

I. BACKGROUND

In this copyright infringement action, Plaintiff alleges that Defendants' movie (the "Film") and companion album (the "Album"), both entitled *Before I Self Destruct*, infringe upon Plaintiff's copyright in his book, *The Preachers Son - But the Streets Turned Me Into a Gangster* (the "Book").

Plaintiff is the author and sole owner of the copyright for the Book. From 2007 to 2008, Plaintiff dictated his autobiography onto electrostatic tapes, which he provided to Mary Gregory ("Gregory"), who in turn transcribed the tapes into written product. According to Plaintiff, prior to the Book's publication, Gregory either released the Book to Defendants, or to individuals who provided the Book to Defendants. Plaintiff then alleges that Defendants infringed upon the copyright of the Book by publishing and selling the Movie and the Album, both of which Plaintiff contends derive their content from the Book.

Based on these allegations, Plaintiff asserts claims of direct, contributory and vicarious copyright infringement, as well as statutory and common law unfair competition, conversion/misappropriation, and unjust enrichment. Defendants filed the instant motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). In addition, Defendant Polydor Ltd. ("Polydor") seeks to dismiss the Complaint for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2).¹

¹ The Court declines to render judgment on the personal jurisdiction issue since the case will be dismissed against all Defendants, including Polydor, for failure to state a claim upon which relief can be granted.

II. LEGAL ANALYSIS

A. Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims have facial plausibility. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). This means that the Complaint must contain sufficient factual allegations to raise a right to relief above the speculative level, assuming the factual allegations are true. *Id.* at 1965; *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). The Supreme Court has made clear that “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 127 S.Ct. at 1964-65; *see also Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009) (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon those documents. *See Pension Benefit Guar. Corp.*, 998 F.2d at 1196. The issue before the Court “is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

B. Discussion

1. Copyright Infringement

“To establish a claim of copyright infringement, a plaintiff must establish: (1) ownership of a valid copyright; and (2) unauthorized copying of original elements of the plaintiff’s work.” *Dun & Bradstreet Software Servs. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002). In the instant case, the ownership of the copyrighted property is undisputed, as is its validity. In addition, for the purposes of this motion, Defendants concede that they had access to the copyrighted work and that there is substantial similarity between the works to support an inference of unlawful copying.² (Defs.’ Rep. Br. 4, July 25, 2011.) However, not all copying amounts to copyright infringement. To give rise to copyright infringement, a court must determine “whether a ‘lay-observer’ would believe that the copying was of protectible aspects of the copyrighted work.” *Dam Things From Denmark v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 562 (3d Cir. 2002). This test has been described as whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.” *Id.*

In his opposition, Plaintiff avers that the Film duplicates the generalized theme and story of the Book and amounts to actionable copying. However, general plot ideas and themes lie in the public domain and are not protected by copyright law. *Daley v. Granada US Productions*, No. 02-2629, 2003 U.S. Dist. LEXIS 3133 at *4 (E.D. Pa. Jan. 29, 2003). In addition, all situations and incidents which flow naturally from a basic plot premise, known as *scenes a faire*,

² Absent proof of direct copying, copying must be proven by showing that the defendant had access to the allegedly infringed copyrighted work and substantial similarity between the two works. *Damiano v. Sony Music Entm’t*, 975 F. Supp. 623, 630 (D.N.J. 1996).

are not entitled to copyright protection. *Whelan Assocs. Inc. V. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986); *Pino v. Viacom, Inc.*, No. 07-3313, 2008 U.S. Dist. LEXIS 24453 at *12 (D.N.J. Mar. 4, 2008) (finding elements common to both works - including the presence of hosts who provide witty commentary on the contestants and competition and introductory sequences that feature highlights of sporting events and sounds associated with various sports - to be *scenes a faire* that flow from the idea of a sports-themed reality show that pits amateurs against professional athletes); *Daley*, 2003 U.S. Dist. LEXIS 3133 at *5 (holding archery tournaments, sword fighting, Nottingham Castle, Sherwood Forest, and appearances by Robin Hood and his Merry Men to be unprotectable *scenes a faire* naturally flowing from works derived by the Robin Hood legend). Copyright law protects a writer's expression of ideas, not the ideas themselves. *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975).

There is no doubt that the Book and Film do share similar characters, themes, as well as a similar setting. However, this sharing of common features is only natural since both works feature a protagonist who has a difficult upbringing and turns to a life of violence and street crime, a story which has long ago been part of the public domain and which has been the subject of numerous movies and television shows. Thus, both works may properly contain gang life in inner-city New Jersey, characters spending time in jail, the search for an ex-girlfriend upon release from prison, making love in the shower, obtaining money through criminal activity, purchasing fancy clothes and accessories with the proceeds of crime, shoot-outs, murder, and the loss of a parent. Moreover, a simple viewing of the two works reveals that they are entirely different with respect to plot, mood, and sequence of events. The Book details Plaintiff's rise above a life of violence to achieve redemption whereas the Film portrays the protagonist's

descent into moral apathy and eventual death. Any common themes of a young male whose tumultuous upbringing leads him to resort to a life of crime and violence in order to gain power and money are *scenes a faire*, or standard to any coming of age story of a young man from an inner-city.

In addition, Plaintiff contends that direct phrases from his Book appear in the Film and Album and are protectable under copyright law. However, it is well-established that commonly used words, phrases and cliches are not protectable. *See Douglas v. Osteen*, 317 Fed. Appx. 97, 99 (3d Cir. 2009) (“words and short phrases are excluded from copyright protection”); *see also Jarvis v. A & M Records*, 827 F. Supp. 282, 291-92 (D.N.J. 1993) (cliched language, phrases and expressions conveying an idea that is typically expressed in a limited number of stereotypic fashions, are not subject to copyright protection, nor are easily arrived at phrases and chord progressions); *Cottrill v. Spears*, No. 02-3646, 2002 U.S. Dist. LEXIS 8823 at *33 (E.D. Pa. May 22, 2003) (elements of the work must be original and nontrivial to constitute improper appropriation). As a preliminary matter, Plaintiff misquotes and misstates many of the illustrations he provides as examples of identical wording. Further, the language that is accurately quoted - “putting work in,” names “ringing,” “stash,” and “get the dope, cut the dope”- merely amounts to generic short words and phrases, common in gangster movies and hip hop music. The average layman, who would be observing these phrases in the context of an overall story or song, would not regard these minute snippets as unique and protectable. As such, Defendants did not improperly appropriate Plaintiff’s work and Defendants’ motion to dismiss

the copyright infringement claim will be granted.³

2. State Law Claims

Defendants argue that Plaintiff's unfair competition, conversion/misappropriation, and unjust enrichment claims are pre-empted by the federal copyright law. Section 301 of the Copyright Act explicitly preempts state laws that (1) fall within the subject matter of the federal copyright law and protect works that are fixed in tangible medium of expression; and (2) create legal or equitable that are equivalent to any of the exclusive rights granted to the copyright holder and specified in section 106. *Jarvis*, 827 F. Supp. at 296; *see* 17 U.S.C. § 301. The issue here is whether the state laws asserted by Plaintiff create rights which are "equivalent to" any of the exclusive rights granted to the copyright holder under § 106. If so, they are preempted.⁴ The inquiry performed under the § 301 preemption analysis is as follows:

³ Because the Court holds that Defendants did not infringe on Plaintiff's copyright, Plaintiff's claims of vicarious and contributory infringement fail since they hinge on a preliminary finding of direct infringement. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) ("one fringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it"); *Arista Records Inc. v. Flea World, Inc.*, No. 03-2670, 2006 U.S. Dist. LEXIS 73485 at *26 (D.N.J. Mar. 31, 2006) ("Any finding of either contributory infringement or vicarious liability by this Court hinges on the Court first concluding that vendors in the Market have directly infringed Plaintiffs' copyrighted recordings.").

⁴ "Courts have generally concluded that the theory of unjust enrichment protects rights that are essentially 'equivalent' to the rights protected by the Copyright Act; thus, unjust enrichment claims relating to the use of copyrighted material are generally preempted." *Video Pipeline*, 210 F. Supp. 2d at 567. In addition, courts interpreting 17 U.S.C. § 301 have consistently held that "unfair competition actions arising from an allegedly unauthorized copying . . . are preempted by the Copyright Act." *Tannock v. Review Trad. Corp. Inc.*, No. 85-2864, 1986 U.S. Dist. LEXIS 25963 at *11 (D.N.J. May 2, 1986). Likewise, "misappropriation . . . is grounded in the alleged unauthorized copying and use of another's copyrighted expression, and thus fails the extra element test. *Video Pipeline*, 210 F. Supp. 2d at 565.

[A] right which is “equivalent to copyright” is one which is infringed by the mere act of reproduction, performance, distribution or display. . . . If, under state law, the act of reproduction, performance, distribution or display . . . will in itself infringe the state created right, then such right is preempted. But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie “within the general scope of copyright,” and there is no preemption.

Jarvis, 827 F. Supp. at 297. In other words, the federal Copyright Act does not preempt a claim where

an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action . . . A state law claim is not preempted if the extra element changes the nature of the action so that it is qualitatively different from a copyright infringement claim.

Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 210 F. Supp. 2d 552, 564 (D.N.J. 2002).

The factual allegations in support of Plaintiff’s state law claims are premised entirely upon Defendants’ copying of Plaintiff’s work: Plaintiff’s unjust enrichment claim is based on the “profits” arising “from the infringement of [Plaintiff’s] copyright” (Am. Compl. ¶ 73), Plaintiff’s unfair competition claims are based on “the misappropriation of [Plaintiff’s] copyrighted materials” and “Defendants’ unauthorized use of [Plaintiff’s] copyrighted materials” (Am. Compl. ¶¶ 72, 70), and Plaintiff’s conversion/misappropriation claim is based on Defendants’ purchase and possession of Plaintiff’s Book for their own use. (Am. Compl. ¶ 66). Plaintiff fails to distinguish the underlying factual predicate of his infringement claim with that of his state law claims. Accordingly, Plaintiff’s state law claims are preempted by the Copyright Act and will be dismissed.

III. CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion to dismiss. An appropriate form of Order will be filed together with this Opinion.

s/ Stanley R. Chesler
STANLEY R. CHESLER
United States District Judge

DATED: September 20, 2011