No. _____

In The

Supreme Court of the United States

GUY HOBBS,

Petitioner,

v.

ELTON JOHN a/k/a SIR ELTON JOHN HERCULES JOHN, BERNARD TAUPIN a/k/a BERNIE TAUPIN, and BIG PIG MUSIC LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court case of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), renders a composition that combines a series of words, ideas, phrases, and themes in a unique manner protectable under copyright law, even if these elements would not be protectable if viewed in isolation.

2. When does the issue of substantial similarity become a question of fact that requires an evidentiary hearing.

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 722 F.3d 1089 (7th Cir. 2013). The opinion of the district court is reported at 2012 U.S. Dist. LEXIS 154452 (N.D. Ill. Oct. 29, 2012).

BASIS FOR JURISDICTION

The Seventh Circuit filed its decision on July 17, 2013, and entered an order affirming the district court's judgment on the same date. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

17 U.S.C. § 501 provides, in pertinent part:

> (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) . . . is an infringer of the copyright or right of the author, as the case may be.
>
> (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.

STATEMENT OF FACTS

While working as a photographer on board a Russian cruise ship, Plaintiff, Hobbs,[1] wrote the lyrics to a song about a Cold War love affair between a Western man and a Russian woman, named "Natasha." In those lyrics, the nascent love affair is thwarted by the political differences between their respective countries. The lyrics to Natasha were copyrightable under the laws of the United States and Great Britain. Hobbs registered his copyright of "Natasha" in the United Kingdom on May 10, 1983, and again on November 11, 1983.

Hobbs submitted his lyrics of "Natasha" to Big Pig, which was created and owned by John and Taupin. In less than a year after receiving the lyrics of Hobbs' "Natasha," John and Taupin jointly copyrighted a song called "Nikita," about a Cold War love affair between a Western man and a Russian woman, named Nikita, whose nascent love affair is thwarted by the political differences between their respective

[1] For brevity, all individual parties will be referred to by last name (*i.e.*, "Hobbs", "John" and "Taupin"). Corporate Defendant, Big Pig Music Ltd., will be referred to as "Big Pig." Defendants, John, Taupin and Big Pig, will occasionally be referred to collectively as "Defendants".

countries. John recorded the song, which became a commercial success.

"Natasha" and "Nikita" share a number of structural, linguistic and thematic similarities, including:

- The theme of a love between a Western man and a Communist woman during the Cold War that is thwarted by the ideological differences between their respective countries;
- An emphasis on various manifestations of their love that will never happen, which is continually repeated in both lyrics – the word "never" appears 12 times in "Natasha" and 11 times in "Nikita";
- Repetition of the Russian woman's name, 13 times in "Natasha" and 14 times in "Nikita";
- Repetition in the chorus of the Russian woman's name exactly four times each in both lyrics in combination with the phrases "You'll never know," "you will never know," "to hold you," and "I need you";
- Repetition of the phrase "to hold you" three times in Natasha, and four times in Nikita;
- Descriptions of Natasha's/Nikita's "pale blue eyes";

- References to sending Natasha/Nikita correspondence in the mail; and
- Use of phonetically similar Russian names: three syllables, beginning with the letter "N", and ending with the letter "A."

Based on the substantial similarity between "Natasha" and "Nikita," Hobbs filed the instant lawsuit on April 26, 2012, accusing Defendants of copyright infringement. On August 7, 2012, Defendants filed a Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6). After being fully briefed, the district court issued an opinion on October 29, 2012, granting Defendants' Motion to Dismiss in its entirety and dismissing Hobbs' Complaint with prejudice. The district court concluded that Hobbs failed to show substantial similarity between his song "Natasha" and Defendants' song "Nikita."

Hobbs filed his timely Notice of Appeal on November 20, 2012. After being fully-briefed, the circuit court affirmed the district court, finding that, as a matter of law, "Natasha" and "Nikita" are not substantially similar as they failed to share enough unique features to give rise to a breach of duty not to copy another's work.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE UNIQUE ARRANGEMENT OR COMBINATION OF UNPROTECTED ELEMENTS CAN CONSTITUTE A COPYRIGHTABLE INTEREST.

The main argument that Hobbs raised on appeal is that a composition that combines a series of words, ideas, phrases, and themes in a unique manner is protectable under copyright law, even if these elements would not be protectable if viewed in isolation. In support of that argument, Hobbs cited the Supreme Court case of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).

In *Feist*, this Court held that although facts themselves are part of the public domain and therefore are not copyrightable, compilations of unprotectable facts generally are. 499 U.S. 340 at 344. In so doing, this Court noted that, "copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope." *Id*. at 345. Furthermore, although copyright protection is limited to an author's original selection or arrangement of unprotectable elements, that particular selection or arrangement is protectable. *Id*. at 350-351. This Court held that "[t]his principal, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship," and is intended to ensure authors the right to their original expression. *Id*. at 349, emphasis added.

Numerous Circuits have followed the Supreme Court's holding in *Feist Publications*. *See Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003-1004 (2d Cir. 1995) ("[T]he Supreme Court's decision of [*Feist Publications*] makes clear, a work may be copyrightable even though it is entirely a compilation of unprotectible elements. . . . What is protectable then 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."); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) ("It is well settled that a jury may find a combination of unprotectible elements to be protectable. . . ."); *Meshworks, Inc. v. Toyota Motor Sales U.S.A.*, 528 F.3d 1258, 1262 (10th Cir. 2008) ("[N]ot every work of authorship, let alone every aspect of every work of authorship, is protectable in copyright; only original expressions are protected."); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1141 (11th Cir. 2007) ("[T]he [Supreme] Court held that a compiler's selection, arrangement and coordination, if original, are the only protectable elements of a factual compilation.").

Despite this Court's clear holding in *Feist*, the district court spent the vast majority of its opinion opining that a composition which includes a unique combination of elements only merits copyright protection if the individual elements, when viewed in isolation, are independently protectable. The district court

relied primarily on the following language in *Peters v. West*, 692 F.3d 629 (7th Cir. 2012):

> If the copied parts are not, on their own, protectable expression, then there can be no claim for infringement of the reproduction right. *See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 61 (2d Cir. 2010).

692 F.3d at 632.

As discussed at length in Hobbs' appellate brief, *Peter F. Gaito* does not hold that the copied parts of a work of art must be protected in isolation to maintain a claim for infringement. Furthermore, said language in *Peters* contradicts the copyright principles employed by other Circuits and by the Supreme Court, particularly in the case of *Feist*. However, despite citing the erroneous language in *Peters*, the district court ultimately did not limit its inquiry to whether the individual elements are protectable – as an afterthought, it devoted a mere sentence in deciding that arrangement of unprotectable elements in Nikita" did not constitute copyrightable work.

On appeal, in contravention to the precedential case of *Feist*, the Seventh Circuit refused to overrule *Peters*, finding that Hobbs failed to state a claim for copyright infringement. The Seventh Circuit found that "even when the allegedly similar elements between the songs are considered in combination, the songs are not substantially similar."

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHEN THE ISSUE OF SUBSTANTIAL SIMILARITY BECOMES AN ISSUE OF FACT.

Although Hobbs contends the Seventh Circuit's finding was problematic, the Seventh Circuit did go beyond the analysis conducted by the district court. Of the six elements of similarity argued by Hobbs, the Seventh Circuit found that four of said elements of similarity were *expressed* differently in "Natasha" and "Nikita." However, despite finding that there were two elements of similarity, the Seventh Circuit determined that said elements were commonplace, rudimentary, standard, or unavoidable in popular love songs, and therefore "Natasha" and "Nikita" were not substantially similar. As a result, the Seventh Circuit found that Hobbs "cannot rely upon a combination of dissimilar expressions to establish that 'Nikita' infringes upon 'Natasha's' 'unique selection, arrangement, and combination of ' those expressions."

The first problem is that this analysis misinterprets *Feist*. In *Feist*, this Court clearly held that the "original selection or arrangement" of unprotectable elements meets the constitutional minimum for copyright protection. *Feist* at 499 U.S. 348. Thus, pursuant to *Feist*, Hobbs' lyrics constitute protectable, copyrightable work if he selected, arranged, and uniquely combined unprotectable elements. The copyright protection arises out of the unique combination of the elements – not out of whether the individual

elements themselves, standing in isolation, were expressed similarly.

The second problem is that this Court also held in *Feist* that the crux of any work qualifying for protection under copyright law is one simple element – originality. 499 U.S. 340 at 345. This is a low threshold – to qualify for protection, a work must simply be original to the author. *Id*. *Feist* noted that, "[t]o be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works made the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Id*.

Contrary to holding in *Feist*, the Seventh Circuit determined that Hobbs failed to establish a prima facie case of infringement to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss. The Seventh Circuit made this determination despite finding the existence of both access and elements of similarity. However, in light of said findings, the question of substantial similarity should have been a question of fact. *See Atkins v. Fischer*, 331 F.3d 998, 995 (D.C. 2003) ("The issue of substantial similarity in a copyright infringement claim 'is customarily an extremely close question of fact . . . '"); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985), *citing Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981) ("Substantial similarity in copyright infringement actions is a question of fact uniquely suited for determination by the trier of fact.").

Instead, rather than leaving the issue of substantial similarity to the trier of fact, both the district court and the Seventh Circuit held Hobbs to a higher standard than that required for maintaining a copyright infringement claim; Hobbs' Complaint was improperly dismissed. Therefore, as both the district court and the Seventh Circuit's findings were of questions of fact at odds with the holding in *Feist*, this Court's review is warranted.

CONCLUSION

For the aforementioned reasons, petitioner, Guy Hobbs, respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 12-3652

GUY HOBBS,

Plaintiff-Appellant,

v.

ELTON JOHN, also known as
Sir Elton Hercules John, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 12-CV-03117 – **Amy J. St. Eve**, *Judge.*

ARGUED MAY 31, 2013 – DECIDED JULY 17, 2013

Before FLAUM, MANION, and ROVNER, *Circuit Judges.*

MANION, *Circuit Judge.* While working on a Russian cruise ship, Guy Hobbs composed a song entitled "Natasha" that was inspired by a brief love affair he had with a Russian waitress. Hobbs tried to publish his song, but was unsuccessful. A few years later, Elton John and Bernie Taupin released a song entitled "Nikita" through a publishing company to which Hobbs had sent a copy of "Natasha." Believing that "Nikita" was based upon "Natasha," Hobbs

eventually demanded compensation from John and Taupin, and ultimately filed suit asserting a copyright infringement claim and two related state law claims. The defendants moved to dismiss Hobbs's complaint for failure to state a claim, and the district court granted the defendants' motion. Hobbs appeals. We affirm.

I. Facts

In 1982, Guy Hobbs began working as a photographer on a Russian cruise ship where he met and romanced a Russian waitress. His experience inspired him to write a song entitled "Natasha" about an ill-fated romance between a man from the United Kingdom and a woman from Ukraine. In 1983, Hobbs registered his copyright of "Natasha" in the United Kingdom, and subsequently sent the song to several music publishers. One of those publishers was Big Pig Music, Ltd. ("Big Pig"), a company that published songs composed by Elton John and Bernard Taupin. Ultimately, Hobbs's efforts to find a publisher for his song proved unsuccessful.

However, in 1985, John released a song entitled "Nikita," wherein the singer (who is from "the west") describes heartfelt love for Nikita, whom the singer "saw . . . by the wall" and who is on the other side of a "line" held in by "guns and gates." Big Pig registered the copyright for "Nikita," and the copyright application lists both John and Taupin. "Nikita" proved to be extremely successful.

Hobbs alleges that he first encountered the written lyrics of "Nikita" in 2001. Believing that "Nikita" infringed his copyright of "Natasha," Hobbs sought compensation from John and Taupin, but his requests were apparently rebuffed. Consequently, in 2012, Hobbs sued John, Taupin, and Big Pig in the Northern District of Illinois for copyright infringement in violation of the Copyright Act of 1976.[1] Hobbs also asserted two related state law claims. The defendants moved to dismiss Hobbs's entire complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.[2]

In opposing the defendants' motion, Hobbs identified a number of allegedly similar elements between the two songs. He argued that his selection and combination of those elements in "Natasha" constituted a unique expression entitled to copyright protection, and that the defendants' similar use of those

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[1] Although Hobbs brought his action twenty-seven years after "Nikita" was authored and eleven years after Hobbs allegedly first encountered "Nikita," the defendants did not raise the three-year statute of limitations, *see* 17 U.S.C. § 507(b), as a defense in their motion to dismiss.

[2] Although Hobbs did not attach the lyrics of either "Natasha" or "Nikita" to his complaint, the two songs are the central focus of the complaint. *See Wright v. Associated Ins. Cos.,* 29 F.3d 1244, 1248 (7th Cir. 1994) ("[D]ocuments attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim."). Furthermore, Hobbs does not challenge the district court's reliance on the lyrics of the two songs in ruling on the defendants' motion to dismiss.

elements in "Nikita" supported a claim for copyright infringement. The district court concluded that the elements identified by Hobbs are not entitled to copyright protection when considered alone. The district court also rejected Hobbs's "unique combination" theory because it thought that *Peters v. West,* 692 F.3d 629, 632 (7th Cir. 2012), precluded a copyright infringement claim based upon a combination of similar elements that are unprotectable individually. Despite rejecting Hobbs's "unique combination" theory, the district court nevertheless went on to consider that argument, and concluded that the similar elements considered in combination still could not support a claim for copyright infringement. The district court also concluded that the Copyright Act preempted Hobbs's state law claims. Consequently, the district court granted the defendants' motion and dismissed Hobbs's entire action with prejudice. Hobbs appeals.

II. Lyrics

The lyrics to "Natasha" are:

> You held my hand a bit too tight
> I held back the tears
> I wanted just to hold you, whisper in your ear
> I love you, girl I need you
> Natasha . . . Natasha . . . I didn't want to go
> Natasha . . . Natasha . . . the freedom you'll never know
> The freedom you'll never know

But a Ukraine girl and a UK guy just never
stood a chance
Never made it to the movies, never took you
to a dance
You never sent me a Valentine,
I never gave you flowers
There was so much I had to say
But time was never ours
You sailed away – no big goodbyes
Misty tears in those pale blue eyes

I wanted just to hold you, whisper in your ear
I love you, girl I need you
Run my fingers through your hair
Natasha.. . Natasha . . . I didn't want to go
Natasha . . . Natasha . . . the freedom you'll
never know
The freedom you'll never know

You held my hand a bit too tight
I held back the tears
I wanted just to hold you, whisper in your ear
I love you, girl I need you
Natasha . . . Natasha . . . I didn't want to go
Natasha . . . Natasha . . . the freedom you'll
never know
The freedom you'll never know
(Spoken quietly) But Natasha . . . Remember me

The lyrics to "Nikita" are:

Hey Nikita is it cold
In your little corner of the world
You could roll around the globe
And never find a warmer soul to know
Oh I saw you by the wall
Ten of your tin soldiers in a row

With eyes that looked like ice on fire
The human heart a captive in the snow

Oh Nikita you will never know, anything
about my home
I'll never know how good it feels to hold you
Nikita I need you so
Oh Nikita is the other side of any given
line in time
Counting ten tin soldiers in a row
Oh no, Nikita you'll never know

Do you ever dream of me
Do you ever see the letters that I write
When you look up through the wire
Nikita do you count the stars at night

And if there comes a time
Guns and gates no longer hold you in
And if you're free to make a choice
Just look towards the west and find a friend

Oh Nikita you will never know, anything
about my home
I'll never know how good it feels to hold you
Oh no, Nikita you'll never know
Oh Nikita you will never know, anything
about my home
I'll never know how good it feels to hold you
Nikita I need you so
Oh Nikita is the other side of any given
line in time
Counting ten tin soldiers in a row
Oh no, Nikita you'll never know
Counting ten tin soldiers in a row.

III. Discussion

On appeal, Hobbs relies solely upon his "unique combination" theory.[3] Hobbs contends that the unique selection, arrangement, and combination of individually unprotectable elements in a song can be entitled to copyright protection. Hobbs argues that *Peters* does not preclude such a theory, or alternatively, that we should overrule *Peters*. Finally, Hobbs contends that the similar elements found in "Natasha" and "Nikita," when considered in combination, support a claim for copyright infringement.

Ultimately, as explained below, we hold that Hobbs failed to state a claim for copyright infringement because, even when the allegedly similar elements between the songs are considered in combination, the songs are not substantially similar. Therefore, we need not decide if Hobbs is correct when he argues that a unique selection, arrangement, and combination of individually unprotectable elements in a song can support a copyright infringement claim. Similarly, we need not decide whether the district court correctly interpreted *Peters* as prohibiting such a theory.[4]

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[3] Thus, we do not consider whether the allegedly similar elements identified by Hobbs are entitled to copyright protection when considered alone. Nor do we review the district court's ruling that Hobbs's state law claims are preempted by the Copyright Act.

[4] In rejecting Hobbs's "unique combination" theory, the district court relied upon our statement in *Peters* that "[i]f the

(Continued on following page)

We review a dismissal under Rule 12(b)(6) *de novo*. *Peters,* 692 F.3d at 632. In conducting our review, we construe the allegations in the complaint

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copied parts are not, on their own, protectable expression, then there can be no claim for infringement of the reproduction right." 692 F.3d at 632. Although we need not address whether the district court correctly interpreted *Peters* on this issue, we observe that there is a wealth of authority recognizing that, in certain situations, a unique arrangement of individually unprotectable elements can form an original expression entitled to copyright protection. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 362 (1991) ("The question that remains is whether [the plaintiff] selected, coordinated, or arranged these uncopyrightable facts in an original way."); *JCW Invs., Inc. v. Novelty, Inc.,* 482 F.3d 910, 917 (7th Cir. 2007) ("[T]he very combination of these [unprotectable] elements as well as the expression that is [the work itself] are creative."); *Bucklew v. Hawkins, Ash, Baptie & Co.,* 329 F.3d 923, 929 (7th Cir. 2003) ("[I]t is the combination of [unprotectable] elements, or particular novel twists given to them, that supply the minimal originality required for copyright protection."); *Roulo v. Russ Berrie & Co.,* 886 F.2d 931, 939 (7th Cir. 1989) ("While it is true that these elements are not individually capable of protection, just as individual words do not deserve copyright protection, it is the unique combination of these common elements which form the copyrighted material."); *see also Stava v. Lowry,* 323 F.3d 805, 811 (9th Cir. 2003) ("It is true, of course, that a *combination* of unprotectable elements may qualify for copyright protection.") (emphasis in original); *Knitwaves, Inc. v. Lollytogs Ltd.,* 71 F.3d 996, 1003-04 (2d Cir. 1995) ("As the Supreme Court's decision in [*Feist*] makes clear, a work may be copyrightable even though it is entirely a compilation of unprotectible elements."). Indeed, in *Peters,* our conclusion that the similarities between the two songs were not individually protectable did not keep us from considering whether the plaintiff could establish a copyright infringement claim based on "all of these [unprotectable] elements in combination." 692 F.3d at 636.

in the light most favorable to Hobbs in order to determine whether he has stated a plausible claim for copyright infringement. *Id.*; *see also Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). To establish his copyright infringement claim, Hobbs must prove "(1) ownership of a valid copyright; and (2) unauthorized copying of constituent elements of the work that are original." *Peters,* 692 F.3d at 632. Because defendants rarely admit to copying the works of others, Hobbs may establish the second element of his infringement claim by showing that the defendants had the opportunity to copy "Natasha" and that the two works are "substantially similar," thereby supporting an inference that the defendants actually did copy his song. *Id.* at 633. For the purposes of their motion to dismiss, the defendants concede that Hobbs owns a valid copyright for "Natasha," and that they had the opportunity to copy it. Thus, the defendants can only prevail on their motion to dismiss if "Natasha" and "Nikita" are not "substantially similar" as a matter of law. That is, if as a matter of law "Natasha" and "Nikita" do not "share enough unique features to give rise to a breach of the duty not to copy another's work." *Id.* at 633-34.

Hobbs contends that the two songs are "substantially similar" because "Nikita" appropriates "Natasha"'s unique selection, arrangement, and combination of certain elements. In support of this argument, Hobbs identifies the following allegedly similar elements that are found in both songs:

(1) A theme of impossible love between a Western man and a Communist woman during the Cold War;

(2) References to events that never happened;

(3) Descriptions of the beloved's light eyes;

(4) References to written correspondence to the beloved;

(5) Repetition of the beloved's name, the word "never," the phrase "to hold you," the phrase "I need you," and some form of the phrase "you will never know;" and

(6) A title which is a one-word, phonetically-similar title consisting of a three-syllable female[5] Russian name, both beginning with the letter "N" and ending with the letter "A."

Hobbs's argument flounders on two well-established principles of copyright law. First, the Copyright Act does not protect general ideas, but only the particular expression of an idea. *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.,* 672 F.2d 607, 615 (7th Cir. 1982) ("It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself." (internal quotation marks omitted)), *superseded by statute on other grounds as*

[5] Nikita is actually a masculine name in Slavic countries, but it is often used as a feminine name elsewhere. *See* http://en.wikipedia.org/wiki/Nikita_given_name) (last visited July 9, 2013).

recognized in Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429 (7th Cir. 1985); *see also JCW,* 482 F.3d at 917 ("It is, of course, a fundamental tenet of copyright law that the idea is not protected, but the original expression of the idea is." (citing *Feist,* 499 U.S. at 348-49)). Second, even at the level of particular expression, the Copyright Act does not protect "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Incredible Techs., Inc. v. Virtual Techs., Inc.,* 400 F.3d 1007, 1012 (7th Cir. 2005) (internal quotation marks omitted); *see also Bucklew,* 329 F.3d at 929 ("[A] copyright owner can't prove infringement by pointing to features of his work that are found in the defendant's work as well but that are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another."). Here, a careful review of both songs' lyrics reveals that Hobbs's first four allegedly similar elements are *expressed* differently in "Natasha" and "Nikita." And the remaining similar elements are rudimentary, commonplace, standard, or unavoidable in popular love songs.

Specifically, Hobbs's first allegedly similar element is that each song tells the tale of an impossible romance between "a Western man and a Communist woman" separated by the Cold War (a widespread concern at the time the songs were authored). Although both songs contain the idea of an impossible love affair due to a conflict, each song *expresses* this

general idea differently. That is, "Natasha" and "Nikita" tell *different* stories about impossible romances during the Cold War. "Natasha" tells the story of two people who briefly become intimate, but who are forced to part ways because one is not free (presumably because of the Iron Curtain) and must sail away. But for a short time, at least, he could hold her hand, whisper in her ear, run his fingers through her hair, and cry with her when forced to separate. "Nikita" tells the tale of a man who sees and desires a woman whom he can never meet because she is on the other side of a "line" held in by "guns and gates" (perhaps the Berlin Wall). He could only imagine and wish for a chance to hold her, to tell her about his home, and if the border guards were to leave and set her free then to find and meet her, but he thinks that will never happen.

Hobbs's second, third, and fourth allegedly similar elements fare no better. While it is true that "Natasha" and "Nikita" both contain references to unfulfilled desires or events that never occur, what matters is that the particular ways that each song expresses these concepts are *dissimilar*. "Natasha" refers to "the freedom [the woman will] never know," a relationship that "never stood a chance," and never going to the movies or a dance. In contrast, "Nikita" says that the woman could "never find a warmer soul to know" and "will never know anything about [the man's] home," and that the man will "never know how good it feels to hold [the woman]." Similarly, while both songs refer to the beloved's light eyes and

to written correspondence between the lovers, they do so in entirely different ways. "Natasha" refers to "pale blue eyes," whereas "Nikita" talks about "eyes that looked like ice on fire." Again, "Natasha" contains the complaint that, "You never sent me a Valentine," while "Nikita" contains the wholly dissimilar query, "Do you ever see the letters that I write[?]" In short, Hobbs cannot rely upon a combination of *dissimilar* expressions to establish that "Nikita" infringes upon "Natasha"'s "unique selection, arrangement, and combination of" of those expressions.

However, Hobbs's fifth and sixth similar elements are *expressed* in similar ways (more or less) within both songs.[6] Both "Natasha" and "Nikita" make liberal use of repetition – including repeatedly using the word "never," the phrases "to hold you" and "you'll never know," as well as the beloved's name. Additionally, each song's title is a Russian name beginning with the letter "N" and ending with the letter "A." While these similar elements are present at the level of expression, they are also rudimentary, commonplace, standard, or unavoidable in popular love songs.[7] Repetition is ubiquitous in popular music.

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[6] Although both songs repeatedly use a form the phrase "will never know," the context is somewhat different. "Natasha" refers to the "freedom you'll never know," whereas in "Nikita" the singer laments that he "will never know" how it feels to touch the object of his affection, and that she "will never know anything about [his] home."

[7] Indeed, even Hobbs's first four allegedly similar elements reflect concepts that are standard fare in love songs. Love songs

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See Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984) (observing that "popular music" is a field "in which all songs are relatively short and tend to build on or repeat a basic theme"). And, as the district court observed, the United States Copyright Office's Registered Works Database reveals that numerous works share the titles "Natasha" and "Nikita." *See* http://cocatalog.loc.gov/ (last visited July 9, 2013). Thus, that "Natasha" and "Nikita" share a few similar expressions that are commonplace in love songs could not support a finding that the songs are "substantially similar." *Cf. Johnson v. Gordon,* 409 F.3d 12, 22 (1st Cir. 2005).

We agree with the district court that "Natasha" and "Nikita" simply "tell different stories," *Hobbs v. John,* No. 12C3117, 2012 WL 5342321, at *7 (N.D. III. Oct. 29, 2012), and "are separated by much more than 'small cosmetic differences,'" *Peters,* 692 F.3d at 636 (quoting *JCW,* 482 F.3d at 916). "Natasha" tells the story of an actual, though brief, romantic encounter between a man from the United Kingdom and a woman from Ukraine. Their tangible relationship is severed because the woman must sail away. In contrast, "Nikita" tells the tale of man who sees and loves a woman from afar. But that love can never find

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are replete with references to impossible love, unfulfilled desires, events that never occur, light eyes, and written correspondence between lovers. *See* Selena Gomez & the Scene, *Love You Like A Love Song* (Hollywood Records 2011) ("It's been said and done/Every beautiful thought's been already sung. . . .").

physical expression because the two are separated by "guns and gates."

We conclude that as a matter of law "Natasha" and "Nikita" are not "substantially similar" because they do not "share enough unique features to give rise to a breach of the duty not to copy another's work." *Peters,* 692 F.3d at 633-34.

IV. Conclusion

Because "Natasha" and "Nikita" are not "substantially similar" as a matter of law, Hobbs's copyright infringement claim fails as a matter of law. Therefore, we AFFIRM the judgment of the district court.

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

GUY HOBBS, an individual, Plaintiff, v. ELTON JOHN a/k/a SIR ELTON HERCULES JOHN, an individual, BERNARD JOHN TAUPIN a/k/a BERNIE TAUPIN, an individual, and BIG PIG MUSIC, LTD., a foreign business organization, form unknown, Defendants.	)	Case No. 12 C 3117

MEMORANDUM OPINION AND ORDER

(Filed Oct. 29, 2012)

AMY J. ST. EVE, District Court Judge:

On April 26, 2012, Plaintiff Guy Hobbs brought the present three-count Complaint against Defendants Elton John, Bernard John Taupin, and Big Pig Music, Ltd., alleging copyright infringement in violation of the Copyright Act of 1976, 17 U.S.C. § 101, *et seq*. (Count I), as well as state law claims for the equitable remedies of constructive trust (Count II) and an accounting (Count III), pursuant to the Court's supplemental jurisdiction. *See* 28 U.S.C.

§§ 1331, 1367(a). On August 7, 2012, Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court grants Defendants' motion to dismiss and dismisses this lawsuit in its entirety.

LEGAL STANDARD

A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *See Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7,* 570 F.3d 811, 820 (7th Cir. 2009). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (citation omitted). Under the federal notice pleading standards, a plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. Put differently, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 570). "In evaluating the sufficiency of the complaint, [courts] view it in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's

favor." *AnchorBank, FSB v. Hofer,* 649 F.3d 610, 614 (7th Cir. 2011). Courts may also consider documents attached to the pleadings without converting the motion into a motion summary judgment, as long as the documents are referred to in the complaint and central to the claims. *See Geinosky v. City of Chicago,* 675 F.3d 743, 745 n.1 (7th Cir. 2012); *Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 556 (7th Cir. 2012) Fed.R.Civ.P. 10(c).

BACKGROUND

I. Factual Allegations

Plaintiff Guy Hobbs, who was born in Australia and raised in the United Kingdom, is an award-winning freelance photojournalist. (R. 1, Compl. ¶ 7.) At the beginning of 1982, after studying photography at Salisbury Art College in the United Kingdom, Hobbs took his first job as a photographer on a Russian cruise ship, the Taras Shevchenko. (*Id.* ¶ 8.) While on board the Russian cruise ship, Hobbs became romantically involved with a Ukrainian waitress. (*Id.*) Before leaving the Taras Shevchenko in the spring of 1982, he wrote the lyrics to a song called "Natasha" inspired by his experiences with the waitress. (*Id.* ¶ 9.) In his Complaint, Hobbs alleges that "Natasha" is about an impossible love affair between a Western man and an Ukrainian woman during the Cold War. (*Id.*)

In April 1982, Hobbs transferred to a Greek ship and, after a year at sea, he moved to London for two

years. (*Id.* ¶ 10.) On May 10, 1983, Hobbs registered his copyright of "Natasha" in the United Kingdom through the process proscribed by the United Kingdom Intellectual Property Office. (*Id.*) Again, on November 11, 1983, Hobbs registered his copyright of "Natasha" in the United Kingdom, along with four other songs' lyrics he had written. (*Id.* ¶ 12.) Meanwhile, based on information Hobbs found in a September 1984 issue of a magazine called "The Songwriter," Hobbs forwarded the "Natasha" lyrics to several music publishers, including Defendant Big Pig, asking them to consider publishing his lyrics and assisting him in connecting with singer/songwriter collaborators. (*Id.* ¶ 11.) Hobbs maintains that at that time, he thought Big Pig was an independent publishing company and did not know it was affiliated with Defendants John and Taupin. (*Id.*)

In October 1984, after having had no success with his lyrics, Hobbs returned to his career as a photojournalist. (*Id.* ¶ 13.) In 2001, Hobbs came across the written lyrics of Defendants' "Nikita" for the first time in a song book.[1] (*Id.* ¶ 14.) According to Hobbs, "Nikita" involves an impossible love affair between a Western man and an East German woman

[1] Although the statute of limitations for copyright infringement is three years and starts to run when the plaintiff learns, or should have learned, that the defendant was violating his rights, *see Gaiman v. McFarlane,* 360 F.3d 644, 653 (7th Cir. 2004), Defendants did not move to dismiss Hobbs' Complaint as untimely.

during the Cold War. (*Id.*) Hobbs further alleges that when he read the "Nikita" lyrics, he was shocked by the many similarities between the lyrics of "Nikita" and "Natasha" and that since 2001, he has consistently communicated with Defendants John, Taupin, and their attorneys demanding compensation for the unauthorized use of his lyrics. (*Id.* ¶¶ 14-15.)

In 1985, Big Pig copyrighted the musical composition entitled "Nikita" – Certificate of Registration PA0000267371/1985-11-18. (*Id.* ¶ 27.) Hobbs maintains that the authorship on the "Nikita" copyright application lists John and Taupin, although Hobbs alleges that John and Taupin never sought or obtained his permission to copy, duplicate, perform, or otherwise use his lyrics to "Natasha" in their musical composition and sound recording of "Nikita." (*Id.* ¶¶ 27-28.)

II. Songs' Lyrics

The lyrics to Defendants' song "Nikita" are as follows:

Hey Nikita is it cold
In your little corner of the world
You could roll around the globe
And never find a warmer soul to know

Oh I saw you by the wall
Ten of your tin soldiers in a row
With eyes that looked like ice on fire
The human heart a captive in the snow

Oh Nikita you will never know, anything
about my home
I'll never know how good it feels to hold you
Nikita I need you so
Oh Nikita is the other side of any given
line in time
Counting ten tin soldiers in a row
Oh no, Nikita you'll never know

Do you ever dream of me
Do you ever see the letters that I write
When you look up through the wire
Nikita do you count the stars at night

And if there comes a time
Guns and gates no longer hold you in
And if you're free to make a choice
Just look towards the west and find a friend

Oh Nikita you will never know, anything
about my home
I'll never know how good it feels to hold you
Oh no, Nikita you'll never know

Oh Nikita you will never know, anything
about my home
I'll never know how good it feels to hold you
Nikita I need you so
Oh Nikita is the other side of any given
line in time
Counting ten tin soldiers in a row
Oh no, Nikita you'll never know

Counting ten tin soldiers in a row.

(R. 23-10, Ex. H, "Nikita" lyrics.)

Hobbs' lyrics to "Natasha" are:

You held my hand a bit too tight
I held back the tears
I wanted just to hold you, whisper in your ear
I love you, girl I need you
Natasha . . . Natasha . . . I didn't want to go
Natasha . . . Natasha . . . the freedom
you'll never know
the freedom you'll never know

But a Ukraine girl and a UK guy just never
stood a chance
Never made it to the movies, never took you
to a dance
You never sent me a Valentine, I never gave
you flowers
There was so much I had to say
But time was never ours
You sailed away – no big goodbyes
Misty tears in those pale blue eyes

I wanted just to hold you, whisper in your ear
I love you, girl I need you
Run my fingers through your hair
Natasha . . . Natasha . . . I didn't want to go
Natasha . . . Natasha . . . the freedom
you'll never know
the freedom you'll never know

You held my hand a bit too tight
I held back the tears
I wanted just to hold you, whisper in your ear
I love you, girl I need you
Natasha . . . Natasha . . . I didn't want to go

Natasha . . . Natasha . . . the freedom
you'll never know
the freedom you'll never know

But Natasha. . . . Remember me [*spoken quietly*].

(R. 23-11, Ex. I, "Natasha" lyrics.)

ANALYSIS

I. Copyright Infringement Claim – Count I

To establish a copyright infringement claim, a plaintiff must show: "(1) ownership of a valid copyright; and (2) unauthorized copying of constituent elements of the work that are original." *See Peters v. West,* 692 F.3d 629, 632 (7th Cir. 2012) (citation omitted); *see also Nova Design Build, Inc. v. Grace Hotels, LLC,* 652 F.3d 814, 817 (7th Cir. 2011). As to the second requirement, due to the rarity of direct evidence of copying, "a plaintiff may prove copying by showing that the defendant had the opportunity to copy the original (often called 'access') and that the two works are 'substantially similar,' thus permitting an inference that the defendant actually did copy the original." *Peters,* 692 F.3d at 633; *see also Nova Design Build,* 652 F.3d at 817-18. The Court focuses on the "substantially similar" aspect of this requirement because it is dispositive.[2] The substantially similar test, also known as the "ordinary observer" test,

[2] Defendants concede ownership and access solely for purposes of this motion to dismiss.

requires the Court to consider "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Incredible Tech., Inc. v. Virtual Tech., Inc.,* 400 F.3d 1007, 1011 (7th Cir. 2005) (citation omitted). The Seventh Circuit has recently simplified the test for substantial similarity, namely, whether "the two works share enough unique features to give rise to a breach of the duty not to copy another's work." *Peters,* 692 F.3d at 633-34. "The test for substantial similarity is an objective one." *JCW Inv., Inc. v. Novelty, Inc.,* 482 F.3d 910, 916 (7th Cir. 2007).[3]

In their motion to dismiss, Defendants ask the Court to compare the lyrics of the two songs "Nikita" and "Natasha" pursuant to Rule 10(c) arguing that the lyrics are not substantially similar. *See Peters,* 692 F.3d at 633. Hobbs does not object to Defendants' Rule 10(c) request, and because the Complaint references both songs' lyrics and the lyrics are central to this lawsuit, it is appropriate under Rule 10(c) and Seventh Circuit case law for the Court to consider Defendants' attachments containing the songs' lyrics.

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[3] Because the test for substantial similarity is an objective test, district courts may determine copyright infringement claims at the motion to dismiss stage of litigation. *See, e.g., Peters v. West,* 776 F.Supp.2d 742 (N.D. Ill. 2011), *aff'd Peters v. West,* 692 F.3d 629 (7th Cir. 2012); *O'Leary v. Books,* No. 08 C 0008, 2008 WL 3889867, at *2-3 (N.D. Ill. Aug. 18, 2008).

See Geinosky, 675 F.3d at 745 n.1; *Wigod,* 673 F.3d at 556; *Peters v. West,* 776 F.Supp.2d 742, 747 (N.D. Ill. 2011).

A. Non-Protectable Elements

There are several limitations to copyright protection that are relevant to the parties' arguments. First, it is well-established that common words and phrases are not protected under the Copyright Act. *See Peters,* 692 F.3d at 635-36 (The ubiquity of "what does not kill me, makes me stronger" suggests that Defendants lyrics do not infringe on Plaintiff's song); *Johnson v. Gordon,* 409 F.3d 12, 24 (1st Cir. 2005) ("You're the one for me" too common and trite to warrant copyright protection); *Acuff-Rose Music, Inc. v. Jostens, Inc.,* 155 F.3d 140, 144 (2d Cir. 1998) (phrase "you've got to stand for something, or you'll fall for anything" too common to accord copyright protection); 37 C.F.R. § 202.1. In other words, "phrases that are 'standard, stock, . . . or that necessarily follow from a common theme or setting' may not obtain copyright protection." *Lexmark Int'l Inc. v. Static Control Components, Inc.,* 387 F.3d 522, 535 (6th Cir. 2004) (citation omitted).

In addition, it is "a fundamental tenet of copyright law that the idea is not protected, but the original expression of the idea is." *JCW Inv.,* 482 F.3d at 917. Put differently, the "Copyright Act protects the expression of ideas, but exempts the ideas themselves from protection." *Seng-Ting* [sic] *Ho,* 648 F.3d

at 497 (citation omitted). As the Supreme Court recently explained:

> The idea/expression dichotomy is codified at 17 U.S.C. § 102(b): "In no case does copyright protec[t] . . . any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . described, explained, illustrated, or embodied in [the copyrighted] work." "Due to this [idea/expression] distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication"; the author's expression alone gains copyright protection.

Golan v. Holder, ___ U.S. ___, 132 S.Ct. 873, 890, 181 L.Ed.2d 835 (2012) (citing *Harper & Row Publishers, Inc. v. National Enter.,* 471 U.S. 539, 556, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) ("idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression") (internal quotation marks omitted)). "This limitation on copyright protection promotes the purpose of the Copyright Act by assuring 'authors the right to their original expression,' but also by 'encourag[ing] others to build freely upon the ideas and information conveyed by a work.'" *Seng-Tiong Ho,* 648 F.3d 497 (citation omitted).

Furthermore, the *scènes à faire* doctrine prohibits copyright protection for "incidents, characters or

settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Incredible Tech.,* 400 F.3d at 1012 (citation omitted). In other words, "a copyright owner can't prove infringement by pointing to features of his work that are found in the defendant's work as well but that are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another." *Bucklew v. Hawkins, Ash, Baptie & Co., LLP,* 329 F.3d 923, 929 (7th Cir. 2003).

B. Substantially Similar Test

Hobbs sets forth the following areas of similarity in the songs' lyrics to establish that Defendants infringed his copyrighted lyrics to "Natasha":

- A theme of impossible love between a Western man and a Communist woman during the Cold War;
- Both songs have descriptions of a woman's pale eyes;
- Both songs reference sending correspondence in the mail;
- Both songs repeat and emphasize a concept of events that never happened – the word "never" appears 12 times in "Natasha" and 11 times in "Nikita";
- In the chorus, the title names are each repeated four times and then combined with

the phrases "You'll never know," "you will never know," "to hold you," and "I need you;"

- The phrase "to hold you" is repeated three times in Plaintiff's song, and four times in Defendants' song;
- Each song has a one-word, phonetically-similar title consisting of a three-syllable Russian name, both beginning with the letter "N" and ending with the letter "A;" and
- The title name is repeated 13 times in "Natasha" and 14 times in "Nikita."

Of these listed similarities, there are certain themes or ideas that Hobbs argues are protected under the Copyright Act, including the impossible love affair during the Cold War, a postal theme, and references to a woman's pale eyes. These themes are not protected under the Copyright Act because they are rudimentary, commonplace, and standard under the *scènes à faire* doctrine. *See Atari,* 672 F.2d at 915 ("such stock literary devices are not protectible by copyright"). Moreover, phrases and themes that are common, trite, or cliched are not protected under copyright laws. *See Peters,* 776 F.Supp.2d at 750; 37 C.F.R. § 202.1. As the Seventh Circuit teaches: "If standard features could be used to prove infringement, not only would there be great confusion because it would be hard to know whether the alleged infringer had copied the feature from a copyrighted work or from the public domain, but the net of liability would be cast too wide; authors would find it impossible to write without obtaining a myriad [ ]

copyright permissions." *See Gaiman v. McFarlane,* 360 F.3d 644, 659 (7th Cir. 2004).

The theme of a Cold War love affair, for example, is not protected under the Copyright Act because this was a common theme in songs, books, and movies for decades. *See Hoehling v. Universal City Studios, Inc.,* 618 F.2d 972, 979 (2d Cir. 1980) ("Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices, we have held that *scènes à faire* are not copyrightable as a matter of law."); *see also Lexmark Int'l Inc.,* 387 F.3d at 535 ("phrases that are 'standard, stock, . . . or that necessarily follow from a common theme or setting' may not obtain copyright protection."). In particular, the theme of a Cold War love affair is present in other songs written during the same time period that Hobbs wrote "Natasha."[4] Also, the reference to a woman's light-colored eyes is also too common or cliched to be protectable expression. In fact, in 1982, which was the same year Hobbs wrote "Natasha,"

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[4] *See* Devo, "Cold War," http://www.lyricsfreak.com/d/devo/cold+war_20039646.html ("I heard it said that all is fair, In love and war so what's life for, The boy and girl, Two separate worlds, The endless tug of war, Uh!"); David Bowie & Brian Eno, "Heroes," http://www.lyricsfreak.com/d/david+bowie/heroes+single+version20962708.html ("I, I can remember (I remember), Standing by the wall (By the wall), And the guns, shot above our heads (Over our heads), And we kissed, as though nothing could fall (Nothing could fall")).

Defendant John wrote a love song called "Blue Eyes."[5] Likewise, a postal theme in a love song is very common in popular music.[6]

Further, the references to the postal theme are expressed differently. Hobbs' lyrics in "Natasha" are "you never sent me a Valentine" and "Nikita" states "do you ever see the letters that I write?" Likewise, the descriptions of women's eyes are expressed differently, namely, Taupin's and John's lyrics state: "With eyes that looked like ice on fire," whereas Hobbs' lyrics are "Misty tears in those pale blue eyes." *See Peters,* 692 F.3d at 636 ("entirely different lines" are not substantially similar).

Next, Hobbs argues that the songs' lyrics are substantially similar because they emphasize a concept of events that never happened and that the word "never" appears multiple times in both songs, as well as the phrase "to hold you." Again, the concept of events that never happened is too generic to constitute an original expression protected under the Copyright Act. *See Bucklew,* 329 F.3d at 929-30. Also, the word "never" and the phrase "to hold you" are not sufficiently unique to be protectable. *See Peters,* 692 F.3d at 633-34.

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[5] *See* Elton John & Gary Osborne, "Blue Eyes," http://www.lyricsfreak.com/e/elton+john/blue+eyes_20046435.html

[6] *See* Dario Marianelli, "Love Letters," as performed by Elton John, http://www.lyricsfreak.com/e/elton+john/love+letters 20046251.html

Hobbs additionally points to the chorus, also known as "hook," of each song, arguing that the title/women' s names are each repeated four times and then the names are combined with the phrases "you'll never know," "you will never know," "to hold you," and "I need you." The phrases, "you'll never know," "to hold you," and "I need you" are commonly used in musical lyrics.[7] Also, short phrases that do not express an "appreciable amount of original text" are not subject to copyright protection. *See Alberto-Culver Co. v. Andrea Dumon, Inc.,* 466 F.2d 705, 711 (7th Cir. 1972); 37 C.F.R. § 202.1.

Meanwhile, although Hobbs argues that the lyrics are substantially similar because "[e]ach song has a one-word, phonetically-similar title consisting of a three-syllable Russian name, both beginning with the letter 'N' and ending with the letter 'A,'" he acknowledges that the titles "Natasha" and "Nikita" are not identical. Because "titles by themselves are not subject to copyright protection," *see Peters,* 776 F.Supp.2d at 749, the comparison of the two titles is not relevant to the Court's analysis, especially because they are not the same. *See* 37 C.F.R. § 202.1; *see also Wihtol v. Wells,* 231 F.2d 550, 553 (7th Cir. 1956). Furthermore, both names are popular – a quick

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[7] *See, e.,g.,* Mindi Adair, Matthew, Hagen, "You'll Never Know," performed by Frank Sinatra, http://www.lyricsfreak.com/f/frank+sinatra/youll+never+know_20055900.html; Keith Moon, "I Need You," http://www.lyricsfreak.com/w/who/i+need+you_20146459.html.

search on the United States Copyright Office's Registered Works Database reveals that there are other songs entitled "Natasha" and "Nikita" that have copyright protection. *See* http//cocatalog.loc.gov.

Hobbs also contends that the songs are substantially similar because the women's names are repeated approximately thirteen times in each song, including the repetition of the names in the hook. Although both songs repeat the women's names throughout the song, courts have recognized that in popular music, most songs are "relatively short and tend to build on or repeat a basic theme." *See Selle,* 741 F.3d at 904; *see also Johnson,* 409 F.3d at 22; *Gaste v. Kaiserman,* 863 F.2d 1061, 1068 (2d Cir. 1988). Indeed, repeating the name of a love interest is common in popular music.[8]

Thus, after filtering out the non-protected elements, no similarities exist between the two songs except for generic themes, words, and phrases, as discussed above. In other words, the ubiquity of the common sayings sprinkled throughout both "Nikita" and "Natasha," along with the repeated use of these commons [sic] phrases and sayings in other songs, establish that Defendants' lyrics to "Nikita" do not infringe on Hobbs' lyrics to "Natasha." *See Peters,* 692 F.3d at 635-36. In sum, the similarities highlighted by

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[8] *See* Raymond Davies, "Lola," http://www.lyricsfreak.com/k/kinks/lola_20079021.html; Gordon Sumner, "Roxanne,"http://www.lyricsfreak.com/j/juliet+simms/roxanne_21016751.html

Hobbs are not sufficiently unique or complex to establish copyright infringement. *See id.* at 635; *Selle v. Gibb,* 741 F.2d 896, 904 (7th Cir. 1984).

Indeed, Hobbs all but admits that these elements are not protectable individually, but argues that his unique combination of these elements creates a protectable, copyrightable work. (R. 31, Hobbs' Resp., at 7.) As such, Hobbs asks the Court to compare the "total concept and feel" of the two works without looking at whether the copied parts are protected under the Copyright Act. *See Atari,* 672 F.2d at 614. Despite Hobbs' argument, the Seventh Circuit has made it abundantly clear that "[i]f the copied parts are not, on their own, protectable expression, then there can be no claim for infringement of the reproduction right." *Peters,* 692 F.3d at 632; *see also Incredible Tech.,* 400 F.3d at 1011-12 ("despite what the ordinary observer might see, the copyright laws preclude appropriation of only those elements of the work that are protected by the copyright.").

Nevertheless, when viewing these elements in combination, Hobbs has not plausibly alleged that "Nikita" infringes on "Natasha" because the two works do not share any unique features that "give rise to a breach of the duty not to copy another's work." *Peters,* 692 F.3d at 633-34; *see Selle,* 741 F.3d at 904. Moreover, there are many dissimilarities between the two songs, including that "Natasha" is about a man from the United Kingdom and an Ukrainian woman who met, but never had a chance after the woman sailed away. Whereas, "Nikita" is

about an East German woman looking through the wires of the Berlin wall with guns and gates holding her in and soldiers guarding the area. Also, it is apparent from the lyrics in "Nikita" that the man and woman never met. In short, the songs' lyrics are different in content and tell different stories. *See Peters,* 776 F.Supp.2d at 751. Therefore, even assuming that the elements highlighted by Hobbs are protectable, an ordinary reasonable person would not conclude that Defendants unlawfully appropriated Hobbs' lyrics. *See Incredible Tech.,* 400 F.3d at 1011. The Court thus grants Defendants' motion to dismiss Hobbs' copyright claim.

II. State Law Claims – Counts II and III

Next, Defendants argue that the Court should dismiss Plaintiff's state law claims for a constructive trust and an accounting – both equitable remedies under Illinois law – based on preemption. *See* 17 U.S.C. § 301(a). In his response brief, Hobbs does not address Defendants' preemption argument. *See Steen v. Myers,* 486 F.3d 1017, 1020 (7th Cir. 2007) (absence of discussion in legal memoranda amounts to abandonment of claims). For the sake of completeness, however, the Court will determine whether the Copyright Act preempts Hobbs' state law claims for equitable relief.

"The Copyright Act preempts 'all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as

specified by section 106' and are 'in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103.'" *Seng-Tiong Ho,* 648 F.3d at 500 (quoting 17 U.S.C. § 301(a)). The Seventh Circuit has "distilled from the language of § 301 two elements: 'First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in § 102. Second, the right must be equivalent to any of the rights specified in § 106.'" *Id.* (quoting *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n,* 805 F.2d 663, 674 (7th Cir. 1986)).

Because the material to which Hobbs asserts rights – the lyrics of the song "Natasha" – are expressions in tangible form, the first element of preemption is satisfied. *See* 17 U.S.C. § 101 ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."); *see also Johnson v. Cypress Hill,* 641 F.3d 867, 870 n.5 (7th Cir. 2011) ("a 'composition' copyright [] protects rights in the underlying work, i.e., the music and, if applicable, lyrics.") (citing 17 U.S.C. § 102(a)(2)).

"The second element for preemption is that the rights in the state law claims be equivalent to the exclusive rights under the Copyright Act." *Seng-Tiong Ho,* 648 F.3d at 501. The exclusive rights set forth in

the Copyright Act, include the right to reproduce the copyrighted work, prepare derivative works, distribute copies of the work, perform the copyrighted work publicly, and display the copyrighted work publicly. *See HyperQuest, Inc. v. N'Site Solutions, Inc.,* 632 F.3d 377, 382 (7th Cir. 2011).

Here, Hobbs' claim for an accounting relies upon 17 U.S.C. § 504, regarding Hobbs' recovery of all profits that are attributable to Defendants' acts of infringement. (Compl. ¶ 44.) Furthermore, Hobbs bases his constructive trust claim upon Defendants' alleged infringement of his copyright of "Natasha." (*Id.* ¶ 42.) Because Hobbs' claims for state law remedies are entirely based on his copyright claim, the Copyright Act preempts them. *See Evan Law Group LLC v. Taylor,* No. 09 C 4896, 2010 WL 5135904, at *7 (N.D. Ill. Dec. 9, 2010) ("Copyright Act preempts rights, including state common law remedies, that are equivalent to an exclusive right within the general scope of copyright as specified in federal copyright law."); *see also Heriot v. Byrne,* No. 07 C 2272, 2008 WL 5397496, at *4 (N.D. Ill. Dec. 23, 2008) (equitable accounting claim preempted by Copyright Act). The Court therefore grants Defendants' motion to dismiss the constructive trust and accounting claims as alleged Counts II and III of the Complaint.

CONCLUSION

For the [sic] these reasons, the Court grants Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and dismisses this lawsuit in its entirety with prejudice.

Date: October 29, 2012

ENTERED

/s/ Amy J. St. Eve
AMY J. ST. EVE
United States District Court Judge