

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **12-CV-01615 DMG (PJWx)** Date December 18, 2012

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Present: **DOLLY M. GEE, UNITED STATES DISTRICT JUDGE**

VALENCIA VALLERY

Deputy Clerk

NOT REPORTED

Court Reporter

Attorneys Present for Plaintiff(s)
None Present

Attorneys Present for Defendant(s)
None Present

Proceedings: IN CHAMBERS—ORDER GRANTING FOX DEFENDANTS, NETWORK DEFENDANTS, LIBERTY AND DIRECTV DEFENDANTS’ MOTION TO DISMISS [Doc. # 25] AND GRANTING DEFENDANT BIG TEN NETWORK’S MOTION TO PARTIALLY DISMISS AND SEVER [DOC. # 27]

I. PROCEDURAL HISTORY

On February 24, 2012, Plaintiffs Premier Tracks, LLC (“Premier Tracks”) and Graffiti Music, LLC (“Graffiti Music” together with Premier Tracks, “Plaintiffs”) initiated this copyright infringement and breach of contract action against Defendants Fox Broadcasting Co. and Fox Cable Networks, Inc. (together, the “Fox Defendants”), DirecTV Sports Net Rocky Mountain LLC, DirecTV Sports Net Pittsburgh, LLC, and DirecTV Sports Net Northwest, LLC (together, the “Network Defendants”), Liberty Media Corp. (“Liberty”), DirecTV Group, Inc. and DirecTV Sports Networks, LLC (together, the “DirecTV Defendants”), and Big Ten Network, LLC (“BTN”). [Doc. # 1.]

Plaintiffs filed their First Amended Complaint (“FAC”) on May 3, 2012. [Doc. # 21.] Plaintiffs alleged causes of action against: (1) the Network Defendants, the DirecTV Defendants, and BTN for direct copyright infringement; (2) the Fox Defendants and Liberty for secondary copyright infringement for “operating and marketing the directly infringing broadcasters and networks” and “storing infringing content on their servers and making reproductions of such works for faster distribution”; and (3) the Fox Defendants for breach of contract. (*Id.* ¶¶ 35-58.) Plaintiffs seek a permanent injunction of Defendants’ infringing uses, past and future damages (or alternatively, statutory damages), and attorney’s fees on the copyright infringement claims. (*Id.* ¶¶ 39, 40, 41, 52, 53, 54.)

On June 12, 2012, the Fox Defendants, the Network Defendants, Liberty, and the DirecTV Defendants (“Defendants”) filed a motion to dismiss all of Plaintiffs’ claims against them [Doc. # 25]. That same day, Defendant BTN filed a motion to dismiss Plaintiffs’ copyright

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infringement claims for all but two of the works and dismiss or, in the alternative, sever the remaining claims against them for misjoinder [Doc. # 27].

On July 2, 2012, Plaintiffs filed their opposition to both Motions [Doc. ## 31, 32]. Defendants filed their respective replies on July 13, 2012 [Doc. ## 37, 38]. The Court deemed both motions appropriate for decision without oral argument and took them under submission on July 25, 2012. Fed. R. Civ. P. 78(b); C.D. L.R. 7-15. [Doc. # 38.]

II. FACTUAL ALLEGATIONS

Plaintiff Premier Tracks is a music publishing and distribution company, which licenses music tracks and music libraries, including those controlled by Plaintiff Graffiti Music, for film, television, and non-broadcast use. (FAC ¶¶ 17, 19.) Graffiti Music is a music publishing and production company that produces and publishes musical compositions and sound recordings for use in all forms of broadcast, non-broadcast, and online media. (*Id.* ¶ 19.)

The License Agreements

On June 21, 2005, Plaintiff Premier Tracks and the Fox Defendants entered into a Music Library License Agreement (the “2005 License Agreement”) whereby Premier Tracks granted a three-year nonexclusive, world-wide irrevocable license to certain “Licensee Entities” to utilize tracks from 29 music libraries for television sports productions. (*Id.* ¶ 20, Ex. 1 ¶ 3.) The 2005 License Agreement expressly limited “Licensee Entities” to those identified in Exhibit B of the Agreement, which lists 18 cable networks and affiliated legal entities, including Fox Sports Net Pittsburgh, LLC, Fox Sports Net Rocky Mountain, LLC, and Fox Sports Net Northwest, LLC. (*Id.* ¶ 22, Ex. 1. Ex. B thereto.) These are the former names of the Network Defendants, which were changed following the Share Exchange Agreement, described below. (*Id.* ¶¶ 5-7.)

Paragraph 16 of the 2005 License Agreement prohibited the assignment or transfer of the Agreement without party consent.¹ (FAC ¶ 26, Ex. 1 ¶ 16.) The 2005 License Agreement also specified that it “shall be governed by and construed in accordance with the laws of the State of California.” (*Id.* Ex. 1 ¶ 13.)

On June 21, 2008, the day after the 2005 License Agreement expired, Premier Tracks and the Fox Defendants entered into a second, substantively identical three-year Music Library License Agreement (the “2008 License Agreement,” together with the 2005 License Agreement,

¹ Paragraph 16 of the 2005 License Agreement contains two exceptions, neither of which are applicable here. (FAC, Ex. 1 ¶ 16.)

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the “License Agreements”). (*Id.* ¶¶ 23-26, Ex. 2). Plaintiffs do not include the list of “Licensee Entities” for the 2008 License Agreement or allege that it differs substantially from the 2005 License Agreement.

The Share Exchange Agreement

On February 27, 2008, News Corporation, the parent company to the Network Defendants, entered into a Share Exchange Agreement with Defendant Liberty, whereby News Corporation agreed to transfer all of its shares in the Network Defendants and the DirecTV Defendants to Liberty. (*Id.* ¶ 27, Zavin Decl. Ex. A at 9-11, §§ 3.1, 3.2, 3.3, 3.7.) Plaintiffs allege that the change in ownership of the Network Defendants and the DirecTV Defendants following the Share Exchange Agreement constituted an unauthorized transfer or assignment of the 2005 and 2008 licenses in Plaintiffs’ works, thereby violating the License Agreements. (*Id.* ¶ 28.)

Allegations of Copyright Infringement

Plaintiffs allege that the Network Defendants’ and the DirecTV Defendants’ continuing use of Plaintiffs’ works constitute copyright infringement. Plaintiffs claim to have identified thousands of infringing uses through independent third party royalty statements. (*Id.* ¶¶ 29, 37.) Additionally, Plaintiffs allege that they have identified similar infringing uses by Defendant BTN, which was never a Fox “Licensee Entity” under the License Agreements. (*Id.* ¶ 30.)

Plaintiffs attach as Exhibit 23 a 116 page spread sheet identifying over 3000 of Defendants’ “exemplary, known incidents of unlicensed use of the Works.”² (*Id.* ¶ 33, Ex. 23) Plaintiffs define “Works” as “the applications reflected in Exhibits 3 through 20 and 22, along with other of Plaintiffs’ works and libraries infringed by Defendants that are yet to be identified.” (*Id.* ¶ 31.) Of the 18 copyright applications attached as Exhibits 3 through 20, only five were filed on behalf of Plaintiff Graffiti Music and none on behalf of Plaintiff Premier Tracks. The 13 remaining works were filed on behalf of third parties. (*Id.* Exs. 3-21). These applications indicate that they were all filed on February 23, 2012, the day before the original complaint was filed. (*Id.*) Exhibit 22 lists additional songs for which “Premier Tracks, the libraries administered by Premier Tracks and composers have applied for copyright registration” but does not identify the specific copyright claimants of each. (*Id.* ¶ 31, Ex. 22.) All applications in Exhibit 22 were filed on or after April 14, 2012. (*Id.* Ex. 22.)

² Exhibit 23 shows, *inter alia*, the Network Service and program that infringed, the title of the work copied, and the Library from which it was copied.

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Plaintiffs allege that “Premier Tracks has entered into written agreements with the music libraries it administers conferring to Premier Tracks exclusive copyright rights including exclusive rights to grant non-exclusive licenses to Library Works for the public performance of the Library Works worldwide . . . [and] the exclusive right to grant nonexclusive licenses as well as direct licenses for the synchronization, recording, mechanical reproduction and use of the Works” for various broadcasting, television, radio, advertising, and motion picture productions. (*Id.* ¶ 32.) Additionally, the music libraries granted Premier Tracks the “right to act on their behalf to enforce the copyrights through actions for infringement.” Graffiti Music has entered into similar agreements with authors. (*Id.*)

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citation and internal quotations omitted). Under Rule 12(b)(6), a defendant may seek dismissal of a complaint for failure to state a claim upon which relief can be granted. A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or to allege sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (“Rule 8 . . . does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”). In other words, the plaintiff must articulate “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully” or “facts that are ‘merely consistent with’ a defendant’s liability.” *Id.*

In conducting the above analysis, a court must accept all factual allegations as true even if doubtful in fact. *Twombly*, 550 U.S. at 555. Nonetheless, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.

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CIVIL MINUTES—GENERALCase No. **12-CV-01615 DMG (PJWx)** Date December 18, 2012Title ***Premier Tracks, LLC, et al. v. Fox Broadcasting Co., et al.*** Page 5 of 14**IV. DISCUSSION****A. The Fox Defendants, Network Defendants, Liberty, and DirecTV Defendants' Motion to Dismiss****1. Direct Copyright Infringement**

To state a claim for direct copyright infringement, a plaintiff must allege: “(1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner’s exclusive rights under the Copyright Act.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). “The existence of a license creates an affirmative defense to a claim of copyright infringement.” *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000).

i. The Network Defendants

Plaintiffs contend that the Share Exchange Agreement constituted an unapproved transfer or assignment of the Network Defendants’ licenses because the Network Defendants changed ownership and name. Defendants argue that a change of ownership by stock transfer is distinct from a transfer or assignment of assets and therefore the Network Defendants remain licensed to use Plaintiffs’ musical works.

Under California law, “the transfer of stock is not the same thing as a transfer of the assets of [a] corporation.” *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 935 (9th Cir. 2002) (citing *Richardson v. La Rancherita, Inc.*, 98 Cal. App. 3d 73, 79 (1979); *Ser-Bye Corp. v. C.P. & G. Markets*, 78 Cal. App. 2d 915, 918-21 (1947)). In *U.S. Cellular*, the owner of a limited partnership interest sued its partners for breach of contract when the parent company of another partner transferred all its stock in that partner to a third party successor. *Id.* at 932-33. The plaintiff contended that the other partner’s change of ownership from the stock transfer violated an anti-assignment provision in the partnership agreement. *Id.* at 932. Notwithstanding the plaintiff’s contention that the parties intended the anti-assignment provision to prevent “indirect” transfers of partnership interests, the Ninth Circuit held that the anti-assignment provision did not restrict the sale of the parent company’s stock in the partner. *Id.* at 935-36.

The Ninth Circuit explained that a party entering an agreement with a corporation “is presumed to do so with an understanding of the nature of the corporate form.” *U.S. Cellular Inv. Co.*, 281 F.3d at 935. Thus, “[h]ad the partners intended that the sale of stock of a corporate partner be restricted, such intent could easily have been stated” in the agreement. *Id.* at 936. But because “nothing in the partnership agreement restrict[ed] the sale of the corporate stock of the

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partners” and “the clear California law distinguishing a transfer of assets from a sale of stock,” the court held that no assignment or transfer of the partner’s interest had occurred when its ownership changed via stock sale. *Id.* 936. The court noted in dicta, “[h]ad the stock sale in this case been a sale to or by a shell entity, we would have a very different case.” *Id.* at 937.

As in *U.S. Cellular*, nothing in Fox’s License Agreements prohibited the sale of stock in the Network Defendants. (See FAC Ex. 1, 2.) Nor are the Ninth Circuit’s concerns regarding a sale to or by a shell entity present here. Therefore, because California law applies to these agreements,³ the Network Defendants retained their licenses in the Works after News Corporation sold its stock in the Network Defendants to Liberty.

Plaintiffs rely on a Sixth Circuit decision, *Cincom Sys., Inc. v. Novelis Corp.*, 581 F.3d 431 (6th Cir. 2009), to support their contention that the Network Defendants’ licenses were transferred as a result of the Share Exchange Agreement. In *Novelis*, the owner of copyrighted software brought an infringement claim after the parent of a licensee entity initiated a corporate reorganization and merged the licensee entity with another subsidiary. *Id.* at 433-34. The Sixth Circuit affirmed the district court’s holding that the merger constituted an unauthorized transfer of the license agreement notwithstanding the defendant’s contention that under state law the transfer was permissible. *Id.* at 438, 440. The court explained, “where state law would allow for the transfer of a license absent express authorization, state law must yield to the federal common law rule prohibiting such unauthorized transfers” of copyright licenses. *Id.* at 437.

Novelis is distinguishable from the present case because it concerned a corporate merger rather than a sale of stock. The court in *Novelis* found that because the licensee entity ceased to exist when it merged with the subsidiary, “[t]he vesting of the license in the surviving entity could not occur without being transferred by the old entity.” *Id.* at 438. By contrast, a sale of stock does not cause the entity sold to cease to exist and therefore does not result in the transfer of assets, such as a license agreement. See *U.S. Cellular*, 281 F.3d at 936. As to this point, the First Circuit has explained:

Stock sales are not mergers whereby outright title and ownership of the licensee-corporation’s assets (including its patent licenses) pass to the acquiring corporation. Rather, as a corporation, [appellee] ‘is a legal entity distinct from its shareholders.’ Absent compelling grounds for disregarding its corporate form,

³ Courts apply the general principles of contract interpretation when interpreting the scope and terms of a copyright license agreement. See *Mendler v. Winterland Production, Ltd.*, 207 F.3d 1119, 1121 (9th Cir. 2000). The License Agreements explicitly provide that they are to be construed in accordance with California law. (FAC Ex. 1 ¶ 13.)

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therefore, [appellee's] separate legal identity, and its ownership of the patent cross-licenses, survive without interruption notwithstanding repeated and even drastic changes in its ownership.

Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 494 (1st Cir. 1997). Thus, because the Network Defendants' legal identities remained intact during the sale of their stock, they retained their licenses to use Plaintiffs' Works. Likewise, the Network Defendants' name changes did not terminate their licenses, as limited liability companies may amend their names without altering their legal status. *See* Cal. Corp. Code § 17054(c) (permitting an LLC to amend its name at any time). Plaintiffs therefore have failed to state a claim for copyright infringement.

Accordingly, the Court GRANTS the Network Defendants' Motion to Dismiss Plaintiffs' claims for direct copyright infringement.

ii. The DirecTV Defendants

The DirecTV Defendants argue first that Plaintiffs' cause of action for direct copyright infringement fails because it is aimed against "DIRECTV" without specifying whether DirecTV Group, DirecTV Sports, or both are the intended defendants. Second, the DirecTV Defendants argue that the FAC is entirely devoid of any substantive factual allegations against either.

Although Plaintiffs' allegations against the DirecTV Defendants are scarce, the Court may also consider exhibits attached to the complaint when determining whether dismissal is proper. *See Parks School of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Plaintiffs attach to the FAC, as Exhibit 23, a list that identifies "exemplary, known incidents of unlicensed use of the Works." (FAC ¶ 33.) Therein, Plaintiffs identify 19 works allegedly infringed by DirecTV Sports: "Bring It On"; "Hole In One"; "Long Shore"; "Lost"; "Man Of Steel"; "Maximus"; "Mister Olympia"; "Pride"; "Switch Back Kid"; "Upstart"; "Driving On The Edge"; "Fighter Pilot"; "Peelin Out"; "Rock Suit"; "Sonic Soul"; "The Airplanes"; "The Chase"; and "To The Extreme." (*Id.* Ex. 23.) Exhibit 23 does not list any Works allegedly infringed by DirecTV Group. The Court, therefore, infers that DirecTV Sports is the proper defendant.

Plaintiffs fail, however, to adequately plead ownership in these works. "[O]nly the owner of an exclusive right under the copyright is entitled to sue for infringement." *Silvers v. Sony Pictures Entm't Inc.*, 402 F.3d 881, 889 (9th Cir. 2005) (*en banc*). *See also* 17 U.S.C. § 501(b) ("The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right while he or she is the owner of it."). A legal owner can be the copyright claimant or an assignee or exclusive licensee of a particular

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exclusive right. *See Id.* at 888. While section 201(d) allows exclusive rights in a copyright to be transferred and owned separately, “[section] 201(d) creates no exclusive rights other than those listed in [section] 106, nor does it create an exception to [section] 501(b).”⁴ *Id.* at 885.

Plaintiffs allege generally that they “own, control or administer the copyrights and/or have exclusive distribution rights, including but not limited to the Works.” (FAC ¶ 36; emphasis added.) Plaintiffs do not specify whether they actually own or merely control/administer the copyrights of works allegedly infringed by DirecTV Sports. Only one of the relevant copyright registration applications is attached to the FAC (“Driving on the Edge”) and it lists Messy Music, Inc. as the claimant, not Plaintiffs. (*Id.* Ex. 16.) None of the other annexed copyright registration applications concern tracks allegedly infringed by DirecTV Sports. Exhibit 22 indicates that applications for the other copyrights allegedly infringed by DirecTV Sports have been filed but does not indicate who the claimants are. Exhibit 23 indicates only that all works used by DirecTV Sports came from Auracle and Messy Music Libraries. Therefore, the Court cannot plausibly infer from the facts alleged that Plaintiffs own any copyrights relevant to claims against DirecTV Sports. *See Twombly*, 550 U.S. at 555 (stating a complaint must contain “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action”).

Nor can the Court infer that Plaintiffs own, through assignment or exclusive license, a specific section 106 exclusive right in any of the Works allegedly infringed by DirecTV Sports. Plaintiffs appear only to allege that Premier Tracks is a licensing agent for certain section 106 rights. *See* FAC ¶ 32 (“Premier Tracks has entered into written agreements with the music libraries it administers conferring to Premier Tracks exclusive copyright rights including exclusive rights to grant non-exclusive licenses to Library Works for the public performance of the Library Works worldwide . . . [and] the exclusive right to grant nonexclusive licenses as well as direct licenses for the synchronization, recording, mechanical reproduction and use of the Works . . .”). The exclusive right to grant licenses for others to publicly perform or reproduce a work is separate and distinct from the exclusive right to publicly perform or reproduce a work itself. *See Bourne Co. v. Hunter Country Club, Inc.*, 990 F.2d 934, 937 (7th Cir. 1993) (“A licensing agent is neither the legal nor the beneficial owner of the copyright and has no interest

⁴ Section 106 of the 1976 Copyright Act defines “exclusive rights” to include *only* the rights: “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106.

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in the copyright.”). Therefore, licensing agents are not legal owners of section 106 exclusive rights and do not have standing to sue for copyright infringement.

Nor does it appear that Plaintiffs are beneficial owners of any section 106 exclusive right. The Copyright Act does not define a “beneficial owner” but the Ninth Circuit has held that a beneficial owner can only be a former legal owner that assigned his exclusive rights to another in return for royalties. In *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1444 (9th Cir. 2003) (quoting H.R. Rep. No. 1476 at 159), the court explained that “[a] ‘beneficial owner’ . . . would include, for example, an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.” *Id.* at 1444. The court held that because the copyright in a work-made-for-hire vests initially in the employer *without assignment* by the creator, “a grant of royalties to a creator of a work for hire, absent an express contractual provision to the contrary, does not create a beneficial ownership interest in that creator.” *Id.* at 1145. Likewise, Plaintiffs do not allege that they ever owned or received an assignment of any of the exclusive rights in the Works allegedly infringed by DirecTV Sports. Therefore, as in *Warren*, Plaintiffs are not beneficial owners, notwithstanding any grant of royalties.

Plaintiffs also argue that they have standing to sue because the music libraries they administer granted Plaintiffs the right to bring copyright infringement acts on their behalf. (FAC ¶ 32.) This is incorrect as a matter of law. The Ninth Circuit has held “[t]he bare assignment of an accrued cause of action is impermissible under 17 U.S.C. § 501(b)” of the Copyright Act because “[t]he right to sue for an accrued claim for infringement is not an exclusive right under § 106.” *Silvers*, 402 F.3d at 884, 890.

Plaintiffs are also off the mark in their contention that the FAC is *de facto* sufficiently pled because it complies with Form 19—Complaint for Copyright Infringement and Unfair Competition (“Form 19”).⁵ Form 19 requires an allegation that “plaintiff applied to the copyright office and received a certificate of registration” for the copyrights at issue. Fed. R. Civ. P. Appx. Form 19 ¶ 4. Here, Plaintiffs state only that “Plaintiffs and the music libraries they administer have applied for federal registration” (FAC ¶ 30) (emphasis added). Thus, it is unclear whether Plaintiffs themselves or third parties complied with this requirement. Form 19 also requires that a plaintiff state that it “has remained the sole owner of the copyright.” Fed. R.

⁵ Form 19 is included in the Federal Rules of Civil Procedure Appendix of Forms. “[F]orms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and [] the practitioner using them may rely on them to that extent.” Fed. R. Civ. P. 84, Advisory Committee Notes – 1946 Amendment.

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Civ. P. Appx. Form 19 ¶ 5. The FAC does not adequately allege Plaintiffs' ownership in the copyrights they seek to enforce.

The Court GRANTS the DirecTV Defendants' Motion to Dismiss Plaintiffs' claims for direct copyright infringement.

2. Secondary Copyright Infringement against the Fox Defendants and Liberty

Defendants move to dismiss Plaintiffs' claims for secondary copyright infringement against the Fox Defendants and Liberty because these are dependent on Plaintiffs' claims for direct infringement against the Network Defendants. "It is well-established that '[s]econdary liability for copyright infringement does not exist in the absence of direct infringement . . .'" *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1045 (9th Cir. 2011) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001)) (brackets in original).

The Court GRANTS the Fox Defendants' and Liberty's Motion to Dismiss Plaintiffs' claims for secondary copyright infringement.

3. Breach of Contract against the Fox Defendants

Plaintiffs also allege that the Fox Defendants breached the License Agreements by "assigning or purporting to assign its [sic] rights and obligations under those Agreements" to Liberty and/or by "synchronizing the Works into production made by Fox for third parties." (1st A. Compl. ¶ 57). As discussed *supra*, the Share Exchange Agreement did not result in the assignment of the License Agreements. Thus, Fox's alleged breach on that account fails under Fed. R. Civ. P. 12(b)(6). The claim that Fox breached by synchronizing works for third parties likewise fails because the Network Defendants were licensed to use Plaintiffs' works and the FAC does not provide any factual allegations regarding synchronizing for other third parties. Without supporting factual allegations, this claim fails to cross the line from merely conceivable to plausible. *See Iqbal*, 556 U.S. at 680.

The Court therefore GRANTS the Fox Defendants' Motion to Dismiss Plaintiffs' claims for breach of contract.

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Defendants also move, under 17 U.S.C. § 412(2), to dismiss Plaintiffs' claim for statutory damages under 17 U.S.C. § 504(c) and attorney's fees under 17 U.S.C. § 505. The Copyright Act provides: "no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work." 17 U.S.C. § 412(2).

Here, all applications for copyright registration attached to Plaintiffs' FAC are dated February 23, 2012 and all applications referred to in Exhibit 22 were purportedly filed on or after April 14, 2012. Defendants argue that because all acts of infringement allegedly began before Plaintiffs registered the copyrights at issue, 17 U.S.C. § 412 precludes Plaintiffs from seeking statutory damages or attorney's fees. Plaintiffs concede that they are not entitled to statutory damages and attorney's fees for acts of infringement occurring prior to registration but seek statutory damages and attorney's fees for additional acts of infringement afterwards.

The Ninth Circuit, seeking to "promote the early registration of a copyright," has held that "*the first act of infringement* in a series of ongoing infringements of the same kind marks the commencement of one continuing infringement under § 412." *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 701 (9th Cir. 2008) (emphasis in original). Accordingly, the Ninth Circuit denied statutory damages to the plaintiff for the defendant's continuing use of infringing clothing tags because the defendant began using the infringing clothing tags prior to the plaintiff's copyright registration. *Id.* Likewise, because Defendants here allegedly began infringing all musical Works at issue before the copyright applications for those Works were registered, statutory damages and attorney's fees are unavailable.

The Court GRANTS Defendants' Motion to Dismiss Plaintiffs' claims for statutory damages and attorneys' fees as to those Works identified in the FAC.

B. BTN's Motion to Dismiss Plaintiffs' Copyright Infringement Claim

Defendant BTN argues that Plaintiffs allege ownership in only two of the eight musical works purportedly infringed by BTN. Therefore, BTN moves for a partial dismissal of the claims regarding the other six works.

The Court agrees with BTN that Plaintiffs have not sufficiently alleged ownership in all of the works at issue. Plaintiffs include no factual allegations regarding BTN's infringement

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other than indicating that BTN “has never been a Fox ‘Licensee Entity’ under the 2005 License Agreement or the 2008 License Agreement” and that BTN has been using Plaintiffs’ Works without authorization. (FAC ¶ 30.) Plaintiffs identify eight works in Exhibit 23 that BTN purportedly used without authorization: “Lost”; “With You”; “Riverside Drive, Full”; “Riverside Drive, Narration”; “Road Trip”; “Strummin”; “Catch a Cheater”; and, “Its That Bad.” Of these, Plaintiffs attach the copyright registration applications of only three works. (*Id.* Ex. 12, 15, 19.) Only two of those applications – “Road Trip” and “Strummin” – list one of the Plaintiffs (Graffiti Music) as the claimant. Exhibit 23 indicates that the remaining tracks come from Auracle, Premier Tracks, and Sonic Addict music libraries. Nowhere does Exhibit 23 indicate who actually claims the copyrights or who owns the relevant section 106 exclusive rights. Hence, for the same reasons discussed *supra*, Plaintiffs fail to allege enough facts for the Court to plausibly infer ownership.

Plaintiffs rely on *Atlantic Recording Corp. v. Serrano*, No. CV 07-01824, 2007 WL 4612921 (S.D. Cal. Dec. 28, 2007), to support their contention that, because the FAC includes a partial list of Defendants’ infringing uses, Plaintiffs can still maintain claims for all, including works “yet to be identified.” In *Serrano*, the plaintiffs alleged 224 instances of copyright infringement but included only a partial list of 10 copyrights in their complaint. *Id.* at *3. The court denied the defendant’s motion to dismiss and found that the plaintiffs’ pleading was sufficient to put the defendant on notice of his infringement because it “identifie[d] the time, place, IP address, internet programs, and audio files that comprised Defendant’s alleged infringement.” *Id.* The court in *Serrano* cited to *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961 (N.D. Tex. 2006), which similarly denied a motion to dismiss, holding, “Although Plaintiffs have not identified every copyrighted recording by name, the inclusion of a partial song list and a printout of allegedly offending files on Greubel’s computer provides Greubel with sufficient notice of the basis of Plaintiffs’ complaint for copyright infringement.” *Id.* at 965-66.

Serrano and *Greubel* are inapposite here because they predate the Supreme Court’s tightening of the Rule 8 pleading standards in *Twombly* and *Iqbal*. A complaint must have “more than labels and conclusions” unadorned by factual allegations. *See Twombly*, 550 U.S. at 555. Further, in *Serrano* and *Greubel*, the plaintiffs identified a very precise number of potential acts of infringement on defendants’ computers. By contrast, Plaintiffs seek to keep the potential list open-ended.

Accordingly, the Court GRANTS BTN’s motion to dismiss Plaintiffs’ claims against BTN as to all works, except as to “Road Trip” and “Strummin.” Additionally, for the same reasons discussed *supra*, the Court GRANTS BTN’s motion to dismiss Plaintiffs’ claims for statutory damages and attorneys’ fees.

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C. BTN's Motion to Dismiss or Sever for Misjoinder Under Fed. R. Civ. P. 20(a) and 21

BTN also moves to dismiss or, alternatively, sever Plaintiffs' claims against it for misjoinder. A plaintiff may join multiple defendants only where "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). To remedy misjoinder, "the court may . . . add or drop a party . . . [or] sever any claim against a party." Fed. R. Civ. P. 21. The Court has broad discretion regarding questions of severance. See Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 1689 at 515-516 (West Group 2001).

The Court agrees that the allegations against BTN do not arise from the "same transaction, occurrence, or series of transactions or occurrences" as the claims against the other Defendants. The single allegation against BTN indicates only that BTN also infringed other of Plaintiffs' works. There are no logical ties between BTN's alleged copyright infringement and the other Defendants' alleged copyright infringement, which arose from alleged violations of License Agreements to which BTN was never a party.⁶ The Court is not persuaded by Plaintiffs' argument that joinder is proper because "BTN is affiliated with many of the Defendants in this matter" by virtue of the Defendants' common beneficial ownership by News Corporation, a nonparty. Plaintiffs provide no case law, nor is the Court aware of any, that suggests that such an indirect connection is sufficient to maintain joinder under Rule 20(a)(2).

The Court is also unable to discern any common questions of fact between the claims against BTN and the other Defendants as those claims are currently pled. Plaintiffs' contention that common questions of fact and law exist as to which Defendants were licensed is incorrect because Plaintiffs concede in the FAC that BTN was never licensed. It therefore appears that joinder was improper under Rule 20(a)(2).

For reasons of efficiency and judicial economy, however, the Court will permit Plaintiffs to file their amended complaint against BTN, if any, and will sever all claims against BTN from

⁶ Plaintiffs do not even allege that BTN copied the same works as the other Defendants, though if they had, this would not necessarily make joinder proper. See *On The Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 503 (N.D. Cal. 2011) (finding misjoinder of claims against numerous defendants that were alleged to have illegally downloaded the same copyrighted film because the plaintiff failed to plead facts showing that the defendants' separate acts of infringement were somehow connected).

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the other defendants for purposes of trial. Accordingly, the Motion to Dismiss is DENIED, but the Motion to Sever Plaintiffs' claims against BTN is GRANTED.

V. CONCLUSION

In light of the foregoing, **IT IS HEREBY ORDERED** that the Fox Defendants, Network Defendants, Liberty, and DirecTV Defendants' Motion to Dismiss is **GRANTED** and Defendant BTN's Motion to Partially Dismiss and Sever is **GRANTED IN PART AND DENIED IN PART** as follows:

1. The first cause of action for direct copyright infringement is dismissed as against Network Defendants and the DirecTV Defendants, with leave to amend, for failure to state a claim upon which relief can be granted;
2. The first cause of action for direct copyright infringement is dismissed as against BTN, with leave to amend, with respect to all works other than the works entitled "Road Trip" and "Strummin," for failure to state a claim upon which relief can be granted;
3. The claims against BTN are severed for misjoinder pursuant to Fed. R. Civ. P. 20(a) and 21;
4. The second cause of action for secondary copyright infringement is dismissed, with leave to amend;
5. The third cause of action for breach of contract is dismissed, with leave to amend;
6. The claims for statutory damages and attorneys' fees are dismissed without leave to amend;
7. Plaintiffs shall file their Second Amended Complaint by no later than **January 8, 2013**; and
8. Defendants shall file their responsive pleadings within 21 days after service of any amended complaint.

IT IS SO ORDERED.