

11-2507-cv

*Wadena Pyatt and Bang Hitz Publishing v. Usher Raymond, IV, AKA Usher, et al.*

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6<sup>th</sup> day of February, two thousand and ten.

PRESENT: RICHARD C. WESLEY,  
PETER W. HALL,  
SUSAN L. CARNEY,  
*Circuit Judges.*

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WADENA PYATT, BANG HITZ PUBLISHING,

*Plaintiffs - Appellants,*

- v. -

11-2507-cv

USHER RAYMOND, IV, AKA USHER, ALICIA AUGELLO COOK, AKA 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 INCORPORATED, LA FACE RECORDS, INC., EMI MUSIC PUBLISHING, INC., JERMAINE DUPRE MAULDIN, AKA JERMAINE DUPRE, MAURICE RYAN TOBY, AKA 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 MUSIC PUBLISHING, LLC, UNIVERSAL MUSIC CORP., SONY/ATV TUNES, LLC,

*Defendants- Appellees*

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1 FOR APPELLANT: ROBERT PRITCHARD (Anthony J. Gallo, on  
2 *the brief*), Gallo & Associates, PLLC,  
3 Plainview, NY  
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5 FOR APPELLEE: JOHN J. ROSENBERG, Rosenberg & Giger,  
6 *Alicia Augello* P.C., New York, NY.  
7 *Cook aka Alicia*  
8 *Keys & Krucial*  
9 *Keys, Inc., et al.*

10  
11 FOR APPELLEE: JONATHAN D. DAVIS, P.C., New York, NY  
12 *Usher Raymond,*  
13 *Sony BMG Management,*  
14 *Co., et al.*  
15

16 FOR APPELLEE: CHRISTINE LEPERA, Mitchell Silberberg &  
17 *Jason Boyd, Hitco* Knupp LLP, New York, NY.  
18 *Music Publishing*  
19 *LLC & Poo BZ Publishing, Inc.*  
20

21 Appeal from the United States District Court for the  
22 Southern District of New York (McMahon, J.)  
23

24 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
25 **AND DECREED** that the judgment of the United States District  
26 Court for the Southern District of New York be **AFFIRMED**.

27 Plaintiffs-Appellants Wadena Pyatt and Bang Hitz  
28 Publishing appeal from a judgment of the United States  
29 District Court for the Southern District of New York  
30 (McMahon, J.), dismissing their complaint pursuant to Rule  
31 12(b)(6). We assume the parties' familiarity with the  
32 underlying facts and procedural history.

33 We review *de novo* a district court's dismissal pursuant  
34 to a Rule 12(b)(6) motion. In this case, we affirm for the

1 well-stated reasons of the court below. The originally  
2 registered copyrights and Usher's "Caught Up" have little in  
3 common beyond the title and the phrase "Caught Up." The  
4 songs are lyrically and musically distinct and the district  
5 court correctly concluded that the claim failed the ordinary  
6 observer test. See *Yurman Design, Inc. v. PAJ, Inc.*, 262  
7 F.3d 101, 111 fn. 3 (2d Cir. 2001).

8 We also affirm because we agree with the district  
9 court's interpretation of the complaint as alleging  
10 copyright infringement only with respect to the originally  
11 copyrighted works. Appellants contend the district court  
12 misconstrued the complaint when it held that the  
13 subsequently registered works (those registered after filing  
14 of the complaint and after Defendants' motions to dismiss  
15 were filed) were incorporated in Appellants' copyright  
16 infringement claims. The complaint's broad references to  
17 "materials," "works," and "versions" are simply insufficient  
18 to bring post-complaint registrations within the scope of  
19 the complaint's allegations. This is so especially because  
20 the "Copyright Act . . . requires copyright holders to  
21 register their works before suing for copyright  
22 infringement." *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct.  
23 1237, 1241 (2010) (citing 17 U.S.C. § 411(a)).

1 Appellants claim that the court, in interpreting the  
2 complaint, should have considered certain documents that  
3 Appellants attached to their opposition to Defendants'  
4 motions to dismiss. These documents (lyric sheets and  
5 expert reports regarding subsequently registered works) were  
6 not attached to or integrated into the complaint, or  
7 incorporated therein. The district court did not err by  
8 declining to examine them. See *DiFolco v. MSNBC Cable LLC*,  
9 622 F.3d 104, 111 (2d Cir. 2010).

10 Finally, we affirm the district court's denial of  
11 Appellants' motion for leave to amend the complaint. We  
12 review *de novo* denials of motions to amend based on a  
13 determination that amendment would be futile. *Hutchison*  
14 *v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir.  
15 2011). Amendment under rule 15(a) was futile in this case  
16 because only an allegation that Defendants infringed on  
17 Appellants' newly-registered copyrights could have  
18 potentially allowed Appellants to state a claim for  
19 relief. Appellants' proposed amended complaint failed to  
20 allege these new copyrights and Appellants did not move  
21 for leave to file a supplemental pleading, see Fed. R.  
22 Civ. P. 15(d). In the face of this inaction, the district  
23 court had no duty to order *sua sponte* further amendment or  
24 supplementation.

1  
2 For the foregoing reasons, the judgment of the  
3 district court is hereby **AFFIRMED**.

4  
5 FOR THE COURT:  
6 Catherine O'Hagan Wolfe, Clerk  
7  
8

The image shows a handwritten signature, "Catherine O'Hagan Wolfe", written in black ink. The signature is written over a circular official seal. The seal is divided into two horizontal sections: the top half is red and contains the text "UNITED STATES" in white, and the bottom half is blue and contains the text "SECOND CIRCUIT" in white. There are small white stars on either side of the text in the blue section. The signature is written in a cursive style, with the first name "Catherine" and last name "Wolfe" being more prominent.