

**EIP**

# The Club isn't the Best Place (to find a DNI), so the Court is where Sheeran Goes

On 6 April 2022, Mr Justice Zacaroli ruled on the highly publicised case involving Ed Sheeran (and others) against Sam Chokri (and others) over Mr Sheeran's 2017 well-known hit "Shape of You." The Judge ruled in favour of Mr Sheeran and granted the declaration that Mr Sheeran sought in that in creating and exploiting "Shape of You," Mr Sheeran and the other claimants had not infringed copyright in the song "Oh Why" which had been written by Mr Chokri.

## Background & Issues

These proceedings were commenced by the claimants on 16 May 2018, seeking declarations that they had not infringed copyright in "Oh Why." The claim was issued following the defendants having notified the Performing Rights Society Limited ("PRS") of their contention that they should be credited as songwriters of "Shape of You," causing the PRS to suspend all payments to the claimants in respect of the public performance / broadcast of Shape of You. By a counterclaim, the defendants asserted their claim that copyright in "Oh Why" has been infringed by the claimants.

The defendants' claim relates to the eight-bar post-chorus section of Shape of You, in which the phrase "Oh I" is sung three times, to the tune of the first four notes of the rising minor pentatonic scale commencing on C# (what the Judge referred to as the "OI Phrase"). With the defendants' claiming that this OI Phrase is copied from the eight-bar chorus of Oh Why, in which the phrase "Oh Why" is repeated to the tune of the first four

notes of the rising minor pentatonic scale, commencing on F# (what the Judge referred to as the "OW Hook").

The Judge had to decide the issue of "copying" because without establishing copying, the defendants' case would not succeed. The allegation of copying was only made against Mr Sheeran, although it was acknowledged, if Mr Sheeran was found to have copied, then this would impact the other claimants as owners of the copyright in Shape of You. As such, the judgment focussed heavily on analysis of the evidence as provided by the many witnesses and the submissions put forward by the parties' respective representatives as to whether "copying" was established.

## Conclusion

The Judge concluded a number of points on "copying", these included that:

- Although there were similarities between the OW Hook and the OI Phrase, there were also significant differences.
- Taking into account the totality of the evidence, Mr Sheeran did not have access to and had not heard "Oh Why" before writing "Shape of You" and therefore could not have copied it deliberately.
- Mr Sheeran did not subconsciously copy "Oh Why" in creating "Shape of You."

## Relief

With the claimants' success, it was implicit that they would be granted the declaration they sought. However, the defendants' contended that the declaration sought should not be granted. The Judge noted in his judgment that the grant of a declaration is at the discretion of the court and that the court should take into account "justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any special reasons why or why not the court should grant the declaration."

The Judge found the reasons put forward by the claimants were sufficient justification to grant the declaration, these included:

- The £2,200,000 in royalties, that was in suspense as a result of the defendants' initial actions, was not an insignificant amount to the corporate claimants and had commercial value.
- The desire for the songwriters (which included Mr Sheeran) to clear their names in

order to maintain their reputation as reputable songwriters.

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## Take Away Points

The fact that two musical phrases sound the same does not necessarily mean one was copied from the other. It is necessary to establish on the evidence that there has been either deliberate or subconscious copying.

The judgment contains some helpful observations as to why a court should exercise its discretion to grant a declaration and highlights how illustrating the commercial effect of having one granted can provide a strong case in favour of grant.

The judgment is available [here](#).