

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

AMENDED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Daniel Patrick Moynihan
3 United States Courthouse, 500 Pearl Street, in the City of
4 New York, on the 9th day of February, two thousand twelve,
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6 PRESENT: RICHARD C. WESLEY,
7 PETER W. HALL,
8 SUSAN L. CARNEY,
9 *Circuit Judges.*

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13 WADENA PYATT, BANG HITZ PUBLISHING,
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15 *Plaintiffs - Appellants,*

16
17 - v. -

11-2507-cv

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19 USHER RAYMOND, IV, AKA USHER, ALICIA AUGELLO COOK, AKA
20 ALICIA KEYS, KRUCIAL KEYS, INC., JEFFREY ROBINSON, MBK
21 ENTERTAINMENT, INC., SONY BMG MANAGEMENT CO. LLC, SONY MUSIC
22 ENTERTAINMENT DIGITAL, LLC., ZOMBA RECORDING LLC, ARISTA
23 RECORDS INCORPORATED, LA FACE RECORDS, INC., EMI MUSIC
24 PUBLISHING, INC., JERMAINE DUPRE MAULDIN, AKA JERMAINE
25 DUPRE, MAURICE RYAN TOBY, AKA RYAN TOBY, ANDRE HARRIS, VIDAL
26 DAVIS, JASON BOYD, DOMINIQUE MURO, EMI APRIL MUSIC, INC.,
27 PLADIS MUSIC, INC., C. SILLS PUBLISHING, INC., HITCO MUSIC
28 PUBLISHING LLC, DIRTY DRE MUSIC/UNIVERSAL PUBLISHING INC.,
29 DOUBLE OH EIGHT MUSIC/UNIVERSAL PUBLISHING, INC., POO BZ
30 PUBLISHING, INC., SONY BMG, SONY MUSIC ENTERTAINMENT, INC.,
31 SONY/ATV MUSIC PUBLISHING, LLC, UNIVERSAL MUSIC CORP.,
32 SONY/ATV TUNES, LLC,
33 *Defendants- Appellees*

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1 FOR APPELLANTS: ROBERT PRITCHARD (Anthony J. Gallo, on
2 *the brief*), Gallo & Associates, PLLC,
3 Plainview, NY
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5 FOR APPELLEES: JOHN J. ROSENBERG, Rosenberg & Giger,
6 *Alicia Augello* P.C., New York, NY.
7 *Cook aka Alicia*
8 *Keys & Krucial*
9 *Keys, Inc., et al.*

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11 FOR APPELLEES: JONATHAN D. DAVIS, P.C., New York, NY
12 *Usher Raymond,*
13 *Sony BMG Management,*
14 *Co., et al.*

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16 FOR APPELLEES: CHRISTINE LEPERA, Mitchell Silberberg &
17 *Jason Boyd, Hitco* Knupp LLP, New York, NY.
18 *Music Publishing*
19 *LLC & Poo BZ Publishing, Inc.*

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21 FOR APPELLEES: DOROTHY M. WEBER, Shukat Arrow Hafer
22 *Jeffrey Robinson,* Weber & Herbsman, LLP, New York, NY.
23 *MBK Entertainment,*
24 *Inc., EMI Music*
25 *Publishing, Inc.,*
26 *Maurice Ryan Toby*
27 *aka Ryan Toby,*
28 *EMI April Music, Inc.,*
29 *and Pladis Music, Inc.*

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31 Appeal from the United States District Court for the
32 Southern District of New York (McMahon, J.)
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34 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**

35 **AND DECREED** that the judgment of the United States District
36 Court for the Southern District of New York be **AFFIRMED.**

37 Plaintiffs-Appellants Wadena Pyatt and Bang Hitz
38 Publishing appeal from a judgment of the United States
39 District Court for the Southern District of New York

1 (McMahon, J.), dismissing their complaint pursuant to Rule
2 12(b)(6). We assume the parties' familiarity with the
3 underlying facts and procedural history.

4 We review *de novo* a district court's dismissal pursuant
5 to a Rule 12(b)(6) motion. In this case, we affirm for the
6 well-stated reasons of the court below. The originally
7 registered copyrights and Usher's "Caught Up" have little in
8 common beyond the title and the phrase "Caught Up." The
9 songs are lyrically and musically distinct and the district
10 court correctly concluded that the claim failed the ordinary
11 observer test. See *Yurman Design, Inc. v. PAJ, Inc.*, 262
12 F.3d 101, 111 fn. 3 (2d Cir. 2001).

13 We also affirm because we agree with the district
14 court's interpretation of the complaint as alleging
15 copyright infringement only with respect to the originally
16 copyrighted works. Appellants contend the district court
17 misconstrued the complaint when it held that the
18 subsequently registered works (those registered after filing
19 of the complaint and after Defendants' motions to dismiss
20 were filed) were incorporated in Appellants' copyright
21 infringement claims. The complaint's broad references to
22 "materials," "works," and "versions" are simply insufficient
23 to bring post-complaint registrations within the scope of

1 the complaint's allegations. This is so especially because
2 the "Copyright Act . . . requires copyright holders to
3 register their works before suing for copyright
4 infringement." *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct.
5 1237, 1241 (2010) (citing 17 U.S.C. § 411(a)).

6 Appellants claim that the court, in interpreting the
7 complaint, should have considered certain documents that
8 Appellants attached to their opposition to Defendants'
9 motions to dismiss. These documents (lyric sheets and
10 expert reports regarding subsequently registered works) were
11 not attached to or integrated into the complaint, or
12 incorporated therein. The district court did not err by
13 declining to examine them. *See DiFolco v. MSNBC Cable LLC*,
14 622 F.3d 104, 111 (2d Cir. 2010).

15 Finally, we affirm the district court's denial of
16 Appellants' motion for leave to amend the complaint. We
17 review *de novo* denials of motions to amend based on a
18 determination that amendment would be futile. *Hutchison*
19 *v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir.
20 2011). Amendment under rule 15(a) was futile in this case
21 because only an allegation that Defendants infringed on
22 Appellants' newly-registered copyrights could have
23 potentially allowed Appellants to state a claim for

1 relief. Appellants' proposed amended complaint failed to
2 allege these new copyrights and Appellants did not move
3 for leave to file a supplemental pleading, see Fed. R.
4 Civ. P. 15(d). In the face of this inaction, the district
5 court had no duty to order *sua sponte* further amendment or
6 supplementation.

7 For the foregoing reasons, the judgment of the
8 district court is hereby **AFFIRMED**.

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10 FOR THE COURT:
11 Catherine O'Hagan Wolfe, Clerk
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