

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

PAUL ROSE	X	
	:	
Plaintiff,	:	No. 1:17-cv-1471-DLC
	:	
v.	:	
	:	
PAUL DAVID HEWSON p/k/a BONO, DAVID	:	
HOWELL EVANS p/k/a THE EDGE or EDGE,	:	
ADAM CLAYTON, LAURENCE JOSEPH	:	
MULLEN JR., and ISLAND RECORDS, a	:	
division of UNIVERSAL MUSIC GROUP, INC.,	:	
	:	
Defendants.	:	
	:	
	X	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS THE COMPLAINT**

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Defendants Paul David Hewson p/k/a Bono, David Howell Evans p/k/a The Edge or Edge, Adam Clayton, Laurence Joseph Mullen Jr. (collectively, “U2” or the “Band”), and Defendant Island Records, a division of UMG Recordings, Inc.,¹ respectfully submit this memorandum of law in support of their motion to dismiss the complaint of Plaintiff Paul Rose pursuant to Rule 12(b)(6).²

PRELIMINARY STATEMENT

On October 21, 1991, the iconic rock band U2 released, worldwide and to critical acclaim, a musical composition and sound recording entitled *The Fly*. Despite the fact that *The Fly* received (among other things) massive airplay, Plaintiff waited over 25 years to now claim that *The Fly* is so substantially similar to Plaintiff’s musical composition entitled *Nae Slappin* that it constitutes copyright infringement. If Plaintiff truly believed that *The Fly* infringed *Nae Slappin*, there is no valid reason for Plaintiff’s lengthy delay in asserting his claim, and the Complaint does not offer one. Nothing about *The Fly* has changed in the quarter century since it was released. Put simply, the works at issue are entirely different and, as a result, sound nothing alike. This conclusion is inescapable upon simply listening to the two songs, one after the other, which the Court must do on this motion. That is the crux of the ordinary listener test, and because Plaintiff’s claims plainly fail that test, the Complaint should be dismissed.

Plaintiff’s Complaint does not allege any specifics about how U2 purportedly copied *Nae Slappin*, or how that song is substantially similar to *The Fly*. Rather, the Complaint makes only vague and conclusory references to the two works, and asserts that they share musical ideas, which are, of course, unprotectable under copyright law. For example, Plaintiff’s claim that “the

¹ The Complaint erroneously names Island Records as a division of “Universal Music Group, Inc.”

² A copy of the Complaint (Dkt. 5) (“Compl.”) is attached as Exhibit A to the accompanying Declaration of David A. Munkittrick dated May 9, 2017 (“Munkittrick Decl.”).

dimensions of sound” in the works are similar identifies a general idea, and not a similarity that is specific, substantial, or actionable. While *artistic expressions* of ideas are protected under copyright law, *ideas* themselves are not.

Plaintiff’s claim is not only inadequately pled, but providing leave to re-plead would be futile because, in the end, the songs themselves are determinative. The most skilled legal writer could not adequately plead copyright infringement in this case, because the claim necessarily includes the substance of the works at issue. They not only lack substantial similarity, they *sound* nothing alike. No amount of artful pleading can avoid the works themselves.

Plaintiff’s *Nae Slappin* is a series of multiple guitar solos with percussion. There are no vocals and no lyrics. It is improvisational and experimental in feel – a vehicle for Plaintiff to explore various techniques, sounds, and effects on his guitar. At times, he plays in conventional scalar structures and pitches, while at others he coaxes electronic sounds, noises, and whines from his guitar. While *Nae Slappin* may show that Plaintiff is a proficient guitarist, it bears no similarity to *The Fly*.

The Fly is a different animal. It is not an extended improvisation at all, but rather follows a traditional rock/pop song structure with a repeated and recognizable chorus and a repeating guitar hook, punctuated by verses. The song alternates between a gritty, even abrasive feel during the verses, with a raw and rhythmic guitar sound and almost chant-like singing, and lighter, rapturous choruses with falsetto vocal lines and no guitar. There is nothing of the like in *Nae Slappin*, and there is nothing of *Nae Slappin*’s improvisational guitar effects in *The Fly*.

Because the two works are so different that no reasonable jury could find substantial similarity in protectable expression, the Complaint should be dismissed in its entirety.

RELEVANT ALLEGED FACTS

The facts herein are taken from the well-pleaded allegations in the Complaint that are factual and not conclusory.³

Plaintiff alleges that he is a British musician who wrote and composed *Nae Slappin* in England in 1989. (Compl. ¶ 10.) Plaintiff further claims that *Nae Slappin* was included on a demo tape that Plaintiff provided to Defendant Island Records in the summer of 1989.⁴ (*Id.* ¶ 11.) *Nae Slappin* is alleged to have been listened to, and liked by, Island Records executives, (*id.* ¶ 11), though there is no allegation that any sought to sign Plaintiff to the record label. *Nae Slappin* was allegedly first published in England “no later than the Fall of 1990.” (*Id.* ¶ 10.) Plaintiff claims to have registered *Nae Slappin* with the Mechanical Copyright Protection Society in England in April 1991, resulting in license number No. 1696548A. (*Id.* ¶ 10.)

U2 is an iconic Irish rock band. It is (erroneously) alleged to have signed with Island Records in 1989, and Plaintiff claims that the band members “were often in the Island Records offices” between 1989 and 1991. (*Id.* ¶ 12.) Sometime in 1990, the Band began recording sessions for what would become the album *Achtung Baby*, which was released on November 18, 1991. (*Id.* ¶ 17.) One of the tracks on the album, *The Fly*, was pre-released as a single recording

³ Although not relevant to this motion, we note that many of Plaintiff’s allegations are facially inaccurate, which is apparent on a quick review of publicly available sources of which the Court may take judicial notice. *See* Fed. R. Evid. 201(b); *Volpe v. Am. Language Comm’n Ctr., Inc.*, 200 F. Supp. 3d 428, 430 (S.D.N.Y. 2016) (judicial notice taken of information publicly announced on a party’s website); *In re Yukos Oil Co. Sec. Litig.*, No. 04-cv-5243 (WHP), 2006 WL 3026024, at *21 & n.10 (S.D.N.Y. Oct. 25, 2006) (judicial notice taken of newspaper articles). For example, while Plaintiff claims U2 did not sign with Island Records until 1989 (Compl. ¶ 12), the Band had by then been with Island Records for nine years. *See The Band*, U2.COM, www.U2.com/band (last visited Apr. 17, 2017) (“They would wait until the following year [after 1979] to sign a long-term deal with Chris Blackwell’s Island Records.”); Matt McGee, *U2’s History*, @U2, www.ATU2.com (last visited Apr. 17, 2017) (“Island Records signed U2 to its first international contract in March, 1980.”); Shirley Halperin, *Island’s Chris Blackwell on Signing U2 in 1980: Their ‘Music Was A Little Rinky-Dink,’* THE HOLLYWOOD REPORTER (Dec. 20, 2010), <http://www.hollywoodreporter.com/news/islands-chris-blackwell-signing-u2-61772>.

⁴ While not at issue on this motion, most, if not all, relevant events in this action appear to have taken place in the United Kingdom. *Cf. Carey v. Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir. 2004) (explaining that in the appropriate circumstance, the doctrine of *forum non conveniens* permits a court to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim).

on October 21, 1991. (*Id.* ¶¶ 13, 17.)

Over a quarter century later, Plaintiff filed his Complaint, alleging that *The Fly* is substantially similar to *Nae Slappin* and infringes Plaintiff’s copyright. (Compl. ¶¶ 31, 42–44.)

Specifically, Plaintiff alleges the following four similarities between *Nae Slappin* and *The Fly*:

- 1) An “elaborate and distinctive guitar solo” in *The Fly* is “nearly identical to the one in Plaintiff’s Work;”
- 2) “The guitar hook in the songs is the same;”
- 3) “The percussion in ‘The Fly’ accentuates the same points in the bass line as in Plaintiff’s Work”; and
- 4) “The dimensions of sound of the songs are substantially similar or literal in specific fragments.”

(Compl. ¶ 18.) Recordings of the works at issue – *Nae Slappin* and *The Fly* – are submitted with this motion for the Court’s review.⁵ (*See* Munkittrick Decl. ¶ 3 & Ex. B.)

Plaintiff asserts claims for direct copyright infringement (Count I), contributory and vicarious copyright infringement (Count II), and equitable relief in the form of being included as a writer of *The Fly* (Count III). Because Counts II and III are dependent on first establishing direct infringement, the Complaint should be dismissed in its entirety if the Court finds, as argued below, that, as a matter of law, there is no substantial similarity between the works. *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010).⁶

⁵ Even where the plaintiff has not provided copies of the works at issue in a copyright infringement case, a district court may nonetheless consider them in evaluating a motion to dismiss because they were “clearly relied on by [p]laintiffs in commencing suit.” *Edwards v. Raymond*, 22 F. Supp. 3d 293, 297 (S.D.N.Y. 2014) (Cote, J.); *Pyatt v. Raymond*, No. 10-cv-8764 (CM), 2011 WL 2078531, at *5 (S.D.N.Y. May 19, 2011), *aff’d*, 462 F. App’x 22 (2d Cir. 2012) (citing *Rothman v. Gregor*, 220 F.3d 81, 88–89 (2d Cir. 2000)).

⁶ Count III seeks a “right of attribution” despite Plaintiff’s acknowledgment, in his Complaint, that “the right of attribution is not statutorily recognized.” (Compl. ¶ 42(a).) Plaintiff’s concession actually understates the weakness of his position. Not only is the right not statutorily recognized, U.S. Copyright jurisprudence does not recognize the right of attribution outside the visual art context. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (explaining that the “express right of attribution is carefully limited and focused: It attaches only to specified ‘work[s] of visual art’”); *see also* 17 U.S.C. § 106A (“only the author of a work of visual art has the rights [of attribution] conferred by subsection (a)”).

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, plaintiff’s Complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). By contrast, a pleading that only “offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 566 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Indeed, such conclusory statements “are not entitled to the assumption of truth.” *Id.* at 679. Likewise, the requirement to draw all inferences in plaintiff’s favor is “inapplicable to legal conclusions.” *Id.* at 678; *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

Moreover, in a copyright infringement action, a plaintiff’s allegations are accepted as true only to the extent that they are consistent with the works themselves. *See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010). “In copyright infringement actions, the works themselves supersede and control contrary descriptions of them, including any contrary allegations, conclusions or descriptions of the works contained in the pleadings.” *Id.* (citations omitted).

ARGUMENT

I. No Reasonable Jury Listening to the Works as a Whole Could Find *The Fly* Substantially Similar to *Nae Slappin*.

To make out a claim for copyright infringement, the allegedly infringing work must be “substantially similar” to “protectable” material in the original work. *See Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 354 F.3d 112, 117 (2d Cir. 2003). The keystone is substantial similarity. Any similarity must in fact be “substantial.” *See, e.g., Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008); *see also Bell v. Blaze Magazine*, No. 99-cv-12342 (RCC), 2001 WL 262718, at *3-4 (S.D.N.Y. Mar. 16, 2001).

Works are substantially similar if 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.” *Fulks v. Knowles-Carter*, 207 F. Supp. 3d 274, 278 (S.D.N.Y. 2016) (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001)). The primary question under this standard is 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) (quoting *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir. 1991)); see also *Pyatt*, 2011 WL 2078531, at *4 (S.D.N.Y. May 19, 2011). “In the context of a case alleging music plagiarism,” the analysis is refined to whether “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.” *Edwards*, 22 F. Supp. 3d at 298 (quoting *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997)).

This requires courts to listen to and compare the works as a whole – to “compare the contested [work’s] total concept and overall feel with that of the allegedly infringed work ... as instructed by our good [ears] and common sense.” *Fulks*, 207 F. Supp. 3d at 279 (quoting *Peter F. Gaito Architecture, LLC*, 602 F.3d at 66); see also *Boone v. Jackson*, No. 03-cv-8661 (GBD), 2005 WL 1560511, at *3 (S.D.N.Y. July 1, 2005) (“When determining ‘substantial similarity,’ the finder of fact is constrained to look at the work as a whole, without dissection as an ordinary lay observer would.”), *aff’d on other grounds*, 206 F. App’x 20 (2d Cir. 2006).

This determination can be made as a matter of law at the pleadings stage. *Edwards*, 22 F. Supp. 3d at 298 (citing *Peter F. Gaito Architecture*, 602 F.3d at 64); see also *Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 240 (2d Cir. 1983). Indeed, this Court and others in this

Circuit have time and again dismissed copyright infringement actions for lack of substantial similarity as a matter of law. *E.g.*, *McDonald v. West*, 138 F. Supp. 3d 448, 458, 461 (S.D.N.Y. 2015) (granting motion to dismiss after listening to the two songs); *TufAmerica, Inc. v. WB Music Corp.*, 67 F. Supp. 3d 590 (S.D.N.Y. 2014); *Edwards*, 22 F. Supp. 3d at 302; *Pyatt*, 2011 WL 2078531 at *10.⁷

Here, listening to the songs as a whole, one after the other, makes clear that there is no substantial similarity between the two. Their “total concept and overall feel” is entirely different, as is their “aesthetic appeal.” *Nae Slappin* is essentially an extended guitar solo mostly involving multiple guitar tracks, with percussion accompaniment. There are no vocals, no lyrics, no subject, and no theme. *The Fly* is a different animal entirely. It is a “song” in the true sense of the word, with everything that comes with it: vocals, lyrics, a subject, and a theme. As Plaintiff himself puts it in the Complaint, “‘The Fly’ is a direct reference to ‘The Metamorphosis’ by Franz Kafka, in which the protagonist changes overnight from a travelling salesman into a giant insect, or fly.” Compl. ¶ 16.

This difference is even more fundamental than a “material difference[.]” that this Court noted in *Edwards*. 22 F. Supp. 3d at 301. There, the Court observed that “Plaintiffs’ Song is in significant part a rap song [while] the Challenged Song has no rapping; Usher sings all of the lyrics.” *Id.*; *see also McDonald*, 138 F. Supp. 3d at 460 (noting differences in vocals). Here, the difference is not just in the manner the lyrics are delivered vocally, but in the very existence of lyrics, vocals, and a melody. Accordingly, it is impossible that any of the concept, feel, or

⁷ *See also, e.g.*, *DiTocco v. Riordan*, 496 F. App’x 126, 128 (2d Cir. 2012); *Peter F. Gaito Architecture*, 602 F.3d at 6; *Fulks v. Knowles-Carter*, 207 F. Supp. 3d 274, 293 (S.D.N.Y. 2016); *Currin v. Arista Records, Inc.*, 724 F. Supp. 2d 286, 294 (D. Conn. 2010) (“The court, having carefully listened to the songs and reviewed the record, finds that the total concept and feel of the two songs is very different.”); *Boone v. Jackson*, 2005 WL 1560511, at *4 (S.D.N.Y. 2005) (noting on summary judgment, “The two songs do not sound alike.”); *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 665 (S.D.N.Y. 2011); *Telebrands Corp. v. Del Labs., Inc.*, 719 F. Supp. 2d 286, 294 (S.D.N.Y. 2010).

aesthetics flowing from the vocals in *The Fly* – a central component of the song – could be substantially similar to *Nae Slappin*. This in itself rules out any similarity (much less substantial similarity) in total concept and feel.

Indeed, the total concept and feel of the two works are entirely different. The overall concept and feel of *Nae Slappin* is experimental and improvisatory, exploring different shades, effects, sounds, and techniques on the guitar. It acts as a vehicle for Plaintiff to showcase the different sounds and effects he can produce on a guitar and how he can weave multiple guitar leads together. There is little structure in *Nae Slappin*, in that there is no recognizable theme or chorus – no “hook” that the ordinary listener could walk away humming. After cycling through various improvisatory ideas, *Nae Slappin* ends in what can only be described as noise, which simply cuts out abruptly.

In contrast, *The Fly* follows a more traditional song structure with a chorus and verses. *See also McDonald*, 138 F. Supp. 3d at 460 (finding no substantial similarity and noting that one song was “clearly divided between verse and chorus” while the other was not). Unlike *Nae Slappin*, *The Fly* has a hummable chorus. The chorus enters as a distinct contrast from the sound the Band employed in the verses. The chorus in a way creates a sense of clouds parting, revealing a ray of sun and clarity piercing the gritty, more abrasive sound that surround it in the verses. Each time the chorus appears,⁸ the guitar drops out, a falsetto vocal line enters, and Bono sings a variation of the lyrics:

*A man will beg
A man will crawl
On the sheer face of love
Like a fly on a wall
It's no secret at all*

The song does not conclude in noise as *Nae Slappin* does but rather ends on a single guitar note

⁸ The first iteration of the chorus begins at 1:07, and it returns at 1:51 and 3:24.

and a cymbal roll.

There are differences in the details as well. The opening guitar riff in *The Fly*, which returns at 0:49, uses a different, more raw sound than in *Nae Slappin*. The guitar at the beginning of *Nae Slappin*, in contrast, is cleaner and clearer, with more precise articulations. At 0:45, and again at 2:53, the guitar in *Nae Slappin* devolves into electronic sounds and whines, sounding at times like whale song, at others like a revving engine, and at others almost pitchless. None of these effects is heard in *The Fly*. While the percussion in *The Fly* utilizes a rhythmic tambourine and cowbell throughout, there is no tambourine, cowbell, or anything of the like in *Nae Slappin*.

Because the songs are so patently dissimilar, there is no need to consult written sheet music. “What is required is only a ... comparison of the works.” *Fulks*, 207 F. Supp. 3d at 279. While words cannot do the differences between the songs justice, it is critical to note the number, breadth, and pervasiveness of the differences. “As a matter of logic as well as law, the more numerous the differences between two works the less likely it is that they will create the same aesthetic impact so that one will appear to have been appropriated from the other.” *Id.* at 12 (quoting *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 913 (2d Cir. 1980)). Here, the differences are so numerous, so stark, and so fundamental that the “difference in overall concept and feel ... overwhelms any superficial similarities.” *Id.* at 292.

As in *McDonald*, “[l]istening to the two tracks side by side demonstrates beyond dispute how little they have in common.” 138 F. Supp. 3d at 460. And, as this Court found in *Edwards*,

Because of these differences, the ‘total concept and overall feel’ of the music in the two songs are different, and an average observer would not find that the Defendants have taken ‘from Plaintiffs’ works so much of what is pleasing to the ears of lay listeners ... that Defendants wrongfully appropriated something which belongs to the Plaintiffs.’

22 F. Supp. 3d at 301. The same conclusion is appropriate here.

II. The Complaint Fails to Allege Any Similarity of Protectable Expression.

While the lack of similarity on listening to the songs is sufficient reason to dismiss the Complaint, a claim for copyright infringement may also be dismissed for failure to allege similarity in *protectable* expression. See *Edwards*, 22 F. Supp. 3d at 299; see also *Peter F. Gaito Architecture*, 602 F.3d at 63; 17 U.S.C. § 102(b) (“In no case does copyright protection ... extend to any idea ... [or] concept ... regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). Here, given that the works sound nothing alike, it is no surprise that the Complaint fails to make any cognizable allegation of similarity in protectable expression.

Mere allegations of copying are insufficient to state a claim because not all similarities amount to copyright infringement. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Accordingly, “[i]t is critical to bear in mind what does not amount to infringement under the Copyright Act.” *Fulks*, 207 F. Supp. 3d at 279 (quoting *Croak v. Saatchi & Saatchi, N. Am., Inc.*, 2016 U.S. Dist. LEXIS 44350, at *3 (S.D.N.Y. 2016)). A complaint that alleges only similarity in ideas, rather than the expression of ideas, will not suffice. *Edwards*, 22 F. Supp. 3d at 299. “A Court must decide whether the similarities shared by the works are something more than mere generalized idea or themes.” *Id.* (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48-49 (2d Cir. 1986)).

Alleged similarities can be “so general that they rise to the level of unprotected ideas.” *Fulks*, 207 F. Supp. 3d at 281. Similarly, “copyright does not protect styles, but only particular original expressions of those styles.” *McDonald*, 138 F. Supp. 3d at 455. In music, “the basic building blocks of music, including tempo and individual notes” do not rise to the level of protectable expression, and neither do “common rhythms, song structures, and harmonic

progressions.” *Id.* at 454. And of course, “bare legal conclusions” cannot support an allegation of substantial similarity. *Edwards*, 22 F. Supp. 3d at 300.

Paragraphs 18 and 19 of the Complaint encompass the totality of Plaintiff’s allegations of similarity. Neither paragraph contains a cognizable allegation of substantial similarity in protectable expression. First, Plaintiff claims “The Infringing Work features an elaborate and distinctive guitar solo nearly identical to the one in Plaintiff’s Work.” Compl. ¶ 18(a). As an initial matter, Plaintiff’s *entire* work is an extended guitar solo. In effect, then, this allegation is nothing more than a conclusory claim that *Nae Slappin* is substantially similar to *The Fly*. Not only does listening to the songs belie that claim, this allegation amounts to a legal conclusion of substantial similarity and should be discounted. *Edwards*, 22 F. Supp. 3d at 300 (discounting as a “bare legal conclusion” an allegation that “the theme, melody, hook, lyrics, and chorus of the musical compositions are substantially similar”). Indeed, it is “so general that [it] rise[s] to the level of unprotected ideas.” *Fulks*, 207 F. Supp. 3d at 281.

The same is true of the second alleged similarity, that “the guitar hook in the songs is the same.” Compl. ¶ 18(b). It is a bare legal conclusion and at best rises to the level of unprotected ideas. *See Edwards*, 22 F. Supp. 3d at 300; *Fulks*, 207 F. Supp. 3d at 281.

Plaintiff’s third claim, that “the percussion in ‘The Fly’ accentuates the same points in the bass line as in Plaintiff’s Work” alleges only unprotected ideas. Like the allegation of a similar “shuffling percussion” in *McDonald*, Plaintiff’s allegation is “too vague” and “simply describes a rhythm’s style or general feel, both uncopyrightable.” 138 F. Supp. 3d at 458. Accenting beats alone “is too basic and commonplace a musical technique to be protectable.” *Id.*; *see also Tisi v. Patrick*, 97 F. Supp. 2d 539, 549 (S.D.N.Y. 2000) (finding “there is nothing unusual about ... the rhythm of [the song], ... or the so-called ‘adult contemporary’ style of his song”); *Intersong-*

USA v. CBS, Inc., 757 F. Supp. 274, 282 (S.D.N.Y. 1991) (finding that “a recurring eighth note rhythm” was a “common element” and, thus is, “unoriginal and constitute[s] ... ordinary, unprotectable expression”).

Plaintiff’s fourth claim – that “the dimensions of sound of the songs are substantially similar or literal in specific fragments” – fails for the same reasons as the first three. Compl. ¶ 18(d). Alleging a similarity in “dimensions of sound,” “fails because feel and tone are akin to style – they are too close to ideas to be copyrighted in the abstract.” *McDonald*, 138 F. Supp.3d at 458.

Finally, Plaintiff claims that “an ordinary lay observer would reasonably find that the songs are substantially similar” and that “the similarities ... are strikingly similar.” These claims simply restate legal standards, and are thus pure legal conclusions that allege no facts whatsoever. As such, they should be given “no effect.” *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012); *see also Edwards*, 22 F. Supp. 3d at 300.

In the end, because the songs sound nothing alike, and Plaintiff’s Complaint contains no cognizable allegations of substantial similarity in protectable expression, the Complaint should be dismissed in its entirety.

CONCLUSION

For the foregoing reasons, Plaintiff’s Complaint should be dismissed with prejudice and without leave to replead.

Dated: May 9, 2017

Respectfully submitted,

By: /s/ Brendan J. O'Rourke

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