
Cowan, Liebowitz & Latman

Copyright Review
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“Recent Developments In Copyright”
Selected Annotated Cases

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I. JURISDICTION AND PROCEDURAL ISSUES

A. Subject Matter Jurisdiction

Moore v. Willis, No. 14-1602, 2014 U.S. Dist. LEXIS 127543 (S.D. Cal. Sept. 8, 2014)

District court granted judgment creditor's motion to remand action to state court. Plaintiffs sued defendant in Superior Court of California for breach of legal services contract. Default judgment was issued against defendant. Judgment was assigned to creditor, who filed motion to appoint receiver to aid in collection of judgment by taking possession of and conducting sale of defendant's copyright interests in "certain musical compositions." Defendant removed to federal court, and judgment creditor filed motion to remand. Defendant argued that district court had jurisdiction over matter because creditor's claim "arises under copyright law." Court disagreed, finding that plaintiff's complaint involved state claim for breach of contract; to extent copyright issues were involved in post-judgment enforcement proceedings, they were collateral and did not bear on merits of plaintiff's claim. Court noted that even if it were proper to base subject matter jurisdiction on issues raised in post-judgment motion, and not in complaint, court still would not find federal jurisdiction in instant case. Case did not meet Ninth Circuit test: whether (1) complaint asked for remedy expressly granted by Copyright Act; (2) complaint required interpretation of Copyright Act; or (3) federal principles should control claims. Court also noted that creditor's motion to appoint receiver arose from state law governing enforcement of judgments, which governs whether copyrights are subject to execution to satisfy judgment. Defendant argued creditor sought relief that violated involuntary transfer provision of Copyright Act. Court rejected argument, finding that defendant's reliance on provision was defense, and it was well-established that case may not be removed on basis of federal defense. District court did not have subject matter jurisdiction over action, and removal was improper. Case was therefore remanded to state court.

DEA Specialities Co. v. DeLeon, No. 14-634, 2014 U.S. Dist. LEXIS 123049 (W.D. Tex. Sept. 4, 2014)

Plaintiff distributor sued defendant, manufacturer of operable walls, in Texas state court. Plaintiff and defendant had longstanding exclusive distributorship agreement, which plaintiff terminated in 2013 due to alleged breach by defendant. Plaintiff subsequently began distributing another manufacturer's products, making plaintiff and defendant potential competitors on operable wall projects. Defendant filed counterclaims for breach of contract under Texas law and for copyright infringement, alleging plaintiff continued to use defendant's proprietary and copyrighted computer software to compete against defendant after termination. Defendant removed to federal court based on 28 U.S.C. § 1454, which creates exception to general rules that removal jurisdiction depends on allegations in well-pleaded complaint and that only defendants may remove, and allows removal of all copyright claims. Plaintiff moved to remand, alleging defendant failed to establish copying by plaintiff

sufficient to state claim under Copyright Act. Noting that plaintiff's arguments concerning copying went to merits, not pleading, court found defendant's claim for copyright infringement asserted directly under Copyright Act sufficient to allege claim "arising under" Act, giving defendant right to remove under § 1454. Finding that plaintiff's claims and defendant's counterclaims all arose from distributorship agreement and events occurring after termination, court decided to exercise supplemental jurisdiction over state-law claims. Accordingly, plaintiff's motion to remand was denied.

WTGD 105.1 FM v. SoundExchange, Inc., No. 14-15, 2015 U.S. Dist. LEXIS 17935 (W.D. Va. Feb. 13, 2015)

District court adopted magistrate judge's report recommending dismissal of declaratory judgment action for lack of subject matter jurisdiction. Plaintiffs sought declaration holding that anticipated transmission of radio programming to local listeners over Internet using "geo-fencing technology" conformed with exemption from statutory licenses for sound recordings under § 114 of Act, which provides that radio stations need not obtain licenses or pay royalties if such transmissions are broadcast within 150-mile radius from site of station's broadcast transmitter. First, court dismissed objection that magistrate judge failed to account for contractual relationship between two of plaintiff radio stations and defendant due to existing statutory licenses. Complaint sought no declaration concerning contractual liability, nor did plaintiffs ask court to interpret or enforce existing statutory licenses. Instead, real issue concerned interpretation of § 114 exemption for statutory licenses or payment of royalties. Court affirmed magistrate judge's holding that complaint failed to allege cognizable injury that was fairly traceable to defendant. Threat of alleged injury was of infringement traceable to individual copyright owners, not breach of terms of statutory licenses administered by defendant. Court also affirmed magistrate's holding that dispute was not ripe, since nothing about defendant's response letter "evinces a dispute definite and concrete in nature," particularly in view of letter's failure to mention infringement (much less threaten any legal action) and defendant's admissions at oral argument that defendant would play no role in infringement actions brought by copyright owners in response to plaintiffs' planned "geo-fencing" simulcasts. Finally, court denied plaintiffs leave to amend on basis of futility, due to inherently speculative and hypothetical nature of allegations, since plaintiffs' claimed "geo-fencing" technology was presently only "pipe dream" and plaintiffs had done nothing to implement said technology or otherwise demonstrate that such technology would meet § 114 exemption. Thus, there was no showing of concrete and definite or real and immediate Article III case or controversy.

R.S. Scott Assocs., Inc. v. Timm Constr. Co. LLC, No. 14-13338, 2014 U.S. Dist. LEXIS 173282 (E.D. Mich. Dec. 16, 2014)

District court denied defendants' motion to dismiss for lack of subject matter jurisdiction. Plaintiff, architectural and engineering firm, sued defendants, construction company and architect, for copyright infringement, unjust enrichment and breach of contract. Plaintiff had created architectural design for planned expansion of church. Defendant construction company won bid to handle construction of project. Funding problems delayed construction,

and church decided to scale down to smaller project. Church used defendants construction company and architect to complete smaller project. Once under construction, plaintiff asked to review project plans, and brought suit alleging defendants' plans directly copied portions of plaintiff's plans. Defendants moved to dismiss, claiming plaintiff erred in pleading diversity jurisdiction under 28 U.S.C § 1332 although parties were all Michigan citizens, and therefore all of plaintiff's claims should be dismissed for lack of subject matter jurisdiction. Plaintiff, who had alleged jurisdiction under Copyright Act and §§ 1332 and 1338, conceded wrong statute was cited in complaint. District court found subject matter jurisdiction established by exclusive federal jurisdiction under Copyright Act, and plaintiff's pleading mistake did not require dismissal. While plaintiff had erroneously pleaded diversity jurisdiction, plaintiff had also correctly pleaded copyright jurisdiction under § 1338. Since plaintiff had cited to at least one correct statute, defendants' motion to dismiss for lack of subject matter jurisdiction was denied.

B. Personal Jurisdiction and Venue

BWP Media USA Inc., v. Hollywood Fan Sites, LLC, No. 14-121, 2014 U.S. Dist. LEXIS 160642 (S.D.N.Y. Nov. 14, 2014)

Court granted defendant's motion to dismiss for lack of personal jurisdiction. Plaintiff owned and licensed photographs of celebrities to online and print publications. Foreign company Hollywood Fan Sites, LLC operated websites that allegedly infringed BWP's copyrights by displaying unlicensed copies of BWP's photographs. In New York, exercise of general jurisdiction is permitted where foreign company "is engaged in such a continuous and systematic course of doing business in New York as to warrant a finding of its presence in the state." "Paradigm bases for determining the place where a corporation is at home are the place of incorporation and the principal place of business." BWP asserted in complaint that Hollywood's principal place of business was in New York City. Bare allegation, however, was insufficient; further, it was countered by affidavit of CEO of Hollywood, who asserted that Hollywood was Florida corporation with its principal place of business in Florida. Court granted motion to dismiss for lack of personal jurisdiction, finding that even if Hollywood had "substantial, continuous, and systematic course of business" in New York, it would be insufficient to exercise general jurisdiction.

Flowserve US Inc. v. ITT Corp., No. 14-1706, 2014 U.S. Dist. LEXIS 176904 (N.D. Tex. Dec. 22, 2014)

District court dismissed case so it could proceed in Russia. Plaintiff and defendants were competitors that manufactured and served flow-control systems for oil and gas companies. All three companies were U.S. entities, but conducted significant business activities in Russia. Plaintiff sold pipeline pumps to Moscow company for use in operations in Russia. Plaintiff's employees who worked on specific pumps left plaintiff, and worked for defendant. Additionally, one of plaintiff's Moscow-based employees unlawfully copied plaintiff's copyrighted product drawing from its server in Michigan onto DVD or CD-ROM, then

resigned, joined defendant and allegedly downloaded copyrighted images onto defendant's server. Plaintiff contended that unauthorized copies of drawings were made within United States on plaintiff's server and computer systems so that they could be transmitted to Moscow. Other employees of plaintiff also left for defendant, after being specifically trained on pumps at issue in Netherlands. When plaintiff's contract with Moscow company ended, contract was awarded to defendant. Plaintiff filed suit for copyright infringement, among other claims, and defendant filed motion to dismiss on *forum non conveniens* grounds, arguing that Russia was appropriate forum. Court found Russia to be available and adequate forum not only because defendants had consented to jurisdiction in Russia, but because (1) there was link between Russian offices of parties and instant dispute, and (2) primary unlawful activities took place in Russia. Court also found U.S. courts had routinely found Russia to be adequate forum for types of claims asserted in case. Court then weighed private interest factors, specifically (1) ease of access to sources of proof; (2) availability of compulsory process for unwilling witnesses; (3) cost of securing attendance of willing witnesses; (4) ability to view premises; and (5) other practical factors. Court found that all but fourth factor, which was neutral, weighed heavily in favor of dismissal, mainly because majority of relevant witnesses and documents were located in Russia and were written in Russian. Court also found following public factors further supported dismissal: (1) administrative burdens; (2) interest of forum in resolving controversy; (3) governing law; and (4) burdening citizens. With respect to first two factors, court found Russian law would likely be applied to case, and that actors, property and harm suffered were primarily connected to Russia, causing both to weigh heavily in favor of dismissal. With respect to governing law, court found that despite fact that copyrighted drawings were downloaded from plaintiff's server in Michigan, it was employee's copying and distribution, not downloading, that constituted infringement. As complaint alleged infringement occurred in Russia, Russian law applied. Finally, court found citizens of U.S. forum would be burdened as dispute would involve significant translation, and Russia had greater interest than Texas in dispute. Court therefore granted motion to dismiss.

Havel v. Honda Motor Europe, Ltd., No. 13-1291, 2014 U.S. Dist. LEXIS 140983 (S.D. Tex. Sept. 30, 2014)

Court denied in part and granted in part defendants' motion to dismiss based on lack of personal jurisdiction. Houston-based artists Dan Havel and Dean Ruck obtained copyright registration for "Inversion," portal-like conical sculpture made of wooden house boards. Inversion was disassembled; however, photographs of Inversion, also copyrighted, remained on Internet. Dispute arose after Honda's film company, Rogue Films, contacted plaintiffs by phone and email and subsequently used plaintiffs' copyrighted material to create European Honda CR-V commercial, believing plaintiffs had consented to such use. Court considered following *Walden* factors in determining personal jurisdiction of each defendant: (1) "the relationship between the defendant and the forum state must arise out of contacts the defendant himself creates with the forum state"; and (2) "the defendant's contacts with the forum state itself, not the defendant's contacts with people who reside there." Court found that Rogue Films created "substantial connection with" Texas by playing role in using

plaintiffs' copyrighted material as well as potentially defrauding plaintiffs into consenting to Rogue's use of material in Honda's commercial. Court found that McGarry Bowen UK, Honda's advertising agency, had sufficient contact with Texas to exercise personal jurisdiction, since McGarry UK's employees obtained and used Inversion pictures in their pitchbook, and subsequently circulated Houston-based website www.arteryhouston.com, which displayed video of Inversion being constructed. Internal emails from McGarry UK also suggested employees knew of Rogue's deceptive communications with plaintiffs. Court granted dismissal to McGarry Bowen US based on lack of personal jurisdiction, finding that McGarry US's contacts to Texas were too "random, fortuitous, or attenuated" to satisfy due process, since there was no evidence or allegation that McGarry US directed any activity towards Texas. The Mill UK helped build Inversion-inspired structure for Honda's commercial and provided post-production services. Court also granted The Mill UK's motion to dismiss based on lack of personal jurisdiction, since The Mill UK's "suit-related conduct" was "focused more toward the plaintiffs than toward" Texas. Honda's motion to dismiss for lack of personal jurisdiction was also granted. Court found that plaintiffs' "corporate-agency" theory connecting McGarry Bowen UK to Honda for personal jurisdiction purposes failed because plaintiffs did not allege that Honda "directed its agents or distributors to take action" in Texas. Court denied Honda's motion to dismiss based on *forum non conveniens* because, although available and adequate alternative forum existed, private and public factors did not support dismissal.

C. Pleadings

Adjmi v. DLT Entm't Ltd., No. 14-568, 2015 U.S. Dist. LEXIS 43285 (S.D.N.Y. Mar. 31, 2015)

Plaintiff, author of play *3C*, sought declaratory judgment of non-infringement of defendant production company's copyrights in popular *Three's Company* television series. In analyzing plaintiff's Rule 12(c) motion on pleadings, court noted that case featured "twist" on standard Rule 12(c) motion because it was action for declaratory judgment of non-infringement. Plaintiff could prevail on his motion only if "pleadings establish that there can be no set of facts to support an action for copyright infringement by [defendant] against [plaintiff] as would-be defendant." In evaluating pleadings, court noted that its analysis was based almost exclusively on review of underlying works (*i.e.*, DVDs of *Three's Company* episodes and *3C* script) and several reviews of theatrical production rather than pleadings, finding it appropriate to rely on these materials as incorporated by reference into complaint. "Put differently: the Court's decision is predicated on its review of the raw materials, not the parties' proverbial labels."

Fischer v. Forrest, No. 14-1304, 2015 U.S. Dist. LEXIS 4395 (S.D.N.Y. Jan. 13, 2015)

Court denied defendant's motion to dismiss. *Pro se* plaintiff, creator of popular honey harvesting product, alleged that defendants used plaintiff's proprietary text and images to sell

knock-off product. Parties had previous relationship through which defendants sold plaintiff's product. Defendants terminated relationship and began selling knock-offs using plaintiff's images and text online, including through third party websites, and in catalogs. Court found plaintiff had valid copyright in text and images, and that plaintiff had adequately alleged direct infringement, rejecting defendants' argument that, since plaintiff had authorized defendants to use copyrighted material with plaintiff's product, and authorization had not been expressly revoked, defendants' use to promote knock-off was also authorized. Court also found that plaintiff had adequately pleaded secondary infringement claim, because defendants had made copyrighted material available or had asked third party sellers of knock-offs to use material. Plaintiff adequately pleaded DMCA claim, having provided "solid basis on which to infer that defendant removed the copyright management information [CMI] intentionally," and defendant had removed multiple forms of CMI from plaintiff's documents and repeatedly published materials stripped of CMI, both online and print, for more than three years, and continued such use even after receipt of cease-and-desist letter.

LivePerson, Inc. v. 24/7 Customer, Inc., No. 14-1559, 2015 U.S. Dist. LEXIS 3688 (S.D.N.Y. Jan. 9, 2015)

District court granted defendant's motion to dismiss for failure to state claim. Work at issue was software code. Court noted that infringement claim must allege "(1) which specific original works are the subject of the claim; (2) plaintiff's ownership of the copyrights in those works; (3) proper registration of the copyrights; and (4) 'by what acts during what time the defendant infringed the copyright.'" Court found plaintiff adequately pleaded first three elements. Defendant argued plaintiff did not adequately plead fourth element, time of infringement. Plaintiff contended that allegations of amended complaint, taken together, were fairly read as alleging that period of infringement was "between 2006 when the parties began their contractual relationship and May 2014 when LivePerson filed the FAC." Court found, however, that amended complaint did not specify time of infringement, nor could period of infringement fairly be implied from various allegations in amended complaint and its exhibits. Court accordingly granted in part defendant's motion to dismiss, granting plaintiff leave to replead within 20 days of date of opinion.

Lambertini v. Fain, No. 12-3694, 2014 U.S. Dist. LEXIS 131390 (E.D.N.Y. Sep. 17, 2014)

Court granted defendant's motion to dismiss pursuant to Rule 12(b)(6) with leave to amend. Plaintiff, "creator of numerous pieces of artwork featuring fairies for which she has obtained copyright protection," brought suit based on defendant's selling of allegedly substantially similar artworks. To meet pleading requirements of Rule 8, plaintiff asserting copyright infringement must allege (1) which specific original works are subject of claim, (2) that plaintiff owns copyright, (3) that works have been registered in accordance with copyright statute, and (4) by what acts and during what time defendant has infringed copyright. Plaintiff alleged that defendant had access to works "locally and online," including plaintiff's website, and that defendant's works had "look and feel" of plaintiff's works. Court found, however, that complaint failed to allege which specific original works were subject of action,

and failed to sufficiently allege acts constituting infringement, or when alleged infringement occurred. Court found that plaintiff's allegations were too "vague and broad" to "state a claim of actual copying."

Hayes v. Keys, No. 14-6246, 2015 U.S. Dist. LEXIS 2860 (C.D. Cal. Jan. 7, 2015)

Court granted defendants' motion to dismiss amended complaint. Plaintiff songwriter and related entities sued defendant Viacom and others for copyright infringement of plaintiff's song. Court had previously dismissed plaintiffs' complaint with leave to amend. In deciding defendants' motion to dismiss first amended complaint ("FAC"), court found that plaintiffs had failed to sufficiently plead any of elements of claim. Rather than respond to court's order dismissing original complaint, which provided plaintiffs with guidance on how to potentially state viable claim, FAC was as unintelligible as original complaint. Court noted that, because plaintiffs were appearing *pro se*, court would normally dismiss FAC with leave to amend, but court concluded in this instance that leave to amend would be futile. Pleading defects in FAC applied to all defendants. Thus, court dismissed FAC against all defendants without leave to amend.

Wolf v. Travolta, No. 14-938, 2014 U.S. Dist. LEXIS 165513 (C.D. Cal. Nov. 24, 2014)

District court denied defendant's motion to dismiss copyright infringement claim. Plaintiff, founder and CEO of Actors for Autism ("AFA"), sued defendant, former President and board member of AFA, for copyright infringement and numerous state law claims. Plaintiff alleged she was sole author of filmmaking course curriculum designed for persons with developmental disabilities, which was registered with Copyright Office. Defendant was asked to resign as President of AFA for alleged breaches of fiduciary duty, and took AFA equipment, including computers containing plaintiff's curriculum, when he left, and refused to return them to plaintiff. Plaintiff alleged defendant was using infringing curriculum substantially similar to plaintiff's and had copied large portions of plaintiff's curriculum, including lengthy verbatim passages, into defendant's program guide. Defendant moved to dismiss infringement claim based primarily on plaintiff's failure to provide copy of document covered by copyright registration. Complaint attached curriculum with later date than material covered by registration. Plaintiff later attached earlier version of curriculum to amended complaint, and requested judicial notice of official deposit copy. All three curriculum versions submitted by plaintiff were different page lengths, but contained several identical passages plaintiff alleged defendant had copied. Since many allegedly copied passages remained same in each document, court found defendant had been put on notice as to material allegedly owned by plaintiff and copied by defendant. Accordingly, defendant's motion to dismiss plaintiff's infringement claim was denied.

AJ Mgmt. Consulting, LLC v. MBC FZ-LLC, No. 13-3213, 2014 U.S. Dist. LEXIS 86817 (N.D. Cal. June 24, 2014)

District court granted defendant's motion to dismiss. Plaintiff developed technology related to cloud computing and licensed its products internationally. Plaintiff and defendant entered into agreement for development of custom application for use with television series *Omar*, historical Arab television drama series produced and broadcast by defendant. Agreement provided defendant with license to use application with certain services to customize application for use in connection with mobile devices. Source code of application contained notice declaring ownership by plaintiff in application, and warned that removal of notice revoked license agreement. Plaintiff alleged that defendant's removal of notice revoked defendant's license, such that defendant's distribution of application infringed plaintiff's copyright. Plaintiff further alleged that application, which was customized version of timePlay application created by plaintiff, was subject to End User License Agreement found on plaintiff's website for timePlay application. To establish *prima facie* case, plaintiff must establish ownership of valid copyright and violation of one of exclusive rights granted to copyright owners under Copyright Act. Court found that plaintiff did not adequately allege unauthorized distribution by defendant because plaintiff did not allege facts sufficient to establish that defendant could not distribute customized application without complying with license agreement for timePlay application, or that defendant had agreed to display copyright notice in customized application. Court, accordingly, granted defendant's motion to dismiss, with leave to amend to address deficiencies in allegations of unauthorized distribution.

Visual Communs., Inc. v. Assurex Health, Inc., No. 14-3854, 2015 U.S. Dist. LEXIS 11700 (E.D. Pa. Feb. 2, 2015)

District court denied defendant's motion to dismiss, finding plaintiff sufficiently pleaded copyright infringement. Plaintiff filed amended complaint that specifically alleged that defendant had access to work, as plaintiff had sent defendant email containing three versions of computer-generated design for construction of new trade show exhibit, and that defendant copied one of those designs and sent it to third party for purpose of building new trade show exhibit substantially similar to one sent by plaintiff. Plaintiff requested injunction and statutory and compensatory damages and lost profits, as well as costs. Defendant did not deny access to designs, but alleged that plaintiff failed to establish copying because allegations in complaint were insufficient to overcome Supreme Court's instruction that legal conclusions and conclusory allegations are "not entitled to assumption of truth." Court found plaintiff adequately stated claim for copyright infringement, as plaintiff was not required to prove defendant actually took copy of design and gave it third party, but only needed to allege that defendant did so. Defendant also asserted that injunction and damages sought by plaintiff were not connected to reproduction or distribution of work for which plaintiff owned copyright registration, but rather to defendant's construction of useful articles depicted therein, and that plaintiff could not prove it was entitled to compensatory damages or lost profits. Court found that whether various forms of equitable relief and monetary damages plaintiff sought were provable or even available on basis of plaintiff's copyright infringement claim was issue distinct from whether claim was legally and factually sufficient

to survive motion to dismiss. As plaintiff's allegations were enough for claim of copyright infringement, defendant's arguments concerning types of relief plaintiff might potentially obtain did not require dismissal of plaintiff's claim.

John Wiley & Sons, Inc. v. Golden, No. 14-942, 2015 U.S. Dist. LEXIS 19558 (D.N.J. Feb. 19, 2015)

Court granted plaintiff's motion to amend complaint to add new factual allegations and third-party defendant, Mathews, in suit for copyright infringement based on defendant's distribution of allegedly counterfeit copies of plaintiff's copyrighted textbooks. Both defendants opposed plaintiff's motion on futility grounds. Defendant Golden argued amendment futile because complaint lacked specificity, due to plaintiff's use of conditional "and/or" language in pleadings. Defendant Mathews argued amendment futile because court lacked personal jurisdiction over him. In rejecting Golden's arguments, court found "plaintiffs have set forth in significant detail how [defendants] allegedly interfered with [plaintiffs] rights," which is all that is required under pleading standard. Fact that complaint referred to textbooks distributed by defendants as "counterfeit and/or non-genuine" did not diminish remainder of plaintiff's detailed factual allegations. In rejecting Mathews' arguments, court found defendant had sufficient minimum contacts with New Jersey to support court's jurisdiction over him. Court noted Mathews was alleged to have purposefully entered into business transaction with defendant Golden, resident of New Jersey, for purchase and sale of infringing textbooks, and Mathews shipped allegedly infringing textbooks to Golden in New Jersey. Accordingly, court held inclusion of Mathews as defendant in suit would not be futile, and granted plaintiff's motion to amend complaint.

Leary v. Manstan, No. 13-639, 2015 U.S. Dist. LEXIS 15389 (D. Conn. Feb. 9, 2015)

District court denied plaintiff's motion for leave to amend complaint, finding plaintiff did not act diligently in raising new copyright infringement claim. In 1970s, plaintiff worked with defendant to build replica of "Turtle," first submarine ever built. Plaintiff also spent decades writing unpublished manuscript about Turtle, builder of Turtle, and plaintiff's experience in building replica. Approximately 30 years later, defendant built replica of Turtle with co-defendant, and wrote book *Turtle: David Bushnell's Revolutionary Vessel*, covering same subjects as plaintiff's unpublished manuscript. Plaintiff sued for copyright infringement. Plaintiff later sought to amend complaint to add additional infringement claim regarding photograph, image of plaintiff with submarine, that was used on first page of defendants' book. Defendant opposed motion, stating that plaintiff did not show good cause for adding additional claim so late in litigation. Plaintiff contended good cause existed, as plaintiff acted diligently in seeking to amend complaint once he became aware of how defendant obtained photograph. Plaintiff claimed his sister took photograph, that he owned copyright, and that at some point he gave copy of photograph to Connecticut River Museum to use for "limited purpose" of displaying it in connection with exhibit. Museum then provided photograph to defendants, who featured it on first page of their book, crediting Museum as source. Court found that plaintiff read book at least twice before initiating lawsuit, so he was

on notice as to contents of book and citations and attributes therein. Plaintiff claimed that he did not become aware of where defendants acquired photograph until defendants produced certain documents in discovery. Court found information was not new, as only documents plaintiff received via discovery were few emails between defendants and Museum, which simply confirmed information on first page of book – that defendants obtained photograph from Museum. Court therefore denied plaintiff’s motion for leave to amend complaint, as plaintiff did not act diligently in raising new claim.

R.S. Scott Assocs., Inc. v. Timm Constr. Co. LLC, No. 14-13338, 2014 U.S. Dist. LEXIS 173282 (E.D. Mich. Dec. 16, 2014)

District court granted in part and denied in part defendants’ motion to dismiss. Plaintiff, architectural and engineering firm, sued defendants, construction company and architect, for copyright infringement, unjust enrichment, and breach of contract. Plaintiff had created architectural design for planned expansion of church. Defendant construction company won bid to handle construction of project. Funding problems delayed construction, and church decided to scale down to smaller project. Church used defendants construction company and architect to complete smaller project. Once under construction, plaintiff asked to review project plans, and brought suit alleging defendants’ plans directly copied portions of plaintiff’s plans. Defendants moved to dismiss all claims for failure to state claim. District court found plaintiff had sufficiently pleaded copyright infringement claim, because copyright registration for design plans was *prima facie* evidence of ownership of valid copyright, and allegation that defendants’ plans copied plaintiff’s plans, supported by description of 17 instances of copying, served to identify infringing work and 17 ways work had infringed. Defendants’ arguments that plaintiff failed to attach deposit materials filed with copyright application or defendants’ infringing plans failed, because such materials were not necessary at pleading stage. Further, plaintiff’s allegation that defendant construction company “and/or” defendant architect had infringed plaintiff’s plans was not speculative, since complaint read “as a whole” made clear plaintiff was alleging both defendants had infringed plaintiff’s copyrighted work.

Tresóna Multimedia LLC v. Legg, No. 14-2141, 2015 U.S. Dist. LEXIS 13179 (D. Ariz. Feb. 4, 2015)

Court denied defendants’ motion to dismiss breach of contract claim, finding, contrary to defendants’ assertions, that plaintiff’s claim was not veiled claim for copyright infringement. Plaintiff sold licenses in copyrighted musical works that allowed purchasers to make arrangements of musical works for clients. Record established that plaintiff did not own copyright in licensed works, and therefore lacked standing to sue for infringement. However, plaintiff did have permission from copyright owners of musical works to grant licenses to third parties on owners’ behalf. Plaintiff sued defendants for breach of contract, among other claims, alleging that defendants conspired to purchase licenses to make arrangements from plaintiff and resell those rights to others, in violation of terms of license agreement. Defendants moved to dismiss on several grounds, including ground that breach of contract claim amounted to veiled copyright infringement claim. However, court found

defendants failed to provide any support for this argument. Court further noted that plaintiff clearly had standing to bring suit for breach of contract, and had adequately alleged factual basis for such claim. To extent defendants were suggesting that plaintiff's breach of contract claim was preempted, defendants failed to brief this argument in motion to dismiss. Therefore, court denied defendants' motion to dismiss breach of contract claim under Rule 12(b)(6).

Oracle Am., Inc. v. Or. Health Ins. Exch. Corp., No. 14-1279, 2015 U.S. Dist. LEXIS 3484 (D. Or. Jan. 13, 2015)

Plaintiff Oracle created products and services in connection with project to modernize technological systems for health care exchange program in Oregon. Oracle sued State of Oregon and public corporation Cover Oregon, created to administer health care exchange program, for copyright infringement of software in federal court, asserting that defendants did not have license to use products because they had not fully paid for all products and services. Oregon and Cover Oregon in turn filed action against Oracle for breach of contract and fraud in state court. Federal court granted Oregon's motion to dismiss, finding that Congress did not have authority to abrogate states' sovereign immunity to copyright claims under Copyright Remedy Clarification Act, and that Oregon had not waived its sovereign immunity in federal action when it brought its state law claim. Cover Oregon also moved to dismiss, arguing that Oracle failed to state claim because all products and services ordered had been paid for, and therefore defendants had license to use and distribute products. Cover Oregon further argued that Oracle's claim should be dismissed because it sounded in contract rather than copyright. Oracle argued that all services rendered had not been paid for, whether ordered or not, and thus, pursuant to agreement, there was no license and Cover Oregon had infringed. Court refused to dismiss Oracle's claims, finding that Oracle had sufficiently stated claim. Court noted that Oracle needed merely to plead factual content which allowed court to draw reasonable inference that defendants were liable for alleged misconduct. Since Oracle had sufficiently pleaded that it owned copyright that had been copied, and that defendants had acted outside scope of license, implicating Oracle's statutory rights, court denied Cover Oregon's motion to dismiss for failure to state claim.

Montalvo v. LT's Benjamin Records, Inc., No. 12-1568, 2014 U.S. Dist. LEXIS 171931 (D.P.R. Dec. 9, 2014)

Court denied plaintiffs' motion to reconsider dismissal of contributory and vicarious infringement claims. As to contributory infringement, examination of third amended complaint in its entirety revealed that plaintiffs failed to allege that defendants actively encouraged or induced third parties to infringe plaintiffs' copyrights in musical compositions; "the court cannot simply infer the necessary elements of this claim." As to vicarious infringement, plaintiffs simply argued, without any legal support, that they need not show that defendants had "control," only that defendants had "direction," over third party, and had done so in light of fact that third party had licenses to manufacture and distribute some of compositions. However, mere fact that third party had license to distribute some compositions "does not show the court in any way how Defendants had the right and

ability to supervise ... infringing activity.” As such, plaintiffs failed to persuade court that it erred when it dismissed for failure to state claim upon which relief can be granted.

D. Standing

Wave 3 Learning, Inc. v. AVKO Educational Resource Foundation, Inc., No. 14-1948, 2015 U.S. Dist. LEXIS 21038 (N.D. Ill. Feb. 23, 2015)

Court granted defendant’s motion to dismiss. Plaintiff brought declaratory judgment action against defendant to assert ownership of series of educational children’s books. Defendant’s president registered copyrights in books as author, and assigned copyrights to defendant. Copyrights then passed to Thomas Morrow by way of attempted agreement to sell rights to Home School Holdings, corporation that Morrow headed. Though deal between defendant and Home School Holdings did not come to fruition, plaintiff alleged that document transferred copyrights in books to Morrow in individual capacity. Previous complaint was dismissed because no writing showing transfer of copyrights to Morrow was alleged to exist. Amended complaint alleged that Morrow assigned copyrights to plaintiff via assignment agreement executed five months after filing of initial complaint. Court found that, although not raised by either party, plaintiff lacked Article III standing since “events that occur after the filing of a lawsuit cannot create standing when it did not exist at the time of the filing.” Court dismissed action since subject matter jurisdiction was lacking at time of filing initial complaint.

Viesti Assocs. v. McGraw-Hill Global Educ. Holdings, LLC, No. 12-668, 2015 U.S. Dist. LEXIS 16601 (D. Colo. Feb. 11, 2015)

District court granted defendants’ motion for summary judgment. Plaintiff, stock photo agency, earlier filed two similar suits against Pearson, in which court held that plaintiff lacked standing to sue since it did not hold necessary ownership interest in allegedly infringed photographs. Between 1990 and 2006, McGraw-Hill was granted limited licenses by various stock photo agencies to reproduce photographs. In current suit plaintiff alleged that it owned copyright in photographs, and that McGraw-Hill “exceeded the applicable license limitations” by using photographs in “unlicensed, unauthorized and uncompensated ways.” In 2009-10, before filing this suit, plaintiff’s principal emailed various photographers and stock photo agencies to join in suit against Houghton Mifflin Harcourt by signing “Assignment of Copyright.” In 2012, plaintiff had photographers execute addendum to “strengthen” original assignment agreement. Between 1990 and 2006, photographers also had entered into non-exclusive agency agreements with plaintiff. After filing of this suit, in 2013, photographers executed another assignment agreement with plaintiff. All agreements were executed solely for purpose of bringing copyright infringement lawsuits, and plaintiff’s only interest was possibility of financial gain through award from litigation. McGraw-Hill argued that plaintiff did not have exclusive copyright interest in photographs and therefore lacked standing, and was collaterally estopped from arguing it had standing because identical issue was litigated in Pearson cases. Court found that plaintiff had opportunity to fully

litigate in Pearson cases, issues were same as Pearson cases, and prior court granted final judgment on merits. Prior court found, and current court agreed, that assignment agreements conveyed bare right to sue. Prior court analyzed same assignment agreements at issue in this case and found agreements did not confer standing. While assignment agreements purported to grant copyrights and complete legal title, they were silent as to compensation or royalties photographer would receive for such assignment. Moreover, if parties genuinely intended to transfer complete ownership, plaintiff would retain that ownership in perpetuity if it failed to bring suit. Assignments thus failed to confer legal or beneficial ownership of exclusive right. Prior court found, and court agreed, that agency agreement also did not convey exclusive interest, merely exclusive agency arrangement. In prior case, addenda to copyright agreement were executed after suit was filed, and therefore, could not correct deficiencies in prior assignments. In present case court found addenda still did not grant exclusive rights to plaintiff to confer standing for suit. Finally, 2013 copyright assignment was executed after filing of suit, and thus could not confer standing. Court granted summary judgment for McGraw-Hill dismissing case with prejudice.

II. COPYRIGHTABILITY

A. Originality

Garcia v. Google, Inc., 766 F.3d 929 (9th Cir. 2014)

Ninth Circuit reversed district court's denial of preliminary injunction, finding actress established likelihood of success on merits of claim of infringement as she had protectable performance in film. Plaintiff agreed to act in film *Desert Warrior*. Plaintiff was paid, but *Desert Warrior* never materialized. Instead plaintiff's scene was used in anti-Islamic film titled *Innocence of Muslims*, which plaintiff first saw on YouTube. Plaintiff's performance was partially dubbed over so she appeared to be asking, "Is your Mohammed a child molester?" Egyptian cleric issued *fatwa* calling for killing of everyone in film. Plaintiff received death threats, and in response filed eight DMCA takedown notices. Google refused to take down video, so plaintiff applied for temporary restraining order claiming video infringed her copyright in performance. District court treated application as preliminary injunction and denied application, finding plaintiff delayed in bringing action, failed to demonstrate requested relief would prevent any alleged harm, and was unlikely to succeed on merits as she granted implied license to use performance. Ninth circuit relied on *Winter* factors, and found that plaintiff proved she was likely to succeed on merits, as she owned independent copyright interest in work. Court found plaintiff was not joint owner with producer/screenwriter, as there was no evidence of intent to be joint owner. However, court found plaintiff owned copyrightable interest in performance, as it met minimal requirements of creativity. Court clarified that plaintiff's ownership did not extend to words or actions spelled out in script, and holding was narrowed to instant case. Court also found work was not made "made for hire," as plaintiff never signed written agreement and was not considered employee. Finally, court analyzed whether producer and screenwriter had

implied license. Court found there was implied license, but noted that while such license must be construed broadly, it was not unlimited. Court found that because film differed so radically from anything plaintiff could have imagined when she was cast, use of work exceeded scope of implied license. Accordingly, court found plaintiff likely to prevail on merits. Court also found other factors weighed in favor of plaintiff, so it reversed and remanded case. (Later reversed *en banc*; see *infra* page 90.)

Home Legend, LLC v. Mannington Mills, Inc., No. 14-13440, 2015 U.S. App. LEXIS 7075 (11th Cir. Apr. 29, 2015)

Eleventh Circuit reversed district court's grant of summary judgment invalidating registered copyright in two-dimensional artwork applied to laminate wood flooring. Parties both sold laminate wood flooring consisting of three functional layers – balancing or stabilizing layer; strong and solid core board; and transparent wear-resistant overlay – with decorative layer called “décor paper” between core board and transparent overlay. Mannington's “Glazed Maple” décor paper was “huge digital photograph depicting fifteen stained and apparently time-worn maple planks.” To create design, Mannington employees processed raw wood planks to give appearance of age and wear; selected and arranged “prototype planks” to choose combinations that would look good in home; chose about 30 planks to photograph with high-resolution digital scanner; made changes to digital images to improve appearance; printed out resulting images; and selected 15 images to make composite 120-inch-by-100-inch digital image. Home Legend thereafter began to sell laminate flooring with “virtually identical” design. Mannington requested that Home Legend stop, and Home Legend filed suit seeking declaratory judgment that copyright was invalid. District court granted summary judgment to Home Legend on alternative grounds that (1) Glazed Maple design lacked requisite originality; (2) design was not physically or conceptually separable from functional element of flooring and was “functional component of the flooring itself”; and (3) copyright was directed to “idea or process” of recreating appearance of rustic, aged maple planks. Eleventh Circuit reversed on all three grounds. Regarding originality, court found that Mannington designers did not simply scan raw wood planks; rather, they imagined what maple floor might look like after years of wear, then used stain, paint, hand tools and digital photo retouching to express concept, first on wood and then as digital images. Idea of distressed maple floor is not protectable, but testimony showed that idea's expression in Glazed Maple design was product of creativity, not slavish copy of nature. “Perhaps that expression is not highly creative, but it does not need to be. The decisions Mannington made in the location and character of the marks it added to the boards render its contributions creative enough to hurdle the low bar of copyrightable originality.” Court held further that Glazed Maple design was original compilation. Mannington's designers exercised “some minimal level of creativity” in selection and arrangement of planks, choosing 30 planks that best captured their conception, then exercising artistic judgment in selecting 15 images that they believed looked best together. Selection and coordination of images showed originality sufficient to exceed low bar of copyrightability. District court thus erred in finding design lacked originality.

Ward v. Barnes & Noble, Inc., No. 13-7851, 2015 U.S. Dist. LEXIS 21347 (S.D.N.Y. Feb. 23, 2015)

District court granted in part and denied in part plaintiff's motion for summary judgment. Plaintiff, New Zealand citizen, filed provisional patent in New Zealand for game entitled "Scratch Hangman," and thereafter published "Scratch Hangman" books in New Zealand. Plaintiff then entered into agreement with defendant Sterling Publishing, U.S. publishing company later acquired by co-defendant Barnes & Noble, whereby Sterling agreed to publish six "Scratch Hangman" books as part of "Scratch and Solve" series, with option for two more. Publishing agreement also stated that defendant would file copyright applications for books in plaintiff's name, but publishing company had right to copyright any additional elements, such as illustrations, it added to books. In 2012 and 2013, plaintiff and defendant entered into several additional agreements regarding books in "Scratch Hangman" series, and defendant obtained copyright registrations for books in plaintiff's name. In 2012, plaintiff learned that defendant published additional books for "Scratch and Solve" series in which plaintiff was not listed as author. Plaintiff informed defendant that books infringed his copyrights, but advised that he wanted to maintain business relationship. Defendant then sent plaintiff new publishing agreements regarding additional "Scratch and Solve" books, which plaintiff found unacceptable, as they contained release language stating plaintiff could not sue defendant for copyright infringement. Plaintiff thereafter filed lawsuit, claiming he developed concept and created style of "Scratch and Solve" books, and that publication of new books violated his New Zealand and U.S. copyrights. Parties disputed whether plaintiff had valid New Zealand copyright, but court need not address question because, even if he did, claim failed as matter of law because plaintiff could not show substantial similarity between defendant's work and protectible elements of plaintiff's work. Court found only protectable aspect of plaintiff's book was hangman and gallows, as other features, such as game board, consisted merely of geometric shapes and lettering that was organized alphabetically. Court found hangman and gallows artwork flowed directly from unprotectable idea of game that was created during Queen Victoria's reign. As plaintiff's hangman and gallows were mainly stick figures and straight lines, court found they revealed no particularized protectable expression. Court also found that such elements may be considered *scenes a faire* of traditional game. Additionally, court noted that even if plaintiff's hangman and gallows embodied minimal amount of creativity, they were not substantially similar to hangman and gallows in defendant's New Zealand book, as defendant used curvy lines for such elements, while plaintiff used straight lines. Court also found that total concept and feel of works was different, as plaintiff's books contained two puzzles and scratch-off circles arranged in tight grid, while defendant's books consisted of one puzzle and scratch-offs in loose arrangement. Court therefore found defendants entitled to summary judgment on plaintiff's claim of copyright infringement based on New Zealand book.

Fischer v. Forrest, No. 14-1304, 2015 U.S. Dist. LEXIS 4395 (S.D.N.Y. Jan. 13, 2015)

Court denied defendant's motion to dismiss. *Pro se* plaintiff, creator of popular honey harvesting product, alleged that defendants used plaintiff's proprietary text and images to sell

knock-off product. Parties had previous relationship through which defendants sold plaintiff's product. Defendants terminated relationship and began selling knock-offs using plaintiff's images and text online, including through third party websites, and in catalogs. Court found plaintiff had valid copyright in text and images, rejecting defendant's argument that text did not warrant protection because it consisted of short phrases that were not sufficiently creative. Court noted that plaintiff's text, while brief, was "far from commonplace," consisting of "unique combination of descriptive terms, carefully phrased assurances and an idiosyncratic joke."

Olson v. Sperry, No. 14-7901, 2015 U.S. Dist. LEXIS 23709 (C.D. Cal. Feb. 26, 2015)

Court denied defendants' motions to dismiss. Plaintiff specialized in buying, selling, and merging of dental practices, using "highly customized" form contracts allegedly specific to dental industry. Plaintiff represented prospective purchaser of defendant dentist's practice. Defendant did not ultimately sell practice to plaintiff's client, but instead negotiated sale of practice to another party, allegedly using plaintiff's form contract. Defendants argued that form contracts were not entitled to copyright protection because they lacked originality. Court stated, however, that originality is not question of law, and cannot be determined at Rule 12(b) stage. Plaintiff alleged that its contracts, which were compilation works, were original, and therefore stated claim to relief that was plausible on its face.

Cellular Accessories for Less, Inc. v. Trinitas LLC, No. 12-6736, 2014 U.S. Dist. LEXIS 156661 (C.D. Cal. Nov. 5, 2014)

District court denied defendants' motion for summary judgment. Plaintiff and defendants both sold mobile phone accessories on Internet. Plaintiff owned and operated website that contained extensive descriptions for approximately 10,000 products. To produce product descriptions, plaintiff's employees added extra text to product specifications and facts provided by manufacturers. Plaintiff identified 971 product descriptions it alleged defendants copied, and alleged that defendants also duplicated Frequently Asked Questions ("FAQ") section of website. Defendants argued that plaintiff did not author product descriptions on website, and that to degree that plaintiff edited, rearranged or modified product descriptions, edits were not sufficiently original to warrant copyright protection. Such general allegations are not sufficient to shift burden to plaintiff to prove that its work is original, court held. Burden was clearly on defendants, both as summary judgment movants and as parties relying on non-originality defense, to show that plaintiff's work was non-original by comparing it to preexisting works, manufacturer's descriptions. If defendants could show conclusively that plaintiff had copied large portions of allegedly copyrighted material, and that what remained was trivial, it could succeed on summary judgment. Defendants had presented some evidence that one product description contained some non-original elements. Apart from that portion of that product description, however, defendants had not demonstrated that product descriptions, all of which were subject of registered copyright, and so presumptively protectable, were non-original and therefore non-

protectable. Defendants thus had not identified those portions of pleadings that they believed demonstrated absence of genuine issue of material fact.

Lambert Corp. v. LBJC Inc., No. 13-778, 2014 U.S. Dist. LEXIS 83108 (C.D. Cal. June 16, 2014)

Court denied plaintiff's motion for summary judgment. Plaintiff clothing designer and wholesaler brought suit against defendant clothing designer and retailer for infringing plaintiff's copyright in skull design. Parties submitted conflicting evidence as to originality. Defendant argued that plaintiff's skull was not original because it was "age-old," and had been featured in celebrations of *Dia de los Muertos* for centuries, and provided evidence that numerous skull logos similar to plaintiff's skull were readily available online. Plaintiff responded that skull was "sufficiently unique from other skull-based designs" in public domain that it should be deemed original. Originality, accordingly, could not be determined at summary judgment stage. Moreover, court found, genuine issue of material fact existed as to whether defendant had access to skull. Plaintiff's argument that skull designs were "strikingly similar," such that plaintiff could prevail without providing evidence of access, failed because although skulls had similar attributes, whether defendant copied plaintiff's skull design was not clear given numerous skull designs accessible in public domain.

Rigsby v. Erie Ins. Co., No. 14-905, 2015 U.S. Dist. LEXIS 31711 (W.D. Wisc. Mar. 16, 2015)

District court granted defendants' motion to dismiss *pro se* plaintiffs' copyright infringement claim without prejudice. Court noted that plaintiffs "are no strangers to litigation," having "filed a dozen lawsuits in this court alone (and many more in state court), usually *pro se* and usually related to alleged violations of intellectual property rights." Facts alleged in complaint stemmed from car accident involving plaintiff Catherine Conrad, which caused her injuries so that she was "no longer able to perform as 'The Banana Lady.'" Plaintiffs claimed that defendant insurance companies "infringed Plaintiffs' copyright by 'distributing' [P]laintiffs' 'work product from the auto accident.'" "Work product" consisted of accident photos taken by one of plaintiffs, and written statement of other driver. Court granted motion to dismiss as to written statement because plaintiffs failed to explain how someone else's written statement could be their copyrighted work. As to accident photos, court "decline[d] to find that photographs of a car accident qualify as an original work under copyright law." Court rejected plaintiffs' argument that photos were original because plaintiff chose lighting and camera angles, noting that "every photograph must be taken at some angle and in some light." Plaintiffs, court stated, were required to identify "conscious choices" regarding lighting and camera angles for "purpose of being 'original.'"

B. Pictorial, Graphic and Sculptural Works

Inhale, Inc. v. Starbuzz Tobacco, Inc., No. 12-56331, 2014 U.S. App. LEXIS 13244 (9th Cir. July 9, 2014)

Ninth Circuit affirmed lower court's dismissal of case based upon finding that work was not entitled to copyright protection. Plaintiff brought suit for infringement of shape of hookah water container. Because hookah water container was "useful article," shape of container was only copyrightable upon showing of physical or conceptual separability. Plaintiff did not contend that physical separability applied. In ruling that conceptual separability also did not apply, court found persuasive Copyright Office's view in opinion letter and internal manual that whether item's shape is distinctive does not affect separability. In instant case, court held that shape of container was not independent of container's utilitarian function – to hold contents within its shape – since shape accomplished said function. Since shape of hookah container merely accomplished "the containing," it was not copyrightable. Further, court affirmed lower court's award of attorney's fees to prevailing defendant due to "total success on the merits" and need to deter frivolous claims against innocent defendants.

Home Legend, LLC v. Mannington Mills, Inc., No. 14-13440, 2015 U.S. App. LEXIS 7075 (11th Cir. Apr. 29, 2015)

Eleventh Circuit reversed district court's grant of summary judgment invalidating registered copyright in two-dimensional artwork applied to laminate wood flooring. Parties both sold laminate wood flooring consisting of three functional layers – balancing or stabilizing layer; strong and solid core board; and transparent wear-resistant overlay – with decorative layer called "décor paper" between core board and transparent overlay. Mannington's "Glazed Maple" décor paper was "huge digital photograph depicting fifteen stained and apparently time-worn maple planks." To create design, Mannington employees processed raw wood planks to give appearance of age and wear; selected and arranged "prototype planks" to choose combinations that would look good in home; chose about 30 planks to photograph with high-resolution digital scanner; made changes to digital images to improve appearance; printed out resulting images; and selected 15 images to make composite 120-inch-by-100-inch digital image. Home Legend thereafter began to sell laminate flooring with "virtually identical" design. Mannington requested that Home Legend stop, and Home Legend filed suit seeking declaratory judgment that copyright was invalid. District court granted summary judgment to Home Legend on alternative grounds that (1) Glazed Maple design lacked requisite originality; (2) design was not physically or conceptually separable from functional element of flooring and was "functional component of the flooring itself"; and (3) copyright was directed to "idea or process" of recreating appearance of rustic and aged maple planks. Eleventh Circuit reversed on all three grounds. District court's reasoning that neither flooring nor Glazed Maple design would be marketable without other was based not on evidence but on conjecture, and facts viewed in light most favorable to Mannington disproved conjecture. Home Legend sold flooring decorated with virtually identical copy of Mannington's design. Design, accordingly, had value; otherwise Home Legend would not have copied it. Only obstacle to Mannington demanding payment for use of its design on

other flooring was district court's ruling. District court also erred in finding design had "function of hiding wear." Protection is purpose of "wear layer" of flooring; "decorative layer is just that: decorative." And even if placing copyrightable two-dimensional design on product serves secondary function of hiding wear, that does not invalidate copyright in design: "Hanging an Ansel Adams print over an unsightly water stain on a living room wall might make the print 'functional' in the same way . . . , but it would have no effect on the copyright in the work itself." Court found Glazed Maple design both physically and conceptually severable from flooring to which it was applied. Interchangeability of décor paper designs in manufacturing process necessarily implied that design and flooring were "physically separate objects." Design was also conceptually separable from use as decoration on flooring; design might as easily be applied to wallpaper or as veneer of picture frame, or printed, framed, and hung on wall as art. "This is obviously true, as it is of any two-dimensional image." Because two-dimensional design was both physically and conceptually separable from flooring, district court erred when it determined design was uncopyrightable useful article.

Rubio v. Barnes & Noble, Inc., No. 14-6561, 2014 U.S. Dist. LEXIS 169147 (S.D.N.Y. Nov. 11, 2014)

Plaintiff brought suit against Fashion Institute of Technology and Barnes & Noble, alleging that defendants copied her original drawing of backpack, and produced actual backpacks based on her design, without permission. Court denied defendants' motion to dismiss for failure to state claim with respect to unauthorized reproduction of drawing, but granted motion to dismiss as to actual backpacks. Copyright Act excludes from protection any "useful article," defined in § 101 as "article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Because backpack has "intrinsic utilitarian function," it was not copyrightable. Nor did fact that backpack's design was based on copyrighted drawing give plaintiff any derivative rights in backpack; "ownership of a copyright in a pictorial representation of a useful article does not vest the owner of the picture with a derivative copyright in the useful article itself." While artistic elements of useful article are protected by copyright to extent that they are "physically or conceptually separable from the underlying product," complaint did not identify any elements of backpack design that could stand alone as pictorial, graphic, or sculptural works, and court could not discern any from drawing. Accordingly, court concluded that no aspect of actual backpacks was copyrightable, and that infringement claim based on their production must be dismissed.

C. Compilations and Derivative Works

Tomaydo-Tomahhdo, LLC v. Vozary, No. 14-469, 2015 U.S. Dist. LEXIS 10532 (N.D. Ohio Jan. 29, 2015)

Court granted defendants' motion for summary judgment. Plaintiff restaurant owners brought suit against former business partners for infringement of recipe book. On

defendants' motion for summary judgment, court noted that "factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement," and "does not extend to the facts themselves." Court found that defendants were entitled to summary judgment on plaintiffs' copyright infringement claim, reasoning that to extent plaintiffs had valid copyright in recipe book, copyright protection extended only to layout and creative expression contained in book, not to recipes themselves. Plaintiffs made no allegation that defendants infringed layout or other creative expression contained in recipe book. Rather, plaintiffs contended that defendants wrongfully creating menu items by using plaintiffs' recipes. Since recipes themselves were not copyrightable, use of recipes was not infringement. Court held plaintiffs' copyright infringement claim failed as matter of law.

Rolwes Co. v. Barnes, No. 14-1045, 2014 U.S. Dist. LEXIS 140223 (E.D. Mo. Oct. 2, 2014)

Both plaintiffs and defendants brought motions to modify preliminary injunction order that prohibited defendants "[f]rom marketing for sale, contracting to sell, or constructing any three bedroom, one story, two bath house with a design that would infringe on Plaintiff's copyrighted 'Rockport' architectural work." Defendants sought to amend order to allow customers and potential customers to meet at model home since defendants had developed plans to remove plaintiff's copyrighted hallway design from property. Plaintiff argued that proposed remodeling continued to infringe plaintiff's design as protected derivative work. Court would not modify order based on plans alone, but if defendant modified model home in accordance with plans, court would "reconsider this position after Defendants complete construction." Given that only protectable feature of design was dual hallway configuration, defendant's revised plans would not infringe plaintiff's copyright because model home would no longer contain protectable elements, and therefore was not derivative work.

III. OWNERSHIP

A. Works Made for Hire

Smith v. Mikki More, LLC, No. 13-3888, 2014 U.S. Dist. LEXIS 145564 (S.D.N.Y. Oct. 9, 2014)

Court granted plaintiffs' motion for summary judgment. Plaintiffs brought action alleging misappropriation of labels, marketing materials, and website created by plaintiffs for defendants' line of haircare products, for which they were not compensated. Claims related mainly to gold "Double-Spiral" image on black backdrop. Plaintiffs obtained copyright registrations for "text" and "2-D artwork" prominently featuring Double Spiral on product labels, packaging, advertising, posters and website. After Mikki More refused to compensate plaintiffs as orally agreed, plaintiffs brought action alleging copyright infringement. Mikki More argued that Double Spiral works were works made for hire, of which Mikki More was author and owner. In determining whether hired party is "employee" under § 101, Second

Circuit has instructed courts to consider: “(1) the hiring party’s right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.” *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992). Applying factors, court found no reasonable jury could find that Smith was employee rather than independent contractor. Court concluded that there was no genuine issue of material fact as to Mikki More’s infringement of copyrights and granted summary judgment on copyright infringement claims.

Foster v. Lee, No. 13-5857, 2015 U.S. Dist. LEXIS 22590 (S.D.N.Y. Feb. 25, 2015)

Court granted plaintiff’s motion for partial summary judgment on issue of liability. Plaintiff, freelance photographer, conducted photo shoot for defendants, who produced eyelash extensions and owned several salons where eyelashes could be purchased and applied. Plaintiff understood that photographs were to be used in defendants’ salons, on their promotional calendar, and on website, and that one photo would be used as part of small-scale advertisement in *Allure* magazine. When photograph appeared in magazine, plaintiff “became concerned” that “scale and scope” of ad was larger than defendants led her to believe. Plaintiff registered copyright in photograph and brought suit. Defendants argued that photograph was work for hire. Court found that photo was not work for hire. Because there was no written agreement, and photographs were not categories of works that could be commissioned works for hire, photo could be work for hire only if it was created by employee within scope of employment. Second Circuit has identified five factors as most important in determining whether party is employee: (1) hiring party’s right to control way in which material is created; (2) skill required; (3) whether employee benefits are provided; (4) how hired party is treated with respect to taxes; and (5) whether hiring party has right to assign additional projects. Defendants offered no evidence contesting second, third, fourth, and fifth factors, and on first factor offered only bare statement that they “retained” plaintiff. Court, accordingly, granted plaintiff summary judgment that photo was not work for hire.

Christians of Cal., Inc. v. Clive Christian N.Y., LLP, No. 13-275, 2014 U.S. Dist. LEXIS 139005 (S.D.N.Y. Sept. 15, 2014)

Court granted defendant’s motion for summary judgment on plaintiff’s copyright infringement claim. Works at issue were architectural plans; plaintiff argued that it owned copyright in plans as works for hire. Plaintiff admitted that creator of plans was independent contractor, and there was no evidence in record that even if creator had title of “independent contractor,” he was in fact employee. Accordingly, plans could be works for hire only if (1) plans fit within one of nine categories listed in § 101, and (2) there was written agreement between parties that plans were work for hire. Plans did not fall into any of § 101 categories – “they were not prepared for use in a collective work, or for publication, and the other § 101 categories (which pertain to materials including movies, instructional texts, tests, and atlases) clearly do not apply.” Additionally, there was no written agreement specifying that plans were to be works for hire; plaintiff’s argument that employee manual was written agreement lacked merit. Plaintiff accordingly did not own copyright in plans.

Mahavisno v. Compendia Bioscience, Inc., No. 13-12207, 2015 U.S. Dist. LEXIS 5957 (E.D. Mich. Jan. 20, 2015)

Plaintiff, former University of Michigan (“U-M”) student, sued companies formed by professor and Ph.D. student at U-M for copyright infringement. When plaintiff was student, professor and Ph.D. student conceived idea for computer program, and asked plaintiff to write software for program. Plaintiff finished first version of program in 2003. After plaintiff graduated, he worked at U-M as full-time employee, and wrote additional code and made enhancements to software, which culminated in release of new version. Thereafter, professor and Ph.D. student formed defendant company, and company entered into licensing agreement with U-M, whereby U-M granted company exclusive license to sublicense, create derivative works, and to use, market, distribute and exploit latest version of software. Plaintiff was never employee of company, but alleged that he developed and created software upgrades and improvements for software for company and at company’s request, separate from his work at U-M, and that company promised him compensation and ownership interest. Plaintiff never received compensation, and never entered into agreement regarding compensation or ownership of intellectual property. Plaintiff further claimed that Ph.D. student sent him offer letter on behalf of company that referred to plaintiff as “independent contractor,” and offered to pay plaintiff in exchange for irrevocable assignment to company of any and all intellectual property rights in software. Plaintiff rejected offer, and company was later acquired by co-defendant company. In 2013, plaintiff sued both companies, alleging infringement of software copyright. Defendants filed motion to dismiss, arguing that plaintiff failed to plead plausible claim for infringement because he had not alleged that he had permission to create derivative works of software. Court rejected argument, citing court’s prior opinion which found that plaintiff was author of original copyright, and defendants failed to show that work was “work made for hire.” Accordingly, court had found that plaintiff pleaded plausible set of facts supporting claim of ownership to original software; that defendant company was given license to use software for purpose of making derivative works; and that defendant company granted plaintiff authorization to create derivative works. Court accordingly denied motion to dismiss.

JAH IP Holdings, LLC v. Mascio, No. 13-2195, 2014 U.S. Dist. LEXIS 162546 (D. Colo. Nov. 18, 2014)

District court granted defendants’ motion for summary judgment on copyright infringement claims, finding copyrighted work at issue was work for hire owned by defendants. Plaintiffs, companies owned by Jason Hall, sued defendants, including company cofounded by Hall, Della Parola Capital Research, LLC (“DP Research”), for copyright infringement, contributory infringement and various state and common law claims. Hall worked as official employee of DP Research from 2010 until October 2012, when Hall, on advice of DP Research’s CPA, began receiving percentage of revenues as compensation rather than salary. Plaintiffs alleged Hall created software after termination of his employment for defendants and licensed software to defendants until July 2013, but defendants continued to use software without authorization after license was revoked. Defendants argued plaintiffs had no interest in software, which was created for defendants as work for hire and owned by defendants.

Court considered *Reid* factors to determine DP Research's right to control manner and means by which software was produced, and found all but one factor weighed in favor of employment relationship. Hall was not treated as employee for tax purposes, but continued to perform same duties for DP Research, and used DP Research computers, offices and subscription data service to create software in consultation with defendants. Plaintiff acknowledged lack of license agreement or discussion with defendants regarding licensing. Instead, Hall tendered software to defendants to show his worth and negotiate for greater share of company. Relying on Ninth Circuit precedent, court found Hall's creation of software within scope of employment as employee of DP Research; company's tax treatment of Hall reflected informal nature of start-up company rather than status as independent contractor. Accordingly, plaintiffs could not show copyright interest in software, and defendants were entitled to summary judgment on copyright infringement claims.

Carol Wilson Fine Arts, Inc. v. Qian, No. 14-587, 2014 U.S. Dist. LEXIS 168075 (D. Or. Dec. 3, 2014)

Plaintiff, manufacturer of greetings cards, note cards, calendars and related products, sued defendant, artist and former employee of 21 years, seeking declaratory judgment that certain artworks created by defendant while employed by plaintiff were works made for hire, and for copyright infringement resulting from defendant's display of artworks at issue on personal website. Plaintiff moved for summary judgment, and defendant, appearing *pro se*, filed cross motion for summary judgment requesting court order as to defendant's ownership of works at issue and requesting compensation from plaintiff. Analyzing whether artworks at issue were works made for hire, court found record established that defendant was employed as "artist" and "senior artist" to create original artwork for use in plaintiff's greeting cards and stationary, as confirmed by parties' employment and severance agreements. Moreover, court found defendant created works within authorized time and space limits of employment with plaintiff, and using materials and supplies provided by defendant for such purpose. Lastly, court noted that "defendant's creation of the works was actuated by a purpose to serve plaintiff's business of generating aesthetically-pleasing paper products featuring original artwork." Accordingly, there was no genuine issue of material fact as to whether works were made for hire, and court granted plaintiff's motion, and denied defendant's motion, as to ownership. However, court denied plaintiff's motion for summary judgment of infringement; record was insufficient to determine whether defendant's conduct in displaying on personal website, without commercial purpose, images of artworks he created, even if made for hire, constituted infringement.

Four Points Commun. Servs. v. Bohnert, No. 13-1003, 2014 U.S. Dist. LEXIS 120560 (E.D. Mo. Aug. 29, 2014)

Court denied defendants' motion for summary judgment on plaintiff's claim of copyright infringement. Work at issue was "Site Survey Assistance Manager" software, which plaintiff argued it owned as work for hire. At issue in case was whether defendant, plaintiff's former Vice President of Business Development, developed software as work for hire within scope of his employment by plaintiff, or developed software on his own time and independent of

plaintiff. Court explained that “conduct is within the scope of employment ‘only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.’” Court held that because (a) there was issue of fact as to whether software was within job description of authors; (b) both parties incurred costs in developing technology; and (c) parties presented conflicting evidence as to whether plaintiff directed author to develop software, there were issues of fact as to three factors, making summary judgment inappropriate.

B. Transfer of Ownership

Corbello v. DeVito, 777 F.3d 1058 (9th Cir. 2015)

Plaintiff, heir of ghostwriter of unpublished autobiography of Thomas DeVito, original member of band Four Seasons, brought suit against members of band based upon musical *Jersey Boys*, that attributed inspiration in part to protected autobiography. Lower court dismissed plaintiff’s claims for equitable accounting, declaratory judgment and infringement, ruling that: (1) 1999 agreement between DeVito and two other former bandmates, Frankie Valli and Bob Gaudio, was not assignment but rather granted Valli and Gaudio “selectively exclusive license” to use “aspects” of DeVito’s life in connection with development of musical about Four Seasons; and (2) because United States law governed issue of whether defendants owned valid license, plaintiff’s claims for infringement under foreign law also failed. Ninth Circuit reversed. Court held that since 1999 agreement granted Valli and Gaudio “exclusive right to use” DeVito’s “biographies” to create derivative work (play), 1999 agreement constituted transfer of ownership of DeVito’s derivative-work right in protected autobiography. In finding that agreement constituted assignment, and not mere license, court reaffirmed principle that copyrights are divisible and that copyright owner can freely transfer “any portion of his ownership interests in that copyright.” As heir to ghostwriter of autobiography, plaintiff was co-owner of work, and thus entitled to proportionate share of proceeds resulting from Valli and Gaudio’s exploitation of respective ownership interest. Accordingly, lower court erred in dismissing plaintiff’s claims for equitable accounting and declaratory judgment. Additionally, because lower court’s dismissal of infringement claims under foreign law was premised upon holding that 1999 agreement constituted license rather than assignment, summary judgment was reversed as to those claims.

Hendricks & Lewis PLLC v. Clinton, 766 F.3d 991 (9th Cir. 2014)

Ninth circuit affirmed district court’s order appointing receiver, assigning artist’s master sound recording copyrights to receiver, and authorizing receiver to use copyrights to extent necessary to satisfy monetary judgments that plaintiff law firm obtained against defendant artist. Defendant George Clinton was musician, bandleader, and touring artist. Defendant, through production company, entered into several recording contracts with Warner Bros. Records granting Warner ownership of copyrights, including in masters at issue. Years later,

to resolve separate dispute, Clinton and Warner entered into agreement whereby Warner agreed to “relinquish its ownership” of masters at issue if or when Clinton entered into agreement with third party to distribute masters. Clinton’s ownership of masters was confirmed in later litigation. In instant case, plaintiff was law firm that represented defendant in various disputes, for which defendant owed plaintiff \$1,779,756.29 in fees. Plaintiff pursued variety of judgment collection efforts, and obtained judgments against defendant. Plaintiff and defendant thereafter became involved in legal disputes, and plaintiff moved for order authorizing sale of defendant’s masters to satisfy judgments. Plaintiff also initiated separate action seeking order for judgment debtor examination of defendant, and filed motion for appointment of receiver and for order directing assignment of masters to receiver. District court appointed receiver and granted it authority to maximize value of defendant’s sound recordings to secure judgments and allowed receiver to sell or permanently dispose of masters. Defendant appealed and argued that § 201(e) protected subject copyrights from plaintiff’s judgment collection efforts. Court disagreed, finding neither statute or legislative history supported argument. Under § 201(e), when individual author’s ownership of copyright has not previously been transferred voluntarily by that individual author, no action by any government body or other official or organization may seize or transfer such copyrights. While parties disputed whether Clinton or Warner Bros. Records was owner of copyright, court found issue irrelevant, stating that § 201(e) does not apply when copyright was “previously transferred voluntarily by that individual author.” Court noted that defendant transferred any interest he had in masters to Warner Bros. Records as part of settlement arising from unrelated litigation, and Warner subsequently agreed to transfer ownership back to Clinton. Accordingly, court found such voluntary transfers were sufficient basis for rejecting defendant’s argument that he enjoyed § 201(e) protection as author of master sound recordings. Court therefore affirmed district court holding.

Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-5784, 2015 U.S. Dist. LEXIS 6101 (S.D.N.Y. Jan. 15, 2015)

Court previously denied defendants’ summary judgment motion, and ordered defendants to show cause why summary judgment should not be entered in favor of plaintiff on liability. In deciding order to show cause, court found that plaintiff had established through undisputed testimony and evidence of licensing of works that ownership of works had been transferred to plaintiff, noting that documentary evidence of transfer was not required; transfer of common law copyrights need not be in writing to be valid under New York law. Court rejected defendants’ argument that parties had implied license; defendants had failed to establish elements, presenting no evidence that plaintiff created works at defendants’ request or that plaintiff “handed over” recordings to defendants. Court also held that mere acquiescence is not enough to establish implied license. Court denied defendants’ waiver and estoppel arguments on similar grounds.

Tjeknavorian v. Mardirossian, 56 F. Supp. 3d 561 (S.D.N.Y. 2014)

Plaintiff filmmakers in 2009 began collaborating with defendant, Chairman of Near East Foundation, on documentary to commemorate centennial anniversary of Armenian Genocide. Defendant agreed to fund project, giving plaintiffs creative discretion. Plaintiffs agreed to finish film by 2015, centennial year. After relationship between plaintiffs and defendant soured, defendant demanded that plaintiffs turn over all material created in connection with film, all equipment used, and all legal rights to materials. Plaintiffs sued for declaration that they were “sole owners of the copyrights in all materials they created in connection with their work on the film.” Court granted plaintiffs’ summary judgment motion on basis that parties’ agreement was not memorialized in manner that satisfied writing requirement of § 204(a). In order to satisfy writing requirement, writing does not need to be lengthy or elaborate, but must explicitly convey party’s intention to transfer copyright. Given that parties never executed document explicitly assigning copyright in film to defendant, and that emails between parties did not contain explicit intention to transfer copyright, writing requirement was not satisfied and no transfer of copyright was made.

Guzman v. Hacienda Records, L.P., No. 13-41, 2015 U.S. Dist. LEXIS 21677 (S.D. Tex. Feb. 24, 2015)

Plaintiff brought action against Hacienda Records alleging copyright infringement and DMCA claims. Plaintiff met with Hacienda representatives to discuss his musical compositions including “Dos Horas da Vida.” After meeting, Hacienda gave plaintiff check for \$75, which stated in notation line “For rights to the song ‘Dos Horas da Vida.’” Plaintiff, who did not read English, believed check was to compensate for his travel to Hacienda. Hacienda subsequently issued album including “Dos Horas da Vida,” listing only Hacienda’s president as author. Under § 204(a), “transfer of copyright ownership ... is not valid unless an instrument of conveyance ... is in writing and signed by the owner.” In certain circumstances, signed check may be sufficient to transfer copyright; however, cases have found assignment by check at summary judgment stage only when there was separately executed contract. Court denied Hacienda’s motion for summary judgment, finding language on check insufficient to satisfy § 204(a).

C. Joint Works and Co-Ownership

Isbell v. DM Records, Inc., 774 F.3d 859 (5th Cir. 2014)

Defendant appealed jury verdict and various district court decisions finding defendant liable for infringement of popular song “Whoomp! (There It Is)” and awarding over \$2.1 million in damages for willful infringement. Fifth Circuit affirmed verdict and district court decisions in all respects. Plaintiff company had been formed by former president of record company, Bellmark, that had entered into record agreement with co-writers of song in which 50% of copyrights in song were transferred to Bellmark’s “affiliated designee publisher.” Defendant alleged ownership in copyrights in song by virtue of purchasing Bellmark’s assets out of bankruptcy. Court upheld lower court’s central finding that Bellmark’s “affiliated designee

publisher” under record agreement was plaintiff, and thus, plaintiff was 50% owner of song. First, court held that lower court appropriately interpreted record agreement under California law, since there was no conflicting extrinsic evidence that required credibility determination to be made by jury. Moreover, court denied defendant’s motion seeking relief from judgment based on 2006 agreement in which plaintiff purportedly transferred infringement claims and ownership in song to third party. Even if agreement had been improperly withheld, such facts would not have affected plaintiff’s standing since standing is determined “as of the commencement of the suit” and there was no dispute that plaintiff had standing upon filing suit in 2002. Finally, court rejected defendant’s argument that plaintiff, as 50% owner of song, should not have received 100% of defendant’s royalties as reflected in jury’s damages verdict. Although issue was one of first impression, there was evidence from which jury could have determined that plaintiff was entitled to 100% of royalties “in the first instance” from which plaintiff could remit 50% portion to co-owner of song, since plaintiff administered collection of 100% of royalties and was responsible for accounting to co-owner.

Broad. Music, Inc. v. Evie’s Tavern Ellenton, Inc., 772 F.3d 1254 (11th Cir. 2014)

Circuit court affirmed district court’s grant of summary judgment for plaintiffs. Plaintiffs, owners of musical composition copyrights and BMI, sued defendants, bar and bar owner, for publicly performing six compositions without license. BMI, performing rights society, entered into nonexclusive licenses with copyright owners to publicly perform copyrighted musical compositions, and contracts with third parties to allow performance of those compositions at their establishments. BMI’s agreements with copyright owners give BMI right to act on owners’ behalf and bring actions with or without joining owners to recover for copyright infringement for BMI’s sole benefit. District court granted summary judgment in favor of plaintiffs on five of six musical compositions over defendants’ objections that plaintiffs had failed to establish chain of title for each work. Defendants appealed alleging genuine issues of material fact as to ownership of musical compositions at issue. Plaintiffs established valid license with at least one co-owner of each song at issue. In matter of first impression in Eleventh Circuit, circuit court explicitly adopted Second Circuit rule from *Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007), that copyright co-owner may maintain and recover in copyright infringement action without joining co-owners. Logic behind rule derived from (1) § 501(b) language stating court “may require” owner to serve notice on or join person with interest in copyright; (2) legislative history of Copyright Act; and (3) general rights of copyright ownership treating co-owners as tenants in common with independent rights to use or license work. Accordingly, circuit court affirmed district court’s grant of summary judgment to plaintiffs.

Foster v. Lee, No. 13-5857, 2015 U.S. Dist. LEXIS 22590 (S.D.N.Y. Feb. 25, 2015)

Court granted plaintiff’s motion for partial summary judgment on issue of liability. Plaintiff, freelance photographer, conducted photo shoot for defendants, who produced eyelash extensions and owned several salons where eyelashes could be purchased and applied. Plaintiff understood that photographs were to be used in defendants’ salons, on their

promotional calendar, and on website, and that one photo would be used as part of small-scale advertisement in *Allure* magazine. When photograph appeared in magazine, plaintiff “became concerned” that “scale and scope” of ad was larger than defendants led her to believe. Defendants pleaded affirmative defense that photograph was joint work. Plaintiff moved for summary judgment that defense failed as matter of law. For copyrightable work to be joint work, contributors must intend contributions to be merged into unitary whole, and contributions of each author must independently qualify for copyright protection. Court found no evidence that parties intended joint work, since defendants asked plaintiff’s permission to use photograph in *Allure* magazine, and all parties assumed that plaintiff would be author. Moreover, defendants’ contributions, such as selection of subjects for photographs, were not copyrightable. Court accordingly granted plaintiff summary judgment on defense that photo was joint work.

D. Contracts and Licenses

Corbello v. DeVito, 777 F.3d 1058 (9th Cir. 2015)

Plaintiff, heir of ghostwriter of unpublished autobiography of Thomas DeVito, original member of band Four Seasons, brought suit against members of band based upon musical *Jersey Boys* that attributed inspiration in part to protected autobiography. Lower court dismissed plaintiff’s claims for equitable accounting, declaratory judgment and infringement, ruling that (1) 1999 agreement between DeVito and two other former bandmates, Frankie Valli and Bob Gaudio, was not assignment but rather granted Valli and Gaudio “selectively exclusive license” to use “aspects” of DeVito’s life in connection with development of musical about Four Seasons; and (2) various agreements entered into between parties and DeVito’s subsequent conduct sufficiently licensed defendants to use protected autobiography in developing musical. Ninth Circuit reversed. Court held that 1999 agreement constituted transfer of ownership of DeVito’s derivative-work right in protected autobiography, such that plaintiff, Valli and Gaudio were all co-owners of work. Although such finding would ordinarily preclude plaintiff’s claim for infringement, there were disputed issues of material fact regarding whether 1999 agreement’s reversionary clause subsequently terminated Valli and Gaudio’s ownership interest in autobiography in December 2004. Reversionary clause required that Valli and Gaudio enter into contract no later than two years after initial producer’s rights lapsed. There was contradictory evidence as to whether such agreement was executed within requisite two-year period. Because triggering of reversionary clause would have terminated Valli and Gaudio’s ownership interest, and resulted in subsequent infringement of plaintiff’s copyright interest, summary judgment on plaintiff’s infringement claim was inappropriate. Further, court reversed lower court’s grant of summary judgment based upon implied license, in view of contradictory facts regarding DeVito’s intent in delivering protected autobiography to writers of musical, attending performances of musical and accepting royalty checks from musical. Due to disputed issues of material fact, granting summary judgment on basis of implied license was also inappropriate.

Murphy v. Lazarev, 589 Fed. Appx. 757 (6th Cir. 2014)

Sixth Circuit affirmed district court's grant of summary judgment in favor of defendant, finding he possessed valid license to use song "Almost Sorry." In 2005, defendant, Russian pop star, entered into producer's agreement with record company that lasted until 2009. Once agreement expired, defendant entered into subsequent agreement, granting defendant right to use songs that record label had right to under initial agreement. In 2006, plaintiff songwriters pitched "Almost Sorry" to defendant's manager, who expressed interest in song. In 2007, plaintiffs entered into sub-publishing agreement with Moscow firm that authorized defendant to record song. In late 2006 or early 2007, defendant recorded song, and released several versions over next few years. In 2008, representative of record label informed plaintiffs that they entered into "bad contract" with defendant's manager and Moscow firm, and recommended that plaintiffs terminate agreement and enter into licensing agreement with record label. Plaintiffs therefore entered into two subsequent license agreements with record label in 2008, but backdated both to 2006 so record label could have rights to song before manager, as they believed sub-publishing agreement to be fraudulent. Under license agreements, plaintiffs gave defendant permission to perform song and gave record label permission to grant sublicenses, in return for fees. Plaintiffs received and accepted fees and royalties for song, but less than expected. Plaintiffs then sued defendant and record label for breach of contract and copyright infringement. Plaintiffs voluntarily dismissed record label from case, and district court granted summary judgment in favor of defendant on all claims. On appeal, plaintiffs reasserted prior claims, including that (1) defendant lacked valid license to use song before 2008, when plaintiffs expressly entered into license with record label; and (2) defendant's sublicense expired in 2009 making any exploitation of song after that date unlawful. With respect to first claim, court found defendant had valid, express sublicense to use song until plaintiff's second license with record label expired in 2013. Court analyzed under Russian law, due to choice of law provision in license agreement, and found that defendant was granted valid sublicense as plaintiff's second license agreement with record label entitled record company to grant sublicenses, and defendant's producer's agreements with record label required defendant to record and perform songs for which record label obtained rights during agreement's duration. As there was no evidence that defendant used song after 2013, court found no infringement. As to second claim, court rejected claim that defendant infringed copyright before 2008, when plaintiffs entered license agreements with record label, as plaintiffs intended to authorize defendant to record and perform song as of 2006, as evidenced by fact that plaintiffs (1) pitched song to defendant's manager in 2006; (2) entered into sub-publishing agreement in 2007 which provided that plaintiffs transferred to firm exclusive rights for defendant to perform song; and (3) backdated licensing agreements with record company with intent to authorize defendant's use of song since 2006. Accordingly, court found defendant had proper license, and affirmed judgment of district court.

Collegesource, Inc. v. Academy One, Inc., 597 Fed. Appx. 116 (3d Cir. 2015)

Third Circuit affirmed district court's grant of summary judgment to defendant. Collegesource brought action against Academy One alleging breach of Copyright and

Disclaimer provision of Subscription Agreement between parties. Collegenet compiled college credit-transfer information in online database for paying subscribers and trial users to search digital college course catalogs. Collegenet asserted, and Academy One conceded, that Collegenet and Academy One entered into contract when Academy One created trial accounts on Collegenet's website. However, Collegenet provided no evidence that Academy One downloaded course catalogs from Collegenet through those trial subscriptions, and court found that breach of Subscription Agreement therefore could not be proved. Collegenet also argued that digital files include Copyright and Disclaimer provision. Court found that Copyright and Disclaimer provision "identifie[d] itself not as a contract, but as a declaration of copyright." Court concluded that jury would therefore not be able to find formation of contract between parties.

Spinelli v. Nat'l Football League, No. 13-7398, 2015 U.S. Dist. LEXIS 40716 (S.D.N.Y. Mar. 27, 2015)

Professional photographers brought suit against NFL, Getty Images and Associated Press for infringement of sports-related photographs. Court granted motion to compel arbitration of infringement claims against Getty pursuant to broad arbitration clause of license agreements entered into between photographers and Getty that encompassed "any dispute arising out of or in connection with" said agreements. Court also granted motion to dismiss infringement claims against remaining AP and NFL defendants. First, court held that grant of rights made by plaintiffs to AP and AP's right to sublicense rights to third parties was "broad and unlimited" and thus precluded direct infringement claim. Broad language of license grant encompassed AP's right to issue non-royalty-bearing sublicenses; had plaintiffs wished to exclude such category of sublicenses, such term "should have been negotiated and included explicitly." Moreover, court ruled that "[a]s a matter of copyright law" broad sublicense rights granted to AP enabled AP to grant retroactive licenses "as it saw fit." Additionally, plaintiff's allegations concerning AP's failure to pay appropriate royalties concerned covenant, not condition, and thus could only give rise to claim for breach of contract, not infringement. Direct infringement claims against NFL similarly failed, as allegations were unduly vague and nonspecific, including in failing to differentiate among 32 individual NFL clubs; uses by NFL were authorized by broad sublicense rights granted by AP; and allegations that plaintiffs were owed royalties only gave rise to breach of contract claim, not infringement claim. Finally, court dismissed claims for vicarious and contributory infringement against AP due to plaintiffs' failure to adequately plead primary infringement by NFL.

Grant Heilman Photography, Inc. v. McGraw-Hill Cos., 28 F. Supp. 3d 399 (E.D. Pa. 2014)

Plaintiff, licensor of stock image photographs, contended that defendant exceeded limited use licenses and therefore infringed plaintiff's images. Between 1995 and 2011 plaintiff issued defendant thousands of licenses to use plaintiff's photographs in various publications. Plaintiff alleged 2,395 instances of copyright infringement based on 594 invoices. Defendant did not dispute exceeding use limits set by certain invoices; however, defendant contended

that implied license allowed use of images. Since Third Circuit had not considered issue, court discussed approaches used by various district courts to determine existence of implied license to textbook publisher that had exceeded terms on licensor's invoice. In each case where implied license was found, evidence showed licensor routinely allowed use prior to granting permission or receiving payment. Court noted that whenever plaintiff issued retroactive license plaintiff stated that license was "for use without permission"; thus, plaintiff never intended to allow defendant unlimited use of images. Court concluded that defendant infringed plaintiff's copyrights by using images beyond terms of invoices.

U2logic, Inc. v. Am. Auto Shield, LLC, No. 13-419, 2014 U.S. Dist. LEXIS 138396 (D. Colo. Sept. 30, 2014)

Plaintiff software developer developed software system for defendant, administrator of vehicle service contracts. Parties executed license agreement providing defendant with right to use software at its facilities; license expired in 2008. Plaintiff asserted that defendant infringed by using software after license expired. Defendant argued that because software was at one point licensed product, plaintiff's claim that defendant continued to use software after license ended should have been brought as breach of contract rather than copyright infringement claim. Court disagreed; any use of software after license expired exceeded scope of license, and plaintiff could properly bring claim for copyright infringement.

Ellington v. EMI Music, Inc., 24 N.Y.3d 239 (2014)

New York Court of Appeals upheld dismissal of breach of contract claims. Plaintiff, grandson of Duke Ellington, sued EMI for breach of contract to recover royalties due under 1961 copyright renewal agreement. In agreement, Duke Ellington and members of his family, defined as "First Parties," assigned right to renew certain of Ellington's copyrights to EMI's predecessor Mills Music, defined as "Second Party." Royalty provision required Second Party to pay First Parties "50% of net revenue actually received by Second Party ... from foreign publication." At time of execution of agreement, foreign publishers typically were not affiliated with domestic publishers; currently numerous domestic publishers, including EMI, have affiliated foreign subpublishers. Plaintiff commenced action alleging breach of contract and fraudulent concealment, claiming that by using affiliated foreign subpublishers, EMI was "double-dipping" into pot of revenue generated from foreign sales of compositions. Plaintiff claimed that amount retained by affiliated foreign subpublishers prior to remittal of remainder to EMI was "revenue actually received" by EMI, and therefore EMI should remit to First Parties half of entire amount generated from sales by affiliated foreign subpublishers. Plaintiff contended that two terms in agreement were ambiguous: (1) phrase "net revenue actually received" by Second Party, and (2) term "any other affiliate" in definition of Second Party. Court of Appeals affirmed lower courts' finding that "net revenue actually received" provision was unambiguous, and made no distinction between net revenue received from affiliated and unaffiliated foreign subpublishers. Agreement defined Second Party as consisting of group of named music publishers "and any other affiliate." Plaintiff argued that term "any other affiliate" included affiliated foreign subpublishers. Court held that term included only affiliates in existence when contract was executed, and

not future affiliates; if parties intended to include future affiliates, agreement could have been so drafted. Provision was thus unambiguous. Judge Rivera, dissenting, opined that “affiliate” could reasonably be interpreted to include affiliated foreign subpublishers; majority’s holding foreclosed plaintiff from pursuing claim that EMI had avoided its obligations by “employing music industry business models that increase revenue for publishers, to the detriment of creative artists.”

IV. FORMALITIES

A. Notice and Publication

Elsevier, Inc. v. Comprehensive Microfilm & Scanning Servs., No. 10-2513, 2014 U.S. Dist. LEXIS 172632 (M.D. Pa. Dec. 12, 2014)

Court held that defendant microfilm scanning service companies had innocently infringed plaintiff academic publishing companies’ copyright in certain academic publications. Despite favorable outcome at trial, on motion for judgment as matter of law, plaintiffs argued that jury verdict was deficient, prejudicial to plaintiffs, and should be modified to find that (1) one of defendants was not innocent infringer as matter of law, and (2) that one of individual defendants should be held personally liable for infringement. On first point, plaintiff argued that, pursuant to § 401 of Copyright Act, fact that infringed works displayed copyright notices on each copy precluded finding of innocent infringement as matter of law. Court rejected argument, noting that plaintiff must show not only that each infringed work displayed copyright notice, but also that such copyright notices were properly affixed to copies of works in form prescribed under 37 C.F.R. § 201.20. Court held that jury could have made such finding; thus, plaintiff had not provided sufficient basis to overturn jury verdict. Court further held it would be unconstitutional for court to *increase* jury award based on findings of fact never made by jury. On second point, jury had found company liable, but not individual, even though company was only liable by virtue of individual’s acts. Despite inconsistency in jury verdict, court found that relief requested, judgment as matter of law that individual was liable, was not available. Court could either let inconsistent judgment stand, or could order new trial. Court exercised its discretion in letting verdict stand because it best advanced interests of justice in particular case. In so deciding, court considered fact that neither party wanted new trial and that in all other cases where new trial was granted, defendants, rather than plaintiffs, were prevailing parties. Court also noted that such trial would be waste of courts’ resources.

B. Registration

Dowbenko v. Google, Inc., No. 14-10195, 2014 U.S. App. LEXIS 17229 (11th Cir. Sept. 5, 2014)

Pro se plaintiff asserted claims for copyright infringement, alleging that Google was responsible for publishing copyright-protected photograph of him along with defamatory

article about him on “Encyclopedia of American Loons’ website. Google’s algorithms purportedly manipulated search results so that article appeared directly below plaintiff’s own website. Under *de novo* review, court affirmed dismissal of each of plaintiff’s claims. Dismissal of claim for copyright infringement was upheld because plaintiff failed to allege registration of copyright in photograph in accordance with § 411(a).

Ward v. Barnes & Noble, Inc., No. 13-7851, 2015 U.S. Dist. LEXIS 21347 (S.D.N.Y. Feb. 23, 2015)

District court granted in part and denied in part plaintiff’s motion for summary judgment. Plaintiff, New Zealand citizen, filed provisional patent in New Zealand for game entitled “Scratch Hangman,” and thereafter published “Scratch Hangman” books in New Zealand. Plaintiff then entered into agreement with defendant Sterling Publishing, U.S. publishing company later acquired by co-defendant Barnes & Noble, whereby Sterling agreed to publish six “Scratch Hangman” books as part of “Scratch and Solve” series, with option for two more. Publishing agreement also stated that defendant would file copyright applications for books in plaintiff’s name, but publishing company had right to copyright any additional elements, such as illustrations, it added to books. In 2012 and 2013, plaintiff and defendant entered into several additional agreements regarding books in “Scratch Hangman” series, and defendant obtained copyright registrations for books in plaintiff’s name. In 2012, plaintiff learned that defendant published additional books for “Scratch and Solve” series in which plaintiff was not listed as author. Plaintiff informed defendant that books infringed his copyrights, but advised that he wanted to maintain business relationship with defendant. Defendant then sent plaintiff new publishing agreements regarding additional “Scratch and Solve” books, which plaintiff found unacceptable, as they contained release language stating plaintiff could not sue defendant for copyright infringement. Plaintiff thereafter filed instant lawsuit claiming he developed concept and created style of “Scratch and Solve” books, and that publication of new books violated his copyrights in New Zealand book, as well as U.S. copyrights that publishing company registered in plaintiff’s name. Court found books did not violate New Zealand copyrights. With respect to U.S. copyrights, plaintiff argued that because he had supplied original template and reviewed and gave approval of “Scratch and Solve” books prior to publication, his U.S. copyright registrations extended to interior game boards and artwork, despite fact that registrations listed only “text” as plaintiff’s authorship. Court rejected argument, noting that Copyright Office’s own procedures make clear as general rule that claim to copyright is defined by information in “Author Created field ... or in the Nature of Authorship space” in copyright application. Court therefore found plaintiff had no infringement claim with respect to “Scratch and Solve” illustrations. Court found, however, that plaintiff’s claim based on “Scratch and Solve” instructions in book survived defendant’s motion for summary judgment, as instructions were textual and therefore may be encompassed by U.S. registrations.

Panoramic Stock Images, Ltd. v. John Wiley & Sons, Inc., No. 12-10003, 2014 U.S. Dist. LEXIS 121663 (N.D. Ill. Sept. 2, 2014)

Court granted in part and denied in part plaintiff's motion for partial summary judgment on liability for infringement. Plaintiff brought action alleging direct and contributory infringement based on alleged breach of invoice terms that set forth print quantities, print format, and geographical regions for use of nine of plaintiff's stock images. Wiley alleged that six of plaintiff's photographs were part of three "group registrations that fail to meet the registration requirements" of § 411(a). Court followed *Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc.*, 72 F.3d 591 (4th Cir. 2013), to find that "where the copyright holder of a registered compilation owns the compilation's components, the registration suffices to permit suit." However, Wiley argued in alternative that plaintiff had not established actual ownership of rights to component works in compilation. Plaintiff did not address argument in reply, and court denied summary judgment for plaintiff on claim.

Pac. Coast Marine Windshields Ltd. v. Malibu Boats, LLC, No. 12-33, 2014 U.S. Dist. LEXIS 121351 (M.D. Fla. Aug. 29, 2014)

Court denied summary judgment to defendant. Plaintiff, boat windshield supplier, sued boat manufacturer and customer, alleging copyright infringement, among other claims, relating to plaintiff's copyrighted computer aided design (CAD) images of plaintiff's boat windshield. Defendant moved for summary judgment, arguing that deposit materials for plaintiff's copyright applications were defective because deposit materials differed significantly from earlier drawings and electronic copies of drawings used as deposit materials contained error in dates. Court noted that deposit copies were submitted to register copyright in submitted CAD files, not design of windshield or earlier versions of design. Additionally, plaintiff's amended complaint clearly stated that copyright claim related to particular files submitted to Copyright Office. Court found question of fact remained regarding defendant's claim that plaintiff's deposit materials were defective due to errors in date and creator of files. Court noted that statements in metadata of deposit materials indicating later creation date and different creator did not establish error in deposit materials, because such statements could simply reflect date and identity of person who electronically copied file for submission to Copyright Office. Moreover, defendant did not establish or argue that alleged errors were made with knowledge or would have caused Copyright Office to deny registration. Accordingly, court denied motion for summary judgment.

Compass Homes, Inc. v. Heritage Custom Homes, LLC, No. 13-779, 2015 U.S. Dist. LEXIS 13368 (S.D. Ohio Feb. 4, 2015)

Court granted defendants' motion for summary judgment on plaintiff's claim of copyright infringement. Defendants moved for judgment on pleadings, arguing that copyright claim should be dismissed because plaintiff did not register its design at issue "as required by law." Court found facially plausible claim of registration, but noted that document plaintiff attached to complaint and claimed to be copyright registration did "not necessarily resemble

an official copyright registration document,” and so allowed defendants to renew argument at summary judgment. Defendants argued that plaintiff had not filed certificate of registration with court, or otherwise offered evidence establishing registration. Plaintiff argued that it produced evidence of copyright registration in that it produced its CEO’s affidavit and webpage printout. As to affidavit, court held that CEO lacked personal knowledge of any copyright registration for design at issue. As to webpage printout, court held that printout did not appear to be registration of copyright at issue. Court held that plaintiff “offers no testimony or other evidence that the [plan] was submitted to the copyright office,” and granted defendants’ motion for summary judgment on copyright infringement claim.

Jones v. W. Plains Bank & Trust Co., No. 12-52, 2014 U.S. Dist. LEXIS 119570 (E.D. Ark. Aug. 27, 2014)

Plaintiff provided tapes containing his original musical compositions to nonparty Bobby Roberts to convert to digital format in recording studio, which Roberts bought using loan from defendant bank. Defendant bank foreclosed on loan after Roberts failed to make payment, and sold contents of studio, including plaintiff’s tapes, to defendant Thompson. Plaintiff alleged that he informed bank that he owned tapes and recording equipment, and filed suit when defendant bank refused to return them to him. Court granted defendants’ motion to dismiss because plaintiff had not registered copyrights before bringing suit, and plaintiff brought motion for reconsideration on basis that he registered copyrights of compositions of three songs on tapes and those registrations were included in complaint. Plaintiff also had registered copyright in recordings, and argued that his rights in recordings related back to allow copyright infringement suit, since he was unable to obtain registration of recordings when he filed suit because defendants were in control of tapes. Under § 411(a), copyright infringement claim can only be validly brought after work has been registered. Court “decline[d] to waive the registration filing requirement in the circumstances of the case before the Court. Jones’s recourse, the Court believes, is to move for leave to amend.” Moreover, court found that plaintiff failed to state claim under Copyright Act because defendant’s possession of tape did not interfere with exclusive rights provided by Copyright Act.

C. Restoration

Boston Copyright Assocs., Ltd. v. U-Haul Int’l, Inc., No. 13-12826, 2015 U.S. Dist. LEXIS 18711 (D. Mass. Feb. 17, 2015)

Court dismissed claim for declaratory judgment that defendant was not “reliance party” under § 104A(h)(4). Plaintiff, owner of copyrights in well-known Hummel images and figurines, brought claims against defendant manufacturer of moving supplies, alleging that image of young boy on defendants’ packaging infringed plaintiffs’ copyright. Figurine at issue, while still under German copyright protection, had entered U.S. public domain; figurine, accordingly, had been “restored” under Uruguay Round Agreements Act, which provides for restoration of U.S. copyright in certain eligible foreign works that, although still

protected in their country of origin, have entered public domain in United States. In recognition of possibility that parties may have begun “legitimately exploiting” later-restored work while it was in public domain, URAA limits potential liability of “reliance parties” for claims of infringement in restored works and allows for continued exploitation subject to payment of reasonable compensation. Plaintiff sought declaratory judgment that defendants were not reliance parties under URAA. Plaintiff argued that use of derivative work in violation of any law renders party unable to receive reliance-party status, and since defendant’s packaging, which contained disputed image, had violated Massachusetts consumer protection laws, image used therein was ineligible for copyright protection, and defendant could not claim reliance party status. Argument rested on misreading of relevant statutory provision; there is no requirement that work used by reliance party be independently eligible for copyright protection. Court, accordingly, dismissed plaintiff’s claim for declaratory judgment that defendants were not reliance parties.

V. INFRINGEMENT

A. Access

Olem Shoe Corp. v. Washington Shoe Corp., 591 Fed. Appx. 873 (11th Cir. 2015)

Plaintiff brought suit for infringement of two designs featured on women’s rain boots. Lower court granted summary judgment, finding defendant liable for infringement. On appeal, defendant contended that lower court erred in finding element of copying, arguing that court had relied upon faulty testimonial evidence concerning defendant’s access to works. Court found designs on defendant’s products were “strikingly similar” to both copyrighted designs; that is, “so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.” Because “striking similarity” by itself satisfies element of copying, and no proof of defendant’s access need be shown, disputed testimonial evidence concerning access was unnecessary to finding of infringement and provided no basis for overturning ruling.

Martinez v. McGraw, No. 13-5796, 2014 U.S. App. LEXIS 18022 (6th Cir. Sept. 15, 2014)

Sixth Circuit upheld district court’s grant of summary judgment in favor of defendants due to lack of access to allegedly infringed copyrighted work. Plaintiff, songwriter James Martinez, alleged copyright infringement for his musical composition “Anytime, Anywhere Amanda,” by defendants, country music artist Tim McGraw and music producers, songwriters and publishers, with their song “Everywhere,” released in 1997. Martinez wrote “Anytime” for daughter of his friend Susan Tomac. In 1996, Tomac received sole demo tape of “Anytime” and gave it to Nashville photographer David Bartley, now deceased. None of producers, writers or publishers of “Everywhere” knew Bartley. Sixth Circuit upheld district court’s finding that Martinez’s theories of access through third party intermediaries to whom Bartley could have given demo tape were only “attenuated chains of hypothetical transmissions.”

Sixth Circuit therefore concluded that defendants had no reasonable opportunity to hear “Anytime,” and thus, no access.

Briggs v. Blomkamp, No. 13-4679, 2014 U.S. Dist. LEXIS 142016 (N.D. Cal. Oct. 3, 2014)

District court granted defendants’ motion for summary judgment finding no access to plaintiff’s allegedly infringed screenplay. Plaintiff, Steve Wilson Briggs sued defendants, director Neill Blomkamp and related film and production companies, for infringing his screenplay *Butterfly Driver* with their film *Elysium*. Plaintiff first distributed version of his screenplay to friends and family in May 2005. In 2006, he began marketing screenplay, and sent dozens of letters and emails to agents and film companies. Starting in 2007, plaintiff posted several versions of screenplay on triggerstreet.com, filmmaker-screenwriter website that linked writers with industry professionals and allowed for feedback. Defendants released film *Elysium* in August 2013. Plaintiff asserted that Blomkamp could have viewed screenplay on triggerstreet.com, and may have been director who praised him on message board. Court found that plaintiff provided no evidence of defendants’ direct access to screenplay or proof that defendants actually viewed, read, or heard of script. Court also found that plaintiff provided no evidence that defendants had reasonable opportunity to view work prior to film release and that allegations were entirely speculative as to Blomkamp’s access. Blomkamp’s declaration asserted that he never heard of triggerstreet.com until this lawsuit. Moreover, court found that distribution of screenplay to friends and family was not “wide dissemination” sufficient to support inference that defendants had access to work.

Francescatti v. Germanotta, No. 11-5270, 2014 U.S. Dist. LEXIS 81794 (N.D. Ill. June 17, 2014)

District court granted defendants’ motion for summary judgment, finding no reasonable trier of fact could find plaintiff’s song substantially similar to song “Judas” on defendant Lady Gaga’s album *Born This Way*, despite finding reasonable possibility of access. Plaintiff songwriter wrote musical work titled “Juda” in 1999, and rerecorded it in 2005 with sound engineer/bassist. Same sound engineer/bassist worked with DJ, and both later worked on songs on Gaga’s *Born This Way* album, including remix of song at issue, though both denied ever working on or discussing original creation of Gaga’s song. During this time, sound engineer/bassist also assisted plaintiff with other songs on her album, but parties disputed whether sound engineer/bassist ever came into contact with Gaga. Defendants claimed they were entitled to summary judgment because plaintiff could not show reasonable possibility of access. Court disagreed, noting that plaintiff could establish defendants had reasonable opportunity to view protected work through proof of “nexus” between alleged copier and individual possessing knowledge of creator’s work. Court found that based on nature and timing of collaboration between sound engineer/bassist, DJ and Gaga, reasonable juror could find that nexus existed, and that defendants had opportunity to view plaintiff’s song, despite claims made by Gaga that she never heard song, and that sound engineer/bassist never came into contact with Gaga. Court also found facts viewed in light most favorable to plaintiff showed channel of communication between defendants that surpassed threshold of “mere

conjecture or speculation” and that reasonable juror could find reasonable possibility that work at issue was available to alleged infringer.

Guzman v. Hacienda Records & Recording Studio, Inc., No. 12-42, 2014 U.S. Dist. LEXIS 169746 (S.D. Tex. Dec. 9, 2014)

Plaintiff, Tejano music composer, alleged that defendants, music studio and related entities, infringed plaintiff’s song. Court acknowledged that two songs shared many common elements, and “believe[d] that substantial similarity exists between the songs.” In analyzing factual copying prong, court noted that, in general, access and probative similarity must be proven unless works are “strikingly similar” – much more stringent standard than substantial similarity – in which case access need not be proved. Court found that works were not strikingly similar on grounds that plaintiff’s song was not unique or complex, and court could not conclude that only possible explanation for similarity between songs was copying. Court noted that many courts in analyzing access follow principle that “there is an inverse relationship between access and similarity such that the stronger the proof of similarity, the less the proof of access is required.” Court found that principle was not applicable here because defendants were “record company and its managers who recorded the song and not anyone who wrote it.” Court concluded that defendants’ act of recording song at issue would amount to copying only if defendants were aware of plaintiff’s song, so ordinary standard for establishing access should apply. Court held that direct access was not established, and given limited and sporadic nature of radio airtime and live performances of plaintiff’s song, plaintiff failed to establish that defendants had “reasonable possibility of access” to plaintiff’s song. Thus, no infringement was found.

White v. Alcon Film Fund, LLC, 52 F. Supp. 3d 1308 (N.D. Ga. 2014)

District court granted defendants’ motion for summary judgment based on insufficient evidence of access and lack of substantial similarity between plaintiff’s book and defendants’ film. Plaintiff author Franklin White wrote fictional urban crime drama entitled *First Round Lottery Pick*, about young male living in dangerous and gritty housing projects who pursues professional basketball career to escape poverty, but must first overcome neighborhood crime and drama. Plaintiff’s book was published first in hardback in 2005, then lightly revised and published in paperback in 2010. In November 2010, defendants released film entitled *Lottery Ticket*, about young male living in urban housing projects who wins \$370 million jackpot on Saturday morning of long holiday weekend, and must survive his greedy neighbors until lottery office opens on Tuesday. Plaintiff viewed defendants’ film, and believing defendants had copied his book, brought suit for copyright infringement against film’s production company and distributor. Parties cross-moved for summary judgment on infringement claim. Plaintiff alleged two theories of access. First, plaintiff alleged that in 2009, he sent unsolicited pre-publication copy of his book to one of defendants, Cube Vision, as writing sample in connection with plaintiff’s application for writing position on Cube Vision’s potential new television series. Plaintiff conceded that he did not receive response from Cube Vision. Defendants testified that screenplay writer, film director, and Cube Vision representatives had not heard of plaintiff, and plaintiff conceded that film’s

screenplay writer and director had conceived of film story idea in late 1990s, drafted treatment by 2006, and had no affiliation with Cube Vision while developing screenplay. Defendants also produced near-final draft of screenplay dated 2008, one year before plaintiff sent Cube Vision his book. Second, plaintiff alleged widespread dissemination of 2005 hardback version of book, but provided no sales records for hardback version and only limited evidence of circulation and sales of paperback version (roughly 3,000 copies per year). Court found plaintiff's assertions about Cube Vision's access in 2009 and failure to present evidence of widespread public access to his book during relevant period insufficient to raise triable issue of access.

Dahl v. Toyota Motor Sales USA, Inc., No. 14-1737, 2015 U.S. Dist. LEXIS 29757 (D. Nev. Mar. 10, 2015)

District court denied defendants' motion to dismiss complaint alleging that defendants' advertisement copied storyline of plaintiff's book. Plaintiff wrote book titled *B.B. King's Lucille and the Loves Before Her* that described plaintiff's real-life purchase at pawn shop of Gibson Lucille guitar that he later discovered was original "Prototype 1" Gibson Lucille guitar presented to B.B. King on his 80th birthday in 2005, and stolen from his home in 2009. Plaintiff ultimately returned guitar to B.B. King without compensation, and King gave him another autographed Gibson Lucille guitar in appreciation. In 2014 Toyota began broadcasting television advertisement created by co-defendants, in which young woman purchased guitar from storage unit and then found previous owner, B.B. King. In ad, B.B. King also gave woman autographed guitar. Plaintiff claimed Toyota ad constituted unauthorized derivative work. Defendants filed motion to dismiss, arguing that while plaintiff alleged that ad was based on underlying facts of plaintiff's story, plaintiff failed to plead that defendants had access to plaintiff's book. Court held, however, that plaintiff adequately pleaded access; it was plausible based on face of complaint that defendants had access to plaintiff's book. Court thus denied defendants' motion to dismiss.

B. Copying and Substantial Similarity

Levey v. Brownstone Inv. Group, LLC, 590 Fed. Appx. 132 (3d Cir. 2014)

Plaintiff, former co-owner of defendant securities business, sued defendant for copyright infringement, alleging defendant continued to use software created by plaintiff in violation of oral license that was effective only while plaintiff worked for defendant. Only issue on appeal was whether defendant continued to use plaintiff's software or substantially similar software that would infringe plaintiff's copyright. Plaintiff alleged in complaint that plaintiff learned that defendant was using plaintiff's software when plaintiff attended conference and spoke with sales director of another software company, who informed plaintiff that he had tried to sell software to employee of defendant, but employee advised that it already had proprietary software that it had been using for years, which had all of same capabilities as software sales director was offering. As plaintiff's software had same capabilities as sales director, plaintiff argued defendant was using plaintiff's software or substantially similar

software. Court granted defendant's motion to dismiss for failure to state claim, noting it could not clearly identify which theory of infringement applied, *i.e.*, whether plaintiff was alleging defendant was using plaintiff's software outright after its license expired, or whether defendant was using substantially similar version of plaintiff's software. Assuming former theory, plaintiff failed to provide adequate factual basis for belief that defendant was still using his software years after departure, since all court gathered from plaintiff's discussion with sales director was that defendant used software that had same capabilities as plaintiff's software. Additionally court found that it could not infer substantial similarity from facts, which at most stated that two programs shared common purpose or function, which are non-copyrightable ideas, and not protectable expression. As plaintiff failed to provide any detail about software with respect to look, feel, structure, sequence, organization or other potentially expressive and copyrightable elements, court could not find evidence that defendant was infringing plaintiff's software.

Automated Solutions Corp. v. Paragon Data Sys., 756 F.3d 504 (6th Cir. 2014)

Sixth Circuit affirmed grant of summary judgment for defendant. Plaintiff, computer software developer, sued defendant, computer hardware developer, for infringement based on defendant's use of plaintiff's copyrighted computer software code. Record established that parties entered into Software Development and Ownership Agreement in which parties collaborated to jointly develop, own, market and license software for Chicago Tribune and other newspaper companies. After relationship soured, plaintiff terminated agreement and obtained declaratory judgment in Ohio state court confirming plaintiff was sole owner of software. However, defendant was permitted to continue use of plaintiff's software to provide technical support to Chicago Tribune. Defendant claimed that it later discarded server on which plaintiff's software was stored. Subsequently, defendant developed new software, which plaintiff claimed copied portion of plaintiff's software. District court granted summary judgment to defendant on basis that plaintiff failed to identify specific portions of software code, allegedly copied by defendant, that were protectable by copyright. Circuit court agreed with district court's conclusion that plaintiff did not meet its burden. Court noted that plaintiff's software expert distilled software to its "unique protectable expression," but did not elaborate on which portions of data were "unique" or what made them "unique." According to court, "without more, this is not enough to create a genuine issue of material fact as to whether [defendant] copied original elements of [plaintiff's software]." Accordingly, court affirmed grant of summary judgment to defendant on issue of infringement.

Paycom Payroll, LLC v. Richison, 758 F.3d 1198 (10th Cir. 2014)

Tenth Circuit vacated district court's order to destroy copies of infringing software and remanded case to district court to request more thorough report from Special Master. Plaintiff, payroll management software company, sued defendant, competing payroll software company founded by former member of plaintiff company, alleging defendant infringed plaintiff's copyright by using code developed during defendant's tenure with plaintiff. On consent of parties, district court appointed Special Master to analyze computer

software code at issue for alleged infringement. District court adopted Special Master's finding that defendant infringed plaintiff's copyright and ordered destruction of infringing software. On appeal, defendant argued Special Master's report was flawed. Court agreed with defendant, noting that Special Master failed to document his application of each step of important abstraction-filtration-comparison test. Based on fair reading of report, court questioned whether Special Master performed abstraction step of test at all, without which Special Master's analysis would be fundamentally flawed. Court noted Special Master's report "reads consonantly with the misconception that an infringement analysis begins and ends with 'copying in fact.'" In vacating district court's order and remanding case, court rejected defendant's request for appointment of new Special Master, noting that deficiencies in report may rest simply with report and not with Special Master's application of test.

Ward v. Barnes & Noble, Inc., No. 13-7851, 2015 U.S. Dist. LEXIS 21347 (S.D.N.Y. Feb. 23, 2015)

District court granted in part and denied in part plaintiff's motion for summary judgment. Plaintiff, New Zealand citizen, filed provisional patent in New Zealand for game entitled "Scratch Hangman," and thereafter published "Scratch Hangman" books in New Zealand. Plaintiff then entered into agreement with defendant Sterling Publishing, U.S. publishing company later acquired by co-defendant Barnes & Noble, whereby Sterling agreed to publish six "Scratch Hangman" books as part of "Scratch and Solve" series, with option for two more. Publishing agreement also stated that defendant would file copyright applications for books in plaintiff's name, but publishing company had right to copyright any additional elements, such as illustrations, it added to books. In 2012 and 2013, plaintiff and defendant entered into several additional agreements regarding books in "Scratch Hangman" series, and defendant obtained copyright registrations for books in plaintiff's name. In 2012, plaintiff learned that defendant published additional books for "Scratch and Solve" series in which plaintiff was not listed as author. Plaintiff informed defendant that books infringed his copyrights, but advised that he wanted to maintain business relationship with defendant. Defendant then sent plaintiff new publishing agreements regarding additional "Scratch and Solve" books, which plaintiff found unacceptable, as they contained release language stating plaintiff could not sue defendant for copyright infringement. Plaintiff thereafter filed lawsuit, claiming he developed concept and created style of "Scratch and Solve" books, and that publication of new books violated his New Zealand and U.S. copyrights. With respect to New Zealand copyrights, court found claim failed as matter of law. Court found only protectable aspect of plaintiff's book was hangman and gallows, as other features, such as game board, consisted merely of geometric shapes and lettering that was organized alphabetically. Court found hangman and gallows artwork flowed directly from unprotectable idea of game that was created during Queen Victoria's reign. As plaintiff's hangman and gallows were mainly stick figures and straight lines, court found they revealed no particularized protectable expression. Court also found that such elements may be considered *scenes of faire* of traditional game. Additionally, court noted that even if plaintiff's hangman and gallows consisted of minimal amount of creativity, they were not substantially similar to hangman and gallows in defendant's New Zealand book, as defendant

used curvy lines for such elements, while plaintiff used straight lines. Court also found that total concept and feel of works was different, as plaintiff's books contained two puzzles and scratch-off circles arranged in tight grid, while defendant's books consisted of one puzzle and scratch-offs in loose arrangement. Court therefore found defendants entitled to summary judgment on plaintiff's claim of copyright infringement based on New Zealand book.

TufAmerica, Inc. v. WB Music Corp., No. 13-7874, 2014 U.S. Dist. LEXIS 170008 (S.D.N.Y. Dec. 8, 2014)

District court granted defendants' motion to dismiss. Plaintiff, alleged owner of musical composition and master sound recording of "Hook and Sling Part I," performed by Eddie Bo and the Soul Finders, sued defendants, musical producers of "Run This Town," performed by Jay-Z, Rihanna and Kanye West, for common law copyright infringement of master and statutory copyright infringement of composition for allegedly sampling and using word "oh" from plaintiff's Master and Composition. "Oh" appeared once in plaintiff's recording but allegedly appeared 42 times in "Run This Town"; however, as court noted, it was only in background and was audible only to "most attentive and capable listener." First, court found that word "oh" in composition is not protectable under copyright since it was single and commonplace word. For purposes of motion to dismiss, however, court assumed that Eddie Bo's rendition of "oh" in master was protectable. Court ultimately found that master had no substantial similarity to defendants' work by reviewing qualitative and quantitative significance of allegedly copied matter to plaintiff's work as whole. Court held that use of "oh" had no quantitative significance in master, only appearing once in beginning of song, and lasted two seconds in song lasting two minutes and 35 seconds. Court also held that "oh" had no qualitative significance in master because there was nothing "inherently important about 'oh' to the message conveyed by, or the theme presented," and it could have been replaced by "any host of monosyllabic or duosyllabic utterances." Plaintiff argued that number of times sample of "oh" appeared in defendants' work should be accounted for in substantial similarity test. Court found, however, that test only considers plaintiffs' work; but even if it were to consider defendants' work, barely perceptible sampling of "oh" would make copying *de minimis*. Court therefore dismissed complaint, finding no actionable copying.

Muromura v. Rubin Postaer & Assocs., No. 12-9263, 2014 U.S. Dist. LEXIS 130509 (C.D. Cal. Sept. 16, 2014)

Plaintiff artist brought action for copyright infringement against defendant, advertising agency for Honda Motor Company, in connection with plaintiff's ferrofluid audiovisual work entitled "Protrude Flow, 2001." Honda rented one of plaintiff's works for multi-city tour highlighting Honda's use of ferrofluids. Plaintiff alleged that Honda subsequently used ferrofluid art in advertisements without plaintiff's consent. Defendant moved to dismiss, arguing that plaintiff "failed to identify any original, protectable elements in 'Protrude Flow, 2001' and that the combination of unprotectable elements in Plaintiffs' work and Defendants' advertisements are not similar." Court agreed, finding that plaintiff asserted only that defendant copied "mood, scale, story line [and] pace" and that plaintiff appeared

impermissibly “to lay claim to a natural property of ferrofluid.” Court granted defendant’s motion to dismiss, holding that allegedly infringing work was not substantially similar to plaintiff’s work.

Briggs v. Blomkamp, No. 13-4679, 2014 U.S. Dist. LEXIS 142016 (N.D. Cal. Oct. 3, 2014)

After finding no access to plaintiff’s allegedly infringed screenplay, district court granted defendants’ motion for summary judgment also finding no striking similarity to plaintiff’s allegedly infringed screenplay. Plaintiff Steve Wilson Briggs sued defendants, director Neill Blomkamp and related film and production companies, for infringing his screenplay *Butterfly Driver* with their film *Elysium*. Since court found that defendants had no access to plaintiff’s screenplay prior to release of *Elysium*, plaintiff could only establish copyright infringement by showing striking similarity, higher bar that finds it virtually impossible two works were independently created. Court compared numerous areas in plot, characters, setting, themes and mood, finding some superficial similarities in generic ideas, but few real similarities among protectable elements. For plot, court analyzed 10 different areas, finding mostly similar abstract ideas. For example, in *Butterfly Driver* main hero must get to satellite world for medicine to save his daughter. In *Elysium*, main hero has been exposed to fatal dose of radiation and must travel to another world to receive medical care to save himself, which is similar only in abstract to *Butterfly Driver*. Court also analyzed various characters, finding differences in details. For example, main heroes in screenplay and film each suffer from ailments. Court found these two areas to be similar in abstract, but different in detail. In *Butterfly Driver*, hero suffers from intense headaches, and in *Elysium*, hero suffers from seizures, but only after specific events in film. Court also found setting of futuristic Earth and orbiting space station to be generic. For general themes of screenplay and film, such as corrupting influence of wealth, heroic sacrifice and redemption, court found these were abstract concepts that are not protectable. Finally, mood of both films, dark and serious, are generic or scenes a faire and not protectable elements. Thus, when reviewing all details court found no striking similarity between *Butterfly Driver* and *Elysium*.

Pryor v. Jean, No. 13-2867, 2014 U.S. Dist. LEXIS 143515 (C.D. Cal. Oct. 8, 2014)

District court granted defendants’ motion to dismiss plaintiffs’ claims for infringement of original sound recording based on sampling of unlicensed, but authorized, re-mastered version of sound recording. Plaintiffs, heirs of late musician David Pryor, sued 14 defendants, including Wyclef Jean and music and film production companies, for infringement of Pryor’s original sound recording. In 1974, Pryor wrote musical composition to song called “Bumpin’ Bus Stop” and produced recording of song with his band, “The Play Boys,” which was sent to radio stations and distributors. Pryor did not register copyright in original record. One year later, Pryor allowed second recording studio to produce re-mastered version for wider distribution. Second studio re-mastered record, shortened its length, changed name of Pryor’s band to “Thunder and Lightning,” and placed its own label on re-mastered recording of “Bumpin’ Bus Stop.” Second recording studio registered copyrights in re-mastered recording and musical composition contained therein. In August

2006, re-mastered recording of “Bumpin’ Bus Stop” was licensed for sampling in, *inter alia*, song by Wyclef Jean entitled “Step Up” for film of same name. Plaintiffs, who were assigned all rights in re-mastered record in 2012 and obtained copyright registration for original sound recording (but not underlying musical composition) in 2013, brought suit for infringement, alleging defendants infringed copyright in original sound recording by sampling from re-mastered sound recording, because re-mastered recording was unlicensed. Defendants moved to dismiss plaintiffs’ claims relating to original sound recording, arguing that issues of derivative works and licenses were irrelevant, since copyright in sound recording extends only to sounds fixed in that recording as matter of law, and defendants did not sample anything from original sound recording. District court agreed, and granted defendants’ motion to dismiss claims relating to infringement of original sound recording.

Pryor v. Warner/Chappell Music, No. 13-4344, 2014 U.S. Dist. LEXIS 85930 (C.D. Cal. June 20, 2014)

Plaintiffs, heirs of late musician David Pryor, sued defendants including singer Everlast and music publishing company TB Music for infringement and contributory infringement of Pryor’s original sound recording. In 1974, Pryor wrote musical composition “Bumpin’ Bus Stop” and produced recording of song with his band “The Play Boys.” One year later, Pryor allowed Private Stock Records to produce re-mastered version of original recording. Private Stock Records’ music publisher Caesar’s Music Library federally registered “Bumpin’ Bus Stop” composition in 1975 without reference to Pryor’s preexisting 1974 work. In 1998, defendant TB Music entered into agreement with Caesar’s Music Library to sample and create derivative works based on composition of “Bumpin’ Bus Stop,” and authorized others to use and distribute sample of composition by releasing record entitled “Get Down,” featuring defendant Everlast, which allegedly infringed plaintiffs’ copyright by repeatedly sampling Pryor’s voice from “Bumpin’ Bus Stop” sound recording. Defendants moved to dismiss complaint, claiming two-word sample of “get down” was not original, and alternatively, that use was *de minimis*. Court found half-second clip of words “get down” original, because plaintiffs’ allegation that clip featured Pryor’s “signature voice” was enough to satisfy “extremely low” requisite level of creativity to warrant copyright protection. Court, noting that use “so meager and fragmentary that the average audience would not recognize the appropriation” is *de minimis*, found copying “just barely” substantial enough to constitute infringement. Although two-word clip was only half-second of six-minute recording, plaintiffs sufficiently alleged qualitative significance of Pryor’s “signature voice,” and court could not conclude on motion to dismiss that average audience would not recognize appropriation. Accordingly, defendants’ motion to dismiss was denied.

Francescatti v. Germanotta, No. 11-5270, 2014 U.S. Dist. LEXIS 81794 (N.D. Ill. June 17, 2014)

District court granted defendants’ motion for summary judgment, finding no reasonable trier of fact could find plaintiff’s song substantially similar to song “Judas” on defendant Lady Gaga’s album *Born This Way*. Plaintiff songwriter wrote musical work titled “Juda” in 1999, and rerecorded it in 2005 with sound engineer/bassist. Same sound engineer/bassist worked

with DJ, and both later worked on Gaga's *Born This Way* album, including remix of song at issue, but denied ever working on or discussing original version of Gaga's song. During this time, sound engineer/bassist also assisted plaintiff with other songs on her album, but parties disputed whether sound engineer/bassist ever came into contact with Gaga. Plaintiff sued defendants for infringement, and defendants filed motion for summary judgment, arguing plaintiff failed to show access and substantial similarity between works. Court found reasonable trier of fact could find access due to nexus between parties. In assessing substantial similarity, court applied extrinsic-intrinsic test, finding that expert testimony was warranted to assess similarities between songs due to complexity of Gaga's computer generated song, and fact that it was being compared to plaintiff's song, which was live recording. Under extrinsic prong, plaintiff is permitted to prove copying by showing through analytic dissection and expert testimony that similarities between works are so substantial as to warrant finding defendant usurped plaintiff's ideas. Under intrinsic prong, inquiry is whether ordinary observer would find accused work captured total concept and feel of copyrighted work. Court found that plaintiff established copying under extrinsic test, as songs shared similar title, included same repetitive use of word "Juda" or "Judas" as refrain, and contained four 16th notes that propelled breakdown sections of songs, despite fact that melodies and other aspects of breakdowns were not similar. However, court found that plaintiff failed to meet requirements of intrinsic test, as total concept of feel of works were different, and similarities between works were unprotectable. Court refused to filter out unprotectable elements of works, and compared songs in their entirety, considering both protectable and unprotectable elements. After listening to works, court found that plaintiff had not established similarity between songs as whole, between individual, qualitatively important elements, nor unique combination of elements. Court found that similar titles and four 16th notes were not sufficient to give rise to finding that Gaga's song captured total concept and feel of plaintiff's song, and that no reasonable trier of fact could find songs' expressions substantially similar. Court also found that even if expressions were similar, they were not protectable as "Juda" was found in over 2,000 song titles, repetition of songs' titles in lyrics is not protectable, and four 16th notes were not protectable. Accordingly, court granted defendants' motion for summary judgment, finding songs not substantially similar as matter of law.

Latele TV, C.A. v. Telemundo Communs. Group, LLC, No. 12-22539, 2015 U.S. Dist. LEXIS 11849 (S.D. Fla. Feb. 2, 2015)

Latele brought copyright infringement action against Telemundo in connection with Venezuelan telenovelas. Telemundo's moved for summary judgment, alleging that no reasonable jury could find substantial similarity between Latele's *Maria Maria* and Telemundo's *El Rostro de Analia*. Latele's argument was based on nearly identical plot sequences between 198-episode *Maria Maria* and 178-episode *El Rostro de Analia*. To show substantial similarity between two works, plaintiff must show that "average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Copyrightable expression does not include *scenes a faire*, "sequences of events which necessarily follow from a common theme" or "incidents, characters or settings that are

indispensable or standard in the treatment of a given topic.” However, “particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.” Court found that although Latele’s alleged similarities between two works included *scenes a faire*, reasonable jury could conclude that works were substantially similar, and denied Telemundo’s motion for summary judgment.

Boston Copyright Assocs., Ltd. v. U-Haul Int’l, Inc., No. 13-12826, 2015 U.S. Dist. LEXIS 18711 (D. Mass. Feb. 17, 2015)

Plaintiff, owner of copyrights in well-known Hummel images and figurines, brought claims against defendant manufacturer of moving supplies, alleging that image of young boy on defendants’ packaging infringed plaintiffs’ copyright. Court found that it could assess substantial similarity at motion to dismiss stage because both works were two-dimensional drawings; thus, court could conduct full comparison of works as they appeared on face of complaint. Court, applying ordinary observer test and “rule of dissection,” found that “even after dissection, there are some similarities between the two works.” However, defendant’s image was more formalistic than whimsical style typical of plaintiff’s work, and lacked shading and detail of plaintiff’s image. Court dismissed plaintiff’s claim, finding that in context of other dissimilarities and overall distinct aesthetic appeal, images were not substantially similar.

Feldman v. Rhimes, No. 14-12030, 2014 U.S. Dist. LEXIS 173273 (D. Mass. Dec. 16, 2014)

Plaintiff, author, sued defendants, television producer and production company, alleging that defendant ABC’s 2011 television medical drama *Off the Map* infringed two books and two unpublished manuscripts of plaintiff’s *Overlap* quadrilogy. Defendants moved to dismiss complaint under Rule 12(b)(6). Having undertaken detailed comparison of plaintiff’s works to defendant’s works, and watched all thirteen episodes of *Off the Map*, court weighed “total concept and feel, theme, characters, plot, sequence, pace, and setting” of respective works and concluded that “no reasonable lay observer would recognize *Off the Map* as derivative in any respect” of plaintiff’s works. Court noted “fractured nature” of plaintiff’s submitted excerpts, consisting of 55 pages of her 229-page manuscript with numerous redactions, and highlighted several examples of “mind-bending” and “implausible” comparisons offered by plaintiff. Court held plaintiff “utterly failed to meet her entry-level burden of showing some plausible probative similarity between her works and *Off the Map*.” Accordingly, court granted defendant’s motion and dismissed complaint for failure to state claim.

Tanikumi v. Walt Disney Co., No. 14-5877, 2015 U.S. Dist. LEXIS 19721 (D.N.J. Feb. 19, 2015)

Court granted Disney’s motion to dismiss. Plaintiff filed complaint against Disney alleging that movie *Frozen* infringed her self-published memoir *Yearnings of the Heart*. To make plausible claim for copyright infringement, plaintiff needed to show that Disney had access to her work, and that respective works shared substantial similarities. Plaintiff alleged only

that Disney “plagiarized broad thematic elements of her memoir.” Court found that themes that appeared in both *Frozen* and *Yearnings of the Heart* were “expressed in vastly different ways.” Setting, plot, and characters had no close similarities. Because copyright law does not protect generic, thematic elements of plaintiff’s work, no reasonable juror could find that Disney improperly appropriated from *Yearnings of the Heart*.

Live Face on Web, LLC v. Emerson Cleaners, Inc., No. 14-182, 2014 U.S. Dist. LEXIS 171667 (D.N.J. Dec. 11, 2014)

District court denied defendant’s motion to dismiss plaintiff’s copyright infringement claim. Plaintiff, developer of software and video technology, sued defendant, dry cleaning business, for direct, indirect, vicarious and/or contributory copyright infringement for using unlawful version of plaintiff’s software on its website. Defendant had purchased software from third party, whom plaintiff sued separately for copying plaintiff’s source code. Court found plaintiff had stated claim for direct infringement. Plaintiff’s allegations that defendant used software at issue, and defendant’s website caused copy of plaintiff’s software to be automatically downloaded to visitor’s computer, were sufficient to allege defendant copied and distributed copies of plaintiff’s code to each of its website’s visitors. Defendant’s arguments that third party rather than defendant was responsible for any copying and distributing relied on facts outside complaint and could not be determined on pleadings alone. Accordingly, defendant’s motion to dismiss was denied.

Acker v. King, 46 F. Supp. 3d 168 (D. Conn. 2014)

Plaintiff author, appearing *pro se*, sued Stephen King, alleging King’s 528-page novel *Doctor Sleep* infringed plaintiff’s 18-page unpublished manuscript titled *The Haunting of Addie Longwood*. Defendant moved to dismiss complaint under Rule 12(b)(6). Record established that plaintiff mailed King her manuscript for review and comment, which King’s assistant acknowledged, noting that King could not review manuscript due to time constraints. Question before court was whether plaintiff could demonstrate that copyrightable elements of defendant’s novel were substantially similar to copyrightable elements of plaintiff’s manuscript. After analyzing both works, court found “no reasonable observer could find them to be substantially similar beyond the level of generalized or otherwise unprotectible ideas.” Court noted further that even if similarities between works included protectable elements, defendant’s particular expression of those elements was not at all similar, much less substantially similar. Accordingly, court granted defendant’s motion to dismiss.

Savant Homes, Inc. v. Collins, No. 13-2049, 2015 U.S. Dist. LEXIS 24084 (D. Colo. Feb. 27, 2015)

Court granted defendants’ motion for summary judgment on plaintiff’s copyright infringement claim related to architectural plans. Plaintiff, custom home designer and builder, owned copyright in “Anders Plan.” Wagners, homeowner defendants, visited plaintiff’s model home, and took one of plaintiff’s brochures, which included simplified

version of model home's floor plan based on Anders Plan. Two months later, Wagners returned with realtor to again tour model home, accompanied by designer defendant King and builder defendant Collins. Wagners contracted with Collins and King to design and build two homes. Court found this evidence sufficient to permit reasonable juror to conclude that defendants had access to copyrighted work before accused homes were fully designed and constructed. Plaintiff had discharged its summary judgment burden as to this prong, court held. Court held, however, that design of accused homes was not substantially similar to copyrighted work, due to accused plan having narrower stairway, different garage windows, and smaller and differently shaped master closets. Thus, court granted defendants' motion for summary judgment on plaintiff's claim of copyright infringement.

White v. Alcon Film Fund, LLC, 52 F. Supp. 3d 1308 (N.D. Ga. 2014)

District court granted defendants' motion for summary judgment based on lack of substantial similarity between plaintiff's book and defendants' film. Plaintiff author Franklin White wrote fictional urban crime drama entitled *First Round Lottery Pick*, about young male living in dangerous and gritty housing projects who pursues professional basketball career to escape poverty, but must first overcome neighborhood crime and drama. Plaintiff's book was published first in hardback in 2005, then lightly revised and published in paperback in 2010. In November 2010, defendants released film entitled *Lottery Ticket*, about young male living in urban housing project who wins \$370 million jackpot on Saturday morning of long holiday weekend, and must survive his greedy neighbors until lottery office opens on Tuesday. Plaintiff viewed defendants' film, and believing defendants had copied his book, brought suit for copyright infringement against film's production company and distributor. Both parties moved for summary judgment. Following detailed comparison of works, court found plaintiff's serious book and defendants' light-hearted film extraordinarily different in terms of plot, mood, characters, pace, and setting, except for unprotected stock themes and *scènes à faire* relating to young men growing up in public housing projects. Accordingly, no average lay observer would believe film copied book, and no reasonable fact finder could find film substantially similar to copyrightable elements of book.

Dahl v. Toyota Motor Sales USA, Inc., No. 14-1737, 2015 U.S. Dist. LEXIS 29757 (D. Nev. Mar. 10, 2015)

District court denied defendants' motion to dismiss complaint that alleged that defendants' advertisement copied storyline of plaintiff's book. Plaintiff wrote book titled *B.B. King's Lucille and the Loves Before Her* that described plaintiff's real-life purchase at pawn shop of Gibson Lucille guitar that he later discovered was original "Prototype 1" Gibson Lucille guitar presented to B.B. King on his 80th birthday in 2005, and stolen from his home in 2009. Plaintiff ultimately returned guitar to B.B. King without compensation, and King gave him another autographed Gibson Lucille guitar in appreciation. In 2014 Toyota began broadcasting television advertisement created by co-defendants in which young woman purchased guitar from storage unit and then found previous owner, B.B. King. In advertisement, B.B. King also gave woman autographed guitar. Plaintiff claimed Toyota ad constituted unauthorized derivative work. Defendants filed motion to dismiss, arguing that

plaintiff could not copyright idea of story, only its expression, and that plaintiff did not allege any similar language or common expression between works, and thus plaintiff's claim failed as matter of law. Court found, however, that plaintiff's allegations supported claim of substantial similarity; details of storyline pleaded were more than simply uncopyrightable ideas and concepts. Court thus denied defendants' motion to dismiss.

Silver Streak Indus., LLC v. Squire Boone Caverns, No. 13-173, 2014 U.S. Dist. LEXIS 162737 (S.D. Ind. Nov. 19, 2014)

District court granted partial summary judgment for defendant, finding no substantial similarity between designs of two ore cars. Plaintiff sued defendant for allegedly infringing its copyright in "Ore Car Display and Game Cards," product used for display of loose gemstones. Squire Boone had since redesigned its product, but Silver Streak contended both initial design and re-design infringed. On motion for summary judgment, Squire Boone did not contest validity of Silver Streak's copyright or access, but argued that its version of Ore Car was not substantially similar to Silver Streak's Ore Car. Court reviewed Silver Streak's list of allegedly copied elements. Court found that length, width and height of Ore Car were not protectable. Second, court held that "rustic finish" on wood was not similar. Third, court found placement of wheels on Ore Car to be different. Fourth element, use of metal rail tracks, was not contested by Squire Boone. Fifth, court found that use of posts to hold up light box were different because Squire Boone used two posts, while Silver Streak used one with "T-Shaped" beam. Sixth, court held use of large compartment in middle of car to be utilitarian and not subject to copyright protection. Finally, 12 small item identification compartments labeled and covered with glass were different. Squire Boone's compartments lined two parallel sides and Silver Streak's lined all four sides; court was skeptical whether this element was even copyrightable. Overall, court found no objective observer would believe two Ore Cars were same, and found that Squire Boone's redesigned product did not infringe Silver Streak's copyrighted Ore Car.

Batiste v. Najm, 28 F. Supp. 3d 595 (E.D. La. 2014)

Plaintiff, songwriter and music recording artist, sued various music recording artists, music producers and publishers, alleging over 100 claims of infringement of 45 of plaintiff's songs. Defendants moved to dismiss complaint under Rule 12(b)(6), which court converted to motion for summary judgment owing to materials outside pleadings submitted by both parties already in record. Following exhaustive analysis of plaintiff's claims and thorough comparison of copyrighted songs with defendants' allegedly infringing songs, court granted summary judgment to defendants on all but three of plaintiff's claims, finding no reasonable juror could find substantial similarity between plaintiff's songs and defendants' songs. For two of remaining three claims, court found reasonable juror could find substantial similarity, owing to certain similarities in combination of lyrics, associated melodies, and hooks. Accordingly, court denied summary judgment to defendants as to these claims, finding material question of fact remained. Court found it could not dispense with third remaining claim on summary judgment, because record contained insufficient facts.

Lumos, Inc. v. LifeStrength, LLC, No. 12-1196, 2014 U.S. Dist. LEXIS 124298 (D. Utah Sept. 3, 2014)

District court granted plaintiff's motion for partial summary judgment, finding defendant's videos substantially similar to plaintiff's videos. Plaintiff and defendant were competitors that sold kinesiology tape. Plaintiff created and published instructional videos demonstrating techniques for applying tape to specific ailments. Plaintiff alleged that defendant infringed 20 of plaintiff's videos, as defendant (1) copied organizational structure of videos; (2) made identical use of non-essential and unique wording throughout videos; (3) had near-verbatim lists of potential causes of injury found in same order at beginning of each video; (4) used nearly identical disclaimer language; and (5) suggested nearly identical complementary treatments. Court found plaintiff owned valid registration for videos, and defendant conceded access. Court analyzed whether there were probative similarities between videos to determine whether defendant copied. Court reviewed chart prepared by plaintiff showing similarities in transcripts of videos, and noted that disclaimers on two videos were word-for-word identical. As such, court found plaintiff established similarities between works that would not be expected if works had been created independently. Court then applied "abstraction-filtration-comparison" test to determine whether works were substantially similar. In applying test, court found that unprotectable elements of videos included purpose or concept of video, as it was to instruct purchaser how to use and apply tape, and scene and characters of video, as they included instructor and model, and it is common for instructional videos to show viewer how to apply product. Court found protectable elements were plaintiff's specific script used in videos (when more than single word or short phrase), its spoken and written disclaimers, order, compilations, and selections of causes of injury and suggested complimentary treatments, and entire organizational structure of videos. Court then compared protectable elements of plaintiff's works to defendant's works, and found that because of verbatim copying of selection and order of causes of injury, copying of other areas of plaintiff's script that were not single words or short phrases, such as describing usefulness of tape and disclaimers, and similarity in organization structure of videos, ordinary reasonable person would overlook minute differences in works, and would conclude overall videos were substantially similar. Court therefore granted plaintiff's motion for partial summary judgment.

Smith v. Goodell, No. 14-1010, 2015 Dist. LEXIS 14019 (E.D. La. Feb. 5 2015)

Court granted defendants' motion to dismiss. *Pro se* plaintiff brought action for copyright infringement against NFL and others in connection with work entitled *Fantasy Football Parade Extravaganza*, booklet detailing strategies for marketing New Orleans Saints football team. Plaintiff alleged that booklet was sent to Saints' director of marketing, and subsequently "strategy and unique characteristics" of booklet were featured on Saints' website. To establish claim for copyright infringement, plaintiff must show (1) ownership of valid copyright; and (2) that defendant copied elements of work that are original and protectable. Court found that plaintiff failed to allege claim for copyright infringement. Plaintiff did not allege specifics acts of infringement, and did not identify accused work to compare to copyrighted work. Court reasoned that plaintiff's claim was based on

defendants' alleged use of "ideas and strategies" in booklet; however, copyright law protects "expression of ideas or facts," not "ideas or facts" themselves.

C. Contributory/Vicarious Infringement

Sandybeachgifts.com v. Amazon.com, Inc., 584 Fed. Appx. 713 (9th Cir. 2014)

Plaintiff brought claim for copyright infringement against Amazon, alleging Amazon's affiliates used her photographs on their websites without permission. District court dismissed claim, finding plaintiff failed to allege facts sufficient to show that Amazon could be held directly, contributorily, or vicariously liable for affiliates' conduct. Court reviewed *de novo*. "To state a claim for vicarious copyright infringement, a plaintiff must allege that the defendant has (1) the right and ability to supervise the infringing conduct, and (2) a direct financial interest in the infringing activity," which includes the "ability to supervise and control the infringement, not just affect it." Plaintiff alleged that operating agreement between Amazon and affiliates prohibited affiliates from "infringing on another's copyright" and allowed Amazon to "monitor, crawl, and otherwise investigate" affiliates' websites. Court found that, although Amazon had right to monitor affiliates' websites, plaintiff had failed to allege that Amazon's termination of agreement with affiliates would end infringement of copyrights. Court affirmed that Amazon could not be held vicariously liable for affiliates' conduct, since Amazon could not directly control such conduct.

UMG Recordings, Inc. v. Escape Media Group, Inc., No. 11-8407, 2014 U.S. Dist. LEXIS 137491 (S.D.N.Y. Sept. 29, 2014)

Court granted plaintiffs' motion for summary judgment, finding defendants liable for both direct and secondary copyright infringement. Defendants operated online streaming music service known as "Grooveshark" that provided millions of users with access to vast library of digital music that included plaintiffs' copyrighted sound recordings. Infringement claims related only to direct upload of sound recordings by defendant's officers and employees. Evidence uncovered in discovery confirmed that defendant's co-founders repeatedly instructed all employees, at risk of being fired, to create Grooveshark accounts and to upload hundreds of thousands of digital music files to central library to make such files available to other Grooveshark users. Court first held that defendants were liable for direct infringement based on defendant company officers' repeated instructions to employees to upload substantial volumes of music files to Grooveshark. Next, court held that defendants were liable for vicarious copyright infringement because defendants had right and ability to supervise and control employees' infringing activity (and, in fact, directed employees to engage in infringing activity), and because defendants received financial benefit from infringing employee uploads since comprehensive music catalog attracted more users to Grooveshark service. Defendants were also liable for inducement of infringement since defendant company's officers overtly instructed employees to engage in uploading of digital music files to Grooveshark as condition of employment, and therefore engaged in purposeful conduct with intent to foster infringement. Court further held that defendants were liable for

contributory infringement because defendants had actual knowledge that employees were uploading copyrighted sound recordings to Grooveshark, actively encouraged such conduct, and also materially contributed to such conduct by providing technological means by which infringement occurred and even making home internet connections available to store and stream copies of plaintiffs' copyrighted works. Finally, both co-founders of defendant company were held to be direct infringers based on their own uploading of copyrighted files to Grooveshark, and were otherwise personally liable for company's infringement because they directed infringement at issue through instructions to employees to upload digital music files to central library and directly benefited from infringing activity due to substantial equity interest in defendant company.

Pryor v. Warner/Chappell Music, No. 13-4344, 2014 U.S. Dist. LEXIS 85930 (C.D. Cal. June 20, 2014)

Plaintiffs, heirs of late musician David Pryor, sued defendants including singer Everlast and music publishing company TB Music for infringement and contributory infringement of Pryor's original sound recording. In 1974, Pryor wrote musical composition "Bumpin' Bus Stop" and produced recording of song with his band "The Play Boys." One year later, Pryor allowed Private Stock Records to produce re-mastered version of original recording. Private Stock Records' music publisher Caesar's Music Library federally registered "Bumpin' Bus Stop" composition in 1975 without reference to Pryor's preexisting 1974 work. In 1998, defendant TB Music entered into agreement with Caesar's Music Library to sample and create derivative works based on composition of "Bumpin' Bus Stop," and authorized others to use and distribute sample of composition by releasing record entitled "Get Down," featuring defendant Everlast, which allegedly infringed plaintiffs' copyright by repeatedly sampling Pryor's voice from "Bumpin' Bus Stop" sound recording. Defendants moved to dismiss. Motion was granted with respect to contributory infringement claim, because plaintiff failed to allege requisite knowledge. Plaintiffs alleged that TB Music either "knew or had reason to know of the infringement upon initial release of the recording," or was made aware after its release that sampled vocal performance was not Everlast and was not authorized by Pryor or plaintiffs. Plaintiffs further alleged that infringing recording was approved by defendants prior to entering into sample agreement that limited license to use of composition. Court held that plaintiffs failed to sufficiently allege that TB Music knew or had reason to know that "Get Down" included unauthorized, infringing sample of "Bumpin' Bus Stop" sound recording. Plaintiffs' allegations that defendant Everlast knew sampled voice performance was not his did not establish defendant TB Music's knowledge of allegedly-infringing sample. Further, plaintiffs failed to plausibly allege how defendant TB Music knew that directly infringing defendants would infringe as result of defendant TB Music's licensing of "Get Down." Accordingly, court granted defendant TB Music's motion to dismiss; plaintiffs, who had failed to cure their pleading deficiencies despite prior opportunity, were denied leave to amend.

Gardner v. CafePress Inc., No. 13-1108, 2014 U.S. Dist. LEXIS 168328 (S.D. Cal. Dec. 4, 2014)

Defendant operated website CafePress.com, which allowed users to upload images, slogans or designs to site for printing on items. Images were uploaded at direction of CafePress's users, and stored on CafePress's servers. CafePress provided users online, printing and shipping services. Users also offered images, slogans or designs for sale to third parties, who selected one of CafePress's unbranded items on which to reproduce image. Items or images were sold either through (1) user's virtual shop on CafePress's website; (2) CafePress's marketplace on its website; or (3) CafePress's feed on third-party websites such as Amazon or eBay. Once customer purchased item from CafePress, one of its employees "hard printed" item. Plaintiff owned registered copyrights in artwork. Several CafePress users uploaded copies of plaintiff's artwork to CafePress's server. CafePress users then sold items bearing copies of plaintiff's works through CafePress's website and other websites. CafePress generated approximately \$6,000 from sales, and generated additional revenue by purchasing advertisements displaying plaintiff's works which were clicked on by users. Plaintiff sued CafePress for direct and vicarious copyright infringement; CafePress filed motion for summary judgment. With respect to vicarious infringement, plaintiff must prove (1) direct financial benefit from third party's direct infringement; and (2) right ability to supervise third party's infringing activity. With respect to direct financial benefit, plaintiff argued that CafePress paid image uploaders 10 percent royalty, and advertising bearing plaintiff's images increased sales. Court rejected CafePress's argument that it must obtain "substantial" financial benefit, and noted that it was undisputed that certain number of CafePress's customers saw ad bearing plaintiff's copyrighted works and clicked those ads, generating revenue for CafePress. Additionally, some of CafePress's customers bought items bearing plaintiff's works. While it was not known whether those customers clicked ads or bought items due to plaintiff's work, court found determination was for trier of fact. With respect to second prong, plaintiff argued that CafePress had complete control as to which items were offered for sale on Marketplace and related feeds to Amazon, eBay, and other major retailers such as Wal-Mart and Kmart. Court found CafePress distinguishable from eBay and Amazon, as it seemed to have active control over at least some of allegedly infringing items during process in which it produced and then shipped items to customers. CafePress's production of allegedly infringing items at its production facility appeared to be "purposeful conduct," such that CafePress had right and ability to control, court found. As court found disputed elements under both prongs, it denied CafePress's motion for summary judgment on vicarious liability claim.

Sarvis v. Polyvore, Inc., No. 12-12233, 2015 U.S. Dist. LEXIS 39448 (D. Mass. Mar. 2, 2015)

Plaintiff, assignee of internationally known artist's works, sued defendant Internet service provider for copyright infringement. Polyvore's website provided large database of artwork, and provided users with free tool that allowed them to clip and copy images from other websites and import them to user's account on Polyvore site. Users could also create "set," consisting of group of independent images, and store in account. Polyvore paid users of its

site to clip or copy large amounts of art from other sites, and to bring large number of visitors to its site. Polyvore also compiled central database that included all stored art and sets of its users in high resolution. Users could access searchable database at no charge by using search function on website. Search typically yielded group of small, high resolution images on one side of computer screen, and user could enlarge images using Polyvore's editing tools. Editing tools also allowed users to remove copyright symbols and/or copyright watermarks and to alter images. Polyvore's CEO belonged to number of online art sites and art groups. As user of Polyvore site, CEO created set using one or more of copyrighted images on Polyvore site. Polyvore generated revenue by receiving commissions from retail merchants when user purchased merchant's product as result of using Polyvore site. It also received revenue from advertisers and from fees it received from sponsors of contests on Polyvore's website. Contests involved users editing works, including copyrighted works with watermarks removed, from Polyvore's database, and creating set with works. Polyvore then posted winning sets on its site. Additionally, advertising sponsors chose entries containing at least one copyrighted work at issue as winner in Polyvore's contests, and Polyvore copied and published winning set containing copyrighted work on its site. Plaintiff sued Polyvore for, *inter alia*, contributory infringement. Contributory infringer, court noted, is one who, with knowledge of infringing activity, induces, causes or materially contributes to infringing conduct. Court found Polyvore's actual knowledge of infringement of one of copyrighted works, and failure to take action in response, together with CEO's conduct, to extent she acted as agent for Polyvore, provided basis for contributory infringement liability. Additionally, court noted that Polyvore actively distributed editing tools that allowed users to clip and copy copyrighted images, which resided in Polyvore's searchable database. Accordingly, plaintiff stated plausible claim for contributory infringement.

Live Face on Web, LLC v. Emerson Cleaners, Inc., No. 14-182, 2014 U.S. Dist. LEXIS 171667 (D.N.J. Dec. 11, 2014)

Court granted defendant's motion to dismiss as to contributory infringement claim, and denied in all other respects. Plaintiff, developer of software and video technology, sued defendant, dry cleaning business, for direct, indirect, vicarious and/or contributory copyright infringement for using unlawful version of plaintiff's software on its website. Defendant had purchased software from third party, whom plaintiff sued separately for copying plaintiff's source code. Court found plaintiff had stated claim for vicarious copyright infringement. Defendant had right and ability to control its website, and website provided forum for visitors to receive unlawful copy of plaintiff's software. Defendant's financial interest was sufficiently alleged by claim that software was powerful sales and advertising tool for defendant to generate sales and profits by drawing and retaining customer attention to website. Plaintiff's claim for contributory infringement failed, however, since plaintiff's single allegation that defendant's website directed visitors to infringing code could not support plausible inference that defendant knew such code was impermissibly copied. Viewing complaint as whole, court found no facts to suggest defendant knew or should have known software was copyrighted by someone other than third party seller of software. Court noted unfairness of result to small business forced to litigate costly copyright infringement

lawsuit after purchasing software for one-time fee of few hundred dollars from third party without reason to know or inquire about infringement. “Nonetheless, applying copyright law to computer code is tricky business, and this Court has very little controlling precedent with which to work. Depending on the ultimate outcome of this suit, perhaps the Court of Appeals will have an opportunity to address this issue.”

Oban US, LLC v. Nautilus, Inc., No. 13-1076, 2014 U.S. Dist. LEXIS 84725 (D. Conn. June 23, 2014)

Plaintiff, fitness heart rate monitor manufacturer, brought copyright claim on basis that defendant Nautilus, licensor of trademark used for defendant Sports Beat’s allegedly infringing monitor, was vicariously liable for copyright infringement because defendant Nautilus allegedly benefited from license which broadened its brand awareness, and had power to stop plaintiff’s infringing activity. To state vicarious infringement claim, plaintiff must allege that defendant had “right and ability to supervise” infringing activity and direct financial interest in activity. Court granted defendant Nautilus’s motion to dismiss on basis that plaintiff’s vicarious copyright claim failed, because even though defendant Nautilus could control use of its “mark,” there was no principal/agent relationship, and license did not imply that Nautilus was profiting from infringing activity and that Nautilus could stop such activity.

D. Miscellaneous

Am. Broadcasting Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014)

Supreme Court reversed lower court, finding that defendant’s system of broadcasting television programs to consumers via Internet violated television distributors and broadcasters’ right of public performance. Court held that defendant’s system was analogous to community antenna television (CATV) systems which Congress specifically sought to include within scope of 1976 Act, and thereby overturn prior Supreme Court rulings that such systems did not infringe public performance right. Because defendant’s system was “substantially similar” to predecessor CATV systems that Congress intended Act to reach, insofar as defendant’s system also transmitted television programming to consumers at large from centralized location controlled by defendant, system “performed” within meaning of Act. Further, defendant’s system performed petitioners’ works “publicly” under transmit clause. In so holding, Supreme Court rejected argument that defendant’s use of antennas dedicated to individual users, such that each user received “unique” copy of work, had any bearing on liability when viewing Act in terms of overarching objectives. Such technological differences were merely “behind-the-scenes way” in which defendant delivered television programming to consumers; did not significantly alter nature of programming services provided to consumer; and did not render defendant’s commercial objectives any different than those of cable companies. Moreover, because transmit clause states that performance is “public” regardless of whether members of public “receive [performance] ... at the same time or at different times,” multiple, discrete transmissions of

same work to different consumers still constitutes “public” performance under that clause. Additionally, consumers to whom defendant transmitted television programs were without question “the public,” as they constituted large number of people who were unrelated and unknown to each other. Finally, Court made clear that holding did not reach issue of whether public performance right was infringed by issues not yet presented, such as cloud computing or remote storage of content.

Olem Shoe Corp. v. Washington Shoe Corp., 591 Fed. Appx. 873 (11th Cir. 2015)

Plaintiff brought suit for infringement of two designs featured on women’s rain boots. Lower court granted summary judgment finding defendant liable for infringement, but rejected claim that defendant had willfully infringed. Appeals court affirmed ruling that defendant had not committed willful infringement. Court adopted Second Circuit standard under which willfulness can be found based on “reckless disregard”; *i.e.*, disregard of “objectively high likelihood” that defendant’s conduct was infringing, and risk was either known to party or “so obvious” that it should have been known. Court held that evidence did not support finding that defendant “recklessly disregarded” possibility of infringement, since plaintiff’s initial cease-and-desist letters did not refer to copyright registration numbers or include deposit copies, and thus defendant did not have “sufficient credible information” from which to determine legitimacy of infringement claim. Further, defendant’s behavior after receipt of letters, which included stopping shipments of products at issue and contacting plaintiff’s attorney to request additional information, evidenced defendant’s good-faith effort to determine whether plaintiff’s infringement allegations were true. Finally, court rejected as overbroad argument that “reckless disregard” could be found merely from fact that defendant was unaware of source of products, because it purchased goods from China; to do so would impute reckless disregard to any party that purchases and sells product without specific knowledge of source of design.

Star Pac. Corp. v. Star Atl. Corp., 574 Fed. Appx. 225 (3d Cir. 2014)

Third Circuit affirmed district court’s grant of summary judgment of copyright infringement. Works at issue were copyrighted designs of bathroom sets. Appellant, individual defendant, alleged there was dispute of material fact as to his knowledge of corporate defendant’s infringement. Court held that, considering “ample evidence in the record establishing [appellant’s] involvement and authority within [corporate defendant],” his “assertions that he did not have knowledge of [corporate defendant’s] infringing activities are unavailing” and appellant’s “testimony is insufficient to create a genuine issue of material fact in the face of the abundant evidence of [his] position of authority.” Thus, Court of Appeals affirmed district court summary judgment decision.

Beastie Boys v. Monster Energy Co., No. 12-6065, 2014 U.S. Dist. LEXIS 168225 (S.D.N.Y. Dec. 4, 2014)

Jury found Monster liable for copyright infringement and false endorsement in connection with use of songs recorded and composed by Beastie Boys. Monster submitted post-trial

motion for judgment as matter of law under Fed. R. Civ. P. 50, arguing that there was insufficient evidence for findings of willful infringement and false endorsement. Monster hosted “Ruckus in the Rockies” snowboarding event, and created promotional video using Beastie Boys music as soundtrack without permission. Soundtrack included excerpts from Beastie Boys songs “Pass the Mic,” “So Whatcha Want,” “Sabotage,” “Looking Down the Barrel of a Gun,” and “Make Some Noise.” Court may grant motion for judgment as matter of law only if reasonable juror would have been compelled to accept view of moving party. Second Circuit has found willful copyright infringement to mean (1) that defendant was actually aware of infringing activity, or (2) that defendant’s actions were result of reckless disregard for, or willful blindness to, copyright holder’s rights. Due to Monster employees’ experience in creation of similar promotional videos, for which approval from artists was necessary, as well as Monster’s failure to train employees in use of copyrighted material, court found that reasonable jury could conclude that Monster recklessly disregarded duty to secure approval for use of Beastie Boys’ music. Court explained that jury could consider Monster’s decision to give unqualified employee responsibility to create video requiring “sophisticated judgments about intellectual property and licensing,” as well as Monster’s lack of music licensing policy.

Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-5784, 2014 U.S. Dist. LEXIS 166492 (S.D.N.Y. Nov. 14, 2014)

District court denied defendant Sirius XM Radio, Inc.’s, motion for summary judgment, finding that plaintiff, comprised of two original members of The Turtles, owned common law copyright in pre-1972 sound recordings, and that Sirius infringed exclusive right to reproduce and publicly perform such recordings. Federal law provides copyright protection for sound recordings fixed on or after February 15, 1972; copyright protection for recordings fixed prior to that date is under state law. Under New York law, plaintiffs owned common law copyright in pre-1972 sound recordings. Sirius broadcast plaintiff’s pre-1972 sound recordings over its satellite radio network and streamed them over internet. To broadcast such recordings, Sirius made multiple copies, and then performed copies it made. Sirius did not have license for pre-1972 recordings, and did not pay royalties. Plaintiff sued Sirius for copyright infringement under New York law. Sirius did not dispute plaintiff’s ownership of copyrights, but argued that plaintiff’s rights as copyright owner did not give plaintiffs exclusive right to publicly perform sound recordings. Court rejected Sirius’ argument, finding sound recordings no different than other works protected by New York copyright, and thus should be afforded same bundle of rights, including public performance right. Sirius also argued that it was not liable for infringement because it did not “distribute” recordings, which it contended was additional element of infringement under *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005). Court rejected Sirius’ argument, finding that to extent “distribution” was element of common law copyright infringement, publicly performing sound recordings was act of distribution. Court also rejected Sirius’ argument that its copying of sound recordings was fair use, finding none of four factors weighed in favor of Sirius. Court therefore found that Sirius infringed plaintiff’s copyrights.

Court denied Sirius' motion for summary judgment and ordered Sirius to show cause why summary judgment should not be entered in favor of plaintiffs.

Gardner v. CafePress Inc., No. 13-1108, 2014 U.S. Dist. LEXIS 168328 (S.D. Cal. Dec. 4, 2014)

Defendant operated website CafePress.com, which allowed users to upload images, slogans or designs to site for printing on items. Images were uploaded at direction of CafePress's users, and stored on CafePress's servers. CafePress provided users online, printing and shipping services. Users also offered images, slogans or designs for sale to third parties, who selected one of CafePress's unbranded items on which to reproduce image. Items or images were sold either through (1) user's virtual shop on CafePress's website; (2) CafePress's marketplace on its website; or (3) CafePress's feed on third-party websites such as Amazon or eBay. Once customer purchased item from CafePress, one of its employees "hard printed" item. Plaintiff owned registered copyrights in artwork. Several CafePress users uploaded copies of plaintiff's artwork to CafePress's server. CafePress users then sold items bearing copies of plaintiff's works through CafePress's website and other websites. Plaintiff sued CafePress for direct and vicarious infringement, and CafePress filed motion for summary judgment. Court found *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014), which requires volitional conduct for direct infringement, was still good law. Plaintiff argued that CafePress resembled copy shop operator in *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996), who physically made copies at customer's request, then performed physical acts such as printing copies and selling copies to students, and accordingly was directly liable for infringement. CafePress argued that it was analogous to satellite and cable television providers in *Fox* and *Cartoon Network*, in which courts found that because customer chose whether or not to record programming, provider had not engaged in volitional conduct. Court found that while some of CafePress's process was similar to *Cablevision* and *Fox* cases, significant portion of its process, namely production and sale of allegedly infringing items, was performed by CafePress itself. CafePress's employees were engaged in volitional conduct, as they responded to customer requests to purchase items and they manned machines to create items. Because CafePress engaged in at least some volitional conduct, court denied CafePress's motion for summary judgment with respect to direct infringement.

Sarvis v. Polyvore, Inc., No. 12-12233, 2015 U.S. Dist. LEXIS 39448 (D. Mass. Mar. 2, 2015)

Plaintiff, assignee of internationally known artist's works, sued defendant Internet service provider for copyright infringement. Polyvore's website provided large database of artwork, and provided users with free tool that allowed them to clip and copy images from other websites and import them to user's account on Polyvore site. Users could also create "set," consisting of group of independent images, and store in account. Polyvore paid users of its site to clip or copy large amounts of art from other sites, and to bring large number of visitors to its site. Polyvore also compiled central database that included all stored art and sets of its users in high resolution. Users could access searchable database at no charge by using search

function on website. Search typically yielded group of small, high resolution images on one side of computer screen, and user could enlarge images using Polyvore's editing tools. Editing tools also allowed users to remove copyright symbols and/or copyright watermarks and to alter images. Polyvore's CEO belonged to number of online art sites and art groups. As user of Polyvore site, CEO created set using one or more of copyrighted images on Polyvore site. Polyvore generated revenue by receiving commissions from retail merchants when user purchased merchant's product as result of using Polyvore site. It also received revenue from advertisers and from fees it received from sponsors of contests on Polyvore's website. Contests involved users editing works, including copyrighted works with watermarks removed, from Polyvore's database, and creating set with works. Polyvore then posted winning sets on its site. Additionally, advertising sponsors chose entries containing at least one copyrighted work at issue as winner in Polyvore's contests, and Polyvore copied and published winning set containing copyrighted work, on its site. Plaintiff sued Polyvore for, *inter alia*, inducement of copyright infringement. Polyvore moved to dismiss arguing that plaintiff failed to allege that it intentionally induced or otherwise encouraged direct infringement. Copyright law absolves equivocal conduct of selling item with substantial lawful as well as unlawful uses, and limits liability to instance of more acute fault than mere understanding that some of one's products will be misused. Thus, Polyvore's knowledge that its website and editing tools allowed users to clip and copy copyrighted art was not enough to render Polyvore liable for inducing or encouraging infringement. Court found, however, that while Polyvore did not directly advertise or solicit users to engage in infringement and copyright of copyrighted articles and products, it did have large searchable database of copyrightable art in high resolution, and largely free of copyright watermarks. It also promoted contests in which one of copyrighted works at issue was winner, and received revenues from sponsor fees for such contest. Finally, court noted that CEO of Polyvore was agent of Polyvore, and was member of group that copied image of copyrighted work. Based on foregoing, court found plausible claim that Polyvore intentionally induced and encouraged infringement.

Latele TV, C.A. v. Telemundo Communs. Group, LLC, No. 12-22539, 2014 U.S. Dist. LEXIS 174887 (S.D. Fla. Dec. 18, 2014)

District court granted defendant's motion for summary judgment on plaintiff's claim of copyright infringement. Plaintiff failed to cite any record evidence suggesting that defendant, which "stresse[d] that it is only a holding company which had no material role in, or relationship to, the supposed infringing work," had any involvement in alleged copyright infringement. There was complete absence of evidence that defendant engaged in any infringing acts or played any role in any of allegedly infringing activities referenced in complaint. Thus, district court granted defendant's summary judgment motion in its entirety, on all counts.

Boehm v. Zimprich, No. 14-16, 2014 U.S. Dist. LEXIS 174330 (W.D. Wis. Dec. 17, 2014)

Plaintiffs, professional photographers, brought suit for infringement based on defendants' unauthorized creation of photo prints and canvases which defendants sold through sports memorabilia shop and kiosks. Defendants admitted to copying and selling and/or acquiring and selling one or more of plaintiffs' images, some of which were licensed from Getty Images pursuant to limited "editorial-newspaper" license that did not authorize creation of commercial products. Plaintiffs moved for partial summary judgment on issues of infringement and defendants' willfulness. One defendant did not dispute infringement, but instead disputed number of photos it infringed. Another defendant disputed validity of plaintiffs' copyrights, but failed to offer any evidence in support. Therefore, court found no genuine dispute as to defendants' infringement and granted summary judgment to plaintiffs on infringement claim relating to certain photos where evidence in record established defendants' infringing conduct, but denied summary judgment as to plaintiffs' infringement claims for other photos where record lacked sufficient evidence of infringing conduct. Turning to question of willfulness, court noted at least some defendants' infringement was willful. Defendants argued they were innocent infringers because they did not read Getty Images license agreement governing use of licensed photographs, and alternatively, that they relied on advice of counsel by continuing to sell infringing photos even after plaintiffs' commenced suit. Court rejected defendants' arguments, and found that defendants "were either aware of the restrictions of the editorial-newspaper license or ... were willfully blind to those restrictions." Moreover, court found defendants could not rely on advice of counsel defense because defendants did not waive attorney/client privilege and disclose communications with attorney to court. Accordingly, court granted summary judgment on issue of willful infringement, but only for photos acquired from Getty Images.

VI. DEFENSES/EXEMPTIONS

A. Fair Use

Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014)

Seventh Circuit affirmed grant of summary judgment for defendants. Plaintiff, photographer, sued defendant, clothing company, for infringement based on defendant's use of plaintiff's photograph of Madison, Wisconsin Mayor Paul Soglin. Defendant conceded use of low-quality image of plaintiff's photograph as starting point for defendant's screen-printed t-shirt design. Seventh Circuit agreed with district court that defendant's use of plaintiff's photograph constituted fair use. Applying factors, court noted plaintiff's failure to argue effect on potential market for value of copyrighted work, which court reasoned would, if argued, favor plaintiff. Turning to remaining factors, court found defendant's work used very little of copyrighted work. Court noted "[w]hat is left, besides a hint of Soglin's smile, is the outline of his face which can't be copyrighted." In absence of arguments by plaintiff as to market effect, record lacked basis to offset fact that "almost none of the copyrighted

work remained” in defendant’s work. Accordingly, court affirmed district court’s finding of fair use.

Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014)

Publishing houses brought suit against Georgia State University (“GSU”) based upon university policy that permitted GSU professors to make available digital copies of excerpts of scholarly works to students without paying license fees to plaintiffs. University argued that such copying constituted fair use. District court held that first and second factors favored university in all instances since copies were made to teach students, and thus were for strictly nonprofit educational purposes, and works involved were informational in nature. With respect to third factor, district court held that copying was permissible where university copied no more than 10% of work or one chapter in cases of books with ten or more chapters. Finally, district court held that fourth factor favored university where permissions for digital excerpts were not readily available and placed burden on plaintiffs to show that such permission were so available. After articulating rule that fair use applied whenever at least three of four factors favored university, district court held that all but five instances of claimed infringement were protected by fair use doctrine. Notwithstanding district court’s entry of injunction, university was held to be prevailing party and court awarded university attorneys’ fees and costs. On appeal, Eleventh Circuit held that lower court erred in “mechanistically” giving each factor equal weight, instead of undertaking holistic analysis wherein weight of factors were carefully balanced based upon circumstances. Court affirmed lower court’s holding that first factor favored university, since university’s use, although nontransformative in nature, was for nonprofit educational purposes, which are expressly favored under § 107. However, lower court erred with respect to second factor, since many of plaintiffs’ works were “evaluative, analytical, or subjectively descriptive material” that should have rendered second factor neutral or even slightly against fair use. With respect to third factor, lower court erred in setting 10 percent-or-one-chapter benchmark since such shorthand abdicated court’s responsibility to conduct individual assessment of each claimed use. Finally, with respect to fourth factor, court affirmed lower court’s placement of burden on plaintiffs to show availability of digital permissions, since plaintiffs could reasonably be expected to have evidence as to availability of licenses for plaintiffs’ works. However, because university’s copying was nontransformative and university used works for educational purposes for which plaintiffs’ works were marketed, threat of market substitution was severe and thus district court should have afforded greater weight to fourth factor. Because district court’s fair use conclusions were based on flawed methodology in balancing fair use factors and erroneous application of second and third factors, court vacated injunction and award of university’s attorney’s fees and costs.

Adjmi v. DLT Entm’t Ltd., No. 14-568, 2015 U.S. Dist. LEXIS 43285 (S.D.N.Y. Mar. 31, 2015)

Plaintiff, author of play *3C*, brought declaratory judgment action for non-infringement of defendant production company’s copyrights in popular television series *Three’s Company*. Parties agreed that *3C* copied plot premise, characters, sets, and certain scenes from *Three’s*

Company; plaintiff argued that *3C* was parody, and fair use, of *Three's Company*. On first factor, court found use was commercial in nature even if not-for-profit; however, use was so transformative that factor tipped in favor of fair use. Specifically, *3C* was parody of *Three's Company* that turned latter into “nightmarish version of itself, using the familiar *Three's Company* construct as a vehicle to criticize and comment on the original’s light-hearted, sometimes superficial, treatment of certain topics and phenomena.” Further, despite obvious similarities, “happy, light-hearted, run-of-the-mill, sometimes almost slapstick situation comedy” tone of *Three's Company* differed dramatically from “frenetic, disjointed, and sometimes philosophical ... and unrelentingly vulgar” tone of *C3*. Court noted that additional discovery was unnecessary to evaluate stylistic factors such as setting, costume, style, pace, and tone because, “given the overwhelmingly transformative nature of the substance [of *C3*], the first factor would likely weigh in favor of a finding of fair use even if certain elements, like setting, costume, style, and pace, were exactly the same as in *Three's Company*.” In assessing second factor – nature of copyrighted work, court held that *Three's Company* was creative, even groundbreaking work, and, accordingly factor weighed in favor of defendant. However, court found that second factor “assume[d] less importance in the overall fair use analysis relative to the other three factors” in context of parody. In analyzing third factor, amount and substantiality of portion used in relation to copyrighted work as whole, court found that *C3* borrowed more than necessary from *Three's Company*, tipping factor in favor of defendant. But court held that *C3*’s highly transformative use and minimal effect on market for or value of *Three's Company* rendered factor less important. Court noted that parody is afforded wider latitude under fourth factor because there is no real protectable derivative market for criticism, since authors of original works rarely want their work to be criticized. Defendant argued that *3C* damaged potential market for *Three's Company* because it diminished potential for stage version of television series. Court rejected this argument, finding that *C3* was not market substitute for *Three's Company*; thus there could be no harm, and fourth factor weighed in favor of fair use. Weighing factors together, court concluded that *3C* was fair use. Play was highly transformative parody of television series that, although it appropriated substantial amount of *Three's Company*, was drastic departure from original that posed little risk to market for original.

BWP Media USA, Inc. v. Gossip Cop Media, LLC, No. 13-7574, 2015 U.S. Dist. LEXIS 8811 (S.D.N.Y. Jan. 26, 2015)

Plaintiff brought copyright infringement action against defendant, alleging defendant posted three photographs and one video on its website without plaintiff’s authorization. Plaintiff owned and licensed photographs and videos to various media outlets that feature celebrities. Defendant operated website focusing on celebrity gossip news. Defendant filed motion to dismiss, arguing, *inter alia*, that use was fair. Court found that first factor weighed in defendant’s favor for two images, since these images were taken from another publication and included surrounding commentary, showing “transformative use”; first factor weighed in plaintiff’s favor for third image due to lack of commentary. Court found second factor to be neutral. Court found third factor to weigh in favor of plaintiff since defendant’s use of images was “complete reproduction of the copyrighted images.” Court, noting that “[i]n

effect, the Court is asked to decide whether there is a market for evaluation of celebrity journalism as distinct from the primary celebrity journalism market,” found that fourth factor weighed in plaintiff’s favor. Court denied defendant’s motion to dismiss for two images and video, finding that further inquiry was needed to determine whether defendant’s use was transformative.

N. Jersey Media Group, Inc. v. Pirro, No. 13-7153, 2015 U.S. Dist. LEXIS 15912 (S.D.N.Y. Feb. 10, 2015)

District court denied defendants’ motion for summary judgment that use of famous photograph on television show’s Facebook page was fair use. Plaintiff, newspaper publisher, owned copyright in famous photograph of three firefighters raising American flag near ruins of World Trade Center. Defendant Pirro hosted program *Justice with Judge Jeanine* on Fox News. On September 11, 2013, program production assistant found image on Google showing plaintiff’s photograph juxtaposed with classic World War II photo *Raising the Flag on Iwo Jima* (“Combined Image”) and posted it to program’s Facebook page. Production assistant did not alter Combined Image, but added “#neverforget.” Combined Image cut out top right corner of plaintiff’s work, and resolution and size of image were smaller. Plaintiff filed suit initially against Pirro, later amending complaint to add Fox News. Defendants filed motion for summary judgment, arguing posting was fair use. Court was “unable to conclude that [first factor] weighs in favor of either party as a matter of law.” Court found case to be “closer call” than *Cariou* and *Blanch*, noting that defendant’s changes to work were minimal and because there was question as to whether defendants’ “secondary use of a secondary use” added anything new. Second factor favored finding of fair use. Plaintiff’s work was non-fictional rendering of event of utmost historical importance; photographer acknowledged that photograph “just happened.” Photo, moreover, had been published since September 12, 2001. Court found third factor to be neutral, as it was unclear whether defendant’s use of any less of work could have ensured its audience’s recognition of iconic photograph. Fourth factor weighed in plaintiff’s favor, as plaintiff received substantial revenue from licensing to date, including from several media outlets. Court therefore found defendants’ “interest” in Combined Image posed “very real danger” that other such media organizations would forego paying licensing fees for work and use Combined Image for free. Weighing all factors, court found that defendants’ motion for summary judgment must be denied.

Arrow Prods. v. Weinstein Co. LLC, 44 F. Supp. 3d 359 (S.D.N.Y. 2014)

District court granted defendants judgment on pleadings and dismissed plaintiff’s complaint, including copyright infringement claim. Plaintiff, entertainment company and owner of copyright in well-known pornographic film *Deep Throat*, sued defendants, filmmakers, for copyright infringement, alleging defendants copied three scenes from *Deep Throat* in biographical film *Lovelace* about star of *Deep Throat*, Linda Lovelace. Plaintiffs argued that original dialogue was copied verbatim, and original scenes reproduced by copying position of actors, camera angles, lighting, costumes and settings. Defendants asserted fair use, and district court agreed. Court found *Lovelace*, as critical biographical work, entitled to presumption of fairness under first statutory factor. Further, defendants’ recreation of three

scenes from *Deep Throat* was transformative use that added new, critical perspective on life of Linda Lovelace and production of *Deep Throat*. Two scenes provided behind-the-scenes perspective requiring additional characters and dialogue, and third scene was recreated in entirely different context as part of successful movie premiere juxtaposed with Lovelace's private suffering during filming and marketing of *Deep Throat*. Court found *Lovelace*'s undoubted commercial purpose not significant given film's transformative nature, so first factor weighed in favor of fair use. Considering second factor, court found creative nature of *Deep Throat* placed film within core of copyright protection, and thus second factor favored plaintiff, but noted second factor was rarely determinative. Third factor weighed in favor of fair use, since original *Deep Throat* scenes accounted for only four minutes of 61-minute film; each reproduced scene in *Lovelace* served distinct and important purpose in telling story of Linda Lovelace; and critical, biographical film could not have copied "heart" of original pornographic film. In considering fourth factor, court noted biographical film could not supplant demand for pornographic film, so issue was harm to market for derivative works. Plaintiffs alleged lost licensing revenue to other intended biographic film about Linda Lovelace, *Inferno*, which lost funding and was not produced after press reported on production of *Lovelace*. Nonetheless, court found *Lovelace* transformative use, and therefore plaintiff could not prevent defendants from entering "fair use market." Considering all factors, court found defendants' recreation of scenes from *Deep Throat* fair use.

Fox News Network, LLC v. TVEyes, Inc., No. 13-5315, 2014 U.S. Dist. LEXIS 126138 (S.D.N.Y. Sept. 9, 2014)

Plaintiff television network brought suit for infringement seeking to enjoin defendant's service comprised of monitoring and recording all content broadcast by more than 1,400 television and radio stations. Defendant's service transformed said content into searchable database for subscribers, who could save, archive, edit and download thumbnail image, snippet of transcript and short video clip of broadcast in question. Defendant's service was available only to businesses and included among its subscribers White House, 100 members of Congress, Department of Defense, United States Army and Marines, and Association of Trial Lawyers. Court denied plaintiff's request for injunction upon finding, with certain exceptions, that defendant's use of plaintiff's content constituted fair use. With respect to first factor, court held that defendant's service is "transformative" because it provides singular service insofar as subscribers are not only able to access written content but also "presentation" of content itself through images and video clips (*e.g.*, how content was said, with subtext body language, tone of voice and facial expression). Thus, defendant's search engine together with display of video clips "serves a new and different function from the original work and is not a substitute for it." Court held that second factor was neutral since plaintiff's programming, while copyrightable, was largely factual or information in nature and such factor has limited value where creative aspect has been transformed by defendant. Court likewise held that third factor was neutral since, while defendant copied entirety of plaintiff's copyrighted works, such copying was necessary to accomplish defendant's transformative, all-inclusive database of searchable content. Finally, court held that fourth factor did not weigh against fair use. First, evidence failed to show that subscribers were

using defendant's service as substitute for watching Fox News broadcasts on television, and thus there was no basis for defendant's allegation that defendant's service was likely to cause adverse effects to plaintiff's revenues or income from advertisers or cable or satellite providers. Moreover, there was substantial countervailing public benefit arising from availability of defendant's service, including that government bodies used said service to monitor accuracy of facts reported by media and to seek timely corrections of misinformation, United States Army used said service to track media coverage of military operations in remote locations and to ensure national security, and police departments used said service to track television coverage of public safety messages and to adjust outreach efforts accordingly. However, court denied summary judgment as to specific features of defendant's service where there was insufficient evidence as to whether such features were integral to transformative purpose of service and accompanying defense of fair use.

Erickson Prods. v. Kast, No. 13-5472, 2014 U.S. Dist. LEXIS 152685 (N.D. Cal. Oct. 28, 2014)

District court granted plaintiff's motion for summary judgment with respect to defendant's fair use defense. Plaintiff, professional photographer, brought suit on basis that defendant copied his photos from website of Wells Fargo, one of plaintiff's clients. Defendant asserted fair use defense. Court rejected defendant's contention that commercial character of use was minimal "because he did not like the photos and never intended for them to be used in the final ... website." Defendant's use was "purely commercial" and not transformative, and first factor weighed in favor of plaintiff. On second factor, defendant's argument that photos were not particularly valuable or meaningful to *him* missed point. Factor evaluates whether work is informational or creative, and photos are "generally viewed as creative, aesthetic expressions" and have long been subject of copyright; thus, second factor also weighed in plaintiff's favor. Since photos were copied and used in their entirety by defendant, third factor also weighed in favor of plaintiff. Finally, with respect to fourth factor, court rejected defendant's contention that plaintiff at most lost minimal licensing fees for use of photos since he did not intend to use photos on final version of website, such that effect on potential market was minimal. It is sufficient to show that if challenged use were to become widespread, it would adversely affect potential market for copyrighted work; here, it was plausible that if use were to become widespread it would adversely affect market for plaintiff's photos.

Devil's Advocate, LLC v. Zurich Am. Ins. Co., No. 13-1246, 2014 U.S. Dist. LEXIS 174309 (E.D. Va. Dec. 16, 2014)

Court granted defendant's motion for summary judgment. Work at issue was plaintiff's résumé, which was used in litigation without his permission. Defendant argued use of résumé constituted fair use. Court found first factor, purpose and character of alleged infringing use, weighed in favor of finding of fair use. As to second factor, court held that résumé is not creative work, and is far removed from core of copyright protection. On third factor, court found that where use is for legitimate purpose, quantity of material copied is irrelevant. As to fourth factor, plaintiff failed to show there was any market for his résumé;

indeed, “[it] is hard to imagine that there is any market for the résumé.” Thus, court granted summary judgment for defendant on copyright infringement claim.

Sarvis v. Polyvore, Inc., No. 12-12233, 2015 U.S. Dist. LEXIS 39448 (D. Mass. Mar. 2, 2015)

Plaintiff, assignee of internationally known artist’s works, sued defendant Internet service provider for copyright infringement. Polyvore’s website provided large database of artwork, and provided users with free tool that allowed them to clip and copy images from other websites and import them to user’s account on Polyvore site. Users could also create “set,” consisting of group of independent images, and store in account. Polyvore paid users of its site to clip or copy large amounts of art from other sites, and to bring large number of visitors to its site. Polyvore also compiled central database that included all stored art and sets of its users in high resolution. Users could access searchable database at no charge by using search function on website. Search typically yielded group of small, high resolution images on one side of computer screen, and user could enlarge images using Polyvore’s editing tools. Editing tools also allowed users to remove copyright symbols and/or copyright watermarks and to alter images. In 2012, plaintiff sent Polyvore’s registered agent DMCA notice identifying 20 pieces of art that Polyvore and its users purportedly infringed by copying and displaying images on Polyvore’s website. After receiving notice, Polyvore removed some copyrighted images, but maintained links to other internet service providers. Links allowed internet users to access copyrighted works on Polyvore’s website by performing internet search, albeit not at URLs designated in DMCA notice. In 2013, at least one copyrighted work remained on site at URL address in notice. In 2014, at least three copyrighted works that were listed in notice were still located on Polyvore site. Plaintiff sued for infringement, and Polyvore moved to dismiss, claiming fair use. With respect to first factor, Polyvore, relying on *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), argued that reduced size or thumbnail images on its website were “different than” copyrighted works because they served different purpose, for entertainment or artistic purpose, while copyrighted works served to inform, improve access to information, or provide commentary. Court disagreed, finding Polyvore’s purpose closely aligned with originally intended purposes. While Polyvore’s editing tools allowed users to alter images, they also allowed users to simply extract copyrighted image, and add little, if any, expression. On second factor, court found that fanciful and highly creative nature of copyrighted works weighed firmly in plaintiff’s favor. Third factor remained neutral, when construing record in plaintiff’s favor. On fourth factor, court found that Polyvore’s editing tools allowed enlargement of high resolution thumbnails into full size “useable images” of portions or all of copyrighted works. Weighing all factors, court denied fair use defense.

Richards v. Merriam-Webster, Inc., No. 13-13092, 2014 U.S. Dist. LEXIS 136277 (D. Mass. Sept. 26, 2014)

District court granted defendant’s motion for summary judgment, finding *pro se* declaratory plaintiff’s use of defendant’s dictionary terms was not fair use. Plaintiff intended to develop “textbook dictionary” aimed at improving reading comprehension of its users. Plaintiff

converted electronic copy of defendant's dictionary into set of Word files, then increased font size, underlined words for emphasis, increased space between entries, redacted some etymological history, and inserted examples of how words may be used. Plaintiff did not modify any of defendant's definitions. In total, plaintiff copied 70% of defendant's dictionary definitions. Plaintiff thereafter contacted defendant and requested permission to use "virtually all the material" in its dictionary for his planned textbook. Defendant denied request, so plaintiff filed complaint seeking declaration that publication of his textbook would not violate defendant's copyright, in part because his proposed use was fair use. Defendant filed motion for summary judgment. Court analyzed four factors, and found latter three factors strongly disfavored fair use. With regard to second factor, court found that dictionary definitions represented defendant's unique perspective and opinion as to what words mean, and definitions were therefore result of creative process. Court therefore found factor disfavored fair use. As plaintiff admitted he copied 70% of dictionary, and thus over 1,000 dictionary entries, court found third factor also strongly disfavored fair use. With respect to fourth factor, defendant asserted that it derived income from advertising on web page of its online dictionary, and that rate of such advertisements is based on number of visits to page. Defendant averred that providing access to nearly entirety of its copyrighted work on alternative site would clearly impede market share and profitability of its online dictionary. Court agreed, and found fourth factor weighed against fair use. Court also noted that any negative market effect would be further exacerbated if copying and distributing defendant's dictionary became "unrestricted and widespread" practice. Finally, court addressed first factor, under which plaintiff argued that his free textbook was transformative, as changes he made transformed dictionary from reference book to textbook. Court noted that some level of transformation may have occurred, and that plaintiff disavowed any attempt to garner profits or reputational gain from book's publication, as plaintiff advised that book would be distributed online as public service. Nonetheless, as final three factors strongly disfavored plaintiff's claim, even if textbook could be considered transformative and plaintiff would derive no profit from distribution, first factor alone would not make plaintiff's use permissible.

B. Statute of Limitations

Chicago Building Design, P.C. v. Mongolian House, Inc., 770 F.3d 610 (7th Cir. 2014)

Plaintiff brought suit for infringement of blueprint for design of restaurant, based on allegations that defendant had distributed work to city building inspectors at periodic inspections from July 2009 through January 2012. Lower court dismissed suit as barred by three-year statute of limitations, on ground that plaintiff was put on "inquiry notice" as to possible copyright violation more than three years period to commencement of suit. Seventh Circuit reversed. Seventh Circuit recognizes discovery rule in copyright cases, whereby clock begins to run "when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights." However, lower court erred insofar as "inquiry notice" is distinct from actual or constructive discovery of copyright violation sufficient to

trigger statute of limitations. Further, Supreme Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S. Ct. 1962 (2014), made clear that copyright suits are timely so long as infringing act occurred within three years prior to bringing suit. Because plaintiff alleged unauthorized distribution of blueprint up through January 2012, infringing acts fell within limitations period, and complaint should not have been dismissed based on statute of limitations. Due to inadequate briefing, court declined to address defendant's alternative argument that alleged acts constituted "limited publication," such that acts did not violate plaintiff's exclusive right of distribution.

Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-5784, 2015 U.S. Dist. LEXIS 6101 (S.D.N.Y. Jan. 15, 2015)

Court previously denied defendants' summary judgment motion, and ordered defendants to show cause as to why summary judgment should not be entered in favor of plaintiff on liability. Court, "after thinking about the issue," reversed previous view that six years was proper limitations period, holding that common law copyright infringement is "type of tort to which CPLR § 214(4)'s three-year statute of limitations applies." In order to circumvent general rule that in infringement context, each new unlawful act gives rise to new claim, defendants argued that case was not actually one for infringement, but rather was dispute over ownership of recordings, and that statute of limitations for such ownership disputes accrues only once. Court rejected argument; fact that plaintiff had to establish its ownership of common law copyrights in order to bring suit did not transform case from "infringement" case into "ownership" case.

UMG Recordings, Inc. v. Escape Media Group, Inc., No. 11-8407, 2014 U.S. Dist. LEXIS 137491 (S.D.N.Y. Sept. 29, 2014)

Court granted plaintiffs' motion for summary judgment finding defendants liable for both direct and secondary copyright infringement. Defendants operated online "streaming" music service known as "Grooveshark" that provided millions of users with access to vast library of music that included plaintiffs' copyrighted sound recordings. Infringement claims related only to direct upload of sound recordings by defendant's officers and employees. In granting summary judgment, court rejected defendants' statute of limitations defense based on claim that parties' licensing discussions back in 2007 put plaintiffs on notice of defendants' infringement. Court held that such licensing discussions were immaterial because plaintiffs did not learn that defendants' employees were engaged in uploading of copyrighted sound recordings to Grooveshark – basis for plaintiffs' infringement claims – until August 2011 in connection with discovery in prior state court action, only three months before filing instant federal action.

Panoramic Stock Images, Ltd. v. McGraw-Hill Global Educ. Holdings, LLC, No. 12-9881, 2015 U.S. Dist. LEXIS 9520 (N.D. Ill. Jan. 27, 2015)

District court granted plaintiff's motion for summary judgment. Plaintiff, owner of copyright in photographs, sued defendants for copyright infringement based on unauthorized use of

plaintiff's images in various publications. District court resolved parties' cross motions for summary judgment, and plaintiff moved for clarification of inconsistent treatment of one infringement claim. Treating plaintiff's motion for clarification as motion for reconsideration, court corrected prior order to make clear that discovery rule applied to plaintiff's infringement claims. Consistent with Seventh Circuit authority, district court found discovery rule allowed plaintiff copyright owner to recover for infringements, regardless of when they occurred, so long as owner did not have actual or constructive notice of infringements more than three years before filing. Court stated that Supreme Court reference to discovery rule in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), did not abrogate rule, but rather expressly reserved question of whether discovery rule remained good law. Accordingly, Seventh Circuit precedent applying discovery rule applied to case, and court granted plaintiff summary judgment on issue of defendant's liability for copyright infringement.

Panoramic Stock Images, Ltd. v. McGraw-Hill Global Educ. Holdings, LLC, No. 12-9881, 2014 U.S. Dist. LEXIS 164809 (N.D. Ill. Nov. 25, 2014)

Plaintiff, stock photography agency, sued defendants, textbook publishers, alleging defendants infringed plaintiff's copyright in various images by exceeding scope of parties' photography licensing agreements, which limited use of photographs in various ways, including by number of permissible reproductions, geographic scope of distribution, and type of media. Defendant admitted exceeding scope of certain license agreements, but parties disputed when plaintiff first learned that defendant violated terms of licenses. Defendant moved for partial summary judgment, arguing that certain of plaintiff's claims were barred by statute of limitations. Because court applies "discovery rule" when analyzing statute of limitations defenses, question before court was when plaintiff first learned that defendant exceeded scope of parties' licensing agreements. Court found genuine dispute of material fact remained regarding whether plaintiff had actual or constructive knowledge of specific claims against defendant in 2009, when plaintiff first sought advice of counsel on issue of publishers exceeding scope of licenses generally, as opposed to 2012, when defendant's employee first contacted plaintiff about one specific license defendant had exceeded. In doing so, court rejected defendant's argument that "discovery rule was satisfied (and therefore the statute of limitations began to run) merely because [plaintiff] read a magazine article that discussed the fact that publishers had used photographs from stock agencies in unauthorized ways," and subsequently discussed issue generally with outside counsel. Accordingly, court denied defendant's motion for summary judgment that plaintiff's claims were time-barred.

Sanchez v. Hacienda Records and Recording Studio, Inc., No. 11-3855, 2014 U.S. Dist. LEXIS 118630 (S.D. Tex. Aug. 26, 2014)

District court granted summary judgment in favor of defendants, finding plaintiff's claim barred by statute of limitations. Plaintiff Adan Sanchez sued defendants Hacienda Records and related entities and individual owners for copyright infringement for recording and distributing his purported song "La Prieta Casada." Evidence of copyright ownership of

“La Prieta Casada” was inconsistent. 1976 copyright registration showed plaintiff Sanchez as author and music publisher Jedasa Publishing Co. and its owner Johnny Herrera as copyright holder. 1984 copyright registration showed San Antonio Music Publisher as copyright owner. 1990 notarized document allegedly with Plaintiff Sanchez’s signature acknowledged Herrera as sole publisher. 1994 copyright registration showed Sanchez as renewal copyright claimant and Jedasa as original copyright owner. In 1995, Sanchez sued Herrera and Jedasa for rights in “La Prieta Casada,” but suit settled. Settlement terms were unclear, but purport to give equal division of royalties and that parties would execute documents to perfect “50/50 ownership” of song. In 2010, Jedasa assigned plaintiff Sanchez any interests it held in “La Prieta Casada.” In October 2011, plaintiff Sanchez’s attorney sent defendants letter demanding it cease distribution of unlicensed uses of song and accounting of royalties. Defendants responded by pointing to various sources that cited other writers as author of “La Prieta Casada,” but nevertheless sent royalty check of \$227.50 for recent uses. Hacienda stated it was doubtful Sanchez was original author, but was making payment for efficiency and in “an effort to do the right thing.” This lawsuit followed. Hacienda claimed it acted under express or implied licenses with Herrera or Jedasa and Plaintiff Sanchez’s current ownership interest not relevant to pre-2011 recordings, year demand letter sent. In subsequent summary judgment motion, defendants argued plaintiff Sanchez’s claims time-barred. Court found that facts of case related to copyright ownership claim, rather than infringement, which accrues only once, and therefore, must be brought within three years of accrual. Claims of co-ownership accrue “when plain and express repudiation of co-ownership is communicated to the claimant.” Court held that this copyright ownership dispute began in May 1995 when Hacienda sent letter to three purported claimants to copyright in “La Prieta Casada” – Jedasa, San Antonio Music and Sanchez – stating Hacienda would pay Jedasa royalties. Court found letter expressly repudiated plaintiff Sanchez’s ownership claim, and therefore limitations period expired in May 1998. Even after 1995 settlement of lawsuit between Sanchez and Jedasa, court said it was still unclear who owned song based upon settlement agreement. 2011 payment from Hacienda to Sanchez also did not resolve ownership dispute because it made no concession Sanchez was rightful owner. Moreover, 2010 assignment and 2011 payment occurred after statute of limitations expired. Thus, Sanchez’s current claim was time-barred, and court entered summary judgment for defendants.

U2logic, Inc. v. Am. Auto Shield, LLC, No. 13-419, 2014 U.S. Dist. LEXIS 138396 (D. Colo. Sept. 30, 2014)

Plaintiff software developer developed software system for defendant, administrator of vehicle service contracts. Parties executed license agreement providing defendant with right to use software at its facilities; license expired in 2008. Plaintiff asserted that defendant infringed by using software after license expired. Court denied defendant’s summary judgment motion, finding genuine issue of material fact existed as to whether claim was barred by statute of limitations. Under § 507(b), “[n]o civil action shall be maintained ... unless it is commenced within three years after the claim accrued.” While statute is silent as to accrual, Tenth Circuit applies rule that statute of limitations “begins to run when the

plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action.” Defendant cited testimony indicating that plaintiff had actual knowledge of alleged infringement. However, because testimony was ambiguous and inconsistent with later testimony, court found that genuine issue of material fact existed as to whether plaintiff knew or should have known about alleged infringement more than three years before commencement of action.

Consumer Health Info. Corp. v. Amylin Pharms., Inc., 54 F. Supp. 3d 1001 (S.D. Ind. 2014)

Plaintiff, developer of patient-education materials, sued defendants, pharmaceutical and medical device manufacturer, alleging defendants infringed plaintiff’s copyright in various patient-education materials developed by plaintiff for defendant’s type-2 diabetes treatment BYETTA, for which plaintiff was not fully compensated. Record established that parties entered into Master Services Agreement whereby plaintiff provided consulting services to and developed education materials for defendants. Agreement provided that materials were works made for hire, and included catch-all assignment of copyright from plaintiff to defendants. Record also established that defendants had been using materials at issue for seven years prior to plaintiff’s bringing suit. Defendants moved to dismiss infringement claim as time-barred under three-year statute of limitations. Since parties did not dispute copying, court first addressed ownership of copyright in materials at issue. Court found plain language of agreement “clearly states that all materials created under the agreement are property of [defendants]” pursuant to work for hire provision, and also noted agreement contained catch-all assignment provision. According to court, “[plaintiff] cannot now reinterpret the plain language of the contract, effectively rendering the assignment provisions meaningless, in an attempt to get around the statute of limitations.” Court held that because plaintiff was on notice that defendants claimed ownership interest in copyrighted materials at issue by terms of agreement between parties, plaintiff needed to bring any challenge to ownership within three years of date of agreement. Plaintiff having waited more than three years to bring claim, court dismissed claims as time-barred.

Scott Breuer Constr., Inc. v. Koch, No. 12-3182, 2014 U.S. Dist. LEXIS 87000 (D. Minn. June 16, 2014)

District court granted defendants’ motion for judgment on pleadings due to plaintiff’s claim being barred by statute of limitations. Plaintiff, provider of custom home design and construction services, sued defendants for infringement of copyright in home design. In 2004, defendants inquired with plaintiff about building home using one of plaintiff’s copyrighted designs. They later decided not to use plaintiff’s services. Four years later, president of plaintiff drove by house that “looked suspiciously like” copyrighted design about which defendants had inquired, and later found out defendants lived in that house. Defendants refused request to give him access to home or provide copies of blueprints. In December 2012, after another four years passed, plaintiff sued defendants. On defendants’ motion for judgment on pleadings, court found that plaintiff’s claim accrued no later than December 8, 2008, when plaintiff learned defendants’ home appeared to be same as

copyrighted design shown to them in 2004. Plaintiff's claims were thus time-barred under three-year statute of limitations, and court granted defendants' motion for judgment on pleadings.

Kober Hanssen Mitchell Architects, Inc. v. Wilson Care Home Kailua, LLC, No. 14-479, 2015 U.S. Dist. LEXIS 5736 (D. Haw. Jan. 16, 2015)

Court denied motion to dismiss complaint on basis that copyright infringement claim was barred under statute of limitations. Works at issue were architectural plans for homes. Defendant argued that claim was time-barred because construction of home was substantially complete more than three years prior to action being filed. Plaintiff argued that even if infringing acts began more than three years before action was filed, infringing acts continued until project completion, which was within limitations period. Court held that current record did not set forth sufficient undisputed factual evidence of plaintiff's knowledge of accrual of infringement claims; because claims were not clearly barred on face of complaint, or by judicially noticeable facts, court denied motion.

C. First Sale Doctrine

Omega S.A. v. Costco Wholesale Corp., 776 F.3d 692 (9th Cir. 2015)

Manufacturer of luxury watches brought suit for infringement against retailer based on unauthorized sales of watches containing copyrighted globe design. Watches were "gray market" goods that had initially been sold by plaintiff to authorized foreign distributors, resold to various third parties, and ultimately purchased by defendant from New York company. Plaintiff appealed district court's grant of summary judgment dismissing complaint. While appeal was pending, Supreme Court ruled in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), that "first sale" doctrine applies regardless of where item was manufactured or sold, and thus encompasses copies lawfully made abroad. Because plaintiff conceded that watches had initially been sold to authorized foreign parties, "first sale" doctrine barred plaintiff's claim for infringement. Court also affirmed lower court's award of attorneys' fees to defendant, premised on finding that by affixing barely perceptible copyrighted design to back of some of its watches, Omega did not provide – and did not seek to provide – creative works to general public. Instead, Omega sought to exert control over its watches, control which it believed it could not otherwise exert. Thus, it should have been clear to Omega that copyright law neither condoned nor protected its actions; imposition of fees would thus further purpose of Copyright Act.

D. Res Judicata/Collateral Estoppel

Stan Lee Media, Inc. v. Walt Disney Co., 774 F.3d 1292 (10th Cir. 2014)

Plaintiff brought suit for infringement claiming copyright ownership in various pre-1998 comic book figures created by Marvel Enterprises' famed editor-in-chief Stan Lee. In *Stan Lee Media, Inc. v. Lee* (9th Cir. 2014), Ninth Circuit ruled that plaintiff's statement of

copyright ownership failed to state claim for relief after finding “simply implausible” plaintiff’s central contention that in October 1998 Stan Lee had assigned to plaintiff copyrights in comic book characters at issue. Tenth Circuit affirmed lower court’s dismissal of complaint upon finding that Ninth Circuit’s decision was entitled to collateral-estoppel effect, thereby precluding plaintiff from alleging copyright ownership. First, issue decided in Ninth Circuit decision – plaintiff’s ownership interest in pre-1998 Marvel characters – was identical to ownership issue in present suit. Second, Ninth Circuit’s dismissal for failure to state claim for relief was “decision on the merits” for purposes of collateral estoppel. Third, plaintiff entity was party to Ninth Circuit decision. Only remaining issue was whether plaintiff had “full and fair opportunity to litigate” issue of ownership in Ninth Circuit case. Tenth Circuit answered affirmatively, finding that plaintiff had briefed issue of whether claim was sufficiently “plausible” to meet Rule 8 pleading standard both at district and appellate court levels. Because Ninth Circuit decision precluded plaintiff from claiming copyright ownership in comic book figures at issue, plaintiff’s infringement claim was dismissed.

Disney Enters. v. Entm’t Theatre Group, No. 13-5570, 2014 U.S. Dist. LEXIS 153940 (E.D. Pa. Oct. 29, 2014)

Defendants were live performance theater business that hosted show entitled *Broadway: Now and Forever*. Disney brought infringement suit based on rights in characters, images and songs associated with Spider-Man and other properties. Intervenor Stan Lee Media, Inc. (SLMI) claimed rights to Spider-Man based on agreement between its predecessor and Stan Lee, creator of Spider-Man. SLMI joined dispute by granting defendants retroactive license covering use of Spider-Man in show, and SLMI and defendants sought declaratory judgment, through intervenor complaint and counterclaims, that SLMI owned right to Spider-Man. Court granted plaintiffs’ motion to dismiss intervenor complaint and counter-claims on basis that SLMI was precluded, based on prior decisions, from claiming ownership of Spider-Man. Issue preclusion applies when “(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating was fully represented in the prior action.” Court noted that “issues have previously been addressed in one form or another by multiple courts around the country.” 2013 decision from District of Colorado had already determined that original 2010 decision from Southern District of New York was preclusive; Colorado decision in turn had preclusive effect on this court’s ruling. Issue was actually litigated, as briefing on Disney’s motion to dismiss addressed arguments including that SLMI “cannot prove its ownership of the copyrights because it is barred from re-litigating that issue due to issue preclusion”; issue was necessary to decision, as judge found that dismissal was warranted based on issue preclusion; and SLMI was fully represented since it – “not a predecessor, not shareholders, but SLMI itself” – was plaintiff in that case. Court also rejected argument that statute of limitations could not be used to bar defense that SLMI owned Spider-Man because SLMI and defendants actually sought declaration that SLMI owned Spider-Man copyright, which went beyond defense, and would provide SLMI with affirmative relief.

Viesti Assocs. v. McGraw-Hill Global Educ. Holdings, LLC, No. 12-668, 2015 U.S. Dist. LEXIS 16601 (D. Colo. Feb. 11, 2015)

District court granted defendants' motion for summary judgment. Plaintiff, stock photo agency, earlier filed two similar suits against Pearson, in which court held that plaintiff lacked standing to sue since it did not hold necessary ownership interest in allegedly infringed photographs. Between 1990 and 2006, McGraw-Hill was granted limited licenses by various stock photo agencies to reproduce photographs. In current suit plaintiff alleged that it owned copyright in photographs, and that McGraw-Hill "exceeded the applicable license limitations" by using photographs in "unlicensed, unauthorized and uncompensated ways." In 2009-10, before filing this suit, plaintiff's principal emailed various photographers and stock photo agencies to join in suit against Houghton Mifflin Harcourt by signing "Assignment of Copyright." In 2012, plaintiff had photographers execute addendum to "strengthen" original assignment agreement. Between 1990 and 2006, photographers also had entered into non-exclusive agency agreements with plaintiff. After filing of this suit, in 2013, photographers executed another assignment agreement with plaintiff. All agreements were executed solely for purpose of bringing copyright infringement lawsuits, and plaintiff's only interest was possibility of financial gain through award from litigation. McGraw-Hill argued that plaintiff did not have exclusive copyright interest in photographs and therefore lacked standing, and was collaterally estopped from arguing it had standing because identical issue was litigated in Pearson cases. Court found that plaintiff had opportunity to fully litigate in Pearson cases, issues were same as in Pearson cases, and prior court granted final judgment on merits. Prior court found, and current court agreed, that assignment agreements conveyed bare right to sue. Prior court analyzed same assignment agreements at issue in this case and found agreements did not confer standing. While assignment agreements purported to grant copyrights and complete legal title, they were silent as to compensation or royalties photographer would receive for such assignment. Moreover, if parties genuinely intended to transfer complete ownership, plaintiff would retain that ownership in perpetuity if it failed to bring suit. Assignments thus failed to confer legal or beneficial ownership of exclusive right. Prior court found, and court agreed, that agency agreement also did not convey exclusive interest, merely exclusive agency arrangement. In prior case, addenda to copyright agreement were executed after suit was filed, and therefore, could not correct deficiencies in prior assignments. In present case court found addenda still did not grant exclusive rights to plaintiff to confer standing for suit. Finally, 2013 copyright assignment was executed after filing of this suit, and thus could not confer standing. Court granted summary judgment for McGraw-Hill dismissing case with prejudice.

Neri v. Sentinel Ins. Co., No. 13-382, 2014 U.S. Dist. LEXIS 117055 (W.D. Wis. Aug. 22, 2014)

Court granted defendants' motion to dismiss copyright infringement claim based on claim preclusion. Work at issue was sculpture. As to individual defendant, court granted motion since action was "based upon the same incident, events, transaction, circumstances, or other factual nebula as ... prior suit[s] that went to judgment" and final judgment on merits was

previously entered. Dismissal was proper as to insurance company defendant because insurance company was in privity with individual defendant.

Redwall Live Corp. v. ESG Security, Inc., No. 13-1849, 2015 U.S. Dist. LEXIS 22267 (S.D. Ind. Feb. 24, 2015)

Plaintiff, advertising design and consulting firm, sued defendant, security services provider and client of plaintiff firm, for copyright infringement due to defendant's use of logos and artwork designed by plaintiff for defendant without payment of fees owed pursuant to services contract. Court granted plaintiff leave to amend complaint, but plaintiff instead moved to voluntarily dismiss complaint without prejudice, noting it brought lawsuit to obtain payment for services rendered, now exceeded by cost of litigation. Defendant filed cross-motion to dismiss complaint with prejudice, also seeking award of attorneys' fees and costs for preparing to defend plaintiff's implicitly groundless copyright claim. Court granted defendant's motion in part and denied motion in part, dismissing case with prejudice as to plaintiff's copyright claim, and dismissing plaintiff's state law claims without prejudice. With respect to dismissal of copyright claim, court noted that "allowing [plaintiff] to withdraw without any *res judicata* consequences would be to reward its gamesmanship." Court also granted defendant attorneys' fees and costs for preparation of defense relating solely to copyright claim, noting that "it would be inequitable to allow [plaintiff] to 'take a voluntary non-suit and start over.'"

E. Misuse

Voltage Pictures, LLC v. Revitch, No. 14-301, 2015 U.S. Dist. LEXIS 10330 (D. Or. Jan. 23, 2015)

Court granted plaintiffs' motion to dismiss defendant's counterclaim of copyright misuse. Plaintiffs alleged that defendant copied and published plaintiffs' motion picture *The Company You Keep* via BitTorrent client. Plaintiffs initiated case against Doe defendant, and after securing *ex parte* subpoena to obtain subscriber information from ISP, alleged defendant, subscriber, was responsible for alleged infringement. Court noted that it had in past taken issue with tactics of plaintiff, such as using court's subpoena power to extract information from ISPs regarding hundreds of subscribers via filing of single case, apparently to reap quick and easy settlements. Court addressed these concerns by requiring plaintiff to file separate cases against each alleged violator, adding "hundreds of thousands of dollars in filing fees and substantially increas[ing] plaintiff's incentive to pursue only cases it intends to actually litigate." Defendant in this case viewed "manner in which plaintiffs have pursued these cases as much more nefarious," and accordingly brought counterclaim for copyright misuse. Court explained that copyright misuse counterclaim sounds in fraud, and must be pled with particularity under Fed. R. Civ. P. 9(b). Averments of fraud must be accompanied by who, what, when, where and how of misconduct. Although defendant paid lip service to this requirement, defendant's pleadings were "inadequate to apprise plaintiffs of what the misrepresentation was, when it was made and to whom, how it was material, and how it was

relied upon to the detriment of defendant.” Moreover, “copyright misuse doctrine does not prohibit using conditions to control use of copyrighted material, it prevents copyright holders from using the conditions to stifle competition,” and such stifling did not occur in this case, in which plaintiffs were merely trying to control unauthorized distribution. Thus, court granted plaintiff’s motion to dismiss misuse counterclaim.

F. Miscellaneous

BWP Media USA Inc. v. Rich Kids Clothing Co., LLC, No. 13-1975, 2015 U.S. Dist. LEXIS 8034 (W.D. Wash. Jan. 23, 2015)

Plaintiff, owner of photographs depicting celebrities, brought suit for infringement based on defendant clothing company’s alleged unauthorized posting of three of plaintiff’s photographs on defendant’s website. Both parties moved for summary judgment on issue of infringement. Record established that plaintiff attached three illegible images purporting to be screenshots of defendant’s allegedly infringing conduct to complaint, but during discovery refused to produce viewable copies of screenshots or any other evidence to establish defendants’ alleged infringement. Record also established that, despite defendants’ earlier discovery requests, plaintiff only submitted such evidence in support of instant motion for summary judgment, after close of discovery. Defendant argued Rule 37 sanctions should apply, and plaintiff should be precluded from submitting and relying on evidence it failed to disclose during discovery. Court agreed. Court found plaintiff failed to establish that its discovery-related failures were substantially justified or harmless. According to court, “[plaintiff’s] actions give the appearance of gamesmanship and an attempt to impair [defendants’] ability to marshal a timely defense to dispositive motions and to prepare for trial.” Accordingly, court foreclosed plaintiff from relying on screenshots submitted in support of plaintiff’s motion. Since plaintiff submitted no other evidence to establish copying by defendant, court found plaintiff failed to demonstrate defendant’s alleged infringement, and granted summary judgment for defendant on all claims.

Bowen v. Paisley, No. 13-414, 2014 U.S. Dist. LEXIS 81462 (M.D. Tenn. June 16, 2014)

District court dismissed defendants’ counterclaims for indemnification, but counterclaims for breach of contract were allowed to proceed, excluding request for attorneys’ fees. Plaintiff filed suit claiming that defendants including country artists Brad Paisley and Carrie Underwood infringed copyright in her song “Remind Me” by copying certain key elements. Plaintiff performed “Remind Me” at Country Music Songwriting Workshop in Nashville, at which defendants DuBois and Lovelace were professional instructors. As attendee at Workshop, plaintiff signed Consent Agreement whereby, DuBois and Lovelace argued, plaintiff waived right to bring copyright claim against them. DuBois and Lovelace sought indemnification from plaintiff based on Consent Agreement. District court dismissed DuBois and Lovelace’s counterclaim for indemnification. Under Tennessee law, contractual duty to indemnify generally arises only with regard to claims brought by third parties against

putative indemnitee. To permit DuBois and Lovelace to receive indemnification from plaintiff would lead to “absurd result” of requiring plaintiff to defend DuBois and Lovelace against her own claims. With regard to counterclaim for breach of covenant not to sue, plaintiff contended that Consent Agreement only waived claims that had accrued as of date she signed it, not any future claims. Court found that although Consent Agreement did not explicitly include “future claims,” it could be read broadly to include both past and future claims. Court noted concerns regarding construing Consent Agreement broadly, including whether it violated public policy favoring copyright protection, but ultimately found that Lovelace and DuBois stated plausible claim for breach of contract. Finally, court found that Consent Agreement did not expressly reference recovery of attorneys’ fees or even cost and expenses, and therefore dismissed demand for attorneys’ fees.

VII. REMEDIES

A. Damages and Profits

Oracle Corp. v. SAP AG, 765 F.3d 1081 (9th Cir. 2014)

Ninth Circuit affirmed district court’s judgment as matter of law that plaintiff failed to provide enough evidence to establish objective, non-speculative hypothetical-license price. Copyrighted work at issue was enterprise software. Court explained that “award of hypothetical-license damages is appropriate provided the amount is not based on undue speculation. ... The touchstone for hypothetical-license damages is the range of the license’s reasonable market value. The question therefore, is not what the owner would have charged, but rather what is the fair market value. ... Thus, we do not ask what the owner would like to have charged if unconstrained by reality, but what a willing owner actually would have charged after negotiation with the buyer. That is, fair market value is based on an objective, not a subjective, analysis.” Court further noted that “[a]lthough a copyright plaintiff need not demonstrate that it would have reached a licensing agreement with the infringer or present evidence of benchmark agreements in order to recover hypothetical-license damages, it may be difficult for a plaintiff to establish the amount of such damages without undue speculation in the absence of such evidence.” Because “Oracle has no history of granting similar licenses, and has not presented evidence of benchmark licenses in the industry approximating the hypothetical license in question here, Oracle faced an uphill battle”; Oracle thus failed to meet its burden of proving fair market value of hypothetical license.

Gaylord v. United States, 777 F.3d 1363 (Fed. Cir. 2015)

Federal Circuit affirmed trial court’s determination that 10% royalty was reasonable for United States to pay as damages for unauthorized use of copyrighted work on postage stamp. Plaintiff Frank Gaylord sculpted *The Column*, series of statues depicting soldiers, which forms part of Korean War Veterans Memorial on National Mall in Washington, D.C. John Alli took photograph of *The Column* during snowstorm. Alli licensed photograph to U.S. Postal Service for use on 50th anniversary Korean War commemorative stamp for \$1,500.

Photograph constituted derivative work of *The Column*, and Gaylord had not authorized its use by Postal Service for stamp. Gaylord sued United States for copyright infringement, and United States was found liable. Federal Circuit, however, vacated Court of Federal Claims' decision awarding Gaylord \$5,000 as reasonable compensation, and remanded to determine fair market value of license based on hypothetical negotiation between Gaylord and Government. Trial court on remand broke down damages inquiry into three categories of infringing goods: (1) stamps used to send mail; (2) commercial merchandise featuring image of stamp; and (3) unused stamps purchased by collectors. Parties agreed that no damages would be awarded for stamps used to send mail, and that per-unit royalty was appropriate for commercial merchandise; trial court set rate at 10% of revenue, to produce merchandise award of \$33,092. Trial court determined that 10% per-unit royalty was appropriate to calculate damages for stamps purchased by collectors. Court determined that Postal Service received \$5.4 million in revenue, "almost pure profit," from unused stamps sold to collectors, and awarded \$540,000 plus prejudgment interest for unused stamps. Federal Circuit held that based on hypothetical negotiation with Gaylord, 10% of revenue was reasonable, citing to licenses given for apparel. Court noted that Postal Service would have limited alternatives for such commemorative stamp, particularly due to wide recognition of *The Column*. Trial court did not err in determining revenue base of \$5.4 million; trial court relied upon same survey evidence regarding retention of stamps relied upon for decades by Postal Service.

Beastie Boys v. Monster Energy Co., No. 12-6065, 2015 U.S. Dist. LEXIS 20898 (S.D.N.Y. Feb. 20, 2015)

Plaintiffs, rap group Beastie Boys and affiliated entities, brought copyright infringement claim against defendant beverage company arising out of defendant's creation and dissemination of promotional video that used portions of plaintiffs' songs without permission. Court found defendant liable for willful infringement. During litigation, plaintiffs conceded that court would need to adjust any final judgment in light of existence, for each copyright, of other owner(s) who had not brought suit. Court agreed that any award of copyright damages would have to be discounted to correspond to plaintiffs' ownership interests. In subsequent order, court apportioned damages for certain claims at issue pursuant to affirmative agreement of copyright holders as to percentage interest held by each. With regard to copyrights in which ownership interest had not been established, because not all owners could be located, court ordered apportionment based on undisputed calculations provided by plaintiffs. In so ordering, court recognized theoretical possibility that unrepresented co-owners could later pursue judgment against defendant, while claiming greater ownership interest in copyright than that posited by plaintiffs. To protect defendant against that contingency, it was proper to require plaintiffs to indemnify defendant for any damages awarded to unrepresented co-owner for infringement based on finding of ownership interest for unrepresented party exceeding percentage indicated by plaintiffs.

Kinsey v. Jambow, Ltd., No. 14-2236, 2014 U.S. Dist. LEXIS 167892 (N.D. Ill. Dec. 4, 2014)

Plaintiff brought suit for infringement of three musical compositions. Court granted plaintiff's motion for default judgment upon finding that defendants had defaulted, and thus well-pled allegations of complaint with respect to defendants' liability were admitted as true. Court held that infringement was willful, in view of showing by plaintiff that, despite receiving notice of plaintiff's copyrights on several occasions, defendants ignored such notices and continued to offer licenses in plaintiff's works. Although court found inadequate plaintiff's evidence concerning lost license fees, court held that award of \$7,500 in statutory damages for each work infringed was "sufficient to deter future violations," while not "unduly large." Court further awarded permanent injunctive relief and plaintiff's reasonable attorneys' fees and costs in view of defendants' willful infringement.

Calibrated Success, Inc. v. Charters, No. 13-13127, 2014 U.S. Dist. LEXIS 172544 (E.D. Mich. Dec. 15, 2014)

Plaintiff, owner of copyright in video, sued defendant for infringement based on defendant's copying and sale of plaintiff's video 50 to 75 times. Defendant admitted to copying and selling video, but argued that such copying was *de minimis* and that his actions constituted fair use. On summary judgment, court rejected both arguments, holding that "[t]here is nothing *de minimis* about copying an entire video," and finding all four fair use factors weighed heavily against defendant. Plaintiff sought statutory damages on finding that defendant willfully infringed. Plaintiff argued that infringement was willful based on fact that (1) defendant used aliases on websites he used to sell plaintiff's video; (2) defendant downloaded plaintiff's video from website Pirate Bay; (3) defendant was not entirely truthful at his deposition regarding user names, email addresses and websites through which he advertised video; and (4) according to plaintiff, defendant destroyed or concealed evidence. Court denied plaintiff's arguments, finding genuine issue of material fact as to whether defendant acted willfully. Court noted that plaintiff failed to show that defendant had actual or constructive knowledge that he was committing copyright infringement. Plaintiff presented no evidence, such as letter or legal notice, informing defendant of plaintiff's copyright, and failed to point to any behavior by defendant that imputed constructive knowledge. Court held that defendant's intent and credibility were factual determinations to be resolved by jury.

Apulent, Ltd. v. Jewel Hospitality, Inc., No. 14-637, 2015 U.S. Dist. LEXIS 17467 (W.D. Wash. Feb. 12, 2015)

District court granted defendant's motion for partial summary judgment on plaintiff's claim for indirect profits from copyright infringement. Plaintiff, catering and event planning company and former owner of beach club venue, sued defendant, new owner of venue, for copyright infringement. Plaintiff owned copyright in two images taken at venue. When plaintiff's tenancy at venue ended, defendant took over facility and posted plaintiff's two images on its website to promote venue, along with 10 other images of venue. Defendant

moved for summary judgment on plaintiff's claim for indirect profits, arguing plaintiff failed to establish necessary causal connection between defendant's revenues and alleged infringement. Reviewing Ninth Circuit authority, district court clarified burden on plaintiff to establish indirect profits, stating plaintiff must identify revenues reasonably related to alleged infringement, sufficient non-speculative evidence for reasonable fact finder to conclude alleged infringement actually generated at least part of said revenues, and causal link between defendant's revenues and images at issue. Plaintiff must show causal nexus between defendant's alleged infringement and gross revenues before burden shifts to defendant to apportion profits not resulting from infringement. Court found statements from plaintiff's owner and expert witness presented evidence that defendant's website and photographs generated interest in venue, but failed to satisfy its burden of establishing causal nexus between two specific images at issue and defendant's revenues.

Broad. Music, Inc. v. MWS, LLC, No. 11-1481, 2014 U.S. Dist. LEXIS 83970 (E.D. Mo. June 20, 2014)

In prior order, district court granted plaintiff's motion for summary judgment on issue of liability, finding defendant liable for five acts of willful copyright infringement for unauthorized performance of five copyrighted musical compositions, and directed parties to submit supplemental briefing on issues of damages and attorneys' fees. Court granted plaintiff BMI's supplemental motion for \$35,000 in statutory damages (\$7,000 per work infringed). BMI had agreements with copyright owners whereby it acquired non-exclusive public performance rights in musical works and granted owners and operators of restaurants and bars right to publicly perform any musical works in BMI's repertoire by means of blanket license agreement. Defendants were company and individual who owned and operated establishment "Fifteen," which regularly offered performances of live and recorded music, including music in BMI's repertoire. BMI sent defendants 23 letters and called defendants 66 times, informing defendants that they needed license for public performances of BMI's works. BMI additionally sent defendants nine letters demanding that defendants cease public performances of works until they obtained license. Defendants did not enter into agreement with BMI, and continued to offer performances. BMI claimed \$25,212.60 in lost licensing fees for period from July 1, 2009 through June 30, 2013, and requested statutory damages award of \$7,000 per infringement, for total of \$35,000. Court found requested damages award, which was greater than lost licensing fee, but substantially less than general trend of three times licensing fee, proper given compensatory and deterrent goals of Copyright Act and precedent instructing that penalty must be proportionate to extent of infringement. Court's decision was guided by consideration of past statutory damages awards, amount of unpaid licensing fees, size and nature of defendants' small nightclub business, and defendants' willful infringement evidenced by repeatedly ignoring plaintiff's letters and phone calls, and never executing license agreement or paying fees, constituting reckless disregard sufficient to support finding of willfulness.

Teller v. Dogge, No. 12-591, 2014 U.S. Dist. LEXIS 139632 (D. Nev. Sept. 30, 2014)

Plaintiff, world-renowned magician, sued defendant, Dutch performer, for copyright infringement as defendant created two YouTube videos in which he performed magic trick strikingly similar to one of plaintiff's signature illusions, and offered to sell "A Double illusion for the price of 'One'!!". Defendant also marketed for sale prop of his own design that could potentially be used in infringing trick. Court granted plaintiff's motion for summary judgment on issue of liability, and entered default judgment against defendant with respect to willful infringement. Plaintiff sought \$150,000 in damages for willful infringement. Court found that because plaintiff also sought permanent injunction, maximum statutory award was unnecessary to deter defendant's further violations. Additionally, court noted that plaintiff's case was based on at most two YouTube videos with only around 12 to 14 views, and it was unclear as to whether defendant sold any illusions. Accordingly, court found damages in amount of \$15,000 appropriate.

The Power of Few, LLC v. Does, No. 13-839, 2014 U.S. Dist. LEXIS 143218 (S.D. Ohio Oct. 8, 2014)

Plaintiff brought suit for infringement based upon unauthorized downloading and distribution of motion picture *The Power of Few* by way of BitTorrent peer-to-peer file sharing software. Upon plaintiff's motion for default judgment against sole named defendant, court held that defendant's default conclusively established liability for infringement. However, court held that case did not justify plaintiff's requested maximum award of \$150,000 in statutory damages since it was unclear that defendant was original user who made plaintiff's work available to public and there was no evidence that defendant profited from infringement. Based on review of damages awards in other cases involving infringement by use of BitTorrent protocol, court held that award of \$6,000 in statutory damages was appropriate. Due to continuing threat to plaintiff's copyright, court also granted plaintiff's request for permanent injunctive relief, which, *inter alia*, required defendant to destroy all copies of plaintiff's work downloaded by defendant onto any computer or otherwise possessed by defendant. Finally, court held that plaintiff was entitled to award of approximately \$1,900 in attorneys' fees and costs.

Clever Factory, Inc. v. Kingsbridge Int'l, Inc., No. 11-1187, 2014 U.S. Dist. LEXIS 81463 (M.D. Tenn. June 16, 2014)

Court denied plaintiff's motion *in limine* seeking ruling on number of statutory awards potentially recoverable in action. Plaintiff argued that statutory award for each of protected works should be multiplied by four to account for four retailers with which plaintiff had not settled, to which defendant sold and shipped infringing products, because retailers were not jointly and severally liable with other retailers although they were with defendant. Court found that maximum number of statutory awards allowable was one per protected work, for maximum of six awards. Section 504(c)(1) provides that "copyright owner may elect ... an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more

infringers are liable jointly and severally.” Thus, statutory damages should be calculated based on number of protected works that are infringed, rather than number of actual infringements, unless other infringers are individually liable for particular infringement.

Bell v. McLaws, No. 13-35, 2015 U.S. Dist. LEXIS 21084 (S.D. Ind. Feb. 23, 2015)

Plaintiff, owner of copyright in photograph of Indianapolis skyline available for purchase for \$200, sued numerous defendants for copyright infringement for unauthorized use of photograph on websites. Four defendants defaulted, and plaintiff requested damages of \$5,000 against each. After filing answer to complaint admitting unauthorized use, defendant McLaws failed to further participate in action, and district court entered default judgment against McLaws. Plaintiff did not allege distinguishing conduct by McLaws, but requested “maximum statutory award ... of at least \$7,500.” Noting that arbitrary \$7,500 figure was not maximum statutory award for copyright infringements and not based on evidence, court considered discretionary factors and prior award of damages against other defaulted defendants and found just award of statutory damages was \$2,500. Accordingly, district court awarded statutory damages of \$2,500 plus litigation costs of \$155.40.

B. Attorneys’ Fees

Omega S.A. v. Costco Wholesale Corp., 776 F.3d 692 (9th Cir. 2015)

Manufacturer of luxury watches brought suit for infringement against retailer based on unauthorized sales of watches containing copyrighted globe design. Watches were “gray market” goods that had initially been sold by plaintiff to authorized foreign distributors, resold to various third parties, and ultimately purchased by defendant from New York company. Plaintiff appealed district court’s grant of summary judgment dismissing complaint. While appeal was pending, Supreme Court ruled in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), that “first sale” doctrine applies regardless of where item was manufactured or sold, and thus encompasses copies lawfully made abroad. Because plaintiff conceded that watches had initially been sold to authorized foreign parties, “first sale” doctrine barred plaintiff’s claim for infringement. Court also affirmed lower court’s award of attorneys’ fees to defendant, premised on finding that by affixing barely perceptible copyrighted design to back of some of its watches, Omega did not provide – and did not seek to provide – creative works to general public. Instead, Omega sought to exert control over its watches, control which it believed it could not otherwise exert. Thus, it should have been clear to Omega that copyright law neither condoned nor protected its actions; imposition of fees would thus further purpose of Copyright Act.

Marshall & Swift/Boeckh, LLC v. Dewberry & Davis LLC, 586 Fed. Appx. 448 (9th Cir. 2014)

Defendant appealed trial court’s denial of its application for attorney’s fees under § 505. In affirming lower court’s decision, Ninth Circuit held that trial court did not err when it declined to apply presumption that prevailing party is entitled to attorneys’ fees. Further,

lower court did not err when it applied blameworthiness or culpability standard that was rejected in *Fantasy, Inc. v. Fogerty*, 94 F.3d 553 (9th Cir. 1996), because court also held that its discretion to award fees did not require finding of bad faith or blameworthiness. Because district court did not rest its decision solely on “lack of frivolousness or unreasonableness,” Ninth Circuit found that trial court applied correct standard in ruling on defendant’s motion for attorneys’ fees, and affirmed lower court’s decision.

Klinger v. Conan Doyle Estate, Ltd., 761 F.3d 789 (7th Cir. 2014)

Seventh Circuit granted prevailing party’s costs incurred in defending appeal. Court explained that under § 505, “as a consequence of the successful defense of an infringement suit the defendant is entitled to a ‘very strong’ presumption in favor of receiving attorneys’ fees, in order to ensure that an infringement defendant does not abandon a meritorious defense in situations in which ‘the cost of vindication exceeds the private benefit to the party.’” Court of appeals held that because appellant’s appeal “bordered on the frivolous,” and because appellee’s “willingness ... to sue rather than pay [appellant] a modest license fee is important because it injects risk into [appellant’s] business model,” award of attorneys’ fees was proper.

InDyne, Inc. v. Abacus Tech. Corp., No. 14-11058, 2014 U.S. App. LEXIS 18266 (11th Cir. Sept. 24, 2014)

Eleventh Circuit found that district court did not abuse discretion in awarding defendant attorneys’ fees. Court previously affirmed district court’s grant of summary judgment to defendant on infringement claim, on basis that plaintiff did not present evidence sufficient to allow reasonable jury to find elements in plaintiff’s software copied by defendant were original, and thus entitled to copyright protection. District court awarded defendant its reasonable attorneys’ fees on basis that plaintiff’s decision to file suit without copy of copyrighted material was unreasonable; that plaintiff’s motivation in bringing suit was questionable; and that granting of attorneys’ fees would further intent of Copyright Act by deterring prospective plaintiffs from filing suit “without being able to produce the software code.” Reasonable attorney’s fees may be awarded to prevailing party in copyright infringement action. In deciding whether to make award, court considers whether imposition of fees will further goals of Copyright Act, by encouraging raising of objectively reasonable claims and defenses, which may serve not only to deter infringement but also to ensure that boundaries of copyright law are demarcated as clearly as possible. Factors considered include “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” Plaintiff contended that district court abused its discretion because defendant was “bad actor” that committed “massive copyright infringement” and “got away with it”; under those circumstances, plaintiff argued, attorneys’ fees award did not serve purposes of Copyright Act. Circuit court found, however, that bare assertion that defendant behaved badly was invitation to relitigate already-decided merits of case, not ground for reversing award of fees. Court also rejected plaintiff’s contention that decision to sue despite lacking key evidence was not unreasonable. District court did not

abuse its discretion when it ruled that plaintiff's decision to bring suit without proof of element of its *prima facie* case was objectively unreasonable.

BWP Media USA, Inc. v. Gossip Cop Media, LLC, No. 13-7574, 2015 U.S. Dist. LEXIS 8804 (S.D.N.Y. Jan. 26, 2015)

Plaintiff brought suit for infringement of four images that had been uploaded to defendant Gossip Cop's website without authorization. Subsequent to filing of complaint, plaintiff agreed to voluntarily dismiss claims against defendant Abrams Research with prejudice after Abrams Research claimed no involvement with Gossip Cop's allegedly infringing activity. Court denied Abrams Research's motion for attorneys' fees. Although court held that stipulation of dismissal with prejudice rendered Abrams Research "prevailing party," attorneys' fees were unwarranted. First, court held that plaintiff's filing suit based upon pending copyright application was not objectively unreasonable, because question of whether pending application satisfies registration requirement as precondition to filing suit under § 411(a) was subject of circuit split that had not yet been resolved in Second Circuit. Further, plaintiff's filing suit against Abrams Research was not objectively unreasonable since two defendants were associated, with common corporate addresses, had same CEO and shared counsel, and there remained "significant questions" as to financial and legal relationship between Abrams Research and Gossip Cop. Finally, court held that plaintiff's failure to "immediately ascertain the still-opaque nature" of defendants' corporate relationship, or to immediately take adversaries "at their word" as to that relationship without supporting evidence, did not constitute bad faith.

HarperCollins Publishers LLC v. Open Road Integrated Media, LLP, No. 11-9499, 2014 U.S. Dist. LEXIS 157238 (S.D.N.Y. Nov. 6, 2014)

Publisher brought suit for infringement against third party who distributed e-book edition of author Jean George's acclaimed children's novel *Julie of the Wolves*. Publisher claimed that defendant's release of e-novel violated publisher's exclusive licensing rights to publish *Julie of the Wolves* pursuant to 1971 publishing contract between publisher and George whose grant of exclusive rights encompassed technologies "now known or hereafter invented." After previously issuing order finding defendant liable for infringement, court held that injunction was appropriate based upon review of relevant factors. First, court found there was "reasonable likelihood of future infringement" absent injunctive relief, since defendant continued to sell e-books even after court's prior opinion finding infringement, and was otherwise slow to act to discontinue marketing of e-books. Moreover, balance of hardships favored plaintiff, since infringer of copyright cannot complain about loss of ability to offer infringing product, and injunctive relief served public interest since public has compelling interest in protecting copyright owners' marketable rights. Court held that "appropriately circumscribed injunction" was justified, wherein defendant would be enjoined not only from infringing *Julie of the Wolves* but also all other works owned by publisher whose copyright assignments to publisher contained language identical to that featured in 1971 publishing contract. Court declined to adopt plaintiff's proposed injunction, which would have also covered works whose copyright assignments to publisher contained "substantially identical

language” to 1971 publishing contract. Further, court held that statutory damages award of \$30,000 was appropriate since defendant’s conduct – continuing to make sales of e-books even after court’s opinion putting defendant on notice that such sales constituted infringement – was willful. Finally, court held that award of attorneys’ fees was not warranted since defendant’s position, although ultimately unsuccessful, was not objectively unreasonable where dispute “arose in the context of a developing, and still somewhat uncharted, area of copyright law,” and aggressive manner in which publisher prosecuted lawsuit demonstrated that publisher “had ample motivation to enforce its copyright” irrespective of attorneys’ fee award.

Zalewski v. T.P. Builders, Inc., No. 10-876, 2015 U.S. Dist. LEXIS 106 (N.D.N.Y. Jan. 5, 2015)

On remand following plaintiff’s appeal of award of attorneys’ fees to defendants, prevailing parties in copyright infringement litigation, district court reexamined its earlier award, which Second Circuit found to be flawed. On reexamination, defendants argued award was justified because plaintiff acted in bad faith by naming numerous defendants later dropped from case, seeking excessive damages, engaging in harassing discovery, and submitting three obtuse, abusive and defective amended complaints. Plaintiff contended that it acted in good faith at all times, and that prior, superseded pleadings could not now be used against it. While court remained troubled by plaintiff’s first three pleadings, on reexamination court found award of attorneys’ fees not justified. Court noted that even if there was misconduct by plaintiff, defendants failed to match incurrence of particular fees to plaintiff’s conduct. Court also found shortcomings of plaintiff’s first three pleadings attributable more to counsel’s inabilities than to any bad faith by plaintiff. Accordingly, court denied defendants’ motions for attorneys’ fees.

Lewis v. Activision Blizzard, Inc., No. 12-1096, 2014 U.S. Dist. LEXIS 135889 (N.D. Cal. Sept. 25, 2014)

After granting defendant’s motion for summary judgment dismissing plaintiff’s infringement claim, court granted defendant’s motion for attorneys’ fees. Plaintiff, former employee of defendant, had based infringement claim on defendant’s allegedly unauthorized use of voice-over work performed by plaintiff while employed by defendant company in customer service role. All factors weighed in favor of awarding fees. First, success was complete since defendant prevailed on summary judgment. Second, plaintiff’s claim was objectively unreasonable and “bordered on frivolous” since content-creation was one of plaintiff’s official duties as defendant’s employee; plaintiff had been paid normal hourly rate for voice-over work and did not seek further compensation; and recording sessions were conducted at defendant’s offices, using defendant’s equipment, and under supervision of defendant’s sound engineer. Plaintiff should have known from outset that such facts undermined infringement claim. Third, court held that plaintiff evidenced improper motivation by virtue of plaintiff’s rejection of reasonable settlement offers, imposition of unreasonable settlement demands, and threats that ongoing litigation would constitute “poor public relations” for defendant. Finally, award of fees supported objectives of Act by deterring baseless suits.

Choyce v. SF Bay Area Indep. Media Ctr., No. 13-1842, 2014 U.S. Dist. LEXIS 155438 (N.D. Cal. Nov. 3, 2014)

District court granted defendants' motion for attorneys' fees, but reduced award by 75% of fees and costs requested. Plaintiff brought defamation and copyright infringement suit against SF Bay Area Independent Media Center and Layer42.net, alleging that defendants posted defamatory articles about him and infringed his copyright by posting photograph taken of him from his law firm's website. District court dismissed initial complaint and amended complaint for failure to state claim, due to failure to allege copyright registration, and failure to allege that he owned copyright in photograph by showing assignment from photographer who took photograph. Court noted that "image was not created by Plaintiff; it is an image of Plaintiff." Thus, court found defendants to be prevailing parties due to dismissal of complaints and eligible for attorneys' fees. Court listed following non-exclusive five factors to determine attorneys' fees award: "(1) degree of success obtained; (2) frivolousness; (3) motivation; (4) the objective unreasonableness of the losing party's factual and legal arguments; and (5) the need in particular circumstances, to advance considerations of compensation and deterrence." District court reviewed four of five factors: (1) defendants achieved total success against claim; (2) had Choyce's counsel consulted even "basic" copyright authority would have known that there was no basis for copyright claim; (3) motivation was not to harass defendants, but to have defamatory material removed, and therefore, motivation weighed lightly against awarding fees; (4) IndyBay website may not be "artistic creativity" *per se* but was forum for public expression that should not be hindered by baseless intellectual property claims. Therefore, all factors weighed in favor of attorneys' fees. District court found request for of \$117,114.61 costs and fees by both defendants to be somewhat unreasonable since both motions to dismiss also contained state law claim of defamation which was not addressed by court. Therefore, court reduced fees by 75% and granted \$42,958 to one defendant and \$44,877 to other defendant.

Reinicke v. Creative Empire, LLC, No. 12-1405, 2014 U.S. Dist. LEXIS 150130 (S.D. Cal. Oct. 22, 2014)

Court denied defendant's motion for attorneys' fees. Plaintiff brought action alleging Creative Empire infringed copyright in German language course works created by Reinicke in connection with Mango online learning service. Court previously granted Creative Empire's motion for summary judgment on copyright infringement claim. Creative Empire sought attorneys' fees. Court considered *Fogerty* factors: "(1) the degree of success obtained; (2) frivolousness of the losing party; (3) motivation of the losing party; (4) the objective unreasonableness of the losing party's factual and legal arguments; and (5) the need ... to advance considerations of compensation and deterrence." Notwithstanding that Creative Empire prevailed on merits, court found award of attorney's fees not warranted. Plaintiff produced chain of email communications between parties in which share of profits was promised. Court therefore found that plaintiff's claims were not objectively unreasonable, and were not brought or prosecuted in bad faith. Court found that deterrence considerations did not justify award of attorneys' fees; award of attorney's fees in this case might deter individual language developers from asserting their copyright ownership rights.

Broadcast Music, Inc. v. M.R.T.P, Inc., No. 12-7339 , 2014 U.S. Dist. LEXIS 87232 (N.D. Ill. June 26, 2014)

Plaintiff performing right organization brought suit for infringement based on defendants' unauthorized public performance of eight copyrighted musical compositions at local bar. Defendants did not dispute plaintiff's ownership, and failed to advance any defense to refute unauthorized public performance of compositions. Thus, court found defendant bar owners liable for willful infringement, and granted summary judgment to plaintiff as to those defendants, awarding statutory damages, attorneys' fees and costs. However, as to defendant Rossi, former corporate secretary and part owner of bar, court found evidence insufficient to hold Rossi vicariously liable, noting plaintiff failed to submit any evidence to refute Rossi's declaration that his ownership interest and role as corporate officer was terminated prior to infringement. Accordingly, court granted summary judgment in favor of Rossi, awarding defendant attorneys' fees and costs, noting that plaintiff's refusal to dismiss Rossi from case "based solely on the fact that he was listed as a corporate officer – with no ownership interest – on [defendants'] pre-printed liquor license applications" was unreasonable, and plaintiff's pursuit of summary judgment against Rossi was frivolous.

Lightsource Analytics, LLC v. Great Stuff, Inc., No. 13-931, 2014 U.S. Dist. LEXIS 133007 (W.D. Tex. Sept. 23, 2014)

Magistrate judge recommended that district court deny defendants' motion for attorneys' fees, as defendants were not "prevailing parties." Plaintiff filed Amended Complaint in matter, but subsequently filed Voluntary Notice of Dismissal requesting that district court dismiss action without prejudice under Fed. R. Civ. P. 41. District court issued final judgment in case, and defendants thereafter filed motion for attorneys' fees as prevailing parties under Copyright Act. Plaintiff argued that Notice of Dismissal terminated case, and court therefore no longer had jurisdiction to award attorneys' fees. Alternatively, plaintiff argued that if court had jurisdiction, motion should have been denied because defendants were not "prevailing parties." Court, relying on *Cooter & Gell v. Hartmarx*, 496 U.S. 384 (1990), held that voluntary dismissal of case under Rule 41 did not deprive court of jurisdiction to award attorneys' fees. Court therefore turned to question whether defendants were prevailing parties under Act. Court noted that while Fifth Circuit had not addressed question, other courts had applied standard established by *Buckhannon Bd. & Care Home, Inc. v. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Under *Buckhannon*, court found that prevailing party "is one who has been awarded some relief by the court," or in other words, there has been "judicially sanctioned change in the legal relationship of the parties." As plaintiff voluntarily dismissed complaint under Rule 41 without prejudice, and as defendants had not been awarded any relief by court, and therefore there had not been judicially sanctioned change in legal relationship of parties, defendants could not be considered prevailing parties under Copyright Act. Magistrate judge therefore recommended that district court judge deny defendants' motion for fees.

Broad. Music, Inc. v. C.B.G., Inc., No. 11-40142, 2014 U.S. Dist. LEXIS 127914 (D. Mass. Sept. 12, 2014)

District court granted plaintiff's motion for attorneys' fees. Plaintiff performing rights society sued defendant, owner of Beemer's Pub in Fitchburg, Massachusetts, for "holding public performances" of music from BMI's collection without permission or license. Court previously granted BMI's motion for summary judgment on liability for infringement. BMI then moved for attorneys' fees. Court analyzed four factors: (1) frivolousness, (2) motivation; (3) objective reasonableness, and (4) compensation and deterrence. With regard to frivolousness, court found C.B.G.'s defenses to be "imaginative" but "simply not meritorious." Court found that C.B.G.'s motivation was not improper; there was no evidence that settlement negotiations were conducted for any reason other than avoiding going to court. On objective reasonableness factor, court found evidence of copyright infringement was uncontroverted, and none of defendant's defenses reasonable. Finally, court held that award of attorneys' fees furthered goal of compensation and promoted purpose of statute. BMI sought \$34,270 in fees and \$931.70 in costs. Court awarded \$12,000 plus costs, stating that amount was reduced because of "basic, uncomplicated nature of the controversy, the relative lack of serious factual dispute, the novel, but easily refuted defense, and the relative financial situations of the parties."

Metro Media Entm't v. Steinruck, No. 12-347, 2014 U.S. Dist. LEXIS 120474 (D. Md. Aug. 27, 2014)

Plaintiff, owner of copyright in pornographic film, sued defendant, holder of IP address, for copyright infringement by unauthorized download of film over Internet via BitTorrent file-sharing site. Following protracted discovery disputes, defendant moved for summary judgment. Believing defendant would be found liable for copyright infringement, but concerned that litigation costs might not justify damages awarded, plaintiff filed motion to voluntarily dismiss suit with prejudice pursuant to Fed. R. Civ. P. 41(a)(2), with each party bearing its own costs and attorneys' fees. Defendant opposed plaintiff's voluntary withdrawal, requested hearing on summary judgment, and asked for attorney's fees. Given plausibility of plaintiff's claim, and precedent stating that district courts ordinarily must grant requests for voluntary dismissal with prejudice, which operates as complete adjudication on merits, court granted plaintiff's motion to dismiss. Conditions such as attorneys' fees and costs may be imposed when dismissal is without prejudice; however, where dismissal is with prejudice award of fees is not appropriate absent "exceptional circumstances." Court found defendant's choice to reject settlement offer and pursue aggressive defense strategy did not constitute exceptional circumstance sufficient to warrant attorneys' fees award.

Broad. Music, Inc. v. MWS, LLC, No. 11-1481, 2014 U.S. Dist. LEXIS 83970 (E.D. Mo. June 20, 2014)

In prior order, district court granted plaintiff's motion for summary judgment on issue of liability, finding defendant liable for five acts of willful copyright infringement for unauthorized performance of five copyrighted musical compositions, and directed parties to

submit supplemental briefing on issues of damages and attorneys' fees. Court awarded plaintiff BMI \$10,000 in attorneys' fees and full costs. BMI had agreements with copyright owners whereby it acquired non-exclusive public performance rights in musical works and granted owners and operators of restaurants and bars right to publicly perform any musical works in BMI's repertoire by means of blanket license agreement. Defendants were company and individual who owned and operated establishment "Fifteen," which regularly offered performances of live and recorded music, including music in BMI's repertoire. BMI sent defendants 23 letters and called defendants 66 times, informing defendants that they needed license for public performances of BMI's works. BMI additionally sent defendants nine letters demanding defendants cease public performances of works until they obtained license. Defendants did not enter into agreement with BMI, and continued to offer performances. BMI argued attorneys' fees award was appropriate, because defendants' willful infringement forced litigation to enforce plaintiff's rights, and submitted declaration that counsel spent 63 hours litigating against defendants for total lodestar amount of \$14,993.75 for attorney and paralegal time, including professional discount given to BMI. District court found plaintiffs entitled to award of reasonable attorneys' fees of \$10,000 plus full costs incurred.

Teller v. Dogge, No. 12-591, 2014 U.S. Dist. LEXIS 139632 (D. Nev. Sept. 30, 2014)

Plaintiff, world-renowned magician, sued defendant, Dutch performer, for copyright infringement based on defendant's creation of two YouTube videos in which he performed magic trick strikingly similar to one of plaintiff's signature illusions, and offered to sell "A Double illusion for the price of 'One'!". Defendant also marketed for sale prop of his own design that could potentially be used in infringing trick. Court granted plaintiff's motion for summary judgment on issue of liability, and entered default judgment against plaintiff with respect to willful infringement. Plaintiff sought costs in amount of \$57,906.95 and attorneys' fees in amount of \$931,661.60, totaling \$989,568.60. Court reviewed affidavit submitted by plaintiff outlining costs, hours spent on tasks and billable rates, and found proposed amounts reasonable. Court noted, however, that requested amount was significant, and case was based on posting of merely two infringing YouTube videos that received minimal views, both which were moved by YouTube "in respect for plaintiff's copyright." Court also noted that it was unclear whether defendant sold any offered illusions or made any profit. Nonetheless, court stated that defendant had been exceptionally difficult and unresponsive, necessitating numerous motions and responses from plaintiff to attempt to compel defendant's compliance and cooperation. Accordingly, court awarded plaintiff \$30,000 in costs and \$500,000 in attorneys' fees, totaling \$530,000, due to additional time and effort plaintiff undertook in attempt to achieve defendant's cooperation in litigation process.

Asset Vision, LLC v. Fielding, No. 13-288, 2014 U.S. Dist. LEXIS 175267 (D. Idaho Dec. 16, 2014)

District court granted defendant's motion for attorneys' fees. Plaintiff sued software developers for copyright infringement of computer software. Thereafter, plaintiff amended complaint to include defendant, who denied any involvement in use or development of

software. Plaintiff insisted that defendant used software, but all claims against defendant were dismissed with prejudice on motion to dismiss, or were settled. Defendant sought attorneys' fees under § 505. Court considered five non-exclusive *Fogerty* factors: (1) degree of success obtained; (2) frivolousness; (3) objective unreasonableness; (4) motivation; and (5) need to advance considerations of compensation and deterrence. Under first factor, party who settles claim may be prevailing party if settlement requires material alteration of legal relationship between parties. While plaintiff argued that defendant was not prevailing party because it agreed not to use software as part of settlement, court disagreed, finding that because plaintiff's settlement with other defendant developer stopped software at its source, no business could thereafter use software. As such, defendant's settlement became ceremonial at best, and did not alter legal relationship of parties. As to second factor, court found that while facts strongly suggested defendant was wrong party, absent further proceedings court could not pronounce claims frivolous. With respect to third, fourth and fifth factors, court found suit might have been brought against defendant as leverage over developers, and not because plaintiff wanted defendant to cease use of software. Additionally, court found that plaintiff denied requests to discuss claims with defendant upon defendant's request. As such, court found remaining three factors weighed in favor of defendant. Court therefore awarded defendant \$84,375.50 in fees, and \$1,778.63 in costs.

C. Injunction/Impoundment

Garcia v. Google, Inc., No. 12-57302, 2015 U.S. App. LEXIS 8105 (9th Cir. May 18, 2015)

Ninth Circuit sitting *en banc* reversed panel's decision that required Google to remove film *Innocence of Muslims* from its platforms, including YouTube. Plaintiff actress agreed to act in film *Desert Warrior*. Plaintiff was paid, but *Desert Warrior* never materialized. Instead plaintiff's scene was used in anti-Islamic film titled *Innocence of Muslims*, which plaintiff first saw on YouTube. Plaintiff's performance was partially dubbed over so she appeared to be asking, "Is your Mohammed a child molester?" Film caused Egyptian cleric to issue *fatwa* calling for killing of everyone in film. Plaintiff received death threats, and in response filed eight DMCA takedown notices. Google refused to take down video, so plaintiff applied for temporary restraining order, claiming video infringed her copyright in performance. District court treated application as application for preliminary injunction, and denied application, finding plaintiff delayed in bringing action, failed to demonstrate requested relief would prevent any alleged harm, and was unlikely to succeed on merits, as she granted implied license to use performance. Ninth Circuit panel reversed, finding actress established likelihood of success on merits of claim of infringement, as she had protectable interest in her performance in film. Divided panel first issued mandatory injunction requiring Google to remove film, but later limited injunction to versions of film featuring plaintiff's performance. Court sitting *en banc* reversed panel's decisions, and affirmed district court's denial of preliminary injunction, finding district court did not abuse its discretion as "weak copyright claim cannot justify censorship in the guise of authorship." Court analyzed *Winter* factors, and found that under first factor, likelihood of success, that plaintiff had "doubly

demanding” burden, as she sought mandatory injunction. Central question, therefore, was whether law and facts “clearly favored” plaintiff’s claim to copyright in her five-second acting performance, to which court answered “no.” Court found plaintiff was not author under Copyright Act, as she was not author of film or script, and was seeking protection of performance. Court relied on “expert opinion” of Copyright Office, which rejected plaintiff’s application for protection in performance, finding it could not register performance apart from motion picture as motion picture is single integrated work. Court reasoned that plaintiff’s theory of copyright would result in “legal morass” warned against in *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000), that defining “work” so broadly would fragment copyright protection for unitary film into many pieces. Court gave example of films with “casts of thousands,” noting that treating each performance as independent work would be “logistical and financial nightmare,” as “cast of thousands” would turn into “copyright of thousands.” Dissent argued that *Aalmuhammed* emphasized that joint authorship of movie is different question from whether contribution to movie could be “work” under § 102(a), and that court clearly stated that contribution to movie can be copyrightable. Court disagreed, stating dissent “spins speculative hypotheticals,” and reality was that granting copyright ownership to all those on movie set, particularly in movies with heavily populated scenes, could impose huge burden on content distributors. Court also found that plaintiff faced additional statutory barrier in that she never fixed her performance in tangible medium as required under § 101, as she never authorized her performance to be part of film. Dissent disagreed, asserting that performer need not operate recording equipment to be author of own performance. Court then addressed second *Winter* factor, irreparable harm. Court noted that plaintiff could have sought preliminary injunction under number of claims, such as privacy or fraud, but instead chose copyright. As such, court stated plaintiff’s harm would need to stem from harm to legal interests as author. Plaintiff’s claim therefore failed, as purpose of copyright is free expression, not protection of privacy, and therefore harm was “too attenuated from the purpose of copyright.” Court also noted that plaintiff delayed in bringing action as she waited months to seek injunction after film was uploaded to YouTube, and did not seek emergency relief when film first surfaced on Internet. As court found first two *Winter* factors weighed against plaintiff, it did not analyze other two factors. Court also found that panel’s take-down notice was unwarranted and incorrect, as it censored and suppressed politically significant film based on unprecedented theory of copyright, and that it was prior restraint that infringed First Amendment values at stake. Court therefore dissolved amended injunction. Concurrence argued that case should have been decided as narrowly as possible, and therefore should have been decided by focusing solely on irreparable harm, as there was no causal connection between injury plaintiff faced and conduct she hoped to enjoin. Dissent argued that plaintiff’s performance met requirements for copyright protection, that plaintiff was author of her work, and that she made ample showing of irreparable harm, as her life was at stake.

Fox Broad. Co. v. Dish Network L.L.C., No. 13-56818, 2014 U.S. App. LEXIS 13348 (9th Cir. July 14, 2014)

Ninth Circuit upheld district court's denial of Fox's motion for preliminary injunction against Dish Network for alleged copyright infringement and breach of contract. Reviewing district court's decision for abuse of discretion, Ninth Circuit found that Fox had not shown likelihood that Dish Network's "Dish Anywhere" and "Hopper Transfers" technology would irreparably harm Fox before final adjudication. Court upheld finding that, due to Fox's contractual relationship with Dish Network, Fox failed to show that absent injunction, harm could not be remedied with money damages. District court did not commit legal error in finding that lack of evidence that Dish Network's technology, available for several years, had caused Fox's business any harm weighed against argument that it would cause harm absent preliminary injunction. Finally, circuit court held district court ruling had not relied on clearly erroneous findings of fact. District court's denial of Fox's motion for preliminary injunction was thus affirmed.

Beastie Boys v. Monster Energy Co., No. 12-6065, 2015 U.S. Dist. LEXIS 20896 (S.D.N.Y. Feb. 20, 2015)

Plaintiffs, rap group Beastie Boys and affiliated entities, brought copyright infringement claim against defendant beverage company arising out of defendant's creation and dissemination of promotional video that used portions of plaintiffs' songs without permission. Court found defendant liable for willful infringement, and plaintiffs brought motion for permanent injunction, seeking broadly to enjoin defendant from using their music, voices, names and trademarks in any advertisement or other trade-related content. Defendant argued that plaintiffs were not entitled to injunctive relief or, alternatively, that scope and injunction should be strictly limited to infringing video at issue in litigation. Court granted plaintiffs' motion for permanent injunction, finding that plaintiffs established irreparable injury. Court reasoned that plaintiffs generally did not license their music for advertisements – viewing such practice as “selling out” – and, in particular, would not have granted permission in this instance because they disliked product and how women were portrayed in advertisement at issue. Court held that loss of plaintiffs' First Amendment right *not* to speak unquestionably constituted irreparable harm, and that remedies available at law would not compensate for such injury. In balancing hardships, court rejected defendant's argument that injunction would frustrate its First Amendment rights, holding that defendants had no legitimate interest in further dissemination of video; thus, balance of hardships tipped in plaintiffs' favor. Court held further that public interest would be served by protecting copyright owners' rights, thereby encouraging creative work. Court, however, limited injunction to cover only infringing video, reasoning that plaintiffs' proposed injunction was overbroad, as it could extend beyond video at issue and ban host of hypothetical future acts easily encompassing lawful uses of plaintiffs' music or names.

Magder v. Lee, No. 14-8461, 2014 U.S. Dist. LEXIS 171479 (S.D.N.Y. Dec. 3, 2014)

Court denied plaintiff's motion for preliminary injunction. Because agreement between parties expressly barred plaintiff from seeking injunctive relief, and plaintiff failed to show likelihood of success on merits, court did not need to address remaining factors in standard for injunctive relief. Plaintiff, co-author of screenplay, entered into series of agreements with defendants, film producers, production company and co-collaborators on project to adapt plaintiff's screenplay to film. Among agreements was "purchase agreement" by which plaintiff granted all rights, including copyright, in screenplay to defendant company. Purchase agreement also contained express provision prohibiting plaintiff from seeking injunctive relief for any alleged breach. After relationship between plaintiff and defendants soured, defendants removed plaintiff as member of defendant company and scaled back her creative input in film project. Plaintiff sued for copyright infringement, among other claims, based on defendants' distribution of copies of screenplay and ongoing preparation for production of film, alleging copyright in screenplay was never transferred to defendants under purchase agreement. As threshold matter, court found preliminary injunction not appropriate in this case because "pursuant to the clear terms of the purchase agreement, plaintiff expressly waived her right to seek injunctive relief." Notwithstanding express provision of agreement, court also considered possible basis for granting equitable relief. However, because plaintiff clearly transferred her ownership of screenplay pursuant to purchase agreement, court found plaintiff could not satisfy ownership prong for copyright infringement claim and therefore could not possibly succeed on merits. Accordingly, court denied plaintiff's motion for preliminary injunction.

Am. Broadcasting Cos., Inc. v. Aereo, Inc., No. 12-1540, 2014 U.S. Dist. LEXIS 150555 (S.D.N.Y. Oct. 23, 2014)

After U.S. Supreme Court found that Aereo's transmission of ABC's programming through "individually designated antennas" infringed ABC's public performance right, ABC sought preliminary injunction against Aereo. Aereo set forth four arguments against injunction: (1) Aereo should be considered "cable system" entitled to compulsory license under 17 U.S.C. § 111; (2) Aereo was mere conduit entitled to safe harbor protection under 17 U.S.C. § 512(a); (3) ABC had not shown irreparable harm; and (4) scope of injunction should require 10-minute delay on Aereo's retransmission. Court found Aereo's arguments unpersuasive and granted ABC's motion for injunction, finding ABC was likely to prevail on merits and balance of hardship favored ABC. Injunction restricted Aereo from retransmitting ABC's live programming while such programming was still being broadcast.

NTE LLC v. Kenny Constr. Co., No. 14-9558, 2015 U.S. Dist. LEXIS 13053 (N.D. Ill. Feb. 4, 2015)

Court denied plaintiff's motion for preliminary injunction despite showing of likelihood of success on merits. Plaintiff, web-based supply chain software solution provider, entered into master professional services agreement with defendant, construction company, to acquire logistical support for construction of power line transmission towers, solar power

transmission projects, inventory management, and wind energy transmission projects. Defendant input data relating to various projects into plaintiff's software and retrieved other proprietary data generated by plaintiff relating to its projects, which defendant needed to effectively manage its utility projects. Defendant, concerned about its reliance on plaintiff's software, developed its own software, which defendant populated with certain proprietary data generated by plaintiff containing historical inventory information about defendant's projects. Plaintiff sued for copyright infringement of plaintiff's proprietary data, and moved for preliminary injunction. In denying plaintiff's motion, court found defendant could be fully compensated with monetary damages, and any harm suffered would not be irreparable, because defendant could avoid plaintiff's claims by simply agreeing to pay plaintiff fixed monthly fee. Moreover, plaintiff had adequate remedy at law because alleged losses were calculable and compensable through monetary damages. Lastly, court found balance of harms and public interest slightly favored defendant, due to important nature of defendant's utility projects and economic harm defendant would incur if it were unable to access and utilize historical information in management of its projects. Therefore, despite showing of likelihood of success on merits, court denied plaintiff's motion for preliminary injunction.

Yellow Pages Photos, Inc. v. Ziplocal, No. 12-755, 2014 Dist. LEXIS 83014 (M.D. Fla. June 18, 2014)

Plaintiff sought permanent injunctive relief against defendants on basis that defendants' infringement of plaintiff's copyrighted works caused irreparable harm to plaintiff, and that if injunction were not granted, infringement would continue to cause irreparable harm. In order to obtain permanent injunctive relief, plaintiff must demonstrate (1) irreparable injury suffered; (2) that damages do not provide adequate compensation; (3) equitable relief warranted in light of balance of hardship between parties; and (4) permanent injunction will not undermine public interest. Court found that plaintiff had not shown that it would suffer irreparable harm in future or that damages already awarded by jury would not adequately compensate for any losses; plaintiff had not obtained new customers since 2009, and with no new market or income stream from licenses and photos for five years, plaintiff could not demonstrate that it would be irreparably harmed by loss of income. Moreover, plaintiff's principal testified that damages would compensate him for market losses. Court thus denied plaintiff's motion for entry of permanent injunction.

Calibrated Success, Inc. v. Charters, No. 13-13127, 2014 U.S. Dist. LEXIS 172544 (E.D. Mich. Dec. 15, 2014)

Plaintiff, owner of copyright in video, sued defendant for infringement based on defendant's copying and sale of plaintiff's video 50 to 75 times. Defendant admitted to copying and selling video, but argued that such copying was *de minimis* and that his actions constituted fair use. On summary judgment, court rejected defendant's arguments, holding that "[t]here is nothing *de minimis* about copying an entire video," and finding all four fair use factors weighed heavily against defendant. Despite finding of liability on infringement claim, court denied plaintiff's request for permanent injunction on grounds that plaintiff did not show likelihood that defendant would commit future copyright infringement, and failed to address

four-factor test used to determine whether to grant permanent injunction. Court similarly rejected plaintiff's request for impoundment order because plaintiff failed to meet requirements for injunctive relief.

Graftech Int'l Holdings, Inc. v. Sangraf Int'l, Inc., No. 14-2658, 2015 U.S. Dist. LEXIS 13397 (N.D. Ohio Feb. 4, 2015)

District court denied plaintiff's motion for preliminary injunction prohibiting defendant from using defendant's allegedly infringing software. Plaintiff, dominant company in graphite electrode market, sued defendants, new competing company and its employee, for copyright infringement. Plaintiff sold graphite electrodes to steel manufacturers, and provided monitoring software to some customers free of charge. Defendant company developed monitoring software with help of independent consultant, who was former employee of plaintiff and had helped develop plaintiff's software. Plaintiff alleged defendant company's software was poorly disguised copy of plaintiff's software, and sought preliminary injunction forbidding defendant company from installing or using its software. Considering likelihood of success on merits, court found available evidence pointed in both directions, but tilted somewhat in favor of granting plaintiff injunction. Plaintiff had shown former incident of copying by defendant employee, shared designer for both parties' software, and similarities in software code. Defendant company had argued independent creation and presented testimony suggesting practical considerations accounting for similarities in software code. Plaintiff argued showing of likelihood of success on copyright claim was sufficient to show irreparable harm, but court disagreed, stating presumption of harm no longer viable in light of *eBay v. MercExchange*, in which Supreme Court rejected near-automatic grant of injunction for patent violation by analogizing to copyright cases. Court found plaintiff failed to demonstrate irreparable injury in absence of injunction. Representatives for both parties testified that software was only one factor considered by consumers choosing electrode supplier, and price was most important factor. Further, plaintiff only provided software to some customers, customers who did receive software still purchased electrodes from multiple suppliers, and electrode purchasing decisions were generally made centrally rather than by individual factories, so plaintiff failed to establish impact on sales and goodwill. Court declined to consider remaining factors (balance of equities and public interest), concluding neither could overcome lack of irreparable harm. Accordingly, plaintiff's motion for preliminary injunction was denied.

Teller v. Dogge, No. 12-591, 2014 U.S. Dist. LEXIS 139632 (D. Nev. Sept. 30, 2014)

Plaintiff, world-renowned magician, sued defendant, Dutch performer, for copyright infringement as defendant created two YouTube videos in which he performed magic trick strikingly similar to one of plaintiff's signature illusions, and offered to sell "A Double illusion for the price of 'One'!". Defendant also marketed for sale prop of his own design that could potentially be used in infringing trick. Court had granted plaintiff's motion for summary judgment on issue of liability, and entered default judgment against defendant with respect to willful infringement. Plaintiff sought permanent injunction to prohibit defendant from selling prop and from reproducing plaintiff's illusions. Relying on *Winter v. NRDC*,

555 U.S. 7 (2008), court considered following factors to determine whether permanent injunction was appropriate: (1) likelihood of irreparable injury if preliminary relief is not granted; (2) likelihood of success on merits; (3) balance of hardships; and (4) advancement of public interest. Court found plaintiff met burden of showing first and second factors as it achieved success on merits on infringement claim, and demonstrated that it would suffer irreparable injury because defendant's copyright infringement was likely to continue. Court also found that balance of hardships and public interest both weighed in plaintiff's favor as plaintiff expended substantial time and money in building and promoting performances that were respected worldwide, and any harm to defendant in forcing him to comply with requirements of law was outweighed by plaintiff's efforts to protect his performances. Court therefore found permanent injunction appropriate to enjoin defendant from any further infringement. However, court disagreed with plaintiff that defendant should be enjoined from producing, manufacturing, selling or distributing defendant's prop. Plaintiff asserted that purchasers of prop would be more likely to perform plaintiff's famous illusion with prop than create new illusion. Additionally, plaintiff claimed that sale of prop would cause plaintiff to have to continue to bring enforcement actions and engage in high degree of monitoring since sale of prop would make it more likely that others would be doing illusion, causing further harm to plaintiff. Court stated that injunctions must be narrowly tailored to remedy only specific harms shown by plaintiff. Therefore, fact that defendant's prop *might* cause purchasers to perform plaintiff's illusion in infringing manner, which would require plaintiff to bring future actions against additional defendants, was not concern for court. Accordingly, court declined to prevent defendant from producing, manufacturing, selling or otherwise distributing prop.

D. Sanctions

Lightspeed Media Corp. v. Smith, 761 F.3d 699 (7th Cir. 2014)

Plaintiff operated online pornography site, and brought lawsuits around country against John Doe defendants it identified through IP addresses, alleging that IP addresses were associated with unlawful viewing of plaintiff's content made possible by hacked password. Plaintiff also added thousands of "co-conspirators" to suits, and alleged they were in wide-reaching scheme to steal passwords and content. Plaintiff would then cause courts to grant early-discovery requests so plaintiff could identify defendants and exact settlement proceeds from them. Plaintiff was represented by three attorneys who alleged they were from different firms. In instant case, plaintiff sued John Doe, and later amended complaint to name defendant. ISPs were also added to complaint, as they refused to respond to subpoenas regarding release of personally identifiable information of thousands of IP address owners that plaintiff named as "co-conspirators." California district court case pending at same time as instant case found that attorneys representing plaintiff were all part of same firm, and same scheme. Accordingly, California court issued sanctions against attorneys. Attorneys thereafter dismissed cases around country, including instant case. Defendant and ISPs in instant case filed motion for attorneys' fees and costs. District court granted motion and order imposed joint and several liability for fees against attorneys. Attorneys failed to pay,

so defendants moved for order to show cause why attorneys should not be held in contempt for failure to pay, or in alternative for immediate contempt. After hearing, district court found that there was no excuse for failure to pay, and thus held attorneys in civil contempt and ordered them to pay 10% of original sanctions award to cover defendants' additional costs for contempt litigation. On appeal, attorneys argued that due process rights were violated, as they never received notice of defendant's motion for sanctions, even though one of attorneys was properly served. Court rejected argument, finding that attorneys had ongoing relationship, and thus service on one sufficed as service on all. Attorneys also argued that they were not given sufficient time to respond to defendant and ISP's fees itemization. Court noted that it was error for district court to accelerate time for ruling on fee itemization without informing parties, but such error was harmless, as attorneys did not give any reason to believe fee itemization was unreasonable. Court also reviewed merits, and found that district court did not abuse its discretion in granting ISPs or defendant fees, as cases against both were baseless from inception. Court also found district court did not abuse its discretion in holding attorneys jointly and severally liable for fees awarded, as all three attorneys in case were "in cahoots." Additionally, court found district court did not abuse its discretion in holding attorneys in civil contempt and imposing stated fine, as district court set forth unambiguous order and attorneys failed to pay. Accordingly, court affirmed order of sanctions and order holding attorneys in civil contempt and imposing stated fine.

E. Miscellaneous

Wallert v. Atlan, No. 14-4099, 2015 U.S. Dist. LEXIS 13958 (S.D.N.Y. Feb. 5, 2015)

Defendant served letters regarding Rule 68 Offer of Judgment on plaintiff. Rule 68 provides that "party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." If rejected, Rule 68 offers become part of record and are used to make determination regarding attorneys' fees and damages – if judgment or settlement is less than Rule 68 offer, plaintiffs cannot recover costs or attorneys' fees from date of offer to suit's conclusion; and if plaintiff "cannot establish greater damages than those offered" by defendant, under Rule 68, plaintiff will be obligated to compensate defendant for costs it incurred after offer was made. Plaintiff requested that court either deem Rule 68 offer ineffective, or delay effective date of offer until end of discovery, since until completion of discovery he could not determine whether he should accept offer. Plaintiff also argued that risk he would run were he to reject offer – potentially having to absorb plaintiff's post-offer costs – had potential to "intimidate a plaintiff into accepting an offer that may be vastly out of proportion to the damages it could recover." However, court declined to find offer ineffective on basis that plaintiff was put in difficult position. Rule 68 is neutral, and designed to favor settlement; defendant's decision to make offer also exposed it to risk, that offer would exceed damages that might one day be awarded. "That is how Rule 68 works. That [plaintiff] is presented with a hard choice ... does not make it unlawful for [defendant] to put him to that choice."

VIII. PREEMPTION

Einiger v. Citigroup, Inc., No. 14-4570, 2014 U.S. Dist. LEXIS 128180 (S.D.N.Y. Sept. 11, 2014)

Plaintiff, developer of marketing program targeted towards health care providers, sued defendant Citigroup in New York state court for numerous claims including breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, fraudulent misrepresentation, unjust enrichment and *quantum meruit*. Agreement governing development of marketing program provided plaintiff all rights and ownership in intellectual property created for program, and provided defendant option to license or purchase intellectual property if program were successful. Program was successful, and defendant continued to use program, but did not license or purchase plaintiff's intellectual property. Plaintiff alleged defendant breached agreement by using plaintiff's intellectual property without payment via licensure or purchase. Defendant removed case to federal court, claiming preemption, and plaintiff moved to remand. Court found that written materials describing plaintiff's marketing program proposal fell within subject matter of copyright, and further allegations that plaintiff created and shared various uncopyrightable "ideas" and "concepts" did not remove intellectual property at issue from statute's broad preemptive reach. Court then considered whether each of plaintiff's claims was qualitatively different from claim under Copyright Act. With respect to contractual claims, court found plaintiff adequately alleged "promise to pay" for plaintiff's intellectual property if used, extra element not contained in Copyright Act. Accordingly, contractual claims were not preempted. Noting lack of Second Circuit precedent on issue, court agreed with courts in other Circuits that promissory estoppel claim also involved "promise to pay" as extra element, distinguishing claim from those under Copyright Act. It was undisputed that plaintiff's fraudulent misrepresentation claim was not preempted. Plaintiff's unjust enrichment and *quantum meruit* claims, alleging defendant unjustly benefited from unauthorized use of plaintiff's intellectual property were not qualitatively different from copyright infringement claim, and were therefore preempted. Court declined to exercise supplemental jurisdiction over plaintiff's remaining state law claims, and granted plaintiff's motion to remand with respect to those claims.

Cummings v. Soul Train Holdings LLC, No. 14-36, 2014 U.S. Dist. LEXIS 172382 (S.D.N.Y. Dec. 12, 2014)

Court granted defendants' motion to dismiss state law right of publicity claim as preempted. Action arose out of defendants' alleged misuse of recordings of plaintiff's performances, as member of Harold Melvin and the Blue Notes, on television program "Soul Train." Court held that right of publicity claim was preempted, since "once a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purposes of preemption under § 301(a)."

Bolier & Co., LLC v. Decca Furniture (USA), Inc., No. 12-160, 2014 U.S. Dist. LEXIS 131750 (W.D.N.Y. Sept. 19, 2014)

Court denied plaintiffs' motion to remand case to state court on basis that common law copyright claims in furniture designs were not preempted by Copyright Act. In order for state law claim to be preempted, (1) claim must fall within subject matter of copyright, and (2) claim must be equivalent to exclusive rights provided by Copyright Act. If claim requires extra element that makes it qualitatively different from copyright infringement claim, claim will not be considered equivalent, and there will be no preemption. Plaintiffs argued that because furniture designs and marketing materials were not registered, claims did not fall within Copyright Act, and that furniture designs are not eligible for copyright protection, and are thus not within subject matter of Act. However, even though furniture designs are generally not copyrightable due to fact that they are considered useful articles, some "individual design elements" in furniture may be copyrightable, and all furniture designs fell within subject matter of Act. Similarly, marketing materials fell within subject matter of copyright even though not all were protectable. Moreover, since plaintiffs had only alleged that they had copyright which defendants had infringed, plaintiffs' common law copyright claim did not contain extra element that would avoid preemption.

Coyle v. O'Rourke, No. 14-7121, 2015 U.S. Dist. LEXIS 585 (C.D. Cal. Jan. 5, 2015)

Plaintiffs, professional models, entered into agreements with defendants concerning use of photographs and videos for defendants' marketing campaign. Plaintiffs alleged defendants used their images and likenesses for commercial purposes beyond terms of agreements, and sued under California state law for (1) invasion of privacy and (2) misappropriation of likeness. Defendants removed action, claiming plaintiffs' allegations were preempted. Plaintiffs moved to remand to state court. As preemption is affirmative defense, it does not provide basis for removal jurisdiction unless there is "complete preemption": where Congress has so completely preempted particular area that any civil complaint raising select group of claims is necessarily federal in character. As Ninth Circuit had not yet addressed whether Copyright Act effects complete preemption, court looked to district courts, which used two-part test applied by Ninth Circuit for "defensive preemption" to determine whether there was complete preemption: (1) whether subject matter of state claim falls within subject matter of copyright; and (2) whether rights asserted under state law are equivalent to those protected by federal copyright law. Plaintiffs contended claims arose from their "*personae*," which are not copyrightable works of authorship. Defendants contended that plaintiffs' alleged injury arose from photographs and videos, which were "performances" captured in fixed tangible medium, and therefore claims were based on "alleged unauthorized reproduction of a visual performance contained within a copyrightable medium"; models in photo and video shoot were similar to actors in dramatic performance. Court disagreed, and found facial subject matter of complaint was *personae*, which is not copyrightable. Court, noting strong presumption against removal, found defendants did not meet burden to show removal was proper. Court therefore found it unnecessary to reach second part of test, and remanded case to state court. However, court did not award plaintiffs fees and costs, as defendants did not lack objectively reasonable basis for removal.

Weller Constr., Inc. v. Mem'l Healthcare Servs., No. 14-1115, 2014 U.S. Dist. LEXIS 144431 (C.D. Cal. Oct. 8, 2014)

Court granted motion to dismiss conversion claim as preempted. Plaintiff brought action in Orange County Superior Court, alleging causes of action for conversion, unjust enrichment and violation of California's unfair competition law. Defendant removed to federal district court on ground that state law claims were preempted by Copyright Act. Plaintiff allegedly advised defendant on suitable site for installation of linear accelerator vaults used for radiotherapy treatment, and at defendant's request provided proposed design plans for facility to hold vaults. Defendant subsequently used plaintiff's design to solicit bids from other builders, and informed plaintiff that plaintiff would not be architect for facility. Under *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9th Cir. 1998), for state law claim to be preempted, (1) "the claim must involve a work that falls within the 'subject matter' of the Copyright Act as set forth in 17 U.S.C. §§ 102 and 103," and (2) "the rights that a plaintiff asserts under state law must be 'rights that are equivalent' to those protected by the Copyright Act as specified in 17 U.S.C. § 106." Parties did not dispute first prong, since plaintiff's designs were "fixed in a tangible medium of expression" as required by 17 U.S.C. §§ 102 and 103. Parties disputed whether conversion claim is "equivalent" to copyright claim. Court found that "it was not the actual design plans that were wrongfully converted, but the information contained within." Court, therefore, concluded that plaintiff's conversion claim asserted rights that were substantially equivalent to rights available in copyright claim, meeting second prong of *Kodadek* preemption test. Court granted defendant's motion to dismiss conversion claim.

Dent v. Renaissance Mktg. Corp., No. 14-2999, 2014 U.S. Dist. LEXIS 152448 (N.D. Ill. Oct. 28, 2014)

Members of 1985 Chicago Bears football team filed suit against defendants based on defendants' alleged unauthorized use of plaintiffs' performance of song and video called "Super Bowl Shuffle," touting 1985 Chicago Bears' success. Record company, which had royalty agreement with plaintiffs, assigned its interest in song to president, and president's widow claimed that she had survivorship rights in song. Plaintiffs argued that assignment from record company to president was inoperative because under terms of agreement, record company could not assign its interest without plaintiffs' consent; and therefore defendants benefited from distributing and licensing song without their authorization. Plaintiffs brought claims in state court for constructive trust, declaratory judgment and injunctive relief, conversion, unjust enrichment and accounting. Defendants removed suit to federal court on basis that all claims were preempted, and plaintiffs moved to remand. Court denied plaintiffs' motion, finding three claims asserted rights under Copyright Act. Complete preemption provides exclusive federal jurisdiction in cases where Congress intended scope of federal law to be so broad as to entirely replace any state law claim. In order for federal Copyright Act to preempt state law claim, (1) work in which rights are asserted must be within subject matter of copyright, and (2) rights asserted must be equivalent to exclusive rights specified in § 106 of Copyright Act. State law claim that is "qualitatively distinguishable" from exclusive rights under Copyright Act will not be preempted. If one

claim is preempted, removal is proper. Even though plaintiffs alleged that their request for declaratory relief and injunction was based on contract between record company and plaintiffs, since plaintiffs alleged that defendants were not parties to royalty agreement and were looking to prevent defendants from distributing and licensing song, plaintiffs were essentially asking court to enforce their rights of reproduction, publication and performance, exclusive rights under Copyright Act. Moreover, since crux of conversion claim was unauthorized use of song, plaintiffs were focused on defendants' unauthorized publishing of protected work, which is equivalent to exclusive right under Copyright Act. As such, court found that Copyright Act preempted these state law claims.

Visual Communs., Inc. v. Assurex Health, Inc., No. 14-3854, 2014 U.S. Dist. LEXIS 131495 (E.D. Pa. Sept. 18, 2014)

District court dismissed plaintiff's state law claims for conversion and *quantum meruit* as preempted. Plaintiff, trade show exhibit designer, sued defendant, former client, for copyright infringement, conversion and *quantum meruit*. Defendant rented custom exhibit system from plaintiff in 2013 and used exhibit at trade shows and conferences. Defendant terminated relationship in November 2013 without purchasing or licensing exhibit system design. In 2014, plaintiff attended trade show for client and found defendant in close proximity with identical exhibit. Defendant moved to dismiss plaintiff's state law claims as preempted. Plaintiff argued conversion claim alleged extra element beyond infringement claim, relying on Middle District of Pennsylvania case finding use of chattel without consent to be extra element. Defendant argued plaintiff could not allege wrongful use of plaintiff's chattel, since only chattel at issue was trade show exhibit constructed by third party at defendant's expense. Noting lack of Third Circuit authority, district court relied on Eastern District of Pennsylvania precedent finding conversion claims preempted, and held plaintiff's conversion claim, which had alleged appropriation of plaintiff's design for defendant's pecuniary benefit without consent or compensation, merely "another way of claiming copyright infringement," and thus preempted. Plaintiff argued *quantum meruit* claim alleged extra element beyond infringement claim, because claim included allegation of pecuniary benefit conferred on defendant without compensation to plaintiff. Noting that *quantum meruit* claims are treated as unjust enrichment claims under Pennsylvania law, and courts within Third Circuit have found unjust enrichment claims preempted, court found no benefit to defendant other than not having to independently create design. Since plaintiff's *quantum meruit* claim sought compensation for defendant's use of design, claim did not contain extra element beyond copyright infringement claim and was preempted.

Maxient, LLC v. Symplicity Corp., No. 14-1184, 2014 U.S. Dist. LEXIS 150542 (E.D. Va. Oct. 23, 2014)

Court granted in part and denied in part plaintiff's motion to remand. Defendants removed case from state court on basis that claims of misappropriation and computer fraud were preempted. Plaintiff and defendant were competing software developers who created student conduct records management software and provided it to educational institutions. Plaintiff alleged that defendants accessed confidential password-protected information on plaintiff's

website, made it available to customers without authorization, and used confidential and proprietary information from plaintiff's software to create features in their own software. In order for state law claim to be preempted, (1) work must be within subject matter of copyright in §§ 102 and 103; and (2) rights must be equivalent to exclusive rights specified in § 106. If there is extra element to state law claim, claim will not be preempted. Defendants argued that because all of plaintiff's claims were based on alleged access to and copying of plaintiff's computer software and other materials, claims were preempted. All claims related to computer programs, which are within subject matter of copyright. Court found, however, that while conversion and trespass claims were preempted, false pretenses and encryption claims were not. Specifically, court found that plaintiff's claim for obtaining property on computer through false pretenses was not preempted because it added extra element – false pretenses – that distinguished claim from copyright infringement; plaintiff's claim that defendant used encryption to further criminal activity was not preempted because use of encryption was essential extra element that distinguished claim from copyright infringement. However, plaintiff's conversion claim was preempted, because "plaintiff alleges only the unlawful retention of its intellectual property rights and not the unlawful retention of the tangible object embodying its work," and only added element of claim was that computer was used "without authorization," which did not qualitatively change nature of claim. Plaintiff's computer trespass claim was preempted, because even though claim contained extra element of "malicious intent," added element changed scope of claim but not its nature.

Baglama v. MWV Consumer & Office Prods., No. 13-276, 2014 U.S. Dist. LEXIS 156648 (S.D. Ohio Nov. 5, 2014)

District court granted partial summary judgment for defendants, finding some of plaintiffs' claims preempted. Plaintiffs designed "peel-and-stick, dry-erase and wall organizer" for defendants. Product was released to market and was very successful. Plaintiffs were paid for initial design of product, but alleged they were not paid additional fees for product's release to market, as agreed upon by parties. Plaintiffs filed suit for (1) declaratory relief; (2) injunctive relief; (3) breach of written contract; (4) breach of implied contract; (5) unjust enrichment; and (6) accounting. Defendants filed motion for summary judgment, alleging claims were preempted. As to declaratory judgment claim, court found that defendants had not identified evidence that there was justiciable controversy as to whether plaintiffs owned copyright in design, and therefore denied summary judgment. As to injunctive relief, court noted that it was not cause of action on its own, but relief that could flow from plaintiffs' other claims. However, plaintiffs sought to enjoin defendants from continuing to wrongfully use designs for profit. Court found that this claim asserted right equivalent to right under Copyright Act, and therefore was preempted. As to breach of contract claim, court found series of emails between parties did not amount to written contract. However, court found breach of implied contract claim contained extra element, promise to pay, and therefore was not preempted. As to unjust enrichment, court held that alleged unauthorized use of design did not involve rights different from those under Copyright Act; claim therefore was preempted. Finally, as to accounting, if claim could be viewed as cause of action, rather than

relief flowing from another claim, it was also preempted, because it was exact relief provided under Copyright Act, with no additional element.

Patel v. Hughes, No. 13-701, 2014 U.S. Dist. LEXIS 129474 (M.D. Tenn. Sept. 16, 2014)

District court granted defendants' motion to dismiss plaintiffs' state and common law claims as preempted. Plaintiffs, owner of copyrighted software and two others named as contacts for rights and permissions on copyright registration, sued defendants for copyright infringement and various state and common law claims. Only one of three plaintiffs owned copyright to source code; other two lacked standing to pursue infringement claim. Plaintiffs agreed to withdraw state and common law claims brought by copyright owner, but argued that because two plaintiffs lacked standing to bring copyright claim, their state and common law claims could not be preempted. District court disagreed, noting statutory language stating "no person is entitled" to pursue state or common law claims equivalent to copyright claims, and that Copyright Act's fundamental purpose of uniform federal system to protect original works. Court recognized authority stating conversion claims usually survive preemption, but action for conversion of intangible personal property was not recognized in Tennessee, and claims centered on intangible rights in property were preempted. Since plaintiffs' claim centered on use and sale of source code, not return of personal property, conversion claim was preempted. Unjust enrichment claim as pleaded alleged nothing more than unauthorized use of copyrighted material, and was thus preempted. Plaintiffs' claims for deceptive trade practices and unfair competition were also preempted, since confusion to consumer regarding source of software was not extra element qualitatively different from copyright infringement claim. Accordingly, plaintiffs' state law claims for conversion, unjust enrichment, deceptive trade practices and unfair competition were dismissed.

Dryer v. Nat'l Football League, No. 09-2182, 2014 U.S. Dist. LEXIS 144362 (D. Minn. Oct. 10, 2014)

Plaintiffs, former NFL players, brought suit against NFL alleging violation of right of publicity under various state laws arising from NFL's use of video footage of NFL games showing plaintiffs playing football. Court granted defendant summary judgment, holding that Act preempted and thus foreclosed plaintiffs' state-law causes of action for violation of right of publicity. First, disputed work was within subject matter of copyright, since NFL maintained valid and enforceable copyright in video footage gathered during each NFL football game. Moreover, in reversing prior ruling, court concluded that right of publicity was equivalent to exclusive rights within scope of Act, since plaintiffs' causes of action would escape preemption only if such works were used for advertising purposes, but in instant case NFL used works for expressive purposes. In short, plaintiffs' performances on football field were part of copyrighted material owned by NFL and "[plaintiffs'] likeness cannot be detached from the copyrighted performances that were contained in the films."

Cartagena Enters. v. EGC Corp., No. 14-500, 2014 U.S. Dist. LEXIS 168293 (D.P.R. Dec. 3, 2014)

District court granted defendants' motion to dismiss plaintiff's unjust enrichment claim as preempted. Plaintiff, music publisher, owned and controlled catalog of Latin music compositions. Defendants requested license to include two compositions owned by plaintiff on album entitled *El Gran Combo de Puerto Rico – 50 Aniversario* by salsa band El Gran Combo. After examining sample of album, plaintiff notified defendants that two other compositions featured on album also belonged to plaintiff, and denied license to use all four compositions, finding style and manner in which songs were used "significantly altered" their basic melodies, structures and musical arrangements. Defendants attempted unsuccessfully to secure compulsory license, then notified plaintiff they had acquired license through Harry Fox Agency. Plaintiff responded that Harry Fox Agency lacked authority to issue license and license was invalid, and sent cease and desist letter to Harry Fox Agency. Defendants proceeded to feature all four compositions, with altered lyrics, on album, and added fifth song featuring portions of four other compositions owned by plaintiff, all without license or authorization from plaintiff. Plaintiff sued defendants for copyright infringement, false designation of origin and unfair competition, and unjust enrichment under Puerto Rico law. Defendants moved to dismiss unjust enrichment claim, claiming plaintiff failed to allege extra element to render claim qualitatively different from copyright infringement claim. In support of unjust enrichment claim, plaintiff had reincorporated allegations underlying copyright infringement claim, and added allegation that defendants were unjustly enriched at plaintiff's expense, and should be required to make restitution for benefits they received from using compositions without consent. District court found no factual allegations distinct from those alleged in support of copyright infringement claim. Accordingly, plaintiff's unjust enrichment claim under Puerto Rico law was preempted.

IX. DIGITAL MILLENNIUM COPYRIGHT ACT

Wolk v. Photobucket.com, Inc., 569 Fed. Appx. 51 (2d Cir. 2014)

Second Circuit affirmed district court's grant of summary judgment to defendant on plaintiff's claims of copyright infringement. *Pro se* appellant contended that appellee file hosting website was not entitled to safe harbor protection of DMCA § 512(c), arguing that appellee should have done more to police website for infringing material. Court held that under *Viacom. v. YouTube*, safe harbor applies so long as online service provider "(1) properly removes infringing activity upon gaining subjective knowledge of infringement or of 'facts that would have made the specific infringement objectively obvious to a reasonable person,' (2) bans repeat offenders, and (3) does not have the 'right and ability to control' infringing activity to which a 'financial benefit' is 'directly attributable,'" and that defendant met those requirements.

Williams v. Roberto Cavalli S.p.A., No. 14-6659, 2015 U.S. Dist. LEXIS 34722 (C.D. Cal. Feb. 12, 2015)

District court denied defendant's motion to dismiss plaintiff's claim for removal and alteration of copyright management information (CMI). Plaintiffs, well-known graffiti artists, sued defendants, producers and distributors of Just Cavalli clothing, for copyright infringement, removal and alteration of CMI, unfair competition and negligence. Plaintiffs had created mural in San Francisco containing signature elements that identified plaintiffs as its creators, namely stylized signatures of pseudonyms associated with two plaintiffs and background imagery publicly recognized as third plaintiff's signature style. Defendants took high-resolution photographs of mural and placed images on Just Cavalli clothing collection. Defendants altered images by rearranging stylized signatures to render them indiscernible on resulting clothing. On some items, defendants superimposed Just Cavalli over images of plaintiffs' mural. Plaintiffs alleged defendants violated § 1202 prohibition on intentional removal or alteration of CMI by removing and altering signatures that identified plaintiffs as authors of mural. Defendant Staff USA, Inc. moved to dismiss claim for removal and alteration of CMI, arguing without citation to authority that "Section 1202(b) does not protect signatures." District court disagreed, finding signatures "exact type of information that would identify the author of a work." Staff further argued legislative purpose of DMCA targeted at digital copyright issues required plaintiff to allege technological process involved in altering or removing signatures. Court disagreed, noting recent authority rejecting that proposition and plain meaning of statute, which does not limit CMI to digital information and defines CMI as information listed in § 1202(c)(1-8), "including in digital form." Since reading statute to require digital CMI would render that language superfluous, court must avoid that reading. Accordingly, plaintiffs sufficiently alleged that signatures constituted CMI were intentionally removed by defendants to aid infringement.

Rosen v. Global Net Access, LLC, No. 10-2721, 2014 U.S. Dist. LEXIS 84560 (C.D. Cal. June 20, 2014)

Plaintiff photographer visited website and found nine of his copyrighted photographs displayed there without authorization. Plaintiff traced website to IP address located on server owned by defendant. Plaintiff served takedown notice on defendant in February 2010, and in April 2010 discovered that infringing photographs were still available on website, and that website was still located on server owned by defendant. Plaintiff brought claim for contributory infringement against defendant. To state contributory infringement claim, plaintiff must allege that (1) he/she is owner of valid copyrights; (2) third person directly infringed plaintiff's copyrights; (3) defendant knew or should have known of infringing activity; and (4) defendant "materially contributed" to activity by direct infringer. Court found that defendant "knew or should have known" of infringing activity when it received plaintiff's DMCA notice, and "materially contributed" to infringing activity by failing to remove infringing material from website after it received notice. Moreover, claims were not barred by DMCA safe harbors, which provide shield from liability for transitory digital network communications and "information residing on systems or networks at the direction of users," because defendant did not meet threshold requirement of § 512(i) that ISP adopt

and implement policy terminating subscriptions of account holders who are repeat infringers, that it have working notification system and procedure for dealing with DMCA-complaint notifications, and that it not actively prevent copyright owners from collecting information needed to issue such notifications. Since defendant was unable to produce any record of DMCA notifications, court inferred that no “working notification system” existed. Moreover, defendant did not meet requirements of § 512(a) because service provider’s connection with material must be transient, and defendant’s storage of data was not transient. Defendant did not meet requirements of § 512(c) because it had actual knowledge of infringing activity when it received plaintiff’s DMCA notice.

Murphy v. Millennium Radio Group LLC, No. 08-1743, 2015 U.S. Dist. LEXIS 10719 (D.N.J. Jan. 29, 2015)

Plaintiff, photographer, sued defendants, producer and co-hosts of radio show, alleging violation of DMCA resulting from defendants’ use of plaintiff’s copyrighted photograph depicting defendant co-hosts on defendants’ website. Record established that defendants posted unaltered copy of defendants’ photograph on website, and told listeners to alter photograph and submit altered versions to radio station. Twenty-six such altered versions were received. Record also established that version of unaltered photograph on website did not include plaintiff’s copyright management information (“CMI”). Defendants moved for partial summary judgment, arguing plaintiff’s claim for removal of CMI under DMCA § 1202 could not be maintained because (1) Third Circuit earlier found defendant’s posting of listener-altered photographs constituted fair use, and § 1202 requires underlying infringement; and (2) defendants’ posting of single copy of unaltered photograph did not violate § 1202. In opposition to motion, plaintiff requested additional discovery on issue of defendants’ removal of plaintiff’s CMI from unaltered photograph. Noting case presented issue of apparent first impression, court reviewed plain language of § 1202, and noted statute prohibits removal of CMI where offender has knowing “intent to abet” infringement. Accordingly, court found underlying infringement not required to violate § 1202, and denied summary judgment as to claim based on posting of listener-altered photographs. Regarding posting of unaltered version of photograph, court found insufficient facts in record to establish how CMI was removed or omitted from photograph.

Frost-Tsuji Architects v. Highway Inn, Inc., No. 13-496, 2015 U.S. Dist. LEXIS 6627 (D. Haw. Jan. 21, 2015)

Court denied plaintiff’s request for reconsideration of interlocutory order granting summary judgment against plaintiff on claim of removal of copyright management information under § 1202 of DMCA. Plaintiff, architects, sued defendants for violation of § 1202, alleging that defendants removed plaintiff’s CMI from copyrighted architectural drawing created by plaintiff for construction of restaurant. Plaintiff argued that court erred in failing to consider earlier-submitted evidence regarding defendant’s possession and transmission of copies of plaintiff’s drawings with CMI removed. Court earlier reasoned that such evidence did not establish violation of § 1202 because mere possession and sending of drawings without plaintiff’s CMI did not prove that it was defendant who removed CMI. Court noted that

liability under § 1202 requires that defendant intentionally removed CMI, and did so knowingly or having reasonable grounds to know that doing so would induce, enable, facilitate or conceal infringement. Here, court found that “none of [plaintiff’s] arguments raises a genuine issue of fact as to whether any defendant removed copyright management information from [plaintiff’s] original work, rather than indicating that defendants created derivative work from [plaintiff’s work].” Accordingly, court denied plaintiff’s request for reconsideration of interlocutory order granting summary judgment to defendant on this claim.

X. MISCELLANEOUS

A. Insurance

Graper v. Mid-Continent Cas. Co., 756 F.3d 388 (5th Cir. 2014)

Court of appeals affirmed district court’s grant of summary judgment to defendant insurance company, holding that insurer had no disqualifying conflict of interest, and thus was not required to pay fees of attorney of plaintiff’s choice in defending copyright infringement lawsuit. Insurer issued reservation of rights letter to insured, acknowledging that it had duty to defend lawsuit, but questioning whether it must indemnify. Court explained that although such reservation of rights can create potential conflict of interest, it does not necessarily create such conflict. Court further explained that “the test to apply is whether the facts to be adjudicated in the underlying lawsuit are the same facts upon which coverage depends.” Court held that where insureds are sued for copyright infringement, there are no facts capable of being adjudicated in copyright litigation that would decide issues of coverage between insurer and insureds. Because coverage did not depend on same facts as underlying lawsuit, no disqualifying conflict of interest exists. Moreover, trial court’s determination that there was willful copyright violation under § 504(c)(2) would not settle issue of whether violation was “knowing,” thereby excluding coverage under policy; finding of willfulness under Copyright Act does not require proof of knowing conduct. Insurer fulfilled its duty to defend insureds by tendering insurer’s chosen attorney, and insurance company was properly granted summary judgment on insureds’ claim.

B. Antitrust

Meredith Corp. v. SESAC, LLC, No. 09-9177, 2015 U.S. Dist. LEXIS 20055 (S.D.N.Y. Feb. 19, 2015)

Meredith Corp. brought antitrust class action against SESAC, alleging anticompetitive practices in selling blanket licenses for rights to perform copyrighted music of SESAC’s affiliates. Meredith, part of group of mostly local television stations, alleged that SESAC’s practices “made it impossible or uneconomical for local television stations to obtain from SESAC anything but its blanket license.” Meredith and SESAC agreed to settlement of \$58.5 million for past harm. For prospective relief, SESAC agreed to (1) offer all stations

blanket license or viable alternative; (2) relief from threat of litigation during license negotiations; (3) enter into binding arbitration if SESAC is unable to come to agreement on industrywide license fees and/or terms; and (4) neither prohibit nor interfere with SESAC's affiliates entering into direct licenses with local stations. In return, Meredith agreed to dismiss action with prejudice. Court found proposed settlement to be "fair, reasonable, and adequate" in view of nine-factor test set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), and approved settlement.

C. Miscellaneous

Music Choice v. Copyright Royalty Bd., 774 F.3d 1000 (D.C. Cir. 2014)

1995 amendments to Copyright Act provided for appointment of Copyright Royalty Board ("CRB") by Librarian of Congress to set reasonable rates and terms of royalty payments if owners of sound recording copyrights were unable to negotiate mutually acceptable royalty with digital music services. SoundExchange, organization responsible for collecting and distributing royalties to copyright owners, appealed decision by CRB setting royalty rates for satellite digital audio radio services ("SDARS") and preexisting subscription services ("PSS") on grounds that CRB had arbitrarily set royalty rates too low. SoundExchange also contended that CRB erred in defining "gross revenues" for purposes of determining what percentage of such gross revenues should constitute appropriate royalty rate. Music Choice, PSS that provides music-only television channels, also appealed determination, arguing that CRB arbitrarily set PSS rates too high. Appellate court affirmed CRB determination, noting that appellate court is "especially deferential" to CRB, and finding that CRB had acted within its discretion in setting royalty rates, given policy considerations enumerated in § 801(b)(1). Further, CRB had reasonably explained its determinations, based those determinations on substantial evidence, and had not relied on impermissible or "extra-record" factors. Specifically, court found use of prior marketplace benchmark as guidepost in determining rate was not improper. Court further found that CRB did not act arbitrarily by allowing satellite radio provider to exclude from "gross revenues" revenue attributable to non-music programming because, contrary to SoundExchange's argument, there was no double discounting of this non-music programming. Nor did CRB act arbitrarily by allowing provider to deduct from its SDARS royalty obligations revenue attributable to pre-1972 sound recordings, reasoning that federal copyright protection does not extend to such recordings. CRB did not act arbitrarily in using existing PSS rate, which was result of settlement, as starting point in setting PSS rate.

Flo & Eddie, Inc. v. Sirius XM Radio Inc., No. 13-5784, 2015 U.S. Dist. LEXIS 17374 (S.D.N.Y. Feb. 10, 2015)

Court had previously denied defendant's motion for summary judgment, holding that plaintiffs' common law copyrights in pre-1972 sound recordings encompassed exclusive right of public performance. Upon consideration of relevant factors, court certified interlocutory appeal to Second Circuit to present question of whether, under New York law,

holders of common law copyrights in pre-1972 sound recordings have right to exclusive public performance of said sound recordings. First, case involved “critically important controlling question of law,” since resolution of issue will have “precedential value for a large number of cases.” Second, there was “substantial ground for difference of opinion,” since issue concerned “unaddressed question of law” about which reasonable minds could differ. Third, immediate appeal would “materially advance the ultimate termination of the litigation,” since if lower court’s holding were reversed, then lawsuit would end immediately or in short order; or, alternatively, if lower court’s holding is affirmed, then case would turn to issue of how to license and compensate public performances of pre-1972 sound recordings. Court held that litigation would never proceed without “definitive ruling on this question of first impression.”

Flo & Eddie Inc. v. Sirius XM Radio Inc., No. 13-5693, 2014 U.S. Dist. LEXIS 139053 (C.D. Cal. Sept. 22, 2014)

Plaintiffs, owners of all rights in master sound recordings of The Turtles, brought suit against nationwide satellite and Internet radio service for infringement of pre-1972 sound recordings. Because pre-1972 sound recordings are excluded from scope of Act, rights in those sound recordings are governed by state law. Court squarely confronted issue of first impression: Does ownership of pre-1972 sound recordings under California law include exclusive right to public performance? Court answered question affirmatively, principally on basis that California statute governing ownership of pre-1972 sound recordings defined “exclusive ownership” without any limitation excepting specific exception that such ownership did not include right to make “covers.” Accordingly, court ruled that California legislature intended ownership of pre-1972 sound recordings to include all rights that can attach to intellectual property, save singular, expressly-stated exception for making “covers.” Court further held that there was no California common law rule regarding public performance rights in said sound recordings (contrary or otherwise), and also that legislative history of California statute was consistent with court’s textual reading of statute to encompass right of public performance. Moreover, two prior California court decisions implicitly or in *dicta* recognized right of public performance in pre-1972 sound recordings. Having found that plaintiffs owned right of public performance in subject recordings, court granted summary judgment on copyright infringement claim based on violation of right of public performance. However, due to disputed issues of fact, court denied summary judgment on copyright infringement claim based on violation of reproduction right.

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