
Lana Del Rey May Have Creeped too Close to Radiohead's Melody, Copyright Infringement Suit Nears

Flaster Greenberg Blog

January 9, 2018

A tweet sent by Lana Del Rey earlier this week (likely to the chagrin of her attorneys) informed her 8.3 million followers that Radiohead is claiming that the song 'Get Free', off her recent album 'Lust for Life', infringed on Radiohead's 1993 hit song 'Creep.' The 90's band is seeking 100% of the profits related to the publishing of the song, which Del Rey is credited with co-writing along with songwriters and record producers, Kieran Menzies and Rick Nowels.

Fast forward to a few hours after the tweet was sent when Del Rey then repeated this sentiment at a subsequent concert in Denver, CO, where she referred to the song as her "personal manifesto." As an aside, it was a questionable move for Del Rey to go so public with this dispute, let alone state terms of settlement offers, as settlement negotiations are often confidential...unless where published in the manners Del Rey has done, and could taint the available jury pool. Check out a clip of Del Rey addressing the crowd [here](#).

Does Radiohead have a case?

I've never been much of a gambler, but after listening to both songs I would say that Radiohead has a strong case in this copyright dispute. For those of you unfamiliar, a copyright arises from the creation of an original work that is fixed in a tangible medium of expression, described as "*when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.*" While the mere creation of the composition is enough to establish a copyright, registration affords the author/publisher additional protections. The courts often look to whether the composition contains a minimal spark of creativity. The spark can be in the chord progression, rhythm, melody or lyrics. In order to establish the infringement, a comparison of the songs must be done, often by an expert, and a judge or jury must then determine if such an infringement, or unauthorized borrowing or use of the same chord progression, rhythm, melody or lyrics, has occurred. Since such proof is often subjective to the fact finder, most cases are resolved prior to a final determination in Court.

In fact, the very song Radiohead is now claiming Del Rey has infringed upon, was itself the subject of a claim of infringement by Albert Hammond and Mike Hazlewood, regarding the 1972 song 'The Air That I Breathe,' sung by The Hollies. As a result of that claim, Hammond and Hazlewood received co-writing credits and a percentage of the royalties of Radiohead's 'Creep.' While one might ask whether Hammond and Hazlewood should really be making the claim against Del Rey, it is too soon to tell whether it is the very same chord progression, rhythm, melody or lyrics involved in the Del Rey-Radiohead dispute as the Radiohead-Hollies dispute, as every song is made up of many different such elements. Time will tell whether Radiohead's lawsuit will go anywhere, although my money would be on Radiohead winning, if it went to trial. However,

Continued

odds are that there will be a similar result to the Radiohead-Hollies out of court settlement, with Radiohead sharing writing credits and royalties.

You Be The Judge: Take a listen to both songs here:

Prior Precedent

Copyright disputes between musicians, writers and publishers have been part of the music landscape for decades. In 1971, former Beatle George Harrison had a number 1 single on his hands with 'My Sweet Lord.' Yet, while that single was still in heavy rotation, Harrison was hit with a lawsuit by publisher Bright Tunes Music, which held the rights to the Chiffons' 1963 hit 'He's So Fine,' written by Ronnie Mack. Harrison tried unsuccessfully to settle the matter and, ultimately, lost at trial, having to pay Bright Tunes damages in the amount of \$1,599,987! As only a former Beatle could, Harrison did, however, turn the experience of tortuous litigation into another hit called 'This Song.'

More recently, Robin Thicke, Pharrell Williams and Clifford Harris, Jr. were found to have infringed on the work of Marvin Gaye, in particular the song 'Got To Give It Up.' Interestingly, it was Thicke, Williams and Harris who pre-emptively filed suit against the Gaye family and Bridgeport Music, in an attempt to have the court determine Thicke and company had not infringed on Gaye's work. The suit backfired, with a finding that Thicke and company had infringed on Gaye's work and awarded \$5.3 million in damages. Thicke and company have appealed to the United States Court of Appeals for the 9th Circuit. At oral argument, Thicke and company argued that there can be no infringement for a "groove," which it sought to differentiate from a lyric, rhythm, etc. No decision has been reached by the 9th Circuit as of yet, but Thicke, Williams and Harris have a tough road ahead to overturn the lower court's verdict.

Questions? Let Jeff know.

ATTORNEYS MENTIONED

Jeffrey Cohen