

# Kluwer Copyright Blog

## Ed Sheeran's song "Shape of You" does not infringe Sami Switch's "Oh Why"

Jeremy Blum, Jake Palmer (Bristows LLP) · Thursday, May 19th, 2022

The UK High Court has declared that Ed Sheeran's mega-hit "Shape of You" does not infringe copyright in Sami Switch's lesser-known song "Oh Why" ([2022] EWHC 827 (Ch)).

The case focuses on whether Ed Sheeran consciously copied Sami Switch's chorus. Accordingly, this case is a useful example of how a court will: (1) assess the derivation requirement (of actual copying) of UK copyright; and, (2) as part of that, consider similarity between musical works for the purpose of copyright infringement. There is also some useful, but limited, commentary on copyright subsisting in part of a song and individual elements of that part.



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### The background

The case concerns whether Ed Sheeran's song Shape of You infringes the copyright in Sami Switch's song Oh Why. Ed Sheeran and the other writers of the song, as claimants, sought a declaration that it does not; the defendants counterclaimed that it does.

The matter came to court in that form after the defendants claimed they should be credited as songwriters of Shape of You to the Performing Rights Society (PRS), a UK collecting society that collects royalties for musicians, among others. This led to PRS suspending certain royalties to the claimants, which in turn led to the claimants seeking a declaration of non-infringement.

## The parties

The first three claimants (Ed Sheeran, Stephen McCutcheon and John McDaid) are the writers of the song Shape of You, performed by Ed Sheeran to huge commercial success. It was the first song to pass 3 billion streams on Spotify and has more than 5.6 billion views on YouTube. In the end, the allegations of copying were directed at Ed Sheeran only.

The fourth to sixth claimants are music publishing companies that own a share of the rights subsisting in Shape of You.

The first two defendants (Sami Chokri – who performs as “Sami Switch” – and Ross O’Donoghue) are the writers of Oh Why. The third defendant (A&C) is a music artists’ development, management and social media company, and the assignee of Sami Switch’s copyright in Oh Why.

## The parties’ claims

The defendants’ claim related only to an eight-bar post-chorus section of Shape of You, in which the phrase “Oh I” is sung four times. They identify this as the song’s “hook”, meaning the part that stands out as catchy, memorable and recurrent. This is referred to in the judgment as the “OI Phrase”. The OI Phrase can be heard [here](#).

The defendants alleged the OI Phrase is copied from the eight-bar chorus of Oh Why, where the phrase “Oh why” is repeated three times in succession, followed by a final “Oh”. This is described by Zacaroli J as “clearly central” to Oh Why. The OW Hook can be heard [here](#).

It was common ground that copyright subsisted in Oh Why as an original musical work. The defendants’ pleaded case was that Ed Sheeran had access to Oh Why and as a result reproduced a substantial part of the OW Hook in writing Shape of You. The key issue in the case was copying: had Ed Sheeran copied the “OW Hook” either deliberately and consciously, or subconsciously?

Regarding deliberate and conscious copying, which was the focus of the case, the defendants submitted that there was:

1. sufficient similarity between the works,
2. evidence of access to Oh Why by Ed Sheeran, and
3. evidence of Ed Sheeran having a propensity to collect ideas from songs.

They claimed this should shift the evidential burden of copying to the claimants to show they had not deliberately copied. The claimants deny that Ed Sheeran copied any part of the OW Hook in creating the OI Phrase. In his judgment, Zacaroli J went through each of the three points above in turn.

## Did Ed Sheeran copy Oh Why?

## 1. Similarities, differences and their significance

In considering the significance of similarities between works for the purposes of establishing likelihood of copying, the following must be taken into account: (1) the extent of similarities and differences, (2) possible sources for the OI Phrase other than the OW Hook, and (3) the evolution of the OI Phrase.

Firstly, on **similarities and differences**, the OW Hook and OI Phrase are shown below when transposed into the same key of A Minor, as considered by the judge:

### OW Hook



### OI Phrase



For the musically-minded, a comparison of the principal similarities and differences between the songs is at paragraphs 34 and 35 of the judgment. One key difference, by way of example, highlighted by the judge was the difference in emphasis between the OI Phrase and OW Hook, brought about by a different word being on the beat. This meant the emphasis was different between the two: “oh; why-oh; why-oh; why-oh” versus “oh-I; oh-I; oh-I; oh-I”.

Stepping back from the detail of the similarities and differences, Zacaroli J noted that the defendants had focussed on the particular similarities while ignoring the points of difference. He noted that each element is a common building block in music and that the same or similar elements had been used in Shape of You and other of Ed Sheeran’s songs.

Remaining distanced from the detail, Zacaroli J also noticed the difference the phrases played in their respective songs: the OW Hook is a central part of Oh Why, reflecting the song’s “*slow, brooding and questioning mood*”; the OI Phrase, in contrast was described as “*something catchy to fill the bar before each repeated phrase “I’m in love with your body”*”. (Paragraph [203])

Regarding possible sources for the OI Phrase and the evolution of the OI Phrase, the judge accepted Ed Sheeran’s impressive version of the writers’ development of the OI Phrase and Shape of You: after meeting in the recording studio at 11am, a complete demo version of Shape of You had been created by 18:25 that day. It was repeated at various instances in the judgment that there was good evidence to show that Ed Sheeran was able to work at “*tremendous speed*” when collaborating and that his speed was not suggestive of copying. The judge also noted the commonplace nature of various of the shared features in music generally as well as in Ed Sheeran’s own work.

Ultimately, while Zacaroli J accepted there are similarities between the OW Hook and the OI Phrase, there are also “*significant differences*”. Furthermore, for those elements that were similar, the judge’s analysis of the musical elements of Shape of You, the writing process and the evolution of the OI Phrase were enough to provide “*compelling evidence*” that the OI Phrase was not copied but rather “*originated from sources other than Oh Why*”. (Paragraph [205])

## 2. Access

Here, the defendants relied on two categories of access.

Firstly, their own efforts to publicise Oh Why, including by trying to get it onto the radar of people known to be associated with Ed Sheeran. However, the success of the promotion of Oh Why was found to be “*limited*” (Paragraph [146]), with Switch himself acknowledging the promotion had been “*amateurish*”. (Paragraph [98])

Numerous alleged mutual acquaintances of Switch and Sheeran were discussed as possible routes for Oh Why to have reached Ed Sheeran. However, the evidence here was weak and they were variously found to have been unlikely to have listened to Oh Why, unlikely to have shared it with Ed Sheeran, or both.

Secondly, the possibility of Ed Sheeran himself coming across Oh Why while looking for new artists or inspiration for his songs. This was rejected on the basis that Ed Sheeran’s record label was to sign specific artists he admired, rather than actively looking out for talent.

The defendants argued that Ed Sheeran would have been aware of Switch due to his following of the “*UK scene*”, but the judge accepted that Ed Sheeran had been “*off-grid*” for a significant part of the relevant period. (Paragraph [134])

Finally, the defendants alleged Ed Sheeran had written a song “Eraser” which had similarities with another of Switch’s songs which appeared on the same EP as Oh Why. This was considered flawed by the judge on the basis there was no evidence Ed Sheeran would have looked at other artists’ songs for inspiration for his own, and he found nothing sufficiently suspicious in Ed Sheeran’s writing of Eraser.

Ultimately, the defendants’ evidence provided no more than a “*speculative foundation*” for Ed Sheeran having heard Oh Why, whether by finding it himself or by having it shared with him by others. (Paragraph [205])

## 3. Ed Sheeran’s alleged propensity to copy

Somewhat strangely, the defendants pointed firstly to the examples where Ed Sheeran had referenced and credited other writers to suggest he is more likely to copy music, even if legitimately. The judge in fact made the opposite finding: Ed Sheeran’s habit of recognising and crediting the works of others would make it less likely he would attempt to steal the creative works of others.

The defendants also pointed to examples of Ed Sheeran copying other songs without permission. Firstly, it was claimed that Ed Sheeran had copied his Photograph from Matt Cardle's "Amazing". This was rejected, among other things, given the obvious nature of the pop melody underlying both.

In another example, the judge found that there were "*insufficient similarities*" between Shape of You and TLC's "No Scrubs", after Ed Sheeran had changed Shape of You following an initial inclusion of a deliberate reference to No Scrubs in an earlier draft of Shape of You. (Paragraph [170])

Overall, the judge found these did not provide any support for the defendants' contention of regular copying and concealing on the part of Ed Sheeran.

#### 4. *Conclusion on copying*

Given the lack of evidence of access and the evidence that the OI Phrase originated from sources other than Oh Why, Zacaroli J found Ed Sheeran had not heard Oh Why and in any event did not deliberately copy the OW Hook in coming up with the OI Phrase. Accordingly, there was no conscious copying.

The judge also noted that if Ed Sheeran had been looking for inspiration from other songs, Oh Why would be far from an obvious choice, given the stark contrast between Oh Why's dark mood compared to the upbeat dance feel that Ed Sheeran would have been looking for in creating Shape of You. Furthermore, it was doubted by the judge that Ed Sheeran would have needed to seek out inspiration for the first four notes of the rising minor pentatonic scale for the melody, given how "*short, simple, commonplace and obvious*" it was in the context of the rest of the song. (Paragraph [203])

**Subconscious copying was dismissed** with relative ease by the judge in light of the earlier findings.

#### **Declaration of non-infringement**

It followed from Zacaroli J's judgment that a declaration of non-infringement should be granted.

As a discretionary remedy, however, the court should consider the "*justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any special reasons why or why not the court should grant the declaration*". (Paragraph [208])

In the circumstances, the court determined the suspended PRS royalties of £2,200,000 alone were a commercial justification for declaratory relief. Furthermore, the justification was augmented by the fact the case related to Ed Sheeran being a "magpie", which Zacaroli J rejected, who habitually copies and conceals the works of others.

The defendants raised a number of objections to the granting of the declaration, but these were all dismissed. Namely, the objections were: no commercial basis for the declaration, failures by the

claimants in relation to disclosure and compliance with the pre-action protocol, and the lack of independence of an advisor to the claimants involved in the pre-action stage.

## Conclusion

Though the judgment is long, and the trial took 11 days, the answer seems straightforward: Ed Sheeran did not copy the song. An interesting outcome is that he has said from now on he plans to video the entire song writing process in order to try and avoid future accusations of copying.

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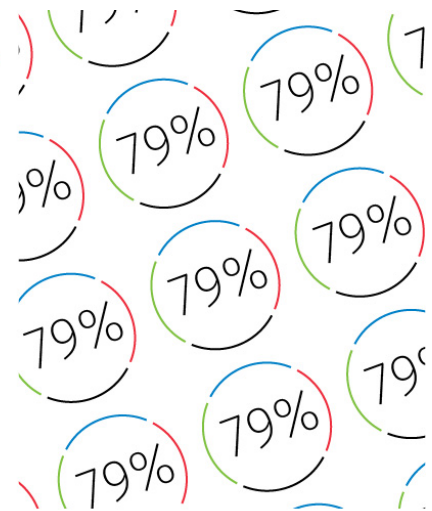
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