

Title: Sheeran succeeds in ‘Shape of You’ music copyright infringement claim

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Citation: *Sheeran & Ors v Chokri & Ors* [2022] EWHC 187 (Ch) (06 April 2022)

Introduction

This case involved an assessment of UK copyright infringement, including the application of the question of independent creation and substantial similarity in relation to the copying of a musical work.

Legal context

Ed Sheeran and the co-writers of the song ‘Shape of You’ were accused of infringing the copyright of Sam Chokri in his earlier song ‘Oh Why.’ The UK High Court considered the two key elements of the test for copyright infringement. First, whether the person accused of copying had indeed copied, which requires that they had access to the earlier work, or if not whether the later work was independently created. Secondly, if there was access and copying, whether the later work copied a substantial part of the earlier work, meaning that the parts taken were original for the purpose of copyright subsistence.

Facts

The song ‘Shape of You’ was written by Ed Sheeran, Steven McCutcheon and John McDaid and released early 2017. It quickly became the best-selling digital song worldwide and in December 2021 became the first song to pass 3 billion streams on Spotify. It now has more than 5.7 billion views on YouTube. Sam Chokri (who performs under the name Sami Switch) and Ross O'Donoghue, are the writers of the song ‘Oh Why’, which is performed by Chokri, and was released in 2015. (For detailed information on the background of this case and the initial issues see Boshier H., ‘Oh Why, Oh I, Wonder if it is a Substantial Part...’ The IPKat, 14 August 2018).

In 2017, Chokri and the assignee of the copyright in ‘Oh Why,’ Artist and Company Ltd, contacted Sheeran’s lawyers claiming that ‘Shape of You’ had infringed their song. Thereafter they notified the Performing Rights Society (PRS) of their contention, resulting in the PRS royalties for ‘Shape of You’ to be frozen in respect of its public performance/broadcast. In response, on 16 May 2018, Sheeran’s legal team sought a declaration from the court that they had not infringed the copyright of ‘Oh Why’.

Naturally, the defendants – Chokri – counterclaimed, asserting that the copyright in ‘Oh Why’ had indeed been infringed by the claimants. In particular, the claim related only to an eight-bar post-chorus section of ‘Shape of You’, in which the phrase “Oh I” is sung, three times, to the tune of the first four notes of the rising minor pentatonic scale commencing on C# (the “Oh I” phrase). The defendants contended that the “Oh I” phrase was copied from the eight-bar chorus of ‘Oh Why’, in which the phrase “Oh why” is repeated to the tune of the first four notes of the rising minor pentatonic scale, commencing on F# (the ‘Oh Why’ hook).

Analysis

It was common ground that copyright subsisted in the musical work of ‘Oh Why.’ The main contention was whether there had been copying. (Additionally, the issue of similar fact evidence was disputed in a previous hearing, see Boshier H., ‘Sheeran v Chokri Part 2: Admission of Similar Fact Evidence’ The IPKat, 8 January 2020). The defendants’ pleaded that Sheeran had access to ‘Oh Why’ and “*as a result*” reproduced a substantial part of the hook in writing ‘Shape of You,’ either deliberately and consciously, or, alternatively, subconsciously. The claimants denied copying, and that even if copying was established, there was not substantial similarity. Furthermore, the claimants contended that the ‘Oh Why’ hook was unoriginal and therefore not protectable as a musical work.

Copyright infringement is taking the whole, or a substantial part, of a protected work without permission. This is a qualitative, not quantitative, question. The test is whether the parts taken are the expression of the intellectual creation of the author of the work (*Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890, [24]-[28] applying *Infopaq International A/S v Danske Dagblades Forening* [2009] ECDR 16). The essential consideration is, therefore, whether the accused has taken from the originality in the accuser’s copyright work (*Mitchell v BBC* [2011] EWPCC 42, [28]-[29]). While the legal burden rests with the alleged, in the case of conscious copying the evidential burden shifts to the alleged infringer if there is proof of sufficient similarity and proof of access.

Substantial taking – the similar parts are unoriginal

In considering the significance of similarities between the works as an indication of the likelihood of copying, the following was taken into account: (1) the extent of the similarities and differences between the two works; (2) possible sources for the “Oh I” phrase other than the ‘Oh Why’ hook, by reference to the rest of ‘Shape of You’ and the extent to which it is comprised of elements that are commonplace in music; and (3) the evolution of the “Oh I” phrase, according to the evidence of the claimants and contemporaneous evidence.

It was concluded that whilst there were some similarities between the songs, such as the tune in each song comprised of the first four tones of a rising minor pentatonic scale: A, C, D and E and the lyrical phrases - as the diphthong in the “Oh I” phrase meant that although it is sung to the words “Oh I”, it sounds the same as “Oh why”. Nevertheless, the Judge, Mr Justice Zacaroli, pointed out that these phrases are unoriginal in popular music and held that there was compelling evidence that the source of Sheeran’s “Oh I” phrase was not ‘Oh Why’.

Potential access is not enough

Infringement requires that there has been *actual* copying, which inevitably requires that the alleged infringer not only had access to the original work, but actually saw or heard it. Mr Justice Zacaroli recognised that in the digital streaming age, simply making music available online would not be an appropriate bar for the test of access, stating that: “*Tens of thousands of new songs are uploaded to internet sites daily. It clearly cannot be enough to shift the burden of proof that a song was uploaded to the internet thereby giving the alleged infringer means of accessing it.*” at [25]. Instead, he insisted that it must be a question of fact and degree whether the extent of the alleged infringer’s access to the original work, combined with the extent of the similarities, raises a sufficient possibility of copying to shift the evidential burden. Where, for example, the original work was highly individual or intricate, and the alleged infringing work was very close to it, then only limited evidence of access may be sufficient in order to shift the

burden. The same would not be true, on the other hand, where the original work was simple and involved relatively common elements.

Sheeran and his co-writers said that to the best of their knowledge they had never heard ‘Oh Why’ or of Chokri before the complaint arose. On the other hand, the defendants contended that Sheeran had heard the song based on their publicising the release on digital platforms and through mutual acquaintances. Mr Justice Zacaroli noted the limited success of the promotion of the ‘Oh I’ song and found, therefore, that the possibility that these attempts might have led to it coming to Sheeran's attention – either through an associated person or because he found it himself – was at best speculative.

Conclusion

Mr Justice Zacaroli held that, listening to the sounds as a whole, the two phrases played very different roles in their respective songs. The use of the first four notes of the rising minor pentatonic scale for the melody was so short, simple, commonplace, and obvious in the context of the rest of the song that it was not credible that Sheeran sought out inspiration from other songs to come up with it. Stating that whilst there were similarities between the ‘Oh Why’ hook and the “Oh I” phrase, there were also significant differences; concluding that the “Oh I” phrase originated from sources *other than* Oh Why. Therefore, the judge concluded that Sheeran had not heard ‘Oh Why,’ and in any event that he did not deliberately or subconsciously copy the “Oh I” phrase from the ‘Oh Why’ hook. Additionally, the evidence of similarities and access was insufficient to shift the evidential burden, so far as deliberate copying was concerned, to the claimants and even if the evidential burden had shifted to the claimants, they have established that Sheeran did not deliberately copy the “Oh I” phrase from the ‘Oh Why’ hook.

Beyond these conclusions, Mr Justice Zacaroli agreed with the claimants that none of the elements of similarity upon which the defendants relied acquired originality on ‘Oh Why’ as a musical work. In particular *“the use of the rising minor pentatonic scale is a generic and commonplace building block in many musical genres.”* [206] The fact that each note of the scale is repeated did not alter that conclusion. The use of a vocal chant and its harmonisation with low and high octaves are equally generic and commonplace ideas. However, the combination of these features did sufficiently represent the intellectual creativity of Chokri and O'Donoghue. Lastly, although there was no claim to infringement of the lyrics, the setting of music to a distinct vocal sound (e.g., humming, "ahh", "ooh", etc) could be considered part of the orchestration of a musical work (*Hayes v Phonogram Ltd* [2003] ECDR 11, at [60]).

Practical significance

The 11-day trial which led to the finding that Sheeran *“neither deliberately nor subconsciously copied”* should deter other artists and songwriters from bringing unsubstantiated copyright infringement claims. Likewise, it may also have a bearing on similar royalty-share negotiations and settlement deals around the same issues. It is a clear reminder from the courts of the tests for UK copyright infringement. In particular, just because two songs sound similar does not mean that there has been infringement, similarity is, and has always been, only the starting point. These tests are necessary to maintain copyright's ability to strike the right balance between protecting and encouraging creativity. In recent years there has been a growing trend of accusations over copying in music in the UK and more prominently in the US. However, the outcome of this case puts the balance back where it belongs, under UK law at least, clarifying that copyright only protects original expressions of creativity and requires *actual* copying.

