TABLE OF APPENDICES

United States Court of Appeals
for the Fifth Circuit

No. 23-50254

KIRK JOHNSTON,

Plaintiff—Appellant,

versus

CHAD KROEGER; MICHAEL KROEGER; RYAN PEAKE; DANIEL ADAIR; ROADRUNNER RECORDS, INCORPORATED; WARNER/CHAPPELL MUSIC, INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-497

(Filed Feb. 19, 2024)

Before JONES, HAYNES, and DOUGLAS, *Circuit Judges.*

PER CURIAM:*

Plaintiff Kirk Johnston brought this copyright infringement suit alleging a popular band copied the musical composition of his song. Finding Johnston failed to produce sufficient evidence of copying, the district

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

court granted summary judgment to the defendants. For the reasons set forth below, we AFFIRM.

I. Background

Johnston is a musician and songwriter who has been a member of a band called Snowblind since 1997. Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, and Daniel Adair are members of the band Nickelback. At all relevant times, Defendant Roadrunner Records, Inc. was Nickelback's record label and Defendant Warner Chappell Music, Inc. was Nickelback's music publishing company.

In 2001, Johnston wrote and created the musical composition for the song *Rock Star*. Johnston holds a federal copyright registration for this song. Four years later, Nickelback released a song with a similar title called *Rockstar*. Johnston alleges Nickelback copied the original musical composition of his song. In 2020, Johnston initiated this suit for copyright infringement.[1] Nickelback moved for summary judgment, and the district court referred the motion to a magistrate judge. The magistrate judge recommended summary judgment in favor of Nickelback because Johnston had not raised a genuine dispute of material fact as to factual copying; indeed, the two songs did not sound alike. Over Johnston's objection, the district court adopted

[1] Johnston claims he was unaware of Nickelback's song until 2018. While the court must accept that statement at the summary judgment stage, it is an odd contention considering how popular the Nickelback song was.

the magistrate judge's recommendation and dismissed Johnston's claim. Johnston timely appealed.

II. Jurisdiction & Standard of Review

The district court properly exercised jurisdiction over Johnston's claim under 28 U.S.C. §§ 1331 and 1338(a). We have appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

We review a motion for summary judgment de novo, applying the same standards as the district court. *Voinche v. Fed. Bureau of Investigation*, 999 F.2d 962, 963 (5th Cir. 1993) (per curiam). In conducting this review, we "construe all facts and inferences in the light most favorable to the nonmovant." *Batiste v. Lewis*, 976 F.3d 493, 500 (5th Cir. 2020). Summary judgment is proper where there are no genuine disputes of material fact and the movant is entitled to prevail as a matter of law. *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017) (citing FED. R. CIV. P. 56(a)).

III. Discussion

To establish a claim for copyright infringement, a plaintiff must show "(1) ownership of a valid copyright; (2) factual copying; and (3) substantial similarity." *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007) (per curiam). At issue here is the element of factual copying, which a plaintiff may show with direct or

circumstantial evidence. *See id.* When, as here, a plaintiff lacks direct evidence of copying, factual copying may be inferred from "either a combination of access and probative similarity or, absent proof of access, striking similarity." *Batiste*, 976 F.3d at 502. The district court held that Johnston failed to raise a genuine dispute of material fact as to access or striking similarity. We agree.

A. Access

As stated above, the first way a plaintiff may establish factual copying is with "a combination of access and probative similarity." *Id.* At the first step, the plaintiff must offer "proof that the defendant had access to the copyrighted work prior to creation of the infringing work." *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001). Next, the plaintiff must show that the works, "when compared as a whole, are adequately similar to establish appropriation." *Id.* at 397.

"To establish access, a plaintiff must prove that the person who created the allegedly infringing work had a reasonable opportunity to view [or hear] the copyrighted work before creating the infringing work." *Armour*, 512 F.3d at 152–53 (internal quotation marks and citation omitted). A "bare possibility" of access is insufficient, as is mere "speculation or conjecture." *Peel & Co.*, 238 F.3d at 394–95. Indeed, to survive summary judgment, "the plaintiff must present evidence that is *significantly probative* of a *reasonable opportunity* for

access." *Batiste*, 976 F.3d at 503 (internal quotation marks and citation omitted).

Johnston argues the following evidence shows Nickelback had a reasonable opportunity to access his work: (1) executives from Roadrunner's parent company, Universal Music, likely attended Snowblind's Continental Club show; (2) Nickelback's management group likely attended Snowblind's show at the Whisky-a-Go-Go;[2] (3) Nickelback and Snowblind were "moving in relatively the same circles" when they were searching for record label deals; (4) Nickelback routinely used music ideas from third-party bands; and (5) Johnston made significant efforts to publicize his music in the early 2000s. But inferring access from this evidence would require "leaps of logic" that are not supported by the record. *See Armour*, 512 F.3d at 155. A jury would have to infer that the executives Johnston named actually attended Snowblind's shows or received one of his demo CDs, and that these executives then showed the song to Nickelback. This "chain of hypothetical transmittals is insufficient to infer access," *id.* at 153 (quotation omitted), especially in the face of testimony from Nickelback members and relevant executives that they had never heard of Johnston's song, *see Batiste*,

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[2] The only evidence Johnston identifies for the assertion that certain executives attended Snowblind's shows is that they frequently attend shows at the Continental Club and the Whisky-a-Go-Go. Johnston has not presented evidence that any of these executives actually attended one of Snowblind's performances. Indeed, the record establishes only that Johnston's friend, an intern at Universal/Motown Records, attended a Snowblind show with one of his colleagues in marketing.

976 F.3d at 504 (considering defendants' sworn testimony that they had never heard of plaintiff or his music). Because Johnston's contentions amount to mere speculation, he has failed to raise a genuine fact issue as to whether Nickelback had access to his work.

B. Striking Similarity

Without proof of access, Johnston must establish factual copying by showing "striking similarity" between Nickelback's song and his. *See id.* To meet this burden, he must "demonstrate that the alleged similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source." *Guzman v. Hacienda Recs. & Recording Studio, Inc.*, 808 F.3d 1031, 1039 (5th Cir. 2015) (internal quotation marks and citation omitted). The similarities must also "appear in a sufficiently unique or complex context . . . which is of particular importance with respect to popular music, in which all songs are relatively short and tend to build on or repeat a basic theme." *Id.* (internal quotation marks and citation omitted). Johnston asserts several challenges to the district court's conclusion that he did not raise a material fact issue as to striking similarity. None is availing.

As an initial matter, Johnston contends the district court applied the improper legal standard. First, he argues that the court erred by not applying the "more discerning ordinary observer test." But that test applies in certain circumstances under the substantial

similarity analysis—not striking similarity. *See Hamil Am., Inc. v. GFI*, 193 F.3d 92, 101 (2d Cir. 1999) ("[T]he 'more discerning' ordinary observer standard . . . requires the court to eliminate the unprotectible elements from its consideration and to ask whether the protectible elements, standing alone, are substantially similar.").[3] The substantial similarity analysis applies only after a plaintiff establishes factual copying and is thus irrelevant here. *See Batiste*, 976 F.3d at 506.

Second, Johnston asserts the district court erred by considering all versions of the songs rather than the "stripped down" versions. However, Johnston provides no support for this argument, citing only to cases that apply his argued standard to the substantial similarity analysis. *See, e.g., Positive Black Talk Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357, 367 (5th Cir. 2004) (upholding jury instruction that "correctly indicate[d] that the jury should compare the parts of the two songs that are similar in determining substantial similarity"), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). The district court did not err by considering all versions of the songs in the record.

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[3] Johnston argues that the "more discerning observer" test should apply to the striking similarity analysis because "factual copying cannot be sustained on the basis of unprotectable elements." But we have previously held that a plaintiff can show factual copying in part by pointing to "any similarities between the two works, even as to unprotectable elements." *Batiste*, 976 F.3d at 502 (internal quotation marks and citation omitted). Thus, the "more discerning observer" test is inapplicable to striking similarity.

Additionally, Johnston contends the works at issue are strikingly similar because they have similar hooks and lyrics. But he has not raised a material fact issue on whether these alleged similarities are so unique that they "can only be explained by copying, rather than by coincidence, independent creation, or prior common source." *Guzman*, 808 F.3d at 1039.

Johnston's expert first opines that the hooks of the songs are strikingly similar. He states that there are "clear lyrical similarities" between the two hooks: "Gonna be a rock star someday" in Johnston's work, and "Hey, hey, I wanna be a rockstar" in Nickelback's work. Johnston's expert also contends that there are musical similarities "between the two hooks." However, even under Johnston's expert's analysis, the melodic and harmonic similarities between the two hooks are not so great as to preclude all explanations but copying. Further, Johnston fails to raise a material fact issue on whether these alleged similarities arise in a "unique or complex context." *See id.* (quotation omitted). As the summary judgment record reflects, several other Nickelback songs and other songs in the rock genre share the same similarities. *See id.* at 1040 (affirming finding of no striking similarity because the alleged similarities were "either common to the Tejano genre or common in other songs").

Johnston's argument that the rest of the songs' lyrics create striking similarity also fails. Johnston's expert categorizes the lyrics into common themes such as "making lots of money," "connections to famous people," and "references to sports." But these broad

categories are mere clichés of being a rockstar that are not unique to the rock genre. Singing about being a rockstar is not limited to Johnston. Further, organizing the lyrics into these categories overstates their similarities. For example, Johnston contends both songs lyricize about sports. Well, Johnston's work includes the phrase "Might buy the Cowboys and that's how I'll spend my Sundays," but Nickelback's work includes the phrases "And a bathroom I can play baseball in" and "It's like the bottom of the ninth and I'm never gonna win." These lyrics reference different sports in different contexts, and do not approach the threshold of striking similarity. No reasonable juror would think that Nickelback could have produced its lyric about baseball only by copying Johnston's lyric about football. Indeed, we have previously held that two songs were not strikingly similar despite "nearly identical" opening lyrics. *Id.* Accordingly, Johnston has not raised a fact issue as to striking similarity. Put another way, these two songs are simply *not* sufficiently similar.

In sum, because he has not shown factual copying with either a combination of access and probative similarity, or striking similarity, Johnston's copyright infringement claim fails.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's order granting summary judgment to the defendants.[4]

[4] Because summary judgment for the defendants is proper, we do not reach the other issues raised on appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KIRK JOHNSTON,	§	
Plaintiff	§	
	§	
v.	§	
CHAD KROEGER,	§	
MICHAEL KROEGER,	§	
RYAN PEAKE, DANIEL	§	**Case No.**
ADAIR, ROADRUNNER	§	**1:20-cv-00497-RP**
RECORDS, INC., WARNER/	§	
CHAPPELL MUSIC, INC.,	§	
and LIVE NATION	§	
ENTERTAINMENT, INC.,	§	
Defendants	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Aug. 11, 2021)

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Before the Court are two Motions to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6), filed October 22, 2020 by Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc. (Dkt. 17) and Defendant Live Nation Entertainment, Inc. (Dkt. 18); Plaintiff's Response in Opposition to All Defendants' Rule 12 Motions to Dismiss, filed December 3, 2020 (Dkt. 21); and the

Defendants' reply briefs, both filed December 17, 2020 (Dkts. 23 and 26). On April 8, 2021, the District Court referred the motions to the undersigned Magistrate Judge for Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

I. Background

Plaintiff Kirk Johnston brings this action for copyright infringement against Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc. (collectively, the "Nickelback Defendants") and Live Nation Entertainment, Inc. ("Live Nation"). Johnston alleges that the Nickelback Defendants copied his original musical composition, *Rock Star*, which he wrote in 2001 while a member of the band Snowblind Revival (the "Copyrighted Work"). Complaint, Dkt. 1 ¶ 15. Johnston holds a federal copyright registration for the Copyrighted Work, U.S. Copyright No. PA 2-216-632. *Id.*

From the late 1990s through the early 2000s, Snowblind Revival performed its music for A&R (artists and repertoire) representatives from numerous record labels. *Id.* ¶ 16. Johnston and Snowblind Revival also performed Johnston's original songs in venues around the United States. *Id.* ¶¶ 16-17. In August 2001, Snowblind Revival created a master recording of

Rock Star, along with three other original songs. *Id.* ¶ 17. The band made fifteen copies of the master recording and sent them to several record labels, including Universal Music Group and Warner Music Group,[1] of which Defendants Roadrunner Records, Inc. and Warner Chappell Music, Inc. are wholly owned indirect subsidiaries. *Id.*; Dkt. 24 at 1; Dkt. 25 at 1. Chad Kroeger, Michael Kroeger, Ryan Peake, and Daniel Adair are members of the band Nickelback, which is signed to Roadrunner Records. Dkt. 1 ¶¶ 3-6; Dkt. 21 at 6 n.1. Plaintiff alleges that the Nickelback Defendants had direct access to Johnston's musical composition *Rock Star* as a result of Snowblind Revival's marketing efforts. Dkt. 1 ¶ 18.

In January 2005, Nickelback released the song *Rockstar* on its album *All the Right Reasons*. *Id.* ¶ 20. The Nickelback band members each are credited as composers and songwriters for *Rockstar*. *Id.* Johnston alleges that "a substantial amount of the music in *Rockstar* is copied from [his] original composition *Rock Star*," including "the tempo, song form, melodic structure, harmonic structures, and lyrical themes." *Id.* ¶ 23. More than 4.5 million copies of Nickelback's *Rockstar* have been sold since its debut in 2005. *Id.* ¶ 22. Nickelback also has performed *Rockstar* live in concert hundreds of times. *Id.* Live Nation has promoted Nickelback's live concerts at which the song was performed. *Id.* ¶ 11.

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[1] Johnston voluntarily dismissed Defendant Warner Music Group on August 10, 2020. Dkts. 9 and 11.

Johnston seeks damages for copyright infringement and an injunction against further infringement. *Id.* ¶ 1. The Nickelback Defendants and Live Nation move to dismiss Johnston's Complaint for failure to state a claim.

II. Legal Standard

Rule 12(b)(6) allows a party to move to dismiss an action for failure to state a claim on which relief can be granted. In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court accepts "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation omitted). The Supreme Court has explained that a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic 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." *Iqbal*, 556 U.S. at 678.

> 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. Factual allegations must be enough to raise a right to relief above

> the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly, 550 U.S. at 555 (cleaned up). The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint. *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

III. Analysis

There are two types of copyright infringement: direct and secondary. *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 439 (5th Cir. 2017). Direct copyright infringement occurs when a party engages in conduct that violates the exclusive rights of a copyright owner. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984). Secondary liability is a means of holding parties responsible for infringement by others even if they have not engaged in the infringing activity. *Id.* at 435. Secondary infringement occurs when one intentionally induces or encourages infringing acts by others or profits from such acts while declining to exercise a right to stop or limit them. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

A. Direct Copyright Infringement

Defendants argue that Johnston cannot state a claim for copyright infringement because he fails to plead facts showing that they had access to the Copyrighted Work. Defendants also assert that Johnston cannot state a claim for copyright infringement because *Rockstar* is not substantially similar to the Copyrighted Work.

To state a claim for direct copyright infringement under the Copyright Act, a plaintiff must show (1) ownership of a valid copyright, and (2) copying of constituent elements of the plaintiff's work that are original. *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 499 (5th Cir. 2012). To show copying, a plaintiff must plead and prove (1) factual copying, and (2) substantial similarity. *Guzman v. Hacienda Recs. & Recording Studio, Inc.*, 808 F.3d 1031, 1037 (5th Cir. 2015).

Factual copying may be inferred from (1) proof that the defendant had access to the copyrighted work prior to creation of the infringing work, and (2) probative similarity. *Id.* Access may be shown if "the person who created the allegedly infringing work had a reasonable opportunity to view [or hear] the copyrighted work." *Batiste v. Lewis*, 976 F.3d 493, 503 (5th Cir. 2020). When access cannot be shown, the plaintiff may prove factual copying "by showing such a striking similarity between the two works that the similarity could only be explained by actual copying." *Armour v. Knowles*, 512 F.3d 147, 152 n.3 (5th Cir. 2007) (internal quotation marks omitted). The works of the copyright

holder and the alleged infringer will be deemed probatively similar if they are "adequately similar" when compared as a whole. *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 141 (5th Cir. 2004).

1. Access

Access may be shown if a third party with possession of the Copyrighted Work was concurrently dealing with the copyright owner and alleged infringer. *Am. Registry of Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695, 704-05 (W.D. Tex. 2013).

Johnston alleges that Snowblind Revival presented the Copyrighted Work to executives from Universal Music Group at in-person meetings and provided them discs containing the song as part of a press kit. Dkt. 1 ¶¶ 16-17. At the time, Nickelback's label, Roadrunner Records, was a wholly owned subsidiary of Universal Music Group. Dkt. 21 at 10 n.1. These facts, taken as true, could have given the Nickelback Defendants a reasonable opportunity to hear Johnston's Copyrighted Work. The Nickelback Defendants do not argue that Johnston has failed to meet the pleading requirements for probative similarity in assessing factual copying.

Johnston has alleged facts sufficient to raise his right to relief above the speculative level, which is all that is required at the pleading stage. *Twombly*, 550 U.S. at 570. Accordingly, Johnston has sufficiently pled access to state a claim for copyright infringement against the Nickelback Defendants.

With respect to Live Nation, Johnston does not allege that Live Nation accessed or copied his song, merely that it promoted the Nickelback concerts at which the song was performed. Dkt. 1 ¶ 11. In the absence of an allegation that Live Nation copied his work, Johnston cannot state a claim for direct infringement against Live Nation. The Court therefore recommends that Live Nation's motion to dismiss be granted as to Johnston's direct infringement claim.

2. Substantial Similarity

Defendants assert that Johnston cannot state a claim for copyright infringement because "fundamentally, the works at issue are not substantially similar to an ordinary observer." Dkt. 17 at 13. Defendants argue that the works are so dissimilar as to defeat Johnston's claim for copyright infringement as a matter of law. Defendants ask the Court to compare the musical elements of the Copyrighted Work and Nickelback's *Rockstar* and determine that Johnston fails to state a claim. Dkt. 17 at 13-15.

A determination that no substantial similarity exists as a matter of law is appropriate "if the Court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the nonmoving party, that no reasonable juror could find substantial similarity of ideas and expression." *Gen. Universal Sys.*, 379 F.3d at 142. When the original work and the allegedly infringing work are submitted with the pleadings for side-by-side comparison, the Court may

determine non-infringement a matter of law in deciding a Rule 12(b)(6) motion to dismiss. *Rucker v. Harlequin Enters.*, No. H-12-1135, 2013 WL 707922, at *4 (S.D. Tex. Feb. 26, 2013).

Johnston alleges that "a substantial amount of the music in *Rockstar* is copied from [his] original composition *Rock Star*," including "substantial portions of the tempo, song form, melodic structure, harmonic structures, and lyrical themes" Dkt. 1 ¶ 23. Johnston also alleges that "[t]he musical and lyrical themes of Nickelback's *Rockstar* is substantially, strikingly similar to Johnston's *Rock Star*. The portions copied are both quantitatively and qualitatively substantial to copyrightable elements of Johnston's *Rock Star*, individually and in combination." *Id.* ¶ 25.

Having listened to the works at issue, Dkts. 17-1 and 17-2, the Court finds that it is possible for a reasonable juror to determine that the works share protectable elements. Whether Johnston will be able to produce evidence that these similarities rise to the level of "substantial" or "striking" in view of the Nickelback Defendants' level of access is yet to be determined. But at the motion to dismiss stage, taking all well-pleaded allegations as true, Johnston has sufficiently pled substantial similarity to the Copyrighted Work. *See Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 965 (N.D. Tex. 2006) (stating that copyright infringement claims must satisfy only the minimal notice pleading requirements of Rule 8).

Accordingly, Johnston has stated a claim for direct copyright infringement claim against the Nickelback Defendants. The Court recommends that the Nickelback Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) be denied.

B. Secondary Infringement

In its motion, Live Nation argues that Johnston has offered no facts "justifying Live Nation's status as a culpable party in this lawsuit" or that it "in any way specifically violated the Copyright Act." Dkt. 18 at 1. Johnston does not address Live Nation's argument in his Response.

A plaintiff is entitled to plead alternative claims for direct and secondary copyright infringement against a single defendant. *Oppenheimer v. Deiss*, No. A-19-CV-423-LY, 2019 WL 6525188, at *3 (W.D. Tex. Dec. 3, 2019) (citing Fed. R. Civ. P. 8(d)(3)), *R. & R. adopted*, 2020 WL 10056214 (W.D. Tex. Jan. 15, 2020).

To establish a claim for contributory copyright infringement, a copyright owner must show that the defendant, with knowledge of the infringing activity, induced, caused, or materially contributed to the infringing conduct of another. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999). To state a claim for vicarious infringement, a plaintiff must show that a defendant has (1) a direct financial interest in the infringing activity, and (2) the right and ability to supervise the activity that causes the infringement but declines to stop or limit it. *Grokster*,

545 U.S. at 930. Intent or knowledge of the infringement is not an element of a claim for vicarious liability. *Id.* at n.9; *UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, No. A-17-CA365-LY, 2018 WL 1096871, at *9 (W.D. Tex. Feb. 28, 2018), *R. & R. adopted*, 2018 WL 2182282 (W.D. Tex. Mar. 26, 2018).

Johnston has not alleged facts showing that Live Nation (1) knew or had reason to know of the Nickelback Defendants' allegedly infringing activity, and (2) induced, caused, or materially contributed to the Nickelback Defendants' allegedly infringing conduct. Johnston alleges only that "Live Nation has promoted and continues to promote live concerts for [Warner Music Group] and the Nickelback Defendants, including performance of the infringing *Rockstar* song." Dkt. 1 ¶ 11. Viewed in a light most favorable to Johnston, the Complaint lacks any factual allegations that would allow a reasonable inference that Live Nation was aware of and materially contributed to infringing activity. Therefore, Johnston has not sufficiently pled a claim for contributory infringement against Live Nation.

Johnston also fails to state a claim for vicarious liability against Live Nation. He alleges no facts showing that Live Nation, in executing its promotional activities, had the right and ability to supervise or control Nickelback's performance of *Rockstar*. *See Montes v. Live Nation*, No. 2:18-cv-01150-SVW-JEM, 2018 WL 4964323, at *4 (C.D. Cal. May 9, 2018) (dismissing vicarious infringement claim because plaintiff failed to allege that concert promoter had right and

ability to supervise infringing activity). Nor has Johnston alleged that Live Nation owned or managed a concert venue at which the infringement took place, which would give it the right to supervise the performance. *See EMI April Music v. Jet Rumeurs, Inc.*, 632 F. Supp. 2d 619, 623 (N.D. Tex. 2008) (entering default judgment against club owner on vicarious liability for infringing performance because plaintiff alleged right and ability to control activities at venue). Without allegations that would support an inference that Live Nation had right or ability to supervise the Nickelback Defendants' allegedly infringing activity, Johnston has not stated a claim for vicarious infringement. Accordingly, the Court recommends that Johnston's claims for contributory and vicarious infringement against Live Nation be dismissed for failure to state a claim.

C. Johnston's Request for Leave to Amend

In his Response, Johnston seeks leave to file an amended complaint if the Court finds his pleadings deficient. Dkt. 21 at 5, 14-15. Courts should freely grant leave to amend when justice so requires. Fed. R. Civ. P. 15(a)(2). Courts should deny leave to amend when amendment would cause undue delay or undue prejudice to the opposing party, or the amendment would be futile or in bad faith. *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004). Amendment is futile where it "would fail to state a claim upon which relief could be granted." *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872-73 (5th Cir. 2000).

Johnston offers no additional facts to cure the defects in his allegations against Live Nation and adequately state a sufficient claim. Dkt. 21 at 5, 14-15. Therefore, the Court is unable to assess whether amendment is warranted. *See Edionwe v. Bailey*, 860 F.3d 287, 294 (5th Cir. 2017) (holding that leave to amend is not required where movant fails to apprise court of facts he would plead in amended complaint to cure any deficiencies). Accordingly, the Court recommends denying Johnston's request for leave to amend.

IV. Recommendation

Based on the foregoing, the undersigned **RECOMMENDS** that the District Court **DENY** Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc.'s Motion to Dismiss Plaintiff's Complaint Pursuant to FRCP 12(b)(6) (Dkt. 17).

The undersigned **FURTHER RECOMMENDS** that the District Court **GRANT** Defendant Live Nation Entertainment, Inc.'s Motion to Dismiss Plaintiff's Complaint Pursuant to FRPC 12(b)(6) (Dkt. 18) and dismiss all claims against Live Nation.

The undersigned **FURTHER RECOMMENDS** that the District Court **DENY** Plaintiff's request for leave to amend his Complaint (Dkt. 21 at 5, 14-15).

It is **FURTHER ORDERED** that the Clerk remove this case from the Magistrate Court's docket and

RETURN it to the docket of the Honorable Robert Pitman.

V. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on August 11, 2021.

/s/ Susan Hightower
SUSAN HIGHTOWER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KIRK JOHNSTON, Plaintiff, v. CHAD KROEGER, MICHAEL KROEGER, RYAN PEAKE, DANIEL ADAIR, ROADRUNNER RECORDS, INC., WARNER/ CHAPPELL MUSIC, INC., and LIVE NATION ENTERTAINMENT, INC., Defendants.	§ § § § § § § § § § § § §	1:20-CV-497-RP

ORDER

(Filed Aug. 26, 2021)

Before the Court is the report and recommendation of United States Magistrate Judge Susan Hightower concerning Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc.'s Motion to Dismiss, (Dkt. 17), Defendant Live Nation Entertainment, Inc.'s Motion to Dismiss, (Dkt. 18), Plaintiff's request for leave to amend, (Dkt. 21), and all related briefing. (R. & R., Dkt. 27). In her report and recommendation, Judge Hightower recommended denying Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and

Warner Chappell Music, Inc.'s Motion to Dismiss, (Dkt. 17), granting Defendant Live Nation Entertainment, Inc.'s Motion to Dismiss Plaintiff's Complaint Pursuant to FRPC 12(b)(6) (Dkt. 18), and denying Plaintiff's request for leave to amend, (Dkt. 21). (*Id.* at 10). Defendants Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc. ("Nickelback Defendants") filed objections to the report and recommendation. (Objs., Dkt. 28).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). Because the Nickelback Defendants timely objected to the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so, the Court overrules the Nickelback Defendants' objections and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Susan Hightower, (Dkt. 27), is **ADOPTED**.

IT IS ORDERED that Defendant Live Nation Entertainment, Inc.'s Motion to Dismiss, (Dkt. 18), is **GRANTED**. All claims against Defendant Live Nation Entertainment are dismissed with prejudice.

IT IS FURTHER ORDERED that the Nickelback Defendants' Motion to Dismiss, (Dkt. 17), is **DENIED**.

IT IS FINALLY ORDERED that Plaintiffs' request for leave to amend, (Dkt. 21, at 5, 14–15), is **DENIED**.

SIGNED on August 26, 2021.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KIRK JOHNSTON,	§	
Plaintiff	§	
	§	
v.	§	
	§	
CHAD KROEGER,	§	
MICHAEL KROEGER,	§	**Case No.**
RYAN PEAKE, DANIEL	§	**1:20-cv-00497-RP**
ADAIR, ROADRUNNER	§	
RECORDS, INC., and	§	
WARNER/CHAPPELL	§	
MUSIC, INC.,	§	
Defendants	§	

ORDER AND REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Feb. 15, 2023)

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Now before the Court are (1) Plaintiff's Motion for Partial Summary Judgment on Defendants' Affirmative Defense of Statute of Limitations and Application of the Discovery Rule to Plaintiff's Damages (Dkt. 58) and (2) Defendants Chad Kroeger, Michael Kroger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc.'s Motion for Summary Judgment (Dkt. 59), both filed December 16, 2022, and the associated response and reply briefs. By

Text Orders entered January 3, 2023, the District Court referred the motions to this Magistrate Judge for a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

I. Background

Plaintiff Kirk Johnston brings this copyright infringement suit against Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc. Defendants are the individual members of the group Nickelback and the record label and musical publishing company that distribute Nickelback's work. Johnston alleges that Nickelback's song *Rockstar* ("Nickelback's Work"), released in 2005, copied his original musical composition *Rock Star* ("Plaintiff's Work"), which he wrote in 2001 while a member of the band Snowblind. Johnston holds a federal copyright registration for Plaintiff's Work, U.S. Copyright No. PA 2-216-632. Dkt. 59-1 at 304. The parties now bring cross-motions for summary judgment.

II. Summary Judgment Standard

Summary judgment will be rendered when the pleadings, the discovery and disclosure materials, and any affidavits on file show that there is no genuine dispute as to any material fact and that the moving party

is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute over a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn*, 504 F.3d at 508. A court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see also Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation also are not competent summary judgment evidence. *Id.* The party opposing summary judgment must identify specific evidence in the record and articulate the precise manner in which that evidence supports its claim.

Adams v. Travelers Indem. Co. of Conn., 465 F.3d 156, 164 (5th Cir. 2006). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

On cross-motions for summary judgment, the Court reviews each party's motion independently, in the light most favorable to the non-moving party. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010).

III. Defendants' Motion for Summary Judgment

The Court first takes up Defendants' motion for summary judgment on Johnston's sole claim of copyright infringement. If Defendants prevail on their motion, Johnston's motion for partial summary judgment will be rendered moot.

A claim for copyright infringement has three elements: (1) ownership of a valid copyright; (2) factual copying; and (3) substantial similarity. *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007) (per curiam). Defendants do not challenge Johnston's copyright ownership, satisfying the first element of infringement. The Court turns to the second element, copying, which is dispositive.

A. Factual Copying

To establish factual copying, a plaintiff must show that the defendant actually used the copyrighted material to create his own work. *Batiste v. Lewis*, 976 F.3d 493, 502 (5th Cir. 2020). Absent direct evidence of copying, a plaintiff can raise an inference of factual copying from "(1) proof that the defendant had access to the copyrighted work prior to creation of the infringing work and (2) probative similarity." *Positive Black Talk Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357, 368 (5th Cir. 2004) (quoting *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001)), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnik*, 559 U.S. 154 (2010). A plaintiff can show probative similarity by pointing to "any similarities between the two works," even as to unprotectable elements, "that, in the normal course of events, would not be expected to arise independently." *Id.* at 370 & n.9.

> A strong showing of probative similarity can make up for a lesser showing of access. *Id.* at 371. In fact, a plaintiff may raise an inference of factual copying without any proof of access if the works are "strikingly similar." *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[B] (rev. ed. 2020). But the reverse is not true. Even with "overwhelming proof of access," a plaintiff can't establish factual copying "without some showing of probative similarity." *Positive Black Talk*, 394 F.3d at 371 n.10.

Batiste, 976 F.3d at 502. Thus, to survive summary judgment on the second element of copyright infringement, Johnston must raise a genuine dispute as to either a combination of access and probative similarity or, absent proof of access, striking similarity. *Id.*

B. Access

To establish access,

> a plaintiff must show that the person who created the allegedly infringing work had a reasonable opportunity to view or hear the copyrighted work. A bare possibility of access isn't enough, nor is a theory of access based on speculation and conjecture. To withstand summary judgment, then, the plaintiff must present evidence that is *significantly probative* of a *reasonable opportunity* for access.

Id. at 503 (cleaned up). Access may be shown if a third party with possession of a plaintiff's work was concurrently dealing with the copyright owner and alleged infringer. *Am. Registry of Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695, 704-05 (W.D. Tex. 2013).

Having carefully considered the entire record, the Court finds that Johnston has presented no probative evidence that Defendants had a reasonable opportunity to hear Plaintiff's Work. All four members of Nickelback who created the allegedly infringing work *Rockstar* aver that, before this litigation, they never heard of Johnston or his band and never heard Plaintiff's Work or received a copy of it from Roadrunner or

any other source. Adair Dec. ¶ 4, Dkt. 59-1 at 33; Kroeger Dec. ¶ 5, *id.* at 41; Peake Dec. ¶ 6, *id.* at 45; Turton (p/k/a Chad Kroeger) Dec. ¶¶ 18, 21-30, *id.* at 57-59.

Although Johnston presents no probative evidence that any member of Nickelback ever heard Plaintiff's Work or any other song by Snowblind, he argues that his evidence "establishes a reasonable opportunity to view his work via access from third parties." Dkt. 61 at 20.

> Snowblind and Nickelback were trying to establish themselves around the same time frame, and engaged within the same circles of the industry in order to do so. Both bands performed at the Continental Club and the Whisky-a-Go-Go, venues which were well known to members of the record industry as places to find new music and new talent. Both relied on their industry contacts to make inquiries on their behalf – Nickelback's lawyers provided their music to Jan Steedman, an unknown figure in the industry, who then sent it to Ron Burman at Roadrunner. Similarly, Eric Pulido was working at Universal and made certain that Snowblind's music was introduced with Universal's primary A/R [Artist & Repertoire] executive, Tom Mackay.

Id. at 20-21. This argument for access via third parties is purely speculative, but even so, it overstates Johnston's evidence.

As evidence of access by Defendants and Roadrunner's parent Universal Music Group,[1] Johnston submits evidence that CDs including Plaintiff's Work and three other original songs were sent to representatives at certain labels, including but not limited to Warner Music Group and Universal. Johnston Dec. ¶ 4, Dkt. 61-1 at 43; Johnston Tr. at 103:23-104:1, Dkt. 59-1 at 85-86. Johnston testified at deposition that an Artist & Repertoire representative from Roadrunner whose name he could not recall told him he had listened to the demo CD. Johnston Tr. at 174:18-177:12, Dkt. 61-1 at 249-52.

Johnston also submits evidence that, in August 2001, Snowblind performed a show at the Continental Club in New York arranged by Eric Pulido, a friend of his working as a summer marketing intern at Universal/Motown Records during college. Johnston Dec. ¶ 2, *id.* at 47. Johnston states: "I also believe that representatives from Epic and Universal Music Group attended the show. I also had a conversation with an individual at Roadrunner Records regarding the show, and I sent a copy of Snowblind's music including the demo CD containing my work *Rock Star* to the A/R Department at the label." *Id.* ¶ 3. Pulido shared Snowblind's press kit with employees in Universal's media marketing department, booked and attended the show,

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[1] From 2001 to 2006, Island Def Jam owned a stake in Defendant Roadrunner Records, and Island Def Jam's ultimate corporate parent was Universal Music Group. *See* Rath Dec. ¶ 2, Dkt. 59-1 at 48-49; Dkt. 61-1 at 52 (stating that "Island Def Jam is one of Universal's four major divisions"), 53.

and "tried to get people to come out." Pulido Tr. at 95:23-96:5, 104:23-109:15, Dkt. 59-1 at 208-09, Dkt. 61-1 at 152-56. But the three Roadrunner executives identified by Johnston, two of whom worked with Nickelback, testified that they never heard of Johnston or Snowblind before this lawsuit and never shared Snowblind's demo CD or any of its music with Nickelback. Burman Decl. ¶¶ 8-9, Dkt. 59-1 at 38; Rath Decl. ¶¶ 8-9, *id.* at 50-51; Estrada Tr. at 49:3-50:13, 53:17-54:3, *id.* at 223-27.

Viewed in the light most favorable to him, Johnston's evidence at most demonstrates a "bare possibility of access." Johnston offers no significantly probative evidence that any of Defendants' executives actually heard Plaintiff's Work, much less shared it with Nickelback.

Defendants have demonstrated that Johnston lacks evidence supporting access to Plaintiff's Work by Nickelback. Because Johnston has not created a genuine issue of material fact as to access to Plaintiff's Work, the Court concludes that his evidence of access is insufficient to withstand summary judgment.

C. Striking Similarity

Without proof of access, Johnston must prove factual copying by showing "striking similarity" between the two works. *Batiste*, 976 F.3d at 504. "To meet that burden, he must point to 'similarities . . . that can only be explained by copying, rather than by coincidence, independent creation, or prior common source.'" *Id.*

(quoting *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1039 (5th Cir. 2015)).

Johnston alleges that "a substantial amount of the music in *Rockstar* is copied from [his] original composition *Rock Star*," including "substantial portions of the tempo, song form, melodic structure, harmonic structures, and lyrical themes" Dkt. 1 ¶ 23. Johnston also alleges that "[t]he musical and lyrical themes of Nickelback's *Rockstar* is substantially, strikingly similar to Johnston's *Rock Star*. The portions copied are both quantitatively and qualitatively substantial to copyrightable elements of Johnston's *Rock Star*, individually and in combination." *Id.* ¶ 25.

Johnston submits expert and rebuttal reports from Dr. Kevin Mooney, a musicologist, Senior Lecturer of music history at Texas State University, and performing guitarist. Dkt. 61-1 at 277, 295. Mooney states in the summary of conclusions to his expert report:

> I believe that a jury will find the similarities between Rock Star and Rockstar are substantial and significant. From a musicological perspective, it is my opinion that the jury will hear similarities that are most evidence in tempo, melodic structure, harmonic structure, rhythmic structure, and lyrics between the two songs. In particular, the signature phrase of the two songs, also known as the hook, is substantially identical both melodically and lyrically.

Dkt. 61-1 at 277. Mooney subsequently prepared a declaration in support of Johnston's opposition to

Defendants' summary judgment motion, in which he opines for the first time that the "hooks" of the two songs are strikingly similar:

> It is also my opinion as a trained musicology expert that the specific combination of melodic characteristics in the hooks of both songs can only be explained by copying. I believe that the aggregation of unique melodic choices made by Nickelback simply could not have been made independently or coincidentally. I understand that this factual predicate results in what is legally referred to as "striking similarity."

Id. at 258. The "hooks" to which Mooney refers are "gonna be a rock star someday" (repeated nine times) in Plaintiff's Work, and "hey, hey, I wanna be a rockstar" (repeated five times) in Nickelback's Work. Moody opines that the two hooks contain eight specific melodic similarities.

Defendants submit the expert report of Dr. Lawrence Ferrara, a Professor of Music at New York University and Director Emeritus of all studies in Music and the Performing Arts in NYU's Steinhardt School. Dkt. 59-1 at 310. Ferrara opines that any similarities between the two songs "are commonplace, coincidental, unremarkable, and not remotely suggestive of copying." Dkt. 59-1 at 450. Specifically:

> On the basis of my analysis of the constituent elements in [Plaintiff's Work] "Johnston" and [Nickelback's Work] "Nickelback" individually, in the aggregate, and within the context

> of prior art, I found that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities between "Johnston" and "Nickelback", and no musicological evidence suggesting that any expression in "Nickelback" was copied from "Johnston".

Id. at 449. Ferrara finds that Nickelback's own body of songs predating Plaintiff's Work "includes numerous musical and lyrical 'fingerprints' that are also used in Nickelback's 2005 'Rockstar,'" *id.* at 311, including many musical aspects of the hook in Nickelback's Work. Ferrara concludes that any similar melodic elements between the parties' songs "are fragmentary, commonplace, often in Nickelback's own songs that predate August 2001, and not even barely indicative of copying." *Id.* at 382.

Plaintiff's expert evidence does not foreclose the conclusion that Nickelback's Work was created independently of Plaintiff's Work. *Landry v. Atl. Recording Corp.*, No. 04-2794, 2007 WL 4302074, at *7 (E.D. La. Dec. 4, 2007). The Court has conducted a side-by-side examination of the works, carefully listening to and considering all versions of the songs of record. Viewing the evidence and drawing inferences in a manner most favorable to Johnston, the evidence does not establish that the songs are strikingly similar. As an "ordinary listener," the Court concludes that a layman would not consider the songs or even their "hooks" to be strikingly similar. *Id.* (citing *Johnson v. Gordon*, 409 F. 3d 12, 18 (1st Cir. 2005)). Stated simply, they do not sound alike.

As for the lyrics, Johnston's expert identifies "eight specific and substantially similar traits characteristic of life as a rock star." Dkt. 61-1 at 260-61. The Court considers all of the lyrics in the two songs concerning each of the "traits" identified by Mooney.

Plaintiff's Work	Nickelback's Work
1. "Becoming a rock star"	
"Gonna be a rock star someday"	"Cause we all just want to be big rock stars"; "Well, we all just wanna be big rock stars"; "Hey, hey, I wanna be a rockstar
2. "A tour bus"	
"Gonna ride the tour bus because I don't like jet planes"	"I want a new tour bus full of old guitars"
3. "Making lots of money"	
"Gonna make lots of money"	"I'll need a credit card that's got no limit'"; "I'm gonna trade this life for fortune and fame"; "And live in hilltop houses, driving fifteen cars"
4. "Live life in the fast lane"	
"Live life in the fast lane"	"Gonna join the mile high club at thirty-seven thousand feet"; "The girls come easy and the drugs come cheap"; "Everybody's got a drug dealer on speed dial"

5. "Gaining access to Hollywood"	
"Gonna hang out at Hollywood parties with Matthew McConaughey"	"My own star on Hollywood Boulevard"; "And we'll hang out in the coolest bars"; "Get a front-door key to the Playboy mansion"
6. "Connections with famous people"	
"Gonna have lots of friends like Robert Plant and Jimmy Page"	"Somewhere between Cher and James Dean is fine for me"; "In the V.I.P. with the movie stars"; "Gonna date a centerfold that loves to blow my money for me"; "With the latest dictionary of today's who's who"
7. "Things to buy"	
"Might buy the Cowboys and that's how I'll spend my Sundays"	"I want a brand new house on an episode of Cribs"; "And a king-size tub big enough for ten plus me"; "And a big black jet with a bathroom in it"
8. "Reference to sports"	
"Might buy the Cowboys and that's how I'll spend my Sundays"	"It's like the bottom of the ninth and I'm never gonna win"; "And a bathroom I can play baseball in"

Dkt. 61-1 at 261-62, 329-34.[2]

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[2] The full lyrics to both songs are included in an Appendix to this Report and Recommendation.

Nickelback's expert opines that the "rock star" lyrical theme in both songs "was in common use and widely available" before Plaintiff's Work was created, and that "[m]any songs dealing with this theme also share more specific lyrical similarities" with one or both songs. Dkt. 59-1 at 352. Ferrara compares the lyrics in 17 such songs, from "So You Want To Be A Rock And Roll Star" by The Byrds in 1966 to "Rockstar" by Poison in 2001. *Id.* at 352-66. Plaintiff's expert also submits a chart demonstrating that many of the contemporary rock songs Ferrara identifies share similar lyrical themes. *See* Dkt. 61-1 at 384.

Mooney's assertion that some of the lyrics in the two songs are substantially similar borders on the absurd. This includes, for example, any suggestion that the two baseball analogies in Nickelback's Work are evidence that the band copied Johnston's lyric "might buy the Cowboys" professional football team simply because both are "references to sports." But even accepting all of the shared lyrical "traits" as described by Johnston's expert, the Court concludes that they are not evidence of striking similarity between the two songs.

The lyrics of both songs comprise *scènes à faire*[3] of "outlandish stereotypes and images associated with

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[3] Ideas are not protectable in copyright; only particular expressions of ideas may be protected. *Busti v. Platinum Studios, Inc.*, No. A-11-CA-1029-SS, 2013 WL 12121116, at *6 (W.D. Tex. Aug. 30, 2013) (citing 17 U.S.C. § 102(b)). "Scenes a faire," including "expressions that are standard, stock or common to a particular subject matter," are not subject to copyright. *Id.*; *see also*

being a huge, famous, rock star," as described by Nickelback lead singer Chad Turton (professionally known as Chad Kroeger), principal author of *Rockstar*. Turton Dec. ¶ 11, Dkt. 59-1 at 55. Turton avers that Nickelback's brainstorming session to write the *Rockstar* lyrics "was hours of spitting out ridiculous things that our imagined rock star would want; the ideas that made us smile or laugh the most ultimately made it into the song." *Id.*

Where both songs evoke similar themes, they are rendered dissimilar through the vivid detail of the original expression in Nickelback's lyrics. So while Nickelback's lyrics "Gonna join the mile high club at thirty-seven thousand feet"; "The girls come easy and the drugs come cheap"; and "Everybody's got a drug dealer on speed dial" evoke the timeworn trope of sex, drugs, and rock 'n roll, they are not similar to Johnston's naked lyrical longing to "Live life in the fast lane." Johnston fails to raise a fact issue as to striking similarity between the two songs.

D. Conclusion

Johnston raises no fact issue of access or striking similarity and so has not shown that there is a genuine

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Morrill v. Stefani, 338 F. Supp. 3d 1051, 1058 (C.D. Cal. 2018) (stating that "scènes à faire—stock or standard features that are commonly associated with the treatment of a given subject—are unprotectable"); *Brainard v. Vassar*, 625 F. Supp. 2d 608, 619 (M.D. Tenn. 2009) ("In any country song discussing the past and future 'good old days,' the subjects of drinking, socializing, and courting are clearly *scenes a faire*.").

dispute for trial as to factual copying. Factual copying is an element essential to his copyright infringement case, on which he would bear the burden of proof at trial. Because Johnston fails to raise a genuine issue of material fact as to factual copying, he cannot establish copyright infringement as a matter of law. This Magistrate Judge therefore recommends that the District Court grant Defendants' motion for summary judgment.

IV. Order on Evidentiary Objections and Defendants' Motion to Strike

Johnston objects to Defendants' "Statement of Undisputed Facts," which he contends "were not discussed or agreed upon by all parties and essentially amounts to an additional 25 pages of briefing and argument disguised as Appendix materials." Dkt. 61 at 5-6. The Court hereby **SUSTAINS** Johnston's objection and has given no consideration to Defendants' "Statement of Undisputed Facts."

Defendants, in turn, submit a motion to strike and 16 pages of evidentiary objections to Johnston's summary judgment evidence. Dkt. 64-2. In view of the Court's recommendation, Defendants' objections are **OVERRULED** and their motion to strike **DENIED AS MOOT**.

V. Recommendation

For the foregoing reasons, the undersigned Magistrate Judge **RECOMMENDS** that the District Court **GRANT** Defendants Chad Kroeger, Michael Kroger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc.'s Motion for Summary Judgment (Dkt. 59); **DENY AS MOOT** Plaintiff's Motion for Partial Summary Judgment on Defendants' Affirmative Defense of Statute of Limitations and Application of the Discovery Rule to Plaintiff's Damages (Dkt. 58); and **DISMISS** Plaintiff's claim with prejudice.

It is **FURTHER ORDERED** that the Clerk **REMOVE** this case from the Magistrate Court's docket and **RETURN** it to the docket of the Honorable Robert Pitman.

VI. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and

recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on February 15, 2023.

/s/ Susan Hightower
SUSAN HIGHTOWER
UNITED STATES
MAGISTRATE JUDGE

Appendix

Plaintiff's Work *Rock Star*	**Nickelback's Work** *Rockstar*
Verse 1	**Verse 1**
Gonna be a rock star, someday Gonna ride the tour bus because I don't like jet planes Gonna make lots of money; live life in the fast lane. Gonna be a rock star someday.	I'm through with standin' in line to clubs I'll never get in, It's like the bottom of the ninth and I'm never gonna win. This life hasn't turned out Quite the way I want it to be. (Tell me what you want.)
Verse 2	I want a brand-new house on an episode of Cribs, And a bathroom I can play baseball in.
Gonna be a rock star someday	

Gonna have lots of friends like Robert Plant and Jimmy Page
Gonna make my family proud, I'm gonna stand up strong gonna sing it loud
Gonna be a rock star someday.

Verse 3

Gonna be a rock star someday
Gonna hang out at Hollywood parties with Matthew McConaughey.
Might buy the Cowboys and that's how I'll spend my Sundays.
Gonna be a rock star someday.

Repeat Verse 1

Gonna be a rock star someday

And a king-size tub
Big enough for ten plus me. (Go for what you need.)
I'll need a credit card that's got no limit
And a big black jet with a bathroom in it.
Gonna join the mile high club At thirty-seven thousand feet.
(Been there, done that.)
I want a new tour bus full of old guitars,
My own star on Hollywood Boulevard.
Somewhere between Cher
And James Dean is fine for me. (So, how you gonna do it?)

Pre-Chorus

I'm gonna trade this life For fortune and fame,
I'd even cut my hair
And change my name.

Chorus 1

'Cause we all just wanna be big rock stars And live in hilltop houses, driving fifteen cars.
The girls come easy and the drugs come cheap.
We'll all stay skinny

	'cause we just won't eat. And we'll hang out in the coolest bars, In the V.I.P. with the movie stars. Ev'ry good gold digger's gonna wind up there, Ev'ry Playboy bunny with her bleach blond hair. And we'll . . . Hey, hey, I wanna be a rockstar. Hey, hey, I wanna be a rockstar. **Verse 2** I wanna be great like Elvis, without the tassels. Hire eight body guards who love to beat up assholes. Sign a couple autographs So I can eat my meals for free. (I'll have the quesadilla, ha, ha.) I'm gonna dress my ass with the latest fashion, Get a front-door key to the Playboy mansion. Gonna date a centerfold that loves To blow my money for me (So, how you gonna do it?)

	Repeat Pre-Chorus **Chorus 2** 'Cause we all just wanna be big rockstars And live in hilltop houses, driving fifteen cars. The girls come easy and the drugs come cheap. We'll all stay skinny 'cause we just won't eat. And we'll hang out in the coolest bars In the V.I.P. with the movie stars. Every good gold digger's gonna wind up there, Every Playboy bunny with her bleach blond hair. And we'll hide out in the private rooms With the latest dictionary of today's who's who. They'll get you anything with that evil smile. Everybody's got a drug dealer on speed dial. Hey, hey, I wanna be a rockstar. **Bridge** I'm gonna sing those songs that offend the censors. Gonna pop my pills from a Pez dispenser.

	Get washed-up singers writing all my songs. Lip sync 'em every night so I don't get 'em wrong. **Chorus 3** Well, we all just wanna be big rockstars And live in hilltop houses, driving fifteen cars. The girls come easy and the drugs come cheap. We'll all stay skinny 'cause we just won't eat. And we'll hang out in the coolest bars In the VIP with the movie stars. Ev'ry good gold digger's gonna wind up there, Ev'ry Playboy bunny with her bleach-blond hair. And we'll hide out in the private rooms, With the latest dictionary of today's who's who. They'll get you anything with that evil smile. Everybody's got a drug dealer on speed dial. Hey, hey, I wanna be a rockstar Hey, hey, I wanna be a rockstar

Dkt. 59-1 at 461-66; Dkt. 61-1 at 329-34.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KIRK JOHNSTON, Plaintiff,	§	
v.	§	1:20-CV-497-RP
CHAD KROEGER, et al., Defendants.	§	

ORDER

(Filed Mar. 16, 2023)

Before the Court is the report and recommendation of United States Magistrate Judge Susan Hightower concerning Defendant Chad Kroeger, et al.'s ("Defendants") Motion for Summary Judgment, (Dkt. 59), and Plaintiff's Motion for Partial Summary Judgment, (Dkt. 58). (R. & R., Dkt. 67). Plaintiff timely objected to the report and Defendants responded. (Obj., Dkt. 69, Resp., Dkt. 70).[1]

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C.

[1] Defendants also filed a limited objection in the alternative, requesting the Court reconsider Judge Hightower's ruling on their objections to Plaintiff's evidence. As the Court adopts the report and recommendation, it need not rule on this objection.

§ 636(b)(1)(C). Because Plaintiff timely objected to the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so, the Court overrules Plaintiff's objections and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Susan Hightower, (Dkt. 67), is **ADOPTED**.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment, (Dkt. 59), is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's motion for partial summary judgment, (Dkt. 58), is **DENIED as moot**.

IT IS FINALLY ORDERED that Plaintiff's claims are **DISMISSED with prejudice**. The Court will enter final judgment by separate order.

SIGNED on March 16, 2023.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KIRK JOHNSTON,	§	
Plaintiff	§	
	§	
v.	§	
	§	
CHAD KROEGER,	§	
MICHAEL KROEGER,	§	**Case No.**
RYAN PEAKE, DANIEL	§	**1:20-cv-00497-RP**
ADAIR, ROADRUNNER	§	
RECORDS, INC., and	§	
WARNER/CHAPPELL	§	
MUSIC, INC.,	§	
Defendants	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Now before the Court are Defendants' Motion for Attorneys' Fees Pursuant to 17 U.S.C. § 505 (Dkt. 74) and Bill of Costs (Dkt. 75), both filed April 14, 2023; Plaintiff's Objections to Request for Bill of Costs and Opposition to Defendants' Motion for Attorneys' Fees, filed April 28, 2023 (Dkt. 78); and Defendants' Reply, filed May 5, 2023 (Dkt. 79), with an amended supporting declaration filed May 7, 2023 (Dkt. 80). By Text Order entered April 17, 2023, the District Court referred the motion to this Magistrate Judge for a report and recommendation, pursuant to 28 U.S.C.

§ 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas ("Local Rules").

I. Background

Plaintiff Kirk Johnston sued Chad Kroeger, Michael Kroeger, Ryan Peake, Daniel Adair, Roadrunner Records, Inc., and Warner Chappell Music, Inc. for copyright infringement. Defendants are the individual members of the group Nickelback and the record label and musical publishing company that distribute Nickelback's work. On March 16, 2023, the District Court granted summary judgment for Defendants and entered judgment dismissing Plaintiff's claims with prejudice. Dkt. 71; Dkt. 72. Plaintiff has appealed the judgment to the Fifth Circuit Court of Appeals, where the appeal remains pending. *See* Dkt. 73; *Johnston v. Kroeger*, Case No. 23-5054 (5th Cir. Apr. 14, 2023). Defendants now move the Court for an award of $592,482.13 in attorneys' fees and $9,650.10 in costs. Johnston opposes the motion.

II. Analysis

The Copyright Act authorizes a court to award full costs and reasonable attorneys' fees to the prevailing party. 17 U.S.C. § 505. Defendants are the prevailing parties because the Court granted their motion for summary judgment. *See, e.g.*, *McGaughey v. Twentieth Century Fox Film Corp.*, 12 F.3d 62, 65 (5th Cir. 1994)

(affirming award of attorneys' fees when defendant was granted summary judgment). Although this case is on appeal, a district court retains jurisdiction to resolve motions for attorneys' fees while a judgment on the merits is pending on appeal. *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 524-25 (5th Cir. 2002). "Such motions are collateral to the merits, so the appeal does not divest the district court of jurisdiction." *Id.* The Court thus has jurisdiction to address the merits of Defendants' motion.

A. Attorneys' Fees

An award of attorneys' fees to the prevailing party in a copyright action is "the rule rather than the exception and should be awarded routinely. Nevertheless, recovery of attorney's fees is not automatic." *Virgin Recs. Am., Inc. v. Thompson*, 512 F.3d 724, 726 (5th Cir. 2008) (cleaned up). It is a matter of the district court's discretion. *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 326 (5th Cir. 2022). "We cannot overemphasize the concept that a district court has broad discretion in determining the amount of a fee award." *Assoc. Builders & Contractors of La. Inc. v. Orleans Par. Sch. Bd.*, 919 F.2d 374, 379 (5th Cir. 1990).

Copyright law "ultimately serves the purpose of enriching the general public through access to creative works." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). "The statute achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling

others to build on that work. Accordingly, fee awards under § 505 should encourage the types of lawsuits that promote those purposes." *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 204 (2016) (citing *Fogerty*, 510 U.S. at 526).

In *Fogerty*, the Supreme Court held that in awarding attorneys' fees under the Copyright Act, courts must treat prevailing defendants the same as prevailing plaintiffs.

> Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion. "There is no precise rule or formula for making these determinations," but instead equitable discretion should be exercised "in light of the considerations we have identified."

Id., 510 U.S. at 534 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983)). A court's discretion may be guided by such nonexclusive factors as "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* at 534 n.19 (citation omitted).

The Court has considered the relevant factors, the parties' arguments, and the entire record. Although finding the question to be a very close one, this Magistrate Judge recommends against an attorney fee award, for the reasons explained below.

1. Frivolousness

First, the Court finds that Johnston's claims were not frivolous. "There is a difference between a suit that is 'without merit' and one that is 'patently frivolous.'" *Randolph v. Dimension Films*, 634 F. Supp. 2d 779, 794 (S.D. Tex. 2009). A claim is wholly insubstantial and frivolous if it is foreclosed by previous decisions of the Supreme Court. *WickFire, L.L.C. v. Woodruff*, 989 F.3d 343, 349 (5th Cir. 2021). A losing claim is not frivolous when it has legal and factual undergirding. *CoreClarity, Inc. v. Gallup, Inc.*, No. 4:20-CV-00601, 2020 WL 6741062, at *2 (E.D. Tex. Nov. 17, 2020) (citing *Creations Unlimited Inc. v. McCain*, 112 F.3d 814, 817 (5th Cir. 1997)).

A claim for copyright infringement has three elements: (1) ownership of a valid copyright; (2) factual copying; and (3) substantial similarity. *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007) (per curiam). To establish factual copying, a plaintiff must show that the defendant actually used the copyrighted material to create his own work. *Batiste v. Lewis*, 976 F.3d 493, 502 (5th Cir. 2020). Absent direct evidence of copying, a plaintiff can raise an inference of factual copying from "(1) proof that the defendant had access to the copyrighted work prior to creation of the infringing work and (2) probative similarity." *Positive Black Talk Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357, 368 (5th Cir. 2004) (quoting *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001)), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnik*, 559 U.S. 154 (2010). Lacking proof of access, a plaintiff may raise an

inference of factual copying if the works are "strikingly similar." *Batiste*, 976 F.3d at 502.

Johnston claimed that Nickelback's song *Rockstar*, released in 2005, copied his 2001 song *Rock Star*. At the motion to dismiss stage, when a plaintiff's allegations are taken as true, this Court recommended that the District Court deny Defendants' motion to dismiss because it found that (1) Johnston sufficiently pleaded access and substantial similarity, and (2) after listening to the two songs, "it is possible for a reasonable juror to determine that the works share protectable elements." Dkt. 27 at 7. Because Johnston's claim did not lack an arguable basis either in law or in fact, the Court finds that it was not frivolous. This factor weighs against a fee award.

2. Objective Reasonableness

Objective reasonableness is "an important factor in assessing fee applications—not the controlling one." *Kirtsaeng*, 579 U.S. at 208. Courts "should give substantial weight to the objective reasonableness of the losing party's position," but have discretion to award fees "even when the losing party advanced a reasonable claim or defense." *Id.* at 199-200.

"A claim is more likely to be found frivolous or objectively unreasonable . . . when the lack of similarity between the unsuccessful plaintiff's work and the allegedly infringing work are obvious." *Randolph*, 634 F. Supp. 2d at 794. On summary judgment, the Court found that Johnston failed to raise a genuine issue of

material fact as to factual copying, an essential element of his copyright infringement case. He raised no fact issue as to any access by Nickelback to his song. Dkt. 67 at 6. The Court also found that Nickelback's allegedly infringing song was not strikingly similar to Johnston's, concluding that the two songs "do not sound alike" and lacked lyrical similarities beyond unprotectable *scènes à faire* of life as a "rock star." Dkt. 67 at 9-11.

Johnston contends that he "brought objectively reasonable claims in good faith." Dkt. 78 at 6. Although not dispositive, Johnston's claim had some support from a musicologist who opined that the parties' songs shared substantial similarities, particularly with respect to their "hooks" (Johnston's "gonna be a rock star someday" and Nickelback's "hey, hey, I wanna be a rock star"). *See* Dkt. 61-1 at 258. Johnston also offered some evidence demonstrating, at most, a "bare possibility of access." Dkt. 67 at 6 (quoting *Batiste*, 976 F.3d at 503).

The Court questions whether the legal components of Johnston's meritless copyright claims were objectively reasonable. But because he proffered at least some factual support for his claims, the Court finds the objective reasonableness factor to be neutral.

3. Motivation

When a losing party offers reasonable arguments, a court may order fee-shifting due to litigation misconduct or to deter repeated instances of copyright infringement or overaggressive assertions of copyright

claims. *Kirtsaeng*, 579 U.S. at 209. Johnston contends that he pursued this litigation not in bad faith but because he "subjectively believes his song was copied." Dkt. 78 at 11. As evidence of improper motivation, Defendants point to Johnston's settlement demand of $5 million, discussed below. They also argue that:

> Plaintiff's decision to continue prosecuting this lawsuit in the face of his utter lack of access evidence, the dissimilarity of the works at issue, and the dispositive legal authority regarding the nonprotectability of any purported similarities, combined with his 15-year delay in bringing suit and Defendants' stature in the music industry, are "hallmarks" of improper motivation and bad faith.

Dkt. 74 at 11 (quoting *Porto v. Guiris*, 659 F. Supp. 2d 597, 617 (S.D.N.Y. 2009)).

The Court finds that while these arguments do raise questions as to Johnston's motivation, Defendants have not shown that he has acted in bad faith. *See Randolph*, 634 F. Supp. 2d at 795 ("The cases that find a bad-faith basis for filing a copyright infringement suit involve some direct evidence of improper motive that is lacking here."). Defendants do not assert that Johnston engaged in litigation misconduct, or that he has pursued other copyright infringement claims. *Cf., e.g.*, *Berg v. M&F Western Prods., Inc.*, No. 6:19-cv-00418-JDK, 2021 WL 2646223, at *3 (E.D. Tex. June 28, 202 1) (awarding fees to copyright defendant when plaintiff identified 27 other companies "'lined up for litigation' and was actively sending demand letters

that used this case to feign leverage," and his "motive in this case seems improper, especially when considering that his copyright claims were frivolous and objectively unreasonable"). Because Johnston's pursuit of this case lacks sufficient characteristics of improper motivation, this factor weighs slightly against a fee award.

4. Considerations of Compensation and Deterrence

Finally, Defendants argue that because Johnston's copyright infringement claim was objectively unreasonable, deterrence is an important factor. They assert that he "has a history of litigiousness," citing three other cases Johnston has filed in state and federal court since 2012, including one in which summary judgment was granted to the defendant. Dkt. 74 at 13 n.5.

Johnston responds that he "is an individual who would likely be forced to file for bankruptcy if the Court awards any part of Warner's claim for fees." Dkt. 78 at 11. Despite this assertion, the Court observes that Johnston is represented by attorneys from two different law firms. He has pursued this case for more than three years, since May 2020, and continues to do so on appeal.

Johnston's claims required Defendants to incur expenses for:

- Conducting a factual investigation
- Filing a motion to dismiss
- Participating in written discovery and document review
- Successfully opposing Plaintiff's motion to compel
- Overseeing preparation of an expert musicologist report
- Taking and defending ten depositions
- Preparing a motion for summary judgment, and
- Opposing Plaintiff's motion for partial summary judgment.

Dkt. 74-1 ¶ 15. In May 2022, when this action had been pending for two years, Johnston made a written settlement demand of $5 million. *Id.* ¶ 16. Defendants offered to pay him $25,000 and forgo their fees and costs if he dismissed his case before they "were forced to incur the time and expense of summary judgment." *Id.* Johnston declined. Again, after the District Court entered judgment in Defendants' favor, they offered to forgo fees and costs if Johnston waived his right to appeal. *Id.* ¶ 17. Again, he declined.

The Supreme Court instructs that "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Fogerty*, 510 U.S.

at 527. The Court finds that a fee award to Defendants would promote the purposes of the Copyright Act by "encouraging and rewarding authors' creations." *Kirtsaeng*, 579 U.S. at 204. By deterring meritless claims and compensating defendants for advancing meritorious defenses, the final factor weighs heavily in favor of a fee award.

5. Conclusion as to Fee Award

The Court is guided by the *Fogerty* factors and identifies no other factors relevant to an award of attorneys' fees. While the deterrence of meritless litigation weighs strongly in favor of a fee award, the other three factors are either neutral or weigh against an award. Therefore, this Magistrate Judge recommends that the District Court exercise its equitable discretion to deny Defendants' motion for attorneys' fees.

B. Costs

Rule 54(d)(1) provides that costs "should be allowed to the prevailing party." "Unlike attorneys' fees, statutory costs are generally awarded to the prevailing party as a matter of course." *Stross v. Redfin Corp.*, No. A-15-CA-00223-SS, 2016 WL 11782817, at *6 (W.D. Tex. Dec. 22, 2016). The Fifth Circuit recognizes a strong presumption that costs will be awarded to a prevailing party. *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 483 (5th Cir. 2006).

Defendants seek $9,650.10 in costs for certified transcripts of nine depositions "necessarily obtained for use in the case." Dkt. 75 at 1. These costs are recoverable under 28 U.S.C. § 1920 and § 505 of the Copyright Act. *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 876 (2019).

Defendants filed their Bill of Costs on April 14, 2023, within 30 days of entry of the Final Judgment on March 16, 2023. Under Local Rule CV-54(a)(2), Johnston was required to notify Defendants of his opposition within seven days, after which the parties must confer. Johnston failed to do so and makes no specific objection to Defendants' Bill of Costs in his Objections to Request for Bill of Costs and Opposition to Defendants' Motion for Attorneys' Fees, filed April 28, 2023. Dkt. 78. The Court agrees with Defendants that Johnston has waived any opposition to their Bill of Costs. Dkt. 79 at 7.

In the Final Judgment, the District Court ordered that "each party bear its own costs" and also that "the parties may file a motion for attorney's fees and costs . . . within 30 days of the date of this order." Dkt. 72. This Magistrate Judge recommends that the District Court exercise its discretion to amend the Final Judgment, if needed, and award Defendants $9,650.10 in costs.

III. Recommendation

For these reasons, this Magistrate Judge **RECOMMENDS** that the District Court **DENY**

Defendants' Motion for Attorneys' Fees Pursuant to 17 U.S.C. § 505 (Dkt. 74); **GRANT** Defendants' Bill of Costs (Dkt. 75) and award Defendants $9,650.10 in costs; and **AMEND** the Final Judgment (Dkt. 72) to the extent the District Court may find appropriate in accordance with these recommendations.

It is **FURTHER ORDERED** that the Clerk **REMOVE** this case from the Magistrate Court's docket and **RETURN** it to the docket of the Honorable Robert Pitman.

IV. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53

(1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on September 14, 2023.

/s/ Susan Hightower
SUSAN HIGHTOWER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KIRK JOHNSTON, Plaintiff,	§	
v.	§	1:20-CV-497-RP
CHAD KROEGER, et al., Defendants.	§	

ORDER

(Filed Oct. 4, 2023)

Before the Court is the report and recommendation from United States Magistrate Judge Susan Hightower concerning Defendants Chad Kroeger, et al.'s Motion for Attorney Fees, (Dkt. 74). (R. & R., Dkt. 81). Pursuant to 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Judge Hightower issued her report and recommendation on September 14, 2023. (*Id.*). As of the date of this order, no party has filed objections to the report and recommendation.

Pursuant to 28 U.S.C. § 636(b), a party may serve and file specific, written objections to a magistrate judge's proposed findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure de novo review by the district court. When no

objections are timely filed, a district court can review the magistrate's report and recommendation for clear error. *See* Fed. R. Civ. P. 72 advisory committee's note ("When no timely objection is filed, the [district] court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.").

Because no party has filed timely objections, the Court reviews the report and recommendation for clear error. Having done so and finding no clear error, the Court accepts and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the Report and Recommendation of the United States Magistrate Judge, (Dkt. 81), is **ADOPTED**. Defendants' motion for attorney fees is **DENIED**.

Defendants' Bill of Costs, (Dkt. 75), is **GRANTED**. The Clerk of the Court is directed to enter the Bill of Costs against Plaintiff and in favor of Defendants. The Court will enter an amended final judgment separately to award costs to Defendants.

SIGNED on October 4, 2023.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 23-50254

KIRK JOHNSTON,

Plaintiff—Appellant,

versus

CHAD KROEGER; MICHAEL KROEGER; RYAN PEAKE; DANIEL ADAIR; ROADRUNNER RECORDS, INCORPORATED; WARNER/CHAPPELL MUSIC, INCORPORATED,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-497

ON PETITION FOR REHEARING

(Filed Mar. 18, 2024)

Before JONES, HAYNES, and DOUGLAS, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for panel rehearing is DENIED.
