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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHANNSONGS-PUBLISHING
LTD.,

Plaintiff,

v.

ROLF LOVLAND, et al.,

Defendants.

Case No. CV 18-10009-AB (SSx)

**ORDER GRANTING DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT [Dkt. No. 28]**

Before the Court is a Motion for Summary Judgment (“Motion,” Dkt. No. 28) filed by Defendants Peermusic, Ltd., Universal-Polygram International Publishing, Inc. (“Universal-Polygram”) (incorrectly sued as Universal Music Publishing Group), UMG Recordings, Inc., and Warner Bros. Records Inc. (incorrectly sued as Warner Music Group) (collectively, “Defendants”). Plaintiff Johannsongs-Publishing Ltd. (“Plaintiff”) filed an opposition and Defendants filed a reply. The Court heard oral argument on December 6, 2020, and took the matter under submission. Thereafter, Defendants filed a Notice of Supplemental Authority (Dkt. No. 50), which Plaintiff asked the Court to strike (Dkt. No. 51), to which Defendants filed a reply (Dkt. No. 53). The Court finds that Defendants appropriately filed Dkt. No. 50 and therefore declines to strike it. The Motion for Summary Judgment is **GRANTED**.

1 **I. BACKGROUND**

2 Plaintiff alleges that it owns all rights to the 1977 musical composition
 3 *Soknodur*, except for the lyrics. Compl. ¶¶ 14, 90. Plaintiff alleges that the song *You*
 4 *Raise Me Up* (“*Raise*”), written by defendants Rolf Lovland and Brendan Graham¹,
 5 and released in 2001 by Secret Garden and in 2003 by Josh Groban, infringes on
 6 *Soknodur*. See Compl. ¶¶ 1-4, 14.² The moving Defendants are corporations involved
 7 in publishing and/or selling *Raise*. *Id.* ¶¶ 29-32. They seek summary judgment on the
 8 ground that the elements that are supposedly similar between *Raise* and *Soknodur*—
 9 the melody and lyrical themes—are not actually sufficiently similar to support a
 10 finding of copyright infringement, and the similarities that do exist are derivative of
 11 the Irish folk tune *Londonderry Air*, aka *Danny Boy*³, which is in the public domain,
 12 and several of other prior art songs.

13 **II. LEGAL STANDARD**

14 **A. Summary Judgment**

15 A motion for summary judgment must be granted when “the pleadings, the
 16 discovery and disclosure materials on file, and any affidavits show that there is no
 17 genuine issue as to any material fact and that the movant is entitled to judgment as a
 18 matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 19 247-48 (1986). The moving party bears the initial burden of identifying the elements
 20 of the claim or defense and evidence that it believes demonstrates the absence of an
 21 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

22 Where the nonmoving party will have the burden of proof at trial, the movant
 23 can prevail merely by pointing out that there is an absence of evidence to support the
 24 _____

25 ¹ Neither Lovland nor Graham have appeared.

26 ² Plaintiff also alleged a claim for unjust enrichment but stipulated to its dismissal.

27 ³ According to the parties, *Londonderry Air* is an Irish folk tune first published in
 28 1855, and was set to lyrics in 1913 in the well-known Irish song *Danny Boy*. See
 Statement of Undisputed Facts (“SUF,” Dkt. No. 44) 51. The parties and the Court
 sometimes use the names interchangeably.

1 nonmoving party’s case. *Id.* The nonmoving party then “must set forth specific facts
2 showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

3 “Where the record taken as a whole could not lead a rational trier of fact to find
4 for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus.*
5 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must draw all
6 reasonable inferences in the nonmoving party’s favor. *In re Oracle Corp. Sec. Litig.*,
7 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson*, 477 U.S. at 255).

8 Nevertheless, inferences are not drawn out of thin air, and it is the nonmoving
9 party’s obligation to produce a factual predicate from which the inference may be
10 drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal.
11 1985), *aff’d*, 810 F.2d 898 (9th Cir. 1987). “[M]ere disagreement or the bald assertion
12 that a genuine issue of material fact exists” does not preclude summary judgment.
13 *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

14 **B. Legal Framework for Copyright Infringement**

15 **1. The Two Primary Elements of a Copyright Infringement Claim:**

16 **Ownership and Copying**

17 To establish a claim for copyright infringement, a plaintiff must prove: “(1)
18 ownership of a valid copyright, and (2) copying of constituent elements of the work
19 that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361
20 (1991); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000). Here,
21 Defendants do not challenge the first element, that Plaintiff owns a valid copyright in
22 *Soknodor*. Rather, Defendants challenge the second element, contending there is no
23 triable issue as to copying.

24 **2. Copying Consists of Copying and Unlawful Appropriation**

25 The copying element of the infringement analysis contains two separate
26 components: “copying” and “unlawful appropriation.” *Rentmeester v. Nike, Inc.*, 883
27 F.3d 1111, 1116–17 (9th Cir. 2018) (citing *Feist*, 499 U.S. at 361). “Although these
28 requirements are too often referred to in shorthand lingo as the need to prove

1 ‘substantial similarity,’ they are distinct concepts.” *Skidmore v. Led Zeppelin*, No. 16-
2 56057, 2020 WL 1128808, at *9 (9th Cir. Mar. 9, 2020).

3 “Proof of copying by the defendant is necessary because independent creation is
4 a complete defense to copyright infringement . . . [n]o matter how similar the
5 plaintiff’s and the defendant’s works are. . .” *Rentmeester*, 883 F.3d at 1117. And,
6 “[p]roof of unlawful appropriation—that is, *illicit* copying—is necessary because [the
7 Copyright Act] does not forbid all copying,” and in fact expressly excludes such
8 matters as ideas, concepts, or principles from its protection. *Id.* (emphasis in original);
9 *see also* 17 U.S.C. § 102(b). Thus, a defendant who copies “ideas” or “concepts” does
10 not commit unlawful appropriation and therefore cannot be liable for copyright
11 infringement.

12 Accordingly, to prove *copying*, “the similarities between the two works need
13 not be extensive, and they need not involve protected elements of the plaintiff’s work.
14 They just need to be similarities one would not expect to arise if the two works had
15 been created independently.” *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d
16 Cir. 1992); 4 Nimmer on Copyright § 13.01[B]. To prove *unlawful appropriation*, on
17 the other hand, the similarities between the two works must be “substantial” and they
18 must involve protected elements of the plaintiff’s work. *Laureyssens*, 964 F.2d at 140.

19 **3. Unlawful Appropriation Requires Proof of “Substantial Similarity,” As** 20 **Determined by the Extrinsic Test and the Intrinsic Test**

21 To consider whether works are substantially similar sufficient to establish
22 unlawful appropriation, the Ninth Circuit employs a two-part test: an extrinsic test and
23 an intrinsic test. *See Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045
24 (9th Cir. 1994). The extrinsic test compares the objective similarities of specific
25 expressive elements in the two works, *Cavalier v. Random House, Inc.*, 297 F.3d 815,
26 822 (9th Cir. 2002), and often requires expert analysis. *See Apple*, 35 F.3d at 1443.
27 The intrinsic test “test[s] for similarity of expression from the standpoint of the
28 ordinary reasonable observer, with no expert assistance.” *Jada Toys, Inc. v. Mattel*,

1 *Inc.*, 518 F.3d 628, 637 (9th Cir. 2008) (quoting *Apple Comput., Inc. v. Microsoft*
2 *Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994) (“*Apple*”). Both tests must be satisfied for
3 the works to be deemed substantially similar. *See Funky Films, Inc. v. Time Warner*
4 *Entm't Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006). However, the only the extrinsic test
5 may be considered on a motion for summary judgment, because only it can be
6 resolved by the court as a question of law. *Kouf*, 16 F.3d at 1045. The subjective
7 question of whether the works are intrinsically similar is left to the jury. *Swirsky v.*
8 *Carey*, 376 F.3d 841, 845 (9th Cir. 2004), *as amended on denial of reh’g* (Aug. 24,
9 2004).

10 **4. The Extrinsic Test**

11 To satisfy the extrinsic test, the plaintiff must first identify the sources of the
12 alleged similarity between the two subject works. *See Apple*, 35 F.3d 1435, 1443 (9th
13 Cir. 1994). When analyzing musical compositions, a “variety of compositional
14 elements may be considered, including melody, harmony, rhythm, timbre, structure,
15 instrumentation, meter, tempo, and lyrics.” *Batts v. Adams*, No. CV 10-8-8123-JWF
16 (RZx), 2011 WL 13217923, at *5 (C.D. Cal. Feb. 8, 2011) (citing *Swirsky*, 376 F.3d at
17 849). Then, “[u]sing analytic dissection, and, if necessary, expert testimony, the court
18 must determine whether any of the allegedly similar features are protected by
19 copyright.” *Apple*, 35 F.3d at 1443. “[A] finding of substantial similarity between two
20 works can’t be based on similarities in unprotectable elements.” *Mattel, Inc. v. MGA*
21 *Entm’t, Inc.*, 616 F.3d 904, 916 (9th Cir. 2010), *as amended on denial of reh’g* (Oct.
22 21, 2010)

23 The Court must therefore “filter out” any unprotectable elements in the
24 plaintiff’s work before assessing whether it is substantially similar to the defendant’s
25 work. *Apple*, 35 F.3d at 1446 (“the unprotectable elements have to be identified, or
26 filtered, before the works can be considered as a whole.”).

1 III. DISCUSSION

2 The Court finds that there are no triable issues of fact requiring a trial, and that
3 Defendant is entitled to summary judgment.

4 **A. Plaintiff Has No Standing to Pursue an Infringement Claim Based on** 5 **Alleged Similarities Between the Lyrics of *Raise* and *Soknudur*.**

6 The Complaint repeatedly alleges that *Raise* copies the lyrics and lyrical themes
7 of *Soknudur*. See, e.g., Compl. ¶¶ 29, 43, 54. And in its opposition, Plaintiff argues
8 that the songs' lyrics are similar. See Opp'n (Dkt. No. 34), pp. 17-18. However, the
9 Complaint also concedes that Plaintiff does not own any rights to *Soknudur*'s lyrics,
10 see Compl. ¶ 90, and the opposition states that Plaintiff does not seek to recover for
11 similarity in the lyrics. See Opp'n p. 17. To clear up any confusion, Plaintiff's claim
12 for copyright infringement cannot be based on the lyrics because Plaintiff has no
13 rights in the lyrics and thus lacks standing to pursue such a claim. *Feist*, 499 U.S. at
14 361 (claim for copyright infringement consists of two elements: "(1) ownership of a
15 valid copyright, and (2) copying. . ."). Thus, insofar as the Complaint encompasses a
16 claim based on the lyrics, Defendants are entitled to summary judgment on that claim.

17 **B. *Raise* is Not Substantially Similar to *Soknudur***

18 The dispositive issue in this Motion is whether *Raise* is substantially similar to
19 *Soknudur* under the extrinsic test. It is not. Both sides filed expert reports in support of
20 their positions, but only Defendants' expert report correctly applies the extrinsic test.

21 **1. The Ferrara Reports (Defendants' Expert)**

22 Defendants' expert, Dr. Lawrence Ferrara, analyzed (1) five musical elements
23 (structure, harmony, rhythm, melody, and lyrics) of *Soknudur* and *Raise* in their
24 entirety, (2) the songs' component elements individually and in combination, (3)
25 prior art (pre-1977 compositions), and finally (4) *Soknudur* and *Raise* in their entirety
26 within the context of the analysis of their component elements and prior art. See
27 Ferrara Report (Dickstein Decl. (Dkt. No. 31), Ex. A). The analysis is supported with
28 visual illustrations showing and comparing the structures (p. 5), harmonies/chord

1 progressions (p. 10), and melodies (p. 17) of *Soknudur* and *Raise*, and comparing the
2 melodies of *Soknudur* and *Raise* with prior art songs (*see, e.g.*, pp. 21, 25, 27, 28, 32).
3 Ferrara also prepared (and Defendants lodged) multiple audio recordings
4 demonstrating his analysis. In his analysis, Ferrara applied reliable principles and
5 methods to the facts of the case, *see* Fed. R. Evid. 702(c), (d), and has appropriately
6 filtered out prior art from his comparison, as required by the extrinsic test.

7 Defendants have distilled Ferrara’s findings as facts in their Statement of
8 Undisputed Facts (“SUF,” Dkt. No. 44 (Reply SUF)), so the Court will refer to those
9 facts. Ferrara found that *Soknudur* and *Raise* lack significant structural similarities
10 (SUF 22) and gives multiple examples of how their structures differ (SUF 23-27).
11 Ferrara found that *Soknudur* and *Raise* lack significant harmonic similarities (SUF 28,
12 29, 33) and that their harmonic similarities are either commonplace or present in prior
13 art, especially in *Danny Boy*. (SUF 30, 31.) Likewise, Ferrara found that *Soknudur* and
14 *Raise* lack any significant rhythmic similarities and gives examples of how they differ.
15 (SUF 34-37.) Finally, Ferrara concluded that there are no significant melodic
16 similarities between *Soknudur* and *Raise* (SUF 38, 39, 41-47), and that “[a]ny melodic
17 expression in common between [*Soknudur*] and [*Raise*] is found in Irish folk songs
18 that date back to the 18th and 19th century, and some is also found in a popular song
19 [*When a Child is Born*] released shortly before the release of [*Soknudur*].” (SUF 40,
20 48-49). Ferrara then goes on to explain how any melodic similarities between
21 *Soknudur* and *Raise* are actually found in prior art, most importantly in the prior art
22 songs *Londonderry Air* and *Danny Boy* which are in the public domain. (SUF 48-61,
23 63, 65-71). For example, Ferrara finds that out of a total of 87 notes in the melody of
24 verse 1 and chorus 1 in *Raise*, there are only 20 scattered notes that have the same
25 pitch and metric placement. (SUF 63; Ferrara Report ¶ 37, Musical Example 3.) Of
26 these 20 similar notes, there are “only 5 isolated and fragmentary notes [] with the
27 same pitch and metric placement in [*Soknudur* and *Raise*] [that are] not also found in
28 [*Londonderry Air*] and [*Danny Boy*].” (SUF 63; Ferrara Report ¶ 37, Musical

1 Example 3.) Furthermore, of these 20 notes shared by *Soknodur* and *Raise*, there is only
2 one 3-note sequence, but it appears in *Londonderry Air* and *Danny Boy*. Ferrara
3 Report ¶ 37. These facts are well-supported by the proffered underlying evidence,
4 which includes the Ferrara Report and all of its exhibits, as well Ferrara’s Rebuttal
5 Report (“Ferrara Rebuttal Report,” Dickstein Decl. (Dkt. No. 43) Ex. A) submitted
6 with the reply. For the reasons discussed below, the Court finds that Plaintiff does not
7 genuinely dispute these facts, so the Court finds them undisputed.

8 Based on such facts, Ferrara presents the following conclusion:

9 On the basis of my musicological analysis . . . it is my professional opinion that
10 while “Soknodur” and “You Raise Me Up” share some musical similarities,
11 those similarities exist in well-known prior art songs. The similarities in
12 common between “Soknodur” and “You Raise Me Up” were widely available
13 to the writers of both “Soknodur” and “You Raise Me Up”. The musical
14 elements that are found in both “Soknodur” and “You Raise Me Up” derive
15 from well-known 18th and 19th century folk songs, particularly Irish folk
16 songs, and are also embodied in at least one well-known popular song that was
17 released shortly before “Soknodur”. From a musicological perspective, the
18 similarities that preexist “Soknodur” in famous, longstanding works, cannot be
19 used to support a claim of copying, let alone a claim of the copying of
20 expression that can be monopolized by “Soknodur”. As a result, when viewed
21 in the context of this prior art, there are no significant structural, harmonic,
22 rhythmic, lyrical, or melodic similarities between “You Raise Me Up” and
23 “Soknodur,” and there is no support for a claim that musical elements found in
24 “You Raise Me Up” were copied from “Soknodur.”

25 Ferrara Report p. 1-2. These conclusions flow directly from the analysis and the Court
26 accepts them.

2. The Finell Reports (Plaintiff's Expert)

Plaintiff offers a contrary opinion from their expert Judith Finell, who prepared a Report and a Rebuttal Report. *See* Machat Decl. (Dkt. No. 36) Exs. 3-5 (Finell Report), Ex. 7 (Finell Rebuttal Report). Based on the Finell Reports, Plaintiff contends that Ferrara's analysis is faulty and purports to dispute most of Defendants' proffered facts. However, the Court finds that Finell's Reports are fatally flawed and therefore declines to consider them. As a result, Ferrara's reports are not meaningfully rebutted, the well-supported undisputed facts derived from them are not *genuinely* disputed, and the resulting conclusions prevail.

At the outset, the Court notes that the initial Finell Report (entitled "Preliminary Comparison...") is far less comprehensive than the Ferrara Report, as it consists of only 7 paragraphs of "preliminary" findings contained in fewer than 4 double-spaced pages, supported by 2 exhibits purporting to compare the "skeletal pitches" and "skeletal pitch series within similar structure and musical event sequence" in *Soknudur* and *Raise*. *See* Finell Report. The Finell Report states that the songs share a similar melodic theme based on a series of "skeletal pitches" and musical events. Finell Report ¶ 5-8. The Report's two exhibits consist of a few staves of music (with embedded audio) excerpted from each song, but the Report lacks adequate explanation of the terms used, and fails to put the selected excerpts in the context of the entire compositions. Thus, the Finell Report does not reflect the application of reliable principles and methods to the facts of the case, as required to be admissible under Fed. R. Evid. 702(c) and (d).

Furthermore, and critically, the Report expressly admits that Finell had "not yet conducted a prior art investigation," but nevertheless speculates that "it is highly doubtful that another musical work will share the same lengthy series of skeletal pitches and musical events to the degree of similarity that is shared between [*Soknudur*] and [*Raise*]." Finell Report ¶ 9. Because the Finell Report fails to consider prior art, its comparison between *Soknudur* and *Raise* fails to filter out unprotectable

1 prior art elements, which is the foundation of the extrinsic test. *See Apple*, 35 F.3d at
2 1446 (“the unprotectable elements have to be identified, or filtered, before the works
3 can be considered as a whole.”). Accordingly, because the Finell Report does not
4 compare *Soknudur* and *Raise* in the manner required by the extrinsic test, its opinion
5 about the similarities between *Soknudur* and *Raise* are legally deficient and irrelevant.
6 Brevity alone does not render an expert report deficient, but Finell’s Report is silent
7 on too many matters to be considered either adequately supported or probative of the
8 main issue—the application of the extrinsic test.

9 Although the Finell *Rebuttal* Report is more extensive, as its name suggest its
10 central purpose is to rebut the Ferrara Report; it does little to reinforce the scanty
11 conclusions presented in the preliminary Finell Report. And, the Finell Rebuttal
12 Report fails to discredit the Ferrara Report for several reasons, the most important
13 being that it repeats the fatal flaw of the preliminary Finell Report—it fails to filter out
14 prior art from *Soknudur* and *Raise* before comparing them. For example, the Finell
15 Rebuttal Report states that both *Soknudur* and *Raise* share the same 8-note sequence.
16 *See* Finell Rebuttal Report ¶ 10(b), p 5. However, Ferrara points out that this sequence
17 is not identical (in *Soknudur* it has an additional C note in the middle), and more
18 importantly, it is actually present in *Londonderry Air* and *Danny Boy*, Ferrara Rebuttal
19 ¶¶ 44-45, so it must be excluded from the extrinsic test. Finell’s opinion based on this
20 8-note sequence is therefore irrelevant.

21 Furthermore, the Court notes that while the Finell Rebuttal Report does discuss
22 the most important prior art—*Londonderry Air* aka *Danny Boy*—it does not do so in a
23 legally relevant way: it does not filter out elements of these prior art songs from
24 *Soknudur* and *Raise* and compare the remainder as the case law requires; rather, it just
25 tallies up the number of similarities and concludes that there are more similarities
26 between *Soknudur* and *Raise* than between either of them and *Londonderry Air*. But
27 indiscriminately counting the common notes between the songs in issue and the prior
28 art does not satisfy the extrinsic test. Rather, the point is to eliminate the non-

1 protectible prior art components from the songs in issue, and then compare the
2 protectable remainder, to see how similar that protectible remainder is. A comparison
3 that includes both unprotectible and protectible elements is invalid under the extrinsic
4 test and is legally irrelevant. Thus, although the Finell Rebuttal Report does analyze
5 prior art, the analysis does not engage in the crucial step of eliminating prior art from
6 the songs in issue. As a result, the Finell Rebuttal Report’s criticisms of the Ferrara
7 Report—which incorporate this mistake—are largely unfounded. In fact, this error is
8 woven throughout the Finell Rebuttal Report, rendering it unhelpful and inadmissible.
9 *Knowles v. Spin Master, Inc.*, No. CV 18-5827 PA (JCX), 2019 WL 4565102, at *4
10 (C.D. Cal. Sept. 17, 2019) (disregarding report where expert “does not attempt to
11 differentiate between protectable and unprotectable elements of the works. At least for
12 the Court’s resolution of the extrinsic test on summary judgment, the Court concludes
13 that [expert’s] opinions are not helpful to the Court at this stage of the proceedings.”);
14 *see also Olson v. NBC*, 855 F.2d 1446, 1450-51 (9th Cir. 1988) (affirming court’s
15 decision to discount expert testimony that deemphasized dissimilarities and relied on
16 unprotectable elements).

17 The Ferrara Rebuttal Report also points out ways in which Finell’s Reports are
18 unreliable and reach unsupportable conclusions, or mischaracterize the Ferrara Report.
19 The Court will not recount them all at length but gives three examples. First, Finell
20 considers notes to be similar even when they appear in different places in the songs’
21 melodies (different metric placement), *see* Finell Rebuttal Report p. 6, Example 3.
22 Finell offers no justification for this technique of considering notes to be similar
23 despite different metric placements in the melody. Second, Finell opines that
24 “identical pitches [] found in succession in both songs” are similarities, but then
25 admits that there are intervening pitches between some of these notes. *See* Finell
26 Rebuttal Report p. 10. Again, there appears to be no justification for deeming notes to
27 be consecutive when in fact there is an intervening note between them. Finally, neither
28 Finell Report includes sufficient supporting evidence—like comparative transcriptions

1 or sheet music—for the Court to assess the validity and accuracy of her analysis. This
2 renders Finell’s analysis conclusory and not helpful.

3 For all of these reasons, the Finell Reports fail to describe reliable principles
4 and methodology, fail to apply such principles and methodology to the facts, and fail
5 to properly apply the extrinsic test, rendering the Reports unreliable, unhelpful, and
6 inadmissible.

7 **3. Plaintiff Cannot Establish Substantial Similarity Under the Extrinsic** 8 **Test**

9 Given the foregoing, the Court finds that as a matter of law, *Soknudur* and
10 *Raise* are not substantially similar under the extrinsic test. As noted above, Ferrara
11 established that *Soknudur* and *Raise* lack substantial structural, harmonic, rhythmic,
12 and melodic similarities. The dueling expert reports focus primarily on the melodies,
13 and only Defendants’ expert Ferrara applied reliable principles and methods to this
14 task, and only Ferrara’s analysis filtered out the prior art as required by the extrinsic
15 test. Plaintiff’s expert report is fatally flawed as discussed above, and on that basis is
16 excluded. Accordingly, Ferrara’s analysis—which is well-supported and thorough—
17 is, effectively, un rebutted. The Court therefore finds that Ferrara’s extensive analysis
18 of the melodies is conclusive: any melodic similarities between *Soknudur* and *Raise*
19 are either unprotectible because they are found in prior art songs including
20 *Londonderry Air* aka *Danny Boy*, or they are too scattered to amount to substantial
21 similarity.

22 In their opposition brief, Plaintiff observes that “copyright may inhere, under
23 appropriate circumstances, in the selection and arrangement of unprotected
24 components.” See Opp’n (Dkt. No. 34) 9:11-15 (quoting *Brown Bag Software v.*
25 *Symantec Corp.*, 960 F.2d 1465, 1476 (9th Cir. 1992)). However, despite quoting this
26 caselaw, Plaintiff fails to apply it in any way and therefore has failed to pursue this
27 theory. A claim based on a selection and arrangement of unprotected elements
28 requires a plaintiff “to explain how these elements are particularly selected and

1 arranged,” otherwise the claim “amounts to nothing more than trying to copyright
2 commonplace elements.” *Skidmore*, 2020 WL 1128808, at *18 (copyright claim based
3 on selection and arrangement of unprotected elements is a separate theory that
4 plaintiff failed to present); *see also Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir.
5 2003) (“a combination of unprotectable elements is eligible for copyright protection
6 only if those elements are numerous enough and their selection and arrangement
7 original enough that their combination constitutes an original work of authorship”).
8 Here, neither Plaintiff nor its expert engaged in any analysis that could support a
9 selection and arrangement theory, so the Court concludes that Plaintiff is not
10 genuinely pursuing that theory and certainly has not carried its summary judgment
11 burden as to it.

12 In light of the foregoing, Plaintiff cannot establish that *Soknudur* and *Raise* are
13 substantially similar under the extrinsic test, properly applied. Because “a plaintiff
14 who cannot satisfy the extrinsic test necessarily loses on summary judgment, *see*
15 *Kouf*, 16 F.3d at 1045, the Court **GRANTS** Defendants’ Motion.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Defendants’ Motion for Summary Judgment (Dkt.
18 No. 28) is **GRANTED**.

19 Plaintiff’s Request for Entry of Default (Dkt. No. 46) as to the non-appearing
20 individual defendants is, accordingly, **DENIED**.

21 Defendants are **ORDERED** to file a proposed Judgment within 5 days of the
22 issuance of this Order.

23 **IT IS SO ORDERED.**

24
25 Dated: April 03, 2020



26 HONORABLE ANDRÉ BIROTTE JR.
27 UNITED STATES DISTRICT COURT JUDGE
28