

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WADENA PYATT and BANG HITZ PUBLISHING,

Plaintiffs,

-against-

10 Civ. 8764 (CM)

USHER RAYMOND IV a/k/a USHER, ALICIA
AUGELLO COOK a/k/a ALICIA KEYS, KRUCIAL
KEYS, INC., JEFFREY ROBINSON, MBK
ENTERTAINMENT, INC., SONY BMG
MANAGEMENT CO, LLC, SONY MUSIC
ENTERTAINMENT DIGITAL, LLC, ZOMBA
RECORDING LLC, ARISTA RECORDS, INC.,
LA FACE RECORDS, INC., EMI MUSIC PUBLISHING,
INC., JERMAINE DUPRE MAULDIN a/k/a JERMAINE
DUPRE, MAURICE RYAN TOBY a/k/a RYAN TOBY,
ANDRE HARRIS, VIDAL DAVIS, JASON BOYD,
DOMINIQUE MURO, EMI APRIL MUSIC, INC.,
PLADIS MUSIC, INC., C. SILLS PUBLISHING, INC.,
HITCO MUSIC PUBLISHING LLC, DIRTY DRE
MUSIC/UNIVERSAL PUBLISHING INC., DOUBLE
OH EIGHT MUSIC/UNIVERSAL PUBLISHING, INC.,
POO BZ PUBLISHING, INC., SONY BMG, SONY
MUSIC ENTERTAINMENT, INC., SONY/ATV TUNES,
LLC, and SONY/ATV MUSIC PUBLISHING, LLC,

Defendants.

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MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

McMahon, J.

Wadena Pyatt and Bang Hitz Publishing (collectively, the "Plaintiffs") commenced this action against numerous defendants in the music industry, including well-known recording artists Usher and Alicia Keys. The crux of Plaintiffs' Complaint is that Usher's song, titled "Caught Up," is copied from Pyatt's song, also by the same name. Pending before the Court are four

motions to dismiss filed by four different groups of defendants. For the reasons discussed below, the motions to dismiss are granted.

I. BACKGROUND

A. The Parties

1. The Plaintiffs

Wadena Pyatt is a singer and songwriter. (Compl. ¶ 40.) Bang Hitz Publishing is her publishing company. (*Id.* ¶ 41.)

2. The Moving Defendants

(a) *The Usher Defendants*

Usher Raymond IV (“Usher”) is a Grammy-winning performing and recording artist. (*Id.* ¶ 46.) The allegedly infringing song is part of Usher’s album, titled “Confessions.”

Sony BMG Management Co., LLC, Sony Music Entertainment Digital LLC, Zomba Recording LLC, and Arista Records, Inc. are New York-based record labels. (*Id.* ¶¶ 51-54.) LaFace Records, Inc. is a California-based record label. (*Id.* ¶ 55.)

Sony BMG and Sony Music Entertainment, Inc. are Delaware corporations with their principal places of business in New York. (*Id.* ¶¶ 42-43.)

Sony/ATV Tunes LLC and Sony/ATV Music Publishing LLC are Delaware limited liability companies with their principal places of business in New York. (*Id.* ¶¶ 44-45.)

Usher, Sony BMG Management, Sony Music Entertainment Digital, Zomba Recording, Arista Records, LaFace Records, Sony BMG, Sony Music Entertainment, Sony/ATV Tunes, and Sony/ATV Music Publishing (collectively, the “Usher Defendants”) filed a motion to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6).

(b) The Keys Defendants

Alicia Augello Cook, better known by her stage name Alicia Keys, is a Grammy-winning recording artist and musician. (Id. ¶47.)

Krucial Keys, Inc. is a New York corporation with its principal place of business in New York. (Id. ¶ 48.)

Keys and Krucial Keys (collectively, the “Keys Defendants”) also moved to dismiss the Complaint as against themselves.

(c) The Robinson Defendants

Jeffrey Robinson is president of MBK Entertainment, Inc. (Id. ¶ 49.)

MBK Entertainment, Inc. is a New York-based record label and management production and film company. (Id. ¶ 50.) Pyatt alleges that MBK Entertainment is a joint business venture between Keys and Robinson. (Id. ¶¶ 47, 49.)

Maurice Ryan Toby, known as Ryan Toby, is a songwriter who is listed as a co-writer of Usher’s album. (Id. ¶ 58.)

EMI April Music, Inc. is a New York-based record label. (Id. ¶ 63.)

Although EMI Music Publishing, Inc. is named as a defendant, no information describing the entity is provided in the Complaint.

EMI Music Inc. is a Delaware corporation with its principal place of business in New York. (Id. ¶ 56.)

Pladis Music, Inc. is a music publishing company based in Georgia. (Id. ¶ 64.)

Robinson, MBK Entertainment, Toby, EMI April Music, EMI Music Publishing, EMI Music, and Pladis Music (collectively, the “Robinson Defendants”) also moved to dismiss the Complaint.

(d) The Boyd Defendants

Hitco Music Publishing, LLC is a music publishing company located in Georgia. (*Id.* ¶ 66.)

Poo BZ Publishing, Inc. is a music publishing company listed on the copyrights for Usher's song, "Caught Up." (*Id.* ¶ 68.)

Jason Boyd is a songwriter who is also a co-writer of Usher's album, "Confessions," and Usher's song, "Caught Up." (*Id.* ¶ 61.)

Hitco Music, Poo BZ Publishing, and Boyd (collectively, the "Boyd Defendants") are the final group of defendants to file a motion to dismiss.

3. The Non-Moving Defendants

The following defendants have not moved to dismiss the Complaint and have not joined the motions filed by the other defendants.

Jermaine Dupre Mauldin is a songwriter and president of So So Def Record Label. (*Id.* ¶ 57.) Dupre is also a producer of Usher's "Confessions" album. (*Id.*)

Andre Harris, Dominique Muro, and Vidal Davis are songwriters, listed as co-writers of the album, "Confessions," and the song, "Caught Up." (*Id.* ¶¶ 59-60, 62.)

Dirty Dre Music/Universal Publishing, Inc. is the music publishing company used by Andre Harris. (*Id.* ¶ 67.)

C Sills Publishing, Inc. is a music publishing company located in Georgia. (*Id.* ¶ 65.)

B. Plaintiffs' Allegations

For purposes of these motions, the allegations in the Complaint are accepted as true. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007).

In 2002, Robinson and Keys wanted new artists for their record label and, as a result, talent scouts for MBK Entertainment approached Pyatt to discuss a record deal. (Id. ¶ 75.) MBK Entertainment recruited Pyatt and, in 2003, Robinson offered Pyatt a one-album record deal under the MBK Entertainment-J/Records Label. (Id. ¶¶ 76-77.) According to Pyatt, Robinson instructed her to begin work on her album before the written contract with MBK Entertainment was finalized. (Id. ¶¶ 79, 81.)

In 2003, Robinson assigned employees of MBK Entertainment (none named as defendants in this action) to work with Pyatt. (Id. ¶ 83.) Robinson told Pyatt to submit copies of her lyrics, songs, and other materials for her album to MBK Entertainment. (Id. ¶ 84.) In 2003, Pyatt named her album “Caught Up” and gave MBK Entertainment hand-written and typed lyrics for the album. (Id. ¶ 85.)

Pyatt also wrote a song titled “Caught Up,” which she included in the “Caught Up” album. Pyatt alleges that she wrote the lyrics, melodies, and composition for her song as early as the 1990s. (Id. ¶ 69.) In 2003, Pyatt received a copyright in her song “Caught Up.” (Id. ¶ 70.)

In 2004, Kenneth Spratt, an MBK Entertainment employee, approached Pyatt with a new proposal: Pyatt was asked to release the rights to her song, “Caught Up,” to MBK Entertainment for \$7,500 to \$10,000 and Pyatt was asked to ghost write songs for Alicia Keys and other MBK Entertainment artists without receiving credit or royalties for the work. (Id. ¶¶ 15, 89.) Pyatt rejected Spratt’s proposal.

According to Pyatt, Robinson promised that MBK Entertainment would not release any of her song materials to third parties without her consent. (Id. ¶ 102.) While working on her album for MBK Entertainment, Pyatt discovered that Usher was working on a new album—“Confessions.” (Id. ¶¶ 17-18.) Despite his promise, Robinson submitted Pyatt’s song, “Caught

Up,” to Usher for his album, and Robinson also gave Pyatt’s songs to other artists at MBK Entertainment—all without her consent. (*Id.* ¶¶ 18-19, 96.) Pyatt objected to Robinson’s sending her song materials to Usher and refused to give MBK Entertainment permission to use her song. (*Id.* ¶¶ 20, 93, 105-06, 113.) Pyatt alleges that Keys and Robinson used her materials (*i.e.*, her melodies and lyrics) for Usher’s album without her consent. (*Id.* ¶¶ 24-25, 97.)

In March 2004, Usher released his “Confessions” album, which contains the allegedly infringing song, also titled “Caught Up.” Pyatt discovered the infringement in 2005, when she heard Usher’s song played on the radio. (*Id.* ¶ 100.) Pyatt alleges that she did not authorize Usher to record, release, or perform any version of her song. (*Id.* ¶ 113.)

Pyatt’s “Caught Up” album was never completed, because MBK Entertainment placed her album budget “on hold.” (*Id.* ¶ 36.) Pyatt alleges that MBK Entertainment agreed to pay her living expenses and provide her with advances while she was working on her album. (*Id.* ¶ 32.) Pyatt did not receive the promised payments.

On November 19, 2010, Pyatt commenced this action against Defendants, asserting five causes of action: (1) copyright infringement (Count One); (2) punitive damages (Count Two); (3) fraud in the inducement (Count Three); (4) breach of contract (Count Four); and (5) quantum meruit (Count Five).

The Usher Defendants, the Keys Defendants, and the Robinson Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) on February 25, 2011. The Boyd Defendants filed their motion to dismiss on April 15, 2011.

The only basis for federal jurisdiction is Plaintiffs’ claim for copyright infringement of Pyatt’s song, “Caught Up.” *See* 28 U.S.C. § 1338(a).

II. DISCUSSION

A. Motion to Dismiss

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. See Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44 (2d Cir. 2003); see also Roth v. Jennings, 489 F.3d 499, 510 (2d Cir. 2007).

To survive a motion to dismiss, “a complaint must contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (internal quotations, citations, and alterations omitted). Thus, unless a plaintiff’s well-pleaded allegations have “nudged [its] claims across the line from conceivable to plausible, [the plaintiff’s] complaint must be dismissed.” Id. at 570; Iqbal, 129 S. Ct. at 1950-51.

Finally, in deciding a motion to dismiss, the Court may consider the full text of documents that are quoted in or attached to the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. Rothman v. Gregor, 220 F.3d 81, 88-89 (2d Cir. 2000) (citing Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir. 1991));

San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 808 (2d Cir. 1996).

B. Elements of a Copyright Infringement Claim

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. Actual copying may be established with evidence that the defendant had access to the copyrighted work and that there are substantial similarities between the works. Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 765 (2d Cir. 1991). “The plaintiff then must show that the copying amounts to an ‘improper’ or ‘unlawful’ appropriation by demonstrating that substantial similarities relate to protectible material.” Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139-40 (2d Cir. 1992) (internal citations omitted).

To determine if two works are substantially similar, the Court asks “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.’” Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001) (quoting Hamil Am. Inc. v. GFI, 193 F.3d 92, 100 (2d Cir. 1999)). In applying the ordinary observer test, the Court asks whether “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1002 (2d Cir. 1995). 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.” Repp & K&R Music, Inc. v. Webber, 132 F.3d 882, 889 (2d Cir. 1997) (quoting Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946)).

“Under certain circumstances, when the works at issue contain considerable elements from the public domain that are unprotectible by copyright, the usual ‘ordinary observer’ test becomes ‘more discerning,’ and requires the Court to ‘attempt to extract the unprotectible elements from . . . consideration and ask whether the *protectible elements, standing alone*, are substantially similar.” Velez v. Sony Discos, 2007 WL 120686, at *7 (S.D.N.Y. Jan. 16, 2007) (quoting Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1002 (2d Cir. 1995)) (emphasis in original).

Regardless of whether the Court applies the “ordinary observer” or the “more discerning” test, the Court is not required to dissect the works to “compare only those elements which are in themselves copyrightable.” Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010). Rather, the Court is guided “‘by comparing the contested design’s ‘total concept and overall feel’ with that of the allegedly infringed work’ as instructed by our ‘good eyes and common sense.’” Id. (quoting Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 133 (2d Cir. 2003) and Hamil Am. Inc. v. GFI, 193 F.3d 92, 102 (2d Cir. 1999)).

In this Circuit, it is permissible for a district court to make a determination as to substantial similarity on a Rule 12(b)(6) motion to dismiss. See Peter F. Gaito Architecture, 602 F.3d at 64. In Peter F. Gaito Architecture, the Second Circuit, in affirming a district court’s dismissal of a copyright infringement claim on a motion to dismiss, stated, “The question of substantial similarity is by no means exclusively reserved for resolution by a jury” Id. at 63. The Court explained that when the works at issue are attached to the complaint, “it is entirely

appropriate for the district court to consider the similarity between those works in connection with a motion to dismiss, because the court has before it all that is necessary in order to make such an evaluation.” Id. at 64. “If, in making that evaluation, the district court determines that the two works are ‘not substantially similar as a matter of law,’ the district court can properly conclude that the plaintiff’s complaint, together with the works incorporated therein, do not ‘plausibly give rise to an entitlement to relief.’” Id. (quoting Iqbal, 129 S.Ct. at 1950) (internal citations omitted). Although Plaintiffs did not attach the works at issue to the Complaint, the Court may nonetheless consider them because they were clearly relied on by Plaintiffs in commencing this suit. See, e.g., Rothman, 220 F.3d 81 at 88-89 (citing Cortec Indus., 949 F.2d at 47).

Further, copyright protection extends only to those 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), and does not extend to ideas, only their expression, Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996). Single words or short phrases “which do not exhibit the minimal creativity for copyright protection” are not protectible expression. Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992). “[T]hough the ‘ordinary’ phrase may be quoted without fear of infringement, a copier may not quote or paraphrase the sequence of creative expression that includes such a phrase.” Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir. 1987). “[A] work may be copyrightable even though it is entirely a compilation of unprotectible elements.” Knitwaves, Inc., 71 F.3d at 1003-04. “What is protectible then is ‘the author’s original contributions,’—the original way in which the author has ‘selected, coordinated, and arranged’ the elements of his or her work.” Id. at 1004; see also Peter F. Gaito Architecture, 602 F.3d at 66 (quoting Knitwaves Inc., 71 F.3d at 1004). The phrase “caught up” is, as a matter of law, not copyrightable.

Pyatt alleges that she has a valid copyright in two versions of the lyrics to her song, and a copyright in a sound recording of the song. (Compl. ¶ 70, 73; see also Pl.'s Opp. Br. Exs. C1, C2, and F at A1 (Track 6).) Defendants do not challenge the validity of Pyatt's copyrights. For purposes of this motion, the Court assumes actual copying by the Defendants and addresses the question of whether substantial similarity exists between Usher's song and any protectable element of Pyatt's song. See, e.g., Peter F. Gaito Architecture, LLC v. Simone Development Corp., 2009 WL 5865686, at *5 (S.D.N.Y. May 22, 2009), aff'd, 602 F.3d 57 (2d Cir. 2010).

C. Pyatt's Copyrighted Lyrics

In 2003, Pyatt registered with the United States Copyright Office two versions of the lyrics to her song, "Caught Up." (See Plaintiff's Opp. Br. Exs. C1 and C2.)

The first version was registered with the United States Copyright Office under registration number Pau 2-836-122 and is titled "Court Up." (Id. at Ex. C1.)

Pyatt also registered a second version titled "Caught Up (Remix)" under registration number Pau 2-792-475. (Id. at Ex. C2.)

Pyatt alleges that Usher's song infringes her copyright in the lyrics of "Caught Up (Remix)" and "Court Up."

1. Pyatt's "Court Up" versus Usher's "Caught Up"

"Court Up" by Pyatt

[Intro]
How many times he hurt you
How many times he use you

[Verse 1]
How many times did he put you down like
your nothing
How many times did he creep around say your
tripping
He always crying broke

"Caught Up" by Usher

[Verse 1]
I'm the kind of brother'
Who been doin' it my way
Getting my way for years, in my career
And every lover, y'all
In and out my life
I've hit, loved and left in tears
Without a care

[Pre-Hook]

On those holidays, like your birthday
 And he don't feel shame to ask you for money
 Girl brother calling you out your name
 Playing them liars games
 You waiting up by your phone
 Thinking your man gonna call
 You aint [sic] got not time for no part time guy

[Chorus]

Sister don't get court up (1x)
 Brother knows he messed up
 You said he wasn't around
 When you needed him the most
 Like most broke buster they wanna use you for
 your stuff
 Sweet-talk ya, think about it girl

[Verse 2]

Now how long has it been
 Since he treated you on a night out
 He cancel out on dates, tell ya he's working
 late
 So wait a minute now, you better think about
 All the times that your man played you out
 Indirectly and right in your face
 He's a buster who hate on ladies
 Now don't be made [sic] cause I'm telling the
 truth girl
 You aint [sic] got no time for no part time love

[Bridge]

Brother thinks he know ya, he wants to control
 ya (2x)
 Enough is enough, but you still aint [sic] tough
 He's creeping around, messing around
 Come back home old girl you still down
 That's messed up you court up

[Ending]

Girl you know you got to leave him, how many
 times is he gonna play ya

Until I met this girl who turned the tables
 around
 She caught me by surprise and I
 I never thought I'd be the one
 Breakin' down I can't figure it out why I'm so

[Hook]

Caught up
 Got me feelin' it
 Caught up
 I don't know what it is but it seems
 She got me twisted I'm so
 Caught Up
 Got me feelin'
 Caught Up
 I'm losing control, this girl's got
 A hold on me

[Verse 2]

My mama told me
 Be careful who you do
 Cause karma comes back around
 Same ol' song
 But I was so sure
 That it wouldn't happen to me
 'Cause I know now to put it down
 But I was so wrong

[Pre-Hook]

This girl was mean, she really turned
 Me out
 Her body was so tight
 I'm looking for her in the daytime
 With a flashlight
 My homies say this girl is cramping my style
 And I can't figure it out
 And I'm so

[Hook (2x)]

[Pre-Hook]

[Hook (2x)]

A comparison of the two songs illustrates that there are no identical lyrics. The two songs also do not share a common theme. Using a male narrator, Usher's song is about a womanizer who finds himself in unfamiliar territory: he is falling in love with a woman. Pyatt's song, on the other hand, is about a woman in a bad relationship with a man who does not treat her well and is unfaithful. In Usher's song, the narrator, once dominant and in control, is unsure how to react to the new and unfamiliar emotions he feels towards a woman. Unlike the narrator in Usher's song, the narrator in Pyatt's song is not recounting experiences that happened to her but, rather, is attempting to convince the woman to leave the man. Usher finds himself "Caught Up" in new and entangling feelings; Pyatt urges the woman in her song not to get "Caught Up" in an abusive relationship.

As the Second Circuit explained, "'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.'" Peter F. Gaito Architecture, 602 F.3d at 67 (quoting Feist Publ'ns, Inc., 499 U.S. at 349-50)). While both songs (like millions of others) share the theme of relationships between men and women, this theme is an idea that is not copyrightable. "Only the actual expression of those ideas might be protected," and here there is no overlap in the expression of the ideas embodied in the two songs. Currin v. Arista Records, Inc., 724 F. Supp. 2d 286, 293 (D. Conn. 2010).

Because the "total concept and overall feel" of both songs is different, the average observer would not recognize Usher's lyrics as having been appropriated from Pyatt's "Court Up." Therefore, to the extent that Plaintiffs' copyright infringement claim in Count One rests on Pyatt's copyright in the lyrics of "Court Up," that claim is dismissed as against all Defendants.

2. Pyatt's "Caught Up (Remix)" versus Usher's "Caught Up"

"Caught Up (Remix)" by Pyatt

[Intro]

How many times he hurt you
How many times he use you
How many times did he put you down
Creep around, leaving you crying

[Chorus]

Caught up (with a buster) (2x)
Caught up (He's using her)
Caught up (In a liars game)
Caught up (She's so shame)

[Verse 1]

He put you down, say your nothing
He mess around, catch him cheating
Holidays, like your birthday,
He's crying broke and never shame
Yes girl, he's calling you out your name
Playing them liars games
Your waiting up by your phone
He won't call _____

[Chorus]

Caught up (with a buster) (2x)
Caught up (He's using her)
Caught up (In a liars game)
Caught up (She's so shame)

[Verse 2]

How long has it been
Since he treated you out on a date
The same story, he's working late (um hum)
So wait a minute now, you better think about
All the times that your man played you out
Indirectly and right in your face
He's a buster, move on
Escape _____

[Chorus]

Caught up (with a buster) (2x)
Caught up (He's using her)
Caught up (In a liars game)

"Caught Up" by Usher

[Verse 1]

I'm the kind of brother'
Who been doin' it my way
Getting my way for years, in my career
And every lover, y'all
In and out my life
I've hit, loved and left in tears
Without a care

[Pre-Hook]

Until I met this girl who turned the tables
around
She caught me by surprise and I
I never thought I'd be the one
Breakin' down I can't figure it out why I'm so

[Hook]

Caught up
Got me feelin' it
Caught up
I don't know what it is but it seems
She got me twisted I'm so
Caught Up
Got me feelin'
Caught Up
I'm losing control, this girl's got
A hold on me

[Verse 2]

My mama told me
Be careful who you do
Cause karma comes back around
Same ol' song
But I was so sure
That it wouldn't happen to me
'Cause I know now to put it down
But I was so wrong

[Pre-Hook]

This girl was mean, she really turned
Me out
Her body was so tight

Caught up (She's so shame)

[Music Break]

How many times did he hurt you, How many times did he use you, How many times did he put you down, leaving you crying

[Bridge]

The brother thinks he knows ya (know ya), he wants control ya (control Ya), Time is winning up girl, enough is enough, your caught up

[Verse 3]

Oh, he's messing around, creeping around,
Come back to you girl, you still down
That's messed up you court up
He's leaving you crying, he's lying, he's using you

[Bridge]

The brother thinks he knows (Caught up)
He wants to control (Caught up)
He's playing you (Caught up)
Enough is enough (Caught up)
Said you got to leave him (caught up)
Oh you gotta leave him (caught up)

[Chorus repeats to end the song]

I'm looking for her in the daytime

With a flashlight

My homies say this girl is cramping my style

And I can't figure it out

And I'm so

[Hook (2x)]

[Pre-Hook]

[Hook (2x)]

Like "Court Up," "Caught Up (Remix)" is about a woman who, despite her lover's infidelities, does not leave him.

The lyrics of Pyatt's "Caught Up (Remix)" are also different from the lyrics used by Usher. The only similarity between the songs is the phrase "caught up," which also serves as the title of both songs and is spoken repeatedly by the narrator in both songs. The phrase "caught up," however, is used commonly in everyday speech: "I'm all caught up with my homework;" "I'm caught up in traffic;" or "I'll be late because I'm caught up at work" are a few examples of the phrase used in colloquial speech. "Common phrases are not subject to copyright protection."

Acuff-Rose Music, Inc. v. Jostens, Inc., 155 F.3d 140, 144 (2d Cir. 1998); Lessem v. Taylor, 2011 WL 344104, at *7 (S.D.N.Y. Feb. 3, 2011). “Nor will substantial similarity be found if only a small, common phrase appears in both the accused and complaining songs; unless the reappearing phrase is especially unique or qualitatively important, there is no basis for inferring copying.” Stratchborneo, 357 F. Supp. at 1404. Pyatt cannot claim that she coined the phrase “caught up” because it existed long before she included it in her song. Further, Pyatt’s use of the phrase is not infused with the minimal creativity necessary to warrant copyright protection. See, e.g., Arica, 970 F.2d at 1072.

Even if the Court assumes that Usher copied the unprotectible phrase, “caught up,” there are no other similarities in the lyrics or themes of the two songs and, as discussed, the overall concept and feel of both songs is different. Thus, an ordinary observer would not recognize Usher’s lyrics as having been appropriated from Pyatt’s copyrighted work. Knitwaves, Inc., 71 F.3d at 1002.

Accordingly, Pyatt’s copyright infringement claim is dismissed to the extent it alleges that Usher’s song infringes her copyright in the lyrics of “Caught Up (Remix).”

D. Pyatt’s Copyrighted Sound Recording

Pyatt also alleges that she has a valid copyright in the sound recording of “Caught Up.” Defendants do not challenge the validity of Pyatt’s copyright. Rather, Defendants argue that there is no substantial similarity between Usher’s sound recording of “Caught Up” and Pyatt’s copyrighted sound recording. The lyrics on Pyatt’s sound recording represent yet a third version of her song; what follows is a side-by-side comparison between Pyatt’s recorded lyrics and Usher’s (which are the same lyrics quoted above).

“Caught Up Remix” by Pyatt

“Caught Up” by Usher

[Intro]

Hey girly girl do the don shake
Hey girly girl you caught up

[Chorus Verse 1]

(I'm caught up) (4x)
With the don
Chilling with the don
(I'm caught up)
With the don
Caught with the don
(I'm caught up)

[Verse 1]

(Hey girly girl, do the don shake)
(Hey girly girl)
What can I say
(Hey girly girl do the don shake)
(Hey girly girl)
I'm winning my waist
(Hey girly girl do the don shake)
(Hey girly girl)
What can I say
I'm caught up

Chorus: Repeats (4x)

[Verse 2]

(auh a ooh a _____) (1x) (bv)
I'm caught up in a liar's game
(auh a ooh a _____) (1x) (bv)

The girly girl, oh she so shame
He put me down like I'm nothing
He mess around I catch him cheating
His flirty ways, I still love him
(auh a ooh a _____) (1x) (bv)
Hey girly girl is not my name
The girly girl oh she so shame
I'm caught up in his game
I'm winning and crying
I'm caught up (2x)

[Verse 3]

(auh a ooh a _____) (2x) (bv)

[Verse 1]

I'm the kind of brother'
Who been doin' it my way
Getting my way for years, in my career
And every lover, y'all
In and out my life
I've hit, loved and left in tears
Without a care

[Pre-Hook]

Until I met this girl who turned the tables
around
She caught me by surprise and I
I never thought I'd be the one
Breakin' down I can't figure it out why I'm so

[Hook]

Caught up
Got me feelin' it
Caught up
I don't know what it is but it seems
She got me twisted I'm so
Caught Up
Got me feelin'
Caught Up
I'm losing control, this girl's got
A hold on me

[Verse 2]

My mama told me
Be careful who you do
Cause karma comes back around
Same ol' song
But I was so sure
That it wouldn't happen to me
'Cause I know now to put it down
But I was so wrong

[Pre-Hook]

This girl was mean, she really turned
Me out
Her body was so tight
I'm looking for her in the daytime
With a flashlight
My homies say this girl is cramping my style

I'm caught in a liar's game	And I can't figure it out
(auh a ooh a _____) (1x) (bv)	And I'm so
The girly girl oh she so shame	
He put me down like I'm nothing	[Hook (2x)]
He mess around I catch him cheating	[Pre-Hook]
His flirty ways, I still love him	[Hook (2x)]
I'm caught up (2x)	

Ad libs again: Hey girly girl ad libs
End the song with chorus and ad libs

(Pl.s' Opp. Br. Ex. F at B6.)

Again, both songs use the phrase "caught up." That is where the lyric similarities end.

Turning to the music on the two recordings, it is entirely dissimilar. Pyatt's song is styled as a call and response between a male and a female vocalist. The song takes strong influence from Jamaican dancehall and hip hop, but it does not fall squarely into either category.

In contrast, Usher's song is R&B with unmistakable Motown influences. Whereas Pyatt's song does not clearly feature a single "lead" singer, Usher is the sole lead vocalist in his song accompanied by various back-up singers. Unlike Pyatt's song, which is styled as a conversation between two individuals, Usher's "Caught Up" is a monologue with a narrative in the first person. Every minute of Usher's song is filled with vocals from either Usher or his back-up singers. Pyatt's song, on the other hand, has several periods where the melody or beat is the focus of the listener's attention, because the vocalists are silent. Moreover, Usher's song has a fast, steady beat when compared to Pyatt's song, which has a slower, more languid, beat. And the musical motifs are extremely dissimilar.

Although the two songs share a general theme—both discuss "relationships"—each song addresses a different type of relationship. Pyatt's female vocalist is in a relationship with a man who cheats on her and treats her poorly—the quintessential "bad" relationship. Despite his

shortcomings, the female vocalist is caught up and still in love with her unfaithful partner.

Usher's narrator faces a different situation. Despite dating many women, he is falling in love and the loss of control to a woman has him confused.

Thus, not only are the lyrics of both songs different, but the overall musical impression of each song is also different. Upon examining the "total concept and feel" of the two songs with "good eyes and common sense," the Court concludes that no "average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Peter F. Gaito Architecture, 602 F.3d at 67 (internal citations omitted). To the extent that Pyatt's copyright infringement claim relies on the copyright in her sound recording, the claim is dismissed.

Accordingly, Count One is dismissed against all Defendants.

E. Pyatt's Unregistered Sound Recordings

On May 9, 2011, Plaintiffs submitted a letter to the Court explaining that on May 7, 2011, Pyatt electronically registered in the copyright office the "remaining unregistered song versions of [Pyatt's] copyrighted song." The Usher Defendants, in a May 13, 2011 letter to the Court, argue that the Plaintiffs' Complaint refers only to Pyatt's registered works so the recently filed registration application is not relevant to the Defendants' motions to dismiss.

The Usher Defendants are correct. The Complaint refers only to Pyatt's copyrighted lyrics and copyrighted sound recording. Specifically, Pyatt alleges that she copyrighted "Caught Up" in 2003 (Compl. ¶ 70), that her "two registered copyrights pre-date Usher's registered copyrights by one year," (*id.* ¶ 71), and that "since 2003, Plaintiff has been and still is the proprietor of the statutory copyrights in the musical composition for Caught Up, and duly possesses all rights, title, and interests therein" (*id.* ¶ 73). Additionally, in a second letter to the

Court, dated May 17, 2011, Plaintiffs admit that as of the date the Complaint was filed, Pyatt had three copyrights: two copyrights in the lyric sheets and one copyright in the sound recording of “Caught Up.”

The Complaint was filed on November 19, 2010, and alleges only that Defendants infringed the copyright in Pyatt’s registered works. As such, the fact that Pyatt may now have, or at a future date may acquire, a copyright in other versions of her lyrics or sound recording is not relevant to this proceeding, because those works are not the subject of the Plaintiffs’ Complaint.

F. Pyatt’s Second Cause of Action for Punitive Damages

In her second cause of action, Pyatt requests that Defendants pay punitive damages for their “willful copyright infringement.” (Compl. ¶¶ 131-38.) Punitive damages are not available in a statutory copyright infringement action. See Oboler v. Goldin, 714 F.2d 211, 213 (2d Cir. 1983). Further, punitive damages are a remedy and not a cause of action. See, e.g., In re Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456, 492 n.14 (S.D.N.Y. 2010).

Plaintiffs do not object to the dismissal of Count Two. (See Pl.’s Opp. Br. at 30.)

Accordingly, Count Two of the Complaint is dismissed as against all Defendants.

G. Pyatt’s State-Law Claims

Federal jurisdiction in this case exists by virtue of Pyatt’s copyright infringement claim in Count One. See 28 U.S.C. § 1338(a). Pyatt also asserts state claims, under New York law, for fraud in the inducement (Count Three), breach of contract (Count Four), and quantum meruit (Count Five). Because Pyatt has stated no federal claim for relief, the Court declines to exercise supplemental jurisdiction over the state-law claims. Plaintiffs’ claims for fraud in the inducement, quantum meruit, and unjust enrichment are dismissed without prejudice.

H. Plaintiffs' Cross-Motion for Leave to Amend the Complaint is Denied

In their brief, Plaintiffs request leave to amend the Complaint to correct the name of Usher's album and to correct the names of some of the corporate Defendants. Because the requested changes will not alter the Court's decision to dismiss the Complaint in its entirety, leave to amend the Complaint is denied as futile.

III. CONCLUSION

Plaintiffs' copyright infringement claim in Count One and Plaintiffs' erroneous claim for punitive damages in Count Two are dismissed with prejudice. Plaintiffs' state-law claims in Counts Three through Five are dismissed without prejudice. The Docket Clerk is instructed to remove docket entries 35, 39, 44, 61, and 64 from the Court's list of pending motions.



Date: May 19, 2011

U.S.D.J.

BY ECF TO ALL COUNSEL