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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 FRANK COBLE,

11 Plaintiff,

12 v.

13 ANITA RENFROE and ANITA
14 RENFROE LLC,

15 Defendants.

CASE NO. C11-0498 RSM

ORDER ON DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

16 This matter comes before the Court on Defendants' Motion for Summary Judgment. Dkt.
17 # 20. Plaintiff commenced this action against Defendants on March 21, 2011, asserting claims
18 for copyright infringement under the United States Copyright Law, and unfair competition and
19 false designation of origin under the Lanham Act.¹ Defendants move for summary judgment on
20 both claims, asserting that Plaintiff cannot show that the works at issue are substantially similar,
21 that Plaintiff has not used a legally cognizable mark in commerce, and that Plaintiff cannot, in
22 any event, establish any likelihood of confusion. Dkt. # 20.

23 _____
24 ¹ Although Plaintiff was initially represented by counsel, he is now proceeding *pro se*.

1 Having reviewed the motion, Plaintiff’s response, Dkt. # 32,² and Defendants’ reply, Dkt.
2 # 34, Defendants’ motion is GRANTED.

3 **I. BACKGROUND**

4 This case centers upon two humorous songs – both regarding the general subject of
5 mothers – composed by two comedians: Plaintiff Frank Coble and Defendant Anita Renfroe.³
6 Plaintiff is a full time artist who also performs standup comedy. Renfroe is a full-time
7 professional singer, songwriter and comedian. Renfroe is well-known for her comedy targeted at
8 women, specifically mothers, and she has performed in this genre since 1998.

9 Sometime prior to July 2005, Plaintiff developed lyrics for a song based on his own
10 interactions with his mother, and he entitled that composition, the “Mom Song.” Plaintiff first
11 publicly performed the “Mom Song” – delivered as a non-melodic rap against the backdrop of a
12 drumbeat – on July 3, 2005. Although the record contains various different versions of this song,
13 when the Court refers to the “Mom Song,” it refers to the following lyrics, which are
14 representative of the various different versions:

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17 ² More than two months after the instant motion had been noted and fully briefed, Plaintiff
18 moved to amend his response, Dkt. ## 41-42, and Defendants opposed that motion. Dkt. # 43.
19 Although the Ninth Circuit has held that “procedural requirements should be more liberally
20 construed for pro se litigants,” *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002), “[p]ro se
21 litigants must follow the same rules of procedure that govern other litigants.” *King v. Atiyeh*,
22 814 F.2d 565, 567 (9th Cir. 1987). Here, the Court previously granted Plaintiff an extension to
23 file his response, at which time it admonished him to comply with the Federal Rules of Civil
24 Procedure and the Local Rules of this Court, and advised him that the Court “will not grant any
further motions for extensions of time or other deviations from the rules except where there is
actual good cause, supported by a sworn and signed declaration.” Dkt. # 33. Plaintiff’s motions
to amend his response are inconsistent with the Court’s previous order, and he has not
demonstrated good cause for his failure to comply with that order. Therefore, Dkt. ## 41-42 are
STRICKEN, and are not considered by the Court.

³ Defendant Anita Renfroe LLC is a limited liability owned and controlled by Renfroe.

1 Get upstairs and pick up your room. Or I'm going to whip you with a
2 wooden spoon. Get upstairs and make up your bed. Or I'm going to slap
you upside the head.

3 It's time to get up. Get up now. It's time to get out of bed. Don't be a
4 sleepy head. Hurry up and get ready for school. Otherwise you end up
being a stupid fool. Eat all your food and don't give me none of your lip.
5 Or I'll send you off to Africa on a freight ship. Eat all your food. Now eat
it, now! Turn off the TV and hit the hay. Otherwise you'll be looking for
6 another place to stay. Now get ready for bed. Otherwise I'm going slap
you upside the head. Why? Because I'm the Mom.

7 Dkt. # 32, p. 2-3.

8 In June 2006, Plaintiff attended the "Christian Comedy Association Annual Event" and
9 performed the first four sentences of the "Mom Song." Renfroe was present at that event and
10 does not dispute having heard the first four sentences. After his performance, Plaintiff alleges
11 that he spoke directly with Renfroe and recited the remaining lyrics of the "Mom Song" to her.

12 Subsequently, in 2007, Renfroe publicly performed a song entitled "Momisms," which is
13 a musical compilation of all the things that, in Renfroe's view, a mother would say to her
14 children throughout a typical day. In the song, Renfroe harmonizes her lyrics on this subject
15 with the music of the William Tell Overture, which plays in the background. Dkt. # 21, ¶¶ 11-
16 13. In November 2007, Defendants publically released a DVD containing the "Momisms" song.
17 *Id.* ¶ 12, Ex. I at 44:20,

18 In April of 2008, Plaintiff first accused Renfroe of "stealing his idea" and began
19 demanding compensation in connection with Defendants' "Momisms" song. Plaintiff filed this
20 lawsuit in March of 2011 and registered a copyright for the "Mom Song" later that month.⁴

21 Defendants now move for summary judgment.

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24 ⁴ There is no evidence before the Court that Plaintiff registered the "Mom Song" mark.

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2 **II. ANALYSIS**

3 A. Standard of Review

4 Summary judgment is proper if the pleadings, discovery, affidavits and disclosure
5 materials on file show that “there is no genuine dispute as to any material fact and the movant is
6 entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(a) & (c) (as amended December 1,
7 2010). An issue is “genuine” if “a reasonable jury could return a verdict for the nonmoving
8 party” and a fact is material if it “might affect the outcome of the suit under the governing law.”
9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

10 The moving party is entitled to judgment as a matter of law when the nonmoving party
11 fails to make a sufficient showing on an essential element of a claim in the case on which the
12 nonmoving party has the burden of proof. *Celotex Corp. v. Cartett*, 477 U.S. 317, 323 (1986).
13 The Court resolves any factual disputes in favor of the nonmoving party only when the facts
14 specifically attested by each party are in contradiction. *T.W. Elec. Serv., Inc. v. Pac. Elec.*
15 *Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987).

16 B. Copyright

17 Defendants first move for summary judgment on Plaintiff’s claim of copyright
18 infringement. A plaintiff alleging copyright infringement must show “(1) ownership of a valid
19 copyright, and (2) copying of constituent elements of the work that are original.” *Feist Pubs.*,
20 *Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). For purposes of this analysis, the Court
21 assumes that Plaintiff owns a valid copyright over the “Mom Song,” and that he therefore
22 satisfies the first prong.

1 To satisfy the second prong, a plaintiff must “demonstrate a triable issue of fact whether
2 [the defendant] ‘cop[ied] anything that was ‘original’ to’ [Plaintiff’s] work.” *Funky Films, Inc.*
3 *v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006) (citing *Feist Pubs.,*
4 *Inc.*, 499 U.S. at 361). A plaintiff may use direct or circumstantial evidence to show that the
5 defendant copied the work at issue. *Id.* Circumstantial evidence consists of proof “that the
6 defendant had ‘access’ to the plaintiff’s work and that the two works are ‘substantially similar.’”
7 *Funky Films, Inc.*, 462 F.3d at 1076 (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481
8 (9th Cir. 2000)). Here, because Plaintiff has not presented any direct evidence that Defendants
9 copied the “Mom Song,” the Court will analyze the circumstantial evidence before it regarding
10 the issues of access and substantial similarity.

11 1. *Access*

12 There is no dispute that Renfroe viewed at least a portion of Plaintiff’s “Mom Song”
13 during the 2006 conference. Although Plaintiff alleges that he also recited additional lyrics
14 directly to Renfroe during the conference, Defendants deny that claim. Because these conflicting
15 claims present a question of fact, the Court will resolve the issue in favor of Plaintiff, the non-
16 moving party. *See T.W. Elec. Serv., Inc.*, 809 F.2d at 631. Thus, for purposes of the instant
17 motion, the Court assumes that Defendants had access to the “Mom Song.” *Id.*

18 2. *Substantial Similarity*

19 In order to sustain his claim for copyright infringement, Plaintiff must also demonstrate
20 substantial similarity between the “Mom Song” and “Momisms” song. For the reasons set forth
21 below, Plaintiff is unable to satisfy this burden.

22 “When the issue is whether two works are substantially similar, summary judgment is
23 appropriate if no reasonable juror could find substantial similarity of ideas and expression.”
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1 *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994); *Funky Films,*
2 *Inc.*, 462 F.3d at 1076. At summary judgment, the substantial similarity test is an “extrinsic test”
3 that “depends not on the responses of the trier of fact, but on specific criteria which can be listed
4 and analyzed.” *Funky Films, Inc.*, 462 F.3d at 1077 (quoting *Krofft Television Productions, Inc.*
5 *v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)).

6 The specific criteria employed by the court may include elements such as “plot, themes,
7 dialogue, mood, setting, pace, characters, and sequence of events.” *Kouf*, 16 F.3d at 1045.

8 When comparing musical compositions, the court may also compare musical components such
9 as “melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics.”
10 *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (citing *Ellis v. Diffie*, 177 F.3d 503, 506 (6th
11 Cir. 1999)).

12 The court “must take care to inquire only ‘whether the protectable elements, standing
13 alone, are substantially similar.’” *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (quoting
14 *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442–43 (9th Cir. 1994)). In other
15 words, the court “must filter out and disregard the non-protectible [sic] elements in making its
16 substantial similarity determination.” *Cavalier*, 297 F.3d at 822. Non-protectable elements
17 include “general plot ideas” and “familiar stock scenes and themes that are staples of literature.”
18 *Berkic*, 761 F.2d at 1293-94; *Cavalier*, 297 F.3d at 823.

19 Although Plaintiff identifies a number of generic similarities between his “Mom Song”
20 and Defendants’ “Momisms” song, those similarities, taken together, do not render the two
21 compositions “substantially similar” for purposes of the copyright law. Indeed, the similarities
22 identified by Plaintiff relate to non-protectable elements. For example, Plaintiff notes that both
23 songs concern “all the things a mom says to her kids throughout the day” and cover topics such
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1 as “bed making,” “food eating,” “room cleaning,” and “going to bed.” Dkt. # 32, p. 9-10.

2 Plaintiff points out that “Momisms” “has drum beats in it” and the “[s]ame fast tempo” as the

3 “Mom Song.” *Id.* at p. 15. Additionally, according to Plaintiff, the songs are similar in that “half

4 of the joke . . . is ‘how fast moms can spit out orders to their kids like a drill sergeant.’” *Id.*

5 But even a cursory comparison of the two songs reveals “greater, more significant
6 differences” in genre, tempo, key, melody, presentation, and lyrics. *See Swirsky*, 376 F.3d at
7 849. To begin, there are several clear differences with respect to the forms of the two songs.

8 There is no dispute, for example, that the works are of different genres – Plaintiff describes his
9 “Mom Song” as a rap, whereas Defendants’ “Momisms” song is delivered to the tune of a well-
10 known classical composition. Although Plaintiff alleges that both works are delivered at a “fast
11 tempo,” the tempo of Defendants’ production is decidedly faster. The works also are distinct in
12 terms of key and melody: Plaintiff’s presentation is delivered as a spoken, non-melodic text,
13 while Defendants’ follows the melody of the William Tell Overture.

14 Additional differences exist with respect to both the form and substance of the two songs.
15 Defendants’ song, for example, is written from Renfroe’s personal perspective as a mother, while
16 Plaintiff’s is written from his recollection of what his mother has said to him when he was a
17 child. While Defendants’ song is a collection of words that mothers typically say to their
18 children throughout the day, Plaintiff’s is a list of motherly commands and the consequence for
19 disobeying them. Defendants’ lyrics consist of advice (“Eat your breakfast the experts tell us it’s
20 the most important meal of all”), commands (“Be polite, make a friend don’t forget to share”),
21 questions (“are you wearing that?”), observations (“It must be your father’s DNA”), reminders
22 (“Don’t forget you gotta feed the cat,” “Don’t forget – I love you”), and reasoning (“Because . . .
23 I said so”). Dkt. # 21, ¶ 13. Plaintiff’s lyrics, by contrast, generally consist of pairings in which
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1 the first element is a command (“Hurry up and get ready for school”) and the second is the
2 consequence (“Otherwise you end up being a stupid fool”). Dkt. # 32, p. 2.

3 Although Plaintiff claims that both works share a common sequence of events in that
4 both begin in the morning and end in the evening, the test for substantial similarity “compares,
5 not the basic plot ideas for stories, but the actual concrete elements that make up the total
6 sequence of events.” *Berkic*, 761 F.2d at 1293. The generic chronology contained in the “Mom
7 Song” is not protectable. *Id.*

8 Nor can the broad theme or plot idea of “motherly advice” be protected under the
9 copyright law. *Cavalier*, 297 F.3d at 823 (*citing Kouf*, 16 F.3d at 1045). In *Cavalier*, for
10 example, the court noted that broad plot ideas similar to those at issue here – i.e., “kids fighting
11 insurmountable dangers,” “miseries of domestic life,” “romantic frolics at the beach” – are not
12 protectable against copying. The same result follows here: The general plot idea of a mother
13 giving orders is not protectable.

14 In sum, there is no triable issue of fact as to whether Defendants’ “Momisms” song is
15 substantially similar to Plaintiff’s “Mom Song.” The Court therefore concludes, as a matter of
16 law, that the two songs are not substantially similar. Because the “Mom Song” is not
17 substantially similar to the “Momisms” song, Plaintiff’s claim of copyright infringement must be
18 dismissed.

19 C. Lanham Act

20 Plaintiff claims that Defendants violated the Lanham Act by infringing upon his “Mom
21 Song” mark through a false designation of origin. Dkt. #1, at p. 4-5. This claim must fail
22 because the term “Mom Song” is not a protectable mark.

1 In analyzing a claim of trademark infringement, the court’s first step is to determine
2 whether the plaintiff has a protected mark. *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 783
3 (9th Cir. 2002) (validity of the trademark is a threshold question since “[a] necessary
4 concomitant to proving infringement is, of course, having a valid trademark; there can be no
5 infringement of an invalid mark”). Once the court makes that determination, it may then proceed
6 to the question of whether the defendant infringed the plaintiff’s mark.

7 Marks are placed into one of five categories – fanciful, arbitrary, suggestive, descriptive
8 or generic – based upon their level of distinctiveness. *KP Permanent Make-Up, Inc. v. Lansting*
9 *Impression I, Inc.*, 408 F.3d 596, 602 (9th Cir. 2005). Arbitrary marks consist of words that
10 have no connection to the product, and fanciful marks are “coined” words or phrases (e.g.,
11 “Kodak” for cameras). *Survivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 632 (9th
12 Cir. 2005). Suggestive marks do not directly describe the product but require “the exercise of
13 some imagination . . . to associate [the] mark with the product.” *Id.* (citing *Kendall-Jackson*
14 *Winery v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 (9th Cir. 1998) (noting, for example, that
15 “Slickcraft” is a suggestive mark for a boat)). Descriptive marks define a specific characteristic
16 of the product, such as “honey roasted” peanuts. Descriptive marks do “not receive trademark
17 protection unless they acquire sufficient ‘secondary meaning’ to create an association between
18 the mark and the product.” *Survivor Media, Inc.*, 406 F.3d at 632 (citing *Kendall Jackson*
19 *Winery*, 150 F.3d at 1047).

20 Generic marks “give the general name of the product; they embrace an entire class of
21 products” and receive no trademark protection. *Kendall-Jackson Winery*, 150 F.3d at 1047;
22 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 15 (1995) (generic marks tend to describe the
23 general category, type or class of goods of the product). To determine genericness, courts often
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1 refer to the “who-are-you/what-are-you” test. *Filipino Yellow Pages, Inc. v. Asian Journal*
2 *Publi’n, Inc.*, 198 F.3d 1143, 1147 (9th Cir. 1999). While a valid trademark answers the former
3 question, a generic mark answers the latter. *Id.* “If the primary significance of the trademark is
4 to describe the *type of product* rather than the *producer*, the trademark [is] a generic term and
5 [cannot be] a valid trademark.” *Id.* (quoting *Anti-Monopoly, Inc. v. Gen. Mills Fun Grp.*, 611
6 F.2d 296, 304 (9th Cir. 1979)) (emphasis in original).

7 “Mom Song” is a generic mark that is not protectable. Indeed, virtually any song
8 regarding the broad topic of motherhood could appropriately bear the same mark. The “Mom
9 Song” mark, which simply names the product to which it is attached, does not require “the
10 exercise of some imagination . . . to associate [the] mark with the product,” and, although the
11 mark is descriptive in the most literal sense, the primary significance of the mark is to describe
12 the *type of product* (i.e., a song about a mom) rather than its producer. *Filipino Yellow Pages,*
13 *Inc.*, 198 F.3d at 1147. Because the term “Mom Song” “embrace[s] an entire class of products”
14 (i.e., songs about moms), it can receive no trademark protection. *Kendall-Jackson Winery*, 150
15 F.3d at 1047. Allowing trademark protection for such a generic phrase would place an undue
16 burden on competition, contrary to the goals of trademark law. *Intel Corp. v. Terabyte Int’l, Inc.*,
17 6 F.3d 614, 618 (9th Cir. 1993).

18 Because the “Mom Song” mark is not protectable, Plaintiff’s claim that Defendants
19 infringed upon that mark must be dismissed. *Tie Tech, Inc.*, 296 F.3d at 783.

20 D. Other Pending Motions

21 During the pendency of the instant motion, the parties have filed a number of discovery
22 motions. In Dkt. ## 35 and 37, Plaintiff seeks a continuance of the instant motion in order to
23 take discovery regarding copyright registration documents allegedly obtained by Defendants
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1 with respect to a book they published entitled, “If It’s Not One Thing, It’s Your Mother” (the
2 “Book”). Plaintiff bases this request upon his belief that the Book contains content from his
3 “Mom Song.” Plaintiff’s request for a continuance is DENIED, as Defendants attached a
4 published version of the Book to their summary judgment motion, Dkt. # 21-3, Ex. K, and
5 Plaintiff had not demonstrated the relevancy of the copyright registration documents or other
6 requested discovery materials.

7 The remaining discovery motions, Dkt. ## 44, 45, and 47, are DENIED as moot.

8 **III. CONCLUSION**

9 For all of the foregoing reasons, the Court orders as follows:

- 10 (1) Defendants’ motion for Summary Judgment (DKT. #20) is GRANTED.
11 (2) All other pending motions are DENIED.
12 (3) This action is DISMISSED in its entirety.

13 Dated this 15 day of February 2012.
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17 **RICARDO S. MARTINEZ**
18 **UNITED STATES DISTRICT JUDGE**
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