# [GB] High Court decides ‘Shape of You’ composer Ed Sheeran and his co-songwriters did not deliberately or subconsciously copy the song ‘Oh Why’

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Ed Sheeran and his co-songwriters, Johnny McDaid and Steve McCutcheon (the claimants), have won a copyright case, the High Court granting the declaration sought that their 2017 song "Shape of You" had not infringed the copyright of another song "Oh Why" composed in 2014 by Sami Chokri and Ross O’Donoghue (the defendants). The judge, Mr Justice Zacaroli, ruled that Sheeran and his collaborators had “neither deliberately nor subconsciously copied” the earlier song.

The claimants commenced the proceedings when the defendants had the music royalty collecting agency, the Performing Rights Society (PRS), suspend payment of significant royalties due to the claimants, contending that their copyright had been breached.

The defendants defended the claimants' case by arguing that Ed Sheeran had either listened to their song and deliberately copied the music, or, alternatively subconsciously heard and absorbed the song so that he was replicating aspects of Oh Why.

Evidence was given by Ed Sheeran and his co-writers as to how they had written Shape of You. The defence highlighted that Sheeran composed very quickly suggesting he was replicating someone else’s composition. Court evidence revealed that Sheeran had a talent for writing quickly.

Whilst there were some similarities in the songs, this was not unusual and there was no evidence to show Ed Sheeran had heard Oh Why before co-composing Shape of You. The defendants gave examples of how they had tried to bring their song to the attention of Ed Sheeran but the examples they gave were tenuous and did not indicate Sheeran had been aware of their song let alone had heard it. Whilst there were some inconsistencies between the Claimants' evidence as to how Shape of You had been composed, overall their recollections were found to be honest and consistent.

Further, the defendants argued that Ed Sheeran had in other compositions, used or sampled music from other composers’ songs. Court evidence revealed that Ed Sheeran and his producers were proactive in approaching other songwriters to

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acquire their consent before using any music. In one case Sheeran had written a song which was similar in nature to another song. Although it was considered a borderline case as to whether an approach should be made to the other composer, Sheeran had insisted that the approach be made.

In another example, Sheeran and McDaid had been sued in the US for alleged copyright infringement. However, they had settled the claim agreeing shared royalties for the other composer. Mr Justice Zacaroli accepted this settlement was for commercial expediency with no admission of liability by Sheeran and McDaid.

Mr Justice Zacaroli considered Mr Sheeran would approach anyone whose music he wished to use or alternatively if there was a similarity, risking an infringement allegation. This demonstrated someone who was not a deliberate copier of other composers' musical work.

The defence, in arguments aimed, in particular, against Mr Sheeran, focused on a two-bar musical phrase repeated three times throughout Shape of You over the lyrics, amounting to just 15 seconds throughout Shape of You. Expert musicologist Anthony Ricigliano noted that the phrase comprised the first four notes of the minor pentatonic, which he called "*humanity's favourite scale*". The claimants argued that reproducing those notes in the same sequence as the scale was more likely to be coincidental than copying. Accepting Mr Ricigliano's evidence, the judge stated that "the use of the first four notes of the rising minor pentatonic scale for the melody is so short, simple, commonplace and obvious in the context of the rest of the song that it is not credible that Mr Sheeran sought out inspiration from other songs to come up with it".

The granting of a declaration was at the discretion of the judge and in the circumstances Mr Justice Zacaroli considered it reasonable to grant the declaration that there had been no deliberate copying nor had there been subconscious copying. Although there were similarities between the Shape of You and Oh Why songs, there were also significant differences. The evidence of similarities and access to having heard Oh Why was insufficient to shift the evidential burden to the claimants. Mr Justice Zacaroli determined that even if the evidential burden had shifted to the claimants the court had established there had been no deliberate copying by Mr Sheeran.

***In the High Court of Justice Business and Property Courts of England and Wales Intellectual Property List, Neutral Citation Number: [2022] EWHC 827 (Ch)***

https://www.judiciary.uk/wp-content/uploads/2022/04/Sheeran-v-Chokri-judgment-060422.pdf

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