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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DAVID LLOYD MARCUS,	)	17-cv-00148-RSWL-AJWx
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER Re: DEFENDANTS'</b>
	)	<b>MOTION TO DISMISS [35]</b>
ABC SIGNATURE STUDIOS,	)	<b>AND MOTION TO STRIKE AND</b>
INC.; KHALOBO INK SOCIETY;	)	<b>FOR SANCTIONS [42]</b>
KENYA BARRIS; DOES 1-10.	)	
	)	
	)	
Defendants.	)	

Plaintiff David Lloyd Marcus ("Plaintiff") brought the instant Action against Defendants ABC Signature Studios, Inc. ("ABC"); Khalabo Ink Society ("Khalabo"); and Kenya Barris ("Barris") (collectively, "Defendants") alleging copyright infringement, unfair competition, and fraud. Currently before the Court are Defendants' Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure ("FRCP" or "Rule") 12(b)(6) ("Motion to Dismiss") [35] and Defendants' Motion to Strike the Complaint and for Sanctions

1 ("Motion to Strike") [42]. Having reviewed all papers  
2 submitted pertaining to these Motions, the Court **NOW**  
3 **FINDS AND RULES AS FOLLOWS:** Defendants' Motion to  
4 Dismiss is **GRANTED without leave to amend** and  
5 Defendants' Motion to Strike and for Sanctions is  
6 **DENIED as MOOT.**

## 7 I. BACKGROUND

### 8 A. Factual Background

9 In February 2013, former Defendant Overbrook and  
10 ANA Alliance sponsored a script writing contest called  
11 "Search for America's Newest Screenwriter." Compl.  
12 ¶ 9, ECF No. 1. On March 20, 2013, Plaintiff submitted  
13 a script called *Across the Tracks* ("*Across the Tracks*"  
14 or "the Script") to the contest. Id. ¶ 10. In  
15 November 2014, Plaintiff submitted the Script to the  
16 United States Copyright Office and received the  
17 exclusive rights and privileges to the Script. Id.  
18 ¶ 17. Plaintiff alleges he never heard from the  
19 contest creators on the status of his submission. Id.  
20 ¶ 12.

21 Plaintiff alleges that former Defendant Will Smith  
22 is the owner of former Defendant Overbrook, the sponsor  
23 of "Search for America's Newest Screenwriter." Id.  
24 ¶ 4. Plaintiff further alleges that Mr. Smith  
25 developed a close business relationship with Barris  
26 after working with Barris on various television  
27 projects. Id. ¶¶ 15-16.

28 In the fall of 2014, ABC released a pilot called

1 *Black-ish*, created by Barris and produced by Khalabo.

2 Id. ¶ 18. Plaintiff alleges *Black-ish* is virtually  
3 identical to *Across the Tracks*, including the major  
4 characters, thematic points, and plot turns. Id.

5 ¶¶ 18-19. Subsequently, Plaintiff initiated an Action  
6 in this Court against Defendants alleging copyright  
7 infringement under the Copyright Act of 1976, unfair  
8 competition under the Lanham Act of 1946, and fraud.

9 1. Summary of the Works

10 a. *Across the Tracks*

11 The Script begins with the Johnson family—Dave, his  
12 wife, Keisha, and their children, Kimberly and Dave  
13 Junior (“DJ”)—driving up to their new home after  
14 “leaving their old neighborhood and old friends that  
15 looked and talked just like they do.” Defs.’ Req. for  
16 Jud. Not. (“RJN”), Ex. A at 8. As the Johnsons pull  
17 into their driveway, they notice their new neighbors, a  
18 white couple, Tim and Katie Smith, doing yard work.

19 Id. The Smiths greet the Johnsons, and the two  
20 families have an awkward exchange as the Smiths try to  
21 act stereotypically “black.” Id. at 9-10. The  
22 Johnsons go inside and discuss the Smiths’ actions, and  
23 instead of being offended, they note how the Smiths  
24 were just trying to make the Johnsons feel welcome.

25 Id. at 13.

26 DJ meets the Smiths’ son, Matty, while shooting  
27 hoops in the Johnsons’ backyard, and Dave invites Matty  
28 and the rest of the Smiths over for a barbeque. Id. at

1 15-16.

2 Tim and Katie take their efforts to appear  
3 stereotypically "black" even further when they arrive  
4 at the barbeque. "Tim is dressed like a gansta [sic]  
5 rapper, and Katie looking like a video girl, with her  
6 heels and lip gloss popping." Id. at 17. As the  
7 barbeque progresses, Tim and Katie both acknowledge how  
8 ridiculous they have been, attributing it to just  
9 wanting their new neighbors to feel welcome and prove  
10 that they were not prejudiced. Id. at 20. The  
11 Johnsons laugh off the situation, and both families  
12 agree to be themselves. Id. at 21.

13 The Smiths' other son, Kyle, joins the barbeque,  
14 and it quickly becomes clear that Kyle will become a  
15 love interest for the Johnsons' daughter, Kimberly.  
16 Id. at 18. While enjoying the barbeque, the families  
17 discover that Keisha will be starting as a new nurse  
18 manager at the hospital at which Katie works as a nurse  
19 making Keisha Katie's boss. Id. at 23-24.

20 The family is confronted by even more overt racism  
21 the following day. Matty invites DJ over to the  
22 Smiths' house for a sleepover. Id. at 24. That night,  
23 Matty's friend Chris tells DJ that DJ is only good at  
24 violent video games because "[y]ou know about guns  
25 right. You're from the hood aren't you." Id. at 28.  
26 After hearing that DJ's father owns a used car  
27 dealership, Chris declares that "blacks are good  
28 salesmen anyway they go from pimps to sales. They even

1 get to [wear] the same suit. Hood skills pay off for  
2 you guys." Id. at 28.

3 DJ quickly runs over to his house to tell his  
4 parents about the encounter. Id. at 27. Dave, while  
5 angry, uses it as a teaching moment for his son,  
6 emphasizing that "God expects us to do what we are  
7 supposed to do, and let him deal with those who offend  
8 us." Id. at 29. Tim and Chris' father, Eric, come  
9 over to apologize to the Johnsons. Id. at 30. Eric  
10 makes clear that his son's behavior was unacceptable,  
11 and the Script ends as Dave explains that there is a  
12 valuable lesson in owning up to when you are wrong and  
13 forgiving those who wrong you. Id. at 31.

14 b. *Black-ish*

15 The pilot episode of *Black-ish* opens with the main  
16 character, Andre Johnson, introducing his family—his  
17 wife, Rainbow ("Bow"), four children (teenagers, Andre  
18 Jr. and Zoey, and pre-teen twins, Jack and Diane), and  
19 his father, Pops. Andre explains that while he grew up  
20 in the "hood," his and his wife's successes, including  
21 his work at an advertising agency and his wife's work  
22 as a doctor, have allowed him to raise his family in an  
23 upper-class neighborhood.

24 Having raised his family in a predominantly white  
25 area, Andre is concerned that his family may have  
26 assimilated too well to the white culture. When Andre  
27 drops Andre Jr. off at school, Andre Jr. tells Andre  
28 that instead of playing basketball like his father,

1 Andre Jr. will be trying out for the field hockey team.  
2 Additionally, Andre learns that Andre Jr.'s friends  
3 call him "Andy" instead of Andre. Andre Jr. also later  
4 informs his family that he wants to have a bar mitzvah.

5 The pilot spends time at Andre's work, where he has  
6 just been promoted to Senior Vice President, a title  
7 reserved primarily for Andre's white co-workers. When  
8 Andre learns that he has been promoted to Senior Vice  
9 President of his company's Urban Division, he is upset  
10 that he has been put in charge of "black stuff."

11 Frustrated with work and his children, Andre makes  
12 it his mission to ensure his family remains "black, not  
13 black-ish," even going so far as to make Andre Jr.  
14 participate in an African rite of passage ceremony.  
15 Bow calls Andre out on his crazy behavior, and after a  
16 discussion with his father, Andre discovers that he  
17 must admit when he is wrong and find a way to make it  
18 right. Andre then accepts his position as Senior Vice  
19 President of the Urban Division, making a well-received  
20 presentation for a Los Angeles tourism account. The  
21 episode ends with Andre throwing a "bro mitzvah" for  
22 Andre Jr. to make his son happy while still including  
23 part of his culture that he thought his family was so  
24 quickly losing.

25 **B. Procedural Background**

26 On January 6, 2017, Plaintiff filed his Complaint  
27 [1]. On April 26, 2017, the parties stipulated and  
28 this Court granted Plaintiff leave to file an amended

1 complaint within five days of the Court's order and  
2 gave Defendants fourteen days to respond to the amended  
3 complaint [29]. Plaintiff did not file an amended  
4 complaint within the timeline prescribed.

5 On April 11, 2017, the parties filed a stipulation  
6 to dismiss Defendants Overbrook and Will Smith [25].  
7 The Court dismissed Defendants Overbrook and Will Smith  
8 on April 20, 2017 [28].

9 On May 11, 2017, Plaintiff's counsel filed a Motion  
10 to Withdraw as Attorney [31] requesting to be relieved  
11 as counsel because of a disagreement that arose between  
12 counsel and Plaintiff which rendered counsel's ability  
13 to represent Plaintiff difficult. Mot. to Withdraw  
14 3:12-16, ECF No. 31. After the Court granted the  
15 Motion to Withdraw [40] on June 7, 2017, the Court  
16 continued the hearing on the Motion to Dismiss to allow  
17 Plaintiff additional time to either retain new  
18 representation or prepare to proceed pro se. To date,  
19 Plaintiff has not retained new representation.

20 On May 22, 2017, Defendants filed the instant  
21 Motion to Dismiss [35], and on July 17, 2017,  
22 Defendants filed a Motion to Strike and for Sanctions  
23 [42]. Plaintiff's Oppositions to both the Motion to  
24 Dismiss and Motion to Strike were due on August 1,  
25 2017; however, Plaintiff did not file any Oppositions.  
26 Defendants' Replies were due on August 8, 2017, and  
27 none were filed.

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2 **II. DISCUSSION**

3 **A. Legal Standard**

4 1. Motion to Dismiss under Rule 12(b)(6)

5 Federal Rule of Civil Procedure 12(b)(6) allows a  
6 party to move for dismissal of one or more claims if  
7 the pleading fails to state a claim upon which relief  
8 can be granted. To survive a motion to dismiss on  
9 12(b)(6) grounds, a complaint must "contain sufficient  
10 factual matter, accepted as true, to state a claim to  
11 relief that is plausible on its face." Ashcroft v.  
12 Iqbal, 556 U.S. 662, 678 (2009)(internal quotation  
13 marks omitted). Dismissal can be based on a "lack of a  
14 cognizable legal theory or the absence of sufficient  
15 facts alleged under a cognizable legal theory."  
16 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
17 (9th Cir. 1990).

18 In ruling on a 12(b)(6) motion, a court may  
19 generally consider only allegations contained in the  
20 pleadings, exhibits attached to the complaint, and  
21 matters properly subject to judicial notice. Swartz v.  
22 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court  
23 must presume all factual allegations of the complaint  
24 to be true and draw all reasonable inferences in favor  
25 of the non-moving party. Klarfeld v. United States,  
26 944 F.2d 583, 585 (9th Cir. 1991).

27 The question presented by a motion to dismiss is  
28 not whether the plaintiff will ultimately prevail, but  
whether the plaintiff has alleged sufficient factual

1 grounds to support a plausible claim to relief, thereby  
2 entitling the plaintiff to offer evidence in support of  
3 its claim. Iqbal, 556 U.S. at 678; Swierkiewicz v.  
4 Sorema N.A., 534 U.S. 506, 511 (2002). While a  
5 complaint need not contain detailed factual  
6 allegations, a plaintiff must provide more than "labels  
7 and conclusions" or "a formulaic recitation of a cause  
8 of action's elements." Bell Atl. Corp. v. Twombly, 550  
9 U.S. 544, 555 (2007)(internal citation omitted).  
10 However, a complaint "should not be dismissed under  
11 Rule 12(b)(6) 'unless it appears beyond doubt that the  
12 plaintiff can prove no set of facts in support of his  
13 claim which would entitle him to relief.'" Balistreri,  
14 901 F.2d at 699 (citing Conley v. Gibson, 355 U.S. 41,  
15 45-46 (1957)).

## 16 2. Motion to Strike

17 The Court may strike a pleading that contains "any  
18 redundant, immaterial, impertinent, or scandalous  
19 matter." Fed. R. Civ. P. 12(f). Matters are  
20 "immaterial" if they have "no essential or important  
21 relationship to the claim for relief or the defenses  
22 being pleaded" and "impertinent" if they "do not  
23 pertain, and are not necessary, to the issues in  
24 question." Fantasy, Inc. v. Fogerty, 984 F.2d 1524,  
25 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S.  
26 517 (1994). Matters are "scandalous" if they "cast a  
27 cruelly derogatory light on a party or other person."  
28 In re 2TheMart.com, Inc. Sec. Litig., 114 F. Supp. 2d

1 955, 965 (C.D. Cal. 2000).

2 **B. Discussion**

3 1. Defendants' Request for Judicial Notice

4 A court "may judicially notice a fact that is not  
5 subject to reasonable dispute because it . . . can be  
6 accurately and readily determined from sources whose  
7 accuracy cannot reasonably be questioned." Fed. R.  
8 Evid. 201(b). Typically, however, in reviewing a Rule  
9 12(b)(6) motion to dismiss, a court is generally  
10 "limited to the contents of the complaint." Sprewell  
11 v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.  
12 2001). An exception to this general rule includes  
13 material "which is properly submitted as part of the  
14 complaint." Lee v. City of Los Angeles, 250 F.3d 668,  
15 688 (9th Cir. 2001). "Even if a document is not  
16 attached to the complaint, it may be incorporated by  
17 reference into a complaint if the plaintiff refers  
18 exclusively to the document or the document forms the  
19 basis of the plaintiff's claim." United States v.  
20 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). The second  
21 exception to this rule includes matters of "public  
22 record." Lee, 250 F.3d at 689; see Cabell v. Zorro  
23 Prods., No. 5:15-cv-00771-EJD, 2017 U.S. Dist. LEXIS  
24 82413, at \*12 (N.D. Cal. May 30, 2017)(holding that in  
25 reviewing a motion to dismiss, courts "may also  
26 consider material subject to judicial notice").

27 Defendants request the Court take judicial notice  
28 of the following materials: (1) a copy of the Script of

1 *Across the Tracks* from the United States Copyright  
2 Office, (2) a DVD copy of the pilot episode of *Black-*  
3 *ish*, (3) Plaintiff's proposed Amended Complaint, and  
4 (4) United States Census Bureau data identifying the  
5 top fifteen most popular last names in the United  
6 States. See RJN.

7 With regards to the copy of the *Across the Tracks*  
8 script, while Plaintiff did not attach the Script to  
9 the Complaint, the Complaint "refers exclusively to the  
10 document," and, in this copyright infringement suit,  
11 Plaintiff's copyrighted script "forms the basis of  
12 [his] claim." Ritchie, 342 F.3d at 908. Additionally,  
13 "Courts routinely take judicial notice of documents  
14 from the Copyright Office." Basile v. Twentieth  
15 Century Fox Film Corp., No. CV144263DMGJPRX, 2014 WL  
16 12521340, at \*2 (C.D. Cal. Aug. 19, 2014), aff'd, 678  
17 F. App'x 576 (9th Cir. 2017). Because the Script is  
18 the basis for Plaintiff's claims and Defendants  
19 obtained it from the Copyright Office, the Court **GRANTS**  
20 Defendants' request for judicial notice of the Script.

21 Likewise, because the pilot episode of *Black-ish*  
22 forms the basis for Plaintiff's copyright claim as the  
23 allegedly infringing work, the Court also **GRANTS**  
24 Defendants' request for judicial notice of the DVD of  
25 the pilot episode of *Black-ish*. See id. (taking  
26 judicial notice of DVD of allegedly infringing work);  
27 Campbell v. Walt Disney Co., 718 F. Supp. 2d 1108, 1111  
28 n.3 (N.D. Cal. 2010)(same).

1 Defendants request judicial notice of Plaintiff's  
2 proposed Amended Complaint filed along with the  
3 parties' stipulation asking the Court to grant leave  
4 for Plaintiff to file the Amended Complaint [26].  
5 Courts may "take judicial notice of court filings  
6 and other matters of public record." Reyn's Pasta  
7 Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6  
8 (9th Cir. 2006). As such, the Court **GRANTS** Defendants'  
9 request for judicial notice of Plaintiff's proposed  
10 Amended Complaint.

11 Finally, Defendants seek judicial notice of United  
12 States Census Bureau data identifying the top fifteen  
13 most popular last names in the United States. "United  
14 States census data is an appropriate and frequent  
15 subject of judicial notice." Hollinger v. Home State  
16 Mut. Ins. Co., 654 F.3d 564, 571-72 (5th Cir. 2011)  
17 (citing United States v. Esquivel, 88 F.3d 722, 726-27  
18 (9th Cir. 1996)). Therefore, the Court **GRANTS**  
19 Defendants' request for judicial notice of this Census  
20 Data.

## 21 2. Defendants' Motion to Dismiss

22 As a preliminary matter, Plaintiff did not file an  
23 Opposition to Defendants' Motion to Dismiss. Pursuant  
24 to Local Rule 7-12, "failure to file any required  
25 document, or the failure to file it within the  
26 deadline, may be deemed consent to the granting or  
27 denial of the motion." C.D. Cal. R. 7-12.  
28 Accordingly, the Court **GRANTS** Defendants' Motion

1 without reaching the merits, simply based on  
2 Plaintiff's failure to oppose the Motion. See Ghazali  
3 v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995)(per curiam)  
4 (affirming grant of an unopposed motion to dismiss  
5 under local rule by deeming pro se litigant's failure  
6 to oppose as consent to granting motion). Despite  
7 this, the Court will discuss the merits of Defendants'  
8 Motion to Dismiss.

9 Defendants seek dismissal of the four causes of  
10 action Plaintiff alleges against them in the Complaint:  
11 (1) copyright infringement, (2) unfair competition  
12 under the Lanham Act, (3) declaratory relief, and  
13 (4) injunctive relief. Plaintiff's proposed Amended  
14 Complaint only includes a copyright infringement claim  
15 against Defendants; however, Plaintiff has not filed  
16 the proposed Amended Complaint. Therefore, the  
17 Complaint is the operative pleading, and the Court  
18 addresses the copyright infringement, unfair  
19 competition, and declaratory and injunctive relief  
20 claims contained in the Complaint in turn below.<sup>1</sup>

21 a. *Plaintiff's Copyright Infringement Claim*

22 To maintain a claim for copyright infringement, a  
23 plaintiff must show "(1) ownership of a valid  
24 copyright, and (2) copying of constituent elements of  
25 the work that are original." Feist Publ'ns, Inc. v.

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26  
27 <sup>1</sup> The Complaint also includes a claim for fraud. See Compl.  
28 ¶¶ 39-52. However, this claim is only asserted against former  
Defendants Overbrook and Will Smith. The Court dismissed these  
Defendants on April 20, 2017 [28].

1 Rural Tel. Servs. Co., 499 U.S. 340, 361 (1991).  
2 Copying may be established by demonstrating (1) "that  
3 the [defendant] had access to plaintiff's copyrighted  
4 work" and (2) "that the works at issue are  
5 substantially similar in their protected elements."  
6 Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th  
7 Cir. 2002).

8 "There is ample authority for holding that when the  
9 copyrighted work and the alleged infringement are both  
10 before the court, capable of examination and  
11 comparison, non-infringement can be determined on a  
12 motion to dismiss." Christianson v. West Pub. Co., 149  
13 F.2d 202, 203 (9th Cir. 1945). "If after examining the  
14 works themselves, th[e] Court determines that there is  
15 no substantial similarity, then the plaintiff [] can  
16 prove no facts in support of his claim which would  
17 entitle him to relief—the standard for dismissal under  
18 Rule 12(b)(6)." Boyle v. Stephens, Inc., 97 Civ. 1351  
19 (SAS), 1998 U.S. Dist. LEXIS 1968, at \*12 (S.D.N.Y.  
20 Feb. 23, 1998); see Zella v. E.W. Scripps Co., 529 F.  
21 Supp. 2d 1124, 1131 (C.D. Cal. 2007).

22 i. *Plaintiff Has Alleged a Reasonable*  
23 *Possibility of Access to the Script*

24 Plaintiff must first allege that Defendants had  
25 access to his copyrighted work. See Cavalier, 297 F.3d  
26 at 822. Proof of access requires only "an opportunity  
27 to view or to copy plaintiff's work." Sid & Marty  
28 Krofft Television v. McDonald's Corp., 562 F.2d 1157,

1 1162 (9th Cir. 1977). "Access must be more than a bare  
2 possibility and may not be inferred through speculation  
3 or conjecture." Gaste v. Kaiserman, 863 F.2d 1061,  
4 1066 (2d Cir. 1988). One way to show access is through  
5 "evidence that a third party with whom both the  
6 plaintiff and defendant were dealing had possession of  
7 plaintiff's work." Kamar Int'l, Inc. v. Russ Berrie &  
8 Co., 657 F.2d 1059, 1062 (9th Cir. 1981).

9 Defendants do not discuss the access element of  
10 Plaintiff's copyright claim in their Motion to Dismiss.  
11 However, Defendants do note that they have also filed a  
12 Motion to Strike [42], which discusses Plaintiff's  
13 meritless argument for access. See Mot. to Dismiss 1:9  
14 n.2. Attached to Defendants' Motion to Strike is the  
15 Declaration of Richard O'Sullivan, in which Mr.  
16 O'Sullivan declares that Will Smith did not have access  
17 to Plaintiff's Script. See Decl. of Richard  
18 O'Sullivan, ECF No. 42-1.

19 "[W]hen the legal sufficiency of a complaint's  
20 allegations is tested by a motion under Rule 12(b)(6),  
21 'review is limited to the complaint.'" Lee, 250 F.3d  
22 at 688 (quoting Cervantes v. City of San Diego, 5 F.3d  
23 1273, 1274 (9th Cir. 1993)). Further, "factual  
24 challenges to a plaintiff's complaint have no bearing  
25 on the legal sufficiency of the allegations under Rule  
26 12(b)(6)." Id. In his Complaint, Plaintiff alleges  
27 that he submitted the Script to the script writing  
28 contest Overbrook sponsored. Compl. ¶ 9. Plaintiff

1 alleges that Will Smith is the director of Overbrook  
2 and that Mr. Smith and Barris worked together  
3 professionally and have developed a close personal  
4 relationship. Id. ¶¶ 4, 15. Plaintiff then concludes  
5 that Mr. Smith allowed Barris access to the Script,  
6 which Barris used as the basis for *Black-ish*. Id.  
7 ¶ 46. These allegations suggest that a third party,  
8 Mr. Smith and Overbrook, with whom both Plaintiff and  
9 Barris were dealing, had possession of Plaintiff's  
10 work. Such allegations, while circumstantial, show a  
11 reasonable possibility that Defendants had access to  
12 Plaintiff's script and therefore are sufficient to  
13 survive a motion to dismiss. Shame on You Prods. v.  
14 Banks, 120 F. Supp. 3d 1123, 1149 (C.D. Cal. 2015) ("To  
15 satisfy its burden of pleading access, plaintiff must  
16 allege facts 'from which a reasonable finder of fact  
17 could infer that the defendant had a reasonable  
18 opportunity to copy his or her work.'" (quoting Grubb  
19 v. KMS Patriots, L.P., 88 F.3d 1, 3 (1st Cir. 1996))).

20 ii. *Across the Tracks and Black-ish Are*  
21 *Not Substantially Similar*

22 In addition to alleging access to the Script,  
23 Plaintiff must also allege that *Across the Tracks* and  
24 *Black-ish* are substantially similar. The test for  
25 substantial similarity is broken into two parts: an  
26 intrinsic test and an extrinsic test. Shaw v.  
27 Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990). "[T]he  
28 intrinsic test, which examines an ordinary person's

1 subjective impressions of the similarities between two  
2 works, is exclusively the province of the jury." Funky  
3 Films, Inc. v. Time Warner Entm't Co., L.P., 462 F.3d  
4 1072, 1077 (9th Cir. 2006). Courts, in examining  
5 substantial similarity as a matter of law, apply the  
6 "extrinsic test," which focuses on "articulable  
7 similarities between the plot, themes, dialogue, mood,  
8 setting, pace, characters, and sequence of events of  
9 the two works."<sup>2</sup> Id. As part of the extrinsic test,  
10 the court should only determine whether "the  
11 protectible elements, standing alone, are substantially  
12 similar." Williams v. Crichton, 84 F.3d 581, 588 (2d  
13 Cir. 1996). Because copyright law only protects  
14 expression of ideas, not the ideas themselves, stock  
15 scenes, general plot ideas, and scenes-a-faire  
16 (situations and incidents that flow naturally from a  
17 basic plot premise) are not protected. Cavalier, 297  
18 F.3d at 823.

19 In his Complaint, Plaintiff alleges that "all the  
20 major characters, thematic points, and plot turns were  
21 virtually identical to those of the Script Across the  
22 Tracks." Compl. ¶ 19. He specifically points to the  
23 "overarching theme of the juxtaposition of an upwardly  
24

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25 <sup>2</sup> Because a jury may not find substantial similarity without  
26 evidence on both the extrinsic and intrinsic tests, if the Court  
27 determines that there is no substantial similarity as a matter of  
28 law, it has the power to dismiss a plaintiff's case. See Zella,  
529 F. Supp. 2d at 1133 n.8; see also Silas v. HBO, Inc., 201 F.  
Supp. 3d 1158, 1171 (C.D. Cal. 2016) ("A court may dismiss a  
complaint on a 12(b)(6) motion, however, for failing to satisfy  
the extrinsic test.").

1 mobile African American family moving into a  
2 predominately Anglo community and the main characters  
3 and their characteristics and personality traits are  
4 virtually identical." Id. ¶ 21. The Court looks to  
5 these allegations, the Script, and the DVD of the pilot  
6 episode of *Black-ish*, to determine whether Plaintiff  
7 has sufficiently pled that the two works are  
8 substantially similar. See Idema v. Dreamworks, Inc.,  
9 162 F. Supp. 2d 1129, 1178 (C.D. Cal. 2001), aff'd in  
10 part, dismissed in part, 90 F. App'x 496 (9th Cir.  
11 2003), as amended on denial of reh'g (Mar. 9,  
12 2004)("With these principles in mind, the Court must  
13 therefore engage in an 'analytic dissection' and  
14 comparison of the works at hand . . . .").

15 1) Plot

16 Plaintiff, in his Complaint, makes only conclusory  
17 allegations related to the similarities in the plots of  
18 the two works. See Compl. ¶ 19 ("[P]lot turns were  
19 virtually identical to those of the Script Across the  
20 Tracks."). In his proposed Amended Complaint,  
21 Plaintiff alleges that the plots of the two works are  
22 substantially similar because they both involve "an  
23 upwardly mobile African American family moving into and  
24 living amongst a predominately white neighborhood and  
25 the perceptions of the family by and between themselves  
26 and their neighbors and co-workers."<sup>3</sup> Am. Compl. ¶ 30.

27

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28 <sup>3</sup> While Plaintiff has at no point filed this proposed  
Amended Complaint, the allegations contained in the proposed

1 While Plaintiff may allege that this idea "was a  
2 radical and new departure from the traditional themes  
3 of African American centered television comedies," this  
4 plot, which as Defendants point out has been  
5 "repeatedly explored in film and television series,"  
6 including *The Jeffersons*, *Diff'rent Strokes*, and *The*  
7 *Fresh Prince of Bel-Air*, is simply a "basic plot idea .  
8 . . not protected by copyright law." Cavalier, 297  
9 F.3d at 824.

10 While both works involve African American families  
11 living in predominantly white areas, the concrete  
12 elements of the two works are not substantially  
13 similar. See Berkic v. Crichton, 761 F.2d 1289, 1293  
14 (9th Cir. 1985)(holding that the court must look at  
15 "the actual concrete elements that make up the total  
16 sequence of events and the relationships between the  
17 major characters"). *Across the Tracks* focuses almost  
18 exclusively on the Johnson family's interactions with  
19 their new white neighbors, the overt racism that arises  
20 in these interactions, and the Johnsons' use of their  
21 faith to deal with this racism. The pilot episode of  
22 *Black-ish* does not once mention the Johnsons'  
23 neighbors, and the plot does not include any

24  
25  
26 Amended Complaint are relevant to the analysis of whether the two  
27 works are substantially similar and whether, if Plaintiff is  
28 allowed to amend his Complaint, he will be able to sufficiently  
plead a claim for copyright infringement. Therefore, the Court,  
in performing its comparison of the two works, looks at  
Plaintiff's allegations in both the Complaint and proposed  
Amended Complaint.

1 interactions with neighbors. In *Black-ish*, it appears  
2 that the Johnson family has been living in the  
3 predominantly white neighborhood for some time, and the  
4 focus of the plot is the struggles the main character,  
5 Andre, endures as he realizes his family has  
6 assimilated almost too well into the majority culture  
7 while forgetting their own minority culture in the  
8 process. For example, Andre scoffs at his son's  
9 intention to join the field hockey team and desire to  
10 be called "Andy" rather than Andre. *Across the Tracks*  
11 makes no mention of the Johnson family losing sight of  
12 their culture as they continue to interact with their  
13 white neighbors. Instead, the Johnsons in *Across the*  
14 *Tracks* seem to embrace their neighbors' attempts at  
15 "acting black," recognizing it as their neighbors' way  
16 of trying to make them feel comfortable in a new  
17 neighborhood.

18 The climaxes of the plots in both works are also  
19 dissimilar. The climax of *Across the Tracks* occurs  
20 when DJ faces racist comments at a sleepover, and his  
21 parents are then confronted with the aftermath of these  
22 comments. The climax of *Black-ish* occurs when Bow puts  
23 a stop to Andre's crazy antics in trying to make sure  
24 his family remains "black, not black-ish." While Andre  
25 faces some indirect racism with his co-worker trying to  
26 "act black" around Andre, the pilot does not focus on  
27 overt racism and instead focuses on Andre's fear that  
28 his family is not "black enough." Although the two

1 works "at a high level of generality" are similar,  
2 including the experiences of a black family living in a  
3 predominantly white area, these similarities only exist  
4 in the basic plots and are not protected. See Berkic,  
5 ("No one can own the basic idea for a story. General  
6 plot ideas are not protected by copyright law . .  
7 . ."); see also Silas, 201 F. Supp. 3d at 1174 ("[N]one  
8 of the alleged similarities [in the two plots] are  
9 substantially similar in their protectible objective  
10 details.").

11 Finally, Plaintiff alleges in his proposed Amended  
12 Complaint that the storylines of the adult characters  
13 receiving promotions is "identical." Am. Compl. ¶ 36.  
14 Plaintiff's allegations regarding these "identical"  
15 storylines are vague, but despite these allegations, it  
16 is hard to see how these storylines are substantially  
17 similar. *Black-ish* focuses on Andre's promotion to  
18 Senior Vice President of the Urban Division and the  
19 conflict that ensues when he learns he has been put in  
20 charge of "black stuff." The script of *Across the*  
21 *Tracks* had yet to explore Keisha's workplace, but she  
22 did not receive a promotion; rather, she obtained a  
23 better job at a different hospital. Further, there is  
24 nothing in *Across the Tracks* that suggests Keisha  
25 obtained the job because the hospital assumed she would  
26 better understand "black culture," like Andre's boss in  
27 *Black-ish*. Instead, it appears likely that *Across the*  
28 *Tracks* would explore Keisha's struggles of coming into

1 a new workplace where she is the new boss, specifically  
2 the boss of her new neighbor, Katie Smith. Even if  
3 both characters did receive internal promotions and the  
4 two shows explored the characters' reactions to those  
5 promotions, basic plot ideas are "not protected by  
6 copyright law." Campbell, 718 F. Supp. 2d at 1112.

7 Therefore the plots of the two works are not  
8 substantially similar.

9 2) Theme

10 "A work's theme is its overarching message."  
11 Silas, 201 F. Supp. 3d at 1180. "[T]here is no  
12 protection for stock themes or themes that flow  
13 necessarily from a basic premise." Id.; Cavalier, 297  
14 F.3d at 823.

15 Defendants argue that Plaintiff's alleged theme,  
16 "the juxtaposition of an upwardly mobile African  
17 American family moving into a predominately Anglo  
18 community," is merely a description of an underlying  
19 plot idea, which copyright law does not protect. Mot.  
20 to Dismiss 11:20-24; see Berkic, 761 F.2d at 1293  
21 ("General plot ideas are not protected by copyright  
22 law; they remain forever the common property of  
23 artistic mankind."). The Court agrees with Defendants'  
24 assessment as Plaintiff's alleged theme does not  
25 encompass an overarching message. See Kouf v. Walt  
26 Disney Pictures & Television, 16 F.3d 1042, 1045 (9th  
27 Cir. 1994)(describing one work's theme as a  
28 "celebrat[ion] [of] family values" and another work's

1 theme as "the triumph of good over evil"); cf. Silas,  
2 201 F. Supp. 3d at 1180 ("[T]he alleged theme of 'fast  
3 paced and lavish lives of professional football  
4 players' is an underlying plot idea, not a theme.").  
5 Instead, it describes the basic plot of the two works,  
6 and such generic ideas are not protectable expressions  
7 courts will consider in an extrinsic analysis. See  
8 Silas, 201 F. Supp. 3d at 1180.

9 Plaintiff alleges in the proposed Amended Complaint  
10 that the theme of "the juxtaposition of the white  
11 majority community attempting to appear cool, hip, and  
12 at peace with their new African American neighbors is  
13 copied by Blackish from *Across the Tracks*." Am. Compl.  
14 ¶ 30. Plaintiff notes the similarities of the  
15 neighbors in *Across the Tracks* and the colleagues in  
16 *Black-ish* who attempt "to talk with swagger or 'act  
17 Black.'" Id.

18 Importantly, "acting black" is not a theme but  
19 rather an underlying plot idea because it is not an  
20 underlying message in the works. Silas, 201 F. Supp.  
21 3d at 1180. Further, in *Black-ish*, while Andre's co-  
22 workers do use dialogue in an attempt to "act black,"  
23 these interactions are extremely brief and are not a  
24 large point of contention. Rather, Andre, while a bit  
25 annoyed, seems to brush off these interactions. On the  
26 other hand, these interactions are the main focus of  
27 the plot in *Across the Tracks*; the Johnson family  
28 spends the entire script dealing with the Smiths'

1 effort to dress, talk, and act "black" to make the  
2 Johnsons feel more comfortable.

3       The only similarity is the idea of "acting black";  
4 none of the actual dialogue or instances of "acting  
5 black" in the two works are similar. The Smiths in  
6 *Across the Tracks* show up to the Johnsons' barbeque  
7 having completely transformed their style in an effort  
8 to "act black." The Script states, "Tim is dressed  
9 like a gansta [sic] rapper, and Katie is looking like a  
10 video girl, with her heels and lip gloss popping."  
11 RJN, Ex. 1 at 17. In *Black-ish*, Andre's co-worker  
12 refers to him as "Dr. Dre" and "Driggity Dre" in an  
13 effort to show comradery. These instances are  
14 "[s]cenes-à-faire, or situations and incidents that  
15 flow necessarily or naturally" from the basic plot  
16 premise of a black family living and working in a  
17 predominantly white area, and they are not protected.  
18 Cavalier, 297 F.3d at 823.

19       Plaintiff alleges that the theme of "moving into  
20 the majority culture [and] constantly feel[ing] that  
21 they are oddities and out of place" is prevalent in  
22 both works. Am. Compl. ¶ 31. The alleged theme of  
23 feeling out of place also naturally arises from the  
24 plot and cannot qualify as a protectable element of the  
25 work. Benay v. Warner Bros. Entertainment, Inc., 607  
26 F.3d 620, 627 (9th Cir. 2010)(holding "fish-out-of  
27 water" theme naturally arises from two works' shared  
28 plot of an American war veteran who travels to Japan).

1 Because this "theme" arises from the basic plot idea,  
2 it is not protected, and the Court must therefore  
3 disregard this non-protectable element in looking at  
4 Plaintiff's ability to plead substantial similarity.  
5 Cavalier, 297 F.3d at 822-23 ("[W]hen applying the  
6 extrinsic test, a court must filter out and disregard  
7 the non-protectible elements in making its substantial  
8 similarity determination.").

9 Finally, as Defendants note in their Motion, "the  
10 actual themes of the two works are markedly different."  
11 Mot. to Dismiss 14:8. In *Across the Tracks*, the  
12 primary theme is relying on your faith to help you  
13 overcome racism, while in *Black-ish* the theme is  
14 staying true to one's heritage, or "keeping it real."  
15 *Black-ish* does not reference the Johnsons' religion nor  
16 does it use religion as the family's coping mechanism  
17 for conflict. While both families may be dealing with  
18 the struggles of being a minority in a majority  
19 culture, the message in each work is distinct.  
20 Therefore, the themes of the two works are not  
21 substantially similar.

### 22 3) Characters

23 Plaintiff alleges that aspects of the characters in  
24 the two works are very similar. He notes that the two  
25 families share the same last name, Johnson, and each  
26 family has a son named after the father (Dave and Dave  
27 Jr. in *Across the Tracks* and Andre and Andre Jr. in  
28 *Black-ish*). Am. Compl. ¶ 32. Plaintiff also alleges

1 that the two mothers are very similar because they both  
2 work in the medical field, with the mother in *Across*  
3 *the Tracks* working as a nurse manager and the mother in  
4 *Black-ish* working as a doctor. Id. Plaintiff claims  
5 that the teenage daughter characters are "virtually  
6 identical" because they are both "constantly too busy  
7 on [their] cell phone[s] to be involved in any family  
8 discussions revolving around [them]." Id. ¶ 34.

9 As Defendants note, the cast of characters in the  
10 two works are very different. In *Black-ish*, Andre and  
11 his wife, Bow, have four children, a teenage son, a  
12 teenage daughter, and pre-teen twins. In *Across the*  
13 *Tracks*, Dave and his wife, Keisha, have two kids, a  
14 teenage son and a teenage daughter. There is a  
15 grandfather character in *Black-ish*, while there is no  
16 grandfather character in *Across the Tracks*.  
17 Additionally, the Smiths, the Johnsons' neighbors in  
18 *Across the Tracks*, play a significant role, while there  
19 are no neighbor characters in *Black-ish*. See Benay,  
20 607 F.3d at 627 (noting that characters in one work did  
21 not have a parallel in the other work).

22 Additionally, the similarities that Plaintiff  
23 alleges are incidental and do not reach the level of  
24 substantially similar. The fact that the families in  
25 both works have the last name Johnson and both have son  
26 characters who are "juniors" is of no consequence,  
27 particularly where, as here, the names are generic.  
28 See CK Co. v. Burger King Corp., 92 Civ. 1488 (CSH),

1 1994 U.S. Dist. LEXIS 13934, at \*22 (S.D.N.Y. Sep. 29,  
2 1994)("The fact that characters have identical names  
3 and have similar roles in two works does not  
4 necessitate a finding of substantial similarity.").

5 Further, Plaintiff's allegations regarding the  
6 similarities of the characters personalities are not  
7 protectable. "[O]nly distinctive characters are  
8 protectible, not characters that merely embody  
9 unprotected ideas." Benay, 607 F.3d at 626.

10 Accordingly, "[n]o character infringement claim can  
11 succeed unless plaintiff's original conception  
12 sufficiently developed the character, and defendants  
13 have copied this development and not merely the broader  
14 outlines." Smith v. Weinstein, 578 F. Supp. 1297, 1303  
15 (S.D.N.Y. 1984), aff'd, 738 F.2d 419 (2d Cir. 1984).

16 The character trait of teenage daughters being too busy  
17 on their cell phones is "too abstract to warrant  
18 copyright protection." Shame on You Prods., 120 F.  
19 Supp. 3d at 1164. It is a surface-level description of  
20 a character and does not make either daughter  
21 distinctive; it merely describes the majority of  
22 today's teenagers. Id. (holding that stock characters  
23 do not invoke copyright protection). Other than being  
24 typical teenage girls, the two characters are quite  
25 different. Kimberly in *Across the Tracks* learned to  
26 cook from her mother and prepares dinner for the whole  
27 family. There is no suggestion that Zoey in *Black-ish*,  
28 who regularly sasses her father, would ever be

1 interested in cooking a dinner for her whole family.  
2 See Hogan v. DC Comics, 48 F. Supp. 2d 298, 309-10  
3 (S.D.N.Y. 1999) ("In determining whether characters are  
4 similar, a court looks at the totality of [the  
5 characters'] attributes and traits . . . ." (quoting  
6 Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d  
7 Cir. 1986))). Additionally, *Across the Tracks* has set  
8 up a love interest for Kimberly, while there is no  
9 equivalent love interest for Zoey.

10 The fact that both mother characters work in the  
11 medical field is another example of a non-distinct  
12 trait that cannot be copyrighted. The two women only  
13 work in the same field; they do not share the exact  
14 same profession, and even if they did, such similarity  
15 would not be protected. See Eaton v. NBC, 972 F. Supp.  
16 1019, 1029 (E.D. Va. 1997) (holding that basic human  
17 traits including occupation "are too general or too  
18 common to deserve copyright protection"). Plaintiff's  
19 allegations of similarities that only involve working  
20 in the same field, are "far from the level of  
21 specificity and distinctiveness required for characters  
22 to be protected by copyright." Gadh v. Spiegel, No. CV  
23 14-855-JFW (PJWx), 2014 U.S. Dist. LEXIS 64081, at \*15  
24 (C.D. Cal. Apr. 2, 2014).

25 Finally, the main characters, Andre in *Black-ish*  
26 and Dave in *Across the Tracks*, are distinct as well.  
27 Andre is a successful advertising executive who is  
28 distraught when he realizes that his family has become

1 too assimilated to the majority culture in which they  
2 live. He then comedically goes above and beyond to  
3 make sure his children, most specifically his son,  
4 Andre Jr., appreciate their black culture. Dave, on  
5 the other hand, owns a used car dealership and is a man  
6 of strong faith who relies on God to give him guidance  
7 about the racism his family is facing. Besides working  
8 hard to provide a good life for their families, the two  
9 men do not share many attributes. Any similarities  
10 "flow naturally from the works' shared premises" and  
11 are thus not protected. Benay, 607 F.3d at 627.

12 Accordingly, there are no substantial similarities  
13 between the characters in the two works.

14 4) Dialogue

15 Plaintiff fails to make any allegations in his  
16 Complaint regarding the similarity of the works'  
17 dialogue. However, in his proposed Amended Complaint,  
18 he alleges that "specific words and phrases are said if  
19 [sic] a virtually identical way." Am. Compl. ¶ 35.  
20 "[E]xtended similarity of dialogue [is] needed to  
21 support a claim of substantial similarity." Olson v.  
22 Nat'l Broad. Co., 855 F.2d 1446, 1450 (9th Cir. 1988).  
23 Plaintiff alleges three instances of what he claims are  
24 "virtually identical" dialogue. Plaintiff points to an  
25 instance where characters in both works refer to  
26 "seeing color." Am. Compl. ¶ 35. Bow in *Black-ish*  
27 refers to how her twins do not "see color," while the  
28 Script notes that the neighbors still "saw color." Id.

1 The reference in *Across the Tracks* to how the neighbors  
2 "saw color" is a script note, not dialogue, and is thus  
3 irrelevant to the Court's analysis.

4 The two examples Plaintiff provides of actual  
5 dialogue, which he alleges are "identical," are also  
6 insufficient to show substantial similarity. Plaintiff  
7 notes that both works refer to "being black."<sup>4</sup> Am.  
8 Compl. ¶ 35. This two-word phrase, which is used once  
9 in each work, can in no way be construed as "extended  
10 similarity of dialogue." See Shame on You Prods., 120  
11 F. Supp. 3d at 1156 (noting that any overlap in  
12 dialogue in the two works was "isolated and involve[d]  
13 common words or phrases," which did not support a claim  
14 for substantial similarity). Further, short, stock  
15 phrases are not protectable. See Southco, Inc. v.  
16 Kanebridge Corp., 390 F.3d 276, 285-287 (3d Cir.  
17 2004)(recognizing the longstanding principle of  
18 copyright law that words and short phrases are not  
19 copyrightable). Therefore, even if this phrase could  
20 be considered "extended similarity of dialogue," it  
21 still could not support a claim for substantial  
22 similarity because the phrase is not a protected  
23 element the Court considers when examining claims for  
24 copyright infringement. Cavalier, 297 F.3d at 822-23.

25 Finally, Plaintiff points to a line of dialogue in  
26

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27  
28 <sup>4</sup> In *Black-ish*, Andre states, "I need my family to be black  
again at home." Am. Compl. ¶ 35. In *Across the Tracks*, Dave  
states, "Do you mind being black for a second again[?]" Id.

1 each work where the father character states that his  
2 family can learn from their mistakes.<sup>5</sup> The dialogue,  
3 while similar in the abstract, is not identical, and  
4 the message of learning from one's mistake is a message  
5 shared in countless works. Such stock dialogue,  
6 "containing little in the way of original expression,"  
7 cannot be protected. See Narell v. Freeman, 872 F.2d  
8 907, 911 (9th Cir. 1989).

9 Of note, Andre in *Black-ish* frequently provides  
10 voiceover narratives throughout the episode, while  
11 *Across the Tracks* does not have any voiceovers. See  
12 Silas, 201 F. Supp. 3d at 1181 (noting the difference  
13 in use of, or lack of, voiceovers in the two works).  
14 This distinction is yet another way of showing how the  
15 dialogue in the two works, both in content and type, is  
16 dissimilar.

17 For the foregoing reasons, the three instances of  
18 dialogue Plaintiff alleges are "virtually identical,"  
19 one of which is not even dialogue, are insufficient to  
20 allege substantial similarity. See Silas, 201 F. Supp.  
21 3d at 1181 (finding that one instance of similar  
22 dialogue was insufficient to survive motion to  
23 dismiss).

#### 24 5) Mood, Setting, and Pace

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26 <sup>5</sup> In *Black-ish*, Andre states, the "lesson we learned today  
27 is that a man always admits when he is wrong," while in *Across*  
28 *the Tracks*, Dave states, "We can all learn a valuable lesson  
today, own up to being wrong, but if someone owns up to his  
wrong, you have to be man enough to forgive them." Am. Compl.  
¶ 35.

1 Plaintiff does not make any allegations regarding  
2 the two works' similarities in mood, setting, and pace.  
3 However, even a surface-level examination of these  
4 elements shows that the two works are not substantially  
5 similar.

6 While both works are billed as comedies, *Across the*  
7 *Tracks* takes on a more serious mood with the overt  
8 racism and clear movement towards a message of family  
9 strength and emphasis on religion as the Johnson family  
10 deals with the inappropriate behavior of their  
11 neighbors. *Black-ish* is much more light-hearted, even  
12 ending the episode with the family dancing at Andre  
13 Jr.'s "bro mitzvah." Thus, the moods of the two works  
14 are not substantially similar. See Olson, 855 F.2d at  
15 1451 (holding that while both works were described as  
16 comedies and thus had similar moods, this was  
17 insufficient to demonstrate substantial similarity).

18 The setting of *Across the Tracks* is not clearly  
19 defined in the Script, while *Black-ish* is set in Los  
20 Angeles. Even if both works were set in Los Angeles,  
21 this similarity would not be protectable under  
22 copyright law. Alexander v. Murdoch, 2011 U.S. Dist.  
23 LEXIS 79503, at \*21 (S.D.N.Y. July 14, 2011)(finding  
24 that the shared setting of Los Angeles was not  
25 protectable under copyright law). Therefore, there is  
26 no substantial similarity between the setting of the  
27 two works.

28 As Defendants note in their Motion, the pace of the

1 two works is very different. Mot. to Dismiss 16:17-18.  
2 In determining the pace of a work, courts look at the  
3 time period within which the works are set. See Capcom  
4 Co., Ltd. v. MKR Group, Inc., No. 08-0904-RS, 2008 U.S.  
5 Dist. LEXIS 83836, at \*10 (N.D. Cal. Oct. 20, 2008).  
6 The majority of *Across the Tracks* takes place in one  
7 day, with the last scene occurring the following night.  
8 Additionally, the scenes all take place in and around  
9 the Johnsons' home. The pace is slow and the scenes  
10 are linear. *Black-ish* is fast-paced as it cuts back  
11 and forth between different parts of the Johnsons' home  
12 and Andre's work place. Additionally, *Black-ish*  
13 clearly takes place over a number of days. During the  
14 pilot episode, Andre obtains the promotion, creates two  
15 different presentations for work, and plans a "bro  
16 mitzvah" for Andre Jr. At the very least, the pilot  
17 episode takes place over the course of a couple of  
18 days. See Kouf, 16 F.3d at 1046 (noting two works were  
19 dissimilar when one took place over 24 hours and the  
20 other took place over a series of days). Thus, there  
21 is no substantial similarity in the pace of the two  
22 stories.

23 Ultimately, *Across the Tracks* and *Black-ish* share  
24 similarities only in the abstract: both works involve  
25 black families living in predominantly white areas and  
26 their experiences as they navigate living in these  
27 areas. Plaintiff's Complaint alleges nary a similarity  
28 that is protectable under the copyright law. See Funky

1 Films, 462 F.3d at 1081. Even a review of Plaintiff's  
2 proposed Amended Complaint does nothing to cure the  
3 defects in his pleading of copyright infringement.  
4 Plaintiff's allegations in the proposed Amended  
5 Complaint are again generic ideas that flow from the  
6 basic plot of the two works, not specific,  
7 copyrightable elements. See Shame on You Prods., 120  
8 F. Supp. 3d at 1148 (noting that the court, in  
9 evaluating the extrinsic test, only looks at  
10 protectable elements of the works).

11 Finally, this Court has reviewed both of the works  
12 in detail, including examining the potential  
13 "similarities between the plot, themes, dialogue, mood,  
14 setting, pace, characters, and sequence of events in  
15 two works." Kouf, 16 F.3d at 1045. Any similarities,  
16 including characters "acting black," the lessons of  
17 owning up to your mistakes, and the two families  
18 feeling out of place in a predominantly white area,  
19 "flow necessarily and naturally from the basic plot  
20 premise." See Cavalier, 297 F.3d at 823.

21 Consequently, Plaintiff cannot allege that the two  
22 works are substantially similar, and the Court **GRANTS**  
23 Defendants' Motion to Dismiss as to Plaintiff's  
24 copyright infringement claim.

25 ///

26 b. *Plaintiff's Unfair Competition Claim*

27 Plaintiff also asserts a claim for unfair  
28 competition, alleging that Defendants "have made, and

1 will continue to make a false and misleading  
2 designation about the origin of [*Black-ish*] in  
3 violation of the Lanham Act." Compl. ¶ 34. As  
4 Defendants note, the U.S. Supreme Court in Dastar Corp.  
5 v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)  
6 dealt with the relationship between designation of  
7 origin claims under the Lanham Act and copyright  
8 claims. Mot. to Dismiss 23:4-7. In Dastar, the  
9 plaintiffs alleged that the defendant purchased video  
10 tapes from the plaintiffs, copied and edited the tapes,  
11 and then distributed the tapes as its own product. 539  
12 U.S. at 26-27. The plaintiffs sued under the Lanham  
13 Act alleging that the defendant's "passing off" of the  
14 tapes as its own resulted in a "false designation of  
15 origin" of the tapes. Id. at 29. The Court focused on  
16 the definition of "origin" under the Lanham Act to  
17 determine whether it included the "entity that  
18 originated the ideas that 'goods' embody or contain."  
19 Id. at 32.

20 In holding that "origin" did not include the  
21 originator of the ideas but instead refers to the  
22 producer of the actual good itself, the Court noted  
23 that including the originator of the ideas in the  
24 "origin" definition would put the Lanham Act in  
25 conflict with copyright law. Id. at 34 ("[I]n  
26 construing the Lanham Act, we have been 'careful to  
27 caution against misuse or over-extension' of trademark  
28 and related protections into areas traditionally

1 occupied by patent or copyright." (quoting TrafFix  
2 Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29  
3 (2001)). Ultimately, the Court concluded that because  
4 the defendant was the producer of the actual video  
5 tapes it sold, it was therefore the "origin" of those  
6 tapes, and the plaintiffs could not prevail on their  
7 Lanham Act claim. Id. at 38.

8 Courts in the Central District have relied on this  
9 ruling and dismissed plaintiffs' claims for violation  
10 of the Lanham Act. See Whitehead v. Millennium Films,  
11 No. CV 15-03564-RGK (AGRx), 2016 U.S. Dist. LEXIS  
12 187805, at \*7 (C.D. Cal. May 4, 2016)(dismissing claim  
13 under Lanham Act where plaintiff alleged defendant made  
14 a false claim of creation as to the plaintiff's  
15 script); Friedman v. Zimmer, No. CV 15-502 GHK (Ex),  
16 2015 U.S. Dist. LEXIS 143941, at \*16 (C.D. Cal. July  
17 10, 2015)(granting motion to dismiss Lanham Act claim  
18 based on allegation that movie score infringed  
19 plaintiff's copyright in a musical composition).

20 Here, Plaintiff's unfair competition claim under  
21 the Lanham Act is essentially a duplicate of his  
22 copyright claim. He does not allege that Defendants  
23 stole his physical script, repackaged it as their own,  
24 and then sold it. Rather, he is alleging that  
25 Defendants stole the ideas in the *Across the Tracks*  
26 script. See Compl. ¶ 34. Because Plaintiff does not  
27 allege that Defendant misappropriated his tangible  
28 goods, he cannot proceed with his unfair competition

1 claim. See Dastar, 539 U.S. at 38. The Court  
2 therefore **GRANTS** Defendants' Motion to Dismiss as to  
3 Plaintiff's unfair competition claim.

4 c. *Plaintiff's Claim for Declaratory Relief*

5 Plaintiff's allegations regarding his claim for  
6 declaratory relief are succinct and essentially only  
7 seek a judicial determination that Defendants infringed  
8 Plaintiff's copyright in *Across the Tracks*. Compl. ¶¶  
9 54-55. As noted above, Plaintiff does not have a  
10 viable claim for copyright infringement. "[A]bsent a  
11 viable underlying claim," Plaintiff is not entitled to  
12 the declaratory relief he requests. See Shaterian v.  
13 Wells Fargo Bank, N.A., 829 F. Supp. 2d 873, 888 (N.D.  
14 Cal. 2011)(dismissing claim for declaratory relief  
15 after dismissing underlying claims upon which plaintiff  
16 sought declaratory relief). Accordingly, the Court  
17 **GRANTS** Defendants' Motion to Dismiss as to Plaintiff's  
18 declaratory relief claim.

19 d. *Plaintiff's Claim for Injunctive Relief*

20 Plaintiff's final claim is a claim for injunctive  
21 relief. As with his declaratory relief claim,  
22 Plaintiff premises his claim for injunctive relief on  
23 Defendants' alleged infringement of Plaintiff's  
24 copyright. However, "[i]njunctive relief is a remedy  
25 and not, in itself, a cause of action." Biederman v.  
26 Nw. Tr. Servs., No. CV 15-02283-AB (JCx), 2015 U.S.  
27 Dist. LEXIS 82221, at \*5 (C.D. Cal. June 24, 2015).  
28 Because the Court has dismissed Plaintiff's other

1 claims, he does not have any claim for which he can  
2 seek injunctive relief. Massacre v. Davies, No.  
3 13-cv-04005 NC, 2014 U.S. Dist. LEXIS 114787, at \*17  
4 (N.D. Cal. Aug. 18, 2014)(dismissing prayer for  
5 injunctive relief "because [plaintiff] has not pled a  
6 cause of action that could entitle him to that  
7 relief"). As such, the Court **GRANTS** Defendants' Motion  
8 to Dismiss as to Plaintiff's injunctive relief claim.

9 3. Leave Amend Would be Futile

10 Federal Rule of Civil Procedure 15(a) provides that  
11 a party may amend their complaint once "as a matter of  
12 course" before a responsive pleading is served. Fed.  
13 R. Civ. P. 15(a). After that, the "party may amend the  
14 party's pleading only by leave of court or by written  
15 consent of the adverse party and leave shall be freely  
16 given when justice so requires." Id. Leave to amend  
17 lies "within the sound discretion of the trial court."  
18 United States v. Webb, 655 F.2d 977, 979 (9th Cir.  
19 1981). The Ninth Circuit has noted "on several  
20 occasions . . . that the 'Supreme Court has instructed  
21 the lower federal courts to heed carefully the command  
22 of Rule 15(a), F[ed]. R. Civ. P., by freely granting  
23 leave to amend when justice so requires.'" Gabrielson  
24 v. Montgomery Ward & Co., 785 F.2d 762, 765 (9th Cir.  
25 1986)(quoting Howey v. United States, 481 F.2d 1187,  
26 1190 (9th Cir. 1973))(citations omitted).

27 In motions to dismiss a copyright infringement  
28 claim, courts have held that "[b]ecause substantial

1 similarity is 'a defect that cannot be cured by an  
2 amended complaint,'" dismissal without leave to amend  
3 is proper. Schkeiban v. Cameron, No. CV 12-0636-R  
4 MANX, 2012 WL 5636281, at \*1 (C.D. Cal. Oct. 4, 2012),  
5 aff'd, 566 F. App'x 616 (9th Cir. 2014); see Campbell,  
6 718 F. Supp. 2d at 1116.

7 Here, while Plaintiff attached his proposed Amended  
8 Complaint to the parties' stipulation to extend time to  
9 file an Amended Complaint [26], Plaintiff never filed  
10 the proposed Amended Complaint. However, the  
11 allegations in the proposed Amended Complaint do  
12 nothing to change the fact that Plaintiff cannot plead  
13 substantial similarity. As noted above, a comparison  
14 of the plot, themes, dialogue, mood, setting, pace,  
15 characters, and sequence of events of the two works  
16 failed to reveal any substantial similarities. This  
17 defect cannot be cured by amendment, see Silas, 201 F.  
18 Supp. 3d at 1184, and thus, granting Plaintiff leave to  
19 amend would be futile. Therefore, the Court **GRANTS**  
20 Defendants' Motion to Dismiss without leave to amend.

21 4. Defendants' Motion to Strike and for Sanctions  
22 is DENIED as MOOT

23 In light of the Court's **GRANT** of Defendants' Motion  
24 to Dismiss, the Court **DENIES as MOOT** Defendants' Motion  
25 to Strike and for Sanctions.

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1 **III. CONCLUSION**

2 Based on the foregoing, the Court **GRANTS**  
3 Defendants' Motion to Dismiss [35] **without leave to**  
4 **amend.** Accordingly, the Court **DENIES as MOOT**  
5 Defendants' Motion to Strike and for Sanctions [42].

6 This matter is closed. The Clerk shall  
7 terminate this case.

8 **IT IS SO ORDERED.**

9 DATED: September 13, 2017

s/ RONALD S.W. LEW

10 **HONORABLE RONALD S.W. LEW**  
11 Senior U.S. District Judge  
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