositions, novels, and paintings for sharing some of the same notes, words, or colors.”). Overprotecting such basic elements would threaten to stifle creativity and undermine the purpose of copyright law: “To promote the Progress of Science and useful Arts.” U.S. CONST., art. I, § 8, cl. 8; *see also Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and

the primary object in conferring the monopoly [that copyright affords] lie[s] in the general benefits derived by the public from the labors of authors.”).

The district court thus correctly determined that SAS failed to raise a triable claim that *Let’s Get It On’s* chord progression/harmonic rhythm combination was protectible.<sup>8</sup>

### c. Overall Similarity

Finally, we also agree with the district court that a reasonable jury could not find the songs as a whole substantially similar. While “the infringement analysis must *begin* by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, [the] infringement analysis is not *simply* a matter of ascertaining similarity between components viewed in isolation.” *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003). We must also consider whether the “total

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<sup>8</sup> “Where the quantum of originality is slight and the resulting copyright is ‘thin,’ infringement will be established only by *very close copying* because the majority of the work is unprotectable.” *Beaudin v. Ben & Jerry’s Homemade, Inc.*, 95 F.3d 1, 2 (2d Cir. 1996) (emphasis added). A plaintiff seeking to enforce a thin copyright must therefore show that the challenged work features “the *particular* selection or arrangement,” *Feist*, 499 U.S. at 351 (emphasis added), or “the *same* selection and arrangement” as the original, *id.* at 362 (emphasis added). Here, however, as SAS’s own complaint shows, Townsend used a I–iii–IV–V progression, while Sheeran used a I–I–IV–V progression. App’x at 42. *Thinking Out Loud* thus does not feature the *particular* selection and arrangement featured in the Deposit Copy.

concept and overall feel” of the two songs is substantially similar. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010) (cleaned up). The classic formulation in music cases “is whether defendant took from plaintiff’s work[] so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.” *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

Only substantial similarity—not *any* similarity—suffices. And similarity depends on context. “In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.” 1 Nimmer on Copyright § 2.05[B]. So while a similar chord progression and harmonic rhythm may create a similar sound and feel, that is not enough to show substantial similarity.

Here, no jury could find that, taken as a whole, *Let’s Get It On* and *Thinking Out Loud* are substantially similar. Neither the melody nor the lyrics of *Thinking Out Loud* bears any resemblance to those in *Let’s Get It On*. Cf. *N. Music Corp.*, 105 F. Supp. at 400 (“It is the arrangement or succession of musical notes, which are the finger prints of the composition, and establish its identity.”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985) (analyzing whether the infringing work copied “what was essentially the heart” of the original). “Undeniable and obvious differences exist between” them. *Skidmore*, 952 F.3d at 1080

(Watford, *J.*, concurring). So SAS's infringement claim fails.

\* \* \*

In sum, the allegedly infringing elements here boil down to a similar, but not identical, four-chord progression paired with a commonplace harmonic syncopation, neither of which is sufficiently original to be protectable in isolation, nor is their combination. What is more, the songs are not substantially similar taken as a whole. Thus, no reasonable jury could infer that Sheeran plagiarized the Deposit Copy when he wrote *Thinking Out Loud*. We affirm the district court's entry of summary judgment in Sheeran's favor.<sup>9</sup>

### III. CONCLUSION

The judgment of the district court is affirmed.<sup>10</sup>

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<sup>9</sup> The district court concluded that selection-and-arrangement theories cannot proceed based on the combination of various numbers of unprotectable elements—*i.e.*, numerosity. We affirm on other grounds. Although the number of elements in combination is an aspect of the distinctiveness of music, originality is not a concept that is easily reducible to a simple test like numerosity.

<sup>10</sup> The parties dispute the concert proceeds that SAS might have recovered. Because SAS lost on its copyright-infringement claim, these challenges are moot.

34a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 5839 (LLS)

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STRUCTURED ASSET SALES, LLC,

Plaintiff,

– against –

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.

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**CLERK’S JUDGMENT**

It is hereby **ORDERED, ADJUDGED AND DECREED:**  
That for the reasons stated in the Court’s Opinion  
and Order dated May 16, 2023, defendants’ Motion  
for Reconsideration is granted. Their Motion for  
Summary Judgment is granted. The Complaint is  
dismissed with prejudice. Plaintiff’s renewed cross-  
motion for Summary Judgment is denied and the  
case is closed.

**Dated:** New York, New York  
May 17, 2023

35a

**RUBY J. KRAJICK**

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**Clerk of Court**

**BY:**

**/s/ [ILLEGIBLE]**

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**Deputy Clerk**

36a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 5839 (LLS)

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STRUCTURED ASSET SALES, LLC,

Plaintiff,

—against—

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.

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OPINION & ORDER

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.

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.<sup>1</sup> *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.

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

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<sup>1</sup> 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.

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.”<sup>2</sup> Dkt. No. 202; Dkt. No. 205.

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 67, 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

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<sup>2</sup> 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.

a genuine dispute necessitating denial of defendants' motion.

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**

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

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).

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).

In doing so, the Court is not required to “compare only those elements which are themselves copy-rightable.” *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 unprotectible 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 unprotectible 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

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.

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 [unprotectible 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 *Nwosuocho 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**

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.

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 con-



stitutes a protectable, original selection and arrangement from a combination of unprotected properties has long vexed the courts.

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 (1991). The selection and arrangement of unprotected musical elements “cannot be so mechanical or routine as to require no creativity whatsoever.” *Id.* at 358. 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.

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 com-

bination.<sup>3</sup> 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.

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

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<sup>3</sup> 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).

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).

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 (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,<sup>4</sup> at least four songs that were released prior to "Let's Get It On" that used virtually the same combination. *Id.* at ¶¶ 91 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.

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

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<sup>4</sup> 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.

sufficiently original to trigger copyright protection.” *Feist Publications, Inc.*, 499 U.S. at 358.

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.

The Clerk of the Court is directed to close the case.

So Ordered.

Dated: New York, New York  
May 16, 2023

/s/ LOUIS L. STANTON  
\_\_\_\_\_  
LOUIS L. STANTON  
U.S.D.J.

51a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 5839 (LLS)

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STRUCTURED ASSET SALES, LLC,

Plaintiff,

—against—

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.

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**ORDER**

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**BACKGROUND**

The Court assumes the parties' familiarity with the facts and prior proceedings, including *Structured Asset Sales, LLC Sheeran*, 433 F. Supp. 3d 608, 609 (S.D.N.Y. 2020) (granting in part and denying in part plaintiff's motion to compel) (Dkt. No. 144); *Structured Asset Sales, LLC v. Sheeran*, 559 F. Supp. 3d 172, 173 (S.D.N.Y. 2021) (Opinion & Order on defendants' Motion in limine) (Dkt. No.

197); and *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019) (asserting a claim that TOL infringes the copyright in LGO).

In response to this Court's September 9, 2021 Order, SAS's expert musicologists, Dr. Covach and Dr. Everett, filed amended reports: (1) a Revised Covach Report, (2) a Revised Covach Rebuttal Report, and (3) a Revised Everett Report (collectively, the "Revised Reports"). Dkt. No. 200 Exs. 3, 5, & 7. The September 9<sup>th</sup> Order held that "the Deposit Copy is the sole definition of the elements included in the protection of copyright" and, consequently, the LGO Sound Recording "is indamissable in any way which might confuse the jury into thinking it represents what is protected by copyright." Dkt. No. 197 at 2-3. The Order directed the experts to delete "all references to the Gaye sound recording," all references to prior art, as "the proof as to the existence of prior art shall be only that submitted by defendants," and all "opinions unsupported by facts, or suggesting legal conclusions." *Id.* at 3-4.

## Discussion

### **A. Renewed Motion to Exclude SAS's Experts Dr. Covach and Dr. Everett**

Issues raised in Sheeran's renewed application for in limine rulings are disposed of as follows.

1. The Revised Reports may use the terms "common," "uncommon," "noteworthy," and "stylistically commonplace." These are not legal



conclusions but epithets characterizing a work's place on a scale of originality.

2. The term “appropriates” is stricken from Paragraph 20 of the Revised Covach Report because the term has a legal meaning in the copyright field. An unlawful appropriation is one where “the second work bears ‘substantial similarity’ to protected expression in the earlier work.” *Castle Rock Ent., Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998). An expert may not opine that a defendant's work is substantially similar to that of the plaintiff. That is for the jury to decide.
3. All references to the Gaye sound recording are to be stricken because they violate the Court's Order that SAS “must delete all references to the Gaye sound recording” as “comparisons of elements in Thinking Out Loud which are similar to elements in the Gaye sound recording (but not the Deposit Copy) will not be allowed.” Dkt. No. 197 at 3. There is no ambiguity in that direction, and it is the lawyer's responsibility to see that his client, and retained experts, comply with it. A report containing such references will be excluded.
4. Sheeran raises several issues alleging that SAS's experts did not remove all references to prior art in compliance with the Court's Order that “[o]ne of plaintiffs experts having ignored the issue of prior art, and the other having only made inquiries so superficial as to amount to

no research at all, the proof as to the existence of prior art shall be only that submitted by defendants.” Dkt. No. 197 at 4.

References to prior art will not be accepted when used to prove that an element of LGO is unusual or similar to that of TOL. Thus, the prior art examples listed on Pages 9-10, Paragraph 7 of the Revised Everett Report, are stricken, except for “Hurdy Gurdy Man” by Donovan, which is admissible because it is offered into evidence by Sheeran’s expert.

References to prior art are acceptable when they are used to illustrate general principles of musicology. The Revised Everett Report can mention the prior art on Pages 12-13, Paragraph 3 because the songs are being used as examples of the different functions a chord progression may have within the formal structure of the song. The only song that is used to show the similarity between LGO and TOL is the Commodores’ “Easy,” which is introduced by Sheeran’s expert and may thus also be discussed in the Revised Everett Report.

The study on Pages 3-4, Paragraphs 6-7 of the Everett Report is acceptable, for it describes chord progressions, not prior art.

## **B. Motion for Summary Judgment**

### **1) General Legal Standards**

Summary judgment is warranted if, based upon admissible evidence, “the movant shows that there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, a Court must “construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor.” *Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010).

## **2) Legal Standard Applied to Copyright Infringement**

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 issue of substantial similarity “is frequently a fact issue for jury resolution.” *Warner Bros. Inc. v. Am. Broad. Companies, Inc.*, 720 F.2d 231, 239 (2d Cir. 1983). Even so, on a motion for summary judgment, a court may determine non-infringement as a matter of law, “either because the similarity between two works concerns only noncopyrightable elements of the plaintiff’s work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar.” *Id.* at 240 (citations omitted).

### 3) Copyright Infringement

SAS's infringement claim is based on Sheeran's alleged copying of the combination of two elements from LGO's Deposit Copy into TOL: (1) the chord progression; and (2) the particular way in which anticipation is used in connection with the chord progression ("Harmonic Rhythm") (collectively the "Backing Pattern"). The parties agree that those elements, standing alone, are commonplace and unprotectable. Accordingly, Sheeran argues that summary judgment dismissing the claim is appropriate as a matter of law because (i) the combination of two unprotectable elements is not sufficiently numerous or original to constitute an original work entitled to copyright protection under the "selection and arrangement" theory of liability; and (ii) LGO's backing pattern is not identical or nearly identical to that in TOL.

#### i) Copyrightability of the combination of the chord progression and harmonic rhythm

The law does not support Sheeran's contention that the combination of LGO's chord progression and harmonic rhythm is insufficiently original to warrant it copyrightable. There is no bright-line rule that the combination of two unprotectable elements is insufficiently numerous to constitute an original work. *Cf. Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1003-04 (2d Cir. 1995) ("a work may be copyrightable even though it is entirely a compilation of unprotectable elements. What is

protectable 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.” (citations omitted)); *Rose v. Hewson*, No. 17 CV 1471, 2018 WL 626350, at \*3 (S.D.N.Y. Jan. 30, 2018) (“compilations of generally unprotectable elements can be afforded copyright protection.”). Moreover, Courts “treat the question 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). Therefore, “the question whether those elements in LGO demonstrate ‘sufficient originality and creativity to warrant copyright protection’ is a factual question to be determined at trial.” *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 497 (S.D.N.Y. 2019).

Moreover, where, as here, the parties’ experts disagree as to whether a particular musical element is original, summary judgment is inappropriate. See *Ulloa v. Universal Music & Video Distribution Corp.*, 303 F. Supp. 2d 409, 413-14 (S.D.N.Y. 2004) (“It would be improper for this Court, on a motion for summary judgment, to draw its own conclusions from this competing evidence regarding the originality of the Vocal Phrase.”). The parties’ experts disagree as to whether the combination of the chord progression and harmonic rhythm present in both compositions is original and thus protectable. They squarely dispute whether that combination was commonplace before LGO: SAS’s experts opined that “the progression

class shared between [the songs] is uncommon,” Dkt. No. 200 Ex. 7 ¶¶ A.6-7, whereas Sheeran’s expert opined “that the combination of commonplace elements in LGO . . . is found in prior art,” Dkt. No. 179 Ex. 10 ¶ 26.

Sheeran’s expert alleges the existence of three prior works—“Downtown,” “Since I Lost My Baby,” and “Georgy Girl”—that use the chord progression in LGO, a I-iii-IV-V chord progression, together with the same anticipation of chord changes on the second and fourth chords as used in LGO. Dkt. No. 179 Ex. 10 ¶¶ 26-38. SAS’s expert opposes the characterization of those songs as prior art of LGO. He argues that LGO’s backing pattern is not present in “Downtown,” its chord progression is different from that in “Since I Lost My Baby,” and its harmonic rhythm is on an alternative beat compared to the one in “Georgy Girl.” Dkt. No. 200 Ex. 5 ¶¶ 10-12. The experts’ disagreement on whether the backing pattern is sufficiently uncommon to warrant copyright protection is a genuine dispute as to a material fact, preventing summary judgment. Fed. R. Civ. P. 56(a)

## **ii) Substantial Similarity between LGO and TOL**

When a copyright claim is “limited to the particular selection or arrangement” of elements, the “protection given is ‘thin,’” because a “subsequent [author] remains free to use [the public domain elements] to aid in preparing a competing work, so long as the competing work does not feature the

same selection and arrangement.” *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 136 (2d Cir. 2003) (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)) (alteration in original). Thus, substantial similarity in selection and arrangement cases “will be established only by very close copying” of the plaintiff’s work. *Beaudin v. Ben & Jerry’s Homemade, Inc.*, 95 F.3d 1, 2 (2d Cir. 1996); *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 107 (2d Cir. 2014). In determining the substantial similarity of works that have both protectable and unprotectable elements, the Court’s analysis must be “discerning” and we “must attempt to extract the unprotectable elements from our consideration and ask whether the protectable elements, standing alone, are substantially similar.” *Knitwaves, Inc.*, 71 F.3d at 1002. Even so, the Court is principally guided “by comparing the contested design’s ‘total concept and overall feel’ with that of the allegedly infringed work,” *Tufenkian Import/Export Ventures, Inc.*, 338 F.3d at 133; *Knitwaves, Inc.*, 71 F.3d at 1003.

The parties’ expert musicologists have opined on the similarity between the musical elements in LGO’s and TOL’s backing patterns and have come to competing conclusions. SAS’s experts opine that the backing patterns are “harmonically equivalent,” Dkt. No. 200 Ex. 3 ¶6, whereas Sheeran’s expert maintains that they are objectively different, Dkt. No. 179 Ex. 8 ¶14. Although the two musical compositions are not identical, a jury could find that the overlap between the songs’ combina-

tion of chord progression and harmonic rhythm is very close. Accordingly, questions remain that are not resolvable by summary judgment, but require trial.

### **Chord Progression**

The LGO Deposit Copy features a I-iii-IV-V7 (or a 1-3-4-5) chord progression. Dkt. No. 208 (Defendants' Rule 56.1 Reply to Plaintiff's Rule 56.1 Response) ¶ 32. TOL features a I-I6-IV-V7 chord progression. *Id.* ¶ 33. The "I6" chord is a major chord and the "iii" chord is a minor chord. *Id.* ¶ 35.

The parties dispute the effect of that slight adjustment between the chord patterns. SAS alleges that these chord progressions are harmonically equivalent because, as illustrated by music textbooks, the "I6" chord may substitute for the "iii" chord "without affecting the function of the progression." *Id.* ¶ 33; Dkt. No. 200 Ex. 5 ¶ 6; Dkt. No. 200 Ex. 7 ¶ 4. Sheeran maintains that the chord progressions are different and none of the chord progressions in TOL are I-iii-IV-V7. Dkt. No. 208 ¶ 33; Dkt. No. 179 Ex. 2 ¶ 39.

Sheeran also argues that there is a significant harmonic difference between the chord progressions because the "I6" chord is a major chord, and the "iii" chord is a minor chord. Dkt. No. 208 ¶ 35; Dkt. No. 179 Ex. 8 ¶ 14. But SAS's expert Dr. Everett contends that the minor "iii" chord could be equivalent to the major "I6" because of the "interchangeability of the two triads." Dkt. No. 200 Ex. 7 ¶¶ A.4-5.



### **Harmonic Anticipation of Chord Changes**

The LGO Deposit Copy sets the I-iii-IV-V7 chord progression to extend over two measures (or bars) according to a “slow” 4/4 time signature. Dkt. No. 208 ¶ 41. TOL sets the I-I6-IV-V7 chord progression to a “fast” 4/4 time signature. *Id.*

The parties dispute whether the songs’ harmonic rhythms, the timing of the chord changes in the songs, are substantially similar. SAS claims that the harmonic rhythms are the same but are notated using two different time signatures. *Id.*; Dkt. No. 3 ¶¶ 10-11. In Sheeran’s view, the harmonic rhythms are different because the chord progression in LGO is played over four bars as compared to two bars in TOL and LGO’s Deposit Copy does not notate a fast or slow 4/4 time, which refers to the tempo of the song. Dkt. No. 179 Ex. 2 ¶ 49. SAS dismisses any arguments that the difference in notation makes the rhythmic pattern dissimilar because, it claims, the rhythms are identical in sound. Dkt. No. 200 Ex. 5 ¶ 5. It also argues that syncopated chord changes, occurring on a weak beat, are in both songs. Dkt. No. 200 Ex. 7 ¶ D.1.

As evidenced by the differences in opinions of the parties’ experts, the question of whether TOL is substantially similar to LGO cannot be resolved summarily and is left for trial.

### **4) Touring Profits Damages**

As a remedy for infringement, a copyright owner is entitled to recover statutory damages or “actual damages and any additional profits of the

infringer.” 17 U.S.C.A. § 504(a) (2018). SAS seeks a damages award in the amount of actual damages plus profits, including all profits relating to touring revenue, such as concert ticket and concert merchandise sales. Dkt. No. 102 (Third Amended Complaint).

In the event that the complaint is not dismissed, both parties seek partial summary judgment on various issues related to profits. Sheeran moves for summary judgment to dismiss SAS’s claim that the damages award can include touring profits. SAS opposes the motion and cross moves for summary judgment that

(i) to the extent there is any burden on Plaintiff to establish a link between the separate acts of infringement that arose when Sheeran performed TOL at concerts and the direct profits from the concerts, that burden has been satisfied;

(ii) the numerous references throughout Mr. Massarsky’s report to Plaintiff’s purported failure to meet its causal burden should be struck as inappropriate (as Mr. Massarsky is not a legal expert) and wrong;<sup>1</sup> and

(iii) if Plaintiff prevails on its copyright infringement claim, it will be entitled—at a minimum—to the “straight-line” apportion-

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<sup>1</sup> SAS’s motion to strike is denied. There is nothing improper about Massarsky opining that there is no evidence of a causal link between tour profits and the alleged infringement.

ment of direct profits arising from the direct infringements advanced by Mr. Massarsky, based on the number of songs Mr. Sheeran performed at each Ed Sheeran concert.

In other words, if TOL is found to infringe LGO, the parties disagree over whether touring profits—the sale of concert tickets and concert merchandise—can be recovered and in what amount. SAS alleges that it can recover revenue generated from concert tickets and merchandise because they are direct profits. SAS argues it does not need to prove a causal nexus between the separate acts of infringing public performances and the direct revenues collected from them. Rather, the burden is on Sheeran to prove the proper apportionment of those direct profits to the TOL infringements.

Sheeran contends that all the touring profits are indirect profits. Nonetheless, regardless of how the profits are classified, Sheeran argues SAS must prove a causal nexus between the infringement and the profits and SAS has not adduced any evidence that shows TOL specifically caused concertgoers to purchase Sheeran concert tickets and merchandise sold at his concerts.

### **1) Classification of Profits**

Depending on how attenuated profits are from the infringing act, an infringer's profits may be direct or indirect. *Complex Sys., Inc. v. ABN Ambro Bank N.V.*, No. 08 CIV. 7497 KBF, 2013 WL 5970065, at \*2 (S.D.N.Y. Nov. 8, 2013). Direct profits arise from the sale of the infringing good. *Cohen*

*v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 446 (E.D.N.Y. 2018), *aff'd sub nom. Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020); *Garcia v. Coleman*, No. C-07-2279 EMC, 2009 WL 799393, at \*2 (N.D. Cal. Mar. 24, 2009) (quoting *Mackie v. Rieser*, 296 F.3d 909, 914 (9th Cir. 2002)). Indirect profits are “derived from the use of the copyrighted work to promote sales of other products.” *Graham v. Prince*, 265 F. Supp. 3d 366, 388 (S.D.N.Y. 2017).

Profits that arise from the performance of a song are direct whereas profits that may have come about because the performance acted as a draw for other profit centers are indirect. Accordingly, profits from the sale of concert tickets are direct. The profit is arising because the artist was paid to perform songs and there is an expectation, although not a guarantee, that an artist will play their most popular ballads. In comparison, profits from the sale of concert merchandise are indirect because the source of profits is from the sale of another good separate from the infringing performance.

## 2) Causal Nexus

A copyright owner is entitled to recover “any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” 17 U.S.C. § 504 (2018). The Copyright Act goes on to describe a burden-shifting analysis: “In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or

her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.” *Id.*

A plaintiff thus has the burden of showing a causal nexus between the infringement and the gross revenue. *Lawton v. Melville Corp.*, 116 F.3d 1472 (2d Cir. 1997) (Because “only those profits attributable to the use of the infringed work” can be awarded, a copyright owner “must show some nexus between the gross revenues and the infringement.”); *Viktor v. Top Dawg Ent. LLC*, No. 18 CIV. 1554, 2018 WL 5282886, at \*1 (S.D.N.Y. Oct. 24, 2018) (“Significant here, before the burden shifts to the infringer, a plaintiff must first demonstrate a causal relationship between the infringement and the defendants’ revenues.”). It is insufficient for a copyright owner to “simply show gross revenues from the sale of everything the defendant sells.” *Id.* “[T]he term ‘gross revenue’ under the statute means gross revenue reasonably related to the infringement, not unrelated revenues.” *On Davis v. The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001) (holding plaintiff failed to discharge its burden by submitting evidence of the defendant’s gross revenues when the revenue included sales that were in no way promoted by the infringing advertisement). In cases of direct profits, the burden to satisfy the nexus requirement is minimal and may be obvious. *See Lowry’s Reps., Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 751 (D. Md. 2003) (“In the case of ‘direct profits,’ such as result from the sale or performance of copyrighted material, the nexus is obvious.”); *Data Gen. Corp. v. Grumman*

*Sys. Support Corp.*, 36 F.3d 1147, 1173 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (“In the context of infringer’s profits, the plaintiff must meet only a minimal burden of proof in order to trigger a rebuttable presumption that the defendant’s revenues are entirely attributable to the infringement.”).

### **Concert Tickets**

SAS has the burden of producing evidence that shows revenue from the sale of tickets to concerts where TOL was performed. SAS put forward such evidence in the form of an expert report, which calculated that the portion of concert ticket revenue attributable to the live performance of TOL ranged from 13.3%, based on a method of calculating according to the Spotify streaming statistics, to 23.97%, based on calculating according to the RIAA certified sales. Dkt. No. 205 Ex. 1 at 9-10.

Sheeran disputes this method of calculation. They put forward a competing expert report that calculates TOL’s share of the profits by dividing the Adjusted Show Profits (a figure provided by them that subtracts expenses from the total live income) by the number of songs performed by Ed Sheeran, or, in the alternative, by the number of songs performed by Mr. Sheeran and by the opening act(s). Dkt. No. 205 Ex. 2 at 6, 15-20.

SAS disputes Sheeran’s method of calculation and Sheeran’s deduction of business management fees, management commissions, and UK taxes from

the Adjusted Gross Profits figure on the grounds that those items are not directly attributable to TOL. Dkt. No. 205 Ex. 1 at 8.

In light of the dispute between the parties, the proper calculation of damages should be determined by trial rather than on summary judgment.

### **Concert Merchandise**

SAS has not identified any admissible evidence that ties the alleged infringement, the live performance of TOL, to the revenues generated by the sale of concert merchandise.

Without a showing of “any causal connection between the infringement and the defendant’s profits,” it is only speculative whether the revenue is reasonably related to the infringement. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 159 (2d Cir. 2001). Copyright law does not allow for speculative recovery, and we can surmise a myriad of reasons why a concertgoer would purchase concert merchandise, reasons that have nothing to do with the live performance of TOL.

Accordingly, if TOL is found to be an infringement of LGO, the jury cannot take into account the revenue from concert merchandise sales when making the damages calculation. *See Bayoh v. Afropunk LLC*, No. 18 CV 5820, 2020 WL 6269300, at \*7 (S.D.N.Y. Oct. 26, 2020) (“In cases that involve indirect profit claims, the district court opinions have underscored that “the decision to ‘send[ ] such claims to a jury should be extremely rare.’” (alteration in original)).

**CONCLUSION**

Sheeran's motion for summary judgment dismissing SAS's claim for infringement is denied. Sheeran's motion in the alternative to dismiss SAS's claim to include concert merchandise revenue in a calculation of damages is granted, but its motion to dismiss the inclusion of concert ticket sales is denied.

Sheeran's motion to exclude Dr. Covach's and Dr. Everett's Revised Reports and testimony is granted conditionally on their present submissions. If, within thirty days from the date of entry of this Order, they submit reports which comply strictly with this Order and the September 9, 2021 Order, their reports will be received in evidence and they may testify. Those of Sheeran's objections and disputes with their reports which have not been specifically addressed by the Court are left to be dealt with on cross-examination.

SAS's summary judgment motion for a finding that if the jury finds TOL infringes LGO, SAS has established a link between the infringing concert performances of TOL and profits arising from concert ticket sales is granted. It is denied in all other respects.

So Ordered.

Dated: New York, New York  
September 29, 2022



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/s/ LOUIS L. STANTON

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LOUIS L. STANTON  
U.S.D.J.

70a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 5839 (LLS)

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STRUCTURED ASSET SALES, LLC,

Plaintiff,

– against –

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.

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**OPINION & ORDER ON  
DEFENDANTS' MOTION IN LIMINE**

The issues raised by defendants' application for  
*in limine* rulings are disposed of as follows.

1.

The Deposit Copy

On July 17, 1973, in compliance with the then—  
applicable 1909 Copyright Act Sections 9 and 12,  
17 U.S.C. §§ 5(e), 9, 10, 12 (1964), Ed Townsend  
filed with the Copyright Office (through music pub-

lishers) the application for registration of the musical composition Let's Get It On, and deposited two copies of the sheet music he had authored. The copyright was registered as No. EP 314589, and the sheet music deposited with the Copyright Office ("Deposit Copy") defines "precisely what was the subject of copyright." *Merrell v. Tice*, 104 U.S. 557, 561 (1881). "[T]he scope of the copyright is limited by the deposit copy." *Skidmore v. Led Zeppelin*, No. 16-56057, March 9, 2020 p. 20 (9th Cir. 2020) (en banc). The Copyright Office instructs that "a registration for a work of authorship only covers the material that is included in the deposit copy(ies)" and "does not cover authorship that does not appear in the deposit copy(ies), even if the applicant expressly claims that authorship in the application." U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*. § 504.2 (3d ed. 2017). As such, the Deposit Copy is the sole definition of the elements included in the protection of copyright, which does not include other embellishments, even if they were added by Townsend himself—because they have not undergone the copyright process.

Nor is the field of protected elements enlarged on the theory that they are consistent, and harmonize with the work as articulated in the Deposit Copy, and are implied by the way the articulated elements are expressed. If what is implied is not in the Deposit Copy, it does not have the protection of copyright.

## 2.

## The Sound Recording

A clear understanding that only the Deposit Copy has copyright protection is important in this case because Marvin Gaye, who co-wrote Let's Get It On ("LGO") with Townsend, recorded the song for its first commercially released sound recording on March 22, 1973. The Gaye sound recording contains many elements: percussion/drums, bass-guitar, guitars, Gaye's vocal performances, horns, flutes, etc., which do not appear in the simple melody of the Deposit Copy. These additional elements—at least some of which appear in Thinking Out Loud ("TOL") in more or less similar form—are not protected by copyright, because they are not in the Deposit Copy.

Thus the Gaye sound recording is inadmissible in any way which might confuse the jury into thinking it represents what is protected by copyright. For example, comparisons of elements in Thinking Out Loud which are similar to elements in the Gaye sound recording (but not the Deposit Copy) will not be allowed.

## 3.

A clear example is the bass line issue. There is no genuine question that there is no notation or specification of a bass line in the Deposit Copy. That has been accepted by both sides and is apparent from a visual inspection, and is beyond dispute.

Plaintiff's experts' produced opinions basing infringement on an asserted similarity between

Thinking Out Loud and a combination of three elements in LGO called the “backing pattern.” It consisted of the chord progression, the harmonic anticipation of chord changes (both of which are commonplace and unprotectable), and a bass line. There is no bass line in the LGO Deposit Copy. This led to the concoction of remedial theories—e.g. that if you string together the lowest notes in the Deposit Copy you will “find” a bass line; that the remaining two elements are its “functional equivalence”—which have serious analytic problems.

The present point is that none of that could be discerned by examining the Deposit Copy. The waste and confusion came from comparing TOL with the Gaye sound recording rather than the Deposit Copy, and failing to take seriously the understanding that “copyright law protects only that which is literally expressed, not that which might be inferred or possibly derived from what is expressed.” (Defts’ Reply Memo., pp. 3-4).

To prevent the jury from any such confusion, plaintiff’s expert reports must delete all references to the Gaye sound recording, and its experts shall not mention it in their testimony without prior approval by the Court.

Within the next 30 days plaintiff shall furnish defendants with final copies of its experts’ reports, as so amended.

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4.

One of plaintiff's experts having ignored the issue of prior art, and the other having only made inquiries so superficial as to amount to no research at all, the proof as to the existence of prior art shall be only that submitted by defendants.

5.

Plaintiff's experts' corrected reports and testimony are to eschew opinions unsupported by facts, or suggesting legal conclusions.

So Ordered.

Dated: New York, New York  
September 9, 2021

/s/ LOUIS L. STANTON

Louis L. Stanton  
U.S.D.J.

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**Registration #:** PA0002238083  
**Service Request #:** 1-8693744639

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**Mail Certificate**

Structured Asset Sales, LLC  
David Pullman  
8721 Santa Monica Blvd., Suite 747  
Los Angeles, CA 90069 United States

**Priority:** Special Handling  
**Application Date:** April 14, 2020

**Note to C.O.:** David Pullman is certifying this application on behalf of Structured Asset Sales, LLC, of which he is the principal, and on behalf of, and with the permission of, and at the direction of Kathryn Townsend Griffin, and The Estate of Cherrigale Townsend, and The Helen Christine Townsend McDonald Trust.

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**Correspondent**

**Registration Number**  
**PA 2-238-083**  
**Effective Date of Registration:**  
April 14, 2020  
**Registration Decision Date:**  
April 24, 2020

**Title**

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**Title of Work:** Let's Get It On

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**Completion/Publication**

**Year of Completion:**

1973

**Date of 1st Publication:**

January 01, 1978

**Nation of 1st Publication:**

United States

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**Author**

• **Author:** Edward Townsend

**Author Created:** music, lyrics

**Citizen of:** United States

**Domiciled in:** United States

• **Author:** Marvin Gaye

**Author Created:** music, lyrics

**Citizen of:** United States

**Domiciled in:** United States

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**Copyright Claimant**

**Copyright Claimant:**

Stone Diamond Music  
Corporaton

25 Madison Ave. 24th Floor,  
c/o Sony/ATV Music  
Publishing USA,  
New York, NY, 10010,  
United States

**Transfer statement:**

By written agreement



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**Copyright Claimant:**

Cherritown Music Co., Inc.  
Box 37, Fosterdale, NY,  
12735, United States

**Transfer statement:**

By written agreement

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**Limitation of copyright claim**

**Material excluded from this claim:**

music, lyrics, Excludes  
lyrics and music reflected  
on deposit copy for 1973  
registrations

**Previous registration and year:**

EP0000314589, 1973  
EU0000422281, 1973

**New material included in claim:**

music, lyrics, Includes  
lyrics and music not  
reflected on deposit copy  
for 1973 registrations

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**Certification**

**Name:** David Pullman

**Date:** April 14, 2020

**Correspondence:** Yes

78a

**FORM E**

REGISTRATION NO.    CLASS E

EP 314589

DO NOT WRITE HERE

EP

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**Application**

**for Registration of a Claim to Copyright**

**In a musical composition the author of which is a citizen or domiciliary of the United States of America or which was first published in the United States of America**

**Instructions:** Make sure that all applicable spaces have been completed before you submit the form. The application must be **SIGNED** at line 9. For published works the application should not be submitted until after the date of publication given in line 4(a), and should state the facts which existed on that date. For further information, see page 4.

Pages 1 and 2 should be typewritten or printed with pen and ink. Pages 3 and 4 should contain exactly the same information as pages 1 and 2, but may be carbon copies.

Mail all pages of the application to the Register of Copyrights, Library of Congress, Washington, D.C. 20540, together with:

(a) If unpublished, one complete copy of the work and the registration fee of \$6.

(b) If published, two copies of the best edition of the work and the registration fee of \$6.

Make your remittance payable to the Register of Copyrights.

**1. Copyright Claimant(s) and Address(es):**

Give the name(s) and address(es) of the copyright owner(s). In the case of published works the name(s) should ordinarily be the same as in the notice of copyright on the copies deposited.

Name            Stone Diamond Music Corp.

Address        6464 Sunset Blvd.  
Hollywood, Calif. 90028

Name            Cherritown Music Co., Inc.

Address        Box 37  
Fosterdale, N.Y. 12735

**2. Title:**     LET'S GET IT ON  
(Give the title of the musical  
composition as it appears on  
the copies)

#5958

**3. Authors:** Citizenship and domicile information must be given. Where a work is made for hire, the employer is the author. Organizations formed under U.S. Federal or State law are U.S. citizens.

Authors include composers of music, authors of words, arrangers, compilers, etc. If the copyright claim is based on new matter (see line 5) give information about the author of the new matter.

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Name Ed Townsend  
(Give legal name followed by  
pseudonym if latter appears on  
the copies)

Citizenship: U.S.A. X  
(Check if U.S. citizen)

Other  
(Name of country)

Domiciled in U.S.A. Yes X No

Address 6464 Sunset Blvd.

Author of words & music  
(State which: words, music,  
arrangements, etc.)

Name  
(Give legal name followed by  
pseudonym if latter appears on  
the copies)

Citizenship: U.S.A.  
(Check if U.S. citizen)

Other  
(Name of country)

Domiciled in U.S.A. Yes No

Address

Author of  
(State which: words, music,  
arrangements, etc.)

81a

Name

(Give legal name followed by  
pseudonym if latter appears on  
the copies)

Citizenship: U.S.A.  
(Check if U.S. citizen)

Other  
(Name of country)

Domiciled in U.S.A. Yes    No

Address

Author of  
(State which: words, music,  
arrangements, etc.)

**NOTE: Leave all spaces of line 4 blank unless  
your work has been PUBLISHED.**

**(a) Date of Publication:** Give the date when  
copies of this particular version of the work were  
first placed on sale, sold or publicly distributed.  
The date when copies were made or printed, or the  
date when the work was performed should not be  
confused with the date of publication. **NOTE:** The  
full date (month, day, and year) must be given.

February 14, 1973  
(Month)    (Day)    (Year)

**(b) Place of Publication:** Give the name of the  
country in which this particular version of the work  
was first published.

USA

**NOTE: Leave all spaces of line 5 blank unless the instructions below apply to your work.**

**Previous Registration or Publication:** If a claim to copyright [ILLEGIBLE] any substantial part of this work was previously registered in the U.S. Copyright Office in unpublished form, or if any substantial part of the was previously published anywhere, give requested information.

[ILLEGIBLE] work previously registered? Yes No

Date of registration

Registration number

[ILLEGIBLE] work previously published? Yes No

Date of publication

Registration number

[ILLEGIBLE] any substantial **NEW MATTER** in this version? Yes No If your answer is "Yes," give a brief general [ILLEGIBLE] of the nature of the **NEW MATTER** in this version. (New matter may consist of compilation, arrangement, adaptation [ILLEGIBLE] editorial revision, and the like, as well as additional words and music.)

EXAMINER

[ILLEGIBLE]

*Complete all applicable spaces on next page*

**6. If registration fee is to be charged to a deposit account established in the Copyright Offices, give name of account:**

Stone Diamond Music Corp.

**7. Name and Address of person or organization to whom correspondence or refund, if any, should be sent:**

Name Stone Diamond Music Corp. Address below

**8. Send certificate to:**

(Type or print name and address)

Name Stone Diamond Music Corp.  
6464 Sunset Blvd.  
(Number and street)  
Hollywood, Calif. 90028  
(City) (State) (ZIP code)

**9. Certification:**

(Application not acceptable unless signed)

I CERTIFY that the statements made by me in  
this application are correct to the best  
of my knowledge,

\_\_\_\_\_  
/s/ [ILLEGIBLE]

(Signature of copyright claimant or  
duly authorized agent)

**Application Forms**

Copies of the following forms will be supplied by  
the Copyright Office without charge upon request.

Class A Form A—Published book manufactured  
in the United States of America.

Form A-B Foreign—Book or periodical  
manufactured outside the

United States of America (except works subject to the ad interim provisions of the copyright law).

- Class A or B    Form A-B Ad Interim—Book or periodical in the English language manufactured and first published outside the United States of America.
- Class B    Form B—Periodical manufactured in the United States of America.
- Form BB—Contribution to a periodical manufactured in the United States of America.
- Class C    Form C—Lecture or similar production prepared for oral delivery.
- Class D    Form D—Dramatic or dramatico-musical composition.
- Class E    Form E—Musical composition the author of which is a citizen or domiciliary of the United States of America or which was first published in the United States of America.
- Form E Foreign— Musical composition the author of which is not a citizen or domiciliary of the United States of America and which was not first published in the United States of America.



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- Class F    Form F—Map.
- Class G    Form G—Work of art or a model or  
            design for a work of art.
- Class H    Form H—Reproduction of a work of art.
- Class I    Form I—Drawing or plastic work of a  
            scientific or technical character.
- Class J    Form J—Photograph.
- Class K    Form K—Print or pictorial illustration.  
            Form KK—Print or label used for an  
            article of merchandise.
- Class L    Form L-M—Motion picture.  
or M
- Class N    Form N—Sound recordings.  
            Form R—Renewal copyright.  
            Form U—Notice of use of copyright  
            music on mechanical instruments.

**FOR COPYRIGHT OFFICE USE ONLY**

Application received

Jul. 17, 1973

One copy received

Two copies received

Jul. 17, 1973

Fee received

Renewal

R 840-063

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\* (Appl.) \* See V. v. 1510 p. 290-292 Assign. Rec.

Re: Authorship

7.1571

ED TOWNSEND

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AND CHERRITOWN MUSIC CO., INC.

HOLLYWOOD, CALIF, U.S.A







89a

LET'S GET IT ON

YOU KNOW HOW SWEET AND WONDERFUL LIFE CAN BE

OOH OOH I'M

ASK IN' YOU BA BY TO GET IT ON WITH ME

OOH OOH OOH

I AINT GOIN' TO WORRY I AINT GOIN' TO PUSH

I WON'T PUSH YOU BA BY JUST COME ON COME ON COME ON

COME ON COME ON BA BY STOP BEAT IN' ROUND THE DUSH

HEY LET'S GET IT ON

OOH OOH LET'S GET IT ON YOU



90a

LET'S GET IT ON

KNOW WHAT I'M TALKIN' A BOUT COME ON BA BY

HEY HEY LET YOUR LOVE COME OUT

IF YOU BELIEVE IN LOVE LET'S GET IT ON

DOH LET'S GET IT ON BA BY THIS

MINUTE ON YEAH LET'S GET IT ON

PLEASE GET IT ON

HEY HEY COME ON COME ON COME ON

COME ON COME ON DAR LIN' STOP BEATIN' ROUND THE BUSH

OH GONNA GET IT ON



91a

LET'S GET IT ON

RIGHT WITH YOU BA-BY I WANT TO GET IT ON

YOU DON'T HAVE TO WORRY THAT IT'S WRONG IF THE SPIRIT MOVE

YOU LET ME GROOVE YOU GOOD LET YOUR LOVE COME DOWN

OH GET IT ON COME ON BA-BY

DO YOU KNOW I MEAN IT I'VE BEEN SANCTIFIED

HEY HEY GIRL YOU GIVE ME GOOD

FEELINGS SO GOOD SOME THING LIKE SUMMER TIME

92a

**"Let's Get It On" (Single) (Released on 45 Vinyl in 1973)**





93a

“Let’s Get In On” (Released on 33 1/3 Vinyl in 1973)

