



it was created, and has not been copied or changed<sup>4</sup>. However, when integrated in the context of legal language, originality is disregarded with relation to impalpable thought. According to Peterson J in *University of London Press v University Tutorial Press*: ‘Copyright Acts are not concerned with the originality of ideas, but with the expression of thought.’<sup>5</sup> This thus distinguishes the ‘every day-use’ of ‘original’ and its interpretation in the legal world, as legal application does not concern the genuine source of work (e.g. as an unpublished notion), but rather whether said work is, by palpable evidence, considerably similar and/or in replication to another.

Despite some clarity upon inspection, the very notion of ‘originality’ is still difficult to apply within the context of musical works. Chord progressions, notes and melodies...are these musical elements also entitled to the label of ‘originality’? The interpretation of ‘originality’ as something strictly derivable from the author justifies the possibility that constituent musical elements may become eligible for copyright, as one could argue that it is those elements that institute for the authentic fabric of a previously published musical work. Therefore, if an ‘original’ idea becomes a published invention, filing for a patent is the next step in insuring such an idea is officially exclusive to said author: can, then, the very ‘building blocks’<sup>6</sup> to music be owned?

Simultaneously, it is crucial to examine the Latin expression used in legal jargon: ‘De Minimis’ (meaning too trivial or minor to merit consideration). The court established rule comprises that the: “De Minimis Doctrine’ [with relation to copyright legislation] directs that no infringement occurs if the way the allegedly infringing work borrows from the original is so meager that the court should not concern itself

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#### **<sup>4</sup>References (2)**

[ORIGINAL | English meaning - Cambridge Essential British](#) (Access Date: 16/12/23)

<sup>5</sup> *University of London Press V University Tutorial Press* *ibid* at p605 (Access Date: 16/12/23)

<sup>6</sup> *Ed Sheeran cleared of infringing copyright in Marvin Gaye lawsuit* (Access Date: 16/12/23)  
Available at: [Ed Sheeran cleared of infringing copyright in Marvin Gaye lawsuit | Ed Sheeran | The Guardian](#)

with the inconsequential use.<sup>7</sup> This indicates that it would be plausible to employ the ‘De Minimis Doctrine’ to prevent the grant of copyright entitlement, preventing the action of copyright infringement. With reference to the music industry, if similarity, too ‘trivial’ or minor’, is found within a chord progression, melody or perhaps even a particular lyric, the power of the ‘De Minimis’ principle overrides consideration for copyright infringement. Whilst this concept may seem clear, ambiguities lie in its duality with ‘originality’. Can it be suggested that a seemingly ‘trivial’ or ‘minor’ component in musical composition may in fact be the very key element(s) that renders it ‘original’, thus exclusive, to said creator? Where does current copyright legislation draw the line between the labelling of ‘originality’ and the consideration of ‘De Minimis’?

This fundamental, yet neglected, grey area in copyright legislation can be demonstrated through Ed Sheeran’s fairly recent legal battles against copyright infringement.

Ed Sheeran’s 2017, chart topper, ‘Shape of You’, faced copyright infringement allegations in the English High Court early 2022<sup>8</sup>, with claims of being a rip off from the 2015 song ‘Oh Why’, by Sami Chokri and Ross O’Donoghue. Upon first having heard ‘Shape of You’ on the radio, Chokri informed the trial of his feelings of being ‘robbed’ by the music star. Despite the ‘similarities’ between the repeating one-bar phrase ‘Oh why’ (Chokri’s song) and the repetition of ‘Oh I’ (Sheeran’s), the judge declared Ed Sheeran guiltless of copyright infringement, as there still remain ‘significant differences’ between the songs. Ed Sheeran went on to state that ‘Shape of You’ uses a ‘basic minor pentatonic pattern’ of which is ‘entirely

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### **<sup>7</sup>References (3)**

**De minimis use may not be a defense to copyright infringement of a photograph (Access Date: 18/12/23)**  
Available at: [De minimis use may not be a defense to copyright infringement of a photograph | Lawrence G. Townsend, Intellectual Property Lawyer \(lgt-law.com\)](#)

**<sup>8</sup> Ed Sheeran and the blurred lines around copyright infringement claims (Access Date: 20/12/23)**  
Available at: [Ed Sheeran and copyright infringement - Harper Macleod LLP](#)

commonplace' within musical creation.<sup>9</sup> This case can be seen as a classic example of the battle between 'originality' and 'De Minimis'. It is indeed true that the repeating phrases in both chorus' of the songs may formulate the argument that such repetition constitutes for the 'originality' of 'Oh Why', therefore exclusive to Chokri & O'Donoghue. However, this repetition is weakly justified.

Despite sounding the same, as stated, the lyrics of the repeating phrases are still different. This is alongside the fact that it would be unjustified to claim that the 'basic pentatonic pattern' is exclusive to one artist, given its long held precedence in the music field. Nevertheless, if Ed Sheeran was found to have committed a breach against the 'originality' of 'Oh Why', proving he had previously heard, thus, elicited inspiration from the song when writing 'Shape of You', is somewhat problematic. Sheeran's lawyers claim that the singer does not recall hearing the song 'Oh Why', despite both songs (Sheeran's & Chokri's) having made their appearances on YouTube channel SBTV at a similar time.<sup>10</sup> Chokri's lawyers would have to justify the notion that Sheeran had listened thus deliberately or subconsciously 'nicked' the iconic repetition found in 'Oh Why', problematic as this introduces too many hypotheticals to prove a 'commonality' in musical elements that may indeed just be 'too trivial or minor to merit consideration'.

Whilst Ed Sheeran was eventually declared free from having committed copyright infringement in this particular case, it can be argued that the strenuous nature of the trial, as well as subsequent ones, had yielded to both a win and loss for Sheeran. In a joint statement after the judgement, Sheeran, McDaid

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#### <sup>9</sup>**References (4)**

**Ed Sheeran wins court battle over Shape of You plagiarism accusation (Access Date: 20/12/23)**  
**References**

**Available at:** [Ed Sheeran wins court battle over Shape of You plagiarism accusation | Ed Sheeran | The Guardian](#)

<sup>10</sup> **'Music is so different now': Copyright laws need to change, says legal expert (Access Date: 21/12/23)**

**Available at:** ['Music is so different now': Copyright laws need to change, says legal expert | Music | The Guardian](#)

and McCutcheon spoke of the 'cost on creativity'<sup>11</sup> as a result of the case. After all, what is it to be truly 'creative' if mere constitutional musical notes have the power to take one to court?

As we rapidly approach an era where technological advancement is ever-flourishing, the production and reciprocation of music at an all-time peak, it is no wonder why songwriters feel that their innovation is stifled by the dangling possibility of a lawsuit, reputational damage and loss of livelihood.

These ramifications exist beyond the singular case of Ed Sheeran.

From the dreary 'Dark Horse' controversies of Katy Perry<sup>12</sup>, the concern of 'coincidence' with Sam Smith<sup>13</sup>, it is doubtlessly clear that the cost of 'outdated' copyright laws have taken their unprecedented hold over the music industry. As stated by musician and lawyer, Damien Riehl, and programmer, Noah Rubin,<sup>14</sup> there are 'only a finite number of melodies'<sup>15</sup>, reinstating the fundamental flaw within modern copyright legislation, as committing copyright infringement would be 'inevitable', given the growing availability and accessibility of music every day. The newly emerging consensus argues that, due to the prevailing domination of the digital age on music streaming, no new song can ever be deemed

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### <sup>11</sup>**References (5)**

**Ed Sheeran wins Shape of You copyright case and hits out at 'baseless' claims (Access Date: 21/12/23)**  
**References**

**Available at:** [Ed Sheeran wins Shape of You copyright case and hits out at 'baseless' claims - BBC News](#)

<sup>12</sup> **A "Dark Horse" Victory for Katy Perry: Central District of California Overturns \$2.8M Copyright Verdict (Access Date: 23/12/23)**

**Available at:** [Calif. Fed Court: Katy Perry Copyright Win Over 8-Note Ostinato \(natlawreview.com\)](#)

<sup>13</sup> **Sam Smith on Tom Petty Settlement: 'Similarities' but 'Complete Coincidence' (Access Date: 23/12/23)**

**Available at:** [Sam Smith on Tom Petty Settlement: 'Complete Coincidence' \(rollingstone.com\)](#)

<sup>14</sup> **Music law: A barrier to creativity? (Access Date: 23/12/23)**

**Available at:** [Music law: A barrier to creativity? - Legal Cheek](#)

<sup>15</sup> **Musician uses algorithm to generate every possible melody to prevent copyright lawsuits (Access Date: 23/12/23)**

**Available at:** [Musician uses algorithm to generate every possible melody to prevent copyright lawsuits | The Independent | The Independent](#)

‘original’<sup>16</sup>. It would thus seem fair to declare inadequacy with current copyright legislation; if musical talents are at continual hindrance by the nuances of ‘originality’ and ‘De Minimis’, lawmakers must now realize how incompatible ‘outdated’ copyright laws are with this continually evolving, digital era.

The blurred lines in UK copyright legislation can indeed be amended to account for such temporal evolution within the dynamic of the music industry. Firstly, the loose concept of ‘originality’ can be reviewed to institute for what is defined as ‘original’ within the creative arts field. As stated by Jessica Silbey, Author of ‘Against Progress: Intellectual Property and Fundamental Values in the Internet Age’:

‘current IP law hasn’t evolved to keep pace with what innovation looks like in the digital age. Today, it’s more about sharing, adapting, and improving than conjuring ideas from scratch’<sup>17</sup>.

As a result of this adjusted definition, monopoly rights & patents would be granted in a more definitive, less subjective manner. According to Mr. Justice Laddie: ‘...We should not be handing out monopolies like confetti’<sup>18</sup>; Parliament would thus be able to take precaution to avoid this practice. By doing so, work that is not entitled to ‘originality’, therefore copyright protection, will be rightfully at access to the public domain, encouraging artists to ‘adapt’ and ‘improve’ from said work.

Having said this, it can finally be stated that a strengthened distinction between ‘originality’ and ‘De Minimis’ should be made. This is to prevent copyright infringement of seemingly ‘unoriginal’ work(s) by outlining what details truly render a creation ‘original’, hence entitled to protection under the 1988 Copyright, Designs and Patent Act.

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### <sup>16</sup>**References (5)**

**Music law: A barrier to creativity? (Access Date: 23/12/23)**

Available at: [Music law: A barrier to creativity? - Legal Cheek](#)

<sup>17</sup> [Against Progress: Intellectual Property and Fundamental Valu... \(sup.org\)](#) (Access Date: 25/12/23)

<sup>18</sup> **Are the UK Copyright Laws of High Standard? (Access Date: 25/12/23)**

Available at: [Are the UK Copyright Laws of High Standard? \(lawteacher.net\)](#)

Laddie “Copyright: Over-strength, Over-regulated, Over-rated” (1996) EIPR 253

The paradoxes of current UK copyright legislation have been clearly defined. From the ambiguities that lie in determining 'originality', alongside the unsystematic employment of the 'De Minimis Doctrine', these nuances have yielded to unfortunate impacts on the 'creativity' of the creative arts field. Such impacts have been examined through the lens of the music industry, demonstrated infamously through the 2022 court case regarding Ed Sheeran's battle against copyright infringement allegations.

Creativity, innovation and artistic flair is what drives the music industry, yet unless 'outdated' copyright laws change, fear of infringement and reputational damage may usurp the vibrancy of future musical creation, enforcing the necessity for Parliamentary review.