Cowan, Liebowitz & Latman

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"Recent Developments In Copyright"
Selected Annotated Cases

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These annotations cover cases reported since our report at the 48th Copyright Society Annual Meeting of 2024.

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A. Subject Matter Jurisdiction

Superama Corp. v. Tokyo Broad. Sys. TV., No. 23-55001, 2024 U.S. App. LEXIS 19124 (9th Cir. Aug. 1, 2024)

Ninth Circuit reversed dismissal of infringement claim for lack of subject matter jurisdiction. Plaintiff Superama Corp. alleged that defendant Tokyo Broadcasting System circumvented technological measures that controlled access to its copyrighted work under DMCA. Plaintiff raised additional claims under Japanese copyright law. District court dismissed complaint, concluding that it lacked subject matter jurisdiction because circumvention claim did not pertain to extraterritorial conduct that occurred in Japan. Ninth Circuit held that whether statute applied abroad concerned what conduct statute prohibited, so whether plaintiff alleged any domestic conduct did not affect district court's subject matter jurisdiction. Ninth Circuit further held that because district court had federal question jurisdiction over plaintiff's DMCA claim, district court had supplemental jurisdiction over Japanese copyright claims. Court held that if, on remand, district court dismissed with prejudice claims over which it had original jurisdiction, it should consider whether to exercise supplemental jurisdiction over any remaining claims. Ninth Circuit reversed and remanded.

Peary v. DC Comics, Inc., No. 25-910, 2025 U.S. Dist. LEXIS 78561 (S.D.N.Y. Apr. 24, 2025)

Court granted motion to dismiss complaint seeking declaratory judgment, damages and injunctive relief, finding complaint related solely to purported infringement in Canada, United Kingdom, Ireland and Australia, for which court lacked subject matter jurisdiction. Plaintiff, heir to Joseph Shuster, co-creator of Superman, sued DC Comics for infringement of copyright in Superman character in certain foreign countries, arguing that notwithstanding assignment of worldwide copyrights for Superman to defendant in 1938, copyright laws in those countries provided for termination of that transfer (and thus reversion of rights to plaintiff as executor to estate) and that, "under the Berne Convention ... the Court is 'treaty bound to apply the laws of those countries so as to protect'" plaintiff's interest in copyrights as executor of estate. On motion to dismiss for lack of subject matter jurisdiction, court first found lack of diversity jurisdiction because at least one defendant and at least one plaintiff were both California citizens (because estate is citizen of state of where decedent was citizen), and then turned to whether federal-question jurisdiction existed. Although complaint brought infringement claims "explicitly under the laws of foreign countries," plaintiff sought federal-question jurisdiction by arguing that claims arose under Berne Convention. After finding that Berne Convention is not "self-executing" treaty and thus cannot give rise to cause of action absent act of Congress, court considered plaintiff's argument that federal-question jurisdiction arose from "substantial federal question doctrine," in which federal-question jurisdiction can lie over state-law claims "that implicate significant federal issues." Court noted that substantial federal question doctrine implicated only in narrow category of cases that involve "issues of pure law," and found that "fact-bound and situation-specific" issues raised in plaintiff's claims concerning applicability of Berne Convention and 1909 Act were inappropriate for applying doctrine. Finding neither diversity nor federal-question jurisdiction, complaint dismissed for lack of subject matter jurisdiction.

Mayer v. Glassman, No. 24-6576, 2024 U.S. Dist. LEXIS 181849 (C.D. Cal. Oct. 4, 2024)

District court remanded case for lack of subject matter jurisdiction. Plaintiff and defendant co-owned software development company. Defendant sought to end business partnership, and plaintiff agreed to sever ties on condition that plaintiff receive equal compensation for liquidated software products. Defendant never responded, and ceased paying plaintiff's compensation. Plaintiff filed suit, asserting claim for breach of fiduciary duty, seeking to determine ownership of copyrighted software. Defendant removed action to federal court on basis of federal question jurisdiction. Court determined that, because parties solely disputed ownership of copyrighted software, resolving dispute did not require interpretation of Act. Resolution of ownership dispute was matter of contract and fiduciary rights, not copyright law. Court therefore lacked subject matter jurisdiction, and remanded case to state court.

B. Personal Jurisdiction and Venue

DP Creations, LLC v. Adolly.com, No. 23-4126, 2024 U.S. App. LEXIS 25828 (10th Cir. Oct. 15, 2024)

Tenth Circuit reversed district court's amended judgment and remanded for further proceedings. Plaintiff doll manufacturer learned defendants sold counterfeit dolls on Amazon. Plaintiff notified Amazon, which took down infringing materials and provided defendants § 512(g)(2)(A) notifications. Defendants sent § 512(g)(3)(D) counter notices, consenting to personal jurisdiction in any judicial district in which Amazon "may be found" and agreeing to accept service from plaintiff or its agent. Plaintiff filed copyright infringement action in Utah. Defendants did not respond, and plaintiff moved for default judgment. District court denied motion, ruling it lacked personal jurisdiction over defendants. District court found plaintiff did not show that Amazon "may be found" in Utah. Plaintiff moved to reconsider, arguing Amazon may be found in Utah for purposes of § 512(g)(3)(D) because it had physical presence or place of business there. District court granted motion in part, vacating due process reasoning in prior order, but otherwise denying motion. Plaintiff appealed. Tenth Circuit found district court improperly relied on Black's Law Dictionary definition because whether process may be served on corporation in copyright case requires due process analysis that, in some cases alleging copyright infringement by service provider's subscriber, will prove impossible to perform. Court held that in § 512(g)(3)(D) cases where service provider is not subject to general jurisdiction in forum, court must conduct due process analysis to determine if specific jurisdiction is proper. Relying on non-legal dictionaries, Tenth Circuit concluded that district courts have jurisdiction over subscriber not domiciled in U.S. "if it is possible to come upon or locate the service provider in the forum state." For purposes of § 512(g)(3)(D), party can come upon or locate service provider corporation if its agents or officers carry on corporation's business in judicial district. Plaintiff presented evidence that Amazon's agents or officers were present in Utah and carrying on corporation's business in state. Tenth Circuit reversed district court's dismissal of plaintiff's action and remanded for further proceedings.

> *Fernandez v. Jagger*, No. 23-30909, 2024 U.S. App. LEXIS 19969 (5th Cir. Aug. 8, 2024)

Fifth Circuit affirmed district court's dismissal for lack of personal jurisdiction and improper venue. Plaintiff musician domiciled in Spain alleged that he provided demo of works to "immediate family member" of Mick Jagger and that defendants, two members of Rolling Stones, misappropriated key protected elements of plaintiff's song. Plaintiff sued for infringement in Eastern District of Louisiana. Defendants were not residents of Louisiana and moved to dismiss on lack of personal jurisdiction and venue grounds. District court granted defendants' motion, finding no jurisdiction and improper venue. Plaintiff moved to amend or alter judgment, suggesting transferring case to Southern District of New York, and district court denied motion. On appeal, plaintiff claimed protected elements of plaintiff's song were made available on internet in all 50 states, which established specific jurisdiction in Louisiana and any other state with compatible long-arm statute. Fifth Circuit held that merely using internet that is accessible in all 50 states does not sufficiently target forum state, and does not create minimum contacts necessary to establish personal jurisdiction.

> *Creative Photographers, Inc. v. Televisa, S.A.B.*, No. 23-7106, 2025 U.S. Dist. LEXIS 19970 (S.D.N.Y. Feb. 4, 2025)

Plaintiff, agency that licensed works of photographers to high end magazines, sued defendant, multimedia company located in Mexico, arguing that it displayed copyrighted photos on 20 websites and to sell defendant's various brands of Spanish language content to consumers in United States. Defendant filed motion to dismiss for lack of personal jurisdiction. District court granted defendant's motion, finding that personal jurisdiction in New York was improper, since plaintiff failed to allege, beyond stating conclusory assertions, that defendant transacted business in New York and tort occurred in New York. That website was accessible to users in New York was not sufficient to show that users interacted with it. Similarly, that defendant was related to U.S. entities was not sufficient to show that they controlled defendant's actions.

> *Minden Pictures, Inc. v. Grupo Televisa, S.A.B.*, 738 F. Supp. 3d 458 (S.D.N.Y. 2024)

Court reconfirmed prior short-form order granting defendant's motion to dismiss for lack of personal jurisdiction. Plaintiff, California corporation, sued Mexico-based defendant for infringement in Southern District of New York, alleging subsidiary of defendant published two articles containing plaintiff's copyrighted photos on two websites. Plaintiff asserted that jurisdiction was proper under either New York long-arm statute or FRCP 4(k)(2). New York long-arm statute required court to decide (1) whether defendant transacted any business in New York, and if so, (2) whether cause of action arose from such business transaction. Court found that marketing and distributing magazines in Mexico and New York failed to meet requirement of purposeful activity within forum state. Court further found that availability of sites to New York consumers, standing alone, was not sufficient to establish that defendant transacted business in state. Plaintiff also failed to sufficiently allege that any business transaction defendant conducted in New York was related to infringing websites from which plaintiff's copyright claim arose or that infringing websites were maintained or created in New York. Court therefore found that personal jurisdiction over defendant was not authorized under New York long-arm statute. Court also found plaintiff failed to satisfy one of requirements for jurisdiction pursuant to FRCP 4(k)(2) because plaintiff failed to certify that foreign defendants were not subject to jurisdiction in any other state.

Twin Beauty LLC v. NR Interactive LLC, No. 24-7412, 2024 U.S. Dist. LEXIS 226367 (E.D.N.Y. Dec. 14, 2024)

District court denied motion for preliminary injunction based on lack of personal jurisdiction. Plaintiff, producer of "handbook containing step-by-step instructions and illustrations on how to make common origami models," received DMCA takedown notice for its Amazon listing from defendant, alleging book violated defendant's copyright; Amazon responded by taking down listing for plaintiff's book. Plaintiff sued for, *inter alia*, DMCA abuse (on basis that defendants' copyrights were obtained fraudulently), and sought preliminary injunction seeking to instruct defendants to withdraw their complaints on Amazon and have listing for book restored. Having failed to establish general jurisdiction over defendant (resident of Florida or Japan), plaintiff alleged specific jurisdiction under N.Y. C.P.L.R. §§ 302(a)(1), 302(a)(3)(i), and 302(a)(3)(ii). Court found that defendant's sales of its work on Amazon (presumably to customers in New York) did not establish sufficient contacts with New York, noting that although Second Circuit courts routinely find transaction of business prong satisfied where defendant offers its products for sale on third party marketplace like Amazon, and there is evidence of at least one sale to customer in New York, in this case plaintiff failed to allege single pre-suit sale to New York. Moreover, court found that plaintiff's DMCA claims did not arise out of defendants' Amazon sales: "[a]t bottom, plaintiff alleges it was injured by a scheme whereby defendants, located either in Florida or Japan, sent fraudulent DMCA takedown notices to an out-of-state-party, Amazon," with such claims not touching on New York. Similarly, court found defendant's sending of demand letter and engaging in settlement discussions with plaintiff insufficient to establish minimum contacts to confer personal jurisdiction under New York law. Motion for preliminary injunction denied due to lack of personal jurisdiction.

Future Roots, Inc. v. Year0001 AB, No. 23-6825, 2024 U.S. Dist. LEXIS 211552 (C.D. Cal. Nov. 20, 2024)

District court denied defendants' motion to dismiss for lack of personal jurisdiction and declined to transfer case to Sweden based on *forum non conveniens* doctrine. Plaintiff d/b/a Dublab, Los Angeles-based non-profit internet radio station and "creative collective," released, under Creative Commons Attribution-Noncommercial 3.0 license, INTO INFINITY, compilation of eight-second audio loops, including Loop 61 by producer De De Mouse. Sweden-based defendants Yung Lean, musician, and Yung Gud, producer, sampled Loop 61 to create their song "Ginseng Strip 2002" ("Song") for commercial purposes and without attribution, which song was released by defendant YEAR0001, Swedish record label, including on "Lavender EP" ("Album"). Defendants sold physical Album copies to U.S., including California, consumers and published Song on music platforms. Yung Lean performed Song numerous times in California, to which YEAR0001 employees accompanied him. After plaintiff sued for copyright infringement, defendants moved to dismissed alleging *forum non conveniens* and lack of personal jurisdiction. Although defendants successfully demonstrated existence of alternative forum, Sweden, private and public interest factors weighed against dismissal on *forum non conveniens* grounds. Plaintiff had identified more non-party witnesses actually material to disputed issues, and they resided in California, elsewhere in United States or Japan, meaning that Sweden would not be more convenient forum for them. There was also no evidence that anyone affiliated with plaintiff had spent time in Sweden, while defendants had spent time in California in connection with Song. Court also had local interest and claims were under U.S. law. Weighing these and other factors, court concluded that defendants had been unable to carry their burden. Court also held that it had personal jurisdiction over defendants under California law and Rule 4(k)(2), which required court to look at defendants' nationwide contacts since they were not subject to any state's general jurisdiction and plaintiff's claims were federal. YEAR0001 argued that claims against it did not arise out of or relate to its U.S. contacts, but court disagreed because plaintiff had alleged (and even shown by some documentary evidence) that YEAR0001 had sold Album copies in United States through third-party company and, moreover, had sold Album copies to third-party company in New Hampshire. Court also held that exercising personal jurisdiction over defendants was reasonable because defendants performed and/or sold Song copies in, and to residents of, United States and California. Defendants also failed to show any threat to Swedish sovereignty.

> *SoundExchange, Inc. v. Sirius XM Radio, Inc.*, No. 23-1083, 2024 U.S. Dist. LEXIS 124586 (E.D. Va. July 15, 2024)

District court denied motion to dismiss claim for underpaid royalties for lack of personal jurisdiction, but granted motion to transfer venue to New York for convenience of parties and witnesses. Plaintiff SoundExchange, sole entity designated by Copyright Royalty Board to collect digital performance royalties and distribute them to artists and copyright owners, sued satellite radio service Sirius XM in Eastern District of Virginia for underpayment of royalties under Act. Sirius XM was required in relevant period to pay royalty rate of 15.5% of its gross revenues. SoundExchange argued that Sirius XM began selling its satellite radio service only as part of product bundle including its separate webcasting service transmitted over internet, and that Sirius XM overattributed share of its revenue generated from webcasting to justify withholding too much from its calculation of royalties due to SoundExchange. Sirius XM moved for lack of jurisdiction or for transfer of venue to District Court for District of Columbia. Sirius XM argued that SoundExchange's claims did not arise from activities in Virginia, but rather from national-level business decisions made in its New

York headquarters and royalties based on nationwide revenue figures, meaning claims could exist independent of Virginia sales and customers. Court disagreed and denied motion to dismiss, finding that because Sirius XM deliberately sold subscriptions in Virginia, and its Virginia subscribers alone brought in $14-24 million per month, its activities in Virginia created personal jurisdiction over claims for underpaid royalties. However, court ruled that case should be transferred to Southern District of New York because Sirius XM is based in New York, its witnesses are in New York, and relevant decisions were made in New York, while SoundExchange is based in D.C. and incorporated in Delaware, giving case no reason to be in Virginia.

Cornerstone Grp. Architects LLP v. Dager Constr., Inc., No. 23-554, 2024 U.S. Dist. LEXIS 189098 (W.D. Tex. Oct. 17, 2024)

Court granted defendants' motion to dismiss where plaintiff failed to establish minimum contacts of defendants with Texas. Plaintiff architecture firm created architectural plans. Defendants, construction company and its owners, saw plans on social media and reached out by phone and email to acquire copy of brochure from plaintiff. After purchasing, defendants contacted plaintiff regarding purchase of other architectural drawings but did not end up buying them. Months later, plaintiff discovered defendants had built home that was "substantially similar" to one of plaintiff's plans, and sued for copyright infringement. Court previously granted defendants' motion to dismiss for lack of personal jurisdiction, also subject of instant opinion. Court analyzed whether defendants had sufficient contacts with forum state of Texas to and found plaintiff failed to allege sufficient facts to establish specific personal jurisdiction. Plaintiff failed to allege facts showing defendant committed any acts in forum state or that communications with forum state gave rise to plaintiff's copyright claim. Where plaintiff alleged defendants gained access to copyright material through communication with Texas-based plaintiff, without committing intentional act directly tied to infringement and targeted at state of Texas, contacts did not rise to level of purposeful availment needed to exercise personal jurisdiction. Court disagreed that purchase of single brochure, absent more, gave rise to jurisdiction in Texas. As before, court found that factual allegations and pleadings were insufficient to demonstrate that content of defendants' communications gave rise to copyright infringement claim.

Redoak Commc'ns, Inc. v. Adm'r of the Est. of Olsen, No. 23-80008, 2024 U.S. Dist. LEXIS 196193 (S.D. Fla. Oct. 29, 2024)

Plaintiff brought infringement claim against defendant regarding motion picture entitled *Just Before Dawn a/k/a the Last Ritual*. Defendant *pro se* filed answer to plaintiff's complaint and then passed away. Defendant's estate then moved to dismiss suit based on lack of personal jurisdiction and improper venue. Court found that defendant had waived defenses of personal jurisdiction and improper venue by not raising defenses in answer or by motion, and defendant's estate, as substitute party, stepped into same position as defendant. Accordingly, motion to dismiss for lack of personal jurisdiction and improper venue was denied.

Lin Jiang v. Xue Zhao, No. 21-1703, 2024 U.S. Dist. LEXIS 208116 (W.D. Wash. Nov. 15, 2024)

Defendant's motion to dismiss for improper venue denied. *Pro se* defendant argued that venue in U.S. was improper because all parties were "Chinese citizens who have never been to the United States," and that "numerous witnesses and evidence related to this case … are located in China." Court understood defendant to be arguing for dismissal under doctrine of *forum non conveniens*, under which court may dismiss case where litigation in foreign forum would be more convenient for litigants. In determining whether to dismiss case on *forum non conveniens* grounds, courts consider: (1) whether adequate alternative forum exists; and (2) whether balance of private and public interest factors weigh in favor of dismissal. Here, defendant did not address public interest factors, or whether China was available as alternative forum. Court denied dismissal but granted defendant, given that he was *pro se*, leave to file another motion addressing issues.

C. Pleadings

Richardson v. Commerce Media Holdings, LLC, No. 24-4660, 2025 U.S. Dist. LEXIS 56278 (S.D.N.Y. Mar. 26, 2025)

District court granted defendants' motion to dismiss infringement claim because plaintiff failed to allege during what time defendants infringed copyright. Plaintiff, professional photographer known for "street-style" documentation of fashion industry, took photo of Tyler, the Creator. Plaintiff sued defendants, owners of entertainment website Complex Media, for allegedly posting photograph to Complex's Instagram account without permission (albeit with credit). Plaintiff had alleged that defendants copied, rather than shared or reposted, photograph. However, complaint was silent as to when defendants allegedly infringed photograph, necessitating dismissal.

Pryimachenko v. HBO, Inc., No. 23-10034, 2025 U.S. Dist. LEXIS 8168 (S.D.N.Y. Jan. 14, 2025)

District court granted defendant's motion to dismiss infringement claim because plaintiff did not adequately allege place of first publication and exemption from registration requirement. Plaintiff, Ukrainian artist, created audiovisual work depicting transcript of phone call ("Call") with firefighter headquarters that responded to 1986 nuclear disaster at Chernobyl nuclear power plant ("Video"). Plaintiff alleged that, in 2013, Video was "widely publicly displayed and disseminated, including by posting it to YouTube." In 2016, plaintiff offered Video for sale or license to company based in Lviv, Ukraine. Plaintiff registered Video with Ukrainian, but not U.S., Copyright Office. In 2019, HBO released mini-series *Chernobyl*, featuring in first episode and in promotional videos audio of Call with real-time transcription. Plaintiff alleged that Video was first published outside United States and was exempt from U.S. registration requirement. Court found that plaintiff did not sufficiently plead facts demonstrating that Video was first published in Ukraine, and his allegations of wide, public dissemination of Video conflicted with his alleged first publication in Ukraine. Whether posting to YouTube constituted publication depends on what YouTube's "functionality" was at relevant time, which was not addressed in complaint nor resolved by YouTube terms of service. Based on facts, court determined it could not address whether posting Video constituted publication, simultaneously in United States and Ukraine, or otherwise. Therefore, court dismissed plaintiff's claims and did not address issue of whether complaint adequately alleged copying.

Lynk Media LLC v. Mediaite, LLC, No. 24-29, 2025 U.S. Dist. LEXIS 7379 (S.D.N.Y. Jan. 14, 2025)

Plaintiff owned copyrights in three videos, two of disruptions of events featuring Alexandria Ocasio-Cortez, and one featuring altercation outside Gracie Mansion. Defendant Mediaite used videos in articles published on its site without plaintiff's permission. Plaintiff sued for infringement, and defendant moved to dismiss on grounds that videos were embedded from posts of those videos by third parties on Twitter, and that use was fair. Court found that issue was premature for motion to dismiss, as plaintiff did not allege how videos appeared on defendant's site. Fair use defense similarly could not support motion to dismiss when defendant had burden to prove fair use through fact-intensive inquiry. Defendant also argued that Twitter terms of service allowed its actions, but ambiguities in Twitter terms of service also prevented this issue from being decided on motion to dismiss.

Davidson v. 925 LLC, No. 23-9891, 2025 U.S. Dist. LEXIS 4357 (S.D.N.Y. Jan. 6, 2025)

District court denied defendant's motion to dismiss. In 2018 plaintiff, award-winning professional photographer, took nighttime aerial shot of Apple Inc.'s headquarters in Silicon Valley for purpose of editorial commentary and licensing. Plaintiff then displayed work on his website, where he included CMI in form of digitally embedded metadata, copyright notices, and visible and invisible watermarks. Plaintiff registered work as part of group registration in February 2019. In November 2023, plaintiff sued defendant, operator of five websites covering different "tech verticals," alleging that defendant had copied work from internet to advertise, market, and promote defendant's business, and in process of so doing had removed plaintiff's CMI. Defendants moved to dismiss, arguing that work was not original; that it was unclear whether work was registered in accordance with Act; that fair use permitted defendant's use; and that plaintiff did not allege removal of CMI under DMCA. Court found that plaintiff met minimal requirements of originality under Act because he had used drones and photography skills to creatively capture work. Court found that plaintiff had adequately alleged registration. Defendant's arguments as to whether work was part of group registration were premature because plaintiff sufficiently alleged work was properly registered, and defendant could request copy of deposit during discovery. Defendant's fair use argument was likewise premature because of fact-intensive nature of inquiry. Finally, court found plaintiff properly stated claim of CMI removal because plaintiff allegedly displayed work on his website with CMI included and defendant removed CMI from work by cropping watermark.

Richards v. Warner Music Grp., No. 22-6200, 2024 U.S. Dist. LEXIS 175192 (S.D.N.Y. Sept. 25, 2024)

Court granted defendants' motion to dismiss claims of direct and vicarious infringement and violations of DMCA. Plaintiff, record producer Shane Richards, sued defendants Warner Music Group, Orchard Music ("Orchard"), and Blunt Recordings ("Blunt") for infringing four copyrights plaintiff claimed to own. Plaintiff alleged that third party Marwan Music, LLC ("Marwan") filed copyright registrations on behalf of plaintiff, but Marwan was listed as copyright claimant for works. Plaintiff subsequently filed supplementary registrations listing plaintiff as copyright claimant. Plaintiff sued all defendants for direct infringement and for violating DMCA by removing and altering CMI from plaintiff's works, and sued defendants Orchard and Blunt for vicarious infringement. Defendants sought dismissal of complaint for failure to allege facts supporting elements of copyright claims, for relying on impermissible group allegations, and because plaintiff's claimed works were not registered in his name prior to filing suit. Court dismissed claim of direct infringement because plaintiff failed to adequately allege that defendants engaged in copying of constituent elements of works. Plaintiff's evidence of posted videos and uploaded recordings of works identified non-parties, instead of defendants, as uploaders of works. Court dismissed vicarious infringement claims because plaintiff failed to demonstrate direct infringement by defendants, and because plaintiff's substantive allegations of vicarious infringement were threadbare and conclusory. Court dismissed claim of DMCA violation because plaintiff failed to demonstrate how defendants removed CMI from original works created by plaintiff, therefore failing to demonstrate requisite intent element. Court found that plaintiff's allegations of DMCA violations were conclusory, and that plaintiff failed to plausibly allege violation of DMCA. Court dismissed claims of direct infringement, vicarious infringement, and violations of DMCA against all defendants, and plaintiff's request for statutory damages and attorneys' fees under DMCA, were also dismissed.

Tangle, Inc. v. Buffalo Games, LLC, No. 23-924, 2024 U.S. Dist. LEXIS 142076 (W.D.N.Y. Aug. 9, 2024)

Court granted defendant's motion to dismiss. Plaintiff Tangle Inc. owned copyrights in several kinetic sculptures. In its pleading, plaintiff provided exemplary photograph of one of plaintiff's products into which registered works are allegedly incorporated. Plaintiff admitted that its products contained both protectable and unprotectable elements. Court found that plaintiff had not plausibly alleged substantial similarity between defendant's products and plaintiff's works because plaintiff did not identify what allegedly protectible aspects of registered works were incorporated into its own products, and this information could not be inferred from included photograph. In its response to defendant's motion to dismiss, plaintiff described distinguishing characteristics of registered works, but those allegations were not included in second amended complaint and could not be reasonably inferred from photographs of plaintiff's product. Court granted defendant's motion to dismiss for failing to demonstrate substantial similarity between defendant's products and plaintiff's registered works.

Griego v. Jackson, No. 24-3260, 2025 U.S. Dist. LEXIS 13097 (C.D. Cal. Jan. 24, 2025)

Defendants' motion for judgment on pleadings granted. Plaintiff created album cover for hip hop artist Otis Jackson Jr., known as Madlib, in 1999. Included in album cover was character Madlib adopted as his graphic alter ego, called Lord Quas. In 2023, plaintiff registered copyright in album cover and in 2024 sue defendant for copyright infringement. Plaintiff, by his own allegations, admitted that he granted unlimited license to use Lord Quas, detailing defendants' "wide-ranging, open, and notorious use of Lord Quas over many years" with his knowledge and without his objection. With license established by plaintiff's own allegations, plaintiff bore burden to prove it was limited and that defendant exceeded its scope. Plaintiff failed to allege any facts that could infer intent to limit license; in complaint plaintiff indicated he was aware of use and even gratified by its widespread appeal. While scope of implied license is not generally decided at pleadings stage, plaintiff's infringement cause of action failed, as pleadings established facts compelling decision.

Sybersound Recs., Inc. v. Apollo Glob. Mgmt., No. 23-9750, 2024 U.S. Dist. LEXIS 217752 (C.D. Cal. Dec. 2, 2024)

District court granted defendant's motion to dismiss, finding plaintiff failed to adequately plead infringement. Plaintiff, producer of karaoke cover versions of hit songs in both audiovisual ("AV Works") and sound recording ("SR Works") formats, sued defendant, karaoke lounge, for infringement when defendant facilitated performance of YouTube videos of AV Works for karaoke participants at defendant's lounge. Plaintiff alleged infringement based on only registrations for Sound Recording Works and cited to no registrations for AV Works. Court noted that sound recordings are not entitled to exclusive right of public performance in general; only public performance "by means of a digital audio transmission" per § 106 of Act. Plaintiff argued defendant's performance of AV Works in karaoke lounge constituted "digital audio transmission," but court looked to § 114(j)(5) of Act to confirm definition of "digital audio transmission" as "not includ[ing] the transmission of any audiovisual work." Accordingly, court found plaintiff had failed to adequately allege infringement of SR Works based on defendant's performance of AV Works only, and granted plaintiff's motion to dismiss with leave to amend.

Providence Publ'ns, LLC v. Hub Int'l Ins. Servs., No. 24-109, 2024 U.S. Dist. LEXIS 119625 (E.D. Cal. July 8, 2024)

District court granted defendant's motion to dismiss plaintiff with leave to amend. Plaintiff published newsletter titled *Workers' Comp Executive*, which featured original articles about occupational health and safety issues. Defendant, insurance and financial service provider, subscribed to newsletter, which was delivered electronically. Through analysis of email data from delivery of newsletter, plaintiff discovered defendant was copying and distributing several different issues of newsletter to dozens of its employees. Plaintiff sued, alleging willful infringement. Defendant moved to dismiss, arguing that complaint failed to state claim because it acknowledged that defendant possessed newsletter subscription without specifying which of plaintiff's subscriptions defendant had purchased, as plaintiff offered multiple types of subscriptions, including ones that allowed company-wide distribution and ones that did not. Defendant also argued that claims were time-barred. Court found for defendant regarding scope of license, finding that complaint omitted key facts regarding license, such as whether license allowed company-wide distribution, and thus failed to state claim. However, as plaintiff would likely be able to allege additional facts concerning scope of defendant's subscription, court granted plaintiff leave to file amended complaint to address issues raised.

Philips N. Am. LLC v. Glob. Med. Imaging, LLC, No. 21-3615, 2024 U.S. Dist. LEXIS 169216 (N.D. Ill. Sept. 19, 2024)

District court dismissed counterclaims seeking declaration of noninfringement as duplicative of affirmative infringement claims. Plaintiff ultrasound machine maker used its own proprietary software on machines and provided repair services to customers of its machines. Defendant also provided repair services on plaintiff's machines, and plaintiff accused defendant of hacking into its machines and stealing its intellectual property. Defendant counterclaimed seeking declaration that it did not infringe copyrights or violate DMCA, and that plaintiff misused its copyrights. Court dismissed declaratory crossclaims that were exact inverse of plaintiff's affirmative claims, as they would create risk of jury reaching opposite conclusions on same issues. Even claim seeking declaration of copyright misuse, though not exact inverse of plaintiff's infringement claims, was dismissed, as copyright misuse would be better asserted as affirmative defense to infringement.

Yang v. iHeartMedia, Inc., No. 24-625, 2025 U.S. Dist. LEXIS 61439 (W.D. Tex. Mar. 28, 2025)

Court denied defendant's motion to dismiss, finding plaintiff adequately stated claim for direct infringement. Plaintiff photographer created and licensed two photographs to New York Post, which published photos in article, adequately crediting plaintiff as author. Defendant iHeartMedia displayed photos on its website as part of online story. Plaintiff sued for direct infringement, claiming photos were copied and displayed without permission. Defendant moved to dismiss, arguing that it received license to display photos based on X's (formerly Twitter) terms of service because photos were published on X. Defendant further argued that Ninth Circuit's server test precluded infringement claim since defendant only embedded photos. Court found that plaintiff did not mention X's terms of service in complaint, and therefore declined to consider "extraneous allegations" asserted in defendant's motion to dismiss. Court rejected defendant's argument regarding server test because server test had not been adopted by Fifth Circuit district courts or Court of Appeals. Court held that plaintiff had sufficiently alleged elements of direct copyright infringement and denied defendant's motion to dismiss.

Sydney Nicole LLC v. Alyssa Sheil LLC, No. 24-423, 2024 U.S. Dist. LEXIS 207937 (W.D. Tex. Nov. 15, 2024)

District court granted in part and denied in part partial motion to dismiss. Court noted that "case appears to be the first of its kind – one in which a social media influencer accuses another influencer of (among other things) copyright infringement based on the similarities between their posts that promote the same products." Plaintiff attached to complaint exhibit showing plaintiff's posts next to defendant's to demonstrate how defendant "replicated the neutral, beige, and cream aesthetic of [plaintiff's] brand identity." Court found that plaintiff had sufficiently pleaded, at motion to dismiss stage, vicarious copyright infringement by pleading that defendant had right and ability to control alleged third-party infringement by exercising control over allegedly infringing content on her platforms and third parties' ability to access that content. Plaintiff also sufficiently pleaded violation of DMCA by removal of copyright management information CMI. While defendant argued she could not be liable under DMCA where "there is no copy and paste of identical images with a copyright cropping," court noted that DMCA may properly apply even when allegedly infringing work is not identical to original.

Sadowski v. FYI Networks, LLC, No. 23-81267, 2024 U.S. Dist. LEXIS 189879 (S.D. Fla. Oct. 17, 2024)

Court granted in part and denied in part defendant's counterclaims for declaratory judgment against plaintiff photographer. Defendant news website operator aggregated news stories, using and modifying pictures but giving credit where author known. Plaintiff photojournalist sued for copyright infringement, and defendant counterclaimed for declaratory judgment. Defendant alleged plaintiff manipulated metadata in his digital images, licensed images to third parties, then searched internet to locate sites where images posted without permission and threatened suit. Prior to case, plaintiff licensed photos to New York Post. Defendant alleged that agreement granted exclusive license to Post, which transferred ownership of works such that plaintiff no longer owned them, and defendant could lawfully reproduce photos. Defendant sought declaratory judgment that (1) plaintiff was not owner of works, (2) defendant used derivative work of Post, (3) defendant's use was fair, and (4) defendant's use of copyrighted works was not willful. Court stated standard that claim for declaratory judgment must serve "useful purpose" and that counterclaim must not simply mirror plaintiff's allegations or duplicate defendant's affirmative defenses. Court found counterclaims 1 and 3 challenged validity of plaintiff's copyright based on lack of ownership and affirmatively pled that defendant had not infringed, and were therefore not redundant and could proceed. Counterclaims 1 and 3 involved different rights and remedies than those asserted and sought in complaint. As to counterclaim 3, defendant was not concerned only with avoiding liability but also with affirmatively establishing it did not infringe. Conversely, counterclaims 2 and 4 served no useful purpose. They were not proper declaratory judgment claims because they sought factual determinations regarding defendant's use of plaintiff's works. Since declaratory judgment serves to clarify legal relations, counterclaims 2 and 4 served no useful purpose and were dismissed with prejudice.

Marasco v. Taylor Swift Prods., Inc., No. 24-14153, 2024 U.S. Dist. LEXIS 137178 (S.D. Fla. Aug. 2, 2024)

District court adopted magistrate's recommendation that court grant defendant's motion to dismiss complaint for failure to state claim. Plaintiff, poet and author of poetry books, filed copyright infringement claim against defendant Taylor Swift Productions. Plaintiff alleged that lyrics, themes, images and dances used in Swift's Eras Tour were substantially similar to plaintiff's copyrighted works and were used without permission or compensation. Court noted that complaint was shotgun pleading containing vague and conclusory allegations about infringement without specifying copyrighted works being infringed or setting out separate claims. Further, plaintiff failed to allege any facts concerning access. Complaint did not allege any acts by Taylor Swift Productions or explain why plaintiff sued Taylor Swift Productions in connection with allegations solely against Swift, who was not named as defendant. Additionally, plaintiff sought protection for general ideas and themes (e.g., metaphor expressing that "no matter how hard she works her efforts are futile in relation to a man"), none of which warrant protection.

A. Perry Designs & Builds, P.C. v. J. Paul Builders, LLC, No. 23-828, 2024 U.S. Dist. LEXIS 214558 (D. Md. Nov. 25, 2024)

Defendants' motion to dismiss denied. Plaintiff, architectural firm that designed luxury homes, sued defendants for infringing copyright in home design. Plaintiff was originally hired to design project, and registered copyright in design once complete. Original builder terminated contract for failure to pay after plaintiff had already provided designs. New builders on project hired new architectural firm, which was tasked to trace original plans, correct errors, and change some design elements. Defendants moved to dismiss for failure to state claim, arguing that plaintiff failed to satisfy two-part substantial similarity test. Court disagreed. Plaintiff, court found, sufficiently pleaded that defendants planned to trace plaintiff's original designs, which would include directly copying both unprotected and protected elements of architectural work. Having alleged direct evidence of copying, plaintiff was not required to also allege facts necessary to satisfy Fourth Circuit's two-part substantial similarity test. Complaint, nevertheless, also made factual allegations that satisfied intrinsic and extrinsic elements of circumstantial evidence analysis. At this point, plaintiff was not required to demonstrate claims but simply allege them.

Recon Grp. LLP v. Lowe's Home Ctrs., LLC, 743 F. Supp. 3d 737 (W.D.N.C. 2024)

District court denied defendant's motion to dismiss plaintiff's copyright infringement claim for failure to state claim, finding plaintiff's pleadings adequate. Plaintiff, retail logistics technology company, entered into services agreement with defendant retailer pursuant to which plaintiff licensed software product to defendant for managing merchandise return. During period in which defendant had access to software, defendant allegedly copied portions of software to create in-house software for managing merchandise return. Plaintiff sued for copyright infringement. Defendant argued plaintiff failed to state claim, but court disagreed. Court stated elements of adequately pleaded infringement claim as (1) allegation of ownership of valid copyright and (2) allegation that copyright infringed, noting that infringement may be alleged by showing (a) defendant had access to software and (b) defendant's work is substantially similar to protected aspects of software. Defendant did not challenge copyright ownership allegation. As to infringement allegation, court found plaintiff sufficiently alleged defendant had access to software, as plaintiff licensed software to defendant and plaintiff alleged defendant gave access to software to information technology and software development employees outside of scope of agreement between parties. Further, court found plaintiff's allegation that defendant's software performed same or substantially similar function as software to be sufficient allegation of substantial similarity for pleading stage, with no need for plaintiff to show specific similarities, such as similarity between pieces of code, prior to discovery. As such, court found plaintiff adequately stated claim for copyright infringement.

D. Standing

Raw Story Media, Inc. v. OpenAI, Inc., 756 F. Supp. 3d 1 (S.D.N.Y. 2024)

Plaintiffs, various news outlets that publish breaking news articles, sued OpenAi, Inc., creator of ChatGPT, alleging that thousands of their works of journalism were scraped from internet, stripped of their author, title, and copyright information, and input into at least three of OpenAI's training sets used to train ChatGPT; and that removal of copyright management information was in violation of § 1202(b)(i) of DMCA. Court granted defendant's motion to dismiss, finding that plaintiffs lacked Article III standing to assert their claims since plaintiffs' stated injury was not concrete, and they did not allege any actual adverse effects or harm stemming from alleged DMCA violation.

Tempo Music Invs., LLC v. Cyrus, No. 24-7910, 2025 U.S. Dist. LEXIS 49470 (C.D. Cal. Mar. 18, 2025)

Court denied motion to dismiss infringement claim relating to award-winning song "When I Was Your Man," released by Bruno Mars in 2013. Plaintiff, investment company that purchased and owned rights to various songs, acquired ownership share of copyright in 2020 through acquisition of catalog of Mars' co-author. In 2023 defendant Miley Cyrus released hit song "Flowers," which, plaintiff alleged, was substantially similar to and infringed copyright in Mars song. Defendant moved to dismiss, arguing that plaintiff lacked standing because plaintiff was recipient of transfer of co-owned copyright and, therefore, plaintiff was not legal or beneficial owner of exclusive right. Court acknowledged that co-owner, standing alone, may only grant non-exclusive license to third party; however, court found that situation at hand was not license but full transfer, which placed plaintiff in shoes of Mars' co-author. Court warned that ownership of "exclusive rights" should not be conflated with "exclusive ownership" of rights and explained that each co-owner of copyright owns interest in exclusive rights that make up copyright. Such exclusive rights are exclusive to co-owners collectively as against rest of world. Because Act requires ownership interest in exclusive right – and not exclusive ownership of copyright rights – for standing to sue, plaintiff as co-owner had standing to sue for infringement. Accordingly, court denied defendant's motion to dismiss.

> *August Image, LLC v. Line Fin., PBC*, No. 23-5492, 2024 U.S. Dist. LEXIS 235349 (C.D. Cal. Dec. 17, 2024)

Court granted in part and denied in part defendant's motion for summary judgment for lack of standing. Plaintiff, full-service rights managed collection, represented fashion photographers. Case involved 18 copyrighted photographs, some of which defendant commercial website owner allegedly posted without license, authorization, or consent from plaintiff. Plaintiff had agency agreements ("Agreements") with photographers that all made plaintiff exclusive worldwide agent for sale, licensing, and promotion of photographs. Court noted that only copyright owner, or owner of exclusive rights, as of time acts of infringement occur has standing to bring action for infringement. After analyzing Agreements, court found plaintiff had standing to bring action for alleged exploitation of subject photographs as exclusive licensee with right to reproduce, distribute, and display photographs. On their face, Agreements provide plaintiff right to sell, license, or otherwise promote subject photographs for editorial and commercial use. Contractual language that photographers retain all right, title and interest did not contradict transfer of right to reproduce, distribute and display. Court agreed with defendant that Agreements did not convey exclusive right to prepare derivative works, and that plaintiff lacked standing to sue for any alleged unauthorized preparation of derivative works. Court accordingly granted defendant's motion for summary judgment to extent it related to allegations of derivative works

> *Botanic Tonics, LLC v. Shot of Joy, LLC*, No. 23-10437, 2024 U.S. Dist. LEXIS 149137 (C.D. Cal. Aug. 19, 2024)

Court granted in part and denied in part defendant's motion to dismiss. Defendant Shot of Joy, Inc. claimed assignment agreement was insufficient, and therefore, plaintiff was not owner of work at time of alleged infringement and plaintiff was not expressly assigned right to accrued causes of action. Court found that assignment agreement, which stated that plaintiff was granted assignment of "any and all causes of action … prior to or after the effective date of the agreement," was sufficient to demonstrate that plaintiff was expressly assigned rights to sue for accrued causes of action, including present action. Defendant further challenged plaintiff's Article III standing, asserting that plaintiff failed to sufficiently plead actual damages and was prohibited from seeking statutory damages. Court found that plaintiff sufficiently pled Article III standing by alleging that due to defendant's misleading and deceptive advertisement and misrepresentations, plaintiff suffered damages through displaced sales, lost profits, and reputational harm. Court declined to make finding regarding availability of statutory damages because work's date of publication was contested. Court granted defendant's motion to dismiss without prejudice as to statutory damages; as to all other challenges to plaintiff's infringement claim, court denied motion to dismiss.

Great Bowery Inc. v. Consequence Sound LLC, No. 23-80488, 2024 U.S. Dist. LEXIS 116173 (S.D. Fla. July 1, 2024)

District court granted defendant's motion for summary judgment and dismissed for lack of standing. Plaintiff alleged that defendant improperly posted certain Star Wars photos on defendant's website. Photos were not taken by plaintiff but instead were taken by Annie Leibovitz. Defendant filed motion for summary judgment, arguing that plaintiff did not have standing to sue. District court granted motion and dismissed case, finding that Authorization Letter that Leibovitz had granted to plaintiff did not convey exclusive rights to plaintiff and that plaintiff did not have standing.

E. Miscellaneous

N.Y. Times Co. v. Microsoft Corp., No. 23-11195, 2024 U.S. Dist. LEXIS 212998 (S.D.N.Y. Nov. 22, 2024)

Court denied defendants' motion to compel production of plaintiff's position on use and development of generative artificial intelligence tools. Plaintiff New York Times brought action against defendants Microsoft and OpenAI for unlawfully using plaintiff's copyrighted work to train defendants' large-language models. Defendant OpenAI moved to compel production of: (1) plaintiff's use of nonparties' generative artificial intelligence ("Gen AI") tools, (2) plaintiff's creation and use of its own Gen AI tools, and (3) plaintiff's position regarding Gen AI. Defendant argued that discovery was relevant because plaintiff purportedly claimed Gen AI threatens plaintiff's business model and enterprise. Court found that plaintiff's statement about threat posed by Gen AI served as heading in plaintiff's amended complaint and therefore was neither claim nor defense. Court further found that plaintiff's amended complaint did not include wholesale indictment of Gen AI tools. Court found that case was about whether defendant trained large-language models on plaintiff's copyrighted materials, not referendum on benefits of Gen AI, plaintiff's business practices, or whether any employees of plaintiffs use Gen AI tools at work. Court held that defendant failed to demonstrate relevance of discovery sought, and motion to compel was thus denied.

Concord Music Grp., Inc. v. Anthropic PBC, No. 24-3811, 2025 U.S. Dist. LEXIS 55639 (N.D. Cal. Mar. 25, 2025)

District court denied plaintiffs' motion for preliminary injunction because they failed to allege irreparable harm. Plaintiffs, music publishers including UMG, Concord and ABKCO, sued Anthropic, technology company whose signature product was general purpose AI model called "Claude," for infringing their copyrights in millions of musical compositions. Publishers' claims addressed both Claude's inputs (on which model was trained) and outputs (what model generated in response to user prompts). After oral arguments but prior to court's decision, parties entered into stipulation concerning Claude's outputs, meaning that publishers were seeking injunction solely related to input-related infringement. Court noted that broad and shifting scope of publishers' requested relief "cast[] a long shadow" because "enormous and seemingly ever-expanding scope of Works included in the requested injunction raises significant concerns regarding enforceability and manageability." Court then held that publishers failed to establish irreparable harm required for preliminary injunction. Reputational harm described by publishers was "largely related to Claude's outputs rather than the use of the Works for training purposes alone." Publishers had further failed to articulate harms (beyond loss of control over rights associated with any copyright infringement) to publishers. Market harm was also not shown because publishers did not submit any "evidence that Anthropic's use of lyrics to train Claude reduces [publishers'] license fees with lyric aggregators, lyric websites, or other existing licensees, which provide entirely different services and do not compete with Claude." Publishers further failed to specify how use of compositions to train Claude had "affected their respective abilities to negotiate training licenses with other AI developers, or how it will inflict harm on the emerging licensing market." Finally, publishers failed to show that their losses "could not be compensated through monetary damages." Because irreparable harm not established, court did not consider whether publishers could establish direct or secondary infringement claims.

II. COPYRIGHTABILITY

A. Originality

Structured Asset Sales, LLC v. Sheeran, 120 F.4th 1066 (2d Cir. 2024)

Affirming district court, Second Circuit joined Ninth Circuit to hold that scope of copyright in pre-1978 musical compositions is defined by, and limited to, musical notation that was submitted to Copyright Office under 1909 Act deposit requirements. Plaintiff owned partial share of song "Let's Get It On" ("LGIO"), successfully recorded in 1973 by Marvin Gaye. Plaintiff asserted that Ed Sheeran's hit 2014 song "Thinking Out Loud" was substantially similar to LGIO, specifically with respect to (a) bass line audible on recording of LGIO but not explicitly notated in deposit copy ("Implied Bass Line"); (b) basic chord progression ("Progression"); (c) syncopated placement of Progression relative to song's rhythmic structure; and (d) overall selection and arrangement of above elements. Melody and lyrics of parties' songs were not alleged to be similar. Defendants prevailed below on motion for summary judgment. Affirming, Second Circuit first rejected claim of similarity based on Implied Bass Line, following Ninth Circuit's reasoning in *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (*en banc*): because Implied Bass Line was not included in notated "lead sheet" that songwriter submitted to Copyright Office in 1973, it was not part of LGIO as matter of law. Plaintiff had proffered expert testimony to argue that bass line could be inferred from chord symbols that were included in deposit copy. Second Circuit acknowledged that "[t]here may be some instances in which expert testimony of this sort can aid the trier-of-fact in interpreting what, precisely, is represented in the four corners of the Deposit Copy," but did not find that district court's exclusion of such testimony on *Daubert* motion was manifestly erroneous. Court also emphasized that 1909 Act required "complete copy" to be deposited for registration of musical compositions, so it would be improper to consider any element not expressly included within deposit copy. Court further noted that *Compendium of U.S. Copyright Office Practices* that was in effect in 1973 stated that "protection extends only to the material actually deposited," so "a musical work registered under the 1909 Act *is* the 'complete copy' filed with the Copyright Office" (emphasis original). As to other elements of claimed similarity, court applied "more discerning ordinary observer" standard to hold that Progression of chords Eb – Gm – Ab – Bb was "ubiquitous in pop music – even coupled with a syncopated harmonic rhythm," and thus was "too well-explored to meet the originality threshold that copyright law demands," again citing and quoting *Skidmore*, 952 F.3d at 1075-76, which cautioned against "deem[ing] substantially similar two vastly dissimilar musical compositions, novels, and paintings for sharing some of the same notes, words, or colors." In footnote, Second Circuit declined to address district court's additional conclusion that selection and arrangement of elements may be unprotectable *per se* simply because plaintiff did not combine sufficiently large number of elements. Although "the number of elements in combination is an aspect of the distinctiveness of music, originality is not a concept that is easily reducible to a simple test like numerosity."

> *Sound & Color, LLC v. Smith*, No. 23-2680, 2025 U.S. App. LEXIS 10264 (9th Cir. Apr. 29, 2025)

Ninth Circuit reversed district court's grant of summary judgment for defendants. Issue presented for summary judgment was whether "hook" in plaintiff's song was substantially similar to hook in defendants' song under extrinsic test. District court held that plaintiff could not satisfy extrinsic test as matter of law. Defendants did not argue on appeal that selection and arrangement of unprotectable elements in plaintiff's hook did not constitute original work; rather, they contended that same selection and arrangement did not appear in their hook. Ninth Circuit does not have well-defined standard for assessing substantial similarity in selection and arrangement, but has "suggested generally" that selection and arrangement of elements must be similar enough that ordinary observer, unless he set out to detect disparities, would be disposed to overlook them. Court found reasonable jury could find that hooks shared same combination of unprotectable elements in substantial amounts. Plaintiff's experts opined that hooks share same combination of several musical elements, including same lyrics, same "metric placement" of beginning of each syllable, and same downward "melodic contour" that starts at pitch 7 and ends at pitch 3; and that hooks shared various other similarities, such as four-on-the-floor bass drum pattern with syncopated hi-hats. Defendants' experts did not identify any hook in prior art that shared same melodic contour with those starting and ending pitches. Court further rejected defendants' argument that grant of summary judgment could be affirmed on alternative ground that plaintiff's hook was only entitled to thin copyright protection, noting that defendants' exhibit containing 43 audio excerpts of songs with similar lyrics but differences in rhythm, pitch sequence, and melodic contour illustrated "wide range of possible expression and broad creative choices" involved in crafting hook, and showed that broad copyright protection was appropriate. Reversed and remanded.

MFB Fertility Inc. v. Wondfo USA Co., Ltd., No. 23-17000, 2024 U.S. Dist. LEXIS 159669 (N.D. Ill. Sept. 5, 2024)

District court denied in part defendant's motion to dismiss. Plaintiff invented at-home fertility test to measure progesterone and confirm occurrence of ovulation. Defendant online retailer sold progesterone test strips. Plaintiff alleged defendant infringed plaintiff's copyright by promoting, advertising, and selling products that were substantially similar to its copyrighted work. Plaintiff alleged order and selection of instructions section, ovulation cycle phases graph, and FAQ section were infringing elements as they were substantially similar or verbatim to plaintiff's test. Court found ovulation graph was scientific data and not protectable, but plaintiff's instructions section and FAQ section were not for utilitarian purposes, were not required under FDA, and were specifically worded. Thus, plaintiff's instructions and FAQ sections were protectable expression, and defendant's wording, order and arrangement were allegedly substantially similar to plaintiff's sections, sufficiently alleging infringement claim.

Compulife Software, Inc. v. Rutstein, Nos. 16-80808, 16-81942, 2025 U.S. Dist. LEXIS 5090 (S.D. Fla. Jan. 10, 2025)

Court held that arrangement of plaintiff's HTML source code is not protectable. Plaintiff Compulife Software, Inc. offered life insurance price quotes through proprietary database that relied on copyrighted HTML source code. Defendants Binyomin Rutstein and company copied large portions of HTML source code, stole plaintiff's database, and began competing against plaintiff. Upon remand from Eleventh Circuit, court must determine whether arrangement of HTML source code is protectable. Court found that plaintiff's arrangement of parameter blocks was not sufficiently creative to be copyrightable; there was no direct evidence of intellectual production or thought involved in plaintiff's arrangement of parameter blocks. Court further found that arrangement of parameter blocks did not affect functionality of HTML source code. Court held plaintiff's HTML source code not protectable under copyright because plaintiff failed to show that its arrangement of HTML source code in totality was original work of authorship.

Diamonds Direct, L.C. v. Manly Bands, No. 23-870, 2024 U.S. Dist. LEXIS 210234 (D. Utah Nov. 18, 2024)

District court granted in part and denied in part defendant's motion to dismiss. Plaintiff wedding ring company discovered defendant wedding ring company manufactured knockoffs of plaintiff's designs for third party. Plaintiff confronted defendant, but defendant insisted designs were not protectable. After observing more of defendant's copycat products, plaintiff filed suit, asserting claims for infringement and unlawful falsification and removal of CMI. Defendant moved to dismiss. Court found majority of plaintiff's designs not entitled to copyright protection because they were simple combinations of unprotectable elements. Assuming plaintiff's remaining designs were protectable, court found defendant's designs not substantially similar. Court dismissed copyright infringement claims related to ring designs.

B. Compilations and Derivative Works

Oracle Int'l Corp. v. Rimini St., Inc., 123 F.4th 986 (9th Cir. 2024)

Ninth Circuit vacated district court holdings that defendant's software was infringing because they were based on erroneous definition of "derivative work." Plaintiff Oracle develops software (including PeopleSoft, tool that can be customized to manage all sorts of business processes) and further offers support services. However, Oracle's customers can also modify and customize software themselves or through third-party providers. Defendant Rimini Street is such third-party provider and competitor of Oracle in support-services market. In first litigation lasting from 2010 to 2023, defendant's programs were found to have infringed Oracle's copyrights. Defendant then changed aspects of its business model and sought declaration that its revised Process 2.0 did not infringe Oracle's copyrights; Oracle counterclaimed for infringement. After bench trial, district court ruled that defendant had created infringing derivative works, and therefore entered permanent injunction against defendant. On appeal, Ninth Circuit found that district court had erroneously held that defendant's Process 2.0 files and updates were infringing derivative works simply because they were only interoperative and usable with Oracle's software. Neither Copyright Act nor precedent supported mere interoperability, even if exclusive, as sufficient to render work derivative. Copyright Act's examples of derivative works all physically incorporate underlying work and, here, defendant alleged that many of its files were interoperable without containing Oracle's copyrighted code. Ninth Circuit therefore remanded to district court.

Grant v. Trump, 749 F. Supp. 3d 423 (S.D.N.Y. 2024)

District court granted summary judgment, finding that Donald Trump infringed plaintiff Eddy Grant's copyright by using plaintiff's song in his 2020 presidential campaign. Third-party Trump supporter took Grant's song "Electric Avenue" without permission and used it in animated video denigrating Joe Biden, and Trump posted video on his Twitter account, which had nearly 100 million followers. Plaintiff sued for infringement and moved for summary judgment on liability, while Trump moved for summary judgment on defense that song was not validly registered. Registration asserted by plaintiff was for 2002 album "Eddy Grant: The Greatest Hits," which was registered as "compilation," and which included "Electric Avenue." Trump argued that compilation registration did not cover sound recording of "Electric Avenue," but court found that registration of compilation was sufficient to register constituent work. Trump cited to Compendium and other Copyright Office documents stating that registration of collective work can only cover constituent parts when parts were previously unpublished – unlike "Electric Avenue" – but court noted that Second Circuit never adopted this rule and has allowed previously published works to be covered by newer collective work registrations.

Epstein v. Bruce Furniture, Inc., No. 19-30050, 2024 U.S. Dist. LEXIS 157131 (D. Mass. Jul. 16, 2024)

After bench trial, district court found in defendant's favor because plaintiff failed to establish protectable elements of derivative work. Plaintiff, advertising agency, prepared promotional letters for defendant, furniture retailer, including letters based on plaintiff's works, namely, Dunn's Letter, derivative work which was in turn was based on earlier Epstein Letter. When defendant, with plaintiff's involvement, created further promotional letter that incorporated elements from Epstein/Dunn's Letter, plaintiff sued for copyright infringement. Plaintiff relied upon Dunn's Letter registration, which was clearly for derivative work, as made clear by its registration certificate, which limited protection to "new 'text' and 'editing' which differentiates that work from the preexisting work and excludes the 'text' set forth in the preexisting work." Court stated that, while plaintiff's ownership of Epstein Letter could carry forward to Dunn's Letter, plaintiff failed to present evidence demonstrating ownership or originality of Epstein Letter. As such, court found statutory presumption of copyright validity could not be applied to Dunn's Letter. Further, court found plaintiff's failure to provide evidence relating to ownership and originality of Epstein Letter "preclude[d] any finding of liability as to that preexisting work" and plaintiff's failure to provide evidence showing changes Dunn's Letter made to Epstein Letter precluded finding of liability as to Dunn's Letter because protection for derivative works like Dunn's Letter extends only to new contributions, and there was no way for court to tell how Dunn's Letter differed from Epstein Letter. Plaintiff, accordingly, enjoyed no presumption of validity for Dunn's Letter, despite timely registration certificate, and court found no liability on part of defendant.

C. Pictorial, Graphic and Sculptural Works

Tangle, Inc. v. Aritzia, Inc., 125 F.4th 991 (9th Cir. 2025)

Tangle, Inc. owned registered copyrights in seven "kinetic and manipulable sculptures," each made of "17 or 18 identical, connected, 90-degree curved tubular segments … that can be twisted or turned 360 degrees where any two segments connect." In 2023 defendant Aritzia Inc., which owned and operated upscale "lifestyle apparel" stores, decorated its store windows with sculptures made with 18 identical, connected, 90-degree curved tubular segments that can be twisted or turned 360 degrees where any two segments connect. Tangle sued for copyright infringement. Aritzia moved to dismiss on basis that Tangle sought to protect unprotectable idea rather than protectable expression. District court agreed, finding that "Tangle claims copyright protection over an amorphous idea, effectively asking the Court to pin jelly to the wall. … Tangle seeks to copyright a particular style." District court found Tangle failed to state claim because works were not sufficiently "fixed" to qualify for copyright protection. In court's view, Tangle was claiming ownership of "every conceivable iteration of tubular sculptures made of interlocking 90-degree segments." Court held that Tangle instead must allege that "specific accused work infringes upon a specific, fixed, protected work." Court dismissed complaint without prejudice, and granted Tangle leave to replead. Rather than replead Tangle gave formal notice of intent not to amend, and district court entered order dismissing with prejudice, from which Tangle appealed. Ninth Circuit reversed. To state claim for copyright infringement, court stated, Tangle must plausibly allege (1) that it owns valid copyright in sculptural works, and (2) that Aritzia copied protected aspects of Tangle's expression. As to first element, Aritzia argued that Tangle's registrations were valid only to extent that they sought protection for specific poses, but not for works' full range of motion. Ninth Circuit disagreed; fact that Tangle's works move into various poses does not, by itself, support conclusion that they are not "fixed" for copyright purposes. Court noted that numerous types of works involving motion are within range of copyrightable subject matter, including choreography and motion pictures, "which 'move' from frame to frame, as does a symphony, from note to note, yet both can be protected under copyright law." Accordingly, like dance, movies, and music, moveable sculpture is sufficiently "fixed" to be entitled to copyright protection, even when its pose changes. Tangle's sculptures are material objects, and thus qualify as "copies." And sculptures can be perceived and reproduced for more than transitory period. Tangle's expression as embodied in sculptures therefore is "fixed in a tangible medium," even though sculpture may take different poses, and Tangle's registered copyrights are thus valid, and protect its works across their full range of motion. As to substantial similarity, Ninth Circuit test contains "extrinsic" and "intrinsic" components. Court could apply only extrinsic test, which asks whether, based on articulable, objective factors, <u>any</u> reasonable juror could find that allegedly infringing work is substantially similar to copyrighted expression. To determine whether work contains "protectable elements" under extrinsic test, court "filters out" unprotectable elements of work – ideas and concepts, material in public domain, and stock or standard features commonly associated with treatment of given subject. On other hand, substantial similarity can be found in combination of elements, even if those elements are individually unprotected. While individual elements of Tangle's sculptures may be unprotected when viewed in isolation, what <u>is</u> protectable is Tangle's selection and arrangement of those otherwise unprotected elements. Court, moreover, held Tangle's particular arrangement of elements entitled to "broad" copyright protection, because wide range of possible expression can result from different choices about number, shape, and proportions of segments used in sculptural work, whether to make segments uniform, and how to connect them. Thus, to establish that Aritzia unlawfully appropriated Tangle's protected expression, Tangle need only show that Aritzia's allegedly infringing sculptures are substantially similar – rather than "virtually identical" – to Tangle's works. Court found Tangle had done so. Comparing selection and arrangement of elements in Tangle's work with that in allegedly infringing work, court determined that Tangle had plausibly alleged that creative choices it made in selecting and arranging elements of its protected sculptures were substantially similar to choices Aritzia made in creating its sculptures. Aritzia's sculptures, like Tangle's, are made from "18 identical, connected, 90-degree curved tubular segments (i.e., one quarter of a torus) that can be twisted or turned 360 degrees where any two segments connect, allowing sculpture to be manipulated to create many different poses." Accordingly, Tangle's and Aritzia's sculptures were similar enough that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them."

Grondin v. Fanatics, Inc., No. 23-2149, 2024 U.S. App. LEXIS 32729 (3d Cir. 2024)

Third Circuit affirmed district court's dismissal of plaintiff's copyright claim, holding that plaintiff failed to identify copyrighted aspects of work that were substantially similar to defendant's product. Plaintiff William Grondin designed "Slice of the Ice," sculpture made from transparent Lucite, shaped like hockey puck, and filled with melted rink ice. Defendant Fanatics later began selling transparent hockey puck filled with melted rink ice. Plaintiff sued for copyright infringement, and district court dismissed, finding that plaintiff failed to demonstrate substantial similarity because identified elements of similarity were not copyrightable. Third Circuit first held that plaintiff's idea of hockey memorabilia filled with melted rink ice was not protectable because ideas cannot be protected by copyright law. Third Circuit further held that that transparency, hollowness, and existence of air bubble in plaintiff's sculpture were utilitarian, non-copyrighted aspects because they are intrinsically useful for displaying melted rink ice. Third Circuit ultimately held that plaintiff failed to identify any copyrighted aspects of its sculpture that were substantially similar to defendant's, and thus affirmed district court's dismissal of claim.

D. Miscellaneous

Thaler v. Perlmutter, 130 F.4th 1039 (D.C. Cir. 2025)

D.C. Circuit affirmed district court's holding that only humans may be authors for copyright purposes. Plaintiff, computer scientist Stephen Thaler, created generative artificial intelligence model he named "the Creativity Machine," which in turn generated image titled "A Recent Entrance to Paradise" ("Work"). Thaler applied to register Work, listing Creativity Machine as its sole author and himself as Work's owner. Copyright Office refused to register Work on ground that only works authored by human beings are eligible for copyright protection. In two round of administrative reconsideration requests, Thaler confirmed that Work was "autonomously generated by an AI" and made constitutional, statutory and policy arguments against human authorship requirement. After again being refused registration, Thaler appealed to D.C. District Court, reiterating his earlier arguments but also claiming for first time that Work was copyrightable because Thaler, human being, provided instructions to and directed his AI. District court found for Copyright Office because human authorship is "bedrock requirement of copyright." District court further held that Thaler had waived his arguments for Work's copyrightability based on Thaler's creation and operation of Creativity Machine because he failed to raise them before Copyright Office. Thaler appealed. D.C. Circuit Court affirmed Copyright Office's determination based on text of Copyright Act, Copyright Office's guidance, and Thaler's unwaived arguments. Circuit Court began by enumerating examples of Copyright Act provisions that make sense only when applied to humans: ownership requiring capacity to own property, duration tied to lifespan, inheritance provisions, signature requirements, domiciles and intentionality. Although none of these provisions stated necessary condition for authorship, court found they were best read together as making humanity prerequisite for authorship. Court reinforced its reading by citing to Copyright Office's longstanding guidance requiring human authorship and characterizing computers as “inert” machines. Thaler’s attempt to characterize his AI-authored work as one made for hire met with no success, despite his correctly pointing out that, under Copyright Act’s work-for-hire provision, non-human corporations and governments can be “considered” authors. Court held that crucial word was “considered,” because work-for-hire provision does not say that such non-human entities “are” authors, merely that they are “considered” authors. Initial human author is still required, even if author is, legally, non-human entity. Since Thaler had, before Copyright Office, consistently affirmed that Creativity Machine was Work’s sole author, his only argument before court was that work autonomously generated by machine could be copyrighted. This, court held, was clearly foreclosed by Copyright Act.

Tracy Anderson Mind & Body, LLC v. Roup, No. 22-4735, 2024 U.S. Dist. LEXIS 118008 (C.D. Cal. June 12, 2024)

Court granted defendant’s motion for summary judgment, finding plaintiff’s workout routines not copyrightable. Founder of plaintiff fitness company developed *The Tracy Anderson Method* (“TA Method”), which combines choreography, fitness, and cardiovascular movement. Defendant was employed as trainer by plaintiff for six years. After terminating employment with plaintiff, defendant developed choreography-based dance cardio workout and related training materials. Plaintiff alleged copyright infringement, and defendant moved for summary judgment, arguing that TA Method was noncopyrightable, exercises were not protectable choreography, and plaintiff could not establish copyright ownership. Court found that TA Method routines were unprotectable system or method of exercise. Plaintiff’s routines were explicitly called “method,” and plaintiff operated in wellness industry, demonstrating that purpose of TA Method was not art or expression, but instead health and fitness. Court thus granted defendant’s summary judgment motion.

III. OWNERSHIP

A. Works Made for Hire

Germain v. Martin, No. 22-8377, 2024 U.S. Dist. LEXIS 175159 (S.D.N.Y. Sept. 27. 2024)

Court granted defendants’ motion to dismiss for failure to state claim because plaintiff was unable to adequately demonstrate ownership of work at issue. Plaintiff and solo artist Patrice Germain p/k/a G-Flexx created song titled *Diamonds Are Forever* (“DAF”) in or around 2006 with now-deceased artist Keith Elam (“Elam”). Plaintiff stated that Elam collaborated on DAF as work for hire, but that plaintiff had sole ownership of DAF. In 2019, defendants Christopher Martin p/k/a DJ Premier (“Martin”) and Gang Starr Enterprises LLC (“Gang Starr”) produced and released song titled *Family and Loyalty*, which was distributed worldwide through defendant Apple, Inc.’s music streaming service Apple Music under defendant and record label Universal Music Group. Plaintiff brought action alleging defendants infringed his sound recording copyright of DAF, and that they did not seek or receive permission or license to copy, duplicate, perform, or use DAF. Defendants Martin and Gang Starr moved to dismiss for failure to state claim of infringement, arguing plaintiff did not plausibly plead ownership of DAF. Plaintiff asserted that he was owner of DAF because certificate of registration from Copyright Office listed plaintiff as owner. Defendants Martin and Gang Starr argued that plaintiff had not proffered sufficient facts to define Elam's contribution to creation of DAF as work for hire, and therefore, plaintiff had not adequately established ownership of DAF. Court found that Elam was not treated as or intended to be ongoing employee, so plaintiff was required to show written agreement between plaintiff and Elam indicating work-for-hire relationship. Court further found that plaintiff gave no indication that any written agreement existed, nor had he provided any facts related to issue of Elam's working relationship with plaintiff. Court held that plaintiff had not pleaded sufficient facts to validly claim ownership of DAF, and defendants' motion to dismiss was granted.

B. Termination of Transfers

Lil' Joe Recs., Inc. v. Ross, 752 F. Supp. 3d 1287 (S.D. Fla. 2024)

District court denied plaintiff's summary judgment motion seeking declaration that defendants' notice of termination was invalid, finding defendants' rights to terminate transfer not renounced through bankruptcies and settlement agreements involving various defendants. Plaintiff record label acquired ownership of musical composition and sound recording copyrights for albums of rap group 2 Live Crew ("Works"). Defendants, former members of and heirs to deceased members of 2 Live Crew, had transferred Works to separate record label ("Luke Records"), which went bankrupt, and in bankruptcy proceedings Works were transferred from Luke Records to plaintiff. Plaintiff also entered into settlement agreements with several defendants confirming plaintiff's ownership in all rights to Works, though such settlement agreements were silent on question of defendants' termination rights. When Works became eligible for termination, defendants served termination notice on plaintiff. Court found summary judgment precluded by disputed issues of material fact on questions of whether Works were works made for hire; whether termination notice was ineffective; and details of agreements via which defendants transferred Works to Luke Records. Accordingly, court turned focus to questions of whether defendants' termination rights were renounced via bankruptcies and/or settlement agreements. Court reviewed U.S. Supreme Court case *Mills Music, Inc. v. Snyder*, in which Court found no issue with heirs exercising termination rights post-bankruptcy, and also cited to persuasive authority that repeatedly indicated "inalienable" nature of termination rights, to determine that defendants' termination rights survived bankruptcy. Further, court found no indication that termination rights were intended to be transferred via settlement agreements, to extent such rights could even be transferred via agreement, so such rights were not transferred in settlement agreements. Accordingly, court rejected defendants' motion for summary judgment as to invalidity of defendants' termination notice.

Vetter v. Resnik, No. 23-1369, 2024 U.S. Dist. LEXIS 122767 (M.D. La. July 12, 2024)

In ownership dispute concerning 1962 song "Double Shot (Of My Baby's Love)," district court held that termination of transfer encompasses both domestic and foreign rights to work, and denied defendant's motion to dismiss on basis that termination interest only extended to U.S. rights. In years following 1962 authorship of work (jointly authored by two songwriters), there were numerous transfers, renewals and terminations of both authors' ownership rights. By 2022 (shortly following effective date of notice of termination), television network expressed interest in using work on television show to be broadcast worldwide, and defendant asserted it retained ownership of foreign rights to work on basis that neither renewal interest under 1909 Act nor termination right under 1976 Act cover foreign rights. Plaintiff sued for declaratory judgment that it owned all right and interest to work worldwide, and that defendant had no rights to exploit work anywhere in world outside U.S. Defendant filed motion to dismiss. Defendant urged court to consider territoriality of copyright, and pointed to language in Act stating "Termination of the grant … in no way affects rights arising under … foreign laws." While plaintiff acknowledged existence of cases supporting defendant's position, plaintiff argued that those cases were wrongly decided and contrary to purpose of termination right in 1976 Act because this would result in termination right applying "in only *one* of the 181 countries in the Berne Convention." District court agreed with plaintiff, finding its argument "plausible" based on "admittedly novel" theory that "there is only one copyright in the [work] which is recognized by other countries pursuant to the Berne convention," and thus termination right should apply to both domestic and foreign rights. Defendant's motion to dismiss denied. On appeal to Fifth Circuit.

C. Joint Works and Co-Ownership

D'Arezzo v. Appel, 753 F. Supp. 3d 294 (S.D.N.Y. 2024)

District court denied defendants' motion for summary judgment on copyright co-authorship claim. Plaintiff Angela D'Arezzo, woman with muscular dystrophy, worked with defendant Catherine Appel, artistic director of defendant foundation Overtime Dance, over 20 years to create work eventually titled *The Salty Mountain* about plaintiff's life and family in Italy. Appel asserted that, between 2005 and 2018, she wrote all materials on her own computer, shared written materials upon request, and organized material into cohesive narrative. Plaintiff, meanwhile, contended that she had written portions of text and further that Appel had sought plaintiff's input on narrative, flow and shape. In 2018, parties had meeting with plaintiff's attorney present; Appel claimed that plaintiff expressed desire to exclusively own copyright in *Salty Mountain*, while plaintiff alleged that Appel attempted to get plaintiff's signature on co-copyright ownership agreement. Between April 2018 and early 2019 (when *Salty Mountain* was published), plaintiff and Appel corresponded about *Salty Mountain*'s authorship. Although Appel claimed sole ownership periodically, she simultaneously acknowledged that *Salty Mountain* was collaboration and joint project. Moreover, *Salty Mountain* cover, both in draft forms continuously exchanged by parties and as ultimately published, stated "By Angela D'Arezzo with Cathy Appel." Plaintiff brought suit on January 7, 2022. Plaintiff's authorship claim did not accrue until there was express repudiation by Appel and court held that, in light of ambiguous correspondence and continued cover attribution, genuine issues of fact remain as to whether and when Appel repudiated plaintiff's authorship claim.

> *Elliott v. Cartagena*, No. 19-1998, 2025 U.S. Dist. LEXIS 26160 (S.D.N.Y. Feb. 13, 2025)

Court denied defendants' motion to dismiss plaintiff's claims under Copyright Act where he made plausible claim of joint authorship over unfinished and released version of song. Plaintiff songwriter and artist claimed he co-created song "All The Way Up" in 2015 with another artist, Infared, during recording session in Miami by writing lyrics for verse and pre-hook and creating vocal melody and rhythmic flow for several verses (unfinished version). Song was later complete and released by artist Joseph Cartagena (p/k/a Fat Joe) and others, without crediting plaintiff as contributor (released version). Plaintiff sued various defendants, including Cartagena and other prominent artists and music industry figures, producers, labels, and distribution companies (collectively, defendants) alleging infringement and ownership of musical composition and sound recording, claiming joint authorship. After song's release and success, plaintiff was paid $5,000 by Cartagena, allegedly in exchange for rights to song. District court previously dismissed plaintiff's claims based on draft agreement allegedly assigning his rights, but Second Circuit reversed, finding factual disputes about draft's authenticity. After remand, plaintiff filed amended complaint asserting claims under Act. Court analyzed unfinished and released versions of song separately. Defendants argued plaintiff was not joint author of any version of "All The Way Up." Court went through two elements of joint authorship: when two or more contributors to work each (1) made independently copyrightable contributions to work and (2) fully intended to be co-authors. On first prong, plaintiff sufficiently alleged his contributions to unfinished version independently copyrightable. Further, despite defendants' claim that plaintiff contributed basic, commonplace phrases "ubiquitous in hip-hop and rap music" to released versions, court found plaintiff plausibly alleged other contributions, like lyrics to pre-hook and vocal melody and rhythmic flow. On second prong, plaintiff alleged all artists who made contributions to unfinished song intended to be joint authors, merging their contributions into inseparable song. Plaintiff cited interview where Infared described importance of collaboration as well as phone call with Cartagena where he realized plaintiff wrote and performed on song. Therefore, court found plaintiff's allegations sufficient to support claim of joint authorship over each version of song. Relatedly, court found that since plaintiff sufficiently alleged he was joint author, he plausibly alleged that each version was joint work. Court found defendants' argument that released version was derivative work to be premature at motion to dismiss stage.

Tempo Music Invs., LLC v. Cyrus, No. 24-7910, 2025 U.S. Dist. LEXIS 49470 (C.D. Cal. Mar. 18, 2025)

District court found that plaintiff had standing to sue based on one co-owner's assignment of his rights to plaintiff. In 2013, Bruno Mars released popular and award-winning song "When I Was Your Man" ("Mars Song"), which was co-written by Mars, Philip Lawrence and two others. Plaintiff, investment company, alleged that it acquired ownership share of copyright in Mars Song through acquisition of catalog of its co-author, Lawrence. Lawrence's assignment of his rights in Mars Song to plaintiff was recorded in Copyright Office. In January 2023, plaintiff sued Miley Cyrus and related entities, claiming that her hit song "Flowers" was substantially similar to and infringed copyright in Mars Song. Defendants moved to dismiss, arguing that plaintiff lacked standing. According to defendants, because Lawrence was co-author with others, he did not exclusively own any right in Mars Song. Thus, Lawrence's assignment granted plaintiff only non-exclusive license and, to be able to sue, plaintiff would have to acquire all co-authors' interests. Court disagreed, finding that defendants had conflated "ownership of exclusive rights" with "exclusive ownership of rights." Copyright co-owners collectively own "exclusive rights" to work. These "exclusive rights" are exclusive to co-owners as against rest of world, but any one co-owner had right to sue third party for infringement without joining other co-owners. Thus, plaintiff had standing to sue.

Copon v. Lara Ho, No. 23-987, 2025 U.S. Dist. LEXIS 4776 (M.D. Fla. Jan. 10, 2025)

District court denied motion to dismiss infringement claims, finding that plaintiff adequately pled that he co-wrote film and was not subject to work-for-hire agreement. Plaintiff co-produced, co-wrote, directed and starred in film. Defendants obtained copyright registration for film without plaintiff, asserting that plaintiff's writing was pursuant to work-for-hire agreement to direct. Plaintiff separately obtained copyright registration in screenplay and claimed that film infringed screenplay copyright. Court found that work-for-hire director contract did not bear at all on copyright. Defendants also argued that they were co-authors of screenplay and lawfully created film as derivative work, but court found that complaint alleged that only plaintiff owned copyright in screenplay, so argument failed at pleading stage.

D. Contracts and Licenses

Teri Woods Publ'g, LLC v. Amazon.com, Inc., No. 24-1137, 2025 U.S. App. LEXIS 3739 (2d Cir. Feb. 19, 2025)

Second Circuit affirmed dismissal of copyright claims, finding that putting audiobooks on subscription model did not violate license agreement with author. Plaintiff, owner of copyrights in author's books, licensed audiobook rights to one defendant. That licensee transferred license to other defendant, who then granted sublicenses to Amazon and Audible to put books on their subscription services. Plaintiff argued that audiobooks were essentially distributed "for free" on Audible service, in violation of original license. Though agreement permitted licensee to assign its rights, and subscription models were not forbidden, plaintiff argued that license included royalty provisions that were violated by "free" distribution of audiobooks to subscribers. District court and Second Circuit agreed that distribution to subscribers for monthly fee was not distribution "for free," and that royalty provisions in license only related to per-unit sales while not forbidding mechanisms of distribution other than per-unit sales.

Aquarian Found., Inc. v. Lowndes, 127 F.4th 814 (9th Cir. 2025)

Ninth Circuit affirmed bench trial decision that Aquarian Foundation church founder licensed his written works to defendant for online publication prior to bequeathing his copyrights to church, but reversed finding that church's termination of license was ineffective. Court found no evidence that works were written for hire for church, so founder held copyright that he validly licensed to defendant. District court found that license could not be terminated without two years' notice, pursuant to § 203 of Act. Ninth Circuit reversed, finding that because Aquarian was not statutory heir, but rather obtained rights in will, its rights were not addressed by Act, but rather by state law. In all relevant states, licenses are terminable at will. Ninth Circuit remanded action for determination of whether any infringement occurred after license was terminated by Aquarian.

Cutillo v. Cutillo, No. 23-2382, 2024 U.S. App. LEXIS 15958 (3d Cir. July 1, 2024)

Third Circuit affirmed district court's dismissal of infringement claim. Plaintiff developed natural hormone balancing system which she expressed in book *The Hormone Shift* and other written materials, and licensed to defendant via exclusive master distributor and license agreement. After execution of agreement, plaintiff became aware that defendant had been making unauthorized derivatives of her works. Plaintiff sued defendant, arguing that defendant exceeded scope of agreement. District court dismissed infringement claim. Third Circuit affirmed, finding that plaintiff had failed to state claim since there was no evidence that defendant exceeded scope of license agreement by engaging in copying, distributing and displaying derivatives of works. License agreement itself had no limits, and granted defendants perpetual, exclusive, royalty-free rights to use works.

White v. DistroKid, 738 F. Supp. 3d 387 (S.D.N.Y. 2024)

Court denied defendant's motion to dismiss plaintiff's direct infringement claim. Plaintiff musician wrote music and beats, sometimes licensing beats to other artists. In 2020, plaintiff created series of beats ("Beats") that he registered with Copyright Office and subsequently licensed to another musician, Rivers, via oral agreement. Agreement provided Rivers could use Beats for her singing as long as she continued to book live performances for plaintiff and provided him with 50% of proceeds of exploitation of Beats or any music including them. If she failed to perform payment and live performance obligations, license rights would automatically revert to plaintiff, and Rivers would no longer have right to use Beats. Later, Rivers created album using Beats ("Album"). Plaintiff posted Album to defendant

DistroKid's website where, for fees, it distributed music to online streaming services and stores (Spotify, iTunes, Amazon, etc.). After Rivers created Album, she and plaintiff performed show, but she then did not continue to meet performance obligations under agreement and also did not pay plaintiff 50% of proceeds for performances or that were generated by Album. Rivers registered copyright in Album. Plaintiff told Rivers she no longer had authorization under license to use Beats and must cease use. Plaintiff removed Album from DistroKid, but Rivers later re-uploaded it, and DistroKid changed format of at least one copy of Album before distributing it to various digital stores. DistroKid argued it was entitled to distribute Album because plaintiff granted Rivers license to use Beats. Plaintiff argued such licensing rights did not exist because (1) Rivers never received right to use Beats because she never fulfilled conditions on which license would be granted, (2) if licensing rights vested at some point, there was reversion after Rivers did not book performances or pay 50%, and (3) even if licensing rights vested but did not revert, he revoked Rivers' licensing rights. DistroKid argued that plaintiff may have had contract claim against Rivers, but no copyright claim. Court agreed with plaintiff, finding compliance with terms of oral agreement was condition of license; if Rivers failed to continue to perform payment and live performance obligations, license rights would automatically revert, and Rivers could no longer use Beats. Even if characterized as covenant, material breach will allow licensor to rescind license and hold licensee liable for infringement. Court therefore denied DistroKid's motion to dismiss.

Providence Publ'ns, LLC v. NBC Universal Media, LLC, No. 23-8551, 2025 U.S. Dist. LEXIS 79572 (C.D. Cal. Mar. 25, 2025)

Court granted defendant's motion for summary judgment, finding plaintiff granted defendant express license to forward materials, and although it later removed forwarding permission statement, plaintiff failed to provide notice of changes to licensing terms. Plaintiff website operator reported on developments in occupational health and safety laws and regulations, as well as administrative decisions by California Division of Occupational Safety and Health ("Cal/OSHA"). Plaintiff published and distributed Cal/OSHA Reporter ("CORs") to entities that purchased licenses or subscriptions. From 2012 through mid-2017, plaintiff sent to defendant media company's staff emails containing language that permitted forwarding of CORs under certain conditions. Plaintiff removed permission-to-forward language from emails in July 2017 but gave no notice to defendant regarding any change in license terms. Defendant continued internal circulation of CORs among staff without receiving updated conditions or warnings. Plaintiff later accused defendant of copyright infringement, citing 605 internal forwards of 47 protected works. Court first considered whether plaintiff granted express license to forward CORS and found defendant amply met initial burden due to years of plaintiff explicitly stating CORs may be forwarded. Court found plaintiff failed to demonstrate defendant exceeded scope of license even though CORs themselves had copyright reservation of rights stating they could not be reproduced or transmitted. Defendant was within its rights to rely on statements in emails sent directly to defendant that stated COR could be forwarded. Court next considered whether, after permission-to-forward language was removed, defendant still had implied license to forward CORs. Implied license can be found where copyright holder engages in conduct from which other party may properly infer that owner consents to use. Court went through several factors, focusing on plaintiff's intent that implied licensee-requestor copy and distribute its work. Main issue was whether plaintiff's conduct indicated that use of material without plaintiff's involvement or consent was permissible, and court found answer was "yes." First, plaintiff sent defendant "veritable torrent" of emails over many years giving permission to forward CORs. Second, plaintiff used tracking software that would have given it actual knowledge that forwarding practice was common. Third, plaintiff engaged in conduct indicating permissible use by never bothering to send notices to customers alerting them to purported change in copyright authorization. Plaintiff's conduct strongly supported finding of implied license, and defendant was therefore entitled to summary judgment on plaintiff's copyright claim.

> *Griego v. Jackson*, No. 24-3260, 2025 U.S. Dist. LEXIS 13097 (C.D. Cal. Jan. 24, 2025)

Defendants' motion for judgment on pleadings granted. Plaintiff created album cover for hip hop artist Otis Jackson Jr., known as Madlib, in 1999. Included in album cover was character Madlib adopted as his graphic alter ego, called Lord Quas. In 2023, plaintiff registered copyright in album cover and in 2024 sue defendant for copyright infringement. Plaintiff, by his own allegations, admitted that he granted unlimited license to use Lord Quas, detailing defendants' "wide-ranging, open, and notorious use of Lord Quas over many years" with his knowledge and without his objection. With license established by plaintiff's own allegations, he bore burden to prove it was limited and that defendant exceeded its scope. Plaintiff failed to allege any facts that could infer intent to limit license; in complaint plaintiff indicated he was aware of use and even gratified by its widespread appeal. While scope of implied license is not generally decided at pleadings stage, plaintiff's infringement cause of action failed, as pleadings established facts compelling decision.

> *Jenni Rivera Enters. LLC v. Cintas Acuario Inc.*, No. 23-7847, 2024 U.S. Dist. LEXIS 195585 (C.D. Cal. Oct. 28, 2024)

District court granted defendants' motion for summary judgment dismissing plaintiffs' infringement claim, finding plaintiff raised no genuine issue of material fact as to infringement claim. Plaintiffs, estate of Latin singer Jenni Rivera and licensing company for Rivera's music ("Works"), alleged infringement by defendants, record labels owned by Rivera's father. Specifically, plaintiffs alleged defendants licensed Works outside of scope of Rivera's various recording contracts with defendants. However, plaintiffs failed to provide evidence of infringement of Works via licensing arrangements that exceeded scope of contracts. Plaintiffs did point to licensing agreement with distributor that defendants entered into without plaintiffs' knowledge ("Agreement"), but plaintiffs provided no evidence Agreement covered Works not covered by Rivera's contracts with defendants. Plaintiffs argued defendants were unable to confirm all revenue attributable to Agreement concerned Works covered by Rivera's contracts with defendants, but court described such arguments as "[p]laintiffs … attempt[ing] to shift the burden to Defendants to disprove infringement." Court found plaintiffs raised no genuine issue of material fact as to infringement, as plaintiffs failed to point to specific infringement of Works by defendants, and granted defendants' motion for summary judgment as to infringement claim.

Hanna v. Jespersen & Assocs. LLC, No. 23-13258, 2025 U.S. Dist. LEXIS 60878 (E.D. Mich. Mar. 31, 2025)

District court granted defendant's motion to dismiss. Plaintiff and his company offered medical-writing services, specifically drafting systematic reviews, including study protocols, which are necessary for publication in scientific journals. In 2020 defendant, healthcare communications agency, contracted with plaintiff to draft study protocol. After study protocol was drafted, defendant terminated contract. In response, plaintiff applied for copyright registration covering study protocol he had created for defendant. Later, defendant used study protocol in order to publish in journal. Plaintiff sued for infringement and breach of contract. Court found that contract between parties, while not creating express license because there was no copyrighted material in existence at time of contract, nevertheless created implied license. Contract showed that parties intended defendant to be able to submit study protocol to journals, which is way copyrighted work in question, study protocol, was used. Copyright owner could not now sue licensee for using copyrighted work in way it was intended to be used.

E. Miscellaneous

Ithier v. Aponte-Cruz, 105 F.4th 1 (1st Cir. 2024)

First Circuit reversed district court's grant of summary judgment to plaintiffs and denial of summary judgment to plaintiff. Conflict centered around El Gran Combo, popular Puerto Rican band that typically had 14 members, and its sometime-lead vocalist, declaratory judgment defendant Aponte-Cruz. Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") entitles recording artist "featured" on sound recordings to 45% share of certain royalties. Aponte-Cruz contended that he was lead vocalist on sound recordings at issue and thus entitled to 45% of royalties therefrom. Declaratory judgment plaintiffs EGC Corp., owner of El Gran Combo, and Ithier, sole owner of EGC Corp., contended that El Gran Combo was distinct legal entity and "featured artist," rather than any one individual in band, and thus plaintiffs should get 45% of royalties from recordings at issue. Key issue concerned interpretation of phrase "recording artist or artists featured on such sound recording" in DPRA. Since DPRA provided no definition of phrase, court turned to definition of "perform," which discussed people, not corporations, who performed regardless of if there were one or more persons performing. Therefore, court concluded that DPRA referred to people rather than corporations. Thus, individual artists, not corporation that owns musical group, was eligible for "featured artist" share of royalties. Court also rejected plaintiffs' legislative history arguments as unpersuasive because history appeared to contemplate that "featured" artists would be natural persons.

Production Pit Ltd. v. Warner Bros. Ent. Inc., No. 24-4286, 2025 U.S. Dist. LEXIS 80484 (C.D. Cal. Apr. 22, 2025)

District court denied motion to dismiss infringement claim brought by voice actor against Warner Bros. for using his "Sorting Hat" voice recording on products not agreed to. Plaintiff, personal services company for British voice actor, portrayed voice of "Sorting Hat" from Harry Potter to be used in plush animatronic Sorting Hat toys. Plaintiff asserted that it was sole owner of copyrights in sound recordings under UK Copyright Law, and that plaintiff had oral agreement with one defendant that recordings would be used only on that toy. When recordings were nonetheless used on many products and at theme parks, plaintiff sued various companies that used recording, including Warner Bros., owner of many rights in Harry Potter franchise. Court, applying UK copyright law, denied motion to dismiss that asserted plaintiff did not own copyright in recordings and lacked standing. Court found that in UK, though voice recordings are considered authored by their creator, if created in scope of employment, they are owned by employer. Plaintiff adequately pled that it, as employer of voice actor, owned copyrights in recordings. Warner's assertion that it actually owned copyrights pursuant to agreement with plaintiff was fact-intensive question not suitable for motion to dismiss.

Joint Stock Co. 'Channel One Russia Worldwide' v. Infomir LLC, No. 16-1318, 2024 U.S. Dist. LEXIS 228378 (S.D.N.Y. Dec. 18, 2024)

District court denied plaintiffs' motion for summary judgment because they failed to show copyright ownership under Russian law. Plaintiffs, group of Russian television broadcasters, brought suit alleging that defendants pirated and rebroadcast plaintiffs' television programming over internet without authorization. Because programming at issue was created by Russian entities, broadcast from Russia, and copyright ownership was claimed in Russia, Russia had most significant relationship to property and parties; thus Russian law governed issue of initial ownership. Plaintiffs argued that they owned unregistered copyrights in programming, but only via naked, conclusory claims. Notably, they failed to articulate how such ownership came to be, under Russian law or otherwise. Accordingly, court denied summary judgment to plaintiffs based on their improper reliance on *ipsi dixit* instead of admissible evidence and cogent legal analysis.

IV. FORMALITIES

A. Registration

Structured Asset Sales, LLC v. Sheeran, 120 F.4th 1066 (2d Cir. 2024)

Affirming district court, Second Circuit joined Ninth Circuit to hold that scope of copyright in pre-1978 musical compositions is defined by, and limited to, musical notation that was submitted to Copyright Office under 1909 Act deposit requirements. Plaintiff owned partial share of song "Let's Get It On" ("LGIO"), successfully recorded in 1973 by Marvin Gaye.

Plaintiff asserted that Ed Sheeran's hit 2014 song "Thinking Out Loud" was substantially similar to LGIO, specifically with respect to (a) bass line audible on recording of LGIO but not explicitly notated in deposit copy ("Implied Bass Line"); (b) basic chord progression ("Progression"); (c) syncopated placement of Progression relative to song's rhythmic structure; and (d) overall selection and arrangement of above elements. Melody and lyrics of parties' songs were not alleged to be similar. Defendants prevailed below on motion for summary judgment. Affirming, Second Circuit first rejected claim of similarity based on Implied Bass Line, following Ninth Circuit's reasoning in *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (*en banc*): because Implied Bass Line was not included in notated "lead sheet" that songwriter submitted to Copyright Office in 1973, it was not part of LGIO as matter of law. Plaintiff had proffered expert testimony to argue that bass line could be inferred from chord symbols that were included in deposit copy. Second Circuit acknowledged that "[t]here may be some instances in which expert testimony of this sort can aid the trier-of-fact in interpreting what, precisely, is represented in the four corners of the Deposit Copy," it did not find that district court's exclusion of such testimony on *Daubert* motion was manifestly erroneous. Court also emphasized that 1909 Act required "complete copy" to be deposited for registration of musical compositions, so it would be improper to consider any element not expressly included within deposit copy. Court further noted that *Compendium of U.S. Copyright Office Practices* that was in effect in 1973 stated that "protection extends only to the material actually deposited," so "a musical work registered under the 1909 Act *is* the 'complete copy' filed with the Copyright Office" (emphasis original). As to other elements of claimed similarity, Court applied "more discerning ordinary observer" standard to hold that Progression of chords Eb – Gm – Ab – Bb was "ubiquitous in pop music – even coupled with a syncopated harmonic rhythm," and thus was "too well-explored to meet the originality threshold that copyright law demands," again citing and quoting *Skidmore*, 952 F.3d at 1075-76, which cautioned against "deem[ing] substantially similar two vastly dissimilar musical compositions, novels, and paintings for sharing some of the same notes, words, or colors." In footnote, Second Circuit declined to address district court's additional conclusion that selection and arrangement of elements may be unprotectable *per se* simply because plaintiff did not combine sufficiently large number of elements. Although "the number of elements in combination is an aspect of the distinctiveness of music, originality is not a concept that is easily reducible to a simple test like numerosity."

Grant v. Trump, 749 F. Supp. 3d 423 (S.D.N.Y. 2024)

District court granted summary judgment finding that Donald Trump infringed plaintiff Eddy Grant's copyright by using plaintiff's song in his 2020 presidential campaign. Third-party Trump supporter took Grant's song "Electric Avenue" without permission and used it in animated video denigrating Democratic nominee Joseph Biden, and Trump posted that video on his Twitter account, which had nearly 100 million followers. Plaintiff sued for infringement and moved for summary judgment on liability while Trump moved for summary judgment on defense that song was not validly registered. Registration asserted by plaintiff was for 2002 album "Eddy Grant: The Greatest Hits," which included "Electric Avenue" and which was registered as "compilation." Trump argued that compilation registration did not cover sound recording of "Electric Avenue," but court found that compilation registration was sufficient to register constituent work. Trump cited to Compendium and other Copyright Office documents stating that registration of collective work can only cover constituent parts when parts were previously unpublished – unlike "Electric Avenue" – but court noted that Second Circuit never adopted this rule, and has allowed previously published works to be covered by newer collective work registrations.

> *Ilyon Dynamics Ltd. v. Kings Fortune PTE. Ltd.*, No. 24-4581, 2025 U.S. Dist. LEXIS 34021 (N.D. Cal. Feb. 25, 2025)

Magistrate judge denied motion to dismiss infringement claim based on lack of ownership, and declined to refer registrability question to Register of Copyrights. Plaintiff, owner of copyright in "Triple Match 3D" mobile game, sued defendant alleging their mobile game "Happy Match Café" was infringing. On motion to dismiss, defendant argued plaintiff's copyright was invalid "because the certificate of registration states the work was completed in 2015, but the complaint alleges the work was created [i]n or around 2021." Noting that defendant focused solely on inaccurate date on registration certificate (rather than on application for copyright registration) and that defendant failed to allege that plaintiff was aware of any inaccuracy in application/registration, court found issue more appropriate for resolution at summary judgment phase and denied motion to dismiss. Court further declined defendant's "invitation" to request Register of Copyrights to advise court on whether inaccurate information would have caused Register to refuse registration, because facts concerning plaintiff's application were not yet of record.

> *Gregorini v. Apple Inc.*, No. 20-406, 2024 U.S. Dist. LEXIS 214480 (C.D. Cal. Nov. 25, 2024)

Court denied defendants' motion for summary judgment on basis that plaintiff's copyright was invalid. Plaintiff independent filmmaker alleged defendants – Apple Inc., individual filmmaker M. Night Shyamalan, and various production companies – impermissibly copied from her independent film *The Truth About Emanuel* ("*Emanuel*"). In *Emanuel*, mother hires young nanny to care for baby doll that mother believes is her deceased child. Defendants created show "Servant," supernatural thriller that follows wealthy couple who hired nanny to care for baby doll that mother believes is her deceased child. Plaintiff alleged single claim of infringement. In 2020, defendants' motion to dismiss on basis that two works were not substantially similar was granted, but Ninth Circuit revered because reasonable minds could differ on issue. Defendants moved for summary judgment and asserted plaintiff's copyright was invalid. Court disagreed, first noting party seeking to invalidate copyright registration must show registrant included inaccurate information in application with knowledge of inaccuracies. Defendants claimed plaintiff's registration failed to disclose that plaintiff's friend provided initial idea for *Emanuel*. Court was "dubious" plaintiff was required to disclose friend's minimal involvement in *Emanuel*, having provided "very basic one-liner" of idea that plaintiff then fleshed out. Court further disagreed with defendants that plaintiff had to disclose preexisting work it was based on for application to be accurate because that is only true for derivative works or compilations, and no evidence *Emanuel* was either. Court stated plaintiff's friend was not co-author and declined to find plaintiff's copyright invalid.

Beijing Meishe Network Tech. Co. v. TikTok Inc., No. 23-6012, 2024 U.S. Dist. LEXIS 130213 (N.D. Cal. Jul. 23, 2024)

District court denied defendants' motion to dismiss infringement claim on basis that plaintiff failed to register works, holding that plaintiff had plausibly alleged that its works were foreign works exempt from registration requirement. Plaintiff, developer of audio and video software, alleged that defendants TikTok and affiliates infringed on source code copyright ("Works"). Defendants moved to dismiss infringement claim, arguing plaintiff failed to register Works. Court stated legal standard that "[a]n unpublished 'United States work' is defined as a work in which 'all authors of the work are nationals, domiciliaries, or habitual residents of the United States…,'' while published United States works are first published in United States; simultaneously in United States and foreign nation; or in foreign nation by United States nationals, domiciliaries, or habitual residents of United States. According to legal standard, "plaintiff must 'adequately allege that its works are not United States works in order to be exempt …." Plaintiff argued Works constituted unpublished foreign works exempt from registration requirement, since Works were authored by plaintiff's Chinese employees in China. In alternative, plaintiff argued that if Works were found to be published on basis that "distribution of software applications derived from unpublished source code were to constitute a publication," as argued by defendants, such publication was in China only. Defendants responded by claiming "copyrights available to the public on the Internet carry a presumption of worldwide availability," and therefore Works were published simultaneously in United States and China and not exempt as foreign works. Court agreed with plaintiff, finding "[i]t is plausible that the Chinese app stores were only publicly available to people in China" and therefore Works were plausibly alleged to be foreign works, allowing plaintiff's claim to survive motion to dismiss.

Future Roots, Inc. v. Year0001 AB, No. 23-6825, 2024 U.S. Dist. LEXIS 211552 (C.D. Cal. Nov. 20, 2024)

District court denied defendants' motion to dismiss, which alleged that plaintiff had not satisfied registration requirement in light of admitted errors in registration certificate. Plaintiff d/b/a Dublab, Los Angeles-based non-profit internet radio station and "creative collective," in 2008 released INTO INFINITY, compilation of eight-second audio loops, including Loop 61 by producer De De Mouse. Both plaintiff and De De Mouse believed that Loop 61 was created as work-for-hire for plaintiff. Plaintiff, through non-attorney, registered sound recording and musical composition of Loop 61 but later admitted there were two "possible errors" in registration, though plaintiff did not know about their inaccuracy when filing. First, plaintiff had indicated, because it believed, that Loop 61 had been provided pursuant to written work-for-hire agreement, but plaintiff had subsequently been unable to locate such agreement. Second, plaintiff had listed incorrect publication date (September 26, 2007 rather than correct date of August 26, 2008). Court held that possible or admitted error in registration certificate did not mean that certificate's existence can be ignored when determining whether plaintiff had complied with registration requirement. While alleged or admitted inaccuracies might serve as basis for subsequent court intervention, they were not roadblock at pleading stage.

Lin Jiang v. Xue Zhao, No. 21-1703, 2024 U.S. Dist. LEXIS 110008 (W.D. Wash. June 21, 2024)

Plaintiffs, Chinese citizens, alleged that they designed logos, and copyrighted symbols and characters for video game *Things As They Are*, and that their works were infringed by defendant, independent game developer, in pay-to-play version of game available on Steam Platform, owned by defendant Valve Corporation. District court granted defendant's motion to dismiss without prejudice, since plaintiffs' first amended complaint failed to establish that works at issue were properly registered United States works, or alternatively were foreign works exempt from registration requirement under Act. Court granted plaintiffs 30 days to amend complaint accordingly.

Design with Friends, Inc. v. Target Corp., No. 21-1376, 2024 U.S. Dist. LEXIS 160439 (D. Del. Sept. 6, 2024)

Plaintiff Design with Friends alleged that defendant Target copied look and feel of its room-planning website. District court found that both plaintiff and defendant had enough evidence to survive summary judgment motion and that material questions of fact remained regarding infringement. Target argued that room planner was not copyrightable since it contained generic ideas, and that errors in plaintiff's copyright application, "including the publication date, the nation of first publication, and the content of the deposit," should invalidate its registration. District court found that there were copyrightable elements in plaintiff's website and that errors in plaintiff's application did not invalidate its copyright registration.

V. INFRINGEMENT

A. Access

Morford v. Cattelan, No. 23-12263, 2024 U.S. App. LEXIS 20774 (11th Cir. Aug. 16, 2024)

Eleventh Circuit, in *per curiam* opinion, affirmed district court's grant of summary judgment in plaintiff's favor where defendant failed to demonstrate access and thus did not meet standard for either probative or striking similarity. Plaintiff artist alleged that his sculptural diptych, "Banana & Orange," was infringed by work entitled "Comedian" by internationally famous artist Maurizio Cattelan. Both works prominently featured banana affixed to wall with silver duct tape, while plaintiff's work also included duct-taped orange. Plaintiff's work was available on his public Facebook page for nearly 10 years and was featured in one of his YouTube videos and blog posts. Plaintiff's website had been viewed in over 25 countries by thousands of unknown viewers. However, this evidence was insufficient to establish nexus between "Banana & Orange" and Cattelan, thereby failing to raise triable issue that Cattelan had reasonable opportunity to access same. Moreover, despite parties' use of same two incongruous items (banana and duct tape), there were sufficient differences in displays to preclude striking similarity finding.

Greene v. Warner Music Grp., No. 23-1555, 2024 U.S. Dist. LEXIS 107515 (S.D.N.Y. June 18, 2024)

District court granted defendants' motion to dismiss for failure to state claim, dismissing all claims with prejudice. Plaintiff, author of instrumental song "It's About To Be On," alleged that defendants, artists Megan Thee Stallion and Anthony White, producer and music publisher, infringed his copyright by creating and producing their song "Savage." Plaintiff provided no direct evidence of copying but relied for access on circumstantial evidence of non-party having access to plaintiff's song twice in four-year period and being professional mentor to one of artists. Court found that this was insufficient to plausibly plead access. Theory of access via non-party is not *per se* unreasonable but requires factual support. Further plaintiff's song was not widely distributed, as work was not commercially released or readily available. Moreover, alleged similarities included 4/4 time signature, two-bar sequence repetition, underlying drum pattern, and use of sirens. Court found none of them strikingly, let alone substantially, similar, as 4/4 time is called common time and used by numerous artists, two bar sequence, tresillo, is basic building block of music, plaintiff admitted drum pattern was played at different tempo, and use of siren sounds not copyrightable because it is choice of instrument.

Piuggi v. Good for You Prods. LLC, 739 F. Supp. 3d 143 (S.D.N.Y. 2024)

District court granted motion to dismiss where plaintiff failed to allege access. Plaintiff pitched reality dating TV show called *Instafamous* to two media production companies; first company passed on project, but second expressed enthusiasm. However, soon after plaintiff's second pitch, HBO released trailer for *Fake Famous* and began casting for *FBOY Island*, both of which were also reality dating TV shows. Plaintiff brought infringement claim against both media production companies and HBO, alleging defendants had conspired to steal plaintiff's ideas and to use them to create HBO's shows. It is well-settled that inference of access requires more than mere allegation that someone known to defendant possessed work in question. Instead, access may be inferred if intermediary has "close relationship with the infringer" including, for example, if intermediary supervises or works in same department as infringer or contributes creative ideas to infringer. Here, court found that alleged connections between media companies and HBO were either wholly implausible or amounted to little more than speculation or conjecture and, as such, companies did not have sufficiently close relationship with HBO to support plausible inference that HBO had access to plaintiff's ideas. As plaintiff failed to plausibly allege particular chain of events by which HBO might have gained access to copyrighted work through media companies, court rejected plaintiff's claim of actual copying and granted defendants' motion to dismiss.

Freeman v. Deebs-Elkenaney, No. 22-2435, 2024 U.S. Dist. LEXIS 136735 (S.D.N.Y. Aug. 1, 2024)

Court denied summary judgment cross motions as questions of fact remained concerning access. Plaintiff, unpublished author of young adult paranormal romance novel, filed suit alleging copyright infringement against defendants, author Tracy Wolff, her agent and her publisher. Plaintiff worked with same agent as Wolff to try to find publisher, but ultimately her novel was passed on. Plaintiff alleged that agent and publisher both had direct access to her work and directly helped Wolff author *Crave*. Defendants did not dispute agent's or publisher's direct access to plaintiff's work. However, there was no evidence on record to support that publisher did anything more than copy editing, which does not amount to authoring. There was question of fact as to whether agent helped Wolff author *Crave*, including text messages from agent discussing her helping Wolff, but such factual issues should be resolved by jury. In lieu of direct access theory, plaintiff also argued indirect access through agent and publisher who had direct access, claiming that they shared her work with Wolff. Plaintiff failed to provide evidence that Wolff had reasonable possibility of viewing plaintiff's work. There was no evidence to counter Wolff's, agent's, and publisher's direct testimony that Wolff had neither seen nor been provided copy of plaintiff's work. Court also found no evidence of striking similarity that could serve as basis for proving access. While court found enough evidence to show that works had probative similarity, evidence did not raise to level of striking similarity because difference outweighed similarities. Thus, question of access was disputed and should be resolved by jury.

Beijing Meishe Network Tech. Co. v. TikTok Inc., No. 23-6012, 2024 U.S. Dist. LEXIS 130213 (N.D. Cal. Jul. 23, 2024)

District court denied defendants' motion to dismiss infringement claim, finding plaintiff plausibly pleaded that defendant had access to allegedly infringed works. Plaintiff, developer of audio and video software, alleged defendants TikTok and affiliates infringed source code copyright ("Works") when plaintiff's former employee ("Employee") became employed by defendant and implemented Works in defendant's software application. Defendants moved to dismiss for failure to state claim, arguing plaintiff failed to plausibly allege Employee had access to Works created by plaintiff after Employee resigned from plaintiff. Plaintiff argued access inferred by striking similarity between different applications created by plaintiff and defendant when such applications created by plaintiff after Employee resigned from plaintiff. Court agreed, finding "[b]ecause [plaintiff] had plausibly pled striking similarity as to one copyrighted work plausibly created after [Employee] left [plaintiff], the Court finds it reasonable to infer that defendants had access to other copyrighted source code created after [Employee] left [plaintiff]." Court did not require plaintiff to plead striking similarity as to each and every work in question in order to show defendants had plausible access to Works. Accordingly, court denied motion to dismiss.

Hian v. Louis Vuitton USA Inc., No. 22-3742, 2024 U.S. Dist. LEXIS 114123 (E.D. Penn. Jun. 28, 2024)

District court granted defendant's motion to dismiss in part. Plaintiff, fashion designer, alleged defendant, major fashion house, copied three of plaintiff's fashion designs. District court granted defendant's motion to dismiss infringement claims as to two of three designs, but allowed plaintiff's claim to survive as to third design. For first design, plaintiff failed to plead registration so claim was dismissed. For two additional designs, defendant argued plaintiff failed to plausibly allege access. However, court found access plausibly pleaded for one design where plaintiff alleged sending design to defendant's executive via email and executive's assistant printed and put materials enclosing design on executive's desk. For remaining design, court found access plausibly pleaded where plaintiff alleged defendant looked up plaintiff online and found design after reviewing materials delivered via email. Court also noted plaintiff plausibly alleged access by pointing to French textile manufacturer hired by both plaintiff and defendant due to common industry practice for such manufacturers to share designs among clients. Ultimately, infringement claim survived only as to one of two designs for which access was found, as court noted one design was not "remotely [visually] similar" to allegedly infringing product so no substantial similarity could be plausibly alleged. As such, court granted motion to dismiss as to two designs, but denied motion to dismiss for remaining design for which access and substantial similarity were plausibly alleged.

B. Copying and Substantial Similarity

Lego A/S v. Zuru Inc., No. 24-634, 2025 U.S. App. LEXIS 6979 (2d Cir. Mar. 26, 2025)

Plaintiff Lego sued defendant toy company for infringement related to toy figurines. District court granted preliminary injunction prohibiting defendant from selling figurines substantially similar to or likely to be confused with plaintiff's Minifigure. In response, defendant redesigned its figurine and released "Second Generation" and later "Third Generation" figurines, both of which were also prohibited due to substantial similarity to protectable elements of plaintiff's Minifigure. Defendant argued that Third Generation figurines fell outside bounds of protection of plaintiff's asserted copyrights and appealed to Second Circuit. Finding that district court failed to provide sufficient reasoning for its decision, Second Circuit held that, where work contains both protectable and unprotectable elements, as here, "more discerning observer" test must be applied. Such test is intended to emphasize that substantial similarity must exist between defendant's allegedly infringing design and *protectable* elements in plaintiff's design. Here, Second Circuit found that plaintiff was not entitled to copyright protection for idea of "little man" figurine but, instead, for particularized expression of figurine. Because district court did not perform any analysis in applying preliminary injunction to Third Generation figurines, Second Circuit held, it was impossible to discern if its ruling was based on unprotectable elements of plaintiff's Minifigure, as defendant argued. Accordingly, Second Circuit remanded case to district court to apply more discerning observer test.

Lee v. Warner Media, LLC, No. 23-8067, 2025 U.S. App. LEXIS 3636 (2d Cir. Feb. 18, 2025)

Pro se plaintiff sued various television networks and production companies alleging that defendants infringed her copyright in sitcom she wrote called *Girlfriends* in order to create television shows *Girlfriends*, *Friends*, *Sex in the City* and *Living Single*. Court of Appeals found that district court correctly concluded that there was no substantial similarity since similarities plaintiff alleged between her works and defendants' – namely, "groups of friends living in a city and confronting life challenges," were unprotectable elements, and plaintiff's works differed dramatically from defendants' in terms of content, total concept and overall feel.

Baker v. Coates, No. 23-7483, 2024 U.S. App. LEXIS 31424 (2d Cir. Dec. 11, 2024)

Second Circuit affirmed district court's adoption of magistrate's report and recommendation dismissing infringement claim for lack of substantial similarity. *Pro se* plaintiff Ralph W. Baker, Jr., author of self-published memoir "*Shock Exchange: How Inner-City Kids From Brooklyn Predicted the Great Recession and the Pain Ahead*," sued author Ta-Nehisi Coates and associated entities alleging that Coates' work mimicked his writing style and copied portions of *Shock Exchange*, which plaintiff had sent to Coates in 2013. Second Circuit agreed with district court that plaintiff failed to demonstrate substantial similarity as matter of law, finding that "passages that Baker includes in his Complaint to demonstrate alleged similarities in content and style show neither; the works are so dramatically different in content, total concept, and overall feel that no 'lay observer'" would regard Coates's works has having been appropriated from plaintiff. Second Circuit noted differences in respective writing styles, and found that to extent there were any similarities between works, those concerned non-copyrightable ideas rather than copyrightable expression.

Cates v. Shlemovitz, No. 23-7501, 2024 U.S. App. LEXIS 24733 (2d Cir. Oct. 1, 2024)

Second Circuit affirmed district court's dismissal of complaint for failure to plausibly allege substantial similarity. *Pro se* plaintiff brought claim against Procter & Gamble and other defendants alleging that various P&G advertisements for product Febreze contained jingle copying five-note portion of plaintiff's song. District court dismissed, holding that plaintiff failed to allege substantial similarity between P&G jingle and his song. Second Circuit affirmed; even expressive works that are protectable contain material that is not original and free to be used by others. Five-note sequence at issue did not contain protectable elements.

Sound & Color, LLC v. Smith, No. 23-2680, 2025 U.S. App. LEXIS 10264 (9th Cir. Apr. 29, 2025)

Ninth Circuit reversed district court's grant of summary judgment for defendants. Issue presented for summary judgment was whether "hook" in plaintiff's song was substantially similar to hook in defendants' song under extrinsic test. District court held that plaintiff could not satisfy extrinsic test as matter of law. Defendants did not argue on appeal that selection and arrangement of unprotectable elements in plaintiff's hook did not constitute original work; rather, they contended that same selection and arrangement did not appear in their hook. Ninth Circuit does not have well-defined standard for assessing substantial similarity in selection and arrangement, but has "suggested generally" that selection and arrangement of elements must be similar enough that ordinary observer, unless he set out to detect disparities, would be disposed to overlook them. Court found reasonable jury could find that hooks shared same combination of unprotectable elements in substantial amounts. Plaintiff's experts opined that hooks share same combination of several musical elements, including same lyrics, same "metric placement" of beginning of each syllable, and same downward "melodic contour" that starts at pitch 7 and ends at pitch 3; and that hooks shared various other similarities, such as four-on-the-floor bass drum pattern with syncopated hi-hats. Defendants' experts did not identify any hook in prior art that shared same melodic contour with those starting and ending pitches. Court further rejected defendants' argument that grant of summary judgment could be affirmed on alternative ground that plaintiff's hook was only entitled to thin copyright protection. Defendants' exhibit containing 43 audio excerpts of songs with similar lyrics but differences in rhythm, pitch sequence, and melodic contour illustrated "wide range of possible expression and broad creative choices" involved in crafting hook, and showed that broad copyright protection was appropriate. Reversed and remanded.

Tangle, Inc. v. Aritzia, Inc., 125 F.4th 991 (9th Cir. 2025)

Tangle, Inc. owned registered copyrights in seven "kinetic and manipulable sculptures," each made of "17 or 18 identical, connected, 90-degree curved tubular segments … that can be twisted or turned 360 degrees where any two segments connect." In 2023 defendant Aritzia Inc., which owned and operated upscale "lifestyle apparel" stores, decorated its store windows with sculptures made with 18 identical, connected, 90-degree curved tubular segments that can be twisted or turned 360 degrees where any two segments connect. Tangle sued for copyright infringement. Aritzia moved to dismiss on basis that Tangle sought to protect unprotectable idea rather than protectable expression. District court agreed, finding that "Tangle claims copyright protection over an amorphous idea, effectively asking the Court to pin jelly to the wall. … Tangle seeks to copyright a particular style." District court found Tangle failed to state claim because works were not sufficiently "fixed" to qualify for copyright protection. In court's view, Tangle was claiming ownership of "every conceivable iteration of tubular sculptures made of interlocking 90-degree segments." Court held that Tangle instead must allege that "specific accused work infringes upon a specific, fixed, protected work." Court dismissed complaint without prejudice, and granted Tangle leave to replead. Rather than replead Tangle gave formal notice of intent not to amend, and district court entered order dismissing with prejudice, from which Tangle appealed. Ninth Circuit reversed. To state claim for copyright infringement, court stated, Tangle must plausibly allege (1) that it owns valid copyright in sculptural works, and (2) that Aritzia copied protected aspects of Tangle's expression. As to first element, Aritzia argued that Tangle's registrations were valid only to extent that they sought protection for specific poses, but not for works' full range of motion. Ninth Circuit disagreed; fact that Tangle's works move into various poses does not, by itself, support conclusion that they are not "fixed" for copyright purposes. Court noted that numerous types of works involving motion are within range of copyrightable subject matter, including choreography and motion pictures, "which 'move' from frame to frame, as does a symphony, from note to note, yet both can be protected under copyright law." Accordingly, like dance, movies, and music, moveable sculpture is sufficiently "fixed" to be entitled to copyright protection, even when its pose changes. Tangle's sculptures are material objects, and thus qualify as "copies." And sculptures can be perceived and reproduced for more than transitory period. Tangle's expression as embodied in sculptures therefore is "fixed in a tangible medium," even though sculpture may take different poses, and Tangle's registered copyrights are thus valid, and protect its works across their full range of motion. As to substantial similarity, Ninth Circuit test contains "extrinsic" and "intrinsic" components. Court could apply only extrinsic test, which asks whether, based on articulable, objective factors, <u>any</u> reasonable juror could find that allegedly infringing work is substantially similar to copyrighted expression. To determine whether work contains "protectable elements" under extrinsic test, court "filters out" unprotectable elements of work – ideas and concepts, material in public domain, and stock or standard features commonly associated with treatment of given subject. On other hand, substantial similarity can be found in combination of elements, even if those elements are individually unprotected. While individual elements of Tangle's sculptures may be unprotected when viewed in isolation, what <u>is</u> protectable is Tangle's selection and arrangement of those otherwise unprotected elements. Court, moreover, held Tangle's particular arrangement of elements entitled to "broad" copyright protection, because wide range of possible expression can result from different choices about number, shape, and proportions of segments used in sculptural work, whether to make segments uniform, and how to connect them. Thus, to establish that Aritzia unlawfully appropriated Tangle's protected expression, Tangle need only show that Aritzia's allegedly infringing sculptures are substantially similar – rather than "virtually identical" – to Tangle's works. Court found Tangle had done so. Comparing selection and arrangement of elements in Tangle's work with that in allegedly infringing work, court determined that Tangle had plausibly alleged that creative choices it made in selecting and arranging elements of its protected sculptures were substantially similar to choices Aritzia made in creating its sculptures. Aritzia's sculptures, like Tangle's, are made from "18 identical, connected, 90-degree curved tubular segments (i.e., one quarter of a torus) that can be twisted or turned 360 degrees where any two segments connect, allowing sculpture to be manipulated to create many different poses." Accordingly, Tangle's and Aritzia's sculptures were similar enough that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them."

Compulife Software, Inc. v. Newman, 111 F.4th 1147 (11th Cir. 2024)

Eleventh Circuit reversed district court's finding of non-infringement on basis that that most of plaintiff's computer code was not protectable, and remanded for further consideration of whether there was legal – i.e., actionable – copying. Plaintiff made life insurance comparison and quotation software that used proprietary factual compilation database of insurance rates to develop insurance quotes. Defendant copied plaintiff's software and database code. Plaintiff sued for infringement, and magistrate held at bench trial that most of plaintiff's code was not protectable, and thus there was no legal copying and no infringement. Eleventh Circuit held that district court erred in misapplying abstraction-filtration-comparison test under which court should: (1) "abstract" software by breaking down allegedly infringed elements into constituent structural parts; (2) "filter" by sifting out all non-protectable material; and (3) compare all protectable material with "copycat" software and consider substantial similarity. Eleventh Circuit found that district court did not properly consider selection and arrangement of plaintiff's computer code, in that it "never identified the entire arrangement of these variables in the code as a constituent component of the code" and focused too heavily on results produced by software rather than arrangement of code used by software. Case remanded to district court for further consideration of whether arrangement of code is protectable. However, Eleventh Circuit noted district court was correct to conclude that certain elements of plaintiff's code (naming of software variables such as "BirthYear"; use of "camel case" wherein spaces between words are removed and first in each word letter is capitalized; and use of software "radio buttons") are too commonly used and/or obvious in software industry to be protectable, and were correctly filtered out during infringement analysis.

Bennett v. Walt Disney Co., No. 23-12786, 2024 U.S. App. LEXIS 22430 (11th Cir. Sept. 4, 2024)

Eleventh Circuit affirmed district court's dismissal of *pro se* plaintiff's infringement claim for failure to state claim. Plaintiff, cartoonist who created character Owl, sued Marvel, alleging that its Falcon and Vulture characters, which included wings with blade tips, military garb, boots, guns, and mask, infringed plaintiff's *Owl* books. Court found that defendant's Falcon and Vulture were not substantially similar to protectable aspects of Owl and that many aspects of winged superheroes are non-protectable stock elements.

Piuggi v. Good for You Prods. LLC, 739 F. Supp. 3d 143 (S.D.N.Y. 2024)

District court granted motion to dismiss where plaintiff failed to allege substantial similarity. Plaintiff pitched reality dating TV show called *Instafamous*, including circulating 40-page treatment, to two media production companies; first company passed on project, but second expressed enthusiasm. However, soon after plaintiff's second pitch, HBO released trailer for *Fake Famous* and began casting for *FBOY Island*, both of which were also reality dating TV shows. Plaintiff brought infringement claim against both production companies and HBO, alleging defendants had conspired to steal plaintiff's ideas and to use them to create HBO's shows. Court found for defendants, finding that plaintiff failed to plead that HBO had access to his work or that works were substantially similar, though, given lack of access, court was not required to make determination regarding similarity. In analysis, court found that plaintiff failed to identify any protectable elements in his own work and, instead, broadly alleged that defendants stole his ideas and concepts, which, in any case, court found to be "stock concepts" common to all reality dating shows, including, e.g., dating show where no one finds love and backstabbing friends' role. Court also highlighted plaintiff's failure to establish that any elements that defendants used, e.g., dating competition, social media use by contestants, documentary-style filming, casting specific actor, etc., were protected by copyright. Finally, plaintiff neglected to attach treatment to complaint or include information about other materials, if any, that were submitted to Copyright Office. Without copy of plaintiff's original work, court stated, it was impossible to compare "total concept and overall feel" of shows. Accordingly, court found plaintiff's "vague and conclusory" allegations of unspecified copying insufficient as matter of law to plausibly plead substantial similarity between *Instafamous* and HBO's shows at issue, and granted defendants' motion to dismiss.

> *Eliahu v. Mediaite, LLC*, No. 23-11015, 2024 U.S. Dist. LEXIS 171689 (S.D.N.Y. Sept. 23, 2024)

District court denied defendant's motion to dismiss, which was based on its alleged *de minimis* use of plaintiff's video. Plaintiff photo-and-video-journalist attended funeral of Jordan Neely, "New Yorker whose death ... has been the subject of widespread public discourse," and captured 15-second video of Representative Alexandria Ocasio-Cortez commenting on Neely's death. Plaintiff subsequently licensed video for distribution, and registered video with Copyright Office. Defendant Mediaite published online news article concerning Neely's funeral, including reporting on Ocasio-Cortez's comments, and article featured single image comprised of screenshot of plaintiff's video. Plaintiff sued for infringement, and defendant moved to dismiss infringement claim based on *de minimis* use. Considering applicable legal standard of whether "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work," court held that screenshot formed prominent feature of defendant's article, being sole photograph illustrating article and being visible for entire time article was displayed on reader' screens. Court also noted that screenshot displayed by defendant "captures the one distinctive moment depicted in [plaintiff's] short video," further undermining *de minimis* defense. Motion to dismiss denied.

> *Stevens v. Tomlin*, No. 23-5898, 2025 U.S. Dist. LEXIS 45053 (E.D.N.Y. Mar. 12, 2025)

Court granted defendant's motion to dismiss where plaintiff failed to plausibly allege access or substantial similarity. Plaintiff screenplay writer claimed authorship of original work *Way Out West* that he registered with Copyright Office and also submitted to Writers Guild of America registry. Defendant filmmaker participated in production of Netflix release *Project Power*. Plaintiff asserted defendant accessed registered script through WGA registry without permission and copied significant artistic elements in *Project Power*. Plaintiff accused defendant of copying several elements, including use of five-minute superpowers, invisibility ability, pursuit by corrupt law enforcement, and protagonist flashbacks. Defendant raised two arguments in motion to dismiss: first, that plaintiff failed to plead plausible theory of access to his copyright-protected work, and second, that plaintiff failed to allege facts showing that *Way Out West* was substantially similar to *Project Power* beyond its unprotectible abstract concepts and general character archetypes. Court agreed with defendant that plaintiff failed to plead plausible theory of access. *Way Out West* was unpublished and therefore likely not widely disseminated (if at all). Nor did plaintiff allege he sent copies of screenplay to defendant or anyone defendant may have known. Plaintiff's only argument – that defendant accessed screenplay through WGA registry – was bare conjecture that failed to raise plausible inference of access. Further, plaintiff failed to plead substantial similarity between works due to lack of protectible elements. Shared concepts like superpowers and superheroes, invisibility, flashbacks, or chase scenes fell within genre conventions and those belonging to public domain. Protagonists' similar fighting skills not dispositive – having fighting skills is attribute of almost every action film protagonist, and since totality of both characters' other attributes dissimilar, there was no plausible showing of appropriation. Plaintiff further failed to meet striking similarity test, which can sometimes suffice in instances without facts alleging access.

Kassel v. Moynihan, No. 23-6958, 2024 U.S. Dist. LEXIS 99403 (S.D.N.Y. June 3, 2024)

Court granted defendants' motion to dismiss plaintiff's copyright claims because plaintiff's work largely unprotectable and, even if court applied ordinary observer test, total concept and feel of works not substantially similar as matter of law. In 2013, plaintiff cartoonist created YouTube channel "Jukebox Manatee" featuring cartoon starring manatee character. In 2018, at Pratt Institute, plaintiff developed idea into pitch that would eventually become final project, "Happily Everglades After" ("Happily"). Plaintiff presented ideas, storyboards, and character designs to other Pratt students and guests at various events in 2018-2019 and final version of Happily was screened at Pratt graduation animation show and eventually premiered in New Jersey International Film Festival in 2020. Plaintiff registered Happily with Copyright Office. Plaintiff later learned of "Loafy," defendants' animated series about Mantee character Loafy. Two of plaintiff's Pratt classmates worked for defendant Cartuna. Plaintiff's complaint alleged copyright infringement when defendants produced and distributed Loafy animated series. Since defendants did not challenge legal sufficiency of plaintiff's access allegations, court only analyzed whether substantial similarity existed between protectible elements of Happily and Loafy. Court found that "key features" plaintiff argued showed substantial similarity between his work and defendants' – (1) manatee protagonist, (2) with laid-back attitude, (3) who has human girlfriend, and (4) who suffers misfortunes as commentary on life – were not protectable expression. As to first two features, laid-back manatee too generalized to be protectable by copyright. Third feature even more basic, unprotectable character type. Last feature found to be unprotectable, basic stock theme. Even if unprotectable elements were considered and court applied ordinary observer test, total concept and feel of two works not substantially similar: Loafy was eight-part animated series with multiple characters versus Happily, four-minute animated video; differences in animation styles, setting (Central Park Zoo tank versus Florida Everglades), messaging and tone, and other characters in works; and main character dissimilar in behavior and actions despite both being manatees. For these reasons, court dismissed plaintiff's copyright claims.

Roberts v. Richard Beavers Gallery, 755 F. Supp. 3d 235 (E.D.N.Y. 2024)

District court granted in part motion to dismiss because some of parties' works not substantially similar. Plaintiff visual artist Deborah Roberts created collages highly sought after by museums and collectors, typically combining "fragments of photographs and fabric swatches with hand drawn and painted details" and featuring Black adolescents as subjects. After plaintiff declined defendant' approach to sell collages at defendant gallery, defendants "arranged to have another artist … discontinue her previous artistic practice so she could create and sell collages similar to Plaintiff's collages." On motion to dismiss infringement claim, defendants argued that defendants works contained elements "that are not unique to Plaintiff's work and are not copyrightable." In assessing substantial similarity, court considered whether to apply "ordinary observer test" or "more discerning observer test," and found that it must compare "the total concept and feel of the contested works," including both literal copying and "excerpting, modifying, and arranging of unprotectable components … in relation to one another." Conducting substantial similarity analysis for numerous works, court found "similarities in the 'total concept and feel'" for several works and denied motion to dismiss as to those works. But for several other works, court found them so dissimilar that no reasonable jury could find substantial similarity, and granted motions to dismiss as to those works.

Stone v. Carey, No. 23-9216, 2025 U.S. Dist. LEXIS 51895 (C.D. Cal. Mar. 19, 2025)

District court granted defendant's motion for summary judgment dismissing infringement claim. On November 1, 2023, plaintiffs Andy Stone, also known as Vince Vance, and Troy Powers filed infringement action against Mariah Carey and her co-writer Walter Afanasieff. Plaintiffs claimed that they co-authored song entitled "All I Want for Christmas Is You," and that defendants had access to plaintiffs' song and copied its lyrics, compositional structure, chord progression, melody and harmony. Parties agreed that principal issue was whether parties' respective songs were substantially similar under Ninth Circuit's extrinsic test, and stipulated to initial phase of expert discovery as to extrinsic test while all other discovery was stayed. Under extrinsic test, court "compares the objective similarities of specific expressive elements in the two works." In applying extrinsic test in musical infringement cases, Ninth Circuit explicitly requires parties to present expert testimony, because "it is unrealistic to expect district courts to possess even a baseline fluency in musicology." Court credited "well-supported conclusions" made in defendants' expert reports, which stated there were no significant structural, harmonic, rhythmic, or melodic similarities between parties' songs, and that any lyrical similarities were arranged differently, with different phrases, used commonly. Defendants' expert testimony concluded that songs were very different, with only element of similarity being use of commonplace lyrical idea (defendants' literary expert noted 12 works released prior to 1989 that use phrase "all I want for Christmas is you" or slight variation) as well as Christmas song clichés. Court excluded both of plaintiffs' expert reports, finding neither report to be product of reliable principles and methods, or to reflect reliable application of principles and methods required by extrinsic test. Well-supported conclusions made in defendants' expert reports were thus effectively unrebutted and not genuinely disputed. Plaintiffs, accordingly, had not met their burden of showing that songs were substantially similar under extrinsic test, and plaintiff who fails to satisfy extrinsic test cannot survive summary judgment on copyright claim.

Boyland v. Tenthousand Projects, LLC, No. 21-7321, 2025 U.S. Dist. LEXIS 5485 (C.D. Cal. Jan. 10, 2025)

Court dismissed infringement claim on summary judgment, finding lack of copying and substantial similarity. Plaintiff owner of copyright to musical composition and sound recording entitled *Pimps in the House* sued for infringement alleging song *Death* by Trippie Redd copied his work. On motion for summary judgment on sound recording claim, defendants submitted unrebutted evidence that defendants' work "does not 'recapture the actual sounds fixed in'" sound recording, and court granted summary judgment. On musical composition claim, defendants argued that claim failed under "extrinsic test" for substantial similarity because only similarity between works was "repeating 16th note pattern" and "repeating single piano note," neither of which is protectable under copyright law. Based on plaintiff's testimony that its musical composition copyright only covered music (and not vocals) to song, defendants submitted expert testimony and declaration analyzing works and concluding that other than vocals (which were not covered by copyright), similarities were "only minor and commonplace elements," such as "repeating 16th hi-hat note and the single repeating piano note." Considering unrebutted testimony that these elements are "commonplace in rap music and many other genres of music," court found lack of substantial similarity as to protectible elements and granted summary judgment for defendants.

Ilyon Dynamics Ltd. v. Kings Fortune PTE. Ltd., No. 24-4581, 2025 U.S. Dist. LEXIS 34021 (N.D. Cal. Feb. 25, 2025)

Magistrate judge denied motion to dismiss infringement claim based on lack of substantial similarity. Plaintiff, owner of copyright in "Triple Match 3D" mobile game, sued defendant alleging its mobile game "Happy Match Café" was infringing. On motion to dismiss, defendant argued that infringement allegations "fail to pass the extrinsic" substantial similarity test and that elements of work defendant allegedly copied "are neither protected by [plaintiff's] copyright nor copyrightable." Specifically, defendant contended that infringement claim failed because it only alleged infringement of "gameplay mechanics or design concepts," which are not subject to copyright protection, and "does not allege infringement of any code from the copyrighted work." Court rejected defendant's argument, finding it "relies on a misreading of the allegations in complaint." Rather, court found that complaint alleged copying of certain visuals in copyrighted work, such as graphic visuals, color schemes, and appearance of certain interfaces. Finding plaintiff sufficiently alleged copying of visual elements of game, motion to dismiss infringement claim denied.

Gregorini v. Apple Inc., No. 20-406, 2024 U.S. Dist. LEXIS 214480 (C.D. Cal. Nov. 25, 2024)

Court denied defendants' motion for summary judgment where defendants had access to plaintiff's work and plaintiff showed genuine dispute as to substantial similarity between works. Plaintiff independent filmmaker alleged defendants – Apple Inc., filmmaker M. Night Shyamalan, and various production companies – impermissibly copied from her independent film *The Truth About Emanuel* ("*Emanuel*"). In *Emanuel*, mother hires young nanny to care for baby doll that mother believes is her deceased child. Defendants created show *Servant*, supernatural thriller that follows wealthy couple who hired nanny to care for baby doll that mother believes is her deceased child. Plaintiff charged defendants with single claim of copyright infringement. In 2020, defendants' motion to dismiss on basis that two works were not substantially similar was granted, but Ninth Circuit revered because reasonable minds could differ on issue. Court first found circumstantial evidence of defendants' access to plaintiff's film. It had widespread dissemination: *Emanuel* premiered at Sundance Film Festival, where it received acclaim, and starred well-known actors. Defendant Shyamalan asked employees to scout talent at film festivals, and defendant Apple sent representatives to Sundance. *Emanuel's* notoriety in independent film scene during same time defendants consumed independent films demonstrated reasonable possibility defendants had chance to review *Emanuel*. Second, court found reasonable minds could conclude defendants had direct access to *Emanual*. Plaintiff produced evidence to show at least one defendant – Apple executive – had direct access to *Emanuel* while *Servant* was in creative development. Finally, court concluded plaintiff showed genuine dispute as to substantial similarity between works. Plaintiff put forth "selection-and-arrangement theory" and needed to identify combination of protectible elements as eligible for copyright protection. Plaintiff's expert fleshed out pattern of similarities between works. Though some differences, court found too much in common to conclude that "no reasonable juror could find substantial similarity."

Atari Interactive, Inc. v. State Farm Mut. Auto. Ins. Co., No. 24-704, 2024 U.S. Dist. LEXIS 175442 (N.D. Tex. Sept. 27, 2024)

Court denied motion to dismiss infringement claim based on defendant's contention that use of copyrighted work was *de minimis*. Plaintiff Atari owned copyright in Crystal Castles arcade video game, including artwork wrapping game cabinet and gameplay features. Defendant State Farm published six-second online video advertisement featuring images of arcade game cabinet, which plaintiff Atari alleged features identical Crystal Castles video game cabinet artwork and gameplay, albeit with name Crystal Castles replaced with Witches Broom. On motion to dismiss infringement claim, defendant argued its use of work in six-second video clip was *de minimis* and thus there was no actionable copying. Considering precedents in which courts found *de minimis* use when work was only visible in background or periphery of defendant's reproductions, district court found in this case that "the arcade cabinet appears in the center of the video for the majority of the length of the video." Finding that copyrighted work formed "central part of the plot" of advertisement, district court held copying more than *de minimis* and denied motion to dismiss.

AMDL Collections, Inc. v. Coast to Coast Bus. Mgmt., Inc., No. 23-4146, 2025 U.S. Dist. LEXIS 756 (S.D. Tex. Jan. 3, 2025)

District court granted defendants' motion for summary judgment as to some accused toys but reserved one for determination at trial. Plaintiff and defendant both made plush animals in China and imported them to United States. Plaintiff sued defendant alleging infringement of its copyrights in four toys: (1) bearded dragon named "Pogo," (2) mosasaurus named "Moby," (3) gecko lizard named "Leo," and (4) bee named "Buzzy." Court conducted side-by-side comparison for each toy to determine whether ordinary observer would find substantial similarity between plaintiff's and defendant's products. As to Buzzy bee and Leo gecko toys, side-by-side comparison with defendant's bee and Gila monster plush toys did not show substantial similarity that would amount to infringement. Accordingly, court granted defendant's motion for summary judgment of noninfringement as matter of law for bee and gecko/Gila monster toys. Court next considered plaintiff's bearded dragon, Pogo, and found that placement and design of white felt spikes on toy were protectable elements. Through side-by-side comparison with defendant's bearded dragon, court concluded that reasonable jury could find toys to be substantially similar and, as such, denied both parties' motions for summary judgment, leaving question of substantial similarity and infringement to factfinder. Finally, court considered Moby mosasaurus and, again, found placement and design of felt spikes were protectable elements. However, in contrast to analysis for bearded dragon, court found that felt spikes, while protectable and similar in isolation, were not significant in relation to whole toy, which is dominated by unprotectable elements. Accordingly, court granted defendant's motion for summary judgment of noninfringement given lack of substantial similarity between "overall look and feel" of mosasaurus toys.

Epstein v. Bruce Furniture, Inc., No. 19-30050, 2024 U.S. Dist. LEXIS 157131 (D. Mass. Jul. 16, 2024)

Court found no substantial similarity where parties' respective works only shared unprotectable elements such as factual information and common slogans and catch-phrases. Plaintiff, creator of promotional mailers for furniture stores, used different versions of form letter ("Work") for different clients. Plaintiff sued defendant furniture store for infringement for using promotional letter that shared certain features with Work. Court looked at allegedly similar portions of defendant's letter as compared to Work and concluded much of Work consisted of unprotectable elements. Specifically, respective letters both featured primarily factual information, such as names and locations of furniture stores, dates of sales, information about interest rates and brand name manufacturers included in sale. Additionally, court found phrases such as "Your bank can't do this. Your credit card won't do it," referring to interest rates, as "so common in interest-free advertising as to be unoriginal." Court found similarities between respective letters to largely consist of unprotectable factual information concerning sales and aforementioned unoriginal phrases, and found other differences, such as defendant's flyer being addressed to general audience with "flashier" design while plaintiff's flyer was addressed to specific past customer in letter format, as sufficient to avoid substantial similarity. Accordingly, court found no substantial similarity between parties' respective letters.

C. Contributory/Vicarious Infringement

UMG Recordings, Inc. v. Grande Commc'ns Networks, L.L.C., 118 F.4th 697 (5th Cir. 2024)

Court held defendant liable for willful contributory infringement because defendant provided its subscribers with tools necessary to infringe, and defendant's subscribers used those tools to infringe, plaintiffs' copyrights. Defendant internet service provider originally had policy to address copyright infringement by subscribers and partnered with third-party company Rightscorp to get notices of infringement. But after defendant was acquired, policy changed to no longer terminate subscribers who infringed even after receiving notices from Rightscorp. Record label plaintiffs brought suit against defendant for contributory infringement and succeeded following jury trial. Defendant appealed final judgment. Fifth Circuit held district court did not err in concluding jury's verdict finding defendant liable for contributory copyright infringement was supported both as matter of law and by sufficient evidence. Court agreed plaintiffs sufficiently proved all four elements of contributory infringement. First, plaintiffs proved ownership of works by providing declarations establishing chain of title by which they came to own or control copyright in works. Second, plaintiffs provided substantial evidence that defendant's subscribers committed direct infringement: plaintiffs worked with third-party company Rightscorp to identify instances of infringement by subscribers and used trade association to confirm that Rightscorp downloaded works at issue from subscribers. Third, district court correctly concluded that jury had legally sufficient basis to find knowledge or willful blindness – between 2011 and 2017, Rightscorp sent more than 1.3 million infringement notices to defendant, 300,000 of which concerned works in instant suit. Defendant had policy not to terminate subscribers for copyright infringement no matter how many notices it received. Fourth, Fifth Circuit concluded district court applied correct legal standard by determining defendant could be secondarily liable if it materially contributed to subscribers' infringing activity. Here, nexus between defendants' conduct (providing subscribers with tools necessary to conduct infringement, i.e., high speed internet access, and continuing to do so after learning subscribers were repeatedly using those tools to infringe, along with policy never to terminate accounts that infringed) and tort (copyright infringement) was direct. Direct nexus permitted inference that defendants' knowing provision of internet services to infringing subscribers was actionable. Evidence at trial supported district court's decision.

N.Y. Times Co. v. Microsoft Corp., No. 23-11195, 2025 U.S. Dist. LEXIS 64462 (S.D.N.Y. Apr. 4, 2025)

District court denied defendants' motion to dismiss contributory infringement claims. Defendant OpenAI, founded in 2015, developed large language models ("LLMs"), AI that receives text prompts and generates natural language responses. In 2018, defendant released first of its Generative Pre-trained Transformers ("GPTs") in 2018 under name GPT-1, followed by release of GPT-2 in 2019, GPT-3 in 2020, GPT-3.5 in 2022 and GPT-4 in 2023. In November 2022, OpenAI released ChatGPT, text-generating chatbot. Plaintiffs, news organizations including New York Times, New York Daily News and Center for

Investigative Reporting, sued Microsoft (having invested in OpenAI) and OpenAI, claiming that defendants' LLMs implicated plaintiffs' copyrighted articles and other written works ("Works") at various stages. Pre-training (or collection) stage involves collecting and storing "vast amount of content scraped from the internet," including plaintiffs' websites, then creating datasets later used to train LLMs. Training (or input) stage involves storage of training articles in computer memory, provision of portions of articles to LLM and adjusting LLM's parameters so it accurately predicts next word. Response generation (or output) stage sees LLM responding to user queries based on data collected and using for training. Responses can regurgitate large portions of plaintiffs' Works and sometimes produce hallucinations, responses that are demonstrably but not recognizably false. Plaintiffs, in alternative to their direct infringement claims, alleged that defendants "materially contributed to and directly assisted with the direct infringement by end users by (1) building and training their LLMs using plaintiffs' works; (2) deciding what content is outputted by their LLMs through specific training techniques; and (3) developing LLMs capable of distributing copies of plaintiffs' works to end users without authorization by plaintiffs." Defendants moved to dismiss contributory infringement claim, arguing that plaintiffs had not alleged third-party direct infringement of plaintiffs' Works or defendants' knowledge of such infringement, as well as that defendants' LLMs were capable of substantial non-infringing uses. Court held that plaintiffs had adequately pled third-party infringement by alleging "widely publicized" instances of copyright infringement after release of ChatGPT as well as by including "numerous examples of infringing outputs." As to knowledge of third-party infringement, parties disagreed about applicable standard: plaintiffs urged actual or constructive knowledge (Second Circuit standard) while defendants urged heightened standard requiring actual knowledge or willful blindness to specific acts of infringement (Ninth Circuit standard). Applying Second Circuit standard, court held that plaintiffs sufficiently alleged that defendants possessed far more than "generalized knowledge of the possibility" of third-party infringement. Plaintiffs alleged both defendants' actual knowledge as well as that "defendants knew not only that their unauthorized copying of plaintiffs' works on a massive scale during the training of their LLMs would 'result[] in the unauthorized encoding of huge numbers of such works in the models themselves,' but also that it 'would inevitably result in the unauthorized display of such works' in response to third-party queries." In other words, plaintiffs had alleged that copyright infringement was central to defendants' business model. Court further rejected defendants' contention that contributory infringement claims failed because defendants' LLMs capable of "substantial noninfringing uses." Citing to U.S. Supreme Court's decisions in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005), court found that defendant whose product capable of such uses can still be held liable for third-party infringement in certain circumstances (e.g., where defendant takes affirmative steps to foster infringement, as in *Grokster*). *Sony* merely foreclosed "imputing 'culpable intent' solely based on the 'characteristics or uses of distributed product.'" Unlike in *Sony*, here there was "ongoing relationship" between "defendants and end users, via defendants' LLM outputs that respond to end users' prompts," and LLMs were "*built* on purportedly appropriated works." Finally, *Sony* and *Grokster* analyzed claims of contributory infringement by inducement, whereas here plaintiffs alleged contributory infringement by material contribution. Plaintiffs had therefore plausibly alleged contributory infringement.

Totin v. Brown Harris Stevens Residential Sales, *LLC,* No. 22-9392, 2024 U.S. Dist. LEXIS 154705 (S.D.N.Y. Aug. 28, 2024)

Court granted in part and denied in part defendant's summary judgment motion. Plaintiff photojournalist asserted claims of direct and vicarious infringement, alleging that defendant's real estate listing website used plaintiff's works without permission. Defendant moved for summary judgment. As to direct infringement claim, court found lack of evidence of actual copying, and therefore granted defendant's motion for summary judgment. However, court found defendant had obvious and direct financial interest in copyrighted material and had right and ability to supervise postings on real estate listing website. Therefore, court concluded reasonable jury could find defendant vicariously liable for infringement and denied defendant's summary judgment motion as to claim.

White v. DistroKid, 738 F. Supp. 3d 387 (S.D.N.Y. 2024)

Court granted defendant's motion to dismiss plaintiff's vicarious and contributory infringement claims. Plaintiff musician wrote music and beats, sometimes licensing beats to other artists. In 2020, plaintiff created series of beats ("Beats") that he registered with Copyright Office and subsequently licensed to another musician, Rivers, via oral agreement. Agreement provided Rivers could use Beats for her singing as long as she continued to book live performances for plaintiff and provided him with 50% of proceeds of exploitation of Beats or any music including them. If she failed to perform payment and live performance obligations, license rights would automatically revert to plaintiff, and Rivers would no longer have right to use Beats. Later, Rivers created album using Beats ("Album"). Plaintiff posted Album to defendant DistroKid's website where, for fees, it distributed music to online streaming services and stores (e.g., Spotify, iTunes, Amazon). After Rivers created Album, she and plaintiff performed show, but she then did not continue to meet performance obligations under agreement and also did not pay plaintiff 50% of proceeds for performances or that were generated by Album. Rivers registered copyright in Album. Plaintiff told Rivers she no longer had authorization under license to use Beats and must cease use. Plaintiff removed Album from DistroKid, but Rivers later re-uploaded it, and DistroKid changed format of at least one copy of Album before distributing it to various digital stores. Under first prong of vicarious infringement claim, plaintiff provided sufficient factual allegations establishing DistroKid had right and ability to supervise or control infringing activity (could remove content from digital stores). On second prong, plaintiff must allege causal relationship between infringing activity and financial benefit defendant reaps. Plaintiff argued user access fees Rivers paid to DistroKid provided DistroKid with requisite financial benefit. But causation was lacking: plaintiff failed to show facts that users of DistroKid were drawn to its platform in order to engage in or profit from copyright infringement; mere payment of monthly access fee not sufficient to hold DistroKid vicariously liable for copyright violations committed by Rivers. On contributory infringement, court found complaint failed to allege DistroKid had actual or constructive knowledge that Rivers uploaded infringing content and did not provide facts to suggest DistroKid and Rivers acted in concert. Plaintiff only alleged DistroKid was aware of royalty payments received for content, not that content infringed plaintiff's copyright in Beats. Court granted motion to dismiss on both claims.

> *Robinson v. Binello*, No. 24-6501, 2025 U.S. Dist. LEXIS 54405 (N.D. Cal. Mar. 24, 2025)

District court dismissed contributory infringement claims but did not dismiss direct and vicarious infringement claims against Roblox for allegedly allowing third party to upload plaintiff's work to Roblox platform. Roblox, platform to play games created and uploaded by users, also allowed users to upload assets, including music, to Roblox cloud for use in those games. Composer plaintiff alleged that his song was uploaded by user, and Roblox staff reviewed and approved it before it was then used in popular game, being downloaded thousands or millions of times. Court declined to dismiss direct infringement claim, as plaintiff alleged that Roblox moderation team actually reviewed and approved song in question, exercising control over it, and that song would not have been uploaded to platform but for actions of moderators. Court did not dismiss vicarious infringement claim. Roblox argued that it received no direct financial benefit from use of song in games on its platform, and thus could not vicariously infringe, but plaintiff pled direct financial benefit to Roblox in form of fee that third-party user paid Roblox to upload song in first place. Court dismissed contributory infringement claim, as plaintiff did not allege that Roblox had specific knowledge that recording was plaintiff's copyright-protected audio recording.

> *Andersen v. Stability AI Ltd.*, 744 F. Supp. 3d 956 (N.D. Cal. 2024)

District court denied AI companies' motions to dismiss artists' claim for induced infringement based on defendants' sale of AI software to users who could then create infringing outputs. Visual artists filed class action suit against Stability AI, Runway AI, Midjourney, and DeviantArt, creators of AI products using Stable Diffusion software that used plaintiffs' works as training images, such that AI could produce output images in style of those works. Court denied Stability and Runway's motions to dismiss claims of induced infringement, in which plaintiff alleged that by selling Stable Diffusion models that, by operation, permit users to copy plaintiffs' works, those defendants are responsible for that third-party infringement. Court allowed induced infringement claims to proceed to discovery, in part, based on Stability CEO's statement that Stability took 100,000 gigabytes of images and compressed them into two-gigabyte file that can "recreate" any of those images. Runway did not make such statement, but allegations that it helped train and develop Stable Diffusion were sufficient to survive motion.

> *Rearden LLC v. Walt Disney Co.*, No. 17-4006, 2024 U.S. Dist. LEXIS 152889 (N.D. Cal. Aug. 26, 2024)

Plaintiff created MOVA Contour Reality Capture, program used for capturing faces to create computer graphic characters in movies. Disney had contracted with DD3, which used MOVA program for Disney movies, including Disney's live action *Beauty and the Beast*. Plaintiffs sued Disney, alleging that Disney was contributorily and vicariously liable for infringement because DD3 was copying MOVA software every time software was used.

Prior to jury verdict, Disney filed motion for judgment as matter of law, arguing that Reardan did not provided legally sufficient evidence that (1) Reardan owned copyright, (2) that Disney had practical ability to control DD3's infringement, (3) that Disney directly financially benefitted from infringement, (4) that there was causal nexus between DD3's alleged infringement and Disney's revenue from film, and (5) that Reardan suffered actual damages as result of infringement. Jury found that Rearden owned copyright and that Disney was contributorily and vicariously liable for DD3's infringement. Disney renewed its motion for JMOL, and district court granted Disney's renewed motion. Court found that Rearden had provided sufficient evidence that it owned copyright in MOVA. However, while Disney may have been contributorily liable, court found Disney's argument that it was not vicariously liable persuasive, since jury had not been presented with sufficient evidence that Disney had practical ability to identify, police and control infringing conduct of DD3. Court found that Disney did derive financial benefit due to DD3's direct infringement and that MOVA contributed to success of *Beauty and the Beast*.

> *Waterman v. TikTok, Inc.*, No. 24-4802, 2024 U.S. Dist. LEXIS 198512 (C.D. Cal. Oct. 30, 20244)

District court granted defendant's motion to dismiss plaintiff's secondary infringement claims. Plaintiff, photographer, created and owned two registered copyrighted photographs ("Photos"), which she alleged were "displayed/published" on defendant TikTok's platform by TikTok users. Plaintiff claimed that, despite sending multiple DMCA takedown notices, TikTok failed or refused to remove Photos. After plaintiff sued, TikTok moved to dismiss all copyright claims. Plaintiff did not dispute that she had failed to plead volitional conduct required for direct infringement claim, so dispute centered on secondary infringement claims. Court held that contributory infringement's requirement that TikTok have "actual knowledge that specific infringing material is available using its system" was not met because plaintiff did not indicate what information was included in her DMCA takedowns, making it impossible whether TikTok had "sufficient information" to find specific infringing content on its system. Plaintiff also failed to allege that TikTok was able to take "simple measures" to prevent further infringement, requiring dismissal of contributory infringement claim. Plaintiff did not sufficiently allege that TikTok had direct financial interest in infringing activity, as required for vicarious infringement claim. In particular, plaintiff did not allege any relationship between infringing activity and alleged increased traffic to TikTok by existence of Photos on its platform. Court dismissed claims with leave for plaintiff to amend.

D. Miscellaneous

> *McGucken v. Valnet, Inc.*, No. 24-511, 2024 U.S. App. LEXIS 32419 (9th Cir. Dec. 19, 2024)

Plaintiff, landscape photographer, alleged that defendant violated plaintiff's copyrights in 36 photographs when defendant embedded plaintiff's Instagram posts on defendant's website. Ninth Circuit affirmed district court's dismissal of plaintiff's complaint because claim failed

Server Test, which states that embedded or in-line linked images appearing on user's computer screen do not directly infringe display rights. Because defendant's website contained only embedded references to plaintiff's Instagram posts, defendant never displayed or distributed copies of photographs. Thus, defendant did not infringe plaintiff's display rights under Server Test. Further, because direct infringement claim failed, plaintiff's contributory and vicarious liability claims also failed. On appeal, plaintiff argued that Server Test "should be cabined to use in the search-engine context." Ninth Circuit explained that test did not rely on unique context of search engaging but instead method of embedding images. Accordingly, Ninth Circuit affirmed district court's finding of non-infringement.

White v. DistroKid, LLC, No. 22-2205, 2025 U.S. Dist. LEXIS 23937 (S.D.N.Y. Feb. 11, 2025)

Court granted defendant judgment on pleadings on plaintiff's claim of direct infringement, finding defendant did not engage in "volitional conduct." Plaintiff musician created series of beats and musical recordings to which he obtained copyright registration. Plaintiff alleged that musician with whom he previously had professional relationship, without authorization, uploaded copies of works to defendant DistroKid, "music distributor, i.e., company that, for a fee, populates a musician's music to a variety of streaming services, online music stores, and other platforms," which constituted direct infringement by DistroKid. On motion for judgment on pleadings, defendant argued that it was merely "platform" by which users facilitate distribution of music to streaming services, and that due to its automatic operation there is no "volitional" conduct by defendant to support direct infringement claim. Relying heavily on *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008), court found that defendant service operated as "automated process," such that there was no material difference between defendant's responsibility for infringement "and that of the owner of a copy shop who provides the machines that allow infringement to potentially occur."

Andersen v. Stability AI Ltd., 744 F. Supp. 3d 956 (N.D. Cal. 2024)

District court denied AI companies' motions to dismiss artists' claim for induced infringement based on defendants' sale of AI software to users who could then create infringing outputs. Visual artists filed class action suit against Stability AI, Runway AI, Midjourney, and DeviantArt, creators of AI products using Stable Diffusion software that used plaintiffs' works as training images, such that AI could produce output images in style of those works. Midjourney moved to dismiss direct infringement claim based on its use of plaintiffs' works as training images, arguing that plaintiffs failed to identify which specific works were actually used for training. Court denied motion, finding that given size of datasets and sufficient allegations about why plaintiffs thought their works were in training set, that level of detail was unnecessary in pleadings. DeviantArt moved to dismiss direct infringement claims as well, arguing that unlike other defendants, it was not alleged to have trained any AI model, but only to have used AI tools provided by other defendants in service provided to its users, and holding all individual users of AI software liable for infringement would be unsupportable. Court found that plaintiff alleged that protectible elements of their works remained inside Stable Diffusion, and whether DeviantArt's use of Stable Diffusion was infringement or fair use was question for summary judgment.

> *Providence Publ'ns, Ltd. Liab. Co. v. Hub Int'l Ins. Servs., Inc.*, No. 24-109, 2024 U.S. Dist. LEXIS 181859 (E.D. Cal. Oct. 4, 2024)

District court denied defendant's motion to dismiss. Plaintiff, publisher of *Workers Comp Executive* e-newsletter, which it sent to subscribers via different subscription options, sued defendant for willful infringement because it discovered that defendant, who only possessed single subscription option, forwarded e-newsletter to other unsubscribed employees at its company at least 40 separate times. Defendant filed motion to dismiss, arguing that case was essentially "contract case" and that complaint failed to establish existence of valid, enforceable agreement. Court denied motion to dismiss, since plaintiff sufficiently alleged that defendant exceeded scope of license, which constitutes copyright infringement.

> *Raynor v. Comcast Corp.*, No. 24-1842, 2024 U.S. Dist. LEXIS 101479 (E.D. Pa. June 7, 2024)

Pro se plaintiff sued Comcast and DreamWorks, arguing that they plagiarized his life story in 1998 animated film *The Prince of Egypt*, about biblical character Moses. District court had dismissed plaintiff's claims but allowed him to amend complaint. Court reviewed amended complaint and dismissed claims with prejudice, finding that plaintiff's claims that he was God and that *The Prince of Egypt* infringed on his life were frivolous and clearly baseless. Plaintiff "does not allege ownership of a valid copyright. He identifies his copyright as 'the true story of events that took place while in dispute against the Governments of Earth ...' which he 'wr[ote] and recorded' on a GoDaddy site and on Facebook. But Mr. Raynor does not allege a valid copyright in anything he wrote on his website or Facebook in 1998 when DreamWorks produced *The Prince of Egypt* movie or a valid copyright in his life. Nor does Mr. Raynor allege DreamWorks copied original elements of his original work, the second element of a copyright infringement claim."

> *Bungie, Inc. v. Phx. Digit. Grp. LLC*, No. 21-811, 2024 U.S. Dist. LEXIS 156716 (W.D. Wash. Aug. 30, 2024)

Plaintiff, owner of copyright in video game *Destiny 2*, brought infringement claim against defendant, creator of cheat codes for game. Defendants filed counterclaim for circumvention of technological measures under DMCA. At trial, jury rendered verdict for plaintiff on copyright claim and against defendants on DMCA counterclaim, finding that defendants were directly, vicariously, and contributorily liable and that defendants had not proven their DMCA counterclaim. Defendant then filed motion for judgment as matter of law. Court denied defendant's JMOL motion on copyright claim, finding that jury's verdict should be upheld since it was supported by substantial evidence, namely, that defendant had admitted at trial to developing cheat codes by reverse engineering plaintiff's game, and plaintiff had presented evidence that cheat codes caused unauthorized copying to occur.

Equine Legal Sols., PC v. Fireline Farms, Inc., No. 22-1850, 2025 U.S. Dist. LEXIS 26126 (D. Or. Feb. 12, 2025)

Court granted plaintiff's motion for summary judgment on infringement. Plaintiff provides equine-related legal services in Oregon and owned copyrights in release forms prepared specifically for use in horse rental and housing context. Defendant operated horse ranch in Florida and purchased forms, which were delivered via email for download, from plaintiff. Defendant then provided forms to web developer for defendant's new business website. Web developer saved documents online such that they were accessible to public at URLs connected to defendant's business website. After several attempts to have forms taken down, plaintiff sued defendant for infringement. Court found that defendant did not violate plaintiff's exclusive distribution rights because plaintiff failed to show actual dissemination or that defendant intended to sell, lease or transfer ownership of forms. However, court did find that defendant violated plaintiff's display rights and consequently granted plaintiff's motion for summary judgment on infringement. Court reasoned that, even though it is likely that no other user would be able to find forms, by displaying forms in connection with defendant's website such that they were publicly accessible to anyone with internet, defendant "publicly displayed" forms. Plaintiff was not required to show any minimum number of public users who in fact accessed forms through website to establish *prima facie* case of infringement. Accordingly, plaintiff established that defendant violated plaintiff's exclusive display rights.

VI. DEFENSES/EXEMPTIONS

A. Fair Use

Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 (2d Cir. 2024)

Second Circuit affirmed district court's denial of defendant's summary judgment motion because defendant's scanning and uploading of plaintiffs' books was not fair use. Defendant non-profit Internet Archive ("IA") in 2011 partnered with non-profit Open Library of Richmond ("OLR") and for-profit bookstore Better World Books ("BWB") to create Free Digital Library ("Library"), following process where OLR bought or accepted donations of books (primarily from BWB) and sent those books to IA for scanning and digitizing, while retaining possession of books in shipping containers where they were kept out of circulation post-scanning. IA then posted digital copy of each book on IA's website, where IA account holders could access it in full for free under "Controlled Digital Lending" ("CDL"), which allowed only as many concurrent "checkouts" of digital book as there were physical copies in storage (except between March and June 2020, when IA lifted its one-to-one owned-to-loaned ratio and allowed up to 10,000 patrons at time to "borrow" each digital book). In 2018, IA launched Open Libraries Project, allowing libraries to "contribute" non-circulating print books to number of concurrent checkouts available on IA website. IA marketed its lending services to libraries as alternative to print and eBook licenses from publishers. Plaintiffs, four leading U.S. book publishers ("Publishers"), sued IA for infringement of 127 works ("Works") and IA asserted defense of fair use, which was rejected by district court. Second Circuit affirmed. First, IA's use was not transformative because its digital books serve same exact purpose as originals: making authors' books available to read. Although IA argued that its copying was done to make lending more efficient, IA's Library offered few efficiencies beyond those already offered by Publishers' own eBooks (for which Publishers charged licensing fees) while greatly impinging on Publishers' exclusive rights to prepare those works. IA further argued that, by adhering to CDL, IA delivered each work only to one already entitled to view it (i.e., person entitled to check out physical copy), but IA did not perform traditional functions of library; it instead prepared derivatives of Publishers' works and delivered those to its users in full. Contrary to district court, however, Second Circuit did not find IA's use to be commercial because IA did not directly profit from Library. IA did not charge fees for its services and, though IA's browser-based digital book platform contained button allowing user to purchase print book from BWB, link between this commercial gain and IA's use of works to create Library was "attenuated." Likewise, IA's solicitation of donations (which was done on nearly every page of IA's website) was not specifically tied to Library and thus too attenuated to render use commercial. Only benefits IA obtained from Library were nonmonetary benefits such as advancing its mission and bolstering its reputation, which, if held to be commercial profits, would render commercial virtually all activities of any nonprofit. Although IA's use was not commercial, it was still not transformative and thus first factor weighed in Publishers' favor. Second, both Publishers' fiction and nonfiction books were published expressive and creative works, weighing in Publishers' favor. Third, IA copied works in their entirety and distributed full copies to public, and such wholesale copying was not necessary to achieve transformative secondary purposes. Finally, IA's use caused harm to market for Works, regardless of format. Not only was IA's Library likely to serve as substitute for originals; it was expressly intended to achieve that result, as IA itself advertised to libraries. Were IA's use to become widespread, it is "self-evident" that it would adversely affect Publishers' market for works. Moreover, if authors knew their original works could be copied and disseminated for free, there would be little motivation to produce new works. Any short-term public benefits of IA's Library were therefore outweighed not only by harm to Publishers and authors, but also by long-term detriments to society.

Wilder v. Hoiland, No. 24-1436, 2025 U.S. App. LEXIS 5722 (2d Cir. Mar. 12, 2025)

Court of Appeals affirmed district court judgment for defendant based on affirmative defense of fair use. Plaintiff professor authored and registered copyright in materials for faculty development program. Defendant professor used portions of materials in presentation about program's successes and challenges. Plaintiff sued for copyright infringement. Both parties moved for summary judgment, and defendant asserted affirmative defense of fair use. District court granted summary judgment for defendant, and plaintiff appealed. Regarding first fair use factor, Court of Appeals found that purpose and character of defendant's use of portions of materials had been sufficiently transformative, because defendant used portions as visual aids for presentation concerning assessment results of plaintiff's faculty development program for those interested in instituting similar development programs. On second factor, plaintiff did not dispute that works were factual and informational. Court of Appeals affirmed district court's conclusion that third factor weighed slightly in favor of plaintiff but was not dispositive in fair use analysis. Even though district court found that defendant made use of substantial portion of works, Court of Appeals concluded that plaintiff intended works to be treated as one cohesive curriculum. Court of Appeals thus held that third fair use factor weighed slightly in favor of plaintiff, but not strongly enough to overcome finding of fair use. As to fourth factor, Court of Appeals affirmed district court's analysis that defendant's singular use of portion of works would not have impacted whatever limited market existed for works. Court of Appeals held that district court did not err in granting summary judgment in favor of defendant.

Keck v. Mix Creative Learning Ctr., LLC, 116 F.4th 448 (5th Cir. 2024)

Fifth Circuit affirmed district court's grant of summary judgment based on fair use. Defendant was art studio offering art lessons to children. In 2020, defendant began selling "art kits" online so students could learn at home during pandemic. One kit reproduced artwork from plaintiff's Dog Art series. Plaintiff sued for infringement, seeking enhanced statutory damages for willful infringement. District court granted summary judgment in favor of defendants based on fair use, finding that purpose and character fair use factor favored art studio where, although commercial enterprise, art kits had educational purpose that was significantly different from original, decorative purpose of artist's dog-themed artworks and therefore use of works was transformative. Court also found that effect upon potential market factor favored studio as it used artists' work for educational purposes, did not participate in same markets as artists, and there was no likely market for licensing work as teaching tool. Fifth Circuit affirmed district court's judgment.

Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc., 126 F.4th 589 (8th Cir. 2025)

Court of Appeals upheld district court's holding that inclusion of floorplans in real estate listings was fair use. Plaintiff, creator of home design featuring triangular atrium and stairs, owned registered copyright in designs and photographs of designs. Plaintiff discovered that several defendants, real estate agents, used floorplans showing plaintiff's designs in real estate listings to sell homes that had been built using plaintiff's designs. Plaintiff sued real estate agents, arguing that they infringed his copyrights by including floorplans in real estate listings. Court of Appeals reasoned that agents' purpose of designs was transformative and different from plaintiff's purpose, since defendants used designs informationally, to show to buyers to help them decide to buy homes, rather than to facilitate construction of homes. Court reasoned that even though agents used designs in commercial setting to sell homes, commerciality sub-factor was weighted less heavily than transformativeness since defendants did not copy plaintiff's advertisements to produce their own advertisements of new homes; they merely used floorplans as part of reselling already existing home. Court found that nature of work weighed slightly against fair use, as plaintiff's work contained some artistic features that were not simply utilitarian. However, this factor was of less significance. Court found that third factor was neutral, since copying was tailored for purpose of supplying information to potential homebuyers. Court found that defendant's sales did not harm plaintiff, and instead may have benefitted plaintiff by increasing resale value of homes built to his designs. Court also found that risk of others using plaintiff's floorplans as shortcut to create infringing works was low and speculative.

Griner v. King, 104 F.4th 1 (8th Cir. 2024)

Eighth Circuit affirmed jury's finding that congressman's fundraising committee's use of copyrighted meme template photo was not fair. Plaintiff took photo of her 11-month-old Sam that went viral, becoming one of earliest and most popular internet meme, known as "Success Kid," with billions of uses. In 2012, plaintiff registered copyright in Success Kid template and licensed use of template to many companies (including Coca-Cola and Microsoft) for use in advertisements. In 2020, defendant, fundraising committee for Congressman Steve King, posted version of Success Kid meme captioned "FUND OUR MEMES," alongside solicitation for campaign donations with link to donation page. Jury found that committee had innocently infringed plaintiff's copyright and awarded statutory minimum of $750 in damages. Committee appealed, arguing its use was fair despite jury's contrary finding. Court held that committee's use was purely commercial with its call to donate, thus committee sought to exploit copyrighted material for financial gain without paying customary price. Thus, particular compelling justification was needed for committee's use and committee's proffered explanation – essentially, that memes are disseminated "millions (if not billions) of times each day" – was insufficient because "everyone else is doing it" was not compelling justification, especially considering most of these uses are non-commercial. Moreover, committee used "heart" of Success Kid template, i.e., image of Success Kid himself. Fourth factor was neutral because, though plaintiff had licensed template for use by many well-known brands, licensing requests had decreased before committee's use and there was no evidence that committee's use had revitalized this licensing market. Overall, though, jury properly concluded that committee did not make fair use of Success Kid template.

Grant v. Trump, 749 F. Supp. 3d 423 (S.D.N.Y. 2024)

District court granted summary judgment finding that Donald Trump infringed plaintiff Eddy Grant's copyright by using plaintiff's song in his 2020 presidential campaign. Third-party Trump supporter took Grant's song "Electric Avenue" without permission and used it in animated video denigrating Democratic nominee Joseph Biden, and Trump posted that video on his Twitter account, which had nearly 100 million followers. Plaintiff sued for infringement and moved for summary judgment on liability, and Trump unsuccessfully asserted fair use defense. Trump argued that original song was protest against social conditions, but Trump used it as part of colorful attack on traits of rival political figure. Court found that purpose of animated video was irrelevant, what mattered was video's use of Grant's song. Use of song was deemed commercial even if video itself was not commercial, because defendant gained improper commercial advantage by forgoing well-established market for music licensing. Song was clearly creative work, and was played for entirety of animation, also weighing against fair use. Finally, there was no public benefit from use of song, which could have been replaced by any other song without changing meaning of animation, to weigh against clear harm to market for licensing song.

Santos v. Kimmel, 745 F. Supp. 3d 153 (S.D.N.Y. 2024)

District court granted Jimmy Kimmel and ABC's motion to dismiss copyright infringement claim brought by former Congressman George Santos for use of his videos on Kimmel's talk show and on YouTube. After Santos was indicted and expelled from Congress, he earned money by selling personalized video messages to fans on Cameo service. Defendants created Cameo accounts under false names and obtained fourteen videos from Santos in which they successfully requested he make absurd statements, broadcasting some of those videos on *Jimmy Kimmel Live!* show in segment called "Will Santos Say It?" Terms of service on Cameo forbade account holders from using false identities and required users to select either personal use or commercial use license. Kimmel created false accounts and selected personal use license despite his plan to air clips on his show. Court found on motion to dismiss that Kimmel's use was fair use, mostly relying on first factor, as his use was for purposes of criticism and political commentary on public figure, while Santos stated that his use was to generate inspiring message. Reasonable observer would understand that Kimmel showed videos to comment on willingness of Santos, expelled from Congress for alleged fraudulent financial activity, to say absurd things for money. Kimmel's acts may have been deceptive and unkind, but fair use does not turn on user's subjective or stated intent, but rather on court's objective inquiry into what user did with work. Even if Kimmel acted in bad faith by making personal use accounts under fake names, bad faith is not dispositive of fair use.

Eliahu v. Mediaite, LLC, No. 23-11015, 2024 U.S. Dist. LEXIS 171689 (S.D.N.Y. Sept. 23, 2024)

Plaintiff photo- and video-journalist attended funeral of Jordan Neely, "New Yorker whose death ... has been the subject of widespread public discourse," and captured 15-second video of Representative Alexandria Ocasio-Cortez commenting on Neely's death. Plaintiff subsequently licensed video for distribution, and registered video with Copyright Office. Defendant Mediaite published online news article concerning Neely's funeral, including reporting on Ocasio-Cortez's comments, and article featured single image comprised of screenshot of plaintiff's video. Plaintiff sued for infringement, and defendant moved to dismiss infringement claim based on fair use. Court first addressed defendant's contention that article was fair use because screenshot from video was published in context of news reporting, and found this single factor unavailing. On first factor, court agreed with plaintiff's argument that screenshot had same purpose and character as original video, both being created for journalistic purpose: "to document political discourse following Jordan Neely's death, specifically by visually depicting one moment when Ocasio-Cortez contributed to that discourse." Court rejected defendant's contention that use of screenshot was transformative because article provided additional context not contained in video – court found that video and article "concern the same subject matter" so "the addition of contextual information does not change the work's purpose or character." On second factor, court found video "published factual work" created for news gathering purposes, thus favoring fair use under existing precedent. On third factor, court weighed parties' contentions concerning use of single frame of video, which plaintiff contended was portion of work "with the most value to potential readers or licensors [sic]"; finding both parties' arguments persuasive, court found third factor neutral. On fourth factor, court found that if use of single screenshot from copyrighted work "becomes a widespread practice," this would harm licensing value of video, and that this factor favored plaintiff. Weighing fair use factors, court denied defendant's motion to dismiss.

Richardson v. Townsquare Media, Inc., No. 24-4217, 2025 U.S. Dist. LEXIS 7381 (S.D.N.Y. Jan. 14, 2025)

Court granted defendant's motion for judgment on pleadings after finding defendant's article embedding copyrighted video was fair use. Plaintiff professional videographer alleged defendant owner of online news website violated Act by posting two copyrighted videos on its website. With respect to "Jordan video," which showed Michael Jordan stopping individual from engaging in fight with another individual, plaintiff created video in May 2015 and subsequently obtained copyright registration. Third party blog posted video on X.com, and defendant subsequently posted article on its XXL website. Article described video, included screenshot, and embedded blog's X post with video. Court evaluated defendant's fair use defense, first noting news reporting cited in § 107 preamble as example of legitimate purpose for copying. Court found that because video was subject of news story and article added new information and context about contents, defendant's article could be considered use with further purpose or different character. Court found second factor weighed in favor of fair use where work was previously published and served informational, factual purpose rather than creative, as news article with video did here. Court found third factor weighed for defendant because while it was undisputed that defendant copied entire video, it was because it included embedded link to X post, so could not reasonably have copied only portion of video. Copying entire video was necessary to convey information to public accurately. On last factor, effect of use on potential market, court found news article about viral video unlikely to threaten to deprive rights holder of significant revenues because news article serves different purpose from original video. Weighing all factors, court held defendant's article embedding of Jordan video was fair use, and granted judgment on pleadings as to video.

Nixon v. Source Digit., Inc., No. 23-5218, 2024 U.S. Dist. LEXIS 231657 (S.D.N.Y. Dec. 23, 2024)

Court granted summary judgment in favor of plaintiff photographer on copyright claim after finding no genuine dispute of material fact concerning defendant's copying of plaintiff's photographs and defendant's fair use defense failed as matter of law. Plaintiff photographer took series of photos in 1990s depicting famous hip-hop artists ("Subject Photographs"). Defendant operated digital platform *The Source*, described as news magazine focusing on hip-hop, urban culture, and politics. Defendant largely relied on independent contractor "contributors" for its content. Defendant also posted on its Instagram account, and content was governed by defendant's copyright policies (though there were no explicit enforcement procedures). Plaintiff's infringement claim based on five of defendant's Instagram posts featuring Subject Photographs and short captions. On first fair use factor, court found posts were "nowhere close to transformative" in that they simply posted images to Instagram with no attempt at alteration. Court disagreed with defendant that captions provided commentary; they merely identified individuals in Subject Photographs, and purpose was same as original photographer's, to portray significant hip-hop figures. Additionally, court found defendant's use was commercial because Instagram account linked to its website where it earned ad revenue. Court found second factor – nature of copyrighted work – did not weigh strongly for either party because record largely devoid of evidence regarding creative attributes of Subject Photographs. Court easily found amount and substantiality of use factor weighed against fair use because defendant's Instagram posts copied each Subject Photograph in its entirety. On last factor, effect of use on market for original, court found that by copying Subject Photographs for commercial purposes without payment of licensing fee, defendant usurped market that properly belonged to plaintiff copyright holder. In weighing factors, court found defendant's actions in usurping market for Subject Photographs could do significant damage to rights of professional photographers if it became widespread. Court held defendant's fair use defense failed as matter of law.

Shihab v. Source Digit., Inc., No. 23-7266, 2024 U.S. Dist. LEXIS 127980 (S.D.N.Y. July 18, 2024)

District court granted plaintiff's summary judgment motion as to copyright infringement, finding no fair use. Plaintiff Shihab, photographer of hip hop artists, sued Source Digital, online platform for hip hop and urban culture, for copyright infringement and DMCA violations. Plaintiff took and registered copyright in 1995 photograph of Wu Tang Clan members ("Photograph"). Independent contractor hired by defendant posted Photograph to Source's Instagram page without obtaining permission or consulting with counsel, notwithstanding Source's written guidelines to always assume that images are subject to copyright and to consult with Source's attorneys before posting anything. Source did not deny that it infringed plaintiff's copyright, but claimed its use was fair. Court noted that purpose and character weighed strongly against fair use because defendant did not show that its use was transformative or non-commercial. In particular, Source argued that its use was transformative because it "presented the [Photograph] in a new context, that is, that it commented on the historical and cultural significance of the image to the hip-hop community and enabled viewers to associate and display the post with other similar content by use of the Source hashtag." However, court found that simply adding hashtags to post was not commentary and that this violated Source's own guidelines that required commentary "on the image itself." Moreover, court rejected defendant's argument that its use "was non-commercial because the purpose of the Instagram page is to celebrate the legacy of hip-hop and maintain its relevance" and "no advertisements run on photographic posts on its Instagram account." However, court found that defendant's purpose in displaying Photograph was clearly commercial because "celebration of hip-hop is the engine that drives [Source's] for-profit business," plus Instagram page was used for promotional purposes and linked to Source's for-profit website. Nature of work was neutral, as there was no definitive proof whether original purpose of Photograph was expressive or more factual. Further, Source used entire copyrighted image, so portion of work weighs against fair use. Lastly, effect on market also weighed against fair use as similar usage would damage rights of professional photographers. Court noted that it did not matter that in this specific instance plaintiff had never licensed this Photograph. Defendants' fair use defense therefore failed.

> *XiaoQian Zhao v. BABIQIU*, No. 23-4507, 2025 U.S. Dist. LEXIS 1759 (N.D. Ill. Jan. 6, 2025)

District court granted summary judgment to plaintiff, rejecting defendant's fair use defense. Plaintiff, creator of 59-second video demonstrating proper use and safety for fire extinguisher, sued defendant, owner of online Amazon storefront selling fire extinguishers, alleging infringement of copyright in video. Defendants had downloaded video from website 1688.com, public platform where sellers and distributors commonly share promotional materials for products, and posted 38-second clip in photo section of Amazon product listing, changing only length of video and subtitle language from Chinese to English. Court found that defendants' use of video was not fair use because: (1) use was commercial, and changing language of subtitles was not transformative because purpose remained selling fire extinguishers; (2) video was creative work, despite instructional nature; (3) defendants used more of video than was necessary to maintain instructional content, especially given that video depicted different brand of fire extinguisher than defendant sells; (4) use of video without authorization could have substantial adverse effect on market for licensing plaintiff's safety video.

> *Alexander v. Take-Two Interactive Software, Inc.*, No. 18-966, 2024 U.S. Dist. LEXIS 173915 (S.D. Ill. Sept. 25, 2024)

After jury trial, court held denied defendants' motion for judgment as matter of law on their fair use defense, but granted their motion as to jury's speculative damages award. Plaintiff, former tattoo artist, inked six tattoos on WWE wrestler Randy Orton between 2002 and 2008. Defendants, in creating their WWE video game, reproduced plaintiff's tattoos to accurately depict Orton's likeness but also for use within "Create-A-Superstar" feature that enabled users to take tattoos and apply them to their own custom wrestler avatar. Plaintiff sued for copyright infringement and jury rendered verdict in her favor, awarding damages of $3,750. Defendants moved for judgment as matter of law on grounds that fair use doctrine insulated their copying of plaintiff's tattoos and that plaintiff failed to prove actual damages. Court denied defendants' motion as to fair use defense, holding that it was not unreasonable for jury to conclude that defendants not entitled thereto. First, defendants' use was commercial and entailed reproducing plaintiff's tattoos for their expressive value, as they were not only used to depict Orton's likeness accurately but also to allow users to create custom avatars. Second, plaintiff testified about her creative process for creating tattoos, confirming their expressive nature. Third, defendants copied entirety of plaintiff's tattoos. Defendants' claim that wholesale copying was necessary to accurately depict real life was belied by "Create-A-Star" feature and by evidence that defendants had previously altered tattoos to avoid infringing third-party rights. Finally, although market harm factor weighed in defendants' favor, given plaintiff's admission that she had never licensed tattoos for use in video games as well as expert testimony that such market was nonexistent and unlikely to be developed, it was not unreasonable for jury to conclude that defendants' use was not fair where other factors weighed in plaintiff's favor. However, court held that plaintiff presented no evidence at trial to support damages award because her experts did not conduct analysis as to how much of video games' sales or profits were attributable to tattoos and because plaintiff testified that she had never licensed her tattoos for use in any medium nor could she identify any business lost due to Orton's tattoos. Because jury's damages award was therefore unduly speculative, defendants were entitled to judgment as matter of law.

Dow Jones & Co. v. Harris, 749 F. Supp. 3d 776 (W.D. Tex. 2024)

District court granted plaintiff's motion for summary judgment on infringement claim. Plaintiff, global provider of news and business information, required readers to pay license fee to distribute articles to certain number of recipients. Defendant investment manager and professor had email program to share PDF versions of plaintiff's articles, and email distribution list included more than 1,000 individuals. Plaintiff received notice of potential infringement. After plaintiff contacted defendant, defendant ceased circulating PDFs of plaintiff's articles and instead circulated links to articles. Plaintiff filed suit, alleging copyright infringement. Parties cross-moved for summary judgment. Court held plaintiff established that defendant engaged in copyright infringement, but defendant argued that his use constituted fair use. On first factor, court found that articles sent to current university students was likely fair use, but transmission of articles to non-students, even if for educational purposes, was not transformative. On second and third factors, court found that wholesale copying of news articles weighed against fair use. On fourth factor, court found defendant's use superseded original works, and adversely impacted plaintiff's potential market for copyrighted works. Court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment on infringement claim.

Atari Interactive, Inc. v. State Farm Mut. Auto. Ins. Co., No. 24-704, 2024 U.S. Dist. LEXIS 175442 (N.D. Tex. Sept. 27, 2024)

Court denied motion to dismiss infringement claim based on fair use. Plaintiff Atari owned copyright in Crystal Castles arcade video game, including artwork wrapping game cabinet and gameplay features. Defendant State Farm published six-second online video advertisement featuring images of arcade game cabinet, which plaintiff Atari alleges features identical Crystal Castles video game cabinet artwork and gameplay, albeit with name Crystal Castles replaced with Witches Broom. On motion to dismiss infringement claim, defendant argued its use of work in six-second video clip was fair use. On first factor, court found use of work in online commercial advertisement "to invoke the same aesthetic tones intended to be evoked by the artwork itself," thus weighing against fair use. On second factor, court found plaintiff sufficiently alleged defendant appropriated visual elements of artwork, thus weighing against fair use. On third factor, court found that "majority of the balance of the visual art on the cabinet wrap is visible" (although partially obscured by actors), weighing against fair use. On fourth factor, court found it plausible that "widespread, unlicensed use of Atari's copyrighted works would impact" plaintiff's alleged licensing business, thus weighing against fair use. Finding all four factors weighing against fair use, court denied motion to dismiss.

> *Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.*, No. 20-613, 2025 U.S. Dist. LEXIS 24296 (D. Del. Feb. 11, 2025)

On summary judgment, district court held that defendant's use of copyrighted West headnotes for purpose of training AI legal research tool was not fair use. Defendant created paraphrases of headnotes to use as training material, rather than using actual West headnotes, but 2,243 of defendant's paraphrases were substantially similar to headnotes, thus were infringing if not excused by fair use. First factor weighed in plaintiff's favor because defendant's use was commercial and was not transformative under *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), which looks to whether "an original work and a secondary use share the same or highly similar purposes." Here, court found that defendant and plaintiff both used headnotes for "the same or highly similar purposes," i.e., to make legal research tools. Court also stated that first-factor analysis was "much trickier" because West headnotes themselves did not appear in output of defendant's tool. Instead, "Ross turned the headnotes into numerical data about the relationships among legal words to feed into its AI," similar to process of intermediate copying that other courts have found to be fair use. Court found intermediate-copying cases inapposite, however, because "the intermediate-copying cases (1) are computer-programming copying cases; and (2) depend in part on the need to copy to reach the underlying ideas. Neither is true here." Even though use was not transformative, court added that "[b]ecause the AI landscape is changing rapidly, I note for readers that only non-generative AI is before me today." Court held that second factor favored defendant because West headnotes "are not that creative." Quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 222 (2d Cir. 2015), court weighed third factor in defendant's favor as well because "what matters is not 'the amount and substantiality of the portion used in making a copy, but rather the amount and substantiality of what is thereby made accessible to a public for which it may serve as a competing substitute.' Because Ross did not make West headnotes available to the public, Ross benefits from factor three." Fourth factor favored plaintiff because defendant was using copied material to create competing legal research product. Further, "at least one potential derivative market is also obvious: data to train legal AIs … it does not matter whether Thomson Reuters has used the data to train its own legal search tools; the effect on a potential market for AI training data is enough."

> *Bell v. Kiffin*, No. 24-231, 2024 U.S. Dist. LEXIS 226884 (N.D. Miss. Dec. 16, 2024)

Court granted defendant's motion to dismiss based on fair use. Plaintiff, author of book *Winning Isn't Normal*, sued defendant, famous and wealthy football coach for University of Mississippi, alleging that defendant's tweet of inspirational passage from plaintiff's book infringed plaintiff's copyright. Court granted motion to dismiss, finding that tweet constituted fair use. Court also noted that plaintiff had filed 25 copyright lawsuits in 10 years in what appeared to be abusive pattern of suing public schools and other non-profit entities that published parts of same inspirational passage on social media. Court focused on 2022 decision issued by Fifth Circuit, which had fact pattern that was "extraordinarily similar" to case at hand. Consistent with Fifth Circuit's findings, court considered fair use factors and found that: (1) plaintiff was unable to demonstrate that he suffered any real economic harm, especially given that tweet was photocopy of printout of passage without any commentary or elaboration upon content, and, further, plaintiff was unable to show that defendant was economically motivated to tweet, as plaintiff's allegations that defendant was trying to recruit players and to drum up business for his motivational speaking side gig were "highly speculative and implausible"; (2) plaintiff successfully demonstrated that passage constitutes work of creativity, but, on balance, nature of work is considered least significant factor; (3) defendant demonstrated that passage was only small excerpt from book, which was already freely available to public; and (4) plaintiff was unable to demonstrate any real licensing market for his passage or that he had ever previously licensed passage for use on social media, including to motivational speakers. Court emphasized last factor as most important, stating that it was not plausible that even one individual who might have otherwise purchased plaintiff's book decided not to do so as result of defendant's tweet.

B. Statute of Limitations

Michael Grecco Prods., Inc. v. RADesign, Inc., 112 F.4th 144 (2d Cir. 2024)

Second Circuit reversed district court's finding that infringement claim was time-barred because "sophisticated plaintiff" should have detected infringement and could not benefit from discovery rule, basing its ruling on lack of "sophisticated plaintiff" exception to discovery rule. Plaintiff, photography studio, filed infringement lawsuit against defendant on October 12, 2021, alleging defendant used plaintiff's photos on blog and social media platforms. Defendant's allegedly infringing use began on August 16, 2017 and plaintiff allegedly discovered infringing use of photos on February 8, 2021, so lawsuit was filed less than one year after alleged discovery of infringement, but over four years after alleged infringement use began. Defendant moved to dismiss complaint, arguing claim time-barred by three-year statute of limitations. District court looked to plaintiff's history as aggressive and experienced enforcer of photo rights, including plaintiff's statements in complaint touting sophisticated copyright enforcement program, and found discovery rule did not apply to plaintiff since plaintiff was sophisticated and should have discovered infringement within three years from when infringing use began. Second Circuit rejected district court's approach of applying discovery rule unequally to claims brought by different plaintiffs based on sophistication, as Copyright Act not understood to "employ different rules of accrual for different plaintiffs." According to Second Circuit, whether infringement should have been discovered by copyright holder with due diligence is "fact-intensive inquiry" and "[a] plaintiff's 'sophisticated' nature does not automatically relieve a defendant of her burden to plead and prove a … limitations defense." As such, Second Circuit vacated and remanded.

Bridgeport Music Inc. v. TufAmerica Inc., No. 23-7386, 2024 U.S. App. LEXIS 30328 (2d Cir. Dec. 2, 2024)

Second Circuit affirmed district court's holding that defendant's counterclaim for declaratory judgment on copyright ownership was time-barred. Claims accrued in 1970 when defendant's predecessor in interest became aware that plaintiffs were exploiting musical compositions without paying royalties to plaintiff. Because defendant was experienced record executive, he should have expected royalties for use of his musical compositions on air and should have tried to enforce his right to receive payment at that time. However, because defendant did not assert any claims until lawsuit was initiated in 2018, counterclaim was time-barred.

Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd., 108 F.4th 458 (7th Cir. 2024)

Court held plaintiff was entitled to damages for all copyright violations it discovered in three years before it added its copyright claims. Plaintiff Motorola and defendant Hytera competed globally in market for two-way radios. Plaintiff spent years and tens of millions of dollars developing trade secrets embodied in its line of high-end digital mobile radios ("DMRs"). Defendant stole trade secrets by poaching plaintiff's engineers, who downloaded copyrighted Motorola source code before leaving. Defendant then launched its own line of DMRs that were functionally indistinguishable. In 2017, Motorola sued Hytera for copyright infringement, and jury found Hytera violated Act and awarded damages. Hytera appealed, arguing copyright damages should be limited to three-year period before Motorola added its copyright claims. Hytera argued Motorola's copyright damages should be limited to copyright violations *committed* in three years before date Motorola amended its complaint to add copyright claims. Motorola responded that under discovery rule, it could recover for any copyright violations *discovered* in three years prior to adding claims. Court agreed with Motorola, holding recent Eleventh Circuit case *Nealy v. Warner Chappell Music, Inc.* (and U.S. Supreme Court's affirmance) did not overturn Seventh Circuit's settled adoption of discovery rule in copyright cases.

N.Y. Times Co. v. Microsoft Corp., No. 23-11195, 2025 U.S. Dist. LEXIS 64462 (S.D.N.Y. Apr. 4, 2025)

District court denied defendants' motion to dismiss claims based on infringements occurring more than three years prior to complaint filing, holding that claims accrued within that time period under discovery rule. Defendant OpenAI, founded in 2015, developed large language models ("LLMs"), AI that receives text prompts and generates natural language responses. In 2018, released first of its Generative Pre-trained Transformers ("GPTs") in 2018 under name GPT-1, followed by release of GPT-2 in 2019, GPT-3 in 2020, GPT-3.5 in 2022 and GPT-4 in 2023. In November 2022, OpenAI released ChatGPT, text-generating chatbot. Plaintiffs, news organizations including New York Times ("NYT"), New York Daily News ("Daily News") and Center for Investigative Reporting ("CIR"), sued Microsoft (having invested in OpenAI) as well as OpenAI, claiming that defendants' LLMs implicate plaintiffs' copyrighted articles and other written works ("Works") at various stages. Pre-training (or collection) stage involves collecting and storing "vast amount of content scraped from the internet," including plaintiffs' websites, then creating datasets later used to train LLMs. Training (or input) stage involves storage of training articles in computer memory, provision of portions of articles to LLM and adjusting LLM's parameters so it accurately predicts next word. Response generation (or output) stage sees LLM responding to user queries based on data collected and using for training. Responses can regurgitate large portions of plaintiffs' Works and sometimes produce hallucinations, responses that are demonstrably but not recognizably false. NYT filed its complaint on December 2023, Daily News and related plaintiffs in April 2024, and CIR in June 2024. OpenAI moved to dismiss as time-barred NYT and Daily News direct infringement claims based on Open AI's creation and use of GPT-2 and GPT-3 training datasets because alleged infringement occurred more than three years before filing of respective complaints. District court denied motion, holding that, under discovery rule, no evidence that NYT and Daily News discovered, or with due diligence should have discovered, facts giving rise to their specific claims prior to December 2020 and April 2021, respectively. Although complaints alleged that defendants trained their LLMs in 2019 and 2020 on datasets that included plaintiffs' Works, there was no evidence that relevant plaintiffs were "on notice of the particular infringing conduct by defendants that provides the basis for plaintiffs' claims." Articles from 2019 and 2020 about defendants' AI plans (even NYT article about OpenAI training its models by "analyzing … nearly a trillion words posted to blogs, social media and the rest of the internet") failed to show that plaintiffs should have discovered defendants' specific copying of Works. Even if NYT was "sophisticated publisher," there was no evidence that NYT was "*in fact on notice*" before December 2020 and, in any case, there is no heightened "sophisticated rightsholder" constructive knowledge theory. Although discovery could reveal facts supporting OpenAI's contention that NYT and Daily News discovered infringement of their Works more than three years prior to filing their complaints, OpenAI's conclusory statements that these plaintiffs should have discovered these activities sooner were insufficient.

Hayden v. Koons, No. 21-10249, 2025 U.S. Dist. LEXIS 33345 (S.D.N.Y. Feb. 25, 2025)

District court held plaintiff's copyright infringement claim time-barred. Plaintiff Michael A. Hayden, artist who resided primarily in Italy between 1980 and 2007, created several sculptures for Diva Futura, Italian production company of adult-oriented performances, partially owned by Ilona Staller aka Cicciolina. In 1988, Plaintiff created sculptural work featuring serpent wrapped around pedestal of boulders ("Original Work") for Staller to use in her live erotic shows and sold Original Work to Diva Futura for $900. In 1989-90, defendant Koons, American "appropriation artist," paid Staller (whom Koons subsequently married) to be photographed with him in sexually explicit positions and traveled to Italy multiple times during this period. Koons and Staller used Original Work in their photo sessions. Koons subsequently incorporated depictions of Original Work, in whole or in part, in at least six different artworks partially comprising his *Made In Heaven* series, of which three works were at issue ("Koons Works"). When Koons Works premiered in Venice Biennale in 1990, they caused "media sensation and scandal," followed by further scandal over divorce and custody battle waged between Koons and Staller in Italian court. Plaintiff became aware of Koons Works in April 2019, when he was alerted to new article discussing legal dispute between Staller and Sotheby's concerning one of Koons Works. In August 2019, plaintiff registered Original Work with U.S. Copyright Office under title *Il Serpente for Cicciolina*. In December 2021, plaintiff commenced suit. Koons argued that plaintiff's claims were time-barred because plaintiff was on inquiry notice and should have discovered existence of Koons Works decades ago. Court held that it was unlikely that diligent person in position of plaintiff, who resided in Italy during multiple scandals concerning Koons Works and was fluent in Italian, would hear of Staller's involvement in Biennial and "then put it out of mind for nearly 30 years without looking deeper." Although plaintiff had asserted that he was unaware, until April 2019, that Koons was artist who had engaged with Staller in any artistic collaborations, court found this subjective representation unpersuasive in light of objective evidence. Specifically, complaint had alleged that Koons is "one of the most controversial living contemporary artists in the world," that *Made In Heaven* had caused sensation and scandal (presumably in Italy, where plaintiff was then living), and that plaintiff had seen coverage of custody battle between Koons and Staller. These facts were enough to put reasonably diligent plaintiff on notice of Koons' use of Original Work in Koons Works. Court noted that this case would have been different if plaintiff had not resided in Italy for 20 years or if he had not had reason to follow career of Staller, household name in Italy with whom he had had multiple transactions.

Gong v. Savage, No. 23-7355, 2024 U.S. Dist. LEXIS 203406 (S.D.N.Y. Nov. 4, 2024)

District court dismissed direct infringement claim on statute of limitations grounds while preserving contributory infringement claim that accrued later. Plaintiff, geography professor and defendant's former master's thesis advisor, alleged that defendant incorporated her proprietary information into his thesis. Defendant had obtained this information after specifically agreeing not to use it in his thesis as condition of his employment with plaintiff. Court dismissed plaintiff's claim for direct infringement, as it was "clear from the face of the complaint" that plaintiff knew about defendant's direct infringement approximately six years before she filed the complaint in this case. Her contributory infringement claim survived, as it was based on publication of thesis by CUNY, which occurred as result of defendant's submission for publication to CUNY, within limitations period.

Schatz v. Binary Bits LLC, No. 23-5361, 2024 U.S. Dist. LEXIS 133796 (S.D.N.Y. July 29, 2024)

Plaintiff photographer took photograph of athletes in 2002 and registered photo with Copyright Office. In 2015, defendant published plaintiff's photo on its website geared towards food and dining social community. Plaintiff discovered usage in 2022 and sued for infringement. Defendant moved to dismiss complaint, arguing that copyright claim was time-barred. Magistrate judge recommended that court deny defendant's motion to dismiss because under discovery rule, claim accrues when copyright owner discovers, or with due diligence should have discovered, infringement, and there was not sufficient evidence that plaintiff had significant copyright litigation and enforcement experience, such that it reasonably should have discovered infringement earlier.

Woodall v. Walt Disney Co., No. 20-3772, 2024 U.S. Dist. LEXIS 219909 (C.D. Cal. Nov. 1, 2024)

Plaintiff, creator of "Bucky" and "Bucky the Wave Warrior" animated film project, sued Disney *et al*. for infringement in connection with release of animated film *Moana*. Plaintiff and defendants moved for summary judgment on plaintiff's claims and affirmative defenses. District court granted summary judgment for all defendants except Buena Vista Home Entertainment, Inc., finding that plaintiff's copyright infringement claim was time-barred since plaintiff discovered alleged infringement when *Moana* movie came out in theaters in 2016 and raised issue with its lawyer in 2017, but did not sue until 2020, outside three-year statute of limitations. However, district court found claim to be timely with regard to defendant Buena Vista, which continued to distribute home videos of *Moana* after 2017. Court further denied defendant's motions for summary judgment as to copyright infringement claim since there were disputed issues of fact regarding access, substantial similarity and independent creation.

Bowery v. Skinney LLC, No. 23-257, 2024 U.S. Dist. LEXIS 177907 (E.D.N.Y. Sept. 30, 2024)

District court denied motion to dismiss infringement suit on statute of limitations grounds, finding that plaintiff licensing agency had no ongoing duty to police its photographs. Plaintiff photography licensing agency sued defendant for using its photographs on social media without authorization. Defendant moved to dismiss, arguing that plaintiff should have found allegedly infringing posts more than three years earlier because plaintiff was licensing agency, and had continuous and ongoing duty to detect infringement of its copyrights. Court found that this duty does not exist, even for sophisticated plaintiffs, and in any event defendant failed to identify evidence of plaintiff's sophistication.

Providence Publ'ns, LLC v. Hub Int'l Ins. Servs., No. 24-109, 2024 U.S. Dist. LEXIS 119625 (E.D. Cal. July 8, 2024)

District court denied defendant's motion to dismiss all claims that accrued more than three years prior to complaint filing as untimely. Plaintiff published newsletter entitled *Workers' Comp Executive*, which featured original articles about occupational health and safety issues. Defendant, insurance and financial service provider, subscribed to newsletter, which was delivered electronically. Through analysis of email data from delivery of newsletter, plaintiff discovered defendant was copying and distributing several different issues of newsletter to dozens of its employees. Plaintiff sued defendant, alleging willful infringement. Defendant moved to dismiss, arguing that complaint failed to state claim because it acknowledged that defendant possessed newsletter subscription without specifying which of plaintiff's subscriptions defendant had purchased, as plaintiff offered multiple types of subscriptions, including ones that allow company-wide distribution and ones that do not. Defendant also argued that plaintiff's claims were time-barred, given that claims accrued before January

2021. Court found no facts in complaint to indicate that plaintiff had notice of defendant's copying prior to recent discovery which, at this stage of litigation, was sufficient to overcome time bar. Further, plaintiff stated that it had only recently run analysis of email data, which led to discovery, and that plaintiff needed to gain access to defendant's servers, which were highly secure and inaccessible to general public and plaintiff, to confirm that unauthorized distribution and copying occurred. Court indicated that defendant may re-raise this issue after discovery if facts alleged prove to be untrue.

Bluprint Clothing Corp. v. Chico's FAS, Inc., No. 23-4226, 2024 U.S. Dist. LEXIS 136794 (C.D. Cal. July 23, 2024)

District court granted summary judgment to defendant because plaintiff failed to show reasonable diligence that would allow application of discovery rule. Plaintiff created, designed, manufactured and sold printed textile designs and women's apparel. Defendant, plaintiff's prior partner, allegedly copied three designs and marketed them in defendant's seasonal runs in 2017 and 2019. By March 2020, defendant had stopped selling infringing products; however, plaintiff did not discover alleged infringement of one design until mid-2021 and infringement of other two designs until March 2023, through online searches. Plaintiff did not have reason to suspect defendant of infringement, given their business relationship between 2015 and 2018, and plaintiff appeared to have conducted reasonable diligence. However, court dismissed claims because plaintiff failed to put forward any evidence supporting its reasonable diligence; to refute defendant's evidence; or to represent to court that there was no reason to suspect defendant of copyright infringement prior to 2021. As such, court stated that there was no way for fact finder to infer that plaintiff's discoveries in 2021 and 2023 were reasonable, and, as such, plaintiff failed to create triable issue of fact regarding its entitlement to discovery rule. Accordingly, court granted defendant's motion for summary judgment.

Williams v. Elliott, No. 18-5418, 2024 U.S. Dist. LEXIS 152339 (E.D. Pa. Aug. 26, 2024)

District court granted summary judgment to Missy Elliott dismissing claims brought against her by plaintiff seeking declaration that he was uncredited co-author of her songs. Former music producer plaintiff owned home recording studio that Missy Elliott frequented from 1993 to 1995. Plaintiff asserted that he was unlisted co-author of song *Heartbroken*, and thus should have been paid royalties for sales of derivative song allegedly based on that song sung by Aaliyah, also called *Heartbroken*, on which Elliott was listed as author. Plaintiff claimed he discovered existence of Aaliyah song in 2017 and argued that cause of action for infringement did not arise until then. Court found that plaintiff's authorship of *Heartbroken* was expressly repudiated when song was released in 1996 without plaintiff receiving credit, and he should have known of Aaliyah's song given its popularity and his continued presence in music industry as late as 1997, when he attended party with Elliott and Aliyah present, as well as his continuing work with Elliott in 1997 and 1998. Claim was dismissed on statute of limitations grounds. Similar claims by plaintiff based on songs released by SISTA, R&B group of which Elliott was part, were not dismissed on statute of limitations grounds because album was shelved in 1994 and only published in 2017, and thus plaintiff's alleged rights as co-author were only expressly repudiated in 2017, at which time his claim accrued. Plaintiff's affirmative motion for summary judgment on SISTA songs was denied due to issues of material fact around whether he actually contributed to those songs.

Sci. Photo Libr. Ltd. v. Bell Performance, Inc., No. 23-2302, 2024 U.S. Dist. LEXIS 136978 (M.D. Fla. Aug. 2, 2024)

Court denied defendant's motion to dismiss, holding that plaintiff's claims were timely under discovery rule. Plaintiff, owner of copyright in photograph of "a rod prokaryote," sued defendant, "company that develops products for … trucks, cars and home furnaces," for infringement, alleging defendant used photograph in connection with its website advertising its products for sale. Defendant moved for judgment on pleadings, arguing it posted work onto its website in January 2019, and thus plaintiff's suit, filed in November 2023, was time-barred. District court dismissed motion for judgment on pleadings, agreeing with plaintiff that claim accrued when plaintiff discovered defendant's use of work in July 2022, and thus plaintiff's suit (filed just over one year following plaintiff's discovery of alleged infringement) was timely. District court noted that Eleventh Circuit "has not explicitly adopted either the discovery rule or the injury rule in the civil copyright infringement context," but that "each circuit court" that has considered issue has applied discovery rule. Defendant urgent application of injury rule, under which claim would accrue upon first instance of infringement, in this case defendant's initial publication of work, and argued Eleventh Circuit cases applying discovery rule in copyright ownership claims distinguishable from infringement claims. District court found defendant's arguments unpersuasive and adopted discovery rule, noting it "practically impossible for a copyright owner" to monitor and enforce all conduct on internet, and commenting that injury rule "allows the willful copyright infringer – a thief – to escape justice after he has kept his misdeed quiet for the statutory period."

Fang Cong v. Xue Zhao, No. 21-1703, 2024 U.S. Dist. LEXIS 208118 (W.D. Wash. Nov. 15, 2024)

Plaintiffs, Chinese citizens, worked with defendant to create video game "Things As They Are." Plaintiffs alleged that, in June 2019 defendant published and sold game with plaintiff's graphic designs on Steam, digital distribution platform, without plaintiffs' authorization. Plaintiffs retained attorney in August 2019 and, after trying unsuccessfully to work with Steam to take down game, plaintiffs brought claim of direct infringement against defendant, and vicarious and/or contributory infringement claim against Steam. In response, Steam argued that claim should have been brought within three years of plaintiffs retaining attorney, i.e., by August 2019, and was now time-barred. Plaintiffs countered that statute of limitations "should be calculated from the time plaintiffs actually discovered" Steam's infringing act, claiming that, in August 2019, they were not yet aware of Steam's role in infringement. Instead, plaintiffs argued, they did not discover Steam was "protecting" infringing game until January 1, 2022, when platform refused to take down game without court order. Siding with Steam, court found that vicarious and/or contributory infringement claims were barred, reasoning that, upon discovery that game was being sold on Steam in 2019, plaintiffs should have known or reasonably should have discovered that Steam was allegedly involved in sale and distribution of game and had ability to remove game from platform and was benefiting financially from sales. To hold otherwise, according to court, and allow delayed start of limitations period until vicarious or contributory infringer is directly confronted and answers accusations, would prejudice defendants and allow plaintiffs to wait indefinitely to trigger start of limitations period. Accordingly, court granted motion dismissing Steam from proceeding.

C. Res Judicata/Collateral Estoppel

Foss v. Marvic, Inc., 103 F.4th 887 (1st Cir. 2024)

First Circuit found district court erred in dismissing plaintiff's infringement claim based on claim preclusion, and vacated dismissal. Plaintiff graphic designer alleged defendant used 20-page marketing brochure without authorization. Plaintiff filed suit, alleging infringement, and later amended complaint, adding that brochure was registered. District court dismissed plaintiff's complaint with prejudice, finding Copyright Office had not acted upon plaintiff's application for copyright registration. Plaintiff appealed, and First Circuit declined to address district court's dismissal. Plaintiff filed separate action for copyright infringement based on same facts alleged in first action. Defendant moved to dismiss plaintiff's actions on claim preclusion grounds and plaintiff amended complaint, adding new defendant to infringement claim. Newly added defendant moved to dismiss, and district court granted motion. Plaintiff appealed, and First Circuit found dismissal in first action for failure to satisfy registration requirement was not decision on merits for claim preclusion purposes. First Circuit vacated ruling and remanded for further proceedings.

Ramona Larue, Inc. v. Roadget Bus. PTE. Ltd., No. 23-16743, 2024 U.S. Dist. LEXIS 174471 (N.D. Ill. Sept. 26, 2024)

District court granted motion to dismiss plaintiff's eight previously asserted copyright claims, but denied motion as to plaintiff's three new copyright claims. Plaintiff corporation sold garments designed by model, and images of garments were posted on plaintiff's website. Plaintiff alleged defendants cropped plaintiff's photographs to remove model's face and sold knock-off products, infringing plaintiff's photos. Plaintiff previously sued over 150 defendants for infringement. In this action, plaintiff asserted infringement of eight copyrighted works from prior suit, as well as three new copyrights. Defendant filed motion to dismiss all claims on basis of claim splitting. Court found plaintiff improperly split claim as to eight copyrights that were subject of prior suit because plaintiff knew additional product listings would apply in that suit, and failed to amend complaint; additional product pages did not present different claim or transaction, and addition of defendant did not negate application of claim splitting theory. However, as to three new copyrights, they did not register until after first action was filed, and court found claim splitting did not apply.

D. Sovereign Immunity

Allen v. Cooper, No. 15-27, 2024 U.S. Dist. LEXIS 156919 (E.D.N.C. Aug. 29, 2024)

After Supreme Court held that federal government could not abrogate States' sovereign immunity from copyright infringement claims, district court nevertheless allowed plaintiff's amended direct infringement claims to proceed where he plausibly alleged that State's Copyright Act violation was also procedural due process violation. Plaintiff Fredrick Allen was hired to document recovery of pirate ship Queen Anne's Revenge, which was discovered off North Carolina coast in 1996. Plaintiff took numerous videos and photos, in all of which he registered copyrights. In 2013, State of North Carolina uploaded some of plaintiff's works to its website without his permission. Although State and plaintiff settled initial claims, State resumed infringement of plaintiff's works and, in 2015, passed N.C. Gen. Stat. § 121-25(b), which provided that all "documentary materials of … shipwreck" in State's custody were in public domain. In 2015, plaintiff sued State for copyright infringement based on Copyright Remedy Clarification Act of 1990, in which Congress stripped states of sovereign immunity from copyright infringement suits. Although district court allowed claims to proceed, its decision was ultimately appealed to U.S. Supreme Court, which held that CRCA was invalid prophylactic abrogation of Section 5 of Fourteenth Amendment because CRCA's "indiscriminate scope" was "out of proportion" to any due process problem. Plaintiff then alleged that district court nevertheless had subject matter jurisdiction over his claims against State based on other theories of abrogation of State's sovereign immunity under Fifth Amendment and Section 5 of Fourteenth Amendment. Court held that plaintiff had no recourse in federal court under Fifth Amendment because he could seek redress of State's alleged "taking" of his copyrights in State courts. However, plaintiff had recourse under Supreme Court's 2006 decision in *United States v. Georgia*, which allowed case-by-case (or as-applied) abrogation as long as plaintiff could allege copyright infringement claims as well as Fourteenth Amendment violation arising from same conduct. Plaintiff had plausibly alleged that State had willfully infringed his copyrights and, moreover, that State had done so under established State procedure (namely, § 121-25(b)) which was apparently passed specifically to facilitate said infringement. Because State's conduct violated Copyright Act and independently violated Fourteenth Amendment's Due Process Clause, Georgia permitted abrogation of State's sovereign immunity in connection with plaintiff's copyright infringement claims, giving court subject matter jurisdiction.

E. Misuse

Shenzhenshi Liangyuankeji Youxiangongsi v. Antsy Labs LLC, No. 24-1223, 2024 U.S. Dist. LEXIS 210162 (S.D.N.Y. Nov. 18, 2024)

Plaintiff, Chinese toy merchant, sought declaratory judgment on infringement and misuse claims against defendant, toy manufacturer, which sued plaintiff and several other defendants for infringement of popular "Fidget Cube" toy. Defendant had obtained restraining order, resulting in "lock down" of plaintiff's Amazon e-commerce storefront and business accounts, which defendant demanded $100,000 ransom to "unfreeze." When plaintiff refused, defendant voluntarily dismissed claims against plaintiff. In complaint, plaintiff argued that defendant's claim was based solely on use of phrase "fidget cube," which is not protectable. Court noted that, while sympathetic to plaintiff's frustration at being sued for potentially non-meritorious infringement claim, such frustration did not support any of plaintiff's claims, which centered on allegation that defendant was protecting copyright in phrase instead of toy design. Court even found arguments that "a direct comparison of Defendant's copyrighted work … [and] Plaintiff's devices … demonstrates that the Coogam items bear no resemblance to the copyrighted object" were not relevant insofar as they were made in support of claims centering only on defendant's rights in phrase "fidget cube." Instead, court reasoned, defendant's references to name "fidget cube" were made to bolster allegations that plaintiff had infringed copyright in toy itself and not just phrase. As enforcing valid copyright without more cannot constitute misuse, plaintiff's claims failed. In addition, while courts have acknowledged misuse as positive affirmative defense to action for infringement in past, here misuse was raised in context of declaratory judgment action. As such, court granted defendant's motion to dismiss complaint, declining to create independent cause of action for misuse.

F. Miscellaneous

Microsoft Corp. v. Search People Enters. Ltd., No. 22-1113, 2025 U.S. Dist. LEXIS 12221 (W.D. Wash. Jan. 23, 2025)

District court granted plaintiff's motion for summary judgment, finding that first sale doctrine does not apply to sale of product keys. Plaintiff sued defendants over distribution of software product activation keys and tokens. Plaintiff alleged defendants distributed plaintiff's product activation keys, which defendants obtained on black market, and then falsely advertised and sold them to customers as genuine plaintiff software. Plaintiff brought claims for contributory infringement and defendants asserted affirmative defense of first sale doctrine. Plaintiff sought summary judgment on defense. Court determined first sale doctrine does not apply to sale of product keys because keys are not copyrightable works. Court found download of software by defendants' customers constituted reproduction, not redistribution, because customer was creating new copy and reproducing software. Court held first sale doctrine does not apply to distribution of digital works (separated from hardware) and declined to extend doctrine.

Eight Mile Style, LLC v. Spotify USA Inc., 745 F. Supp. 3d 632 (M.D. Tenn. 2024)

District court granted summary judgment for Spotify, dismissing claims by Eminem's company on equitable estoppel grounds where plaintiff knew of and allowed infringement in order to manufacture claim for damages. Plaintiff, owner of copyrights in Eminem songs, alleged that Spotify streamed those songs for years without valid license. Plaintiff filed infringement suit after 2018 effective date of Music Modernization Act, which established liability limitation for past infringement by streaming providers who completed certain steps.

Plaintiff argued that this limitation was unconstitutional and sought pre-2018 damages. Court found that equitable estoppel barred plaintiff's claims, as plaintiff was sophisticated steward of its copyrights that knew licensing status of its songs had fallen into confusion, it being unclear from whom Spotify or others could legally seek license, and plaintiff allowed its rights to be violated in way that would be inexplicable other than as strategic choice to manufacture claim for statutory damages.

VII. REMEDIES

A. Damages and Profits

Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd., 108 F.4th 458 (7th Cir. 2024)

On issue of damages, Seventh Circuit held (1) plaintiff was not entitled to damages for foreign infringement and (2) district court must reconsider defendant's apportionment argument for its own contributions to infringing products. Plaintiff Motorola and defendant Hytera competed globally in market for two-way radios. Plaintiff spent years and tens of millions of dollars developing trade secrets embodied in its line of high-end digital mobile radios ("DMRs"). Defendant stole trade secrets by poaching plaintiff's engineers, who downloaded copyrighted Motorola source code before leaving. Defendant then launched its own line of DMRs that were functionally indistinguishable. In 2017, Motorola sued Hytera for copyright infringement, and jury found Hytera violated Copyright Act and awarded damages. Hytera appealed, arguing (1) copyright damages should be apportioned to account for Hytera's own contributions to success of its products and (2) Copyright Act should not be applied to Hytera's sales outside United States. Court first addressed extraterritorial application of Copyright Act. Doctrine holds that copyright owner may recover damages for foreign infringement if two conditions are met: (1) initial act of copyright infringement occurred in United States and (2) domestic infringement was enabled or otherwise directly linked to foreign infringement for which recovery is sought. Appellate court disagreed with district court's acceptance of Motorola's server theory. Because Motorola failed to prove that Hytera's thieves made their unauthorized download from server in Illinois, as opposed to one of Motorola's "mirrored" servers abroad, its server theory failed at step one. Without completed domestic violation of Copyright Act, Motorola was not entitled to recover damages for any of Hytera's foreign sales of infringing products. On remand, district court was ordered to limit Motorola's copyright award to Hytera's domestic sales of infringing products. Hytera also sought to pare copyright damages via apportionment argument. District court relied on "but-for" causation to refuse apportionment, accepting Motorola's argument that without stolen intellectual property, Hytera's infringing radios would never have reached market. However, court should have addressed Hytera's contributions, if any, to products' value. District court erred in failing to engage arguments and was ordered to reconsider apportionment on remand.

UMG Recordings, Inc. v. Grande Commc'ns Networks, L.L.C., 118 F.4th 697 (5th Cir. 2024)

Court held district court erred in granting judgment as matter of law that each of 1,403 songs in suit was eligible for separate award of statutory damages because many works in suit were compilations (albums) comprising individual works (songs), and compilations eligible for only one statutory damage award under Copyright Act. Defendant internet service provider originally had policy to address copyright infringement by subscribers and partnered with third-party company Rightscorp to get notices of infringement. But after defendant was acquired, policy changed to no longer terminate subscribers who infringed even after receiving notices from Rightscorp. Record label plaintiffs brought suit against defendant for contributory copyright infringement and succeeded following jury trial. District court determined each of plaintiffs' 1,403 sound recordings that was infringed entitled plaintiffs to individual statutory damages award. Defendant appealed, arguing Copyright Act requires single statutory damages award for album where multiple recordings appear. Fifth Circuit agreed with defendant's reading of statute. Copyright Act defines "compilation" as including "collective works," meaning works in which number of separately copyrightable contributions are assembled into collective whole. Court rejected plaintiffs' assertion that district court should have applied "functional" test that looks to where market assigns value, deciding whether parts of compilation are individually eligible for statutory damages. Court held plain reading of Act mandated conclusion that each registered compilation was eligible for only one award of statutory damages. Therefore, text limited plaintiffs' eligibility to award of statutory damages for each album, rather than each song, in suit. Further, record evidence supported conclusion where works' certificates of registration bore hallmarks of compilations (labeled "collective work," referred to as "compilation," etc.). Thus, district court erred, and Fifth Circuit vacated statutory damages award and remanded for new trial on damages.

Bitmanagement Software GmbH v. United States, 124 F.4th 1368 (Fed. Cir. 2025)

Federal Circuit affirmed district court's award of damages based on hypothetical negotiation between parties. Plaintiff, 3D graphics software developer, gave per-computer seat license to U.S. Navy in 2008 to use plaintiff's software BS Contact Geo ("BCG"). In 2012, Navy switched to floating license, which allowed users to access software from any computer as long as measures were taken to limit simultaneous use of programs to number of individuals permitted by license. Initial floating license capped maximum usage at 20 users, and Navy agreed to use third-party tracking software Flexera to ensure compliance with usage limits. However, Flexera failed to operate as intended. In 2016, plaintiff sued U.S. government, alleging that government had infringed plaintiff's copyright. Earlier in case, Federal Circuit agreed with district court that Navy had implied license to use BCG but added that use of Flexera was material condition thereof and remanded to district court for damages calculation. District court, pursuant to footnote in Federal Circuit's earlier decision, calculated damages based on Navy's actual usage of BCG in excess of limited usage contemplated by implied license, in form of hypothetical negotiation. Pursuant to this, district court awarded $154,400 in damages, representing $200 per copy of BCG used by Navy rather than each copy made. On appeal, Federal Circuit held that, because hypothetical negotiation would have proceeded on per-use (rather than per-copy) basis, district court had not abused its discretion in making damages calculation.

Carrillo v. Sabbadini, No. 23-5692, 2024 U.S. Dist. LEXIS 190062 (S.D.N.Y. Oct. 17, 2024)

Court granted defendant's motion to dismiss plaintiff's claim for statutory damages and attorneys' fees because plaintiff's copyright registration occurred after alleged infringement. Plaintiff artist created poster stating "Love Will Rise Above All" that she carried during 2017 New York City Women's March. Defendant luxury fashion photographer took photographs during march and later partnered with defendant ZV NY, luxury women's fashion brand, to launch collection consisting of three T-shirts using photographs from march. Plaintiff alleged picture printed on one t-shirt was copy of her poster superimposed on different poster from march. In July 2020, plaintiff saw someone in documentary wearing t-shirt with poster. In November 2022, plaintiff applied for copyright registration for "Love Will Rise Above All" poster, and her attorney sent defendants cease and desist letter. Plaintiff's poster was registered with Copyright Office on December 4, 2022. Plaintiff filed complaint July 1, 2023. Court agreed with ZV NY that because any alleged infringement commenced prior to date plaintiff's registration of "Love Will Rise Above All" poster became effective, she was not entitled to statutory damages or attorneys' fees. Court cited Act and case law to support denial of statutory damages or attorneys' fees where any infringement commenced after first publication of work and before effective date of its registration. Bright line rule meant plaintiff not entitled to recover, and defendant's motion to dismiss was granted.

McDermott v. Kalita Mukul Creative Inc., No. 23-1274, 2024 U.S. Dist. LEXIS 208094 (E.D.N.Y. Nov. 15, 2024)

Plaintiff, photographer, brought infringement claim against defendant, for-profit publishing outlet created to support community in Queens during COVID-19 pandemic, for using photo in article without license or authorization. Defendant conceded liability and court entered summary judgment on that issue, awarding plaintiff $940 in statutory damages and denying plaintiff's motion for fees and costs. To determine amount owned in statutory damages, court examined *Bryant* factors, including defendant's state of mind (finding defendant did not act willfully); expenses saved, and profits earned by infringer (finding no evidence defendant saved expenses or earned profits from photo at issue); revenue lost by copyright holder (finding plaintiff failed to provide any clear support for stated amount in licensing fees lost); deterrent effect on infringer and third parties (finding that future infringement would be unlikely, as infringement was not willful and because this is only instance defendant has been accused of infringement despite several years of existence); infringer's cooperation in providing evidence (neutral factor here); conduct and attitude of parties (finding defendant's quick removal of photo and concession of liability weighed heavily in favor of awarding minimal statutory damages). In sum, court found no factors that supported substantial statutory damages award and, accordingly, awarded only $940 – representing double plaintiff's daily rate at time he took photo – to plaintiff.

Moonbug Ent. Ltd. v. Babybus Fujian Network Tech. Co., Ltd., No. 21-6536, 2024 U.S. Dist. LEXIS 139833 (N.D. Cal. Aug. 6, 2024)

District court awarded damages, with interest, to plaintiff. Plaintiff sued defendant for infringement of its popular animated children's show CoComelon. After 10-day trial, jury found defendant liable and awarded $17,718,114.00 in actual damages and lost profits. Court then addressed plaintiff's request to amend judgment to include award of pre-judgment interest, arguing that such interest compensates for profits it was deprived of during period of infringement, addresses defendant's unjust enrichment and delay in compensating plaintiff, and deters further infringement and delay. Court agreed, finding that damages alone without interest would not fully compensate plaintiff for full earnings potential it possessed during time of infringement, and granted pre-judgment interest to plaintiff at average rate between August 2021 and October 2023. Court ordered parties to make final calculation of rate and apply rate to final judgment award total listed above.

XiaoQian Zhao v. BABIQIU, No. 23-4507, 2025 U.S. Dist. LEXIS 1759 (N.D. Ill. Jan. 6, 2025)

Court partially granted plaintiff's summary judgment motion for damages. Plaintiff, creator of 59-second video demonstrating proper use and safety for fire extinguisher, sued defendant, owner of online Amazon storefront selling fire extinguishers, alleging infringement of copyright in video. Defendants had downloaded video from public platform where sellers and distributors commonly shared promotional materials for products and posted 38-second clip from plaintiff's video in photo section of Amazon product listing, changing only length of video and subtitle language from Chinese to English. Court granted plaintiff's motion for summary judgment as to infringement and concluded that plaintiff was entitled to maximum amount allowed, i.e., $30,000, in statutory damages from each defendant, totaling $180,000, given that infringement was blatant and that it would be difficult for plaintiff to obtain actual or profit-based damages because reasonable jury could find defendants' customers bought fire extinguishers for any number of reasons, not just because of safety video. Court also pointed to defendants' vast online customer base as well as defendants' $4 million in revenues during period that plaintiff's video was on defendants' listings. In addition, plaintiff's motion for summary judgment as to willful statutory damages enhancement was granted for one defendant, who did not provide any evidence of due diligence and instead cited that other companies were using video as excuse. Motion was denied as to other defendants, who contended they made reasonable intellectual property rights searches before using video, which would require jury to confirm. Finally, court denied plaintiff's request for attorneys' fees because plaintiff simply argued strong presumption that she was entitled to attorneys' fees without providing any specific reasoning.

Painteq, LLC v. Omnia Med., LLC, No. 20-2805, 2024 U.S. Dist. LEXIS 190526 (M.D. Fla. Oct. 21, 2024)

Plaintiff served as distributor of defendant's products, including implants and instrumentation for SI joint fusion procedures in interventional pain community. Plaintiff also provided consumers with materials relating to defendant's products, including brochures, technique guides and images of products. Defendant accused plaintiff of infringement after learning that plaintiff had started making its own similar surgical products. In response, plaintiff brought declaratory action, filing motion for summary judgment dismissing defendant's infringement claim. Court found that defendant did not have statutory standing to sue for infringements prior to July 2020, as ownership of copyrights was not transferred to defendant from predecessor until after that time, and plaintiff had not distributed any guides or materials with infringing images since then. Court explained that damages are tied to what occurred at time of infringement, and given that defendant did not own copyrights at time of infringement, defendant could not prosecute infringements or claim any damages from plaintiff's dissemination of copyrighted material. Court also rejected defendant's claim for damages based on customers' continuing placement of infringing material in doctor's offices, as guides with infringing images received in July 2020 were still being displayed as of 2024, finding that such claim was too speculative. Further, court held that even though defendant's burden was "low" it nevertheless failed to put forth any non-speculative evidence of damages suffered due to plaintiff's infringement after July 2020. Accordingly, court granted plaintiff's motion for summary judgment on this issue.

Equine Legal Sols., PC v. Fireline Farms, Inc., No. 22-1850, 2025 U.S. Dist. LEXIS 26126 (D. Or. Feb. 12, 2025)

Court granted plaintiff's motion for summary judgment on infringement and awarded minimum statutory damages. Plaintiff provided equine-related legal services in Oregon and owned copyrights in release forms prepared specifically for use in horse rental and housing context. Defendant operated horse ranch in Florida and purchased forms, which were delivered via email for download, from plaintiff. Defendant then provided forms to web developer for defendant's new business website. Web developer saved documents online such that they were accessible to public at URLs connected to defendant's business website. After several attempts to have forms taken down, plaintiff sued defendant for infringement. Court found that defendant violated plaintiff's display right and consequently granted plaintiff's motion for summary judgment on infringement. Turning to question of damages, court concluded that defendant's infringement was "innocent," given that there was no evidence that defendant was aware that forms were publicly accessible on website before it received DMCA notices and, instead, there was only evidence that defendant worked to have forms removed from website and cease infringing conduct every time DMCA notice was received. Given that defendant's infringement was innocent, there was no evidence of profits reaped or revenues lost, and need for deterrence was minimal, statutory award of $200 for each of two works infringed, or $400 in total, was made to plaintiff.

B. Attorneys' Fees

Keck v. Mix Creative Learning Ctr., LLC, 116 F.4th 448 (5th Cir. 2024)

Fifth Circuit affirmed district court's award of damages and denial of attorneys' fees. Defendant was art studio offering art lessons to children. In 2020, defendant began selling "art kits" online so students could learn at home during pandemic. One kit reproduced artwork from plaintiff's Dog Art series. Plaintiff sued for infringement, seeking enhanced statutory damages for willful infringement. District court granted summary judgment in favor of defendant based on fair use and awarded \$102,404 in fees and \$165.72 in costs against plaintiff while declining to hold plaintiff's attorneys jointly and severally liable for award. Fifth Circuit affirmed district court's judgment, finding that award was not abuse of discretion given fair use was complete defense. Fifth Circuit also agreed attorneys' fees were not warranted, given insufficient evidence that attorneys' conduct was unreasonable and vexatious; however, Fifth Circuit also warned plaintiff's firm that future overly aggressive litigation strategy may warrant sanctions and stated that that nothing in opinion would prevent plaintiff's firm from compensating its client if appropriate for fees plaintiff was now obliged to pay defendants.

Alifax Holding Spa v. Alcor Sci. LLC, No. 2022-1641, 2024 U.S. App. LEXIS 14113 (Fed. Cir. 2024)

Plaintiff Alifax sued defendant Alicor alleging infringement. District court excluded opinion of plaintiff's expert on infringement damages, and parties agreed copyright claim was no longer part of case. On appeal, defendant argued district court abused its discretion in denying its motion for attorneys' fees as to infringement claim because plaintiff never identified content of work or presented cognizable damages theory. Federal Circuit held that plaintiff's purported failure to present entirety of source code and that expert's failure to revise damages opinion as case progressed had little to do with overall strength of plaintiff's infringement claim. District court held nothing in record indicated plaintiff brought claim with improper or frivolous motivation, and that there was no need to compensate defendant or deter plaintiff. Federal Circuit affirmed, holding that there was no abuse of discretion in denial of attorneys' fees.

Nwosuocha v. Glover, No. 21-4047, 2025 U.S. Dist. LEXIS 30550 (S.D.N.Y. Feb. 20, 2025)

District court granted in part and denied in part defendants' fee motion because, while awarding attorneys' fees appropriate, smaller fee award was warranted. Plaintiff brought copyright action against defendants, music publishers and performers (including Donald Glover aka Childish Gambino), alleging defendants' song "This is America" infringed on lyrical themes, content, and structure of plaintiff's song "Made in America." Court granted defendants' motion to dismiss in full because plaintiff had not registered copyright in musical composition and, in any case, songs were not substantially similar. Defendants filed motion for attorneys' fees and costs as prevailing party. Court found copyright claim objectively unreasonable because plaintiff pursued claim after learning that it lacked legal or factual support. Court found strategic motivation, as plaintiff had filed action after defendants' song generated widespread commercial success, but plaintiff had not filed similar copyright claims against other high-profile recording artists. Court determined award of attorneys' fees was consistent with goals of compensation and deterrence. However, court found smaller fee award would adequately deter plaintiff and send general deterrence message, and still meaningfully compensate defendants. Court denied defendants' request for fees and costs associated with plaintiff's unsuccessful appeal because court did not preside over appeal and that award should be left up to circuit court.

> *Oppenheim v. Goldberg*, No. 23-2645, 2024 U.S. Dist. LEXIS 170529 (S.D.N.Y. Sept. 20, 2024)

District court denied defendant's motion for attorneys' fees, finding plaintiff's infringement claim was not objectively unreasonable where plaintiff alleged ownership of copyright in television show treatment about crime-fighting scuba diving team ("Work"). Court recited standard for objective unreasonableness, for purposes of awarding attorney's fees, as requiring claims to be "clearly without merit or otherwise patently devoid of a legal or factual basis." Here, defendant argued plaintiff's claim was objectively unreasonable because plaintiff claimed copyright ownership of and protection for treatment for "'dark' television show revolving around a crime-fighting dive team and their relationships on land," which court eventually found to be "all standard ideas and themes related to crime shows." However, court found plaintiff "not objectively unreasonable … to believe that the combination of all of those elements – especially because of 'the additional idea of the scuba diving nature of the team, as well as more detailed facts about the team's admissions process, training, and work'" would result in Work meriting protection under copyright law. Further, court noted defendant admitted "I did something in the vein of illegality" in course of litigation, contradicting claim of plaintiff's "objectively unreasonable" position. Court also found no improper motive for plaintiff's claim or other need for compensation or deterrence for purposes of justifying attorney's fee award. Accordingly, court denied plaintiff's motion for attorneys' fees.

> *Beijing Meishe Network Tech. Co. v. TikTok Inc.*, No. 23-6012, 2024 U.S. Dist. LEXIS 203113 (N.D. Cal. Oct. 8, 2024)

Plaintiff Beijing Meishe Technology Co. and TikTok defendants were in extended litigation over alleged use of plaintiff's proprietary source code. In response to plaintiff's amended complaint, TikTok asserted that plaintiff's copyright infringement claim was in bad faith because plaintiff based claim on 18 copyrights registered with Copyright Protection Centre of China but "later admitted it was unable to determine the entirety of ten of these registered copyrights," fact it knew or should have known before filing suit. As such, TikTok requested relief via attorneys' fees. Plaintiff filed motion to dismiss. Court granted defendant's motion to dismiss, finding that it is improper for defendants to bring counterclaim for attorneys' fees at pleading stage since under Act, attorneys' fees are remedy that can only be granted to "prevailing party."

Moonbug Ent. Ltd. v. Babybus Fujian Network Tech. Co., Ltd., No. 21-6536, 2024 U.S. Dist. LEXIS 139833 (N.D. Cal. Aug. 6, 2024)

District court awarded attorneys' fees to prevailing plaintiff. Plaintiff sued defendant for infringement of its popular animated children's show CoComelon. After 10-day trial, jury found defendant liable. Plaintiff then moved for total of $5,963.684.85 in attorneys' fees covering, among other things, work related to infringement claim. Court considered several factors including, e.g., degree of success obtained, frivolousness, motivation, objective unreasonableness, and need to advance considerations of compensation and deterrence, and, using lodestar method, granted plaintiff's motion, emphasizing plaintiff's "nearly perfect success" at trial and defendant's several unreasonable arguments throughout case. Total amount of fees requested and granted also included compensation for work by plaintiff's attorneys related to copyright misrepresentation claim; work related to proving that defendant willfully infringed several Cocomelon songs; and for work related to motion for sanctions, which was based on, among other things, defendant submitting fabricated evidence. Court further granted plaintiff's additional motion for attorneys' fees for post-judgment work, including work related to execution of judgment and administrative motions, including motion for attorneys' fees currently under consideration. Court found entries were detailed enough to make costs reasonable and granted additional attorneys' fees in amount of $174,922, bringing total amount of attorneys' fees and costs to $6,657,490.57.

Canadian Standards Ass'n v. P.S. Knight Co., Ltd., No. 20-1160, 2025 U.S. Dist. LEXIS 44834 (W.D. Tex. Mar. 12, 2025)

Plaintiff Canadian Standards Association ("CSA") sued defendants for infringement, alleging that defendants obtained invalid U.S. copyright registration and infringed its Canadian copyrights in model electrical, propane, and oil and gas pipeline codes by selling copies of codes in United States. District court found for CSA, but Fifth Circuit reversed, holding that because CSA's codes were incorporated into Canadian law, defendants' copying of those codes was not infringement. Defendants moved for attorneys' fees and costs. Magistrate judge recommended against attorneys' fees because (1) litigation was not frivolous or objectively unreasonable, there were no legal precedents involving foreign copyrights, and this was issue of first impression; (2) CSA did not litigate with improper motivation but in attempt to protect its copyright, even if it was unsuccessful; and (3) unique facts of this case presented issues at heart of aims of Copyright Act. Defendants' motion for attorneys' fees denied.

Eclipse Sportswire v. Sports Mall, LLC, No. 22-1433, 2025 U.S. Dist. LEXIS 16324 (M.D. Fla. Jan. 30, 2025)

District court, adopting magistrate judge's report and recommendation, granted defendant's motion for attorneys' fees. At issue were four photographs by non-party Evers, taken while employed by Eclipse Sportswire, company that provided editorial photographic coverage for sporting events. Eclipse provided Evers photographs to other entities for redistribution. Defendant Sports Mall sold sports memorabilia, including Evers photographs. Eclipse sued

Sports Mall for infringement. Court granted summary judgment for defendant because Eclipse did not own exclusive copyright interest in photographs, and therefore lacked standing. Defendant moved for attorneys' fees, which court granted. Plain reading of Eclipse's contract made clear that there was no evidence of exclusive license, and therefore it was unreasonable to bring action. Regarding improper motivation, while magistrate judge in report and recommendation did not enumerate any improper litigation conduct, magistrate pointed to fact that Eclipse demanded $600,000, maximum statutory damages available under Act, for alleged infringement of four photographs it licensed for $2,000 to $4,000, then prolonged litigation for more than year, requiring defendant to expend fees to defend itself through summary judgment. Finally, court rejected Eclipse's argument that award of fees was not warranted because there had been no substantive holding of non-infringement. "Technical" or not, statutory standing defense in this case was objectively reasonable, and award of attorneys' fees encouraged defendants to raise similar defenses in future cases.

> *Eclipse Sportswire v. Sports Mall, LLC*, No. 22-1433, 2024 U.S. Dist. LEXIS 203053 (M.D. Fla. Nov. 7, 2024)

Plaintiff provided worldwide editorial photographic coverage for sporting events with focus on horse racing, equestrian events, and golf. Plaintiff and photographer entered into non-exclusive license agreement relating to photos taken by photographer, including photos of jockeys, in which photographer agreed not to share images that he submitted to plaintiff with any other stock photo agency. However, agreement did not restrict photographer from sharing images beyond competitors of plaintiff. Defendant, operator of online store that sold sports memorabilia and collectibles, obtained autographed posters and prints depicting relevant jockey photos from one such third party that was not competitor of plaintiff. Nevertheless, plaintiff sued defendant for infringement. Court granted summary judgment in defendant's favor, concluding that plaintiff lacked standing, and dismissed plaintiff's case with prejudice. Following dismissal of case, defendant moved for attorneys' fees. Court held that defendant was prevailing party, even though favorable ruling was not on merits. Court also concluded that fees award would further objectives of Act, including encouraging plaintiffs to assess standing prior to filing suit and by deterring plaintiffs who lack standing from proceeding with litigation, as well as encouraging defendants to enforce standing requirements and not seek settlement. Court emphasized that, despite plaintiff's arguments to contrary, assignment of right to sue does not convey standing. Court also highlighted fact that plaintiff requested maximum statutory damages of $600,000 for infringement of four photos that plaintiff licensed for only thousands of dollars, as well as several delays by plaintiff that caused year-long prolonging of litigation.

> *Prepared Food Photos Inc. v. Epic Sols. LLC*, No. 22-37, 2024 U.S. Dist. LEXIS 216827 (W.D. La. Oct. 16, 2024)

District court denied motion for summary judgment seeking dismissal of statutory damages claim on basis of delay in registration, where timing of infringement was in dispute. Plaintiff food photographer sued grocery store defendants for using its food photographs in weekly advertisements. Defendants moved for partial summary judgment, arguing that § 412 prohibits statutory damages and attorneys' fees when works at issue were not registered prior to commencement of infringement or within three months of publication. Plaintiff asserted that all infringement took place after registration. Court agreed with plaintiff that statutory damages and attorneys' fees would be available if all infringement took place after registration, but when infringement began was disputed, so summary judgment was denied for both parties.

C. Injunction/Impoundment

Narratives v. Tech.-FZCO, No. 25-1644, 2025 U.S. Dist. LEXIS 29888 (N.D. Cal. Feb. 19, 2025)

District court granted plaintiff's request for temporary restraining order because plaintiff showed likelihood of success on merits, irreparable harm, balance of equities, and public interest. Plaintiff, copyright owner of animated series, asserted claims against defendant for allegedly fraudulently obtaining copyright registrations. Defendant claimed to be current copyright owner of animated series and submitted DMCA takedown notices regarding plaintiff's content. Plaintiff sought TRO enjoining defendant from taking actions to remove or disable access to content. Court found TRO without notice appropriate because if defendant filed another DMCA takedown notice, plaintiff's content would be disabled. Court found plaintiff demonstrated likelihood of succeed on merits of DMCA false notification claim because plaintiff presented evidence defendant was neither creator nor copyright owner of animated series, and access to series was disabled in response to defendant's DMCA takedown notice, which caused loss in revenue. Court determined plaintiff established that it was likely to suffer irreparable harm if TRO not granted because defendant planned to submit another DMCA takedown notice and if disabled, plaintiff would lose ad revenue as well as loss of goodwill and damage to reputation. Court found balance of equities favored plaintiff because defendant did not have any legitimate lawful interest in animated series. Public interest favored granting of TRO to avoid misuse of IP laws, including DMCA. Court found it appropriate to issue injunctive relief without requiring plaintiff to provide security because there was no likelihood of harm to defendant.

L ALD LLC v. Gray, No. 24-2195, 2025 U.S. Dist. LEXIS 15233 (S.D. Cal. Jan. 28, 2025)

District court denied plaintiff's motion for preliminary injunction. Defendant Rebekah Gray began writing YA fiction work *Nightweaver* in 2020 and self-published it in October 2023. Work was picked up by Hachette and scheduled to be published in deluxe limited edition in March 2025. *Nightweaver* was meant to be first novel of three-book series written by Gray and published by Hachette. Plaintiff sought preliminary injunction to stop defendants from offering *Nightweaver* for sale. Defendant began writing *Nightweaver* in January 2020, completing substantial draft by October 2020, one year before plaintiffs wrote opening chapters of YA novels *The Boy With the Beautiful Name* and *The Boy With the Beautiful Soul*, which were distributed on Wattpad. Defendant sent complete manuscript to her editor, as evidenced by emails, in June 2022, before plaintiff's first book was finished. Court, reviewing under prohibitory injunction standard, because request would keep status quo before alleged infringement, found plaintiff failed to meet standard. To show likelihood of success on merits, plaintiffs were required to show (1) copying and (2 unlawful appropriation. Court found plaintiff could not meet either element. To prove copying circumstantially, plaintiff can show that defendant had access to plaintiff's work and that two works share similarities probative of copying. Plaintiffs failed to assert their copyrighted works were widely read and disseminated. Plaintiffs' argument that simple Google search would pull up work was unpersuasive, as anything searchable on internet would then be considered widely disseminated. Additionally, there was issue of timing. Plaintiffs could not show access because defendant finished majority of *Nightweaver* before plaintiff published its work. Further, plaintiff failed to show striking similarity, such that access could be presumed. Plaintiff's works and *Nightweaver* did not share substantial similarity in total concept and feel. Finally, plaintiff had not provided evidence to support claim that it would suffer irreparable harm. Court found public interest served by denying motion for preliminary injunction.

Fokiss, Inc. v. TLM Glob., LLC, No. 24-14096, 2025 U.S. Dist. LEXIS 17610 (S.D. Fla. Jan. 31, 2025)

Court, adopting magistrate judge's recommendation, denied plaintiff's motion for preliminary injunction and granted defendant's motion for preliminary injunction. Case revolved around copyright issues in film *Died Suddenly*. While there was oral contract between parties, no written contract existed regarding scope of work or ownership rights in intellectual property associated with film. Party seeking preliminary injunction must establish four conditions: (1) substantial likelihood of success on merits; (2) showing that movant will suffer irreparable injury if injunction does not issue; (3) proof that threatened injury to movant outweighs any harm that might result to non-moving party; and (4) showing that public interest would not be disserved by granting of preliminary injunction. Court found that defendant satisfied its burden as to each of four factors.

Isaac Hayes Enters., LLC v. Trump, No. 24-3639, 2024 U.S. Dist. LEXIS 163188 (N.D. Ga. Sept. 11, 2024)

District court granted preliminary injunction prohibiting further use of plaintiff's song. Plaintiff owned exclusive copyright interest in and to song "Hold On, I'm Comin'" by Isaac Hayes and David Porter ("HOIC"). Trump Campaign began regularly publicly performing HOIC in 2020, as "outro" music for appearances and campaign events. Cease-and-desist letter was sent to Trump Campaign in 2020 by then-music publishers of HOIC but was ignored by Trump Campaign. Generally, entities that wish to publicly perform copyrighted songs obtain licenses from one or more "performing rights societies" ("PROs"), which acquire nonexclusive public performance rights through agreements with musical-work copyright owners, and in turn act as licensing agents, granting to music users right to publicly perform any of millions of songs in PROs' respective repertoires by means of "blanket license agreements." Blanket license agreements offered by BMI differ according to music-user licensee's "business type," including "Political Entities or Organizations."

BMI's Political Entities license includes provision that permits BMI to exclude musical works from license should BMI receive objection from songwriter or publisher to its use by licensee. In that case, BMI notifies licensee that particular musical work has been removed from license and licensee is no longer authorized to perform it. Trump Campaign entered into Political Entities License in 2022. In June 2024, BMI emailed Trump Campaign, informing Campaign that HOIC had been excluded from Campaign's Political Entities license at request of David Porter. Trump Campaign continued to publicly perform HOIC at campaign events. Plaintiffs sued, and moved for preliminary injunction, requesting court to order defendants to stop using HOIC without license, and to take down any videos they had posted that contained HOIC. Under 11th Circuit law, to obtain preliminary injunctive relief moving party must show (1) substantial likelihood of success on merits; (2) that it will suffer irreparable injury unless injunction is issued; (3) that threatened injury outweighs possible harm that injunction may cause opposing party; and (4) that injunction would not disserve public interest. Court found plaintiffs likely to succeed in proving both elements of infringement claim, ownership of valid copyright, and violation of one or more of copyright owner's exclusive rights. Given that BMI notified Trump Campaign on June 6, 2024 that one of songwriters for HOIC objected to defendants' use and that it was excluded from Agreement effective immediately, court found it likely that plaintiffs would be able to show that Trump Campaign's post-June 6, 2024 uses were unlicensed and infringing. Plaintiffs argued that they would be irreparably harmed absent injunction because being associated with defendants would "mar their brand," and might lead other entities to not license HOIC. Court agreed, finding that if Campaign's use of HOIC continued, risk of association with Trump and harm that might ensue therefrom were both actual and imminent, and unable to be remedied through damages. Given consistency with which Trump Campaign had used HOIC and fact that Campaign events are frequently aired on widely disseminated media, association between HOIC and Trump was neither speculative nor remote. Court found, however, that risk of harm from videos of past events remaining online did not pose same imminent risk, and accordingly held that plaintiffs had shown irreparable harm based on future use of HOIC but not for videos of past uses. Court noted that public interest is served by upholding copyright protection and preventing misappropriation of protected works, and found there was no evidence to suggest that inability to publicly perform HOIC in future would inhibit defendants' political speech. Court therefore found balance of equities to favor plaintiffs, and public interest to be served by entering preliminary injunction barring defendants' future use of HOIC without valid license.

Whaleco Inc. v. Shein Tech. LLC, No. 23-3706, 2025 U.S. Dist. LEXIS 23573 (D.D.C. Feb. 9, 2025)

Plaintiff Temu, fast fashion seller, sued Shein, competing fast fashion seller. Temu moved for preliminary injunction "on one sliver of its claims in this litigation: that Shein is abusing the Digital Millennium Copyright Act by submitting to Temu meritless takedown notices that allege, without the required good-faith basis, that photographs of products for sale on Temu's site are infringing copyrighted material." Temu alleged that on entering U.S. market it began receiving average of 170 DMCA takedown requests daily with around 63% being from Shein, totaling 33,000 DMCA takedowns over last year just from Shein. ("For a sense of scale, Temu's U.S. site hosts over three million product listings displaying more than 80 million product images, with over 100,000 new product images uploaded to Temu each day.") Shein's DMCA takedowns allegedly sometimes included faulty links and illegal screen grabs. Temu moved for preliminary injunction requiring that Shein provide proof that it owned copyrighted material or was acting on behalf of copyright owner along with each takedown notice it submits to Temu while suit was pending. Plaintiff seeking preliminary injunction must establish that it is likely to succeed on merits, that it is likely to suffer irreparable harm in absence of preliminary relief, that balance of equities tips in its favor, and that injunction is in public interest. While injunction request was relatively narrow in scope, Temu had not sufficiently alleged irreparable harm to grant injunction. Temu argued that it would suffer harms to its reputation and goodwill, seller and customer relations, and ability to compete and market share, all of which are akin to economic loss. Temu provided no evidence of its public image or its reputation being damaged by takedowns; further, seller customer relations were not harmed, as it was Shein filing takedowns, not Temu requesting its merchants stop selling. Finally, loss of competitive standing, i.e., customers, is not irreparable harm because it can be addressed by monetary reward. While Temu might lose some prospective customers, it had not shown why it could not be compensated with monetary damages. Further evidence that harm can be remedied through monetary reward was fact that Temu had been receiving takedowns from Shein for over year and had just sought to move for injunction.

VIII. PREEMPTION

Tubb v. Paramount Pictures Corp., No. 24-1417, 2025 U.S. Dist. LEXIS 17198 (C.D. Cal. Jan. 29, 2025)

Plaintiff, actor from original *Top Gun* movie, sued Paramount for using his image in photo that was shown in sequel *Top Gun: Maverick* without his authorization, claiming violation of California statutory and common law right of publicity. Defendant filed motion to strike. Court found plaintiff's right of publicity claims were preempted, since work at issue was photograph displayed in movie, which falls under type of fixed works of authorship covered by Copyright Act. Plaintiff could not avoid preemption by arguing that his image or persona should be protected generally, since issue complained of was reflected in fixed copyrightable work.

Azam Aliafgerad v. Bates, No. 24-10721, 2025 U.S. Dist. LEXIS 84399 (C.D. Cal. May 1, 2025)

Plaintiff Azam Ali, singer, composer, and creator of "authentic Middle Eastern-inflected" vocal performances used in film soundtracks and videogames, sued defendant Tyler Bates for unauthorized use of her voice in various recordings. District court denied defendant's motion to dismiss plaintiff's breach of contract and breach of confidence claims. Court found that claims were not preempted as they had additional elements not found in copyright law, including right not to have information disclosed to others and right to compensation that went beyond scope of copyright law.

Tremblay v. OpenAI, Inc., 742 F. Supp. 3d 1054 (N.D. Cal. 2024)

District court granted OpenAI's motion to dismiss Unfair Competition Law ("UCL") claim, finding that UCL claim was preempted. Plaintiffs allege that defendants used plaintiff's copyrighted books and play to train ChatGPT without permission. Court reasoned that, because infringed materials were literary works, subject matter of UCL claim fell within subject matter of copyright. Court also found that UCL claim was qualitatively same as direct copyright infringement claim, as basis or "underlying nature" of both claims is unauthorized copying and use of infringed works to train ChatGPT, even though elements of claims are not identical. Court dismissed UCL claim without leave to amend as amendment would be futile, given that claim lacked "tenable legal theory."

X Corp. v. Bright Data Ltd., No. 23-3698, 2024 U.S. Dist. LEXIS 214657 (N.D. Cal. Nov. 26, 2024)

Court denied plaintiff's motion for leave to amend complaint as to claims based on scraping and selling of data because claims were preempted. Plaintiff X Corp, owner and operator of social media platform X, brought suit against defendant Bright Data Ltd., alleging defendant improperly accessed, scraped, and sold user-generated data from X Corp.'s systems in violation of X Corp.'s Terms of Service. Plaintiff brought state-law claims for misappropriation, unjust enrichment, tortious interference, and breach of contract, as well as statutory claims under federal and state law. Defendant argued, and court agreed, that scraping-related claims were preempted. Court found that in proposed amended complaint, plaintiff disclaimed ownership of users' posts while simultaneously seeking to assert control over copying of those posts by third parties. Court was not persuaded by plaintiff's attempt to claim rights in organization of non-copyrightable data, and court found that plaintiff failed to allege that defendant copied any protectable arrangement of data, as opposed to unprotectable facts. Court held that plaintiff's efforts to assert control over publicly available or non-copyrightable data were inconsistent with Copyright Act's purpose of promoting public access to facts and unoriginal information. Court also held that state-law claims cannot be used to achieve copyright protection for unprotectable elements, such as raw data or content organization. Court thus denied plaintiff's motion for leave to amend complaint as to scraping-related claims.

Hian v. Louis Vuitton USA Inc., No. 22-3742, 2024 U.S. Dist. LEXIS 114123 (E.D. Penn. Jun. 28, 2024)

Plaintiff, fashion designer, alleged defendant, major fashion house, copied three of plaintiff's fashion designs ("Works"). District court granted defendant's motion to dismiss Lanham Act, state law unfair competition and unjust enrichment claims on basis such claims preempted. For Lanham Act and state law unfair competition claims, plaintiff argued defendant used Works in defendant's marketing materials. Court found Works fall within subject matter of copyright and plaintiff's claims concerned same rights protected by copyright, with no "extra elements" required, as plaintiff's arguments all rested upon "alleged unauthorized copying and use of [plaintiff's] copyright expression," and therefore claims were preempted. Similarly, plaintiff argued unjust enrichment on basis defendant earned profits by using Works in promotion and on products. Court found unjust enrichment claim "seeks compensation for [defendant] 'having profited from the use of [Works] and thus seeks to protect the same rights as those protected by Copyright Act" and, with no "extra element" required, claim was preempted. Accordingly, court granted defendant's motion to dismiss as to Lanham Act, state law unfair competition and unjust enrichment claims.

SocialCoaster, Inc. v. ADME (CY) Ltd., No. 24-404, 2024 U.S. Dist. LEXIS 192616 (M.D. Tenn. Oct. 23, 2024)

District court denied plaintiff's motion to dismiss defendant's state law counterclaims relating to defendant's allegations that plaintiff filed false DMCA takedown notifications against defendant. Plaintiff, tech-centric media publisher, acquired rights in and then monetized online videos, including "Making Resin Waves" ("Video"). Plaintiff sued defendant, digital content studio, claiming that defendant violated plaintiff's rights in Video. Defendant counterclaimed, alleging that plaintiff filed false DMCA takedown notification to Facebook requesting takedown of certain content posted by defendant, even though plaintiff did not hold registered copyrights in content and defendant had license to use content. In addition to DMCA claims, defendant counterclaimed under state law for defamation, intentional interference with contract and tortious interference with business relationships. Plaintiff argued that such counterclaims were preempted by DMCA provisions providing remedies for false takedown notices. Court found state law tort claims all included additional elements not covered by DMCA false notice provisions. Additionally, court found state law claims not expressly preempted by DMCA, nor were such state law claims impliedly preempted on basis DMCA conflicts with such claims or "scheme of federal regulation … so pervasive as to make reasonable the inference that Congress left no room for the [s]tates to supplement it." Accordingly, court denied plaintiff's motion to dismiss counterclaims.

Recon Grp. LLP v. Lowe's Home Ctrs., LLC, 743 F. Supp. 3d 737 (W.D.N.C. 2024)

District court denied defendant's motion to dismiss plaintiff's breach of contract, trade secret and unjust enrichment claims, finding plaintiff's claims not preempted. Plaintiff, retail logistics technology company, entered into services agreement with defendant retailer per which plaintiff licensed software product ("Work") to defendant for managing merchandise return. During period in which defendant had access to Work, defendant allegedly copied portions of Work to create in-house software for managing merchandise return. Plaintiff sued for copyright infringement, breach of contract, trade secret misappropriation and unjust enrichment. Defendant argued plaintiff's contract, trade secret and unjust enrichment claims were preempted. Court disagreed, looking at two-pronged test for preemption and asking (1) whether Work falls within subject matter of copyright and (2) whether other claims protect rights equivalent to exclusive rights of federal copyright, such as reproduction. For first prong, court found that, while aspects of plaintiff's claims concerned reproduction of elements of Work protected by copyright, claims also included allegations of misappropriation of "know-how, concepts, processes, methods, and protocols," for example, which are outside scope of copyright. For second prong, court found plaintiff's other claims sought relief outside exclusive rights of federal copyright protection, such as defendant's breach of promise to pay provision in agreement. As such, court found plaintiff's claims for breach of contract, trade secret misappropriation and unjust enrichment not preempted.

Aristocrat Techs., Inc. v. Light & Wonder, Inc., No. 24-382, 2024 U.S. Dist. LEXIS 217471 (D. Nev. Nov. 18, 2024)

District court denied defendant's motion to dismiss plaintiff's trade dress claims as preempted, finding plaintiff's trade dress claims concerned whether audiovisual elements of plaintiff's game would result in consumer confusion over source of game products, not confusion over creative author of such audiovisual elements. Defendant moved to dismiss plaintiff's claims for alleged infringement of trade dress of plaintiff's electronic casino game, specifically certain audiovisual elements of game ("Works") which plaintiff claimed as trade dress. Defendant argued plaintiff's claims preempted because claims relating to "communicative" works, such as audiovisual works, are precluded by copyright law. In support of argument, defendant cited *Dastar Corp. v. Twentieth Century Fox Film Corp.* in which U.S. Supreme Court found Lanham Act claims preempted by where claims concern source of "communicative product," such as authorship of artistic work, as opposed to "origin of goods" where Lanham Act applies. Here, court found *Dastar* not applicable because trade dress claims concerned use of Works for purposes of identifying "creator of the slot machine game itself," rather than for purposes of identifying "origin of the [creative author of the] audiovisual elements." As such, court found plaintiff's trade dress claims not preempted and denied defendant's motion to dismiss.

IX. DIGITAL MILLENNIUM COPYRIGHT ACT

Capitol Recs., LLC v. Vimeo, Inc., 125 F.4th 409 (2d Cir. 2025)

Second Circuit affirmed district court's granting of DMCA safe harbor to video sharing platform Vimeo, finding plaintiff failed to show defendant was ineligible for safe harbor based on "actual or red flag knowledge" of infringing material and right and ability to control infringing material. Plaintiffs, record companies and rightsholders of musical recordings, sued video streaming platform Vimeo for infringement based on user-uploaded videos featuring unlicensed copyrighted music. Although Vimeo timely responded to takedown requests relating to videos, plaintiffs alleged that Vimeo employees promoted or otherwise interacted with videos containing copyrighted materials, that those employees knew or should have known that those videos were infringing, and that failure of employees to affirmatively take down those videos (even absent takedown request) made Vimeo ineligible for DMCA safe harbor. As to whether Vimeo had "red flag" knowledge of infringing videos, Second Circuit considered whether Vimeo employees (persons with "no specialized knowledge" of copyright law) were aware of facts making it obvious that: (1) videos contained copyrighted music; (2) music was not licensed; and (3) videos did not constitute fair use. Second Circuit rejected plaintiffs' argument that Vimeo employees' general knowledge that music licensing “can be confusing and painful” and that they should avoid using copyrighted music in background of videos met standard for “red flag” knowledge as to infringement for any particular video. As to fair use, Second Circuit stated that difficulty of distinguishing fair use from infringement was illustrated by *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), noting that “[w]here academic scholars specialized in the study of the fair use question and the Justices of the Supreme Court are so divided, we cannot conclude that it was ‘apparent’ … to untutored employees of Vimeo that dancing, acting, or lip-dubbing performances of copyrighted music uses posted by Vimeo users were not fair use” Finding that plaintiffs similarly failed to prove that Vimeo had right and ability to control user content (and noting paucity of cases and very narrow circumstances where this prong has been satisfied), district court application of DMCA safe harbor affirmed.

Superama Corp. v. Tokyo Broad. Sys. TV., No. 23-55001, 2024 U.S. App. LEXIS 19124 (9th Cir. Aug. 1, 2024)

Ninth Circuit affirmed holding that circumvention claim under DMCA cannot rest on wholly extraterritorial conduct, and reversed dismissal of DMCA claim. Plaintiff Superama Corp. brought suit against defendant Tokyo Broadcast Systems, claiming defendant circumvented technological measures that controlled access to plaintiff’s work, in violation of DMCA. Specifically, plaintiff alleged defendant’s hacking techniques were applied to plaintiff’s servers in United States, thereby circumventing U.S.-based protection in order to permit unauthorized download of plaintiff’s work. Ninth Circuit employed presumption against extraterritoriality, finding that worldwide protection under § 104(a) applied to works, not conduct. Court affirmed holding that circumvention claim cannot rest wholly on extraterritorial conduct, but reversed dismissal, holding that plaintiff could adequately allege permissible domestic application of DMCA even if defendant directed conduct from abroad.

Green v. United States DOJ, 111 F.4th 81 (D.C. Cir. 2024)

Circuit court affirmed district court’s dismissal of facial First Amendment challenges to DMCA’s anticircumvention and antitrafficking provisions. Plaintiffs, computer science professor Matthew Green and creator of digital video circumvention device Andrew “bunnie” Huang sought to invalidate, as facially violative of First Amendment, DMCA § 1201’s (1) anticircumvention provision, which includes triennial rulemaking process to grant exemptions thereto by Librarian of Congress, and (2) antitrafficking provision, which is not subject to triennial exemption process. Plaintiffs had dismissed their as-applied claims, so on appeal argued solely that substantial amount of what DMCA prohibits as circumvention or trafficking facilitates fair use of copyrighted works, rendering DMCA provisions overbroad or prior restraint on speech. Plaintiffs also claimed that triennial rulemaking process compounded First Amendment injury by transforming Librarian of Congress into censor with broad discretion to grant exemptions to favored speakers and messages. Court noted that “heartland” conduct prohibited by DMCA is digital piracy (form of modern theft), and further that fair use has never been held to guarantee access to copyrighted material in order to copy it with fair user’s preferred technique or format. Court held that § 1201(a) could not be subject to strict scrutiny because it is not facially content-based or otherwise contingent upon message conveyed; indeed, § 1201(a) expressly regulates conduct (circumvention of technological means and trafficking in circumvention means) rather than speech. Further, § 1201(a) passed intermediate scrutiny because it furthers substantial government interest in fostering widespread availability of copyrighted digital work on content-neutral basis and any constitutionally cognizable burden alleged by plaintiffs was slight. Plaintiffs' claim that triennial rulemaking process was prior restraint likewise failed because exemption process neither directly regulates speech nor bears close enough nexus to expression to threaten censorship risks. Court nevertheless held in *dicta* that future litigants remained free to argue that particular regulatory exemption discriminates based on content or viewpoint and is therefore subject to strict scrutiny, as well as to bring as-applied challenges against Librarian of Congress exemptions as being content- or viewpoint-based.

Med. Imaging & Tech. All. v. Libr. of Cong., 103 F.4th 830 (D.C. Cir. 2024)

D.C. Circuit held that Librarian of Congress's waivers to DMCA anti-circumvention provision are subject to Administrative Procedures Act ("APA"), reversing district court finding that Librarian, as part of Library of Congress, is part of "the Congress" and therefore not "agency" within meaning of APA. Librarian (following Register of Copyright's recommendation) issued rulemaking decision under DMCA that anti-circumvention prohibition should be waived to permit diagnosis and repair of certain medical devices. Trade association representing medical device manufacturers sued, arguing Librarian acted *ultra vires* and rulemaking power was unconstitutional "because it was either a legislative decision rendered without bicameralism and presentment or an executive rulemaking performed by a congressional officer." District court granted Library's motion to dismiss, finding APA claims barred by sovereign immunity on basis that Library "is indisputably part of Congress" and, since Congress is immune from APA claims, Library's rulemaking power not subject to APA review. D.C. Circuit reversed, finding that irrespective of whether Library is considered "agency," Act specifies that "all actions" of Register (including rulemaking subject to approval of Librarian) are subject to APA, and thus DMCA rules are subject to APA review just like all other copyright rules. Judgment for defendant Library vacated and case remanded to district court for consideration of APA claims.

N.Y. Times Co. v. Microsoft Corp., No. 23-11195, 2025 U.S. Dist. LEXIS 64462 (S.D.N.Y. Apr. 4, 2025)

District court denied defendants' motion to dismiss contributory infringement claims. Defendant OpenAI, founded in 2015, developed large language models ("LLMs"), AI that receives text prompts and generates natural language responses. In 2018, released first of its Generative Pre-trained Transformers ("GPTs") in 2018 under name GPT-1, followed by release of GPT-2 in 2019, GPT-3 in 2020, GPT-3.5 in 2022 and GPT-4 in 2023. In November 2022, OpenAI released ChatGPT, text-generating chatbot. Plaintiffs, news organizations including New York Times, New York Daily News and Center for Investigative Reporting, sued Microsoft (having invested in OpenAI) as well as OpenAI, claiming that defendants' LLMs implicated plaintiffs' copyrighted articles and other written works ("Works") at various stages. Pre-training (or collection) stage involves collecting and storing "vast amount of content scraped from the internet," including plaintiffs' websites, then creating datasets later used to train LLMs. Training (or input) stage involves storage of training articles in computer memory, provision of portions of articles to LLM and adjusting LLM's parameters so it accurately predicts next word. Response generation (or output) stage sees LLM responding to user queries based on data collected and using for training. Responses can regurgitate large portions of plaintiffs' Works and sometimes produce hallucinations, responses that are demonstrably but not recognizably false. Plaintiffs asserted claims under DMCA §§ 1202(b)(1), which prohibits intentional removal of copyright management information ("CMI"), and 1202(b)(3), which prohibits distribution of works knowing that CMI has been removed or altered without copyright owner's authority. Defendants moved to dismiss, arguing that plaintiffs lacked Article III and statutory standing, and that their complaints failed to state claim under either § 1202(b) provision. Court held that plaintiffs had necessary standing. Harm under both DMCA and traditional copyright infringement claims involves injury to author's property rights in original work of authorship. Plaintiffs' allegations of harm from DMCA violation were sufficiently concrete to satisfy Article III's injury-in-fact requirement. Further, plaintiffs' harm "fairly traceable to the removal of CMI" because plaintiffs had alleged that "defendants' removal of CMI from plaintiffs' works conceals and facilitates copyright infringement, which deprives plaintiffs of licensing and subscription revenue." Plaintiffs also had statutory standing because, even assuming without deciding that DMCA claims require "allegations of injury beyond a mere statutory violation," plaintiffs have alleged that DMCA "violation injures them by concealing defendants' own copyright infringement, enabling and facilitating the copyright infringement of end users, diverting users from plaintiffs' websites, and causing a decline in subscription and licensing revenue." Although plaintiffs had standing, court dismissed most DMCA claims, save for CIR's and Daily News' (and related plaintiffs') § 1202(b)(1) claims against OpenAI. As to § 1202(b)(1) claims, court held that NYT failed to plausibly allege that OpenAI removed CMI from training datasets because NYT's sole contention was that, "because the regurgitating outputs listed in their complaints lack CMI, then *a fortiori* CMI was removed by defendants during the training process." Daily News plaintiffs and CIR had sufficiently alleged that OpenAI removed CMI during training process because OpenAI, in creating training dataset, used Dragnet and Newspaper content extractors, both of which remove CMI as part of extraction process. These plaintiffs further plausibly alleged that OpenAI's CMI removal was intentional because extractors' removal of CMI was publicly known to remove author, title, copyright notices and footers, and OpenAI's highly skilled data scientists would know how these extractors worked. Daily News plaintiffs and CIR also plausibly alleged that OpenAI had knowledge that CMI removal would induce or conceal copyright infringement because OpenAI had publicly acknowledged "both that it uses copyrighted works to train its models and that its models 'are capable of distributing unlicensed copies of copyrighted works.'" Court held that all plaintiffs had failed to allege any of § 1202(b)(1) elements against Microsoft. It further held that all plaintiffs had failed to allege § 1202(b)(3) claims against either defendant. NYT and Daily News plaintiffs failed to plead that even ChatGPT's "regurgitations" constituted substantial or entire reproductions of plaintiffs' Works, as they were instead only excerpts of said Works. CIR, meanwhile, failed to plead that defendants distributed CMI-less copies of

Works with one another. Thus, although plaintiffs had standing to assert DMCA claims, most such claims were dismissed.

> *Intercept Media, Inc. v. OpenAI, Inc.*, No. 24-1515, 2025 U.S. Dist. LEXIS 30147 (S.D.N.Y. Feb. 20, 2025)

District court held that removal of copyright management information ("CMI") is concrete injury supportive of independent claim under Act and Constitution, and that plaintiff pled claim for removal of CMI by ChatGPT against OpenAI, creator of ChatGPT, due to its knowledge of possible infringement, but not against its partner Microsoft. Plaintiff Intercept sued OpenAI and Microsoft alleging that ChatGPT, their joint artificial intelligence model, violates DMCA by training on copies of plaintiff's works that had CMI removed. Plaintiff alleged that defendants used algorithms to extract main article text from plaintiff's articles, not bringing CMI with it. Plaintiff also alleged that ChatGPT output regurgitated nearly verbatim copyrighted works of plaintiffs, and that CMI was deliberately removed from training data to avoid ChatGPT settings designed to recognize copyrighted works and avoid regurgitating them. Defendants moved to dismiss, arguing that CMI removal is not injury supportive of independent claim, but court found that removal of CMI is sufficiently similar to harm traditionally actionable under copyright: injury to property rights that Constitution upholds to encourage creative production. Defendants also argued that plaintiff failed to allege that OpenAI knew or had reasonable grounds to know that alleged CMI removal would induce, enable, facilitate, or conceal copyright infringement. Plaintiff's allegations that ChatGPT sometimes regurgitates copyrighted material, and that OpenAI has taken efforts to reduce regurgitation, were sufficient to plead this knowledge. However, plaintiff failed to allege knowledge by Microsoft, which is partner of OpenAI but does not train ChatGPT itself. Claims that OpenAI and Microsoft distributed actual Intercept articles with CMI removed by sending training data to each other were also dismissed, as there was insufficient factual support for these claims.

> *Monroe v. Buzzfeed, Inc.*, No. 23-6234, 2024 U.S. Dist. LEXIS 180062 (S.D.N.Y. Sept. 30, 2024)

District court granted in part and denied in part defendant's motion to dismiss. Plaintiff photojournalist registered photographs with Copyright Office and published work with CMI. Plaintiff alleged defendant willfully copied, reproduced, and distributed one photograph on Facebook for financial benefit without authorization. Plaintiff claimed defendant's photo's elements, composition, colors, arrangement, subject, lighting, angle and overall appearance were identical or substantially similar to protected photograph. Plaintiff filed complaint alleging infringement. Defendant moved to dismiss. As to direct infringement claim, court denied defendant's motion, finding plaintiff plausibly alleged ownership of valid copyright and unauthorized copying by defendant. As to vicarious and contributory infringement claims, court denied motion, finding plaintiff plausibly alleged that defendant induced infringement or profited from infringement while declining to stop it. As to count alleging removal/alteration of CMI under DMCA, court denied motion, finding plaintiff adequately pleaded required elements of § 1202(b) claim. As to § 1202(a) claim, however, court granted motion, finding defendant's minimal designation of "Complex" did not constitute CMI because it was not "copyright-identifying information," as it referred to author of Facebook posts, not creator of photograph.

White v. UMG Recordings, Inc., No. 20-9971, 2024 U.S. Dist. LEXIS 153585 (S.D.N.Y. Aug. 27, 2024)

Court granted defendants' motion for summary judgment, finding defendants' takedown notice was not improper under § 512(f). Plaintiff G-Baby paid non-party for non-exclusive license to use instrumental music track ("Beat"). In 2017, G-Baby used Beat to create sound recording titled "Oi!" and posted links of sound recording and related music video on multiple platforms, including Twitter. In 2018, defendant Playboi Carti created sound recording titled "Right Now," which also incorporated Beat, which sound recording was owned by defendant Universal Music Group Recordings, Inc. ("UMG"). UMG content protection specialist encountered two posts of "Oi!" on Twitter when searching for posts that infringed UMG copyrights. UMG notified Recording Industry Association of America, which issued takedown notice, with which Twitter complied. G-Baby filed suit, alleging UMG knowingly submitted improper takedown notices for "Oi!" and that Playboi Carti enlisted UMG to stifle competition by taking down "Oi!" posts. Defendants moved for summary judgment as to DMCA claim. Court held § 512(f) only required "good faith belief" that material was infringing, and copyright holder was not liable for misrepresentation under DMCA if it subjectively believed identified material infringed copyright, even if they were ultimately mistaken. Court found that factual record contradicted G-Baby's claim that, in issuing takedown notices, UMG knew that "Oi!" did not infringe on UMG's copyrights. Additionally, G-Baby conceded that UMG content protection specialist was not aware that G-Baby had license to use Beat and that "Oi!" did not infringe on UMG copyright. Court also found that record did not establish that Playboi Carti was involved in issuance of takedown notices. Finding that takedown notices were not improper, court granted defendants' motion for summary judgment on plaintiff's DMCA claim.

Kadrey v. Meta Platforms, Inc., No. 23-3417, 2025 U.S. Dist. LEXIS 42084 (N.D. Cal. Mar. 7, 2025)

Defendant Meta developed artificial intelligence software called Large Language Model Meta AI (LLaMA). Meta trained LLaMA through text from various sources, including works of plaintiffs, who filed class action against Meta for infringement and violation of DMCA. District court denied Meta's motion to dismiss DMCA claim since plaintiffs alleged sufficient injury for Article III standing, finding that there was sufficient evidence that Meta removed copyright management information as part of training of AI using copyrighted materials.

Andersen v. Stability AI Ltd., 744 F. Supp. 3d 956 (N.D. Cal. 2024)

District court denied AI companies' motions to dismiss artists' claim for induced infringement based on defendants' sale of AI software to users who could then create infringing outputs. Visual artists filed class action suit against Stability AI, Runway AI, Midjourney, and DeviantArt, creators of AI products using Stable Diffusion software that used plaintiffs' works as training images, such that AI could produce output images in style of those works. Court dismissed plaintiffs' DCMA claims alleging that Stability, Runway, and Midjourney removed CMI and provided fake CMI on its output images, because plaintiffs did not allege that any exact copies of plaintiffs' work was produced without CMI, or that fake CMI was used on or in connection with plaintiffs' actual works, as opposed to on new outputs that looked similar to plaintiffs' works.

> *Cognosphere Pte. Ltd. v. X Corp.*, No. 23-80294, 2024 U.S. Dist. LEXIS 168544 (N.D. Cal. Sept. 18, 2024)

Court denied defendant's request to quash subpoena to reveal identities of anonymous X users accused of copyright infringement. Plaintiff Cognosphere, operator of online video gaming service, initiated matter in order to issue subpoena to defendant X Corp. (formerly Twitter) pursuant to DMCA. Plaintiff sought to discover true identities of several account holders (collectively, "Hutao accounts") plaintiff alleged were involved in distributing material that infringed plaintiff's copyrights in works related to video game Genshin Impact. Defendant objected to subpoena and asserted objections based on First Amendment against revealing information that would identify users of Hutao accounts. Court considered four factors in its decision. First, it found "speech" at issue here was not "core" First Amendment expression to be protected because Hutao's accounts' alleged posting of unauthorized copies of plaintiff's Genshin Impact neither religious nor political speech. Second, court analyzed whether plaintiff demonstrated *prima facie* case of infringement. Court found it had because plaintiff (1) owned copyright in specific aspects of Genshin Impact and (2) submitted evidence that account holders posted material that infringed plaintiff's copyright (images and materials for unreleased game updates). Third, court evaluated whether need for discovery outweighed First Amendment interests and found subpoena was issued in good faith after *prima facie* case of infringement shown. Material sought was directly and materially relevant to plaintiff's core claim and was not available through other sources. Finally, court asked whether anonymous speakers had adequate notice to defend anonymity, finding defendant's policies would have resulted in notice of subpoena being sent to account holders. Weighing these factors, court denied defendant's motion to quash subpoena.

> *Beijing Meishe Network Tech. Co. v. TikTok Inc.*, No. 23-6012, 2024 U.S. Dist. LEXIS 130213 (N.D. Cal. Jul. 23, 2024)

District court denied defendants' motion to dismiss infringement claim, finding plaintiff adequately alleged defendants' removal of copyright management information ("CMI") in violation of DMCA. Plaintiff, developer of audio and video software, alleged defendants TikTok and affiliates infringed on source code copyright ("Works") by creating infringing source code and removed CMI such as "copyright notice, a reservation of rights, the 'birth date,' ownership and authorship" from Works and replaced such information with defendants' own information. Defendants argued plaintiff failed to identify specific information removed or altered; plaintiff failed to plausibly allege "required mental condition" for defendants to know removal of CMI would "aid infringement" because, as

CMI was not visible to public, "it is implausible for … [removal of CMI] … to induce, enable, facilitate, or conceal alleged infringement"; and defendants' code from which CMI was allegedly removed was not "identical" to Works. Court found that plaintiff identified specific CMI removed or altered from Works, specifically changing of author name for software application; mental conditions at pleading stage "need not be alleged with specificity" and, drawing all inferences in favor of plaintiff, plaintiff sufficiently alleged mental state; and case law split concerning whether works in question must be identical. As such, court found plaintiff's claims should not be dismissed at pleading stage.

> *Levy v. Kilgore*, No. 23-559, 2024 U.S. Dist. LEXIS 225977 (W.D. Tex. Dec. 13, 2024)

Magistrate judge recommended that district court deny both parties' motions for summary judgment. Plaintiff, resident of Lakeway, Texas, sued defendant, mayor of Lakeway, arguing that defendant made misrepresentations under DMCA. Plaintiff alleged that defendant sent DMCA takedown notices to YouTube and Rumble Canada Inc. for two videos plaintiff posted that were originally posted by City of Lakeway's Facebook account and webpage, and that as part of takedowns defendant misrepresented that videos infringed defendant's copyrights. Plaintiff requested permanent injunction restraining defendant from taking down properly posted materials and restraining free speech. Both sides moved for summary judgment. Court found that there was genuine issue of material fact as to whether defendant knowingly materially misrepresented that videos were infringing or considered plaintiff's fair use defense. Court found that issue of defendant's subjective belief was appropriate for trial. Additionally, plaintiff submitted evidence that he suffered damages by paying to set up website to host videos after takedown, paying consultant to prepare counter-takedown notices, and incurring attorneys' fees, thus raising genuine issue of material fact whether he had suffered damages. Court concluded that plaintiff adequately alleged cognizable injury under DMCA, and thus defendant had not shown entitlement to summary judgment either.

> *Whaleco Inc. v. Shein Tech. LLC*, No. 23-3706, 2025 U.S. Dist. LEXIS 23573 (D.D.C. Feb. 9, 2025)

Plaintiff Temu, fast fashion seller, sued Shein, competing fast fashion seller. Temu moved for preliminary injunction "on one sliver of its claims in this litigation: that Shein is abusing the Digital Millennium Copyright Act by submitting to Temu meritless takedown notices that allege, without the required good-faith basis, that photographs of products for sale on Temu's site are infringing copyrighted material." Temu alleged that on entering U.S. market it began receiving average of 170 DMCA takedown requests daily with around 63% being from Shein, totaling 33,000 DMCA takedowns over last year just from Shein. ("For a sense of scale, Temu's U.S. site hosts over three million product listings displaying more than 80 million product images, with over 100,000 new product images uploaded to Temu each day.") Shein's DMCA takedowns allegedly sometimes included faulty links and illegal screen grabs. Temu moved for preliminary injunction requiring that Shein provide proof that it owned copyrighted material or was acting on behalf of copyright owner along with each takedown notice it submits to Temu while suit was pending. Plaintiff seeking preliminary injunction must establish that it is likely to succeed on merits, that it is likely to suffer irreparable harm in absence of preliminary relief, that balance of equities tips in its favor, and that injunction is in public interest. While injunction request was relatively narrow in scope, Temu had not sufficiently alleged irreparable harm to grant injunction. Temu argued that it would suffer harms to its reputation and goodwill, seller and customer relations, and ability to compete and market share, all of which are akin to economic loss. Temu provided no evidence of its public image or its reputation being damaged by takedowns; further, seller customer relations were not harmed, as it was Shein filing takedowns, not Temu requesting its merchants stop selling. Finally, loss of competitive standing, i.e. customers, is not irreparable harm because it can be addressed by monetary reward. While Temu might lose some prospective customers, it had not shown why it could not be compensated with monetary damages. Further evidence that harm can be remedied through monetary reward was fact that Temu had been receiving takedowns from Shein for over year and had just sought to move for injunction.

Philips N. Am. LLC v. Image Tech. Consulting, LLC, No. 22-147, 2024 U.S. Dist. LEXIS 212866 (N.D. Tex. Nov. 22, 2024)

District court found that DMCA "right to repair" exemption does not operate retroactively, and violations before its passage remain actionable. Plaintiff MRI machine maker used its own proprietary software on machines and provided repair services to customers of its machines. Defendants also provided repair services on plaintiff's machines, and plaintiff accused defendants of circumventing security measures on its software in order to do so. Court granted summary judgment for plaintiff, finding that plaintiff's technical measures to limit access to its copyrighted software were protected by DMCA, and defendants used fake certificates to bypass those measures. Though right-to-repair exemption in DMCA protects circumventions performed to allow defendants to apply maintenance to machines, circumventions that took place before exemption was passed into law in October 2021 were not protected.

Dow Jones & Co. v. Harris, 749 F. Supp. 3d 776 (W.D. Tex. 2024)

District court granted defendant's motion for summary judgment on DMCA claim. Plaintiff, global provider of news and business information, required readers to pay license fee to distribute articles to certain number of recipients. Defendant investment manager and professor had email program to share PDF versions of plaintiff's articles, and email distribution list included more than 1,000 individuals. Plaintiff received notice of potential infringement. After plaintiff contacted defendant, defendant ceased circulating PDFs of plaintiff's articles and instead circulated links to articles. Plaintiff filed suit, alleging defendant removed or altered CMI conveyed in connection with plaintiff's articles, thereby violating DMCA. Defendant moved for summary judgment on its DMCA claim. Court found plaintiff did not provide evidence that defendant intentionally or knowingly altered CMI, and defendant provided declarations that he did not knowingly or intentionally make deletions or alterations in emails. Court concluded plaintiff failed to establish genuine dispute of material fact on scienter and granted defendant's motion for summary judgment on DMCA claim.

Mishiyev v. UMG Recordings, Inc., No. 23-1942, 2024 U.S. Dist. LEXIS 222217 (M.D. Fla. Dec. 9, 2024)

Court denied defendants' motion to dismiss plaintiff's material misrepresentation claim under DMCA. Plaintiff Erik Mishiyev, also known as DJ Short-E, created videos of himself mixing, performing, and DJ-ing on his YouTube channel. Plaintiff asserted that he created and owned all videos at issue, and that they were transformative videos that include original works. Plaintiff alleged that defendants, record labels, improperly filed DMCA takedown notices with knowledge that they were misrepresenting that plaintiff had engaged in infringement. Plaintiff brought suit, alleging violation of DMCA by material misrepresentation. Defendants moved to dismiss plaintiff's complaint, arguing that plaintiff failed to allege any facts supporting his contention that defendants knowingly and materially misrepresented that videos were infringing. Although court found that while plaintiff's use of defendants' copyrighted works for commercial mixing likely does not fall within definition of fair use, court held that, at this stage, plaintiff sufficiently alleged misrepresentation to withstand motion to dismiss, citing Eleventh Circuit opinion that failure to consider fair use before issuing takedown notice constitutes misrepresentation of copyright infringement. Court further found that defendant did not raise affirmative defense that use was unauthorized and not fair use, and plaintiff had no obligation to plead facts supporting that affirmative defense. Thus, court denied defendants' motion to dismiss plaintiff's material misrepresentation claim under DMCA.

Oppenheimer v. Highland Falls Country Club, Inc., No. 24-133, 2024 U.S. Dist. LEXIS 201429 (W.D.N.C. Nov. 4, 2024)

District court denied motion to dismiss where plaintiff adequately pled that defendant had removed CMI. Plaintiff progressional photographer sued defendant country club alleging defendant removed copyright notice from one of plaintiff's works and used work to advertise country club through website and printed brochures. Plaintiff alleged violation of DMCA for removal of copyright management information ("CMI") for each of 250 copies of photograph distributed through printed brochures. On motion to dismiss, defendant argued that DMCA claim for removal of CMI only applies to *digital* removal of information, and that plaintiff could not state claim for defendant's removal of CMI from *physical* materials. District court considered definition of "copies" in Act, noting that DMCA did not amend definition, and found this definition favored plaintiff. Turning to portion of definition of CMI in DMCA ("[t]he name of, and other identifying information about, the copyright owner of the work, <u>including</u> the information set forth in a notice of copyright") (emphasis added), court found plain language of statute contains no distinction between "digital" or "physical" materials. Finding that plaintiff sufficiently pled defendant's removal of plaintiff's CMI in reproducing physical copies of plaintiff's work, motion to dismiss DMCA claim denied.

Parent World, LLC v. True to Life Prods., No. 23-8089, 2024 U.S. Dist. LEXIS 172098 (D. Ariz. Sept. 24, 2024)

Court denied defendants' motion for judgment on pleadings concerning false copyright management information and copyright infringement. Plaintiff New Parent World LLC created original copyrighted content for breastfeeding techniques and newborn care. Plaintiff entered into licensing and royalty agreement with defendant True To Life, allowing defendant to distribute content on subscription-based website. Defendant allegedly made content available on free-trial basis in violation of agreement, and altered and distributed plaintiff's content bearing only defendant's copyright notices. Plaintiff sued, claiming false copyright management information ("CMI") and removal of CMI in violation of DMCA, as well as copyright infringement. Defendant moved to dismiss claims relating to falsification and removal of CMI, arguing that both counts failed because DMCA does not apply to derivative works. Defendants further argued that DMCA requires that infringing work be identical to violate DMCA, and works at issue were distinct derivative works that lacked substantial similarity to plaintiff's works. Court found that language of DMCA does not require infringing work be identical to violate DMCA. Court thus denied defendants' motion as to claims of falsification and removal of CMI.

Diamonds Direct, L.C. v. Manly Bands, No. 23-870, 2024 U.S. Dist. LEXIS 210234 (D. Utah Nov. 18, 2024)

District court granted in part and denied in part defendant's motion to dismiss. Plaintiff wedding ring company discovered defendant wedding ring company manufactured knockoffs of plaintiff's designs for third party. Defendant also had "Custom Ring Builder" on its website. Some images on Builder tool came from plaintiff's servers, but coding in defendant's tool obscured plaintiff's watermark, so images appeared as defendant's own. Defendant moved to dismiss. As to § 1202(a) claim, court found allegations sufficient to plead that defendant knowingly used its CMI alongside product images with intent to conceal its infringement of images. As to § 1202(b) claim, court found allegations sufficient because averments alleged defendant removed plaintiff's CMI and distributed amended images with intent to conceal defendant's infringement. Court denied motions to dismiss §§ 1202(a) and 1202(b) claims.

X. VISUAL ARTISTS RIGHTS ACT

Hayden v. Koons, No. 21-10249, 2025 U.S. Dist. LEXIS 33345 (S.D.N.Y. Feb. 25, 2025)

District court held that plaintiff's work not eligible for VARA protection. Plaintiff Michael A. Hayden, artist who resided primarily in Italy between 1980 and 2007, created several sculptures for Diva Futura, Italian production company of adult-oriented performances, partially owned by Ilona Staller aka Cicciolina. In 1988, plaintiff created sculptural work featuring serpent wrapped around pedestal of boulders ("Original Work") for Staller to use in her live erotic shows and sold Original Work to Diva Futura for $900. In 1989-90, defendant

Koons, American “appropriation artist,” paid Staller (whom Koons subsequently married) to be photographed with him in sexually explicit positions and traveled to Italy multiple times during this period. Koons and Staller used Original Work in their photo sessions. Koons subsequently incorporated depictions of Original Work, in whole or in part, in at least six different artworks partially comprising his *Made In Heaven* series, of which works three were at issue (“Koons Works”). Plaintiff argued that Koons’ use infringed plaintiff’s rights under VARA. VARA protects all covered works created on or after June 1, 1991 as well as those created before such date “but title to which has not, as of such effective date, been transferred from the author.” It was undisputed that Original Work created before VARA effective date, but parties disputed whether plaintiff had transferred “title” before that date. Although previous version of VARA had used “copyright” in place of “title,” final version adopted title to avoid Takings Clause claims under Fifth Amendment. In light of this, and VARA’s failure to define “title,” court concluded that “title” refers to physical copy of visual work at issue and not to title in any intellectual property rights. Because plaintiff had sold Original Work to Diva Futura in 1988, prior to VARA effective date, VARA did not cover Original Work.

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