

# MUSIC COPYRIGHTS ON A ROLL – READ AND LISTEN TO HEAR THE LATEST

*Hodgson Russ Intellectual Property Litigation Alert*  
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In May 2023, news of Ed Sheeran’s copyright victory over his hit song “Thinking Out Loud” spread like wildfire. There, the plaintiffs alleged that Sheeran’s “Thinking Out Loud” had “striking similarities” to Marvin Gaye’s soul classic, “Let’s Get It On.” After just three hours of deliberations, the jury determined that Sheeran had independently created the song and therefore did not infringe the “Let’s Get It On” copyright.

A different twist, with an additional positive result in favor of allegedly infringing samplers was winding its way through the courts around the same time. Musician Ernie Hines claimed that Jay-Z, Timbaland, and Ginuwine infringed his copyrighted, three-bar guitar riff from the beginning of his 1969 song “Help Me Put Out the Flame.” Like Sheeran, that group of defendants have prevailed.

## The Lawsuit

In his complaint, Hines claimed that Jay-Z, Timbaland, and Ginuwine sampled his copyrighted guitar riff in their songs “Paper Chase” and “Toe 2 Toe.” Hines’ guitar riff from “Help Me Put Out the Flame” can be heard [here](#). Hines alleged that the first six seconds were infringed. So by the time the vocals come in, you’ve heard everything that the defendants allegedly sampled.

Ginuwine’s “Toe 2 Toe,” one of the allegedly-infringing songs can be heard [here](#). The other allegedly-infringing song, Jay-Z’s “Paper Chase” (produced by Timbaland), can be heard [here](#).

## Court Grants Defendants’ Motion for Summary Judgment

U.S. District Judge J. Paul Oetken for the Southern District of New York granted summary judgment in favor of Jay-Z, Timbaland, and Ginuwine. In a 15-page order, the Court found that the introductory guitar riff in Hines’ 1969 “Help Me Put Out the Flame” was not original enough to be copyrightable.

In analyzing whether Hines’ guitar riff was eligible for copyright protection, the Court found that the riff borrowed heavily from a “stock, public domain phrase from a 1914 work” called “Mysterioso Pizzicato,” also known as “The Villain’s Theme.” “Mysterioso Pizzicato” is “available to all music creators to borrow in building their own works,” and it appears frequently in art forms ranging from silent films to

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modern music. In fact, Hines’ own expert acknowledged that the guitar riff alluded to “Mysterioso Pizzicato.” “Mysterioso Pizzicato” can be heard [here](#).

The Court held that Hines’ “additions of a single note and a single different rhythm did not render the riff protectable,” and further stated that “[e]ven if Hines conceived of the introduction on his own, what he claims copyright in is not protectable.” The reasoning: “[T]he undisputed facts demonstrate that the [allegedly-infringed material] is a three-bar guitar riff that runs for a maximum of six seconds out of 192 seconds, measuring barely three percent of “Help Me” in total. The brevity of the [guitar riff] suggests a lack of quantitative significance.” Thus, because Hines’ three-bar guitar riff borrowed from a heavily-used work in the public domain with only minimal additions, “no reasonable jury could find that the amount of copying here is sufficient to support a copyright infringement claim.” Hines’ claims have been defeated.

A copy of Judge Oetken’s Order can be viewed [here](#).

### **Takeaways**

While musical artists are free to use phrases from the public domain in their own works, the addition of minimal notes and rhythms to that public domain phrase does not render their newly-created work protectable under the copyright law.

Hodgson Russ’ intellectual property team helps clients protect their intellectual property rights by prosecuting and defending claims of ownership. Hodgson Russ can also help secure trademarks, copyrights, and other protections for businesses and individuals. For more information, please contact [Jodyann Galvin](#) (716.848.1520), [Fallon Martin](#) (716.848.1594), or any member of our [Intellectual Property Litigation Practice Group](#).

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