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Infinitely Original or Inevitably Derivative? Reconciling the Simplicity of Popular Music with the Rise in Copyright Infringement Cases

Abstract:

Since *Williams v Bridgeport Music* (US) blurred the lines between inspiration and copyright infringement in musical works, the courts have been flooded with cases of alleged infringement over use of the basic building blocks of music, which have been traditionally treated as unprotectable elements. By exploring the invariably limited nature of musical expression in relation to the recent case of *Sheeran v Chokri* (UK), this thesis argues that the narrow conception of 'originality' within the law of copyright must be safeguarded against the inevitable repetition of musical ideas. *Sheeran v Chokri* is seen as the turning point in favour of the universality of music, for the benefit of artistic expression and society as a whole.

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Introduction

It has been said that humans did not invent music. Instead, humanity has received musical elements from nature and over many generations have developed them into ordered traditions that all recognise, and all may participate in.[1] Musical tools such as melody, harmony, and rhythm have become elementary to music as the alphabet is to language. Due to this simplicity, musicians and critics alike have questioned whether any piece of music can truly be said to be original.[2] These 'basic building blocks of music'[3] now exist *res publicae* – things in the public domain that are capable of being appropriated.[4] Whilst it is desirable that copyright protection be given to musical creators to allow them to be justly rewarded, plaintiffs in the UK and US are targeting lucrative, yet simple pop-music works claiming infringement. Though there are no concrete figures on the matter, it is widely accepted that these actions are on the rise,[5] and if judges grant exclusive ownership of the musical alphabet to select artists, they risk creating a chilling effect that severely strangles the musical expression of the next generation. By examining the simplicity of music, this essay will examine whether the inevitably derivative nature of music may be reconciled with the current law of copyright.

Chapter 1 of this essay will briefly examine the evolution of music as it is derived from nature and has been developed into the Western tradition. The language of Western European music is a construction of melodic, harmonic, and rhythmic devices, the expression of which are constrained to limited patterns that sound pleasing to the popular ear. The songs we hear are the product of one thousand years of musical development, meaning no musician can claim true originality. Due to this, a preliminary discussion asks how justifications for copyright may

[1] Cooke D, 'The Language of Music', (Oxford University Press, 1959), p.41
[2] J. Pallington West, What would Keith Richards do?: Daily Affirmations with a Rock and Roll Survivor (London: Bloomsbury Publishing, 2009) p.63
[3] Wang A X, 'How Music Copyright Lawsuits Are Scaring Away New Hits', *Rolling Stone*, (January 2020) <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> accessed 6 January 2023
[4] van der Walt A. J. & du Bois M., 'The Importance of the Commons in the Context of Intellectual Property' (2013) 24 Stellenbosch L Rev 31
[5] Bailey J, 'Why Are There So Many Pop Music Lawsuits', *Plagiarism Today*, (March 2022), <https://www.plagiarismtoday.com/2022/03/08/why-are-there-so-many-pop-music-lawsuits/> accessed 16 January 2023

be reconciled with the universality of music. Following this, the law of music copyright is set out as it exists in the Copyright, Designs and Patents Acts 1988 and in the case law. Central to this discussion is the UK's requirement for substantive originality in a work, which stands at odds with a co-operative view of music creation.[6] The historic 'sweat of the brow' doctrine will be outlaid and assessed alongside its equivalent counterparts in the USA and European Union.

Chapter 2 will assess the recent case of *Sheeran v Chokri (2022)*[7], which saw relatively unknown artist Sami Switch claim conscious copying on the part of Ed Sheeran for the hook in Sheeran's No. 1 hit, 'Shape of You'. It will be argued that Zacaroli J was correct to reason that chance similarities between works are inevitable, and his decision to dismiss the claim is in the interest of artistic expression writ large. Furthermore, it will be argued that allowing stylistic similarities to amount to substantive infringement gives ownership of a genre to a privileged few, halting its development for contemporary artists and audiences.

Chapter 3 will turn to cases of infringement in the US, where the undesirable decision in *Williams v Bridgeport Music* can be seen as the source of legal uncertainty and the reason for the rise in high-profile infringement claims.[8] The chapter will also discuss what the US may learn from the treatment of copyright claims in the English courts.

Finally, the essay will conclude by discussing the fallout of recent cases. This section will consider the growing role of musicologists, not just in the courtroom but by top record labels prior to a song's release, to assess whether the composition may lead to a lawsuit. Artists are now advised not to name their influences and create nervously for fear of litigation from those who have inspired them. The chilling effect means copyright law is falling short of its aims: to protect existing artists whilst allowing room for cultural development.

Chapter 1: The Building Blocks of Music

Understanding how music is made is foundational to the fair assessment of infringement lawsuits. Indeed, much of the legal uncertainty surrounding this area has been created by a judicial misunderstanding of the simplicity of music. This chapter attempts to lay

[6] Steel E, 'Original sin: reconciling originality in copyright with music as an evolutionary art form', E.I.P.R. 2015, 37(2), 66
[7] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch)
[8] Pharrell Williams, et al. v. Bridgeport Music, et al. 895 F.3d 1106 (9th Cir. 2018)

these foundations by asking how music came to be, in order to argue that no one may claim copyright to such elements.

Music as derived from Nature

Music is nearly as old as time itself. The project of ethnomusicology is dedicated to exploring the cultural significance of music across time, culture, and place.[9] From the tribal song of the Venda people in South Africa, to the symphonies of Vaughan Williams and Vivaldi, all people groups are musical. John Blacking has proposed that music is as common to man as language,[10] but Steven Mithen has gone further, arguing that Neanderthals communicated through musical and mimetic means which provided the evolutionary basis for the development of language.[11] In ice-age conditions, music-like communication of thought and action was essential for survival. Humans did not create these sounds *ex nihilo*, instead echoed what they heard in nature. Hence, music's universality has even been extended to animals.[12] Humpback whale songs contains repeating refrains and melodic rhymes, and birdsong features rhythmic patterns and melodic intervals found in human music.[13] Musical notes, scales and tuning systems are derived from the naturally occurring harmonic series,[14] which has been mathematically systemised since the time of Ancient Mesopotamia.[15] Therefore, humans did not invent music but have received it from nature. The history of music is replete with examples of man seeking to 'connect with nature on a deep, emotional level',[16] such as Biblical Psalms or Beethoven's Symphony No.6; having been fully immersed in nature humanity reflects her beauty with the language that she first taught him.

Thus, we may say that music is as natural as land itself. In Lockean fashion, man has mixed his labour with music and joined to it something that is his own, thereby making it his property.[17] Copyright law gives a similar kind of agency to the 21st century creative class by giving value to artistic labour, and a guarantee of reward in the form of private property rights.

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[9] Rice T, 'Ethnomusicology: A Very Short Introduction' (Oxford University Press, 2014), p.6
[10] Blacking J A R, 'How Musical is Man?' (London: University of Washington Press, 1973),
[11] Mithen S, 'The Singing Neanderthals: The Origins of Music, Language, Mind and Body' (Harvard University Press, 2006), p.253
[12] Higgins K M, 'The Music between Us: Is Music a Universal Language?' (The University of Chicago Press, 2012'
[13] Stewart, K D F, 'The Essentialism of Music in Human Life and Its Roots in Nature' (2014) Linfield University Senior Theses 6, p.6
[14] Cooke D, 'The Language of Music', (Oxford University Press, 1959), p.41
[15] Dumbrill R J, 'The Archeomusicology of the Ancient Near East' (Trafford, 2005), p.18
[16] Stewart, K D F, 'The Essentialism of Music in Human Life and Its Roots in Nature' (2014) Linfield University Senior Theses 6, p.54
[17] Locke J, 'Second Treatise on Government' (London: George Routledge and Sons, 1884) 207

Unlike land, constrained by geography and enclosed to exclusive possession through a title of law, music is more complex. Isolated musical notes are *res communes* – a term of Roman law referring to things that by their nature are incapable of being owned. Paradoxically, they are also *res publicae* – things open to the public due to a working of law even though their nature allows them to be appropriated.[18] The notes of the piano live in the commons for use by the everyman as unprotected ideas capable of becoming protected expressions, but that George Harrison once remarked in 1970 that he was scared to approach the piano for fear of using someone else's notes demonstrates to us that historically the distinction between ideas and expression is a line drawn imprecisely.[19] Much of the legal uncertainty can be attributed to a judicial misunderstanding of just how simple music really is. It is to this question that we now turn.

When Notes are Stitched Together

It will be demonstrated that the structure of music is much more simple than ordinary listeners believe. In reality only a handful of notes are available to the typical popular musician.

Western music typically uses 12 notes. These notes are arranged in the ascending chromatic scale – C, D, E, F, G A and B, with five flats (denoted "♭") and equivalent sharps (denoted "#") in between, these are: C#/D♭, D#/E♭, F#/G♭, G#/A♭, and A#/B♭.[20] These twelve notes form an octave, and a modern piano consists of seven octaves ascending in pitch.[21]

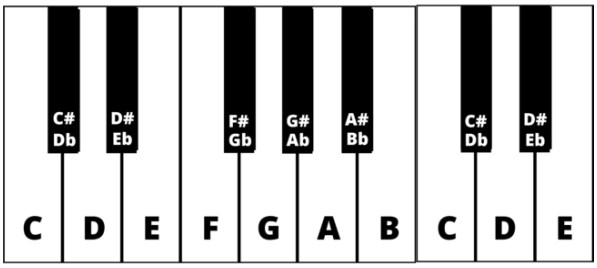

Figure 1: Notes on a Piano

[18] A. J. van der Walt & M. du Bois, 'The Importance of the Commons in the Context of Intellectual Property' (2013) 24 Stellenbosch L Rev 31

[19] Hutchinson L, 'George Harrison's "My Sweet Lord" Copyright Case', *Performing Songwriter*, (February 2015) <https://performingsongwriter.com/george-harrison-my-sweet-lord/> accessed 20 January 2023

[20] Pentreath R, 'Why are there only 12 notes in Western music?', (May 2021) *Classic FM*, <https://www.classicfm.com/discover-music/music-theory/why-are-there-only-12-notes-in-western-music/#:~:text=Western%20music%20typically%20uses%2012,and%20A%20sharp%2FB%20flat> accessed 20 January 2023

[21] Wenig A, 'How to Play an Octave on Piano' (June 2022), *Simply*, <https://www.hellosimply.com/blog/piano-beginner/octave-on-piano/> accessed 20 January 2023

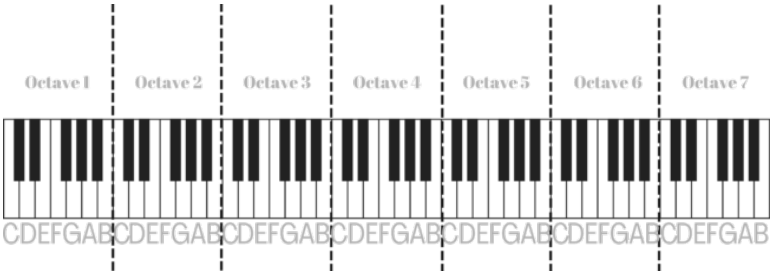

Figure 2: Octaves on a Piano

Though there are twelve notes in a chromatic scale, popular music rarely facilitates all twelve. Instead, writers of pop music often use the major and natural minor scale,[22] which only use seven notes that repeat at the octave. The scale a piece of music uses is called the key. There are twenty-four keys, as each of the twelve notes can become the first degree (the starting point) of a major or minor scale. The most common key is C major, which uses all the white notes on the keyboard. When only seven notes are available to songwriters, we begin to see how repetition of musical ideas is inevitable. Musicologist Kenny Ning analysed over 30 million songs on the Spotify database and found that more than a third of all songs are in one of four keys: G Major, C Major, D Major, and A major. Ning claimed the reason for this is the convenience of these keys on the guitar and piano, Western music's most common instruments.[23] Therefore, of the twenty-four available, only four keys are being routinely used, making the chance of compositional similarities and alleged infringement six times more likely.

Another element of musical structure is the interval, which is the distance in pitch between two notes.[24] Intervals communicate certain moods, ideas, and emotions, labelled 'tonal tension' by musicologist Deryck Cooke in his book 'The Language of Music'.[25] For example, Cooke brands the major seventh (Note I+VII) 'optimistic',[26] and the minor third (Note I+III♭) 'brooding, ... gloomy' and expressing 'a sense of inescapable doom'.[27]

[22] Citation needed
[23] Palermino C L, 'Play it in G! Spotify analyses our streams to find the most popular musical key', (May 2015), *Digital Trends*, <https://www.digitaltrends.com/music/whats-the-most-popular-music-key-spotify/> accessed 20 January 2023
[24] Pagliaro M J, 'Basic Elements of Music: a primer for musicians, music teachers, and students' (Lanham, Maryland: Rowman & Littlefield, 2016), page number citation needed
[25] Cooke D, 'The Language of Music', (Oxford University Press, 1959)
[26] Ibid. 143
[27] Ibid. 140

Figure 4: The Major Seventh (interval denoted by grey notes)

Figure 3: The Minor Third (interval denoted by grey notes)

These tonal tensions are not innately understood by humans but are 'socially codified', defined by Western music's long association with them.[28] This has been empirically verified as consistent by music cognition researchers across time and cultures.[29] Although music is an expressive artform, many creative decisions are predetermined by factors outside an artist's control. Far from being a fault of music, it should be seen as a feature. A musical theme should have 'a certain something which the whole world already knows',[30] otherwise the world will not understand it. Music, like language, communicates meaning by using words and phrases people have heard before; a composer's combination of intervals may be thought of as their semantic field through which they express their message. However, as there are only twelve intervals, the semantic constraints upon musicians are much greater than those imposed on literary authors and poets. It is inevitable that two composers will use similar intervals, often consecutively, to achieve their respective aims. This is not plagiarism, but incidental, and is to be expected. The following chapters address the legal treatment of these issues as infringement, and the growing threat this poses to musical expression.

The simplicity and universality of music is seen most pertinently in chordal progressions. Three notes played together is called a triad, or a chord. By itself, a chord is 'entirely indefinite in its harmonic meaning';[31] it may be the tonal centre (tonic) of one key, or a degree of several others. A succession of chords played one after another that 'aims for a definite goal' is called a chord progression,[32] which have formed the basis of many Western musical styles (e.g., pop, rock, and jazz) since the Classical period in the 18th Century. The most famous is the I, V, VI, IV progression that in the key of C Major uses the chords: C Major, G Major, A Minor, F Major.

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[28] Machin A, 'Analysing Popular Music', (SAGE 2010) 107
[29] Huron D, 'Sweet Anticipation: Music and the Psychology of Expectation', (The MIT Press, 2006), second article citation needed: https://doaj.org/article/65fd27bf586f4f6e9a79ea409f82d14b
[30] Schoenberg A, 'Fundamentals of Musical Composition' (London: Faber and Faber, 1980), 20
[31] Schoenberg A., 'Structural Functions of Harmony' (Faber, 1948), 1
[32] Ibid.

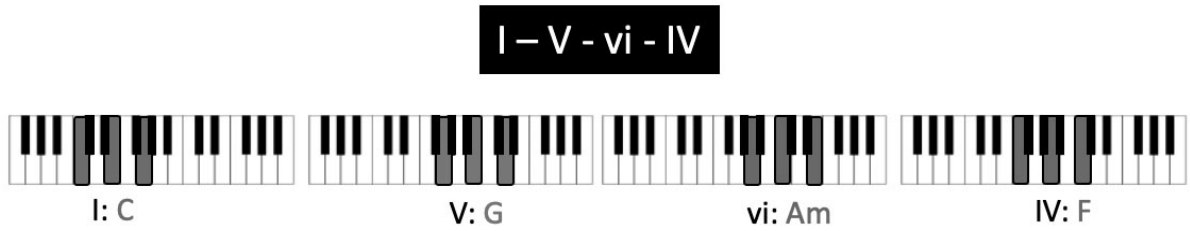

Figure 5: The I-V-VI-V Chord Progression in C Major

Dubbed (occasionally disparagingly) the 'four chord song', comedy rock group 'Axis of Awesome' played the progression while singing 38 hit pop choruses. Ranging from Journey's 'Don't Stop Believing' to Bob Marley's 'No Woman No Cry', they demonstrated with great humour how our musical heroes use the simplest blueprint to find success almost every time.[33] Genres, such as pop music, must share musical characteristics otherwise there would be nothing with which to tie them together. Similarly, when stitching notes together, only a few permutations of the musical notes are pleasing, 'and much fewer still to the infantile demands of the popular ear,'[34] as was acknowledged in an infringement dispute as far back as 1940. Therefore, despite music's extraordinary ability to evoke our deepest emotions, it does so with striking simplicity.

Perhaps surprisingly, this phenomenon is not exclusive to pop music. Musicologist Honey Mecconi has written that musical 'borrowing is probably as old as music itself', and that 'Western notated music is replete with examples from every time period.'[35] It may shock us to hear that some of the most celebrated works are not merely the product of independent genius. 'This entire passage has been stolen from the Mozart symphony in C', wrote Classical composer Ludwig van Beethoven on one of his musical sketches.[36] Indeed, the theme of Beethoven's world-renowned 'Ode to Joy' was taken from a melody in Mozart's 'Misericordias Domini'.[37] Whilst we may acknowledge that most musical replication is accidental, Beethoven teaches us there are some melodies so innovative and captivating that they deserve to be taken and reworked into new great pieces of music. It is folly to argue that 'Ode to Joy' is not a gift to society merely because it recycles a musical idea. In contemporary

[33] Axis of Awesome, 'Four Chord Song', *YouTube*, (December 2009), <https://www.youtube.com/watch?v=5pidokakU4I> accessed 21 January 2023
[34] Darrel v Joe Morris Music 113 F. 2d 80 (2d Cir. 1940)
[35] Meconi H, 'Early Musical Borrowing' (Routledge, 2003), p.1
[36] Klugewicz S M, 'Copying Mozart: Did Beethoven Steal Melodies for His Own Music?' (February 2018) <https://theimaginativeconservative.org/2018/02/copying-mozart-beethoven-steal-melodies-music-stephen-klugewicz.html> accessed 13 February 2023
[37] Ibid.

hip-hop music, the art of sampling (including an element of a pre-existing record[38]) is built on this same premise of transformation. If over-protective copyright laws had restricted Beethoven, the world may have never heard 'Ode to Joy'.

This thesis seeks to answer how it may be at all possible to reconcile music as a collaborative and evolutionary artform with a requirement of originality under copyright that both protects existing works and fosters the development of new artists to the benefit of society.

Reconciling Justifications for Copyright with the Universality of Music

In 1709, the UK Parliament passed the Statute of Anne, creating the first copyright legislation in the English-speaking world.[39] In *Bach v Longman*, it was held that published music fell under the protection provided by the statute.[40] Since the 18th Century, legal scholars have debated the justifications for, and the aims of, copyright.[41] This ongoing discourse is important in ensuring copyright is successful in balancing the aims of protection and development, and also provides a useful criterion by which we may assess the current state of the law as it relates to copyright in musical works.

Lockean natural rights theory argues it is right to recognise a property right in intellectual property works because such creations emanate from the mind of an individual author, and an author has a natural right over the productions of their intellectual labour.[42] Copyright law is the 'positive law's realisation of this self-evident, ethical precept.'[43] However, due to the universality of music, much of an author's creation is owed to the minds of his predecessors in the form of artistic influence. In this way, music is always a collaborative process, even for the lone songwriter. Lockean justifications cannot, therefore, be neatly applied to musical works.

Reward theory proposes it is fair to reward an author for their effort expended in creating a work and giving it to the world. Copyright may be seen as a 'legal expression of gratitude.'[44] This may be applied to music as even the most derivative of works require effort to create.

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[38] Fitzgerald H, 'Sampling: Its Role in Hip Hop and its Legacy in Music Production Today' (October 2020) <https://abbeyroadinstitute.co.uk/blog/sampling-role-in-hip-hop-and-its-legacy-in-music-production/> accessed 14 February 2023

[39] Statute of Anne (1710)
[40] Bach v Longman (1777) 2 Cowper 623
[41] Bently L and others, *Intellectual Property Law* (6th edn, OUP 2022) – Chapter ???
[42] Locke J, 'Second Treatise on Government' (London: George Routledge and Sons, 1884) 207
[43] Bently L and others, *Intellectual Property Law* (6th edn, OUP 2022) 42
[44] Ibid. 43

Incentive-based theorists contend that intellectual property protections are essential for incentivising artists to create works. This argument presupposes the value of the production and sharing of cultural objects such as music and argues that that without protection the dissemination of cultural objects would be sup-optimal.[45] Conversely, granting ownership of elements of the musical alphabet to select artists disincentivises the creation of new works.

Drawing on Hegelian ideas of self-expression, some assert copyright protects the 'expressive autonomy' of authors but can also serve as an unwarranted restriction on the expression of another.[46] For example, artist Katy Perry was ordered to pay $2.8m in infringement damages for her use of the (aforementioned and commonplace) natural minor scale.[47] Although the decision was later overturned on appeal, the case demonstrates the precarity of what constitutes a protected expression. See Chapter 3 for further discussion of this case.

Despite varying schools of thought, we may identify two broad aims. First, copyright must protect works that have already been created. Second, copyright must allow new artists the freedom to express themselves in works not yet created. The law of copyright is an iterative process that must balance these divergent aims to be successful.

The Originality Requirement in the UK, EU, and US

Musical works are protected under the Copyright, Designs and Patents Act 1988, (hereafter referred to as CDPA 1988) s.1(1)(a), s.3(1)(d).[48] However, neither the UK, EU, nor the US have defined an originality requirement within legislation but have instead developed their respective standards through case law.[49] The substantive originality requirement in the UK is made up of two parts: (i) a requirement that the work must be the author's own independent creation; and (ii) the 'sweat of the brow' doctrine. Since *Infopaq*, the UK test is interpreted in light of the EU test.[50] The originality requirements will be dealt with in turn.

In *University of London Press Ltd*, the court ruled that a work does not require original or inventive thought to be deemed 'original' in law, but that the expression of the thought

[45] Ibid. 44
[46] Ibid. 44; J. Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown LJ 287,
[47] Marcus Gray, et al. v. Katy Perry, et al. No. 2:15-cv-05642 (C.D. Cal. March 16, 2020); No. 20-55401 (9th Cir., March 10, 2022)
[48] Copyright, Designs and Patents Act 1988
[49] Jovanovic M, 'The Originality Requirement in EU and U.S., different approaches and implementation in practice' (2020) <https://ecta.org/ECTA/documents/MinaJovanovic3rdStudentAward202012149.pdf> accessed 23 January 2023
[50] Infopaq International A/S v Danske Dagblades Forening Case C-5/08 [2009] *ECR* I–6569

should originate from the author, meaning it should not be copied from another source.[51] However, there is no such thing as a musical idea apart from expressing it; unlike literature where an idea can be expressed in different words, a musical idea (or 'motif'[52]) and its expression are ontologically identical. This would create a high chance of infringement in many works of music if it were not for the caveat, that the original expression of an unoriginal thought is not copied, consciously or subconsciously.[53]

Taken from Genesis 3:19 ('by the sweat of the brow you will eat your food'), the 'sweat of the brow' doctrine rewards an author's effort and expense. In *Walter v Lane*, it was stated that in order to give rise to copyright an author must exercise 'skill, labour, and capital' when creating a work.[54] This test has no dependence on creativity or 'artisanship', betraying Britain's industrial past that values labour over intellectual pursuit.[55]

Conversely, the European Union requires that a work is the 'author's own intellectual creation'.[56] In the pursuit of judicial harmonisation, the EU equated their requirement of 'intellectual creation' with the UK test for 'skill and labour', in infringement[57] and subsistence.[58] This was confirmed in *Painer*, where a work was considered to be an intellectual creation if it reflected the 'personality' of the author and was an 'expression' of their 'free and creative choices'.[59] This threshold, though not overt, requires the author to make a choice himself in order to render a work 'original'.

The originality requirement in the United States is again defined in different terms. In *Feist v Rural*, the Supreme Court stated a work must have 'at least a modicum' of creativity, though 'the requisite level of creativity is extremely low', so that 'even a slight amount will suffice.'[60] In *Feist* the American court rejected the traditional common law approach that is based on effort and shifted in the direction of the civil law requirement of 'intellectual creation' by importing a requirement of creativity.[61]

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[51] University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch. 601
[52] Chase S, 'What is a Motif in Music?' (May 2022) <https://hellomusictheory.com/learn/motifs/> accessed 15 February 2023
[53] Francis Day & Hunter v Bron [1963] 1 Ch 287
[54] Walter v Lane [1990] AC 539
[55] Steel E, 'Original sin: reconciling originality in copyright with music as an evolutionary art form', E.I.P.R. 2015, 37(2), 72
[56] Recital 10 to the Term Directive; Infopaq International A/S v Danske Dagblades Forening Case C-5/08 [2009] *ECR* I–6569
[57] Newspaper Licensing Agency Ltd v Meltwater Holding BV [2010] EWHC 3099 (Ch)
[58] Bezpečnostní softwarová asociace–Svaz softwarové ochrany v Ministerstvo kultury, Case C-393/09 [2011] *ECR* I–13,971, [49]
[59] Painer v Standard VerlagsGmbH and Others, [2011] Case C-145/10
[60] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340
[61] Steel E, 'Original sin: reconciling originality in copyright with music as an evolutionary art form', E.I.P.R. 2015, 37(2), 73

The legal requirement for originality is essential in establishing copyright infringement as a person cannot infringe copyright if they copy elements that are not original to the claimant's work.[62] Across both common and civil law jurisdictions, the law of copyright does not protect facts, ideas, concepts, things in the public domain, the commonplace, and *scénes á faire* ('scenes which must be done'). The doctrine of *scénes á faire* when applied to music ought to encompass much of musical expression, such as chord progressions or simple melodies, that occur as a result of 'satisfying compositional impulses'.[63] What encompasses a musical 'scene which must be done' is growing increasingly unclear due to judicial misunderstanding of the universality and simplicity of music, alongside the growing role of 'intellectually dishonest' musicologists in some of the most defining infringement disputes.[64] As we will see in the case law of chapters 2 and 3, the doctrine is at risk of erosion.

Whole or Substantial Part Infringement

In an action for primary infringement, the claimant must demonstrate on the balance of probabilities that:

(i) The defendant carried out one of the activities that falls within the copyright owner's control; and

(ii) The defendant's work was *derived* from the claimant's work (a 'causal connection'); and

(iii) The restricted act was carried out in relation to the copyrighted work or a substantial part of it.[65]

Thus, copyright infringement is not limited to an exact reproduction of a work. It is a qualitative, not quantitative test: the part in question must contain elements of the author's 'intellectual creation'[66] that confers originality on the claimant's copyright work (or a substantial part of it).[67] A court may find infringement in parts of a work, such as a melody or chord progression,[68] by considering whether particular similarities relied on are 'sufficiently

[62] Mitchell v BBC [2011] EWPCC 42, [28]-[29]
[63] Steel E, 'Original sin: reconciling originality in copyright with music as an evolutionary art form', E.I.P.R. 2015, 37(2), 71
[64] Neely A, 'Why the Katy Perry/Flame lawsuit makes no sense', (August 2019) <https://www.youtube.com/watch?v=0ytoUuO-qvg> accessed 10 January 2023; referring to Marcus Gray, et al. v. Katy Perry, et al. No. 2:15-cv-05642 (C.D. Cal. March 16, 2020); No. 20-55401 (9th Cir., March 10, 2022)
[65] CDPA 1988, s. 16(3); Bently L and others, *Intellectual Property Law* (6th edn, OUP 2022) 42 211
[66] Newspaper Licensing Agency Ltd v Meltwater Holding BV [2011] EWCA Civ 890 [24]-[28]; Infopaq International A/S v Danske Dagblades Forening Case C-5/08 [2009] *ECR* I–6569
[67] Mitchell v BBC [2011] EWPCC 42, [28]-[29]
[68] Hyperion Records v Sawkins [2005] EWCA Civ 565

close, numerous or extensive' to be more likely to be the result of copying rather than coincidence.[69] However, as sounds take precedent over notes in music copyright cases,[70] the outcome of a case depends to a 'large degree'[71] on the aural perception of the judge,[72] which risks subjective inconsistencies and legal uncertainty.

Whether or not there has been subconscious copying (as in *Sheeran v Chokri*) is a question of fact to be determined on the basis of all the evidence.[73] There will rarely be direct evidence of subconscious copying, so the court must reach its conclusion based on inferences from other evidence.[74]

Having laid out the law, the following chapters will discuss its application in both the English and American contexts.

Chapter 2: *Sheeran v Chokri* and the Contradiction of Musical 'Originality'

In upholding the originality of singer-songwriter Ed Sheeran and his writing team, the ruling in *Sheeran v Chokri* (2022) was a landmark judgement in favour of the universality of music.[75]. The case went against the 'tide of decisions' in the wake of the 'Blurred Lines' case,[76] which in 2015 opened the 'floodgates' to infringement lawsuits in musical works.[77]
Zacaroli J was correct to reason that chance similarities between musical works are inevitable, and his decision to dismiss the claim is in the interest of artistic expression and society as a whole.

Background

In *Sheeran v Chokri*, singer-songwriter Ed Sheeran was put under the spotlight – not of packed-out arenas or stadia – but in the High Court of England and Wales. The song in question, 'Shape of You', was the best-selling digital song worldwide in 2017, and in

[69] Designer's Guild v Russell Williams [2000] 1 WLR 2416 [24
[70] Caddick N and others, 'Copinger and Skone James on Copyright' (18th Ed., Sweet and Maxwell 2022)
[71] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [23]
[72] Francis Day & Hunter v Bron [1963] 1 Ch 287
[73] Mitchell v BBC [2011] EWPCC 42, [39]
[74] Ibid.
[75] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch)
[76] Ed Sheeran + no evidence of access = no copyright infringement, Nick Eziefula Rachael Heeley, Ent. L.R. 2022, 33(6), 220
[77] Fiona McAllister, Will the floodgates open now that there are no more Blurred Lines? Ent. L. R. 2019 30(1), 1-2

December 2021 became the first song to surpass 3 billion streams on Spotify.[78] Sheeran was a claimant alongside his long-time co-writers, Steven McCutcheon, and John McDaid. The trio sought declaration that they had not infringed copyright of Sami Chokri (who performs under the alias Sami Switch) and Ross O'Donoghue (the defendants), for their work 'Oh Why', which was released in June 2015.[79] The claim was issued after the defendants notified the Performing Rights Society ('PRS') that they should be accredited songwriters of 'Shape', which caused the PRS to suspend all payments to the claimants in respect of publicly-generated royalties of Shape. In a counterclaim, the defendants asserted their copyright in Oh Why was infringed by the claimants.[80]

The principal way in which Chokri and his team put their case against Mr Sheeran was an allegation of deliberate copying of the Oh Why phrase in the writing process of Shape. Alternatively, they contend the copying was done so subconsciously.[81] The two claims will be dealt with in turn.

Oh Why, Oh I

Zacaroli J's judgement recognises the universality of music and the inevitability of chance similarities when using unoriginal compositional elements. His decision is welcome against the backdrop of much legal uncertainty regarding infringement claims.

The defendants counterclaimed that Sheeran et al. infringed the copyright in the eight-bar chorus of Oh Why (OW), targeting the eight-bar post-chorus section of Shape, in which the phrase 'Oh I' is sung, three times, to the first four notes of the rising minor pentatonic scale commencing on C#. This 'hook' (the catchy, recurrent motif) was pitted against Chokri's 'Oh Why' phrase, which is repeated to the first four notes of the rising minor pentatonic scale, commencing on F#.[82] For the purpose of this analysis, both songs will be transposed into the A minor pentatonic scale, so that their similarities and differences may be seen more clearly.

Zacaroli J considered the extent of the similarities and differences between the two phrases. The similarities include: (i) The tune in each song comprises the first four notes of the rising minor pentatonic scale (A-C-D-E). (ii) In each song, the first three tones of the scale are repeated. (iii) The vocalisation in both phrases mean the diphthong in the 'Oh I' phrase sounds

[78] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [1]
[79] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [2]-[6]
[80] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [6]
[81] Ibid. [9]
[82] Ibid. [4]

similar to 'Oh Why'. (iv) Both melodies are harmonised by doubling the melodies in the adjacent octaves. (v) Both phrases use a 'call and response' technique.

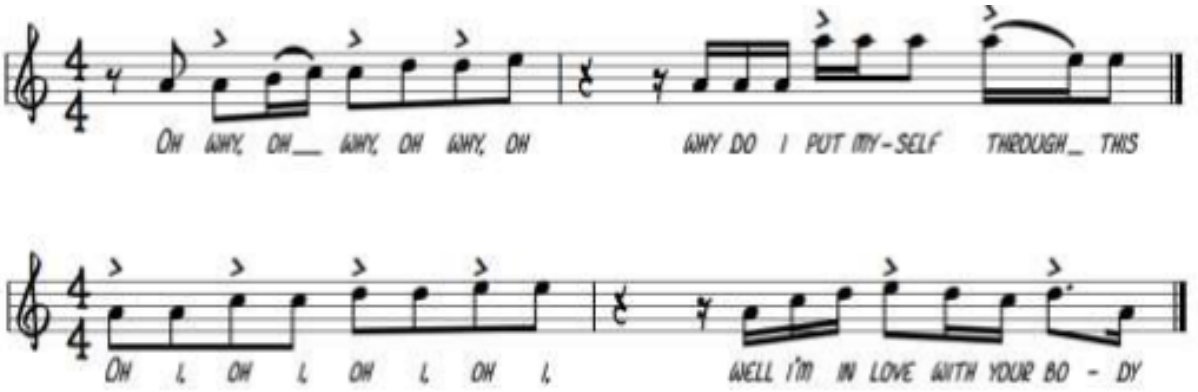

Figure 6: Melody Lines to Oh Why (above) and Shape of You (below)

Use of the minor pentatonic scale is in no way original to Ed Sheeran nor Sami Chokri. The scale is 'versatile and widely used' over minor and major chord progressions and is common in many genres including blues and pop music.[83] Though Chokri claimed artistic (as distinct from legal,) originality over this phrase, Sheeran did not. The musicologist for the claimants, Mr Anthony Ricigliano, demonstrated numerous examples of contemporary pop songs using the first four notes of the minor pentatonic scale.[84] For example, (You Drive Me) 'Crazy' by Britney Spears contains 'precisely the same tune' as the OI Phrase, albeit not in a single bar phrase. Similarly, 'Praying' by Tom Grennan, where a vocal part (also functioning as a hook) set to 'mm, ah, mm, ah, mm ah, yeah' follows the same pattern.[85] Akin to Shape and Oh Why, Grennan's phrase forms a hook within the chorus in a call-and response style. Many of Sheeran's prior hits utilised the A-C-D-E pattern, albeit without repeating each note as in the OI Phrase. Examples of this include Don't (2014), Give Me Love (2011), Grade 8 (2011) and Afire Love (2014),[86] all of which preceded Chokri's Oh Why (2015).

Harmonically and melodically, much of the OI Phrase was predetermined by *scénes á faire* elements. Mr Sheeran and his writing team began writing Shape with the marimba part and bassline repeating the pattern: E, A, C, D, on a loop. Against this background, the trio spontaneously came up with vocal ideas and lyrics in the minor pentatonic scale, which only has five notes: A, C, D, E, G, (two fewer notes than the aforementioned natural minor scale,

[83] Applied Guitar Theory, 'Minor Pentatonic Scale Positions', *Applied Guitar Theory*, (February 2023), <https://appliedguitartheory.com/lessons/minor-pentatonic-scale/#:~:text=The%20minor%20pentatonic%20scale%20is%20a%20versatile%20and%20widely%20used,note%20patterns%20for%20each%20position.> accessed 20 February 2023
[84] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [43]
[85] Ibid. [43]
[86] Ibid. [44]

oft utilised in pop composition). Sheeran worked quickly and intuitively within the context of the scale, and the song was finished in under two hours.[87] The melody was created alongside the marimba pattern and, to a large extent, was defined by it. It is no surprise that the writers landed on the same pattern of notes that were perennially in their ears or, in the words of Mr Ricigliano, 'in their DNA'. [88] As acknowledged by Zacaroli J, there are very 'limited ways' of moving between the tonic and the dominant because there are only two intervening notes.[89] The minor pentatonic is famous for its ability to evoke a 'distinct, bluesy feeling',[90] hence both artists use it for their respective purposes: Chokri, to express the tensions of world politics, and Sheeran, to express the tensions of romance. The dispute between Shape and Oh Why demonstrate the inherent limitations within musical expression: there were only five notes to choose from.

There are other commonplace elements within the phrase. For example, vocal chants are commonly found in pop music and Shape was not the first time Sheeran had used it either.[91] Furthermore, call and response is not a product of Western pop music but has been traced back to Sub-Saharan African cultures to denote democratic participation in public gatherings such as religious rituals and civic gatherings.[92]

Similarly, both the OI Phrase and OW Phrase are sung to the rhythm of quavers. To put this into context, a quaver is a musical note that lasts for half a beat; it is among the simplest of rhythmic devices.[93] To suggest copying on this basis is comparable to an author declaring their work is original for its use of vowels or consonants. Hence, Zacaroli J was correct to assert that use of multiple quavers in a single bar can 'hardly' be seen as an indication of copying,[94] yet it formed a substantial part of Chokri's claim.

The commonplace elements do not stop there. The use of octave harmonies doubling the main melody that was used in both the OI and OW Phrases was a technique Ed Sheeran has used before, in particular on his tracks 'Bloodstream' and 'Runaway' from his 'X' ('Multiply') album that was released in 2014, a year before 'Oh Why'. Finally, and perhaps

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[87] Ibid. [195]
[88] Ibid. [42]
[89] Ibid. [43]
[90] Happy Bluesman, 'A Beginner's Guide to the Minor Pentatonic Scale', *Happy Bluesman*, <https://happybluesman.com/master-minor-pentatonic-scale-blues/> accessed 21 February 2023
[91] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [46]
[92] Courlander H, 'A Treasury of Afro-American Folklore: The Oral Literature, Traditions, Recollections, Legends, Tales, Songs, Religious Beliefs, Customs, Sayings and Humor of People of African Descent in the Americas' (New York: Marlowe & Company, 1976)
[93] Hoffman Academy, 'What's a Quaver? Music Note Names in the US and UK', *Hoffman Academy*, <https://www.hoffmanacademy.com/blog/whats-a-quaver-note-names/> accessed 21 February 2023
[94] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [46]

most unremarkably of all, the oscillating and repeating 'Oh Why' and 'Oh I' that sound materially the same have 'nothing original' in them.[95] It is common for lyrics within a hook to be simple and often devoid of much meaning. The duo-syllabic phrase allows the focus to be on the tune, which is the enduring earworm that brings the listener back for more. 'Shape' may have generated billions of streams and millions of dollars,[96] but in reality, it is nothing that we have not heard before. As was argued in Chapter 1, so too here it is put forward that this in fact is a good thing. The reason for Sheeran's startling levels of commercial success is due to the universality of his music. Over his fifteen-year career, the singer-songwriter has created work that straddles the genres of pop, folk, soft-rock, R&B, hip-hop, grime, and even drill music.[97] In 'Shape', we instinctively recognise the tune is catchy; perhaps the lyrics reflect a portion of our own experience or merely give us what we have grown to expect in a modern pop song. The dancehall rhythm over a looping chord progression transports us to a nightclub the author has likely forsaken: 'the club isn't the best place to find a lover, so the bar is where I go', sings Sheeran in the opening line. Music journalist Michael Cragg has argued Sheeran makes 'emotionally straightforward, resolutely "authentic"' music, 'broad enough to leave no one feeling alienated.'[98] He is right: Sheeran's music leaves no one alienated because it does not stray far from the *res publicae* elements from which he starts; his sources come from everywhere and nowhere: for this reason, by artistic standards his work is not 'original'. However, for the purposes of copyright Sheeran's songs are the 'expression' of his 'free and creative choices' that reflect his 'personality', thus qualify as intellectual creations protectable by copyright.[99]

The different conceptions of the term 'originality' in law and society is a contradiction that will be further explored later in this chapter.

The Claim of Access

In order for Sheeran to copy the OW Phrase, he must have first had access to it. The defendants claimed Sheeran and his team had access to Oh Why via various sources, labelling the artist a musical 'magpie' who 'habitually and deliberately copies and conceals the work of

[95] Ibid. [43]
[96] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [210]
[97] Clark B, 'What genre is Ed Sheeran?' *Musician Wave*, (October 2022), <https://www.musicianwave.com/what-genre-is-ed-sheeran/> accessed 24 February 2023
[98] Cragg M, 'Music for general societal exhaustion: that's why Ed Sheeran sells so much', *The Guardian*, (June 2022), <https://www.theguardian.com/commentisfree/2022/jun/22/music-ed-sheeran-musician-2021> accessed 24 February 2023
[99] Painer v Standard VerlagsGmbH and Others, [2011] Case C-145/10

other songwriters.'[100] Thus, much of the convoluted litigation process consisted of a forensic examination into the means by which Ed Sheeran and his team may have gained access to Oh Why.

The similarities between the OI and OW Phrases show not that Sheeran is a plagiarist, but that it was inevitable that two artists would compose near-identical phrases considering the sheer volume of commercially released music in the digital age.[101] The defendants accused Mr Sheeran of conscious copying of the OW Phrase. Per Lord Millett in *Baigent v Random House*,[102] this inquiry must be a question of fact and degree whether the extent of the alleged infringers' access to the original work, combined with the extent of the similarities, raises a sufficient possibility of copying to shift the evidential burden. It was added by Zacaroli J that just because a song is uploaded to the internet thereby giving the alleged infringer means of accessing is insufficient to shift the burden of proof.[103] In 2021, it was announced that 60,000 songs are uploaded to streaming services every single day,[104] in 2022 this figure had risen to 100,000.[105] Zacaroli J's clarification to the rule in *Baigent* is thus a welcome addition considering the volume of music being produced in the modern age. According to Nick Eziefula in the Entertainment Law Review, the judge undertook a 'detailed factual analysis' as to whether Oh Why was shared with (or discovered by) Sheeran.[106] This description is understated; the forensic inquiry spanned many weeks as the defendants claimed Sheeran had access to Oh Why through a great number of sources, from music blogs such as Noisey,[107] A&R executives at Sony Music,[108] to American producer Benny Blanco,[109] all of which required investigation. As the truth transpired, the defendants chose not to plead the Benny Blanco access route, and in doing so arguably revealed their legal strategy: far-fetched 'speculation' in the hope that one might prove successful, but this was not to be the case.[110] On

[100] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [80]
[101] Willman C, 'Music Streaming Hits Major Milestone as 100,000 Songs are Uploaded Daily to Spotify and Other DSPs', *Variety*, (October 2022) <https://variety.com/2022/music/news/new-songs-100000-being-released-every-day-dsps-1235395788/> accessed 6 January 2023
[102] Baigent v Random House [2007] EWCA Civ 247 [4]
[103] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [25]
[104] Ingham T, 'Over 60,000 tracks are now being uploaded to Spotify every day. That's nearly one per second.', *Music Business Worldwide*, (February 2021) <https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second/> accessed 24 February 2023
[105] Willman C, 'Music Streaming Hits Major Milestone as 100,000 Songs are Uploaded Daily to Spotify and Other DSPs', *Variety*, (October 2022) <https://variety.com/2022/music/news/new-songs-100000-being-released-every-day-dsps-1235395788/> accessed 6 January 2023
[106] Eziefula N and Heely R, 'Ed Sheeran + no evidence of access = no copyright infringement', Ent. L.R. 2022, 33(6), 220-224
[107] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [85]
[108] Ibid. [90]
[109] Ibid. [121]
[110] Ibid. [121]

the facts, Zacaroli J concluded that Sheeran had not heard Oh Why, therefore it was not possible for him to have deliberately or subconsciously copied the OI Phrase.[111] This was irreconcilable in the eyes and ears of the defendants, who argued the musical coincidence was 'one-in-a-million'.[112] But if 100,000 songs are released to streaming platforms a day,[113] and pop artists are limited to a pattern of seven or fewer notes, then the odds of musical similarities far exceed one-in-a-million.

Sheeran and his team understand this truth, so throughout the claimants never laid claim to any artistic originality in the OI Phrase.[114] The reason for the suit against Chokri was twofold: the first, to clear their names and reclaim artistic integrity; the second, to clear the suspension of royalty payments with the Performing Rights Society, and reclaim the sum of £2,200,000 that was withheld as a result of the defendant's notice.[115] The declaration was sought not because the claimants thought they had written a spectacularly original work, but because they thought they had not plagiarised another. In a statement following the verdict, Sheeran acknowledged the inherent limitations within musical expression and the vast amount of music being released every single day: 'coincidences are bound to happen' if artists are, on the whole, releasing '22 million songs a year'.[116] In an Instagram caption to a video posted in July 2021, Chokri wrote '[I am] slowly but surely learning piano so I can produce and perform my own songs'.[117] From this we may begin to question, or even assume that Chokri's understanding of the universality of music is invariably limited, hence his belief that the OW Phrase was truly stolen. Alternatively, it is not unreasonable to question whether the defendants took advantage of the legal uncertainty created by the Blurred Lines verdict by seeking a two-million-dollar payday in court over 2017's most successful song.[118] In contrast, Shape was written in ninety minutes,[119] on a writing day that saw Sheeran and his team pen several other

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[111] Ibid. [205]
[112] Ibid. [202]
[113] Willman C, 'Music Streaming Hits Major Milestone as 100,000 Songs are Uploaded Daily to Spotify and Other DSPs', *Variety*, (October 2022) <https://variety.com/2022/music/news/new-songs-100000-being-released-every-day-dsps-1235395788/> accessed 6 January 2023
[114] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [43]
[115] Ibid. [210]
[116] Sheeran E, 'Dealing with a lawsuit recently. We won and I wanted to share a few words about it all x', *YouTube*, (April 2022), <https://www.youtube.com/watch?v=A8cXaCtUrT8> accessed 28 February 2023
[117] Chokri S, 'Slowly but surely learning piano so I can produce and perform my own songs. One day I'll be a real musician I swear', (July 2021) <https://www.instagram.com/p/CQ6IYAVCKok/> accessed 28th February 2023
[118] Wang A X, 'How Music Copyright Lawsuits Are Scaring Away New Hits', *Rolling Stone*, (January 2020) <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> accessed 6 January 2023
[119] Holden S, 'Ed Sheeran's Shape of You was written in just 90 minutes', *BBC News*, <https://www.bbc.co.uk/news/newsbeat-41650916> accessed 28 February 2023

pop songs for different artists. When Sheeran is creating an album (as he was when writing Shape), he will write anywhere from four-to-five songs per day.[120] He is well-versed in the natural idiosyncrasies that artists fall into when songwriting, the inevitability of musical repetition, and ultimately that no musical work can truly be declared original. Sheeran stands on the shoulders of his influences: from Eric Clapton to Eminem;[121] in his own words he would not be an artist without them, such is the evolutionary and collaborative nature of music.

Therefore, Zacaroli J's decision in *Sheeran v Chokri* ought to be welcomed because it is in line with the reality of music as a universal, yet limited artform, and goes some way in settling the creative nerves of those whose living are owed to the creation of new pop hits, which in turn benefits the society for whom artists make their work.

The Contradiction of Musical 'Originality'

'Originality is dependent on the obscurity of your sources' – John Hegarty, Creative[122]

Sheeran v Chokri reveals a contradiction within the originality threshold: how originality may subsist in two similar, almost identical works. Both works were original in the eyes of the law as works of the respective artist's intellectual creation, but their artistry was not unique.[123] Chokri used the 'generic and commonplace' building blocks of many musical genres (also known as *scénes á faire* elements), that when combined were sufficiently original to represent his own intellectual creation. Neither Sheeran nor Chokri were artistically original in their use of generic phrases sung to the ascending minor pentatonic scale, hence originality was granted in the later work, 'Shape', despite it containing remarkable similarities to 'Oh Why'. As previously argued, artists do not create *ex nihilo* – out of nothing – but they create with *res publicae* elements within the context of genre and style, much of which are predetermined. Unlike in the dictionary, originality is not defined in law as something which exists from the beginning, but something that is created personally by a particular artist as a work of their

[120] Young K, 'Sauce, Specs and Stan: What did we learn from Ed Sheeran's Desert Island Discs?', *BBC Radio 4*, (May 2017), <https://www.bbc.co.uk/programmes/articles/1LQRRVsVqqZTQZPt7csQZBz/sauce-specs-and-stan-what-did-we-learn-from-ed-sheeran-s-desert-island-discs#:~:text=But%20Ed%20describes%20a%20slightly,a%20hundred%20might%20be%20good.%E2%80%9D> accessed 28 February 2023
[121] Ibid.
[122] Hegarty J, 'Hegarty on Creativity – There Are No Rules' (Thames and Hudson: 2014) 18, 19
[123] Recital 10 to the Term Directive; Infopaq International A/S v Danske Dagblades Forening Case C-5/08 [2009] *ECR* I–6569

intellectual creation.[124] This definition is preferable, but it is not intuitive to artists and consumers alike, who often perceive 'originality' as something they have never seen or heard before. Thus, we may say that the law (of the UK, EU, and USA, respectively) holds a narrow conception of what constitutes originality in copyrightable works. However, originality, in the words of advertising creative John Hegarty, 'is dependent on the obscurity of your sources'.[125] For if the legal threshold was defined as something which exists from the beginning, then no artistic work would be granted protection as there is no such thing as absolute originality. If that were the case, then copyright would fall short of its aims to protect pre-existing artists whilst incentivising the creation of new work. All forms of expression – artistic, musical, literary – are limited by the confines of their medium, and (from *Painer*) the 'creative choices' open to musicians are limited further still.[126] In order for art to be recognisable it must contain something the world already understands. For Pablo Picasso, that something was the human face, deformed though he made it, his work in Cubism and Surrealism is celebrated for its ingenuity and originality. Yet Picasso was famously quoted as saying, 'good artists borrow, great artists steal', from which we may infer a lifelong admission to artistic theft.[127] Ironically, whether or not Picasso was truly the first to express this sentiment is in some dispute.[128] In the present case, Sheeran's influence on Chokri is clear as the defendant went to great lengths to get 'Oh Why' on the radar of those closely associated with the claimant, and 'Oh Why' contained many of the lyrical, musical and production techniques used by the claimant in the preceding years.[129] Chokri's hero clearly became his enemy. It is suggested that musicians receive some level of legal advice and education in what constitutes an original work under UK copyright law, in hope that less litigation reaches the courts, freeing artists to create without fear of legal reprimand.[130]

The narrow legal test for originality is preferable – but not perfect – as it allows artists to create new works by placing the building blocks of music in the public domain. As *Sheeran v Chokri* demonstrates, this only functions on a correct understanding of the universality of music. The independent creation doctrine also serves as the essential basis for substantial part

[124] Recital 10 to the Term Directive
[125] Hegarty J, 'Hegarty on Creativity – There Are No Rules' (Thames and Hudson: 2014) 18, 19
[126] Painer v Standard VerlagsGmbH and Others, [2011] Case C-145/10
[127] Connolly J, 'Great artists steal!', *Creative Thinking Hub*, <https://www.creativethinkinghub.com/creative-thinking-and-stealing-like-an-artist/> accessed 3 March 2023
[128] Ibid.
[129] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [47]
[130] Sisario B, ''Blurred Lines' on Their Minds, Songwriters Create Nervously', *New York Times,* (March 2019), <https://www.nytimes.com/2019/03/31/business/media/plagiarism-music-songwriters.html> (Accessed 7 January 2023)

copying in cases where access can be proved, as explored in *Hyperion*.[131] However, the current tests are blunt to the reality of music as an evolutionary and cooperative artform. The law of copyright must go further to acknowledge this otherwise it risks giving ownership of *res publicae* elements to select artists, such as the rising minor pentatonic scale. If Zacaroli J had judged in favour of the defendants, as a first-time right holder Chokri would have legal right to litigate against anyone who used a similar musical phrase in the future. Herein lies the danger of art becoming an asset: music becomes enclosed like land, depriving the common artist their right of access and privilege.[132] First-time rightsholders become landlords of musical elements, allowing them to generate passive income streams by virtue of their ownership. To combat this, Emma Steel has proposed a dynamic originality standard to 'ground' copyright in a musical work more 'accurately'.[133] This standard would allow for 'reproduction and recycling' in music, akin to Beethoven's 'Ode to Joy' that was discussed in Chapter 1, by distinguishing works on the basis of 'authorial creativity' and 'contextual distinctions':[134]

> 'It could support both the public domain and rights holders by allowing creators to produce "original" works that draw from and build upon the works of others. Where this scale should rest must be determined on a case-by-case basis; the lower the standard applicable, the less strictly the author should be allowed to enforce his or her rights in the work.' – Emma Steel, Entertainment Law Review[135]

Though the scope of this essay does not permit a full analysis of the dynamic originality standard of which Steel discusses, the recommendations of Steel are wise to the universality of music and the litigious impulses of a competitive industry. In the 21st Century, the law of copyright must nuance music as distinct from literary, dramatic, and artistic works, in regard to music's inherent limitations for expression that exist in tension with the volume of commercially released music every single day.

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[131] Hyperion Records v Sawkins [2005] EWCA Civ 565
[132] The Land, 'A Short History of Enclosure in Britain', *The Land Magazine*, (Date Unknown), <https://www.thelandmagazine.org.uk/articles/short-history-enclosure-britain> accessed 2 March 2023
[133] Steel E, 'Original sin: reconciling originality in copyright with music as an evolutionary art form', E.I.P.R. 2015, 37(2), 79
[134] Ibid.
[135] Ibid.

Chapter 3: Blurred Lines, the Fallout, and a Look to the Future

In this essay, *Sheeran v Chokri* has been characterised as the case standing in resolute opposition to the 'Blurred Lines case', or *Pharrell Williams et. al. v Bridgeport Music et. al.*[136] This chapter will argue the uncertainty created in *Williams v Bridgeport* is damaging to the creative freedom of musicians worldwide and examine the growing role of musicologists in the studio and the courtroom.

Blurred Lines: Tone-Deaf to the Universality of Music

In 2018, the 9th Circuit Court of Appeals concluded a five-year litigation battle, confirming that artists Robin Thicke and Pharrell Williams had infringed the copyright subsisting in the (late) Marvin Gaye song, 'Got to Give it Up' (1977).[137] The claimants, Thicke and Williams, were ordered to pay Gaye's heirs and Bridgeport Music US$5.3 million (a number later reduced on appeal) in profits and damages, despite their song containing no two consecutive notes with the same pitch, duration, and placement, of 'Got to Give it Up'.[138] During the appeal process, the claimants were given support (via an *amicus curiae* brief) by more than 200 musicians (that include bands such as Train and Linkin Park, and even contemporary composer Hans Zimmer) who stated the decision was 'dangerous' for 'punish[ing] songwriters for creating [music] that is inspired by prior works'.[139] It is argued that *Williams v Bridgeport* is tone-deaf to the universality of music as an evolutionary artform, and is a worrying departure from traditional legal understanding of copyright in music. Unlike *Sheeran v Chokri*,[140] the 'Blurred Lines' case was not centred around infringement of a substantial part, such as a particular series of notes, but the claimants were accused of creating too similar a 'vibe' to 'Got to Give it Up', due to similar rhythmic patterns and production decisions such as the bassline or vocal foley in the background of the mix.[141]

There exist a number of procedural reasons why *Williams v Bridgeport* would have been decided differently in the UK, and the comparison shows that the US have some way to

[136] Pharrell Williams, et al. v. Bridgeport Music, et al. 895 F.3d 1106 (9th Cir. 2018)
[137] Ibid.
[138] McAllister F, Will the floodgates open now that there are no more Blurred Lines? Ent. L. R. 2019 30(1)
[139] Gardner E, '"Blurred Lines" Appeal Gets Support From More Than 200 Musicians"', *The Hollywood Reporter*, <https://www.hollywoodreporter.com/business/business-news/blurred-lines-appeal-gets-support-924213/> accessed 2 March 2023
[140] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch)
[141] McAllister F, Will the floodgates open now that there are no more Blurred Lines? Ent. L. R. 2019 30(1)

go if they want to support the evolution of new musical artists, styles, and genres in the years ahead.

First, if Thicke and Williams were inspired by Marvin Gaye's iconic sound, inspiration cannot amount to infringement as it is not possible in English law (and preceding this judgement, in American law) to own a groove, style, genre: in the words of Mr Williams himself – 'you can't own a feeling'.[142] Lawyers for the defendants were correct to acknowledge substantial similarities in the two works, but their reasoning was not only confusing but beyond the scope of protected expression. For example, they argued many of the vocal and instrumental themes within 'Blurred Lines' are 'rooted in' 'Got to Give it Up', and that both songs shared 'departures from convention' without providing evidence to substantiate these baseless claims; it is still not known from what 'conventions' the artists departed.[143] These statements were accurately labelled by American legal scholar Charles Cronin as 'quantitative hot air'[144] because lawyers for the defendants did not refer to a single protected musical expression in 'Got to Give it Up'. Regional accents, volume, articulation, and stylistic attributes when captured in sound recordings are protected, but the stylistic techniques are not themselves protectable.[145] Unlike a *Designer's Guild*-type test that assesses qualitative similarities,[146] the quantitative approach of the American courts found infringement, despite little to no specific copying in 'Blurred Lines' on a 'musicological level'.[147] This means that there was a greater level of musical overlap in 'Shape' and 'Oh Why', than there exists between 'Blurred Lines' and 'Got to Give it Up'.

The second significant procedural difference between the English and American courts is the use of a jury. Copyright cases in the United Kingdom are adjudicated solely by a judge, whereas courts across the Atlantic use 'misguided and musically ignorant' juries who are won over by non-musical arguments.[148] It is essential that in high-profile and highly technical intellectual property cases, juries (if at all used) are educated in the universality of music and

[142] Skinner T, 'Pharrell disagrees with 'Blurred Lines' lawsuit verdict: "You can't copyright a feeling"', *NME*, (November 2019), <https://www.nme.com/news/music/pharrell-on-blurred-lines-lawsuit-verdict-you-cant-copyright-a-feeling-2574201> accessed 2 March 2023
[143] Defendants Counterclaim to Plaintiff's Claim for Declaratory Relief, *Williams v Bridgeport Music,* (filed August 2015)
[144] Cronin C, 'Case Comment: Pharrell Williams, et al. v. Bridegport Music', *Music Copyright Infringement Resource*, (March 2018) <https://blogs.law.gwu.edu/mcir/case/pharrell-williams-et-al-v-frankie-gaye-et-al/> accessed 9 January 2023
[145] Ibid.
[146] Designer's Guild v Russell Williams [2000] 1 WLR 2416 [24
[147] McAllister F, Will the floodgates open now that there are no more Blurred Lines? Ent. L. R. 2019 30(1)
[148] Cronin C, 'Case Comment: Pharrell Williams, et al. v. Bridegport Music', *Music Copyright Infringement Resource*, (March 2018) <https://blogs.law.gwu.edu/mcir/case/pharrell-williams-et-al-v-frankie-gaye-et-al/> accessed 9 January 2023

the essential distinction between unprotected elements and protectable expressions. Lawyers for Gaye's estate used *ad hominem* arguments to 'alienate' and distract the jury from the defendant's lack of legal and factual justifications for the case.[149] In *Sheeran v Chokri*, though accusations were made of Ed Sheeran as a 'magpie',[150] such accusations were relevant to Sheeran as a musician and composer and did not affect Zacaroli J who grounded his judgement in musicological reality. The theatrics in the American court are distracting, irrelevant, and ultimately damaging to the music industry who no longer understand the legal distinction between inspiration and plagiarism.

The third procedural difference between the judgements of *Williams* and *Sheeran* is the use of lead sheets and audio recordings in the trial. Neither audio recordings of 'Got to Give it Up' nor 'Blurred Lines' were played in the courtroom, but instead the judge was restricted to a lead sheet.[151] For context, a lead sheet is a single sheet of musical notation that is filed in the U.S. Copyright Office for the purposes of copyright subsistence and protection,[152] but are also widely used by jazz musicians for the purposes of improvisation. According to the Berklee College of Music, they are an 'abbreviated form' of notation featuring 'just the essential musical notation' to allow musicians to develop a 'unique interpretation of the tune together'.[153] Lead sheets are deliberately reductive, yet they are the primary source of evidence in all infringement cases within the US when a court determines the extent to which a song has been plagiarised. In *Williams v Bridgeport*, the result is a 'tortuous document' that attempts to render an 'essentially improvised work of sound using the straitjacket of symbolic music notation'.[154] For the most part, in contemporary song writing, sheet music is not used. Artists improvise freely and record their work on digital audio workstations (DAWs), where parts of a song are collated, edited, and produced into a single track. For example, Ed Sheeran improvised over the marimba loop in the writing process for Shape. In the 21st Century, we are 'decades beyond' the use of sheet music, which demonstrates the inadequacies of copyright

[149] Cronin C, 'Case Comment: Pharrell Williams, et al. v. Bridegport Music', *Music Copyright Infringement Resource*, (March 2018) <https://blogs.law.gwu.edu/mcir/case/pharrell-williams-et-al-v-frankie-gaye-et-al/> accessed 9 January 2023
[150] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [80]
[151] McAllister F, Will the floodgates open now that there are no more Blurred Lines? Ent. L. R. 2019 30(1)
[152] Krasilovsky M W and others, 'The Business of Music' (New York: Billboard Books, 2007)
[153] Feist J, 'Why Lead Sheets?', *Berklee College of Music*, (June 2018), <https://www.berklee.edu/berklee-today/summer-2018/lead-sheet>
[154] Cronin C, 'Case Comment: Pharrell Williams, et al. v. Bridegport Music', *Music Copyright Infringement Resource*, (March 2018) <https://blogs.law.gwu.edu/mcir/case/pharrell-williams-et-al-v-frankie-gaye-et-al/> accessed 9 January 2023

law in the United States when dealing with new musical works.[155] Though musicians will always be confined to 12 notes, music is ever evolving in style and practice. The law must keep in time if it wants to allow for the creation of new musical works. In light of outdated musicological analysis, Pavel Karnaukhov, a musician and software developer, has developed an app called 'Melody Composer Squared' that creates graphical representations of melodic lines.[156] Pictured below, the differences between the melodies of 'Got to Give it Up' and 'Blurred Lines' are evident to the naked eye, even without understanding the exact methodology used. Similarly, Spotify is developing a 'plagiarism risk detector' to scan songs for copyright infringement. It is reported that the graphical user interface delivers 'dynamic visual feedback' in substantially real-time.[157] The technology would allow artists to check whether for plagiarism prior to a song's release in order to avoid expensive and invasive lawsuits later down the line. It is suggested that the US and UK alike begin to implement these new technologies in the courtroom to deliver fairer, more reasonable judgements.

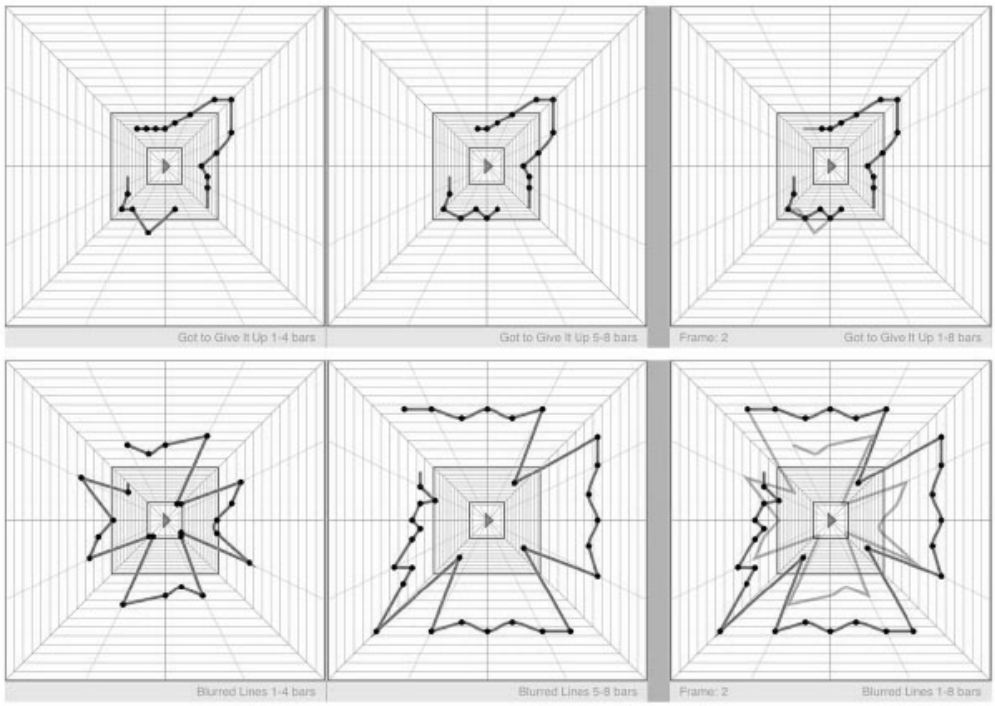

Figure 7: 'Melody Composer Squared' representation of 'Got to Give it Up' and 'Blurred Lines'

[155] Caramanica J, 'What's Wrong with the 'Blurred Lines' Ruling', *New York Times*, (March 2015) <https://www.nytimes.com/2015/03/12/arts/music/whats-wrong-with-the-blurred-lines-copyright-ruling.html> accessed January 6 2023

[156] Cronin C, 'Case Comment: Pharrell Williams, et al. v. Bridegport Music', *Music Copyright Infringement Resource*, (March 2018) <https://blogs.law.gwu.edu/mcir/case/pharrell-williams-et-al-v-frankie-gaye-et-al/> accessed 9 January 2023

[157] Darville J, 'Report: Spotify develops "Plagiarism Risk Detector" to scan songs for copyright infringement', *The Fader*, (December 2020) <https://www.thefader.com/2020/12/02/report-spotify-develops-plagiarism-risk-detector-to-scan-songs-for-copyright-infringement#:~:text=Spotify%20has%20applied%20for%20a,similarities%20in%20already%2Dpublished%20songs.> (accessed 14 April 2023)

Following *Williams v Bridgeport*, Fiona McAllister argued the decision was 'unlikely to have much practical sway over musicians', who will always be influenced by their predecessors.[158] McAllister was correct in say that context forms an 'intrinsic part of the creative process' in music,[159] but was wrong about the effect it would have on musicians. The decision sent shockwaves throughout the music industry and has changed how artists create altogether.

Artists Create Nervously

'There are no virgin births in music. Music comes out of other music' – Sandy Wilbur, Musicologist[160]

The ruling in *Williams v Bridgeport* has blurred the lines between inspiration and infringement. Music does not exist in a vacuum but is the product of culture; artists become artists because they are inspired by those that came before them. For Gaye, 'Got to Give it Up' was created in the disco-craze of the late '70s, where labels and artists were searching for 'that big-selling disco hit'.[161] The song was a step away from the soul music Gaye was known for, and when he 'subversively' set out to take disco to its 'absurd conclusion', he inadvertently created a chart-topping single that is viewed by some as 'one of the greatest disco tunes of all time'.[162] It is no surprise the song proved inspiring for Williams,[163] who redefined the genre in his generation. This was argued by musicologist for the claimants, Sandy Wilbur, in *Williams v Bridgeport*, expressing the views of artists and songwriters worldwide, but to no avail. The uncertainty created by the judgement affects musicians everywhere because music is not confined to jurisdictional boundaries but is created and enjoyed globally. Artists now create in fear that their work will be subject to infringement lawsuits, and their reputation tarnished by the mainstream media. However, the majority of those affected are not the superstars – such as Sheeran or Pharrell who can afford to pay hefty damages, as undesirable as that may be – but

[158] McAllister F, Will the floodgates open now that there are no more Blurred Lines? Ent. L. R. 2019 30(1)
[159] Ibid.
[160] Wang A X, 'How Music Copyright Lawsuits Are Scaring Away New Hits', *Rolling Stone*, (January 2020) <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> accessed 6 January 2023
[161] Ellsworth K, Marvin Gaye's 'Got to Give it Up:' Story and facts about the disco hit he didn't' want to make', *Groovy History*, (June 2020) <https://groovyhistory.com/marvin-gaye-got-to-give-it-up-story-facts-disco/6> (accessed 17 April 2023)
[162] Ibid.
[163] HipHollywood, 'Pharrell Williams admits he was inspired by Marvin Gaye's 'Got to Give it Up', (July 2013) <https://www.youtube.com/watch?v=yfJkRXcXZQQ> accessed 17 April 2023

the 'rank-and-file' songwriters who make their living in obscurity.[164] Songwriters are now forced to take out expensive insurance policies to protect themselves from claims.[165]

Music is about expressing oneself, that is its purpose. Artists create music primarily for themselves, and secondarily for others. The decision in *Williams v Bridgeport* severely impedes an artist's ability to express themself. 'I shouldn't be thinking about legal precedent when I am trying to write a chorus', complained Evan Bogart, who has written songs for Beyoncé, Rhianna, and Madonna.[166] In an interview following the 'Shape of You' case, co-writer Jonny McDaid spoke candidly of the effects of lawsuits on his creative process: 'we need to be able to make music freely, honourably, but do it in a way that we can express ourselves from the heart.'[167] The fear of infringement claims has created a 'self-fulfilling prophecy' in the artistic process, labelled by long-term litigator Christine Lepera a 'chilling effect'.[168] When artists are impeded by the failures of copyright law, they suffer alongside the culture who do not get to enjoy the fruit of their work. The hallmark of a successful copyright scheme is one that protects existing work whilst allowing for the development new artistry. On this basis, the US legal system is failing musicians, and the effects are felt worldwide.

The Growing Role of Musicologists

The ruling in *Williams v Bridgeport* has seen an increase in the role of musicologists, both in the studio and in the courtroom. Musicologist Sandy Wilbur has received triple the number of requests from music companies to check whether new songs sound similar to pre-existing works before they are considered for release.[169] Ed Sheeran himself had 'Shape of You' checked by a musicologist before it was released, but even that could not protect him

[164] Sisario B, ''Blurred Lines' on Their Minds, Songwriters Create Nervously', *New York Times,* (March 2019), <https://www.nytimes.com/2019/03/31/business/media/plagiarism-music-songwriters.html> (Accessed 7 January 2023)
[165] Wang A X, 'How Music Copyright Lawsuits Are Scaring Away New Hits', *Rolling Stone*, (January 2020) <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> accessed 6 January 2023
[166] Sisario B, ''Blurred Lines' on Their Minds, Songwriters Create Nervously', *New York Times,* (March 2019), <https://www.nytimes.com/2019/03/31/business/media/plagiarism-music-songwriters.html> (Accessed 7 January 2023)
[167] BBC News, 'Ed Sheeran says copyright case was about honesty, not money – BBC Newsnight', *YouTube*, (April 2022), <https://www.youtube.com/watch?v=KW8OTSZu6Bc> accessed 26 February 2023
[168] Sisario B, ''Blurred Lines' on Their Minds, Songwriters Create Nervously', *New York Times,* (March 2019), <https://www.nytimes.com/2019/03/31/business/media/plagiarism-music-songwriters.html> (Accessed 7 January 2023)
[169] Wang A X, 'How Music Copyright Lawsuits Are Scaring Away New Hits', *Rolling Stone*, (January 2020) <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> accessed 6 January 2023

from a lawsuit.[170] In the litigation stages, musicologists are employed on-demand by artists who feel they have been wronged. The musicologist will then create a report which is sent to the PRS, which in turn freezes royalty payments until the legal matter is settled, meaning musicologists can be used as a 'threat'.[171] Because musicologists are employed by artists, they cease to become truly objective in their analysis when a case reaches the courtroom. For example, in *Marcus Gray v Katy Perry*, Katy Perry was accused of copying rap artist Flame in her song, 'Dark Horse'.[172] The two songs, Dark Horse and Joyful Noise, do not share the same key, melody, chord progression, bassline, or drum groove. The musical phrase in question was an eight-note synth ostinato, rhythmically 'monotonous' descending the natural minor scale.[173]

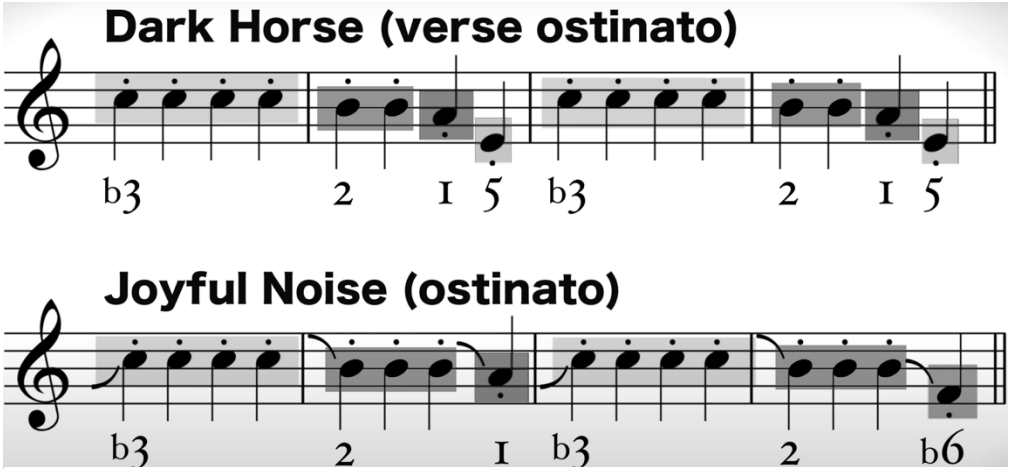

Figure 8: A Comparison between the Ostinatos of Dark Horse and Joyful Noise

On the face of it, the rhythm and the majority of the notes appear the same, despite the marked differences in the second and fourth bars. Musicologist for the claimants, Todd Decker, testified under oath that he had 'not seen another piece that descends in the way these two do',[174] however Katy Perry's musicologists used authoritative databases of melodies to determine that the pitch sequence in question can be found in 'thousands of earlier works.'[175]

[170] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) [178]
[171] BBC News, 'Ed Sheeran says copyright case was about honesty, not money – BBC Newsnight', *YouTube*, (April 2022), <https://www.youtube.com/watch?v=KW8OTSZu6Bc> accessed 26 February 2023
[172] Marcus Gray, et al. v. Katy Perry, et al. No. 2:15-cv-05642 (C.D. Cal. March 16, 2020); No. 20-55401 (9th Cir., March 10, 2022)
[173] Cronin C, 'Case Comment: Marcus Gray, et al. v. Katy Perry, et al.' *Music Copyright Infringement Resource*, (March 2020) <https://blogs.law.gwu.edu/mcir/case/marcus-gray-et-al-v-katy-perry-et-al/> accessed 8 January 2023
[174] Marcus Gray, et al. v. Katy Perry, et al. No. 2:15-cv-05642 (C.D. Cal. March 16, 2020); No. 20-55401 (9th Cir., March 10, 2022)
[175] Cronin C, 'Case Comment: Marcus Gray, et al. v. Katy Perry, et al.' *Music Copyright Infringement Resource*, (March 2020) <https://blogs.law.gwu.edu/mcir/case/marcus-gray-et-al-v-katy-perry-et-al/> accessed 8 January 2023

Examples include phrases from the 18th Century composer J S Bach and traditional Christmas carols (pictured below).

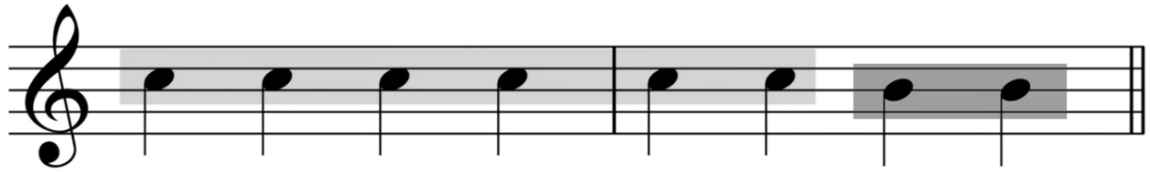

Figure 9: Traditional Christmas Carol - Jolly Old St Nicholas

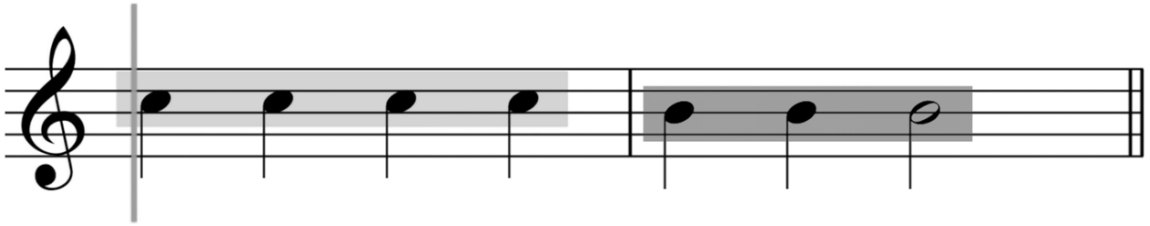

Figure 10: J S Bach - Violin Sonata in F minor (adagio) (1723)

Music journalist Adam Neely has argued the most closely related ostinato to Joyful Noise comes from the song Moments in Love (1984) by English synth-pop band Art of Noise.[176] He points this quarter note ostinato played on a synth originally found in Moments in Love has been used to create a large body of work,[177] as it has been sampled 152 times,[178] mostly by hip-hop artists such as Flame. Neely speculates this is where the musical idea for the ostinato comes from.[179] We need not be sure of the exact source of inspiration, but one thing is for certain: the musical idea was in no way original to the claimant; thus, it did not deserve legal protection as it is a *res publicae* element. Yet this was not what was argued by the musicologist for the plaintiffs. Decker's intellectual dishonesty is shocking as a Professor of Musicology at Washington University in St. Louis, and it is severely questioned whether he would make the same claims in front of his scholarly contemporaries as he did in his paid court appearance.[180]

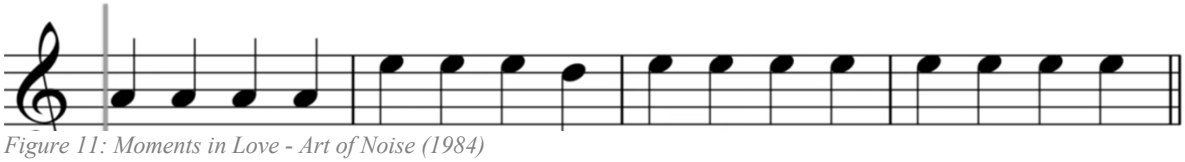

Figure 11: Moments in Love - Art of Noise (1984)

[176] Neely A, 'Why the Katy Perry/Flame lawsuit makes no sense', (August 2019) <https://www.youtube.com/watch?v=0ytoUuO-qvg> accessed 10 January 2023
[177] Ibid.
[178] 'Samples of Moments in Love by Art of Noise', *Who Sampled*, <https://www.whosampled.com/Art-of-Noise/Moments-in-Love/sampled/> accessed 21 March 2023
[179] Neely A, 'Why the Katy Perry/Flame lawsuit makes no sense', (August 2019) <https://www.youtube.com/watch?v=0ytoUuO-qvg> accessed 10 January 2023
[180] Ibid.

In *Gray v Perry*, the claimants demanded a trial-by-jury because they wanted to confuse and win over the sympathies of non-musician jurors with musical jargon,[181] which proved successful.[182] Katy Perry lost the case and was ordered to pay the claimants damages worth US$2.8 million. In an appeal, judges overturned the decision in favour of Perry, acknowledging the eight-note section in question was 'not a particularly unique or rare combination' of notes.[183] *Gray v Perry* is one of many cases in the legacy of the 'Blurred Lines' decision. It is a deliberate and cynical example of plaintiffs trying to own the basic building blocks of music for pecuniary gain. Though the correct decision was reached on appeal, the case demonstrates the precarity of infringement cases in the United States: 'We all feel like the system has failed us,' writes music manager Lucas Keller, 'there are a lot of aggressive lawyers filing lawsuits.'[184] Until the courts take a firm stance by throwing these cases out of court, musicians and artists will continue to suffer from the covetous impulses of financially-insecure plaintiffs and the sympathies of non-expert jurors.

Conclusion

In conclusion, *Williams v Bridgeport* created damaging shockwaves through the music industry worldwide and can be traced as the source of legal uncertainty within the law of copyright over the past ten years. The decision was blind to music as an evolutionary artform whose expression will always be limited to the domain of twelve notes only. By crossing the Rubicon of protecting genre in a musical work, the judiciary of the United States affected music studios and writing rooms across the globe, thereby creating a chilling effect. Opportune and financially unstable plaintiffs took advantage of legal uncertainty by seeking vast sums of royalties over the alleged theft of musical building blocks, and in many cases have won. *Williams* and *Gray* are two examples that ignore one fundamental truth about music: it is, has been, and always will be a derivative artform. The answer is definitive: there is no such thing as infinite originality. Though experimentalists have tried, music that strays from musical

[181] Claimant's Complaint: Marcus Gray, et al. v. Katy Perry, et al. No. 2:15-cv-05642 (C.D. Cal. March 16, 2020); No. 20-55401 (9th Cir., March 10, 2022)
[182] Ibid.
[183] Beaumont-Thomas B, 'Katy Perry wins appeal in $2.8m plagiarism case', *The Guardian*, (March 2020), <https://www.theguardian.com/music/2020/mar/18/katy-perry-wins-appeal-in-28m-plagiarism-case-dark-horse> accessed 8 January 2023
[184] Wang A X, 'How Music Copyright Lawsuits Are Scaring Away New Hits', *Rolling Stone*, (January 2020) <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> accessed 6 January 2023

norms will never resonate with universal human experience and is doomed to fail as a communicative work of art. What is known as 'popular music' is named as such because it is strikingly the simplest and yet most universal of all musical genres. Currently, the stance of protectionism within the American context is leading artists to create nervously – with fear of legal reprimand – which in turn discourages the creation of new musical works. In this regard, the law of copyright is failing in a key area.

The narrow conception of originality within the law of copyright – counterintuitive as it may be – must be safeguarded against inevitable musical repetitions as the volume of commercially-released music is ever increasing. Music is naturally occurring, therefore it must simultaneously belong to 'everyone and no one'; as paradoxical as that may seem, that is reality, and the law must reflect that.[185] It is hoped that *Sheeran v Chokri* will prove to be a shift in the cross-jurisdictional landscape in favour of the universality of music by setting a new precedent that discourages litigation. It was argued that in the 21st Century, the law of copyright must nuance music as distinct from literary, dramatic, and artistic works, in regard to the inherent limitations for expression. It is further suggested here that the Law Commission takes heed to the common-sense reasoning of Zacaroli J and the cries of a fearful music industry to enact the *Sheeran* precedent into legislation, within the context of the CDPA 1988, or otherwise.

To suggest that infringement cases will no longer reach the court is an optimistic, but fundamentally unrealistic idea. The litigious impulses of powerful record labels will not wane overnight and as we have seen, the American courts are procedurally and technologically unfit to fairly adjudicate. As partisan musicologists are increasingly mistrusted to provide objective evidence in court, the United Kingdom has the opportunity to lead the way in facilitating new technologies to assess the scope of infringement, providing fairer judgements for artists and songwriters alike.

Finally, it ought to be acknowledged that music is a gift like no other. Society is richer for it. Artists ought to be free to create without fear of legal reprimand. The law must not award ownership of the basic building blocks of music to a select few, lest it risks choking the expression of the next generation who wish to speak into their own contexts with a musical language used for millennia.

Word Count: 9867

[185] Steel E, 'Original sin: reconciling originality in copyright with music as an evolutionary art form', E.I.P.R. 2015, 37(2), 180

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Blog: The Paradox of Originality in Music

Have you ever considered – in your profundity or procrastination – whether it is possible for a piece of music to be totally original? In other words, is it feasible that one day an artist could create a song the kind of which no one else has heard before?

This thought, entertaining as it may be, proves as fruitful as inventing a new colour. Just as the human eye is limited by frequencies of light, so too the ear is restricted to frequencies of sound. Just as the tones in the tube of the artist's acrylic are found first in nature, so too the notes of the scale, in song or symphony, find their origin in the natural world.

In total there are only twelve notes. Upon this foundation the entirety of Western music has been built. It may come as further surprise that not all of these notes are used at any one time, either. The most common scale – the major scale – only uses seven.

We may then question how any one person can lay claim to own notes, or indeed a collection of notes. This idea, in law, is called music copyright.

Musical notes exist in the public square, unprotected in law and free to use by the commoner. Musical expressions, however – such as songs or a part thereof – can become protected in law. This gives the author the right to copy, adapt, lend, or sell copies of the work. It also gives them recourse when another has infringed those rights. But that George Harrison (of *The Beatles*) once remarked in 1970 that he was scared to approach the piano for fear of using someone else's notes demonstrates to us that historically the distinction between ideas and expressions is a line drawn imprecisely.

In 2013, this issue was once again brought to light when Pharrell Williams and Robin Thicke sought a declaratory judgement that their song, 'Blurred Lines', did not infringe Marvin Gaye's 'Got to Give it Up'. 'Blurred Lines', albeit controversial for other reasons, was undoubtedly the hit song of the summer, spending 12 weeks atop the Billboard 100. Two years later, in March 2015, a California district jury found there was 'substantial similarity' between the two works, ordering Williams and Thicke to pay nearly US$2 million in combined damages and profits.

From this language, one assumes the R&B duo had totally *ripped-off* the Gaye classic.

The opposite was true.

No two consecutive notes in 'Blurred Lines' has the same pitch, duration, or placement of 'Got to Give it Up'. Instead, the substance of infringement was found in the *groove*, *feel*, and *vibe* of the two songs, all three of which are historically unprotectable musical characteristics.

It is undisputed that 'Blurred Lines' had something of Gaye in it, whether in soulful harmonies or funky bassline. The authors admitted as much. But people become musicians because they are inspired by their predecessors. They learn how to play the works of their heroes and in time write works of their own. This is how music and genres evolve over time.

Though the judgement was given in a Californian courtroom, the decision sent shockwaves through the music industry and the effects were felt in studios and writing rooms all over the globe.

Five years later on the other side of the Atlantic, Ed Sheeran sought a declaratory judgement that his song, 'Shape of You' did not infringe 'Oh Why' by Sami Switch.

Shape of You was 2017's biggest hit and was just the third song on streaming service Spotify to reach 1 billion streams. How strange it is that only the most successful songs are targeted in lucrative infringement claims?!

The protected hook in question were the words 'Oh Why' sung by Switch to the first four notes of the rising minor pentatonic scale. Sheeran's hook was noticeably similar: the words 'Oh I' sung to the first four notes of the rising minor pentatonic scale, but with a half-beat's rest at the beginning of the bar. You can listen to a comparison of the two here.

Judgement was given in favour of Ed Sheeran and no infringement was found. His reasoning was simple: the two hooks – albeit similar – were so commonplace that neither deserved copyright protection. Hence, originality was upheld in the later work.

One may ask how originality may be found in a work almost identical to another. The law does not define originality as something that has never been heard before, but as something that emanates from the mind of a creator. It must be their intellectual creation.

This is seemingly at odds with the reality of music creation as an evolutionary artform but is more desirable than defining originality as something that no one has heard before. As previously argued, attaining to that standard is impossible.

If the judgement were ruled in favour of Switch, the artist would have effective ownership of one of the most common scales in all of music. The notes of the minor sale would no longer exist in the public square and the law would usher in a class system or those who own and those who don't.

Instead, the judgement soothed the creative nerves of artists globally. This should be rightly celebrated.

Let us be honest, claims of infringement are never about artistic integrity. After all, Marvin Gaye has been dead for nearly forty years, and no one has ever heard of Sami Switch. These cases are simply about money. But that is not what music ought to be about.

Music is about expression. Artists create primarily for themselves and secondarily for an audience. It is essential that the basic building blocks of music are not put into the ownership of individuals, lest we risk strangling the next generation of musicians who want to express themselves with a musical language that has been used for centuries.

Word Count: 980