

EIP

Music copyright case discusses originality requirement

Kelly-Marie Smith, a singer/songwriter and member of the Voice UK duo Nu-Tarna, brought a copyright action against nine defendants including members of the band “Rudimental” and James Newman. Ms Smith asserted that her 2007 song ‘Can You Tell Me’ was ripped off by Rudimental’s 2014 single ‘Waiting All Night’ and that Mr Newman had copied her song when composing the 2014 hit. By the end of the trial the copying allegations were pursued solely against Mr Newman after it was determined the contributions from the members of Rudimental were not relevant to the alleged copying from Ms Smith’s song.

The Similarities

One similarity between the two songs consists of the repetitive use of the phrase “tell me that you” followed by a variety of similar two-word phrases. Both songs have the phrase “need me” as a follow up phrase. Another similarity was the use of the melody to stress certain words with those words being sung at a higher pitch. The Judge accepted these features as similarities but found there were important features which significantly diminished the strength of the argument that these similarities had come about through copying. The most significant of these were the commonplaceness of the similar lyrics, the availability of Ms Smith’s song and the creative evolution of Waiting All Night.

First, Mr Newman’s counsel pointed out that 14 other artists including Huey Lewis and the News, Nazareth, Bruce Springsteen and Michael Jackson have songs which contain the phrase “tell me that you need me”. This emphasised that the lyrics are not “ground-breaking or particularly original”. Therefore, it is wholly plausible that two individuals

could separately compose a pop song with the lyrics “tell me that you need me” which reinforced the point that the phrases used in Rudimental’s song could be original even though not unique.

Secondly, Ms Smith’s song had never been commercially released but only made available through a MySpace post in 2007, on a DVD distributed internally in the recording industry also in 2007 and on Vimeo in May 2012. It was held to be unlikely that Mr Newman would have accessed the song through any of these means. Nor would he have come across Ms Smith’s work via any of the “personal circles” of associates with which both Mr Newman and Ms Smith worked. The likelihood of Mr Newman knowingly or unknowingly copying the song without having heard it was improbable.

Finally, the analysis of infringement was assisted by the existence of a voice memo from 2012 which demonstrated Mr Newman’s creative process of composing the song and evidenced the song in its juvenile state. Upon analysing the voice memo the Judge took the view that Mr Newman had chosen the phrase “tell me that you need me” after a process of trial and error of exploring a variety of phrases but settled with the final result because it worked the best. The same conclusion was reached when the creation of the melody was analysed as well.

Conclusion

Following the submissions by the parties and review of the voice memo, the judge held that Mr Newman had not infringed the copyright in Ms Smith’s song as he had not copied.

This case discusses how the originality requirement for copyright does not depend upon a work including unique lyrics but instead is focused on a work being an original expression by an artist that has been created separately from another work. Although, this leaves room for there to be crossover in similarity, particularly within certain genres of music such as pop where the use of similar phrases and lyrics is common, this case does act as a clear reminder for singer/songwriters to consider both how individual their music is and how widely distributed it has been before bringing a copyright claim.

Smith v Dryden & Ors [2021] EWHC 2277 (IPEC)

Written by Drew Layton.