

4 November 20021

**\*162 Stephan Malmstedt v EMI Records Ltd and  
Per Gessle**

(Case HC01C03820)

High Court of Justice (Chancery Division)

Deputy Judge M. Strauss Q.C.

- The claimant represented himself
- For the defendant: Pushpinder Saini (instructed by Lee & Thompson, solicitors)

H2 Copyright — Musical work — Song — Action for infringement in respect of later song — Whether copying could be inferred from similarities — Whether copying could be inferred from defendant's alleged prior knowledge of claimant's work — Action dismissed

- [Civil Evidence Act 1972, s.3](#)

**HEADNOTE**

H4 The claimant, the author of a pop song called *Jenny and I*, alleged that another song, *Sleeping in my car*, which was composed by the second defendant and recorded by the first defendant, infringed the copyright in the music of *Jenny and I*. In support of his claim he stated that he had sent a tape of *Jenny and I* to an executive who worked for the first defendant and also to another agent who knew the second defendant. The second defendant denied that he had ever heard the tape of *Jenny and I*. In \*163 evidence the defendants' expert and an expert who was jointly instructed by the claimant and the defendant agreed that, while the choruses of both works shared certain similarities, those similar features were commonplace and did not indicate copying.

H5 by the Deputy Judge, that the claimant's action would be dismissed:

H6 1. There was no evidence that the second defendant had heard the tape of *Jenny and I*. This being so, the claimant could only succeed in an action for copyright infringement if he could demonstrate the existence of

**Representation****Legislation referred to**

similarities between the two works which could not be coincidental. On that basis the court would be obliged to conclude that, in some way, the second defendant had heard the song and copied it, notwithstanding the apparent credibility of his evidence and the evidence of other witnesses.

H7 2. On the facts of this case, such similarity was certainly not apparent on hearing the two songs. The alleged similarities, whether taken individually or as a whole, did not indicate that there had been any copying. Further, such similarities as did exist could well be coincidental. Accordingly, on a clear balance of probabilities there was no copying.

H8 3. Even if there had been copying, the amount of the claimant's song which the second defendant was alleged to have been copied was not a substantial part of the claimant's work.

**Cases cited in the judgment**

- [Geographia Limited v Penguin Books Limited \[1985\] F.S.R. 208](#)
- [Ladbroke \(Football\) Ltd v William Hill \(Football\) Ltd \[1964\] 1 W.L.R. 273](#)
- [Liverpool RC Trustees Inc. v Goldberg \(No.3\) \[2001\] 1 W.L.R. 2335](#)

## JUDGMENT

1 In this case the claimant claims damages and an injunction for infringement of copyright. He alleges that a pop song composed by the second defendant, a member of the group Roxette, and recorded on the first defendants' label, infringes his musical copyright in an earlier work called *Jenny and I*.

2 The claimant has acted in person, with the assistance of Mrs Chiverton acting as a McKenzie friend. He has conducted his case with skill and, notwithstanding the strength of his feelings, with courtesy and moderation.

3 The claimant made his first demonstration tape in 1975 and he has since then made a number of other demonstration tapes as well as, in 1983, an album called "Looking for the red light", which was released by EMI and was well reviewed.\*164

4 In 1991, the claimant left Sweden and moved to London in order to make another demonstration tape. This tape included *Jenny and I*, which is undoubtedly an original work and in my view one of some distinction, with subtle and sensitive harmonies.

5 When the claimant returned to Sweden in October 1991, amongst the people he tried to interest in his songs were Mr Kjell Andersson of the A&R department at EMI Sweden, in which Mr Andersson had worked for some 17 years; he is now its head. Mr Andersson was the person at EMI who had been responsible for signing the second defendant in the late 1970s, since when he had successfully guided his career. Mr Andersson listened to the tape and kept it for about a week. EMI was interested in a couple of the songs, but with somebody other than the claimant as the recording artist. The claimant wanted to record the songs himself and asked for the tape back; it was duly returned.

6 Shortly after this, the claimant approached another re-

ording artist/songwriter in Sweden called Niklas Stromstedt, who the claimant thought had good contact. Earlier in this career, Mr Stromstedt had also been a recording artist at EMI and he was a friend of the second defendant. He kept the tape for six months, but eventually returned it saying that he had approached two companies, WEA (for whom he was himself now recording) and BMG, without success.

7 The claimant continued to regard the tape as his hope for a break in his career until March 1994, when he heard *Sleeping in my car* and concluded that the chorus from *Jenny and I* has been copied. There are some similarities between the two works and I have no doubt that the claimant's belief that his work has been unlawfully copied was and is entirely genuine.

8 The first step he took was to complain to STIM, the Swedish equivalent of the Performing Rights Society; although this body does not have power to decide disputes, it will express a view in a case of this kind in order to assist the parties and may, if it thinks fit, freeze the royalties arising from disputed work.

9 In this instance, the Committee's view was that, while there were similarities in the harmonic structure, there were also several differences, and that where the musical phrases and chord structures were similar they were not unique. The Committee also said that similarities in musical phrases were not unusual in this style of music. They did not freeze the royalties on the work.

10 In about May 1995, being unable to afford civil proceedings, the claimant recorded a demonstration of the similarities between the choruses of the two works and went to the police with a criminal complaint. The police obtained an opinion from a director of studies and university lecturer at Stockholm University, Mr Brolinson, who said that, while there were \*165 certain similarities between the choruses of the two songs, these were insufficient to indicate plagiarism, and that the chorus of *Sleeping in my car* had its own characteristics which

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distinguished it from *Jenny and I*. The police decided not to prosecute.

11 In about February 1996, the claimant approached a senior lecturer at the University of Gothenberg, Mr Ola Stockfelt, who following consultation with two colleagues wrote a letter which was critical of Mr Brolinson's view and suggested that he had not approached his task with great care and accuracy; at this stage, Mr Stockfelt expressed no view of his own as to the degree of similarity between the two works. However, some months later in October 1996, an article in Svenska Dagbladet reported Mr Stockfelt as saying that there had been obvious plagiarism and that the second defendant had "... nicked the chorus, it is noticeable especially in the chord changes ...". I have also been shown a video of a TV programme in Sweden, in which Chris Isakk, another well-known recording artist, said that the two works sounded the same, but that he was no sure if there had been theft by the second defendant.

12 In November 1998, having appealed unsuccessfully to the Supreme Public Prosecutor against the police decision not to prosecute, the claimant returned to England. These proceedings were commenced in June 2001. On 31 July 2001, Gage J. refused to grant the claimant an injunction. On 3 October 2001 Deputy Master Weir ordered a trial on liability only and the directions he made included a direction for the exchange of experts' reports; in the first instance this was, with their consent, to be paid for by the defendants. The defendants obtained a report from their expert, Mr Oxendale. However, on 30 January 2002 Master Bragge gave directions for a single joint expert. This was done because it was appreciated that the claimant would be unable to afford an expert witness, and so to put him on a more equal footing. The parties agreed to instruct Mr Guy Protheroe, and in their instructions asked him amongst other things to say whether he agreed or disagreed with Mr Oxendale's conclusions.

13 Both Mr Oxendale and Mr Protheroe have reached the same conclusions, in very detailed reports, that STIM and Mr Brolinson (but not Mr Stockfelt), had earlier reached, namely that while there are certain similarities in the chorus of both works, the similar features

are commonplace and do not indicate copying. For the most part, but not in every detail, the reasons given by Mr Oxendale and Mr Protheroe are the same. Mr Protheroe maintained his view in the course of his oral evidence.

14 The claimant has also given expert evidence on his own behalf, both by way of detailed written report and orally. Objection might well have been taken to this either on the basis that an expert witness must be impartial (see *Liverpool RC Trustees Inc v Goldberg* (No.3) [2001] 1 W.L.R. 2335), or on the basis that the appointment of a single joint expert precludes the parties from relying on their own expert evidence. However, the defendants \*166 accepted at the outset of the hearing that the claimant should be permitted to advance his case as he wished, and to rely on his own reports and oral expert evidence.

15 The fundamental issue in the case is whether the second defendant copied the claimant's work. In his witness statement he said that he had never heard it when he composed *Sleeping in my car* in 1993. He was unshaken in cross-examination. The claimant sought to undermine his credibility by showing that, while in two newspaper interviews in March 1994 and August 1995 he said that he had composed his song for Roxette's new album because it needed a first single (*i.e.* a single which was sufficiently strong to be released in advance of the album), in a later interview with the same journalist who had interviewed him in March 1994 he gave a different explanation, namely that he had composed this song out of "pure desperation" because he had nothing to do. The second defendant flatly denied that he had ever said this to the journalist. I am not satisfied that he did and in any event it is a peripheral point. I do not attach any weight to it.

16 Mr Andersson also gave evidence. He clearly admired both the claimant's earlier album released by EMI and some of the songs on the demonstration tape. He said that he definitely did not play the demonstration tape to the second defendant. He had no recollection of doing so and gave two reasons why he would not have done. In the first place he would regard it as unethical to play the tape to another recording artist without the per-

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mission of the composer, precisely because disputes of this kind happen. Secondly the second defendant recorded his own compositions, or sometimes those which he had co-composed with another writer, and would not have been interested in the claimant's compositions. Mr Andersson was a credible witness and his evidence made perfect sense.

17 Mr Stromstedt also gave evidence and said that he was certain that he had not played the demonstration tape to the second defendant, whom he had seen rarely if at all during the relevant period. His evidence is supported by the fact that, in his note returning the tapes, he said that he had tried WEA and BMG; no reference was made in the note to trying to interest the second defendant. It is also to some extent corroborated by Mr Andersson's evidence, which the claimant did not challenge, that the second defendant did not record works of other composers; if that was the case, there would have been no point in Mr Stromstedt (who must have known it) playing the tape to him.

18 The claimant accepted in cross-examination that, apart from the possibility that either Mr Andersson had played the tape to the second defendant, he could think of no other way which the second defendant could have heard it.\*167

19 In these circumstances, the claimant could only succeed on the issue of copying by demonstrating similarities between the two works which could not be coincidental, so that one would be driven to find that in some way the second defendant heard the song and copied it, despite the apparent credibility of his evidence and that of the other witnesses. Such a degree of similarity is certainly not apparent, at least to my unqualified ear, from hearing them.

20 The claimant's case therefore depends substantially on an assessment of the expert evidence. I found Mr Protheroe an impressive and convincing witness, thorough, careful, impartial and ready to concede points where he felt it to be appropriate. I have reservations about the claimant's expert evidence. They are not as to the genuineness of his views. He was a transparently honest witness, and I am sure that the opinions he ex-

pressed were sincerely held. I also accept that, although without formal musical training, he clearly has considerable technical knowledge and expertise so as to make his evidence potentially of value and therefore admissible under s.3 of the Civil Evidence Act 1972, if perhaps not of as much weight as that of an expert with the impressive qualifications possessed by Mr Protheroe. My main reservation is as to his objectivity, arising in part from the mere fact that he is giving what is normally independent and impartial evidence on his own behalf, and in part from some of the views he advanced, for example in relation to the point discussed at para.31 below where he did seem to me to be attaching significance to very minor points.

21 In apply for an interim injunction the claimant summarised his case as follows:

“Firstly, their *chord progression* is so similar to mine that it is possible to sing the whole chorus of *Sleeping in my car* to the original chord progression of the chorus of *Jenny and I*. Secondly, *construction of phrases* along the chord patten in Roxette's chorus are so identical to mine that it is possible, throughout the whole chorus, to swap phrases in quite an extraordinary way.

*Taken separately*, these two similarities are, to my knowledge, to be found nowhere else in the music world—but, *put together*, make an even more unique position. The similarities are of such an extent that I can't help but describe Mr Gessle's chorus *Sleeping in my car* as a “twin chorus” and an variation of my own *Jenny and I*. They of such proportion that it goes beyond the possibility of chance or accident and seems to me could only have been achieved by Mr Gessle, with considerable influence from my chorus *Jenny and I*.

22 These points are developed in considerable detail in the claimant's response to Mr Oxendale's revised report and in this response to Mr Protheroe's report. In cross-examination, Mr Saini put to the claimant what he agreed was a fair summary of the features of the two works which he said were similar. He also contended, quite correctly, that it was necessary not only to consider the individual similarities but also to consider whether, even if none of the similarities looked at indi-

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vidually indicated copying, all the similarities taken together could not be coincidental.\*168

23 Mr Protheroe's conclusions are summarised in his report:

“4.1.1The only area of any similarity between the songs *Jenny And I* by Stephan Malmstedt and *Sleeping in My Car* by Per Gessle is in the chorus sections of the songs, and in the musical works involved only—not the literary works (lyrics) at all.

4.1.2The musical material in each of the chorus sections comprises an underlying chord sequence, with a vocal melody line consisting of pitches and rhythms arranged into phrases.

4.1.3Chord sequences: as I have analysed, the relevant chord sequences are each of nine bars duration, one chord per bar. I find that, comparing the two sequences, only five chords are the same, occurring as two pairs and one single chord. The individual chords themselves are highly commonplace within the key of the works and the two successions of paired chords are also highly commonplace.

4.1.4Vocal melody pitches: there are very few pitches occurring in common between the melodies and no successions of even two pitches in common.

4.1.5Vocal melody rhythms: the rhythmic patterns in the melodies are quite different.

4.1.6Vocal melody phrase structure: the first four phrases in each chorus have the same duration, in terms of beats (though the pitch and rhythmic content within them are quite different). The remaining phrases are quite different in structure and duration between the songs.

4.1.7Therefore the only similarity I can find between the songs is in the chorus sections: a few chords in the chord sequence and the duration of the first four vocal phrases (but not the musical content of these four phrases). I find nothing significant or substantive about these features.”

24 In answer to the question in his instructions as to whether he agreed or disagreed with Mr Oxendale's conclusion, he said:

“5.8.2In my report about I have analysed what I consider to be all the important elements and factors, and I cannot find any evidence which leads me to the conclusion that the song *Jenny and I* has been copied in any substantive way, if at all, in *Sleeping in my car*.

5.8.3Mr Oxendale's conclusions are given on p. 20 of his revised report ... ‘as there is such a limited degree of objective similarity between the two works and as I have been unable to find any hard evidence in the music to support the view that “substantial” and, in particular, original music material has been copied from one work and interpolated within the other, it is my considered opinion that there are sufficient grounds to sustain the claim for infringement of the copyright vested in the musical work’.

5.8.4I concur with Mr Oxendale's conclusions entirely, for the reasons given in my report above.”

25 Mr Saini's formulation of the list of similar features relied on by the claimant, slightly re-ordered by me, is as follows:(a)The chord sequences.(b)Similarity and duration of the first four vocal phrases.(c)Copying of the notes in the harmony vocal of the “hook” of *Jenny and I* in the lead vocal of the “hook” of *Sleeping in my car*.(d)Similarity in musical shape or contour.\*169 (e)Copying of the “literary phrase structure”.(f)The timing of chord changes, or “chord structure”

26 I will take each of these in turn.

27 The chord sequences:(a)In paras. 2.2.2 and 2.2.3 of his Report, Mr Protheroe analyses the chord sequences in the chorus of the two songs, and concludes that five out of the nine chords are the same, two pairs and a single. The first pair is a C and G, which he describes as the most common pairing of all the chords in the scale. The second pair is F and C, the second most common pairing and the final chord is G, the second most common chord to appear in the scale.(b)Therefore he concludes that “such coincidences as there are in the two

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sequences are common chords in commonplace successions”.(c)The claimant says that, in addition to these, there is a further similarity in the chord sequence since, between the two pairs, one finds C in *Jenny and I* and A minor in *Sleeping in my car*. This he says, is another similarity since these two chords are tonically parallel and in effect interchangeable. Mr Protheroe's view is that, while the chord of A minor can be described as the minor chord relating to C major, it is nevertheless a different chord and not necessarily interchangeable.(d)I do not think that the narrow difference between the claimant and Mr Protheroe on this point matters much. I accept Mr Protheroe's view that the similarity in the chord sequence is of no significance, and the claimant himself placed little reliance on this point and accepted that, if this had been the only similarity, he probably would not have reacted at all.

28 Similarity and duration of the first four vocal phrases:(a)Mr Protheroe was asked to consider the extent of the objective similarity between the combined patten of the chord sequence (dealt with above) and the musical structure in the two works.(b)At para. 5.4.2-3, he said:

“I find no similarity between the individual phrases in the chorus melodies and *Jenny and I* and those of *Sleeping in My Car*. The pitches and the rhythms, of which these phrases are constructed, are all different (apart from the occasional note). The only similarity is in the actual duration of the first four phrases in each chorus, in terms of the number of beats they occupy (but not in the musical contents). I do not consider this to be a significant factor.

Mr Malmstedt defines this similarity, in the first four phrases, as being four phrases each of four beats duration. This is what I refer to as ‘slots’: as I noted, the four beats is the space in the structure where the phrases are located—they are like building blocks, but in fact two of \*170 the blocks are not complete (being three beats each within a space of four) and the actual content of each of the blocks, comparing them in pairs between the songs, is quite different.”(c)The claimant's response on this point suggests (in my view wrongly) that Mr Protheroe has only considered the similarities between

the works individually, but not the combination of similarities. However he does not deal with the point made above in relation to duration, and I accept Mr Protheroe's evidence on it.

29 Copying of the notes and the harmony vocal of the hook phrase of *Jenny and I* in the lead vocal of *Sleeping in my car*:(a)The claimant relies on Appendix 4 to his response to Mr Oxendale's revised report, which shoes and alleged similarity between his harmony vocal in the catchphrase in the choruses of his work with the lead vocal in the responding phrases in *Sleeping in my car*. He states: “It can be seen that four of the five notes in the catchphrases of *Sleeping in my car* are the same as the harmony vocals of *Jenny and I*, although in reverse order, with one note added”.(b)In his oral evidence, he said that this was an instance of “backwards stealing”.(c)Mr Protheroe agrees that the harmony line in *Jenny and I* has the pitches E-C-C-C, while the melody line in *Sleeping in my car* has the pitches C-C-D-C-E. However, as he points out, not only does E occur at the beginning of the first and the end of the second, *Sleeping in my car* also has the pitch D which does not occur in the claimant's work. There is a different number of notes and there are different rhythms, in that the claimant's work has four notes ending with an anticipation whereas *Sleeping in my car* has five notes ending on the first beat of the next bar. Thus, *Sleeping in my car* does not have the same rhythm backwards, nor the same order of pitches.(d)In accept Mr Protheroe's conclusion that there is no musical significance in this comparison.

30 Similarity in musical shape or contour:(a)This point originates from Mr Oxendale's revised report. At p.12 he says that, although unable to identify any areas of substantive objective similarity between the vocal melodies of the two works, “for the sake of completeness” he has transcribed them to facilitate comparison. He notes that the vocal melody as found in the various choruses of *Jenny and I* as performed by the claimant often fluctuates in terms of actual pitches used and that the melody is in places difficult to find, and confines his comparison to one particular chorus \*171 where the pitches of the note are most clearly defined. In relation

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to that chorus, he states, amongst other points: “There is a degree of similarity with regard to the musical shape or ‘contour’ of the second and fourth phrases respectively found in bars 1 and 2 but they are, nonetheless, different”.(b)In section 2.3 of his Report, Mr Protheroe analyses the chorus melodies of the two pitches for both choruses, and concludes from his analysis that there is almost no coincidence of pitches between the chorus melodies of the two works and no two successive pitches at all occurring in common between them. There is some disagreement between Mr Protheroe and the claimant in relation to some notes, which Mr Protheroe, like Mr Oxendale, attributes to “ambiguities” in the performance.(c)The claimant deals with this section of Mr Protheroe’s report to considerable detail at pp.10–14 of his response, but the majority of the points he makes are minor points relating to the transcription of the music, in circumstances in which both Mr Oxendale and Mr Protheroe have found difficulty with “ambiguities”. Apart from these, the main point of substance he makes is to refer back to Mr Oxendale’s comment about a degree of similarity with regard to the musical shape or “contour”. As to that, Mr Protheroe responded, in Notes produced at the outset of his oral evidence at p.6 second

and third paragraphs, by analysing the pitches by reference to the musical example set out in his report. He concluded that there were “quite different contours” and in the course of his oral evidence convincingly demonstrated the differences by singing them.(d)The claimant also relies on Mr Oxendale’s observation that the answerphrases in both choruses start on the same note and that the second answerphrase in both choruses end on the same note. However, I accept Mr Protheroe’s evidence these similarities are not significant, since the notes are very common; also the end notes do not coincide in time.

31 The literary phrase structure:(a)This again originates from Mr Oxendale’s revised Report. It is common ground that the subject matter of the lyrics of the respective choruses are entirely different, and that there is no similarity in the works.(b)However, Mr Oxendale identifies similarities in the structure of the choruses as follows: “In terms of structure, the respective choruses could be described as follows: \*172

### **Jenny and I**

#### Chorus A

*Jenny & I*

A1 hook-line performed in harmony

*No big dream*

B1 answering phrase performed solo

*Jenny & I*

A1 hook-line performed in harmony

*No hot steam*

C1 answering phrase performed solo

*Jenny & I*

A1 hook-line performed in harmony

*We get around*

D1 answering phrase performed solo

*With both feet on the ground*

E1 end phrase performed in harmony

#### Chorus B

*Jenny & I*

A1 hook-line performed in harmony

*Have no car*

B2 answering phrase performed solo

*Jenny & I*

A2 hook-line performed in harmony

*Don't go far*

C2 answering phrase performed solo

*And if we must*

D2 new phrase 1 performed in harmony

*We'll take the bus*

E2 new phrase 2 performed solo

*That's good enough for us*

F2 end phrase performed in harmony

**Sleeping in my car**

Chorus A

*Sleeping in my car*

A1 hook-line performed in harmony

*I will undress you*

B1 answering phrase performed solo

*Sleeping in my car*

A1 hook-line performed in harmony

*I will caress you*

C1 answering phrase performed solo\*173

*Staying in the back seat*

D1 new phrase 1 performed in harmony

*Of my car*

E1 new phrase 2 performed in harmony

*Making love oh yeah*

F1 end phrase performed solo

Chorus B

*Sleeping in my car*

A2 hook-line performed in harmony

*I will possess you*

B2 answering phrase performed solo

*Sleeping in my car*

A2 hook line performed in harmony

*Certainly bless you*

C2 answering phrase performed solo

*Laying in the back seat*

D2 new phrase 1 performed in harmony

*Of my car*

E2 new phrase 2 performed in harmony

*Making up oh yeah*

F2 end phrase performed solo”

(c) In his response to this report, the claimant says that Mr Oxendale's analysis gives a clear indication that the “literary phrase structure” of the two choruses of *Sleeping in my car* is copied from the literary phrase structure of the second chorus of *Jenny and I*, and he refers to this again in several passages in this response and again in his response to Mr Protheroe's report. As I understand it, he does not rely on this as an infringement of literary copyright, but as evidence of another similarity in the work as a whole which negatives the second defendant's evidence that he never heard the work. (d) The most obvious similarity in the literary phrase structure is that, in each of the choruses in each of the works, the hook line or catchphrase is sung in lines 1 and 3 and followed by answering phrases in lines 2 and 4. However, the claimant accepts that this is a commonplace device; his main point is that in chorus B the hook/line answering phrase sequence is broken at the same place, in line 5 with two new phrases and an end phrase. I cannot regard this as having any significance at all, especially as the similarity is only in one chorus and given other differences in the phrase structure pointed out by Mr Oxendale including the different rhyming patterns. \*174 Neither Mr Oxendale nor Mr Protheroe

considers that this point adds anything to the claimant's case and nor do I.

32 Timing of chord changes and “chord structure”(a) I take this point last, because the claimant's main evidence about it was advanced only at a very late stage, in his response to Mr Protheroe's report, which contains the following passage “Although I have been perfectly aware from the beginning that two choruses change phrases in the very same way all the way through I have only very recently noticed exactly how this pattern appears. This pattern that I created instinctively for the chord changes of the chorus *Jenny and I*—one bar with two chord changes, the first change on the first beat of the bar and the second on the last quaver of the bar, followed by a bar without chord changes, is that I believe to be one of the contributions to the musical flow of *Jenny and I* and *Sleeping in my car*. The other important element to this is how the melody line is built alongside it. In the bars with the two chord changes the first chord change comes on a crotchet followed by a crotchet rest and the second chord change comes on a crotchet falling “over the bar line” followed by a dotted crotchet. This is a musical construction that is identical between

the two choruses until the beginning of the 7th bar save for some minor changes in bars 6 and 8 ... This new realisation of the true picture of the chord changes/structure in the choruses of *Jenny and I* and *Sleeping in my car* does mean all previous illustrations of chord sequences provided by both musicologists and by me are inaccurate insofar as they all have shown a pattern of one chord change on the first beat in every bar, which I have now shown above as not being correct. *This misconception by Mr Protheroe and Mr Oxendale of the true pattern of the chord changes/chord structure in the choruses of Jenny and I and Sleeping in my car is confirmed in 2.4.2 of Mr Protheroe's Report.*"(b)Mr Protheroe disagrees with the claimant on this point. In his view, there is a significant difference between the timing of the chord changes, in that there are "pushes" or "anticipations" in the chord changes in *Sleeping in my car*, whereas *Jenny and I* all the chord changes except two are on the bar line, without any pushes/anticipations. Even if the claimant had been right, Mr Protheroe was able to produce two other compositions with similarly timed chord changes; it is a common device to make a pop song more lively.(c)In his oral evidence, the claimant said that there were indeed pushes/anticipations in all the chord changes in *Jenny and I*, although less emphatic than those in *Sleeping in my car*. Although I listened carefully to the two works, I am not able to determine for myself who was right but it seems to be that, even if the claimant is right, the fact that the "pushes" are subtler is itself a different. In any event, I do not consider that much weight can be placed upon a similarity which the claimant, who has obviously been very concerned about this \*175 matter for several years, was only able to detect some weeks before the trial.

33 Having come to the conclusion that the alleged similarities taken individually do not indicate copying, it is necessary to consider them as a whole. There are cases in which each similarity on its own may be coincidence, but in which it is not credible that all similarities taken together are coincidental. This is not such a case. The similarities are not extensive and do not relate to musical features which are unusual. I accept Mr Protheroe's view that the whole of the similarity is not greater than the sum of its individual parts.

34 I am therefore left with the credible evidence that the second defendant did not copy the claimant's work, and with expert evidence, which I accept, that such similarities as there are could perfectly well be coincidental. I therefore find, on a clear balance of probabilities, that there was no copying.

35 In these circumstances, it is not necessary for me to consider whether what is alleged to have been copied was a substantial part of the work, but I will do so briefly. The test is whether, having regard to the quality and quantity of what was copied, there has been any real prejudice to the interests of the owner of the copyright: see *per* Whitford J. in [Geographia Ltd v Penguin Books Ltd \[1985\] F.S.R. 208, 219](#). Quality is more important than quantity: see *per* Lord Reid in [Ladbroke \(Football\) Ltd v William Hill \(Football\) Ltd \[1964\] 1 W.L.R. 273, 276](#). Having regard to para.5.6.1 of Mr Protheroe's report, I do not consider that what is alleged to have been copied is substantial. Taken as a whole, the claimant's composition is a striking and attractive work, but the allegedly copied elements are quantitatively not great, not qualitatively not great originality.

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1. Paragraph numbers are as assigned by the court.

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