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and Sony Music Entertainment*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AHMAD JAVON LANE, an individual,

Plaintiff,

-against-

BEYONCÉ KNOWLES CARTER; PARKWOOD
ENTERTAINMENT; and COLUMBIA
RECORDS,

Defendants.

Civil Action No. 1:14-CV-06798-PAE

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

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Defendants Beyoncé Giselle Knowles-Carter (incorrectly sued as Beyonce Knowles Carter) (“Carter”), Parkwood Entertainment, LLC (“Parkwood”), and Sony Music Entertainment (incorrectly sued as “Columbia Records”) (“Sony,” and together with Carter and Parkwood, “Defendants”), respectfully submit this memorandum of law in support of their motion to dismiss Plaintiff’s complaint (the “Complaint” or “Compl.”)¹ pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6) (“Defendants’ Motion”).

PRELIMINARY STATEMENT

Plaintiff Ahmad Javon Lane (“Plaintiff” or “Lane”) has brought this infringement claim against Defendants based on his alleged ownership of a musical composition entitled, “XOXO” (“Plaintiff’s Song”). Plaintiff claims that Defendants’ musical composition, entitled “XO” (“Defendants’ Song”), which was recorded by Carter and released on her album, “Beyoncé” on or about December 16, 2013, copies Plaintiff’s Song. In his seven-sentence complaint, Plaintiff simply states that Defendants’ Song “copies my song and artwork,” including an unidentified “melody” from Plaintiff’s Song. One is left to guess what the supposed similarities may be, including whether Plaintiff takes issue with the appearance of the unprotectable phrase “XO” in the title and lyrics of both songs. For this, he demands \$3 million. However, even when Defendants afforded Plaintiff every opportunity to elaborate on his ambiguous allegations, there simply are no protectable – or even audible – similarities between these songs.

Defendants respectfully submit that 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 no lyrical or musical similarity, other than perhaps

¹ A true and correct copy of the Complaint is annexed as Exhibit A to the Declaration of Ilene S. Farkas, dated April 17, 2015 (the “Farkas Decl.”). References herein to “Ex. _” are to the exhibits annexed to the Farkas Declaration.

the letters “X” and “O.” 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 fact that Defendants’ Song is entitled “XO,” while Plaintiff’s Song has the (different) title, “XOXO.” 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, to the extent that “XOXO” is a “phrase,” and not just the letters “X” and “O,” no infringement claim can be based on the alleged copying of a generic, commonplace phrase such as “XOXO” (and, even if protectable, which it is not, this phrase is certainly not original to Plaintiff).
- Third, to the extent Plaintiff’s claim is based on similarities in the “music” between the works, it must be rejected. While Plaintiff’s Complaint vaguely refers to “a melody” in Plaintiff’s Song, this Court can hear for itself that these are two completely different songs with no audible similarities. Moreover, it appears that the music to Plaintiff’s Song is not covered by Plaintiff’s copyright registration.
- Fourth, Plaintiff’s vague allegation regarding unidentified infringing “artwork” can be dismissed based on Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure. Moreover, Plaintiff has failed to allege the requisite ownership of a valid copyright registration in such “artwork” as required by 17 U.S.C. § 411(a).

Accordingly, Defendants’ Motion should be granted in its entirety and the Complaint dismissed.

STATEMENT OF FACTS

A. The Plaintiff

Plaintiff claims to be the copyright owner of the musical composition entitled “XOXO.” (Ex. A, ¶ C.) No copyright registration was identified in or annexed to the Complaint. The publicly-available copyright registration filed by Plaintiff, however, claims ownership of only the lyrics to Plaintiff’s Song, and specifically excludes the music to Plaintiff’s Song. (Ex. C.) Plaintiff claims Defendants had access to Plaintiff’s Song through a former “background singer” for Ms. Carter, someone named Crissy Collins. Specifically, Plaintiff alleges that he worked as a background singer with Ms. Collins for “another artist” and sent Ms. Collins “the material [he] wrote after releasing it.” (Ex. A, ¶ C.) Plaintiff does not allege that Ms. Collins shared Plaintiff’s Song with Carter or anyone else, or that Carter or any other writer of Defendants’ Song otherwise obtained a copy of Plaintiff’s Song. Nor does Plaintiff even allege that Ms. Collins worked for Carter or the Defendants during the relevant period.²

B. The Defendants

Carter is an enormously successful entertainer, songwriter, recording artist, actress and music producer, winning 17 Grammy Awards and selling over 118 million albums as a solo artist and a further 60 million albums with the recording group Destiny’s Child, making her one of the best-selling artists of all time. Plaintiff alleges that Carter’s recording of Defendants’ Song was released on December 16, 2013 on her eponymous album, “Beyoncé” (the “Album”), through

² Solely for purposes of this motion, given the abject lack of substantial similarity between the songs at issue, Defendants assume the facts regarding access are true (although, as noted above, such allegations do not even allege that any of the Defendants had access to Plaintiff’s Song prior to the creation of Defendants’ Song). Should Plaintiff’s Complaint survive Defendants’ Motion, Defendants intend to vigorously dispute access in discovery.

Parkwood and Columbia Records.³ (Ex. A, ¶ C.) The Album was released digitally to the iTunes Store without prior announcement or promotion and debuted at number one on the U.S. *Billboard* 200 chart, earning Carter her fifth consecutive number-one album in the country.

C. Plaintiff Brings Suit for Infringement

On August 20, 2014, Plaintiff instituted this action *pro se*. The entire seven-sentence “Facts” section of the Complaint is set forth below:

I believe my copywritered [sic] musical work has been infringed upon. On December 16th 2013 Beyonce Knowles Carter released a self-titled album with work and images that copied my original works. She release [sic] a song titled “XO” which copies my song and artwork ‘XOXO,’ via Parkwood Entertainment/Columbia Records. I have worked with her background singer ‘Crissy Collins’ as a background singer for another artist. I sent her the material I wrote after releasing it. ‘The Dream’ Terius Nash sings a melody I sing in XOXO. Millions of people have witnessed her release in the form of fans, media, and the general public.

(Ex. A, ¶ C.) He demands at least \$3 million in damages.

Plaintiff vaguely refers to “my song” being “copied,” without any elaboration. Similarly, Plaintiff conclusorily alleges that the Album copies his “artwork ‘XOXO,’” without providing a single detail sufficient to identify the alleged artwork at issue or whether he has copyrighted such artwork.

Accordingly, in an effort to clarify these vague allegations, between February and April 2015, counsel for Defendants contacted Plaintiff and asked him to describe the similarities that he believes exist between Plaintiff’s Song and Defendants’ Song. (*See* Farkas Decl. ¶¶ 7-9.) After several telephone calls and email exchanges, it appears that Plaintiff’s claims boil down to the following similarities:

1. At 0:06, Defendants’ Song allegedly copies the first four bars of an eight-bar

³ Plaintiff incorrectly names Columbia Records as a defendant. The proper entity is Sony Music Entertainment.

melody that is looped throughout Plaintiff's Song.

2. At 2:54, Defendants' Song allegedly contains a four-note sequence that is similar to the four-note sequence heard at 3:54 of Plaintiff's Song.
3. The title of Defendants' Song ("XO") is similar to the title of Plaintiff's Song ("XOXO").
4. Defendants' Album featuring "XO" contains images that are similar to artwork for Plaintiff's Song.

(Farkas Decl. ¶¶ 8-9.)

Even if this clarification were deemed part of the Complaint, as demonstrated herein, Plaintiff cannot state a claim for copyright infringement as a matter of law. No amount of discovery is going to change the lyrics and music of these two songs. Thus, the Court can compare the works on this motion and determine now that Plaintiff's Complaint should be dismissed as a matter of law.

ARGUMENT

I. STANDARD OF REVIEW

The Supreme Court has explained that Rule 8(a)(2) of the Federal Rules of Civil Procedure 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]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007). A motion to dismiss under Rule 12(b)(6) is meant to test the sufficiency and plausibility of plaintiffs' allegations. *Id.* 550 U.S. 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 his or her

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”) (citations & 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 570.⁴

When deciding a motion to dismiss under Rule 12(b)(6), the Court may consider the pleadings, as well as materials incorporated into the complaint by reference, materials that the plaintiff relied on in bringing suit, materials 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); *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide Inc.*, 369 F.3d 212, 217 (2d Cir. 2004); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991); *see also Bay Harbour Mgmt. LLC v. Carothers*, 282 F. App’x 71, 76 (2d Cir. 2008) (affirming consideration

⁴ Even where a plaintiff is appearing *pro se*, he must still allege facts sufficient to state a legal claim to survive a motion to dismiss. *See Wager v. Littell*, 549 F. App’x 32, 33 (2d Cir. 2013) (affirming dismissal of *pro se* plaintiff’s copyright infringement claim for failing to satisfy her pleading burden); *James v. Cent. Casting N.Y.*, No. 13 Civ. 3859(GBD)(JCF), 2014 U.S. Dist. LEXIS 102014, at *4, *13 (S.D.N.Y. July 24, 2014) (“Dismissal of a *pro se* complaint is nevertheless appropriate where a plaintiff has clearly failed to meet minimum pleading requirements.”) (citations omitted); *Kamanou v. Exec. Sec’y. of the Comm’n of the Econ. Cmty*, No. 10 Civ. 7286 (GBD)(JLC), 2012 U.S. Dist. LEXIS 7647, at *8 (S.D.N.Y. Jan. 19, 2012) (dismissing copyright infringement claim by *pro se* plaintiff on 12(b)(6) motion to dismiss and explaining that “the fact that [plaintiff] is proceeding *pro se* ‘does not exempt [her] from compliance with relevant rules of procedural and Substantive law’” (citations omitted)).

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 – which Plaintiff relied upon in bringing this action and are matters of public record – in addition to the facts alleged in the Complaint: (i) a recording of Defendants’ Song (Ex. B at Track 1); (ii) a recording of Plaintiff’s Song (Ex. B at Track 2); and (iii) the copyright registration for Plaintiff’s Song (Ex C). *See TufAmerica, Inc. v. WB Music Corp.*, No. 13-cv-7874 (LAK), 2014 U.S. Dist. LEXIS 170008, at *11-12 (S.D.N.Y. Dec. 8, 2014); *Edwards v. Raymond*, 22 F. Supp. 3d 293, 297 (S.D.N.Y. 2014) (considering allegedly infringing lyrics and audio recordings even though they were not attached to the Complaint because “the Plaintiffs clearly relied upon those materials in bringing this suit”); *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) (comparing musical works on 12(b)(6) motion and dismissing copyright infringement claims); *Gottwald v. Jones*, No. 11 Civ. 1432 (CM)(FM), 2011 U.S. Dist. LEXIS 103414, at *7-8 (S.D.N.Y. Sept. 12, 2011) (considering allegedly infringing recordings that were not attached on motion to dismiss as they were “[t]he very crux of the allegations . . .”); *Pyatt v. Raymond*, No. 10 Civ. 8764 (CM), 2011 U.S. Dist. LEXIS 55754, at *14 (S.D.N.Y. May 19, 2011) (comparing musical works that were not attached to complaint on 12(b)(6) motion because “they were clearly relied on by Plaintiffs” in commencing the lawsuit), *aff’d*, 462 F. App’x 22 (2d Cir. 2012); *Canal+ Image UK, Ltd. v. Luyak*, 773 F. Supp. 2d 419, 427 (S.D.N.Y. 2011) (considering allegedly infringing movie and musical that were not attached to or described in the complaint as they were “integral” to the claim); *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) (same); *see also* Fed. R. Evid. 201(c) (discretionary judicial notice); Fed. R. Evid. 902(6).

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. *See, e.g., Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (affirming dismissal of plaintiff's copyright infringement claim and explaining that "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"); *Klauber Bros. v. Bon-Ton Stores, Inc.*, 557 F. App'x 77, 80 (2d Cir. 2014) ("While substantial similarity is often a question of fact reserved for the trier of fact, 'it is entirely appropriate for a district court to resolve that question as a matter of law' if 'no reasonable jury, properly instructed, could find that the two works are substantially similar.'" (citation omitted)); *WB Music Corp.*, 2014 U.S. Dist. LEXIS 170008, at *18-20; *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 595 (S.D.N.Y. 2013) (holding that courts in this district "regularly consider audio files" on a motion to dismiss to determine whether they are "substantially similar as a matter of law"); *Pyatt*, 2011 U.S. Dist. LEXIS 55754, at *13-27 (dismissing copyright infringement claim on 12(b)(6) motion after comparing lyrics and sound recordings at issue – even though not attached to complaint – because no substantial similarity existed between defendant's song and any protectable element of plaintiff's song); *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).

II. PLAINTIFF FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT

A plaintiff asserting a copyright infringement claim must show “(i) ownership of a valid copyright; and (ii) 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 appropriation by demonstrating that substantial similarities relate to **protectable material**. *Id.* at *10-11.

A. The Alleged Similarities Between The Musical Works Are Unoriginal As To Plaintiff And Unprotectable As A Matter Of Law

Mere allegations of copying alone are insufficient 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 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).

1. The Title Of Plaintiff's Song Is Not Copyrightable

It appears that Plaintiff's copyright infringement claim is premised, in part, on the (different) titles of the two songs – "XO" and "XOXO." 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 299 (granting motion to dismiss where plaintiff claimed infringement based on two songs sharing the same title, "Caught Up"); *Chapman v. Universal Motown Records Grp.*, No. 08 Civ. 3255(LAP), 2010 U.S. Dist. LEXIS 11015, at *11-12 (S.D.N.Y. Feb. 3, 2010) (rejecting copyright infringement claim based on both songs sharing the title and lyrics "Lean Back"); *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) (holding that the title of the song, "frontin," is a "non-protectible element of the plaintiffs' song"), *aff'd sub nom., Currin v. Williams*, 428 F. App'x 21 (2d Cir. 2011); 37 C.F.R. § 202.1(a).

Nor is there anything novel or otherwise copyrightable about the letters "XO." A search of the U.S. Copyright Office's publicly-available online records reveals 170 other works with "XOXO" in the title. (Farkas Decl., ¶ 5; Ex. D.) Any attempt to claim ownership of this unprotectable title fails.

2. The Letters "XO" Are Not Protectable

Nor can Plaintiff base any copyright infringement claim on the use of the letters (or, at best, the phrase) "XO" in the lyrics of Defendants' Song. It is well settled that letters, 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); *see also 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) (“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”), *aff’d*, 21 F. App’x 76 (2d Cir. 2001); *Bell*, 2001 U.S. Dist. LEXIS 2783, at *6. *Accord Peters v. West*, 692 F.3d 629, 635 (7th Cir. 2012).

Plaintiff cannot enjoy a monopoly over the letters “X” and “O” or the phrase “XO” as a matter of well-settled copyright jurisprudence. *See Boone 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); *Chapman*, 2010 U.S. Dist. LEXIS 11015, at *11-12; *Gottwald*, 2011 U.S. Dist. LEXIS 103414, at *16 (holding that “drop top” is a colloquial phrase and, as such, “is not subject to copyright protection”); *Pyatt*, 2011 U.S. Dist. LEXIS 55754, at *22-23 (holding that the phrase “caught up” was not subject to copyright protection); *Oldham v. Universal Music Grp.*, No. 09 Civ. 7385 (LMM), 2010 U.S. Dist. LEXIS 126697, at *9 (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 use of the word “why”); *Staggs v. West*, Civ. No. PJM 08-728, 2009 U.S.

Dist. LEXIS 72275, at *8-9 (D. Md. Aug. 14, 2009) (claims based on allegedly similar words and short phrases, such as “good life,” dismissed as not copyrightable).

Accordingly, Plaintiff cannot state a claim based on the use of the unprotectable letters “X” and “O.”

3. There Are No Protectable Melodic Similarities Between The Works At Issue

Plaintiff also makes a vague and bare allegation that in Defendants’ Song, “‘The Dream’ Terius Nash sings a melody [Plaintiff] sing[s] in XOXO.” (Ex. A, ¶ C.) After asking Plaintiff to identify the alleged similarities, it appears that Plaintiff believes that the works contain two musical similarities: (1) The introduction of Defendants’ Song (beginning at 0:06) allegedly copies four bars of “an eight-bar melody” that is looped throughout Plaintiff’s Song; and (2) There is a four-note sequence at 3:54 of Plaintiff’s Song that is allegedly similar to the four-note sequence heard at 2:54 of Defendants’ Song. (Farkas Decl. ¶¶ 8-9.) Neither of these alleged similarities is even detectable, let alone protectable as a matter of law.

First, while Plaintiff alleges that the introduction of Defendants’ Song uses four bars of an eight-bar melody that is looped throughout Plaintiff’s Song, there is nothing in Defendants’ Song – introduction or otherwise – that even remotely sounds like a four-bar melody found in Plaintiff’s Song. If the alleged musical similarity is not even perceptible, it certainly cannot form the basis of an allegation of infringement against Defendants. *See WB Music Corp.*, 2014 U.S. Dist. LEXIS 170008, at *18-20; *Pyatt*, 2011 U.S. Dist. LEXIS 55754, at *11.

With respect to Plaintiff’s second alleged musical similarity, the four-note sequence at issue is nothing more than, at best, simply four consecutive notes descending down a scale (*i.e.*, such as D-C-B-A), which is a basic musical building block and not protectable as a matter of law. *See, e.g., Currin*, 724 F. Supp. 2d at 291 (“Thus, for example, courts have held that certain

commonly-used elements such as a descending scale step motive . . . are not, in themselves, protectible.”); *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 282 (S.D.N.Y. 1991) (holding that “descending scale step motive” is a “commonly used compositional device” that is not protectable). Thus, to the extent this sequence can even be detected in Defendants’ Song, it is not original enough to warrant copyright protection.⁵

Indeed, simply listening to Plaintiff’s Song and Defendants’ Song reveals that they do not share any melodic content and there is no meaningful similarity in pitch series, rhythm or rhythmic patterns, melodic development or structure. As elaborated *infra*, it is respectfully submitted that the Court will hear for itself that these are entirely different songs and no reasonable person could detect, much less conclude, that any of the melodic content of Defendants’ Song is similar to Plaintiff’s Song, much less substantially similar. No amount of discovery will change this, and thus Plaintiff’s infringement 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 considers “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 omitted).

⁵ If Plaintiff’s claim survives this motion, Defendants will demonstrate that this “similarity” does not actually exist, as there are differences in pitches, rhythm and development of even these miniscule parts of the songs at issue. However, even taking Plaintiff’s “allegation” as true, this alleged similarity is simply not protectable expression.

“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 300-01 (quoting *Peter F. Gaito Architecture*, 602 F.3d at 66).

Defendants have attached recordings of both songs with this Motion. (*See* Ex. B.) 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].” *Pyatt*, 2011 U.S. Dist. LEXIS 55754, at *19, *27 (quoting *Peter F. Gaito Architecture*, 602 F.3d at 67).

A comparison of the songs’ lyrics illustrates vast differences between the two works. Indeed, apart from the use of the letters “X” and “O” (which do not “belong” to Plaintiff), there are no other discernible similarities between the songs’ lyrics. Moreover, the lyrical and musical use and development of these non-protectable letters or elements is distinctively and dramatically different in each song. In Plaintiff’s Song, the letters are sung in a repetitive call and response format with different vocalists singing the “X” and the “O”. (Ex. B, Track 2.) Further, in Plaintiff’s Song, the “X” and “O” call and response appears in the chorus and is repeated dozens of times throughout the song. (*Id.*)

In contrast, in Defendants’ Song, the “XO” lyrical phrase is not used in the song’s chorus, and is only featured in a section of Defendants’ Song that appears only once, and not until 2 minutes and 30 seconds into the 3:30 minute song. (Ex. B, Track 1.) These letters are sung

together by a single vocalist (Ms. Knowles-Carter) as part of the lyrical sentence “I love you like XO” in this one section.

Moreover, the two songs are distinct from a thematic perspective, with the Plaintiff’s Song describing the narrator’s romantic and sexual feelings toward a new love interest. He sings “first I think you want me, then you don’t,” he speaks of being “horny,” being “shut down” and loving “every inch of you.” (Ex. B, Track 2.) On the other hand, the Defendants’ Song expresses an uplifting celebration of love and life, emphasizing the importance of living in the present with a loved one “before our time has run out.” She celebrates her love by singing, “in the darkest night hour, search through the crowd, your face is all that I see, I’ve given you everything, baby love me lights out.” (Ex. B, Track 1.) Simply put, the “feel” of these two songs is entirely different and cannot possibly support a finding of substantial similarity. *Edwards*, 22 F. Supp. 3d at 300-01; *Pyatt*, 2011 U.S. Dist. LEXIS 55754, at *23, *26-27.

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 a slow, R&B style song, starting with a lengthy instrumental introduction of 43 seconds (versus the 4 second introduction of Defendants’ Song). Defendants’ Song, on the other hand, is a midtempo pop power ballad. Virtually every minute of Defendants’ Song is filled with vocals from Carter, while the first vocals in Plaintiff’s Song are not heard until 43 seconds into the song. The melodies of each song, the production and the instrumentation used in each are also entirely different. No average observer could possibly listen to Defendants’ Song and conclude it was appropriated from Plaintiff’s Song. *Pyatt*, 2011 U.S. Dist. LEXIS 55754, at *27.

Finally, even taking Plaintiff’s allegations – as amplified in his communications with Defendants’ counsel – to be true, the Court can hear for itself that these alleged “similarities”, in

addition to being unprotectable, are, at most, “barely perceptible” to the average listener and, thus, “sufficiently *de minimis* to render moot whatever otherwise might have been made of the alleged copying” *WB Music Corp.*, 2014 U.S. Dist. LEXIS 170008, at *18-19 (holding that no substantial similarity existed where the allegedly infringing sample “appear[ed] only faintly in the background” and was, “at best, only barely perceptible to the average listener”).

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.

C. Plaintiff Has Not Pled Ownership Of A Valid Copyright In The Music Of Plaintiff’s Song

Plaintiff’s claim for copyright infringement of the music to Plaintiff’s Song must also be dismissed because Plaintiff has not alleged that he holds a valid copyright registration for this music. Section 411(a) of the Copyright Act makes clear that “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.” 17 U.S.C. § 411(a). “Indeed, [t]he absence of a valid copyright registration . . . would bar a plaintiff from bringing a viable copyright infringement action.” *John Wiley & Sons, Inc. v. DRK Photo*, 998 F. Supp. 2d 262, 282-83 (S.D.N.Y. 2014) (quotation marks & citation omitted).⁶

Here, Plaintiff appears to allege that he owns a copyright in the musical work “XOXO.” (Ex. A, ¶ C.) However, the copyright registration for Plaintiff’s Song is clear that Plaintiff only

⁶ Although the Supreme Court’s recent decision in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), indicates that the registration requirement is not jurisdictional, registration still remains a statutory prerequisite to filing suit. 17 U.S.C. § 411(a).

holds a copyright to the **lyrics** of the song – not the music thereof. (See Ex. C.) Indeed, in the registration for “XOXO,” Plaintiff specifically identifies the “music” as “[m]aterial excluded from this claim.” (*Id.*) Accordingly, to the extent Plaintiff’s claim is based on the alleged infringement of the music of “XOXO,” Plaintiff does not own a valid copyright in this material, and his claim must be dismissed.⁷ See *Kamanou*, 2012 U.S. Dist. LEXIS 7647, at *16-18 (dismissing copyright infringement claim against *pro se* plaintiff where plaintiff did not have a registered copyright in the work at issue).

D. Plaintiff Has Not Stated A Claim For Infringement Of “Artwork”

Finally, Plaintiff’s vague and conclusory claim that Defendants copied Plaintiff’s “artwork” for “XOXO” must be dismissed. Significantly, even after providing Plaintiff with a chance to describe his allegations, Plaintiff still has not identified with specificity which images from Defendants’ Album he believes are infringing and/or the specific artwork associated with “XOXO” that he believes was copied.

In any event, even if Plaintiff had sufficiently described the artwork, the claim still fails because Plaintiff has not alleged that he has a valid copyright registration for any artwork associated with “XOXO.” As discussed *supra*, a plaintiff must “either hold a valid copyright registration outright or have applied and been refused a registration prior to filing a civil claim.”

Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ’g Co., No. 09 CV 2669 (LAP), 2012 U.S. Dist. LEXIS 42791, at *13-14 (S.D.N.Y. Mar. 26, 2012); *see also* 17 U.S.C. § 411(a).

Here, Plaintiff does not allege that he holds a valid copyright registration in any artwork at issue nor does he allege that he has applied for and been refused a registration prior to filing this lawsuit. Accordingly, this claim must be dismissed.

⁷ Leave to amend should not be granted to cure this defect, as any amendment would be futile given the inability to state a claim for infringement. See Sections I.A. and I.B., *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Defendants' Motion should be granted and Plaintiff's Complaint should be dismissed in its entirety with prejudice, as no amendment will change the two songs and the lack of any substantial similarity between them.

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