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UMG Recordings, Inc., Roc-A-Fella Records, LLC,  
Def Jam Recordings and Roc Nation LLC*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JOEL R. McDONALD a/k/a JOEL MAC, an  
individual,

Plaintiff,

-against-

KANYE WEST; JAY-Z, A/K/A SHAWN  
CARTER; MIKE DEAN; FRANK OCEAN A/K/A  
CHRISTOPHER BREAUX; SHAMA JOSEPH;  
UMG RECORDINGS, INC.; ROC-A-FELLA  
RECORDS LLC; DEF JAM RECORDINGS; ROC  
NATION LLC; AND DOES 1-10 INCLUSIVE,

Defendants.

Civil Action No. 1:14-CV-08794-AJN

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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Defendants Kanye West (“West”), Jay-Z, a/k/a Shawn Carter (“Carter”), UMG Recordings, Inc. (“UMG”), Roc-A-Fella Records, LLC (“Roc-A-Fella Records”), Def Jam Recordings, a division of UMG Recordings, Inc., and Roc Nation LLC (“Roc Nation”) (collectively, “Defendants”), respectfully submit this memorandum of law in support of their motion to dismiss Plaintiff’s first amended complaint (the “Amended Complaint” or “Am. Compl.”)<sup>1</sup> pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Defendants’ Motion”).

### PRELIMINARY STATEMENT

Plaintiff Joel R. McDonald, a/k/a Joel Mac (“Plaintiff” or “McDonald”) alleges that, in 2008, he wrote a musical composition entitled, “Made in America” (“Plaintiff’s Song”). Plaintiff brings this misguided suit against Defendants and others for copyright infringement, claiming that Defendants’ musical composition, also entitled, “Made In America,” which was recorded by defendants West and Carter and released over three and a half years ago, on August 8, 2011 (“Defendants’ Song”), infringes Plaintiff’s copyright in Plaintiff’s Song. Plaintiff’s claims are based primarily on the fact that (i) both songs share the unprotectable title, “Made in America,” (ii) Plaintiff’s Song has the lyric “Made in America” while Defendants’ Song has the lyric “Made it in America”; (iii) both songs make fleeting reference to the historical figures Malcolm X and Martin Luther King, Jr., among others; and (iv) both songs begin and end with instrumental sections (although Plaintiff concedes these instrumental sections are expressed differently). Other than some references to allegedly similar musical “techniques,” Plaintiff utterly fails to identify any other “similarity” between these two works or any other basis to bring suit.

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<sup>1</sup> A true and correct copy of the Amended Complaint is annexed as Exhibit A to the Declaration of Ilene S. Farkas, dated February 25, 2015 (the “Farkas Decl.”). References herein to “Ex. \_” are to the exhibits annexed to the Farkas Declaration.

The Court can hear for itself that, as a matter of law, no protectable expression has been, nor can be, identified by Plaintiff. Indeed, the two works at issue are entirely different songs that share painfully little similarity stylistically, thematically, melodically or even lyrically. After applying the ordinary observer/listener test (which this Court can do on Defendants' instant 12(b)(6) motion, as a matter of well-established precedent), it is obvious that no actionable copying has occurred here. More specifically:

- First, Plaintiff cannot possibly base a claim on the two songs' shared title, "Made in America." It is well settled that titles are not copyrightable.
- Second, it is black letter law that words and short phrases are simply not protectable under copyright law. Thus, no infringement claim can be based on the alleged copying of a generic, commonplace phrase such as "Made in America" (and, even if protectable, which it is not, this phrase is certainly not original to Plaintiff).
- Third, any claim based on the use of the names "Martin Luther King" and "Malcolm X" – or the order in which these two names appear – fails, as copyright law does not protect names. Nor could Plaintiff possibly claim ownership of these names or any historical references to these individuals.
- Fourth, Plaintiff's strained attempt to identify musical similarities between these undeniably different songs fails. Plaintiff alleges similar tempos, and yet ignores the authorities cited by Defendants that hold tempos are unprotectable. Plaintiff's allegations regarding the use of similar musical techniques and concepts (and his acknowledgement that these unprotectable elements are expressed differently) are similarly insufficient to maintain a copyright infringement claim as a matter of law. This Court can listen to the songs for itself and hear that these are two completely different songs.



This is Plaintiff's second attempt to allege any actionable similarities between the two songs at issue in this action. After Defendants filed a previous motion to dismiss ("Defendants' Prior Motion"), pursuant to this Court's January 16, 2015 Order, Plaintiff was given the opportunity to amend his Complaint to cure the deficiencies briefed in Defendants' Prior Motion. Having had the benefit of Defendants' Prior Motion, the Amended Complaint does nothing more than acknowledge that the alleged similarities are limited to unprotectable elements, notwithstanding Plaintiff's attempt to describe these unprotectable elements in a more detailed fashion.

Accordingly, Defendants' Motion should be granted in its entirety and the Amended Complaint dismissed with prejudice and without leave to replead.

#### STATEMENT OF FACTS

##### A. The Plaintiff

Plaintiff is a self-described "artist of modest means." (Am. Compl. ¶ 25.) According to the Amended Complaint, Plaintiff wrote and recorded an album entitled "Joel Mac Songs" in his apartment in 2008. (Id. ¶ 23.) Plaintiff's Song is purportedly the second track on that album. (Id.) Plaintiff alleges that he has attempted to sell his album through various online retailers, and that he sold an unspecified number of his CDs on the street in the "SoHo" neighborhood of Manhattan. (Id. ¶ 26.)

Plaintiff claims Defendants had access to Plaintiff's Song through defendant Mike Dean, "a long-time collaborator with defendant West" who allegedly purchased one of Plaintiff's CDs.<sup>2</sup>

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<sup>2</sup> As of the filing of this Motion, to the moving Defendants' knowledge, defendant Dean has not been served with the Complaint or the Amended Complaint in this Action. Of course, even assuming the truth of Plaintiff's allegations of access for the purposes of Defendants' Motion only, given the lack of protectable expression that is alleged to be at issue herein, Plaintiff's allegations of access are irrelevant, as copying is presumed for the purposes of this motion only. Should any portion of Plaintiff's claim

(Id. ¶ 30.) Plaintiff alleges that Dean communicated with Plaintiff “almost on a daily basis, about plaintiff’s music and the production of the [A]lbum going on in the Mercer Hotel.” (Id. ¶ 31.)

**B. The Defendants**

Mr. West and Mr. Carter are enormously successful entertainers, songwriters, recording artists and music producers, winning over 35 Grammy Awards and selling over 100 million albums between them, with most of their albums going platinum. Plaintiff alleges that Mr. West and Mr. Carter released Defendants’ Song on August 8, 2011 on their collaborative studio album entitled, “Watch the Throne” (the “Album”). (Am. Compl. ¶ 32.) The Album debuted at number one on the US Billboard 200 chart, sold over 400,000 copies in its first week of release, and earned Messrs. Carter and West seven Grammy Award nominations. According to the Amended Complaint, UMG manufactured, distributed and sold the Album, which embodied Messrs. West’s and Carter’s recording of Defendants’ Song. (Id. ¶ 18.) The Amended Complaint also alleges that Def Jam Recordings, Roc Nation and Roc-A-Fella Records marketed the Album. (Id. ¶¶ 19-21.)

**C. Plaintiff Brings Suit for Infringement**

In November 2014, over three years after the release of Defendants’ Song, Plaintiff brought this action. Plaintiff bases his single claim for copyright infringement on the following purported similarities between the two musical compositions:

1. Both songs share the same title, “Made in America.”

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survive dismissal, Defendants intend to vigorously dispute Plaintiff’s allegations of both access as well as copying.

2. Plaintiff's Song contains the lyrical phrase "Made in America," and Defendants' Song contains the lyrical phrase "Made it in America." Plaintiff does not allege (nor could he) that he created either phrase.
3. Both songs "evoke the same creative theme" by referencing historical figures, Martin Luther King, Jr. and Malcolm X. Plaintiff does not claim (nor could he) that he created these names or that he can copyright them or any "theme" (no one can).
4. Both songs employ the concept of using instrumental sections at the beginning and towards the end of each song (Plaintiff concedes these are expressed entirely differently).
5. Both songs have similar tempos and employ other "techniques" such as "alliteration."

The supposed "similarities" alleged by Plaintiff consist of nothing more than words, phrases, musical concepts, "techniques" and "themes" which are not protectable as a matter of well-established copyright jurisprudence. No amount of discovery is going to change the lyrics and music of these two songs. Thus, the Court can compare the works and determine now that Plaintiff's Amended Complaint is without merit and should be dismissed.

## ARGUMENT

### I. STANDARD OF REVIEW

The Supreme Court explained in Bell Atl. Corp. v. Twombly that Rule 8(a)(2) requires a complaint to contain a "showing" that a plaintiff is entitled to relief, and that this substantive threshold is not achieved by "blanket assertion[s]." 550 U.S. 544, 555 n. 3 (2007) (citation omitted). A motion to dismiss under Rule 12(b)(6) is meant to test the sufficiency and plausibility of plaintiffs' allegations. Id. at 570; see also Ashcroft v. Iqbal, 556 U.S. 662 (2009).

In order to survive a motion to dismiss, a plaintiff must do more than solely recite the elements for a violation – he or she must plead facts with sufficient particularity so that their

right to relief is more than mere conjecture. See Iqbal, 556 U.S. at 677-78; Twombly, 550 U.S. at 561-62. While factual allegations in a complaint are generally taken as true on a motion to dismiss, “conclusions of law or unwarranted deductions of fact are not admitted.” Lentell v. Merrill Lynch & Co., 396 F.3d 161, 175 (2d Cir. 2005) (quoting First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994)); La Pietra v. RREEF Am., L.L.C., 738 F. Supp. 2d 432, 436 (S.D.N.Y. 2010) (“the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions”) (citation & quotations omitted). Dismissal is warranted where the complaint fails to allege enough facts to state a claim for relief that is plausible on its face. Twombly, 550 U.S. at 570.

In deciding a motion to dismiss, courts will consider the complaint, as well as documents incorporated into the complaint by reference, documents that the plaintiff relied on in bringing suit, documents integral to the complaint, and matters of which a court may take judicial notice. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007); Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002); see also Bay Harbour Mgmt. LLC v. Carothers, 282 F. App'x 71, 76 (2d Cir. 2008) (affirming consideration of the contents of documents referenced in the amended complaint on a motion to dismiss); Rapoport v. Asia Elecs. Holding Co., 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) (considering two documents referenced in the amended complaint but not attached thereto).

In light of these principles, the Court should consider the following integral materials, in addition to the facts alleged in the Amended Complaint:

- Plaintiff's Song (Farkas Decl., Ex. B at Track 1);
- Defendants' Song (Farkas Decl., Ex. B at Track 2); and
- The lyrics to each song (Farkas Decl., Ex. C).

If, after reviewing this material, the Court finds that no protectable elements have been copied, it may dismiss Plaintiff's copyright infringement claim on a Rule 12(b)(6) motion, as Courts have routinely done in infringement actions. Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 64 (2d Cir. 2010) ("it is entirely appropriate for the district court to consider the similarity between [contested] 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 . . . ."); TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 595 (S.D.N.Y. 2013); Bell v. Blaze Magazine, No. 99 Civ. 12342 (RCC), 2001 U.S. Dist. LEXIS 2783, at \*9 (S.D.N.Y. Mar. 15, 2001) ("If a court determines that no reasonable jury could find that the works are substantially similar, or if it concludes that the similarities pertain only to unprotected elements of the work, it is appropriate for the court to dismiss the action because, as a matter of law, there is no copyright infringement"; motion to dismiss granted) (citing Buckman v. Citicorp, No. 95 Civ. 0773, 1996 U.S. Dist. LEXIS 891, at \*9 (S.D.N.Y. Jan. 29, 1996), aff'd, No. 96-7236, 1996 U.S. App. LEXIS 20881 (2d Cir. Aug. 14, 1996)). See also Pyatt v. Raymond, No. 10 Civ. 8764 (CM), 2011 U.S. Dist. LEXIS 55754 (S.D.N.Y. May 19, 2011), aff'd, 462 F. App'x 22 (2d Cir. 2012) (comparing musical works on 12(b)(6) motion and dismissing copyright infringement claims); Poindexter v. EMI Record Grp., Inc., No. 11 Civ. 559 (LTS)(JLC), 2012 U.S. Dist. LEXIS 42174 (S.D.N.Y. Mar. 27, 2012) (same); Gottwald v. Jones, No. 11 Civ. 1432 (CM)(FM), 2011 U.S. Dist. LEXIS 103414 (S.D.N.Y. Sept. 12, 2011) (same).

#### **H. PLAINTIFF FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT**

A plaintiff asserting a copyright infringement claim must show (1) ownership of a valid copyright, and (2) unauthorized copying of the copyrighted work. Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003). To establish unauthorized copying, "a plaintiff must

show both that his work was ‘actually copied’ and that the portion copied amounts to an ‘improper or unlawful appropriation.’” Id. (citation omitted). Actual copying may be established with proof that the defendant had access to the plaintiff’s copyrighted work and that there are substantial similarities between the works. Pyatt, 2011 U.S. Dist. LEXIS 55754, at \*10. The plaintiff is required to show that the alleged copying amounts to an unlawful taking by demonstrating that substantial similarities relate to protectable material. Id. at \*10-11.

**A. Plaintiff’s Alleged Similarities Are Unoriginal  
As To Plaintiff And Unprotectable As A Matter Of Law**

Mere allegations of copying alone are not sufficient to state a claim, because not all copying amounts to copyright infringement. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). A copyright claim requires the “copying of constituent elements of the work that are original” and where the allegedly infringed material is not original to the plaintiff or otherwise protectable, no claim for infringement can lie. Id. at 361 (citation omitted). Indeed, when the similarities alleged consist of unprotected elements, such as concepts, themes, techniques or commonplace unoriginal expression, no claim of infringement has been alleged. Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625, 631 (S.D.N.Y. 2008). Edwards v. Raymond, 22 F. Supp. 3d 293, 301 (S.D.N.Y. 2014) (“Themes are not independently protectable.”); Arica Inst., Inc. v. Palmer, 761 F. Supp. 1056, 1062 (S.D.N.Y. 1991) (“Courts will not find copyright infringement where the only similarity between plaintiff’s and defendant’s works is that of an abstract idea, system or discovery because to do so would unduly inhibit independent creation by others.”) (citations omitted); see also Lassin v. Island Def Jam Music Grp., Case No. 04-22320-CIV-HUCK/SIMONTON, 2005 U.S. Dist. LEXIS 43862, at \*12-13 (S.D. Fla. Aug. 8, 2005) (“Unoriginal, common musical devices generally are not protectible under copyright law, and cannot be a basis for a finding of substantial similarity.”);

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.”).

1. **The Title Of Plaintiff’s Song Is Not Copyrightable**

Plaintiff’s copyright infringement claim is premised, in substantial part, on the two songs having the same title, “Made in America.” It is well settled that titles are not copyrightable. Bell, 2001 U.S. Dist. LEXIS 2783, at \*6 (“Words and short phrases, such as titles or slogans, are insufficient to warrant copyright protection, as they do not exhibit the minimal creativity required for such protection”) (citing Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992); Edwards, 22 F. Supp. 3d at 301 (plaintiff claimed infringement based on two songs sharing the same title, “Caught Up”; motion to dismiss granted); see also Dobson v. NBA Props., Inc., No. 98 Civ. 7696, 1999 U.S. Dist. LEXIS 1834 at \*5 (S.D.N.Y. Feb. 19, 1999) (“The law is clear, however, that words and short phrases, such as names, titles, and slogans are not subject to copyright”) (citations & quotations omitted); Currin v. Arista Records, Inc., 724 F. Supp. 2d 286, 293 (D. Conn. 2010), aff’d, Currin v. Williams, 428 F. App’x 21 (2d Cir. 2011) (holding that the title of the song, “frontin,” is a “non-protectible element of the plaintiffs’ song”); Haycs v. Koch Entm’t, No. G-06-515, 2008 U.S. Dist. LEXIS 33418, at \*1 (S.D. Tex. Mar. 14, 2008) (“the similarity of the titles does not matter because they are categorically not protectable . . .”); Peters v. West, 692 F.3d 629, 631 (7th Cir. 2012) (Court rejected claim based on both songs sharing the title, “Stronger,” finding titles unprotectable).

Nor is there anything novel or otherwise copyrightable about the title phrase, “Made in America.” A search of the U.S. Copyright Office’s publicly-available, online records reveals

231 other works with the identical title, “Made in America.” (Farkas Decl., Ex. D.) Any attempt to claim ownership of this generic title fails.

2. **The Lyrical Phrase “Made in America” Is Not Protectable**

Plaintiff’s claim is also premised on the use of the phrase “Made in America” in Defendants’ Song, as Plaintiff claims it copies the different phrase, “Made in America,” in Plaintiff’s Song. Plaintiff claims that Defendants have copied the “central phrase” in Plaintiff’s Song. However, Plaintiff ignores the simple fact that he cannot stop anyone from using the phrase “Made in America” as Plaintiff does not, and could not possibly, “own” it.

It is well settled that words and short phrases are simply not original, protectable expression and cannot form the basis of an infringement claim. 37 C.F.R. § 202.1(a) (“[w]ords and short phrases such as names, titles, and slogans” are material not subject to copyright); Arica Inst., Inc., 970 F.2d at 1067 (single words or short phrases are not copyrightable and are insufficient to establish infringement); Maxwood Music Ltd. v. Malakian, 713 F. Supp. 2d 327, 345 (S.D.N.Y. 2010) (“Neither ‘computer nation’ nor ‘communist nation’ is an independently copyrightable phrase”); Boyle v. Stephens, Inc., No. 97 Civ. 1351(SAS), 1997 U.S. Dist. LEXIS 12780, at \*13 (S.D.N.Y. Aug. 25, 1997), aff’d, 21 F. App’x 76 (2d Cir. 2001) (“plaintiff cannot rest his claims on the mere duplication of individual words and short phrases . . . as such commonly-used terms cannot in themselves exhibit the minimal originality required for copyright protection”) (citations omitted); Bell, 2001 U.S. Dist. LEXIS 2783, at \*6; see also Peters, 692 F.3d at 629; Narell v. Freeman, 872 F.2d 907, 911 (9th Cir. 1989) (“[p]hrases and expressions conveying an idea typically expressed in a limited number of stereotyped fashions are not subject to copyright protection”) (citations omitted); Alberto-Culver Co. v. Andrea Dumon, Inc., 466 F.2d 705, 710 (7th Cir. 1972); Staggs v. West, No. PJM 08-728, 2009 U.S.



Dist. LEXIS 72275, at \*7-8 (D. Md. Aug. 14, 2009); Advanz Behavioral Mgmt. Res. v. Mirafior, 21 F. Supp. 2d 1179, 1190 (C.D. Cal. 1998) (“Words or short phrases, of course, are not themselves copyrightable subject matter.”) (citation omitted).

Plaintiff cannot enjoy a monopoly over the phrase “Made in America” as a matter of well-settled copyright jurisprudence. See Hoone v. Jackson, 206 F. App’x 30, 33 (2d Cir. 2006) (finding that the common phrase “holla back” is not protectable); Acuff-Rose Music v. Jostens, Inc., 155 F.3d 140, 144 (2d Cir. 1998) (finding the phrase, “you’ve got to stand for something, or you’ll fall for anything” too common to accord copyright protection); Oldham v. Universal Music Grp., No. 09 Civ. 7385 (LMM), 2010 U.S. Dist. LEXIS 126697 (S.D.N.Y. Nov. 29, 2010) (granting defendant’s Rule 12(c) motion, and dismissing plaintiffs’ copyright infringement claim based, *inter alia*, on the alliterative use of the word “why”); Staggs, 2009 U.S. Dist. LEXIS 72275, at \*8-9 (claims based on allegedly similar words and short phrases, such as “good life,” dismissed as not copyrightable); O’Brien v. Chappel & Co., 159 F. Supp. 58, 58 (S.D.N.Y. 1958) (granting motion for judgment on the pleadings and dismissing infringement claim premised upon use of the phrase “night and noon”).<sup>3</sup>

Accordingly, Plaintiff cannot state a claim based on the use of the unprotectable lyrical phrase “Made in America.”

### 3. Names and References to Historical Figures Are Not Protectable

Plaintiff also alleges that the opening to both songs evokes “the same creative theme” as both “pay[] homage to historical figures” by including references to “Martin Luther King” and “Malcolm X.” However, the names “Martin Luther King” and “Malcolm X” are not protected by copyright law (and under no circumstances could Plaintiff claim ownership of these names

<sup>3</sup> Plaintiff’s allegation that both songs “employ a long ‘a’ in the vocalization of the word America” hardly transforms this unprotectable element into protectable expression. The Court can hear for itself that the performance of this unprotectable phrase is entirely different in each song.

under any intellectual property theory). See CFR § 202.1(a); Eng v. Creators of the Philosoraptor Website, No. 14-CV-4948 (LAP), 2014 U.S. Dist. LEXIS 158954, at \*5 (S.D.N.Y. Sept. 16, 2014) (“he cannot assert copyright infringement for the use of the name Philosoraptor, because a name alone is not protected by copyright law”) (citations omitted); Reece v. Marc Ecko Unltd., No. 10 Civ. 02901 (JSR) (DF), 2011 U.S. Dist. LEXIS 102199, at \*26 (S.D.N.Y. Aug. 19, 2011) (names and words are not themselves subject to copyright protection). Nor is the idea of “paying homage to historical figures” any more protectable, as the concept is just that – an unprotectable idea. See Oldham, 2010 U.S. Dist. LEXIS 126697, at \*9-10 (rejecting claim of infringement based on similar references in both songs to deaths of prominent recording artists Aaliyah, Tupac and Biggie Smalls); Bell, 2001 U.S. Dist. LEXIS 2783, at \*7 (“copyright protection does not extend to a concept or idea, regardless of the form in which it is communicated, explained, illustrated, or embodied.”) (citations omitted).

Furthermore, “[h]istorical events are ‘in the public domain and beyond the scope of copyright protection.’” Oldham, 2010 U.S. Dist. LEXIS 126697, at \*8-9 (quoting Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986)) (quotations omitted).

It is without question that Plaintiff did not independently coin the names “Martin Luther King” or “Malcolm X” (despite Plaintiff’s attempt to magnify the importance of these lyrics, Malcolm X is referenced once in Plaintiff’s Song and Martin Luther King is referenced twice). Plaintiff’s allegation that the “same creative theme is evoked” by referencing these two individuals is equally unavailing, as “themes” are not protectable as a matter of law. Edwards, 22 F. Supp. 3d at 301.

Indeed, a comparison of the two songs and their lyrics shows that these “themes” are expressed entirely differently. In Defendants’ Song, these historical figures are expressed as follows:

Sweet King Martin  
Sweet Queen Coretta  
Sweet Brother Malcolm  
Sweet Queen Betty  
Sweet Mother Mary  
Sweet Father Joseph

(Farkas Decl., Ex. C.)

Plaintiff’s Song references these historical figures as follows:

Martin Luther King  
Made in America  
JFK  
Made in America  
Malcolm X  
Made in America  
The wild wild west  
Made in America  
Bobby Kennedy  
Made in America

(Id.)

The only arguable similarity between these lyrics is the mention of these two historical figures – albeit in an entirely different manner, with the Defendants’ Song referring to Martin Luther King, Jr. and Malcolm X only as “Sweet King Martin” and “Sweet Brother Malcolm,” respectively. Thus, Plaintiff’s claim boils down to an attempt to monopolize the idea of simply mentioning these two historic figures’ names in a song, even though the works may express these indisputably unprotectable elements in completely different ways. No such claim can be maintained under the Copyright Act. Accordingly, Plaintiff’s claim based on entirely dissimilar references to Martin Luther King, Jr. and Malcolm X fails as a matter of law.

4. **The “Order” In Which These Unprotectable Elements Appear in Each Song Does Not Elevate These Alleged Similarities to the Level of Protectable Expression**

Undeterred by the ample authority cited in Defendants’ Prior Motion, Plaintiff attempts to create some aura of significance to the unprotectable, alleged similarities by claiming that the names at issue supposedly appear “in the very same order” in both works (Am. Compl. ¶ 39.)

Plaintiff alleges as follows:

Unique to plaintiff’s song is reference to civil rights leaders, notably Martin Luther King and Malcolm X in the Intro Segment. Defendants’ “Made in America 2” does exactly the same, referencing both Martin Luther King and Malcolm X (followed respectively by their wives), in the very same order as plaintiff’s song. Both songs immediately follow these references with the phrase/hook “Made in America”/“Made it in America”. (Id. ¶ 39; emphasis supplied.)

As the Court’s independent review of the two works at issue will plainly reveal, Plaintiff’s allegations are simply false, and fail to accurately recount the actual lyrics of each song – which is, in all likelihood, no accident. As demonstrated in Point II.A.3., supra, there is nothing remotely similar in the way this unprotectable concept is expressed in each song. (See also Farkas Decl., Ex. C.)

Indeed, Plaintiff’s allegation that “[b]oth songs immediately follow [the names] with the phrase/hook “Made in America”/“Made it in America” is simply incorrect. (Am. Compl. ¶ 39.) Plaintiff’s Song repeats the phrase “Made In America” after each name (in fact, it does so after practically every name or phrase uttered throughout the song). In Defendants’ Song, however, after referencing “Sweet King Martin” and “Sweet Brother Malcolm” (along with 4 other historical figures) in the opening hook, the *different* phrase “We made it in America” does not “immediately follow.” Rather, the lyrics “Sweet Queen Betty, Sweet Mother Mary, Sweet Father Joseph, Sweet Jesus” appear next:

Sweet King Martin  
Sweet Queen Coretta  
Sweet Brother Malcolm  
Sweet Queen Betty  
Sweet Mother Mary  
Sweet Father Joseph,

Sweet Jesus  
We made it in America  
Sweet baby Jesus, ooh  
Oh sweet baby Jesus  
We made it in America  
Sweet baby Jesus, ooh  
Oh, sweet baby Jesus,  
We made it in America

Plaintiff seems to be suggesting that it does not matter that the names are unprotectable, that the concepts are expressed differently, or that entirely different lyrics appear in between these unprotectable names – the fact that both songs reference Martin Luther King *before* Malcolm X is, by Plaintiff’s logic, sufficient to maintain a claim for copyright infringement. While, technically, the references to these two historical figures appear in the “same order” – Plaintiff refers to “Martin Luther King” before “Malcolm X,” and Defendants’ Song refers to “Sweet King Martin” before “Sweet Brother Malcolm” – that fact is entirely irrelevant in light of the fact that Plaintiff has no cognizable claim that any protectable expression is infringed in the first instance. (Indeed, it is 50/50 which of the two names would be recited first.)<sup>4</sup>

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<sup>4</sup> Plaintiff’s allegations regarding “identical alliteration techniques” highlights Plaintiff’s desperation. First, techniques are not protectable. See *Arica Inst., Inc.*, 761 F. Supp. at 1062; *Lassin*, 2005 U.S. Dist. LEXIS 43862, at \*12; 17 U.S.C. § 102(b). Second, as demonstrated herein (and by a review of the songs’ lyrics), there is nothing “identical” or even significant (much less protectable) about the use of the words Martin, Malcolm or Made in the songs – whether or not they happen to begin with the same two letters. Indeed, these words constitute a miniscule portion of Defendants’ Song lyrics as a whole, as do the names Martin and Malcolm in Plaintiff’s Song (Martin appears twice and Malcolm once).

**5. There Are No Protectable Musical Similarities Between The Works At Issue**

The Court can hear for itself that, musically, these are two entirely different songs. Undeterred, Plaintiff alleges in the most conclusory fashion that the songs are musically similar because (a) they have similar tempos; (b) they both employ the idea of beginning and ending with an instrumental section; (c) they “make use of shuffling percussion throughout, where the percussive texture in the rhythmic groove both incorporate a shuffling feel”; and (d) neither song has a “pronounced bass line throughout.”

First, Plaintiff’s reference to the songs’ tempos is meaningless under copyright law, as a song’s rhythm and tempo are not copyrightable. See Gottwald, 2011 U.S. Dist. LEXIS 103414, at \*18 (“The two songs share the same rhythmic pulse, but this is not copyrightable.”); Currin, 724 F. Supp. 2d at 294 (“However, even if the plaintiffs are correct that the two songs have the same tempo, the speed of the song is not, by itself, a protectible element”).

Second, Plaintiff is incorrect – Defendants’ Song does not end with an instrumental section – it ends with the hook/chorus. However, even assuming, *arguendo*, that both songs begin and end with an instrumental portion, that is hardly protectable and hardly original to Plaintiff’s Song. At best, the idea of beginning and ending a song with an instrumental portion is just that – an unprotectable idea; and, moreover, as the Court can plainly hear (and as Plaintiff concedes), the instrumental sections are expressed quite differently in each song. Thus, Plaintiff has not identified any additional protectable expression in this allegation.

Third, Plaintiff’s vague reference to a “shuffling” percussion is unclear, but again, at best, this allegation appears to refer to a concept or musical technique that is expressed differently in each song. Concepts and techniques are not protectable. See Arica Inst., Inc., 761 F. Supp. at 1062; Lassin, 2005 U.S. Dist. LEXIS 43862, at \*12; 17 U.S.C. § 102(b). Even if Plaintiff is

attempting to allege that the songs share some rhythmic similarities (i.e., a “shuffling percussive” element), that too is unprotectable. Gottwald, 2011 U.S. Dist. LEXIS 103414, at \*18 (“The two songs share the same rhythmic pulse, but this is not copyrightable.”). In any event, no reasonable listener would conclude that there is anything musically or rhythmically similar about these two songs.

Fourth, Plaintiff’s allegation that neither song has a “pronounced bass line throughout” is meaningless. If the songs do not contain any actionable *similarities* as required to state a claim for copyright infringement – and they do not – then it is irrelevant what elements Plaintiff claims both songs may be “missing.”

In sum, simply listening to Plaintiff’s Song and Defendants’ Song reveals that they do not share any protectable musical elements. As demonstrated below, it is respectfully submitted that the Court will hear for itself that these are two entirely different songs, and no reasonable person could conclude that Defendants’ Song is similar to Plaintiff’s Song. Accordingly, Plaintiff’s claim fails as a matter of law.

**B. No “Substantial Similarity” Exists Between Plaintiff’s Song and Defendants’ Song**

Even assuming, *arguendo*, that Plaintiff had alleged even a modicum of similarity of *protectable expression* between the two songs (which he has not) and the Court were to examine the works as a whole, this Court can determine on this motion that no substantial similarity exists between Plaintiff’s Song and Defendants’ Song as a matter of law. In determining whether two songs are substantially similar, the Court inquires “whether an ‘ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same.’” Pyatt, 2011 U.S. Dist. LEXIS 55754, at \*11 (citations & quotations omitted).

“In the context of music plagiarism, the Second Circuit has described this ordinary observer test as requiring proof that ‘defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such . . . music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.’” Id. at 11-12 (citations omitted). Courts are guided by a comparison of the “total concept and overall feel” of the two songs “as instructed by [its] good eyes and common sense . . . .” Edwards, 22 F. Supp. 3d at 301 (citing Peter F. Gaito Architecture, 602 F.3d at 66) (quotations omitted).

Defendants have attached the full lyrics and recordings for both songs with this Motion. (Farkas Decl., Exs. B and C.) A comparison of the “total concept and overall feel” of the two songs “with good [ears] and common sense” reveals that the “average observer would not recognize [Defendants’ Song] as having been appropriated from [Plaintiff’s Song]” by any stretch of the imagination. See Pyatt, 2011 U.S. Dist. LEXIS 55754, at \*19, \*27 (quoting Peter F. Gaito Architecture, 602 F.3d at 67) (quotations omitted).

A side-by-side comparison of the songs’ lyrics illustrates vast differences between the two works. (See Farkas Decl., Ex. C.) Indeed, apart from the minimal lyrical similarities identified in the Amended Complaint (which do not “belong” to Plaintiff), there are no other discernible similarities between the songs’ lyrics.

The music of the two songs is also vastly different. Any ordinary observer can easily recognize the substantial difference in overall musical impression between the songs. Plaintiff’s Song is simplistic and extremely repetitive. It lacks the traditional song structure of alternating verses and choruses, and instead it merely repeats the same basic melodic line throughout. It is a slow paced song, incorporating primarily reggae-like elements and beats.



Defendants' Song, on the other hand, is a faster-paced, more complex song incorporating alternating R&B melodies, sophisticated rap lyrics and other elements. Defendants' Song also has a defined, more traditional structure, with an introduction and a chorus of a sung melody, which appears three times and which alternates between two rapped verses. There are three different vocalists in Defendants' Song, as compared to the one in Plaintiff's Song. The melodies of each song and the instrumentation used in each are noticeably different.

Moreover, the two songs are entirely distinct from a thematic perspective, with the Plaintiff's Song merely reciting a litany of historic figures' names (e.g., including Martin Luther King, Malcolm X, Bobby Kennedy) as well as references to "soccer moms" and "atomic bombs," followed each time by the phrase "Made in America," presumably as a paean to each individual's achievements, and certain historic events and social norms, and their importance to the nation's culture. On the other hand, the Defendants' Song is an autobiographical presentation by Kanye West and Jay-Z, through their respective rap lyrics, of their ascent to their current positions of prominence in the music industry, from different, yet equally improbable beginnings, recognizing that their stories are only possible in America by virtue of the struggles of figures like "King Martin" (i.e., Martin Luther King, Jr.) and "Brother Malcolm" (i.e., Malcolm X), and hence, they "made it in America." Indeed, as the Court can see from the printed lyrics of Defendants' Song (see Farkas Decl., Ex. C), despite the unprotectable title "Made In America" that both songs share, the actual melodic line sung in the refrain of Defendants' Song is "we made it in America," which further supports the distinct autobiographical themes of their respective successes laid out in each rap verse, performed by Kanye West and Jay-Z. By contrast, Plaintiff's Song's litany of historic figures' names, events and cultural customs (i.e., "atomic bombs," "soccer moms," and "dresses for the prom") appears

to merely reflect the fact that these people and things are unique to the U.S., or were “made in America.”

Simply put, the “feel” of these two songs is vastly different and cannot possibly support a finding of substantial similarity. Edwards, 22 F. Supp. 3d at 301. The Court can hear for itself that the two songs are distinct works, and leave the listener with entirely different impressions. No average observer would recognize Defendants’ Song as having been appropriated from Plaintiff’s Song. Accordingly, there is no actionable similarity between protectable elements of Plaintiff’s Song and Defendants’ Song, and Plaintiff’s claim for infringement should be dismissed.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that Defendants' Motion should be granted and Plaintiff's Amended Complaint should be dismissed in its entirety. This Court has given Plaintiff a second opportunity to cure the deficiencies identified in Defendants' Prior Motion, and, as demonstrated, Plaintiff has failed to do so. It is, therefore, respectfully submitted that the Court should dismiss the Amended Complaint with prejudice and without leave to amend.

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