

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT NEW YORK

JOHN J. JACOBS, JR.,

Plaintiff,

- against -

MARC ANTHONY PRODUCTIONS INC.,  
NUYORICAN PRODUCTIONS INC., and  
UNIVISION COMMUNICATIONS INC.,

Defendants.

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC#  
DATE FILED: 6/27/2014

**PROPOSED ORDER**

13 Civ. 8915 (ER)

RAMOS, D.J.:

WHEREAS, on May 28, 2014, the Court, having been advised that all claims asserted herein had been settled, ordered the above-entitled action discontinued, subject to reopening should the settlement not be consummated within thirty (30) days of that date (Dkt. No. 17); and

WHEREAS, the parties have informed the Court that, while the case remains settled in principle, final execution of the settlement agreement has been delayed by the travel schedules of the parties; it is

ORDERED, that the deadline for the parties to request that the case be reopened should the settlement not be ultimately consummated is hereby extended to July 27, 2014.

SO ORDERED.

Dated: New York, New York

June 27, 2014



Edgardo Ramos, U.S.D.J.

**UNITED STATES DISTRICT COURT  
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Civil Action No. 13 Civ. 8915 (ER)

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS THE COMPLAINT**

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Defendants Marc Anthony Productions, Inc. (“MAP”), Nuyorican Productions Inc. (“Nuyorican”), and Univision Communications, Inc. (“Univision”) (collectively, the “Defendants”) hereby submit this memorandum of law in support of their motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

### **PRELIMINARY STATEMENT**

Plaintiff’s claims in this case fail because the law—whether Copyright or common law—simply does not protect generic, non-novel ideas. On the contrary, such ideas “remain forever the common property of artistic mankind.” *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985). Nevertheless, Plaintiff alleges that the Defendants’ television program *¡Q’Viva! The Chosen* (“*Q’Viva*”) infringes his unregistered treatment for a reality show to be called “Crossover,” because both shows are, at the most abstract level, reality talent competition shows featuring Latin American contestants. Yet, beyond that broad premise, and the generic stock elements that necessarily flow from the basic idea (and which are common to countless reality shows), “Crossover” and *Q’Viva* are in no way similar.

Plaintiff alleges that *Q’Viva* and his work share such common elements as celebrity hosts, talent searches, performance showcases, and elimination of contestants. But these are all staples of countless reality shows, including, in particular, shows like *American Idol* and *So You Think You Can Dance*, which were created by the creator and co-executive producer of *Q’Viva*, Simon Fuller. Because the reality television genre typically relies on standard plot devices and generic elements – which are not protected by copyright – courts consistently have rejected copyright claims involving reality programs. *See, e.g., Bethea v. Burnett*, No. 04 Civ. 7690, 2005 WL 1720631 (C.D. Cal. June 28, 2005) (*The Apprentice* did not infringe treatment for show called *C.E.O.*); *CBS v. ABC*, No. 02 Civ. 8813, 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. Jan. 14, 2003) (*Survivor* did not infringe *I’m a Celebrity, Get Me Out of Here*). So too here: even if Plaintiff

were to register his work—without which, his suit must be dismissed at the outset—and assuming solely for purposes of this motion that Defendants had access to Plaintiff’s treatment, Plaintiffs cannot come close to showing the requisite “substantial similarity” in *protectible* expression between his proposed reality show and *Q’Viva*.

Plaintiff’s state law claims for unjust enrichment and unfair competition fare no better. First, those claims must be dismissed as preempted by the Copyright Act, since they are based on the exact same alleged misconduct as his copyright claim. But even if not preempted, his claims fail under well settled New York law “requir[ing] that an idea be original or novel for it to be protected as property.” *Murray v. NBC*, 844 F.2d 988, 993-94 (2d Cir. 1988). *abrogated on other grounds by Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000). Because Plaintiff cannot possibly show that his idea—which is little more than a variation on a very well-worn theme—is novel, his state law claims fail on the merits, and must be dismissed with prejudice.

### **FACTUAL BACKGROUND<sup>1</sup>**

#### **A. The Parties**

Plaintiff is an individual residing in Trenton, New Jersey. Defendant MAP is a New York corporation, which serves as the production company of the Latin American singer, songwriter, actor and record producer, Marc Anthony. Defendant Nuyorican is a California corporation, which serves as the production company of the Latin American singer, dancer, actress, producer, and recording artist Jennifer Lopez, who was a judge on *American Idol*. Ms. Lopez and Mr. Anthony were married in 2004, but separated in July 2011. Defendant Univision is a Delaware corporation, which owns and operates numerous Spanish language

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<sup>1</sup> Defendants accept as true the factual allegations of the Complaint for the purposes of this Motion only.

television networks and television and radio stations.

**B. Plaintiff's Treatment and Its Alleged Submission to Defendants**

Plaintiff alleges that between 2005 and 2008, he submitted a "treatment" for a "reality show concept" to each of the Defendants. (Complaint, Dkt. No. 2 ("Compl.") at 2-3.) Specifically, Plaintiff alleges that in or about April 2005, representatives of Defendant Univision "requested information by fax asking for details about [his] reality show concept so that program development could evaluate the concept." (Compl. at 3.) He alleges that he contacted Univision by phone, but that his messages were not returned. However, he does not allege that he actually submitted the treatment to Univision.

Plaintiff next alleges that in November and December 2007, he presented his concept to MAP. Representatives of MAP informed him that Bigram Zayas of MAP was "very interested in reviewing the treatment," and that Mr. Zayas "enjoyed the contents of information pertaining to [Plaintiff's] reality show concept." (*Id.* at 2.) Eventually, in early 2008, MAP employees informed Plaintiff that Marc Anthony was not interested in developing the show, but he should send the materials to Jennifer Lopez at Nuyorican. Plaintiff requested and received the copy of his treatment back from MAP. (*Id.* at 3.) Plaintiff alleges that Ms. Lopez had been "present when Mr. Zayas presented [his] treatment to Marc Anthony at their Long Island mansion," though Plaintiff does not allege how he knows this fact. (*Id.*) Plaintiff subsequently submitted his treatment to Nuyorican, but alleges that "[n]ot one representative from Nuyorican Productions ever got back to [him]." (*Id.*)

After seeing trailers for *Q'Viva* in 2012, Plaintiff called MAP to inquire about the alleged similarities to his treatment. He expressed his concerns to Mr. Zayas, who told him that he would speak to Marc Anthony and get back to Plaintiff, but Plaintiff did not hear back from Mr. Zayas again. (*Id.* at 4.) Plaintiff also alleges that messages he left at Nuyorican and Univision

were not returned. (*Id.*)

### C. The Two Works<sup>2</sup>

Since “a determination of substantial similarity requires a detailed examination of the works themselves,” *Williams v. Crichton*, 84 F.3d 581, 583 (2d Cir. 1996) (citation and quotation marks omitted), a summary of each of the works at issue follows.

#### 1. Plaintiff’s Treatment

Plaintiff alleges that his reality show concept was a part of a “three phase concept (Board Game, Interactive Web Game and Reality Show),” called “Miami Beach, The Game!” (Compl. at 3.) The reality show component, which Plaintiff allegedly pitched to Defendants, was called “Crossover.” (*Id.*) Plaintiff alleges that “the premise was to produce a reality show and have it aired on both Hispanic and Anglo TV at the same time. The show was to be hosted by two well known Latino celebrities who would travel in search of artists and create a path of success and future for the next crossover superstar.” (*Id.*)

Plaintiff’s written treatment for “Crossover” (the “Treatment”) is a page-and-a-half of large-font type. The Treatment describes Crossover as “a bi-lingual format reality show concept that has been created to discover future artists and superstars.” (McNamara Dec. Ex. A (“Treatment”) at 1.) The two celebrity hosts “would start the ‘discovery’ phase by traveling all over Latin America in search of contestants for the show. They would find ‘the future artists’ by

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<sup>2</sup> In evaluating this motion, the Court may consider documents that are “incorporated by reference or integral to the claim” (which includes the treatment and the episodes of *Q’Viva*, annexed, respectively, as Exhibit A and Exhibits B-G to the Declaration of Elizabeth A. McNamara in Support of Motion to Dismiss (“McNamara Dec.”)). *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 & n.3 (2d Cir. 2002) (courts may consider on a motion to dismiss the documents plaintiff relied on in drafting the complaint); *Hogan v. DC Comics*, 983 F. Supp. 82, 84 (N.D.N.Y. 1997) (court must evaluate the underlying works referenced in plaintiff’s complaint, even if not attached to the complaint, to determine if plaintiff has sufficiently stated a copyright claim). Should the Court deem the evidence to be not incorporated in the complaint, it can convert this motion to one for summary judgment. *See* Fed. R. Civ. P. 12(d); *see Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250, 2007 WL 4258196, at \*2 (S.D.N.Y. Dec. 3, 2007) (converting 12(b)(6) motion into summary judgment motion, and granting summary judgment without discovery).

going to shows, concerts, events, festivals, and other places, find the most talented and then bring them to the United States to showcase those talents.” (*Id.*) The contestants would then “compete showcasing their respective talents (singing, dancing, band performances, etc.) in an elimination type format as they attempt to make it to the ‘final phase’ where they would compete for the title of ‘Crossover Champion.’” (*Id.*) The Treatment is indeterminate about what being named “Crossover Champion” would entail, stating that the contestants would have “a chance to win prizes, monies, entertainment contracts, or simply international exposure and acceptance on both markets that could ‘open doors’ for possible lucrative deals.” (*Id.* at 1-2.) The Treatment states that “[t]he ‘Grand Finale’ competition show could be aired on both Spanish and American Networks.” (*Id.* at 2.) The Treatment also contemplates the possibility of a “‘live’ event that would be held at a yet to be determined location. Prime considerations could be Miami, Las Vegas or Los Angeles as those locations have a high Hispanic/American presence.” (*Id.*)

Plaintiff alleges that he registered the written treatments for “Miami Beach, The Game!” and “Crossover” with the Writers Guild of America East (“Writers Guild”), and includes certificates of that registration with his Complaint. (*See* Compl. at 4.) He does not allege that he registered either of the treatments with the U.S. Copyright Office.

## 2. *¡Q’Viva! The Chosen*<sup>3</sup>

*Q’Viva* was a reality television series created by reality television impresario Simon Fuller (creator of popular reality talent competition shows including *American Idol* and *So You Think You Can Dance*), who co-executive produced the show with Marc Anthony, Jennifer Lopez and concert director and choreographer Jamie King. (*See* McNamara Dec. Ex. B (Episode

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<sup>3</sup> “*Q’Viva*” is a contraction of the Spanish exclamation “¡Que Viva!”, which translates roughly to “Long live...,” as in, for example, “¡Que Viva Mexico!”

101 (Opening Credits).<sup>4</sup> The concept of the show is effectively summarized by the voiceover introduction to the first episode, which is interspersed with clips from the series:

Two of the biggest superstars in the world – Marc Anthony and Jennifer Lopez – have joined forces with legendary tour director, Jamie King – to put together the ultimate live Latin show in Las Vegas. To assemble their cast, they’ve committed to traversing two continents and seeking out talent on their home turf. There’s a whole world of incredible artists to uncover. To put together their Vegas show, they’ll need dancers, singers, musicians, and raw street talent. Nothing is off limits. They’re looking for passion, strength, sensuality—artists that define the spirit of Latin America. Anyone who inspires them will get tickets to the next stage in L.A., right on the spot. Once in Los Angeles, they’ll face Jennifer, Marc and Jamie for the first time, to fight for a place in the cast of the live *Q’Viva* show in Las Vegas. Get ready for the journey of a lifetime—one that’s going to change everything.

(See McNamara Dec. Ex. B (Episode 101/102).) Although the show is a talent competition show of sorts, the show did not feature a single “winner.” Rather, numerous groups competed to be considered for the large, multi-act cast of the live Las Vegas show, and ultimately several dozen of the contestants were “winners,” in that they participated in the show.

*Q’Viva* aired in Spanish on Univision in the United States, and networks in countries throughout North, South and Central America starting in January 2012. A version in English and Spanish (with English subtitles) aired on the Fox Network in the United States during March and April 2012. The English version comprised six double-length episodes of two hours each (including commercial breaks).<sup>5</sup>

During the first half of the series, Mr. Anthony and Ms. Lopez are shown traveling separately (sometimes alongside Mr. King) through several Latin American countries where they

<sup>4</sup> The opening credits list Mr. Fuller, Mr. Anthony, Ms. Lopez and Mr. King as “Executive Producer.” After the closing credits, production logos for Nuyorican, MAP, King Productions (owned by Jamie King) and XIX Entertainment (owned by Simon Fuller) are displayed. (See McNamara Dec. Exs. B-G.)

<sup>5</sup> See McNamara Dec. Exs. B–G (Episodes 101/102, 103/104, 105/106, 107/108, 109/110, 111/112).

encounter performers and performing groups in various contexts. The performers who the host believes could be good additions to the live Las Vegas show are given tickets to Los Angeles by the host. (See McNamara Dec. Exs. B-D, Episodes 101/102, 103/104 and the first half of 105/106.) In the second half of the series, the acts who were invited to audition in Los Angeles perform for all three hosts together. Some of the acts are invited to remain in contention for the final cast, while others are sent back home. For several of the performing groups, only some of the performers within the group are invited to stay, while the rest of the group is eliminated. (See McNamara Dec. Exs. D-E, Episodes 105/106, 107/108.) The remaining performers are invited to the “rehearsal compound,” where they live together and are encouraged to collaborate with each other to further develop their acts. The performers also begin rehearsing with the directors and choreographers of the Las Vegas show. (See McNamara Dec. Ex. F, Episode 109/110.) Throughout this stage, individual performers are eliminated or choose to leave for personal reasons. The show also focuses on certain human interest elements, including one contestant’s struggle to obtain medicine for his daughter while he is in Los Angeles, and a romantic relationship that develops between two of the performers from different groups.<sup>6</sup> In the final episode, the cast of the *Q’Viva* show is finalized and the hosts and contestants reflect on their journey. (See McNamara Dec., Ex. G, Episode 111/112.)

The *Q’Viva* live show played to a sold out crowd at the Mandalay Bay Events Center in Las Vegas on May 26, 2012. *Q’Viva* was not renewed for additional seasons.

## **ARGUMENT**

### **I. STANDARD ON A MOTION TO DISMISS**

On this Rule 12(b)(6) motion, Defendants accept, as they must, the well-pleaded

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<sup>6</sup> Another thread that runs throughout the series is the emotional responses of Ms. Lopez and Mr. Anthony to the process, in particular because the couple had announced their separation just before the series was filmed.



allegations of the complaint. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 61 (2d Cir. 2010). Nonetheless, “[i]n order to withstand a motion to dismiss, a complaint must plead ‘enough facts to state a claim for relief that is plausible on its face.’” *Parane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[A] plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Although plaintiffs are not required to plead detailed factual allegations, they must plead “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must plead sufficient facts to “nudge[] their claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

## II. PLAINTIFF’S COPYRIGHT CLAIM MUST BE DISMISSED

Plaintiff’s copyright claim must be dismissed for two separate and independently sufficient reasons. First, he has not registered his work with the Copyright Office. Second, even if he had registered his work, he cannot show any substantial similarity between the protectible expression in his work and *Q’Viva*.

“Copyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying.” *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997); *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). As the Second Circuit has explained, “a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff’s work; and (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectible elements of plaintiff’s.” *Peter F. Gaito Architecture*, 602 F.3d at 63 (citation omitted).

Plaintiff does not have a “valid copyright” because he has not registered his work with



the U.S. Copyright Office. *See* 17 U.S.C. § 411(a). And any similarity between Plaintiff's and Defendants' works concerns generic ideas, not "protectible elements." Accordingly, the copyright claim must be dismissed.

**A. Plaintiff's Copyright Claim Must Be Dismissed Because his Work is Not Registered**

As a threshold matter, Plaintiff's copyright claim must be dismissed because he has not registered his works. Under the Copyright Act, "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." *See* 17 U.S.C. § 411(a). The Supreme Court has held that, while failure to register does not deprive a district court of jurisdiction to hear a copyright claim, registration is a "threshold requirement" that is "a pre-condition to filing suit." *See Reed Elsevier v. Muchnick*, 130 S. Ct. 1237, 1247 (2010). *See also Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ'g Co.*, No. 09 Civ. 2669, 2012 WL 1021535, at \*2 (S.D.N.Y. Mar. 26, 2012) ("Courts in this Circuit require that a plaintiff either hold a valid copyright registration or have applied and been refused a registration as a prerequisite to filing a civil claim." (collecting cases)).

Plaintiff does not allege that he registered his treatment with the Copyright Office. He alleges only that he registered his works with the Writers Guild, and attaches certificates of those registrations. (*See* Compl.) But the Copyright Act requires registration "in accordance with this title"—which includes registration with the U.S. Copyright Office—before filing an infringement action. 17 U.S.C. § 411(a). *See* 17 U.S.C. §§ 408-10 (setting forth statutory requirements and process for copyright registration). Registration with the Writers Guild does not satisfy this requirement. *See Latimore v. NBC Universal, Inc.*, No. 07 Civ. 9338, 2009 WL 1321901, at \*2 (S.D.N.Y. May 11, 2009) (holding that, where complaint alleged registration with

Writers Guild of America, “[c]opyright registration [was] not alleged”). For this reason alone, Plaintiff’s copyright claim cannot survive.

**B. Plaintiff Cannot Plausibly Plead a Copyright Infringement Claim**

**1. Copyright Infringement Requires Substantial Similarity of Protectible Expression and Cannot be Premised On Facts, Ideas or Stock Elements**

In determining whether two works are substantially similar, the key question is “whether a lay observer would consider the works as a whole substantially similar to one another,” *Williams*, 84 F.3d at 590, but where the works contain both protectible and non-protectible elements, as here, courts apply the “more discerning ordinary observer test”, which asks “whether the *protectible elements, standing alone*, are substantially similar.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002-03 (2d Cir. 1995). *See also Key Publ’n’s, Inc. v. Chinatown Today Publ’g Enters., Inc.*, 945 F.2d 509, 514 (2d Cir. 1991) (plaintiff must “show[] [a] substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation”).

In exercising its gatekeeper function by analyzing the works at issue, there are fundamental principles that a court must apply.

First, “[i]t is a principle fundamental to copyright law that a copyright does not protect an idea, but only the expression of an idea.” *Williams*, 84 F.3d at 587 (internal quotation marks and citations omitted). *See also* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

Second, the Second Circuit has repeatedly held that stock scenes and stock themes, often termed *scenes à faire*, cannot form the basis of a copyright claim. These are defined as

“incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic,” *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980), or as “thematic concepts...which necessarily must follow from certain similar plot situations.” *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976).<sup>7</sup>

Relatedly, because reality television shows typically draw from a limited pool of stock conventions and well-worn premises, courts are reluctant to stifle innovation and creativity by providing protection to a combination of generic or stock elements. As a result, courts routinely dismiss copyright claims based on alleged infringement of the concept for a reality show.<sup>8</sup>

## **2. The Court May Dismiss Plaintiff’s Claims as a Matter of Law, Without Discovery, Based on the Lack of Substantial Similarity of the Works**

Courts routinely dismiss on pre-discovery motions meritless copyright infringement claims like Plaintiff’s under either Rule 12(b)(6) or Rule 56 where, as here, the alleged similarity “concerns only noncopyrightable elements of plaintiff[s] work or no reasonable trier of fact

<sup>7</sup> See, e.g., *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (holding that for cop television show set in the Bronx, “[e]lements such as drunks, prostitutes, vermin and derelict cars” as well as “[f]oot chases[.]...the morale problems of policemen...[and] the Irish cop” were unprotectible *scenes à faire* or stock elements); *Hoehling*, 618 F.2d at 979 (revelry in German beer hall, common greetings of that time such as “Heil Hitler” and songs such as German national anthem were *scenes à faire* in works about Hindenburg).

<sup>8</sup> See *Castorina v. Spike Cable Networks, Inc.*, 784 F. Supp. 2d 107 (E.D.N.Y. 2011) (holding that treatment for sports reality show pitting amateurs against professionals was not infringed by *Pros v. Joes* show with similar premise); *Pino v. Viacom, Inc.*, No. 07-3313, 2008 WL 704386 (D.N.J. Mar. 4, 2008) (same); see also *Rodriguez v. Heidi Klum Co., LLC*, No. 05 Civ. 10218, 2008 WL 4449416 (S.D.N.Y. Sept. 30, 2008) (holding that *Project Runway* did not infringe plaintiff’s treatment for fashion design competition show called “*American Runway*”); *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288, 1295-96 (C.D. Cal. 2008) (holding that *The Biggest Loser* did not infringe plaintiff’s treatment for show entitled “*Fat to Phat*”); *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124 (C.D. Cal. 2007) (holding that *Rachael Ray* show, which featured episodes where the host cooked with a celebrity in their home did not infringe plaintiff’s treatment for *Showbiz Chefs*, a talk show featuring celebrities cooking in their kitchens with a host); *Quaglia v. Bravo Networks*, No. Civ. A 04-10460, 2006 WL 721545, at \*3 (D. Mass., Mar. 21, 2006) (holding that reality show *The It Factor*, about struggling actors in New York City, did not infringe plaintiff’s documentary called “*The Ultimate Audition*,” which was also about struggling actors), *aff’d*, No. 06-1864, 2006 WL 3691667 (1st Cir. Dec. 15, 2006); *Bethea*, 2005 WL 1720631 (holding that *The Apprentice* did not infringe plaintiff’s treatment for business competition show called “*C.E.O.*”); see also *CBS v. ABC*, 2003 U.S. Dist. LEXIS 20258 (denying preliminary injunction motion, holding that *I’m a Celebrity, Get Me Out of Here!* did not copy protectable elements from *Survivor*).

could find the works substantially similar.” *Williams*, 84 F.3d at 587 (quotation marks and citation omitted). The Second Circuit has explained that where the works in question are incorporated into a plaintiff’s complaint, “it is entirely appropriate for the district court to consider the similarity between those works in connection with a motion to dismiss, because the court has before it all that is necessary in order to make such an evaluation.” *Peter F. Gaito Architecture*, 602 F.3d at 64. If the court determines that the two works are not substantially similar as a matter of law, the court “can properly conclude that the plaintiff’s complaint, together with the works incorporated therein, do not ‘plausibly give rise to an entitlement to relief.’” *Id.* (quoting *Iqbal*, 556 U.S. at 679). See also *Gal v. Viacom Int’l, Inc.*, 403 F. Supp. 2d 294, 305 (S.D.N.Y. 2005) (“[T]here is ample authority for the proposition that a district court may make [the substantial similarity] determination on a motion to dismiss for failure to state a claim under Rule 12(b)(6).”). As the Second Circuit has repeatedly emphasized, courts “have an important responsibility...to monitor the outer limits within which juries may determine” the issue of substantial similarity. *Warner Bros. v. ABC*, 720 F.2d 231, 245 (2d Cir. 1983).

Because dismissal on motion is based on an ordinary observer’s comparison of the actual, published works, discovery is not necessary. See *Peter F. Gaito Architecture*, 602 F.3d at 64 (“[W]hat is required is only a . . . comparison of the works”); *Polsby v. St. Martin’s Press, Inc.*, 8 F. App’x 90, 92 (2d Cir. 2001) (discovery “not necessary for a comparison of the works in order to assess whether, as to the protectible elements, they were substantially similar”). “[I]n any case involving substantial similarity, the actual texts are the relevant evidence.” *Nelson v. Grisham*, 942 F. Supp. 649, 652 (D.C. Cir. 1997) (citing *Walker*, 784 F. 2d at 51), *aff’d*, 132 F.3d 1481 (D.C. Cir. 1997). “[T]he works themselves, not descriptions or impressions of them, are the real test for claims of infringement.” *Walker*, 784 F.2d at 51.

Here, by simply reviewing Plaintiff's treatment and comparing it to *Q'Viva* – after stripping the works of their generic ideas and stock elements – only one conclusion can reasonably be reached: there is no similarity between the works as a matter of law, and Plaintiff's claim of copyright infringement must be rejected.

### **3. There is No Substantial Similarity of Protectible Expression Between Plaintiff's Treatment and *Q'Viva***

A review of the respective works readily reveals that the only similarities between Plaintiff's Treatment and *Q'Viva* are generic, unprotectable ideas or stock *scenes à faire* that are staples of the reality television genre or necessarily follow from his unprotectible idea. Moreover, even at the most abstract level, *Q'Viva* has a fundamentally different premise from Crossover.

At bottom, Plaintiff alleges nothing more than infringement of an unprotectible idea. In fact, Plaintiff's own Complaint repeatedly refers to his work as a "reality show concept." (*See* Compl. at 1-3.) A "concept"—along with an "idea" and a "premise"—is among the items that are expressly excluded from copyright protection by the statute itself. 17 U.S.C. § 102(b).

Plaintiff's treatment describes the generic idea of a talent competition reality show, which is indisputably "a basic staple of modern television programming." *Rodriguez*, 2008 WL 4449416, at \*4 n.11. Countless programs are centered on the same basic concept, including many similar, popular shows of the present—like *American Idol*, *The Voice*, *The Sing-Off*, *America's Got Talent*, *So You Think You Can Dance*, and *The X-Factor*—and the past—like *Star Search*, *The Gong Show*, and *Showtime at the Apollo*. The only element distinguishing Plaintiff's concept from these shows is that his show would focus on Latin American contestants and court a Latin American audience. But that slight variation "can be seen as an effort to exploit [a] trend in a new and different context," and not as new expression protectible by

copyright. *Milano*, 584 F. Supp. 2d at 1295-96. And even that idea is hardly unique, since numerous reality television shows featuring Latin American contestants have already existed, including *Latin American Idol*, which aired from 2006 to 2009.

Courts have repeatedly held in the reality television show context that similar slight-variations-on-a-theme are merely uncopyrightable ideas, including: “a reality television show set in the corporate environment,” *Bethea*, 2005 WL 1720631 at \*12; “a fashion design reality show,” *Rodriguez*, 2008 WL 4449416, at \*5; “a sports-themed reality show that pits amateurs against professional athletes,” *Pino*, 2008 WL 704386, at \*5; “a cooking- and home-related talk show,” *Zella*, 529 F. Supp. 2d at 1134; a “weight loss competition” show, *Milano*, 584 F. Supp. 2d at 1296; and a reality program “show[ing] the day-to-day experiences of young actors in New York City,” *Quaglia*, 2006 WL 721545, at \*1.<sup>9</sup>

Beyond the unprotected concept that the works share, each of the alleged specific similarities between Plaintiff’s Treatment for “Crossover” and *Q’Viva* are nothing more than stock elements and *scenes à faire*, which “necessarily flow from the uncopyrightable idea” of a Latin American talent competition show. *Rodriguez*, 2008 WL 4449416, at \*5. Plaintiff’s Complaint points in particular to the idea of having the show “air[] on both Hispanic and Anglo TV at the same time,” having it “hosted by two well known Latino celebrities,” and featuring the hosts “travel[ing] in search of artists” to “create a path of success and future for the next crossover superstar.” (Compl. at 2.) These are precisely the types of stock elements that courts have consistently rejected as a basis for infringement in this context, and, whether alone or in

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<sup>9</sup> Earlier decisions (before the reality television era) involving reality-type shows also held that the idea of the show itself is not protectible. See, e.g., *Kalmansohn v. J.M. Prods.*, No. CV 87–5490, 1988 WL 1517050, at \*2 (C.D. Cal. July 18, 1988) (“a game show based upon video games is not protectable”); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, No. 86 Civ. 5037, 1988 WL 3013, at \*3 (S.D.N.Y. Jan. 4, 1988) (“[t]he idea of a game [show] in which people lie and contestants guess who is telling the truth is not protectible”); *dick clark co. v. Alan Landsburg Prods., Inc.*, No. CV 83–3665, 1985 WL 1077775, at \* 3 (C.D. Cal. June 13, 1985) (holding that creator of TV’s *Censored Bloopers* had “no copyright interest in the idea of a show based on outtakes”).

combination with each other, they do not rise to the level of protectible expression.

In fact, courts have rejected even more specific combinations of otherwise generic elements as a basis for infringement because they are mere *scenes à faire*. For example, in *Bethea v. Burnett*, 2005 WL 1720631, the plaintiffs alleged that the NBC show *The Apprentice*, which is hosted by and stars Donald Trump, infringed their treatment for a business competition reality show called “*C.E.O.*” The plaintiffs alleged that both shows “depict a group of dynamic contestants from varied backgrounds competing in business challenges in a dynamic corporate environment for promotions and benefits, and ultimately, a real job as a top-level executive of a corporation.” *Id.* at \*11. The court rejected these similarities because they are “nothing more than a string of generic ‘ideas’ which [are] not protected by copyright law.” *Id.* The plaintiffs also argued that the shows were similar because both featured a boardroom, but the court pointed out that this was a “classic example of *scenes à faire*,” because “one would expect to find a boardroom . . . in any television program that is set in a corporate environment.” *Id.* at \*12. The similarities went even further: the plaintiffs’ treatment contemplated Donald Trump himself hosting the show, but the court explained that “Plaintiffs cannot copyright the idea of having a well-known business leader, or even more specifically Donald Trump, host a reality television program.” *Id.* at \*13.

Similarly, in *Pino*, the court held that

the presence of hosts who provide witty commentary on the contestants and competition, introductory sequences that feature highlights of sporting events and sounds associated with various sports, spotlights on professional athletes and amateur contestants, camera shots of athletic fields or arenas, trash-talking exchanges, and sports contests are *scenes à faire* that flow necessarily from the idea of a sports-themed reality show that pits amateurs against professional athletes.

2008 WL 704386, at \*5; see also *Castorina*, 784 F. Supp. 2d at 112 (rejecting similar claim of



infringement by *Pros v. Joes*, because the plaintiff's "treatment's choices in selecting, coordinating and arranging stock elements are largely inherently functional to the idea of a sports reality show, not original creative expressions of any particular idea" (quotation marks and citation omitted)). And in *Rodriguez*, which concerned the show *Project Runway*, the court held that "[t]he use of a panel of judges composed of fashion industry experts, a design workroom with sewing machines, a specific number of contestants, professional models, hairstylists, make-up artists, weekly episodes and the setting of New York (among other enumerated similarities) all necessarily flow from the uncopyrightable idea of a fashion design reality show." 2008 WL 4449416, at \*5.

Here, the bare concept for a talent competition show with celebrity hosts traveling around a region to discover contestants, bringing the contestants who pass muster to a central location, and having the contestants showcase their talents in an "elimination type format" cannot be copyrighted, and, in fact, describes countless popular shows, including, most significantly, *American Idol* (also created by Simon Fuller). Indeed, each of these elements "is not only not original to Plaintiff . . . , it is a staple of the reality television genre." *Bethea*, 2005 WL 1720631, at \*12. Featuring hosts that are well known to both the Latin American and English-speaking communities, and making the show bilingual, necessarily flow from the unprotectible idea of a Latin American talent competition show. Plaintiff cannot claim a monopoly on those ideas.

As then-Judge Preska stated, in denying preliminary injunctive relief on the claim that the jungle-survival reality show *I'm a Celebrity, Get Me Out of Here* infringed plaintiff's copyright in *Survivor*, "providing protection to a combination of generic elements without more—that is, without consideration of the presentation or expression of those elements—would stifle innovation and would stifle the creative process." *CBS*, 2003 U.S. Dist. LEXIS 20258, at \*24-25; *id.* at \*21, \*23



(holding that “[v]oyeur verite, hostile environment in the deserted island sense . . . building of social alliances, challenges arising from the game show element and serial elimination” were unprotected “elements defining a genre”). *See also Zella*, 529 F. Supp. 2d at 1135 (holding that, although the formats of the plaintiff’s and defendant’s shows “may look similar,” “so does every talk show to some extent,” and “[e]xtending copyright protection over the generic format of a cooking/talk show would stretch the bounds of copyright law beyond what it was intended to cover”).

Plaintiff makes no allegations of infringement of the “presentation or expression” of the elements in his treatment—nor could he, since his treatment is essentially a bare-bones list of stock elements, running less than 250 words.<sup>10</sup> And he ignores the critical fact that the two shows, though sharing stock elements common to countless reality shows, are fundamentally different in their basic premises. Plaintiff envisions a show centered on a search for “the next crossover superstar,” where the contestants would compete to reveal a single winner who would be crowned the “Crossover Champion,” not unlike *American Idol* or other talent competition shows. (Compl. at 2, Treatment at 2.) The name also suggests that the purpose of the search is to find a performer who would “cross over” to become popular with mainstream English-speaking audiences. *Q’Viva’s* premise, by contrast, is a search for many different acts to participate in a live showcase of Latin American talent. Though some contestants are eliminated from the cast along the way, there is no single “winner.” Rather, several dozen different performers are featured in the ultimate live show (which was not aired as part of the television series). *See generally* McNamara Dec. Exs. B-G. These fundamentally different premises make the similarities between the generic elements even less significant. *See Rodriguez*, 2008 WL 4449416, at \*5 (finding fashion design competition shows not similar where one was “focused on the search for the next great high-class fashion

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<sup>10</sup> Courts have held that this type of “vagueness . . . also undercuts [a treatment’s] protectability.” *Castorina*, 784 F. Supp. 2d at 111-12.

designer” and the other featured “aspiring fashion designers compet[ing] to create the best moderately priced clothing line for a ‘Real American Man or Woman’”); *Bethed*, 2005 WL 1720631, at \*12 (noting that the “final prize” in the two shows was completely different).

In sum, Plaintiff cannot possibly show substantial similarity between the protectible expression in his work and *Q’Viva*. Accordingly, even if he were to register the copyright in his treatment, his claim must still be dismissed as a matter of law.

### **III. PLAINTIFF’S UNJUST ENRICHMENT AND UNFAIR COMPETITION CLAIMS MUST BE DISMISSED**

Plaintiff’s state law claims for unjust enrichment and unfair competition must be dismissed for two reasons. First, those claims are both preempted by the Copyright Act, and therefore must be dismissed. Second, he cannot show that his ideas are sufficiently original and novel to state a claim based on misappropriation of an idea.

#### **A. Plaintiff’s State Law Claims Are Preempted by the Copyright Act**

The Copyright Act expressly preempts “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . .” 17 U.S.C. § 301.<sup>11</sup> Thus, the Act exclusively governs a claim when “(1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106.” *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). The first prong of this test is referred to as the “subject matter requirement,”

<sup>11</sup> Section 106 provides that a copyright owner will have the exclusive right, *inter alia*, “(1) to reproduce the copyrighted work in copies . . . ; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; [and] (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.” 17 U.S.C. § 106.

and the second prong is referred to as the “general scope requirement.” *Id.* Both are satisfied here. State law claims that meet both prongs must be dismissed as preempted.

**1. Plaintiff’s Work Falls Within the Subject Matter of the Copyright Act for Preemption Purposes**

Courts interpret the “subject matter requirement” “broad[ly].” *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 430 (2d Cir. 2012). Works may fall within the subject matter of copyright for purposes of preemption “even if they contain material that is uncopyrightable under section 102,” such as unprotectible ideas. *Id.* at 429. *See also Briarpatch*, 373 F.3d at 306 (“To the extent that the project includes non-copyrightable material, such as ideas, these are not sufficient to remove it from the broad ambit of the subject matter categories.”); *NBA v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997) (“Section 301 preemption bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements”). As the Fourth Circuit put it, “the shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.” *U.S. ex rel. Berge v. Board of Trs. of Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997).

Plaintiff’s work falls well within the subject matter of copyright for preemption purposes. Plaintiff’s written treatment is a literary work protected by 17 U.S.C. § 102(a)(1). Although, as argued above, Plaintiff’s *ideas* are not protected by the Copyright Act, courts consistently hold that “for purposes of preemption, the Copyright Act applies with equal force to ideas.” *Panizza v. Mattel, Inc.*, No. 02 Civ. 7722, 2003 WL 22251317, at \*3 (S.D.N.Y. Sept. 30, 2003).

Therefore, his claims meet the first prong of the preemption test.

**2. Plaintiff’s Claims Fall Within the General Scope of Rights Protected By the Copyright Act**

In order for a state law claim to meet the “general scope” requirement, it must be based on a right that “may be abridged by an act that would, in itself, infringe one of the exclusive

rights provided by federal copyright law. In other words, the state law claim must involve acts of reproduction, adaptation, performance, distribution or display,” and “must not include any extra elements that make it qualitatively different from a copyright infringement claim.” *Briarpatch*, 373 F.3d at 305. As one court in this District noted, in holding that state law claims based on misappropriation of an idea for a reality show were preempted, “the Court of Appeals has explicitly ruled that New York misappropriation, unfair competition and unjust enrichment claims are fundamentally similar to copyright infringement claims and thus are preempted by the Copyright Act.” *Rodriguez*, 2008 WL 4449416, at \*7. Accordingly, courts in this circuit routinely dismiss as preempted state law claims for unjust enrichment and unfair competition that are, as here, based on nothing more than allegedly copying or adapting the plaintiff’s work.<sup>12</sup>

Plaintiff’s state law claims readily meet the “general scope” requirement. All of his claims are based on identical alleged misconduct: the alleged reproduction and adaptation of his idea for a reality television show. Plaintiff does not allege any “extra element” in support of his unjust enrichment and unfair competition claims; they are simply based on the alleged copying of his ideas. Such claims are preempted by the Copyright Act and must therefore be dismissed.

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<sup>12</sup> Unjust enrichment: *See Stewart v. World Wrestling Fed’n Entm’t, Inc.*, No. 03 Civ. 2468, 2005 WL 66890, at \*5 (S.D.N.Y. Jan. 11, 2005) (“The overwhelming majority of courts in this circuit have held that an unjust enrichment claim based upon the copying of subject matter within the scope of the Copyright Act is preempted.” (quoting *Boyle v. Stephens, Inc.*, No. 97 Civ. 1351, 1998 WL 690816, at \*6 (S.D.N.Y. Sept. 29, 1998) (collecting cases))); *see also Briarpatch*, 373 F.3d at 306-07; *Faktor v. Yahoo! Inc.*, No. 12 Civ. 5220, 2013 WL 1641180, at \*5 (S.D.N.Y. Apr. 16, 2013) (“This Circuit has consistently held that unjust enrichment claims do not contain an ‘extra element’ and thus satisfy the general scope requirement.”).

Unfair competition: *Walker*, 784 F.2d at 53 (holding that a plaintiff’s “cause of action for unfair competition is preempted by the federal copyright laws to the extent it seeks protection against copying of” the plaintiff’s work); *see also Kregos v. Associated Press*, 3 F.3d 656, 666 (2d Cir. 1993); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992).

**B. Even If Not Preempted, Both Claims May Be Dismissed as a Matter of Law on the Merits**

**1. Plaintiff's Tort Claims Based on Misappropriation of Ideas Fail Because He Cannot Allege That His Ideas Were Novel and Original**

Plaintiff's state law claims are, in substance, based on the alleged misappropriation of his ideas. Both his unjust enrichment and unfair competition claims are "are each premised on the assumption of protectable interests in the Plaintiff['s] idea." *Charity Group LLC v. Absolut Spirits Co.*, No. 08 Civ. 11020, 2009 WL 5083398, at \*3 (S.D.N.Y. Sep. 30, 2009).<sup>13</sup> But it is well settled that "New York law requires that an idea be original or novel in order for it to be protected as property." *Murray v. NBC*, 844 F.2d at 993-94. *See also Sokol Holdings, Inc. v. BMB Munai, Inc.*, 726 F. Supp. 2d 291, 304 (S.D.N.Y. 2010) ("Where an unjust enrichment claim is premised on a plaintiff's submission of an idea to a defendant, the plaintiff must demonstrate the novelty of the idea in order to recover."), *aff'd in relevant part*, 438 F. App'x 45 (2d Cir. 2011); *Alliance Security Prods., Inc. v. Fleming Co.*, 471 F. Supp. 2d 452, 459 (S.D.N.Y. 2007) ("Under New York law, lack of novelty in an idea is fatal to *any* cause of action for its unauthorized use." (quotation marks and citation omitted)), *aff'd*, 290 F. App'x 380 (2d Cir. 2008). This is because "unoriginal, known ideas have no value as property and the law does not protect against the use of that which is free and available to all." *Nadel*, 208 F.3d at 380.

As courts have explained, the test for "novelty" is "rather stringent." *Broughel v. Battery Conservancy*, No. 07 Civ. 7755, 2010 WL 1028171, at \*4 (S.D.N.Y. Mar. 16, 2010):

The idea need not reflect the flash of genius, but it must show

<sup>13</sup> "[T]o claim unjust enrichment, a plaintiff must allege that: "(1) the other party was enriched, (2) at that plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Thayil v. Fox Corp.*, No. 11 Civ. 4791, 2012 WL 364034, at \*4 (S.D.N.Y. Feb. 2, 2012) (quoting *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.2d 173, 182, 944 N.E.2d 1104 (2011) (internal quotation marks and brackets omitted)). An unfair competition claim involving misappropriation is concerned with (1) the taking and use of the plaintiff's property; and (2) competing against the plaintiff's own use of the same property." *Id.* at \*3 (citing *Roy Export Co. Establishment of Vaduz, Lichtenstein v. CBS*, 672 F.2d 1095, 1105 (2d Cir. 1982)).

genuine novelty and invention, and not a merely clever or useful adaptation of existing knowledge.... Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions—all the variations on a basic theme—partake more of the nature of elaboration and renovation than of innovation.

*Khreativity Unlimited v. Mattel, Inc.*, 101 F. Supp. 2d 177, 185-86 (S.D.N.Y. 2000) (citation omitted), *aff'd*, 242 F.3d 366 (2d Cir. 2000). The Second Circuit has explained that

[t]he determination of whether an idea is original or novel depends upon several factors, including, *inter alia*, the idea's specificity or generality (is it a generic concept or one of specific application?), its commonality (how many people know of this idea?), its uniqueness (how different is this idea from generally known ideas?), and its commercial availability (how widespread is the idea's use in the industry?).

*Nadel*, 208 F.3d at 378.

Above all, where “an idea consists in essence of nothing more than a variation on a basic theme . . . novelty cannot be found to exist.” *Murray*, 844 F.2d at 993. Accordingly, courts in this circuit have dismissed at the pleading stage claims based on misappropriation of ideas for reality shows that lack novelty. *See Thayil*, 2012 WL 364034, at \*5 (dismissing state law claims, including unjust enrichment and unfair competition, based on “marketing plan” that plaintiff alleged defendants used to create *American Idol*, *So You Think You Can Dance*, and other reality shows because his proposal involved “activit[ies] that any commercial venture seeking to create a competitive reality show would undertake”); *Charity Group*, 2009 WL 5083398, at \*3 (holding that idea for “‘best-bartender’ reality show is not novel,” and dismissing claims for unfair competition and unjust enrichment under Rule 12(b)(6)).

Here, Plaintiff cannot show the requisite degree of novelty in order to assert tort claims based on misappropriation of those ideas. As discussed above, and as recognized by numerous court decisions, reality shows—and talent competition shows in particular—are some of the most

popular programs on television. The format of many of these shows is nearly identical to the rough format outlined in Plaintiff's Treatment: celebrity hosts, searching for contestants, talent competitions, and elimination of contestants until one contestant is crowned the winner. Plaintiff's "idea" was simply to adapt those well-worn concepts for a specifically Latin American audience. But marketing one of the most popular television show formats to the single largest ethnic minority group in the country is "nothing more than a variation on a basic theme." *Murray*, 844 F.2d at 993.<sup>14</sup>

The Second Circuit's decision in *Murray* is directly on point. In that case, the plaintiff submitted a proposal to NBC for a sitcom starring Bill Cosby about "the family life of a Black American family," with two professional parents and five children. 844 F.2d at 989-90. Although NBC personnel expressed interest in the proposal initially, the plaintiff's idea was ultimately not pursued. Four years later, *The Cosby Show* premiered to great acclaim. The plaintiff sued, claiming that NBC misappropriated his idea. The plaintiff pointed to media response to *The Cosby Show*, which praised the show as a "unique" and "revolutionary" portrayal of an African-American family on network television. The Second Circuit did "not dispute the fact that the portrayal of a nonstereotypical black family on television was indeed a breakthrough." *Id.* at 992. Nevertheless, the court affirmed the district court's conclusion that the plaintiff had "merely combined two ideas which had been circulating in the industry for a number of years—namely, the family situation comedy, which was a standard formula, and the casting of black actors in non-stereotypical roles." *Id.* at 991. In fact, Bill Cosby himself had been talking about the basic idea behind the show in interviews as far back as 1965. *Id.* at 989.

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<sup>14</sup> See U.S. Census Bureau, USA Quick Facts, <http://quickfacts.census.gov/qfd/states/00000.html> (estimating that 16.9% of the population identifies as "Hispanic or Latino" as of 2012, higher than any other ethnic minority group). The court may take judicial notice of U.S. government census statistics. *Victoria Cruises, Inc. v. Changjiang Cruise Overseas Travel Co.*, 630 F. Supp. 2d 255, 263 n.3 (E.D.N.Y. 2008)



The court held that the idea was not novel because it “consist[ed] in essence of nothing more than a variation on a basic theme—in this case, the family situation comedy.” *Id.* at 993.

This case is no different. Just as the plaintiff in *Murray* adapted a stock genre concept for a particular ethno-cultural group, so too did Plaintiff here. Like in *Murray*, Plaintiff’s idea is not novel, and thus cannot be protected as property. Therefore, Plaintiff’s tort claims based on the alleged misappropriation of that idea may be dismissed as a matter of law.

## **2. Even if Plaintiff’s Claims Were to Be Construed as Contract Claims, They Still Fail as a Matter of Law**

Even if the Court were to hold that Plaintiff’s state law claims were not preempted, and construed the claims (which are pleaded as tort claims) as derived from an implied contract, his claims still fail. The Second Circuit has explained that claims based on a breach of a contract regarding the use of an idea require “novelty to the buyer,” whereas misappropriation tort claims require “‘originality’ (or novelty generally).” *Nadel*, 208 F.3d at 374.<sup>15</sup> However, the court was clear that “[t]he existence of novelty to the buyer only addresses the element of consideration necessary for the formation of the contract”—a plaintiff alleging the existence of a contract (whether implied-in-fact or express), must still allege and show all of the usual elements of a contract, including “mutual assent, legal capacity and legal subject matter.” *Id.* at 377 n.5. *See also Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 372 (2d Cir. 2003) (“Under New York contract law, the fundamental basis of a valid, enforceable contract is a meeting of the minds of the parties. If there is no meeting of the minds on all essential terms, there is no contract.” (citation omitted)). In addition, the court held that “in some cases an idea may be so unoriginal or lacking in novelty that its obviousness bespeaks widespread and public knowledge

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<sup>15</sup> The theory behind this approach is that “[w]hile an idea may be unoriginal or non-novel in a general sense, it may have substantial value to a particular buyer who is unaware of it and therefore willing to enter into contract to acquire and exploit it.” *Nadel*, 208 F.3d at 377.



of the idea, and such knowledge is therefore imputed to the buyer.” *Nadel*, 208 F.3d at 378-79.

Plaintiff’s claims could not survive as contract claims for two reasons. First, he does not allege the existence of a valid contract, express or implied. At most, he alleges that he submitted his treatment at the request of the Defendants. But he does not allege any facts to plausibly demonstrate the existence of a “meeting of the minds” or any agreement on such essential terms as price or term. *Opals on Ice Lingerie*, 320 F.3d at 372. Second, his ideas are so generic and lacking in novelty that knowledge of them could be imputed to the Defendants, regardless of who they were. Here, of course, Defendants are the production companies of two popular Latin American entertainers and a Spanish language television network. Plaintiff cannot plausibly allege that the idea of adapting one of the most popular and frequently-replicated television show formats for the Defendants’ own target audience was novel to them. Thus, even as implied contract claims, Plaintiff’s state law claims fail as a matter of law.

### **CONCLUSION**

All of Plaintiff’s claims may be dismissed at the outset because he has not registered his works, and his state law claims are preempted by the Copyright Act. But even if he were to register, all of his claims fail as a matter of law. Because no amendment could cure the fundamental legal deficiencies of Plaintiff’s lawsuit, Defendants respectfully request that the Court dismiss his Complaint with prejudice.

Dated: New York, New York  
May 6, 2014

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

/s/ Elizabeth A. McNamara

Elizabeth A. McNamara

Eric J. Feder

1633 Broadway, 27th Floor  
New York, New York 10019-6708  
Telephone: (212) 489-8230  
Facsimile: (212) 489-8340  
Email: lizmcnamara@dwt.com

*Attorneys for Defendants Marc Anthony Productions,  
Inc., Nuyorican Productions, Inc., Univision  
Communications, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below a copy of the foregoing was served by CMECF and/or mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System. I hereby further certify that a copy of the foregoing has been served, via regular United States mail, postage prepaid, this 6th day of May, 2014, upon:

John J. Jacobs, Jr.  
511 Greenwood Ave. Apt. 11-0  
Trenton, NJ 08609

/s/ Elizabeth A. McNamara

Elizabeth A. McNamara

United States Courthouse  
500 Pearl Street  
New York, NY 10007-1312

13 CV 8915

**UNITED STATES DISTRICT COURT**  
For The  
**SOUTHERN DISTRICT OF NEW YORK**

Plaintiff **JOHN J. JACOBS, JR.**

- VS -

CIVIL ACTION

Defendants **1: MARC ANTHONY PRODUCTIONS, INC.**

**2: NUYORICAN PRODUCTIONS, INC.**

**3: UNIVISION COMMUNICATIONS, INC.**

**ADDRESS OF PLAINTIFF**

JOHN J. JACOBS, JR. 511 GREENWOOD AVENUE -APT 11-O TRENTON, NJ  
08609

**ADDRESSES OF DEFENDANT**

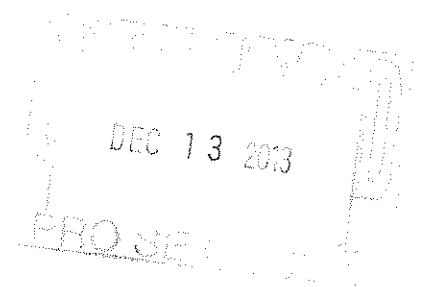
1: MARC ANTHONY PRODUCTIONS, INC. 489 5<sup>th</sup> AVENUE SUITE 24-A  
NEW YORK, NY 10017

2: NUYORICAN PRODUCTIONS, INC. 1100 GLENDON AVENUE #920  
LOS ANGELES, CA 90024

3: UNIVISION COMMUNICATIONS, INC. 605 3<sup>rd</sup> AVENUE #12  
NEW YORK, NY 10017

**STATEMENT OF JURISDICTION**

**SOUTHERN NEW YORK**



**ACTION**

*UNJUST ENRICHMENT, UNFAIR COMPETITION, COPYRIGHT INFRINGEMENT*  
*The defendants damaged my project by producing and airing it on dual networks.*

**Statement of Case**

On November 12, 2007 and December 20, 2007 I presented a **reality show** concept to **Marc Productions, Inc**

At that time **Marc Anthony Productions Inc.** was located at 146 West 57<sup>TH</sup> Street Suite #38C New York, NY 10019.

Communication was conducted by phone, email and USPS.

Cynthia Paulino an executive assistant at Marc Anthony Productions, Inc. was communicating my information directly to **Mr. Bigram Zayas** and his personal secretary Michelle Huerfano who run the day to day operations at Marc Anthony Productions, Inc. Subsequently Ms. Paulino informed me that Mr. Zayas was very interested in reviewing the treatment for my reality show concept, and that I should send it to him at my earliest convenience

Shortly after Mr.Zayas solicited my treatment I sent it to Mr. Zayas by US Mail. As a follow up I called Marc Anthony Productions, Inc. and once again spoke with Ms. Paulino who confirmed that Mr. Zayas had my treatment in his office.

In early **January 2008** I followed up by contacting Mr.Zayas for his status report on my treatment submission.

I was advised that Mr. Zayas was in a meeting however Ms Paulino relayed the following message to me from Mr. Zayas.

I was told that Mr Zayas **enjoyed the contents of information pertaining to my reality show concept** and that he would be taking my treatment to the **Long Island mansion** that Marc Anthony and Jennifer Lopez were sharing at the time so that Marc could personally review the treatment that weekend.

Several weeks passed and I had not heard from Mr. Zayas so I contacted him at Marc Anthony Productions, Inc.

Once again, Ms. Paulino spoke with me and relayed another message to me from Mr.. Zayas.

I was told that Marc Anthony **liked my idea** however he was "more into New York". That I should send my treatment to Jennifer Lopez at Nuyorican Productions.

Since Jennifer Lopez was present when Mr. Zayas presented my treatment to Marc Anthony at their Long Island mansion, I took Marc Anthony's suggestion.

Before hanging up I asked to speak with Michelle Hurfano and asked her to have Mr. Zayas return my original treatment if possible in its original envelope. I did not feel that his company or staff should be in possession of my intellectual property.

Two weeks later I received my treatment along with some other information.

I went ahead and contacted Nuyorican Productions and let them know that I would be submitting a treatment for consideration.

I explained that **Marc Anthony** and Jennifer Lopez had already looked at my treatment, that Marc Anthony had instructed me to send it and that if necessary they could call Marc Anthony Productions to verify this.

Nuyorican Productions **agreed to accept** my treatment and I was told that it would be forwarded to Jennifer Lopez and Benny Medina.

I never heard back from Nuyorican Productions and when I called to follow up on my submission I was told to leave my name and number that some one would get back to me. Not one representative from Nuyorican Productions **ever got back to me**.

The treatment was, " **Miami Beach, "The Game!** A three phase concept (**Board Game, Interactive Web Game and Reality Show**)

One of the components was **CROSSOVER**, the reality show which is what I had "pitched" to Marc Anthony Productions and then to Nuyorican Productions.

**Que Viva The Chosen** aired on (Univision and Fox) and it was **IDENTICAL TO CROSSOVER**..

They were so **similar** that they were twins.

When I first created this concept in 1999 the premise was to produce a reality show and have it aired on both Hispanic and Anglo TV at the same time.

The show was to be hosted by two well known Latino celebrities who would travel in search of **artists and create a path of success and future for the next crossover superstar**.

After contacting Univision on or about April 2005 Joysette Rivera a representative of program development for Univision requested information by fax asking for details about my reality show concept so that program development could evaluate the concept.

The request was made on Univision letterhead with a "Jenny Llano's" name on it.

I never heard back from Joysette Rivera or anyone in program development.

Sometime later after calling Univision, I was told that I should contact the head of program development a man by the name of Alberto Santini Lara.

Messages left for Mr. Santini Lara were never returned.

By now years had gone by, and by coincidence as I watched TV I began to see trailers for an up coming reality show that was going to be shown on Univision and Fox, hosted by Marc Anthony and Jennifer Lopez called "Que Viva The Chosen".

Where they were going to search for and discover future artists.

All this was too similar to what I had presented so I made a call to Mr. Zayas at Marc Anthony Productions.

It took Mr. Zayas several weeks but he finally returned my calls.

I had to reintroduce myself as Mr. Zayas acted as if he had never heard of me.

After expressing all of my concerns to Mr. Zayas he told me that he would speak with Marc Anthony and get back to me within a week.

Mr. Zayas never followed through and failed to return several follow up messages that I had left with staff.

Messages left at Nuyorican Productions and Univision was never returned either so I went ahead and sent each of them a cease and desist letter.

They never responded.

**CERTIFICATE OF REGISTRATION WRITERS GUILD OF AMERICA EAST**

#156248 MIAMI BEACH THE GAME!

#1230934 CROSSOVER

*See Attachment for Certificate of Registration*

**DEMAND**

Because my reality show concept has already been broadcast on Hispanic and Anglo TV and was simply renamed Que Viva The Chosen I will never be able to do my reality show.

I am asking the court for punitive and compensatory damages in the amount of

**25 Million Dollars**

John J. Jacobs, Jr.  
**JOHN J. JACOBS, JR. PRO SE**  
*Plaintiff*

Date 12/11/2013

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**From:** "Cynthia Paulino" <cpaulino@marcaprod.com>  
**To:** "John Jacobs" <john1927@verizon.net>  
**Cc:** <office@marcaprod.com>  
**Sent:** Thursday, December 20, 2007 10:24 AM  
**Subject:** FW: Crossover Reality Show Concept

Good afternoon Mr. Jacobs,

I hope all is well. As previously mentioned, Mr. Zayas is interested in reviewing the program treatment of Miami Beach the Game.

Happy holidays,

Cynthia Paulino  
Marc Anthony Productions  
146 West 57th Street  
Suite 38 C  
New York, NY 10019  
T 212-245-4132  
F 212-245-4301

-----Original Message-----

**From:** Cynthia Paulino [mailto:cpaulino@marcaprod.com]  
**Sent:** Monday, November 12, 2007 4:19 PM  
**To:** 'John Jacobs'  
**Cc:** 'Michelle Huerfano'  
**Subject:** RE: Crossover Reality Show Concept

Dear Mr. Jacobs,

I understand. Bigram Zayas requested a program treatment. Could you please send it at your earliest convenience? Thanks in advance.

Kindest regards,  
C.

Cynthia Paulino  
Marc Anthony Productions  
146 West 57th Street  
Suite 38 C  
New York, NY 10019  
T 212-245-4132  
F 212-245-4301

-----Original Message-----

**From:** John Jacobs [mailto:john1927@verizon.net]  
**Sent:** Monday, November 12, 2007 3:59 PM  
**To:** Cynthia Paulino  
**Subject:** Crossover Reality Show Concept

12/21/2007



WRITERS GUILD OF AMERICA, EAST



555 W. 57th Street  
New York, NY 10019-2967

T: 212-767-7800  
F: 212-582-1909  
www.wgaeast.org

January 14, 2008

John Jacobs  
120 Harding St  
Rear Apt  
Trenton, NJ 08611

Dear John:

Enclosed is a Registration Certificate for the literary material you recently submitted to the Writers Guild of America, East Registration Service. Please retain this certificate for future reference. This literary material will be stored for a ten-year period at which time it will be destroyed. You may, however, renew the registration for an additional ten years by paying an additional registration fee before January 12, 2018.

Registration Number: J56248

Title: Miami Beach, The Game!

Date Registration: January 12, 2008

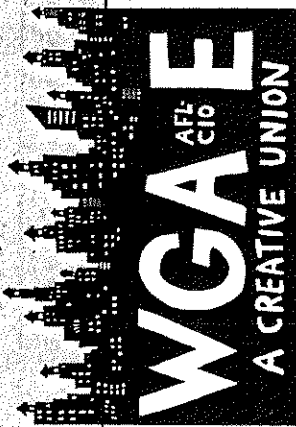
Payment Received: \$22.00

Thank you for using our registration service.

Sincerely,

GB  
Registration Department  
Writers Guild of America, East

WRITERS GUILD OF AMERICA, EAST



# CERTIFICATE OF REGISTRATION

The Writers Guild of America, East, Inc. issues this certificate to:

**John Jacobs**

for the material titled:

**Miami Beach, The Game!**

Registration Number: **156248**

Date Registered: **January 12, 2008**

Expiration Date: **January 12, 2018**



# CERTIFICATE OF REGISTRATION

The Writers Guild of America, East, Inc. issues this certificate to:

Jacobs, John

Jacobs, John

for the material titled:

CROSSOVER

Registration Number:	1230934
Date Registered:	07/22/2011
Expiration Date:	07/22/2021



**Department of Veterans Affairs  
Medical Center  
University and Woodland Avenue  
Philadelphia PA 19104**

August 18, 2011

To Whom It May Concern:

I am the primary care physician for Mr. John Jacobs, social security number 165-40-6553. I have seen him since January of 2011, but he has been followed at this medical center for years.

He remains disabled from his medical condition, since March 16, 2005 through the present date. He is under care for complications of ventral hernia repair, which was followed by infection and a long hospitalization. His repair totally and permanently failed. He has no central musculature in his abdomen and suffers from daily pain which can be quite acute and severe. He is unable to bend or lift in any significant way. He requires the use of a prosthetic device to try to restrain his abdominal contents but this only provides partial control.

Yours truly,

A handwritten signature in black ink, appearing to read "DS Stern MD".

David H. Stern, MD

\*\*\* REC 2013043 150711 H4EB1AE0 CH4A CIPDMA2 PDM2 (F-CH4 ) \*\*\*

Social Security Administration  
SOCIAL SECURITY  
ROEBLING MARKET  
635 S CLINTON AVE  
TRENTON NJ 08611-1831

Date: February 12, 2013

JOHN J. JACOBS  
511 GREENWOOD AVE  
APT 110  
TRENTON, NJ 08609

This is a receipt for the check you returned today. You should keep this receipt as proof that you returned this check. Your receipt number is 13044171001.

Person Making the Payment: JOHN J. JACOBS  
You Returned This  
Check For : JOHN J. JACOBS  
Claim Number : XXX-XX-6553 A  
Amount of Returned Check : \$395.00  
Reason for Payment : To Return A Benefit Check  
Type of Payment : Check Or Money Order  
Date of Check/Money Order: FEBRUARY 08, 2013  
Check/Money Order Number : 205999088466

Thank you for returning the check.