

No. 18-

In the Supreme Court of the United States

THOMAS S. ROSS,

Petitioner,

—v—

APPLE, INC.,
A California Corporation,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Copyright Act grants copyright owners certain exclusive rights, including the rights to reproduce, distribute, and publicly display their copyrighted works. *See* 17 U.S.C. § 106. Direct copyright infringement occurs when a plaintiff proves ownership of the work at issue, and violation of at least one of the rights established by 17 U.S.C. § 106, 17 U.S.C. § 501(a).

This case presents one question concerning the Standard of Review for a Motion of Dismissal in a Copyright Act:

Whether the Eleventh Circuit correctly held that granting defendant's Motion for Dismissal was justified even though a) plaintiff proved ownership of copyrights that were the subject of the Complaint, and b) plaintiff alleged at least one violation of his rights established by 17 U.S.C. § 106, 17 U.S.C. § 501(a).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following entity was a party to the proceeding before the United States Court of Appeals for the Eleventh Circuit and may therefore be considered a respondent under this Court's Rule 12.6:

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RULE 29.6 STATEMENT

Petitioner Pro Se, Thomas S. Ross, is not a corporation.

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OPINIONS BELOW

Opinion issued by the U.S. Court of Appeals for the Eleventh Circuit as to Appellant Thomas S. Ross. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link <http://www.ca11.uscourts.gov/opinions>. [Entered: 07/12/2018 11:45 AM]

Order of the U.S. District Court for The Southern District of Florida as to Plaintiff Thomas S. Ross. Decision: Granted Defendant's Motion to Dismiss (Entered December 30, 2016)

Order of the U.S. District Court for The Southern District of Florida as to Plaintiff Thomas S. Ross. Decision: Denied Motion for Leave to File Amended Complaint (Entered July 19, 2017).



JURISDICTION

The judgment of the court of appeals was entered on July 12, 2018. On July 14, This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

- **17 U.S.C. § 106**

The Copyright Act provides in pertinent part that:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (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;

- **17 U.S.C. § 501(a)**

The Copyright Act further provides in pertinent part that:

Anyone who violates any of the exclusive rights of the copyright owner as provided by section[] 106 * * * is an infringer of the copyright.



STATEMENT OF THE CASE

A. Facts of the Case

In 1992, Ross created a set of original drawings in free-hand style and on plain lined medium paper, each depicting different views of what Ross called an Electronic Reading Device (“ERD”) collection.

On or about May 4, 2014, Ross registered his works of original authorship, with the United States Copyright Office, and secured Certificates of Registration for each of the works of original authorship.

The One work of original authorship, that is relevant in this cause of action, is the drawing identified by the U.S. Copyright Office as Certificate of Registration VAu 1-186-491 (491):

On March 10, 2015, Ross sent a cease and desist letter to Apple, stating that Apple (1) infringed on his exclusive copyrights, (2) copied Ross’s original design, (3) prepared derivative works based upon Ross’s copyrighted work, (4) distributed copies of Ross’s protected work to the public, and, (5) caused

images of Ross's copyrighted work to be displayed publicly without Ross's permission. On June 10, 2015, Apple sent a reply letter to Ross declining to comply.

1. Ross's Lawsuit in the District Court

On or about June 27, 2016, Ross filed an action in the United States Court for the Southern District of Florida alleging 17 counts relating to copyright infringement and misappropriation of intellectual property by Defendant-Appellee Apple, Inc. ("Apple").

On December 30, 2016, the court granted Apple's motion to dismiss, holding that "Ross's Complaint satisfies the first element of an infringement claim" because Ross holds five copyright registrations for his drawings and these Certificates were attached to the Complaint. However, the district court dismissed the initial Complaint on the second element of the infringement claim, holding that it "d[id] not present with particularity" a description of how Apple's infringing designs were "strikingly similar" to the drawings copyrighted by Ross.

The district court allowed Ross to seek leave to amend his complaint by January 21, 2017. Because January 21 fell on a Saturday, the actual due date was January 23, 2017. *See* Local Rule 7.1(a)(c)(1).

On January 23, 2017, Ross filed a Motion for Leave to File an Amended Complaint, attaching the Amended Complaint to his motion. The Amended Complaint alleged a single count of copyright infringement against Apple's designs, and, as the district court noted, "expand[ed] on the descriptions of the similarities between the ERD and Apple's products."

On July 18, 2017, the district court issued a Judgment and Order denying Ross's Motion to File an Amended Complaint

B. The District Court Proceedings

1. Appellant Proved Ownership of Copyrights in Question

Appellant attached to his original Complaint, the Certificates of Copyright that were at issue in his original Copyright infringement allegations against Respondent, and the District Court acknowledged, in her Order Granting Motion To Dismiss, that "Ross's Complaint satisfies the first element of an infringement claim by alleging that he holds five copyright registrations in relation to each ERD Written Material." See Order of the U.S. District Court For The Southern District of Florida as to Plaintiff Thomas S. Ross. (Entered December 30, 2016) pg. 6-7.

2. Appellant Alleged Copying by Apple, Inc.

Respondent, by way of various Apple executives, publicly bragged about stealing abandoned ideas in order to profit from them and, not surprisingly did just that. They appropriated technologies and designs, aggregated all these components into their iPhone, iPad and iPod and created a money-making juggernaut. Apple, Inc., then, adopted a strategy to make slight changes or improvements to various components of these devices, in order to re-brand them as new generations of products, while maintaining the original design, that, by their own admission, was the thing that produced enormous sales worldwide from 2007 on. This is the design that Appellant alleges has "the same

concept, feel and look" to that of Plaintiff's drawing identified as "drawing 491" in his Amended Complaint, that never saw the light of day because the District Court denied Appellant's Motion To File his Amended Complaint.

As to this element, the District Court found that "It does not, however, allege any facts showing when and how Apple copied constituent elements of Ross's original works." *See Order of the U.S. District Court For the Southern District of Florida as to Plaintiff Thomas S. Ross.* (Entered December 30, 2016) pg. 7.

3. Appellant Alleged Striking Similarity

Ross alleged that APPLE, Inc. product line was strikingly similar to his copyright protected design because they have the "same overall look and feel" (*See Petrella v. Metro Goldwyn-Mayer, Inc. Et Al.*, 134 S.Ct. 1962 (2014)) consisting of a distinctive shape and appearance, a flat rectangular shape with rounded corners".¹ Ross, then, enumerates all of APPLE, Inc. devices that infringe on his copyrighted design "491", and alleges that this is a continuous infringement running from 2007 and continuing to this date, thus inclusive of the last three years from the commencement of this action. The District Court saw it differently, as it concluded that "This lack of specificity leaves

¹ This is the same standard of comparison that Apple, Inc. used in their Complaint when they claimed that Samsung was infringing on the designs of their products. (See Apple's Complaint in *Apple v. Samsung*, as filed in the United States District for The Northern District of California on April 11, 2011.) (* * * The iphone is radically different from the devices that preceded it. It has a distinctive shape and appearance-a flat rectangular shape with rounded corners * * *")

the Complaint bereft of detail sufficient to afford Apple the opportunity to draft a meaningful responsive pleading.” *See Id.* Pg 10.

C. The Appellate Court Proceedings

The U.S. Court of Appeals for the Eleventh Circuit Affirmed the decisions of the District Court for The Southern District of Florida, on July 12, 2018.

D. Statutory Framework

The Copyright Act grants copyright owners certain exclusive rights, among them the rights to reproduce, distribute, and publicly display their copyrighted works, and to authorize others to do the same. *See 17 U.S.C. § 106(1), (3), (5).* As this Court has explained, “[a]nyone who violates any of the exclusive rights of the copyright owner,’ that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the * * * ways set forth in the statute, ‘is an infringer of the copyright.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (quoting 17 U.S.C. § 501(a)).

“Two elements must be proven to establish copyright infringement: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994). As to the first prong, an “author has a valid copyright in an original work at the moment it is created—or, more specifically, fixed in any tangible medium of expression.” *See Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 823 n.1 (11th Cir. 1982) (citing 17 U.S.C. § 102(a)). Copyright law never protects an idea itself,

but only protects the expression of that idea. *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1248 (11th Cir. 1999)." See Opinion of the United States Court of Appeals for the Eleventh Circuit (July 12, 2018), pg. 6.

Standard of Review of a Motion to Dismiss.

[A] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). The court must accept as true all well pleaded, nonconclusory allegations in the complaint, and must liberally construe the complaint in favor of the plaintiff. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 246-247 (5th Cir. 1997); *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986). However, conclusory allegations, unwarranted deductions of fact, or legal conclusions masquerading as factual allegations will not suffice to prevent the granting of a motion to dismiss. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993); *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997); *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974). A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt from the face of the plaintiff's pleadings that he can prove no set of facts in support of his claim that would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Garrett v. Commonwealth Mortgage Corp.*,

938 F.2d 592, 594 (5th Cir. 1991); *Kaiser Aluminum*, 677 F.2d at 1050. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. *Blackburn v. City of Marshall*, 42 F.3d 925, 930 (5th Cir. 1995).

[. . .]

Rule 8 requires a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The statement must give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *Swierkiewicz*, 534 U.S. at 512, 122 S.Ct. at 998. The simplified notice-pleading standard relies on liberal discovery rules and summary-judgment motions to define the disputed facts and issues and dispose of meritless claims. *Id.* at 512, 122 S.Ct. at 998.

See Arista Records v. David Greubel, Case 4:05-cv-00531-Y.



REASONS FOR GRANTING THE PETITION

Whether the Eleventh Circuit should have denied Motion to Dismiss when Plaintiff attached certificates of Copyright to his Complaint and satisfying the question of ownership, thus Creating a Split Between The 11th Circuit and the 2nd and 5th Circuits.

I. THE ELEVENTH CIRCUIT'S STANDARD FOR GRANTING MOTION TO DISMISS IS WRONG AND CREATES A SPLIT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS

In contemplating the course of events in this instant case, Appellant is reminded of a currently popular television advertisement, where, in the background, it shows a mother manually washing dishes and then, putting them in the dishwasher, prompting the young girl in the foreground, to ask "what is the dishwasher for?".

It strikes Appellant that much of these proceeding involving Copyright litigation prompts the same question.

Consider the fact that we have a Copyright Office whose task is to determine what is copyrightable and what is not. Appellant waited a year, for the decision of the Copyright Office to determine that his submissions were, indeed, worthy of copyright protection. Then, there is a rule that requires a litigant to have a Certificate of Copyright before he/she can file a copyright infringement lawsuit. In addition, much is written to profess that the Office of Copyright is

given much deference during legal proceedings, with respect to copyrightability, and has been further widely held that the Certificate of Copyright creates a presumption of ownership.

Yet, this Eleventh Court of Appeals has demonstrated that a judge has the power to declare a copyrighted design certified to be protectable, null and void, stating, "there is nothing unique or expressive about a handheld electronic device being rectangular with a screen" (*See* the Opinion at pg. 9), yet, that is exactly what the Copyright Office issued a Certificate of Copyright for. So, this begs the question, what is a Copyright Office for?

In consideration of Rule 8 of Federal Rules of Civil Procedure, and the standard of Review relating to Motions to Dismiss, The Court of Appeals was wrong in Affirming the Motion to Dismiss. As in many other copyright litigations, lip service is given to 1) Rule 8, 2) allowing Pro Se litigants a more liberal interpretation, and 3) viewing the facts in light most favorable to the Plaintiff, but if fact, as in this instant case, all of this is, more often than not, is totally ignored.

Even when a Plaintiff may fall short with allegations of copying or "Striking Similarity", a Plaintiff that has proven ownership of the subject Copyright protected designs, and has attached the Copyright Certificates to the Complaint, should be given a chance to test his claim of infringement through discovery and Trial by Jury, rather than by an Order by the "Bench". This is wrong, and this Court should overturn decisions by the lower courts. *See Newborn v. Yahoo!, Inc.*, 391 F. Supp.2d 181, 76 U.S.P.Q. 2d 1845 (D.C.C. 2005) citing *Tin Pan Apple, Inc. v. Miller Brewing Co.*,

Inc., 737 F. Supp. 826, 17 Media L. Rep. (BNA) 2273, 15 U.S.P.Q. 2d 1412 (S.D.N.Y. 1990).



CONCLUSION

The 11th Circuit Affirmed a dismissal of a Motion to Dismiss granted by the District Court in spite of Plaintiff's showing that he owned Certificates of Copyright by attaching same to the Complaint, and alleging that defendant copied his designs and alleged that the designs were infringing in that the overall concept, feel and look of them, are "strikingly similar" as viewed by an ordinary person, not an expert. Plaintiff should have been allowed to test the validity of his claims through discovery, and have a trier of facts, a Jury, determine whether Plaintiff's designs are copyrightable and whether Apple, Inc. infringed on his designs. We have the 11th Circuit ready to Affirm a dismissal of Plaintiff's case, whereas the 5th Circuit would have likely looked with "disfavor" at such a Motion, and the 2nd Circuit would have likely denied on the grounds that Plaintiff proved Ownership of the copyright, even if his/her allegation of copying and "striking similarity" might have been viewed as vague.

Clearly there are conflicting applications of the Standard of Review of Motions to Dismiss in copyright infringement cases, among various Circuits, that this Court needs to address.

Respectfully submitted,

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OCTOBER 10, 2018

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