

██████████ -- SBN ██████████
LAW OFFICES OF ██████████
██████████
██████████, California ██████████
Telephone: ██████████
Telefax: ██████████

Attorneys for Defendants ██████████
██████████, an individual; and ██████████,
INC., a Pennsylvania corporation doing
business as ██████████

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

██████████ LLC, a California)
limited liability company,)
)
Plaintiff,)
)
vs.)
)
██████████, an)
individual; ██████████, INC.,)
a Pennsylvania corporation doing)
business as ██████████, and)
DOE 1 through DOE 10, inclusive,)
)
Defendants.)
_____)

Civil Case No. ██████████

**NOTICE OF MOTION AND MOTION
TO DISMISS ACTION PURSUANT TO
F.R.C.P. RULES 12(b)(1) AND 12(b)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

TO PLAINTIFF ██████████ LLC, a California limited liability company (“Plaintiff

██████████ to its counsel of record, and to all other interested parties:

NOTICE IS HEREBY GIVEN that on the ____ day of _____, 2006, before the Honorable _____, Judge of the United States District Court for the Central District of California, Defendants _____, an individual; and _____, INC., a Pennsylvania corporation doing business as _____ (collectively "Defendants"), will move the Court to dismiss this action (the "Motion") pursuant to the provisions of Federal Rule of Civil Procedure ("FRCP") Rule 12(b)(1) and further pursuant to FRCP Rule 12(b)(6).

The Motion will be made upon each and all of the following grounds:

1. The Court lacks jurisdiction over the subject matter of Plaintiff _____'s complaint, and the within action should accordingly be dismissed pursuant to FRCP Rule 12(b)(1).

2. Plaintiff _____'s complaint fails to state sufficient facts upon which relief may be granted, and the within action should accordingly be dismissed pursuant to FRCP Rule 12(b)(6).

The Motion will be based on this Notice of Motion and Motion; the pleadings, records, and files herein; and upon such other and further oral and documentary evidence as may properly be brought before the Court at the time of the hearing on the Motion.

Dated: _____, 2006

Respectfully submitted,

[REDACTED]

[REDACTED]
LAW OFFICES OF [REDACTED]

Attorneys for Defendants [REDACTED]
[REDACTED], an individual; and [REDACTED],
INC., a Pennsylvania corporation doing
business as [REDACTED]

TABLE OF CONTENTS

<u>Item</u>	<u>Page(s)</u>
NOTICE OF MOTION AND MOTION.....	i
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	v
MEMORANDUM OF POINTS AND AUTHORITIES.....	1
SECTION 1 RECAPITULATION OF THE FACTS AVERRED BY THE COMPLAINT.....	1
SECTION 2 THE FAILURE OF THE COMPLAINT TO AVER THAT “DANCING IN THE MOONLIGHT” WAS EVER REGISTERED BY COPYRIGHT DEPRIVES THE COURT OF SUBJECT MATTER JURISDICTION.....	3
SECTION 3 THE COMPLAINT FAILS TO STATE SUFFICIENT FACTS UPON WHICH RELIEF MAY BE GRANTED BECAUSE IT FAILS TO ALLEGE THAT PLAINTIFF DARBO HAS, OR EVER DID HAVE, ANY KIND OF PROTECTIBLE INTEREST IN THE RECORDING.....	8
SECTION 4 CONCLUSION.....	12

TABLE OF AUTHORITIES

<u>Item</u>	<u>Page(s)</u>
 <i>Cases</i>	
<i>Aslar Inc. v. Structural Dynamics Research Corp.</i> (N.D. Cal. 1995), 36 U.S.P.Q.2d 1402).....
<i>Bromhall v. Rorvik</i> (1979, E.D. Pa.) 478 F.Supp. 361, 203 U.S.P.Q. 774.....
<i>Brown v. Flowers</i> (2003, Md. N.C.) 297 F.Supp.2d 846.....
<i>Brush Creek Media, Inc. v. Boujaklian</i> (2002 U.S. Dist. LEXIS 15321, 2002 WL 1906620 (N.D. Cal. 2002).....
<i>Capitol Records, Inc. v. Wings Digital Corp.</i> (2002, E.D. N.Y.) 218 F.Supp.2d 280.....
<i>Davies v. Bowes</i> (1914, C.A.2 N.Y.) 219 F. 178.....
<i>Derminer v. Kramer</i> (2005, E.D. Mich.) 386 F.Supp.2d 905.....
<i>La Resolana Architects v. Clay Realtors Angel Fire</i> (2005, C.A.10), 416 F.3d 1195, 75 U.S.P.Q.2d 1496.....
<i>Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.</i> (2004) 315 F.Supp.2d 1053, 2004 U.S. Dist. LEXIS 7534, 70 U.S.P.Q.2d 1732.....
<i>McCormick v. Fugerson</i> (1995), E.D. Pa.) 34 U.S.P.Q.2d 1735.....
<i>National Ass’n of Freelance Photographers v. A.P.</i> (1997, S.D. N.Y.), 45 U.S.P.Q.2d 1321.....
<i>Prospect Planet, L.L.C. v. Paychecks for Life.com</i> (2003, D.C. N.D.), 65 U.S.P.Q.2d 1798.....
<i>Rene Periz & Assocs. v. Almeida</i> (1996, S.D. Fla.) 39 U.S.P.Q.2d 2010.....
<i>Ryan v. Carl Corp.</i> (1998 U.S. Dist. LEXIS 9012, 1998 WL 320817, (N.D. Cal. 2002).....
<i>Techniques, Inc. v. Rohn</i> (1984, S.D. N.Y.) 592 F.Supp. 1195, 225 U.S.P.Q. 741.....

Telex Entm't v. Telemundo Network, Inc. (2004, S.D. Fla.) 18 FLW
Fed. D. 291.....

United States v. Backer (1943, C.A.2 N.Y.) 134 F.2d 533, 57 U.S.P.Q. 133.....

Statutes and Rules of Court

17 U.S.C. § 101.....

17 U.S.C. § 104(b)(1)-(3).....

17 U.S.C. § 204.....

17 U.S.C. § 205.....

17 U.S.C. § 411.....

FRCR Rule 12(b)(1).....

FRCR Rule 12(b)(6).....

Legislative History Materials

“Historical and Revision Notes” contained within House of
Representatives Report No. 94-1476.....

MEMORANDUM OF POINTS AND AUTHORITIES

Section 1

Recapitulation of the Facts Averred by the Complaint

The complaint alleges infringement of copyright by Defendants in connection with the 1972 hit song “Dancing in the Moonlight” (the “Recording”) as recorded by the band known by the name “King Harvest.” Specifically, the pleading alleges that:

- “On April 26, 1971, Musidisc Europe (‘Musidisc’), a French record company, signed...[King Harvest]...to a three-year recording contract (the ‘Recording Contract’), which expired on April 25, 1974.” [Complaint, p. 3, lns. 8-11]
- “Pursuant to the Recording Contract, King Harvest assigned to Musidisc the exclusive right to all the group’s sound recordings made during the period from April 26, 1971 to April 25, 1974.” [Complaint, p. 3, lns. 18-20]
- “Pursuant to an agreement between Musidisc and French music producer Pierre Jaubert dba Berjot Music (‘Jaubert’), in the spring of 1972 Jaubert contracted with Jack Robinson...to produce a sound recording of the song ‘Dancing in the Moonlight’ with King Harvest. Pursuant to the Recording Contract, Musidisc owned all rights to the King Harvest master sound recording of Dancing in the Moonlight (the ‘Recording’).” [Complaint, p. 3, lns. 28-28, p. 4, lns. 1-3]
- “In late 1972, after the release of the Recording in France and Germany, Musidisc entered into a written agreement dated July 1, 1972 (the ‘Licensing Agreement’) which licensed the Recording to Perception Records (‘Perception’), a record company located in New York City, New York. The Licensing Agreement

licensed Perception to release the Recording in the United States and Canada; the Licensing Agreement was subsequently amended to include the United Kingdom.” [Complaint, p. 4, Ins. 12-17]

- “The Licensing Agreement granted Perception the exclusive right for three years to manufacture, distribute, and sell phonorecords in the United States, Canada, and the United Kingdom. In exchange, Perception promised to pay Musidisc a royalty of 10% for each phonorecord manufactured and sold by Perception.” [Complaint, p. 4, Ins. 20-24]
- “Perception breached the Licensing Agreement and Musidisc threatened legal action to recover money from Perception, but ultimately Musidisc was never able to collect any money from Perception.” [Complaint, p. 5, Ins. 5-7]
- “In 1974, Perception and its related entities filed for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code, in the Southern District of New York, case Numbers 74B574, 74B1132, and 74B1133, resulting in the liquidation of Perception’s assets. Leonard Adams acquired the bankruptcy assets of Perception at a trustee sale.” [Complaint, p. 5, Ins. 8-12]
- “Since the 1970s, Musidisc went through two ownership changes. Initially, Musidisc was purchased by a company called Grandchamp des Raux, which in turn sold Musidisc to Universal in July 1999. Universal thus obtained ownership of the rights to the Recording through its acquisition of Musidisc.” [Complaint, p. 5, Ins. 18-21]
- “After investigation, Universal learned that an attorney named Bill Mohr, based in Atlanta, who represents the Estate of ██████████, had illicitly licensed use of

the Recording to Fidelity. Plaintiff is informed and believes, and upon such information and belief alleges, that defendant ██████ is the successor to the late ██████.” [Complaint, p. 6, lns. 1-5]

And *that’s all*. From a journey that started out under the contractual auspices of Musidisc, the complaint pleads that over a period of three+ decades, the “rights” to the Recording -- if there ever were any rights -- ended up reposing in Universal. How Plaintiff ██████ fits into the picture is not discernible from the language of the complaint.

Section 2

The Failure of the Complaint to Aver That “Dancing in the Moonlight”

Was Ever Registered by Copyright Deprives the Court of Subject Matter Jurisdiction

The complaint’s only reference to the possible application of U.S. copyright law to the Recording reads: “At all relevant times, France has been and remains a party to several international agreements (as that term is defined in 17 U.S.C. § 101), including the Berne Convention, the Geneva Phonograms [c]onvention, the WTO Agreement, and an agreement between the United States and France dated July 1, 1891. Therefore, the Recording is protected by United States copyright law pursuant to 17 U.S.C. § 104(b)(1)-(3).” [Complaint, p. 4, lns. 6-11]

At *no point* in the complaint does Plaintiff ██████ allege that any registration of the Recording was ever carried out, either in France, the United States, or in any other jurisdiction. In this regard, 17 U.S.C. § 411 specifically provides as follows:

“(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), no 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 an 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.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner--

- (1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and
- (2) makes registration for the work, if required by subsection (a), within three months after its first transmission.”

At no point does the complaint aver that Plaintiff [REDACTED] or any of its predecessors-in-interest, ever complied, or attempted to comply, with the provisions of 17 U.S.C. § 411, *supra*. In interpreting the statute, courts have held uniformly that in the absence of advance registration of copyrightable material as required by law, district courts lack federal subject matter jurisdiction and must dismiss complaints that are defective in this regard. This was true as early as 1914 under previously-existing common law copyright principles (see *Davies v. Bowes* (1914, C.A.2 N.Y.) 219 F. 178); it continued to be equally true in 1943 (see *United States v. Backer* (1943, C.A.2 N.Y.) 134 F.2d 533, 57 U.S.P.Q. 133); and it continues to be true today, in the aftermath of the 1976 wholesale rewriting of the federal statutes comprising the ***Copyright Act***.

Most recently, the Court noted in *La Resolana Architects v. Clay Realtors Angel Fire* (2005, C.A.10) 416 F.3d 1195, 75 U.S.P.Q.2d 1496, that the plain language of the ***Copyright Act of 1976*** [17 U.S.C. § 101 *et seq.*] requires a series of affirmative steps by both the applicant and the Copyright Office in order to register a copyright. The Court further noted that only upon registration or refusal to register is an alleged “copyright holder” entitled to sue for copyright infringement. Until these steps are followed and the registration is “made,” federal courts lack subject matter jurisdiction over an infringement claim.

At least one Court has pointed out that the *Copyright Act of 1976* abolished common law copyright, and in that case, since the plaintiff had not registered his copyright in the work alleged to have been infringed, his claims were properly dismissed. *Bromhall v. Rorvik* (1979, E.D. Pa.) 478 F.Supp. 361, 203 U.S.P.Q. 774.

Likewise, in *McCormick v. Fugerson* (1995), E.D. Pa.) 34 U.S.P.Q.2d 1735, as well as in *Rene Periz & Assocs. v. Almeida* (1996, S.D. Fla.) 39 U.S.P.Q.2d 2010, both Courts held that a copyright infringement action filed in the absence of prior registration of the subject copyright must be dismissed for lack of federal subject matter jurisdiction.

The first of Plaintiff ██████'s claims in its complaint is couched in terms of being for declaratory relief. The same situation was faced by the Court in *Prospect Planet, L.L.C. v. Paychecks for Life.com* (2003, D.C. N.D.) 65 U.S.P.Q.2d 1798. There, the Court ruled that in a declaratory judgment action arising from alleged copyright infringement, the Court lacked subject matter jurisdiction because the defendant had not registered its copyright, and no actual controversy was present.

In *Telex Entm't v. Telemundo Network, Inc.* (2004, S.D. Fla.) 18 FLW Fed. D. 291, the defendants' motion to dismiss for lack of subject matter jurisdiction was granted because it was apparent that the plaintiff had not registered the works at issue with the Copyright Office. The Court noted specifically that the failure of anyone to register works as required by the statute would be fatal to federal subject matter jurisdiction.

The applicability of the *Copyright Act of 1976* insofar as its requirements relate to musical compositions, such as the action at bar, is without question. In *Derminer v. Kramer* (2005, E.D. Mich.) 386 F.Supp.2d 905, one of the songs at issue was found not to have been copyrighted until after the action had already been commenced, and as to the other works

claimed to have been infringed, the plaintiffs offered no evidence or showing that registration had occurred prior to the commencement of the litigation. It was held that the Court lacked federal subject matter jurisdiction over the claims.

Likewise, in *Capitol Records, Inc. v. Wings Digital Corp.* (2002, E.D. N.Y.) 218 F.Supp.2d 280, a group of music production companies' copyright infringement claims against a compact disc manufacturer's president were dismissed because although applications were pending for their registration, such applications had not yet been approved. Despite the passage of over thirty years, Plaintiff ██████'s complaint does not even aver that applications have *ever* been filed for registration, let alone either approved or disapproved.

Other Courts which have upheld the proposition that a certificate of copyright registration from the Copyright Office is a prerequisite to bringing a copyright infringement claim include *Brush Creek Media, Inc. v. Boujaklian* (2002 U.S. Dist. LEXIS 15321, 2002 WL 1906620 (N.D. Cal. 2002); *Ryan v. Carl Corp.* (1998 U.S. Dist. LEXIS 9012, 1998 WL 320817 (N.D. Cal. 2002); and *Aslar Inc. v. Structural Dynamics Research Corp.* (N.D. Cal. 1995) 36 U.S.P.Q.2d 1402). Finally, it was definitively held in *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.* (2004) 315 F.Supp.2d 1053, 2004 U.S. Dist. LEXIS 7534, 70 U.S.P.Q.2d 1732 that because "...the plain language of the Copyright Act unambiguously mandates the actual issuance of a registration certificate before a copyright action is brought, the Court grants Defendant's motion to dismiss..."

Clearly, the complaint's lack of any averment that the Recording is now, or ever was, registered as required by law defeats federal subject matter jurisdiction, leaving the Court with the only option of dismissing this action pursuant to FRCP Rule 12(b)(1).

Section 3

**The Complaint Fails to State Sufficient Facts Upon Which Relief May Be
Granted Because it Fails to Allege That Plaintiff ██████ Has, or Ever Did
Have, Any Kind of Protectible Interest in the Recording**

As recounted in Section 1 above, according to the complaint, the original rights to the Recording were initially vested in Musidisc. Musidisc then licensed the U.S., Canadian, and U.K. rights to Perception, which subsequently went bankrupt. Some twenty-five years later, Musidisc was purchased by Grandchamp des Raux, which then sold it to Universal in July, 1999. Universal then, through investigation, discovered that an attorney in Atlanta, Bill Mohr, while representing the Estate of one Leonard Adams, licensed the Recording to Fidelity for use in Fidelity's television advertisements, Mr. Adams having purchased all of Perception's assets from the Trustee in its 1974 bankruptcy. One of the defendants named herein, ██████████, is alleged to be the successor in interest to the deceased ██████████.

Plaintiff ██████'s only discernible involvement, according to the complaint, is that it is "...the assignee of UNIVERSAL MUSIC S.A.S. (Société Anonyme Simplifiée), a French corporation whose principal place of business is in Paris, France." [Complaint at p. 2, lns. 11-13]

Whether "UNIVERSAL MUSIC S.A.S. (Société Anonyme Simplifiée)" is the same "Universal" referred to later in the complaint is totally unclear. In any event, as to its supposed rights as an assignee, no mention is made of when any alleged assignment was made; by whom it was made; in return for what consideration it was made; what rights the assignment included; what consents, if any, were procured prior to the assignment; or who were collectively the parties to the assignment. Conspicuously, no copy of any assignment is attached to the complaint.

17 U.S.C. § 204 expressly provides that:

“(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.”

The immediately following section, 17 U.S.C. § 205, provides, in pertinent part:

“(a) Conditions for Recordation. - Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document.

(b) Certificate of Recordation. - The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

(c) Recordation as Constructive Notice. - 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 so that, after the document is indexed by the Register of Copyrights, it would be revealed

by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

(d) Priority Between Conflicting Transfers. - As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.”

The “Historical and Revision Notes” contained within House of Representatives Report No. 94-1476 make the congressional intention behind the adoption of subdivision (d) of Section 205, *supra*, abundantly clear. According to the Notes:

“The provisions of subsection (d), *requiring recordation of transfers as a prerequisite to the institution of an infringement suit*, represent a desirable change in the law. The one- and three-month grace periods provided in subsection (e) are a reasonable compromise between those who want a longer hiatus and those who argue that any grace period makes it impossible for a bona

fide transferee to rely on the record at any particular time.”

[Emphasis added]

In the aftermath of the adoption of 17 U.S.C. § 205, it has been held that in a case in which the plaintiffs were unable to prove the specifics of particular transfers in copyrighted works -- what Plaintiff ██████ calls an “assignment” in its complaint, without further detail -- should be dismissed with prejudice due to a lack of standing of the plaintiffs and for lack of specifics regarding the alleged transfers. *National Ass’n of Freelance Photographers v. A.P.* (1997, S.D. N.Y.) 45 U.S.P.Q.2d 1321. And, where plaintiffs have attempted to allege that defendants wrongfully registered copyrights that are in dispute, it has been held that the plaintiffs’ lack of a written transfer or a recording of that transfer deprives the Court of subject matter jurisdiction. *Techniques, Inc. v. Rohn* (1984, S.D. N.Y.) 592 F.Supp. 1195, 225 U.S.P.Q. 741.

Finally, in an instance in which a music producer failed to establish original copyright ownership, *and* also failed to allege any effective transfer of copyright ownership from the songwriter, his action was dismissed. *Brown v. Flowers* (2003, Md. N.C.) 297 F.Supp.2d 846.

Plaintiff ██████’s failure to allege in its complaint that it has any legally cognizable interest as an assignee of any rights to the Recording renders it fatally defective, and subject to dismissal pursuant to FRCP Rule 12(b)(6) for failure to state sufficient facts upon which a claim for relief may be granted.

