

1 Robert S. Besser SBN 46541
LAW OFFICES OF ROBERT S. BESSER
2 100 Wilshire Blvd., Suite 700
Santa Monica, California 90401
3 Tel: (310) 394-6611
Fax: (310) 394-6613
4 rsbesser@aol.com

5 Stewart L. Levy NY State Bar No. 1143536
EISENBERG, HEFLER & LEVY, LLP
6 335 Madison Avenue, 9th Floor
New York, New York 10017
7 Tel: (212) 599-0777
Fax: (212) 599-0770
8 slevy@ehllaw.com
Admitted Pro Hac Vice

9
10 Attorneys for Plaintiffs
CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD MONTAGUE,
11 FABIAN ANDRES ACUNA, ADAM
SPENCER KAMPF and DENTON BEDWARD

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION
15

16 CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD MONTAGUE,
17 FABIAN ANDRES ACUNA, ADAM
SPENCER KAMPF and DENTON BEDWARD,

Case No. 2:22CV01384 SSS (AS)

FIRST AMENDED
COMPLAINT FOR COPYRIGHT
INFRINGEMENT

18
19 Plaintiffs,
20 vs.

21 WARNER RECORDS, INC., a Delaware
corporation, DUA LIPA, an individual,
CLARENCE COFFEE, JR.,
22 an individual, SARAH HUDSON,
an individual, STEPHEN KOZMENIUK,
23 an individual and DOES 1 through 10,

DEMAND FOR JURY TRIAL

24 Defendants.
25 _____/

1 Plaintiffs CHRISTOPHER EDWARD COPE, CHRISTOPHER EDWARD
2 MONTAGUE, FABIAN ANDRES ACUNA, ADAM SPENCER KAMPF and DENTON
3 BEDWARD, for their complaint against WARNER RECORDS, INC., DUA LIPA, an
4 individual, CLARENCE COFFEE, JR., an individual, SARAH HUDSON, an individual,
5 STEPHEN KOZMENIUK, an individual and DOES 1 through 10, hereby allege:

6 PARTIES

7 1. Plaintiff CHRISTOPHER EDWARD COPE is an individual resident of the
8 State of Florida.

9 2. Plaintiff CHRISTOPHER EDWARD MONTAGUE is an individual
10 resident of the State of Florida.

11 3. Plaintiff FABIAN ANDRES ACUNA is an individual resident of the State
12 of Florida.

13 4. Plaintiff ADAM SPENCER KAMPF is an individual resident of the State
14 of Florida.

15 5. Plaintiff DENTON BEDWARD is an individual resident of the State of
16 Florida.

17 6. Defendant WARNER RECORDS, INC. (“WARNER”) is a corporation
18 organized and existing pursuant to the laws of the State of Delaware with its principal
19 place of business located in the Central District of California. WARNER is in the
20 business of recording and distributing musical performances.

21 7. Defendant DUA LIPA is an individual resident of the United Kingdom.
22 She is a singer/songwriter who in 2020 released a song entitled “Levitating.” Her
23 recording of that song became an international best seller.

24 8. DUA LIPA’s recording of “Levitating” was released in many formats by
25 WARNER including as a track on her album “Future Nostalgia,” as well as a single, as
26 several remixes and as videos. Various formats of the performance reached as high as

1 Number 3 on the United States Billboard 200 Chart and Number 2 on Billboard’s Hot
2 100.

3 9. Defendants SARAH HUDSON and STEPHEN KOZMENIUK are, upon
4 information and belief, individual residents of Venice, California. Defendant
5 CLARENCE COFFEE, JR. is an individual resident of Oakland, California.

6 10. The true names and capacities of the Defendants sued as DOES 1 through
7 10, whether individual, corporate, associate or otherwise, are unknown to Plaintiffs who
8 therefore sue such Defendants by fictitious names. Plaintiffs are informed and believe
9 and thereupon allege that each of the Defendants designated as a fictitiously named
10 Defendant is in some manner responsible for the wrongful acts complained of herein. If
11 and when Plaintiffs ascertain the true names and capacities of DOES 1 through 10,
12 Plaintiffs will amend this Complaint to state their true names and capacities.

13 11. Plaintiffs are informed and believe and thereupon alleges that at all relevant
14 times each of the Defendants was the agent and employee of each other Defendant and
15 acted within the course and scope of their respective agency and/or employment in the
16 performance of the wrongful acts alleged herein.

17 JURISDICTION AND VENUE

18 12. The subject matter jurisdiction of this Court is invoked pursuant to 28 USC
19 1331 because it involves copyright infringement under 17 USC §101, et seq.

20 13. Venue is proper in this District pursuant to 28 USC §1391(b)(1) because
21 WARNER RECORDS has its principal place of business in this District and the other
22 Defendants conduct business in this district.

23 FACTS

24 14. Plaintiffs are members of the band Artikal Sound System (“Artikal”).
25 Artikal has been performing and touring together since 2011 and their album upon which
26 the song “Live Your Life” appears charted in 2017 at number 2 on the Billboard

1 magazine Reggae chart. They are the authors and copyright owners of the musical
2 composition entitled “Live Your Life.” Attached hereto as Exhibit A is a true and correct
3 copy of the Certificate from the U.S. Copyright Office for “Live Your Life,” Registration
4 Number PA 2-314-836.

5 15. “Live Your Life” is an original work which was written in 2017. Plaintiffs
6 spent their time and talent creating and recording “Live Your Life.” and are entitled to
7 full copyright protection.

8 16. On information and belief, Defendants copied substantial portions of “Live
9 Your Life” when they wrote “Levitating.” As set forth in detail below, Defendants had
10 access to “Live Your Life” prior to writing “Levitating” and there are substantial
11 similarities between the two compositions.

12 ACCESS

13 17. Artikal has been a popular band, largely in the Florida region, for over a
14 decade.

15 18. During the period in question, March 31, 2017, when the band’s Smoke and
16 Mirrors album was released, and August 28, 2018, when Dua Lipa admits “Levitating”
17 was written, Plaintiffs’ band played in numerous venues, principally in Florida, and
18 performed “Live Your Life.”

19 19. In April 2017 the Smoke and Mirrors EP containing “Live Your Life”
20 charted on Billboard’s Reggae chart at #2.

21 20. Within the reggae music community Smoke and Mirrors garnered coverage
22 which extended to the birthplace of reggae, Jamaica, where it is highlighted in one of that
23 nation’s leading newspapers.

24 21. Beginning in April 2018 “Live Your Life” was significantly used in a video
25 commercial for Delray Beach, Florida’s “Beerfest 2018,” which promoted tours of local
26 bars and restaurants.

1 28. "Live Your Life" and "Levitating" are both set to minor keys and have
2 similar tempos and overall feel or style.

3 29. The similarity of "Live Your Life" and "Levitating" is readily apparent
4 from a transcription (i.e., music notation) of the relevant passages of each composition.

5 30. Given the degree of similarity between the "Live Your Life" and
6 "Levitating," it is highly unlikely that "Levitating" was created independently from "Live
7 Your Life."

8 CLAIM FOR RELIEF

9 (For Copyright Infringement Against All Defendants)

10 31. Plaintiffs repeat and incorporate by reference the allegations contained in
11 Paragraphs 1 through 30 above as though fully set forth.

12 32. The acts of Defendants and DOES 1 through 10 constitute copyright
13 infringement under Title 17 of the United States Code.

14 33. Defendants and DOES 1 through 10 acted willfully and in conscious
15 disregard for Plaintiff's rights.

16 34. Plaintiffs are entitled to an award of Defendants' profits and Plaintiffs'
17 actual damages.

18 WHEREFORE Plaintiffs pray for relief as follows:

19 1. For actual damages in an amount according to proof;

20 2. For an award of Defendants' profits attributable to the infringement in an
21 amount according to proof;

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3. For costs of suit herein, including Plaintiffs' reasonable attorney fees; and

4. For such other relief as the Court may deem just and proper.

Dated: September 19, 2022

LAW OFFICES OF ROBERT S. BESSER

By: *s/ Robert S. Besser*
ROBERT S. BESSER
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs CHRISTOPHER EDWARD COPE, CHRISTOPHER EDWARD
MONTAGUE, FABIAN ANDRES ACUNA, ADAM SPENCER KAMPF and DENTON
BEDWARD hereby demand a jury trial on all issues herein triable by a jury.

Dated: September 19, 2022

LAW OFFICES OF ROBERT S. BESSER

By: *s/ Robert S. Besser*
ROBERT S. BESSER

1 DAVID A. STEINBERG (SBN 130593)
das@msk.com
2 GABRIELLA N. ISMAJ (SBN 301594)
gan@msk.com
3 MITCHELL SILBERBERG & KNUPP LLP
2049 Century Park East, 18th Floor
4 Los Angeles, CA 90067-3120
Telephone: (310) 312-2000
5 Facsimile: (310) 312-3100

6 Attorneys for Defendants
Warner Records Inc., Dua Lipa,
7 Clarence Coffee, Jr., Sarah Hudson,
and Stephen Kozmeniuk
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD
13 MONTAGUE, FABIAN ANDRES
ACUNA, ADAM SPENCER KAMPF
14 and DENTON BEDWARD,

15 Plaintiffs,

16 v.

17 WARNER RECORDS, INC., a
Delaware corporation, DUA LIPA, an
18 individual, CLARENCE COFFEE, JR.,
an individual, SARAH HUDSON, an
19 individual, STEPHEN KOZMENIUK,
an individual and DOES 1 through 10,

20 Defendants.
21

CASE NO. 2:22-cv-01384 SSS (ASx)

Judge Sunshine Suzanne Sykes

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Time: 2:00 p.m.
Date: December 16, 2022

File Date: March 1, 2022
Trial Date: None Set

*[Declaration of David A. Steinberg and
[Proposed] Order Submitted
Concurrently Herewith]*

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on December 16, 2022, in the

courtroom of the Honorable Sunshine Suzanne Sykes of the United States District Court for the Central District of California, 3470 Twelfth Street, Courtroom 2, Riverside, CA 92501, at 2:00 p.m., or as soon thereafter as the matter may be heard, Defendants Warner Records Inc., Dua Lipa, Clarence Coffee, Jr., Sarah Hudson, and Stephen Kozmeniuk (collectively, “Defendants”), shall and hereby do move this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing the First Amended Complaint (“FAC”) filed by Plaintiffs Christopher Edward Cope, Christopher Edward Montague, Fabian Andres Acuna, Adam Spencer Kampf, and Denton Bedward (collectively, “Plaintiffs”) on September 19, 2022, in its entirety.

This Motion is made on the grounds that Plaintiffs fail to sufficiently plead that Defendants had access to “Live Your Life” before creating “Levitating” or that the works are substantially similar, both of which are basic and necessary elements of their copyright infringement claim.

This Motion is and will be based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of David A. Steinberg (“Steinberg Decl.”), the pleadings and orders in the Court’s files for this case, any matters on which the Court may or must take judicial notice, any reply that is filed in support of this Motion, any argument presented at the hearing on this Motion, and any other matters the Court deems proper.

1 This Motion is made following the conference of counsel, held pursuant to
2 Local Rule 7-3, that took place via telephone conference on November 7, 2022.
3 Steinberg Decl., ¶ 4.

4
5 DATED: November 14, 2022

DAVID A. STEINBERG
GABRIELLA N. ISMAJ
MITCHELL SILBERBERG & KNUPP LLP

6
7
8 By: /s/ David A. Steinberg
David A. Steinberg
9 Attorneys for Defendants
Warner Records Inc., Dua Lipa,
10 Clarence Coffee, Jr., Sarah Hudson,
and Stephen Kozmeniuk
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION..... 1

II. FACTUAL BACKGROUND3

 A. The FAC’s Insufficient Access Allegations4

 B. The FAC’s Insufficient Substantial Similarity Allegations.....5

III. LEGAL STANDARD5

IV. THE FAC FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT7

 A. Plaintiffs Fail To Adequately Allege Access.....8

 1. Plaintiffs Fail To Sufficiently Plead Access Through The Purported Widespread Dissemination Of “Live Your Life”9

 a. Plaintiffs’ Vague Allegations Of Unspecified Performances And Sales Of “Live Your Life” And Alleged Critical Acclaim Are Insufficient 10

 b. The Mere Availability Of “Live Your Life” On The Internet Is Insufficient To Allege Widespread Dissemination 13

 2. Plaintiffs’ “Chain of Events” Allegations Also Fail To Sufficiently Allege Access 14

 B. Plaintiffs Fail To Adequately Allege Substantial Similarity 16

V. CONCLUSION 19

1
2
3
4
5
6
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8
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11
12
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14
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TABLE OF AUTHORITIES

Page(s)

CASES

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355 F.3d 1179 (9th Cir. 2004) 6

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2017 WL 3493606 (E.D.N.C. Aug. 14, 2017) 7

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581 F.3d 1138 (9th Cir. 2009) 8, 10, 15

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556 U.S. 662 (2009) 5, 6

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2014 WL 12521344 (C.D. Cal. Aug. 1, 2014) 16

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976 F.3d 493 (5th Cir. 2020) 12

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2011 WL 13217923 (C.D. Cal. Feb. 8, 2011) 13

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550 U.S. 544 (2007) 5, 6

Broughel v. Battery Conservancy,
2010 WL 1028171 (S.D.N.Y. 2010) 18

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556 F. Supp. 3d 322 (S.D.N.Y. 2021) 7, 13

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2019 WL 1002512 (C.D. Cal. Jan. 4, 2019) 7, 17

Evans v. NBCUniversal Media, LLC,
2021 WL 4513624 (C.D. Cal. July 23, 2021) 17

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723 F. Supp. 2d 357 (D. Mass. 2010) 7

TABLE OF AUTHORITIES
(continued)

		<u>Page(s)</u>
1		
2		
3		
4	<i>Funky Films, Inc. v. Time Warner Enm’t Co.</i> ,	
5	462 F.3d 1072 (9th Cir. 2006).....	8
6	<i>Gray v. Hudson</i> ,	
7	28 F.4th 87 (9th Cir. 2022).....	17, 18
8	<i>Guzman v. Hacienda Records & Rec. Studio, Inc.</i> ,	
9	2014 WL 6982331 (S.D. Tex. Dec. 9, 2014), <i>aff’d</i> 808 F.3d 1031 (5th Cir. 2015)	12
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11	2014 WL 12586731 (C.D. Cal. Nov. 10, 2014).....	14
12	<i>Hayes v. Minaj</i> ,	
13	2012 WL 12887393 (C.D. Cal. Dec. 18, 2012).....	6, 14, 15, 16
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15	2020 WL 1888832 (S.D.N.Y. Apr. 16, 2020).....	17
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17	526 F. Supp. 774 (C.D. Cal. 1981).....	11
18	<i>Klauber Brothers, Inc. v. P.J. Salvage</i> ,	
19	2018 WL 6984817 (C.D. Cal. Oct. 30, 2018).....	10, 15
20	<i>Loomis v. Cornish</i> ,	
21	2013 WL 6044345 (C.D. Cal. Nov. 13, 2013), <i>aff’d</i> , 836 F.3d 991 (9th Cir. 2016)	9, 12, 13
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23	836 F.3d 991 (9th Cir. 2016).....	<i>passim</i>
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25	2013 WL 5969840 (C.D. Cal. Nov. 6, 2013)	6
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27	2010 WL 1493846 (M.D. Tenn. Apr. 14, 2010)	18
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	968 F. Supp. 559 (D. Co. 1997)	12

TABLE OF AUTHORITIES
(continued)

1
2
3
4
5
6
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8
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10
11
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14
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Page(s)

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521 F.3d 1097 (9th Cir. 2008) 6

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716 F. App’x 618 (9th Cir. 2017)..... 7

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204 F. Supp. 2d 1244 (C.D. Cal. 2002),
aff’d, 388 F.3d 1189 (9th Cir. 2004) 3

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2018 WL 2561029 (S.D.N.Y. June 4, 2018)..... 18

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2022 WL 3013214 (C.D. Cal. Feb. 23, 2022)..... 15

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952 F.3d 1051 (9th Cir. 2020)..... 8, 16, 18

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2014 WL 12591271 (C.D. Cal. Dec. 2, 2014)..... 7, 10, 15

Three Boys Music Corp. v. Bolton,
212 F.3d 477 (9th Cir. 2000) 8

Tisi v. Patrick,
97 F. Supp. 2d 539 (S.D.N.Y. 2000) 17

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TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Federal Rule of Civil Procedure Rule 12(b)(6) 1, 5, 6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION¹

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Warner Records Inc. (“Warner”), Dua Lipa, Clarence Coffee, Jr., Sarah Hudson, and Stephen Kozmeniuk (collectively, “Defendants”) hereby move for an Order dismissing the First Amended Complaint (“FAC”) for copyright infringement filed by Plaintiffs Christopher Edward Cope, Christopher Edward Montague, Fabian Andres Acuna, Adam Spencer Kampf, and Denton Bedward (collectively, “Plaintiffs”) on September 19, 2022, in its entirety.

In the FAC, Plaintiffs allege that Defendants’ musical composition and sound recording “Levitating,” embodying the performance of Dua Lipa, infringes Plaintiffs’ copyright in the musical composition entitled “Live Your Life.” However, the FAC fails to comply with the most basic pleading requirements of the Federal Rules as applied to copyright infringement actions.

First, the FAC fails to allege under any plausible theory that the writers of “Levitating” had access to “Live Your Life” prior to creating “Levitating.” As discussed below, Plaintiffs must allege facts demonstrating those writers had a *reasonable possibility* of access to “Live Your Life” prior to creating “Levitating” either by demonstrating that “Live Your Life” was widely disseminated prior to the creation of “Levitating” or by alleging a chain of events linking “Live Your Life” to the “Levitating” writers. But Plaintiffs do not allege such facts. Instead, Plaintiffs assert vague allegations of purported unspecified performances and sales of “Live Your Life” with no detail whatsoever regarding the size, location, date, or number of the alleged performances, or the quantity, date and location of the purported sales of “Live Your Life.” And while Plaintiffs also attempt to plead access through the alleged dissemination of “Live Your Life” on the Internet, they

¹ Unless noted, all emphasis is added and all citations and quotation marks omitted.

1 also fail to provide a single fact or detail as to the number of streams or downloads
2 of the work. Similarly, Plaintiffs’ tortuous chain of events allegations are based on
3 many degrees of separation and are far too attenuated to plead any “reasonable
4 possibility” of the “Levitating” writers’ access to “Live Your Life.” In other
5 words, even if true, Plaintiffs’ access allegations could not, as a matter of law,
6 establish that the writers of “Levitating” had a reasonable opportunity to hear
7 “Live Your Life” prior to creating “Levitating.”

8 Second, Plaintiffs fail to allege a single fact that identifies what material
9 from “Live Your Life” is copied in “Levitating.” Instead, Plaintiffs merely
10 conclusorily allege purported similarities between the two works without any
11 factual detail whatsoever. As discussed below, Plaintiffs must allege facts that
12 could support a claim under the United States Copyright Act for infringement of
13 their alleged copyright, including, but not limited to, facts that demonstrate any
14 substantial similarities in original, protectable elements between “Live Your Life”
15 and “Levitating.” But the FAC contains nothing more than blanket legal
16 conclusions unsupported by any facts, such as: “‘Live Your Life’ and ‘Levitating’
17 are substantially similar in their main melodic theme, supportive harmonies, and
18 accompaniment” and “are both set to minor keys and have similar tempos and
19 overall feel or style.” FAC, ¶¶ 27-28. These conclusory allegations are
20 insufficient to state a claim for copyright infringement.

21 As this Court is aware, this is Plaintiffs’ second attempt at pleading a
22 copyright infringement claim. Plaintiffs’ Initial Complaint (ECF 1) similarly failed
23 to allege any facts regarding the purported similarities between the works at issue
24 (alleging only that “‘Levitating’ is substantially similar to ‘Live Your Life.’” *Id.*,
25 ¶ 18), or that Defendants had access to “Live Your Life” prior to the creation of
26 “Levitating.” Prior to Plaintiffs’ filing of the FAC, the parties met and conferred
27 regarding the Initial Complaint, and Defendants put Plaintiffs on express notice of
28 their deficient substantial similarity and access allegations. Plaintiffs then

1 amended the Initial Complaint as of right, and still failed to plausibly allege that
2 the “Levitating” writers had access to “Live Your Life” prior to the creation of
3 “Levitating” or to provide any factual or musicological support that “Levitating”
4 infringes any protectable expression in “Live Your Life.” Defendants submit that
5 Plaintiffs’ failure to allege such facts is intentional, because Plaintiffs know that
6 they cannot plead that the “Levitating” writers had the requisite access to “Live
7 Your Life” or that any actionable similarities exist between “Live Your Life” and
8 “Levitating.”

9 The FAC should be dismissed.

10 **II. FACTUAL BACKGROUND²**

11 Plaintiffs initiated this copyright infringement action against Defendants on
12 March 1, 2022. ECF 1. Following a meet and confer in which Defendants raised
13 deficiencies in Plaintiffs’ pleading (including as to Plaintiffs’ substantial similarity
14 and access allegations), Plaintiffs filed the FAC on September 19, 2022. ECF 52.

15 Plaintiffs allege that they are the authors and copyright owners of a musical
16 composition entitled “Live Your Life.” FAC, ¶¶ 14-15 & Ex. A. Plaintiffs allege
17 that Defendants’ musical composition and sound recording “Levitating” infringes
18 Plaintiffs’ copyright interests in the musical composition “Live Your Life.”³ *Id.*,
19 ¶¶ 14-30. Plaintiffs have asserted their claim for infringement against the four
20 writers of “Levitating”—Dua Lipa, Clarence Coffee, Sarah Hudson, and Stephen

22 ² Any facts and/or allegations set forth herein taken from the FAC are presumed to
23 be true solely for purposes of this Motion.

24 ³ There are two types of musical works: sound recordings and their underlying
25 musical compositions. Each are separate works with their own distinct copyrights.
26 A musical composition consists of rhythm, harmony, melody, and structure
27 captured in written form. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D.
28 Cal. 2002), *aff’d*, 388 F.3d 1189 (9th Cir. 2004). A musical composition copyright
protects the sound that would necessarily result from any performance of the piece.
Id. A sound recording, on the other hand, is the sound produced by a performer’s
rendition of a musical composition. *Id.* In this case, only the musical composition
“Live Your Life” is at issue; there is no allegation that the sound recording of
“Live Your Life” was sampled or otherwise infringed.

1 Kozmeniuk—and the record company that released the sound recording thereof,
2 Warner.

3 **A. The FAC’s Insufficient Access Allegations**

4 The FAC fails to plead sufficient factual allegations regarding the
5 “Levitating” writers’ purported access to “Live Your Life” prior to the creation of
6 “Levitating.” Plaintiffs appear to allege access based on two theories: widespread
7 dissemination and chain of events. Both access theories fail to state a claim for
8 copyright infringement.

9 Plaintiffs’ widespread dissemination allegations are based on (i) Plaintiffs’
10 alleged performances of “Live Your Life” at *unspecified venues in Florida* to
11 *audiences of unspecified size* from March 31, 2017 until August 28, 2018 (FAC,
12 ¶ 18); (ii) the alleged sale of only *several hundred* physical copies of *Smoke and*
13 *Mirrors* (the album containing “Live Your Life”) at a *local music store* and to
14 audiences of *unspecified size* at the various *unspecified venues* at which Plaintiffs
15 performed (*id.*, ¶ 23); (iii) the use of “Live Your Life” in a video commercial for a
16 “Beerfest” in Delray Beach, Florida which promoted local bars and restaurants (*id.*,
17 ¶ 21); (iv) the *Smoke and Mirrors* EP charting at #2 on Billboard’s Reggae chart in
18 April 2017 (*id.*, ¶ 19); and (v) the availability of “Live Your Life” for streaming
19 and/or download on various online platforms (*id.*, ¶ 22-23).

20 Plaintiffs’ “chain of events” access allegations appear to be based on the
21 following alleged facts: (i) Defendant Coffee is a member of a production team
22 that originated in Miami, Florida which produced *an entirely different song* on
23 Dua Lipa’s album (*not* “Levitating”), entitled “Break My Heart” (FAC, ¶¶ 24-25),
24 and (ii) Ali Tamposi, who is alleged to be one of the co-writers of “Break My
25 Heart” (*but not* “Levitating”), was taught guitar by Plaintiff Cope’s brother in law
26 and is connected to Cope on Facebook (where Cope posted unspecified news about
27 Plaintiffs’ reggae band) (*id.*, ¶ 26). None of these allegations, even if true, would

1 establish that the writers of “Levitating” had a reasonable opportunity to hear
2 “Live Your Life” prior to creating “Levitating.”

3 **B. The FAC’s Insufficient Substantial Similarity Allegations**

4 Nowhere in the FAC are there any factual allegations regarding alleged
5 similarities between original, protectable elements of “Live Your Life” and
6 “Levitating.” The only allegations proffered are the following vague, boilerplate
7 labels and conclusions: “‘Live Your Life’ and ‘Levitating’ are substantially similar
8 in their main melodic theme, supportive harmonies, and accompaniment” and “are
9 both set to minor keys and have similar tempos and overall feel or style.” FAC,
10 ¶¶ 27-28.

11 As noted above, the parties met and conferred following the filing of
12 Plaintiffs’ Initial Complaint and prior to the filing of the FAC regarding the
13 pleading deficiencies present in the Initial Complaint. During that meet and
14 confer, Defendants specifically addressed the deficiencies in Plaintiffs’ substantial
15 similarity and access allegations. Even after being put on notice of same, Plaintiffs
16 still failed to properly allege substantial similarity and access in filing the FAC.
17 The FAC should be dismissed in its entirety.

18 **III. LEGAL STANDARD**

19 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a
20 complaint when it does not contain enough facts to state a claim for relief that is
21 plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
22 “A claim has facial plausibility when the plaintiff pleads factual content that allows
23 the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The
25 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
26 than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting
27 *Twombly*, 550 U.S. at 556). While the Federal Rules of Civil Procedure do not
28 require “detailed factual allegations,” a pleading that offers mere “labels and

1 conclusions” or a “formulaic recitation of the elements of a cause of action will not
2 do.” *Twombly*, 550 U.S. at 555. “Nor does a [pleading] suffice if it tenders ‘naked
3 assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678. To
4 the contrary, to survive a motion to dismiss, a pleading “must contain sufficient
5 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
6 face.’” *Id.*; *Twombly*, 550 U.S. at 555 (“Factual allegations must be enough to
7 raise a right to relief above the speculative level”). “A claim has facial plausibility
8 when the plaintiff pleads factual content that allows the court to draw the
9 reasonable inference that the defendant is liable for the misconduct alleged.”
10 *Iqbal*, 556 U.S. at 678. Ascertaining whether there is a plausible claim for relief is
11 a “context-specific task that requires the reviewing court to draw on its judicial
12 experience and common sense.” *Id.* at 679.

13 Dismissal for failure to state a claim can be warranted based on either a lack
14 of a cognizable legal theory or the absence of factual support for a cognizable legal
15 theory. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th
16 Cir. 2008). While a court must accept the plaintiff’s factual allegations as true and
17 construe them in the light most favorable to the plaintiff, “[f]or an allegation to be
18 entitled to the assumption of truth, however, it must be well-pleaded; that is, it
19 must set forth a non-conclusory factual allegation rather than a legal conclusion.”
20 *Maiden v. Finander*, 2013 WL 5969840, at *2 (C.D. Cal. Nov. 6, 2013) (citing
21 *Iqbal*, 556 U.S. at 678-79); *see also Twombly*, 550 U.S. at 556. As such, “[t]he
22 Court need not accept as true unreasonable inferences, unwarranted deductions of
23 fact, or conclusory legal allegations cast in the form of factual allegations.”
24 *Maiden*, 2013 WL 5969840, at *2; *see also Adams v. Johnson*, 355 F.3d 1179,
25 1183 (9th Cir. 2004).

26 Dismissal under Rule 12(b)(6) is appropriate when a plaintiff fails to allege
27 access or delineate the basis upon which they claim that two works are
28 substantially similar. *See, e.g., Hayes v. Minaj*, 2012 WL 12887393, at *3-5 (C.D.

1 Cal. Dec. 18, 2012) (dismissing copyright claim regarding musical work where
 2 complaint failed to adequately allege substantial similarity and access); *Shaheed-*
 3 *Edwards v. Syco Entm't, Inc.*, 2017 WL 6403091, at *3 (C.D. Cal. Dec. 14, 2017)
 4 (“merely conclusory” allegations of similarity between musical works “fail[] to
 5 state a claim for copyright infringement”) (dismissing copyright claim); *Evans v.*
 6 *McCoy-Harris*, 2019 WL 1002512, at *3 (C.D. Cal. Jan. 4, 2019) (dismissing
 7 copyright claim for failure to plead substantial similarity: “conclusory statements
 8 do not satisfy *Iqbal*’s pleading standard”); *Mintz v. Subaru of Am., Inc.*, 716 F.
 9 App’x 618, 621 (9th Cir. 2017) (affirming grant of motion to dismiss: “[w]ithout
 10 specific allegations that any Subaru employee viewed any of the publications in
 11 which her designs were featured or that the publications were widely disseminated
 12 to the general public, Mintz has not plausibly alleged that Subaru had access to her
 13 works.”); *Star Fabrics, Inc. v. Wet Seal, Inc.*, 2014 WL 12591271, at *3-4 (C.D.
 14 Cal. Dec. 2, 2014) (granting motion to dismiss for failure to plead access via chain
 15 of events or widespread dissemination).⁴

16 The FAC should be dismissed because Plaintiffs utterly fail to allege any
 17 facts that, even if true, could establish access; nor do the FAC’s allegations
 18 remotely satisfy the standard for pleading substantial similarity. These conclusory
 19 and vague allegations are insufficient to state a claim for copyright infringement.

20 **IV. THE FAC FAILS TO STATE A CLAIM FOR COPYRIGHT**
 21 **INFRINGEMENT**

22 To establish copyright infringement, a plaintiff must prove two elements:
 23 (1) ownership of a valid copyright and (2) copying of protected aspects of the
 24

25 ⁴ See also *Arnett v. Jackson*, 2017 WL 3493606, at *3 (E.D.N.C. Aug. 14, 2017)
 26 (granting motion to dismiss with prejudice where plaintiff failed to sufficiently
 27 allege access); *Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d
 28 357, 366 (D. Mass. 2010) (dismissing copyright infringement claim because
 plaintiff “failed to allege facts sufficient to demonstrate reasonable opportunity of
 access”); *Clanton v. UMG Recordings, Inc.*, 556 F. Supp. 3d 322, 328 (S.D.N.Y.
 2021) (granting motion to dismiss based on failure to sufficiently plead access).

1 work. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020); *Loomis v.*
 2 *Cornish*, 836 F.3d 991, 994 (9th Cir. 2016). Regarding the latter element,
 3 “[a]bsent direct evidence of copying,” Plaintiffs must prove that: (1) the
 4 “Levitating” writers had access to “Live Your Life” before creating “Levitating”
 5 and (2) “Live Your Life” and “Levitating” are substantially similar in original,
 6 protectable expression. *Loomis*, 836 F.3d at 994; *Skidmore*, 952 F.3d at 1064; *see*
 7 *also Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir.
 8 2006).

9 Plaintiffs fail to sufficiently plead either element of their infringement claim.
 10 The FAC should be dismissed.

11 **A. Plaintiffs Fail To Adequately Allege Access**

12 Plaintiffs fail to adequately allege that the writers of “Levitating” had access
 13 to “Live Your Life” before creating “Levitating.” In the copyright context, access
 14 means that the creators of the allegedly infringing work had “an opportunity to
 15 view or to copy plaintiff’s work.” *Loomis*, 836 F.3d at 995. “[A] plaintiff must
 16 show a *reasonable possibility*, not merely a bare possibility, that an alleged
 17 infringer had the chance to view the protected work.” *Art Attacks Ink, LLC v.*
 18 *MGA Entm’t Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). Put differently, a
 19 reasonable opportunity requires more than mere speculation or conjecture and
 20 “does not encompass any bare possibility in the sense that anything is possible.”
 21 *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (quoting 4
 22 Nimmer on Copyright § 13.02[A] (1999)).

23 Access can be proven through direct evidence of access or, “[w]here there is
 24 no direct evidence of access, circumstantial evidence can be used to prove access
 25 either by (1) establishing a chain of events linking the plaintiff’s work and the
 26 defendant’s access, or (2) showing that the plaintiff’s work has been widely
 27 disseminated.” *Loomis*, 836 F.3d at 995. Here, Plaintiffs do not allege direct
 28 access. Instead, Plaintiffs attempt to allege access based on the purported

1 widespread dissemination of “Live Your Life” and through purported
2 circumstantial evidence establishing a chain of events linking “Live Your Life” to
3 the “Levitating” writers. Plaintiffs fail to state a claim under either theory.

4 **1. Plaintiffs Fail To Sufficiently Plead Access Through The**
5 **Purported Widespread Dissemination Of “Live Your Life”**

6 In order to plead widespread dissemination, a plaintiff must allege its work
7 “*saturat[ed]* a relevant market *in which both the plaintiff and the defendant*
8 *participate[d].*” *Loomis*, 836 F.3d at 997. Widespread dissemination “centers on
9 the degree of a work’s commercial success and on its distribution through radio,
10 television, and other relevant mediums.” *Id.* In that regard, “the public
11 dissemination necessary to infer that a defendant might have had access to the
12 work is considerable.” *Loomis v. Cornish*, 2013 WL 6044345, at *10 (C.D. Cal.
13 Nov. 13, 2013), *aff’d*, 836 F.3d 991. “As a general matter, in order for a work to
14 be widely disseminated, *it must achieve a high degree of commercial success* or
15 be readily available in the market.” *Id.* (collecting cases).

16 Plaintiffs’ widespread dissemination theory is based on: (i) Plaintiffs’
17 alleged performances of “Live Your Life” at *various unspecified venues in Florida*
18 *to audiences of unspecified size* from March 31, 2017 until August 28, 2018 (FAC,
19 ¶ 18); (ii) the alleged sale of only *approximately several hundred* physical copies
20 of *Smoke and Mirrors* at a *local music store* and to audiences of *unspecified size* at
21 the various *unspecified venues* at which Plaintiffs allegedly performed (*id.*, ¶ 23);
22 (iii) the use of “Live Your Life” in a video commercial for a “Beerfest” in Delray
23 Beach, Florida which promoted local bars and restaurants (*id.*, ¶ 21); (iv) the
24 *Smoke and Mirrors* EP containing “Live Your Life” charting at #2 on Billboard’s
25 Reggae chart in April 2017 (*id.*, ¶ 19); and (v) the availability of “Live Your Life”
26 for streaming and/or download on various online platforms (*id.*, ¶ 22-23). Even if
27 true, these allegations do not sufficiently allege that “Live Your Life” was so

1 widely disseminated as to make it reasonably possible that the “Levitating” writers
2 had the opportunity to hear it before creating “Levitating.”

3 **a. Plaintiffs’ Vague Allegations Of Unspecified**
4 **Performances And Sales Of “Live Your Life” And**
5 **Alleged Critical Acclaim Are Insufficient**

6 Plaintiffs’ allegations as to their purported performances and sales of “Live
7 Your Life” fail to sufficiently plead widespread dissemination. Plaintiffs do not
8 plead any details whatsoever regarding the size, location, date, or number of
9 alleged performances that took place, or the quantity, date and location of the
10 purported sales of “Live Your Life.” Instead, the FAC only conclusorily and
11 vaguely alleges that, during an approximate one-year period, “Live Your Life” was
12 allegedly performed “in *numerous venues*” and its album sold “*approximately*
13 *several hundred* physical copies at a *local music store* and to audiences at the
14 various venues at which it played.” FAC, ¶¶ 18, 23. These allegations are
15 insufficient. *See, e.g., Klauber Brothers, Inc. v. P.J. Salvage*, 2018 WL 6984817,
16 at *4 (C.D. Cal. Oct. 30, 2018) (dismissing complaint that did not state “the
17 approximate quantity of products sampled and sold, the approximate number of
18 parties in the fashion and apparel industries to whom the Lace Designs were
19 distributed, the channel(s) of distribution, the approximate time of this distribution
20 and whether that was before or after Defendants’ purported infringing activities”);
21 *Star Fabrics*, 2014 WL 12591271, at *4 (no widespread dissemination alleged
22 where plaintiff “does not allege the approximate quantity of fabric bearing the
23 design that it has distributed [or] the approximate number of parties in the fashion
24 and apparel industries to whom it has distributed the design”).⁵

25 _____
26 ⁵ Even assuming that Plaintiffs’ allegation as to several hundred sales of its album
27 is true, that allegation would likewise fail to support a widespread dissemination
28 theory. *See, e.g., Art Attacks Ink*, 581 F.3d at 1144 (T-shirt design not widely
disseminated where plaintiff sold 2,000 shirts a year and displayed the design at
fair booths and store kiosks); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th
Cir. 2003) (no widespread dissemination where plaintiff sold 17,000 copies of a

1 Importantly, the FAC alleges that such performances and hard copy sales
 2 took place *in Florida*. See, e.g., *id.*, ¶ 18 (performances “principally in Florida”);
 3 ¶ 21 (“video commercial for Delray Beach, Florida’s ‘Beerfest 2018,’ which
 4 promoted tours of local bars and restaurants”); ¶ 23 (album sold “at a local music
 5 store and to audiences at the various venues at which it played”). The FAC is
 6 devoid of any facts alleging that the “Levitating” writers attended or were aware of
 7 these performances, or that they participated in the “local” Florida music scene in
 8 which Plaintiffs participated. Indeed, the FAC does not allege any facts
 9 connecting the “Levitating” writers to Florida whatsoever.

10 These allegations cannot reasonably satisfy Plaintiffs’ pleading obligations.
 11 Courts consistently reject access based on purported widespread dissemination
 12 where, like here, a plaintiff’s work only reached a limited audience. In that regard,
 13 the Ninth Circuit’s decision in *Loomis v. Cornish* is directly on point. In *Loomis*,
 14 the plaintiff argued access based on the fact that the defendant songwriters were in
 15 Santa Barbara for writing sessions at the time when Santa Barbara was “saturated”
 16 with the allegedly infringed work through “tons of airplay” on local radio stations
 17 and due to various newspapers writing stories about the plaintiff’s band’s
 18 achievements. 836 F.3d at 998. The Court held that these facts could not establish
 19 access through widespread dissemination as a matter of law:

20 [The defendants] were not participating in the relevant
 21 market—the Santa Barbara local music scene—during
 22 their brief stay in Santa Barbara. Their production
 23 responsibilities had nothing to do with listening to local
 24 radio, reading local press, or scouting local bands, and
 25 there was no evidence that they undertook any other

26
 27 video over a 13-year period); *Jason v. Fonda*, 526 F. Supp. 774, 776-77 (C.D. Cal.
 28 1981) (book sales of no more than 2,000 copies nationwide and no more than 700
 copies in Southern California were insufficient).

1 activity in that market that created a reasonable
2 possibility of access to Bright Red Chords. Although
3 there was a *bare possibility* that they heard Bright Red
4 Chords on the radio, or that they read about Loomis and
5 the Lust in a magazine in the break room of Playback
6 Studios, or that they picked up one of Loomis’s
7 promotional CDs while at Playback, that is not enough to
8 raise a triable issue of access.

9 *Id.* Numerous other cases are in accord. *See, e.g., Guzman v. Hacienda Records &*
10 *Rec. Studio, Inc.*, 2014 WL 6982331, at *2, 5-6 (S.D. Tex. Dec. 9, 2014), *aff’d* 808
11 F.3d 1031 (5th Cir. 2015) (no widespread dissemination or access where plaintiff’s
12 song was performed for many years “at dance halls, concerts, and weddings in
13 Corpus Christi and surrounding towns” and “did not achieve popularity outside of
14 the Tejano music scene”); *Batiste v. Lewis*, 976 F.3d 493, 503-04 (5th Cir. 2020)
15 (no access under either a widespread dissemination or chain of events theory where
16 plaintiff’s record “show[ed] meager sales in only a handful of local stores[,]” and
17 defendants’ performance near a store where plaintiff’s records were sold created
18 only a “bare possibility of access”); *Loomis*, 2013 WL 6044345, at *11 (“evidence
19 of small circulation . . . or local air time without other proof of access is generally
20 not enough to demonstrate a reasonable possibility of access”); *McRae v. Smith*,
21 968 F. Supp. 559, 565 (D. Co. 1997) (performances in Colorado and Wyoming
22 insufficient to establish access where defendants were not in those States at the
23 time).

24 Plaintiffs’ allegation that the *Smoke and Mirrors* EP containing “Live Your
25 Life” charted at #2 on Billboard’s Reggae chart *for a single month* in April 2017
26 also is not probative of the *reach* of “Live Your Life.” All this alleged fact may
27 show is that the name of the album—and not the specific song “Live Your Life”—
28 appeared on a chart in a niche genre of music. Again, Plaintiffs have not alleged

1 that the writers of “Levitating” participate in the reggae genre. Thus, it is nothing
2 more than sheer speculation to assume that the “Levitating” writers saw the name
3 of Plaintiffs’ album on Billboard, sought the album out, and then listened to every
4 single song on the album, including “Live Your Life.”

5 **b. The Mere Availability Of “Live Your Life” On The**
6 **Internet Is Insufficient To Allege Widespread**
7 **Dissemination**

8 Plaintiffs’ allegations that “Live Your Life” was available to stream and/or
9 download on the Internet likewise fail to sufficiently plead access. Plaintiffs
10 vaguely allege that “Live Your Life” “appeared on a variety of streaming services”
11 and was “available online both via streaming and downloads” from 2017-2018.
12 FAC, ¶¶ 22, 23. Tellingly, however, Plaintiffs again fail to allege any facts as to
13 how many streams and/or downloads of “Live Your Life” took place during that
14 one-year period. Plaintiffs’ failure to plead any such facts is fatal to their claim.

15 Indeed, “[t]he availability of a copyrighted work on the Internet, in and of
16 itself, is insufficient to show access through widespread dissemination.” *Loomis*,
17 2013 WL 6044345, at *12; *Batts v. Adams*, 2011 WL 13217923, at *4 (C.D. Cal.
18 Feb. 8, 2011) (“[T]he posting of videos and/or songs on YouTube, Amazon.com,
19 and iTunes by an unknown singer . . . is hardly ‘widespread’ [dissemination] and,
20 in fact, is quite limited, and clearly insufficient to support a finding of access”).

21 Here, Plaintiffs have alleged nothing more than the “mere availability” of
22 “Live Your Life” online. Plaintiffs have provided zero facts as to the scope of the
23 alleged distribution of “Live Your Life” on the Internet. Such bare assertions of
24 internet presence are insufficient to plead widespread dissemination. *See, e.g.*,
25 *Clanton*, 556 F. Supp. 3d at 328 (granting motion to dismiss: “[a]s a matter of law,
26 the fact that the Subject Composition was posted on the internet is insufficient on
27 its own to show ‘wide dissemination.’ Were it otherwise, any work that any person
28 uploaded publicly to the internet would have to be considered sufficiently ‘widely

1 disseminated’ to give rise to an inference that every person had heard it—an
 2 inference that would be plainly unreasonable.”); *Minaj*, 2012 WL 12887393, at *5
 3 (“[T]he mere fact that the video was placed on YouTube does not establish it was
 4 disseminated widely.”) (granting motion to dismiss on access grounds); *Hayes v.*
 5 *Keyes*, 2014 WL 12586731, at *2 (C.D. Cal. Nov. 10, 2014) (“Plaintiffs’ sole
 6 allegation with regard to access is that the work was uploaded to YouTube in 2009.
 7 However, this does not imply it was disseminated widely, and the Complaint
 8 provides no facts to support such an inference.”) (granting motion to dismiss).

9 **2. Plaintiffs’ “Chain of Events” Allegations Also Fail To**
 10 **Sufficiently Allege Access**

11 The FAC also fails to plausibly allege access through a particular chain of
 12 events. The FAC merely alleges that (i) Defendant Coffee is a member of a
 13 production team that originated in Miami, Florida, which team produced *an*
 14 *entirely different song* on Dua Lipa’s album (*not* “Levitating”), entitled “Break
 15 My Heart” (FAC, ¶¶ 24-25), and (ii) one of the co-writers of “Break My Heart,”
 16 non-party Ali Tamposi, was taught guitar by Plaintiff Cope’s brother in law and is
 17 also connected to Cope on Facebook (where Cope posted unspecified news about
 18 Plaintiffs’ band) (*id.*, ¶ 26).

19 Plaintiffs’ tortured chain of events allegations are insufficient to raise a
 20 reasonable possibility that the writers of “Levitating” had access to “Live Your
 21 Life” prior to the creation of “Levitating.” They amount to nothing more than a
 22 speculative, attenuated theory based on numerous degrees of separation, none of
 23 which establish any link—let alone a concrete link—between the writers of
 24 “Levitating” and “Live Your Life.” Plaintiffs are essentially seeking to plead
 25 access by alleging that someone who knows someone who knows someone *might*
 26 have met one of the “Levitating” writers, without alleging how or whether any
 27 writer of “Levitating” became aware of “Live Your Life” through any such chain.
 28 Indeed, Plaintiffs do not even allege that Ms. Tamposi was familiar with “Live

1 Your Life”—let alone that she provided any writer of “Levitating” with an
 2 opportunity to hear it. *See, e.g., Ronk v. Hudson*, 2022 WL 3013214, at *7 (C.D.
 3 Cal. Feb. 23, 2022) (“Plaintiff fails to allege facts showing *each link in the chain*
 4 *of events* leading to [Defendants’] access”) (granting motion to dismiss for failure
 5 to plausibly plead chain of events). Simply put, these allegations fail to establish
 6 any nexus between the “Levitating” writers and “Live Your Life.” Plaintiffs’ chain
 7 of events allegations thus fail as a matter of law. *See, e.g., Star Fabrics, Inc.*, 2014
 8 WL 12591271, at *3-4 (“Because the Complaint fails to allege any *concrete facts*
 9 *specifically linking* The Wet Seal to the protected design, Star has not adequately
 10 alleged access by a chain of events.”); *Klauber Brothers*, 2018 WL 6984817, at *4
 11 (complaint lacked “specific factual support” for chain of events access theory and
 12 “fail[ed] to allege any concrete facts specifically linking Defendants’ activities to
 13 the Lace Designs”); *Minaj*, 2012 WL 12887393, at *3 (“[T]he pleadings fail to set
 14 forth any chain of events connecting the video to Minaj or Viacom. For instance,
 15 Plaintiff fails to explain how Minaj or Viacom would have known the video was
 16 available on YouTube”); *Art Attacks Ink*, 581 F.3d at 1143-44 (no chain of events
 17 where plaintiff proffered evidence that one of defendant’s decision-makers
 18 attended a county fair where plaintiff displayed its designs because there was no
 19 evidence the decision-maker saw the design or visited the fair during the relevant
 20 time period).

21 * * *

22 The FAC’s access allegations are wholly insufficient to plead access under
 23 either a widespread dissemination or chain of events theory. These allegations,
 24 even if true, could not even establish a “bare possibility” of access (which itself
 25 would be insufficient). They certainly do not give rise to the requisite *reasonable*
 26 inference that writers of “Levitating” had a *reasonable* opportunity to hear “Live
 27 Your Life” prior to creating “Levitating.” The FAC should be dismissed on this
 28 ground.

1 **B. Plaintiffs Fail To Adequately Allege Substantial Similarity**

2 The Ninth Circuit applies a “two-part test to determine whether the
3 defendant’s work is substantially similar to the plaintiff’s copyrighted work.”
4 *Skidmore*, 952 F.3d at 1064. “The first part, the extrinsic test, compares the
5 objective similarities of specific expressive elements in the two works,” while
6 “distinguish[ing] between the protected and unprotected material in a plaintiff’s
7 work.” *Id.* “The second part, the intrinsic test, ‘test[s] for similarity of expression
8 from the standpoint of the ordinary reasonable observer, with no expert
9 assistance.’” *Id.* At the pleading stage, only the extrinsic component is at issue.
10 *Basile v. Sony Pictures Entm’t, Inc.*, 2014 WL 12521344, at *3 (C.D. Cal. Aug. 1,
11 2014). As explained below, the FAC must be dismissed due to Plaintiffs’ failure to
12 properly allege substantial similarity.

13 Plaintiffs’ FAC contains zero factual identification of any materials from
14 “Live Your Life” that are allegedly infringed in “Levitating.” Courts consistently
15 recognize that where a plaintiff fails to allege substantial similarity between the
16 allegedly infringed work and the allegedly infringing work through non-conclusory
17 facts, he or she fails to state a claim for copyright infringement. Indeed, “the
18 extrinsic test demands more than listing elements in vague and conclusory fashion;
19 it requires a plaintiff to ‘compar[e] those elements for proof of copying.’” *Minaj*,
20 2012 WL 12887393, at *4 (granting motion to dismiss where “Plaintiff fail[ed] to
21 compare the elements, or constellation of elements, from the two works,” and thus,
22 “the Court ha[d] no factual basis to infer that the protected elements of the songs
23 [were] substantially similar under the extrinsic test.”).

24 Plaintiffs fail to plead the existence of *any protectable* similarities at all,
25 much less substantial ones, that exist between “Live Your Life” and “Levitating.”
26 Plaintiffs’ sole allegations regarding the purported similarities between the works
27 at issue are devoid of a shred of factual detail and are entirely conclusory in nature.
28 Indeed, Plaintiffs allege only that “‘Live Your Life’ and ‘Levitating’ are

1 substantially similar in their main melodic theme, supportive harmonies, and
2 accompaniment” and “are both set to minor keys and have similar tempos and
3 overall feel or style.” FAC, ¶¶ 27-28. No facts whatsoever are provided regarding
4 any alleged musical similarity. Indeed, use of the minor key and tempo are not
5 protectable, so those allegations are irrelevant to any substantial similarity analysis.
6 *Gray v. Hudson*, 28 F.4th 87, 98 (9th Cir. 2022) (“[N]o person may copyright the
7 minor scale, as such scales are common musical building blocks belonging to the
8 public”); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 548 (S.D.N.Y. 2000) (describing
9 tempo as “non-protectible musical element[]”).

10 Plaintiffs’ failure to allege how “Live Your Life” and “Levitating” are in any
11 way substantially similar in protectable expression is fatal to Plaintiffs’
12 infringement claim. *See, e.g., Shaheed-Edwards*, 2017 WL 6403091, at *3
13 (“Plaintiffs’ allegations that the chorus, concept, and cadence of the two songs are
14 similar are merely conclusory and cannot be sustained without more specificity.
15 Accordingly, Plaintiffs have failed to state a claim for copyright infringement
16 based on substantial similarity between the two works.”); *McCoy-Harris*, 2019 WL
17 1002512, at *3 (“conclusory statement” that “*Finding Boaz* contains ‘portions’ of
18 [plaintiff’s] screenplays ... do[es] not satisfy *Iqbal*’s pleading standard” where
19 “Plaintiff makes no effort to compare the copyrightable elements of *Finding Boaz*
20 with either of the Works”); *Evans v. NBCUniversal Media, LLC*, 2021 WL
21 4513624, at *5 (C.D. Cal. July 23, 2021) (allegations that “film copied numerous
22 copyrightable elements of Plaintiff’s work” including “the title and medium of the
23 screenplay, dialogue, structure, themes, choices of shots, camera, angles, colors,
24 lighting, textual descriptors, and other artistic and expressive elements of
25 Plaintiff’s work” were “conclusory allegations [that] do not satisfy *Iqbal*’s
26 pleading standards”).⁶

27 _____
28 ⁶ *See also Hines v. Roc-A-Fella Recs., LLC*, 2020 WL 1888832, at *4 (S.D.N.Y.
Apr. 16, 2020) (“The complaint in this case entirely fails to identify which

1 Pleading requirements exist for a reason. Defendants are entitled to be
2 apprised of specific allegations of the protectable expression that is allegedly
3 infringed by their work. Without such a requirement, infringement claims would
4 become moving targets, with copyright plaintiffs vaguely alleging similarities at
5 the pleading stage with leeway to change and shift their theory as they please in
6 discovery. See *Martinez v. McGraw*, 2010 WL 1493846, at *6 (M.D. Tenn. Apr.
7 14, 2010) (“[W]hen a party fails to delineate the basis upon which a plaintiff
8 claims two works are ‘substantially similar,’ it is ‘impossible for Defendants to
9 answer or defend against Plaintiff’s claim,’ and Plaintiff’s claim must be
10 dismissed.”). The need for a clear understanding of what is alleged to be infringed
11 at the pleadings stage has only been further underscored by the Ninth Circuit’s
12 recent seminal decisions in *Skidmore v. Led Zeppelin* and *Gray v. Hudson*, which
13 reinforced that similarities based on the common use of basic musical building
14 blocks, either alone or in combination, are not actionable. See *Skidmore*, 952 F.3d
15 at 1069 (“Nor does copyright extend to ‘common or trite’ musical elements . . . or
16 ‘commonplace elements that are firmly rooted in the genre’s tradition,’ . . . These
17 building blocks belong in the public domain and cannot be exclusively
18 appropriated by any particular author.”); *Gray*, 28 F.4th at 101-102 (“[T]he portion
19 of the Joyful Noise ostinato that overlaps with the Dark Horse ostinato consists of
20 a manifestly conventional arrangement of musical building blocks . . . both employ
21 the pitch progression 3-3-3-3-2-2 played in a completely flat rhythm. This

22

23 elements of ‘Help Me’ were infringed or which elements of ‘Paper Chase’ and
24 ‘Toe 2 Toe’ are infringing. The complaint contains only broad allegations of
25 similarity. These ‘vague and general allegations of similarity’ do not suffice.”);
26 *Broughel v. Battery Conservancy*, 2010 WL 1028171, at *2 (S.D.N.Y. 2010)
27 (plaintiff denied leave to re-assert copyright infringement where plaintiff did not
28 “articulate with any specificity . . . what aspect of any images used by the
defendant make them legally similar to her own copyrighted works.”); *Perry v.
Mary Ann Liebert, Inc.*, 2018 WL 2561029, at *5 (S.D.N.Y. June 4, 2018)
 (“Plaintiff’s copyright infringement claim is dismissed for failure to plausibly
plead which aspect of the Pierce Article infringed a protectable aspect of her
Dissertation and how those aspects are substantially similar.”).

1 combination is unoriginal because it is really nothing more than a two-note snippet
2 of a descending minor scale, with some notes repeated.”).

3 The need for clarity as to the scope of Plaintiffs’ claims is even more critical
4 here in light of the similar action against Defendants pending in the Southern
5 District of New York, entitled *Larball Music Publishing, et al. v. Dua Lipa, et al.*,
6 Case No. 22-cv-1872 (the “*Larball Action*”).⁷ In the *Larball Action*, the plaintiffs
7 have alleged that the same musical composition and sound recording “Levitating”
8 infringe *their* alleged rights in different works, namely two musical compositions
9 entitled “Don Diablo” and “Wiggle and Giggle All Night.” Since both cases assert
10 infringement claims based on Defendants’ creation and exploitation of
11 “Levitating,” it is crucial that Defendants be provided sufficient notice of the
12 alleged similarities asserted by Plaintiffs, so that they can fully assess whether and
13 to what extent there is overlap as to the musical materials claimed to be infringed
14 in each action.

15 **V. CONCLUSION**

16 For the foregoing reasons, Defendants respectfully request that the Court
17 grant their motion to dismiss the FAC.

18 DATED: November 14, 2022

DAVID A. STEINBERG
GABRIELLA N. ISMAJ
MITCHELL SILBERBERG & KNUPP LLP

21 By: /s/ David A. Steinberg
22 David A. Steinberg
23 Attorneys for Defendants
24 Warner Records Inc., Dua Lipa,
Clarence Coffee, Jr., Sarah Hudson,
and Stephen Kozmeniuk

25 ⁷ Defendants are simultaneously filing a motion to transfer this action to the
26 Southern District of New York, so that this action may be deemed related and/or
27 consolidated with the *Larball Action*. Defendants respectfully request that the
28 Court defer adjudication of this motion to dismiss until after its adjudication of
Defendants’ transfer motion. In the event this Court grants Defendants’ motion to
transfer, Defendants submit that it would be appropriate to have the Court sitting in
the Southern District of New York adjudicate this motion to dismiss.

1 Robert S. Besser SBN 46541
LAW OFFICES OF ROBERT S. BESSER
2 100 Wilshire Blvd., Suite 700
Santa Monica, California 90401
3 Tel: (310) 394-6611
Fax: (310) 394-6613
4 rsbesser@aol.com

5 Stewart L. Levy NY State Bar No. 1143536
EISENBERG, HEFLER & LEVY, LLP
6 335 Madison Avenue, 9th Floor
New York, New York 10017
7 Tel: (212) 599-0777
Fax: (212) 599-0770
8 slevy@ehllaw.com
Admitted *Pro Hac Vice*

9 Attorneys for Plaintiffs
10 CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD MONTAGUE,
11 FABIAN ANDRES ACUNA, ADAM
SPENCER KAMPF and DENTON BEDWARD

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION
15

16 CHRISTOPHER EDWARD COPE,
CHRISTOPHER EDWARD MONTAGUE,
17 FABIAN ANDRES ACUNA, ADAM
SPENCER KAMPF and DENTON
18 BEDWARD,

19 Plaintiffs,

20 vs.

21 WARNER RECORDS, INC., a Delaware
corporation, DUA LIPA, an individual, BOSCO
KANTE, an individual, CLARENCE
22 COFFEE, JR., an individual, SARAH HUDSON,
an individual, STEPHEN KOZMENIUK,
23 an individual and DOES 1 through 10,

24 Defendants.

Case No. 2:22CV01384 SSS (AS)

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO MOTION TO DISMISS;
DECLARATION OF STEWART L.
LEVY IN SUPPORT OF OPPOSITION
Filed Concurrently Herewith

Date: March 17, 2023
Time: 2:00 p.m.
Ctrm.: 2

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. PRELIMINARY STATEMENT 5

II. ARGUMENT 6

 A. Motions to Dismiss Are Disfavored in Copyright Infringement Cases 6

 B. Substantial Similarity is Not Only Adequately Pled in the Amended
 Complaint Has Been Disclosed in Detail to Defendants 7

 C. Access Exists and in the Alternative, a Decision on Access on a Motion
 to Dismiss is Premature10

 1. Existence fo Wide Dissemination of Allegedly Infringed
 Work Requires Discovery11

 2. Chain of access has been sufficiently established to defeat
 a Motion to Dismiss 13

III. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

1

2

3 *Art Attacks Ink, LLC v. MGA Entm’t*,
581 F. 3d 1138 (9th Cir. 2009) 16

4

5 *Ashcroft v. Iqbal*,
556 U.S. 662 (2009) 7

6 *Bell Atl. Corp. v. Twombly*,
550 U.S. 544 (2007) 7

7

8 *Cavalier v. Random House, Inc.*,
297 F. 3d 815, 822 (9th Cir. 2002) 6

9 *DuMond v. Reilly*,
2021 U.S. Dist. LEXIS 37241 (C.D. Ca. January 14, 2021) 10

10

11 *In re My Ford Touch Consumer Litig.*,
46 F. Supp.3d 936, 976 (N. Dist. Ca 2014)..... 9

12 *Lois v. Levin*,
2022 U.S. Dist. LEXIS 168358 (C.D. Ca September 16, 2022)..... 7

13

14 *Loomis v. Cornish*,
836 F.3d 991 (9th Cir. 2016)..... 11

15 *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
519 F.3d 1025, 1031 (9th Cir. 2008)..... 16

16

17 *Marder v. Lopez*,
450 F.3d 445 (9th Cir. 2016)10

18 *Mendiondo v. Centinela Hosp. Med. Ctr.*,
521 F.3d 1097 (9th Cir. 2008) 7

19

20 *Segal v. Segel*,
2022 U.S. Dist. Lexis 11832 (S.D. Ca January 21, 2022) 7

21 *Skidmore v. Led Zeppelin*,
952 F.3d 1051 (9th Cir, 2020)..... 12

22

23 *Star Fabrics, Inc. v West Seal, Inc.*,
2014 U.S. Dist. LEXIS 20052 (9th Cir. December 2, 2014)..... 16

24 *Three Boy Music Corp. v. Bolton*,
212 F.3d 477 (9th Cir. 2000)..... 11

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TABLE OF AUTHORITIES
(Continued)

Warren v. Fox Family Worldwide, Inc.
328 F.3d 1136 (9th Cir. 2003)10

Zindel v. Fox Searchlight Pictures, Inc.,
815 F. App’x 158 (2020)..... 6

Other Authorities

Federal Rule of Civil Procedure 8(a)(2) 9

Federal Rule of Civil Procedure 12(b)(6) 10

1 Plaintiffs submit this memorandum in answer and in opposition to the motion by
2 Defendants seeking an order dismissing the amended complaint. Defendants’ motion is
3 not only premature, but their recitation of the law as applied to the undisputed facts is
4 incorrect.

5 I. PRELIMINARY STATEMENT

6 Plaintiffs’ amended complaint alleges that defendants, the singer and
7 performer, Dua Lipa, and various other individuals, infringed Plaintiffs’ copyrighted
8 musical composition, “Live Your Life,” in writing a song entitled, “Levitating.” The
9 amended complaint explains that Plaintiffs are members of a professional band based in
10 Delray Beach, Florida who have performed for over a decade under the name Artikal
11 Sound System and who composed “Live Your Life” approximately eighteen months
12 before Defendant Dua Lipa has admitted the infringing work, “Levitating,” was written.

13 Plaintiffs’ album which contained their performance of “Live Your Life,” charted
14 on the *Billboard* magazine chart, the group’s performance of their recording of the song
15 was sold both via the internet, and through retail, and the group performed their song at
16 numerous concerts. All these elements establish access sufficient to reject a motion to
17 dismiss, but are made even more compelling by the Delray Beach connection.
18 Specifically, a writer who collaborates in writing songs with at least one of the
19 Defendants, and who admittedly worked on a song on the album on which Dua Lipa’s
20 infringing song, “Levitating,” appears, not only grew up in Delray Beach, but was
21 mentored as a musician and writer by the brother-in-law of plaintiff Chris Cope (the latter
22 who remains a Facebook friend) (*see* paragraphs 17-26 of the amended complaint).

23 As for the substantial similarity between “Live Your Life,” and “Levitating,” the
24 amended complaint notes the two songs share melodic themes, harmonies,
25 accompaniment performance in minor key and have similar tempos and overall feel or
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1 style. (*see* paragraphs 27-30) Defendants maintain that these allegations of substantial
2 similarity are too generic to support a complaint or to assist them in preparing their
3 defense. Significantly, however, Defendants have failed to inform the Court that on three
4 (3) occasions Plaintiffs' counsel submitted to Defendants' prior attorneys a twelve page
5 report prepared by a respected musicologist setting forth in detail the substantial
6 similarities between the two songs. A copy of that report, together with correspondence
7 from Defendants' attorney prior to their current counsel, indicating receipt of the report,
8 are attached to the accompanying declaration of Stewart L. Levy. The existence of this
9 musicologist's report and its submission to prior counsel for Defendants makes, at best,
10 disingenuous any argument that substantial similarity has not been sufficiently alleged at
11 this stage of the litigation.

12 II. ARGUMENT

13 A. Motions to Dismiss Are Disfavored in Copyright Infringement Cases

14 The two elements of a copyright infringement case are access and substantial
15 similarity. *Cavalier v. Random House, Inc.* 297 F. 3d 815, 822 (9th Cir. 2002). Both
16 elements tend to be factual in nature and, hence, the province of the trier of fact. There is,
17 therefore, a strong presumption by the courts to reject motions to dismiss infringement
18 cases as being premature. In *Zindel v. Fox Searchlight Pictures, Inc.*, 815 F. App'x 158
19 (2020) the Ninth Circuit instructed district courts to be "cautious" before dismissing
20 complaints for lacking allegations of substantial similarity. *Id.* at 159. The Court
21 explained that a dismissal motion is warranted only if, "as a matter of law" the similarities
22 between "works are only in uncopyrightable material or are *de minimus*."

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1 The same reasoning applies to motions to dismiss based on lack of access. In such
2 cases “the court’s task is ... to assess the legal feasibility of the complaint.... Not to
3 assess the weight of the evidence.” *Segal v. Segel*, 2022 U.S. Dist. LEXIS 11832 *25
4 (S.D. Ca. January 21, 2022)

5 In considering a motion to dismiss, a court not only evaluates the elements of the
6 complaint, but also the context in which the allegations are made. In cases such as *Bell*
7 *Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (involving allegations of antitrust conspiracy
8 in the telecommunications industry) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
9 (involving complaints of a Pakistani national involved in the 9/11 attack) the Supreme
10 Court dismissed complaints, noting that the complexity of the allegations and the cost of
11 extensive discovery justified dismissal of the litigations. In cases of lesser national
12 import and/or where discovery will not be so extensive, however, the courts have been
13 more lenient in permitting an action to continue. See, e.g., *Mendiondo v. Centinela Hosp.*
14 *Med. Ctr.*, 521 F.3d 1097, 1104. (9th Cir. 2008) (denying a motion to dismiss a complaint
15 by a whistleblower against her hospital employer even though complaint was “inartfully
16 drawn”); *Lois v. Levin*, 2022 U.S. Dist. LEXIS 168358 (C.D. Ca September 16, 2022)
17 (denying motion to dismiss a copyright infringement suit finding that under the a ”theory
18 of striking similarity” the court could infer the similarity between the works and that at
19 the early stage of the case the plaintiff need only make a plausible claim of striking
20 similarity.)

21 B. Substantial Similarity Is Not Only Adequately Pled in the Amended
22 Complaint, but an Expert Musicologist’s Report Has Been Disclosed in Detail to
23 Defendants

24 Defendants argue that the amended complaint lacks sufficient allegations of
25 substantial similarity between “Live Your Life” and “Levitating” to warrant the dismissal
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1 of the action. Their position is puzzling in light of the fact that Defendants have for nearly
2 a year had access to a musicologist report setting forth in detail the similarities between
3 the two compositions, and reaching the conclusion, as set forth in paragraph 30 of the
4 amended complaint, that the “degree of similarity” between the two compositions makes
5 it “highly unlikely that “Levitating” was created independently from “Live Your Life.”

6 As explained in the accompanying declaration of Stewart L. Levy, to which the
7 report is attached, Mr. Levy sent the report on three occasions to attorneys for
8 Defendants, two times prior to the filing of the lawsuit and the third time a few weeks
9 after the complaint had been filed and Plaintiffs’ counsel was made aware of which
10 attorney would be representing Defendants. Initially, Mr. Levy sent a letter dated
11 December 2, 2021, to Julian Petty, the executive vice president and head of business and
12 legal affairs of Defendant Warner Records, to which the musicologist report was
13 attached. When Mr. Petty failed to respond to the letter (which was both mailed, certified,
14 return receipt requested, and emailed) Mr. Levy again sent the letter and attached report
15 to Mr. Petty, this time dating the letter January 7, 2022. When this second letter elicited
16 no response, Mr. Levy in March, 2022 engaged in a series of conversations with Robert
17 Meloni, an attorney who represented that he acted as litigation counsel for Dua Lipa and
18 who, over the course of a few days that month, confirmed that he would be representing
19 all Defendants in this action. Copies of the musicologist report and the correspondence
20 with Mr. Meloni are attached to Mr. Levy’s accompanying declaration.

21 This correspondence together with the attached musicologist’s report provided
22 ample details of the allegations of the substantial similarities between the two songs and
23 made it unnecessary to repeat them verbatim in the amended complaint other than
24 referring to the report’s findings and transcriptions in paragraphs 28, 29 and 30 of the
25 amended complaint. Having sent the musicologist’s report to Mr. Petty twice and Mr.

1 Meloni once and confirming with Mr. Meloni that he had received the report, it seemed
2 superfluous to provide in the amended complaint greater specifics concerning substantial
3 similarity. “The primary purpose of Rule 8(a)(2) [providing for a ‘short and plain
4 statement of the claim’] is to ensure the pleading gives a defendant ‘fair notice of what
5 plaintiff’s claim is and the grounds upon which it rests in order to enable the [defendant]
6 to answer and prepare for trial, and to identify he nature of the case.” *Segal, supra* *13.
7 Sometimes, as in this case, pre-suit notice serves the same purpose as notice provided in a
8 complaint. See, e.g., *In re My Ford Touch Consumer Litig.*, 46 F. Supp.3d 936, 976 (N.
9 Dist. Ca 2014).

10 The report, prepared by Alexander Stewart, a Professor of Music at the University
11 of Vermont, analyzes in detail similarities in key, tempo, harmony, melodies, signature
12 themes and structures, divides both musical compositions into parcels of a few seconds
13 each, identifies the similarities in the various parcels, and also presents its findings in
14 musical transcriptions and bars indicating notes played by electric guitar and vocalist,
15 together with similarities in harmonic rhythm and accompaniment. Professor Stewart
16 concludes his report by stating the following:

17 “The musical expression at issue in this case is substantially
18 similar and is significant both quantitatively and qualitatively
19 to each song. These signature phrases are distinctive and a
20 prior art search has uncovered no other songs similar to
21 these songs as they are to each other. ...I consider it highly
22 unlikely that LVT (“Levitating”) was created independently
23 from LYL (“Live Your Life”).

1 The Defendants should not and cannot keep from the Court the existence of
2 Professor Stewart's report by claiming that extrinsic evidence is not properly reviewed on
3 motions to dismiss. On the contrary, the District Court noted in *DuMond v. Reilly*, 2021
4 U.S. Dist. LEXIS 37241 (C.D. Ca. January 14, 2021) that "[w]hile a court must generally
5 refrain from considering extrinsic evidence in deciding a 12(b)(6) motion, it may ...
6 consider documents on which the complaint 'necessarily relies', and whose 'authenticity
7 is not contested.'" *Id.* at *4.(quoting *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d
8 1136, 1141 n. 5 (9th Cir. 2003). *See also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
9 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if: (1)
10 the complaint refers to the document; (2) the document is central to the plaintiff's claim;
11 and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.").

12 Quite apart from the striking similarity between the two works sufficiently alleged
13 in the complaint when the contents of Professor Stewart's report are considered,
14 allegations of substantial similarity between the two compositions extend beyond
15 uncopyrightable material or being just *de minimus* (see *Zindel, supra*). Dismissal of the
16 action on a Rule 12(b)(6) motion, prior to any discovery being undertaken, is therefore
17 improper, and a motion seeking such relief should be denied.

18 C. Access Exists And, in the Alternative, Decision on Access on a Motion to
19 Dismiss Is Premature

20 Defendants misinterpret and/or overreach in arguing that a dismissal of the action
21 is appropriate due to the amended complaint's alleged failure to adequately allege
22 Defendants' access to Plaintiffs' musical composition. Defendants erroneously conflate
23 the two recognized theories of access - chain of access and wide dissemination. "When
24 there is no direct evidence of access, circumstantial evidence can be used to prove access
25 either by (1) establishing a chain of events linking the plaintiff's work and the
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1 defendants' access or (2) showing that the plaintiff's work has been widely
2 disseminated." *Three Boy Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

3 1. Existence of wide dissemination of allegedly infringed work requires
4 discovery

5 "Wide dissemination" exists when allegations "enable a court to infer plausibly
6 that the alleged protected works reached an audience sufficiently large and diverse to
7 render reasonable the possibility the alleged infringer himself is among the audience."
8 *Segal, Id* at 11832, *19. While in *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) the
9 Ninth Circuit suggested that widespread dissemination usually involves "a work's
10 commercial success," the Ninth Circuit did not identify a specific amount of commercial
11 success or what constitutes such success, leaving open to discussion in this case whether
12 Plaintiffs' successful career as a professional band meets the requirement of wide
13 dissemination. Significantly, in *Three Box Music Corp., supra*, the Ninth Circuit affirmed
14 a jury verdict against the singer Michael Bolton for copyright infringement where access
15 was far less than pled by Plaintiffs here.

16 The Ninth Circuit's decision in *Bolton*, a case in which Defendants' counsel
17 represented Bolton, is especially relevant. In that case, Bolton, a popular singer and
18 entertainer, was accused of infringing upon a song recorded by the group, The Isley
19 Brothers, twenty-five years before Bolton had written his song. The Isley Brothers' song,
20 initially released only as a 45-rpm single, never charted even once in a music magazine's
21 Top 100, and first appeared on a long-playing album a year after Bolton wrote his song.
22 Bolton was not alleged to have had direct access to the Isley Brothers' song.
23 Nevertheless, the jury found for the Isley Brothers and the Ninth Circuit affirmed the
24 jury's decision. In so doing the Court of Appeals quoted approvingly the reasoning in
25 *Nimmer* which cautions that "concrete cases will pose difficult judgments as to where
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1 along the access spectrum a given exploitation falls... At times, distinguishing a “bare”
2 possibility from a ‘reasonable’ possibility will present a close question.” *Id.* at 482. The
3 need to carefully evaluate an infringement claim instead of quickly dismissing it is also
4 evidenced in *Loomis*. The Court of Appeals in that case affirmed a district court’s
5 summary judgment dismissal of a copyright infringement case, but only after plaintiffs
6 had been afforded discovery to establish their access and substantial similarity arguments
7 and had failed to meet their evidentiary burden. *Loomis* is not the only case relied upon by
8 Defendants to support their dismissal motion which, in fact, presented instances where
9 plaintiffs’ allegations were dismissed only **after** discovery had been had or a case tried to
10 a jury. *See, e.g., Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir, 2020) (affirmed jury’s
11 decision finding no copyright infringement involving the song, “Stairway to Heaven”);
12 *Art Attacks Ink, LLC v. MGA Entm’t*, 581 F. 3d 1138 (9th Cir. 2009) (affirmed district
13 court’s decision on a summary judgment made after a jury verdict concerning alleged
14 infringement involving Bratz Dolls) These cases involved decisions which came after
15 plaintiffs had had discovery opportunities to gather evidence of widespread
16 dissemination.

17 That is not the case here where Defendants seek to deny Plaintiffs their right to
18 discovery. Defendants attempt to do so even though the following facts, set forth in the
19 amended complaint (“FAC”), require discovery to ascertain details of the extent of the
20 widespread dissemination of Plaintiff’s musical composition, “Live Your Life.”

21 A. Artikal has been a popular band, largely in the Florida region, for
22 about a dozen years. FAC ¶17.

23 B. During the period in question, March 31, 2017, when the
24 band’s *Smoke and Mirrors* album was released, and August 28, 2018, when Dua Lipa
25 admits to having written “Levitating”, the band played mainly in small venues, principally
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1 in Florida. (FAC ¶18.

2 C. In April 2017 “Live Your Life,” from the *Smoke and Mirrors* album
3 charted on Billboard’s Reggae chart at #2. FAC ¶19.

4 D. Within the reggae music community *Smoke and Mirrors* garnered
5 coverage which extended to the birthplace of reggae, Jamaica, where it is mentioned in
6 one of that nation’s leading newspapers. FAC ¶20.

7 E. Beginning in April 2018 “Live Your Life” was significantly used in
8 a video commercial for Delray Beach, Florida’s “Beerfest 2018,” which promoted tours
9 of local bars and restaurants. FAC ¶ 21

10 F. From its 2017 release, “Live Your Life” and the album in which it
11 appears, *Smoke and Mirrors*, until Artikal stopped the album’s sale in the late fall, 2018,
12 the group played the song at its concerts and recordings were available online both via
13 streaming and downloads, while the group sold on its own approximately 500 physical
14 copies. (In October 2018 the group asked that the album be taken off on-line sites because
15 the group had a new lead singer and, as a result, was changing its repertoire to reflect the
16 strengths of the new singer.) FAC ¶23.

17 Given the above facts, the extent to which Plaintiffs have pled the dissemination of
18 their recording of “Life Your Life” is sufficient to defeat a motion to dismiss.

19 2. Chain of access has been sufficiently established to defeat a motion
20 to dismiss

21 In *Segal, supra*, the District Court denied defendants’ motion to dismiss a
22 copyright infringement claim against them, finding that chain of access existed merely by
23 plaintiff having sent her screenplay to thirteen talent agents at the William Morris Agency
24 (WMA”), even though those agents did not represent the defendants (other agents at
25 WMA represented the defendants) and there was no evidence that any of the thirteen

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1 agents had discussed plaintiff’s screenplay with defendants or their agents at the
2 company. The District Court reasoned that “[p]laintiff is entitled to the presumption of
3 truth that the intermediaries received her message and that the intermediaries used their
4 relevant connection as employees of WMA to transmit Plaintiff’s protected works to
5 [defendants]... and/or their agents.” The Court went on to explain that whether plaintiff’s
6 screenplay actually was seen by defendants, or their agents were facts which “reside
7 exclusively within the files of Defendants and/or WMA and, thus, Plaintiff is not
8 expected to have knowledge of them prior to discovery.” *Id* at *27-28.

9 The facts supporting chain of access in this case are much stronger than those
10 presented in *Segal*. The amended complaint this action alleges that:

- 11 1. Artikal Sound System is based in Florida. FAC ¶17.
- 12 2. Clarence Coffee, Jr., one of the defendants and a co-writer of “Levitating,”
13 is a member of a production team known as Monsters and Strangerz. FAC ¶ 24.
- 14 3. Monsters and Strangerz produced a song which appears on Dua Lipa’s
15 album, *Future Nostalgia* – “Break My Heart.” FAC ¶ 25
- 16 4. “Break My Heart” was co-written by Ali Tamposi, a prominent songwriter
17 FAC ¶26.
- 18 5. Co-writer credit on “Break My Heart,” was given to two members of the
19 popular 1980s group, INXS, Andrew Farriss and Michael Hutchence, because “Break My
20 Heart” is strikingly similar to, and derivative of, the guitar riff in INXS’ 1987 hit, “Need
21 You Tonight.” FAC ¶ 25.
- 22 6. Upon information and belief, Monsters and Strangerz originated in Miami,
23 Florida. FAC ¶ 24.
- 24 7. Ali Tamposi not only shares a Florida connection, but she was taught guitar
25 by plaintiff Chris Cope’s brother-in-law. FAC ¶26

1 8. Plaintiff Chris Cope has for years been a Facebook friend. of Tamposi’s.
2 FAC ¶ 26.

3 9. Cope has regularly posted news about Artikal Sound Systems on his
4 Facebook page. FAC ¶26.

5 The Court in *Segal*, quoting *Loomis*, 836 F.3d at 995 noted that “a plausible
6 inference ‘that a third party with whom both the plaintiff and defendant were dealing had
7 possession of plaintiff’s work[s] is sufficient to establish access by the defendant[s].” *Id*
8 at *23. In *Segal*, the simple fact that the allegedly infringed work had been given to
9 agents at WMA, a talent agency which represented defendants, adequately alleged that
10 “defendants had a reasonable opportunity to view plaintiff’s screenplay and treatment
11 prior to the creation of [defendant’s alleging infringing] book sufficed to defeat a motion
12 to dismiss. *Id.* *28. That is certainly the case here where plausible inference of
13 Defendants’ access to Plaintiffs’ “Live Your Life” can be made not only through Ms.
14 Tamposi, but based upon the Florida roots of Plaintiffs and one of the co-writers of
15 “Levitating,” Clarence Coffee, Jr., and his production team which produced the Dua Lipa
16 recording of that song.

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1 III. CONCLUSION

2 For the reasons set forth above, Plaintiffs have established sufficient allegations of
3 access and substantial similarity to defeat a motion to dismiss their infringement claim. In
4 the event Defendants’ motion is granted, request is hereby made for leave to file a second
5 amended complaint. *See Star Fabrics, Inc. v West Seal, Inc.*, 2014 U.S. Dist, LEXIS
6 20052, *3 (9TH Cir. December 2, 2014) “When a district court grants a motion to dismiss,
7 it should provide leave to amend unless it is clear that the complaint could not be saved
8 by any amendment.” Citing *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
9 1031 (9th Cir. 2008).

10 Dated: January 19, 2023

11 Respectfully submitted,

12 EISENBERG, HEFLER & LEVY, LLP

13 By: s/ Stewart L. Levy
14 STEWART L. LEVY
15 Attorneys for Plaintiffs

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