

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

DAQUAN ROBINSON

Plaintiff,

v.

NAYVADIUS DEMUN WILBURN, p/k/a  
FUTURE and d/b/a NAYVADIUS  
MAXIMUS MUSIC; WILBURN HOLDING  
CO., INC.; NAYVADIUS WILBURN LLC;  
FREEBANDZ PRODUCTIONS, LLC;  
XAVIER LAMAR DOTSON, p/k/a  
ZAYTOVEN; DOTSON EMPIRE LLC;  
ZAYTOVEN GLOBAL, LLC; ULTRA  
INTERNATIONAL MUSIC PUBLISHING  
LLC; SONY MYSIC ENTERTAINMENT;  
and JOHN DOE COMPANIES 1 – 10;

Defendants.

Case No. 21-cv-3585

Honorable Martha M. Pacold

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT  
OF THEIR MOTION TO DISMISS THE AMENDED  
COMPLAINT PURSUANT TO RULE 12(b)(6)**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT .....1

STATEMENT OF FACTS .....2

    A. Procedural History .....2

    B. The Robinson Song & Wilburn Song .....3

    C. The Amended Complaint Solely  
        Alleges Copying Of Unprotectable Expression .....3

    D. The Amended Complaint Does Not Include A Single Plausible Allegation  
        Suggesting That WHCI, NWL Or FPL Engaged In Any Infringing Acts .....4

ARGUMENT .....5

    I. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM.....5

        A. Legal Standard Under Fed. R. Civ. P. 12(b)(6) .....5

        B. Legal Standard For Copyright Infringement.....5

        C. The Phrase “When U Think About It” Is Not Entitled To Copyright Protection .....7

        D. Themes About Money, Guns and Jewelry Are Not Protectable .....9

        E. The Amended Complaint Should Be Dismissed Because It Does Not  
            Plausibly Allege The Unlawful Appropriation Of Protectable Elements .....12

        F. The Amended Complaint Also Should Be Dismissed As Against WHCI, NWL  
            And FPL Since It Does Not Allege They Engaged In Any Infringing Acts.....13

CONCLUSION.....14

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE(S)</u></b>
<i>Acuff-Rose Music, Inc. v. Jostens, Inc.</i> , 155 F.3d 140 (2d Cir. 1998).....	8
<i>Alberto-Culver Co. v. Andrea Dumon, Inc.</i> , 466 F.2d 705 (7th Cir. 1972) .....	7
<i>Arlin-Golf, LLC v. Village of Arlington Heights</i> , 631 F.3d 818 (7th Cir. 2011) .....	13
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
<i>Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.</i> , 672 F.2d 607 (7th Cir. 1982) .....	10
<i>Basile v. Sony Pictures Entm’t Inc.</i> , No. 14-cv-04264 (DMG), 2014 WL 12521344 (C.D. Cal. Aug. 19, 2014), <i>aff’d</i> , 678 F. App’x 473 (9th Cir. 2017).....	12
<i>Batiste v. Najm</i> , 28 F. Supp. 3d 595 (E.D. La. 2014).....	8
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	5
<i>Boisson v. Banian, Ltd</i> , 273 F.3d 262 (2d Cir. 2001).....	6
<i>Brooks v. Ross</i> , 578 F.3d 574 (7th Cir. 2009) .....	14
<i>Bucklew v. Hawkins, Ash, Baptie &amp; Co.</i> , 329 F.3d 923 (7th Cir. 2003) .....	10
<i>CMM Cable Rep, Inc. v. Ocean Coast Props.</i> , 97 F.3d 1504 (1st Cir. 1996).....	8
<i>Corbello v. Valli</i> , 974 F.3d 965 (9th Cir. 2020) .....	6
<i>Design Basics, LLC v. WK Olson Architects, Inc.</i> , No. 17-cv-7432 (SLE), 2018 WL 3629309 (N.D. Ill. July 31, 2018) .....	12

<u>CASES</u>	<u>PAGE(s)</u>
<i>Dix v. Edelman Fin. Servs., LLC</i> , 978 F.3d 507 (7th Cir. 2020), <i>cert. denied</i> , 141 S. Ct. 2658 (2021), <i>reh'g denied</i> , 141 S. Ct. 2890 (2021) .....	5
<i>Ekern v. Sew/Fit Co.</i> , 622 F. Supp. 367 (N.D. Ill. 1985) .....	10
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991) .....	6
<i>Goplin v. Weconnect, Inc.</i> , 893 F.3d 488 (7th Cir. 2018) .....	9
<i>Hobbs v. John</i> , 722 F.3d 1089 (7th Cir. 2013) .....	7, 9, 10, 12
<i>Hutchins v. Zoll Med. Corp.</i> , 492 F.3d 1377 (Fed. Cir. 2007) .....	8
<i>Incredible Techs., Inc. v. Virtual Techs., Inc.</i> , 400 F.3d 1007 (7th Cir. 2005) .....	5, 6, 9
<i>JCW Invs., Inc. v. Novelty, Inc.</i> , 482 F.3d 910 (7th Cir. 2007) .....	5, 6
<i>Johnson v. Gordon</i> , 409 F.3d 12 (1st Cir. 2005) .....	8
<i>Le Moine v. Combined Commun. Corp.</i> , No. 95-cv-5881 (SBC), 1996 WL 332688 (N.D. Ill. June 13, 1996) .....	10
<i>Moon v. Samuels</i> , No. 15-cv-00861 (MJR), 2015 WL 5162499 (S.D. Ill. Sept. 2, 2015) .....	13, 14
<i>Narell v. Freeman</i> , 872 F.2d 907 (9th Cir. 1989) .....	8
<i>Personal Keepsakes, Inc. v. Personalizationmall.com, Inc.</i> , 975 F. Supp. 2d 920 (N.D. Ill. 2013) .....	<i>passim</i>
<i>Peter F. Gaito Architecture, LLC v. Simone Development Corp.</i> , 602 F.3d 57 (2d Cir. 2010) .....	7
<i>Peters v. West</i> , 692 F.3d 629 (7th Cir. 2012) .....	8, 9

<b><u>CASES</u></b>	<b><u>PAGE(s)</u></b>
<i>Peters v. West</i> , 776 F. Supp. 2d 742 (N.D. Ill. 2011), <i>aff'd</i> , 692 F.3d 629 (7th Cir. 2012) .....	<i>passim</i>
<i>Puckett v. Hernandez</i> , No. 16-cv-02199 (SVW), 2016 WL 7647555 (C.D. Cal. Dec. 21, 2016) .....	8
<i>Puncochar v. Revenue Mgt. of Illinois Corp.</i> , No. 15-cv-07089 (SJC), 2017 WL 1208427 (N.D. Ill. Mar. 31, 2017) .....	13
<i>Regalado v. Hayes</i> , No. 11-cv-1472 (VMK), 2011 WL 5325542 (N.D. Ill. Nov. 3, 2011) .....	13
<i>Rivera v. Philip Morris, Inc.</i> , 395 F.3d 1142 (9th Cir. 2005) .....	9
<i>Scott v. WKJG, Inc.</i> , 376 F.2d 467 (7th Cir. 1967) .....	5
<i>Taha v. International Bhd. of Teamsters, Local 781</i> , 947 F.3d 464 (7th Cir. 2020) .....	5
<i>Tillman v. New Line Cinema Corp.</i> , No. 05-cv-0910 (MFK), 2008 WL 687222 (N.D. Ill. Mar. 7, 2008), <i>aff'd</i> , 295 F. App'x. 840 (7th Cir. 2008) .....	10
<i>U.S. v. Kmart Corp.</i> , No. 12-cv-881 (NJR), 2014 WL 11696711 (S.D. Ill. Sept. 26, 2014).....	9
<i>U.S. v. Rosemond</i> , 841 F.3d 95 (2d Cir. 2016).....	11
<i>Wihtol v. Wells</i> , 231 F.2d 550 (7th Cir. 1956) .....	7, 8
 <b><u>STATUTES AND RULES</u></b>	
37 C.F.R. § 202.1(a).....	8
17 U.S.C. § 501(a) .....	13
17 U.S.C. § 505.....	14
Fed. R. Civ. P. 12(b)(1).....	2
Fed. R. Civ. P. 12(b)(6).....	2, 12

**TREATISES**

**PAGE(s)**

1 *Nimmer on Copyright* § 2.01[B][3] (2021).....8

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Christian D. Rutherford, “Gangsta” *Culture in A Policed State: The Crisis in Legal Ethics Formation Amongst Hip-Hop Youth*, 18 Natl. Black L.J. 305 (2005).....11

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Reyna Araibi, “Every Rhyme I Write”: *Rap Music As Evidence in Criminal Trials*, 62 Ariz. L. Rev. 805 (2020) .....11

Sheldon Pearce, *Why Rap Is Obsessed With Dracos*, Pitchfork, available at: [www.pitchfork.com/thepitch/why-rap-is-obsessed-with-dracos/](http://www.pitchfork.com/thepitch/why-rap-is-obsessed-with-dracos/) (last accessed, November 4, 2021) .....11

**PRELIMINARY STATEMENT**<sup>1</sup>

The one-count Amended Complaint for copyright infringement of an obscure hip-hop song should be dismissed as a matter of law because plaintiff has not alleged plausible facts sufficient to satisfy an infringement claim.

It is an elementary precept of copyright law that an infringement exists only where a defendant has copied protectable elements from a plaintiff's work. The music of the two songs is not at issue in this case. Rather, plaintiff solely alleges lyrical similarities between the two works: (1) that both songs repeat a similar but distinct – and exceedingly commonplace – five-word phrase (plaintiff uses “When U think about it,” and Defendants use “When I Think about it”), and (2) that both songs “discuss” “guns,” “money” and “jewelry,” themes and ideas ubiquitous in rap and hip-hop music. The Seventh Circuit has made clear that short fragmentary phrases like those at issue here do not qualify for copyright protection, and that one cannot copyright ideas or themes (especially ideas and themes that are pervasive in a given art form). Accordingly, because the sole expression that plaintiff alleges to be copied is not protectable as a matter of law, plaintiff has not alleged and cannot allege unlawful appropriation. And because these pleading defects cannot possibly be cured, the Amended Complaint should be dismissed with prejudice and without leave to replead.

The Amended Complaint also should be dismissed as to defendants Wilburn Holding Co., Inc., Nayvadius Wilburn LLC, and Freebandz Productions, LLC, for the additional reason that it fails to allege that any of these entities had anything to do with the song accused of infringement in this case.

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<sup>1</sup> “Defendants” refers to the Defendants making this motion. Other undefined capitalized terms have the meanings given to them in the Amended Complaint, as that term is defined below.

## STATEMENT OF FACTS

### **A. Procedural History**

Gutta Enterprises, LLC (“Gutta LLC”) commenced this action on July 6, 2021. (ECF 1). On September 9, 2021, Gutta LLC filed an amended complaint as of right. (ECF 9). On April 7, 2022, Defendants filed a motion to dismiss the September 9, 2021 amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6). (ECF 44-45). Defendants Xavier Lamar Dotson, Dotson Empire LLC, Ultra International Music Publishing LLC, and Zaytoven Global, LLC filed a joinder to that motion. (ECF 46). On May 3, 2022, the Court (a) granted leave to Gutta LLC’s counsel of record to withdraw from this action, (b) granted leave to DaQuan Robinson (“Plaintiff” or “Mr. Robinson”) to file a further amended complaint substituting Mr. Robinson as a plaintiff in lieu of (or in addition to) Gutta LLC and (c) deemed the pending motion to dismiss withdrawn as moot. (ECF 55). On May 11, 2022, Mr. Robinson purported to file a further amended complaint, substituting himself as the named plaintiff in lieu of Gutta LLC. (ECF 57). The May 11 amended complaint is identical to the September 2021 amended complaint, with one exception – the first page includes the following two sentences: “I would like to change plaintiff from company name to myself (DaQuan Robinson). Also, I would like pictures attached to case.”

On May 18, 2022, upon recognition that no pictures are attached to the May 11 amended complaint, the Court denied Mr. Robinson’s “request that unspecified pictures be attached to the amended complaint” and directed Mr. Robinson to refile the amended complaint to the extent he still wished to include pictures with it. (ECF 58). On that same date, Mr. Robinson appears to have filed with the Court two separate documents: (1) the same “Amended Complaint” he filed on May 11, 2022; and (2) a “2<sup>nd</sup> Amended Complaint” that attached pictures. (ECF 61, 62). For purposes of this motion, Defendants are treating Mr. Robinson’s May 18, 2022 filings as the



operative Amended Complaint (“Amended Complaint” or “AC”).

**B. The Robinson Song & Wilburn Song**

Plaintiff, a rapper and hip-hop artist known as “Gutta,” alleges that in January 2017, he created a sound recording of the musical composition “When U Think About It” (the “Robinson Song”). (AC ¶¶ 19, 22). Thereafter, Robinson allegedly “filed an application for registration of the sound recording and music” of the Robinson Song with the Copyright Office, and the Copyright Office subsequently issued a Certificate of Registration for the sound recording of the Robinson Song. (*Id.* ¶ 20 & Ex. B). Plaintiff does not allege ownership of the registered copyright in the musical composition for the Robinson Song.

In its single-count, the AC alleges that the musical composition “When I Think About It,” authored, performed and recorded by defendant Nayvadius Demun Wilburn (“Wilburn”), a successful hip-hop artist known as “Future” (the “Wilburn Song”), infringes the copyright in the Robinson Song. (*Id.* ¶¶ 55-58, 68-97).

**C. The Amended Complaint Solely Alleges Copying Of Unprotectable Expression**

The Amended Complaint does not allege any musical similarities between the Robinson Song and Wilburn Song. Instead, the Amended Complaint identifies only alleged similarities between the lyrics and “theme” of each work. (*Id.* ¶¶ 79-90).

The sum total of the alleged similarities between the two works is (1) that whereas the Robinson Song is titled “When U Think About It” and often begins chorus lines with that lyrical phrase, the Wilburn Song is titled “When I Think About It” and often concludes chorus lines with that lyrical phrase;<sup>2</sup> and (2) both songs “discuss” commonplace subject matter ubiquitous in rap

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<sup>2</sup> The chart at Paragraph 82 of the Amended Complaint misrepresents the syntax of the lyrics in the Robinson Song, attempting to convey the false impression that it concludes chorus lines with “When U Think About It.” It does not. The Court can hear for itself that the Robinson Song

and hip-hop music such as “money,” “guns” and “jewelry.” (*Id.* ¶¶ 81-90).

Phrases very similar to the phrase “when U think about it” or “when I think about it” have appeared in dozens of songs before the Robinson Song was published. A chart summarizing some of the prior songs that utilize the phrases “when you think about it,” “when u think about it,” or “when I think about it” is annexed as Exhibit 2 to the Goldsmith Declaration. It is “beyond reasonable controversy” that these songs exist and include the quoted lyrics. To verify that, the chart includes Internet links to each song, at which the Court can access and listen to each song.

**D. The Amended Complaint Does Not Include A Single Plausible Allegation Suggesting That WHCI, NWL Or FPL Engaged In Any Infringing Acts**

The Amended Complaint does not include a single specific factual allegation showing, or even suggesting, that defendants Wilburn Holding Co., Inc. (“WHCI”), Nayvadius Wilburn LLC (“NWL”) or Freebandz Productions, LLC (“FPL”) had anything to do with the Wilburn Song, much less that any of these entities reproduced, distributed, sold, performed or publicly displayed the Wilburn Song (or the Robinson Song). Instead, the Amended Complaint lumps together all “Defendants” and concludes, without supporting facts, that all “Defendants” “released” “for streaming and download” an album that includes the Wilburn Song. (*Id.* ¶ 56).

In regard to WHCI, the Amended Complaint alleges on “information and belief” that WHCI is a “record label,” that Wilburn is one of the artists signed to WHCI and that WHCI “financially benefits” from Wilburn’s success. (*Id.* ¶¶ 7, 33). In regard to NWL and FPL, the Amended Complaint alleges on “information and belief” that NWL and FPL “promote[]” the career of Wilburn and “financially benefit[]” from his success. (*Id.* ¶¶ 8, 39-40, 42-43). Again, the Amended Complaint does not include a single specific allegation that WHCI, NWL or FPL

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begins chorus lines with “When U Think About It” while the Wilburn Song concludes chorus lines with “When I Think About.” (AC at Ex. A & Ex. E).

distributed, sold or otherwise exploited (or even promoted) the album including the Wilburn Song.

## **ARGUMENT**

### **I. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM**

#### **A. Legal Standard Under Fed. R. Civ. P. 12(b)(6)**

To survive a motion to dismiss for failure to state a claim, a complaint must allege plausible facts sufficient “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts accept factual allegations as true on a motion to dismiss, that rule does not apply to legal conclusions, bare assertions or inherently incredible claims. *E.g., Dix v. Edelman Fin. Servs., LLC*, 978 F.3d 507, 514 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2658 (2021), *reh’g denied*, 141 S. Ct. 2890 (2021); *Taha v. International Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020).

#### **B. Legal Standard For Copyright Infringement**

To plead a claim for copyright infringement, a plaintiff must allege plausible facts demonstrating, among other things, (1) that the defendant copied from his or her work, and (2) that, in doing so, the defendant “unlawfully appropriated protected material from the copyrighted work.” *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir. 1967) (citation omitted; emphasis added); *accord Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005); *Peters v. West*, 776 F. Supp. 2d 742, 747 (N.D. Ill. 2011), *aff’d*, 692 F.3d 629, 633 (7th Cir. 2012).

Because direct evidence of copying is rare, “copying may be inferred where the defendant had access to the copyrighted work and the accused work is substantially similar to the copyrighted work.” *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 915 (7th Cir. 2007) (citations & quotations omitted). However, as the Seventh Circuit recognizes, even where direct evidence of copying exists, an infringement will not be found unless the defendant has copied protectable expression

from the plaintiff's work because no one can monopolize commonplace elements, public domain elements or elements not otherwise protected by copyright. *See Incredible Techs.*, 400 F.3d at 1011 ("the copyright laws preclude appropriation of only those elements of the work that are protected by the copyright") (citation omitted); *Personal Keepsakes, Inc. v. Personalizationmall.com, Inc.*, 975 F. Supp. 2d 920, 927 (N.D. Ill. 2013) ("unprotected, or unprotectable, elements of the work in question, even those that are most significant and most clearly similar, are not taken into account") (citation & quotation omitted).

As the Seventh Circuit also has explained, the test for substantial similarity is "an objective one" (*JCW Invs.*, 482 F.3d at 916), and it includes two components: (1) whether the defendant actually copied from the plaintiff's work, and (2) whether such copying "if proven, went so far as to constitute an improper appropriation." *Incredible Techs.*, 400 F.3d at 1011 (citation & quotation omitted). The second prong implicates the "ordinary observer test" and asks "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Id.* (citation & quotation omitted).

Critically, "[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); *accord Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001); *Corbello v. Valli*, 974 F.3d 965, 973 (9th Cir. 2020). Thus, courts must "filter out" unprotectable elements and assess only whether the protectable elements in the two works are substantially similar. *See Peters*, 776 F. Supp. 2d at 749 ("the Court must first identify whether those elements [put in issue by the plaintiffs] are protected by copyright"); *Personal Keepsakes*, 975 F. Supp. 2d at 926 ("there is no substantial similarity between the plaintiff's work and [the defendant's] work after all the unprotected

elements are filtered out, and therefore there is no [infringement]”); accord *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57, 66 (2d Cir. 2010) (“when faced with works that have both protectible and unprotectible elements ... we [] must attempt to extract the unprotectible elements from our consideration and ask whether the protectible elements, standing alone, are substantially similar”) (citations & quotations omitted).

**C. The Phrase “When U Think About It” Is Not Entitled To Copyright Protection**

Plaintiff bases its copyright infringement claim on the allegation that the phrase “when I think about it” in the Wilburn Song is substantially similar to the phrase “when U think about it” in the Robinson Song. (AC ¶¶ 82-86). However, the Seventh Circuit has ruled that copyright protection does not extend to titles or fragmentary phrases and words such as “when I think about it,” as applied to literary works such as song lyrics. See *Hobbs v. John*, 722 F.3d 1089, 1096 (7th Cir. 2013) (finding fragmentary lyrics in plaintiff’s song unprotectable because they were “rudimentary, commonplace, standard, or unavoidable in popular love songs” and rejecting plaintiff’s argument that repetition of such lyrics afforded copyright protection because “[r]epetition is ubiquitous in popular music”) (citation omitted); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (finding unprotectable the phrase “most personal sort of deodorant” because it is “merely a short phrase or expression,” which “hardly qualifies as an appreciable amount of original text”) (quotations omitted); *Peters*, 776 F. Supp. 2d at 750, *aff’d*, 692 F.3d 629 (granting motion to dismiss without leave to replead where song lyrics in issue were “trite and clichéd”); *Personal Keepsakes*, 975 F. Supp. 2d at 925 (granting motion to dismiss without leave to replead because “[t]he short [lyrical] verse ‘May the strength of the Holy Spirit be with you, guiding you every day of your life’ is too common and unoriginal to receive copyright protection in itself”); *Wihtol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956) (“the title [of a song], in

itself, is not subject to copyright protection”).

Courts outside the Seventh Circuit uniformly follow this well-settled rule. *E.g.*, *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1384 (Fed. Cir. 2007) (“It is axiomatic that copyright law denies protection to fragmentary words and phrases ...”) (citations & quotations omitted); *CMM Cable Rep, Inc. v. Ocean Coast Props.*, 97 F.3d 1504, 1520 (1st Cir. 1996) (rejecting protection for phrases “if you’re still on the clock at quitting time,” “clock in and make \$50 and hour” and “call in, clock in, and win”); *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 143 (2d Cir. 1998) (finding unprotectable the lyrics “You’ve got to stand for something, or you’ll fall for anything”); *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) (“Ordinary phrases are not entitled to copyright protection”) (citations omitted); *Johnson v. Gordon*, 409 F.3d 12, 21 (1st Cir. 2005) (finding unprotectable lyrics “You’re the One for Me” because it was “too trite to warrant copyright protection”); *Puckett v. Hernandez*, No. 16-cv-02199 (SVW), 2016 WL 7647555, at \*5 (C.D. Cal. Dec. 21, 2016) (finding unprotectable the lyrics “I would die for you baby but you don’t feel me/I gave you my heart, but you didn’t do the same” because such lyrics “are common phrases that do not possess the requisite originality to be copyrightable”); *Batiste v. Najm*, 28 F. Supp. 3d 595, 615 (E.D. La. 2014) (finding unprotectable lyrics “I can’t get enough,” “Win, win, win, at all cost” and “raise your hands in the air” because they were “common, everyday expressions”). *See also* 37 C.F.R. § 202.1(a); 1 *Nimmer on Copyright* § 2.01[B][3] (2021).

Measured against the established law of this Circuit (and others) regarding what literary elements are not protectable, it is plain that the phrase “when U think about it,” whether used in the title or the lyrics, is not protectable as a matter of law. In fact, this ubiquitous phrase has

appeared in dozens of songs that existed before the Robinson Song. (Goldsmith Dec. Ex. 2).<sup>3</sup> In *Peters v. West*, the plaintiff sued Kanye West for copyright infringement based on a song by West that had the same title of plaintiff's song ("Stronger") and both songs referenced Nietzsche's phrase "what does not kill me, makes me stronger." 692 F.3d 629, 635 (7th Cir. 2012) (Plaintiff's lyrics included the phrase "What don't kill me make me stronger" whereas West's song used the phrase "that don't kill me/Can only make me stronger.") The Seventh Circuit upheld the lower court's dismissal of the complaint for failure to state a claim based on the "ubiquity of this common saying, together with its repeated use in other songs." *Id.* The AC here should likewise be dismissed.<sup>4</sup>

**D. Themes About Money, Guns and Jewelry Are Not Protectable**

Plaintiff also bases its copyright claim on the allegation that both parties' songs discuss money, guns and jewelry. (AC ¶¶ 81, 88-90). However, copyright protection does not extend to ideas, themes or *scènes à faire*, *i.e.*, "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Incredible Techs.*, 400 F.3d at 1012 (internal quotations omitted); *accord Hobbs*, 722 F.3d at 1095 (no infringement despite thematic similarity in lyrics where authors of each work expressed their similar themes in a dissimilar manner); *id.* at 1094 ("the Copyright Act does not protect general ideas, but only the

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<sup>3</sup> This Court can take judicial notice of the fact that dozens of prior songs use the identical lyrical phrases at issue in this case (many of which repeat the five-word phrase in much the same manner as the Robinson Song). *See, e.g., Goplin v. Weconnect, Inc.*, 893 F.3d 488, 491 (7th Cir. 2018); *U.S. v. Kmart Corp.*, No. 12-cv-881 (NJR), 2014 WL 11696711, at \*2 (S.D. Ill. Sept. 26, 2014) (judicial notice may be taken of matter, including information on websites and online resources, "when the matter is 'beyond reasonable controversy'") (quoting *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005)).

<sup>4</sup> To be clear, for purposes of this motion, Defendants do not dispute that the Robinson Song, as a whole, is entitled to copyright protection. What Defendants contend – and what the law unequivocally supports – is that the elements on which Plaintiff relies to claim infringement are not protectable as a matter of law.

particular expression of an idea”) (citing *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 615 (7th Cir. 1982)); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003) (“a copyright owner can’t prove infringement by pointing to features of his work that are found in the defendant’s work as well but that are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another”) (citations omitted); *Tillman v. New Line Cinema Corp.*, No. 05-cv-0910 (MFK), 2008 WL 687222, at \*7-9 (N.D. Ill. Mar. 7, 2008), *aff’d*, 295 F. App’x. 840 (7th Cir. 2008) (because *scènes à faire* are unprotectable, they must be excluded from consideration in assessing substantial similarity); *Ekern v. Sew/Fit Co.*, 622 F. Supp. 367, 369 (N.D. Ill. 1985) (“thematic elements are not protected”) (citations omitted). Instead, “[t]he essence of copyright infringement lies not in the infringer’s taking of the general ideas or theme of another’s work, but in taking the particular manner in which the creator has expressed those ideas in the copyrighted work.” *Le Moine v. Combined Commun. Corp.*, No. 95-cv-5881 (SBC), 1996 WL 332688, at \*3 (N.D. Ill. June 13, 1996) (citations omitted).

Here, the Wilburn Song expresses the idea of “money,” “guns” and “jewelry” differently than the Robinson Song. The sole example cited in the AC of these ideas being expressed in an allegedly similar manner is (a) that the Robinson Song includes the lyrics “stashing money, grin with no sleep,” “my whole life I’ve been keeping it G” and “laying law [sic] from the police,” and (b) that the Wilburn Song includes the lyrics “got a million dollars in jewelry,” “all these cars, my kids inheretin” and “all this money, I can’t cherish.” However, to the extent the lyrical passages from each work even express similar ideas (which is debatable), they manifestly do not do so in a remotely similar fashion. Simply put, these are commonplace ideas expressed dissimilarly in each work and do not support an infringement claim as a matter of law.



Further reinforcing that Plaintiff cannot claim ownership over such ideas and themes is the fact that “money,” “guns” and “jewelry” are ubiquitous in rap and hip-hop music. *E.g.*, *U.S. v. Rosemond*, 841 F.3d 95, 101 (2d Cir. 2016) (noting that “conferences” with popular hip-hop figures have been held to “talk about the guns and violence in hip-hop [music]”); Christian D. Rutherford, “Gangsta” Culture in A Policed State: The Crisis in Legal Ethics Formation Amongst Hip-Hop Youth, 18 Natl. Black L.J. 305, 332 (2005) (noting that certain famous rappers “condone, or at the very least glamorize gun violence”); Reyna Araibi, “Every Rhyme I Write”: Rap Music As Evidence in Criminal Trials, 62 Ariz. L. Rev. 805, 815 (2020) (noting that gangster rap is “filled with insightful but markedly profane descriptions of,” among other things, “guns,” and “violence”); Sheldon Pearce, *Why Rap Is Obsessed With Dracos*, Pitchfork, available at: [www.pitchfork.com/thepitch/why-rap-is-obsessed-with-dracos/](http://www.pitchfork.com/thepitch/why-rap-is-obsessed-with-dracos/) (last accessed, November 4, 2021); Craig S. Jenkins, *Rappers And Gun Violence: Exploring Hip-Hop’s Love Of Firearms*, The Boombox, available at: [www.theboombox.com/rappers-and-gun-violence-exploring-hip-hops-love-of-firearms/](http://www.theboombox.com/rappers-and-gun-violence-exploring-hip-hops-love-of-firearms/) (last accessed, November 4, 2021); Cailin Dahlin, *Counternarratives in Hip Hop Music: Themes of Marginalization*, Honors Projects, available at: <https://digitalcommons.spu.edu/cgi/viewcontent.cgi?article=1106&context=honorsprojects> (last accessed, November 4, 2021) (“Within the hip hop community, criticism has grown that recent artists have lost the original social justice message of hip hop and have turned to focus more on possessions, money, and sex”); Questlove, *Mo’ Money, Mo’ Problems: How Hip-Hop Failed Black America, Part II*, Vulture, available at: [www.vulture.com/2014/04/questlove-on-money-jay-z-how-hip-hop-failed-black-america-part-2.html](http://www.vulture.com/2014/04/questlove-on-money-jay-z-how-hip-hop-failed-black-america-part-2.html) (last accessed, November 4, 2021) (member of famous hip-hop group *The Roots*, explaining that “when people think of hip-hop, pretty quickly they think of,” among other things, “bling” (slang for expensive jewelry or clothing) and “jewels”).

**E. The Amended Complaint Should Be Dismissed Because It Does Not Plausibly Allege The Unlawful Appropriation Of Protectable Elements**

Once the Court filters out from consideration the unprotectable subject matter that Plaintiff places in issue, no similarities between the two works remain. Accordingly, because what Plaintiff claims has been copied is not protectable expression, Plaintiff's infringement claim fails as a matter of law. *E.g.*, *Hobbs*, 722 F.3d at 1095-96; *Peters*, 776 F. Supp. 2d at 751-52, *aff'd*, 692 F.3d 629; *Personal Keepsakes*, 975 F. Supp. 2d at 927.

Importantly, "the Seventh Circuit in recent years has made clear that district courts can address the substantial similarity issue on a Rule 12(b)(6) motion, considering in great detail whether a plaintiff has plausibly alleged that a defendant's work infringes on a copyright." *Design Basics, LLC v. WK Olson Architects, Inc.*, No. 17-cv-7432 (SLE), 2018 WL 3629309, at \*4 (N.D. Ill. July 31, 2018) (citations omitted). To that end, infringement claims may be dismissed as a matter of law where no reasonable jury could find the works substantially similar, or the claimed similarities pertain only to unprotected elements. *E.g.*, *Personal Keepsakes*, 975 F. Supp. 2d at 927 (granting motion to dismiss because "when the portion of the expression at issue that is not copyrighted, or could not properly be copyrighted, is set aside, there is virtually nothing of [plaintiff's] allegedly protected work left to compare with [defendant's] version for substantial similarity"); *Peters*, 776 F. Supp. 2d at 751-52 (granting motion to dismiss where "no ordinary observer could find" the song lyrics substantially similar and where the only claimed similarities pertained to "unprotectable elements" that had been "filtered out" from consideration), *aff'd*, 692 F.3d 629 (7th Cir. 2012); *accord Basile v. Sony Pictures Entm't Inc.*, No. 14-cv-04264 (DMG), 2014 WL 12521344, at \*2 (C.D. Cal. Aug. 19, 2014), *aff'd*, 678 F. App'x 473 (9th Cir. 2017).

Moreover, leave to replead should be denied because Plaintiff cannot possibly overcome the absence of protectable similarities. *E.g.*, *Peters*, 776 F. Supp. 2d at 750, *aff'd*, 692 F.3d 629;

*Personal Keepsakes*, 975 F. Supp. 2d at 925; accord *Regalado v. Hayes*, No. 11-cv-1472 (VMK), 2011 WL 5325542, at \*7 (N.D. Ill. Nov. 3, 2011) (the court “maintains considerable discretion to deny a plaintiff leave to replead her Complaint when to do so would be futile, fail to cure the defect in the original Complaint or not survive a second motion to dismiss”) (citing *Arlin-Golf, LLC v. Village of Arlington Heights*, 631 F.3d 818, 823 (7th Cir. 2011)).<sup>5</sup>

**F. The Amended Complaint Also Should Be Dismissed As Against WHCI, NWL And FPL Since It Does Not Allege They Engaged In Any Infringing Acts**

To plead a copyright infringement claim against a given defendant, a plaintiff must plead plausible facts showing that the defendant actually infringed one of the plaintiff’s exclusive rights under copyright. *See* 17 U.S.C. § 501(a). Here, the Amended Complaint does not allege that WHCI, NWL or FPL had anything to do with the creation, reproduction, distribution, performance or exploitation of the Wilburn Song. Rather, it lumps together WHCI, NWL and FPL with all “Defendants” and concludes, without support, that all “Defendants” engaged in infringing acts. Lumping together all “Defendants” is not proper pleading and does not suffice to state a claim. *E.g., Puncochar v. Revenue Mgt. of Illinois Corp.*, No. 15-cv-07089 (SJC), 2017 WL 1208427, at \*2 (N.D. Ill. Mar. 31, 2017) (dismissing claim that “lump[ed] all of the defendants together” and failed to provide allegations supporting that each specific defendant engaged in wrongdoing); *Moon v. Samuels*, No. 15-cv-00861 (MJR), 2015 WL 5162499, at \*2 (S.D. Ill. Sept. 2, 2015) (“formulaic recitations” that all defendants are liable “does not put the defendants on notice of

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<sup>5</sup> Further, while it would not matter if both songs concluded chorus lines with the same or similar unprotectable five-word phrases (since the five-word phrase is unprotectable irrespective of any similarities in repetition or structural use), the actual expression of the unprotectable five-word phrase is different in each work. The Court can hear for itself that the Robinson Song begins chorus lines with “When U Think About It,” while the Wilburn Song concludes chorus lines with the distinct phrase “When I Think About It.” Plaintiff’s allegation that both songs “end” chorus lines with the five-word phrase is objectively false. (AC ¶ 85).

what exactly they might have done”) (quoting *Brooks v. Ross*, 578 F.3d 574, 582 (7th Cir. 2009)).

**CONCLUSION**

For the foregoing reasons, it is respectfully requested that the Court dismiss the Complaint with prejudice and without leave to replead, that the Court award Defendants their attorneys’ fees and costs pursuant to 17 U.S.C. § 505 as the prevailing party in this copyright action, and that the Court award Defendants such other and further relief that the Court deems just and proper.

Dated: June 15, 2022

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that the foregoing document was served upon all counsel of record via filing with CM/ECF on June 15, 2022, and that on June 15, 2022, counsel caused the foregoing document to be served by email and FedEx upon plaintiff DaQuan Robinson at 5822 Westover Dr., Apt. D, Richmond, VA 23225 and [guttaenterprises@gmail.com](mailto:guttaenterprises@gmail.com).

*/s/ Andrew M. Goldsmith*\_\_\_\_\_

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