



Whose line is it anyway?

Coincidence or copycat? [Laura Trapnell](#) & [Louis Iveson](#) examine the increasing trend in litigating copyright disputes over hit songs

IN BRIEF

► The pace at which copyright claims for large sums are being brought against major artists appears to be increasing.

► Claims are beginning to be brought in respect of intangible elements, including the feel, rhythm or tempo of a song, which has been described by one judge as a 'devastating blow to the future of musicians'.

We are increasingly seeing copyright claims brought against major artists. The list of artists subject to such claims in the last decade is long, and includes household names such as Pharrell Williams and Robin Thicke for *Blurred Lines*, Katy Perry for *Dark Horse*, Lil Nas X for *Rodeo*, Miley Cyrus for *We Can't Stop*, Bruno Mars and Mark Ronson for *Uptown Funk*, and in 2022, Ed Sheeran's *Shape of You* and Mariah Carey's *All I Want for Christmas is You*.

The pace at which these cases are being brought appears to be speeding up and artists are concerned about the rising number of copyright claims being brought against them, with Ed Sheeran claiming they are 'easy targets' for 'baseless claims'.

The way that listeners access music has changed. The world has, for the most part, moved on from physical CDs and records and the music industry is now dominated by streaming. This has, in turn, significantly altered the way that artists generate revenue; revenue received from songs has fallen dramatically. This may go some way to explain why smaller artists have begun bringing claims in respect of hit songs more and more frequently.

In July 2021, Spotify stated that over 50,000 hours of content are uploaded to its platform every day. Given the limited number of notes available, and the fact that most pop songs are written in the same 4/4-time signature, there are bound to be coincidental similarities eventually. The difficulty that claimants have, over and above proving similarity, is proving that the

defendant knew of and intentionally copied the prior work.

What does copyright protect?

Copyright exists to protect the expression of an idea to encourage the creation of original works. It does not protect the idea itself. This means that it gives the owner the exclusive right to copy, publish, perform or show the work in public or adapt the work. For songs, protection lasts for the life of the author of the lyrics and composer of the music, plus 70 years from the date of death of the last of them to die.

Songs are protected as literary copyright, which protects the melody and lyrics; however, in the last decade, the position seems to be shifting towards allowing the protection of more abstract qualities, such as rhythm, tempo, or even the general 'feel' of the song.

Test for infringement & damages

The test for copyright infringement under UK law is whether the defendant has copied 'the work as a whole or any substantial part of it'. Case law provides that substantial is assessed qualitatively (eg see *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2001] UKHL 38) as well as quantitatively, which means that even relatively short sections could potentially amount to infringement. Infringement can be committed directly or indirectly.

Plaintiff lawyers are frequently relying upon indirect copying to avoid the need of proving that the defendant actually took the music. The arguments centre around songs having a large number of hits on YouTube or streams on Spotify, and it is argued that the defendant is therefore likely to have heard the song many times prior to releasing their own. Indirect copying is starting to be implied by judges and juries in the US very broadly due to the prevalence of freely available streaming services.

The potential damages are huge. This is what makes these claims so attractive. Prior to winning her appeal, Katy Perry owed £2.1m

in damages. Miley Cyrus settled a \$300m lawsuit for an undisclosed sum. Ed Sheeran settled the claim over his song *Photograph* for £13.8m. The more profitable the song, the more money the claimants will be seeking; however, defendants will be thankful that sums recoverable are limited by the relevant limitation period.

The effect of the Limitation Act 1980 is that claims in the UK must be brought within six years of knowledge of the infringing acts. However, where infringement is continuing, ie the infringing music is still generating revenue, this means that the timeframe to bring an action is rolling, but damages will only be recoverable for the preceding six years.

Government inquiry

The Digital, Culture, Media and Sport Committee (DCMSC) published the results of their investigations last year on the economics of music streaming. Creators, industry experts, streaming services, musicians, record labels and tech companies were consulted on their views on modernising the approach to streaming.

One of the issues discussed was in respect of copyright infringement and 'safe harbour', which exempts companies that host user-generated content from being liable for copyright infringement where they do not have 'actual knowledge' of it occurring. This, in turn, creates a 'value gap' as it leads to business models offering consumers free music, and the revenues generated by such ad-funded services are dramatically lower than paid-for services. As highlighted above, the fall in revenue may be in part to blame and fuelling copyright claims.

DCMSC recommendations included: equitable remuneration for creators; revenue parity for songwriters and composers; studying the market power in the music industry; fair and transparent algorithms and playlisting; and addressing concerns about safe harbour.

It is clear that the landscape of the music industry and copyright infringement is under stress, and it remains to be seen how it will be 'modernised', both in the UK and worldwide.

Key cases

Notable recent copyright cases include

- *Sheeran and others v Chokri and others* [2022] EWHC 827 (Ch), [2022] All ER (D) 48 (Apr)

Grime artist Sami Chokri (aka Sami Switch) accused Ed Sheeran of stealing the chorus of his *Oh Why* track to use in the 'Oh I' hook in Sheeran's song *Shape of You*. The judge found that, despite similarities between the one-bar phrases, similarities are only a starting point. The claimant failed to demonstrate that Sheeran deliberately or unconsciously copied elements of his song and rejected that Sheeran had a propensity to copy other works.

Sheeran has also been subject to claims over his songs *Photograph*, which settled out of court, and *Thinking Out Loud* which is still ongoing in the US

Stone v Carey et al, US District Court, Eastern District of Louisiana, No. 22-0161

Meanwhile, last month in the United States, songwriter Andy Stone (aka Vince Vance) has claimed to have written a song in the same style as and with an identical name to Mariah Carey's 1994 song *All I Want for Christmas is You* five years prior. He is claiming damages for Carey's 'undeserved profits' from 'knowingly, wilfully, and intentionally' infringing copyright.

While titles of songs are not capable of being protected by copyright, as short phrases do not have sufficient creative expression to qualify, artists will nevertheless have their

time wasted in responding to and defending such claims. The *Carey* case also demonstrates that even songs released decades ago may still be subject to copyright claims; no artist can ever feel safe from litigation.

Yonay et al v Paramount Pictures Corporation et al, US District Court, Central District of California, No. 22-03846

In a slightly different vein, we also last month saw the movie *Top Gun: Maverick* become the subject of a copyright claim by the successors of author Ehud Yonay. The author wrote an article entitled 'Top Guns' published in 1983 which was the inspiration for the first *Top Gun* movie. His heirs claim that there was a licence granted to the film studio at the time of the original film that, under US copyright law, terminated in 2020 due to the ability of a licensor to recover a copyright assignment after 35 years from the grant of the licence.

There is no equivalent right available under statute in the UK, but licensees would be wise to review any termination rights in their licences to avoid a similar fate. However, Art 22 of the EU Copyright Directive (Directive (EU) 2019/790) provides a right to revoke a licence where there is a lack of exploitation after a reasonable period of time, and the DCMSC investigation included the Directive as a term of reference—so watch this space.

The evolution of copyright

These mounting cases arrive on the back of other prominent claims in the last decade. Many people will remember the *Blurred Lines* case, in which the US Court of Appeals for the Ninth Circuit awarded the claimants half of the royalties the song produced, a sum of £4m, for infringing upon the 'feel' of the prior work. Never before had copyright been found to subsist in musical style.

This judgment has paved the way for claims to be brought for copying intangibles including its feel, tempo or rhythm, where previously protection was restricted to the written elements. Indeed, the dissenting judge in the appeal case, Circuit Judge Nguyen, called it a 'devastating blow to future musicians and composers everywhere'.

UK law has not yet followed suit to expanding the type of works protected by copyright, but the increased publicity and success of such claims in the US is likely to have a follow-on effect in this jurisdiction—if only to give increased courage for litigants to come forward. **NLJ**

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