

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

MATTHEW FULKS,

Plaintiff,

v.

**BEYONCÉ GISELLE KNOWLES-CARTER,
ET AL.,**

Defendants.

Civil Action No. 16-CV-4278

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Matthew Fulks ("Fulks" or "Plaintiff") submits this Response to the Motion to Dismiss the Second Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) filed by Defendants Beyonce Giselle Knowles-Carter, Sony Music Entertainment, Parkwood Entertainment LLC, and Home Box Office, Inc. ("Defendants") [DE 31].

I. INTRODUCTION

Plaintiff is the author of an original audiovisual work entitled *Palinoia*. An audiovisual work is one of eight categories¹ of protectible expression in which authors are granted a set of exclusive rights under the Copyright Act.² Plaintiff claims that his exclusive rights in the *Palinoia* work were infringed by two separate works – the *Lemonade* Trailer and the *Lemonade* Film – created and displayed by Defendants.³

Defendants' Motion to Dismiss is notable in its omission of any reference to the 2011 decision from this District, *LaChapelle v. Fenty*, 812 F.Supp. 2d 434 (S.D.N.Y. 2011). The published *LaChapelle* decision denying in part defendants' motion to dismiss considers an allegedly infringing audiovisual work against a backdrop of facts and claims that are strikingly similar to those included in Plaintiff's Second Amended Complaint. In contrast, Defendants' cited cases involve still images, sculptures, or other static works.

In an effort to avoid the most relevant authority and ignore similarities between the audiovisual works in question, Defendants direct the Court to cases that are factually dissimilar

¹ Copyright protection subsists in: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. 17 U.S.C. § 102.

² "Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. 17 U.S.C. § 101.

³ To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially. 17 U.S.C. § 101.

and attempt to conflate the two infringing works – the *Lemonade* Trailer and the *Lemonade* Film – into a single work for purpose of an infringement analysis. Defendants then engage in an improper dissection of the Plaintiff’s work and the Defendants “conflated” works in an effort to avoid the obvious similarities between both their specific protectible elements and total concept and feel.

Plaintiff’s Second Amended Complaint sufficiently pleads the required elements to prevail on a claim of copyright infringement against two separate works. Plaintiff is the owner of a valid copyright and has described sufficient factual matter that, if accepted as true, states a claim to relief that is plausible on its face. Therefore, Defendants’ motion to dismiss must be denied.

II. STANDARD FOR MOTION TO DISMISS UNDER FRCP 12(B)(6)

In addressing the sufficiency of a complaint under Rule 12(b)(6) the Court must accept as true all factual allegations, *Aegis Ins. Servs., Inc. v. World Trade Co.*, 737 F.3d 166, 176 (2d Cir. 2013), and must draw all reasonable inferences in favor of the plaintiff. *Daniel v. T & M Prot. Res., Inc.*, 992 F.Supp.2d 302, 304 n. 1 (S.D.N.Y. 2014) (citing *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012)). Additionally, “[i]n ruling on a 12(b)(6) motion, ... a court may consider the complaint[,] ... any written instrument attached to the complaint as an exhibit[,] or any statements or documents incorporated in it by reference,” as well as “matters of which judicial notice may be taken, and documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.” *Kalyanaram v. Am. Ass'n of Univ. Professors at N.Y. Inst. of Tech., Inc.*, 742 F.3d 42, 44 n. 1 (2d Cir. 2014) (some alterations, citation, and internal quotation marks omitted); see also *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (“In adjudicating a Rule 12(b)(6) motion, a district court must

confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.” (internal quotation marks omitted)).

“The task of the court in ruling on a Rule 12(b)(6) motion is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.” *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 264 (S.D.N.Y. 2004). As the Supreme Court held in *Twombly*, “asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible. *See generally Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (“two or more witnesses” may tell mutually inconsistent but “coherent and facially plausible stor[ies]”). The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion. “[F]act-specific question[s] cannot be resolved on the pleadings.” *Todd v. Exxon Corp.*, 275 F.3d 191, 203 (2d Cir. 2001). As the *Twombly* Court noted, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.” *Id.* (internal quotation marks omitted).

Plaintiff here goes beyond a basic recitation of elements of copyright infringement in the Second Amended Complaint and brings forth allegations in support of those elements that are non-conclusory, specifically:

- (1) The Plaintiff's and Defendants' works themselves;

(2) The identification of similarities between protectible expression in Plaintiff's work and Defendants' works alleged to be infringing, demonstrated by nine examples of direct visual similarities;

(3) The identification of unrefuted audio similarities between Plaintiff's protectible audible expression and audio elements of the Defendants' works alleged to be infringing;

(4) Evidence of the original manner in which Plaintiff selected, coordinated, and arranged the elements of his work and a comparison of the resulting "total concept and feel" to that of the Defendants' works alleged to be infringing.⁴

III. PLAINTIFF'S COPYRIGHT CLAIM IS SUFFICIENTLY STATED

A. Plaintiff Pleads a Plausible Claim of Copyright Infringement

To establish a claim of copyright infringement, "a plaintiff with a valid copyright⁵ 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." *LaChapelle v. Fenty*, 812 F.Supp. 2d 434, 439 (S.D.N.Y. 2011) (quoting *Mannion v. Coors Brewing Co.*, 377 F.Supp. 2d 444, 449 (S.D.N.Y. 2005) (emphasis in original)).

A plaintiff may prove that a defendant actually copied the plaintiff's work by direct or, as is commonly the case, by indirect evidence. *Lumetrics, Inc. v. Todd Blalock*, 23 F.Supp. 3d 138, 145 (W.D.N.Y. 2014). In the absence of direct evidence of copying, "a plaintiff may establish copying circumstantially by demonstrating that the person who composed the defendant's work had access to the copyrighted material, and that there are similarities between the two works that

⁴ Second Amended Complaint, ¶¶ 54-80.

⁵ Plaintiff has pled a valid U.S. Copyright Office Certificate of Registration for his work and the presumption of its validity has not been challenged by Defendants. Defendants' Motion to Dismiss p.12 n.5.

are probative of copying.”⁶ *LaChapelle*, 812 F.Supp. 2d at 440; *Jorgensen v. Epic/Sony Records*, 351 F.3d. 46, 51 (2d. Cir. 2003).

“The standard test for substantial similarity between two items is 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.” *LaChapelle*, 812 F.Supp. 2d at 441 (quoting *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d. 57, 66 (2d. Cir. 2010)). In applying the so-called “ordinary observer test,” courts question whether “an average lay observer would ... recognize the alleged copy as having been appropriated from the copyrighted work.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (citing *Folio Impressions, Inc. v. Byer California*, 937 F. 2d 759, 766 (2d Cir. 1991)). The law requires “the lay observer to focus on similarities rather than differences when evaluating a work. Only when the similarities are insubstantial or unprotectible will a claim fail.” *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996).

When faced with works that have both protectible and unprotectible elements, the analysis becomes “more discerning” and courts “must attempt to extract the unprotectible elements from ... consideration and ask whether the protectible elements, standing alone, are substantially similar.” *Knitwaves, Inc.*, 71 F.3d. at 1002.

Regardless of the test applied, courts are not to dissect the works into their separate components “and compare only those elements which are in themselves copyrightable.” *Id.* at 1003. Instead, courts are principally guided by comparing the works’ “total concept and overall

⁶ Defendants do not attempt to rebut Plaintiff’s claims that Matthew Fulks provided a copy of his *Palinoia* work to Bryan Younce, Senior Vice-President of Video Production at Defendant Sony, whose primary responsibility it is to produce music videos for Sony talent including Beyonce. See Second Amended Complaint, ¶¶ 9-14, 59, 68-73. Defendants expressly concede access for purposes of their motion.

feel’ with that of the allegedly infringed work.” *LaChapelle*, 812 F.Supp. 2d at 441; *Peter F. Gaito Architecture, LLC*, 602 F. 3d. at 66.

B. Plaintiff’s Work Is Comprised of Protectible Elements under Copyright Law

In applying the substantial similarity test, a court must first determine what are the protectible elements of the plaintiff’s work. Material that is original to the author, that is independently created, and that possesses a minimal degree of creativity is protected under the Copyright Act. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Courts have provided guidance on authorship that satisfies this test.

1. Plaintiff’s Rendition of Subject Matter in *Palinoia* is Protectible

Filmmakers make aesthetic decisions about the rendition of subject matter in films. Rendition concerns not “*what* is depicted, but rather *how* it is depicted.” *LaChapelle*, 812 F. Supp. 2d at 440.⁷ These choices contribute to the aesthetic of the final work. Among a filmmaker’s creative choices held to be protectible expression are: camera angle, lighting, shade, lens angle, depth of field, composition, color balance, saturation, and contrast. *Id.*

In filming *Palinoia*, Plaintiff did not simply record his subject matter mechanically. Rather, he carefully selected and refined his rendition of subject matter, including through camera angle, distance, lighting, and color balance. *See Id.* at 445.⁸ Plaintiff has pled these elements of protectible expression and identified where they appear in Plaintiff’s work.⁹ These elements of Plaintiff’s work are properly considered by a jury in a substantial similarity analysis.

⁷ Citing *Mannion v. Coors Brewing*, 377 F.Supp. 2d 444, 452 (S.D.N.Y. 2005)(emphasis in original).

⁸ Photographer’s selection and orchestration of themes, props, settings, wardrobes and colors” while controlling “angles, poses and lighting” support finding of original elements.

⁹ *See* Plaintiff’s claims of original expression in camera angle, lighting, lens angle, depth of field, composition, color balance, and saturation or contrast; Second Amended Complaint, ¶ 73.

In *Mannion v. Coors Brewing Co.*, Plaintiff asserted that an advertisement copied his photograph of basketball player Kevin Garnett because both images featured African American men posed against a cloudy sky, wearing white t-shirts, athletic pants, and similar jewelry. 377 F.Supp. 2d 444 (S.D.N.Y. 2005). Judge Kaplan found “original in the rendition,” and thus protectible, the somewhat “unusual angle and distinctive lighting” of plaintiff’s work in denying cross-motions for summary judgment. *Id.* at 455. Thus, should a jury find that Defendants’ rendition of subject matter is sufficiently like the unusual angles and distinctive lighting of Plaintiff’s work, Plaintiff would be entitled to prevail on infringement.

2. Plaintiff’s Orchestration of Subject Matter in *Palinoia* is Protectible

Filmmakers also select and orchestrate the subject matter of films. *LaChapelle*, 812 F. Supp. 2d at 441. This *selection of* subject matter for inclusion in a work is original contribution protected by copyright law. As Judge Kaplan wrote in denying a defendant’s motion for summary judgment:

It of course is correct that the photographer of a building or tree or other pre-existing object has no right to prevent others from photographing the same thing. That is because originality depends upon independent creation, and the photographer did not create that object. By contrast, if a photographer ***arranges or otherwise creates the object that his camera captures***, he may have the right to prevent others from producing works that depict that subject.

Mannion, 377 F.Supp. 2d 444, 450 (S.D.N.Y. 2005) (Emphasis added).

Plaintiff did not “stumble upon” the subject matter included in his film *Palinoia*. He carefully selected subject matter for inclusion to achieve a particular effect. Plaintiff has identified specific subject matter in the Second Amended Complaint including, without limitation, nine examples of protectible visual expression in subject matter: (1) Graffiti and Persons With Head Down, (2) Red Persons With Eyes Obscured, (3) Parking Garage, (4)

Stairwell, (5) Black and White Eyes, (6) Title Card Screens, (7) The Grass Scene, (8) Feet on the Street, and (9) Side-lit Ominous Figures,¹⁰ in addition to Plaintiff's protectible total concept and feel.

C. Substantial Similarity Exists Between the Protectible Elements of Plaintiff's Work and Defendants' Works

Plaintiff has stated a case in its initial pleading that particular elements of protectible expression included in Plaintiff's work have been misappropriated by inclusion in Defendants' works. This case involves a fact pattern very similar to *LaChapelle v. Fenty*, conspicuously omitted from the Defendants' Motion to Dismiss.¹¹

In *LaChapelle*, a photographer claimed his works were misappropriated by the Defendants' production of a Rihanna music video titled "S & M." *LaChapelle*, 812 F. Supp. 2d at 438. Judge Scheindlin engaged in a thorough analysis of both the protectible and certain unprotectible elements of Plaintiff's works in her Opinion and Order.¹² In allowing certain of the claims to proceed, Judge Scheindlin acknowledged the various unprotectible elements in the plaintiff's works, namely those elements that flowed "naturally and necessarily" from the choice of "the common theme of S & M." *Id.* at 445. Notwithstanding the *scenes a faire* limitations that accompanied the subject matter, the Court agreed with the plaintiff that his photographs included protectible elements, e.g. unusual angles, distinctive lighting, positioning of poses, unique wardrobe, for purposes of an infringement analysis. *Id.*

As one example, Judge Scheindlin noted that the Defendants' "Pink Room Scene" and the plaintiff's work "Striped Face" both featured a choreographed "S & M-inspired scene of women dominating men in a fanciful domestic space." And, Judge Scheindlin continued, these

¹⁰Second Amended Complaint, ¶73.

¹¹ Defendants' counsel of record Tom Ferber served as counsel of record for Defendants in *LaChapelle*.

¹² Judge Scheindlin's Opinion is 13 pages long, includes 97 footnotes to legal authority, and includes 4 exhibits.

subjects flow naturally from the chosen idea and thus are not protectible. However, Judge Scheindlin went on to clarify, that it *did not* necessarily flow from the shared themes that both works feature, “hot pink and white striped walls; two single-hung windows in the middle of the back wall; windows with glossy hot-pink casings and interior framework ...”, nor is it required by the subject matter that both works be “well-lit and intensely saturated, with all of the details in sharp focus and almost no shadows.” *Id.* at 446. A side-by-side comparison of the works in *LaChapelle*, included in the Court’s opinion, is attached as **Exhibit B**¹³ hereto. Judge Scheindlin relied upon six scenes in the Defendant’s 4:30 minute video to support her findings. Plaintiff relies on nine scenes in Defendant’s :59 second video in support of his argument with respect to the *Lemonade* Trailer.

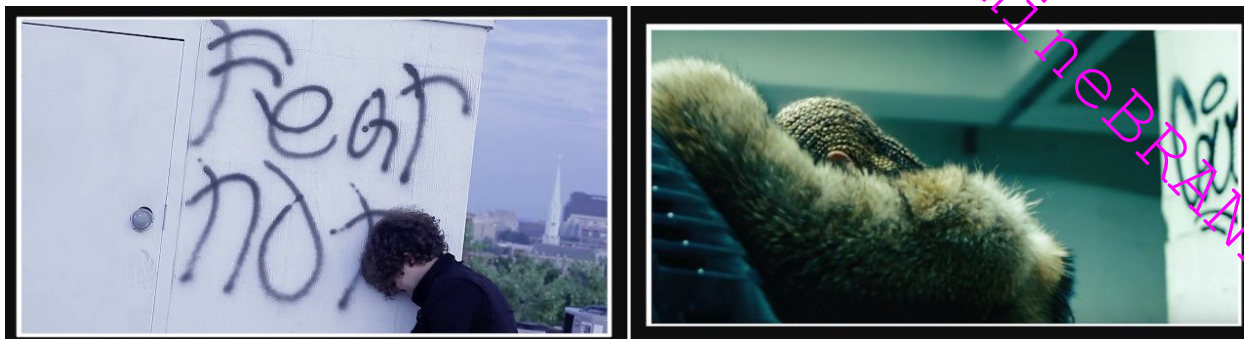
In the present case, there are no shared *scenes a faire* from which unprotectible elements flow. Instead, *Palinoia* is an original work composed of protectible elements created through the Plaintiff’s orchestration, rendition, selection and arrangement of the scenes. Plaintiff includes a side-by-side comparison below,¹⁴ similar to the one relied upon by Judge Scheindlin in *LaChapelle*, to assist in an analysis of similarities.¹⁵

¹³ See **Exhibit A** - Declaration of Amy Cahill, for purpose of identifying Exhibits B and C to the Response. See **Exhibit B** *LaChapelle* at 450, Exhibit A, (color version). Defendants argue that still images taken from a film are not proper for comparison, but the *LaChapelle* opinion demonstrates otherwise.

¹⁴ The same comparisons appear in Plaintiff’s Second Amended Complaint. In contrast, but perhaps not surprisingly, Defendants do not include images from either work in their motion to dismiss.

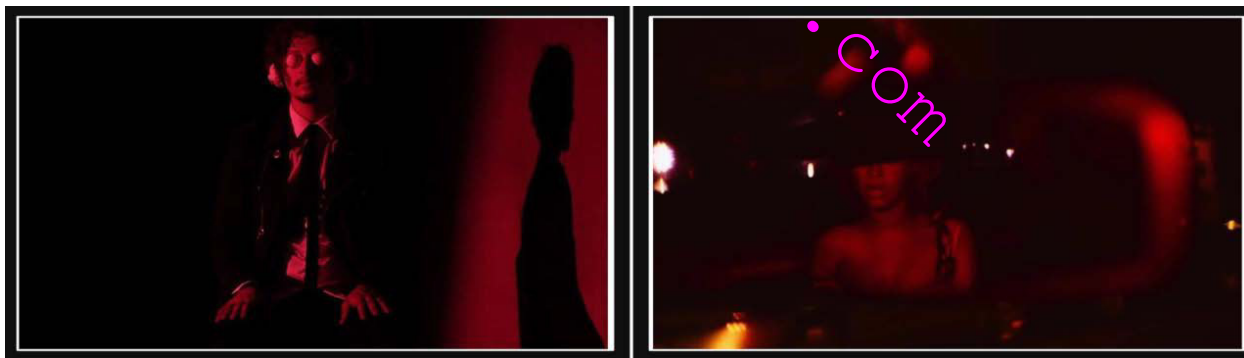
¹⁵ In each side-by-side, the scene from *Palinoia* appears on the left and the scene from the *Lemonade* Trailer and *Lemonade* Film appears on the right.

1. Similarity One – Graffiti and Person with Head Down



The orchestration of the subject matter in the two scenes is substantially similar. The character in each is leaning against a structure, with head down, face hidden from the viewer. Both structures display hand-painted graffiti words in similar typeface. The characters in both images are also facing left, and the subjects are filmed from the subjects' left. The orchestration of the subjects -- person with head down, face obscured, defeated, against the side of a graffiti-tagged building -- and rendition of the subject matter display substantial similarity of aesthetic effect in the final works.

2. Similarity Two – Red Person with Eyes Obscured



The selections and orchestration of the subject matter -- primary protagonists with eyes intentionally obscured -- are similar. Even more notable is the rendition of the subjects, including use of the same depth of field (shot at a medium distance), using red saturation from a

single light with a red gel, similar camera angles, dark lighting, and an identical heavy contrast of color, all of which are used to create a substantially similar aesthetic effect.

3. Similarity Three - Blue and Yellow Parking Garage



The subject matter of the two scenes is identical – a concrete commercial parking garage. The two scenes involve obvious substantial similarities in rendition. Both employ similar camera angles (wide shots), shot length-wise from one end of the garage to the other. There are no fill lights used in either image, leaving the only light coming from the garage's own lights, allowing other parts of the scenes to remain dark. The scenes also share the contrast between yellow and blue hues.¹⁶ The particular framing of the shots features the sectioned ceilings of the garages, along with their pillars, and concrete floors. The similarity in subject matter and rendition of the Plaintiff's work create the same aesthetic as Defendants' works rendering them substantially similar.

¹⁶ Defendants provide no support for their curious assertion that blue and yellow is a common color scheme for commercial parking structures.

4. Similarity Four – Sweeping Stairwell



The scene above left from the *Palinoia* work and on the right from the *Lemonade* Trailer and *Lemonade* Film feature dimly lit stairwells with worn, gritty, concrete stairs with handrails. Both scenes are unusually rendered by using tilted camera angles, intentionally dim lighting, and very close depth of field that focuses on the details of the stairwells. The scenes are also filmed using angular, close-up shots and employ a fast sweeping camera motion, which contrasts sharply with the stationary shots that comprise the majority of the parties' respective works. Thus both the exact subject matter and its original rendition in Plaintiff's work have been appropriated by Defendants.

5. Similarity Five – Black and White Eyes



The subject matter of both scenes is of a partial human face with a focus on the eyes. Again, it is the rendition of the subjects that brings to the fore the substantial parallels between

the scenes. These two scenes are filmed in black and white -- the only use of black and white in the Plaintiff's work and one of only three black and white shots in the Defendants' *Lemonade* Trailer. Both shots "cut off" the top and bottom of the subjects' heads to create focus on the eyes, which is an unusual and original framing choice in a professionally produced film. Plaintiff's aesthetic choice of subject matter combined with its original rendition creates a protectible image that the Defendants used to create a substantially similar image.

6. Similarity Six – Title Card Screens



Plaintiff's title card, while sparse, is the result of particular aesthetic choices. Plaintiff selected white text on a solid dark color background, with the title of the work centered in the frame in very small letters, printed in all capitals and in a clean sans serif font. These elements of Plaintiff's original work were used by Defendants in creating two works, the *Lemonade* Film and *Lemonade* Trailer, that are substantially similar in concept and feel to Plaintiff's work.

7. Similarity Seven – Blended Grasses



The subject matter of dead and living grasses mixed together to blend green and tan colors in the shots is shared by the scenes above. Plaintiff selected the color contrast of the grasses against the focus subject, along with particular color saturation and hues. Defendants incorporate the same subject matter and rendition to create a substantially similar aesthetic in their *Lemonade* works.

8. Similarity Eight – Feet on Street



Visual similarity eight shows scenes from the *Palinoia* Work and the *Lemonade* Trailer and *Lemonade* Film composed of close-up shots of human feet, filmed from the middle of the leg down. The subject matter is similarly rendered, with the subject (lower legs) in the center of the shot both horizontally and vertically, incorporating a strong contrast between light and dark, with shadows being cast on the feet. This original rendition creates protectible authorship that was copied in Defendants' works.

9. Similarity Nine – Side-Lit Ominous Figures



The same subject matter – a human figure with face obscured – is rendered in a substantially similar manner. Both scenes are filmed using “wide shots” where the central subjects are in the center of the frame, with their feet “cut-off” in both screenshots. Both scenes are lit from the right hand side of the frame in a manner that obscures the subjects' faces for an ominous effect.

D. Defendants Improperly Dissect the Works in an Effort to Distinguish Them

Defendants spend pages dissecting the works, scene by scene, in an effort to obscure the forest for the trees. For example, Defendants' motion includes pages of translation of Plaintiff's poetry voiceover to highlight apparent differences, all the while overlooking the much more significant and obvious similarity that both works contain a poem as primary narration of the works. Defendants' dissection of the elements of the images is improper. Courts consistently disavow any notion that:

[W]e are required to dissect [the works] into their separate components, and compare only those elements which are in themselves copyrightable.

Peter F. Gaito Architecture, LLC v. Simone Development Corp., 602 F.3d 57, 66 (2d Cir. 2010).

The court in *LaChapelle* conducted an infringement analysis that prevented defendants from picking apart the works into modicums of disconnected elements writing:

Defendants argue that notwithstanding these similarities, the differences in the Video preclude a finding of substantial similarity. They cite, for example, the pattern on the walls, the shape of the room, the man's clothing and position, the focus on Rihanna over the rest of the subjects, and the absence of witches, all as examples of differences. However, “by definition copying need not be of every detail so long as the copy is substantially similar to the copyrighted work.”

LaChapelle at 446. Defendants' dissection of the works is inappropriate.

Instead of looking to the most analogous case law, i.e. *LaChapelle*, Defendants lean heavily on three inapposite cases to try to argue that the unprotectible elements of *Palinoia*

prevent the case from proceeding. In *Kaplan v. Stock Market Photo Agency, Inc.*, 133 F.Supp.2d 317 (S.D.N.Y. 2001), the still images involved were of a businessman on the ledge of a tall building, within a large urban area. *Id.* at 319. There the court stated that the idea of the plaintiff's photo was a businessman contemplating suicide, and the photo was a result of the necessary sequence of events that follow from the setting. *Id.* at 323. None of the expressive similarities here is in any way dictated by the underlying idea of the parties' works, unlike *Kaplan*.

In another *scènes a faire* case, *Bill Diodato Photography v. Kate Spade*, 388 F.Supp.2d 382 (S.D.N.Y. 2005), the court examined a fashion photo and a fashion advertisement, both of a woman's feet and handbag below a bathroom stall. *Id.* at 384. The court noted that the specific idea of the photo was to highlight the woman's handbag and shoes and that the subject needed to pose specifically to display such accessories. *Id.* at 393. The court stated that the idea of a woman in a bathroom is not protectible and that the framing of the subject with the floor and bathroom walls was necessary to properly shoot a photograph of the bottom part of a woman's legs in the bathroom. *Id.* at 392. Again, the expressive similarities in the works in this case do not "flow naturally" from the underlying ideas as in *Kaplan*, nor are they constrained by the logistics of shooting a particular subject for a particular angle as in *Bill Diodato*.

The third case the Defendants cite in support of their position is *Croak v. Saatchi & Saatchi, N. Am., Inc.*, 2016 U.S. Dist. LEXIS 44350 (S.D.N.Y. Mar. 31, 2016). *Croak* involved one of the most common mythical creatures of pop culture and history, Pegasus, and to a lesser extent the unicorn. *Id.* at *7. The plaintiff's sculpture was of a hyper-realistic horse with wings "bursting through" the roof of an old lowrider car with a background of smoke. The defendant's advertisement involved a large, pink, stuffed, unicorn Pegasus physically strapped to a family-

style SUV set in a bright, sunny neighborhood. *Id.* at *11. This court pointed to the plaintiff's efforts to construct "abstract parallels" in an effort to create similarities in the face of only unprotectible visual similarities. *Id.* at *15-16. The facts of *Kaplan*, *Diodato*, and *Crook* render these cases completely inapposite to the analysis of the similarities here at issue.

E. Defendants' Works Misappropriate the Total Concept and Feel of Plaintiff's Work

In addition to the comparison of specific elements of protectible expression described above, when comparing works that have both protectible and unprotectible elements for infringement purposes, the Second Circuit may consider the works' "total concept and feel." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995); *See also Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 500 (2d Cir. 1982). This is because an "infringement analysis is not simply a matter of ascertaining similarity between components viewed in isolation." *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003). While a defendant may infringe on a plaintiff's work by literally copying a portion of the work, a defendant may also infringe on a plaintiff's work "by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff's work ... are considered in relation to one another." *LaChapelle*, 812 F. Supp. 2d at 442 (quoting *Canal + Image UK Ltd. v. Lutvak*, 773 F.Supp. 2d 419, 436 (S.D.N.Y. 2011)). In the end, the total concept and feel analysis focuses on whether the alleged infringer has misappropriated "the original way in which the author has 'selected, coordinated, and arranged' the elements of his or her work." *Id.*

Plaintiff has pled specific similarities in total concept and feel between Plaintiff's work and Defendants' works in the Second Amended Complaint. In addition to the way in which

Plaintiff selected and arranged the specifically protectible individual elements of his work, similarities in mood, pace, and theme result in substantial similarity of total concept and feel.¹⁷

1. The Works Share the Same Narrative Theme

Defendants begin their analysis of the Plaintiff's work by incorrectly stating that the romantic relationship depicted in the *Palinoia* film has ended, while in fact the film depicts an ongoing tumultuous relationship. The *Lemonade* Film and *Lemonade* Trailer are substantially similar to *Palinoia* in this aspect as they portray a struggle of a relationship; the reasons for such struggle are unclear and irrelevant.¹⁸ Defendants' description of the story sequence of *Palinoia* is almost identical to a reasonable observer's perception of the story sequence of the *Lemonade* Film and Trailer.¹⁹

2. The Works Share the Same Aesthetic in Mood and Pace

Defendants continue their argument by stating that *Palinoia* features a succession of abstract scenes with unknown meanings. But this description supports a finding of similarities between the works. There are numerous abstract scenes found throughout the *Lemonade* Film and the *Lemonade* Trailer.²⁰ This aesthetic of a pattern of successive montage of abstract scenes, with unknown or unclear meanings, pieced together in "short takes," reflects a substantially similar mood and pace to the mood and pace found in *Palinoia*, as is evidenced by the works themselves.²¹

¹⁷ Second Amended Complaint, ¶¶ 78-80.

¹⁸ Defendants also point to the dictionary definition of 'palinoia' to show that the film does not align with said definition, however, it is equally true that a drink made from lemon juice and sweetened water does not align with an allegedly Southern Gothic film about a tumultuous relationship.

¹⁹ The Defendants bring up the race of the characters in *Palinoia*. The race of the characters in the film is irrelevant to the total concept and feel of a film about relationships.

²⁰ These abstract segments in Defendants' works include: The figure in a wedding dress in a parking garage that is on fire with strange electronic noise, a bluish light surrounded by shrill noises, a girl with a painted face and a crown of thorns, a staircase cast in red light with odd noises, a woman swinging a red work light in the dark, a girl in tall grass, a random explosion in the background of a woman swinging a bat at a camera.

²¹ See Second Amended Complaint, ¶¶ 4, 19, 78.

3. Defendants' Distinctions in Total Concept and Feel Are Merely Pretextual

Defendants identify these “differences” between the works’ total concept and feel:

- Plaintiff’s protagonist is a white man while Defendants’ protagonist is an African-American woman;
- Defendants’ films depict the protagonist’s dilemma in the context of African-American culture while Plaintiff’s film does not;
- Defendants’ ending is upbeat and joyous while Plaintiff’s film is not;
- Defendants’ film has a “Southern gothic feel” while Plaintiff’s film does not.²²

It is axiomatic that a court must emphasize similarities and not differences. *LaChapelle*, 812 F.Supp.2d at 446; *See also, Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 (2d Cir. 1977) (“the key is the similarities rather than the differences”). This is especially the case regarding total concept and feel as the court recognized in *LaChapelle*:

Indeed, although the protectible and nonprotectibility of individual components of the copyrighted photograph must be considered by the Court, ultimately originality may be determined by the ‘total concept and feel’ of the photograph. In this case, both works share the frantic and surreal mood of women dominating men in a hyper-saturated, claustrophobic domestic space. Thus, I find that an ordinary observer may well overlook any differences and regard the aesthetic appeal of “Striped Face” and the “Pink Room Scene” as the same.

Id. at 446-447. In *Knitwaves, Inc. v. Lollytogs, Ltd.*, the plaintiff, a manufacturer of children’s knitwear, claimed that the defendant’s line of fall sweaters copied its “Leaf Sweater” and “Squirrel Cardigan.” In comparing the works for infringement purposes, the Second Circuit examined the “total concept and feel” of the works and disregarded the defendant’s lengthy recitation of differences, “[g]iven the overwhelming similarity of the sweaters’ ‘total concept and feel.’” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1004.

²² Defendants’ Motion to Dismiss, p.14, “Nor is [the *Lemonade* work] substantially similar to *Palinoia* in its story or mood because while *Palinoia* depicts the white male protagonist’s distress over a failed past relationship, *Lemonade* portrays the stages through which its African-American female protagonist goes in connection with an existing relationship, ending in *reconciliation*.”

Similarly, here, Defendants' "lengthy recitation of differences" is not sufficient to avoid a finding of infringement. Defendants' copying becomes apparent to a reasonable observer when the numerous aesthetic decisions embodied in Plaintiff's work are considered in relation to one another in comparison to Defendants' works.

F. Neither the Expression/Idea Dichotomy Nor the Scenes A Faire Doctrine Prevent a Jury from Considering Plaintiff's Claims

Copyright protection extends only to the components of a work that are original to the author. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991). As the Supreme Court explained:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. ... To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.

Id. at 345 (citation omitted). Further, copyright protection extends only to the particular expression of an idea and not to the idea itself. *LaChapelle*, 812 F. Supp. 2d at 440 (quoting *Peter F. Gaito Architecture, LLC*, 602 F.3d at 67 ("This principle, known as the 'idea/expression dichotomy,' 'assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.'")).

Under the related doctrine of *scenes a faire*, "elements of an image that flow naturally and necessarily from the choice of a given concept cannot be claimed as original." *Id.*; *See also Williams v. Crichton*, 84 F.3d 581, 587-588 (2d Cir. 1996) ("[s]cenes a faire are unprotectible elements that follow naturally from a work's theme rather than from an author's creativity").

Defendants argue that any copying was limited to “ideas” only and that the *scenes a faire* doctrine insulates them from liability under the Copyright Act. But even a cursory review of the similar elements between *Palinoia* and the *Lemonade* works, makes clear that they are not required to tell the story of a tumultuous relationship. Therefore, these scenes cannot be properly considered *scenes a faire*.

If the similarities Defendants rely on were *scenes a faire*, similar elements would be found in third-party works on the same subject. Defendants offer no examples of third-party works. The only works of record that incorporate these elements are the parties’ own. As this Court held in *Tufenkian*, when rejecting a similar argument, “the record contains little evidence of what is conventional (and hence, by analogy to ‘scenes a faire’, unprotected) in these respects.” *Tufenkian*, 338 F.3d at 135. Therefore, Defendant’s asserted *scenes a faire* defense should be disregarded.

There are an infinite number of ways that a story about a struggling romantic relationship can be told. But the seemingly otherwise disconnected series of images that form Plaintiff’s work would not be among those that would “flow naturally and necessarily” from Plaintiff’s choice of concept.²³ Why stairs? Why a parking garage? Why a shot of lower legs? Plaintiff’s orchestration of seemingly disparate subject matter for his film was not dictated by the narrative or genre of the film. The selection, arrangement, and visual content of the particular elements set forth above were original aesthetic decisions. The lack of any narrative necessity for combining

²³ Even if a person with his “head down” might be considered a natural extension of emotional tumult, the particular expression in these frames (camera angle from left, against a building, similar graffiti words shown on building) remove the particular shot from the realm of merely an idea and into protectible expression. “Because the choice of camera position, composition, the model’s expression, lighting, saturation, and color constitute “the original way in which [LaChapelle] has ‘selected, coordinated, and arranged’ the elements” of his work, an ordinary observer could find substantial similarity.” *LaChapelle v. Fenty*, 812 F. Supp. 2d 434, 447 (S.D.N.Y. 2011).

these images, e.g. grasses, the feet, parking garage, stairs, etc. in Defendants' works emphasizes the similarities between the two works and refutes Defendants' *scenes a faire* argument.

Instead, Defendants rely entirely on distinguishable cases in which the subject matter of the work had been used by artists many times previously. *See e.g. Kaplan v. Stock Market Photo Agency, Inc.*, 133 F.Supp. 2d 317, 323 (S.D.N.Y. 2001)(the "idea of a business person contemplating a leap from a tall building" can naturally be expressed by a man in business attire perched on the top of a tall building); *See Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F.Supp.2d 382, 392 (S.D.N.Y. 2005)(The idea of a woman sitting on a toilet with only her shoes and handbag not obscured by the stall can only be expressed in limited ways).

Defendants' efforts to extend the *scenes a faire* doctrine as applied to a single image in *Kaplan* and *Diodato* are not helpful in considering the otherwise disconnected series of images included in Plaintiff's work and identified in the Second Amended Complaint. Moreover, Defendants have not identified a single instance in which similar elements here have been included in other works concerning troubled relationships, let alone any evidence that such elements flow "necessarily" from the choice of concept. *LaChapelle*, 812 F.Supp.2d at 440. Therefore the argument that ideas and *scenes a faire*, without more, are unprotectible is not an available defense when considering Plaintiff's original work.

G. Plaintiff Has Sufficiently Pled Substantial Similarity

Because (1) Plaintiff's original choice of particular subject matter, (2) the way in which Plaintiff rendered that subject matter (through camera position, composition, the actor's expression, lighting, saturation and color contrast) and (3) Plaintiff's selection, arrangement, pacing, mood, and theme of the expression contributed to the aesthetic of the *Palinoia* film, and because the Defendants' works, by incorporating this aesthetic, are substantially similar,

Defendants' works infringe upon the particular expression contained in Plaintiff's work, including without limitation, the total concept and feel of Plaintiff's work. "By definition copying need not be of every detail so long as the copy is substantially similar to the copyrighted work." *LaChapelle*, 812 F. Supp. 2d at 446.

H. Defendants Do Not Substantively Address the Works' Audible Similarities

Audio similarities do not lend themselves to written description. Nonetheless, Plaintiff alleges similarities between the respective works' audio content and timing, and describes in detail, as one example, a conspicuous audio similarity between the works.²⁴

Plaintiff will show that his work includes an original and unconventional soundtrack that has been copied in Defendants' *Lemonade* Trailer. This soundtrack is absent of dialogue or song and instead incorporates disharmonious sounds interspersed with lines of narrated poetry. A "side by side" comparison of audio elements²⁵ from *Palinoia* and the *Lemonade* Trailer is attached as a CD ROM as **Exhibit C** and is available at the following active Hyperlink: <https://www.dropbox.com/s/uflraay17v38im2/pal%20audio%20no%20cards.mov?dl=0>

Defendants do not rebut the similarities alleged except to dismiss the claims as "meritless" and non-actionable in a cursory footnote.²⁶ Of the myriad of creative choices that can be made in filmmaking, it strains credibility that two filmmakers would independently assemble a series of similar images to tell a similar story using similar sound elements.

I. The *Lemonade* Trailer and the *Lemonade* Film Are Two Separate Works

The Defendants chose to create two separate works – the *Lemonade* Trailer and the *Lemonade* Film – both intended to promote the *Lemonade* Album. The two works were

²⁴ Second Amended Complaint, ¶¶ 75-77.

²⁵ Because the side-by-side of audio elements directs the sounds from one work to the left ear and sounds from the other work to the right ear, listening to the comparison requires headphones.

²⁶ Defendants' Motion to Dismiss, FN 12, p. 24.

broadcast in different venues at different times.²⁷ The works include two different soundtracks – a fact not addressed by the Defendants. For example, the Trailer does not include Beyonce singing. If the Film and the Trailer truly cannot be divorced then what purpose was there in making an hour long film if the sixty second Trailer would suffice in conveying all the alleged expression?²⁸ Defendants cannot conflate their two separate works into one and then pick and choose among their various elements to distinguish them from Plaintiff's work to avoid liability. The *Lemonade* Trailer and the *Lemonade* Film are two different works and the infringement analysis must be applied separately to each of them.

Although all of the visual similarities pled in the Second Amended Complaint are pled with respect to both the *Lemonade* Trailer and the *Lemonade* Film because all these similar elements appear in both works, a promotional trailer is a separable work as a matter of law and can form the basis for a claim of infringement, even if the film the trailer promotes does not. *Wilson v. Walt Disney Co.*, 123 F. Supp. 3d 1172 (N.D. Cal. 2015). While it is true that the *Lemonade* Film is significantly longer than the *Lemonade* Trailer, infringement may be found where only a small portion of Plaintiff's work is copied so long as the part is more than *de minimis*. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997). As then-District Judge Leval held in *Merton Co. v. Tony Trading of Hong Kong, Ltd.*:

Defendants are correct that if one starts with an infringing copy and makes enough changes eliminating the copied expression, the object eventually will cease to infringe. This may occur even before the last copied vestige has disappeared if the copied elements have been reduced to *de minimis* proportions.

6 U.S.P.Q.2d 1156 (S.D.N.Y. 1987) citing *Mattel Inc. v. Azrak-Hamway Int'l Inc.*, 724 F.2d 357, 360 (2d Cir. 1983); *Burroughs v. Metro-Goldwyn Mayer, Inc.*, 683 F.2d 610, 624 n. 14 (2d Cir.

²⁷ Second Amended Complaint, ¶¶ 21-23, 25, 61-63.

²⁸ Plaintiff attempts to minimize the *Lemonade* Trailer by describing it as “feature[ing] a rapid succession of snippets excerpted from the Film.” Motion to Dismiss, p. 11.

1982). *See also Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 135 (2d Cir. 2003) (no infringement where “copying would appropriate no more than a *de minimis* amount of protected expression”); *Elsemere Music, Inc. v. National Broadcasting Co., Inc.* (482 F. Supp. 741 (S.D.N.Y. 1980), *aff’d* on opinion below, 623 F.2d 252 (2d Cir. 1980)).

Here, both the *Lemonade* Trailer and *Lemonade* Film have copied Plaintiff’s work, and the mere addition of more extraneous non-infringing matter in the *Lemonade* Film does not absolve the copying. As Learned Hand held in *Sheldon v. Metro-Goldwyn Pictures Corp.*, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.” 81 F.2d 49, 56 (2d Cir. 1936).

IV. CONCLUSION

As the factual allegations of Plaintiff’s Second Amended Complaint are well-pled, the Court should assume their veracity and determine whether they plausibly would give rise to entitlement for relief. *LaChapelle*, 812 F.Supp. 2d at 439. The allegations do not need to meet a high standard of probability, but instead only the standard of plausibility. *Id.* Defendants’ motion to dismiss should be denied because there is little “more than a sheer possibility that [the Defendants] have acted unlawfully.” *Id.* Plaintiff has presented sufficient allegation and evidence of unlawful copying in support of well-pled claims and therefore Defendants’ motion to dismiss should be denied.

This 10th day of August, 2016.

s/ Robert W. Clarida/
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CERTIFICATE OF FILING

I hereby certify that on this 10th day of August, 2016, the foregoing Plaintiff's Response to Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) was filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all parties through their counsel of record.

s/ Amy Sullivan Cahill/

Amy Sullivan Cahill

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW FULKS,

Plaintiff,

v.

Civil Action No. 16-CV-4278

BEYONCÉ GISELLE KNOWLES-CARTER,
et al.

Defendants.

DECLARATION OF AMY S. CAHILL IN SUPPORT OF PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO DISMISS SECOND AMENDED
COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(6)

I, Amy S. Cahill, hereby declare, pursuant to 28 U.S.C. §1746 and Local Civil Rule 1.9 of the Local Rules of the Southern and Eastern Districts of New York, that the following is true and correct:


1. I am founding partner of Cahill-IP, PLLC and co-counsel of record for Plaintiff Matthew Fulks. I am admitted to practice in this Court and am a member of the New York State Bar Association. I submit this declaration in support of Plaintiff's Response to Defendants' Motion to Dismiss Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for the sole purpose of putting into the record before the Court copies of the Exhibits referred to in Plaintiff's Response.

2. Submitted herewith as Exhibit B is a color exhibit from *LaChapelle v. Fenty*, 812 F.Supp. 2d 434 (S.D.N.Y. 2011) (referred to as Exhibit A in the *LaChapelle* opinion) showing side-by-side visual elements relied upon by the Court in that case.

3. Submitted herewith as Exhibit C is a compact disc (CD) containing a .mov file that includes a side-by-side comparison of the audio elements from *Palinoia* and the *Lemonade* Trailer. The audio segments in the *Palinoia* soundtrack been selected and rearranged for purposes of creating the side-by-sides, but the audio segments themselves are not altered from the original works submitted to the Court. The locations of where the audio segments appear in each work are notated with a time stamp. The *Palinoia* audio segments are presented on the left audio channel (left ear of headphone set). The *Lemonade* Trailer audio segments are presented on the right audio channel (right ear of headphone set).

I declare under penalty that the foregoing is true and correct.

Executed: Louisville, Kentucky
 August 10, 2016



Amy S. Cahill

EXHIBIT B

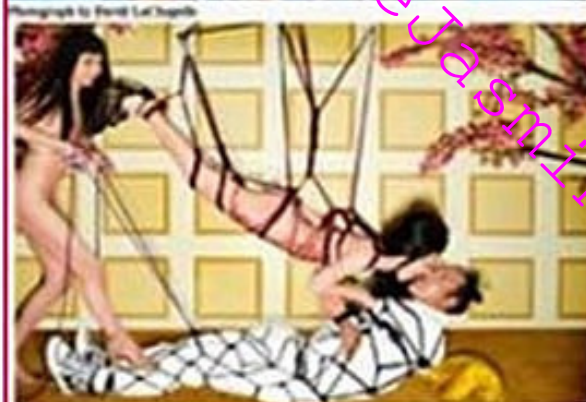


EXHIBIT C

