APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2023

[Filed August 28, 2018]

CLAYTON PRINCE TANKSLEY, Appellant	)
	)
v.	)
	)
LEE DANIELS; LEE DANIELS ENTERTAINMENT; DANNY STRONG; DANNY STRONG PRODUCTIONS; TWENTY-FIRST CENTURY FOX, INC., Parent Company of Fox Entertainment Group, Inc., 20th Century Fox Film Corp, 20th Century Fox Television Inc, 20th Century TV Inc., 20th Century Fox International, 20th Century Fox International Television LLC and 20th Century Fox Home Entertainment LLC; FOX NETWORK GROUP INC, Parent Company of Fox Broadcasting Company, Fox Television Stations, Inc., Fox Digital Media, Fox International Channels, Inc.;	)

DOES 1 THORUGH 10; SHARON PINKENSON, Executive Director; GREATER PHILADELPHIA FILM OFFICE; LEAH DANIELS-BUTLER)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 2-16-cv-00081)
District Judge: Honorable Joel H. Slomsky

Argued April 9, 2018

Before: CHAGARES, VANASKIE and FISHER,
Circuit Judges.

(Filed: August 28, 2018)

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OPINION OF THE COURT

FISHER, *Circuit Judge*.

Clayton Prince Tanksley is an actor and producer who lives in Philadelphia. In 2005, he created a three-episode television pilot, *Cream*, for which he received a copyright. In 2015, Fox Television debuted a new series, *Empire*, from award-winning producer and director Lee Daniels. Shortly thereafter, Tanksley filed suit, claiming that *Empire* infringed on his copyright of *Cream*. The District Court found no substantial similarity between the two shows and dismissed Tanksley's complaint. For the reasons stated below, we will affirm.

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I

A. Factual Background

In 2005, Tanksley wrote, produced, directed, filmed, starred in, and copyrighted three episodes of *Cream*, a show about an African-American record executive who runs his own hip-hop label. In 2008, Tanksley participated in an event called the Philly Pitch hosted by the Greater Philadelphia Film Office. The Philly Pitch provided an opportunity for aspiring local writers to pitch movie concepts to a panel of entertainment professionals. Lee Daniels served as a panel member.

During his presentation to the panel, Tanksley pitched an idea unrelated to *Cream*. At a meet-and-greet following the pitches, however, Tanksley spoke with Daniels one-on-one, and the two discussed the show. Daniels apparently expressed interest, so Tanksley provided him with a DVD and a script of the series. Tanksley's complaint does not allege any further contact between him and Daniels. In 2015, nearly seven years later, Fox aired the debut episode of the Daniels-created series *Empire*, which also revolves around an African-American record executive who runs his own music label.

The following are brief descriptions of each show.[1]

Cream

Winston St. James is the founder and owner of Big Balla Records based in Philadelphia. *Cream* documents

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[1] The District Court provided an exceptionally thorough summation of each show, the most relevant portions of which we have attempted to distill here.

the challenges Winston faces as he attempts to run his record label while dealing with a variety of personal and family problems. *Cream* features numerous, prolonged sex scenes and portrays Winston and other characters as highly promiscuous. The show has several story arcs of varying prominence; the main three are outlined below.

Herpes: Throughout the show, Winston has a number of sexual forays with various characters, including his two assistants, Chantal and Tiffany. Towards the end of the first episode, Winston grabs his groin in obvious pain and instructs an assistant to schedule a doctor's appointment for him immediately. Early in the second episode, Winston learns from his doctor that he has herpes. In this scene, the dialogue between Winston and his doctor is conspicuously educational for a drama, and includes many clinical details about herpes prevention and treatment. Episode two concludes with Tanksley (out of character) delivering a lengthy public service announcement about sexually transmitted diseases. In the third episode, the audience learns that Winston's two assistants also have herpes, and there are intra-office recriminations over the source of the outbreak. At the end of the third episode, Winston learns that Chantal's husband has been visiting a prostitute who has herpes, dramatically revealing her as the unexpected source of the outbreak at Big Balla Records.

Domestic Abuse: Early in the first episode, Winston's younger sister, Angelica, is physically abused by her boyfriend, Shekwan. He is upset over Angelica's failure to get him an audition with Big Balla Records. After discovering the source of Angelica's injuries,

Winston agrees to give Shekwan an audition, but also arranges to have him murdered. The first episode ends with two of Winston's associates shooting Shekwan many times from the shadows of an alley. Following the first episode, the actress who plays Angelica delivers a public service announcement about domestic abuse. In the second episode, Shekwan survives the shooting and makes a full—miraculous, even—recovery. Winston then allows Shekwan to make a record, but attempts to sabotage him with a comically bad song. To Winston's chagrin, the song ends up being massively successful, with many suppliers calling Winston's office directly to order several thousand copies.

Company Takeover: Winston's ex-girlfriend, Brenda, and his father, Sammy, are introduced in the final scene of the second episode. The audience learns that Winston's younger brother and sister are actually his and Brenda's children. Winston's parents raised the children because of Brenda's past drug abuse. Sammy—now apparently estranged from his ex-wife and Winston—pledges to help Brenda get her children back and vows to take control of Big Balla Records. Sammy and Brenda then have sex and the episode ends. In the third episode, Winston's mother, Nora, gets in a fight with Brenda and suffers a fatal heart attack. At her funeral, the audience learns for the first time that Nora owned fifty percent of Big Balla Records. Sammy confronts Winston and demands Nora's share of the company, which Winston refuses. Later, Sammy learns that Nora gave her shares to her grandchildren, i.e., Winston's children. Following another sex scene with Brenda, Sammy schemes to drive a wedge between Winston and his children by

revealing the truth about their parentage. In this way, Sammy hopes to gain control of Big Balla Records. After learning that Winston is actually her father, Angelica tells him that she never wants to see him again. The third episode ends with the actress who plays Nora delivering a public service message about the apparent crisis of grandparents raising their grandchildren.

Empire

Lucious Lyon is the founder and CEO of Empire Entertainment, a prominent record label based in New York City. Lucious rose from a life of poverty and crime in Philadelphia to become a music and entertainment mogul. The members of Lucious' immediate family also play central roles in the series. As outlined below, *Empire*'s first season is defined by several story arcs.

Succession: Unquestionably, *Empire*'s main storyline concerns the question of who will succeed Lucious as head of Empire Entertainment. In the pilot episode, Lucious is diagnosed with ALS and told that he has only three years to live. Lucius keeps his illness a secret, but the prognosis prompts him to tell his three sons that he will soon choose one of them as his successor. Lucious' decision is complicated by the fact that each of his sons has a unique set of talents and liabilities. His oldest son, Andre, is a Wharton graduate and the current CFO of Empire Entertainment. Andre, however, lacks musical talent, and Lucious, as an acclaimed artist in his own right, believes that Empire should be led by a musician. The middle son, Jamal, is a talented R&B singer and songwriter, but struggles to gain his father's approval because he is gay. Due to a presumed hostility to homosexuality in the African-

American community, Lucious is doubtful that Jamal could successfully lead Empire Entertainment. Lucious' youngest son, Hakeem, is an emerging, charismatic rapper who embodies the hip-hop lifestyle. Lucious initially favors Hakeem because of his star potential, but Hakeem's immaturity and undisciplined behavior force Lucius to reconsider.

Lucious' Past: Before becoming an entertainment mogul, Lucious dealt drugs and committed various other crimes, some violent. In various ways throughout the series, Lucious' past threatens to undermine everything he has built at Empire. In the pilot episode, Lucious' ex-wife, Cookie, is released from prison after serving a seventeen-year sentence. The audience learns that Cookie took the rap for Lucious so he could use proceeds from a drug sale to launch his career and, eventually, Empire Entertainment. Upon her release, Cookie, whom Lucious divorced shortly after her incarceration began, confronts Lucious at Empire headquarters and demands fifty percent of the company. When Lucious resists, Cookie threatens to inform the SEC that Empire Entertainment was started with drug money, a particularly potent threat in light of Empire's upcoming IPO.

Later in the pilot, Lucious' longtime friend Bunkie attempts to blackmail him by threatening to tell police about Lucious' past crimes. Lucious arranges to meet Bunkie by the river at night, and shoots him in the face. The investigation into Bunkie's death, and Lucious' suspected involvement, play out over the course of the series.

B. Procedural History

Tanksley filed his initial complaint in the Eastern District of Pennsylvania, alleging copyright infringement and several derivative claims. He then amended the complaint one month later. Following a hearing on Defendants' motions to dismiss, the District Court permitted Tanksley to further amend his complaint.

The operative complaint asserts that *Cream* and *Empire* are "in many respects strikingly substantially similar," Compl. ¶ 39, and contains a detailed analysis—including dozens of screenshots from each show—documenting the alleged similarities. The District Court conducted four days of hearings, during which each party presented video excerpts from the shows to demonstrate similarity or dissimilarity.

The court then granted Defendants' motions to dismiss, finding that Tanksley's complaint fails to state a claim because the two shows are not substantially similar as a matter of law. Tanksley timely appealed.

II

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367. We have jurisdiction under 28 U.S.C. § 1291. "Our review of the grant of a motion to dismiss is plenary." *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 489 n.5 (3d Cir. 2017).

III

On appeal, Tanksley raises two primary arguments, one procedural and one substantive. Procedurally, he argues that the question of substantial similarity is too

fact-intensive to be resolved at the pleading stage. Substantively, Tanksley argues that the District Court erred in finding no substantial similarity between *Cream* and *Empire* as a matter of law.

A. Copyright Infringement and Rule 12(b)(6)

In order to prove copyright infringement, a plaintiff must establish that his copyrighted work and the infringing work are "substantially similar." *Dam Things from Den. v. Russ Berrie & Co.*, 290 F.3d 548, 561–62 (3d Cir. 2002). This term's meaning will be discussed more fully below. For present purposes, it is enough to observe that substantial similarity "is usually an extremely close question of fact," which is why even "summary judgment has traditionally been disfavored in copyright litigation." *Twentieth Century–Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 n.6 (9th Cir. 1983). Nevertheless, if "no reasonable jury" could find that two works are substantially similar, then "summary judgment for a copyright defendant" has been considered "appropriate." *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296–97 (D.C. Cir. 2002). And in recent years, several Courts of Appeals have taken the next step by affirming dismissals under Federal Rule of Civil Procedure 12(b)(6) after finding no substantial similarity as a matter of law. *See* 3 William F. Patry, *Patry on Copyright* § 9:86.50 (Mar. 2018 update) (citing published opinions from the Second, Seventh, Eighth, Ninth, and Tenth Circuits). Such dismissals, which were formerly rare (but not unprecedented, *e.g.*,

Christianson v. W. Pub. Co., 149 F.2d 202, 203 (9th Cir. 1945)), are now more common.[2]

In justifying dismissals of copyright infringement claims, courts follow a now-familiar logical progression. First, in evaluating a motion to dismiss, courts are not limited to the four corners of the complaint, but may also consider evidence "integral to or explicitly relied upon" therein. *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir. 1999) (emphasis omitted) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)). The copyrighted and allegedly infringing works will necessarily be integral to an infringement complaint and are therefore properly considered under Rule 12(b)(6). Next, courts have justified consideration of substantial similarity at the pleading stage by noting that "no discovery or fact-finding is typically necessary, because 'what is required is only a visual comparison of the works.'" *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (quoting *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991)). Finally, having limited the focus to the works themselves, courts will dismiss an infringement action if they conclude that "no trier of fact could rationally determine the two [works] to be substantially similar." 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.10[B][3] (rev. ed. 2018).

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[2] Panels of our Court have affirmed dismissals of copyright infringement claims in two nonprecedential opinions. *Tanikumi v. Walt Disney Co.*, 616 F. App'x 515 (3d Cir. 2015) (per curiam) (nonprecedential); *Winstead v. Jackson*, 509 F. App'x 139 (3d Cir. 2013) (per curiam) (nonprecedential).

The District Court followed this precise line of reasoning in dismissing Tanksley's complaint. First, it properly considered the copyrighted and allegedly infringing works in their entireties. The complaint does not have recordings of either show formally attached as an exhibit, but it includes dozens of side-by-side screenshots of each, so both shows are unquestionably integral to the complaint. Second, the District Court properly concluded that no additional evidence or expert analysis would be relevant to the question of substantial similarity. On appeal, Tanksley criticizes the court for rendering its decision "without the benefit of witness testimony, documentary evidence, or expert analysis," Appellant's Br. 14, but fails to explain how any such evidence could have been relevant. It would not have been. On substantial similarity, the question is how the works "would appear to a layman viewing [them] side by side," *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975), and we have rejected the usefulness of experts in answering this question, *id.* at 907.[3]

In ratifying the District Court's approach, we do not mean to minimize the central role of the jury in cases where substantial similarity might reasonably be found. But where no reasonable juror could find substantial similarity, justice is best served by putting "a swift end to meritless litigation." *Hoehling v.*

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[3] We have expressed more openness to expert testimony when the works at issue are highly technical in nature, e.g., computer programs. *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232–33 (3d Cir. 1986). But television shows, like "novels, plays, and paintings," are precisely the kinds of works for which the ordinary observer test is best suited. *Id.* at 1232.

Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980) (quoting *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980)). We conclude that the District Court properly considered the question of substantial similarity under Rule 12(b)(6). We next evaluate whether it arrived at the correct answer.

B. Substantial Similarity

1. Background Principles

To establish a claim of copyright infringement, a plaintiff must show: "(1) ownership of a valid copyright; and (2) unauthorized copying of original elements of the plaintiff's work." *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002). This second element—unauthorized copying—itself comprises two (frequently conflated) components: actual copying and material appropriation of the copyrighted work. *Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998); 3 Patry, *supra*, § 9:91. The conceptual distinction between actual copying and material appropriation is foundational to copyright law because not all instances of actual copying give rise to liability, and, conversely, without proof of actual copying the amount of similarity between two works is immaterial. Because we conclude that Tanksley has failed to plausibly allege material appropriation, we do not address the separate question of whether the complaint plausibly alleges actual copying. Nevertheless, a clear understanding of both components is essential to our analysis.

a. Actual Copying

Actual copying focuses on whether the defendant did, in fact, use the copyrighted work in creating his own. If the defendant truly created his work independently, then no infringement has occurred, irrespective of similarity. *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 110 (2d Cir. 2001); *see Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 151 (S.D.N.Y. 1924) (L. Hand, J.) (using the example of two mapmakers and noting that "if each be faithful, identity is inevitable," but, "[e]ach being the result of original work, the second will be protected, quite regardless of its lack of novelty"). On the other hand, it is no defense that a defendant copied a protected work—such as a song—subconsciously. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482–84 (9th Cir. 2000) (upholding plaintiff's "twenty-five-years-after-the-fact-subconscious copying claim").

In the great majority of cases, a plaintiff will lack direct evidence of copying, which may instead be shown through circumstantial evidence of access and similarity. 3 Paul Goldstein, *Goldstein on Copyright* § 9:6.1 (Supp. 2008). There is a critical, though often misunderstood, distinction between "substantial similarity" with respect to copying and "substantial similarity" with respect to material appropriation. Two works can be "substantially similar" so as to support an inference of copying, yet not "substantially similar" in the sense that the later work materially appropriates the copyrighted work. *Salkeld*, 511 F.2d at 907. To clearly mark this distinction, we prefer the term "probative similarity" in the copying context, while reserving "substantial similarity" for the question of

material appropriation. *See Dam Things from Den.*, 290 F.3d at 562 & nn.19–20. This distinction has critical analytical consequences for what evidence may be considered at each step of the infringement analysis. On the question of copying, the finder of fact may consider any aspect of the works that supports an inference of copying, even elements that are incapable of copyright protection. *See Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139–40 (2d Cir. 1992); 3 Patry, *supra*, § 9:19. By contrast, when assessing material appropriation, i.e., substantial similarity, only similarities in protectable expression may be considered. *Laureyssens*, 964 F.2d at 139–40. Titles, for example, are quintessentially unprotectable by copyright, but the fact that two works share the same title may be considered as evidence that the later work was copied from the earlier. *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990).

b. Unlawful Appropriation

Actual copying alone is insufficient to support an infringement claim because a copyright only protects the holder's particular creative expression, not his ideas. At a certain level, copying is perfectly permissible, even expected. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (L. Hand, J.) ("[T]he defendants were entitled to use, not only all that had gone before, but even the plaintiffs' contribution itself, if they drew from it only the more general patterns; that is, if they kept clear of its 'expression.'"). If copying is proven (or conceded), the defendant is only liable for infringement if his work is substantially similar to the protected elements of the copyrighted work.

In its basic formulation, substantial similarity asks whether "a 'lay-observer' would believe that the copying was of protectible aspects of the copyrighted work." *Dam Things from Den.*, 290 F.3d at 562, or—again quoting Judge Hand—whether "the ordinary observer, unless he set out to detect the disparities [in the two works], would be disposed to overlook them, and regard their aesthetic appeal as the same," *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960), *quoted in Dam Things from Den.*, 290 F.3d at 562. To answer this question, the trier of fact performs a side-by-side comparison of the works and, excluding any unprotectable elements, assesses whether the two works are substantially similar. *Dam Things from Den.*, 290 F.3d at 566.

The difficulty of this analysis derives from the impossibility of drawing an exact line between what constitutes an idea—which is not protected—and an expression—which is. This challenge is particularly acute in the case of dramatic works. As Judge Hand described:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever

> been able to fix that boundary, and nobody ever can.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (citation omitted). Tanksley's complaint exemplifies these difficulties. His copyright undoubtedly protected more than the literal expression in *Cream*, but it is difficult to draw a principled line to determine at what level of abstraction the expression in *Cream* loses its protection and becomes a mere idea. Is the premise of a television show based on an African-American record executive expression or idea? What about a record executive dealing with family strife? Or dealing with family strife and his relatives' efforts to gain control of his company?

Adding to the difficulty is the need to maintain focus on the protected elements of Tanksley's work, not the prominence of any such elements in the defendant's work. Even if what was taken from *Cream* forms but a minor element in *Empire*, infringement has occurred so long as what was taken was a material part of Tanksley's work. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–65 (1985) ("A taking may not be excused merely because it is insubstantial with respect to the *infringing* work.").

Seeking to impose a semblance of order on this "at large" analysis, courts have developed several methods and principles for evaluating substantial similarity. In works that involve a mix of protected and unprotected elements, as is the case here, the first step is to identify and exclude from the substantial similarity analysis any unprotected material. In dramatic works, an important category of unprotected content is *scènes à faire*, or plot elements that flow predictably from a

general idea. In a film about a college fraternity, for example, "parties, alcohol, co-eds, and wild behavior" would all be considered *scènes à faire* and not valid determinants of substantial similarity. *Stromback v. New Line Cinema*, 384 F.3d 283, 296 (6th Cir. 2004).

After excising all unprotectable ideas and *scènes à faire*, courts have sought to compare dramatic works across a number of components: plot and sequence of events, dialogue, characters, theme, mood, setting, and pace. *See* Robert C. Osterberg & Eric C. Osterberg, *Substantial Similarity in Copyright Law*, § 4:2–8 (2011). At the same time, however, substantial similarity can be grounded in a work's "total concept and feel," *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995), and courts are admonished not to lose sight of material similarities by "balkanizing a unified copyrighted work into constituent elements, which are then compared in isolation," 3 Patry, *supra*, § 9:73. The total concept and feel approach recognizes that "a work may be copyrightable even though it is entirely a compilation of unprotectable elements," because "[w]hat is protectable . . . is 'the author's original contributions'—the original way in which the author has 'selected, coordinated, and arranged' the elements of his or her work." *Knitwaves*, 71 F.3d at 1003–04 (citation omitted) (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350, 358 (1991)). There is obvious tension between the imperative to filter out unprotectable elements of a work while keeping sight of the work's total concept and feel (which necessarily includes unprotectable elements). We reconcile these competing considerations by recalling that the basic inquiry remains whether an ordinary observer would perceive that the defendant

has copied protected elements of the plaintiff's work. Other filters, e.g., *scènes à faire*, total concept and feel, etc., while helpful, are merely tools to assist the trier of fact in reaching a proper conclusion.

2. Application to Cream *and* Empire

With these principles in mind, we conclude that, superficial similarities notwithstanding, *Cream* and *Empire* are not substantially similar as a matter of law. This conclusion flows unavoidably from a comparison of the two shows' characters, settings, and storylines.

As a preliminary matter, we note that the shared premise of the shows—an African-American, male record executive—is unprotectable. These characters fit squarely within the class of "prototypes" to which copyright protection has never extended. *Nichols*, 45 F.2d at 122; *see Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (observing that only characters with "consistent, widely identifiable traits," e.g., Godzilla, James Bond, and Rocky Balboa, have received copyright protection). The scope of *Cream*'s protection, therefore, extends only to Tanksley's particular expression of this unprotectable idea.

a. Main Characters and Setting

In *Cream*, Winston St. James runs Big Balla Records, and while he is clearly the man in charge, the label itself is not presented as being particularly glamorous or high profile. Winston appears to run the label largely by himself, his office is small and dated, and aspiring talent audition in what appears to be a dilapidated dance studio that Winston does not even appear to own. In *Empire*, Lucious Lyon's company,

Empire Entertainment, is portrayed as a massive corporate conglomerate, with stakes in music, clothing, and entertainment. Lucious' life is portrayed as the epitome of luxury: lavish offices and homes, state-of-the-art studios, and yacht parties.

Lucious is a celebrated artist in his own right, and is portrayed as having an innate ability to recognize talent and get the best out of his performers. Winston, by contrast, does not appear to be a musician of any sort. And while artists in *Cream* crave the opportunity to join his label, Winston is not depicted as having any notable artistic or promotional ability. As for the characters' backgrounds, *Cream* reveals little about Winston aside from the fact that he fathered two children with a drug-addicted woman, with these children being raised under the impression that Winston is their older brother. In contrast, Lucious' background—vividly depicted in flashbacks—forms a central dramatic element in *Empire*. Lucious came up as a drug dealer and used proceeds from drug sales to fund his initial recording venture. *Empire* also reveals that Lucious committed multiple drug-related murders in the past. The possibility that this information will come to light, and the risk it poses to Lucious' fortune and freedom, are central dramatic elements in *Empire*. As these descriptions indicate, even if we assume that Winston and Lucious stem from the same unprotectable idea, the particular expressions of this idea are not substantially similar.

b. Main Storylines

With regard to plot, the similarities between the shows likewise extend no farther than the bare abstraction of an African-American, male record executive. *Cream*'s plot largely, though not exclusively, revolves around Winston's herpes diagnosis. In the first episode, Winston experiences groin pain of unknown origin. In the second episode, he is officially diagnosed with herpes, and it is suggested that one of his paramours has herpes as well. The second episode also concludes with a public service announcement about herpes and other sexually transmitted diseases. In the third episode, multiple additional characters learn that they have herpes, and Winston learns that the husband of one of his inamoratas was the original source of the outbreak. This last piece of information is revealed in *Cream*'s final scene and serves as the show's dénouement. While *Cream* includes several other storylines, the herpes element is the only one woven into all three of its episodes.

The *Empire* plot focuses most concertedly on the question of which Lyon son will be chosen to succeed Lucious as the head of Empire Records. The sons each have a distinct personality and a unique blend of artistic and business savvy, which fuels the dramatic tension over whom Lucious will select. This succession storyline, which dominates *Empire*, has no analog in *Cream*. *Empire* also prominently features Lucious' ex-wife, recently released from prison, who is seeking to gain control of fifty percent of the company and

becomes embroiled in the conflict over Lucious' corporate heir.[4]

Tanksley seeks to offset these broad similarities by highlighting particular snippets common to each show. To take a representative example, Tanksley argues that substantial similarity can be found in the fact that Lucious and Winston are both diagnosed with a disease in the course of their respective series. The ultimate significance of this comparison is equally representative: any facial plausibility fades upon examination. In *Empire*, Lucious' diagnosis of ALS—which is fatal—creates the urgency to choose his successor, the focal point of the entire series. In *Cream*, Winston's diagnosis of herpes—which is painful—merely serves to interfere with his romantic liaisons and introduces the venereal whodunit that follows. "[R]andom similarities" are insufficient to establish substantial similarity. *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996) (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984)). After all, both Mozart and Metallica composed in E minor. The question is whether, in view of such similarities, "a 'lay-observer' would believe that the copying was of

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[4] It is true that *Cream* contains a secondary storyline wherein Winston's father attempts to wrest control of the company from him. However, in the context of a show about a company, the fact that a storyline would involve who controls that company is neither surprising nor protectable. *Cf. Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (identifying foot chases and morale problems as *scènes à faire* in police dramas). In addition, the expression of this idea in each show is starkly different. Lucious' ex-wife, Cookie, helped him found Empire and has a legitimate claim to her sought-after share of the company. Winston's father is motivated by pure greed.

protectible aspects of the copyrighted work." *Dam Things from Den.*, 290 F.3d at 562.

In considering the protectable elements of *Cream*, we are convinced that "no reasonable jury, properly instructed, could find that the two works are substantially similar." *Gaito*, 602 F.3d at 63 (quoting *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983)). As the District Court concluded, even when "viewing the comparisons in the light most favorable to [Tanksley], . . . *Cream* and *Empire* contain dramatically different expressions of plot, characters, theme, mood, setting, dialogue, total concept, and overall feel." *Tanksley v. Daniels*, 259 F. Supp. 3d 271, 294 (E.D. Pa. 2017). Without substantial similarity, Tanksley's complaint fails to state a claim of copyright infringement and was properly dismissed under Rule 12(b)(6).

C. Derivative Claims

We will also affirm the District Court's dismissal of Tanksley's assorted derivative claims. His claims of contributory copyright infringement are foreclosed by our conclusion that he has not plausibly alleged direct infringement. *See Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 387 (3d Cir. 2017), *cert. denied* 138 S. Ct. 975 (2018). Tanksley's misrepresentation claims against Daniels and his negligence claim against the Greater Philadelphia Film Office, having not been raised in his opening brief, are waived. *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 230 n.17 (3d Cir. 2016). His other negligence claims, being virtually indistinguishable from the infringement claims, are preempted by the Copyright Act. 17 U.S.C. § 301(a); *see Dun & Bradstreet*, 307 F.3d at 217–18. Finally, we will

affirm the District Court's determination that further amendment to the complaint would have been futile. *Tanksley*, 259 F. Supp. 3d at 304 n.14.

IV

We will AFFIRM the judgment of the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 16-0081

[Filed April 28, 2017]

CLAYTON PRINCE TANKSLEY,

Plaintiff,

v.

LEE DANIELS, et al.,

Defendants.

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OPINION

Slomsky, J. **April 28, 2017**

I. INTRODUCTION

Plaintiff Clayton Prince Tanksley brings this action against numerous Defendants alleging that they infringed on his copyrighted work titled *Cream* by creating and using copyrighted materials to produce the television series *Empire*. (Doc. No. 45.) The Defendants in this case can be divided into two identifiable groups. The first one consists of the "Fox Defendants." Included in this group are Lee Daniels, Lee Daniels Entertainment, Leah Daniels-Butler, Danny Strong, Danny Strong Productions, Twenty-First Century Fox, Inc., Fox Entertainment Group, Inc., Twentieth Century Fox Film Corp., Twentieth Century Fox Television, Inc., Twentieth Television, Inc., Twentieth Century Fox International, Twentieth Century Fox International Television, LLC, Twentieth Century Fox Home Entertainment, LLC, Fox Networks Group, Inc., Fox Broadcasting Company, Fox Television Stations, Inc., Fox Digital Media, and Fox International Channels. The second group has two Defendants: Sharon Pinkenson and the Greater Philadelphia Film Office ("GPFO").

In Count I of the Second Amended Complaint ("SAC"), Plaintiff alleges that Fox Defendants directly infringed on his copyrighted work *Cream* by producing the television series *Empire*. (Doc. No. 45 at ¶¶ 42-56.) In Count II, Plaintiff alleges a contributory copyright infringement claim against Sharon Pinkenson and GPFO, and in Count III, a negligence claim against the same Defendants. (Id. at ¶¶ 57-70.) In Counts IV and

V respectively, Plaintiff alleges intentional and negligent misrepresentation claims against Lee Daniels. (Id. at ¶¶ 71-79.) Finally, in Count VI, Plaintiff alleges that Leah Daniels-Butler committed contributory copyright infringement. (Id. at ¶¶ 79-86.) Defendants have filed two Motions to Dismiss the SAC in its entirety. (Doc. Nos. 53-54.) The Motions are now ripe for disposition.[1]

II. BACKGROUND

In 2005, Plaintiff Clayton Prince Tanksley wrote, filmed, and produced a three episode television series titled *Cream* about an African American man "who has overcome a disadvantaged . . . past to achieve financial success in the music industry, only to be exploited by those closest to him." (Doc. No. 45 at ¶ 41(A).) On September 23, 2005, Plaintiff obtained a registration of *Cream* from the United States Copyright Office. (Registration Number Pau3-002-354.) He then set about marketing his copyrighted work with the hope of making a hit television show or movie. Through these efforts, Tanksley learned about an event called Philly Pitch, where "writers and potential producers [were presented with] an opportunity to pitch their film concepts to a panel of entertainment industry professionals who act as 'judges.'" (Doc. No. 45 at ¶ 31.)

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[1] In reaching a decision, the Court has considered the SAC (Doc. No. 45), Defendants' Motions to Dismiss the SAC (Doc. No. 53-54), Plaintiff's Responses in Opposition (Doc. No. 57-60), Defendants' Replies (Doc. Nos. 62-63), oral argument on the Motions to Dismiss (See, e.g., Doc. No. 69), and the parties' supplemental briefing (Doc. Nos. 80-84). The Court has also considered the DVDs of *Cream* and *Empire*, which were attached as exhibits to Plaintiff's SAC and Defendants' Motions to Dismiss, respectively.

The Greater Philadelphia Film Office ("GPFO") and its Executive Director, Sharon Pinkenson, organized this event. (Id. at ¶ 32.) Lee Daniels participated as one of the judges. (Id. at ¶ 31.)

On April 5, 2008, Tanksley attended Philly Pitch. (Id.) He presented one copyrighted work, titled *Kung Fu Sissy*, to the panel of judges.[2] (See Doc. No. 53, Ex. B.) After each presenter pitched an idea to the panel, the participants broke for informal discussions and

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[2] In the SAC, Plaintiff alleges that he "pitched not just one, but two different works" to the panel—*Kung Fu Sissy* and *Cream*. (Doc. No. 45 at ¶ 34.) This allegation, however, is disproved by a video recording of Philly Pitch, which clearly shows that Plaintiff pitched only *Kung Fu Sissy* to the panel of judges, not *Cream*. (Doc. No. 53, Ex. B.)

When considering a motion to dismiss, the court must "accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff." Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006). The court may also consider certain documents not made part of the complaint. Miller v. Cadmus Communications, No. 09-2869, 2010 WL 762312, at *2 (E.D. Pa. Mar. 1, 2010). For example, a court may consider "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Pension Benefit Guaranty Corp. v. White Consolidated Indus., 998 F.2d 1192, 1196 (3d Cir. 1993).

Here, the Court will consider the video recording of Philly Pitch. The video is "undisputably authentic" and a "document" upon which Plaintiff's claims are based. Pension Benefit Guaranty Corp. v. White Consolidated Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Plaintiff subpoenaed the video directly from Robert Kates, the creator and custodian of the video who was hired by GPFO to film the event. (Doc. No. 45 at ¶ 35.) In addition, Plaintiff's claims are based on his alleged pitch of *Cream* to the panel of judges and to Lee Daniels in particular.

networking. At that time, Plaintiff alleges that he and Daniels privately discussed *Cream*. (Doc. No. 45 at ¶¶ 35-36.) Tanksley gave Daniels several copies of a DVD containing his copyrighted work, along with a written script of the show. (Id. at ¶ 36.) His goal was to work with Daniels to produce *Cream* as a hit television show. (Id.)

Nearly seven years later, on January 7, 2015, Fox aired a pilot episode of its new television series titled *Empire*, which features the struggles of Lucious Lyon, a rapper and former drug dealer who founded one of the world's leading media companies, Empire Entertainment, with his ex-wife Cookie Lyon. (Id. at ¶ 37.) This soap opera chronicles Lucious and Cookies' fight for control over Empire Entertainment, vicariously waged through a succession battle among their three adult sons. (Doc. No. 53 at 3.)

Lee Daniels and Danny Strong are the creators of *Empire*. (Id. at ¶ 37.) Plaintiff alleges that Daniels and Strong surreptitiously took his copyrighted work and were "knowingly and willfully involved in the unauthorized copying of 'Cream'" in connection with the creation of *Empire*. (Id. at ¶ 46.) Plaintiff avers that after the airing of *Empire*, he was unable to successfully market *Cream* to any television network "due to its striking similarities to 'Empire.'" (Id. at ¶ 41.)

On January 8, 2016, Plaintiff initiated this action. (Doc. No. 1.) He filed an Amended Complaint on January 29, 2016. (Doc. No. 3.) On June 17, 2016, Defendants filed two Motions to Dismiss the Amended Complaint. (Doc. Nos. 21, 25). The Court held a hearing on Defendants' Motions to Dismiss on June 2, 2016.

(Doc. Nos. 41-42.) At the hearing, this Court afforded Plaintiff another opportunity to amend the Amended Complaint. On August 1, 2016, Plaintiff filed the Second Amended Complaint ("SAC"). (Doc. No. 45.) Upon the filing of the SAC, the Court denied Defendants' pending Motions to Dismiss without prejudice as moot. (Doc. No. 46.)

On September 30, 2016, Defendants filed another two Motions to Dismiss the SAC. (Doc. Nos. 53-54.) Plaintiff filed Responses in Opposition on October 30, 2016. (Doc. Nos. 57-60.) On November 14, 2016, Defendants filed Replies. (Doc. Nos. 62-63.) This Court held a hearing on the Motions to Dismiss the SAC. (See Doc. No. 69.) At the hearing, the Court granted the parties leave to file supplemental briefs in support of their positions. (Id.) On March 27, 2017, Plaintiff and Defendants filed supplemental briefs on the Motions to Dismiss (Doc. Nos. 80-84), which is now ripe for a decision.

III. STANDARD OF REVIEW

The motion to dismiss standard under Federal Rule of Civil Procedure 12(b)(6) is set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009). After Iqbal it is clear that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to defeat a Rule 12(b)(6) motion to dismiss. Id. at 663; see also Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 231 n.14 (3d Cir. 2013) (citing Sheridan v. NGK Metals Corp., 609 F.3d 239, 262 n.27

(3d Cir. 2010)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Applying the principles of Iqbal and Twombly, the Third Circuit in Santiago v. Warminster Twp., 629 F.3d 121 (3d Cir. 2010), set forth a three-part analysis that a district court in this Circuit must conduct in evaluating whether allegations in a complaint survive a 12(b)(6) motion to dismiss:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Id. at 130 (quoting Iqbal, 556 U.S. at 675, 679). "This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011).

A complaint must do more than allege a plaintiff's entitlement to relief, it must "show" such an entitlement with its facts. Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (citing Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234-35 (3d Cir. 2008)).

"[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'shown' — 'that the pleader is entitled to relief.'" Iqbal, 556 U.S. at 679. The "plausibility" determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

IV. ANALYSIS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants seek to dismiss the SAC in its entirety. (Doc. Nos. 53-54.) The Court will address each of Plaintiff's claims in turn.

A. Plaintiff Has Not Plausibly Alleged a Claim of Copyright Infringement Against Fox Defendants

In Count I of the SAC, Plaintiff alleges that the Fox Defendants directly infringed on his copyrighted work titled *Cream* by producing the television series *Empire*.[3] (Doc. No. 45 at ¶¶ 42-56.) "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer . . . ." 17 U.S.C. § 501(a). To

[3] As previously noted, Plaintiff refers to the following individuals and entities collectively as the "Fox Defendants:" Lee Daniels, Lee Daniels Entertainment, Leah Daniels-Butler, Danny Strong, Danny Strong Productions, Twenty-First Century Fox, Inc., Fox Entertainment Group, Inc., Twentieth Century Fox Film Corp., Twentieth Century Fox Television, Inc., Twentieth Television, Inc., Twentieth Century Fox International, Twentieth Century Fox International Television, LLC, Twentieth Century Fox Home Entertainment, LLC, Fox Networks Group, Inc., Fox Broadcasting Company, Fox Television Stations, Inc., Fox Digital Media, and Fox International Channels. (Doc. No. 45 at ¶ 17.)

state a claim of copyright infringement, a plaintiff must establish ownership of a valid copyright, and unauthorized copying of protectable elements of the plaintiff's copyrighted work. Tanikumi v. Walt Disney Co., 616 F. App'x 515, 519 (3d Cir. 2015). Proof of unauthorized copying can be found either in the defendant's admission or, as is more often the case, by circumstantial evidence of access and substantial similarity. Dam Things from Denmark, a/k/a Troll Co. ApS v. Russ Berrie & Co., Inc., 290 F.3d 548, 561 (3d Cir. 2002). To determine whether the works are substantially similar, a court "compares the allegedly infringing work with the original work, and considers whether a 'lay-observer' would believe that the copying was of protectable aspects of the copyrighted work."[4] Jackson v. Booker, 465 F. App'x 163, 165 (3d Cir. 2012).

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[4] Plaintiff contends that the Court should not compare the two works to assess whether they are substantially similar at the motion to dismiss stage. It is well established, however, that a district court may consider items that are integral to the complaint on a motion to dismiss. See In re Rockefeller Ctr. Props. Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999). Moreover, "[a]lthough the question of substantial similarity is one of fact, a district court is permitted to consider the disputed works in deciding a Rule 12(b)(6) motion." Tanikumi v. Walt Disney Co., 616 F. App'x 515, 519 (3d Cir. 2015); see also Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 64 (2d Cir. 2010) (explaining that "[w]hen a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because what is required is only a visual comparison of the works"). In this case, because Plaintiff's three episode television series of *Cream* and Fox Defendants' *Empire* series were integral to the SAC and part of the record before the Court, the Court will consider the works to determine whether Plaintiff has sufficiently alleged a claim for copyright infringement.

This inquiry involves distinguishing between protectable and unprotectable aspects of the copyrighted work. Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 208 (3d Cir. 2005). "It is a fundamental premise of copyright law that an author can protect only the expression of an idea, but not the idea itself." Id. Accordingly, a court must discern "the author's expression and the idea or theme that he . . . seeks to convey or explore," because the former is protected and the latter is not. Id.; see also Winstead v. Jackson, 509 F. App'x 139, 143 (3d Cir. 2013) (citations omitted) ("The court must determine whether the allegedly infringing work is similar because it appropriates the unique expressions of the original work, or merely because it contains elements that would be expected when two works . . . explore the same theme.").

In analyzing the two works for substantial similarity, the court compares aspects such as plot, characters, theme, mood, setting, and dialogue. See, e.g., Tanikumi, 616 F. App'x at 521 (comparing plot, theme, setting, and characters, among other aspects, to determine if there was substantial similarity between the allegedly infringing work and the original copyrighted work). Without meticulously dissecting the works, a court's task is to compare the works' "total concept and overall feel . . . as instructed [by] good eyes and common sense." Peter F. Gaito Architecture, LLC v. Simone Development Corp., 602 F.3d 57, 66 (2d Cir. 2010).

Here, Fox Defendants do not contest that Plaintiff held a valid copyright for *Cream*, and that Plaintiff has adequately pled access. (Doc. No. 54 at 23 n.12.) Rather, they argue that Plaintiff has failed to plead

facts showing that the two works are substantially similar. (Id. at 23.) In contrast, Plaintiff argues that he has stated a claim for copyright infringement because the two works are substantially similar in plot, characters, theme, mood, and setting.[5] (Doc. No. 60 at 10-24.) For reasons that follow, this Court agrees with Fox Defendants that *Empire* does not infringe on the expressions embodied in *Cream*.

1. Summary of the Two Works

To determine whether *Cream* and *Empire* are substantially similar, it is helpful first to summarize the content of the two works.

a. Summary of *Cream*

Plaintiff's copyrighted work titled *Cream* can be summarized as a television show that follows the trials and tribulations of Winston St. James, an African-American hip-hop mogul who runs a record label called Big Balla Records. (Doc. No. 45 at ¶ 41.) Throughout the three episode series, viewers watch Winston St. James manage artists who seek contracts with the label, attempt to save his sister (who is actually his daughter) from an abusive relationship, attend the funeral of his mother, and dismiss his father's request to co-own the record label. Additionally, *Cream* features extensive sexual scenes, in which Winston engages in sex with multiple partners, contracts herpes, and seeks solace in a prostitute.

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[5] Plaintiff does not allege that *Cream* and *Empire* contain substantially similar sequences of dialogue. (See Doc. No. 45 at ¶¶ 47(A)-(F).)

Episode one of *Cream* opens with Winston having sex with his two married assistants, Tiffany and Chantal. (*Cream* DVD at 0:44-1:46.) In the next scene, Winston arrives late to a dance studio where he is scheduled to hear a rap group's audition. (Id. at 1:48-2:49.) As the rap group performs a song, the scene fades to an extended fantasy sequence in which Winston has sex with yet another woman, Joy, who is a member of the rap group's entourage. (Id. at 2:50-5:16.)

The next scene takes a dramatic shift. Winston's sister Angelica is beaten by her boyfriend Shekwan. (Id. at 5:22-6:30.) Shekwan asks Angelica to call Winston and set up an audition for him. (Id. at 6:30-6:33.) Angelica obliges. (Id. at 6:50-7:30.) Winston receives her call while in bed with Joy, and initially refuses to give Shekwan an audition, but then tells Angelica to meet him in his office to discuss it. (Id. at 7:30-8:08.) The next day, Angelica arrives at Winston's office wearing sunglasses. (Id. at 8:24-8:38.) Winston asks Angelica to take off the sunglasses, revealing a black eye, which she presumably got from the abusive Shekwan. (Id. at 8:39-9:35.) At that moment, Winston decides to give Shekwan an audition after all, hatching a plot to exact revenge on the man who is hurting his little sister. (Id. at 9:36-10:01.) After Angelica leaves the office, Winston grabs his groin and calls his secretary, asking that she schedule an urgent appointment with his doctor. (Id. at 10:18-10:26.)

In the next scene, Shekwan auditions for Winston in the dance studio. (Id. at 10:38-12:30.) The audition is horrendous, yet Winston signs Shekwan to the record label anyway. (Id. at 12:30-12:59.) After the

audition, Winston asks Angelica to join him for dinner, so that she is away from Shekwan. (Id. at 13:08-13:39.) Then he gestures to two men in the studio, suggesting that they can now go forward with a plan to take out revenge on Shekwan. (Id. at 13:40-13:47.)

The scene then shifts to later that night, where Shekwan walks down an alleyway talking on the phone about his new contract with the record label. (Id. at 13:54-12:59.) As Shekwan urinates on a dumpster, the two men lurk in the darkness and shoot Shekwan. (Id. at 14:25-14:50.) The men then enter the frame and kick him, checking that Shekwan is dead. (Id. at 14:55-15:14.) The credits roll. Thereafter, episode one concludes with a public service announcement from the actress who plays Angelica, who warns of the dangers of domestic violence and offers resources for those who need help escaping from an abusive relationship. (Id. at 15:48-16:46.)

Next, in episode two of *Cream*, Winston learns from Angelica that Shekwan survived the shooting. (Id. at 17:44-18:19.) He berates the two hit men for failing to finish the job. (Id. at 18:19-19:11.) The next scene shifts to a doctor's office, where Winston is informed that he has herpes, a non-fatal disease. (Id. at 19:26-22:03.) The scene cuts to one of Winston's sexual partners, Chantal, having sex with her husband. (Id. at 22:06-22:53.) After having sex, Chantal appears to be in pain, apparently experiencing the symptoms of herpes. (Id. at 23:45-23:56.)

The next day, Winston and Tiffany meet in the office. (Id. at 23:58-24:33.) Tiffany tells Winston that she and Chantal both are feeling under the weather,

suggesting to the audience that they are all feeling the effects of herpes. (Id.)

In the next scene, Angelica sits beside Shekwan's hospital bed, praying for his recovery. (Id. at 25:45-26:22.) Winston arrives and suggests that Angelica leave and get some rest. (Id. at 26:22-27:21.) Alone in the hospital room with Shekwan, Winston threatens the man, even though he appears to be in a coma. (Id. at 27:41-28:46.) As Winston leaves, however, the camera cuts to Shekwan opening his eyes. (Id. at 28:46-28:57.)

Back at the office, Winston contemplates his herpes diagnosis, detailing his sexual encounters through various flashbacks. (Id. at 29:00-29:49.) Looking forlorn, he begrudgingly takes herpes medication. (Id.) Next, one of Winston's artists interrupts him in the bathroom demanding more money for his record sales, but Winston pulls out a gun and refuses to pay him. (Id. at 29:53-31:15.) In the meantime, Winston's mother Nora arrives at the office with Angelo, who is introduced as Winston's brother. (Id. at 31:19-32:54.) Angelo is developmentally disabled and has trouble speaking coherently, referring to himself in the third person. (Id. at 31:52-32:16.) Nora explains that Winston's father, Sammy, is currently dating Winston's ex-girlfriend Brenda. (Id.)

In the following scene, Sammy and Brenda are sitting on the couch and talking in Sammy's apartment. (Id. at 32:56-34:02.) Through their conversation, the audience learns that Angelica and Angelo are really Brenda and Winston's children—not his younger siblings. (Id.) Winston's mother raised Angelica and Angelo as her own children after Brenda

was sent away for her drug problem. (Id.) Sammy and Brenda also discuss how Sammy is going to take over Big Balla Records and Brenda is going to "get her kids back." (Id.) The scene ends heavily suggesting that Sammy and Brenda will have sex. (Id. at 34:03-34:21.)

Episode two then concludes with a lengthy public service announcement wherein Plaintiff Tanksley, the actor who plays Winston, talks about herpes, its statistics and its symptoms. (Id. at 34:59-36:43.) He recommends getting tested for herpes and other sexually transmitted diseases. (Id.)

The third and final episode of the *Cream* pilot opens with a rapper recording in the studio. (Id. at 38:00-39:13.) While in the studio, Winston receives a call from Angelica, informing him that Shekwan is "going to make a fully recovery." (Id. at 39:15-40:15.)

In the following scene, Nora, Winston's mother, arrives at Sammy's apartment to confront him about his affair with Brenda. (Id. at 40:20-41:20.) Nora follows Brenda out of the apartment, where they have a confrontation in a parking lot. (Id. at 41:20-42:28.) Nora has a heart attack and dies. (Id.) At her funeral, Sammy demands that he take over the share of Big Balla Records that Nora owned (50%), which had not been revealed in the storyline until this point. (Id. at 43:00-45:22.) Winston refuses and storms off. (Id.)

After a lengthy sequence of Winston driving around, the audience sees him pick up a prostitute named Regina, and they go to her apartment. (Id. at 45:38-45:22.) However, Winston is too upset by his mother's death to have sex. (Id.)

Next, Winston watches as Shekwan records a song called "Biscuits and Gravy," which is meant to be comically bad. (Id. at 50:30-52:41.) However, to Winston's chagrin, the song becomes a hit. In the following scene, Winston, Chantal, and Tiffany deal with the herpes outbreak in the office. (Id. at 53:01-54:15.) Chantal admits to Winston that she has herpes, but Winston denies being infected. (Id.) Therefore, Chantal blames Tiffany for spreading herpes to the group and they get into an altercation. (Id.) When Chantal later admits to her husband that she has herpes, he kicks her out of their apartment. Chantal goes to Winston's home and asks to stay with him, and the two have sex.

The scene then cuts to Sammy's apartment, where Brenda and Sammy are engaging in sexual acts. (Id. at 54:18-55:39.) Sammy is upset that Angelica and Angelo received all of Nora's shares of Big Balla Records. (Id.) Sammy decides that he and Brenda should reveal to Angelica and Angelo who their parents really are. (Id.) In this way, Sammy will be able to control their shares of Big Balla Records. (Id.)

Later, Sammy and Brenda reveal to Angelica who her parents really are. (Id. at 104:37-108:41.) Upset at the news, Angelica calls Winston and says that she never wants to see him again. (Id.) Distraught, Winston goes to Regina's apartment, seeking solace in the prostitute. (Id. at 109:00-111:15.) While there, he reveals the truth about Angelica and Angelo, and his herpes diagnosis. (Id.) Regina confesses that she also has herpes. (Id.) Minutes later, Chantal's husband stops by Regina's apartment for a date. (Id.) At that moment, Winston realizes that Chantal's husband

must have infected her with herpes, and that Chantal must have spread the disease to Winston and Tiffany. (Id.)

At the conclusion of the pilot, the actress who plays Nora offers a public service announcement on the benefits of adoption. (Id. at 111:54-112:49.) She says that there is an "epidemic across America of grandparents rearing grandchildren, in many cases with special needs, because of the parents' problems," and encourages adoption of those children who "don't have grandparents to rescue them." (Id.)

b. Summary of *Empire*

The allegedly infringing work titled *Empire* can be summarized as a television soap opera "reveling in the intrigue, power struggles and opulent excesses of a powerful and wealthy family"—the Lyons. (Doc. No. 54 at 3.) *Empire* tells the story of Lucious Lyon and his ex-wife Cookie Lyon, who rose from a criminal past of drug dealing to create a leading music label and entertainment company called Empire Entertainment. (Id.) The show details the couples' fight for control of the company, and chronicles a *King Lear*-style succession rivalry among their three sons—Andre, Jamal, and Hakeem—who each want to succeed their father in running the family business. (Id.)

The pilot episode of *Empire* opens with Lucious Lyon, the family patriarch, sitting in a recording studio dissatisfied with the performance of one of his artists. (*Empire* DVD at 0:12-1:33.) As she sings, the scene cuts to stylized flashbacks of Lucious being examined by doctors who appear to be delivering bad news. (Id.) To get the performance he wants, Lucious emotionally

manipulates the artist, telling her to recall the recent death of her brother. (Id. at 1:44-2:09.) The performance that follows demonstrates how Lucious is both a genius record producer and a man who is willing to stop at nothing to get what he wants. (Id. at 2:09-2:44.)

The next scene opens with a lavish party on a yacht anchored in New York harbor. (Id. at 2:55-4:30.) Lucious's sons Jamal and Hakeem improvise an upbeat musical performance, while their older brother Andre cynically looks down on them for showing off their talent to gain their father's affection. (Id.)

The next scene cuts back to Manhattan where, greeted by a throng of paparazzi and fans, Lucious arrives at the skyscraper which is the headquarters of Empire Entertainment. (Id. at 4:40-4:55.) Lucious's faithful assistant Becky quickly meets him in the lobby and informs him of the days urgent matters before Lucious goes to a board meeting. (Id. at 4:55-5:31.) At the board meeting, he announces that Empire Entertainment has filed to become a publicly traded company. (Id. at 5:32-6:40.)

Later, Lucious meets with his three sons at his mansion and tells them that he plans to select one of them to take over Empire Entertainment, but that none of them are ready yet. (Id. at 6:46-8:05.) Jamal, the middle child, asks "what is this *King Lear* now?," suggesting the narrative for the series. (Id.)

The scene then cuts to prison gates opening and Cookie Lyon, the matriarch of the Lyon family, exiting the grounds. (Id. at 8:08-8:33.) The audience learns that Lucious's ex-wife Cookie was released after

serving seventeen years in prison for charges associated with drug dealing.

At a boxing gym, Andre, the oldest son, tries to convince his father that he should take over the company. (Id. at 8:40-9:50.) Andre is a graduate of the Wharton School of Business and has helped his father with handling the finances of the company. (Id.) However, he is not musically talented like his two younger brothers. (Id.) Andre tells his father that Cookie was released from prison. (Id.) Hearing this news, Lucious asks Bunkie, his right hand man, to spy on her. (Id. at 9:52-10:22.) The audience later learns that Bunkie is in fact Cookie's cousin, and has been a long-time friend of the family. Bunkie asks Lucious for $25,000 to cover his gambling debts, but Lucious refuses to pay for his habit. (Id.)

The next scene opens to Jamal hanging out with his partner Michael in his spacious loft. (Id. at 10:25-14:00.) Jamal tells Michael about his father's succession challenge, but believes that he will never be chosen because Lucious does not approve of his homosexuality and does not think that an openly gay man can be successful in the world of hip-hop music. (Id.) When the phone rings, Jamal answers and is shocked to hear that his mother Cookie is outside and wants to be buzzed in. (Id.) Through flashbacks, the audience learns that in stark contrast to her ex-husband, Cookie knew that Jamal was gay and has always supported him. (Id.)

The audience then follows Cookie to Empire Entertainment's headquarters, where she drops by to visit with Lucious. (Id. at 14:00-17:15.) In Lucious's opulent office, Cookie demands half of the company,

but Lucious says that this is not possible. (Id.) During their argument, the audience learns that Lucious and Cookie were both involved in drug dealing, and that Cookie pled guilty so that Lucious could pursue his music career and take care of their children. (Id.) Cookie feels that she is entitled to half of Empire Entertainment for her sacrifice, in part relying on the fact that the money used to create the company was the same drug money which landed her in prison. Cookie then asks for an annual salary of $5 million and a position as head of Artists & Repertoire ("A&R"). (Id.) Lucious says that he will support Cookie financially, albeit not by giving her an annual salary of $5 million, and that he cannot make her head of A&R because the position is already filled (with his girlfriend, Anika). (Id.) When Anika enters the office, Cookie casually insults her and warns Lucious that he cannot sweep her under the rug. (Id.)

Cookie then visits the high rise apartment of Hakeem, her youngest son. (Id. at 17:24-18:50.) Hakeem is disrespectful towards her, so she brutally beats him with a broom. (Id.)

Later, Andre and his wife Rhonda discuss Lucious's succession ploy in their apartment. (Id. at 24:44-26:00.) Rhonda suggests that Andre pit his two younger brothers against one another, so that Andre will be the last man standing to take over Empire Entertainment. (Id.) As part of this strategy, Andre visits Cookie at her new apartment and recommends that she manage Jamal's career and make him a star, as a way to get leverage over Lucious. (Id. at 26:00-27:57.)

Cutting to a modern conference room at the company's headquarters, Cookie interrupts Lucious's

meeting to tell him that she wants to manage Jamal. (Id. at 27:58-28:30.) She threatens Lucious by telling him that she will leak to the Securities and Exchange Commission the fact that Empire Entertainment was created with drug money. (Id. at 28:33-29:56.) Lucious acquiesces. (Id.)

The pilot then cuts to performances by Jamal and Hakeem, demonstrating their brotherly bond while also underscoring the mounting tension between them. (Id. at 30:15-36:40.) First, Jamal performs at a coffee shop. (Id.) Cookie tells him that he should share his talents with the world and start making hit records, but he initially refuses to let her manage his career. (Id.) Then, Hakeem has trouble recording a song for Lucious in the studio. (Id.) Hungover from the night before, he is unfocused and his performance suffers greatly. (Id.) To get back in his father's good graces, he visits Jamal, who helps him rework the song into a hit. (Id.)

Later, Bunkie materializes at Lucious's mansion and demands $3 million. (Id. at 36:40-37:44.) He threatens Lucious by saying that he will tell the police about murders Lucious committed many years ago. (Id.) Despite this threat, Lucious still refuses to give Bunkie any money. (Id.)

The following scene shows Hakeem back in the studio performing the reworked song while Lucious and Jamal watch him perform. (Id. at 37:48-36:40.) Lucious is impressed with Hakeem's improvements. (Id.) Even though Hakeem tells his father that Jamal helped him rework the song, Lucious refuses to recognize Jamal's talents. (Id.) Frustrated by being constantly overlooked by his father because of his homosexuality, Jamal

finally agrees to let Cookie manage his career. (Id. at 38:51-39:18.)

The following scene shows Lucious at the doctor's office. (Id. at 39:19-40:50.) The doctor informs Lucious that he has Amyotrophic Lateral Sclerosis (ALS), a progressive and fatal neurodegenerative disease (also known as Lou Gehrig's disease). (Id.) The doctor tells Lucious he has three years to live, thus informing the audience of Lucious's rationale for the succession battle amongst his adult sons. (Id.)

Later, Lucious meets with Bunkie under a highway overpass, where Bunkie is seen urinating in the river. (Id. at 41:45-43:00.) Because of Bunkie's attempts to blackmail Lucious, Luscious shoots Bunkie as they stand face to face. (Id.)

In the final scene of the pilot episode, the entire family returns to the lavish party on the yacht. (Id. at 45:05-45:55.) Lucious announces Cookie's return to the company, and that Jamal and Hakeem will be releasing albums. (Id.) He closes with a toast "to the Empire." (Id.)

In the remaining episodes of the first seasons of *Empire*, Lucious reveals to his family that he has ALS, becomes engaged to Anika, and continues to struggle with naming his successor. Cookie continues to manage Jamal's career, and Jamal comes out publicly as being gay. Andre has a manic episode and requires a brief period of hospitalization, while Hakeem leaves and later returns to Empire Entertainment. In the season's final episode, Lucious learns that he does not have ALS after all, chooses Jamal as his successor, and is arrested for Bunkie's murder.

2. Substantial Similarity Analysis

As previously noted, to determine whether the works are substantially similar, a court "compares the allegedly infringing work with the original work, and considers whether a 'lay-observer' would believe that the copying was of protectable aspects of the copyrighted work." Jackson v. Booker, 465 F. App'x 163, 165 (3d Cir. 2012). Keeping in mind the "total concept and overall feel" of the two works at issue, a comparison based on plot, characters, theme, mood, setting, and dialogue, even when considered in the light most favorable to Plaintiff that what he contends is evidence of infringement, demonstrates that there is no substantial similarity between *Cream* and *Empire*. See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010).

a. Plot

Plaintiff first contends that the plots of *Cream* and *Empire* demonstrate that the two works are substantially similar. (Doc. No. 45 at ¶ 47(B).) Plaintiff specifically alleges that "in both shows, the male protagonist is forced to contend with family members who are claiming entitlement and scheming to take over 50% of his record label business, and exploiting his children in the effort." (Id.) Plaintiff also claims that less significant plot points about disease, urination, flashback scenes, female-female altercations, same-sex relationships, and secret parentage, all support a finding of substantial similarity. (Id.)

General plot ideas are not protected by copyright law. Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985). A succession story is a far too general plot idea,

and does not warrant protection. After viewing *Cream* and *Empire*, Plaintiff's allegation that that the main plot line in both works deals with a succession story involving a fight for control over Big Balla Records (*Cream*) and Empire Entertainment (*Empire*) is inaccurate. Moreover, this allegedly similar plot line is expressed in radically different ways. For instance, in *Cream*, Winston's father Sammy, by all accounts a sideline character, wants to co-own Big Balla Records. When Sammy is introduced at the end of the second episode, he mentions to Winston's ex-girlfriend Brenda that he is going to take his share of Big Balla Records. Then, in the final episode of *Cream*, Sammy asks Winston to give him the 50% ownership stake in Big Balla Records that Winston's deceased mother held.

In this rendition of a succession story, Winston's father Sammy seeks to inherit half of a company which Winston's mother owned. In other words, Sammy is trying to take for himself any share of the company which would have been passed to Winston, Angelica, or Angelo (as Nora's child and adopted grandchildren). Sammy's sideline request to share control over Big Balla Records is overshadowed by major plot lines such as Winston's herpes diagnosis and the failed attempt to murder Shekwan, which are highlighted in all three episodes.

Unlike *Cream* where succession, if at all prevalent, is a side or minor plot line, the heart of the *Empire* series is its *King Lear*-style succession story. In *Empire*, Lucious Lyon is motivated by his terminal illness to choose the right successor to take over the media behemoth Empire Entertainment. In the pilot episode, he tells his three sons that he will choose one

of them to run the company, but explains that none of them are ready yet. The ensuing succession rivalry underscores the entire series. It fuels almost every fight and scheme waged in the Lyon family.

The difference in expression of these stories is stark. In *Cream*, Winston's father wants to inherit Nora's half of Big Balla Records and ultimately to take away from Winston, Angelica, and Angelo their stake in the company. Conversely, in *Empire*, Lucious wants one of his three sons to prove that they can run Empire Entertainment and take his place as CEO of the company once he is gone. There is simply no similar plot line in *Cream*. For this reason, the plots of the two works are not substantially similar.

Plaintiff also contends that the two works have plot lines about disease, urination, flashbacks, female-female altercations, same-sex relationships, and secret parentage, which warrant a finding of substantial similarity. These purported similarities, however, have even less in common than the allegedly similar succession story.

Plaintiff asserts that the "identical plots about diseases" demonstrate substantial similarity. (Doc. No. 45 at ¶ 47(F)(6).) In *Cream*, Winston is diagnosed with herpes. This diagnosis of a non-fatal, sexually transmitted disease connects Winston's many sexual encounters and allows Plaintiff to issue a public service announcement about sexually transmitted diseases. In contrast, *Empire*'s Lucious is diagnosed with ALS, which unlike Winston's herpes diagnosis, is a fatal neurodegenerative disease. The discovery of ALS is the spark that ignites the entire succession rivalry among his three sons, and is the driving force behind the

show. It is not meant to be used for moralistic messaging as Winston's herpes is used in *Cream*. In addition, unlike Winston's herpes diagnosis, which is discussed at length among several characters, Lucious's ALS diagnosis is initially kept secret from his family.[6] Because the expressions of disease are so different in *Cream* and *Empire*, this allegation does not support a finding of substantial similarity.

Plaintiff contends that both works involve a scene where a "victim is shot shortly after urinating outside." (Doc. No. 45 at ¶ 47(F)(6).) However, these two scenes are expressed in different ways. In *Cream*, Winston orders his two henchmen to murder Shekwan after learning of his abuse of Angelica. Shekwan is seen walking through a parking lot, and briefly urinating on a dumpster when he hears people lurking in the shadows. The audience then sees Shekwan receive several gunshot wounds. Only when a grievously injured Shekwan has fallen to the ground do the two shooters enter the frame.

Unlike *Cream*, where henchmen shoot and fail to kill the victim, in *Empire* Lucious himself commits the

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[6] Plaintiff contends that the fact that both Winston and Lucious have white female physicians shows substantial similarity. (Doc. No. 45 at ¶ 47(F)(2).) White female doctors are commonplace, both in the real world and on television (e.g., *Grey's Anatomy*, *ER*, and *General Hospital*). Moreover, a doctors' race and gender adds nothing to the storyline in either work. See Eaton v. National Broad. Co., 972 F. Supp. 1019, 1029 (E.D. Va. 1997), aff'd, 145 F.3d 1324 (4th Cir. 1998) (internal citation omitted) (stating that "basic human traits that certain characters share, including age, sex, and occupation, are too general or too common to deserve copyright protection").

murder. Lucious shoots and kills his longtime friend Bunkie, not an enemy like Shekwan in *Cream*. Bunkie's murder occurs because Bunkie tried to blackmail Lucious into paying him money by threatening to tell the police that Lucious committed other murders long ago. This murder in *Empire* is unrelated to a desire to kill an evil and abusive boyfriend. Additionally, Lucious shoots Bunkie at close range, after speaking to him face to face, whereas Shekwan's attempted murderers remain out of the frame during the shooting. Finally, the urination scene in *Cream* takes place in a parking lot, whereas in *Empire* it occurs on a riverbank underneath a highway overpass. Given all the differences in expression of the urination scenes in *Cream* and *Empire*, Plaintiff's allegation that this scene shows substantial similarity is unconvincing.

As noted, Plaintiff also contends that both works involve flashback scenes, female-female altercations, same-sex relationships, and secret parentage, which show substantial similarity between the two works. These assertions, however, are unavailing.

Generally speaking, flashback scenes are not protected. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1261 (11th Cir. 1999) (noting that flashbacks are familiar devices in film and fiction). They are commonly used devices in a soap opera style story, and have been used countless times in television shows and movies. See id. (citing examples of flashbacks, including *Citizen Kane*, which "uses the device to show how different witnesses remember similar events from Kane's life in opposing ways; and 'the Usual Suspects' where throughout the film the investigation of a

suspected drug deal gone bad is portrayed in flashback."). In addition, the flashbacks which appear in the two works here are not similar in expression. *Cream*'s flashbacks are in black-and-white and depict images of Winston's previous sexual encounters, whereas *Empire*'s flashbacks are in color and depict scenes such as Lucious's ALS diagnosis and his rejection of his son Jamal for dressing in women's clothing as a young child. Viewed in the light most favorable to Plaintiff, these flashbacks do not show substantial similarity between *Cream* and *Empire*.

Plaintiff also alleges that *Cream* and *Empire* are substantially similar because both works contain scenes depicting a fight between two women. Such an altercation is a commonly used device in soap operas to drive the narrative. Fights between two female characters (or "female-female altercation") have occurred on famous soap operas such as *Dynasty* and *Melrose Place*.

The scenes in *Cream* and *Empire* depicting these fights are not similar in terms of expression. For example, a female-female altercation in *Cream* occurs when Brenda has a physical fight with Nora, Winston's mother. No similar fight occurs in *Empire*. Additionally, the fight between Tiffany and Chantal in *Cream* is motivated by fear over who spread herpes during a sexual encounter. In contrast, *Empire* contains a scene in which a fight breaks out between Lucious's ex-wife and his current girlfriend (Cookie and Anika) and is motivated by underlying tensions over Lucious, a mutual love interest. No similar altercation occurs in *Cream*. Because the fights in *Cream* and *Empire* involve different types of characters and are

motivated by varying conflicts, the female-female altercation appearing in *Empire* is not substantially similar to those shown in *Cream*.

Moving to Plaintiff's allegation that *Cream* and *Empire* are substantially similar because both shows include a same-sex relationship, this argument is unpersausive. First, the existence of a same-sex relationship, standing alone, is far too general to warrant protection. Same-sex relationships are commonplace in many soap operas and have been prominent in movies like *Philadelphia*, *The Birdcage*, and *Brokeback Mountain*. Second, the same-sex relationship in *Cream* is radically different in its expression from the expression shown in *Empire*. *Cream* includes an explicit sex scene between Tiffany and Chantal, two female side characters who are married to men and are having extramarital affairs with Winston. In *Empire*, one of the main characters—Jamal—is gay. *Empire* portrays Jamal's sexual orientation as a catalyst of the conflict between Jamal and his father Lucious, and Jamal's same-sex love interest is his boyfriend. The committed and loving same-sex relationship in *Empire* is nothing like the explicit and fleeting same-sex affair in *Cream*. Therefore, the mere existence of a same-sex relationship in *Cream* and *Empire* will not support a finding of substantial similarity.

Concluding with Plaintiff's allegation of secret parentage appearing in both works, this assertion does not show substantial similarity between *Cream* and *Empire*. Revelations about secret parentage are a mainstay of soap opera melodramas, and have been the driving force in movies like *Star Wars*. This general

plot device is not a protectable element of Plaintiff's copyright.

Furthermore, this plot device as used in *Cream* and *Empire* is not similar in expression. In *Cream*, Winston hides the fact that Angelica and Angelo are his children. Instead, Winston and his parents, Nora and Sammy, pretend that Angelica and Angelo are Winston's younger siblings. Nora and Sammy, therefore, raise Angelica and Angelo as their own children. Only in the final episode of *Cream* is it revealed that Angelica and Angelo are Winston's children. Sammy reveals this fact to Angelica in order to secure her shares of Big Balla Records to take control of the company.

In contrast, in *Empire*, Jamal appears to have fathered a child with his ex-wife Olivia, but it is revealed that Lucious is actually the father of Olivia's child. Olivia is a side character who appears with a child named Lola during the sixth episode of *Empire*'s first season. She later vanishes, leaving Lola with the Lyon family. In a later episode, Olivia's current partner Reggie appears at the Lyon family mansion. The audience learns that Reggie is a violent man who has been abusing Olivia. Reggie threatens to shoot and kill Jamal, but Lucious intervenes, confessing that he fathered the child with Olivia. Lucious also confesses that he promised Olivia would be a star if she stayed with Jamal to hide his son's homosexuality. During the tumultuous standoff, Reggie is shot and killed by another character.

Thus, the two depictions of secret parentage are expressed in radically different ways and for different reasons. In *Cream*, Winston's secret parentage is

revealed so that Sammy can take control of Big Balla Records. In *Empire*, Lucious's secret parentage is revealed during a nail-biting standoff to save the life of his son Jamal. For these reasons, Plaintiff's comparison of secret parentage appearing in the two works does not support a finding that *Empire* is substantially similar to *Cream*.

In sum, these general plot devices such as flashback scenes, female-female altercations, same-sex relationships, and secret parentage are not protectable elements of Plaintiff's copyright, and cannot be the basis of the infringement claim against Fox Defendants.

b. Characters

According to Plaintiff, the characters in the two works are a major point of similarity. (Doc. No. 45 at ¶ 47(D).) Plaintiff contends Lucious, Cookie, and Andre from *Empire* are substantially similar to Winston, Brenda, and Angelo from *Cream*. (Id.) To determine whether characters are similar, courts look at the "totality of [the characters'] attributes and traits as well as the extent to which the defendant's characters capture the total concept and feel of figures in the plaintiff's work." DiTocco v. Riordan, 815 F. Supp. 2d 655, 667 (S.D.N.Y. 2011); Warner Bros. v. American Broad. Co., 720 F.2d 231, 241 (2d Cir. 1983). Prototypical or stock characters who display generic traits are "too indistinct to merit copyright protection." Tanikumi v. Walt Disney Co., 616 F. App'x 515, 519 (3d Cir. 2015); see also Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1259 (11th Cir. 1999) (explaining that "characters who keep secrets are part and parcel of the murder mystery genre and are not protectable"); see

also Whitehead v. Paramount Pictures Corp., 53 F. Supp. 2d 38, 50 (D.D.C. 1999) (finding that "general characteristics such as black hair, intelligence, patriotism and slight paranoia . . . are not copyrightable and do not establish substantial similarity"). In fact, the bar for substantial similarity in a character is set high because only characters who are especially distinctive are entitled to protection. See Hogan v. DC Comics, 48 F. Supp. 2d 298 (S.D.N.Y. 1999) (finding no substantial similarity between two young male half-vampire characters named Nicholas Gaunt who both had similar appearances, both experienced flashbacks as part of their quest to discover their origins, and both became killers).[7]

First, Plaintiff contends that the two male protagonists, Winston St. James and Lucious Lyon, are substantially similar. (Doc. No. 45 at ¶ 47(D).) Plaintiff characterizes the two men as "African-American male[s] in [their] early to mid-40s who rise[] from

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[7] In another explanation of how two characters are not substantially similar, the court in Rucker v. Harlequin Enterprises, Ltd. wrote:

> The similarities between the characters in Rucker's work and in the Harlequin work are not legally protectable. Both male protagonists are black-haired, blue-eyed, "tall, dark, and handsome" figures. They are wealthy and powerful. The men sweep the female protagonists off their feet, into a luxurious life. The women are beautiful, with red hair and green eyes. They are slender, curvaceous, and young. Their personalities are strong-willed and passionate. These descriptions suffice to make it clear that these are generic characters in romance novels.

No. 12-1135, 2013 WL 707922, at *8 (S.D. Tex. Feb. 26, 2013).

poverty and [lives] of crime on the streets of Philadelphia to become the head[s] of a large record label company." (Id.) To be sure, there are similarities between Winston and Lucious. However, these similarities are not copyrightable. The allegation that both characters are African-American men who rise from poverty and lives of crime to become successful is too general to show substantial similarity. See Jackson v. Booker, 465 F. App'x 163, 165 (3d Cir. 2012) (finding no substantial similarity between two characters who "both were African-American males and ex-convicts who become community activists"). The additional description that the two characters run record labels is not distinctive enough to show substantial similarity. See Astor-White v. Strong, No. 15-6326, 2016 WL 1254221, at *5 (C.D. Cal. Mar. 28, 2016) (finding that Lucious Lyon from *Empire* and the plaintiff's character who are both African-American "record moguls who rise to power and become billionaires in the record industry" and who have three children was insufficient to show substantial similarity). The facts that both men have straightened hair or dress in button-down shirts without a tie and occasionally wear a blazer are also too general. See Newt v. Twentieth Century Fox Film Corp., No. 15-2778, 2016 WL 4059691, at *11 (C.D. Cal. July 27, 2016) (writing that "the alleged 'similarities' in style and dress (e.g., jackets, coats, hats, dresses, hair styles, eyewear, and jewelry) are too common and generic, and constitute *scenes-a-faire* that flow directly from characters in the music industry"); see also Whitehead v. Paramount Pictures Corp., 53 F. Supp. 2d 38, 50 (D.D.C. 1999) (noting that general characteristics such as black hair, and intelligence, among other traits, were not copyrightable and could not establish substantial similarity). Therefore, the

character comparison made between Winston and Lucious is too general to warrant copyright protection.

Furthermore, the overall feel of the two characters is dramatically different. Winston in *Cream* is best understood as a sexually promiscuous man who contracts herpes, tries to exact revenge on a family member's abusive boyfriend, and lies about the parentage of his children, all while trying to run a record label. In comparison, Lucious in *Empire* is an ambitious, wealthy, and homophobic entertainment magnate who wants to ensure that his most capable son takes over the family business. He has a complicated personal and professional relationship with his ex-wife Cookie. For these reasons, the expression and feel of the two characters is dissimilar, and the comparison drawn between Winston and Lucious does not support a finding of substantial similarity.

Second, Plaintiff makes a comparison between two women, Brenda and Cookie, as "female leads with drug backgrounds who had children with the male protagonist in the past and are now seeking to claim a part of his business." (Doc. No. 45 at ¶ 47(D).) Yet the differences between even these characters overshadow their similarities. Brenda is the ex-girlfriend of Winston. She is by all accounts a minor or sideline character in *Cream*, and is not a "lead" as Plaintiff contends. (See id.) As a former drug addict, Brenda has no relationship with her children. In fact, she is only introduced to them at the end of the final episode of *Cream*. Nowhere in *Cream* is it ever suggested that Brenda has ever owned an interest in Big Balla Records. In contrast, Cookie Lyon is a leading

character in *Empire*. She is Lucious's ex-wife, and is heavily involved in the lives of her three sons throughout the entire television show. She is portrayed as a tough and savvy businesswoman who, after her release from prison, is ready to take back control of half of Empire Entertainment. Notably, she has an extensive background in the music industry, which is demonstrated initially in a flashback scene in which she helps Lucious produce his first hit album and then by managing her son Jamal's music career. Put simply, there is no similar character to Cookie Lyon who appears in *Cream*. These two characters, therefore, are not substantially similar. In fact, they are not similar at all.

Third, Plaintiff asserts that there are substantial similarities between the characters Angelo and Andre. (Doc. No. 45 at ¶ 47(D).) The SAC states: "Each of the male leading characters also ha[ve] a son who is suffering from a mental disorder, both of whom exhibit the 'quirk' or symptom of referring to themselves in the third person." (Id.) These characters, however, bear even less resemblance to each other than the other comparisons drawn by Plaintiff. Angelo appears in only two scenes of the *Cream* series. He seems to suffer from a significant developmental disability or mental delay. Other characters refer to Angelo as a "special needs" person and attribute his disability to his mother's drug use during pregnancy. In stark contrast to Angelo's limitations, Andre in *Empire* is a highly educated and functioning individual. He is a Wharton graduate who has continuously helped his father with the finances of a hugely successful record label and entertainment company. Although he suffers from bipolar disorder, this illness has not affected his cognitive abilities. His

manic episodes arising from his bipolar disorder are shown in a few scenes, but they are vastly different from Angelo's overall inability to function independently as portrayed in *Cream*.

Plaintiff's allegation that Angelo and Andre have the "quirk" of referring to themselves in the third person overstates the importance of this characteristic, and does not show an appreciable similarity. (Id.) One of the only times Angelo speaks is in the second episode of *Cream* when he is first introduced to the audience. He cannot speak full sentences and repeatedly says "Angelo in the house." In contrast, Andre has no problem speaking to others and presenting important matters at board meetings for Empire Entertainment. He regularly refers to himself in the first person, and only refers to himself in the third person during a manic episode. During this episode, he switches back and forth using the first and third person. These two scenes alone do not show that Angelo and Andre are substantially similar.

Most tellingly, there are characters with no counterparts featured in *Cream* and *Empire*. What is notably lacking in *Cream* is the triad of brothers who fight to succeed their father for control over the family record label. *Cream* has no counterpart to Andre, Jamal, and Hakeem who are main characters in *Empire*. These characters do not appear in *Cream*, and without them, there is no substantial similarity.

Given the above discussion demonstrating that the characters of *Cream* are not substantially similar to those featured in *Empire*, this component of the analysis does not plausibly support a conclusion that the works are substantially similar.

c. Theme

Next, Plaintiff contends that the themes of *Cream* and *Empire* are substantially similar. (Doc. No. 45 at ¶ 47(A).) Specifically, Plaintiff asserts that both *Cream* and *Empire* are soap opera dramas which "focus on an African-American male who has overcome a disadvantaged/criminal past to achieve financial success in the music industry only to be exploited by those closest to him." (Id.) However, this general theme is not copyrightable. See Winstead v. Jackson, 509 F. App'x 139, 144 (3d Cir. 2013) (explaining that two works that explored the same theme about life on "the streets" necessarily contained similar elements of "the story of an angry and wronged protagonist who turns to a life of violence and crime" and that "this story has long been part of the public domain."); see also DiTocco v. Riordan, 815 F. Supp. 2d 655, 670 (S.D.N.Y. 2011), aff'd 496 F. App'x 126 (2d Cir. 2012) (finding that stock themes such as "the development of an adolescent man through a series of tests," bravery, independence and "mythology affect[ing] the real world" were not protectable).

The idea of an African-American male who rises up from a disadvantaged or criminal past to achieve success through music is nothing new to storytelling, nor is it a protectable element of Plaintiff's work. It is a compelling theme which has played out both in real life and which has been prominent in many forms of artistic expression. Hip-hop moguls such as Jay-z, Dr. Dre, and Sean ("Diddy") Combs are living examples of this remarkable story. Rappers like Tupac Shakur, Snoop Dogg, Master P, and Kanye West have written prolific rhymes about this very idea. Movies such as

Hustle & Flow and *Get Rich or Die Tryin'* depict hip-hop artists struggling to break out. Biographical movies (or biopics) including *Straight Outta Compton* and *Notorious* dramatize the lives and careers of famous rappers, who achieve overwhelming success in the music industry despite overcoming staggering obstacles. Moreover, documentaries like *Tupac: Resurrection*, *The Carter*, and *Beats, Rhymes & Life: The Travels of a Tribe Called Quest* also delve into this theme of hip-hop as the product of struggle and the vehicle for achieving success. Watching people overcome long odds and achieve success thanks to their creative gifts has strong narrative impact. Watching those same people achieve success through their musical talents and start a record label is compelling, though not distinctive. Therefore, similarities alleged between the themes of *Cream* and *Empire* are not a protectable element of a copyright.

d. Mood

Next, Plaintiff asserts that the moods expressed in *Cream* and *Empire* are substantially similar because both contain "regular musical interludes." (Doc. No. 45 at ¶ 47(E).) This contention, however, does not support a claim of copyright infringement. Musical interludes are nothing new to film. Televisions shows dating back to *The Partridge Family* have used musical numbers to bridge one scene to the next. Such devices can be found in popular contemporary television shows such as *Glee* and *Nashville*. In addition, the expression of musical interludes in each work is strikingly different. The musical interludes in *Cream* are performed by minor or nameless characters, and are used for comedic or entertainment purposes; whereas the musical

interludes in *Empire* are often performed by central characters. Through these musical numbers, the audience learns more about the nuances of the character's desires. Because musical interludes themselves are commonly used devices, and the expression of these devices varies dramatically in the two works at issue here, Plaintiff's assertion that musical interludes show substantial similarity is not persuasive.

e. Setting

Plaintiff contends that the settings of *Cream* and *Empire* support a finding that the two works are substantially similar. (Doc. No. 45 at ¶ 47(C).) Facts pled in a complaint demonstrating substantial similarity in the settings of the copyrighted work and the allegedly infringing work may support a finding that a plaintiff has stated a claim for copyright infringement. Tanikumi v. Walt Disney Co., 616 F. App'x 515, 521 (3d Cir. 2015). Plaintiff contends that "both 'Cream' and 'Empire' are based out of or derive its [sic] origin from, counterintuitively, Philadelphia, which is certainly not known as a hot spot in the recording industry." (Doc. No. 45 at ¶ 47(C).) Despite Plaintiff's contention, *Empire* is set in New York City, whereas *Cream* is based entirely in Philadelphia. Although Lucious and Cookie Lyon are originally from Philadelphia, representations of the city play out only in flashbacks showing their criminal past, and in a few scenes where Cookie re-visits the city after her release from prison. Philadelphia is not the setting of *Empire*. Thus, Plaintiff's contention that the two works share the same setting cannot be the basis for a claim of copyright infringement.

f. Dialogue

Last, Fox Defendants argue that Plaintiff cannot point to any similar dialogue between *Cream* and *Empire* to show substantial similarity. (Doc. No. 54 at 34.) Similar dialogue appearing in two works is commonly used to support a claim of copyright infringement. See, e.g., Jackson v. Booker, 465 F. App'x 163, 168 (3d Cir. 2012) (considering lack of similar dialogue in support of its finding of no substantial similarity between the copyrighted work and the allegedly infringing work). Lack of any similar dialogue in *Cream* and *Empire*, therefore, weighs in favor of the conclusion that it is not plausible that the two works are substantially similar.

In conclusion, in viewing the comparisons in the light most favorable to Plaintiff, it is evident that *Cream* and *Empire* contain dramatically different expressions of plot, characters, theme, mood, setting, dialogue, total concept, and overall feel. Consequently, this Court finds that *Empire* is not substantially similar to *Cream*. Plaintiff has not stated a claim for copyright infringement against Fox Defendants. Therefore, this claim, as asserted in Count I, will be dismissed.

B. Plaintiff Has Not Plausibly Alleged a Claim of Contributory Copyright Infringement Against Sharon Pinkenson and the Greater Philadelphia Film Office

Next, Plaintiff contends that Sharon Pinkenson and the Greater Philadelphia Film Office ("GPFO") committed contributory copyright infringement stemming from their organization of Philly Pitch,

where Plaintiff met Lee Daniels. (Doc. No. 45 at ¶¶ 57-64.) A party "who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'" Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 160 (3d Cir. 1984) (quoting Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)). To establish a claim of contributory infringement, a plaintiff must show: "(1) a third party directly infringed the plaintiff's copyright; (2) the defendant knew that the third party was directly infringing; and (3) the defendant materially contributed to or induced the infringement." Leonard v. Stemtech Int'l Inc., 834 F.3d 376, 387 (3d Cir. 2016).

Pinkenson and GPFO argue that Plaintiff's claim fails to satisfy all three elements of a contributory copyright infringement claim. (Doc. No. 53 at 12-15.) For reasons that follow, the Court agrees.

Considering the first element of a contributory copyright infringement claim, Pinkenson and GPFO argue that the contributory copyright infringement claim fails because Plaintiff has not pled plausible facts showing that a third party directly infringed on his copyrighted work. (Doc. No. 53 at 12.) In order to claim that a defendant is a contributory infringer, the plaintiff "must allege first, that he had registered copyrights that were infringed by a third party." Parker v. Google, Inc., 422 F. Supp. 2d 492, 499 (E.D. Pa. 2006), aff'd, 242 F. App'x 833, 837 (3d Cir. 2007). A claim of contributory infringement "cannot stand without plausible allegations of third-party direct infringement." Parker v. Yahoo!, Inc., No. 07-2757,

2008 WL 4410095, at *5 (E.D. Pa. Sept. 25, 2008) (citing Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005)). Because Plaintiff has failed to plead plausible facts showing that Fox Defendants directly infringed on his copyright of *Cream*, he cannot state a claim for contributory copyright infringement against Pinkenson and GPFO. For this reason alone, the contributory copyright infringement claim can be dismissed.

With respect to the second element of a contributory infringement claim, Pinkenson and GPFO argue that Plaintiff has not plausibly alleged facts showing that they had any knowledge of Fox Defendants' alleged direct infringement of *Cream*. (Doc. No. 53 at 14.) A plaintiff must allege facts showing that the defendant had knowledge of the third-party infringement. Leonard, 834 F.3d at 387. This knowledge requirement has been interpreted to include "both those with actual knowledge and those who have reason to know of direct

infringement."[8] Parker v. Google, 422 F. Supp. 2d at 499.

The SAC alleges that Pinkenson and GPFO "provided a venue" by hosting Philly Pitch, where Plaintiff met Daniels and discussed *Cream*. (Doc. No. 45 at ¶ 60.) It also asserts that Pinkenson and GPFO required each contestant to sign a release attesting that he was presenting an "authentic and genuine" work, but that the release was lacking because it "did not . . . protect those works from unauthorized use by the judges." (Doc. No. 45 at ¶ 33.)

These allegations, taken together, fail to show that Pinkenson or GPFO knew or had reason to know that Daniels or the other Fox Defendants allegedly would infringe on Plaintiff's copyright. The SAC is devoid of any facts which would raise an inference that Pinkenson or GPFO knew or would reasonably know

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[8] Defendants argue that the knowledge element of a contributory infringement cause of action requires actual knowledge, and that constructive knowledge is insufficient. Although Defendants are correct that the Third Circuit has never expressly held that anything short of actual knowledge is sufficient to state a claim for contributory copyright infringement, district courts within the Third Circuit have held that constructive knowledge is sufficient. See Parker v. Google, 422 F. Supp. 2d 492, 499 (E.D. Pa. 2006), aff'd, 242 F. App'x 833 (3d Cir. 2007) (the knowledge element includes "both those with actual knowledge and those who have reason to know of direct infringement"); see also Gordon v. Pearson Educ., Inc., 85 F. Supp. 3d 813, 818 (E.D. Pa. 2015) (citation omitted) ("The knowledge requirement has been interpreted to include both those with actual knowledge and those who have reason to know of direct infringement."). Therefore, this Court will analyze the knowledge requirement as including both actual and constructive knowledge.

that Daniels was or would later allegedly infringe on the *Cream* copyright. "Whether or not Pinkenson and GPFO knew Plaintiff spoke with Daniels at the event or gave Daniels the 'Cream Materials' is of no consequence because the pleading standard requires Plaintiff allege the Philadelphia Defendants' knowledge of the purported infringement." (Doc. No. 53 at 14.) In addition, the SAC's allegations regarding the releases, which guaranteed that each contestant's work was authentic, lends no support to Plaintiff's claims about Pinkenson or GPFOs' knowledge, either actual or constructive, of alleged third-party infringement.

Turning to the third element of a contributory infringement claim, Pinkenson and GPFO argue that Plaintiff has not plausibly alleged facts showing that they materially contributed to or induced the infringement. (Id. at 15.) A plaintiff must allege facts demonstrating the defendant's material contribution to or inducement of the third-party infringement. Leonard, 834 F.3d at 387. Material contribution or inducement is "personal conduct that encourages or assists the infringement." Gordon v. Pearson Educ., Inc., 85 F. Supp. 3d 813, 819 (E.D. Pa. 2015). The encouragement or assistance "must bear some direct relationship to the infringing acts, and the person rendering such assistance or giving such authorization must be acting in concert with the infringer." 3 Nimmer on Copyright § 12.04[A][3][a] (citing Parker v. Google, 422 F. Supp. 2d at 499); see also Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1171 (9th Cir. 2007) (explaining that "an actor may be contributorily liable . . . if the actor knowingly takes steps that are substantially certain to result in such direct infringement.").

For example, in Live Face on Web, LLC v. Control Group Media Co., a plaintiff which copyrighted "live face on web" packages that were used in conjunction with its proprietary software sued a licensee of its software for contributory copyright infringement. 150 F. Supp. 3d 489 (E.D. Pa. 2015). The plaintiff alleged that the licensee should be liable for contributory infringement because it provided the means for visitors to the licensee's website to download an unauthorized version of the plaintiff's copyrighted package. Id. However, the court found that the complaint failed to plead plausible facts showing material contribution. Id. at 499. It explained that "simple downloading of the [plaintiff's packages] onto a computer's RAM is not enough for contributory infringement." Id. This, the court explained, was similar to the "mere operation of a website business" and did not demonstrate encouragement or assistance to third-party infringement. Id.

Like Live Face on Web, LLC,, the SAC here is devoid of plausible facts showing material contribution. Rather, the SAC alleges only that Pinkenson and GPFO provided a forum where Plaintiff met Daniels. This is not sufficient to show material contribution or inducement. See Gordon, 85 F. Supp. 3d at 822 ("[M]erely supplying the means to accomplish infringing activity is not enough."); see also Wolk v. Khodak Imaging Network, Inc., 840 F. Supp. 2d 724, 750 (S.D.N.Y. 2012) (citation omitted) ("An allegation that a defendant merely provid[ed] the means to accomplish an infringing activity is insufficient to establish a claim for contributory copyright infringement."). Organizing an event where Plaintiff meets a third party, who several years later may have

directly infringed on Plaintiff's work, is not the type of affirmative conduct which gives rise to liability as a contributory infringer. Because the SAC does not plausibly allege direct infringement by Fox Defendants, or that Pinkenson or GPFO reasonably should have known of alleged infringing conduct, or materially contributed to or induced infringement of the *Cream* copyright, this claim fails. In sum, Plaintiff's contributory copyright infringement claim against Pinkenson and GPFO will be dismissed.

C. Plaintiff Has Not Plausibly Alleged a Claim of Negligence Against Sharon Pinkenson and the Greater Philadelphia Film Office

In Count III of the SAC, Plaintiff alleges a negligence claim against Pinkenson and GPFO in connection with Philly Pitch. (Doc. No. 45 at ¶¶ 65-70.) Specifically, Plaintiff alleges that Defendants "negligently failed to disclaim liability or otherwise warn participants of the dangers of unauthorized copying, and negligently failed to obtain appropriate guarantees and undertakings from the judges in order to protect the original work presented from any kind of misappropriation." (Id. at ¶ 69.) Defendants argue to the contrary that the state law negligence claim is preempted by the Copyright Act. (Doc. No. 53 at 18-21.) In addition, Defendants assert that Plaintiff has failed to plausibly allege facts showing negligence. (Id. at 21-22.)

1. Plaintiff's Negligence Claim is Preempted by the Copyright Act

Pinkenson and GPFO argue that Plaintiff's negligence claim is preempted by the Copyright Act.

(Id. at 18-21.) The Copyright Act expressly preempts all causes of action falling within its scope, with few exceptions. Dun v. Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197, 216-17 (3d Cir. 2002). Section 301(a) of the Copyright Act provides as follows:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a). This preemption provision "accomplishes the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims." Daboub v. Gibbons, 42 F.3d 285, 288 (5th Cir. 1995).

Courts have interpreted Section 301(a) to contain a two-step test. Id. Under this test, a state law claim will be preempted when "(1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102

and 103,[9] and (2) the claim seeks to vindicate legal or

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[9] Section 102 of the Copyright Act provides:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
>
> (2) musical works, including any accompanying words;
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> (3) dramatic works, including any accompanying music;
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> (4) pantomimes and choreographic works;
>
> (5) pictorial, graphic, and sculptural works;
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> (6) motion pictures and other audiovisual works;
>
> (7) sound recordings; and
>
> (8) architectural works.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102. In addition, Section 103 of the Copyright Act states:

> (a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106."[10] Briarpatch

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> (b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103.

[10] Section 106 of the Copyright Act provides:

> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004). The first prong of this test is called the "subject matter requirement," and indicates the subject matter of the state law claim must fall within the subject matter of the Copyright Act. Id. The second prong is referred to as the "general scope requirement," and focuses on whether the state law claim "include[s] any extra elements that made it qualitatively different from a copyright infringement claim." Id. Courts within the Third Circuit "take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim." See, e.g., Tegg Corp. v. Beckstrom Elec. Co., 650 F. Supp. 2d 413, 422 (W.D. Pa. 2008) (holding that civil conspiracy, tortious interference, and conversion claims were preempted by the Copyright Act).

Here, Plaintiff alleges a state law negligence claim and a contributory copyright infringement claim against Sharon Pinkenson and GPFO. (Doc. No. 45 at ¶¶ 65-70.) Under the two-step test, it is clear that the first element or the subject matter requirement is satisfied. *Cream*, the work allegedly infringed, falls within the scope of copyright protection. See 17 U.S.C. § 102. The second element, the general scope requirement, however, is contested.

As noted, this second requirement focuses on whether the state law claim includes an extra element

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> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

that makes it qualitatively different form the copyright infringement claims. Briarpatch Ltd., L.P., 373 F.3d at 305. Courts have held that state law negligence claims lack the "extra element" to avoid preemption. Parker v. Yahoo!, Inc., 2008 WL 4410095, at *6 (E.D. Pa. Sept. 25, 2008). A negligence claim under Pennsylvania law contains four elements: (1) a duty or obligation recognized by the law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting in harm to the plaintiff. Farabaugh v. Pennsylvania Turnpike Comm'n, 911 A.2d 1264, 1272-73 (Pa. 2006).

Here, Plaintiff's contributory copyright infringement claim alleges:

> 59. Plaintiff believes, and therefore, avers that Pinkenson and GPFO failed to institute proper safeguards and otherwise take appropriate measures [to] properly or adequately ensure that the original creations pitched by participants during GPFO's Philly Pitch Event in April 2008 would be protected from unauthorized copying or other misuse. In particular, but without limitation by specification, Pinkenson and GPFO failed to disclaim liability or otherwise warn participants of the dangers of authorized copying, and failed to obtain appropriate guarantees and undertakings from the judges in order to protect the original work presented from misappropriation.
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> 60. Furthermore, Plaintiff believes and, therefore, avers that Pinkenson and GPFO have

> contributorily infringed upon [Plaintiff's] copyright by materially facilitating the direct infringement committed by the Fox Defendants insofar as they provided the venue that led [Plaintiff] to Daniels and created an environment where [Plaintiff] was induced and encouraged to share the Cream materials with Daniels, and Daniels was thereby afforded an opportunity to obtain the Cream materials.

(Doc. No. 45 at ¶¶ 59, 60.) Plaintiff's contributory copyright infringement claim against Pinkenson and GPFO alleges that these Defendants "failed to institute proper safeguards and otherwise take appropriate measures to properly or adequately ensure that the original creations pitched by participants during GPFO's Philly Pitch Event in April 2008 would be protected from unauthorized copying or other misuse." (Id. at ¶ 59.) Similarly, Plaintiff's negligence claim alleges that Pinkenson and "had a duty to [Plaintiff] to take appropriate measures in order to safeguard his legitimate interests in the original works presented at the 2008 Philly Pitch Event, and to protect those works from misappropriation or misuse." (Id. at ¶ 66.)

Both the copyright claim and negligence claim allege that Pinkenson and GPFO should have, but did not, implement "appropriate measures" to "protect [Plaintiff's] original work . . . from any kind of misappropriation." (Id. at ¶¶ 59, 68-69.) The same allegations are used by Plaintiff to support both claims. The gist of Plaintiff's allegations in both claims is that Pinkenson and GPFO failed to protect Plaintiff's copyrighted work from misappropriation by the judges at Philly Pitch and therefore contributed to the alleged

infringement. "The grounds for the negligence claim are virtually the same as those for the contributory copyright infringement claim." (Doc. No. 53 at 20.) Moreover, both claims seek the same relief—"monetary damages in the form of lost profits and copyright infringement." (Doc. No. 45 at ¶¶ 63, 70.) In conclusion, Plaintiff's negligence claim against Pinkenson and GPFO covers the same subject matter as that governed by the Copyright Act and lacks any extra element to avoid preemption. Therefore, this claim will be dismissed.

2. Plaintiff Has Not Plausibly Alleged a Claim of Negligence

Next, Pinkenson and GPFO argue that Plaintiff has not plausibly alleged a claim of negligence in the SAC. (Doc. No. 53 at 21-22.) As discussed, under Pennsylvania law, the elements of negligence are: (1) a duty or obligation recognized by the law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting in harm to the plaintiff. Farabaugh v. Pennsylvania Turnpike Comm'n, 911 A.2d 1264, 1272-73 (Pa. 2006).

Here, Plaintiff contends that "Pinkenson and GPFO had a duty to [Plaintiff] to take appropriate measures in order to safeguard his legitimate interests in the original works presented at the 2008 Philly Pitch event, and to protect those works from misappropriation or misuse." (Doc. No. 45 at ¶ 66.) Plaintiff asserts that this duty arises from Pinkenson and GPFOs' "actions in establishing conditions (and encouraging participation)" in the event. (Doc. No. 57 at 30.) He also contends that this duty arises from the

releases which guaranteed that each contestant's work was authentic and genuine, and that Pinkenson and GPFO should have "protect[ed] those works from unauthorized use by judges or anyone else." (Doc. No. 45 at ¶ 33.) This argument, however, is unavailing. Plaintiff identifies no source of the alleged duty to prepare releases or protect his copyright from infringement by third parties. (See Doc. No. 53 at 22.) "Even if Plaintiff could identify such a duty, whatever duty Pinkenson and GPFO owed Plaintiff was no greater than Plaintiff's own duty to police his own copyright." (Id.) Additionally, this non-existent duty would not have extended to *Cream*, which was not pitched to the panel of judges, but rather was only discussed privately between Plaintiff and Daniels. (See Doc. No. 53, Ex. B.) Because Plaintiff has failed to plausibly allege that Pinkenson and GPFO owed him a duty to protect his copyright, this negligence claim will be dismissed.

D. Plaintiff Has Not Plausibly Alleged a Claim of Intentional Misrepresentation Against Lee Daniels

In Count IV of the SAC, Plaintiff asserts an intentional misrepresentation claim against Lee Daniels. (Doc. No. 45 at ¶¶ 71-75.) In defending against this claim, Daniels argues that Plaintiff has failed to plausibly allege facts showing intentional misrepresentation. (Doc. No. 54 at 43-45.) Daniels also submits that this state law claim is preempted by the Copyright Act.[11] (Id. at 42.)

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[11] Daniels argues that Plaintiff's state law claims of intentional and negligent misrepresentation must be dismissed because they

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are preempted by the Copyright Act. (Doc. No. 54 at 42.) As previously noted, the Copyright Act expressly preempts all causes of action falling within its scope, with few exceptions. Dun v. Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197, 216-17 (3d Cir. 2002). A claim will be preempted by Section 301 of the Copyright Act when (1) the subject matter of the claims falls within the subject matter of the Copyright Act, and (2) the asserted state law right is equivalent to those rights granted in Section 106 of the Copyright Act. Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004). The second part of this two-step test focuses on whether the state law claim "include[s] any extra elements that make it qualitatively different from a copyright infringement claim." Id.

In this case, Plaintiff raises a copyright infringement claim, a state law intentional misrepresentation claim, and a state law negligent misrepresentation claim against Daniels. (Doc. No. 45 at ¶¶ 42-56, 71-75.) Under the two-step test, the subject matter requirement is satisfied because Plaintiff alleges in all three causes of action that *Cream*, his copyrighted work, was infringed upon. However, the general scope requirement is contested.

As noted, the general scope requirement focuses on whether the state law claim includes an extra element that makes it qualitatively different from the copyright infringement claim. Briarpatch Ltd., L.P., 373 F.3d at 305. Under Pennsylvania law, to establish intentional misrepresentation, a plaintiff must show:

> (1) A representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Hanover Insurance Co. v. Ryan, 619 F. Supp. 2d 127, 141 (E.D. Pa. 2007) (quoting Heritage Surveyors & Engineers, Inc. v. National Penn Bank, 801 A.2d 1248, 1250-51 (Pa. 2002)).

Additionally, in Pennsylvania, the elements of a state law negligent misrepresentation claim are:

> (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

Weisblatt v. Minnesota Mut. Life Ins. Co., 4 F. Supp. 2d 371, 377 (E.D. Pa. 1998) (citing Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994)).

Generally speaking, "fraud or negligent misrepresentation claims are generally not preempted because they involve the element of a statement or misrepresentation that induced the plaintiff's reliance and caused damages not attributable to copyright infringement." Zito v. Steeplechase Films, Inc., 267 F. Supp. 2d 1022, 1027 (N.D. Cal. 2003). However, a fraud or intentional misrepresentation claim can be "disguised as a copyright infringement claim" if the sole basis of the fraud claim is that a defendant represented materials as his own. Seng-Tiong Ho v. Taflove, 648 F.3d 489, 502-03 (7th Cir. 2011) (citing 1 Nimmer & Nimmer § 1.01[B][1][e]). Here, Plaintiff alleges that the statement Daniels made to him at Philly Pitch was a misrepresentation. This extra element of a misrepresentation in both the intentional misrepresentation and negligent misrepresentation claims is absent from the copyright infringement claim. In addition, Plaintiff requests relief for "pain and humiliation" in these tort claims. This relief is not recoverable under the Copyright Act, which provides recovery for lost profits, injunctive relief, and attorney's fees. Therefore, these tort claims are not preempted by the Copyright Act. But this holding is not dispositive of Plaintiff's intentional and negligent misrepresentation claims because of the failure to assert an actual misrepresentation.

Daniels argues that Plaintiff has not stated a claim for intentional misrepresentation. (Doc. No. 54 at 43-45.) In Pennsylvania, the elements of an intentional misrepresentation claim are:

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) injury resulting [from] and proximately caused by the reliance.

Yakubov v. GEICO Gen. Ins. Co., No. 11-3082, 2011 WL 5075080, at *2 (E.D. Pa. Oct. 24, 2011) (quoting Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999)). These elements are equivalent to those of fraud. Square D Co. v. Scott Elec. Co., No. 06-0459, 2008 WL 2096890, at *2 (W.D. Pa. May 16, 2008). Therefore, the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply.[12] Id.

Daniels argues that Plaintiff's intentional misrepresentation claim fails because the SAC does not allege a misrepresentation of a past or present material fact. (Id.) "Although it is well-established that fraud consists of anything calculated to deceive, whether by

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[12] Federal Rule of Civil Procedure 9(b) provides:

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Fed. R. Civ. P. 9(b).

single act or combination . . . , it is equally clear that a promise to do something in the future and the failure to keep that promise, is *not* fraud." Greenberg v. Tomlin, 816 F. Supp. 1039, 1054 (E.D. Pa. 1993). Rather, stating a claim for fraud or intentional misrepresentation "requires that a misrepresentation of a past or present material fact be pleaded and proved." Id. (citations omitted). Although a statement of present intention which is false when uttered may constitute a misrepresentation of material fact, "non-performance does not by itself prove a lack of present intent." See Mellon Bank Corp. v. First Union Real Estate Equity and Mortg. Invs., 951 F.2d 1399, 1410-11 (3d Cir. 1991) (holding that First Union's repudiation of its promise not to prepay mortgages held by Mellon Bank was not evidence of fraud in the absence of evidence that First Union's original intent was not be abide by the original agreement).

For example, in KDH Electronic Systems, Inc. v. Curtis Tech., Ltd., which involved a contract dispute over development of a sonar system, the plaintiffs raised counterclaims alleging in part that the defendants should be liable under a theory of fraudulent misrepresentation for overstating market sales projections during contract negotiations. 826 F. Supp. 2d 782, 802-03 (E.D. Pa. 2010). The court, however, found that the defendants "merely provided predictions of future sales" and that the plaintiffs "had not alleged that [defendants] did not intend to meet those goals." Id. at 803. Such projections were not promises, nor were the projections misrepresentations

of past or present material facts, and thus the fraudulent misrepresentation claim was dismissed.[13]

Here, the SAC alleges "Daniels . . . affirmatively represented to [Plaintiff] that he was very interested in [*Cream*] and might well be disposed to proceed further with its development as a television soap opera series." (Doc. No. 45 at ¶ 72.) Daniels suggested that he might be interested in developing Plaintiff's work. (Doc. No. 45 at ¶ 72.) Daniel's statement is not a representation of a past fact. Moreover, the statement is not a misrepresentation of present fact because he did not guarantee at that point that *Cream* would be developed in the future. Most significantly, Daniels did not make any promise to Plaintiff. Simply because Daniels later changed his mind and lost interest in developing *Cream* does not mean that his statement was a

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[13] Pennsylvania's courts have reached similar conclusions. See Krause v. Great Lakes Holdings, Inc., 563 A.2d 1882, 1188 (Pa. 1989) (finding that the defendant's alleged oral representation that it would assume an obligation for another company's debt in return for a three-year moratorium on payments and the plaintiffs' forbearance from immediate legal action constituted a promise to do something in the future and was not a proper basis for a fraud action); see also Boyd v. Rockwood Area Sch. Dist., 907 A.2d 1157, 1170 (Pa. Commw. Ct. 2006) (holding that the alleged representation of a teachers' union president to employees of a school district who were considering early retirement that the school district would continue to provide the same health insurance coverage provided in the then-existing collective bargaining agreement until the employees reached the Medicare eligibility did not amount to a misrepresentation. It did not constitute fraud, especially since there was no evidence that the union president actually knew, or should have known, that there would be a change of health insurance coverage in the next collective bargaining agreement).

misrepresentation of a past or present material fact. See Mellon Bank Corp., 951 F.2d at 1411 ("Statements of intention made at the time of contracting are not fraudulent simply because of a later change of mind.").

Like the defendant's statement in KDH Electronic Systems, Inc., Daniel's statement that he "might well be disposed to proceed" in *Cream*'s development is not a misrepresentation of past or present material fact. Neither this statement nor anything else in the SAC alleges plausible facts showing a misrepresentation of a past or present material fact. See Krause v. Great Lakes Holdings, Inc., 563 A.2d 1182, 1187 (Pa. 1989). For this reason, Plaintiff's intentional misrepresentation claim against Daniels cannot be maintained.

E. Plaintiff Has Not Plausibly Alleged a Claim of Negligent Misrepresentation Against Lee Daniels

In Count V of the SAC, Plaintiff raises a negligent misrepresentation claim against Lee Daniels. (Doc. No. 45 at ¶¶ 71-75.) Daniels argues that Plaintiff has failed to plausibly allege facts showing negligent misrepresentation. (Doc. No. 54 at 43-45.) Moreover, Daniels asserts that the Copyright Act preempts this state law claim. (Id. at 42.)

Daniels argues that Plaintiff has not plausibly alleged a claim of negligent misrepresentation. (Id. at 43-45.) Under Pennsylvania law, the elements of negligent misrepresentation are:

> (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the

> misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

Azarchi-Steinhauser v. Protective Life Ins. Co., 629 F. Supp. 2d 495, 501 (E.D. Pa. 2009) (quoting Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994)). Further, "[a] negligent misrepresentation claim must be based on some duty owed by one party to another." Abdul-Rahman v. Chase Home Fin. Co., No. 13-5320, 2014 WL 3408564, at *5 (E.D. Pa. July 11, 2014) (citing Gibbs, 647 A.2d at 890).

Here, Plaintiff's allegations fail to state a claim for negligent misrepresentation for two reasons. First, the SAC fails to allege Daniels owed a duty to Plaintiff. Second, the SAC fails to plead facts demonstrating that Daniels made a misrepresentation of past or present material fact.

As previously discussed under the negligence claim, no duty on the part of Pinkenson or GPFO arose from their organization of Philly Pitch. The same applies here to Plaintiff's negligent misrepresentation claim against Daniels, one of the judges at the event. Nothing in the SAC demonstrates that Daniels owed a duty to Plaintiff. The SAC alleges that Plaintiff met Daniels at Philly Pitch and that they had a "private conversation" during which they discussed *Cream*. (Doc. No. 45 at ¶¶ 34-35.) This conversation, taken alone, does not establish a duty Daniels owed to Plaintiff in the

absence of any additional circumstances from which a duty could be inferred. See Bucci v. Wachovia Bank, N.A., 591 F. Supp. 2d 773, 783 (E.D. Pa. 2008) (no duty where the plaintiff failed to allege anything but an arms-length transaction with the defendant); see also Schnell v. Bank of New York Mellon, 828 F. Supp. 2d 798, 806 (finding that a mortgage lender acting in its financial interest did not owe a duty to a borrower). Since the SAC fails to allege a duty owed by Daniels to Plaintiff, this negligent misrepresentation claim must be dismissed.

In addition, as noted in the discussion of Plaintiff's intentional misrepresentation claim against Daniels, the SAC does not allege a misrepresentation of past or present material fact. Such a misrepresentation also is essential to state a claim of negligent misrepresentation. See Azarchi-Steinhauser, 629 F. Supp. 2d at 501 (listing "a material misrepresentation of material fact" as an element required to state a negligent misrepresentation claim). Rather, the SAC alleges that Daniels "affirmatively represented to [Plaintiff] that he was very interested in [*Cream*] and might well be disposed to proceed further with its development as a television soap opera series." (Doc. No. 45 at ¶ 72.) Under Pennsylvania law, however, promises to perform future acts are not misrepresentations unless the promise maker did not intend to fulfill the promise. Mellon Bank Corp., 951 F.2d at 1409-10. Daniels did not promise to Plaintiff to perform a future act. Daniels only suggested that he might be interested in developing Plaintiff's work. (Doc. No. 45 at ¶ 72.) He did not guarantee that development would happen. Nothing in the SAC, therefore, alleges

plausible facts showing a misrepresentation of past or present material fact.

Ultimately, the SAC offers nothing more than conclusory allegations and restatements of law, all of which are insufficient to plausibly state a claim of negligent misrepresentation. Because the SAC fails to allege facts showing that Daniels owed a duty to Plaintiff or that Daniels made a misrepresentation of past or present material fact, the negligent misrepresentation claim cannot be maintained.

F. Plaintiff Has Not Plausibly Alleged a Claim of Contributory Copyright Infringement Against Leah Daniels-Butler

Plaintiff's final claim is that Leah Daniels-Butler committed contributory copyright infringement by assisting her brother, Lee Daniels, in the production of *Empire*. (Doc. No. 45 at ¶¶ 79-86). As noted, to state a claim for contributory copyright infringement, a plaintiff must plead facts showing: "(1) a third party directly infringed the plaintiff's copyright; (2) the defendant knew that the third party was directly infringing; and (3) the defendant materially contributed to or induced the infringement." Leonard v. Stemtech Int'l Inc., 834 F.3d 376, 387 (3d Cir. 2016).

Daniels-Butler argues that Plaintiff fails to plead plausible facts to state a claim for contributory copyright infringement. (Doc. No. 54 at 39-40.) This Court agrees.

Plaintiff contends that the SAC contains facts stating a claim for direct copyright infringement against Fox Defendants. (Doc. No. 60 at 30.) A claim of contributory infringement "cannot stand without

plausible allegations of third-party direct infringement." Parker v. Yahoo!, Inc., 2008 WL 4410095, at *5 (E.D. Pa. Sept. 25, 2008) (citing Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005)). As discussed above, Plaintiff has not pled plausible facts alleging a claim for direct copyright infringement against Fox Defendants. Because Plaintiff has failed to plead such facts showing that Fox Defendants directly infringed on his copyright of *Cream*, he cannot state a claim for contributory copyright infringement against Daniels-Butler. For this reason alone, this contributory copyright infringement claim will be dismissed.[14]

---

[14] Plaintiff requested that he be granted leave to further amend the SAC. (Doc. No. 60 at 48.) Federal Rule of Civil Procedure 15(a) provides that "leave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility. In re Burlington Securities Litigation, 114 F.3d 1410, 1434 (3d Cir. 1997). For example, "a district court need not grant leave to amend a complaint if 'the complaint, as amended, would fail to state a claim upon which relief could be granted.'" Kundratic v. Thomas, 407 F. App'x 625, 630 (3d Cir. 2011) (quoting Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000)).

After reviewing the procedural history of this case, it is clear that allowing Plaintiff to amend his complaint once again would be futile. On January 8, 2016, Plaintiff initiated this action. (Doc. No. 1.) He filed an Amended Complaint on January 29, 2016. (Doc. No. 3.) On June 17, 2016, Defendants filed two Motions to Dismiss the Amended Complaint. (Doc. Nos. 21, 25). The Court held a hearing on Defendants' Motions to Dismiss on June 2, 2016. (Doc. Nos. 41-42.) At the hearing, this Court afforded Plaintiff with another opportunity to amend the Amended Complaint. On August 1, 2016, Plaintiff filed a Second Amended Complaint ("SAC"). (Doc. No. 45.)

V. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss (Doc. Nos. 53-54) will be granted in the entirety. An appropriate Order follows.

Upon the filing of the SAC, the Court denied Defendants' pending Motions to Dismiss without prejudice as moot. (Doc. No. 46.)

On September 30, 2016, Defendants filed two Motions to Dismiss the SAC. (Doc. Nos. 53-54.) Plaintiff filed Responses in Opposition on October 30, 2016. (Doc. Nos. 57-60.) On November 14, 2016, Defendants filed Replies. (Doc. Nos. 62-63.) This Court held a hearing on the Motions to Dismiss the SAC. (See Doc. No. 69.) At the hearing, the Court granted the parties leave to file supplemental briefs. (Id.) On March 27, 2017, Plaintiff and Defendants filed supplemental briefs on the Motions to Dismiss. (See Doc. Nos. 80-84.) Thus, at this point, there has been not one, but two rounds of motions practice and oral argument on Defendants' Motions to Dismiss. Plaintiff has filed three different complaints in this action, and has had two opportunities to amend the Complaint. Further amendment will not cure the defects in the claims raised. Consequently, amending the SAC again would be futile and leave to amend will not be granted.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 16-0081

[Filed April 28, 2017]

CLAYTON PRINCE TANKSLEY,	)
	)
Plaintiff,	)
	)
v.	)
	)
LEE DANIELS, et al.,	)
	)
Defendants.	)
	)

ORDER

AND NOW, this 28th day of April 2017, upon consideration of Defendants' Motions to Dismiss (Doc. Nos. 53-54), Plaintiff's Responses in Opposition (Doc. Nos. 57-60), Defendants' Replies (Doc. Nos. 62-64), arguments made by counsel for the parties at the hearings held on the Motions to Dismiss (See Doc. No. 69), Defendants' Supplemental Briefs (Doc. Nos. 80-81), Plaintiff's Supplemental Briefs (Doc. Nos. 82-84), and in accordance with the Opinion issued this day, it is **ORDERED** that Defendants' Motions to Dismiss (Doc. Nos. 53-54) are **GRANTED**. It is **FURTHER ORDERED** that the Clerk of Court shall close this case for statistical purposes.

BY THE COURT:

/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL NO. 16-81

[Dated January 31, 2017]

CLAYTON PRINCE TANKSLEY.,	)
	)
Plaintiff	)
	)
v.	)
	)
LEE DANIELS, et al.,	)
	)
Defendant	)
	)

Philadelphia, Pennsylvania
January 31, 2017
2:15 p.m.

- - -

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOEL H. SLOMSKY
UNITED STATES DISTRICT JUDGE

- - -

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Proceedings recorded by electronic sound recording; transcript produced by computer-aided transcription service.

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(The following was heard in open court at 2:15 p.m.)

THE COURT: Please be seated.

ALL: Good afternoon, Your Honor.

THE COURT: Good afternoon, everyone. This is the case of Clayton Prince Tanksley versus Lee Daniels, et al. And this is our third hearing, so I notice in court we have Mary Bogan, Esquire and Predrag Filipovic representing the plaintiff. And let's see, on behalf of the defendants, we have Andrew Thomas, who is here representing what we call the Fox defendants. We have Charles Golden and Rigel Farr representing I think it's Pinkenson and the Greater Philadelphia Film Office. And --

MR. TWERSKY: Michael Twersky, Your Honor, also --

THE COURT: -- Michael Twersky.

MR. TWERSKY: -- for the Fox defendants.

THE COURT: And Richard Stone represent --

MR. STONE: Good afternoon, Your Honor.

THE COURT: Okay. So we have all defendants represented?

MR. STONE: Yes, Your Honor.

THE COURT: All right. And my recollection, at least after reviewing the file and

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my notes, is that we may have been at a point in the middle of Ms. Burrows' arguments?

MR. STONE: Bogan, Your Honor.

THE COURT: I'm sorry, Ms. Bogan's argument. And I said I'd give everybody a chance to speak. We did have some other issues outstanding regarding the state law claims --

MR. STONE: That's right, Your Honor.

THE COURT: -- and preemption.

MR. STONE: Yes, Your Honor.

THE COURT: And I know that defendant Lee Daniels Butler is also charged with contributory copyright infringement, and we hadn't heard any argument about her.

MR. STONE: Right, Your Honor. My recollection from the last hearing is that we were going to go through the substantial similarity, including rebuttal, and we were then going to shift over to the state law claims with Mr. Thomas --

THE COURT: Okay.

MR. STONE: -- tackling those.

THE COURT: So in terms of substantial similarity, we are at -- you're in the middle of your argument?

MS. BOGAN: That is correct, Your Honor.

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THE COURT: All right, you may continue.

MR. STONE: Your Honor, if I may? I'm sorry.

THE COURT: Yes?

MR. STONE: One preliminary matter to take up regarding the video clips. They've now submitted a list of their clips and we've submitted a list of our clips, all of which may or may not be --

THE COURT: So we're going to see videos today?

MR. STONE: We may have dueling videos, yes, Your Honor.

THE COURT: Oh, okay.

MR. STONE: But I just have one request. Several of their clips are not part of the copyrighted work. They are from YouTube postings apparently and I would only --

THE COURT: Wait, I'm sorry. They're from what?

MR. STONE: YouTube postings, YouTube videos.

THE COURT: You can remain -- you can remain seated if you want. Go ahead.

MR. STONE: It seems --

THE COURT: That's all right.

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MR. STONE: -- alien to me to do so, but I'll try, Your Honor. We have clips that they intend to show I believe, assuming they show them, that are not part of the copyrighted works that were registered. So I would just ask that when they play those clips they make a disclosure so Your Honor understands what is actually part of the copyrighted works versus what is not. And then we can argue separately about the --

THE COURT: Okay.

MR. STONE: -- import of those.

THE COURT: Were these video clips, like the video of "Cream," exposed to Mr. Daniels or made available to Mr. Daniels?

MR. FILIPOVIC: Yes, Your Honor, they were made available to Mr. Daniels. (Indiscernible) is correct that they weren't submitted with the initial submission to the Copyright Office. However, those video clips, as alleged in our complaint, have been made available to Mr. Daniels via Lee Butler Daniels, which was another reason for her inclusion. And it occurred via her friendship of Facebook with the plaintiff, and that was the only -- the content was only available to friends of --

THE COURT: And these are referred to in

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the complaint?

MR. FILIPOVIC: Yes.

THE COURT: Now, I don't know whether these are protected or not protected, but I'm sure we'll sort that out at some point.

MR. STONE: Yeah, my only --

MR. FILIPOVIC: Yes, sir.

MR. STONE: -- point, Your Honor, is for the -- so that we avoid confusion, that there be a disclosure before clips are shown that are outside the copyrighted works. And obviously we can take up later --

THE COURT: Okay.

MR. STONE: -- the legal effect of that.

MS. BOGAN: Your Honor, if I -- if I may? We'll certain disclose those clips that were not on the registered copyright. And there is an issue with respect to what they -- the defendants have produced, as they call it, their video list. Just to be forthright with the Court, Your Honor, you indicated in our last hearing on January 12th that we were -- that the defendants were supposed to disclose and we were supposed to exchange our video clips that we are going to show here today, as well as the prior video clips that they showed when they didn't disclose that

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to us on the January 12th hearing. However, defendants have only provided us, the plaintiff, with video -- a video list with video codes of where their clips are. They have no provided us with the actual video they're going to show. That's number one.

THE COURT: Have you been able to figure out --

MS. BOGAN: We have --

THE COURT: -- how to (indiscernible)?

MS. BOGAN: Well, Your Honor, they gave it to us on Friday and we have disclosed to the defendants our full videos that we intended to show.

THE COURT: Okay.

MS. BOGAN: They still haven't given us the video that they showed on the 12th of January.

THE COURT: But the list that you have, it's not hard to figure out from the list, I take it, what the clips are.

MS. BOGAN: Mr. Filipovic is going to address this.

MR. FILIPOVIC: Your Honor, I will. And it's -- it may be a -- it's a waste of time on our end. We see nothing but it is an underhanded move and it's directly contrary to Your Honor's words, which were at the last hearing to exchange the

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videos. If they want to submit to the Court the same codes that they submitted to us, we have no issue with

that. But we do want to point out that the videos themselves were never showed. It's not quite the same thing, Your Honor.

MR. STONE: So, Your Honor -- so what happened is --

THE COURT: Wait, wait, wait. You haven't answered my question. My question is from the list you've given, have you been able to determine what the videos are referred -- which videos are referred to?

MR. FILIPOVIC: And we will only find that out when we see it today in court, Your Honor. We think so. Yes, we think so. We did --

MS. BOGAN: We did. We did go through it, but --

MR. FILIPOVIC: But we're not sure.

MS. BOGAN: -- we haven't recreated their video for them. That's their -- that's their obligation to provide us with their video. We haven't recreated -- although we've looked at it, we haven't recreated it on the DVD so we know exactly what they're showing here today is in compliance with what they indicated in the list.

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THE COURT: Oh. Can they tell exactly what the --

MR. STONE: Yes, Your Honor, what we did is we suggested an exchange on January 24th. We never heard anything. On January 24th, they suggested an exchange. Yesterday, we explained we were going to be on a plane, so we ended up -- we heard nothing further so we provided a detailed list which has a description of the clips and the time stamp from the "Cream" DVD

and the time stamp from the "Empire" DVDs, which they have. And so we provided that to them Friday. We never heard anything further. If they wanted a DVD, they could have asked for one, but we've certainly provided a list which detailed the description of the --

THE COURT: Okay.

MR. STONE: -- scenes.

MS. BOGAN: We did, Your Honor --

THE COURT: Okay.

MS. BOGAN: Just for the record, we did ask for the video. I -- and by the way, we also sent emails indicating that we were not going to be able to provide by the 24th and we were going to provide by -- or by the 27th, we would provide by the 30th. We communicated that in advance. And we also -- when

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we got their list, I emailed them and said we still haven't gotten your video clips in an email. So they were well aware of it, and we still haven't gotten their video -- their video.

THE COURT: All right. Well, let's see how it goes today, okay?

MS. BOGAN: Okay.

THE COURT: All right. I'll hear from you.

(Pause in proceedings.)

MS. BOGAN: Okay, Your Honor. I'm going to just highlight for the Court plaintiff's position with respect

to what the proper standard and analysis for this Court to apply in the motion to dismiss standard. Though I argued that previously on the 12th, I did not complete all my argument because of the time limitation. So there are a couple of items I want to point out.

It is our position, as I said previously, that the motion to dismiss standard, which is what we're here for, should be applied and not a side by side comparison. As you know, the Court is well aware, there are two required elements to make the claim for copyright infringement ownership of the copyright and copying by the defendant. Proof of ownership need be established by attaching a copy of

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the Copyright Office registration, which was done here. And a complaint based on copyright infringement must allege which specific works are the subject of the copyright claim, the ownership of the copyrights in those works, registration of the works in question with the Copyright Office in accordance with 17 U.S.C. Section 101, and, you know, four, by what acts the defendant infringed the copyright.

In our case the second amended complaint has sufficient factual content that permits the Court to draw reasonable inferences that the defendants are liable for the alleged misconduct. Plaintiff's second amended complaint sustains the burden of saving a claim for copyright infringement. Because plaintiff has ownership of a registered copyright, which was filed on September 23rd of 2005, number PAU3022354, and plaintiff has pled copying by the defendants in paragraph 46 of the second amended complaint. This is

demonstrated by showing, as we pled, access and substantial similarities between the work "Cream" and "Empire," and that the infringing work was placed in the marketplace, as we pled in paragraph 37.

So if the well-pleaded facts do not permit the Court infer more than the mere possibility of

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misconduct, the complaint has alleged that it has not shown that the pleader is entitled to relief. And that's the Fowler case quote Iqbal, 556 U.S. at 679.

At this stage the plaintiff need not establish all of the elements for a prima facie case, but need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of the necessary element. The plausibility determination is a context specific task requiring the Court to draw on its judicial experience and common sense.

So applying all of that, which is the proper standard for a motion to dismiss, which is where we are -- we're not in summary judgment, we're not in a PI. The second amended complaint clearly contains factual allegations that provide notice to the defendants as to the basis of plaintiff's claims, alleges facts that are detailed clearly above mere speculation, and that there are well-pleaded facts, as -- just like Your Honor did in the Visuals, Unlimited versus Pearson Education case, this Court must then assume their veracity and then determine that they plausibly give rise to an entitlement to relief.

Here, the second amended complaint contains

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more than an unadorned "the defendant unlawfully harmed me" accusations, and, again, quoting Iqbal. This Court should not be engaging --

THE COURT: Let me ask a question.

MS. BOGAN: Yes?

THE COURT: You said I should take into account veracity at the -- at the motion to dismiss stage?

MS. BOGAN: You assume that what we have pled is true.

THE COURT: Oh, okay.

MS. BOGAN: Correct. The Court should not be engaging in the side by side comparison. I'm going to give you four reasons as to why. The first is this is -- there's well-established precedent, which I mentioned in the last hearing on January 12th, that at the motion to dismiss stage, not motion for summary judgment -- that's not where we are, or preliminary injunction -- that this Court must not do so. And I quote Minority versus Prudential Insurance case, as well as your own case, Your Honor, Visual, Unlimited versus Pearson Education. In that case you did that. You applied the motion to dismiss standard on a copyright infringement matter.

Number two, district courts in this circuit

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are reluctant to engage in a side by side comparison when the works are conflicts in nature, like computer programs or codes. They don't do it. It's too complex,

similarly, as we have these works which are very complex.

District courts -- number three, district courts have found that unless the first step of the two step test is met -- I'm speaking about proving copyright infringement -- the Court should not engage in the second -- in the second step. So here, defendants have not even conceded the issue of access. In fact, what they have done is they say well, we're not going to address access now and we'll challenge that issue at another time.

Well, I'm suggesting, Your Honor, that in order for this Court to even consider engaging in what's going on here, that you've got to say -- you've got to make a determination and they've got to dispute it, which they haven't even done here, that access has been established.

THE COURT: Well, you've alleged that in the complaint.

MS. BOGAN: Correct. That is correct, Your Honor. But to go to a side by side analysis, which is what they've briefed, and then they said in their

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briefs but we're not going to talk about access right now. They've got to challenge access now, and if we're going to go to this kind of analysis at this stage in a motion to dismiss, you've got to -- you've got to at least challenge access and then you've got to make a finding as to whether or not access is even met.

THE COURT: Well, let's assume there's the three elements to a copyright infringement: register copyright, access, and infringement. They can -- they don't have to challenge every element at this point. They can wait until summary judgment to challenge an element.

MS. BOGAN: Then -- that's correct, Your Honor. So if they're not going to challenge access, then we don't do a side by side comparison, which is what is going on here.

THE COURT: Why -- that's another element.

MS. BOGAN: It's not appropriate with a motion to dismiss, Your Honor. We're not here on a motion for summary judgment. All of the cases in the district court in this circuit do not engage in a side by side analysis at a motion to dismiss stage, and those are the distinctions that I just read to you. Unless your computer code -- even they

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recognized the computer code case on a motion to dismiss, the Kumar case, they won't do it. They won't go there because the complexity.

THE COURT: All right, I'll --

MS. BOGAN: So --

THE COURT: I'll have to take a look at that and I'll take a look at the cases. I thought in order to make a decision as to whether or not, preliminarily, there is substantial similarity, I've got to put these side by side.

MS. BOGAN: That's not how I understand -- and I have -- I have studied the cases in the last week and a half, Your Honor, since we last met here, and I had an understanding before it, but I have a greater understanding, and that's what I'm trying to communicate --

THE COURT: All right. I'll --

MS. BOGAN: -- and make clear for the record.

THE COURT: Like I said earlier, I'll give the parties the opportunity to submit a supplemental brief.

MS. BOGAN: I understand. I am just stating it for Your Honor --

THE COURT: Okay.

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MS. BOGAN: -- and I -- and we feel strongly. This is a motion to dismiss. The cases in these -- in this court, in the district court, and in the circuit court, there are no cases that deal with at a motion to dismiss stage these type of complex works going a side by side comparison.

THE COURT: Okay.

MS. BOGAN: Okay? THE COURT: The fourth reason is, and this is very important, Your Honor, that the defendants are not even telling this Court what their test is that they're asking you to apply. You've asked repeatedly. You asked the last hearing, you asked in the hearing with Ms. Burrows in June, June 2nd. And you asked what test do I apply? And Ms. Burrows, on page 14 and 16 of the June 2nd hearing

transcript said -- doesn't tell you what the test is after you asked that question. And, interestingly, nor does Mr. Stone in the last January 12th hearing specifically state the test that they want the Court to apply. They make a reference about an extrinsic view. They make a reference about one case. But they don't come out and say what they're trying to do, which is to have different circuit's law applied in this circuit, the Third Circuit. They have -- they're trying to use either the Ninth

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Circuit, the Second Circuit, whatever circuit, not this circuit's law. And that's not appropriate.

In fact, what the defendants are arguing, they're arguing incorrect analysis by offering proof of the substantial similarity comparison through their suggested analytic dissection, which is what I raised last hearing. They're using this improper analytic dissection as their -- as their ordinary lay observer test to determine unlawful appropriation.

The point is is that defendants are conducting an improper analysis since this is the analysis of that -- of an expert witness, okay? You don't use these type of dissection analysis clips, video clips, unless you have an expert. That's why you have an expert. That's what an expert witness if for for a copyright case. If we were at a -- if we were at a trial, that would be appropriate. So what we're doing here is not appropriate in terms of looking at these snippets because the ordinary lay observer, which is the jury, Your Honor, looks at the works from the beginning to the end, the beginning to the end. That's what should be done here. These works should properly be in front of the ordinary lay observer,

the jury, where they could compare side by side the entire works, not these snippets.

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Requiring plaintiff now to engage in a substantially similar analysis, a side by side comparison, under all of these considerations and precedent that exist both in this court and the Third Circuit places too high a standard on plaintiff at this stage of the pleadings.

(Pause in proceedings.)

MS. BOGAN: So with that said, Your Honor, we are prepared to go through the substantial similarity analysis with a full objection to it, and I've stated why. So I'm going to continue with that. We feel strongly about our work. I know that Mr. Tanksley created this work and I know it was infringed by "Empire."

Contrary to Mr. Stone's suggestion, I'm going to refer back to the January 12th Transcript, Your Honor, because Mr. Stone made some statements that have to be clarified, and I'm going to go through those. I'm going to clear those up right now.

The first is that, as mentioned, plaintiffs don't agree with a side by side comparison. Secondly, the plaintiffs don't concede, unlike what Mr. Stone said, that plaintiff's story of an African-American male running a Hip Hop record label is a

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generic idea. Third, the elements of plot, sequence of events, character, mood, and the actual expression is not completely dissimilar. In fact, the complete

opposite of what Mr. Stone argued when examined is true.

So let's take a closer look. He talked about the plot. He went on about the plot and how it was so different because the nature of the relationships and the ultimate consequences ended up in a different place. Well, in "Cream," the driving plots that have been created by my client are expressed in a strikingly substantially similar matter in "Empire" throughout the "Empire" series.

There are layers of unique expression created by Mr. Tanksley's work that permeate throughout "Empire." In every soap opera -- and by the way, as you know, I mentioned this in my June hear -- the June hearing, that Mr. Tanksley was in two soap operas, "Another World" and "Ryan's Hope." He was -- he acted in those soap operas. He's very, very familiar personally on how to act and how it's operated and what the plot lines are and how the whole soap opera story goes. And what he did in "Cream" -- and this is very important for you to understand, Your Honor, is that there's always an A

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plot, or a major, major plot that permeates throughout the work, a storyline that drives the entire series. And in here, that A plot line is the African-American male leads that have an incurable disease, okay? Winston with Herpes, Lucious with, initially, ALS -- that falls in the beginning of both works.

This is important because Mr. Stone argued that the sequence of events are different. But, in fact, what's critical is that that disease, the understanding that

they have a disease, happens both in the beginning of both works. It's not that "Empire" shows Lucious, having an incurable disease, let's just (indiscernible) in the second season. No, they do it right in the front, just like -- just like in "Cream." And they have this -- they learn of this incurable disease by a female, white doctor. So there's layers of similarities.

This all happens, all this understanding about this disease happens before Brenda comes back into his life, just like before Cookie comes back into Lucious' life. So the sequence of events on the disease and when they find out, this is critical in terms of understanding the overall sequence of events and how the storyline, the A storyline plays out.

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Our position is the A storyline is always about the main characters. Here, it's about Winston, Lucious, Brenda, Cookie. But what happens to them? They are the -- they're the building blocks. Everything else around is a B and a C storey line, and I'll talk more about that, okay?

Both male leads, who we've already talked about, whose origins are from Philadelphia -- we'll talk more about that -- who have 100 percent control of that Hip Hop label record company, and what happens is they are in total control on the beginning of both -- of both works. They have their 100 percent ownership, they've got their -- they've got their stuff going on, they've got their mojo going on, they've got -- you know, they're dressing well, they got the whole thing.

All of a sudden, it starts to unravel. When he finds out he has an incurable disease things start to unravel

around him. You see him lose himself. He starts to worry about his disease. We're going to show that in some of the clips. And then what happens? His significant other, who's no longer in -- hasn't been in the picture, comes back. And then that starts to unravel. You see his life start to unravel, you see his relationships with his

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family start to unravel, you see him lose potentially his one big thing he did, which is the record label that he built. And it all starts to unravel. And that's the sequence of event that you have throughout both works. It's an override -- it's an overriding plot about those two main characters.

In addition, you have, as I was saying, they dress the same, their hair straight, the attitude, they both have criminal backgrounds. Because of this incurable disease, they now, as I said, can't control their health. They start to unravel. You see Winston and Lucious both lie about their health and their illness, contrary to what Mr. Stone said, on page 20, lines 11 through 12 at the last hearing of January where he said Lucious doesn't lie about his disease. Well, we're going to show otherwise.

You see Lucious and Winston act out in a more violent manner because they're losing their self of who they are. This was the creativity and the context that Mr. Tanksley put and ascribed to Winston. Not only do we have all of the outside characters the same, we got the internal stuff going on. And he carries this through the storyline, as does "Empire." They both become violent, yes.

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They're both interestingly involved in a murder in the same setting, that famous urination scene, and we'll get to that.

You see Lucious, just like Winston, have promiscuous sexual encounters throughout "Empire" that are filmed and created in a very graphic style. And why is that important? It's important because, Your Honor, you never see -- you've never seen this type of graphic sexual encounters on network TV before. My client created this knowing that it was -- it was pushing the envelope. The themes, the characters, they all push the envelope. And that's what makes it so uniquely his expression. You don't see this type of sexual encounters, which we're going to show, it's novel, it's unique, and it's an expression of my client's creativity. You certainly don't see that on any African-American drama. I can't even think of any -- I mean any white drama that you see this kind of sex on, and that's the point. And "Empire" has it. And we're going to show it.

Not only that, there's tons of promiscuity by Lucious that we didn't even show. There's a -- there's a scene with a reporter where he has sex on the couch. I mean there's a ton of -- there's tons

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of it. But this -- the point is this unraveling, loss of one's self themed storyline is throughout "Cream," and just like "Cream," seen throughout "Empire." This storyline works, is seen in the sequence of events that I just told you about.

As I mentioned, we have Brenda showing up from Winston's past now causing family turmoil, using her children against Winston, causing family drama, power struggles, igniting a struggle for control of exactly 50 percent of the record label. And just like Brenda, Cookie, who has had children with Lucious, has a drug past from Philadelphia, dresses sassy, okay?

I'm getting to the glitter and the glitz difference that Mr. Stone suggests -- or his fabricated differences rather showing -- you have Cookie showing up from Lucious' past now causing family turmoil, using her children against Lucious, causing family drama, power struggles, igniting a struggle for exactly 50 percent of the company.

These plots, these storylines, themes, characters, Winston, Lucious, Brenda, Cookie, as the main storyline that -- a storyline that's beyond substantial similarity is the male lead's life becomes out of control and he's the most vulnerable

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when he has the most to lose, his record label, becomes up for grabs. And you see that.

There are B storylines that I had mentioned previously, and there's C storylines that both appear in "Cream" and appear in "Empire," like the paternity and the mental health. I mean I don't even have to go -- it's enough with what I already gave you under the law to find that they infringed. But we're going to go deeper. We're going to go into the B and the C storylines, the paternity and the mental health, okay?

This is all the storylines that drive the plot. It drives the sequence of events. "Empire" -- the point is that "Empire" is not sufficiently original and contains only, if any, trivial variations. Mr. Tanksley's formula and unique creation, the Fox defendants really only changed slightly -- they slightly changed things in the scheme of what the creative work is actually has been -- what has actually been created.

Now, I'm going to got through Mr. Stone's fabricated differences that he made at the last hearing. This is my rebuttal. I'm going to start by saying he stated incorrectly that there's all this leverage that Cookie shows in "Empire" that

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supposedly she has against Lucious. But in "Cream," it clearly shows that Brenda is co-conspiring with Winston's father, Sammy, to use her leverage in getting 50 percent of the company to Sammy so Brenda could get her children back. And, ultimately, Brenda's goal is to take the company, that 50 percent, herself. And that's shown in one of the clips that we have prepared for you, Your Honor.

So the fact that Mr. Stone suggested -- or tries to suggest, in my opinion, is a fabricated difference, that there's no leverage that is shown in "Cream," and you have to look -- and this is important, Your Honor -- you have to look at the original work. You have to look at Mr. Tanksley's work when doing comparison. It's not "Empire" -- what has "Empire" done that "Cream" doesn't have? That was also a fabricated difference, an argument. That's not the law. The law is my client went and got a registered copyright. He did what he

was supposed to do well in advance before "Empire." So let's look at what Mr. Tanksley created. And one of those things are the leverage and the co-conspiring that we see that Brenda does with Sammy, Winston's father.

Mr. Stone, also, on page 48, lines two to

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four, made a comment -- correction. Before I get to that. The fact that the criminal past comes back to haunt Lucious is not in "Cream." They're making -- and I say that there's no hunting of Winston with his criminal background or his criminal past. They're making a huge assumption, and it's an incorrect assumption, that Winston has no criminal past. Clearly, as you see in "Cream," Winston uses a gun, he's familiar with the gun, he's -- you don't see Winston in "Cream" running and going to the store trying to buy a gun or trying to get a gun off of somebody else. He has a gun. He uses it. No issues with that.

Now, referring back to Mr. Stone's fabricated difference with respect to the fact that "Empire" he says has no PSAs or anything like a PSA, which is public service announcement, like "Cream" does. Your Honor, on page 48, lines two to four, the last hearing on January 12th, Mr. Stone said that the "Cream" -- in "Cream" the characters step out of their characters and that doesn't happen -- he says that doesn't happen in "Empire." However, we've said all along that "Empire" has taken the PSA style of both how they film, how they produce, and the topics they use. And what do they do? They talk about an

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almost entire episode about mental health, bipolar, and they make it all about the whole issue and cause. And he said that it's not altruistic, there's nothing altruistic with what they do in "Empire" with the -- with the mental health bipolar.

Well, guess what. Yes, it actually is. You're incorrect. There's a lot of altruistic things about doing a PSA, or a public announcement, or doing an entire -- at the time they had a fundraising -- it was in his speech -- fundraising efforts about mental health and bipolar. There's something very altruistic about doing that, and just like there is about doing a PSA, which was done in "Cream."

What is key here, and we're going to show this as well, Your Honor, is that Mr. Stone incorrectly states that there is no stepping out of character in "Empire," but here, Your Honor, one of the things they didn't show you in the last hearing when they showed their video clip, the one of the supposed episode about the mental health and the bipolar is that they failed to show you the whole clip, Your Honor. So what they did was they showed you only part of the clip and what they didn't include was -- there is a scene, which we have for Your Honor, where you see Andre straight on. So

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there's something in the film industry when you're doing filming that is called the fourth wall, Your Honor. So you have on your film -- you usually film from this side, this side, the back. You rarely do a direct right on with the camera. That's called the

fourth wall. And that's what my client did in "Cream." He had the fourth wall when he did his public service announcements.

THE COURT: Are you going to play videos?

MS. BOGAN: We will play them. I'll get there.

THE COURT: All right.

MS. BOGAN: I will get there. And you will see it. And I'll show you that point I want to make. But the point is is that they break the fourth wall in what they didn't show you, and I'll go through that again. I'm going to go through it.

Also, the paternity. Defendants fabricated difference about the nature and consequences are completely different. They say this leads to Lucious and Jamaal being closer, whereas in "Cream," the issue of the paternity, which is the B storyline, they say well -- in "Empire," Lucious and Jamaal got real close, but in "Cream," it was fracturing. Well, the reality is that they're not being truthful, Your

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Honor.

The truth of the matter is that it fractured the family, and you'll see that. You'll see that in the video clip that we show here today. And the only reason that Lucious and Jamaal got close was because Jamaal, who is gay, stood up and showed that he was acting "like a man," that Lucious later saw, and they -- Jamaal then turned around and realized that his -- oh, my dad is actually -- he's actually standing up for me. He understands.

So the reasoning -- the point is that the reason that Mr. Stone is alleging that they got close due to the paternity issue is not correct. That's a fabricated difference, because it was another reason.

The setting. I'm going to talk about the setting and I'm going to show you the clips. Defendants state, there's no dispute, that the settings are different, "Empire" in New York and "Cream" in Philadelphia, and that's not exactly true, Your Honor. As a matter of fact, it's a fabricated difference.

While plaintiff states that yes, Philly is not typically known as the hub of a music town, he twists -- defendants twist that point in the last hearing. This is what he said. They twist the point

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the plaintiff was making. The point is is that the reason we make that point, that Philadelphia is not typically known as the hub of a music town is because that makes our story so much more unique and different than "Empire." That's the point. The fact that the plaintiff wrote the story about Philadelphia being the hub of Hip Hop music makes it unique, makes it different. You would think it would be in New York. You would think it would be in LA or maybe Georgia, Atlanta, whatever. It's not, and that's the point.

In fact, also a fabricated difference, there are numerous -- numerous references and settings that take place in "Empire" that are from Philadelphia, and we're going to show those today, Your Honor. So you have Cookie and Lucious in flashbacks in Philadelphia that we're going to show. We have Cookie going to Philadelphia (indiscernible) and testifying before a

grand jury. We're not going to show that, but that's another scenario. We have Lucious and Jamaal going to their home that they still own in Philadelphia.

In the "Empire" show they show Philadelphia. They have a shooting where they go to shoot Frank, who Cookie was going to snitch on, and

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they go and show that drive-by shooting in Philadelphia. We have Cookie going to Philadelphia in -- for Bunkie's funeral where she's talking to Carol. We have Cookie going to see Carol at her home in Philadelphia. There's tons of Philadelphia settings in "Empire." There's a variety -- there's a variety of ways to portray a shooting, Your Honor.

The urination scene. Why is this so creative? You know, why is it so original? Well, you have to ask yourself why wouldn't they have shown a urination scene in -- have Bunkie go into the bathroom and getting shot by five hoods or by Lucious some other way? Have Bunkie driving in a car and then pull off the side of the road and urinate on the side of the road and then have him shot. But that's not what they do. No. They take the same scene, the same setting.

This is another fabricated difference. Mr. Stone said that the -- the plaintiffs admit that the urination scene is an idea. That's not correct. That's wrong. What we said was that the idea of urination may be an idea, may be a concept, but how you decide to portray urination or someone getting shot while they urinated, for a number of reasons is my client's expressive way that he did so, and that's

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the point.

The motivation he said was difference. He's -- Mr. Stone said the relationships -- the relationships between the characters were different. That's a fabricated -- that's not -- that's not correct, Your Honor. That's fabricated. They're not. They're actually -- they're in a setting that's identical at night. Both have an element of surprise that a shooting is even going to happen. They don't know. Both of them are surprised. It's out of nowhere for the -- for Bunkie and for Shaquan. And, interestingly, both are friends with the lead male characters.

The sequence of events. Both shootings occur after the urination scene. Again, the building of -- the unraveling of that male lead's life. You can see that his life is unraveling. This is why he's doing all this -- these things. He's becoming more violent. He's doing things -- he's pushing himself off the edge, something he normally might not do. And so that's the expression that has to be protected.

Both murders are done by the male lead's directions. We're going to show that. Interesting again, what they didn't show you in the last hearing,

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Your Honor, and we'll have it in our clip, is that they didn't show a full clip of "Cream" where Winston direct the hit, just like Lucious, okay? So it's -- all right, it's Winston directing it, but it's Lucious doing it. It's still the same thing. Both male leads are acting out in a way because of their unraveling of their lives and they

have no control over it. That's the overriding, arc storyline.

They're both -- here's important -- the relationship -- as I said, the relationship with the characters are different he said. Well, they're both friends with the male leads. Next, the motivation is different. Both male leads motives are for their own self-interests, as I said at the last hearing. Shaquan, because Winston protects his daughter, and Lucious, because his life is going out of control and he doesn't want to have to worry about anything else, paying some money to Bunkie. Both male leads get arrested relating to the murders. Both victims that are shot perceive and portray themselves as successful moguls in the same industry. These are all similarities, just the urination scene. This is just the urination scene. I haven't even talked about all the other stuff.

The mood. Now there's Stoner fabricated

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difference. We don't agree that the mood is different between the two works. Defendants argue that none of the central characters do any musical interludes. But in "Cream," the music sets the mood and also has original music and has original performers, just like "Empire." So they draw a distinction that well, they have -- we have our family members who sing and do music, and "Cream" doesn't.

Well, actually, Mr. Tanksley wrote two of the songs for the soundtrack for "Cream" and he sings in one of them. Not only that, you have this original music concept. There's no other show that has original music, not when this show was -- came out. And the difference

is that "Glee" has cover stories that they sing. "Glee," the show, "Glee." This is original -- this is original music, original artists, that's the expression that my client chose.

THE COURT: All right. Do you want to play videos now? Because it's not --

MS. BOGAN: Oh, I do, Your Honor. And I apologize. I have a little bit more and then we'll go right to the videos if you --

THE COURT: Okay. Because --

MS. BOGAN: -- if you --

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THE COURT: Are you going to play it straight through or are you going to comment on it or --

MS. BOGAN: I'm going to comment.

THE COURT: Okay.

MS. BOGAN: Yeah. So the last item is the themes. When defendants argue about themes they switch the comparison and they state what theme is in "Empire" and not present in "Cream." So, as I said earlier, it's not about what's in "Empire." They're the ones who are infringing. It's about what's in "Cream" that they're copying.

They argue that family disloyalty, family conflict, succession. The point is the proper inquiry is the themes of "Cream," the original music, the family drama, the power struggles, the complex relationship with Winston and Brenda, they're all in "Empire" and they're all expressed in a substantially similar way as

plaintiff's work. And I'm just going to reference for the record that's page 48 of the January 12th transcript, lines eight through 14, where Mr. Stone said that they switch -- where he switches the comparison and states really what's in "Empire." Well, how is "Cream" related to "Empire?" That's not appropriate. So let's go to the video.

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(Pause in proceedings.)

MS. BOGAN: I can't see anything. I'll start -- hold on one second. Okay, that's fine. You're set to go? Okay.

MR. FILIPOVIC: It's just warming up.

MS. BOGAN: It's warming up, Your Honor.

(Pause in proceedings.)

MS. BOGAN: I'm going to -- before you start running, I have to --

(Pause in proceedings.)

MS. BOGAN: All right. I'm just going to start speaking. Let me know when you're ready, okay? As you know, Your Honor, copyright infringement is nothing new --

(Videotape is being played at this time.)

MS. BOGAN: Whoops. Stop one second. Copyright infringement is nothing new in show business. Okay. "Cream" and "Empire" both have leading men who own a record label. They both have similar style of dressing,

button up shirts, no tie, and sometimes with a blazer. They also have their hair straightened.

(Videotape is being played at this time.)

MS. BOGAN: Okay. The disease. Both men are diagnosed with an incurable disease. They both

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have a white, female doctor. Run it.

(Videotape is being played at this time.)

MS. BOGAN: Your Honor, on page 17, line 16, of the January 12th transcript, Mr. Stone makes conclusory statements about ALS as though he's the world's medical expert. In fact, they say that these diseases are so different. People die from Herpes every year. 70 percent of people die from Encephalitis caused by Herpes. It's the same idea, same concept, same expression. Both men lie about having their disease, contrary to the defense arguments. The end results of the disease are the same in the shows. As long as they take their medicine, they'll be fine.

(Videotape is being played at this time.)

MS. BOGAN: You see in that clip, Your Honor, clearly, both Lucious and Winston are not being forthright about the disease they have. And the defense statement that "Cream" has a character which has Herpes and a major storyline about this as well, but Herpes is only mentioned once in "Empire" relating to have -- to one character having that. That's Cookie's sister, Carol. The point is while that's true, it also shows the defense has an unfair position. They can write, edit, produce, and air any

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changes to help their case, just like the disease storyline. Roll it.

(Videotape is being played at this time.)

MS. BOGAN: So you see the white, female nurse say that it's chronic, but highly treatable condition. Sounds more like regular Herpes. So, actually, that didn't really work well for them. But they did change it. They changed his diagnosis.

Winston and Lucious have both done criminal things and run their company in a criminal way. We're going to show --

(Videotape is being played at this time.)

MS. BOGAN: Again, they're acting in criminal ways, they run their company in a criminal manner, both have the setting of the office.

The next one is the urination scene, Your Honor. In defendant's clip during the last hearing -- hold on -- defendant did not want Your Honor to see that it's Winston, the main character, who sets off this murder just like Lucious pulls off in "Empire." Both victims, if you notice with the clip, are defiant of a threat right before they're executed. They don't even show any fear, interestingly, both of them. Here's Bunkie. His friend -- great friend, Lucious, who's been, you

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know, close with (indiscernible) to Cookie, doesn't even plead for his life or even try to rationalize the conflict before the hit. Roll it.

(Videotape is being played at this time.)

MS. BOGAN: There he just gave the nod -- that's Winston -- for the hit.

(Videotape is being played at this time.)

MS. BOGAN: You don't see him pleading.

(Videotape is being played at this time.)

MS. BOGAN: You also both see both of the killers walking away in both "Empire" and in "Cream." Now, while the idea of urination may be generic, Your Honor, "Empire" misappropriates the plaintiff's unique expression of this concept. The point is is that plaintiff's works -- work contains elements that would not be expected that you would see, which we do see, in "Empire."

The family members of both leading men are going after exactly 50 percent of their company. Go ahead.

(Videotape is being played at this time.)

MS. BOGAN: Your Honor, respectfully, shares of stock and ownership of company, they don't care whose hands they're in. And either way, in both scenarios they were divorced and it was the divorce

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that is the catalyst for both Sammy and Cookie to have been allegedly deprived of their 50 percent share of the company. And, as you see, you see Cookie come back after she was in jail, divorced for Lucious, making the same claim for exactly 50 percent, same stake.

Original music. This is highly unusual. It's not been done before until "Cream." "Empire" has original artists' music, just like from their -- from other than their family members, just like "Cream." Go ahead.

(Videotape is being played at this time.)

MS. BOGAN: This is Tatiana, not a family member. Jennifer Hudson, (indiscernible).

(Videotape is being played at this time.)

MS. BOGAN: Going on to Brenda. Oh, one more. Here we go.

(Videotape is being played at this time.)

MS. BOGAN: Wait. Both the character, Cookie, from "Empire" and the character, Brenda, from "Cream" have a drug past, as you see. Both women had children with the lead men who owned the record label, as you've seen. But the drug issues prevented them from raising their children. They both dress in a sassy style, sassy dressing. Here, we show that

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both Sammy and Brenda are co-conspiring to get 50 percent of Big Baller Records back, just like Cookie is in "Empire." She's doing a conspiring, but she's going the same thing for exactly 50 percent.

Flashbacks and music propel the storyline. Both shows use flashbacks and original Hip Hop and R&B music as a stylized method to propel the storyline.

(Videotape is being played at this time.)

MS. BOGAN: you saw scenes with Winston -- okay.

(Videotape is being played at this time.)

MS. BOGAN: No. Okay. So you saw scenes with Winston, who feels he's lost control of his body and his life. The flash -- you see the flashbacks of both "Cream" and "Empire." They -- "Empire" uses the same technique and storyline as "Cream." They talk about the Philadelphia setting. You just saw in the clip he references Philadelphia (indiscernible). All the characters from "Cream" and "Empire" are originally from Philadelphia. In "Empire," they frequently go back and forth from New York to Philadelphia, and the Lyon family still own their home in Philadelphia, which they frequent often, unlike defense's argument that "Empire" is devoid of

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Philadelphia. There is no Philadelphia in "Empire," says Mr. Stone, and that it's all New York. Run it.

(Videotape is being played at this time.)

MS. BOGAN: Your Honor, we also would like to point out for you that Lee Daniels Butler is -- appears in this clip. She is wearing the beige sweater. You'll see her. So she acts in this episode as well, writes it, directs, acts it.

(Videotape is being played at this time.)

MS. BOGAN: Right there, Your Honor.

(Videotape is being played at this time.)

MS. BOGAN: There she is.

(Videotape is being played at this time.)

MS. BOGAN: And by the way, Your Honor, what's more gritty than throwing your child into a trash can?

(Videotape is being played at this time.)

MS. BOGAN: This is back at their home in Philadelphia.

(Videotape is being played at this time.)

MS. BOGAN: Let's move onto the sexual encounters that the defense say in court, in open court, that "Cream" has a lot of sex while "Empire" has none. That's not true, Your Honor.

(Videotape is being played at this time.)

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MS. BOGAN: This is in "Empire."

(Videotape is being played at this time.)

MS. BOGAN: Also, the type of sexual encounters, the type of scenes, the type of filming, highly unusual for network TV.

(Videotape is being played at this time.)

MS. BOGAN: That's Hakeem.

(Videotape is being played at this time.)

MS. BOGAN: This is Tatiana.

(Videotape is being played at this time.)

MS. BOGAN: Same-sex relationship.

(Videotape is being played at this time.)

MS. BOGAN: There's a same-sex relationship there, and that's the point. So in "Cream," the major storyline is the same-sex relationship, which we're going to see here, and "Empire" has it as well. This is unusual at this time in terms of network TV. You have to remember that.

(Videotape is being played at this time.)

MS. BOGAN: This is Jamaal with his lover.

(Videotape is being played at this time.)

MS. BOGAN: Cat fight, Brenda and Cookie both have cat fights with women who are close to Winston and Lucious. Go ahead. Roll it.

(Videotape is being played at this time.)

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MS. BOGAN: That's Anika and Cookie. Anika has a relationship with Lucious. So does Cookie.

(Videotape is being played at this time.)

MS. BOGAN: Wait, wait, wait. Defendants state, which is another fabricated difference, that Winston is a promiscuous, unsophisticated, violent in the way he runs his affairs, while they claim Lucious is more of a boardroom operator type of character. We already showed that Lucious has promiscuous sex and is a violent criminal. Now we're doing to show you Winston St. James operating the board room in "Cream." This clip, Your Honor, was not in the original copyrighted work. However, it is in a subsequent work that the plaintiff did, which was in 2010 I believe, and also was produced and part of the whole "Cream" original series,

which also was on a website and was on Facebook, for which Lee Butler had access to.

(Videotape is being played at this time.)

MS. BOGAN: There's Lucious in the boardroom talking about an original work -- original artist.

(Videotape is being played at this time.)

MS. BOGAN: As complex and the characters are, they are the same as "Cream"'s characters, Your

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Honor, and it's enough to have such distinct characteristics to be a protected expression.

They also, which is the B storyline, talk about paternity, just like "Cream" created. "Empire" had a very popular storyline about domestic violence and a confusing paternity issue which lasted for many episodes. But when they realized the story similarities and the story -- the strong similarities of the storyline to one that is in "Cream" they could cancel it and stop it with an implausible scene or two. I'll talk more about that. Let's go to the paternity clips.

(Videotape is being played at this time.)

MS. BOGAN: So here they are. And why don't -- the question you have to ask, Your Honor, is why don't they have the paternity issue, I don't know, be with Cookie's brother or some other character? It's the same lead character that they ascribe this storyline to. And in those scenes the paternity issues is a surprise and it does indeed fracture the relationships amongst the family members. I made the distinction previously with

respect to Mr. Stone's representations, fabricated difference, that oh, in fact, it made them closer. The point is is that the defense can edit, change,

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and change the storyline, whatever they want to do. This is what they did with the paternity storyline, season two, episode 14, which aired April 20th, 2016, after our lawsuit was filed.

In that particular scene, they send a lawyer to the playground where they pluck the hair off a little girl, Lola. Then in a later scene in the episode, they say that the little girl was not fathered by any of the man on "Empire," not Lucious, but now a random man named Marcus Jones that they happen to be able to identify with the plucking of a hair. It doesn't even make sense, quite frankly, the plot, the storyline.

As it stands right now, the Court will have to watch all 48 episodes of "Empire" and all of the episodes of "Cream" to give a fair ruling because the changes the producers of "Empire" have made to help their case.

We're going to talk about Angelo and Andre, mental illness. The defense is trying to belittle the similarities of Andre and Angelo, but how can they? They're both the adult sons of the two male characters, Lucious and Winston, who have a mental issue and who are both sent away to school. Run it.

(Videotape is being played at this time.)

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MS. BOGAN: Now we're going to show Andre. This is when he's talking to himself alone in a room.

(Videotape is being played at this time.)

MS. BOGAN: The defense wants the Court to believe that Andre, when speaking in the third person, is just having a manic episode. That's what Mr. Stone said, whereas Angelo, in "Cream," is mentally ill. Again, the defense -- now Mr. Stone is a psychiatrist who is giving expert testimony, expert opinion, about what bipolar -- the proper symptomology -- or symptoms of bipolar disease is versus what Angelo has? That's the problem when we're doing this and that's the point that I made earlier.

This whole alleged distinction that Angelo is messed upon more than Andre is not persuasive because we'll see that Angelo is a cognizant -- you see when he comes in he says, "Angelo in the house. Angelo in the house." He's talking to the other people in the room. Here, we have Andre, he's talking to himself. There's no one else in the room. I don't know. Andre is acting more like a person with Angelo's illness.

Once again, this demonstrates how the creators of "Empire" changed the name of the

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character's disease in hopes of making it different, but they failed to do it. They failed miserable and it's blatantly obvious that they copied it. We're going to go on to the PSA style.

THE COURT: Wait, let me ask a question. I have another matter at 4:30, so we still have plenty of time, but how many more clips do you have?

MS. BOGAN: I have two more clips, Your Honor.

THE COURT: And how many clips does --

MS. BOGAN: Three more.

THE COURT: -- the defense have?

MR. STONE: If I were to be selective, it's probably eight.

THE COURT: Eight? Do you think we'll finish by 4:30 or we'll go on until --

MR. STONE: No, unfortunately.

THE COURT: Okay.

MR. STONE: Well, let me just --

THE COURT: We'll come back again. I mean I'm not -- I'm not limiting it to 4:30, but I just want to alert you we have to end here today at 4:30.

MR. STONE: Appreciate it.

THE COURT: We'll come back one more time. I know this is a very complex matter and a complex

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case, and I want to give all counsel an opportunity to present their arguments. But, unfortunately, we have so many matters that scheduling sometimes becomes difficult.

MR. STONE: Right.

THE COURT: We'll bring you back again. Let's take a five minute recess at this point.

MS. BOGAN: Very good. Thank you, Your Honor.

(Recess taken from 3:40 p.m. to 3:47 p.m.)

THE COURT: Please be seated.

MR. STONE: Thank you, Your Honor.

MS. BOGAN: We're now looking at the public service announcements, Your Honor, and we contend that "Empire" takes our PSA style relative to the mental health issue. The defendants have repeatedly denied ever doing a PSA at "Empire." They even called it amateurs in court, but they did an entire episode, as I mentioned earlier, about doing a PSA.

Now, defendant's clip shown on January 12th of 2017, what they didn't want you to see, Your Honor, is in the beginning of the episode they're doing a public announcement on mental health is brilliant. That's what you'll hear when Cook -- that's what Cookie says. They didn't show this in

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the last hearing. And there's a reason why they didn't want you to see it.

(Videotape is being played at this time.)

MS. BOGAN: Okay. Your Honor, I asked Clayton to stop here because in full disclosure, the next scene that you're going to see is not part of what was submitted with the copyright, it is part of "Cream," it's part of -- it's another -- that other 2010 set of episodes that my client produced, put on website, put on Facebook, and this is it.

(Videotape is being played at this time.)

MS. BOGAN: This isn't it. This is still "Empire." You'll see it following it.

(Videotape is being played at this time.)

MS. BOGAN: Philadelphia.

(Videotape is being played at this time.)

MS. BOGAN: This is the part with "Cream."

(Videotape is being played at this time.)

MS. BOGAN: So Mr. Stone says nothing altruistic about bipolar disease. They've got to be kidding me. They have a whole three episodes, or three scenes in one episode about bipolar, they have a fundraising, they have speech about bipolar. That's completely altruistic. It has nothing to do with what Mr. Stone suggests. And in "Cream," the

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same cause, bipolar. Here, Angelo is speaking out. They also -- you could see they brought the fourth wall when they showed Andre looking right into the camera. That's what they didn't show in the last hearing. And that fourth wall is known in the film -- in the TV industry and film industry as the fourth wall. And they did it. They did it the same way.

Your Honor, as if this wasn't already enough, this is an -- this is not all of the substantial similarities we have. We understand we're under time considerations and constraints, but as if this wasn't enough, we have a scene where at the end of the season, first season, of "Empire" that they have Lucious getting arrested for the -- for the murder, and also, in "Cream," we have

Winston getting arrested for being involved in a murder, and they're both cliffhangers, Your Honor, both identical. Go ahead.

(Videotape is being played at this time.)

MS. BOGAN: I apologize. Stop it for a second. I thank you for -- I also wanted to mention this was also the third item that was not -- third clip that was not part of the original copyrighted work that my client registered the copyright on.

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However, it is part of the additional episodes that he produced and made on website, as well as on Facebook, that Lee Butler had asked to. And it is also in the complaint. We do mention this arrest scene in the complaint.

(Videotape is being played at this time.)

MS. BOGAN: You're going to see, Your Honor, a poster that we attached as an exhibit in our complaint -- I believe it's Exhibit C -- that my client paired -- put it out there in the marketplace relative to "Cream," put it on Facebook, and you're going to see in that poster there's a gun, there's a mention about the family struggle, there's a mention about Winston fighting to keep his empire, interestingly, the same word of "Empire." You're going to see that and then you're going to see their piece they use for "Empire" as their main promotional piece. So if all the similarities and "Cream" and "Empire" were taken out, what would be left? You got to ask yourself.

(Pause in proceedings.)

MS. BOGAN: Here's the poster. Bring it down.

MR. FILIPOVIC: Your Honor, we need to bring down just so --

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MS. BOGAN: Just so you can see the word and --

MR. FILIPOVIC: (Indiscernible) would all fit on the page.

MS. BOGAN: There's the gun. There's the record label, the record.

(Pause in proceedings.)

MS. BOGAN: Well, it basically says he's going to fight and keep his -- protect his empire, Big Baller Records, from the greedy hands of family, friends, and lovers. "How does he keep it all together? You'll just have to come out and see." This was a marketing piece that Mr. Tanksley did for his work. As you can see, down below is the place, location, and all of that where it was going to be shown. He also put this on Facebook. This is all -- the part that this is on Facebook was alleged in our complaint, along, again, the exhibit within our second amended complaint.

So the point is, Your Honor -- go ahead, roll it -- that if you took all the similarities away from "Empire," there would be no Lucious, no Winston, really no Brenda, no Cookie, no original music that my client prod -- put in "Cream," no family drama that he has in "Cream," no power struggles, which

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we've shown. There would be no "Empire."

There are, beyond what we've shown here today, extensive expressions that my client has created in "Cream" that are substantially similar in "Empire." This is just little snippets, which we've already said really we shouldn't be doing, but we did, and we're confident that they infringed upon my client's expression, his creativity, and you have to look at, Your Honor, again, the value of what my plaintiff created and what "Empire" did in terms of taking from "Cream," not the other way around.

I do have a closing, Your Honor. My thoughts are, since we have half an hour, we can allow, if you'd like, the other side to present their video clips because they brought them here, and I'm fine with that. And then I just would like the opportunity to say my closing after they're finished.

MR. STONE: Well, it's our motion, Your Honor. I'd prefer to have a full rebuttal, if I may.

THE COURT: All right.

MS. BOGAN: All right. We don't have a problem with that.

THE COURT: Let me just look at the calendar. I'm wondering if we can continue tomorrow morning after 5:30.

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MR. STONE: Mr. Thomas has to be back for a hearing and I have to be back for a meeting. Is it possible we could move it to the next week?

MS. BOGAN: Thursday --

MR. FILIPOVIC: Your Honor, I apologize --

THE COURT: All right, somebody has to -- you have to speak into microphones.

MR. FILIPOVIC: Yes. Okay.

MS. BOGAN: All right. It's okay. We have some dates -- he has a -- Mr. Filipovic has a conflict on February 14th.

THE COURT: All right.

MR. FILIPOVIC: Well, no, actually. No, no, I have a conflict until that day, Your Honor. I'm going to be getting married on that day and before that, I'm leaving.

THE COURT: Oh.

MR. FILIPOVIC: And, I'm sorry, I didn't know we would go past today.

THE COURT: Well --

MR. FILIPOVIC: I'm prepared to argue the opposition to the Greater Philadelphia Film Office. I don't need longer than 20 minutes to do that today. But I'm unavailable until the 14th for that reason.

THE COURT: Okay. Could we accommodate

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counsel now and then bring you back for rebuttal?

MR. STONE: Absolutely. Yeah.

MS. BOGAN: I -- then I would like to just do my closing -- it's not that long -- and then have --

THE COURT: All right.

MS. BOGAN: -- Filipovic speak. Okay?

THE COURT: Okay.

MS. BOGAN: Thank you.

THE COURT: When you say not that long, now, how many --

MS. BOGAN: I promise you. I promise you.

THE COURT: How many minutes?

MS. BOGAN: Ten minutes.

THE COURT: I want to make sure you're -- I'll leave you --

MS. BOGAN: Not even. Five. Five.

MS. FARR: Your Honor, can we just ask one procedural question. If Mr. Filipovic rebuts our argument that we made last time, I just want to make sure we would have the opportunity to reply, and that doesn't have to be today.

THE COURT: Okay.

MS. FARR: It can be whenever is convenient for the Court.

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THE COURT: All right. But I know --

MS. FARR: Okay.

THE COURT: -- counsel has some other things on his mind. I want to accommodate him.

MS. BOGAN: I appreciate that, Your Honor.

THE COURT: Okay.

MS. BOGAN: I just found out today, so this was news to me too.

THE COURT: Okay.

MS. BOGAN: Okay. Your Honor, now, after you've seen everything here today -- and I would like to thank the Court for your patience and your attention. I understand there's a lot of material. But as I mentioned earlier, we have much more than what we've offered here. But we have to inquire as to what type of legal precedent we're establishing here.

We have Mr. Tanksley, who has a valid, enforceable, registered copyright for "Cream." We have -- plaintiff has an admission from the executive director, the facilitator of the access, the access that happened at the film office, Executive Director Ms. Bressler, and we've seen all the strikingly similar expressions of plaintiff's work, even though we did not need to engage at this stage in this type

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of analysis.

Defendants are asking Your Honor that Mr. Tanksley work not be protected so they can continue to run the infringing work? Your Honor, the effective finding, as defendant suggests, would indeed create a chilling effect on creativity. No creators would feel empowered to create original works. They would be swallowed up by those, such as defendant's. There would be rapid piracy.

If this type of plaintiff, Mr. Tanksley, with all that he has in what we've shown, cannot even set foot in this court and have his original work expressions honored, and to open discovery in this case, then what does that -- what does that do? Well, it gives the Fox defendants a monopoly. Unlike what Mr. Stone represented, we don't have the monopoly. They would have the monopoly. And yes, even more, it gives them every incentive to do it again.

We ask that you dismiss, obviously, their motion to dismiss.

THE COURT: Do you have a list you can give us to make part of the record of these clips and which episode and -- or is there a video here that your counsel is waving?

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MS. BOGAN: Yes, the ones that you've seen. Yes, we have a DVD, Your Honor, that we would like to submit to the Court.

THE COURT: All right. And --

MS. BOGAN: And we have provided it, as mentioned, to opposing counsel.

THE COURT: Right. Do we know just by looking at the video -- I know you've said it on the record, but I'm wondering if there's a list of which -- each episode and the times it --

MS. BOGAN: Time codes. We can prepare that for Your Honor. I mean we weren't asked to do that, but we'll be more than happy to do that if you would like us to.

THE COURT: Yeah. This way -- I know what's on there, but at least I can identify it as to episode and perhaps time in the -- in the -- if we get to that point in the complaint --

MS. BOGAN: Absolutely.

THE COURT: -- or the opinion, you know, however --

MS. BOGAN: Okay.

THE COURT: -- we frame it. Okay?

MS. BOGAN: Very good. Thank you.

THE COURT: All right.

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MR. FILIPOVIC: Thank you. Thank you, Your Honor, for accommodation.

THE COURT: All right.

MR. FILIPOVIC: I'll be able to get this done. I'm just wondering -- I'll probably step up just so I can --

THE COURT: Yes.

MR. FILIPOVIC: -- be a part of --

THE COURT: You know, I could be wrong, but I think the issues are knowledge of the infringement and preemption perhaps, although we're not counting it with the state claims.

MR. FILIPOVIC: Correct, Your Honor.

THE COURT: All right.

MR. FILIPOVIC: And so I'm going to be responding to the Greater Philadelphia Film Office motion to dismiss. One of the counts -- and sure, we can still call them the movie defendants.

One of the counts, as Your Honor just mentioned, is did the contributory copyright infringement. As Your Honor has correctly yourself noted in this court and Visuals, Unlimited case, the exact formulation of those cause -- the cause of action for copyright -- contributory copyright infringement has been subject to some litigation.

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But we can generally agree that a plaintiff must allege direct infringement by a third party, facilitation, material contribution, inducement, if you will, by the actor, the contributory actor, and as well as some level of knowledge, cognizance, that this is going on, the direct infringement is going on.

Because their argument occurred some time ago now, Your Honor, I will refer back to the transcript to remind the Court that the -- Mr. Golden opened with just stating that, you know, our real argument here is knowledge. And, Your Honor, I submit to you that in this circuit, the case law is actually very well-established, and a case that sums it all up that is notably missing from Greater Philadelphia Film Office brief and other briefs of this case, Your Honor, and the case is, of course, the Artista Records versus Flea World. It's in our brief, the correct citation and the full citation.

Since we're getting to the chase here, the Greater Philadelphia Film Office in their memorandum of law

on this element of knowledge really is inviting this Court to adopt this specific knowledge that something is occurring at the time that it's occurring. And I'm going to quote directly from this

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Third Circuit case, and it couldn't be clearer. And the case, again, is Artista Records versus Flea World. I quote, "Defendants are incorrect that plaintiffs are required to prove that defendants had knowledge of 'specific infringements' at the time the defendants materially contributed to direct infringement. As defendant's argument runs contrary to the holdings of Fonavista" -- that's a milestone case in another circuit -- "and Napster" -- that's another milestone case -- "and as well as Gershwin." And, in fact, this was not challenged at the Third Circuit. This is a -- in the Third Circuit Court of Appeals it was not challenged.

So this pandering that is the well-established or knowledge is that constructive knowledge is enough where the -- a knowledge element is met when a plaintiff shows a set of facts, claims -- alleges a set of facts that establishes actual knowledge or merely that the defendant had a reason to know.

This opinion was given at the summary judgment stage, Your Honor. We're only at the 12(b)6. And the defendants here, interestingly, Artista Records defendants took the same approach that the Greater Philadelphia Film Office is taking

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now in that they won't -- you know, the knowledge element here, since this is their oral argument, is more than what is accepted in this circuit.

Moving on to the transcript, Mr. Golden goes on to say that -- you know, that there is no real dispute that the Greater Philadelphia Film pitch -- Philly pitch event was (indiscernible) for motion picture movies and nothing else and that that's what plaintiff came there to show. And he chooses the words "no dispute" not by accident, Your Honor. The -- you know, whether or not -- the choices of words, "there is no factual dispute," not only are they incorrect, because of course there was a dispute, our allege -- in the alleged -- in the second alleged complaint, F35, 34, 36, we do allege that the Philly pitch event was, with the knowledge of the judges, also created for the plaintiff to show "Cream" that you've just seen.

Not only that, but dispute comes down to the -- you know, we don't -- not that we need to prove it, but we are -- we have proven it even in the complaint. We have a letter from the high executive officer at the Greater Philadelphia Film Office, his own client.

THE COURT: Let me -- let me ask a

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question.

MR. FILIPOVIC: Sure.

THE COURT: I'm listening, but it's time for me to ask a question. My understanding is April 5th, 2008, is the pitch at the Great --

MR. FILIPOVIC: Correct, Your Honor.

THE COURT: -- at the Greater Philadelphia Film Office. Daniels is there and they meet. There's no question that Daniels had exposure. The pitch was given at DBD. Now, for -- you know, the first airing of "Empire" I think 2015, so we have a hiatus, six, seven years, let's say. What is alleged in the complaint to show that Pinkenson and the Greater Philadelphia Film Office would know that Daniels was there to -- or would, after being shown a copyrighted product, take it and use it in violation of the copyright? In other words, you have party A sets up the contact between B and C. B is Mr. Daniels, C is --

MR. FILIPOVIC: Understood.

THE COURT: -- Mr. Tanksley. And thereafter, Daniels misappropriates, for lack of a better word, a copyrighted item. You know, I'm not making any finding that he did it, but I'm just assuming for the sake of your argument -- to this

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argument. Where does that show knowledge, constructive knowledge?

THE COURT: Under the --

MR. FILIPOVIC: Your Honor, the --

THE COURT: Under that factual scenario, how do you get to constructive knowledge?

MR. FILIPOVIC: So the constructive knowledge we know is a reason to know. But that's --

THE COURT: What is the evidence of reason to know? That's what I want to know.

MR. FILIPOVIC: The reason to know, Your Honor, is in the -- is also admitted here in court, but omitted from the two briefs. There is these releases. They've admitted to having them. A release obviously releases somebody from something, and what else -- we're entitled to a reasonable inference that there's something in these releases that they have --

THE COURT: I remember --

MR. FILIPOVIC: -- and we don't have them here.

THE COURT: I remember the -- there is a release, right?

MR. FILIPOVIC: There --

THE COURT: What does the complaint say

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about the release?

MR. FILIPOVIC: The complaint says that they drafted a release with full knowledge of the -- of the infringement or knowledge of potential -- that the work that was being pitched could be infringed upon.

THE COURT: Well, it's --

MR. FILIPOVIC: We don't have the release, so --

THE COURT: Is --

MR. FILIPOVIC: -- we're entitled to the presumption.

THE COURT: Is the release something that the Greater Philadelphia Film Office prepared that says that in the event anything happens in the future, we're released?

MR. FILIPOVIC: And, Your Honor, we're actually left to wonder.

THE COURT: Is that --

MR. FILIPOVIC: We are left to wonder. We don't know.

THE COURT: Is that what he --

MR. FILIPOVIC: We don't know what it says, you know, because even though they've admitted on record -- or apparently, in June, they admitted on

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record of having located all the other participants' releases except for the plaintiff's.

THE COURT: All right.

MR. FILIPOVIC: We have asked for those releases. We don't have them --

THE COURT: In what paragraph --

MR. FILIPOVIC: -- curiously.

THE COURT: What paragraph of the complaint do you talk about the releases?

MR. FILIPOVIC: Well, let me just get the --

(Pause in proceedings.)

MR. FILIPOVIC: Starting with paragraph 31 and going through 36 is where we allege the knowledge, a reason to know. And then 58, 59, and --

(Pause in proceedings.)

MR. FILIPOVIC: -- 60, 61, 62. And, Your Honor, if I may, the standard -- your question was what facts could be played to give them a reason to know that the infringement was occurring when it did at that particular time. But the holding -- the holding in Fonavista makes clear that the reason to know -- and another case, AOL, from the Ninth Circuit follows that, that it doesn't have to be at the time of the actual direct infringement because the

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infringement did not actually occur -- only the access occurred on April 5th.

THE COURT: All right. Put aside the temporal element. If we -- if we just look at the complaint allegation, the allegation in the complaint -- I have to look at the complaint in the light most favorable to the plaintiff. Just what specifically does it say about the release? Do you know which specific paragraph it's in?

MR. FILIPOVIC: Yeah, 33. Upon information and belief, Greater Philadelphia Film Office had releases drawn up where participating contestants were required to attest that the work presented was authentic and genuine. Greater Philadelphia Film Office pre-screened each work based on this requirement. However, while requiring participants to present only authentic, copyrightable works, upon information and belief, GPFO did not have any release

or document prepared to protect those works from unauthorized use by the judges or anyone else.

THE COURT: All right. So that -- from what -- the way I read that allegation is the Greater Philadelphia Film Office didn't want the presenters to present unauthentic or I guess uncopyrighted works -- not copyrighted works, put -- I read it to

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be that -- more pointedly, that the allegation being made was that they didn't get something in writing from let's say Mr. Daniels, that they wouldn't -- that he, if he's exposed to a copyrighted work, would not infringe it. It was more an error of omission that commission, as they say. Is that the theory?

MR. FILIPOVIC: It's -- Your Honor, it's an ungrateful task to be guessing what's in a release when the counsel has six months ago admitted to possessing a release, locating the release. We've asked for a release.

THE COURT: Well, but --

MR. FILIPOVIC: We didn't get it.

THE COURT: Yeah, but --

MR. FILIPOVIC: We asked for it before we filed the second amended complaint --

THE COURT: Before you --

MR. FILIPOVIC: -- well before we filed. I think the presumption needs to be made with this lacking document, which is the release --

THE COURT: Well, I'm going to take a close look at it before -- but before you get to discovery, you have to have a complaint that alleges sufficient facts in order to state a claim --

MR. FILIPOVIC: Sure.

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THE COURT: -- or you don't get to discovery. So --

MR. FILIPOVIC: And, Your Honor, reason to know in the AOL case was also constructive knowledge. I also would like at this point to point out a case -- a second case by -- and this is proffered by Greater Philadelphia Film Office -- that allows you -- and this case is the pension fund case. In the pension fund case, Your Honor, the Third Circuit says, "To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint, and matters of public records." That's the holding here for the Pension Benefit Guaranty Corporation versus White Consol Industry, (indiscernible) F.2d. It's in their brief. It's also in ours.

Your Honor, on that -- on matters of public record, they are using this case to get you to look at the video from the film office, but I will tell you -- thank you. Okay. Matters of public record, there is extensive public record of Greater Philadelphia Film Office having a reason to know of copyright infringement. How about a letter that was issued six months prior to -- or almost a year, a letter that's Exhibit B, where plaintiff alleges --

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and they address this allegation in their memorandum, that he informed them what this was about when he got the letter, as implausible as it may be, at the 12(b)6 motion. We do have the letter. The letter exists. And they call it a theory. It's --

THE COURT: What letter are you talking about? I'm not --

MR. FILIPOVIC: The letter from Joan Bressler saying yes, this man was here, and yes, this man pitched "Cream" in addition to (indiscernible) panel of judges, and they were all given a copy of the DVD. That letter.

THE COURT: I'm looking at the facts --

MR. FILIPOVIC: Okay.

THE COURT: -- that in the light most favorable to Mr. Tanksley, that he did meet with Mr. Daniels, that Mr. Daniels was exposed to a copyrighted work by the name of "Cream," which is reflected in here. But it's a lot of people, a lot of -- you know, it's Pinkenson, the Greater Philadelphia Film Office, et cetera.

MR. FILIPOVIC: Uh-huh.

THE COURT: And when you have a theory of copyright infringement, whether it's constructive knowledge or actual knowledge -- but actual knowledge

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you don't, so assuming it's constructive, I got to make sure that looking at the facts in the light most

favorable to your client, there's a plausible claim that they have knowledge.

MR. FILIPOVIC: Your Honor, the --

THE COURT: There's no doubt there's contact.

MR. FILIPOVIC: Right.

THE COURT: The next element is knowledge.

MR. FILIPOVIC: Right.

THE COURT: I'm going to -- I'm going to read the complaint, you know, very, very carefully on this point. And it's not only what you say in the complaint. It's all the inferences that may arise from what you write that I have to look at very carefully.

MR. FILIPOVIC: Correct. And --

THE COURT: But that's the -- that's the issue.

MR. FILIPOVIC: It is the issue, Your Honor, on this.

THE COURT: When you get to the negligence count you have an additional issue of preemption.

MR. FILIPOVIC: And I'll address that next.

THE COURT: Okay.

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MR. FILIPOVIC: But just one last point on this, Your Honor. When you -- when you do look at the complaint the Court should keep in mind that it's not only the complaint. This Third Circuit case has exhibits, also matters of public record, and one of them

is the -- that was also pled, or a matter of public record, is that, you know, this ran on NBC well before this lawsuit. This is no secret that this man's stake -- had a stake in this claim.

THE COURT: Well --

MR. FILIPOVIC: And be that as it may, I would also shortly like to address the video that was attached --

THE COURT: Okay.

MR. FILIPOVIC: -- because I think there was a lot made of that. In this same case, Your Honor -- now, they're asking you not to apply the 12(b)6 standard on because -- which we can admit are all allegations and inferences, but they want you to look at the video and derive therefrom that this didn't happen because the video didn't show it happening. And by this, I mean the access, the pitching of the "Cream." The --

THE COURT: Well, I can't consider anything outside the complaint. It has to be either inside

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the complaint or attached to it, and --

MR. FILIPOVIC: Okay.

THE COURT: -- you know, a video that raises a credibility question is beyond the purview of what I consider at this point.

MR. FILIPOVIC: And then that's perfect. I'll leave that argument alone.

THE COURT: Okay.

MR. FILIPOVIC: That's great. Okay. But on the knowledge, Your Honor -- and this is also extremely important. On the knowledge element, here's page four of their reply. Counsel flat out tells you, page four of their reply, "Equally as important, Pinkenson and GPFO have no independent knowledge of 'Empire.'" This is in their reply and in their motion. Counsel is not filing an answer here. You know, he doesn't get to deny this allegation like he's attempting to do, you know, my clients don't know anything about anything. If this were a -- if this were -- this just is not proper for him to stand up and claim -- disclaim any knowledge by his clients. Let his clients tell us what they know and -- or not know about it.

Further, Your Honor, there is a case also in this circuit that deals with knowledge. It's

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actually Griggs versus Associates -- versus Andies (ph) Associates. It arises in the consumer protection arena that ties -- the judge gives great opinion on knowledge. We only -- the actual knowledge of the defendant, what they really know, is solely within the product of the defendant. It's far from asking us to know what's in their head without requiring them to as so much as sign a name or a verified pleading under any kind of verification, let alone under oath.

So we contend that the existence of the releases, the broad construction of reason to know, rather than actually know, that is the law in this circuit, and the other offense that you -- where you are allowed to look at public record, matters of public record, that would

give them a reason to know, public record being it was on television.

Also a matter of record, the fact that he visited (indiscernible) and, you know, her letter obviously connected to this case. All those things imply that they really did have a reason to know.

I'll move on to negligence next, Your Honor. And you heard my counterparts argue, relying largely on their brief, that negligence is preempted by the copyrighter. Your Honor, when -- there is

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nothing in there, but they failed to provide a citation. Why isn't there a cite? Because there is nothing in the actual Copyright Act that states that it preempts negligence. If the legislator had wanted it there, like in the FCRA, Fair Credit Reporting Act, he specifically comes out and says all remedies are, including -- states all remedies, including defamation, are preempted by this act. You can't sue and say your credit report is off. You can't sue for defamation even though it's wrong, even though -- because it's explicitly stated. So statutory construction calls for a vote against preemption because it's not stated, and where they wanted it they did say it.

Now, a second theory on why it shouldn't be preempted, it is in the fact that they cause -- it's always preempted by law, whether or not it's stated, when the cause of action and the remedies -- the remedies are the same. Whether or not we asked for it or we wrote in the complaint we ask for this and other release, that's really pretense. But really, these two causes of action

are not the same, and neither is the relief, and I will tell you how.

The cause of action for negligence, that's important. It provides for certain kind of damages

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that the Copyright Act would not provide for, such as compensatory for pain and suffering, like any tort. Copyright Act gives you lost profit. Conversely, Copyright Act gives attorney's fees, as mandatory if you wind up finding liability. Negligence does not. Mere negligence, not gross negligence (indiscernible), but just negligence, normally there's no attorney's fees there. So even the remedy they provide is -- are different. The remedies are different, clearly, because of -- just giving you a reason.

Backing that up with actual know -- you know, of argument why it's not preempted. It's not explicitly preempted and it's not preempted by -- because of the difference that exist in both what they provide and what they protect and what you can actually hope to recover.

Now, counsel mentioned now, can we actually make out a case for negligence? Was there a duty? Counsel brought up a case, Palsgraf, and I'm glad he did. I believe the direct quote was when he hung around law school I guess at that time. Well, it was more recent that I was in law school, obviously, and I apologize for some of that. But Palsgraf actually works completely in the favor of finding duty of care

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because it was actually overturned. And the holding in Palsgraf was that whether or not there is a duty of care -- whether the law should recognize a duty of care depends on the risk or particular circumstances of a foreseeable risk of harm that the plaintiff is in. In other words, if it is reasonable to expect that a certain plaintiff, a certain situation, would come under a reasonable risk of harm, then yes, a duty should be extended to protect him from that risk.

Now, in Palsgraf, it was found ultimately that an -- you know, a passenger on a platform helping a man board a train and then a package falls out and the contents explode because they were fireworks was too far removed from the actual foreseeable risk of harm. I mean who would have thought of that? However, in this case, you know, is it foreseeable risk of harm that when you're coming in to pitch a show that is presumably original and they make you sign a release in connection with that -- with the either originality or that you're not going to sue the judges if they steal your show -- we don't know what it says. There's a reason why I didn't produce them yet. But is that a foreseeable risk of harm? Well, Your Honor, I submit

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to you that's the only risk of harm that he was facing that day. I mean there was no package that was going to explode upon him, there was no -- I don't know what else could have happened to him, but whatever show pitch that he did ended up misappropriated, misappropriated badly. But that's the risk of harm. And it's entirely foreseeable. The fact that there are

releases makes it foreseeable. The fact that it's in the industry that's known or I guess notorious for copyright infringement or -- you know, that also makes it foreseeable. And I will end there with the negligence.

As for -- I guess I'm going to be responding to when Mr. Thomas gives his -- but I'll save that for that -- for that time, Your Honor. Thank you so much. If you have any other questions --

THE COURT: I'll give you -- no other questions. I'll give you an opportunity to respond. That's what we should have said. But let's see if we can get a date. And, hopefully, this will be the last time we get together. But are counsel saying it can't be this week?

MR. STONE: Not under my schedule or Mr.

[p.83]

Thomas' schedule. I'm conferred with Mr. Thomas and --

THE COURT: And I start a jury trial the week of Monday, February 13, which I'm not sure how long it's going to go. I could possibly do it the afternoon of Friday, February 10th.

MR. STONE: Yeah, we'll make that work if we have to. We're also open the week of the 13th if that opens up.

THE COURT: Will that work?

MR. STONE: We would rather have it the week of the 13th, but --

THE COURT: Will you be back?

MR. FILIPOVIC: No, unfortunately, I come back on the 13th, Your Honor. I'm sorry.

THE COURT: On the 13th?

MR. FILIPOVIC: Yeah.

THE COURT: I just don't know how long that trial is going to go. It's --

MR. FILIPOVIC: I can --

THE COURT: It's hard to say because then you're into March and it could be into the second week of March. I just can't anticipate. Under the law, criminal cases take precedent, so I have to deal with that case. I don't think the rebuttal has to be

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that extensive. Perhaps you can handle it, Ms. Bogan.

MS. BOGAN: I think I can, Your Honor. No problem.

THE COURT: All right. But, you know, let's complete it on the 10th. I think we can do that.

MR. STONE: Thank you, Your Honor.

THE COURT: But in the afternoon. I know you like afternoon sessions.

MR. TWERSKY: Just given how things have gone here, Your Honor, the earlier in the afternoon may be the better.

THE COURT: Well, do you want to do it at 1:00, starting at 1:00?

MR. TWERSKY: Does that work for you guys?

MR. STONE: Yeah, sure.

THE COURT: All right.

MS. BOGAN: We're available on the 10th, Your Honor.

THE COURT: 1:00, February 10?

MR. STONE: And, Your Honor, it would be awesome if Mr. Thomas and I can be excused. We're rushing to catch a plane, if --

THE COURT: Yes.

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MR. STONE: -- that would be okay.

THE COURT: Absolutely.

MR. STONE: We apologize.

THE COURT: Absolutely.

MR. STONE: Thank you, Your Honor.

THE COURT: All right. So we'll come back Feb -- I'm not going to do an order. I don't think I did an order for this hearing.

MR. STONE: That's fine, Your Honor.

THE COURT: 1:00 on Friday, February 10th, and we have to finish at that point. I think we would. Okay?

MR. FILIPOVIC: Thank you.

MR. STONE: Thank you, Your Honor.

THE COURT: All right.

MS. BOGAN: Very good. Thank you.

(Proceedings adjourned, 4:33 p.m.)

* * *

CERTIFICATION

I, Michael Keating, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

2/1/17	/s/Michael T. Keating
Date	Michael Keating

APPENDIX D

In this report, I will compare the Fox television drama "Empire", created and executive produced by Lee Daniels, to the original television screenplay and filmed pilot "Cream", written and executive produced by Clayton Prince.

I am currently Associate Professor of Screenwriting in the Department of Radio-Television-Film at the University of Texas at Austin, where I serve as head of the department's screenwriting area for both undergraduate and graduate students. I have taught at UT since August 2004, and previously taught screenwriting at Harvard University, Boston College, Emerson College, and Northeastern University. I have worked professionally as a screenwriter for over 20 years, and have written screenplays for studios and production companies such as 20th Century Fox, Paramount, Sony and Mandalay, and worked with actors including Denzel Washington, Goldie Hawn and Sean Connery. I have also written original television pilots for HBO, NBC, Gary Sanchez Productions (Will Ferrell and Adam McKay, producers) and Happy Madison Productions (Adam Sandler, producer).

In my careful examination of "Empire" and "Cream", I have found that qualitatively important similarities exist between the two properties, as follows:

Characters.

Both "Cream" and "Empire" feature an African-American male protagonist in his mid-30's – 40's, who rises from the streets of Philadelphia to become head of a large record label.

Moreover, both "Cream" and "Empire" feature similar supporting characters in important roles. Both properties prominently feature women who have had children with the protagonist during their criminal pasts, who then re-enter the protagonist's life to claim a piece of his now-thriving legitimate business.

Additionally, in both properties, the protagonist has a son who suffers from a severe mental illness: in "Empire", the eldest son suffers from bi-polar disorder, while the son in "Cream" has an unspecified yet significant intellectual disability.

Plot:

In both "Empire" and "Cream", the protagonist must deal with imminent threats to his business from immediate family members.

The central plot-thread (known as the "A-story") of both "Empire" and "Cream" revolves around a close family member trying to take over the protagonist's record label. In "Empire", when the protagonist's ex-wife is released from prison, she tells the protagonist "you still owe me what's mine: half of this company" (Season 1, Episode 1, 15:30). Similarly in "Cream", the protagonist's estranged father declares his intent to "take over Big Balla Records" (p. 21), telling his son "now I know I should own half of your company" (p.24). Both the ex-wife and estranged father exploit the

protagonist's children to further their plot against the record label. As the protagonist's estranged father states in "Cream", "we'll be able to control Big Balla Records through the kids" (p. 30). This exploitation of the protagonist's children finds a parallel in "Empire", where the ex-wife uses her two sons to force her way into the protagonist's business. As the youngest son tells his brother, "you best believe they trying to make us kill each other" (Season 1, Episode 1, 34:20).

In an important subplot of both "Cream" and "Empire", the protagonist is diagnosed with a serious medical condition which influences his decisions regarding the future of his company. Though the medical condition in "Cream" is not life-threatening – the protagonist is diagnosed with herpes during the pilot episode – it is treated with the same dramatic weight as the life-threatening illness in "Empire".

In another intrinsic subplot of both "Empire" and "Cream", the protagonist shoots a man who threatens the success of his music label. Interestingly, both men are shot while urinating out-of-doors.

Sequence of Events:

There were no distinctive similarities in sequence of events.

Mood:

Both properties use regular musical interludes, performed on-screen by the shows' characters, for purposes of establishing mood and atmosphere. In both "Empire" and "Cream", these musical interludes help to reveal characters' internal emotional states through their performance.

Dialogue:

There were no distinctive similarities in dialogue.

Setting:

Both "Cream" and "Empire" are set in Philadelphia, with each main character having established himself first in Philadelphia's crime scene before founding their media company in that city. At first glance, Los Angeles or New York would seem the logical choice of location for a show about the music industry; therefore, it's noteworthy that both Mr. Prince and Mr. Daniels chose Philadelphia -- a city not primarily known as a center of the music industry – for the setting of their series.

In conclusion, I have found that qualitatively important similarities exist between Clayton Prince's original work "Cream" and the television show "Empire" created by Lee Daniels. I was also made aware that a pitch-meeting was held in 2008 between Mr. Prince and Mr. Daniels, in which Mr. Prince's screenplay and produced pilot were submitted to Mr. Daniels at his request. This pitch meeting, with the subsequent exchange of materials, could certainly account for the significant similarities between the two properties.

APPENDIX E

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- Biography
- Expertise

Stuart Kelban is a professional screenwriter with experience writing for feature films and television, for both network and cable outlets. A Writers Guild of America member, he has sold screenplays to many of the major studios and productions companies in Los Angeles.

Recently, Stuart was hired to write an original 30-minute TV pilot for Will Ferrell and Adam McKay of "Gary Sanchez Productions" (*Anchorman, Step-Brothers, Talladega Nights*), as well as rewriting a feature for Mr. Ferrell and Mr. McKay. He's also developed a 60-minute original pilot with Adam Sandler's "Happy Madison Productions." Currently, he's working on a feature set amongst the maquiladoras on the Mexico-Texas border.

Stuart's original feature screenplays include:

End-Game, a spy-thriller bought by Mandalay Pictures and Paramount Studios, with Peter Guber producing, and Sean Connery attached as actor and producer.

Shades of Grey, a legal drama set in Brooklyn, NY, developed for 20th Century Fox Studios, with Denzel Washington attached as actor and producer.

Black September, an action-drama, developed for Sony Studios, with John Woo attached as director and producer.

Double-Play, a con movie, financed by Stratus Pictures, developed with the director Dean Perisot.

Stealing Hearts, a romantic road-movie, optioned by Warner Brothers Studios, with Goldie Hawn attached as actor and producer; Arnold Kopelson producing.

Stuart's television work includes:

"Killer Elite," a 6-part miniseries written for HBO, based on the American Society of Magazine Editors award-winning book *Generation Kill* by Evan Wright, a "Rolling Stone" journalist embedded with the first Marine platoon to cross into Iraq during the current war.

"The Samurai," a drama pilot, written for NBC, with NBC Productions producing. Jeff Goldblum attached as actor.

"Three Card Monte", a drama pilot, written for UPN, with Mel Gibson and Icon Productions producing.

And "Paradise Pawn," spec drama pilot.

Stuart's short fiction has been published in several national literary journals, including *The Carolina Quarterly*, *The Crescent Review*and *Padan Aram*- several of his humor pieces were also published in *The Harvard Lampoon*, where he served as an editor. Stuart received his MFA in fiction-writing from the University of Virginia at Charlottesville, where he studied under a Henry Hoyns' Fellowship, and was awarded The Griffis Prize for short fiction. His award-winning story "Foreigners" was based on his experience working in a United Nations sponsored refugee camp for Cambodian refugees, where Stuart supervised a printing press with over 50 workers, printing over 25,000 reading books, medical manuals and educational materials - the largest printer of Khmer-language texts outside of Phnom Penh.

Before coming to the University of Texas at Austin, Stuart taught screenwriting, fiction-writing and

literature at various Boston-area schools, including Emerson College, Boston College, Harvard University, and Northeastern University. While living in Boston, Stuart co-wrote and coproduced several short films. He is a diehard Red Sox fan.

APPENDIX F

17 U.S.C. § 501(a)-(b)

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall

permit the intervention, of any person having or claiming an interest in the copyright.