

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 16-4781-SVW-FFM

Date December 22, 2016

Title *Tresona Multimedia, LLC v. Burbank High School Vocal Music Association, et al.*

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

**Proceedings:** IN CHAMBERS ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT BRETT CARROLL’S MOTION FOR SUMMARY JUDGMENT [73]

**I. INTRODUCTION**

Plaintiff Tresona Multimedia, LLC (“Tresona” or “Plaintiff”) brought this suit for copyright infringement against Brett Carroll (“Carroll”), who is a music director at Burbank High School, Burbank High School Vocal Music Association (“the Association”), and numerous members of the Association (collectively “Defendants”) on June 29, 2016. Dkt. 1. The allegations are based around four songs, two of which (“Magic” and “(I’ve Had) the Time of My Life”) the Burbank Show Choir “In Sync” performed themselves and thus allegedly Defendants infringed on Plaintiff’s copyrights by not acquiring a custom arrangement license, synchronization license, and grand right license. *See id.* Two other songs (“Don’t Phunk with My Heart” and “Hotel California”) were performed by a third-party Jon Burroughs High School Show Choir at a Burbank High School event called Burbank Blast, and thus allegedly Defendants infringed on Plaintiff’s copyright by not acquiring a grand right license. *See id.*

Carroll brought the instant motion for summary judgment on November 21, 2016. Dkt. 73. Carroll alleges that Plaintiff lacks standing to sue due to its failure to provide a chain-of title, that Plaintiff lacks standing to sue with regards to “(I’ve Had) the Time of My Life”, “Don’t Phunk with My Heart”, and “Hotel California” because they do not have exclusive licensee rights to 100% of the copyrighted work, that the copyright three-year statute of limitations bars Plaintiff’s claims regarding “Magic”, and that Carroll has qualified immunity from the suit.

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For the following reasons, the Court finds that Carroll has qualified immunity and thus the Court GRANTS in part Carroll’s motion for summary judgment and dismisses him from the case. The Court also finds that Tresona lacks standing to sue for copyright infringement with regards to “(I’ve Had) the Time of My Life”, “Don’t Phunk with My Heart”, and “Hotel California” and thus GRANTS summary judgment against those claims. The Court finds that there is a triable issue of fact as to whether Tresona should have known about Defendants’ performances of “Magic” and thus DENIES summary judgment as to the statute of limitations defense.

**A. Performances of the Copyrighted Material**

The underlying facts are largely undisputed. Between 2010-2011 the Burbank show choir “In Sync” performed “Magic” on at least seven occasions without obtaining copyright licenses. The Association sponsored these events. Between 2013-2014 “In Sync” performed “(I’ve Had) the Time of My Life” on at least six occasions without obtaining copyright licenses. The Association sponsored these events. The Association received revenue from these performances.

At the 2014-2015 Burbank Blast event, Jon Burroughs High School’s show choir performed “Don’t Phunk with My Heart.” Jon Burroughs High School obtained a custom arrangement license and synchronization license from Tresona. Neither Jon Burroughs High School nor Defendants had a grand right license for this performance. Similarly, at the 2015-2016 Burbank Blast event, Jon Burroughs High School’s show choir performed “Hotel California.” Jon Burroughs High School obtained a custom arrangement license and synchronization license from Tresona. Neither Jon Burroughs High School nor Defendants had a grand right license for this performance.

**B. Tresona’s Rights to the Copyrighted Material**

Though Carroll initially contested Tresona’s chain-of-title, Tresona has since provided documents establishing their chain-of-title for “Magic” and “(I’ve Had) the Time of My Life”. See dkt. 103.<sup>1</sup> The parties do not dispute that Tresona received its rights under each copyright from either PEN

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<sup>1</sup> The Court recognizes these documents were provided after briefing for this motion was complete, but nonetheless accepts the evidence currently in the record. The Court also recognizes Tresona has not filed documents establishing chain-of-title for “Don’t Phunk with my Heart” and “Hotel California”, but since the Court disposes of these claims on other grounds it has no reason to require such documents from Tresona.

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Music Group (“PEN”), which has rights to “(I’ve Had) the Time of My Life”, “Hotel California”, and “Magic”, or from The Royalty Network, which has rights to “Don’t Phunk with my Heart”. It is also not disputed that any entity can only license or assign the rights that it controls. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1146 (9<sup>th</sup> Cir. 2008). Thus, Carroll makes the following allegations which Tresona does not dispute: (1) PEN controls only 25% of “(I’ve Had) the Time of My Life”, *see* Carroll Decl., Exh. 18, and thus Tresona’s rights derive from fewer than 100% of the copyright owners, dkt. 73 at 3-4, (2) PEN controls only Don Felder’s interest in “Hotel California”, Danforth Decl., exh. 14, which is a joint work, Craig Decl., exh. 4, and thus Tresona’s rights derive from fewer than 100% of the copyright owners, dkt. 73 at 4, and (3) The Royalty Network controls only Kalyanji’s and Indivar Anandji’s interest in “Don’t Phunk with My Heart”, Craig Decl., ¶ 10<sup>2</sup>, which is jointly owned with six other entities, Craig Decl., exh. 5, and thus Tresona’s rights derive from fewer than 100% of the copyright owners, dkt. 73 at 4.<sup>3</sup>

**C. Facts Relating to Qualified Immunity**

The parties seem to dispute whether the “Burbank High School Vocal Music Association” (“VMA”), of which Carroll is indisputably the director, is a part of Burbank High School or rather is a separate 501(c)(3) non-profit. Carroll puts forth evidence that the VMA “has no independent legal existence separate and apart from Burbank High School,” and that the “Burbank High School Vocal Music Association Boosters Club” (“Boosters Club”) is a separate legal entity that Carroll “has no role in”. Dkt. 73 at 8. Carroll provides the Boosters Club’s IRS Form 990 which shows that “Burbank High School Vocal Music Assoc Boosters Club” is a 501(c)(3) entity. *See* dkt. 73-3, exh. B-12. Tresona provides a scanned page from an unknown source which says that the Burbank High School VMA is a 501(c)(3) non-profit. *See* dkt. 89-1, exh. 12. It also says the VMA is a parent volunteer organization. *Id.*

**II. LEGAL STANDARD**

Summary judgment is appropriate if there is no genuine issue of material fact and the moving

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<sup>2</sup> Though normally a statement in a declaration is not taken as true for purposes of summary judgment, Tresona does not dispute this fact and itself relies solely on a declaration to establish its rights under the song. *See* dkt. 89 at 2 (stating in their opposition brief that “[t]he works covered by the Royalty Network licensing agreement include Don’t Phunk With My Heart” and citing Greenburg’s declaration at ¶ 7. Greenburg’s declaration itself merely states “[t]he work [sic] covered by the Royalty Network licensing agreement include Don’t Phunk With My Heart” without citing an exhibit or other evidence, *see* dkt. 89-4 ¶ 7).

<sup>3</sup> Carroll does not argue that Tresona’s right to “Magic” derive from less than 100% of the copyright owners.

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party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” and material facts are those “that might affect the outcome of the suit under the governing law.” *Id.* at 248. However, no genuine issue of fact exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

**III. ANALYSIS**

**A. Standing**

The Ninth Circuit conclusively held in *Sybersound Records, Inc.*, that “a co-owner of the copyright[] could grant only a nonexclusive license . . . because [a co-owner] may not limit the other co-owners’ independent rights to exploit the copyright.” 517 F.3d at 1146. Thus, a potential plaintiff would need all co-owners in a copyright to join in granting an exclusive license to that plaintiff in order to confer standing to bring copyright infringement claims. *See id.* In *Sybersound*, the Court confronted a situation almost identical to this case. *Sybersound* was an assignee of TVT Music Publishing’s “copyrighted interests for purposes of karaoke use, and also the exclusive assignee of the right to sue to enforce the assigned copyright interest.” *Id.* at 1142. TVT itself was a co-owner of the nine songs at issue in the case. *Id.* at 1945. Thus, the Ninth Circuit held that “as a co-owner of the copyright, TVT could not grant an exclusive right in the karaoke-use interest of the nine reference copyrights.” *Id.*

In this case, Tresona received its rights from PEN and The Royalty Network. These entities, themselves not co-owners of any of the copyrights at issue, received their rights from less than 100% of copyright owners for the songs “(I’ve Had) the Time of My Life”, “Hotel California”, and “Don’t Phunk with My Heart”. Thus, the co-owners could not have granted PEN or The Royalty Network an “exclusive right” to license these songs without approval from all other co-owners. There is no evidence that PEN or The Royalty Network received such approval. Accordingly, they likewise granted to Tresona a licensing right derived from less than 100% of copyright owners for these three songs and thus Tresona also does not have an “exclusive right.” Under binding Ninth Circuit precedent, Tresona

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lacks standing to sue for infringement of these works.

Tresona argues that *Sybersound* was abrogated *sub silencio* by the more recent Ninth Circuit case *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1003 (9th Cir. 2015). In this case, Minden was a stock photography company that served as the exclusive licensing agent for individual photographers. *Id.* at 999. The agreements with each photographer appointed Minden the “sole and exclusive agent and representative with respect to the Licensing of any and all uses of Images.” *Id.* at 1000. The photographers reserved some rights to personal promotion and granting commercial licenses themselves. *Id.* In all agreements the photographer was prohibited from hiring a licensing agent other than Minden. *Id.* The Ninth Circuit found that these agency agreements “conveyed a sufficient property interest in the photographs to permit [Plaintiff] to bring an infringement suit.” *Id.* at 1002. The Court based its reasoning on foundational copyright law, stating that “any party to whom [an exclusive right] has been transferred — whether via an assignment or an exclusive license — has standing to bring an infringement action based on that right.” *Id.* at 1003 (citing *Sybersound*, 517 F.3d at 1146). Conversely, *Minden* confirmed that a party granted a nonexclusive license cannot bring an infringement suit. *See Minden*, 795 F.3d at 1003. The *Minden* Court found that the authors’ retention of some rights did not defeat the exclusivity of the license those authors granted to Minden. *Id.* at 1005-06. The Court reasoned that to hold otherwise would defeat the divisibility principle (i.e. the idea that rights under a copyright can be divided, such that “an author of a novel might convey the right to publish a hardcover edition of the novel to one person and the right to create a movie based upon the novel to another”). *Id.* at 1002, 1004.

In *Minden*, the Court considered a situation where sole owners to a copyright granted Minden some exclusive rights, and kept other rights for themselves. Such is not the situation presented here or the situation that the Ninth Circuit ruled on in *Sybersound*. The *Minded* Court cited approvingly to *Sybersound* for the fundamental notion in copyright law that a party with an exclusive right has standing to sue. *See id.* at 1003. If the Court then intended to gut *Sybersound*’s central holding it likely would have given some indication of this intent. Further, the Ninth Circuit expressly confirmed the *Sybersound* ruling mere months before *Minden* in February, 2015, in *Corbell v. DeVito*, 777 F. 3d 1058, 1065 (9th Cir. 2015) (reiterating that “when one co-owner independently attempts to grant an exclusive license of a particular copyright interest, that licensee . . . does not have standing to sue alleged third-party infringers.”)<sup>4</sup> Thus, “the *Minden Pictures* court neither expressly nor impliedly abrogated the holding in

<sup>4</sup> Later in that paragraph the Court states “a third-party assignee or licensee lacks standing to challenge the attempted assignments or licenses of other copyright owners.” *Corbell*, 777 F. 3d at 1065. This Court does not read that sentence to

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*Sybersound* that a transferee of a license conferred by one of many co-authors without the other authors' permission holds only a non-exclusive license in the transferred work. *Elohim EPF USA, Inc. v. Total Music Connection, Inc.*, 2015 WL 12655484, at \*7 (C.D. Cal. Nov. 19, 2015).

This Court GRANTS summary judgment against all of Tresona's infringement claims regarding "(I've Had) the Time of My Life", "Hotel California", and "Don't Phunk with My Heart."<sup>5</sup> The remainder of the order will analyze only the alleged infringement of "Magic".

**B. Statute of Limitations**

Actions for Copyright infringement must be commenced within three years after the claim accrues. 17 U.S.C. § 507(b). The Ninth Circuit employs a "discovery rule", in which the statute of limitations begins to run on the date that plaintiff knew, or should have known, that the infringement occurred. *See Polar Bear Productions, Inc. v. Timex Corp.*, 384 F. 3d 700, 705-06 (9th Cir. 2004). The parties do not dispute that In Sync performed "Magic" in 2011, more than three years before filing this case. The parties also do not dispute that Tresona first gained actual knowledge of this infringement in November of 2014, within three years of filing this case. Thus, the issue in dispute is whether Tresona *should have discovered* the infringing activity earlier—specifically, before June 29, 2013 (three years before the case was filed).

Carroll argues that Tresona should have discovered the infringing activity earlier for the following reasons: (1) the videos were posted to YouTube in 2011 and 2012 and included in the title "In Sync", (2) part of Tresona's business is to sell license to show choirs, and thus they would be incentivized to look for infringing activity, (3) Tresona knew that Burbank show choirs put videos on YouTube because Tresona sent Carroll an email in 2012 proposing that Tresona and the Burbank show choir team-up to monetize videos posted on YouTube, and (4) PEN's President stated in 2015 that he monitored YouTube for infringing performances by Burbank show choirs. *See* dkt. 73 at 16-18.

Tresona does not dispute these facts, but instead argues that they do not conclusively show that Tresona should have known of the infringing performances of "Magic" earlier than November of 2014.

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hold that *the only time* the *Sybersound* standing analysis is applicable is when a defendant received a license for the same copyrighted work from another source.

<sup>5</sup> The Court does not reach the merits of Carroll's argument that a retroactive licenses from a nonparty co-owner can defeat an accrued infringement claim.

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Specifically, Tresona disputes that it should have found the videos on YouTube through its own volition. *See* dkt. 8-9. Tresona states that searching YouTube for “Magic”, or even more targeted searches, reveal too many results to reasonably find infringing activity. *Id.* at 9. Tresona also alleges that the videos of In Sync performing “Magic” lack relevant metadata that would have made the videos easier to find. *Id.* at 9. Tresona further explains that the 2012 email about monetizing YouTube videos was a blanket advertisement sent to numerous clients on a mailing list, and is not evidence of specific knowledge related to Tresona’s YouTube activities. *Id.* at 10-11. Lastly, Tresona argues that any purported monitoring activity conducted by PEN’s president in 2015 is irrelevant to the inquiry of whether *Tresona* should have discovered these YouTube videos prior to June 29, 2013. *Id.* at 11.

The Court finds that the underlying facts do not conclusively determine whether Tresona should have known of the infringing activity before 2013. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. Here, it is a justifiable inference that Tresona should not have known of the infringing performances of “Magic” prior to November of 2014. Thus, this Court DENIES summary judgment on this issue.

**C. Qualified Immunity**

Before analyzing the elements of qualified immunity, the Court must first determine whether qualified immunity applies to copyright infringement cases. Then, the Court must analyze whether Carroll is protected by qualified immunity in this case.

1. Whether Qualified Immunity Applies to Copyright Infringement

There is no binding authority which applies the doctrine of qualified immunity to copyright law. Qualified immunity has been applied to copyright cases in this district, and in some federal district courts around the country. *See, e.g., Ass’n. for Info. Media & Equip. v. Regents of the University of California*, 2012 WL 7683452, at \*5 (C.D. Cal. 2012), *Issaenko v. University of Minnesota*, 57 F. Supp. 3d 985, 1013 (D. Minn. 2014), *Campinha–Bacote v. Bleidt*, 2011 WL 4625394, at \*3 (S.D. Tex. Oct. 3, 2011), *Lane v. First National Bank of Boston*, 687 F. Supp. 11 (D. Mass. 1988). However, none of these cases engage in actual analysis on whether qualified immunity *should* apply to copyright law, but instead simply note that other courts have done so.

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One circuit Court has also applied qualified immunity to copyright law. *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), *vacated sub nom. Univ. of Houston v. Chavez*, 517 U.S. 1184 (1996), *rev'd on remand*, 204 F.3d 601 (5th Cir. 2000). In this case, Plaintiff was a “nationally renowned playwright” who contracted with the University of Houston to publish her books. *Id.* at 540. The University printed more copies than Plaintiff allowed, and she sued under copyright law and the Lanham Act naming the University and an employee, Kanellos, as defendants. *Id.* at 541. The Court engaged in rather extensive analysis on whether Congress could abrogate state sovereign immunity for lawsuits of copyright infringement through its Article I powers. *See id.* at 541-47. The Court concluded that it could. *Id.* at 547. The Court then, without explanation, applied qualified immunity to Kanellos. *See id.* The Supreme Court granted certiorari and vacated the holding in light of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which severely limited Congress’ ability to abrogate sovereign immunity. Neither the Supreme Court, nor any subsequent decisions by the Fifth Circuit after remand, revisited or even mentioned the initial application of qualified immunity to protect Kanellos. Thus, it can be rightfully said that this case was reversed and remanded on other grounds and that its application of qualified immunity to copyright infringement remains undisturbed. Nonetheless, the lack of any analysis on whether qualified immunity *should* have applied to this context, coupled with the tortured appellate history of this case and that the Fifth Circuit is not binding authority, provides little guidance for this Court.

Though this Court has reservations about whether the policies underlying qualified immunity are applicable to copyright infringement, the Court concludes that it is bound to apply qualified immunity in light of the Supreme Court cases *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In *Harlow* the Court confronted the failure of qualified immunity to protect officials from standing trial due to the fact-intensive subjective intent inquiry. *See Harlow*, 457 U.S. at 816-17. The Court therefore decided that, to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment”, the Court would no longer scrutinize subjective intent of an official when applying qualified immunity. *See id.* at 818. Noteworthy for this case, the *Harlow* Court in no way limited its holding to particular officials—such as police officers—or to particular causes of actions—such as § 1983. Instead, the Court stated that qualified immunity applied “‘across the board,’ to all ‘government officials performing discretionary functions.’” *Id.* at 821 (Brennan, J., concurring) (this description was adopted by the majority opinion of *Anderson* in finding that “*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied ‘across the board.’” 483 U.S. at 645).

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The *Anderson* opinion is even more informative for this case. In *Anderson*, Respondent argued that “no immunity should be provided to police officers who conduct unlawful warrantless searches of innocent third parties’ homes in search of fugitives.” 483 U.S. at 644. The *Anderson* Court firmly rejected engaging in an activity-based analysis to determine whether qualified immunity should apply. *See id.* at 645-45. The Court found that,

[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.

*Id.* at 642. The Court concluded by saying that the purposes underling qualified immunity, namely “to provide government officials with the ability [to] reasonably [] anticipate when their conduct may give rise to liability for damages,” would be defeated if the Court began “carving exceptions.” *Id.* at 646.

This Court agrees that subjecting public officials to an extra layer of uncertainty—whether a federal court will find that their role in government or their governmental activities trigger the protections of qualified immunity in the first place—defeats the very policies that qualified immunity is intended to promote. Thus, this Court finds that qualified immunity applies to suits for copyright infringement.

2. Legal Standard

Qualified immunity is a question of law. *Nunez v. Davis*, 169 F. 3d 1222, 1229 (9th Cir. 2000). Public employees are protected by qualified immunity when “a particular area of copyright law was not clearly established.” *Ass’n. for Info. Media & Equip.*, 2012 WL 7683452 at \*5. Courts have also granted a public employee qualified immunity in the copyright context when their conduct was “objectively reasonable.” *See Campinha-Bacote*, 2011 WL 4625394 at \*3 (“Because it was objectively reasonable for Demps to believe that she would not be violating copyright law in administering the survey in 2007–09, she is entitled to summary judgment.”).

When determining whether a right is “clearly established,” the Court “must determine not

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whether copyright law is clearly established in a broad sense, but whether a specific right is clearly established under copyright law.” *Ass’n. for Info. Media & Equip.*, 2012 WL 7683452 at \*5. “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. at 639.

Tresona and Carroll dispute three factors related to qualified immunity: (1) whether Carroll acted in his capacity as a public official, (2) whether the rights Carroll allegedly violated were clearly established, and (3) whether Carroll’s action were objectively reasonable. If Carroll acted as a public official, he needs *either* (2) or (3) to have qualified immunity. Yet, for the sake of thoroughness, this Court will analyze all three elements.

3. Analysis

i. Whether Carroll Acted in his Capacity as a Public Official

Tresona argues that Carroll is not a public employee because he worked for the Boosters Club, a separate 501(c)(3) non-profit organization. Tresona puts forth two bases for this argument: (1) The Burbank High School Vocal Music Association, which Carroll is indisputably the director of, “is the booster club”, *see* dkt. 89 at 13 (emphasis in original), and (2) Carroll’s actions were beyond the scope of his employment with the school, and instead were taken on behalf of the Boosters Club.

As for the argument that the VMA and the Booster Club are one-in-the-same, Tresona premises this on a scanned booklet page from an unknown source. *See* dkt. 89-1, exh. 12. Tresona is correct that the booklet page, describing the activities of the Club, calls itself the “Burbank High School VMA” and omits the words “boosters club” from its name. *See id.* Nonetheless, this omission from an unknown author is not attributable to Carroll and in no way effects Carroll’s *actual* employment with Burbank High School. Further, Carroll submitted into evidence IRS Form 990 which shows that “Burbank High School Vocal Music Assoc *Boosters Club*” is the real 501(c)(3) entity. *See* dkt. 73-3, exh. B-12. Tresona itself provides evidence that “Burbank High School Vocal Music Association” is in fact a part of Burbank Unified School District, and not a separate entity. *See* dkt. 89-1, exh. C (an article printout *from* [www.burbankusd.org](http://www.burbankusd.org) in which Carroll is listed as director of the VMA). This Court finds that, despite an “imprecisely written document from an unknown author,” dkt. 102 at 15, the VMA is a part of Burbank Unified School District, that Carroll is the director of the VMA, and that the Boosters Club is a separate entity from the VMA and the school district. *See also* dkt. 89-1, exh. B-11 (the Boosters Club’s compliance paperwork listing Carroll as the “*teacher liaison*” (emphasis added)).

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Further, there is no evidence that Carroll acted beyond the scope of his duties as a teacher for Burbank High School. Tresona argues that:

Carroll is the person who decides and hires the choreographers, arrangers and accompanists who are paid by the booster club. He decides which competitions the choirs will attend and is involved in the related travel arrangements made by the booster club. Carroll directs contractors hired and paid by the booster club, such as choreographer Randy Sage. Carroll selects and requests the custom arrangements for the booster club to pay—in fact, he testified that he asked Josh Greene to create the musical set that included Magic, that Mr. Greene communicated directly with Carroll about it, that Greene submitted invoices to Carroll, and that Carroll would pass that invoice along to the booster club.

Dkt. 89 at 13 (citations omitted). There is no evidence that any of these activities are beyond the scope of Carroll’s employment with Burbank High School.<sup>6</sup> Carroll states that all his actions related to Tresona’s infringement claims were within the scope of his duties as a music teacher for Burbank High School and that he was paid by Burbank Unified School District. Carroll Decl. ¶¶ 9-10. There is no evidence to refute these claims. The fact that a public employee’s job duties may entail being a *liaison* for a separate 501(c)(3) non-profit does not strip that employee of their status as a public official.

ii. Whether Carroll Violated Clearly Established Rights

This Court finds that the copyright laws Carroll allegedly violated were not “clearly established” during the 2011 performances of “Magic.” This Court agrees with Tresona that copyright laws in general were firmly established in 2011, including the need for a license to create a derivative work, distribute audiovisual recordings of a copyrighted work, or perform a musical work in a dramatic fashion. *See* dkt. 89 at 15-22. However, the Court finds that “the contours” of these rights were not “sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right.” *See Anderson v. Creighton*, 483 U.S. at 639.

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<sup>6</sup> This relationship seems to be exactly what is expected between a teacher liaison and a Boosters Club, which is described as a “school-connected organization” and which is expressly given power to hold “fundraising activities directly related to an extracurricular/instructional program” and to expend those funds to boost that activity *See* dkt. 89-1, exh. B-11

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-4781-SVW-FFM	Date	December 22, 2016
Title	<i>Tresona Multimedia, LLC v. Burbank High School Vocal Music Association, et al.</i>		

Prior to 2011, there were two articles in the Choral Journal that discussed copyright law in relation to show choirs. *See* 89-2, exhs. K-L. Further, Tresona’s president Mark Greenburg declares that “Since 2010, more than 4,000 schools have requested custom choral arrangements of copyrighted music through Tresóna.” Dkt. 89-4, Greenburg Decl. ¶ 50.<sup>7</sup> This is the entirety of Tresona’s evidence that the law regarding show choirs needing to obtain licenses was “clearly established.” Plaintiff “bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct.” *Romero v. Kitsap County*, 931 F. 2d 624, 627 (9th Cir. 1991). Tresona fails to meet this burden. Not only are two magazine articles insufficient to show a “clearly established right,” each article actually recognizes that most choir directors do not, in fact, get copyright licenses for their work.<sup>8</sup> Tresona points to no legal authority, in the form of a court case, treatise, law review article, or otherwise, that suggests Carroll’s activities in 2011 clearly violated the law.

iii. Whether Carroll’s Actions Were Objectively Reasonable

Lastly, in this case, Carroll asserts the defense of fair use. The Court finds that “a reasonable person would not have known that the alleged conduct violated any clearly established rights pursuant to copyright law because it is ambiguous whether the use was fair use under copyright law.” *Ass’n. for Info. Media & Equip.*, 2012 WL 7683452 at \*6. Neither party cites to an analogous case in which a show choir’s fair use defense was litigated and found either successful or unsuccessful. The Court need not decisively answer this question, but will briefly discuss fair use in determining whether Carroll acted reasonably.

Use of a copyrighted work “is not an infringement of copyright” when used “for purposes such as . . . *teaching* (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C. § 107 (emphasis added). The law provides four factors to be balanced in determining whether a use constitutes fair use:

<sup>7</sup> Though, as Carroll points out, Greenburg also stated that at the beginning of 2015 *only 80* show choirs were “in the Tresona system.” Dkt. 102-2, exh. 23. Thus, the trend of requesting custom choral arrangements through Tresona is a very recent one indeed.

<sup>8</sup> Greenburg himself stated in January, 2016, that “[t]hrough education, and unfortunately, some very public litigation that came as a last resort, the word has spread and the [music] publishers now have about 1/3rd of the show choirs doing the right thing and recognizing the rights of the the [sic] songwriters, acknowledging that they must be paid for the wonderful music that is arranged and performed.” Dkt. 102-2, exh. 23. Thus, even in 2016, only about 1/3 of show choirs were “doing the right thing” even after “education” and “very public litigation” that spread the word. Tresona presents no evidence there was similar “education” and “very public litigation”, let alone that “the word ha[d] spread”, prior to 2011.

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- (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 copyright work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.* In this motion, the parties did not brief for the Court the issue of fair use, and thus the Court does not resolve whether fair use would be a successful defense on the merits. At this stage, the Court merely finds that since teaching is *explicitly* listed as fair use, a public school teacher acting in his teaching capacity would be reasonable in believing the fair use defense applies.

Thus, this Court finds that Carroll is protected by qualified immunity and GRANTS summary judgment in his favor on all counts.

**IV. CONCLUSION**

In finding that Tresona lacks standing to sue for infringement of the songs “(I’ve Had) the Time of My Life”, “Don’t Phunk with My Heart”, and “Hotel California”, this Court GRANTS summary judgment as to *all defendants* on those claims. As to Tresona’s remaining claim for infringement of “Magic”, the Court DENIES summary judgment on statute of limitations grounds. The Court finds Defendant Carroll is protected by qualified immunity and thus GRANTS summary judgment in his favor on all counts and dismisses him from the case.

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