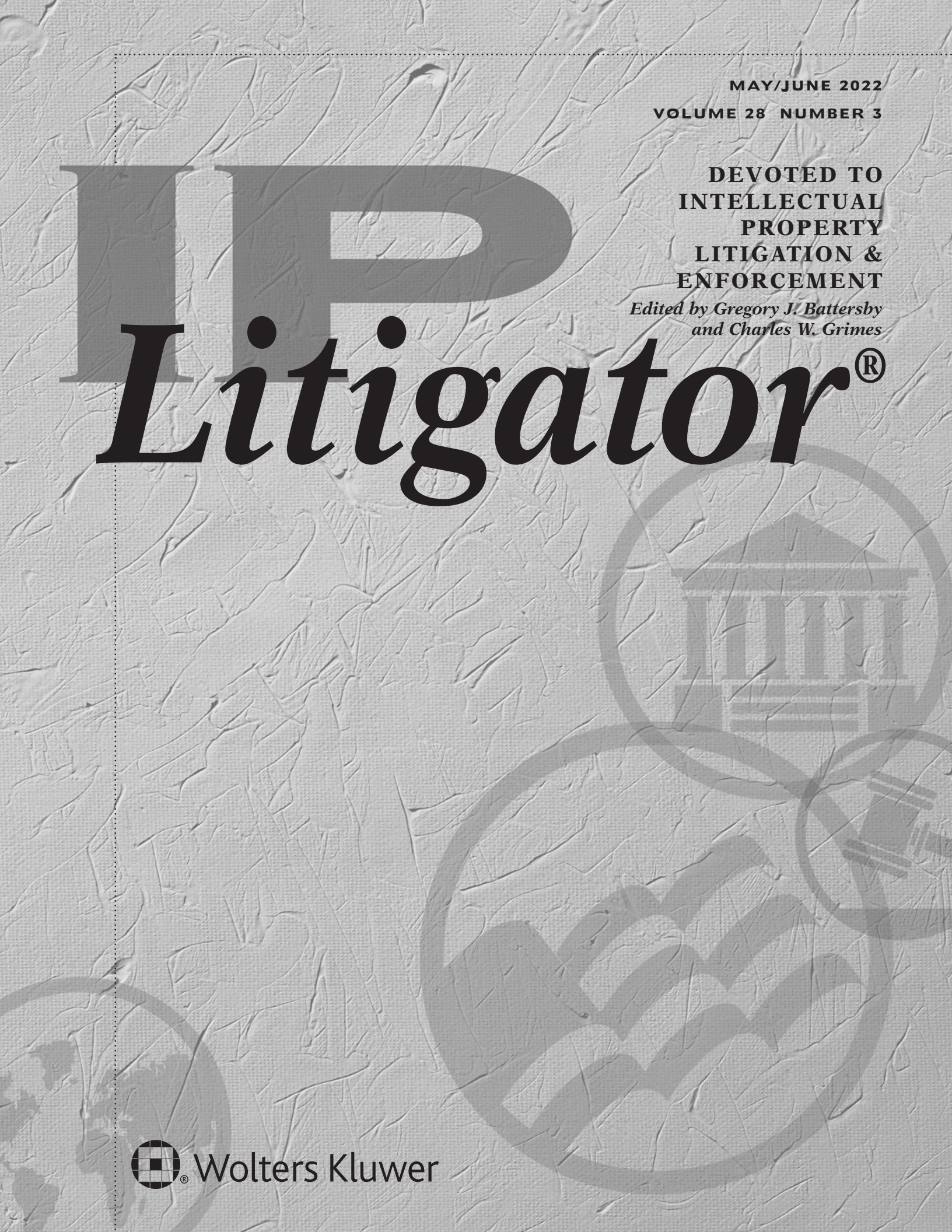
MAY/JUNE 2022
VOLUME 28 NUMBER 3

IP Litigator®

DEVOTED TO INTELLECTUAL PROPERTY LITIGATION & ENFORCEMENT

Edited by Gregory J. Battersby and Charles W. Grimes



Wolters Kluwer

© Copyright Litigation

Adrian Gonzalez Cerrillo and Sana Hakim

"Levitating" Lawsuits: Understanding Dua Lipa's Copyright Infringement Troubles

Even global stardom will not make copyright woes levitate away from British superstar Dua Lipa. The pop icon is making headlines following a week of back-to-back, bi-coastal lawsuits alleging copyright infringement with her hit "Levitating." First, on Tuesday March 1st, members of reggae band Artikal Sound System sued Dua Lipa for copyright infringement in a Los Angeles federal district court.[1] Then, on Friday March 4th, songwriters L. Russell Brown and Sandy Linzer filed their own copyright infringement lawsuit against the pop star in a New York federal district court.[2] Both lawsuits were filed claiming violations of the Copyright Act, 17 U.S.C. §§ 101 et seq.[3]

The Artikal Sound System lawsuit is short and alleges that Dua Lipa and the co-creators of "Levitating" copied Artikal Sound System's 2017 song "Live Your Life."[4] The lawsuit does not provide any details in the allegation, other than explaining that "Live Your Life" was commercially released in 2017, was available during the time Dua Lipa and her co-creators wrote "Levitating," and that because the two songs are substantially similar "Levitating" could not have been created independently.[5] As a remedy, Artikal Sound System seeks actual damages, a portion of Dua Lipa's profits stemming from the alleged infringement, the cost of the lawsuit, and any additional remedies the Court sees fit.[6]

Similarly, the Brown and Linzer lawsuit alleges that Dua Lipa and her "Levitating" co-creators copied their works "Wiggle and Giggle All Night" and "Don Diablo."[7] More specifically, the Brown and Linzer lawsuit alleges that "Levitating" is substantially similar to "Wiggle and Giggle All Night" and "Don Diablo."[8]

Accordingly, the lawsuit claims that the defining melody in "Levitating," the "signature melody," is a direct duplicate of the opening melody in "Wiggle and Giggle All Night" and "Don Diablo," and therefore appears in all three songs.[9] As additional support, the lawsuit points to professionals and laypersons noticing a similarity between the three songs, and Dua Lipa previously admitting that she "purposely sought influences from past eras for the album Future Nostalgia."[10]

As for a remedy, Brown and Linzer request full compensatory and/or statutory damages, punitive damages, an injunction on "Levitating," a portion of Dua Lipa's profits stemming from the alleged infringement, the cost of the lawsuit, and any additional remedies the Court sees fit.[11]

The Copyright Infringement Legal Framework

A general overview of the copyright infringement legal framework is helpful in assessing the potential outcomes of the "Levitating" lawsuits. Specifically, the legal framework from the Ninth Circuit, where one of the "Levitating" lawsuits was filed, provides great guidance.

In order to establish copyright infringement, one must prove two elements: owning a valid copyright and copying of "constituent elements of the work that are original."[12] Importantly, when there is no direct evidence of copying, but rather circumstantial evidence, plaintiffs must show that:

1. the accused infringers had access to the copyrighted work, and
2. the infringing work and the copyrighted work "are substantially similar.

Plaintiffs can easily show access to the copyrighted work, but "substantial similarity" is harder to show.

Two-Part Test

Luckily, the Ninth Circuit devised a two-part test to prove "substantial similarity."[13] Under the test, there is sufficient copying, and therefore "substantial similarity," if an infringing work meets an "extrinsic" and "intrinsic" prong.[14] The intrinsic prong is met if there is "similarity of expression" between the works, as evaluated from the subjective standpoint of an "ordinary reasonable observer."[15] The extrinsic prong is objective and requires comparing the "constituent elements" of the copyrighted and infringing works to see if there is substantial similarity in terms of the "protected" elements in the copyrighted work.[16]

As such, if the commonality between the copyrighted and infringing works is not based on "protected" elements, then the extrinsic prong is not met, and

there is no "substantial similarity" between the works for purposes of a copyright infringement action. It must be noted that the Ninth Circuit recognizes that, in certain situations, there can be a "substantial similarity" even if the constituent elements are individually unprotected, but only if their "selection and arrangement" reflects originality.[17]

To understand "substantial similarity" one must define what is "protectable" under copyright law. Copyright protection extends only to works that contain original expression.[18] In this context, the standard for originality is a minimal degree of creativity.[19] According to the Copyright Act, protection does not extend to ideas or concepts used in original works of authorship.[20] In the musical context, copyright does not protect "common or trite musical elements, or commonplace elements that are firmly rooted in the genre's tradition" because "[t]hese building blocks belong in the public domain and cannot be exclusively appropriated by any particular author."[21]

Katy Perry "Dark Horse" Case and an Ostinato

While the "Levitating" lawsuits are still young, a recent decision by the Ninth Circuit in the infamous Katy Perry "Dark Horse" case is a good example of how courts conduct legal analyses in copyright infringement cases. The precedential ruling (*Gray v. Hudson*), released on March 10th, affirms a US District Judge's decision to vacate a jury verdict that awarded US$2.8 million in damages to a group of rappers who claimed Katy Perry's "Dark Horse" copied their song "Joyful Noise."[22]

The Ninth Circuit's opinion cogently applies copyright law to hold that the plaintiffs in the original lawsuit did not provide legally sufficient evidence that "Joyful Noise" and "Dark Horse" were "extrinsically similar" in terms of musical features protected by copyright law.[23]

Specifically, the Court reasoned that while "Dark Horse" used an ostinato (a repeating musical figure) similar to the one in "Joyful Noise," the resemblance in the ostinatos stemmed from "commonplace, unoriginal musical principles" and made them uncopyrightable.[24] Without the ostinatos, the plaintiffs could not point to any "individually copyrightable" elements from "Joyful Noise" that were "substantially similar" in "Dark Horse."[25]

Additionally, the Court held that the "Joyful Noise" ostinato was not original enough to be a protectable combination of uncopyrightable elements.[26] In turn, under the legal framework for copyright infringement the plaintiffs failed to meet their burden.[27] The Court put it best by opining that:

> [a]llowing a copyright over [the] material would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure.[28]

"Levitating" Lawsuits Likely Outcomes

Applying the copyright infringement framework to the "Levitating" lawsuits allows us to understand the likely outcomes. First, the Artikal Sound System lawsuit does not allege any direct evidence of copying. As such, Artikal Sound System must show that Dua Lipa had access to "Live Your Life" and that "Levitating" is "substantially similar" to their song under the two-prong test. Access is easily proved, as "Live Your Life" was commercially available on multiple streaming services when Dua Lipa wrote "Levitating."[29]

However, the Artikal Sound System lawsuit does not provide enough information to pass the two-prong "substantial similarity" test. The lawsuit only alleges that "Levitating" is "substantially similar" to "Live Your Life," but does not detail any similarities much less provide any evidence that there is similarity of expression between the works from the point of view of a reasonable observer, as required by the intrinsic component of the test.[30]

More importantly, the lawsuit does not even mention any protectable elements from "Live Your Life" copied in "Levitating" and would, therefore, fail the extrinsic prong of the "substantial similarity" test.[31] In turn, as submitted, the Artikal Sound System lawsuit fails to make a prima facie case of copyright infringement by Dua Lipa's "Levitating."

The story may be different for the Brown and Linzer lawsuit. Like the first suit, the Brown and Linzer lawsuit does not provide direct evidence of copying and will therefore only succeed if it passes the circumstantial evidence requirements of 1) access and 2) "substantial similarity." Unlike the first suit, however, the Brown and Linzer complaint includes comparisons of the notes in "Levitating" to the notes in "Wiggle and Giggle All Night" and "Don Diablo" as support for the allegation of "substantial similarity."

The Second Circuit, where the lawsuit was filed, held that a court can determine as a matter of law that two works are not "substantially similar" if the similarity between the two works concerns non-copyrightable elements of the copyrighted work.[32] In practice, this means that the Second Circuit can apply the

two-prong "substantial similarity" test. Brown and Linzer can easily prove access to "Wiggle and Giggle All Night" and "Don Diablo" since both songs are internationally popular.[33]

Brown and Linzer can also meet the intrinsic prong of the test because, as they point out, "laypersons" (ordinary reasonable observers) have noticed the commonality between their copyrighted works and "Levitating," as supported by widespread postings on mediums like TikTok.[34] The extrinsic prong of the test is more uncertain.

In their lawsuit, Brown and Linzer point to a "signature melody" that repeats in "bars 10 and 11 of all three songs… [and] with some slight variation, in bars 12 and 13."[35] The court may find that this "signature melody" is not protected by copyright if it reasons that a melody is a basic musical principle, much like the Ninth Circuit did for ostinatos in the Katy Perry "Dark Horse" case.

At its core, it seems like Brown and Linzer will have to convince the court that a melody, which they define as "a linear succession of musical tones," qualifies as copyrightable because it is an original creative expression. Conversely, Brown and Linzer can concede that a melody is not copyrightable, but that their original arrangement and use of the melody in their copyrighted songs is copyrightable. In the end, it will be up to whether or not a court finds that the "signature melody" is copyrightable. As such, the outcome of Brown and Linzer's action for copyright infringement is uncertain.

Nonetheless, one thing is for sure, copied or not, "Levitating" will continue powering gym visits and nights out dancing.

Sana Hakim is a partner in the IP Procurement and Portfolio Management group at K&L Gates. Ms. Hakim counsels clients on all aspects of trademarks and copyrights, including registration, enforcement and licensing.

Adrian Gonzalez Cerrillo is an associate the IP Procurement and Portfolio Management group at K&L Gates. Mr. Gonzalez Cerrillo primarily focuses his practice on patent portfolio management and related counseling, opinion work, and due diligence.

1. *See* Complaint, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
2. *See* Complaint, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
3. *See* Complaint at ¶ 7, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022); Complaint at ¶ 12, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
4. *See* Complaint at ¶ 17, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
5. *See* Complaint at ¶ 15–18, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
6. *See* Complaint at ¶ 19–22, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
7. *See* Complaint at ¶ 2, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
8. *See* Complaint at ¶ 2, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
9. *See* Complaint at ¶ 3, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
10. *See* Complaint at ¶ 49, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
11. *See* Complaint at 13–14, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
12. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).
13. *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994).
14. *Id.*
15. *Id.*
16. *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).
17. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).
18. *See* 17 U.S.C. § 102(a); *Feist*, 499 U.S. at 345.
19. *See Feist*, 499 U.S. at 345.
20. *See* 17 U.S.C. § 102(b); *Skidmore as Tr. for the Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) (en banc).
21. *Skidmore*, 952 F.3d at 1069.
22. *Gray v. Hudson*, No. 20-55401, slip op at 26 (9th Cir. Mar. 10, 2022).
23. *Id.*
24. *Id.* at 14–21.
25. *Id.* at 17.
26. *Id.* at 22.
27. *Id.* at 26.
28. *Id.* at 24.
29. *See* Complaint at ¶ 16, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
30. *See* Complaint at ¶ 18, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
31. *See* Complaint at ¶ 18, *Cope v. Warner Records, Inc.*, Case 2:22-cv-01384 (C.D. Cal. 2022).
32. Peter F. *Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63–65 (2d Cir. 2010).
33. *See* Complaint at ¶ 35, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
34. *See* Complaint at ¶ 4, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).
35. *See* Complaint at ¶ 38, *Larball Publ'g Co., Inc. v. Dua Lipa*, Case 1:22-cv-01872 (S.D.N.Y. 2022).