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**Cowan, Liebowitz & Latman**

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**Copyright Review**  
**2016**

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*“Recent Developments In Copyright”  
Selected Annotated Cases*

By Thomas Kjellberg and Scott Ceresia

with

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**These annotations cover cases reported since our report at  
the 39<sup>th</sup> Copyright Society Annual Meeting of 2015.**

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## I. JURISDICTION AND PROCEDURAL ISSUES

### A. Subject Matter Jurisdiction

*Manning v. Dimech*, No. 15-5762, 2015 U.S. Dist. LEXIS 173376 (C.D. Cal. Dec. 30, 2015)

District court granted defendants' motion to dismiss complaint for declaratory judgment, finding complaint did not present "actual case or controversy" within meaning of Declaratory Judgment Act. Plaintiff, actress Taryn Manning, partnered with defendants to produce film tentatively titled *Droppers*. Plaintiff and defendants produced trailer for film, after which parties' business relationship ended. Defendants threatened litigation against plaintiff, alleging that plaintiff infringed copyright belonging to defendants by releasing trailer without defendants' permission. Plaintiff sought judicial determination to establish: (a) parties' rights with respect to copyright allegedly belonging to defendants; (b) that she had not infringed valid copyright owned by defendants; and (c) that defendants did not have interest in purported copyright to *Droppers* motion picture screenplay sufficient to confer standing to pursue claims of infringement. Court applied Ninth Circuit's two-part test for ripeness, considering (1) fitness of issues for judicial decision, and (2) hardship to parties of withholding court consideration; that is, whether withholding review would result in "direct and immediate" hardship and would entail more than possible financial loss. As to first prong, court found issue unfit for judicial decision because complaint did not allege that defendants registered copyright in film or trailer. As to second prong, plaintiff did not demonstrate that she "will suffer direct and immediate hardship entailing more than possible financial loss." Therefore, case was not ripe for adjudication, and court lacked subject matter jurisdiction.

*Regents of the Univ. of Cal. v. Aisen*, No. 15-1766, 2015 U.S. Dist. LEXIS 147705 (S.D. Cal. Oct. 29, 2015)

District court denied motion to remand case to state court upon finding that complaint implicated federal jurisdiction under Act. Although complaint asserted only state-law causes of action and did not mention Act, several asserted claims necessarily raised questions concerning ownership and control that could only be resolved by reference to Act's work-for-hire doctrine. In particular, because complaint asserted work-for-hire ownership of disputed electronic data capture software, accuracy of plaintiff's claims "necessitate[d] resort to federal copyright law." Under artful pleading doctrine, plaintiff could not defeat removal of case by omitting to plead necessary federal questions on face of complaint. Further, court held that plaintiff's attempt to narrow claims to medical study data did not eliminate copyright question because collections of data are potentially copyrightable and therefore question of whether plaintiff or defendant owned copyright in such data could affect resolution of case.

*Royal Printex, Inc. v. LA Printex Industries, Inc.*, No. 15-2075, 2015 U.S. Dist. LEXIS 97072 (C.D. Cal. July 21, 2015)

Defendant removed case alleging breach of license agreement from state court to federal court on ground that complaint arose under copyright law. District court remanded action to state court upon finding that plaintiff's complaint did not ask for remedy expressly granted by Act, did not require interpretation of Act and there was no dispute regarding validity of defendant's copyrights. Rather, sole disputed issues arose under state contract law including validity of agreement, whether particular individual was authorized to enter into contract on defendant's behalf and whether defendant wrongfully repudiated contract. District court also rejected argument that case arose under Act because plaintiff could have asserted federal causes of action such as declaration of non-infringement. Plaintiff was "master of its complaint" and chose to assert only state-law causes of action, even though federal causes of action were also available. Finally, fact that defendant could have asserted counterclaim for infringement was irrelevant to federal jurisdiction inquiry.

*Puetz v. Spectrum Health Hosps.*, No. 14-275, 2015 U.S. Dist. LEXIS 83098 (W.D. Mich. June 26, 2015)

District court dismissed plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff doctor had admission privileges at defendant hospitals from 1999 through 2013. Plaintiff alleged that independent of duties to defendant, she had developed various observational medicine materials for use in evaluating and treating patients ("Observation Unit Materials") on her own time and without use of defendant's facilities or resources. Plaintiff alleged that defendant had previously rejected observational medicine for financial reasons, but eventually viewed plaintiff as competitor and took steps to restrict plaintiff's ability to compete by inserting intellectual property clause in her contract, taking control of plaintiff's Observation Unit Materials, attempting to license and distribute plaintiff's Observation Unit Materials in defendant's name, and insisting defendant could prohibit plaintiff from consulting with other hospitals regarding observation units. In 2013, plaintiff was terminated and banned from defendant's facilities after commenting "OMG. Is that TB?" on Facebook post by nurse, which contained picture of female's backside plaintiff suspected belonged to former patient. Plaintiff alleged defendant had exaggerated plaintiff's mistake to justify termination and gain greater control over plaintiff's intellectual property, and brought suit alleging various state law claims and requesting declaratory judgment that plaintiff owned copyright in Observation Unit Materials. Noting that claims referring to Copyright Act do not necessarily arise under Act for purposes of federal subject matter jurisdiction, and that Declaratory Judgment Act does not provide independent basis for jurisdiction, court considered jurisdiction from perspective of defendant's hypothetical claim and whether coercive action defendant might have brought to enforce its rights would necessarily present federal question. Court applied two part test for jurisdiction from *Severe Records, LLC v. Rich*, 658 F.3d 571 (6th Cir. 2011): (1) whether defendants could have sued plaintiffs for copyright infringement under theory that they were not authors or owners of works in question; and (2) whether such action would have arisen under federal law, and responded no to both questions. Here, defendants had not threatened to sue for copyright infringement,

sent demand letters, or in any way disputed plaintiff's authorship. Instead, parties' dispute concerned ownership and control over Observation Unit Materials on basis of contract. Although dispute regarding whether Observation Unit Materials were works made for hire would have given rise to federal question under Copyright Act, defendant would raise work-for-hire doctrine as defense rather than coercive claim, and plaintiff had not alleged defendant ever asserted work-for-hire doctrine as basis for its ownership. Accordingly, plaintiff's declaratory judgment claim did not arise under Act, and court lacked subject matter jurisdiction over case.

*Frazier v. Capitol CMG Publ'g*, No. 14-2310, 2015 U.S. Dist. LEXIS 164611 (M.D. Tenn. Dec. 4, 2015)

Plaintiff songwriter sued defendants, including gospel artist and publisher, for copyright infringement and other claims stemming from defendants' collection of royalties for two gospel songs composed by plaintiff ("Compositions"). Plaintiff and defendants had executed publishing agreement providing defendants with 25% of publishing income generated from plaintiff's Compositions on "Family Affair II" album. Plaintiff alleged defendants had violated agreement by collecting 25% of all royalties associated with plaintiff's Compositions rather than 25% of publishing income from "Family Affair II" album. Defendants moved to dismiss plaintiff's copyright claims for lack of subject matter jurisdiction on ground that plaintiff's claims only involved state contract law and did not arise under federal copyright laws. Court acknowledged contract at center of parties' dispute, but found plaintiff had alleged more than breach of contract by claiming defendants had collected additional royalties outside scope of contract. Accordingly, plaintiff had alleged infringement and established subject matter jurisdiction through claims for relief arising under Act.

*Humphreys & Partners Architects LP v. Atlantic Dev. & Investments Inc.*, No. 14-1514, 2016 U.S. Dist. LEXIS 50977 (D. Ariz. Apr. 15, 2016)

Defendant filed counterclaim seeking declaration that defendant was owner of architectural plans at issue. Plaintiff moved to dismiss counterclaim on ground that court lacked authority to grant requested declaratory relief. District court denied plaintiff's motion. Although federal court "cannot issue a copyright" itself, such court may properly resolve dispute over ownership to copyrighted material as between parties in pending case. Thus, court's inability to issue valid copyright does not preclude court from issuing declaratory judgment and does not strip court of subject matter jurisdiction.

## **B. Personal Jurisdiction and Venue**

*Erickson v. Nebraska Machinery Co.*, No. 15-1147, 2015 U.S. Dist. LEXIS 87417 (N.D. Cal. July 6, 2015)

Plaintiff, photographer and California domiciliary, sued defendant, distributor of heavy equipment and Nebraska domiciliary, for infringement arising from defendant's use of

plaintiff's photographs on defendant's website without permission. Defendant admitted copying of photographs for defendant's website redesign, but claimed publication of photographs on final website was inadvertent. Defendant moved to dismiss for lack of personal jurisdiction. Plaintiff argued defendant's use of photographs was "express aiming" under Ninth Circuit purposeful direction test for personal jurisdiction because defendant website provided address in California. However, court noted holdings in cases cited by plaintiff were called into question by Supreme Court's recent decision in *Walden v. Fiore*, and there was split among district courts in Ninth Circuit on whether *Walden* overruled prior law. Relying on only precedential decision in district since *Walden*, court's 2015 decision in *Picot v. Weston*, court noted that defendant's mere act of copying plaintiff's photographs and posted them on website "did not involve entering California, contacting anyone in California, or otherwise reaching out to anyone in California." Court also rejected plaintiff's argument that defendant's alleged attempt to license photographs satisfied purposeful direction test because such negotiations did not give rise to plaintiff's infringement claim. Lastly, court rejected argument that defendant's website itself could confer personal jurisdiction, noting lack of evidence that website was directed at California residents. Accordingly, court found plaintiff failed to establish *prima facie* case for personal jurisdiction over defendant and ordered transfer of case to District of Nebraska.

*Wake Up & Ball LLC v. Sony Music Entm't Inc.*, 119 F. Supp. 3d 944 (D. Ariz. 2015)

Plaintiff, hip-hop record label and producer, Arizona company, sued defendant record label, Delaware company located in New York, and hip-hop artist, resident of Arizona, for infringement arising from defendant's posting of plaintiff's copyrighted music video on several online video websites, including YouTube and iTunes, without permission. Defendant admitted that it acted intentionally when it published defendant's video online, but moved to dismiss complaint for lack of personal jurisdiction, claiming that its actions were not expressly aimed at Arizona. Court noted that defendant's mere negotiation with Arizona company and Arizona-based artist did not constitute express aiming, nor did mere fact that defendant placed video on publicly available websites accessible in Arizona. However, court found that defendant's promotion of video release party in Arizona at which plaintiff's video was shown, and promotion of live performances by artist in Arizona, if established, "would tend to show the 'something more' required for express aiming," especially since defendant would receive percentage of revenue from such performances. Given that such facts were in dispute, court denied defendant's motion to dismiss and granted parties leave to conduct limited jurisdictional discovery.

*Epic Tech, LLC v. STHR Grp., LLC*, No. 15-252, 2015 U.S. Dist. LEXIS 163486 (M.D.N.C. Dec. 7, 2015)

Magistrate judge recommended that defendant's motions to dismiss be denied. Plaintiff, owner of Legacy proprietary gaming software system, sued entities involved in distribution and utilization of pirated version of Legacy called Falcon. Court denied motions to dismiss for lack of personal jurisdiction because defendant initiated and entered into agreement with North Carolina corporation that was governed by North Carolina law, contained North



Carolina forum selection clause with corresponding consents to jurisdiction in North Carolina, and governed distribution of materials in North Carolina.

### C. Pleadings

*Kousnsky v. Amazon.com*, No. 14-1979, 2015 U.S. App. LEXIS 20380 (2d Cir. Nov. 24, 2015)

Plaintiff photographer brought action for infringement against defendant licensee. Plaintiff alleged that defendant had breached parties' licensing agreement by altering images and failing to provide plaintiff with final approval of photographs. Second Circuit held that district court should have allowed plaintiff opportunity to amend claims against defendant. Court noted that, absent parties' agreement asserted as defense, defendant could be subject to claim of infringement. Federal courts have exclusive jurisdiction over copyright claims "even if the plaintiff seeking copyright remedy is only entitled to that remedy on prior showing of contractual entitlement." Court held that complaint lacked facts required to state plausible claim because plaintiff did not identify artwork defendant allegedly altered or how defendant "sold" plaintiff's work after agreement terminated. If complaint was amended to include such facts, defendant could potentially be liable for infringement.

*FC Online Mktg., Inc. v. Burke's Martial Arts, LLC*, No. 14-3685, 2015 U.S. Dist. LEXIS 89415 (E.D.N.Y. July 8, 2015)

District court denied motion to dismiss. Provider of website design, search engine optimization, and other online marketing services sued for infringement based upon former licensee's development of competing website. Defendants moved to dismiss infringement claim on ground that plaintiff did not sufficiently identify nature of alleged infringement insofar as complaint failed to attach screenshots of plaintiff's website as website appeared during relevant time period. District court denied motion, finding that there is no requirement under Rule 8 that plaintiff attach copies of works in question in order to state plausible claim for infringement. Court held that plaintiff's allegations identifying plaintiff's website as work that had been infringed, and specifying that defendants had copied numerous proprietary elements from plaintiff's website, were sufficient to survive motion to dismiss.

*Clifton v. Houghton Mifflin Harcourt Publishing Co.*, No. 15-3985, 2015 U.S. Dist. LEXIS 171915 (N.D. Cal. Dec. 23, 2015)

District court denied defendant's motion to dismiss claims for infringement brought by plaintiff photographer against publisher licensee for unauthorized use of thirty photographs. Plaintiff had granted limited license to defendant to use plaintiff's photographs in certain publications. Defendant exceeded license by printing more copies than allowed, distributing outside authorized distribution area, using images in unauthorized publications and using pictures beyond specified time limits. Defendant challenged copying element of infringement claim, arguing that allegations made "upon information and belief" were

conclusory and lacked support. Court disagreed, noting that Ninth Circuit had not yet considered sufficiency of similar allegations post-*Twombly* and *Iqbal*, and finding that plaintiff's allegations were adequate since information needed to further substantiate claims lay "peculiarly within the possession and control" of defendant. Court also rejected defendant's argument that plaintiff's claims were barred by statute of limitations. Statute-of-limitations defense was not obvious from face of complaint, since plaintiff alleged that infringement occurred "shortly after" license agreements and therefore left open possibility that defendant's infringing acts continued into limitations period. Further, allegations were silent as to when plaintiff discovered or should have discovered purported infringements so as to trigger statute of limitations defense.

*Microsoft Corp. v. A&S Electronics, Inc.*, No. 15-3570, 2015 U.S. Dist. LEXIS 168462 (N.D. Cal. Dec. 11, 2015)

Microsoft brought suit for contributory copyright infringement, alleging that defendant had unlawfully sold "product activation keys" in combination with distributable media such as DVDs containing Microsoft software or instructions for downloading software from Microsoft's website. Court issued tentative ruling granting defendant's motion to dismiss, finding that Microsoft had failed to allege direct infringement as predicate for contributory infringement claim since Microsoft had not shown that original buyers of Microsoft software programs at issue had acquired copyrighted software as licensees as opposed to owners. If original purchasers were owners, defendant could lawfully sell copies of Microsoft software pursuant to "first sale" and "essential step" exceptions to Act. Therefore, in order to state plausible claim for infringement, Microsoft had to plead specific facts demonstrating that software user was licensee, in addition to "significant" restrictions on user's ability to transfer software and "notable use restrictions." Conclusory allegations that arrangement was license rather than sale are insufficient.

*Blizzard Entm't, Inc. v. Lilith Games Co. Ltd.*, No. 15-4084, 2015 U.S. Dist. LEXIS 164527 (N.D. Cal. Dec. 8, 2015)

District court granted motion to dismiss due to plaintiffs' failure to plead facts demonstrating copyrightable elements in video game characters or specifically plead what elements in video games were infringed. Plaintiffs, developers of *Warcraft* video games claimed that defendants' video games *DotA Legends* and *Heroes Charge* infringed copyrights in plaintiffs' characters and "settings, terrain, background art and other assets." Defendant filed motion to dismiss for failure to state claim, arguing that plaintiffs failed to identify copyright infringed or owner of said copyright. District court found argument to be without merit, stating that plaintiffs alleged ownership of copyrights in various *Warcraft* works, and complaint made clear which plaintiff owned particular work. Court found, however, that plaintiffs did not allege facts showing characters in games to be copyrightable. In order for characters to be protectable under Ninth Circuit test, character must be "especially distinctive"; to meet standard, character must be "sufficiently delineated" and show "consistently, widely identifiable traits." Court found that plaintiffs pleaded conclusory statements that characters were distinctive, but pleaded no facts demonstrating that characters

were “plausibly copyrightable.” Finally, court found that plaintiffs made sweeping statements that defendants’ characters infringed, but did not specifically state which of defendant’s characters infringed plaintiffs’ characters. Court granted motion to dismiss with leave to amend.

*Albert v. YouTube, LLC*, No. 15-5283, 2015 U.S. Dist. LEXIS 163154 (N.D. Cal. Dec. 4, 2015)

Magistrate judge recommended that complaint in suit for copyright infringement and DMCA violations, seeking “over one hundred million dollars of punitive damages,” be dismissed for failure to state claim under Rule 12(b)(6), and granted plaintiff leave to amend complaint. Plaintiff, musical artist appearing *pro se* and *in forma pauperis*, sued YouTube for “failure to even consider” plaintiff’s takedown notice related to defendant’s display of plaintiff’s music video. Record established that defendant received and acknowledged plaintiff’s takedown notice, but refused to comply with request because defendant received music video under license from Vevo. Court noted that plaintiff failed to present any factual allegations showing harm or illegal actions by defendant. In particular, plaintiff did not allege ownership of copyright in music video or that display of video on YouTube violated plaintiff’s ownership rights. Similarly, plaintiff failed to allege facts showing that defendant’s response to takedown notice violated DMCA safe harbors. Accordingly, court held complaint failed as matter of law, but granted plaintiff leave to amend complaint.

*LiveCareer Ltd. v. Su Jia Technologies Ltd.*, No. 14-3336, 2015 U.S. Dist. LEXIS 87401 (N.D. Cal. Jul. 2, 2015)

Court granted plaintiff’s motion for leave to file second amended complaint to add new factual allegations in suit for copyright infringement based on defendant’s alleged copying of plaintiff’s copyrighted websites and online advertisements. Defendants opposed plaintiff’s motion on bad faith, undue delay and futility grounds, but did not allege any prejudice it would suffer if motion was granted, which court noted “is the factor that carries the most weight in the Court’s analysis.” In rejecting defendant’s arguments, court found plaintiff did not cause undue delay because plaintiff sought leave before deadline to amend, and defendants had not yet responded to first amended complaint. Court also found defendants did not present strong evidence of futility because complaint sufficiently alleged copyright infringement, and thus defendant also failed to show bad faith by plaintiff. Accordingly, court granted plaintiff’s motion for leave to file second amended complaint.

*RMC Publs., Inc. v. Phoenix Tech. Solutions, LLC.*, No. 15-896, 2015 U.S. Dist. LEXIS 145809 (E.D. Va. Oct. 27, 2015)

Plaintiff brought suit for infringement of copyrighted PMP Exam preparation book. District court denied defendant’s motion to dismiss infringement claim upon finding that plaintiff had alleged enough facts concerning elements of access and substantial similarity sufficient to establish defendant’s copying of plaintiff’s work for purposes of Rule 12(b)(6). In particular, plaintiff had sufficiently alleged defendant’s access to copyrighted work in light of

allegations in complaint that plaintiff's copyrighted exam book is "bestselling PMP exam preparation book in the world," that defendant is in business of offering PMP exam preparation classes, and that course materials for one of defendant's classes included copy of plaintiff's exam book. Further, court held that plaintiff had sufficiently alleged originality of copyrighted exam book based on allegations in complaint that author of book had creatively organized material "in a specific fashion to enhance comprehension by students" by adding concrete examples to abstract concepts and regular tests to aid in retention.

*Geophysical Servs. v. TGS-NOPEC Geophysical Servs.*, No. 14-1368, 2015 U.S. Dist. LEXIS 151441 (S.D. Tex. Nov. 9, 2015)

Court granted defendant's motion to dismiss. Plaintiff, Canadian seismic data company, sued defendant, U.S. seismic data company, alleging that defendant directly and contributorily infringed plaintiff's copyrighted seismic data by requesting copies of data from Canadian government and subsequently providing that data to third parties. Defendant moved to dismiss claims based on Rule 12(b)(6). Record established that defendant requested and obtained copies of plaintiff's seismic data from Canadian government in compliance with Canadian law. Moreover, defendant obtained data long after ten-year confidentiality period, and thus alleged disclosure by defendant was permitted under Canadian law at that time. Turning to pleadings, court found plaintiff's claims for direct infringement were conclusory and speculative because plaintiff admitted lack of knowledge as to whether defendant made copies of plaintiff's copyrighted data, or whether such copies were distributed to others. Court granted plaintiff leave to amend complaint, but when plaintiff advised court it could not, court dismissed direct infringement claims with prejudice. Court also found plaintiff failed to state claim for contributory infringement. Applying extraterritoriality rule, court noted that contributory infringement under Copyright Act requires direct infringement occurring within U.S. Because direct infringement alleged by plaintiff occurred in Canada, plaintiff necessarily failed to state claim. Lastly, court noted that even if extraterritoriality rule did not apply, plaintiff's claims would still be barred by act of state doctrine because alleged direct infringement was official act of Canadian government pursuant to Canadian law. Therefore, court granted defendant's motion to dismiss plaintiff's claims under Rule 12(b)(6).

*Dickert v. N. Coast Family Health, Inc.*, No. 14-316, 2015 U.S. Dist. LEXIS 87583 (D.N.H. June 10, 2015)

Plaintiff, former dietician and administrative employee of defendant's naturopathic healing clinic, designed and maintained clinic's website, Facebook page and other promotional materials. Plaintiff asserted ownership of promotional materials as independent contractor, and on that basis claimed that plaintiff was entitled to receive percentage of defendant's revenues as consideration for providing license to defendant for use of subject materials. Following plaintiff's departure from clinic, defendant continued to use website and promotional materials but refused to continue compensating plaintiff for right to do so. Plaintiff subsequently withdrew permission for defendant to use subject materials, issued DMCA takedown notice, and registered website with Copyright Office. District court

granted defendant's motion to dismiss portion of plaintiff's claim alleging infringement of non-website promotional materials because plaintiff had not obtained valid copyright registration for said materials prior to bringing suit. Citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), district court noted that Section 411(a)'s requirement is "a non-jurisdictional claim-processing rule" that prohibited plaintiff from stating valid claim with respect to non-website promotional materials.

#### **D. Standing**

*Ray Charles Found. v. Robinson*, 795 F.3d 1109 (9th Cir. 2015)

Music legend Ray Charles had named charitable organization, The Ray Charles Foundation ("Foundation"), sole beneficiary of Charles' musical compositions under Charles' will. Foundation's funding relied exclusively on royalties from Charles' works. In March 2010, seven of Charles' children ("Terminating Heirs") filed copyright termination notices on various parties, including Warner/Chappell Music, Charles' publisher's successor-in-interest, pertaining to 51 compositions. Foundation subsequently filed suit challenging validity of termination notices, including on ground that compositions at issue were works made for hire and therefore not subject to Act's termination provisions. Terminating Heirs moved to dismiss for lack of jurisdiction, arguing that Foundation was improperly asserting rights on behalf of third party copyright owner, Warner/Chappell. District court granted Terminating Heirs' motion to dismiss for lack of standing, finding that Foundation lacked prudential standing because asserted interests did not fall within termination provisions' "zone of interests" which instead encompassed only authors, statutory heirs and grantees of transfers. On appeal, Ninth Circuit reversed, and held that Foundation had standing to challenge validity of copyright termination notices filed by Terminating Heirs. Ninth Circuit rejected initial argument that Foundation was entitled to sue as "beneficial owner" of compositions because whether party is deemed "beneficial owner" for purposes of suing for infringement under Section 501 is irrelevant to whether said party can sue under termination provisions. However, Ninth Circuit found that Foundation's interest fell within statutory zone of interests, and therefore Foundation had standing to challenge termination notices, because notices directly implicated Foundation's right to receive royalties. Unlike Warner/Chappell, whose interests would be adversely affected only if Terminating Heirs granted ownership to another publisher or renegotiated grants on terms less favorable to Warner/Chappell, Foundation could be deprived entirely of royalty stream if termination notices were upheld as valid. Therefore, although Foundation was not party expressly mentioned in termination provisions, alleged injury to Foundation's continued ability to receive royalty stream represented interest that Congress sought to protect in enacting termination provisions. Alternatively, even if termination notices were upheld as valid, Foundation had standing to seek judicial determination of when termination notices took effect since such declaration would similarly impact Foundation's right to receive future royalties.

*Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997 (9th Cir. 2015)

Ninth Circuit reversed district court's holding that plaintiff, stock photography company, did not have standing to sue for infringement under Act. Under terms of contracts with photographers, plaintiff had exclusive right to act as their licensing agent, but photographers reserved rights to use photographs themselves and license them to others. Pursuant to divisibility principle embodied by 1976 Act, one who takes "exclusive" license subject to preexisting license may lack true exclusivity, but nonetheless possesses legal right to exclude third parties (other than existing licensee), and thus has standing to sue for infringement. Because agreements with photographers conveyed rights to reproduce, distribute, and display photographs to plaintiff via "exclusive license" to grant licenses to third parties, plaintiff had standing to remedy unauthorized reproduction, distribution, and display of photographs by those to whom it granted licenses.

*Hutson v. Notorious B.I.G., LLC*, No. 14-2307, 2015 U.S. Dist. LEXIS 170733 (S.D.N.Y. Dec. 21, 2015)

Plaintiff singer/songwriter brought action against composers, publishers, and distributors of Notorious B.I.G. song "The What," alleging infringement of copyright in 1973 song "Can't Say Enough About Mom." Prior to release of allegedly infringed work, plaintiff entered into recording contract with record company, in which plaintiff agreed to create sound recordings that would be exclusive property of record company. Two music publishing companies registered copyright in composition of allegedly infringed work, and record company registered copyright in sound recording. Court found plaintiff lacked standing to sue for infringement of composition because he failed to plausibly allege that he owned copyright interest at time of alleged infringement, or had been assigned copyright ownership interest including right to sue for past infringement. Court dismissed claim for infringement of sound recording outside U.S. on basis that it lacked jurisdiction over infringement occurring abroad. Plaintiff also failed to plead ownership in sound recording because, through 2008 Settlement Agreement relating to 2007 lawsuit, plaintiff had transferred copyright in sound recording, including digital performance rights, and any causes of action that accrued prior to Settlement Agreement.

*Lane v. Knowles-Carter*, No. 14-6798, 2015 U.S. Dist. LEXIS 143794 (S.D.N.Y. Oct. 21, 2015)

District court granted defendant's motion to dismiss. *Pro se* plaintiff sued defendant, recording artist Beyoncé, for copyright infringement based on defendant's use of plaintiff's copyrighted lyrics. Plaintiff alleged that in June 2013 he gave digital copy of his song "XOXO" to one of defendant's back-up singers. Plaintiff claimed that Beyoncé infringed "XOXO" by creating song "X.O." While court agreed that plaintiff had copyright in lyrics to "XOXO," plaintiff did not claim infringement of lyrics, but rather music, and registration certificate expressly excluded music from claim. Plaintiff claimed ownership of exclusive rights in music under license agreement regarding underlying beat in music. While exclusive licensee has standing to sue for infringement, plaintiff's failure to allege that licensor had

validly registered copyright in beat led court to conclude plaintiff did not have standing. Regarding substantial similarity, court found that use of common four-bar phrase in “XO” and “XOXO” could not establish substantial similarity between works as matter of law. Only similarity, court found, was that both songs use letters “X” and “O,” commonly used to signify kisses and hugs. Additionally, plaintiff and defendant deployed letters differently, with defendant consistently using “XO” throughout her song, and plaintiff sometimes using “O” alone. Furthermore, choruses in two songs had no words in common, aside from few “musically ubiquitous words,” such as “I,” “you,” “your,” “is,” and “baby.” Accordingly, court granted motion to dismiss with prejudice.

*Kelley v. Universal Music Group*, No. 14-2968, 2015 U.S. Dist. LEXIS 142130 (S.D.N.Y. Oct. 19, 2015)

District court granted defendants’ motion to dismiss. Plaintiffs, co-authors of song “Try to Leave Me If You Can” (“Try”), brought action against rap artist Fabolous, UMG Recordings, Inc., Island Def Jam Music Group, Island Def Jam Records, Desert Strom Records and Kila Records, alleging that defendants infringed by sampling part of “Try” in 2012 song “For the Love” (“Love”). Plaintiffs co-wrote and produced “Try” in or about 1974, and registered song with Copyright Office shortly thereafter. On registration certificate, plaintiffs were listed as co-authors of “Try,” while New York Times Music Corporation and Eden Music Corp. were listed as copyright claimants. In 1994, plaintiff Kelley transferred his interest in “Try” to third party in exchange for licensing royalties. Third party declined to pursue infringement claims against defendants; plaintiffs opted to proceed independently. Court analyzed pleadings and found that plaintiffs failed to alleged that they (1) were owners of copyright at issue; or (2) had been granted exclusive licenses by owners of copyright at issue, as required for standing under Act. Copyright registration certificate listed plaintiffs as co-authors, but not owners, of “Try.” Plaintiffs presented insufficient evidence that they later became owners of copyright. Court similarly rejected plaintiffs’ argument for standing based on beneficial ownership. Accordingly, court dismissed plaintiffs’ infringement claim for lack of standing.

*Atanasio v. Golden*, No. 15-8103, 2016 U.S. Dist. LEXIS 50571 (C.D. Cal. Apr. 13, 2016)

District court granted defendants’ motion to dismiss for lack of subject matter jurisdiction where plaintiff did not allege facts sufficient to show actual case or controversy. Although plaintiff alleged that defendants had contacted two third parties doing business with plaintiff and represented to those third parties that “Plaintiff’s [works] infringe upon Defendants’ copyrights,” that “[Defendants] would aggressively pursue” legal action against plaintiff, that on several occasions defendant emailed plaintiff and claimed that plaintiff’s works were derivative and infringed upon defendants’ copyrights, and that defendant stated that “I fully intend to legally protect my I.P.,” court held that plaintiff lacked reasonable apprehension of potential litigation over defendants’ alleged copyrighted works since defendants’ email explicitly expressed desire to “avoid any/all legal trouble on this topic.” Moreover, plaintiff’s only specific allegation that defendants threatened infringement action occurred

several days after plaintiff had filed claims for declaratory judgment, and whether party possesses reasonable apprehension of imminent litigation must be assessed prior to said party bringing suit.

*Liang v. AWG Remarketing, Inc.*, No. 14-99, 2015 U.S. Dist. LEXIS 108909 (S.D. Ohio Aug. 18, 2015)

Plaintiff, alleged assignee of copyright in computer code for use in online automobile auctions, sued former business partners and target company for infringement following failed attempt to acquire defendant target company. Defendants moved for summary judgment, claiming that plaintiff did not own copyrights at issue and therefore lacked standing to sue. Question before court was whether plaintiff received valid transfers from purported owners of copyright in computer code. Plaintiff argued ownership based on (1) alleged exclusive license granted by defendant, claimed co-author of code, to plaintiff's predecessor in interest, and (2) alleged transfer of copyright in code contained in mutual general release agreement between plaintiff and other co-author of code executed nearly two years after plaintiff filed suit. Court rejected plaintiff's claimed ownership based on alleged exclusive license because record established there was no formal written assignment of copyrights as required by Section 204(a). Court noted that defendant's subjective intention, without more, was insufficient to grant exclusive license to copyrighted computer code. Regarding plaintiff's second claimed basis for ownership, court noted that facts existing at time complaint was filed determine standing. Record established that release agreement was executed after plaintiff filed suit, and release could not retroactively cure plaintiff's lack of standing. Accordingly, court held that plaintiff lacked standing to prosecute lawsuit and granted summary judgment for defendants.

## **II. COPYRIGHTABILITY**

### **A. Originality**

*DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015)

Ninth Circuit held that Batmobile was subject to copyright protection as character. DC filed infringement suit against defendant, producer of replicas of Batmobile. In reaching decision, court set forth three-part test for determining protection of comic book, television or film character under 1976 Act. First, character must generally have physical as well as conceptual qualities. Second, character must be sufficiently delineated to be recognizable as same character whenever it appears; character must display consistent, identifiable character traits and attributes, although it need not have consistent appearance. Third, character must be especially distinctive and contain some unique elements of expression; it cannot be stock character such as magician in standard magician garb. If it meets standard, character can be protected even if it "lacks sentient attributes and does not speak." Upon finding that Batmobile met all necessary criteria, court held that DC had right to bring suit because DC had reserved all merchandising rights when it granted licenses for creation of 1966 *Batman*



television series and 1989 *Batman* film. In alternative, because 1966 program and 1989 film were derivative works of original *Batman* comics, infringement of derivative works also gave rise to claim for DC, copyright owner of underlying works. Accordingly, court affirmed district court's grant of summary judgment for DC on infringement claims.

*Lorenzana v. S. Am. Rests. Corp.*, 799 F.3d 31 (1st Cir. 2015)

First Circuit affirmed district court's dismissal of plaintiffs' copyright infringement claim. Plaintiffs, including employee of Church's Chicken location, sued defendants, including operator of Church's Chicken location, for claims including copyright infringement following defendant's adoption of chicken sandwich proposed by plaintiff. While working for defendant, plaintiff had suggested concept for new chicken sandwich consisting of "fried chicken breast patty, lettuce, tomato, American cheese, and garlic mayonnaise on a bun." After successful taste tests, defendant began offering plaintiff's proposed sandwich for sale under plaintiff's proposed name, "Pechu Sandwich." Plaintiff later alleged defendant misappropriated his intellectual property in both recipe and name for Pechu Sandwich. Court noted that neither recipe nor name fit any of eight categories of works protected by copyright under Section 102(a), and noted that copyright protection does not extend to mere listing of ingredients or to short phrases such as names. Accordingly, court agreed with district court that "a chicken sandwich is not eligible for copyright protection."

*Savant Homes, Inc. v. Collins*, 809 F.3d 1133 (10th Cir. 2016)

Tenth Circuit affirmed district court's grant of summary judgment to defendants. Plaintiff custom home designer and builder held registered copyright in floor plan of three-bedroom ranch house. Plaintiff sued defendant homeowners, builder and designer after defendants toured house in which copyrighted work was embodied, obtained brochure of copyrighted floor plan, and built two houses in Colorado with similar floor plan. Plaintiff failed to show that copyrighted floor plan included protectable elements or arrangement of elements, which precluded finding of substantial similarity. While original selections or arrangements of individual standard elements of architectural works may be protectable, defendants' expert report stated that floor plan consisted almost exclusively of standard elements arranged in standard fashion. District court's use of abstraction-filtration-comparison ("AFC") test to independently analyze protectability of elements was unnecessary because plaintiff had failed to carry summary judgment burden by failing to show protectable elements. Tenth Circuit also rejected plaintiff's contention that *Blehm v. Jacobs*, 702 F.3d 1193 (10th Cir. 2012), held AFC test categorically inapplicable to architectural works.

*Concentro Labs., L.L.C. v. Practice Wealth, Ltd.*, No. 15-10325, 2015 U.S. App. LEXIS 20919 (5th Cir. 2015)

Appellant chiropractor created video outlining diagnostic procedure and blank form to be filled in while conducting that procedure, and brought infringement claim against competitor who created video and form covering same procedure. Firth Circuit affirmed district court's dismissal of claim on basis that copyright protection extends to "original expressions" of

ideas, procedures, processes and systems, but not to “those things themselves.” Court noted that appellant had “chiefly alleged infringement of the procedure itself, for which there is no copyright protection.”

*Leisure Concepts, Inc. v. California Home Spas, Inc.*, No. 14-388, 2015 U.S. Dist. LEXIS 76552 (E.D. Wash. June 12, 2015)

District court denied defendant’s motion to dismiss plaintiff’s claim for infringement based on instruction manual for spa cover lifter. Plaintiff’s registration for instruction manual provided presumption of validity of copyright. Although instruction manual consisted of non-protectable elements, such as lists of product parts, court held that manual’s narrative instructions may be protected. Moreover, language in defendant’s instruction manual had been copied verbatim from plaintiff’s manual, and “such obvious copying ... is not to be encouraged.”

*New Old Music Group, Inc. v. Gottwald*, 122 F. Supp. 3d 78 (S.D.N.Y. 2015)

In infringement action by plaintiff against defendant recording artist Jesse J. and related entities, district court denied defendants’ motion for summary judgment based exclusively on expert analysis of musical compositions. Plaintiff alleged that drum part of popular song Price Tag recorded by artist was copied from Zimba Ku, song recorded by band Black Heat in 1975 and written by president of plaintiff company. Plaintiff alleged that Zimba Ku’s break beat was “the driving force of the composition and is featured continuously throughout the work.” Plaintiff’s infringement claim was based solely on drum component of Zimba Ku. All rhythmic similarities between Zimba Ku’s drum part and Price Tag’s drum part were contained in single measure, which was repeated continually throughout both songs. Defendants did not dispute that as transcribed by musical notation, two drumbeats in question were virtually identical. However, defendants argued that regardless of such similarities, drum part in Zimba Ku was so common that use of similar elements or combination of such elements in Price Tag could not constitute actionable infringement. Court rejected defendants’ argument. Although elements that comprised drum beat could be considered common and widely used in prior art if viewed in isolation, court could not conclude, as matter of law, that “total concept and feel” of elements in combination were not protectable given low level of creativity needed to establish originality. Thus, defendants failed to show that similarities between works concerned only noncopyrightable elements such that no reasonable juror could find works substantially similar.

## **B. Pictorial, Graphic and Sculptural Works**

*Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468 (6th Cir. 2015)

Sixth Circuit reversed district court’s judgment and entered partial summary judgment for plaintiff with respect to whether designs on garments were copyrightable pictorial, graphic, or sculptural works. Plaintiff sued alleging infringement of two-dimensional designs used on clothing and other useful articles. District court entered summary judgment for defendant,

concluding that designs were not copyrightable because graphic elements were not physically or conceptually separable from utilitarian function of garments because “colors, stripes, chevrons, and similar designs typically associated with sports in general, and cheerleading in particular” make garment they appear on “recognizable as a cheerleading uniform.” Sixth Circuit had not yet adopted approach to determining whether pictorial, graphic, or sculptural features of design of useful article are separable from utilitarian aspects of useful article, “and so we do so now.” Court canvassed “approaches” to conceptual separability, and noted that Second and Fourth Circuits have used multiple approaches in same case, illustrating difficulty of selecting one approach conceptual separability. Sixth Circuit adopted “similar hybrid approach”: to ask series of questions that are grounded in text of Copyright Act: (1) Is design pictorial, graphic, or sculptural work? (2) If design is pictorial, graphic, or sculptural work, then is it design of useful article? (3) What are utilitarian aspects of useful article? Court held that “portraying appearance” and “conveying information” are two “utilitarian aspects” that courts may *not* use; considering these two functions “utilitarian aspects” for purpose of determining separability would be at odds with Act’s definition of useful article. Once permissible utilitarian aspects are identified, court asks: (4) Can viewer of design identify pictorial, graphic, or sculptural features separately from utilitarian aspects of article? (5) Can pictorial, graphic, or sculptural features of design of useful article exist independently of utilitarian aspects of article? Court noted that Copyright Office Compendium provides helpful way to think about questions four and five: pictorial, graphic, and sculptural features incorporated into design of useful article are conceptually separable if artistic feature of design and useful article could both exist side by side and be perceived as fully realized, separate works, one artistic work and other useful article. Court declined to endorse looking at why designer chose ultimate design, to exclusion of other evidence, and rejected likelihood-of-marketability test because it privileges judge’s personal taste, is often based entirely on conjecture, and is often undermined by fact that defendant has copied work at issue. Court also rejected argument that graphic features are inseparable because they serve “decorative function”; such holding would render nearly all artwork unprotectable. Sixth Circuit also rejected conclusion that graphic features are not separable because garment “without team colors stripes, chevrons, and similar designs typically associated with sports in general, and cheerleading in particular, is not recognizable as a cheerleading uniform.” Record established that not all garments must look alike to “be” cheerleading uniforms, and that designs may be incorporated onto surface of different types of garments and articles. Interchangeability of various designs was evidence that graphic design on surface of garment does not affect whether garment still functions as cheerleading uniform. Because graphic features of Varsity’s designs are “more like fabric design than dress design,” court held that they are protectable subject matter under Copyright Act, and entered summary judgment for Varsity solely on issue of protectability of Varsity’s designs as pictorial, graphic, or sculptural works.

*Hoberman Designs, Inc. v. Gloworks Imps., Inc.*, No. 14-6743, 2015 U.S. Dist. LEXIS 176117 (C.D. Cal. Nov. 3, 2015)

District court granted defendants' motion for summary judgment on infringement claim. Plaintiff Hoberman Designs, Inc. ("HDI") sued defendants for copyright infringement stemming from defendants' sale of expanding and contracting geometric plastic toys similar to plaintiff's. Charles Hoberman, well-known designer and engineer of expanding structures and spheres, sold toy versions of designs through company, HDI, including registered "Mini Sphere" and "Twist-o" designs. Gloworks imported and sold similar toys as "NF-EXPBALL" and "Flashing Skull." Defendants moved for summary judgment on infringement claim, arguing that HDI's designs were not original, because they consisted of unprotectable geometric shapes and were mechanical or utilitarian in nature. Court noted that basic shapes are not protectable under copyright law, but original combination of unoriginal geometric shapes can be copyrighted. HDI had claimed original selection and arrangement of geometric shapes. Because defendants failed to demonstrate that combination lacked originality or was inevitable, use of combined geometric shapes did not preclude copyright protection. With respect to useful or mechanical aspects of HDI's designs, court found very few elements of HDI's toys that were not mechanical or utilitarian. Mini Sphere's trusses permitted expansion and contraction, joints held trusses together, and hub-style joints, though not required for expansion, gave Mini Sphere 24-sided shape when expanded. Twist-o's gears permitted expansion and contraction, cross pieces linked gears together, gear covers prevented debris from getting caught in gears, and layering, which HDI had claimed as original "layered look," served functional purpose of permitting transformation into larger object. "Relative size" of HDI's toys and proportion between hubs and trusses related to expansion function, and "aesthetic web" of toys in expanded position was merely outline of geometric shape. Court further rejected HDI's claim to original "overall look and feel" of toys, because copyright only extends to copyrightable elements. For purposes of summary judgment, court found some copyrightable, original elements in plastic joints and trusses of Mini Sphere and plastic cross pieces of Twist-o, but found defendants' toys dissimilar to those few protected elements, and accordingly granted defendants' motion for summary judgment on infringement claim.

*Zahourek Sys., Inc. v. Balanced Body University, LLC*, No. 13-112, 2016 U.S. Dist. LEXIS 47165 (D. Colo. Apr. 7, 2016)

Plaintiffs developed and sold product called Maniken, "an interactive learning tool which requires the user to shape muscles of clay and attach them to the model ... to provide a meaningful armature upon which one could explore muscular ideas." Plaintiffs claimed that defendant had infringed "copyrighted anatomy models" through unauthorized display of such models in manual. Court determined plaintiff did not hold valid copyright in work at issue because Maniken was "useful article" under Section 101 of Act, in that Maniken was (1) created for utilitarian features, serves utilitarian ends and has intrinsic utilitarian function to portray appearance of life-like form, and (2) designed for anatomically-functional reasons not independent from artistic judgment such that conceptual separability did not exist.

### C. Compilations and Derivative Works

*Keeling v. Hars*, 809 F.3d 43 (2d Cir. 2015)

Second Circuit affirmed district court's holding that "if the creator of an unauthorized work stays within the bounds of fair use and adds sufficient originality, she may claim protection under the Copyright Act ... for her original contributions." Appellee authored *Point Break Live!* ("*PBL*"), parody stage adaptation of 1991 film *Point Break*. *PBL* borrows characters, plot elements and selected dialogue from film, adding jokes, props, staging and other theatrical devices to "transform the dramatic plot and dialogue of film into an irreverent, interactive theatrical experience." At no point did appellee possess copyright or license with respect to film. Appellant, owner of production company, contracted to stage two-month run of *PBL*, and subsequently sought to continue to produce *PBL* without further payment to appellee, on theory that appellee did not lawfully own any rights to *PBL*. Appellee objected, threatened suit and registered copyright in *PBL* without first obtaining permission from copyright holders of film. Appellee brought suit in district court, and appellant asserted counterclaim seeking declaration that appellee's *PBL* copyright registration was invalid. District court found, and Second Circuit affirmed, that derivative works, such as *PBL*, are entitled to "independent" copyright protection. Although protection does not extend to material that has been used unlawfully, if "a work employs copyrighted material lawfully – as in the case of a 'fair use' – nothing ... prohibits the extension of the 'independent' copyright protection promised by Section 103." Appellant further claimed that appellee's copyright was invalid because her contributions to derivative work consisted solely of non-copyrightable individual elements such as stage directions and theatrical devices, and those contributions cannot support copyright. However, copyright law "protects not only the individual elements themselves, but the creative choices made in selecting and arranging even un-copyrightable elements." Therefore, appellee's "creative contribution, and thus her copyright, is in the original way in which [she] has selected, coordinated, and arranged the elements of ... her work" to create new parodic meaning.

*Tomaydo-Tomahhdo, LLC v. Vozary*, No. 15-3179, 2015 U.S. App. LEXIS 18384 (6th Cir. Oct. 20, 2015)

Sixth Circuit affirmed district court's grant of summary judgment to defendants on copyright infringement claim. Plaintiffs, including restaurant owner and cookbook author Rosemarie Carroll ("*Carroll*"), sued defendants, including former restaurant co-owner Larry Moore ("*Moore*") and new catering business, for infringement. Carroll and Moore had jointly created Tomaydo-Tomahhdo restaurant and catering business serving recipes conceived by Moore. In 2007, Carroll and Moore parted ways, and Carroll purchased Moore's interest in business in agreement that required Moore to return all menu and recipe materials. In 2012, Carroll created Tomaydo-Tomahhdo recipe book based on recipes Moore had created. Moore opened catering business, and Carroll alleged Moore was copying Tomaydo-Tomahhdo's recipes. District court granted defendants' motion for summary judgment on basis of plaintiffs' failure to demonstrate infringement of creative work, and material differences between parties' recipes. Plaintiffs appealed. On appeal, plaintiffs argued recipe

book was copyrightable compilation, because Moore's trial-and-error process for developing recipes involved creative selection and arrangement of ingredients, and items on menu were purposefully selected and coordinated with each other. Court found plaintiffs' recipes did not enjoy copyright protection because list of ingredients was mere factual statement ineligible for protection, and cooking instructions were functional directions statutorily excluded from copyright protection by Section 102(b). Further, plaintiffs failed to demonstrate that recipe book was original compilation. Plaintiffs had alleged purposeful selection and coordination of menu items, but failed to identify what was original and creative about that process. Accordingly, no aspect of plaintiffs' recipe book was original work entitled to copyright protection.

#### **D. Miscellaneous**

*Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015)

Ninth Circuit affirmed district court's holding that sequence of yoga poses and breathing exercises is not entitled to copyright protection. Plaintiff developed "Sequence" and first published it in his 1979 book *Bikram's Beginning Yoga Class*. Sequence consisted of 26 yoga poses and two breathing exercises, designed to improve physical health and sense of well-being, performed over course of 90 minutes in room heated to 105 degrees Fahrenheit. Plaintiff registered book in 1970, and obtained supplemental registration for "compilation of exercises" in book in 2002. Plaintiff introduced Teaching Training Course in 1994; individual defendants completed course and in 2009 founded Evolution Yoga, LLC, offering classes for several yoga styles, including "hot yoga," consisting of 26 yoga poses and two breathing exercises practiced over course of 90 minutes in room heated to 105 degrees Fahrenheit. Plaintiff claimed infringement based on defendants' offering of yoga classes. District court granted defendants' motion for partial summary judgment, finding that Sequence is collection of facts and ideas not subject to copyright protection. Ninth Circuit affirmed, holding that Sequence is uncopyrightable idea, process or method designed to "cure, heal, or at least alleviate" physical injury and illness. Protection for processes and methods, if any, must be secured through patent. Ninth Circuit further held Sequence not entitled to copyright protection as compilation: "the Sequence is an idea, process, or system; therefore, it is not eligible for copyright protection. That Sequence may possess many constituent parts does not transform it into a proper subject of copyright protection. Virtually any process or system could be dissected in a similar fashion." Finally, Ninth Circuit held Sequence not copyrightable as choreographic work for same reason it is not copyrightable as compilation: Sequence is idea, process, or system to which copyright protection may "in no case" extend. Fact that Sequence contains bodily or rhythmic movements does not change it from being process; certain functional movements, such as churning butter, which may also be rhythmic, do not suddenly become copyrightable. Thus, district court properly granted Evolution's motion for partial summary judgment.

### III. OWNERSHIP

#### A. Works Made for Hire

*Lewin v. Richard Avedon Found.*, No. 11-8767, 2015 U.S. Dist. LEXIS 83452 (S.D.N.Y. June 26, 2015)

Plaintiff worked as assistant to famous photographer Richard Avedon. Plaintiff claimed his duties did not include taking photographs; rather, he was responsible for lighting and administrative tasks for Avedon. Over period of years, while working for Avedon, plaintiff claimed he created several thousand photographs on his own time. Defendant Richard Avedon Foundation, successor to Avedon's rights, asserted otherwise. Defendant claimed that plaintiff's duties included taking pictures and that some of photographs were done at "instance and expense" of Avedon, and so were owned by Avedon, and defendant as his successor. District court denied summary judgment as to ownership of most photographs, finding issues of fact as to plaintiff's duties and, even if his duties included taking pictures, whether pictures at issue in case were taken for plaintiff's own purposes. For certain pictures, however, district court granted summary judgment in favor of defendant. For example, in connection with shoot of Raquel Welch, Avedon asked plaintiff to photograph Welch as distraction after Welch and Avedon had dispute. Court held photographs resulting from this "distraction" photography belonged to defendant because photographs were taken by plaintiff as part of his job, were Avedon's idea and were done for Avedon's, not plaintiff's, benefit. Similarly, on another occasion Avedon asked plaintiff to take photographs of group that had gathered in Avedon's home to raise money for theatrical production. Plaintiff admitted that he likely used studio camera to take pictures. Since Avedon had instructed plaintiff regarding whom to photograph and where, court held pictures were taken at Avedon's instance. Use of studio camera meant pictures were taken at Avedon's expense. Applying "instance and expense" test under 1909 Act, court held these photos were owned by defendant foundation.

*Pay(q)r, LLC v. Sibble*, No. 15-1038, 2015 U.S. Dist. LEXIS 173465 (N.D. Ohio Dec. 31, 2015)

Plaintiff, developer of hospitality industry payment software application and cloud-based communications system, brought infringement suit against Sibble, co-developer and engineer of products. Parties had entered into agreement for Sibble to develop products and Sibble and plaintiff also discussed creation of another company, POSitronics, which would own one product. Sibble cultivated relationship with co-defendant MenuPad, ostensibly cutting plaintiff out of business plans for POSitronics. When relationship between Sibble and plaintiff soured, Sibble failed to complete work per parties' agreement and MenuPad withdrew investment from POSitronics. After Sibble and other defendants created code for product that was similar to code for plaintiff's product, plaintiff sued for infringement. Sibble moved to dismiss plaintiff's infringement claim asserting, first, that Sibble was author of work. Plaintiff argued that products were works made for hire and, therefore, ownership

should vest with plaintiff. Court disagreed, finding that Sibble's work as independent software developer did not fit into statutory definition of work-for-hire. Although parties' agreement contemplated Sibble becoming plaintiff's full-time employee in future, Sibble was not employee until such time and could pursue other business opportunities. However, court found that parties' agreement, under which Sibble "agreed to assign" all rights in inventions, which were defined to include copyrightable material, constituted valid transfer of Sibble's copyrights to plaintiff. Therefore, plaintiff had plausibly alleged valid transfer of copyright ownership sufficient to avoid dismissal.

## **B. Transfer of Ownership**

*Wallert v. Atlan*, No. 14-4099, 2015 U.S. Dist. LEXIS 145027 (S.D.N.Y. Oct. 26, 2015)

Plaintiff brought suit for infringement of musical work. District court dismissed infringement claim upon finding that plaintiff lacked standing due to failure to adequately allege ownership of musical work. Court rejected argument that plaintiff's ownership of corporate entity listed on registration as copyright claimant conferred standing upon plaintiff, since shareholders do not hold legal title to corporation's assets and there was no evidence that plaintiff had formally dissolved corporate entity as necessary for plaintiff to become owner of copyright by operation of law. Second, plaintiff did not produce any written documents as required under Section 204(a) to support claim that copyright in work had been transferred to plaintiff. Third, complaint was devoid of factual allegations supporting claim that plaintiff was "beneficial owner" of musical work such as, for example, written documents showing that plaintiff had assigned copyright to corporate entity in exchange for payment of royalties.

*Adobe Sys. v. A & S Elecs., Inc.*, No. 15-2288, 2015 U.S. Dist. LEXIS 173176 (N.D. Cal. Dec. 29, 2015)

Software company sued licensee and distributor of software products for infringement arising from defendants' unauthorized distribution of plaintiff's software code. Plaintiff alleged that defendants distributed copyrighted software in violation of parties' agreement, thereby willfully infringing plaintiff's copyrights. Court rejected defendant's argument that infringement claim should be dismissed because there was no nexus between defendants' violation of agreement and infringement of plaintiff's rights under Act. Defendants argued that only conduct attributed to defendants was sale of fabricated serial license key, which was "not copyrightable." Court held that even if serial license key was not separately subject to copyright protection, defendants' alleged distribution of code to facilitate sale and use of software that defendants had no right to distribute was sufficient to state claim for infringement. Court also rejected argument that defendants were putative owners of software since, under agreement, defendants were mere licensees. Therefore, affirmative defense of first sale doctrine was unavailable to defendants. Court also rejected defendants' essential



step defense because such defense similarly requires that alleged infringer is owner and not mere licensee of copyrighted work.

*Liang v. AWG Remarketing, Inc.*, No. 14-99, 2015 U.S. Dist. LEXIS 108909 (S.D. Ohio Aug. 18, 2015)

Plaintiff, alleged assignee of copyright in computer code for use in online automobile auctions, sued former business partners and target company for infringement following failed attempt to acquire defendant target company. Defendants moved for summary judgment, claiming that plaintiff did not own copyrights at issue and therefore lacked standing to sue. Question before court was whether plaintiff received valid transfers from purported owners of copyright in computer code. Plaintiff argued ownership based on (1) alleged exclusive license granted by defendant, claimed co-author of code, to plaintiff's predecessor in interest, and (2) alleged transfer of copyright in code contained in mutual general release agreement between plaintiff and other co-author of code executed nearly two years after plaintiff filed suit. Court rejected plaintiff's claimed ownership based on alleged exclusive license because record established there was no formal written assignment of copyrights as required by Section 204(a). Court noted that defendant's subjective intention, without more, was insufficient to grant exclusive license to copyrighted computer code. Regarding plaintiff's second claimed basis for ownership, court noted that facts existing at time complaint was filed determine standing. Record established that release agreement was executed after plaintiff filed suit, and release could not retroactively cure plaintiff's lack of standing. Accordingly, court held that plaintiff lacked standing to prosecute lawsuit and granted summary judgment for defendants.

*Gen. Steel Domestic Sales, LLC v. Chumley*, 129 F. Supp. 3d 1158 (D. Colo. 2015)

District court denied plaintiff's motion for summary judgment on defendant's counterclaims alleging infringement of registered logo. Defendant had retained third party to assist in creation of logo. Court rejected plaintiff's arguments that defendant was not owner of logo upon finding that third party had orally transferred copyright in logo to defendant at time of logo's creation. Although Section 204(a) requires that transfers of copyright ownership be memorialized in writing, court noted that such provision has been broadly interpreted to permit effective oral assignments so long as original owner ratifies or confirms transfer in writing at later point. Court held that subsequent agreement entered into between defendant and third party confirming previous assignment of all right, title and interest in logo to defendant validated prior oral assignment. Finally, court held that copyright registration's statement that logo had been "work for hire" did not affect analysis since errors in registration do not invalidate rights secured by registrant absent showing of intent to defraud and prejudice.

### C. Termination of Transfers

*Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18 (2d Cir. 2015)

Plaintiffs, heirs of songwriter John Frederick Coots, co-writer of *Santa Claus Is Comin' To Town*, sought declaration that copyright termination notice served on defendant in 2007 was effective in terminating defendant's rights in song. Defendant's predecessor had purchased rights from song's authors in 1934. Because song was governed by 1909 Copyright Act, copyright in song lasted for initial 28-year term, followed by 28-year renewal term. In 1951, author of song and defendant's predecessor entered into second agreement in which predecessor was granted all renewals and extensions of copyrights in song. In 1981, song's author sent defendant's predecessor notice to terminate 1951 agreement. Song's author also entered into 1981 agreement which granted defendant's predecessor rights in song for extended renewal period created by 1976 Copyright Act. Following passage of 1998 Sonny Bono Copyright Term Extension Act, which extended renewal period for additional 20 years, plaintiffs sent termination notice in 2007. On summary judgment, district court ruled in defendant's favor, finding that defendant owned rights in song by virtue of 1951 agreement, which, as pre-1978 grant, was not terminable under Section 203. On appeal, Second Circuit reversed upon finding that defendant's ownership of rights in song was traceable to 1981 agreement, which had superseded 1951 agreement as source of defendant's existing rights in song. Because 1981 agreement granted same rights to defendant already owned by virtue of 1951 agreement, parties had "clearly manifested" intention that new agreement replaced 1951 agreement's grant of rights to work's renewal term. Moreover, court held that 1981 agreement signified intention to grant to defendant's predecessor all of author's renewal rights, and was not merely conveyance of author's future interest in statutory renewal term extension. District court's reliance upon extrinsic evidence to hold otherwise was inappropriate in light of unambiguous contract language. Because 1981 agreement constituted post-1978 grant "executed by the author" and did not cover right of publication, grant was terminable by plaintiffs under Section 203. Therefore, plaintiffs' 2007 termination notice will terminate 1981 agreement, and defendant's rights in song, on December 15, 2016.

*Larson v. Warner Bros Entm't, Inc.*, No. 13-56243, No. 13-56244, No. 13-56257, No. 13-56259, 2016 U.S. App. LEXIS 2507 (9th Cir. Feb. 10, 2016)

Ninth Circuit previously decided that October 19, 2001 letter from attorney for Jerome Siegel, co-creator of Superman, to attorney for DC constituted binding settlement agreement that potentially resolved all questions in suit. On remand, district court held that 2001 letter transferred to DC all copyrights listed in agreement. Larson, Siegel's successor-in-interest, appealed, arguing 2001 letter did not constitute present assignment of rights, and was conditioned on future signing of formal contractual agreement. Ninth Circuit disagreed, having previously held that letter finalized material terms of contract to which parties had agreed. Larson argued further, based on Section 304(c)(6)(D), which provides that "further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of termination," that even if 2001 letter was agreement transferring rights to Superman, letter could not have transferred copyrights to

Superboy and early Superman Ads because Siegels had not yet terminated DC's rights to Superboy and Ads when letter was written. Larson also argued that 2001 agreement could not bar recapturing copyrights to Superboy and Ads because 2001 letter was "agreement to contrary" under Section 304(c)(5). Ninth Circuit disagreed, citing *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005), in which court rejected argument that Congress intended to preclude parties from alienating their statutory termination rights by contract, and held that neither Section 304(c)(5) nor Section 304(c)(6)(D) invalidated heir's re-grant of copyrights by contract in lieu of statutory termination because heir had done exactly what Congress intended: used his "increased bargaining power conferred by imminent threat of statutory termination to enter into new, more advantageous grants." Siegels' bargaining position was similarly fortified by their statutory termination power. Siegels believed that in 1999 they recaptured rights to Superboy works and Ads from DC by issuing notices in 1997 purporting to terminate pre-1978 grants for wide range of Superman works, including Ads and Superboy. Although litigation clarified that Ads and Superboy grants were not properly terminated in 1999, Siegels, like heir in *Milne*, bargained with their statutory termination power in hand to negotiate highly remunerative new agreement. Larson, like *Milne*, failed to show that she was in any way prejudiced by 2001 agreement, through which Siegels reassigned purportedly recaptured rights to DC in exchange for substantial compensation. Because 2001 agreement replaced and superseded earlier grants of Superboy and Ads copyrights, Larson's attempts to recapture these copyrights through her subsequent termination notices were ineffective.

*Ray Charles Found. v. Robinson*, 795 F.3d 1109 (9th Cir. 2015)

Music legend Ray Charles had named charitable organization, The Ray Charles Foundation ("Foundation"), sole beneficiary of Charles' musical compositions under Charles' will. Foundation's funding relied exclusively on royalties from Charles' works. In March 2010, seven of Charles' children ("Terminating Heirs") filed copyright termination notices on various parties, including Warner/Chappell Music, Charles' publisher's successor-in-interest, pertaining to 51 compositions. Foundation subsequently filed suit challenging validity of termination notices, including on ground that compositions at issue were works made for hire and therefore not subject to termination provisions. Terminating Heirs moved to dismiss for lack of jurisdiction, arguing that Foundation was improperly asserting rights on behalf of third party copyright owner, Warner/Chappell. District court granted Terminating Heirs' motion to dismiss for lack of standing, finding that Foundation lacked prudential standing because asserted interests did not fall within termination provisions' "zone of interests" which instead encompassed only authors, statutory heirs and grantees of transfers. On appeal, Ninth Circuit reversed, and held that Foundation had standing to challenge validity of copyright termination notices filed by Terminating Heirs. Ninth Circuit rejected initial argument that Foundation was entitled to sue as "beneficial owner" of compositions because whether party is deemed "beneficial owner" for purposes of suing for infringement under Section 501 is irrelevant to whether said party can sue under termination provisions. However, Ninth Circuit found that Foundation's interest fell within statutory zone of interests, and therefore Foundation had standing to challenge termination notices, because

notices directly implicated Foundation's right to receive royalties. Unlike Warner/Chappell, whose interests would be adversely affected only if Terminating Heirs granted ownership to another publisher or renegotiated grants on terms less favorable to Warner/Chappell, Foundation could be deprived entirely of royalty stream if termination notices were upheld as valid. Therefore, although Foundation was not party expressly mentioned in termination provisions, alleged injury to Foundation's continued ability to receive royalty stream represented interest that Congress sought to protect in enacting termination provisions. Alternatively, even if termination notices were upheld as valid, Foundation had standing to seek judicial determination of when termination notices took effect since such declaration would similarly impact Foundation's right to receive future royalties.

*Brumley v. Albert E. Brumley & Sons, Inc.*, No. 15-5429, 2016 U.S. App. LEXIS 8894 (6th Cir. 2016)

Sixth Circuit affirmed district court's holding that assignment of copyright in gospel song "I'll Fly Away" to author's son was successfully terminated under Section 304(c) by four of author's six children. Author assigned copyright in song to two sons' company in 1975, and in 1979, author's widow executed "Bill of Sale and Assignment" purporting to assign and transfer all right, title and interest in "all rights to obtain renewals or copyrights in the future" to sons' company. After death of author's widow, four of author's children timely served termination notice on their brother and recorded same with Copyright Office. Court distinguished cases holding superseded agreements could not be terminated because 1979 agreement did not clearly revoke 1975 contract. Even assuming authors or heirs may contract away or extinguish termination right after 1978, 1979 agreement failed to extinguish widow's termination right because agreement was silent as to termination rights. Four siblings complied with timeline, majority-share prerequisites, and other requirements established by Act, so termination was effective.

*Scorpio Music Black Scorpio S.A. v. Willis*, No. 11-1557, 2015 U.S. Dist. LEXIS 124000 (S.D. Cal. Sept. 15, 2015)

Court awarded attorneys' fees to prevailing defendant-counterclaimant Victor Willis, songwriter and original member of Village People, in action arising from Willis's termination of grants of rights in numerous compositions, including "YMCA." Willis obtained split jury verdict following trial, and sought \$527,235.84 in attorneys' fees as prevailing party in action. Court, citing Act's "primary objective" to "encourage the production of original literary, artistic, and musical expression for the good of the public," and Section 203's purpose to "safeguard authors against unremunerative transfers" and address "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited," found that although adverse parties had not acted frivolously or with improper motive, or made objectively unreasonable factual or legal arguments "on the whole," attorneys' fees award was warranted.

## D. Joint Works and Co-Ownership

*16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015)

Second Circuit determined as matter of first impression that plaintiff film production company owned copyright in all versions of film work in question, and that copyright did not exist in individual contributions to film by defendant film director. Plaintiff purchased rights to screenplay, and asked defendant to direct film based on screenplay. Defendant subsequently claimed rights in raw footage of film and registered copyright in film, and attempted to prevent plaintiff from screening film, citing alleged rights in film. Plaintiff brought declaratory judgment suit. District court held that defendant could not copyright his creative contributions to film at issue, and that defendant lacked copyright ownership in raw film footage. On appeal, Second Circuit addressed question of first impression: “May a contributor to a creative work whose contributions are inseparable from, and integrated into, the work maintain a copyright interest in his or her contributions alone?” Second Circuit, noting that defendant was not “joint author” of film, and that defendant’s efforts could not be deemed “work made for hire,” found that Copyright Act’s terms, structure and history supported conclusion that defendant’s contributions to film did not themselves constitute “work of authorship” amenable to copyright protection. Second Circuit further concluded that with respect to raw film footage, plaintiff was “dominant author,” and thus plaintiff owned copyright in finished film and prior versions, including raw film footage.

*Moofly Prods., LLC v. Favila*, No. 13-5866, 2015 U.S. Dist. LEXIS 121329 (C.D. Cal. July 13, 2015)

Counterclaimants, 51% shareholders of certain intellectual property assets, asserted counterclaim for infringement against parties who were, or acted as licensees of, 49% shareholder based on exploitation of copyrights in connection with various business ventures. District court held that 49% co-owner had ability to grant licenses to third parties for use of copyrighted assets, subject only to duty to account to counterclaimants. Citing well-established doctrine that copyright co-owner cannot be liable to another co-owner for infringement of co-owned copyright, district court dismissed counterclaimants’ infringement claim for failure to state claim.

*Boyd v. Tribbett*, No. 14-5671, 2015 U.S. Dist. LEXIS 89731 (D.N.J. July 10, 2015)

Plaintiff writer/producer brought infringement claims against artist and record label based on plaintiff’s contributions to gospel songs “Same God” and “You Are Everything.” On motion to dismiss, district court held that plaintiff’s infringement claim for “Same God” was barred because parties’ agreement explicitly stated that song was work made for hire. Court found that where, as here, work-for-hire contract contains provision for payment of royalties and plaintiff does not seek rescission of contract, plaintiff cannot bring claim for copyright infringement but may instead only seek relief through breach of contract claim. Court also found that plaintiff’s infringement claims were barred because plaintiff had filed copyright registrations for songs at issue that listed defendant as co-author and claimant. Because

copyright owner cannot maintain infringement action against co-owner, plaintiff's only available remedy was accounting.

*Ford v. Ray*, 130 F. Supp. 3d 1358 (W.D. Wash. 2015)

District court granted defendant's motion to dismiss plaintiff's suit for declaratory judgment and accounting. Plaintiff David Ford sued for declaration of co-authorship, based on alleged collaboration in late 1980s and early 1990s with defendant Anthony Ray, also known as Sir Mix-A-Lot, on numerous hip-hop songs including Grammy-award winning "Baby Got Back." Plaintiff alleged that he had supplied defendant with "handful" of beats, one of which defendant had chosen as basis for "Baby Got Back," and that plaintiff had also provided "scratching" for song's chorus and solo. Thereafter, plaintiff continued collaborating with defendant on 15 additional works over seven-year period, maintaining status of independent contractor throughout, with no formal agreement. Plaintiff alleged he was unaware that defendant had filed copyright registrations for some works, including "Baby Got Back," until 2014, when Nicki Minaj single sampled heavily from "Baby Got Back" without first requesting plaintiff's consent. Plaintiff then discovered defendant's copyright registrations identifying defendant as sole author. Plaintiff sued defendant for declaratory judgment that plaintiff was co-author and co-owner of 16 works, and for accounting of revenues from defendant's use of any jointly owned works. Court applied Ninth Circuit three-factor test for joint authorship, considering (1) whether plaintiff "superintended" works at issue by exercising control; (2) whether parties made "manifestations" of shared intent to be coauthors; and (3) whether audience appeal of works turned on both contributions and share of each in works' success cannot be appraised. Court found first, and most important, factor strongly favored defendant, since plaintiff provided material to defendant, but defendant ultimately decided whether and how to incorporate plaintiff's material in finished product. Court rejected plaintiff's claim that his contribution served "as the basis for the song 'Baby Got Back,'" because "simply making a significant contribution to a work does not make one an author." As to second factor, court found plaintiff failed to allege mutual intent to co-author works at issue or any objective manifestations of such intent; plaintiff had not alleged that he had ever claimed authorship or that defendant had ever acknowledged him as co-author. Without formal contract, intent determination rested on facts, and facts demonstrated collaboration in which defendant incorporated some material from plaintiff into his songs, then promptly registered copyrights solely in his name. As to third factor, plaintiff's allegations that defendant used plaintiff's beat and scratching failed to demonstrate how much of song was plaintiff's creation, or allege contributions accounting for appeal of "Baby Got Back." Accordingly, plaintiff failed to allege facts giving rise to plausible claim of co-authorship.

*Bubble Pony, Inc. v. Facepunch Studios Ltd.*, No. 15-601, 2015 U.S. Dist. LEXIS 163718 (D. Minn. Dec. 7, 2015)

Court denied defendant's motion to dismiss declaratory judgment claim. Plaintiff sought declaration adjudging plaintiff joint owner of copyright in computer game titled *RUST*. Defendant sought to dismiss claim on ground that defendant never intended to enter into joint

ownership with plaintiff. However, parties agreed that plaintiff was independent contractor who had never signed any documents disavowing interest in games produced. Further, plaintiff alleged authorship of 75% of code for computer game, which, if true, would render plaintiff dominant author. Dominant author's intent to share authorship shapes analysis of whether parties intended to be joint authors at time work was created.

### **E. Contracts and Licenses**

*Fox TV Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152 (C.D. Cal. 2015)

Court held that defendants were potentially entitled to Section 111 compulsory license "if they meet the applicable requirements." Plaintiff broadcasting networks moved for summary judgment that defendants, which received and retransmitted broadcast programming content to users over Internet, were not entitled to compulsory license. Court held, despite plaintiffs' arguments in support of distinction between traditional cable services and defendants' services, that defendants' services involved broadcast signals received by antennas located in particular buildings within particular states that were subsequently retransmitted out of those facilities on wires, cables, microwaves, or other communication channels to users, and thus defendants' operations met definitions of eligibility for Section 111 compulsory license.

*Drauglis v. Kappa Map Group, LLC*, 128 F. Supp. 3d 46 (D.D.C. 2015)

Photographer brought suit for infringement based on defendant map publisher's unauthorized use of plaintiff's photograph on cover of defendant's commercially-released atlas for Montgomery County, Maryland. Both parties moved for summary judgment on issue of infringement. Record established that plaintiff had uploaded photograph at issue to public photo-sharing website, Flickr, and selected license option that specifically permitted commercial use without compensation. Defendant did not dispute plaintiff's ownership of valid copyright or that defendant downloaded plaintiff's photograph from Flickr and sold copies of atlas with photograph on cover. Therefore, only issue before district court was "whether defendant – which gave plaintiff full credit for the work it displayed on the cover of its publication – complied with the technical terms of the license under which plaintiff licensed the work." Plaintiff conceded validity of license, but argued that defendant exceeded scope by (1) violating "ShareAlike" requirement by not also distributing free copies of atlas, (2) not providing adequate information about license in atlas, and (3) not giving plaintiff proper attribution. Court found that "ShareAlike" requirement only applied to derivative works, and therefore did not apply to atlas in question. Moreover, court found that defendant had properly identified license and gave proper attribution to plaintiff in atlas. Accordingly, court held that defendant did not violate terms or exceed scope of license and granted summary judgment in defendant's favor.

*Woodard v. Victory Records, Inc.*, No. 11-7594, 2016 U.S. Dist. LEXIS 42863 (N.D. Ill. Mar. 31, 2016)

Plaintiffs, members of musical group A Day to Remember, sued record label seeking declaratory judgment that plaintiffs owned copyrights to songs recorded under record contract. Both parties moved for summary judgment. Plaintiff argued that record contract did not transfer copyrights to defendant. Conversely, defendant argued that record contract gave defendant exclusive license to reproduce, distribute, and perform recordings of plaintiff's songs. Based on language of agreement, including reference to "exclusive" deal, court held that defendant had acquired exclusive license to distribute music that plaintiffs produced pursuant to contract. Court characterized plaintiffs' argument that contract only granted nonexclusive license to defendant as "perverse reading" of agreement that defied economic sense. Due to genuine issues of material fact, court denied parties' respective motions for summary judgment on issue of which party owned copyrights in musical compositions. Court found that language of record contract was ambiguous as to transfer of copyrights in compositions, and noted that other evidence in record might support finding that contract in fact transferred copyrights in musical compositions to defendant.

*Joint Comm'n on Accreditation of Healthcare Orgs. v. Greeley Co.*, No. 14-10225, 2016 U.S. Dist. LEXIS 49567 (N.D. Ill. Apr. 13, 2016)

Plaintiffs Joint Commission on Accreditation of Healthcare Organizations ("JC") and Joint Commission Resources, Inc. ("JCR") brought suit for infringement of two accreditation manuals for hospitals authored in 2009 and 2011. Plaintiffs alleged that defendants had published text copied from copyrighted manuals. District court granted defendant's motion to dismiss due to plaintiffs' failure pursuant to Section 411(a) to apply for registration of 2009 manual until after filing of instant lawsuit. Court dismissed other claims brought by licensee JCR because although exclusive licensee may bring suit for infringement of copyrighted work, JCR did not possess exclusive right to reproduce and distribute JC's works and therefore was not entitled to sue for infringement of works at issue. Finally, court held that plaintiffs' complaint – which identified six of defendants' publications that included text allegedly copied from 2011 manual and included chart containing two examples of pages in defendants' publications that allegedly infringed 2011 manual – was insufficient to state plausible claim of substantial similarity, because plaintiffs did not show that allegedly infringing works infringed upon substantial portion of plaintiffs' work and only identified small number of instances of duplication relative to large size of total work.



## IV. FORMALITIES

### A. Registration

*Senisi v. John Wiley & Sons, Inc.*, No. 13-3314, 2015 U.S. Dist. LEXIS 160572 (S.D.N.Y. Nov. 20, 2015)

Photographer brought suit for infringement against textbook publisher based on allegations that publisher had used photographs beyond terms of license agreements. Plaintiff alleged that photographs at issue were registered as “single work” or alternatively as “compilation.” District court dismissed plaintiff’s infringement claims on summary judgment upon finding that plaintiff lacked valid registration under either theory. First, multiple published works may be protected under single registration only if works were published for first time together as “single unit of publication,” and plaintiff had admitted that photographs subject to registration had been published at different times. Second, to be considered protectable compilation, data constituting work must be “selected, coordinated or arranged” in such manner that resulting work constitutes original work of authorship. Plaintiff’s mass registration of all 8,000 photographs created by plaintiff between 1990 and 2007 did not satisfy admittedly low threshold for “original” work, since there was no evidence that plaintiff had displayed even minimal level of creativity in selecting or compiling mass group of photographs.

*Sullivan v. Duncan*, No. 13-1640, 2015 U.S. Dist. LEXIS 93359 (S.D.N.Y. July 17, 2015)

Plaintiff brought suit for infringement based on airing of reality show television *Bullrun* which plaintiff alleged was based on treatment for show titled *Speedstar* that plaintiff had pitched to producers of *Bullrun*. Plaintiff did not apply for registration of treatment until more than one year after commencing lawsuit. District court granted defendants’ motion to dismiss in light of plaintiff’s failure even to apply for registration of work prior to commencing lawsuit. Although Second Circuit had not settled question whether pending application for registration satisfies Section 411(a)’s precondition requirements, court held that plaintiff must at least apply for registration prior to bringing suit. If Copyright Office subsequently issued registration for treatment, plaintiff would be required to commence new action for infringement.

*Epikhin v. Game Insight N. Am.*, No. 14-4383, 2015 U.S. Dist. LEXIS 152837 (N.D. Cal. Nov. 11, 2015)

Plaintiffs brought suit for infringement based upon copyright in mobile application known as *Cat Story*. Mobile application at issue was allegedly first conceived by plaintiffs in early 2012 at South Port Studios, LLC (“South Port”) and originally called *PussyVille*. *PussyVille* contained computer code based on and derived from code created by South Port employees in connection with earlier South Port project titled *Fairy Farm*. In seeking copyright protection for *Cat Story*, plaintiffs deposited with Copyright Office (1) various images of

characters in *Cat Story* that were allegedly identical to or derivative of *PussyVille*, and (2) source code of *Fairy Farm* on which *PussyVille* was allegedly based. District court dismissed plaintiffs' copyright infringement claims upon finding that plaintiffs lacked valid copyright registration for either *PussyVille* or *Cat Story*. Valid registration requires copyright applicant to deposit two "bona fide copies" of original work, and not "reconstructions" of original work. Acknowledging plaintiffs' admission that plaintiffs lacked access to original works, court found that deposit copies were not "bona fide" copies of original works but were instead materials from other games or were materials that plaintiffs merely "believed" were identical to original work. Because plaintiffs lacked valid registration for mobile application, infringement claim was foreclosed under Ninth Circuit's decision in *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9th Cir. 1998).

*Roberts v. Gordy*, No. 13-24700, 2016 U.S. Dist. LEXIS 47694 (S.D. Fla. Apr. 8, 2016)

Plaintiffs brought suit for infringement of musical composition entitled "Hustlin." District court dismissed action on summary judgment because plaintiffs did not own valid registration for work. Court found that three separate copyright registrations had been filed on behalf of plaintiffs for work at issue and that each registration contained indisputably inaccurate information, including as to identity of claimant and publication of work. Noting that "proper registration is a prerequisite to an action for infringement," that Copyright Office regulations generally "permit only one registration for the same version of a particular work," and that Copyright Register issued opinion finding that misrepresentations at issue were material and that registrations would not have issued had Copyright Office known of inaccuracies, court held that plaintiffs did not hold valid registration that would enable plaintiffs to sue for infringement. Court further held that finding of intent to defraud Copyright Office was not necessary to invalidate registration; all that was required was showing of misrepresentations that, if known, would have led to rejection of application. Moreover, factual record belied assertion that plaintiffs had been unaware of numerous inaccuracies contained in registrations at issue.

*Bossen Architectural Millwork, Inc. v. Kobolak & Sons, Inc.*, No. 14-4294, 2015 U.S. Dist. LEXIS 155552 (D.N.J. Nov. 17, 2015)

Plaintiffs brought suit for infringement of photographs that had been displayed on defendants' websites without permission. District court granted defendants' motion dismissing infringement claims because plaintiffs did not state plausible claim for infringement due to failure to allege ownership of registrations in photographs at issue. Court noted current circuit split regarding meaning of copyright "registration" in Section 411(a). While "application approach" holds that copyright is registered at time copyright holder's application is received by Copyright Office, "registration approach" holds that copyright is registered at time Copyright Office issues certificate of registration. District court adopted registration approach as more consistent with language of Section 411(a) and Third Circuit's decision in *Dawes-Lloyd v. Publish Am., LLLP*, 441 F. App'x 956 (3d Cir. 2011).

*Frazier v. Capitol CMG Publ'g*, No. 14-2310, 2015 U.S. Dist. LEXIS 164611 (M.D. Tenn. Dec. 4, 2015)

District court granted defendants' motion to dismiss. Plaintiff songwriter sued defendants, including gospel artist and publisher, for infringement stemming from defendants' collection of royalties for two gospel songs composed by plaintiff ("Compositions"). Plaintiff and defendants had executed publishing agreement providing defendants with 25% of publishing income generated from Compositions on "Family Affair II" album. Plaintiff alleged defendants had violated agreement by collecting 25% of all royalties associated with Compositions rather than 25% of publishing income from "Family Affair II" album. Defendants moved to dismiss plaintiff's copyright claims on ground that plaintiff had failed to demonstrate preregistration or registration of copyright for Compositions prior to filing suit. Plaintiff's complaint had alleged sole ownership of Compositions, but court found conclusory allegation of ownership insufficient to satisfy registration requirement. In response to defendants' motion to dismiss, plaintiff claimed he had preregistered all asserted copyrights, but did not provide copies of any filings. Accordingly, plaintiff's copyright infringement claim was dismissed for failure to state claim.

*Compass Homes, Inc. v. Heritage Custom Homes, LLC*, No. 13-779, 2015 U.S. Dist. LEXIS 101338 (S.D. Ohio Aug. 3, 2015)

Court denied plaintiff's motion for relief from judgment. Court had granted defendant's summary judgment motion on grounds that plaintiff could not prevail on infringement claim because plaintiff put forth no evidence raising genuine issue as to whether plaintiff registered allegedly infringed design with Copyright Office. Court found evidence submitted – affidavit from plaintiff's CEO with no personal knowledge of matter, and webpage printout that purportedly established registration – insufficient, and plaintiff failed to submit registration certificate for copyright at issue. Month after judgment entered, plaintiff obtained registration certificate from Copyright Office, and argued that this was newly discovered evidence that court should consider pursuant to plaintiff's 60(b) motion. Court disagreed, finding that plaintiff failed to carry burden because it did not diligently obtain certificate of registration.

*Asche & Spencer Music, Inc. v. Principato-Young Entm't, Inc.*, No. 15-3305, 2015 U.S. Dist. LEXIS 158540 (D. Minn. Nov. 24, 2015)

Plaintiff, owner of musical compositions, brought action for copyright infringement against hosts of web series titled "Reluctantly Healthy" based on defendants' alleged unauthorized use of approximately 20 musical compositions spread across 119 episodes. Prior to filing complaint, plaintiff filed application for registration with Copyright Office, but Copyright Office had not yet made decision with respect to application. Court granted motion to dismiss, holding that plaintiff must wait for decision from Copyright Office before instituting civil action for infringement. In absence of guidance from Eighth Circuit, district court adopted "registration approach," reasoning that (1) registration approach is more consistent with relevant statutory language than application approach; (2) court owes deference to

Copyright Office, which explicitly adopted registration approach in Compendium III; (3) registration approach furthers Congress's intent that Copyright Office have opportunity to comment on whether work warrants registration; and (4) registration provides clarity once litigation begins by determining whether plaintiff must prove elements of copyrightability or simply present certificate of registration.

*Crumley Architects, P.A. v. Wheatley, Inc.*, No. 14-731, 2015 U.S. Dist. LEXIS 168549 (S.D. Miss. Dec. 14, 2015)

District court denied defendant's motion to dismiss action for infringement for lack of subject matter jurisdiction. Prior to initiation of lawsuit, plaintiff had sought to register work in question with Register of Copyrights, paid required fee and deposited work in question with Copyright Office, but had not received registration certificate. Court held that, while Section 411(a) of Act may appear to require copyright holders to register works prior to initiating infringement actions, United States Supreme Court precedent holds that Section 411(a) does not divest federal courts of subject matter jurisdiction over infringement claims involving unregistered works. Court further held that plaintiff had pled sufficient facts to make out claim for infringement under Rule 12(b)(6) because Fifth Circuit law requires only that plaintiff submit application to Copyright Office and show that Copyright Office received said application prior to initiation of lawsuit.

## **V. INFRINGEMENT**

### **A. Access**

*Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031 (5th Cir. 2015)

Plaintiff, who wrote song "Triste Aventurera" in early 1970s, brought suit for infringement based on defendants' release of Hometown Boys' song "Cartas de Amor" in 1990. After bench trial, district court ruled in defendants' favor, finding that plaintiff failed to show that defendants had reasonable possibility of access to "Triste Aventurera" before releasing "Cartas de Amor," and that musical differences between songs undermined plaintiff's claim of striking similarity. On appeal, Fifth Circuit affirmed. Although plaintiff had claimed there was reasonable possibility of defendant's access to "Triste Aventurera" because song had played "thousands" of times on Corpus Christi radio stations, there was no evidence or testimony at trial that clearly established frequency or time period during which song had played on radio stations. Likewise, district court properly rejected plaintiff's argument alleging access based on live performances of "Triste Aventurera" in Corpus Christi because there was conflicting testimony and most credible witness indicated that peak popularity of song was in mid-1970s, approximately 15 years before defendant had recorded allegedly infringing song. District court's findings as to lack of striking similarity were also not clearly erroneous. Although songs' opening lyrics were virtually identical, plaintiff had failed to establish that such lyrics were sufficiently unique or complex as necessary to sustain

finding of striking similarity. Expert testimony at trial established that phrases, attitudes and expressions contained in songs' opening lyrics were commonplace, and that songs' melodies, rhythmic patterns and instrumental accompaniment were common to Tejano genre or in other songs.

*Concentro Labs., L.L.C. v. Practice Wealth, Ltd.*, No. 15-10325, 2015 U.S. App. LEXIS 20919 (5th Cir. 2015)

Appellant chiropractor created short outlining diagnostic procedure and blank form to be filled in while conducting that procedure, and brought infringement claim against competitor who created video and form covering same procedure. Fifth Circuit affirmed district court's dismissal of claim on basis that appellant had "chiefly alleged infringement of the procedure itself, for which there is no copyright protection." Further, to extent that appellant did base infringement claim on protectable expression, Fifth Circuit found no factual copying where (1) appellant submitted no evidence of access; and (2) district court determined that videos were not so strikingly similar that similarity could only be explained by copying.

*Stabile v. Paul Smith Ltd.*, 137 F. Supp. 3d 1173 (C.D. Cal. 2015)

District court granted defendants' motion for summary judgment dismissing infringement claim. Artist brought suit for infringement of abstract painting. In absence of direct evidence of copying, plaintiff had to show that defendants had access to painting, which required showing that defendants had "reasonable opportunity" or "reasonable possibility" of viewing painting. Dissemination of plaintiff's painting had been limited to display in two Southern California restaurants, sale of handful of prints in single location, and display on plaintiff's website for undeterminable period of time. Because painting had not been "widely disseminated," there was no issue of fact concerning lack of access, since no reasonable jury could find more than "bare possibility" that defendants had access to painting during relevant time period.

*Jordan-Benal v. Universal Studios, Inc.*, No. 14-5577, 2015 U.S. Dist. LEXIS 82220 (C.D. Cal. June 24, 2015)

Plaintiff brought suit for infringement based on production companies' release in July 2013 of movie *The Purge*, which plaintiff alleged was based in substantial part on plaintiff's draft script for film titled *Settler's Day*. Plaintiff had submitted script to defendant United Talent Agency, Inc. ("UTA") for possible representation in June 2011. Defendant James DeMonaco, who was credited as sole writer of *The Purge*, was also represented by UTA at time plaintiff submitted script. Defendants moved to dismiss on ground that plaintiff had insufficiently alleged defendants' access to plaintiff's *Settler's Day* script. District court rejected argument that plaintiff had alleged only "bare corporate receipt of the copyrighted work," pointing to specific allegations in complaint that script had been "packaged" and transferred to DeMonaco, and that DeMonaco had received script from agent at UTA. Court concluded that plaintiff had alleged plausible claim for infringement based upon

DeMonaco's relationship with UTA at time of script's transmission and relatively short period of time between submission of plaintiff's script and release of *The Purge*.

## **B. Copying and Substantial Similarity**

*Sissom v. Snow*, No. 14-3355, 2015 U.S. App. LEXIS 17252 (7th Cir. Oct. 1, 2015)

Seventh Circuit affirmed district court's dismissal of plaintiff's copyright infringement claim. Plaintiff, freelance journalist, conducted investigation in 1990s of unsolved 1971 murder of three Indianapolis businessmen. Her investigation led to men being charged with murder, but charges were later dropped. In 2003, Indianapolis police received letter with confession to murders. Plaintiff, believing letter validated her investigation, wrote 2006 book *The LaSalle Street Murders*, followed by trilogy few years later. 2003 letter ultimately led to Indianapolis police closing murder case. In 2012, defendant wrote book *Slaughter on North LaSalle*, detailing original police investigation, plaintiff's work in 1990s and conclusion of case. Middle third of *Slaughter on North LaSalle* relied heavily on plaintiff's 2006 book, and defendant credited her as source of information. Plaintiff sued, alleging that *Slaughter on North LaSalle* was unlawful paraphrase of her book. District court concluded that defendant's book copied only unprotectable facts, and defendants thus were entitled to judgment as matter of law. Seventh Circuit noted that district court committed harmless error in considering books as whole since books were matters outside pleadings, but ultimately affirmed: "Because Snow merely retold historical events using his own, more succinct style of expression, he did not appropriate any copyrightable expression."

*Tanikumi v. Walt Disney Co.*, No. 15-1959, 2015 U.S. App. LEXIS 17142 (3d Cir. 2015)

Third Circuit affirmed district court's dismissal of infringement claim. Author brought suit alleging that Disney's movie *Frozen* infringed autobiographical books *Yearnings of the Heart* and *Living My Truth*. Author emphasized that both *Frozen* and *Yearnings* involve village at base of snow-covered mountains; two sisters with "intense sisterly love"; incident in which older sister accidentally injures younger sister and younger sister has no memory of incident; traumatic natural disaster; betrayal of young girl's first love; and romantic scenes set under shadows of moon. District court examined both works and concluded correctly that similarities "concern prototypical settings, plots, and characters too indistinct to merit copyright protection." Furthermore, mood and overall feel of works were dramatically different.

*Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532 (4th Cir. 2015)

Fourth Circuit affirmed district court's grant of summary judgment to defendant architects on basis that no reasonable jury could find that two apartment building designs at issue were substantially similar. Plaintiff designed high-rise residential tower in 2001. In 2003, plaintiff registered design as architectural work with Copyright Office. Building was

constructed in Minnesota in 2004. In 2008, defendant Penrose began developing high-rise apartment building in Virginia, and solicited design proposals from plaintiff and co-defendant Lessard. Penrose chose Lessard's design. Plaintiff subsequently filed action alleging infringement. Lessard argued that it did not copy plaintiff's design, and that two designs were not substantially similar. Plaintiff relied on expert, who identified nine characteristics that were shared by both designs. District court granted defendants' motion for summary judgment because there was no direct evidence of copying, and no reasonable jury could find two buildings "extrinsically (i.e., objectively) similar." Fourth Circuit agreed that plaintiff failed to carry burden of identifying specific similarities between buildings. Evidence merely showed that designs incorporated nine of same concepts, but did not establish that two designs had similar overall form, or that designs arranged or composed elements and spaces in similar manner.

*Copeland v. Bieber*, 789 F.3d 484 (4th Cir. 2015)

Fourth Circuit vacated district court's dismissal of copyright infringement claim against defendants Usher and Justin Bieber, finding that choruses in songs were sufficiently similar to withstand motion to dismiss, as reasonable jury could find songs intrinsically similar. Plaintiffs, singer-songwriters Devin Copeland and Mareio Overton, brought suit against Bieber, Usher and affiliated parties, alleging that defendants' songs infringed plaintiffs' copyrighted song "Somebody to Love." Plaintiffs alleged that after being given copy of Copeland's album, Usher released YouTube demo of song called "Somebody to Love," which was recorded and released by Justin Bieber, followed by remixed version that included Usher several months later. Defendants filed motion to dismiss, arguing that no reasonable jury could find that defendants' songs were substantially similar to plaintiffs' song. District court agreed, finding that songs were not intrinsically similar because intended audience for songs, general public, would not "construe the aesthetic appeal of the songs as being similar." Moreover, "mood, tone, and subject matter" of songs differed "significantly." On appeal, Fourth Circuit vacated district court's findings and remanded for further proceedings. Fourth Circuit declined to decide question of whether district court may grant motion to dismiss without analysis of "extrinsic similarity," objective review of copyright-protectable elements of original work and purported copy. Fourth Circuit found that, even assuming motion to dismiss may be granted on ground that no reasonable jury could find intrinsic similarity, which requires more subjective analysis, district court erred in granting dismissal. After listening to songs, Fourth Circuit found that district court placed too much emphasis on differences in "mood" and "tone" and overlooked most important elements of songs, their choruses. Though songs were from different genres, R&B versus dance pop, court found that differences in genre were not dispositive. Court based ruling on fact that choruses in songs were substantially similar, noting that, "courts routinely permit a finding of substantial similarity where the works share some especially significant sequence of notes or lyrics." Fourth Circuit concluded that choruses were similar enough that reasonable jury could find songs intrinsically similar: "it is not simply that both choruses contain the lyric 'somebody to love'; it is that the lyric is delivered in what seems to be an almost identical rhythm and a strikingly similar melody."

*Williams v. A&E TV Networks*, 122 F. Supp. 3d 157 (S.D.N.Y. 2015)

Court granted defendants' motion to dismiss. Plaintiff brought action against defendant television networks and related entities arising out of defendants' development and airing of television series titled *Married at First Sight*, which plaintiff alleged infringed on her treatment for reality competition similarly titled *Married at 1st Sight*. Plaintiff's treatment involved reality competition where two contestants win chance to marry and various prizes. Show plays out over several episodes where contestants, after going out on 12-hour date, are judged and eliminated by matchmaking/coaching team and viewing audience. Eventually, favorite couple is chosen and has opportunity to get married and win grand prize consisting of "dream house," "dream wedding," exotic honeymoon and \$250,000, provided they stay married for six months. Additional episodes follow as couple plans their wedding, goes on honeymoon, lives together and takes part in various "exciting activities" and "therapeutic tasks." Defendants' show *Married at First Sight* was television docu-series that follows experiences of three couples, chosen and matched by team of four experts, through their first six weeks of marriage. Each couple meets for first time at marriage ceremony, and is then legally married. At end of six weeks, couples choose to either stay married or obtain divorce. Court held that plaintiff's treatment consisted predominantly of unprotectable scenes a faire, and that as matter of law, total concept and overall feel of treatment was not substantially similar to defendants' show. Court held that "[p]laintiff does not own an enforceable copyright in general idea of a reality show about arranged marriages or marriage between strangers," and that many of alleged similarities were elements that could not be protected, such as interactions with coaching teams, pre-wedding events, and elaborate honeymoons. Court granted defendants' motion to dismiss, finding no substantial similarity between works at issue as matter of law.

*Lane v. Knowles-Carter*, No. 14-6798, 2015 U.S. Dist. LEXIS 143794 (S.D.N.Y. Oct. 21, 2015)

District court granted defendant's motion to dismiss. *Pro se* plaintiff sued defendant, recording artist Beyoncé, for copyright infringement based on defendant's use of plaintiff's copyrighted lyrics. Plaintiff alleged that in June 2013 he gave digital copy of his song "XOXO" to one of defendant's back-up singers. Plaintiff claimed that Beyoncé infringed "XOXO" by creating song "X.O." While court agreed that plaintiff had copyright in lyrics to "XOXO," plaintiff did not claim infringement of lyrics, but rather music, and registration certificate expressly excluded music from claim. Plaintiff claimed ownership of exclusive rights in music under license agreement regarding underlying beat in music. While exclusive licensee has standing to sue for infringement, plaintiff's failure to allege that licensor had validly registered copyright in beat led court to conclude plaintiff did not have standing. Regarding substantial similarity, court found that use of common four-bar phrase in "XO" and "XOXO" could not establish substantial similarity between works as matter of law. Only similarity, court found, was that both songs use letters "X" and "O," commonly used to signify kisses and hugs. Additionally, plaintiff and defendant deployed letters differently, with defendant consistently using "XO" throughout her song, and plaintiff sometimes using "O" alone. Furthermore, choruses in two songs had no words in common, aside from few



“musically ubiquitous words,” such as “I,” “you,” “your,” “is,” and “baby.” Accordingly, court granted motion to dismiss with prejudice.

*Skidmore v. Led Zeppelin*, No. 15-3462, 2016 U.S. Dist. LEXIS 51006 (C.D. Cal. Apr. 8, 2016)

Trustee of trust formed on behalf of Randy Wolfe, leading member of rock band Spirit, brought suit for infringement alleging that Led Zeppelin’s iconic song “Stairway to Heaven” infringed copyright in Spirit’s lesser-known song “Taurus.” On summary judgment, defendants moved to dismiss infringement claim on ground that plaintiff had failed to prove element of copying. District court denied defendants’ motion. Although plaintiff had not proffered evidence of striking similarity, which is “an exceedingly high bar,” court held that plaintiff had successfully raised triable issues of fact as to access and substantial similarity. First, although there was insufficient evidence that Led Zeppelin had direct access to “Taurus,” factual record indicated circumstantial evidence of access based on “chain of events,” including evidence that Spirit and Led Zeppelin performed in succession and actually interacted at several festivals between 1968 and 1971, when “Stairway to Heaven” was released; Spirit would frequently perform “Taurus” because such song was arguably Wolfe’s favorite; and surviving members of Led Zeppelin admitted to playing one of Spirit’s other songs that had appeared on same album as “Taurus.” With respect to substantial similarity, because plaintiff’s infringement claims relied solely on rights in “Taurus”’ musical composition, court agreed that plaintiff’s experts’ reliance on performance elements found in parties’ sound recordings was improper. However, even after limiting comparison to compositional elements, court held that central similarity between works at issue – repeated A-minor descending chromatic bass line structure marking first two minutes of each song – was sufficient for issue of substantial similarity to be submitted to jury. Court rejected defendants’ argument that descending chromatic bass line was “centuries-old, common musical element” not entitled to protection, holding instead that similarities between works “transcend this core structure,” especially because core common feature appears at beginning of both songs, “arguably the most recognizable and important segments.”

*Shame on You Productions, Inc. v. Banks*, 120 F. Supp. 3d 1123 (C.D. Cal. 2015)

Plaintiff, owner of motion picture screenplay titled *Darci’s Walk of Shame*, sued film producers, actress, and various other parties involved in defendants’ motion picture titled *Walk of Shame*, alleging infringement of plaintiff’s screenplay. Defendants moved to dismiss complaint under Rule 12(b)(6). Following exhaustive comparison between plaintiff’s screenplay and defendants’ allegedly infringing film, district court granted motion to dismiss, finding no substantial similarity between works as matter of law. Plaintiff argued that under Ninth Circuit’s “inverse ratio rule,” because plaintiff sufficiently pleaded defendants’ direct access to screenplay, plaintiff had lower standard to prove substantial similarity to survive motion to dismiss. Despite court’s agreement with plaintiff’s argument, court nonetheless was obligated to evaluate whether plaintiff could demonstrate that copyrightable elements of defendant’s motion picture were substantially similar to

copyrightable elements of plaintiff's screenplay. After analyzing both works, court found that "although they share the same premise and a number of elements that follow naturally from that premise, the two works at issue tell fundamentally different stories." Accordingly, court found no substantial similarity between works as matter of law and granted motion to dismiss.

*Williams v. Bridgeport Music, Inc.*, No. 13-6004, 2015 U.S. Dist. LEXIS 97262 (C.D. Cal. July 14, 2015)

District court granted counterclaimants' motion for declaratory judgment or judgment as matter of law and denied counterclaim defendants' motion for judgment as matter of law, declaratory relief and new trial following jury verdict finding counterclaim defendants liable for copyright infringement. Counterclaimants, children of singer-songwriter Marvin Gaye and owners of 1977 copyright in musical composition for Marvin Gaye song "Got to Give It Up" ("Gaye Family"), alleged song "Blurred Lines" composed by counterclaim defendants Robin Thicke, Pharrell Williams and Clifford Harris infringed copyright in "Got to Give It Up." Jury found by preponderance of evidence that Thicke and Williams had infringed, and awarded \$4 million in actual damages, plus profits of \$1.6 million against Williams and \$1.8 million against Thicke. Defendants filed motion for judgment as a matter of law, declaratory relief, new trial or *remittitur*, claiming combination of similarities between songs alleged by Gaye Family was not sufficient to support finding of infringement. Counterclaimants filed motion for declaration that Harris and record distributor were also liable for copyright infringement. At trial, parties had presented competing expert testimony on issue of substantial similarity between "Blurred Lines" and "Got to Give It Up." Defendants had claimed some elements of alleged similarity were not present in deposit copy (keyboard part and four-note core theme) and others were dissimilar (including lyrics, signature phrases and hooks). Counterclaimants claimed all 130 measures of "Blurred Lines" contained protected material copied from "Got to Give It Up," and combination of certain elements gave songs similar "heart-beat" or "pulse." Court found that although defendants had disputed expert for Gaye Family's methodology and presented competing expert testimony, defendants had failed to show that great weight of evidence favored defendants' musicological analysis. Accordingly, jury verdict was supported by substantial evidence, and defendants failed to show error warranting new trial or other relief. With respect to motion for declaratory relief, court noted that jury had found works substantially similar after considering competing expert testimony, and defendants did not offer sufficient basis to disturb jury's reasonable finding, based on substantial evidence, that there was substantial extrinsic and intrinsic similarity between "Got to Give It Up" and "Blurred Lines." Noting failure to instruct jury that distribution of infringing works constitutes copyright infringement, court found verdict of no liability for Harris and distributor of "Blurred Lines" record plainly erroneous. Accordingly, Gaye Family was also entitled to judgment against Harris and record distributor, and court entered judgment in favor of Gaye Family against all defendants declaring that any past and ongoing reproduction, distribution, sale or public performance of "Blurred Lines" infringes copyright in "Got to Give It Up."

*Folkens v. Wyland*, No. 14-2197, 2016 U.S. Dist. LEXIS 47373 (E.D. Cal. Apr. 6, 2016)

Plaintiff, wildlife artist in field of marine mammals, sued for infringement claiming that defendant's giclée on canvas titled "Life in the Living Sea" infringed plaintiff's copyrighted pen and ink drawing titled "Two Dolphins." Defendant conceded access to plaintiff's drawing, but moved for summary judgment on basis that respective works were not substantially similar. After comparing works at issue, district court granted summary judgment in favor of defendant. Question before court was whether depiction of two dolphins crossing underwater constituted protectable element. Plaintiff acknowledged work may only receive thin copyright protection, but argued that "the pose, attitude, perspectives, and arrangement of the two dolphins" were protectable elements. Defendant argued that such "generic addition to the depiction of actual dolphins does not amount to the 'quantum of originality' required to protect plaintiff's work." Citing *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003), court noted that natural positioning and physiology are not protectable. Thus, because cross-dolphin pose featured in both works "results from dolphin physiology and behavior since dolphins are social animals, they live and travel in groups, and for these reasons, they are commonly depicted swimming close together," such element was unprotectable. Since only similarities between works consisted of unprotectable elements, court dismissed infringement claim.

*Gallagher v. Lions Gate Entm't Inc.*, No. 15-2739, 2015 U.S. Dist. LEXIS 122441 (C.D. Cal. Sept. 11, 2015)

Author Peter Gallagher sued movie writers, producers and distributors alleging that film *The Cabin in the Woods* infringed Gallagher's copyright in book *The Little White Trip: A Night in the Pines*. District court granted defendants' motion to dismiss infringement claim, finding that works were not substantially similar under extrinsic test, involving objective analysis of specific expressive elements of works at issue. Court found no substantial similarity under extrinsic test because works' shared premise – students venturing to remote location where they are murdered by evil forces – "amounts to *scenes a faire*" that "flow indispensably from the premise of horror film," and thus such premise was unprotectable. Court further found compelling differences in works' characters, dialogue, mood, pace and sequence of events. Finally, court noted that works' shared "theme of horror" constituted generic and common theme that was likewise unprotectable.

*Alpi Int'l, Ltd. v. Anga Supply, LLC*, 118 F. Supp. 3d 1172 (N.D. Cal. 2015)

District court denied defendant's motion for summary judgment. Plaintiff, seller of soft foam and molded plastic toys known as "stress relievers," brought suit for infringement against competitor. Defendant moved for summary judgment on ground that defendant's products were independently created and plaintiff's designs were insufficiently similar to defendant's products to support finding of infringement. First, district court found that parties' designs were entitled only to "thin" copyright protection requiring "virtually identical" level of similarity to find infringement, since limitations inherent in use of soft

foam medium and parties' "approximately true-to-life" designs of animals, fruits and other objects placed significant constraints on possible range of creative expression. Although district court expressed doubt that certain of plaintiff's designs possessed protectable elements, court refused to hold that no reasonable juror could find that defendant's "extraordinarily similar" designs arose from protectable elements and were therefore infringing. District court relatedly held that because parties' designs were so similar, jury could find products "strikingly similar" and therefore create permissible inference of copying even without evidence that defendant had access to plaintiff's copyrighted designs.

*Stabile v. Paul Smith*, 137 F. Supp. 3d 1173 (C.D. Cal. 2015)

District court granted defendants' motion for summary judgment dismissing infringement claim. Artist brought suit for infringement of abstract painting. Because there was no proof of access to work by defendants, court analyzed whether "striking similarity" existed between plaintiff's painting and allegedly infringing rug. Under "extrinsic" test applied in Ninth Circuit, district court found no striking similarity between "specific expressive elements" of works, particularly because color palettes of two works were "markedly different" and defendant's work had "greater variation of colors and shades." District court held that statement of plaintiff's expert that works were "nearly identical" was merely conclusory and unsupported by specific evidence. Striking similarity doctrine was also unavailable because facts did not preclude possibility of independent creation, including evidence showing that defendant used design process that largely pre-dated creation of plaintiff's work and inspiration for parties' respective works stemmed from separate sources.

*Hoberman Designs, Inc. v. Gloworks Imps., Inc.*, No. 14-6743, 2015 U.S. Dist. LEXIS 176117 (C.D. Cal. Nov. 3, 2015)

District court granted defendants' motion for summary judgment on copyright infringement claim. Plaintiff Hoberman Designs, Inc. ("HDI") sued for infringement stemming from defendants' sale of expanding and contracting geometric plastic toys similar to plaintiff's. Charles Hoberman, well-known designer and engineer of expanding structures and spheres, sold toy versions of his designs through his company, HDI, including registered "Mini Sphere" and "Twist-o" designs. Gloworks imported and sold similar toys as "NF-EXPBALL," "Flashing Skull," and "FL-EXPANDBALL." Defendants moved for summary judgment on infringement claim, arguing that HDI's designs were not original works, because they were unprotectable geometric shapes and were mechanical or utilitarian in nature. Court reviewed HDI's alleged protectable elements and found some copyrightable, original elements in plastic joints and trusses of Mini Sphere and plastic cross pieces of Twist-o. Court also found HDI had demonstrated defendants' access to HDI's popular and widely disseminated designs. However, court found toys at issue extrinsically dissimilar with respect to few copyrightable elements. Defendants' designs were not substantially similar to HDI's Mini Sphere, because toys were different sizes and colors, joints were different colors and shapes, and trusses on defendants' designs were larger and looser than those on Mini Sphere. Defendants' FL-EXPANDBALL design was not similar to Twist-o, because toys were different sizes and colors, gear covers were different color and textures,

and cross pieces on Twist-o were rounded with slight beveling while cross pieces on FL-EXPANDBALL had raised multi-tier patterns. Accordingly, defendants did not infringe plaintiff's thin copyrights.

*AMA v. 3Lions Publ'g, Inc.*, No. 14-5280, 2015 U.S. Dist. LEXIS 147978 (N.D. Ill. Nov. 2, 2015)

Court granted declaratory plaintiff's motion for judgment on pleadings. Plaintiff American Medical Association filed declaratory judgment action seeking declaration that AMA did not infringe copyright in article written by defendant 3Lions. Both plaintiff and defendant published articles on their respective websites setting out overview of 2009 Health Information Technology for Economic and Clinical Health Act. Plaintiff moved for judgment on pleadings. Court found that no reasonable trier of fact could find that respective articles were substantially similar. Defendants provided court with highlighted version of AMA article, labelling highlighted version "Infringing Content." Court held that much of highlighted text was not protectable as it related to headings and short phrases, for example, "privacy and security," "breach laws," and "the name of institution," which are excluded from copyright protection under 37 C.F.R. § 202.1(a). Additionally, such short phrases are excluded from copyright under merger doctrine when such phrases are only way feasible way to convey particular idea. Moreover, plaintiff's article had number of introductory paragraphs and five sections, whereas defendant's article had one introductory paragraph followed by seven sections. Court held that there was no overlap, other than name of statute and certain non-essential words. Court noted that only one sentence was same; apart from that one sentence, articles were quite different: "The facts are arranged in different orders, sentences have different structures, and facts in short sentences are combined into longer sentences and vice versa." Court granted AMA's motion for judgment on pleadings.

*Prunty v. Vivendi*, 130 F. Supp. 3d 385 (D.D.C. 2015)

District court granted defendants' motion to dismiss infringement claim. Plaintiff filed suit alleging that record labels' release of song titled "Kingdom" performed by hip-hop artist Common infringed plaintiff's song "Keys to the Kingdom." Court held that songs bore little resemblance to one another aside from word "Kingdom" appearing in both songs' titles and phrase "keys to the kingdom" appearing in both songs' lyrics; therefore works were not substantially similar. District court further held that expert testimony was not needed to determine whether "readily accessible song lyrics" were substantially similar.

*Medallion Homes Gulf Coast, Inc. v. Tivoli Homes of Sarasota, Inc.*, No. 14-3117, 2015 U.S. Dist. LEXIS 151018 (M.D. Fla. Nov. 5, 2015)

District court granted defendants' motion for summary judgment on infringement claim. Plaintiff builder sued defendants, including homeowners Michael and Nicole Duke ("Dukes") and architect and builder of their home, for infringement of its architectural plan. Dukes purchased vacant lot and selected plaintiff to construct modified version of plaintiff's "Santa Maria VIII" model home. Plaintiff subsequently failed to appear at scheduled

meeting before residential community's Architectural Review Board, and community banned plaintiff from building within community. Dukes contracted with another builder for construction of new custom home, and builder retained architect to draft building plans. In meetings with builder and architect, Dukes referred to plaintiff's Santa Maria VIII marketing brochure, builder's floor plans, and other materials from past building projects. After Dukes' home was constructed, plaintiff sued for infringement, and defendants jointly moved for summary judgment. Defendants did not challenge plaintiff's ownership of valid copyright or defendants' access to Santa Maria VIII brochure. In considering whether architectural works involved were substantially similar, court noted copyright protection afforded to compilations, such as floor plans, is thin, and modest differences will be more significant than with other types of works. Court acknowledged many similarities between Dukes' home and plaintiff's Santa Maria VIII, but found differences dispositive. Court conducted side-by-side comparison of rooms and design features and listed numerous differences between Dukes' home and plaintiff's Santa Maria VIII, including overall square footage (2,953 versus 2,615), square footage of garage (559 versus 724), and master bedroom features (two windows, pocket door entrance, and two hinged closet doors versus one window, hinged entrance door, and four double bifold closet doors). Plaintiff presented affidavit from architect concluding homes were substantially similar, but court found opinion belied by architect's own description of many differences between two homes. Court also noted deposition testimony by plaintiff's representative failed, despite multiple opportunities, to provide details regarding alleged similarities beyond "the rooms were laid out the same." Accordingly, court found significant differences between protectable elements of Santa Maria VIII and Dukes' residence, such that no reasonable trier of fact could find works substantially similar.

*Farouk Systems, Inc. v. AG Global Products, LLC*, No. 15-465, 2016 U.S. Dist. LEXIS 45689 (S.D. Tex. Apr. 5, 2016)

District court granted summary judgment for defendants dismissing infringement claims. Plaintiff, manufacturer of hair care products, sued competitor for infringement based on defendant's alleged posting online of copyrighted images taken from plaintiff's Facebook page. Plaintiff also claimed that defendant copied copyrighted photograph of defendant Gulamani, taken when defendant was employed by plaintiff, and posted this image on defendant's personal LinkedIn page. Record established that two images taken from plaintiff's Facebook page were compilations containing at least some elements borrowed from other sources, including quotations and stock images obtained from royalty-free image provider. Thus, copyright owned by plaintiff extended only to original material contributed by plaintiff. Court found that defendant's images were not copies of plaintiff's images and did not contain original elements added by plaintiff. Record also established that photograph of defendant was taken by third party photographer, with no evidence that copyright had been transferred to plaintiff in written agreement required by Section 204(a) or that photograph was work made for hire. Although subject of photograph was employee of plaintiff, work made for hire provision only covers circumstances where author of work was employee.

*Abassi v. Bhalodwala*, No. 15-115, 2015 U.S. Dist. LEXIS 162028 (M.D. Ga. Dec. 3, 2015)

District court denied defendants' motion to dismiss plaintiff's amended complaint. Plaintiff, software developer, sued defendants, RealTime and individual owner of RealTime, for copyright infringement. Plaintiff had created lottery ticket tracking tool called Lottery Tracking System ("LTS") for use in stores where lottery tickets are sold, and registered software with Copyright Office. Plaintiff licensed LTS software to owner of Stop N Save convenience store in Milledgeville under name Sunny Milledgeville and provided 138 minutes of phone service to explain software. Shortly thereafter, plaintiff was notified of improper login attempt into LTS's email account from IP address in Milledgeville. Plaintiff later learned that defendant RealTime had begun selling application "substantively identical" to LTS, and that RealTime's website was displaying images copied directly from plaintiff's software. Contact information listed on RealTime's website matched that of Sunny Milledgeville, Stop N Save store that had licensed plaintiff's software. Plaintiff filed suit alleging copyright infringement, and defendants moved to dismiss. Defendants did not challenge plaintiff's ownership of valid copyright, but claimed plaintiff had failed to allege facts sufficient to demonstrate access or substantial similarity. Court disagreed, finding that plaintiff had sufficiently alleged access via direct license of copyrighted software to defendants, and substantial similarity via claims that defendants were selling "substantively identical" application using images from plaintiff's software. Accordingly, defendants' motion to dismiss infringement claim was denied.

*Silver Streak Indus., LLC v. Squire Boone Caverns, Inc.*, No. 13-173, 2015 U.S. Dist. LEXIS 81813 (S.D. Ind. June 23, 2015)

Plaintiff, distributor of themed displays, brought suit for infringement of copyrighted "ore car" display based upon defendant's sale of similar display. Copyrighted display consisted of trapezoidal ore car sitting atop piece of railroad track and two rounded, wooden posts extending from opposite sides of top of ore car holding customizable sign between said posts. Defendant moved to dismiss plaintiff's infringement claim on summary judgment based on absence of substantial similarity. Noting that summary judgment on issue of substantial similarity is appropriate only where "the works are so dissimilar as to protectable elements that no reasonable jury could find for the plaintiff," district court denied defendant's motion. Court held that ordinary observer could find overall look of two products to be substantially similar as products were nearly same shape and size, signs featured in products were supported in nearly identical ways and both ore cars sat on railroad tracks. Defendant's "laundry list" of alleged differences between products were dismissed as "slight differences" that jury could hold do not preclude finding of substantial similarity. Further, court held that products' differing finish – smooth versus weathered looks – was tantamount to using different color paint or different medium which Seventh Circuit in *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (7th Cir. 1977), held was insignificant difference for purposes of substantial similarity.

*Nason Homes v. Billy's Constr., Inc.*, No. 14-566, 2015 U.S. Dist. LEXIS 150467 (M.D. Tenn. Nov. 5, 2015)

District court denied plaintiff's motion for summary judgment. Plaintiff, construction company, brought claim for infringement against defendants, alleging that defendants used plaintiff's copyrighted-protected architectural plan to build and sell home. Record established that plaintiff owned copyright in Plan. Court considered defendants' access to plan and whether works were "substantially similar." Court applied two-pronged test for substantial similarity: (a) identify aspects of plaintiff's work that are copyrightable; and (b) determine whether allegedly infringing work is "substantially similar" to those copyright-protectable elements. Here, defendants had "reasonable possibility to view" plan, and opportunity to build home based on design. Overall arrangement of component architectural parts was copyrightable, but plaintiff failed to show that specific layout of defendants' home was similar to its plan. Plaintiff, accordingly, "failed to show 'there is no issue requiring a trial' with respect to similarities between the two homes."

*Leary v. Manstan*, 118 F. Supp. 3d 460 (D. Conn. 2015)

Plaintiff, author of unpublished manuscript about Revolutionary War-era submarine "The Turtle," sued defendants, authors of later published book on same subject, alleging book infringed plaintiff's copyright. Defendants conceded access to plaintiff's manuscript, but moved for summary judgment claiming respective works not substantially similar. Following analysis of plaintiff's claims and thorough comparison of plaintiff's manuscript with defendants' allegedly infringing book, court granted summary judgment to defendants. Court noted that although works were about same subject matter, plaintiff did not allege defendants engaged in verbatim copying or close paraphrasing of plaintiff's manuscript. Absent such allegations, court also noted that "copyright law otherwise affords only narrow protection to works of history, and subsequent authors may utilize the same facts, theories, and concepts contained in prior works so long as they do not copy another author's particular original manner of expression." In this case, court found that only shared experiences and interests of parties gave rise to similarities between respective works, and that, "most fundamentally, the two works adopt different approaches to similar subject matter." Accordingly, court found no reasonable juror could find substantial similarity between plaintiff's manuscript and defendants' book, and therefore granted summary judgment to defendants.

*Design Basics LLC v. J & V Roberts Inv., Inc.*, 130 F. Supp. 3d 1266 (E.D. Wis. 2015)

District court denied defendants' motion for summary judgment. Plaintiffs, creators of architectural plans, sued defendants, builders of residential homes, for infringement of eight registered architectural plans after plaintiffs' employee discovered allegedly infringing plans on corporate defendant's website. Defendants filed motion for summary judgment on copyright infringement claim. For purposes of motion, defendants did not dispute plaintiffs' ownership of valid copyrights. As plaintiffs had not offered direct evidence of copying,



court considered whether copying could be inferred from defendants' access to plaintiffs' designs and "substantial similarity" between parties' plans. Plaintiffs successfully demonstrated material issue of fact on access, alleging 12-year business relationship with defendants and delivery of 24 of plaintiffs' home plan catalogs to defendant. With respect to "substantial similarity and wrongful copying," defendants argued that similarities between parties' designs were attributable to non-copyrightable subject matter. Court acknowledged many non-copyrightable aspects of architectural plans, such as design elements attributable to efficiency, consumer demand, or "scenes a faire" of certain architectural style, but found limited originality in plaintiffs' particular selection, arrangement and combination of design elements. Plaintiffs argued substantial similarity between protectable elements of plaintiffs' designs and defendants' designs, based on "overall flow" and locations of rooms, hallways, bathrooms, access points and closets. Defendants argued similarities were attributable to basic conventional and standard elements found of necessity in every moderately priced home and pointed to differences in room dimensions and overall square footage, variations in overall massing of homes, including roofing configurations and building footprints, differences in building materials that altered exterior appearance of homes, and other building details. Court, under ordinary observer test, determined ordinary observer could find parties' designs substantially similar with regard to copyrightable elements, because side-by-side comparison of all eight designs revealed nearly identical configurations of rooms and design features. Moreover, court found designs did not belong to particular style, such as colonial style architecture, that requires certain features, and defendants had not presented evidence that moderately priced homes require placement or arrangement of features in any specific way. Accordingly, material issues of fact precluded summary judgment for defendants.

*Rentmeester v. Nike, Inc.*, No. 15-113, 2015 U.S. Dist. LEXIS 77468 (D. Or. June 15, 2015)

Plaintiff photographer sued Nike for copyright infringement based on claims that Nike used image he snapped of basketball great Michael Jordan for Life magazine to create photo that formed basis of Nike logo – silhouette of Jordan soaring toward hoop, limbs outstretched. District court found photo was entitled to only narrowest copyright protection; essentially, Nike's photo would have to be nearly identical to plaintiff's photo to infringe. In reaching decision, court focused on two inquiries: (1) whether photo deserved "broad" or "thin" copyright protection; and (2) whether works were substantially similar. Court noted that Ninth Circuit has held that courts should give broad protection to works where range of possible expression is wide. Under such circumstances, accused work will infringe if it is substantially similar to copyrighted work. By contrast, works are given thin protection where range of expression is narrow. In those cases, accused work must be virtually identical to infringe. Court found that Jordan's pose and other protectable elements in photo at issue were simply not similar enough for finding of infringement, and court dismissed case accordingly.

### C. Contributory/Vicarious Infringement

*Smith v. BarnesandNoble.com, LLC*, No. 12-4374, 2015 U.S. Dist. LEXIS 148321 (S.D.N.Y. Nov. 2, 2015)

Author had entered into distribution agreement with online eBook distributor to make book available on both distributor's own website and websites of distributor's partners including named defendant. After plaintiff terminated distribution agreement, free sample of plaintiff's eBook remained in digital locker of single customer and customer re-downloaded book sample two times thereafter. On summary judgment, district court dismissed plaintiff's claims for direct and contributory infringement alleging violation of exclusive right of reproduction. First, with respect to direct infringement claim, defendant had not engaged in "volitional conduct" or "actively" violated plaintiff's exclusive right of reproduction since copies of work had been made automatically upon demand of third-party customer. Second, with respect to contributory infringement claim, defendant's provision of site and facilities for third party's alleged direct infringement was sufficient to establish element of material contribution. However, court held there was insufficient evidence that defendant acted with requisite knowledge of infringing activity. Defendant's web system was commonly used to distribute eBooks for which defendant had legal licenses and oversaw eBook store containing more than two million titles. Unlike systems designed for sole purpose of infringement, defendant's digital locker system was used for commercially significant non-infringing uses under *Sony-Betamax* rule. Thus, allegations of two infringing downloads out of two million books in defendant's repository were insufficient to support claim for contributory infringement.

*Wu v. John Wiley & Sons, Inc.*, No. 14-6746, 2015 U.S. Dist. LEXIS 120707 (S.D.N.Y. Sept. 10, 2015)

Photographer brought suit for contributory and vicarious infringement against textbook publisher based on allegations that plaintiff's works had been published in foreign editions by defendant's foreign subsidiaries without permission. District court granted summary judgment in favor of defendant on plaintiff's claims. First, there was no evidence that defendant's Canadian subsidiary had committed act of direct infringement as necessary element of claims for vicarious or contributory infringement. Adaptation agreement between defendant and Canadian subsidiary expressly prohibited use of third-party images unless appropriate licenses were secured. Further, to prevail on claim for contributory infringement, plaintiff must show that defendant encouraged or assisted infringement; merely providing means for infringement is insufficient. Even if plaintiff's images appeared in textbooks published by defendant's foreign subsidiary, there could be no liability for contributory infringement unless there was evidence that defendant authorized or assisted subsidiary in making unauthorized use of images.

*Jordan-Benel v. Universal Studios, Inc.*, No. 14-5577, 2015 U.S. Dist. LEXIS 82220 (C.D. Cal. June 24, 2015)

Plaintiff brought suit for infringement based on production companies' release in July 2013 of movie *The Purge*, which plaintiff alleged was based in substantial part on plaintiff's draft script for film titled *Settler's Day*. Plaintiff had submitted script to defendant United Talent Agency, Inc. ("UTA") for possible representation in June 2011. Defendant James DeMonaco, who was credited as sole writer of *The Purge*, was also represented by UTA at time plaintiff submitted script. Court denied UTA's motion to dismiss contributory infringement claim based on UTA's transfer of script to DeMonaco. Court held that plaintiff sufficiently alleged that UTA had materially contributed to infringement by distributing plaintiff's script for use by DeMonaco as basis for *The Purge*, and further that plaintiff had plausibly alleged UTA's knowledge of infringement based on UTA's role as agent of DeMonaco.

*China Cent. Television v. Create New Tech. (HK) Ltd.*, No. 15-1869, 2015 U.S. Dist. LEXIS 76005 (C.D. Cal. June 11, 2015)

District court granted plaintiffs' motion for preliminary injunction. Plaintiffs, including television broadcasters in China and Hong Kong ("Broadcasters"), sued defendants, including manufacturer of "TVpad" device and distributors of device and service, for infringement. Broadcasters licensed copyrighted television programming for retransmission in U.S. via authorized providers. Defendant manufacturer offered TVpad device that delivered streaming television programming from Asia to U.S. customers over Internet without requiring subscription fee to authorized providers, and distributors operated websites that sold TVPads to U.S. consumers. Before TVpad users could access television programming, they were required to download free applications ("TVpad Apps") from "TVpad Store" for TVpad devices. TVpad Apps would then allow users to view Broadcasters' programming in four modes: "live" streaming, "time-shifted" streaming, and two forms of video-on-demand streaming. Certain forms of streaming were shared via peer-to-peer network, and others streamed from servers in U.S. or China. Court found plaintiffs likely to succeed on merits of contributory and vicarious infringement claims. Court first noted likelihood of success in demonstrating direct infringement, because plaintiffs would likely demonstrate ownership of copyright registrations for programs, exclusive rights to transmit programs in U.S., and infringing public performance of programs by third parties via unauthorized streaming. On contributory infringement claim, plaintiffs would likely show defendants' actual knowledge of infringing activity, because plaintiffs had previously sent cease and desist letters, and could likely demonstrate both inducement and material contribution. Meeting Ninth Circuit's test for inducement, plaintiffs would likely show (1) distribution of TVpad device and service that enable users to view infringing streams of plaintiffs' programs; (2) acts of infringement by TVpad and TVpad Apps users as documented by plaintiffs' investigator; (3) intent to promote TVpad device and TVpad Apps by advertising device and service, providing customer support and technical assistance, and collaborating with users to develop and improve service; and (4) causation, because device and service being used to infringe and defendants are but-for cause of that infringement.

Plaintiffs could also likely demonstrate contributory infringement through material contribution, because defendants failed to take steps to protect copyrighted works and provided software that allowed infringing peer-to-peer network. Plaintiffs would also likely succeed on vicarious infringement claim, based on evidence that defendants benefited financially by offering unauthorized programming and had practical and operational control over TVpad Apps and servers necessary to stream content and right to exclude infringing applications from device and service.

*Live Face on Web, LLC v. Control Grp. Media Co.*, No. 15-1306, 2015 U.S. Dist. LEXIS 166063 (E.D. Pa. Dec. 10, 2015)

District court granted in part and denied in part defendants' motion to dismiss. Plaintiff developed and owned "live person" software, copyright-protected video technology program and video presentation. Defendants purchased customized versions of plaintiff's software package and in doing so became bound by terms and conditions of plaintiff's End User License Agreement ("EULA"). EULA provided that, without obtaining express permission and paying additional fees, plaintiff's software package may only be used on one URL and may not be assigned, sub-licensed or transferred by licensee. Plaintiff alleged that defendants transferred assets, including subject software package, to other entities without consent or authorization from plaintiff and in violation of plaintiff's copyrights. Plaintiff alleged further that defendant unlawfully displayed software package on two or more URLs without authorization or payment, in violation of EULA, and that visitors to defendants' websites downloaded and executed software package, including into their computers' random access memory ("RAM"). Plaintiff alleged direct, vicarious and contributory infringement, and inducement. Court denied defendants' motion to dismiss direct infringement claim, finding "sufficient facts are alleged to make out prerequisite averments of unauthorized copying and volitional conduct necessary to support a claim of direct infringement." As to vicarious infringement, court found sufficient facts to support claim where plaintiff alleged that (1) visitors to defendants' web sites downloaded and executed plaintiff's software package; (2) defendants had "right and ability to monitor, control, direct, supervise and limit the infringing conduct," yet made "no attempt to stop or limit" such conduct; and (3) plaintiff's software package acted as draw for customers, and created financial benefit to defendants. However, court granted defendants' motion to dismiss as to plaintiff's contributory infringement claim because plaintiff failed to sufficiently allege that defendants authorized or assisted third parties' infringement – simple downloading of plaintiff's software packaging into third party's computer's RAM is not enough; merely providing means to accomplish infringing activity is insufficient to establish claim for contributory infringement. Court granted defendants' motion as to inducement of copyright infringement claim for same reason – plaintiff failed to show that defendants intended website visitors to infringe plaintiff's copyright.

*Hanover Architectural Serv., P.A. v. Christian Testimony-Morris, N.P.*, No. 10-5455, 2015 U.S. Dist. LEXIS 94916 (D.N.J. July 21, 2015)

District court denied defendants' motion for reconsideration of motion for partial summary judgment. Plaintiff architect sued defendants involved in construction project based on plaintiff's designs for infringement. Plaintiff and defendants both moved unsuccessfully for summary judgment, and defendants moved for reconsideration of their summary judgment motion. With respect to plaintiff's claim for secondary or vicarious liability against certain defendants, defendants argued that plaintiff had not sufficiently alleged separate financial benefit to each defendant, because defendants had been paid on hourly basis and would have received same amount regardless of infringement. Defendants cited case law finding landlords not liable for infringing activity of tenants, where landlords were not involved in tenants' infringing activity and landlords' rental income was not tied to tenants' infringing activity. Court rejected defendants' arguments, finding defendants involved in construction project closer to alleged infringing activity, because each had financial stake in project being completed and participated in completion by supervising portions of project's design or construction.

*Broad. Music, Inc. v. Benchley Ventures, Inc.*, 131 F. Supp. 3d 1097 (W.D. Wash. 2015)

District court granted plaintiffs' motion for summary judgment on copyright infringement claim. Plaintiffs, including performing rights society BMI and copyright owners of musical compositions, sued defendants, corporate and individual restaurant owners, for copyright infringement for unlicensed public performances of copyrighted music by live bands at defendants' restaurant. Plaintiffs provided abundant documentation of ownership and established copying "by publicly performing" of nine works via investigator reports and declarations. Individually named defendants argued against vicarious liability on ground that musical performance decisions for restaurant were delegated to another individual. Court disagreed, finding that individual defendants, as owners and officers of infringing corporation, had direct financial interest in infringing conduct that acted as draw for customers. Further, individually named defendants had right and ability to supervise infringing conduct, because they were in position to delegate musical performance decisions and had admitted that they held responsibility for ensuring performers were paid. Court accordingly found individual defendants jointly and severally liable as vicarious infringers for corporate defendant's copyright infringement.

*Alticor Inc. v. UMG Recordings, Inc.*, No. 14-542, 2015 U.S. Dist. LEXIS 166317 (M.D. Fla. Dec. 10, 2015)

In consolidated action between numerous record companies and accused infringers, record companies raised counterclaims, including direct, contributory and vicarious copyright infringement claims, concerning links to Internet videos posted worldwide that contained unauthorized use of copyrighted sound recordings. Subset of accused infringers, including Amway Corp. and Alticor Inc. (together, "Amway"), moved to dismiss certain

counterclaims. Amway argued for dismissal of infringement claims on ground that exclusive public performance right generally applicable to sound recordings under Section 106(6) was inapplicable to audiovisual works, because Section 114(j)(5) excludes any “audiovisual work” from “digital audio transmission” required by Section 106(6). Court disagreed, because Act cautions that definitions set forth in Section 114(j) are only for use in Section 114. Further, court determined that applying Section 114(j)(5) definition as Amway suggested would run contrary to statement in Section 103(b) that copyright protection in preexisting material is not affected by use of such material in work that is based upon one or more preexisting works. Here, sound recordings were “preexisting material” independent from any audiovisual works in which they were incorporated, and copyrights were not invalidated by that incorporation. Amway further argued that court should dismiss claims based on allegations that copyrighted recordings were “made available” to public, because Act does not confer exclusive “making available” right under Section 106. Court considered act of making copyrighted works available potentially relevant to record companies’ indirect infringement claims against Amway, and therefore dismissal was unwarranted.

*Tomelleri v. Zazzle, Inc.*, No. 13-2576, 2015 U.S. Dist. LEXIS 165007 (D. Kan. Dec. 9, 2015)

Fish illustrator brought claims for direct, contributory and vicarious infringement and violation of DMCA against operator of website which allows third party users to create, buy, and sell customized merchandise online. Plaintiff alleged that 62 fish illustrations had been copied and placed on defendant’s website without authorization. District court adopted Ninth Circuit’s test for determining contributory infringement in context of computer system operators, under which operator can be held contributorily liable only if such operator “has actual knowledge that specific infringing material is available using its system and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works.” Court denied defendant’s motion for summary judgment seeking to dismiss contributory infringement claim because genuine issue of fact existed as to defendant’s actual knowledge of infringement since defendant failed to remove all 62 allegedly infringing designs despite plaintiff having notified defendant of presence of such designs on defendant’s website. However, court granted summary judgment dismissing claim for vicarious infringement because plaintiff provided no evidence that infringing activity was draw to users of defendant’s website and therefore could not establish defendant’s receipt of financial benefit from such infringing activity.

#### **D. Miscellaneous**

*Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 15-1164, 2016 U.S. App. LEXIS 6716 (2d Cir. Apr. 13, 2016)

Second Circuit certified question whether there is right of public performance for creators of sound recordings under New York law and, if so, nature and scope of that right, to New York Court of Appeals. Plaintiff, California corporation that owns recordings of The Turtles, brought suit against Sirius XM on behalf of itself and class of owners of pre-1972 recordings,

asserting claims for common-law copyright infringement and unfair competition under New York law. Sirius moved for summary judgment on grounds that there is no public performance right in pre-1972 recordings under New York law, that internal reproductions of these recordings were permissible fair use, and that state-law public performance right, if recognized, would be barred by dormant Commerce Clause. District court denied motion, concluding that New York does afford common-law right of public performance to copyright holders, that Sirius's internal reproductions were not fair use, and that recognition of performance right did not implicate dormant Commerce Clause because such right was not "regulation" of commerce under *Sherlock v. Alling*, 93 U.S. 99 (1876). With no clear guidance from New York Court of Appeals, Second Circuit was "in doubt" as to whether New York common law affords right to prohibit Sirius from broadcasting pre-1972 sound recordings. In deciding whether to certify, court considered three factors: (1) whether New York Court of Appeals had addressed issue and, if not, whether decisions of other New York courts permit court to predict how Court of Appeals would resolve it; (2) whether question is of importance to state and may require value judgments and public policy choices; and (3) whether certified question is determinative of claim before court. Court found certification "clearly appropriate." First, Court of Appeals had not addressed whether copyright holders in sound recordings have public-performance right; nor was there sufficient other guidance that allowed circuit court to predict how Court of Appeals would resolve issue. Second, Flo & Eddie's infringement claims "patently rise and fall" with question's resolution. Third, whether to recognize public performance right is essentially "public policy choice" appropriately resolved by New York court. Parties disputed New York "default rule" as to scope of property rights. Flo & Eddie asserted that in New York property rights are all-encompassing unless specifically limited. Sirius, conversely, contended that property rights are inherently limited. Second Circuit found that New York has no such clear default rule, and that question of whether such right would violate dormant Commerce Clause was not "something we can adjudicate without knowing what, if any, limitations New York places on such rights, if they do exist." Court, accordingly, reserved decision and certified following question to New York Court of Appeals: Is there right of public performance for creators of sound recordings under New York law and, if so, what is nature and scope of that right? Second Circuit invited Court of Appeals, should it accept certification, to "reformulate or expand" question as appropriate and "welcome[d] its guidance on any other pertinent questions that it wishes to address."

*Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182, 2015 U.S. Dist. LEXIS 80535 (S.D. Fla. June 22, 2015)

Plaintiff company, formed by two original members of The Turtles, brought suit for infringement against defendant Sirius XM Radio for broadcasting without permission 1967 hit song "Happy Together" and other pre-1972 sound recordings owned by plaintiff. Plaintiff claimed that defendant's broadcasting violated exclusive rights to publicly perform and reproduce subject sound recordings. District court granted defendant's motion for summary judgment dismissing action. District court held that, contrary to analogous cases decided under California and New York law, Florida common law did not recognize

exclusive right of public performance for pre-1972 sound recordings. District court based ruling on observation that Florida had no specific legislation covering sound recording property rights nor abundant case law interpreting common law copyright “related to the arts,” and on that basis declined to usurp legislative role to create new state law property right. District court also rejected argument that defendant’s use of back-up and buffer copies of sound recordings violated plaintiff’s exclusive right of reproduction upon finding that such copies were neither publically unavailable nor maintained by defendant. Moreover, such buffer copies were not full length recordings copies of recordings but instead were only created to aid in transmission of recording.

## **VI. DEFENSES/EXEMPTIONS**

### **A. Fair Use**

*Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015)

Second Circuit affirmed district court’s grant of summary judgment in favor of defendant. Plaintiffs, authors of published books under copyright, sued defendant, Google, Inc. for infringement. Through Google Library Project, Google partnered with libraries to create digital copies of tens of millions of library books. Google Books allowed public to conduct limited searches of digitally copied books to determine whether books contained specific terms, and to view three small “snippets” of text containing those terms in context. District court found Google’s actions constituted fair use, and plaintiffs appealed. Second Circuit affirmed. With respect to first factor, court found Google Books search function highly transformative, because it provided significant information *about* plaintiffs’ books, including whether and how often certain terms appeared. Plaintiffs argued snippet view function provided substitute for plaintiffs’ works, but court found snippet view contributed to highly transformative search function by revealing just enough context around term to allow searcher to determine whether term of interest appeared in context of interest. Plaintiffs further argued that although Google Books did not generate direct revenues, Google indirectly reaped profits from service, and commercial motivation precluded fair use. Court, noting that commercial uses are not presumptively unfair, found no reason to deny fair use based on profit motivation, given convincing transformative purpose and lack of significant substitutive competition. Second factor also favored fair use, because Google’s use provided valuable information about original works rather than replicating protected expression in manner that provided meaningful substitute for original. As to third factor, court found Google’s copying of entire original works necessary to achieve Google’s transformative purpose of providing reliable search function. Further, Google’s copying did not provide market substitute for original books, because snippet view, as structured, only revealed limited information about books to public. Restrictions built into Google Books program ensured that even after substantial effort, only small and randomly scattered portions of book would be accessible. With respect to fourth factor, court found no significant harm to value of original works, because discontinuous, tiny fragments amounting in aggregate to no more



than 16% of book would rarely satisfy searcher's interest in protected aspects of work or substitute for purchase of book, which was relatively low cost in relation to manpower needed to secure collection of snippets through multiple searches. Accordingly, considering four fair use factors in light of goals of copyright, court found Google's copying of plaintiffs' works for purpose of providing public with search and snippet view functions was fair use.

*Katz v. Google Inc.*, 802 F.3d 1178 (11th Cir. 2015)

Eleventh Circuit affirmed district court's grant of summary judgment to defendant. Plaintiff, minority investor in Miami Heat basketball team and commercial real estate tycoon, owned copyright in unflattering and embarrassing photograph of himself, taken while he was standing courtside at basketball practice in Jerusalem. Defendant, disgruntled former tenant in one of plaintiff's shopping centers, created blog devoted to sharply criticizing plaintiff and plaintiff's business practices, and reproduced plaintiff's photograph in 25 blog posts. Second Circuit held that first factor weighed in favor of fair use because every use of photograph on blog was of primarily educational, rather than commercial, character, in that defendant criticized plaintiff and sought to deter others from conducting business with him. Use of photo was also transformative because, in context of blog post's surrounding commentary, defendant used plaintiff's appearance to ridicule and satirize his character. Second factor weighed in favor of fair use because photograph was published prior to defendant's use, and photograph was primarily factual work because it was shot candidly in public setting, and there was no evidence that photographer attempted to convey ideas and emotions or influence plaintiff's appearance. Third factor was neutral because to copy any less of photograph would have made it useless to defendant's story. Fourth factor weighed in favor of fair use because no potential market for photograph existed as plaintiff had obtained copyright in photograph and initiated lawsuit to prevent its publication, thus attempting to "utilize copyright as an instrument of censorship against unwanted criticism." Because three factors weighed in favor of defendant, district court did not err in granting summary judgment to defendant on fair use defense.

*TCA Television Corp. v. McCollum*, No. 15-4325, 2015 U.S. Dist. LEXIS 168934 (S.D.N.Y. Dec. 17, 2015)

Plaintiffs, heirs of famous comedy duo Abbott and Costello, sued for infringement based upon defendants' use of dialogue from *Who's On First?* comedy routine in Broadway comedy, *Hand to God*, and related promotional material. District court granted defendants' motion to dismiss infringement claim upon finding that defendants' use was protected by fair use doctrine. Although work was clearly creative in nature and defendants had used instantly recognizable portion of work, court found that such factors were outweighed by "highly transformative" nature of defendants' use. In contrast to original routine, which involved actors whose performance fell in vaudeville genre, *Hand to God* attaches new tone and aesthetic to work in order to fashion "a darkly comedic critique of the social norms governing a small town in the Bible Belt." Moreover, while *Hand of God's* use of work also results in comedic relief for audience, nature of joke is distinct as audience laughs not at

original material but at “inside joke” that relies on audience’s knowledge that play’s character did not originate material at issue.

*Equals Three, LLC v. Jukin Media, Inc.*, No. 14-9041, 2015 U.S. Dist. LEXIS 143389 (C.D. Cal. Oct. 13, 2015)

Defendant Jukin Media, Inc. was digital media company that compiled library of user-generated Internet clips to license on clip creators’ behalf, and uploaded clips to YouTube network and its own content-focused websites. Plaintiff Equals Three, LLC produced short humor programs that it broadcast via YouTube. Programs generally involved host who introduced and showed video clips and other multi-media content to depict original, humorous story. Video clips were generally shown in edited form and inset within decorative graphical frame. Equals Three sued Jukin for declaratory judgment and relief under Digital Millennium Copyright Act. Jukin brought counterclaim for infringement based on Equals Three’s use of videos without license. Equals Three asserted fair use defense. As to factor one, district court determined that, with exception of one video, Equals Three’s episodes directly responded to Jukin’s videos through host’s reactions, jokes, narration, costumes and graphics. Host did not simply describe videos, but rather “highlights their ridiculousness by creating fictionalized narratives of how the events transpired, using similes or by directly mocking the depicted events and people.” Equals Three thus provided Jukin’s videos with different purpose or character. Although use of videos was commercial in nature, commerciality was outweighed by transformativeness, and factor one therefore weighed heavily in favor of fair use. Court found factor two to slightly favor Jukin because works were already published when used by Equals Three. As to factor three, Equals Three “does not show more than is reasonably necessary to convey enough of the events to allow the host’s jokes, comments, and criticisms to make sense to the viewer and resonate.” Therefore, factor three weighed in favor of fair use. Factor four weighed toward neither party, as court found no actual evidence of market harm and because Equals Three’s episodes did not take excessively from Jukin’s videos. On balance, court found use of all of Equal Three’s videos except for one was fair use, and granted in part and denied in part Jukin’s motion for partial summary judgment.

*Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187 (N.D. Ill. 2015)

Plaintiffs brought suit for infringement based upon Illinois Republican Party’s distribution of flyers containing plaintiff’s copyrighted photograph without permission. Original photograph had depicted subject, plaintiff Jacob Meister, driving in convertible with poster on side of car advertising re-election campaign of Democratic member of Illinois House of Representatives, Sam Yingling. Defendants’ flyer had digitally altered photograph to make Meister appear to be driving away from Illinois State Capitol in car full of stolen money. Defendants, who had mistakenly thought that man driving car was Representative Yingling rather than Meister, had intended flyer to criticize Yingling’s fiscal policies. District court found use of photograph was fair use. Court found first factor, concerning purpose and character of use, to be “deadlocked.” While transformative purpose and non-commercial nature of flyer supported fair use, finding that defendants did not require copyrighted

photograph to effectuate criticism weighed against fair use. Second factor, nature of work, weighed in favor of fair use because photograph was candid shot and primarily factual in nature. Third factor, harm to potential market for or value of work, which Seventh Circuit “has indicated ... is usually the most important,” also weighed in favor of fair use because works at issue “cater[ed] to wholly different audiences,” and flyer may have increased market demand for photograph due to attention flyer brought to Yingling’s political campaign. Court also rejected argument that flyer harmed reputation of photograph’s subjects because fair use analysis does not take into account commercial depreciations due solely to critical commentary of underlying works. Further, copyright law does not protect against potential market harm resulting from blemished reputation of politician depicted in photograph. Although third factor weighed against fair use, because defendants “had plethora of alternative means” of conveying critical message without use of photograph, on balance court held that defendants had established fair use defense.

*Gen. Steel Domestic Sales, LLC v. Chumley*, 129 F. Supp. 3d 1158 (D. Colo. 2015)

Plaintiff brought suit against competitor in steel industry. Defendant asserted counterclaim alleging infringement of registered logo consisting of image of shield with words “ARMSTRONG STEEL” emblazoned across yellow star. Plaintiff’s website contained link to e-brochure that made oblique reference to defendant, along with image consisting of shield logo with words “FRAUDULENT STEEL” emblazoned over yellow star. On summary judgment, court rejected plaintiff’s fair use defense because plaintiff had appropriated most distinctive elements of defendant’s logo, and plaintiff’s purpose for using logo was not to comment or criticize logo itself but for was for “explicitly commercial purpose” of convincing prospective consumers to patronize plaintiff’s business.

## **B. Statute of Limitations**

*Simmons v. Stanberry*, 810 F.3d 114 (2d Cir. 2016)

Second Circuit affirmed dismissal of suit as time barred. Plaintiff, writer and performer of hip-hop music, sued producer Stanberry, Curtis Jackson, p.k.a. 50 Cent, and various entities involved in production and distribution of 2007 song “I Get Money.” Plaintiff alleged that he purchased exclusive license to “beat” from Stanberry in 2006, and that when Jackson expressed interest in beat, Stanberry, despite having sold exclusive rights in beat to plaintiff, collaborated in production of “I Get Money” employing beat. “I Get Money” was released in summer of 2007. Plaintiff did not file suit until more than three years after song had been released, despite plaintiff’s “evident awareness” of Stanberry’s repudiation of sale and of release of allegedly infringing song. District court granted defendants’ motion to dismiss suit as untimely. Second Circuit noted case was controlled by prior ruling in *Kwan v. Schlein*, 634 F.3d 224 (2d Cir. 2011). Notwithstanding occurrence of allegedly infringing acts within three years of filing action, suit was nonetheless barred by three-year statute of limitations of Section 507(b) because plaintiff, although aware of defendants’ acts of infringement done in rejection of plaintiff’s claim of copyright interest, had waited more than

three years to sue. Where plaintiff's claims are rooted in contested assertion of ownership interest in copyright, plaintiff cannot "revive the time barred claim of ownership of a copyright interest by relying on defendants' continued exploitation of the copyright within three years of his filing suit."

*Wu v. John Wiley & Sons, Inc.*, No. 14-6746, 2015 U.S. Dist. LEXIS 120707 (S.D.N.Y. Sept. 10, 2015)

In August 2014, professional photographer brought suit for infringement against textbook publisher based on allegations that publisher had exceeded use limitations in license. Defendant moved to dismiss infringement claim as barred by statute of limitations, on ground that plaintiff had been generally aware of infringement by textbook publishers and had been "on high alert" for potential infringement for period exceeding three years. District court denied defendant's motion. Court held that prior court's dismissal of plaintiff's first infringement lawsuit in May 2013, although technically ordered without prejudice, had been designed to toll statute of limitations and therefore plaintiff's filing date related back to institution of first lawsuit in May 2013. Further, plaintiff's knowledge about actions of textbook publishers generally was insufficient to support constructive knowledge of defendant's specific infringement. Because plaintiff had not been placed on notice of defendant's infringing acts until December 23, 2010, plaintiff's filing of lawsuit in May 2013 had been timely.

*Diaz v. City Univ. of N.Y.*, No. 13-2038, 2015 U.S. Dist. LEXIS 126855 (S.D.N.Y. Sept. 22, 2015)

Court held that Act's three-year statute of limitations, "running from the date of discovery" of alleged infringement, barred plaintiff's copyright claims where plaintiff possessed sufficient information regarding alleged copyright violations and book at issue was published over three years prior to institution of lawsuit. Plaintiff, student and adjunct lecturer at defendant City University of New York ("CUNY"), sued alleging numerous claims including copyright infringement. Specifically, plaintiff alleged that CUNY professor misappropriated plaintiff's research notes for use in book and failed to properly credit plaintiff. Plaintiff argued that statute of limitations was tolled on account of defendant's fraudulent concealment of information necessary to allow plaintiff to discover alleged violation. Court held that plaintiff's copyright claim was untimely because plaintiff possessed sufficient information regarding alleged violation in 2009, outside limitations period.

*Clifton v. Houghton Mifflin Harcourt Publishing Co.*, No. 15-3985, 2015 U.S. Dist. LEXIS 171915 (N.D. Cal. Dec. 23, 2015)

District court denied defendant's motion to dismiss claims for infringement brought by plaintiff photographer against publisher licensee for unauthorized use of thirty photographs. Plaintiff had granted limited license to defendant to use plaintiff's photographs in certain publications. Defendant exceeded license by printing more copies than allowed, distributing outside authorized distribution area, using images in unauthorized publications and using

pictures beyond specified time limits. Defendant challenged copying element of infringement claim arguing that allegations made “upon information and belief” were conclusory and lacked support. Court disagreed, noting that Ninth Circuit had not yet considered sufficiency of similar allegations post-*Twombly* and *Iqbal*, and finding that plaintiff’s allegations were adequate since information needed to further substantiate claims lay “peculiarly within the possession and control” of defendant. Court also rejected defendant’s argument that plaintiff’s claims were barred by statute of limitations. Statute-of-limitations defense was not obvious from face of complaint, since plaintiff alleged that infringement occurred “shortly after” license agreements and therefore left open possibility that defendant’s infringing acts continued into limitations period. Further, allegations were silent as to when plaintiff discovered or should have discovered purported infringements so as to trigger statute of limitations defense.

*Lott-Johnson v. Estate of Goreau*, No. 14-3104, 2015 U.S. Dist. LEXIS 92091 (N.D. Ga. July 15, 2015)

Plaintiff, alleged assignee of rights to book entitled *Just Mahalia Baby*, about life and career of renowned gospel singer and civil rights activist Mahalia Jackson, sued defendants, book publisher and estate of book’s author, alleging defendants infringed copyright in book. Plaintiff, appearing *pro se*, argued in complaint described by court as “nearly incomprehensible” that plaintiff was rightful owner of copyright in book based on assignment dated November 1, 1996. However, record established that defendant author registered copyright in book in 1975. Defendants moved to dismiss complaint, arguing that 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, or in exercise of reasonable diligence should have discovered, that defendants were violating copyright. Court noted that plaintiff, upon receipt of assignment, “failed to act even though he knew, or should have known, that Ms. Goreau was the author of the book, that the copyright was claimed by someone else, and that the book was published, sold and distributed to the general public.” Court found that plaintiff did not exercise reasonable diligence and should have discovered defendants’ alleged copyright violation 18 years prior to plaintiff’s filing of lawsuit. Accordingly, court held that plaintiff’s claim was time-barred, and granted defendants’ motion to dismiss.

*Degginger v. McGraw-Hill Global Educ. Holdings LLC*, No. 14-2429, 2015 U.S. Dist. LEXIS 173974 (D. Ariz. Nov. 4, 2015)

Magistrate judge recommended that district court deny defendants’ motion for partial summary judgment. Plaintiff photographer sued defendants, publishers of educational textbooks, for infringement based on defendants’ unauthorized use of 1,407 photographs belonging to plaintiff and plaintiff’s father over two decades. Defendants moved for partial summary judgment on ground that infringing acts that had occurred more than three years before plaintiff brought suit in 2014 were barred by statute of limitations. Between 1999 and 2010, plaintiff and his father, and their agents, became aware of numerous instances of unauthorized use of their photographs by defendants. In each instance, parties negotiated

retroactive license. Aside from those instances, plaintiff claimed no personal, specific knowledge of other infringements by defendants prior to filing suit. Defendants alleged plaintiff had actual knowledge of specific infringements imputed from his father and his agents prior to 2011, but failed to provide evidence related to those instances. Magistrate judge found genuine issue of material fact, and rejected summary judgment on basis of actual knowledge. Defendants further alleged plaintiff had constructive knowledge, because reasonable person would have investigated and discovered defendants' extensive infringement after learning of some instances of infringement by defendants. Magistrate disagreed, finding reasonable person could have believed, based on defendants' voluntary notification of some license violations, that defendants would continue to provide such notice, rendering further inquiry unnecessary. Further, plaintiff's relationship with defendants involved 1,407 photographs and over 200 licenses, and violation of one license did not provide notice to investigate every other license. Defendants' additional allegations of constructive knowledge based on industry knowledge that textbook publishers were making unauthorized use of photographs, and knowledge of counsel from prior publishing cases, also failed for lack of evidence attributing specific knowledge to plaintiff or plaintiff's counsel. Accordingly, issues of fact also prevented summary judgment based on constructive knowledge, and magistrate judge concluded that defendants' motion for partial summary judgment should be denied.

### **C. First Sale Doctrine**

*Adobe Systems Inc. v. Christenson*, 809 F.3d 1071 (9th Cir. 2015)

Ninth Circuit affirmed grant of summary judgment for defendant. Plaintiff, owner of copyrighted computer software, sued defendant, principal of now defunct company that resold copies of plaintiff's software acquired from third parties. District court found defendant met burden to show lawful purchase of genuine copies of plaintiff's software, but plaintiff failed to produce license agreements or other evidence to show that software in question was licensed, not sold, and therefore plaintiff retained title to copies of software. Question on appeal was who bears burden of proving first sale defense in context of software licensing dispute. Ninth Circuit agreed with district court that "in the context of a summary judgment motion in a software case ... the party asserting a first sale defense must come forward with evidence sufficient for a jury to find lawful acquisition of title, through purchase or otherwise, to genuine copies of the copyrighted software." Moreover, court found that "to the extent that the copyright holder claims that the alleged infringer could not acquire title or ownership because the software was never sold, only licensed, the burden shifts back to the copyright holder to establish such a license or the absence of a sale." Court noted that this burden-shift make sense, because "the copyright holder is in a superior position to produce documentation of any license." In this case, because plaintiff failed to produce specific license agreements or other evidence relating to software at issue, in part due to state of discovery at time of summary judgment and court's rejection of plaintiff's late-offered evidence, district court found plaintiff did not meet burden to prove existence of

licenses. Accordingly, Ninth Circuit held district court did not abuse discretion in granting summary judgment to defendant.

#### **D. Misuse**

*Rimini Street, Inc. v. Oracle Int'l Corp.*, No. 14-1699, 2015 U.S. Dist. LEXIS 89295 (D. Nev. July 9, 2015)

Plaintiff brought suit for declaratory judgment of non-infringement of defendant's software copyrights. In response to defendant's counterclaim for infringement, plaintiff asserted various affirmative defenses. Court granted defendant's motion to strike plaintiff's affirmative defenses alleging limitations on exclusive use of computer programs under Section 117 and copyright misuse. Court found that Section 117 was inapplicable. Section 117(a) provides bar to infringement where owner of computer program makes copy of program, provided such copy is "essential step" in utilization of program or is for archival purposes only. Since defendant's customers only licensed, rather than purchased, defendant's copyrighted software, they were not "owners" within meaning of Section 117. Section 117(c), which provides bar to infringement where owner makes copy of program for purposes of "maintenance or repair of [the] machine," was likewise inapplicable as plaintiff provided only support services for software licensed by plaintiff, not maintenance or repair services for computer hardware. Second, court held defendant failed to allege conduct that could constitute copyright misuse. License agreement between plaintiff and defendant fell within proper scope of plaintiff's exclusive rights as copyright owner, including right to control reproduction and distribution of protected software. Moreover, license agreement did not specifically prohibit licensees from using or independently developing competing product.

#### **E. Merger**

*Innovation Ventures, LLC v. Ultimate One Distribution Corp.*, No. 12-5354, 2016 U.S. Dist. LEXIS 44576 (E.D.N.Y. Mar. 31, 2016)

Plaintiffs, owners, manufacturers and distributors of 5-hour ENERGY brand energy drinks, sued more than 70 companies and individuals involved in massive scheme to sell counterfeit 5-hour ENERGY drinks bearing plaintiff's intellectual property, including copyrighted designs. Plaintiffs moved for summary judgment on infringement claims. Factual record established that plaintiffs owned copyright registration for "caution" label appearing on packaging for plaintiffs' energy drinks. Defendants did not dispute that counterfeit bottles contained identical reproduction of copyrighted "caution" label. However, one defendant sought to rebut plaintiffs' presumptively valid copyright by asserting merger doctrine as defense. Evaluating "caution" label at issue, court found idea of label, *i.e.*, warning about caffeine content in drinks and potential side effects of consumption, could be expressed in variety of ways. Court also found that "particular 'caution' text chosen by [plaintiffs] reflects deliberate choices of content, language, and word order to convey its warning."

Accordingly, because plaintiffs' "caution" label idea and expression did not merge, defendant's merger defense did not bar judgment for plaintiffs on infringement claim.

## F. Miscellaneous

*VMG Salsoul, LLC v. Ciccone*, Nos. 13-57104, 14-55837, 2016 U.S. App. LEXIS 10017 (9th Cir. June 2, 2016)

Ninth Circuit affirmed summary judgment in favor of defendants. Plaintiff alleged that producer of Madonna song "Vogue" copied 0.23-second sampled "horn hit" from plaintiffs' early 1980s song "Love Break" and used modified version of snippet when recording "Vogue." District court granted summary judgment to defendants, applying rule that *de minimis* copying does not constitute infringement, and holding that plaintiff's claim failed because copying (if it occurred) was trivial. Plaintiff's claim encompassed two distinct alleged infringements: infringement of copyright in musical composition, and independent copyright in sound recording. Ninth Circuit squarely held in *Newton* that *de minimis* exception applies to claims of infringement of copyrighted composition. However, it was open question in circuit whether exception applies to claims of infringement of sound recording. Court noted that "use is *de minimis* only if average audience would not recognize appropriation"; question, accordingly, was whether reasonable juror could conclude that average audience would recognize appropriation. As to claim based on musical composition, what matters is not how musicians actually played notes but, rather, "generic rendition of composition." Court found defendants copied, at most, quarter-note single horn hit and full measure containing rests and double horn hit; after listening to recordings, court concluded that reasonable jury could not conclude that average audience would recognize appropriation of composition. As to alleged infringement of sound recording, court found defendants copied one quarter-note of four-note chord, lasting 0.23 seconds; isolated horns by filtering out other instruments playing at same time; transposed it to different key; truncated it; and added effects and other sounds to chord itself, and overlaid resulting horn hits with sounds from many other instruments to create song "Vogue." After listening to audio recordings court concluded that reasonable juror could not conclude that average audience would recognize appropriation of horn hit. Court declined to follow bright-line rule from *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), that any unauthorized copying of copyrighted sound recording, no matter how trivial, constitutes infringement. Court also rejected notion that Congress intended to create special rule for copyrighted sound recordings, eliminating *de minimis* exception. Nothing in Section 102 suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works. Similarly, nothing in neutrally worded statutory definition of "sound recordings" suggests that Congress intended to eliminate *de minimis* exception. Court likewise rejected argument based on Section 114(b), which court found shows that Congress intended to limit, not to expand, rights of sound recording copyright holders. In sum, statutory text, confirmed by legislative history, reveals that Congress intended to maintain *de minimis* exception for sound recordings. Court accordingly took "unusual step of creating a circuit split" by disagreeing with Sixth Circuit's contrary holding in *Bridgeport* to hold that



*de minimis* exception applies to actions alleging infringement of copyright in sound recordings.

*Skidmore v. Led Zeppelin*, No. 15-3462, 2016 U.S. Dist. LEXIS 51006 (C.D. Cal. Apr. 8, 2016)

Trustee of trust formed on behalf of Randy Wolfe, leading member of rock band Spirit, brought suit for infringement alleging that Led Zeppelin's iconic song "Stairway to Heaven" infringed copyright in Spirit's lesser-known song "Taurus." On summary judgment, defendants moved to dismiss infringement claim on ground that Wolfe had abandoned rights in "Taurus" musical composition. In 1991 interview, Wolfe had been asked about possibility that Led Zeppelin had copied opening of "Taurus" for song "Stairway to Heaven." In response, Wolfe had stated that, "I'll let [Led Zeppelin] have the beginning of Taurus for their song without a lawsuit." Although district court noted that Wolfe's explicit reference to "Taurus" and Led Zeppelin could conceivably constitute grounds for abandonment, plaintiff had raised issues of fact as to whether Wolfe's statement evinced intent to abandon rights in "Taurus." Plaintiff submitted evidence demonstrating that Wolfe had acted in manner inconsistent with intent to abandon rights, including that Wolfe had met with attorney in 1990s to inquire about possibility of bringing lawsuit against Led Zeppelin. Due to such factual disputes, court denied defendants' motion.

*Fox TV Stations, Inc. v. Filmon X LLC*, No. 13-758, 2015 U.S. Dist. LEXIS 161304 (D.D.C. Dec. 2, 2015)

Court dismissed defendant's counterclaim for declaratory relief. Following Supreme Court's holding in *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), that Internet-based broadcast television retransmission services perform publicly within meaning of Act's Transmit Clause, defendant cross-moved for summary judgment on counterclaim that defendant was entitled to compulsory license to retransmit plaintiffs' broadcast programming as cable system under Section 111. In light of plain language of Section 111(f)(3), overall statutory scheme meant to encompass localized retransmission services that are regulated as cable systems by FCC, and Copyright Office's interpretation of Section 111 as excluding Internet-based retransmission services, district court held that defendant, who relied on Internet to deliver video content to subscribers, was not "cable system" entitled to Section 111(c) license. Court held that *Aereo's* broad, "technology-agnostic" reading of Transmit Clause did not automatically extend to other provisions of Act such as Section 111 licensing scheme. Court also entered partial judgment in favor of plaintiffs, holding that defendant's nearly-simultaneous retransmissions directly infringed plaintiffs' exclusive right of public performance. Court extended *Aereo's* reasoning to time-delayed retransmissions because defendants transmitted works to large numbers of paying subscribers who lacked prior possessory relationship to works.

*Mosca v. Yankee Publ'g, Inc.*, No. 15-266, 2015 U.S. Dist. LEXIS 159114 (D. Me. Nov. 25, 2015)

Plaintiff brought suit for infringement based upon Yankee Magazine's unauthorized republication of literary work in March 2015 issue. Defendant had previously published literary work at issue with plaintiff's permission in October 1993 edition. Court granted defendant's motion to dismiss upon finding that defendant's republication of literary work was privileged under Section 201(c). Section 201(c) provides that, in absence of express agreement holding otherwise, "the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Upon consideration of legislative history of Section 201(c), court ruled that Congress intended that subsequent issue of same magazine qualifies as "later collective work in the same series," even if such later edition is technically new collective work. Therefore, pursuant to Section 201(c), author is presumed to have ceded to publisher right to reprint contribution in later edition of same magazine in absence of contrary agreement. In so holding, court rejected plaintiff's narrower interpretation of Section 201(c) privilege as only applying to "updates" of earlier editions of collective work, such as later edition of encyclopedia or dictionary.

## **VII. REMEDIES**

### **A. Damages and Profits**

*Broad. Music, Inc. v. Crocodile Rock Corp.*, No. 14-3891, 2015 U.S. App. LEXIS 18930 (3d Cir. Oct. 30, 2015)

Third Circuit affirmed district court's award of \$35,000 in statutory damages for copyright infringement based on defendants' unlicensed public performance of several songs at two concerts. Court dismissed defendants' objection that statutory damages of \$7,000 per infringement were far in excess of total ticket sales for concerts where infringement occurred. Mere fact that infringement was unprofitable does not prevent court from imposing damages award anywhere within statutory limits. Moreover, contrary to defendant's contention, there is no limitation in Section 504 preventing court from awarding statutory damages above statutory minimum where award is based on default judgment.

*Cengage Learning, Inc. v. Shi*, No. 13-7772, 2015 U.S. Dist. LEXIS 119322 (S.D.N.Y. Sept. 3, 2015)

District court awarded group of educational publishers \$5 million in statutory damages arising from defendant's unauthorized sale of digital copies of copyrighted textbooks and instructor manuals on websites BolteBooks.com and eBookAve.com. Upon defendant's default, district court granted plaintiffs' request for statutory damages. District court held that defendant's conduct was "startlingly willful" as evidenced by deliberate concealment of

defendant's identity by continuously changing servers, IP addresses, and hosts, and using false names and old addresses. Although plaintiffs sought statutory damages of \$3,000 for each of 453 copyrighted works infringed by defendant, court held that such amount was excessive because there was no evidence of decline in plaintiffs' sales. Court found that award of \$5 million was sufficient to compensate plaintiffs for losses and to deter future infringement by defendant.

*Monster Energy Co. v. McNamee*, No. 15-84, 2015 U.S. Dist. LEXIS 120295 (C.D. Cal. Sept. 8, 2015)

Plaintiff brought suit alleging that defendant's sale of decals, motorcycle graphic kits and motorcycle accessories infringed plaintiff's copyrighted "Claw Icon Mark." Upon defendant's default, district court granted plaintiff's motion for default judgment finding defendant liable for infringement. Court held that plaintiff's request for \$25,000 in statutory damages was excessive. Although defendant's infringement was found to be willful, plaintiff gave no indication of how much defendant had profited from sale of infringing items nor any estimate of plaintiff's actual damages, and instead only provided images of infringing products found on defendant's website and Facebook page. District court held that award of \$15,000 in statutory damages was reasonable, bore plausible relationship to defendant's infringing conduct and was sufficient to have deterrent effect on other potential infringers.

*Williams v. Bridgeport Music, Inc.*, No. 13-6004, 2015 U.S. Dist. LEXIS 97262 (C.D. Cal. July 14, 2015)

District court granted in part counterclaim defendants' motion for *remittitur* following jury verdict finding counterclaim defendants liable for copyright infringement. Counterclaimants, children of singer-songwriter Marvin Gaye and owners of 1977 copyright in musical composition for Marvin Gaye song "Got to Give It Up" ("Gaye Family"), alleged song "Blurred Lines" composed by counterclaim defendants Robin Thicke, Pharrell Williams and Clifford Harris infringed copyright in "Got to Give It Up." Jury found by preponderance of evidence that Thicke and Williams had infringed, and awarded \$4 million in actual damages, plus profits of \$1.6 million against Williams and \$1.8 million against Thicke. Defendants argued jury award was excessive and filed motion for *remittitur*. At trial, Gaye Family's accounting expert had estimated roughly \$8 million in publishing revenue earned from "Blurred Lines," and same \$8 million figure was quoted in stipulated response to jury question during deliberations without verification. Since actual publishing revenue for "Blurred Lines" was \$6.4 million, defendants' counsel alleged jury award not supported by evidence. Given precision of \$4 million actual damages award, court found jury's \$4 million figure apparently based on expert testimony that hypothetical license fee for allegedly copied portions of "Got to Give It Up" would have been 50% of publishing revenue if obtained before release of "Blurred Lines." Since response to jury question was erroneous, and jury had apparently applied 50% rate to misstated figure, actual damages amount exceeded amount supported by evidence. Accordingly, court remitted award of actual damages to maximum reasonable amount jury could have awarded, approximately \$3.2 million (50% of

\$6.4 million total publishing revenue). Court also found profits award excessive with respect to Williams. Jury had found \$1.8 million (40% of stipulated artist royalties) attributable to Thicke's infringement of "Got to Give It Up" and \$1.6 million (187% of stipulated producer royalties) in profits attributable to Williams' infringement. Noting that defendants are generally severally liable for profits, and there had been no finding that Williams and Thicke were partners, court found jury award approximately 4.7 times greater for Williams excessive. Since there was no evidence that passion and prejudice had affected liability finding, court found *remittitur* rather than new trial appropriate method of correcting excessive verdict. Based on jury's factual determination that 40% of profits were attributable to infringement, court considered same percentage maximum award that could be sustained against Williams, and remitted award of Williams' profits from \$1.6 million to \$358,000.

*Oracle Am., Inc. v. Google Inc.*, 131 F. Supp. 3d 946 (N.D. Cal. 2015)

In copyright infringement action relating to defendant Google's use of Java programming platform, defendant moved to preclude submission of issue of willfulness to jury unless and until plaintiff Oracle elected to pursue statutory damages pursuant to Section 504(c) instead of actual damages and profits pursuant to Section 504(b). Noting that 504(c) mentions "willfulness" and 504(b) does not, court concluded that "the best statement of the law is that an infringer who has been shown by the copyright owner to have been a willful, conscious, and deliberate plagiarist, in a sense of moral blame, of the copyrighted material may not deduct any income taxes or excess profits taxes from its gross revenues in the calculation of its infringement profits."

*Grant Heilman Photography, Inc. v. McGraw-Hill Cos.*, 115 F. Supp. 3d 518 (E.D. Pa. 2015)

Plaintiff, licensor of stock image photographs, brought suit for infringement based on allegations that textbook publisher had exceeded use limitations in license. Jury found in favor of plaintiff on 53 claims for infringement, and awarded plaintiff actual damages of \$98,610 and profits of \$28,477. Post-trial, defendant claimed that jury's use of six-times multiplier in actual damages award, in order to determine "fair market value" of licenses covering defendant's infringing uses, was unconstitutionally excessive. Court held that use of multiplier to calculate actual damages was improper under Section 504(b) because such multiplier did not represent "fair market value" of plaintiff's lost license fees, but instead inserted improper deterrent or punitive component into award of actual damages. Moreover, including speculative multiplier did not comport with purpose of actual damages, which was to compensate plaintiff for actual amount of lost license fee. Accordingly, district court granted defendant's motion and reduced award of actual damages to remove use of multiplier. However, evidence that defendant willingly paid amounts additional to normal license fee with respect to specific uses could be considered, since "fair market value" included such additional amounts. Court denied plaintiff's motion seeking award of additional profits under Section 504 because defendant had presented evidence relevant to apportionment of profits, and jury had legally sufficient basis for amount of profits awarded. Defendant's witnesses had testified that photo content of textbooks had no impact on

profitability, and played little role in consumers' decision-making process. Further, jury was entitled to use "common sense" in determining amount of defendant's profits attributable to infringed photographs, including that such photographs were "a relatively minor part of each textbook."

*Hanover Architectural Serv., P.A. v. Christian Testimony-Morris, N.P.*, No. 10-5455, 2015 U.S. Dist. LEXIS 94916 (D.N.J. July 21, 2015)

District court denied defendants' motion for reconsideration. Plaintiff architect sued defendants involved in construction project based on plaintiff's designs for copyright infringement. Plaintiff and defendants both moved unsuccessfully for summary judgment, and defendants moved for reconsideration of denial of their summary judgment motion. With respect to plaintiff's claim for damages, defendants challenged plaintiff's right to sue for copyright infringement based on copyright registrations that originally listed plaintiff's president ("Liou") rather than plaintiff as owner. Noting that inadvertent errors on registration certificates do not invalidate copyright and thus do not bar infringement actions, court found issue of fact as to whether plaintiff could be awarded damages, because Liou appeared to be sole architect working for plaintiff, and nothing in record indicated ownership dispute between plaintiff and Liou or intent to defraud Copyright Office by listing Liou rather than plaintiff on original copyright registration.

*Modern Jug Face, LLC v. Wright*, No. 13-847, 2015 U.S. Dist. LEXIS 119884 (S.D. Ohio Sept. 9, 2015)

Plaintiff, owner of copyright in motion picture *Jug Face*, brought suit against defendants for downloading and sharing film via BitTorrent peer-to-peer sharing software. Upon defendants' default, district court awarded plaintiff statutory damages of \$6,000. Court found that plaintiff was not entitled to maximum statutory damages of \$150,000 for willful infringement because plaintiff had not established that defendant was original user who made plaintiff's work publicly available; there was no evidence that defendant had profited from infringement except for amount saved by illegally downloading film; and review of statutory damages awards in other cases showed that total award closer to \$6,000 would adequately deter future infringement.

*Best v. Mobile Streams, Inc.*, No. 12-564, 2015 U.S. Dist. LEXIS 86758 (S.D. Ohio July 2, 2015)

Plaintiff brought suit for infringement of copyrighted compilation of audio recordings entitled "Slangtones." Upon defendants' default, court granted default judgment of defendants' liability for willful infringement. Plaintiff thereafter moved for maximum statutory damages of \$150,000 against each defendant. Magistrate judge recommended award of less than full statutory amount, notwithstanding defendants' default, where plaintiff was unable to adduce evidence sufficient to justify maximum statutory damages award. Although defendants' default prevented plaintiff from providing court with information regarding revenue or profits related to defendants' infringing conduct, magistrate judge

refused to recommend maximum statutory damages because plaintiff did not provide evidence concerning economic loss resulting from infringing conduct or actual value of plaintiff's copyrighted work. Based on prior court decisions in Sixth Circuit, magistrate judge held that statutory damages awards of \$1,500 against each defendant were appropriate.

*Liguori v. Hansen*, No. 11-492, 2015 U.S. Dist. LEXIS 125078 (D. Nev. Sept. 18, 2015)

Plaintiffs brought suit against defendant, operator of snack shop concession at Hoover Dam, alleging copyright infringement, breach of contract, tortious breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty and fraud, based on Retail Licensing Agreement concerning manufacture and sale of souvenirs bearing plaintiffs' "High Scaler" image. Jury returned verdict for plaintiffs on breach of contract claim in amount of \$1,200,000, and awarded maximum statutory damages of \$150,000 on copyright infringement claim. Court denied defendant's motion for judgment as matter of law, granted motion for new trial pursuant to FRCP 59(a) as to breach of contract and copyright infringement claims, and declined to grant *remittitur* as alternative to new trial. Court held that jury could have found that defendant failed to pay royalties on sales of all souvenirs that were subject to Retail Licensing Agreement and that defendant infringed plaintiffs' copyright. However, breach of contract verdict, which was only consistent with finding that defendant's sale of food, water and other non-souvenir items bearing High Scaler image was within scope of Retail Licensing Agreement, far exceeded any amount that could have been awarded for defendant's alleged failure to pay royalties on souvenirs because defendant's use of High Scaler image to market food and water products could not reasonably be interpreted to bring sales of such items within scope of Retail Licensing Agreement. Given amount of breach of contract verdict, jury could not have also found defendant liable for copyright infringement, because in order to recover for copyright infringement based on breach of license agreement, use must exceed scope of defendant's license. On retrial, jury must determine whether defendant breached Retail License Agreement by not paying royalties on souvenir products within its scope and, in light of proper scope of Retail Licensing Agreement, whether defendant infringed plaintiffs' copyright in High Scaler image by using it to brand restaurant and market food and water products.

## **B. Attorneys' Fees**

*KTS Karaoke, Inc. v. Sony ATV Music Publ'g, LLC*, No. 14-55355, 2016 U.S. App. LEXIS 4901 (9th Cir. Mar. 17, 2016)

Ninth Circuit affirmed district court's denial of plaintiff's motion for attorneys' fees. Plaintiff moved for attorneys' fees following defendants' voluntary dismissal of copyright infringement counterclaim. Defendants had voluntarily dismissed counterclaim against plaintiff as part of settlement agreement in which plaintiff's insurer agreed to pay defendants \$1.25 million. Ninth Circuit found that plaintiff was not prevailing party as to copyright infringement claim, because defendants had obtained enforceable, judicially sanctioned

award of much of relief it had sought. Plaintiff had entrusted counterclaim defense to its insurer, and could not argue that it was not party to resulting settlement. Other determinations in plaintiff's favor, including denial of defendants' motions for sanctions, injunctive relief and dismissal of plaintiff's claims, had not afforded relief to plaintiff, and thus did not render plaintiff prevailing party for purpose of attorneys' fees. Other voluntary actions by defendants in plaintiff's favor were similarly insufficient, because prevailing party must prevail as result of court action. Accordingly, court affirmed district court's denial of attorneys' fees to plaintiff.

*Killer Joe Nevada, LLC v. Does*, 807 F.3d 908 (8th Cir. 2015)

Eight Circuit affirmed district court's refusal to award attorney's fees to prevailing party in infringement lawsuit. Plaintiff, owner of copyright to film titled *Killer Joe*, sued numerous "John Doe" defendants for infringement, alleging illegal downloading of plaintiff's film using BitTorrent software. One defendant counterclaimed, seeking declaratory judgment of non-infringement. Plaintiff moved to voluntarily dismiss complaint, and defendant opposed, seeking attorneys' fees. District court granted plaintiff's motion to dismiss, and denied defendant's request for fees. On appeal, defendant argued that district court abused its discretion, including by ruling that plaintiff's suit against "John Doe" defendants as subscribers of IP addresses without first investigating for infringement was reasonable and not frivolous. Court noted that defendant cited no binding authority that infringement lawsuits based on IP addresses are unreasonable or frivolous. Accordingly, court found district court did not abuse its discretion in finding plaintiff's actions were reasonable. Court also rejected defendant's argument that district court abused discretion by ruling that plaintiff did not have improper motive in bringing suit. Court noted that plaintiff's voluntary dismissal of claims upon learning defendant did not infringe copyrights showed plaintiff's proper motivation. Court found defendant's other arguments equally unpersuasive, and held district court did not abuse its discretion in declining to award attorneys' fees.

*Beastie Boys v. Monster Energy Co.*, 112 F. Supp. 3d 31 (S.D.N.Y. 2015)

District court granted Beastie Boys' motion for attorneys' fees after band had succeeded on claim for copyright infringement. Although district court found that defendant's arguments concerning willfulness and actual damages generally were objectively reasonable, defendant's refusal, until eve of trial, to concede infringement was objectively unreasonable because infringement was "flagrant," as defendant had exploited Beastie Boys' musical compositions and sound recordings in web advertisement, and there was no question that defendant had never sought Beastie Boys' permission for such use. Court also faulted defendant for needless delay and expense caused by defendant's unsuccessful attempt to shift blame for infringement onto third party. Jury's finding that defendant had willfully infringed due to reckless disregard of third-party copyrights, including absence of comprehensive music licensing policy, supported award of attorneys' fees. Fee award also vindicated purposes of compensation and deterrence because such award ensured net positive recovery for Beastie Boys, and encouraged other copyright holders to pursue meritorious claims. However, court reduced Beastie Boys' requested fee by 30% to account for excessive

partner-heavy staffing of case and instances in which more than one lawyer was assigned to specific task without evident justification.

*Mahan v. Roc Nation, LLC*, No. 14-5075, 2015 U.S. Dist. LEXIS 93349 (S.D.N.Y. July 17, 2015)

District court granted defendants 90% of requested attorneys' fees following dismissal of plaintiff's four Copyright Act claims. Court, noting that "objective unreasonableness" is most important *Fogerty* factor and sufficient on its own to grant fees award, found plaintiff's copyright claims to be plainly time-barred and therefore objectively unreasonable. Given public success of disputed works, and plaintiff's longstanding career in recording industry, plaintiff's alleged ignorance of defendants' representations of sole ownership was not credible. Therefore, plaintiff's pursuit of copyright claims more than 10 years after they accrued was objectively unreasonable. Further, court found that awarding fees would promote interests of Copyright Act by deterring frivolous lawsuits. Court considered attorneys' hourly rates of \$460-720 comparable to similarly situated attorneys in New York, and defendants' request for combined amount of \$281,566.65 equal to presumptively reasonable "lodestar" fee amount, but discounted requested fees by 10%, because one of plaintiff's claims did not arise under Copyright Act. Though one of five claims, only 10% reduction was justified because claim was not introduced until Amended Complaint was filed. Accordingly, court awarded defendants combined fees of \$253,409.99.

*Magder v. Lee*, No. 14-8461, 2015 U.S. Dist. LEXIS 108125 (S.D.N.Y. Aug. 17, 2015)

Defendants brought motion for attorneys' fees as prevailing parties after plaintiff's motion for preliminary judgment was denied and plaintiff subsequently filed notice of voluntary dismissal without prejudice. Court denied motion, finding that where plaintiff unilaterally dismisses case without prejudice, such act is not "judicially sanctioned," since no court action is required. Court further found that dismissal without prejudice was not change in legal relationship between parties required to establish prevailing party status, because plaintiff could still bring claim again. Accordingly, defendants were not "prevailing parties" under Act, and motion for attorneys' fees was denied.

*Epikhin v. Game Insight N. Am.*, No. 14-4383, 2016 U.S. Dist. LEXIS 44170 (N.D. Cal. Mar. 31, 2016)

Plaintiffs brought suit for infringement against defendants based on rights to *Cat Story*, mobile application that had been downloaded over one million times through Apple App Store, Google Play, Amazon and other platforms. Plaintiffs alleged that *Cat Story* contained significant copyrightable material created during development of different app called *PussyVille*; that these rights were properly assigned to plaintiffs; and that rights were infringed by defendants' distribution of *Cat Story*. Before filing suit, plaintiffs "filed for copyright protection for *PussyVille* and *Cat Story*." Plaintiffs had no access to original works that formed basis of *PussyVille*, and so in support of applications deposited (1) source



code of *Fairy Farm*, game upon which *PussyVille* was allegedly based; and (2) images of characters in *Cat Story* that were allegedly identical to or derivative of *PussyVille*. Copyright Office registered *Cat Story* and *PussyVille* based on these deposits. District court dismissed plaintiffs' infringement claim, without prejudice, for failure to properly register allegedly infringed works because "the deposited works were not 'virtually identical' to the original *PussyVille* or *Cat Story*, nor were the deposited works 'produced by directly referring to the original.'" Subsequently, defendants moved for attorneys' fees and costs. Court found first *Fogerty* factor, degree of success obtained, to be neutral because defendants prevailed on technical defense rather than on merits, and dismissal was without prejudice. Second factor, objective unreasonableness, weighed against award of fees because there was no evidence plaintiffs knowingly misled Copyright Office as to deposit copies, and, in light of issued registrations, plaintiffs could have believed that Copyright Office found deposit copies sufficient. Third factor, frivolousness, weighed against award of fees because claim was not clearly baseless and did not involve "fantastic or delusional scenarios." Fourth factor, motivation, weighed against grant of fees because there was no evidence of bad faith or improper motive. Court rejected defendants' argument that bad faith could be inferred because (a) plaintiffs filed in United States while majority of parties were from Russia, and underlying development of application occurred in Russia; and (b) plaintiffs' counsel was disqualified by court due to obvious conflict of interest, and may have misrepresented facts when opposing motion for disqualification. Fifth factor, deterrence and compensation, weighed against award of fees because neither specific nor general deterrence was necessary in instant case, where plaintiffs' claims were not frivolous or objectively unreasonable, and plaintiffs did not act in bad faith. Furthermore, need for compensation did not support fees because defendants had "ample incentive" to defend application that had been downloaded over one million times. Potential chilling effect factor was neutral, as plaintiffs had not presented evidence of their financial condition. Ultimately, court found, award of fees would not further purposes of Act.

*Moofly Prods., LLC v. Favila*, No. 13-5866, 2015 U.S. Dist. LEXIS 121476 (C.D. Cal. Sept. 8, 2015)

Court conditionally granted plaintiff's motion for attorneys' fees after dismissing counterclaims for copyright infringement for failure to state claim. Court found that infringement counterclaim was frivolous; precedent made clear that infringement claim could not be asserted against co-owners, and defendant had only 51% interest in copyright at issue. Court further found plaintiff was prevailing party, rejecting defendant's arguments that plaintiff was not successful because other claims still remained in case, and copyright claim was dismissed on technical question rather than on merits. Court similarly rejected defendant's argument that "material alteration" requirement was not satisfied because both parties experienced material alteration in their positions, insofar as court declined to allow plaintiff to pursue claim for declaratory relief. However, plaintiff's request for declaratory judgment related only to defendant's trademark infringement claim, and was not relevant to copyright infringement analysis. Accordingly, court held attorneys' fees were warranted. As to amount, plaintiff submitted declaration providing narrative account of billing rates for

each attorney and number of hours worked by each lawyer generally, and redacted documents, asserting that it did so to preserve privilege on behalf of client in light of ongoing state court action. Court found argument unpersuasive, and ordered plaintiff to provide to court each attorney's hourly billing rate, number of hours billed, services associated with billable hours, and date on which hours were billed. Plaintiff was ordered to redact individual items only as necessary to maintain privilege concerning state court matters.

*Muromura v. Rubin Postaer & Assocs.*, No. 12-9263, 2015 U.S. Dist. LEXIS 124514 (C.D. Cal. Sept. 17, 2015)

Plaintiffs, non-native English speakers, brought action for copyright infringement of ferrofluid works, "having no knowledge of similar other works using ferrofluid." District court previously granted defendants' motions to dismiss complaint, first amended complaint, and second amended complaint for failure to state claim. Court denied defendants' motion for attorneys' fees because plaintiffs had obtained copyright registration for subject works and brought action in good faith attempt to protect what they believed to be their original work. Plaintiffs did not adequately identify protectable elements of their work, but their position was not unreasonable in light of awkwardness of applying extrinsic test framework to art. Moreover, deficiencies in complaints were not fairly attributable to plaintiffs themselves, where claims were brought in good faith and plaintiffs relied on counsel to develop legal strategy, using their non-native language in foreign country with unfamiliar procedure.

*Jordan-Benel v. Universal Studios, Inc.*, No. 14-5577, 2015 U.S. Dist. LEXIS 82220 (C.D. Cal. June 24, 2015)

Plaintiff brought suit for infringement based on production companies' release in July 2013 of movie *The Purge*, which plaintiff alleged was based in substantial part on plaintiff's draft script for film titled *Settler's Day*. District court granted defendants' motion to dismiss claims for statutory damages and attorneys' fees because plaintiff had not registered script with Copyright Office until after first publication of *The Purge*. Although plaintiff conceded lack of entitlement to statutory damages or attorneys' fees for *The Purge*, plaintiff argued that film sequel *The Purge: Anarchy* was released after registration of script, and therefore plaintiff was entitled to enhanced remedies from release of sequel. Court held that derivative work, such as film sequel, did not constitute newly commenced act of infringement for which statutory remedies would be available under Section 412.

*Scorpio Music Black Scorpio S.A. v. Willis*, No. 11-1557, 2015 U.S. Dist. LEXIS 124000 (S.D. Cal. Sept. 15, 2015)

Court awarded attorneys' fees to prevailing defendant-counterclaimant Victor Willis, songwriter and original member of Village People, in action arising from Willis's termination of grants of rights in numerous compositions, including "YMCA." Willis obtained split jury verdict following trial, and sought \$527,235.84 in attorneys' fees as prevailing party in action. Court, citing Act's "primary objective" to "encourage the

production of original literary, artistic, and musical expression for the good of the public,” and Section 203’s purpose to “safeguard authors against unremunerative transfers” and address “the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited,” found that although adverse parties had not acted frivolously or with improper motive, or made objectively unreasonable factual or legal arguments “on the whole,” attorneys’ fees award was warranted.

*Watkins v. ITM Records*, No. 14-1049, 2015 U.S. Dist. LEXIS 127404 (E.D. Pa. Sept. 23, 2015)

Magistrate judge awarded \$13,650 in attorneys’ fees to prevailing defendant in infringement action. Court held that defendant was prevailing party upon plaintiff’s failure to file amended complaint after court had issued order dismissing original complaint. Attorneys’ fees award was justified based on consideration of *Fogerty* factors. First, although lawsuit may not have been factually meritless at time of commencement, court held that plaintiff’s decision to continue lawsuit against defendant was unreasonable because discovery produced no evidence that defendant had sold infringing album and only documentation allegedly supporting infringement claim was later “lost” by plaintiff. Second, plaintiff’s refusal to voluntarily dismiss case and decision to increase amount of settlement demand even after plaintiff had “lost” proof of defendant’s infringement evidenced improper attempt by plaintiff to “squeeze settlement money out of [defendant].”

*Conway v. Licata*, No. 13-12193, 2015 U.S. Dist. LEXIS 151074 (D. Mass. Nov. 6, 2015)

District court denied plaintiffs’ request for attorneys’ fees under *Fogerty* factors upon finding that (1) there was no evidence defendants were improperly motivated in defending against plaintiffs’ infringement claim; (2) plaintiffs had overly litigated infringement claim by seeking maximum statutory damages award of \$150,000 per song infringed even though evidence showed that infringement had caused minimal pecuniary loss to plaintiff; and (3) there was significant difference between damages awarded (\$5,000) and amount of fees sought by plaintiffs (over \$50,000). District court similarly denied plaintiffs’ request for attorneys’ fees relating to defendants’ unsuccessful counterclaims for infringement. First, plaintiffs did not qualify as “prevailing parties” for purposes of defendants’ counterclaims, since defendants’ voluntary dismissal of such claims did not constitute “final judgment on the merits.” Even if plaintiffs could be deemed prevailing parties, fees were unwarranted because defendants promptly withdrew counterclaims after learning in discovery that such claims were not viable.

*Broad. Music, Inc. v. Tommy Doyles Hyannis, LLC*, No. 13-12258, 2015 U.S. Dist. LEXIS 75182 (D. Mass. June 10, 2015)

Music performing rights organization brought infringement suit against defendants who had publicly performed four copyrighted songs at establishment owned by defendants. Upon defendants’ default and entry of default judgment, plaintiffs sought statutory damages of

\$6,000 per musical work infringed, for total of \$24,000. District court rejected plaintiffs' requested amount of damages because plaintiffs had previously stated that blanket license that would have permitted defendants to perform any of over 8.5 million musical compositions would have cost only \$3,011. Accordingly, award of \$24,000 for defendants' unlicensed performance of mere four songs, one time each, was not justified. Court awarded minimum statutory damages of \$750 per song infringed because such amount adequately served purpose of deterring future infringers.

*Geophysical Servs. v. TGS-NOPEC Geophysical Servs.*, No. 14-1368, 2016 U.S. Dist. LEXIS 150 (S.D. Tex. Jan. 4, 2016)

Following grant of summary judgment for defendant in copyright infringement lawsuit, court granted defendant's motion for attorney's fees and costs, but reduced amount of attorneys' fees based on lodestar calculation. Court applied Supreme Court test from *Fogerty v. Fantasy* and found that balancing of *Fogerty* factors favored fees award. Although court noted plaintiff's claims were "not patently frivolous," court found claims were objectively unreasonable because they lacked factual support and "sought an aggressive expansion of copyright in an international context." Court also found *Fogerty* factor of bad faith did not apply, but remaining *Fogerty* factors – compensation and deterrence – both favored award of attorney's fees, as did balance of all factors. Court then applied lodestar calculation to determine amount of fee award. Defendant sought \$170,706.00 in fees and \$236.95 in costs, based on calculation of above-median hourly rate for similar attorneys in district. Court noted that median rate is not end of inquiry, as court must also consider complexity of legal issues, novelty of claims, complexity of facts, skill and expertise of counsel, quality of representation, and results obtained from litigation. In this case, court found plaintiff's legal theory was novel, aggressive and based on unusual facts. Court also found defendant's counsel presented vigorous, skillful and successful defense. Accordingly, court adopted rates of \$500 per hour (partner) and \$400 per hour (associate), which were lower than counsel's actual rates but higher than median rate in district. Court also reduced associate's number of hours billed by 15 percent, having found number of hours "unreasonably high given that the case was dismissed under Rule 12(b)(6)." Court awarded defendant attorneys' fees in amount of \$132,888.00.

*Tempest Publ'g, Inc. v. Hacienda Records & Recording Studio, Inc.*, No. 12-736, 2015 U.S. Dist. LEXIS 143227 (S.D. Tex. Oct. 21, 2015)

Court granted in part motion for costs. Plaintiff sued defendants alleging infringement of copyrights in four songs. Plaintiff obtained judgment that defendant infringed one of its songs, and defendant obtained judgment that it had not infringed three remaining copyrights. Both plaintiff and defendant claimed they were prevailing party. Court held that under plain language of Rule 54(d)(1) and controlling Supreme Court and Fifth Circuit precedent, plaintiff was "the" prevailing party because court entered judgment for plaintiff on one of its copyright infringement claims, materially altering legal relationship between plaintiff and defendant. Defendant was not "the" prevailing party, court found, and "Rule 54(d) does not give the district court the power to award costs to the nonprevailing party."

*Guzman v. Hacienda Records & Recording Studio, Inc.*, No. 12-42, 2015 U.S. Dist. LEXIS 99830 (S.D. Tex. July 30, 2015)

District court denied defendant's request for attorneys' fees. Plaintiff brought suit for infringement of song entitled "Triste Aventurera" based upon defendant's release of song entitled "Cartas de Amor." After trial, district court dismissed plaintiff's infringement claims upon finding that defendant did not have reasonable access to plaintiff's song prior to defendant's release of allegedly infringing song. Court held that ability of plaintiff's claims to survive summary judgment indicated that such claims were neither patently frivolous nor objectively unreasonable. District court further held that plaintiff had presented "compelling if ultimately unsuccessful case of 'copying,'" and evidence at trial actually favored plaintiff on issue of substantial similarity, including compelling similarities in songs' tempo, key and lyrics. Second, there was no evidence that plaintiff brought suit in bad faith or had improper motive, since plaintiff had good-faith belief in legitimacy of claim and filed suit only after settlement discussions with defendant were unsuccessful.

*Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, No. 13-433, 2015 U.S. Dist. LEXIS 154014 (E.D. Va. Nov. 13, 2015)

District court granted summary judgment to defendants in infringement suit relating to copyrighted condominium building. Fourth Circuit affirmed grant of summary judgment on appeal. Post-judgment and post-appeal, court granted in part and denied in part defendants' motions to recover full costs and reasonable attorneys' fees. Court held plaintiff's legal and factual positions were not frivolous because, although Fourth Circuit ultimately rejected plaintiff's theory that plaintiff in architectural copyright case need not show how individually extrinsic elements relate to one another, at time suit was brought, there was no precedent directly on point, and plaintiff had some evidence that defendants had obtained access to allegedly protected materials. Plaintiff's legal and factual positions were, however, objectively unreasonable because plaintiff asserted infringement largely on basis of ideas, concepts, and individual standard features, case result was foreseeable under Fourth Circuit precedents, and plaintiff claimed enormous amount in damages. Court held "the motivation of the parties" and "the need in particular circumstances to advance considerations of compensation and deterrence" were controlling *Rosciszewski* factors in determining that fees award was appropriate, but found fees claimed by defendants were not reasonable, based on unreasonably high hourly rates and inadequate documentation flawed by lumped time entries, identical double entries, and vague task descriptions. Court also held non-taxable costs not recoverable pursuant to Section 505 because scope of recoverable costs under statute is limited by scope of recoverable costs pursuant to general bill of costs statutes, 28 U.S.C. §§ 1821 and 1920.

*Compass Homes, Inc. v. Heritage Custom Homes, LLC*, No. 13-779, 2015 U.S. Dist. LEXIS 101338 (S.D. Ohio Aug. 3, 2015)

Court granted defendant's motion for attorneys' fees. Despite requirement under Act that claim cannot be brought prior to preregistration or registration of copyright, plaintiff declined

to submit copy of registration with complaint, or in response to motion practice that put issue of registration squarely before court. Court found that plaintiff litigated case devoid of any factual support for claim of registration, which was objectively unreasonable. Court also held deterrence weighed in favor of awarding fees since plaintiff had brought suit before it was ready to litigate, again noting absence of registration certificate. Court was not persuaded by fact that plaintiff obtained registration certificate after judgment was entered, reasoning instead that this served to bolster need for deterrence and compensation. In determining amount of award, court reduced fee amount by 20% to account for fees attributable to several state law claims that were dismissed without prejudice.

*Salyer v. Hotels Com GP, LLC*, No. 13-1966, 2015 U.S. Dist. LEXIS 82171 (W.D. Wash. June 23, 2015)

Court granted plaintiff statutory damages, attorneys' fees and costs. Plaintiff, owner of copyrighted photograph, sued defendant, owner of website, claiming infringement arising from defendant's use of plaintiff's photograph on website without permission. Having found plaintiff alleged *prima facie* case of infringement, court granted default judgment against defendant, awarding plaintiff \$3,000 in statutory damages. With respect to attorneys' fees, court applied "lodestar method," and found hours billed were reasonable. However, court found billing rates charged by plaintiff's counsel were higher than those prevailing in district for attorneys of comparable skill, experience and reputation. Accordingly, court adjusted billing rates to \$400 (partner), \$300 (associate) and \$200 (associate), and granted plaintiff \$7,020 in attorneys' fees.

*Frost-Tsuji Architects v. Highway Inn, Inc.*, No. 13-496, 2015 U.S. Dist. LEXIS 127213 (D. Haw. Sept. 23, 2015)

District court granted in part and denied in part defendants' motion for attorney's fees after successful defense against infringement claim and claim alleging improper removal of plaintiff's copyright management information ("CMI"). Although court denied fees as to infringement claim, because such claim was not objectively unreasonable, court held that fees were warranted with respect to CMI claim and plaintiff's motions seeking reconsideration of decision dismissing infringement and CMI claims. CMI claim was wholly unsupported by facts or evidence, and therefore was objectively unreasonable. Plaintiff's motions for reconsideration were also objectively unreasonable because such motions failed to take into account court's earlier rulings, and contradicted admissions previously made by plaintiff; plaintiff "should have known" that such motions were "highly unlikely to succeed." Court also held that plaintiff's litigation conduct, including plaintiff's filing of numerous public health and safety complaints with multiple state and country agencies regarding defendant's restaurant, notwithstanding communications from such agencies that defendant was in full compliance with relevant codes and requirements, suggested improper motive. Award of attorneys' fees for CMI claim and motions for reconsideration also compensated defendants for successfully asserting substantive copyright defenses and deterred litigants from unreasonably driving up litigation costs.

### **C. Injunction/Impoundment**

*Elements Spirits, Inc. v. Iconic Brands, Inc.*, No. 15-2692, 2015 U.S. Dist. LEXIS 75986 (C.D. Cal. June 11, 2015)

Court denied plaintiffs' motion for preliminary injunction even though plaintiffs raised serious questions on merits, because plaintiffs failed to otherwise show likelihood of success on merits, or that balance of hardships favored plaintiffs. Plaintiffs, producers of tequila sold in bottles shaped and painted to resemble skulls traditionally associated with Mexican "Day of the Dead" celebration, entered into license agreement with defendants or defendants' predecessors in interest and/or related parties for exclusive use of copyrighted bottle designs. Defendants argued plaintiffs breached agreement by failing to satisfy condition of license, and therefore license automatically terminated. Subsequently, defendants began selling tequila in nearly identical bottles. Plaintiffs sued, alleging defendants' infringement of plaintiffs' copyrighted bottle designs, and moved for preliminary injunction. In denying plaintiffs' motion, court noted there were open questions as to validity of plaintiffs' license, given plaintiffs' alleged breach of agreement. For this reason, court found plaintiffs could not establish likelihood of success on merits. Moreover, although court found plaintiffs could establish "serious questions going to the merits," court found balance of hardships was same for both parties, and did not favor plaintiffs. Therefore, court denied plaintiffs' motion for preliminary injunction.

*Bell v. Taylor*, No. 13-798, 2015 U.S. Dist. LEXIS 163352 (S.D. Ind. Dec. 4, 2015)

Court rejected plaintiff's request for injunctive relief. Defendants used plaintiff's copyrighted photograph of Indianapolis skyline on business websites without authorization. District court previously held that plaintiff failed to show actual damages resulting from alleged infringement and that plaintiff was not entitled to statutory damages. First, plaintiff failed to present evidence demonstrating "irreparable injury," such as loss of business or market share, resulting from infringement. Court also rejected plaintiff's argument that plaintiff would be "powerless to stop" future infringement by defendants absent injunctive relief. Plaintiff had adequate remedy at law to address any future infringement by defendants, including monetary damages, statutory damages and/or attorneys' fees.

### **D. Sanctions**

*Baiul v. NBC Sports*, No. 15-9920, 2016 U.S. Dist. LEXIS 52291 (S.D.N.Y. Apr. 19, 2016)

Famous ice skater Oksana Baiul brought suit against defendant, alleging claims for unjust enrichment, conversion and accounting. District court granted defendants' motion to dismiss complaint as preempted. Additionally, court ordered sanctions against Baiul's counsel under 28 U.S.C. § 1927 due to clearly frivolous nature of claims and numerous frivolous filings made by Baiul's counsel, as well as ample evidence that Baiul's counsel acted in bad faith,

including filing another lawsuit on behalf of Baiul in California whose allegations directly contradicted allegations of complaint in current action.

## VIII. PREEMPTION

*Spear Mktg. v. BancorpSouth Bank*, 791 F.3d 586 (5th Cir. 2015)

Plaintiff, producer of cash management software program, filed suit in Texas state court alleging 10 causes of action including violation of Texas Theft Liability Act (TTLA) and conversion. Defendants removed case to federal court on ground that plaintiff's claims were completely preempted. Plaintiff then amended state court petition to delete conversion claim and references to copying and distribution and moved for remand, contending that none of its claims were preempted. District court denied plaintiff's motion on ground that conversion and TTLA claims were completely preempted. On appeal, Fifth Circuit affirmed denial of motion to remand, holding that removal is assessed according to time-of-filing rule, under which jurisdictional facts are determined at time petition for removal is filed. Accordingly, post-removal amendment to petition that deleted all federal claims, leaving only pendent state claims, did not divest district court of subject matter jurisdiction. Fifth Circuit joined majority of circuits and held that state law claims based on ideas fixed in tangible media are preempted. Because computer software is tangible medium protected by Copyright Act, and allegedly misappropriated trade secrets were "fixed" in software user interface, technical trade secrets found within software program fall within subject matter of copyright. Conversion and TTLA causes of action are "equivalent" to exclusive rights of federal copyright to extent that claims allege conversion, copying, communication, and transmission of trade secrets and intangible property.

*Dryer v. NFL*, 814 F.3d 938 (8th Cir. 2016)

Eighth Circuit upheld district court's grant of summary judgment in NFL's favor, finding that Act preempted appellants' state-law right-of-publicity claims. Appellants, former NFL players, had brought suit based on films chronicling NFL history featuring appellants. Court first rejected argument that appellants' athletic performances during NFL careers constituted "part of their identities" rather than "fixed" works of authorship eligible for copyright protection. Fixed recordings of live NFL games, which was only context in which appellants' challenged NFL's use of appellants' likenesses, fell squarely within purview of Act. Court also rejected argument that appellants' claims fell outside scope of Act because NFL films represented commercial speech that states have legitimate interest in regulating. Upon consideration of relevant factors, court held that NFL films constitute expressive, non-commercial speech as opposed to advertisements for specific products or services. NFL's economic motivations in producing films, alone, did not convert productions into commercial speech. Because appellants' right-of-publicity claims challenged NFL's expressive, non-commercial use of copyrighted works, appellants' suit asserted rights equivalent to "exclusive rights within the general scope of copyright" and was thus preempted.



*Baiul v. NBC Sports*, No. 15-9920, 2016 U.S. Dist. LEXIS 52291 (S.D.N.Y. Apr. 19, 2016)

Famous ice skater Oksana Baiul brought suit against defendant, alleging that defendant had failed to pay continuing royalties for exploitation of three audiovisual works featuring Baiul's ice skating performances. Baiul's complaint asserted claims for unjust enrichment, conversion and accounting. District court granted defendants' motion to dismiss complaint as preempted under Second Circuit's two-step test. First, subject matter requirement was clearly met because motion picture recording of Baiul's performance was fixed in tangible medium of expression, and thus entitled to copyright protection. Second, court, noting that Second Circuit takes restrictive view of "extra element" test in preemption analysis, held that Baiul's state-law claims sought to vindicate rights equivalent to exclusive rights protected by Act, and did not involve extra element beyond those required by infringement claim. Mere allegation that plaintiff did not receive royalties did not transform infringement claim into unjust enrichment claim outside purview of copyright law. Likewise, under Second Circuit law, plaintiff's conversion claim was preempted because such claim was based on defendant's unauthorized publication of work, as opposed to defendant's possession of specific tangible object. Baiul's claim for accounting was preempted because such claim was also predicated on defendant's alleged misappropriation and exploitation of copyrighted work.

*Elements Spirits, Inc. v. Iconic Brands, Inc.*, No. 15-2692, 2015 U.S. Dist. LEXIS 124645 (C.D. Cal. Sept. 17, 2015)

District court granted in part plaintiffs' motion to dismiss certain of defendants' counterclaims. Plaintiffs, including Elements Spirits, Inc., retailer of KAH brand tequila, sued defendants, including Elements founder and creator of KAH brand, Grace Kim Brandi, for various claims, including trade dress infringement and breach of contract. Brandi formed Elements in 2009, and in 2010 Elements launched KAH tequila, which was sold in skull-shaped glass bottles meant to resemble skulls associated with "Dia de los Muertos." In April 2011, Brandi was removed as officer and director of Elements, but remained minority shareholder. In August 2011, Brandi registered copyrights in tequila bottle designs in her own name. In November 2013, Elements and Brandi entered into agreement resolving various copyright and company ownership issues. Thereafter, relations deteriorated, and Brandi started new company, Iconic Brands, which began selling tequila using Brandi's copyrighted skull-shaped bottle designs. Plaintiffs brought suit against Iconic and Brandi, and Iconic and Brandi responded with counterclaims for rescission of agreement and for accounting. Brandi sought accounting against all plaintiffs for profits earned by use of her copyrights in tequila bottle design, sales of KAH tequila, attorneys' fees, and valuation of Brandi's stock in Elements. Plaintiffs filed motion to dismiss defendants' accounting counterclaim as preempted. Brandi argued claim was not preempted, because it was based on breach of contract and fraud claims in addition to copyright claims. Court applied Ninth Circuit's two-part test to determine whether subject matter of accounting claim fell within subject matter of copyright, and whether rights under state law were equivalent to exclusive rights given to copyright holders. Court found subject matter of accounting claim for profits

earned from use of copyrights, by its terms, related to copyrightable subject matter, namely copyrights in tequila bottles as sculptural works. Other accounting claims, for sales, attorneys' fees and valuation of stock, were not grounded in copyrightable subject matter and were therefore not within scope of Act. Accounting between co-owners of copyright is not preempted, because co-owners have equal rights and cannot sue each other for infringement, but accounting claim based on infringement claim is preempted. Since accounting claim for profits was derived from use of copyrighted material and depended on resolution of copyright claim, accounting claim for use of copyrighted material was preempted. Accordingly, motion to dismiss accounting claim was granted with respect to profits derived from use of copyrighted material, but was otherwise denied.

*Ryoo Dental, Inc. v. Han*, No. 15-308, 2015 U.S. Dist. LEXIS 90085 (D. Cal. July 9, 2015)

Plaintiff dental practice had invested significant capital in search engine optimization fees and related website costs. After losing its first page search ranking on Google, plaintiff learned that defendant, another dentist, had copied content from plaintiff's site and put it on his own site, causing Google's algorithm to penalize plaintiff's site. Plaintiff sued for copyright infringement and several related state law claims, all of which court found were preempted. First prong of test for preemption was met, as website fell within subject matter of copyright because it was fixed work of authorship. In assessing second prong – whether claims asserted rights equivalent to those protected under copyright law – court looked to whether any state law claim included “extra element that chang[ed] the nature of the action so that it [wa]s quantitatively different than a copyright infringement claim.” Court found that conversion claim was preempted because it involved conversion of website content, which is intangible rather than tangible property. Likewise, plaintiff's negligent interference with prospective economic advantage was preempted because alleged disruption of business consisted of defendant's alleged copying of plaintiff's website. False advertising and unfair competition claims received separate treatment, but they were viewed essentially as reverse passing off rather than passing off claims. Court held “[r]everse passing off claims are preempted unless the plaintiff alleges bodily appropriation and seeks more than mere monetary damages.” Since these criteria were not met, these claims also were preempted. Claims for unjust enrichment failed because California has no separate cause of action for it, and claim rested on same facts and asserted same rights as copyright claims. Plaintiff also argued that accounting was necessary to determine damages, but this too was preempted to extent it related to copyright claim since “the Copyright Act already affords [plaintiff] an adequate means by which to calculate damages.”

*Lilith Games (Shanghai) Co. v. uCool, Inc.*, No. 15-1267, 2015 U.S. Dist. LEXIS 88820 (N.D. Cal. July 8, 2015)

Plaintiff, video game developer, brought suit against defendant, video game marketer, who had created video game based on plaintiff's copyrighted source code to which defendant had unlawfully gained access. Defendant moved to dismiss plaintiff's claims for trade secret misappropriation and unfair competition as preempted. District court analyzed preemption

defense under two-prong test adopted by Ninth Circuit. Court held that first prong was satisfied because work at issue – copyrighted source code – fell within “subject matter of copyright.” However, second prong was not satisfied, and therefore preemption did not apply, because element of secrecy within trade secret misappropriation claim constituted “extra element” that changed nature of action. Although plaintiff owned Chinese copyright registrations for source code, code deposited with Chinese Copyright Office is not publicly available, and there was no suggestion in complaint that plaintiff’s code was available to public. Court ruled that “there is nothing about owning copyright that is antithetical to maintaining the same code as a trade secret, assuming it is not available for public inspection as a result.” Because plaintiff’s unfair competition claim was predicated on trade secret misappropriation allegations, such claim was also not preempted.

*GlobeRanger Corp. v. Software AG USA, Inc.*, No. 11-403, 2015 U.S. Dist. LEXIS 76059 (N.D. Tex. June 11, 2015)

Jury had granted verdict in favor of plaintiff and awarded \$15 million in compensatory damages for trade secret misappropriation claim involving disputed software. After trial, defendant moved to vacate judgment, arguing that trade secret misappropriation claim was preempted. District court denied defendant’s motion. Although plaintiff conceded that first element of preemption analysis, whether claim fell “within the subject matter” of copyright, was satisfied, court held that trade secrets claim was not preempted because elements of claim directed to showing of secrecy and acquisition of trade secrets by way of breach of confidential relationship or other improper means constituted “extra elements” different in kind from elements of infringement claim. Unlike copyright infringement, which is strict liability tort that is triggered regardless of defendant’s mental state, claim for trade secret misappropriation examines blameworthiness of defendant’s conduct. Further, while exclusive rights granted by Act last only for limited period of time, trade secrets law offers indefinite protection of information so long as information is kept secret.

*Precision Drone, LLC v. Channel Masters, LLC*, No. 15-476, 2015 U.S. Dist. LEXIS 81042 (S.D. Ind. June 23, 2015)

Plaintiff moved to remand action to state court, arguing that federal court lacked subject matter jurisdiction. Suit involved claims stemming from breach of purchase and non-disclosure agreements governed by Indiana state law, and plaintiff did not seek protection of any federal laws including Act. District court held remand inappropriate because gravamen of plaintiff’s complaint was directed at defendant’s unauthorized use of imagery and advertising from plaintiff’s copyrighted website. Accordingly, because plaintiff’s allegations were “based on nothing more than the act of infringement,” plaintiff’s claims for breach of contract were preempted.

*Epic Tech, LLC v. STHR Grp., LLC*, No. 15-252, 2015 U.S. Dist. LEXIS 163486 (M.D.N.C. Dec. 7, 2015)

Magistrate judge recommended that defendants' motions to dismiss be denied. Plaintiff, owner of Legacy proprietary gaming software system, sued entities involved in distribution and utilization of pirated version of Legacy called Falcon. Court denied motions to dismiss state-law conversion, trade secret misappropriation, and North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) claims as preempted. North Carolina conversion claim was not preempted because Amended Complaint sufficiently alleged conversion of physical copy of Legacy software. Trade secret claim was not preempted under Fourth Circuit precedent, and UDTPA claim was not preempted because plaintiff relied on claims other than copyright infringement, namely, trademark infringement and trade secret misappropriation, which supported UDTPA claim.

## **IX. DIGITAL MILLENNIUM COPYRIGHT ACT**

*Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016)

Plaintiff uploaded to YouTube 29-second home video of plaintiff's two young children dancing while song *Let's Go Crazy* by artist Prince played in background. After Universal issued take-down notice, plaintiff brought suit for violation of Section 512(f) of DMCA, which renders copyright owner liable for damages for knowingly misrepresenting that activity subject to takedown notice is infringing. In affirming district court's denial of parties' cross-motions for summary judgment, court ruled, on issue of first impression, that copyright owner must consider whether potentially infringing activity constitutes fair use under Act before issuing take-down notification under DMCA. Because Section 107 expressly authorizes fair use as valid defense to infringement, take-down notice requirement that complaining party has good faith belief that use of material "is not authorized by ... the law" necessarily encompasses belief that use is not protected by fair use doctrine. In order to meet this standard, copyright owner need only form subjective good faith belief that use does not constitute fair use. Thus, copyright owner who considers fair use defense prior to issuing take-down notice is protected from liability under Section 512(f), even if court may come to contrary conclusion as to whether fair use applied. Conversely, copyright owner who fails to consider fair use or who merely "pays lip service" to fair use consideration before sending take-down notification cannot meet requirement of subjective good faith and becomes subject to liability for damages under Section 512(f). Court further held that willful blindness doctrine is available to determine whether copyright owner "knowingly" misrepresented good faith belief that offending activity did not constitute fair use. In current case, willful blindness doctrine was unavailable to plaintiff because there was no evidence that Universal subjectively believed there was high probability that video constituted fair use and took deliberate actions to avoid learning of such fair use. However, plaintiff could proceed on Section 512(f) misrepresentation claim under theory of actual knowledge. Additionally, Ninth Circuit held that plaintiff may seek recovery of nominal damages for injury arising from Section 512(f) misrepresentation, rejecting Universal's argument that

plaintiff must demonstrate “actual monetary loss.” Use of phrase “any damages” in Section 512(f) evidenced Congress’ intent that recoverable damages under statute are broader than monetary relief.

*BWP Media USA Inc. v. Hollywood Fan Sites LLC*, 115 F. Supp. 3d 397 (S.D.N.Y. 2015)

Court granted in part and denied in part plaintiffs’ motion seeking to strike affirmative defense under DMCA safe harbor provisions asserted by defendants. Plaintiffs, owners of rights in certain images of celebrities, brought infringement action alleging that photographs at issue appeared on websites operated by defendants without authorization. Court found that defendants Fan Sites Org (“FSO”) and Hollywood Fan Sites LLC (“HFS”) were barred from asserting safe harbor defense for infringement shown to have occurred prior to date such entities first filed DMCA agent designation with Copyright Office. Court also held that HFS was not covered by parent company’s DMCA agent designation “on behalf of itself and its subsidiaries and affiliates” because designation made no direct reference to HFS, and therefore HFS would not have been listed in Copyright Office’s directory of agent registrations. Moreover, regulations issued by Copyright Office disallowed use of single agent designation to cover multiple entities. Court also held that availability of agent information on HFS’s website alone was insufficient to meet safe harbor defense because statute requires that agent information be available both on service provider’s website and in Copyright Office’s directory.

*Bounce Exchange, Inc. v. Zeus Enterprise Ltd.*, No. 15-3268, 2015 U.S. Dist. LEXIS 165073 (S.D.N.Y. Dec. 9, 2015)

District court granted plaintiff’s motion to amend complaint to include two claims under DMCA, based upon plaintiff’s “contention that certain abbreviations of its corporate name used throughout its software’s source code constitute ‘copyright management information’ (‘CMI’).” Plaintiff developed and sold proprietary software that allowed clients to track website users’ behavior and target them with advertising. Plaintiff claimed that in March 2013 two executives of defendant posed as potential customers, and plaintiff gave them software demonstration, non-public information and marketing materials. Plaintiff claimed that in February 2015 it discovered that defendant was selling software source code that was substantially similar to plaintiff’s proprietary code. Plaintiff sent letter demanding that defendant cease use of infringing code, to which defendant responded that code was based on open-source code. Plaintiff sued, alleging infringement of its software and code. In motion to amend, plaintiff alleged that defendant removed references in its code to plaintiff, specifically terms “bounce” and “bouncex,” and replaced them with terms referring to defendant. Plaintiff asserted that those terms were shorthand references to its official name as author of work, and thus were CMI. Defendant argued that “bounce” and “bouncex” were not CMI, but rather embedded in code, and thus, portion of work. Court disagreed, finding defendant misconstrued term “in connection with” to exclude any information that is “portion” or element of copyrighted work. Defendant also argued that statutory definition should be limited to CMI “assigned” to work by “automated systems.” Court held this would

be too-narrow reading of statute. Court rejected defendant's argument that "bounce" and "bouncex" are not specific enough to identify plaintiff. Court granted motion to amend complaint to add claims under DMCA, finding use of "bounce" and "bouncex" in source code to be CMI.

*BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc.*, No. 14-1611, 2015 U.S. Dist. LEXIS 161091 (E.D. Va. Dec. 1, 2015)

Plaintiffs, putative owners of 1,400 musical composition copyrights, sued defendant, high-speed Internet service provider, alleging contributory and vicarious liability resulting from illegal peer-to-peer sharing of plaintiffs' music files by users of defendant's Internet service. Plaintiff moved for summary judgment that defendant was not entitled to DMCA safe-harbor defense, because defendant failed to meet statutory requirement that Internet service providers adopt and reasonably implement repeat infringer policy. Record established that defendant did not implement its repeat infringer policy before 2012, and after 2012, defendant's policy was implemented only in narrow circumstances. Before 2012, court found, defendant "publicly purported to comply with its policy, while privately disparaging and intentionally circumventing the DMCA's requirements." Moreover, court found that after 2012 defendant's implementation of policy was unreasonable, because emails in record established that defendant had actual knowledge that users were intentionally and repeatedly infringing, and defendant did not terminate those user accounts. Accordingly, defendant was not entitled to DMCA safe-harbor defense to plaintiff's contributory and vicarious infringement claims, and court granted partial summary judgment to plaintiff.

*Tomelleri v. Zazzle, Inc.*, No. 13-2576, 2015 U.S. Dist. LEXIS 165007 (D. Kan. Dec. 9, 2015)

District court granted in part and dismissed in part defendant's motion for summary judgment dismissing plaintiff's DMCA claims. Fish illustrator brought claims for violation of Section 1202 of DMCA against operator of website that allowed third party users to create, buy, and sell customized merchandise online. Plaintiff alleged that 62 fish illustrations had been copied and placed on defendant's website without authorization. As to Section 1202(a) claim, court rejected plaintiff's argument that mere appearance of copyrighted design on defendant's website conveyed false CMI, since websites do not generally claim ownership of images simply because such images appear on website. Further, since defendant had invested significant resources to remove designs that had been accused of infringement from website, there was no evidence that defendant had acted with intent to aid infringement. As to Section 1202(b) claim, court held that statutory phrase "conveyed in connection with copies ... of the work" required plaintiff to show that images on defendant's website were obtained from sources containing identifying information. Because plaintiff claimed in affidavit that infringing images had been scanned from six books that contained such identifying information, including statutory copyright notice at beginning of books, there was genuine issue of fact that precluded summary judgment. Finally, court granted summary judgment in defendant's favor on plaintiff's claim that defendant violated Section 1202(b) through alteration and removal of CMI in metadata

included in electronic image files of illustrations because plaintiff failed to show that such images on plaintiff's website contained metadata with identifying information that satisfied definition of Section 1202(c).

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