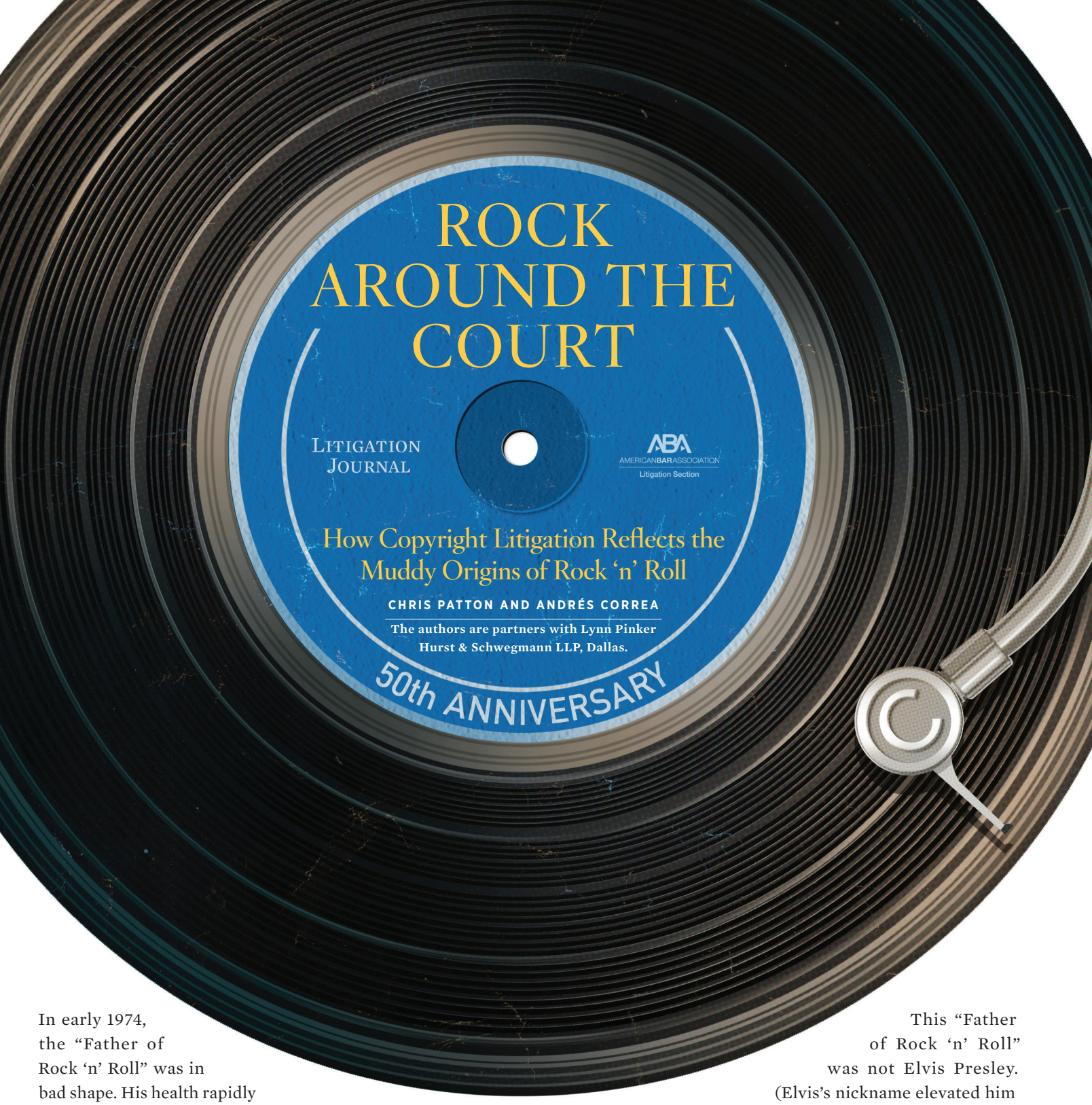

In early 1974, the "Father of Rock 'n' Roll" was in bad shape. His health rapidly declining, he took some comfort in a long, influential career that rightly landed him among the originators of a dominant cultural force. Among other massive hits, his song "That's All Right" jump-started the rock 'n' roll era 20 years before. Influenced by the gospel music he sang as a youth in Mississippi, he later became a fixture in the Memphis music scene. Over the next two decades, his songs played on radio stations and turntables around the world.

This "Father of Rock 'n' Roll" was not Elvis Presley. (Elvis's nickname elevated him to "The King.") This founding father was instead Arthur "Big Boy" Crudup, who wrote many of the songs that Elvis and others rode to fame. In Memphis in 1954, Elvis could record "That's All Right" without paying Crudup because Crudup, like most Black artists of the 1940s and 1950s, had purportedly signed away his copyright. To Elvis's credit, he always acknowledged Crudup's contribution to his career. According to Elvis, his version of "That's All Right" stemmed

Illustration by Taylor Callery

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from a stalled early recording session that kicked back into gear as Elvis began shaking and moving while playing "this song [that] popped into my mind that I had heard years ago."

Crudup, after years of royalty battles with his record label, quit performing for a time, returning to Mississippi to farm (with some bootlegging on the side). Although he returned to the stage in the 1960s, he lamented just before his death: "I was born poor, I live poor, and I'm going to die poor." Far from Graceland, Crudup died in poverty on March 28, 1974, having never received the royalties he deserved.

This dynamic of exploitation not only characterized the early days of rock 'n' roll but also set the stage for legal battles that continue to shape the industry today. From George Harrison to Ed Sheeran, courts have struggled to draw the line between homage and theft. Of course, any litigator or historian can persuasively argue that rock music directly plagiarized the Black rhythm & blues artists of the 1940s, whose music most radio stations would not play to national, White audiences. But that oversimplification also ignores the creative advances spurred by Elvis, as well as Buddy Holly, Jerry Lee Lewis, Bill Haley, Roy Orbison, and Carl Perkins. It also gives short shrift to the influence of "country & western"—a term coined to escape the derogatory associations of "hillbilly music" (the Delmore Brothers' "Hillbilly Boogie" is a good example of this genre's influence)—on rock 'n' roll's development.

Recognizing this complexity, our article aims to honor rock 'n' roll's founding fathers and mothers (such as Big Momma Thornton, who originally recorded the Elvis hit "Hound Dog") by telling their tale and analogizing it to the "blurred lines" of musical creation evident in subsequent copyright litigation. It explores the creative process—part copying, part inspiration, and part evolution—through key cases of copyright infringement litigation. From the Chiffons v. George Harrison, to Howlin' Wolf and Muddy Waters (and others) v. Led Zeppelin, to the estate of Marvin Gaye v. Robin Thicke and Pharrell Williams, and then Ed Sheeran, the fundamental question that seems to underlie each lawsuit is this: Where do we draw the line between finding inspiration in (or paying homage to) a movement's artistic progenitors, on the one hand, and the theft of intellectual property, on the other?

Origins of Rock 'n' Roll and Its Creative Tensions

On April 12, 1954, Bill Haley and His Comets recorded the iconic song "Rock Around the Clock." A year earlier, Haley had recorded "Crazy Man Crazy," which brought rock 'n' roll closer to mainstream influence. But it was Haley's two hits in 1954—"Rock Around the Clock" and "Shake, Rattle and Roll"—that brought him to new heights. "Rock Around the Clock" reached number 1 on the *Billboard* pop charts and held that position for eight weeks. "Shake, Rattle and Roll" was in the top 10 for 12 weeks beginning in September 1954.

As with Elvis, "Shake, Rattle and Roll" was not Haley's creation. Instead, it was first recorded by Big Joe Turner, a rhythm & blues artist from Kansas City. And, with all respect to Haley's talent, as observed decades ago by Charlie Gillett, author of *The Sound of the City: The Rise of Rock and Roll* (1970), "the novel feature of Haley's style, its rhythm, was drawn from black music."

In 1954, rhythm & blues—then called "race records"—were published only in local markets by independent recording companies, for Black audiences. The style largely contradicted the music of the times. For reference, in 1950, some of the most popular songs were "Goodnight Irene" by the Weavers; "Mona Lisa" by Nat King Cole; "The Tennessee Waltz" by Patti Page—all soft, melodic ballads, fit for a quiet evening by the fire. Although big orchestral bands also had reached *Billboard* status, Tony Bennett and Perry Como best exemplify the era, and they were rapidly fading from the mainstream.

By contrast, rhythm & blues was looser, louder, and explicit—and its listeners could not help but "shake, rattle, and roll" along with it. These songs were rebelliously exciting. In his 1950 article *Listening to Popular Music*, the sociologist David Riesman commented on the "minority group" of music listeners of the time as compared with the "majority" who accepted the major recording companies' musical selections:

> The minority group is small. It comprises the more active listeners. . . . The group tends to dislike name bands, most vocalists (except Negro blues singers), and radio commercials. . . . [They share] a sympathetic attitude or even preference for Negro musicians; an egalitarian attitude towards the roles, in love and work, of the two sexes; a more international outlook . . . similarly a reaction against the stylized body image and limitations of physical self-expression. . . .

This "minority" also included teenagers, a rising commercial force inspired to demand its own, new culture represented by movies like *Rebel Without a Cause* and *The Wild One*. While Hollywood was catching on, music was still lagging.

Alan Freed—a Cleveland radio disc jockey often credited with inventing the term "rock 'n' roll," despite gospel communities using the term long before in the religious revivalist context, along with artists like Roy Brown using it as a sexual reference in "Good Rockin' Tonight"—focused his attention on this "minority" audience. He named his new radio show "Moondog's Rock 'n' Roll Party" after he saw teenagers moving around while listening to rhythm & blues records (Red Prysock, Big Al Sears, and Ivory Joe Hunter) at a local record store. In Cleveland, Freed quickly proved the success of this traditionally Black music with White audiences, and in 1954 he moved his show to New York.

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Many have described rock 'n' roll in those early years as simply rhythm & blues by another name. Dave Bartholomew, Fats Domino's producer and Little Richard's band leader, explained that "[w]e had rhythm & blues for many, many a year, and here come in a couple of white people and they call it rock 'n' roll, and it was rhythm & blues all the time!" But the story is also not that simple. As Gillett observes:

> When [Freed] first used the term "rock 'n' roll," he was applying it to music that already existed under another name, "rhythm & blues." But the change in name induced a change in the music itself. "Rhythm & blues" had meant music by black people for black people. "Rock 'n' roll" meant at first only that this music was being directed at white listeners, but then, as the people producing the music became conscious of their new audience, they changed the character of the music, so that "rock 'n' roll" came to describe—and be—something different from "rhythm & blues."

The money soon followed. With few exceptions, major recording companies began successfully using White artists to play Black music. As a result, most of the initial rock 'n' roll hits were simply covers of songs written by Black artists. For example, although Fats Domino originally recorded "Ain't That a Shame," and Little Richard "Tutti Frutti," Pat Boone's versions made them hits. Although Big Momma Thornton originally recorded "Hound Dog," Crudup first issued "That's All Right," and Otis Blackwell wrote "All Shook Up," "Don't Be Cruel," and (in part) "Return to Sender," these songs became massive hits only after Elvis's versions.

Can a court ever know an instance of "subconscious infringement" to a reliable degree?

The increasing mainstream popularity of Elvis's recordings of these songs was aided by White Memphis radio DJs, who would invariably introduce them with references to the high school Elvis attended, which, in the 1950s South before school desegregation, was a way of reminding audiences that the singer was White. And the Beatles and Led Zeppelin—both of which are the subject of litigation described in this article—themselves popularized music that either arguably belonged to a Black artist (like Led Zeppelin with Muddy Waters' "You Need Love") or in fact belonged to a Black artist (like the Beatles with the Top Notes' "Twist and Shout").

As rock 'n' roll's popularity grew, it became clear that the genre's original, and mostly Black, inventors would not achieve riches and fame from their music comparable to their mostly White imitators. Crudup is just one in a long line of rhythm & blues artists who nurtured the revolutionary energy of rock 'n' roll. Starting in the 1940s and into the 1950s, Black artists like Fats Domino, Louis Jordan, Roy Brown, Wynonie Harris, Lloyd Price, Red Prysock, and more relied on independent publishers to play their "race records" and create something new. But it would be White artists like Elvis and Haley who would popularize the new brand of rhythm & blues and achieve commercial success with it. One important exception was Chuck Berry, whose "clear enunciation probably enabled his record to 'pass for white' on the radio stations that generally kept such stuff off the air" (in the words of Gillett).

Two conclusions are undeniable. First, rock 'n' roll emerged as a near-copy of rhythm & blues, just with different packaging. Second, rock 'n' roll evolved quickly, dramatically breaking with its past. It is therefore hard to draw the line between where rhythm & blues ends and rock 'n' roll begins. It is this same murky question that faces lawyers, courts, and juries in the most newsworthy copyright litigations of the past 50 years.

Landmark Copyright Cases: Legal Battles That Shaped the Industry

As rock 'n' roll evolved from its Black rhythm & blues origins into a global phenomenon, so too did the legal frameworks designed to protect creative works. However, courts often struggled to navigate the murky waters between inspiration and plagiarism, as seen in a series of landmark lawsuits.

We begin our legal journey with the "mantra that took over the world." Released in November 1970 on his triple album *All Things Must Pass*, the song "My Sweet Lord" was George Harrison's first solo single after the Beatles disbanded. It became a massive hit, topping charts worldwide. The song uniquely blends Christian and Hindu references, using phrases like "Hallelujah" and "Hare Krishna" to promote religious unity.

Harrison testified that he began writing the song while on tour in Sweden in late 1969. According to Harrison, his main inspiration for it was "Oh Happy Day," an old gospel tune rearranged into a hit that year for the Edwin Hawkins Singers. The role of "Oh Happy Day" is obvious if you listen to it. Responding to that record's joyful call-and-response, Harrison said: "It really just knocked me out. . . . I just felt a great feeling of the Lord. So I thought: 'I'll write another 'Oh Happy Day,' which became 'My Sweet Lord.'"

The Chiffons were a prominent American girl group that originated from the Bronx, New York City, in 1960. The original lineup consisted of Judy Craig, Patricia Bennett, and Barbara Lee, who were all schoolmates at James Monroe High School. Their first major hit was "He's So Fine," and the Chiffons even performed as the opening act for the Beatles' first American concert. His divine message notwithstanding, Harrison found himself accused of copyright infringement by the Chiffons.

In 1971, the Chiffons sued Harrison for copyright infringement. The Southern District of New York described the song in its 1976 opinion:

> He's So Fine, recorded in 1962, is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, "sol-mi-re" (hereafter motif A), altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, "sol-la-do-la-do," (hereinafter motif B). While neither motif is novel, the four repetitions of A, followed by the four repetitions of B, is a highly unique pattern.

During trial, Harrison could not remember how either motif came into being, believing they likely emerged spontaneously during recording. The court, in its opinion, homed in on the critical issue: "Seeking the wellsprings of musical composition . . . is a fascinating inquiry." While the court believed an earnest Harrison that he did not intentionally use "the He's So Fine theme," it was "perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase." Faced with these facts, the court concluded that the composer "knew" that "this combination of sounds would work" because "his subconscious knew it already had worked in a song his conscious mind could not remember."

Given the similarity of the songs, and because "Harrison had access to He's So Fine," the court found infringement, "and [it] is no less so even though subconsciously accomplished." "Subconscious infringement" presents all sorts of epistemological, as well as legal, issues. Can a court ever know an instance of "subconscious infringement" to a reliable degree? Even when it can, should entirely independent creation that happens to closely resemble a prior one be punished? If it is true, as Jung observed, that "man does not possess creative powers, he is possessed by them," then who is at fault here?

More Difficult Later Cases

Ultimately, this early copyright dispute was not as difficult to resolve as the ones that came later. As Oscar Veliz—composer, arranger, and conductor with 30 years of experience in the music business—explains, in this particular case, "both songs are very similar not only in harmony (which happens to a lot among songs) but also in melody and in the way the background choir responds." So it was a straightforward case for the court.

On September 6, 1974, Marvin Gaye enthralled audiences with "What's Goin' On," "How Sweet It Is," and numerous of his other hits live on *The Midnight Special*, a late-night musical variety show of the era. Perhaps as an unwanted marker of his music's lasting influence, Marvin Gaye's estate has found itself involved in two extremely high-profile copyright disputes over the last 15 years.

When Marvin Gaye released "Got to Give It Up" in 1977, it became a chart-topping hit. Praised for its seamless blend of funk, soul, and R&B, it quickly reached number 1 on the *Billboard* charts. Considered one of Gaye's signature songs, it remains influential in the music world for, among other things, its distinctive groove.

In 2013, Robin Thicke and Pharrell Williams released "Blurred Lines," a massive commercial success that became the world's best-selling single that year. With a catchy beat and controversial lyrics, the song ignited debate but dominated the music industry by amassing millions in sales and streams. But the Gaye family soon sued Thicke and Williams for copyright infringement. The lawsuit alleged that "Blurred Lines" copied bass lines, hooks, melodies, and other allegedly protected elements from Gaye's song. A jury found infringement and awarded the Gaye family millions in damages. The family also received a 50 percent share of future royalties from "Blurred Lines."

On appeal, the Ninth Circuit explained the standard for establishing "substantial similarity" between the two musical compositions. To show substantial similarity, courts use two tests. The first, the extrinsic test, focuses on objective criteria. It looks at specific, measurable musical elements that can be analyzed without subjective interpretation, including melody, harmony, rhythm, structure, and lyrics. Expert musicologists play a large role here.

The second, the intrinsic test, is subjective. It considers the music's overall impression on an ordinary listener. It asks whether an average person, without any musical training, would perceive the two pieces of music as substantially similar. This test is about the music's "feel" or "vibe." It needs no experts because it looks at the music as a whole, rather than breaking the composition down into components. It is about the overall experience of listening to the music. The two tests are meant to balance the analysis; but balance, as in all things, is hard to achieve.

Importantly, the Ninth Circuit emphasized that "the requirement is one of substantial similarity to protected elements of the copyrighted work," and therefore "it is essential to distinguish between the protected and unprotected material in a plaintiff's work." However, there is an exception here, which proved critical in this case: "[S]ubstantial similarity can be found in a combination of elements, even if those elements are individually unprotected."

This exception allowed the Ninth Circuit to uphold the jury verdict, and it arguably led to the criticism of the decision. The Ninth Circuit upheld the jury's finding of substantial similarity based on the combination of both protectable and unprotectable elements of the songs. The court emphasized, under the extrinsic test, that infringement could be found not just from literal copying but also from the appropriation of "a combination of unprotected elements" taken together based on the overall feel of the works.

There is no shortage of critics for the "Blurred Lines" ruling. Veliz observed that "[i]n this specific case, I think the composer of 'Blurred Lines' simply liked the vibe of the other song and created something based on that vibe, not the same chords, not the same melody, and not the same rhythm." And by upholding the verdict based on, among other things, the "feel" and "vibe" of the songs, rather than specific, quantifiable elements, the ruling potentially lowers the infringement threshold. This criticism highlights a tension between protecting original works and ensuring that the standards for infringement are not overly broad or subjective.

Critics, both legal and otherwise, found fault with the court's handling of the "substantial similarity" test. *Rolling Stone* noted, for example, that "the 'Blurred Lines' verdict has also generated a great deal of uncertainty in the music industry over where the line between inspiration and imitation now lies." Critics also argued that the court's emphasis on the overall "feel" of the songs, rather than specific musical elements, may lead to a more subjective and unpredictable standard for copyright infringement. On this criticism, the dissent did not mince words:

> The majority allows the Gayes to accomplish what no one has before: copyright a musical style. "Blurred Lines" and "Got to Give It Up" are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.

Along these lines, artists and industry professionals similarly worried the decision could stifle innovation. Some have observed a rise in pre-release "risk assessment" of music, with artists changing parts of their songs because they "feel" like another song. Deterring artists from drawing inspiration from existing works could lead to a more cautious and less innovative musical landscape, where artists are hesitant to experiment with new ideas that might be perceived as derivative.

Gaye's estate was then involved in another high-profile copyright case. "Let's Get It On" is one of Marvin Gaye's most iconic songs. Released in 1973, and blending soulful melodies with sensual lyrics, the song immediately topped the charts and cemented Gaye's legacy as one of soul's most influential artists. Thirty years later, British singer-songwriter Ed Sheeran released the song "Thinking Out Loud." Not only was the song a massive commercial hit certified as multi-platinum, but in 2016 it also went on to win the Grammy Award for Song of the Year. With romantic lyrics and soulful melody, the song is not only a wedding favorite, but it also helped establish Sheeran as the one of the world's leading contemporary pop artists.

In 2017, Gaye's cowriter, Ed Townsend, sued Sheeran for copyright infringement, claiming that "Thinking Out Loud" featured a similar chord progression, harmonic rhythm, melody, and bass line to "Let's Get It On" and seeking damages for both Sheeran's sales and his performances of the song. Sheeran insisted that copyright law does not protect similarities in chord progressions and rhythms because those are common musical elements.

At trial, Sheeran testified about his songwriting process, explaining that it started through playing a basic chord progression and expanded from that point. He emphasized that the chords used were common in many songs, including Van Morrison's "Crazy Love." He also explained that, although during his live performances he would sometimes combine songs like "Let's Get It On" with "Thinking Out Loud" because of their similar feel and chord structures, he denied that this reflected any intentional copying during the creation of his song. Sheeran's testimony focused on the fact that the similarities between the two songs were coincidental and a result of using widely shared musical conventions, not copying. Crediting Sheeran, the jury found in his favor on the basis that he had "independently created" the song. An appeal followed that has since been dismissed.

Led Zeppelin Cases

In 1974, Led Zeppelin released the group's sixth studio album, *Physical Graffiti*, which, with songs like "Kashmir," became a double album that reached number 1 on *Billboard*'s Top Albums chart and was the first album to go platinum on advance orders. But to the great dismay of the authors of this article (each of whom grew up loving the band), Led Zeppelin is a serial, and sometimes unabashed, copyright offender. Lead singer Robert Plant all but admitted to infringement when he said: "You only get caught when you're successful. That's the game." Perhaps the band's only redeeming characteristic on this front is that it is an indiscriminate infringer because both Black artists, like Muddy Waters (via writer Willie Dixon, writer of "You Need Love") and Chester Arthur Burnett (better known as Howlin' Wolf, writer of "Killing Floor"), and White artists, such as Jake Holmes (writer of "Dazed and Confused") and Spirit, have all sued the band for copyright infringement. Led Zeppelin settled with most, paying or giving credit for "Whole Lotta Love," "Dazed and Confused,"

and "The Lemon Song." Spirit, on the other hand, lost in court, leading to a pivotal decision in music copyright law.

In *Skidmore v. Led Zeppelin*, Spirit sued Led Zeppelin in May 2014, claiming the opening eight bars of "Stairway to Heaven" infringed on the opening bars of its song "Taurus." After a five-day trial, the jury found that Led Zeppelin had "access" to "Taurus" because it had covered a Spirit song in the early 1970s and because Jimmy Page, the band's guitarist, had Spirit's record in his collection. But the jury also found that the plaintiff had failed to meet the "extrinsic evidence" test, finding the testimony of Led Zeppelin's expert musicologist credible that despite the existence of chromatic scales and arpeggios in both, the songs were otherwise "completely distinct." The Ninth Circuit found no reason to disturb the verdict based on Spirit's other procedural and factual challenges.

Deterring artists from drawing inspiration from existing works could lead to a more cautious and less innovative musical landscape.

Listening to Spirit's song "Taurus," it is not hard to hear the similarities with the iconic descending guitar line in "Stairway to Heaven." But, Veliz cautioned, "people get confused by this kind of trial when experts talk about melody, harmony, descending chromatic lines, number of bars, etc. In this case, I'd concentrate on the nature of the descending line in the guitar. . . . They are super similar, almost identical, in that part but nothing else is the same."

The *Skidmore* decision is notable for a number of reasons (including one not discussed here—the court's rejection of the "inverse ratio" rule). The court emphasized the importance of originality in copyright law, noting that only original elements of a work are protected. The court found that the descending chromatic four-chord progression at issue was not sufficiently original to warrant copyright protection, as it was a common musical element that had been used in numerous songs prior to "Taurus." This appears, at least obliquely, to respond to the critics of the "Blurred Lines" decision who believed the court was overprotective of common musical elements.

But the Ninth Circuit also found that the jury instructions were flawed because they did not adequately explain the "selection and arrangement" doctrine. This doctrine protects the unique combination of unprotectable elements if the combination itself is original. The court emphasized that while individual elements of a work may not be protected, their unique combination could still be subject to copyright protection—in line with the "Blurred Lines" decision.

In a recent jam session, the authors (a bassist and drummer, respectively) tried to create something original. We had been covering the Beastie Boys, and we found their energy and fun inspiring. The moment we began to play something, our guitarist observed, "I'm pretty sure I've played this riff before, 20 years ago." So before our new song ever came to be, it is clear it will bear similarities to preexisting music.

Creators will unavoidably draw on both their own past creations and those of others. As Veliz observed, "there are times as a composer when you just create something you like, and it's not until someone else tells you, 'Hey, this sounds like X song,' that you realize it actually does sound like X song." So what emerges from the creative process may well have elements of something else, but it can also stand in its own right as something new, something that simply did not exist before. The cases above demonstrate that drawing that line is a challenge—in particular, drawing it in a way that will yield consistent results.

The disputes will continue. As we wrote this article, Miley Cyrus was sued because "Flowers" allegedly copies Bruno Mars's "When I Was Your Man." And in a case to watch closely, the Jamaican duo Cleveland "Clevie" Browne and Wycliffe "Steely" Johnson have alleged that reggaeton's most celebrated artists, such as Daddy Yankee and Luis Fonsi, unlawfully copied their "Fish Market" song's rhythm (or "riddim") when creating reggaeton. Many are asking, Can you copyright a rhythm?

The line will probably stay fairly blurry. But hopefully justice will prevail where most needed, such as in the case of Big Boy Crudup. It was only after his death in 1975, and after the original publishing company was sold, that his family received $248,000, with regular and greater payments since. Crudup did not see the fruits of his work, but at least his family will, thanks to copyright law. ■

(Mindful of Elvis Costello's cheeky quote that "writing about music is like dancing about architecture," the authors have created a publicly available Spotify playlist—entitled "Rock Around the Court"—containing all the songs referenced in this article for those readers who are inclined to experience this music firsthand.)

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