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## **Copyright Litigation: The Year In Review**

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# COPYRIGHT LITIGATION – THE YEAR IN REVIEW

August 21, 2019

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## Selected Appellate Decisions

### 1. Copyright Registration Certificate As Prerequisite To Filing A Copyright Action

*Fourth Estate Pub. Benefit Corp. v. Wall Street.com*, 586 U.S. \_\_\_\_ 139 S. Ct. 881; 203 L. Ed. 2d 147; 129 U.S.P.Q.2d 1453 (March 4, 2019)

### 2. Expert Fees Not Recoverable To Prevailing Party In Copyright Infringement Action

*Rimini Street, Inc. v. Oracle USA, Inc.* 586 U.S. \_\_\_\_ (2109); 139 S. Ct. 873; 203 L. Ed. 2d 180; 129 U.S.P.Q.2d 1459 (March 4, 2019)

### 3. Attorneys Fees Available To Prevailing Party Where Merits Don't Turn On Copyright Act – Dangers of Pursuing Unsuccessful Claims

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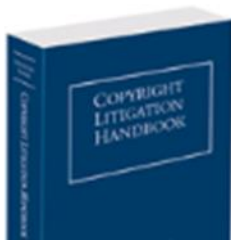
*Experience Hendrix, L.L.C. v Pitsicalis*, 17 CIV. 1927 (PAE), 2018 WL 6191039, at \*10 [SDNY Nov. 28, 2018]

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## COPYRIGHT LITIGATION – THE YEAR IN REVIEW

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This year was eventful for copyright litigation. In the decade preceding this spring, the US Supreme Court decided only about a dozen copyright cases. See [https://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_Supreme\\_Court\\_copyright\\_case\\_law#Forthcoming\\_cases](https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_copyright_case_law#Forthcoming_cases). This spring the U.S. Supreme Court issued two opinions and granted cert in two cases likely to be argued this year. The Court also sought the views of the Solicitor General in another case, *Google v. Oracle*. The Court's interest in copyright law is likely to continue to grow.

The first decision, *Fourth Estate Pub. Benefit Corp. v. Wall Street.com* analyzed copyright registration issues that litigators need to know and carefully vet before commencing litigation. Many litigators start cases without realizing that their clients' claims are not properly registered in the copyright office, creating weaknesses in their cases that could have been avoided.

The second decision, *Rimini Street, Inc. v. Oracle USA, Inc.* dealt with the issue of whether a federal court has the power of including expert witness fees as part of "full costs" to be awarded under the Copyright Act to a prevailing party. In a unanimous opinion authored by Justice Kavanaugh, the Court held that "full costs" means "taxable costs" under 28 USC § 1920. This decision is a blow to intellectual property owners who cannot now recoup reasonable litigation expenses even if they win a hard-fought copyright infringement litigation.

The Supreme Court has granted certiorari in two cases relating to state governments' use of works of authorship on the following issues:

**Did Congress validly abrogate state sovereign immunity via the Copyright Remedy Clarification Act in providing remedies for authors of original expression whose federal copyrights are infringed by States?** *Allen v. Cooper* No. 18-877 Cert granted June 3, 2019

**Does the government edicts doctrine extends to works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated, and render them uncopyrightable?** *Georgia v. Public.Resource.Org, Inc.* No. 18-1150 Cert granted June 24, 2019.

A case to watch where the Court has asked the Solicitor General to present views is *Google LLC v. Oracle America Inc.* Google has asked that cert be granted on the following

issues: **Whether copyright protection extends to a software interface; and (2) whether, as the jury found, the petitioner’s use of a software interface in the context of creating a new computer program constitutes fair use.**

This year in litigation showed severe setbacks for copyright trolls. Copyright lawyers involved with Prenda received jail sentences for extortion following a long court saga. *See Cox, Kate* “Prenda Law porn-troll saga ends with prison for founder Disbarred former lawyer John Steele said he made "stupid decisions."” (July 10, 201) <https://arstechnica.com/tech-policy/2019/07/prenda-law-porn-troll-saga-ends-with-prison-for-founder/>; *Cooper v. Steele*, 2014 WL 3734255 (D. Minn. July 29, 2014).

Federal judges increasingly are showing skepticism in allowing discovery of IP addresses to find individual infringers and looking for a higher level of proof at the outset of infringement litigations. Meaningful sanctions appear to be increasingly common. *Craig v UMG Recordings, Inc.*, 380 F Supp 3d 324, 339 [SDNY 2019], reconsideration denied, 16-CV-5439 (JPO), 2019 WL 2992043 [SDNY July 9, 2019](awarding sanctions) *Cruz v Am. Broadcasting Companies, Inc.*, 17-CV-8794 (LAK), 2017 WL 5665657, at \*1 [SDNY Nov. 17, 2017](ordering attorney with history of unmeritorious copyright infringement actions to show cause why bond should not be required as a pre-condition to proceeding with copyright infringement action).

Battles over online photography continue to rage, with decisions in various circuits attracting large numbers of *amici curiae*. These “friends of the court” have realized the high stakes and importance of circuit court decisions in shaping outcomes in copyright law and litigation and seem to be filing amicus briefs in increasingly large numbers at the circuit level, rather than waiting until a case hits the U.S. Supreme Court to express their views.

We also saw meaningful decisions from a number of circuits relating to creators of systems that post user-generated content online. The question of who is copying and who is liable for user generated-content containing infringing materials is a complex one that will continue to be hotly-litigated in the future.

Defendants are using the provisions of the Pro-IP Act of 2008 to invalidate copyright registrations where inaccurate statements were made to the Copyright Office to obtain registration. In the past such statements were no big deal and often done to cut corners on copyright registration fees. A big decision from the Ninth Circuit should cause attorneys to advise their client to exercise a much higher level of care in registering copyrights.

## Selected Appellate Decisions

### US Supreme Court

#### 1. Copyright Registration Certificate As Prerequisite To Filing A Copyright Action

*Fourth Estate Pub. Benefit Corp. v. Wall Street.com*, 586 U.S. \_\_\_\_ 139 S. Ct. 881; 203 L. Ed. 2d 147; 129 U.S.P.Q.2d 1453 (March 4, 2019)

On March 4, 2019, in *Fourth Estate Pub. Benefit Corp. v. Wall Street.com*, (No. 17-571), a unanimous Supreme Court decided that copyright registration is necessary before bringing an infringement action in a U.S. district court. Opinion [here](#) and oral argument [here](#) courtesy SCOTUS blog. Justice Ginsburg, the opinion's author, was in the hospital during the oral argument.

Fourth Estate sued Wall Street.com for copyright infringement shortly after applying to the Copyright Office for a copyright registration, rather than waiting the estimated seven months for the Copyright Office to issue a registration certificate. In some parts of the country, courts permitted a plaintiff to commence a lawsuit where an application to register a copyright claim had been filed with the Copyright Office - the "application approach." In other jurisdictions, including in the Second Circuit, federal judges dismissed cases where a plaintiff could not show a copyright registration certificate (or a refusal of the Register to issue a registration) prior to the lawsuit's commencement - the "registration approach."

*Fourth Estate* resolves a rather unsexy issue dividing the federal courts since I wrote [Copyright Litigation Handbook](#) over a decade ago. The case is important to lawyers and copyright owners commencing copyright infringement lawsuits in federal court, but is not likely of interest to a broader audience. The case relates only to a narrow administrative issue: how and when to sue in federal court in light of administrative delays in registration at the Copyright Office that have grown from one to two weeks in 1956 to seven months today. Because many federal courts had already required action by the Register as a precondition of suit, as a practical matter this decision, will only change things for copyright owners in a hurry to sue in parts of the United States where Circuit Courts had adopted the "application approach." For years, copyright owners in "registration approach" jurisdictions have been well-advised to use the Copyright Office's "Special Handling" procedure that is available in cases involving potential litigation. Special Handling has, according to the Copyright Office, a five-day turnaround (I would allow a few extra days). Unfortunately, the Special Handling procedure comes with an \$800 fee. By comparison, a basic electronic copyright registration runs \$35-55 according to the latest [Copyright Office Circular 4](#).

The Supreme Court's decision turned on the language of Section 411(a) of the Copyright Act:

*(a) Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), [1] no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration*



*has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.*

A unanimous Supreme Court concluded that "registration ...has been made" "when the Register has registered a copyright after examining a properly filed application." under 17 U.S.C. 411(a). The opinion noted that copyright "registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights." In practical terms, this means that a copyright owner suing for infringement must have a copyright registration certificate in hand before commencing an action in federal court (or a refusal of registration by the Register).

Paying an \$800 fee for Special Handling is an unfair annoyance. This case means that, in emergency situations where litigation is necessary, copyright owners throughout the nation will have to obtain a copyright registration certificate (or a refusal) following the Special Handling procedure where waiting for the Copyright Office to issue a registration certificate is not an option.

Oral argument in the case contains a lot of interesting information on copyright registration history, policy and arguments relating to how many registrations are rejected and how many involve correspondence with the Copyright Office. A footnote to the decision notes that Fourth Estate's check to the Copyright Office bounced. During oral argument it was argued that Congress had recently increased staffing budgets by 60% to reduce the registration time lag. In the end, the Supreme Court found the administrative time lag to be "unfortunate" but that the lag did not justify a rewrite of Section 411's requirement of registration by the Register of Copyrights prior to commencement of a lawsuit.

## **2. Expert Fees Not Recoverable To Prevailing Party In Copyright Infringement Action**

*Rimini Street, Inc. v. Oracle USA, Inc.* 586 U.S. \_\_\_\_ (2109); 139 S. Ct. 873; 203 L. Ed. 2d 180; 129 U.S.P.Q.2d 1459 (March 4, 2019)

SCOTUS just gave us a full explanation of "full costs" in copyright litigation and the glass has come up less than half empty. On March 4, 2019 Justice Kavanaugh delivered a unanimous opinion for the U.S. Supreme Court in *Rimini Street, Inc. v. Oracle USA, Inc.* *Rimini Street* decided the issue of whether a winning copyright litigant could recover "full costs" of the litigation as the Copyright Act's section 505 specifically provides or something less. The issue arose where a successful copyright litigant sought to recover costs (litigation expenses) related to discovery and expert witness fees. In a lot of fussing over the meaning of the word "full," SCOTUS completely eliminated a district court's discretion to award non-taxable costs as part of "full costs."

## **17 U.S. Code § 505. Remedies for infringement: Costs and attorney's fees**

*In any civil action under this title, the court in its discretion may allow the recovery of **full costs** by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court **may also award a reasonable attorney's fee to the prevailing party as part of the costs.***

Section 505 has made many copyright litigants thirsty for a win. For many years we understood that Congress wished to encourage copyright litigants to pursue rights as a matter of policy, and Congress understood that the costs of litigation, including attorneys fees, often outweighed the benefits of a particular case.

Essentially the Court limited the meaning of "full costs" to "taxable costs" (which are in most cases more than half a pint short of a pint glass of costs) that are found in

#### 28 U.S. Code § 1920. Taxation of costs

*A judge or clerk of any [court of the United States](#) may tax as costs the following:*

- (1) Fees of the clerk and marshal;*
  - (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;*
  - (3) Fees and disbursements for printing and witnesses;*
  - (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;*
  - (5) Docket fees under [section 1923 of this title](#);*
  - (6) Compensation of [court](#) appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under [section 1828 of this title](#).*
- A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.*

Section 1920 was passed in 1948. Because taxable "costs" are generally so low and routinely awarded by the Clerk of the Court, there is very little litigation over the meaning of costs. In a spirited and interesting oral argument, on behalf of Oracle, Paul Clement argued that reading the word "full" out of Section 505 and reading 1920's cramped view of "costs" (ie taxable costs) as "full costs" would do "carnage" to the statute and common grammar. Clement pointed out that Congress revisited Section 505 in 1984 and made it clear that "full costs" in Section 505 of the Copyright Act clearly meant non-taxable costs based on a plain reading of the English language.

Here is the grammar lesson from the full SCOTUS opinion:

*Oracle argues that the word "full" authorizes courts to award expenses beyond the costs specified in §§1821 and 1920. We disagree. "Full" is a term of quantity or amount. It is an adjective that means the complete measure of the noun it modifies. See American Heritage Dictionary 709 (5th ed. 2011); Oxford English Dictionary 247 (2d ed. 1989). As we said earlier this Term: "Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality." *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U. S. \_\_\_, \_\_\_ (2018) (slip op., at 8). The adjective "full" in §505 therefore does not alter the meaning of the*

word “costs.” Rather, “full costs” are all the “costs” otherwise available under law. The word “full” operates in the phrase “full costs” just as it operates in other common phrases: A “full moon” means the moon, not Mars. A “full breakfast” means breakfast, not lunch. A “full season ticket plan” means tickets, not hot dogs. So too, the term “full costs” means costs, not other expenses. The dispute here, therefore, turns on the meaning of the word “costs.” And as we have explained, the term “costs” refers to the costs generally available under the federal costs statute—§§1821 and 1920. “Full costs” are all the costs generally available under that statute.

The flaw in the argument is that "full costs" have been in copyright statutes since the [Statute of Anne](#). Lawyer are always shot down by clerks for including non-taxable costs. A full moon means the full moon as opposed to a quarter moon. A full breakfast means you get to eat ALL of your eggs and sausages. A full season ticket plan means ALL tickets.

To avoid giving the winning party full costs, the Court looked to Section 1920 - a 1948 statute giving a judge or a clerk the power to tax certain items as costs. The court also created a new category of costs - "litigation expenses" -- that Congress had supposedly forgotten to mention in drafting Section 505.

Acknowledging the flaw in the Court's approach, the opinion concludes: "Sometimes the better overall reading of the statute contains some redundancy."

### **3. Attorneys Fees Available To Prevailing Party Where Merits Don't Turn On Copyright Act – Dangers of Pursuing Unsuccessful Claims**

*Manhattan Review LLC v. Yun* - 2019 WL 1319813 (2d Cir. 2019); 2019 WL 1326528 (2d Cir. 2019).

Can a "prevailing party" in a copyright or trademark action obtain attorneys fees even if the victory had nothing to do with the Copyright Act or Lanham Act? The Second Circuit, in a pair of recent decisions involving alleged infringement of test preparation materials, says "yes."

In *Manhattan Review LLC v. Yun* - 2019 WL 1319813 and 2019 WL 1326528 the Second Circuit divided its opinion into two decisions, one of precedential value limited to the question of whether a "prevailing party" could collect attorneys fees and one by summary order dealing with the questions of whether attorneys fees were appropriate under the Copyright Act and Lanham Act. This federal action arose in the wake of a failed state action. In the state action based on various state law claims, the litigation turned on the corporate status of Manhattan Review LLC because its corporate status had been cancelled by the State of Delaware. Manhattan Review's loss of corporate status led to dismissal of copyright and trademark claims brought derivatively on its behalf. Manhattan Review's principal obtained a certificate of good standing and moved to vacate the dismissal. The state court denied the motion to vacate.

Manhattan Review LLC and its principal filed the federal action for copyright and trademark infringement, failing to mention the state court action. The court found the certificate of good standing did not nullify Delaware's cancellation and ruled against the plaintiffs on the

grounds of collateral estoppel, finding that plaintiffs had received a full and fair opportunity to litigate.

The defendants sought, and were awarded attorneys fees and costs pursuant to section 505 of the Copyright Act and section 35(a) of the Lanham Act. Plaintiff objected, arguing that the copyright and trademark claims had not been considered on the merits, making statutory awards of attorneys fees inapplicable.

The Second Circuit rejected the argument as foreclosed by the U.S. Supreme Court's 2016 decision in *CRST Van Expedited, Inc. v. EEOC* which decided that the "defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a non-merits reason."

The Second Circuit's summary order dealt with the questions of whether attorneys fees were properly assessed under the Copyright Act and Lanham Act which afford district court judges discretion - and boundaries on their discretion - in awarding attorneys fees. The Second Circuit affirmed the finding that plaintiffs' litigation positions were "objectively unreasonable and frivolous" and that "the failure to mention a relevant prior action indicates a lack of candor". Accordingly, the Second Circuit concluded that approximately \$49,000 in attorneys fees were appropriately awarded under the Copyright Act and as an "exceptional case" under the Lanham Act.

Persisting in pursuing unsuccessful theories in copyright and trademark matters can be a dangerous pursuit.

#### **4. Statute of Limitations – Accrual of Copyright Ownership Claims – Registration of Ownership Claims Does Not Trigger Statute (Circuit Split)**

17 U.S.C. Section 205(c); *Wilson v Dynatone Publ. Co.*, 908 F3d 843, 843-44 [2d Cir 2018]

In a dispute over ownership of the renewal term copyrights in musical composition vacated the district court's grant of Defendants' motion under Fed. R. Civ. P. 12(b)(6) to dismiss for untimeliness and remanded. *Wilson v. Dynatone*, 892 F.3d 112 (2d Cir. 2018). Defendants petitioned for reconsideration, arguing that Plaintiffs' suit was untimely because under § 205(c) of the Copyright Act, Plaintiffs' ownership claim accrued—triggering the running of the statute of limitations—when Defendants registered their claim of ownership in the Copyright Office. *Wilson v Dynatone Publ. Co.*, 908 F3d 843, 843-44 [2d Cir 2018].

17 U.S.C. Section 205(c) states:

*Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—(1) the document, or material attached to it, specifically identifies the work to which it pertains ... and (2) registration has been made for the work.*

The Second Circuit rejected the argument that registration, without more, triggers accrual of an ownership claim because this would mean that after authoring a work, an author would need to

constantly monitor the Copyright Office registry to be sure that no one registered a spurious claim of authorship, on pain of losing ownership of the copyright three years after the spurious registration. This would impose on authors an intolerable and unrealistic burden, and would open fertile opportunities for thieves to steal copyrights by simply filing baseless registrations for previously created works. The Court noted its agreement with the Third, Sixth and Seventh Circuits. *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004) (“Authors don’t consult the records of the Copyright Office to see whether someone has asserted copyright in their works.... [I]t is no more the purpose of registration to start statutes of limitations running than it is the purpose of the copyright notice itself to do so.”); *Brownstein v. Lindsay*, 742 F.3d 55, 71–72 (3d Cir. 2014) (“[t]he act of registering a copyright does not repudiate co-authorship ... because co-authors are not expected to investigate the copyright register for competing registrations. ... [Otherwise, a] challenger to a plaintiff’s authorship could surreptitiously apply for copyright registration of the plaintiff’s work to start the statute of limitations running and, if the plaintiff did not discover the registration until three years thereafter, the plaintiff’s authorship would be nullified.”); see also *Roger Miller Music, Inc. v. Sony/ATV Publ’g, LLC*, 477 F.3d 383, 390 (6th Cir. 2007). The Second Circuit noted its disagreement with the First Circuit. *Saenger Org. v. Nationwide Licensing Assoc.*, 119 F.3d 55 (1st Cir. 1997)(under § 205(c), the registration “put the world on constructive notice as to the [plaintiff’s] ownership of the copyright and of the facts stated in the registration certificate,” and accordingly the defendant “had constructive notice of [the plaintiff’s] claim of exclusive ownership of the copyrights.”)

## 5. Derivative Works – Digital Remasters of Sound Recordings

*ABS Entertainment, Inc. v CBS Corp.*, 908 F.3d 405 [9th Cir 2018]

In the context of a class action lawsuit alleging that transmission of remastered sound recordings violated state copyright law, the Ninth Circuit reviewed the question of whether post-1972 remasters of pre-1972 Sound Recordings were “derivative works” containing federally-copyrightable original expression added during the remastering process.

A “derivative work” is defined in the Copyright Act as a work “based upon one or more preexisting works” that “recast[s], transform[s], or adapt[s]” a preexisting work and “consist[s] of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.” 17 U.S.C. § 101. A derivative work is copyrightable when it meets two criteria: (1) “the original aspects of a derivative work must be more than trivial,” and (2) “the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.” *U.S. Auto Parts*, 692 F.3d at 1016 (citing *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980) ). This is known as the *Durham* test. Both prongs arise out of Copyright’s basic focus on originality. The first prong asks “whether the derivative work is original to the author and non-trivial” and the second prong ensures that the derivative work author does not hinder the original copyright owner’s ability to exercise all of its rights. *Id.* at 1017.

The Ninth Circuit concluded that a derivative sound recording distinctly identifiable solely by the changes incident to the change in medium generally does not exhibit the minimum level of originality to be copyrightable. *ABS Entertainment, Inc. v CBS Corp.*, 908 F.3d 405, 423 [9th Cir 2018]

## **6. Internet Service Provider Direct Liability For User Generated Content**

### **A. Second Circuit – “Volitional” Requirement For ISP To Be Liable For User-Generated Content**

*BWP Media USA Inc. v. Polyvore, Inc.*, 922 F.3d 42 (2d Cir. 2019)(opinion by Judge Walker, two separate concurrences by Judges Newman and Pooler)

The Second Circuit addressed the issue of whether a photo-sharing site, an internet service provider (“ISP”) claiming the “safe harbor” of the Digital Millennium Copyright Act, 17 U.S.C. §512 could be held liable for direct copyright infringement claims. The court held that although copyright infringement is a strict liability tort, a creator of automated systems must take an affirmative “volitional” step to be liable for direct infringement and that the infringement “must have resulted from the provider’s own volitional conduct.” 922 F.3d at 47. An ISP does not engage in volitional conduct when an ISP simply displays user-uploaded images and plays no role in selecting the images. 922 F.3d at 50. A service designed to permit users to clip and post photographs that the ISP passively displayed did not satisfy the “volition” requirement to conclude that the ISP was “making copies” or “displaying copies” within the meaning of the Copyright Act, 17 U.S.C. §106(1), (5).

Congress passed the DMCA to “clarify the liability faced by service providers who transmit potentially infringing material over their networks.” *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012) The act established four safe harbors to spare ISPs from liability for “claims of copyright infringement based on (a) ‘transitory digital network communications,’ (b) ‘system caching,’ (c) ‘information residing on systems or networks at [the] direction of users,’ and (d) ‘information location tools.’” *Viacom*, 676 F.3d at 27 (quoting 17 U.S.C. § 512(a)-(d)).

Section 512(c), provides:

A service provider shall not be liable ... for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider,—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1). A service provider that meets all of these criteria is shielded from copyright liability as long as it also “has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and ... accommodates and does not interfere with standard technical measures.” 17 U.S.C. § 512(i)(1). Since the DMCA safe harbors are affirmative defenses, a defendant generally has the initial burden of establishing that it meets the statutory requirements. *See Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2016).

Polyvore, the ISP, argued that it has satisfied all of these requirements for the DMCA safe harbor of § 512(c) because the undisputed record shows that at the time of the conduct alleged: (1) Polyvore was an ISP, (2) Polyvore registered an agent to receive take-down notices and remove infringing content, (3) Polyvore had a repeat infringer policy, (4) the infringing images were initially uploaded by users, and (5) Polyvore had no actual or “red flag knowledge” that any of Plaintiff’s images uploaded by users were copyrighted.

Plaintiff argued that Polyvore is not eligible for any safe harbor under the DMCA because (1) by altering the metadata of images uploaded to its site it interfered with “standard technical measures” in contravention of § 512(i), and (2) the copying of the additional images was not infringement “at the direction of the user.” The Court found that Plaintiff failed to establish that preserving metadata is a “standard technical measure.” The Court concluded that questions of material fact prevented the Court from concluding that the copying here was done “at the direction of the user” sufficient to shield the ISP from liability and remanded for additional findings of fact.

#### **B. Ninth Circuit – Volitional Requirement For Direct Infringement Not Satisfied By Real Estate Website Displays of Non-Searchable Photographs/Searchable Photographs Not Fair Use**

*VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723 (9<sup>th</sup> Cir. 2019)

In an important case for websites posting user-generated photographs, the Ninth Circuit divided real estate website Zillo’s use of photographs into two categories. In the first category, photographs posted by users were held not to be direct copyright infringements because Zillo did not satisfy the volitional requirement by “causing” the copies to be made. In the second category, the Court considered photographs posted by users that Zillow tagged and made part of a searchable database called “Digs.”

The focus of the parties' debate here is whether Zillow's tagging of 3,921 VHT photos for searchable functionality on Digs was transformative and thus supported a finding of fair use. The purpose of Digs is to permit users to search for certain attributes or features,

such as a marble countertop or hardwood floor, and view photos of rooms with those attributes or features. These photos are either uploaded by users to Digs, or selected manually or electronically by Zillow. Zillow then tags the photos to make them searchable. Of course, tagging makes it possible for a user's keyword search to produce relevant results. Zillow refers to these tagged photos as “searchable images” or components of the “searchable set.” VHT's 3,921 photos are in the searchable set

The Court reviewed the history of search engine cases where fair use of photographs had been found. Reviewing the four fair use factors set forth in Section 107 of the Copyright Act, 17 U.S.C. § 107 (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work, *VHT, Inc. v Zillow Group, Inc.*, 918 F.3d 723, 739 [9th Cir 2019], the Court concluded that the use was not fair. Importantly the Court compared the Digs searchable database and found that its “closed-universe” search engine that did not refer back to the original images on the internet and led mainly to commercial links from Zillow vendors did have a transformative purpose unlike other search engines that had been found to have fulfilled important functions for the public like the Arriba video search engine or Google Books.

## **7. Website Owner Has No Vicarious Liability For Infringing Photographs On Website Where No “Direct Financial Benefit”**

*Erickson Productions, Inc. v. Kast*, 921 F.3d 822 (9<sup>th</sup> Cir. 2019).

A website owner hired a contractor to build a website. Part of the contractor’s duties was to obtain licenses for any photographs used on the website. In the rush to launch the website, unlicensed photographs were used. When the owner of the photographs complained, the website owner immediately removed the photographs. The Ninth Circuit considered the question of first impression of whether the website owner’s avoidance of licensing fees conferred a direct financial benefit on the website owner sufficient to support vicarious liability.

To prevail on a vicarious liability claim, a plaintiff must prove that a defendant has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity. *Erickson Productions, Inc. v Kast*, 921 F.3d 822, 829 (9th Cir 2019); *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 745 (9th Cir. 2019); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017). The essential aspect of the “direct financial benefit” inquiry is “whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps. *Erickson Productions, Inc. v Kast*, 921 F.3d 822, 829 (9th Cir 2019) The Ninth Circuit concluded that the owner’s avoidance of a license fee was not a “direct financial benefit” sufficient to impose vicarious liability.



The Ninth Circuit upheld the jury’s verdict of contributory liability. A party engages in contributory copyright infringement when it “(1) has knowledge of another’s infringement and (2) either (a) materially contributes to or (b) induces that infringement.” *VHT*, 918 F.3d at 745 (citing *Perfect 10, Inc. v. Visa Int’l Serv., Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007)). *Erickson Productions, Inc. v Kast*, 921 F3d 822, 831 (9th Cir 2019). However, the Court rejected a “should have known” standard of willfulness that was given to the jury because this amounted to a negligence standard. Without the finding of willfulness, plaintiff’s statutory damages would be reduced from \$450,000 to a maximum of \$90,000. *Erickson Productions, Inc. v Kast*, 921 F3d 822, 833 (9th Cir 2019).

## **8. Insurance: Intellectual Property Exclusion on Advertising Injury Policy**

*Sterngold Dental LLC v. HDI Global Insurance Co.*, 2019 WL 2754185 (1<sup>st</sup> Cir. 2019)

The Court considered plaintiff’s effort to avoid an intellectual property exclusion to personal and advertising coverage under a standard commercial general liability policy and affirmed the district court’s grant of a motion to dismiss. The plaintiff sought a defense and indemnification to trademark claims arising from use of nearly identical trademarks for nearly identical products. Personal and advertising injury “arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights” were excluded under the policy. The issue was whether the “advertising injury” arose out of the infringement claim. Because the injury arose from the infringement claim it was subject to the intellectual property exclusion.

## **9. Rule 12(b)(6) Motions to Dismiss**

### **A. Children’s Book - Granted – Substantial Similarity and Scenes-a-Faire Doctrine**

*Nicassio v. Viacom International Inc.*, -- Fed.Appx. \_\_\_ 2019 WL 2762343 (3d Cir. 2019)

Rule 12(b)(6) motion to dismiss granted and affirmed. Complaint brought by the author of an illustrated children’s book *Rocky: The Rockefeller Christmas Tree*. The court acknowledged similarities with Defendant’s work but found that many of the similarities were excluded from copyright protection under the scenes-a-faire doctrine as elements that not only: “necessarily flow from the basic plot premise, but also ones that naturally flow from it” and were “plot elements that flow predictably from a general idea.”

### **B. Phd. Dissertation Diagrams - Granted – Substantial Similarity and Scenes-a-Faire Doctrine**

*Perry v Mary Ann Liebert, Inc.*, 765 Fed Appx 470, 472 [2d Cir 2019]

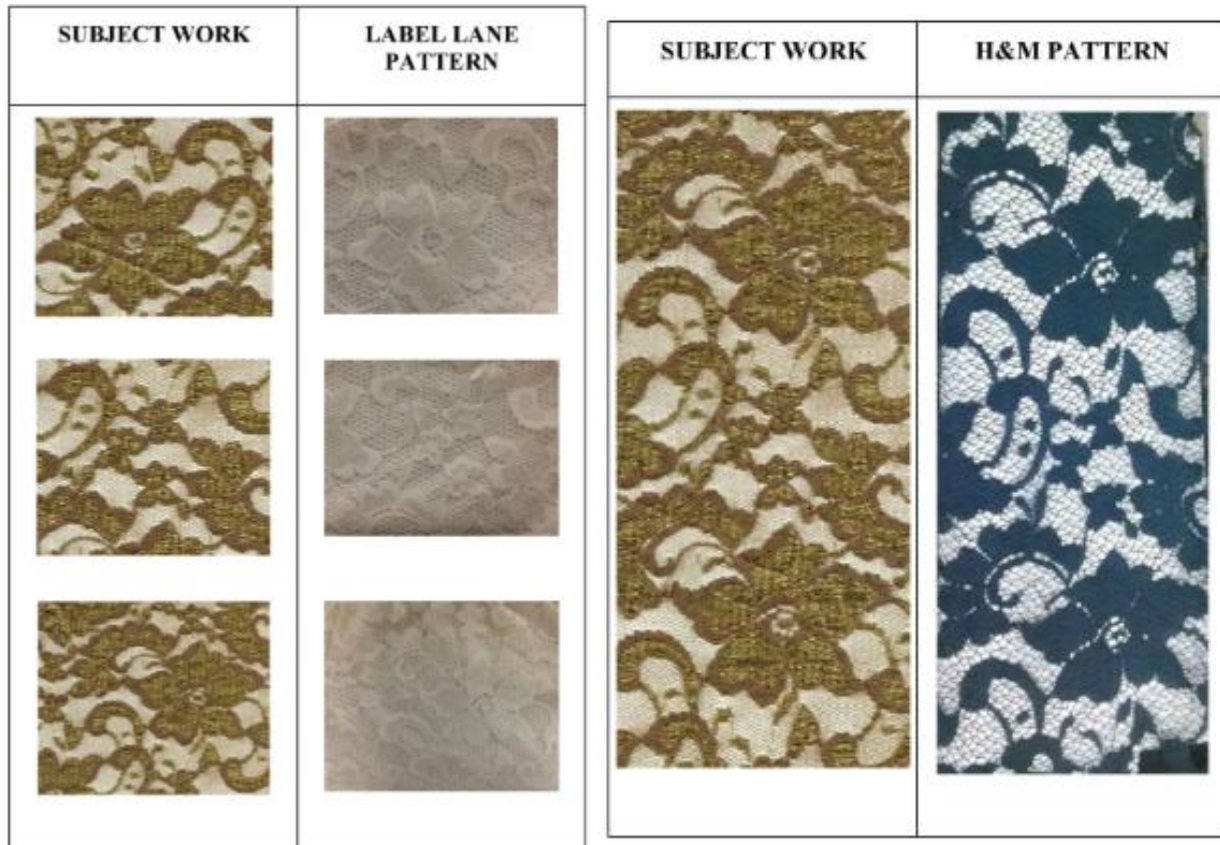
Rule 12(b)(6) motion to dismiss granted and affirmed. Plaintiff alleged that a diagram in an academic article was substantially similar to multiple diagrams in her dissertation. “The standard test for substantial similarity between two items is whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same.” Additionally, when faced with works that have both protectible and unprotectible elements court applied a “more discerning” analysis, and must “ask whether the

protectible elements, standing alone, are substantially similar.” Copyright protects only “the expression of ideas, not the ideas themselves. “Protectible elements” diagrams are aesthetic portions, *i.e.*, the arrangement of the diagrams, the shapes, and the colors, not the actual scientific information being conveyed. Copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery” (internal quotation marks omitted) ). Diagrams differ as to color, arrangement, shape, labeling, and number of elements. Indeed, many of the similarities between the diagrams are features of all diagrams generally. Plaintiff cannot “claim copyright” in binding “conventions” of a type of design). Upon reviewing the two works, “no reasonable jury, properly instructed, could find” that the diagrams are “substantially similar.”

**C. Fabric Designs – Granted and Reversed on Appeal – Striking Similarity**

*Malibu Textiles, Inc. v. Label Lane International Inc.*, 922 F.3d 946 ( 9<sup>th</sup> Cir. 2019)

District court granted motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Ninth Circuit compared the two fabric designs and reversed, finding that the plaintiff had alleged striking similarity and had also pleaded access sufficient to support a claim of substantial similarity.



*See also Neman Brothers & Assoc. Inc. v. Burlington Stores, Inc.*, 765 Fed.Appx. 235 (9<sup>th</sup> Cir. 2019) (affirming grant of summary judgment – fabric designs not substantially similar).

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**Thank you!**

#### **D. Manuscript and Film – Granted – Implausibility**

*Fillmore v. Blumhouse Prods., LLC*, 2019 WL 2406707 (9<sup>th</sup> Cir. 2019)

District court judge properly dismissed copyright infringement claim for failure to state a claim. Court properly took judicial notice of manuscript and film that were referred to in the pleadings. Dismissal with prejudice and without leave to amend because amendment would be futile.

*Esplanade Productions, Inc.*, 768 Fed.Appx. 732 (9<sup>th</sup> Cir. 2019)

Affirmed dismissal of copyright infringement claims in case as implausible despite identical titles “Zootopia” and line of dialogue about becoming an elephant. Titles unprotected as matter of federal law. 37 C.F.R. §202.1(a).

#### **10. Sculpture – Visual Artists Rights Act (VARA) Not Violated By Moving Sculpture**

*Tobin v. Trinity Church*, 735 Fed.Appx. 32 (2018)



**TRINITY ROOT**  
STEVE TOBIN

© BROADWAY NY #10226

CREATED FROM THE ROOTS OF THE HISTORIC WIGMORE THEATRE THAT SAVED ST. PAUL'S CHAPEL DURING THE WORLD TRADE CENTER ATTACKS ON SEPTEMBER 11, 2001

Because artist’s contract with Trinity Church contemplated moving the sculpture to other locations, artist waived any potential rights to claim that the installation was site-specific under the Visual Artists Rights Act 17 U.S.C. §106(A)(a)(2).

#### **11. Music – Indemnification For Copyright Infringement Litigation**

*Pettibone v. WB Music Corp.*, 767 Fed.Appx 145 (2d Cir. 2019)

Defendant music company sought to recoup from musician \$500,000 in attorneys fees expended in successful defense of copyright infringement action by withholding royalty payments. The musician argued that because he never breached the agreement, he was under no duty to indemnify. The Court found the indemnification agreement to be ambiguous and that the intent of the parties was for each to bear its attorneys fees, absent a breach by the musician.

The Court held that Defendant improperly withheld royalties and remanded for assessment of attorneys fees in the musician’s favor.

## **12. Permanent Injunctive Relief – Not Available Where Money Damages Suffice**

*TD Bank N.A. v Hill*, 928 F3d 259, 278 [3d Cir 2019]

The Court denied permanent injunction to prevailing party where infringer published autobiography that infringed on former employer’s copyright. Even after prevailing on the merits, the party seeking a permanent injunction must make a sufficient showing that (1) it will suffer irreparable injury, (2) no remedy available at law could adequately remedy that injury, (3) the balance of hardships tips in its favor, and (4) an injunction would not disserve the public interest. The inability to show irreparable harm—or that a legal remedy would be inadequate—defeats a request for injunctive relief. To obtain a permanent injunction, a moving party must show that it will suffer irreparable harm that is causally attributable to the challenged infringement.<sup>1</sup> Courts have found that the “availability of adequate monetary damages belies a claim of irreparable injury.” In weighing the public interest, the court found that First Amendment concerns and the risk of the former employee being held in contempt did not weigh in favor of injunctive relief.

## **13. Work-for-hire doctrine – Employee’s Autobiography Was Not Work-for-hire, But Rights Validly Assigned**

*TD Bank N.A. v Hill*, 928 F3d 259, 278 [3d Cir 2019]

We have been reminded that just because a work is “deemed” a work for hire as almost all contracts seem to do, that doesn’t make it so. The Third Circuit has explained the practical consequences relating to works created by employees:

In its summary judgment decision, the District Court .... accepted TD Bank’s argument that the letter agreement itself vested exclusive ownership with the Bank, stating that “[l]anguage in a written instrument ... that deems the work to be a work made for hire within the meaning of the Copyright Act may ... vest ownership exclusively with an employer.”

That was error. It appears the District Court confused an original vesting of ownership under the work-for-hire doctrine with a transfer of ownership rights via an assignment. By its terms, the Copyright Act recognizes only nine specified categories of works by independent contractors that can be deemed “for hire” through a signed writing. 17 U.S.C. § 101(2). For an employee’s work to receive for-hire treatment, by contrast, the work must actually come within the “scope of his or her employment.” *Id.* § 101(1). Certain writings, such as negotiated employment agreements, may sometimes help clarify the scope of employment, when considered under general agency-law principles. *See U.S. Auto Parts Network, Inc. v.*

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<sup>1</sup> *TD Bank N.A. v Hill*, 928 F3d 259, 280 [3d Cir 2019]; *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011); *Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1363 (Fed. Cir. 2013)

*Parts Geek, LLC*, 692 F.3d 1009, 1018 (9th Cir. 2012); *but cf. Garcetti v. Ceballos*, 547 U.S. 410, 424–25, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) (observing that “[f]ormal job descriptions often bear little resemblance” to an employee’s actual duties, and the mere inclusion of a task in a job description “is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties”). But a bare statement that a particular work is “for hire,” says nothing about the scope of an individual’s employment and cannot suffice on its own. Had Congress intended to permit parties to “deem” works by employees as “for hire,” it would have so specified in subsection 101(1), just as it did for independent contractors in subsection 101(2). *Id.* But it did not. And where, as here, “Congress has shown that it knows how to [adopt a measure] in express terms,” it is “particularly inappropriate” to extend that policy to another subsection lacking such language.

Whether a writing operates to render a work “for hire” or to assign the author’s interest may seem like a distinction without a difference. But that distinction, though technical, does carry some practical consequences. **If a work qualifies as a work for hire, the Act treats the employer or principal as the author, and the copyright presumptively vests in the principal unless the parties execute an agreement to the contrary. 17 U.S.C. § 201(b). If a work does not satisfy the statutory definition, the author can still assign it but retains certain non-waivable rights to cancel the transfer after 35–40 years, *id.* § 203(a)(3), and—depending on the type of work—waivable moral rights in the work’s proper attribution and integrity, *id.* § 106A(a). The creator of a work for hire has neither, *see id.* §§ 101, 106A(a), 203(a), so allowing parties to deem a work as “for hire” without fulfilling the statutory requirements would undercut the Copyright Act’s protection of those termination and moral rights and would negate the difference between a work for hire and an assigned work.<sup>7</sup> That difference underscores why an employee’s work created outside the scope of employment cannot simply be “deem[ed]” for hire.**

*TD Bank N.A. v Hill*, 928 F3d 259, 272-73 [3d Cir 2019](citations and punctuation omitted).

#### **14. Software Licenses – Summary Judgment - Licensee owned copy of software and was permitted to copy and have third party service software**

*Universal Instruments Corp. v. Micro Systems Engineering Inc.*, 924 F.3d 32 (2d Cir. 2019)

The Second Circuit affirmed an award of summary judgment in favor of a software licensee that had been sued for copyright infringement and breach of contract for working with a new supplier and programmer with respect to a custom software program. Section 117(a) of the Copyright Act permits the owner of a copy of software to make a copy if it is essential to use the program in conjunction with a machine.

## **15. Points of Procedure - Letter Motions - Motion to Intervene — Second Circuit**

Fed.R.Civ.P. 24; *Griffin v Sheeran*, 767 Fed Appx 129, 132-33 [2d Cir 2019].

This case raises two interesting procedural points on 1. Pre-motion Letters and 2. Motions to intervene. The original copyright infringement action was filed in August 2016 to nationwide publicity. It was dismissed and re-filed in July 2017. The district court denied a May, 2018 motion to intervene after the close of discovery as untimely. The would-be intervenor did not wish to reopen discovery but wished to use its own expert. The Second Circuit affirmed the denial of intervention, finding that the intervenor had constructive notice of the original action

### **A. Pre-motion letters**

The district court's individual practices require a pre-motion letter requesting a pre-motion conference. Plaintiff wrote a letter requesting a pre-motion conference to make a motion to intervene. The district court read the letter, deemed the motion made and denied the motion to intervene as untimely. The Second Circuit found this to be error, but harmless, concluding that absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, a court has no power to prevent a party from filing pleadings [or] motions ... authorized by the Federal Rules of Civil Procedure. Although the District Court did not technically preclude SAS from moving to intervene, it acted outside the scope of its powers under the Federal Rules when it converted SAS's letter request for a conference into a motion and denied that motion without allowing SAS to respond to Defendants' opposition. This case is unlike others where this Court has previously approved of district courts' treating a pre-motion conference request as a motion. In those cases, the district court allowed the movant to offer reply letters, exhibits, and/or oral argument in support of its request. By contrast, SAS was not allowed any such opportunity. Unlike in those cases, SAS has identified additional argument[s] it would have made had it filed full motion papers. *Griffin v Sheeran*, 767 Fed Appx 129, 132 [2d Cir 2019]

### **B. Motion to intervene**

To intervene as of right under Federal Rule of Civil Procedure 24(a)(2), "an applicant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, *and* (4) show that the interest is not protected adequately by the parties to the action." *Griffin v Sheeran*, 767 Fed Appx 129, 133 [2d Cir 2019]; *Catanzano v. Wing*, 103 F.3d 223, 232 (2d Cir. 1996). Federal Rule of Civil Procedure 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact."

In assessing timeliness district courts have broad discretion. Courts consider (1) how long the applicant had notice of its interest in the action before making its motion; (2) the prejudice to the existing parties resulting from this delay; (3) the prejudice to the applicant resulting from a

denial of the motion; and (4) any unusual circumstance militating in favor of or against intervention.” *Griffin v Sheeran*, 767 Fed Appx 129, 132-33 [2d Cir 2019]

#### **16. Points of Procedure – Motion for joinder of copyright owner as plaintiff**

Fed. R. Civ. P. 17(a)(3); *Dolores Press, Inc. v Jones*, 766 Fed Appx 455, 459 [9th Cir 2019]

It was reversible error for the district court to not permit a publisher to add a copyright owner as a plaintiff where a complaint alleged an exclusive license with ambiguous terms.<sup>2</sup> The addition of the copyright holder as a party is not “ratification”—let alone improper ratification—under Rule 17(a)(3) of the Federal Rules of Civil Procedure. It is *joinder* of the real party in interest, which would eliminate the statutory standing defect and any other defect under Rule 17(a). A district court may not dismiss an action without giving a reasonable time for the copyright owner to join or be substituted into the action.

#### **17. Points of Procedure - Tagging Offshore Copyright Defendants with Jurisdiction**

Fed.R.Civ.P. 4(k)(2); *Universal Music MGB NA LLC v. Quantum Music Works Inc.*, 769 Fed.Appx 445 (9<sup>th</sup> Cir. 2019)

For copyright infringement claims against foreign entities without a physical address in the United States, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws. The effect of this rule is that jurisdiction may be exercised over copyright claims against a foreign defendant where sufficient contacts with, or injury to, U.S. residents is alleged and due process is satisfied, even though there are not sufficient contacts with any single state to justify jurisdiction in that state. If a defendant who wants to preclude use of Rule 4(k)(2), it can do so by identifying a state where it may be sued.

#### **18. Claim preclusion – Effect of prior patent infringement case on later-filed Digital Millennium Copyright Act case**

*Media Rights Technologies, Inc. v. Microsoft Corp.*, 922 F.3d 1014 (9<sup>th</sup> Cir. 2019)

Plaintiff developed a technology in the early 2000s to protect electronic files, such as music files, from content piracy. Plaintiff claims that Microsoft developed a similar technology following exchanges between the parties and in doing so used information from Plaintiff. In 2013, Plaintiff brought a patent infringement suit. After a court in a separate proceeding declared one of Plaintiff’s patents invalid, Plaintiff voluntarily dismissed that suit with prejudice. During the pendency of the first action, Plaintiff’s expert found a watermark from Plaintiff’s source code

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in Microsoft's Window's Service Packs that was a result of reverse engineering. Plaintiff's contract with Microsoft forbid reverse engineering.

Plaintiff then filed a second action against Microsoft, asserting claims for copyright infringement, violation of the Digital Millennium Copyright Act ("DMCA"), and breach of contract. The Ninth Circuit held that claim preclusion barred claims that had accrued at the time of the original patent-infringement action: (1) copyright infringement claims arising from the sale of Microsoft products before the patent-infringement suit; (2) the DMCA circumvention claim; and (3) the breach of contract claims based on reverse engineering. The Ninth Circuit held that these claims all arose from the same events—Microsoft's alleged misappropriation of software—as the prior patent infringement claims and merely offer different legal theories for why Microsoft's alleged conduct was wrongful. However, applying the "separate accrual" rule for copyright infringements the Court held that claim preclusion does not bar Plaintiff from asserting copyright infringement claims that accrued after it filed its patent-infringement suit: claims arising from the sale of Microsoft products after that date.

## **Highlights Of The Year in Copyright Litigation Sanctions**

### **1. Sanctions for knowingly including inaccurate information in copyright registration**

#### **A. Misleading Statements to Copyright Office Claiming Works "Unpublished"**

*Urban Textile v. Rue 21 Inc.*, 74 Fed.Appx. 603 (2019). Summary judgment granted in favor of defendants based on discovery sanction concluding that placing fabric designs in "Look Book" distributed to clients to solicit purchases of fabric constituted "publication" under 17 U.S.C. §101.

*Gold Value International Textile, Inc. v. Sanctuary Clothing LLC*, 925 F.3d 1140 (9<sup>th</sup> Cir. 2019)

The Ninth Circuit held that knowingly providing inaccurate information to the Copyright Office that otherwise would have caused the Register to refuse registration invalidated the registration, even absent evidence of fraud. The Ninth Circuit applied the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (the "PRO IP Act") which amended the Copyright Act to include a new provision, 17 U.S.C. § 411(b) (2008). Section 411(b) provides that a "certificate of registration satisfies the [registration requirement of § 411(a)], regardless of whether the certificate contains any inaccurate information," unless (1) "the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate," and (2) "the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration." 17 U.S.C. § 411(b)(1). Prior to the PRO IP Act the Ninth Circuit had held that inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement.

The district court determined that because a design had been sold prior to it being registered as a unpublished work, it had been published and, therefore, the claimant's description of the design as unpublished in the copyright application was inaccurate. Because the claimant knew that the fabric had previously been sold, the court concluded, the claimant included inaccurate information in its copyright application with knowledge that it was inaccurate. The court then submitted an inquiry to the Copyright Office regarding whether the Register of Copyrights would have rejected the application if it had known of the inaccuracy, specifically:

*Would the Register of Copyrights have rejected Plaintiff's Registration No. VAu 1-151-509 for 2-dimensional artwork ("Grp. 029-Spring/Summer 2014," filed October 24, 2013) with respect to Design 1461? Thus, would it have done so if, at the time of the application, the Register of Copyrights had known that, although Plaintiff had characterized the work as an unpublished collection that included the 1461 Design, Plaintiff previously had published the 1461 Design when it sold to its customers fabric samples that used the 1461 Design, without limiting further distribution or sale by those customers?*

The Register of Copyrights responded that had the Copyright Office been aware that the 1461 Design had been previously published, the Copyright Office would have refused registration of that work using the unpublished collections option because the work was registered as unpublished when in fact it had been published. The Register noted that if it is made aware of an error at the time of application, the Copyright Office's general practice is to correspond with the applicant and give an opportunity to correct the error within forty-five days. The Register's response was "premised on the fact that the error identified in the Court's question was not timely corrected."

In light of the Register's response, the district court granted Defendants' motion for summary judgment, declaring the copyright registration to be invalid as to the design and dismissing Fiesta's claims with prejudice and awarded attorney's fees and costs in the amount of \$ 121,423.01. The Ninth Circuit affirmed.

## **2. Sanctions for fraud on the U.S.P.T.O.**

*Amusement Art LLC v. Life Is Beautiful, LLC.*, 768 Fed.Appx 683 (Ninth Cir. 2019)

The Ninth Circuit affirmed the district court's grant of summary judgment against an artist making copyright and trademark infringement claims where the artist committed fraud on the trademark office by submitting false affidavits and photographs purporting to show the trademark "life is beautiful" on a variety of commercial products together with a splashed-paint heart in which the artist claimed copyright.

## **3. Sanctions for concealing a settlement in a fee application under the Copyright Act**

*Bell v. Vacuforce, LLC*, 908 F.3d 1075 (7<sup>th</sup> Cir. 2018)

Copyright infringement defendant settled an action and obtained dismissal with prejudice. Defendant's attorney then applied for attorneys fees under §505 of the Copyright Act arguing that the dismissal "with prejudice" under the Copyright Act made the settling party a prevailing party under the Copyright Act. In moving for attorneys fees, Defendant concealed the existence of the settlement. Court imposed \$500 sanction on attorney for misleading application. Counsel's argument that an "omission" cannot give rises to sanctions under Rule 11 was rejected.

**4. Sanctions rejected for attorney affidavit not based on personal knowledge, exclusion appropriate remedy**

*Fameflynet, Inc. v. Jasmine Ents., Inc.*, 2018 WL 4590002 (N.D. Ill. 2018)

Where counsel's affidavit contained improper substantive testimony without record support and without showing a basis for personal knowledge, striking portions of counsel's affidavit appropriate remedy, not sanctions under Rule 11.

**7. Sua sponte Rule 11 sanctions by court based on finding of frivolous litigation**

*J. Walter Thompson Puerto Rico, Inc. v. Latin American Music Company, Inc.*, 308 F.Supp.3d 611 (D. Puerto Rico April 6, 2018)

Court determined lawsuit to be frivolous based on prior documentation and statements in prior judicial proceedings, ordered attorneys to show cause, under seal as to why sanctions should not be imposed.

**Excerpt below:**

The Court finds that this litigation is frivolous. A frivolous lawsuit may result in sanctions, such as an award of attorney's fees. Fed. R. Civ. P. 11(c). Federal Rule of Civil Procedure 11 ("Rule 11") provides that:

By presenting to the court a pleading, written motion, or other paper [...] an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [...] the claims, defenses, and other legal contentions are warranted by existing law or for establishing new law.

Fed. R. Civ. P. 11(b)(2). Courts employ an objective standard in determining whether a litigant and his or her attorney reasonably commenced and litigated a cause of action. See Cruz v. Savage, 896 F.2d 626, 630 (1st Cir. 1990) (affirming imposition of sanctions pursuant to Rule 11 because "plaintiffs' attorney's litigation of this claim was 'a vexatious time consuming exercise \*619 which bore no fruit.' "). While the imposition of Rule 11 sanctions does not require a finding of bad faith, a showing of at least culpable carelessness is required. Citibank Global Mkts., Inc. v. Santana, 573 F.3d 17, 32 (1st Cir.

2009). The following two circumstances persuade the Court that this litigation is unfounded: (1) the 1995 agreement between LAMCO, ACEMLA and Balseiro and (2) representations made by LAMCO and ACEMLA in bankruptcy proceedings.

\*\*\*

This Court **ORDERS** Jelka L. Duchesne, Ibrahim Latiff–Carrasquillo, Robert Penchina, and Kelly D. Talcott, as counsel for LAMCO and ACEMLA, to submit individual filings addressing (1) whether LAMCO and ACEMLA claimed to own “Llegó la Navidad,” (2) on what basis counsel filed documents to the Court representing that LAMCO and ACEMLA own “Llegó la Navidad,” and (3) why the Court should not impose sanctions pursuant to Rule 11. To the extent that the information requested in this Order to Show Cause implicates the attorney-client privilege, the filings may be submitted under seal and accompanied by an explanation as to why the attorney-client privileged is implicated.

#### **8. Warning but no sanctions on copyright troll re-filing case in foreign jurisdiction**

*Pereira v 3072541 Can. Inc.*, 17-CV-6945 (RA), 2018 WL 5999636 (SDNY)(Nov. 15, 2018)

Copyright troll delayed SDNY case, dismissed without prejudice, and re-filed in California. Sanctions denied for lack of authority to sanction conduct before other courts.

Excerpt:

The Court is troubled by Mr. Liebowitz’s conduct in this case, as in many of his law firm’s hundreds of other copyright cases. See, e.g., *McDermott v. Monday Monday, LLC*, No. 17-CV-9230 (DLC), 2018 WL 1033240, at \*3 (S.D.N.Y. Feb. 22, 2018) (noting that “Plaintiff’s counsel, Richard Liebowitz, is a known copyright ‘troll,’ filing over 500 cases in this district alone in the past twenty-four months” and warning him that future frivolous arguments or filings in other cases may be sanctionable). The Court finds particularly concerning Mr. Liebowitz’s repeated failures to follow the orders and rules of this Court and others within the district, as well as his propensity to take unreasonable positions and to omit crucial facts—or even to make outright misrepresentations—in an apparent attempt to increase costs and to extort unwarranted settlements. See, e.g., *Reynolds v. Hearst Commc'ns, Inc.*, No. 17-CV-6720 (DLC), 2018 WL 1229840, at \*4 (S.D.N.Y. Mar. 5, 2018) (finding that Mr. Liebowitz had “failed to comply with orders in this litigation, as he has in other lawsuits” and that he had “inevitably increase[d] the cost of litigation” by failing to disclose certain facts), reconsideration denied, 2018 WL 1602867, at \*2 (S.D.N.Y. Mar. 29, 2018); *Rudkowski v. MIC Network, Inc.*, No. 17-CV-3647 (DAB), 2018 WL 1801307, at \*3 & n.3 (S.D.N.Y. Mar. 23, 2018) (“caution[ing]” Mr. Liebowitz for making misrepresentations to the court); *Steegeer v. JMS Cleaning Servs., LLC*, No. 17-CV-8013 (DLC), 2018 WL 1363497, at \*3 (S.D.N.Y. Mar. 15, 2018) (imposing educational and financial sanctions on Mr. Liebowitz for failing to

comply with court orders and noting that Mr. Liebowitz's submissions to the court evinced a "pattern of omissions and misrepresentations").

Here, Mr. Liebowitz failed to follow this Court's orders and rules in at least three ways: (1) by failing to serve the order of initial conference on Defendant; (2) by failing to submit his response to the Court's order to show cause in a timely manner; and (3) by failing to comply with the Court's Individual Rule 1(D) when requesting extensions of time. His other actions throughout even the short time span of this case—including but not limited to his delay in amending the complaint to sue the correct corporate defendant, his multiple requests for extensions of time, and his unreasonable settlement demands—are also troubling, especially given Plaintiff's ultimate decision to dismiss the case voluntarily.

Despite these concerns, the Court is not persuaded that sanctions are justified in this particular case. Although the potential damages award in this case may well have been modest if not negligible, Mr. Liebowitz rightly notes in his opposition papers that there is no minimum amount of damages necessary to succeed in a copyright-infringement action under federal law and that, even where no damages can be proven, a copyright owner may be entitled to a declaratory judgment of infringement. See *On Davis v. The Gap, Inc.*, 246 F.3d 152, 159 (2d Cir. 2001), as amended (May 15, 2001) ("The existence of damages suffered is not an essential element of a claim for copyright infringement."). That legal conclusion of course does not give Mr. Liebowitz or his law firm the right to vexatiously prolong litigation and thereby force his opposing counsel to incur needless expenses, particularly where damages awards are likely to pale in comparison to those costs and fees. Here, however, Plaintiff's claims are at least colorable, and he dismissed the lawsuit voluntarily at an early stage in the litigation, before Defendant filed its response to the Amended Complaint.

Although a close question, under these circumstances, the Court exercises its discretion to deny Defendant's request for sanctions under Rule 11, 28 U.S.C. § 1927, and 17 U.S.C. § 505. The Court thus need not address Plaintiff's various legal arguments regarding the threshold applicability of those authorities to the circumstances here. Plaintiff's cross-request for fees for responding to Defendant's motion, meanwhile, is denied as meritless. The Court expresses no view as to whether Mr. Liebowitz's decision to re-file the case in California is sanctionable, as it lacks the authority to sanction attorneys "for conduct that occurred in other courts." See *Galonsky v. Williams*, No. 96-CV-6207 (JSM), 1997 WL 759445, at \*7 (S.D.N.Y. Dec. 10, 1997). To the extent that Mr. Liebowitz and/or his law firm engage in misconduct in the future, however, the Court will not hesitate to impose sanctions.

**9. Award of attorneys fees under Copyright Act §505 not same standard as Rule 11 sanctions**

**Sid Bernstein Presents, LLC v Apple Corps Ltd.**, 16CIV7084GBDKNF, 2018 WL 1587125, at \*3 [SDNY Mar. 29, 2018], appeal withdrawn, 18-1310, 2018 WL 5733511 [2d Cir Aug. 29, 2018]

Copyright infringement action: Rule 11 sanctions were rejected, but applying factors under Section 505 of the Copyright Act, an award of reasonable attorneys fees was warranted.

Plaintiff has failed to cite *any* authority for the proposition that just because a claim is not frivolous for purposes of Rule 11, attorneys' fees may not be awarded under § 505. (*See* Report at 11.)

### **10. Rule 16 sanctions for failing to obey a scheduling order**

*Stampin' Up!, Inc. v Hurst*, 2:16-CV-00886, 2018 WL 2018066, at \*2 [D Utah May 1, 2018]

Rule 16 of the Federal Rules of Civil procedure provides that a court “may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party ... fails to obey a scheduling or other pretrial order.” Fed.R.Civ.P. 16(f)(1)(c). Rule 37 provides for certain sanctions when a party does not obey a discovery order, including “rendering a default judgment against the disobedient party.” Fed. R. Civ. P. 37(b)(2)(A)(vi).

“Default judgment” is a “harsh sanction that should be used only when a party’s noncompliance is due to ‘willfulness, bad faith, or any fault of the disobedient party and not when a party is unable to comply with a [pretrial] order.’” *See Klein–Becker USA, LLC v. Englert*, 711 F.3d 1153, 1159 (10th Cir. 2013) (alteration in original) (citation omitted). Courts should consider whether a sanction less than default judgment may be appropriate—“[p]articularly in cases in which a party appears pro se ....” *See Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 n.3 (10th Cir. 1992). But courts should also be mindful that “a workable system of justice requires that litigants not be free to appear at their pleasure.” *Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983). Courts “therefore must hold parties ... to a reasonably high standard of diligence in observing the courts’ rules of procedure.” *Id.*

Before entering default judgment, a court should consider factors set forth in *Ehrenhaus. Klein–Becker* 711 F.3d at 1159 (“To determine if a sanction such as ... default judgment is appropriate, courts should consider [the *Ehrenhaus* factors.]”). The factors are:

(1) the degree of actual prejudice to the [opposing party]; (2) the amount of interference with the judicial process; (3) the culpability of the litigant, (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

*Ehrenhaus*, 965 at 921. (citations omitted) (internal quotation marks omitted). The court is mindful that “[i]n *Ehrenhaus*, [the Tenth Circuit] expressly stated the factors ‘do not represent a rigid test’...” *Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1323 (10th Cir. 2011) (citation omitted). Instead, the factors “are simply a non-exclusive list of sometimes-helpful ‘criteria’ or guide posts the district court may wish to ‘consider’ in the exercise of what must always remain a discretionary function.” *Id.*

### **13. Statutory damages under Sections 505 and 1203 of the Copyright Act for default**

Court imposed maximum statutory damages of \$150,000 plus attorneys fees for defendants' failure to participate in action.

*Wilson v Natl. Bikers Roundup Inc.*, CV 3:15-4862-MGL-SVH, 2018 WL 3120668, at \*5 [DSC Feb. 26, 2018]

*Sony/ATV Music Publ. LLC v 1729172 Ontario, Inc.*, 3:14-CV-1929, 2018 WL 4007537, [MD Tenn Aug. 20, 2018](awarding hundreds of millions in statutory damages against willful infringement by karaoke disk producer)

### **14. Sanctions for installing and using anti-forensic software following litigation hold to destroy documents**

*Experience Hendrix, L.L.C. v Pitsicalis*, 17 CIV. 1927 (PAE), 2018 WL 6191039, at \*10 [SDNY Nov. 28, 2018]

Copyright infringement defendants concealed and hid a computer, then installed anti-forensic software on cell phones and other devices, such as Advanced Mac Cleaner and CleanMyMac to shred documents so that the documents could not be found by a forensic search.

The trial judge must determine the appropriate sanction for spoliation of evidence on a case-by-case basis. *Fujitsu*, 247 F.3d at 436. Such sanctions should be designed to:

(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position [they] would have been in absent the wrongful destruction of evidence by the opposing party.

*West*, 167 F.3d at 779. Case-dispositive sanctions, however, “should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions.” *Id.*

Considering these objectives, the Court imposes the following two sanctions, regarding (1) Andrew Pitsicalis' computer, iPhone, and desktop computer; and (2) Schmitt's computer, as to each of which the Court has found intentional spoliation. First, the Court will instruct the finder of fact that it may draw an adverse inference from the PHP parties' failure adequately to preserve and produce these materials, to wit, that the devices in question contained evidence of conduct by the PHP defendants in breach of their legal duties to plaintiffs in connection with the sale and marketing of Jimi Hendrix-related materials.<sup>8</sup>

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<https://store.legal.thomsonreuters.com/law-products/Practice-Materials/Copyright-Litigation-Handbook-2018-2019-ed/p/106153779>



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