

## Litigation + Dispute Resolution

# NY Federal Court Says “Neigh” to Plaintiff’s Copyright Claim Against Megan Thee Stallion

### The Bottom Line

- A recent decision indicates that copyright plaintiffs must do more than just allege distribution of a song to industry representatives to show defendants had access to their work, a required element for claims relying on circumstantial evidence of copying where the works are not strikingly similar.
- Posting a work to social media also does not establish widespread dissemination for purposes of establishing access without specific allegations as to how many people viewed the post.
- The decision reaffirms that the basic building blocks of music are not actionable similarities to establish infringement.

The well-known rapper, musician and songwriter Megan Thee Stallion recently saddled up and successfully defeated a copyright infringement suit over her 2020 hit *Savage*. After taking the opportunity to amend his complaint, plaintiff James Greene, a musician and producer proceeding without counsel, referred to as “*pro se*”, attempted to set forth circumstantial evidence of copying by showing defendants had access to his song. He also alleged the works shared similarities that establish copying. In a motion to dismiss Greene’s amended complaint, Defendants argued that Greene failed to sufficiently allege access or that the two works are substantially similar, let alone strikingly similar.

In granting the motion and dismissing the complaint with prejudice, Judge Katherine Polk Failla in the Southern District of New York held that the allegations failed to establish a chain of events or widespread dissemination theory of access. She also found that the alleged similarities between the two works concerned unprotectable elements or were not sufficiently similar.

### Copyright Infringement Basics

To state a claim for copyright infringement, a plaintiff must show ownership of a valid copyright and unauthorized copying of the work at issue. With respect to copying, a plaintiff must show a defendant actually copied the work and

that the copying is illegal because the works at issue share protectable elements. Since direct evidence of copying is often unavailable, a plaintiff may establish a claim through circumstantial evidence. Such circumstantial evidence must show that the composer of the defendant's work had access to the copyrighted material and that similarities between the two works are probative of copying.

With respect to the access requirement, a plaintiff must show a *reasonable* possibility, not a *bare* possibility, that the composer of the defendant's work heard the prior work through either a "chain of events" or through "wide dissemination" of the prior work. A plaintiff who demonstrates that the protectable elements of two works are "strikingly" similar such that the possibility of independent creation is precluded (higher than the "probative" similarity standard) can bypass showing access.

### Plaintiff's Access Theories Fail to Measure Up

In this case, Plaintiff James Greene sued Megan Thee Stallion, her producer and co-songwriter Anthony White, along with her record label, 1501 Certified Entertainment, LLC, and Warner Music Group, alleging that *Savage* infringed Greene's copyright in a composition titled *It's About To Be On* which he registered in 1999. Greene also asserted claims under the Lanham Act for false designation of origin and reverse passing off.

Greene did not allege direct evidence of copying, but rather relied on circumstantial evidence that Defendants had access to *It's About To Be On*. In attempting to plead a "chain of events" theory showing Defendants had access to his work, Greene alleged that in 2000 and 2004 he gave copies of a CD containing his copyrighted composition to a well-known music producer and manager who later became defendant White's manager. He alleged that as a result, White gained access to the work through this manager.

The Court found that Greene's allegations that the non-party music manager must have played Greene's composition for White sometime in the *two decades* between when Greene gave the manager his CDs and when *Savage* was created were too speculative to establish a reasonable possibility of access. The Court found it relevant that Greene failed to allege any facts suggesting the manager actually listened to the work on the CDs Greene gave him. The Court was also unpersuaded by the mere fact that the manager had a professional relationship with Defendant White.

Greene did not explicitly argue a widespread dissemination theory of access, yet the Court analyzed it due to his *pro se* status. In rejecting this theory, the Court found that Greene did not allege his song was commercially released nor readily available on the market. Further, the Court found that the allegations did not establish that the song had considerable commercial

success. While Greene alleged he *distributed* the work through industry representatives and social media, he did not allege that the work was *received*. With respect to social media, the complaint lacked allegations of viewership that would establish anything more than the mere posting of the song online.

This decision highlights that plaintiffs, even *pro se* ones, must do more than raise a bare possibility of access through either a chain of events or widespread dissemination theory in order to strike the right chord with the Court and meet their pleading burden.

### The Works Are Not Substantially or Strikingly Similar

Greene also argued that the two works shared actionable similarities including the use of sirens, the same time signatures and similar rhythmic sequences. Having listened to the two works, the Court found that the works were not substantially similar, let alone strikingly similar. In addressing the alleged similarities, the Court held that such elements were either unprotectable as they are basic building blocks of music or were not similar.

### Tuning In to the Takeaways

This case highlights that copyright infringement plaintiffs attempting to show copying through circumstantial evidence cannot rely on allegations that only assert a bare possibility that defendants may have had access to their work through an unattenuated grapevine or mere availability on the internet. More is required.

This decision also reiterates that courts will not only provide leniencies to *pro se* plaintiffs who may not have formally articulated certain arguments, but also will generally allow copyright infringement plaintiffs the opportunity to amend when allegations of access (as opposed to issues clear from the works themselves such as similarity) are called into question. Therefore, defendants fighting these claims should be aware that it may take more than one attempt to defeat the claims at the pleading stage.

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## For More Information

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