

No. 08-15927

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

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DONGXIAO YUE,

Plaintiff - Appellant,

v.

STORAGE TECHNOLOGY CORPORATION; SUN  
MICROSYSTEMS INC.; MICHAEL MELNICK; JULIE  
DECECCO; MICHAEL P. ABRAMOVITZ; LISA K.  
RADY; JONATHAN SCHWARTZ,

Defendants - Appellees.

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On Appeal from the United States District Court  
for the Northern District of California  
(District Case No. 5:07-CV-05850-MJJ)

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**BRIEF OF APPELLANT DONGXIAO YUE**

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## I. STATEMENT OF JURISDICTION

The district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a) because Plaintiff brought the copyright infringement claims under the Copyright Act at 17 U.S.C. § 101 *et seq.*

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because (1) the district court dismissed the case below with prejudice and entered final judgment against Plaintiff on March 4, 2008; and (2) Plaintiff filed a timely Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a) on April 1, 2008.

## II. ISSUES PRESENTED FOR REVIEW

1. Was Yue virtually represented in the *Netbula, LLC v. Sun Microsystems, Inc.* case even though he was explicitly prohibited by the district court from participating in the *Netbula-Sun* case?
2. Was Yue adequately represented by Netbula as to his personal copyright claims, even though Netbula had no standing to bring infringement suit on Yue's copyrights and there were conflicting ownership claims on the only copyright at issue in the *Netbula-Sun* case?
3. Was this case duplicative of the *Netbula-Sun* case, even though it involved a different plaintiff, different intellectual property, different defendants and asserted different claims arising from different types of infringing activities?

4. Had *pro se* plaintiff Yue had his day in court to protect his copyrights as a result of the district court's denial of his *pro se* appearance after the discharge of his counsel and the district court's subsequent dismissal of his case with prejudice and without leave to amend?
5. Have Defendants obtained the judgment by misconduct and fraud, including communicating directly with Yue on *Netbula-Sun* matters via attorney Laurence Pulgram and then use those communications to support the argument of virtual representation against Yue?
6. Did the former district judge have jurisdiction to issue orders in this case while it was presided over by another district judge?
7. Should default judgment have been entered against StorageTek and Sun for their failure to timely respond to the complaint absent a valid court order granting enlargement of time?
8. Was the former district judge retroactively disqualified under 28. U.S.C. §§ 455(a) and 455(b) because of allegations of retaliation by the former judge due to a blog Yue wrote and subsequent complaints Yue filed against the former judge?

### **III. STATEMENT OF THE CASE**

#### **A. Nature of the Case**

Dongxiao Yue (“Yue”) is the author and the owner of the three copyrights in the PowerRPC software, and the founder and principal of

Netbula, LLC. The three copyrights at issue in this case are: (1) The “YUE PWRPC” copyright, with U.S. Copyright Registration No. TXu 1-576-987<sup>1</sup>; (2) The “00-SDK copyright”, with Registration No. TX 6-437-847; and (3) the “2K4 copyright”, with Registration No. TX 6-491-697. The YUE PWRPC copyright covers the code Yue authored before he founded Netbula. At the time of the complaint, the registration of YUE PWRPC was pending. The other two copyrights were transferred from Netbula to Yue in September 2007. Excerpts of Record (“ER.”) at pages 2-3, 19-21.

This 10-count copyright infringement action arises out of StorageTek and Sun’s unauthorized copying, distribution and adaptation of PowerRPC. StorageTek acquired the copies of two versions of PowerRPC by making two license purchases in 2000 and 2004. The year 2000 purchase was made for eight (8) developer licenses and 1000 distributions, limited to the Microsoft Windows NT environment and older. The 2004 purchase was made for one (1) developer license and 1000 distributions. In 2005, StorageTek admitted making at least over 7000 distributions. Yue later found

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<sup>1</sup> Pursuant to Federal Rules of Evidence 201, 803(8), 901(b)(7) and 902(5), Plaintiff-Appellant requests the Court to take Judicial Notice of the U.S. Copyright Office records for the “YUE PWRPC” copyright, available at <http://www.copyright.gov/records/>. The registration information of “YUE PWRPC” was retrieved by entering “YUE PWRPC” in the “Search for” field of the “Public Catalog” search page. As July 17, 2008, Plaintiff has not received the hard copy of the registration certificate. See also, Exhibit G to the Request for Judicial Notice, being filed concurrently.

that StorageTek actually sold others unlimited rights to copy PowerRPC and developed derivative software for unauthorized Windows environment. Sun acquired StorageTek in August 2005. ER. 5-17.

The individual defendants directly infringed the copyrights, destroyed evidence, contributed to the infringement or are vicariously liable for the infringement. ER. 5-17.

## **B. Proceedings in the District Court**

On October 22, 2007, acting *pro se*, Yue filed a FRCP 24(a) motion to intervene and join as a party in the case of *Netbula v. Sun Microsystems, Inc.*, et al. (“*Netbula-Sun*” or “*Netbula*”, Case No. C06-07391 N.D. Cal), to protect three copyrights of Yue owned personally that were not part of the *Netbula-Sun* case. Yue’s motion was set for hearing on November 27, 2007. At the time, *Netbula-Sun* was presided over by the Honorable Martin J. Jenkins and no dispositive motion was pending in *Netbula* at the time <sup>2</sup>. ER. 53.

After receiving notice of Yue’s motion to intervene and join in *Netbula*, Sun’s defense counsel, Laurence F. Pulgram, initiated direct email communications with Yue on substantive issues about *Netbula-Sun*. After learning Yue’s intentions to assert his personal claims by either joining

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<sup>2</sup> The dismissal order below incorrectly stated that the copyright assignment in was done “while a Motion for Summary Judgment was pending in the *Netbula-Sun* case.” ER.45:2-3. Sun filed the motion for summary judgment in *Netbula-Sun* on Oct. 23, 2007.

*Netbula* or filing a new lawsuit, Sun filed an “administrative” request to vacate the hearing of Yue’s motion to intervene. Yue filed an opposition. In an *ex parte* hearing without Yue’s participation, the Judge Jenkins granted Sun’s request to vacate the hearing of Yue’s motion to intervene in *Netbula*<sup>3</sup>. ER. 53-56.

After his effort to participate in *Netbula* was rebuffed, Yue filed the instant *Yue v. Sun* case (“*Yue-Sun*” or “*Yue*”) against Sun and StorageTek on November 19, 2007, alleging ten (10) counts of willful copyright infringement. The case was assigned to District Judge the Honorable Susan Illston. ER. 56-57, 70.

The following day, November 20, 2007, in a hearing in the *Netbula* case, Judge Jenkins issued a “cease and desist” order that prohibited Yue from filing pleadings or speaking in court. Judge Jenkins and the parties also made it clear that “the only copyright at issue” in *Netbula-Sun* was the one alleged in *Netbula*’s complaint – the 1996 Copyright with Registration No. TX 6-211-063. Judge Jenkins also suggested Sun’s defense counsel Laurence Pulgram to question the validity of assignment of that copyright to Yue, so “he is not substituted in as a party” in the *Netbula-Sun* case<sup>4</sup>. ER. 22-23, 40, 57-61.

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<sup>3</sup> That order is attached to the accompanying Request for Judicial Notice.

<sup>4</sup> Excerpts of the November 20, 2007 hearing transcript is attached to the Request for Judicial Notice.

Sun then filed a motion in *Netbula-Sun* to relate *Yue-Sun* to *Netbula-Sun*, which would cause the *Yue-Sun* case to be reassigned to Judge Jenkins. Yue was unable to file a response because of the “cease and desist” order. ER. 38-39.

On December 10, 2007, Yue filed the First Amended Complaint (“FAC”), adding five individual defendants.

On December 14, 2007, there was a hearing for Sun’s motion for summary judgment in the *Netbula* case<sup>5</sup>. Judge Jenkins again prohibited Yue to speak in court<sup>6</sup>. ER. 22-23, 59-60.

On December 17, 2007, Yue wrote a letter to Judge Jenkins, alleging that the judge was biased due to a blog Yue wrote and stated that the judge should recuse himself from cases in which Yue was a party. ER.22-23.

On January 2, 2008, receiving no answer to the FAC, Yue moved before Judge Illston for default judgment against Sun and StorageTek. Sun filed an opposition. Yue filed a reply brief on January 8, 2008. At the time, Judge Illston was still the presiding judge of the case below. ER.26.

On January 9, 2008, an order backdated to December 14, 2007 was entered to relate *Yue-Sun* and *Netbula-Sun*. On January 10, 2008, the

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<sup>5</sup> On January 18, 2008, Judge Jenkins granted Sun’s motion for summary judgment in the *Netbula-Sun* case, mostly relying on a “phantom” declaration of Michael Melnick, which was executed after Sun’s motion was filed.

<sup>6</sup> See Exhibit C of the Request for Judicial Notice for the excerpts of the hearing transcript.

Executive Committee of the Northern District of California reassigned *Yue-Sun* to Judge Jenkins. ER. 27-29, 71.

On January 28, 2008, attorney Elena Rivkin noticed her appearance as counsel for Yue in *Yue-Sun*.

On January 29, 2008, Defendants filed a motion to dismiss under FRCP 12 (b) (6), noticed for hearing on March 4, 2008.

On February 11, 2008, Judge Jenkins denied Yue's motion for default judgment.

On February 21, 2008, Yue noticed the substitution of counsel to proceed as a *pro se* litigant again, discharging attorney Rivkin. ER.41.

On March 3, 2008, Judge Jenkins vacated the hearing for Defendants' motion to dismiss. ER. 73, Docket Entry 49 below. On March 4, 2008, based on the finding of virtual representation in *Netbula*, Judge Jenkins dismissed the case below with prejudice and entered final judgment against Yue. Judge Jenkins also denied Yue's request to proceed *pro se*. ER. 43-49.

On March 10, 2008, Yue re-noticed his *pro se* appearance. ER. 50-51.

On March 18, 2008, Yue filed a motion to disqualify Judge Jenkins. On March 26, 2008, Yue filed a motion under FRCP 60(b) to vacate the judgment. Yue also filed a motion to disqualify defense counsel on the ground that the lawfirm presumably received confidences from Yue in a prior case and engaged in unethical conduct, such as direct communications

with Yue on *Netbula* matters.

On April 1, 2008, Yue filed the Notice of Appeal.

On April 4, 2008, Judge Jenkins resigned from the federal bench. On April 9, 2008, the case was reassigned to the Honorable James Ware.

Yue later filed an amended FRCP 60(b) motion and a motion for an “indicative” ruling, with the aim of seeking a remand from this Court. Defendants did not file oppositions to these two motions, but orally challenged the district court’s jurisdiction.

#### **IV. STATEMENT OF FACTS<sup>7</sup>**

##### **A. Yue’s Authorship of the PowerRPC SDK and Runtime Software**

Since 1994, Yue had been developing software he later named “PowerRPC.” PowerRPC enables a computer to execute a command on another computer connected via a network. In July 1996, Yue founded a Delaware Limited Liability Company named “Netbula, LLC” (“Netbula”) to market PowerRPC. ER.3.

The PowerRPC software contained two parts: (1) the “Software Development Kit” (“SDK”) that consists of computer programs and source code files which allow computer programmers to create applications based on PowerRPC technology; and (2) the “runtime software” that consists of

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<sup>7</sup> Unless otherwise noted, the alleged facts in this section are taken from the First Amended Complaint. See ER.1-21.

computer programs providing the core remote call functionality to applications developed with PowerRPC. ER.3-4.

A purchaser of PowerRPC software must buy an "SDK" license for each computer programmer who will use the SDK to develop applications. A purchaser must also buy separate licenses for the right to distribute the runtime software files along with the applications developed with the SDK. The license for the right to copy the runtime software to a single computer is called a "runtime license." Each SDK license and runtime license is only granted for a single computer and might only be granted for use in one specific operating system environment, for example, Windows NT but not Windows 2000. ER.4.

### **B. Yue's Ownership of the PowerRPC Copyrights**

Three copyrights are allegedly infringed in this case. One of them covers the code Yue wrote as an individual before he founded Nebula, i.e., the code from 1994 to July 1996. This copyright is titled "YUE PWRPC" and has U.S. copyright registration number TXu 1-576-987 (effective date of November 27, 2007)<sup>8</sup>. But at the time of the complaint, the registration was pending. When Yue founded Netbula in July 1996, he did not transfer the YUE PWRPC copyright to the company. ER.3

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<sup>8</sup> See, Exhibit G to Request for Judicial Notice.

The two other copyrights cover the 2000 and 2004 versions of PowerRPC. They are the “00-SDK copyright” and the “2K4 copyright”, with U.S. copyright registration numbers TX 6-437-847 and TX 6-491-697, respectively. These two copyrights were assigned from Netbula to Yue in September 2007, along with accrued and prospective causes of action. ER.2.

None of the three copyrights in the instant action was part of the *Netbula-Sun* case. That case only deals with the copyright of the code written between July 1996 and September 1996 (the “1996 Copyright”, Registration No. TX 6-211-063). ER.39, 46:26-28<sup>9</sup>.

Defendants contend that there is a question of whether Yue or Netbula owns the rights of the 1996 Copyright. ER. 30:23-26, 38, 52:7-18.

### **C. Unauthorized Copying of the 2000 Version of PowerRPC**

In 2000, StorageTek purchased from Netbula eight (8) PowerRPC developer licenses (SDK licenses) and 1000 runtime licenses. Yue delivered the software to StorageTek on a CD with the license information on the CD label: licensee -- “StorageTek”, invoice number -- “1605”, “8 Developers 1000 runtime”. In addition to the restriction on the number of copies, the SDK and runtime licenses were also restricted to Microsoft Windows NT and Windows 95. One of the programs, “pmapsvc.exe”, was licensed for Windows NT only. ER.5.

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<sup>9</sup> See also, Exhibit B of the Request Judicial Notice (hearing transcript).

The license purchases were made pursuant to a written agreement drafted by defendant Michael Melnick, a manager at StorageTek. The agreement stated in part:

STORAGETEK shall pay NETBULA a one-time fee of \$895 per license for all rights granted under this Agreement with respect to the SDK Product, and one-time fee of \$5,995 for the right to distribute up to 1000 units of software containing the Supporting Programs... Additional licenses purchased are subject to the terms and conditions of this Agreement.

In September 2002, StorageTek informed Netbula that it no longer distributed the PowerRPC runtime with its products. Unknown to Yue, from 2000 to 2004, StorageTek developed multiple versions of various software products using PowerRPC SDK and distributed copies of the PowerRPC runtime with these products, far exceeding the number of licenses purchased.

One StorageTek product that incorporated PowerRPC is “LibAttach”, a program which enables computers to control data storage machines. In March 2004, defendant Lisa K. Rady, the program manager of the LibAttach software, wrote in an internal email:

As you can see, we have exceeded the 1,000 distributions that we had right to with Netbula.... I think it is obvious that engineering has not and did not monitor the distributions on this product.

ER. 6:16-22. In the responding email, defendant Michael Melnick wrote:

The agreement is specific to platform (Win NT and 95/98 platforms) types of Netbula software (PowerRPC SDK). This concerns me greatly as we have already told them we are no longer shipping it with our product.

At the time, StorageTek already developed LibAttach by using PowerRPC on Windows 2000 – an unlicensed platform. ER.7, 12.

StorageTek also sold unlimited licenses for the LibAttach software. Since LibAttach bundled and incorporated PowerRPC, such licenses allowed others to make unlimited copies of PowerRPC for unlimited concurrent use.

StorageTek also granted its customers “floating” licenses, which limited the number of concurrent users but permitted unlimited number of copies.

StorageTek only purchased 8 developer licenses in 2000. But more than eight developers, including defendant Michael Abramovitz, had used PowerRPC on multiple computers in the development of LibAttach. See, generally, ER. 11-13, Counts I-V of the FAC.

#### **D. Unauthorized Copying of the 2004 Version of PowerRPC**

In 2004, StorageTek decided to upgrade PowerRPC to a version for Microsoft Windows 2003. Without revealing to Yue the fact that StorageTek had exceeded the distribution rights and developed LibAttach on unauthorized Windows platforms, Michael Melnick, on behalf of StorageTek, purchased one (1) PowerRPC SDK license and 1000 runtime licenses for the 2004 version of PowerRPC. ER.7.

With the new PowerRPC software, StorageTek developed newer versions of LibAttach. Again, StorageTek distributed more than 1000 copies of the newer version of the PowerRPC runtime software, sold unlimited licenses and “floating” licenses. See, ER.14-17, Counts V-IX of the FAC.

#### **E. Discovery of Infringement and Continuing Infringement**

StorageTek only made the two purchases of licenses described above.

In mid 2005, Sun announced that it was going to acquire StorageTek. In August 2005, right before it was acquired by Sun, StorageTek sent a report to Netbula admitting that it had made or distributed 7455 copies of PowerRPC. ER.8.

Sun’s employees, including Julie DeCecco and Jonathan Schwartz, employed various delay tactics to continue the infringement. They ignored Yue’s further inquiries and prepared for litigation, while permitting the infringement to continue at StorageTek, Sun and their customers. ER.9-10.

#### **F. Netbula’s Copyright Action Against StorageTek and Sun**

In December 2006, Netbula filed a civil action (Case No. C-06-07391) against StorageTek and Sun in the Northern District of California, alleging infringement of the copyrights in “Netbula PowerRPC” published in 1996, with U.S. registration number TX 6-211-063. ER.46:27-28 (footnote).

On October 23, 2007, Netbula deposed Michael Abramovitz. Part of the evidence used in this case was from discovery of the *Netbula* case.

## V. SUMMARY OF THE ARGUMENT

### A. Dismissal Based On Virtual Representation was Erroneous

The Supreme Court has held that “it would violate the Due Process Clause . . . to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented.” *Richards v. Jefferson County*, 517 U.S. 793, 794 (1996).

Yue attempted to intervene and join as a party in *Netbula*, but district court vacated the hearing of “Non-Party” Yue’s motion to intervene and told Yue to “cease and desist” from filing pleadings in that case. ER. 38-40, 53, 56. Thus, the only way for Yue to assert his claims was to file the *Yue-Sun* action.

The district court dismissed the complaint on the ground that Yue was “virtually represented” in *Netbula-Sun*. ER.48:16-17. But, since Judge Jenkins prohibited Yue from filing papers and speaking in court, Yue was not adequately represented in *Netbula-Sun*. Essentially, Judge Jenkins denied Yue’s day in court in *Netbula-Sun* and then denied Yue’s day in court in *Yue-Sun* by saying Yue actually had his day in *Netbula-Sun*.

*Yue-Sun* involves Yue’s personally owned intellectual property rights and

different transactions that gave rise to different claims. Netbula had no standing to bring suit on Yue's copyrights. The three copyrights in the case below were never part of the *Netbula* case. ER.59. There were conflicting claims on copyright ownership, which precludes the finding of any privity relationship between Yue and Netbula.

**B. The Opposing Party Obtained Judgment by Misconduct and Fraud**

On October 25, 2007, well before Yue filed the *Yue-Sun* case, Defense counsel Laurence Pulgram initiated direct email communications with Yue on *Netbula* matters, ER.64, represented by counsel. After gaining substantial work-product from Yue regarding the *Netbula* case, Pulgram used these direct email exchanges against Yue in the case below. ER.31-37.

The dismissal of the complaint was the direct result of defense counsel's misconduct.

**C. Default Should Have Been Entered Against Sun and StorageTek**

Until January 10, 2008, the *Yue-Sun* case was presided over by the Honorable Susan Illston. ER. 29. She did not grant any extension for defendants to delay responding to the complaint. Prior to January 10, 2008, Judge Jenkins had no jurisdiction over the case below. Whatever he granted *Yue-Sun* defendants was not on the record, and was made without jurisdiction. Yue's motion for default judgment filed on January 2, 2008 should be granted.

#### **D. Judge Jenkins was Disqualified**

Learning that Judge Jenkins might have retaliated against him due to a blog article, Yue filed complaints against Judge Jenkins at the Ninth Circuit. Yue also complained against Judge Jenkins due to the “cease and desist” order and other conduct. ER. 22-23, 60-61. Judge Jenkins should be retroactively disqualified under 455(a) due to the appearance of bias, and he should be disqualified under 455(b) because he had an interest in the outcome of the motion to dismiss – justifying his judicial conduct in the *Netbula* case by finding Yue had no right to sue.

#### **VI. STANDARDS OF REVIEW**

Defendants - Appellees filed the motion to dismiss below under FRCP 12 (b) (6). The Court "review[s] *de novo* the district court's decision to grant a motion to dismiss pursuant to FRCP 12(b)(6)." *Watson v. Weeks*, 436 F.3d 1152, 1157 (9th Cir. 2006).

Also, the Court reviews a district court's dismissal of an action based on *res judicata de novo*. *Palomar Mobilehome Park v. City Of San Marcos*, 989 F.2d 362, 363(9th Cir. 1993); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1287 (9th Cir. 1992); *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

The district court’s failure to grant leave to amend is reviewed *de novo*. “Failure to grant leave to amend the complaint, however, is improper unless

it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) (internal quotes removed).

The standard of review for a district judge's denial of a motion for default judgment is abuse of discretion. *First Idaho Corp. v. Davis*, 867 F.2d 1241, 1242 (9th Cir. 1989) (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9<sup>th</sup> Cir. 1980)).

## VII. ARGUMENT

### A. The District Court Erred By Finding the *Yue* Case Duplicative Of the *Netbula* Case

#### 1. The District Court Erred by Precluding *Yue* from the *Netbula* Case then Dismissing this Case on the Theory of Virtual Representation in *Nebula*

It is a “deep-rooted historic tradition that everyone should have his own day in court” and “one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citations omitted).

The district court primarily relied on the case of *Adams v. California Dept.*, 487 F.3d 684 (9th Cir. 2007). But *Adams* deals with the situation where *the same person* filed two suits against essentially the same defendants. To determine whether the second suit was duplicative, the Ninth

Circuit “borrow[s] from the test for claim preclusion.” *Id.* at 688.

The instant situation is qualitatively different. Yue is a *nonparty* to *Netbula-Sun* as to the copyright claims. Netbula did not and could not represent Yue, and the district court took no procedure to safeguard the interest of Yue in *Netbula-Sun*.

On the contrary, the district court took several steps to preclude Yue’s rights being litigated or considered in *Netbula-Sun*.

First, in a telephonic hearing without Yue’s participation, upon Sun’s motion, the district court vacated the hearing of “Non-Party” Yue’s FRCP 24(a) motion to intervene in *Netbula-Sun*. ER.56:1-9; Ex. A to Request for Judicial Notice (“RFJN”).

Second, the district court ordered Yue to “cease and desist” from filing papers in *Netbula-Sun* and told Yue that “I will have you taken out if you don’t be quiet.” The district court declined to receive any evidence from Yue at *Netbula-Sun* hearings. ER.40, 57-59; Ex. B & C to RFJN.

Third, the district court and Sun designated the 1996 Copyright as “the only copyright at issue” in *Netbula-Sun*, excluding all other copyrights. ER.39, 59; Ex. B to RFJN.

Fourth, the district court denied Netbula’s motion to substitute Yue as the copyright plaintiff in *Netbula-Sun* and suggested Sun’s counsel to question the validity of the assignment of the 1996 Copyright from Netbula to Yue, so

“he is not substituted in as a party.” ER.57:25-58:11; Ex. B to RFJN.

Thus, Yue attempted to assert his copyrights in the *Netbula-Sun* court; the district court did nothing to safeguard Yue’s interest. Instead, it specifically blocked his effort to join *Netbula*. Due process requires that Yue be given his own day in court to protect his copyrights.

**2. The District Court Erred By Concluding That Netbula Adequately Represented Yue Even Though Netbula Had No Standing To Bring Infringement Suit On Yue’s Copyrights And There Were Conflicting Ownership Claims On The Only Copyright At Issue In The *Netbula* Case**

a. *Netbula had no standing to represent Yue on his copyright claims*

The PowerRPC software copied by StorageTek and other defendants are derivative works of YUE PWRPC – the software code Yue authored before he founded Netbula. Yue never assigned the YUE PWRPC copyright to Netbula, he always owned that copyright. ER.3:6-16. By making unauthorized copying of PowerRPC, defendants infringed the YUE PWRPC copyright. See, e.g., *Montgomery v. Noga*, 168 F.3d 1282 (11th Cir. 1999) (copying a derivative work infringes the copyright in the original work). See also, *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984) (copyrights in articles written by a partner before formation of a partnership remain with the original author). Thus, Yue has the right to assert copyright claims against StorageTek Defendants based on the YUE PWRPC copyright alone.

Moreover, only Yue can sue for the infringement of his copyrights,

because “only owners of an exclusive right in the copyright could bring suit.” *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 886 (9th Cir. 2005). Netbula had no standing to represent Yue on Yue’s copyrights. Without standing, it was impossible for Netbula to be Yue’s virtual representative on his copyrights.

Unlike the YUE PWRPC copyright, the “00-SDK” and “2K4” copyrights were assigned to Yue in September 2007. ER.3, 21. At the time of assignment, no motions were pending in *Netbula-Sun*. The district court’s dismissal order stated that Netbula “should have asserted violations of those copyrights in *Netbula-Sun*.” ER.47:9-10. However, Netbula had no standing to do so. Yue did want to assert these violations in *Netbula-Sun* by joinder or substitution and amending the complaint, but the district court and Sun blocked his effort. Yue was forced to file a separate suit.

*b. Conflicting claims of ownership on the 1996 copyright foreclose the finding of any privity relationship between Netbula and Yue*

Defense counsel challenged Netbula’s ownership of the 1996 Copyright. ER. 38, 52. As Laurence Pulgram wrote in one of the motions below:

As to Yue’s allegation that he began developing the software at issue before he established Netbula in 1996, there is a common question of whether Yue or Netbula holds the copyrights in the software, and what parts are owned by each.

ER.30:22-26. Thus, according to defense counsel, Yue and Netbula had and have conflicting ownership claims on the copyrights. Defendants intended to

take full advantage of the alleged conflicting claims of ownership to support their defense that Netbula's copyright is invalid. ER. 52:6-10. Defendants made a binding judicial admission that Yue and Netbula had conflicting claims on the copyright ownership. They can't escape their liability under the federal copyright statute using this simple gambit: saying Netbula's copyright was actually owned by Yue – thus getting out of the *Netbula* case-- and then saying Yue is precluded by *Netbula* due to virtual representation.

The Ninth Circuit has addressed a similar situation in *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005). In that case, Kourtis, a different copyright claimant sued the same defendants on identical causes of action, years after the first suit was final. The district court found that the second suit was duplicative of the first on the ground that the plaintiff in the first suit was the virtual representative of the plaintiff in the second suit. The Ninth Circuit reversed, because “a conflict of interest between a non-party and his purported representative forecloses the possibility of privity because a nonparty cannot be adequately represented by a person with whom he is in conflict.” *Id.* at 997. Here, like *Kourtis*, Netbula and Yue had conflicting claims on the copyrights and Yue was a nonparty to *Netbula-Sun*. There could be no privity relationship between Netbula and Yue on the copyright claims.

The *Kourtis* Court further held that “the [second set of plaintiffs] were

under no obligation to intervene [in the first suit], and they are free to pursue their copyright infringement claim...” and “[t]he onus therefore rested with [the defendant] to join [the second plaintiffs] to the [first] litigation.” *Id.* at 999. Under *Kourtis*, even if the district court entered final judgment in the *Netbula* case, Yue can still pursue his own copyright infringement action against the same defendants.

### **3. The Case below Involved a Different Plaintiff, Different Intellectual Properties, Different Defendants and Asserted Different Claims Arising from Different Types of Infringing Activities**

The plaintiff in this case is Yue, not Netbula. As shown above, Yue and Netbula could not and cannot have a privity relationship, because Netbula and Yue had conflicting claims on the 1996 Copyright and Netbula had no standing to sue on Yue’s copyrights.

The three copyrights in this case are: (1) “YUE PWRPC”; (2) “00-SDK Copyright”; and (3) the 2K4 Copyright. The 00-SDK and 2K4, were assigned to Yue in September 2007. ER.3, 21. But, these two copyrights were never part of *Netbula-Sun* case. The district court had decided that “the only copyright at issue” in *Netbula-Sun* was the 1996 Copyright (Registration No. TX 6-211-063). ER.39. *Netbula-Sun* was filed on December 4, 2006, ER.44:7-10, the effective date of the 2K4 Copyright was December 15, 2006 (See, ER.2, 19-20), and the YUE PWRPC’s effective date of registration was November 27, 2007. The district court may not even

have subject matter jurisdiction over these copyrights when *Netbula-Sun* was filed.

In its order dismissing the complaint, the district court concluded:

[T]he two actions involve infringement of the same rights - Plaintiff's rights to the PowerRPC software that he alleges Defendants used in excess of their license agreements... In both actions, Plaintiff alleges the same use, in excess of the same licenses, of the same software.

ER.46:18-22. The district court erred in at least three ways.

First, the district court regarded “rights to the PowerRPC software” as a single indivisible object. However, in terms of intellectual property rights, a piece of software may embody multiple patents, copyrights and trade secrets, owned by different persons. Even a single copyright includes several exclusive rights, which “may be transferred and owned separately.” *Silvers*, 402 F.3d at 885 (9th Cir. 2005). Thus, one person may own the exclusive right to create derivative works, and another person may own the exclusive right to distribute the work. Each may bring an infringement action for violation of the exclusive right they owned. The PowerRPC software embodies several copyrights, and Yue owns the three copyrights at issue in this case<sup>10</sup>. Thus, the *Yue-Sun* case involves different intellectual properties.

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<sup>10</sup> Under *Kourtis*, Yue had no obligation to join the *Netbula* suit. But, Yue did attempt to join *Netbula*, the district court blocked his joinder request and specifically constrained the *Netbula* case to the 1996 Copyright only.

This factor alone makes the causes of action different.

Second, the district court's conclusion that Yue alleged the "same claims" is conclusory. The case below pled ten (10) counts of infringement claims against Sun, StorageTek and five individuals, alleging violations of the different exclusive rights Yue had in his three copyrights. ER. 11-17. The *Netbula* case had one count of copyright infringement. The types of infringing activities are different – they violated different exclusive rights granted by the Copyright Act. For instance, in the summary judgment order in the *Netbula-Sun* case, in the section on the SDK license, Judge Jenkins wrote: "[Netbula] offers these communications, however, to show that StorageTek *distributed* software for users on unlicensed platforms." Docket 138 of the *Netbula-Sun* case, p.9:8-9; Ex. F to RFJN. However, such distribution on unlicensed platforms was not analyzed and decided for infringement claims in the *Netbula* summary judgment order. Count III and IV of the *Yue-Sun* action are about acts in which "StorageTek *distributed* software for users on unlicensed platforms." ER.12-13. The district court made no effort to compare the 10 count infringement claims here to the *Netbula* suit.

Third, the facts in this case are different from the *Netbula* case. The district court observed that "much of the *Yue-Sun* Complaint is a verbatim restatement of Mr. Yue's declaration presented to the Court in opposition to

the *Netbula-Sun* defendants’ motion for summary judgment.” ER.46:8-10. Even if this is true, a declaration is not a complaint. In the *Netbula* case, the district court did not consider most of Yue’s declaration. It certainly did not actually decide the potential claims arising out of the facts alleged in Yue’s declaration. For instance, this case alleged that defendant Michael Abramovitz knowingly made unlicensed copies of the SDK on to multiple computers, created unauthorized derivative works, contributed to unauthorized distribution and destroyed evidence of infringement. ER. 10:7-10, 12:20-13:4, 14:22-24. For another example, this case alleged that Sun continues to infringe Yue’s copyrights. ER.16-17. Moreover, Yue’s declaration in the *Netbula* case was filed after his FRCP 24(a) motion to intervene and join that case --- to assert his claims – had already been blocked. The additional facts stated in Yue’s declaration could have been used by Yue to establish new claims, but the district court disallowed Yue’s participation in *Netbula-Sun*.

The district court found that because (1) Sun and StorageTek were parties in the *Netbula* case; (2) the five individual defendants were current or former employees of StorageTek or Sun; and (3) four of the five individuals filed declarations in the *Netbula* case, “they were virtually represented in the prior [*Netbula*] action.” ER.48:8-10. However, in *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005), the same defendant had even been sued twice on

the same copyright, because a non-party has the right to have its own day in court. Here, Defendants are sued by a non-party to *Netbula-Sun* for infringing different copyrights – the ones owned by Yue.

Therefore, the instant *Yue* case involves different parties, different copyrights, different claims based on new facts.

The following table shows some but not all of the differences of the *Netbula-Sun* and the instant *Yue-Sun* case. The paragraph numbers in the table are from the First Amended Complaint (“FAC”).

<b>Transactional Nucleus of Facts in the <i>Yue v. Sun</i> Action</b>	<b>In <i>Netbula-Sun</i> Complaint?</b>	<b>Considered by <i>Netbula-Sun</i> Summary Judgment ruling?</b>
¶40. Lisa K. Rady (manager of LibAttach): “As you can see, we have exceeded the 1,000 distributions that we had right to with Netbula.... I think it is obvious that engineering has not and did not monitor the distributions on this product.	No	No.
¶40. Melnick: The agreement is specific to platform (Win NT and 95/98 platforms) types of Netbula software (PowerRPC SDK). This concerns me greatly as we have already told them we are no longer shipping it with our product.	No.	No.

<p>¶51. Melnick: As for Sun, it should be completed by the end of summer... The only thing that you and I may have to do is for you to allow assignment of the agreement to Sun. The agreements calls [<i>sic</i>] for your approval. I assume you would swallow [<i>sic</i>] this as if you did not the agreement would be terminated.</p>	<p>No.</p>	<p>No.</p>
<p>¶52. Melnick: The number that Holly has provided and thought it may be low causes quite a problem for you. We have only made 2 purchases for the rights to distribute a total of 2000 licenses.</p>	<p>No.</p>	<p>No.</p>
<p>¶64. after Michael Abramovitz learned of the dispute between Netbula and SUN/StorageTek, he and potentially other StorageTek employees, presumably under direction of SUN's managing agents, systematically erased the Netbula SDK software from their computers, thus destroying part of the evidence.</p>	<p>No.</p>	<p>No.</p>
<p>¶85-86. multiple groups in StorageTek and SUN had copied and used the NT SDK, without internal control of the copying...many StorageTek employees, including Anton Vatchky and Scott Painter, made numerous copies of the NT SDK onto many computers without licenses, in violation of Plaintiff's copyright in the NT SDK.</p>	<p>No.</p>	<p>No.</p>
<p>¶88-90. StorageTek developed REELS, LibAttach and LibAttach Integrators' Kit</p>	<p>No.</p>	<p>No.</p>

<p>products with unauthorized copies of the NT SDK...The REELS, LibAttach and LibAttach Integrators' Kit products developed with unauthorized copies of NT SDK were thus infringing derivative works of Plaintiff's copyrighted software.</p>		
<p>¶93-95. The 2000 Agreement was restricted to the Windows NT/98/95 operating systems. StorageTek's engineers and managers knew the 2000 Agreement was for Windows NT/98/95 only. In March 2004, Michael Melnick wrote in an internal email stating that the 2000 Agreement was specific to Windows NT and 95/98 platforms). In July 2005, Michael Melnick acknowledged that the 2000 Agreement was for Windows NT/98/95 only. Lisa Rady and Michael Abramovitz also knew that the PowerRPC software on the CD StorageTek received was for Windows Nt/98/95 only...Defendants developed LibAttach and LibAttach Integrators' Kit software for Windows 2000 with the NT SDK, without a license for Windows 2000...numerous third parties also used the LibAttach Integrators' Kit to create derivative works for unauthorized platforms.</p>	<p>Partial</p>	<p>Partial.</p>
<p>¶98-99. Defendants, and each of them, made, offered to sell, sold, and/or distributed copies of the infringing derivative works of the NT SDK, or contributed to these activities.</p>	<p>No.</p>	<p>No.</p>

<p>¶101-104. StorageTek knew it only had the right to distribute 1000 copies under the 2000 Agreement...StorageTek further violated Plaintiff’s copyright by granting “floating” licenses which permitted its customers to make unlimited number of copies of Plaintiff’s software...Lisa Rady wrote the following about LibAttach: “There is no license key in the product, and it is apparent that the software has been copied, uncontrolled, for several years” and “engineering has not and did not monitor the distributions.” Defendants thus further violated Plaintiff’s copyright by willfully failing to monitor the copying of Plaintiff’s software and willfully permitting others to make unauthorized copies.</p>	<p>No.</p>	<p>No.</p>
<p>¶109. multiple StorageTek or SUN employees, including Abramovitz, had copied the 2003 SDK on multiple computers, without internal control of inside copying, violating Plaintiff’s copyright in the 2003 SDK.</p>	<p>No.</p>	<p>No.</p>
<p>¶111-114. StorageTek developed LibAttach and LibAttach Integrators’ Kit products with unauthorized copies of the 2003 SDK...The LibAttach and LibAttach Integrators’ Kit products developed with unauthorized copies of 2003 SDK were thus infringing derivative works of Plaintiff’s copyrighted software.</p>	<p>No.</p>	<p>No.</p>

<p>¶116-120. Defendants distributed more than 1000 copies of the 2004 Runtime, without the proper licenses and in violation of Plaintiff's "2K4 copyright." Defendants further violated Plaintiff's copyright by willfully failing to monitor the copying of Plaintiff's software and willfully permitting others to make unauthorized copies...numerous third parties also used the infringing LibAttach Integrators' Kit which contained the 2004 Runtime to create derivative works without authorization.</p>	<p>No.</p>	<p>No.</p>
<p>Defendants knew that each copy of Plaintiff's software required a license. Defendants offered to sell unlimited licenses for LibAttach software which contained Plaintiff's copyrighted software, in violation of Plaintiff's copyright. Defendants sold unlimited licenses for LibAttach software which contained Plaintiff's copyrighted software to multiple customers, in violation of Plaintiff's copyright.</p>	<p>Partial</p>	<p>No.</p>
<p>Both the 2000 Agreement and 2004 Agreement were not transferable. Michael Melnick, representing StorageTek, stated that the agreements were not transferable and "would be terminated" upon SUN's acquisition of StorageTek... Defendants continued to use, copy, distribute, offer to sell and sell LibAttach and LibAttach Integrator's Kit software (which contained Plaintiff's software) after StorageTek</p>	<p>No.</p>	<p>Partial (the district court did not consider the effect of termination)</p>

became a subsidiary of SUN.		
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#### **4. The Court Erred by Depriving Yue Legal Representation and Then Denying Leave to Amend**

On February 21, 2008, Yue filed a “NOTICE FOR SUBSTITUTION OF COUNSEL”, ER.41-42, discharging attorney Elena Rivkin and noticing that “Dongxiao Yue shall appear *pro se*.” On March 3, 2008, the district court vacated the hearing of Defendants’ motion to dismiss. ER.73. The next day, the district court dismissed the case with prejudice and denied Yue’s right to proceed *pro se* in *Yue-Sun* on the ground that “he could not, as a *pro se* litigant, represent the rights of the entity<sup>11</sup>.” ER.44:16-18.

Thus, the district court rendered Yue without any legal representation – either by counsel or self-representation, and then it dismissed his case with prejudice. There is a presumption of prejudice from the district court’s erroneous denial of Yue’s statutory right of self-representation. *O’reilly v. New York Times Co.*, 692 F.2d 863, 866-867 (2nd Cir. 1982).

The Ninth Circuit has “noted frequently that the rule favoring liberality in amendments to pleadings is particularly important for the *pro se* litigant. Presumably unskilled in the law, the *pro se* litigant is far more prone to

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<sup>11</sup> The district court did recognize that this case not only involves the copyrights assigned to Yue but also “Plaintiff’s other unpublished works with pending copyright registrations.” Dismissal Order at p.4, footnote 2; ER.46:26-28.

making errors in pleading than the person who benefits from the representation of counsel.” *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (*en banc*) (finding dismissal of *pro se* complaint without leave to amend contrary to the “longstanding rule that leave to amend should be granted” and “inconsistent with our precedent because Lopez was a *pro se* plaintiff”).

The complaint alleged pending registration of the YUE PWRPC copyright. ER.2:15-16, 46:27-28. Defendants contend that the district court had no subject matter jurisdiction over the pending copyright registration, ER.32:23-24, ignoring authorities in the Northern District of California which state the contrary. See, e.g., *In re Napster, Inc. Copyright Litig.*, 191 F.Supp.2d 1087, 1101 (N.D. Cal. 2002) (“works with pending registrations will be given the benefit of the presumption of ownership.”); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1108-1109 (9th Cir. 1970) (“[W]hen plaintiff placed the revised applications in the mail., it ...could ... on that day maintain that action”). The district court also ignored Yue’s then pending copyright registration.

Recently, the copyright office issued registration for the YUE PWRPC work. The delay in the issuing of the certificate was simply due to the large volume of applications the copyright office receives. By denying Yue leave to amend and dismissing the case with prejudice, the district court denied the author the protection of the Copyright Act.

The district court rationalized its drastic actions of totally denying Yue any legal representation and then dismissing his complaint by alluding to “the tactics that Plaintiff has pursued, which have ranged from duplicative to nearly vexatious,” without any analysis of Yue’s conduct. ER.49:9-11. The district court could not objectively cite any event where Yue was unreasonable or “vexatious.” Viewing the procedural history without omission and unfounded accusations, Yue made every effort to conserve judicial resources. See, ER.37-38, 53-55.

**B. Defendants Obtained Judgment by Communicating Directly With Yue on *Netbula* Matters and Using Those Communications against Yue in This Case**

On October 25, 2007, Sun’s defense counsel Laurence Pulgram initiated direct email communications with Yue on *Netbula* matters, such as Netbula’s counsel Ms. Brillet’s motion to withdraw. ER.53-54, 64. Yue regarded Pulgram as friendly and exchanged a lot of candid email messages with Pulgram. Yue informed Pulgram that he had to assert his own claims, and suggested that Sun stipulate to Netbula’s motion for substitution of party as to the 1996 Copyright claim, allowing Yue to become the *Netbula* copyright plaintiff and then amend the complaint. Yue told Pulgram that the alternative would be forcing him to file a separate lawsuit, which may be less efficient. Pulgram sent numerous lengthy emails to Yue. ER.36, 54-55, 64-65.

However, in his subsequent representations to the district court, Mr.

Pulgram made every attempt to preclude Yue from the *Netbula* case. During the October 31, 2007 telephonic hearing, Mr. Pulgram advised Judge Jenkins that Yue should be disallowed. ER.56:19-13. That hearing was about Sun's motion to vacate the hearing of Yue's motion to intervene in the *Netbula-Sun* case. As a result, Mr. Pulgram enjoyed an *ex parte* telephonic conference with Judge Jenkins, resulting in an order that vacated the hearing of Yue's motion to intervene and join as a party in *Netbula-Sun*.

In the declaration supporting the motion to dismiss *Yue-Sun*, defense counsel attached some email exchanges about *Netbula* between Pulgram and Yue dated October 26-29, 2007, three weeks before the *Yue-Sun* case was filed. ER.35-37. Alluding to these email communications between defense counsel and Yue on *Netbula* matters, defendants made various unfounded attacks against Yue, such as "judge-shopping" and "vexatious litigation." ER.31-34.

Defendants' motion to dismiss below relied heavily on Pulgram's email exchanges with Yue on *Netbula-Sun* matters. ER.31-34. For instance, Exhibit C to Albert Sieber's declaration in support of Defendants' motion to dismiss was an email exchange between Pulgram and Yue on October 29, 2007. It was quoted at length and referenced multiple times in Defendants' Motion to Dismiss. See, e.g., ER.33:25-27. Defendants used the email exchanges between Pulgram and Yue regarding *Netbula-Sun* to support their

theory that Yue was virtually represented by *Netbula* even as to his own copyrights. Falsely interpreting the emails, defendants stated that “Dr. Yue’s tacitly accepted it was too late to amend” and “Dr. Yue has also proven himself to be capable of the sort of vexatious litigation Ninth Circuit warned against in *Adams*.” ER. 34.

But for defense counsel Pulgram’s initial email to Yue on substantive *Netbula-Sun* matters and subsequent engaging communications, Yue would not have revealed the work-product in the *Netbula* case to Pulgram, and Pulgram would not have been able to use those emails to fabricate his “virtual representation” theory.

Thus, defense counsel intentionally communicated directly with a represented party then used these communications against that party. After drawing from Yue substantive information about *Netbula*’s and Yue’s work-product, defense counsel discarded their “friendly” masks. In court filings, Mr. Pulgram attacked *pro se* litigants on the ground that “[a *pro se*] wants to be free of the ethical restraints to which attorneys are bound.” In addition to disparaging Yue as a “vexatious” layperson and touting their attorney ethics, defense counsel told the district court that Yue and *Netbula* were privies on all copyright claims and Yue must be denied his day in court.

Defendants also made various false representations to bolster their arguments. For instance, in describing the 00-SDK and 2K4 copyrights, Mr.

Pulgram alleged that the registrations were “issued” on October 3, 2006 and December 15, 2006, respectively. ER.32:4-8. He then argued that Netbula could have raised the claims back then. Mr. Pulgram knew well that “[t]he effective date of a copyright registration is the day on which an application . . . [is] received in the Copyright Office.” *In re Napster, Inc. Copyright Litig.*, 191 F.Supp.2d 1087, 1101 (N.D. Cal. 2002). Mr. Pulgram was a defense attorney in the *Napster* case, and he also knew that a copyright application takes many months to process. Moreover, the “received” dates were printed on the copyright certificates attached to the *Yue-Sun* complaint. See, ER.19-20. By misrepresenting the date on which the copyright *application was received* at the Copyright Office as the date the copyright *registration was issued*, Mr. Pulgram misled the district court into the conclusion that Netbula could have asserted the copyright claims on the 00-SDK and 2K4 copyrights at the time of the *Netbula* case was filed.

Another trickery Defendants made was presenting a table showing the similarities between the *Netbula* case and *Yue* case, then concluding the two cases are “substantially identical.” What they did not show were the dissimilarities that made the two cases different.

It is clear Defendants obtained the judgment by misconduct and fraud.

### **C. Default Judgment Should Be Entered Against StorageTek and Sun**

On January 2, 2008, receiving no response to the FAC, Yue filed the

motion for entry of default and default judgment against Sun and StorageTek. Doc. No. 13 below. At the time, the case was presided over by the Honorable Susan Illston. There was no order granting defendants enlargement of time, and there was no order reassigning the case to Judge Jenkins. On January 4, 2008, Sun acknowledged that “[a] formal order relating the cases has yet to be entered” and the case was presided over by Judge Illston. ER.24:27-28.

On January 9, 2008, after the parties completed the briefing on Yue’s motion for default, Judge Jenkins entered an order relating *Yue-Sun* to *Netbula-Sun*. The next day, the Executive Committee of the Northern District of California reassigned the case to Judge Jenkins. ER.29. Even after reassignment, no order granting Sun enlargement of time was ever entered.

Defendants claim that on December 14, 2007, at a hearing in *Netbula-Sun*, Judge Jenkins granted them extension of time. The transcript showed that Mr. Jedediah Wakefield, who was not an attorney in the *Yue* case, said to Judge Jenkins: “We propose some scheduling – .” ER.26:2-3.; Ex. C to RFJN. Without waiting for Mr. Wakefield to finish his oral motion, Judge Jenkins asked Netbula’s attorney and Mr. Wakefield to reach some stipulation. When Yue, the *pro se* in *Yue-Sun*, tried to seek clarification, Judge Jenkins forbade Yue to speak. What happened afterward was not in the record, and was even more confusing. ER.22, 26.

On December 17, 2007, Yue sent a letter to Judge Jenkins with a copy to

Judge Illston. In this letter, Yue pointed that the Mr. Wakefield was not attorney of record in *Yue-Sun* and the case was “still presided by Judge Illston as of today.” ER.22-23. Yue also wrote: “I previously wrote to Your Honor that once the ‘cease and desist’ order is lifted, I will file a formal response to Sun’s motion to relate the cases.” The previous letter (ER.38-40) was dated December 6, 2007. The district court made no clarification of the situation.

In any case, on December 14, 2007, Judge Jenkins was not the judge of the *Yue-Sun* case, and he had no jurisdiction to grant any extension to the defendants in *Yue-Sun*. “[T]he structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction.” *In Re McBryde*, 117 F.3d 208, 225 (fn.11) (5th Cir. 1997) (citing *Dhalluin v. McKibben*, 682 F. Supp. 1096 (D. Nev. 1988)). “No express or implied power is granted a chief judge to affect administratively, directly or indirectly, litigation assigned to and pending before another judge of the court.” *United States v. Heath*, 103 F. Supp. 1, 2 (D. Haw. 1952); see also *In re Brown*, 346 F.2d 903, 910 (5th Cir. 1965) (“[O]rderly procedure, of course, forbade Judge Cox to interfere with the handling of a case assigned to Judge Mize.”).

After the case was reassigned, Judge Jenkins denied Plaintiff’s motion

for default judgment on the ground that (1) Yue did not seek entry of default first; and (2) Judge Jenkins did grant Sun an extension. However, Yue's motion sought both an entry of default and default judgment. Since Judge Jenkins had no jurisdiction to affect the *Yue-Sun* case before January 10, 2008, any purported order by Judge Jenkins granting extension to Sun and StorageTek was null and void.

Moreover, Mr. Wakefield was not an attorney of record in *Yue-Sun* on December 14, 2007. He had no standing to make a motion for enlargement of time on behalf of the *Yue-Sun* defendants<sup>12</sup>. On January 2, 2008, Laurence F. Pulgram was Sun and StorageTek's sole counsel of record. He failed to file any response. Therefore, default must entered against Sun and StorageTek and default judgment should be entered.

#### **D. The Former Presiding Judge was Retroactively Disqualified**

At the November 20, 2007 hearing of Netbula's motion to substitute party, Judge Jenkins told Dr. Yue: "I will have you taken out if you don't be quiet" when the latter attempted to make an argument against the "cease and desist" order. ER.40, 57.

At the hearing of December 14, 2007, Judge Jenkins forbade Yue to speak and then purportedly granted Mr. Wakefield's oral motion to delay answering the complaint in *Yue-Sun*. On December 17, 2007, Yue sent a

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<sup>12</sup> Wakefield's appearance in *Yue-Sun* was entered on January 7, 2008. ER. 71.

letter to Judge Jenkins (the “Letter to the Judge”). This letter raised the issues of apparent bias and prejudice and cited relevant rules on mandatory disqualification. ER.22-23.

Yue filed a complaint against Judge Jenkins in the Ninth Circuit, alleging that, *inter alia*, (1) Judge Jenkins was retaliating against Yue due to a blog he wrote; (2) Judge Jenkins issued *ex parte* orders against Yue; (3) Judge Jenkins denied Yue due process by issuing a “not-to-file” order without legal basis; (4) Judge Jenkins coached Mr. Pulgram to attack the validity of copyright assignment. Attached to the complaint was Yue’s letter to the former Chief Judge of the Ninth Circuit, in which Yue indicated that the person responsible for Netbula’s loss of revenue in the *Netbula v. Symantec* case should be held accountable for such losses. Judge Jenkins received a copy of Yue’s complaint on or after December 17, 2007. ER.60-61.

As the U.S. Supreme Court held in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988):

The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No 93-419, at 5; H. R. Rep. No. 93-1453, at 5. Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality.

The facts Yue alleged in his complaint against Judge Jenkins, if proven,

would establish that the Judge is biased against him. There was an appearance of bias. Therefore, Judge Jenkins should have been disqualified under §455(a).

The allegations in Yue’s complaint against judge Jenkins can find parallels in the decision by the Committee to Review Circuit Council Conduct Disability Order of the Judicial Conference (the “Committee”) of the United States in case No. 98-372-001, including acts “issuing rulings as part of an improper vendetta or some other illicit or vindictive motive.” In No. 88-372-001 (1988), the Committee affirmed a reprimand of a district judge for stating that he would not permit the complainant to practice in his courtroom. In No. 95-372-001, a district judge threatened to imprison complainant for “simply expressing [complaint’s] legal opinions” and “deliberately delayed issuing an order.” The Breyer Committee Report<sup>13</sup> states that a not-to-file order against a non-party may not be merits-related.

The Motion to Dismiss was about whether Yue could prosecute infringement of his personally owned copyrights. Part of the complaint Yue had against Judge Jenkins was that the judge issued an *ex parte* order that vacated hearing of Yue’s motion to intervene and issued the order that forbade Yue to speak and file papers without legal basis. A ruling against Yue on the Motion to Dismiss on the issue of privity can be used as legal

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<sup>13</sup> <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>

justification of the judge's "not-to-file" order and *ex parte* order. On the other hand, a ruling allowing Yue to prosecute his own copyright claims would support Yue's complaint that the judge's "cease and desist" order was wrong. Thus, Judge Jenkins had a direct interest in the outcome of the Motion to Dismiss and ruling against Yue's copyright claims, such interest required his disqualification under 28 U.S.C. § 455 (b).

Before he received a copy of Yue's complaint, Judge Jenkins stated that the *Yue-Sun* case "[is] not completely overlapping with the [*Netbula-Sun case*]." ER. 62-63. He also recognized that "Mr. Yue is not trying to assert the rights of Netbula." ER.62. But, the Dismissal Order concluded the exact opposite.

The facts alleged above "might reasonably cause an objective observer to question [the judge's] impartiality." Thus, Judge Jenkins was disqualified.

The U.S. Supreme Court has held that vacating judgment is proper when judgment was entered by a judge who had improperly refused to recuse himself in the proceeding. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988) (vacating judgment even after court of appeal had previously affirmed).

Accordingly, the judgment in *Yue-Sun* should be vacated and reminded to

the trial court<sup>14</sup>.

### VIII. CONCLUSION

For the foregoing reasons, the district court's March 4, 2008 order of dismissal with prejudice should be reversed. The judgment against Plaintiff should be vacated. Instead, default judgment should be entered against Sun and StorageTek and the case be remanded for further proceedings.

Respectfully submitted,

DATED: July 17, 2008

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<sup>14</sup> At the district court, on April 30, 2008, Plaintiff filed an amended motion for relief from judgment under FRCP 60(b) and a motion for an indicative ruling, following the procedures set in *Greear v. Greear*, 288 F.2d 466 (9th Cir. 1961). Defendants did not file opposition to either of these two motions below.

## **REQUEST FOR ORAL ARGUMENT**

Plaintiff–Appellant hereby request that this appeal be set for oral argument.

Respectfully submitted,

DATED: July 17, 2008

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**DONGXIAO YUE  
SELF-REPRESENTED**

## **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant states that there are no pending related cases in this Court.

**CERTIFICATE OF COMPLIANCE  
PURSUANT TO CIRCUIT RULE 32-1 FOR CASE No. 08-15927**

I certify that the appeal brief is proportionately spaced, has a typeface of 14 points, and contains no more than 10,100 words.

Dated: July 17, 2008

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Dongxiao Yue

## **CERTIFICATE OF SERVICE**

I certify that I served the Appellant's brief, the Excerpt of Records and Request for Judicial Notice on the following persons on July 17, 2008:

The Defendants – Appellees (STORAGE TECHNOLOGY CORPORATION; SUN MICROSYSTEMS INC.; MICHAEL MELNICK; JULIE DECECCO; MICHAEL P. ABRAMOVITZ; LISA K. RADY; JONATHAN SCHWARTZ), by emailing a true copy to their attorneys of record, Mr. Laurence Pulgram, Mr. Jedediah Wakefield and Mr. Liwen Mah in accordance to an agreement on service by email, and by mailing a hard copy via U.S. mail to their address at 555 California Street, San Francisco, CA.

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Dongxiao Yue