

## **APPENDIX**

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## APPENDIX A

## FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**No. 17-55983  
D.C. No. 2:14-cv-04054-R-MAN**

[Filed April 24, 2019]

No. 17-55984  
D.C. No. 2:14-cv-01018-R-E

MALIBU TEXTILES, INC., a New York corporation, )  
(  
(  
(  
*Plaintiff-Appellant,* )  
(  
v. )  
(  
H&M HENNES & MAURITZ, L.P., )  
(

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a New York limited partnership,        )  
    )  
    *Defendant-Appellee.*        )  
    )

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    No. 17-56531  
    D.C. No. 2:14-cv-01018-R-E

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MALIBU TEXTILES, INC.,        )  
a New York corporation,        )  
    *Plaintiff-Appellee,*        )  
    )  
    v.        )  
    )  
    )  
H&M HENNES & MAURITZ, L.P.,        )  
a New York limited partnership,        )  
    *Defendant-Appellant.*        )  
    )

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**OPINION**

Appeals from the United States District Court  
for the Central District of California  
Manuel L. Real, District Judge, Presiding

Argued and Submitted January 7, 2019  
Pasadena, California

Filed April 24, 2019

Before: A. Wallace Tashima and Paul J. Watford,  
Circuit Judges, and Jack Zouhary,\* District Judge.

Opinion by Judge Zouhary

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\* The Honorable Jack Zouhary, United States District Judge for  
the Northern District of Ohio, sitting by designation.

**SUMMARY\*\***

**Copyright**

The panel reversed the district court's dismissal of two copyright infringement actions, dismissed a cross-appeal regarding attorney fees as moot, and remanded.

Malibu Textiles claimed that defendants infringed its copyrights for two floral lace designs. The panel held that, on remand following prior appeal, Malibu sufficiently alleged ownership of valid, registered copyrights. Malibu also successfully pled striking similarity between its designs and defendants' designs. The panel further held that the district court abused its discretion in denying Malibu leave to amend its allegations of access for a theory of substantial similarity.

The panel dismissed as moot one defendant's cross-appeal from the district court's denial of its motion for attorney fees.

**COUNSEL**

Stephen Doniger (argued), Frank Gregory Casella, and Scott A. Burroughs, Doniger/Burroughs APC, Venice, California, for Plaintiff-Appellant.

Neal J. Gauger (argued) and Staci Jennifer Riordan, Nixon Peabody LLP, Los Angeles, California, for Defendants-Appellees.

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

## OPINION

ZOUHARY, District Judge:

### INTRODUCTION

Five years ago, Plaintiff-Appellant Malibu Textiles filed these copyright infringement lawsuits against Defendants-Appellees Label Lane International, Entry, and H&M Hennes & Mauritz (collectively, “Defendants”), accusing them of illegally copying Malibu’s lace designs. And for five years, these cases have languished at the pleading stage. The cases are now before this Court for a second time, after the district court again denied leave to amend and dismissed with prejudice. We again reverse and remand.

### BACKGROUND

In 2014, Malibu sued Defendants for copyright infringement. Malibu alleges it owns copyrights for two lace designs, consisting of flowers, vines, leaves, and other elements arranged in a pattern. Malibu refers to these two designs collectively as the Subject Work and alleges Defendants infringed on both.

The first appeal came after the district court dismissed the cases with prejudice for failure to state a claim. This Court reversed, stating that “[d]ismissal with prejudice is appropriate only if the complaint ‘could not be saved by any amendment.’” *Malibu Textiles, Inc. v. Label Lane Int’l, Inc.*, 668 F. App’x 803, 803 (9th Cir. 2016) (quoting *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008)); *Malibu Textiles, Inc. v. H&M Hennes & Mauritz, L.P.*,

## App. 5

668 F. App'x 800, 801 (9th Cir. 2016) (same). This Court concluded that Malibu could fix its Complaints by adding more allegations of similarity between the Subject Work and Defendants' works and how Defendants had access to the Subject Work. *Label Lane*, 668 F. App'x at 803–04; *H&M*, 668 F. App'x at 801.

On remand, Malibu filed new Complaints<sup>1</sup> with additional similarity allegations, including side-by-side photos of the Subject Work and Defendants' works. But the Malibu attorneys mistakenly omitted new access allegations. When they realized their error, the parties filed a joint stipulation seeking leave to file amended versions of the post-remand Complaints. Malibu included a declaration explaining the mistake and provided the district court with redlined copies of the new Complaints with the missing access allegations. In a one-sentence, handwritten order, the district court denied leave to amend: “Denied[,] no good cause is shown.”

Defendants again moved to dismiss, and the district court again dismissed with prejudice. The district court determined that most of the similarities between Malibu's designs and Defendants' designs consisted of non-protectable elements, such as “the natural appearance of a Bengal Clockvine flower.” The district court identified differences in the side-by-side images, concluding that the designs were not strikingly similar.

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<sup>1</sup> In the *Label Lane* case, Malibu filed its Second Amended Complaint. In the *H&M* case, Malibu filed its First Amended Complaint.

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The district court further held that Malibu failed to plausibly allege access, without mentioning whether the proposed amendments would have cured this deficiency. H&M moved for attorney fees, which the district court denied. These appeals followed.

### DISCUSSION

This Court reviews dismissals under Federal Civil Rule 12(b)(6) *de novo*, accepting the plaintiff's allegations as true and construing them in the light most favorable to the plaintiff. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009). At this stage, a complaint's factual allegations need not be detailed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). They "must be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Id.* at 555, 570.

To state a claim for copyright infringement, Malibu "must plausibly allege two things: (1) that [it] owns a valid copyright in [the Subject Work], and (2) that [Defendants] copied protected aspects of [the Subject Work]'s expression." *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018).

### Ownership

Although the district court based its decision on the copying element, Defendants argue this Court should affirm because Malibu failed to allege ownership of a registered copyright in the Subject Work. *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005) ("This court can affirm the district court's dismissal on any ground supported by the record, even if the district court did not rely on the

ground.”). To plead ownership, Malibu must plausibly allege it owns a valid copyright registration for its work. *See Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir. 2017) (“[Plaintiff] was required to show registration as an element of an infringement claim.”); *see also Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) (“[A]lthough an owner’s rights exist apart from registration, registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights.”) (citations omitted).

Malibu alleges it owns “two original two-dimensional artworks”—Designs 1967 and 1717—which are registered with the United States Copyright Office under numbers VA 1-159-155 and VA9230008. But Defendants argue that Malibu’s case is not based upon either of these copyrights, but rather upon some third work called the “Subject Work.”

Defendants mischaracterize Malibu’s allegations. According to Malibu, Design 1967 derives from Design 1717. The designs are “essentially the same artwork” with only “slight variations” due to differences in the machinery used in production. The post-remand Complaints allege that Malibu owns valid, registered copyrights in both Design 1967 and Design 1717, and that the infringement action is based on the original artistic expression owned by Malibu and reflected in both designs. Malibu is entitled to protect all components of that artistic expression—both derivative and original. *See DC Comics v. Towle*, 802 F.3d 1012, 1023–25 (9th Cir. 2015). Malibu plausibly alleges it

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owns registered copyrights for the artwork in Designs 1967 and 1717; its use of a shorthand label for that artwork does not change that fact.

And contrary to Defendants' assertions, Malibu was not required to include images of Design 1717, a complete deposit of Design 1967, or registration materials for either Design in the Complaints to plausibly allege ownership. *See Rentmeester*, 883 F.3d at 1117–18. As for Defendants' arguments about their foreign copyright registrations, those defenses are better suited for summary judgment. At the pleading stage, Malibu successfully alleged ownership of valid, registered copyrights.

### **Copying**

To allege actionable copying, Malibu was required to plead facts plausibly showing either (1) “that the two works in question are strikingly similar,” or (2) “that [the works] are substantially similar and that [Defendants] had access to the [Subject Work].” *Label Lane*, 668 F. App’x at 803 (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481, 485 (9th Cir. 2000)); *H&M*, 668 F. App’x at 801 (same). Where two works are strikingly similar, access may be inferred. *Unicolors*, 853 F.3d at 987–88; *see also Rentmeester*, 883 F.3d at 1124 (“[I]f the similarities are ‘striking’ enough . . . such similarities can be sufficient on their own to establish that the defendant must have had access to the plaintiff’s work.”). Thus, a plaintiff must separately plead access only when alleging substantial similarity, not when alleging striking similarity. *See, e.g., Three Boys Music*, 212 F.3d at 485; *Baxter v. MCA, Inc.*, 812 F.2d 421, 423–24 & n.2 (9th Cir. 1987); *see*

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*also Astor-White v. Strong*, 733 F. App'x 407, 407 (9th Cir. 2018).

“In assessing whether particular works are substantially similar, or strikingly similar, this Circuit applies a two-part analysis: the extrinsic test and the intrinsic test.” *Unicolors*, 853 F.3d at 985. At the pleading stage, this Court considers only the extrinsic test. *See Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018). The extrinsic test “is an objective comparison of specific expressive elements; it focuses on the articulable similarities between the two works.” *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848 (9th Cir. 2012) (internal quotation marks and citation omitted). The extrinsic test consists of two steps.

### *Step 1: Protectable Elements*

First, the reviewing court “must ‘filter out’ the unprotectable elements of the plaintiff’s work,” *Rentmeester*, 883 F.3d at 1118 (citation omitted), and determine the breadth of copyright protection for the protectable elements, *id.* at 1120. Although certain elements—like elements found in nature—may not be protectable individually, “[o]riginal selection, coordination, and arrangement” of unprotectable elements may be protectable expression. *L.A. Printex*, 676 F.3d at 849. A combination of unprotectable elements is eligible for copyright protection “if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

For protectable elements, this Court “distinguishe[s] between ‘broad’ and ‘thin’ copyright protection based on the ‘range of expression’ involved.” *Williams*, 895 F.3d at 1120 (quoting *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010)). “[T]he greater the range of creative choices that may be made, the broader the level of protection that will be afforded to the resulting [work].” *Rentmeester*, 883 F.3d at 1120. “We review de novo the district court’s determination as to the scope of copyright protection.” *Mattel*, 616 F.3d at 914 (citation omitted).

Here, although copyright law does not protect the natural appearance of a Bengal Clockvine flower, *see Satava*, 323 F.3d at 813, it does protect the original “selection, coordination, and arrangement” of floral elements in a lace pattern, *Label Lane*, 668 F. App’x at 803 (citing *L.A. Printex*, 676 F.3d at 850); *H&M*, 668 F. App’x at 801 (same). The Subject Work’s copyright protection is broad—not thin—because there is “a wide range of expression’ for selecting, coordinating, and arranging floral elements in stylized fabric designs.” *L.A. Printex*, 676 F.3d at 850 (citation omitted). After all, “there are gazillions of ways to combine petals, buds, stems, leaves, and colors in floral designs on fabric.” *Id.* at 850–51 (internal quotation marks and citation omitted).

#### *Step 2: Similarity Comparison*

Second, the “protectable elements that remain are then compared to corresponding elements of the defendant’s work to assess similarities in the objective details of the works.” *Rentmeester*, 883 F.3d at 1118. “We do not have a well-defined standard for assessing

## App. 11

when similarity in selection and arrangement becomes ‘substantial’” or striking, “and in truth no hard-and-fast rule could be devised to guide determinations that will necessarily turn on the unique facts of each case.” *Id.* at 1121. “In comparing fabric designs, we examine the similarities in their objective details in appearance, including, but not limited to, the subject matter, shapes, colors, materials, and arrangement of the representations.” *L.A. Printex*, 676 F.3d at 849 (internal quotation marks and citation omitted).

*Striking Similarity.* The first question is whether Malibu pled striking similarity, which would obviate the need to plead access. Two works are strikingly similar when the similarities between them are so great that they are “highly unlikely to have been the product of independent creation.” *Rentmeester*, 883 F.3d at 1124.

Here, the similarities between the lace patterns go well beyond their mutual inclusion of the Bengal Clockvine flower. The works contain nearly identical floral, leaf, boteh, and dot elements, and those elements are arranged in virtually the same way. The post-remand Complaints state that the patterns are “identically arranged” and that the elements “are arranged exactly the same in relation to each other.” They describe, in detail, some of the similarities between the patterns. And most importantly, they provide side-by-side pictures that make the similarities apparent. *See Appendix, infra.*

To be sure, the pictures do show some minor differences between the Subject Work and Defendants’ works, such as in color, netting, and shape curvature.

## App. 12

“But a rational jury could find that these differences result from the fabric-printing process generally and are ‘inconsequential,’ or could credit [Malibu]’s assertion that these differences result in part from ‘print[ing] using cruder, lower-quality techniques and machinery.’” *L.A. Printex*, 676 F.3d at 851 (second alteration in original) (citations omitted). Alternatively, a jury could find these to be knowing modifications, which could be evidence of willful copying. *See Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315, 1316 (2d Cir. 1969) (per curiam) (“While the trial court placed great emphasis on the minor differences between the two patterns, we feel that the very nature of these differences only tends to emphasize the extent to which the defendant has deliberately copied from the plaintiff.”).

As for the differences pointed out by the district court in its dismissal order, those appear to result from the cropping and angle of the images rather than any real differences in the designs. And to the extent Defendants contend the similarities are “required by the medium of lace” and are merely “functional choices . . . dictated by the lace medium,” those arguments are better suited for summary judgment, after discovery and perhaps with the aid of expert testimony. For this stage, Malibu successfully pled striking similarity in the post-remand Complaints, and the district court erred in dismissal on this ground.

*Substantial Similarity.* But striking similarity was not the only theory Malibu sought to plead. The next question is whether the district court erred in denying Malibu leave to amend its access allegations for a

theory of substantial similarity. This Court reviews denial of leave to amend for abuse of discretion. *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002). “Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.” *Id.* (citation omitted). “An outright refusal to grant leave to amend without a justifying reason is . . . an abuse of discretion.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (citation omitted).

When pleading substantial similarity, a copyright infringement plaintiff “must allege facts ‘from which a reasonable finder of fact could infer that the defendant had a reasonable opportunity to copy his or her work.’” *Shame on You Prods., Inc. v. Banks*, 120 F. Supp. 3d 1123, 1149 (C.D. Cal. 2015) (citation omitted), *aff’d*, 690 F. App’x 519 (9th Cir. 2017); *see also L.A. Printex*, 676 F.3d at 846 (“Proof of access requires ‘an opportunity to view or to copy plaintiff’s work.’”) (citation omitted). As the prior Panel instructed, Malibu could meet this pleading requirement by alleging “a chain of events that linked the protected pattern with the allegedly infringing patterns, or provid[ing] sales figures accompanied by dates and geographic distribution information plausibly showing access via widespread dissemination.” *Label Lane*, 668 F. App’x at 804; *see also H&M*, 668 F. App’x at 801.

Here, the proposed amended Complaints allege several ways Defendants had access to the Subject Work. Malibu first alleges that Defendants do business in California and that they had access to the Subject

Work through Malibu’s California showrooms. Malibu next states that, since 1998, it has produced “approximately 1 million yards of lace bearing the Subject Work,” which have been manufactured in “over twenty mills, including numerous mills in China.” Those mills’ libraries of patterns, containing the Subject Work, have since been acquired by other mills, who in turn “have offered those patterns to customers without regard to whether those patterns were protected by copyright law.” Malibu further alleges that its customers have “sold garments and other products featuring the Subject Work . . . in the same markets (domestically and internationally) as Defendants.” Finally, Malibu specifies several clothing retailers “operating in the same market as Defendants” that collectively “have sold hundreds of thousands of garments featuring reproductions of the Subject Work.”

These allegations, taken as true, plausibly allege Defendants had reasonable opportunities to view the Subject Work. *See L.A. Printex*, 676 F.3d at 848. The proposed amendments would have sufficiently alleged access. The district court thus abused its discretion by denying leave to amend.

### **Attorney Fees**

In its cross-appeal, H&M argues the district court erred in denying its motion for attorney fees. Because of the district court errors, H&M is no longer a prevailing party eligible for attorney fees under 17 U.S.C. § 505, making its cross-appeal moot. *See Electro Source, LLC v. Brandess-Kalt-Aetna Group, Inc.*, 458 F.3d 931, 941 (9th Cir. 2006).

## CONCLUSION

It is the responsibility of “the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Federal Civil Rule 1. This aspirational goal was not achieved in these cases. This latest round of appeals added nearly two years to cases that were already three years old. And these cases have not advanced beyond the initial pleading stage. Direction from the earlier appeals was disregarded, as were the parties’ stipulations to allow amendments to the Complaints. This Court reverses the dismissal of the Complaints and remands to allow the cases to proceed consistent with this Opinion.

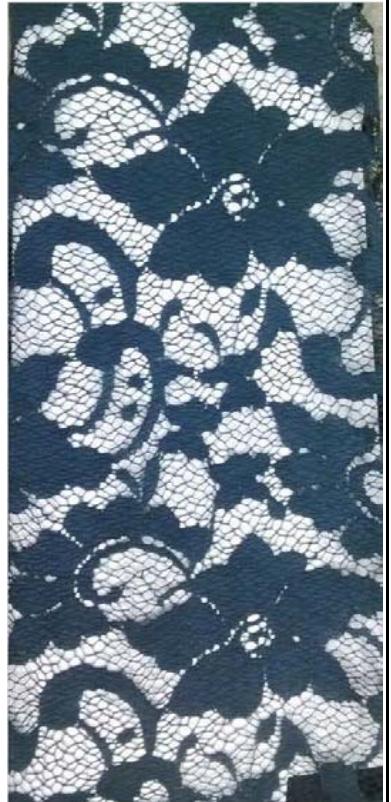
The district court judgments in Case Nos. 17-55983 and 17-55984 are **REVERSED and REMANDED**. The cross-appeal in Case No. 17-56531 is **DISMISSED** as moot.

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APPENDIX

SUBJECT WORK	LABEL LANE PATTERN
	
	
	

App. 17

SUBJECT WORK	H&M PATTERN
	

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**APPENDIX B**

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

**CASE NO. CV 14-01018-R**

**[Filed June 3, 2014]**

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MALIBU TEXTILES, INC., a New York	)
Corporation,	)
	)
Plaintiff,	)
	)
v.	)
	)
H&M HENNES & MAURITZ L.P.,	)
a New York Limited Partnership;	)
and DOES 1-10,	)
	)
Defendants.	)
	)

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**ORDER GRANTING DEFENDANT  
H&M HENNES & MAURITZ L.P.'s  
MOTION TO DISMISS**

Plaintiff Malibu Textiles, Inc. (“Malibu”), on February 10, 2014, filed a copyright and contributory copyright infringement suit against defendant H&M Hennes & Mauritz L.P. (“H&M”). H&M filed a motion to dismiss Malibu’s Complaint on March 25, 2014. Having been thoroughly briefed by both parties, this

Court took the matter under submission on May 6, 2014.

On a motion to dismiss, the trial court takes all well-pleaded facts in the complaint to be true and determines whether, based upon those facts, the complaint states a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). *See Alperin v. Vatican Bank*, 410 F.3d 532, 541 (9th Cir. 2005). To state a claim, the complaint must contain factual assertions that make the claimed relief not merely possible, but “plausible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although factual assertions are taken as true, the court does not accept legal conclusions as true. *Id.*

A motion to dismiss tests the legal sufficiency of the claims alleged in the complaint. *See Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1023 (C.D. Cal. 1998). A claim is properly dismissed for “lack of a cognizable legal theory,” “absence of sufficient facts alleged under a cognizable legal theory,” or seeking remedies to which plaintiff is not entitled as a matter of law. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988); *King v. California*, 784 F.2d 910, 913 (9th Cir. 1986).

To sustain an action for copyright infringement the plaintiff must plead either a copyright registration number or allege it submitted an application to the copyright office. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). Malibu has failed to plead ownership with a copyright registration and had failed this basic requirement to sustain an action.

A plaintiff must allege that the infringer either had access to the plaintiff's work or that it was widely disseminated. Nimmer & Nimmer, NIMMER ON COPYRIGHT § 13.02. Malibu admits the H&M did not have direct access to its work, nor has Malibu pled facts sufficient to show the work was widely disseminated.

In a copyright case based on substantial similarity, a plaintiff must plead the "sources of alleged similarity." *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 2002). To state a claim for substantial-similarity both an extrinsic and intrinsic test must be met. *Funky Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). The extrinsic test focuses on "articulable similarities" between the works. *Id.* If a plaintiff cannot satisfy the extrinsic test, the complaint will be dismissed. *Campbell v. The Walt Disney Co.*, 718 F. Supp. 2d 1108, 1116 (N. D. Cal 2010). Malibu has failed to allege any protectable elements that are substantially similar between Malibu's work and H&M's allegedly infringing shirt. The allegation that the works are substantially similar is a mere legal conclusion.

Further, Malibu has not proved any factual basis for its claim that H&M is liable for contributory infringement of its copyright. Malibu conceded that there is no other defendant that H&M could have helped to infringe Malibu's work.

Dismissal with prejudice is appropriate when further amendment would be futile. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

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Here, because Malibu has not provided any factual basis for its bare legal conclusions, further amendment would be futile. Thus dismissal with prejudice is appropriate.

IT IS HEREBY ORDERED that defendant H&M's motion to dismiss is GRANTED with prejudice.

Dated: June 3, 2014.

s/ \_\_\_\_\_  
MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE

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**APPENDIX C**

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

**CASE NO. CV 14-1018-R**

**[Filed June 29, 2017]**

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MALIBU TEXTILES, INC., a New York	)
Corporation,	)
	)
Plaintiff,	)
	)
v.	)
	)
H&M HENNES & MAURITZ L.P.,	)
a New York Limited Partnership;	)
and DOES 1 through 10,	)
	)
Defendants.	)
	)

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**ORDER GRANTING DEFENDANT'S MOTION TO  
DISMISS PLAINTIFF'S FIRST AMENDED  
COMPLAINT**

Before the Court is Defendant H&M Hennes & Mauritz's ("H&M") Motion to Dismiss (Dkt. No. 51) which was filed on March 15, 2017. Having been fully briefed, this Court took the matter under submission on April 26, 2017.

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper when a complaint exhibits either “the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). Under the heightened pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face,” so that the defendant receives “fair notice of what the...claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 570. The plaintiff must plead 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. Courts will not accept “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements....” *Id.* “All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted).

This matter is before the Court after being remanded from the Ninth Circuit with instructions to allow Plaintiff to amend its complaint. Previously, this Court granted a motion to dismiss the Complaint. (Dkt. No. 17). The Ninth Circuit held that the Complaint failed to state a claim for copyright infringement, but that the Plaintiff should be given the opportunity to amend. Plaintiff was given the opportunity to amend and now H&M comes before the Court to dismiss First Amended Complaint (“FAC”). The FAC states one cause of action, copyright infringement.

To state a claim for copyright infringement, a Plaintiff must plead “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). A plaintiff may establish copying by direct evidence or circumstantial evidence “(1) that the defendant had access to the plaintiff’s work and (2) that the two works are substantially similar.” *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012). If a complaint fails to allege access, its copyright claim may be saved if it alleges a striking similarity between the two works. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000). Here, Plaintiff failed to plead access and striking similarity. For the reasons discussed below, the Motion is granted.

“Proof of access requires an opportunity to view or to copy [the] plaintiff’s work.” *Id.* at 482 (internal quotation and citation omitted). A plaintiff must demonstrate “a reasonable possibility, not merely a bare possibility, that an alleged infringer had the chance to view the protected work.” *Art Attacks Ink, LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). There are two ways to allege access: “(1) establishing a chain of events linking the plaintiff’s work and the defendant’s access or (2) showing that the plaintiff’s work has been widely disseminated.” *Id.*

The FAC and complaint contain virtually identical allegations regarding access. The FAC alleges that Defendants had access to the Subject Work via Plaintiff’s showroom, illegally distributed copies of the Subject Work by third parties, access to Plaintiff’s

samples, and access to garments legally in the marketplace containing the Subject Work. (FAC ¶ 21). These allegations are not materially different than those previously dismissed by this Court and upheld by the Ninth Circuit. Such conclusory allegations are nothing more than a speculative list of guesses as to how Defendants may have accessed the Subject Work. In fact, these are the same allegations rejected by the court in *Star Fabrics, Inc. v. Wet Seal, Inc.*, due to their lack of “any concrete facts specifically linking the [Defendant] to the protected design.” 2014 WL 12591271, at \*4 (C.D. Cal. Dec. 2, 2014). Similarly, Plaintiff fails to allege widespread dissemination in the FAC. There are no allegations relating to distribution in the FAC. Accordingly, Plaintiff’s FAC fails to allege a plausible claim of access.

The test for substantial similarity entails an extrinsic and intrinsic test. On a motion to dismiss, however, courts only consider the extrinsic test. See *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). “The extrinsic test is an objective comparison of specific expressive elements; it focuses on the articulable similarities between the two works.” *L.A. Printex Indus., Inc.*, 676 F.3d at 848 (internal quotations and citation omitted). When applying the extrinsic test, courts must distinguish between protectable and non-protectable elements of the protected work and consider only whether the protectable elements are substantially or strikingly similar. *Id.*

Here, the protectable elements of the Subject Work include the arrangement, selection, coordination of the

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Bengal Clockvine flower featured in the lace design. However, the “floral pattern depicting bouquets and branches is not protectible [sic]” nor is the “combination of open flowers and closed buds in a single bouquet or the green color of stems and leaves.” *Id.* at 850. The Subject Work contains both protectable and non-protectable elements. The majority of the similarity between the Subject Work and the allegedly infringing work come from non-protectable elements. For example, Plaintiff alleges that the five-petaled flower in both works contain the same leaf elements with the same patterns and indentations in the petals. The flower and its petals are non-protectable because they are merely the natural appearance of a Bengal Clockvine flower. The Bengal Clockvine flower contains five-petal leaf elements with indentations at the tips of each petal in its natural form. The non-protectable five-petal flowers make up the majority of the similarities between the two works. Plaintiff does point to additional similarities, but like the Bengal Clockvine, most are non-protectable. Furthermore, there are objective differences between the two works. For example, the two pictures examined in Paragraph 12 of the FAC reveal marked differences. The Subject Work contains thicker, more sloped boteh shapes to the left of the image whereas the Defendant’s design contain thin, more vertical boteh shapes. Additionally, the lace netting is much tighter in the Subject Work than in the Defendant’s design. Accordingly, the Court finds that the two works do not contain strikingly similar protectable elements. As such, the FAC has failed to allege copying.

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Because the FAC fails to plead access and striking similarity, it has not stated a legally cognizable claim for copyright infringement. Accordingly, dismissal is appropriate under Rule 12(b)(6).

**IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (Dkt. No. 37) is GRANTED.

Dated: June 29, 2017.

s/ \_\_\_\_\_  
MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE

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## APPENDIX D

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

**CASE NO. CV 14-01018-R**

**[Filed July 22, 2014]**

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MALIBU TEXTILES, INC., a New York	)
Corporation,	)
	)
Plaintiff,	)
	)
v.	)
	)
H&M HENNES & MAURITZ L.P.,	)
a New York Limited Partnership;	)
and DOES 1-10,	)
	)
Defendants.	)
	)

---

**ORDER DENYING DEFENDANT H&M HENNES &  
MAURITZ L.P.’S MOTION FOR ATTORNEY’S FEES  
AND DENYING PLAINTIFF MALIBU TEXTILES,  
INC.’S MOTION FOR RECONSIDERATION**

Plaintiff Malibu Textiles, Inc. (“Malibu”), on February 10, 2014, filed a copyright and contributory copyright infringement suit against defendant H&M Hennes & Mauritz L.P. (“H&M”). H&M filed a motion to dismiss Malibu’s Complaint on March 25, 2014. On

June 3, 2014, this Court dismissed Malibu's complaint with prejudice. Subsequently, on June 16, 2014, Malibu filed a motion for reconsideration. On June 17, 2014, H&M filed a motion for attorney's fees. Having been thoroughly briefed by both parties, this Court took the matters under submission on July 11, 2014.

### **I. Motion for Reconsideration**

Reconsideration of an order is appropriate when the court has committed clear error. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Malibu argues that it can cure all the defects in its complaint, and should have been granted leave to amend. Malibu does not move for reconsideration under any of the rules of procedure, but under the court's inherent authority to amend its orders.

Malibu failed to plead the most basic elements of any copyright infringement suit. Malibu failed to plead a valid copyright ownership, Malibu admitted H&M had no direct access to its work, Malibu failed to allege how the works were substantially similar, and Malibu failed to allege any other defendant in connection with its contributory and vicarious liability copyright infringement claim.

The standard for a complaint to survive a motion to dismiss is well settled: the trial court takes all well-pleaded facts in the complaint to be true and determines whether, based upon those facts, the complaint states a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). See *Alperin v. Vatican Bank*, 410 F.3d 532, 541 (9th Cir. 2005). To state a claim, the complaint must contain factual assertions

that make the claimed relief not merely possible, but “plausible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although factual assertions are taken as true, the court does not accept legal conclusions as true. *Id.* Dismissal with prejudice is appropriate when further amendment would be futile. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008).

A plaintiff must allege that the infringer either had access to the plaintiff’s work or that it was widely disseminated. Nimmer & Nimmer, NIMMER ON COPYRIGHT § 13.02. Malibu admits the H&M did not have direct access to its work. Further, Malibu pled no facts that the work was widely disseminated, merely that they had sent out copies of the pattern in a pattern book to people other than H&M. It is well settled that this does not make a work widely disseminated, if Malibu had any facts to support this, they would have been included in the complaint.

Instead, Malibu relied on how similar the works allegedly are. This is inapposite, when the work is a pattern of the naturally occurring clockvine flower. Naturally occurring depictions and features are not copyrightable, thus Malibu’s copyright is “thin” and does not extend to the natural features of the clockvine flower. *See Satava v. Lowry*, 323 F. 3d 805, 811–12 (9th Cir. 2003). Given this along with predating (to Malibu’s copyright) clockvine patterns in the public domain, the failure to plead direct access is fatal.

Moreover, given the thin copyright given to depictions of nature, even ignoring the extensive public domain clockvine patterns, the failure to plead

substantial similarity is even more egregious. The patterns are not actually the same despite Malibu's claim that H&M's is an exact replica. Malibu's pattern is two-tone, H&M's pattern has one tone. The stigmas of the clockvine flower are shaped differently. The vines themselves are shaped differently, and the spacing between the various elements are of different proportions. Malibu's pattern has vine segments that are not in H&M's pattern. They are clearly not exact or identical as Malibu bare legal assertion claims. Malibu failed to plead substantial similarity, because once the uncopyrightable depictions of nature and public domain elements of its work are removed, there is little left.

Taking the facts in Malibu's complaint as true, Malibu cannot cure its complaint so granting leave to amend would be futile. Unless Malibu is now claiming that it will assert facts inconsistent with its initial complaint, Malibu will not be able to show access, nor be allowed to draw an inference as such because of thin nature of its copyright.

## **II. Motion for Attorney's Fees**

The Copyright Act, 17 U.S.C. § 505, provides that the court may award a reasonable attorney's fee to the prevailing party. This provision has two steps: (1) deciding whether an award of attorney's fees is appropriate; and (2) calculating the amount of fees to be awarded. *Traditional Cat Ass'n v. Gilbreath*, 340 F. 3d 829, 832–33 (9th Cir. 2003). Factors to be considered in determining whether attorney's fees are appropriate are: (1) the degree of success; (2) frivolousness of the claim; (3) motivation of the claim; (4) objective reasonableness; and (5) the need to

advance the considerations of compensation and deterrence. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

There is no evidence that Malibu's motivation was improper in this case. Malibu's refusal to settle the case early on, is not itself evidence of bad faith. Further, defendant H&M has benefitted from Malibu's poor complaint in that H&M was able to achieve dismissal of the suit early in the case. This Court finds that because H&M was able to resolve this case before summary judgment and a lack of demonstrated bad faith or egregious conduct on behalf of Malibu, attorney's fees are not appropriate in this case.

IT IS HEREBY ORDERED that plaintiff Malibu's motion for reconsideration is DENIED.

IT IS HEREBY FURTHER ORDERED that defendant H&M's motion to for attorney's fees is DENIED.

Dated: July 22, 2014.

s/ \_\_\_\_\_  
MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE

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**APPENDIX E**

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**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**No. 14-56203  
D.C. No. 2:14-cv-01018-R-E**

**[Filed September 13, 2016]**

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MALIBU TEXTILES, INC., a New York corporation,	)
Plaintiff-Appellant,	)
v.	)
H&M HENNES & MAURITZ, L.P., a New York limited partnership,	)
Defendant-Appellee.	)

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No. 14-56253  
D.C. No. 2:14-cv-01018-R-E

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MALIBU TEXTILES, INC.,	)
a New York corporation,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
H&M HENNES & MAURITZ, L.P.,	)
a New York limited partnership,	)
Defendant-Appellant.	)
	)

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**MEMORANDUM\***

Appeal from the United States District Court  
for the Central District of California  
Manuel L. Real, District Judge, Presiding

Argued and Submitted September 1, 2016  
Pasadena, California

Before: SILVERMAN, IKUTA, and WATFORD,  
Circuit Judges.

**1.** The district court erred by granting H&M's motion to dismiss with prejudice. Although Malibu did not plead sufficient facts to state a claim for copyright infringement, the district court abused its discretion by denying Malibu the opportunity to amend its complaint. Dismissal with prejudice is appropriate

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

only if the complaint “could not be saved by any amendment.” *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008). Here, that is not the case.

To state a claim for copyright infringement, Malibu first had to allege facts plausibly showing ownership of a valid copyright. *See Sid & Marty Krofft Television v. McDonald’s Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). The district court held that Malibu failed to plausibly allege ownership because it did not include a copyright registration number in its complaint. Assuming for the sake of argument that the registration number must be pleaded in the complaint, Malibu’s failure to do so cannot be deemed fatal. Malibu could of course have amended the complaint to include the copyright registration number.

Malibu next had to allege facts plausibly showing that H&M copied the protected elements in Malibu’s work. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000). A plaintiff may satisfy this element by showing either that the two works in question are strikingly similar, or by showing that they are substantially similar and that the defendant had access to the plaintiff’s work. *Id.* at 481, 485. In the absence of direct evidence of access, a plaintiff can show that a chain of events linked the protected work to the defendant, or that the work had been widely disseminated. *Id.* at 482. Malibu’s complaint did not adequately allege copying of a protected work under any of these theories.

However, Malibu potentially could have amended its complaint to cure this deficiency in several ways.

To allege striking or substantial similarity, Malibu could have described the pattern's protectible elements—such as the selection, coordination, and arrangement of flowers, leaves, and branches—and identified those same elements in H&M's garment, perhaps with reference to photos showing a side-by-side comparison of the works. *See L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 850 (9th Cir. 2012). To allege access, Malibu could have pleaded facts showing a chain of events that linked the pattern with H&M, or provided sales figures accompanied by dates and geographic distribution information plausibly showing access via widespread dissemination. Because these allegations could cure the complaint's deficiencies, the district court's conclusion that amendment would be futile was incorrect.

**2.** We affirm the district court's denial of H&M's motion for attorney's fees. Because H&M is no longer a prevailing party at this stage of the litigation, it is not eligible for attorney's fees under 17 U.S.C. § 505. *See Electro Source, LLC v. Brandess-Kalt-Aetna Group, Inc.*, 458 F.3d 931, 941 (9th Cir. 2006).

**AFFIRMED in part, REVERSED in part, and REMANDED.**

The parties shall bear their own costs on appeal.

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**APPENDIX F**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**No. 17-55984**

**D.C. No. 2:14-cv-01018-R-E  
Central District of California, Los Angeles**

**[Filed May 31, 2019]**

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MALIBU TEXTILES, INC., a New York	)
corporation,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
H&M HENNES & MAURITZ, L.P.,	)
a New York limited partnership,	)
	)
Defendant-Appellee.	)
	)

---

**ORDER**

Before: TASHIMA and WATFORD, Circuit Judges, and  
ZOUHARY,\* District Judge.

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\* The Honorable Jack Zouhary, United States District Judge for  
the Northern District of Ohio, sitting by designation.

Judge Watford votes to deny the petition for rehearing en banc, and Judges Tashima and Zouhary so recommend. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed May 8, 2019, is DENIED.

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## APPENDIX G

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### STATUTORY PROVISIONS INVOLVED

#### 17 U.S.C. § 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which

it is described, explained, illustrated, or embodied in such work.

**17 U.S.C. § 103. Subject matter of copyright:  
Compilations and derivative works**

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

**17 U.S.C. § 104. Subject matter of copyright:  
National origin**

(a) Unpublished Works.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) Published Works.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

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- (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party, or is a stateless person, wherever that person may be domiciled; or
- (2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party; or
- (3) the work is a sound recording that was first fixed in a treaty party; or
- (4) the work is a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; or
- (5) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or
- (6) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or

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which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

For purposes of paragraph (2), a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be.

(c) Effect of Berne Convention.—No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

(d) Effect of Phonograms Treaties.—Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.

**17 U.S.C. § 501. Infringement of copyright**

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

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- (c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.
- (d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.
- (e) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(5),<sup>[1]</sup> a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.
- (f)
  - (1) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is

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actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station.

(2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.