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**Marianne Creagh (Professionally known as
Marianne Cray) v Hit and Run Music Publish-
ing Limited**

Case No: 0102006

High Court of Justice Chancery Division

- Mr Richard Edwards (instructed by Gersten & Nixon) for the Claimant.
- Mr Tim Penny (instructed by Seddons) for the Defendant.

JUDGMENT

Introduction

1. This is an action for infringement of copyright. The claimant, Ms Creagh, is a songwriter and is known professionally as Marianne Cray (“Ms Creagh”).
2. Ms Creagh is the composer of the music and lyrics of a song called Where Are You Now (“WAYN”). In these proceedings Mr Creagh claims that she is the owner of the musical and literary copyright subsisting in the song and that these rights have been infringed by the defendant, Hit and Run Music (Publishing) Limited (“Hit and Run”), a music publishing company.
3. The complaint arises in relation to another song called Where are You (“WAY”). Ms Creagh first heard at least part of it in 1998 when she was watching a trailer for the Eurovision Song Contest. She heard what she took to be the chorus of her song being such by the female pop artist professionally known as “Imaani”, the British entrant for that year.
4. WAY was allegedly written by three authors, Mr Philippou, (known as Mr Manakiza), Mr Simon Stirling and Mr Scott English. It was published by Hit & Run, together with Warner Chappell Music

Mr David Kitchin QC

Wednesday 22nd May, 2002

Representation

Limited and Charisma Music (Publishing) Limited. Hit & Run granted a mechanical licence to EMI Records Limited to make sound recordings of the song, in particular as sung by Imaani, and gave permission for the work to be performed in public and broadcast on numerous occasions prior to and after the Eurovision Song Contest.

5. It was not in the end disputed that Ms Creagh was the author and owner of the copyright in the various versions of her song WAYN. The real contest between the parties arose in relation to the allegation of infringement. In particular, it was vigorously disputed that the song WAY was derived in any way from the song WAYN or that it involved the reproduction of a substantial part of any literary or musical work embodied in it.

The background facts

6. Ms Creagh composed the first version of the song WAYN in about 1985. She produced a recording of it using a friend's recording equipment. The version of the song was referred to in the proceedings as “WAYN Original”. Shortly afterwards, Ms Creagh produced another recording of the song at the Rondor Studios in Parsons Green, referred to as “WAYN Rondor”.
7. Very little happened thereafter until early 1995 when Ms Creagh met a Mr Johnny Stirling of Hit & Run. So began a relationship which lasted for about 15 months. Ms Creagh played Mr Stirling her song

and he appeared to like it. He arranged for her to make a recording of the song with a producer called Mr David Ogilvy. This took place over two days and at the expense of Hit & Run. The result was the third version of the song, referred to in these proceedings as "WAYN Ogilvy". Neither Ms Creagh nor Mr Stirling was very impressed with the result, which seemed to them to be rather bland.

8. In August 1995 Ms Creagh met another producer called Mr John Ravenhall. There followed various meetings between Mr Ravenhall and Mr Johnny Stirling and between Mr Ravenhall and Ms Creagh. In about November 1995 Ms Creagh and Mr Ravenhall produced a fourth version of WAYN, referred to as "WAYN Ravenhall".

9. Finally, in May 1996 the fifth and last version of the song was produced with a Mr Phillip Tennant. It was referred to as "WAYN Tennant". Both "WAYN Ravenhall" and "WAYN Tennant" were also produced at the expense of Hit & Run.

10. I should mention at this stage that during the course of the relationship between Ms Creagh and Mr Johnny Stirling certain conversations and incidents were alleged to have taken place, the substance of which was very much in dispute. Each party relied on aspects of them in relation to the allegation of copying. I explain here how they arose and return to them later in considering the issues to be determined.

11. The first took place between Ms Creagh and Mr Ogilvy. It was Ms Creagh's evidence that whilst with Mr Ogilvy she overheard a telephone conversation between Mr Ogilvy and Mr Johnny Stirling which involved a heated argument about money. When she asked Mr Ogilvy about it he told her that Mr Johnny Stirling had not paid him for work he had done for Hit & Run. I understood Ms Creagh considered this the first indication that the trust she had in Mr Johnny Stirling might be misplaced. Mr Ogilvy's evidence was very different. He could recall no such incident and could only assume that Ms Creagh had misinterpreted a light hearted dis-

cussion. He explained and I accept that he had never had a money problem with Mr Stirling.

12. The second set of incidents concerned Ms Creagh, Mr Ravenhall and Mr Johnny Stirling. Ms Creagh gave evidence that during a conversation with Mr Ravenhall he said to her that he had had meetings with Mr Stirling and made an offensive observation to the effect that he and Mr Stirling had decided the song needed a black singer. Ms Creagh continued that when she later reported this conversation to Mr Johnny Stirling, he flew into a rage, and indicated that he and Mr Ravenhall would decide who sang the song. I did not have the benefit of evidence from Mr Ravenhall, but Mr Stirling strenuously denied this allegation and that any such conversations had taken place. What was not disputed was that at about this time Mr Stirling and Ms Creagh discussed the possibility of another person singing the song if they could agree terms, but that Ms Creagh wanted another year to see if she could "get somewhere with it first".

13. Thirdly, and after the production of WAYN Tennant, Ms Creagh alleged that Mr Johnny Stirling said to her words to the effect that if she did not sign the song to him and he saw her singing it on stage then she would be "singing in a wheel chair". Ms Creagh said she understood this as a threat revealing that Mr Johnny Stirling was determined to have and use her song. It was again specifically denied by Mr Johnny Stirling.

14. Finally, Ms Creagh maintained that one day she was in Mr Johnny Stirling's office with the song WAYN playing when a young man entered. He was introduced by Mr Johnny Stirling as "Simon", and Ms Creagh understood him to be Mr Simon Stirling, a writer with Hit & Run and, as she subsequently found out, one of the authors of the alleged infringement. Accordingly she formed the view that Mr Simon Stirling had heard the song WAYN in her presence. It has since become clear that the man could not have been Mr Simon Stirling and was probably Mr Johnny Stirling's nephew, Esmond. It is accepted that Mr Esmond Stirling had

no connection with the alleged infringement. Nevertheless, Ms Creagh maintains that she was introduced to him as “Simon”, and this was again a matter disputed by Mr Johnny Stirling.

15. In May 1998 Ms Creagh was watching a television trailer for the Eurovision Song Contest when she heard the chorus of the British entry WAY being sung by Imaani. In her words, she “saw and heard my chorus being sung by a black woman”. She went out and bought a copy, and found Mr Johnny Stirling's name as executive producer, the name of Mr Simon Stirling as a co writer and the name of Hit & Run. She formed the view that Mr Johnny Stirling had done everything he had threatened.

The law

16. Each version of WAYN contains a literary and musical work protected by copyright. The Copyright, Designs and Patents Act 1988 protects such works from reproduction in any material form. [Section 16\(3\)](#) of the Act provides that such protection applies to the reproduction of the work as a whole or to any substantial part of it, and whether directly or indirectly.

17. It was not alleged that the whole of the literary or musical works in any version of WAYN had been copied; rather it was alleged that a substantial part of each work had been copied.

18. It is clear that for there to be infringement of copyright two elements must be present. First, there must be sufficient similarity between the infringing work and the copyright work, or a substantial part of it, for the former to be described as a reproduction or adaptation of the latter. Secondly, the copyright work must be the source from which infringing work is derived, directly or indirectly.

19. The question of what amounts to a substantial part of the copyright work is one of fact and degree. In considering the question in the context of the present case I believe that the following principles

are relevant and may be derived from the cases cited to me.

20. First, what is a substantial part depends more on the quality than on the quantity of that which is taken: [Ladbroke \(Football\) Ltd v William Hill \(Football\) Ltd \[1964\] 1 WLR 273](#) at 276 per Lord Reid.

21. Secondly, in a case where an altered copy has been produced then it is a useful test to consider whether the infringer has incorporated a substantial part of the independent skill and labour contributed by the original author in creating the copyright work: [Designers Guild Ltd v Russell Williams \(Textiles\) Ltd \[2001\] FSR 11](#) at [64] per Lord Scott.

22. Thirdly, certain ideas expressed by a copyright work may not be protected because, although they are ideas of literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work: [Designers Guild Ltd v Russell Williams \(Textiles\) Ltd \[2001\] FSR 11](#) at [25] per Lord Hoffmann. The same must, I believe, apply to a musical work.

23. Turning to the second requirement, the claimant must establish that the features which it complains about have been copied, directly or indirectly, from the copyright work. This must be a question for the court to determine in the light of all the evidence.

24. In considering the question of whether the copyright work is the source of the alleged infringement, the similarities between the works may themselves raise an inference of copying. If the claimant demonstrates sufficient similarity, not in the works as a whole, but in the features which he alleged have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying: [Designers Guild Ltd v Russell Williams \(Textiles\) Ltd \[2001\] FSR 11](#) at [38] per Lord Millett.

The experts

25. I had the benefit of the evidence of two experts. Professor Roderick Swanston gave evidenced on behalf of Ms Creagh. He has been professor at the Royal College of Music for twenty five years and is currently Reader in Historical and Interdisciplinary Studies. He is also a lecturer in music at Imperial College and at Birkbeck College, University of London. He studied music at Cambridge University and is a Fellow of the Royal College of Music and the Royal College of Organists, a Graduate of the Royal Schools of Music and a Licentiate of the Royal Academy of Music. He has frequently broadcast and reviewed CDs on air and in print.

26. Mr Peter Oxendale gave evidence on behalf of Hit & Run. He studied at the Royal Academy of Music and King's College, London and is a Graduate of the Royal Schools of Music and is both a Licentiate and Associate of the Royal Academy of Music. He has experience as a writer, producer, musical director, arranger and conductor. He has also acted as expert witness in a number of copyright disputes over the years.

27. The experts each submitted reports and, together, a joint report indicating areas of agreement and disagreement. I found the evidence of both experts to be of assistance and I have no doubt that the evidence they gave was objective and reflected their honest opinions. What is clear is that the experts had different opinions about the extent of the similarities between the songs in issue.

28. It was submitted on behalf of Ms Creagh that the approach of Mr Oxendale was unduly narrow and that he adopted an extreme approach to the issue of similarity and to the identification of commonplace matter. I reject these criticisms. It seemed to me that the opinions which Mr Oxendale expressed were always reasonable, although not ne-

- (a)The title of WAY is substantially the same as the title of WAYN. Indeed, the song WAY was originally registered with the PRS with the same title "Where Are You Now".
- (b)The words of the hook line of WAY ("Where Are You Now") are the same as in WAYN, and the hook line forms the chorus of both songs.

cessarily in agreement with those of Professor Swanston.

The songs in issue

29. The words and verse structure of each of the four latest versions of the song WAYN are set out in Appendix A to this judgment. Each is in common (4/4) time and consists essentially of three verses. The first begins the song and opens "I am sitting at this window, looking out across the street" and ends "Trapped by these thoughts of you". The second begins "Drinking endless cups of coffee" and ends "For the sound of your letter on the floor". The last verse is substantially the same as the first. Following each verse is a repeated refrain ending with the words: "Where are you now, where are you now".

30. The words and verse structure of the song WAY are set out in Appendix B to this judgment. The song consists of a series of four line verses. After the first two verses there is a chorus section, itself comprising two parts. This chorus is repeated after the third and fourth verses. There then follows a middle-8 and then the chorus section is repeated again. It is not be noted that the last line of each of the verses of WAY comprises the three words "Where Are You", and the last line of each part of the chorus comprises the words "Where Are You Now".

The alleged similarities

31. As developed at trial, it was contended on behalf of Ms Creagh that WAY amounted to a reproduction of the literary and musical works embodied in WAYN for the following reasons set out in paragraph 9 of the Particulars of Claim:

- (c)When WAY is transposed into the same key as WAYN (A minor), the melodic notes of the hook line are identical, save for the reversal of the first two notes.
- (d)There is a strong aural similarity between the melodies of the songs.
- (e)There are substantial similarities between the lyrics of the two songs.
- (f)The “message” and “story” of the lyrics in each of the songs are identical, in that, as alleged in the particulars of Claim, “the image of the absent one colours the singer's surroundings”.

32. These alleged similarities and their significance were considered by the experts in their evidence in chief and in cross examination. I will deal with them in turn.

The titles

33. The titles are clearly very similar. Mr Oxendale explained, however, that the Performing Right Society has over 150 works on file entitled “Where Are You” and a similar number entitled “Where Are You Now”. It is fair to say that there may be a significant overlap between each of the lists. Nevertheless, I conclude that it is established that the titles are commonplace. A similar picture emerged from the United States. Mr Oxendale procured a search in the US Library of Congress Copyright Registration Records from 1978 to 2001. This revealed over 300 entries for the title “Where Are You” and over 300 entries for the title “Where Are You Now”.

The words of the hook line

34. The words “Where Are You Now” appear in the chorus of each of the songs. In my judgment this is not surprising in the light of the use of these words in the titles. In WAYN they constitute one of the 18 lines of the song, disregarding repetitions, and counting “Lost in a sea of faces and timeless places” as a single line. They appear at the end of each section of the chorus as part of the lyric:

“Lost in a sea of faces, and timeless places

Where are you now

Where are you now”

35. In WAY, the words appear in a rather different context. They do not appear at the end of each section of the chorus but are not repeated and are, in my view, a natural development of the phrase “Where are you”, which appears at the end of each of the verses. I should add that the words “lost in a sea of faces, timeless places” do not appear in WAY and are not alleged to have been reproduced.

The melodic notes of the hook line

36. This, together with the words of the hook line, formed an important aspect of the case advanced by Ms Creagh. In the last two versions of WAYN, namely WAYN Ravenhall and WAYN Tennant, the final words of the chorus are accompanied by two closing bars alleged to have been reproduced in WAY, as shown by a comparison produced by Professor Swanston, and illustrated below:

37. It was Professor Swanston's evidence that the most notable and consistent feature of each phrase is the final three note descent to the tonic note A (marked as *descending third*). He considered that in both choruses the phrase to which the music drives is “where are you now”. He also referred to the used in each work of only three chords (Dminor [IV], E major [V], and A minor [I]), but this was not in the end pursued as being a relevant feature.

38. The relevant notes in the case of WAYN are: C-B-A-A and, in the case of WAY, are: B-C-B-A. As Mr Oxendale explained, these notes do not appear in the original three versions of WAY and only appear in WAYN Ravenhall and WAYN Tennant.

39. Mr Oxendale gave evidence, not disputed by Professor Swanston, and which I accept, that these notes are based on notes 1,2 and 3 of the minor

scale and that a large number of pieces in the repertoire of contemporary and classical music are based on them. Further, I believe they are significantly different in that the phrase found in WAYN commences on the third degree of the scale and descends by scale step to the tonic. By contrast, the phrase found in WAY commences on the second degree of the scale and ascends to the third degree before descending by scale step to the tonic. Mr Oxendale also gave evidence, which I again accept, that the phrases are similar in that they both commence after a crotchet rest and have similar durations and rhythms, but these are also commonplace features.

The melodies

40. The experts differed in their opinions as to the melodies. Professor Swanston believed that in each song the focus on the final phrase was built up by similar cumulative harmonic, rhythmic and melodic means. Mr Oxendale thought there was no similar-

- “I see your face in distant crowds” “I see your [a] face without a name”
- “Autumn leaves fall gently to the ground” “Leaves are falling in the park”
- “The wind seems to whisper your name out loud” “Through the storm I call your name”
- “Trapped by these thoughts of you” “You're in my mind all the time” “unlock these chains”

43. It was contended that these were lines which, despite a lesser degree of verbal resemblance than the hook lines, contain similar images. I agree that at a very general level these lines do contain similar images. At that level of generality, however, I believe the images are commonly used and simply reflect the subject matter of the songs. Indeed, in their joint report, the experts agreed that in isolation and out of context none of those images is original.

The message and story of the lyrics

44. There is clearly a general similarity between the subject matter of each of the songs. Each is a love song about a missing or absent person. They each contain lines which reflect that theme and their common titles. To my mind, however, the theme is worked out differently in each of the songs. They

ity other than the common use of the notes C-B-A. In the end Professor Swanston accepted that there was no similarity between the chord sequences of the two works and that, save for the 4 note melodic phrase C-B-A-A, there was no commonality in the melodies.

41. I have listened carefully to the songs a number of times. Save for the hook line, I do not believe they have any significant similarity.

The lyrics

42. It was alleged there is a substantial similarity between the other lyrics of the two works as follows:

WAYN WAY

do contain some similar images, as is apparent from the lines set out above, but I believe the setting of those images is rather different in each of the songs.

Do the similarities amount to a substantial part of the copyright works?

45. I believe that this issue must be approached in the light of the findings that I have made as to the extent and nature of the similarities between the works in issue.

46. The case in relation to the literary work relied on four elements, namely the title, the works of the hook line, certain other lines and the general message and story of the lyrics. The title is indeed substantially the same but is not original and is commonly used in popular songs. Similarly, the words of the hook line are not original. Moreover, they

appear in WAYN in a particular context which, in my judgment is not reproduced in WAY. Once the lines are removed from their context then the similarity amounts to the repeated use of the common place title at the end of each section of the chorus. I do not believe that this constitutes a significant part of the literary work embodied in WAYN.

47. As to the other lines and the general message and story of the lyrics, they involve the use of well known ideas and images and reflect the theme of the title. In my view these themes and ideas are worked out in WAY in a manner which cannot be found in WAYN. I reject the submission that there are substantial similarities between the lyrics of the two works.

48. For all these reasons I have reached the conclusion that the similarities relied upon do not amount to a substantial part of literary work embodied in WAYN.

49. The case in relation to the musical work relied on the melodic notes of the hook line and the overall similarity between the melodies of the respective songs. For this purpose reliance was placed upon WAYN Tennant and WAYN Ravenhall. As I have identified, there is an identity of three notes: C-B-A. The notes are not original, forming as they do, notes 1,2 and 3 of the minor scale and are commonplace. They represent a small phrase in WAYN as a whole. I have considered the views of the experts and endeavoured to exercise my own aural judgment. These notes did not seem to be to have a particular or essential significance to the song WAYN and did not to my ear seem particularly memorable in the context of the whole. In my judgment these notes do not represent a substantial part of the musical work embodied in WAYN Tennant and WAYN Ravenhall, and I could detect no other real similarity between the melodies.

50. I believe it is also of note that the particular musical phrase in issue does not appear in the three earlier versions of WAYN. In my judgment these versions share the same essential melody as the

later two versions, WAYN Tennant and WAYN Ravenhall. I believe this is further support for my conclusion that the musical phrase does not amount to a substantial part of any version of WAYN.

51. For all these reasons I conclude that the similarities between WAY and WAYN do not amount to a substantial part of any of the musical works embodied in the various versions of WAYN.

The writing of WAY

52. It follows from the conclusions I have reached that the claim for infringement must fail. Nevertheless, since derivation of the similarities which do exist was very much in issue and the subject of considerable evidence and argument, I believe it right to set out my conclusions.

53. I must begin with a consideration of the extent of the similarities between WAY and WAYN and whether they are sufficient to raise an inference of copying. I have set out the extent of the similarities which I have found between the two songs. In my judgement, even taken as a whole, they do not, of themselves, raise an inference of copying. They are not sufficiently close, numerous or extensive as to be more likely the result of copying than coincidence.

54. I must also consider the matter in the light of the evidence. I have heard from each of the three songwriters of WAY, Mr Manikiza, Mr Simon Stirling and Mr English, in addition to the evidence of Mr Johnny Stirling. Both Mr Manikiza and Mr Simon Stirling were Hit & Run writers.

55. Mr Johnny Stirling accepted that he had Mr Simon Stirling and Mr Manikiza in mind to collaborate with Ms Creagh on WAYN. It was clear also on the evidence that at some time before the creation of WAY, probably in the summer of 1996, Mr Johnny Stirling spoke to Mr Manikiza about the possibility of working with Ms Creagh, but that nothing came of it. Both witnesses denied that the song WAYN was played by Mr Stirling to Mr

Manikiza on that or any other occasion or that a copy of a recording was provided. I gained the impression from Mr Manikiza in the witness box that he could not recall the meeting clearly. But Mr Johnny Stirling was clear under cross examination that he did not play the song to Mr Manikiza. He recalled that he had no opportunity to do so because Mr Manikiza flatly rejected his suggestion of working with Ms Creagh on the basis that she did not have a recording contract.

56. In 1997 Mr Johnny Stirling introduced Mr English to the other two songwriters, Mr Manikiza and Mr Simon Stirling. Each of the three writers gave evidence about how WAY came to be written. I find the following to be established. In about October 1997 they met at Mr Simon Stirling's home where he had a studio. Mr Manikiza had some ideas for the melody before the first meeting, including some chords. He also had in mind some lines, including "Where are you now" and the idea of a song about a lost or missing person. Most of the song was written over the course of the first day, although it took a little longer for it to be completed. Mr Simon Stirling and Mr Manikiza were primarily responsible for the music and Mr English made a major contribution to the lyrics.

57. I heard and have carefully considered the evidence of each of the three writers and I have no doubt that they did not have direct access to a recording of the song WAYN. Moreover I accept that they did not deliberately set about producing a variation or reworking of WAYN. Nevertheless, it was also clear to me that the writers had no clear recollection of all the details of the creation of WAY or who was responsible for the creation and conception of particular parts of it. Indeed their recollection of the process of creation contained a number of inconsistencies.

58. Shortly after the production of the first recording of WAY, Mr Manikiza contacted the artist Imaani and invited her to make a recording of her work. He explained, and I accept, that he chose her because he heard her singing as a session musician

and was impressed by her voice. That recording was played to Warner Chappell and they suggested that it be put forward as the Eurovision Song Contest entry.

59. Mr Johnny Stirling explained that he first learned of the song WAY in about October 1997 and heard the recording by Imaani sometime later. He knew Imaani and had worked with her. She did not want to perform the Eurovision entry because she did not think it fitted her image. Mr Johnny Stirling persuaded her to participate and became executive producer for the project.

Deliberate copying at the instigation of Mr Johnny Stirling

60. It was submitted on behalf of Ms Creagh that Mr Johnny Stirling deliberately took her song WAYN and arranged to have it reworked by one or more of the three songwriters of WAY. This, it was submitted, was apparent from the conversations he had with Ms Creagh about the kind of singer the song needed and that if he saw Ms Creagh singing the song then she would be singing it in a wheelchair. It was submitted that Mr Stirling always had a singer in mind whose identity was not disclosed to Ms Creagh and that he wanted to sing WAYN more than he was prepared to admit.

61. I should say at the outset that I found Ms Creagh to be a careful and honest witness. Having heard her evidence and the evidence of Mr Johnny Stirling I do believe that it is more likely than not that the conversations she said she had with Mr Johnny Stirling did take place. Her recollection of them was vivid and clear. I also believe that Ms Creagh took these conversations seriously and found his comments offensive and hurtful. In the circumstances it is hardly surprising that she formed the view that she did when she heard the song WAY being performed by Imaani, based on a similar theme and containing the same hook line "Where are you now".

62. Nevertheless, I reject this submission as to de-

liberate copying. I found Mr Stirling to be an honest witness. Mr Stirling explained and I accept that he was attracted and intrigued by Ms Creagh and the song WAYN and that is why he funded the production by her of three versions of it. He had visions of the song being sung in the style of a French chanson. He was cross examined as to his knowledge of the creation of WAY and the approach made to Imaani. I accept his evidence that he had no knowledge of the approach made to Imaani until after she had made at least one recording. Although I have accepted that it is likely he did have the conversations with Ms Creagh concerning the singer and the wheelchair I also believe that Mr Stirling has forgotten them and that they were more likely made in bad humour than seriously, and that they did not reflect a hidden intention to have the song sung by Imaani. It is more likely, in my judgment, that they reflected some frustration on his part at the fact that the relationship between them was not developing. The other incidents referred to at the outset of this judgment concerning the first, the conversation Ms Creagh overheard between Mr Ogilvy and Mr Stirling about money and secondly, the introduction to "Simon" show that Ms Creagh is capable of taking matters more seriously than intended and that at least on one other occasion there was a misunderstanding between her and Mr Stirling.

63. I also reject the submission in the light of the evidence given by the writers of WAY under cross examination. I have found that they did not set out to rework WAYN in writing WAY. I do not accept that any of the writers were party to a deliberate plan to rewrite WAYN.

Copying after hearing WAYN

64. It was also submitted on behalf of Ms Creagh that it was likely that Mr Johnny Stirling did play WAYN to Mr Manikiza or Mr Simon Stirling in 1996 and that the similarities between the songs are attributable to the fact that one or other of the writers had some recollection of the song, perhaps subconsciously, when it came to the writing of

WAY in 1997.

65. I am satisfied that Mr English did not hear WAYN before the song WAY was written. It was clear on the evidence that Mr Johnny Stirling had no reason or opportunity to play to him or provide him with a copy of WAYN. Mr English gave evidence, which I accept, that he had never heard of Ms Creagh.

66. I am satisfied on the evidence that Mr Simon Stirling did not have a copy of WAYN or hear it before WAY was written. He did not meet Ms Creagh at Mr Johnny Stirling's office. He gave evidence, which I accept, that he had his own recording studio so that he spent little time at the offices of Hit & Run, that his professional contact at Hit & Run was Mr Jon Crawley and that his only contact with Mr Johnny Stirling was social.

67. I did not find the position in relation to Mr Manikiza so clear. Various matters were raised on behalf of Ms Creagh which led me seriously to doubt that the similarities between the songs were arrived at independently. They were as follows.

68. First, it is clear that Mr Johnny Stirling did find the song WAYN interesting and that he thought it might have some potential. He accepted this in evidence and it is reflected in the fact that he was prepared to fund a number of recordings. There was therefore a reason for him to want to play the song to any person who might be interested in production work on the song with Ms Creagh.

69. Secondly, Mr Johnny Stirling specifically raised with Mr Manikiza the possibility of working with and producing Ms Creagh. Nothing came of this. It would, however, have been natural for Mr Stirling to have played to Mr Manikiza the song WAYN, or at least part of it, in order for him to assess the potential of the suggestion that was being made to him. Stirling liked the song and he wanted to persuade Mr Manikiza to work with Ms Creagh. He had had recordings of the work made so that people could hear them and they were readily available.

70. Thirdly, Mr Manikiza and Mr Simon Stirling were looking for production work at the time. Mr Manikiza also had respect for the judgment of Mr Stirling. Again I consider this to be a reason that Mr Manikiza would not turn down the suggestion out of hand and without listening to the work in question

71. Fourthly, it was also clear that Mr Johnny Stirling had in mind at least the possibility of the song WAYN being sung by another singer. As he explained, when the relationship with Ms Creagh did not appear to be progressing, he suggested that she might like to consider developing her career as a songwriter rather than as a performer. This was a further reason to play the song to Mr Manikiza.

72. Fifthly, although Mr Mazikiza gave evidence that he had not heard WAYN before writing WAY I must also take into account that it emerged in cross examination that Mr Manikiza was not asked to listen to WAYN when the allegation of copying was first raised and he only heard a very short passage in counsel's chambers on the day he finalised his statement.

73. I believe these are powerful points. Nevertheless, I have concluded, not without some hesitation, that the requirement of copying is not made out. I have reached this conclusion for the following reasons. First, and as I have indicated, the similarities between the songs do not, of themselves, raise an inference of copying.

74. Secondly, I believe the matters advanced on behalf of Ms Creagh are reasons to infer that Mr Manikiza heard WAYN before WAY was written. As such, they must be weighed against the evidence given by Mr Johnny Stirling that he did not play or supply a copy of the song to Mr Manikiza. I have decided that I must accept the evidence of Mr Stirling and that I would not be justified in rejecting it on the basis of the points raised. Mr Johnny Stirling was clear that he never played or supplied a copy of the recording because Mr Manikiza had no intention of working with Ms Creagh, an unknown artist.

75. Finally, there was no other evidence to support the allegation of copying. It is true that the authors of WAY could recall very little detail about how the song came to be written. But I do not believe this assists Ms Creagh because, in my judgment, the similarities are not such as to raise an inference of copying.

Conclusion

76. In my judgment Hit & Run has not infringed the copyright subsisting in the literary or musical works embodied in WAYN. The action must therefore be dismissed. If the terms of the order cannot be agreed, I will hear argument.

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